REPORTED JUDGMENTS

OF

HON'BLE MR. JUSTICE ALI AKBAR QURESHI

JUDGE, LAHORE HIGH COURT, LAHORE

Compiled by:

Judges Library, Lahore High Court, Lahore.

Mr. Justice Ali Akbar Qureshi
Judge, Lahore High Court, Lahore
(November 07, 2014 to December 28, 2018)

Mr. Justice Muhammad Ali Akbar Qureshi was born on December 29, 1956 in Lahore. After obtaining early education from Lahore his lordship did LL.B. from the Punjab University Law College in the session of 1980-1982. After completion his professional qualification, he was enrolled as a practicing Advocate on November 11, 1982 and thereafter as Advocate High Court & Supreme Court on February 06, 1985 & November 1997 respectively. Thereafter he was elevated as Judge of Lahore High Court on February 08, 2008 and remained till July 31, 2009 and again elevated on November 07, 2014 till December 28, 2018. He remained Secretary General, Lahore Bar Association from 1993-94, Secretary, Supreme Court Bar Association from 2005-2006, Member Executive Lahore High Court Bar Association from 1988-89 & 2006, Member Legal Aid Committee High Court Bar Association, Member Visiting Faculty University Law College,

University of the Punjab, Ex-Member, Visiting Faculty Directorate of Income Tax Training Lahore & Member Faculty (The Institute of Legal Studies) etc.

Before elevation his lordship remained associated with many departments i.e. Legal Advisor Faisalabad Development Authority from 1987-2014, Legal Advisor Water and Sanitation Agency, Faisalabad (WASA Faisalabad), Senior Legal Advisor Lahore Development Authority (LDA), Penal Arbitrator, Pakistan Cricket Board (PCB), Legal Advisor Crescent Group of Industries & Legal Advisor University of Veterinary Sciences etc. His area of practice remained Civil & Corporate matters. His lordship has a credit of deciding over 8000 cases in Single Bench and above 1200 cases in Division Bench during his tenure of service coupled with hearing of public interest litigation cases i.e. Water Crises, Encroachments in Miani Sahib Graveyard, Rehabilitation of Mall Road/implementation of Traffic Rules/Helmet etc., removal of encroachments around Shrine Hazrat Ali Hajveri (Data Ganj Bakhsh R.A.), Rehabilitation of Shrine Bibi Pak Daman, Encroachments in graveyards of Lahore/Punjab, Encroachments in Parks/State land and Walled City of Lahore as well as provision of facilities to Transgender and minorities.

TABLE OF CONTENTS

2015 C L C 1127
[Lahore]
Before Ali Akbar Qureshi, J
RASHEED AHMAD KHAN and 7 others----Petitioners
versus
MUHAMMAD ASHRAF through his real mother and others----Respondents

C.R. No.477-D of 1996, heard on 16th January, 2015.

(a) Islamic Law---
----Inheritance---Custom/Riwaj excluding daughter from inheritance, validity of---Daughter inherited property from father but her name was not entered in mutation due to alleged custom whereunder daughter was not entitled to inherit from legacy of her father---Daughter died issueless and legal heirs of her husband filed suit for declaration to correct said inheritance mutation---Trial court decreed the suit, but appellate court set aside the same---Respondents contended that the daughter being aware of entries in revenue record had relinquished her right in legacy of her father---Validity---Predecessor of petitioners, being one of the legal heirs, could not be deprived from her right on ground of alleged custom---Respondents could not produce any evidence pertaining to the custom/Riwaj and the same was not sustainable in law---Impugned judgment was not sustainable being violative of law---High Court set aside judgment and decree of appellate court and affirmed that of trial court.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 rel.

(b) Civil Procedure Code (V of 1908)----
----S. 11, O. II, R. 2 & O. XVII, R. 3----Constructive res judicata, applicability of---Frame of suit---Relinquishment of claim---Dismissal in default---Appellate court non-suited petitioners on the ground that petitioner had earlier filed a suit regarding residential property left by predecessor-in-interest of parties in which they had not included agricultural property which was subject matter of present suit; and petitioners had relinquished their right to the extent of said agricultural property under S.11 and O.II, R.2, C.P.C. and the same could not be agitated in the present suit---Pleas raised by petitioners were that the earlier suit had not been decided on merits and dismissed under O.XVII, R.3, C.P.C., and in said suit parties had sought partition of the residential property on basis of family settlement, but in the present suit petitioners had challenged entries of inheritance mutation in revenue record---Validity---When earlier suit was filed, predecessor-in-interest of petitioners was not owner of agricultural land for purpose of any further transaction and he became owner thereof by operation of law and was not entitled to make the agricultural land subject matter of the earlier suit unless revenue entries were corrected---Claim of petitioners in earlier suit was entirely different---Findings of appellate court were contrary to record and law and the same were not sustainable in law---Appellate court had wrongly held that principle of res judicata was applicable---In case of any dispute regarding residential property, jurisdiction was vested with civil court, whereas in case of agricultural land, parties approach the Revenue Courts/authorities, and the ground of relinquishment of claim had no force.

Muhammad Tahir v. Abdul Latif and 5 others 1990 SCMR 751; Mst. Nazima Begum and others v. Mst. Hasina Begum and others 1991 SCMR 177; Dilawar Khan and others v. Ghulam Nabi and others 1991 SCMR 398; Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801; Rafique Ahmad v. Mst. Tafseela and others 1992 CLC 1401; Chiragh v. Abdul and others PLD 1999 Lah. 340; Muhammad Bachal v. Province of Sindh through Home Secretary and 12 others 2011 CLC 1450 and Nazeer Ahmad and 9 others v. Naseer Ahmad 2011 YLR 121 rel.

Muhammad Ashraf Qureshi for Petitioners.
Mian Muhammad Jamal for Respondents.
Date of hearing: 16th January, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- The petitioners, through this civil revision, are calling in question the judgment and decree dated 23-1-1996, passed by learned Additional District Judge, Taunsa, whereby the judgment and decree passed by the trial court dated 9-3-1994, in favour of the petitioners was set aside, by accepting the appeal of the respondents.

2. Since it is an old litigation, therefore, it is necessary to state the facts in brief. The petitioners, who are legal heirs of Mst. Ayesha daughter of Fazal Khan and sister of Musa Khan, filed a suit for declaration to correct the inheritance mutation entered in the revenue record, after the death of predecessor/father of Mst. Ayesha, by which she was excluded from the list of the heirs of Fazal Khan at the time of entering the inheritance mutation, on the ground that Mst. Ayesha daughter of Fazal Khan married with Muhammad Bakhash and died issueless; whereupon the Muhammad Bakhash, husband of deceased Mst. Ayesha became an heir to the extent of 1/2 share of her property as the succession opened in the life time of Mst. Ayesha; the petitioners/ plaintiffs are the heirs of said Muhammad Bakhash, which is shown in detail in the pedigree-table mentioned in this civil revision. Further contended, that the land of deceased father of Mst. Ayesha was mutated in the name of his two sons namely Musa and Ahmad by ignoring Mst. Ayesha, who was admittedly the daughter of Fazal Khan and real sister of the respondents; as Mst. Ayesha and after his death Muhammad Bakhash deceased predecessor in interest of the petitioners, became owners to the extent of 1/5 share of the property left by Fazal Khan, therefore, the petitioners are entitled to inherit the property of Mst. Ayesha to the extent of 1/40 shares and they are also in possession of the land.

3. The suit was contested by the respondents mainly on the grounds, that after the death of Fazal Khan mutation was entered according to the custom prevailing at the time of death of Fazal Khan, whereby the daughter was not entitled to inherit anything from the legacy of her father.

4. The learned trial court out of the pleadings, settled issues, recorded evidence of the parties and finally decreed the suit vide judgment and decree dated 9-3-1994.

5. The respondents being aggrieved of the judgment and decree dated 9-3-1994, filed an appeal which was accepted and the suit filed by the petitioners was dismissed vide judgment and decree dated 23-1-1996. Hence, this civil revision.

6. In this case, the petitioners have been non-suited by the learned appellate court, while recording findings on issue No.3 framed by the learned trial court. Issue No.3 is as under:---

(1) ……..

(2) ……..

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

Although the respondents did not specifically raise any preliminary objection by referring Order II, Rule 2 or section 11 of C.P.C. (res judicata) but the learned trial court framed the aforesaid issue. The learned trial court decided the issue in negative as the respondents, upon whom the burden was placed could not discharge the same, the learned appellate court decided the same although without referring any evidence, on the ground, that the petitioners earlier to this filed a suit regarding the residential property left by predecessor-in-interest of the parties to the case and did not include the landed property subject matter of this case, therefore, the petitioners relinquished their right to the extent of the landed property and are precluded to agitate their right under the provisions of Order II, Rule 2, C.P.C. and principle of res judicata to file the instant suit.

7. Learned counsel for the petitioners submits, that the findings recorded by the learned appellate court are not only against the law but also the record maintained by the learned trial court. The learned counsel for the petitioners submits, that in the earlier suit, which was not decided on merits and dismissed by applying Order XVII, Rule 3 of C.P.C., the petitioner sought the partition of the residential property left by the predecessor of the parties to the suit, on the basis of a family settlement, whereas in this case, the petitioners have challenged the entries of inheritance mutation in the revenue record.

8. Since it is an old matter, therefore, the record was scrutinized carefully with the assistance of learned counsel for the parties, from where it is found that the earlier suit filed by the petitioners was pertaining to the residential property and the petitioners sought the partition, whereas in the second suit, subject matter of this litigation, the petitioners are seeking the correction of the adverse/wrong entries made in the revenue record whereby the predecessor in interest of the petitioners, namely, Ayesha Bibi deceased was excluded from the list of the heirs of Fazal Khan. The predecessor-in-interest of the respondents while filing the written statement did not deny that the predecessor-in-interest of the petitioners, namely, Ayesha Bibi was their real sister. But she was excluded from the list of legal heirs on the ground of custom . It is also very important to mention here, that at the time of filing the earlier suit (Suit for partition of residential property), according to the revenue record, the predecessor-in-interest of the petitioners was not owner of the agricultural land for the purpose of any type of further transaction of the land/property in question, although the

predecessor of petitioners became owner of the land/property in question by operation of law, the moment Fazal Khan, father of the predecessor of petitioners, namely, Ayesha Bibi died. At the time of entering the inheritance mutation, the real brothers of the predecessor of the petitioners, namely, Musa etc., with the connivance of the revenue staff, excluded the name of Mst. Ayesha Bibi from the list of inheritance on the ground of custom and by this way the predecessor of the petitioners was deprived from her right of inheritance ordained by the Allah, the Almighty.

9. In this suit, the petitioners have sought the correction of the revenue record whereby the predecessor of the petitioners was excluded, therefore, the claim of the petitioners in the earlier suit and in this suit is entirely different, therefore, the findings of the learned appellate court on issue No.3 are contrary to the record as well as law and un-sustainable in law.

As regards, the question of res judicata, it has earlier been observed, that as the predecessor of the petitioner was not owner as per the revenue, record for the purpose of any further transaction, therefore, was not entitled to make the landed property/agricultural land subject matter of the earlier suit unless the revenue entries are corrected, thus it has wrongly been held by the learned appellate court that the principle of res judicata is applicable in this case.

10. In this respect I am fortified by following esteemed judgments:---

1. Muhammad Tahir v. Abdul Latif and 5 others (1990 SCMR 751),

2. Mst. Nazima Begum and others v. Mst. Hasina Begum and others (1991 SCMR 177),

3 Dilawar Khan and others v. Ghulam Nabi and others (1991 SCMR 398),

4. Mst. Gohar Khanum and others v. Mst. Jamila Jan and others (2014 SCMR 801),

5. Rafique Ahmad v. Mst. Tafseela and others (1992 CLC 1401),

6. Chiragh v. Abdul and others (PLD 1999 Lahore 340),

7. Muhammad Bachal v. Province of Sindh through Home Secretary and 12 others (2011 CLC 1450),

8. Nazeer Ahmad and 9 others v. Naseer Ahmad (2011 YLR 121).

In a judgment cited as 1991 SCMR 398 (supra) the honourable Supreme Court of Pakistan, interpreted sec.11 and Order II, Rule 2, C.P.C. in the following manner:

"[P.399] A …. suit was barred by constructive res judicata as also by the Provisions of Rule 2 of Order II, C.P.C., by contending that the evidence has not been properly read. He also

took us through the alleged sale documents relating to 1895 and others which also related to the period near the end of the last century. He also took us through some of the depositions recorded in the legal proceedings conducted during the first quarter of present century. Notwithstanding the same he has not been able to satisfy us that the previous cases/decisions in this matter did not operate as res judicata. Otherwise too we are of the view that even if the question of constructive res judicata is looked at from the petitioners' point of view, this petition would not succeed on that hypothesis either. If the questions raised in the present litigation were raised and decided previously, the present litigation would be barred by res judicata, and in the circumstances of the case if the subject-matter of the present litigation was not brought within the net of the previous litigation, Order II, Rule 2, C.P.C., would be a bar. Looked at from whatever angle this petition fails and the leave to appeal is accordingly refused."

As regard the recording of wrong entries in the revenue record in the matter of inheritance the honourable Supreme Court of Pakistan in the judgment cited as "Mst. Gohar Khanum and others v. Mst. Jamila Jan and others" (2014 SCMR 801), (mentioned supra) has held as under:---

"We have heard learned counsel for the parties at great length and have also gone through the impugned judgment and the record with their assistance. The relationship between the parties is undisputed. It is, therefore, clear that on the death of Hashim, in accordance with Islamic Sharia which was applicable to the question of inheritance in this case, the petitioners through their predecessor-in-interest Dost Muhammad became owners of 2/3rd of the property while the respondents through their predecessor Mst. Zarina Jan became owners through inheritance of the remaining 1/3rd of the land.

"The main emphasis of the learned counsel for the appellants was that the suit was time barred having been filed 50 years after the mutation dated 31-8-1940. This contention, is however, easily dispensed with as Mst. Zarina Jan admittedly came to own a 1/3rd share of the land by operation of law and not by any mutation. The mutation was meant to record the legal entitlement of Dost Muhammad and Mst. Zarina Jan. If the mutation was erroneously made in favour of Dost Muhammad, such mutation would not create title in favour of Dost Muhammad in accordance with Sharia Law of inheritance. Learned counsel for the appellants repeatedly emphasized that Mst. Zarina was fully aware of the decision and assertion of title by her brother Dost Muhammad and Dost Muhammad had also constructed a house on the disputed land. This, however, does not attract the provisions of Limitation Act in the circumstances of the present case. Mst. Zarina Jan being the sister was co-owner and the possession/occupation of the land by her brother as the other co-owner could only be construed as possession on behalf of all co-owners including Mst. Zarina. In order to relinquish or transfer her interest in the property, there had to be a positive and affirmative act. We have not been shown any document or deed of relinquishment, sale, transfer or gift which would establish that Zarina Jan had either relinquished her interest in the disputed property or actually conveyed or transferred the same in favour of Dost Muhammad. In the absence of any such affirmative act on the part of Mst. Zarina Jan, it cannot be said that the property came to vest entirely in Dost Muhammad."

"It was next contended that Mst. Zarina Jan did not appear in the witness box herself and instead her daughter in law namely Mst. Karam Jan appeared as P.W.1. The fact is that Mst. Zarina Jan was close to 100 years old and it was this exigency which required her to act through her daughter in law. Since it is not disputed that the brother and sisters were owners of the disputed land by way of inheritance, the onus squarely fell on the appellants to establish that the 1/3rd interest of Zarina had been transferred in favour of Dost Muhammad or that Zarina had relinquished her rights in the suit property. But this onus was not discharged."

11. The learned counsel for the respondents supported the findings recorded by the learned appellate court on issue No.3 and submitted, that the predecessor of the petitioner i.e. Ayesha Bibi was very much aware of the entries in the Revenue Record and had relinquished her right regarding the property left by Fazal Khan, predecessor of the parties to the suit. I am afraid, that the arguments advanced by learned counsel for the respondents have any force being contrary to law and the principle laid down by the honourable Supreme Court of Pakistan in the judgments supra. The learned counsel for the respondents, anyhow, has not denied that the predecessor of the petitioners, namely, Mst. Ayesha Bibi was the daughter of Fazal Khan and real sister of Musa Khan etc. sons of deceased Fazal Khan, therefore, in these circumstances, even otherwise, the predecessor of the petitioners being one of the legal heir, could not be deprived from her right on the ground of alleged custom etc. It is also notable here, that the respondents could not placed on record any evidence pertaining to the custom/Rawaj alleged by them therefore, this ground taken by the respondents is not sustainable in law and further the honourable Supreme Court of Pakistan through a land mark judgment cited as Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1). The relevant para is reproduced as under:---

"Scope of rights of inheritance of females is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence is yet to take its own time."

12. The another aspect of the case is that the original owner of the suit land, namely, Fazal Khan predecessor of the parties to the case left residential as well as agricultural land. As regard the residential land situated in the urban area, if any dispute is arisen the jurisdiction is vested with the Civil Court whereas in the case of agricultural land some time the parties had to approach to the Revenue Courts/authorities, therefore, this could also hardly be one of the ground that the earlier suit was filed only regarding the residential property by relinquishing her right of inheritance, therefore, the contention raised by learned counsel for the respondents has no force.

13. In view of above, it is held, that the judgment dated 23-1-1996, impugned herein, is not sustainable being of law, therefore, this revision petition is accepted, the judgment and decree passed by the learned appellate Court is set aside and that of the learned trial court is affirmed, with no order as to cost.

SL/R-12/L Petition accepted.

2015 C L C 1378
[Lahore]
Before Ali Akbar Qureshi, J
Messrs COLONY TEXTILE MILLS LIMITED through Chief Executive----Appellant
versus
WATER AND POWER DEVELOPMENT AUTHORITY (Defunct MESCO) through Chairman----Respondent

R.S.A. No.15 of 2003, heard on 13th April, 2015.

(a) Jurisdiction---
----Primary duty of court that it should first assume jurisdiction before proceeding further with the case.

(b) Administration of justice---
----Good faith, due diligence, utmost care and caution were mix questions of facts and law and could only be decided by recording of evidence.

(c) Limitation Act (IX of 1908)---
----S. 14---Civil Procedure Code (V of 1908), O. VII, R. 10---Limitation---Exclusion of time of proceedings---Bona fide consumption of time in court having no jurisdiction could only be proved through actions---Filing of plaint before a court of competent jurisdiction would be continuity of previous suit.

Mst. Anwar Bibi and others v. Abdul Hameed 2002 SCMR 144; Princess Zohra Bakhte v. Shaukat Ali Khan and another 1988 CLC 332; Trustees of the Port of Karachi v. Messrs Fatima Sugar Mills Ltd. and 2 others PLD 2011 Kar. 426 and Mst. Khadija Begum and 2 others v. Mst. Yasmeen and 4 others PLD 2001 SC 355 ref. and rel.

(d) Civil Procedure Code (V of 1908)---
----S. 115---Revision---Scope---If concurrent findings were result of misreading and non-reading of evidence or jurisdictional defect, same can be corrected while exercising revisional jurisdiction.

Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others 2014 SCMR 914 rel.

Muhammad Waseem Shahab for Appellant.
Amir Aziz Qazi for Respondent.
Date of hearing: 13th April, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- This Regular Second Appeal calls in question the validity of judgment and decree dated 21-6-2003 and 6-10-1987, whereby the learned courts below allowed an application under Order VII, rule 11, C.P.C. and rejected the plaint, being barred by time.

2. Shortly, the facts for the disposal of this appeal are, that the appellant instituted a suit for recovery of sum of Rs.3,33,543/99 against the respondent, on the ground, that the Federal Government acquired a project, wherein the petitioner had 85112 shares and it was agreed, that the certificate of entitlement to compensation of the aforesaid amount of the shares will be given. Subsequently, it was agreed, that Rs.600,000 would be adjusted at the cost of the transformers against the amount due from the respondent to the appellant, whereas remaining amount of Rs.3,33,543.99 would be adjusted against the certificate of entitlement to compensation. Neither the certificate nor the amount was paid, therefore, the appellant filed a suit before the learned Civil Court at Lahore in the year 1975, as the Head Office of respondent-department was situated in Lahore and other transactions were also took place at Lahore. The respondent while filing the written statement of the suit, taken a specific objection regarding the jurisdiction of the Civil Court at Lahore which was contested by the appellant and finally, on 12-8-1986, the plaint was returned to the appellant under Order VII, rule 10, C.P.C. for its presentation before the court of competent jurisdiction. The appellant, after receiving the plaint, presented the same in the Civil Court, Multan, on 19-2-1986. At this stage, the respondent filed an application under Order VII, rule 11, C.P.C. on the ground, that the suit filed by the appellant was hopelessly barred by time. The application was contested by the appellant. Finally, the application was allowed and the plaint of the appellant was rejected under Order VII, rule 11, C.P.C. being barred by time.

Being dissatisfied of the judgment and decree, the appellant filed an appeal which too was dismissed by the learned Addl. District Judge, Multan.

3. Learned counsel for the appellant argued the case mainly on the ground, that the appellant in good faith, filed the suit in the Civil Court, Lahore, as the cause of action also arose at Lahore and the moment, the plaint was returned by the leaner Civil Court, Lahore, the same was presented in the Civil Court, Multan, within seven days. Learned counsel further submits, that there is no mala fide on the part of the appellant, therefore, the appellant cannot be held responsible for filing the case in the Civil Court, Lahore. Reliance is placed on Mst. Anwar Bibi and others v. Abdul Hameed (2002 SCMR 144), Princess Zohra Bakhte v. Shaukat Ali Khan and another (1988 CLC 332), Trustees of the Port of Karachi v. Messrs Fatima Sugar Mills Ltd. and 2 others (PLD 2011 Karachi 426).

4. Conversely, learned counsel for the respondent submitted, that the suit filed by the appellant in the Civil Court, Multan, is hopelessly barred by time, therefore, the learned trial court as well as the learned appellate court rightly rejected the plaint under Order VII, rule 11, C.P.C. Reliance is placed on Mst. Khadija Begum and 2 others v. Mst. Yasmeen and 4 others (PLD 2001 Supreme Court 355).

5. As evident from the findings of the learned courts below, the appellant mainly has been non-suited on the ground, that the appellant did not act in good faith and failed to perform his duty with due diligence, utmost care and caution while pursuing the case. Although the learned appellate court while recording the findings, has referred the instances and the law declared by the Hon'ble Courts but has not taken care of the important facts, that the respondent, at the time of filing the written statement, had taken a specific preliminary,

objection regarding the jurisdiction of the court but the learned trial court, who was under legal obligation to decide the question of jurisdiction at first, took eleven years to decide the question of jurisdiction of the court. It is the primary duty of every court, as observed by the Hon'ble Supreme Court of Pakistan many a times, that the court should first assume the jurisdiction before proceeding further with the case. It is also pertinent to mention here, that the appellant contested the objection taken by the respondent regarding the jurisdiction of the court and the same was decided by the learned Civil Court, Lahore, whereby finally the plaint was returned to the appellant.

6. The learned appellate court has mainly decided, as observed earlier, on the ground, that the appellant did not act in good faith and with due diligence, therefore, is not entitled for any relief. Needless to mention, that the good faith, due diligence and utmost care and caution are mix question of facts and law and can only be decided by recording the evidence, whereas in this case, no such exercise has been done by the courts below. As regard the exclusion of time of proceedings, bona fide consumed in court having no jurisdiction can only be proved through actions, the Hon'ble Supreme Court of Pakistan has observed in a judgment cited as Mst. Anwar Bibi and others v. Abdul Hameed (2002 SCMR 144), the relevant esteemed observation deals with the matter of the Hon'ble Supreme Court of Pakistan on this issue is as under:---

"Section 14 of Limitation Act applied to a case where the Court by its own order has terminated the suit or proceedings on the ground that it has no jurisdiction to entertain it or that there is some other cause of like nature which makes it impossible for the Court to entertain it. The object behind is the protection against the bar of limitation of party bona fide pursuing his case and seeking adjudication on merits but nevertheless prevented from getting decision on merits on account of defect of jurisdiction or other cause of like nature."

7. In another judgment cited as Princess Zohra Bakhte v. Shaukat Ali Khan and another (1988 CLC 332) it is ruled by the learned Sindh High Court, that the filing of the plaint before a court of competent jurisdiction, would be continuity of the previous suit:---

"10. It may also not be out of place to mention here that the plaint that was filed before the First Class Court was returned by the order of this Court to the plaintiff for presentation to proper Court under Order VII, Rule 10, C.P.C. The plaintiff presented that plaint along with another newly-drafted plaint and the balance of court-fee which he was required to pay in this Court only after two days of its return to him. The said presentation of the said plaint in these circumstances cannot be said to be filing of a new suit. It will have to be treated as a continuity of the previous suit. The time taken by the plaintiff in that Court will have to be excluded but even if the said time is not excluded it would not make any difference for the reasons already shown by me."

8. In another judgment titled Trustees of the Port of Karachi v. Messrs Fatima Sugar Mills Ltd. and 2 others (PLD 2011 Karachi 426), the question of bona fide proceedings has been discussed and in view of the principle laid down by the Hon'ble Courts and even otherwise it appears from the record, that there is no mala fide on the part of the appellant and further it was otherwise duty of the learned courts below and particularly the learned trial court to record the evidence to decide the question of bona fide proceedings/mala fide

proceedings, good faith, due care and diligence. The learned counsel for the respondent has relied upon Mst. Khadija Begum and 2 others v. Mst. Yasmeen and 4 others (PLD 2001 Supreme Court 355). But the facts of the case are quite distinguishable as in this case, there appears no mala fide on the record which can be attributed to the appellant. As regard the concurrent findings argued by the learned counsel for the respondent, the Hon'ble Supreme Court of Pakistan in plethora of judgments has observed, that if the concurrent findings are result of misreading and non-readings of evidence or jurisdictional defect, those can be corrected while exercising the revisional jurisdiction. The latest judgment on this point is Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others (2014 SCMR 914) wherein the Hon'ble Supreme Court of Pakistan, has laid down the principle to interfere with the concurrent findings of facts recorded by the forums below. The relevant portion of the judgment is reproduced as under:---

"The argument that when all the fora functioning in the revenue hierarchy concurrently held that the appellants were occupying the land in dispute in their capacity as tenants, such finding being one of fact could not have been interfered with by the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, has not impressed us as a finding does not become sacrosanct because it is concurrent. It becomes sacrosanct only if it is based on proper appraisal of evidence. The finding of the fora functioning in the revenue hierarchy despite being concurrent was not based on proper appraisal of evidence and due application of law, therefore, the High Court was well within its jurisdiction to interfere therewith. For the very condition for conferment of jurisdiction on a Court of law is to render a finding on proper appraisal of evidence and due application of law. If and when it would do otherwise, it would go outside its jurisdiction. Such order can, well be quashed in exercise of Constitutional jurisdiction of the High Court."

9. Resultantly, the judgment and decrees passed by learned courts below are set aside, the case is remanded to the learned trial court to decide the same afresh after framing issues and recording the evidence of the parties. No order as to cost.

RR/C-14/L Case remanded.

2015 C L C 1423
[Lahore]
Before Ali Akbar Qureshi, J
KINNAIRD COLLEGE FOR WOMEN through Principal----Petitioner
versus
MARIA ISABEL MALDONADO GARCIA----Respondent

C.R.No.1783 of 2015, heard on 15th June, 2015.

(a) Civil Procedure Code (V of 1908)---
----O. VII, R. 11---Constitution of Pakistan, Art.10A---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Plaint, rejection of---Right of fair trial---Scope---Contents of plaint had disclosed a cause of action and same could only be decided by recording evidence of the parties---Law would favour adjudication on merits---Right of fair trial should be

provided to the parties---Trial Court had rightly dismissed application for rejection of plaint---No jurisdictional defect or legal infirmity was pointed out in the impugned order passed by the Trial Court---Revision was dismissed in circumstances.

Ilyas Ahmed v. Muhammad Munir and 10 others PLD 2012 Sindh 92; Muhammad Iqbal v. Altaf Hussain and others 2011 CLC 250; Province of Punjab through Collector, Bahawalpur v. Anwar Ali and 315 others 2000 CLC 1362; Messrs Karsaz Construction Company through Partner Muhammad Hanif v. Pakistan through Secretary, Ministry of Defence, Islamabad and another 1999 CLC 1719; Muhammad Hamdan Shaikh v. The Chairman, Board of Secondary Education, Nazimabad, Karachi and 2 others PLD 1998 Kar. 59; Messrs. Ghee Corporation of Pakistan (Pvt.) Ltd. v. Messrs Ashraf & Sons through its Proprietor 1995 MLD 390; Agricultural Development Bank of Pakistan and 3 others v. Anwar Hussain Jatoi PLD 1982 Kar. 313 and Pakistan International Airlines Corporation and 5 others v. Muhammad Izharul Ahsan Qureshi PLD 1979 Kar. 640 distinguished.

(b) Administration of justice---

----Law would favour adjudication on merits.

(c) Constitution of Pakistan---

----Art. 10A---Right of fair trial---Scope--- Right of fair trial should be provided to the parties.

Jawwad Hassan for Petitioner.

Nemo for Respondent.

Date of hearing: 15th June, 2015.

ORDER

ALI AKBAR QURESHI, J.--- Through this revision petition, petition, the petitioner-institution has questioned the validity of an order dated 16-5-2015, passed by learned trial Court, whereby the application filed by the petitioner-defendant under Order VII, Rule 11 of the Code of Civil Procedure, 1908, was dismissed being pre-mature.

2. Shortly the facts as stated in the record are; that the respondent/plaintiff filed a suit for declaration alongwith damages, on the ground, that respondent/plaintiff joined the petitioner-institution as a "Lecturer on Contract" for teaching "Spanish" in the year 2004, for a period of one year. Subsequently, the contract was extended for successive year up till February, 2009, and thereafter no further extension was made and lastly prayed that the act of the petitioner/defendant be declared illegal and unlawful. The petitioner/ defendant appeared in response of the notice and instead of submitting the written statement, filed an application under Order VII, Rule 11 of Code of Civil Procedure, 1908, for the rejection of the plaint on the ground, that the plaint does not disclose any cause of action and no relief under section 42 of the Specific Relief Act, 1877, could be granted.

As regard the damages claimed by the respondent/plaintiff it was alleged, that those could not be claimed being barred by limitation.

The application was contested by the petitioner/defendant on the ground; that the factual controversy does disclose a cause of action and can only be disposed of by recording the evidence.

The learned trial court after hearing the arguments dismissed the application under Order VII, Rule 11 of Code of Civil Procedure, 1908. Hence, this revision petition.

3. Learned counsel for the petitioner reiterated the contentions taken in the civil revision and submitted, that the order is liable to be set aside. Learned counsel for the petitioner has placed reliance on the judgments titled "Ilyas Ahmed v. Muhammad Munir and 10 others" (PLD 2012 Sindh 92), "Muhammad Iqbal v. Altaf Hussain and others" (2011 CLC 250), "Province of Punjab through Collector, Bahawalpur v. Anwar Ali and 315 others" (2000 CLC 1362), "Messrs Karsaz Construction Company through Partner Muhammad Hanif v. Pakistan through Secretary, Ministry of Defence, Islamabad and another" (1999 CLC 1719), Muhammad Hamdan Shaikh v. The Chairman, Board of Secondary Education, Nazimabad, Karachi and 2 others" (PLD 1998 Karachi 59), "Messrs Ghee Corporation of Pakistan (Pvt.) Ltd. v. Messrs Ashraf & Sons through its Proprietor" (1995 MLD 390), "Agricultural Development Bank of Pakistan and 3 others v. Anwar Hussain Jatoi" (PLD 1982 Karachi 313) and "Pakistan International Airlines Corporation and 5 others v. Muhammad Izharul Ahsan Qureshi" (PLD 1979 Karachi 640).

4. Heard. Record perused.

5. The contents of the plaint filed by the respondent/plaintiff were perused with the assistance of learned counsel for the petitioner during the course of arguments, which disclose a cause of action and can only be decided by recording the evidence of the parties. Even otherwise, the law favours the adjudication on merits and particularly after the insertion of Article 10-A in the Constitution of Islamic Republic of Pakistan, 1973, it is mandatory to provide a fair right of trial, therefore, the learned trial court rightly dismissed the application. The learned counsel for the petitioner although argued the case at some length but could not point out any jurisdictional defect or legal infirmity with the order impugned herein and further the law referred by the learned counsel for the petitioner is not applicable on the facts of the instant case. Moreover, the judgments relied upon by learned counsel for the petitioner, have already been discussed by the learned trial court while dismissing the application under Order VII, Rule 11 of the Code of Civil Procedure, 1908. Therefore, I see no reason to interfere with the well-reasoned findings of learned trial court.

6. Resultantly, this revision petition being devoid of any merits is dismissed, with no order as to cost.

ZC/K-22/L Revision dismissed.

2015 C L C 1661
[Lahore]
Before Ali Akbar Qureshi, J
MUBARA and 4 others----Petitioners
versus
Mst. KHANU through L.Rs. and others----Respondents

C.R. No.1138 of 2004, heard on 7th September, 2015.

Limitation Act (IX of 1908)---
----S. 28 [since omitted]---Adverse possession, claim of---Repugnancy to injunctions of Islam---Plaintiff had filed a suit for possession of suit land, which was contested by the defendant on the ground that he had acquired title to the suit land on the basis of adverse possession---Trial Court decreed suit of plaintiff, however Appellate Court accepted respondent's plea of adverse possession and set aside such decree---Validity---Defendants had no title to the suit land except for the claim of adverse possession---Revenue entries showed that plaintiff had acquired the land in terms of an exchange of some other land---High Court remanded the case to the Appellate Court, in such circumstances, to decide the same afresh on the basis of available record and the principles of adverse possession laid down in the case of Maqbool Ahmed v. Hakoomat-e-Pakistan (1991 SCMR 2063)---Revision petition was disposed of accordingly.

Maqbool Ahmad v. State of Pakistan 1991 SCMR 2063 ref.

Shaigan Ijaz Chadhar for Petitioner.

Tariq Mehmood Aamir for Respondents.

Date of hearing: 7th September, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- This civil revision calls in question the judgment and decree dated 18-3-2004, passed by the learned Addl. District Judge, Bhalwal, whereby the suit for possession, filed by the petitioners was dismissed.

2. Briefly the facts as stated in the record, that the petitioners/ plaintiffs filed a Suit for Possession on the basis of title of a piece of land measuring 18 kanals situated in village Badin, Tehsil Bhalwal, District Sargodha, on the ground, that the petitioners in exchange of their land acquired the suit land along with the possession; that the suit land was given to the respondents, who started paying the rent as tenants to the petitioners but thereafter refused to hand over the possession.

The suit was contested by the respondents on the ground, that the respondents/defendants had acquired the title of the suit land on the basis of the adverse possession.

The learned trial court out of controversial pleadings framed necessary issues, recorded evidence of the parties and after hearing the arguments finally decreed the suit on 28-11-1991. Against which an appeal was filed by the respondents, which was dismissed on 13-12-1992. Against the said judgment and decree dated 13-12-1992 a revision petition was

filed before this Court, wherein the judgment and decree dated 13-12-1992 was set aside on 10-10-2001 and the case was remanded to the learned appellate court for its decision afresh.

The learned Addl. District Judge, Bhalwal, in compliance of the remand order heard the arguments of the parties and finally accepted the appeal vide judgment and decree dated 18-3-2004. Hence, this revision petition.

3. Learned counsel for the petitioners at the very outset of the arguments referred issue No.4, which relates to the adverse possession claimed by the respondents. Learned counsel further submitted, that the learned appellate court has mainly decided aforesaid issue in favour of the respondent although the claim of adverse possession has been declared un-Islamic and no longer available in the field. Reliance is place on "Maqbool Ahmad v. State of Pakistan" (1991 SCMR 2063).

4. When it was confronted to the learned counsel for the respondents, learned counsel, although had no answer to this legal proposition but even then tried to defend the judgment "Maqbool Ahmad v. State of Pakistan" (1991 SCMR 2063).

5. To further find out the truth the record was perused with the assistance of learned counsel for the parties.

6. From the perusal of record it revealed, that the respondents had no title except the claim of adverse possession whereas on the other hand according to the revenue entries the petitioners exchanged the land. In this view of the matter, without further commenting upon the facts of the case it would be appropriate that the case be remanded to the learned appellate court to decide the same afresh on the basis of the available record and the law declared by the Hon'ble Supreme Court of Pakistan pertaining to issue No.4, which relates to the claim of the adverse possession of the respondents.

7. Resultantly, the judgment and decree dated 18-3-2004 passed by the learned appellate court is set aside and the case is remanded to the learned appellate court to decide the same afresh in view of the available record and the principle laid down by the Hon'ble Supreme Court of Pakistan, in the judgment supra.

8. Parting with the judgment parties to the case shall appear before learned District Judge, Sargodha, on 28-9-2015, who may hear the case himself or entrust it to any other competent Court.

MWA/M-289/L

2015 M L D 1225
[Lahore]
Before Ali Akbar Qureshi, J
GUL MUHAMMAD and 5 others---Petitioners
versus
GHULAM QADIR and 2 others---Respondents

C.R. No.588-D of 1997, heard on 20th January, 2015.

Islamic Law---
----Inheritance---Right of daughter, uterine brothers and sisters in inheritance---Gift/donation of inherited share, proof as to---Mother donated/gifted her share, which she had inherited from husband, in favour of her daughter, a minor at the relevant time---Mutation was directly sanctioned in name of the daughter on basis of said gift---Daughter died issueless and inheritance mutation was sanctioned in names of her (daughter's) mother and husband---Uterine brothers and sisters of the daughter filed suit for declaration claiming that all said mutations were illegal and unlawful as their mother had not donated/gifted her share to the daughter---Trial Court after recording evidence and hearing parties dismissed the suit---Appellate Court decreed the same on ground that no fraud was committed and gift mutation in favour of the daughter was rightly entered; however uterine brothers and sisters as such, along with their mother, were entitled to their respective shares out of remainder of legacy left by the daughter as her husband was entitled only to 1/2 share in legacy---Validity---Daughter being minor at the time the gift was made to her was unable to manage to get share of her mother by way of donation and entry in the inheritance mutation in connivance with anyone---Mother had not challenged said gift mutation in her life time---No fraud was alleged---Mother and husband of daughter were entitled to their respective legal share and remainder of legacy of the daughter was to be distributed among uterine brothers and sisters---Gift mutation was rightly entered in the name of the daughter in revenue record---Trial Court committed serious jurisdictional error by not attending said aspects of case and wrongly interpreted available record---Appellate Court rightly appreciated the record and reached fair conclusion---High Court dismissed petition and affirmed judgment and decree passed by appellate Court.

Mian Waseem Alam Ansari for Petitioners.
Malik Muhammad Latif Khokhar for Respondents.
Date of hearing: 20th January, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 29-9-1997 passed by learned Additional District Judge, Rojhan, in appeal filed by the respondents/plaintiffs, whereby the judgment and decree passed by the learned trial court, was set aside.

2. Shortly the facts for the disposal of this petition are that, the suit land was originally owned by one Imam Bakhsh who, at the time of death, survived by four sons, namely, Naseer, Sardar, Jamal and Ghullan; out of them, Naseer died issueless whereas Sardar died

leaving behind Allah Wasai as widow and Mst.Gehnwar as daughter; allegedly Mst. Allah Wasai donated her share in favour of her daughter Mst. Gehnwar and by this way, the inheritance Mutation No.183 dated 6-7-1925 was sanctioned solely in favour of Mst.Gehnwar, daughter of Sardar.

3. During this period, Mst. Allah Wasai contracted second marriage and out of this wedlock, two sons, namely, Ghulam Qadir and Ghulam Sarwar, and three daughters, namely, Mst.Zohran, Mst.Ghulam Fatima and Mst.Ameer Khatoon were born, Mst. Gehnwar married with petitioner No.1, namely, Gul Muhammad and died issueless, her inheritance mutation was attested on 30-6-1957 in the name of her mother and her husband, who got their shares out of the legacy left by Mst.Gehnwar.

4. The uterine brothers and sisters of Mst. Gehnwar (sons and daughters from the second husband of Mst. Allah Wasai), filed a suit for declaration, on the ground, that at the time of death of original owner, namely, Sardar, Mst. Allah Wasai, mother of the respondents had not donated her share in favour of Mst. Gehnwar, so they are entitled to get their share from the legacy of Mst. Gehnwar, being her uterine brothers and sisters, therefore, the Mutation No.183 dated 6-7-1925 and the Mutation No.1551 dated 30-6-1956 attested after the death of Sardar son of Imam Bakhsh and Mst. Gehnwar respectively, be declared illegal and unlawful.

5. The suit was contested by the petitioner by filing written statement, wherein the maintainability of the suit filed by the respondents/plaintiffs was questioned on the ground of limitation. The learned trial court, out of the pleadings, settled down issues, recorded the evidence of the parties, and after hearing the arguments, dismissed the suit vide judgment and decree dated 17-12-1995.

6. The respondents/plaintiffs, being aggrieved of the judgment and decree passed by the learned trial court, filed an appeal before the Additional District Judge, Rojhan, which was accepted, and finally the suit was decreed in favour of the respondents/plaintiffs. Hence, this civil revision.

7. The record was perused with the assistance of learned counsel for the parties, from where it is found, that undeniably Mst.Allah Wasai was widow of deceased Sardar, whereas Mst.Gehnwar was his daughter, but the inheritance mutation was entered only in the name of Mst. Gehnwar as Mst. Allah Wasai, her mother, donated her share in her favour. Further, the respondents are heirs of Mst. Allah Wasai (sons and daughters of Allah Wasai from her second husband) who, after the death of Sardar, contracted second marriage and out of this wedlock, the respondents were born. Further, they are entitled to get share from the legacy of Mst. Gehnwar, being her uterine brothers and sisters, as her husband was only entitled to the extent of 1/2 share.

8. It would be appropriate to firstly resolve the controversy as to whether Mst. Allah Wasai, after the death of her husband, namely, Sardar, the original owner, donated her share in favour of her daughter, namely, Mst. Gehnwar. From the record, it is proved, that at the time of death of Sardar, real father of Mst. Gehnwar and husband of Mst. Allah Wasai, Mst.

Gehnwar was minor and was unable to manage in connivance with anyone, to get the share of her mother, by way of donation and entry in the inheritance mutation.

Therefore, it can safely be held, that Mst. Allah Wasai donated her share in favour of her only daughter, namely, Mst. Gehnwar and Mutation No.183 dated 6-7-1925 rightly entered in the revenue record.

9. Even otherwise, the factum of donating the share by Mst. Allah Wasai in favour of Mst. Gehnwar, becomes more strengthened from the conduct of Mst. Allah Wasai, who did not challenge the inheritance mutation or donation made by her, in her lifetime. Further, no fraud has been alleged, and even if alleged, could not be proved, therefore, the learned trial court committed serious jurisdictional error by not attending this aspect of the case, and wrongly interpreted the record available on the file, whereas learned appellate court rightly appreciated the record and reached to a fair conclusion, that the inheritance mutation, at the death of Sardar, the original owner, was rightly entered and no fraud was committed.

10. Learned counsel for the petitioners/defendants submits, that the respondents/plaintiffs are not entitled to inherit anything from the legacy of Mst.Gehnwar, as at the time of her death, nothing was left by her.

The aforesaid contention has already been dealt with by the learned appellate court by observing, that at the time of death of Mst.Gehnwar, who died issueless, her husband, namely, Gul Muhammad was entitled to inherit 1/2 property, whereas the remaining property was to be distributed among her uterine brothers and sisters alongwith the share of their mother, namely, Mst. Allah Wasai, admittedly died before the institution of the suit, and after the death of Mst.Gehnwar, therefore, the remaining portion of the legacy of Mst.Gehnwar, after satisfying the share of her deceased husband, is to be inherited by the uterine brothers and uterine sisters.

11. From the above finding, it is crystal clear, that Mst.Gehnwar inherited the property from her father, namely, Sardar and the share of her mother, namely, Mst. Allah Wasai, and at the time of her death, the property was transferred/inherited by the husband of Mst.Gehnwar to the extent of his share and by this way, the respondents are entitled to get their share out of the legacy of Mst. Gehnwar.

12. In view of above, it is held, that the learned appellate court, after careful perusal of the record, reached to a fair and just conclusion, which is in accordance with the principles of the law of inheritance, therefore, there is hardly any reason to interfere therewith.

13. Resultantly, this civil revision is dismissed, the order passed by the learned appellate court is affirmed. No order as to costs.

SL/G-11/L Petition dismissed.

2015 P L C 232
[Lahore High Court]
Before Ali Akbar Qureshi, J
PUNJAB SEED CORPORATION through Managing Director and another
versus
LABOUR COURT NO.9, MULTAN through Presiding Officer and 2 others

W.P.No.8208 of 2013 and 94 other Petitions, decided on 27th January, 2015.

(a) Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968)---

----Sched, Para 1(b)(c)---'Permanent Workman'---Definition---When a worker is appointed against a project which is likely to continue for more than nine months and he remains in service for nine months, such worker will attain status of regular employee---Service rules of employer authority do not determine status of workman and his regularization but by Para 1(b)(c) of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968---Denial of employer authority to regularize services of such worker as permanent workman is not permissible in law.

Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others 1995 PLC 539; Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others PLD 1996 SC 610; Tehsil Municipal Administration v. Muhammad Amir 2009 PLC 273; Pakistan International Airlines v. Sindh Labour Court No.5 and others PLD 1980 SC 323; Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others 1999 SCMR 2557; Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724 Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others 2008 SCMR 1058; Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain 2013 SCMR 1547; WAPDA and others v. Khanimullah and others 2000 SCMR 879 and Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others PLD 2001 SC 415 rel.

Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724 ref.

(b) Industrial Relations Act (IV of 2008)---

----S. 41---Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968), Sched. Para 1(b) & (c)---Employees on work charge basis---Regularization of service---Grievance petition---Labour Court and Labour Appellate Tribunal accepted grievance petition of employees---Validity---Employees were working from last four to twenty eight years on permanent posts without any break or gap in their service on work charge basis---Employees, in circumstances, were entitled to regularization of their services having attained status of 'permanent workman' by afflux of time---Service rules could only be formulated to run domestic affairs of employer authority and not the status of employees and such rules would only apply prospectively.

(c) Constitution of Pakistan-------Art. 199---Constitutional petition---Fresh plea, raising of---Scope---When the petitioner had not pleaded a ground before lower forums, he was precluded by law to agitate the same under Constitutional jurisdiction of High Court.

(d) Constitution of Pakistan---
----Art. 199---Constitutional jurisdiction---Scope---Concurrent findings of facts recorded by courts below---When the courts below have recorded concurrent findings, these cannot be interfered with in constitutional jurisdiction unless the forums has acted without lawful authority---Relief being discretionary and equitable under the Constitutional jurisdiction cannot be granted unless some jurisdictional defect, legal infirmity or irregularity is pointed out in the judgments of courts below.

General Manager, Pearl Continental Hotel, The Mall, Lahore/Rawalpindi v. Farhat Iqbal PLD 2003 SC 952; Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others PLD 2005 SC 792; State Life Insurance Corporation and others v. Jaffar Hussain and others PLD 2009 SC 194; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44 and Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan 2013 SCMR 13 rel.

Mushtaq Ahmad Mohal, Hafiz M. Abu Bakar Ansari and Malik Muhammad Tariq Rajwana for Petitioner.

Ch. Saleem Akhtar Waraich, Qamar-uz-Zaman Butt, Nadeem Parwaz, Tariq Mehmood Dogar and Ch. Muhammad Akbar Sajid for Respondents.

Date of hearing: 23rd December, 2014.

JUDGMENT

ALI AKBAR QURESHI, J.--- By this judgment I propose to dispose of the following writ petitions along with this petition, as common question of law and facts is involved:---

Sr. No.	Writ Petitions Nos.	Names of Respondents/ Employee	Designation	Date of appointment
1.	W.P.No.10136/ 2014	Muhammad Waheed s/o Haji Allah Yar	Turbine Operator	2-2-2008
2.	W.P.No.8210/ 2013	Dilber Hussain s/o Muhammad Siddique	Machinery Helper	1985
3.	W.P.No.10139/ 2014	Javaid Iqbal s/o Ghulam Muhammad Bhatti	Fieldman	2008
4.	W.P.No.10135/ 2014	Muhammad Ramzan s/o M. Rafiq Kamboh	Fieldman	1995
5.	W.P.No.2769/ 2014	Khalid Mehmood s/o Muhammad Din	Fieldman	1998
6.	W.P.No.2065/ 2014	Faisal Ahmad Shahzad s/o Muhammad Zulfiqar	Worker	2-3-2007
7.	W.P.No.2078/ 2014	Muhammad Iqbal s/o Allah Rakha	Worker	3-5-2008

8.	W.P.No.2780/ 2014	Jamshed Ali s/o Rao Shamshad Ali	Security Guard	1993
9.	W.P.No.2427/ 2014	Shahid Nadeem s/o Zafar Ali	Mechanic/ Helper	1996
10.	W.P.No.2430/ 2014	Wali Muhammad s/o Sardar Khan	Helper	1988
11.	W.P.No.10134/ 2014	Sadiq Hussain s/o Khadim Hussain	Fieldman	2007
12.	W.P.No.2075/ 2014	Muhammad Afzal s/o Noor Muhammad	Worker	31-10-2006
13.	W.P.No.2436/ 2014	Rashid Yousaf s/o Kanwar Muhammad Khan	Welder	2000
14.	W.P.No.2439/ 2014	Zahoor Hussain s/o Muhammad Chiragh	Assistant Mechanic	1-1-1990
		Muhammad Afzal s/o Nazir Ahmad,	Assistant mechanic	1-1-2000
		Muhammad Saleem s/o Muhammad Jamil	Machinery Helper	1-1-1999
		Altaf Hussain s/o Fateh Muhammad	Welder	1-1-1998
15.	W.P.No.2437/ 2014	Muhammad Nadeem s/o Muhammad Bashir	Tube well Operator	2000
16.	W.P.No.2447/ 2014	Sabir Ali s/o Muhammad Yaqoob Sultani	Carpenter	1985
17.	W.P.No.2446/ 2014	Altaf Hussain s/o Fida Hussain	Beldaar	1993
18.	W.P.No.2429/ 2014	Saeed Ahmad Khan s/o Muhammad Yousaf Khan	Store Clerk	1998
19.	W.P.No.2428/ 2014	Muhammad Aslam s/o Nasir Khan	Beldar	1-6-2004
20.	W.P.No.2434/ 2014	Abdul Haq s/o Malik Ghulam Qasim	Machinery Helper	1999
21.	W.P.No.2440/ 2014	Zafarullah s/o Abdul Aziz	Mechanic/ Helper	7-12-1982
22.	W.P.No.2435/ 2014	Ghulam Murtaza s/o Muhammad Nawaz	Security Guard	21-1-1998
23.	W.P.No.2433/ 2014	Abdul Sattar s/o Muhammad Shafi	Beldar	2001
24.	W.P.No.2441/ 2014	Maqbool Hussain s/o Muhammad Bakhsh	Cook	16-10-2006
25.	W.P.No.2767/ 2014	Khadim Hussain s/o Murad Ali	Mechanic Helper	1996

26.	W.P.No.2076/ 2014	Liaqat Ali s/o Muhammad Rafiq	Worker	31-10-2006
27.	W.P.No.2074/ 2014	Umar Hayat s/o Noor Muhammad	Worker	31-10-2006
28.	W.P.No.2069/ 2014	Liaqat Ali s/o Manzoor Hussain	Worker	3-5-2008
29.	W.P.No.2068/ 2014	Shahid Raza s/o Sher Muhammad	Field Man	1-1-2011
30.	W.P.No.2444/ 2014	Muhammad Younas s/o Muhammad Mansha	Helper Assistant Mechanic	1997
31.	W.P.No.2418/ 2014	Muhammad Shahid s/o Muhammad Ramzan	Cleaner/Helper	16-10-2006
32.	W.P.No.2414/ 2014	Shabbir Hussain s/o Abdul Hameed	Store Clerk	1999
33.	W.P.No.2764/ 2014	Abu Nassar s/o Muhammad Akram	Security Guard	April, 2002
34.	W.P.No.2085/ 2014	Abdul Shakoor s/o Manzoor Hussain	Field Man	1-1-2008
35.	W.P.No.2083/ 2014	Muhammad Iqbal s/o Wahid Bakhsh	Worker	3-5-2008
36.	W.P.No. 2084/ 2014	Muhammad Ramzan s/o Bashir Ahmad	Worker	31-10-2006
37.	W.P.No.2416/ 2014	Mashooq Ali s/o Lal Din	Mechanic/ Helper	1999
-38.	W.P.No.2425/ 2014	Nassarullah s/o Abdul Aziz	Welder	January, 1994
39.	W.P.No.2766/ 2014	Allah Ditta s/o Hamid Khan	Fumigation helper	12-9-2001
40.	W.P.No.2423/ 2014	Mazhar Khan s/o Ghulam Rasool	Electrician	16-10-2006
41.	W.P.No.2422/ 2014	Sajjad Hussain s/o Soba Khan	Morter Mate	1992
42.	W.P.No.2775/ 2014	Noor Muhammad s/o Jamal Din	Security Guard	1998
43.	W.P.No.2776/ 2014	Bashir Ahmad s/o Sarang Khan	Naib Qasid/ Security Guard	Jan-91
44.	W.P.No.2779/ 2014	Muhammad Saeed s/o Muhammad Shafi	Store Clerk	1-5-2002
45.	W.P.No.2778/ 2014	Asif Bilal s/o Peer Muhammad	Security Guard	January, 2000
46.	W.P.No.2077/ 2014	Syed Najam ul Hassan s/o Fida Hussain	Worker	31-10-2006
47.	W.P.No.2079/ 2014	Muhammad Ajmal s/o Manzoor Ahmad	Worker	31-10-2006
48.	W.P.No.10143/	Abdul Majeed s/o	Fieldman	2009

	2014	Zulfiqar Ali		
49.	W.P.No.8207/ 2014	Pervaiz Ahmad s/o Sardar Ahmed	Tube well Operator	1988
50.	W.P.No.10142/ 2014	Ejaz Ahmad s/o Manzoor Ahmad	Fieldman	2006
51.	W.P.No.10140/ 2014	Mushtaq Ahmad s/o Noor Muhammad Sial	Fieldman	1997
52.	W.P.No.10137/ 2014	Muhammad Aslam s/o Haji Allah Yar	Driver	2010
53.	W.P.No.10141/ 2014	Khizar Hayat s/o Haq Nawaz	Driver	2000
54.	W.P.No.2765/ 2014	Pervaiz Khan s/o Gull Member Khan	Fieldman	Feb-98
55.	W.P.No.2773/ 2014	Ijaz Ahmad s/o Ameer Ali	Driver	1996
56.	W.P.No.2421/ 2014	Asif Ali s/o Ameer Shah	Store Clerk	2006
57.	W.P.No.2410/ 2014	Muhammad Ali s/o Muhammad Afzal	Store Clerk	2006
58.	W.P.No.2408/ 2014	Muhammad Safdar s/o Mulazim Hussain	Machinery Helper	2006
59.	W.P.No.2409/ 2014	Shafaat Ali s/o Rafaqat Ali	Laboratory Assistant	1997
60.	W.P.No.2768/ 2014	Zulfiqar s/o Allah Ditta	Fieldman	Jan-01
61.	W.P.No.2431/ 2014	Muhammad Akram s/o Muhammad Eesa	Beldar	1999
62.	W.P.No.2777/ 2014	Mehmood Ali s/o Manzoor Ahmad	Fumigation Helper	17-9-1999
63.	W.P.No.2426/ 2014	Manzoor Hussain s/o Muhammad Ramzan	Assistant Foreman (Chem)	1998
64.	W.P.No.2445/ 2014	Rao Naeem Akhtar s/o Muhammad Hafeez	Storeman	2001
65.	W.P.No.2449/ 2014	Muhammad Irfan s/o Muhammad Idrees	Store Clerk	1992
66.	W.P.No.2432/ 2014	Ramzan Nisar s/o Irshad Hussain	Lab. Assistant/ Store Clerk	1993
67.	W.P.No.2070/ 2014	Nasir Mehmood s/o Amanullah	Worker	31-10-2006
68.	W.P.No.2067/ 2014	Bashir Masih s/o Rorha Masih	Worker	31-10-2006
69.	W.P.No.2438/ 2014	Rashid Abbas s/o Irshad Hussain	Welder	2000
70.	W.P.No.2419/ 2014	Riaz Hussain s/o Muhammad Shafi	Electrician	1994

71.	W.P.No.2080/ 2014	Abdul Shakoor s/o Manzoor Hussain	Fieldman	1-7-2009
72.	W.P.No.8209/ 2014	Muhammad Yasin s/o Barkat Ali	Assistant Mechanic	1995
73.	W.P.No.2443/ 2014	Jamshed Afzal s/o Afzal Haq	Store Clerk	2006
74.	W.P.No.2025/ 2014	Muhammad Sarwar s/o Bashir Ahmad	Worker	31-10-2006
75.	W.P.No.2417/ 2014	Muhammad Riaz s/o Haq Nawaz	Beldar	10-12-1994
76.	W.P.No.2774/ 2014	Tahir Nadeem s/o Muhammad Ramzan	Mechanic Helper	June, 2004
77.	W.P.No.2420/ 2014	Nazir Ahmad s/o Ghulam Sarwar	Store Clerk	18-3-1993
78.	W.P.No.2770/ 2014	Saleem Masih s/o Yousaf Masih	Fumigation Helper	Jan-98
79.	W.P.No.2771/ 2014	Muhammad Ramzan s/o Abdul Majeed	Fieldman	Jan-88
80.	W.P.No.2415/ 2014	Nazir Ahmad s/o Bagh Ali	Beldar	1986
81.	W.P.No.2413/ 2014	Muhammad Imran s/o Habibullah	Laboratory Assistant	2005
82.	W.P.No.2073/ 2014	Muhammad Iqbal s/o Ghulam Muhammad	Worker	1-4-2008
83.	W.P.No.2424/ 2014	Manzoor Hussain s/o Charagh	Helper	7-4-1983
84.	W.P.No.2772/ 2014	Abdul Hafeez s/o Muhammad Sharif	Mechanic Cold Storage	15-6-2002
85.	W.P.No.2071/ 2014	Imam Bukhsh s/o Haq Nawaz	Worker	3-1-2007
86.	W.P.No.2411/ 2014	Basharat Hussain s/o Ali Asghar	Store Clerk	2006
87.	W.P.No.2015/ 2014	Sakina Bibi w/o Amir Masih	Worker	2-3-2007
88.	W.P.No.2066/ 2014	Amjad Ali s/o Muhammad Anwar	Worker	31-10-2006
89.	W.P.No.2412/ 2014	Muhammad Nawaz s/o Haji Muhammad Shafi	Beldar/Driver	2-1-1991`
90.	W.P.No.2442/ 2014	Rana Muhammad Arashad s/o Rana Abdul Sattar	Beldar	2003
91.	W.P.No.10138/ 2014	Sajid Ali s/o Naseer Ahmad	Turbine Operator	20-3-2007
92.	W.P.No.2082/ 2014	Yasir Abbas s/o Syed Nasir Hussain	Store Man	1-2-2010

93.	W.P.No.2081/ 2014	Muhammad Akbar s/o Allah Yar	Worker	31-10-2006
94.	W.P.No.2072/ 2014	Nasir Abbas s/o Noor Muhammad	Worker	31-10-2006

2. The petitioners are aggrieved of the judgment dated 23-4-2009, passed by the learned Labour Court, and the learned Labour Appellate Tribunal, Punjab-II, Multan dated 4-6-2013, whereby the grievance petitions filed by the respondents under the labour laws, were accepted and the petitioners have been directed to regularize the services of the private respondents.

Although the respondents are working against different posts, but the common grievance voiced, pertains to their regularization into service.

3. The respondents, under section 41 of the Industrial Relations Act, 2008, filed grievance petitions to the effect, that the respondents are working with the petitioners corporation on the work charge basis from the last more than 4 to 28 years, the respondents have completed the statutory period given in the law satisfactorily, they were appointed against a regular post and by afflux of time, have attained the status of permanent/regular employee.

4. The grievance petitions filed by the respondents were vehemently contested by the petitioners through a detailed reply. In reply, the petitioners have admitted that the respondents are working in the corporation from the last many years and originally they were appointed on work charge basis for a specific period and their services have been extended from time to time by issuing new appointment letters orders before the completion of 90 days.

5. The learned Labour Court after recording evidence of the parties and hearing the arguments, accepted the grievance petitions filed by the respondents and directed the petitioners corporation to regularize the services of the respondents.

6. Being aggrieved of the order passed by the learned Labour Court, the petitioners filed an appeal before the learned Punjab Labour Appellate Tribunal-II, Multan, which was dismissed through an elaborative judgment and affirmed the judgment passed by the learned Labour Court, directing the petitioners corporation to regularize the services of the respondents. Hence this Constitutional petition.

7. Undeniably, the respondents are working as workers/workmen with the petitioners corporation from the last four to twenty-eight years without any break in service, the respondents are getting monthly salary as mentioned in the appointment letters along with the facility of leave, and as evident from the record, nothing adverse has been reported against them during this period. It is also not denied by the petitioners, that the nature of the job of the respondents is manual, therefore, the respondents are workers/workmen and fully covered under the labour laws.

8. The only question, which although has already been dilated upon in detail, by the learned Labour Court as well as the learned Labour Appellate Tribunal, pertains to the status of the respondents and their regularization by afflux of time and law applicable thereon, requires consideration.

9. The legislature has defined the permanent workman in Standing Orders 1(b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1(b) of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:---

SCHEDULE.
STANDING ORDERS

1. Classification of Workmen: (a) Workmen shall be classified as---

(1) ……..

(2) ……..

(3) ……..

(4) ……..

(5) ……..

(6) ……..

(b) A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months] "

10. In this case, the respondents are working against the same post and Project from the last four to twenty-eight years, therefore, it can safely be held, that the post and project against which the respondents are working, is of permanent nature, thus, the denial of the petitioners to regularize the services of the respondents as permanent workmen, is not permissible in law.

11. It is not denied, that the respondents are working from the last many years, and suffice to hold, that the respondents are needed to the petitioners corporation and further,

even otherwise, it is also to be taken into consideration that almost all the respondents have become over-age during the period of their service and cannot go anywhere nor can apply to earn their livelihood in any department or organization, therefore, the petitioners corporation instead of involving them in litigation, should have regularized the services of the respondents.

12. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, government or the private, who hire the service of the poor people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact it is the device which is based on mala fide being used to deprive the poor worker who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the Hon'ble Supreme Court of Pakistan titled Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others (1995 PLC 539), this petition was filed by the petitioners corporation i.e. Punjab Seed Corporation. The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:---

"3. The contentions of the learned counsel for the petitioners that the respondent was appointed on 'work charge basis' to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.

4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under:---

There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure 'A' would demonstrate that he was appointed on 25-6-1980 and that his services were terminated on 20-7-1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.

5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal

which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

13. In another esteemed judgment reported as Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others (PLD 1996 Supreme Court 610), the Hon'ble Supreme Court of Pakistan, while dealing with the question of permanent worker, at page 621, has ruled as under:---

"The ratio of the above judgment in the case of Muhammad Yaqoob (supra) seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and non-residential buildings and constructing itself and/or causing construction thereof. The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by the Labour Courts in this respect cannot be said to be not founded on evidence on record."

14. In another judgment cited as Tehsil Municipal Administration v. Muhammad Amir (2009 PLC 273), has further elaborated the status of a workman at page 280, the relevant paragraph is reproduced as under:---

"13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with 'water work', `well' within the meaning of construction industry as defined in section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked. He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were transferred to TMA Bhalwal where he continued to work till 15-8-2005 when he was informed that his services had been terminated w.e.f. 1-9-2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of clause (b) of paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in para-10 above."

15. The other esteemed judgments applicable in this case are as under:---

(1) Pakistan International Airlines v. Sindh Labour Court No.5 and others (PLD 1980 Supreme Court 323)

(2) Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others (1999 SCMR 2557)

(3) Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724)

(4) Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others (2008 SCMR 1058)

(5) Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain (2013 SCMR 1547)

(6) WAPDA and others v. Khanimullah and others (2000 SCMR 879).

16. Since the respondents, in view of the law laid down by the Hon'ble Supreme Court of Pakistan, have attained the status of permanent workmen/workers by afflux of time, therefore, the petitioners will have to regularize the services of the respondents in accordance with law, and any action, if required in case of any misconduct, will be initiated under Order 12 of the Standing Orders Ordinance and not otherwise.

17. The learned counsel for the petitioners, during his arguments, mainly relied upon the service rules of the petitioners corporation, formulated in the year 2007. It is pertinent to mention here, that the petitioners did not plead this question before the forum below, therefore, the petitioners are precluded by law to agitate the same. And even otherwise, if the petitioners, as argued by the learned counsel for the petitioners, have formulated the service rules to run its domestic affairs, could only be enforced prospectively and not retrospectively and even otherwise, those rules do not determine the status of a temporary workman/worker and its regularization, as the said question can only be decided under the provisions of Standing Orders Ordinance 1 (b) (c) of the West Pakistan Industrial and Commercial Employment (Standing Order) Ordinance, 1968.

18. The arguments advanced by the learned counsel for the respondents relying on the different esteemed judgments of the Hon'ble Supreme Court of Pakistan, that this Court, while exercising the jurisdiction conferred under Article 199 of Constitution of the Islamic Republic of Pakistan, 1973, cannot substitute its own finding in the presence of the concurrent conclusion drawn by the forums below on facts as well as on record. Both the learned forums below, after due appreciation of the record and the contentions of the parties, have recorded concurrent findings which cannot be interfered while exercising the writ jurisdiction unless the forums below acted, without lawful authority and jurisdiction. Reliance is placed on Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others (PLD 2001 Supreme Court 415), General Manager, Pearl Continental Hotel, The Mall, Lahore/Rawalpindi v. Farhat Iqbal (PLD 2003 Supreme Court 952), Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others (PLD 2005 Supreme Court 792), State Life Insurance Corporation and others v. Jaffar Hussain and others (PLD 2009 Supreme Court 194), Rai Ashraf and others v. Muhammad Saleem Bhatti

and others (PLD 2010 Supreme Court 691), and Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 Supreme Court 44).

19. The learned counsel for the petitioners has referred a recent judgment of the Hon'ble Supreme Court of Pakistan cited as Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan (2013 SCMR 13). The aforesaid esteemed judgment has been passed by the Bench consisting of three Hon'ble Judges of the Hon'ble Supreme Court of Pakistan, whereas the judgment cited as Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724), referred by the learned counsel for the respondents supra, is of a Bench consisted of five Hon'ble Judges of the Hon'ble Supreme Court of Pakistan. Thus, following the principle laid down by the Hon'ble Supreme Court of Pakistan in various judgments, that the judgment of the larger Bench would follow to resolve the controversy, hence the judgment (supra) delivered by the Hon'ble five Judges of the apex Court would govern the controversy in this matter. Even otherwise, the ratio decidendi of the other judgments on this point goes in favour of the respondents.

20. This Constitutional petition has been filed against the concurrent findings on facts as well as on law recorded by the learned forums below, although the learned counsel for the petitioners argued the case at length but could not point out any jurisdictional defect, legal infirmity or irregularity with the findings recorded by the learned forums below. Needless to mention, that in the Constitutional jurisdiction conferred under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners will have to point out the illegality committed by the learned forums, therefore, this is not a fit case to exercise the Constitutional jurisdiction, which is discretionary and equitable in nature. Even otherwise, the petitioners, in view of the facts and circumstances of the case, are not entitled for any discretionary relief.

21. Resultantly, the judgment passed by the learned lower forum is affirmed and the writ petitions are dismissed with no order as to cost.

MM/P-11/L Petition dismissed.

2015 P L C 295
[Lahore High Court]
Before Ali Akbar Qureshi, J
PUNJAB SEED CORPORATION through Director Admn. and another
versus
CHAIRMAN, PUNJAB LABOUR APPELLATE TRIBUNAL NO.2, MULTAN and 2 others

Writ Petition No.15656 of 2013, heard on 5th March, 2015.

(a) Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968)---

----S.Os. 1(b) & 12---Constitution of Pakistan, Art.199---Constitutional petition---Work-charge employees---Regularization---Employees filed grievance petition for regularization of their service which was accepted concurrently---Contention of employer was that employees were appointed on work-charge basis therefore, they could not attain the status of a permanent employees---Validity---If a worker was appointed against a project which was likely to continue more than nine months and the worker remained in service for nine months, he would attain the status of a regular employee---Employees, in the present case, were working against the same post and project for the last many years---Post and project against which the employees were working was of permanent nature---Denial of employer to regularize the services of employees as permanent workmen was not permissible in law---Employees had attained the status of permanent workmen/workers by afflux of time---Services of employees should have been regularized in accordance with law---Any action, if required in case of any misconduct, could be initiated under S.O.12 of the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 and not otherwise---Employees had become over-aged during the period of their service and could not go anywhere nor could apply to earn their livelihood in any organization---Employer should have regularized the services of the employees---No jurisdictional defect, legal infirmity or irregularity was pointed out in the findings recorded by the forums below---Labour Appellate Tribunal had properly appreciated the evidence on record and concluded that employees were "permanent workmen"---Constitutional petition was dismissed in circumstances.

Muhammad Yaqoob v. The Punjab Labour Court No.1 and 5 others 1990 SCMR 1539 and Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan 2013 SCMR 13 ref.

Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others 1995 PLC 539; Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others PLD 2001 SC 415; General Manager, Pearl Continental Hotel, The Mall, Lahore/ Rawalpindi v. Farhat Iqbal PLD 2003 SC 952; Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others PLD 2005 SC 792; State Life Insurance Corporation and others v. Jaffar Hussain and others PLD 2009 SC 194; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44; Executive Engineer, Central Civil Division, Pak.

P.W.D. Quetta v. Abdul Aziz and others PLD 1996 SC 610; Tehsil Municipal Administration v. Muhammad Amir 2009 PLC 273; Pakistan International Airlines v. Sindh Labour Court No.5 and others PLD 1980 SC 323; Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others 1999 SCMR 2557; Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724; Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others 2008 SCMR 1058; Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain 2013 SCMR 1547 and WAPDA and others v. Khanimullah and others 2000 SCMR 879 rel.

(b) Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968)---

----S.O. 1(b)---"Worker"---Meaning---If a worker was appointed against a project which was likely to continue for more than nine months and the worker remained in service for nine months, he would attain the status of a regular employee.

(c) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Constitutional jurisdiction was discretionary and equitable in nature---Concurrent findings could not be interfered while exercising constitutional jurisdiction unless forum below had acted without lawful authority and jurisdiction.

Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others PLD 2001 SC 415; General Manager, Pearl Continental Hotel, The Mall, Lahore/ Rawalpindi v. Farhat Iqbal PLD 2003 SC 952; Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others PLD 2005 SC 792; State Life Insurance Corporation and others v. Jaffar Hussain and others PLD 2009 SC 194; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44; Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others PLD 1996 SC 610; Tehsil Municipal Administration v. Muhammad Amir 2009 PLC 273; Pakistan International Airlines v. Sindh Labour Court No.5 and others PLD 1980 SC 323; Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others 1999 SCMR 2557; Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724; Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others 2008 SCMR 1058; Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain 2013 SCMR 1547 and WAPDA and others v. Khanimullah and others 2000 SCMR 879 rel.

(d) Constitution of Pakistan--- ----Art. 25---Equal protection of law---Scope---All citizens were entitled to equal protection of law.

Muhammad Zaeem Khalid and others v. Baha-ud-Din Zakeria University and others 1995 SCMR 723; Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others 1996 SCMR 1185 and Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others 2005 SCMR 499 rel.

(e) Industrial dispute---

----Benefit of judgment of the court should be extended to other employees who might not be parties to the litigation and fell in the same category, instead of compelling them to approach the legal forum.

Muhammad Zaeem Khalid and others v. Baha-ud-Din Zakeria University and others 1995 SCMR 723; Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others 1996 SCMR 1185 and Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others 2005 SCMR 499 rel.

Hafiz Muhammad Abu Bakar Ansari and Qazi Mansoor Ahmad for Petitioners.

Tariq Zulfiqar Ahmad Chaudhry for Respondents.

Date of hearing: 5th March, 2015.

JUDGMENT

ALI AKBAR QURESHI, J:- Through this judgment, I propose to decide the following writ petition along with this petition, as common question of law and facts is involved:---

1.	W.P.No.11845/2013.	Muhammad Yasin, etc. versus Punjab Labour Appellate Tribunal No.2, Multan, etc. (Detail of the status of employees has been given in the petition)

2. Shortly the facts, necessary for disposal of the above-referred writ petitions are that, the employees (detail of whom has been given in the writ petitions) were appointed in the office of the petitioner's corporation, against different posts, namely, Stock Clerk, Tube-Well Operator, Machinery Helper, Assistant Mechanic, Helper Welder (detail of the status of employees has been given in the petitions).

3. The respondents/grievance-petitioners, who were working against their posts from the last many years, filed grievance notices to the petitioners for their regularization into service, which was turned down and thereafter, under the Labour Laws, they filed joint Grievance Petitions before the Labour Court No.9, Multan, on the grounds; that they (respondents) were initially appointed on work-charge basis and from the last many years are working against the said post; the petitioners all the time extended the period of their service instead of regularizing their services during this period; the service period of the respondents is continuous without gap and nothing was adverse against them, therefore, the respondents, by afflux of time as given in the law, had attained the status of a permanent/regular employees. The respondents are doing manual jobs, therefore, fall in the definition of workmen. The petitioners regularized other employees like the respondents/workers, working under the Executive Engineer Irrigation and Power Machinery Division, Multan, under the order of the High Court passed in W. P. No. 7448 of 2004, which was also affirmed by the Hon'ble Supreme Court of Pakistan through an esteemed judgment dated 17-9-2009. Lastly, it was prayed, that the respondents be regularized into their services from the date of their initial appointment with all the benefits admissible in law.

4. The grievance petitions were vehemently contested by the petitioners/respondents by filing reply wherein it was alleged, that as the respondents were appointed on work-charge basis, therefore, they cannot attain the status of a permanent employee.

5. The learned Labour Court No.9, Multan, recorded evidence of the respective parties, heard arguments and finally accepted the grievance petitions by directing the petitioner-department to regularize the services of the respondents/petitioners from the date of their initial appointments along with all the benefits available to the other regular employees.

6. Being aggrieved thereof, the petitioner-department filed appeals before the learned Punjab Labour Appellate Tribunal No.II, Multan, which was dismissed by the learned Appellate Tribunal through exhaustive and elaborative judgments impugned in afore-referred petitions.

7. Learned counsel for the petitioners submitted, that the respondents are not working against the confirmed/sanctioned posts, and initially, were appointed on work-charge basis, therefore, cannot be termed as permanent workmen; learned Labour Court had no jurisdiction to entertain the cases of the work-charge employees, but this fact has not been attended by learned Labour Appellate Tribunal; the learned forums below while rendering the concurrent findings, acted against the principle laid down by the Hon'ble Courts in different cases, that the work-charge employee, if not taking the benefit of a regular employee, cannot be declared permanent workman, and the judgments have been rendered by the learned Courts below in haste, which is against the norms of justice. Reliance is placed on Muhammad Yaqoob v. The Punjab Labour Court No.1 and 5 others (1990 SCMR 1539), and Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan (2013 SCMR 13).

8. The arguments advanced by learned counsel for the petitioners, were seriously opposed by learned counsel for the respondents.

9. The legislature has defined the permanent workman in Standing Orders 1(b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1(b) of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:---

SCHEDULE.
STANDING ORDERS

I. Classification of Workmen.--- (a) Workmen shall be classified as--
(1) …….
(2) …….
(3) …….
(4) …….
(5) …….
(6) …….

(b) A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months]."

10. The only question, which although has already been dilated upon in detail, by the learned Labour Court as well as the learned Labour Appellate Tribunal, pertains to the status of the respondents and their regularization by afflux of time and law applicable thereon, requires consideration.

11. In this case, the respondents are working against the same post and Project from the last many years, therefore, it can safely be held, that the post and project against which the respondents are working, is of permanent nature, thus, the denial of the petitioners to regularize the services of the respondents as permanent workmen, is not permissible in law.

12. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, government or the private, who hire the service of the poor people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact this device is based on mala fide which is being used to deprive the poor worker who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the Hon'ble Supreme Court of Pakistan titled Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others (1995 PLC 539). The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:---

"3. The contentions of the learned counsel for the petitioners that the respondent was appointed on `work charge basis' to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.

4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under:---

There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure 'A' would

demonstrate that he was appointed on 25-6-1980 and that his services were terminated on 20-7-1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.

5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

13. Since the respondents, in view of the law laid down by the Hon'ble Supreme Court of Pakistan, have attained the status of permanent workmen/workers by afflux of time, therefore, the petitioners will have to regularize the services of the respondents in accordance with law, and any action, if required in case of any misconduct, will be initiated under Order 12 of the Standing Orders Ordinance and not otherwise.

14. It is not denied, that the respondents are working from the last many years, and suffice to hold, that the respondents are needed to the petitioners-department and further, even otherwise, it is also to be taken into consideration that almost all the respondents have become over-age during the period of their service and cannot go anywhere nor can apply to earn their livelihood in any department or organization, therefore, the petitioners-department instead of involving themselves in litigation, should have regularized the services of the respondents.

15. The arguments advanced by the learned counsel for the respondents relying on the different esteemed judgments of the Hon'ble Supreme Court of Pakistan, that this Court, while exercising the jurisdiction conferred under Article 199 of Constitution of the Islamic Republic of Pakistan, 1973, cannot substitute its own findings in the presence of the concurrent conclusion drawn by the forums below on facts as well as on record. Both the learned forums below, after due appreciation of the record and the contentions of the parties, have recorded concurrent findings which cannot be interfered while exercising the writ jurisdiction unless the forums below acted without lawful authority and jurisdiction. Reliance is placed on Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others (PLD 2001 Supreme Court 415), General Manager, Pearl Continental Hotel, The Mall, Lahore/Rawalpindi v. Farhat Iqbal (PLD 2003 Supreme Court 952), Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others (PLD 2005 Supreme Court 792), State Life Insurance Corporation and others v. Jaffar Hussain and others (PLD 2009 Supreme Court 194), Rai Ashraf and others v. Muhammad Saleem Bhatti and others (PLD 2010 Supreme Court 691), and Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 Supreme Court 44).

16. In another esteemed judgment reported as Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others (PLD 1996 Supreme Court 610), the Hon'ble Supreme Court of Pakistan, while dealing with the question of permanent worker, at page 621, has ruled as under:---

"The ratio of the above judgment in the case of Muhammad Yaqoob (supra) seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and non-residential buildings and constructing itself and/or causing construction thereof. The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by the Labour Courts in this respect cannot be said to be not founded on evidence on record."

17. In another judgment cited as Tehsil Municipal Administration v. Muhammad Amir (2009 PLC 273), has further elaborated the status of a workman at page 280, the relevant paragraph is reproduced as under:---

"13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with 'water work', `well' within the meaning of construction industry as defined in section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked. He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were transferred to TMA Bhalwal where he continued to work till 15-8-2005 when he was informed that his services had been terminated w.e.f. 1-9-2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of clause (b) of paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in para-10 above."

18. The other esteemed judgments applicable in this case are as under:---

1. Pakistan International Airlines v. Sindh Labour Court No.5 and others (PLD 1980 Supreme Court 323)

(2) Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others (1999 SCMR 2557)

(3) Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724)

(4) Tehsil Municipal Administration, Rahimyar Khan and others v.. Hanif Masih and others (2008 SCMR 1058)

(5) Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain (2013 SCMR 1547)

(6) WAPDA and others v. Khanimullah and others (2000 SCMR 879).

19. The learned counsel for the petitioners, during the course of arguments, has referred a recent judgment of the Hon'ble Supreme Court of Pakistan cited as Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan (2013 SCMR 13). The aforesaid esteemed judgment has been passed by the Bench consisting of three Hon'ble Judges of the Hon'ble Supreme Court of Pakistan, whereas the judgment cited as Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724), referred by the learned counsel for the respondents supra, is of a Bench consisted of five Hon'ble Judges of the Hon'ble Supreme Court of Pakistan. Thus, following the principle laid down by the Hon'ble Supreme Court of Pakistan in various judgments, that the judgment of the larger Bench would follow to resolve the controversy, hence the judgment (supra) delivered by the Hon'ble five Judges of the apex Court would govern the controversy in this matter. Even otherwise, the ratio decidendi of the other judgments on this point goes in favour of the respondents.

20. There is another aspect of the case which also favours the cause of the respondents, that the respondents/employees, while filing the grievance petition before the learned Labour Court, have mentioned in para No.9 of the grievance petition, that the petitioner-department earlier to this, in the similar situation, regularize the services of the other employees (55-employees) in compliance of the order passed by this Court and affirmed by the Hon'ble Supreme Court of Pakistan. As stated in the afore-referred para of the grievance petition, that the employees of the petitioner-department filed a Writ Petition No.7448 of 2004 titled Muhammad Iqbal v. Government of Punjab, etc. before this Court, which was disposed of on 5-6-2009 on the strength of a well-known esteemed judgment of the Hon'ble Supreme Court of Pakistan in Akram Bari's case cited as 2005 PLC (C.S.) 915, and the petitioner-department was directed to regularize the services of the writ-petitioner and respondents within a period of two months. The aforesaid order passed by this Court, was assailed by the petitioner-department before the Hon'ble Supreme Court of Pakistan, by filing Civil Petition No.1534-L/2009, the Hon'ble apex Court refused to interfere in the order passed by this Court and finally dismissed the civil petition on 17-9-2009.

21. The Hon'ble Supreme Court of Pakistan, while dealing with such type of situation, has already dictated, that the benefit of the judgment of the Court should be extended to

others who might not be parties to the litigation and are falling in the same category, instead of compelling them to approach the legal forum. Further, even otherwise, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 is also clear on the point, that all the citizens are entitled to equal protection of law. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, cited as Muhammad Zaeem Khalid and others v. Baha-ud-Din Zakeria University and others (1995 SCMR 723), Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others (1996 SCMR 1185), and Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others (2005 SCMR 499).

22. This Constitutional petition has been filed against the concurrent findings on facts as well as on law recorded by the learned forums below, although the learned counsel for the petitioners argued the case at length but could not point out any jurisdictional defect, legal infirmity or irregularity with the findings recorded by the learned forums below. Needless to mention, that in the Constitutional jurisdiction conferred under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners will have to point out the illegality committed by the learned forums, therefore, this is not a fit case to exercise the Constitutional jurisdiction, which is discretionary and equitable in nature. Even otherwise, learned Tribunal has appreciated the evidence on record and concluded, that the respondents were permanent workmen under the petitioners, which is undoubtedly a finding of fact having been given by learned Appellate Tribunal on the basis of reliable evidence, which cannot be interfered with in these proceedings.

23. For these reasons, I find no infirmity with the judgment of learned Punjab Labour Appellate Tribunal No.II, Multan, which findings are based on proper appraisal of the evidence of the parties.

24. Resultantly, the judgments passed by learned forums below, are affirmed and this writ petition is dismissed with no order as to cost.

ZC/P-22/L Petition dismissed.

2015 P L C (C.S.) 1073
[Lahore High Court]
Before Ali Akbar Qureshi, J
SAMI ULLAH and another
versus
GOVERNMENT OF PUNJAB through Secretary Education, Punjab, Lahore and 6 others

W.P.No.2500 of 2015, decided on 5th March, 2015.

Constitution of Pakistan---
----Art. 199---Constitutional petition---Recruitment in service---Requisite qualification in advertisement---Removal from tentative list of candidates---Equivalence of certificate/degree notified by Inter-Board Committee of Chairman---Status---Petitioner

being diploma holder in Associate Engineering applied for post of Educators in Education Department and qualified in written examination---Authorities had issued pre-interview tentative list that included name of petitioner but later on his name was dropped on the ground that he did not have requisite qualification of F.A./F.Sc.---Validity---Qualifications mentioned in advertisement were to be considered at time of making appointment but when Inter-Board Committee of Chairmen had notified that Diploma in Associate Engineering was equivalent to F.A./F.Sc. and same had not been challenged, Authorities were bound to abide by the same---Qualification of petitioner was held to be equivalent to requisite qualification mentioned in Advertisement---Action of authorities being illegal was set aside and constitutional petition was allowed.

Khurram Iqbal v. Deputy Director Food, D.G. Khan and another 2013 SCMR 55 ref.

Haji Muhammad Tariq Aziz Khokhar for Petitioners.

Mobasher Latif Gill, Asstt. A.-G. along with Muhammad Elahi, Deputy Controller, Punjab Board of Technical Education, Lahore and Ghulam Shabir, Assistant Legal Cell, Registrar Office, University of Punjab, Lahore.

ORDER

ALI AKBAR QURESHI, J.--- Through this Constitutional petition, the petitioners have prayed, that they in response of an advertisement for the appointment of 1194 Educators in the Education Department including 115 Educators i.e. E.S.E.(School-Math), in District Dera Ghazi Khan, applied for the Post of Elementary School Educators (Scl-Math) having the qualification B.A. Degree and Diploma of Associate Engineering from the Punjab Board of Technical Education, Lahore. The petitioners qualified the examination of National Testing Service (N.T.S.), thereafter, the respondent department issued pre-interview, tentative list for the recruitment of Educators for the year 2015, wherein the names of the petitioners are placed at Serial Nos.24 and 25. As contended by the petitioners, afterwards the names of the petitioners were dropped on the ground, that the requisite qualification for the appointment of the aforesaid Post is F.A./F.Sc., whereas the petitioners are diploma holders of Associate Engineering from the Punjab Board of Technical Education, Lahore.

2. The learned counsel during the course of arguments has referred a certificate dated 9-9-2003, issued by the Punjab Board of Technical Education, Allama Iqbal Town Lahore, wherein it is clearly mentioned, that the diploma of Associate Engineering issued by the Punjab Board of Technical Education, Lahore, is equivalent to the Intermediate Examination (F.Sc.) of the Boards of Intermediate and Secondary Education, functioning with in the territorial jurisdiction of the University.

The aforesaid certificate is reproduced as under:---

Reference the letter N. (EE) 5-33/73 dated 4-10-1976, subject noted that "RECOGNITION OF DIPLOMA OF ASSOCIATE ENGINEER FROM BOARD OF TECHNICAL EDUCATION EQUIVALENT TO INTERMEDIATE EXAMINATION" and reference with the letter No.PBTE/Acd/76-3578-3594, dated 11-8-1976 subject noted that Eligibility of Associate Engineer to appear in BA/B.Sc. Examinations.

Certified that Diploma of Associate Engineer (DAE) of Punjab Board of Technical Education, Lahore, in following Technologies are equivalent to the Intermediate examination (F.Sc.) of the Board's of Intermediate and Secondary Education functioning within the territorial jurisdiction of the University:---

Sr. No.	Name of Technologies	Duration
1.	Civil	Three years
2.	Electrical	Three years
3.	Mechanical	Three years
4.	Electronics	Three years
5.	Computer	Three years
6.	Architecture	Three years
7.	Ref. And Air Conditioning	Three years
8.	Instruments	Three years
9.	Food	Three years
10.	Auto and Farm Machinery	Three years
11.	Auto and Diesel	Three years
12.	Textile Spinning	Three years
13.	Textile Weaving	Three years
14.	Chemical	Three years
15.	Metallurgy and Welding	Three years
16.	Foundry and Pattern Making	Three years
17.	Leather	Three years
18.	Petroleum	Three years
19.	Petro Chemical	Three years
20.	Chemical Processing	Three years
21.	Mine Electrical	Three years
22.	Mine Mechnical	Three years
23.	Construction Machinery	Three years
24.	Printing and Graphics Arts	Three years
25.	Automation	Three years
26.	Computer Information	Three years
27.	Textile Dying and Printing	Three years

3. At this stage, Deputy Controller Punjab Board of Technical Education, Lahore, namely Muhammad Elahi submitted an attested copy of a booklet i.e. Inter Board Committee Chairmen, Book of Equivalence of Educational Qualifications in Pakistan, whereby the Diploma of Associate Engineering has been declared equivalent to the F.A./F.Sc. by the Inter Board Committee of Chairmen, Ministry of Education, Government of Pakistan Islamabad.

The relevant content of the aforesaid booklet is reproduced as under:---

IBCC
BOOK OF EQUIVALENCES OF EDUCATIONAL
QUALIFICATIONS IN PAKISTAN,
published by INTER BOARD COMMITTEE OF

CHAIRMEN MINISTRY OF EDUCATION
GOVERNMENT OF PAKISTAN, ISLAMABAD 1997:

Sr. No.	Nomenclature	Institution/ Authority	Corresponding Equivalent in Pakistan
1.	….	….	….
2.	….	….	….
3.	….	….	….
..	….	….	….
..	….	….	….
	….	….	….
..	….	….	….
30.	Diploma of Associate Engineer	Board of Technical Education Pakistan	HSSC (Pre-Engineering)

At Serial No.30 of the aforesaid book, it has been declared that Diploma of Associate Engineering is equivalent to H.S.S.C. (Pre-Engineering).

4. In response of the aforesaid submissions, the learned Assistant Advocate-General submitted, that the qualification/education mentioned in the advertisement, is to be considered at the time of making the appointment, whereas in this case the petitioners are diploma holders of Associate Engineering, whereas in the advertisement the required qualification is FA/FSC.

5. Reliance is placed upon the judgment titled "Khurram Iqbal v. Deputy Director Food, D.G. Khan and another (2013 SCMR 55).

6. It is not denied, that the qualification mentioned in the advertisement is to be considered at the time of making the appointment. In this case, the respondent department is requiring the candidates having the certificate of F.A/F.Sc., whereas the petitioners are diploma holders of Associate Engineering but at the same time, the Board of Technical Education and The Highest Body namely Inter Board Committee Chairmen, Ministry of Education, Government of Pakistan Islamabad, had declared that the qualification of diploma of Associate Engineer is equivalent to F.A./F.Sc. The respondent department till today has not challenged the validity of the afore-referred notifications, therefore, it can safely be held, that the academic qualifications of the petitioners is equivalent to the F.A./F.Sc., which is the required qualification for the appointment of Elementary , School Educator (Scl-Math), therefore, in these circumstances, the act of the respondents whereby the names of the petitioners were dropped and the respondent department refused to appoint the petitioner as Elementary School Educators (Scl-Math), is illegal.

7. It is noted with great concern, that one department of the Government of Punjab does not honour or care the Notifications or the certificates issued by the other department of the Government of Punjab and unnecessarily drag the poor people particularly who are seeking jobs, into litigation and the poor people had to bear the heavy expenses of litigation. Even

otherwise this practice of the different department of the Government of the Punjab have increased the litigation, although this types of the grievance of the people should be redressed at the level of the persons who are at the helm of the affairs despite clear directions given by the Courts from time to time do not bother to attend or follow the instructions, which is highly deplorable.

8. In view of the above, this petition is allowed and the respondent department is directed to initiate the process for the appointment of the petitioners against the post of Elementary School Educators (Scl-Math). The process shall be completed preferably within a period of one month. No order as to cost.

MM/S-43/L Petition accepted.

2015 P L C (C.S.) 1395
[Lahore High Court]
Before Ali Akbar Qureshi, J
MUHAMMAD SALEEM
Versus
FEDERATION OF PAKISTAN through Secretary, Ministry of Water and Power, Islamabad and 10 others

W.P.No.11937 of 2011, heard on 17th March, 2015.

Constitution of Pakistan---
----Art. 199---Constitutional petition---Civil service---Termination of service---Reinstatement---Petitioner was terminated from service and the representation was dismissed on the ground that equivalence certificate of degree must be submitted---Validity---According to Higher Education Commission, University of Engineering and Technology was a chartered university and status of B.Sc. Industrial and Manufacturing Engineering and B.Sc. Mechanical Engineering degrees was same---Petitioner having fulfilled condition by providing equivalence certificate of his academic qualification, was therefore, entitled to be reinstated into service in accordance with law and rules applicable thereon---Constitutional petition was disposed of, accordingly.

Rao Jamshed Ali Khan for Petitioner.
Sh. Muhammad Ashraf for Respondents.
Date of hearing: 17th March, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- The petitioner, through this petition, has questioned the validity of order dated 5-7-2010 and 6-7-2010, whereby the petitioner was terminated from service and his representation was dismissed respectively. The petitioner is also seeking a direction to respondent No.2 i.e. Chairman Higher Education Commission, Government of Pakistan, Islamabad, to issue an equivalence certificate.

2. Shortly the facts as stated in the petition, are that the petitioner who qualified B.Sc. Industrial and Manufacturing Engineering from the University of Engineering and Technology, Lahore, applied for the post of Junior Engineer, Mechanical (B.S.-17) with the respondent-department; the petitioner in response of the call, appeared in interview and produced all the documents relating to his academic qualification, and finally the petitioner was offered the post of Junior Engineer, Mechanical, on contract basis for a period of 1-Year vide appointment letter dated 1-4-2010. As contended, the petitioner started performing his duties, but during the contract period, the services of the petitioner were terminated on 5-7-2010 whereupon the petitioner filed a representation to respondent No.9 i.e. Deputy Manager (Admin), GENCO-III, Thermal Power Station, Muzaffargarh, on 6-7-2010 which was disposed of in the following manner:---

> "Your service contract has been terminated because of irrelevant degree of B.Sc. Industrial and Manufacturing Engineering instead of B.Sc. Mechanical Engineering. Your requested has been considered by the competent authority and it has been decided to advise you to provide the equivalence certificate issued by the Higher Education Commission, Government of Pakistan, Islamabad that the degree of Industrial and Manufacturing Engineering is equivalent to the degree of Mechanical Engineering.
>
> Your request for restoration in service will be considered on provision of the said document.
>
> This issues with the approval of CEO, GENCO-III "

3. The petitioner in compliance of the aforesaid direction given by respondent No.9 while disposing of the representation of the petitioner, filed an application to respondent No.2 for issuance of equivalence certificate which was not issued neither the application was decided and the petitioner had to file a Constitutional Petition (W.P. No. 8193 of 2010).

In response of the notice, Pakistan Engineering Council filed report and parawise comments, wherein it was very much mentioned, that the Industrial Engineers also cover the mainstream of Mechanical Engineering subjects. Finally, writ petition was disposed of with a direction to the respondents to act in accordance with law.

4. The petitioner also filed an appeal before the Chairman Higher Education Commission which was dismissed. Hence, this writ petition.

5. Learned counsel for the petitioner at the very outset of the arguments, has submitted, that there is only one point which requires consideration by this Court and referred Annex-K, a letter No.8-61/ HEC/A&A/2010, dated 9-7-2010, issued by the Higher Education Commission to the petitioner, which is reproduced as under:---

> "With reference to your application dated July 7, 2010 on the subject, it is informed that the University of Engineering and Technology, Lahore is a chartered university in public sector. The status of B.Sc. Industrial and Manufacturing Engineering and

B.Sc. Mechanical Engineering degrees is the same to the extent that these degrees are awarded after completion of 16-years education. Though, curriculum and scheme of studies of the above degrees may have some common courses but are awarded in distinct disciplines with different nomenclatures. Therefore, degrees cannot substitute each other.

Please note that granting admission for higher education and determination of suitability in relation to job requirement rests with the admitting university and the employing agencies respectively and this commission has no role in such matters."

6. The vires of the aforesaid letter were perused with the assistance of learned counsel for the parties and it is found, that the Higher Education Commission has informed in response of an application, that the University of Engineering and Technology is a Chartered University and the status of B.Sc. Industrial and Manufacturing Engineering and B.Sc. Mechanical Engineering degrees, is the same.

7. In this view of the matter, the petitioner has fulfilled the condition imposed by respondent No.9 while disposing of the representation of the petitioner vide order dated 6-7-2010, wherein it was required by the petitioner to provide the equivalence certificate.

8. As the petitioner has fulfilled the condition by providing the equivalence certificate of his academic qualification, therefore, the petitioner is entitled to be reinstated into service obviously in accordance with law and the rules applicable thereon.

9. The petitioner, along with this order and the other necessary documents including the equivalence certificate shall appear before respondent No.9 i.e. Deputy Manger (Admin) GENCO-III, Thermal Power Station, Muzaffargarh, who will hear the petitioner and decide the grievance in the light of the observation made in the order and the law applicable thereon.

10. With this observation, the writ petition is disposed of.

RR/M-131/L Order accordingly.

2015 P T D 1714
[Lahore High Court]
Before Ali Akbar Qureshi, J
DISTRICT HEADMASTERS/PRINCIPALS ASSOCIATION DISTRICT MULTAN through President
versus
FEDERATION OF PAKISTAN through Secretary Ministry of Finance, Islamabad and 3 others

W.P. No.296 of 2014, decided on 14th January, 2015.

Income Tax Ordinance (XLIX of 2001)---

----Ss. 12, 13, 14 & Second Sched. Part I---Income Tax Rules, 2001, Rr.2 - 7---FBR Circular No.3 of 2006, dated 11-7-2006---FBR Circular No.6 of 2013, dated 19-7-2013---Constitution of Pakistan, Art.199---Constitutional petition---Grant of tax rebate in income tax on salary---Tax rebate extended to teaching facility and exclusion of certain staff from getting said rebate---Department through Circular No.3 of 2006, dated 11-7-2006, extended a favour to the members of the teaching faculty by giving 50% to 75% tax rebate in its income from salary---Department later on through Circular No.6 of 2013, dated 19-7-2013, made amendment in Second Sched. of Income Tax Ordinance, 2001, and reduced the rebate from 75% to 40%; and excluded the teaching staff performing any administrative or managerial job for such rebate---Department also issued a clarification of additional 50% tax reduction in the case of full time teachers---Concession given by department in payment of income tax on salary, had already been acted upon, and the petitioner (Association of Principals and Headmasters) and others were practising the same---Held, department under the principle of locus poenitentiae, could not withdraw the concession the same by any clarification, and without giving any right of hearing to the beneficiaries---Right accrued in favour of the Association (petitioner), could not in any way be taken away or withdraw, when the department could not refer any plausible explanation or rebuttal to the contention or claim agitated by the Association.

Arif Hussain Dar v. Board of Revenue through Secretary, Muzaffarabad and 5 others PLD 2002 Azad J&K 14; Aziz Ahmad v. Provincial Police Officer (I.-G.P.) Punjab Lahore and 6 others PLD 2005 Lah. 185; Muhammad Nadeem Arif and others v. Inspector-General of Police, Punjab, Lahore and others 2011 SCMR 408 and Sub. Muhammad Asghar v. Safia Begum and others PLD 1976 SC 435 rel.

Raja Naveed Azam for Petitioner.

Agha Muhammad Akmal Khan for Respondents.

ORDER

ALI AKBAR QURESHI, J.---The petitioner through this writ petition has challenged a clarification circulated by the Central Board of Revenue/FBR Income Tax Department dated 18-5-2005, whereby the tax rebate/reduction granted to the full time teachers or researchers employed in a non-profit education or research institution recognized by the Higher Education Commission, has withdrawn on the ground, that the teachers who

are performing any administrative or managerial job e.g. principals, headmasters, doctors vice chancellors etc. are not entitled to the aforesaid rebate.

2. The record annexed with this petition was examined and scrutinized with assistance of the learned counsel for the parties.

3. It is found from the record, that the respondent department i.e. Income Tax Department through a Circular No.3 of 2006 dated 11-7-2006 extended a favour to the members of the teaching faculty by giving 50% to 75% tax rebate on his income from salary. The relevant part of the aforesaid circular is reproduced as under:--

"GOVERNMENT OF THE PAKISTAN
(REVENUE DIVISION)
CENTRAL BOARD OF REVENUE

C.No.4(5)ITR/06 Islamabad, July 11, 2006

Circular No.03 of 2006
(Income Tax)

Subject. COMPUTATION OF INCOME TAX PAYABLE BY THE SALARIES TAXPAYERS FOR TAX YEAR 2007 AND DEDUCTION OF ADVANCE TAX FROM SALARY FOR THE TAX YEAR COMMENCING 1ST JULY 2006

Tax in the case of a salaried taxpayer shall be computed in accordance with sections 12, 13 and 14 of Income Tax Ordinance, 2001, read with Rules 2 to 7 of Income Tax Rules 2002. A salaried taxpayer means where salary constitutes more than 50% of the total income. All perquisites, allowances or benefits, [excepting those covered under Part-I of the Second Schedule to the Ordinance], are to be included in the salary and rate of tax prescribed in Part-I of the First Schedule shall be applied for the tax year 2007 on the gross figure. The taxation of salaried taxpayer is explained as under:

2. REBATE FOR TEACHERS AND RESEARCHERS POSTED IN GOVERNMENT INSTITUTIONS

A full time teacher or a researcher, employed in a non-profit education or research institution recognized by Higher Education Commission (HEC), a Board of Education or a University was entitled to a benefit, under Part III of Second Schedule to the Income Tax Ordinance, 2001 and his tax liability stood reduced by an amount equal to 75% of tax payable on his income from salary.

This concession has now been extended to full time teachers and researchers employed in government training and research institutions also."

4. The petitioners who are full time teachers, welcomed the favour extended by the respondent department and feel comfortable but all of a sudden the respondent department through Circular No.6 of 2013 dated 19-7-2013 made amendment in second schedule of the Income Tax Act and reduced the rebate from 75% to 40% and also excluded the teaching

staff performing any administrative or managerial job. It is necessary to reproduce the same:--

"GOVERNMENT OF THE PAKISTAN
(REVENUE DIVISION)
FEDERAL BOARD OF REVENUE

C.No.4(36)ITP/2013 Islamabad, the 19 July, 2013

Circular No.6 of 2013
Income Tax

Subject. FINANCE ACT, 2013 - EXPLANATION REGARDING IMPORTANT AMENDMENTS MADE IN THE INCOME TAX ORDINANCE, 2001

Salient features of the amendments made in the Income Tax Ordinance, 2001 through Finance Act, 2013 are explained as under:-

1. ……

2. ……

3. ……

43. AMENDMENTS IN SECOND SCHEDULE

In Second Schedule to the Income Tax Ordinance, 2001 some of the amendments made are as follows:

(a) ……

(b) ……

(c) ……

(d) In Part-III in clause (2) reduction in tax liability of the tax payable on income from salary equal to 75% has been reduced to 40% in the case of:

(i) a full time teacher employed in a non profit educational institution duly recognized by Higher Education Commission, a Board of Education or a University recognized by the Higher Education Commission, including government training institutions.

(ii) a full time researcher employed in a research institution duly recognized by Higher Education Commission, a Board of Education or a university recognized by the Higher Education Commission, including government research institution.

(iii) It is further clarified that a full time teacher means a person employed purely for teaching and not performing any administrative or managerial jobs e.g. principals,

headmasters, directors, vice-chancellors, chairmen, controllers etc. similarly a full time researcher means a person purely employed for research job only in a research institution and such institution is purely performing research activities."

5. The respondent department did not restrain itself to this extend but also issued a clarification of additional 50% tax reduction in the case of full time teachers, which is reproduced as under:--

"GOVERNMENT OF THE PAKISTAN
CENTRAL BOARD OF REVENUE
INCOME TAX DEPARTMENT
….."

MTU/2005/
May 18, 2005
District Accounts Officer,
Sheikhupura

Subject: Clarification of additional 50% tax reduction in the case of full time teachers.

Reference Several applications No(s). Nil Dated May 18, 2005 by the District Sheikhupura Head Masters.

It is to clarify that according to clause (2) Part III of Second Schedule of Income Tax Ordinance, 2001, is reproduced as under:

"In addition to the reduction specified in sub-clause (i), the tax payable by a full time teacher or a researcher, employed in a non profit education or research institution including government training and research institution duly recognized by a Board of Education or a university or the University grants commission, shall be further reduced by an amount equal to 50% of the tax payable after the aforesaid reduction".

In order to qualify for tax reduction under the above noted provision, the following conditions have to be fulfilled:

1. A full time teacher which means

· A regular employee (full time faculty member);
· Not a part time teacher (visiting faculty-member);

According to code of action "Dastoor-ul-Amaal" issued by Education Department of Punjab."

2. Non profit education institution which means

· An institution which has been established not to earn profit.

Since both of these conditions are met with in their cases. Hence, Head Masters are eligible for this additional 50% tax reduction.

(Ashraf Ahmed Ali)
Commissioner Income Tax"

6. Learned counsel for the petitioner submits that the concession given by the respondent department in payment of income tax on salary has already been acted upon and the petitioner and others are practicing the same, therefore, the respondents under the principal of loscus poenitentiae, cannot withdraw the same by any clarification and without giving any right of hearing to the petitioner/beneficiaries.

7. In this case, the respondents department in fact, in a very clandestine manner, excluded the persons who although are teachers, teaching in an educational institution i.e. school, college or university but also performing administrative or managerial job. The respondent department in fact has clarified the relevant provision in a manner so that the persons who although are teachers but performing managerial job too have been excluded which in any case cannot be the intention of the law maker at the time of granting this benefit to the petitioner.

8. Now it is to be seen, whether a teacher i.e. headmaster, principal etc., can be excluded from the beneficiaries of the afore-referred notification on the ground, they are also performing the managerial duty. In many educational institutions, the headmaster or the principal also teach the students and further if a teacher after some time promoted as headmaster and as the case may be, a lecturer as principal, cannot be excluded from the definition of a teacher. In fact the respondent department has made a novel clarification or interpretation, which in any case is against the principal of interpretation.

9. The benefit and concession granted by the respondent department in the shape of rebate in payment of income tax on the salary, as admitted by the respondent has already been acted upon, therefore, the right accrued in favour of the petitioner by way of the aforesaid circular can in any manner not be taken away or withdrawn. Reliance is placed upon Arif Hussain Dar v. Board of Revenue through Secretary, Muzaffarabad and 5 others (PLD 2002 Azad J&K 14), Aziz Ahmad v. Provincial Police Officer (I.-G.P.) Punjab Lahore and 6 others (PLD 2005 Lahore 185) and Muhammad Nadeem Arif and others v. Inspector-General of Police, Punjab, Lahore and others (2011 SCMR 408). In PLD 2002 Azad J&K 14 (Supra), it was held that "the Policy or the Notification cannot override the Statutory Rules framed by the Government under a Statute." In PLD 2005 Lahore 185 (Supra) it was held that "The Departmental circular is not more than a departmental instructions. The Departmental circular/instruction even cannot be called a rule. The Departmental circular are good enough for the internal management and control but they cannot confer a right or deprive a person of a right, which is only possible on the basis of a statutory provisions or a rule made by a competent authority under the concept of delegated legislation, as held in Sub. Muhammad Asghar v. Safia Begum and others PLD 1976 SC 435." In 2011 SCMR

408, the Hon'ble Supreme Court of Pakistan held that "The learned High Court in the impugned judgment after quoting all the relevant rules and provisions of Police Act had given findings of fact that Office Order dated 23-2-2002/8-11-2002 was issued by the Inspector-General of Police without approval of the Government of the Punjab, therefore, the same has no legal sanctity. Section 12 of the Police Act confers power upon the Inspector-General of Police to frame rules after securing approval from the Government of the Punjab."

Even otherwise, the learned counsel for the respondent could not refer any plausible explanation or rebuttal to the contention or claim agitated by the petitioner.

10. In view of the above, the impugned notification is not sustain-able in law, resultantly, this petition is allowed. No order as to cost.

HBT/D-2/L Petition allowed.

2015 Y L R 2274
[Lahore]
Before Ali Akbar Qureshi, J
PAKISTAN TELECOMMUNICATION CO. LTD. through Chairman and 5 others---Petitioners
versus
ABDUL GHAFOOR and 2 others---Respondents

W.P. No.5749 of 2001, decided on 1st April, 2015.

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

----S. 115---Revision---Failure to annex certified copy of pleadings with the revision application---Effect---Revision was dismissed by District Judge on the ground that petitioner had failed to annex certified copies of pleadings at Trial Court---Validity---Revision filed under S.115, C.P.C., if initially was within time, stipulated by law, irrespective of fact that pleadings and proceedings of trial court were not attached, it could not be dismissed summarily.

Riasat Ali v. Muhammad Jaffar Khan and 2 others 1991 SCMR 496 rel.

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

----S. 115---Constitution of Pakistan, Art.199---Constitutional petition---Revision, filing of---Requirements---If revision was filed within stipulated period of ninety days, it could not be treated barred by time even if certified copies of record of trial court were not annexed with the petition---Constitutional petition was allowed---Case was remanded to revisional court to decide revision in accordance with law.

Mst. Sabiran Bi v. Ahmad Khan and another 2000 SCMR 847 rel.

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

----S. 115---Revision---If revision was filed initially within time and court issued notices to parties and also requisitioned record, the same could not be dismissed summarily.

(d) Administration of justice---

----Matter should be decided on merits instead of dismissing the same on hyper-technicalities.

Muhammad Yousaf Syed for Petitioners.

Nemo for Respondents.

ORDER

ALI AKBAR QURESHI, J.---Despite repeated calls and keeping the case in wait, no one entered appearance on behalf of the respondents, therefore, the respondents are proceeded ex parte.

2. This Constitutional petition assails the order dated 2-4-2001 passed by learned Additional District Judge, Burewala, whereby the civil revision filed under Section 115, C.P.C. was dismissed on the ground, that the petitioners could not annex the certified copies of the pleadings and proceedings of learned trial Court.

3. In this case, the petitioners filed a civil revision under section 115, C.P.C. against an order dated 1-4-1999 passed by learned Civil Judge, Burewala through which the right of the petitioners/defendants to file the written statement was closed. The civil revision was dismissed by learned revisional Court/Additional District Judge on the ground, that the petitioners have failed to annex the certified copy of the pleadings and proceedings of learned trial Court, therefore, have failed to comply with the requirement of section 115, C.P.C.

4. Learned revisional Court/ Additional District Judge, it appears from the order, is not aware of the law declared by the Hon'ble Supreme Court of Pakistan in plethora of judgments, that the revision petition filed under section 115, C.P.C. if initially within time stipulated by the law irrespective of the fact, that the pleadings and proceedings of learned trial Court not attached, could not be dismissed summarily. In this respect, a renowned judgment of the Hon'ble Supreme Court of Pakistan may be referred which is cited as Riasat Ali v. Muhammad Jaffar Khan and 2 others (1991 SCMR 496). In this case, the Hon'ble Supreme Court of Pakistan while dealing this aspect of the case, has observed as under:--

"The Revision Petitions were well within time. The proper applications had been made. If the High Court considered that the non-filing of attested copies of certain documents could prove fatal to the case of the appellants, it should have, consistent with the language of the law as it stood after amendment, called upon the party to file those documents and waited till at least the period of limitation for dealing with the matter, unless of course, on examination of the grounds urged during the course of the arguments, it felt irresistibly that the jurisdictional aspects of the question raised, required examination and

determination. To abstain from examining the jurisdictional aspects only because a party has not filed appropriate documents, without calling upon the party to make up the deficiency, would be a harshness and a technicality not visualized in exercising powers under Section 115 of the Code of Civil Procedure."

5. Another judgment cited as Mst. Sabiran Bi v. Ahmad Khan and another (2000 SCMR 847), the Hon'ble Supreme Court of Pakistan has gone to this extent, that if the revision presented by the petitioner within stipulated period of ninety days, could not be treated barred by time if the certified copy of record of learned trial Court is not annexed with the petition. The relevant part (at Page No.1790) is reproduced as under:--

"So far as this legal provision as referred by the learned counsel is concerned, there is no doubt about it but with reference to proposition under discussion in the instant case, it is suffice to observe that if a revision petition suffers from defects i.e. non-filing of pleadings etc. still it cannot be dismissed being barred by time and in such situation, at the best the petition could be treated as not maintainable. It is important to note that this Court had always emphasized for decision of cases on merits instead of disposing of the matters on hyper-technical grounds."

6. Another important aspect of the case, that learned revisional Court/ Additional District Judge at the preliminary stage while entertaining the civil revision, filed by the petitioners, issued the notices to the other side and also requisitioned the record. In these circumstances, it is to be adjudicated, that if the civil revision was filed initially within time and secondly when learned Additional District Judge, while issuing the notices to the other side also requisitioned the record, the same could be dismissed in view of the principle laid down by the Hon'ble Supreme Court of Pakistan in the judgments referred above. Even otherwise, when learned revisional Court while entertaining the petition at the preliminary stage, itself requisitioned the record, whether learned revisional Court could have decided/adjudicated the matter, the answer would be "yes".

7. Needless to observe, that it is well established principle of law, that the cases should be decided on merit instead of dismissing the same on hyper-technicalities, therefore, in this view of the matter, the order dated 2-4-2001 passed by learned revisional Court, is hardly sustainable in law.

8. Resultantly, the order dated 2-4-2001 passed by learned revisional Court, is set aside, the case is remanded to learned revisional Court to decide the revision strictly in accordance with law. No order as to costs.

RR/P-20/L Case remanded.

PLJ 2015 Lahore 543
[Multan Bench Multan]
Present: **ALI AKBAR QURESHI, J.**
TEHSIL MUNICIPAL OFFICER, T.M.A. DERA GHAZI KHAN--Petitioner
versus
PUNJAB LABOUR APPELLATE TRIBUNAL NO. 2 MULTAN, etc.--Respondents

W.P. No. 1474 of 2014, heard on 5.3.2015.

Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (VI of 1968)--

----S. O. 1(b)--Constitution of Pakistan, 1973, Art. 199--Constitutional jurisdiction--Permanent workman--Grievance notices for regularization into service, turned down--Denial to regularize service as permanent workman--Concurrent findings cannot be interfered while exercising writ jurisdiction unless forums below acted without lawful authority and jurisdiction--Validity--Petitioners will have to point out illegality committed by forums, therefore, that was not a fit case to exercise constitutional jurisdiction which was discretionary and equitable in nature--Employees were permanent workman which is undoubtedly finding of fact having been given by tribunal on basis of reliable evidence which cannot be interfered with in these proceedings--Petition was dismissed. [Pp. 552] A & B

PLD 2001 SC 415, PLD 2003 SC 952, PLD 2005 SC 792,
PLD 2009 SC 194, PLD 2010 SC 691 & PLD 2011 SC 44, *ref.*

Haji Muhammad Aslam Malik, Advocate for Petitioner.

Ch. Athar Aziz, Advocate for Respondents.

Date of hearing: 05.03.2015

JUDGMENT

Through this judgment, I propose to decide the following writ petition alongwith this petition, as common question of law and facts is involved:--

Sr. No.	Writ Petition No.	Title of Writ Petitioner.
1	W.P.No. 14171/2014	Tehsil Municipal Administration, Jampur through its Tehsil Municipal Officer (TMO) Versus Punjab Labour Appellate Tribunal, Multan No. 2, etc. (Detail of the status of employees has been given in the head-note of this petition)

2. Shortly the facts, necessary for disposal of the above-referred writ petitions are that, the employees (detail of whom has been given in the head-note of the writ petitions) were appointed in the office of the petitioner-department, against different posts, namely, Sanitary Workers.

3. The respondents/grievance-petitioners, who were working against their posts from the last many years, filed grievance notices to the petitioners for their regularization into service, which was turned down and thereafter, under the Labour Laws, they filed joint Grievance Petitions before the Labour Court No. 9, Multan, on the grounds; that they (respondents) were initially appointed on work-charge basis and from the last many years are working against the said post; the petitioners all the time extendedthe period of their service instead of regularizing their services during this period; the service period of the respondents is continuous without gap and nothing was adverse against them, therefore, the respondents, by afflux of time as given in the law, had attained the status of permanent/regular employees. The respondents are doing manual jobs, therefore, fall in the definition of workmen. The petitioners regularized other employees like the respondents/workers, working under the Executive Engineer Irrigation and Power Machinery Division, Multan, under the order of the High Court passed in W.P. No. 7448 of 2004, which was also affirmed by the Hon'ble Supreme Court of Pakistan through an esteemed judgment dated 17.09.2009. Lastly, it was prayed, that the respondents be regularized into their services from the date of their initial appointment with all the benefits admissible in law.

4. The grievance petitions were vehemently contested by the petitioners/respondents by filing reply wherein it was alleged, that as the respondents were appointed on work-charge basis, therefore, they cannot attain the status of a permanent employee.

5. The learned Labour Court No. 9, Multan, recorded evidence of the respective parties, heard arguments and finally accepted the grievance petitions by directing the petitioner-department to regularize the services of the respondents/petitioners from the date of their initial appointments alongwith all the benefits available to the other regular employees.

6. Being aggrieved thereof, the petitioner-department filed appeals before the learned Punjab Labour Appellate Tribunal No. II, Multan, which was dismissed by the learned Appellate Tribunal through exhaustive and elaborative judgments impugned in afore-referred petitions.

7. Learned counsel for the petitioners, submitted that the respondents are not working against the confirmed/sanctioned posts, and initially, were appointed on work-charge basis, therefore, cannot be termed as permanent workmen; learned Labour Court had no jurisdiction to entertain the cases of the work-charge employees, but this fact has not been attended by learned Labour Appellate Tribunal; the learned forums below while rendering the concurrent findings, acted against the principle laid down by the Hon’ble Courts in different cases, that the work-charge employee, if not taking the benefit of a regular employee, cannot be declared permanent workman, and the judgments have been rendered by the learned Courts below in haste, which is against the norms of justice. Reliance is placed on *Muhammad Yaqoob v. The Punjab Labour Court No. 1 and 5 others*

(1990 SCMR 1539), and *Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan* (2013 SCMR 13).

8. The arguments advanced by learned counsel for the petitioners, were seriously opposed by learned counsel for the respondents.

9. The legislature has defined the permanent workman in Standing Orders 1 (b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1. (b). of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:

SCHEDULE.

STANDING ORDERS

1. Classification of Workmen: (a) Workmen shall be classified as--

(1) …

(2) …

(3) …

(4) …

(5) …

(6) …

(b) A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months.]"

10. The only question, which although has already been dilated upon in detail, by the learned Labour Court as well as the learned Labour Appellate Tribunal, pertains to the status of the respondents and their regularization by afflux of time and law applicable thereon, requires consideration.

11. In this case, the respondents are working against the same post and Project from the last many years, therefore, it can safely be held, that the post and project against which the respondents are working, is of permanent nature, thus, the denial of the petitioners to regularize the services of the respondents as permanent workmen, is not permissible in law.

12. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, government or the private, who hire the service of the poor

people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact this device is based on *mala fide* which is being used to deprive the poor worker who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the *Hon'ble Supreme Court of Pakistan titled Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others* (1995 PLC 539). The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:

> "3. The contentions of the learned counsel for the petitioners that the respondent was appointed on "work charge basis" to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.
>
> 4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under:--
>
> > There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure "A" would demonstrate that he was appointed on 25.06.1980 and that his services were terminated on 20.07.1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.
>
> 5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

13. Since the respondents, in view of the law laid down by the Hon'ble Supreme Court of Pakistan, have attained the status of permanent workmen/workers by afflux of time, therefore, the petitioners will have to regularize the services of the respondents in accordance with law, and any action, if required in case of any misconduct, will be initiated under Order 12 of the Standing Orders Ordinance and not otherwise.

14. It is not denied, that the respondents are working from the last many years, and suffice to hold, that the respondents are needed to the petitioner-departments and further,

even otherwise, it is also to be taken into consideration that almost all the respondents have become over-age during the period of their service and cannot go anywhere nor can apply to earn their livelihood in any department or organization, therefore, the petitioner-departments, instead of involving themselves in litigation, should have regularized the services of the respondents.

15. The arguments advanced by learned counsel for the respondents relying on the different esteemed judgments of the Hon'ble Supreme Court of Pakistan, that this Court, while exercising the jurisdiction conferred under Article 199 of Constitution of the Islamic Republic of Pakistan, 1973, cannot substitute its own findings in the presence of the concurrent conclusion drawn by the forums below on facts as well as on record. Both the learned forums below, after due appreciation of the record and the contentions of the parties, have recorded concurrent findings which cannot be interfered while exercising the writ jurisdiction unless the forums below acted without lawful authority and jurisdiction. Reliance is placed on *Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others* (PLD 2001 Supreme Court 415), *General Manager, Pearl Continental Hotel, The Mall, Lahore/Rawalpindi v. Farhat Iqbal* (PLD 2003 Supreme Court 952), *Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others* (PLD 2005 Supreme Court 792), *State Life Insurance Corporation and others v. Jaffar Hussain and others* (PLD 2009 Supreme Court 194), *Rai Ashraf and others v. Muhammad Saleem Bhatti and others* (PLD 2010 Supreme Court 691), and *Pakcom Limited and others v. Federation of Pakistan and others* (PLD 2011 Supreme Court 44).

16. In another esteemed judgment reported as *Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others* (PLD 1996 Supreme Court 610), the Hon'ble Supreme Court of Pakistan, while dealing with the question of permanent worker, at Page 621, has ruled as under:

> "The ratio of the above judgment in the case of Muhammad Yaqoob *(supra)* seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of Paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in Section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and non-residential buildings and constructing itself and/or causing construction thereof. The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by

the Labour Courts in this respect cannot be said to be not founded on evidence on record."

17. In another judgment cited as *Tehsil Municipal Administration v. Muhammad Amir* (2009 PLC 273), has further elaborated the status of a workman at Page 280, the relevant Paragraph is reproduced as under:

> "13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with "water work" "well" within the meaning of construction industry as defined in Section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked. He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were transferred to TMA Bhalwal where he continued to work till 15.08.2005 when he was informed that his services had been terminated w.e.f. 01.09.2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of clause (b) of Paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in para-10 above."

18. The other esteemed judgments applicable in this case are as under:--

1. *Pakistan International Airlines v. Sindh Labour Court No. 5 and others* (PLD 1980 Supreme Court 323)
2. *Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others* (1999 SCMR 2557)
3. *Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others* (PLD 2003 Supreme Court 724)
4. *Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others* (2008 SCMR 1058)
5. *Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain* (2013 SCMR 1547)
6. *WAPDA and others v. Khanimullah and others* (2000 SCMR 879).

19. The learned counsel for the petitioners, during the course of arguments, has referred a recent judgment of the Hon'ble Supreme Court of Pakistan cited as *Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan* (2013 SCMR 13). The aforesaid esteemed judgment has been passed by the Bench consisting of three Hon'ble Judges of the Hon'ble Supreme Court of Pakistan, whereas the judgment cited as *Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others* (PLD 2003 Supreme Court 724), referred by the learned counsel for the respondents supra, is of a Bench consisted of five Hon'ble Judges of the Hon'ble Supreme Court of Pakistan. Thus, following the principle laid down by the Hon'ble Supreme Court of Pakistan in various judgments, that the judgment of the larger Bench would follow to resolve the controversy, hence the judgment (supra) delivered by the Hon'ble five Judges of the Apex Court would govern the controversy in this matter. Even otherwise, the ratio decidendi of the other judgments on this point goes in favour of the respondents.

20. There is another aspect of the case which also favours the cause of the respondents, that the respondents/employees, while filing the grievance petition before the learned Labour Court, have mentioned in Para No. 9 of the grievance petition, that the petitioner-department earlier to this, in the similar situation, regularized the services of the other employees (55-employees) in compliance of the order passed by this Court and affirmed by the Hon'ble Supreme Court of Pakistan. As stated in the afore-referred Para of the grievance petition, that the employees of the petitioner-department filed a Writ Petition No. 7448 of 2004 titled *Muhammad Iqbal v. Govt. of Punjab,* etc, before this Court, which was disposed of on 05.06.2009 on the strength of a well-known esteemed judgment of the Hon'ble Supreme Court of Pakistan in *Akram Bari's case* cited as 2005 PLC (CS) 915, and the petitioner- department was directed to regularize the services of the writ-petitioner and respondents within a period of two months. The aforesaid order passed by this Court, was assailed by the petitioner-department before the Hon'ble Supreme Court of Pakistan, by filing Civil Petition No. 1534-L/2009, the Hon'ble Apex Court refused to interfere in the order passed by this Court and finally dismissed the civil petition on 17.09.2009.

21. The Hon'ble Supreme Court of Pakistan, while dealing with such type of situation, has already dictated, that the benefit of the judgment of the Court should be extended to others who might not be parties to the litigation and are falling in the same category, instead of compelling them to approach the legal forum. Further, even otherwise, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 is also clear on the point, that all the citizens are entitled to equal protection of law. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, cited as *Muhammad Zaeem Khalid and others v. Baha-ud-Din Zakeria University and others* (1995 SCMR 723), *Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others (*1996 SCMR 1185), and *Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others* (2005 SCMR 499).

22. This Constitutional petition has been filed against the concurrent findings on facts as well as on law recorded by the learned forums below, although learned counsel for the petitioners argued the case at length but could not point out any jurisdictional defect, legal infirmity or irregularity with the findings recorded by the learned forums below. Needless to mention, that in the Constitutional jurisdiction conferred under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners will have to point out the illegality committed by the learned forums, therefore, this is not a fit case to exercise the Constitutional jurisdiction, which is discretionary and equitable in nature. Even otherwise, learned Tribunal has appreciated the evidence on record and concluded, that the respondents were permanent workmen under the petitioners, which is undoubtedly a finding of fact having been given by learned Appellate Tribunal on the basis of reliable evidence, which cannot be interfered with in these proceedings.

23. For these reasons, I find no infirmity with the judgment of learned Punjab Labour Appellate Tribunal No. II, Multan, which findings are based on proper appraisal of the evidence of the parties.

24. Resultantly, the judgments passed by learned forums below, are affirmed and the writ petitions are dismissed with no order as to cost.

(R.A.) Petitions dismissed.

PLJ 2015 Lahore 581
[Multan Bench Multan]
Present: **ALI AKBAR QURESHI, J.**
Mst. **MUMTAZ MAI--Petitioner**
versus
SAJJAD HUSSAIN and 4 others--Respondents

C.R. No. 541 of 2004, decided on 24.12.2014.

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

----S. 12(2)--Suit for declaration, dismissal of--Inheritance--Right of female--Appeal was accepted on basis of recalled compromise--Fraud and misrepresentation obtained signature and thumb-impression to get appeal--One of legal heir neither impleaded in suit nor in appeal--Entitlement to legacy of deceased--Validity--Right of inheritance is Quranic injunction, which, beyond doubts, cannot be defeated or denied or violated in any manners whatsoever--Revision was allowed. [P. 585] A

Mr. Muhammad Aslam Sumra, Advocate for Petitioner.

Date of hearing: 24.12.2014

ORDER

This civil revision is directed against the judgment dated 28.04.2004 passed by the learned Addl. District Judge, Karor, District Layyah whereby the application U/S. 12(2), CPC filed by the petitioner was dismissed.

2. The necessary facts for the disposal of this petition are, that a suit for declaration was filed by Sajjad Hussain and *Mst.* Irshad Mai, the son and daughter of deceased Talib Hussain, respectively, against Nokar Hussain and Mazhar Abbas, sons of Wali Muhammad, on the grounds; that they are in possession of the suit land and the registered sale-deed allegedly executed by their predecessor namely, Talib Hussain is illegal and be declared unlawful. The suit was contested by the defendants namely Nokar Hussain and Mulazim Hussain sons of Wali Muhammad, by filing written statement, the learned trial Court after exhausting the procedure, finally dismissed the suit by way of judgment and decree date 05.07.1993.

3. An appeal was filed by Sajjad Hussain etc. The defendants of the suit namely, Nokar Husain etc. appeared through counsel on 28.07.1993. On 21.02.1994, the appeal was adjourned to 28.04.1994, but in the meanwhile on an odd date i.e. 29.03.1994, the appellant/plaintiff moved an application to the effect, that the parties have compromised, therefore, the suit be decreed by accepting the appeal. The learned Addl. District Judge summoned the file on same day and Nokar Hussain etc., real brother of the petitioner, appeared through another counsel namely Malik Mulazim Hussain Advocate on 29.03.1994, who recorded his statement that in view of the compromise, the appeal be accepted and the suit be decreed, the learned Addl. District Judge, accordingly, accepted the appeal on 29.03.1994.

4. Thereafter, one Khadim Hussain claiming himself the purchaser of the suit land through an agreement to sell dated 17.02.1987 executed in his favour by Nokar Hussain etc.,

filed another application U/S.12(2), CPC. In reply of the aforesaid application, the claim of the applicant was accepted by Nokar Hussain etc.

5. Nokar Hussain and Mazhar Abbas, real brothers of the petitioner, also filed an application U/S.12(2), CPC on 01.06.1994 wherein they challenged the judgment and decree dated 29.03.1994 passed by the learned appellate Court on the ground that the appellant/plaintiff by playing fraud and misrepresentation obtained their signatures and thumb impression and succeeded to get the appeal decided in their favour.

6. The present petitioner also filed an application U/S.12(2), CPC challenging the afore referred judgment and decree i.e. dated 29.03.1994 being daughter of deceased Wali Muhammad and real sister of Nokar Hussain and Mazhar Abbas, on the ground, that she being the daughter of Wali Muhammad is entitled to inherit the property belonging to her father and the parties to the civil suit as well as the appellant/Sajjad Hussain with the connivance of each other by playing fraud and misrepresentation, did not implead her in the litigation, therefore, any decree passed at the back of her, has no legal sanctity in the eye of law. Astonishingly, the brother of the petitioner and defendants of the civil suit namely Nokar Hussain and Mazhar Abbas not only admitted the contents of the application of the petitioner U/S.12(2), CPC but also admitted the claim of one Khadim Hussain who filed application U/S.12(2), CPC, claiming himself one of the purchasers of the suit property through agreement to sell from the above referred persons namely Nokar Hussain and Mazhar Abbas.

7. The learned appellate Court on 22.10.2003, framed four issues, recorded the evidence of the parties and finally dismissed the applications on the basis of the findings recorded, while deciding Issue No. 1 *vide* judgment dated 28.04.2004.

8. Through this civil revision, *Mst.* Mumtaz Mai has come forward to challenge the validity of the findings recorded by the learned appellate Court while dismissing the application U/S. 12(2), CPC filed by the petitioner.

Admittedly and not denied by the parties to the suit including Nokar Hussain and Mazhar Abbas, real brothers of the petitioner, that the petitioner is the real daughter of Wali Muhammad deceased and real sister of Nokar Hussain and Mazhar Abbas. It is also established on record, that the petitioner, although she is one of the legal heirs of deceased Wali Muhammad, neither impleaded in the suit filed by Sajjad Hussain etc. nor in appeal and so much so, the real brothers of the petitioner who were very much party in the civil suit as well as in appeal did not inform to the Court neither any application to this effect was filed. It is also notable here, that even at the time of giving the consenting statement in appeal by the brother of the petitioner, the petitioner was not there neither she was informed. From the record and the conduct of the brothers of the petitioner, it appears rather proved, that the brothers of the petitioner namely Nokar Husain and Mazhar Abbas with the intention to deprive the petitioner from her right of inheritance, in connivance with Sajjad Hussain etc., the appellant in the appeal, managed all this and finally the appeal was accepted on the basis of so-called compromise and the suit was decreed and in result thereof the registered sale-deed, which was in the name of father of the petitioner, was set aside.

9. The learned appellate Court, as evident from the findings impugned herein, did not even bother to examine the record which establish and prove the status of the petitioner as one of the legal heirs. Further, the application U/S.12(2), CPC of the petitioner has been

dismissed in a very cursory and casual manners which, in any circumstances, is not permitted and sustainable in law.

10. Learned counsel for the petitioner has mainly argued, that the petitioner in any case, being one of the legal heirs of the deceased Wali Muhammad, is entitled to the legacy of deceased Wali Muhammad.

11. Conversely learned counsel for the respondent tried to support the findings of learned appellate Court but on Court query, could not offer any satisfactory answer that as to whether the petitioner could be deprived from her right of inheritance when admittedly she is one of the co- owners.

12. I am fortified, while dealing with this proposition, by the landmark esteemed judgment of Hon'ble Supreme Court of Pakistan cited as *Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi* (PLD 1990 Supreme Court 1). The relevant part of the judgment is reproduced as under:

> "---Inheritance---Co-sharer---Adverse possession---Rights of females---Pardanashin Muslim lady---Different considerations apply from those that apply between adult males even as regards adverse possession where one is concerned with pardanashin Muslim female--In the case of adult males if the possession is neither obtained by force nor by fraud nor in secret, it does not matter that it is in fact not known to the person against whom adverse possession is alleged---The law is satisfied if that person would have known had he been acquainted with what was going on in the world---In case of Purdanashin Muslim female it is necessary to find not mere adverse possession but ouster.
>
> *Mst. Fardosjahan Begum v. Kazi Sharifuddin AIR 1942 Nag. 75 ref."*
>
> **(h) Muhammadan Law---**
>
> "---Inheritance---Opening of inheritance---Right of females---Principles---Muslim's estate vests immediately on his death in his or her heirs---Brother, father, husband, son or vice versa, does not or cannot intervene as an intermediary.
>
> As soon as an owner dies, succession to his property opens. There is no State intervention on clergy's intervention needed for the passing of the title immediately to the heirs. Thus it is obvious that a Muslim's estate legally and juridically vests immediately, on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the state by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction. It is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner. [p.]I.
>
> About the vesting of the property in a Muslim heir, if the State, the Court, the clergy, the executor, the administrator does not intervene, no other body intervenes on any other principle, authority, or relationship--even of kinship. Thus the brothers, the

father, husband, son or vice versa, does not or cannot intervene as an intermediary. [p.] J.

(i) Muhammadan Law--

---Inheritance---Rights of females--- Brother trying, though illegally as if a guardian-in-inheritance, of a sui juris sister, on allegedly "moral" basis to oust her is prohibited by Islam--Females cannot be treated so in Pakistan--Import or application of any foreign system or common law or law of nature in preference to law in Pakistan is not possible in present constitutional and legal system of Pakistan. [p.] K."

13. Even otherwise, the right of inheritance is Quranic injunction, which, beyond doubts, cannot be defeated or denied or violated in any manners whatsoever.

14. Resultantly this civil revision is allowed, judgment impugned herein alongwith the judgment and decree passed by the learned appellate Court, in result of compromise, is set aside and, that of learned trial Court, whereby the suit filed by Sajjad Hussain etc. was dismissed, is upheld, with throughout cost.

(R.A.) Revision allowed.

PLJ 2015 Lahore 851 (DB)
[Multan Bench, Multan]
Present: **ALI AKBAR QURESHI AND CH. MUHAMMAD IQBAL, JJ.**
MUHAMMAD ASLAM, etc.--Appellants
versus
Khawaja **ABDUL MANAF--Respondent**

R.F.A. No. 30 of 2007, decided on 31.3.2015.

Defamation Ordinance, 2002--

----S. 8--Suit for recovery as damages--Defamatory and scandalous news was published in weekly magazine--Publication of apology was sufficient proof--Scandalous material was published--Validity--Such type of illegality and willful negligence on part of appellants cannot be over looked and left unattended which was not only against law but also unwritten norms, values and conventions of at least a fair reporting and ideal journalism--Further, that type of negligence, is so fatal which ruins life of a person or family and sometimes may cause a risk to life--When because of such type of the news published without mandatory inquiry, aggrieved person committed suicide--Publication of material against respondent/plaintiff without establishing veracity of news item or material, therefore, it was extreme example of yellow and irresponsible journalism--News items published was highly defamatory, scandalous and example of irresponsible journalism, so quantum of damages awarded by trial Court could had been much higher, if respondent/plaintiff had filed cross appeal or cross objection but any how findings recorded by trial Court were affirmed. [Pp. 854 & 855] A, B, C & E PLD 2006 Lah. 551, *rel.*

Damages--

----Defamatory and scandalous news items was published in weekly magazine--Suffered mental agony and torture--Subsequently, an apology was published in same magazine--

Sufficient to show *bona fide*--No *mala fide*--Validity--Apology always published of few lines and in corner without publishing scandalous and defamatory material in detail alongwith apology and normally public-at-large readers of news papers do not even read apology, therefore, apology published in magazine was totally insufficient and lame excuse and not acceptable in law--Apology published cannot restore dignity and honour of a person or family and it is not possible for aggrieved person to show apology to every person known to him or public-at-large, therefore, plea was hardly sustainable in law. [P. 854 & 855] D

M/s. Tahir Mehmood, Ahsan Raza Hashmi, and Muhammad Sarwar Awan, Advocates for Appellants.

M/s. Malik Muhammad Tariq Rajwana, and Barrister Malik Kashif Rafique Rajwana, Advocates for Respondents.

Date of hearing: 31.03.2015

JUDGMENT

Ali Akbar Qureshi, J.--This Regular First Appeal is directed against the judgment and decree dated 16.01.2007 passed by learned Additional District Judge, Dera Ghazi Khan, whereby the suit filed by the respondent to recover an amount of Rupees One Crore on account of damages was decreed to the extent of Rs.5,00,000/- (Rupees Five Lacs).

2. The facts as averred in the record, are that the respondent/plaintiff lodged a suit for recovery of Rupees One Crore as damages under the provisions of Defamation Ordinance, 2002, on the grounds, that the respondent belongs to a respectable religious family of Taunsa, having large number of devotees; the appellants/defendants who are owners of a weekly magazine, namely, *"Voice of Taunsa"* published scandalous news in their weekly magazine with the intention to extract money; the appellants/defendants in the magazine of April, published a news item with contemptuous title of "Pir of Dhori" which is in fact a deliberate attempt of the appellants/ defendants to disrepute the plaintiff's family; the weekly magazine was circulated in other several districts of the province and because of this, the honour, dignity and reputation of the respondent/plaintiff were seriously damaged and the respondent/plaintiff suffered mental agony and torture. A mandatory notice under Section 8 of the Defamation Ordinance, 2002 was issued to the appellants/defendants to pay Rupees One Crore on account of damages, but no reply was made, and remained un-rebutted, thus stood proved.

3. The suit was contested by the appellants/defendants by controverting the contents of the plaint and claimed, that the news published in magazine depicts true situations, and nothing has been published which is against the record.

4. Learned trial Court out of the pleadings, framed as many as seven issues, recorded the evidence of the parties and finally decreed the suit to the extent of Rs.500,000/- (Rupees Five Lacs).

5. Learned counsel for appellants contends, that the appellants who are owners of the magazine, are not responsible as the news was published by the reporter of the magazine and further submitted, that learned trial Court failed to appreciate the record and the law and without appreciating the record, passed the decree which is not sustainable in law. Learned counsel, during the course of arguments, fairly submitted that although the news was

published in the magazine owned by the appellants, but subsequently, an apology was also published in the same magazine, therefore, it is sufficient to show the *bona fide* of the appellants. Also contended, that there was no *mala fide* in publishing the material as the same was provided by a lady, namely, Taj Bibi (DW-1) who is aggrieved of the acts done by the respondent.

6. Conversely, learned counsel for the respondent supported the findings recorded by learned trial Court, and submitted, that the damages amount be enhanced in view of the facts of the case. When confronted, that as to whether any appeal has been filed by the respondent, learned counsel submitted, that no appeal has been filed by the respondent.

7. Arguments have been heard and record perused.

8. It is not denied, as evident from the record, that a news which on the face of it, is defamatory and scandalous, was published in the weekly magazine owned by the appellants, and subsequently, an apology was also published. The publication of the apology is sufficient proof, that the scandalous material was published by the appellants and now, it is to be seen as to whether the material supplied to the appellants by the lady was probed into or any investigation was conducted by the appellants to meet with the requirements and parameters of an ideal journalism. When it was confronted to learned counsel for the appellants, learned counsel could not refer any material from the record in this regard. This type of the illegality and willful negligence on part of the appellants cannot be overlooked and left unattended, which is not only against the law applicable on the case, but also the unwritten norms, values and conventions of at least a fair reporting and ideal journalism. Further, this type of the negligence, which is otherwise mandatory, is so fatal which ruins the life of a person or family and sometimes may cause a risk to life. There are many examples, even reported in the press, when because of this type of the news published without mandatory inquiry, aggrieved person committed suicide. Therefore, it can safely be observed, that the appellants published the material against the respondent without establishing the veracity of the news item or material, therefore, it is extreme example of yellow and irresponsible journalism.

9. There is another aspect of the case which depicts from the record, that the appellants not only published baseless and defamatory material against the respondent, but there are also other innocent people against whom defamatory material was published who lodged F.I.R. and filed civil suits for damages on the same issue. Some of the civil suits as mentioned in the record, have been decreed against the appellants.

10. The aforesaid facts which are based on documentary evidence including the judicial record, show that the appellants are habitual to publish such type of the defamatory and scandalous news items against different people to extract money, therefore, learned trial Court rightly reached to the conclusion, that the appellants are liable to be dealt with under the provisions of the Defamation Ordinance, 2002, and finally awarded damages on account of publishing the defamatory and scandalous material without probing into the matter.

11. There is another most important fact which requires adjudication, that the newspaper owners like the appellants, claim if someone brought them in the Court of law, that an apology has been issued in the newspaper. Needless to mention, that the apology always published of few lines and in the corner, without publishing the scandalous and defamatory material in detail alongwith the apology and normally public-at-large/readers of

newspapers do not even read the apology, therefore, the apology published by the appellants in the magazine is totally insufficient and lame excuse and not acceptable in law. Even otherwise, the apology published by the appellants in this magazine cannot restore the dignity and honour of a person or family and it is not possible for an aggrieved person to show the apology to every person known to him or public-at-large, therefore, this plea of the appellants is hardly sustainable in law. Anyhow in future, the publisher and newspaper owner shall publish the apology, if required or ordered, giving the same place and space in the newspaper alongwith defamatory material earlier published by them, so that the public-at-large could know the defamatory material as well as the apology tendered by the publisher or the newspaper owner.

12. It is proved on record through the evidence, that the news item published by the appellants was highly defamatory, scandalous and example of irresponsible journalism, so the quantum of damages awarded by learned trial Court could have been much higher, if the respondent had filed the cross appeal or cross objection but anyhow the findings recorded by learned trial Court are affirmed.

13. The evidence adduced by the appellants was perused during the course of arguments but there is nothing in the evidence to contradict the claim of the respondent.

Reliance is placed on *Mudasser Iqbal Butt v. Shaukat Wahab and others* (PLD 2006 Lahore 557).

14. In view of above, we see no reason to interfere with the well-reasoned judgment delivered by learned trial Court, thus this appeal has no force, and is dismissed with no order as to costs.

(R.A.) Appeal dismissed.

PLJ 2015 Lahore 870
[Multan Bench, Multan]
Present: **ALI AKBAR QURESHI, J.**
SARWAR ALI KHAN and others--Petitioners
versus
Mst. **SHEHNAZ PARVEEN--Respondent**

C.R. No. 561-D of 2001, decided on 16.4.2015.

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

----S. 115--Civil revision--Inheritance--Status of lay palak--Not entitled to inherit anything from legacy being legal heir--Lawful collateral of deceased--Scribe or signatory of documents--Validity--Documents tendered by respondent/plaintiff, cannot be read in evidence unless scribe or signatory of those documents are produced as witnesses in Court--Secondly, it was mandatory duty of trial Court to decide objections raised by petitioners/defendants at time of tendering documents by respondent/plaintiff--Objections could be decided firstly at time of raising objections and secondly while finally deciding case--Trial Court was not denuded powers to summon necessary witnesses while exercising its inherent jurisdiction--Matter would be decided and ended for all time to come, between parties, therefore, it is just and proper to remand matter to trial Court. [P. 875] A, B & C

Syed Najm-ul-Saqib, Advocate for Petitioners.

Ch. Muhammad Akram, Advocate for Respondent.

Date of hearing: 16.04.2015

JUDGMENT

This civil revision is directed against the judgment and decree dated 16.04.2001, whereby the learned appellate Court through a consolidated judgment set aside the judgment and decree dated 27.10.2000 and decreed the three suits filed by the respondent/ plaintiff.

2. Shortly the facts arising out of the pleadings of the parties are that, respondent/plaintiff *Mst.* Shahnaz Parveen claiming herself sister of the petitioners and daughter of deceased Hussain Ahmad filed following three suits:-

(1) *Mst. Shahnaz Parveen v. Sarwar Ali etc.*

(2) *Shahnaz Parveen v. Province of Punjab etc.*

(3) *Mst. Shahnaz Parveen v. Public-at-Large etc.*

In the aforesaid civil suits *Mst.* Shahnaz Parveen respondent/plaintiff claimed that she is real daughter of Hussain Ahmad and sister of the petitioners/defendants therefore, is entitled to get the property left by deceased HussainAhmad to the extent of her share. Further the Petitioner/Defendant No. 1 after the demise of Hussain Ahmad took charge of the property left by the deceased being only male member of the family. The respondent/plaintiff was only six years old when her father Hussain Ahmad died. Therefore, she could not get her share and the petitioners/ defendants mutated whole of the legacy left by Hussain Ahmad in their favour. Lastly prayed, that the mutation entered in the name of the petitioners/defendants excluding the respondent from the list of legal heirs be declared illegal, unlawful and without lawful authority.

All the above suits were contested by the petitioners/ defendants through written statement wherein the petitioners refuted the contention of the respondent/plaintiff on the ground, that respondent namely ShehnazParveen is not daughter of Hussain Ahmad and has no relation whatsoever with the family of the petitioners/defendants. In fact about more than 30 years ago the respondent/plaintiff was left in the front of police chowki by some lady being off- shoot of illicit relationship in neighborhood of Hussain Ahmad, the predecessor, and she was handed over to Nawab Hussain Ahmad who brought up her, therefore, the status of the respondent/plaintiff at the most is a lay-palak daughter, who is not entitled to inherit anything from the legacy of the father of Hussain Ahmad.

The learned trial Court consolidated all three suits and out of the controversial pleadings of the parties framed the following issues:--

1. Whether all the three suits of *Mst.* Shahnaz Parveen are barred under Order II Rule 2, CPC? OPD

2. Whether all the three suits of *Mst.* Shahnaz are not maintainable in its present form? OPD

3. Whether all the three suits are barred u/S. 11, CPC? OPD

4. Whether suit of *Mst.* Shahnaz Parveen are barred under Order XXIII Rule 1, CPC? OPD

5. Whether all the three suits of *Mst.* Shahnaz Parveen are time barred? OPD

6. Whether *Mst.* Shahnaz Parveen is estopped by words and conduct to file the suit? OPD

7. Whether the plaintiffs in all three suits are liable to be rejected under Order VII Rule 11, CPC? OPD

8. Whether the suits of plaintiff are false, vexatious, liable to be dismissed and contesting defendants are entitled to recover special costs u/S. 35-A, CPC? OPD

9. Whether Shahnaz Parveen is real daughter of Hussain Ahmad Khan and *Mst.* Khurshid Jehan (husband and wife) and is entitled to inherit their landed property and debts situated in various Chaks as alleged in the plaint? OPP

10. Whether impugned mutations of Inheritance No. 8902 attested on 5.12.91 in respect of revenue estate of Khurshid Jehan is against facts, law, void and in effective upon the rights of plaintiff for the grounds mentioned in plaint? OPP

11. Whether impugned Mutation No. 145, dated 23.2.71 in respect of revenue estate of Hussain Ahmad Khan is against facts, law, void, without authority liable to be set aside and in effective upon the rights of plaintiff, for grounds mentioned in the plaint? OPP

12. Whether impugned order of A.C. and Addl: Commissioner Revenue dated 16.2.92 and 31.10.92 pertaining to revenue estate of *Mst.* Khurshid Jehan are against facts, law, void, without authority, liable to be set aside and in effective upon the rights of plaintiff *Mst.* Shahnaz Parveen? OPP

13. Whether impugned orders passed by Civil Judge Ist Class, Khanewal, for grant of succession certificate in favour of the defendant is against facts, law and in effective upon the rights of the plaintiff? OPP

14. Relief.

Both the parties adduced their oral as well as documentary evidence. The learned trial Court after hearing the arguments of the parties finally dismissed all the three suits through a consolidated judgment. Being dissatisfied of the dismissal of all the three suits, the respondent/plaintiff filed three separate appeals against the three judgment and decrees passed by the learned Courts below.

3. The learned appellate Court after hearing the arguments of the parties, accepted the three appeals, set aside the judgments and decrees passed by the learned trial Court and decreed the three suits filed by respondent/plaintiff. Hence, this civil revision.

4. Learned counsel for the petitioners mainly argued the following points:--

(i) The respondent/plaintiff could not prove the contentions taken by her at the time of filing the case, through any reliable evidence.

(ii) Only one witness appeared on behalf of the respondent/plaintiff, who could not corroborate the contentions of the petitioners.

(iii) The documentary evidence produced by the respondent/plaintiff is not reliable.

The respondent/plaintiff while appearing in the witness box has categorically stated that it is correct, that she was left by someone in front of the police post and the police officials handed over to her to Hussain Ahmad deceased, therefore, this is sufficient to prove, that the respondent/plaintiff is not the daughter of Hussain Ahmad, thus, is not entitled to inherit anything out of the legacy of Hussain Ahmad being legal heir. Learned counsel, is presently appearing on behalf of the collateral of the petitioners namely Sarwar Ali Khan etc, who are claiming themselves the only collaterals to inherit the legacy of Hussain Ahmad and Sarwar Ali Khan etc. For this purpose the learned counsel submitted a certified copy of a statement recorded by the respondent *Mst.* Shahnaz Parveen in an application to obtain the succession certificate in the Court of learned Senior Civil Judge, Khanewal, wherein she has admitted, that the present collateral are members of the pedigree of one Nizam Ali Khan and petitioner Sarwar Ali Khan deceased and Hussain Ahmad Khan were also members of the same pedigree, therefore, the present petitioners are lawful collateral of deceased petitioner Sarwar Ali Khan and are entitled to inherit the property left by deceased Hussain Ahmad.

5. On the other hand, learned counsel for the respondent argued the case on the following points:--

1. The documentary evidence, CINC, School leaving certificates and FIR lodged by the petitioner deceased Sarwar Ali Khan fully supports the contentions of the respondent/plaintiff.

2. The oral evidence appeared on behalf of the respondent also fully corroborated the claim of the respondent/ plaintiff.

3. The evidence, documentary and oral, could not shatter the claim to inherit the property made by the respondent/plaintiff.

6. After hearing the arguments of learned counsel for the parties, the record was perused.

7. The respondent *Mst.* Shahnaz Parveen herself appeared in the witness box as PW-2 and reiterated the contentions/grounds taken in her suit. The respondent/ plaintiff while recording her examination-in-chief or the cross-examination did not produce, tender or got exhibited any document, anyhow, her learned counsel while closing the evidence recorded his statement without oath and tendered documents Exh.P1 to Exh.P10 but these documents have not been proved by adducing the signatory or scribe of the document, therefore, as ruled by the Hon'ble Supreme Court of Pakistan in an esteemed judgment titled *"Khan Muhammad Yusuf Khan Khattak v. S.M. Ayub and 2 others"* (PLD 1973 SC 160), cannot be received or read in evidence. The following documents have not been tendered particularly by the respondent/plaintiff in her own statement but in the statement of his learned counsel. The following documents cannot be admissible in evidence unless their scribe or signatory are produced:--

Copy of Mutation No. 8902 as Exh.P-1

Copy of Mutation No. 145 as Exh.P-2

Copy of voters list (under objection) as Exh.P-3. Copy of FIR (under objection) as Exh.P-4

Copy of Discharge Report (under objection) as Exh.P-7

Copy of character certificate (Under objection) as Exh.P-8

Copy of matriculation certificate as Exh.P-9 and

Copy of school leaving certificate (Under objection) Exh.P.10.

8. Another aspect of the case which is notable, that at the time of tendering the aforesaid documents by the learned counsel for the respondent/plaintiff, the petitioners/ defendants raised objections but those objections have not been decided by the learned Courts below, therefore, real adjudication of the matter is not possible unless the objections raised on the documents are decided by the learned Courts below.

9. Since, the matter relates to the inheritance, which can only be decided by adjudicating the parentage of the respondent/plaintiff *Mst.* Shehnaz Parveen. The documents tendered by the respondent/plaintiff, as earlier observed, cannot be read in evidence unless the scribe or signatory of those documents are produced as witnesses in the Court. Secondly, it was the mandatory duty of the learned trial Court to decide the objections raised by the petitioners/defendants at the time of tendering the afore-referred documents by the learned counsel for the respondent/plaintiff. The objections could be decided firstly at the time of raising the objections and secondly while finally deciding the case.

10. As serious question was involved in this case therefore, the learned trial Court was not denuded the powers to summon the necessary witnesses while exercising its inherent jurisdiction as ruled by the Hon'bleSupreme Court of Pakistan in judgment supra i.e. *"Khan Muhammad Yusuf Khan Khattak v. S.M. Ayub and 2 others"* (PLD 1973 SC 160).

11. In view of the above and particularly keeping in view the nature of the case, it is appropriate, that the matter should be decided and ended for all time to come, between the parties, therefore, it is just and proper to remand the matter to the learned trial Court to decide the lis keeping in view the observation made above.

12. Resultantly, this civil revision is accepted, the judgment and decree passed by the learned appellate Court dated 16.04.2001 is set aside and the case is remanded to the learned trial Court for its afresh decision after providing fair opportunity to the parties to the case and the suit filed by the respondent/plaintiff shall deem to have been pending before the learned trial Court.

13. Parting with the judgment, since it is an old matter, therefore, parties to the case shall appear before learned Senior Civil Judge, Khanewal, on 18.05.2015, who may hear the case himself or entrust it to any other competent Court. The learned trial Court is directed to conclude the matter preferably within a period of four months.

C.M. No. 61-C of 2014

Through this application the applicant wishes to implead the legal heirs of deceased Petitioners No. 1 & 2. Allowed. The amended memo. is taken on record.

C.M. No. 2749-C of 2014

Through this application applicant/ respondent wishes to place on record certain documents.

The documents annexed with this application have been argued and taken into consideration. C.M. stands disposed of.

C.M. No. 2750-C of 2014

Dispensation sought for is allowed subject to all just and legal exceptions. C.M. stands disposed of.

(R.A.) Case remanded.

PLJ 2015 Lahore 1005
[Multan Bench Multan]
***Present*: ALI AKBAR QURESHI, J.**
MUHAMMAD NAEEM IQBAL KHAN--Petitioner
versus
WASEEM SHAFI and 11 others--Respondents

C.R. No. 32 of 2015, heard on 21.1.2015.

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

----S. 12(2)--Case was not decided on merits--Validity--Final judgment, decree and order can only be challenged by filing an application u/S. 12(2), CPC, if case has been decided on merits.[P. 1008] A

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

----S. 12(2)--Ingredient of fraud or misrepresentation--Maintainability of application u/S. 12(2), CPC--Petitioner could not point out any ingredient of fraud or misrepresentation played with Court, therefore, application is not maintainable. [P. 1008] B

Muhammad Shareed Karkhi Khera, Advocate for Petitioner.

Makhdoom Ijaz Hussain Bukhari & Mian Anwar Mubeen Ansari, Advocates for Respondents.

Date of hearing: 21.1.2015.

JUDGMENT

The petitioner through this civil revision, has challenged the validity of the order dated 07.07.2011 passed by learned Special Judge (Rent), Multan, judgment dated 12.10.2011 passed in appeal, and order dated 01.12.2014, whereby the application u/S. 12(2), CPC filed by the petitioner, against the judgment dated 12.10.2011 passed in appeal, was dismissed being without any substance.

2. The petitioner, claiming himself the purchaser of the suit land, detail of which is given in the head-note, filed an application under Section 12(2), CPC against the judgment dated 12.10.2011 passed by the learned Additional District Judge, Multan, in appeal against the acceptance of Ejectment Petition by the learned Special Judge (Rent), Multan, alleging

therein, that the Respondents No. 1 to 5 claiming themselves the owners of the suit land, filed an ejectment petition against one *Mst.* Shameem Akhtar, tenant of the suit property and finally by playing fraud and misrepresentation obtained an ejectment order by the learned Rent Tribunal on 07.07.2011, therefore, the order passed by the learned Rent Tribunal and affirmed by the learned Appellate Court, is liable to be set aside by applying the Provision of Section 12(2), CPC.

3. The learned Additional District Judge, Multan, after hearing the arguments of the parties, dismissed the application on the ground, that the petitioner has failed to point out any iota of misrepresentation or fraud played with the Court.

4. The Respondents No. 6 to 9 filed S.A.O. No. 17 of 2011 titled *Mst. Shameem Akhtar, etc. v. Waseem Shafee",* wherein the petitioner also filed an application to implead in S.A.O. Later on, the S.A.O. No. 17 of 2011 was dismissed by this Court.

5. Thereafter, the petitioner filed an application u/S. 12(2), CPC before the learned trial Court, which was dismissed.

6. Then, the petitioner filed an application before the learned Additional District Judge, the learned Judge, after hearing the arguments, dismissed the application on 01.12.2014. Hence, this civil revision.

7. Learned counsel for the petitioner has argued only one point, that the application u/S. 12(2), CPC, is maintainable before this Court, as the learned Courts below have refused to entertain the application under Section 12(2), CPC filed by the petitioner. Reliance is placed on the case titled *Nasrullah Khan and others v. Mukhtar-ul-Hassan and others* (PLD 2013 SC 487) and *Muhammad Aslam (deceased) through L.Rs and others v. Molvi Muhammad Ishaq (deceased) through L.Rs.* (2012 SCMR147).

8. As depicts from the record of the case, that the petitioner challenged the validity of an order dated 12.10.2011 before the learned Additional District Judge, Multan, by filing an application under Section 12(2), CPC on the ground, that the petitioner had purchased the suit land after paying huge amount as earnest money through an agreement to sell the possession had already been given to the petitioner by the original owner of the suit land, namely Ghulam Muhammad and by virtue of the agreement to sell the tenant occupying the suit land as tenant came under the tenancy of the petitioner, therefore, Respondents No. 1 to 5 had no authority in law to file any ejectment petition, claiming themselves the owners of the suit land against the tenant. The ejectment petition, as recorded in the order impugned herein, was affirmed in appeal by the learned Additional District Judge, Multan, against which S.A.O. No. 17 of 2011 was filed, which was dismissed on 01.12.2014, in the following words:

> "No authorized person is present on behalf of the appellants. The name of the learned counsels for the appellants has duly been reflected in today's cause list.
>
> 2. This appeal was filed beyond limitation and according to the office report it was thirteen days barred at the time of its institution.
>
> 3. Called repeatedly. Same is the position. No justification to keep this appeal pending.
>
> 4. Dismissed."

9. Learned counsel for the petitioner has relied upon the esteemed judgment cited as *Nasrullah Khan and others v. Mukhtar-ul-Hassan and others* (PLD 2013 SC 487), which is not applicable upon the facts of the present case. In the above judgment their Lordship in an elaborative manner interpreted Section 12(2), CPC and the words used by the legislature i.e. final judgment/decree/order, for approaching the forum. The relevant para is as under:--

(PLD 2013 SC 487)

> "It is on account of this established principle of (merger), that in the case reported as *Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others* (1992 SCMR 241) it has been held "It appears that in holding that the period of limitation for execution of the decree commenced from the date of the decision by the Appellate Court, the rule that the decree of the Court of first instance, merged into the decree of Appellate Court, which alone can be executed, was not present to the mind of the learned Judge. It is to be remembered that till such time, an appeal or revision from a decree is not filed, or such proceedings are pending but no stay order has been issued, such decree remains capable of execution but when the Court of last instance passes the decree only that decree can be executed, irrespective of the fact, that the decree of the lower Court is affirmed, reversed or modified." This is the crux of the matter. From the above it is clear that for all legal purposes, it is the final decree/order of the last Court in the series, even if such decree etc. be of affirmation, which has to be executed and should be considered and treated to be the final judgment/decree/order in terms of Section 12(2), CPC for approaching the forum. Thus, notwithstanding the reversal of modification of the decree/order, if the decree/order of a forum below, which has been affirmed by the higher forum on merits, both on the points of the facts and the law involved therein, it shall be that decree/order, which attains the status of the final decree/order etc. within the purview of Section 12(2), CPC. It is so because the higher forum has not only endorsed the point(s) of fact and law and has agreed with the reasoning and conclusion of the lower forum, but may be, has upheld the decision(s) challenged before it, by substituting and supplying its own reasons and by substantially doing away with the reasoning of the decision(s) challenged before it. Thus, it would be ludicrous to conceive and hold that the questions of facts and law which have been finally approved, endorsed, affirmed and settled by the higher forum should be allowed to be examined, annulled and obliterated by a forum below, whose decision stands affirmed in the above manner."

10. From the order, passed by this Court, dated 12.11.2014, it is crystal clear, that the S.A.O. No. 17/2011 was not decided on merits, whereas the Honourable Supreme Court of Pakistan in the judgment *supra* has observed, that final judgment, decree and order can only be challenged by filing an application u/S. 12(2), CPC, if the case has been decided on merits both on points of facts and the law involved therein and this type of the judgment/order will attain the status of the final decree/order etc. within the purview of Section 12(2), CPC.

11. Even otherwise, as recorded by the learned appellate Court, that the petitioner could not point out any ingredient of fraud or misrepresentation played with the Court, therefore, the application is otherwise not maintainable and particularly in view of the principle laid down by the Honourable Supreme Court of Pakistan, the application under Section 12(2), CPC filed by the petitioner is not maintainable before this Court. The learned

counsel for the petitioner although argued the case at length but failed to make out any case of interference, therefore, resultantly, this Civil Revision is dismissed. No order as to cost.

(R.A.) Revision dismissed.

PLJ 2015 Lahore 1042
[Multan Bench Multan]
***Present*: ALI AKBAR QURESHI, J.**
MEVA KHAN--Petitioner
versus
MUHAMMAD AZAM, etc.--Respondents

C.R. No. 500 of 2005, heard on 12.1.2015.

Talb-i-Muwathibat--

----Pre-emption suit--Requirement of talb-i-muwathibat--Not mentioned time and date to fulfill requirement of talb-i-muwathibat--No notice was served in order to fulfill requirement of talb-i-ishhad--Validity--Although pre-emptor has not , mentioned exact time but stated that *talb-i-muwathibat* was made in later part of day *i.e. shamm*, in plaint, whereas, pre-emptor has not even stated first part or later part of day, therefore, trial Court had rightly decided issue of *talb-i-muwathibat.* [P. 1044] A

M/s. Mian Abbas Ahmad, Mian Muhammad Shahid Riaz and Ahmad Nadeem Gehla, Advocates for Petitioner.

M/s. Syed Jawad Hussain Jaffari and Aurangzaib Ghumman, Advocates for Respondents.

Date of hearing: 12.1.2015.

JUDGMENT

This civil revision is preferred against a judgment and decree dated 23.4.2005 passed by the Additional District Judge, D.G. Khan, whereby the learned Judge decreed the suit in favour of the respondent/Muhammad Azam by setting aside the judgment and decree passed by the learned trial Court dated 6.7.2002, by which the learned trial Court dismissed the suit of the respondent.

2. Shortly the facts as stated in the record are that the respondent instituted a suit challenging a sale of land measuring 14-*kanal* 15-*Marlas* situated in Mauza Yaroo Tehsil DeraGhazi Khan detail of which is given in body of the plaint, on the ground that the land in question was purchased by the petitioner through Mutation No. 803 dated 29.6.1995 for a consideration of Rs. 100,000/- but in order to defeat the right of the pre-emptor. entered the price of land Rs. 300,000/-, the moment, sale in question came into the knowledge of the respondent/plaintiff, the plaintiff in the presence of witnesses announced his right of pre-emption and thereafter also send the notices, therefore, the respondent by this way fulfilled the requirements of *Talb-i-Muwathibat* and *Talb-i-Ishhad*.

3. The suit was contested by the petitioner on factual as well as on legal side through a written statement.

4. The trial Court framed as many as 7 issues, recorded evidence of the parties and finally dismissed the suit. Against the aforesaid judgment and decree, the respondent filed an appeal, which was accepted by the learned appellate Court, *vide* judgment and decree dated 24.4.2005 and decreed the suit in favour of the respondent/ plaintiff.

5. Learned counsel for the petitioner at the very outset, has drawn my attention to the contents of the plaint and particularly, Paragraph-6. Learned counsel submits that the respondent while filing the plaint has not mentioned the time and date to fulfill the requirement of *Talb-i-Muwathibat* and further, that no notice was issued in order to fulfill the requirement of *Talb-i-Ishhad*, therefore, the suit of the respondent is liable to be dismissed on the strength of the principle laid by the Hon'ble Supreme Court of Pakistan in *Mst. Kharia Bibi v. Mst. ZakiaBegum and 2 others* (2007 SCMR 515), *Muhammad Bashir and others v. Abbas Ali Shah* (2007 SCMR 1105) and (2013 SCMR 863).

6. The judgment cited as 2007 SCMR 515, deals with the proof of *Talb-i-Muwathibat* and non-mentioning of date, time and place of making *Talb-i-Muwathibat* in the plaint. The relevant paragraph on this issue as recorded by their lordships is as under:--

> "On the other hand, learned counsel for the respondents/pre-emptors stated that although in the pleadings the date, place and time of performance of *Talb-e-Muwathibat* is not mentioned but this fact got clarified through statement of P.W.4 Ajaib Khan who appeared as their attorney. In this behalf it may be noted that by the time it is well-settled that the particulars regarding the place, time and date of the performance of *Talb-e-Muwathibat* are required to be mentioned in the pleadings with the object of such observation in the judgment that in order to determine the question of limitation it is necessary to know exact date and time when *Talb-e-Muwathibat* was performed and it is also necessary to perform *Talb-e-Muwathibat* because according to law after performing *Talb-e-Muwathibat* within 14 days notice of *Talb-e-Ishhad* has to be issued. Admittedly in the instant case no such details were mentioned in the pleadings, therefore, following the law on the subject reported in different cases including *Haji Muhammad Saleem v. Khuda Bukhsh* PLD 2003 SC 315, *Muhammad Siddique v. Muhammad Sharif* 2005 SCMR 1231, *Akbar Ali Khan v. Mukammal Shah and others* 2005 SCMR 431, *Atiqur Reham and others through their real father v. Muhammad Amin* PLD 2006 SC 309 and a recent judgment in C.P. 822 of 2006 dated 20th September, 2006 pronounced by the Bench, of which one of us (IftikharMuhammad Chaudhry, Chief Justice) is a member, we are of the opinion that learned Additional District Judge had rightly directed for dismissal of the suit filed by the respondent/pre-emptor."

7. In this case as evident from the contents of Paragraph-6 of the plaint, that the mandatory requirement as ruled by the Hon'ble Supreme Court of Pakistan i.e. mentioning of date, time and place is missing, therefore, the learned trial Court on the basis of the record and particularly the pleadings, rightly concluded that the respondent/pre-emptor has filed to fulfill the requirement of *Talb-i-Muwathibat* and finally dismissed the suit.

8. As regard the *Talb-i-Ishhad*, the respondent also failed to prove the service of the notice send by him upon the petitioner through any cogent and confidence inspiring evidence. The witnesses, an official of the post office though appeared as witness but could not substantiate the claim of the respondent/pre-emptor in a manner as required by law.

9. The learned counsel for the respondent during the course of arguments has mainly relied upon a judgment cited as *Muhammad Hanif v. Tariq Mehmood and others* (2014 SCMR 941) which also deals with the requirement of *Talb-i-Muwathibat*. The aforesaid esteemed judgment of the Hon'ble Supreme Court of Pakistan is not applicable upon the facts of this case as in the aforesaid case, although the pre-emptor has not , mentioned the exact time but stated that the *Talb-i-Muwathibat* was made in the later part of the day i.e. *Shamm,* in the plaint, whereas in this case, the respondent/pre-emptor has not even stated the first part or the later part of the day, therefore, the learned trial Court has rightly decided the issue of *Talb-i-Muwathibat*.

10. The learned appellate Court although differed with the findings of the learned trial Court but without referring the law ruled by the Hon'ble Supreme Court of Pakistan on this issue, therefore, any finding contrary to law are hardly sustainable or permissible in law.

11. In view of the above, this revision petition is accepted, the judgment and decree delivered by the learned appellate Court dated 23.04.2005 is set aside and that of the learned trial Court is affirmed, resultantly, suit filed by the respondent/pre-emptor is dismissed. No order as to cost.

(R.A.) Petition accepted.

PLJ 2015 Lahore 1057

[Multan Bench, Multan]

***Present*: ALI AKBAR QURESHI, J.**

TAUQEER ABID, TCR Gr.I, PAKISTAN RAILWAYS, MULTAN--Petitioner

versus

DIVISIONAL SUPERINTENDENT, PAKISTAN RAILWAYS, MULTAN and 4 others--Respondents

Writ Petition No. 4986 of 2015, heard on 23.4.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Prime Minister family assistance package--Services of employees--Denial to fundamental rights--Challenge to--Working against same post and project from last many years--Validity--Post and project against which petitioner is working, was of permanent nature, thus, denial of respondents to regularize services of petitioner as permanent workmen, was not permissible in law--Petitioner was needed to department and further, even otherwise, it was also to be taken into consideration that petitioner had become over-age during period of his service and cannot go anywhere nor can apply to earn his livelihood in any department or organization, therefore, department instead of involving him in litigation, should have regularized services of petitioner. [Pp. 1060, 1061 & 1062] A & B

Mr. Kanwar Intizar Muhammad Khan, Advocate for Petitioner.

Rao Muhammad Iqbal, Advocate for Respondents.

Date of hearing: 23.4.2015

JUDGMENT

The petitioner, through this petition, has prayed, that he was appointed on contract basis as Ticket Collector Grade-I (BS-5), on 08.04.2013, for a period of two years under a scheme issued by the Prime Minister of Pakistan, namely, Prime Minister Family Assistance Package; the petitioner is still working against the said post; the respondents made a promise to regularize his service but no action was taken; the respondents have regularized the services of all the employees appointed under Prime Minster Family Assistance Package, but the petitioner has been denied to his fundamental rights and is being treated discriminatory. Hence, this writ petition.

2. The prayer made by the petitioner was opposed by the other side on the ground, that the petitioner was appointed on contract basis for a specific period, therefore, his service cannot be regularized.

3. It is not denied by the respondents, that the petitioner was appointed on contract basis and is still working in the department against the said post. The most important aspect of this case which requires consideration, that the respondent-department, as evident from a notice/letter dated 08.03.2012, regularized the services of the other employees, appointed on contract under the same scheme, namely, Prime Minster Family Assistance Package, but the said benefits have not been extended to the petitioner which is violative of the guaranteed and secured rights of the petitioner under Articles 2-A, 4 & 25 of the Constitution of the Islamic Republic of Pakistan, 1973. The Hon'ble Supreme Court of Pakistan, through an esteemed judgment cited as *Pakistan Telecommunication Company Limited through General Manager and another v. Muhammad Zahid and 29 others* (2010 SCMR 253), has laid down, that any employee whether on work charge or on contract, will attain the status of a permanent/ regular employee after expiry of the ninety days. The relevant portion (at Page No. 284) is reproduced as under:

> "Undisputedly, the crux of the case of the private respondents has been that they are being discriminated as against the other Operators performing service permanently with the PTCL or having been regularized in due course as Operators in the International Gateway Exchange performing similar functions in the Exchange apparently amounts to have been grossly violated as against the guaranteed rights under Articles 2-A, 4, and 25 of the Constitution by depriving them of their emoluments besides all other service benefits etc., described in Paragraph No. 2 of the writ petition being paid to other Operators performing service in the said Exchange and similarly placed and, therefore, discriminatory treatment has been meted out to the writ petitioners employed on daily wages and not regularized despite having rendered service for a period more than 2 years as contract employees renewed from time to time mentioned in Para No. 16 (supra), therefore, the impugned judgment is unexceptionable irrespective of the status of the private respondents be that of a 'worker' or a 'civil servant' or the 'contract employees' having no nexus to the maintainability of the writ petition on the ground of discrimination meted out to them."

4. Another latest esteemed judgment, the Hon'ble Supreme Court of Pakistan has laid down in *Ejaz Akbar Kasi and others v. Ministry of Information and Broadcasting and others* (PLD 2011 Supreme Court 22), the relevant portion (at Page No. 25) is reproduced as under:

"Thus in such view of the matter we are of the opinion that the Board of Directors may have not declined the petitioners' regularization, however it is a fact that regularization of contract employees, if at all is to be made is to depend upon the performance. The petitioners who have appeared in person state that they have qualified the test and their performance as well is up to mark which is evident that for the last more than ten years they have been allowed to continue work against the vacancies which they are holding without any interference and there is, now, no question of performance at all as they have already shown their performance.

4. Be that as it may, we are not inclined to agree to the reasons which prevailed upon the Board in not regularizing the Group 4, 5 and 6 when at the same time the employees of other Groups as noted hereinabove were regularized beside other individual persons whose names have also been mentioned hereinbefore. This Court has laid down a criteria in respect of such employees who have somehow identical contentions in the case of *Ikram Bari and others v. National Bank of Pakistan through President and another* (2005 SCMR 100). Therefore, we are of the opinion that the case of the petitioners deserves to be considered by the Board of Directors for the reasons noted hereinabove as they cannot be discriminated without any cogent reason by violating the provisions of Article 25 of the Constitution and at the same time after having spent a considerable period of their lives in the Organization performing duties on contract basis. It is also the duty of the Organization to protect their fundamental rights enshrined in Article 9 of the Constitution."

5. The legislature has defined the permanent workman in Standing Orders 1 (b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1. (b). of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:

SCHEDULE

STANDING ORDERS

1. Classification of Workmen.--(a) Workmen shall be classified as--

(1) …

(2) …

(3) …

(4) …

(5) …

(6) …

(b) A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive

months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months.]"

6. The only question, which pertains to the status of the respondents and their regularization by afflux of time and law applicable thereon, requires consideration.

7. In this case, the petitioner is working against the same Post and Project from the last many years, therefore, it can safely be held, that the post and project against which the petitioner is working, is of permanent nature, thus, the denial of the respondents to regularize the services of the petitioner as permanent workmen, is not permissible in law.

8. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, Government or the private, who hire the service of the poor people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact it is the device which is based on *mala fide* being used to deprive the poor worker who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the Hon'ble Supreme Court of Pakistan titled *Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others* (1995 PLC 539). The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:

"3. The contentions of the learned counsel for the petitioners that the respondent was appointed on 'work charge basis' to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.

4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under:--

> There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure 'A' would demonstrate that he was appointed on 25.06.1980 and that his services were terminated on 20.07.1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the

petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.

5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

9. Since the petitioner, in view of the law laid down by the Hon'ble Supreme Court of Pakistan, has attained the status of permanent workman/worker by afflux of time, therefore, the respondents will have to regularize the service of the petitioner in accordance with law, and any action, if required in case of any misconduct, will be initiated under Order 12 of the Standing Orders Ordinance and not otherwise.

10. It is not denied, that the petitioner is working from the last many years, and suffice to hold, that the petitioner is needed to the respondent-department and further, even otherwise, it is also to be taken into consideration that the petitioner has become over-age during the period of his service and cannot go anywhere nor can apply to earn his livelihood in any department or organization, therefore, the respondent-department instead of involving him in litigation, should have regularized the services of the petitioner.

11. In another esteemed judgment reported as *Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others* (PLD 1996 Supreme Court 610), the Hon'bleSupreme Court of Pakistan, while dealing with the question of permanent worker, at page 621, has ruled as under:

"The ratio of the above judgment in the case of *Muhammad Yaqoob (supra)* seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of Paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in Section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and non-residential buildings and constructing itself and/or causing construction thereof. The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by the Labour Courts in this respect cannot be said to be not founded on evidence on record."

12. In another judgment cited as *Tehsil Municipal Administration v. Muhammad Amir* (2009 PLC 273), has further elaborated the status of a workman at page 280, the relevant paragraph is reproduced as under:

> "13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with 'water work', 'well' within the meaning of construction industry as defined in Section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked. He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were transferred to TMA Bhalwal where he continued to work till 15.08.2005 when he was informed that his services had been terminated w.e.f. 01.09.2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of Clause (b) of Paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in Para-10 above."

13. The other esteemed judgments applicable in this case are as under:--

1. *Pakistan International Airlines v. Sindh Labour Court No. 5 and others* (PLD 1980 Supreme Court 323)
2. *Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others* (1999 SCMR 2557)
3. *Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others* (PLD 2003 Supreme Court 724)
4. *Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others* (2008 SCMR 1058)
5. *Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain* (2013 SCMR 1547)
6. *WAPDA and others v. Khanimullah and others* (2000 SCMR 879).

14. The learned counsel for the respondent-department, during the course of arguments, has referred a recent judgment of the Hon'ble Supreme Court of Pakistan cited as *TehsilMunicipal Officer, TMA Kahuta and another v. Gul Fraz Khan* (2013 SCMR 13). The aforesaid esteemed judgment has been passed by the Bench consisting of three Hon'ble Judges of the Hon'ble Supreme Court of Pakistan, whereas the judgment cited as *Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others* (PLD 2003 Supreme Court 724), referred by learned counsel for the petitioner supra, is of a Bench consisted of five Hon'ble Judges of the Hon'ble Supreme Court of Pakistan. Thus, following the principle laid down by the Hon'ble Supreme Court of Pakistan in various judgments, that the judgment of the larger Bench would follow to resolve the controversy, hence the judgment (supra) delivered by the Hon'ble five Judges of the Apex Court would govern the controversy in this matter. Even otherwise, the ratio *decidendi* of the other judgments on this point goes in favour of the petitioners.

15. The Hon'ble Supreme Court of Pakistan, while dealing with such type of situation, has already dictated, that the benefit of the judgment of the Court should be extended to others who might not be parties to the litigation and are falling in the same

category, instead of compelling them to approach the legal forum. Further, even otherwise, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 is also clear on the point, that all the citizens are entitled to equal protection of law. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, cited as *Muhammad Zaeem*

Khalid and others v. Baha-ud-Din Zakeria University and others (1995 SCMR 723), *Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others*(1996 SCMR 1185), and *Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others* (2005 SCMR 499).

16. In view of the law laid down by the Hon'ble Supreme Court of Pakistan, this petition is allowed. The respondents are directed to regularize the service of the petitioner alongwith the back benefits, in accordance with law.

(R.A.) Petition allowed.

PLJ 2015 Lahore 1076
[Multan Bench Multan]

***Present*: ALI AKBAR QURESHI, J.**
SARDAR MUHAMMAD--Petitioner
versus
PROVINCE OF PUNJAB through Sub-Registrar Shujabad, District Multan and another--Respondents

W.P. No. 2733 of 2001, decided on 3.4.2015.

Stamp Act, 1899--

----S. 27-A--Registration Act, 1908, S. 80--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Stamp duty--Suit for specific performance of contract--Refusal to execute sale-deed--Additional stamp duty according to schedule of stamp duty--Insufficient stamp duty--Validity--Value of immovable property at time of registration shall be completed according to valuation table recorded by Distt. Collector--Petitioner had not challenged valuation table issued by authority that agreement to sell was executed in year 1992 and occurred for submitting sale for registration is not on part of petitioner but because of litigation started and culminated in year 2000--Petitioner had no option but to pay stamp duty as per valuation table issued by D.C.--Petition was dismissed. [Pp. 1078 & 1079] A, B & C

Syed Mohtashamul Haq Pirzada, Advocate for Petitioner.

Mr. Mobasher Latif Gill, Asstt.A.G for Respondents.

Date of hearing: 3.4.2015.

ORDER

This Constitutional petition calls in question the order dated 19.03.2001, whereby the registration authority/Sub-Registrar has refused to register the sale-deed and directed the

petitioner to pay the additional stamp duty according to the schedule of stamp duty issued by the Government.

2. Shortly the facts giving rise to filing the instant petition, that the petitioner Sardar Muhammad entered into an agreement with the Respondent No. 2/Basheer Ahmad on 02.08.1972 for the purchase of land, situated in Shujabad, Multan, against consideration; on the refusal of the Respondent No. 2 to execute the sale-deed the petitioner filed a suit for specific performance of the contract.

The suit was contested by the Respondent No. 2, by filing written statement, the learned trial Court framed issues out of the pleadings, and put the case for evidence.

At this stage the parties to the suit entered into a compromise on 27.06.2000 and consequently the suit was decreed on 05.09.2000.

3. The petitioner Sardar Muhammad as alleged by him for the execution of the decree filed an execution petition on 02.10.2000, whereupon the learned Executing Court deputed a Court representative for the registration of the sale-deed. The petitioner alongwith the Court representative approached to the Respondent No. 1/Sub-Registrar for registration of the sale-deed, who refused to register the same on the ground, that the petitioner has paid the insufficient stamp duty, which is not in accordance with the schedule issued under Section 27-A of the Stamp Act, 1899. The Sub-Registrar on the asking of the petitioner demanded the report from the Registration Clerk, Shujabad, who reported, that the petitioner will have to pay the Stamp Duty Rs. 72,080/- as per letter of Board of Revenue, Punjab, Lahore, dated 20.10.1988.

4. Learned counsel for the petitioner submits, that the respondent authority could not refuse to register the sale-deed on the ground, that the petitioner has paid the less stamp duty, which is against the provision of Section 27-A of the Stamp Act, 1899, and the petitioner is only bound to pay the stamp duty according to the value assessed by the parties. Learned counsel further submitted, that the petitioner cannot give effect retrospectively of the amended Section 27-A of the Stamp Act.

5. The learned Assistant Advocate General opposed the arguments advanced by the learned counsel for the petitioner on the strength of Section 80 of the Registration Act, 1908 and submitted, that the petitioner is bound to pay the stamp duty according to the schedule issued by the Government of Punjab.

6. As per the record, the agreement to sell between the parties was executed in the year 1972, whereas the decree was passed on 05.09.2000, by the learned Civil Court and the petitioner under the order of the Court submitted the sale-deed for registration to the Sub-Registrar, therefore, the provisions of Section 27-A of Stamp Act amended on 1986 were very much attracted, therefore, the respondent/registration authority rightly claimed the additional stamp duty according to the schedule for facilitation the Section 27-A of Stamp Act, 1899. The same is produced as under:--

> **"Value of immovable property.** (1) Where any instrument chargeable with ad valorem duty under [4][Articles 23, 27-A, 31 or 33] of Schedule-I, relates to an immovable property, the value of the immovable property shall be calculated according to the valuation table notified by the District Collector in respect of immovable property situated in the locality."

7. The simple interpretation of aforesaid provision of law would be that the Value of the immovable property at the time of registration shall be completed according to the valuation table recorded by the District Collector. The Registration Act, 1908, has also taken care of this type of situation, the same is reproduced here:

> **"80. Fee payable on presentation.** All fees for the registration of documents under this Act shall be payable on the presentation of such documents."

The aforesaid provision of law clearly shows, that all the fees for the registration of the document shall be payable on the day of presentation of such document.

8. Learned counsel for the petitioner although referred the case law but the basic provision of law Section 27-A of the Stamp Act, 1899, is very much clear whereby the District Collector has been authorized to calculate the value of the property and notified the same.

9. It is also notable, that the petitioner has not challenged the valuation table issued by the respondent authority rather submitted, that the agreement to sell was executed in the year 1992, and delay occurred for submitting the sale for registration is not on the part of the petitioner but because of litigation started and culminated in the year 2000. Learned counsel for the petitioner referred another letter during the course of arguments, dated 20th October 1988, issued by the Board of Revenue, Punjab, wherein the opinion of the law department upon this issue is mentioned, which is as under:

> "The Law Department has agreed with the views of Board of Revenue. It has been clarified that in view of the provision of Section 27-A(1) of the Stamp Act, effective from 14.06.1986. Stamp duty on sale-deeds is to be paid on the value of the land given in the valuation table notified by the Collector of the district and not on the value of the property fixed by the parties or determined in decrees passed in suits for specific performance of the contract."

10. In view of the above, the petitioner has no option but to pay the stamp duty as per the valuation table issued by the District Collector, therefore, this petition has no force. Resultantly, the same stands dismissed with no order as to cost.

11. In the light of above, CM. No. 3952 of 2010, also stands disposed of.

(R.A.) Petition dismissed.

2015 Law Notes 788

[Multan]

Present: **ALI AKBAR QURESHI, J.**

Multan Development Authority, Multan through its Director Estate and Land Management

Versus

Masab Ali Khan others

R.F.A. No. 247 of 2001, decided on 6th April, 2015.

CONCLUSION

(1) Action or inaction on the part of the Court or judicial system, the litigant should not suffer.

ACQUISITION PROCEEDINGS --- (Value of land)

Land Acquisition Act (I of 1894)---

---Ss. 54, 18---Land acquisition proceedings---Value of land---Assessment criteria---**Held:** Trial Court very fairly assessed value of land---Petitioner could not succeed to point out anything which could call for interference by High Court---R.F.A. dismissed.

(Paras 7, 8)

لینڈ ایکوزیشن کے تحت عدالت ماتحت نے درست طور پر مالیت اراضی کا تعین کیا تھا۔ ہائیکورٹ نے اپیل خارج کردی۔

[Court below had under Land Acquisition Act correctly assessed value of land. R.F.A. was dismissed].

For the Petitioner: **Muhammad Amin Malik, Advocate.**

Date of hearing: **6th April, 2015.**

ORDER

ALI AKBAR QURESHI, J. --- This first appeal is directed against the judgment and decree dated 20.12.2000, passed by the learned Senior Civil Judge, Multan, whereby the reference filed by the respondent was allowed in the following manners:---

> *"In view of my above findings, the reference of the petitioner is accepted and the value of the suit property is fixed as Rs. 2000/- per marla as well as incidental charges, with compound interest and charges according to law."*

2. The appellant acquired the land of the respondent measuring 15 Marlas situated in Khewat No. 342, Khasra No. 11/22 situated in Moza Jahangirabad, Tehsil and District Multan, through an award dated 08.08.1993, and at the time of announcement of award, the Land Acquisition Collector assessed the value of the land even less than the amount, on which the respondent purchased the land in question. The respondent, being aggrieved and not satisfied with the price/value assessed by the Land Acquisition Collector, filed an award under Section 18 of the Land Acquisition Act in the office of the Land Acquisition Collector, the same was forwarded to the learned Senior Civil Judge, Multan, who after recording the evidence of the parties, finally assessed the value @ Rs. 2000/- per Marla, the price on which the respondent purchased the land through registered sale-deed on 07.08.1982.

3. The learned Senior Civil Judge, as appears from the judgment and decree impugned herein, very fairly assessed the value and granted the price mentioned in the sale-deed which was executed in favour of the respondent about ten years before the acquisition of land. Surprisingly, the appellate authority has even challenged this type of the decree, wherein the respondent is being paid the price of the day when the respondent purchased the property in question.

4. Learned counsel for the petitioner submitted, that the learned Senior Civil Judge erred in law to assess the value @ Rs. 2000/- whereas the respondent has failed to prove it by any cogent and confidence inspiring confidence. The learned counsel also submitted and pointed out, that the learned Senior Civil Judge, while passing the decree, has not mentioned anything including the price assessed by the Land Acquisition Collector and the amount awarded to the respondent in decree sheet.

5. Although the learned Trial Court/Senior Civil Judge has not mentioned the amount assessed by the Court of the land and the total amount given to the respondent while preparing the decree sheet, which should have been mentioned in the decree sheet. Undeniably, it was the paramount and mandatory obligation of the learned Senior Civil Judge, Multan, to mention the value assessed and the amount awarded by the Court to the respondent in the decree sheet. No doubt, it is an illegality.

6. But at the same time, it cannot be ignored at this stage, the respondent purchased the property in question in the year 1982, the award was announced on 08.081993, whereby the land of the respondent was acquired; the judgment and decree, on the reference field by the respondent, was announced by learned Trial Court on 20.12.2000, whereas the R.F.A. against the said judgment and decree is being decided in the year 2015 by this Court. Almost, more than two decades have been expired, therefore, it would not be fair and justiciable to remand the case at this stage to the learned Senior Civil Judge, Multan, on the ground of incomplete decree sheet. And even otherwise, the respondent, in any case is not at fault and because of action or inaction on the part of the Court or judicial system, the litigant should not suffer.

7. As earlier observed, that the learned Trial Court very fairly assessed the value of the land and the learned counsel for the petitioner could not succeed to point out anything which is contrary to this part of the judgment.

8. In view of the above, this appeal has no force and is dismissed. No order as to cost.

9. The office is directed to prepare the decree sheet strictly in accordance with the terms of the judgment.

R.F.A. dismissed.

2015 Law Notes 831

[Multan]

Present: **ALI AKBAR QURESHI, J.**

Shaista Nawaz

Versus

Govt. of Punjab through Secretary Schools Education Department, Punjab, Lahore, etc.

Writ Petition No. 3294 of 2015, decided on 18th March, 2015.

(a) Policy decision---

---The Courts should not interfere into the policy matters of the government, but if the policies framed by the government are detrimental to the interest of people, the Courts are not precluded to take cognizance and to interfere. (Para 9)

RECRUITMENT POLICY --- (Un-reasonableness)

(b) Constitution of Pakistan, 1973---

---Art. 199---Policy matter---Impugned Recruitment Policy, 2014 for appointment of educators---Qualifications---Unreasonableness---Stance of the department was that in fact the Govt. was intended to accommodate other graduates or holder of Master degree who were jobless---Government had advertised the requisite qualification for the appointment of educators to teach the students from primary to secondary school which was B.A/B.Sc, B.A Hons, B.Sc. Hons---If the candidates having qualification of Agricultural Engineer, B.Sc., Doctor of Veterinary, B.Sc. Engineering, were allowed to compete for advertised posts, in interview or in written test, definitely the highly qualified candidates *i.e.* having the qualification of B.Sc. Engineering, Agricultural Engineering, and Doctor of Veterinary would get better position as compared to a student who had done simply B.A, B.Sc. or B.A. Hons. or B.Sc. Hons.---By that way, the government although unintentionally but impliedly, would create more jobless persons in the country---If said policy was followed and adopted by the government, the candidates who had done B.A./B.Sc. would be in miserable condition and would be deprived to get a job easily---Respondent/Secretary, Education Department was directed to revisit the policy in question---Order accordingly.

(Paras 7, 8, 10, 11)

ایجوکیٹر کی تقرری کے متعلق ریکروٹمنٹ پالیسی 2014 قانون کے مطابق نہ تھی۔ ہائیکورٹ نے سیکرٹری ایجوکیشن ڈیپارٹمنٹ /رسپانڈنٹ کو مذکورہ پالیسی پر نظر ثانی کے لئے ہدایت صادر کی۔

[Recruitment Policy, 2014 for appointment of Educators was not in accordance with law. High Court directed the Secretary, Education Department/respondent to revisit the said policy].

For the Petitioner: **Ghulam Qadir Khan Chandia, Advocate.**

For the Respondent: **Mubasher Latif Gill, Additional Advocate-General alongwith Ghulam Yasin Bhatti, Litigation Officer, Office of the E.D.O., Education, Muzaffargarh.**

Date of hearing: **18th March, 2015.**

JUDGMENT

ALI AKBAR QURESHI, J. --- The petitioner, through this Constitutional petition, has challenged the vires of the Recruitment Policy, 2014 for the appointment of the Educator on the ground, that the policy is totally contrary to law and settled practice of recruitment.

2. The respondent-department, through an advertisement, invited applications for the recruitment of Educators for Primary, Elementary, Secondary and Higher Secondary Schools, on contract basis.

3. In the advertisement, the respondent-department has given the detail of academic qualification and experience in the same field. The required qualification as per the advertisement is as under:---

Nomenc-lature of Post	Academic Qualification (at least 2nd div)	Professional Qualification (at least 2nd div)
ESE	BA/B.Sc/BA (Honors)/ BSc(Hons)/BS(Honors)/BCS OR BS/B.Sc(Hons-4 years) in Agriculture or Engineering OR BSEd/MSEd/ADE/B.Ed (Honors-4 years)	B.Ed/M.Ed/ M.A (Edu)
ESE (Sci-Math)	B.Sc. with at least two subjects out of Chemistry, Zoology, Botany, Physics, Math-A Course, Math-B Course & Math OR DVM, Animal Husbandry, D-Pharmacy, MCS & BCS OR M.Sc/BS (Hons-4 years) in Physics/Chemistry/Botany/ Zoology/Math/Biochemistry/ Biotechnology/Environmental Sciences/all branches of Chemistry, Biology, IT/Computer Science OR B.Sc. (4-years) in Agriculture/all branches of Engineering OR B.Sc./BA with F.Sc. OR MSEd/BSEd with at least two subjects out of Chemistry, Zoology, Botany, Physics, Math-A Course, Math-B Course & Math	B.Ed/M.Ed/ M.A. (Edu)
ESE (English)	BA with English 200 Marks plus English Literature 200 Marks OR MA English or Masters of Teaching of English as Second Language/Linguistics	B.Ed/M.Ed/ M.A. (Edu)

SESE (Urdu)	M.A Urdu	B.Ed/M.Ed/ M.A. (Edu)
SESE (Math)	BSc with at least two subjects out of Math A, Math B, Math, Physics, Computer and Chemistry OR BSc in Engineering OR M.Sc in Math or Physics Or MSEd/BSEd with Math and Physics	B.Ed/M.Ed/ M.A (Edu)
SESE (Science)	BSc with at least two subjects out of Zoology, Botany, and Chemistry OR M.Sc Chemistry/Biochemistry/ Biotechnology/ Zoology/Environmental Science/Botany/Biology OR BSc in Engineering OR BSc (4-years) in Agriculture OR MSEd/BSEd with Zoology, Botany and Chemistry	B.Ed/M.Ed/ M.A. (Edu)
SESE (Arabic)	BA with Shahdat-ul-Almia OR M.A Arabic	B.Ed/M.Ed/ M.A. (Edu)
SESE (PET)	MA/MSc in Sports Sciences/Physical Education	B.Ed/M.Ed/ M.A (Edu)
SESE (DM)	M.A Fine Arts	B.Ed/M.Ed/ M.A (Edu)
SESE (Comp Sci)	MSc (CS)/MCS/MSc (IT)/MIT	B.Ed/M.Ed/ M.A (Edu)
SSE (Urdu)	M.A Urdu	B.Ed/M.Ed/ M.A (Edu)
SSE (English)	MA English or Master in Teaching of English as Second Language/Linguistics	B.Ed/M.Ed/ M.A (Edu)
SSE (Math)	M.Sc Mathematics	B.Ed/M.Ed/ M.A (Edu)
SSE (Physics)	M.Sc Physics	B.Ed/M.Ed/ M.A (Edu)
SSE (Biology)	M.Sc Zoology/Botany/Biology/Biotechnology OR BSc (4-years) in Agriculture	B.Ed/M.Ed/ M.A (Edu)
SSE (Chemistry)	M.Sc Chemistry/Biochemistry	B.Ed/M.Ed/ M.A (Edu)
SSE (Comp Sci)	MSc (CS)/MCS/MSc (IT)/MIT	B.Ed/M.Ed/ M.A (Edu)

"i. BS (Honors 4-years) in prescribed subjects/Master in any branch of the prescribed subject can also apply.

ii. The candidates having prescribed academic qualification will be considered for the posts of Educators. However, the candidates without prescribed professional qualification appearing in the merit list may be considered as per ranking criteria. Such candidates, in case of selection, will have to acquire the prescribed professional qualification within three years otherwise their contract will stand terminated, without any notice.

iii. The candidates having BA/B.Sc. with Diploma in Physical Education (one year) issued by the recognized Board of Intermediate and Secondary Education (BISE) or University can also apply for the post of SESE (PET). However, they will have to acquire prescribed academic qualification within five years. A part of MSc in Physical Education cannot be equated to Senior Diploma in Physical Education.

iv. The candidates having B.A/B.Sc. with Diploma in Fine Arts (one year) issued by the recognized Board of Intermediate and Secondary Education (BISE) or BA with Fine Arts an elective subject of 200 Marks issued by the recognized University can also apply for the post of SESE (DM). However, they will have to acquire prescribed academic qualification within five years."

4. It is very strange, that the respondent-department is going to appoint the Educators to teach the students from Primary to Higher Secondary School and the required qualification is B.A. B.Sc. or B.Sc. Hons. alongwith Agriculture Engineering, B.Sc., B.Ed. or D.V.M. Animal Husbandry, B. Pharmacy, M.C.S., B.C.S., as given in the afore-referred table.

5. Learned Additional Advocate-General submits, that in fact the government is intended to accommodate the other graduates or holder of Master Degree who are jobless. The contention raised by learned Additional Advocate-General, under instruction, is ridiculous as how a doctor of Veterinary Sciences can teach the student of Primary School or even the Higher Secondary School.

6. No doubt, as submitted by the petitioner, the government can frame the recruitment policies but in accordance with law and keeping in view the requirement. The Veterinary Doctor or B.Sc. Agricultural Engineering can be appointed in the institutions where this type of the education is imparting. Therefore, the policy framed by the respondent-department is totally against the law, and the principle laid down by the Hon'ble Superior Courts.

7. Learned Additional Advocate-General repeatedly argued, that the government is intended to accommodate the educated young lot. The intention of the government should be appreciated but at the same time, it is to be seen, that the government has advertised the requisite qualification for the appointment of educators to teach the students from primary to secondary school which is B.A/B.Sc, B.A Hons, B.Sc Hons, and if the candidates having the qualification of Agricultural engineer, B.Sc., Doctor of Veterinary, B.Sc. Engineering, are allowed to compete for the advertised posts, in interview or in written

test, definitely the highly qualified candidates *i.e.* having the qualification of B.Sc. Engineering, Agricultural Engineering, and Doctor of Veterinary will get better position as compared to a student who has done simply B.A, B.Sc. or B.A Hons., or B.Sc. Hons., and by this way, the government, although unintentionally but impliedly, will create a more jobless persons in the country, and if this policy was followed and adopted by the government, the candidate who has done B.A./B.Sc. would be in miserable condition and would be deprived to get a job easily.

8. Needless to observe, that the highly educated segment of the society *i.e.* B.Sc. Engineering, Agricultural Engineer, etc., should definitely be accommodated but at the proper place and even otherwise, it is the primary duty of the State to provide jobs to the qualified persons and also to create jobs for the unqualified or uneducated persons. It is too observed, that if a candidate who has done B.Sc. Engineering, Agricultural Engineering or DVM, etc., if appointed a teacher in Grade 11, 14, etc., that would also be a kind of unemployment, therefore, the government should re-visit its policy announced in the year 2014.

9. It is also always observed by the Hon'ble Superior Courts, that the Courts should not interfere into the policy matters of the government, but if the policies framed by the government are detrimental to the interest of people, the Courts are not precluded to take cognizance and to interfere.

10. In this view of the matter, this petition alongwith the order is dispatched to respondent No. 1/Secretary Schools Education Department, Punjab, Lahore, to form a committee to re-visit the policy in the light of observations made above and the law laid down by the Hon'ble Supreme Court of Pakistan from time to time.

11. Resultantly, this writ petition is disposed of with the above observations.

Order accordingly.

2016 C L C 248
[Lahore]
Before Ali Akbar Qureshi, J
ABDUL MAJEED and another----Petitioners
Versus
Mst. IRSHAD BEGUM and 10 others----Respondents

C.R. No.1022 of 2007, heard on 23rd June, 2015.

(a) Specific Relief Act (I of 1877)---
----Ss. 42 & 54---Civil Procedure Code (V of 1908), S.12(2)---Suit for declaration and perpetual injunction---Fraud and misrepresentation, proof of---General power of attorney---Scope---Arbitration agreement beyond power of attorney---Permissibility---Plaintiffs application under S.12(2) of C.P.C. and suit for declaration and perpetual injunction, were dismissed by both trial and appellate courts---Plaintiffs claimed that predecessor of defendants, being general power of attorney of their predecessor, had fraudulently and through misrepresentation transferred suit land in favour of his brother by obtaining decree on basis of arbitration award---Contention raised by plaintiffs was that said attorney was not empowered to enter into any arbitration agreement---Validity---All transactions, that were arbitration proceedings, announcement of award and making of award rule of court, were based on registered general power of attorney---Even if said power of attorney was admitted to be correct, attorney had not been given power to enter into any type of arbitration to dispose of suit property---Agreement for referring matter to arbitrator, award and filing of petition had been made on same day, which was sufficient to show fraud and misrepresentation on part of predecessor of defendants---Fraud vitiated even most solemn proceedings or order---General or special attorney could not go beyond scope of terms of power of attorney---General power of attorney, in order to transfer suit and in favour of his own brother, had to obtain permission from principal, predecessor of plaintiffs, which was missing in the present case---Courts below did not peruse record, particularly power of attorney, which was basis of all subsequent misdeeds and frauds---Appellate court, instead of appreciating and evaluating record, had dismissed appeal in very summary and slipshod manner, which was not warranted by law---Appellate court was expected to correct irregularities and illegalities committed by trial court---High Court, setting aside impugned judgment and decree along with all transactions conducted on basis of general power of attorney with regard to suit land, decreed the suit---Revision petition was allowed in circumstance.

Malik Riaz Ahmed and others v. Mian Inayat Ullah and others NLR 1992 SCJ 587; Unair Ali Khan and others v. Faiz Rasool and others PLD 2013 SC 190; Rashida Begum v. Ch. Muhammad Anwar and others PLD 2003 Lah. 522; Muhammad Jan v. Arshad Mehmood and 3 others 2009 SCMR 114; Rehmatullah and others v. Saleh Khan and others 2007 SCMR 729; Nasir Abbas v. Manzoor Haider Shah PLD 1989 SC 568 and Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others 2014 SCMR 914 rel.

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

----S. 12(2)---Contract Act (IX of 1872), S.182---Application under S.12(2), C.P.C.---Power of attorney--- Scope--- Fraud and misrepresentation-Determination---Attorney, in the present case, had not been given power to enter into any type of arbitration to dispose of suit property---Agreement for referring matter to arbitrator, award and filing of petition had been made on same day, which was sufficient to show fraud and misrepresentation.

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

----S. 115----Revisional jurisdiction of High Court---Scope---Concurrent findings---Principles---Court observed that even in case of concurrent findings of courts below, where courts below had acted with material irregularity and legal infirmity, High court could take cognizance of the matter under S.115 of C.P.C.

Nasir Abbas v. Manzoor Haider Shah PLD 1989 SC 568 and Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others 2014 SCMR 914 rel.

(d) Fraud---

----Fraud vitiates even most solemn proceedings or order.

Rehmatullah and others v. Saleh Khan and others 2007 SCMR 729 rel.

(e) Power of Attorney---

----General or special attorney cannot go beyond scope of terms of power of attorney.

Malik Riaz Ahmed and others v. Mian Inayat Ullah and others NLR 1992 SCJ 587; Unair Ali Khan and others v. Faiz Rasool and others PLD 2013 SC 190 and Rashida Begum v. Ch. Muhammad Anwar and others PLD 2003 Lah. 522 rel.

(f) Administration of Justice---

----Appellate jurisdiction---Duty of appellate court---Appellate court is always expected to correct irregularities and illegalities committed by trial court.

Malik Noor Muhammad Awan for Petitioners.

Nemo for Respondents.

Date of hearing: 23rd June, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- This civil revision calls in question the judgment and decree dated 14.12.2006 and 23.06.2001, whereby the learned Courts below through this single judgment dismissed the application under section 12(2) of Code of Civil Procedure, 1908, and suit (No.204/91) for declaration and for perpetual injunction.

2. The necessary facts for the disposal of this revision petition are that, the suit land was originally allotted to one Jan Muhammad predecessor-in-interest of the petitioners and proprietary rights were finally transferred through sale deed dated 07.04.1989; that the said Jan Muhammad remained in possession being owner of the suit land till his death, and after his death by operation of law, the petitioners being successors-in-interest came into the possession. Allegedly the predecessor of the respondents obtained a decree on the basis of an arbitration proceedings and the said decree was also given effect in the revenue record through mutation No.146, attested on 18.08.1989. The petitioners while filing the suit and the application under section 12(2) of Code of Civil Procedure, 1908, alleged that their

predecessor had not entered into any type of the transaction qua the suit land, neither received any consideration, therefore, the impugned decree on the basis of the arbitration oh the statement of special attorney of Jan Muhammad deceased is product of fraud and misrepresentation as the alleged power of attorney in favour of predecessor of the respondents is forged and fabricated. Lastly prayed, that the judgment and decree passed on the basis of arbitration proceeding and mutation along with special power of attorney be declared illegal, unlawful.

The suit was contested vehemently by the respondents on legal as well as factual grounds.

The learned Courts below out of divergent pleadings of the parties framed necessary issues, recorded evidence of respective parties and finally dismissed the application under section 12(2) of Code of Civil Procedure, 1908, as well as the suit for declaration and perpetual injunction on 23.06.2001. Against which an appeal was filed, which too was dismissed vide impugned judgment and decree 14.12.2006. Hence, this revision petition.

3. Learned counsel for the petitioners submits, that all the documents and particularly the general power of attorney allegedly executed by the predecessor-in-interest of the petitioners is forged and product of fraud and misrepresentation. Further pointed out, that if for the sake of arguments the general power of attorney is admitted correct, that no such power to enter into arbitration is mentioned, therefore, even on this ground all the proceedings are liable to be quashed.

4. Conversely, no one has entered appearance on behalf of the respondents despite publication in the newspaper, therefore, respondents have already been proceeded ex-parte vide order dated 23.06.2014.

5. Heard. Record perused.

6. It is revealed from the record, that all the transactions i.e. arbitration proceedings, announcement of award and making the award rule of the court, are based on a registered general power of attorney allegedly executed by the predecessor of the petitioners. Although the validity of general power of attorney has seriously been questioned by the petitioners but to find out the truth, the contents of general power of attorney dated 15.10.1981 (Ex.D1) were perused and examined, from where it is found, that even if this document is admitted correct, the attorney has not been given the power to enter into any type of the arbitration to dispose of the property. The relevant part of the power of attorney is reproduced hereunder:-

7. As evident from the record, that the agreement to refer the matter to the arbitrator, the award and filing of the petition all were made on the same day, which is sufficient to show the fraud and misrepresentation on the part of predecessor of the respondents. Further by way of the alleged arbitration and award, the predecessor of the respondents finally transferred the suit land in favour of his real brothers.

8. It is settled law that the attorney i.e. general/special attorney cannot go beyond the scope of the terms of the power of attorney. Reliance is placed on "Malik Riaz Ahmed, etc.

v. Mian Inayat Ullah, etc." (NLR 1992 SCJ 587), wherein the Hon'ble Supreme Court of Pakistan, has observed that:-

> "8. It is settled principle governing the relationship of Principal and agent that if the agent has any interest in the property or has any personal gain in the transaction he must disclose all facts to the principal. It is an admitted position that the bungalow is a joint property in which Respondent No.2 is one of the co-owners. He may have intended to sell his share in the property but the possibility cannot be ruled out that the price of a small share in a joint property may not be gainful or more profitable than the price for which the entire property can be sold. Therefore, Respondent No.2 may have thought it fit to sell the entire property which would have certainly benefited him materially. In such circumstances he was duty bound as the attorney of appellants No.2 to 6 to have brought to their notice the intended sale prior to entering into the agreement to sell. There was a complete failure on the part of Respondent No.2 to discharge his duty in this regard.
>
> 9. Section 214 of the Contract Act provides that it is duty of an agent, in cases of difficulty, to use all reasonable methods in communicating with his principal and in seeking to obtain his instructions. It, therefore, makes it obligatory on an agent to communicate with his principal and obtain his instruction in cases of difficulty. The determination whether a particular case will be covered by the expression 'case of difficulty' depends upon the facts and circumstances of each case. However, as the power of attorney has to be construed strictly and in cases of doubt and ambiguity for the benefit of the executant, in the facts of this case it seems that Respondent No.2 ought to have sought instructions and communicated with his principals. The facts that appellants Nos.3 to 6 are pardahnashin ladies, the interest Respondent No.2 has in the property, since the execution of the power of attorney Respondent No.2 had only been managing and had not sold a single property and further that the power of attorney was executed about 7 years back and the executants have been disputing that it was acted upon which only reflects the reluctant attitude of the principals, the case was of difficulty and it was obligatory for Respondent No.2 to have sought instructions from his principals."

The Hon'ble Supreme Court of Pakistan, while dealing with the same proposition in the judgment titled "Unair Ali Khan and others v. Faiz Rasool and others" (PLD 2013 SC 190), laid down that:-

> "3. It is settled law that power of attorney should be construed strictly and only such powers, which are expressly and specifically mentioned in the power of attorney, must be exercised by the agent as considered to have been delegated to him (for reference see PLD 2002 SC 71). "
>
> In another judgment delivered by this Court cited as "Rashida Begum v. Ch. Muhammad Anwar and others" (PLD 2003 Lahore 522), it has been observed that:-

"8. Attending to argument raised by the learned counsel for the appellant that the powers of attorney Ex.R-13, did not authorize Muhammad Nazir to enter into any arbitration agreement and thus the agreement and the award based thereupon are invalid. It is fundamental rule of law that the power of attorney must be strictly construed. If any reference in this behalf is required, reliance can be placed on the case reported as Muhammad Yasin and others v. Dost Muhammad and others (PLD 2002 SC 71). Applying this principle, I have gone through the power of attorney and find that though there are general powers conferred upon the attorney, to conduct the cases before the Courts and also to alienate the property, but there is no specific power given to him to enter into any arbitration agreement on behalf of ladies, for the reference of the matter to the arbitrator. The general powers mentioned above, cannot in any manner be construed, the intention of the ladies to authorize their agent to seek the resolution of the dispute through arbitration. If the ladies intended to confer such power, nothing prevented them to have specifically empowered the attorney, in this behalf. This conspicuous omission of authority in the power of attorney clearly indicates that Muhammad Nazir was never authorized to enter into the arbitration agreement, therefore, notwithstanding whether Muhammad Nazir factually executed the arbitration agreement on behalf of the daughters of Muhammad Bakhash with the respondents and had agreed for the appointment of Muhammad Asghar, even on the principle of acquiescence on his part such an agreement, would not bind the appellant and the other ladies."

9. As regard the transfer of suit land by the attorney in result of the so called arbitration in favour of his own brother, it is also settled proposition of law that the general attorney in this situation had to obtained the permission from the principal i.e. predecessor of the petitioner which is missing in this case. Reliance is placed upon the judgment of the Hon'ble Supreme Court of Pakistan i.e. "Muhammad Jan v. Arshad Mehmood and 3 others" (2009 SCMR 114). The relevant paragraph of this judgment is reproduced hereunder:-

"In the case of Jamil Akhtar (supra) the question pertained to registration of transfer of property by an attorney in his own name where registered general power of attorney did not authorized such a transfer. It is settled principle of law that whenever a general attorney transfers the property of his principal in his own name or in the name of his close fiduciary relations, he has to take special permission from the principal. Therefore, the case is distinguishable from the present petition."

Therefore, it can safely be observed in the light of the judgment passed by the Hon'ble Supreme Court of Pakistan cited as 'Rehmatullah and others v. Saleh Khan and others" (2007 SCMR 729), that the fraud vitiates even most solemn proceedings/order.

10. It is very strange, as appears from the findings of the learned courts below that both the learned courts have not even bothered to peruse the record and particularly the power of attorney which is in fact the basis of all the subsequent misdeeds and frauds. The learned appellate court being the first court of appeal instead of appreciating and evaluating the record in a very summery and slipshod manner had dismissed the appeal, which in any case, is not warranted by law. The learned courts below and specially the learned appellate court

is always expected, that the appellate court will correct and set at right the irregularities and illegalities committed by the court of first instance.

11. Although both the learned courts below recorded concurrent finding's but the Hon'ble Supreme Court of Pakistan has observed; that the if the courts below acted with material irregularity and legal infirmity, the High Court while exercising the revisional jurisdiction conferred under section 115 of Code of Civil Procedure, 1908, can take the cognizance of the matter.

The Hon'ble Supreme Court of Pakistan in the judgment titled "Nasir Abbas v. Manzoor Haider Shah" (PLD 1989 Supreme Court 568), has observed that this type of the concurrent findings can be interfered. The relevant portion is reproduced as under:

> "11. ….. It is also settled that if the lower Court, misreads the evidence on record and fails to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court. See Dwarika v. Bagawati (AIR 1939 Rangoon 413) and Fut Chong v. Maung Po Cho (AIR 1929 Rangoon 145)."

In another esteemed judgment cited as "Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others" (2014 SCMR 914), the Hon'ble Supreme Court of Pakistan has observed as under:

8. The argument that when all the fora functioning in the revenue hierarchy concurrently held that the appellants were occupying the land in dispute in their capacity as tenants, such finding being one of fact could not have been interfered with by the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, has not impressed us as a finding does not become sacrosanct because it is concurrent. It becomes sacrosanct only if it is based on proper appraisal of evidence. The finding of the fora functioning in the revenue hierarchy despite being concurrent was not based on proper appraisal of evidence and due application of law therefore, the High Court was well within its jurisdiction to interfere therewith. For the very condition for conferment of jurisdiction on a Court of law is to render a finding on proper appraisal of evidence and due application of law. If and when it would do otherwise, it would go outside its jurisdiction. Such order can well be quashed in exercise of Constitutional jurisdiction of the High Court. An order thus passed cannot be protected because the repository of such jurisdiction has the jurisdiction to pass it. Lord Denning in his well-known book "the Discipline of law", while commenting on orders of this nature at page 74, observed as under:-

> "This brings me to the latest case. In it I ventured to suggest that whenever a tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void, because parliament only conferred jurisdiction on the tribunal on condition that it decided in accordance with law."

Another paragraph of this book at page 76 also merits a keen look which reads as under:-

"I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so as to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in what court it is heard. The way to get things right is to hold thus: No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."

12. In view of above, this civil revision is allowed. Consequently, the judgment and decree dated 14.12.2006 and 23.06.2001, passed by the learned courts below, is set aside, all the transactions qua the suit land conducted on the basis of general power of attorney are also set aside and the suit filed by the petitioners is decreed. No order as to cost.

SL/A-141/L Petition allowed.

2016 C L C 502
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD ANWAR----Petitioner
Versus
GHULAM KHADIJA and another----Respondents

W.P.No.18924 of 2011, decided on 30th September, 2015.

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

----O. VIII, R.10---Suit for recovery of damages---Written statement, non-filing of---Right of defence, striking of---Scope---Trial Court granted adjournment for filing of written statement which was challenged by the plaintiff---Revisional Court while accepting the revision struck off right of defence of defendant---Validity---Revisional Court without adverting to the record and law applicable to the case accepted the revision petition---Trial Court did not pass a specific order to file written statement---Revisional Court had struck off the valuable right of defendant to file written statement---Litigant could not be deprived from his valuable right---Impugned order passed by the Revisional Court was harsh which was not sustainable---Law would favour adjudication on merits instead of technicalities---- Defendant was given only one opportunity to file written statement---Defendant was directed to appear before the Trial Court on the date fixed and file his written statement---If defendant failed to file his written statement then his right of defence would be deemed to be struck off---Constitutional petition was accepted in circumstances.

(b) Administration of justice---

----Law would favour adjudication on merits instead of technicalities.

Mian Tariq Hussain for Petitioner.
Nemo for Respondents.

ORDER

ALI AKBAR QURESHI, J.--- This Constitutional petition is directed against an Order dated 16.06.2011, whereby the learned appellate court accepted the revision petition against the Order dated 21.12.2010, passed by the learned trial court.

2. Shortly the facts as stated in the record are, that the respondent/plaintiff filed a suit for recovery of Rs.24,000/- on account of damages. The petitioner/defendant appeared in response of the notice issued by learned trial court through his counsel. The learned counsel engaged by the petitioner/defendant submitted his wakalatnama and sought time to file the written statement. On the next date the petitioner could not file written statement and the case was adjourned to 23.11.2010, 21.12.2010 and 24.01.2011. The respondent being aggrieved of the adjournments granted by the learned trial court filed a revision petition. The learned Addl: District Judge/Revisional Court after hearing the arguments of the parties accepted the revision and struck off the right of defense of the petitioner. Hence, this Constitutional petition.

3. No one has entered appearance on behalf of the respondents despite service, therefore, proceeded against ex parte.

4. As appears from the record, the learned trial court to file the written statement granted adjournments in routine to the petitioner, who could not file the written statement on the first date fixed by the learned trial court for the said purpose. Against the said order the respondent filed the revision petition before the learned Addl. District Judge, Bhakkar. The learned Addl. District Judge, Bhakkar, without adverting to the record and law applicable to this case, accepted the application and struck off the valuable rights of the petitioner. It is revealed from the record, that the learned trial court did not pass a specific order to file the written statement therefore, this type of the harsh order passed by the revisional Court is not sustainable and a litigant cannot be deprived from his valuable right.

Even otherwise the law always favours the adjudication on merits instead of beating the litigants on technicalities.

5. In view of above, the petitioner is given only one opportunity to file the written-statement.

6. Resultantly, this petition is allowed. Petitioner is directed to appear before the learned trial court on 12.10.2015 and file his written statement on 16.10.2015. In case of failure the right of the defense of the petitioner to file the written statement shall be deemed to be struck off. No order as to cost.

ZC/M-292/L Petition allowed.

2016 C L C 736
[Lahore]
Before Ali Akbar Qureshi, J
Rana LIAQUAT ALI and 10 others----Petitioners
Versus
Mst. AZIZAN and 5 others----Respondents

C.R.No.1137-D of 2003, heard on 28th April, 2015.

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

----Ss. 53 & 118---Mutation of exchange---Illiterate lady---Plaintiff was an illiterate, ignorant and blind lady---Nobody out of family members of plaintiff was present at the time of executing the alleged exchange mutation to identify and look after her---Land measuring 19 kanals and 04 marlas was being exchanged with land measuring 02 kanals owned by the defendant---Defendant who was brother of plaintiff had committed fraud with her---Revision was dismissed with cost of Rs.25,000/- which should be paid to the plaintiff/respondent.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 and Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi 2013 SCMR 868 rel.

Rana Majid Ali for Petitioners.

Nemo for Respondents.

Date of hearing: 28th April, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- This civil revision is directed against the judgments and decrees dated 06.10.2003 and 27.03.2001, passed by the learned Courts below, whereby the suit for declaration filed by the respondent/plaintiff namely Mst. Azizan Bibi, was decreed.

2. Necessary facts for the disposal of this civil revision are, that the respondent/plaintiff/Mst. Azizan Bibi, who is blind by birth, filed a suit for declaration contending therein, that she obtained the suit land measuring 19 kanal 04 marlas, through inheritance out of the legacy of her deceased father; that the suit property was cultivated by the Sakhawat Ali/defendant with her consent, who was real brother of the respondent/plaintiff, that when the petitioners/defendants stopped to pay the share of produce to the respondent/plaintiff, the respondent/plaintiff who is dependent upon others being blind by birth, when inquired, it came into her knowledge that the defendant Sakhawat Ali (predecessor of the petitioners) by playing fraud and misrepresentation alienated the suit land in his favour by virtue of mutation of exchange No.1872, dated 04.06.1994, with the connivance of the revenue staff, that the respondent/plaintiff neither executed any mutation of exchange in favour of the defendant/Sakhawat Ali nor appeared before any revenue officer, therefore, all the proceedings of mutation of exchange are bogus and result of fraud; that the petitioner/defendant by way of alleged mutation has given land measuring 02 kanals in exchange of land measuring 19 kanals 04 marlas, which is otherwise inadequate and lastly

prayed that the exchange mutation and other revenue proceedings be declared illegal, unlawful and without lawful authority.

The defendants/petitioners appeared in response of the notices, issued by the learned trial court, filed written statement, wherein the defendants contended, that in fact the respondent/plaintiff sold the suit land but in order to defeat the right of pre-emption it was coloured as Exchange.

The learned trial Court out of the controversial pleadings of the parties framed the necessary issues, recorded the evidence of the parties and finally decreed the suit vide judgment and decree dated 27.03.2011. The petitioners/defendants being aggrieved of the judgment and decree of the learned trial Court, filed an appeal which too was dismissed by the learned appellate court vide judgment dated 06.10.2003. Hence, this civil revision.

3. Arguments heard. Record perused.

4. The record available on the file was scanned and examined with the assistance of learned counsel for the petitioners, from where it is found that it is not denied by the petitioners that the respondent/plaintiff is his real sister, who is blind by birth and inherited the suit property out of the legacy of her deceased father, the defendant Sakhawat Ali (predecessor of the petitioners) through the alleged exchange given land measuring 02 kanals in place of 19 kanals 04 marlas of the same category, the respondent/ plaintiff is an illiterate and ignorant lady and at the time of executing the alleged mutation of exchange nobody out of the family members of the blind lady/respondent was there not only to identify her but also to look after her affairs.

6.(sic) It is sufficient to prove the factum of fraud committed by defendant/Sakhawat Ali with the respondent/plaintiff/Mst. Azizan Bibi, who is his real sister, that a piece of land measuring 19 kanals 04 marlas is being exchanged with 02 kanals, meaning thereby the real brother gave land measuring 02 kanals and got 19 kanals & 04 marlas. This is in fact not only a fraud but also an example of greediness, which in fact compelled defendant/Sakhawat Ali to commit a fraud with his real sister, who is blind.

7. The Hon'ble Supreme Court of Pakistan has already dealt with these type of the propositions in the following esteemed judgments titled Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 Supreme Court 1), wherein the Hon'ble Supreme Court of Pakistan has observed, that the women, who are weaker segment of the society, should not be deprived from their right of inheritance in the name of customs or by emotionally exploiting them. The relevant portion is reproduced as under:

> "As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case) is so wide and their thrust so strong that it is the duty of the Courts to protect and

enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.

In the rural areas where 80% of the female population resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an ubranised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'rights', up to the enforcement' even in homes, through `Social Security' Laws, with web of network of 'Inspectorates' etc. who are supposed to be helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin --- sometimes by the urbanized brother himself is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

Secondly, the respondent/plaintiff, who is not only an illiterate lady but also blind by birth and at the time of exchange and entering of the alleged mutation of exchange, no male member of her family was present there to identify her, to witness the exchange and entering of the disputed mutation. To resolve this controversy, the reliance is placed on Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi (2013 SCMR 868), wherein the Hon'ble Supreme Court of Pakistan has ruled, that the legal protection provided to the Parda Nasheen lady is also available to an illiterate lady. The relevant esteemed paragraph is reproduced as under:

"6. ....The contention that the general power of attorney was given by the respondent/plaintiff not to a stranger but to her own son-in-law and that she was not a 'Pardanasheen Lady' for which the courts of law have provided protection is not tenable in the facts and circumstances of the instant case, first, because it is in evidence that the relations between the two were too strained on account of the discord between him and her daughter and in the normal course of events she could not have reposed

that kind of trust; second, the protection provided to them in law is on account of the fact that they invariably are helpless, weak and vulnerable. The said consideration would equally be attracted to an illiterate lady particularly when she was placed in circumstances which made her vulnerable to deceit misrepresentation."

8. In view of the law laid down by the Hon'ble Supreme Court of Pakistan, which is squarely applicable on the facts of the instant case, this civil revision is dismissed with cost of Rs.25,000/- which shall be paid to the respondent/plaintiff Mst. Azizan Bibi.

ZC/L-5/L Revision dismissed.

2016 C L C 1744
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
FAIZ MUHAMMAD through L.Rs. ----Petitioners
Versus
MUHAMMAD BOOTA through L.Rs. and others----Respondents

C.R. No.579-D of 1996, decided on 4th February, 2015.

(a) Qanun-e-Shahadat (10 of 1984)---
----Ars. 17, 72, 78, 79 & 117---Specific Relief Act (I of 1877), S.42---Suit for declaration---Exchange deed, proof as to execution/authenticity---Plaintiffs filed suit challenging the validity of exchange deed regarding agricultural land on ground that (defendant) while being their tenant in said agricultural land had prepared the exchange deed by playing fraud and misrepresentation and the deed was illegal and unlawful---Plea raised by defendants was that they had transferred a piece of land in name of plaintiffs as consideration of said exchange deed and the same was valid---Trial court decreed the suit and appellate court affirmed the same on ground that plaintiffs had succeeded in proving their claim---Validity---Burden to prove genuineness and validity of the exchange deed was on defendant---Defendants could not produce any marginal witnesses to the deed and failed to prove both execution and registration thereof---Contradiction in statements of oral witnesses were found---Proceedings for comparison between thumb impressions of parties on the deed were conducted and thumb impressions were found different---Defendants had failed to adduce any solid, cogent or reliable evidence to substantiate their claim---Mere registration of document was not sufficient to prove its execution and validity---Courts below had rightly reached the concurrent findings both on facts and on law and there was no reason to interfere with the same---High Court dismissed the petition.

(b) Civil Procedure Code (V of 1908)---
----S. 115----Scope---Concurrent findings, interference with---High Court normally does not interfere in concurrent findings unless the same is the result of exercise of jurisdiction not vested with the courts below.

Muhammad Tahir v. The State PLD 1984 Pesh. 56; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161;

Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984; and Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 ref.

Malik Waqar Haider Awan for Petitioners.

Ch. Ayyaz Muhammad Khan for Respondents

Date of hearing: 25th November, 2014.

JUDGMENT

ALI AKBAR QURESHI, J.--- This civil revision is directed against the judgment and decree dated 09.04.1996 and 15.06.1993, passed by the learned courts below, whereby the suit for declaration filed by the respondents was decreed.

2. In this case, the respondents filed suit for declaration, challenging the validity of an exchange deed of agricultural land, alleging therein, that the petitioners/defendants were tenant over the land in question and during the tenancy period, the petitioners/defendants by playing fraud and misrepresentation and with the connivance of the concerned official, prepared a forged exchange deed of the land to deprive him from the valuable land. Lastly prayed that the exchange deed, which is product of fraud be declared illegal and unlawful.

The petitioners/defendants contested the suit by filing written statement, and controverted the contents of plaint as stated, that in lieu of exchange, the petitioners also had transferred a piece of land in the name of the respondents/plaintiffs through the exchange deed duly executed by the parties, therefore, no fraud was committed.

3. The learned trial court settled down the issues on the basis of the pleadings of the parties, recorded the evidence and finally decreed the suit. In appeal filed by the petitioners, the learned appellate court affirmed the judgment and decree passed by the learned trial court and dismissed the appeal vide judgment and decree dated 09.04.1996.

4. After hearing the arguments and examining the record, it is found, that the burden was placed by the learned trial court at the time of framing the issues on the petitioners/defendants to prove the genuineness and validity of the sale deed. As, evident from the record, the petitioners/defendants could not produce even a single marginal witness of the alleged sale deed despite the fact, that one of the marginal witness namely, Kaura, was alive and no explanation to this effect was offered by the petitioners. Therefore, this is sufficient to hold that the petitioners/defendants have failed to prove the execution and registration of the exchange deed allegedly executed by the respondent namely Muhammad Boota. Another aspect of the case goes against the petitioners that the witness appeared as DW2, namely, Muhammad Bakhash stated that he does not know the name of the village, where the land is located, although he claimed to be in cultivation possession of the land, whereas DW3 Muhammad Khan/defendant who is son of Allah Dad, the deceased petitioners, although stated that the petitioners have also given a valuable land in exchange but also stated that he was not present at the time of settlement of the transaction of exchange. The learned trial court in order to ascertain the true facts and for a fair and just adjudication of the mater, also sent the thumb impression of the respondents, allegedly affixed on Al-Abadat for comparison. The concerned official who conducted the proceedings of the comparison of thumb impression appeared in the court as PW4 and stated, that the thumb impression of the parties regarding registered exchange deed

No.2921/1 were found different. Even otherwise, as evident from the record, that the petitioners have miserably failed to adduce any solid, cogent or reliable evidence to substantiate their claim as mere registration of document is not sufficient to prove, its execution and validity. As regard the statement of the witnesses on oath recorded on solemn affirmation, both the learned courts below have rightly concluded that no objection at the relevant time was raised by the petitioners. Reliance is placed on "Muhammad Tahir v. The State" (PLD 1984 Peshawar 56).

5. As regard the concurrent finding on facts and law, I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the cases of Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), and Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT,) and another (2008 SCMR 428) that the High Court, normally does not interfere unless the same is result of exercise of jurisdiction not vested with the learned courts below.

6. The learned courts below as evident from the concurrent findings, on facts and on law rightly reached to the conclusion that the respondents have succeeded to prove their case, therefore, there is hardly any reason to interfere therewith. Resultantly, this civil revision stands dismissed with no order as to costs.

SL/F-15/L Petition dismissed.

2016 C L C 1832
[Lahore]
Before Ali Akbar Qureshi, J
AYESHA MOEEN----Petitioner
Versus
APPELLATE RENT TRIBUNAL/ADDITIONAL DISTRICT JUDGE, LAHORE and 4 others----Respondents

W.P. No.6324 of 2016, heard on 20th June, 2016.

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

----S. 10---Specific Relief Act (I of 1877), S.12---Agreement to sell after execution of tenancy agreement---Effect---Suit for specific performance on the basis of agreement to sell---Dismissal of ejectment petition---Grounds---Agreement to sell or any other agreement entered into between the landlord and the tenant, after execution of a tenancy agreement, in respect of premises and for a matter other than a matter provided under the tenancy agreement, shall not affect the relationship of landlord and tenant unless the tenancy was revoked through a written agreement entered before the Rent Registrar in accordance with the provisions of S.5 of the Punjab Rented Premises Act, 2009---In the present case, the agreement to sell was executed on 05.06.2012, whereas the lease agreement was dated 28.02.2012---Agreement to sell would have no effect upon the ejectment petition and the

tenancy was to be regulated by the terms of lease agreement---Pendency of a suit for specific performance on the basis of agreement to sell of the rented premises executed during pendency of tenancy was not a sufficient ground to dismiss the ejectment petition---Leave to defend filed by the tenant was also dismissed which disclosed that tenant failed to prove its case before the Trial Court---Ejectment order passed by the Trial Court was upheld---Constitutional petition was allowed accordingly.

Haji Muhammad Saeed v. Additional District Judge 2012 MLD 108 rel.

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

----S. 15---Specific Relief Act (I of 1877), S.12---Eviction of tenant---Grounds---Pendency of suit for specific performance---Pendency of a suit for specific performance on the basis of agreement to sell of the rented premises executed during pendency of tenancy was not a sufficient ground to dismiss the ejectment petition.

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

----O. XLI, R. 41---Remand of case---Principles---Cases not to be remanded in routine but in extraordinary circumstances and if the material was available and sufficient to decide the appeal on merits, the appeal etc. should finally be decided on merits, instead of remanding the matter on technicalities.

Muhammad and 9 others v. Hasham Ali PLD 2003 SC 271; Ashiq Ali and others v. Mst. Zamir Fatima and others PLD 2004 SC 10 and Mst. Shahida Zareen v. Iqrar Ahmed Siddiqui 2010 SCMR 1119 rel.

Ch. Abdul Majeed Gondal for Petitioner.

Hafeez-ur-Rehman Mirza for Respondents Nos.3 to 5.

Date of hearing: 20th June, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.--- This Constitutional petition is preferred against the validity and propriety of a judgment dated 25.01.2016, passed by the learned Additional District Judge, Lahore, in an ejectment petition filed under the provisions of the Punjab Rented Premises Act, 2009, whereby the learned Appellate Court accepted the appeal filed by the respondents, set aside the ejectment order dated 21.06.2014, allowed the petition for leave to contest and defend the suit, and remanded the matter to the learned Special Judge Rent, Lahore, for afresh decision on the ejectment petition filed by the petitioner.

2. It is necessary to give the brief history of the case before deciding the Constitutional petition:---

The rented premises No.121-D Gulberg-II, Lahore, owned by the petitioner was rented out at the monthly rent of Rs.200,000/- with an annual increase of 10% to the respondent No.3; Rs.12,00,000/- was paid as advance rent of six months along with

security amount of Rs.600,000/- and by this way, the respondent No.3 paid a sum of Rs.18,00,000/-; a written agreement was also executed for a period of 11 months in favour of the petitioner; the registration of the lease agreement under Section 5(2) of the Act ibid was although contested by the respondents Nos.3 to 5 but ultimately it was ordered to be registered by learned Special Judge Rent; that during the process of registration of the lease agreement, the respondents filed a suit for specific performance of an agreement to sell allegedly executed by the petitioner along with an application for interim relief; the application was dismissed on 12.07.2013; the petitioner, after succeeding to register the lease agreement, filed an ejectment petition; the respondent, in response of the notices, appeared before the Court, filed an application for leave to contest which was dismissed; against which an appeal was filed by the respondent which too was dismissed; the respondent, being dissatisfied of the dismissal of the appeal dated 13.07.2013, filed a Writ Petition No.29341/2013, which was also dismissed; finally the ejectment petition, filed by the petitioner, was allowed and the respondents were directed to hand over the vacant possession of the premises to the petitioner within thirty days. Against the acceptance of the ejectment petition order dated 21.06.2014, the respondents filed an appeal before the learned Additional District Judge, Lahore, which was finally allowed and the case was remanded to the learned Trial Court for afresh decision.

3. Learned counsel for the respondents, at the very outset of the arguments submitted, that the application for the consolidation of the suit for specific performance of an agreement filed by the respondents and ejectment petition filed by the petitioner is still undecided but the learned Special Judge Rent, without taking cognizance of this aspect of the case, allowed the ejectment petition.

4. Unfortunately, the learned counsel for the petitioner had not annexed the application for consolidation of the aforesaid two suits and the same was also not available with the learned counsel for the respondents, therefore, on their request, the record was summoned.

5. During the course of arguments, it was admitted by both the learned counsel for the parties, that the application for consolidation of suits was filed in the suit for specific performance of the agreement, filed by the respondents.

6. Learned counsel for the petitioner, in response thereof submitted, that the application filed by the respondents for the consolidation of the suit has nothing to do with the appeal filed by the respondents against the acceptance of the ejectment petition. Further submitted, that the order of remand made by learned Appellate Court is otherwise without lawful authority on the ground, as the consolidation of suit for specific performance and ejectment petition is otherwise not permissible in law.

7. Heard. Record perused.

8. In order to examine the validity of the remand order made by the learned Appellate Court, the record of the case, including the suit for specific performance and the ejectment petition, was perused with the assistance of learned counsel for the parties. From the record

of the case it is found, that the relationship of landlord and tenant is admitted which is on the basis of a lease agreement, admittedly executed by the respondent in favour of the petitioner. The lease agreement was got registered under Section 5(2) of the Act ibid, which is reproduced as under:-

> **"5. Agreement between landlord and tenant.---**
>
> (1) …….
>
> (2) A landlord shall present the tenancy agreement before the Rent Registrar."

As per record, the agreement to sell was executed on 05.06.2012, whereas the lease agreement is dated 28.02.2012, therefore, the agreement to sell which is later in time would have no effect upon the ejectment petition and the tenancy is to be regulated by the terms of the lease agreement. The alleged agreement to sell was prepared on 05.06.2012 which is admittedly after the registration of the lease agreement dated 28.02.2016 of the rented premises and the respondent has filed the suit for specific performance on the basis of the aforesaid agreement, which is still pending adjudication.

9. Although a suit for specific performance has already been filed by the respondents on the basis of the agreement to sell but it is to be seen, as to whether the alleged agreement to sell was got registered or brought into the notice of the learned Special Judge Rent. The Legislature, in order to curb and discourage the old practice, when most of the tenants taking the benefit of lacunas of late enactment namely, West Pakistan Urban Rent Restriction Ordinance, 1959, used to prepare agreement to sell during the currency of the tenancy to deprive the landlord/land owner from the monthly rent and even some times from their title, in the new law (Punjab Rented Premises Act, 2009) has inserted Section 10, which is reproduced as under:

> **"Effect of other agreement.---** An agreement to sell or any other agreement entered into between the landlord and the tenant, after the execution of a tenancy agreement, in respect of premises and for a matter other than a matter provided under the tenancy agreement, shall not affect the relationship of landlord and tenant unless the tenancy is revoked through a written agreement entered before the Rent Registrar in accordance with the provisions of section 5."

The aforesaid provision of law is self-explanatory and needs no further interpretation.

10. It is admitted on record, that in this case, no exercise for the revocation of tenancy agreement through a written revocation agreement provided under Section 5 of Act ibid was initiated nor the agreement to sell, in any manner whatsoever, was placed before the Rent Registrar/ Special Judge Rent, therefore, the alleged agreement to sell claimed to have been executed by the petitioner would have no baring effect upon the pendency of the rent petition/appeal. Reliance is placed on Haji Muhammad Saeed v. Additional District Judge (2012 MLD 108). The learned Civil Judge/Trial Court, before whom the suit for specific

performance filed by the respondents is pending, will also look into this aspect of the case while deciding the suit for specific performance.

11. Since, the relationship of landlord and tenant between the parties is admitted, the leave to defend filed by the respondent/tenant was dismissed, thus, it is observed, that the respondent failed to prove his case before the learned Special Judge Rent. It is settled proposition of law, that mere pendency of a suit for specific performance on the basis of an agreement to sell of the rented premises executed during period of tenancy is not a sufficient ground to dismiss the ejectment petition. Needless to mention, that it has already been held in plethora of judgments, that in case the vendee/tenant succeeds in getting a decree in the case of specific performance, the tenant can ask for the re-possession of the rented premises.

12. The learned Appellate Court, who remanded the matter, unfortunately completely failed to apply its judicious mind or to exercise the jurisdiction vested with it while deciding the appeal filed by the respondent. The learned Appellate Court has not even bothered to see the record of the instant case and to consult the law applicable on the case. The learned Appellate Court, as appears from the record of the instant case, had sufficient material to decide the appeal on its own merits instead of remanding the matter on flimsy grounds to the learned Special Judge Rent for re-decision of the ejectment petition. It has been held many a times by the Superior Courts, that the cases should not be remanded in routine but in extraordinary circumstances and if the material is available and sufficient to decide the appeal on merits, the appeals etc. should finally be decided on merits, instead of remanding the matter on technicalities. Reliance is placed on Muhammad and 9 others v. Hasham Ali (PLD 2003 SC 271) Ashiq Ali and others v. Mst. Zamir Fatima and others (PLD 2004 SC 10) and Mst. Shahida Zareen v. Iqrar Ahmed Siddiqui (2010 SCMR 1119). Relevant part of the judgment supra (PLD 2003 SC 271) is reproduced as under:--

> "8. The appellate and the revisional Court is always empowered to remand the case in terms of Order XLI, Rule 25, C.P.C. but this discretionary power is used only in exceptional situation and if the parties have led evidence with regard to the particular point and the Court of first instance by giving specific finding on the said point as a pivotal question of fact decided the same in the light of evidence available on record, the remand of the case in appeal or revision for mere reason that a specific issue was not framed on such point is not proper exercise of jurisdiction. The case in hand was not of the nature in which without framing a specific issue the controversial question regarding nature of transaction whether sale or mortgage could not be decided by the appellate Court on the basis of evidence available on record therefore, remand of the case by the appellate Court on the trial Court was not proper and further the High Court instead of saving the parties from unnecessary agony of litigation committed the same mistake and remanded the case to the trial Court with additional direction of framing of fresh issue and recording of further evidence if need be. The proper course for the High Court was to send the case back to the appellate Court for decision of appeal on merits."

13. In view of above, this writ petition is allowed, the appeal of the respondents is dismissed and the ejectment order passed by the learned Special Judge Rent, Lahore is upheld. No order as to costs.

WA/A-81/L Petition accepted.

2016 M L D 39
[Lahore]
Before Ali Akbar Qureshi, J
Mst. KATTU and others---Petitioners
Versus
EESA---Respondent

C.R. No.880-D of 1996, decided on 7th April, 2015.

Specific Relief Act (I of 1877)---

----S. 42---Suit for declaration---Inheritance---Limitation---Trial Court while non-suiting the plaintiffs on the question of limitation had over-looked the relief claimed by them---Filing a suit for declaration to correct the revenue entries in the matter of inheritance was not necessary, however, if suit was filed for the purpose, Law of Limitation would not apply---Plaintiffs being legal heirs of the deceased were entitled to inherit the property to the extent of their shares---Findings recorded by the Appellate Court with regard to limitation were set aside and suit filed by the plaintiffs was declared to be within time---Revision was accepted in circumstances.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Muhammad Zubair and others v. Muhammad Sharif 2005 SCMR 1217 and Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801 rel.

Muhammad Shehzad Langrrial for Petitioners.

Nemo for Respondent.

Date of hearing: 7th April, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision assails the judgments and decrees dated 27.09.1995 and 31.10.1991, whereby the learned Courts below dismissed the suit for declaration filed by the petitioners on the point of inheritance.

2. No one has entered appearance on behalf of the respondent, therefore, proceeded ex parte.

3. As reveals from the record, a suit for declaration was filed by the petitioners contending therein, that one Rehman s/o Fateh, predecessor of the parties to the suit, was owner of land measuring 62 kanals and 16 marlas, in khata No.76 and 01 marla in Khata No.77; Rehman s/o Fateh died issueless and mutation No.193, dated 30.04.1980 was sanctioned in favour of the respondents regarding the legacy of Rehman s/o Fateh, depriving the petitioners/plaintiffs of their inheritance share although the petitioners are residuary of equal decree.

The suit was contested by the respondent mainly on the ground, that the suit is barred by time and the respondent also did not admit the pedigree table given by the petitioners in the plaint. On the controversial pleadings of the parties the learned trial Court framed five issues including issue No.3, relating to the limitation of the suit. The learned trial Court recorded

the evidence of the parties and finally after hearing the parties dismissed the suit. Being aggrieved of the judgment and decree passed by the learned trial Court the petitioners preferred an appeal, wherein the learned appellate Court granted the relief to the extent of the status of the petitioners and declared, that the petitioners are also real legal heirs of Rehman s/o Fateh and reversed the findings of issues No.1 & 2 but dismissed the appeal on the ground of limitation, hence this civil revision.

3. The record and the findings of the learned appellate Court was perused. Arguments heard.

4. It appears from the record, that the learned trial Court non-suited the petitioners on the ground, that the petitioners are not legal heirs of Rehman s/o Fateh, therefore, are not entitled to inherit anything from the legacy of Rehman s/o Fateh, who died issueless. In appeal, the learned appellate Court although reversed the findings on issue No.1 & 2 and declared that the petitioners/plaintiffs No.1 to 3 are real legal heirs of Rehman s/o Fateh and are of equal degree but dismissed the appeal on the ground that the suit for declaration has been filed by the petitioners after the time stipulated by the law. Therefore, the only question which is to be appreciated and decided is the question of limitation involved in the matter.

4(sic) Admittedly, in this case the question of inheritance is involved and as evident from the record, the petitioners claiming themselves legal heirs of Rehman s/o Fateh and seeking the shares out of the legacy left by Rehman s/o Fateh. The learned trial Court while non-suiting the petitioners on the question of limitation has over looked the relief claimed by the petitioners. In the matter of inheritance the Honourable Supreme Court of Pakistan has observed in a landmark esteemed judgment titled "Ghulam Ali and two others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 SC 01), that firstly there is no need to file the suit for declaration to correct the revenue entries and if the suit is filed for this purpose the Law of Limitation, will not apply. The relevant findings of the Honourable Supreme Court of Pakistan is reproduced as under:--

This controversy now stands finally settled by a recent judgment of this Court. It was held in "Haji v. Khuda Yar" (PLD 1987 Supreme Court 453) that a similar adverse entry and non-participation in the profits of the property would not amount to an ouster. While taking note of the earlier case of "Anwar Muhammad and others v. Sharif Din and others" (1983 SCMR 626) in extenso, it was observed that "wrong mutation conferred no right in property as revenue record is maintained only for purposes of ensuring realization of land revenue."

> "The similar effect is the decision in "Najabat and others v. Saban Bibi and others" (PLD 1982 SC 187). It was held in the circumstances of that case that the co-sharer/co-owners were not at all obliged to file a suit to seek a declaration to the effect that a mutation had wrongly been sanctioned. It was also held that a suit filed, due to denial of rights of the plaintiff/co-sharer, for declaration would be within time and the Revenue authorities on success of such suit would be required by law to correct the wrong mutation entries."

In another judgment titled "Muhammad Zubair and others v. Muhammad Sharif" (2005 SCMR 1217), it was held that:--

> "7. There is no cavil to the proposition of law that on the enforcement of Muslim Personal Law (Shariat) Application Act, 1962 as amended by Act XIII of 1983, the property of last male owner subject-matter of limited interest would be deemed to have devolved upon his legal heirs on his death, and the right of succession would not be defeated by the law of limitation or the principle of res judicata as no law or judgment can override the law of Sharia which is superior law."

In another judgment titled "Mst. Gohar Khanum and others v. Mst. Jamila Jan and others" (2014 SCMR 801), it was held that:--

> "3 (sic.) The main emphasis of the learned counsel for the appellants was that the suit was time barred having been filed 50 years after the mutation dated 31.08.1940. This contention, is however, easily dispensed with as Mst. Zarina Jan admittedly came to own a 1/3rd share of the land by operation of law and not by any mutation. The mutation was meant to record the legal entitlement of Dost Muhammad and Mst. Zarina Jan. If the mutation was erroneously made in favour of Dost Muhammad, such mutation would not create title in favour of Dost Muhammad in accordance with Sharia Law of inheritance. Learned counsel for the appellants repeatedly emphasized that Mst. Zaria was fully aware of the decision and assertion of title by her brother Dost Muhammad and Dost Muhammad had also constructed a house on the disputed land. This, however, does not attract the provisions of the Limitation Act in the circumstances of the present case."

5. In view of the facts and the law laid down by the Hon'ble Supreme Court of Pakistan, it can safely be held, that the suit for declaration filed by the petitioner was within time and the petitioners being the legal heirs of Rehman s/o Fateh are entitled to inherit the property to the extent of their shares.

6. Resultantly, this civil revision is accepted, the findings recorded by the learned appellate Court on issue No.3, which relates to the limitation, are set aside and declared that the suit for declaration filed by the petitioners is within time. No order as to cost.

ZC/K-21/L Revision allowed.

2016 M L D 236
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD IBRAHEEM and others---Petitioners
Versus
ABDUL REHMAN and others---Respondents

Civil Revision No.112-D of 1998, decided on 8th December, 2014.

Islamic Law---

----Inheritance---Gift---Will---Scope---Inheritance mutation was sanctioned after the demise of predecessor in interest of the parties in compliance of S. 42 of West Pakistan Land Revenue Act, 1967---Legal heirs of the deceased including plaintiff and defendants/respondents were mentioned in the inheritance mutation---Gift mutation had been entered on the basis of a Will along with Tamleek allegedly made by predecessor in interest of the parties---Both the documents of Will/ Wasiatnama or gift/Tamleek were never produced by the defendants which were not on record in any shape---Defendants had not produced and proved the documents of Wasiatnama/Will and Tamleek and had failed to prove the factum of gift and Will, made in their favour, by any cogent or confidence inspiring and independent evidence---Impugned gift mutation was illegal, unlawful, void ab initio and having no legal effect in the eye of law---Defendants, in order to deprive other legal heirs, with the connivance of Revenue Staff had succeeded to manage the entry of gift mutation---Such act of defendants was not only against law but also against the ordain of Allah, the Almighty---Revision was allowed with cost throughout, in circumstances.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Vakil Ahmad Siddiqui v. State Life Insurance Corporation of Pakistan and another 2011 CLC 2002; Muhammad Bakhsh v. Ellahi Bakhsh [Deceased] through Umar Khan and others 2003 SCMR 286; Manzoor Hussain and 3 others v. Muhammad Siddique 2000 CLC 623; District Evacuee Trust Committee, Hyderabad v. Ismail and 4 others 1990 SCMR 20; Arbab Jamshed Ahmad and another v. Ghazan Khan and others 1995 CLC 695; Muhammad Hafeez v. Muhammad Hanif Khan and another 1991 MLD 1576 and Muhammad Tufail and 4 others v. Mst. Muhammad Bibi alias Mahadan Law Notes 1967 (W.P.) Lah. 60 ref.

Manzoor Hussain and 3 others v. Muhammad Siddique 2000 CLC 623; District Evacuee Trust Committee, Hyderabad v. Ismail and 4 others 1990 SCMR 20; Arbab Jamshed Ahmad and another v. Ghazan Khan and others 1995 CLC 695; Muhammad Hafeez v. Muhammad Hanif Khan and another 1991 MLD 1576 and Muhammad Tufail and 4 others v. Mst. Muhammad Bibi alias Mahadan, Law Notes 1967 (W.P.) Lah. 60 distinguished.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Vakil Ahmad Siddiqui v. State Life Insurance Corporation of Pakistan and another 2011 CLC 2002 and Muhammad Bakhsh v. Ellahi Bakhsh [Deceased] through Umar Khan and others 2003 SCMR 286 rel.

Mian Habib-ur-Rehman Ansari for Petitioners.
Muhammad Javed Iqbal Khan Jaffer for Respondent No.1.

ORDER

ALI AKBAR QURESHI, J.---This civil revision is against the judgment dated 12.12.1997 passed by learned Additional District Judge, Muzaffargarh, whereby the judgment and decree dated 11.04.1994 passed by the learned trial court was set aside and consequently the suit was dismissed.

2. The necessary facts for the disposal of this petition are that, the petitioners instituted a suit for declaration with perpetual injunction regarding the property (detail of which is given in the headnote of the plaint) on the grounds, that their predecessor in interest, namely, Saleh Muhammad son of Gohar, original owner of the property in question died on 07.01.1973 leaving behind the legal heirs (detail of which is given in Para No.2 of the plaint); after the death of Saleh Muhammad, inheritance mutation No.94 was entered and sanctioned on 08.06.1973, wherein the name of the predecessor in interest of the petitioners was entered; one Abdur Rehman, defendant No.1 in the suit and grandson of Saleh Muhammad got attested a gift mutation No.99, sanctioned on 08.06.1973, of the suit land, on the basis of a Will and by this way alienated the property in question in his favour; that the alleged gift and the will in the presence of the inheritance mutation has no legal sanctity and no gift or will was made by deceased Saleh Muhammad in favour of the defendant No.1 in the suit, that the aforesaid alleged documents has been prepared by fraud and misrepresentation and the petitioners are entitled to 2/9 share out of the suit property being legal heirs of Saleh Muhammad.

3. The suit was contested by the defendants of the suit mainly on the grounds, that suit is barred by time, the plaintiffs are stopped by their conduct to file this suit, a valid gift was made, therefore, the gift mutation was rightly attested in his name, whereas the defendants No.13 to 22 recorded their statements and conceded the claim of the petitioners/ plaintiffs.

4. The learned trial Court framed as many as 8 issues, recorded the evidence of the parties and finally decreed the suit, against which, an appeal was filed by the respondents which was accepted and the suit filed by the petitioners was dismissed. Hence, this revision petition.

5. Learned counsel for the petitioners submits, that admittedly and not denied by the other side, the inheritance mutation No.99 (Exh.P-1) was entered in favour of all the heirs of deceased Saleh Muhammad, therefore, after attesting the aforesaid mutation, the entry and sanctioning of a mutation of the same property on the same day is against the law.

6. The record was examined with the assistance of learned counsel for the parties from where, it is found that the inheritance mutation was sanctioned on 08.06.1973 after the demise of predecessor in interest of the parties to the suit strictly in compliance of Section 42 of the Land Revenue Act. All the heirs of the aforesaid deceased including the petitioner and the respondents are mentioned in the mutation No.94 (Exh.P-1). On the other hand, the mutation No.99 dated 08.06.1973 has been entered and sanctioned on the basis of Will (Wasiatnama) and Gift (Tamleek). The contents of aforesaid mutation for reference are reproduced in Urdu as under:--

7. The aforesaid contents recorded by the concerned Patwari while entering the mutation No.99 depicts that this mutation was entered on the basis of a Will ( ) along with Tamleek, allegedly as claimed by the respondents, were made by Saleh Muhammad Predecessor in interest of the parties to the suit. The learned counsel for the respondents, when confronted, to show the Wasiatnama/Will or the gift/Tamleek, the learned counsel for the respondents frankly conceded that the aforesaid documents were never produced by the respondents, therefore, are not on the record in any shape. However, as regards the gift, learned counsel for the respondents submitted that the gift was oral one and in fact through the Will/Wasiat, the predecessor in interest of the parties directed some of the person named in the Will to implement the gift made in favour of the respondent No.1/defendant No.1 of the suit. It is very strange that the respondents are claiming the ownership/title/ transfer of the land in question on the basis of the mutation No.99 dated 08.06.1973, entered on the basis of two documents i.e. Wasiatnama/Will and Tamleek but both the documents were not produced and proved by the respondents in accordance with law. Further, the respondents have miserably failed to prove the factum of gift and the Will made in their favour by any cogent or confidence inspiring and independent evidence, therefore, such type of the entry in the Revenue record including the mutation is totally illegal, unlawful, void ab initio and having no legal effect in the eye of law.

8. The respondent, as appears from the record of the instant case, in order to deprive the other legal heirs, with the connivance of the Revenue staff, succeeded to manage the entry of mutation No.99. This act of the respondent is not only against the law but also ordain of ALLAH, the Almighty. The Hon'ble Supreme Court of Pakistan, way back in the year 1990, through a landmark judgment cited as Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1), has concluded that the legal heir cannot be deprived. (It is also notable, that the inheritance mutation was entered prior to the mutation No.99). The judgments cited as Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1), Vakil Ahmad Siddiqui v. State Life Insurance Corporation of Pakistan and another (2011 CLC 2002), Muhammad Bakhsh v. Ellahi Bakhsh [Deceased] through Umar Khan and others 2003 SCMR 286 by the learned counsel for the petitioners are fully applicable on facts of this case, whereas the judgments cited by the learned counsel for the respondents Manzoor Hussain and 3 others v. Muhammad Siddique (2000 CLC 623), District. Evacuee Trust Committee, Hyderabad v. Ismail and 4 others 1990 SCMR 20), Arbab Jamshed Ahmad and another v. Ghazan Khan and others (1995 CLC 695), Muhammad Hafeez v. Muhammad Hanif Khan and another (1991 MLD 1576) and Mohammad Tufail and 4 others v. Mst. Mohammad Bibi alias Mahadan (Law Notes 1967 (W.P.) Lah. 60) have no relevance with the issue involved in this case.

9. Resultantly, this civil revision is allowed with cost throughout.

ZC/M-41/L Revision allowed.

2016 M L D 589
[Lahore]
Before Ali Akbar Qureshi, J
Haji FAZAL KAREEM through L.Rs.---Petitioner
Versus
MUHAMMAD ILYAS through L.Rs. and others---Respondents

C.R. No.989-D of 2001, heard on 15th April, 2015.

Civil Procedure Code (V of 1908)---
----O. XLI, R. 23---Appeal---Remand of case---Post-remand proceedings---Scope---Plaintiff filed suit for possession of land which was dismissed by Trial Court---Appellate Court accepted appeal of plaintiff and remanded the case to Trial Court with the direction to appoint local commission for demarcation of land in dispute---Trial Court, in post remand proceedings had held that suit was barred by time---Plaintiff contended that during first round of litigation, issue of limitation was decided in his favour and Appellate Court, while remanding the case, issued specific direction to Trial Court to appoint local commission for the demarcation of land and maintained finding on issue of limitation---Validity---Trial Court was under obligation to act in accordance with terms of remand order instead having gone beyond the scope of remand order---Court, in post remand proceedings, would only be confined to the terms of remand order---Matter was remanded to appellate court to decide the appeal afresh---Revision was allowed accordingly.

Muhammad Tahir v. Abdul Latif and 5 others 1990 SCMR 751 ref.
Muhammad Ramzan Khalid Joiya for Petitioner.
Ch. Abdul Sattar Goraya and Muhammad Bilal for Respondents.
Date of hearing: 15th April, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 14.07.2001, passed by the learned appellate Court, whereby the appeal filed by the petitioner Fazal Kareem was dismissed and the judgment and decree dated 28.10.2000 passed by the learned trial Court was confirmed and the suit filed by the petitioner/plaintiff was dismissed.

2. The facts narrated in this petition are, that the petitioner/ plaintiff namely Fazal Kareem filed a suit for possession of land measuring 2 marla 1 sarsahi, comprising khewat No.171/164, khasra No.670-671-Min. According to Jamabandi for the year 1987-88, situated in Dunia-pur Sharqi Urban, the suit was contested by the respondent Muhammad Ilyas by filing written statement, whereupon the learned trial Court out of the controversial pleadings framed as many as nine (9) issues including issue No. 3, which relates to the limitation of the suit. The learned trial Court after recording the evidence and hearing the parties dismissed the suit vide judgment and decree dated 28.10.2000.

Being aggrieved of the aforesaid judgment and decree, the petitioner/plaintiff challenged the same in appeal, which was contested by the other side but finally the same was accepted and the matter was remanded to the learned trial Court to appoint a local commission to demarcate the land in dispute. The learned trial Court in post remand proceedings decided issue No.3, against the petitioner and finally it was held, that the suit filed by the petitioner is barred by time against which an appeal was filed, same was also dismissed.

3. The petitioners in this case is aggrieved of the judgment and decree passed by the learned trial Court on the ground, that the learned trial Court has gone beyond the scope of the remand order, which is not permissible in law.

4. As appears from the record, that the learned trial Court in the first round of litigation, out of the pleadings of the parties framed nine issues including the issue No.3, which relates to the limitation of the suit for declaration. Issue No.3 is reproduced as under:-

1. ….
2. ….
3. Whether the suit is within time? OPP

The learned trial Court decided issue No.3 in favour of the petitioner Fazal Kareem and hold, that the suit has been filed within time but finally dismissed the suit vide judgment and decree dated 18.07.1993. The findings of the issue No.3, as recorded by the learned trial Court is as under:--

> "The plaintiff in para No.1 of the plaint has stated that he has become owner of the suit land vide mutation 592 dated 27.02.1985. The plaintiff can bring a suit for possession within 12 years under section 8 of the Specific Relief Act, against the defendants. Thus the suit having been filed on 30.09.1989 is held to be well within time. The issue is decided in favour of the plaintiff. "

4. Against the aforesaid judgment and decree the petitioner filed an appeal which was accepted by maintaining the finding recorded by the learned trial Court on issue No.3 in para 11 of the judgment. The same are, as under:--

> "11. Issue No.3 is regarding the limitation. Trial court has held that suit is within time. Respondents have not challenged the findings of trial court through any cross-objection. I do not see any illegality or irregularity in the findings therefore findings of trial court on issue of limitation do not call for any interference."

5. The learned appellate Court while remitting the case to the learned trial Court, vide judgment and decree dated 05.06.1996, directed the learned trial Court to appoint a local commission for the demarcation of the land. In fact, with the following reference the case was remanded:--

> "14. Admittedly property in dispute and the property of respondents are adjoining. The matter of possession can only be determined by the demarcation Valu-able right

are involved. Trial Court has decided this substantial matter in a hyper technical manner. Trial Court should have done substantial justice to the parties and should have resolved the matter of demarcation by appointment of local Commissioner. Interest of justice requires that Hyper Technical findings of trial court be set aside and the matter be remanded to trial court for appointment of local Commissioner for demarcation and the decision afresh in the light of demarcation report. Being so the findings of trial court on issue No.7 are set aside and assailed judgment and decree are also set aside and the case is remanded to the trial court with the direction to appoint any expert as local commissioner for demarcation of the light of report of decide the matter afresh in the light of report of demarcation. In the circumstances, of the case no order is made as to costs.

15. File of trial court be remitted back immediately. The parties are directed to appear before the trial court (Civil Judge Dunyapur) on 26.06.1996. File of this Court be consigned to the record room after its necessary completion."

6. The learned trial Court in post remand proceeding again decided issue No.3 and declared, that the suit is barred by time and dismissed the suit vide judgment and decree dated 28.10.2000, although this issue was earlier decided and findings on this issue were maintained by the learned appellate Court, while remanding the matter to the learned trial Court vide judgment and decree date 05.06.1996. The findings on issue No.3 in post remand proceeding are as under:--

"The onus to prove this issue is on the defendants. Counsel for the plaintiff pleaded that he has become owner of the suit land vide mutation No.592 dated 27.02.1985 and suit for possession within 12 years is not time barred, as the suit is filed on 30.09.89. But the land was allotted to both the parties, plaintiff and defendant No.1 out of Khasra No.31/21 by the orders of DSC dated 30.07.69 and were given the possession. So, both the parties were given the possession in view of the orders of DSC dated 30.07.69. Plaintiff Fazal Karim PW-3 also admitted that the constructions of the dispute are 30/35 years old. He also admitted that when the property was allotted to plaintiff by DSC and to Muhammad Ilyas Khasra Numbers were different. So the possession to the parties was given in view of their allotment by DSC on 30.07.69 and if there is any dispute as to the possession. The plaintiff was to claim the same within 12 years from 30.07.69 and the limitation expired on 30.07.81 whereas the suit is filed on 30.07.89 and the suit is held time barred and the issue is decided in favour of the defendants.

7. The petitioner being dissatisfied of the decree dated 28.10.2000, passed in post remand proceedings, filed an appeal which was dismissed, while maintaining the finding of the learned trial Court on issue No.3 (relates to the limitation of filing the suit).

8. Learned counsel for the petitioners is mainly aggrieved of the post remand proceedings, wherein the learned trial Court again decided the issue No.3, which relates to the limitation for filing the suit against the petitioner. Learned counsel submits, that the learned appellate Court while remanding the case in appeal, specific reference along with

terms were given, but the learned trial court instead of complying with the direction passed by the learned appellate Court, decided to re-write the judgment on all the issues.

9. As evident from the record that the learned appellate Court while remanding the order given a specific direction to the learned trial Court to appoint a local commission for the demarcation of the land but at the same time maintained the finding on issue No.3. The learned trial Court, who was under legal obligation to act in accordance with the terms of the remand order but it appears from the findings of the learned trial Court that the learned trial Court has gone beyond the scope of the remand order and because of this, in appeal, the order impugned herein the learned appellate Court dismissed the appeal and maintained the findings on issue No.3, recorded by the learned trial Court in post remand proceedings. The Hon'ble Supreme Court of Pakistan has observed in a judgment cited as "Muhammad Tahir v. Abdul Latif and 5 others" (1990 SCMR 751), that in post remand proceeding the Court will only confine to the terms of the remand order. The observation made by the Hon'ble Supreme Court of Pakistan is as under:--

> "The learned counsel is justified in saying that those issues, which had been decided by the High Court earlier, confining the remand to only issue No.6, could not be reopened subsequently, the respondent having sought no relief against them."

Learned counsel for the respondents although tried to support the impugned judgment and decree passed by the learned appellate Court but could not refer any law that the Court in the post remand proceedings can go beyond of the scope of the reference made by the appellate Court.

10. In view of the above and the law laid down by the Hon'ble Supreme Court of Pakistan, this civil revision is allowed, the case is remitted to the learned appellate Court to decide the appeal afresh in the light of the record referred above and the law declared by the Hon'ble Supreme Court of Pakistan.

11. Resultantly, this civil revision is allowed with no order as to cost.

C.M. No.801 of 2005

12. This is an application for correction of clerical mistake inadvertently made in the head-note of the plaint regarding the area in dispute of khasra No.670,671, mentioned 02 kanals 01 marla, instead of 02 marla and 01 sarsai. Application is allowed and the clerical mistake regarding the area of the land is corrected as given in the application.

RR/F-22/L Revision allowed.

2016 M L D 977

[Lahore]

Before Ali Akbar Qureshi, J

SHAHID BASHIR KHAN---Petitioner

Versus

NAJMA ANEES SHEIKH and others---Respondents

W.P. No.3777 of 2014, decided on 5th August, 2015.

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

----S. 15---Ejectment of tenant---Application for leave to contest---Preliminary objections---Scope---Rent Tribunal was not denuded of the power to take cognizance of preliminary objections taken by the tenant in the application for leave to contest---Tenant should have first agitated all such objections before the proper forum instead of approaching the High Court---Rent Tribunal was bound to perform its duties in terms of Punjab Rented Premises Act, 2009---High Court directed the Rent Tribunal to dispose of all the objections if agitated by the tenant while deciding petition for leave to contest---Constitutional petition was dismissed in circumstances.

Abdul Sattar v. Mst. Anar Bibi and others PLD 2007 SC 609; Khalid Ahmad v. Abdul Jabbar Khan and others 2005 SCMR 911; Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428; Mushtaq Ahmad Qadri v. Noor Hussain 1993 MLD 1972; Zahida Parveen and 3 others v. Muhammad Saleem and another 2003 CLC 1245; Begum Azhari Bashir v. Abdul Hamid Chowdhary and 5 others 1984 MLD 1047; Taj Din and others v. Muhammad Ramzan and others 1989 MLD 234; The Chief Settlement Commissioner, Lahore v. Raja Mohammad Fazil Khan and others PLD 1975 SC 331; Federation of Islamic Republic of Pakistan v. Yousaf A. Haroon and another 2002 CLC 1382; Shafique Ahmad v. Mirza Muhammad Anwar Beg PLD 1968 Lah. 367; Sohni Shah v. Momeen and others 1988 CLC 67; Muhammad Shabir and 3 others v. Mst. Janat Khatoon 2015 CLC 102 and Khushi Muhammad and others v. WAPDA and others 1992 CLC 2356 ref.

Hanif and others v. Malik Ahmed Shah and another 2001 SCMR 577 rel.

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

----S. 34---Provisions of Qanun-e-Shahadat, 1984 and Code of Civil Procedure, 1908---Applicability to the proceedings under Punjab Rented Premises Act, 2009---Scope---Provisions of Qanun-e-Shahadat and Code of Civil Procedure, 1908 were not applicable to the proceedings under Punjab Rented Premises Act, 2009 before the Rent Tribunal, District Judge or Additional District Judge.

Haji Khudai Nazar and another v. Haji Abdul Bari 1997 SCMR 1986 rel.

Muhammad Ali Binyameen for Petitioner.

Irfan Aslam Rana for Respondent.

ORDER

ALI AKBAR QUREHSI, J.---The petitioner through this petition has challenged the validity and maintainability of the ejectment petition filed by the respondent No.1/Mst. Najma Anees Shaikh and has prayed as under:--

> "Under the submissions made above, it is therefore respectfully prayed that this petition may kindly be allowed and the ejectment petition pending before the Ld. Court of respondent No.2 filed by the respondent No.1 may kindly be rejected/quashed and the proceeding of the ejectment petition pending before the respondent No.2 may kindly be stayed till the final decision of this writ petition.
>
> Any other relief which this Hon'ble Court deems fit may also kindly be awarded."

2. Learned counsel for the petitioner submits, that although in this writ petition the petitioner has not impugned any order passed by the learned Special Judge Rent, Lahore, but has in fact questioned the validity and maintainability of the ejectment petition filed by respondent No.1 being landlord on the following grounds:--

> 1. That the respondent/ejectment petitioner at the time of filing the ejectment petition has annexed only one affidavit, whereas it is against the mandatory requirement of the Punjab Rented Premises Act, 2009.
>
> 2. The power of attorney placed on record is not attested by the Consulate of the concerned country.
>
> 3. That the respondent is seeking the ejectment of house No.27-A-Block Model Town Lahore, whereas in the documents, wrong address is mentioned.
>
> 4. That the respondent has not issued the notice before filing the ejectment petition as provided Section 21(1) of the Punjab Rented Premises Act, 2009, through Courier Service.
>
> 5. The notices sent by the respondent No.1 to the petitioner were not accompanied by the Copy of the plaint and affidavit of the respondent and other relevant document, therefore, the mandatory requirement has not been fulfilled.

This type of ejectment petition is liable to be buried at the initial stage.

Learned counsel for the petitioner relied upon the judgments titled "Abdul Sattar v. Mst. Anar Bibi and others" (PLD 2007 SC 609), "Khalid Ahmad v. Abdul Jabbar Khan and others" (2005 SCMR 911), "Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another" (2008 SCMR 428), "Mushtaq Ahmad Qadri v. Noor Hussain" (1993 MLD 1972), "Zahida Parveen and 3 others v. Muhammad Saleem and another" (2003 CLC 1245), "Begum Azhari Bashir v. Abdul Hamid Chowdhary and 5 others" (1984 MLD 1047), "Taj Din and others v. Muhammad Ramzan and others" (1989 MLD 234), "The Chief

Settlement Commissioner, Lahore v. Raja Mohammad Fazail Khan and others" (PLD 1975 SC 331), "Federation of Islamic Republic of Pakistan v. Yousaf A. Haroon and another" (2002 CLC 1382), "Shafique Ahmad v. Mirza Muhammad Anwar beg" (PLD 1968 Lahore 367), "Sohni Shah v. Momeen and others" (1988 CLC 67), "Muhammad Shabir and 3 others v. Mst. Janat Khatoon" (2015 CLC 102), "Khushi Muhammad and others v. WAPDA and others" (1992 CLC 2356).

3. In response of the arguments advanced by learned counsel for the petitioner, the learned counsel for respondent submits, that the petitioner has already filed application for leave to contest and all these objections have been raised therefore, this Constitutional petition is not maintainable.

4. Heard. Record perused.

5. Firstly it is to be seen, whether the judgments referred by the learned counsel for the petitioner are applicable on the facts of the instant case. The judgments were perused and it is found that in all the judgments delivered by the Hon'ble Supreme Court of Pakistan as well as this Court, proposition of civil nature relating to the interpretation of Code of Civil Procedure is involved, whereas according to the terms of section 34 of the Punjab Rented Premises Act, 2009, the provisions of Code of Civil Procedure, 1908, are not applicable to the proceedings conducted under the Punjab Rented Premise Act, 2009. The Section 34 of the act ibid is relevant which is reproduced as under:--

> **"Provisions of Qanun-e-Shahadat Order and Code of Civil Procedure not to apply.---**Save as otherwise expressly provided under this Act, the provisions of the Qanun-e-Shahadat Order, 1984 (P.O. No.10 of 1984), and the Code of Civil Procedure, 1908 (Act V of 1908) shall not apply to the proceedings under this Act before a Rent Tribunal, District Judge or Additional District Judge."

According to the terms of above section, the legislature has not made applicable the provisions of Qanun-e-Shahadat Order, 1984, and the Code of Civil Procedure, to the proceedings under the Punjab Rented Premises Act, 2009 before a Rent Tribunal, District Judge or Additional District Judge. Their lordships of the Hon'ble Supreme Court of Pakistan has observed in the judgment cited as Haji Khudai Nazar and another v. Haji Abdul Bari (1997 SCMR 1986), that the provisions of the C.P.C. unless specifically made applicable by the rent law do not apply in terms to the rent proceedings. The relevant part of the observation is as under:--

> "5. The first question is whether C.P.C. is applicable to the proceedings before the Rent Controller. The consensus is that the provisions of C.P.C. unless specifically made applicable by the rent laws, do not apply in term to the rent proceedings, but the principles of C.P.C. so far they are not in conflict with the provisions of the rent laws and advance the cause of justice, may be applied in the facts and circumstances of the case. (Underline is mine). In Mrs. Nawab Din Ahmed and another v. Faiz-ur-Rehman (PLD 1982 Karachi 89) the applicability of C.P.C. in proceedings before the Rent Controller was considered by me and after referring to Ghulam Nabi v.

Mukhtar Ahmed (PLD 1980 SC 206) and Imperial Dying and Printing Mills Karachi v. Safdar Ali (PLD 1971 Karachi 778) it was observed:

> "The consensus of opinion is that C.P.C. is not applicable in terms to the proceedings before the Controller. It is only applicable to the extent provided by the Ordinance itself However, where no procedure has been provided it is just and convenient to apply the principles laid down by the Code of Civil Procedure for the conduct of proceedings. In applying these principles the penal provisions as provided by C.P.C., cannot be pressed in service. The principles of Order XXII can be applied for bringing the legal heir in record."

In the second judgment cited as Hanif and others v. Malik Ahmed Shah and another (2001 SCMR 577), the Hon'ble Supreme Court of Pakistan, while dealing with this proposition has observed as under:--

> "There is no gainsaying that the provisions of Code of Civil Procedure may not be stricto sensu applicable to the proceedings before a Rent Controller, broad and equitable principles regulating the procedure of the proceedings before the Rent Controller can always be invoked and attracted in the interest of justice and fairplay."

6. Even otherwise, the learned Special Judge Rent, is not denuded of power to take the cognizance of the preliminary objections taken by the petitioner in the application for leave to contest. The petitioner should have first agitated all these objections before the proper forum i.e. Special Judge Rent instead of approaching this Court particularly under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

7. Needless to mention, that the office of Special Judge Rent has been created through a Special Law, therefore, the Special Judge Rent is obliged to perform his duties in terms of the Punjab Rented Premises Act, 2009, therefore, the arguments advanced by learned counsel for the petitioner are ill founded and misconceived.

8. In view of the above, this petition being devoid of any merits stands dismissed. Parting with the judgment, the learned Special Judge Rent, Lahore, is directed to dispose of all these objections, if agitated by the petitioner while deciding the petition for leave to contest.

ZC/S-115/L Petition dismissed.

2016 M L D 1193
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD JAVAID and others---Petitioners
Versus
PRINCIPAL, GOVERNMENT COLLEGE FOR WOMEN, LAHORE---Respondent

C.R. No.116 of 2016, decided on 28th January, 2016.

Civil Procedure Code (V of 1908)---

----O. XLI, R. 1---Appeal from original decree---Appellate Court dismissed the appeal on ground that the petitioner had earlier withdrawn appeal against the same order without permission to file fresh appeal---Validity---Dismissal of the appeal on said ground was contrary to law---High Court, setting aside impugned order of dismissal, directed appellate court to decide the appeal on merits---Revision petition was allowed in circumstances.

Muhammad Yar (deceased) through L.Rs. and others v. Muhammad Amin (deceased) through L.Rs. and others 2013 SCMR 464 rel.

Ch. Ishtiaq Ahmed Khan for Petitioners.

Barrister Danyal Ijaz Chadhar for Respondent.

ORDER

ALI AKBAR QURESHI, J.---The petitioners, through this revision petition, have challenged the validity of a judgment dated 28.11.2015, whereby the learned appellate court dismissed the appeal filed by the petitioner on the ground, that the petitioner earlier filed an appeal against the same order but subsequently withdrew the same and at the time of withdrawing the appeal, no permission was sought or granted to the petitioners to file the fresh appeal.

2. Heard. Record perused.

3. It is not denied by the petitioners, that earlier an appeal was filed against the impugned order dated 15.09.2015, which was simply withdrawn without seeking any permission to file the fresh one. The dismissal of the appeal on the aforesaid ground by the learned appellate court is contrary to the law laid down by the Hon'ble Supreme Court of Pakistan in esteemed judgment cited as Muhammad Yar (deceased) through L.Rs. and others v. Muhammad Amin (deceased) through L.Rs. and others (2013 SCMR 464), therefore, is not sustainable.

4. In view of the above, this revision petition is allowed, judgment dated 28.11.2015 is set aside and the appeal filed by the petitioners shall deem to be pending before the learned appellate Court, who is directed to decide the matter on merits.

SL/M-89/L Revision allowed.

2016 M L D 1505
[Lahore (Multan (Bench)]
Before Ali Akbar Qureshi, J
MUHAMMAD IMRAN and 4 others---Petitioners
Versus
MUHAMMAD AFZAL and another---Respondents

C.R. No.239-D of 2015, decided on 12th March, 2015.

Gift---

----Ingredients---Undue influence---Effect---Parties to the suit were legal heirs of the deceased---Predecessor of the parties remained ill for about three years and died on 20-11-2002 whereas alleged gift was executed on 12-06-2001---Two important ingredients of gift i.e. offer and acceptance were missing in the present case---Father who was on death-bed could not deprive his other sons and daughters by way of a gift---Donees had failed to prove the fact through any reliable evidence that gift in question was free from undue influence---Both the courts below had carefully examined the record and appreciated the evidence and reached to the right conclusion---Defendants had failed to prove the ingredients of a valid gift---Revision was dismissed in circumstances.

Muhammad Bashir v. Allah Ditta and others 1194 SCMR 1870), Aadut v. Noor Ahmad 2012 MLD 802; Gul Sher and others v. Dost Muhammad and others 2013YLR 1856 and Muhammad Amin v. Mst. Shaista and 30 others 2015 MLD 296 distinguished.

Muhammad Bashir v. Allah Ditta and others 1994 SCMR 1870 and Gull Sher and others v. Dost Muhammad and others 2013 YLR 1856 rel.

Muhammad Ali Siddiqui for Petitioners.

Nemo for Respondents.

Date of hearing: 12th March, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This Civil Revision calls in question the validity of the judgments and decree dated 19.02.2015 and 26.04.2011 passed by learned Courts below, whereby the suit for declaration filed by the respondents, was decreed.

2. The facts, as depicts from the record, are that the respondents/plaintiffs instituted a suit for declaration to challenge the correctness of mutation No.4431 dated 12.06.2001, entered into the revenue record on the basis of a gift allegedly made by the predecessor in interest of the parties to the suit, namely deceased Allah Bakhash, on the ground that from the first marriage of deceased Allah Bakhash, respondents, namely Muhammad Afzal and Muhammad Shaffi were born, whereas from the second marriage which was contracted with Mst. Kaneez Mai, defendants Nos.2 to 5 were born; that the petitioners with the connivance of the revenue staff, succeeded to enter the mutation on the basis of gift in the circumstances, when the predecessor of the parties, was seriously ill being patient of cancer; that the predecessor of the parties remained stuck to bed for about three years, and was not

in a position even to walk, therefore, the mutation entered on the basis of the gift is product of fraud and misrepresentation with the intention to deprive the respondents/plaintiffs who are step brothers of the petitioners/defendants, from their right of inheritance.

3. The suit was contested through written statement by the petitioners/defendants, wherein it was stated, that the mutation was entered strictly in accordance with law and with free consent of the predecessor of the parties.

4. Learned trial court after framing necessary issues out of the divergent pleadings of the parties, recorded the evidence and finally decreed the suit, against which an appeal was filed by the petitioners, which too was dismissed and the decree passed by learned trial Court was maintained. Hence, this civil revision.

5. The record reveals, that parties to the suit are step brothers and sisters and legal heirs of deceased, namely, Allah Bakhash, who at the time of his death, left the suit property. It is not denied, that the predecessor of the parties remained seriously ill being patient of cancer for about three years and died on 20.11.2002, whereas the alleged gift was executed on 12.06.2001.

6. In this case, in fact it has been claimed by the petitioners, that a gift (Tamleek Nama) was executed by the predecessor of the petitioners, whereby he partitioned his property by way of gift among his children i.e. parties to the suit, but at the time of making the gift, the petitioner, namely Muhammad Imran was given 428-Shares, whereas the plaintiffs were given 10-Shares and other defendants were given 15-Shares out of the total legacy measuring 22-Kanals 18-Marlas, therefore, by this way, the petitioners are the major beneficiaries of the alleged gift and for this reason, defending the gift made by predecessor of the parties to the suit.

7. Another important aspect of the case which cannot be ignored, that the validity of the gift is being challenged by the beneficiaries who have been deprived from their due share, meaning thereby the factum of gift was not in their knowledge, therefore, it can safely be held, that two important ingredients of gift, i.e. offer and acceptance are missing in this case. Had the predecessor of the petitioners made the gift as alleged by the petitioners in favour of his would-be legal heirs, the signature/thumb impression could have been obtain from them in order to protect them from future litigation. The gift mutation Exh.P1 was perused with the assistance of learned counsel for the petitioners, which is silent about the signature or thumb impression of the other legal heirs. Further, one of beneficiaries, namely, Muhammad Afzal appeared in the witness box as PW-1, and stated, that the donor i.e. predecessor of the parties, namely, Allah Bakhash (deceased) was suffering from disease of cancer and was unable to walk before his death, whereas PW-2 stated, that the senses of deceased Allah Bakhash were not functioning property for the last about three years before his death, and as evident from the record, this part of the examination-in-chief has not been cross examined by the petitioners/defendants.

8. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of "Muhammad Bashir v. Allah Ditta and others" (1194 SCMR 1870) and "Gull Sher and others v. Dost Muhammad and others" (2013 YLR 1856).

9. Even otherwise, it is very strange, that a father who is on death-bed being the patient of fatal disease i.e. cancer, can deprive his other sons and daughters by way of a gift.

10. Learned counsel for the petitioners submitted, that the petitioners have successfully proved the ingredients of gift by adducing the evidence and further submitted, that even otherwise, the gift is a registered document and cannot be questioned or set aside by the Courts below, relying on the evidence which is against the facts. Reliance is placed on "Muhammad Bashir v. Allah Ditta and others" (1194 SCMR 1870), "Aadut v. Noor Ahmad" (2012 MLD 802), "Gul Sher and others v. Dost Muhammad and others" (2013YLR 1856) and "Muhammad Amin v. Mst. Shaista and 30 others" (2015 MLD 296).

11. The judgments referred by learned counsel for the petitioners do not support the cause of the petitioners. The first judgment cited by learned counsel for the petitioners i.e. "Muhammad Bashir v. Allah Ditta and others" (1194 SCMR 1870), wherein their lordships of the Hon'ble Supreme Court of Pakistan, have observed, that in the case of a gift made by the predecessor, the heir of the donor will have to prove, that the gift is not outcome of undue influence exercised by the donee. The relevant para is re-produced as under:--

> "It is significant to mention that all the Courts below have unanimously held that the petitioner had failed to prove that the transaction of gift in respect of the suit land made by the donor was outcome of undue influence exercised by the respondent. This petition has no substance. It is accordingly dismissed and leave is refused."

In this case, the petitioners who are one of the legal heirs and also the donees, have failed to prove the fact through any reliable evidence, that the gift in question is free from undue influence.

Another judgment which in fact supports the findings recorded by learned Courts below cited as "Gul Sher and others v. Dost Muhammad and others" (2013 YLR 1856), wherein it is observed, that in case, the gift has been made under "Marz-ul-Maut", the nature of the disease will have to be proved. The relevant portion of the judgment is reproduced as under:--

> "therefore by no stretch of imagination it can be said that the gift was under "Marz-ul-Maut" as the matter of gift is several months before his death, when nature of disease was also not proved. For proving a transaction during "Marz-ul-Maut" it is the basic fact which is required to be pleaded and proved that transferor was in fear of death and he transferred the property under the said fear. The disease was of such nature where fear of death was natural. No such facts have either been pleaded or proved.
>
> 10. In the light of what has been discussed above, the findings recorded by both the courts below are in accordance with the law and facts on record, which need not be

interfered with by this Court while exercising jurisdiction under section 115 of the C.P.C. Consequently, this civil revision having no force is dismissed with no order as to costs."

The evidence and other record available on the file, particularly the death certificate of predecessor of the parties clearly proves, that the predecessor of the parties was patient of a fatal disease i.e. cancer. So by this way, it can safely be observed, that the respondents have succeeded to prove through oral as well as documentary evidence, that the predecessor of the parties was patient of cancer and remained almost out of senses for about three years, as stated by PW-2. The ratio of the judgments referred by learned counsel for the petitioners are against the petitioners.

12. Learned trial Court and especially learned appellate Court as evident from the findings, carefully examined the record, appreciated the evidence, ocular as well as documentary, and finally reached to the conclusion, that the petitioners have miserably failed to prove the ingredients of a valid gift as required by the principle of Muhammadan Law, and the law declared by the Hon'ble Supreme Court of Pakistan, therefore, I see no reason to interfere with the well-worded and well-reasoned judgments of the learned Courts below.

13. Resultantly, this civil revision has no force, same is dismissed. No order as to costs.

ZC/M-240/L Revision dismissed.

2016 M L D 1674
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD ILYAS through L.Rs. and others---Petitioners
Versus
KHURSHEED BIBI through L.Rs. and others---Respondents

Civil Revision No.1705 of 2005, decided on 19th February, 2016.

(a) Islamic Law---
----Inheritance---None of the plaintiffs were entitled to anything out of the legacy of propositus as they did not fall in the category of sharer---Distant kindred could not inherit anything in presence of residuaries---Nearer in decree would exclude the more remote---Propositus of the plaintiffs were not only distant kindred but also remoter in decree and they were not entitled to inherit anything from the property---Both the mutations were not attested in accordance with law which would not affect the rights of the heirs who would inherit the property---Bar of limitation was not applicable in the matter of inheritance.

Mst. Bushra Bibi and 2 others v. Muhammad Sharif and 23 others 2002 CLC 587; Muhammad lqbal and others v. Allah Bachaya and 18 others 2005 SCMR 1447; Atta

Muhammad v. Maula Baksh and others 2007 SCMR 1446; Allah Yar v. Mst. Zahoor Elahi and 5 others 2011 YLR 2099; Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801; Mahmood Shah v. Syed Khalid Hussain Shah and others 2015 SCMR 869; Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others PLD 2014 SC 167; Cantonment Board through Executive Officer Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

(b) Islamic Law---
----Inheritance---Legal heirs---Classes---Classes of legal heirs were sharer; residuary and distant kindred.

(c) Islamic Law---
----Inheritance---When Muslim owner died his succession would open and devolve upon the legal heirs.

(d) Limitation---
----Inheritance---No limitation would run in the matter of inheritance.

Saeed-uz-Zafar Khawaja, Ch. Muhammad Naseer, Asjad Saeed for Petitioners.
Bakhtiar Mahmood Kasuri, Abdul Wahid Chaudhry for Respondents.
Shahid Naseem Gondal and Mushtaq Ahmad Mohal for Respondent No.9-C.
Date of hearing: 22nd January, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---This single judgment will dispose of two cases i.e. C.R.Nos.1705 and 1706 of 2005, being arisen out of the same judgment and decree.

2. This civil revision is directed against the judgment and decree dated 28.04.2005 and 16.12.2000, whereby through a consolidated judgment, suit titled as Muhammad Ilyas etc. v. Khursheed Bibi etc. filed by the petitioners was dismissed, whereas the suit titled Khursheed Bibi etc. v. Muhammad Ilyas etc. filed by the respondents was decreed.

3. This case has a long history and question of inheritance is involved, therefore, it is necessary to give brief facts of the case. The petitioners Muhammad Ilyas, Muhammad Siddique, sons of Jannatay Bibi and Bahishfan, daughters of Dina, filed a suit for possession Malkana titled as Muhammad Ilyas etc. v Khushi Muhammad etc. regarding the suit land measuring 324 Kanal 5 Marla on the ground, that predecessor of the parties namely Hasal was the original owner of the suit land and on his death, inheritance mutation No.797 dated 09.08.1951, was sanctioned in favour of Baksha for half share and remaining half share in favour of Jannatay and Bahishtan, daughters of Dina, who was son of Balaki; when Baksha died, his inheritance mutation No.846 dated 17.03.1952 was sanctioned in favour of Jannatay and Bahishtan; when Jannatay died, her property was devolved upon her sons Muhammad Ilyas and Muhammad Siddique; that the land in question is common and is being cultivated by the tenants who are paying the share of produce to defendants/respondents Nos.1 to 12 and by this way, the petitioners are being deprived of

their share out of the suit land and lastly submitted, that they time and again asked the respondents Nos.1 to 12 to admit the petitioners as owners of the suit land to the extent of their shares and hand over the possession, which was refused.

Muhammad Din, Muhammad Shafi and Jamal Din alias Jamala also filed a rival suit for possession Malkana qua the suit land measuring 258 Kanal 17-1/2 Marla contendings therein, that Hasal son of Yousaf was owner of the suit land measuring 161 Marla 7-1/2 Marla and on his demise, inheritance mutation No.797 dated 09.08.1951 was sanctioned in favour of one Baksha son of Balaki and Mst. Jannatay and Bahishtan in equal share. Lastly prayed, that the afore-referred inheritance mutation was wrongly entered, as Dina, the father of defendants Nos.1 and 2, had already died and by this way, Baksha son of Balaki was only legal heir of Hasal son of Yousaf and respondents Nos.1 and 2 are not entitled to get anything from the legacy of Hasal (deceased). Further submitted, that Baksha who was himself owner of the land measuring 258 Kanal 7-1/2 Marla when died, his inheritance mutation No.846 dated 17.03.1952 was sanctioned in favour of respondents Nos.1 and 2 which was in fact against the law, because Dina, the father of defendants Nos.1 and 2, had already died. Lastly prayed, that respondents Nos.1 and 2 have been asked many a times to give possession Malkana of the suit land to the rival petitioners being co-sharer but the respondents Nos.1 and 2 refused to accede the genuine demand of the petitioners.

4. As per the record, the controversy involved in this matter is regarding the inheritance of one Hasal, predecessor of the parties and owner of suit land. The respondents are claiming themselves owner of the suit property on the basis of two inheritance mutations Nos.797 and 846 of suit land entered on the demise of Hasal son of Yousaf and Baksha son of Balaki, respectively, whereas the plaintiffs of rival suit being collaterals have claimed the inheritance of aforesaid deceased persons and prayed, that the aforementioned inheritance mutations be declared against the law.

Both the suits were consolidated in compliance of the order passed by the learned Additional District Judge, who remanded the matter to the learned trial court. The learned trial court framed consolidated issues, recorded the evidence of the parties and finally dismissed the suit titled Muhammad Ilyas etc. v. Khursheed Bibi etc. and decreed the suit titled Khursheed Bibi etc. v. Muhammad Ilyas etc.

Being. aggrieved with the judgment and decree passed by the learned trial court, two appeals were filed by the petitioners, which were dismissed by the learned appellate court after hearing arguments of both the parties, hence, this revision petition.

5. Heard. Record perused.

6. The parties to the case filed two suits claiming themselves the legal heirs of Hasal son of Yousaf, predecessor of the parties and status of the inheritance Mutation No.797 dated 09.08.1951 and Mutation No.846 dated 17.03.1952. Both the parties while filing the suit submitted pedigree table and details of the suit land which have not been disputed by any of the parties, therefore, it is to be seen who is entitled to inherit the suit land.

7. It would be appropriate to firstly deal with the inheritance of Hasal son of Yousaf who as per the death certificate (Exh.P.7) died on 15.12.1950. This fact was stated by Bahishtan, who appeared as witness and stated that Hasal died about two years prior to the partition of the subcontinent whereas Baksha died 5/6 years after the death of Hasal son of Yousaf, therefore, it is clear, that Baksha died after Hasal son of Yousaf and this fact is also supported by the death certificate (Exh.P.9), which is available in the record, wherein the date of death of Baksha son of Balaki is entered as 15.11.1951.

8. Admittedly, Hasal son of Yousaf died issueless and at the time of death of Hasal, Baksha son of Balaki, one of the collaterals of Hasal, was alive whereas Dina son of Balaki had died in the year 1916, this fact is mentioned in his inheritance mutation. Bahishtan while appearing as witness also stated, that she was 60 years old when her father Dina, son of Balaki, was died.

9. Jannatay and Bahishtan Bibi, the predecessor of the petitioners Muhammad Ilyas etc. were the daughters of said Dina son of Balaki as recorded by the learned courts below and admittedly Jannatay and Bahishtan Bibi are not the lineal female descendants of Kamal, who was the common great ancestral of them and that of Baksha son of Balaki as well as Hasal son of Yousaf. Baksha son of Balaki was only alive lineal male descendant of Kamal son of Amin at the time of death of Hasal son of Yousaf.

10. The learned courts below and especially the learned appellate court, after putting great efforts and analyzing the provisions of Muhammadan Law, has reached to the conclusion, that Baksha was the only male descendant at the time of death of Hasal.

11. Law of inheritance gives three classes of legal heirs i.e. sharer, residuaries and distant kindred. The pedigree table is admitted by the parties, therefore, according to the pedigree table, none of the petitioners, being sharer are entitled to anything out the legacy of Hasal or Baksha because they do not fall in the category of sharer.

12. As regard the residuaries, which has been defined in Muhammadan Law, that full paternal uncles, full paternal uncles's sons sons and their remote male descendants in the like order how low so ever comes in the class pertaining to descendants of true grandfather how high so ever of the deceased and by this way, the petitioners fall in the category of residuaries of legal heirs of deceased Hasal son of Yousaf.

13. The learned appellate court, after consulting the record and the law applicable on the case, finally came to the conclusion, that the plaintiffs of the suit titled Muhammad Din etc. v. Jannatay Bibi etc. are the residuaries whereas Jannatay and Bahishtan, the predecessors of plaintiffs in a suit titled Muhammad Ilyas etc. v. Khusi Muhammad etc. are the distant kindred of both the deceased i.e. Hasal son of Yousaf and Baksha son of Balaki.

14. According to the mandate of Muhammadan Law, in the presence of residuaries, distant kindred cannot inherit anything. Even otherwise it is settled principle of Islamic Law, that nearer in decree excludes the more remote, therefore, as per the pedigree table and the

law, Jannatay Bibi and Bahisthan Bibi are not only distant kindred of Baksha son of Balaki but also remoter in decree.

15. In these circumstances, Bahishtan and Jannatay being distant kindred were not entitled anything from the legacy of Hasal son of Yousaf being distant kindred in the presence of residuary, deceased Baksha son of Balaki, the inheritance mutation No.797 dated 09.08.1951 of deceased Hasal son of Yousaf which was sanctioned in favour of Baksha son of Balaki and Bahishtan and Jannatay but as per law Jannatay and Bahisthan being distant kindred are not entitled to inherit anything from the property left by deceased Hasal, as whole of the property left by Hasal son of Yousaf is to be inherited by Baksha son of Balaki being residuaries.

In the same manners and principle, the property left by Baksha son of Balaki was to be inherited by Muhammad Din, Qaim Din and Jamal Din alias Jamala and inheritance mutation No.846 dated 17.03.1952 was not correctly entered in the names of Bahishtan and Jannatay, being distant kindred.

16. Even otherwise, it is well established principle of Muhammadan Law, the moment Muslim owner dies, succession of estate left by Muslim owner immediately opens and devolves upon the legal heirs, meaning thereby when Hasal died, his inheritance was immediately devolved upon Baksha being sole residuary and when Baksha son of Balaki died, in the same manner, his succession opened and devolved upon the heirs i.e. Muhammad Din, Qaim Din and Jamal Din and by this way all the above persons became owners of the property left by deceased predecessor, to the extent of their shares. Both the impugned mutations Nos.797 and 846 were not attested and sanctioned in accordance with law, therefore, both mutations would not affect the rights of the heirs who inherited the property.

17. Learned counsel for the petitioners vehemently argued, that the respondents while filing the suit did not claim the declaration and by this way, the suit is hopelessly barred by time.

18. It has already been observed, that the moment Muslim owner of the property dies, immediately succession opens and devolves upon the heirs and the Muslim heirs become the owner of the property to the extent of their share. Admittedly, in this case, the property was cultivated by the tenants and they were giving the share of produce to the respondents, therefore, the arguments advanced by learned counsel for the petitioners have no substance or force.

19. As regard the limitation, the Hon'ble Supreme Court of Pakistan in plethora of judgments, has observed, that in the matter of inheritance, no length of time would extinguish the right of inheritance and bar of limitation is not applicable. Reliance is placed on Mst. Bushra Bibi and 2 others v. Muhammad Sharif and 23 others [2002 CLC 587 (Lahore)], Muhammad lqbal and others v. Allah Bachaya and 18 others (2005 SCMR 1447), Atta Muhammad v. Maula Baksh and others (2007 SCMR 1446), Allah Yar v. Mst. Zahoor Elahi and 5 others [2011 YLR 2099 (Lahore)], Mst. Gohar Khanum and others v. Mst.

Jamila Jan and others (2014 SCMR 801) and Mahmood Shah v Syed Khalid Hussain Shah and others (2015 SCMR 869).

20. To rebut the arguments of learned counsel for the respondents, the learned counsel for the petitioners has relied upon Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others (PLD 2014 SC 167), but the facts of the aforesaid case are entirely different, therefore, the same is not applicable in the instant case.

21. Although the learned counsel for the petitioners argued the case at length but could not point out any jurisdictional defect, legal infirmity, illegality or irregularity with the judgment questioned herein, therefore, there is hardly any chance to interfere with the well worded concurrent findings of the learned courts below. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of Cantonment Board through Executive Officer Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

22. Resultantly, this revision petition, having no force, is dismissed with no order as to costs.

ZC/M-95/L Revision dismissed.

2016 P L C 150
[Lahore High Court]
Before Ali Akbar Qureshi, J
MUHAMMAD FAZEEL ARSHAD
Versus
DIVISIONAL SUPERINTENDENT PAKISTAN RAILWAYS, MULTAN and 4 others

Writ Petition No.3092 of 2015, heard on 5th March, 2015.

Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968)--

----S.O. 1(b)---Constitution of Pakistan, Arts.2-A, 4 & 25---Prime Minister Family Assistance Package---Appointment on contract under package---Denial to regularize service---Petitioners, who were appointed on contract basis under package for a period of two years, remained working against their respective posts---Employers, had regularized the services of all other employees appointed under package, but said benefit was not extended to the petitioners---Petitioners who had attained the status of permanent workmen by afflux of time, their services would have been regularized in accordance with law---Petitioners, who were working from the last many years, had become over-age during period of their services, could not go anywhere, nor could apply to earn their livelihood in any department or organization---Employer, instead of involving the petitioner in litigation, should have regularized their services---Benefits under Prime Minister Family Assistance Package

having been extended to all other employees, but same was denied to the petitioners---Such was violative of the guaranteed and secured rights of the petitioners under Arts.2-A, 4 & 25 of the Constitution---Employers, were directed by High Court to regularize the services of the petitioners, along with the back benefits in accordance with law.

Pakistan Telecommunication Company Limited through General Manager and another v. Muhammad Zahid and 29 others 2010 SCMR 253; Ejaz Akbar Kasi and others v. Ministry of Information and Broadcasting and others PLD 2011 SC 22; Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others 1995 PLC 539; Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others PLD 1996 SC 610; Tehsil Municipal Administration v. Muhammad Amir 2009 PLC 273; Pakistan International Airlines v. Sindh Labour Court No.5 and others PLD 1980 SC 323; lzhar Ahmad Khan and another v. Punjab Labour Appellate, Tribunal, Lahore and others 1999 SCMR 2557; Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724; Tehsil Municipal Administration, Rahimyar Khan-and others v. Hanif Masih and others 2008 SCMR 1058; Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain 2013 SCMR 1547; WAPDA and others v. Khanimullah and others 2000 SCMR 879; Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan 2013 SCMR 13; Muhammad Zaeem Khalid and others v. Baha-ud-Din Zakeria University and others 1995 SCMR 723; Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others 1996 SCMR 1185 and Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others 2005 SCMR 499 ref.

Kanwar Intizar Muhammad Khan for Petitioner.
Rao Muhammad Iqbal for Respondents.
Date of hearing: 5th March, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.-- Through this judgment, I propose to decide the following writ petitions along with this petition, as common question of law and facts is involved:-

S. No.	Writ Petition Nos.	Title of Writ Petitions
1.	W.-P. No.4181/ 2014	Mst. Huma Noreen v. Divisional Superintendent, Pakistan Railways, Multan, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
2.	W.P. No.1688/2015	Miss Naseem Akhtar v. Divisional Superintendent, Pakistan Railways, Multan,

		etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
3.	W.P. No.718/ 2015	Muhammad Nadeem Aktitar v. Divisional Superintendent; Pakistan Railways, Multan, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
4.	W.P.No.10618/2014	Khalil Ahmad v. Divisional Superintendent, Pakistan Railways, Multan, etc. (Detail of the status of employee/petitioner has been given in the petition)
5.	W .P. No.8389/2014	Abdul Qadir. v. Divisional Superintendent, Pakistan Railways, Multan, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
6.	W.P. No.8938/2014	Muhammad Azeem v. Senior Superintendent of Pakistan Railways Police, Multan, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
7.	W .P. No.6135/2014	Muhammad Yameen, etc. v. The Divisional Superintendent, Pakistan Railways, Multan, etc. (Detail of the status of employees/petitioners has been given in the petition)
8.	W.P. No.9947/2014	Masood Ahmad v. Divisional Superintendent, Pakistan Railways, Multan, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)

9.	W.P. No.8240/2014	Muhammad Altaf v. Works Manager Concrete Sleeper Factory, Pakistan Railways, Khanewal, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
10.	W.P. No.16276/ of 2014	Muhammad Arif Hashmi v. Pakistan Railways through Chairman/Secretary, Railway Ministry, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
11.	W .P. No.7777/2014	Tasawar Abbas v. Divisional Superintendent, Pakistan Railways, Multan, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)
12.	W.P.No.10282/2014	Hassan Rasheed v. Works Manager Concrete Sleeper Factory, Pakistan Railways, Khanewal, etc. (Detail of the status of employee/petitioner has been given in the head-note of this petition)

2. The petitioners, through the afore-referred different writ petitions, have submitted, that they were appointed on contract basis as Ticket Collector Grade-I (BS-5), Aya (BS-1), Lower Division Clerk (BS-7), Points-Man (BS-5), Gangman (BS-2), Muawin (BS-1), C&W Cleaner (BS-1), for a period of two years under a scheme issued by the Prime Minister of Pakistan, namely, Prime Minister Family Assistance Package; the petitioners are still working against the said posts; the respondents made a promise to regularize their services but no action was taken; the respondents have regularized the services of all the employees appointed under Prime Minster Family Assistance Package, but the petitioners have been denied to their fundamental rights and are being treated discriminatory. Hence, these writ petitions.

3. The .prayer made by the petitioners was opposed by the other side on the ground, that the petitioners were appointed on contract basis for a specific period, therefore, their services cannot be regularized.

4. It is not denied by the respondents, that the petitioners were appointed on contract basis and are still working in the department against the said posts. The most important aspect of

this case which requires consideration, is that the respondent-department, as evident from a notice/letter dated 08.03.2012, regularized the services of the other employees, appointed on contract under the same scheme, namely, Prime Minster Family Assistance Package, but the said benefits have not been extended to the petitioners which is violative of the guaranteed and secured rights of the petitioners under Articles 2-A, 4 and 25 of the Constitution of the Islamic Republic of. Pakistan, 1973. The Hon'ble Supreme Court of Pakistan, through an esteemed judgment cited as Pakistan Telecommunication Company Limited through General Manager and another v. Muhammad Zahid and 29 others (2010 SCMR 253), has laid down, that any employee whether on work charge or on contract, will attain the status of a permanent/regular employee after expiry of the ninety days. The relevant portion (at Page No. 284) is reproduced as under:

> "Undisputedly, the crux of the case of the private respondents has been that they are being discrinzi3ated as against the other Operators performing service permanently with the PTCL or having been regularized in due course as Operators in the International Gateway Exchange performing similar functions in the Exchange apparently amounts to have been grossly violated as against the guaranteed rights under Articles 2-A, 4, and 25 of the Constitution by depriving them of their emoluments besides all other service benefits etc., described in paragraph No.2 of the writ petition being paid to other Operators performing service in the said Exchange and similarly placed and, therefore, discriminatory treatment has been meted out to the writ petitioners employed on daily wages and not regularized despite having rendered service for a period more than 2 years as contract employees renewed from time to time mentioned in pars No. 16 (supra), therefore, the impugned judgment is unexceptionable irrespective of the status of the private respondents be that of a 'worker' or a 'civil servant' or the 'contact employees' having no nexus to the maintainability of the writ petition on the ground of discrimination meted out to them."

5. Another latest esteemed judgment, the Hon'ble Supreme Court of Pakistan has laid down in Ejaz Akbar Kasi and others v. Ministry of Information and Broadcasting and others (PLD 2011 Supreme Court 22), the relevant portion (at Page No.25) is reproduced as under:

> "Thus in such view of the matter we are of the opinion that the Board of Directors may have not declined the petitioners' regularization, however it is a fact that regularization of contract employees, if at all is to be made is to depend upon the performance. The petitioners who have appeared in person state that they have qualified the test and their performance as well is up to mark which is evident that for the last more than ten years they have been allowed to continue work against the vacancies which they are holding without any interference and there is, now, no question of performance at all as they have already shown their performance.
>
> 4. Be that as it may, we are not inclined to agree to the reasons which prevailed upon the Board in not regularizing the Groups 4, 5 and 6 when at the same time the employees of other Groups as noted hereinabove were regularized beside other individual persons whose names have also been mentioned hereinbefore. This Court has laid down a criteria in respect of such employees who have somehow identical

contentions in the case of Ikram Bari and others v. National Bank of Pakistan through President and another (2005 SCMR 100). Therefore,, we are of the opinion that the case of the petitioners deserves to be considered by the Board of Directors for the reasons noted hereinabove as they cannot be discriminated without any cogent reason by violating the provisions of Article 25 of the Constitution and at the same time after having spent a considerable period of their lives in the Organization performing duties on contract basis. It is also the duty of the Organization to protect their fundamental rights enshrined in Article 9 of the Constitution."

6. The legislature has defined the permanent workman in Standing Orders 1(b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1. (b) of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:

SCHEDULE
STANDING ORDERS

1. Classification of Workmen: (a) Workmen shall be classified as--
(1) ……
(2) ……
(3) ……
(4) ……
(5) ……
(6) ……

(b). A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months."

7. The only question, which pertains to the status of the respondents and their regularization by afflux of time and law applicable thereon, requires consideration.

8. In this case; the petitioners are working against the same post and Project from the last many years, therefore, it can safely be held, that the post and project against which the petitioners are working, is of] permanent nature, thus, the denial of the respondents to regularize the services of the petitioners as permanent workmen, is not permissible in law .

9. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, government or the private, who hire the service of the poor people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact it is the device which is based on mala fide being used to deprive the poor worker who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the Hon'ble Supreme Court of Pakistan titled Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others (1995 PLC 539). The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:

> "3. The contentions of the learned counsel for the petitioners that the respondent was appointed on 'work charge basis' to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.
>
> 4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under:-
> There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure 'A' would demonstrate that he was appointed on 25.06.1980 and that his services were terminated on 20.07.1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.
>
> 5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

10. Since the petitioners, in view of the law laid down by the Hon'ble Supreme Court of Pakistan, have attained the status of permanent workmen/workers by afflux of time, therefore, the respondents will have to regularize the services of the petitioners in

accordance with law, and any action, if required in case of any misconduct, will be initiated under Order 12 of the Standing Orders Ordinance and not otherwise.

11. It is not denied, that the petitioners are working from the last many years, and suffice to hold, that the respondents are needed to the respondent-department and further, even otherwise, it is also to be taken into consideration that almost all the petitioners have become over-age during the p6riod of their service and cannot go anywhere nor can apply to earn their livelihood in any department or organization, therefore, the respondent-department instead of involving them in litigation, should have regularized the services of the petitioners.

12. In another esteemed judgment reported as Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others (PLD 1996 Supreme Court 610), the Hon'ble Supreme Court of Pakistan, while dealing with the question of permanent worker, at page 621, has ruled as under:

> "The ratio of the above judgment in the case of Muhammad Yaqoob (supra) seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and nonresidential buildings and constructing itself and/or causing construction thereof The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by the Labour Courts in this respect cannot be said to be not founded on evidence on record "

13. In another judgment cited as Tehsil Municipal Administration v. Muhammad Amir (2009 PLC 273), has further elaborated the status of a workman at page 280, the relevant paragraph is reproduced as under:

> "13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with 'water work', 'well' within the meaning of construction industry as defined in section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked..He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were

transferred to TMA Bhalwal where he continued to work till 15.08.2005 when he was informed that his services had been terminated w.e f 01.09.2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of clause (b) of paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in para-10 above."

14. The other esteemed judgments applicable in this case are as under:

1. Pakistan International Airlines v. Sindh Labour Court No.5 and others (PLD 1980 Supreme Court 323)

2. lzhar Ahmad Khan and another v. Punjab Labour Appellate, Tribunal, Lahore and others (1999 SCMR 2557)

3. Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724)

4. Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others (2008 SCMR 1058)

5. Province of Punjab through Secretary Communication and Works Department, and others v. Ahmad Hussain (2013 SCMR 1547)

6. WAPDA and others v. Khanimullah and others (2000 SCMR 879).

15. The learned counsel for the respondent-department, during the course of arguments, has referred a recent judgment of the Hon'ble Supreme Court of Pakistan cited as Tehsil Municipal Officer, TMA Kahuta and another v. Gul Fraz Khan (2013 SCMR 13). The aforesaid esteemed judgment has been passed by the Bench consisting of three Hon'ble Judges of the Hon'ble Supreme Court of Pakistan, whereas the judgment cited as Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724), referred by learned counsel for the petitioners supra, is of a Bench consisted of five Hon'ble Judges of the Hon'ble Supreme Court of Pakistan. Thus, following the principle laid down by the Hon'ble Supreme Court of Pakistan in various judgments, that the judgment of the larger Bench would follow to resolve the controversy, hence the judgment (supra) delivered by the Hon'ble five Judges of the Apex Court would govern the controversy in this matter. Even otherwise, the ratio decidendi of the other judgments on this point goes in favour of the petitioners.

16. The Hon'ble Supreme Court of Pakistan, while dealing with such type of situation, has already dictated, that the benefit of the judgment of the Court should be extended to others who might not be parties to the litigation and are falling in the same category, instead of compelling them to approach the legal forum. Further, even otherwise, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 is also clear on the point, that all the citizens are entitled to equal protection of law. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, cited as Muhammad Zaeem Khalid and others v.

Baha-ud-Din Zakeria University and others (1995 SCMR 723), Hameed Akhtar Niazi v. The Secretary, Establishment Division, Government of Pakistan and others (1996 SCMR 1185), and Tara Chand and others v. Karachi Water and Sewerage Board, Karachi and others (2005 SCMR 499)

17. In view of the law laid down by the Hon'ble Supreme Court of Pakistan, these writ petitions are allowed. The respondents are directed to regularize the services of the petitioners along with the back benefits, in accordance with law.

HBT/M-130/L Petitions allowed.

2016 P L C (C.S.) 1142
[Lahore High Court]
Before Ali Akbar Qureshi, J
SIDRA IDREES
Versus
PUNJAB PUBLIC SERVICE COMMISSION through Chairman

Writ Petition No.21863 of 2015, decided on 6th August, 2015.

Civil service---

----Advertisement for appointment of Educator (BS-16) in Education Department---Non-submission of original Bank challan to the Public Service Commission---Effect---Petitioner was not recommended for appointment due to non-submission of original Bank challan---Validity---Petitioner had deposited examination fee within time---Number of Bank challan had been mentioned in the application form for appointment submitted before the Public Service Commission---Public Service Commission could inquire from the concerned bank the veracity of said application submitted by the petitioner---Public Service Commission instead of performing its primary and fundamental duty had deleted the name of petitioner form the merit list in a mechanical way---Public Service Commission was vested with the parental jurisdiction to overcome such type of technicalities---Institution which was known to provide employment was expected to act as parents---Omission or illegality committed by the Public Service Commission should not be remained in field---Order of Public Service Commission to reject the candidature of petitioner and refusing to recommend her name for appointment in the concerned department was declared illegal, unlawful and without lawful authority---Matter was referred to the Public Service Commission with the direction to consider the same within a specified period---Petitioner was directed to appear before the Public Service Commission on the date fixed for further proceedings---Constitutional petition was accepted in circumstances.

Sheeraz Aziz Cheema v. Punjab Public Service Commission, through Secretary and 2 others PLD 2004 Lah. 545; Nazia Javed v. Government of the Punjab through Secretary, Education Department, Lahore and another 2009 PLC (C.S.) 58 and Imtiaz Ahmad v. Ghulam Ali and others PLD 1963 SC 382 rel.

Dawood Aziz Khokhar for Petitioner.

Tariq Mehmood Chaudhry, Assistant Advocate-General.
Mian Ghulam Shabbir Thaheem for Punjab Public Service Commission.
Muhammad Kashif Hayat, Law Officer, Special Education Department.

ORDER

ALI AKBAR QURESHI, J.--- The petitioner through this Constitutional petition is aggrieved of an order whereby the name of the petitioner has not been recommended by the respondent/Punjab Public Service Commission (hereinafter called the 'Commission') and has prayed as under:---

> "In view of the aforesaid it is most respectfully prayed that this Honourable Court be pleased to
>
> (i) Set aside the decision of PPSC in the Impugned Letter to cancel the candidature of the petitioner as done without lawful authority and with mala fide intentions;
>
> (ii) Direct PPSC to appoint the petitioner at post of Educationist that she has achieved after passing the written exam and interview with shining marks.
>
> (iii) Any other relief which this Honourable Court deems appropriate may also be granted."

2. The petitioner in response of an advertisement, applied for the post of Educator (BS-16) in Special Education Department Government of Punjab, the application of the petitioner was accepted and she was allowed to sit in the written examination conducted by the Commission. The petitioner qualified the written examination and was called for interview, through a call letter by the Commission. The petitioner appeared in the interview and finally secured the following marks, as informed by the Law Officer of the Commission:-

> Academic 32
> Written 32
> Interview 81
> Total- 145

The petitioner was placed at serial No.24 in the merit list, whereas the Commission conducted the written test and interview for 48 posts.

3. The Commission recommended 48 successful candidates for appointment to the concerned department but the name of the petitioner was not included in the list, as submitted by the petitioner. When enquired, it was informed, that as the petitioner despite notice failed to submit the original bank challan of Rs.400/- within 7 working days after conducting the interview i.e. 19.3.2015, therefore, the name of the petitioner has not been recommended and his initial application has been rejected, against which, the petitioner filed a review petition, which too was dismissed.

4. In response of the notice, the learned Law Officer of the Commission along with the learned Assistant Advocate-General appeared in the Court and submitted, that although the petitioner qualified for the said post and placed at serial No.24 of the merit list, but could not be recommended because of non-supplying the original bank challan of Rs.400/-.

5. At this stage the learned counsel for the petitioner submitted, that the petitioner deposited Rs.400/- well within time as required by the Commission and also mentioned the number of bank challan in the application, but this has totally been ignored by the Commission. When this fact was confronted to the learned Law Officer of the Commission, the learned Law Officer frankly conceded to the fact, that the petitioner deposited the amount within the stipulated time and also mentioned the number of bank challan, but the Commission is not supposed to verify the number from the concerned bank to enquire as to whether the amount of Rs.400/- had been deposited within time or not.

6. In view of the above facts it looks very strange and painful, that the Commission on this technicality thrown away a successful candidate who had legitimate expectation and did not recommend his name despite the fact, that her name was placed by the Commission in the merit list at serial No.24, whereas 48 successful candidates are to be recommended by the Commission for appointment to the concerned department. Undisputedly the petitioner deposited the amount of Rs.400/- well within time, mentioned the number of bank challan in the application, the Commission had unlimited sources to enquire from the concerned bank the veracity of the contents of application submitted by the petitioner wherein the bank challan number was mentioned, the Commission instead of performing its primary and fundamental duty, in a mechanical way elected to delete the name of the petitioner from the merit list, which in any case cannot be expected from the Commission which is vested with intrinsic parental jurisdiction to overcome this type of technicalities. The institution which is known to provide the employment on merits, is always expected to act like parents, therefore, this type of omission or illegality committed by the Commission should not be remained in the field. This type of proposition has already been dealt with by this Court in a judgment cited as Sheeraz Aziz Cheema v. Punjab Public Service Commission, through Secretary and 2 others (PLD 2004 Lahore 545) wherein it has been held that this type of the omission should be ignored by the Commission, particularly in the circumstances when it is to be seen whether the approach adopted by the Commission not to recommend her for appointment is justified. His lordship while delivering the judgment (supra) has observed "Needless to reiterate that too much adherence to technicalities which impedes the cause of justice cannot be countenanced by the Court". There is another judgment cited as Nazia Javed v. Government of the Punjab through Secretary, Education Department, Lahore and another (2009 PLC (CS) 58), lends support to the assertion of the petitioner wherein almost in identical circumstances, this Court passed a direction to the Commission in favour of the writ petitioner. In another judgment cited as Imtiaz Ahmad v. Ghulam Ali and others (PLD 1963 SC 382) the Honourable Jurist of the Hon'ble Supreme Court of Pakistan observed that "the proper place of the procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy."

7. The learned Law Officer also submitted during the proceedings, that as the recommendations have already been forwarded to the concerned department, therefore, the

Commission is precluded by law to make any recommendation, but if the concerned department demands or makes the requisition, the Commission would have no objection to recommend the petitioner.

At this stage, on the request of the learned counsel for the petitioner, the Secretary Special Education, Government of Punjab was impleaded as respondent in the constitutional petition and learned Assistant Advocate-General was directed to summon the representative of the Special Education Department, Government of the Punjab. Mr. Muhammad Kashif Hayat, Advocate/Law Officer of the Special Education Department appeared and submitted, that the successful candidates recommended by the Commission are joining their posts, but if the Commission recommends the name of the petitioner, the Special Education Department would have no objection to accommodate her.

8. In view of the above, the writ petition is accepted, the order of the Commission to reject the candidature of the petitioner and refusing to recommend the name of the petitioner for appointment in the concerned department is declared illegal, unlawful and without lawful authority and the matter is referred to the Chairmen, Punjab Public Service Commission, Lahore to look into the matter in these light of the observation made above. This exercise shall be completed positively within a period of 30 days from today. Since the matter relates to the appointment, therefore, the petitioner along with copy of this order shall appear before the Chairman/Commission on 17.08.2015 for further proceedings.

ZC/S-114/L Petition allowed.

2016 P L C 491
[Lahore High Court]
Before Ali Akbar Qureshi, J
PAKISTAN TELECOMMUNICATION COMPANY LIMITED (PTCL) through General Manager and 2 others
Versus
AZEEM KIBRIA BHATTI and 2 others

W.P. No.11161 of 2012, heard on 3rd August, 2015.

Industrial Relations Ordinance (XCI of 2002)---

----S. 46---Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968), S.O.1(b)---Permanent status of workman---Regularization of service---Grievance petition---Employee who was appointed as 'Service Attendant-II' on 19-9-1997 as daily wager, served the department for a long period by successfully completing the initial period of nine months---Employee, by afflux of time, had attained the status of regular/permanent employee, but he was not formally declared as such---Grievance petition filed by the employee was accepted by the Labour Court, and Labour Court directed the employers to regularize the services of the employee from the date of his appointment---Labour Appellate Tribunal upheld the order of Labour Court---Validity---Employee having attained the status of a permanent employee from the day he completed the initial period of nine months,

employers had no option, but to regularize the services of the employee from the date he was initially inducted into service---Post and project against which the employee was working, being of permanent nature, denial of the employers to regularize the services of the employee, was not permissible under the law---Judgments passed by the lower forums, were affirmed, and the constitutional petition, was dismissed, in circumstances.

Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 SC 153; Muhammad Hussain and others v. Settlement and Rehabilitation Commissioner and others 1975 SCMR 304; Independent Newspaper Corporation (Private) Ltd. v. Punjab Labour Appellate Tribunal and others 2013 SCMR 190; Ikram Bari and 524 others v. National Bank of Pakistan through President and another 2005 SCMR 100; Khadim Hussain v. The Secretary, Irrigation and Works, Lahore 2006 PLC 8; Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others 1995 PLC 539; Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others PLD 1996 SC 610; Pakistan International Airlines v. Sindh Labour Court No.5 and others PLD 1980 SC 323; Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others 1999 SCMR 2557; Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724; Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others 2008 SCMR 1058; Province of Punjab, through Secretary Communication and Works Department and others v. Ahmad Hussain 2013 SCMR 1547; WAPDA and others v. Khanimullah and others 2000 SCMR 879; Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others PLD 2001 SC 415; General Manager, Pearl Continental Hotel, The Mall, Lahore/ Rawalpindi v. Farhat Iqbal PLD 2003 SC 952; Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others PLD 2005 SC 792; State Life Insurance Corporation and others v. Jaffar Hussain and others PLD 2009 SC 194; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691 and Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44 ref.

Mirza Amir Baig and Khurram Shahzad Chughtai for Petitioners.
Asmat Kamal Khan for Respondent No.1
Date of hearing: 3rd August, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- This constitutional petition is preferred against the judgment dated 07.03.2012 and 12.07.2010 passed by the learned forum below, whereby the grievance petition under Section 46 of the Industrial Relations Ordinance, 2002, filed by respondent No.1 was allowed and the petitioners/employer was directed to regularize the services of respondent No.1 from 19.12.1997.

2. Shortly, the facts as depict from the record are, that respondent No.1 was appointed as Service Attendant-II on 19.09.1997 as daily wager; the respondent served the department for a long period by successfully completing the initial period of nine (9) months, as provided by West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, and by afflux of time attained the status of regular/permanent employee, but he was not

formally declared as a permanent employee. The respondent, being aggrieved, filed a grievance petition under Section 46 of the Industrial Relations Ordinance, 2002.

3. The learned Labour Court, after receiving the reply of the petitioners, recorded evidence of the parties and finally accepted the grievance petition by directing the petitioners to regularize the services of the respondent from 19.09.1997.

4. Being aggrieved thereof, the petitioner filed an appeal before the Punjab Labour Tribunal, which was dismissed and the order passed by the learned Labour Court was upheld.

5. Learned counsel for the petitioners has mainly argued, that the grievance petition filed by the respondent before the learned Labour Court was hopelessly barred by time but this aspect of the case has totally been ignored by the learned forums below. Also submitted, that the mandatory requirement to serve the grievance notice before filing the grievance petition has not been complied with, therefore, the grievance petition is liable to be dismissed on this score alone.

However, the learned counsel for the petitioners has not denied that the respondent initially was appointed as Service Assendant-II on 19.09.1997 as daily wager.

6. Conversely, learned counsel for respondent No.1 submits, that both the learned forums below have concurrently concluded, that the respondent is entitled to be regularized from the date of his initial appointment as daily wager i.e. 19.09.1997.

7. Heard. Record perused.

8. Undisputedly respondent was appointed as Service Attendant-II on 19.09.1997 as daily wager and continuously served the department. It is also not denied, that the respondent was appointed against a permanent post and permanent project and successfully completed the initial period of nine months as given in Industrial Relations Ordinance, 2002, therefore, the question which requires consideration and adjudication, as to whether the respondent was entitled to be regularized into service from the date of his initial appointment or not. Learned counsel for the petitioners has relied upon Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 SC 153), Muhammad Hussain and others v. Settlement and Rehabilitation Commissioner and others (1975 SCMR 304), Independent Newspaper Corporation (Private) Ltd. v. Punjab Labour Appellate Tribunal and others (2013 SCMR 190), Ikram Bari and 524 others v. National Bank of Pakistan through President and another (2005 SCMR 100) and Khadim Hussain v. The Secretary, Irrigation and Works, Lahore (2006 PLC 8).

9. The record reveals, that the witnesses appeared on behalf of the petitioners categorically stated and admitted while appearing in the witness box before the learned Labour Court, that the respondent was appointed initially as Service Attendant-II, on daily wages, on 19.09.1997 and still working in the petitioner's establishment, therefore, under the settled law, the respondent has attained the status of a permanent employee from the day he completed the initial period of nine months, therefore, the petitioners had no option but to regularize the services of the respondent from the date he was initially inducted into service.

A specific question was put during the course of arguments to the learned counsel for the petitioners, that why the respondent was not regularized into service from the date of his initial appointment, the learned counsel could not offer any satisfactory explanation and even in the record nothing is available, therefore, sufficient material is available on the file to hold, that the respondent is entitled to be regularized into service.

10. Further, the only question which although has already been dilated upon in detail, by the learned Labour Court as well as the learned Labour Appellate Tribunal, pertains to the status of the respondent and his regularization by afflux of time and law applicable thereon, requires consideration.

11. The legislature has defined the permanent workman in Standing Orders 1(b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1(b) of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:-

SCHEDULE
STANDING ORDERS

1. **Classification of Workmen:** (a) Workmen shall be classified as--

(1) ……..

(2) ……..

(3) ……..

(4) ……..

(5) ……..

(6) ……..

(b) A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months.] "

12. In this case, the respondent is working against the same post and Project from the last many years, therefore, it can safely be held, that the post and project against which the respondent is working, is of permanent nature, thus, the denial of the petitioners to regularize the services of the respondent, is not permissible in law.

13. It is not denied, that the respondent is working from the last many years, and suffice to hold, that the respondent is needed to the petitioners establishment.

14. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, government or the private, who hire the service of the poor people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact it is the device which is based on mala fide being used to deprive the poor workers from their legal rights, who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the Hon'ble Supreme Court of Pakistan titled Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others (1995 PLC 539), this petition was filed by the Punjab Seed Corporation. The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:

> "3. The contentions of the learned counsel for the petitioners that the respondent was appointed on `work charge basis' to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.
>
> 4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under -
>
> There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure 'A' would demonstrate that he was appointed on 25.06.1980 and that his services were terminated on 20.07.1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.
>
> 5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

15. In another esteemed judgment reported as Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others (PLD 1996 Supreme Court 610), the Hon'ble Supreme Court of Pakistan, while dealing with the question of permanent worker, at page 621, has ruled as under:

> "The ratio of the above judgment in the case of Muhammad Yaqoob (supra) seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and non-residential buildings and constructing itself and/or causing construction thereof. The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by the Labour Courts in this respect cannot be said to be not founded on evidence on record."

16. In another judgment cited as Tehsil Municipal Administration v. Muhammad Amir (2009 PLC 273), the status of a workman has further been elaborated at page 280, the relevant paragraph is reproduced as under:

> "13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with 'water work', 'well' within the meaning of construction industry as defined in section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked. He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were transferred to TMA Bhalwal where he continued to work till 15.08.2005 when he was informed that his services had been terminated w.e.f. 01.09.2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of clause (b) of paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in para-10 above."

17. The other esteemed judgments applicable in this case are as under:

> 1. Pakistan International Airlines v. Sindh Labour Court No.5 and others (PLD 1980 Supreme Court 323)

2. Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others (1999 SCMR 2557)

3. Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724)

4. Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others (2008 SCMR 1058)

5. Province of Punjab, through Secretary Communication and Works Department and others v. Ahmad Hussain (2013 SCMR 1547)

6. WAPDA and others v. Khanimullah and others (2000 SCMR 879).

18. The arguments advanced by the learned counsel for the respondent relying on the different esteemed judgments of the Hon'ble Supreme Court of Pakistan, that this Court, while exercising the jurisdiction conferred under Article 199 of Constitution of the Islamic Republic of Pakistan, 1973, cannot substitute its own finding in the presence of the concurrent conclusion drawn by the forums below on facts as well as on law. Both the learned forums below, after due appreciation of the record and the contentions of the parties, have recorded concurrent findings which cannot be interfered while exercising the writ jurisdiction unless the forums below acted without lawful authority and jurisdiction. Reliance is placed on Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others (PLD 2001 Supreme Court 415), General Manager, Pearl Continental Hotel, The Mall, Lahore/Rawalpindi v. Farhat Iqbal (PLD 2003 Supreme Court 952), Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others (PLD 2005 Supreme Court 792), State Life Insurance Corporation and others v. Jaffar Hussain and others (PLD 2009 Supreme Court 194), Rai Ashraf and others v. Muhammad Saleem Bhatti and others (PLD 2010 Supreme Court 691), and Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 Supreme Court 44).

19. This Constitutional petition has been filed against the concurrent findings on facts as well as on law recorded by the learned forums below, although the learned counsel for the petitioners argued the case at length but could not point out any jurisdictional defect, legal infirmity or irregularity with the findings recorded by the learned forums below. Needless to mention, that in the Constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the findings of forums below, the petitioners will have to point out the illegality committed by the learned forums, and in this case the petitioners have failed to point out any such legal infirmity, therefore, this is not a fit case to exercise the Constitutional jurisdiction, which is discretionary and equitable in nature. Even otherwise, the petitioners, in view of the facts and circumstances of the case, are not entitled for any discretionary or equitable relief.

20. Resultantly, the judgment passed by the learned lower forums is affirmed and the writ petition is dismissed with no order as to cost.

HBT/P-37/L Petition dismissed.

2016 Y L R 198
[Lahore]
Before Ali Akbar Qureshi, J
Haji GHULAM MUHAMMAD through L.Rs. and others---Petitioners
Versus
TAHIR MEHMOOD and others---Respondents

C.R. No.299 of 2003, heard on 3rd June, 2015.

(a) Arbitration Act (X of 1940)---

----S.30---Objections against award---Petitioners did not file objection under S.30, Arbitration Act, 1940 at the time when award was submitted before Trial Court for making the same rule of court---Petitioner, in circumstances, admitted the award and was not permitted to raise any such objection at belated stage.

Khan Muhammad Yusuf Khan Khattak v. S.M. Ayub and 2 others PLD 1973 SC 160; Mst. Rashida Abdul Rehman v. Zahoor Hussain and 5 others 2007 CLC 1372; Bashir Ahmad and 21 others v. Shah Muhammad and another 2010 CLC 734; Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.R.s and others 2013 SCMR 1300; Abdul Ghani and others v. Mst. Yasmeen Khan and others 2011 SCMR 837; Musaddaq Ali Khan, and others v. Sharif Rahat Qureshi, and others NLR 2001 Civil 137; Karim Bakhash v. Gul Rehman 1990 CLC 1200, Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241; Maqsood Ahmad and others v. Salman Ali PLD 2003 SC 31; China International Water v. Pakistan Water and Power Development Authority PLD 2005 Kar. 670; Inayat Ullah Khan v. Obaidullah Khan and others 1999 SCMR 2702 and Mst. Farida Malik and others v. Dr. Khalida Malik and others 1998 SCMR 816 ref.

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

----S.115---Revision---Interference in concurrent findings on facts by courts below---Scope---Concurrent findings on facts not to be interfered in routine but in an extraordinary circumstances when courts below had committed serious jurisdictional error or legal infirmity.

Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others 2014 SCMR 914; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984; Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 and Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452 rel.

Malik Noor Muhammad Awan and Ejaz Ahmad for Petitioners.

Naveed Shaheryar Sheikh and Fayyaz Ahmad Kaleem for Respondents.

Date of hearing: 3rd June, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---Through this single judgment, I intend to dispose of this petition along with C.R. No.300 of 2003, titled "Haji Ghulam Muhammad (deceased) through L.Rs. v. Muhammad Tofail and another" arisen out of the consolidated judgment and decree dated 06.01.2003 and 16.02.1993, passed by the learned Courts below.

2. This civil revision is preferred against the concurrent findings recorded by the learned Courts below while dictating consolidated judgment dated 06.01.2003 and 16.02.1993, in the following two suits; whereby the suit for specific performance, filed by the present respondents, was decreed, whereas the suit for possession, filed by the present petitioners, was dismissed.

(1) Tahir Mehmood v. Ghulam Muhammad
(Suit No.467/2001)
(2) Ghulam Muhammad v. Muhammad Tofail
(Suit No.468/2001)
Appeals:
(1) Ghulam Muhammad v. Tahir Mehmood
(Appeal No.82/1993)
(2) Ghulam Muhammad v. Muhammad Tofail
(Appeal No.83/1993)

3. The necessary facts for the disposal of this civil revision as well as C.R. No.300 of 2003 are that, a suit for specific performance of a contract regarding plot No.75, measuring 10 marla, situated in Block-II, Mundi Town Bhakkar, was filed by the respondent namely Tahir Mehmood, against the petitioners, whereas the petitioners filed a suit for possession of the suit land against the respondents.

In the suit for specific performance of the contract, the respondents have contended that the petitioner Haji Ghulam Muhammad entered into an agreement for the sale of suit land for a consideration of Rs.12,000/-, which was received by the petitioner, but thereafter refused to execute the sale deed despite the fact, that the possession was handed over to the respondents at the time of receiving the consideration. Further contended, that to resolve the controversy with the consent of the petitioner, Haji Ghulam Muhammad, an arbitrator namely Tahir Mehmood was appointed, who given the award in favour of the respondent/plaintiff, but the same could not be made rule of the Court on a technical ground although the learned counsel appointed by the petitioner namely Ghulam Muhammad recorded his conceding statement to the effect, that the petitioner had no objection, if the award is made rule of the Court.

In a suit for possession filed by the petitioner namely Ghulam Muhammad, it was contended, that the petitioner is owner of the suit land and the respondents had forcibly taken the possession, which be declared unlawful.

The learned trial court consolidated both the suits, and from the divergent pleadings of the parties framed as many as eleven issues, recorded the evidence of the parties and finally decreed the suit "for specific performance of the contract" filed by the respondents, whereas dismissed the suit "for possession" filed by the petitioners, vide consolidated judgment and decree dated 16.02.1993.

Against the consolidated judgment passed by the learned trial court two appeals were filed by the petitioners. The learned appellate Court after hearing the arguments of the parties dismissed both the appeals through a consolidated judgment dated 06.01.2003. Hence, this civil revision.

4. Learned counsel for the petitioners mainly argued, that the respondents could not prove the oral agreement and the factum of arbitration proceedings in accordance with law as instead of producing the original documents pertaining to the arbitration proceedings, certified copies issued by the learned trial court were placed on record, therefore, this is sufficient to dismiss the suit filed by the respondents. Further submits, that as the award was not made rule of the Court, therefore, the same cannot be referred and if these documents are excluded from the evidence, the respondents have no evidence to prove the oral agreement. Lastly, contended that the oral agreement without consideration is void.

5. Conversely, learned counsel for the respondents seriously opposed the contentions advanced by the learned counsel for the petitioners and submitted, that the respondents have succeeded to prove their case through reliable and confidence inspiring evidence, therefore, both the learned courts below rightly decreed the suit of the respondents and dismissed the suit filed by the petitioners. Next contended, that even otherwise, both the learned Courts below have recorded concurrent conclusion, therefore, in view of the principle laid down by the Hon'ble Supreme Court of Pakistan in different judgments, cannot be interfered.

6. Heard. Record perused.

7. After careful perusal of the record collected by the learned trial court during the course of recording the evidence of the parties, it appears that to resolve the controversy between the parties, the record pertaining to the arbitration proceeding requires consideration. As per the record, during the pendency of the suit, obviously with the intervention of certain people to resolve the controversy amicably the matter was referred to a Salis for arbitration; the arbitration proceedings were conducted by the Arbitrator/Salis appointed by the parties, who gave the arbitration award on 25.02.1982, which was submitted under section 17 of the Arbitration Act, 1940, for making it rule of the Court but the learned trial Court refused to make the award, rule of the Court on the ground, that in fact the parties in order to avoid the payment of government dues, have appointed the Salis. Now it is to be seen as to whether, the respondents have succeeded to prove the aforesaid record including the arbitration proceedings through the signatory and scribe to rebut the objection raised by the petitioners.

8. The record shows, that the arbitrator duly appointed by the parties, appeared in the witness box and proved the arbitration award (Ex.D1); the scribe Shaikh Muhammad Akhtar of award/Ex.D1 and Iqrarnama Taqarari Salis /Ex.D2, appeared in the witness box as DW3 and proved the execution of the aforesaid arbitration proceedings. So much so, DW4 Malik

Ghulam Rasool, Advocate, also appeared and stated that he was appointed by the petitioner namely Ghulam Muhammad and filed the conceding statement for making the award as rule of the Court. The aforesaid documents which had been proved in accordance with law are sufficient to prove, that the petitioner entered into an agreement for the sale of suit plot to the respondent, received the consideration agreed between the parties and handed over the possession to the respondents.

In this regard, I'm fortified by the esteemed judgment of the Hon'ble Supreme Court of Pakistan titled "Khan Muhammad Yusuf Khan Khattak v. S. M. Ayub and 2 others" (PLD 1973 Supreme Court 160), wherein it is ruled, that except the judicial record, all other documents, even if exhibited, can only be read in evidence if the signatory or the scribe appeared in the Court. Relevant part of the judgment (supra) is reproduced hereunder:--

> "When I say that the document Exh. P. E. is unproved, I have in mind the mandatory provisions of section 67 of the Evidence Act, which lay down that "if a document is alleged to be signed or written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting". If the case of the respondent was that the appellant had signed the original of Exh. P. E. or the certificate appended to it, it must have been proved that it was in the appellant's handwriting, for which no effort whatsoever was made. In the case of Bengal Friends & Co. v. Gour Benode Saha & Co., this Court had expressed itself on this point as follows:-
>
> "Documents which are not copies of judicial record, should not be received in evidence without proof of signatures and handwriting of persons alleged to have signed or written them."
>
> I am of the view that even if such documents are brought on record and exhibited without objection, they remain on the record as "exhibits" and faithful copies of the contents of the original but they cannot be treated as evidence of the original having been signed and written by the persons who purport to have written or signed them, unless the writing or the signature of that person is proved in terms of the mandatory provisions of section 67 of the Evidence Act."

9. Learned counsel for the petitioners vehemently argued; that the respondents have failed to produce the original record pertaining to the arbitration proceedings. The record depicts that the respondents annexed all the original record pertaining to the arbitration proceedings, with the application filed before the learned Senior Civil Judge, Bhakkar, for making the award rule of the Court, and produced the certified copies duly issued by the learned Civil Court of the aforesaid record and further, also produced the scribe and signatory of those documents, therefore, the objection raised by the learned counsel for the petitioners has no substance. The learned counsel for the petitioners while arguing the case has referred the following judgments:--

> "Mst. Rashida Abdul Rehman v. Zahoor Hussain and 5 others" (2007 CLC 1372), "Bashir Ahmad and 21 others v. Shah Muhammad and another" (2010 CLC 734),

"Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.Rs. and others" (2013 SCMR 1300), "Abdul Ghani and others v. Mst. Yasmeen Khan and others" (2011 SCMR 837), "Musaddaq Ali Khan, and others v. Sharif Rahat Qureshi, etc." (2001 CLC 551), "Karim Bakhash v. Gul Rehman" (1990 CLC 1200), "Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others" (PLD 2011 SC 241), "Maqsood Ahmad and others v. Salman Ali" (PLD 2003 SC 31), "China International Water v. Pakistan Water and Power Development Authority" (PLD 2005 Karachi 670), "Inayat Ullah Khan v. Obaidullah Khan and others" (1999 SCMR 2702), "Mst. Farida Malik and others v. Dr. Khalida Malik and others" (1998 SCMR 816) and submitted, that as the respondents had failed to prove the oral agreement, the agreement of reference, award was not made rule of the Court has no value, the arbitration proceedings being disputed document cannot be made basis for decision of the case and the award which is a judgment, should be written by the judge not by any other.

The esteemed judgments referred by learned counsel for the petitioners were perused but those are not helpful to the petitioners as the respondents through reliable, cogent and confidence inspiring evidence had successfully proved the appointment of Arbitrator/Salis, proceedings of the arbitration and award announced by the arbitrator.

It is also notable here, that the petitioners did not file the objection under section 30 of the Arbitration Act, 1940, at the time when the award was submitted before the learned trial court for making it rule of the Court, meaning thereby, that the petitioner had admitted the award, therefore, at this belated stage is not permitted to raise any such objection.

10. The learned trial court as well as the learned appellate court as manifest from the record of the case, rightly reached to the conclusion that the respondents have succeeded to prove the case for specific performance of the contract, therefore, the petitioner namely Ghulam Muhammad was not entitled to ask for the possession of the disputed plot. Further, after giving my anxious consideration, I myself have reached to the conclusion, that the petitioners have miserably failed to defend the suit filed by the respondents and prove their own suit for possession and because of the malicious attitude of the petitioners, the litigation remained pending for decads.

Although the learned counsel for petitioners argued the case at some length but could not point out any illegality, infirmity or irregularity in the impugned judgment with regards the concurrent conclusion rendered by learned Courts below or that the judgment and decree is result of misreading and non-reading of evidence. Even otherwise, as ruled by the Hon'ble Supreme Court of Pakistan, that the concurrent findings on facts should not be interfered in routine, but in an extra ordinary circumstance, when the learned courts below have committed serious jurisdictional error or legal infirmity.

I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others (2014 SCMR 914), Cantonment Board through Executive Officer Cantt. Board,

Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another (2008 SCMR 428), and "Abdul Ghafoor and others v. Kallu and others" (2008 SCMR 452), that the High Court, in the case of concurrent findings, normally does not interfere unless the same is result of exercise of jurisdiction not vested in the learned courts below.

11. In view of the above, I see no reason to interfere with the concurrent findings rendered by the learned courts below. Resultantly, this revision petition alongwith C.R. No.300 of 2003, stand dismissed, with no order as to cost.

RR/G-26/L Revision dismissed.

2016 Y L R 668
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD SIDDIQUE through Legal Heirs and others---Petitioners
Versus
HADAYAT ALI through Legal Heir and others---Respondents

C.R. No.579-D of 1995, heard on 15th December, 2014.

Specific Relief Act (I of 1877)---

----S. 12---Suit for specific performance of agreement to sell---Document, proof of---Male member of the family to identify the lady who was illiterate or "Pardanashin"---Two marginal witnesses of the document were required to prove the same---Only one marginal witness of agreement to sell had appeared in the present case---Plaintiff had failed to prove the execution of alleged agreement to sell---Concurrent findings recorded by the courts below should not be interfered in routine unless there was any serious misreading or non-reading of evidence or jurisdictional defect---Revision was dismissed in circumstances.

Muhammad Ibrahim through Legal Heirs and others v. Mst. Basri through Legal Heirs and others 1998 SCMR 96; Faiz Muhammad through Legal Representatives and others v. Mst. Khurshid Bibi PLD 2009 Lah. 41; Muhammad Afzal Khan, and others v. Mian Ashfaq Ahmad 2007 SCMR 1840; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984 and Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 rel.

Nemo for Petitioners.

Muhammad Ramzan Khalid Joiya for Respondents.

Date of hearing: 15th December, 2014.

JUDGMENT

ALI AKBAR QURESHI, J.---Before deciding the main case, it is necessary to note, that instant civil revision was filed in the year 1995 and admitted for regular hearing on 06.12.1998, whereas the interim relief was granted on 02.08.1995, but thereafter, the petitioners did not carefully prosecute their case, and in order to provide the right of hearing, the notices were issued in the name of the petitioners, and as per the report dated 09.12.2014, the notices were served upon the real brother of the petitioners, namely, Muhammad Boota son of Bashir Ahmad who also took the responsibility to inform the others, but nobody appeared.

2. Since it is an old matter and the civil revision has been admitted for regular hearing, therefore, the same is being decided on merits.

3. This civil revision is directed against the judgments and decree dated 03.05.1995 and 18.05.1991, passed by the learned courts below, whereby the suit for specific performance of an agreement dated 31.01.1963, filed by the petitioners, was finally dismissed.

4. Shortly the facts as stated in the record are, that the petitioners/plaintiffs instituted a suit for the specific performance of an agreement dated 31.01.1963, allegedly executed by the predecessors in interest of the respondents, namely, Raishman Bibi, for the sale of land measuring 09-Kanals 09-Marlas, for a consideration of Rs.3000/- out of 22-Kanals, the detail of which is given in the headnote of the plaint. It was also contended in the plaint by the petitioners, that an amount of Rs.1500/- was paid at the time of execution of the agreement, whereas the rest of the amount was to be paid at the time of registration of the sale deed as the proprietary rights are yet to be conferred upon deceased Raishman Bibi.

5. The suit was contested by the predecessor in interest of the respondents, namely, Raishman Bibi by filing written statement, wherein she denied the execution of any agreement in favour of the petitioners.

6. The learned trial court, out of the pleadings, framed as many as eight issues, recorded evidence of the parties, and finally, after hearing the arguments, dismissed the suit, against which an appeal was filed, which too was dismissed by the learned appellate court. Hence, this civil revision.

7. The record of the case was examined with the assistance of learned counsel for the respondents from where, it is revealed, that the petitioners filed the suit on the basis of an agreement to sell allegedly executed by the predecessor in interest of the respondents, namely, Raishman Bibi and to prove the execution of the agreement to sell, the petitioners produced marginal witness who although stated, that he signed the document, but did not utter even a single word as to whether the contents of the agreement to sell were read over and made understand to the deceased Raishman Bibi, the predecessor in interest of the respondents, who was an illiterate village-lady, and further the PWs appearing on behalf of the petitioners, did not say, that the said lady executed the agreement to sell in his presence by putting her thumb impression. It is well-settled proposition of law, as laid down by the

Hon'ble Supreme Court of Pakistan, that in case of the illiterate or "Parda Nasheen" lady, the male member of the family will identify the lady. In this case, no such exercise was done. Reliance is placed on Muhammad Ibrahim through Legal Heirs and others v. Mst. Basri through Legal Heirs and others (1998 SCMR 96) and Faiz Muhammad through Legal Representatives and others v. Mst. Khurshid Bibi (PLD 2009 Lahore 41).

8. Learned counsel for the respondents submits, that in this case, only one marginal witness appeared, whereas it is the requirement of law, that to prove a document, particularly the agreement to sell, two marginal witnesses are required. Reliance is placed on Muhammad Afzal Khan, and others v. Mian Ashfaq Ahmad 2007 SCMR 1480.

9. Keeping in view the above observation and the law laid down on this point, it can safely be observed, that the petitioners have completely failed to prove the execution of the alleged agreement to sell.

10. It is also pertinent to mention here, that in this case, the petitioners are the real brothers of the predecessor in interest of the respondents, namely, Raishman Bibi (deceased) and it appears, that simply to deprive their sister from her valuable rights, the petitioners had managed all this and for this reason, he (petitioner/plaintiff) did not himself appear in the witness box. The son of the petitioner/plaintiff appeared in the witness box as attorney, who stated in his statement, that his father, the petitioner/plaintiff, is present in the courtyard and further stated, that although he is sick but not hospitalized. The afore-referred state of affairs is sufficient to show and prove, that the petitioner/plaintiff has miserably failed to prove the execution of the agreement to sell.

11. I myself carefully examined the record and the findings concurrently drawn by the learned courts below. Both the learned courts below, after careful examination and consideration of the record, reached to a conclusion, that the petitioners have failed to prove the execution of the agreement to sell, therefore, they are not entitled for any relief. I am in agreement with the findings concurrently concluded by the learned courts below and even otherwise, it is now settled proposition of law, that the concurrent findings should not be interfered in routine unless there is any serious mis-reading or non-reading of evidence, or the jurisdictional defect.

I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), and Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another (2008 SCMR 428), that the High Court, in the case of concurrent findings, normally does not interfere unless the same is result of exercise of jurisdiction not vested in the learned courts below.

12. In view of the above, I see no reason to interfere with the concurrent findings rendered by the learned courts below. Resultantly, this petition is dismissed with no order as to cost.

ZC/M-70/L Revision dismissed.

2016 Y L R 2694
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
ABDUL RAZZAQ---Petitioner
Versus
ADDL: DISTRICT JUDGE and others---Respondents

W.P. No.16148 of 2015, heard on 5th November, 2015.

Civil Procedure Code (V of 1908)---

----S. 12(2) & O. XXXII, R. 3---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of agreement to sell---Defendants being minors---Non-appointment of guardian-ad-litem of the minors---Fraud and misrepresentation---Decree, setting aside of---Scope---Plaintiff had not disclosed the age of minors and fraud had been committed by him---No guardian-ad-litem was appointed by the Trial Court nor any such prayer was made by the plaintiff---Brother and sister of minors had not sincerely and effectively safeguarded the interests of minors---Both the courts below had rightly accepted the application for setting aside impugned judgment and decree obtained by the plaintiff---No illegality had been pointed out in the impugned orders passed by the courts below---Constitutional petition was dismissed in circumstances. Tanveer Mehboob and another v. Haroon and others 2003 SCMR 480; Mst. Fauzia Parveen alias Fauzia Tiwana v. Mst. Sahib Khatoon and others 1988 SCMR 552 and Mst. Muhammad and others v. Ghulam Nabi and others 2007 SCMR 761 rel.

Ch. Pervaiz Akhtar Gujjar for Petitioner.
Date of hearing: 5th November, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This Constitutional petition calls in question the validity of an order dated 03.10.2015 and 10.09.2013, passed by the learned Courts below whereby the application under section 12(2) of Code of Civil Procedure, 1908, filed by the respondents was allowed.

2. Shortly the facts as stated in the record are; that a suit for specific performance of an agreement to sell was filed by the petitioner against the predecessor in interest of the respondent namely Khalid Mehmood; that during the pendency of the suit Khalid Mehmood died and his legal heirs were placed on record by the petitioner; Ali Raza and Abdul Qayyum legal heirs of deceased Khalid Mehmood were minors at the time; the list of legal heirs of deceased Khalid Mehmood was placed on record but neither the Court nor the petitioner prayed for the appointment of the guardian-ad-litem to fulfill the mandate of Order XXXII, Rule 3(iii) of the Code of Civil Procedure, 1908. Thereafter no one appeared on behalf of the respondents/defendants including the minor; therefore, they were proceeded against ex parte on 24.10.2008 and subsequently after recording the ex-parte evidence of the petitioner/plaintiff an ex-parte judgment and decree was passed on 09.01.2010.

3. The respondents/minors on coming to know the ex-parte judgment and decree dated 09.01.2010, filed an application under section 12(2), C.P.C. before the learned trial court on the ground, that the guardian-ad-litem was not appointed and the minors were not competent in law to prosecute or defend the suit, therefore, the judgment and decree has been obtained by playing fraud and misrepresentation.

4. The learned trial court on the basis of the available record, accepted the application under section 12(2), C.P.C. and set aside the judgment and decree dated 09.01.2010 against which a civil revision was filed before the learned Addl: District Judge, Khanewal, which was dismissed. Hence, this writ petition.

5. Heard. Record perused.

6. The only question involved in this case which requires adjudication of the matter as to whether the minor is competent to file or defend a suit without the appointment of the guardian-ad-item or guardian duly appointed by the competent Guardian Judge.

As per record, in this case the guardian-ad-litem was not appointed by the Court nor any prayer was made by the petitioner, therefore, this illegality cannot lightly be ignored keeping in view the principle laid down by the Hon'ble Supreme Court of Pakistan, in a judgment cited by learned counsel for the petitioner, titled "Tanveer Mehboob and another v. Haroon and others" (2003 SCMR 480), the Hon'ble Supreme Court of Pakistan, has observed, that if a minor defendant in a suit was represented by his father, brother or sister as co-defendant without any conflict or interest and such co-defendant sincerely and effectively defended the rights and interest of the minor in the property it would be deemed that the rights were sufficiently guarded and mere fact that the minor was not sued through guardian-ad-litem would not make the decree invalid. The afore- referred esteemed judgment has misinterpreted and misconstrued by the learned counsel for the petitioner.

7. The most important words used by the Hon'ble Supreme Court of Pakistan in the judgment supra are "sincerely" and "effectively" defended the rights and interest of the minors.

> The meanings of word "Sincerely" are: genuinely, honestly, really, with all sincerity, truly, truthfully, wholeheartedly, with all one's heart, with good faith; honestly, openly, and without deceit or fraud. AND
>
> The meanings of word "effectively" are; efficiently, successfully, skillfully, ably, competently, capably and proficiently.

In this case firstly it is to be seen as to whether petitioner/plaintiff fairly assisted the Court and whether the petitioner committed any fraud or misrepresentation on the demise of the predecessor of the minors namely Khalid Mehmood when a list of legal representative was placed on record, wherein the age of the minors as 16 and 17 years was mentioned but the petitioner/ plaintiff while filing the amended plaint under the order of the Court neither disclosed the age of the minors who were impleaded as defendants nor asked to the Court to

appoint the guardian-ad-litem. The aforesaid act of the petitioner, sufficiently proves the mala fide and the fraud committed by him.

8. Secondly, as to whether the brother and sister of the minors sincerely and effectively safeguarded the interest of the minors. After perusing the record, the answer is negative. Although the brother and sister of the minor filed power of attorney but thereafter disappeared and facilitated the other side to get the ex-parte judgment and decree therefore, both the learned Courts below rightly accepted the application and set aside the judgment and decree obtained by the petitioner by playing fraud and misrepresentation.

The Hon'ble Supreme Court of Pakistan in similar circumstances wherein an ex-parte decree was passed against minor, has observed in a judgment cited as Mst. Fauzia Parveen alias Fauzia Tiwana v. Mst. Sahib Khatoon and others (1988 SCMR 552), as under:--

> "In this case, the guardian had failed to do her duty and was liable to be removed and substituted by the Court. As the Court happens to be the custodian of the interest of the minors it has to be watchful whether a party discharges its duty or not. We are, therefore, in agreement with the view taken by the two Courts that this omission to ensure proper representation of the minors was a material factor to be taken not of while considering the application for setting aside the ex-parte decree. The minors were, in any case, neither properly served nor properly represented.
>
> So far as the factual aspect of the case is concerned we do not want to interfere with the concurrent findings of fact recorded by the District Judge, and upheld by the learned Judge in Chambers holding that keeping in view that there were Pardah nashin ladies and minors involved the service should have been got effected in a more inspiring manner than was according to the two Courts done in the case.
>
> As regards the question of limitation in filing the application for setting aside the ex parte decree there is, as observed by the learned Judge in the High Court no objection taken at the proper stage by the plaintiff and no issue in that behalf was framed."

In another judgment cited as Tanveer Mahboob and another v. Haroon and others (2003 SCMR 480), the Hon'ble Supreme Court of Pakistan has dealt with the duties of Guardian-ad-litem wherein it is observed, that although the non-appointment of the Guardian-ad-litem is sometimes of technical importance but if such omission caused prejudice to the minor the Courts will take care the interest of the minor. The same is reproduced as under:--

> "The non-fulfillment of formal requirement of appointment of a minor defendant under Order XXXII, Rule 3, C.P.C. would not affect the proceedings in the suit and the decree if ultimately passed, unless it is shown that due to omission of appointment of guardian ad-litem of a minor, who was being represented by his natural guardian, the minor was caused prejudice and the objection would be only of technical importance."

In another judgment of the Hon'ble Supreme Court of Pakistan titled Mst. Muhammadi and others v. Ghulam Nabi and others (2007 SCMR 761) it has been observed as under:--

"8. It is also a settled law that the non-compliance of the provisions of Order XXXII, Rule 12, C.P.C. would be fatal only in those cases where the interest of the minor was not fully protected and prejudice was caused to the interest of minor as result of such non-compliance as the law laid down by this Court in Mst. Afzal Begum's case (PLD 1979 SC 30). In the present case minors are beneficiary."

9. Learned counsel for the petitioner also submitted that the learned Court did not appoint the Guardian-ad-litem but the same is not helpful or has any substance in view of the principle laid down in the afore-said esteemed judgment and further for the reason, that initially the minors were arrayed as defendants through their real brother and sister who could not watch or safeguard the interest of the minors. It is also well settled principle of law, that the suit can be instituted by or on behalf of a competent person and in any case, in the instant case, the minors were arrayed as defendants who were legally not competent to safeguard their interest.

10. Even otherwise the petitioner should not be shy or scared to prosecute his case before the learned trial court particularly when the minors during this period has attained age of majority.

11. Learned counsel for the petitioner also argued the case at some length and sought some time to further prepare his brief but could not be succeeded to point out anything which is illegal, unlawful and against the law. Therefore, I see no reason to interfere with the concurrent findings on facts as well as on law recorded by the learned court below.

12. Resultantly, this writ petition is dismissed being devoid of force. No order as to costs.

ZC/A-15/L Petition dismissed.

PLJ 2016 Lahore 82
[Multan Bench Multan]
***Present*: ALI AKBAR QURESHI, J.**
***Mst.* SAKINA BEGUM--Petitioner**
versus
GOVERNMENT OF PUNJAB through Secretary EDUCATION PUNAJB, LAHORE and 6 others--Respondents

W.P. No. 4096 of 2013, decided on 22.1.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional Petition--Promotion--Fake degree was provided at time of promotion--No action was taken--Challenge to--EDO (Education), was directed to take action as recommended by inquiry officer against delinquent and if necessary, EDO (Education) will seek; permission from competent authority including secretary education (Schools) EDO

(Education), will also determine validity of promotion order passed in favour of respondent--Process will be completed positively within a period of 20 days. [P. 85] A

Rana Asif Saeed, Advocate for Petitioner.

Mr. Mubashar Latif Gill, Asstt.A.G. with *Shaukat Ali Tahir,* EDO (Education), Vehari for Respondents.

Raja Naveed Azam and Shakil Javed Chaudhry, Advocates for Respondents No. 7.

Date of hearing: 22.1.2015.

ORDER

The petitioner, who is working as EST at Govt. Girls Primary School Chak No. 138/WB, has challenged the promotion of Respondent No. 7, on the ground, that the Respondent No. 7 on the basis of a fake B.Ed. degree, managed to promote herself as SST.

2. Learned counsel for the petitioner submits, that in an inquiry conducted by the District Monitoring Officer, Vehari, in compliance of the order passed by this Court, it has been proved, that the Respondent No. 7 used a fake B.Ed, degree but no action till today, has been taken and lastly prayed, that the promotion of Respondent No. 7 may be declared illegal.

3. Mr. Shoukat Ali Tahir, EDO (Education), Vehari, present in the Court and submitted, that after verification, it has been proved, that the Respondent No. 7 used fake B.Ed degree at the time of her promotion.

4. The aforesaid statement made by the EDO (Education), Vehari, was controverted by the learned counsel appearing on behalf of the Respondent No. 7 and submitted, that the Respondent No. 7 did not use the fake decree as in fact it was submitted by the petitioner and further submitted, that even otherwise as per the Recruitment Rules, the requisite qualification to promote as SST is B.Sc., B.Ed/M.Ed, or M.A in Education, therefore, the Respondent No. 7, having the qualification of M.A Education, is entitled to be promoted as SST. At this stage, learned counsel for the petitioner has referred the seniority list duly signed and attested by the DEO (SE), Vehari, wherein the Respondent No. 7 is at Sr. No. 1 and in column "Date of Passing B.Ed. Examination" is mentioned 15.02.1995. When it was confronted to the learned counsel for the Respondent No. 7 and particularly EDO (Education), Vehari, the EDO (Education), Vehari frankly conceded, that this seniority list has been issued by the department and it is correct.

5. After hearing the arguments by learned counsel for the parties and perusing the record, it appears, that the Respondent No. 7 herself submitted the B.Ed degree issued on 15.02.1995 to the department and subsequently on the basis of this, the department mentioned the date in the column of "Date of Passing B.Ed Examination". Further, as evident from the contents of the seniority list, the Respondent No. 7, on the basis of the aforesaid degree dated 15.02.1995, was placed at Sr. No. 1. This B.Eddegree in the inquiry conducted by the District monitoring Officer, Vehari, has been proved fake and the said inquiry officer, at the time of making the report, observed as under:

> "The degree record of *Mst.* Sakina Begum (petitioner) is available from the website of AIOU, however, the degree record of *Mst.* Musarrat Parveen, as per her roll

number 15565204 is not traceable on the website on the academic year and seems to be fake."

6. The inquiry officer while concluding the inquiry dated 12.11.2012, made the following findings:

- "It is obvious that *Mst.* Sakina Begum is senior to *Mst.* Musarrat Parveen in terms of date of joining, length of service and promotion as EST.
- The base on which *Mst.* Musarrat Parveen was given undue seniority (i.e. academic qualification) is dubious at best.
- There is no plausible explanation as to how suddenly *Mst.* Musarrat Parveen sprang up to the top in the SST seniority list of year 2005.
- Then EDO Education in his inquiry report dated 26.05.2009 recommended withdrawal of SST orders of *Mst.* Musarrat Parveen, and forwarding case to ACE establishment on account of forgery. This action was never initiated against the accused.
- A dubious report was initiated by the EDO Education office in the year 2011, which seems to have a favourable bias for *Mst.* Musarrat Parveen, it did not take into account the matter of fake degree of the accused. The report is devoid of clarity and on face value seems to be a result of collusion between the education authorities and the undersigned.
- It is clear to the undersigned that the promotion orders of *Mst.* Musarrat Parveen in 2005 as SST were not on merit and warrants to be cancelled.
- The case of *Mst.* Musarrat Parveen may be referred to ACE establishment for initiating criminal proceedings.

Furthermore, the pecuniary benefits that she enjoyed during her period as SST may be reclaimed."

7. When EDO (Education), who was present in the Court, asked as to whether any action has been taken against the Respondent No. 7, he replied, that till today, no action in this regard has been taken.

8. It is very strange, that although the respondent department conducted a detailed inquiry and finally the inquiry officer reached to the conclusion, that the B.Ed, degree provided by the Respondent No. 7 at the time of her promotion, is fake but till today no action, as recommended by the inquiry officer/District Monitoring Officer, Vehari, has been taken, therefore, the EDO (Education), Vehari is directed to take action as recommended by the inquiry officer against the delinquent and if necessary, the EDO (Education) will seek the permission from the competent authority including the Secretary Education (Schools). The EDO (Education), Vehari will also determine the validity of the promotion order passed in favour of the Respondent No. 7. The process will be completed positively within a period of 20 days from today and compliance report whereof shall be submitted to Deputy Registrar (Judicial) of this Bench who will submit the same for perusal.

9. A copy of this order alongwith the petition shall also be transmitted to the Secretary Education (Schools), Govt. of the Punjab, to take action in the light of the record and the order passed by this Court.

10. With the above observations, this petition is disposed of with no order as to cost.

(R.A.) Petition disposed of.

PLJ 2016 Lahore 568

[Multan Bench Multan]

Present: **ALI AKBAR QURESHI, J.**

SULEMAN (deceased) through Legal Heirs--Appellant

versus

MUHAMMAD ALI, etc.--Respondents

R.S.A. No. 29 of 2008, decided on 15.1.2016.

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

----Art. 79--Gift-deed--Product of fraud and misrepresentation by playing fraud got thumb-impression on blank papers--Mandatory requirement of law--Second attesting witness could not be produced--Scribe of gift-deed can be substituted for attesting witness-- Respondents who were bound to prove gift deed in terms of Art. 79 of Q.S.O., could not offer any explanation that why other attesting witness was not produced, therefore, respondents intentionally and deliberately withheld evidence and failed to meet with test of article--Predecessor of appellants, even admitted by respondent side, was an illiterate person of advance age, who himself appeared and denied execution of gift deed stated, that respondents got his thumb impression on blank papers, on pretext to purchase a tractor--Predecessor of petitioners/real father himself filed suit for cancellation of gift deed alleged to have been executed by him in favour of respondents--Therefore, predecessor of parties had no intention to deprive petitioners (real daughters) from their right of inheritance which is secured and guaranteed by Allah Almighty--Thus, gift deed of suit land claimed to have been executed by predecessor of petitioners in favour of respondents is product of fraud and misrepresentation and is nullity in eye of law. [Pp. 571, 572 & 573] A, B & C

Mr. Taffazul H. Rizvi, Advocate for Appellant.

Mr. Khalid Saleem Akhtar Awan, Advocate for Respondents No. 2 and 3.

M. Zulfiqar Ali Khan, Advocate for Respondent No. 13.

Nemo for Respondents No. 1 and 4 to 12.

Date of hearing: 15.1.2016.

JUDGMENT

This regular second appeal is directed against the judgment and decree dated 01.02.2008 passed by the learned appellate Court whereby the appeal filed by the respondent was accepted and judgment and decree dated 24.02.2005 was set aside.

2. The predecessor of the appellants instituted a suit for declaration contending therein, that he is the owner of the suit property and the gift deed made by the respondents is product of fraud and misrepresentation as the respondents by playing fraud got his thumb impression on blank papers on the pretext to obtain a tractor but subsequently it was made a gift and by this way usurped the suit land owned by him. Lastly prayed that the Gift Deed No. 129 dated 10.04.1999 be declared illegal/unlawful, product of fraud and misrepresentation.

3. The respondents who are legal heirs of the predeceased son of the predecessor of the appellants appeared before the learned trial Court, controverted the averment of the plaint on the ground, that the suit land, after the death of their father was transferred in their names in the presence of witnesses, the gift deed is registered one and no fraud has been committed.

4. The learned trial Court framed necessary issues out of the controversial pleadings of the parties, recorded the evidence and finally decreed the suit, against which an appeal was filed by the respondents, which was allowed and the suit filed by the appellants was dismissed. Hence this Civil revision.

5. Learned counsel for the appellants has mainly questioned the propriety and validity of the judgment and decree passed by the learned appellate Court on the ground that the respondents in order to prove the alleged gift deed, allegedly executed by the predecessor of the appellants produced only one marginal/attesting witness and by this way has failed to prove the gift deed (Ex.D-4) as required by Article 79 of Qanun-e-Shahadat Order, 1984. Learned counsel in support of his arguments has referred the findings recorded by the learned appellate Court in Para-11 of the judgment impugned herein. Reliance is placed *Farzand Ali and another v. Khuda Bakhsh and others*(PLD 2015 SC 187), *Farid Bakhsh v. Jind Wadda and others* (2015 SCMR 1044) and *Muhammad Abaidullah v. Ijaz Ahmed* (2015 SCMR 394).

6. When it was confronted to the learned counsel appearing on behalf of the purchaser of 24-*Kanal* out of the total land (Respondent No. 13), the learned counsel submitted, that although the second attesting witness could not be produced by the respondents but the respondents produced the scribe and Sub-Registrar, therefore, the scribe is in fact the substitute of the attesting witness. Reliance is placed upon (2013 SCMR 1351).

Respondents No. 1 and 4 to 12 have already been proceeded against ex-parte.

7. Heard. Record perused.

8. It is not denied as evident from record of the case, the predecessor of the appellants namely Suleman was the owner of the suit land. To prove this fact the predecessor of the appellants himself appeared in the witness-box and proved his title through reliable documentary evidence and denied the execution of any gift deed in favour of the respondents. As regards the gift deed, allegedly made by the predecessor of the appellants, the respondents were required by law to prove the same in accordance with the terms of Article 79 of the Qanun-e-Shahadat Order, 1984. It is mandatory requirement of law as enunciated, that to prove a document at least the evidence of two marginal/ attesting witnesses is required. For ready reference, Article 79 of the Qanun-e-Shahadat Order, 1984 is reproduced as under:

"79. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."

Admittedly, the respondents could not produce the second attesting witness despite the fact, the alleged executant had denied the execution of the same, therefore, thedocument (Ex-D-4) is not admissible in evidence. I am afraid the arguments advanced by the learned counsel for the respondents that the scribe of the gift deed can be substituted for an attesting witness, has any substance or force in view of the law laid down by the Hon'ble Supreme Court of Pakistan in a recent esteemed judgment cited as *Farzand Ali and another v. Khuda Bakhsh and others* (PLD 2015 SC 187) and *Farid Bakhsh v. Jind Wadda and others* (2015 SCMR 1044). In this judgment the Hon'bleSupreme Court of Pakistan has also interpreted Articles 17(2) and 79 of the Qanun-e-Shahadat Order, 1984. The relevant part of the esteemed judgment (PLD 2015 SC 187-Supra) thereof is reproduced as under:-

"10. Considering the proposition if the agreement of the appellants was required to be proved by the examination of two attesting witnesses, it is settled law that an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is *sine qua non* for the validity of the agreement. For the purposes of proof of such agreement it is mandatory that two attesting must be examined by the party to the lis as per Article 79 of the Order *ibid*. In this case, the respondent had unequivocally denied the execution of the said agreement and it is on account of the above that Issue No. 11 was also framed requiring, the appellants to prove their agreement; the appellants never objected to the issue or sought to get it struck off; thus for all intents and purposes they accepted the responsibility of proving the same, despite the fact that according to their stance now the said agreement was admitted by the vendors in their written statement. However, the appellants for this purpose produced P.W.1 who is the scribe of the document, but admittedly is not the attesting witness and in number of judgments of this Court it has been clearly held, that a scribe of an agreement to sell immovable property is not a substitute for an attesting witness, and does not legally qualify to be so, therefore, his evidence may have a supportive value, but is neither in line with the mandate of law nor does it meet the test of Article 79 *ibid*. the only attesting witness examined by the appellants id D.W.2, namely, Muhammad Hanif, whereas the other attesting witness, Aftab has not been examined, and no explanation has been given by the appellants for this vital omission which was essential for proving their agreement to sell. This is fatal to the case of the appellants as per the law laid down in *Hafiz Tassaduq Hussain v. Muhammad din through Legal Heirs and others* (PLD 2011 SC 241). The repeated argument to overcome this legal impediment is that the vendors have accepted and acknowledged the agreement to sell in the written statement; in this context the constant answer is that an admission of a co-defendant

is not binding upon the other co-defendant and as the respondent had denied the agreement to sell of the appellants and issue was also framed, therefore, the appellants were duty bound to prove the same in terms of the law enunciated in the judgment (*supra*) and Article 79 *ibid*."

9. The record further revealed, that the respondents who were bound to prove the gift deed (Ex.D-4) in terms of Article 79 of the Qanun-e-Shahadat Order, 1984, could not offer any explanation that why the other attesting witness was not produced, therefore, by this way the respondents intentionally and deliberately withheld the evidence and failed to meet with the test of aforesaid Article.

10. Learned appellate Court, who was hearing the first appeal, should have carefully perused, examined and appreciated the record instead of taking the matter, wherein the valuable rights of the parties are involved, leisurely. The learned appellate Court in a very novel way dealt with the mandatory requirement of Article 79 of the Qanun-e-Shahadat Order, 1984. It is necessary to reproduce the relevant finding recorded by the learned appellate Court while accepting the appeal of the respondents, which is as under:

"Thus, it is clear that evidence produced on record by the defendants (respondents) is sufficient and confidence inspiring that Hibba-Deed (Ex-D-4) is a genuine document. After placing the evidence of the plaintiff and defendants-appellants (respondents) in juxtaposition, it would appear that evidence produced by the defendants has ring of truth. So far as the argument of learned counsel for the respondents that Iqbal Hussain marginal witness has been produced but other marginal witness Muhammad Hussain has not been produced so the document Ex.D-4 does not stand proved in accordance with law as at-least two witnesses should have been produced to prove it and in this view of the matter Hibba-Deed has no legal sanctity, is concerned, the evidence is silent as to why Muhammad Hussain has not been produced as witness. Non production of this witness appears to be due to the fact that legal assistance of the lawyers at Mufasil Courts is not proper and some-times very important documents or piece of evidence does not come on the record due to professional incompetence. Same situation appears to be here. It would have been much better if Muhammad Hussain marginal witness of Ex.D.4 had also appeared. However, it is understandable that Muhammad Hussain had not come forward to deny the execution of this document. The genuineness of the Hiba-deed stands proved from the mouth of Sub-Registrar and the other witnesses. Mere on the basis of technicalities, the justice cannot be frustrated."

11. The aforesaid findings recorded by the learned appellate Court are not only violative of the mandatory command of the law but also against the canon of fairness and justice. Courts are required to dispense the justice in accordance with law and it has wrongly been observed by the learned appellate Court that non-producing the two attesting witnesses is a technicality. This type of the observation, in the presence of the mandatory provisions of the statute and the principle laid down by the Hon'bleSupreme Court of Pakistan should not remain in the field. Perhaps, it appears, that the learned Judge has not even bothered to consult the basic law and what about the law declared by the Hon'ble Supreme Court of Pakistan. In these circumstances, the afore-referred findings record by learned appellate Court are liable to be set aside.

12. There is another aspect of the case that the predecessor of the appellants, even admitted by the respondent side, was an illiterate person of advance age, who himself appeared and denied the execution of the gift deed stated, that the respondents got his thumb impression on blank papers, on the pretext to purchase a tractor. Respondent No. 1 who appeared as DW-3, during cross-examination almost admitted the stance taken by the predecessor of the appellants. The same is as under:-

13. It appears from the record, that in fact the respondents took the benefit of the illiteracy and simpleness of the predecessor of the appellants and succeeded to transfer the whole land in their name. Although it is noticed in many cases, that the daughters or sisters are being denied and deprived form their right of inheritance and this practice has constantly been deprecated by the Courts, but in this case, the predecessor of the petitioners/real father himself filed the suit for cancellation of the gift deed alleged to have been executed by him in favour of the respondents. Therefore, it appears that the predecessor of the parties to the case had no intention to deprive the petitioners (real daughters) from their right of inheritance which is secured and guaranteed by the Allah Almighty. Thus, the gift deed of the suit land claimed to have been executed by the predecessor of the petitioners in favour of the respondents is product of fraud and misrepresentation and is nullity in the eye of law.

14. Resultantly, this second appeal is allowed, the judgment and decree passed by the learned appellate Court is set aside and that of the learned trial Court is upheld. No order as to cost.

(R.A.) Appeal allowed.

PLJ 2016 Lahore 589

Present: **ALI AKBAR QURESHI, J.**

MUHAMMAD ILYAS (deceased) through his Legal Heirs--Petitioners

versus

HADAYATULLAH (deceased) through his Legal Heirs etc.--Respondents

C.R. No. 1062 of 2004, heard on 29.6.2015.

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

----O.XXI R. 103 & S. 12(2)--Consequential relief--Suit was filed prior to insertion of Section 12(2), CPC--Validity of judgment--Warrant dakhal--Execution petition for getting possession--Respondent/plaintiff did not avail the further remedy, therefore, order of became final, hence, suit filed by respondents/plaintiffs was incompetent and barred in view of Rule 103 of Order 21, C.P.C. as amended by Law Reforms Ordinance, 1972. [P. 591] A

Messrs Ch. Muhammad Anwar-ul-Haq and Muhammad Hussain Chaudhary, Advocates for Petitioners.

Mian Sohail Anwar, Advocate for Respondents.

Date of hearing: 29.6.2015.

JUDGMENT

This civil revision is directed against the judgment and decree dated 07.01.2004, passed by the learned appellate Court, whereby the appeal filed by the respondents was accepted and suit was decreed.

2. The respondents/plaintiffs instituted a suit for declaration on the ground, that the judgments and decrees dated 18.10.1975, 12.11.1976 and 28.02.1977 obtained by the petitioner/defendant against the respondent namely, *Mst.* Hanifan Bibi, were illegal and ineffective qua the rights of the respondents. As a consequential relief, the respondents/plaintiffs prayed for permanent injunction to restrain the petitioner/defendant for dispossessing the respondents from the suit land on the basis of aforesaid impugned decrees. Further contended, that the respondents/plaintiffs had become owner in possession of the disputed property measuring 185 Kanal 1 Marla by virtue of the exchange Mutation No. 14 dated 15.01.1974 and the petitioner, through the afore-mentioned judgments and decrees, intended to deprive the respondents from their entitlement and further, the petitioner had also forged a fictitious compromise deed dated 18.10.1975.

3. The suit was contested by the Petitioner No. 1/defendant Muhammad Ilyas mainly on the ground, that the afore-mentioned judgments and decrees sought to be annulled, were obtained by him strictly in accordance with law and there is no fraud or misrepresentation, as alleged in the suit. Also contended in the written statement, that the exchange Mutation No. 14 dated 15.01.1974, was obtained by the petitioner during the proceedings of the suit titled *'Muhammad Ilyas vs. Hanifan Bibi'* which was filed on 11.06.1970 and dismissed on 18.10.1975.

4. The learned trial Court, out of the pleadings of the parties, framed as many as seven issues, recorded evidence of the respective parties and finally dismissed the suit *vide* judgment and decree dated 22.07.1987. Against which an appeal was filed which was dismissed on 24.04.1995 by the learned Additional District Judge, Sialkot, mainly on the technical ground, that after the insertion of Section 12(2), C.P.C., the suit to challenge the judgment and decree, was no more competent.

5. The case was finally remanded by this Court on 26.12.2001 on the ground, that the suit had been filed prior to the insertion of Section 12(2), C.P.C., therefore, the appeal should be decided afresh.

6. Learned counsel for the petitioners has questioned the validity of the judgment and decree passed by the learned appellate Court on the ground, that the second suit filed by the petitioner for setting aside the order dated 18.10.1975 was not a new suit but was in continuation of the first suit filed on 11.06.1970 and the judgment dated 12.11.1976, passed in favour of the petitioner, only corrected the fraudulently obtained order dated 18.10.1975 and on the same date, the suit was decreed in favour of the petitioner Muhammad Ilyas, which was pending since 11.06.1970. Further contended, that the petitioner filed an execution petition for getting possession under the aforesaid decree; in the execution

petition, the respondent/plaintiff filed objections on the ground, that they were in possession of the disputed land but were not party in the suit finally decided on 12.11.1976, therefore, the warrant Dakhal for their dispossession in favour of the petitioner be restrained; the objection petition filed by the respondents was dismissed on 13.12.1977 against which a civil revision was filed by the respondents which was dismissed by the learned Additional District Judge on 11.03.1980 and consequently, the petitioner was put in possession of the suit land on 07.12.1980. Also contended, that as the respondent/plaintiff did not avail the further remedy, therefore, the order of the learned Additional District Judge became final, hence, the suit filed by the respondents/plaintiffs was incompetent and barred in view of Rule 103 of Order XXI, C.P.C. as amended by Law Reforms Ordinance, 1972.

7. When this legal proposition was confronted to the learned counsel for the respondents, the learned counsel submits, that the suit was rightly decreed in favour of the respondents/plaintiffs, but no answer or explanation was offered by the learned counsel for the respondents.

8. At this stage, the judgment delivered by the learned appellate Court was examined with the assistance of learned counsel for the parties in order to ascertain as to whether the learned appellate Court, while recording the findings, has discussed this legal aspect of the case but it is found, that this aspect has neither been attended nor decided by the learned appellate Court.

9. Learned counsel for the respondents also perused the record and the findings but could not refer anything in support of his contention and lastly had no option but to say, that this legal aspect of the case should have been decided by the first appellate Court.

10. Without further commenting upon the facts of the case, which has a long history, the instant case, with the concurrence of the learned counsel for the parties, is remanded to the learned appellate Court to decide the case afresh on merits and in the light of Rule 103 Order XXI, C.P.C.

11. Resultantly, in view of above, this civil revision is allowed, the judgment and decree passed by the learned appellate Court is set aside, the case is remanded to the learned appellate Court to re-decide the same afresh in the light of observation made above. No order as to cost.

12. Parting with the judgment since it is an old matter, therefore, the parties to the case shall appear before the learned District Judge, Sialkot on 20.08.2015 who may hear the case himself or entrust to any other competent Court for its disposal positively within a period of one month thereafter. Till the decision of the appeal, both the parties shall maintain *status qua* the suit land.

(R.A.) Revision allowed.

PLJ 2016 Lahore 623

***Present*: ALI AKBAR QURESHI, J.**

***Mst*. SHAMEEM AKHTAR--Appellant**

versus

GOVERNMENT OF PUNJAB, etc.--Respondents

F.A.O. No. 272 of 2008, heard on 20.1.2016.

Temporary Powers Rules, 1962--

----R. 10--Settlement of compensation of property--Entitled to claim compensation only for period of three years--Limitation of filing suit and claiming compensation--Fixation--Validity--Limitation to file the petition/reference to arbitrator meaning thereby the statute has itself given the limitation to file the petition for fixation of compensation before forum available in law--Since the main question in this case revolved around the limitation which is mix question of law and facts and can only be decided by recording the evidence--Petition filed under W.P. Requisitioning of Immovable Property (Temporary Powers) Rules, 1962, is to be decided in terms thereof, therefore, without further commenting upon the facts of the case the matter is remanded to decide the case afresh strictly in accordance with law. [Pp. 626 & 627] A, B & C

Mr. Muhammad Shehbaz Ahmad, Advocate for Appellant.

Mr. Tariq Mehmood Chaudhry, Assistant Advocate-General alongwith *Shabnam Noor,* Deputy Tehsil Shalimar for Respondents.

Date of hearing: 20.01.2016.

JUDGMENT

This first appeal calls in question the validity and propriety of an order dated 01.08.2008, passed by the learned Addl. District Judge, Lahore, while exercising the powers conferred under Rules 10 of the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Rules, 1962, on a petition filed before the learned District Judge, Lahore, by the appellant for settlement of the compensation of the property owned by the appellant and requisitioned by Respondent No. 1.

2. The appellant, being the owner of the suit property which was requisitioned by Respondent No. 1/Government of Punjab, through Secretary Education, Civil Secretariat, Lahore, filed a petition under Rule 10 of the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Rules, 1962, for settlement of the compensation of requisitioned property (enhancement of compensation) on the ground, that the suit property owned by the appellant measuring 6 *marla*s, consisted of 8 rooms and open space was requisitioned by the Respondent No. 1 on 06.03.1978 for running a school namely M-B Islamia Girls Middle School, Mughalpura, Lahore and started depositing the compensation @ Rs. 450/- per month in favour of the owner, the compensation being deposited by the respondent-government was not just, fair and lastly prayed that the compensation (rent) be enhanced to Rs. 9,000/- from the date it was requisitioned.

The suit was contested by the respondents on the ground, that the claim is barred by time and the compensation being paid by Respondent No. 1 is just & fair and the appellant is not owner of the property.

Learned Additional District Judge to whom the case was entrusted framed the following issues:--

1. Whether the petitioner has no *locus standi* and cause of action? OPR
2. Whether the petition is not maintainable?
3. Whether the petitioner is entitled to assessment of fair compensation? If so, to what extent? OPP
4. Relief.

The learned Additional District Judge after recording the evidence decided Issue No. 1 against the respondents, Issue No. 2 which pertains to the limitation, in the manner, that the appellant is entitled to claim the compensation only for the period of three years and not beyond that. While deciding Issue No. 3 the learned Court enhanced the compensation from Rs. 450/- to Rs. 4000/- per month only for the period of three years.

3. Learned counsel for the appellant relied upon a judgment delivered by the Hon'ble Supreme Court of Pakistan i.e. *"Government of the Punjab through Secretary Education, Lahore v. Shahida Begum"* (1994 SCMR 1488) and concluded his arguments.

4. On the other hand, learned Assistant Advocate-General submitted, that the respondent-department has already paid an amount of Rs. 5,90,425+2,41,342= (Rs. 8,31,767/-), therefore, nothing is due against the respondent-department. As regard the enhancement of the compensation the learned Assistant Advocate-General relied upon two judgments of this Court titled *"Azmatullah and another v. Secretary to Government of West Pakistan"* (PLD 1978 Lahore 979) and *"Home Department, Government of Punjab through Secretary and others v. Mian Irshad Hussain"* (PLD 2010 Lahore 654).

5. Although both the learned counsel for the parties after submitting the aforesaid citations concluded their arguments but in order to decide the matter, the findings recorded by the learned Additional District Judge/trial Court and the record was perused carefully.

6. From the findings it is found, that the learned Additional District Judge decided Issue No. 2, which relates to the limitation of filling the suit and claiming the compensation/rent. Learned Additional District Judge while deciding the aforesaid issue stated as under:

> "Onus to prove this issue was on the respondent. Contention of respondent in written reply is that petition was not maintainable as it was time barred. The property in question was admittedly requisitioned by Respondent No. 1 *vide* order dated 06.03.1978. The instant petition was filed on 05.09.1993 i.e. after about fifteen years from the date of requisition. Rate of rent cannot be enhanced beyond a period of three years, before institution of the instant petition, as per law. Hence, the contention of petitioner for enhancement of compensation can only be considered to the extent of past three years prior to the filing of this petition and claim prior to that period is time barred. This issue is thus decided accordingly."

7. It is evident from the record, that this petition was filed under a special law pertaining to the requisition of the private property for public use. According to the provisions of the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Rules, 1962, the owner of the property if not satisfied with the compensation fixed by the

requisitioning authority, firstly will approach to the requisitioning authority and on its refusal after issuing the statement in writing will file a Reference to the Arbitrator within thirty days thereafter for fixation of the compensation. The relevant Rules are reproduced hereunder:--

> **8. Determination of Compensation.--**(1) The owner of a requisitioned building shall, as soon as possible, after the requisitioning thereof, negotiate with the Requisitioning Authority or its representative for fixing, by agreement, the amount of compensation payable to the owner for the use and occupation of his property.
>
> (2) If the owner does not within a fortnight of the Service on him of the order requisitioning his building, move the Requisitioning Authority for fixation of compensation for the use and occupation of the building, the Authority shall proceed to determine under Section 7 of the Act, the amount of compensation payable to him.
>
> (3) An offer of the compensation assessed under sub-rule (2) shall be made to the person or persons interested in the property, and if not accepted within thirty days of the making thereof shall be deemed to have been refused;
>
> Provided that the Requisitioning Authority may extend the period as it may deem fit where such person are persons show willingness to negotiate.
>
> (4) Where possible refusal of the offer of compensation should be obtained in writing.
>
> **9. Requisitioning Authority' s Statement.--**(1) Within seven days of the refusal of the offer of compensation, the Requisitioning Authority, shall deliver to the person or persons interested in the property, a duly authenticated statement in writing setting forthwith:--
>
> (a) Particulars of the property in such detail as the case may require;
>
> (b) The amount of compensation assessed by the Requisitioning Authority;
>
> (c) The grounds on which such amount was determined; and
>
> (d) The date on which the period of limitation prescribed in the next succeeding rules expires.
>
> (2) A written acknowledgment shall be taken of the delivery of such statement.
>
> **10. Reference to the Arbitrator about the fixation of the compensation.--**(1) Within thirty days of the receipt of such statement, the party contesting the assessment may make an application to the arbitrator for assessing the proper compensation due to him and supply simultaneously a copy thereof to the Requisitioning Authority.
>
> (2) Where no application is made within the prescribed time limit the compensation fixed under rule (2) of Rule 8 shall remain operative.

8. The afore-referred Rules made under Section 13 of the Act, have given the limitation to file the petition/Reference to the arbitrator meaning thereby the statute has itself given the limitation to file the petition for fixation of the compensation before the forum available in the law. In this case the learned trial Court/Additional District Judge while deciding Issue No. 2 has neither consulted the law and discussed the relevant provisions

which deal with the limitation. Thus the learned Additional District Judge seriously erred in law not to decide the Issue No. 2 as required by the law, therefore, the findings of Issue No. 2 are not sustainable and set aside.

9. Since the main question in this case revolved around the limitation which is mix question of law and facts and can only be decided by recording the evidence.

10. The ratio of the citations supra is, that the petition filed under the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Rules, 1962, is to be decided in terms thereof, therefore, without further commenting upon the facts of the case the matter is remanded to the learned District Judge, Lahore, to decide the case afresh strictly in accordance with law.

11. Resultantly, this appeal is allowed, order 01.08.2008, passed by the learned Addl: District Judge, Lahore, is set aside and the case is remanded to the learned District Judge, Lahore, to decide the same afresh strictly in accordance with law.

12. Parting with the judgment, parties to the case shall appear before learned District Judge, Lahore, on 03.02.2016 and no notice for the service shall be issued to the parties by District Judge, Lahore. No order as to costs.

(R.A.) Appeal allowed.

PLJ 2016 Lahore 713
[Multan Bench Multan]
Present: **ALI AKBAR QURESHI, J.**
MUHAMMAD FAZIL and others--Petitioners
versus
MEMBER, BOARD OF REVENUE, PUNJAB, LAHORE and 5 others--Respondents

W.P. No. 18 of 2007, decided on 26.10.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Alter or vary consolidation--MBR has error in law to involve land of petitioners without any lawful justification--Question of--Whether revenue staff is authorized to interfere into consolidation scheme which had already been finalized--Validity--Therefore, without further commenting upon facts of case, matter is remanded to M.B.R. to re-decide same after providing fair opportunity to parties and consulting relevant record and law. [Pp. 714 & 715] A

Rana Shahzad Hussain Noon, Advocate for Petitioners.
Mr. Mubasher Latif Gill, Assistant Advocate General fopr Respondents.
Mr. Javed Ahmad Khan, Advocate for Respondent No. 2.
Date of hearing: 26.10.2015.

ORDER

This Constitutional petition assails the order dated 17.10.2006, passed by the learned Member (Judicial-III), Board of Revenue Punjab, Lahore, whereby the R.O.R No. 1096/1996 filed by the respondents was allowed in the following manner:

"I have given my anxious thoughts to the problem. The carelessness of the Consolidation officials has created this complicated situation. The District Officer (Revenue) Multan is directed to get the Consolidation staff to fulfill the deficiency of land of the respondent from any alternate source. The land purchased by the petitioner through registered deed shall get the priority and their deficiency shall be made good by stricto senso implementing the registered sale-deeds referred, to above. The revision is disposed of with these observations."

2. The question involved in this case relates to the controversy as to whether the consolidation officials, after completing the consolidation, have the authority to interfere, alter or vary the consolidation.

3. Learned counsel for the petitioners submits, that during the consolidation proceedings, the petitioner was given the land according to their entitlement and the petitioners are living there by constructing houses over there, therefore, the learned Member, Board of Revenue, has erred in law to involve the land of the petitioners without any lawful justification.

2. Conversely, learned counsel for the respondents has vehemently opposed the contentions raised by learned counsel for the petitioners.

3. Heard. Record perused.

4. It appears from the findings questioned herein, that the learned Member, Board of Revenue, has not taken into consideration the scheme of the consolidation, its completion and as to whether the Revenue staff is authorized to interfere into the consolidation scheme which has already been finalized. In my view, without determining this question, no plausible or justified order can be passed.

5. Although learned counsel for the respondents supported the findings rendered by the learned Member, Board of Revenue, but could not offer any satisfactory explanation to the legal controversy involved in this matter. Therefore, without further commenting upon the facts of the case, the matter is remanded to the learned Member, Board of Revenue, Lahore, to re-decide the same after providing fair opportunity to the parties and consulting the relevant record and law.

6. Resultantly, this petition is allowed, the order dated 17.10.2006, passed by learned Member (Judicial-III), Board of Revenue Punjab, Lahore, is set aside and the case is remanded to re-decide the same after providing fair opportunity to the parties. The parties to the case shall appear before the learned Member, Board of Revenue, on 12.1.2015. No order as to cost.

(R.A.) Petition allowed.

PLJ 2016 Lahore 741

Present: **ALI AKBAR QURESHI, J.**

AKBAR ALI--Petitioner

versus

MUHAMMAD YASEEN and 4 others--Respondents

C.R. No. 3320 of 2015, heard on 10.3.2016.

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

-----S. 115--Civil revision--Partition--Legal heirs--Suit for partition of partial property was not maintainable--Controversial pleadings--While filing suit concealed one property which was owned by predecessor of parties to suit--Mis-reading and non-reading of evidence--Validity--Respondent could not place any documentary evidence to show that house was owned by predecessor of parties--**Held:** Only partition of properties can be prayed which were owned by predecessor of parties, whereas, house was not owned by predecessor of parties and, therefore, if respondent still had any grievance, may approach to Civil Court--Petition was allowed. [P. 743] A & B

Mr. Muhammad Iqbal Mohal, Advocate for Petitioner.

Rao Jabbar Khan, Advocate for Respondents.

Date of hearing: 10.3.2016.

JUDGMENT

This civil revision is directed against the judgment and decree dated 10.10.2015 and 16.10.2012 passed by the learned Courts below whereby the suit filed by the petitioner was dismissed.

2. Both the learned Courts below through concurrent findings have reached to the conclusion in a suit filed by the petitioner for partition of the property left by the predecessor of the parties, that the partial partition of the property is not permissible in law and consequently dismissed the suit filed by the petitioner.

3. As per record, the petitioner filed a suit for partition along with permanent injunction contending therein, that predecessor of the parties to the suit namely Bashir Ahmad left the suit property, which is to be partitioned among the legal heirs of late Bashir Ahmad. The suit was contested by the Respondent No. 1, who is real brother of the petitioner and one of the legal heir, through written statement wherein it was averred, that the petitioner while filing the suit has concealed a property/House No. 2/52, village Kalas Wala, Tehsil Pasrur District Sialkot, which was also owned by the predecessor of the parties, therefore, the suit for partition of partial property is not maintainable.

4. The learned trial Court out of controversial pleadings of the parties framed necessary issues, recorded evidence of the parties and finally dismissed the suit on the ground, that as the petitioner while filing the suit concealed one property which is owned by the predecessor of the parties to the suit and partial partition is not permissible in law. An appeal, being aggrieved of the judgment and decree of the trial Court was filed, which was dismissed on the same ground.

5. Learned counsel for the petitioner submits, that the property bearing House No. 2/52, village Kalas Wala, Tehsil Pasrur District Sialkot was not owned by the predecessor of the parties to the case but by Nazir Begum wife of Alam Khan resident of Kalas Wala Tehsil Pasrur District Sialkot. Learned counsel also referred Rxh.P-2 wherein the name of Nazir Begum is mentioned. Reliance is placed *Khawaja Nayyar Qayyum v. Zubair Oayyum* (2006 YLR 2059).

6. When it was confronted to the learned counsel for the respondent, the learned counsel had no answer to it but submitted, that the property was in fact allotted to the father of the petitioner.

7. The concurrent findings of the learned Courts below have been examined with the assistance of the learned counsel for the parties and it appears, that both the learned Courts below have not adverted to this important aspect of the case, therefore, it can conveniently be held that it is case of misreading and non-reading of evidence. Furthermore, the respondent could not place any documentary evidence to show, that the House No. 2/52, Village Kalas Wala Tehsil Pasrur District Sialkot is owned by the predecessor of the parties to the case namely Bashir Ahmad.

8. As regard the framing of issues on this point, the learned trial Court, despite the fact not agitated by any party, was not denuded of power to frame issue and decide the same after collecting the evidence of the parties. Needless to mention that only the partition of those properties can be prayed which are owned by the predecessor of the parties, whereas in this case, the house is not owned by the predecessor of the parties and therefore, if the respondent still has any grievance, may approach to the Civil Court.

9. Since both the learned Courts below without perusing the record available on the file have dismissed the suit for partition, through the concurrent findings, which in any case are not sustainable in law, therefore, in order to resolve the controversy and to partition the property owned by Bashir Ahmed, the predecessor-in-interest of the parties to the case, it would be appropriate to remit the matter to the learned trial Court to re-decide the matter after providing fair opportunity of hearing to all the parties.

10. Resultantly this petition is allowed, the impugned judgment and decree dated 10.10.2015 and 16.10.2012 passed by the Courts below is set aside and the case is remanded to the learned trial Court to decide the same afresh after providing right of hearing and defending to the parties. No order as to costs.

(R.A.) Order accordingly.

PLJ 2016 Lahore 820

Present: **ALI AKBAR QURESHI, J.**

MUHAMMAD ASGHAR BUTT--Petitioner

versus

LIAQAT ALI (deceased) etc.--Respondents

C.R. No. 581 of 2008, heard on 31.3.2016.

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

----S. 115--Civil revision--Recovery of Court fee--Delay--It is well settled proposition of law, that matter regarding recovery of Court fee is between litigant and exchequer and delay if occurred would not cause any prejudice to judgment debtor--Petitioner timely deposited amount of Court fee with government treasury and delay is neither willful nor contumacious. [Pp. 822 & 823] A

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

----S. 115--Civil revision--Suit for specific performance of agreement to sell--Application for permission to levy Court fee--Application for extension in time, conduct of litigant to supply Court fee after stipulated time was materially relevant--Validity--Court can grant extension in time to levy Court fee particularly in a case for specific performance of a contract obviously if conduct of litigant is not willful and contumacious--No such evidence is available on file to show and to prove *mala fide*, willful omission and contumacious conduct of petitioner--Respondent had otherwise failed to prove or rebut claim of petitioner to effect, that petitioner deposited amount of Court fee with government treasury even before filing appeal and Court fee had not been used in any other case, by petitioner--Petitioner had also placed on record, while filing application, copy of challan to show deposit of requisite Court fee in government treasury, therefore, Appellate Court would have extended time and allowed petitioner to levy Court fee instead of dismissing, application on surmises and conjectures--Petition was allowed. [Pp. 824 & 825] B & C

Mr. Fakhar-ul-Zaman Akhtar, Advocate for Petitioner.

Messrs Ch. Irshad Ullah Chatha and Zafar Iqbal, Advocates for Respondents.

Date of hearing: 31.3.2016.

JUDGMENT

This civil revision is preferred against an order dated 13.03.2008, passed by learned Additional District Judge, Wazirabad, whereby an application filed by the petitioner for permission to levy the Court fee, was dismissed.

2. From the instant civil revision, following legal propositions arise for consideration and adjudication:--

i. Whether the Court (including the Court of appeal) can extend the time for filing the Court fee in a case of specific performance of an agreement.

ii. Whether the deposit of amount of requisite Court fee in the government treasury well within time will be construed the payment of Court fee.

iii. Whether the non-levy of Court fee, despite depositing the requisite amount in the government treasury would entail the dismissal of the suit/appeal.

3. As per record, the petitioner instituted a suit for specific performance of an agreement to sell; the suit was contested by the respondent; the learned trial Court, after observing all the codal and legal formalities, dismissed the suit *vide* judgment and decree dated 16.09.1999, against which an appeal was filed by the petitioner on 30.09.1999; the appeal was allowed *vide* judgment and decree dated 25.01.2000, in the following manner:

> "The appeal is accepted with cost, modifying the impugned judgment/decree by holding that the appellant was entitled to have the suit decreed, as a whole as prayed for with cost. The sale-deed dated 28-02-1995 is therefor, cancelled. The appellant has not affixed Court fee amounting to Rs. 15,000/- upon the appeal, he is directed to affix the Court fee within 30 days from the date of this judgment, otherwise, his suit shall stand dismissed."

4. The respondent filed a Constitutional petition (W.P.No. 10667/2000) challenging the aforesaid judgment and decree which was withdrawn by the respondent on 12.04.2007 and by this way, the judgment and decree dated 25.01.2000 remained intact. The learned appellate Court, while accepting the appeal, had ordered to the petitioner to affix the Court fee within thirty days. The petitioner, for the levy of Court fee, filed an application for the extension in time. The application was ordered to be consigned to the record room and' adjourned *sine die* till the decision of the aforementioned petition (W.P.No. 10667/2000); the petitioner, after the withdrawal of the writ petition, on 12.04.2007 filed an application before the learned appellate Court for summoning the file to affix the Court fee; the application was dismissed by the learned appellate Court on 13.03.2008 along with an application for framing the issues on the application for extension of the time. Hence, this civil revision.

5. Heard. Record perused.

6. To resolve the controversies, the record was perused with the assistance of learned counsel for the parties. It is admitted on record, that the petitioner, in order to file, the appeal against the judgment and decree of the learned trial Court, deposited an amount of Rs. 15,000/- in the government treasury on 28.09.1999; the appeal was filed on 30.09.1999 and after passing the decree by the learned appellate Court on 25.01.2000, and during the pendency of the writ petition (W.P.No. 10667/2000) filed by the respondent, filed an application on 20.06.2000 for extension in time which was firstly ordered to be consigned to the record and secondly, the application of the petitioner was dismissed.

7. It is well settled proposition of law, that matter regarding the recovery of Court fee is between litigant and the exchequer and delay if occurred would not cause any prejudice to the judgment debtor. The petitioner timely deposited the amount of Court fee with the government treasury and the delay is neither willful nor contumacious. Reliance is placed on *Asif Nasrullah Khan (Minor) and 2 others v. Hayat Khatoon and 2 others* (2007 CLC 1657).

8. As regard the extension of time, it has been ruled in *Nizam-ud-Din and 13 others v. Ch. Muhammad Saeed and 7 others* (1987 CLC 1682), as under:

"2. It may be stated as a general rule that, unless otherwise provided, a Court is not competent to alter a decree and that neither Section 148 nor the residuary Section 151 of the Code of Civil Procedure will avail a person who seeks the alteration. Section 148 gives the Court power to extend time fixed or granted by it for the doing of any act prescribed or allowed by the Code and this the Court can do even after the period originally fixed or granted has expired. But this section, it is now well-settled, does not apply where the period is fixed by a decree unless the decree is in the nature of a preliminary decree and the Court still retains seisin over the action. Per Hamood-ur-Rehman, J. in Shah Wali v. Ghulam Din (PLD 1966 SC 983 at 1000). The principle on which this rule rests, to quote again from the judgment of Hamood-ur-Rehman, J. in Shah Wali 's case, is:

> *"that since a decree normally puts an end to a suit the power of the Court to pass any other order with respect to that particular suit thereafter also comes to an end and the Court becomes functus officio with regard thereto. The exception made in the case of a preliminary decree is also on the same basis that in the case of such a decree the Court does not become functus officio but still retains control over the action and, therefore, has full power to make necessary orders therein including an order for the extension of time."*

9. In another case cited as *Zila Council, Sargodha v. Haji Irshad Ahmad* (1994 CLC 79 Division Bench case), it is observed, that if the litigant had deposited the requisite amount for purchasing the Court fee in the government treasury and has not been utilized for any other purpose or case, the litigant will not be burdened. In a case for specific performance, even the time can be extended for the payment of consideration *Nasir Ahmad v. Muhammad Yousuf* (PLD 1994 Lahore 280)]. The Hon'ble Supreme Court of Pakistan has observed in a case cited as *Shabbir Ahmed and another v. Zahoor Bibi and others* (PLD 2004 SC 790), that granting a decree in a suit for specific performance, the Court does not become *functus officio* and the Court has the powers to pass further orders.

10. While dealing with the application for extension in time, the conduct of the litigant to supply the Court fee after the stipulated time is materially relevant. *Asif Nasrullah Khan (Minor) and 2 others v. Hayat Khatoon and 2 others* (2007 CLC 1657)].

11. In a judgment cited as *Sikandar Ali v. Abdullah and 3 others* (PLD 2015 Sindh 155), it has been observed, that non-payment of Court fee was mere irregularity which can be corrected at any time and such irregularity has not rendered the impugned order without jurisdiction.

12. While dealing with the proposition, the Hon'ble Supreme Court of Pakistan in a case reported as *Qazi Shamas-ur-Rehman and another v. Mst. Chaman Dasta and others* (2004 SCMR 1978) has observed as under:

> *"This Court in the case of Muhammad Swaleh PLD 1964 SC 97 has held that every irregularity or illegality in exercise of jurisdiction will not render the order of Court void and without jurisdiction. Any party aggrieved of such irregularity has to further show that there was such violation of statutory provision which rendered proceedings coram non judice. It is a known principle of law that a procedural irregularity cannot be allowed to stand in the way of justice unless the irregularity has caused a serious, miscarriage of justice."*

From the above facts of the case and the law, it appears, that the Court can grant the extension in time to levy the Court fee particularly in a case for specific performance of a contract obviously if the conduct of the litigant is not willful and contumacious. In this case, no such evidence is available on the file to show and to prove the *mala fide*, willful omission and contumacious conduct of the petitioner. The respondent has otherwise failed to prove or rebut the claim of the petitioner to the effect, that the petitioner deposited the amount of Court fee with the government treasury even before filing the appeal i.e. on 28.09.1999 and the Court fee had not been used in any other case, by the petitioner. The petitioner has also placed on record, while filing the application, the copy of the challan to show the deposit of requisite Court fee in the government treasury, therefore, the learned appellate Court should have extended the time and allowed the petitioner to levy the Court fee instead of dismissing the application on surmises and conjectures. The learned counsel for the respondent also relied upon the judgments cited as *Ghulam Muhammad through his Legal Heirs v. Muhammad Riaz* (1985 MLD 131), *Ghulam Rasool v. Additional District Judge, Narowal and another* (1994 CLC 1311), *Ghulam Murtaza and others v. Ghulam Jillani* (2000 YLR 1798), *Ahmed Yar v. Abdul Razzaq and 2 others* (2002 MLD 1010), *Mst. Naseema Salahuddin and 2 others v. Mst. Daulat Fatima and 4 others* (PLD 2004 Lahore 103), *Syed Muhammad Taqqi v. Additional District Judge, Pindi Bhattian and 3 others* (2005 MLD 1144), *Riffat Iqbal v. Mst. Fatima Bibi and others* (2007 SCMR 494) and *Raja Shamsher Mehdi v. Malik Muhammad Riaz and another* (2008 MLD 877), which have no nexus with the proposition involved in the matter. The judgments referred by the learned counsel for the respondents are entirely on different propositions. Only one judgment (PLD 2004 Lahore 103) relates to the proposition which makes the proposition clearer and easier to understand. The relevant part of the judgment (supra) is reproduced as under:

> "10. ... Therefore, we are of the firm view that, once a decree, in a suit for specific performance of an immovable property, has been passed, which is conditional in nature envisaging a direction to the plaintiff/deeree-holder to make the deposit of certain balance consideration in the Court by a specific date and in case of his failure to do the needful, the suit shall be deemed to have been dismissed, this means the decree is final and conclusive for all intents and purposes, as the Court had finally disposed of the matter, and nothing is left for further determination by the Court, therefore, the Court loses its control over the lis. Resultantly, if the condition of the deposit of certain amount for the grant of decree is not fulfilled, the Court shall have no power under Section 148, C.P.C. to extend the time, as being *functus officio*. But this rule obviously cannot be held to be absolute, but is subject to certain exceptions, which includes the situations beyond the control of the decree-holder to comply with the decree or the act of the Court, which impedes the compliance thereof."

The afore-referred judgment, as earlier observed, has made the proposition easier to understand, thus the learned appellate Court committed glaring illegality by refusing to extend the time to levy the Court fee.

13. In view of the facts of the case and the law, this revision petition is allowed and the impugned order dated 13.03.2008, passed by learned Additional District Judge is set aside. No order as to costs.

(R.A.) Petition allowed

2016 P L C 428
[Lahore High Court]
Before Ali Akbar Qureshi, J
PAKISTAN TELECOMMUNICATION COMPANY LIMITED through Manager and 2 others
Versus
IFTIKHAR AHMAD KHAN and 2 others

W.P. No.11162 of 2012, heard on 3rd August, 2015.

(a) Industrial Relations Ordinance (XCI of 2002)---
----S. 46--- Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968), S.O.1(b)---Grievance petition---Regularization of service of a worker---Scope---Employee filed grievance petition for his regularization which was accepted concurrently---Validity---If a worker was appointed against a project which was likely to continue for more than nine months and worker remained in service for nine months then he would attain the status of a regular employee---Employee who was appointed against a permanent post and on permanent project had served the department continuously---Employee had successfully completed the initial period of nine months---Employee was working against the same post and project for the last many years---Post and project against which employee was working was of permanent nature---Employee was entitled to be regularized into service---Denial of employer to regularize the services of employee was not permissible in law---No jurisdictional defect, legal infirmity or irregularity had been pointed out in the concurrent findings recorded by the courts below---Employer was not entitled to any discretionary or equitable relief in circumstances---Constitutional petition was dismissed in circumstances.

Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 SC 153; Muhammad Hussain and others v. Settlement and Rehabilitation Commissioner and others 1975 SCMR 304; Independent Newspaper Corporation (Private) Ltd. v. Punjab Labour Appellate Tribunal and others 2013 SCMR 190; Ikram Bari and 524 others v. National Bank of Pakistan through President and another 2005 SCMR 100; Khadim Hussain v. The Secretary, Irrigation and Works, Lahore 2006 PLC 8; Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others 1995 PLC 539; Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others PLD 1996 SC 610; Tehsil Municipal Administration v. Muhammad Amir 2009 PLC 273; Pakistan International Airlines v. Sindh Labour Court No.5 and others PLD 1980 SC 323; Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others 1999 SCMR 2557; Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724; Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others 2008 SCMR 1058; Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain 2013 SCMR 1547; WAPDA and others v. Khanimullah and others 2000 SCMR 879; Secretary to the Government of the Punjab Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others PLD 2001 SC 415; General Manager, Pearl Continental Hotel, The Mall, Lahore/ Rawalpindi v. Farhat Iqbal PLD 2003 SC 952; Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others PLD 2005 SC 792; State

Life Insurance Corporation and others v. Jafar Hussain and others PLD 2009 SC 194; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691 and Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44 ref.

(b) Industrial and Commercial Employment (Standing Orders) Ordinance (VI of 1968)---

----S.O. 1(b)---Regularization of a worker---Scope---If a worker was appointed against a project which was likely to be continued for more than nine months and worker remained in service for nine months then he would attain the status of a regular employee.

(c) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Concurrent findings recorded by the courts below could not be interfered with while exercising constitutional jurisdiction unless forums below had acted without lawful authority and jurisdiction.

(d) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Constitutional jurisdiction was discretionary and equitable in nature.

Khurram Shahzad Chughtai for Petitioners.

Asmat Kamal Khan for Respondent No.1.

Date of hearing: 3rd August, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- This constitutional petition is preferred against the judgment dated 07.03.2012 and 12.07.2010 passed by the learned forum below, whereby the grievance petition under Section 46 of the Industrial Relations Ordinance, 2002, filed by respondent No.1 was allowed and the petitioners/ employer was directed to regularize the services of respondent No.1 from 29.06.1993.

2. Shortly, the facts as depict from the record are, that respondent No.1 was appointed as Assistant Technical Staff on 01.04.1993 as daily wager; the respondent served the department for a long period by successfully completing the initial period of nine (9) months, as provided by West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, and by afflux of time attained the status of regular/permanent employee, but he was not formally declared as a permanent employee. The respondent, being aggrieved, filed a grievance petition under Section 46 of the Industrial Relations Ordinance, 2002.

3. The learned Labour Court, after receiving the reply of the petitioners, recorded evidence of the parties and finally accepted the grievance petition by directing the petitioners to regularize the services of the respondent from 29.06.1993.

4. Being aggrieved thereof, the petitioner filed an appeal before the Punjab Labour Tribunal, which was dismissed and the order passed by the learned Labour Court was upheld.

5. Learned counsel for the petitioners has mainly argued, that the grievance petition filed by the respondent before the learned Labour Court was hopelessly barred by time but this aspect of the case has totally been ignored by the learned forums below. Also submitted, that the mandatory requirement to serve the grievance notice before filing the grievance petition has not been complied with, therefore, the grievance petition is liable to be dismissed on this score alone.

However, the learned counsel for the petitioners has not denied that the respondent initially was appointed as Assistant Technical Staff on 01.04.1993 as daily wager.

6. Conversely, learned counsel for respondent No.1 submits, that both the learned forums below have concurrently concluded, that the respondent is entitled to be regularized from the date of his initial appointment as daily wager i.e. 01.04.1993.

7. Heard. Record perused.

8. Undisputedly the respondent was appointed as Assistant Technical Staff on 01.04.1993 as daily wager and continuously served the department. It is also not denied, that the respondent was appointed against a permanent post and permanent project and successfully completed the initial period of nine months as given in Industrial Relations Ordinance, 2002, therefore, the question which requires consideration and adjudication, as to whether the respondent was entitled to be regularized into service from the date of his initial appointment or not. Learned counsel for the petitioners has relied upon Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 SC 153), Muhammad Hussain and others v. Settlement and Rehabilitation Commissioner and others (1975 SCMR 304), Independent Newspaper Corporation (Private) Ltd. v. Punjab Labour Appellate Tribunal and others (2013 SCMR 190), Ikram Bari and 524 others v. National Bank of Pakistan through President and another (2005 SCMR 100) and Khadim Hussain v. The Secretary, Irrigation and Works, Lahore (2006 PLC 8).

9. The record reveals, that the witnesses appeared on behalf of the petitioners categorically stated and admitted while appearing in the witness box before the learned Labour Court, that the respondent was appointed initially as Assistant Technical Staff, on daily wages on 01.04.1993, and still working in the petitioner's establishment, therefore, under the settled law, the respondent has attained the status of a permanent employee from the day he completed the initial period of nine months, therefore, the petitioners had no option but to regularize the services of the respondent from the date he was initially inducted into service.

A specific question was put during the course of arguments to the learned counsel for the petitioners, that why the respondent was not regularized into service from the date of his initial appointment, the learned counsel could not offer any satisfactory explanation and even in the record nothing is available, therefore, sufficient material is available on the file to hold, that the respondent is entitled to be regularized into service.

10. Further, the only question which although has already been dilated upon in detail, by the learned Labour Court as well as the learned Labour Appellate Tribunal, pertains to the status of the respondent and his regularization by afflux of time and law applicable thereon, requires consideration.

11. The legislature has defined the permanent workman in Standing Orders 1(b), that if a worker is appointed against a project which is likely to be continued more than nine months and the worker remained in service for nine months, will attain the status of a regular employee. The relevant provision i.e. Para 1(b) of Schedule of West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, is hereby reproduced as under:

SCHEDULE.
STANDING ORDERS

1. Classification of Workmen: (a) Workmen shall be classified as---

(1) ……

(2) ……

(3) ……

(4) ……

(5) ……

(6) ……

(b). A "permanent workman" is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment, and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lock-out or strike) or involuntary closure of the establishment [and includes a badli who has been employed for a continuous period of three months or for one hundred and eighty-three days during any period of twelve consecutive months.]"

12. In this case, the respondent is working against the same post and Project from the last many years, therefore, it can safely be held, that the post and project against which the respondent is working, is of permanent nature, thus, the denial of the petitioners to regularize the services of the respondent, is not permissible in law.

13. It is not denied, that the respondent is working from the last many years, and suffice to hold, that the respondent is needed to the petitioners establishment.

14. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged the practice of departments, government or the private, who hire the service of the poor people by issuing the appointment letter of eighty nine days just to defeat the legal provisions applicable therein, in fact it is the device which is based on mala fide being used to deprive the poor workers from their legal rights, who served the department for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of the workers appointed on work charge basis or on contract. I am fortified by an esteemed judgment of the Hon'ble Supreme Court of Pakistan titled Punjab Seed Corporation and 2 others v. Punjab Labour Appellate Tribunal and 2 others (1995 PLC 539), this petition was filed by the Punjab Seed Corporation. The Hon'ble Supreme Court of Pakistan at page 540, has observed as under:

> "3. The contentions of the learned counsel for the petitioners that the respondent was appointed on 'work charge basis' to supervise wheat procurement which is of seasonal character; that the respondent was not a workman within the meaning of the Standing Orders Ordinance; that respondent's letter of appointment was issued by an officer who was not empowered; that the order of termination was legal; that the respondent had been paid his remuneration from contingency showing the character of his appointment have been fully dealt with elaborately by the Labour Appellate Tribunal as well as by the learned High Court in the light of the pleadings of the parties and the record placed on the file.
>
> 4. The learned High Court finding no substance in the aforementioned contentions, which are reiterated before us, held as under:--
>
> There is no substance in the arguments of the learned counsel that the respondent was a temporary workman inasmuch as no such objection as never taken by the petitioner in his written statement. Even otherwise, the appointment letter Annexure 'A' would demonstrate that he was appointed on 25.06.1980 and that his services were terminated on 20.07.1981. In other words, the respondent had been working on his job beyond six months to the satisfaction of the Corporation. There was also no complaint against him. This being so, he became a permanent workman in the petitioner-corporation within the meanings of West Pakistan Standing Orders Ordinance, 1968 against a permanent job. The learned Tribunal has appreciated the evidence on record and concluded that the respondent was a permanent workman under the petitioner. This is, undoubtedly, a finding of fact, having been given by the learned Appellate Tribunal on the basis of reliable evidence which cannot be interfered with in these proceedings.
>
> 5. For the reasons we find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of fact reached by the learned Appellate Tribunal which finding is based on proper appraisal of the evidence of the parties. We, accordingly, refuse to grant leave to appeal and dismiss the petition."

15. In another esteemed judgment reported as Executive Engineer, Central Civil Division, Pak. P.W.D. Quetta v. Abdul Aziz and others (PLD 1996 Supreme Court 610), the Hon'ble Supreme Court of Pakistan, while dealing with the question of permanent worker, at page 621, has ruled as under:

"The ratio of the above judgment in the case of Muhammad Yaqoob (supra) seems to be that the period of employment is not the sole determining factor on the question, as to whether a workman is a permanent workman or not, but the nature of the work will be the main factor for deciding the above question. In other words, if the nature of work for which a person is employed, is of a permanent nature, then he may become permanent upon the expiry of the period of nine months mentioned in terms of clause (b) of paragraph 1 of the Schedule to the Standing Orders Ordinance provided, he is covered by the definition of the term "worker" given in section 2(i) thereof. But if the work is not of permanent nature and is not likely to last for more than nine months, then he is not covered by the above provision. It may be observed that once it was proved that the respondents without any interruption remained employees between a period from two years to seven years, the burden of proof was on the appellant-department to have shown that the respondents were employed on the works which were not of permanent nature and which could not have lasted for more than nine months. From the side of the appellant nothing has been brought on record in this behalf. The appellant-department is engaged in maintaining the Government residential and non-residential buildings and constructing itself and/or causing construction thereof. The above work as far as the appellant-department is concerned is of permanent nature. In this view of the matter, the finding recorded by the Labour Courts in this respect cannot be said to be not founded on evidence on record."

16. In another judgment cited as Tehsil Municipal Administration v. Muhammad Amir (2009 PLC 273), the status of a workman has further been elaborated at page 280, the relevant paragraph is reproduced as under:

"13. In the instant case, the work being performed by the respondent as Tube-Well Operator was connected with 'water work', 'well' within the meaning of construction industry as defined in section 2(bb) of the Standing Orders Ordinance. There is nothing in evidence to indicate that he was being paid salary only for those days of the week during which he worked. He served initially in the Public Health Engineering Department from March, 1993 to 2001 when his services were transferred to TMA Bhalwal where he continued to work till 15.08.2005 when he was informed that his services had been terminated w.e.f. 01.09.2004. In the face of this evidence on record, it is manifest that he was engaged on a work of permanent nature within the meaning of clause (b) of paragraph (1) of the Schedule to the Standing Orders Ordinance as reproduced in para-10 above."

17. The other esteemed judgments applicable in this case are as under:

1. Pakistan International Airlines v. Sindh Labour Court No.5 and others (PLD 1980 Supreme Court 323)

2. Izhar Ahmad Khan and another v. Punjab Labour Appellate Tribunal, Lahore and others (1999 SCMR 2557)

3. Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 Supreme Court 724)

4. Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others (2008 SCMR 1058)

5. Province of Punjab through Secretary Communication and Works Department and others v. Ahmad Hussain (2013 SCMR 1547)

6. WAPDA and others v. Khanimullah and others (2000 SCMR 879).

18. The arguments advanced by the learned counsel for the respondent relying on the different esteemed judgments of the Hon'ble Supreme Court of Pakistan, that this Court, while exercising the jurisdiction conferred under Article 199 of Constitution of the Islamic Republic of Pakistan, 1973, cannot substitute its own finding in the presence of the concurrent conclusion drawn by the forums below on facts as well as on law. Both the learned forums below, after due appreciation of the record and the contentions of the parties, have recorded concurrent findings which cannot be interfered while exercising the writ jurisdiction unless the forums below acted without lawful authority and jurisdiction. Reliance is placed on Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others (PLD 2001 Supreme Court 415), General Manager, Pearl Continental Hotel, The Mall, Lahore/Rawalpindi v. Farhat Iqbal (PLD 2003 Supreme Court 952), Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan through L.Rs. and 5 others (PLD 2005 Supreme Court 792), State Life Insurance Corporation and others v. Jafar Hussain and others (PLD 2009 Supreme Court 194), Rai Ashraf and others v. Muhammad Saleem Bhatti and others (PLD 2010 Supreme Court 691), and Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 Supreme Court 44).

19. This Constitutional petition has been filed against the concurrent findings on facts as well as on law recorded by the learned forums below, although the learned counsel for the petitioners argued the case at length but could not point out any jurisdictional defect, legal infirmity or irregularity with the findings recorded by the learned forums below. Needless to mention, that in the Constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the findings of forums below the petitioners will have to point out the illegality committed by the learned forums, and in this case the petitioners have failed to point out any such legal infirmity, therefore, this is not a fit case to exercise the Constitutional jurisdiction, which is discretionary and equitable in nature. Even otherwise, the petitioners, in view of the facts and circumstances of the case, are not entitled for any discretionary or equitable relief.

20. Resultantly, the judgment passed by the learned lower forums is affirmed and the writ petition is dismissed with no order as to cost.

ZC/P-35/L Petition dismissed.

2017 C L C 664
[Lahore]
Before Ali Akbar Qureshi, J
SIKANDAR HAYAT KHAN through L.Rs. and others----Petitioners
Versus
Mst. KHATOON alias AMEER KHATOON through L.Rs. and others----Respondents

Writ Petition No.7034 of 2004, heard on 13th January, 2016.

(a) Islamic Law---

----Whole property could not be bequeathed in favour of anyone by way of will---Alleged deed of will was in-executable, invalid and contrary to Islamic Law---Legal heirs had been deprived from their right of inheritance on procedural technicalities---Nothing was on record that alleged deed of will was executed with the consent of legal heirs---Respondents had failed to prove the validity of the deed---Impugned order passed by the courts below were set aside and case was remanded for its disposal on merits within specified period---Constitutional petition was allowed in circumstances.

Mst. Amir Khatun and another v. Sikandar Khan PLD 1967 W.P. (Rev.) 67; Abdul Ghafoor and others v. Muhammad Shafi and others PLD 1985 SC 407; Shams-ud-Din v. Mst. Jevan and others 1986 MLD 764; Ghulam Akbar Khan v. Haji Sher Jan and others 1989 CLC 1789; Muhammad Aslam Rashid and 2 others v. Dr. Muhammad Anwar Saeed and 4 others 1997 CLC 2012; Mst. Faiz Elahi v. Muhammad Anwar 2001 YLR 2174; Hayderabad Development Authority through M.D. Civic Centre, Hyderabad v. Abdul Maeed and others PLD 2002 SC 84; Ibrahim and 4 others v. Rehmat Ali and 6 others PLD 2002 SC 741; Mst. Reshman Bibi v. Amir and others 2004 SCMR 392; Mst. Janntan and others v. Mst. Taggi through L.Rs. and others PLD 2006 SC 322 and Mst. Suban v. Allah Ditta and others 2007 SCMR 635 ref.

Muzaffar Ali v. Muhammad Shafi PLD 1981 SC 94; Muhammad Afzal and others v. Government of Pakistan and others 1987 SCMR 2078; Mst. Mumtaz Begum and others v. Abdur Rashid and others 1988 CLC 2023; Karachi Shipyard and Engineering Works Limited v. Abdul Ghaffar and 2 others 1993 SCMR 511; Masoom Akhtar v. Rent Controller, Lahore and another 1994 CLC 149; Messrs Huffaz Seamless Pipe Industries Ltd. v. Sui Northern Gas Pipelines Ltd. and others 1998 CLC 1890; Ehsan Ullah v. Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others 1998 SCMR 2079; Messrs Western Brand Tea, Karachi v. Messrs Tapal Tea (Pvt.) Limited, Lahore and another PLD 2001 SC 14; Collector Land Acquisition Abbottabad and 2 others v. Lal Khan and 11 others PLD 2002 SC 277; Sameen Khan and 4 others v. Haji Mir Azad and others 2002 CLC 754; Khalid Mehmood Butt and another v. Managing Director, AKLASC and 4 others 2004 CLC 937; Kala Khan and others v. Rab Nawaz and others 2004 SCMR 517; Muhammad Zubair and others v. Muhammad Sharif 2005 SCMR 1217 and Rehmat Ali and 12 others v. Abdul Hameed and 16 others 2006 YLR 2808 distinguished.

The Punjab Province (Now West Punjab) v. Latif Ahmad Khan PLD 1958 SC (Pak.) 195; Zakir Ullah Khan and others v. Faiz Ullah Khan and others 1999 SCMR 971;

Muhammad Asghar and others v. Muhammad Din and others 2000 YLR 2937; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Muhammad Hussain and others v. Mst. Hanaf Ilahi and others 2005 SCMR 1121; Muhammad Zubair and others v. Muhammad Sharif 2005 SCMR 1217 and Ghulam Ali and 2 others v Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 rel.

(b) Islamic Law---
----Will---Scope---Will could be executed only to the extent of 1/3rd share of the total property.

(c) Civil Procedure Code (V of 1908)---
----O. VII, R. 11---Plaint, rejection of---Scope---Trial Court could decide the maintainability of plaint at any stage irrespective of the fact whether defendant appeared or not.

(d) Civil Procedure Code (V of 1908)---
----S. 115---Revision---Scope---Revisional court had jurisdiction to look into and take the cognizance of the legal infirmity, illegality and jurisdictional defect if committed by the court of first instance.

(e) Islamic law---
----Inheritance---Law of limitation was not applicable in the matter of inheritance.

Abdul Wahid Chaudhry for Petitioners.
Ahmad Waheed Khan for Respondents.
Date of hearing: 13th January, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.--- This Constitutional petition assails the orders dated 17.10.2003, 08.01.2002 and 15.09.2001, passed by the learned Courts below, whereby an application under Section 12(2) of Code of Civil Procedure, 1908, filed by the petitioners for setting aside the judgment and decree dated 14.07.1969, was dismissed.

2. This case has a checkered history started from the year 1937, when the predecessors of the parties to the case Muhammad Afzal Khan died issueless, leaving behind his mother namely Mst. Bakhtan and widow Mst. Khatoon alias Ameer Khatoon and one Sikandar Hayat Khan [paternal cousin of deceased Muhammad Afzal Khan]. Deceased Muhammad Afzal Khan was owner of the suit properties fully described in Paragraph No.2 of this Constitutional petition.

3. After the death of predecessor of parties to the suit, the inheritance Mutation No.268, dated 22.11.1938, under the Customary Law was entered in the name of Mst. Khatoon alias Ameer Khatoon, the widow of deceased Muhammad Afzal Khan, being limited owner. At the time of attestation of the aforesaid mutation under the Customary Law, the father of Mst. Ameer Khatoon, namely Adam Khan produced an unregistered Will Deed dated 09.08.1937, allegedly to have been executed in favour of Mst. Khatoon alias Ameer Khatoon by her husband Muhammad Afzal Khan (deceased), before the Revenue Officer concerned for mutating the whole land in favour of Mst. Khatoon alias Ameer Khatoon as full owner. The

Will Deed produced by the father of Mst. Ameer Khatoon was rejected by the Revenue Officer in the year 1938 and held that Mst. Ameer Khatoon is simply a limited owner. The order of the Revenue Officer, whereby the alleged Will Deed was not given effect in the record in favour of Mst. Ameer Khatoon being fake one, was not challenged before any forum in any manner, which had attained finality to the extent of validity of Will.

4. On the promulgation of the Shariat Application Act, 1964, mutation entered under the Customary Law was challenged by one Sikandar Hayat Khan, predecessor-in-interest of the petitioners before the revenue hierarchy for the division of the properties left by Muhammad Afzal Khan deceased according to Shariah on the ground, that the status of limited owner of the widow of deceased Muhammad Afzal Khan has been terminated; whereupon the revenue authorities entered the mutation of the aforesaid property left by Muhammad Afzal Khan in the names of Mst. Bakhtan as mother; Mst. Ameer Khatoon as widow and Sikandar Hayat Khan as uncle's son, through mutations Nos.815, 4802, 6206 respectively and these mutations were sanctioned by the order of the Collector, Mianwali.

5. Mst. Khatoon alias Ameer Khatoon challenged the order of the Collector, Mianwali, up to the Board of Revenue on the ground, that her status as limited owner should not be disturbed but she remained unsuccessful. Thereafter, Mst. Khatoon alias Ameer Khatoon did not further agitate the matter nor claimed herself the exclusive owner of whole property on the basis of Will or otherwise. But as depicts from the record, under a family settlement, she remained in possession and had been getting the profit of the land along with the mother of deceased Muhammad Afzal Khan. Sikandar Hayat Khan paternal cousin of deceased Afzal Khan died on 26.03.1974, and both the ladies i.e. Mst. Khatoon alias Ameer Khatoon and Mst. Bakhtan remained in possession of the land; Mst. Bakhtan mother of Muhammad Afzal Khan deceased, died in the year 1977, whereas Mst. Khatoon alias Ameer Khatoon died in the year 1993.

6. After the death of aforesaid ladies, the petitioners approached to the revenue authorities for attestation of mutations of inheritance in their names from where it came into the knowledge of the petitioners, that the entire suit property had been transferred in the name of Mst. Khatoon alias Ameer Khatoon in result of an ex parte decree passed in favour of Mst. Ameer Khatoon by the Civil Court vide judgment and decree dated 14.07.1969.

7. The petitioners on coming to know the ex-parte judgment and decree dated 14.07.1969, filed an application under Section 12(2), C.P.C, for setting aside the aforesaid judgment and decree; the application was contested by the respondents and some of the respondents filed their consenting written statements. One Muhammad Ejaz Khan also filed an application under section 12(2), C.P.C, which too was resisted by the respondents and the petitioners.

8. The learned trial court consolidated both the applications under Section 12(2), C.P.C, framed necessary issues out of controversial pleadings, recorded the evidence of respective parties and finally dismissed both the applications vide order dated 15.09.2001.

9. Both the applicants of applications under section 12(2), C.P.C. challenged the order dated 15.09.2001, by way of revision petition before the learned District Judge, Mianwali, which was dismissed by the learned Addl: District Judge, Mianwali, on 01.08.2002. The

petitioners thereafter filed a review application on 22.08.2002, to review the order dated 01.08.2002:

10. Another review petition was also filed by one Muhammad Ejaz/Hayat Khan, but later on withdrew the same. Finally the review petition filed by the petitioners was dismissed on 17.10.2003. Hence, this Constitutional petition.

11. Learned counsel for the petitioners argued the following points:

(i) The learned Courts below without adverting to the record have non-suited the petitioners.

(ii) The petitioners while filing the application under section 12(2), C.P.C. gave sound reasons for setting aside the ex parte decree but those have not been attended.

(iii) The respondents could not prove the Will, on the basis of which the ex-parte decree was obtained and further by way of a Will total property cannot be bequeathed.

(iv) From record it proves, that the ex parte judgment and decree dated 14.07.1969 has been obtained by playing fraud and misrepresentation.

(v) The alleged Will produced by the father of Mst. Khatoon alias Ameer Khatoon before the revenue authorities to transfer the entire suit land in favour of Mst. Ameer Khatoon as a full owner, was rejected in the year 1938 and the order of rejection by the Revenue Officer was never challenged before any forum, therefore, to the extent of invalidity of Will, the order attained finality and in these circumstances, the document of alleged Will could not be used in any subsequent proceedings.

(vi) The learned trial court and especially the learned Revisional Court has completely failed to appreciate the record pertaining to the service of the petitioners in a suit filed in the year 1969, which clearly proves, that no service was effected upon the petitioners and the ex-parte decree was obtained by playing fraud and misrepresentation.

Learned counsel for the petitioners relied upon "The Punjab Province (Now West Punjab) v. Latif Ahmad Khan" (PLD 1958 SC (Pak.) 195), "Mst. Amir Khatun and another v. Sikandar Khan" (PLD 1967 W.P. (Rev.) 67), "Abdul Ghafoor and others v. Muhammad Shafi and others" (PLD 1985 SC 407), "Shams-ud-Din v. Mst. Jevan and others" (1986 MLD 764 Lahore), "Ghulam Akbar Khan v. Haji Sher Jan and other" (1989 CLC 1789, Peshawar), "Muhammad Aslam Rashid and 2 others v. Dr. Muhammad Anwar Saeed and 4 others" (1997 CLC 2012), "Zakir Ullah Khan and others v. Faiz Ullah Khan and others" (1999 SCMR 971), "Muhammad Asghar and others v. Muhammad Din and others" (2000 YLR 2937), "Mst. Faiz Elahi v. Muhammad Anwar" (2001 YLR 2174), Hayderabad Development Authority through M.D. Civic Centre, Hyderabad v. Abdul Maeed and others" (PLD 2002 SC 84) "Khair Din v. Mst. Salaman and others" (PLD 2002 SC 677), "Ibrahim and 4 others v. Rehmat Ali and 6 others" (PLD 2002 SC 741), "Muhammad Hussain and

others v. Mst. Hanaf Ilahi and others" (2005 SCMR 1121), "Mst. Reshman Bibi v. Amir and others" (2004 SCMR 392), "Muhammad Zubair and others v. Muhammad Sharif" (2005 SCMR 1217), "Mst. Janntan and others v. Mst. Taggi through L.Rs. and others" (PLD 2006 SC 322) and "Mst. Suban v. Allah Ditta and others" (2007 SCMR 635).

12. On the other hand, learned Senior counsel for the respondents Mr. Ahmad Waheed Khan, submitted, that at this stage, the validity of the ex-parte decree passed in favour of the respondents cannot be looked into as both the forums below after careful appreciation of the record have held, that the petitioners despite service of notices did not appear. Further submitted that the petitioners challenged the decree passed in 1969, after a considerable period, thus the application under Section 12(2), C.P.C filed by the petitioners was otherwise barred by time. Reliance is placed on "Muzaffar Ali v. Muhammad Shafi" (PLD 1981 SC 94), "Muhammad Afzal and others v. Government of Pakistan and others" (1987 SCMR 2078), "Mst. Mumtaz Begum and others v. Abdur Rashid and others" (1988 CLC 2023 Lahore), "Karachi Shipyard and Engineering Works Limited v. Abdul Ghaffar and 2 others" (1993 SCMR 511), "Masoom Akhtar v. Rent Controller, Lahore and another" (1994 CLC 149), "Messrs Huffaz Seamless Pipe Industries Ltd. v. Sui Northern Gas Pipelines Ltd. and others" (1998 CLC 1890), "Ehsan Ullah v. Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others" (1998 SCMR 2079), "Messrs Western Brand Tea, Karachi v. Messrs Tapal Tea (Pvt.) Limited, Lahore and another" (PLD 2001 SC 14), "Collector Land Acquisition Abbottabad and 2 others v. Lal Khan and 11 others" (PLD 2002 SC 277), "Sameen Khan and 4 others v. Haji Mir Azad and others" (2002 CLC 754), "Khalid Mehmood Butt and another v. Managing Director, AKLASC and 4 others" (2004 CLC 937), "Kala Khan and others v. Rab Nawaz and others" (2004 SCMR 517) and "Muhammad Zubair and others v. Muhammad Sharif" (2005 SCMR 1217) and "Rehmat Ali and 12 others v. Abdul Hameed and 16 others" (2006 YLR 2808).

13. Heard. Record perused.

14. The matter involved in this case pertains to inheritance of the property left by deceased Muhammad Afzal Khan, predecessor-in-interest of the parties to the suit. Relationship among the parties is admitted and the controversy which requires adjudication revolves around a Will Deed dated 09.08.1937, claimed to have been executed by deceased Muhammad Afzal Khan in favour of his wife namely Mst. Khatoon alias Mst. Ameer Khatoon in the year 1937.

15. The petitioners as evident from the record, challenged the validity of the ex parte judgment and decree dated 14.07.1969 by filing an application under Section 12(2), C.P.C, on the grounds, that no notice was served to the petitioners, it was however managed by the respondents to get the ex-parte decree and that the inheritance mutation entered on 28.09.1965, on the promulgation of Shariat Application Act, by the order of the Collector, Mianwali, remained intact up to the Board of Revenue. Further the inheritance mutation was also entered in the name of Mst. Khatoon alias Ameer Khatoon to the extent of her share along with other legal heirs on 28.09.1965, which was not challenged anywhere.

16. The ex-parte decree dated 14.07.1969 was passed on the basis of only one document i.e. Will Deed dated 09.08.1937, claimed to have been executed by the husband of Mst.

Khatoon alias Ameer Khatoon namely Muhammad Afzal Khan deceased. It is well settled proposition of law, that by way of Will under the Islamic Law, total property cannot be bequeathed in favour of anyone and the Will can be executed only to the extent of 1/3rd share of the total property. The judgment dated 14.07.1969 is totally silent about the status of the Will and the law deals with the Will. Needless to mention, that it was the mandatory legal obligation of the learned trial court to look into the record and particularly the validity of Will Deed on the basis of which the suit was filed, irrespective of the fact, that the petitioners/defendants despite service of notice had not appeared. By this way, the learned trial court who passed the ex-parte decree in the year 1969 has extremely failed to exercise the jurisdiction vested with it. The learned trial Court while deciding the application under section 12(2), C.P.C. for setting aside the ex-parte decree dated 14.07.1969 did not utter even a single word in the judgment in this regard. Although, while deciding the application under section 12(2), C.P.C. the learned trial Court, could have corrected the illegality earlier committed, while awarding ex-parte decree. The learned trial court also framed issues on the application under Section 12(2), C.P.C, recorded evidence of the parties and elected to non-suit the petitioners on procedural technicalities. The learned trial court could have decide the civil suit filed by the respondents on merit for fair adjudication instead of wasting its time by dismissing the application under section 12(2) of Code of Civil Procedure, 1908, on technicalities.

17. The mandate envisaged in Order VII, Rule 11 of Code of Civil Procedure, 1908, conferes jurisdiction upon the learned trial court to decide the maintainability of a plaint at any stage irrespective of this, whether the defendant appears or not. In this case, the suit was filed on the basis of a Will to deprive the other legal heirs from their succession, therefore, the learned trial court should have examined the validity of Will particularly in the circumstances, when ex-parte decree is being passed.

The learned trial Court, as depicts from the findings passed at the time of delivering the ex-parte judgment and decree, had not perused the Will Deed, which was otherwise in-executable, invalid and contrary to the principle of Muhammadan Law, therefore, the learned trial court has failed to exercise the jurisdiction vested with it and passed a decree in the absence of the petitioners.

18. As regards the judgment passed by the learned Revisional Court in a revision petition filed by the petitioners, the learned Judge although referred the Will Deed dated 09.08.1937, but in a casual manners and dismissed the revision petition on the ground, that the petitioners/ defendants despite service of notice did not appear and resultantly upheld the ex-parte judgment and decree, ignoring the fact that question of inheritance of the parties guaranteed by the Allah Almighty is involved. Paragraph No.15 of the judgment dated 01.08.2002 passed by the learned Additional District Judge, Mianwali, which pertains to the Will, is re-produced as under:

> "In the beginning it is made clear that legality or otherwise, of Will Deed dated 09.08.1937, executed by Muhammad Afzal Khan in favour of her wife Khatoon alias Ameer Khatoon and law applicable thereto may not be discussed, taken into account and decided at the time of disposal of the application under section 12(2), C.P.C.

These factors are supposed to be adjudicated upon if after cancellation of the judgment & decree dated 14.07.1969 main suit is restored."

19. Section 115 of Code of Civil Procedure, 1908, confers the jurisdiction upon the Revisional Court to look into and take the cognizance of the legal infirmity, illegality and jurisdictional defect, if committed by the learned Court of first instance. It appears from the record, that the learned Revisional Court before whom the orders to dismiss the application under Section 12(2), C.P.C. and the ex-parte judgment and decree were challenged, has failed to exercise the jurisdiction vested in it. The learned Revisional Court was not denuded of powers to take notice of the fact, that the ex-parte judgment and decree is being passed on the basis of a Will Deed whereby the total legacy of Muhammad Afzal Khan is being given to his wife whereas the principal of Muhammadan Law is otherwise and secondly the Will Deed dated 09.08.1937 was produced before the revenue authority in the year 1937 to transfer the properties left by deceased Muhammad Afzal Khan in favour of his wife namely Mst. Khatoon alias Ameer Khatoon as full owner, was rejected and the order of the revenue authority was not further assailed by Mst. Khatoon alias Ameer Khatoon which resultantly attained finality. Meaning thereby, the Will Deed cannot be used, subsequently no decree can be passed on the basis of such like Will Deed. Needless to mention, that the Revisional Court dealt with this important legal aspect of the case in a manner not required by law and has committed serious illegality which is not permitted in law.

20. In review petition, which was filed by the petitioners to review the order dated 01.08.2002, the learned Revisional Court almost re-produced the earlier order and did not even bother to deal with the defect and error, which was floating on the surface of the record.

21. The Courts always decide the matters carefully wherein the inheritance of the parties is involved. In this case, the petitioners, who are admittedly the legal heirs have been deprived from their valuable right of inheritance on procedural technicalities despite the fact, the petitioners while filing the revision and review petitions specifically mentioned the ingredients of fraud and misrepresentation played by respondents. Even otherwise where the status as heirs is not denied, the heirs in any circumstance cannot be deprived from their inheritance on technicalities like non-appearance of an heir despite service of notice. Perhaps, the law of Limitation for this reason has not made applicable in the matter of inheritance.

22. As both the learned courts below have dismissed the application under section 12(2), C.P.C. on the ground, that the petitioners despite service of summon did not appear before the learned trial Court in a suit filed by the respondents, wherein consequently an ex-parte decree was passed in the year 1967. The Hon'ble Supreme Court of Pakistan while dealing with this proposition has observed in a judgment cited as "The Punjab Province (Now West Punjab) v. Latif Ahmad Khan" (PLD 1958 SC (Pak.) 195), has ruled as under:-

"It is clear from these two provisions that a summons to the defendant to appear and answer the claim can only be issued after a suit has been 'duly' instituted. Until the plaint is registered, a suit cannot be said to be duly instituted under section 27 and Order V, rule 1 of the Code of Civil Procedure, and the stage is not reached for issuance of a summons on the defendant to answer the claim. This was the view,

though on slightly different facts, held by the Calcutta High Court in the case of Surendra Parsad Lahiri Chowdhury v. Aftabuddin Ahmad (1) and we agree with this view. At the stage at which the trial Court had issued the notice under rule 6 of Order XXXIII, Civil P.C., the plaint was not registered and the defendant could not be called upon to answer the claim. He was only required to offer evidence with regard to the alleged pauperism of the plaintiff. There was just the possibility of the plaintiff having not been adjudged a pauper and being not in a position to pay proper Court-fee, in which case it would be incumbent on the Court to reject his plaint. The trial Court, therefore, acted illegally and with material irregularity in the exercise of its jurisdiction in prematurely putting down the case for ex-parte hearing, which ultimately resulted in the ex-parte decree under appeal. The trial Court should have, after deciding the question of pauperism and registering the plaint, issued a proper summons to the defendant under form No.1 or 2, Appendix B in the First Schedule to the Civil P.C. as required by Section 27 and Order V, rule 1 of the Code of Civil Procedure, calling upon him to answer the claim. As this was not done, the whole trial was vitiated and the ex-parte decree cannot be sustained."

23. As regards the jurisdiction of this Court, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, to deal with the matter arisen out of civil litigation, the Hon'ble Supreme Court of Pakistan in the judgment cited as "Muhammad Hussain and others v. Mst. Hanaf Ilahi and others" (2005 SCMR 1121), has observed as under:-

"The only point involved in this case is, whether the learned counsel appearing for respondent No.1, had the authority to withdraw the suit in the circumstances of the case in hand. The learned Single Judge of the High Court has dealt with this matter in extenso and has come to a definite conclusion that no such instruction were ever imparted by the lady to her counsel nor they are reflected from the power of attorney executed by her. The learned Single Judge, after advancing valid reasons, has exercised the discretion properly and no exception can be taken to the same."

24. While deciding the question of limitation in the matter of inheritance of the parties the Hon'ble Supreme Court of Pakistan has observed in plethora of judgments, that right of succession would not be defeated by law of limitation or principle of res judicata as no law or judgment could overwrite of Shariah being a Superior Law. Reliance is placed on "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 SC 01), "Khair Din v. Mst. Salaman and others" (PLD 2002 SC 677) and "Muhammad Zubair and others v. Muhammad Sharif" (2005 SCMR 1217).

25. As regards the status of Will, reliance has been placed on "Zakir Ullah Khan and others v. Faiz Ullah Khan and others" (1999 SCMR 971) and "Muhammad Asghar and others v. Muhammad Din and others" (2000 YLR 2937). While dealing with the status of Will, the Hon'ble Supreme Court of Pakistan in the judgment supra (1999 SCMR 971) has observed in following words:--

"4. Admittedly, the said three wills were made in favour of legal heirs which purportedly affected the shares of the legal heirs of deceased Saadullah Khan to which they were entitled according to Islamic Law of inheritance. However, the

second point on which leave has been granted is that, if these deeds are held to be wills, then whether these were executed by the common ancestor Saadullah Khan with the express or implied consent of the prospective heirs. There was no evidence on record to establish that the respondents, the other legal heirs who were not beneficiaries under the said wills, had expressly or impliedly consented to the said wills executed by Saadullah Khan in favour of the appellant. Mr. Safirullah Khan, learned counsel for the appellants had argued that the said transfers in favour of the appellants had been confirmed through mutations in the Revenue Records and he referred to Mutations Nos.6499, dated 08.02.1982 and 6509, dated 6-5-1982. According to learned counsel, the fact that the respondents kept quite for such a long time would amount to implied consent on their part to making of the wills in favour of the appellants. The arguments is ex facie without any substance. Mere silence of the respondents for some period would not raise an inference that they had consented to the wills made out in favour of the appellants whereby their share in the inheritance was substantially reduced. There is no evidence on record to the effect that the said wills had been executed by Saadullah Khan with express or implied consent of the respondents. "

26. In the judgment supra the Hon'ble Supreme Court of Pakistan has discussed the status of the Will and the law related to the Will. In this case, the respondents have failed to bring on record an iota of evidence that the alleged Will was executed by the consent of the legal heirs. Therefore, the arguments advanced by the learned counsel for the respondents are ex-facie without any substance.

27. On the other hand, the law referred by learned counsel for the respondents is hardly relevant to the proposition of this case. Mostly the judgments referred by learned counsel for the respondents are relating to the cases of Specific Performance or the mutation. For instance the judgment cited as "Muzaffar Ali v. Muhammad Shafi" (PLD 1981 SC 94) relates to review; "Muhammad Afzal and others v. Government of Pakistan and others" (1987 SCMR 2078) and "Ehsan Ullah v. Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others" (1998 SCMR 2079) relate to civil service; "Karachi Shipyard and Engineering Works Limited v. Abdul Ghaffar and 2 others" (1993 SCMR 511) relates to labor law; "Masoom Akhtar v. Rent Controller, Lahore and another" (1994 CLC 149), "Messrs Huffaz Seamless Pipe Industries Ltd. v. Sui Northern Gas Pipelines Ltd and others" (1998 CLC 1890) and "Messrs Western Brand Tea, Karachi v. Messrs Tapal Tea (Pvt.) Limited Lahore and another" (PLD 2001 SC 14) relate to the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973; "Sameen Khan and 4 others v. Haji Mir Azad and others" (2002 CLC 754), "Kala Khan and others v. Rab Nawaz and others" (2004 SCMR 517) and "Rehmat Ali and 12 others v. Abdul Hameed and 16 others" (2006 YLR 2808) relate to Limitation and Specific Relief, therefore are not applicable to this case. The other judgments relied upon by learned counsel for respondents i.e. "Muhammad Zubair and others v. Muhammad Sharif" (2005 SCMR 1217), "Khalid Mehmood Butt and another v. Managing Director, AKLASC and 4 others" (2004 CLC 937), "Mst. Mumtaz Begum and others v. Abdur Rashid and others" (1988 CLC 2023 Lahore) are also not applicable on the facts of the instant case. Moreover, the aforesaid propositions have already been discussed in forgoing paragraphs.

In this case, firstly the mutation was entered as limited owner in favour of Mst. Ameer Khatoon and on the promulgation of Shariat Application Act, 1964, the status of limited owner of Mst. Khatoon alias Ameer Khatoon was terminated and the inheritance mutation was entered in the name of the legal heirs/Sharers. The mutation was also entered in the name of Mst. Khatoon alias Ameer Khatoon widow of Muhammad Afzal Khan as sharer which remained intact up to the Board of Revenue.

28. As regards, the Will, it is reiterated, that the respondents have miserably failed to prove the validity of the Will, therefore, this type of the document i.e. Will which deprive the legal heirs from their succession unlawfully should not be remained in the field.

29. In the sequel of above discussion and the facts and circumstances of this case, this Constitutional petition is allowed, the orders dated 17.10.2003, 08.01.2002 and 15.09.2001, are set aside; the case is remanded to the learned trial court and suit filed by the respondents shall deemed to be pending for its adjudication on merits by the learned trial court.

30. Since it is an oldest matter, therefore, the parties to the case shall appear before the learned District Judge, Mianwali, on 24.02.2016, who will entrust the case to any competent court of jurisdiction, for its disposal. The case shall be concluded and decided positively within a period of three months thereafter, under intimation to the Deputy Registrar (Judicial) of this Court. No order as to costs.

ZC/S-36/L Case remanded.

2017 C L C 1667
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD ZOHAIB----Petitioner
Versus
JUDGE FAMILY COURT, JARANWALA and 2 others----Respondents

W.P. No.9891 of 2016, decided on 29th March, 2016.

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

----S. 5, Sched.---Suit for recovery of maintenance allowance, petition for---D.N.A. test by father---Mother filed suit for recovery of maintenance allowance for the minor wherein husband moved application for conducting D.N.A. test---Contention of husband was that he was not capable of becoming a father---Petition for conducting D.N.A. was dismissed by the Family Court---Validity---Father had neither objected the parentage of minor while filing the written statement nor before any other authority---Petition for conducting of D.N.A. test was moved only to avoid the payment of maintenance allowance---Father, in a casual and leisure manner had levelled a serious allegation upon the mother of minor who remained with him as a wife---Minor who was legitimate son of defendant in view of such allegation would have to live for all time with allegation and title of illegitimacy---Constitutional petition of husband was dismissed in limine with cost of Rs.50,000/- which should be paid to the mother of minor.

Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir PLD 2015 SC 327 rel.

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

----O. VIII, R. 5---Evasive reply---Scope---Evasive reply would amount to admission of claim.

Ch. Tariq Mehmood Arshad Kamboh for Petitioner.

ORDER

ALI AKBAR QURESHI, J.--- Through this Constitutional petition, the petitioner has challenged the validity of an order dated 03.02.2015, passed by the learned Judge Family Court, whereby an application to conduct D.N.A. test filed by the petitioner, was dismissed on the ground, that the petitioner has not denied the parentage of the minor while filing the written statement.

2. The respondent No.2, who is mother of respondent No.3 (minor), filed a suit for recovery of maintenance allowance of the minor contending therein, that respondent No.2 was married with the petitioner; during the subsistence of marriage, respondent No.3 (minor) was born who is two years old now and living with respondent No.2; the petitioner has divorced respondent No.2 but from the day first, has not paid a single penny as maintenance to the minor. The suit was contested by the petitioner/defendant and when the proceedings were at the stage of cross-examination upon respondent No.2, the petitioner filed an

application to conduct the D.N.A test of the minor on the ground, that the petitioner is unable to become a father, therefore, to ascertain the parentage of respondent No.3, the application be allowed. The learned Judge Family Court, after hearing the arguments of the parties, finally dismissed the application mainly on the ground, that the minor was born during the subsistence of marriage, therefore, presumption of legitimacy is attached.

3. Heard. Record perused.

4. The record of the instant case was perused with the assistance of learned counsel for the petitioner. The respondent No.2, in paragraph No.5 of the plaint regarding the birth of the minor, has stated as under:

5. The petitioner submitted his written statement and replied paragraph No.5 of the plaint in the following words:

Paragraph No.6 of the reply is also related to the controversy, therefore, the same is also reproduced as under:

6. The suit was filed by the petitioner on 05.06.2014, whereas the application to conduct the D.N.A test was filed on 26.01.2015, after about eight months of filing the suit by respondent No.2.

7. The above facts, which are floating on the surface of the record, are sufficient to dismiss instant Constitutional petition wherein the petitioner is seeking the equitable and discretionary relief.

8. The respondent No.2 while filing the plaint specifically stated, that the minor was born during the subsistence of marriage in the house of her parents whereas while filing the written statement, the petitioner has admitted the birth of minor and as regard rest of the paragraph the petitioner has simply stated, incorrect ( ). Needless to mention, that the reply made by the petitioner is evasive and under the law, evasive reply made by the defendant is amounted to admission of the claim made in the plaint. Further, while replying paragraph No.6, the petitioner has categorically admitted, that he had been paying the maintenance to the respondents Nos.2 and 3 ( ).

9. As regard the filing of the application during the pendency of the suit, it is established on record, the said application was filed after about eight months of filing of the suit by the respondent No.2; and further, it is important to note here, that while filing the written statement, the petitioner did not object, in any manner whatsoever, the parentage of the minor. It is also pertinent to mention here, that the minor, as per the record, is about 02 years old and during these two years i.e. after the birth of the minor, the petitioner did not object the parentage of the minor in any manner whatsoever before any competent authority, therefore, there is no hesitation to hold, that the petitioner, simply in order to avoid the payment of maintenance allowance to the minor, has filed this application which shows the callousness and cruelty of the petitioner.

10. The learned counsel for the petitioner argued in a casual manner and submitted, that the D.N.A test is the only device to ascertain the parentage of the minor but when the learned

counsel was confronted with the aforesaid facts, the learned counsel had no answer and prayed for the withdrawal of this Constitutional petition, which, in peculiar facts and circumstances of the case, was declined.

11. Even otherwise it is noted with great concern, that it has become normal practice in the family cases, the father simply in order to avoid the payment of maintenance allowance, files this type of the application in a very casual and leisure manners and this practice should be discouraged obviously keeping in view the facts and circumstances of the cases.

12. Admittedly, the minor born during the subsistence of marriage and this proposition has already been dealt with by the Hon'ble Supreme Court of Pakistan in a judgment cited as "Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir" (PLD 2015 SC 327), wherein it has been observed that:

> "We first of all, take up for comment the provisions of Article 128 ibid. The Article is couched in language which is protective of societal cohisn and the values of the community. This appears to be the rationale for stipulating affirmatively that a child who is born within two years after the dissolution of the marriage between his parents (the mother remaining unmarried) shall constitute conclusive proof of his legitimacy. Otherwise, neither the classical Islamic jurists nor the framers of the Qanun-e-Shahadat Order could have been oblivious of the scientific fact that the normal period of gestation of the human foetus is around nine months. That they then extended the presumption of legitimacy to two years, in spite of this knowledge, directly points towards the legislative intent as well as the societal imperative of avoiding controversy in matters of paternity. It is in this context that at first glance, clause 1(a) of Article 128 appears to pose a difficulty. It may be noted that classical Islamic Law, which is the inspiration behind the Qanun-e-Shahadat Order (though not incorporated fully) and was referred to by learned counsel for the appellant also adheres to the same rationale and is driven by the same societal imperative. In this regard, it is also worth taking time to reflect on the belief in our tradition that on the Day of Judgment, the children of Adam will be called out by their mother's name. It shows that the Divine Being has, in His infinite wisdom and mercy, taken care to ensure that even on a day when all personal secrets shall be laid bare the secrets about paternity shall not be delved into or diverged."

13. In this case, the petitioner, in a very casual and leisure manner, leveled a serious allegation upon respondent No.2, who is lady and remained in his house along with him as his wife, without considering it that how the lady will live in the society with this serious allegation. The petitioner has not even bothered to think for a while that the minor, who according to the Islamic Principle of the Law, is the legitimate son of the petitioner, will have to live for all time to come with the allegation and title of illegitimacy.

14. Resultantly, this petition, having no merits, is dismissed in limine with cost of Rs.50,000/- (Rupees fifty thousand only), which shall be paid to respondent No.2 before the learned Judge Family Court. The learned Judge Family Court shall ensure the payment of the aforesaid cost to the respondent-lady before starting the proceedings and submit compliance report to the Deputy Registrar (Judicial) of this Court. The copy of this

judgment shall forthwith be transmitted to the learned trial court for compliance. The compliance report will be submitted in Chamber by the office.

ZC/M-102/L Petition dismissed.

2017 C L C 1679
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
FAZAL CLOTH MILLS LIMITED through authorized Representative and 14 others---Petitioners
Versus
FEDERATION OF PAKISTAN, MINISTRY OF WATER AND POWER through Secretary and 3 others----Respondents

W.P. No.6978 of 2015, decided on 7th January, 2016.

Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)---

----S. 31(4)--- Tariff--- Regulatrory Authority's approval---Notification---Scope---Electricity distribution companies were legally entitled to make recommendation for consumer end tariff and send the same to the Authority/NEPRA for approval---Where the Authority approved the same, the Federal Government had no option but to notify the consumer end tariff, determined by NEPRA, in the official gazette---If the Federal Government had not notified the recommendation in official gazette then it could be held that the same was done, with an intention not to forward the benefit to the public at large given by NEPRA---High Court directed Federal Government to issue notification within specified time accordingly---Constitutional petition was allowed accordingly. .

Malik Muhammad Tariq Rajwana, Barrister Malik Kashif Rafique Rajwana, Sajjad Hussain Tangra, Syed Riaz-ul-Hassan Gillani, Tariq Mehmood Dogar and Rao Qasim for Petitioners.

Sh. Muhammad Naeem Goreeja, Deputy Attorney General for Pakistan.

Aamir Aziz Qazi, Furqan Naveed, Ch. Saleem Akhtar Warraich, Muhammad Maalik Khan Langah, Muhammad Amin Malik and Bilal Amin for Respondents.
Date of hearing: 26th November, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.--- Through this single judgment, I intend to dispose of following writ petitions along with instant petition, as common question of law is involved in all these petitions:--

Sr. No.	Case Number
1.	W.P. No.7288 of 2015
2.	W.P. No.7388 of 2015
3.	W.P. No.9481 of 2015
4.	W.P. No.7385 of 2015
5.	W.P. No.7299 of 2015
6.	W.P. No.8854 of 2015
7.	W.P. No.7778 of 2015

2. The petitioners, who are manufacturers of different items of textile are industrial consumers of the respondent electricity distribution company and are required to be charge as per latest, electricity tariff as determined by the respondent-NEPRA, through this Constitutional petition, the following prayer has been made:

"In view of the above, it is respectfully prayed as under:

1. The. Respondent Federal Government may very kindly be directed to immediately notify the latest tariff for FY 2014-15 as finally determined by NEPRA through its decision passed on 27.3.2015 without any further delay of time;

2. The Respondents may very kindly be directed to immediately start billing its consumers as well as the Petitioners on the basis of tariff as determined for FY 2014-15 and may very kindly be restrained from raising the billing demand on the basis of previously determined higher tariff.

3. As the Respondents have deliberately and illegally withheld/delayed the issuance of relevant notification so as a direction may also be very kindly issued that pending the issuance of notification as humbly prayed above, the electricity bill be issued to the Petitioner on the basis of latest Reduced Tariff for 2014-15 and they may very kindly be directed to forthwith issue amended electricity bills for the current month and continue to issue bills at above reduced rates for coming months till the final decision of the petition;

4. The Respondents may very kindly be directed to refund/adjust the excessively recovered amounts from the Petitioners/consumers since 1.7.2014 on the basis of previous years' higher tariff as under the law the above determined reduced tariff for FY 2014-15 becomes applicable from the 1st day of the Financial Year i.e. from 1.7.2014;

5. Costs of the petition including special costs under S.35-A, C.P.C. may also be very kindly afforded to the petitioner;

6. Any other relief deemed appropriate in the peculiar circumstances of the case may also be very kindly afforded to the petitioner."

3. Concisely, the facts as stated by the petitioners are that the respondent electricity distribution company (MEPCO) filed, as submitted by the petitioners, deliberately belated tariff petition seeking the consumer end tariff determination for the financial year 2014-2015 on 15.09.2014 to the National Electric Power Regulatory Authority (hereinafter called "NEPRA") under Section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA Act, 1997). On the petition filed by the respondent-MEPCO, the NEPRA authorities after due deliberation, determined the consumer end tariff by reducing the electricity tariff by a margin of at least Rs.2.00 per unit for every consumer category including domestic, commercial and industrial.

After determining the consumer end tariff on the request of the respondent-MEPCO, the same was intimated to the Federal Government for the purpose of issuance of above required mandatory notification under Section 31(4) of the Act ibid vide its letter No.NEPRA/TRF-283/MEPCO-2014/4264-4266 on 27.03.2015.

4. The only grievance voiced through these petitions by the petitioners is that the respondent-federal government till today has not discharged its mandatory statutory obligation by notifying the tariff determined by the NEPRA in the official gazette despite the fact the respondent-NEPRA timely intimated to the respondent-Federal Government and the Federal Government is required to notify the same in official gazette under Section 31(4) of the Act ibid.

5. Learned counsel for the petitioners submit, that the mala fide on the part of the federal government is conspicuous by not publishing the notification in the official gazette to fulfill the mandatory requirement and further submitted, that the federal government in fact is not intended to grant the benefit given or determined by the NEPRA.

6. Needless to mention, that under Section 31(4) of the Act ibid, which is reproduced as under, the Federal Government is bound to the tariff determined by the NEPRA in the official gazette:

> "Section 31(4). Notification of the Authority's approved tariff, rates, charges, and other terms and conditions for the supply of electric power services by generation, transmission and distribution companies shall be made, in the official Gazette, by the Federal Government upon intimation by the Authority:
>
> Provided that the Federal Government may, as soon as may be, but not later than fifteen days of receipt of the Authority's intimation, require the Authority to reconsider its determination of such tariff, rates, charges and other terms and conditions. Whereupon the Authority shall, within fifteen days, determine these anew after reconsideration and intimate the same to the Federal Government;
>
> [Provided further that the Authority may, on a monthly basis and not later than a period of seven days, make adjustments in the approved tariff on account of, any variations in the fuel charges and, policy guidelines as the Federal Government may issue and, notify the tariff so adjusted in the official Gazette.] "

7. In this case, as evident from the record, the respondent-NEPRA after determining the consumer end tariff, intimated the same to the respondent-federal government through a letter No.NEPRA/TRF-283/MEPCO- 2014/4264-4266 dated 27.03.2015 but unfortunately, till today, the benefit given by the NEPRA to the public at large has not been notified in the official gazette by the federal government, therefore, it can safely be held, that the federal government with an intention not to forward the benefit given by the NEPRA by reducing Rs.2.00 per unit, withheld the notification which on the part of the State in any case is not expected and appreciable.

8. Even otherwise, as submitted by the learned counsel for the petitioners, the matter has been finalized up to the Hon'ble Supreme Court of Pakistan, therefore, the respondent-federal government has no option but to notify the consumer end tariff determined by the NEPRA in the official gazette.

9. In view of the above and the prayer made by the petitioners, these petitions are allowed, the respondent-federal government is directed to notify the consumer end tariff determined by the respondent-NEPRA and intimated through the above referred letter dated 27.03.2015 in accordance with law within a period of 30 days after receiving the certified copy of this order. No order as to cost.

JK/F-10/L Petitions allowed.

2017 C L C Note 49
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
SARDAR MUHAMMAD ---Petitioner
Versus
PROVINCE OF PUNJAB through Sub-Registrar and another---Respondents

W.P. No.2733 of 2001, decided on 3rd April, 2015.

Stamp Act (II of 1899)---

----S. 27-A----Registration Act (XVI of 1908), S. 80---Constitution of Pakistan, Art. 199--- Constitutional petition---Registration of sale deed---Valuation of urban land---Valuation of stamp duty---Determination---Registration authority/Sub-Registrar refused to register sale deed executed by court on ground that petitioner had paid insufficient stamp duty in terms of Sched. issued under S. 27-A of Stamp Act, 1899---Petitioner contended that he was only bound to pay stamp duty according to value fixed by parties to suit, and S. 27-A of Stamp Act, 1899 could not be given retrospective effect---Respondent took plea that under S. 80 of Registration Act, 1908, petitioner was bound to pay stamp duty as per Sched. issued by Provincial Government--- Validity---Registration Authority rightly claimed additional stamp duty as the agreement to sell was executed before addition of S. 27-A in the Stamp Act, 1899---Under S. 27-A, value of immovable property at the time of registration should have been calculated according to Valuation Table recorded by District Collector, who was authorized to calculate value of property and notify the same---Under S. 80 of Registration Act, 1908, all fees for

registration of document should have been payable on the day of presentation of document---Provincial Board of Revenue had notified that stamp duty on sale deed was to be paid on value of land given in Valuation Table notified by Collector of the district and not (as fixed) by parties or determined in decrees passed in suit---Petitioner had no option but to pay stamp duty as per Valuation Table issued by Collector---Constitutional petition was dismissed, in circumstances. [Paras. 6, 7, 8, 9, 10 & 11 of the judgment]

Syed Mohtashamul Haq Pirzada for Petitioner.

Mobasher Latif Gill, Assistant Advocate-General for Respondents.

ORDER

ALI AKBAR QURESHI, J.---This Constitutional petition calls in question the order dated 19.03.2001, whereby the registration authority/Sub-Registrar has refused to register the sale deed and directed the petitioner to pay the additional stamp duty according to the schedule of stamp duty issued by the Government.

2. Shortly the facts giving rise to filing the instant petition, that the petitioner Sardar Muhammad entered into an agreement with the respondent No.2/Basheer Ahmad on 02.08.1972 for the purchase of land, situated in Shujabad, Multan, against consideration; on the refusal of the respondent No.2 to execute the sale deed the petitioner filed a suit for specific performance of the contract.

The suit was contested by the respondent No.2, by filing written statement, the learned trial Court framed issues out of the pleadings, and put the case for evidence.

At this stage the parties to the suit entered into a compromise on 27.06.2000 and consequently the suit was decreed on 05.09.2000.

3. The petitioner Sardar Muhammad as alleged by him for the execution of the decree filed an execution petition on 02.10.2000, whereupon the learned Executing Court deputed a Court representative for the registration of the sale deed. The petitioner along with the Court representative approached to the respondent No.1/Sub-Registrar for registration of the sale deed, who refused to register the same on the ground, that the petitioner has paid the insufficient stamp duty, which is not in accordance with the schedule issued under section 27-A of the Stamp Act, 1899. The Sub-Registrar on the asking of the petitioner demanded the report from the Registration Clerk, Shujabad, who reported, that the petitioner will have to pay the Stamp Duty Rs.72,080/- as per letter of Board of Revenue, Punjab, Lahore, dated 20.10.1988.

4. Learned counsel for the petitioner submits, that the respondent authority could not refuse to register the sale deed on the ground, that the petitioner has paid the less stamp duty, which is against the provision of section 27-A of the Stamp Act, 1899, and the petitioner is only bound to pay the stamp duty according to the value assessed by the parties. Learned counsel further submitted, that the petitioner cannot give effect retrospectively of the amended section 27-A of the Stamp Act.

5. The learned Assistant Advocate General opposed the arguments advanced by the learned counsel for the petitioner on the strength of section 80 of the Registration Act

1908 and submitted, that the petitioner is bound to pay the stamp duty according to the schedule issued by the Government of Punjab.

6. As per the record, the agreement to sell between the parties was executed in the year 1972, whereas the decree was passed on 05.09.2000, by the learned Civil Court and the petitioner under the order of the Court submitted the sale deed for registration to the Sub-Registrar, therefore, the provisions of section 27-A of Stamp Act amended on 1986 were very much attracted, therefore, the respondent/registration authority rightly claimed the additional stamp duty according to the schedule for facilitation the section 27-A of Stamp Act 1899. The same is produced as under:-

> "Value of immovable property. (1) Where any instrument chargeable with ad volorem duty under 4 [Articles 23, 27-A, 31 or 33] of Schedule I, relates to an immovable property, the value of the immovable property shall be calculated according to the valuation table notified by the District Collector in respect of immovable property situated in the locality."

7. The simple interpretation of aforesaid provision of law would be that the value of the immovable property at the time of registration shall be completed according to the valuation table recorded by the District Collector. The Registration Act, 1908, has also taken care of this type of situation, the same is reproduced here:-

> "80. Fee payable on presentation. All fees for the registration of documents under this Act shall be payable on the presentation of such documents."

The aforesaid provision of law clearly shows, that all the fees for the registration of the document shall be payable on the day of presentation of such document.

8. Learned counsel for the petitioner although referred the case law but the basic provision of law Section 27-A of the Stamp Act, 1899, is very much clear whereby the District Collector has been authorized to calculate the value of the property and notified the same.

9. It is also notable, that the petitioner has not challenged the valuation table issued by the respondent authority rather submitted, that the agreement to sell was executed in the year 1992, and delay occurred for submitting the sale for registration is not on the part of the petitioner but because of litigation started and culminated in the year 2000. Learned counsel for the petitioner referred another letter during the course of arguments, dated 20th October 1988, issued by the Board of Revenue, Punjab, wherein the opinion of the law department upon this issue is mentioned, which is as under:-

> "The Law Department has agreed with the views of Board of Revenue. It has been clarified that in view of the provision of section 27-A(1) of the Stamp Act, effective from 14.06.1986. Stamp duty on sale deeds is to be paid on the value of the land given in the valuation table notified by the Collector of the district and not on the value of the property fixed by the parties or determined in decrees passed in suits for specific performance of the contract."

10. In view of the above, the petitioner has no option but to pay the stamp duty as per the valuation table issued by the District Collector, therefore, this petition has no force. Resultantly, the same stands dismissed with no order as to cost.

11. In the light of above, C.M. No.3952 of 2010, also stands disposed of.

SL/S-59/L Petition dismissed.

2017 C L C Note 51
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD AFZAL through LRs. and 8 others---Petitioners
Versus
FIDA HUSSAIN and others---Respondents

C.R. No.1311 of 2002, heard on 27th May, 2015.

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

----S. 14(2) & Art. 181---Civil Procedure Code (V of 1908), S. 12(2)---Decree, setting aside of---Limitation---Due diligence---Good faith---Scope---Applicants had tried to re-open the matter which had already been finally concluded---Conduct of applicants did not entitle them to take the benefit of S. 14 of Limitation Act, 1908---Applicants instead of availing further remedy as provided in the law had filed an application under S. 12(2), C.P.C. after a considerable period on baseless grounds---Applicants had not acted with good faith and due diligence as required by law---Impugned judgment was result of jurisdictional defect and legal infirmity---Such type of application should be buried at the early stage---Impugned judgment passed by the Trial Court was set aside and application filed under S. 12(2), C.P.C. was dismissed---Revision was allowed in circumstances. [Paras. 13, 14, 15, 16 & 17 of the judgment]

United Bank Limited v. Messrs The Hinna Export Co. (Pvt.) Limited, Office Karachi 1998 PSC 78 and Noor Muhammad v. Muhammad Iqbal and 5 others 2014 CLC 1459 ref.

Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company PLD 2006 SC 226 rel.

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

----S. 14(2)---"Diligence", "due diligence" and "ordinary diligence"---Meanings.

"Diligence is a state of human conduct. As to what should be the standard for assessing the behavior of an appellant to style him as diligent; because of fluidity of the notion of diligence, it is difficult to set up a precise yardstick."

> "ordinary diligence means the diligence that a person of average prudence would exercise in handling his or her own property".
>
> "reasonable diligence means a fair degree of diligence expected from someone of ordinary prudence under circumstances". [Para. 11 of the judgment]

Black's Law Dictionary (Eighth Edition); Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584 and AIR 1960 Andhra Pradesh 406 (V 47 C 134) rel.

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

----S. 14(2)---"Good faith"---Meaning and illustration.

"Good faith" means that nothing shall be deemed to be done in good faith which is not done with due care and attention.

"Good faith, is a state of mind consisting of (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. [Para. 11 of the judgment]

Muhammad Ashraf Nawaz Cheena for Petitioners.
Muhammad Saleem Mirza for Respondents.
Date of hearing: 27th May, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is preferred against the judgment dated 15.04.2002, passed by learned Additional District Judge-I, Bhakar, whereby the application under section 12(2), C.P.C. filed by the respondents was accepted, the judgment and decree dated 16.04.1992, passed by the then learned appellate court, was set aside, appeal titled Khadim Hussain etc. Ghulam Muhammad etc. was accepted and the suit filed by the petitioners/plaintiffs against the respondents/defendants was dismissed.

2. Shortly the facts necessary for the disposal of this civil revision are, that the petitioners/plaintiffs filed a suit for possession and mesne profit against the respondents qua the suit land measuring 13 Kanal 16 Marla situated in Khata No.35 Min Khatooni No.45/45 Chak No.45/TDA Tehsil and District Bhakar, wherein it was contended, that the respondents/defendants were in possession of the suit land as tenant under them; that the respondents/defendants when refused to accept themselves as tenant in the suit land and started claiming themselves the owner of the property, the suit was filed.

3. The suit was contested by the respondents namely Khadim Hussain, Sheru and Fida Hussain through written statement, wherein they controverted the contents of the plaint and also raised certain legal objections. Mainly it was contended in the written statement, that the respondents are owners in possession from the last thirty years and the petitioners had already taken the land in lieu of their land and they had nothing to do with the suit land.

4. The learned trial court, after framing necessary issues and recording evidence of respective parties, decreed the suit vide judgment and decree dated 20.07.1989 in favour of the petitioners. Against which, the respondents (Khadim Hussain etc.) filed an appeal which was dismissed on 16.04.1992 by the learned Additional District Judge, Bhakar; the judgment and decree dated 16.04.1992 was not assailed before any forum including this Court, by the respondents; that the respondents also filed a suit for declaration,

wherein the mutation of the suit land was challenged, which was dismissed on 22.01.2007 by the learned Civil Court, Bhakar, against which an appeal was filed which too was dismissed on 16.03.2010 and revision petition bearing C.R. No.2340/2010 was also dismissed by this Court on 21.06.2010; that against the said dismissal order dated 21.06.2010, no further remedy was availed before the Hon'ble Supreme Court of Pakistan.

5. The respondents thereafter filed an application under section 12(2), C.P.C. on 15.09.1997 before the learned appellate court challenging the validity of judgment and decree dated 16.04.1992, passed by the then learned appellate court (learned Additional District Judge), whereby the appeal filed by the respondents was dismissed in earlier litigation. The learned appellate court accepted the application under section 12(2), C.P.C. filed by the respondents and consequently, set aside the judgment and decree dated 16.04.1992 and also dismissed the suit filed by the petitioners/plaintiffs.

6. Learned counsel for the petitioners contends, that the application under section 12(2), C.P.C. filed by the respondents was hopelessly barred by time as the judgment and decree by the learned appellate court was passed on 16.04.1992 and the application under section 12(2), C.P.C. was filed on 15.09.1997 whereas the limitation provided for filing the application under section 12(2), C.P.C. under Article 181 of the Limitation Act, 1908, is three years, therefore the findings recorded by the learned appellate court on issue No.1 are erroneous. Further submits, that even otherwise, the learned appellate court seriously erred in law while accepting the application under section 12(2), C.P.C. wherein the respondents had failed to refer any material. Reliance is placed on United Bank Limited v. Messrs The Hinna Export Co. (Pvt.) Limited, Office Karachi (1998 PSC 78), Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company (PLD 2006 Supreme Court 226) and Noor Muhammad v. Muhammad Iqbal and 5 others (2014 CLC 1459).

7. In response of the contentions raised by learned counsel for the petitioners, the learned counsel for the respondents has submitted, that although the afore-referred facts are correct but the respondents thereafter approached to the Revenue authorities for the redressal of their grievance, therefore, the period consumed before Revenue authorities can be condoned under section 14 (2) of the Limitation Act, 1908.

8. Arguments heard, record perused.

9. The learned counsel for the respondents has not denied the facts submitted by the petitioners, that the petitioners filed a suit for possession and mesne profit qua the suit land, which was decreed in their favour; that the appeal filed by the respondents/defendants was dismissed on 16.04.1992; that the respondents did not assail the aforesaid judgment and decree before any forum; that the respondents also filed a suit for declaration, challenging the mutation of the suit land which was dismissed on 22.01.2007 by learned civil court wherein an appeal was filed which was dismissed and the civil revision filed by the respondents was also dismissed by this Court on 21.06.2010, against which no further remedy was availed; that the application under section 12(2), C.P.C. was filed by the respondents on 15.09.1997 against the judgment and decree dated 16.04.1992, passed by the learned appellate court in favour of the petitioners.

The aforesaid facts which have not been denied by the respondents, are sufficient to show, that all the proceedings conducted in the afore-referred litigation were very much in the knowledge of the respondents and as the respondents actively participated, therefore, the respondents at this stage, are precluded by law to take the plea which is contrary to the afore-referred record.

10. Now it is to be seen, as to whether the application filed by the respondents under section 12(2), C.P.C. was within time as stipulated in Article 181 of the Limitation Act, 1908, and the respondents are entitled to take the benefit given in subsection (2) of section 14 of the Limitation Act, 1908, on the ground, that the respondents prosecuted in good faith before the Revenue authorities.

11. It would be beneficial to consult the provisions of subsection (2) of section 14 of the Limitation Act, 1908, which is reproduced as under:

> "In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence, another civil proceedings whether in a court of first instance or in a court of appeal against the same property for the same relief, shall be excluded, where such proceedings is prosecuted in good faith. In a court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it."

The afore-referred Section of the Limitation Act revolves around two words which are significant i.e. Due diligence and Good faith. The word 'due diligence' has been defined in Black's Law Dictionary (Eighth Edition) as:

> "ordinary diligence. The diligence that a person of average prudence would exercise in handling his or her own property like that at issue.
>
> reasonable diligence. A fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue."

Whereas 'Good faith' can be defined in simple words, that:

> Good faith. Nothing shall be deemed to be done in good faith which is not done with due care and attention.

In Black's Law Dictionary (Eighth Edition), the 'Good faith' is defined as:

> "good faith, A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) Absence of intent to defraud or to seek unconscionable advantage.

The Hon'ble Supreme Court of Pakistan, while dealing with section 14 of the Limitation Act in a judgment cited as Sherin and 4 others v. Fazal Muhammad and 4 others (1995 SCMR 584), has defined the word 'Due Diligence' as;

> "Diligence is a state of human conduct. What should be the standard for assessing the behavior of an appellant to style him as diligent. Because of fluidity of the notion of diligence, it is difficult to set up a precise yardstick."

In AIR 1960, Andhra Pradesh 406 (V 47 C 134), while defining section 14, it has been observed, that;

> "Proceedings before a railway administration cannot be regarded as civil proceedings but as proceedings before an administrative office, prosecution of proceedings in good faith, party needlessly taking proceedings before particular authority is not acting in good faith and party pursuing wrong remedy on wrong advice of counsel is not entitled to exemption."

12. No doubt, it differs from case to case as to whether a litigant had acted diligently and with care. Whereas, in this case, the petitioners filed a suit for declaration which was contested by the respondents and the final decree was passed by the learned appellate court vide judgment and decree dated 16.04.1992 and this judgment and decree was not assailed before any forum and allowed to attain finality. The respondents also filed a suit for declaration challenging the mutation which was dismissed up to this Court through a judgment dated 21.06.2010 in C.R. No.2340/2010, against which no further remedy before the Hon'ble Supreme Court of Pakistan, was availed and by this way, the judgment attained finality. The mala fide of the respondents/defendants starts when the respondent filed an application under section 12(2), C.P.C. on 15.09.1997 against the judgment and decree dated 16.04.1992, passed by the learned appellate court, whereby the appeal filed by the respondents was dismissed.

13. The conduct of the respondents is to be looked into in the light of the aforesaid facts. It can safely be observed, that the conduct of the respondents does not entitle the respondents to take the benefit of section 14 of the Limitation Act, as the respondent has tried to re-open the matter which has already been finally concluded; firstly on 16.04.1992 and secondly on 21.06.2010 by this Court, therefore, the conduct of the respondents is questionable.

14. The respondents, instead of availing further remedy as provided in the law, against the judgment and decree dated 16.04.1992 passed by the first learned appellate court and secondly on 21.06.2010 by this Court, after a considerable period filed an application under section 12(2), C.P.C. on baseless grounds. This practice has not been approved by the Hon'ble Supreme Court of Pakistan. Reliance is placed on Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company (PLD 2006 Supreme Court 226). The relevant part of the esteemed judgment is reproduced as under:

> "8. The petitioner-defendant sealed his own fate by not challenging the judgment and decree of the High Court dated 18.05.2000 passed in R.F.A No.53/2000, dated 23.01.2001 and passed in R.F.A.No.509/2001 whereby the High Court upheld the decree in the sum of Rs.1,01,87,500. That decree attained finality and the arguments now being submitted against this decree could have been examined if the petition for leave to appeal/appeal against the decree was filed in this Court. Application under section 12(2), or under section 151, C.P.C. is no substitute to regular appeal or revision or review nor these provisions can be construed as something over and above the normal modes of questioning a decree by way of appeal, revision or review. It is unfortunate that some litigants attempt to frustrate the decree/its

execution by resorting to provision of section 12(2) and section 151, C.P.C., unnecessarily."

15. From the above circumstances, it is crystal clear, that the respondents had not acted with good faith and due diligence as required by law. The learned appellate court, without taking into consideration firstly the conduct of the respondents and secondly the plethora of judgments delivered by this Court and Hon'ble Supreme Court of Pakistan, accepted the application under section 12(2), C.P.C., therefore, the judgment impugned herein is not only result of jurisdictional defect and legal infirmity but also against the well settled principle of law. The respondents, in any case, is not entitled to take the benefit of law (section 14(2) of Limitation Act) to re-open a matter which has already been finally adjudicated.

16. Even otherwise, in the light of the judgment cited as PLD 2006 Supreme Court 226, the application under section 12(2), C.P.C. was not applicable in any manner whatsoever, therefore, this type of the application should be buried at the early stage instead of allowing such type of the people to engage the innocent citizens into frivolous and endless litigation.

17. Resultantly, this civil revision is allowed, the judgment dated 15.04.2002 passed by learned Additional District Judge, Bhakar, in an application under section 12(2), C.P.C. is set aside and the decree passed by the learned trial court as well as the lower appellate court is restored with throughout cost.

ZC/M-284/L Revision allowed.

2017 C L C Note 160
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
ROOMI FOODS (PVT.) LIMITED through Director Technical and 7 others---Petitioners
Versus
FEDERATION OF PAKISTAN through Secretary Ministry of Water and Power, Islamabad and 4 others---Respondents

W. P. No. 9626 of 2015, decided on 7th January, 2016.

Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)---

----S. 31(4)--- Determination of tariff by NEPRA--- Implementation--- Scope---National Electric Power Regulatory Authority (NEPRA) determined consumer end tariff but same was not implemented by the government---Validity---NEPRA had determined consumer end tariff but same was not gazetted officially---Government had lingered on the matter deliberately to deprive the consumers from the benefit granted under the law---Government could not be absolved from its mandatory duty and obligation to give treatment of orders passed by the NEPRA---Government was directed by High Court to decide the grievance of

consumers within specified period---Constitutional petition was disposed of in circumstances. [Paras. 12, 13 & 14 of the judgment]

Flying Cement Company v. Federation of Pakistan and others 2015 PTD 1945; Ejaz Rasool v. Member National Industrial Relations Commission and 5 others 2014 PLC 288; Mst. Meeran Bibi (Ameer Bibi) and 4 others v. Manager, Zarai Taraqiati Bank Limited, Phool Nagar District Kasur and 2 others 2012 CLD 2029 and Collector of Sales Tax and Federal Excise v. Messrs Wyeth Pakistan Limited 2009 YLR 2096 ref.

Malik Muhammad Tariq Rajwana, Barrister Malik Kashif Rafique Rajwana, Sajjad Hussain Tangra, Syed Riaz-ul-Hassan Gillani, Tariq Mehmood Dogar and Rao Qasim for Petitioners.

Sh. Muhammad Naeem Goreeja, Deputy Attorney General for Pakistan.

Aamir Aziz Qazi, Furqan Naveed, Ch. Saleem Akhtar Warraich, Muhammad Maalik Khan Langah, Muhammad Amin Malik and Bilal Amin for Respondents.

Date of hearing: 26th November, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This consolidated judgment shall decide instant petition along with petitions mentioned in Schedule A to this judgment, as common question of law and facts arise in these petitions.

2. The petitioners, who are manufacturers of different items of textile are industrial consumers of the respondent electricity distribution company and are required to be charged as per latest electricity tariff as determined by the respondent-NEPRA, through this Constitutional petition have prayed as under:

"In view of the above, it is respectfully prayed as under:

1- The impugned acts of omission and commission on the part of Respondents for the issuance of impugned decision (09-06-2015) and notification (10-06-2015), may very kindly be set aside while declaring the same illegal, unlawful and void ab initio.

2- The Respondent may very kindly be directed to continue billing its consumers as well as the Petitioners on the basis of tariff as determined for FY 2014-15 on 27-03-2015 and may very kindly be restrained from raising the billing demand on the basis of the previously determined higher tariff or revised schedule;

3- The Respondents may very kindly be directed to refund/adjust the excessively recovered amounts from the Petitioner/Consumers since 01-7-2014 on the basis of previous years' higher tariff as under the law the above determined reduced tariff for FY 2014-15 becomes applicable from the 1st day of the Financial Year i. e. from 01-07-2014 till 30-06-2015;

4- Any other relief deemed appropriate in the peculiar circumstances of the case may also be very kindly afforded to the petitioners."

3. Concisely, the facts as stated by the petitioners are that, the respondent electricity distribution company (MEPCO) filed, as submitted by the petitioners, deliberately belated tariff petition seeking the consumer end tariff determination for the financial year 2014-2015 on 15.09.2014 to the National Electric Power Regulatory Authority (hereinafter called "NEPRA") under section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA Act, 1997). On the petition filed by the respondent-MEPCO, the NEPRA authorities after due deliberation, determined the consumer end tariff by reducing the electricity tariff by a margin of at least Rs.2.00 per unit for every consumer category including domestic, commercial and industrial.

After determining the consumer end tariff on the request of the respondent-MEPCO, the same was intimated to the federal government for the purpose of issuance of above required mandatory notification under section 31(4) of the Act ibid vide its letter No.NEPRA/TRF-283/MEPCO-2014/4264-4266 on 27.03.2015.

The respondent-federal government after receiving the intimation sent by the respondent-NEPRA, filed a petition on 21.05.2015 under section 31(4) of the Act ibid to reconsider the decision to determine the consumer end tariff by the respondent-NEPRA vide order dated 27.03.2015, whereby the NEPRA reduced the consumer end tariff by Rs.2.00 per unit. The request of the respondent-federal government to reconsider the determination, was considered by the NEPRA and finally levied/imposed two additional surcharges namely, Tariff Realization Surcharge and Financing Cost Surcharge amounting to Rs.2.00 per unit and it was included in the schedule of same tariff determined by the respondent-NEPRA on 27.03.2015. In fact these two surcharges were imposed in addition to the earlier reduction in tariff of Rs.2.00 in the same tariff.

4. The respondent-NEPRA, as per the law, intimated the decision made after reconsideration to the federal government through a letter No.NEPRA/TRF-100/8883-8885 dated 09.06.2015 for issuing the notification in the official gazette, astonishingly, the federal government notified the same and issued the same in the official gazette on the next day i.e. 10.06.2015.

5. Learned counsel for the petitioners submit, that the mala fide on the part of the government appears from its conduct which is malicious and not expected from the State, that the respondent-federal government did not notify the determination of the consumer end tariff of the NEPRA whereby the benefit of Rs.2 per unit was given to the public at large even after passing a considerable time of about one year, whereas the determination made by the respondent NEPRA on the reconsideration petition of the federal government, imposed surcharge amounting to Rs.2.00 per unit in addition to the earlier tariff, notified the same on the very next day.

6. The arguments advanced by the learned counsel for the petitioners have substance keeping in view the facts of the case and the conduct of the State (federal government). This mala fide of the respondent-federal government even noticed by the NEPRA and the

NEPRA authorities could not restrain themselves to say in the letter dated 09.06.2015, whereby the federal government was intimated about the decision taken by the NEPRA on the request of the federal government to reconsider the determination earlier made on 27.03.2015, The relevant portion of paragraph No.7 is reproduced as under:

> "xvii) that whenever a relief is given by NEPRA in reduction of tariff, the same is avoided to be given to the consumers by Govt. of Pakistan the tariff for FY 2014-15 is not being notified for which writ petitions have been filed and as an interim relief, it is ordered that DISCO should recalculate the bill of the petitioner as per rates determined by the NEPRA."

The respondent-NEPRA while reconsidering the earlier determination of consumer end tariff on 27.03.2015., finally observed in paragraph No.11 of the above-referred decision as under:

> 11. Since the NEPRA's determined tariff will remain unchanged and while indicating the amount of surcharges and subsidy in separate columns the same is to be referred back to Government of Pakistan for notification in the official gazette. In view thereof the subject request is accepted and the amount of subsidy and surcharges as indicated by the Federal Government in the Annexures attached with the reconsideration request are allowed to be indicated in the already intimated schedule of tariff as per Annexure-III of the annual tariff determinations. Accordingly, the Schedule of Tariffs (Annexure-III) for Ex-WAPDA DISCOs for the Financial Year 2014-15 are modified and are replaced with Annexures A-1 to A-10 for IESCO, LESCO, GEPCO, FESCO, MEPCO, PESCO, SEPCO, HESCO, OESCO and TESCO respectively. The revised schedule of tariff is being intimated to the Federal Government for notification in the official Gazette in terms of section 31(4) of NEPRA Act. The other Terms and Conditions already intimated would remain the same. The recovery of any of the surcharges from the consumers by the DISCOs shall be subject to the orders of the Courts, if any, notwithstanding this decision."

Learned counsel for the petitioners during the course of arguments have submitted, that provisions of section 31(5) of the Act ibid, whereby the tariff was reconsidered and re-determined on the request of the federal government has been declared ultra vires on 29.05.2015. Reliance is placed on a reported case cited as Flying Cement Company v. Federation of Pakistan and others (2015 PTD 1945). Further submit, that as on 29.05.2015, the aforesaid provision of law was not part of the statute, therefore, the respondent-NEPRA had no jurisdiction or authority to consider the request of the federal government to reconsider/re-determine the tariff, which had already been determined on 27.03.2015, therefore, all the proceedings in this connection are without lawful authority and unlawful.

7. Learned counsel appearing on behalf of the respondents in different writ petitions informed, that the aforesaid judgment reported as (2015 PTD 1945) was challenged before the Hon'ble Supreme Court of Pakistan in C.P.S.L.A. No.1078 of 2015, wherein earlier the leave was granted and subsequently, on the application of the federal government, the aforesaid reported judgment has been suspended on 09.06.2015. The learned counsel for the respondents finally submitted, that since the judgment passed by this Court, whereby the provision of section 31(5) of Act ibid was declared ultra vires, has been suspended,

therefore, the prayer made by the petitioners for the implementation of the order passed by the NEPRA cannot be made.

8. In response thereof, the learned counsel for the petitioners vehemently submitted, that the additional surcharges imposed by the respondent-NEPRA on the request of the federal government were not subject matter of the afore-referred reported judgment, as in the instant case, the respondent-NEPRA imposed the surcharges by re-determining the earlier tariff, namely, Tariff Realization and Financing Cost surcharges @ Rs.2.00 per unit whereas the tariffs namely Equalization Surcharge, Debt Servicing Surcharge, Universal Obligation Fund Surcharge and Neelum Jhelum Surcharge were subject matter of the afore- refferred reported judgment, therefore, the prayer made by the petitioners can be allowed by ordering the respondent-federal government to notify in the official gazette the benefit given to the public at large.

9. The record of the case and the judgments referred by the parties were examined from where it is found, that it is correct, the surcharges imposed were not subject matter of the afore-referred reported judgment but in any case, the afore-referred reported judgment has been suspended by the Hon'ble Supreme Court of Pakistan, therefore, it is to be seen as to whether any direction, in these circumstances, can be given to the federal government to notify the consumer end tariff determined by the respondent-NEPRA on 27.03.2015.

10. Learned counsel for the petitioners have relied upon the judgments cited as Ejaz Rasool v. Member National Industrial Relations Commission and 5 others (2014 PLC 288), Mst. Meeran Bibi (Ameer Bibi) and 4 others v. Manager Zarai Taraqiati Bank Limited, Phool Nagar District Kasur and 2 others (2012 CLD 2029) and Collector of Sales Tax and Federal Excise v. Messrs Wyeth Pakistan Limited (2009 YLR 2096). The learned counsel for the petitioners submit, that in the aforesaid judgments, this Court has declared, that the leave granting order or the suspension of the order by the Hon'ble Supreme Court of Pakistan does not decide the principle of law, therefore, on this ground, the implementation of the order passed by the respondent-NEPRA cannot be denied.

11. In a judgment cited as (2014 PLC 288), this Court has decided, that in case the judgment is in rem, on the basis of suspension order passed by the Hon'ble Supreme Court of Pakistan, the judgment passed by the High Court would remain in the field and binding unless set aside or modified by the Hon'ble Supreme Court of Pakistan finally. While delivering the afore-referred judgment, the learned Judge has relied upon plethora of judgments wherein it is held, that in case of grant of special leave to appeal if ultimately the appeal is accepted, that interim relief merges into the final decision given by the Court and on the other hand, if the appeal is rejected, then the interim relief granted earlier would automatically be disappeared, therefore, the interim relief given at the time of grant of special leave to appeal cannot be termed as Final [referred Maj. Gen. (Retd.) Mian Ghulam Jilani v. The Federal Government through the Secretary Government of Pakistan, Interior Division, Islamabad (PLD 1975 Lahore 65)]. The learned Division Bench of Sindh High Court while delivering the judgment reported as 2009 YLR 2006 has observed, that in the case of suspension of an order by the Hon'ble Supreme Court of Pakistan of a judgment passed by the High Court would not have a binding effect because it did not decide a point of law as enunciated in Article 189 of the Constitution of Islamic Republic of Pakistan, 1973.

12. There is another aspect of the case which has earlier been discussed, that the determination of the consumer end tariff by the respondent-NEPRA on 27.03.2015, despite intimation, has not been gazetted officially till today as claimed by the petitioners and the federal government lingered on the matter deliberately to deprive the petitioners from the benefit granted under the law and on the other hand, the tariff, whereby Rs.2.00 per unit were imposed by the NEPRA on the request of the federal government, was notified in the official Gazette on the very next day. Since the petitioners are individually making the prayer for the implementation of the decision made by the respondent-NEPRA, therefore, the respondent-federal government/State cannot be absolved from its mandatory duty and obligation to give the same treatment of the orders passed by the respondent-NEPRA.

13. In view of the above, the respondent-federal government is directed to decide the grievance of the petitioners in the light of observation made above and the judgments referred by the learned counsel for the petitioners, within a period of 30 days after receipt of certified copy of this judgment.

14. With the above observation, the writ petition along with the connected petitions stand disposed of. No order as to cost.

ZC/R-13/L Order accordingly.

2017 C L C Note 180
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
KHALID MEHMOOD---Petitioner
Versus
Rana MUHAMMAD IQBAL---Respondent

C.R. No. 72 of 2015, heard on 17th February, 2015.

Civil Procedure Code (V of 1908)---

----O. XIII, R. 2---Suit for recovery of damages--- Application to place documents on record----Expression 'Good cause,' interpreted---Plaintiff instituted suit for recovery of damages---Defendant moved application to place documents pertaining to record of department during course of proceedings---Trial Court allowed application---Validity---Law permitted that any party to suit could submit documentary evidence not mentioned in the list of documents at time of institution of suit subject to condition of showing 'good cause'---'Good cause' for placing documents could be interpreted as documents in absence of which no effective decree could be passed---Plaintiff instituted his case by referring documents relating to defendant, therefore, if those documents referred in plaint were not allowed to be produced by defendant, it would not be possible to pass an effective and executable decree---Documents could be brought on record at any stage subject to showing good cause and good cause was to be decided by court by giving reasons---When evidence was yet to be completed, parties must be given maximum opportunity to place on record material pertaining to case---Trial Court after careful appreciation of record had rightly allowed the

application---Revision petition was dismissed being devoid of illegality or jurisdictional effect. [Paras. 5, 6, 7 & 8 of the judgment]

Rab Nawaz and 8 others v. Muhammad Amir and another 1999 SCMR 951; American Express Travel Related Services Company Inc. and 2 others v. Muhammad Nasrullah Beg, Baig and Co. 2001 YLR 1185; Sher Baz Khan and others v. Mst. Malkani Sahibzad Tiwana and others PLD 2003 SC 849; Muhammad Yousaf v. Mst. Maqsooda Anjum and others 2004 SCMR 1049; Allah Dad and 3 others v. Dhuman Khan and 10 others 2005 SCMR 564; Mst. Sadia Muhammad Zahoor and another v. Board of Revenue through Secretary (RS&EP) and 7 others 2008 CLC 34 and Muhammad Mussa and 3 others v. Hamid Ali 2012 CLC 254 ref.

Shamim Riaz Ahmad Langrial for Petitioner.
Mobasher Latif Gill, Assistant Advocate-General for Respondent.
Date of hearing: 17th February, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is directed against the order dated 11.12.2014 passed by the learned Civil Judge, Sahiwal, whereby the application under Order XIII, Rule 2, C.P.C. filed by the respondent, was allowed and the respondent was permitted to submit the departmental record/documents during the course of recording the evidence.

2. The respondent/defendant, during the proceedings, filed an application under Order XIII, Rule 2, C.P.C. to file the documents pertaining to the record of the department, which was contested and finally the learned trial Court, after hearing the arguments of the parties, allowed the application against which, this civil revision has been filed.

3. Learned counsel for the petitioner contends, that the order passed by the learned trial Court is violative of Order XIII, Rule 2, C.P.C., wherein it is mentioned, that the documents mentioned in the list of documents can only be produced during the course of recording evidence, therefore, the order is not sustainable in law. Next contended, that the documents, sought to be produced by the respondent, were very much in the possession of the respondent-department, therefore, the respondent intentionally filed this application simply to linger on the matter. Reliance is placed on Rab Nawaz and 8 others v. Muhammad Amir and another (1999 SCMR 951), American Express Travel Related Services Company Inc. and 2 others v. Muhammad Nasrullah Beg, Baig & Co. (2001 YLR 1185), Sher Baz Khan and others v. Mst. Malkani Sahibzad Tiwana and others (PLD 2003 Supreme Court 849), Muhammad Yousaf v. Mst. Maqsooda Anjum and others (2004 SCMR 1049), Allah Dad and 3 others v. Dhuman Khan and 10 others (2005 SCMR 564), Mst. Sadia Muhammad Zahoor and another v. Board of Revenue through Secretary (RS & EP) and 7 others (2008 CLC 34) and Muhammad Mussa and 3 others v. Hamid Ali (2012 CLC 254).

4. Conversely, the learned Assistant Advocate-General opposed the contention raised by the petitioner.

5. The record, particularly, the application under Order XIII(2) read with section 151, C.P.C. filed by the respondent, was perused, to deal with the matter in the light of the aforesaid provision of law. Order XIII, Rule 2, C.P.C. permits any party of the suit to submit the documentary evidence not mentioned in the list of documents at the time of filing the suit, subject to the condition ofshowing good cause by the parties. The simple or another interpretation of the good cause could be that in the absence of the documentary evidence sought to be produced under Order XIII, Rule 2, C.P.C. at the later stage, no effective decree could be passed. In this case, the petitioner has filed the suit for damages to the tune of Rs.100,00,000/- (Rupees One Crore) against the respondent/defendant who is Director Land Reclamation, Irrigation Department.

In this case, the contents of the plaint reveal, that the petitioner/plaintiff has claimed the damages by referring the documents pertaining to the department of the respondent/defendant, therefore, if those documents referred in the plaint or mentioned in the evidence are not brought on the judicial file, it would not be possible for the learned trial Court to pass an effective and executable decree.

Learned counsel for the petitioner has referred the aforesaid esteemed judgments but the facts of this case are entirely different.

Anyhow, in the afore-referred esteemed judgment delivered by the Hon'ble Supreme Court of Pakistan, it has been ruled that the person who is seeking the permission from the Court to bring on record certain documents at the later stage, will have to show the good cause, therefore, in other words, till the final adjudication of the case, the documents may be brought on record at any stage if not earlier filed subject to showing good cause and the good cause is to be decided by the Court obviously by giving reasons. The primary duty of the Courts is to decide the lis fairly, justly and in accordance with the law applicable on the case and if it is necessary to meet the ends of justice, the Court may grant the permission at any stage of the case.

6. In this case, the respondent/defendant has explained the sufficient cause and even otherwise, while having a glance over the record, it can easily be observed, that only the documents pertaining to the respondent-department sought to be brought on record to meet the ends of justice. Further, at the trial stage and particularly when the evidence is yet to be completed, the parties to the suit should be given maximum opportunity to place on record the material pertaining to the case, so that the learned trial Court could appreciate the same before passing the final decree. It would not be out of place to mention here, that if at the trial stage, parties to the case are permitted to place on record the necessary documents after showing the good cause, if not annexed or mentioned in the list of documents at the trial stage, in appeal stage, it would also help the appellate Court to decide the case fairly and justly.

7. The learned trial Court, after careful appreciation of the record, has rightly reached to the conclusion, that the respondent/defendant should be given an opportunity to produce the documents which pertain to the record of the department, therefore, no illegality or jurisdictional defect has been committed by the learned trial Court while accepting the application.

8. Resultantly, this civil revision is dismissed, the respondent/ defendant are permitted to produce the documents only pertaining to the record of the department. No order as to cost.

MM/K-12/L Revision dismissed.

2017 C L C Note 184
[Lahore]
Before Ali Akbar Qureshi, J
SAEED AHMED---Petitioner
Versus
Haji ABDUL HAMEED and 3 others---Respondents

Civil Revision No. 2274 of 2015, heard on 7th August, 2015.

(a) Transfer of Property Act (IV of 1882)---
----S. 52---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of agreement to sell---Lis pendens, doctrine of---Applicability---Defendants had made transaction during the pendency of suit--- Principle of lis pendens was applicable to the facts of the case---Both the courts below had correctly evaluated, appreciated and interpreted the record produced by the parties during evidence---Plaintiff had succeeded to prove his case whereas defendants had failed to bring on record anything which was confidence inspiring in support of their claim---No illegality or legal infirmity or jurisdictional defect had been committed by the courts below---Revision was dismissed in circumstances. [Paras. 14, 15 & 19 of the judgment]

(b) Qanun-e-Shahadat (10 of 1984)---
----Art. 113---Facts admitted need not to be proved---Scope---Admitted facts did not require any proof. [Para. 9 of the judgment]

(c) Transfer of Property Act (IV of 1882)---
----S. 52---Lis pendens, doctrine of---Scope---Doctrine of lis pendens was based on equity, good conscience and justice. [Para. 14 of the judgment]

(d) Transfer of Property Act (IV of 1882)---
----S. 52---Lis pendens, doctrine of---Meaning. [Para. 14 of the judgment]
The rule of lis pendens and section 52 of the Transfer of Property Act is founded upon the maxim "pendente lite nihil innovetur" which means that pending litigation, nothing should be changed or introduced as the true object of lis is to protect and safeguard the parties to the suit and their rights and interest the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person.
Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983 and Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

(e) Civil Procedure Code (V of 1908)---
----S. 115---Revisional jurisdiction of High Court---Scope---Concurrent findings of facts could not be interfered by the High Court unless courts below had committed jurisdictional error or legal infirmity. [Para. 16 of the judgment]
Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984; Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 and Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452 rel.

Mian Asghar Ali for Petitioner.
Nemo for Respondents.
Date of hearing: 7th August, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 01.06.2015 and 30.03.2013, passed by learned Courts below, whereby the suit filed by respondent No.1 titled "Haji Abdul Hameed v. Abdul Mateen" was decreed and the suit titled "Zulfiqar Ali v. Abdul Mateen" was dismissed.

2. The necessary facts for the disposal of this civil revision are that, respondent No.1 Haji Abdul Hameed instituted a suit for specific performance on 17.05.2005, contending therein, that an agreement to sell dated 21.01.2003 was executed by one Haji Abdul Mateen (respondent No.2) for a consideration of Rs.9,65,000/-, out of which Rs.8,74,878/- were paid as earnest money in the presence of the witnesses and as regard the remaining amount it was agreed that the same will be paid at the time of the registration of the sale deed. Further contended, that it was agreed, that the sale deed will be executed and registered on 30.06.2003 and during this period, Haji Abdul Mateen (vendor) also received further amount Rs.50,000/- but refused to execute and registered the sale deed on the pretext, that the suit land is mortgaged with the Agricultural Development Bank of Pakistan. Also stated, that the said Abdul Hameed time and again asked Haji Abdul Mateen to get redeem the suit land but Haji Abdul Mateen instead of taking any step to redeem the property, alienated the same through oral sale vide mutation No.12501 on 02.09.2011 in favour of one Rehmat Ali, who further alienated the land in favour of one Saeed Ahmad, the petitioner herein, on the basis of registered sale deed dated 20.10.2011. Lastly prayed, that as the agreement to sell executed in favour of respondent No.1 (Haji Abdul Hameed) was prior in time, therefore, the suit be decreed by declaring all the subsequent transactions null and void.

3. In response of the notice respondent No.2 Haji Abdul Mateen, the vendor and original owner of the suit land, appeared in the Court and submitted written statement wherein he admitted the execution of the agreement to sell dated 21.01.2003 in favour of respondent No.1 but also stated in his written statement, that respondent No.1 could not fulfill the terms and condition therefore, respondent No.2 is ready to pay the double of the earnest money according to the terms and condition of the agreement to sell.

4. On the other hand, the petitioner and respondent No.4, who were defendants Nos.2 and 3 in the suit, vehemently contested the claim made by respondent No.1, on the ground, that the land has validly been transferred by way of sale in their favour. Zulfiqar Ali (respondent No.4) one of the defendants also claimed that he had an agreement to sell in his favour prior to the execution of the agreement to sell in favour of respondent No.1.

During the pendency of the aforesaid suit, Zulfiqar Ali (respondent No.4) also filed a suit for specific performance on the basis of an agreement to sell dated 02.01.2003. The learned trial court consolidated both the suits and framed consolidated issues out of the divergent pleadings of the parties. The learned trial court after recording the evidence of the respective parties finally decreed the suit filed by respondent No.1 and dismissed the suit filed by the respondent No.4.

Against the consolidated judgment passed by the learned trial court dated 30.03.2013 following three appeals were filed:

1. Zulfiqar Ali v. Abdul Mateen etc.
2. Saeed Ahmad v. Haji Abdul Hameed etc.
3. Abdul Hameed v. Abdul Mateen etc.

The learned appellate Court after hearing the arguments of the parties dismissed two appeals titled Saeed Ahmad v. Haji Abdul Hameed etc. and Zulfiqar Ali v. Abdul Mateen etc. whereas accepted the appeal filed by Abdul Hameed respondent No.1 to the extent of observation passed in Paragraph No.28 of the judgment delivered by the learned trial court.

5. The instant civil revision has been filed only by the present petitioner, who claimed himself the bona fide purchaser of the suit land through a registered sale deed dated 20.10.2011 executed by one Rehmat Ali respondent No.3 herein, in his favour.

6. Learned counsel for the petitioner mainly argued that the petitioner is a bona fide purchaser of the suit land. Further submitted, that the petitioner purchased the suit land through the registered sale deed but the learned courts below have totally ignored this aspect of the case and non-suited the petitioner. Lastly contended, that the concurrent findings recorded by the learned courts below are totally against the record and the law applicable on the case.

7. Heard. Record perused.

8. During the course of arguments the relevant record pertaining to the sale of land was examined, therefore, firstly it is to be examined as to whether respondent No.1 in whose favour the decree has been passed, has succeeded to prove his case and as to whether the learned courts below while rendering the concurrent conclusion have rightly appreciated the evidence produced by the parties.

9. As per record, that at the time of filing the written statement in a suit filed by the respondent No.1, respondent No.2/defendant (original owner of the property) categorically admitted the execution of the agreement to sell dated 21.01.2003 in favour of respondent No.1, and in these circumstances although there is no need to further examine or discuss the

validity and authenticity of agreement to sell dated 21.01.2003 as the law says, "admitted facts need not to be proved" but anyhow in order to satisfy myself, the evidence produced by the respondent No.1 to prove the agreement to sell was perused.

10. The respondent No.1/plaintiff in order to prove the authenticity and validity of the agreement to sell dated 21.01.2003 produced two marginal witnesses PW1 and PW2, who stated that the agreement to sell was executed in their presence and both the witnesses also identified their signatures. The respondent No.1 (vendee) himself appeared in the witnesses box and stated that the agreement to sell was executed in his favour by Haji Abdul Mateen respondent No.2 herein against consideration. The stamp vendor also appeared as PW-4 and deposed that Ex.P1 (stamp paper) was issued by him in favour of Haji Abdul Mateen (respondent No.2) for the execution of agreement to sell. The said witness also produced the copy of the register to show the issuance of Ex.P1. The scribe of the agreement to sell also appeared as PW1, who is Advocate by profession and stated, that the agreement to sell was scribed by him and he also identified his signatures at the back of Ex.P1. Although these witnesses were cross-examined by the petitioner but the petitioner could not fetch out anything against the stance of the respondent No.1/plaintiff. The above referred evidence produced by the respondent No.1 is sufficient to hold, that the respondent No.1 had succeeded to prove the execution of the agreement to sell in his favour by the respondent No.2 (Haji Abdul Mateen).

11. On the other hand, the petitioner also produced the evidence in support of his version but unfortunately could not succeed to prove his claim of bona fide purchaser of the suit land. There are serious contradictions in the evidence produced by the petitioner. There are also other important facts to show the fraud played by the petitioner in connivance with respondents Nos.2 to 4. For instance, as found out from the record, the petitioner filed the suit for specific performance against respondent No.1 on 26.04.2007 on the basis of alleged agreement to sell dated 02.01.2003, wherein respondent No.2 (Abdul Mateen), the original owner of the suit land, did not appear and consequently, ex parte proceedings were ordered against him vide 10.04.2008, whereupon he filed an application for setting aside the ex-parte proceedings on 26.06.2009, which, as per the record, was never decided by the court. During this period, the respondent No.1 filed an application under Order I, rule 10, C.P.C. in the suit filed by the respondent No.4 which was accepted and respondent No.1 contested the suit through filing written statement. It is pertinent to mention here, that no written statement was filed by the respondent No.2 in the suit filed by the respondent No.4 but on one day, the respondent No.4, plaintiff of the suit, and respondent No.2 both appeared before the Court, filed an application for recording the statement of Abdul Mateen on the basis of a compromise. The respondent No.2 recorded his statement on 26.01.2011 but thereafter the respondent No.2 did not appear in the Court nor any effective order was passed by the learned trial court in favour of respondent No.4 on the basis of the statement recorded by respondent No.2.

12. The story of connivance and fraud of the respondents Nos.2 to 4 does not end here. The respondent No.4 Zulfiqar Ali plaintiff of the suit, after remained unsuccessful to get any order or decree in his favour on the basis of the statement recorded by respondent No.2 played another fraud and on 26.01.2011 managed to mutate the suit land by way of oral sale on 02.02.2011 in favour of Rehmat Ali, his real uncle, instead of transferring the land in his

own favour. The said Rehmat Ali, who is real uncle of respondent No.4, further transferred the land in favour of the petitioner on 20.10.2011 on the basis of a registered sale deed No.2923. These transactions were managed by the respondents Nos.2 to 4 by playing fraud and misrepresentation during the pendency of the injunctive order passed by the learned trial court granted in a suit filed by the respondent No.1. It also establishes from the record, that Zulfiqar Ali, respondent No.4, who filed the suit during the pendency of the suit filed by respondent No.1, completely failed to prove his agreement to sell (Ex.D.1). Thus, it has rightly been concluded by the learned courts below, that the Ex.d.1 was antedated and prepared fraudulently with the connivance of respondents Nos.2 and 3 simply to cheat Haji Abdul Hameed, respondent No.1, who earlier filed the suit.

13. The afore-referred record collected by the learned trial court during the course of recording the evidence is sufficient to establish and hold that a havoc fraud has been played by the petitioner and respondents Nos.2 to 4 with the respondent No.1. On every occasion, the respondents Nos.2 to 4 tried to create a hurdle by preparing forged document in the way to execute and register the sale deed in favour of the respondent No.1.

14. I have carefully examined the findings recorded by the learned courts below and reached to the conclusion, that learned courts below correctly evaluated, appreciated and interpreted the record produced by both the parties during the course of evidence and reached to a fair and just conclusion, that the respondent No.1 has succeeded to prove his case whereas the petitioner and respondents Nos.2 to 4 could not bring anything which is confidence inspiring in support of their claim. As the respondent No.1 has successfully proved the agreement to sell executed in his favour by the respondent No.2 against consideration, therefore, the learned courts below rightly declared the transactions managed with connivance by the petitioner and respondents Nos.2 to 4 null and void and correctly decreed the suit in favour of the respondent No.1.

The scope of the doctrine of lis pendens as embodied in section 52 of Transfer of Property Act, 1882, in pith and substance is not only based on equity but also at good conscience and justice. This Rule has been defined and interpreted at different times in many judgments, that "the rule of lis pendens and section 52 of the Transfer of Property Act is founded upon the maxim "pendente lite nihil innovetur" which means that pending litigation, nothing should be changed or introduced as the true object of lis is to protect and safeguard the parties to the suit and their rights and interest the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person.

I am fortified by the latest judgment of the Hon'ble Supreme Court of Pakistan, titled "Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others" (2012 SCMR 983), wherein the Hon'ble Supreme Court of Pakistan has gone to this extent while interpreting the well-known legal maxim "ut lite pendent nihil innovetur" that the safeguard of principle of lis pendens shall remain in the field even within the limitation to file the appeal against the judgment and decree of the learned courts below. The relevant observation of the Hon'ble Supreme Court of Pakistan is reproduced hereunder:-

"The afore-referred provision enshrines the age old and well established principle of equity that ut lite pendent nihil innovetur (pending litigation nothing new should be introduced) and stipulates that pendent lite parties to litigation wherein right to immovable property is in question, no party can alienate or otherwise deal with such property to the detriment of his opponent. Any transfer so made would be hit by this Section. The doctrine by now is recognized both in law and equity and underpins the rationale that no action or suit would succeed if alienations made during pendency of proceedings in the said suit or action were allowed to prevail. The effect of such alienation would be that the plaintiff would be defeated by defendants alienating the suit property before the judgment or decree and the former would be obliged to initiate de novo proceedings and that too with lurking fear that he could again be defeated by the same trick. The doctrine of lis pendens in pith and substance is not only based on equity but also at good conscience and justice. In Lalji Singh v. Remeshuwar Misra ((1983) 9 All LR 269 (271)(All)), the essential ingredients of section 52 ibid or the condition precedent to attract this principle were construed as follow:-

(i) The pendency of any suit or proceeding in a court law:

(ii) The court must have jurisdiction over the person or property;

(iii) The property must have specifically described and should be affected by the termination of the suit or proceedings;

(iv) The right to the said property be directly and specifically be in question in any suit or proceedings;

(v) An alienation of such immovable property without the permission or order of the court; and

(vi) The alienation should be during the pendency of any such suit or proceeding and a suit or proceeding in question is not collusive."

The Hon'ble Supreme Court of Pakistan in another landmark judgment cited as "Farzand Ali and another v. Khuda Bakhsh and others" (PLD 2015 SC 187) has observed as under:-

"Considering the plea of lis pendens raised by the appellants' learned counsel, it may be mentioned that the scope, the principle and the application of rule of lis pendens has been elaborately dilated in the judgment reported as "Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905). The ratio of the above law is that a subsequent transferee cannot sustain his transfer (e.g. the sale) if he has purchased the property during the pendency of the suit. He is bound by the outcome of the suit, obviously that shall be so if the case is decided against the transferor from whom he is purchasing the property or against the transferee if he is a party to the case, but if the lis is decided in his favour, there shall be no question about the application of the rule of lis pendens."

15. As manifests from the record, that the petitioner and the respondents Nos.2 to 4 made transaction during the pendency of the suit filed by the respondent No.1, therefore, the

principle of lis pendens as defined and interpreted by the Hon'ble Supreme Court of Pakistan, in the afore-referred esteemed judgments is squarely applicable upon the facts of this case and the learned courts below particularly the learned appellate court had not committed any illegality, legal infirmity or jurisdictional defect to dismiss the suit of the petitioner on this ground also.

16. It has also been ruled by the Hon'ble Supreme Court of Pakistan, that the concurrent findings on facts should not be interfered in routine, but in an extra ordinary circumstance, when the learned courts below have committed serious jurisdictional error or legal infirmity.

I find support from the valuable judgments of the Hon'ble Supreme Court of Pakistan, titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Noor Muhammad and others v. Mst. Azmate-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another (2008 SCMR 428), and "Abdul Ghafoor and others v. Kallu and others" (2008 SCMR 452), that the High Court, in the case of concurrent findings, normally does not interfere unless the same is result of exercise of jurisdiction not vested in the learned courts below.

The Hon'ble Supreme Court of Pakistan, in its recent judgment (supra) titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others" (2014 SCMR 161) observed as under:-

> "In other words, the provisions of section 115, C.P.C. under which a High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities. The revisional jurisdiction of the High Court cannot be invoked against conclusions of law or fact, which do not, in any way, affect the jurisdiction of the Court. In the instant case, the learned High Court, in law, could not have investigated into the facts or exercised its jurisdiction on the basis of facts or grounds, which were already proved by the parties by leading evidence. We are of the considered view that the judgment impugned in these proceedings is unexceptionable. The learned High Court was justified in not interfering in the concurrent findings of fact which were based on the material brought on record and proper appreciation of evidence."

17. In view of the above, I see no reason to interfere with the concurrent findings rendered by the learned courts below. Resultantly, this revision petition is dismissed with cost.

ZC/S-123/L Revision dismissed.

2017 C L C Note 190
[Lahore]
Before Ali Akbar Qureshi, J
Messrs ASIF KNITWEAR (PRIVATE) LIMITED through Mian Atif Shakoor---Appellant
Versus
FARKHANDA ANWAR and 11 others---Respondents

F.A.O. No. 207 of 2007, heard on 29th June, 2015.

Civil Procedure Code (V of 1908)---

----Ss. 11, 144, 151, O. XXI, Rr. 97, 98, 99, 100, 101, 102 & 103---Execution of decree---Objection, decision of---Past and closed transaction---Principle of res judicata, applicability---Judgment debtor did not question compromise effected between parties and consent decree in any manner---During execution of decree, judgment debtor filed objections under O. XXI, Rr. 97 to 103, C.P.C., on the ground that decree holder committed a fraud and got sanctioned mutation in her name whereas he (judgment debtor) was lawful owner in possession of property under execution---Validity---Judgment debtor could not be permitted to reopen the case which was past and closed transaction---Principle of res judicata was applicable as judgment debtor was Chief Executive of company in question and was precluded by law to challenge consent decree on the basis of compromise duly signed by him---High Court declined to interfere in execution proceedings---Appeal was dismissed in circumstances. [Paras. 8, 13 & 14 of the judgment]

Mansoor Textile Mills Limited, Shorkot through Syed Jamaat Ali Shah, Managing Director and another v. Jamail Akhtar Naseeb, Textile Consultant, Faisalabad 2001 CLC 1065; Mustafa Kamal and others v. Daud Khan and others PLD 2004 SC 178; Arshad Ali and 6 others v. Muhammad Tufail through L.Rs. and others 2013 CLC 632; Hoshiar Ali v. Ghulam Sabir 1993 CLC 2476; Swamy Atmananda and others v. Sri Ramakrishna Tapavanam and others AIR 2005 SC 2392; Muhammad Akram v. Additional District Judge and others PLD 2008 Lah. 560; Messrs Ilyas Marine and Associates Ltd. through Managing Director and another v. Muhammad Amin Lasania 2009 MLD 1246 and Muhammad Mazhar Iqbal and 8 others v. VIth Additional District Judge and 5 others 2010 MLD 436 rel.

Nisar Ahmad Baig for Appellant.
Ahmed Waheed Khan for Respondents.
Date of hearing: 29th June, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---Through this single judgment, I intend to dispose of this appeal along with:

i. Crl. Org. No.62-C/2007 titled M/s. Asif Knitwear (Pvt.) Ltd. v. Mst. Farkhanda Anwar etc.

ii. Crl. Org. No.59-02010 titled M/s. Asif Knitwear (Pvt.) Ltd. v. Mst. Farkhanda Anwar etc.

iii. Crl. Org. No.115-C/2013 titled M/s. Asif Knitwear (Pvt.) Ltd. v. Mst. Farkhanda Anwar etc.

iv. Crl. Org. No.116-C/2013 titled M/s. Asif Knitwear (Pvt.) Ltd. v. Mst. Farkhanda Anwar etc.

v. C.R. No. 643/2009 titled Mian Muhammad Asif etc. v. Mst. Farkhanda Anwar etc.

vi. W.P. No. 2989/2009 titled Mian Muhammad Asif Shakoor v. Justice of Peace/Additional Session Judge, Tehsil Ferozwala District Sheikhupura etc.

vii. W.P. No.14239/2009 titled Mian Muhammad Asif v. Justice of Peace/Additional Session Judge, Tehsil Ferozwala District Sheikhupura etc.

viii. F.A.O No.417/2012 titled Farkhanda Anwar v. Mian Muhammad Asif etc.

and

ix. C.R No.2887/2012 titled Farkhanda Anwar v. Mian Muhammad Asif etc.

arisen out of the same transaction between the same parties and judgment and decree dated 18.02.2000, passed by learned executing court, dismissing the objection petition filed by the appellant.

2. This first appeal is directed against the order dated 31.07.2007, passed by the learned executing court, whereby the objection petition under Order XXI, rules 97 to 103 read with section 151, C.P.C., filed by the appellant (M/s. Asif Knitwear (Pvt.) Ltd.), in an execution petition filed by the respondent to execute the judgment and decree dated 26.04.2004, was dismissed.

3. This case has a long history which revolves around the distribution of legacy among the legal heirs of Mian Muhammad Sharif who died on 17.06.1988 and presently the dispute is between the real brother and sister, who are also legal heirs of deceased, Mian Muhammad Sharif, predecessor to the parties to the suit.

After the demise of Mian Muhammad Sharif, the legacy, through a registered family settlement dated 03.08.1991, was distributed by the legal heirs; the judgment debtor/appellant Mian Muhammad Asif got land measuring 7 Kanal 10 Marla situated in Sharaqpur Sharif through the family settlement and subsequently sold the same to M/s. Asif Knitwear (Pvt.) Ltd., a company registered under the Companies Ordinance, 1984, owned by the judgment debtor Mian Muhammad Asif; that one of the legal heirs and real sister of the judgment debtor, Mst. Farkhanda Anwar, challenged the validity of family settlement through three civil suits which were consolidated and during the currency of the civil suits, parties to the case entered into a compromise by which the property was re-distributed with

the consent of the parties and finally on the basis of the compromise, a consent decree was passed on 18.02.2000.

4. Thereafter the decree holder Mst. Farkhanda Anwar filed an execution petition, whereupon M/s. Asif Knitwear (Pvt.) Ltd. through Mian Muhammad Asif, the managing director and owner of the company, filed an objection petition under Order XXI, rules 97 to 103 read with section 151, C.P.C. on the allegation, that the decree holder, by playing fraud and misrepresentation and with the connivance of Revenue staff, got sanctioned mutation No.7889 regarding the property in question; that the objection petitioner namely M/s. Asif Knitwear (Pvt.) Ltd. is lawful owner in possession of the suit property and the executing court has no authority to execute the judgment and decree dated 18.02.2000 upon the company. Lastly prayed, that the order dated 26.07.2001 and mutation No.7889 sanctioned on 28.08.2004 be set aside being not sustainable in law.

5. The objection petition filed by M/s. Asif Knitwear (Pvt.) Ltd., through Mian Muhammad Asif/judgment debtor, was vehemently contested by the decree holder raising serious preliminary objections i.e. the objection petition has been filed with mala fide intention, the objection petition is hopelessly barred by time and the matter had already been settled and attained finality, therefore, the objection petitioner namely, Mian Muhammad Asif estopped by his own conduct from filing the objection petition through a same company namely, M/s. Asif Knitwear (Pvt.) Ltd. which is totally owned and possessed by Mian Muhammad Asif/judgment debtor No. 1. Along with the reply of the objection petition, the respondent/decree holder also filed an application under section 151, C.P.C. for issuance of Robkar to the learned Senior Civil Judge, Sheikhupura, to deliver the possession of the suit property to the decree holder with the aid of the police. The said application was also contested by the appellant by controverting the contents of the application. The learned executing court/Civil Judge Class-I, Lahore, after hearing the arguments of the parties, dismissed the application vide order dated 31.07.2007, hence, this appeal.

6. It would be appropriate firstly to record the admitted facts between the parties who are not only decree holder and judgment debtor but also real sister and brother:

i. The suit property was left by the predecessor namely, Mian Muhammad Sharif (real father of the parties).

ii. The legacy of deceased was firstly distributed among the legal heirs of Mian Muhammad Sharif through family settlement dated 03.08.1991.

iii. One of the legal heirs/decree holder Mst. Farkhanda Anwar, by way of three civil suits, questioned the validity of the family settlement dated 03.08.1991.

iv. All the three suits were consolidated and during the currency of suits, the parties to the case entered into a compromise and finally the three consolidated suits were put to an end on the basis of the compromise decree dated 18.02.2000.

v. Record reveals, the judgment debtor namely, Mian Muhammad Asif, chief executive of M/s. Asif Knitwear (Pvt.) Ltd. (appellant herein), in his personal capacity, filed an application under section 144, C.P.C. read with section 151, C.P.C.

for recalling/setting aside the order dated 26.07.2004 and cancellation of the mutation No.7889 dated 28.08.2004 (whereby the mutation was entered of the suit land in favour of the decree holder).

vi. The aforesaid applications were dismissed vide order dated 22.02.2007 and the dismissal orders, as admitted by the learned counsel for the appellant, were not challenged before any higher forum.

7. The judgment debtor Mian Muhammad Asif, after exhausting his remedy by filing application for recalling of the afore-referred orders, filed another objection petition under Order XXI, rules 97 to 103, C.P.C. not in his personal capacity but through his company namely, M/s. Asif Knitwear (Pvt.) Ltd. which is owned, controlled and managed by the judgment debtor, on the same grounds/objections but slightly in a different form. In fact, the appellant used this device obviously with ulterior motive to grab the land of his sister/decree holder, for which, Mian Muhammad Asif, chief executive of the company, himself given his consent at the time of effecting the compromise.

8. From the record of the instant case it can safely be held, that the judgment debtor namely, Mian Muhammad Asif, who did not question the compromise effected between the parties and the consent decree dated 18.02.2000 in any manner whatsoever, cannot be permitted to re-open the case which is past and closed transaction. The conduct of the judgment debtor namely, Mian Muhammad Asif, who claims himself the chief executive of M/s. Asif Knitwear (Pvt.) Ltd. (appellant herein) is very material, who in the earlier round of litigation through his own name, filed an application under section 144, C.P.C. to question the execution proceedings, which was dismissed by the learned executing court and no further remedy was availed but the said judgment debtor, in a different form and through a different name, again filed objection petition obviously to frustrate the execution proceedings.

9. Learned counsel for the appellant argued the case at length and during his course of arguments, repeatedly referred the terms of the compromise decree passed on the basis of the compromise deed and also the statements of the parties to the case. Learned counsel for the appellant submits, that it is very much mentioned in clause IV of the compromise decree, that the decree holder/plaintiff shall be entitled to the property measuring 5 Marla situated in Moza Sharaqpur Khurd free of any encumbrance or bar thereon out of the land detailed in aforesaid family settlement deed.

10. As regard the encumbrance etc. upon the land in question, as argued by learned counsel for the appellant, the learned counsel for the respondent has pointed out, that the judgment debtor, during the pendency of interim injunctive order granted by the learned Civil Court in favour of the decree holder/Mst. Farkhanda Anwar in a suit filed by her, transferred the suit land in favour of M/s. Asif Knitwear (Pvt.) Ltd., being the chief executive and owner of the company. The sale deed, through which the judgment debtor namely, Mian Muhammad Asif transferred the suit land in favour of the appellant M/s. Asif Knitwear (Pvt.) Ltd., speaks volume about the dubious conduct of judgment debtor Mian Muhammad Asif. The said sale deed dated 02.11.1995 has been executed by the judgment debtor in favour of M/s. Asif Knitwear (Pvt.) Ltd., appellant herein, which is without any marginal witnesses as required under Article 17 read with Article 79 of the Qanun-e-Shahadat Order, 1984. Even otherwise,

it is very interesting to note here, that the aforesaid sale deed mainly bears only one signature i.e. of the judgment debtor, being the vendor and the vendee.

11. The learned counsel for the appellant by referring Mansoor Textile Mills Limited, Shorkot through Syed Jamaat Ali Shah, Managing Director and another v. Jamail Akhtar Naseeb, Textile Consultant, Faisalabad (2001 CLC 1065), has submitted, that judgment debtor Mian Muhammad Asif and M/s. Asif Knitwear (Pvt.) Ltd. are two independent entities, therefore, the learned executing court seriously erred in law not to attend this aspect of the case in a manner as required by law.

12. I am afraid, that the law referred by the learned counsel for the appellant is not helpful to the appellant and applicable on the facts of the instant case, wherein the judgment debtor Mian Muhammad Asif, who is also chief executive of the appellant, all the time tried to play havoc fraud with his sister simply to grab a small piece of land measuring 05 Kanal which otherwise is priceless keeping in view the relationship of the parties.

13. Even otherwise, the principle of res judicata is squarely applicable in this case and Mian Muhammad Asif/judgment debtor, who is chief executive of M/s. Asif Knitwear (Pvt.) Limited, is precluded by law to challenge the consent decree passed on the basis of compromise, duly signed by the judgment debtor. Reliance is placed on Mustafa Kamal and others v. Daud Khan and others (PLD 2004 Supreme Court 178). Relevant part of the esteemed judgment is reproduced as under:

> "17. Res judicata, it is observed in Corpus Juris Secundum "is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one of public policy and necessity, which makes it in the interest of the State that there should be an end to litigation-interest republicae ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for the same cause."
>
> In a judgment titled Arshad Ali and 6 others v. Muhammad Tufail through L.Rs. and others (2013 CLC 632), it is observed, that:
>
> "6. The question raised and argued before me with considerable emphasis is that the learned courts below have erred in holding that the general principles of res judicata are applicable to the case. It is well-known that the doctrtne of res judicata is codified in section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits but apart from the codified law, the doctrine of res judicata has been applied since long in various kinds of other proceedings and situation by the superior courts. The rule of constructive res judicata is engrafted in Explanation IV of section 11 of the C.P.C. and in many other situations also the principles not only of direct res judicata but of constructive res judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between same parties. The principle of res judicata comes into play when by judgment/order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by

implication event then the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceedings but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. The object and purpose of the principle of res judicata is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of the fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequently litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment."

Reliance is also placed on Hoshiar Ali v. Ghulam Sabir (1993 CLC 2476), Swamy Atmananda and others v. Sri Ramakrishna Tapovanam and others (AIR 2005 Supreme Court 2392), Muhammad Akram v. Additional District Judge and others (PLD 2008 Lahore 560), Messrs Ilyas Marine and Associates Ltd. through Managing Director and another v. Muhammad Amin Lasania (2009 MLD 1246), Muhammad Mazhar Iqbal and 8 others v. VIth Additional District Judge and 5 others (2010 MLD 436).

14. Resultantly, this first appeal being devoid of any force is dismissed. Since, the matter is between the real brother and sister, therefore, taking a lenient view, this case is dismissed without any cost.

15. Parting with the judgment, the learned executing court is directed to complete the process of execution of the judgment and decree dated 18.02.2000 positively within a period of 45 days. The compliance report be submitted to the Additional Registrar (Judicial) of this Court.

MH/A-111/L Appeal dismissed.

2017 C L C Note 198
[Lahore]
Before Shahid Waheed and Ali Akbar Qureshi, JJ
MUHAMMAD YOUNAS through LRs and others---Appellants
Versus
ABDUL REHMAN through LRs and others---Respondents

R.F.A. No. 1150 and C.M. No. 2-C of 2014, heard on 8th September, 2015.

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

----Ss. 14 & 5---Civil Procedure Code (V of 1908), S. 151---Specific Relief Act (I of 1877), Ss. 42 & 8---Punjab Civil Courts Ordinance (II of 1962), S. 18---Suit for declaration, partition and possession---Application for condonation of delay, dismissal of---Exclusion of time of proceedings in court without jurisdiction---Extension of period---Principles---'Due

diligence' and 'good faith', determination of---Inherent powers of court---Suit was dismissed by Trial Court, after which plaintiffs filed appeal before District Judge, which was returned after two and half years for presentation of same before High Court---Plaintiff sought condonation of delay under S.14, Limitation Act, 1908 on ground that defendant had been appearing before District Judge without raising any objection as to maintainability of appeal and that time was consumed due to contributory negligence on the part of court---Validity---Provision of S. 14 of Limitation Act, 1908 revolved around two words of great significance: 'due diligence' and 'good faith'---Plaintiffs themselves had fixed value of suit for purposes of court fee and jurisdiction at rupees fifty hundred thousands---In view of S. 18 of Punjab Civil Courts Ordinance, 1962, there could be no doubt or complication to determine forum of appeal---Proper forum, to file first appeal in such suits was High Court---Due diligence and care was state of human conduct which could only be assessed from acts performed---Due diligence and care were to be seen from day when judgment and decree was passed against plaintiffs---Plaintiffs could not explain sufficient cause or reason as to why and in which circumstances, they had been compelled to file appeal before wrong forum---Choosing wrong forum, lacking due care and attention, could not be considered as acts done in "good faith"---Principle that act of court would prejudice nobody, was not attracted in the present case, as delay was on account of plaintiffs' own negligence and not due to act of court---In case appeal was barred by time, provisions of S. 5 of Limitation Act, 1908 could only be invoked by showing "sufficient cause", which plaintiffs failed to show or explain---Application for condonation of delay and appeal were dismissed in circumstance. [Paras. 7, 8, 9, 10, 11 & 12 of the judgment]

Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584; Karachi Electric Supply Corporation Ltd. v. Lawari and 4 others PLD 2000 SC 94; Mst. Khadija Begum and 2 others v. Mst. Yasmeen and 4 others PLD 2001 SC 355; Raja Karamatullah and 3 others v. Sardar Muhammad Aslam Sukhera 1999 SCMR 1892; Muhammad Ashiq v. Settlement Commissioner (Lands) The Secretary, Government of Pakistan Ministry of Interior, Narcotics Control Division Islamabad and 4 others 1999 SCMR 1901 and Dr. Syed Sibtain Raza Naqvi v. Hydrocarbon Development and others 2012 SCMR 377 ref.

Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584; Raja Karamatullah and 3 others v. Sardar Muhammad Aslam Sukhera 1999 SCMR 1892; Dr. Syed Sibtain Raza Naqvi v. Hydrocarbon Development and others 2012 SCMR 377; AIR 1960 Andhra Pradesh 406 (V 47 C 134) and Ghulam Ali v. Akbar alias Akoor and another PLD 1991 SC 957 rel.

(b) Words and phrases---

----'Due diligence'----Connotation.

The word 'due diligence' has been defined as under:

Ordinary diligence means the diligence that a person of average prudence would exercise in handling his or her own property like that at issue.

Reasonable diligence means a fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue. [Para. 7 of the judgment]

Black's Law Dictionary ref.

(c) Words and phrases---

----'Good faith'----Meaning.

Good faith means a state of mind consisting of (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) Absence of intent to defraud or to seek unconscionable advantage. [Para. 7 of the judgment]

Black's Law Dictionary ref.
Imran Muhammad Sarwar for Appellants.
Hafiz Muhammad Saqib for Respondents Nos. 1 to 14.
Muhammad Iqbal Ghani for Respondents Nos. 15 and 16.
Date of hearing: 8th September, 2015.

JUDGMENT

C.M. No.2-C/2014

ALI AKBAR QURESHI, J.---This is an application under sections 5 and 14 of the Limitation Act, 1908 read with section 151, C.P.C. seeking condonation of time consumed in prosecuting the titled appeal before a wrong forum i.e. learned District Judge, Sheikhupura.

2. In the present case the learned Trial Court vide judgment and decree dated 19.12.2011, dismissed the applicants' suit for declaration, partition and possession etc. On 16.01.2012 the applicants instead of preferring the appeal before this Court, filed the same before the learned District Judge, Sheikhupura. After a lapse of 2-1/2 years the learned District Judge, Sheikhupura, on 10.07.2014 returned the appeal to the applicants for its presentation before this Court; and, the same was accordingly filed before this Court on 08.09.2014.

3. The applicants are now seeking the condonation of delay under section 14 of the Limitation Act mainly on the grounds: that the respondents had been appearing in the appeal before the learned District Judge without raising any objection as to its maintainability; and, that the time was consumed due to the contributory negligence on the part of the learned court and nobody should be prejudiced by an act of the court.

4. Learned counsel for the applicants, while arguing the case, reiterated the grounds taken in the application and relied upon the cases of Sherin and 4 others v. Fazal Muhammad and 4 others (1995 SCMR 584), Karachi Electric Supply Corporation Ltd. v. Lawari and 4 others (PLD 2000 SC 94) and Mst. Khadija Begum and 2 others v. Mst. Yasmeen and 4 others (PLD 2001 SC 355).

5. On the other hand, learned counsel for the respondents submitted, that the applicants failed to make out a case to take the benefit of section 14 of the Limitation Act; and, that the applicants also failed to show bona fide and diligence on their part. Reliance is placed on

Raja Karamatullah and 3 others v. Sardar Muhammad Aslam Sukhera (1999 SMCR 1892), Muhammad Ashiq v. Settlement Commissioner (Lands) The Secretary Government of Pakistan Ministry of Interior, Narcotics Control Division Islamabad and 4 others (1999 SCMR 1901) and Dr. Syed Sibtain Raza Naqvi v. Hydrocarbon Development and others (2012 SCMR 377).

6. Arguments heard. Relevant record perused.

7. Since the applicants want to take benefit of section 14(2) of the Limitation Act, it would be beneficial to consult the said provisions of law which reads as under:

> "In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence, another civil proceedings whether in a court of first instance or in a court of appeal against the same property for the same relief shall be excluded, where such proceedings is prosecuted in good faith. In a court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it."
>
> The afore-referred Section of the Limitation Act revolves around two words which are of great significance, that is, "due diligence" and "good faith". The word 'due diligence' has been defined in Black's Law Dictionary (Eighth Edition) as:
>
> "ordinary diligence. The diligence that a person of average prudence would exercise in handling his or her own property like that at issue.
>
> reasonable diligence. A fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue."

Whereas 'Good faith' may be defined in following simple words:

> Good faith. Nothing shall be deemed to be done in good faith which is not done with due care and attention.

In Black's Law Dictionary (Eighth Edition), the 'Good faith' is defined as:

> "good faith, A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) Absence of intent to defraud or to seek unconscionable advantage."
>
> The Hon'ble Supreme Court of Pakistan, while dealing with section 14 of the Limitation Act in a judgment cited as Sherin and 4 others v. Fazal Muhammad and 4 others (1995 SCMR 584), has defined the word 'Due Diligence' as;
>
> "Diligence is a state of human conduct. What should be the standard for assessing the behavior of an appellant to style him as diligent. Because of fluidity of the notion of diligence, it is difficult to set up a precise yardstick."

In AIR 1960 Andhra Pradesh 406 (V 47 C 134), while defining Section 14, it has been observed, that;

"Proceedings before a railway administration cannot be regarded as civil proceedings but as proceedings before an administrative office, prosecution of proceedings in good faith, party needlessly taking proceedings before particular authority is not acting in good faith and party pursuing wrong remedy on wrong advice of counsel is not entitled to exemption."

8. Now, in the light of definition and interpretation of the words "good faith" and "due diligence", it is examined as to whether the applicants had acted diligently and with due care. It is evident from the contents of paragraph No.11 of the plaint that the applicants themselves fixed the value of the suit for the purposes of court fee and jurisdiction at Rs.50,00,000/-. In the presence of section 18 of the West Pakistan Civil Courts Ordinance, there could be no doubt or complication to determine the forum of appeal. According to law, the proper forum to file the first appeal in such type of suit was this Court but the applicants filed the appeal against the judgment and decree passed by the learned trial court, before the learned District Judge, Sheikhupura. The due diligence and care is a state of human conduct which can only be assessed from the acts performed. The due diligence and care is to be seen from the day when the judgment and decree was passed against the applicants. Learned counsel for the applicants could not explain sufficient cause or the reason as to why and in which circumstances, the applicants were compelled to file appeal before a wrong forum. Thus, choosing wrong forum lacking due care and attention cannot be considered as acts done in good faith. The principle that act of the Court shall prejudice nobody is not attracted in the present case, as the delay was on account of the applicants' own negligence and not due to the act of Court.

9. There is another aspect of the case which is worth consideration. The applicants filed the appeal before a wrong forum and thereafter waited for a long time for the respondent or the court to raise objection about jurisdiction. Learned counsel for the applicants time and again submitted, during the course of arguments, that the appeal was filed before the wrong forum due to wrong advice of the lawyer. The said ground has not been set up in the application for condonation of delay and, therefore, the applicant cannot be allowed to canvass this plea. Thus, the principle that if the applicant is able to establish that he followed the remedy before a wrong forum, acting with due care and caution, the delay in filing the appeal may be condoned is not attracted, because conduct of the counsel for the applicants in the given circumstances smacks of negligence and carelessness.

10. Even otherwise as per principle laid down in the case of Raja Karamatullah and 3 others v. Sardar Muhammad Aslam Sukhera (1999 SMCR 1892) and Dr. Syed Sibtain Raza Naqvi v. Hydrocarbon Development and others (2012 SCMR 377) the benefit of section 14 of the Limitation Act, 1908 cannot be extended to exclude the time consumed in prosecuting an appeal before wrong forum having no jurisdiction, for the purposes of filing an appeal before a forum having jurisdiction.

11. It is now well settled that time spent in pursuing the proceedings before wrong appellate forum, cannot be excluded for the purposes of filing of an appeal and in case appeal is barred by time the provisions of Section 5 of the Limitation Act, 1908 can only be invoked, that too, by showing the sufficient cause. In this regard reference may be made to the case of

Ghulam Ali v. Akbar alias Akoor and another (PLD 1991 SC 957). In the present case, the applicants have completely failed to show or explain the sufficient cause as provided in section 5 of the Act ibid. Thus, the applicants have failed to make out a case for condonation of delay in filing appeal before this Court against the judgment and decree dated 19.12.2011 of the learned Trial Court.

12. In the sequel, this application being bereft of any merit is dismissed.

Main Case

13. Since, C.M. No.2-C/2014 has been dismissed, this appeal is dismissed being barred by time.

SL/M-310/L Appeal dismissed.

2017 M L D 439
[Lahore]
Before Ali Akbar Qureshi, J
Malik ASHFAQ AHMAD---Petitioner
Versus
PUNJAB COOPERATIVES BOARD FOR LIQUIDATION through Chairman---Respondent

Petition No.3 of 2015, decided on 11th November, 2016.

Punjab Undesirable Cooperative Societies (Dissolution) Act (I of 1993)---

----S. 11---Land belonging to defunct corporation---Forgery for purpose of usurping land---Land in question was purchased by the defunct corporation through various sale deeds---Certain persons in connivance with each other in order to grab and usurp the land, prepared forged documents including credit vouchers etc. in their favour---Record of the defunct corporation did not mention anywhere that the said amount was to be credited in its account---Petitioner, who claimed to be the owner of the land in dispute could not produce the latest fard malkiyat in his name because the land in question, in the revenue record, still existed in the name of the defunct corporation---Although petitioner claimed that the land was purchased by his predecessor but he could not place on record anything to show, that the sale of land in favour of the defunct corporation was challenged in any manner whatsoever by his predecessor---Petitioner in such circumstances had no locus standi to claim the ownership of the land in question or ask for the issuance of "No Objection Certificate" in his favour---Petition was dismissed accordingly.

Shaikh Naveed Sheharyar and Humaira Bashir for Petitioner.

Shaighan Ijaz Chadhar for Respondent.

Date of hearing: 11th November, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---This petition assails an order dated 12.11.2014, passed by Chairman, Punjab Cooperatives Board for Liquidation, whereby two applications regarding land measuring 897 Kanal 16 Marla and 492 Kanal 09 Marla filed by the

petitioner, making a prayer to allow the petitioner to deposit principal amount paid by the defunct Services Cooperative Credit Corporation Limited (SCCCL) plus mark-up and issuance of No Objection Certificate by the concerned committee, were dismissed.

2. The petitioner, claiming himself owner of the property in question, filed an application wherein it was alleged, that an amount of Rs.6,75,00,000/- was received by one Mian Ikram-ul-Haq from defunct SCCCL and the land in question was got transferred in the name of aforesaid defunct corporation; the petitioner in support of his claim, produced photocopies of two credit vouchers dated 29.03.1990 and 17.05.1990 for an amount of Rs.6,00,00,000/- and Rs.75,00,000/-. Lastly prayed, that the No Objection Certificate of the aforesaid land be issued in favour of the petitioner.

3. The petitioner, as evident from the record, was heard by the Chairman, Punjab Cooperatives Board for Liquidation, who on the basis of the record available with the respondent-Board stated in the order, that in fact the land measuring 1564 Kanal, including the land in question, was purchased by the defunct corporation through various sale deeds in the year 1990 for a consideration of Rs.12,29,42,684/- and one Ikram-ul-Haq, with the connivance of others in order to grab and usurp the land, prepared forged documents including credit vouchers etc. in their favour whereas the record of the defunct corporation does not support the contention of aforesaid Ikram-ul-Haq and it is nowhere mentioned in the record that the said amount was to be credited in its account. The petitioner, as appears from the findings impugned herein, could not produce the latest Fard Malkiyat in his name because the land in question, in the revenue record, still exists in the name of the defunct corporation.

4. Learned counsel for the petitioner repeatedly argued, that the land was purchased by the predecessor of the petitioner but the learned Counsel could not place on record anything to show, that the sale of land in question in favour of the defunct corporation was challenged in any manner whatsoever by his predecessor.

5. As regard the declaratory decree, it has rightly been held by the Chairman, PCBL, that the same does not relate to the title of the land in question and has no legal effect upon the facts of this case.

6. The learned counsel for the petitioner, despite argued the case at length, could not point out any jurisdictional defect or legal infirmity with the order impugned herein and further, in my opinion, the petitioner had no locus standi to claim the ownership of the land in question or ask for the issuance of No Objection Certificate in his favour.

7. The order passed by the Chairman, PCBL is well-reasoned and there is hardly any reason to interfere therewith. Hence, this petition is dismissed having no merits.

MWA/A-105/L Petition dismissed.

2017 M L D 467

[Lahore (Multan Bench)]

Before Ali Akbar Qureshi, J

MALIK BROTHERS COTTON GINNING PRESSING AND OIL MILLS through Sole Proprietor and another---Petitioners

Versus

GOVERNMENT OF PAKISTAN through Secretary Ministry of Commerce and 4 others---Respondents

W.P. No.16684 of 2014, decided on 26th December, 2014.

Constitution of Pakistan---

----Art. 199----Constitutional petition---Contractual obligation---Enforceability---Scope---Trading Corporation of Pakistan (TCP) advertised for the purchase of Cotton and petitioners applied for the same---Officials of the corporation visited the premises of the petitioners and assured/promised that contract of purchase would be executed---Corporation, however, refused to execute the contract on the pretext that Federal Government had restrained the corporation to purchase cotton any more---Petitioners contended that they had been subjected to discriminatory treatment as the corporation had executed a contract with another party---Validity---Petitioners had filed the application (for grant of the contract) well before the instructions conveyed by the Federal Government, whereby the TCP had been restrained to sign any further contract---Letter/instructions of the Federal Government had specifically advised to the TCP to complete the process of sampling of the offered contracts, and the petitioners, in the present case, had made an offer for contract; therefore, the corporation was bound to complete the process of sampling to sign the contract in favour of the petitioners---Instructions whereby the corporation had been restrained to sign further contract had prospective effect---No ground was available to refuse to sign the contract with the petitioners who had approached the corporation well within time and fulfilled all the requirements and conditions---Corporation, having put the machinery in motion by visiting the premises of the petitioners, had refused to sign the contract on the lame excuse, with mala fide intention and ulterior motive---High Court observed that the officers of the corporation were granting the contract to the persons of their own choice or liking and directed the corporation to execute the offered contract with petitioners as per the policy---Constitutional petition was allowed in circumstances.

Messrs SF Engineering Services through Proprietor v. Federation of Pakistan through Secretary, Water and Power, Islamabad and 4 others PLD 2014 Sindh 378 and Haqbahoo Corporation v. P.I.A. and others PLD 2003 Kar. 369 rel.

Malik Sohail Ashiq Shujra for Petitioners.

Muhammad Suleman Khan for Respondents.

ORDER

ALI AKBAR QURESHI, J.---The petitioners, who deals in the business of ginning and pressing cotton and processing cotton seeds into oil and oil cake, in response of an advertisement published in Daily Khabrain Multan, dated 30.10.2014, whereby the Trading

Corporation of Pakistan (Private) Limited (herein after referred the TCP) informed to the interested cotton ginners to file applications if they are interested to sell their stock of cotton lint bales to TCP at the rate of Rs.6,864/- per Maund, filed an application on 14.11.2014 for contract of 600 cotton lint bales, the respondent officials visited the premises on the same day and promised to execute the contract for the said purpose. The petitioners had been visiting the office of the respondent corporation, but all the time, an insurance was given to the petitioners to execute the contract, the petitioners waited for a long time and lastly filed an application to the association namely Pakistan Cotton Ginning Association for the redressal of their grievance and lastly prayed as under:--

> "In the light of the foregoing submissions, it is mostly humbly prayed that this Honourable Court maybe graciously pleased to:
>
> i. Declare that the sudden ban imposed by respondents Nos.1 and 2 not to purchase further cotton lint bales from remaining applicants is illegal, without lawful authority and of no legal effect; and
>
> ii. Declare that the unfair and discriminatory acts of respondents Nos.1 to 5 in awarding the contracts to the selected applicants for the purchase of cotton lint bales are illegal, without lawful authority and of no legal effect; and
>
> iii. Direct Respondents Nos.2 to 5 to execute the contract of 600 cotton bales with each petitioner according to the initial policy of Respondent No.1; or
>
> iv. As an alternate, direct respondents Nos.2 to 5 to cancel the contracts already awarded and divide the total number of contracted bales into all the applicants of Multan region equally, so that every applicant may get equal share; and
>
> v. Refrain respondents Nos.2 to 5 from lifting the cotton lint bales which they have already contracted with selected applicants till the disposal of the instant petition; and
>
> vi. Direct respondent No.2 and 5 to present relevant directives of Respondent No.1 through which they started procuring cotton lint bales and then imposed a sudden ban for remaining applicants; and
>
> vii. Grants costs of this petition to the petitioner; and
>
> viii. Grant such other and further relief to which the petitioners are found entitled in the circumstances of the case."

2. Learned counsel for the petitioners contends, that the petitioners timely filed the applications but without any cause and reason, the petitioners have not been given the contract, whereas on the other hand, the respondent has executed a contract with another ginning factory, therefore, discriminatory treatment is being meted out to the petitioners and the petitioners, in any case, are entitled for the relief prayed through this petition.

3. Conversely, the learned Legal Advisor of respondent department contends that, although the petitioner filed application on 14.11.2014, the officers of the respondent corporation visited the premises on 15.11.2014, but because of the ban imposed by the Federal Government through a letter dated 18.11.2014, it is not possible for the respondent department to execute the contract with the petitioners. Further contends, that the writ is not maintainable, as factual disputes and contractual obligation cannot be agitated in the Constitutional petition. Reliance is placed on Messrs SF Engineering Services through Proprietor v. Federation of Pakistan through Secretary, Water and Power, Islamabad and 4 others (PLD 2014 Sindh 378) and Haqbahoo Corporation v. P.I.A. and others (PLD 2003 Karachi 369).

4. Heard, record perused.

5. It is not denied by the respondent corporation that the petitioners filed applications in response of the advertisement issued by the respondent corporation to execute the contract/agreement to sell the cotton lint bales, the official of the respondent corporation visited the premises of the petitioner on the same day or on 15.11.2014, and by this way, the respondent corporation initiated the process to grant the contract, as it is the mandatory requirement as argued by learned counsel for the parties to inspect the premises but thereafter, the respondent corporation refused to execute the contract to sell the cotton lint bales on the ground, that the Federal, Government conveyed instruction telephonically to the General Manager (Cotton) on 18.11.2014, not to sign further contract for purchase of lint cotton, as the government has decided not to purchase further cotton. In this case, the petitioner filed an application well before the instructions conveyed by the federal government i.e. on 18.11.2014, whereby the TCP was restrained to sign any further contract but on the other hand, it cannot be ignored or overlooked that the petitioner filed the application on 14.11.2014, the respondent put the machinery in motion by visiting the premises of the petitioner, to sign the contract, but thereafter, on a lame excuse, and apparently with mala fide intention and ulterior motive, refused to sign the contract, although the respondent corporation had a sufficient time between 14.11.2014 and 18.11.2014. Further, it is observed here, that the instruction whereby the TCP has restrained to sign further contract has prospective effect and the petitioner, in any case, cannot be thrown out on this ground.

6. Letter dated 25.11.2014 issued by the TCP is reproduced as under:--

"No.TCP/cot/67-13/2014-15

November 25, 2014.

The Incharge,

Trading Corporation of Pakistan,

Cotton Procurement Centre,

Plot No.26-30,

Industrial Estate,

MULTAN

Reference Management's instructions conveyed to you by G.M. (Cotton) on 18.11.2014 (evening) on phone not to sign further contracts for purchase of lint cotton for TCP.

2. The government has decided not to purchase further cotton. You are therefore advised not to sign any contract beyond 69,000/- Bales for which you have already contracted.

3. You are also advised to complete the process of sampling of the offered contracted lots for evaluation etc. The lots which are in accordance with the contract specification should be dispatched to Pipri Godown, Karachi without any delay. The bills for adhoc-payment of cotton should also, be processed immediately on completion of documents."

7. The contents of the aforesaid letter, particularly paragraph No.3, shows the intention of the authority who issued this letter. In paragraph No.3, it has specifically been advised to the TCP, to complete the process of sampling of the offered contracts and in this case, the petitioners have offered well within time and particularly before the time of alleged ban, made an offer for contract, therefore, the respondent corporation, even under this letter, is bound to complete the process of sampling etc. to sign the contract in favour of the petitioners.

8. It has also been pointed out by learned counsel for the petitioners during the course of arguments, that the respondent corporation has signed a contract with one Farhan Cotton Ginning Factor and Oil Mills Muzaffargarh bearing contract No.TCP/Cont.Pur/ M/C/2014-15/98 dated 15.11.2014 for the purchase of 600 cotton lint bales. It is deplorable, that the government functionaries i.e. officers of the respondent corporation, ignoring the national interests, granting the contract to the person of their own choice or liking, the respondent corporation has failed to point out any disqualification of the petitioner.

9. The learned Legal Advisor of the respondent corporation has also informed, that the TCP has received 186 applications and awarded contract to 115 applicants but has not given the detail of the applicants or the applications and even otherwise, this is no ground to refuse to sign the contract with the petitioner who approached the respondent corporation well within time and fulfilled all the requirements and conditions of the respondent.

10. An application under Order I Rule 10, C.P.C. has also been filed by one Malik Brothers Cotton Ginning Process and Oil Mills Limited, simply on the ground, that because of the interim relief granted by this court, the respondent corporation is not allowing the applicant, to whom the contract has been given, to proceed further.

11. On the last date of hearing, it was made clear that that injunctive order has been granted in favour of the petitioners only to the extent of 1200 cotton lint bales, therefore, this application is not maintainable, as the order passed by this court is clear and explicit in terms.

12. In view of above, this is allowed, it is held that the petitioners are entitled for the relief prayed by them and the respondent corporation is directed to execute the contract of 600 cotton lint bales with each petitioner according to the policy of the respondent No.1 with no order as to cost.

SL/M-144/L Petition allowed.

2017 M L D 689
[Lahore]
Before Ali Akbar Qureshi, J
Mst. SARDARAN BIBI and others---Petitioner
Versus
Mst. ALLAH RAKHI through L.Rs. and others---Respondents

C.R. No.2512 of 2016, heard on 19th May, 2016.

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

----Ss. 42 & 54---Oral Gift---Suit for declaration and permanent injunction on basis of oral gift---Claim of inheritance---Plaintiffs filed suit on the ground that suit property was owned by the father (deceased) of the parties to the case---On chehlum of deceased, defendants-real sisters of plaintiff orally gifted the suit property in favour of plaintiff---When plaintiff intended to transfer property to his son defendants refused to honour their commitment---Suit of plaintiff was dismissed by the Trial Court as well as lower appellate court---Validity---Plaintiff had failed to fulfill the mandatory requirements of an "oral gift" as no specific date, time and place was mentioned in the plaint---Witnesses could not substantiate claim of plaintiff even plaintiff himself failed to prove his case---Defendants flatly and categorically denied the factum of making oral gift in favor of plaintiff---Women who were weaker segment of society were not to be deprived of their right of inheritance in the name of custom or by emotionally exploiting them---Revision was dismissed accordingly.

Muhammad Nawaz through LRs v. Haji Muhammad Baran Khan through L.Rs. and others 2013 SCMR 1300; Rana Surbland Khan v. B.K. Enterprises through Director PLD 2015 Lah. 681 and Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 rel.

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

----S. 115---Revisional jurisdiction of High Court---Concurrent findings of lower courts---Principle---High Court in case of concurrent findings declined to interfere unless impugned findings were result of exercise of jurisdiction not vested in lower courts.

Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984; Malik

Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 and Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452 rel.

Zafar Iqbal Chohan for Petitioner.
Date of hearing: 19th May, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---This revision petition is directed against the judgment and decree dated 31.03.2016 and 29.09.2012, whereby the learned Courts below dismissed the suit for declaration, filed by the petitioners on the ground, that the respondents, who are real sisters of the predecessor of the petitioners, namely Natha, made an oral gift of the legacy left by their father namely Fazal Deen.

2. The controversy involves in this case relates to the common story, where the brothers deprived their sisters generally on the basis of gifts/oral gifts from their right of inheritance secured and guaranteed by the Allah Almighty. The record reveals, that the predecessor-in-interest of the petitioners namely Natha filed a suit for declaration and perpetual injunction on the ground, that the suit property was owned by the father of the parties to the case, deceased Fazal Deen; on the Chehlum of deceased Fazal Deen the respondents, who are real sisters of the petitioners orally gifted the suit property in their favour in lieu of the services rendered by the petitioner/Natha to his father; the possession which was already with the petitioners was handed over; the inheritance mutation was entered wherein the names of the respondents (real sisters) of the petitioner were also entered the petitioner/Natha when intended to transfer a part of the suit property in favour of his son, the respondents, who were co-owners in the suit property refused to honour their commitment and denied to transfer the title in favour of his son; and lastly prayed, that as the suit property had already been transferred by way of the oral gift by the respondents, therefore, the suit be decreed.

3. The respondents/defendants exclaimed while filing the written statement, that the they are owners of the suit land to the extent of their shares and no oral gift was made in favour of the petitioners.

4. The learned trial Court after completing all the legal as well as, codal formalities dismissed the suit vide judgment and decree dated 29.09.2012, against which an appeal was filed, which too was dismissed on 31.03.2016. Hence, this revision petition.

5. Heard. Record perused.

6. It is not denied, as evinced from the record, that parties to the case are legal heirs of deceased Fazal Deen, who left the suit land as his legacy; the inheritance mutation was entered wherein the names of respondents (daughters of the Fazal Deen) are mentioned as owners of the property. The claim of the petitioner/Natha based upon an oral gift, which allegedly was made at the time of Chehlum of predecessor of the parties.

7. It is well established proposition of law, that the oral gift is to be proved independently, giving time, date, place and names of the witnesses in whose presence the oral gift was made. Whereas in this case, as appears from the record, the petitioners have

failed to fulfill the mandatory requirements of an oral gift, as no specific date, time and place are mentioned in the plaint and names of the witnesses. The witnesses appeared on behalf of the petitioners as concurrently recorded by the learned Courts, below, could not substantiate the claim of the petitioners and even the petitioner/Natha himself failed to prove his case, in view of the law laid down by the Hon'ble Supreme Court of Pakistan in the judgment titled "Muhammad Nawaz through LRs v. Haji Muhammad Baran Khan through L.Rs. and others" (2013 SCMR 1300). The relevant paragraph of the judgment is re-produced as under:--

> "In this view of the matter we are of the view that although the oral agreement is permissible under the law, yet, it must be proved through a credible and unimpeachable character of evidence and both the aforesaid qualities are not available in the evidence adduced by the appellant/plaintiff in the instant case. Learned counsel for the respondents has rightly relied upon the case of Mst. Sardar Bibi (Supra) in which the learned High Court has held that "In a case of this kind when both parties stand to gain or lose valuable property the oral evidence is always to be approached with caution and it is safer to rely on that evidence which is on accord with admitted circumstances and probabilities." We also hold that although it is not the requirement of law that an agreement or contact of sale of immovable property should only be in writing, however, in a case where party comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the party to prove that there was consensus ad idem between both the parties for a concluded oral agreement. An oral agreement by which the parties intended to be bound is valid and enforceable, however, it requires for it prove clearest and most satisfactory evidence."

I am also fortified by the judgment of this Court cited as "Rana Surbland Khan v. B.K. Enterprises through Director" (PLD 2015 Lahore 681).

8. It is common practice of the sub-continent as observed by the Hon'ble Supreme Court of Pakistan in plethora of judgments that the sisters/daughters are deprived from their secured and guaranteed right of inheritance by using these types of the devices. Admittedly, the inheritance mutation was entered in the name of the respondents and they (sisters of the petitioner/Natha) have flatly and categorically denied the factum of the making oral gift in favour of the petitioner. This practice has already been deprecated by the Hon'ble Supreme Court of Pakistan in the landmark judgment cited as "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 Supreme Court 1), wherein the Hon'ble Supreme Court of Pakistan has observed, that the women, who are weaker segment of the society, should not be deprived from their right of inheritance in the name of customs or by emotionally exploiting them. The relevant portion of the judgment is reproduced as under:--

> "As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case)

is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.

In the rural areas where 80% of the female population resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/ seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an ubranised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'rights', up to the enforcement even in homes, through 'Social Security' Laws, with web of network of 'Inspectorates' etc. who are supposed to be helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin-sometimes by the urbanized brother himself, is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

9. The petitioner/Natha had also taken another ground in support of his case, that all the expenses of marriages of the respondents were borne by him and in response thereof, the oral gift was made in his favour. It is sorry state of affairs, that the petitioner/Natha is taking the plea, which on the face of it is shameful. The brothers always played their role actively at the time of marriage of their sisters and even otherwise if admitted for a moment, the respondents (sisters) could not deprive from their right of inheritance, on this baseless ground.

10. Both the learned courts below carefully examined and appreciated the record and correctly reached to the conclusion that the petitioners have miserably failed to prove their case in any manner whatsoever.

11. Although learned counsel for the petitioners argued the case at length but could not point out any illegality, irregularity or any jurisdictional defect in the judgment and decree passed by the learned Courts below. It has been ruled by the Hon'ble Supreme Court of

Pakistan, that the concurrent findings on facts should not be interfered in routine, but in an extra ordinary circumstance, when the learned courts below have committed serious jurisdictional error or legal infirmity.

I find support from the valuable judgments of the Hon'ble Supreme Court of Pakistan, titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another (2008 SCMR 428), and "Abdul Ghafoor and others v. Kallu and others" (2008 SCMR 452), that the High Court, in the case of concurrent findings, normally does not interfere unless the same is result of exercise of jurisdiction not vested in the learned courts below.

The Hon'ble Supreme Court of Pakistan, in its recent judgment (supra) titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others" (2014 SCMR 161) observed as under:--

> "In other words, the provisions of section 115, C.P.C. under which a High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities. The revisional jurisdiction of the High Court cannot be invoked against conclusions of law or fact, which do not, in any way, affect the jurisdiction of the Court. In the instant case, the learned High Court, in law, could not have investigated into the facts or exercised its jurisdiction on the basis of facts or grounds, which were already proved by the parties by leading evidence. We are of the considered view that the judgment impugned in these proceedings is unexceptionable. The learned High Court was justified in not interfering in the concurrent findings of fact which were based on the material brought on record and proper appreciation of evidence."

12. In view of the above, I see no reason to interfere with the concurrent findings rendered by the learned courts below. Resultantly, this revision petition having no force stands dismissed. No order as to cost.

WA/S-63/L Petition dismissed.

2017 M L D 845
[Lahore]
Before Ali Akbar Qureshi, J
MUKHTAR AHMAD---Petitioner
Versus
MUHAMMAD AMEEN (deceased) through Legal Heirs and 8 others---Respondents

Civil Revision No.3917 of 2016, decided on 10th October, 2016.

Gift---

----Gift through attorney---Scope---Contention of plaintiff was that impugned gift deed was result of fraud and misrepresentation---Suit was decreed concurrently---Validity---Love and affection in case of making a gift could not be conveyed or expressed through any other person including the attorney---Sentiments of love and affection must be established on satisfactory and unimpeachable evidence---Impugned gift deed was silent with regard to consent or permission of original owner---Ownership or title of a property could not be transferred or conveyed by way of general power of attorney in favour of attorney---Attorney by playing fraud and misrepresentation made a gift of suit land in favour of her son which was against law---Donee had failed to prove the genuineness of gift deed made in his favour through any law or evidence---No legal infirmity or jurisdictional defect had been committed by the courts below---Revision was dismissed in limine.

Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others 1994 SCMR 818; Haji Faqir Muhammad and others v. Pir Muhammad and others 1997 SCMR 1811; Muhammad Jalil and 4 others v. Muhammad Sami and 8 others PLD 2006 Lah. 619; Haji Faqi Muhammad and others v. Pir Muhammad and others 1997 SCMR 1811; Noor Muhammad v. Abdul Ghani 2002 CLC 88; Muhammad Arif v. Malik Muhammad Farooq and 4 others 2002 CLC 1361; Maqsood Ahmad and others v. Salman Ali PLD 2003 SC 31; Jamil Akhtar and others v. Las Baba and others PLD 2003 SC 494; Mst. Bandi v. Province of Punjab and others 2005 SCMR 1368; Muhammad Boota through L.Rs. v. Mst. Bano Begum and others 2005 SCMR 1885; Mst. Parsan Bibi and another v. Mst. Razia Bibi and 10 others 2006 CLC 1893; Muhammad Jalil and 4 others v. Muhammad Sami and 8 others PLD 2006 Lah. 619; Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others 2007 SCMR 1884;Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

Ms. Iram Iqbal Khan for Petitioner.

ORDER

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 13.05.2016 and 14.09.2015, passed by the learned Courts below in the suit for declaration filed by the respondents.

2. The controversies of the instant case, which require resolution, are as under:--

i. Whether the property could be alienated by way of a gift through an attorney?

ii. Whether, in the lifetime of the owner of the property, a gift could be made without his consent or permission?

3. The necessary facts for the adjudication of this revision petition are, that a suit for declaration was instituted by one Muhammad Amin, predecessor-in-interest of the parties to the case and owner of land, challenging the validity of a general power of attorney dated 21.05.2001, registered on 29.05.2001 and in result thereof, a gift deed made on the basis of general power of attorney, on the ground of fraud and misrepresentation. It was contended in the suit, by Muhammad Amin (now deceased), owner of the suit land, that he never made any general power of attorney nor any permission was granted to his daughter, namely, Mst. Zainab Khattoon for the transfer of the land by way of gift in favour of her son Mukthar Ahmad.

4. The suit was contested by the petitioner/defendant through written statement wherein the claim of the respondent No. 1/plaintiff was refuted on legal as well as on factual grounds. The learned Trial Court, after completing all the legal and codal formalities, decreed the suit. Against which an appeal was filed by the petitioner which was dismissed, hence, this revision petition.

5. Learned counsel for the petitioner contends, that the general power of attorney was validly executed by deceased Muhammad Amin in favour of his real daughter, namely, Zainab Khatoon, predecessor of the petitioner, who subsequently transferred the suit land by way of gift in favour of her son, therefore, no illegality was committed and both the learned Courts below have failed to advert to this aspect of the case.

6. Heard. Record perused.

7. In response of the arguments advanced by learned counsel for the petitioner, a specific question was put, as to whether a gift can be made by an attorney or the love and affection in the case of making the gift can be conveyed or expressed by any other person including the attorney. The learned counsel could not offer any satisfactory reply nor any law but reiterated her earlier arguments. On this proposition, the Hon'ble Supreme Court of Pakistan has already ruled, that the love and affection, in case of making a gift cannot be conveyed or expressed through any other person including the attorney. The sentiments of love and affection must be established on satisfactory and unimpeachable evidence. I am fortified by the judgment delivered by the Hon'ble Supreme Court of Pakistan cited as Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others (1994 SCMR 818). The relevant part of the judgment is reproduced as under:--

> "It is to be kept in view that a gift in the present case was allegedly leased on consideration of love and affection of Said Nawab for his daughter Mst. Gulzar Begum. Love and affection cannot be expressed by any attorney on behalf of the donor. The sentiments which were the consideration for gift in the present suit must be established to have come from the donor. Gifts are voluntarily and gratuitous in the present suit transfer from the donor to the donees. The essential of these

transactions are, the capacity of donor, intention of donor to make gift, complete delivery of the gifted property to the donee and acceptance of gift by donee. In order to establish a valid gift of the property by the donor in favour of the donee where gift is made through a person authorized by the donor, the intention of donor to make the gift must be established in clear terms. In such a case the authority given by the donor in favour of another person to make a gift of his property besides containing the power to make the gift must also clearly specify the property and the donee in the case. In the case before us gift made by Said Ghawas in favour of his wife Mst. Gulzar Begum on the basis of the power of attorney executed in his favour by Said Nawab cannot be upheld for two reasons Firstly, the power of attorney executed in favour of respondent No.2 by the deceased Said Nawab did not contain any specific provision authorizing him to make a gift of his properties and secondly, even if we assume that such power was given, there is no indication in the said document that the donor intended to make gift of all his properties in favour of the wife of respondent No.2 (the donor)."

8. In another judgment cited as Haji Faqir Muhammad and others v. Pir Muhammad and others (1997 SCMR 1811) the Hon'ble Supreme Court of Pakistan, while interpreting the general power of attorney has observed as under:--

"7 The sentiments which were the consideration for gift in the present suit must be established to have come from the donor. Gifts are voluntarily and gratuitous in the present suit transfer from the donor to the donees. The essential of these transactions are, the capacity of donor, intention of donor to make gift, complete delivery of the gifted property to the donee and acceptance of gift by donee. In order to establish a valid gift of the property by the donor in favour of the donee where gift, is made through a person authorized by the donor, the intention of donor to make the gift must be established in clear terms. In such a case the authority given by the donor in favour of another person to make a gift of his property besides containing the power to make the gift must also clearly specify the property and the donee in the case."

9. In a judgment cited as Muhammad Jalil and 4 others v. Muhammad Sami and 8 others (PLD 2006 Lahore 619), this Court has 'observed as under:--

"10. We have heard the learned counsel for the parties. As far as the question about the delegation of power by a Muhammadan to an agent is concerned, there can be no cavil that a Muhammadan, in the matters of gifts, divorce etc. can confer the authority to an agent, but in our view where it is the personal act of the principal, which is dependent upon his own mental decision, such an authority cannot be delegated. In the category of such personal acts, obviously the decision to whom the gift should be made, cannot be left for the choice and whim of the agent, rather this is the sole prerogative of the donor, which cannot be delegated or deputized, however, when the decision is taken, a declaration is made by the donor, only thereafter an agent for the accomplishment of the object can be appointed. A Muhammadan cannot confer upon his agent a random or roving authority to make the gift of his property to any person of the attorney's choice and according to the agent's wish and the considerations. This is because a gift is a voluntarily transfer of

the property to another made gratuitously and without consideration; it is a transaction not in the nature of quid pro quo, but is free of the above, therefore, why and to whom the gift should be made is based upon the very personal and self-considerations of the donor, structured upon his personal state of mind and the decision and therefore, under no rules of general law of agency, such personal decision can be delegated to an agent. We are quite clear in our view, that the donor has to make the gift himself, whereafter he can confer the authority upon his agent to take necessary steps for the proper implementation/execution of the transaction."

10. Reliance is also placed on Haji Faqir Muhammad and others v. Pir Muhammad and others (1997 SCMR 1811), Noor Muhammad v. Abdul Ghani (2002 CLC 88), Muhammad Arif v. Malik Muhammad Farooq and 4 others (2002 CLC 1361), Maqsood Ahmad and others v. Salman Ali (PLD 2003 SC 31), Jamil Akhtar and others v. Las Baba and others (PLD 2003 SC 494), Mst. Bandi v. Province of Punjab and others (2005 SCMR 1368), Muhammad Boota through L.Rs. v. Mst. Bano Begum and others (2005 SCMR 1885), Mst. Parsan Bibi and another v. Mst. Razia Bibi and 10 others (2006 CLC 1893), Muhammad Jalil and 4 others v. Muhammad Sami and 8 others (PLD 2006 Lahore 619) and Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others (2007 SCMR 1884).

11. To further appreciate the record of the instant case, the contents of the gift deed (Exh.D.W.1) were perused with the assistance of the learned counsel for the petitioner, wherein the attorney (mother of the petitioner)/respondent No.5 claimed herself the owner of the suit property on the basis of general power of attorney dated 29.05.2001 and transferred the same in favour of her son (the petitioner). The gift deed (Exh.D.W.1) is completely silent about the consent or permission of the original owner i.e. Muhammad Amin deceased, therefore, this is sufficient to refute the contention of the learned counsel for the petitioner, that the permission to make the gift was granted to the attorney (respondent No.5).

12. As regard the claim of the respondent No.5, that she transferred the suit land by way of gift in favour of her son being owner of the property, the general power of attorney was examined and found, that nowhere it is mentioned in the power of attorney, that the respondent No.5 (mother of the petitioner) has become the owner of the suit property and even otherwise, ownership or title of a property cannot be transferred or conveyed by way of general power of attorney in favour of attorney, therefore, respondent No.5, by playing fraud and misrepresentation, made a gift of the suit land in favour of her son which is against the law and the verdict given by the Hon'ble Supreme Court of Pakistan in plethora of judgments.

13. There is another most important aspect of the case, that suit for the cancellation of power of attorney and gift deed was filed by the real father of the mother of the petitioner (respondent No.5), who allegedly made gift in favour of respondent No.5. This aspect of the case has in fact completely demolished the case of the petitioner.

14. The nutshell of the aforesaid discussion is that the petitioner has completely failed to prove the genuineness of the gift deed made in his favour through any law or evidence, therefore, both the learned Courts below have not committed any jurisdictional defect or legal infirmity. Even otherwise, the concurrent findings, as observed by the Hon'ble Supreme Court of Pakistan, should not be disturbed in routine but in extraordinary

circumstances. Reliance is placed on Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

15. Resultantly, this civil revision, having no merits, is dismissed in limine with no order as to costs.

ZC/M-216/L Revision dismissed.

2017 M L D 1228
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD ASHIQ---Petitioner
Versus
RANI BIBI and 3 others---Respondents

W.P. No.8482 of 2016, decided on 17th March, 2016.

Islamic Law---

----Legitimacy of child---Dispute with regard to legitimacy of minor---Recovery of maintenance allowance---Scope---Wife remained with the husband to perform her marital obligations---Child was born after the period of two months and thirty days of the divorce by the husband---Child would follow the bed (principle of farash) if born during the subsistence of marriage---Legitimacy of child could not be questioned in circumstances---Family Court had rightly held that presumption of legitimacy was attached to the minor---Husband had himself declined to offer for D.N.A. test which had created doubt qua his claim---Minor had attained the age of majority---Minor was born within the wedlock of the spouses and was entitled for maintenance allowance for the period of 18 years---Family Court had fixed the rate of maintenance allowance Rs. 2,000/- per month which was insufficient and inadequate for a young boy having age of more than 18 years---Maintenance allowance was enhanced to Rs. 4,000/- with 10% annual increase---Constitutional petition was dismissed in limine in circumstances.

Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir PLD 2015 SC 327 rel.
Asif Siddique Chaudhary for Petitioner.

ORDER

ALI AKBAR QURESHI, J.---This Constitutional petition assails the judgment and decree dated 16.02.2016 and 12.12.2015, passed by the learned courts below, in a suit for recovery of maintenance allowance filed by the respondents.

2. As per record, the respondent No.2, who has attained the age of majority, filed a suit for recovery of maintenance through her real mother, respondent No.1, against the petitioner on the ground, that respondent No.1 married with the petitioner on 19.01.1990; the marriage was consummated; during subsistence of marriage, relations between the spouses became

strained and finally the petitioner divorced the respondent No.1 on 16.09.1991; the respondent No.2 was born after 02 months and 30 days of the divorce of the parties. The matter remained pending for years and decided on 23.09.1997, whereby the suit of the respondents for recovery of maintenance was dismissed. In appeal, the judgment and decree dated 23.09.1997 was set aside by the learned appellate court on 17.02.2000 and the case was remanded to the learned Judge Family Court to decide the case afresh after getting the report of D.N.A. test from the Forensic Science Laboratory. The petitioner instead of complying with the order passed by the learned appellate court for D.N.A test, challenged the same before this Court. The case filed by the petitioner was dismissed, against which the petitioner approached to the Hon'ble Supreme Court of Pakistan but remained failed and by this way, the judgment and decree dated 17.02.2000, whereby the case was remanded to the learned trial court and the petitioner was directed for D.N.A. test, remained intact. On the other hand, the respondent No.1 went to the Punjab Forensic Science Laboratory, provided her blood sample but the concerned authority of the Laboratory made a report, that for comprehensive report, the blood sample of the petitioner is required. For this purpose, the matter remained pending till 12.12.2015 and the petitioner always lingered on the matter on one pretext or the other, therefore, the learned Judge Family Court having no other option decreed the suit in the following manners:--

> "On the other hand plaintiffs had went to Punjab Forensic Science Laboratory, Lahore and the concerned Agency has obtained their samples in accordance with their rules, however, it require the blood samples of the defendant to prepare the comprehensive report, but the defendant did not appear before the Punjab Forensic Science Laboratory, Lahore on an occasion nor any valid reason was shown in this regard, hence opted not to rebut the original presumption attached with the minor/plaintiff No.22, it is inferred from the words and conduct of the defendant, that he has withheld the best evidence available to rebut the presumption of legitimacy of minor, hence advance information is drawn against the stance of defendant and it is, therefore, held that the plaintiff No.2 namely Shahid Ashiq was born within the wedlock of the spouses i.e. plaintiff No.1 and the defendant and it is, therefore, held that plaintiff No.2 was the real son of the defendant and therefore, defendant being the real father was under obligation to maintain his real son since his birth till attaining the age of his majority, but the defendant did not pay even a single penny to the plaintiff No.2 till date. Now the plaintiff No.2 has already attained the age of majority, but still is entitled to recover all the past maintenance allowance from his father/defendant since his birth till his attaining the age of majority i.e. for the period of 18-years equally 216 months and total maintenance allowance recoverable is deducted as Rs.4,32,000/-. In view of above circumstances, rate of maintenance allowance is fixed Rs.2,000/- per month which shall be paid by the defendant to the plaintiff No.2 at once. Suit of the plaintiffs is hereby decreed ex parte in favour of the plaintiff No. 2 and against the defendant with no order as to cost. Decree sheet be drawn and file be consigned to the record room after its due completion."

3. The petitioner, against the aforesaid judgment and decree, filed an appeal, which was dismissed being not competent by the learned appellate court on the ground, that the maintenance decree to the extent of Rs.2000/- in favour of the child, is not appealable.

4. Learned counsel for the petitioner when confronted the afore-referred facts of the case, the learned counsel had no answer but repeated his argument, that the petitioner be given one opportunity.

5. Heard. Record perused.

6. In this case, the legitimacy of the respondent No.2 is under challenge. Admittedly the respondent No.1 married to the petitioner, remained with him to perform her marital obligations and the respondent No.2 (minor) born after the period of 2 months and 30, days of the divorce pronounced by the petitioner.

7. According to the principle of Islamic Law, that child will follow the bed (principle of farash), if the child born during the subsistence of marriage, the legitimacy of the child cannot be questioned. In this case, the marriage took placed on 19.01.1990, respondent No.1 was divorced and respondent No.2 was born after 02 months and 30 days thereafter, therefore, the learned trial court has rightly held, that the presumption of legitimacy is attached to the minor.

Reliance is placed on the esteemed judgment passed by the Hon'ble Supreme Court of Pakistan cited as "Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir" (PLD 2015 SC 327), wherein it has been observed that:--

> "We first of all, take up for comment the provisions of Article 128 ibid. The Article is couched in language which is protective of societal cohisn and the values of the community. This appears to be the rationale for stipulating affirmatively that a child who is born within two years after the dissolution of the marriage between his parents (the mother remaining unmarried) shall constitute conclusive proof of his legitimacy. Otherwise, neither the classical Islamic jurists nor the framers of the Qanun-e-Shahadat Order could have been oblivious of the scientific fact that the normal period of gestation of the human foetus is around nine months. That they then extended the presumption of legitimacy to two years, in spite of this knowledge, directly points towards the legislative intent as well as the societal imperative of avoiding controversy in matters of paternity. It is in this context that at first glance, clause 1(a) of Article 128 appears to pose a difficulty. It may be noted that classical Islamic Law, which is the inspiration behind the Qanun-e-Shahadat Order (though not incorporated fully) and was referred to by learned counsel for the appellant also adheres to the same rationale and is driven by the same societal imperative. In this regard, it is also worth taking time to reflect on the belief in our tradition that on the Day of Judgment, the children of Adam will be called out by their mother's name. It shows that the Divine Being has, in His infinite wisdom and mercy, taken care to ensure that even on a day when all personal secrets shall be laid bare the secrets about paternity shall not delved into or diverged."

In this case, the petitioner, in a very casual and leisure manner, leveled a serious allegation upon respondent No.1, who is lady and remained in his house along with him as his wife, without considering it that how the lady will live in the society with this serious allegation. The petitioner has not even bothered to think for a while that the minor, who according to

the Islamic Principle of the Law, is the legitimate son of the petitioner, will have to live for all time to come with the allegation and title of illegitimacy.

8. There is another aspect of the case which goes against the petitioner, that the learned appellate court, while remanding the matter in the year 2000, provided a facility to the petitioner to ascertain the legitimacy of the child but the petitioner, one way or the other, refused to give his blood sample for D.N.A test. Presently, in this age, the D.N.A test is only criteria to ascertain the legitimacy of a child. The petitioner, as per the record, himself declined to offer himself for D.N.A test which creates serious doubts qua the claim of the petitioner. The learned Judge Family Court waited for a long time for this purpose and during this period, the minor attained the age of majority, therefore, the learned Judge Family Court rightly observed, that the respondent No.2 was born within the wedlock of the spouses i.e. the petitioner and respondent No.1 and is entitled to recover the maintenance allowance for the period of 18 years. The learned Judge Family Court, while decreeing the suit, fixed the rate of maintenance allowance Rs.2000/- per month, which, to my mind, is insufficient and inadequate for a young boy having the age of more than 18 years, therefore, the same is enhanced to Rs.4000/- with 10 % annual increase.

9. Resultantly, this petition, having no merits, is dismissed in limine with no order as to costs and the judgment and decree passed by the learned courts below is modified to the extent, that maintenance granted to respondent No.2 (minor) is enhanced from Rs.2,000/- to Rs.4,000/- per month with 10% annual increase.

ZC/M-99/L Petition dismissed.

2017 M L D 1331
[Lahore]
Before Ali Akbar Qureshi, J
ZAHIDA BIBI---Petitioner
Versus
MUHAMMAD MUNIR---Respondent

C.R. No.4902 of 2015, heard on 12th April, 2016.

Civil Procedure Code (V of 1908)---

----O. VII, R. 11---Oral sale---Proof of---Procedure---Transaction with illiterate woman---Requirements---Evasive reply---Effect---"Sale"---Scope---Contention of plaintiff was that she had inherited the suit property and impugned oral sale mutation in favour of her husband was product of fraud and misrepresentation---Defendant moved application for rejection of plaint which was accepted concurrently and plaint was rejected---Validity---Oral sale was to be proved independently irrespective of sale mutation entered in the revenue record by giving time, date, place and names of witnesses in whose presence sale was made---No date, time, place and names of witnesses of oral sale had been mentioned while filing written statement by the defendant---Defendant had failed to prove the transaction of oral sale---Plaintiff was an illiterate lady and law had protected such a lady---Defendant was bound to

prove that male family member of plaintiff was present at the time of executing the alleged oral sale mutation and she was identified by a responsible person of the village---No male member of plaintiff was present at the time of executing the alleged oral sale mutation---Even name of identifier had not been mentioned in the impugned mutation---Alleged oral sale mutation was sham transaction and was product of fraud and misrepresentation---Plaintiff had clearly narrated the ingredients of fraud in her plaint---Parawise reply of the plaint filed by the defendant was evasive which would amount to admission on his part---Defendant had played fraud with the plaintiff and after getting the suit land divorced her---Trial Court had accepted application for rejection of plaint on technicalities---Both the courts below should have independently scrutinized the oral sale mutation irrespective of other facts while accepting the application for rejection of plaint---Trial Court should have conducted an inquiry by framing issues and recording evidence---Sale of every kind was to be completed on payment of consideration to the vendor---Defendant was bound to prove the payment of consideration through convincing and independent evidence but same had not been proved---Both the courts below had committed illegality, irregularity, legal infirmity and jurisdictional defect while rendering the findings in the present case---Impugned orders were set aside and suit was decreed with cost of twenty five thousands which should be paid to the plaintiff---Revision was allowed in circumstances.

Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L. Rs. and others 2013 SCMR 1300; Rana Sarbland Khan v. B. K. Enterprises through Director PLD 2015 Lahore 681; Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi 2013 SCMR 868; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Nasir Abbas v. Manzoor Haider Shah PLD 1989 SC 568 and Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others 2014 SCMR 914 rel.

Rana Naeem Tahir Khan for Petitioner.
Mian Mumtaz Hussain for Respondent.
Date of hearing: 12th April, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is preferred against orders dated 15.12.2015 and 10.06.2015 by which both the learned courts below rejected the plaint of the suit, filed by the petitioner, under Order VII, Rule 11, C.P.C.

2. On 25.10.2012, the petitioner, Zahida Bibi, who is an illiterate lady, filed a suit for declaration with permanent injunction contending therein, that she inherited an agricultural piece of land measuring 12 Kanal 13 Marla; the husband of the petitioner, on the pretext to obtain a loan to fulfill his need, persuaded the petitioner to mortgage the suit land; the petitioner having no option being the wife of the respondent went to the revenue office; the respondent obtained the thumb marks of the petitioner fraudulently and subsequently transferred the land in his own name by playing fraud and misrepresentation; the oral sale mutation No.22 sanctioned on 22.12.1999 is product of fraud and misrepresentation, therefore, the same be cancelled and the suit property along with the possession be handed over to the petitioner; the fraud committed by the respondent came into the knowledge of the petitioner when the petitioner was living in the house of her brother namely, Safdar Ali,

whereupon the petitioner filed the suit for declaration; the respondent came to the house of her brother and took the petitioner along with him with the promise, that the sale mutation will be cancelled and he will transfer the land in the name of the petitioner; on the assurance of the respondent, the petitioner withdrew the earlier suit filed against the respondent on 21.12.2009, and thereafter on 03.09.2012, the respondent divorced the petitioner. Lastly prayed, that the petitioner is an illiterate and old lady and because of the sacred relation of husband and wife always depended on the respondent who played a havoc fraud with her, therefore, the suit be decreed.

3. The suit was contested by the respondent through written statement wherein the respondent stated, that earlier a suit for specific performance was filed by the brother of the petitioner namely Safdar Ali; the petitioner while filing the written statement admitted, that she has transferred the suit land in favour of the respondent and secondly, the earlier suit filed against the respondent was withdrawn by the petitioner, therefore, the petitioner is precluded to file the instant suit. On merits, the replies of the material paras of the plaint are evasive which shall be discussed later on.

4. The respondent also filed an application under Order VII, Rule 11, C.P.C., which was replied by the petitioner. The learned trial court firstly framed the issues out of the contentious pleadings of the parties on 22.06.2013 and subsequently framed following two additional issues on 19.03.2014 on application under Order VII, Rule 11, C.P.C.:--

> "1. Whether the present suit is barred to the principle of res judicata because the previous suit was dismissed as withdrawn? OPA
>
> 2. Whether the present court lacks jurisdiction to adjudicate present lis? OPA"

5. After recording evidence of the parties, the learned trial court accepted the application and rejected the plaint, against which an appeal was filed which too was dismissed, hence this civil revision.

6. The following controversies have arisen out of the instant case, which require adjudication:--

> i) Whether the respondent has proved the oral sale in question through independent evidence irrespective of the execution of the oral sale mutation;
>
> ii) Whether the respondent discharged his onus through any independent evidence when the petitioner pleaded that she is illiterate, simple, house wife and old lady;
>
> iii) Whether at the time of entering and sanctioning the oral sale mutation, any male member of the family of the petitioner accompanied her, who was the identifier and who was the attesting witness of the mutation;
>
> iv) What is the effect of the evasive denial made by the respondent in the written statement filed by him before the learned trial court;

v) Whether the learned courts below were not under legal obligation to peruse and examine the record, particularly the sale mutation alleged to have been executed by the petitioner and its validity.

7. As regard the first point, admittedly the respondent has claimed that the suit land was transferred in his name by the petitioner through oral sale and on the basis of the oral sale, the oral mutation was entered. It is settled proposition of law, that the oral sale is to be proved independently irrespective of the sale mutation entered in the revenue record by giving the time, date and place and the names of the witnesses, in whose presence the oral sale was made. After careful perusal of the record it is found, that the respondent has failed to prove the transaction of oral sale in any manner whatsoever and even the time, date and place and the names of the witnesses have not been mentioned by the respondent while filing the written statement. It was otherwise necessary and the onus was upon the respondent to prove the oral sale, particularly in the circumstances when the petitioner specifically claimed and mentioned in the plaint, that she is illiterate and aged lady. Reliance is placed on Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L. Rs. and others (2013 SCMR 1300) and Rana Sarbland Khan v. B. K. Enterprises through Director (PLD 2015 Lahore 681).

8. This is the most important aspect of the case and the law has given full protection to the illiterate lady. The respondent while filing the written statement has not denied this fact, therefore, the respondent was legally bound to prove, that the male family member of the petitioner was present at the time of executing the alleged oral sale mutation and the petitioner was identified by a responsible person of the village. The record is completely silent on this point and further the respondent while filing the written statement and appearing in the witness box has miserably failed to prove this important aspect of the case. The oral sale mutation, when perused with the assistance of learned counsel for the parties, it is found, that no male member of the petitioner's family was present, the name of the identifier is not mentioned, the identity card number of the petitioner is not mentioned in the mutation and even the names of the attesting witnesses are not visible, therefore, it can conveniently be held, that the alleged oral sale mutation is a sham transaction and is product of fraud and misrepresentation.

9. The petitioner, as evident from the contents of the plaint, clearly narrated the ingredients of fraud and also claimed, that she is illiterate lady. The para wise reply of the plaint, filed by the respondent is evasive, which amounts to admission on the part of the respondent. For facilitation, the relevant paragraphs of the plaint and their reply by the respondent in the written statement are reproduced as under:--

10. The aforesaid replies made by the respondent while filing the written statement are sufficient to understand, that the respondent had no answer and played a havoc fraud with the petitioner lady and after getting the suit land which was the only asset of the petitioner, divorced her.

11. The learned trial court, being the court of first instance, should have taken into consideration all these aspects of the case while accepting the application under Order VII, Rule 11, C.P.C. on technicalities. The learned first Court of appeal in a very casual manner dismissed the appeal filed by the petitioner without examining the record. Both the learned courts below have ignored while rejecting the plaint, that the transaction is oral and the respondent cleverly managed to get the land transferred from the petitioner, who was his wife. Even otherwise, both the learned courts below should have independently scrutinized the oral sale mutation irrespective of the other facts, while accepting the application under Order VII, Rule 11, C.P.C. It would be pertinent to mention here, that the learned trial court conducted a detailed inquiry by framing the issues and recording the evidence of the parties while accepting the application under Order VII, Rule 11, C.P.C. but has failed to take cognizance of the validity of the oral sale mutation.

12. There is another sad aspect of the case that firstly the real brother of the petitioner namely Safdar Ali filed a suit for specific performance and at that time the marriage of the parties to this case was intact and the respondent managed to file written statement on behalf of the petitioner wherein the petitioner stated that she has transferred the suit land in the name of respondent. It appears from whole of the record, that the petitioner who is admittedly an illiterate lady, was totally unaware about the contents of the written statement submitted in the case of specific performance filed by the real brother of the petitioner. On another occasion, when the petitioner was living in the house of her brother, the respondent, being the husband of the petitioner, came to her, took her with him giving an undertaking, that the oral sale mutation in question will be cancelled and the suit land will be restored in the name of the petitioner, the petitioner accompanied the respondent being her husband. After some days, the respondent cleverly managed and succeeded to withdraw the suit filed by the petitioner challenging the sale mutation in question and thereafter the respondent divorced the petitioner.

13. As regard the illiterate lady, I am fortified by the judgment of Hon'ble Supreme Court of Pakistan cited as Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi (2013 SCMR 868), wherein it has been observed as under:--

> "6. ....The contention that the general power of attorney was given by the respondent/ plaintiff not to a stranger but to her own son-in-law and that she was not a "Pardanasheen Lady" for which the courts of law have provided protection is not tenable in the facts and circumstances of the instant case, first, because it is in evidence that the relations between the two were too strained on account of the discord between him and her daughter and in the normal course of events she could not have reposed that kind of trust; second, the protection provided to them in law is on account of the fact that they invariably are helpless, weak and vulnerable. The said consideration would equally be attracted to an illiterate lady particularly when she was placed in circumstances which made her vulnerable to deceit misrepresentation."

14. It has been seen in many cases, that the women who are weaker segment of the society, are being deprived from their right of inheritance secured and guaranteed by Allah Almighty from their brothers, but in this case firstly the real brother of the petitioner tried to deprive the petitioner from the suit land by filing a suit for specific performance on the basis of an agreement but unfortunately the respondent who was husband of the petitioner succeeded to deprive the petitioner from her legal right on the basis of an illegal and unlawful document i.e. oral sale mutation. Reliance is placed on Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1).

15. Needless to mention, that it is well established legal proposition, that the sale of every kind is to be completed on the payment of the consideration to the vendor. In this case, the respondent claimed, that the suit property was transferred in his name in pursuance of an oral sale. In these circumstances, heavy duty lies upon the respondent to prove the payment of consideration through convincing and independent evidence. Since allegedly it is an oral sale and the respondent was bound to prove the payment of consideration through evidence but the respondent, through oral evidence, miserably failed to prove the payment of consideration to the petitioner and even during the cross-examination upon the petitioner, not a single question was put in this regard. Thus, the alleged oral sale claimed by the respondent is otherwise unproved and no sale in the eye of law.

16. Although normally this Court does not interfere with the concurrent findings on facts and law but the Hon'ble Supreme Court of Pakistan has observed in the judgments cited as Nasir Abbas v. Manzoor Haider Shah (PLD 1989 Supreme Court 568) and Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others (2014 SCMR 914), where the learned courts below have committed illegality, irregularity, legal infirmity and jurisdictional defect while rendering the findings, this Court can interfere while exercising the revisional jurisdiction conferred by section 115, C.P.C.

17. Resultantly, this revision petition is allowed, the orders dated 15.12.2015 and 10.06.2015 are set aside and the suit filed by the petitioner is decreed with cost of Rs.25,000/- (Rupees fifty thousand only) which shall be paid to the petitioner.

ZC/Z-20/L Revision allowed.

2017 M L D 1567
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD SIDDIQUE and and others---Petitioners
Versus
Mst. KANIZ FATIMA through L.Rs.---Respondents

C.R. No.4933 of 2016, heard on 29th December, 2016.

Specific Relief Act (I of 1877)---

----S. 42---Suit for declaration---Limitation---Inheritance---Custom (Riwaj)---Scope---Bona fide purchaser---Proof---Plaintiff filed suit for her share out of the legacy left by her father---Contention of defendants (brothers) was that no custom existed to give anything from the inheritance to the daughters at the time of death of their father---Suit was dismissed by the Trial Court but Appellate Court decreed the same---Validity---Plaintiff was daughter of deceased and sister of defendants---Name of plaintiff (daughter) being legal heir should have been mentioned in the revenue record---Excluding the name of plaintiff in the inheritance mutation was illegal and unlawful---Plaintiff had been deprived from her right of inheritance secured and guaranteed by Islam---Heir of any deceased would become owner to the extent of his/her share by operation of law the moment predecessor died---No limitation would run against claim of inheritance---Suit filed by the plaintiff was within time---Women who were weaker segment of the society should not be deprived from their right of inheritance in the name of custom---If anyone had deprived the sisters from the right of inheritance, he would have to prove through unimpeachable evidence the reason/ground on the basis of which sisters had been deprived from inheritance---Stance of defendants to deprive the plaintiff from the right of inheritance was vague and ambiguous---Defendants had failed to bring anything on record in support of their stance---Subsequent purchasers of suit land could not bring on record that before purchasing the land precautionary measures were taken and they purchased the property in good faith---Alleged subsequent purchasers remained unsuccessful to prove their stance of bona fide purchaser---Sale transactions/alienations or mutations made by the defendants of suit land in favour of subsequent purchasers were sham and were declared illegal, unlawful having no legal effect qua the right of plaintiff---Revision was dismissed with cost of Rs. 25,000/- in circumstances.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Mahmood Shah v. Syed Khalid Hussain Shah and others 2015 SCMR 869; Mst. Noor-un-Nisa and another v. Ghulam Sarwar and 6 others 1994 SCMR 2087; Muhammad Iqbal through L.Rs. v. Mehmood Hassan and others 2016 MLD 1243 and Muhammad Hafeez and another v. District Judge, Karachi East and another 2008 SCMR 398 rel.

Muhammad Zahid-ur-Rehman for Petitioner.
Date of hearing: 29th December, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---The petitioners being aggrieved of the judgment and decree dated 26.11.2016, passed by learned Additional District Judge, Sialkot, have filed this revision petition, whereby suit filed by respondent No.1 was decreed.

2. Necessary facts for the disposal of this revision petition are that respondent No.1/Mst. Kaniz Fatima filed a suit for Declaration alongwith Possession against the petitioners/ defendants (real brothers) on the ground, that the predecessor of the parties to the case namely Deewan died leaving behind the suit land measuring 4 kanal 8 marla and one daughter/Mst. Kaniz Fatima and three sons namely Muhammad Ghani, Muhammad Shafee and Muhammad Siddique to mourn his death; that respondent No.1 (Mst. Kaniz Fatima) when intended to sale her share out of the legacy left by her father, she approached to the patwari circle in the year 2006 and it came into her knowledge, that the petitioners/defendants have succeeded to enter the inheritance mutation in their names with the connivance of the revenue staff by excluding respondent No.1 from the list of legal heirs of deceased Deewan. Further contended, that in order to incorporate her name in the revenue record, she filed an application but the application of the respondent was dismissed on the behest of the petitioners. Thereafter, respondent No.1 filed a suit for Declaration along with Possession which was contested by the petitioners through written statement. The learned trial court after farming the necessary issues and recording the evidence of the parties dismissed the suit vide judgment and decree dated 14.03.2013, against which an appeal was filed, which was allowed and the suit of respondent No.1 was decreed. Hence, this civil revision.

3. Learned counsel for the petitioners at the preliminary stage argued the case at length and submitted, that the predecessor of the petitioners and respondent No.1 had died before the creation of Pakistan and at that time there was no Custom to give anything from inheritance to the daughters. Also argued, that the suit filed by respondent No.1 is otherwise barred by time and lastly submitted, that the property in question has already been disposed of in different hands, therefore, if any decree is passed in favour of respondent No.1, that would not serve the purpose.

4. Heard.

5. In order to appreciate the contentions raised by the learned counsel for the petitioners, the record as well as the findings recorded by the learned Courts below were perused. It is proved on record and not denied by the learned counsel for the petitioners during the course of arguments, that respondent No.1 is the real daughter of Deewan deceased and sister of the petitioners, therefore, while entering the inheritance mutation after the death of the predecessor of the parties, the name of the respondent being one of the legal heir should have been mentioned along with the petitioners, thus it is held that the inheritance mutation entered in the revenue record excluding the name of the respondent was illegal, unlawful being product of fraud and amounts to deprive the respondent from her right of inheritance, secured and guaranteed by the Allah Almighty. The respondent No.1 in any case, being the daughter of Deewan, is entitled to get her inheritance from the legacy of deceased Deewan and there is no reason to deprive her. Reliance is placed on "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 Supreme Court 1).

6. Learned counsel for the petitioners repeatedly argued, that the respondent has challenged the inheritance mutation entered in the name of the petitioners after the period of more than 30 years, which is hopelessly barred by time and the learned trial court rightly dismissed the suit. It is well established proposition of law, that the heir of any deceased becomes owner to the extent of his/her share by operation of law, the moment the predecessor dies and no

limitation runs against the claim of inheritance. Reliance is placed on "Mahmood Shah v. Syed Khalid Hussain Shah and others" (2015 SCMR 869). The relevant paragraph is re-produced as under:--

> "7. The first argument questioning the judgments of the fora below as well as High Court is that the suit being hopelessly time barred is liable to be dismissed. This argument would have been viable otherwise but not in a case where co-heirs become co-owners in the property left by their propositus on his demise. Their succession to the property of their propositus becomes a fait accompli immediately after his demise. It, thus, does not need to intervention of any of the functionaries of the Revenue Department and remains as such irrespective of what Patwari, Girdawar and Revenue Officer enter in the mutation sanctioned in this behalf. Since possession of one co-heir or any number of them would be deemed to be on behalf of even those who are out of it, preparation of every new record of rights, in their case, would confer on them a fresh cause of action."

7. In view of the principle laid down by the Hon'ble Supreme Court of Pakistan in the judgment supra it can safely be concluded and held, that the suit filed by respondent No.1 to get her share from the legacy of deceased Deewan is well within time.

8. As regard the arguments of the learned counsel for the petitioners regarding the Rawaj, the petitioners in this regard could not bring any evidence on record. This proposition has already been dealt with by Hon'ble Supreme Court of Pakistan in the landmark judgment cited as "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 Supreme Court 1), wherein the Hon'ble Supreme Court of Pakistan has observed, that the women, who are weaker segment of the society, should not be deprived from their right of inheritance in the name of customs or by emotionally exploiting them. The relevant portion of the judgment is reproduced as under:--

> "As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case) is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.
>
> In the rural areas where 80% of the female population resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show

up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/ seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an ubranised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'rights', up to the enforcement' even in homes, through 'Social Security'. Laws, with web of network of 'Inspectorates' etc. who are supposed to be helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin--sometimes by the urbanized brother himself, is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

9. It is already settled proposition of law, that if anyone deprived the sisters from the right of inheritance, they will have to prove through unimpeachable evidence, the reason/ground on the basis of which the sisters have been deprived from their inheritance. In this case the stance of the petitioners to deprive their sisters from the right of inheritance is vague and ambiguous; and the petitioners have been failed to bring anything on record in support of their stance.

10. Lastly, learned counsel for the petitioners submitted, that the petitioners have already disposed of or alienated the suit land to different persons. As per record, the alleged subsequent purchasers were made party in the suit, who, while contesting the suit, claimed themselves the bona fide purchaser without notice for consideration. The alleged subsequent purchasers, as evident from the record, could not bring anything on record through cogent evidence, that before purchasing the land, the precautionary measures as provided by law were taken and they purchased the property in question in good faith and in accordance with law. Thus in these circumstances, it can conveniently be held, that the alleged subsequent purchasers remained unsuccessful to prove their stance of bona fide purchaser. In these circumstances, all the sale transactions/ alienations or mutations made by the petitioners of the suit land in favour of the subsequent purchasers are sham, thus declared illegal, unlawful and having no legal effect qua the rights of the respondents. Reliance is placed on "Mst. Noor-un-Nisa and another v. Ghulam Sarwar and 6 others" (1994 SCMR 2087) and "Muhammad Iqbal through L.Rs. v. Mehmood Hassan and others" (2016 MLD 1243).

11. Even otherwise, it has been held by the Hon'ble Supreme Court of Pakistan, that the findings of the learned appellate Court should be given weightage. Reliance is placed on "Muhammad Hafeez and another v. District Judge, Karachi East and another" (2008 SCMR 398). The relevant part of the judgment is reproduced hereunder:--

"It is well-settled that in the event of conflict of judgments finding of Appellate Court are to be preferred and respected unless it is shown from the record that such findings are not supported by evidence; that the conclusions drawn are against the material on record; that the judgment of the Appellate Court suffers from misreading or non-reading of evidence or that the reasons recorded for reversal of judgment are arbitrary, fanciful and perverse."

12. In view of above, the petitioners have miserably failed to prove their stance, resultantly, this revision petition is dismissed. As regard the cost of the suit, that the respondent, because of the cruel and callous conduct of the petitioners/her brothers, has to run from pillar to post and the respondent cannot be compensated in monetary terms but as a token, the petitioners are burdened with cost of Rs.25,000/- (Rupees twenty five thousand only) which shall be paid to the respondent No.1 at the time of execution of the judgment and decree.

ZC/M-23/L Revision dismissed.

2017 M L D 1600
[Lahore]
Before Ali Akbar Qureshi, J
CANAL VIEW COOPERATIVE HOUSING SOCIETY through General Secretary and another---Petitioner
Versus
Mst. NASIM BEGUM and 4 others---Respondents

C.R. No.196 of 2012, C.R. Nos.3754, 3360 of 2011 and C.M.No.2-C of 2016, heard on 30th January, 2017.

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

----S. 52---Suit for declaration---Sale of suit land during pendency of suit---Lis pendens, doctrine of---Applicability---Contention of plaintiffs was that impugned sale deed was result of fraud and misrepresentation---Suit was decreed concurrently---Validity---Plaintiffs were minors at the time when transaction qua suit land took place---Sale deed was executed by the defendant with connivance of transferees in their favour---Suit land was purchased by the transferees during the pendency of present suit---Rule of lis pendens was applicable in the present case---Transferees could not bring on record the precautionary measures taken by them before purchasing the suit land---Mere inquiring from the revenue officials was not sufficient to prove the stance of bona fide purchaser for consideration without notice---Transferees were not entitled to defend the suit independently---Transferees had failed to prove their stance of bona fide purchaser---Transaction to purchase the suit land during pendency of suit was subject to final outcome of the suit---Transferees had to swim and sink with his predecessor in interest i.e. original vendor---Revision was dismissed in circumstances.

Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905; Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187; Usman v. Haji

Omer Haji Ayub and another PLD 1966 SC 328; Mst. Allah Ditti v. Settlement and Rehabilitation Commissioner, Lahore and 3 others PLD 1966 (W.P.) Lah. 659; Australasia Bank Ltd. Lahore v. Bashir Barton Stores, Sargodha 2 others PLD 1971 Lahore 133; Ali Shan and another v. Sher Zaman and 8 others PLD 1975 Lah. 388; Shukri and 3 others v. Ch. Muhammad Shafi Zaffar and 2 others PLD 1975 Lah. 619; Muhammad Jan Ghaznavi v. Captain Haji Muhammad Kabir and 3 others PLD 1977 Quetta 60; Malik Muhammad Iqbal v. Ghulam Muhammad and others 1990 CLC 670; Maulana Riazul Hassan v. Muhammad Ayub Khan and another 1991 SCMR 2513; Industrial Development Bank of Pakistan through Deputy Chief Manager v. Saadi Asmatullah and others 1999 SCMR 2874; Mukhtar Baig and others v. Sardar Baig and others 2000 SCMR 45; Muhammad Sabir Khan and 13 others v. Rahim Bakhsh and 16 others PLD 2002 SC 303; Muhammad Nawaz Khan v. Muhammad Khan and 2 others 2002 SCMR 2003; Muhammad Anwar Khan v. Habib Bank Ltd. and 4 others 2005 CLD 165; Muhammad Afzal v. Matloob Hussain and others PLD 2006 SC 84; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983; Hafiz Iftikhar Ahmed and 3 others v. Khushi Muhammad and another 2014 CLC 1689; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

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

----S. 52---Lis pendens, doctrine of---Applicability---Scope---Rule of lis pendens would apply till the final adjudication which was given in an appeal or revision at the final level of judicial hierarchy.

Malik Muhammad Iqbal v. Ghulam Muhammad and others 1990 CLC 670 rel.
Imran Muhammad Sarwar, for Petitioners (in C.R.No.196/2012).
Ahmad Waheed Khan for Petitioners (in C.R.No.3754/2011).
M. Baleegh-uz-Zaman Chaudhary for Petitioners (in C.R.No.3360/2011).
Messrs Hassan Nawaz Makhdoon and Javed Gill for Respondents Nos.1 and 2.
Mian Muhammad Hanif, for Applicant (in C.M. No.2-C/2016).
Date of hearing: 30th January, 2017.

JUDGMENT

ALI AKBAR QURESHI, J.---This single judgment will dispose of instant civil revision (C.R. No.196/2012) as well as the connected C.R. No.3360/2011, C.R. No.3754/2011 and C.M. No.2-C/2016, as common question of law and facts is involved in these cases.

2. The petitioners, through this civil revision, have questioned the validity and propriety of the concurrent findings recorded by the learned Courts below vide judgment and decree dated 13.10.2011 and 10.05.2010, while decreeing the suit for declaration filed by the respondents Nos.1 and 2.

3. A suit for declaration, as depicts from the record, was filed by the respondents Nos.1 and 2 for the cancellation of a sale deed bearing document No.12389, Bahi No.1 Jild No.252 dated 30.6.1979 and Mutation No.4001 dated 02.08.1979, on the ground, that the

respondents Nos.1 and 2, being the legal heirs of deceased Fazal Din, inherited the estate left by their deceased father, the detail of which is given in paragraph No.2 of the plaint, to the extent of their shares; that the respondent No.3 who is real brother of the respondents Nos.1 and 2/ plaintiffs, sold their shares to the petitioner (Canal View Cooperative Housing Society) on 30.06.1979; that by playing fraud and misrepresentation, respondent No.3 with the connivance of the petitioner, got executed and registered a sale deed by producing some other persons in the place of respondents Nos.1 and 2 before a local commission allegedly appointed; that neither the respondents Nos.1 and 2 appeared before any local commission nor put their signatures, therefore, all the proceedings to execute and register the sale deed are fictitious and result of fraud and misrepresentation in order to deprive the respondents Nos.1 and 2 from their valuable land. Lastly submitted, that at the time of registration of the fraudulent and bogus sale-deed, respondents Nos.1 and 2/plaintiffs were minor, therefore, the sale-deed and any transaction of the suit land is otherwise nullity in the eye of law.

4. The suit was contested by the petitioners whereas respondent No.3 failed to appear before the learned Trial Court and resultantly ex-parte proceedings were initiated against him vide order dated 03.05.1990.

5. The learned Trial Court, after framing necessary issues, recorded the evidence of the parties, finally decreed the suit vide judgment and decree dated 18.05.2010. An appeal was filed by the petitioners wherein the judgment and decree dated 18.05.2010 was affirmed.

6. It is pertinent to mention here, that respondents Nos.4 and 5, who purchased the suit land during the pendency of the suit filed by the respondents Nos.1 and 2, filed an application under Order I Rule 10 C.P.C which was finally allowed and they were impleaded as respondents Nos.4 and 5 in the appeal.

7. Learned counsel for the petitioners submits, that both the learned Courts below have not carefully perused the record while decreeing the suit, therefore, the judgment and decree is not liable to be sustained. Further submits, that respondents Nos.1 and 2 miserably failed to prove their stance, that they were minors at the time of executing and registering the sale deed and further, no cogent and convincing evidence has been produced to this effect.

8. In response thereof, learned counsel for the respondents submits, that the respondents Nos.1 and 2 succeeded to prove their claim qua the suit land and further both the learned Courts below through concurrent findings have reached to the conclusion, that the respondents Nos.1 and 2 were minors at the time of purchasing the land by the petitioners. Further submitted, that the petitioners have failed to bring any reliable evidence to rebut the claim of the respondents Nos.1 and 2.

9. Heard. Record perused.

10. Firstly it is to be seen and decided, as to whether the respondents Nos.1 and 2, who are the legal heirs of deceased Fazal Din, were minors at the time of executing and registering the sale deed by the respondent No.3 in favour of the petitioners of the suit land. The respondents Nos.1 and 2, in order to prove this issue, produced Secretary Union Council who appeared in the witness box as P.W.2 and categorically stated about the date of birth of

the respondent No.1. The copy of the birth certificate was also placed on record as Exh.P.1. The other witnesses, P.W.1 and P.W.3 to P.W.5 appeared on behalf of the respondents Nos.1 and 2 and succeeded to prove the claim of respondents Nos.1 and 2 and particularly their age. As appears from the record, unfortunately, the petitioners have failed to cross-examine the material and important part of the statement recorded by the witnesses appeared on behalf of the respondents Nos.1 and 2, wherein the witnesses stated the age of the respondents Nos.1 and 2. From the oral as well as documentary evidence, it proves, that the respondents Nos.1 and 2 were minors at the time when the transaction qua the suit land took place and the sale deed was executed by the respondent No.3 with the connivance of the petitioners in their favour.

11. As regard the respondents Nos.4 and 5, admittedly they purchased the suit land during the pendency of the case and are claiming themselves the bona fide purchasers without notice of the suit land. The respondent No.5 has also filed independent civil revision i.e. C.R.No.3754/2011 titled Shahana Khanum v. Naseem Begum etc. against the judgment and decree impugned herein.

12. The learned senior counsel Mr. Ahmad Waheed Khan and M. Baleegh-uz-Zaman Chaudhary, Advocates appeared in C.R. No.3360/2011 and C.R. No.3754/2011, and submitted, that the petitioners in C.R. No.3360/2011 and C.R. No.3754/2011 are bona fide purchasers without notice for consideration, therefore, their rights are protected under the law.

13. As regard the claim of bona fide purchaser, it is not denied that the appellant purchased the suit land during the pendency of the civil suit. The civil suit was filed in the year 2007 and during the pendency in the year 2010, the suit land was purchased by the appellant, therefore, the rule of lis pendens embodied in section 52 of the Transfer of Property Act, 1882, which has been interpreted by the Hon'ble Supreme Court of Pakistan in Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905) is squarely applicable in this case. The relevant part of the judgment (supra), wherein Section 52 of the Act ibid has been defined, is reproduced as under:--

> "The aforesaid section manifestly embodies the rule of lis pendens, which is available both in equity and at the common law. The rule and the section is founded upon the maxim "pendente lite nihil innovetur", which means that pending litigation, nothing should be changed or introduced. The virtual and true object of lis pendens is to protect and safeguard the parties to the suit and their rights and interest in the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person. The rule unambiguously prescribes that the rights of the party to the suit, who ultimately succeed in the matter are not affected in any manner whatsoever on account of the alienation, and the transferee of the property shall acquire the title to the property subject to the final outcome of the lis. Thus, the transferee of the suit property, even the purchaser for value, without notice of the pendency of suit, who in the ordinary judicial parlance is known as a bona fide purchasers in view of the rule/doctrine of lis pendens shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound. The transferee therefore does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all

intents and purposes and has to swim and sink with his predecessor in interest. The rule of lis pendens is founded upon the principle that it would be impossible that any action or suit could be brought to a successful termination if the alienations pendente lite are permitted to prevail and the subsequent transferee is allowed to set out his own independent case, even of being the bona fide transferee against the succeeding party of the matter and ask for the commencement of de novo proceedings so as to defeat the claim which has been settled by a final judicial verdict. The foundation of the doctrine is not rested upon notice, actual or constructive, it only rest on necessity and expediency, that is, the necessity of final adjudication (Emphasis supplied) that neither party to the litigation should alienate the property so as to effect the rights of his opponent. If that was not so, there would be no end to litigation and the justice would be defeated. In support of the above, reliance is placed upon Messrs Aman Enterprises v. Messrs Rahim Industries Ltd. and another (PLD 1993 SC 292), Muhammad Nawaz Khan v. Muhammad Khan and 2 others (2002 SCMR 2003). Besides, in West Virginia Pulp and Paper Co. v. Cooper, 106 S.E. 55, 60, 87 W.Va. 781, it has been held "the doctrine of "lis pendens" is that one who purchases from a party pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause and is bound by the decision that may be entered against the party from whom he derived title." (underline is mine)

14. In another latest judgment cited as Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187), the Hon'ble Supreme Court of Pakistan, by referring the judgment supra (PLD 2011 SC 905), has further elaborated the principle of lis pendens, as under:--

"11. Considering the plea of lis pendens raised by the appellants' learned counsel, it may be mentioned that the scope, the principle and the application of rule of lis pendens has been elaborately dilated in the judgment reported as "Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905). The ratio of the above law is that a subsequent transferee cannot sustain his transfer (e.g. the sale) if he has purchased the property during the pendency of the suit. He is bound by the outcome of the suit, obviously that shall be so if the case is decided against the transferor from whom he is purchasing the property or against the transferee if he is a party to the case, but if the lis is decided in his favour, there shall be no question about the application of the rule of lis pendens. Conceiving this case in light of the ratio of the above judgment, now when the suit of the appellants for the specific performance has been dismissed by the trial Court and the learned Revisional court and such verdicts are being upheld for the reasoning given in this opinion especially the exercise of discretion by the court(s) in this case, the conduct of the appellants, the invalidity of their agreement to sell etc. how could the rule of lis pendens be resorted to. As lis pendens shall only be applicable in case of success of the appellants, but not in the case of their defeat and failure. Resultantly, the plea raised by the learned counsel based upon this principle is liable to be discarded."

15. As regard the claim of the appellant that he is a bona fide purchaser and purchased the land in good faith, it is to be seen as to whether the appellant could prove his stance by bringing or producing unimpeachable evidence. It depicts from the record, that the appellant could not bring any evidence on record the list of precautionary measures taken by the

appellant before purchasing the land. It is held in chains of judgments, that mere inquiring from the revenue officials is not sufficient to prove the stance of bona fide purchaser for consideration without notice. Reliance is placed on Usman v. (1) Haji Omer Haji Ayub, and (2) Haji Razzak (PLD 1966 SC 328), Mst. Allah Ditti v. Settlement and Rehabilitation Commissioner, Lahore and 3 others (PLD 1966 (W.P.) Lahore 659), Australasia Bank Ltd. Lahore v. Bashir Barton Stores, Sargodha 2 others (PLD 1971 Lahore 133), Ali Shan and another v. Sher Zaman and 8 others (PLD 1975 Lahore 388), Shukri and 3 others v. Ch. Muhammad Shafi Zaffar and 2 others (PLD 1975 Lahore 619), Muhammad Jan Ghaznavi v. Captain Haji Muhammad Kabir and 3 others (PLD 1977 Quetta 60), Malik Muhammad Iqbal v. Ghulam Muhammad and others (1990 CLC 670), Maulana Riazul Hassan v. Muhammad Ayub Khan and another (1991 SCMR 2513), Industrial Development Bank of Pakistan through Deputy Chief Manager v. Saadi Asmatullah and others (1999 SCMR 2874), Mukhtar Baig and others v. Sardar Baig and others (2000 SCMR 45), Muhammad Sabir Khan and 13 others v. Rahim Bakhsh and 16 others (PLD 2002 SC 303), Muhammad Nawaz Khan v. Muhammad Khan and 2 others (2002 SCMR 2003), Muhammad Anwar Khan v. Habib Bank Ltd. and 4 others (2005 CLD 165), Muhammad Afzal v. Matloob Hussain and others (PLD 2006 SC 84), Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others (2012 SCMR 983) and Hafiz Iftikhar Ahmed and 3 others v. Khushi Muhammad and another (2014 CLC 1689).

16. From the principle laid down in the afore-referred judgments, the appellant, who purchased the suit land during the pendency of the suit, is not entitled to defend the suit independently. In these circumstances, it can conveniently be held, that the appellant has miserably failed to prove his stance of bona fide purchaser and needless to mention, that the transaction to purchase the suit land by the appellant during the pendency of the suit was subject to the final outcome of the suit and as per rule of lis pendens, the appellant has to swim and sink with his predecessor in interest i.e. the original vendor/respondent No.3.

17. The Hon'ble Supreme Court of Pakistan, while interpreting section 52 of Act ibid, which relates to the rule of lis pendens, has gone to the extent, that the rule of lis pendens will apply till the final adjudication which is given in an appeal or revision at the final level of the judicial heirarchy. The relevant part of judgment supra (PLD 2011 SC 905) is reproduced as under:

> "8. While dealing with the proposition about the scope and application of section 52 ibid it may be relevant to state here, that as per the clear wording of the explanation to the section, when read as a whole, and especially by construing the expression "the suit or proceeding has been disposed of by a final decree or order" it undoubtedly means, that final verdict, which is given in an appeal or revision at the final level of the judicial hierarchy, which verdict has attained conclusiveness."

The rule of lis pendens has further been interpreted by the Hon'ble Supreme Court of Pakistan in the judgment (supra), in the following words:

> "8 Therefore, the rule of lis pendens shall also be duly attracted and applicable during the period of limitation provided for an appeal or revision etc. to challenge a decree/order. If therefore an alienation of a suit property has been made by a party to

the lis, who succeeds at one stage (such as trial), but the transfer is during the period of limitation available to the other (unsuccessful) party, to challenge that decision and ultimately the decree/order is over turned in its further challenge, such alienation made shall also be hit and shall be subject to the rule of lis pendens."

18. Even otherwise, there is hardly any reason to interfere with the well worded concurrent findings of the learned courts below. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

19. Resultantly, this civil revision as well as connected civil revision and C.M. No.2-C/2016 are dismissed and the judgment and decree passed by the learned Courts below is upheld. No order as to costs.

ZC/C-10/L Revision dismissed.

2017 M L D 1874
[Lahore]
Before Ali Akbar Qureshi, J
MAHBOOB ALAM and another---Petitioners
Versus
LIAQAT ALI and 4 others---Respondents

C.R. No.283 of 2016, decided on 2nd February, 2016.

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

----S. 12---Suit for specific performance of contract---Non-production of two marginal witnesses of agreement to sell---Effect---Scribe---Evidentiary value of---Plaintiffs could not produce two attesting witnesses of agreement to sell and suit was dismissed---Contention of plaintiffs was that scribe could be a substitute of marginal witness---Validity---Scribe could not be substitute of any marginal witness---No illegality, irregularity or any jurisdictional defect had been pointed out in the impugned judgments and decrees passed by the courts below---Revision was dismissed in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din through L.Rs. and others PLD 2011 SC 241 rel.

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

----S. 115---Revision---Scope---Concurrent findings on facts and record should not be interfered in routine except jurisdictional error or legal infirmity.

Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984; Malik Muhammad

Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 and Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452 rel.
Imran Mehmood Awan for Petitioner.

ORDER

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 16.10.2015 and 15.01.2015, passed by learned Courts below, whereby the suit for Specific Performance of a contract dated 15.07.2009, was dismissed.

2. Shortly the facts for the disposal of this revision petition are that, the petitioner for the performance of an agreement to sell dated 15.07.2009, filed a Suit for Specific Performance with Permanent Injunction alleging therein, that the suit property measuring 7 kanal 2 marlas was purchased by one Mubarak son of Ghulam Ali, and uncle of the petitioner namely Muhammad Ali filed a suit for Pre-emption and at the time of filing the suit it was agreed, that Mehboob Alam would bear litigation expenses for the suit and in case the suit is decreed, the pre-empted land would be transferred equally in the name of Muhammad Ali and the petitioner. In this regard an "Iqrarnama" dated 15.07.2009 was executed but subsequently respondents refused to perform his part of the contact, therefore, the petitioner filed the suit.

3. The suit filed by the petitioner was resisted through written statement by the respondents through legal as well as factual grounds.

4. Learned trial court after framing necessary issues recorded the evidence of the parties and finally dismissed the suit on 15.01.2015.

5. Feeling aggrieved thereof, the petitioner filed an appeal, which too was dismissed vide judgment dated 16.10.2015. Hence, this revision petition.

6. Learned counsel for the petitioner submits, that it is correct that the petitioner could not produce two attesting witnesses to prove the agreement to sell dated 15.07.2009 but the petitioner also produced PW3, who is scribe and can be substitute of the marginal witness.

7. As regard the scribe, it has already been settled, that the scribe in any circumstances cannot substitute of any marginal witnesses. I am afraid, that the argument advanced by learned counsel for the petitioners has any substance in the presence of the principle laid down by the Hon'ble Supreme Court of Pakistan in the judgment titled Hafiz Tassaduq Hussain v. Muhammad Din through L.Rs. and others (PLD 2011 SC 241), that the scribe of the agreement having appeared as witness to prove the agreement to sell could not assume the role of attesting witness. The relevant paragraphs are re-produced as under:--

> "9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute for the attesting witnesses; the point on which leave was also granted. It may be held that if such witness is allowed to be considered as the attesting witness it shall be against the very concept, the purpose, object and the mandatory command of the law highlighted above. The question, however, has been examined in catena of judgments and the answer is in the negative.

10. It has been held in Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639):--

"Attesting witness was the one who had not only seen the document being executed by the executant but also signed same as a witness-Person who wrote or was 'scribe' of a document was as good a witness as anybody else, if he had signed the document as a witness (Emphasis supplied) No legal inherent in competency existed in the writer of a document to be an attesting witness to it."

In N: Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 503, it has been held:-

"Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest."

In Badri Prasad and another v. Abdul Karim and others (1913 (19) IC 451, it is held:-

"The evidence of the scribe of a mortgage deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed.

An attesting witness is a witness who has seen the deed executed and has signed it as a witness. (Emphasis supplied)"

To the same effect are the judgments reported as Qasim Ali v. Khadim Hussain through legal representatives and others (PLD 2005 Lahore 654) and Shamu Patter v. Abdul Kadir Rowthan and others (1912 (16) IC 250). Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfil and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."

8. Another principle laid down by the Hon'ble Supreme Court of Pakistan, while dealing with the proposition in the judgment supra, is as follows:--

"However, the provisions of Article 17(2)(a) encompasses in its scope two fold objects (i) regarding the validity of the instruments, meaning thereby, that if it is not attested by the required number of witnesses the instrument shall be invalid and therefore if not admitted by the executant or otherwise contested by him, it shall not be enforceable in law (ii) it is relatable to the proof of such instruments in terms of mandatory spirit of Article 79 of The Order, 1984 when it is read with the later. Because the said Article in very clear terms prescribes "if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive and subject to the process of the Court and capable of giving evidence."

9. Although learned counsel for the petitioners argued the case at some length but could not point out any illegality, irregularity or any jurisdictional defect in the judgment and decree passed by the learned Courts below. It has been ruled by the Hon'ble Supreme Court of Pakistan, that the concurrent findings on facts and record should not be interfered in routine, but in an extra ordinary circumstance, when the learned courts below have committed serious jurisdictional error or legal infirmity.

I find support from the valuable judgments of the Hon'ble Supreme Court of Pakistan, titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another (2008 SCMR 428), and "Abdul Ghafoor and others v. Kallu and others" (2008 SCMR 452), that the High Court, in the case of concurrent findings, normally does not interfere unless the same is result of exercise of jurisdiction not vested in the learned courts below.

10. In view of the above law declared by the Hon'ble Supreme Court of Pakistan this petition having no force stands dismissed. No order as to costs.

ZC/M-72/L Revision dismissed.

2017 M L D 1101
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
Mst. MITHAN---Petitioner
Versus
ADDITIONAL DISTRICT JUDGE, JATOI and 7 others---Respondents

W.P. No.15851 of 2011, heard on 2nd May, 2016.

Family Courts Act (XXXV of 1964)---

----S. 5, Sched---Suit for recovery of dower---Entries made in column No. 16 of Nikahnama---Scope---Contention of wife was that husband promised to mutate agricultural land mentioned in column No. 16 of Nikahnama---Suit was decreed by the Family Court but same was dismissed by the Appellate Court holding that Family Court had no jurisdiction to decide the controversy involved in the present case---Validity---Family Court had jurisdiction to entertain and decide the matter arising out of Nikahnama---Family Court rightly assumed the jurisdiction and decided the lis strictly in accordance with law---Appellate Court had committed jurisdictional defect while accepting the appeal---Wife had proved her case through reliable and credible evidence and she was entitled for the decree prayed in the plaint---Impugned judgment and decree passed by the Appellate Court were set aside and those of Trial Court were restored---Constitutional petition was accepted in circumstances.

Air League of PIAC Employees through President v. Federation of Pakistan M/O. Labour and Manpower Division Islamabad and others 2011 PLC 89; Rai Naeem Shahadat v. Mst. Qamar Munir and others 2004 SCMR 412; Yusuf Ali Khan Barrister-at-Law, Lahore v. Messrs Hongkonk and Shanghai Banking Corporation Karachi and another 1994 SCMR 1007; Messrs National Bank of Pakistan, Lahore v. Muhammad Akram Khan and 17 others 2000 CLC 1493; Iftikhar Ali v. The State PLD 2001 SC 38; Khalid Qureshi and 5 others v. United Bank Limited I.I Chundrigar Road, Karachi 2001 SCMR 103 and Dr. Asma Ali v. Masood Sajjad and others PLD 2011 SC 221 rel.

Muhammad Afzal Bhatti for Petitioner.
Mian Bashir Ahmad Bhatti for Respondents.
Date of hearing: 2nd May, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---Through this Constitutional petition, the petitioner has challenged the validity of judgment and decree dated 02.12.2011, passed by learned appellate court/Additional District Judge, Jatoi, whereby the judgment and decree dated 28.03.2011, passed by learned Judge Family Court, Jatoi, in a suit filed by the petitioner, was set aside and suit of the petitioner was dismissed.

2. As per record of the instant case, the following questions require determination

> i. Whether the Family Court, under the Family Courts Act, 1964, has the jurisdiction to decide the entries made in column No.16 of Nikah Nama (Exh.P.1).
>
> ii. Whether the Entry No.10 made through Act No.11/2015 dated 18.03.2015 in Schedule (Part I) of Family Courts Act, 1964 would have retrospective effect.

3. The petitioner, who was married with one Muhammad Nawaz (deceased), the predecessor-in-interest of the respondents, instituted a suit for recovery of dower on 22.01.2008 on the ground, that at the time of Nikah, Muhammad Nawaz deceased, husband of the petitioner, promised to mutate 15-Bigha agricultural land in her name in lieu of the dower and would pay Rs.40,000/- per month; the afore-referred promise was duly entered into Nikah Nama (Exh.P.1) dated 05.12.1973. Lastly prayed, that the suit be decreed in her favour. The respondents, who appeared in response of the notice before the Court, submitted their written statements, wherein the respondents raised a preliminary objection regarding the jurisdiction of the Family Court and on merits, refuted the claim of the petitioner. The learned Judge Family Court, completed the trial and finally decreed the suit vide judgment and decree dated 28.03.2011 in favour of the petitioner, against which an appeal was filed, wherein the learned appellate court accepted the appeal vide judgment and decree dated 02.12.2011 and set aside the judgment and decree passed by the learned Judge Family Court on the ground, that the learned Family Court had no jurisdiction to decide the controversy involved in this case.

4. Heard. Record perused.

5. Firstly it is to be seen whether the learned Family Court had the jurisdiction to decide the controversy of the instant case.

6. In this regard firstly the Entry No.10 added in the Schedule (Part I) of Family Courts Act, 1964, through Act No.11/2015 dated 18.03.2015 is to be examined. For ready reference, the same is reproduced as under:--

> "15. Amendment in Schedule of Act XXXV of 1964:---In the said Act, in the Schedule, in Part I, for entry at serial No.9, the following shall be substituted:
>
> 9. The personal property and belongings of a wife and a child living with his mother.
>
> 10. Any other matter arising out of the Nikahnama."

Through the aforesaid Entry, jurisdiction confers upon the learned Family Court to entertain and adjudicate the matter arising out of the Nikah-Nama. In this case, the petitioner is claiming the land, which is part of the Nikah-Nama (Exh.P.1), by filing a suit under the provisions of the Family Courts Act, 1964, in Family Court established under the Family Laws.

7. Since, the Entry was added during the pendency of the instant case, therefore, as per the dictum laid down by the Hon'ble Supreme Court of Pakistan, in a judgment cited as Air League of PIAC Employees through President v. Federation of Pakistan M/O. Labour and Manpower Division Islamabad and others (2011 PLC 89), that a change of forum to try the lis is a procedural change and operates retrospectively and according to judgment cited as Rai Naeem Shahadat v. Mst. Qamar Munir and others (2004 SCMR 412), the Entry made in the Schedule (Part I) being procedural in nature would have retrospective effect. Further reliance is placed on Yusuf Ali Khan Barrister-at-Law Lahore v. Messrs Hongkonk and Shanghai Banking Corporation Karachi and another (1994 SCMR 1007), Messrs National Bank of Pakistan, Lahore v. Muhammad Akram Khan and 17 others (2000 CLC 1493), Iftikhar Ali v. The State (PLD 2001 SC 38), Khalid Qureshi and 5 others v. United Bank Limited I.I Chundrigar Road, Karachi (2001 SCMR 103).

8. From the above dictum laid down by the Hon'ble Supreme Court of Pakistan, it is clear, that the Family Court has the jurisdiction to entertain and decide the matter arising out of Nikah-Nama and this Entry No.10 would have retrospective effect. By this way, it can conveniently be observed, that the learned Judge Family Court rightly assumed the jurisdiction and decided the lis strictly in accordance with law, whereas the learned appellate court committed jurisdictional defect while accepting the appeal filed by the respondent.

9. In a latest judgment cited, as Dr. Asma Ali v. Masood Sajjad and others (PLD 2011 SC 221), the Hon'ble Supreme Court of Pakistan exactly in the identical matter has observed as under:--

> "20. Now we can take to the question of determination as to whether the appellant-wife is entitled to the house measuring 2 Kanals and 100 Kanals agricultural land. Regarding house, there is oral evidence in the shape of statements of P.Ws. 1 to 3 and appellant-wife herself and a document Exh.P.W.2/D-1 brought on record by respondent-husband in the statement of P.W.2, wherein there is clearly recorded that

> a house situated in village Mirza, Tehsil and District Attock, measuring 2 Kanals of which market value has been given ay Rs.700,000. No successful suggestion has been made to the appellant/plaintiff by the respondent/defendant, when she was subjected to cross-examination by specifying the entries made in the Nikkah Nama to be incorrect except a general suggestion and not specific in respect of the house and agricultural land. "

It has further been observed in the judgment (supra) as under:--

> "23. In respect of 100 Kanals of agricultural land, since no description of the land was given in the Nikkah Nama in terms of its Khasra Numbers or identifying data, a decree is given in favour of appellant-wife as prayed for in her plaint. In view of absence of particulars of 100 Kanals land, the learned Trial Court shall appoint commission by directing a member of the Revenue hierarchy, to determine the average price of per Kanal agricultural land in village Chassian, Tehsil and District Attock and after such determination the appellant will be entitled to receive 100 Kanals land or its market value so determined."

10. As earlier mentioned, that the facts of this case and the judgment (supra) are similar, so I feel no hesitation to observe, that the petitioner has successfully proved her case through reliable and credible evidence, therefore, is entitled for the decree prayed in the plaint on the strength of the dictum laid down by the Hon'ble Supreme Court of Pakistan in the judgments (supra).

11. Learned counsel for the respondents submits, that the learned Family Court had no jurisdiction to entertain and decide the issue and if there is any amendment in law, that would has prospective effect and not retrospective.

12. The contention raised by the learned counsel for the respondents has no substance in view of the principle laid down by the Hon'ble Supreme Court of Pakistan in the judgments referred earlier. The law referred by the learned counsel for the respondents has no relevance with the proposition involved in this matter and distinguish.

13. In view of above, this writ petition is allowed, the judgment and decree dated 02.12.2011 passed by the learned appellate court is set aside and that of the learned Judge Family Court dated 28.03.2011 is upheld. This petition is accepted subject to cost of Rs.25,000/- which shall be paid to the petitioner by the respondents.

ZC/M-145/L Petition allowed.

2017 P L C (C.S.) Note 5
[Lahore High Court]
Before Ali Akbar Qureshi, J
MUHAMMAD SAEED ZAFAR
Versus
DISTRICT CO-ORDINATION OFFICER, MIANWALI and 2 others

W.P. No.11762 of 2010, decided on 1st September, 2015.

Civil service---
----Advertisement for appointment of Elementary School Educator---Merit-cum-waiting list---Scope---Department issued merit list and petitioner stood at serial No. 14---Candidate at serial No. 1 did not join and one post became vacant---Petitioner who was next in the waiting list filed application to be appointed against the said vacant seat but no action was taken---Contention of department was that merit list was to be remained valid for a period of 190 days from the date of recommendations of relevant Selection Committee---Validity---Appointing authority was bound to offer the job to the next person on merit list if the post became vacant within 190 days---Person who was next on the merit list was not required to himself approach or to file any application for appointment against the vacant seat---Government functionaries tried to deprive the petitioner from his secured and guaranteed constitutional promises of impartial, fair and just treatment to all the citizens---Department was directed by High Court to consider the case of petitioner for the post of Elementary School Educator on the basis of merit list in question within a specified period---Secretary Education (Schools) and Chief Secretary of the Province were directed to take action against the delinquents---Constitutional petition was accepted in circumstances. [Paras. 7, 9, 10 & 11 of the judgment]

Shabana Akhtar v. District Coordination Officer, Bhakkar and 2 others 2012 PLC (C.S.) 366 rel.
Malik Saleem Awan Iqbal for Petitioner.
Ch. Akbar Ali Kang, Assistant Advocate-General for the State.

ORDER

ALI AKBAR QURESHI, J.---The petitioner in response of an advertisement issued by the Education Department, Mianwali, for the post of Elementary School Educator (E.S.E.), applied for the said post. The respondent-department after completing the recruitment process issued merit list and the petitioner stood at Serial No.14. The candidate, who stood at serial No.1 namely Kashif Mehmood did not join and in result of that one post became vacant. The petitioner, who was next in the waiting list, filed an application stating therein, that the petitioner is entitled to be appointed against the vacant seat lying with the department. As usual no action was taken by the respondent-department and the petitioner had to file the instant Constitutional petition.

2. The respondent-department in compliance of the order passed by this Court submitted para-wise comments. In the para-wise comments respondent-department by referring

Notification No.DS(O&M)5-3/2004/ Contract(MF), dated 14.03.2010, submitted, as under:-
-

> (ix) "The merit list shall remain valid for a period of 190 days from the date of recommendations of the relevant Selection Committees and the appointing authority shall complete the process of appointment within the said period.
>
> (x) No request for extension in the joining time as specified in the offer of appointment shall be entertained.
>
> (xi) If a person to whom offer of appointment has been issued fails to join the post within the period of specified in the said offer of appointment or where a written refusal is received from a selectee, his/her selection shall stand cancelled and next person on the merit list may be offered the job.
>
> (xii) In case a person joins the job and leaves the same within the period of 190 days, then the appointing authority may offer the job to the next person on the merit list."

3. According to the contents of the aforementioned Notification, the merit list is to be remained valid for a period of 190 days from the date of recommendations of the relevant Selection Committee and as the seat fell vacant on 27.04.2010 and the petitioner did not approach within the time stipulated mentioned in the aforesaid Notification i.e. 190 days, therefore, the petitioner cannot be held entitled for appointment against vacant seat.

4. Learned counsel for the petitioner has submitted, that the petitioner timely approached to the respondent-department as and when it came into the knowledge of the petitioner that seat has become vacant and he is entitled to be accommodated. Learned counsel also pointed out that as per the brief report submitted on behalf of the respondents Nos.1, 2 and 3, the post became vacant on 27.04.2010, whereas 190 days were to be completed on 03.05.2010, therefore, the respondent-department could have appoint the petitioner against the vacant post.

5. Learned Assistant Advocate-General supported the report and para-wise comments and submitted, that the merit list prepared by the department was not valid when the seat became vacant.

6. Heard. Record perused.

7. The respondent-department has filed the report and para-wise comments on the strength of a Notification No.DS(O&M)5-3/2004/ Contract(MF), dated 14.03.2010, issued by the Government of Punjab, Services and General Administration, Department, Lahore, wherein it is mentioned, that the merit list shall remain valid for a period of 190 days. The same notification which perhaps had not been perused and examined by the respondent-authority wherein, in clause XII, it is mandatory to the appointing authority to offer the job to the next person on the merit list if the post became vacant within 190 days. Meaning thereby it is the duty of the appointing authority to inform to the next person on the merit list and offered for the vacant post. In other words, the person who is next on the merit list is not required to himself approach or to file any application for the appointment of the post against the vacant

seat. It appears from the record, that the respondents government functionaries as usual tried their level best to deprive the petitioner from his secured and guaranteed the Constitutional promises of impartial, fair and just treatment to all the citizens. In fact, the government functionaries always adopt these types of the devices with the intention to accommodate their own blue eyed persons.

8. On the identical issue, the learned Division Bench of this Court has observed in the judgment titled "Shabana Akhtar v. District Coordination Officer, Bhakkar and 2 others" (2012 PLC (C.S.) 366) and gone to the extent that the waiting list shall remain available as long as the post continues. The relevant para is reproduced as under:--

> "22. Other advantages of a merit list-cum-waiting list are that vacancy can be filled immediately without re-coursing to a full-fledged recruitment process starting with a fresh public advertisement. Waiting List mechanism saves public money, human resource and time spent on carrying out a full course recruitment process. In case only one or two vacancies occur they can be immediately filled without waiting for a fresh recruitment process to be initiated and without keeping several posts vacant for a considerable period of time. As vacancy can arise at any time, the contingency plan in the shape of an operational Waiting List must be available as long as the post continues. Hence, there can be no timeframe or a cut off date for the expiry of the Waiting List. It is surely not binding on the candidates to remain on the Waiting List and are free to search for other and better employment prospectus, but till they do so, their names continue to be retained on the Waiting List. As and when vacancy arises the said candidates can be contacted and if they are available the vacancy can be dully filled: The only time Waiting List might lose its utility and efficacy is when the eligibility criteria, to the post in question is altered or if the post itself is abolished or restructured or reorganized."
>
> "24. For the above reasons we first hold that the Contract Policy, 2004 has no application to the present case and has been over-rigidly applied to the case of the appellant without evaluating the facts and circumstances of the case. Subject to the qualification, hereunder, we also hold that the validity period of 190 days for the expiry of Merit List is unreasonable and therefore cannot be sustained in law. However, the rule of 190 days can still have a limited application to the extent that where no candidate in the Merit List/Waiting List comes forward to be appointed to the post in spite of the offer made by the department, in such eventuality the merit list can come to an end after a period of 190 days and the department can initiate fresh recruitment process."

9. In view of the above, the respondents are directed to consider the case of the petitioner for the post of Elementary School Educator (E.S.E.) on the basis of the merit list in question within a week from the receipt of this judgment.

10. Resultantly this Constitutional petition is allowed. No order as to cost.

11. Parting with the judgment office is directed to dispatch the copy of this order to Secretary Education (Schools) Govt. of Punjab and the Chief Secretary of the province to take action against the delinquent, because the petitioner suffered mental agony and torturer

and remained job less for five years because of contumacious conduct of the respondent-functionaries.

ZC/M-304/L Petition allowed.

2017 P L C (C.S.) Note 40
[Lahore High Court]
Before Ali Akbar Qureshi, J
SAADIA SULTANA
Versus
PUNJAB PUBLIC SERVICE COMMISSION through Chairman and 3 others

W.P. No.22716 of 2015, heard on 1st October, 2015.

(a) Punjab Public Service Commission Regulations, 2000---

----Regln. 22---Advertisement for appointment of Associate Professor (Islamiat)---Eligibility of a candidate---Determination of---Word 'or'---Scope---Petitioner was called for interview but was not allowed to appear in the same on the ground that she was not qualified for the said post on account of lack of one research paper to be published in the journal recognized by the Higher Education Commission---Validity---Word 'or' used by the Public Service Commission was disjunctive particle and gave a choice or alternate of one among two or more things---Candidate who had done Ph. D. was qualified to apply for the post advertised and in case the candidate was Ph. D. then he/she be of equivalent qualification in the relevant subject with nine years teaching/research experience in the recognized university/ college having two research publication---Public Service Commission while giving advertisement had offered the post of Associate Professor to the candidate who were Ph. D. or alternate qualification---Petitioner was qualified to apply for the post advertised by the Public Service Commission---Eligibility of a candidate had to be determined in accordance with the advertisement for the post, service rules governing the appointment and any amendment or instruction backed by law---Public Service Commission advertised 22 posts whereas only four posts had been filled (including the petitioner)---Petitioner could be adjusted as the remaining posts were still vacant---Public Service Commission had tried to deprive the petitioner from her fundamental right whereas petitioner had the requisite experience---Public Service Commission was directed to recommend the petitioner for appointment as Associate Professor in the Higher Education Department---Constitutional petition was allowed in circumstances. [Paras. 6, 7, 10, 12, 13 & 14 of the judgment]
Government of Punjab through Secretary (S&GAD), Lahore and another v. Zafar Maqbool Khan and others 2012 SCMR 686 and C.A. No.27-K of 1987 Pakistan Fisheries Ltd. Karachi and others v. United Bank Ltd. PLD 1993 SC 109 rel.

(b) Civil service---
----Eligibility of a candidate had to be determined in accordance with the advertisement for the post, service rules governing the appointment and any amendment or instruction backed by law. [Para. 7 of the judgment]

(c) Words and phrases---

----'Or'---Meaning.

> Meaning of 'or' is "introducing second of two alternatives".
>
> "Or is disjunctive particle used to express an alternative to give a choice of one among two or more things."

Ordinarily "or" is used in disjunctive sense. The governing rule, however, is to carry out the intention of the Legislature. It may be found necessary to read the conjunctions 'or' and 'and' one for the other depending on the consequences intended by the Legislature." [Paras. 5 & 6 of the judgment]

Oxford Dictionary; Black's Law Dictionary; Salehon and others v. The State PLD 1969 SC 267; Choudhry Muhammad Din v. Abdul Qayyum and others PLD 1985 Jour. 164; Muhammad Sanaullah v. Allah Din 1993 MLD 399; Hakim Ali Bhatti v. Qazi Abdul Hakim and others 1986 CLC 1784 and Mst. Shagufta v. Chairman Federal Public Service Commission, Islamabad and 2 others 2015 PLC (C.S.) 819 rel.

Ashfaq Qayyum for Petitioner.

Shahbaz Ahmad Tatla, Assistant Advocate General and Mian Ghulam Shabbir Thaheem, Legal Advisor of Punjab Public Service Commissioner for Respondents.

Date of hearing: 1st October, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---The petitioner, in response of an advertisement published by the Punjab Public Service Commission (hereinafter called the 'PPSC') dated 03.05.2015, to fill in 22 posts of Associate Professor Islamiat (Female) (in Higher Education Department, Government of the Punjab, applied for one of the posts considering herself eligible for said post. In the advertisement, for the post of Associate Professor Islamiat, the following qualification was required:

> "Ph. D or equivalent qualification in the relevant subject with 09 years teaching/research experience in recognized College/University or Professional Experience in the Relevant Field in National or International Organization with at least two Research Publications as a Sole or Principal Author in Journal of repute recognized by the HEC."

2. The petitioner has done her Ph.D. in Islamiat from University of the Punjab as a regular student and performing her duties as Assistant Professor (BPS-18) in the Higher Education Department, Government of the Punjab.

3. The petitioner was called for interview on 28.07.2015 but was not allowed to appear in the interview, that she is not qualified for the said post on account of lack of one research paper to be published in the journal recognized by the Higher Education Commission (H.E.C). The petitioner filed a review Petition, as provided in the rules, before the Chairman

PPSC and also filed instant Constitutional petition. However, the petitioner appeared in the interview under the order of this Court.

4. The controversy of the instant case revolves around the interpretation of academic criteria given in the advertisement published by the PPSC and relates to the academic qualification of the candidates, which is reproduced as under:--

> "Ph.D or equivalent qualification in the relevant subject with 09 years teaching/research experience in recognized College/ University or Professional Experience in the Relevant Field in National or International Organization with at least two Research Publications as a sole or Principal Author in Journal of repute recognized by the HEC.
>
> OR
>
> M. Phil. in the Relevant Subject with 11 years Teaching/ Research Experience in a recognized College/University or Professional Experience in the Relevant Field in a National or International Organization and distinguished Research Work with at least 04 Research Publications as a Principal Author in a Standard Journal recognized by the University/HEC with research facility. "

5. The required qualification for the said post is Ph.D. or equivalent qualification in the relevant subject. Now it is to be adjudged, as to whether a candidate who has done Ph.D. is required to submit two research publications as a sole or principal author in a journal of repute recognized by the H.E.C. The important word which requires interpretation is 'or' which is used between Ph.D. and equivalent qualification. The dictionary meaning of the word 'or' is as under:--

Meaning of 'or' in Oxford Dictionary is "introducing second of two alternatives".

In Black's Law Dictionary, 'or' has been defined as under:--

> "Disjunctive particle used to express an alternative to give a choice of one among two or more things."

6. In a judgment cited as Salehon and others v. The State (PLD 1969 SC 267), the word 'or' has been interpreted in the following manners:--

> "The answer to the question raised in the appeal lies in finding out whether the word "or" in the exception clause is used in disjunctive or conjunctive sense. Ordinarily "or" is used in disjunctive sense. The governing rule, however, is to carry out the intention of the Legislature. It may be found necessary to read the conjunctions `or' and 'and' one for the other depending on the consequences intended by the Legislature."

In another judgment cited as Choudhry Muhammad Din v. Abdul Qayyum and others (PLD 1985 Jour. 164), the word 'or' has been defined in the following words:--

"The word 'or' and 'and' interpreted by Maxwell on the Interpretation of Statutes (10th Ed.) page 238:--

> "To carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other. The 43 Eliz. 1' c 3 (t), for instance, in speaking of property to be employed for the maintenance of 'sick and maimed soldiers', referred to soldiers who were either the one 'or' the other, and not only to those who were both (u).
>
> In ordinary use the word 'or' is a disjunctive that marks an alternative which generally corresponds to the word 'either'. In face of this meaning however the word 'or' and the word 'and' are often used interchangeably. As a result of this common and careless use of the word in legislation, there are occasions when the Court, through construction, may change one to the other. This cannot be done, if the Statute's meaning is clear or if the alteration operates to change the meaning of the law. It is proper only in order to more accurately express, or to carry out the obvious intent of the Legislature, when the statute itself furnishes cogent proof of the error of the Legislature, and especially where it will avoid absurd or impossible consequences, or operate to harmonize the statute and give effect to all of its provisions."

Reliance is also placed on Muhammad Sanaullah v. Allah Din (1993 MLD 399) and Hakim Ali Bhatti v. Qazi Abdul Hakim and others (1986 CLC 1784) and Mst. Shagufta v. Chairman Federal Public Service Commission Islamabad and 2 others (2015 PLC (C.S.) 819).

From the aforesaid interpretations, it is crystal clear, that the word 'or' used by the PPSC while giving the academic qualification of the candidates is disjunctive particle and gives a choice or alternative of one among two or more things. According to the advertisement, the candidate who has done Ph.D. is fully qualified to apply for the said post and in case the candidate is not Ph.D., should be of equivalent qualification in the relevant subject with 09 years teaching/research experience in the recognized university/college having two research publications. Needless to mention, that a student of Ph.D. had to publish the research paper in the relevant field and for that reason, the PPSC while giving the advertisement, offered the post of Associate Professor to the candidates who are Ph.D. or alternate qualification, therefore, it can safely be held,. that the petitioner was a fully qualified candidate to apply for the post advertised by the PPSC.

7. As regard the advertisement published by the PPSC or any other department for the recruitment of the employee, it has already been held in Government of Punjab through Secretary (S&GAD), Lahore and another v. Zafar Maqbool Khan and others (2012 SCMR 686), that the eligibility of a candidate had to be determined in accordance with the advertisement for the post, service rules governing the appointment and any amendment or instruction backed by law. Regulation 22 of the PPSC 2000 is very clear on the subject.

8. During the currency of this petition, the petitioner was allowed to appear in the interview. The petitioner appeared in the interview and as per the result informed by the learned Legal Advisor of PPSC, the petitioner stood first among all the candidates in all over the Punjab.

9. Learned counsel for the petitioner submits, that as the petitioner appeared in the interview through an interlocutory order of this Court, therefore, it is a step in aid of the final decision of the case. Learned counsel has relied upon a judgment cited as C.A.No.27-K of 1987 Pakistan Fisheries Ltd., Karachi and others v. United Bank Ltd. (PLD 1993 SC 109).

The relevant part of the esteemed judgment is reproduced as under:--

> "For the purposes of the Ordinance, an interlocutory order may be described as the order which is incidental to or a step in aid of the final decision of the suit."

10. As per the record, the PPSC advertised 22 posts whereas only 04 posts have been filled including the petitioner, therefore, the petitioner can easily be adjusted as the remaining posts are still vacant.

11. The respondent PPSC while filing the report and para wise comments has only objected the candidature of the petitioner, that the petitioner could not submit the research paper duly published in a journal recognized by the H.E.C.

12. It appears from the aforesaid record and the law declared by the Hon'ble Superior Courts of the country, that the respondent-PPSC has tried to deprive the petitioner from her fundamental right i.e. right of employment, on technicalities, whereas the petitioner, as evident from the record, completed her Ph.D. with distinguished result in 2013 and has the requisite experience.

13. It would not be fair not to mention here, that the petitioner, who did appear in the interview under the order of this Court and stood first from all over the Punjab, thus, it would be extreme example of injustice if the petitioner is deprived from her fundamental right promised by the Constitution of Islamic Republic of Pakistan, 1973.

14. In view of the above, this petition is allowed, the respondent-PPSC is directed to recommend the petitioner for the appointment as Associate Professor in the Higher Education Department. No order as cost.

ZC/S-135/L Petition allowed.

2017 Y L R 399
[Lahore]
Before Ali Akbar Qureshi, J
Mst. HAMEEDAN BIBI and another---Petitioners
Versus
MUHAMMAD SHARIF---Respondent

C.R. No.3264 of 2010, heard on 18th March, 2016.

Gift---

----Cuttings on document of mutation---Effect---Cuttings which had been made on the mutation were sufficient to declare the gift deed null and void---Donee did not make statement with regard to date, time and place of making oral gift and names of witnesses in whose presence same was made---Thumb mark of donor was not available over the gift mutation which was sufficient to declare the gift deed unlawful and product of fraud---Ingredients of gift i.e. offer, acceptance and delivery of possession were missing in the present case---Donee was required to prove the oral gift independently that of the gift mutation---Scribe or signatory of gift or any official from the revenue staff had not been produced to prove the alleged gift---Alleged gift deed was produced in the statement of counsel which was not admissible in evidence---No gift, in circumstances, was made by the donor in favour of donee---Alleged gift was product of fraud and fabrication to deprive the plaintiffs from secured and guaranteed rights---Donee had played fraud with his sisters to grab their sharia shares---Impugned judgment and decree passed by the Appellate Court were set aside and those of Trial Court were restored---Revision was allowed in circumstances.

Khan Muhammad Yusuf Khan Khattak v. S. M. Ayub and 2 others PLD 1973 SC 160; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 and Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801 not applicable.

Mian Muhammad Ali Kasuri for Petitioners.
Muhammad Shehzad Shoukat for Respondent.
Date of hearing: 18th March, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---The petitioners, who have been deprived from their right of inheritance guaranteed by the Allah Almighty and the Law of Land by their brother as usual using the device of a gift mutation, filed a suit for declaration, challenging the gift mutation No.7942, dated 02.02.1992, on the grounds, that the father of the parties to the case namely Muhammad Ibrahim died on 22.04.2001, leaving behind the two daughters (the petitioners) and one son (respondent) to mourn his death. The deceased father left the suit land in legacy, which was being cultivated by deceased Ibrahim in his life time and after his death his only son Muhammad Sharif, the respondent herein; when the petitioners demanded their shares from the legacy as per the law, respondent firstly put off the matter on different pretext but finally refused to give the share to the petitioners and stated, that the suit

property has already been transferred in his name by way of gift mutation by the father of the parties to the case; the petitioners on coming to know hurriedly contacted to the concerned patwari, and it came into their knowledge that the respondent with the connivance of the revenue staff through a fake document (alleged gift) has transferred the land in his favour and lastly prayed that the petitioners are admittedly legal heirs of deceased Ibrahim, so are entitled to get the suit property to the extent of their share.

2. The suit was contested through written statement by the respondent wherein he stated, that the suit land was transferred by way of gift mutation by deceased Ibrahim firstly in favour of his grandsons but subsequently the same was transferred in favour of the respondent/real son of the deceased Ibrahim and further, the gift was made with the prior consent of the petitioners.

3. The learned trial court after completing all the codal formalities decreed the suit vide judgment dated 24.02.2010, against which an appeal was filed by the respondent, which was allowed and the suit of the petitioners was dismissed vide judgment and decree dated 28.08.2010.

4. Heard. Record perused.

5. The story of instant case depicts the constant and longstanding behavior prevailing in the sub-continent of the brothers to deprive their sisters from their secured and guaranteed right of inheritance through different modes. In this case, the respondent, who is the real brother of the petitioners is depriving the petitioners from their right of inheritance on the basis of a gift mutation of suit land dated 02.02.1992. The following events are necessary to take into consideration to decide the fate of the alleged gift claimed by the respondent:--

i. The alleged gift firstly was made, as claimed by the respondents, by deceased father of the parties to the case, in favour of his grandsons (sons of respondent) but subsequently through another rapt roznamcha, the gift of the same land was made in favour of the respondent Muhammad Sharif on the same day through same mutation (Exh.D11).

ii. There are serious nature of cuttings on the alleged mutation but no explanation to this effect is available on the mutation or in the record and further no application was filed by the respondent to rectify the aforesaid cuttings. In fact, the cuttings which had been made on the mutation and also admitted by the witnesses appeared on behalf of the respondent are sufficient to declare the gift deed null and void and in effective qua the rights of the petitioners.

iii. The respondent himself appeared in the witness box but did not utter even a single word about the date, time and place of making of the oral gift and names of witnesses in whose presence the alleged oral gift was made.

iv. The petitioners while filing the suit and appearing in the witness box specifically asserted that the alleged gift is product of fraud and no gift was made by the father of the petitioners but this important part of the examination in chief has not been cross-examined and further the petitioners also stated in the evidence, that late

Ibrahim, father of the petitioners did not mark his thumb impression or mentioned his National Identity Card number over the gift deed but this part has not too been cross-examined by the respondents. By this way the claim of the petitioners has gone un-rebutted and is admission on the part of the respondent.

v. The thumb mark of deceased Ibrahim is not available over the gift mutation. This fact is sufficient to declare the gift deed unlawful and product of fraud.

vi. The respondent while appearing as witness stated, that consent of the petitioners was obtained by his late father Ibrahim in the presence of Shafee and Muhammad Ishaq but none of these persons were produced as witness in the witness box to corroborate the version of the respondent.

vii. The respondent who appeared as DW1, stated, that firstly the suit land was gifted in favour of Abdul Rehman and Ismail, grandsons of late Ibrahim and thereafter the names of the aforesaid grandsons were crossed and the name of the respondent was written.

viii. The respondent has claimed that firstly the gift of suit land was made by deceased Ibrahim in favour of his grandsons, but the mandatory ingredients of gift i.e. offer, acceptance and delivery of possession are missing and same is the position in the case of subsequent alleged gift made in favour of respondent. Needless to observe, that under the law, the respondent was required to prove the oral gift independently that of the gift mutation.

ix. To prove the alleged gift, the respondent did not produce the scribe or signatory of the gift or any official from the revenue staff. The alleged gift deed (Exh.D11) was produced in the statement of learned counsel, which otherwise is not admissible in evidence. Reliance is placed on the esteemed judgment of the Hon'ble Supreme Court of Pakistan cited as "Khan Muhammad Yusuf Khan Khattak v. S. M. Ayub and 2 others" (PLD 1973 Supreme Court 160), wherein it is ruled, that except the judicial record, all other documents, even if exhibited, can only be read in evidence if the signatory or the scribe appeared in the Court. Relevant part of the judgment (supra) is reproduced hereunder:-

"When I say that the document Exh. P. E. is unproved, I have in mind the mandatory provisions of section 67 of the Evidence Act, which lay down that "if a document is alleged to be signed or written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting". If the case of the respondent was that the appellant had signed the original of Exh.P.E. or the certificate appended to it, it must have been proved that it was in the appellant's handwriting, for which no effort whatsoever was made. In the case of Bengal Friends and Co. v. Gour Benode Saha and Co., this Court had expressed itself on this point as follows:-

"Documents which are not copies of judicial record, should not be received in evidence without proof of signatures and handwriting of persons alleged to have signed or written them."

I am of the view that even if such documents are brought on record and exhibited without objection, they remain on the record as "exhibits" and faithful copies of the contents of the original but they cannot be treated as evidence of the original having been signed and written by the persons who purport to have written or signed them, unless the writing or the signature of that person is proved in terms of the mandatory provisions of section 67 of the Evidence Act."

6. The afore-referred instances of the instant case which relate to the alleged gift, are sufficient to believe that no gift was made by late Ibrahim in favour of the respondent and in fact this all was managed with the connivance of the revenue staff by the respondent to deprive the petitioners from their valuable right. This practice has already been deprecated by the Hon'ble Supreme Court of Pakistan in the landmark judgment cited as "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 Supreme Court 1), wherein the Hon'ble Supreme Court of Pakistan has observed, that the women, who are weaker segment of the society, should not be deprived from their right of inheritance in the name of customs or by emotionally exploiting them. The relevant portion of the judgment is reproduced as under:--

"As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case) is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.

In the rural areas where 80% of the female population resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/ seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an urbanised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'rights', up to the enforcement' even in homes, through 'Social Security' Laws, with web of network of 'Inspectorates' etc. who are supposed to be

helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin-sometimes by the urbanised brother himself, is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

7. As regard the recording of wrong entries in the revenue record in the matter of inheritance the Honourable Supreme Court of Pakistan in the judgment cited as "Mst. Gohar Khanum and others v. Mst. Jamila Jan and others" (2014 SCMR 801), (mentioned supra) has held as under:--

"We have heard learned counsel for the parties at great length and have also gone through the impugned judgment and the record with their assistance. The relationship between the parties is undisputed. It is, therefore, clear that on the death of Hashim, in accordance with Islamic Sharia which was applicable to the question of inheritance in this case, the petitioners through their predecessor-in-interest Dost Muhammad became owners of 2/3rd of the property while the respondents through their predecessor Mst. Zaria Jan became owners through inheritance of the remaining 1/3rd of the land.

"The main emphasis of the learned counsel for the appellants was that the suit was time barred having been filed 50 years after the mutation dated 31.08.1940. This contention, is however, easily dispensed with as Mst. Zarina Jan admittedly came to own a 1/3rd share of the land by operation of law and not by any mutation. The mutation was meant to record the legal entitlement of Dost Muhammad and Mst. Zarina Jan. If the mutation was erroneously made in favour of Dost Muhammad, such mutation would not create title in favour of Dost Muhammad in accordance with Sharia Law of inheritance. Learned counsel for the appellants repeatedly emphasized that Mst. Zarina was fully aware of the decision and assertion of title by her brother Dost Muhammad and Dost Muhammad had also constructed a house on the disputed land. This, however, does not attract the provisions of Limitation Act in the circumstances of the present case. Mst. Zarina Jan being the sister was co-owner and the possession / occupation of the land by her brother as the other co-owner could only be construed as possessions on behalf of all co-owners including Mst. Zarina. In order to relinquish or transfer her interest in the property, there had to be a positive and affirmative act. We have not been shown any document or deed of relinquishment, sale, transfer or gift which would establish that Zarina Jan had either relinquished her ineptest in the disputed property or actually conveyed or transferred the same in favour of Dost Muhammad. In the absence of any such affirmative act on

the part of Mst. Zarina Jan, it cannot be said that the property came to vest entirely in Dost Muhammad."

"It was next contended that Mst. Zarina Jan did not appear in the witness box herself and instead her daughter in law namely Mst. Karam Jan appeared as P.W.1. The fact is that Mst. Zarina Jan was close to 100 years old and it was this exigency which required her to act through her daughter in law. Since it is not disputed that the brother and sisters were owners of the disputed land by way of inheritance, the onus squarely fell on the appellants to establish that the 1/3rd interest of Zarina had been transferred in favour of Dost Muhammad or that Zarina had relinquished her rights in the suit property. But this onus was not discharged."

8. Learned counsel for the respondent when confronted with the aforesaid facts and the law, the learned counsel although had no answer but repeated his arguments that the gift was validly made in favour of the respondent with the consent of the petitioners. As regards, the cuttings over the gift deed the learned counsel could not offer any satisfactory explanation and simply submitted, that the same is related to the revenue staff but as regards the validity of the gift deed because of these "cuttings" the learned counsel could not refer any law.

9. There is another aspect of the case relating to the ingredients of gift. The mandatory requirements to prove a gift i.e. offer, acceptance and delivery of possession is missing in this case. The respondent could not prove through any credible and confidence inspiring evidence the aforementioned ingredients, therefore, it can safely and conveniently be held that the alleged gift is product of fraud and fabricated simply to deprive the petitioner from the secured and guaranteed right. The learned appellate court, as manifest from the findings, carelessly perused the record and committed serious illegality and jurisdictional defect while passing the judgment impugned herein.

In fact, as evident from the record and particularly the revenue record, the respondent has played a havoc fraud with their sisters to grab their shares granted by Allah Almighty, therefore, is not entitled for any leniency.

10. The judgments referred by learned counsel for the respondent, as appears from the aforesaid facts, are not applicable.

11. Resultantly, this revision petition is allowed, the judgment and decree dated 28.08.2010, passed by the learned appellate court is set aside and that of learned trial court dated 24.02.2010 is upheld. No order as to costs.

ZC/H-12/L Revision allowed.

2017 Y L R 1020

[Lahore]

Before Ali Akbar Qureshi, J

Mst. MEHTAB BIBI---Petitioner

Versus

KHADIM HUSSAIN through L.Rs. and another---Respondents

C.R. No.4650 of 2015, heard on 4th April, 2016.

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

----S. 42---Suit for declaration---Inheritance---Oral gift---Ingredients---Proof---Procedure---Pardanasheen lady---Contention of plaintiff was that gift mutation was based on fraud---Suit was dismissed concurrently--- Validity---Nothing was on record as to when, where and in whose presence alleged oral gift was made---Defendants were required to prove the transaction of oral gift independently irrespective of execution of gift mutation---Defendants had failed to prove oral gift and its ingredients through any independent and confidence inspiring evidence---No official from revenue side was produced to prove the scribe and signatory of alleged gift mutation which was mandatory under the law---Plaintiff had not gifted her share of land in favour of her brothers and her thumb impression was obtained by playing fraud and misrepresentation---Donor was an illiterate and Pardanasheen lady and was completely ignorant with regard to transaction of gift mutation---No family member of plaintiff was accompanying her when the alleged gift mutation was attested---Alleged gift mutation was dubious and liable to be set aside---Courts below had decided the lis on the basis of surmises and conjectures---Impugned judgments and decrees passed by both the courts below were set aside and suit was decreed---Revision was allowed in circumstances.

Khan Muhammad Yusuf Khan Khattak v. S.M. Ayub and 2 others PLD 1973 SC 160; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Ghulam Zainab and another v. Said Rasool 2004 CLC 33; Ghulam Muhammad and another v. Muhammad Ramzan through L.Rs. 2007 MLD 1769; Muhammad Asghar and others v. Hakam Bibi through L.Rs. and others 2015 CLC 719 and Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi 2013 SCMR 868 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---If courts below had acted with material irregularity and legal infirmity, High Court could take cognizance of the matter.

Nasir Abbas v. Manzoor Haider Shah PLD 1989 SC 568 and Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others 2014 SCMR 914 rel.

Nafeer Ahmad Malik for Petitioner.

Nemo for Respondents.

Date of hearing: 4th April, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---This revision petition calls in question the validity of the judgment and decree dated 08.09.2015 and 08.05.2015, passed by learned Courts below, whereby the suit for declaration, cancellation of a gift deed and permanent injunction, was dismissed.

2. The controversy involved in this case, as per the record, revolves around the validity of a gift mutation No.1005, dated 26.08.1984 (Exh.D1), of the suit land, entered on the basis of an oral gift allegedly made by the petitioner/Mst. Mehtab Bibi along with her two sisters in favour of their brothers.

3. The petitioner, who is real sister of Khadim Hussain deceased/respondent No.1/ predecessor-in-interest of respondents Nos.A to I, Mulazim Hussain deceased/ respondent No.2/predecessor-in-interest of respondents Nos.A to L AND Mst. Zuhra Bibi deceased respondent No.3/predecessor of respondents Nos.A and B, filed a suit for declaration for the cancellation of a gift deed No.1005, dated 26.08.1984 of the suit land, entered on the basis of an oral gift, on the grounds, that the predecessor-in-interest of the parties to the case at the time of his death left suit land and two sons, three daughters to mourn his death.

4. The learned trial court after completing all the codal and legal formalities dismissed the suit vide judgment dated 08.05.2015, against which an appeal was filed, which was dismissed on 08.09.2015.

5. Respondents have been proceeded against ex parte vide order dated 02.02.2016.

6. Heard. Record perused.

7. Firstly it is to be seen and adjudicated as to whether the respondents, who are the beneficiaries of the gift, have succeeded to prove the validity of the alleged gift through credible evidence. The whole of the record was scanned and particularly the evidence produced by the respondents and found, that all the DWs could not tell the time, date, place and names of the witnesses in whose presence the alleged oral gift was made by the petitioner. Needless to mention, that the respondents were required to prove the transaction of oral gift independently irrespective of the execution of the gift mutation.

In my opinion, the respondents have miserably failed to prove the oral gift and its ingredients through any independent and confidence inspiring evidence, thus, this type of the transaction of a gift is hardly sustainable in law.

8. As regards, the gift mutation No.1005, dated 26.08.1984 (Exh.Dl), the record reveals, that the respondents have failed to produce any official/officer from the revenue side to prove the authenticity and validity of the gift. Even otherwise the respondents were required to produce the scribe and signatory of the afore-referred alleged gift mutation, which is mandatory as per the dictum laid down by the Hon'ble Supreme Court of Pakistan in the judgment cited as "Khan Muhammad Yusuf Khan Khattak v. S. M Ayub and 2 others" (PLD 1973 Supreme Court 160). Relevant part of the judgment (supra) is reproduced hereunder:--

"When I say that the document Exh. P.E. is unproved, I have in mind the mandatory provisions of section 67 of the Evidence Act, which lay down that "if a document is alleged to be signed or written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting". If the case of the respondent was that the appellant had signed the original of Exh. P. E. or the certificate appended to it, it must have been proved that it was in the appellant's handwriting, for which no effort whatsoever was made. In the case of Bengal Friends & Co. v. Gour Benode Saha & Co., this Court had expressed itself on this point as follows:--

"Documents which are not copies of judicial record, should not be received in evidence without proof of signatures and handwriting of persons alleged to have signed or written them."

I am of the view that even if such documents are brought on record and exhibited without objection, they remain on the record as "exhibits" and faithful copies of the contents of the original but they cannot be treated as evidence of the original having been signed and written by the persons who purport to have written or signed them, unless the writing or the signature of that person is proved in terms of the mandatory provisions of section 67 of the Evidence Act."

9. There is another aspect of the case, that while entering the alleged gift mutation No.1005, dated 26.08.1984 (Exh.D1), only the statement of Mst. Zuhra Bibi, real sister of the petitioner is mentioned (or allegedly recorded) and the statement of the petitioner is nowhere available in the aforesaid document. From the above facts of the case, it proves, that the petitioner did not gift her share of land in favour of her brothers and the thumb impression of the petitioner was obtained by playing fraud and misrepresentation. This practice has already been deprecated by the Hon'ble Supreme Court of Pakistan in the landmark judgment cited as "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 Supreme Court 1), wherein the Hon'ble Supreme Court of Pakistan has observed, that the women, who are weaker segment of the society, should not be deprived from their right of inheritance in the name of customs or by emotionally exploiting them. The relevant portion of the judgment is reproduced as under:--

"As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case) is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.

In the rural areas where 80% of the female populations resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts

act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/ seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an ubranised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'fights', up to the enforcement' even in homes, through 'Social Security' Laws, with web of network of 'Inspectorates' etc. who are supposed to be helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin-sometimes by the urbanized brother himself is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

Further reliance is also placed on Ghulam Zainab and another v. Said Rasool (2004 CLC 33) Ghulam Muhammad and another v. Muhammad Ramzan through L.Rs. (2007 MLD 1769) and Muhammad Asghar and others v. Hakam Bibi through L.Rs and others (2015 CLC 719).

10. There is another aspect of the case, that the petitioner is an illiterate and parda-nasheen lady and was completely ignorant about the transaction of gift mutation and further at the time of making the afore-referred gift mutation no male family member of the petitioner was with her, therefore, the gift mutation is dubious and liable to be set aside in view of the law laid down by Hon'ble Supreme Court of Pakistan in the judgment cited as "Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi (2013 SCMR 868), wherein the Hon'ble Supreme Court of Pakistan has ruled, that the legal protection provided to the Parda Nasheen lady is also available to an illiterate lady. The relevant esteemed paragraph is reproduced as under:--

"6. ....The contention that the general power of attorney was given by the respondent/ plaintiff not to a stranger but to her own son-in-law and that she was not a 'Pardanasheen Lady' for which the courts of law have provided protection is not tenable in the facts and circumstances of the instant case, first, because it is in evidence that the relations between the two were too strained on account of the discord between him and her daughter and in the normal course of events she could not have reposed

that kind of trust; second, the protection provided to them in law is on account of the fact that they invariably are helpless, weak and vulnerable. The said consideration would equally be attracted to an illiterate lady particularly when she was placed in circumstances which made her vulnerable to deceit misrepre-sentation."

11. Learned courts below while recording the concurrent findings have totally ignored this aspect of the case and decided the lis on the basis of surmises and conjectures. In fact both the learned courts below have not carefully perused the evidence produced by the respondents and the contents of the gift mutation.

10(sic). The learned appellate court in paragraph No.11 of the judgment impugned herein, although agreed with the arguments advanced by the learned counsel for the petitioner/appellant that the respondents were required to prove the ingredients of gift but astonishingly observed, that these essentials (ingredients of gift) were to be proved by the respondents in case the petitioner could establish the factum of fraud.

In my opinion the learned appellate court who was under legal obligation being the first court of appeal to carefully peruse the record, had not taken into consideration the contents of the plaint and the statement of the petitioner while appearing in the witness box wherein the petitioner has categorically stated the factum of fraud and misrepresentation, therefore, the findings recorded by the learned courts below are without any substance rather contrary to the record available on the file.

12. Although both the learned courts below recorded concurrent findings but the Hon'ble Supreme Court of Pakistan has observed; that if the courts below acted with material irregularity and legal infirmity, the High Court while exercising the revisional jurisdiction conferred under section 115 of Code of Civil Procedure, 1908, can take the cognizance of the matter.

The Hon'ble Supreme Court of Pakistan in the judgment cited as "Nasir Abbas v. Manzoor Haider Shah" (PLD 1989 Supreme Court 568), has observed that this type of the concurrent findings can be interfered. The relevant portion is reproduced as under:--

"11. …. It is also settled that if the lower Court, misreads the evidence on record and fails to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court. See Dwarika v. Bagawati (AIR 1939 Rangoon 413) and Fut Chong v. Maung Po Cho (AIR 1929 Rangoon 145)."

In another esteemed judgment cited as "Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others" (2014 SCMR 914), the Hon'ble Supreme Court of Pakistan has observed as under:--

"8. The argument that when all the fora functioning in the revenue hierarchy concurrently held that the appellants were occupying the land in dispute in their capacity as tenants, such finding being one of fact could not have been interfered with by the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, has not impressed us as a finding does not become sacrosanct because it is

concurrent. It becomes sacrosanct only if it is based on proper appraisal of evidence. The finding of the fora functioning in the revenue hierarchy despite being concurrent was not based on proper appraisal of evidence and due application of law, therefore, the High Court was well within its jurisdiction to interfere therewith. For the very condition for conferment of jurisdiction on a Court of law is to render a finding on proper appraisal of evidence and due application of law. If and when it would do otherwise, it would go outside its jurisdiction. Such order can well be quashed in exercise of Constitutional jurisdiction of the High Court. An order thus passed cannot be protected because the repository of such jurisdiction has the jurisdiction to pass it. Lord Denning in his well-known book "the Discipline of law", while commenting on orders of this nature at page 74, observed as under:--

"This brings me to the latest case. In it I ventured to suggest that whenever a tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void, because parliament only conferred jurisdiction on the tribunal on condition that it decided in accordance with law."

Another paragraph of this book at page 76 also merits a keen look which reads as under:--

"I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so as to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in what court it is heard. The way to get things right is to hold thus: No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."

13. In view of above, this revision petition stands allowed, the judgment and decree dated 08.09.2015 and 08.05.2015, passed by learned Courts below is set aside and the suit filed by the petitioner is decreed. No order as to costs.

ZC/M-151/L Revision allowed.

2017 Y L R 2024
[Lahore]
Before Ali Akbar Qureshi, J
IRSHAD AHMAD and another---Petitioners
Versus
USAMA HASSAN and others---Respondents

C.R. No.946 of 2007, heard on 8th December, 2015.

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

----S. 8---Qanun-e-Shahadat (10 of 1984), Arts. 17(2) & 79---Suit for possession of immovable property---Plaintiffs had not produced marginal witnesses of sale deed to fulfil the mandatory requirement of Arts. 17(2) & 79 of Qanun-e-Shahadat, 1984---Even buyer and identifier were not produced in the court---Plaintiffs had failed to prove their title and they were not entitled for recovery of possession under S. 8 of Specific Relief Act, 1877---Sale deed on the basis of which suit was filed was not admissible in law---Impugned judgments and decrees passed by the courts below were set aside and suit was dismissed---Revision was allowed in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241; Manzoor Ahmad and 9 others v. Ghulam Nabi and 5 others 2010 CLC 350; Mst. Resham Bibi and others v. Lal Din and others 1999 SCMR 2325; Khan Mir Daud Khan and others v. Mahrullah and others PLD 2001 SC 67; Mst. Ramzan Bibi v. Additional District Judge and others 1995 CLC 1506; Mst. Zubaida v. City District Government, Karachi PLD 2004 Kar. 304; Abdul Rashid v. Muhammad Yaseen and another 2010 SCMR 1871 and Mst. Shah Sultan and 45 others v. Chief Commissioner of Islamabad and 5 others 2004 CLC 145 ref.

Ali Muhammad and another v. Muhammad Bashir and another 2012 SCMR 930; Hazrat Ullah and others v. Rahim Gul and otheres PLD 2014 SC 380 and Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

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

----S. 115---Revisional jurisdiction of High Court--- Scope--- Concurrent findings recorded by the courts below could be interfered by the High Court if same were based on insufficient evidence, mis-reading of evidence, non-consideration of material evidence, erroneous presumption of facts and consideration of inadmissible evidence.

Muhammad Aslam v. Mst. Ferozi and others PLD 2001 SC 213 rel.
Naveed Sheharyar Shaikh for Petitioners.
Syed Muhammad Shah for Respondents.
Date of hearing: 8th December, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision assails the judgment and decree dated 19.12.2006 and 18.04.2006, passed by the learned Courts below, whereby the suit for possession filed by the respondents was decreed against the petitioners.

2. The necessary facts for the disposal of this revision petition are that; the respondents/plaintiffs (hereinafter mentioned as respondents) instituted a suit for possession against the petitioners/ defendants (hereinafter mentioned as petitioners) on the grounds, that the respondents purchased the suit land from one Musharaf Nawaz for a consideration of Rs.60,000/- through Registered Sale Deed No.156, dated 20.04.2001; the sale was given effect in the revenue record against Mutation No.8857, dated 27.08.2001; that the respondents raised the four-walls and also installed a door and the same was given to petitioner No.1/Irshad Ahmad, who is policeman for few months on the promise, that the same shall be vacated as and when the respondents will ask; and when the respondents demanded the possession of the suit land, the petitioners refused to accede the lawful demand.

Petitioners in response of the notice appeared in the Court, filed their contesting written statement, wherein it was specifically stated, that the petitioners also purchased the suit land from the same vendor namely Musharaf Nawaz and having the possession in their own rights.

Learned trial court framed necessary issues out of the divergent pleadings of the parties recorded the evidence and finally decreed the suit vide judgment and decree dated 18.04.2006, against which an appeal was filed by the petitioners, which too was dismissed vide judgment and decree dated 19.12.2006. Hence, this revision petition.

3. Learned counsel for the petitioners mainly argued the following points:--

> (1) That the format of the suit is in accordance with the terms of Section 8 and not Section 9 of the Specific Relief Act, 1877, therefore, the respondents were required to prove their title;
>
> (2) That the respondents failed to produce the marginal witnesses, identifier or even buyer of the sale deed allegedly executed in their favour by Musharaf Nawaz the vendor, therefore, this type of the document cannot be received or relied in evidence. Reliance is placed on "Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others" (PLD 2011 SC 241), also submitted, that the respondents have also failed to fulfill the requirements of Articles 70 and 79 of the Qanun-e-Shahadat Order, 1984.
>
> (3) That it is the duty of the respondents to establish their ownership without any shadow of doubt. Reliance is placed on "Manzoor Ahmad and 9 others v. Ghulam Nabi and 5 others" (2010 CLC 350) and mere registration does not mean the execution of the document/sale deed.

4. Further submitted, that the petitioners at the time of filing the written statement specifically stated, that the petitioners have also purchased the land from the same vendor i.e. Musharaf Nawaz and the petitioners to prove the sale deed produced two marginal

witnesses DW2 and DW3 as well as Halqa Patwari, whereas the respondents while filing the suit for possession did not ask for the declaration of the suit and that cancellation of the sale deed executed in favour of the petitioners, therefore, the suit is not maintainable. Reliance is placed on "Muhammad Aslam v. Mst. Ferozi and others" (PLD 2001 SC 213), and "Ali Muhammad and another v. Muhammad Bashir and another" (2012 SCMR 930).

5. Both the parties i.e. petitioner and the respondents purchased the land from one vendor and out of same Khata i.e. Khata No.210, therefore, suit for possession against the co-sharer is not maintainable. Reliance is placed on "Mst. Resham Bibi and others v. Lal Din and others" (1999 SCMR 2325), "Khan Mir Daud Khan and others v. Mahrullah and others" PLD 2001 SC 67 and "Mst. Ramzan Bibi v. Additional District Judge and others" (1995 CLC 1506).

6. As regards the earlier suit filed by the petitioner wherein the plaint was rejected and rejection of the plaint is not res judicata. Reliance is placed on "Mst. Zubaida v. City District Government, Karachi" (PLD 2004 Karachi 304).

7. On the other hand, learned counsel for the respondents argued the case on the following lines; that the suit land was purchased on 20.04.2001 and four-walls were constructed and was given for a few months to petitioner No.1, for his use who has refused to return the same; that the suit has been filed by the respondents under Section 9 of the Specific Relief Act, 1877, and not under Section 8 and mere non-mentioning of the provision of law does not affect the rights of the respondents; that the sale deed was executed in favour of the respondents prior to sale deed executed in favour of the petitioners, therefore, the sale deed executed prior in time is to be given weightage. "Abdul Rashid v. Muhammad Yaseen and another" (2010 SCMR 1871) and "Mst. Shah Sultan and 45 others v. Chief Commissioner of Islamabad and 5 others" (2004 CLC 145).

Learned counsel also referred the cross examination of patwari, who appeared as DW.

8. Heard. Record perused.

9. The record of the case was perused with the assistance of learned counsel for the parties. Firstly it is to be seen as to whether the suit filed by the respondents according to its contents and averments falls within the ambit of Section 8 or 9 of the Specific Relief Act, 1877. For ready reference, Sections 8 and 9 are re-produced hereunder:--

> **8. <u>Recovery of specific immovable property</u>**. A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure.
>
> **9. <u>Suit by person dispossessed of immovable property</u>**. If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit [* * *] recover possession thereof, notwithstanding any other title that may be set up in the suit.
>
> Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

> No suit under this section shall be brought against [the Central Government or any Provincial Government].
>
> No appeal shall lie from any order or decree passed in any suit instituted under this section nor shall any review of any such order or decree be allowed.

The aforesaid provisions of law may be simply interpreted in the manners, that under Section 8, the recovery of the immovable property can be prayed on the basis of the title, whereas under section 9, a person who has been dispossessed without his consent can be asked for the recovery of the immovable property. The averments of the suit filed by the respondents were examined, wherein the respondents in first paragraph of the suit has given the detail of the suit property purchased by him from one Musharaf Nawaz against consideration through a registered sale deed and sought the recovery of possession of the land purchased by him. Therefore, it can safely be observed, that the suit filed by the respondents does fall within the ambit of section 8 of the Specific Relief Act.

10. There is another distinction sussing out from the record, that the respondents with their own consent handed over the possession of the suit land to the petitioners allegedly to use the same for a certain period and it was agreed that the same will be returned as and when the respondents will claim, therefore, the provision of Section 8 of Act ibid is fully applicable and not Section 9.

11. The afore-referred averments of the suit filed by the respondents offend the provisions of Section 9 of the Act ibid, wherein it is clearly mentioned, that the suit under Section 9 can only be filed if the person has been dispossessed without his consent from the immovable property, whereas in this case the situation is otherwise as the respondents with their free will and consent gave the possession of the property to the petitioners, as alleged by them, to use the same for certain period. By this way, the contention raised by the learned counsel for the respondents during the course of arguments, that the respondents filed the suit under Section 9 instead of under Section 8 of the Act ibid, is contrary to the averments of the plaint filed by them and the respondents are estopped by their own conduct which is floating on the surface of the record to claim, that the suit has been filed under Section 9 of the Act ibid.

On this proposition, the Hon'ble Supreme Court of Pakistan, has ruled in the recent judgment "Hazrat Ullah and others v. Rahim Gul and others" (PLD 2014 SC 380), that in a suit filed under Section 8 of the Specific Relief Act, 1877, the declaration of the entitlement is an inbuilt relief claimed by the plaintiff. Relevant paragraph is re-produced as under:--

> "As far as the plea that Mst. Jarjan had never challenged the sale deed dated 19-04-1938 in favour of Qudratullah in the suit, but only filed a suit for possession, it may be held that in a suit under section 8 of the Specific Relief Act, 1877, the declaration of the entitlement is an inbuilt relief claimed by the plaintiff of such a case. Once the plaintiff is found to be entitled to the possession, it means that he/she has been declared to be entitled, which includes the declaration of title of the plaintiff qua the property, and this is integrated into the decree for possession; and when Mst. Marjan had attained the decree for possession and found entitled to the possession in terms of section 8 (supra), undoubtedly the sale deed dated 19-4-1938 in favour of

> Qudratullah irrespective of it not being directly challenged, would render the above sale deed as nugatory and redundant; because the title of Mst. Marjan shall be valued on the basis of the judicial verdict i.e. the decree, and the sale deed shall not be a hindrance in her way. "

In the judgment (supra) the Hon'ble Supreme Court of Pakistan has observed that in case the suit has been filed under section 8 of the Specific Relief Act, 1877, the declaration of the document would be an inbuilt relief but in this case, the learned counsel for the respondents categorically submitted during the course of arguments that the respondents have filed the suit under section 9 of the Specific Relief Act, 1877, and not under section 8 of the said Act, to recover the possession. Further, the respondents as established on record, could not produce even a single witness, scribe or identifier to fulfill the mandatory requirement of Articles 17(2) and 79 of the Qanun-e-Shahadat Order, 1984, to prove their title (sale deed) in the circumstances, when the respondents claimed the possession on the basis of a title and it has already been observed, that according to the averments of the plaint and submission made by the respondents, the suit filed by the respondents falls in the ambit of Section 8 instead of Section 9 of the Specific Relief Act, 1877.

12. As depicts from the record and not denied by the learned counsel for the respondents, that the respondents did not produce the marginal witnesses to fulfill the mandatory requirement of Articles 17(2) and 79 of Qanun-e-Shahdat Order, 1984. Even the respondents did not produce the buyer and the identifier therefore, the petitioners completely failed to prove their title, hence, are not entitled to ask for the recovery of the possession under section 8 of the Specific Relief Act, 1877. In these circumstances, the sale deed on the basis of which, the respondents have filed the suit, is otherwise not admissible in law. Reliance is placed on "Farzand Ali and another v. Khuda Bakhash and others" (PLD 2015 SC 187)

13. The Hon'ble Supreme Court of Pakistan in another judgment cited as "Ali Muhammad and another v. Muhammad Bashir and another" (2012 SCMR 930) has dealt this proposition in the following esteemed words:--

> "7. We have heard learned counsel for the parties and have also perused the available record. It is an admitted fact that both the suits were filed on 17-2-1979 by appellant Ali Muhammad and Muhammad Ramzan (appellant in the other appeal) against Bashir and Fateh Muhammad respectively seeking declaration and challenging the registered pata milkiat, which was executed on 21-07-1975 and registered on 24-07-1975, to be declared as ineffective. These deeds were produced in evidence. No objection to the production of these deeds was taken by the appellants before the trial Court nor their authenticity was challenged. These deeds were produced and exhibited. On the basis of these deeds, the respondents in both the appeals, claimed their right in the property. The format of the suit is confined to declaration of title. In the plaint, the appellants in both the appeals, have admitted that the respondents are in physical possession of half portion of the properties and were in knowledge of the registered instruments of pata milkiat in favour of the respondents. In the face of such material, the appellants have not sought cancellation of registered instruments in terms of section 39 of the Specific Relief Act in the suit nor direction of their ejectment in suits have been sought. When confronted with this situation, the learned

counsel for the appellants could not offer any plausible explanation except that he contended that the appellants had the right to file a separate suit for possession. Even this argument is without substance. The law does not permit a second suit if a right to the plaintiff is available at the time of filing of the suit. A second suit in such-like situation is otherwise barred under Rule 2, Order II, C.P.C.

In paragraphs Nos.10 and 11 of this judgment it has been observed, that:--

> "In these circumstances, we are of the considered view that the appellants have failed to establish before the trial Court that they have the right to seek declaration of title of the land in the absence of specific prayer of cancellation of documents and possession, moreso when the appellants have admitted possession on the strength of registered documents coupled with the evidence of Sher Muhammad which went un-rebutted. We, therefore, hold that the suits were not competent, in the first place and in the second place evidence of Sher Muhammad has proved the arrangement between the parties pursuant to which the registered instruments were executed by appellants.
>
> 11. For the aforesaid reasons, both these appeals are dismissed with no order as to costs and the judgment of the trial Court is maintained."

There is another judgment titled "Muhammad Aslam v. Mst. Ferozi and others" (PLD 2001 SC 213), which deals with the same proposition wherein it is observed, that:--

> "It is also not understandable as to how a suit for possession had been filed without seeking declaration in respect of title."

14. Needless to reiterate, that the respondents filed the suit for possession on the basis of the title deed, whereas the petitioners/defendants while filing the written statement specifically stated, that they are in possession of the suit land on the basis of a registered sale deed but the petitioners neither amended the plaint nor sought the cancellation of the sale deed claimed by the petitioners.

15. As regards the concurrent finding, the Hon'ble Supreme Court of Pakistan has observed in plethora of judgment that the concurrent findings could not be considered as sacrosanct and this Court is competent to interfere if such findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous, presumption of facts and consideration of inadmissible evidence. Reliance is placed on "Muhammad Aslam v. Mst. Ferozi and others" (PLD 2001 SC 213).

16. In view of above, it is held, that the suit filed by the respondents falls within the ambit of section 8 of Specific Relief Act, 1877, and not under section 9 of the Act ibid and the respondents have failed to prove their title and are not entitled to ask for the possession of the suit land.

17. Resultantly, this revision petition is allowed, the judgment and decree passed by learned Courts below is set aside and the suit filed by the respondents is dismissed. No order as to costs.

ZC/I-11/L Revision allowed.

2017 Y L R 2173
[Lahore]
Before Ali Akbar Qureshi, J
ASIF IQBAL---Petitioner
Versus
AMAN ULLAH and 2 others---Respondents

R.S.A. No.331 of 2016, decided on 23rd December, 2016.

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

----S. 12---Transfer of Property Act (IV of 1882), S. 52---Suit for specific performance of agreement to sell---Lis pendens, doctrine of---Applicability---Suit land was further transferred during the pendency of suit---Suit was decreed concurrently--- Validity---Transferee purchased the suit land during pendency of civil suit---Rule of lis pendens was applicable in the case---Transferee could not bring on record that precautionary measures were taken by him before purchasing the land in question---Mere inquiring from the revenue officials was not sufficient to prove the stance of bona fide purchaser for consideration without notice---Transferee who purchased the suit land during pendency of suit was not entitled to defend the suit independently---Transferee had failed to prove his stance of bona fide purchaser---Transaction during pendency of suit was subject to final outcome of the suit---Transferee had to swim and sink with his original vendor---Agreement to sell had been proved by the plaintiff---No illegality had been pointed out in the findings recorded by the Courts below while decreeing the suit---Second appeal was dismissed in limine.

Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905; Usman v. (1) Haji Omer Haji Ayub, and (2) Haji Razzak PLD 1966 SC 328; Mst. Allah Ditti v. Settlement and Rehabilitation Commissioner, Lahore and 3 others PLD 1966 (W.P.) Lah. 659; Australasia Bank Ltd. Lahore v. Bashir Barton Stores, Sargodha and 2 others PLD 1971 Lah. 133; Ali Shan and another v. Sher Zaman and 8 others PLD 1975 Lah. 388; Shukri and 3 others v. Ch. Muhammad Shafi Zaffar and 2 others PLD 1975 Lah. 619; Muhammad Jan Ghaznavi v. Captain Haji Muhammad Kabir and 3 others PLD 1977 Quetta 60; Malik Muhammad Iqbal v. Ghulam Muhammad and others 1990 CLC 670; Industrial Development Bank of Pakistan through Deputy Chief Manager v. Saadi Asmatullah and others 1999 SCMR 2874; Mukhtar Baig and others v. Sardar Baig and others 2000 SCMR 45; Muhammad Sabir Khan and 13 others v. Rahim Bakhsh and 16 others PLD 2002 SC 303; Muhammad Nawaz Khan v. Muhammad Khan and 2 others 2002 SCMR 2003; Muhammad Anwar Khan v. Habib Bank Ltd. and 4 others 2005 CLD 165; Muhammad Afzal v. Matloob Hussain and others PLD 2006 SC 84; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983; Muhammad Afzal v. Matloob Hussain and others PLD 2006 SC 84 and Hafiz Iftikhar Ahmed and 3 others v. Khushi Muhammad and another 2014 CLC 1689 rel.

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

----S. 52---Lis pendens, doctrine of---Applicability---Rule of lis pendens would apply till the final adjudication which was given in an appeal or revision at the final level of judicial hierarchy.

Maulana Riazul Hassan v. Muhammad Ayub Khan and another 1991 SCMR 2513 rel.

Sh. Naveed Sheharyar and Bashir Ahmad Mirza for Petitioners.

ORDER

ALI AKBAR QURESHI, J.---This Regular Second Appeal is directed against the judgment and decree dated 02.12.2016 and 28.01.2015, passed by the learned Courts below, whereby the suit for specific performance of an agreement to sell, filed by respondents Nos.1 and 2, was decreed.

2. The following controversies, which require adjudication, have arisen out from the instant appeal;

i. The interpretation and application of Section 52 of the Transfer of Property Act, 1882.

ii. Whether the appellant, who admittedly purchased the suit land during the currency of the civil suit, could prove his stance of bona fide purchaser for consideration without notice.

iii. Whether the respondents Nos.1 and 2 could prove the agreement to sell executed by respondent No.3 in their favour, in accordance with law.

3. Precisely the facts of the instant appeal are that, respondent No.3, who was owner of a land measuring 26 Kanal (the suit land), entered into an agreement to sell with the respondents Nos.1 and 2 for a consideration of Rs.1 crore, out of which Rs.14,00,000/- were paid as advance money and Rs.20,00,000/- were paid at the time of executing the agreement to sell; as regard the remaining amount i.e. Rs.66,00,000/-, it was agreed between the parties, that the same shall be paid at the time of execution of the registered sale deed i.e. 22.08.2008. Despite the fact, as contended by respondents No.1 and 2, they remained ready for the execution of the sale deed but the respondent No.3 refused to execute the sale deed, whereupon respondents Nos.1 and 2 filed a suit for specific performance of the agreement to sell. During the pendency of the suit, respondent No.3 further alienated the suit land in favour of the present appellant. On the application of the respondents Nos.1 and 2 under Order I Rule 10, C.P.C., the appellant was impleaded in the list of defendants. The suit was contested by respondent No.3 through written statement, wherein he denied the claim of respondents Nos.1 and 2. The appellant after impleadment also filed his written statement mainly on the ground, that he is bona fide purchaser of the suit land for consideration without notice as it was not informed by the respondent No.3 regarding the agreement to sell or the pendency of the suit. The learned Trial Court, after completing all the codal formalities including framing of issues and hearing of the arguments, decreed the suit; against which an appeal was filed by the appellant which was dismissed. It is pertinent to mention here, that the original vendor i.e. respondent No.3 did not file appeal against the judgment and decree dated 28.01.2015, passed by the learned Trial Court.

4. Learned counsel for the appellant mainly argued, that the appellant although purchased the suit land during the pendency of the suit but he is a bona fide purchaser for consideration without notice as the respondent No.3 did not inform at the time of receiving earnest money regarding the pendency of the suit filed by respondents Nos.1 and 2; that the appellant, after purchasing the land from respondent No.3, has sold out to different persons who are residing at the site and if any adverse order is passed, that will also affect the rights of End purchasers.

5. The appellant, after impleading in the list of the defendants, filed an application before the learned Trial Court to cross-examine the witnesses of the respondents Nos.1 and 2 who had already recorded their examination-in-chief, which was dismissed. The order of dismissal of application was challenged in civil revision the same was dismissed by this Court. Another application to implead the End purchasers was filed by the appellant, which was disallowed up to this Court through a judgment passed in C.R. No.520/2013.

6. Heard.

7. In order to appreciate the contentions raised by the learned counsel for the appellant, the record as well as the findings of the learned Courts below have been perused with the assistance of learned counsel for the appellant.

8. As regard the claim of bona fide purchaser, it is not denied that the appellant purchased the suit land during the pendency of the civil suit. The civil suit was filed in the year 2007 and during the pendency in the year 2010, the suit land was purchased by the appellant, therefore, the rule of lis pendens embodied in Section 52 of the Transfer of Property Act, 1882, which has been interpreted by the Hon'ble Supreme Court of Pakistan in Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905) is squarely applicable in this case. The relevant part of the judgment (supra), wherein section 52 of the Act ibid has been defined, is reproduced as under:--

> "The aforesaid section manifestly embodies the rule of lis pendens, which is available both in equity and at the common law. The rule and the section is founded upon the maxim "pendente lite nihil innovetur", which means that pending litigation, nothing should be changed or introduced. The virtual and true object of lis pendens is to protect and safeguard the parties to the suit and their rights and interest in the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person. The rule unambiguously prescribes that the rights of the party to the suit, who ultimately succeed in the matter are not affected in any manner whatsoever on account of the alienation, and the transferee of the property shall acquire the title to the property subject to the final outcome of the lis. Thus, the transferee of the suit property, even the purchaser for value, without notice of the pendency of suit, who in the ordinary judicial parlance is known as a bona fide purchasers in view of the rule/doctrine of lis pendens shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound. The transferee therefore does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all intents and purposes and has to swim and sink with his predecessor in interest. The

rule of lis pendens is founded upon the principle that it would be impossible that any action or suit could be brought to a successful termination if the alienations pendente lite are permitted to prevail and the subsequent transferee is allowed to set out his own independent case, even of being the bona fide transferee against the succeeding party of the matter and ask for the commencement of de novo proceedings so as to defeat the claim which has been settled by a final judicial verdict. The foundation of the doctrine is not rested upon notice, actual or constructive, it only rest on necessity and expediency, that is, the necessity of final adjudication (Emphasis supplied) that neither party to the litigation should alienate the property so as to effect the rights of his opponent. If that was not so, there would be no end to litigation and the justice would be defeated. In support of the above, reliance is placed upon Messrs Aman Enterprises v. Messrs Rahim Industries Ltd. and another (PLD 1993 SC 292), Muhammad Nawaz Khan v. Muhammad Khan and 2 others (2002 SCMR 2003). Besides, in West Virginia Pulp and Paper Co. v. Cooper, 106 S.E. 55, 60, 87 W.Va. 781, it has been held "the doctrine of "lis pendens" is that one who purchases from a party pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause and is bound by the decision that may be entered against the party from whom he derived title."

9. As regard the claim of the appellant that he is a bona fide purchaser and purchased the land in good faith, it is to be seen as to whether the appellant could prove his stance by bringing or producing unimpeachable evidence. It depicts from the record, that the appellant could not bring any evidence on record the list of precautionary measures were taken by the appellant before purchasing the land. The appellant, while appearing in the witness box, has simply stated, that before purchasing the suit land, he contacted with the Halqa Patwari but unfortunately, no evidence in this regard except the statement of the appellant is available on the record. It is held in chains of judgments, that mere inquiring from the revenue officials is not sufficient to prove the stance of bona fide purchaser for consideration without notice. Reliance is placed on Usman v. (1) Haji Omer Haji Ayub, and (2) Haji Razzak (PLD 1966 SC 328), Mst. Allah Ditti v. Settlement and Rehabilitation Commissioner, Lahore and 3 others (PLD 1966 (W.P.) Lahore 659), Australasia Bank Ltd. Lahore v. Bashir Barton Stores, Sargodha and 2 others (PLD 1971 Lahore 133), Ali Shan and another v. Sher Zaman and 8 others (PLD 1975 Lahore 388), Shukri and 3 others v. Ch. Muhammad Shafi Zaffar and 2 others (PLD 1975 Lahore 619), Muhammad Jan Ghaznavi v. Captain Haji Muhammad Kabir and 3 others (PLD 1977 Quetta 60), Malik Muhammad Iqbal v. Ghulam Muhammad and others (1990 CLC 670), Maulana Riazul Hassan v. Muhammad Ayub Khan and another (1991 SCMR 2513), Industrial Development Bank of Pakistan through Deputy Chief Manager v. Saadi Asmatullah and others (1999 SCMR 2874), Mukhtar Baig and others v. Sardar Baig and others (2000 SCMR 45), Muhammad Sabir Khan and 13 others v. Rahim Bakhsh and 16 others (PLD 2002 SC 303), Muhammad Nawaz Khan v. Muhammad Khan and 2 others (2002 SCMR 2003), Muhammad Anwar Khan v. Habib Bank Ltd. and 4 others (2005 CLD 165), Muhammad Afzal v. Matloob Hussain and others (PLD 2006 SC 84), Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others (2012 SCMR 983) and Hafiz Iftikhar Ahmed and 3 others v. Khushi Muhammad and another (2014 CLC 1689).

10. From the principle laid down in the afore-referred judgments, the appellant, who purchased the suit land during the pendency of the suit, is not entitled to defend the suit

independently. In these circumstances, it can conveniently be held, that the appellant has miserably failed to prove his stance of bona fide purchaser and needless to mention, that the transaction to purchase the suit land by the appellant during the pendency of the suit was subject to the final outcome of the suit and as per rule of lis pendens, the appellant has to swim and sink with his predecessor in interest i.e. the original vendor/respondent No.3.

11. The Hon'ble Supreme Court of Pakistan, while interpreting Section 52 of Act ibid, which relates to the rule of lis pendens, has gone to the extent, that the rule of lis pendens will apply till the final adjudication which is given in an appeal or revision at the final level of the judicial hierocracy. The relevant part of judgment supra (PLD 2011 SC 905) is reproduced as under:--

> "8. While dealing with the proposition about the scope and application of section 52 ibid it may be relevant to state here, that as per the clear wording of the explanation to the section, when read as a whole, and especially by construing the expression "the suit or proceeding has been disposed of by a final decree or order" it undoubtedly means, that final verdict, which is given in an appeal or revision at the final level of the judicial hierarchy, which verdict has attained conclusiveness."

The rule of lis pendens has further been interpreted by the Hon'ble Supreme Court of Pakistan in the judgment (supra), in the following words:--

> "8 Therefore, the rule of lis pendens shall also be duly attracted and applicable during the period of limitation provided for an appeal or revision etc. to challenge a decree/order. If therefore an alienation of a suit property has been made by a party to the lis, who succeeds at one stage (such as trial), but the transfer is during the period of limitation available to the other (unsuccessful) party, to challenge that decision and ultimately the decree/order is over turned in its further challenge, such alienation made shall also be hit and shall be subject to the rule of lis pendens."

12. As regard the third controversy which relates to the execution of the agreement to sell qua the suit land between the respondents Nos.1 and 2 and 3, it is to be seen, as to whether respondents Nos.1 and 2, in whose favour the agreement to sell (Exh.P.1) was executed by the respondents No.3, succeeded to prove the same through unimpeachable and satisfactory evidence. As per the contents of (Exh.P.1), the agreement to sell was executed in the presence of two marginal witnesses namely, Pervaiz and Maqsood Ahmad. Both the marginal witnesses appeared as P.W.1 and P.W.2 in support of the claim of respondents Nos.1 and 2 and successfully proved the agreement to sell (Exh.P.1). The agreement to sell was also admitted by the respondent No.3 in an application (Exh.D.13) given by him to the Sub-Registrar for making his attendance before him. It can conveniently be concluded and held, that the respondents Nos.1 and 2, through convincing and confidence inspiring evidence, proved the agreement to sell and payment of the consideration, therefore, no illegality as appears from the concurrent findings has been committed by the learned Courts below while decreeing the suit. Reliance is placed on Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187).

13. Even otherwise, there is hardly any reason to interfere with the well worded concurrent findings of the learned courts below. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

14. Resultantly, this appeal is dismissed in limine and the judgment and decree passed by the learned Courts below is upheld. No order as to costs.

ZC/A-15/L Appeal dismissed.

2017 Y L R Note 39
[Lahore]
Before Ali Akbar Qureshi, J
Mst. HUMAIRA BEGUM and 5 others---Petitioners
Versus
UZMA AWAN and 17 others---Respondents

C.R. No.2252 of 2015, decided on 5th August, 2015.

(a) Partition Act (IV of 1893)---

----S. 4---Suit for possession through partition---Oral agreement---Proof of---Procedure---Contention of defendants was that suit property had been transferred in their favour through gift by their predecessor-in-interest---Suit was decreed concurrently---Validity---Parties to the suit were legal heirs of the deceased who had left the property in question---Defendants had failed to place on record any document in support of their conten-tion---Both the parties being legal heirs of deceased were owners of suit land to the extent of their shares---Suit property was still joint between the parties---Donee had to prove the time, date and place of offer; acceptance and delivery of possession in case of oral gift---Defendants had failed to bring on record any reliable and confidence inspiring evidence with that regard---Record of Excise and Taxation Department/property tax and P.T.1 could not be a title document---No person could be permitted to grab the inherited property and legal right of any other co-owner/legal heir on the basis of such record---No misreading or non-reading of evidence or jurisdictional defect had been pointed out by the defendants in the findings recorded by the courts below---Revision was dismissed in limine. [Paras. 6, 8, 9 & 11 of the judgment]

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Ghulam Zainab and another v. Said Rasool 2004 CLC 33; Ghulam Muhammad and another v. Muhammad Ramzan through L.Rs 2007 MLD 1769; Agricultural Development Bank of Pakistan through Attorney v. Khalid Aziz Malik and 6 others 2010 CLD 1; Muhammad Asghar and others v. Hakam Bibi through L.Rs and others 2015 CLC 719; Muzaffar Khan v. Sanchi Khan and another 2007 SCMR 181; Sh. Muhammad Rafique v. Sh. Muhammad Jameel 2015 MLD 642; Irfan and 5 others v. Surriya Jabeen and 4 others 2012 CLC 605; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi

v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

(b) Islamic law---

----Gift---Proof of---Procedure---Donee had to prove the time, date and place of offer; acceptance and delivery of possession in case of oral gift. [Para. 6 of the judgment]

Ch. Khurshid Ahmad for Petitioners.

ORDER

ALI AKBAR QURESHI, J.---This civil revision calls in question the judgment and decree dated 25.06.2015 and 16.02.2013, passed by the learned courts below, whereby the suit for possession through partition filed by the respondents was decreed.

2. The necessary facts for the disposal of this petition are, that the respondents filed a suit for possession through partition of the suit property on the grounds, that Muhammad Amin deceased, predecessor/ father of the parties to the suit, died leaving behind the petitioners/defendants and respondents/plaintiffs as his legal heirs; that Muhammad Amin deceased, at the time of death, left behind the suit property; that the suit property consisted of a residential building and shops which is in joint possession of the parties, therefore, the same be partitioned among the heirs of deceased Muhammad Amin.

3. The suit was contested by the petitioners, who are legal heirs of Muhammad Jamil, real son of deceased Muhammad Amin, through written statement, wherein it was alleged, that the respondents, who are daughters of Muhammad Amin, have no concern whatsoever with the suit property, as deceased Muhammad Amin, the predecessor of the parties, in his lifetime, transferred the suit property by way of gift in favour of his real son namely, Muhammad Jamil, the predecessor of the present petitioners.

The learned trial court, out of the controversial pleadings of the parties, framed necessary issues, recorded evidence of the respective parties and finally decreed the suit. The present petitioners/defendants being aggrieved thereof, filed an appeal which was dismissed, hence, this civil revision.

4. Learned counsel for the petitioners has mainly argued, that the suit filed by the respondents was not maintainable because of the reason, the proper court fee was not affixed and the suit was not valued in accordance with law. Further contended, that the deceased father of the parties to the suit namely, Muhammad Amin, in his lifetime transferred the property by way of gift in favour of his real son namely, Muhammad Jamil, deceased predecessor of the present petitioners, therefore, the respondents have no concern whatsoever with the suit land. For this purpose, the learned counsel has relied upon the copy of the Assessment Form commonly known as P.T.1 issued by the Excise and Taxation Department. Further submits, that the suit property is in possession of the petitioners from the last forty years and the property tax is being paid by the petitioners or predecessor of the petitioners namely, Muhammad Jamil, therefore, the petitioners have become owner of the suit property.

5. Heard. Record perused.

6. It is not denied, as evident from the record, that parties to the suit are legal heirs of deceased Muhammad Amin, who at the time of his death, left one son and three daughters along with the suit property, the suit property was in the name of the predecessor of the parties namely, Muhammad Amin and still exists in his name and that the petitioners have miserably failed to place on record any document in support of their contention, that the suit property was transferred in the name of their predecessor namely, Muhammad Jamil by the predecessor of the parties and original owner namely, Muhammad Amin. Both the learned courts below have concurrently reached to the conclusion, that the parties to the suit being the legal heirs of deceased Muhammad Amin are owner of the property to the extent of their shares, the property is still joint and the petitioners/defendants have failed to bring on record anything to show and prove the transfer of suit property by deceased Muhammad Amin in favour of his son Muhammad Jamil, therefore, it can safely be observed, that the petitioners just to deprive the daughters of deceased Muhammad Amin have taken this ill-founded and misconceived stance but could not prove through any iota of evidence. This proposition has already been resolved by the Hon'ble Supreme Court of Pakistan through a landmark judgment cited as Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 Supreme Court 1). The relevant part of the judgment is reproduced as under:--

"It is not so for the first time that it is being so held, Even earlier commentators on Islamic Law (its inheritance branch in particular) have indicated the same approach with reference to some decided cases. The heir in possession was considered to be in constructive possession of the property on behalf of all the heirs in spite of his exclusive possession, e.g., the possession of the brothers would be taken to be the possession of their sisters, unless there was an express repudiation of the claims of the sisters by the brothers. Hyder Khan v. Chanda Khan (501 IC 691 (All).

While dealing with express repudiation and ouster, it was observed that: "There cannot be ouster without a demand and a refusal, or without a clear declaration brought home to the knowledge of the co-sharers that lesser profits were being paid because the others were being ousted from the remainder of the share. A mere omission to pay profits does not in itself constitute ouster, and still less so, when something, though not the whole, is paid. The mere partition among the males without reference to the female heirs does not mean much in the shape of ousting them from their rights. Circumstances may exist in which an inference of knowledge can be drawn, or in which the laches or negligence of the co-owners is so great that knowledge will be presumed but a case of that type would have to be exceptional. The law does not penalise a co-owner who relies on the honesty of his co-sharer, and therefore ordinarily the mere fact that he does not take the trouble to assert his rights as he may be entitled to, would not justify an inference of ouster." (Mohammad Aminudin v. Md. Abdur Rahman 1941 NLJ 467)

It has further been observed in the judgment supra:--

"As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified

therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case) is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.

In the rural areas where 80% of the female population resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/ seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an ubranised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'rights', up to the enforcement' even in homes, through 'Social Security' Laws, with web of network of 'Inspectorates' etc. who are supposed to be helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin-sometimes by the urbanized brother himself, is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

There are some other judgments of this Court cited as Ghulam Zainab and another v. Said Rasool (2004 CLC 33), Ghulam Muhammad and another v. Muhammad Ramzan through L.Rs (2007 MLD 1769), Agricultural Development Bank of Pakistan through Attorney v. Khalid Aziz Malik and 6 others (2010 CLD 1 [Lahore]) and Muhammad Asghar and others v. Hakam Bibi through L.Rs and others (2015 CLC 719). In the judgment supra (2007 MLD 1769) it has been observed, that in the case of oral gift, the donee had to prove the time, date and place as to where the offer of gift was made to the donee which was accepted by the donee and how the delivery of possession was made to the donee. In this case, the petitioner simply stated in the pleadings and also argued by the learned counsel for the petitioner, that the suit property was transferred by Muhammad Amin, the predecessor of the parties, in favour of Muhammad Jamil, his real son, but the petitioners have miserably failed to bring on record any iota of reliable and

confidence inspiring evidence particularly regarding the time, date and place and in whose presence the property was transferred by the predecessor of the parties i.e. deceased Muhammad Amin in favour of Muhammad Jamil, his son.

7. As regard the valuation of the suit, the learned appellate court has dealt with this aspect of the case in detail and rightly concluded, that simply on this ground, the judgment of the learned trial court, keeping in view the peculiar circumstances of the case, could not be set aside.

8. As regard the stance vehemently argued by the learned counsel for the petitioners, that the predecessor of the petitioners namely, Muhammad Jamil had been paying the property tax and are in possession of the suit property from the last forty years, therefore, had become the owners. I am afraid, that the stance taken by the learned counsel for the petitioners has any substance or force. It has already been ruled in plethora of judgments and settled principle of law, that the record of Excise and Taxation/Property Tax and P.T.1 issued by the Excise and Taxation Department in any case is not the title document and on the basis of this, nobody can be permitted to grab the inherited property and legal right of any other co-owner/legal heir particularly the daughters who are, as observed by the Hon'ble Supreme Court of Pakistan in the judgment supra, are the weaker segment of the society. Reliance is placed on Muzaffar Khan v. Sanchi Khan and another (2007 SCMR 181), wherein it is observed, that on the basis of P.T.1 maintained by the Excise and Taxation Department, could not claim to be owner of the property. Reliance is also placed on Sh. Muhammad Rafique v. Sh. Muhammad Jameel (2015 MLD 642 [Lahore]) and Irfan and 5 others v. Surriya Jabeen and 4 others (2012 CLC 605 [Lahore]).

9. Although the learned counsel for the petitioners argued the case at length at the preliminary stage but could not point out any jurisdictional defect, legal infirmity, misreading and non-reading of evidence, with the concurrent conclusion rendered by the learned courts below, therefore, there is hardly any reason to interfere therewith. I find support from the recent valuable judgment of the Hon'ble Supreme Court of Pakistan titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others" (2014 SCMR 161). The relevant part of the esteemed judgment is reproduced as under:--

"In other words, the provisions of section 115, C.P.C. under which a High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities. The revisional jurisdiction of the High Court cannot be invoked against conclusions of law or fact, which do not, in any way, affect the jurisdiction of the Court. In the instant case, the learned High Court, in law, could not have investigated into the facts or exercised its jurisdiction on the basis of facts or grounds, which were already proved by the parties by leading evidence. We are of the considered view that the judgment impugned in these proceedings is unexceptionable. The learned High Court was justified in not interfering in the concurrent findings of fact which were based on the material brought on record and proper appreciation of evidence. "

10. Reliance is also placed on Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

11. Resultantly, this civil revision has no force and the same is dismissed in limine with no order as to cost.

ZC/G-28/L Revision dismissed.

2017 Y L R Note 98
[Lahore]
Before Ali Akbar Qureshi, J
ASMAT ULLAH---Petitioner
Versus
MUHAMMAD ASLAM---Respondent

C.R. No.3045 of 2016, heard on 20th June, 2016.

(a) Punjab Pre-emption Act (IX of 1991)---
----S. 13---Talbs, performance of---Talb-e-Muwathibat---Requirements---Plaintiff had not mentioned in the plaint the exact day, time, date and place as to when and where he performed Talb-i-Muwathibat---Effect---Pre-emptor should have mentioned in plaint the exact date, time, place and when and where he performed Talb-i-Muwathibat as the same was mandatory requirement of law---Right of pre-emption would be extinguished in case of pre-emptor's failure to do so---Decree for possession through pre-emption could not be passed, in circumstances. [Para. 6 of the judgment]
Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others PLD 2007 SC 302 rel.

(b) Punjab Pre-emption Act (IX of 1991)---
----S. 13---Talbs, performance of---Talb-i-Ishhad---Non-producing of postman as witness---Effect---Pre-emptor was under legal obligation to produce postman of concerned post office to prove the service of notice of Talb-i-Ishhad, in case the vendee denied the service of notice---Pre-emptor having failed to do the same, decree for possession through pre emption could not be passed in circumstances. [Para. 7 of the judgment]
Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105 and Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866 rel.

(c) Punjab Pre-emption Act (IX of 1991)---
----S.13---Talbs, performance of---Talb-i-Ishhad--Acknowledgement-due receipt of post office not placed on record--- Effect---Pre emptor failed to place acknowledgement-due receipt on record in order to prove that he sent the notice of Talb-i-Ishhad through postal service receipt (A.D)---Such being mandatory provision of law, decree for possession through pre-emption could not be passed, in circumstances. [Para. 7 of the judgment]

(d) Civil Procedure Code (V of 1908)---
----S. 115---Revisional jurisdiction of High Court---Scope---Concurrent findings---Revisional jurisdiction of High Court was limited and same could be exercised only in case where subordinate court had exercised its jurisdiction, not vested by law. [Para. 8 of the judgment]

Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others 2010 SCMR 984; Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another 2008 SCMR 428 and Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452 rel.
Abdul Qadus Rawal for Petitioner.
Date of hearing: 20th June, 2016.

JUDGMENT

ALI AKBAR QURESHI, J.---The petitioner has challenge the validity and propriety of the judgment and decree dated 18.03.2016 and 30.04.2014, passed by the learned Courts below whereby the suit for possession through pre-emption filed by the petitioner, was dismissed.

2. As per record, the suit for possession through pre-emption filed by the petitioner/plaintiff, pre-empting the sale of the suit land was dismissed through the concurrent findings by the learned courts below on the following grounds:--

i. The petitioner could not prove Talb-i-Muwathibat through credible and trustworthy evidence.

ii. There are material contradictions in the statement of the witnesses appeared on behalf of the petitioner to prove the Talb-i-Muwathibat and Talb-i-Ishhad.

iii. While filing the written statement, the respondent/ defendant denied the service of notice and the petitioner failed to prove the postman of the concerned post office to prove the service of notice which is violative of the principle laid down by the Hon'ble Supreme Court of Pakistan.

iv. The petitioner has also failed to produce the registered post acknowledgement due sent by the petitioner while sending the notice of Talb-i-Ishhad.

v. The vendor is the real brother of the petitioner and as per record living in the same house; the land of the two brothers is adjacent, so the sale of the suit land was very much in the knowledge of the petitioner from the day first and further the possession was given to the respondent of the land by the vendor/real brother of the petitioner, therefore, the petitioner was precluded to file the suit.

3. Learned counsel for the petitioner although not denied, that the petitioner has failed to prove the Talb-i-Muwathibat by giving exact date, time and place and non-production of the postman as witness to prove the notice of Talb-i-Ishhad but submitted, that these are minor discrepancies which can be ignored as the petitioner had a preferential right to purchase the suit land. Further submitted, that the petitioner adduced reliable evidence and succeeded to prove his claim including Talb-i-Muwathibat and Talb-i-Ishhad, but the learned courts below have erred in law not to appreciate the aforesaid aspect of the case as required by law.

4. Heard. Record perused.

5. The record shows, that there are material contradictions in the statement of PW1, who is informer as he stated while appearing in the witness box, that the sale mutation came into his knowledge at 2:00 pm, when he was sitting along with his cousins in the baithak, whereas he stated in his cross-examination, that the petitioner was called in the baithak and he was informed about the sale at 2:00 p.m. It has rightly been observed by the learned courts below that when the informer (PW1) came to know about the impugned sale at 2:00 p.m., how it is possible that the same was conveyed to the plaintiff at the same time.

6. There is another aspect of the case, that the petitioner stated in the plaint about the meeting/majlis. The petitioner stated that he was sitting in front of the house of one Nusrat Iqbal, when impugned sale came to his knowledge.

I am afraid, that the contentions raised by learned counsel for the petitioners during his arguments have any substance or force in view of the law laid down by the Hon'ble Supreme Court of Pakistan in a judgment cited as Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302), wherein it has been ruled, that the pre-emptor is required by law to prove the Talb-i-Muwathibat by giving correct date, time and place of making the Talb-i-Muwathibat.

7. As regard the Talb-i-Ishhad, admittedly, the service of notice of Talb-i-Ishhad was denied by the respondent in the written statement, therefore, as per law declared by the Hon'ble Supreme Court of Pakistan the petitioner was required to produce the postman of the concerned post office. Instead of producing the postman, the petitioner only produced a record keeper of post office which cannot fulfill the requirement of law. Further, the petitioner has also failed to place on record the acknowledgment due. In these circumstances, precisely it can conveniently be held that the petitioner has miserably failed to prove the mandatory requirement of Talb-i-Muwathibat and Talb-i-Ishhad, therefore, the petitioner is not entitled to pre-empt the impugned sale in the light of the law laid down by the Hon'ble Supreme Court of Pakistan in two celebrated judgments cited as "Muhammad Bashir and others v. Abbas Ali Shah" (2007 SCMR 1105) and "Allah Ditta through L.Rs. and others v. Muhammad Anar" (2013 SCMR 866). In these judgments, it has made mandatory and imperative upon the pre-emptor to produce postman of concerned post office to prove the service of notice of Talb-i-Ishhad, in case the vendee denies the service of notice in written statement. The relevant portion of the judgment supra (2013 SCMR 866) is reproduced as under:--

> "As regards the issuance of notice of Talb-i-Ishhad is concerned, admittedly the postman has not been examined by the respondent-pre-emptor in terms of the law laid down in Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105). The argument of the respondent's side that the attorney of the petitioner while appearing as D.W.1 has admitted the receipt of the notice and, therefore, the respondent-plaintiff was not obliged to prove the same, suffice it to say that the affirmative onus to prove Talb-i-Ishhad was on the plaintiff and as the petitioner had denied the factum in the written statement, therefore, notwithstand-ing any subsequent admission of the defendant's attorney, it was obligatory on the plaintiff-pre-emptor to have proved the sending of the notice by leading affirmative evidence,

which undoubtedly required the production and examination of the postman. This vital aspect has also eluded the attention of the two courts below."

In view of the aforesaid law declared by Hon'ble Supreme Court of Pakistan, it can safely and conveniently be held that the petitioners have miserably failed to prove their case through any credible evidence.

8. Even otherwise the learned courts below have concurrently concluded that the petitioner has completely failed to prove the mandatory pre-requisite i.e. Talbs to pre-empt the sale in question. The learned counsel appearing on behalf of the petitioner also argued the case at length but could not point out any legal infirmity or irregularity with the concurrent conclusion rendered by the learned Courts below.

I find support from the valuable judgments of the Hon'ble Supreme Court of Pakistan, titled "Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373), Ahmad Nawaz Khan v. Muhammad Jaffar Khan and others (2010 SCMR 984), Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and another (2008 SCMR 428), and "Abdul Ghafoor and others v. Kallu and others" (2008 SCMR 452), that the High Court, in the case of concurrent findings, normally does not interfere unless the same is result of exercise of jurisdiction not vested in the learned courts below.

9. In view of the above, I see no reason to interfere with the concurrent findings rendered by the learned courts below. Resultantly, this petition is dismissed with no order as to cost.

JK/A-80/L Petition dismissed.

2017 Y L R Note 248
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi and Ch. Muhammad Iqbal, JJ
MUHAMMAD ASLAM and others---Appellants
Versus
Khawaja ABDUL MANAF and others---Respondents

R.F.A. No. 30 of 2007, heard on 31st March, 2015.

Defamation Ordinance (LVI of 2002)---

----Ss. 8 & 9---Suit for recovery of damages---Irresponsible journalism---Defamatory and scandalous news published in magazine---Apology, validity of---Principles---Quantum of damages---Filing of cross-appeal, requirement as to---Plaintiff filed suit for recovery of rupees one crore as damages under Defamation Ordinance, 2002 claiming that he belonged to respectable religious family with large number of devotees, and that defendants, in their weekly magazine with wide circulation, had published scandalous news with contemptuous title, which had seriously damaged dignity and reputation of his family and caused mental

agony and torture---Trial Court decreed the suit to extent of rupees five hundred thousand---Defendant took plea that he was just owner of said magazine and the news had been published by reporter of magazine, and that apology had already been published in the said magazine---Validity---Fact that defamatory and scandalous news was published in weekly magazine owned by defendants and subsequently apology was also published, was not denied by defendants---Defendants could not provide any material to show whether they had probed into or conducted any investigation regarding material against plaintiff to meet requirements and parameters of ideal journalism---Such illegality and wilful negligence on part of defendants, which was both against law and unwritten norms, values and conventions of fair reporting, could not be overlooked and left unattended---Defendants had published material against respondent without establishing its veracity, which was extreme example of yellow and irresponsible journalism---Suits filed against defendants by other persons affected by same news had also been decreed---Record showed that defendants were habitual of publishing such type of defamatory and scandalous news items against different people in order to extract money---Trial Court had rightly concluded that present suit was to be dealt with under provisions of Defamation Ordinance, 2002---Apology published by defendants was insufficient and same was, therefore, not acceptable in law, as same could not restore dignity and honour of plaintiff's family---News published by defendants was highly defamatory and scandalous---If plaintiff had filed cross-appeal, quantum of damages awarded by Trial Court would have been much higher---Judgment and decree of Trial Court was maintained---Appeal was dismissed in circumstance. [Paras. 8, 9, 10, 11, 12, 13 & 14 of the judgment]

Mudasser Iqbal Butt v. Shaukat Wahab and others PLD 2006 Lah. 557 rel.

Tahir Mehmood, Ahsan Raza Hashmi and Muhammad Sarwar Awan for Appellants.

Malik Muhammad Tariq Rajwana and Barrister Malik Kashif Rafique Rajwana for Respondents.

Date of hearing: 31st March, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This Regular First Appeal is directed against the judgment and decree dated 16.01.2007 passed by learned Additional District Judge, Dera Ghazi Khan, whereby the suit filed by the respondent to recover an amount of Rupees One Crore on account of damages was decreed to the extent of Rs.5,00,000/- (Rupees Five Lacs).

2. The facts as averred in the record, are that the respondent/plaintiff lodged a suit for recovery of Rupees One Crore as damages under the provisions of Defamation Ordinance, 2002, on the grounds, that the respondent belongs to a respectable religious family of Taunsa, having large number of devotees; the appellants/defendants who are owners of a weekly magazine, namely, "Voice of Taunsa" published scandalous news in their weekly magazine with the intention to extract money; the appellants/defendants in the magazine of April, published a news item with contemptuous title of "Pir of Dhori" which is in fact a deliberate attempt of the appellants/defendants to disrepute the plaintiff's family; the weekly magazine was circulated in other several districts of the province and because of this, the honour, dignity and reputation of the respondent/ plaintiff were seriously damaged and the

respondent/plaintiff suffered mental agony and torture. A mandatory notice under Section 8 of the Defamation Ordinance, 2002 was issued to the appellants/ defendants to pay Rupees One Crore on account of damages, but no reply was made, and remained un-rebutted, thus stood proved.

3. The suit was contested by the appellants/defendants by controverting the contents of the plaint and claimed, that the news published in magazine depicts true situations, and nothing has been published which is against the record.

4. Learned trial Court out of the pleadings, framed as many as seven issues, recorded the evidence of the parties and finally decreed the suit to the extent of Rs.500,000/- (Rupees Five Lacs).

5. Learned counsel for appellants contends, that the appellants who are owners of the magazine, are not responsible as the news was published by the reporter of the magazine and further submitted, that learned trial Court failed to appreciate the record and the law and without appreciating the record, passed the decree which is not sustainable in law. Learned counsel, during the course of arguments, fairly submitted that although the news was published in the magazine owned by the appellants, but subsequently, an apology was also published in the same magazine, therefore, it is sufficient to show the bona fide of the appellants. Also contended, that there was no mala fide in publishing the material as the same was provided by a lady, namely, Taj Bibi (DW-1) who is aggrieved of the acts done by the respondent.

6. Conversely, learned counsel for the respondent supported the findings recorded by learned trial Court, and submitted, that the damages amount be enhanced in view of the facts of the case. When confronted, that as to whether any appeal has been filed by the respondent, learned counsel submitted, that no appeal has been filed by the respondent.

7. Arguments have been heard and record perused.

8. It is not denied, as evident from the record, that a news which on the face of it, is defamatory and scandalous, was published in the weekly magazine owned by the appellants, and subsequently, an apology was also published. The publication of the apology is sufficient proof, that the scandalous material was published by the appellants and now, it is to be seen as to whether the material supplied to the appellants by the lady was probed into or any investigation was conducted by the appellants to meet with the requirements and parameters of an ideal journalism. When it was confronted to learned counsel for the appellants, learned counsel could not refer any material from the record in this regard. This type of the illegality and willful negligence on part of the appellants cannot be overlooked and left unattended, which is not only against the law applicable on the case, but also the unwritten norms, values and conventions of at least a fair reporting and ideal journalism. Further, this type of the negligence, which is otherwise mandatory, is so fatal which ruins the life of a person or family and sometimes may cause a risk to life. There are many examples, even reported in the press, when because of this type of the news published without mandatory inquiry, aggrieved person committed suicide. Therefore, it can safely be observed, that the appellants published the material against the respondent without

establishing the veracity of the news item or material, therefore, it is extreme example of yellow and irresponsible journalism.

9. There is another aspect of the case which depicts from the record, that the appellants not only published baseless and defamatory material against the respondent, but there are also other innocent people against whom defamatory material was published who lodged FIR and filed civil suits for damages on the same issue. Some of the civil suits as mentioned in the record, have been decreed against the appellants.

10. The aforesaid facts which are based on documentary evidence including the judicial record, show that the appellants are habitual to publish such type of the defamatory and scandalous news items against different people to extract money, therefore, learned trial Court rightly reached to the conclusion, that the appellants are liable to be dealt with under the provisions of the Defamation Ordinance, 2002, and finally awarded damages on account of publishing the defamatory and scandalous material without probing into the matter.

11. There is another most important fact which requires adjudication, that the newspaper owners like the appellants, claim if someone brought them in the Court of law, that an apology has been issued in the newspaper. Needless to mention, that the apology always published of few lines and in the corner, without publishing the scandalous and defamatory material in detail along with the apology and normally public-at-large/readers of newspapers do not even read the apology, therefore, the apology published by the appellants in the magazine is totally insufficient and lame excuse and not acceptable in law. Even otherwise, the apology published by the appellants in this magazine cannot restore the dignity and honour of a person or family and it is not possible for an aggrieved person to show the apology to every person known to him or public-at-large, therefore, this plea of the appellants is hardly sustainable in law. Anyhow in future, the publisher and newspaper owner shall publish the apology, if required or ordered, giving the same place and space in the newspaper along with defamatory material earlier published by them, so that the public-at-large could know the defama-tory material as well as the apology tendered by the publisher or the newspaper owner.

12. It is proved on record through the evidence, that the news item published by the appellants was highly defamatory, scandalous and example of irresponsible journalism, so the quantum of damages awarded by learned trial Court could have been much higher, if the respondent had filed the cross appeal or cross objection but anyhow the findings recorded by learned trial Court are affirmed.

13. The evidence adduced by the appellants was perused during the course of arguments but there is nothing in the evidence to contradict the claim of the respondent.

Reliance is placed on Mudasser Iqbal Butt v. Shaukat Wahab and others (PLD 2006 Lahore 557).

14. In view of above, we see no reason to interfere with the well-reasoned judgment delivered by learned trial Court, thus this appeal has no force, and is dismissed with no order as to costs.

SL/M-229/L Appeal dismissed.

2017 Y L R Note 261
[Lahore]
Before Ali Akbar Qureshi, J
Haji MUHAMMAD ASHRAF and another---Petitioners
Versus
Chaudhary MUHAMMAD SHABBIR through Legal Heirs and 2 others---Respondents

Civil Revision No.2258 of 2006, heard on 6th August, 2015.

(a) Gift---

----Ingredients of---Ingredients of gift, whether oral or written were "offer", "acceptance" and "delivery of possession"---Possession of gifted property by donor was to be handed over at the same time and the moment when such offer was made and it was accepted by donee. [Para. 8 of the judgment]

(b) Contract Act (IX of 1872)---

----S.10---Agreement to sell immovable property---Nature and scope---Non-signing of agreement to sell immovable property---Effect---"Iqrar Nama" had only been signed by alleged donor and was not signed by donee---Validity---Such an "Iqrar Nama" was violative of principles in judgment titled laid down by Supreme Court Farzand Ali Vs Khuda Bakhsh and others PLD 2015 SC 187 wherein it was held that agreement to sell was not a dead poll unlike e.g. a power-of-attorney which is only executed by principal and agent's execution is neither required nor expedient---In law agreement to sell immovable property was a contract and the first and foremost requisite of a contract (agreement) was that the parties should have reached agreement which meant that an agreement was founded upon offer and acceptance, thus, for the purposes of a valid contract (agreement) there should be the meeting of minds of contracting parties---Where a contract was reduced into writing, not only should it be founded upon imperative elements of offer and acceptance but its proof was also dependent upon execution of contract by both contracting parties i.e. by signing or affixing their thumb impressions so that same should reflect and establish their "consensus ad idem" which obviously was the inherent and basic element of meeting of minds which connoted the mutuality of ascent and reflected and proved the intention of parties thereto---In particular it referred to the situation where there was a common understanding of parties in formation of the contract in absence of which there was neither a concept nor possibility of a valid contract. [Para. 9 of the judgment]

Farzand Ali v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

(c) Constitution of Pakistan---

----Art. 189---Decisions of Supreme Court binding on other courts---Binding nature of decision---Prospective and not retrospective---Contention of petitioner was that principles laid down by Supreme Court were not applicable because it would have prospective effect and not retrospective effect and that judgment was delivered by Supreme Court in the year

2015 but present case was decreed by Trial Court on 2006, therefore, petitioners could not be non-suited---Validity---Such contention had no substance. [Para. 10 of the judgment]

Muhammad Yousaf v. The Chief Settlement and Rehabilitation Commissioner, Pakistan, Lahore and Haji Ahmad Din PLD 1968 SC 101; Sakhi Muhammad and another v. Capital Development Authority, Islamabad PLD 1991 SC 777 and Pir Bakhsh represented by his Legal Heirs and others v. The Chairman, Allotment Committee and others PLD 1987 SC 145 rel.

(d) Gift---

----Proof of---Donee, in case of oral gift, had to prove time, date and place as to where offer of gift was made to donee which was accepted by donee and as to how delivery of possession was made to the donee. [Para. 14 of the judgment]

Ghulam Muhammad and another v. Muhammad Ramzan through L.Rs. 2007 MLD 1769 rel.

(e) Islamic law---

---Inheritance---Fabricated "Iqrar nama"---Contents of "Iqrar nama" showed that same had been prepared and fabricated simply to deprive other legal heirs (including females) from right of inheritance which was not only guaranteed by man-made law but also by Islam. [Para. 15 of the judgment]

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Nasir Abbas v. Manzoor Haider Shah PLD 1989 SC 568 and Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others 2014 SCMR 914 rel.
Rafique Anees, Vice Counsel for Petitioners.
Shaikh Naveed Sheharyar for Respondents.
Date of hearing: 6th August, 2015.
JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 06.04.2006 and 21.01.2004, passed by the learned courts below, whereby the suit for declaration and permanent injunction filed by the petitioners was dismissed.

2. The petitioners/plaintiffs filed a suit for declaration, permanent injunction and partition against the respondents/ defendants, contending therein, that the petitioners being the legal heirs of Haji Phool Muhammad, deceased, are owners of the property to the extent of their shares left by Haji Phool Muhammad and the gift deed dated 15.10.1987 claimed to have been made in favour of respondent No.1 is illegal, unlawful and ineffective qua the rights of the petitioners.

3. The suit was contested by the respondents through a detailed written statement, wherein the respondents controverted the contents of the plaint and the claim made by the petitioners.

4. The learned trial court framed necessary issues out of the controversial pleadings of the parties and after recording evidence adduced by the parties, finally dismissed the suit. Being aggrieved thereof, the petitioners filed an appeal, which too was dismissed.

5. In the written arguments, the petitioners have assailed the findings of the learned courts below mainly on the ground, that the same are against the facts and record and that the gift deed is result of fraud and misrepresentation.

6. In response of this, learned counsel for the respondents vehemently argued the case and submitted, that the concurrent findings of the learned courts below cannot be disturbed; that the scribe of the document was produced as P.W.5, who admitted, that the document was written by him and he entered the same in the relevant record; that the stamp vendor and two witnesses of the gift deed (Exh.P.5) were produced; that Haji Phool Muhammad donor died on 19.01.1990 and during his lifetime, Phool Muhammad did not challenge the gift, therefore, his legal heirs are not permitted to challenge the same; that the possession of the property is with the respondents and all the taxes are being paid by them and lastly Farzand Ali v. Khuda Bakhsh and others (PLD 2015 Supreme Court 187) case is not applicable.

7. Heard. Record perused.

8. In this case, as evident from the record, the most important document is "Iqrar Nama Hiba" (Ex.P.5) which requires consideration and adjudication by this Court. The contents of afore-referred "Iqrar Nama Hiba" were perused, which reveal, that Muhammad Shabbir, the predecessor of the respondents, was real son of Haji Phool Muhammad, the predecessor in interest of the parties to the case; Haji Phool Muhammad allegedly prepared an Iqrar Nama Hiba to acknowledge the oral gift which was made by him, as claimed by the respondents in the year 1980 and the possession of suit land was given on 23.01.1982. At the time of making the alleged gift, it is not mentioned in the Iqrar Nama, that in whose presence, the gift was made. When it was confronted to the learned counsel for the respondents, that the time, date and place making the gift and name of the witnesses are not mentioned, the learned counsel for the respondents although tried to defend the case but miserably failed. There is another important incident which is mentioned in this document and sufficient to declare it illegal and unlawful, that the alleged gift was orally made in the year 1980 by Haji Phool Muhammad (deceased) in favour of his son Muhammad Shabbir whereas possession was given on 23.01.1982, which is on the face of it, violative of the settled principles of Muhammadan Law. The ingredients of gift, oral or written, as given in the law are, offer, acceptance and delivery of possession. According to well-settled proposition of law, that the possession of the gifted property by the donor is to be handed over at the same time and moment when the offer was made and it was accepted by the donee, therefore, this fact is sufficient to belie and declare the document not only illegal but also product of fraud to deprive other legal heirs from their right of inheritence.

9. There is also another important aspect of the case, that this Iqrar Nama has only been signed by Haji Phool Muhammad, the alleged donor and did not sign by the donee, which is violative of the principal laid by the Hon'ble Supreme Court of Pakistan in a latest landmark judgment cited as Farzand Ali v. Khuda Bakhsh and others (PLD 2015 Supreme Court 187). The relevant portion is reproduced hereunder:

"9. In the above context, the first and the foremost aspect of the case is, if the agreement to sell of the appellants was valid because if it is not valid the question of its enforcement through the process of law and the exercise of discretion does not arise. It is an undisputed fact that appellants' agreement has not been signed by them. And an agreement to sell immovable property is not a "deed poll", unlike e.g. a power of attorney which is only executed by the principal and the agent's execution is neither required nor expedient. Rather in law such an agreement (of immovable property) is a contract (note: may be executory in nature) and the first, and the foremost requisite of a contract (agreement) is that the parties should have reached agreement, which unmistakably means, that an agreement is founded upon offer and acceptance. Thus for the purposes of a valid contract (agreement) there should be the meeting of minds of the contracting parties (who are competent in law to contract). And where a contract is reduced into writing, not only should it be founded upon the imperative elements of offer and acceptance, but its proof is also dependent upon the execution of the contract by both the contracting parties i .e. by signing or affixing their thumb impression. So that it should reflect and establish their "consensus ad idem", which obviously is the inherent and basic element of the meeting of the minds, which connotes the mutuality of ascent, and reflects and proves the intention of the parties thereto. In particular it refers to the situation where there is a common understanding of the parties in the formation of the contract in the absence of which there is neither a concept nor the possibility of a valid contract. But in this case this is conspicuously lacking by virtue of non-execution (non-signing) of the agreement by the appellants, therefore, in law and fact is no contract (agreement). The argument that the agreement to sell in favour of the appellants has been admitted by the vendors and, therefore, is valid and the non-signing has lost its efficacy, suffice it to say that despite the above, the respondent has joined issue with the appellants vis- -vis the validity and valid execution of the agreement, therefore, the appellants cannot rely upon and take advantage of any admission made by the vendors, because of the law, that an admission made by a co-defendant is not binding on the other even if made in the written statement."

10. Learned counsel for the petitioners also contended, that the principle laid down by the Hon'ble Supreme Court of Pakistan in the esteemed judgments supra is not applicable on the proposition because the law declared by the Hon'ble Supreme Court of Pakistan, by interpreting any provision of law would have prospective effect and not retrospective. Further contended that the afore-referred judgment was delivered in the year 2015, but this case was decided by the learned trial court in the year 2006, therefore, the petitioners cannot be non-suited following the principle laid down by the Hon'ble Supreme Court of Pakistan.

The Hon'ble Supreme Court of Pakistan has already dealt with this proposition of law in a judgment cited as "Muhammad Yousaf v. The Chief Settlement and Rehabilitation Commissioner, Pakistan, Lahore and Haji Ahmad Din" (PLD 1968 SC 101). The relevant part of this judgment is reproduced hereunder:--

"This judgment was delivered on the 2nd November 1964, and its consequence was that as from that date all Courts subordinate to the Supreme Court and all executive and Quasi-judicial authorities were obliged by virtue of the Constitution to apply the

rule as laid down by the Supreme Court in cases coming up before them for decision. It did not have, and it cannot be contended that it had, the effect of altering the law as from the commencement of the Act so as to render void of its own force all relevant orders of the Settlement authorities or of the High Court made in the light of the earlier interpretation which was that the exercise of the delegated power was subject to the provisions in Chapter VI of the Act."

In two other judgments delivered by the Hon'ble Supreme Court of Pakistan, titled "Sakhi Muhammad and another v. Capital Development Authority, Islamabad" (PLD 1991 SC 777) and "Pir Bakhsh represented by his Legal Heirs and others v. The Chairman, Allotment Committee and others" (PLD 1987 SC 145), the afore-referred principle has been followed.

11. Thus in view of the judgments of the Hon'ble Supreme Court of Pakistan i.e. "Farzand Ali v. Khuda Bakhsh and others" (PLD 2015 Supreme Court 187) and Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) and the principle laid down therein, are fully applicable in the present case and the arguments advanced by the learned counsel for the petitioners have no substance.

12. If, for the sake of arguments, it is admitted, that the afore-mentioned Iqrar Nama Hiba was executed by Haji Phool Muhammad in favour of predecessor of the respondents, even then it is on the face of it, illegal, unlawful, against the law and ineffective qua the guaranteed and secured rights of the petitioners.

13. The learned courts below, as appears from the concurrent findings, have not even bothered to see or examine the Iqrar Nama Hiba (Exh. P.5) at the time of recording the findings, therefore, these type of the concurrent findings, as observed by the Hon'ble Supreme Court of Pakistan, should not be remained in the field. Even otherwise, the findings of the learned courts below are totally silent on these points, thus it is a fit case of misreading and non-reading of evidence.

14. As regard the time, date and place, I am fortified by the judgments of this Court cited as Ghulam Zainab and another v. Said Rasool (2004 CLC 33), Ghulam Muhammad and another v. Muhammad Ramzan through L.Rs (2007 MLD 1769), Agricultural Development Bank of Pakistan through Attorney v. Khalid Aziz Malik and 6 others (2010 CLD 1 [Lahore]) and Muhammad Asghar and others v. Hakam Bibi through L.Rs and others (2015 CLC 719). In the judgment supra (2007 M LD 1769) it has been observed, that in the case of oral gift, the donee had to prove the time, date and place as to where the offer of gift was made to the donee which was accepted by the donee and how the delivery of possession was made to the donee.

15. From the contents of Iqrar Nama Hiba, it appears and there is no hesitation to hold, that the same had been prepared and fabricated simply to deprive the other legal heirs from their right of inheritance which is not only guaranteed by the man-made law but also by Allah Almighty in the Holy Book. It is common practice, as observed by the Hon'ble Supreme Court of Pakistan in landmark judgment cited as Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 Supreme Court 1), that by preparing this type of the documents, the legal heirs, including the women, are being deprived from their inheritance.

16. Although both the learned courts below have recorded the concurrent findings on facts but in view of the observation made above, those are entirely contrary to the record and also the law declared by the Hon'ble Supreme Court of Pakistan, therefore, these type of the concurrent findings are open to revision by this Court under section 115, C.P.C. I am fortified by the law laid down by the Hon'ble Supreme Court of Pakistan in judgment cited as Nasir Abbas v. Manzoor Haider Shah (PL D 1989 Supreme Court 568). The relevant portion is reproduced as under:

> "11. It is also settled that if the lower Court, misreads the evidence on record and fails to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court. See Dwarika v. Bagawati (AIR 1939 Rangoon 413) and Fut Chong v. Maung Po Cho (AIR 1929 Rangoon 145). "

In another esteemed judgment cited as Muhammad Nawaz alias Nawaza and others v. Member Judicial, Board of Revenue and others (2014 SCMR 914) the Hon'ble Supreme Court of Pakistan has observed as under:--

> "8. The argument that when all the fora functioning in the revenue hierarchy concurrently held that the appellants were occupying the land in dispute in their capacity as tenants, such finding being one of fact could not have been interfered with by the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, has not impressed us as a finding does not become sacrosanct because it is concurrent. It becomes sacrosanct only if it is based on proper appraisal of evidence. The finding of the fora functioning in the revenue hierarchy despite being concurrent was not based on proper appraisal of evidence and due application of law, therefore, the High Court was well within its jurisdiction to interfere therewith. For the very condition for conferment of jurisdiction on a Court of law is to render a finding on proper appraisal of evidence and due application of law. If and when it would do otherwise, it would go outside its jurisdiction. Such order can well be quashed in exercise of Constitutional jurisdiction of the High Court."

17. Resultantly, this civil revision is allowed, the judgment and decree passed by the learned courts below is set aside and the suit filed by the petitioners is decreed with cost.

RR/M-312/L Revision allowed.

2017 Y L R Note 294
[Lahore]
Before Ali Akbar Qureshi, J
MUHAMMAD AZEEM---Petitioner
Versus
Syed ANWAR MASOOD ZAIDI and 2 others---Respondents

W. P. No. 1490 of 2015, heard on 16th July, 2015.

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

----Ss. 15 & 34---Ejectment of tenant---Default in payment of rent---Substitution of legal representative of dead person in eviction proceedings--- Scope---Contention of tenant was that eviction petition was filed against a dead person i.e. against his father which was not maintainable---Ejectment petition was accepted concurrently--- Validity---Eviction petition could be filed on the ground of default which was one of the grounds of present ejectment application---Both the courts below had rightly decided that tenant had committed default in payment of rent---Dead person could be substituted with the legal representative---No jurisdictional defect, legal infirmity, irregularity or illegality had been pointed out in the impugned orders passed by the courts below---Constitutional petition was dismissed in circumstances. [Paras. 8, 11, 13, 15 & 16 of the judgment]

Muhammad Yar (deceased) through L.Rs. and others v. Muhammad Amin (deceased) through L.Rs. and others 2013 SCMR 464; Malik Bashir Ahmed Khan and others v. Qasim Ali and others PLD 2009 SC 183; Ch. Muhammad Tufail Khan alias Tufail Muhammad through Legal Representatives v. Zarai Taraqiati Bank Limited through Branch Manager PLD 2007 Lah. 180; Abdul Salam v. Mrs. Tahira Zaidi 1984 CLC 2855; Syed Muhammad Anwar, Advocate v. Sheikh Abdul Haq 1985 SCMR 1228; Munir Ahmed Memon v. Mst. Mumtaz Begum 1990 MLD 1689; Muhammad Faryad v. Muhammad Asif PLD 1993 Lah. 469; Mst. Azizan and another v. Mehr Din 1993 CLC 1187; Mst. Zubaida Begum v. Mst. Irshad Bibi 1994 CLC 1044; Land Acquisition Collector, Tarbela Dam Resettlement Organization, WAPDA, Ghazi and 2 others v. Hikmat Khan and another 1996 MLD 1587; Zulfiqar v. Muhammad Jan 2002 CLC 932; Syed Sajjad Hussain Shah v. Messrs Federation of Employees Cooperative Housing Societies Ltd. through General Secretary 2003 CLC 1011; Municipal Committee, Gujrat through Administrator v. Deputy Administrator, Evacuee Trust Property, Gujrat and 3 others 2004 MLD 1170; Nasar Khan and 16 others v. Additional District Judge-I, Lakki Marwat and 76 others 2007 CLC 326; Muhammad Tariq v. Member Board of Revenue, Punjab, Lahore and others 2007 CLC 1123 and Pakistan Bait-ul-Mal v. Umar Mahmood Kasuri and another PLD 2008 Lah. 250 distinguished.

Mst. Mariam and 3 others v. Abdul Rashid 1984 CLC 1571; Haji Khudai Nazar and another v. Haji Abdul Bari 1997 SCMR 1986; Hanif and others v. Malik Ahmed Shah and another 2001 SCMR 577; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

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

----S. 34---Provisions of Qanun-e-Shahadat, 1984 and Code of Civil Procedure, 1908---Applicability to the proceedings under Punjab Rented Premises Act, 2009---Scope---Provisions of Qanun-e-Shahadat, 1984 and Code of Civil Procedure, 1908 were not applicable to the proceedings under Punjab Rented Premises Act, 2009 before the Rent Tribunal, District Judge or Additional District Judge. [Para. 11 of the judgment]

Mian Zafar Iqbal Kalanori for Petitioner.
Syed M. Mohsin Zaidi for Respondents.
Date of hearing: 16th July, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---The petitioner, through this Constitutional petition, has assailed the ejectment order dated 08.11.2014 and 15.06.2011 passed by learned forums below against the petitioner.

2. The facts as depict from the record, are that the respondent No.1 landlord filed an ejectment petition to evict the petitioner/tenant from the shops Nos.5, 6 and 7 situated in New Anarkali, Lahore, on the grounds of default in making the payment of monthly rent since January, 2008, and subletting the demised premises which is against the terms and conditions of the tenancy agreement executed between the parties. The ejectment petition was contested by the petitioner by filing an application for leave to contest under Section 22 of the Punjab Rented Premises Act, 2009. In the application for leave to contest, the petitioner/tenant took a legal objection, that ejectment petition has been filed against a dead person i.e. father of the petitioner, namely, Imdad Ali despite the fact, that the death of Imdad Ali was very much in the knowledge of the respondent/ landlord, therefore, the ejectment petition is not maintainable. On facts, it was submitted, that the petitioner had regularly paid the monthly rent and has not committed default or violated the terms and conditions of the tenancy agreement. Leave was granted by the court.

3. Learned Special Judge Rent, out of the divergent pleadings, framed as many as five issues, recorded the evidence of the parties and allowed the ejectment petition, against which an appeal was filed which was dismissed by learned appellate court, hence, this writ petition.

4. Learned counsel for the petitioner has mainly argued, that the ejectment petition which was filed against a dead person i.e. father of the petitioner/tenant, is not maintainable as this fact was very much in the knowledge of the respondent/landlord prior to filing the ejectment petition. Reliance is placed on Muhammad Yar (Deceased) through L.Rs. and others v. Muhammad Amin (Deceased) through L.Rs. and others (2013 SCMR 464), Malik Bashir Ahmed Khan and others v. Qasim Ali and others (PLD 2009 Supreme Court 183), Ch. Muhammad Tufail Khan alias Tufail Muhammad through Legal Representatives v. Zarai Taraqiati Bank Limited through Branch Manager (PLD 2007 Lahore 180).

On the point of default, learned counsel for the petitioner submits, that the petitioner regularly paid the monthly rent and has not committed any default. Further submits, that in

fact, learned courts below while deciding the maintainability of the ejectment petition against a dead person, have not carefully perused the record and the law applicable on the case, therefore, the ejectment orders passed by learned courts below are liable to be set aside on this score alone.

5. Learned counsel for the respondent submits, that the shops in question were rented out to the father of the petitioner and at the time of filing the ejectment petition, the death of the father of the petitioner, namely, Imdad Ali was not in the knowledge of the respondent/landlord, therefore, the ejectment petition initially was filed against the deceased father of the petitioner, but subsequently, the name of the petitioner was substituted. Next contended, that the petitioner himself appeared in the court in response of the notice and informed, that the original tenant i.e. father of the petitioner has died and the shops in question are under the possession of the petitioner as tenant. As regards the default in payment of monthly rent, learned counsel submits, that it has been proved through evidence, that the petitioner has committed default in making the monthly rent since January 2008, therefore, both the courts below rightly passed the ejectment order against the petitioner. Reliance is placed on Mst. Mariam and 3 others v. Abdul Rashid (1984 CLC 1571) [Karachi], Abdul Salam v. Mrs. Tahira Zaidi (1984 CLC 2855), Syed Muhammad Anwar Advocate v. Sheikh Abdul Haq (1985 SCMR 1228), Munir Ahmed Memon v. Mst. Mumtaz Begum (1990 MLD 1689), Muhammad Faryad v. Muhammad Asif (PLD 1993 Lahore 469), Mst. Azizan and another v Mehr Din (1993 CLC 1187), Mst. Zubaida Begum v. Mst. Irshad Bibi (1994 CLC 1044) [Lahore], Land Acquisition Collector, Tarbela Dam Resettlement Organization, WAPDA, Ghazi and 2 others v. Hikmat Khan and another (1996 MLD 1587), Zulfiqar v. Muhammad Jan (2002 CLC 932), Syed Sajjad Hussain Shah v. Messrs Federation of Employees Cooperative Housing Societies Ltd. through General Secretary (2003 CLC 1011), Municipal Committee, Gujrat through Administrator v. Deputy Administrator, Evacuee Trust Property, Gujrat and 3 others (2004 MLD 1170), Nasar Khan and 16 others v. Additional District Judge-I, Lakki Marwat and 76 others (2007 CLC 326), Muhammad Tariq v. Member Board of Revenue, Punjab, Lahore and others (2007 CLC 1123), and Pakistan Bait-ul-Mal v. Umar Mahmood Kasuri and another (PLD 2008 Lahore 250).

6. Heard. Record perused.

7. As per the record, the relationship of landlord and tenant is admitted. The shops in question were rented out to the deceased father of the petitioner through written tenancy against monthly rent and after the death of the original tenant i.e. Imdad Ali, the petitioner who is son of the original tenant, occupied the shops as tenant and started paying monthly rent to the respondent/landlord.

8. The ejectment petition as evident from the record, has been filed on the ground of default and subletting. In this case, the leave was granted and the case was decided on merits after recording the evidence of the parties and both the learned courts below have concurrently reached to the conclusion, that the petitioner has committed default in making the payment of monthly rent as the rent for the month of January to March 2008 through money order was paid on 03rd of April 2008, whereas according to the terms of the tenancy agreement, the monthly rent is to be paid by 05th of every running month in advance. Although, the petitioner adduced witnesses in support of his contention, but miserably failed to prove the

payment of monthly rent according to the terms of the agreement. As in section 15 of the Punjab Rented Premises Act, 2009, default is one of the grounds, and the ejectment petition can be filed on the ground of default, therefore, the learned courts below rightly decided Issue No.1 against the petitioner.

9. Learned counsel for the petitioner mainly argued on the point which relates to the maintainability of the ejectment petition against a dead person. No doubt, the ejectment petition was filed against the deceased father of the petitioner but in response of the notice issued by the Special Judge (Rent), the petitioner, who is real son of deceased Imdad Ali, appeared in the court and filed an application for leave to contest under Section 22 of the Punjab Rented Premises Act, 2009, wherein the petitioner took this legal objection and informed the Court, that the ejectment petition has been filed against the deceased father of the petitioner, and presently, the shops are in possession of the petitioner as tenant.

10. After filing the application for leave to contest by the petitioner, the respondent/landlord filed an application for the substitution of the name of Muhammad Azeem instead of Imdad Ali, this application was accepted on 07.11.2008 and the name of the deceased Imdad Ali was substituted with Muhammad Azeem, the present petitioner. This order was never challenged before any forum by the petitioner. The learned Special Judge (Rent) while framing the issues on the divergent pleadings of the parties, framed Issue No.4 which is as under:

Whether ejectment petition is liable to be dismissed? OPR.

In the above issue, it is not mentioned, that the ejectment petition is liable to be dismissed being filed against a dead person and the petitioner neither filed any application for re-framing the issue, nor challenged the same. Further, as recorded by the learned Special Judge (Rent) while deciding Issue No.4, the petitioner/tenant did not produce any evidence in support of this issue to discharge his onus as the learned Special Judge (Rent) while framing the aforesaid issue, placed the onus on the petitioner/tenant. The findings on issue No.4 were affirmed by the learned appellate court, while dismissing the appeal.

11. Before discussing the law referred by learned counsel for the petitioner in support of his argument, that the ejectment petition against a dead person is not maintainable, it would be appropriate to consult the basic law i.e. the Punjab Rented Premises Act, 2009. The Section 34 of the Act ibid is relevant which is reproduced as under:

> "Provisions of Qanun-e-Shahadat Order and Code of Civil Procedure not to apply.--- Save as otherwise expressly provided under this Act, the provisions of the Qanun-e-Shahadat Order, 1984 (P.O. No.10 of 1984), and the Code of Civil Procedure, 1908 (Act V of 1908) shall not apply to the proceedings under this Act before a Rent Tribunal, District Judge or Additional District Judge."

According to the terms of above section, the legislature has not made applicable the provisions of Qanun-e-Shahadat Order, 1984, and the Code of Civil Procedure, to the proceedings under the Punjab Rented Premises Act, 2009 before a Rent Tribunal, District Judge or Additional District Judge. Their lordships of the Hon'ble Supreme Court of Pakistan has observed in the judgment cited as Haji Khudai Nazar and another v. Haji Abdul

Bari (1997 SCMR 1986), that the provisions of the C.P.C unless specifically made applicable by the rent law do not apply in terms to the rent proceedings. The relevant part of the observation is as under:

> "5. The first question is whether C.P.C is applicable to the proceedings before the Rent Controller. The consensus is that the provisions of C.P.C. unless specifically made applicable by the rent laws, do not apply in term to the rent proceedings, but the principles of C.P.C. so far they are not in conflict with the provisions of the rent laws and advance the cause of justice, may be applied in the facts and circumstances of the case. (Underline is mine). In Mrs. Nawab Din Ahmed and another v. Faiz-ur-Rehman (PLD 1982 Karachi 89) the applicability of C.P.C. in proceedings before the Rent Controller was considered by me and after referring to Ghulam Nabi v. Mukhtar Ahmed (PLD 1980 SC 206) and Imperial Dying and Printing Mills Karachi v. Safdar Ali (PLD 1971 Karachi 778), it was observed:
>
> "The consensus of opinion is that C.P.C. is not applicable in terms to the proceedings before the Controller. It is only applicable to the extent provided by the Ordinance itself. However, where no procedure has been provided it is just and convenient to apply the principles laid down by the Code of Civil Procedure for the conduct of proceedings. In applying these principles the penal provisions as provided by C.P.C., cannot be pressed in service. The principles of Order XXII can be applied for bringing the legal heir in record."

In the second judgment cited as Hanif and others v. Malik Ahmed Shah and another (2001 SCMR 577), the Hon'ble Supreme Court of Pakistan, while dealing with this proposition has observed as under:

> "There is no gainsaying that the provisions of Code of Civil Procedure may not be stricto sensu applicable to the proceedings before a Rent Controller, broad and equitable principles regulating the procedure of the proceedings before the Rent Controller can always be invoked and attracted in the interest of justice and fairplay. "

12. From the above esteemed observations, it is made clear, that the provisions of C.P.C. are not applicable and even otherwise, the facts of the instant case are peculiar, as the petitioner, who is son of deceased original tenant, himself came forward in response of the notice issued by the learned Special Judge Rent, fully participated in the proceedings and also admitted, that after the death of his father, the original tenant, the petitioner is occupying the shops as tenant.

It is not denied, that the Hon'ble Supreme Court of Pakistan in the judgments referred by the learned counsel for the petitioner, while dealing with a case of civil nature, has observed, that a civil suit against a dead person is not maintainable whereas the instant case/ petition has been filed under the provisions of the rent laws, therefore, the provisions of C. P.C., as observed by the Hon'ble Supreme Court of Pakistan in the judgments supra, are not applicable, therefore, the judgments cited by the learned counsel for the petitioner are distinguishable.

13. On the other hand, the judgment cited as Mst. Mariam and 3 others v. Abdul Rashid (1984 CLC 1571) [Karachi], is directly applicable on the facts of the instant case wherein it is held, that the name of the dead person can be substituted with the legal representative.

14. Even otherwise, the notice issued by the court was received and in response thereof, the petitioner appeared in the court and informed regarding the death of his father during the tenancy whereas the respondent/landlord filed an application and substituted the name of the petitioner with his deceased father. In appeal, no such objection was taken.

15. Although learned counsel for the petitioner argued the case at length, but could not point out any jurisdictional defect, legal infirmity, irregularity or illegality committed by the forums below, therefore, there is hardly any reason to interfere with the well worded concurrent findings of the learned courts below. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

16. Resultantly, this writ petition has no force and the same is dismissed with no order as to costs.

ZC/M-279/L Petition dismissed.

2017 Y L R Note 316
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
SOBIA HINA and 3 others---Petitioners
Versus
ADDITIONAL DISTRICT JUDGE, RAJANPUR and 2 others---Respondents

W.P. No.1031 of 2010, decided on 9th December, 2014.

Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Constitution of Pakistan, Art. 199--- Constitutional petition---Suit for recovery of maintenance allowance and dower---House measuring 5 Marlas had already been transferred in favour of wife---Demand of wife with regard to dower had fully been satisfied---Wife who was not willing to rehabilitate and was living apart from the husband without any reason was not entitled for maintenance allowance until she resorted conjugal rights---Minors/children were school going, keeping in view the expenses being incurred on the education and prices of necessary commodities for maintenance of minors was enhanced at the rate of Rs. 1500/- per month instead of Rs. 1000/- fixed by the Appellate Court from the date of institution of suit till they attained the age of majority---Judgment of Appellate Court was modified to the extent of maintenance of minors whereas rest of the judgment was affirmed---Constitutional petition was disposed of accordingly. [Paras. 6, 7, 8, 9 & 10 of the judgment]

Malik Muhammad Tariq Rajwana for Petitioners.
Aftab Aalam Yasir for Respondents.

ORDER

ALI AKBAR QURESHI, J.---This writ petition calls in question the judgment and decree dated 10.12.2009 and 27.07.2009 passed by learned Court's below whereby the suit filed by the petitioner was partly decreed.

2. Shortly the facts as stated in the case, that the petitioners filed a consolidated suit, for recovery of maintenance allowance at the rate of Rs.9000/- per month including previous two years, recovery of dower in the form of five marlas house, jewelry weighing five Tolas and delivery expense etc.

3. The petitioner No.1 Mst. Sobia entered into marriage with the respondent and out of this wedlock four children were born but because of certain dispute, presently, the petitioner is living with four children separate to the respondent.

4. The suit filed by the petitioners partly decreed, by which the petitioner No.1 Mst. Sobia was held disentitled to recover the maintenance, while the minor children were given maintenance to the tune of Rs.2000/- per month. As regard the dower amount, it is held that the same will be paid in the form of construction of a house which has been given by the respondent through registered sale deed in favour of the petitioner No.1.

5. During the course of arguments, both the parties were given a chance for reconciliation but failed.

6. As regards the dower amount, the learned Appellate Court has rightly observed that according to the terms of Nikahnama, the house measuring 5 marlas, has already been transferred through a registered sale deed in favour of the petitioner, therefore, the demand of the petitioner regarding the dower has fully been satisfied.

7. Regarding the maintenance of the petitioner No.1, the respondent present in the Court showed his willingness to rehabilitate the petitioner but she refused , it appears that she is living apart from the respondent without any reason, therefore, she is not entitled for the maintenance until she restored conjugal rights. As weight of the jewelry is not mentioned in the Nikahnama, so the findings recorded by the learned Appellate Court on this issue are affirmed.

8. So far as, maintenance of the minors are concerned, it is mentioned in the record, that all the four minors are school going children so keeping in view the expenses being incurred on the education and the price of necessary commodities arising on day to day basis, I enhanced the per head, per month maintenance at the rate of Rs.1500/- instead of Rs.1000/- fixed by learned appellate Court from the date of institution of the suit till they attain the age of majority.

9. Resultantly, the judgment passed by the learned Appellate Court is modified to the extent of the maintenance of the minor whereas rest of the judgment is affirmed.

10. Resultantly this petition is disposed of in the terms mentioned above with no orders as to cost.

ZC/S-9/L Petition disposed of.

2017 Y L R Note 398
[Lahore (Multan Bench)]
Before Ali Akbar Qureshi, J
MUHAMMAD AZAM---Petitioner
Versus
ABDUL QADIR---Respondent

C.R. No.1178-D of 2003, heard on 27th October, 2015.

Specific Relief Act (I of 1877)---

----S. 12---Suit for specific performance of agreement to sell---Non-production of two attesting/marginal witnesses---Effect---Scribe of agreement to sell---Evidentiary value---Plaintiff did not produce two attesting/marginal witnesses of agreement to sell---Trial Court decreed the suit but same was dismissed by the Appellate Court---Validity---Nothing was on record as to why other marginal witnesses of agreement to sell were not produced by the plaintiff---Scribe of agreement to sell could not assume the role of attesting witness---Plaintiff had failed to prove the execution of agreement to sell and payment of consideration amount through confidence inspiring and reliable evidence---Appellate Court had rightly appreciated the record and dismissed the suit---Revision was dismissed in circumstances. [Paras. 8, 9, 11 & 12 of the judgment]

Hafiz Tassaduq Hussain v. Muhammad Din through L.Rs. and others PLD 2011 SC 241 rel. Abdul Wali Khan through L.Rs. and others v. Muhammad Saleh 1998 SCMR 760 and Mst. Rasheeda Begum and others v. Muhammad Yousaf and others 2002 SCMR 1089 distinguished.

Ch. Muhammad Naeem for Petitioner.
Muhammad Tufail Alvi for Respondent.
Date of hearing: 27th October, 2015.

JUDGMENT

ALI AKBAR QURESHI, J.---This civil revision is directed against the judgment and decree dated 04.11.2003, passed by learned District Judge, Lodhran, whereby suit for specific performance of an agreement, filed by the petitioner was dismissed.

2. The main controversy required to be adjudicated by this Court, is regarding the validity of an agreement to sell dated 20.03.2001, relating to land measuring 5 kanals 18 marlas for a consideration of Rs.1,00,000/-.

3. A suit for specific performance of agreement to sell was filed by the petitioner/plaintiff contending therein, that Rs.85,000/- were paid by the petitioner and in response thereof the

respondent/defendant handed over the possession of the suit land to the petitioner as a part performance of the contract. As regards the remaining amount it was agreed that the same shall be paid by the petitioner at the time of registration of the sale deed but respondent refused to perform his part of the agreement and the petitioner had to file the aforesaid suit.

4. The learned trial court after completing codal formalities i.e. recording of oral as well as documentary evidence, decreed the suit, against which an appeal was filed by the respondent, which was allowed and the suit of the petitioner was dismissed.

5. Learned counsel for the respon-dent at the very outset of the arguments has raised a preliminary objection that the suit filed by the petitioner is otherwise not maintainable and rightly dismissed by the learned Appellate Court because the petitioner failed to produce the two attesting/ marginal witnesses. Learned counsel has relied upon a judgment of the Hon'ble Supreme Court of Pakistan titled Hafiz Tassaduq Hussain v. Muhammad Din through LRs and others (PLD 2011 SC 241).

6. In response thereof, the learned counsel for the petitioner has submitted that it is true, the petitioner could not produce two attesting/marginal witnesses but the petitioner produced the scribe of the agreement to sell who stated that the agreement was written by him and in their presence the consideration was paid. Learned counsel for the petitioner relied upon the judgments titled Abdul Wali Khan through LRs and others v. Muhammad Saleh (1998 SCMR 760) and Mst. Rasheeda Begum and others v. Muhammad Yousaf and others (2002 SCMR 1089).

7. In order to decide the objection raised by learned counsel for the respondent, the record was perused with the assistance of learned counsel for the parties from where it is found, that the petitioner produced only one marginal witness.

8. The record further reveals, that the petitioner could not place on record anything or offered any satisfactory explanation that why the other marginal witnesses were not produced. The learned counsel for the petitioner has not denied that the other witness was alive and the petitioner, for no reason could not produce the said witness.

9. As regards the contention raised by learned counsel for the petitioner, that the petitioner produced the scribe of the agreement which can be substitute of the marginal witnesses. The argument advanced by learned counsel for the petitioner has no substance in view of the principle laid down by the Hon'ble Supreme Court of Pakistan in the judgment titled Hafiz Tassaduq Hussain v. Muhammad Din through LRs and others (PLD 2011 SC 241), that the scribe of the agreement having appeared as witness to prove the agreement to sell could not assume the role of attesting witness. The relevant paragraphs are re-produced as under:-

> "9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute for the attesting witnesses; the point on which leave was also granted. It may be held that if such witness is allowed to be considered as the attesting witness it shall be against the very concept, the purpose, object and the mandatory command of the law highlighted above. The question,

however, has been examined in catena of judgments and the answer is in the negative.

10. It has been held in Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639):--

"Attesting witness was the one who had not only seen the document being executed by the executant but also signed same as a witness---Person who wrote or was 'scribe' of a document was as good a witness as anybody else, if he had signed the document as a witness (Emphasis supplied) No legal inherent in competency existed in the writer of a document to be an attesting witness to it."

In N: Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 503, it has been held:--

"Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest."

In Badri Prasad and another v. Abdul Karim and others (1913 (19) IC 451), it is held:- "The evidence of the scribe of a mortgage deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed. An attesting witness is a witness who has seen the deed executed and has signed it as a witness. (Emphasis supplied)"

To the same effect are the judgments reported as Qasim Ali v. Khadim Hussain through legal representatives and others (PLD 2005 Lahore 654) and Shamu Patter v. Abdul Kadir Rowthan and others (1912 (16) IC 250). Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfil and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."

10. Another principle laid down by the Hon'ble Supreme Court of Pakistan, while dealing with the proposition in the judgment supra, is as follows:-

"However, the provisions of Article 17(2)(a) encompasses in its scope two fold objects (i) regarding the validity of the instruments, meaning thereby, that if it is not attested by the required number of witnesses the instrument shall be invalid and therefore if not admitted by the executant or otherwise contested by him, it shall not be enforceable in law (ii) it is relatable to the proof of such instruments in terms of mandatory spirit of Article 79 of The Order, 1984 when it is read with the later. Because the said Article in very clear terms prescribes "if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two

attesting witnesses alive and subject to the process of the Court and capable of giving evidence."

While the judgments referred by learned counsel for the petitioner are not relevant to the facts of the case.

11. As regards the other merits of the case, the petitioner could not prove the execution of the agreement to sell and payment of consideration through a confidence inspiring and reliable evidence, therefore, the learned appellate court, as evident from the findings rightly appreciated the record and finally dismissed the suit of the petitioner by accepting the appeal filed by the respondent.

12. In view of above, the instant revision petition is dismissed by upholding the judgment and decree passed by the learned appellate court. No order as to cost.

ZC/M-20/L Revision dismissed.

PLJ 2017 Lahore 98

Present: **ALI AKBAR QURESHI, J.**

Syeda **NEELAM ALTAF and 4 others--Petitioners**

versus

SECRETARY, GOVERNMENT OF PUNJAB, SCHOOL EDUCATION DEPARTMENT, LAHORE 3 others--Respondents

W.P. No. 9365 of 2016, decided on 13.5.2016.

Constitution of Pakistan, 1973--

----Art. 10-A & 199--Constitutional petition--Appointment on contract basis--Termination--Wrongly recruited by competent authority--Ages were less than 20 years on closing date of submission of applications--Validity--Both parties are to be regulated according to terms and conditions of contract executed between parties, therefore, termination of petitioners is against spirit and terms and conditions of contract--Wrong and irregular appointment of petitioners on basis of contract by competent authority which, subsequently turned into termination--Action will be taken against officers who made wrong appointment, but petitioners would not be penalized for wrong action of officers/delinquents--Termination of petitioners is against spirit and Constitutional guarantee of Constitution--Petition was allowed. [Pp. 1001 & 101] A, B, C & D

Mr. Ghulam Hussain Shakar, Advocate for Petitioners.

Mr. Naveed Saeed Khan, Additional Advocate-General with *Liaqat Ali Chatha,* DCO, Gujrat, *Imran Sikandar Baloch,* Special Secretary Schools, Lahore, *Tahir Kashif,* EDO (E), Gujrat, *Riffat un Nisar* DEO (W), Gujrat and *Rana Younas Azhar,* Senior Law Officer Schools Education Department FOR Respondents.

Date of hearing: 13.5.2016.

ORDER

The petitioners who were appointed by the respondent-department as SESE and ESE after completing all codal formalities on contract basis, in education department have been terminated on the ground, that the required age at the time of appointment was 20 years whereas the petitioners were less than the age required and advertised by the respondent-department.

2. In response of the notice, the respondent-department filed report and para-wise comments wherein it is stated, that the petitioners were recruited wrongly by the competent authority as the minimum age limit for recruitment as Educator was 20 years, whereas, the ages of petitioners were less than 20 years on closing date of submission of applications i.e. 5.12.2011. However, the respondent-department has not denied, that the petitioners fulfill the requisite educational qualification and at the time of filing the applications mentioned their correct ages i.e. less than 20 years, the petitioners are working for the last 4 to 5 years and the fact of ages of less than 20 years of the petitioners came into the knowledge of the respondents-department when the petitioners filed applications for regularization.

3. The Special Secretary Schools, Imran Sikandar Baloch and District Coordination Officer, Gujrat, Liaqat Ali Chatha appeared in person and frankly conceded that the petitioners fulfill the requisite qualification and no wrong information was provided by the petitioners at the time of filing the applications. The respondent-Secretary further submitted, that it is in fact the fault of the respondent-authority who at the time of appointment did not carefully scrutinized the record and appointed the petitioners, therefore, stern action has been proposed against the delinquent in accordance with law.

4. The respondent-secretary when confronted as to whether proper opportunity of a fair trial as enunciated in Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, was provided to the petitioners while terminating their services, the respondent-Secretary in all fairness submitted, that no such opportunity was provided to the petitioners. Further stated, that the respondent-department is ready to consider the case of the petitioners sympathetically and the matter will be referred to the higher authorities for accommodation in accordance with law.

5. As earlier noted, that the petitioners fulfill the requisite qualification for the posts of SESE and ESE and at the time of filing the applications provided correct particulars including their age; the petitioners were appointed on contract basis and according to the terms and conditions of the contract, the petitioners can be terminated only according to condition No. 8 which is reproduced as under:

> "(i) Contract of appointment will be liable to termination on One Month Notice or payment of One Month Salary in lieu thereof by either side without assigning any reason.
>
> (ii) The Appointing Authority as a right to terminate contract at any time by giving a notice/personal hearing in case of poor performance or misconduct.
>
> (iii) The contract will be terminated, if the Educator is on willful absence from duty or does not achieve 100% enrollment. Student Teacher Ratio (STR) (40:1), 100% retention and quality education to be judged on the basis of PEC Examinations, BISE examinations and monthly/ term tests conducted through

DTEs or any other mechanism prescribed by the Department for Quality Assurance Test (QAT).

(iv) If degree(s)/certificate(s) are found bogus, the contract shall be terminated by the Appointing Authority."

6. Admittedly and not denied by the respondent-State functionaries, that the petitioners have not been terminated from service according to the terms and conditions of the contract. Needless to mention, that both the parties i.e. the petitioners and the respondent-department are to be regulated according to the terms and conditions of the contract executed between the parties, therefore, the termination of the petitioners is against the spirit and terms and conditions of the contract.

7. As regard, the wrong and irregular appointment of the petitioners on the basis of contract by the competent authority which, subsequently turned into termination, the Hon'bleSupreme Court of Pakistan has observed in *Director, Social Welfare, N.W.F.P., Peshawar v. Sadullah Khan* (1996 SCMR 1350) and *Collector of Customs and Central Excise, Peshawar and 2 others v. Abdul Waheed and 7 others* (2004 SCMR 303). The relevant para is reproduced as under:

"The petitioners themselves appointed him on temporary basis in violation of the rules for reasons best known to them. Now they cannot be allowed to take benefit of their lapses in order to terminate the services of the respondent merely because they have themselves committed irregularity in violating the procedure governing the appointment."

8. Although the Secretary of the respondent-department stated, that the action will be taken against the officers who made the wrong appointment, but the petitioners should not be penalized for the wrong action of the aforesaid officers/delinquents.

9. Even otherwise, the petitioners by afflux of time have already crossed the barrier of 20 years age and during the service of 4 to 5 years, as affirmed by the respondent-Secretary, no complaint has been reported against the petitioners. The termination of the petitioners is against the spirit and Constitutional guarantee of the Constitution of the Islamic Republic of Pakistan, 1973, provided in Article 10-A, therefore, this petition is allowed, the termination orders of the petitioners dated 05.01.2016 and 05.03.2016 are set aside and the matter is referred to the Secretary, Schools Education Department, Government of the Punjab to look into the matter in accordance with law and the principle laid down by the Hon'ble Supreme Court of Pakistan in the judgments (Supra). It is made clear that the law declared by the Hon'ble Supreme Court of Pakistan becomes the law of land under Article, 189 of the Constitution of the Islamic Republic of Pakistan, 1973.

10. Copy of this petition along with all the annexures be dispatched to the Secretary, Schools Education Department, Government of the Punjab. The petitioners shall appear before the secretary on 23.05.2016 at 11:00 a.m.

(R.A.) Petition allowed.

PLJ 2017 Lahore 230

***Present*: ALI AKBAR QURESHI, J.**

ABDUR REHMAN KALYAR--Petitioner

versus

DISTRICT COORDINATION OFFICER, CHINIOT and 3 others--Respondents

W.P. No. 39939 of 2016, decided on 4.1.2017.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Membership of club--Entry in premises and to avail facilities--Validity--If petitioner is member of D.P.C. he is allowed to enter in premises and to avail facilities like other members, extended by D.C.O.--If till today he is not a member of D.P.C., he may take membership in accordance with law and may avail facilities. [P. 231] A

Sardar Yousaf Nadeem, Advocate for Petitioner.

Mr. Naveed Saeed Khan, Addl.A.G. alongwith *Abdul Waheed,* Chief Officer Municiapl Committee, Chiniot for Respondents.

Date of hearing: 4.1.2017.

ORDER

In response of the notice, Abdul Waheed, Chief Officer, Municipal Committee, Chiniot has appeared alongwith the record and submits, that one room consisted of 01 Maria and 01 Sq. Ft. was allotted to the members of the District Press Club, Chiniot by the District Coordination Officer, Chiniot on the application filed for this purpose. Further submits, that neither the room has been allotted permanently nor given on rent to the said club.

2. In response thereof, learned counsel for the petitioner submits, that the petitioner is also the member of the District Press Club, Chiniot and therefore, he be allowed to enter in the premises and to avail the facilities extended by the District Coordination Officer to the other members of the press club.

3. Learned Additional Advocate General, under instructions, has no objection to it.

4. In view of above, if the petitioner is the member of the District Press Club, Chiniot, he is allowed to enter in the said premises and to avail the facilities like other members, extended by the District Coordination Officer. If till today he is not a member of the District Press Club, he may take the membership in accordance with law and may avail the facilities.

5. Abdul Waheed, Chief Officer, Municipal Committee, Chiniot, to whom the show-cause notice to initiate the contempt proceedings was given, seeks forgiveness, therefore, the show-cause notice is recalled.

6. This petition is disposed of accordingly.

(R.A.) Petition disposed of.

PLJ 2017 Lahore 723

***Present*: ALI AKBAR QURESHI, J.**

DEFENCE HOUSING AUTHORITY--Petitioner

versus

***Mst.* NUSRAT AYYAZ, etc.--Respondents**

C.R. No. 2430 of 2014, heard on 7.3.2017.

Land Acquisititon Act, 1894 (I of 1894)--

----S. 4--Registered sale-deed--Agreement to sell--Document--Power of attorney--Mutation--Petitioner who is an authority, is claiming titled of suit land on ground that same was purchased by authority through an agreement to sell against consideration from an attorney of original owner, but unfortunately, petitioner had miserably failed to place on record or to produce any document during course of recording evidence to prove its claim--Neither agreement to sell nor power of attorney in any manner whatsoever was brought on record whereas respondents placed on record in their evidence, duly executed and registered sale-deed, mutation and copy of notification--All these documents are sufficient to prove that suit land is owned by respondents--Revision was dismissed.

[Pp. 724 & 725] A

Mr. Altaf-ur-Rehman Khan, Advocate for Petitioner.

Mr. Athar Mansoor Butt, Advocate and *Mr.Omer Farooq Khan,* Asstt.A.G. for Respondents.

Date of hearing: 7.3.2017.

JUDGMENT

This civil revision calls in question the judgment and decree dated 10.04.2014 and 05.05.2011, passed by the learned Courts below, while decreeing the suit for declaration with consequential relief of possession filed by predecessor-in-interest of the Respondents No. 1 to 5 and Respondent No.6.

2. The facts, as depict from the record are that, the predecessor-in-interest of the Respondents No. 1 to 5 and Respondent No.6/plaintiffs filed a suit for declaration with consequential relief on the ground, that the suit property was purchased on 02.05.1979 through registered sale-deed No.9421 from one Muhammad Akmal Khan; that the mutation on the basis of the sale-deed was entered in the revenue record in favour of respondents; that the petitioner entered into negotiation with the respondents predecessor-in-interest of the Respondents No. 1 to 5 and Respondent No.6 to purchase the suit land but subsequently without giving any notice to the respondents, started acquisition proceedings by issuing notice under Section 4 of the Land Acquisition Act, 1894; that on hue and cry of Respondents No. 1 and 2, the suit land was deleted from the notification issued under Section 4 of the Act *ibid* and the petitioner restarted the negotiation of sale with the respondents; that the respondents, in order to protect their property, filed a Constitutional petition W.P.No.14002/1994, praying therein, that the petitioner be restrained to use the land of respondents; that the writ petition was disposed of having been withdrawn with the observation, that if the respondents prove their title, the petitioner will compensate them in accordance with law; that the respondents filed the instant suit which was contested by the

other side mainly on the ground, that the suit land was purchased by the petitioner-authority twenty years back through an agreement to sell from the attorney of Muhammad Akmal Khan and the petitioner has developed the land; and lastly the respondents have no concern with the suit land.

3. The learned Trial Court, after completing all the codal and legal formalities, decreed the suit; against which an appeal was filed which was dismissed. Hence, this civil revision.

4. Learned counsel for the petitioner mainly argued, that the suit land was purchased by the petitioner-authority through power of attorney executed by the original owner i.e. Muhammad Akmal Khan, the land has been developed and respondents have no concern whatsoever with the land in question. Learned counsel also argued, that the suit filed by the respondents is hopelessly barred by time.

5. In response thereof, learned counsel for the respondents supported the findings recorded by the learned Courts below and submitted, that the respondents are the lawful owners of the suit land on the basis of a validly executed and registered sale-deed.

6. Heard. Record perused.

7. During the course of arguments, with the assistance of learned counsel for the parties, the record as well as the findings recorded by the learned Courts below were surveyed. The petitioner, who is an Authority, is claiming the title of the suit land on the ground, that the same was purchased by the authority through an agreement to sell against consideration from an attorney of the original owner i.e. Muhammad Akmal Khan but unfortunately, the petitioner has miserably failed to place on record or to produce any document during the course of recording the evidence to prove its claim. Neither the agreement to sell nor the power of attorney in any manner whatsoever was brought on record whereas on the other hand, the respondents placed on record, in their evidence, duly executed and registered sale-deed, mutation and copy of the notification. All these documents are sufficient to prove, that the suit land is owned by the respondents and the suit land has neither been purchased nor acquired by the petitioner-authority and the same is being used by the petitioner-authority which is not only against the law but also the Constitutional promises. The provision of Constitution of the Islamic Republic of Pakistan, 1973 says, that nobody can use the land of anyone except in accordance with law, therefore, in these circumstances, it can safely be held, that the petitioner-authority has illegally and unlawfully encroached/possessed the land of the respondents. The respondents are entitled to the compensation according to the prevalent market rate.

8. Even otherwise, there is hardly any reason to interfere with the well worded concurrent findings of the learned Courts below. I am fortified by the esteemed judgments of the Hon'ble Supreme Court of Pakistan, in the case of *Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469) and *Noor Muhammad and others v. Mst. Azmat-e-Bibi* (2012 SCMR 1373).

9. Resultantly, this civil revision has no force and the same is dismissed with no order as to cost.

(Z.I.S.) Revision dismissed.

PLJ 2017 Lahore 770

***Present*: ALI AKBAR QURESHI, J.**

IBRAHIM TANSEER SHEIKH and another--Petitioners

versus

RENT CONTROLLER/ADMINISTRATIVE SPECIAL JUDGE RENT, LAHORE and another--Respondents

W.P. No. 11552/04 of 2017, heard on 31.5.2017.

Arbitration Act, 1940 (X of 1940)--

----S. 34--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Leased out demise premises--Defaulted in payment of monthly rent--Settlement of disputes--Validity--Admittedly, lease agreement, which governs the affairs of parties, contains clause 18, whereby in case of any dispute, matter is to be referred to arbitrators for amicable settlement of disputes--Rent Court has rightly accepted the application under Section 34 of the Act and no illegality has been committed. [P. 771] A & B

Mr. Usman Akram Sahi, Advocate for Petitioners.

Messrs Tipu Salman Makhdoom, Moeen Ahmad and Ikhlaq Hiader Chatha, Advocates for Respondents.

Date of hearing: 31.5.2017.

JUDGMENT

This Constitutional petition assails an order dated 28.03.2017, passed by learned Special Judge Rent, Lahore, in an ejectment petition filed by the petitioners, whereby an application under Section 34 of the Arbitration Act, 1940, filed by the respondents, was allowed.

2. The necessary facts of the case are that, the petitioners, as per record, leased out the demise premises to the Respondent No. 2 under a lease agreement; that the respondent-tenant committed default in payment of monthly rent whereupon the petitioners filed an ejectment petition. The respondent-tenant invoking the provision of settlement of disputes, filed an application under Section 34 of the Arbitration Act, 1940, praying therein, that there is arbitration clause in the main lease agreement, therefore, the matter should firstly be decided by the arbitrator and till then the proceedings in the ejectment petition be stayed. The application was contested by the petitioners/landlord on the ground, that in the rent matter, even if the arbitration clause is part of the lease agreement, the matter cannot be referred for arbitration.

3. The learned Special Judge Rent, Lahore after hearing the arguments of the parties, allowed the application *vide* impugned order and stayed the proceedings of ejectment petition.

4. Heard. Record perused.

5. In order to appreciate the contentions raised by learned counsel for the parties, the record was perused. Admittedly, the lease agreement, which governs the affairs of the parties, contains clause 18, whereby in case of any dispute, the matter is to be referred to the arbitrators for amicable settlement of disputes. Further, as recorded by the learned Special Judge Rent, already an arbitration suit is pending between the parties in the Civil Court. Therefore, in my opinion, learned Special Judge Rent has rightly accepted the application under Section 34 of the Act *ibid* and no illegality has been committed.

6. Resultantly, this writ petition has no force and same stands dismissed with no order as to costs.

(R.A.) Petition dismissed.

PLJ 2018 Lahore 112

[Multan Bench Multan]

***Present*: ALI AKBAR QURESHI, J.**

MUHAMMAD ZIA-UL-HAQ--Petitioner

versus

HOME SECRETARY, GOVERNMENT OF PUNJAB and 3 others--Respondents

W.P. No. 5435 of 2015, decided on 24.4.2015.

West Pakistan Maintenance of Public Order Ordinance, 1960 (XXXI of 1960)--

----S. 3--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Detention order--Quashment--Alternate remedy--Maintainability--Respondent-government despite availing time could not produce any material against the detenue and the only argument, which was advanced by the respondent-government, that the petitioner had an alternate remedy of representation--Conduct of government is not satisfactory and liberty of a citizen should be jealously safeguarded and government action in curtailing liberty of a citizen is not immune to this scrutiny of this Court, under article of 199 of Constitution of Islamic Republic of Pakistan, 1973--In view of above, this petition is allowed the impugned order of detention dated 07.04.2015, passed by the Secretary Govt. of Punjab Home Department in continuation of the request District coordination Officer and District police officer, Dera Ghazi khan is declared illegal, without lawfull authority and the same is set aside.[Pp. 115 & 116] A & B

Mr. Muhammad Umar Qureshi, Advocate for Petitioner.

Mr. Mobasher Latif Gill, Asstt. A.G. for Respondents.

Date of hearing: 24.4.2015.

ORDER

The petitioner, who is son of the detenue, is seeking the quashment of the detention order of his father namely Haji Yar Muhammad s/o Allah Bakhash, under section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960, on the ground, that his father has been detained illegally and unlawfully as there is no material before the detaining authority neither mentioned in the detention order. The detention order is reproduced as under:--

> "No. SO(IS-I) 3-3/2015 (D.G. Khan). WHEREAS, Haji Yar Muhammad s/o Allah Bakhsh was detained for a period of 30-days vide District Coordination Officer, Dera Ghazi Khan Order No. DCO/CSA/1478-82, dated 11.02.2015. On the request of District Coordination Officer & District Police Officer, D.G. Khan, Home Department issued extension Order No. SO(IS-I)3-3/2015 (D.G. Khan), dated 09.03.2015 for a period of 30-days w.e.f. 10.03.2015. The District Coordination Officer & District Police Officer, D.G. Khan have further requested for extension of their detention for another period of 30 days.
>
> 2. WHEREAS, evidence placed on record corroborates that activities of aforesaid person are prejudicial to Public Safety & Maintenance of Public Order.

3. AND WHEREAS, grounds of detention of the District Coordination Officer, Dera Ghazi Khan are justified and continue to exist.

4. NOW THEREFORE, in exercise of powers conferred under sub-section (1) of Section 3 of the Punjab Maintenance of Public Order Ordinance, I960, detention period of aforesaid persons are extended for a period of 30-days with effect from 08.04.2015. His custody shall continue to rest with Superintendent, Central Jail, D.G. Khan.

5. Detenue is at liberty to make a representation against the order to the Government of Punjab. "

2. The father of the petitioner namely Haji Yar Muhammad, was detained by the District Coordination Officer, Dera Ghazi Khan, while exercising his powers under section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960, firstly on 11.02.2015 for a period of 30 days, then on 09.03.2015 for another 30 days and presently by the order dated 07.04.2015 for further thirty days.

The petitioner earlier to this, filed a Constitutional petition against the detention of his father i.e. W.P. No. 3960 of 2015, the same was disposed of on 08.04.2015 in the following manners:

"1. Learned Assistant Advocate General, under instructions submits, that the detention order, impugned herein is going to be elapsed by tomorrow i.e. 09.04.2015 and the government for the time being have no intention to issue any further detention order.

2. Despite availing time, respondent-Government could not place any material against the detenue, before this Court. If the respondent-government issue any further detention order the petitioner would be at liberty to challenge the same."

Although in the previous proceedings of the Constitutional petition, the government stated at the bar, that the government had no intention to further issue any detention order of the detenue but again another order from 07.04.2015 to 07.05.2015 has been issued.

3. In response of the notice learned Assistant Advocate-General appeared before the Court after obtaining instructions and stated, that there is no material against the petitioner, which could be placed on file or to submit before this Court.

4. As regards the preventive detention under section 3(1) of the Ordinance ibid, the Hon'ble Supreme Court of Pakistan, has laid the following principles in a judgment cited as *"Federation of Pakistan through Secretary Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khawaja and others"* (PLD 2003 SC 442):--

"An order of preventive detention has to satisfy the requirements laid down by their Lordships of the Supreme Court that is to say, (i) the Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention; (ii) that satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of detention would be rendered invalid; (iii) that initial burden lies on the detaining authority to show the legality of the preventive detention, and (iv) that the detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any

document, the validity of which claim shall be within the competence of the Court to decide. In addition to these requirements, the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention; that each of the requirements of the law relating to preventive detention should be strictly complied with; that 'satisfaction' in fact existed with regard to the necessity of preventive detention of the detenue; that the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then 'as soon as may be'; that the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenue to make representation against his detention to the authority prescribed by law; that the grounds of detention, that is, they are not irrelevant to the aim and object of this law and that the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice" *(Liaqat Ali v. Government of Sindh through Secretary, Home*, PLD 1973 Karachi 78)."

The Hon'ble Supreme Court of Pakistan has further observed, that the right of a person to a petition for habeas carpus is a high prerogative right and is a Constitutional remedy for all matters of illegal confinement and the Court can see whether the satisfaction about the existence of requite of satisfaction really and truly existing in the mind of the detaining authority or one merely professed by the detaining authority.

5. The learned Assistant Advocate-General repeatedly argued, that the petitioner has an alternate remedy of representation before the higher authority, therefore, in the presence of the alternate remedy available by in the law this Constitutional petition is otherwise not maintainable.

6. This proposition has already been dealt with by the learned Division Bench of this Court in the judgment titled *"Syed Mubbashar Raza v. Govt. of Punjab through Secretary Home Department and 2 others"* (PLD 2015 Lahore 20), wherein it is observed, that remedy of representation had always been considered an illusion, particularly in the circumstances, where the order passed against detenue was *coram non judice* and nullity in the eye of law.

7. In this case admittedly, the respondent-government despite availing time could not produce any material against the detenue and the only argument, which was advanced by the respondent-government, that the petitioner had an alternate remedy of representation. The conduct of the government is not satisfactory and the liberty of a citizen should be jealously safeguarded and the government action in curtailing the liberty of a citizen is not immune to this scrutiny of this Court, under article of 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

8. In view of above, this petition is allowed the impugned order of detention dated 07.04.2015, passed by the Secretary Govt. of Punjab Home Department in continuation of the request District coordination Officer and District police officer, Dera Ghazi khan is declared illegal, without lawful authority and the same is set aside and in result thereof the detenue mentioned in the aforementioned detention order is ordered to be released forthwith.

(Y.A.) Petition allowed.

2018 C L C Note 22
[Lahore]
Before Ali Akbar Qureshi, J
Mst. MUNAWAR BIBI and 4 others---Appellants
Versus
Mst. FARZANA and another---Respondents

R.S.A. No. 228 of 2015, heard on 22nd March, 2017.

Gift---

----Proof of---Alleged donor, an illiterate lady---Contention of plaintiff was that gift-deed was prepared by committing fraud---Suit was decreed concurrently---Validity---Donee to prove the validity of gift-deed failed to produce the marginal witnesses and in case of their death the secondary evidence as required by law---Neither scribe nor stamp-vendor appeared on behalf of donee---Donor was an illiterate and folk lady and no one accompanied her at the time of executing alleged gift-deed---Nothing was on record to prove time, date and place and the names of witnesses in whose presence offer was made by the donor and accepted by the donee---Claim of donee was liable to be struck down on such single score alone---Donee having failed to prove the case through any unimpeachable and convincing evidence, second appeal was dismissed with cost in circumstances. [Paras. 14, 15, 17 & 18 of the judgment]

Mian Allah Ditta through LRs. v. Mst. Sakina Bibi 2013 SCMR 868; Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

Arshad Jehangir Jhoja for Appellants.
Ch. Imran Raza Chadhar and Zaheer Afzal for Respondents.
Date of hearing: 22nd March, 2017.

JUDGMENT

ALI AKBAR QURESHI, J.---This Regular Second Appeal is directed against the judgment and decree dated 22.08.2015 and 27.10.2010, passed by the learned Courts below, whereby the suit filed by the predecessor of the respondents was decreed whereas the suit filed by predecessor of the appellants was dismissed.

2. Mst. Sabiran Bibi, respondent/plaintiff, being real mother of the predecessor of the respondent namely, Muhammad Aslam, instituted a suit for declaration contending therein, that husband of the respondent namely, Ata Muhammad (predecessor-in-interest of the parties to the case) was owner of the suit land, after his demise, inheritance mutation No.6805 was attested in the name of the legal heirs namely, Muhammad Aslam (son), Muhammad Akram (son), Mst. Farzana (daughter) and Mst. Sabran Bibi (widow).

3. Muhammad Akram, real son of Mst. Sabiran Bibi and real daughter namely, Farzana Bibi, due to love and affection, gifted away their shares, measuring 52 Kanal 7-1/2 Marla in favour of their real mother Mst. Sabiran Bibi through gift deed No.7389 dated 17.07.1993; that Sabiran Bibi thereafter gave the total land to her sons namely, Muhammad Aslam (the predecessor of the appellants) and Muhammad Akram on Pata; that after some time, Muhammad Aslam deceased stopped to make the lease money and after inquiry, it came into the knowledge of Mst. Sabiran Bibi (respondent), that Muhammad Aslam, without her consent, has prepared a forged and fictitious Hiba Nama in his favour by obtaining thumb impression of Sabiran Bibi on blank paper; deceased Muhammad Aslam, predecessor of the appellants, also got signatures of Muhammad Akram, respondent No.2 as witness, on the pretext of getting prepared Zarai Passbook; to resolve the controversy, a Punchayat was held wherein Muhammad Aslam, predecessor of the appellants, admitted to have committed fraud by preparing forged and fictitious gift deed and also admitted before the Punchayat, that he has spent an amount of Rs.145,000/- on the development of the land and if Sabiran Bibi (his real mother) pays the said amount, he will transfer the land in her name. Thereafter, the predecessor of the appellants refused to cancel the Hiba Nama as agreed before the Punchayat, on the ground, that their sons were not ready. Lastly, it was prayed in the suit, that the Hiba Nama be declared illegal, unlawful and consequently Hiba Nama as well as mutation be cancelled and the possession be restored in favour of the respondent.

4. In response thereof, the predecessor of the appellants contested the suit through written statement, controverting the contents of the plaint and submitted, that he is the owner of the land in question on the basis of the gift deed which was executed by his mother with her free consent.

5. As per record, the predecessor of the appellants also filed a suit for recovery of possession against his real brother namely, Muhammad Akram, on the ground, that the land was given to him without any charges simply to cultivate the same.

6. The learned Trial Court, after completing all the legal and codal formalities, decreed the suit titled 'Mst. Sabiran Bibi v. Muhammad Aslam etc.' and dismissed the suit titled 'Muhammad Aslam v. Muhammad Akram etc.' through a consolidated judgment.

7. The appellants challenged the impugned judgment and decree of the learned Trial Court through an appeal wherein the learned Appellate Court maintained the judgment and decree passed by the learned Trial Court.

8. Heard. Record perused.

9. The controversy, which requires consideration and adjudication, revolves around a gift deed allegedly executed by Mst. Sabiran Bibi, plaintiff (respondent herein) who is real mother of Muhammad Aslam, predecessor of the appellants.

10. Admittedly, the property in question was inherited by the parties to the case from the legacy of one Ata Muhammad, the predecessor-in-interest of the parties; the suit land was gifted to Mst. Sabiran Bibi by his real son and daughter through a registered document and

thereafter, Mst. Sabiran Bibi gave the suit land to her two sons namely, Muhammad Aslam and Muhammad Akram on lease.

11. Muhammad Aslam deceased, while filing the written statement claimed, that the property in question was gifted to him by his real mother namely, Sabiran Bibi through a registered Gift Deed No.8872 dated 29.08.1993, in the presence of the witnesses.

12. Firstly it is to be seen, as to whether Muhammad Aslam deceased could prove the execution of the gift deed by his mother Mst. Sabiran Bibi in accordance with law. Mst. Sabiran Bibi appeared along with her witnesses and stated, that to resolve the controversy, a Punchayat of the area was held, wherein Muhammad Aslam deceased admitted the fraud committed by him and finally agreed, that if the respondent, Mst. Sabiran Bibi, pays a certain amount, spent by Muhammad Aslam deceased on the development of the land, he would cancel the gift deed and would return the land to Mst. Sabiran Bibi. This fact was also supported by the witnesses of the respondent and particularly by P.W.3. So much so, Muhammad Aslam, the predecessor of the appellants, himself admitted while appearing in the witness box as D.W.1, that the Punchayat was held, wherein Siddique, Ghani (P.W.3), Younas and his mother Mst. Sabiran Bibi were present. Further deposed, that in the Punchayat, the matter regarding amount of Rs.145,000/- spent by him, was discussed but he refused to return the land.

13. There is another most important aspect of the case and to my mind, sufficient to decide the case against the appellants. The D.W.1 Muhammad Aslam, real son of Mst. Sabiran, stated the following words:

The predecessor of the appellants has himself stated about his mother the afore-noted words and unfortunately, the instant suit had to file by Mst. Sabiran Bibi, real mother of Muhammad Aslam deceased, who even according to the deceased Muhammad Aslam does not speak lie or commit any fraud. Meaning thereby, the contents of the suit filed by Mst. Sabiran Bibi are 100% correct which otherwise are supported by an affidavit.

14. As regard the validity of the gift deed, the predecessor of the appellants, failed to produce the marginal witnesses and in case of their death, the secondary evidence as required by law. The predecessor of the appellants did not submit the list of witnesses giving the names of the marginal witnesses of the gift deed. Neither the scribe nor the stamp vendor appeared on behalf of the appellants. Mst. Sabiran Bibi admittedly is an illiterate and folk lady and no one accompanied her at the time of executing the alleged gift deed.

15. There is no evidence available on the file to prove the time, date and place and the names of the witnesses in whose presence, the offer was made by Mst. Sabiran Bibi and accepted by the predecessor of the appellants. Therefore, the claim of the appellants is liable

to be struck down on this single score alone. Reliance is placed on Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi (2013 SCMR 868), wherein the Hon'ble Supreme Court of Pakistan has ruled, that the legal protection provided to the Parda Nasheen lady is also available to an illiterate lady. The relevant esteemed paragraph is reproduced as under:

> "6. ….The contention that the general power of attorney was given by the respondent/plaintiff not to a stranger but to her own son-in-law and that she was not a 'Pardanasheen Lady' for which the courts of law have provided protection is not tenable in the facts and circumstances of the instant case, first, because it is in evidence that the relations between the two were too strained on account of the discord between him and her daughter and in the normal course of events she could not have reposed that kind of trust; second, the protection provided to them in law is on account of the fact that they invariably are helpless, weak and vulnerable. The said consideration would equally be attracted to an illiterate lady particularly when she was placed in circumstances which made her vulnerable to deceit misrepresentation."

16. Learned counsel for the appellants repeatedly argued, that the land in question is in possession of the appellants since last many years in result of gift deed and the appellants have successfully proved the execution and registration of the gift deed.

17. The arguments advanced by learned counsel for the appellants have no substance in the presence of the afore-referred facts and circumstances of the case. The appellants have miserably failed to prove the case through any unimpeachable and convincing evidence. Even otherwise, there is hardly any reason to interfere with the well-worded concurrent findings of the learned Courts below. I am fortified by the judgments of the Hon'ble Supreme Court of Pakistan, in the case of Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

18. Resultantly, this appeal has no force and the same is dismissed with cost of Rs.25,000/- (Rupees twenty five thousand only) which shall be paid to the respondents by the appellants.

ZC/M-147/L Appeal dismissed.

PLJ 2018 Lahore 1063
[Rawalpindi Bench Rawalpindi]
***Present*: ALI AKBAR QURESHI, J.**
IMTIAZ AFZAL etc.--Petitioners
versus
GHULAM FATIMA, etc.--Respondents

C.R. No. 41-D of 2017, decided on 19.4.2018.

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

----S. 42--Suit for declaration filed by legal heirs--Preparation of general power of attorney by fraud and misrepresentation--Transfer of land through gift deed on basis of general power of attorney--Suit was decreed--Appeal--Dismissed--Concurrent findings--Challenge to--It is held on basis of record, that petitioners have failed to prove ingredients of gift made by Petitioner No. 1 on basis of general power of attorney--It is settled proposition of law, that gift made by an attorney has no legal effect and this type of gift is not permissible in law--Petitioners adopted a novel way to achieve their goal i.e. to deprive their real sisters and mother from legacy of their predecessor namely, Painda Khan, firstly a forged and fabricated power of attorney was prepared in name of grandson of predecessor of parties namely, Painda Khan and thereafter gift deeds on basis of power of attorney but unfortunately despite putting hectic efforts, could not prove validity of power of attorney and gift deeds being beneficiary--Learned Courts below and particularly learned first appellate Court carefully re-appreciated evidence, ocular as well as documentary, produced by parties and finally on strength of law laid down by Hon'ble Supreme Court of Pakistan (supra), dismissed appeal by upholding judgment and decree passed by learned trial Court--Therefore, I see no reason to interfere with concurrent conclusion rendered by learned Courts below--Civil Revision dismissed. [P.] B, C, D & E 1994 SCMR 818 *ref.*

Onus to prove--

----Claim of petitions--Power of attorney executed by their predecessor--Transfer of land through gift-deed--Requirement of gift--It is settled proposition of law, that the onus was upon the petitioners to prove the ingredients of gift in respect of the gift deeds allegedly executed by the Petitioner No. 1 in favour of his father and others--The contents of the written statement are completely silent and it is nowhere mentioned, the date, time and place and names of witnesses, in whose presence the gift was made. [P.] A

Sh. Muhammad Khizar-ur-Rashid, Advocate for Petitioners.

Date of hearing: 19.4.2018.

JUDGMENT

This civil revision is directed against the judgment and decree dated 28.10.2016 and 19.10.2015, whereby the learned Courts below, through concurrent findings, decreed the suit filed by the Respondents No. 1 to 5.

2. Shortly, the facts as stated are that, the Respondents No. 1 to 5 (the plaintiffs) instituted a suit for declaration on the ground, that the respondents and the petitioners are the legal heirs of one Painda Khan, who died leaving behind the respondents and the petitioners

to mourn his death and the property in question; that the Petitioner No. 1 (Imtiaz Afzal), who is grandson of Painda Khan, by playing fraud and misrepresentation, succeeded to get a general power of attorney dated 01.07.2009 in his favour with the connivance of Petitioners No. 2 and 3; that on the basis of the aforesaid power of attorney, the Petitioner No. 1 transferred the land in question by way of gift deeds No. 416, 417 and 418 dated 25.11.2009 in favour of Petitioners No. 2, 3 and Respondent No. 6; that the power of attorney and the gift deeds are result of fraud and misrepresentation and this all was managed by the petitioners and Respondent No. 6 to deprive the Respondents No. 1 to 5 from their secured and guaranteed right of inheritance and lastly prayed, that gift deeds and mutations be declared illegal and ineffective upon the rights of the respondents and suit be decreed.

3. The suit was contested by the petitioners through written statement, wherein they controverted the contents of the plaint and submitted, that the power of attorney was validly executed in favour of the Petitioner No. 1.

4. The learned trial Court decreed the suit after completing all the legal and codal formalities. The appeal filed by the petitioners was dismissed by the learned appellate Court. Hence, this civil revision.

5. Heard. Record perused.

6. This is another case like many others, wherein the brothers (the Petitioners No. 2 to 3 and Respondent No. 6), by playing fraud and misrepresentation, deprived their real sisters and mother from their right of inheritance and refused to give the shares from the legacy left by their predecessor namely, Painda Khan.

7. As depicts from the record, the Petitioner No. 1, who is son of Petitioner No. 2 and grandson of deceased Painda Khan, with the connivance of his father and real uncles, by playing fraud and misrepresentation, prepared a forged power of attorney dated 01.07.2009 and subsequently transferred the suit land by way of a gift deed in favour of his father and two uncles.

8. In order to highlight the fraud committed by the petitioners, it is necessary to scan the record.

9. As regard the power of attorney, an advocate namely, Malik Ghulam Shabbir engaged by the petitioners on 11.09.2009, recorded his statement on behalf of the petitioners in a suit for permanent and mandatory injunction filed by the Respondent No. 1 (the plaintiff), that the petitioners shall not pressurize their father for alienating his property. During the proceedings of the instant civil suit, the petitioners admitted the statement recorded by their counsel.

10. The afore-referred Court proceedings reveal, that the statement was recorded on 11.09.2009, whereas the power of attorney was executed fraudulently on 1.7.2009, meaning thereby, that till 11.09.2009, the general power of attorney, claimed to have been executed by Painda Khan was not in existence and it was prepared by playing fraud and misrepresentation.

11. There is another important aspect of the case, that the Petitioner No. 1, the general attorney, transferred the suit land through gift deed in favour of his father but without prior approval of the principal owner i.e. Painda Khan, the transfer of the land by the Petitioner No. 1 in favour of his father and uncles is liable to be set at naught on this

score alone as no permission was obtained from the principal i.e. Painda Khan. Reliance is placed on *Mst. Naila Kausar and another v. SardarMuhammad Bakhsh and others* (2016 SCMR 1781).

12. It is the claim of the petitioners, that the Petitioner No. 1, on the basis of the power of attorney executed by their predecessor namely, Painda Khan, transferred the land in question through gift deeds dated 25.11.2009 in favour of the Petitioners No. 2 and 3 and Respondent No. 6. It is to be seen, as to whether the petitioners (the defendants), have fulfilled the requirement of a gift.

13. It is settled proposition of law, that the onus was upon the petitioners to prove the ingredients of gift in respect of the gift deeds allegedly executed by the Petitioner No. 1 in favour of his father and others. The contents of the written statement are completely silent and it is nowhere mentioned, the date, time and place and names of witnesses, in whose presence the gift was made. While filing the written statement, the petitioners in a very leisure manner, tried to contradict the contents of the plaint but remained completely unsuccessful, therefore, it is held on the basis of the record, that the petitioners have failed to prove the ingredients of gift made by the Petitioner No. 1 on the basis of the general power of attorney.

14. Admittedly, the petitioners are beneficiaries of the gift transaction, therefore, they were bound to prove the validity of the general power of attorney, oral gifts and gift deeds alongwith mutations. Reliance is placed on *Ch. MuneerHussain v. Mst. Wazeeran Mai alias Mst. Wazir Mai* (PLD 2005 SC 658) and *Khan Muhammad v. Muhammad Din through LRs* (2010 SCMR 1351).

15. There is another important aspect of the case, that the Petitioners No. 2 and 3 and Respondent No. 6 are claiming the ownership of the suit property on the basis of the gift made by the Petitioner No. 1 being the attorney of deceased Painda Khan.

16. It is settled proposition of law, that the gift made by an attorney has no legal effect and this type of the gift is not permissible in law. Reliance is placed on *Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others* (1994 SCMR 818), *Muhammad Ashraf and 2 others v. Muhammad Malik and 2 others* (PLD 2008 SC 389) and *Mukhtar Ahmad v. Muhammad Ameen (deceased) through Legal Heirs and 8 others* (2017 MLD 845).

17. The practice to deprive the sisters from their right of inheritance secured and guaranteed by Allah Almighty particularly by the brothers has already been deprecated by the Hon'ble Supreme Court of Pakistan in a landmark judgment, cited as *Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi* (PLD 1990 SC 1). Relevant part of the judgment (supra) is reproduced as under:

> *"As is discussed in the case of Haji Nizam (approved in Mohammad Bashir's case) which was also a case of clash of Islamic principles against those of other systems-a widowed daughter-in-law, seeking maintenance for her minor child against the grandfather, it is the duty of the Courts within the permissible fields, as specified therein, to enforce Islamic law and principles. This case also required similar, if not better, treatment. The scope of rights of inheritance of females (daughter in this case) is so wide and their thrust so strong that it is the duty of the Courts to protect*

and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence, is yet to take its own time.

In the rural areas where 80% of the female population resides, the inheritance rights of the females are not as protected and enforced, as Islam requires. Cases similar to this do come up even to Supreme Court. In a very large majority of them the Courts act rightly and follow the correct rules. But it is a wide guess as to how many females take the courage of initiation or continuing the legal battle with their close one in matters of inheritance, when they are being deprived. The percentage is very low indeed. Neither the Courts nor the law as at present it stands interpreted, are to be blamed. The social organizations including those in the legal field are yet to show up in the rural area. They are mostly managed by Urban volunteers. When will they be able to move out of mostly managed by Urban volunteers. When will they be able to move out of sophisticated methods of American speech/seminar system and all that goes with it, in the enlightened urban society? It is a pity that while an ubranised brother, who is labourer in a neighbouring Mill, has the protection of such mass of Labour Laws; which sometimes even Courts find it difficult properly to count-right from the definition of 'rights', up to the enforcement' even in homes, through 'Social Security' Laws, with web of network of 'Inspectorates' etc. who are supposed to be helping him at every step, his unfortunate sister, who is deprived of her most valuable rights of inheritance even today by her own kith and kin-- sometimes by the urbanized brother himself, is not even cognizant of all this. She is not being educated enough about her rights. Nearly four decades have passed. A new set up is needed in this behalf. Social Organizations run by women have not succeeded in rural field. They may continue for the urban areas where their utility might also be improved and upgraded. At the same time they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women. It is not the reinterpretation alone which is the need of the day but a genuine effort by them for the reconstruction of the Islamic concepts in this field. It cannot be achieved by the use of alien manner or method alone."

18. In this case, the petitioners adopted a novel way to achieve their goal i.e. to deprive their real sisters and mother from the legacy of their predecessor namely, Painda Khan, firstly a forged and fabricated power of attorney was prepared in the name of the grandson of the predecessor of the parties namely, Painda Khan and thereafter gift deeds on the basis of the power of attorney but unfortunately despite putting hectic efforts, could not prove the validity of the power of attorney and the gift deeds being the beneficiary.

19. The learned Courts below and particularly the learned first appellate Court carefully re-appreciated the evidence, ocular as well as documentary, produced by the parties and finally on the strength of the law laid down by the Hon'bleSupreme Court of Pakistan (supra), dismissed the appeal by upholding the judgment and decree passed by the learned trial Court. Therefore, I see no reason to interfere with the concurrent conclusion rendered by the learned Courts below. Reliance is placed on *Cantonment Board through Executive Officer Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469) and *Noor Muhammad and others v. Mst.Azmat-e-Bibi* (2012 SCMR 1373).

20. Resultantly, this civil revision has no force and stands dismissed in limine with cost of Rs. 50,000/- (Rupees fifty thousand only) which shall be paid to the Respondents No. 1 to 5. If the petitioners and Respondent No. 6 fail to pay the cost, the Respondents No. 1 to 5 will be free to recover the same in accordance with law.

(Y.A.) C.R. dismissed.

PLJ 2018 Lahore 1082
[Rawalpindi Bench Rawalpindi]
***Present*: ALI AKBAR QURESHI, J.**
DEFENCE HOUSING AUTHORITY ISLAMABAD and another--Petitioners
versus
CITY DISTRICT GOVERNMENT through DCO, Rawalpindi and another--Respondents

C.R. No. 434-D of 2018, heard on 8.5.2018.

Punjab Land Revenue Act, 1967--

----S. 173--Specific Relief Act, 1877, S. 42--Shamlat Deh reserved for Rafah-i-am--Ghair Mumkin Talab--Petitioner purchased land alongwith right of "Shamlat Deh" Respondent filed an application for declaration of land for exclusion of land "Shamlat Deh"--Allowed--Suit for declaration, permanent and mandatory injunction filed by Petitioner--Dismissed--Appeal--Allowed--Challenge to--It is settled principle of law, that land of *Shamlat Deh* can only be used by inhabitants of Moza and is not ownership of one inhabitant of Moza, therefore, claim of petitioners, that land was purchased through sale deed is totally incorrect and having no effect upon rights of inhabitants of Moza Morgah, Tehsil & District Rawalpindi--Learned trial Court also appointed a local commission who inspected land in presence of parties and finally concluded in his report, that land in question is *Shamlat Deh (Ghair Mumkin Talab)* and cannot be sold or used by any other person except inhabitants of Moza Morgah--As regard proceedings initiated by respondent revenue authorities, it is held, that respondent-revenue authority rightly initiated proceedings under Section 173 of Act ibid against encroacher/petitioners who have included land into its society without any lawful authority and violated law declared by Hon'ble Supreme Court of Pakistan in judgments--Revision was dismissed. [Pp. 1085, 1086 & 1087] A, B & C 2006 SCMR 688 & 2002 SCMR 429, *ref.*

Mr. Muhammad Ilyas Sheikh, Advocate for Petitioners.

Mr. Saif-ur-Rehman, Asstt.A.G. alongwith *Talat Mehmood,* Deputy Commissioner, Rawalpindi *Tasneem Ali Khan,* Assistant Commissioner, Sadar Rawalpindi in *Noor Zaman Khan,* Tehsildar for Respondents.

Date of hearing: 8.5.2018.

JUDGMENT

This civil revision is directed against the judgment and decree dated 22.01.2018, passed by the learned appellate Court/Additional District Judge, Rawalpindi, whereby the

appeal filed by the Respondent No. 1 was allowed and the suit for declaration, permanent and mandatory injunction, filed by the petitioners, was dismissed in the following terms:

> *"21. It is clear from above discussion that plaintiffs may not be declared as owner in possession of the land of Khasra No. 395 which is reserved for the benefit of inhabitants of the village. A decree may not be extended in their favour to legalize their possession over the land and it is clear that the impugned judgment and decree is not in accordance with law and facts which is reversed and suit of the respondents is dismissed with cost throughout by accepting this appeal."*

2. As per record, the petitioners (plaintiffs) instituted a suit for declaration, permanent and mandatory injunction contending therein, that the Petitioner No. 2 acquired/purchased land alongwith rights in *Shamlat Deh* in Moza Morgah, Tehsil & District Rawalpindi; that the Petitioner No. 2 also purchased Shamlat rights alongwith the land measuring 1838 *Kanal* 09 *Marla* 04 Sarsai and presently, the Petitioner No. 1, who is successor of Petitioner No. 2, holds total land measuring 2022 *Kanal* 06 *Marla* 04 Sarsai including Shamlat of Moza Morgah; that the land was purchased by the Petitioner No. 2 for the establishment of a housing scheme; that the development work was started and also the petitioner constructed the streets, roads and other amenities in the scheme; that on the creation of Petitioner No. 1, the Petitioner No. 2 alongwith its all assets, merged into Petitioner No. 1 and presently the Petitioner No. 1 is managing the affairs of the housing scheme; that the entire area including *Shamlat Deh* is under the control of Petitioner No. 1 who has allotted the plots to different persons; that the Respondent No. 2 who had no concern whatsoever with the land in question, filed an application to the City District Government through DCO for the demarcation of the land for the exclusion of land of *Shamlat Deh* of Moza Morgah from the holding of petitioners; that the Respondent No. 1 has no authority in law to take action or to initiate any proceedings against the petitioners, and lastly prayed, that while decreeing the suit, the proceedings initiated by the Respondent No. 1 be declared illegal, unlawful and ineffective qua the rights of the petitioners.

3. The suit was vehemently contested by the respondents through written statement wherein it was asserted, that the land measuring 12 *Kanal* 07 *Marla* bearing Khasra No. 395 is Ghair Mumkin Talab and is indivisible and the Ghair Mumkin Talab is not the ownership of one person rather the same is reserved for Rafah-i-Aam.

4. The learned trial Court, after recording evidence of the parties and hearing the arguments, decreed the suit *vide* judgment and decree dated 13.06.2014. Against which an appeal was filed by the Respondent No. 1 which was allowed and the suit for declaration filed by the petitioners was dismissed with cost throughout *vide* judgment and decree dated 22.01.2018. Hence, this civil revision.

5. Learned counsel for the petitioners mostly reiterated the grounds of instant civil revision in his arguments and repeatedly argued, that the land of *Shamlat Deh* of Moza Morgah was validly purchased by the petitioners, therefore, the respondents have no authority in law to initiate any proceedings under the Punjab Land Revenue Act, 1967, as the Act ibid is not applicable. Further submitted, that the land is not agricultural neither subservient to the agricultural purpose, therefore, any proceedings initiated by the respondents under the Land Revenue Act are illegal and unlawful. Anyhow, learned counsel for the petitioners submitted, that the petitioners have constructed the amenities for the

welfare of the society like park, mosque etc. and if the residents of the Moza Morgah are intended to take the benefits of the facilities, the petitioners will not stop them rather facilitate them by opening a door towards to their side. Learned counsel also submitted, that the judgments referred by the learned appellate Court have wrongly been interpreted, therefore, the judgment and decree passed by the learned appellate Court be set aside.

6. In response thereof, learned Assistant Advocate General, under instructions of the Deputy Commissioner and other revenue staff, submitted, that the land, which is being claimed by the petitioners, is *Ghair Mumkin Talab* according to the revenue record which is for the benefits of the residents of Moza Morgah, Tehsil & District Rawalpindi and no one can claim ownership of the said land. The Deputy Commissioner alongwith revenue staff was summoned to ascertain the true facts and ground realities, who submitted the relevant record.

7. Heard. Record perused.

8. It is not denied by learned counsel for the petitioners, that the land measuring 12 *Kanal* 07 *Marla* bearing Khasra No. 395 is of *Shamlat Deh* and as per the revenue record, the status of the land is mentioned as *Ghair Mumkin Talab*. It is also not denied, that the petitioners, on the ground of purchasing/acquiring the land alongwith the land of *Shamlat Deh*, have included the land of *Shamlat Deh* in the housing society which is against the revenue record and violative of the provisions of the Punjab Land Revenue Act, 1967. It is settled principle of law, that the land of *Shamlat Deh* can only be used by the inhabitants of the Moza and is not ownership of one inhabitant of the Moza, therefore, the claim of the petitioners, that the land was purchased through sale deed is totally incorrect and having no effect upon the rights of inhabitants of the Moza Morgah, Tehsil & District Rawalpindi.

9. The learned trial Court also appointed a local commission who inspected the land in the presence of the parties and finally concluded in his report, that the land in question is *Shamlat Deh (Ghair Mumkin Talab)* and cannot be sold or used by any other person except the inhabitants of the Moza Morgah.

10. Learned counsel for the petitioners, on one hand, is claiming the ownership of the land which is in fact *Ghair Mumkin Talab and Shamlat Deh* whereas on the other hand, during the course of arguments, offered, that the residents/inhabitants of Moza Morgah can use and enjoy the amenities constructed over the land in question by the petitioner-housing society and the petitioners are ready to facilitate them by opening a gate to their side.

11. It is a very ambiguous stance of the petitioners and is sufficient to understand, that the petitioners are still admitting, that the land in question is owned by the residents of Moza Morgah, Tehsil & District Rawalpindi, otherwise learned counsel for the petitioners would have not made such type of the offer.

12. As regard the offer made by learned counsel for the petitioner to facilitate and allow the residents of Morgah, Tehsil and District Rawalpindi to take benefit and enjoy the facilities like mosque and park etc. on the land of the *Shamlat Deh*, it is difficult rather impossible for a common man to enter into a Gated housing society like DHA and even otherwise, it can hardly be a ground to grab or illegally possess the land of *Shamlat Deh*.

13. The petitioner-DHA is created under a Statute but the authority is not consisted of duly elected public representatives, therefore, it cannot be expected from them to provide the facilities, as offered by the learned counsel for the petitioners, to the residents of Moza

Morgah. The Hon'ble Supreme Court of Pakistan has ruled in a judgment cited as *Ali Ahmed and others v. Municipal Committee, Talagang through Administrator and others* (2001 SCMR 585), that although the ownership of the land reserved for Maqbuza Rafah-i-Aam shell vest in the holder of the sale deed but anyhow the characteristics of the property cannot be changed which shall remain as Maqbuza Rafah-i-Aam. The Hon'ble Supreme Court of Pakistan in the judgment (supra) finally directed the concerned Municipal Committee to convert the disputed land into a public park, as the Municipal Committee consisted of elected representatives. Relevant part of the judgment (supra) is reproduced as under:

> *"8. It is, however, significant to note that the ownership of the appellants has been admitted by the learned trial and Appellate Courts which also finds support from Revenue Record and sale deed duly got executed and proved by the appellants. We are, therefore, inclined to hold that the ownership of the land in dispute vests in the appellants but the characteristics of the property in dispute cannot be changed which shall remain as "Maqbuza Rafah-i-Aam". The alternate plea as agitated on behalf of appellants that Municipal Committee may be directed to convert the land in dispute into a public park seems more plausible and must be appreciated. Mr. Ibrahim Satti, learned Advocate Supreme Court on behalf of the Municipal Committee has assured that the needful will be done by the Municipal Committee, Talagang. While accepting the alternate plea and pressing into service of the doctrine of cypress whereby if the formal and particular purpose cannot be carried out the Court may approve scheme which is in consonance with the general intention of the donor. Babaik Singh wanted to serve the public-at-large and by converting the land in dispute into a public park the objective could be achieved by utilizing the land for the public-at-large."*

Reliance is also placed on *Municipal Committee, Chakwal v. Ch. Fateh Khan and others* (2006 SCMR 688).

14. As regard the proceedings initiated by the respondent revenue authorities, it is held, that the respondent-revenue authority rightly initiated the proceedings under Section 173 of the Act ibid against the encroacher/petitioners who have included the land into its society without any lawful authority and violated the law declared by the Hon'ble Supreme Court of Pakistan in the judgments (supra).

15. The Hon'ble Supreme Court of Pakistan has observed in a judgment cited as *Muhammad Hanif and another v. Muhammad Jamil Turk and 5 others* (2002 SCMR 429), that the findings of the Appellate Courts are to be given weightage at the time of deciding the case by the higher forums.

16. In view of above, this civil revision is dismissed with special cost of Rs. 100,000/- (Rupees one lac only) which shall be deposited by the petitioners in the Government Treasury.

17. Parting with the judgment, a copy of this judgment shall forthwith be transmitted to the Chief Secretary Punjab, Senior Member, Board of Revenue and District Collector, Rawalpindi with the direction, that the land of *Shamlat Deh*(Ghair Mumkin Talab), encroached upon by the petitioners, shall be retrieved forthwith, within fifteen days, under an intimation to the Deputy Registrar (Judicial) of this Court. The Deputy Registrar (Judicial) of this Court shall place the report, submitted by the revenue authorities, before the learned Senior Judge of this Bench.

(M.M.R.) C.R. dismissed.