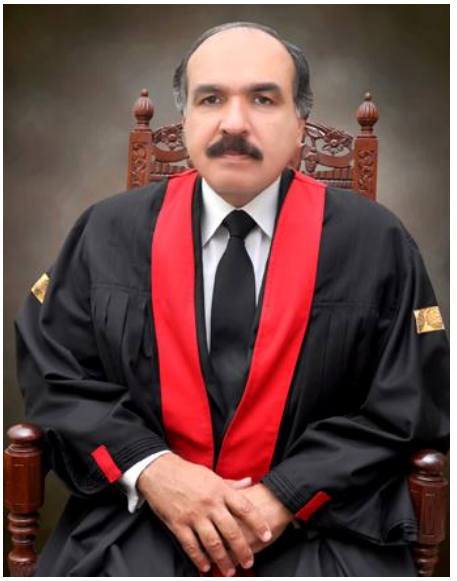

**HON'BLE MR. JUSTICE ATIR MAHMOOD**
**JUDGE LAHORE HIGH COURT, LAHORE**
**(APRIL 12, 2013 TO MAR. 08, 2021)**

After completing his graduation from F.C. College, Lahore and obtaining LL.B degree from the Punjab University Law College, Lahore, his Lordship started legal practice from the historical city of Lahore. His Lordship belongs to a family of lawyers and his father Sardar Khalid Mahmood, Advocate as well as his maternal uncles Sardar Zafar Iqbal and Mr. Javed Iqbal, Advocates were eminent practicing lawyers. The legal practice of his Lordship encompassed wide range of areas but his main domain of practice was on civil side.

His Lordship actively participated in bar politics. He was elected as Finance Secretary, Lahore High Court Bar Association for the year 1991-92; Member, Punjab Bar Council for the period from 2000 to 2004; and remained associated with various committees of Punjab Bar Council.

His Lordship was bestowed with the honor to represent Punjab Bar Council in India; and Peoples Republic of China as a Member of Delegations who visited these countries in the year 2003 and 2004 respectively.

His Lordship also took part in the sports activities of Bar Associations and was Captain of Pakistan Lawyers Cricket Team which participated in the 1st Lawyers World Cricket Cup held in Hyderabad (India) in the year 2007-2008.

His professional excellence in the field of law, ability to understand and interpret true intentions and dynamics of law and its applicability was acknowledged when his Lordship was appointed as Additional Judge of Lahore High Court on April 12, 2013. He graced the emblem of justice and delivered landmark judgments on different concepts of law and significantly contributed in the evolutionary development of civil jurisprudence, which not only guided the courts throughout the Province but

have also been taken as a great source of help by the legal fraternity and Courts throughout the country.

Besides delivering his indelible excellence on judicial side by rendering remarkable judgments and enunciating principles of law, His Lordship also actively took part in various administrative tasks of Lahore High Court and acted as Chairman and a Member of different committees as well as Chairman of various Tribunals. His Lordship also remained Administrative Judge of Consumer Court. He also remained inspection Judge for the District Kasur, Bahawlnagar, Layyah, Okara and Sialkot. His Lordship further remained Member Board of Trustees of Lahore University of Management Sciences (LUMS).

**Member of the committees**

- Member of departmental confirmation committee for District Judiciary.
- Member of Bar & Bench Coordination Committee.
- Member of departmental confirmation committee for District Judiciary.
- Member of Proforma Promotion Recommendation Committee for District Judiciary.
- Member of Performance Evaluation Committee for District Judiciary.
- Member of Rules Committee (High Court Rules and Orders).
- Member of Rule Committee (CPC).
- Member of Committee for Recommendation/Implementation of matters mentioned in Part-C of Chapter-3, Rules and Orders of Lahore High Court Volume-V.
- Member of Bar and Bench Coordination Committee.
- Member of Lahore High Court Enrollment Committee for former Judicial Officers and Lahore High Court officers/officials as advocate High Court.
- Member of Supervisory Committee for advising to the Hon'ble Chief Justice on matters between Bar and Bench in District Judiciary.
- Member of Punjab Subordinate Judiciary Service Tribunal.
- Member of Departmental Examination Committee Human Resources (District Judiciary).

- Member of Recruitment Committee for recruitment of Additional District & Sessions Judges from Quota of the Bar.
- Member of Confirmation Committee.
- Member of High Court Building Committee.

**Chairman of the Committees**

- Chairman Departmental Confirmation Committee for District Judiciary
- Chairman Enrolment Committee of Punjab Bar Council.
- Judge to act as Chairman of Tribunal of the Punjab Bar Council (Lahore) under the legal practitioners and Bar Councils Act, 1973.

## CONTENTS

**2013 C L C 1709**

**[Lahore]**

**Before Atir Mahmood, J**

**NAZIR AHMED KHAN BALOCH----Petitioner**

**Versus**

**ELECTION COMMISSION OF PAKISTAN and others----Respondents**

Writ Petition No.2517 of 2013 (BWP), decided on 26th April, 2013.

**Code of Conduct issued by Election Commission of Pakistan 2013---**

----Cl. 34---Constitution of Pakistan, Arts.16 & 199---Constitutional petition---Holding of public meeting/jalsa by petitioner at place "K" within his constituency in connection with General Election---Refusal of District Administration to allow petitioner to do so on ground of law and order situation---Validity---Clause 34 of Code of Conduct issued by Election Commission of Pakistan required political parties and candidates to carry out rally and processions at places specified by District Administration in consultation with concerned candidate or his representative---Holding of public meetings at place of candidate's own choice were not prohibited by such Code---Petitioner would not be able to carry people of his constituency to a place specified by District Administration for being at a distance of 30 Kilometers from place of his choice---Petitioner on such pretext could not be deprived of his right to apprise people about manifesto of his party---Public safety being of paramount consideration, thus, nobody could be allowed to endanger safety of public or interrupt smooth running of people life---Petitioner's counsel undertook that no thoroughfare would be obstructed during holding of public meeting by petitioner---Public functionaries would be expected to act in accordance with law---High Court accepted constitutional petition while directed petitioner to manage security to maintain law and order situation at place of his public meeting.

Muhammad Aslam Khan Dhukkar for Petitioner.
Muhammad Iqbal Mehr, Asst. A.-G.
Tanveer Hussain S.P. Investigation, Rahim Yar Khan.
Zahoor Hussain Bhutta, A.C. Liaquatpur.
Date of hearing: 26th April, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this constitutional writ petition, the petitioner has prayed that the respondents be directed not to create hurdles in holding a public meeting/jalsa at Khan Baila Sub-Tehsil in connection with the forthcoming general elections within the constituency of the petitioner, i.e. PP-286 RYK-II.

2. Briefly stated the facts rising to the institution are that the petitioner belongs to Pakistan Tehreek Insaaf. He is a candidate for the seat of PP-286 RYK-II and has been allotted symbol of 'BAT'. He wants to hold a public meeting at Khan Baila Sub-Tehsil of Tehsil Liaquatpur on 27-4-2013 but the respondents are not allowing him to do so on the pretext of law and order situation. Hence this writ petition.

3. Learned counsel for the petitioner inter alia contends that Article 16 of the Islamic Republic of Pakistan, 1973 gives freedom to each and every citizen to assemble peacefully and without arms subject to any reasonable restrictions imposed by law in the interest of public order; that there is no prohibition by any law in vogue upon holding public meetings; that the elections are forthcoming and the petitioner being a candidate of PP-286 has a right to convey the manifesto of his party to the public-at-large; that no consultation with any of the candidates of the constituency has been made by the respondents while specifying the places of rallies and processions which is against the code of conduct issued by the Election Commission of Pakistan; that the place of Liaquatpur Stadium specified by the District Administration is 30 Kms. away from the place identified by the petitioner; that it would not be possible for the petitioner to carry the people to Liaquatpur Stadium to apprise them with his party manifesto, therefore, this writ petition be allowed and the respondents be restrained from creating hurdles in the way of holding of public meeting by the petitioner.

4. On the other hand, learned Law Officer submits that Clause 34 of Code of Conduct issued by Election Commission of Pakistan clearly says that the rallies, processions and meetings will be held on the places specified by the District Administration; that keeping in view the law and order situation in the country, places have been specified by the District Administration for holding rallies, processions and public meetings vide notification dated 25-4-2013; that the petitioner may hold the jalsa at Liaquatpur Stadium Liaquatpur; that the public meeting at the choice of the petitioner will endanger the life and property of the public. He prays that this writ petition be dismissed.

5. Arguments heard. Record perused.

6. I have gone through the report submitted by respondent No.5. The Code of Conduct issued by the Election Commission of Pakistan is also appended with the report. Perusal of the Code of Conduct shows that political parties and candidates can carry out the rallies and processions at the places specified by the District Administration in consultation with the candidates of the relevant constituency or their representatives. Learned Law Officer has stressed more on Clause 34 of the Code of Conduct, however, it pertains to rallies and processions and not to the public meetings. The code of conduct issued by Election Commission does not prohibit holding of public

meetings in any manner. Learned Law Officer has also drawn my attention to notification dated 25-4-2013 issued by District Coordination Officer Rahim Yar Khan which provides that the public processions will be held by the political parties and the candidates at places specified below:---

"Public Places for Jalsas

(1) Khawaja Fareed Park, Kachi Mandi, Liaquatpur
(2) Liaquatpur Stadium, Liaquatpur.

For Rallies:
Khawaja Fareed Park, Kachi Mandi to Railway Chowk via Allah Chowk Liaquatpur."

7. Apparently, no prohibition on holding public meetings has been imposed vide notification dated 16-4-2013 or notification dated 25-4-2013. When confronted with, learned Law Officer has not been able to show that there is a specific prohibition for holding a public meeting at a place of candidate's own choice. Article 16 of the Constitution of Islamic Republic of Pakistan, 1973 allows every citizen of the country to assemble peacefully and without arms subject to any reasonable restriction imposed by law in the interests of the public order. The respondents have not been able to show any law on the basis of which restriction has been imposed on holding a public meeting by the petitioner at a place of his own choice.

8. Furthermore, Liaquatpur Stadium, Liaquatpur is 30-Kms. away from the place of choice of the petitioner and the petitioner may not be able to carry the people of his constituency to such a distant place. Being a candidate in the general elections to be held on 11-5-2013, it is the right of the petitioner to convey them what he or his party wants to do if they come in power which right cannot be taken away from him on any pretext.

9. Undoubtedly, public safety is of paramount consideration but the public functionaries are expected to act strictly in accordance with law. There is no excuse to refuse the petitioner to hold a public meeting at a place of his own choice on the pretext of law and order situation. At the same time, nobody can be allowed to endanger the safety of the public or interfere in the smooth running of the public life. Learned counsel for the petitioner on behalf of his client undertakes that no public thoroughfare will be obstructed in any manner on the eve of the public meeting in question.

10. In view of the above, this Writ Petition is allowed. The respondents are directed not to create hurdles in the way of holding the public meeting by the petitioner at the

place of his own choice, i.e. Khan Baila Sub-Tehsil. They are also directed to manage security to maintain law and order situation at the place of the said public meeting.

SAK/N-44/L Petition accepted.

**2013 C L C 1737**
**[Lahore]**
**Before Atir Mahmood, J**
**ABDUL WAHEED----Petitioner**
**Versus**
**GOVERNMENT OF PUNJAB and others----Respondents**

Civil Revision No.490 of 2003, decided on 16th May, 2013.

**(a) Specific Relief Act (I of 1877)---**
----Ss. 42 & 55---Limitation Act (IX of 1908), Arts.14 & 120---Suit for declaration and mandatory injunction---Auction of plot by Government---Deposit of 1/3rd of highest bid money offered by plaintiff---Subsequent unilateral increase in price of plot by defendant while directing plaintiff to deposit same by specified date, otherwise his earnest money would stand forfeited---Deposit of such enhanced amount by plaintiff to avoid forfeiture of earnest money---Plaintiff's prayer was that such unilateral enhancement of bid money was illegal and inoperative against his rights as successful bidder and claimed refund of excess amount from defendant---Defendant's plea was that plaintiff had deposited enhanced amount with his free-will and without coercion, thus, he was estopped to challenge same; and that suit was time-barred---Proof---According to terms and conditions of auction, Auction Committee could reject or accept bid, but could not enhance bid amount offered by highest bidder---Committee instead of rejecting or accepting plaintiff's bid had enhanced bid money unilaterally---Plaintiff as witness deposed that in order to save earnest money, he had deposited enhanced amount under coercion and compulsion---Plaintiff during cross-examination denied defendant's suggestion that he had been offered to withdraw earnest money, if enhanced amount of bid was not acceptable to him---Defendant's witness during cross-examination admitted that plaintiff had not been given option to withdraw earnest money---Plaintiff had not sought cancellation of order of enhancement of bid money, but had prayed for declaring same as inoperative against his rights, which would attract Art. 120 of Limitation Act, 1908---Nothing on record to show that plaintiff had accepted enhanced bid money---Plaintiff had no option except to deposit enhanced amount---Suit was decreed in circumstances.
Commissioner of Income Tax Companies Zone-IV, Karachi v. Hakim Ali Zardari 2006 SCMR 170 and Malhar v. Government of Sindh and others 2005 CLC 285 ref.
Punjab Province v. Nisar Ahmad PLD 1960 (W.P.) Lah. 801 rel.

**(b) Limitation Act (IX of 1908)---**
----S. 3---Limitation, question of---Duty of court---Scope---Such question could not be left to the pleadings of parties, rather court would be bound to take notice thereof.

Shah Hussain and Mian Muhammad Mohsin Rasheed for Petitioner.
Saeed Ahmed Chaudhry, Asst. A.-G. for Respondents.

Date of hearing: 16th May, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---** This civil revision challenges the legality of judgment and decree dated 17-9-2003 passed by learned Additional District Judge Rahim Yar Khan who accepted the appeal of the respondents, set aside the judgment and decree dated 17-4--2003 and dismissed the suit of the petitioner.

2. Brief facts of the case are that the petitioner filed a suit for declaration on the ground that he participated in the open auction proceedings conducted with respect to Plot No.6-A, Block 'Y' at Low Income Housing Scheme No.II, Model Town Sadiqabad conducted on 5-9-1995; that he offered the highest bid @ Rs.17,900/- per marla and on conclusion of the auction, deposited 1/3rd of the total price with the respondents; that the bid money was enhanced by the respondents to Rs.24,500/- per marla unilaterally; that the petitioner vide letter dated 13-11-1995 was directed to deposit the enhanced amount till 30-11-1995, otherwise his earnest money already deposited with the respondents will be forfeited; that the petitioner to avoid forfeiture of the money already deposited with the respondents deposited the enhanced amount as well. In the plaint, it was averred that since the petitioner was successful bidder in the bidding finalized at Rs.17,900/, therefore, the respondents have no right to enhance the bid money unilaterally, therefore, by filing the suit a declaration was sought that the letter No.2382/ST, dated 13-11-1995 for payment @ Rs.24,500/- per marla was void ab initio and inoperative against the rights of the plaintiff, and as mandatory injunction claimed the refund of excess amount so received by the defendants after rendition of the account.

3. The suit was opposed by the respondents. They filed the written statement. The main stance taken by the respondents was that the bid of the petitioner was accepted conditionally @ Rs.24500/- per marla and he deposited the same with his free-will and without any coercion whereafter he had no right to impugned the same.

4. Out of divergent pleadings, the issues were framed. The learned trial Court recorded evidence adduced by the parties and after hearing both sides, decreed the suit of the plaintiff. The appeal was filed by the respondents which was accepted by learned Additional District Judge Rahim Khan vide impugned judgment and decree dated 17-9-2003 resulting in dismissal of the suit of the petitioner. Hence this civil revision.

5. Learned counsel for the petitioner inter alia contends that the petitioner being the highest bidder in the auction proceedings of the suit property was entitled to get the property at the bid offered by him and the respondents have no right to enhance the bid money to Rs.24,500/- from Rs.17,500/- per marla unilaterally; that the judgment passed by learned trial Court is based on cogent reasons; that the learned lower appellate court has failed to appreciate the evidence available on record and passed the impugned judgment in arbitrary and colourful manner; that the suit of the petitioner was within time; that as per terms of the auction, the competent authority has right to accept or reject any bid but it has no right to enhance the bid money which aspect of the case was ignored by learned Additional District Judge. Learned counsel avers that the impugned judgment and decree being against law and fact merits to be set aside by way of allowing the instant revision petition.

6. Conversely, learned Assistant Advocate-General submits that the suit of the petitioner was barred by time; that as per terms and conditions, acceptance of highest bid was subject to approval of the competent authority; that the competent authority who has every right to accept or reject any bid, accepted the bid of the petitioner conditionally with enhance of bid money from Rs.17,900/- to Rs.24,500/-. He argues that after acceptance of the bid in the said manner, the petitioner deposited the money @ Rs.24,500/- meaning thereby he accepted the condition imposed by the competent authority. He avers that after having accepted the terms, the petitioner has no right to seek refund of the enhanced bid money. Learned Law Officer prays that the civil revision having no merit be dismissed.

7. Arguments heard. Record perused.

8. Having been offered the bid to the tune of Rs.17,900/-, the petitioner was the highest bidder in the auction of land conducted by the respondents on 5-9-1995. At the culmination of the auction proceedings, the petitioner deposited 1/3rd of the bid money with the respondents as per terms and conditions of the auction. Thereafter, the auction proceedings were placed before the District Housing Committee but instead of rejecting or accepting the bid, the price of the bid amount was unilaterally enhanced to Rs.24,500/- from Rs.17,900/- which enhanced amount was deposited by the petitioner. The contention of learned counsel for the petitioner is that the petitioner deposited the enhanced bid money under coercion as he was told that if he does not deposit the enhanced amount within the specified time, the earnest money already deposited by the petitioner would be confiscated.

9. The petitioner while appearing as P.W.-1 deposed according to his assertion in the plaint and stated that to save his amount deposited as earnest money, i.e. Rs.119,335/-, he was compelled and coerced to deposit the amount of Rs.370,665/- which was in

excess to the tune of Rs.132,000/-. In cross-examination, he categorically denied the suggestion that any offer was made to him to withdraw the amount deposited as earnest money, if the enhancement bid was not acceptable to him.
In rebuttal DW-1 Muhammad Iqbal District Officer Housing and Town Planning deposed that terms and conditions were accepted by the plaintiff who did not object to the enhancement of the bid amount. He produced the letter No.2382 S.B. dated 13-11-1995 as Exh.Dl (produced as Exh.P2 by the plaintiff), agreement dated 21-12-1995 as Exh.D2 and the decision of the Housing Committee as Exh.D3. In cross-examination, he admitted that according to the letter Exh.D1, the plaintiff was not given any option to withdraw his amount deposited earlier.

10. From perusal of the evidence produced by the parties, which has minutely been examined by this Court, there remains no doubt that the District Housing Committee was competent to accept or reject the bid but as per terms and conditions of the auction, the committee was not competent to increase the bid amount offered by the highest bidder. Condition No.8 is relevant which is reproduced as under:---

"8. The acceptance of the highest bid shall be subject to the approval of competent authority as specified in the auction Notice. The competent authority shall declare its approval or rejection, as the case may be, through a notice affixed on the notice-board in the office of the Deputy Director, Housing and Physical Planning Department concerned within a period of sixty days from the date of auction. It shall be the responsibility of the bidder to ascertain whether the acceptance has been declared or not. In case the approval or rejection of the bid is not declared within the aforesaid period of time, the bidder shall have the right to withdraw his bid and to obtain the refund of the security and the earnest money deposited by him."
Terms and conditions of the auction (Exh.P4) nowhere suggest that the said committee or the competent authority has unilateral power to increase the bid. The impugned judgment of lower appellate court whereby the findings of the trial Court on Issues Nos.1, 2, 2-A have been reversed does not find support from the evidence available on record or from the law. It is noteworthy that while reversing the findings of the trial court, learned lower appellate court has non-suited the petitioner/plaintiff on the point of limitation which is untenable.

11. Learned Law Officer appearing on behalf of the respondents has relied upon the law laid down in case titled "Commissioner of Income Tax Companies Zone-IV, Karachi v. Hakim Ali Zardari (2006 SCMR 170)" to assert that the suit was barred by time. He states that the basic letter challenged in the suit dated 13-11-1995 whereas the suit was filed on 24-7-1997. He further states that under Article 14 of the Limitation Act, one year limitation period has been provided for filing of suit for cancellation of an order passed by a government functionary but the petitioner has

filed the suit after one year and 8 months which is badly hit by law of limitation. The case-law referred to by learned Law Officer is not of any help to the respondents as it says that the question of limitation cannot be left to the pleadings of the parties and it is duty of the court to notice the point of limitation.

12. The petitioner has not sought cancellation of the letter dated 13-11-1995 but declaration that the same is void ab initio being inoperative and having no effect upon the rights of the petitioner and as a consequence has prayed for a mandatory injunction for the return of the amount which was deposited by him under compulsion and coercion. I am of the firm view that where the cancellation of an order by a government officer has been sought, Article 14 of the Limitation Act will attract but where the cancellation of an order by a government officer is not sought rather a declaration is sought that it is inoperative upon the rights of the plaintiff, Article 120 of the Act is attracted which provides six years to file a suit. As such, the suit of the petitioner-plaintiff was within time. I am guided by the law laid down in the cases titled "Malhar v. Government of Sindh and others (2005 CLC 285) and "Punjab Province v. Nisar Ahmad (PLD 1960 (W.P.) Lahore 801)". Excerpts from the said judgments relevant to the case in hand are reproduced hereunder:---

2005 CLC 285

"9. A plain reading of the above position of law shows that period of one year limitation provided in Column No.II starts from the date of the act or order passed by an Officer of Government in his official capacity, which a party seeks to get set aside. To say it in other words, bar to maintainability in terms of Article 14 of the Act will be applicable to a suit where the relief sought in the plaint is to get an order of the nature mentioned in column I, "set aside" and not to a suit where the relief sought is declaratory in nature, the impugned act or order is void, without jurisdiction or mala fide."

PLD 1960 (W.P.) Lahore 801

"11 It has already been mentioned earlier in this judgment that the two suits are for declaration that the orders of the Provincial Government requiring the plaintiffs to place the subject-matter of the bequest at its disposal were illegal, ultra vires and ineffective against the right of the plaintiffs. These suits are not for setting aside such orders, although that would be the necessary consequence if the declarations demanded by the two plaintiffs are granted in their favour. What has to be seen in this context is whether the impugned orders of the Government are void ab initio or only voidable. In the first case in order to grant the relief to the plaintiffs it is not necessary to set aside such orders but in the second case it is absolutely essential that such orders should be clearly set aside, otherwise no effective relief can be granted to the plaintiffs. In the case where the orders of the government are void ab initio and it is not necessary to set them aside in order to grant the relief to the plaintiffs, I do not

think that Article 14 of the Limitation Act would have any application but, in the second case, where the orders are valid, but in order to make them effective they have to be avoided, then whatever the language of the plaint, Article 14 would come into play and if brought more than one after the impugned order is passed the suit would be barred by time."

13. Another objection which has been raised by the learned Law Officer that the petitioner was estopped to file the suit as he accepted the enhanced price of bid and deposited the amount is not supported by any evidence or record. Paragraphs Nos.2 and 6 of impugned letter dated 13-11-1995 (Exh.P2) are reproduced as under:---

2 You are required to deposit the remaining cost amounting to Rs.370665/- upto 30-11-95 failing which the bid shall STAND CANCELLED and the amount already deposited shall be liable to be FORFEITED.

6. In case you commit breach of any of the said conditions this auction shall be liable to cancellation, the agreement shall be rescinded, the plot resumed and the cost already deposited shall be forfeited to Government."

14. It is evident from bare perusal of above paragraphs that there was no option with the petitioner except to deposit the bid money enhanced unilaterally by the department meaning thereby he deposited the money with the respondents under coercions and compulsion.
There is no question of any estoppel against the petitioner-plaintiff. Even the learned appellate court in the impugned judgment has held as under:---
"That the competent authority as per conditions of para No.8 of Exh.P-4 could approve or reject the highest bid and in case of rejection, the respondent/plaintiff was entitled to refund of security and earnest money. Hence, entries at para No.2 of letter No.2382/St, dated 13-11-1995 Ex.D-3 that "in case of default in payment of amount of plot at the rate of Rs.24,500/- per marla, the already deposited amount shall be liable to be forfeited" is surely without jurisdiction."

15. In light of what has been discussed above, the letter dated 13-11-1995 passed by Secretary District Housing Committee Rahim Yar Khan is a void order as the respondents had no authority to enhance the bid money at their own. The judgment and decree passed by learned appellate court is against the law and fact, therefore, it cannot sustain in the eye of law. Resultantly, this civil revision is allowed, the impugned judgment and decree dated 17-9-2003 is set aside and the judgment and decree passed by learned trial Court is restored.

SAK/A-100/L Revision accepted.

**2013 M L D 1686**

**[Lahore]**

**Before Atir Mahmood, J**

**Mst. BALQEES AKHTAR---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No.2585 of 2005/BWP, decided on 10th June, 2013.

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

----O.XIII, R.2, O.XVI, 2 & O. XVIII, R.2---Constitution of Pakistan, Art.199---Constitutional petition---Production of additional documentary evidence by summoning of witnesses, application for---Plaintiff made such application after closing his side of evidence in affirmative and fixation of case for evidence of defendant---Such application dismissed by Trial Court was accepted by Revisional Court on payment of cost of Rs.500---Validity---Plaintiff had sought to produce in evidence copies of Record of Rights, Aks-Shajra and Warabani Mogha etc., on ground that the same were public documents---Such application did not disclosed any good caused for its acceptance or justification for its making at such a belated stage---High Court set aside order of Revisional Court and restored that passed by Trial Court in circumstances.

Jhanda through Legal heir v. Muhammad Younas PLD 1994 Lah. 100; Province of the Punjab through Secretary, Irrigation and Power Department, P.W.D. Secretariat Old Anarkali, Lahore and 3 others v. Ch. Mehraj Din and Co. 2003 CLC 504 and 1999 MLD 2295 rel.

PLD 2013 SC 255 rel.

S.M. Hussain for Petitioner.

Rias Abdul Qadir Warind for Respondents.

Date of hearing: 10th June, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioner has challenged the order dated 25-5-2005 passed by the learned Additional District Judge, Sadiqabad whereby revision petition filed by respondent No.2 was accepted subject to payment of Rs.500 as costs with the observation that defendant/respondent is also at liberty to produce any documentary evidence to rebut this additional evidence.

2. The brief facts of the case are that respondent No.2 filed a suit for pre-emption regarding agricultural land in khata No.86 measuring 115 kanals 17 marlas through registered Mutation No. 111 dated 30-9-1999 against

the petitioner in the Court of learned Civil Judge, Sadiqabad, The petitioner/defendant filed written statement and contested the suit and out of divergent pleadings of the parties learned trial court framed issues and evidence of the parties was recorded and the petitioner was afforded opportunity to produce his evidence in rebuttal. Then an application under Order XIII, Order XVIII Rule 2 and Order XVI Rule 2 of C.P.C. was filed for production of additional evidence by way of production of documents through summoning of the witnesses which was dismissed by the learned trial court vide order dated 14-4-2004. There-after respondent No.2/plaintiff filed revision against the said order before the learned Additional District Judge, Sadiqabad who accepted the same vide order dated 25-5-2005 subject to payment of Rs.500 as costs with the observation that defendant/respondent is also at liberty to produce any documentary evidence to rebut this additional evidence, hence this writ petition.

3. Learned counsel for the petitioner has contended that order passed by learned Additional District Judge, Sadiqabad is illegal, without lawful authority, without jurisdiction, perverse and ultra vires; that respondent No.1 failed to consider the merits of the case, contentions of the parties, case-law of superior courts on the subject; that respondent No.1 exercised jurisdiction not vested in it, the order of the trial court being not amendable to revisional jurisdiction as that could only be attacked under section 105, C.P.C. in appeal against final judgment; that respondent No.1 failed to consider that respondent No.2 had spent more than two years for producing eight witnesses and seven documents of choice; that only reason given in the order of respondent No.1 is denial of justice and technicalities cannot be encouraged; that no right of affirmative evidence being available to respondent No.2 after closure of evidence, petitioner having exhausted her evidence after that, no allowance could be given to respondent No.2 for second right of evidence; that the order of respondent No.1 is one sided, deficient, improper, unwarranted, contrary to law and has resulted in gross injustice to petitioner, therefore, the impugned order dated 25-5-2005 passed by learned Additional District Judge, Sadiqabad is liable to be set-aside. He has relied upon the cases reported as Jhanda through Legal heir v. Muhammad Younas (PLD 1994 Lahore 100), Province of the Punjab through Secretary, Irrigation and Power Department, P.W.D. Secretariat Old Anarkali, Lahore and 3 others v. Ch. Mehraj Din and Co. (2003 CLC 504) and Naseer Ahmad v. District Judge, Multan and 4 others (PLD 1992 Lahore 92).

4. On the other hand, learned counsel for respondent No.2 has controverted the contentions raised by the petitioner and has submitted that the revisional court has rightly exercised the jurisdiction by way of allowing the application under Order XIII Rule 8 Order XVIII Rule 2 and Order XVI Rule 2 of C.P.C. He has further submitted that no prejudice is caused to the petitioner by the impugned order. He has relied upon (1999 MLD 2295).

5. Arguments of learned counsel for the parties have been heard and I have also gone through the record with their able assistance.
6. It transpires that the application for additional evidence was filed by the petitioner contending therein that the petitioner wants to produce the copies of the documents which are the register record of rights, copy of Aksh-Shajra regarding the suit property, copy of Warabandi Mogha and others on the grounds that all these documents are public documents. He further submitted that for production of the said documents the record keeper of the concerned agency i.e. Patwari Halqa and Zila Dar of Canal Department be summoned. The relevant portion of the application is reproduced as under:--
From the perusal of above contents it is established that respondent No.2-plaintiff did not give any good cause for acceptance of his application at a belated stage. In this regard, I am guided by a landmark judgment given by the Hon'ble Supreme Court of Pakistan reported as (PLD 2013 SC 255). The relevant portion of the judgment reads as under:--
"The clear language of Rule 1(1), undisputably stipulates that the parties to a lis are required to furnish the list of witnesses, whom they propose to call either to give evidence or to produce the documents, within seven days of the framing of issues; meaning thereby that the process and the authority of the Court in terms of Order XVI(1), to call and summon the witness by a party, has been made subject to, rather conditional to the list of witnesses which a party is mandated to file in terms thereof; in other words, the power and the machinery of the Court for summoning/calling of the witnesses through the process of Court and law, as is envisaged by certain subsequent relevant rules of Order XVI, C.P.C, can only be invoked if such a list has been provided and not otherwise. From sub-Rule (2), the afore-stated intention of the legislature is fortified and augmented, as a specific prohibition has been placed, preventing a party to call the witnesses and, as per the High Court Amendment-Lahore dated 2-10-2001, even to produce witnesses other than those whose names are mentioned in the list required to be filed under sub-rule (1). Undoubtedly, this is a mandatory provision of law as it entails serious consequences of precluding a party from calling, through aid of law (Court), or even to produce the witnesses if their names do not appear in the requisite list. However, in the same sub-rule (2), a room has been provided to a delinquent party, who either fails to file the list of witnesses at all, or omits a name of the witness (es) therein (if filed) to make up its default and delinquency and ask for the indulgence of the Court to summon and produce the witnesses (es), but only after meeting and fulfilling the command of law, [sub-Rule (2)] i.e., " after showing good cause (emphasis supplied) for the omission of the said witnesses from the list"; besides, the authority and power of the Court, in this behalf has been regulated, in that, " and if the Court grants such permission, it shall record reasons for so doing (emphasis supplied).

Coming to the second limb of sub-rule (2), as noted earlier, not only that the litigant party has to show a good cause for havin g not either furnished the list of witnesses within time or the omission of the name of such witnesses in the list, but a condition has been imposed and a rider has been placed by law on the exercise, of jurisdiction of the Court and discretion in that behalf; in other words the court is not free to grant such permission as per its own whim and caprice and in an arbitrary manner, rather it shall record the reasons for such a permission (emphasis supplied). The condition of recoding the reasons obviously is a check on the unbridled and absolute discretion of the Court, which (reasons) should have nexus to the good cause as set out by the delinquent party. At the cost of repetition, it may be mentioned that the court is not vested within unrestricted authority and discretion to pass any whimsical discretion and capricious order it feels like, but obviously the order allowing the permission has to conform to "those reasons which are justifiable in the eyes of law", which reflects the judicial application of mind by the court and the disposal of the request in a judicial manner. It may be pertinent to state here that while disallowing the application of the party for summoning the witnesses, the court is also required to record its reasons."

7. In the present case neither any good cause was shown by the petitioner nor there was any justification as to why the application was filed at such a belated stage. The case of the petitioner is purely covered by the judgment of Hon'ble Supreme Court of Pakistan (supra). In the present case the order of the learned trial court was set aside by the revisional court without assigning any reason. I am again guided by the above judgment of the Hon'ble Supreme Court which also reads as under:--

"In the instant case, the learned Revisional Court while overturning the trial court order has absolutely failed to assign any valid reasons, except invoking the general principle of law that the technicalities of law should not be allowed to thwart the rights of the litigants. I fail to understand as to how the noted principle can be used as a tool to avoid, shun or to defeat the specific rules of law and to save a party from the consequences of its delinquency against the clear command of law on the concept and in terms of legal technicality. It is a well known principle of law that where the law requires an act to be done in a particular manner it has to be done in that manner alone and such dictate of law cannot be termed as a technicality."

8. In view of what has been discussed above, the petition filed by the petitioner/defendant is accepted. The order dated 25-5-2005 passed by the learned Additional District Judge, Sadiqabad is set-aside and the order dated 14-4-2004 passed by the learned trial court is up-held.

SAK/B-22/L Revision accepted.

**2013 M L D 1862**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD IMTIAZ and others---Petitioners**

**Versus**

**CHIEF EXECUTIVE, MEPCO and others---Respondents**

Writ Petition No.2625 of 2013/BWP, heard on 16th May, 2013.

**(a) Electricity Act (IX of 1910)---**

----S. 24---Constitution of Pakistan, Art. 199---Constitutional petition---Removal of petitioner's electricity meter on ground to have been installed illegally at premises located in unapproved Housing Scheme---Issuance of notice to petitioner after such removal of electricity meter---Validity---Authority could not prove existence of the housing scheme to be unapproved, where petitioner's meter was installed---Authority had issued notice to petitioner after removing his electricity meter, thus, had condemned him unheard---Authority, in case of any illegality on part of petitioner, was obliged to issue him notice before taking any penal action against him---Disconnection/removal of electricity meter without issuing prior notice would be illegal and against principles of natural justice---

Petitioner had been deprived of basic amenity of life without issuing him prior notice, thus, penal action taken against him would not be deemed to be valid and lawful---High Court directed the Authority to restore electricity connection of petitioner, and observed that Authority might proceed against the petitioner after issuing him prior notice about illegality, if any, committed by him.

Haji Muhammad Latif v. Chief Executive GEPCO, Gujranwala and 3 others PLJ 2012 Lah. 751 (DB) rel. PLD 2011 SC 163 distinguished.

**(b) Natural justice, principles of---**

----No body could be penalized without providing him prior opportunity to defend himself---Principles.

According to principles of natural justice i.e., audi alteram partem, which says that anybody against whome some allegation is levelled and likely to be penalized on his account will be intimated before initiating any such proceedings so as to enable him to defend himself in accordance with law.

Muhammad Imran Lodhi for Petitioners.

Ozair Qayyum for Respondents.

Date of hearing: 16th May, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 challenges the disconnection of electricity connections of the petitioners by the respondents-MEPCO.

2. Learned counsel for the petitioners submits that the petitioners applied for electricity connections at their respective premises situated at Shadab Colony, Bahawalpur. After survey, demand notices were issued to the petitioners. The petitioners paid the demand notices. After completion of formalities, the electricity connections were approved and the meters were installed at the premises of the petitioners. Thereafter, the petitioners had been paying monthly bills issued by the respondents for some months. All of a sudden, on 9-4-2013, the respondents disconnected the electricity connections of the petitioners without issuing any prior notice. Learned counsel contends that this act of the respondents is against the law amounting to denial of their fundamental rights, therefore, this writ petition be allowed and the respondents be directed to immediately restore the electricity of the petitioners.

3. On the other hand, learned counsel for the respondents submits that the meters installed at the premises of the petitioners were illegal as these were installed at premises located in an unapproved scheme. He maintains that it is a policy of the MEPCO that no connection will be given to premises situated in unapproved housing schemes. He further submits that during the survey, the petitioners with mala fide intention showed the premises other than the premises where the meters were required to be installed and managed to get connections in this way, therefore, the meters were lawfully removed. He prays that this writ petition is without any merit, hence it be dismissed. In support of his contentions, he has relied upon the law laid down by the Hon'ble Supreme Court of Pakistan in Human Rights Case No.56878-P of 2010 cited at "PLD 2011 SC 163".

4. Arguments heard. Record perused.

5. When confronted with the question about the existence of "non-approved and illegal housing scheme" where the electricity connections of the petitioners were installed, learned counsel for the respondents has not been able to establish anything on record. It is admitted fact that the electricity connections were sanctioned by the competent authority after fulfilling all the codal formalities and the petitioners were enjoying the basic amenity of life, i.e. electricity, which was discontinued by the respondents without issuing any prior show cause notice. The notice dated 17-4-2013 clearly establishes that the electricity connections were disconnected and the meters were removed from the premises of the petitioners and deposited in the office of the

respondents and then the notice dated 17-4-2013 was allegedly issued. The wording of the said notice is reproduced as under:--

6. It
is crystal clear from the wording of the notice that no notice was issued by the respond ents prior to disconnection of electricity supply rather the disconnection was made first and then the notice was issued. It is settled law that no one will be condemned unheard. If there was any illegality on the part of the petitioners, the respondents were under legal obligation to issue notice to the petitioners prior to taking any penal action against them. Disconnection of electricity supply, which is undeniably a basic amenity of life, by the respondents without issuing prior notice to the petitioners is illegal, unlawful and against the principle of natural justice, i.e. audi alteram partem which says that anybody against whom some allegation is levelled and likely to be penalized on this account will be intimated before initiating any such proceedings so as to enable him to defend himself in accordance with law. Without adopting such procedure, no penal action will be deemed to be valid and lawful.

In this regard, the petitioners were unlawfully deprived from their fundamental rights guaranteed under the Constitution of Islamic Republic of Pakistan, 1973. I am guided by the principles laid down in case titled "Haji Muhammad Latif v. Chief Executive GEPCO, Gujranwala and 3 others (PLJ 2012 Lahore 751 (DB)". Relevant para of the said judgment is reproduced as under:--

"8. According to Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 no person can be deprived of his life save in accordance with law. The expression "life" does not mean physical existence but it means enjoyment of all facilities which enable a person to lead a life in a graceful and dignified manner. Electricity is a basic necessity of life and in this age of science and technology no one can lead a conducive life and play effective role in the society without electricity. The denial of electricity connection to the appellant is a violation of fundamental right and the respondents have failed to furnish any reasonable explanation for not providing electricity connection to the appellant."

7. With utmost respect to the Hon'ble Supreme Court of Pakistan, the case-law cited by learned counsel for the respondents cited at PLD 2011 SC 163 is not applicable to the present case as the petitioners in this case are not seeking connections in an un-approved housing society but asserting their right of continuation of electricity supply at their premises which was duly approved by the competent authority and not located in any unapproved housing scheme.

8. In view of the above, this writ petition is allowed and the respondents are directed to restore the electricity connections of the petitioners forthwith. However, if there is any illegality committed by the petitioners, the respondents may proceed against the petitioners after having them issued a prior notice, strictly in accordance with law.

SAK/M-199/L Petition accepted.

**2013 P L C (C.S.) 1372**
**[Lahore High Court]**
**Before Atir Mahmood, J**
**Dr. MUHAMMAD JAVED ARIF (Dr. Muhammad Arif Javed)**
**Versus**
**PROVINCE OF PUNJAB and others**

Writ Petition No.993 of 2013(BWP), decided on 13th June, 2013.

**Punjab Medical and Health Institutions Act (IX of 2003)---**

----S. 18---Punjab Medical and Health Institutions Rules, 2003, Sched. V, Art.42---Constitution of Pakistan, Art.199---Constitutional petition---Medical Officer/Administrator, post of---Non-selection of petitioner for being over-age though period of two years of his service as Medical Officer in Health Department claimed to be excludable from his age---Validity---Process of recruitment had already completed and selected candidates had joined service---No fresh post had been advertised for which petitioner could sought relaxation of upper age limit---High Court dismissed constitutional petition in circumstances.

Dr. Malik Muhammad Hafeez for Petitioner.
Manzoor Ahmad Warriach, A.A.-G. with Muhammad Iqbal Sial, Legal Advisor (QMC) for Respondents.
Date of hearing: 13th June, 2013.

**JUDGMENT**
**ATIR MAHMOOD, J.---** Brief facts as narrated in the writ petition are that the petitioner after being awarded M.B.B.S. decree by the Quaid-i-Azam Medical College/Bahawalpur joined the Health Department as Medical Officer on ad hoc basis and served at different Basic Health Units (BHUs) for the period of more-than two years. The respondent No.3/Principal of Quaid-i-Azam Medical College/Bahawalpur Victoria Hospital invited the applications against the post of Medical Officer/demonstrator through advertisement dated 15-6-2007 published in Daily Nawa-i-Waqt. A call letter was issued by respondent No.3 for written examination for the post of Medical Officer/demonstrator. The petitioner was declared as selected candidate however he was amongst the four reserve candidates. It is averred in the petition that during the year 2008-10, 40 posts became vacant on different occasions and the petitioner wrote letters to the respondent No.3 for his appointment as Medical Officer/demonstrator but of no avail. The petitioner raised many factual grounds regarding preparation of merit by stating that his marks were wrongly calculated by the respondent No.3 due to which petitioner filed Writ Petition No.5157 of 2012

which was disposed of by this Court with a direction to the Secretary Health to decide the representation of the petitioner in accordance with law and merit policy. The petitioner further submitted that the representation of the petitioner was dismissed by respondent No.2 vide order dated 26-1-2013. He further submitted that six seats in Quaid-i-Azam Medical College/Bahawalpur Victoria Hospital, Jubilee Female Hospital and School of Nursing are still lying vacant.

2. Learned counsel for the petitioner submitted that the application for relaxation of age limit was accepted by the Principal of College/Chairman Selection Board but respondent No.2 did not consider that the Principal was empowered to relax the upper age limit of the petitioner upto 3 years under Article/Sr. No.42 of the Schedule-V of the Punjab Medical and Health Institution Rules, 2003 made under section 18 of the Punjab Medical and Health Institutions Act, 2003. It is further submitted that the petitioner has served as Medical Officer in the Health Department for a period of more-than two years which period is required to be excluded from the age of the petitioner while determining the issue of over age and prayed for setting aside the order dated 26-1-2013 passed by respondent No.3 and sought a direction for his appointment as Medical Officer/Demonstrator. He has relied upon the cases reported as Muhammad Yaqoob v. Secretary, Local Government and Rural Development Department, Lahore and others (2005 SCMR 76) and Ghulam Mustafa v. Punjab Public Service Commission, Lahore through Secretary and another (2008 PLC (C.S.) 1117) Lahore.

3. On the other hand, respondents Nos.1 and 2 by filing parawise comments submitted that the writ petition is not maintainable on the ground that earlier Writ Petition No.5157 of 2010 was disposed of by this Court vide order dated 26-11-2012 with the direction to the Secretary Health to decide the same in accordance with law. Further submitted that the petitioner was not selected or appointed as Medical Officer as he was ineligible for such appointment being overage because the maximum age on the closing date was required to be 45 years whereas the petitioner's age was more-than 46 years.

4. Respondent No.3 submitted independent parawise comments and almost reiterated the stance taken by respondents Nos.1 and 2 with further observation that 82 candidates were selected for the post of Medical Officer/demonstrator and 4 were kept as reserve candidates and out of those 82 candidates all joined their services and no post remained vacant at that relevant time and as the petitioner was not selected on merit, therefore, he was not offered the job. The learned counsel for the respondent submitted that out of 4 reserved candidates 3 applied afresh in the next advertisement and all of them were recruited but the petitioner could not be selected being overage. Another aspect of awarding wrong marks as 26 out of 50 marks in the recruitment

process held in April, 2007, the learned counsel for the respondent submitted that the petitioner obtained 25 marks and awarding of 26 marks was incorrect for the reason that the petitioner cleared his examination in more-than one attempt and for this reason he was not entitled to grant of that one mark.

5. Arguments of learned counsel for the parties have been heard and record also perused.

6. Precisely the question which is to be determined by this Court is whether the petitioner was eligible to be appointed as Medical Officer/ demonstrator by relaxation of age and whether the petitioner was entitled for the said post on merit. From the perusal of the record it is revealed that subsequent to recruitment process the petitioner wrote a letter to the Chief Minister Punjab which has been annexed with the petition as annexure P/7 whereby he admitted that he was selected as a reserve candidate. It further transpires that the petitioner when selected as reserved candidate was duly considered and at that relevant time the question of relaxation of age did not come in the way but he could not succeed being lower in merit and all the 82 vacancies were filled by the candidates who were selected on merit.

7. Thereafter, the petitioner filed Writ Petition No.5157 of 2010 BWP with the following prayer:--

"That by accepting this petition petitioner may very kindly be declared entitled to be selected as Medical Officer/Demonstrator by issuing direction to respondent Secretary from the date of selection made by the respondent at the relevant time, with approval for the appointment for the post applied for, in the interest of justice. Any other relief whatsoever this Hon'ble Court deems fit may also be granted in favour of the petitioner in the high interest of justice."

This petition was filed after almost three years of the recruitment process. However, the said petition was transmitted to respondent No.2/Secretary Health, vide order dated 26-11-2012 passed by this Court. The respondent No.2 dismissed the same vide impugned order dated 26-1-2013. In my opinion filing of this petition as well as earlier Writ Petition No.5157 of 2010 BWP by the petitioner is an exercise in futility for the simple reason that the process of recruitment was already completed, the selected candidates joined the service and no fresh post was advertised for which the petitioner could have sought the relaxation of upper age limit. The case-law relied upon by the learned counsel for the petitioner is quite distinguishable and is not attracted in this case.

8. In view of the above discussion, the petitioner has not been able to make out a case for interference by this Court in its writ jurisdiction. Resultantly, this writ petition being devoid of any merit, is dismissed.

SAK/M-200/L Petition dismissed.

**2013 P L C (C.S.) 1384**
**[Lahore High Court]**
**Before Atir Mahmood, J**
**Mst. SHAHNAZ AKHTAR**
**Versus**
**D.E.O. and others**

Writ Petitions Nos.266 and 224 of 2013(BWP), decided on 9th May, 2013.

**Constitution of Pakistan---**

----Art. 199--- Constitutional petition--- Civil service--- Contract appointment--- Senior Elementary School Educator (BPS-14), post of---Termination of such Educator by Authority on ground of her appointment letter to be fake---Petitioner's plea was that termination of her service without holding proper inquiry was illegal---Validity--- Authority had come to know about such fraudulent appointment from a complaint filed against petitioner before Director Anti Corruption---Competent Authority after obtaining fact finding report from department had dispensed with requirement of further inquiry and provided opportunity of personal hearing to petitioner---Record showed that such post had not been advertised nor had petitioner submitted application for her appointment thereagainst---Signature of concerned officer on offer letter were forged and its entry in dispatch register had been fabricated---Petitioner had not pleaded or argued that her appointment order was genuine, rather had admitted same to be forged before court---High Court dismissed constitutional petition in circumstances.

Executive District Officer (Edu), Rawalpindi and others v. Mst., Rizwana Kausar and 4 others 2011 SCMR 1581; The Secretary, Government of the Punjab, through Secretary, Health Department, Lahore and others v. Riaz-ul-Haq 1997 SCMR 1552 and Secretary to Government of N.-W.F.P. Zakat/Social Welfare Department, Peshawar and another v. Saadullah Khan 1996 SCMR 413 ref.

Executive District Officer (Education), Rawalpindi v. Muhammad Younas 2007 SCMR 1835 rel.

Jamshaid Akhtar Khokhar for Petitioner.
Saeed Ahmed Chaudhry, Asst. A.-G. and Muhammad Sabir, Superintendent DEO (Women), Bahawalnagar for Respondents.

Date of hearing: 9th May, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**--- Through this consolidated judgment, I intend to dispose of Writ Petition No.266 of 2013/BWP and Writ Petition No.224 of 2013/BWP as common questions of law and fact are involved therein.

2. Facts of both the cases are the same. The petitioners were appointed as Senior Elementary School Educator (SESE) in BPS-14 vide order dated 30-3-2007 on contract basis initially for a period of five years which was extended for a further period of five years and performed their duties till 31-12-2012 when respondent No.1 vide order dated 31-12-2012 terminated their services on the allegation that their appointment letters were fake which order has been impugned in these writ petitions.

3. Learned counsel for the petitioners submits that even if the petitioners were appointed through bogus appointment letters, it was necessary for the respondents to hold a proper inquiry to look into the allegation and then reach a just and fair conclusion that the appointment of the petitioners are fake or otherwise. He admits that the petitioners were appointed through fake appointment letters but asserts that their services could not be terminated without holding a proper inquiry. In support of his contentions, learned counsel has relied upon the law laid down by the Hon'ble Supreme Court of Pakistan in cases titled "Executive District Officer (Edu), Rawalpindi and others v. Mst., Rizwana Kausar and 4 others (2011 SCMR 1581)," "The Secretary, Government of the Punjab, through Secretary, Health Department, Lahore and others v. Riaz-ul-Haq (1997 SCMR 1552)" and "Secretary to Government of N.-W.F.P. Zakat/Social Welfare Department, Peshawar and another v. Saadullah Khan (1996 SCMR 413)." He prays that both the writ petitions in hand be allowed and the petitioners be re-instated into service while declaring the impugned termination letter dated 31-12-2012 illegal and unlawful.

On the other hand, learned Law Officer submits that neither any advertisement was made for the posts in question nor the petitioners submitted applications for their appointment against the posts of SESE. He avers that the petitioners managed the appointment letters in their favour in connivance with the departmental authorities through fraudulent means and in this way, usurped the rights of lawful prospective candidates of these posts. He argues that the offer letter allegedly issued by Mst. Shahida Hafeez, Ex-DEO(W-EE), Bahawalnagar was under the fake signatures. He contends that no fraud committed by any person can be protected by the courts as it will encourage others to do the same rather than stopping them from using unfair means. He requests that this writ petition being devoid of any force be dismissed.

5. Arguments heard. Record perused.

6. It appears from the record that the factum of appointment of the petitioners through fraudulent means came into the knowledge of concerned authorities when a complaint was filed by one Munawar Hussain son of Barkat Ali before the Director Anti-Corruption, Bahawalpur Division, Bahawalpur asserting that the appointment of the petitioners was result of bogus and fake orders. A fact finding report was obtained by the departmental authorities. After considering the fact finding report, the competent authority vide order dated 1-11-2012 dispensed with the requirement of further inquiry and directed the petitioners to appear before him for the purpose of personal hearing which was duly given to them whereafter the impugned order was passed. Relevant paragraph of the impugned order is as under:--

"The appointment of Educators of various categories were made school specific accor ding to the recruitment policy 2006-07. Neither the vacancy of SESE (Arts) BS-14 of Government Girls E/S 199/8-R Tehsil Fortabbas was advertised nor the said so called Educator submitted her application for appointment as SESE (Arts) in BS 14 on contract basis. The offer letter has been shown to be issued under the fake signature of Mst. Shahida Hafeez EX-DEO (W-EE) Bahawalnagar. The entry of the dispatch register is also fabricated which is evident that the dispatch register was closed at serial No.1250 on 30-3-2007 whereas the dispatch No.1432-34 has been shown in the offer letter dated 30-3-2007. Thus the forgery rises to the surface of the dispatch register as well as relevant record of this office."

7. Learned counsel for the petitioners has nowhere, either in writ petition or his arguments, asserted that the appointment orders were genuine and issued by the competent authority rather he has frankly admitted before this Court that the appointment orders were bogus and fake.

8. In the cases referred to by learned counsel for the petitioners, there is a fault on the part of the departmental authorities and not on that of the employees but in this case, the fault is admittedly on the part of the employees. This particular feature distinguishes the instant case from the cases referred to by learned counsel for the petitioners. I am guided by the judgment of the Hon'ble Supreme Court of Pakistan in case titled "Executive District Officer (Education), Rawalpindi v. Muhammad Younas (2007 SCMR 1835)". Relevant portion is as under:---

"It is a settled law that when the basic order is without lawful authority then the superstructure shall have to fall on the ground automatically as law laid down by this Court in Yousaf Ali's case PLD 1958 SC 104. It is also a settled law that where the order of appointment was secured by fraud and misrepresentation then principle of locus poenitentiae is not attracted as law laid down by this Court in Jalal-ud-Din's case PLD 1992 SC 207."

9. Learned counsel for the petitioners has also not been able to rebut the contentions of learned Law Officer that the appointment letters through which the petitioners were inducted in service were fake ones being prepared wit+h fictitious signatures of the appointing authority.

10. In view of the above, both the writ petitions in hand are devoid of any merit, hence dismissed.

SAK/S-79/L Petition dismissed.

**2013 P L C (C.S.) 1398**
**[Lahore High Court]**
**Before Atir Mahmood, J**
**ABDUL MAJEED SHEIKH**
**Versus**
**ZARAI TARAQIATI BANK LTD. and others**

Writ Petition No.2385 of 2006(BWP), heard on 3rd June, 2013.

**(a) Civil service---**

----Disciplinary proceedings---Removal from service---Corruption, charge of---Acquittal of civil servant from such charge by competent court---Effect---Civil servant due to such acquittal would be deemed not to have committed charged offence---Competent authority in such case would be bound to reinstate civil servant in service forthwith and could not deprive him of his lawful right to be reinstated in service.

Superintending Engineer GEPCO, Sialkot v. Muhammad Yousaf 2007 SCMR 537 rel.

**(b) Constitution of Pakistan---**

----Art. 199---Constitutional petition---Agricultural Development Bank of Pakistan, employee of---Removal from service---Corruption, charge of---Pendency of criminal proceedings against petitioner on basis of such charge in Anti Corruption Court---Report of Inquiry Officer found petitioner to be innocent while suggesting to competent Authority to wait for final decision of the Court---Imposition of penalty of removal from service by competent authority without issuing show cause notice to petitioner---Plea of Bank was that petitioner could not be reinstated for having reached age of superannuation---Validity---Competent authority had neither adhered to recommendations of Inquiry Officer nor issued show cause notice to petitioner, but had condmned him unheard---Competent Authority was obliged to wait for decision of the court and act thereupon---Said court had acquitted petitioner from the charge, thus, he would be deemd to be not to have committed such offence and was liable to be reinstated in service forthwith---Petitioner though was not entitled to be reinstated due to attaining age of superannuation, but same would not deprive him of monetary benefits to which he was entitled under law---High Court set aside impugned order while observing that petitioner would be deemed to be in service from date of removal from service till date of attaining age of superannuain and entitled to all benefits.

Dr. Muhammad Islam v. Government of N.-W.F.P. through Secretary, Food, Agriculture, Livestock and Cooperative Department, Peshawar and 2 others 1998 SCMR 1993; Superintending Engineer GEPCO, Sialkot v. Muhammad Yousaf 2007 SCMR 537; Muhammad Iqbal Zaman, Vernacular Clerk, Marwat Canal Division, Bannu v. Superintending Engineer, Southern Irrigation Circle, Bannu and 4 others 2000 PLC (C.S.) 331 and Dr. Muhammad Islam, Instructor, Animal Husbandry In-Service Training Institute, Daudzai, Peshawar District v. Government of N.-W.F.P. through Secretary Food, Agriculture, Livestock and Cooperative Department, Peshawar and 2 others 1998 PLC (C.S.) 1430 ref.

**(c) Natural justice, principles of---**

----No one can be condemned without giving him proper opportunity of defence.

Mukhtar Ahmed Malik for Petitioner.
Muhammad Afzal Siddique Chaudhry for Respondent.
Date of hearing: 3rd June, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**--- Through this constitutional writ petition, the petitioner has called in question the legality of order dated 10-8-1993 whereby the penalty of removal from service has been imposed upon him. He has also challenged the orders dated 30-10-1993 and 5-12-1998 dismissing his appeal and review petition by Executive Director (Per.) and Chairman ZTBL respectively.

2. The cause of action as given in the instant petition is that the petitioner Abdul Majeed Sheikh was employed in the respondent bank (Zarai Taraqiati Bank Limited) in the year 1969 and is now posted as Mobile Credit Officer/Assistant Director, ADBP, Bahawalnagar. On 15-10-1992, an F.I.R. No.36/92 for the offences under section 161, P.P.C. and section 5(2) PCA 1947 was lodged against the petitioner with the Police Station FIA, Bahawalnagar. A charge sheet dated 26/28-7-1992 was issued to the petitioner containing the allegations mentioned in the F.I.R. that the petitioner got illegal gratification of Rs.1500 while recommending input loan of Rs.18360 to Muhammad Hanif son of Dilawar in the presence of Messrs Muhammad Fazal son of Muhammad Ali and Allah Bakhsh son of Pir Bakhsh. It was also alleged that the petitioner demanded further Rs.1000/- as bribe from said Muhammad Hanif at the time of payment of loan. Muhammad Hanif lodged a complaint/F.I.R. No.10/92 with Anti-Corruption Department Bahawalnagar and handed over Rs.1000 to the petitioner which were recovered from the petitioner by the raiding party.

The petitioner filed reply to the charge sheet denying allegations levelled against him. He took plea that Muhammad Hanif was defaulter of Rs.1004 in loan case No.054981 for the purchase of Spray Machine. The petitioner asked the petitioner to deposit the said amount to which Muhammad Hanif agreed. Accordingly, I.O. receipt No.6 was prepared and issued on 13-7-1992 but Muhammad Hanif showed his inability to pay the defaulted amount and requested the petitioner to pay the same on his behalf to be returned to the petitioner shortly. Accordingly, the petitioner deposited the amount of Rs.1004 on the insistence of Muhammad Hanif on his behalf on 13-7-1992, recommended his case for sanction of loan on 14-7-1992 which was sanctioned on 15-7-1992 by Manager ADBP. Bahawalnagar. After completing the codal formalities, the payment was released on 18-7-1992 and credited in the account of Muhammad Hanif. Meanwhile, Muhammad Hanif paid Rs.1004 to the petitioner and also arranged raid upon him. The petitioner also stated in the reply that one of alleged eye-witnesses namely Muhammad Fazal in his affidavit dated 28-7-1992 has categorically denied the allegations levelled against the petitioner whereas the other witness of F.I.R., i.e. Allah Baldish is closely related to Muhammad Hanif complainant and has personal grudge against the petitioner as the petitioner did not recommend his case for remission of interest amounting to Rs.40,000.

3. The matter was inquired into by Rana Maqsood Khan, Joint Director, ADBP in the capacity of Inquiry Officer who submitted his report on 5-4-1993 concluding that the allegation of illegal gratification of Rs.1500 against the petitioner could not be proved whereas he remained inconclusive regarding allegation of receiving bribe of Rs.1000 by the petitioner and suggested to wait the decision of Special Judge Anti-Corruption. However, respondent No.2 without waiting for decision and fate of the criminal case terminated the petitioner vide order dated 10-8-1993. The petitioner filed departmental appeal which was rejected vide order dated 30-10-1993. Feeling aggrieved, the petitioner filed a Writ Petition No.2615 of 1993. During the pendency of the writ petition, the petitioner was acquitted vide order dated 21-4-1996 passed by learned Special Judge (Central) Multan. Pursuant to order dated 21-4-1996, the petitioner filed a representation dated 22-5-1996 which was responded to by respondent-bank that since the writ petition is pending before the High Court, the case of the petitioner will be considered after decision of petitioner's Writ Petition No.2615 of 1993.

On 18-3-1998, learned counsel for respondent bank made statement before this Court that the case of the petitioner for his re-instatement into service will be considered by the bank. In light of the statement made on behalf of the respondent bank, the writ petition was disposed of. After receiving no response to petitioner's representation dated 30-3-1998, the petitioner filed another Writ Petition No.4895 of 1998 wherein direction was issued to the respondent bank for decision of the representation of the

petitioner vide order dated 7-10-1998. Consequently, the representation of the petitioner was rejected vide order dated 5-12-1998. Feeling dissatisfied, the petitioner filed an appeal before the Federal Service Tribunal under section 4 read with section 2-A of Federal Service Tribunal Act, 1973, which was partly accepted and removal order was converted into compulsory retirement vide order dated 20-2-2002. Thereafter, the petitioner filed a petition before the apex court which was decided on 27-6-2002 and section 2-A of Service Tribunal Act, 1973 was declared ultra vires. The petitioner served a grievance notice upon the respondent bank for redress of his grievance which was not responded to. The petitioner filed a grievance petition before the learned Punjab Labour Court No.8, Bahawalpur for redress of his grievance. In the meantime, the respondents vide letter dated 8-9-2006 replied to the grievance notice that the petitioner was not a workman, therefore, the grievance notice has no force. The petitioner withdrew his grievance petition on 20-9-2006 from the Labour Court and filed the instant petition.

4. Learned counsel for the petitioner inter alia contends that the allegations of receiving illegal gratification were proved to be false in the inquiry report as well as in the proceedings conducted by Special Judge Anti-Corruption, therefore, no penalty could be imposed on the petitioner on account of baseless charges; that after acquittal of the petitioner by the Special Judge Anti-Corruption, the petitioner could not be tried again on the same set of charges and was entitled to be re instated in service with all back-benefits; that in view of the recommendations of the Inquiry Report, the respondents were obliged to serve show cause notice upon the petitioner giving him opportunity to defend himself but they failed to do so and the petitioner was condemned unheard which is against the principles of natural justice; that the charge sheet is badly barred by time. Learned counsel avers that the order impugned dated 10-8-1993, 30-10-1993 and 5-12-1998 are illegal and cannot sustain in the eye of law, therefore, this writ petition be allowed and the orders impugned be set aside re-instating the petitioner with all back-benefits.

In support of his assertions, learned counsel has relied upon the law laid down in cases titled "Dr. Muhammad Islam v. Government of N.-W.F.P. through Secretary, Food, Agriculture, Livestock and Cooperative Department, Peshawar and 2 others (1998 SCMR 1993)", "Superintending Engineer GEPCO, Sialkot v. Muhammad Yousaf (2007 SCMR 537)", "Muhammad Iqbal Zaman, Vernacular Clerk, Marwat Canal Division, Bannu v. Superintending Engineer, Southern Irrigation Circle, Bannu and 4 others (2000 PLC (C.S.) 331)" and "Dr. Muhammad Islam, Instructor, Animal Husbandry In-Service Training Institute, Daudzai, Peshawar District v. Government of N.-W.F.P. through Secretary Food, Agriculture, Livestock and Cooperative Department, Peshawar and 2 others (1998 PLC (C.S.) 1430)."

5. On the other hand, learned counsel for the respondents has vehemently opposed this writ petition mainly on the grounds that the petitioner received illegal gratification of Rs.1000 which was recovered from him during a raid conducted by a Magistrate along with Inspector, Anti-Corruption Bahawalpur; that the petitioner managed to win-over the witnesses of the criminal case due to which he was awarded benefit of doubt and thus acquitted; that the petitioner has already attained the age of superannuation, as such, he cannot be re-instated into service; that the orders passed by the competent authority cannot be challenged in writ jurisdiction being question of facts and prayed for dismissal of the petition.

6. Arguments advanced by learned counsel for the parties have been heard and record perused with their able assistance.

7. The moot points in this case are whether any employee can be imposed penalty on a set of charges from which he has been acquitted from a court of law and whether any employee can be awarded penalty without affording him opportunity of hearing.

8. Specific allegations of taking bribe against the petitioner were levelled in an F.I.R. No.36/92, dated 15-10-1992 wherein the criminal proceedings were initiated before the Special Judge Anti-Corruption. Simultaneously, inquiry proceedings were initiated against the petitioner by the department through Inquiry Officer Rana Maqsood Khan, Joint Director, ADBP who submitted in his report dated 5-4-1993 that the allegation of illegal gratification of Rs.1500 could not be proved. However, with regard to allegation of taking bribe of Rs.1000, he could not reach any decision and asked for waiting decision by the Special Judge Anti-Corruption who ultimately acquitted the petitioner from the charges levelled against him vide order dated 21-4-1996. In the meanwhile, the petitioner was removed from his service vide order dated 10-8-1993 without affording him opportunity of personal hearing depriving him from the right of defence.

9. It is settled law that acquittal of any person by a competent court from the charges levelled against him will be deemed to be an honourable acquittal meaning thereby that such person has committed no offence. There is no denial that the petitioner has been acquitted from the charges levelled against him by the Special Judge Anti-Corruption. When the petitioner was acquitted from the allegations levelled against him, it was the duty of the competent authority to reinstate him in service forthwith and there was no lawful justification for depriving him from his lawful right of having been reinstated into service. In this regard, I am fortified by the dictums laid down by the Hon'ble Supreme Court of Pakistan laid down in case titled "Superintending Engineer GEPCO, Sialkot v. Muhammad Yousaf (2007 SCMR 537)". Relevant portion is reproduced below:---

"In this behalf it may be noted that in the case of Muhammad Iqbal Zaman, Vernacular Clerk, Marwat Canal Division, Bannu v. Superintending Engineer, Southern Irrigation Circle, Bannu and 4 others 1999 SCMR 2870 identical question came for consideration and this Court considered that acquittal of a civil servant, even if based on benefit of doubt was honourable. Applying same principle we are of the opinion that the respondent who statedly was acquitted by extending him benefit of doubt would be deemed to have acquitted honourably. Therefore, under the circumstances we are of the opinion that the Service Tribunal rightly directed the petitioner to treat him on duty and give him all financial benefits during the period of his confinement in custody on account of his involvement in the murder case."

10. According to Departmental Inquiry Report, charges against the petitioner were not proved and also that the Inquiry Officer suggested for final decision by the Special Judge Anti-Corruption to further proceed in the matter but respondent No.2-Director (E&D), ADBP without adhering to the recommendation of the Inquiry Officer and also without giving opportunity of personal hearing to the petitioner removed him from his service vide order dated 10-8-1993 which shows mala fide on his part. There is nothing on the record to infer that the petitioner was served any show cause notice for personal hearing before imposing major penalty of removal from service. Under the principles of natural justice, none can be condemned without giving him proper opportunity of defence which is missing in this case. In my considered view, the competent authority should have waited for the decision by the competent court before which criminal proceedings were pending and should have acted upon the decision of the court accordingly rather than penalizing the petitioner unheard in haste and in an arbitrary manner. This act of the competent authority lacks support from any law in force in the country.

11. Another aspect of the matter is that in a Writ Petition No.2615 of 1993 filed by the petitioner, learned counsel for the respondent-bank made a statement before this Court that the request of the petitioner for reinstatement into service will be considered by the bank in light of the judgment dated 21-4-1996 passed by the learned Special Judge Anti-Corruption if the writ petition is withdrawn. In this view of the matter Writ Petition was withdrawn by the petitioner vide order dated 18-3-1998 but the respondent-bank did not honour to its commitment shown before the Court and did not decide the representation pending before it. The petitioner instituted another Writ Petition No.4895 of 1998 wherein a direction was issued to the respondent bank to decide the representation of the petitioner vide order dated 7-10-1998.

Accordingly, the Chairman ADBP dismissed the representation/review appeal of the petitioner vide order dated 5-12-1998 which is reproduced as under:---

"In compliance with the Orders dated 7-10-1998 of the honourable Lahore High Court, Bahawalpur Bench in Writ Petition No.4895 of 1998, the Chairman, Agricultural Development Bank of Pakistan reconsidered the case of Mr. Abdul Majeed Sheikh, Ex-Assistant Director, ADBP, Bahawalnagar Branch. He was caught red handed by a raiding party for taking bribe. In the departmental proceedings, the charge of corruption was proved against him and he was rightly dismissed from service of the Bank by the competent authority under the ADBP Officers Service (E&D) Regulations, 1975. His formal appeal has been rejected by the Competent Appellant Authority.

2. The honourable Lahore High Court, Bahawalpur Bench desired to reconsider his appeal in light of the Judgment passed, by the Special Judge (Central), Multan who acquitted him by giving him benefit of doubt.

3. The Chairman thoroughly examined the whole case and was of the firm opinion that an employee who has been caught red handed for taking bribe cannot be retained in the Bank's service. The Chairman, therefore, rejected his review appeal."

Bare perusal of the above order clearly reveals that the Chairman did not honour to the statement made by learned counsel for the respondent-bank before this Court in Writ Petition No.2615 of 1993 on 18-3-1998 that the case of the petitioner would be decided in light of the judgment dated 21-4-1996 passed by the Special Judge Anti-Corruption and dismissed the representation/review appeal of the petitioner merely depending upon the allegations levelled against him without assigning any cogent reason. Therefore, this order being not speaking one does not merit to be sustained in the eyes of law.

12. Regarding contention of learned counsel for the respondent-bank that the petitioner having attained the age of superannuation cannot be reinstated in service, I agree to the contention of the learned counsel to the extent of putting him back in service after reaching the age of superannuation but there is no embargo on rectification of wrong done with him to the extent of award of monetary benefits to him which he is entitled to under the law.

13. In light of what has been stated above, this writ petition is allowed, the impugned orders dated 10-8-1993, 30-10-1993 and 5-12-1998 are set aside.

Resultantly, the petitioner will be deemed to be in service from the date of removal of his service, i.e. 5-12-1998, to the date of attaining the age of superannuation and entitled to all the benefits accordingly.

SAK/A-101/L Petition accepted.

**PLJ 2013 Lahore 548**

**Present: Atir Mahmood, J.**

**ALMAS MUBASHAR--Petitioner**

**versus**

**MUBASHAR HANIF--Respondent**

W.P. No. 15303 of 2010, heard on 16.4.2013.

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

----Arts. 17 & 19--Notice talaq--Authenticity of divorce deed--Notice in writing was received by chairman union council--Muslim Family Law has overriding effect over general law in family matters--Validity--Executant had not denied execution of divorce deed/notice of talaq, therefore, provisions of Arts. 79 of Order were not attracted, particularly when petitioner admitted receipt of notice of talaq--Muslim Family Law Ordinance will have over riding effect over all other laws with regard to registration of muslim marriages--OSO does not exclude application of Order 1984 in family matters. [Pp. 551 & 552] A & B

**Effectiveness of Talaq--**

----Issuance of certificate of talaq is a mere technicality which does not find mention in provisions of Muslim Family Laws Ordinance, 1961 and talaq becomes effective automatically after 90 days from receipt of talaq by Administration of Union Council. [P. 552] C PLD 1993 SC 901, ref.

**Muslim Family Laws Ordinance, 1961--**

----S. 7(2)--Constitution of Pakistan, 1973, Art. 199--Notice of talaq--Effectiveness of issuance of certificate of talaq--Challenge to--Validity--Constitutional restraints Courts cannot give any verdict on conflicting claims challenging--In a case where with consent of the parties divorce is effected and confirmed in writing under their undisputed signatures Section 7(2) is to be enforced because in such cases the parties do not willfully commit breach and bona fide believe that they had been divorced with consent of each other and sending of notice to Chairman UC is merely formality--Notice can be sent at any time thereafter to comply with provisions of S. 7 of Ordinance--Where such view had been taken but its validity had been challenged the Court would be justified to refuse to issue writ and exercise its jurisdiction. [P. 552] D

**Divorce--**

----Injunction of Islam--Undoubtedly as per injunction of Islam right of divorce was conferred upon man who can give divorce to her wife at any time and no encumbrance is put upon the man to give divorce to her wife though the same is one of things most disliked by God. [P. 552] E

Ch. Muhammad Arshad Bajwa, Advocate for Petitioner.
Mr. Muhammad Muzaffar Samore, Advocate for Respondent No. 1.
Date of hearing: 16.4.2013.

**Judgment**

Through the instant Writ Petition, the petitioner has challenged the certificate of talaq dated 12.05.2010 issued by Respondent No. 2 after culmination of reconciliation proceedings.

2. Brief facts of the case are that the petitioner Contracted marriage with Respondent No. 1 on 15.12.2008 in accordance with Muslim rites, however, rukhsati did not take place. Respondent No. 1 is a permanent resident of Canada. The petitioner applied for the Canadian Immigration Visa which was refused by the concerned authorities. On query, it transpired that sponsorship was withdrawn by Respondent No. 1. The petitioner tried to get Canadian Visa and in this regard, she remained in contact with Respondent No. 1 but he did not clarify the situation. In the meanwhile, the petitioner received a notice of talaq/divorce deed which was written on stamp paper. The said notice of talaq was sent to Nazim/Administrator Union Council No. 120, Ali Razabad, Lahore who served notice upon the petitioner for reconciliation. The petitioner appeared before Respondent No. 2 and recorded her statement that the petitioner never demanded divorce from Respondent No. 1 and wanted to live with him. Respondent No. 2, during reconciliation proceedings, inquired from Respondent No. 1 regarding the authenticity of the notice of talaq which was replied in affirmative through letter sent by Respondent No. 1 duly attested by Notary Public at Canada. Respondent No. 2 concluded the reconciliation proceedings by issuing certificate of effectiveness of divorce deed dated 12.05.2010 which is under challenge in this writ petition.

3. Learned counsel for the petitioner has contended that the notice of talaq was not issued in accordance with the provisions of Section 7 of Muslim Family Law Ordinance as the stamp paper of divorce deed was purchased from Lahore and the legal formalities were not complied with to make it a valid notice of talaq as Respondent No. 1 is a permanent resident of Canada. It has been stated that the arbitration proceedings were not conducted as the Respondent No. 1 did not appoint any arbitrator on his behalf and all the proceedings conducted by Respondent No. 2 are a nullity in the eye of law. He has relied upon the dictums laid down in case titled "Romana Zahid Vs. Chairman Arbitration Council/Nazim Union Council and another (PLD 2010 Lahore 681)".

4. On the other hand, learned counsel for Respondent No. 1 has strongly contested the instant petition. He submits that the right of talaq has been conferred upon the man by the injunctions of Islam which cannot be curtailed by any law of the land which are procedural in nature. He further contends that the petitioner never denied the receipt of notice of talaq either from Respondent No. 1 or from arbitration council/union council concerned. It has further been stated that in fact the petitioner wanted to immigrate to Canada alongwith her mother and for the very reason, Respondent No. 1 has divorced her.

5. Arguments advanced by learned counsel for the parties have been heard and record also perused.

6. The record shows that the receipt of divorce deed dated 16.10.2009 duly signed by Respondent No. 1 is not denied by the petitioner. The petitioner appeared before Nazim/Administrator Union Council No. 120, Ali Razabad, Lahore and filed a

written statement before him. Relevant contents of the said statement are reproduced hereunder:

"..... I want to live with Mubasher Hanif want to spend my life with him. He has sent me divorce notice for no reason which is unjustified and cruel act. ..As he is a Canadian citizen, Canadian Embassy and Canadian Government knows (as he applied for my Canadian immigration and cancelled twice) that. I am his wife, so please ask him to send divorce according to Canadian Law through Canadian Embassy with all the compensation and my rights along with my dower (Rs. 1 lac and 15 tola Gold Jewelry) and my nan-nafqa (maintenance allowance) from my Nikah (Dec 08) till now (March 2010). No divorce certificate should be issued until provision of Divorce Notice through Canadian Embassy along with all compensations and rights (according to Canadian Law), and my dower and Nan-Nafqa."

Bare perusal of above statement reveals that the petitioner herself admits the receipt of divorce notice, therefore, she cannot say that no notice of talaq was received by her.

7. The petitioner through her brother namely Shahid Mirza participated in reconciliation proceedings whereas no one appeared on behalf of Respondent No. 1. Respondent No. 2 contacted Respondent No. 1 telephonically and asked him to appoint his arbitrator through the embassy but even then, nobody was appointed on behalf of Respondent No. 1, however, a registered letter dated 15.03.2010, duly attested by Notary Public at Canada, was received by Respondent No. 2 from Respondent No. 1 acknowledging the divorce deed which letter has been placed on record along with written reply of Respondent No. 1. Respondent No. 2 concluded the proceedings vide order-dated 12.05.2010 and on the same day, issued a certificate of effectiveness of talaq.

8. In the case law relied upon by learned counsel for the petitioner reported as PLD 2010 Lahore 681, learned Judge has held that "..the notice in writing received by the Chairman Union Council from Dubai UAE had to comply with the requirements of Article 79 of the Qanun-e-Shahadat Order, 1984. This is also important because the Ordinance does not exclude the application of Qanun-e-Shahadat Order, 1984 to the notice under Section 7(1) of the Ordinance. In the present case no such notice was ever received by the Chairman Union Council, which was duly verified by the Pakistan Embassy." In my humble opinion, the provisions of Article 79 of Qanun-e-Shahadat Order, 1984 cannot be read in isolation. As a matter of fact, Article 17 is to be taken into consideration while relying upon Article 79 ibid. Respondent No. 1/executant has not denied the execution of the divorce deed/notice of talaq; therefore, the provisions of Article 79 of Qanun-e-Shahadat Order are not attracted, particularly when the petitioner herself admits the receipt of divorce deed/notice of talaq. There is another important aspect of the case that Respondent No. 2/Nazim of Union Council got himself satisfied by making a telephone call to Respondent No. 1 with-regard to authenticity of the divorce deed/notice of talaq and then by receiving a letter of confirmation dated 15.03.2010 duly attested by a Notary Public in and for the province of Alberta, Canada. Respondent No. 2 has annexed all the record of the reconciliation proceedings while filing his reply to this writ petition which shows that the petitioner has received notice of talaq by Respondent No. 1. With regard to the view taken by learned Judge in the case supra regarding non-exclusion of provisions of Qanun-e-Shahadat Order, the provision of Section 3(1) of Muslim Family Law Ordinance, 1961 provides that:

"Ordinance to override other laws, etc. (1) The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with these provisions."
Bare reading of the above provision shows that the Muslim Family Law Ordinance will have overriding effect over all other laws with regard to the registration of Muslim marriages. Therefore, I am not convinced that this Ordinance does not exclude the application of Qanun-e-Shahadat Order, 1984 in family matters.
9. The issuance of certificate of talaq is a mere technicality which does not find mention in the provisions of Muslim Family Laws Ordinance, 1961 and talaq becomes effective automatically after 90 days from receipt of notice of talaq by Nazim/Administrator of the Union Council concerned. In this regard, I am guided by the dictums laid down by the Hon'ble Supreme Court of Pakistan in case titled "Mst. Kaneez Fatima Vs. Wali Muhammad and another (PLD 1993 SC 901)" wherein it has been held that "The provisions of Section 7 of the Ordinance have remained Controversial from the very beginning and there are conflicting views in general about it. In view of the Constitutional restraints the Courts cannot give any verdict on the conflicting claims challenging or justifying the provisions of Section 7 of the Ordinance. However, keeping in view the facts of each case the applicability and interpretation of Section 7 has to be construed in that light. In a case where with the consent of both the parties divorce is effected and confirmed in writing under their undisputed signatures Section 7(2) is to be enforced because in such cases the parties do not willfully commit breach and bona fide believe that they have been divorced with the consent of each other and sending of notice to the Chairman, Union Council, is merely a formality. The notice can be sent at any time thereafter to comply with the provisions of Section 7. Where such view has been taken but its validity has been challenged the Court would be justified to refuse to issue writ and exercise its jurisdiction".
10. Undoubtedly, as per injunctions of Islam, the right of divorce has been conferred upon man who can give divorce to her wife at any time and no encumbrance is put upon the man to give divorce to her wife though the same is one of the things most disliked by God. In this case, admittedly, the divorce has been given by Respondent No. 1 to the petitioner. Admittedly, the petitioner has received the divorce deed/notice. During the reconciliation proceedings, the Respondent No. 2 contacted Respondent No. 1 who re-affirmed the divorce deed. As a result, Respondent No. 2 declared that talaq had happened and accordingly issued certificate in this regard. When Respondent No. 1 has not only sent talaq/divorce deed to the petitioner but also reaffirmed the same through his written reply/letter dated 15.3.2010 and the petitioner has admittedly received the same, there was no reason for not issuing the certificate of effectiveness of talaq by Respondent No. 2 as it appears that Respondent No. 1 no longer wishes to keep the petitioner in his marriage and none can be forced for the same. In the circumstances, I find no reason to disagree with the findings of Respondent No. 2. No interference is called for.

11. In view of what has been discussed above, this writ petition has no force, hence dismissed.

(R.A.) Petition dismissed.

**PLJ 2013 Lahore 628**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**ABDUL AZIZ etc.--Petitioners**

**versus**

**SUPERINTENDING CANAL OFFICER etc.--Respondents**

C.R. No. 16 of 2001, decided on 1.7.2013.

**Canal and Drainage Act, 1872 (VIII of 1872)--**

----S. 20-B--Constitution of Pakistan, 1973--Art. 199--Constitutional petition--Supply of water to land was terminated--Orders were issued without notice--Orders passed by Divisional Canal Officers and Supt. Canal Officer were challenged through suit for declaration--Riges of thumb impressions over alleged notice were missing--No consequence--Validity--It is mandatory requirement of law u/S. 20-B of Canal Drainage Act, that before cutting water supply a notice is to be reserved upon land owners--Entire subsequent proceedings were unwarranted illegal and unlawful which cannot be sustained--Revision was accepted. [P. 632] A & B

Ch. Naseer Ahmed, Advocate for Petitioners.

Mr. Abdul Sattar Chaudhry, Advocate for Respondents.

Date of hearing: 22.5.2013.

**Judgment**

Through this civil revision, the petitioners have impugned the judgment and decree dated 20.12.2000 passed by learned Additional District Judge Bahawalnagar who accepted the appeal of the respondents and set aside the judgment and decree dated 15.02.1994 passed by learned trial Court whereby the suit of the petitioner was decreed.

2. Briefly stated the facts leading to the filing of this civil revision are that the father of the petitioners namely Abdul Aziz filed a suit for declaration challenging the orders dated 24.07.1985 and 15.05.1989 passed by Divisional Canal Officer, Bahawalnagar and Superintending Canal Officer, Bahawalnagar respectively whereby the supply of water to the land of the plaintiff was terminated. It was stated in the plaint that he is owner of agricultural land measuring 5 acres, comprising Square No. 20, Killas No. 6,7, 14 to 16, situated in Chak No. 89/F, Tehsil Hasilpur, District Bahawalpur, which is being irrigated from outlet No. 101/F (Fateh Canal) for the last 50 years. It was averred that the said orders were issued without notice to the petitioners, therefore, the same are inoperative upon the rights of the plaintiff and were liable to be set aside.

3. The suit was resisted by Defendants No. 3 to 10. Keeping in view the divergent pleadings of the parties, the learned trial Court framed as many as six issues including that of relief. After recording oral as well as documentary evidence adduced by the parties, learned trial Court proceeded to decree the suit of the plaintiff/father of the petitioners vide judgment and decree dated 12.11.1991. However, in appeal, the case was remanded. The trial Court again decreed the suit in favour of the petitioners'

father vide judgment and decree dated 15.02.1994. Feeling dissatisfied, Defendants No. 3 to 10 filed an appeal which was allowed and the findings of learned trial Court were reversed by the learned Additional District Judge Bahawalnagar vide judgment and decree dated 06.02.1995 on the ground that the trial Court/civil Court, Bahawalnagar had no jurisdiction to entertain the suit. The plaintiff challenged the judgment and decree dated 06.02.1995 in Civil Revision No. 65/1995. After death of plaintiff Abdul Aziz, present petitioners being his legal heirs were impleaded in this case. The civil revision was allowed vide judgment dated 23.05.2000 holding that the civil Court at Bahawalnagar had jurisdiction to deal with the mater and the case was remanded for decision on other issues to learned Additional District Judge Bahawalnagar who accepted the appeal of Defendants No. 3 to 10 and set aside the judgment and decree dated 15.02.1994 passed by learned trial Court resulting in dismissal of the suit of the petitioners. Hence this civil revision.

4. Learned counsel for the petitioners inter alia contends that the impugned judgment and decree passed by learned lower appellate Court suffers from material irregularities and misreading/non-reading of evidence; that the learned Additional District Judge has passed the impugned judgment in a slipshod manner based on his findings on Issue No. 5-A alone; that the learned Additional District Judge has failed to appreciate the evidence produced by the parties in its true perspective; that it is evident from the evidence available on record that the plaintiff was condemned unheard and no notice was issued to him prior to discontinuing water supply to his land but this important fact has altogether been ignored by learned lower appellate Court; that the learned trial Court has rightly observed that riges of thumb impressions allegedly put by the plaintiff over the alleged notice were almost missing, therefore, the thumb impressions were of no consequence; that the Canal Authorities were under legal obligation to give cogent reasons for termination of water supply as required under Section 20-B of the Canal and Drainage Act but they have failed to proffer any such reason; that the Superintending Canal Officer has confirmed the order dated 15.05.1989 passed by Divisional Canal Officer vide order dated 24.07.1985 after lapse of four years whereas under Section 20-B of the Act, any such order is required to be confirmed after expiry of only 30 days and not after long period of four years; that the judgment and decree of learned lower appellate Court is perversed and against law and fact, therefore, this civil revision be allowed, the judgment and decree of learned lower appellate Court be set aside and the judgment and decree of learned trial Court be restored.

5. On the contrary, learned counsel for the respondents has vehemently opposed this civil revision and fully supported the impugned judgment and decree. He avers that the impugned judgment and decree is in accordance with law. He states that the learned Additional District Judge has passed the impugned judgment after due appraisal of evidence available on file. He asserts that the learned counsel for the petitioners has failed to point out any illegality in the impugned judgment, therefore, this civil revision be dismissed.

6. Arguments advanced by learned counsel for the parties have been heard and the record available on file has also been perused.

7. The petitioner was non suited by the learned Additional District Judge on the basis of his findings on Issue No. 5-A which reads as under:

ISSUE NO. 5-A

Whether the impugned orders dated 24.07.1985 and 15.05.1989 having been passed by the Defendants No. 1 & 2 respectively are illegal, against facts, without notice and being mala fide the same are ineffective upon the rights of the plaintiff? OPP

The onus to prove this issue was upon the petitioners/plaintiffs who produced four witnesses including himself. PW-1 Muhammad Saleem, who is an official witness being Record Keeper of Sadiqia Canal Division Bahawalnagar deposed that according to his record the disputed property was a command nature but the sanctioned water supply was cancelled by the order of Superintending Canal Officer (SCO), notice u/S. 20-B of the Canal and Drainage, Act was not given to the petitioners/plaintiffs. In cross-examination he stated that the proceedings under Section 20-B were pending since 18.07.1982. The property was got levelled by Canal Department, a notice was given to the petitioners/plaintiffs for cultivation of the land but he did not do it. No notice was brought on the record by the said witness even during the Courts of cross-examination. PW.2 Muhammad Sharif deposed that the property of the petitioners/plaintiffs is cultivated and there is an orchard upon it; no notice was given before cutting the water supply and area is levelled. In cross-examination the defendant was unable to shake the credibility of the said witness. PW.3 Nazeer Ahmad also deposed in the similar manner and PW.4 Abdul Aziz the plaintiff while appearing his own witness deposed that he is irrigating his land by canal water for the last 20 years. He further deposed that no notice was ever issued before the disconnection of water supply; neither he was informed nor ever heard and on account of illegal disconnection of water his orchard and crops are being damaged. In cross-examination he denied the suggestion that he was served through any notice. He volunteered that had he been served he must have appeared before the authority he showed his ignorance whether he filed any appeal before the Superintending Canal Officer or any application before the Divisional Canal Officer, volunteered that as the area is cultivated therefore there was no need for filing any application.

8. No notice was confronted to the petitioners/plaintiffs by the defendant nor any copy of alleged notice was produced in the Court. In rebuttal, DW.1 Muhammad Abdullah deposed that a notice was given to the petitioners/plaintiffs to improve his land from own irrigable land then canal water will be sanctioned. He deposed that in 1985 X.EN made the spot inspection and cancelled the water of the petitioners/plaintiffs u/S. 20-B which was duly accorded in the year 1989 by the Superintending Engineer. In cross-examination he admitted that for the last 4/5 years the plaintiff is watering his land. He admitted that there is an enmity between him and the plaintiff. DW.2 Muhammad Ashraf could not improve the case of the defendant who deposed that the plaintiff was issued notices to improve the nature of the property. He has not uttered even a single word that any notice was served upon the plaintiff before disconnection of water. He admitted in his cross-examination that the DCO decided a case in 1985 whereas the Superintending Canal Officer made his decision in the year 1989. He admitted that as per record of revenue the disputed property is commanded. D.10 Abdul Majeed, Record Keeper Sadiqia Division, Bahawalnagar deposed that a notice u/S. 20 of Canal Act was given to the plaintiff which was duly served and thereafter the case was decided

on 24.07.1985. In cross-examination he admitted that no application for cancellation of water of the plaintiff was made. He admitted that the proceedings are initiated by the Canal Department on the basis of any application. This witness also failed to produce and place on record any alleged notice served upon the plaintiff. DW.4 Amanat Ali Ziladar in his examination-in-chief stated that the disputed property is in his area. Further deposed that the area of the plaintiff is 13 acres wherein `Killajat' Nos. 6,7,14,15 and 16 of Square No. 20 are `Farazi'. In cross-examination he admitted that there is an orchard with fruit trees which are 5 to 6 years of age. Further admitted that the property of the plaintiff is irrigable. Volunteered that 5 acres of land is irrigated by lifting the water. As regards the documents produced as Exh.C1 whereupon there is alleged thumb mark of the plaintiff which was sent for comparison to the Finger Print Expert. I am clear in my mind that this document Exh. C1 could never been termed as notice u/S. 20-B of the Canal Act rather it is a `Fard Raqba Malkan'. It is further noticed that the said thumb mark was never admitted by the plaintiff and even not confronted to the plaintiff when he appeared as PW.4. All the other witnesses produced by the defendant could not improve their case. The appellate Court below has wrongly emphasized upon the statement of DW.4 who visited the spot in the year 1993. The statement of DW.4 is not supported by any record. In my opinion the findings of learned appellate Court on this issue by way of which the judgment and decree passed by the trial Court was set-aside is quite sketchy in its nature. It is mandatory requirement of law u/S. 20-B of the Canal Drainage Act that before cutting the water supply a notice is to be served upon to the land owners. Section 20-B ibid is reproduced for ready reference:--

"[20-B. Cutting of supply for any land not being irrigated.--(1) Whenever, on an application or otherwise, Divisional Canal Officer considers it expedient to terminate the water supply of any land which cannot be used for agriculture or has become unirrigable, he shall give notice of not less than fourteen days to the land-owners and the persons responsible for the maintenance of the water-course through which such supply is conveyed, to show-cause why such supply should not be cut off and after making enquiry, the said Canal Officer may pass orders to stop the complete or partial supply of water.

(2) After the expiry of thirty days of the announcement of the decision by the Divisional Canal Officer, if no objection is received and after giving due opportunity of hearing, if any objection is received, the Superintending Canal Officer may confirm or modify it. The decision of the Superintending Canal Officer shall be final and binding of the parties concerned.]"

In view of this mandatory requirements of law the entire subsequent proceedings conducted by Respondents No. 1 and 2 are unwarranted, illegal and unlawful which cannot be sustained and the trial Court below rightly decided Issue No. 5-A which is interlinked with Issue No. 5, in favour of the petitioners/plaintiffs.

9. In view of discussion above, this civil revision is accepted and the judgment and decree dated 20.12.2000 passed by the learned appellate Court is set-aside and the judgment and decree dated 15.2.1994 passed by the learned trial Court is upheld.

(R.A.) Revision accepted.

**PLJ 2013 Lahore 687**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**MUJAHID ABBAS--Petitioner**

**versus**

**VICE CHANCELLOR ISLAMIA UNIVERSITY BAHAWALPUR and 2 others--Respondents**

W.P. No. 3291 of 2013, heard on 10.6.2013.

**Educational Institution--**

----Examination Rules--Chapter 3--Sought grace marks in LLB Part-I--Short by one marks passing marks--Required to clear all subjects of LLB Part-I in three chances but he could not do so--Contention--Grace marks are given to rightful candidates by University but not to those who appear in examination in Parts--Validity--There is no denial that petitioner had appeared in LLB examination in Part I, as such proviso u/S. 5, Chapter 3 of Examination Rules is attracted to instant case--Grace marks shall not be awarded to any proviso, petitioner was not entitled to grant grace marks--Petition was dismissed. [P. 689] A

Mr. Muhammad Saleem Chaudhry, Advocate for Petitioner.

Mr. Muhammad Nasir Joyia, Legal Advisor Islamia University Bahawalpur and Mr. Abdul Khalid Javed, Assistant Controller, Islamia University, Bahawalpur for Respondents.

Date of hearing: 10.6.2013.

**Judgment**

Through this writ petition, the petitioner has prayed for grace marks in Paper-V of LLB Part-I.

2. The cause of action as given in this petition is that the petitioner is a student of LLB Part-II in Millat Law College Bahawalpur, affiliated with Islamia University Bahawalpur. The petitioner submitted admission form for Annual Examination LLB Part-I in the year 2011 but failed in Paper V (law of Tort and Easement-I). The petitioner appeared in Supplementary Examination, 2011 but could not pass the said paper again. The petitioner then appeared in Annual Examination, 2012 and obtained 39 marks short by one mark to be successful in the paper as required passing marks were 40. The petitioner submitted application for rechecking of the paper but the obtained marks, after rechecking of the paper, were found to be correct. The petitioner also filed application for grant of one grace mark to him and declare him successful in the examination which remained unattended. Hence this writ petition.

3. Learned counsel for the petitioner submits that the petitioner appeared three times in LLB Par-I but could not succeed in one paper, i.e. Paper V, otherwise, the aggregate is complete; that if the petitioner is granted just one grace mark in Paper V, he may be successful otherwise he will have to appear in all the subjects; that the petitioner is a poor person whose future is at stake for just want of one number;

that upto five marks can be given to a candidate as per University Rules. Learned counsel prays that this writ petition be allowed and the petitioner be granted one grace mark enabling him to continue his studies. He has relied upon the dictums laid down in case titled "Karim Bakhsh Vs. Controller Examination, Islamia University, Bahawalpur and another (1998 MLD 21)" and Bahauddin Zakriya University through Vice Chancellor and another Vs. Muhammad Waseem Khan (2005 YLR 1197).

4. On the other hand, learned Legal Adviser for the respondent University has vehemently opposed this writ petition. He argues that under the Examination Rules and Regulations, grace marks are given to rightful candidates by the University but not to those who appear in the examination in parts. He maintains that since the petitioner has appeared in the examination in parts, he is not entitled to the grace marks and will have to appear now in all the subjects as per Examination Rules and Regulations of the University. He prays that this writ petition having no merit be dismissed.

5. I have heard the arguments put forth by learned counsel for the parties and also perused the record made available before me.

6. The petitioner has admittedly appeared three times in Part-I of LLB Examination. Firstly, he passed all subjects except Paper V (Law of Torts and Easement-I). In second and third attempts, he could not pass Paper V. In the third attempt, he obtained 39 marks short by one mark of passing marks being 40 marks. Under the rules, he was required to clear all the subjects of LLB Part-I in three chances but he could not do so. The only prayer of the petitioner is that he be granted one grace marks so that he could avoid appearance in all the subjects of LLB Part-I.

7. There is no denial that the petitioner has appeared in the said examination in parts, as such, the proviso under Section 5, Chapter 3 of Examination Rules is attracted to this case. The said proviso states that "provided further that the grace marks shall not be awarded to any said proviso, the petitioner is not entitled to the grant of grace marks. I am guided by the dictums laid down by this Court in case titled "Jan Muhammad Vs. The Vice Chancellor, Bahauddin Zakariya University (2004 CLC 822)" wherein it has been held that "I am afraid that the language of the regulation is absolutely clear. If a candidate appears in an examination, may be in all the subjects but if he fails to qualify in any one of the subjects and he had to re-appear in those subjects, his case would fall "in parts " and he would not be entitled to any grace marks, However, if a candidate appears in all the subjects for the first time and he is short of jive marks either in any one or more subject or he is short of five marks in his aggregate, then he is entitled to secure five grace marks. "From the aforesaid, it is clear that any candidate who appears in all subjects but fails in one or more subjects and again appears in the failed subjects, he will be deemed to have appeared in parts and will not be entitled to the grace marks. The case law relied upon by the petitioner does not attract to the case in hand as in the case 1998 MLD 21 supra, the petitioner had re-appeared in all subjects whereas the petitioner of this case has appeared in parts. In this view of the matter, I do not find any merit in this writ petition which is accordingly dismissed.

(R.A.) Petition dismissed.

**PLJ 2013 Lahore 696**
**[Bahawalpur Bench Bahawalpur]**
**Present: Atir Mahmood, J.**
**WAPDA through Chairman and 3 others--Petitioners**
**versus**
**FAQIR MUHAMMAD and 2 others--Respondents**

C.R. No. 194 of 2002/BWP, decided on 23.10.2013.

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

----S. 114--Civil revision--Possession of residential plot--Delivery of possession--No illegality or irregularity were committed by Courts below in delivering possession--Audi Alteram Partem--Estopped to file suit was misconceived as document was not confronted--Nor any suggestion was given--Municipal committee was not authorized to transfer property to petitioner, was also mis-conceived--Qestion for determination--Validity--There is no denial to fact that patta malkiat was issued in favour of respondent but on application of petitioner, patta malkiat was cancelled without issuance of any notice--It has been established through production of evidence, that suit property which was transferred was outside boundary wall of petitioner's premises and it was never transferred to petitioner--It is an established principle of law that no body can be condemned unheard and cancellation of patta malkiat in favour respondent, without notice, is a glaring example of violation of principle of audi alteram partem and principle of natural justice--Civil revision was dismissed. [P. 699] A & B

2009 SCMR 54 & 2012 SCMR 1373, rel.
M/s. Hafiz Abdul Qayyum & Uzair Qayyum, Advocates for Petitioners.
Mr. Aftab Ahmad Goraya, Advocate for Respondent.

Date of hearing: 23.10.2013.

**Judgment**

Through this civil revision, the petitioners have challenged the judgment and decree dated 07.01.2002 passed by the learned Additional District Judge, Bahawalnagar who dismissed the appeal filed by the petitioners and upheld the judgment and decree dated 10.10.2000 passed by the learned Senior Civil Judge, Bahawalpur whereby the suit of Respondent No. 1 for declaration with permanent injunction was decreed.

2. Brief facts of the case are that Respondent No. 1/plaintiff filed a suit for possession that he is owner in possession of residential plot measuring 10-Marlas situated at Khadimabad Colony, Bahawalnagar on the basis of Patta Malkiat No. 74/B dated 01.03.1992 as well as subsequent Mutation No. 5856 dated 29.03.1992, therefore, the

petitioners have got no concern whatsoever towards the said plot. It is asserted that the petitioners/defendants were bent upon to cause interference into the possession of the Respondent No. 1/plaintiff qua the said property without lawful justification. It is also averred that the petitioners managed to get issued an order dated 26.12.1995 from Respondents No. 2 and 3 in respect of cancellation of said transfer of property in question in favour of Respondent No. 1, therefore, the said order dated 26.12.1995 was illegal, void, ex parte and mala-fide qua the rights of the Respondent No. 1. The request of Respondent No. 1/plaintiff to the petitioners for not asserting any right as well as not to dispossess Respondent No. 1 from the disputed property illegally and forcibly did not bear any fruit obliging him to file the said suit for declaration.

3. The suit was contested by the petitioners/defendants vehemently by filing written statement. Keeping in view the divergent pleadings of the parties learned trial Court framed the following issues:--

"1. Whether the plaintiff is owner in possession of the impugned plot, defendants have nothing to do with it, order dated 26.12.1995 is collusive, without notice, ex parte, against the law and facts, void, ineffective qua the rights of plaintiff, liable to cancellation and defendants be restrained permanently to dispossess plaintiff from here and claim ownership of the impugned plot? OPP.

2. Whether the plaintiff has no cause of action, locus-standi and the plaint is liable to be rejected under Order VII, Rule 11 CPC?OPD.

3. Whether the suit is not properly stamped? OPD..

4. Whether the suit is vexatious and Defendants No. 1 to 4 are entitled to special costs? If so, upto what extent? OPD.

4-A Whether the Court lacks jurisdiction to try this suit?OPD.

5. Relief.

After recording oral as well as documentary evidence of the parties, learned trial Court decreed the suit for declaration with permanent injunction vide judgment and decree dated 10.10.2000. Feeling dissatisfied the petitioners filed an appeal which was dismissed by the learned Additional District Judge, Bahawalnagar vide judgment and decree dated 07.01.2002, hence this civil revision.

4. Learned counsel for the petitioners has contended that both the Courts below have failed to appreciate the evidence available on record while passing the impugned judgments and decrees; that the impugned judgments and decrees are result of mis-reading and non-reading of evidence; that the impugned judgments and decrees are illegal, void and against the law and facts; that learned Courts have ignored the relevant law and arguments advanced by the learned counsel for the petitioners; that the learned appellate Court failed to consider all the points raised at the time of

arguments in appeal; that the findings on Issues No. 1, 2 and 3 of the learned trial Court are illegal, void and against the law; that the Chairman, Municipal Committee without lawful authority and jurisdiction allotted the disputed plot to the respondents in violation of the Local Government Ordinance, 1979 and the rules framed there-under; that the respondents while applying for the allotment of the disputed property sworn an affidavit, Exh. D-1, wherein he categorically stated that if there is any objection from the WAPDA, the respondents will not object to it and will vacate the suit property, as such, this civil revision be allowed, impugned judgments and decrees be set-aside and the suit of the petitioners be decreed as prayed for.

5. On the other hand, learned counsel for the respondents has vehemently opposed this civil revision and fully supported the impugned judgments and decrees. Learned counsel for the respondents has further contended that the impugned judgments and decrees are well reasoned and the learned Courts have committed no illegality or irregularity in delivering the same, therefore, this civil revision is liable to be dismissed. He has relied upon the judgments reported as Alamgir Khan through L.Rs. and others Vs. Haji Abdul Sittar Khan and others (2009 SCMR 54) and Noor Muhammad and others Versus Mst. Azmat-e-Bibi (2012 SCMR 1373).

6. Arguments have been heard and record has been perused with the able assistance with the learned counsel for the parties.

7. The pivotal question for determination by this Court is Issue No. 1. There is no denial to the fact that the patta malkiat was issued in favour of the respondents on 01.03.1992, which is Exh. P-2 but thereafter on the application of the Petitioners/Defendants No. 1 to 4, Defendant No. 5 cancelled patta malkiat on 26.12.1995 without issuance of any notice to the respondents. It has been established through the production of the evidence that the suit property which was transferred to the respondents is outside the boundary wall of the petitioners' premises and it was never transferred to the present Petitioners/ Defendants No. 1 to 4. Both the Courts below concurrently decided Issue No. 1 against the petitioners. The contention of learned counsel for the petitioners that Exh.D-1 was sworn by the present respondent and he was estopped to file the suit is misconceived as this document was not confronted to Respondent No. 1 nor any suggestion was given to him in this regard, while he appeared in the witness box as PW-3 and that the Chairman, Municipal Committee was not authorized to transfer the property to the petitioners, is also misconceived. It is an established principle of law that nobody can be condemned unheard and cancellation of patta malkiat in favour of the respondents, without notice, is a glaring example of the violation of the principle of Audi Alteram Partem and principle of natural justice. The concurrent findings of facts given by the Courts below do not suffer from any jurisdictional defect, material illegality or irregularity or mis-reading and non-reading of evidence which could be interfered by this Court in its revisional jurisdiction. The guidance is sought from the case reported

as Noor Muhammad and others Vs. Mst. Azmat-e-Bibi (2012 SCMR 1373). The relevant part of the said judgment reads as under:

"There is no cavil to the proposition that the jurisdiction of High Court under Section 115, C.P.C. is narrower and that the concurrent findings of fact cannot be disturbed in revisional jurisdiction unless Courts below while recording findings of fact had either misread the evidence or have ignored any material piece of evidence or those are perverse and reflect some jurisdictional error ".

8. For what has been discussed above, this civil revision being devoid of any force is dismissed.

(R.A.) Revision dismissed.

**2013 Y L R 2484**

**[Lahore]**

**Before Atir Mahmood, J**

**KANWAR MEHMOOD AHMED and others---Petitioners**

**Versus**

**Rao TAHIR ALI KHAN and others---Respondents**

Civil Revision No.238-D of 2009, decided on 24th April, 2013.

**West Pakistan Land Revenue Act (XVII of 1967)---**

----S.172(2)(xviii)---Civil Procedure Code (V of 1908), S.9---Specific Relief Act (I of 1877), Ss. 42 & 54---Suit for declaration and permanent injunction---Joint agricultural land---Assertion of independent right in respect of land in possession of plaintiff on basis of an oral family partition/settlement---Validity---Burden to prove family settlement would heavily lie on plaintiff -- Mere such possession would not be sufficient to prove family settlement, if same was already under challenge before revenue authorities---Civil Court in cases of family partition of such land had no jurisdiction by virtue of S. 172(2)(xviii) of West Pakistan Land Revenue Act, 1967.

Ch. Muhammad Shafi Mayo for Petitioners.

Muhammad Naveed Farhan for Respondents Nos. 1 to 4 and 7.

Date of hearing: 24th April, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this civil revision, the petitioners have impugned the judgment and decree dated 15-5-2009 passed by learned Additional District Judge, Ahmedpur East who accepted the appeal of respondents Nos.1 to 4 and set aside the judgment and decree dated 14-9-2006 passed by learned trial Court whereby the suit for declaration filed by the petitioners was decreed.

2. Brief facts of the case are that the petitioners filed a suit for declaration and permanent injunction regarding the property fully described in the head-note of the plaint with the averment that the petitioners are in possession of the suit property on the basis of family partition, therefore, the respondents be restrained from interfering with their possession. The suit was contested by respondents Nos.1 to 4 and 7 by filing written statements whereas respondents Nos.5 and 9 to 15 filed a conceding statement. Respondents Nos.6 and 8 were proceeded against ex parte. Out of divergent pleadings of the parties, the learned trial Court framed as many as five issues including that of relief. After recording oral as well as documentary evidence adduced by the parties, learned trial Court proceeded to decree the suit of the petitioners-plaintiffs vide judgment and decree dated 14-9-2006. Respondents Nos.1 to 4 feeling dissatisfied filed an appeal which was accepted by the learned lower appellate court and the judgment and decree dated 14-9-2006 passed by learned trial Court was set aside vide judgment and decree dated 15-5-2009 which is under challenge in this civil revision.

3. Learned counsel for the petitioners inter alia contends that there was a family settlement between the parties, in result of which, the suit property was given to the petitioners and the respondents were given the adjacent land. He maintains that the respondents resiled from the settlement, therefore, the instant suit was filed. He avers that the petitioners have successfully proved their case by producing cogent evidence;

that the judgment and decree passed by learned trial Court is based on law and fact; that the learned lower appellate court has failed to appreciate the evidence produced by the petitioners and dismissed their suit without any lawful justification. He prays that this civil revision be allowed, the impugned judgment and decree be set aside and the judgment and decree passed by learned trial Court be restored.

4. Conversely, learned counsel for the respondents Nos.1 to 4 and 7 submits that no family partition took place; that no documentary evidence, in support of their version that there was a family settlement, could be produced by the petitioners; that only two witnesses were produced out of one was the plaintiff himself whereas the other witness who appeared as P.W.2 does not state anywhere that there was a family partition but that the possession lies with the petitioners-plaintiffs; that the possession of the petitioners over the dispute land was challenged before the Revenue authorities which matter has already been decided by the District Officer (Revenue) in favour of the respondents and now the matter is pending before the Member Board of Revenue. He avers that there is nothing on record to show that there was any family settlement with regard to the suit property, therefore, this civil revision merits dismissal.

5. I have heard the arguments advanced by learned counsel for the parties and also perused the record with their able assistance.

6. It is admitted fact that the parties being successors of Kanwar Khawaja Zajar Ali Khan are inter se related and joint owners in the suit property regarding which the petitioners filed the suit for declaration and permanent injunction asserting their independent rights on the basis of a family settlement/partition.

7. The scanning of record shows that the petitioners have not been able to establish that there was any family partition between the parties through convincing evidence. Mere possession of the petitioners over the suit-land is not sufficient to prove the alleged family partition which is also under challenge before the revenue authorities. Since the alleged family partition was oral, the onus probandi lies heavily over the petitioners. The only witness, produced by the petitioners-plaintiffs, who can be presumed independent is P.W.2 Muhammad Nawaz who admits in his cross-examination that neither family partition took place in his presence nor he knows about 'numbers' given to the petitioners pursuant to the family partition meaning thereby he does not know about the alleged family partition. In the circumstances, the petitioners have badly failed to prove their case.

8. Another aspect of the matter is that the jurisdiction of the civil court in the cases of family partition is barred by section 172(2)(xviii) of the Land Revenue Act, 1967 which is reproduced below:--

"(2) a Civil Court shall not exercise jurisdiction over any of the following matters namely:---

(xviii) any claim for partition of an estate or holding, or any question connected with or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought:"

9. Learned counsel for the petitioners has also failed to point out any illegality, infirmity or misreading/non-reading of evidence in the impugned judgment calling for interference by this Court.

10. For the aforementioned reasons, this revision petition has no force, hence dismissed leaving the parties to bear their own costs.

SAK/M-197/L Revision dismissed.

**2013 M L D 1535**

**[Lahore]**

**Before Atir Mahmood, J**

**SALEEM AKHTAR and others---Petitioners**

**Versus**

**PROVINCE OF PUNJAB and others---Respondents**

Civil Revision No.775 of 2012/BWP, decided on 20th May, 2013.

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

----Ss. 8, 39, 42 & 54---Civil Procedure Code (V of 1908), O. XXXIX, Rr.1 & 2---Suit for declaration, possession and permanent injunction---Transfer of suit property in favour of favour of defendant through registered sale deed and mutation---Plaintiff challenged validity of suit mutation---Plaintiff's application for temporary injunction was accepted by Trial Court, but dismissed by Appellate Court---Validity---Plaintiff had not challenged or sought cancellation of sale deed on basis of which suit mutation was attested---Plaintiff had merely sought cancellation of suit mutation---Possession of suit property was with defendant---Plaintiff had failed to establish prima facie case, irreparable loss and balance of inconvenience in his favour---High Court dismissed revision petition.

Ch. Shehzad Ashraf Mohandra for Petitioners.

Saeed Ahmad Chaudhry, A.A.-G. for Respondents Nos. 1 to 7.

Aftab Ahmad Goraya for Respondents Nos. 8 to 15.

**ORDER**

**ATIR MAHMOOD, J.---**Briefly facts giving rise to this petition are that the petitioners, filed a suit for declaration to the effect that they are the owners of the property, fully explained in the head-note of the plaint and the defendants Nos. 8 to 13 (present respondents Nos. 8 to 13) have no right or concern with the same; further sought a declaration that the order dated 7-1-2011 passed by defendant No.2/respondent No.2, orders dated 9-9-2010 and 21-10-2010 passed by defendant No.3/ respondent No. 3 regarding review of Mutation No. 1414 attested on 1-3-1968 and subsequent orders of Mutations Nos. 21079 and 21080 attested on 14-9-2010 passed by defendant No.5/respondent No.5 are illegal, unlawful and inoperative against the rights of the plaintiffs; further sought the possession and permanent injunction against the defendants/respondents restraining them from alienating the suit property to anybody else. Along with the plaint, the petitioners filed an application under Order XXXIX, Rules 1 and 2, C.P.C. for temporary injunction.

2. The learned trial Court below accepted the application under Order XXXIX, Rules 1 and 2, C.P.C. of the plaintiffs vide order dated 16-4-2011 which was assailed in appeal by the present respondents Nos.8 to 11 before the lower appellate Court. The appeal of the defendants Nos. 8 to 11/respondents Nos. 8 to 11 was accepted by the learned Additional District Judge, Rahim Yar Khan vide judgment dated 19-9-2012 whereby the application under Order XXXIX, Rules 1 and 2 C.P.C. of the plaintiffs/petitioners was dismissed. Being aggrieved of the judgment of the lower appellate Court, the petitioners filed the instant writ petition.

3. The learned counsel for the petitioner contended that the learned Additional District Judge has unlawfully dismissed the application of the petitioners for grant of

temporary injunction; that the order of the learned trial court is based on cogent reasons; that the balance of convenience lies with the petitioners; that the petitioners are owners of the property; that if the temporary injunction is not granted to the petitioners they will suffer irreparable loss. He prays that this civil revision be allowed, the impugned order be set-aside and the order of the learned trial Court be restored.

4. On the other hand, learned counsel appearing on behalf of respondents Nos. 8 to 15 as well as learned A.A.-G. while supporting the impugned judgment passed by the learned Additional District Judge have submitted that the respondents are owners in possession of the property vide registered sale deed No.518 dated 21-2-1959, registered sale deed No.55 dated 23-2-1960 and registered sale deed No. 685 dated 12-12-1959 and exchange deed No. 72 dated 3-5-1991 on the basis of which the mutations under challenged were attested by the competent authorities; that the petitioners have no right over the suit property, therefore, this civil revision be dismissed.

5. I have heard the learned counsel for the parties and have also gone through the available record.

6. It is evident from the record that the petitioners, while filing the suit, have not challenged or sought the cancellation of the sale deeds on the basis of which the impugned mutations were attested; possession of the suit property is admittedly with the respondents. The petitioners have not been able to point out any illegality or jurisdictional error committed by the learned Additional District Judge while passing the impugned judgment. I am guided by the dictum laid down by the Hon'ble Supreme Court of Pakistan in the case cited as Mst. Feroz Begum v. Mst. Amtul Farooq (1976 SCMR 291), which reads as under:--

"Having perused the impugned judgment, we find that the District Judge had brushed aside a registered sale deed in respect of the disputed house placed on the record by the respondent purporting to show that her late husband had transferred the house in her favour. The view taken by the High Court was that this document could not be lost sight of merely on account of the challenge to its genuineness as at any rate the finding required to be given at this stage was to be merely tentative in nature and the document was good enough to justify the inference of a prime facie case in favour of the respondent. The petition is completely devoid of force and is hereby dismissed".

7. In the present case the petitioners have not even challenged the registered sale deeds in favour of the respondents and merely sought the cancellation of the mutations in favour of the respondents Nos. 8 to 13. In view of the above discussion, the petitioners have not been able to establish any of the ingredients for the grant of temporary injunction i.e. prima facie case, irreparable loss and balance of in-convenience in their favour. This petition being devoid of merits is hereby dismissed.

SAK/S-80/L Petition dismissed.

**2014 C L C 955**

**[Lahore]**

**Before Atir Mahmood, J**

**NAZIR AHMAD----Petitioner**

**Versus**

**MUHAMMAD SIDDIQUE and another----Respondents**

Civil Revision No.2767 of 2013, decided on 2nd December, 2013.

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

----O. XXXVII, Rr. 2 & 3---Recovery suit based on negotiable instrument---Application for leave to appear and defend the suit---Contention of plaintiff was that leave to appear and defend the suit should be granted subject to some payment or furnishing a reasonable security---Validity---No condition was necessary for granting leave to appear and defend the suit by furnishing any sort of security or any payment---Trial Court, granting application for leave to defend had passed the impugned order while looking into the relevant material placed on the file which could not be termed as illegal or unlawful one---Revision was dismissed in limine.

Muhammad Afzal Shad for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.---** This civil revision is directed against the order dated 2-11-2013 passed by the learned Additional District Judge, Shorkot whereby the application for leave to appear and defend the suit filed by the respondent-defendant was accepted.

2. The brief facts of the case are that the petitioner filed a suit for recovery of Rs.15,00,000/- under Order XXXVII rule 1 of C.P.C. against the respondent, Muhammad Siddique alleging that the petitioner is pensioner from Army and after retirement, he was employed as Security Guard in Muslim Commercial Bank Limited, Shorkot and presently he is running a business. It is also alleged that he has saved some amount for his necessities and on 20-9-2011, the respondent, who is a goldsmith demanded Rs.15,00,000/- as loan from the petitioner for the purchase of gold for a period of six months. On 25-9-2011, the petitioner gave Rs.15,00,000/- to the respondent in presence of Muhammad Ashfaq and Manzoor Hussain P.Ws. while the respondent handed over a Cheque No.MCB 087067 Kaki Nau Branch Code No.0406 under Account KBA/AC180-4 Tehsil Shorkot, District Jhang. The petitioner presented the cheque in the concerned bank after expiry of the date of commitment i.e. 26-3-2012 but the same was dishonuored. Thereafter petitioner approached the respondent along with the witnesses and demanded his money back as the cheque was dishonoured but the respondent refused to return the amount giving the reference of criminal case for abduction got registered by the brother of the respondent against the petitioner and his relatives. Thereafter the respondent filed an application for

permission for leave to defend the suit which was dismissed being barred by time. Thereafter, respondent filed a revision before this court which was accepted with the direction to decide the suit on merits. Thereafter, the application of the respondent for leave to appear and defend the suit was accepted vide impugned order. Hence this civil revision.

3. Learned counsel for the petitioner has contended that the order passed by the learned Additional District Judge, Shorkot is against the facts, record and law; that the learned appellate court without appreciating and considering the real facts of the case allowed the respondent to appear and defend the suit unconditionally; that the appellate court while giving his observation has committed material illegality and irregularity and the same is not sustainable, therefore, the impugned order is liable to be dismissed.

4. I have heard the arguments of the learned counsel for the petitioner and have also gone through the record.

5. The main emphasis of learned counsel for the petitioner is that the trial court has granted leave to appear and defend the suit unconditionally and if at all leave was to be granted it should have been allowed conditionally subject to some payment or furnishing a reasonable security. In this regard, the provisions of Order XXXVII, Rule 3 of C.P.C. are reproduced for ready reference:---

"3. Defendant showing defence on merits to have leave to appear---

(1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit."

6. The bare reading of the above provision makes it explicitly clear that there is no condition precedent for granting the leave to appear and defend the suit by furnishing any sort of security or any payment.

7. The learned trial Court while granting the application for leave to appear and defend the suit has looked into the relevant material placed on the file and has passed the impugned order by exercising its jurisdiction which cannot be termed as illegal or unlawful and it calls for no interference by this Court in view of its revisional jurisdiction.

8. For what has been discussed above, this civil revision being devoid of any force is dismissed in limine.

AG/N-13/L Revision dismissed.

**2014 C L C 1004**
**[Lahore]**
**Before Atir Mahmood, J**
**MUHAMMAD ZAHID----Petitioner**
**Versus**
**ADDITIONAL DISTRICT JUDGE, GUJRANWALA and 3 others----Respondents**

Writ Petition No.33206 of 2013, decided on 9th January, 2014.

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

----S.115---Constitution of Pakistan, Art.199---Constitutional petition---Revision petition dismissed for non-prosecution---Legality---Revisional court dismissed revision petition filed by petitioner for non-prosecution---Plea of petitioner that his revision petition could not have been dismissed for non-prosecution in view of the law laid down in the case of Muhammad Sadiq v. Mst. Bashiran and 9 others (PLD 2000 Supreme Court 820)---Validity---Counsel for respondent could not controvert the law laid down by the Supreme Court in the said case---Order of revisional court whereby revision petition of petitioner was dismissed for non-prosecution was set aside---High Court directed that revision petition filed by petitioner would be deemed to be pending before the revisional court, which shall decide the same on merits in accordance with law---Constitutional petition was allowed accordingly.

Muhammad Sadiq v. Mst. Bashiran and 9 others PLD 2000 SC 820 rel.
Barrister Haris Azmat for Petitioner.
Sultan Mahmood Dar for Respondent No.2.

**ORDER**
**ATIR MAHMOOD,J.---** From the very out-set, the learned counsel for the petitioner has contended that the revision petition filed by the petitioner before the revisional court could not have been dismissed in view of the law laid down by the Hon'ble Supreme Court of Pakistan in a case reported as Muhammad Sadiq v. Mst. Bashiran and 9 others (PLD 2000 Supreme Court 820) which has resulted in grave miscarriage of justice. He has submitted that by accepting this petition, the revision petition pending before the revisional court be restored to its original number and the revisional court be directed to decide the same in accordance with law.

2. Learned counsel for respondent No.2 submits that respondent No.3 is father-in-law of the .petitioner and respondent No.4 is son of respondent No.3 who is abroad but

respondents Nos.3 and 4 are the pro forma respondents and respondent No.2 is a decree-holder: When confronted with the law laid down by the Hon'ble Supreme Court of Pakistan, the learned counsel for respondent No.2 contends that petitioner is deliberately delaying the proceedings before the executing court and the decree dated 21-11-2008 passed by the learned Family Court in favour of respondent No.2 could not be executed due to the revision petition and respondent No.2 is being deprived of the fruits of the decree passed in her favour. However, he has not controverted the above referred law laid down by the Hon'ble Supreme Court and submits that the revisional court below be directed to decide the revision petition expeditiously but within a reasonable given time by this Court.

3. In view of the fair stance taken by learned counsel for respondent No.2, this writ petition is allowed. The orders dated 4-7-2013 whereby the application for restoration of revision petition was dismissed' and the order dated 20-5-2013 whereby the revision petition of the petitioner was dismissed for non prosecution are set aside. Resultantly, the revision petition filed by the present petitioner will deem to be pending before the revisional court who shall decide the same on merits in accordance with law expeditiously but within three weeks from the next date of hearing i.e. 13-1-2014 which is already fixed before the revisional court. The parties are directed to appear before the revisional court on the above said date. The compliance report be submitted for perusal of this Court.

MWA/M-8/L Petition allowed.

**2014 C L C 1119**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD RAMZAN through L.Rs.----Petitioners**

**Versus**

**WALAYAT ALI alias WALAYATI and 2 others----Respondents**

Writ Petition No.21685 of 2009, heard on 11th December, 2013.

**Arbitration Act (X of 1940)---**

----Ss. 34, 14 & 17---Specific Relief Act (I of 1877), S.8---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for possession of immovable property---Arbitration agreement---Stay of proceedings---Scope---Contention of plaintiff was that decision of arbitrator had been denied by him being based on fraud---Application filed under S.34 of Arbitration Act, 1940 was dismissed by the Trial Court but same was accepted by the Appellate Court---Validity---Proceedings of suit could be stayed under S.34 of Arbitration Act, 1940 if matter was mutually agreed between the parties---No occasion to stay proceedings of the present suit existed as factum of alleged arbitration agreement had been denied by the plaintiff---Impugned judgment passed by the Appellate Court was not sustainable in the eye of law which was passed without application of judicious mind and in excess of jurisdiction vested in it---Impugned judgment passed by the Appellate Court was set aside and order of Trial Court was restored---Constitutional petition was accepted in circumstances.

Muhammad Farooq v. Nazir Ahmad and others PLD 2006 SC 196 ref.

Muhammad Farooq v. Nazir Ahmad and others PLD 2006 SC 196 rel.

Shabbir Ahmad Khan for Petitioners.

Shahid Shaukat for Respondent No.1.

Date of hearing: 11th December, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have challenged the judgment dated 5-9-2009 passed by the learned Additional District Judge, Faisalabad who accepted the revision petition filed by respondent No.1 against the order dated 28-1-2009 passed by the learned Civil Judge, Fasialabad, whereby the application under section 34 of the Arbitration Act, 1940 for stay of the proceedings filed by respondent No.1 was dismissed.

2. Brief facts of the case are that petitioner No.1. Muhammad Ramzan (deceased) filed a suit for possession against respondent No.1 in respect of House No.2253/D, measuring 3-1/2 Marlas, situated in Ghulam Muhammad Abad, Faisalabad. The Plot

No.2253/D was allotted to the petitioner in the year 1956 by Rehabilitation Department, Faisalabad and house was constructed by the petitioner. Thereafter the petitioner had died during the pendency of suit and petitioners No.(i) to (vii) were impleaded as legal heirs of the petitioner No.1. It is stated that the respondent No.1 instead of filing written statement, filed an application under section 34 of Arbitration Act with the request to adjourn the suit sine die for the reasons that there is already an application pending under sections 14 and 17 of the Arbitration Act, 1940 to make an award dated 20-10-1995 as Rule of Court. The petitioner filed reply of the application, in which he stated that no arbitration was took place between the parties and the alleged decision of the Arbitrator is based on fraud. The learned Civil Judge, Faisalabad vide order dated 28-1-2009 dismissed the application filed by respondent No.1. The respondent No.1 filed revision petition against the order dated 28-1-2009 which was accepted by the court of learned Additional District Judge, Faisalabad vide judgment dated 5-9-2009, hence this civil revision.

3. Learned counsel for the petitioner has contended that the impugned judgment is against the law and facts; that the decision of the Arbitrator is specifically denied being based on fraud; that the alleged decision of the Arbitrator/Award is dated 13-10-1995 and there was no reason to wait for such long time to make it Rule of Court; that the impugned judgment is illegal and has been passed without any lawful authority. He has placed on record a copy of judgment dated 17-12-2011 passed by the civil court whereby application under section 17/14 of the Arbitration Act for making the award dated 20-12-1995 as rule of the court was dismissed. Learned counsel prays that this writ petition be allowed and the impugned judgment may be set-aside. He has relied upon the case reported as Muhammad Farooq v. Nazir Ahmad and others PLD 2006 SC 196.

4. On the other hand, learned counsel for respondent No. 1 has vehemently opposed this writ petition and fully supported the impugned judgment. He has further contended that the impugned judgment is well reasoned and the learned court has committed no illegality or irregularity in delivering the same, therefore, this petition is liable to be dismissed.

5. Heard. Record perused.

6. The question which is to be determined by this Court is as to whether in view of section 34 of the Arbitration Act, proceedings of a suit can be stayed. In this regard, the language of section 34 of the Act is to be taken into consideration in its true perspective which is reproduced below:---
"Power to stay legal proceedings where there is an arbitration agreement.--- Where any party to an arbitration agreement or any person claiming under him commences

any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings." (underline is mine)

Bare reading of this section clearly establishes that when the matter is mutually agreed between the parties, then proceedings of the subsequent suit can be stayed under section 34 ibid but in the present case from the very outset, the factum of any alleged arbitration was denied by the present petitioners, therefore, there was no legal occasion to stay proceedings of the suit filed by the petitioners by the civil court. Furthermore, the conduct of the petitioners for non-filing the written statement before filing the application under section 34 of the Arbitration Act, smacks mala fides and is fully covered in the case-law relied upon by learned counsel for the petitioners reported as PLD 2006 SC 196 (Muhammad Farooq v. Nazir Ahmad and others). Relevant paragraph is reproduced as under:---

"8. The admitted position is that the appellant/defendant for the first time appeared in the Court on 28th of March, 1998 when the same was adjourned to 17-4-1998 for submission of the written statement and filing power of attorney. The written statement was not filed as such suit was adjourned to 30-4-1998 when the learned Presiding Officer was on leave. The suit was accordingly adjourned to 13-5-1998 yet on the said date written statement was not filed. Learned counsel for the appellant/defendant requested for adjournment to file written statement which was allowed and suit was adjourned to 18-5-1998 but as the Presiding Officer was on leave, therefore, the suit was again adjourned to 30-5-1998 when application under section 34 of the Arbitration Act was moved. From the above proceedings in the Court it would be clear that the appellant even after the receipt of notice of the plaint got three clear dates for filing written statement but the application under section 34 of the Act was moved on the fourth date. Above acts of the appellant on number of dates stated above would show that he intended to participate and defend the suit before the Court."

7. In view of the above discussion, the impugned judgment dated 5-9-2009 passed by the learned Additional District Judge, Faisalabad is not sustainable in the eye of law and is liable to be set aside being passed without application of judicious mind and in excess of jurisdiction vested with the revisional court.

8. Furthermore, on account of subsequent development when the proceedings under sections 17/14 of the Arbitration Act have come to an end by way of judgment given by the civil court vide order dated 17-12-2011, there remains no occasion to justify the stay of the proceedings before the court. This petition is accordingly allowed by setting aside the impugned judgment dated 5-9-2009 and the order dated 28-1-2009 passed by the learned Civil Judge, Faisalabad is upheld.

AG/M-70/L Petition allowed.

**2014 C L C 1270**

**[Lahore]**

**Before Atir Mahmood, J**

**Syed HAROON SULTAN BOKHARI----Petitioner**

**Versus**

**Syeda MUBARAK FATIMA and another----Respondents**

Writ Petition No.23268 of 2010, heard on 7th March, 2014.

**West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 10(4)---Constitution of Pakistan, Art.199---Constitutional petition---Khula---Suit for dissolution of marriage was decreed on the basis of khula subject to relinquishment of her dower amount by wife or portion of the plot equal to dower amount---Wife had developed aversion and hatred towards the husband---Settlement/agreement without any condition to surrender the right of gift on the part of wife was arrived at between the parties---Contention of husband was that after dissolution of marriage on the basis of khula, according to agreement, wife was bound to return the plot to husband, which was mentioned in Column No.16 of Nikah Nama---Validity---Under the Islamic Law, if the dissolution of marriage was made on the basis of khula, the wife was under an obligation to return/forgo the dower amount and the benefits derived from the husband but said principle was applicable when the khula was claimed by the wife without any fault of the husband but if the aversion or hatred was result of the conduct of the husband which could be mental or physical torture, non-payment of maintenance allowance etc., then the return of dower amount was not essential---Property having been given to wife as a bridal gift could not be termed as "Haqmehr"/Dower, therefore, it was not returnable in consideration of "khula"---Constitutional petition was dismissed.

Flight LT. Anwarul Haasan Siddiqui v. Family Judge, Court No.III, Karachi and 2 others PLD 1980 Kar. 477; Abdul Majid v. Razia Bibi and another PLD 1975 Lah. 766; Mst. Khurshid Bibi v. Baboo Muhammad Amin PLD 1967 SC 97; Allauddin Arshad v. Mst. Neelofar Tareen and 2 others 1984 CLC 3369 and Mst. Saleha Babar v. Basit Saleem 2005 YLR 1648 distinguished.

2005 CLC 1844. 2006 CLC 1662; 2006 SCMR 100; PLD 2009 Lah. 227; PLD 2009 Lah. 484; Abdur Rashid and another v. Mst. Shaheen Bibi and 2 others PLD 1980 Pesh. 37; Shakeel Saood Khan v. Rizwana Khanum and another PLD 2012 Lah. 43 and Mst. Mussarat Iqbal Niazi v. Judge Family Court and others 2013 CLC 276 ref.

Talat Farooq Sheikh for Petitioner.

Muhammad Shahnawaz Khan for Respondents.

Date of hearing: 7th March, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, petitioner Syed Haroon Ahmed Sultan Bokhari has challenged the legality of judgment and decree dated 20-10-2010 passed by learned Judge, Family Court, Lahore whereby the suit of respondent No.1 Mst. Syeda Mubarak (the respondent) for dissolution of marriage on the basis of khula was decreed.

2. Brief facts of the case are that the respondent filed a suit for dissolution of marriage on the basis of khula on 5-10-2010 with the averments that her nikah was performed with the petitioner on 19-11-2009, however, rukhsati took place on 16-7-2010; that the attitude of the petitioner towards the respondent was not good from the very beginning who used to beat and torture her physically and mentally; that due to severe beating on 24-9-2010 by the petitioner to the respondent when she was pregnant, there occurred miscarriage, therefore, she asserted that the parties could not live together within the limits ordained by Allah Almighty. Written statement was filed by the petitioner. Learned counsel for the petitioner conceded to decreeing of the suit subject to relinquishment of dower of Rs.100,000 and a plot given to her as dower. However, learned counsel for the respondent submitted that she was required to relinquish only a sum of Rs.100,000, i.e. the dower amount and not the plot received by her. Vide judgment and decree dated 20-10-2010, learned Judge Family Court, Lahore decreed the suit of the respondent on the basis of khula subject to relinquishment of her dower amount of Rs.100,000 or portion of the plot equal to Rs.100,000. Hence this writ petition.

3. Learned counsel for the petitioner inter alia contends that at the time of marriage, the dower of the respondent was fixed as Rs.100,000 mentioned in Column No.13 and a plot measuring one kanal situated in Sui Northern Officers Co-operative Society; that the value of the plot at present is about Rs.10,000,000; that the divorce has not been given by the petitioner but it was sought by the respondent herself on the basis of khula; that under the prevailing law as well as Islamic Injunctions, a wife seeking dissolution of marriage on the basis of khula is bound to return everything including dower as well as the gifts received by her from her husband; that the allegations levelled against the petitioner are false and baseless; that the petitioner belongs to a respectable family; that the learned trial court has incorrectly held that Haqmehr is only Rs.100,000 and not the plot mentioned in Column No.16; that there was a settlement agreement arrived at between the parties on 19-10-2010 whereby it was settled that the petitioner would have no objection if the suit for dissolution of marriage filed by the respondent is decreed on the basis of khula and since the compromise was effected and it was incumbent upon the respondent to return the above referred plot (mentioned in Column No.16 of the Nikahnama) to the petitioner;

that provision of section 10(4) of the West Pakistan Family Courts Act, 1964 has illegally and unlawfully been applied by holding that the respondent lady is only bound to relinquish the amount of dower and not the plot; that the petitioner is entitled and the respondent is under legal obligation to relinquish/return whatsoever she has received from the petitioner in the capacity of his wife; that the impugned judgment and decree is against law and fact as well as injunctions of Islam, therefore, this writ petition be allowed and the impugned judgment and decree be set aside. He has relied upon the case-law reported as Flight LT. Anwarul Haasan Siddiqui v. Family Judge, Court No.III, Karachi and 2 others (PLD 1980 Karachi 477), Abdul Majid v. Razia Bibi and another (PLD 1975 Lahore 766), Mst. Khurshid Bibi v. Baboo Muhammad Amin, (PLD 1967 Supreme Court 97), Allauddin Arshad v. Mst. Neelofar Tareen and 2 others 1984 CLC 3369 and Mst. Saleha Babar v. Basit Saleem (2005 YLR 1648).

4. On the other hand, learned counsel for the respondent submits that under section 10(4) of the West Pakistan Family Courts Act, 1964, a wife seeking dissolution of marriage on the basis of khula is only bound to relinquish the dower/Haqmehr and not the gifts received by her from her husband. Learned counsel asserts that the dower amount of Rs.100,000 is clearly mentioned in Column No.13 of the nikahnama whereas the plot is mentioned in Column No.16; that had the plot been fixed as dower, it would have been written in Column No.13 and not in Column No.16; that the plot was given to the respondent as a gift which cannot be returned, however, the respondent has no objection on relinquishment of dower amount of Rs.100,000 mentioned in Column No.13. Learned counsel asserts that since the petitioner is not entitled under the law to receive back the gifts given by him to the respondent being her husband, therefore, this writ petition is without any force and prays that the same be dismissed. He has relied up the case-law reported as 2005 CLC 1844 2006 CLC 1662, 2006 SCMR 100, PLD 2009 Lahore 227, PLD 2009 Lahore 484, Abdur Rashid and another v. Mst. Shaheen Bibi and 2 others (PLD 1980 Peshawar 37), Shakeel Saood Khan v. Rizwana Khanum and another PLD 2012 Lahore 43 and Mst. Mussarat Iqbal Niazi v. Judge Family Court and others 2013 CLC 276.

5. I have heard the arguments advanced by learned counsel for the parties and also perused the record made available before me.

6. The only question which is to be resolved by this Court is as to whether the respondent was liable to relinquish her right in the Property bearing Plot No.2 measuring one Kanal situated in Sui Northern Officers Co-operative Society, Lahore and return of the same to the petitioner as a consideration for grant of khula or as to whether the amount of-Rs.1,00,000 which was mentioned in Column No.13 of the nikahnama as dower amount was the only consideration for "Khula".

7. In this case, the plaint reflects that serious allegations of physical and mental torture were levelled against the present petitioner by the respondent and dissolution of marriage was sought on the basis of cruelty, habitual assault and cruelty by conduct (mental torture). Though there is an assertion that the respondent/plaintiff has developed severe hatred against the petitioner/ defendant but she never sought the dissolution of marriage on the basis of khula. While filing the written statement the respondent controverted the allegations but submitted that due to the intervention of respectable persons of both the parties, a settlement agreement is executed between the parties on 19-10-2010 and accordingly the respondent received the gold ornaments and valuable articles in the presence of the witnesses. He however, stated that he has no objection if the suit for dissolution of marriage is decreed on the basis of khula provided that all the benefits derived out of this relation be surrendered by the plaintiff including the dower amount as well as the rights in the Plot No.2 Block-C, Sui Gas Co-operative Housing Society Lahore received by her at the time of marriage. Subsequent to the filing of the written statement, the statement of learned counsel for the petitioner/defendant was recorded on 20-10-2010 stating that he has no objection if the suit for dissolution of marriage is decreed on the basis of khula whereas the respondent/ plaintiff made a statement on the same day to the effect that she was used to be tortured by her husband from the very first day of the marriage who remained drank most of the time and in the same condition, he tortured the respondent due to which her four months' pregnancy was miscarried and she remained in Services Hospital for her treatment. She stated that she is ready to forego the dower amount of Rs.1,00,000 for dissolution of marriage on the basis of khula.

8. The contents of the settlement agreement dated 19-10-2010 have been taken into consideration. The clause IV of the said agreement reads as under:---

"That the party of second part has no objection if the suit for dissolution of marriage filed by the first part on the basis of Khula is decreed. Furthermore, the party of second part shall appear before the Family Court on 20th October, 2010 and give his statement accordingly."

According to this clause, no condition has been imposed upon the respondent to surrender the rights of Plot No.2 in Block-C situated in Sui Northern Officers Co-operative Society nor any such claim was raised at the time when a conceding statement was made by the learned counsel for the petitioner.

9. Under the Mohammadan Law, if the dissolution of marriage is made on the basis of khula, the wife is under an obligation to return/forgo the dower amount and the benefits derived from the husband but this principle is applicable when the khula is claimed by the wife without any fault of the husband. As there may not be any fault

on the part of the husband due to which the wife develops aversion or hatred but if this aversion or hatred is result of the conduct of the husband which could be mental or physical torture, non-payment of maintenance allowance etc., then the return of dower amount is not essential. In the present case, the respondent has categorically mentioned the cause for developing the aversion against the petitioner which has not been controverted in any manner by the petitioner during proceedings before the trial Court.

10. The marriage of the parties was dissolved under section 10(4) of the Family Courts Act, 1964 which reads as under:---

"10(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for (the recording of the) evidence:

Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage." (underline is mine)

Perusal of above referred provision of law reflects that the wife is liable to return the dower amount which is received by her at the time of marriage ceremony/nikah from the husband.

11. In Column No.13 of the nikahnama, the amount of Haqmehr is mentioned whereas in Column No.14, the nature of Haqmehr as to whether it is deferred or prompt is specified and if any part of the Haqmehr is paid at the time of marriage, then Colum No.15 comes into picture wherein the amount paid is mentioned. Column No.16 of the nikahnama is very specific in its nature and is a corresponding column to Column No.13. The amount of the dower is mentioned in Column No.13 and if any property in lieu of haqmehr or any of its part is given in the shape of some property, then description and detail of that property is given in Column No.16. If the plot in question was given in lieu of the dower, the dower was prompt but as per Column No.14, it is deferred. In the present case, the dower amount was fixed as Rs.1,00,000 in Column No.13 which was a deferred one as mentioned in Column No.14, therefore, it cannot be presumed that the property mentioned in Column No. 16 i.e. Plot No.2 Block-C, Sui Gas Co-operative Housing Society Lahore was given to the respondent No.1 as dower. Another aspect of the matter is that the plot given to the respondent admittedly values at Rs.10,000,000 (rupees one crore) which can neither become part of the deferred dower of Rs.100,000 nor can be considered in lieu thereof because the plot given to the plaintiff lady is of much greater value than the amount of Rs.100,000 fixed as dower. In my considered view, this property was given to respondent No.1 as a bridal gift which cannot be termed as "Haqmehr", therefore, it is not returnable in

consideration of "khula". The case-law relied by the learned counsel for the petitioner is distinguishable and is not attracted in the present case.

12. The epitome of the whole discussion is that the entry of Column No.16 of the nikahnama which shows giving of a plot of one kanal worth Rs.10,000,000 can neither become part of the deferred dower of Rs.100,000 nor it can be presumed to have been given in lieu thereof. Had it been given in lieu of dower, the dower must have been prompt and not deferred. In addition, there is no comparison of Rs.100,000 (rupees one lac) of deferred dower fixed as per Column No.13 and a plot of Rs.10,000,000 (rupees one crore) mentioned in Column No.16 of the nikahnama, as such, the plot, in my considered view, was given as a bridal gift which by no stretch of imagination can be considered as the part or in lieu of the dower. Resultantly, this writ petition fails which is accordingly dismissed.

SA/H-16/L Petition dismissed.

**2014 C L C 1529**

**[Lahore]**

**Before Atir Mahmood, J**

**GHULAM ALI----Petitioner**

**Versus**

**Mst. FATIMA BIBI and others----Respondents**

Writ Petition No.30640 of 2012, heard on 7th May, 2014.

**West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Transfer of Property Act (IV of 1882), S.43---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance---Attachment of property of the surety--- Scope--- Execution petition---Auction-purchaser--- Deposit of decretal amount in lieu of setting aside auction proceedings---Bona fide purchaser---Scope---Judgment-debtor did not appear in execution proceedings wherein surety submitted surety bond that he would pay the decretal amount---Executing Court attached the property of surety wherein auction-purchaser moved an application seeking permission to deposit decretal amount being bona fide purchaser but same was dismissed---Validity---Surety took responsibility for payment of decretal amount by submitting surety bond and got recorded his statement to such effect---Judgment-debtor did not appear and property of surety was attached and put to auction which was purchased by the auction-purchaser---Neither auction had been confirmed nor sale certificate was issued nor possession of property was handed over to the auction purchaser---Applicant was bona fide purchaser of disputed property without notice and was protected under S.43 of Transfer of Property Act, 1882---Revenue record was silent with regard to proceedings of the court---No bar existed with regard to purchase/transfer of property in question in favour of auction-purchaser---Surety was bound to pay the decretal amount to the extent only for which he gave surety---Surety could not be held responsible for decretal amount accumulated on account of non-payment of decretal amount by the judgment-debtor---Applicant had stepped into shoes of surety by purchasing the property from him and he was responsible for the amount due against the surety only---Surety did not undertake to pay the future liability of judgment-debtor rather he declared to pay the decretal amount against him at such time---Surety could not be held for future liability of judgment debtor---Impugned order and judgment passed by the courts below were not in accordance with law---Constitutional petition was accepted and impugned orders passed by the courts below were set aside and applicant was allowed to deposit the decretal amount and auction proceedings were set aside---Decree-holder might proceed against judgment debtor for recovery of remaining decretal amount due against him in accordance with law.

Javed Imran Ranjha for Petitioner.

Yasar Javed Malik for Respondents Nos.1 and 4.

Allah Bakhsh Gondal for Respondent No.2.

Date of hearing: 7th May, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** The petitioner through the instant constitutional writ petition has challenged judgment dated 13-11-2012 passed by learned Additional District Judge, Bhalwal, District Sargodha who dismissed the appeal of the petitioner and maintained order dated 23-6-2012 passed by learned executing court, Bhalwal whereby the application of the petitioner for deposit of decretal amount of Rs.75,000 in lieu of setting aside auction proceedings was dismissed.

2. Brief facts of the case are that respondent No.1 Mst. Fatima Bibi on 26-9-2009 filed a suit for recovery of maintenance and delivery expenses against respondent No.2 Khizar Hayat which was ultimately decreed by learned Judge, Family Court, Bhalwal, District Sargodha vide judgment and decree dated 18-3-2010. The appeal preferred thereagainst by respondent No.2 was dismissed by learned Additional District Judge, Bhalwal, District Sargodha vide judgment and decree dated 20-12-2010. On 24-2-2011, respondent No.1 filed a petition for execution of the decree against respondent No.2. When respondent No.2 did not appear before the court despite issuance of summons, his warrants of arrest were issued whereupon respondent No.3 Salabat entered appearance before the court on 7-1-2012, got recorded his statement and also submitted surety bond of Rs.75,000 coupled with his affidavit. Thereafter, respondent No.2 did not appear before the executing court, as such, the property of respondent No.3 being surety was attached by the court for recovery of the decretal amount vide order dated 10-12-2011. On 14-4-2012, the petitioner filed an application for recalling of the said order with the assertion that he is bona fide purchaser of the property intended to be sold through auction from respondent No.3. Thereafter, the petitioner also filed application on 23-6-2012 seeking permission to deposit the decretal amount with the court praying that the auctions proceedings be stopped. The application of the petitioner for permission to deposit the decretal amount was dismissed by learned executing court vide order dated 23-6-2012. Feeling aggrieved, the petitioner filed appeal which was dismissed vide judgment dated 13-11-2012 by learned Additional District Judge, Bhalwal, District Sargodha. Hence this writ petition.

3. Learned counsel for the petitioner inter alia contends that the petitioner is a bona fide purchaser without notice from respondent No.3; that the petitioner before purchase of the property inspected revenue record but there was nothing barring anybody to purchase the property of respondent No.3 nor there was mention of court proceedings nor any stay order was recorded therein, therefore, the petitioner remained unaware of the court proceedings regarding the property; that despite the fact that the petitioner is neither the judgment-debtor nor his surety and that the auction proceedings were initiated at his back, he is ready to deposit the decretal amount of Rs.75,000 to discharge the liability of the surety; that the impugned order and judgment passed by learned courts below are against law and fact as they have not taken into consideration the bare fact that the petitioner is not at fault in any manner, therefore, he should not be penalized for the acts committed by others. He prays that

this writ petition be allowed, the impugned order and judgment passed by learned courts below be set aside, the petitioner be allowed to discharge the liability of the surety of Rs.75,000 and order of auction of the property in question be set aside.

4. On the other hand, learned counsel for respondent No.2 has opposed this writ petition on the ground of maintainability asserting that this writ petition is against an interim order passed in an application and objection petition of the petitioner is still pending before the executing court. Learned counsel for respondents Nos.1 and 4 contests this writ petition by stating that respondent No.4 has purchased the property through auction. He has further contended that the petitioner was well aware of the auction proceedings and that he has purchased the property in question in connivance with the revenue officials, therefore, this writ petition be dismissed.

5. I have heard the arguments put forth by learned counsel for the parties and also perused the record made available before me.

6. Undisputedly, the decree was passed against respondent No.2 Khizar Hayat in a suit filed by respondent No.1 Mst. Fatima against respondent No.2. After dismissal of appeal filed by respondent No.2, respondent No.1 filed execution petition wherein respondent No.2 did not appear despite issuance of warrants of arrest rather respondent No.3 Salabat put appearance before the court and took the responsibility of payment of the decretal amount of Rs.75,000 by submitting surety bonds on 26-3-2011. He also filed his affidavit and got recorded his statement on 7-1-2012 to the effect that he will pay the decretal amount in case he is unable to produce judgment-debtor respondent No.2 before the court and that the court may recover the decretal amount by auction of his property. Succinctly, respondent No.2 did not appear before the court and the property of respondent No.3 was attached and put to auction which was purchased in the auction by respondent No.4, however, neither the auction has still been confirmed nor sale certificate issued nor the possession of the property is handed over to the auction-purchaser, i.e. respondent No.4. This is the case of the petitioner that he is a bona fide purchaser of the disputed property without notice. There is no denial to the fact that at the time of purchase of property by the petitioner from respondent No.3 Salabat vide Mutation No.841 sanctioned on 12-4-2012, there was nothing in the revenue record regarding proceedings of the court. The record also did not contain anything to suggest that there was any bar on purchase/transfer of the property. Though the learned counsel for the respondents have asserted that the petitioner was in knowledge of the attachment and auction proceedings prior to purchase of the property, therefore, he deserves no leniency, however, they could not bring in light anything from the record in support of their assertion. Mere levelling allegation of connivance on the part of the petitioner with the revenue officials without any substantial proof is of no consequence. In the circumstances, I am of the considered view that the petitioner is a bona fide purchaser of the property and is protected under section 43 of the Transfer of Property Act, 1882.

7. So far as the liability of the petitioner is concerned, the surety was given by respondent No.3 namely Salabat on account of payment of decretal amount on 7-1-2012. It is pertinent to mention here that at that time, decretal amount due against respondent No.2, i.e. judgment-debtor was only Rs.75,000 which is even mentioned in the warrants of arrest issued against the judgment-debtor. Therefore, respondent No.3 being the surety was liable to pay the decretal amount to the extent of Rs.75,000 only for which he gave the surety. By no stretch of imagination, he can be held responsible for the decretal amount accumulated on account of non-payment of decretal amount by the judgment-debtor thereafter. Since the petitioner has stepped into shoe of respondent No.3 by purchasing the property from him, he can be held responsible for the amount due against respondent No.3 only. I am not convinced with the argument of learned counsel for the respondents that the petitioner should pay the amount of the decree due against judgment- debtor till today because the petitioner, in my view, having been stepped into shoe of the surety is liable to pay what was due against the surety.

4. Both the learned courts below have dismissed the application of the petitioner on the basis of the statement made by the surety Salabat before the court on 7-1-2012. The statement is reproduced below:---

From the above statement, it is not proved that the surety undertook to pay the future liability of the judgment-debtor rather he declared to pay the decretal amount due against the judgment-debtor at that time. The decretal amount at that time was undeniably Rs.75,000 which fact is evident from the warrants of arrest as well as the surety bond furnished by respondent No.3. In the circumstances, respondent No.3 cannot be held for future liability of judgment-debtor. Same is the case with the petitioner who has stepped into shoe of respondent No.3, i.e. surety. In this view of the matter, the impugned order and judgment passed by learned courts below are not in consonance with the law.

9. The contention of learned counsel for respondent No.2 that the writ petition being against an interim order is not maintainable is misconceived as the application of the petitioner for deposit of the decretal amount has been dismissed finally by learned courts below and the writ petition in no way can be considered against an interim order. It is observed that it is the respondent No.2 who is the judgment-debtor and is liable to pay the decretal amount and wants to shift his liability upon the petitioner by making him a scapegoat which cannot be allowed.

10. For what has been discussed above, this writ petition is allowed, impugned judgment dated 13-11-2012 passed by learned lower appellate court as well as order dated 23-6-2012 passed by learned executing court are set aside, the application of the petitioner for deposit of decretal amount of Rs.75,000 is allowed and the auction proceedings of the property in dispute are set aside. It is, however, made clear that the decree-holder may proceed against judgment-debtor for recovery of the remaining decretal amount due against him in accordance with law.

AG/G-37/L Petition accepted.

**2014 C L C 1760**

**[Lahore]**

**Before Atir Mahmood, J**

**Syed AKBAR HUSSAIN through L.Rs. and another----Petitioners**

**Versus**

**Mst. NAZIRAN BEGUM and another----Respondents**

Civil Revision No.3384 of 2012, decided on 18th December, 2013.

**Qanun-e-Shahadat (10 of 1984)---**

---Arts. 59 & 84---Civil Procedure Code (V of 1908), O.XVIII, R.2 & S.151---Specific Relief Act (I of 1877), S.42---Suit for declaration---Comparison of thumb-impressions---Scope---Suit was decreed by the Trial Court whereagainst appeal was filed in which defendants moved an application for comparison of thumb impressions of plaintiffs which was dismissed---Contention of plaintiffs was that original documents were not produced in evidence and comparison of thumb impressions could not be carried out---Validity---Documents produced in the court were copies of a register of scribe which were produced in the court through stamp vendor and scribe vendor---Original register was produced before the court and copies of relevant pages were exhibited---Defendants had requested to summon Vasiqa register for comparison of thumb impressions of plaintiffs which was relevant for the just decision of main suit---Defendants had not submitted in the court that thumb-impressions on the documents were the result of coercion, inducement or undue influence but their case was that of denial of the same---Plaintiff had denied her signatures on the disputed documents---Thumb-impression of one person did not tally with the thumb-impression of other person in the world---Comparison of disputed thumb-impressions in the Forensic Science Laboratory with the admitted one could help the court to reach at a just and correct decision and same would be beneficial for the plaintiff if her thumb-impressions were not available on the said documents---Said report of Finger Prints Expert could be challenged by way of cross-examination---Impugned order passed by the Appellate Court was set aside and application for comparison of thumb-impressions was accepted---Appellate Court was directed to get verified thumb-impressions of plaintiff on the disputed documents through Finger Prints Expert and then decide the case in accordance with law---Revision was accepted in circumstances.

S.M. Zahir v. Pirzada Syed Fazal Ali Ajmeri 1974 SCMR 490; Zar Wali Shah v. Yousaf Ali Shah and 9 others 1992 SCMR 1778; Mst. Ummatul Waheed and others v. Mst. Nasira Kausar and others 1985 SCMR 214; Sultan Ahmad (deceased) through L.Rs. v. Muhammad Yousuf 2011 SCMR 621; Abdul Ghafoor and others v. Mst.

Marriam Bibi (deceased) through Legal Heirs and others 2011 SCMR 1648 and Shtamand and others v. Zahir Shah and others 2005 SCMR 348 rel.

Agha Abdul Hassan Arif for Petitioners.
Raja Muhammad Munir and Rafiq Javed Butt for Respondent No.1.

**ORDER**

**ATIR MAHMOOD, J.---** This civil revision is directed against the orders dated 11-9-2012 and 7-11-2012 passed by the learned Additional District Judge, Lahore, who dismissed the application of the petitioners filed under Order XLI, rules 25, 27 and 33 read with section 151, C.P.C. and application for comparison of thumb-impressions respectively.

2. Brief facts of the case are that respondent No.1, Naziran Begum filed a suit for declaration with permanent injunction against the present petitioners. The suit was contested by the respondents. The learned trial court after conclusion of the trial decreed the suit in favour of respondent No.1 vide judgment and decree dated 2-5-2012. The petitioners filed an appeal against the judgment and decree dated 2-5-2012 before the Additional District Judge, Lahore and during the pendency of the appeal the petitioners filed applications under Order XLI, rules 25, 27 and 33 read with section 151, C.P.C. and application for comparison of thumb-impression of the respondent-decree-holder on Exh.D-3 and Exh.D-4 which were dismissed by the learned lower appellate court vide orders dated 11-9-2012 and 7-11-2012 respectively. Hence this civil revision.

3. Learned counsel for the petitioners has contended that the impugned orders have been passed arbitrarily, fancifully and without applying judicial mind, thus the same are liable to be set aside; that the lower appellate court has failed to exercise jurisdiction so vested in it. Further contended that if the civil revision is not accepted the petitioners will suffer irreparable loss. He has relied upon the judgments reported as S.M. Zahir v. Pirzada Syed Fazal Ali Ajmeri (1974 SCMR 490), Zar Wali Shah v. Yousaf Ali Shah and 9 others (1992 SCMR 1778) and Mst. Ummatul Waheed and others v. Mst. Nasira Kausar and others (1985 SCMR 214).

4. On the other hand, learned counsel for the respondents have submitted that no application for secondary evidence was ever filed by the petitioners and the original document Exh.D-3 and Exh.D-4 were not produced in evidence, therefore comparison of thumb-impression cannot be carried out in accordance with law and further that the application for the production of additional evidence was filed at a belated stage which cannot be allowed to fill up the lacunas. They have relied upon the judgments reported as Sultan Ahmad (deceased) through L.Rs. v. Muhammad Yousuf (2011

SCMR. 621), Abdul Ghafoor and others v. Mst. Marriam Bibi (deceased through Legal Heirs and others (2011 SCMR 1648) and Shtamand and others v. Zahir Shah and others (2005 SCMR 348).

5. I have heard the arguments of the learned counsel for the parties and have also gone through the record.

6. Before dilating upon the merits of the case it is relevant to reproduce the order dated 7-11-2012 passed by the appellate court. The relevant portion of the order is reproduced as under:---

"It is an admitted fact that original documents are not filed. The comparison with a register that too generated in a private person's record, cannot be treated as ultimate proof of a transaction. As far as merits of appeal are concerned those are yet to be evaluated. Hence, being a far fetched effort to cure a lacuna the subject petition has got no ground to appreciate hence is dismissed."

It is revealed from the evidence so far adduced by the parties that Exh.D-3 and Exh.D-4 are the copies of a register scribe which were produced in the court by DW.4, Mian Muhammad Naveed Aslam who is son of Mian Muhammad Aslam, who was a stamp vendor and scribe vendor. The statement of this witness reflects that the original Register No.44 dated 27-7-1981 to 16-1-1982 was produced before the court and the photocopies of the relevant pages were exhibited as Exh.D-3 and Exh.D-4, therefore, the contention of learned counsel for the respondents that since the original were not produced before the court therefore thumb-impression cannot be got verified is not tenable. The perusal of the application filed under Order XVIII, rule 2 and Order XVI, rule 2 read with section 151, C.P.C. and under Articles 59 and 84 of the Qanun-e-Shahadat, 1984 reveals that the petitioners have requested the court to summon the Vasiqa Register for the comparison of thumb-impression of the respondents with those Exh.D-3 and Exh.D-4 which is very relevant for the just decision of the main case. It is not the case of the respondents that thumb-impression on Exh.D-3 and Exh.D-4 are the result of coercion, inducement or undue influence but their case is that of total denial. The respondent No.1 Naziran Begum in so many words have categorically denied the existence of her signatures on the disputed documents i.e. Exh.D-3 and Exh.D-4. It is a universal admitted fact that thumb-impression of one person does not tally with the thumb-impression of any other person in the world and on account of reasonable development in the department of Forensic Science the comparison of disputed thumb-impression with that of admitted one has now become very easy which can help the courts to reach at a just and correct decision and even it can be beneficial for the respondent No.1, if her thumb-impressions are not available on the said documents. Of course, the report of Finger Prints Expert could be challenged on legal ground by way of cross-examination, etc.

7. In view of what has been discussed above, this civil revision is allowed and the order dated 7-11-2012 passed by the learned Additional District Judge, Lahore is set aside which is not sustainable in the eye of law and the application under Order XVIII, rule 2, Order XVI, rule 2 read with section 151, C.P.C. and under Articles 59 and 84 of the Qanun-e-Shahadat, Order 1984 is accepted as prayed for. The learned lower appellate court is directed to get verified thumb-impression of the respondent on the disputed document i.e. Exh.D-3 and Exh.D-4 to the Finger Prints Expert an then to decide the case in accordance with law. As remains the order dated 11-9-2012 passed by the lower appellate court, neither it has been pressed nor any arguments have been advanced by the learned counsel for the petitioners, therefore, to the extent of order dated 11-9-2012 this petition is dismissed.

AG/A-31/L Order accordingly.

**2014 M L D 322**
**[Lahore]**
**Before Atir Mahmood, J**
**Mst. KARIM BIBI and others---Petitioners**
**Versus**
**MUHAMMAD SHAFI AKHTAR and others---Respondents**

Civil Revision No.549/2000/BWP, decided on 12th June, 2013.

**Specific Relief Act (I of 1877)---**
----Ss. 8 & 42---Limitation Act (IX of 1908), Art. 120---Suit for declaration and possession---Mutation of sale attested in favour of defendant by predecessor of plaintiff---Plaintiff alleged such mutation to be for lease and not for sale of suit property---Suit mutation was attested on 31-3-1968, whereas suit was filed on 7-3-1986---Validity---Plaintiff in plaint had not stated date of death of his predecessor---Plaintiff's own two witnesses had deposed that plaintiff's predecessor died in year 1971 and that plaintiff came to know about suit mutation after one year of death of his predecessor---Plaintiff would be bound by statements of his own witnesses---Stance taken by plaintiff during his evidence that his father died in year 1967 i.e. prior to attestation of suit mutation, was contradictory to such statements of his own witnesses---Plaintiff despite being aware about suit mutation had instituted suit in year 1986 i.e. after 18 years of date of its attestion---Plaintiff's predecessor during his life time had not challenged suit mutation---Defendant by examining Naib Tehsildar and witnesses of mutation had proved signatures of plaintiff's predecessor thereon---Plaintiff had failed to prove suit mutation to be illegal and collusive and that his predecessor had died prior to its attestation---Suit was dismissed in circumstances.

Mukhtar Ahmad v. Malik Muhammad Shafi 1991 SCMR 668; Ch. Muhammad Ashraf and others v. Mst. Gulshan Ara and others 2008 YLR 650; Muhammad Shafi through legal representatives v. Abdul Rehman through legal representatives PLD 2005 Lah. 129; Mehandia v. Juma through L.Rs. 2011 MLD 1801; Muhammad Akram and another v. Altaf Ahmed PLD 2003 SC 688 and Ghulam Hussain Khan v. Mst. Aseela Begum and 3 others 1982 CLC 1709 rel.

Ch. Naseer Ahmed and Naveed Ali Abbasi for Petitioners.
Aejaz Ahmed Ansari and Amir Aqeel Ansari for Respondents Nos.1 to 12.
Date of hearing: 13th May, 2013.

**JUDGMENT**
**ATIR MAHMOOD, J.---**By way of filing present civil revision, the petitioners have impugned the judgment and decree dated 3-11-2000 passed by learned District Judge

Rahim Yar Khan who while accepting the appeal of respondents Nos.1 to 12/ plaintiffs decreed their suit and set aside the judgment and decree dated 26-11-1999 whereby the suit of respondents Nos.1 to 12/plaintiffs was dismissed by learned Civil Judge Rahim Yar Khan.

2. The cause of action as contained in this petition is that on 7-3-1988, respondents Nos.1 to 12/plaintiffs filed a suit for possession and declaration alleging that their predecessor-in-interest Maqsood Hussain had leased out the suit property, fully described in the head note of the plaint, to the predecessor-in-interest of petitioners namely Ch. Muhammad Tufail who got prepared a fictitious Mutation No.974, dated 31-3-1968 in his favour. They averred in the plaint that the said mutation as well as subsequent sale transactions/mutations being illegal and unlawful are ineffective upon the rights of the plaintiffs.

3. The suit was hotly contested by the petitioners and respondents Nos.13 to 30 mainly on the ground that the predecessors-in-interest of the petitioners and respondents Nos.13 to 30 namely Ch. Muhammad Tufail had purchased the suit property from Maqsood Hussain, predecessor-in-interest of respondents Nos.1 to 12/plaintiffs vide Mutation No.974, dated 31-3-1968. Ch. Muhammad Tufail was accordingly given possession of the property. Thereafter, ten other transfers/alienation of the property took place through Exh.P-9 to Exh.P-17, out of which eight transactions are based upon registered sale deeds and two are mutations of inheritance. Ch. Muhammad Tufail and subsequent vendees are in possession of the property since 1968.

4. Out of divergent pleadings of the parties, learned trial court settled following issues:--

**"ISSUES**

(1) Whether plaintiffs are owner in possession of the suit property and Mutation No.974 dated 31-3-1968 and subsequent Mutation No.1463 dated 23-2-1986, 1533 dated 20-8-1976, 1887, 1888, 1889, 1890, 1891 dated 24-5-1980, 2099 dated 19-9-1981, 2409 dated 27-1-1983, 2919 dated 19-7-1985, 3118 dated 23-2-1986, 3383 dated 5-4-1987, are void, illegal, collusive, without any consideration, therefore, inoperative against the rights of plaintiffs? OPP

(2) Whether the defendants are in continuous possession of the suit property since 1968 therefore, the suit is not maintainable in its present form? OPD

(3) Whether the suit is time barred? OPD

(4) Whether the suit has been incorrectly valued for the purposes of court fee, if so, what is correct value? OPD

(5) Whether the plaintiff has come to the court with unclear hands, therefore, not entitled to any relief? OPD
(6) Whether the defendants are entitled to special costs under section 35-A of C.P.C., If so, to what extent? OPD
(6.A) Whether the plaintiffs are entitled to decree of possession in respect of disputed property claimed by them? OPP
(7) Relief?"

After recording oral as well as documentary evidence adduced by the parties, learned trial court proceeded to dismiss the suit of respondents Nos.1 to 12/plaintiffs vide judgment and decree dated 26-11-1999. The plaintiffs feeling dissatisfied filed an appeal which was allowed by learned District Judge Rahim Yar Khan decreeing the suit of the plaintiffs vide judgment and decree dated 3-11-2000 which has been challenged through the instant civil revision.

5. Learned counsel for the petitioners inter alia contends that there is a contradiction in the statements of the plaintiff Muhammad Shafi as in the pleadings he states that the Mutation No.974 has been got prepared fraudulently whereas while appearing as P.W.3 he states that it is fictitious and fabricated. He submits that the instant suit was filed after twenty years of the date of sanctioning of the mutation in question on the ground of fraud which being badly hit by law of limitation was liable to be dismissed on this score alone as maximum period of limitation provided by law was six years. He argues that the PWs themselves admit that the plaintiff Muhammad Shafi came to know about the sale transaction just one year of its happening but the plaintiffs remained slept over their rights for a long period of twenty years which cannot be justified. Learned counsel states that the plaintiffs have produced three witnesses including the plaintiff Muhammad Shafi and all the three witnesses are interested one being closely related to the plaintiff Muhammad Shafi. He avers that the plaintiffs have failed to prove their case even on merits as the evidence of P.W.1 and P.W.2 is based on hearsay, therefore, the learned trial court rightly dismissed the suit whereas the learned lower appellate court unlawfully shifting the burden of proof from the plaintiffs to the petitioners-defendants decreed the suit of the plaintiffs by impugned judgment and decree which is not sustainable in the eye of law. He prays that this civil revision be allowed, the judgment and decree passed by learned lower appellate court be set aside and the judgment and decree passed by learned trial court be restored.

6. On the contrary, learned counsel for the respondents vehemently opposes the contentions raised by learned counsel for the petitioners and fully supports the judgment and decree impugned. Learned counsel argues that since the petitioners-defendants were beneficiary of the disputed Mutation No.974, therefore, burden to prove the same was rightly shifted to them who have failed to prove the same. He

contends that the possession of suit property was given to the predecessor-in-interest of the petitioners as tenant who fraudulently got prepared the mutation in question which is illegal and unlawful as once a tenant is always a tenant as per settled principles of law. He further submits that if Mutation No.974 is declared void ab initio, the subsequent mutations will be of no consequence. He avers that this civil revision is without any merit, hence merits dismissal.

7. I have heard the arguments put forth by learned counsel for the parties and also perused the record with their able assistance.

8. There are two points which require consideration by this Court in exercise of its revisional jurisdiction. Firstly, whether the Mutation No.974 dated 31-3-1968 was rightly and lawfully attested and secondly, whether the suit was filed within the period of limitation. The contention of learned counsel for the petitioners is that the suit filed by the respondents was hopelessly barred by time as Mutation No.974 was rightly attested on 31-3-1968 whereas the suit was filed by the sons of vendor Maqsood Hussain on 7-3-1986, i.e. after about 18 years of attestation of the mutation, as such, it, according to learned petitioner's counsel, was liable to be dismissed on this score alone.

9. The factum of death of Maqsood Hussain predecessor of the plaintiffs has not been mentioned in the plaint but during the course of evidence, P.W.1 Rasheed Ahmed deposed in his examination-in-chief that Maqsood Hussain died in the year 1971 whereas P.W.2 Bashir Ahmed stated in his cross-examination that Muhammad Shafi came to know about the mutation after one year of the death of Maqsood Hussain. He further stated that he was told by Muhammad Shafi that the property has wrongly been mutated by Muhammad Tufail in his name. P.W.3 Muhammad Shafi while appearing as his own witness stated that his father died in 1967 in Karachi whereas this fact was not mentioned by him in the plaint.

10. Muhammad Akram DW-1 produced a copy of the Mutation No.974. DW-2 Mian Abdul Sami, Advocate identified the signatures of his father who was the Councilor of the Union Committee in the year 1968 and who identified Maqsood Hussain at the time of attestation of mutation. DW-4 Haji Muhammad Akram Naib Tehsildar deposed that his father was Tehsildar in the year 1968 of Teshil Rahim Yar Khan. DW-4 identified the signature and handwriting of his deceased father on Mutation No.974 which was sanctioned by his deceased father. DW-5 Muhammad Lateef and DW-6 Ghulam Haider are the witnesses of the deal between Muhammad Tufail and Maqsood Hussain on the sale mutation. Muhammad Ameen appeared himself as well as on behalf of other defendants as DW-7 and deposed that the property was purchased from Maqsood Hussain by Haji Muhammad Tufail who died in the year

1982. He further deposed that they are in possession of the property and Muhammad Shafi one of the plaintiffs was well aware of the said sale. In cross-examination, this witness categorically stated that Muhammad Shafi told him that his father has sold the land. At that time, no other person was present and at that time Muhammad Shafi was an adult and in 1982 he was a young man.

11. It is crystal clear from the scrutiny of evidence that the stance taken by P.W.3 Muhammad Shafi that Maqsood Hussain died in 1967 prior to attestation of the disputed mutation is contradictory to the statements made by P.Ws. 1 and 2 who state that Maqsood Hussain died in the year 1971 and that Muhammad Shafi became aware of the mutation after about one year of death of Maqsood Hussain. I am guided by the law laid down in case titled "Mukhtar Ahmad v. Malik Muhammad Shafi (1991 MLD 668)" that the party producing the evidence is bound by the statements of its own witnesses. At the maximum, Muhammad Shafi was aware about the attestation of the mutation in favour of Ch. Muhammad Tufail in 1972 but he instituted the suit in 1986, i.e. about 16 years of date of knowledge and kept mum for such a long period without any lawful reason. On the other hand, the assertions made by the defendants are fully corroborated by the witnesses that Maqsood Hussain was alive at the time of mutation and did not expire prior to sanctioning of the disputed mutation. Even, signatures of the deceased Tehsildar who sanctioned the mutation in dispute and deceased Advocate who identified Maqsood Hussain at the time of attestation of the mutation were identified and confirmed by their respective sons. Further, in the entire evidence led by the plaintiffs it has nowhere been established that Maqsood Hussain did not die in the year 1971, i.e. subsequent to the disputed mutation which was attested on 31-3-1968 and rather he died in 1967 as asserted by Muhammad Shafi.

12. From the above narrated facts, it is clear that the trial court has rightly decided the issue No.3 that the suit was barred by time whereas the findings of the appellate court are quite sketchy which has wrongly reversed the findings of the trial court on issue No.3 on the ground that the mutation is result of fraud and misrepresentation. In my opinion, the findings of the appellate court are not sustainable in view of the law laid down in cases titled "Ch. Muhammad Ashraf and others v. Mst. Gulshan Ara and others (2008 YLR 650)", "Muhammad Shafi through legal representatives v. Abdul Rehman through legal representatives (PLD 2005 Lahore 129)", and "Mehandia v. Juma through L.Rs. (2011 MLD 1801)" wherein it has consistently been held that a suit for declaration can only be filed within the period of six years from the date when the right to sue accrued. As it is apparent from the statements of P.W.1 and P.W.2 that Maqsood Hussain vendor, died in the year 1971 and the plaintiffs came to know about the disputed mutation after one year of the death of Maqsood Hussain, the suit cannot be termed to have been filed within the period of limitation which is upto six years but

the suit has been filed after about eighteen years after the date of attestation of the mutation which is badly hit by law of limitation.

13. Another important factor in this regard is that the said Maqsood Hussain never challenged the said mutation in his life time. The plaintiffs have not been able to prove that the Mutation No.974 dated 31-3-1968 was void, illegal and collusive and that Maqsood Hussain died prior to the date of attestation of the said mutation. Onus to prove Issue No.1 was upon the respondents-plaintiffs through affirmative evidence. P.W.1 to P.W.3 could not pass the test of cross-examination whereas petitioners/predecessors of late Muhammad Tufail proved the attestation of Mutation No.974 by producing DW-I to DW-7, however, nothing could be brought on record by the respondents/plaintiff in rebuttal. Learned counsel for the respondents has relied upon the dictums laid down in cases titled "Muhammad Akram and another v. Altaf Ahmed (PLD 2003 SC 688)" and "Ghulam Hussain Khan v. Mst. Aseela Begum and 3 others (1982 CLC 1709)." The case-law relied upon by the respondents-plaintiffs is not applicable to the present case as the facts of the case relied upon by learned counsel for the respondents-plaintiffs are quite distinguishable and not attracted to the case in hand. In the circumstances, the suit filed by respondents Nos.1 and 2/plaintiffs having been instituted after 18 years of attestation of mutation and about 16 years of alleged knowledge of the mutation was badly barred by time and was liable to be dismissed on this score alone.

14. For the aforementioned reasons, this civil revision is allowed, the impugned judgment and decree dated 3-11-2000 passed by learned District Judge Rahim Yar Khan is set aside and the judgment and decree dated 26-11-1999 passed by learned Civil Judge Rahim Yar Khan is restored.

SAK/K-22/L Revision accepted.

**2014 M L D 921**

**[Lahore]**

**Before Atir Mahmood, J**

**NADEEM AHMED---Appellant**

**Versus**

**ALTAF HUSSAIN and others---Respondents**

R.S.A. No.266 of 2010, heard on 12th December, 2013.

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

----O. XVII, Rr. 3 & 1 (3)---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Closure of evidence---Applicability---Expression "Proceed to decide the suit forthwith" occurring in R. 3, O.XVII, C.P.C.---Scope---Provisions of O. XVII, Rr. 1(3) & 3 were directory in nature as no penalty had been imposed upon non-production of evidence---Court might decide the case on the same day and it was for the court to proceed with the matter in accordance with law on the basis of material available on record---Provisions of O. XVII, R. 3, C.P.C. were applicable when on the date previous to the date of final order an adjournment was sought by the plaintiff---When no objection was made to such adjournment by the other party, then it could not be presumed that the adjournment was granted on behalf of the party who sought the same---Request for adjournment on the date previous to that of final order was made by the counsel for plaintiff which was not objected to by the other side---Trial Court, without taking into consideration that on the previous date of hearing no objection was raised by the other side, invoked provisions of O. XVII, R. 3, C.P.C. and dismissed the suit without giving its issue-wise findings---Trial Court was bound to decide the case on the basis of material available on record and gave its findings issue-wise---Trial Court was not justified to close the right of evidence of plaintiff rather to decide the case on merits other than on technicalities---Impugned judgments and decrees passed by both the courts below were set aside and case was remanded for decision afresh on merit after affording one last and final opportunity to produce evidence---Appeal was accepted in circumstances.

Muhammad Haleem and others v. H.H. Muhammad Naim and others PLD 1969 SC 270; Ali Muhammad v. Mst.Murad Bibi 1995 SCMR 773; Muhammad Arshad v. Muhammad Jahanzeb Khan 2008 SCMR 1335; Muhammad Ramzan v. Khadim Hussain 2007 SCMR 1269; Ghulam Rasool v. Rai Ghulam Mustafa and others 1993 SCMR 2026; Amanullah Khan and 3 others v. Mst. Akhtar Begum 1993 SCMR 504; Zahoor Ahmed v. Mehra through Legal Heirs and others 1999 SCMR 105; Syed Tasleem Ahmad Shah v. Sajawal Khan and others 1985 SCMR 585; Ghulam Qadir alias Qadir Bakhsh v. Haji Muhammad Suleman and 6 others PLD 2003 SCMR 180;

Abdul Shakoor and others v. Province of the Punjab and 4 others 2005 SCMR 1673; Fateh Sher v. Muhammad Zubair 2003 SCMR 797; Zahoor v. Election Tribunal, Vehair and others 2008 SCMR 322; Mst.Hurmat Bibi v. Lt. Col. Muhammad Bukhsh Soobi 2005 PSC 1118; Barkat Ali v. Muhammad Nawaz PLD 2004 SC 489 and Tasleem Khan v. Sher Ghulam and others 2010 SCMR 1422 ref.

Syed Tasleem Ahmad Shah v. Sajawal Khan and others 1985 SCMR 585 and Ghulam Qadir alias Qadir Bakhsh v. Haji Muhammad Sleuman and 6 others PLD 2003 SCMR 180 rel.

Zafar Iqbal Bhatti for Appellant.
Irshad Ahmed Cheema for Respondents.

Date of hearing: 12th December, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**---By way of filing the instant RSA, the appellant has called in question the vires of judgment and decree dated 21-8-2010 passed by learned District Judge, Hafizabad who dismissed the appeal of the appellant and upheld judgment and decree dated 6-5-2010 passed by learned trial court whereby the suit of the appellant was dismissed in exercise of powers under Order XVII, Rule 3, C.P.C.

2. Briefly stated the facts leading to filing of this Regular Second Appeal, a suit for specific performance of an agreement to sell dated 25-11-2004 regarding property fully described in para 1 of the plaint was filed by the appellant on 28-4-2006 against the respondents with the averments that he had purchased the suit property from the respondents for a consideration of Rs.2,000,000 out of which a sum of Rs.1,125,000 was paid as earnest money. The suit was contested by the respondents by filing written statement. Out of divergent pleadings of the parties, issues were framed by the trial court. Vide judgment and decree dated 6-5-2010, learned trial court by invoking provisions of Order XVII, Rule 3, C.P.C. proceeded to close the evidence of the appellant-plaintiff and dismissed his suit for want of evidence. The learned Additional District Judge, Hafizabad vide judgment and decree dated 21-8-2010 dismissed the appeal preferred by the appellant against judgment and decree dated 6-5-2010. Both the said judgments and decrees have been challenged by the appellant in this RSA.

3. Learned counsel for the appellant inter alia contends that provisions of Order XVII, Rule 3, C.P.C. are permissive and discretionary in nature and not mandatory, as such, these should be used in exceptional cases; that the appellant before closing of his right to adduce evidence was entitled to be issued at least one notice but no such notice was

issued to him; that as the defendants had not denied the execution of the sale agreement, the trial court, even after closing right to produce evidence of the plaintiff, was required to pass a judgment on the basis of available material and after affording opportunity of hearing to the appellant-plaintiff which was not done; that if the appellant was not present before the court on the fateful date, the trial court at the most should have dismissed the suit for want of prosecution rather than exercising its powers under Order XVII, Rule 3, C.P.C.; that adjournments sought by any party and not opposed by the other side are ordinary adjournments and do not call for invoking of provisions of Order XVII, Rule 3, C.P.C.; that the cases should be decided on merit and the technicalities, whatsoever, be ignored to meet the ends of justice; that after non-denial of the execution of the agreement to sell in question, there was a case prima facie in favour of the appellant but this fact was ignored by learned courts below; that the appellant's brother who was initially pursuing the case of the appellant was brutally murdered, due to which the appellant remained in shock for a number of months and could not pursue his case; that there is no negligence on the part of the appellant and if any it is on his counsel; that the appellant is a bona fide purchaser of the suit property and has, prima facie, an arguable case and balance of convenience also lies in his favour; that the judgments and decrees of learned courts below are against the law and fact and suffer from glaring contradictions; that the learned courts below have failed to apply their judicious mind; that the impugned judgments and decrees are perverse, arbitrary and contrary to the facts of the case, therefore, this appeal be allowed, the impugned judgments and decrees be set aside and the case be remanded to the trial court for decision afresh. In support of his assertions, learned counsel for the appellant has relied upon the law laid down by the Hon'ble Supreme Court of Pakistan in cases reported as PLD 1969 SC 270 (Muhammad Haleem and others v. H.H. Muhammad Naim and others), 1995 SCMR 773 (Ali Muhammad v. Mst.Murad Bibi), 2008 SCMR 1335 (Muhammad Arshad v. Muhammad Jahanzeb Khan), 2007 SCMR 1269 (Muhammad Ramzan v. Khadim Hussain), 1993 SCMR 2026 (Ghulam Rasool v. Rai Ghulam Mustafa and others), 1993 SCMR 504 (Amanullah Khan and 3 others v. Mst. Akhtar Begum), 1999 SCMR 105 (Zahoor Ahmed v. Mehra through Legal Heirs and others) and 1985 SCMR 585 (Syed Tasleem Ahmad Shah v. Sajawal Khan and others).

4. On the other hand, learned counsel for the respondents has vehemently opposed this R.S.A. and controverted the arguments advanced by learned counsel for the appellant. He avers that sufficient opportunity was granted to the appellant-plaintiff to produce the evidence but he has failed to do so, therefore, the learned trial court was justified to invoke the provisions of Order XVII Rule 3 C.P.C. and dismissed the suit of the appellant-plaintiff. Learned counsel maintains that the impugned judgments and decrees do not suffer from any illegality, therefore, this RSA having no merit be dismissed. He has relied upon the law laid down by the Hon'ble Supreme Court of

Pakistan in cases reported as PLD 2003 SCMR 180 (Ghulam Qadir alias Qadir Bakhsh v. Haji Muhammad Suleman and 6 others), 2005 SCMR 1673 (Abdul Shakoor and others v. Province of the Punjab and 4 others), 2003 SCMR 797 (Fateh Sher v. Muhammad Zubair), 2008 SCMR 322 (Zahoor v. Election Tribunal, Vehair and others), 2005 PSC 1118 (Mst.Hurmat Bibi v. Lt. Col. Muhammad Bukhsh Soobi), PLD 2004 SC 489 (Barkat Ali v. Muhammad Nawaz) and 2010 SCMR 1422 (Tasleem Khan v. Sher Ghulam and others).

5. I have heard the arguments advanced by learned counsel for the parties and also perused the record.

6. The contentions raised before this Court are mainly based on the legal question as to whether trial court was legally justified to close the evidence of the appellant-plaintiff or not. Relevant provisions are Order XVII Rule 1(3), C.P.C. (High Court Amendments Lahore) and Order XVII Rule 3, C.P.C. which are reproduced below:--

Order XVII Rule 1 (3), C.P.C. (High Court Amendments -Lahore)

"Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith."

Order XVII Rule 3, C.P.C

"Court may proceed notwithstanding either party fails to produce evidence, etc.--- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

From plain reading of above said provisions, it is spelt out that these provisions are of directory in nature as no penalty has been imposed upon non-production of evidence. The words "proceed to decide the suit forthwith" suggest that the court may decide the case on the same day and it is for the court to proceed with the matter pending before it in accordance with law on the basis of material available on record. As per law laid down by the Hon'ble Supreme Court of Pakistan in case reported as 1985 SCMR 585 (Syed Tasleem Ahmad Shah v. Sajawal Khan and others), the provisions of Order XVII Rule 3, C.P.C. are applicable when on the date previous to the date of final order, an adjournment was sought by the petitioner but no objection was made to the adjournment by the other party, then it cannot be presumed that the adjournment was granted on behalf of the party who sought adjournment. Relevant paragraph of the said judgment is reproduced below:--

"In the particular case before us we find that the adjournment had been requested for by the petitioner and the request was made on his behalf by his counsel. The respondents had not objected to it. This would not amount to granting time to him at his request."

The order dated 27-4-2010, i.e. the order of date previous to that of final order passed by the trial court, shows that a request for adjournment was made by learned counsel for the appellant which was not objected to by the other side and the case was adjourned to 6-5-2010 when both the learned counsel for the parties put appearance before the court.

The trial court without taking into consideration that on the previous date of hearing, no objection was raised by the other party invoked provisions of Order XVII, Rule 3, C.P.C. and straight away dismissed the suit of the appellant-plaintiff without giving its issue-wise findings. In my view, it was mandatory for the trial court to decide the case on the basis of the material available on record and give its findings issue-wise while reaching a just and proper conclusion but no such exercise was done by the trial court which warrants for interference by this Court in its appellate jurisdiction.

7. As regards, the objection raised by learned counsel for the respondents that even if the provisions of Order XVII Rule 3, C.P.C. are not attracted but in the presence of Order XVII Rule 1(3), C.P.C. (High Court Amendments -Lahore), as no sufficient cause was shown by learned counsel for the appellant, therefore, the trial court was justified to close evidence of the appellant and decide the suit forthwith is of a bit hyper-technical nature. The afore-noted amendment made by Lahore High Court is not to be read in isolation rather it is to be read along with Sub-rule (1) of Order XVII, C.P.C. as there is no specific reference with closure of the evidence of the parties therein but as regards Rule (3) of Order XVII, C.P.C., it is very much specific regarding the evidence.

His reliance upon PLD 2003 SCMR 180 (Ghulam Qadir alias Qadir Bakhsh v. Haji Muhammad Suleman and 6 others) is also distinguishable on facts. In the said case, neither the plaintiff and his witnesses nor his counsel was present but in the instant case, learned counsel for the appellant was present before the court who requested for grant of an adjournment, therefore, the court below was not justified to close right of evidence of the appellant. It is always preferable to decide the case on merits rather than on technicalities.

8. In view of what has been discussed above and while relying upon the dictums laid down by the august Supreme Court in case 1985 SCMR 585 (supra), this appeal is allowed, the impugned judgments and decrees are set aside and the case is remanded

to learned trial court with the direction to decide the suit of the appellant afresh on merit after affording him one last and final opportunity to produce his evidence. In case, the appellant fails to produce his evidence on the date fixed by the trial court for the very purpose, the trial court may proceed with the matter in accordance with law.

AG/N-4/L Case remanded.

**2014 M L D 1395**

**[Lahore]**

**Before Atir Mahmood, J**

**ALI MUBIN---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No.6684 of 2009, decided on 25th February, 2014.

**West Pakistan Family Court Act (XXV of 1964)---**

----Ss.10(4) & 5, Sched---Constitution of Pakistan, Art.199---Constitutional petition---Execution of decree for recovery of dower amount---Dissolution of marriage on the basis of khula---Scope---Contention of husband was that wife was required to relinquish her claim of dower--Validity---Decree for recovery of dower was passed in favour of wife and during pendency of appeal marriage was dissolved on the basis of khula without fixation of any consideration for khula---Amount of deferred dower would become due to be paid to the wife at the time of dissolution of marriage or at the time when husband died---Husband would not be entitled to receive anything back given by him to his wife if he divorced her--Wife would have to give something in lieu of her release if she wanted to desert her husband--Family Court was bound to restore dower received by the wife to the husband while passing decree for dissolution of marriage on the basis of khula---Wife could seek dissolution of marriage on the basis of khula and she would have to pay back what she had received from her husband if he did not relinquish the same and no upper limit had been fixed by the Holy Quran for consideration of khula---Wife had obtained decree for dissolution of marriage on the basis of khula and she could not claim amount of deferred dower as same could only be paid if divorce was given by the husband or he died---Impugned judgments and decree for recovery of dower would become redundant and in-executable which were set aside---Constitution petition was accepted in circumstances.

Mst. Khrushid Bibi v. Baboo Muhammad Amin PLD 1967 SC 97; Muhabbat Hussain v. Mst. Naseem Akhtar and others 1992 PSC 1034 and Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi PLD 1959 (Writ Petition) Lah. 566 ref.

Verse No.229 of Surah Baqar and saying of Holy Prophet (peace be upon him) rel.

Abdul Khaliq Safrani for Petitioner.

Mian Subah Sadiq Wattoo for Respondent.

Date of hearing: 25th February, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Succinct facts leading to the institution of the instant writ petition are that respondent No.3 Mst. Saba Ahmed (the respondent) filed a suit for recovery of the dower on 10-1-2008 with the averments that she was married with the petitioner Ali Mobin on 18-4-2004 and an amount of Rs.2,00,000 was fixed as her dower at the time of nikah. It was alleged in the plaint that the relations between the

parties had become strained, therefore, she had left the house of her husband and started to live with her parents. She claimed that dower amount was not paid to her. The suit was contested by the petitioner who filed written statement. He mainly took the objection that the suit was pre-mature as the dower was deferred one. Out of divergent pleadings of the parties, learned Judge, Family Court, Depalpur framed issues. Evidence was led by the respective parties. Thereafter, the learned family court decreed the suit of the respondent vide judgment and decree dated 27-3-2008. Feeling aggrieved, the petitioner filed an appeal which was dismissed by learned Additional District Judge, Depalpur vide judgment and decree dated 18-12-2008 maintaining the judgment and decree of learned family court.

2. During the pendency of the appeal on 21-7-2008, the respondent filed a suit for dissolution of marriage alleging that the petitioner was not a man of good character whose attitude towards the plaintiff had been harsh towards her since inception. It was asserted in the plaint that the petitioner had kicked out the plaintiff from his house after beating her about one year prior to the institution of the suit and since then she was residing in the house of her parents. The plaintiff also stated in the plaint that the parties cannot live more together within the limits prescribed by Allah Almighty but despite demand, the petitioner was not giving her talaq salasa. The summons were issued to the petitioner but he did not put appearance before the court. He was ultimately proceeded against ex parte. Thereafter, ex parte evidence was led by the respondent.

3. Since the plaintiff denied joining the defendant-petitioner as his wife, the suit for dissolution of marriage was decreed on the basis of khula vide judgment and decree dated 18-11-2008, i.e. before decision of the appeal filed by the petitioner in suit for recovery of dower instituted by the respondent. Hence this writ petition.

4. Learned counsel for the petitioner inter alia contends that since the respondent's suit for dissolution of marriage has been decreed on the basis of khula, the judgments and decrees passed for recovery of dower cannot be executed; that under section 10(4) of West Pakistan Family Courts Act, 1964 (the Act), the wife while seeking dissolution of marriage on the basis of khula is required to relinquish her claim of dower and even if it is not done, the court which passes the decree of khula is bound to restore the dower itself. Learned counsel avers that if the wife is not ready to waive her right of dower, the decree for dissolution of marriage on the basis of khula would be considered as void, therefore, this writ petition be allowed and judgments and decrees dated 27-3-2008 and 18-12-2008 passed by learned Judge Family Court and Additional District Judge, Depalpur respectively be set aside. He has relied upon the law laid down in cases titled Mst. Khrushid Bibi v. Baboo Muhammad Amin (PLD 1967 SC 97), Muhabbat Hussain v. Mst. Naseem Akhtar and others (1992 PSC 1034) and Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi (PLD 1959 (Writ Petition) Lahore 566).

5. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition as well as contentions of learned counsel for the petitioner. He avers that it is the discretion of the family court either to fix consideration in lieu of dower or

pass the decree of khula without it. He further asserts that since no consideration amount has been fixed by the family court, therefore, the concurrent judgments and decrees passed by learned courts below for recovery of dower amount can be executed and are immune from interference by this Court. He prays that this writ petition having no merit be dismissed.

6. I have heard the arguments advanced by learned counsel for the parties and also perused the record made available before me.

7. The moot point in this case is as to whether a decree for recovery of undisputed deferred dower amount can be executed when the marriage is dissolved by the court on the basis of khula.

8. Admittedly, a decree for recovery of dower of Rs.200,000 has been passed in favour of the respondent-plaintiff lady upto the level of the learned lower appellate court. During the pendency of the appeal, another decree for dissolution of marriage on the basis of khula has also been passed by the learned Judge, Family Court, Depalpur without fixation of any consideration for khula. There is no dispute between the parties regarding the amount of deferred dower of Rs.200,000 which is unambiguously mentioned in the nikahnama. Undoubtedly, the amount of deferred dower becomes due to be paid to the wife at the time of dissolution of marriage or at the time when the husband leaves this world for the heavens. Since the marriage has been dissolved on the basis of khula through a decree of the court, a dispute has arisen between the parties as to whether the dower is payable or not. The petitioner side has asserted that in presence of the decree for dissolution of marriage on the basis of khula, the decree passed for recovery of dower amount is not executable in view of section 10 (4) of the Act whereas the respondent side has claimed that it is the discretion of the family court either or not to fix any consideration for award of decree and since the decree has been passed without fixation of any consideration for khula, the dower is payable and the judgments and decrees for recovery of dower amount concurrently passed against the petitioner are executable in their present form.

9. The Holy Quran is source of knowledge which provides us guidance in all spheres of life. It has been stated in verse No.229 of Surah Baqar of Holy Quran that:--

"Divorce may be pronounced twice; then kept (them) in good fellowship or let (them) go with kindness and it is not lawful for you to take back any part of what you have given them, unless both fear that they cannot keep within limits of Allah; then if you fear that they would be unable to keep the limits ordained by Allah; there is no blame on either of them if she gives something (to her husband) for her release."

From bare reading of above translation of the verse of the Holy Quran, it is evident that if a husband leaves her wife giving her talaq, he will not be entitled to receive anything back given by him to her spouse. However, if a wife herself wants to desert her husband, she will have to give something in lieu of her release.

10. Section 10(4) of the West Pakistan Family Courts Act, 1964 is relevant in this case which is reproduced below:--

"10(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for the recording of the evidence;

Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage."

(Emphasis provided)

Plain reading of the above proviso makes it crystal clear that it is incumbent upon the court which passes decree for dissolution of marriage on the basis of khula to restore the dower received by the wife to the husband. In my considered view, if both the spouses are unable to live a peaceful and harmonious life and the wife seeks dissolution of marriage on the basis of khula, a wife, if the husband does not relinquish what he has given to her, will have to pay back at least what she has received from her husband, however, no upper limit has been fixed by the Holy Quran for consideration for khula. In this case, the only thing which is disputed between the parties is to the extent of dower amount of Rs.200,000 for recovery of which a decree was passed by the learned Family Judge and upheld by learned Additional District Judge, Depalpur. Since the respondent lady has obtained decree for dissolution of marriage on the basis of khula, she cannot claim the amount of deferred dower as a deferred dower can only be paid to the wife if the divorce is given by the husband or in case the husband dies but in case where the wife has herself resorted to khula, she cannot claim the amount of dower. In this regard, I am fortified by the saying of Holy Prophet (peace be upon him) in the matter of Jamila, wife of Sabit Ibn Qais when she wished to separate from her husband. The Holy Prophet (peace be upon him) said:

"Are you prepared to return the garden that he gave you." She said: "Yes, Oh Prophet of 'Allah' and even more." The Holy Prophet (peace be upon him) said: "No more, but you return the garden that he gave you."

11. For what has been discussed above, a wife seeking dissolution of marriage on the basis of khula will have to return or relinquish her dower and the court while passing such decree is bound to restore the dower to the husband, if the husband does not relinquish his right. Therefore, the learned Judge, Family Court when there was no dispute between the parties regarding the amount of dower should have ordered for restoration of dower of the plaintiff lady to the petitioner while passing the decree for dissolution of marriage on the basis of khula which is accordingly modified. Resultantly, judgments and decrees dated 18-12-2008 and 27-3-2008 passed by learned Additional District Judge and Family Judge, Depalpur respectively for recovery of dower of Rs.200,000 from the petitioner have become redundant and inexecutable which are set aside. The writ petition is allowed in the said terms.

AG/A-33/L Petition allowed.

**2014 M L D 1635**

**[Lahore]**

**Before Atir Mahmood, J**

**FAREED GUL---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE, MULTAN and 3 others---Respondents**

Writ Petition No.11358 of 2013, heard on 21st November, 2013.

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

----S.151---Inherent jurisdiction---Consolidating of suits---Principle---No provision for consolidation of civil suits has been provided in Civil Procedure Code, 1908---Court may consolidate different suits to avoid conflict of judgments provided parties in the suits are the same and cause of action is common.

**(b) Succession Act (XXXIX of 1925)---**

----S.372---Civil Procedure Code (V of 1908), S.115---Constitution of Pakistan, Art. 199---Constitutional petition---Succession certificate---Successive applications---Scope---Son and widow of deceased filed two separate applications for issuance of succession certificates---During pendency of proceedings for issuance of succession certificates, three applications were filed one for consolidating both applications for issuance of succession certificates, second for providing details of business and third for impleading other business partners as party---All three applications were dismissed by Trial Court against which widow filed two revision applications before Lower Appellate Court out of which one was dismissed whereas the other was allowed---Validity---During pendency of first revision application, widow filed second revision application concealing the filing of earlier revision application, and such facts were not adverted to by Lower Appellate Court---Subsequent revision application was not maintainable in view of the earlier revision application filed by same party challenging the same judgment on same cause of action---Subsequent revision application against the same judgment attacking different findings of the same judgment which were not assailed in earlier revision application by widow was not maintainable---Lower Appellate Court in exercise of revisional jurisdiction was not justified to accept subsequent revision application filed by the widow---High Court set aside the order passed by Lower Appellate Court and subsequent revision application was dismissed---Petition was allowed accordingly.

Syed Muhammad Ali Gilani for Petitioner.
Muhammad Asghar Bhutta for Respondent No.2.
Ms. Riffat Zahra for Respondents Nos. 2 to 4.

Date of hearting: 21st November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this writ petition, the petitioner Fareed Gul has challenged the vires of judgment dated 17-9-2013 passed by Additional District Judge, Multan whereby revision petition filed by respondent No.2 was allowed.

2. Brief facts of the case as narrated in the writ petition are that Gul Muhammad son of Ch. Rehmat Ali died on 30-8-2012; that said Gul Muhammad was a share holder in two limited companies namely Qadir Ghee Industries (Pvt.) Limited and Qadir Oil Industries; that Gul Muhammad was also partner in a firm namely Qadir Corporation and was holding an account in Bank Al-Habib Bahawalpur Road, Multan; that Gul Muhammad left behind him Mst. Nazeer Begum, his real mother (respondent No.2), Mst. Tahira Aziz, his widow and two sons namely Fareed Gul (petitioner) and Sheraz Gul (respondent No.4). After death of Gul Muhammad, the petitioner was appointed as Managing Director and respondent No.3 as Director of the business left by their father Gul Muhammad.

3. In order to meet the necessary legal as well as business requirements, the petitioner filed an application on 28-1-2013 for issuance of succession certificate giving description of legal heirs as well as of moveable property of late Gul Muhammad. In the application, other legal heirs of Gul Muhammad including Mst. Nazeer Begum (real mother of Gul Muhammad) were impleaded as respondents. Mst. Nazeer Begum first submitted her conceding reply admitting the factual position but later on, resiled from her earlier stance submitting an application with the prayer that she wanted to file another reply to petitioner's application for succession certificate. On agreeing to the same by the petitioner, the reply was submitted by Mst. Nazeer Begum but the matter prolonged and on 3-5-2013, respondent No.2 Mst. Nazeer Begum also made an application for issuance of succession certificate impleading therein a number of other persons other than those impleaded by the petitioner. Thereafter, three other applications were also filed by respondent No.2. One of the applications was for deciding both the applications for succession certificate together by way of consolidating them. The second application was for issuing direction to the petitioner for providing all the details of the business, assets and moveable/immoveable properties. The 3rd application claimed that other partners of the companies may also be impleaded. All the three applications were dismissed vide single order dated 21-5-2013. A revision petition was also filed by respondent No.2 to set aside the said order which revision petition was ultimately dismissed on 27-8-2013. Another revision petition was filed by respondent No.2 which was allowed by the learned Additional District Judge, Multan vide judgment dated 17-9-2013 by way of consolidating both the applications of petitioner as well as respondent No.2 for issuance of succession certificate. Hence this Writ Petition.

4. Learned counsel for the petitioner inter alia contends that the impugned judgment is against the law and facts; that there is no provision of law by which applications for succession certificates could be consolidated as under the prevailing law, everyone interested in the inheritance may file an application regarding his interest in the property; that under the law, if more than one applications are submitted for succession certificates, those are to be decided separately to the extent of share of the respective applicants; that the application of respondent No.2, ipso facto, seems to be

a civil suit rather than an application for succession certificate; that second revision petition was not competent after dismissal of first revision petition; that vide order dated 21-5-2013, three applications of respondent No.2 were dismissed and if any of the claims made therein was not challenged in first revision, it could not be raised in the second revision under Order II Rule 2 C.P.C.; that learned Additional District Judge has passed the impugned judgment in violation of provisions of Succession Act, 1925 causing miscarriage of justice, therefore, the judgment impugned cannot sustain in the eye of law. He prays that this writ petition be allowed and the impugned judgment be set aside.

5. On the other hand, learned counsel for the respondents have vehemently controverted the assertions made by learned counsel for the petitioner and fully supported the impugned judgment.

6. Arguments heard. Record perused.

7. In the Code of Civil Procedure Code, 1908, no provision for consolidation of civil suits is provided but the court may consolidate different suits to avoid conflict of judgments provided the parties in the suits are the same and the cause of action is common. In the present case, the petitioner filed an application under section 372 of Succession Act, 1925 impleading respondents Nos.2 to 4 as legal heirs of deceased Gul Muhammad son of Ch. Rehmat Ali. Admittedly, the deceased Gul Mullah was succeeded by the present petitioner and respondents Nos.2 to 4. Respondent No.2 Mst. Nazeer Begum is real mother whereas respondent No.3 Sheraz Gul is son and respondent No.4 Mst. Tahira Aziz is widow of the deceased. Apparently, in the presence of the said legal heirs of the deceased, no other person can be termed as legal heir of the deceased qua the properties left by the deceased.

8. Perusal of the application filed under section 372 of the Succession Act, 1925 by respondent No.2, being real mother of the deceased, reflects that a number of other persons other than actual legal heirs have been arrayed as respondents therein alleging that they are also entitled for share in the properties left by the deceased as deceased Gul Muhammad through fraud and concealment of facts had usurped the property of Ashiq Muhammad, who happened to be his real brother. Ashiq Muhammad had since died, his children were impleaded as respondents in the application filed by respondent No.2. There are many other allegations levelled against deceased Gul Muhammad regarding frauds committed by him. I am afraid that such allegations could be subject matter of a civil suit but not that of the application under section 372 of the Succession Act, 1925 for grant of succession certificate. If legal heirs of Ashiq Muhammad had any grievance against the conduct of deceased Gul Muhammad, they may assert their rights in a civil suit for redress of their grievance as, such matters could not be dealt with in application under section 372 of the Succession Act.

9. The application filed by the petitioner has entirely a different scenario from that of the application filed by respondent No.2 as the latter includes not only the different parties but different causes of action as well. In my view, two applications having distinct features cannot be consolidated, as such, the revisional court has exceeded its

jurisdiction while allowing consolidation of applications for succession certificates. As such, these findings are not sustainable in the eye of law.

10. There is yet another aspect of the case that the order passed by the trial court on 21-5-2013 dismisses three applications of respondent No.2 filed for deciding both the applications of the petitioner and respondent No.2 for succession certificate together by way of consolidating them; for issuing direction to the petitioner for providing all the details of the business, assets and moveable/immoveable properties and for impleading other partners of the companies in the matter as well. The said order was assailed by respondent No.2 in Civil Revision No.243-R/2013 on 13-6-2013 in which she did not challenge the findings of the trial court to the extent of dismissal of her claim regarding consolidation of the two applications. The said revision petition was dismissed vide judgment dated 27-8-2013. During the pendency of the said revision petition, a subsequent Revision Petition No.99-R/2013 was also filed by respondent No.2 on 19-8-2013 without disclosing filing of earlier civil revision and concealing the filing of earlier civil revision petition, as such, the learned Additional District Judge has not adverted to these factors. In my view, subsequent revision petition was not maintainable in view of the earlier revision petition filed by the same party challenging the same judgment. To my mind, filing of different revision petitions on the same cause of action are not maintainable. Subsequent revision petition against the same judgment attacking different findings of the same judgment which were not assailed in the earlier revision petition by respondent No.2 was not maintainable, as such, the revisional court was not justified to accept the subsequent revision petition filed by respondent No.2.

11. For the aforementioned reasons, this Writ Petition is allowed and the order impugned is set aside.

MH/F-4/L Petition allowed.

**2014 M L D 1809**

**[Lahore]**

**Before Atir Mahmood, J**

**SHAFQAT IBRAR---Petitioner**

**Versus**

**JUDGE FAMILY COURT and another---Respondents**

Writ Petition No.653 of 2013, decided on 30th May, 2014.

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

----S. 55---West Pakistan Family Courts Act (XXXV of 1964), S.5, Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Suits for dowry articles and maintenance allowance of minors---Execution petitions---Re-arrest of judgment debtor---Trial Court decreed suits---Defendant was sent to civil prison for his failure to pay decretal amount in execution petition for recovery of dowry articles while execution petition for recovery of maintenance allowance remained pending---Defendant appeared before executing court in Police custody and refused to pay decretal amount in execution for recovery of maintenance allowance as well---After lapse of one year defendant was released but, thereafter, executing court sent the defendant to civil prison again for his failure to pay decretal amount in execution petition for maintenance allowance---Validity---Defendant was brought before court in execution petition for maintenance allowance while he was under arrest in civil prison for failure to pay decretal amount in execution petition for dowry articles---Executing Court should have made speaking orders in execution petition for maintenance allowance as defendant had been brought before the court in both execution petitions which had been in progress simultaneously---Omission of the executing court to pass a speaking order could not prejudice the rights of defendant who could not be vexed twice by sending to civil prison for more than one year which he had already served---Petition was accepted---Order of re-arrest of defendant was set aside.

Abdul Ghafoor Sheikh for Petitioner.
Ch. Sameed Ahmad Wains for Respondents.
Date of hearing: 21st April, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the impugned order dated 28-11-2012 passed by the learned Judge Family Court, Faisalabad whereby review application filed by the petitioner against the order dated 19-11-2012 was dismissed.

2. The brief facts of the case as narrated in this writ petition are that the respondent No.2, Mst. Najma Kanwal (the respondent) filed suits for recovery of dowry articles and for the recovery of maintenance allowance of the minors which were decreed by

the learned Judge Family Court Faisalabad vide judgment and decree dated 10-2-2009. There-after the respondent filed an execution petition against the petitioner-judgment-debtor. In the execution petition the petitioner surrendered himself before the mercy of the court and refused to pay amount of dowry articles and maintenance allowance whereupon he was sent to civil imprisonment for one year vide orders dated 25-2-2011 and 5-3-2012 in each case. After the lapse of one year i.e. 5-3-2012, the petitioner requested the executing court to release him as he has already undergone one year civil imprisonment. There-after on 19-11-2012 the learned Judge Family Court again issued non-bailable warrants of arrest of the petitioner, consequences of it the petitioner was arrested. When the petitioner was presented before the court, he requested that he has already undergone a civil imprisonment of more than one year and further detention is illegal and unlawful but the learned Judge Family Court refused his request. The petitioner then filed a revision petition before the learned executing court which was dismissed by the learned Judge Family Court on 28-11-2012. The petitioner feeling aggrieved from the said order filed an appeal before the learned District Judge, Faisalabd which was later on withdrawn by the petitioner on 8-12-2012.

3. Learned counsel for the petitioner has contended that the impugned orders dated 19-11-2012 and 28-11-2012 passed by the learned Judge Family Court, Faisalabaad are against the law and facts of the case; that under section 55 of C.P.C. no person/judgment-debtor is liable to be re-arrested under the decree in execution petition when he has once completed the sentence of one year; that it is a settled principle of law that no person can be punished twice to the same offence; that the impugned orders are against the fundamental rights of the petitioner.

4. On the other hand, learned counsel for the respondent No.2 has supported the impugned orders passed by the learned Judge Family Court, Faisalabad by submitting that the said orders are well reasoned and the learned court below has committed no illegality while passing the same.

5. The perusal of the record reflects that the respondent No.2 filed an execution petition for recovery of maintenance allowance from the petitioner on 15-9-2006. Then another execution petition was filed on 7-12-2009 for satisfaction of the decree dated 10-2-2009 passed in the suit for recovery of dowry articles. In the subsequent execution petition for recovery of dowry articles, the petitioner was arrested by the order of the executing court and was sent to civil prison vide order dated 25-2-2011. At that relevant time, the other execution petition for recovery of maintenance allowance was also pending before the court. In the earlier execution petition (out of which this writ petition has arisen), the petitioner was summoned from jail and he was produced before the executing court on 5-3-2011 in police custody where he categorically denied to pay the decretal amount. The case was adjourned for 19-3-2011 and on the said date he repeated his stance and refused to pay the decretal amount. There-after, he used to appear before the executing court under police custody and on 5-3-2012 he was ordered to be released from the prison. The said order is reproduced as under:--

"Perusal of the record reveals that judgment-debtor was produced from jail on 5-3-2011. He was sent to civil prison in connected execution petition titled "Najma Kanwal v. Shafqat Ibrar" by the court of Shahzad Aslam, Civil Judge Ist. Class, Faisalabad. In instant execution petition he has served a period of one year on 2-2-2012. However, he was produced before the court on 5-3-2011. Now a period of one year has lapsed. According to section 55 of C.P.C. he could not be further detained in civil prison as a period of one year has been lapsed. Therefore he be released forthwith if not required in any other case. However, his release from civil prison will not absolve him from his liability to pay decretal amount to the decree-holder. Hence, he is directed to appear before the court on 5-4-2012." (Emphasis provided)

6. The execution petition remained pending and again the notices were issued to the judgment-debtor i.e. the petitioner. Thereafter, the warrants of arrest were issued and he was again arrested. He was produced before the court on 19-11-2012 and it was submitted that since he has served imprisonment for more than one year, therefore, he cannot be sent to civil prison again but the executing court while disagreeing with the contention of the petitioner sent him behind the bars while observing that he was sent to the civil prison in another execution petition and has not served the sentence for the satisfaction of the decree in the subsequent execution petition. The impugned order dated
19-11-2012 reads as under:--

Then an application for review of the order was filed by the petitioner which was dismissed vide order dated 28-11-2012. The relevant paragraph of the said order is reproduced as under:--

"From perusal of the record it is transpired that judgment debtor/petitioner admittedly remained behind the bars for almost one year but the same imprisonment was with regard to some other execution petition titled "Mst. Najma Kanwal v. Shafqat Ibrar" regarding recovery of dowry articles. Although, the presence of judgment debtor/petitioner was marked before the court and he was summoned by the Court from jail but it is very much clear from the order sheet that judgment debtor was not ordered to be kept in jail in present execution petition. Admittedly, judgment debtor/petitioner has to pay an amount of Rs.1,19,534 being decretal amount to his minor children and he is liable to pay the same. Thus, order dated 19-11-2012 passed in accordance with law and application for review of the same is dismissed being baseless. The instant application along with order be appended with main petition". (Emphasis provided)

7. Undeniably, the petitioner was brought before the court from the prison on 5-3-2011 while he was already under arrest and he categorically refused to satisfy the decree by making any payment, therefore, it was incumbent upon the executing court to pass an order regarding his detention in the said execution petition. There was no justification for the executing court at that relevant time, not to pass any speaking order in this regard. Since the proceedings of the execution petition were under progress simultaneously and the petitioner was brought before the court in both the execution petitions, therefore, his period of detention is to be construed in both the

execution petition. Act of the court whereby no speaking order was passed by the executing court cannot prejudice the rights of the petitioner. He cannot be vexed twice and cannot be sent to civil prison more than one year which he has already served. The order dated 5-3-2012 passed by the learned predecessor of the executing court was just in accordance with law. The decree-holder may adopt other modes for satisfaction of the decree in accordance with law.

8. With these observations, this petition is accepted and the impugned orders dated 19-11-2012 and 28-11-2012 passed by the learned Judge Family Court/executing court are hereby set aside.

ARK/S-103/L Petition accepted.

**2014 Y L R 749**

**[Lahore]**

**Before Atir Mahmood, J**

**JAMIL HUSSAIN SHAH and others---Petitioners**

**Versus**

**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No.2281 of 2010/BWP, heard on 29th October, 2013.

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

----S. 12(2)---Specific Relief Act (I of 1877), S. 42---Limitation Act (IX of 1908), S.18---Constitution of Pakistan, Art.199---Constitutional petition---Suit for declaration on the basis of agreement to sell---Application for setting aside decree on the basis of fraud---Limitation---Contention of applicants was that fraud had been committed while obtaining the impugned judgment and decree---Said application was accepted by the Trial Court but same was dismissed by the Appellate Court---Validity---Application under Order I, Rule 10, C.P.C., was filed to implead counsel who got recorded his conceding statement in the suit but same was opposed by the decree-holder and was turned down---Applicants discharged their onus to prove that counsel was never appointed in the suit through their attorney---Onus would shift on the decree-holder to rebut the same through production of her evidence by summoning the said counsel through the court to establish that he was appointed counsel for the judgment-debtor---Said counsel was appointed by the decree-holder in another suit who got recorded his conceding statement on her behalf in the said suit---Evidence produced by the applicants had not been rebutted by production of any credible evidence by the respondent---Application under S. 12(2), C.P.C. could be filed within three years from the date of knowledge---Revisional Court committed error while ignoring the provisions of S.18 of Limitation Act, 1908---Judgment passed by the Revisional Court was not maintainable---Material illegality and irregularity had been committed by the said court---Impugned judgment passed by the Revisional Court was set aside and order passed by the Trial Court was restored---Constitutional petition was accepted in circumstances.

Mst. Rasool Bibi through Legal Heirs v. Additional District Judge Silakot and another PLD 2006 Lah. 181 and Sheikh Muhammad Sadiq v. Elahi Bakhsh and 2 others 2006 SCMR 12 rel.

Malik Waqar Haider Awan and Muhammad Ali Siddiqui for Petitioners.
Athar Rehman Khan for Respondents.
Date of hearing: 29th October, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Through this writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, the petitioners have challenged the order dated 4-3-2010 passed by the learned Additional District Judge, Jampur, District Rajanpur, who accepted the revision petition filed by respondent No.2 and set aside the order dated 7-9-2009 passed by the learned Civil Judge Class-II, Jampur, whereby the application under section 12(2) C.P.C. filed by the petitioners was accepted.

2. Brief facts of the case are that the petitioners and respondent No.3 filed an application under section 12(2), C.P.C. in the Court of Civil Judge, Jampur to challenge the validity of judgment and decree passed on 15-11-1997 in a declaratory suit filed by respondent No.2 against Basharat Ali, predecessor of the applicants and through the impugned decree, plaintiff has been declared owner of 215 Kanals and 12 marlas of land owned by Basharat Ali, defendant. The declaratory suit was filed on the basis of some undated agreement to sell. Respondent No.2 appeared in the court in response to the notice issued by the court and filed his reply. After filing the reply the learned trial Court framed the issues. Thereafter the applicants during the pendency of said application, applied for impleading Mr. Zia-ud-Din, Advocate as respondent in the application under section 12(2), C.P.C., who allegedly appeared in the suit on behalf of the defendant. After hearing the parties the learned trial Court dismissed the said application on 7-3-2006. The applicant Syed Manzoor Hussain appeared in the trial Court as a witness as A.W.-1 and also produced documents. Respondent No.2 appeared as RW-1 in his oral evidence and produced documentary evidence as well.

The learned Civil Judge, Jampur accepted the application under section 12(2), C.P.C. filed by the applicants/petitioners vide its order dated 7-9-2009 and by setting aside the judgment and decree passed on 15-11-1997, suit filed by respondent No.2 was restored. Feeling dissatisfied respondent No.2 filed a revision petition before the learned Additional District Judge, Jampur against the order dated 7-9-2009 which was accepted vide its judgment dated 4-3-2010 and dismissed the application filed by the applicants.

3. Learned counsel for the petitioners has contended that the impugned judgment dated 4-3-2010 passed by the learned Additional District Judge, Jampur is illegal, unwarranted and is liable to be set aside; that the learned Additional District Judge, Jampur while passing the impugned judgment has not applied his judicious mind; that the suit for declaration on the basis of agreement to sell was not maintainable and the learned Additional District Judge, Jampur has absolutely ignored this fact of the case and without giving findings on this point, reversed the finding recorded by the learned trial Court on application under section 12(2), C.P.C.; that respondent No.2 previously

had been obtaining fake decrees from the courts which have been set aside and the present case was also a result of that series; that the address of Basharat Ali was wrongly mentioned in the suit; That Syed Manzoor Hussain Shah neither appointed Mr. Zia-ud-Din Khan, Advocate as his counsel nor recorded his statement and the trial Court rightly passed the order; that it is admitted from the evidence produced by both the parties that the applicants are in possession of the property in dispute; that the applicants have fully proved that fraud has been committed while obtaining the impugned judgment and decree; that the findings recorded by the learned trial Court while accepting application under section 12(2), C.P.C. have been reversed by the learned Additional District Judge without any legal reasons, therefore, the impugned order is liable to be set aside. He has relied upon the judgments reported as Mst. Rasool Bibi through Legal Heirs v. Additional District Judge, Sialkot and another (PLD 2006 Lahore 181), Sheikh Muhammad Sadiq v. Elahi Bakhsh and 2 others (2006 SCMR 12) and Ilahi Bakhsh v. Sheikh Muhammad Sadiq and 2 others (2005 CLC 1704).

4. On the other hand, learned counsel for respondent No. 2 has vehemently opposed this petition and supported the impugned order. Learned counsel for respondent No. 2 has contended that the impugned order is well-reasoned and the learned Additional District Judge has committed no illegality or irregularity in delivering the same, therefore, this writ petition is liable to be dismissed.

5. I have heard the learned counsel for the parties and have also gone through the available record.

6. The facts which are admitted by the parties are that a suit for declaration with confirmation with possession was filed by respondent No.2 against one Basharat Ali, the father of the present respondent No.3. On 24-10-1997, summonses were issued on the same day to the said defendant for 15-11-1997 and on that day one Zia-ud-Din, Advocate appeared on behalf of the defendant along with alleged general attorney namely Syed Manzoor Hussain Shah (present petitioner No.2) and got recorded a conceding statement for decreeing the suit. In view of the conceding statement the trial Court decreed the suit on the same date i.e. 15-11-1997 without asking for filing the written statement.

7. Through the impugned judgment dated 4-3-2010, the present petitioners have been non-suited on two grounds firstly that the application under section 12(2), C.P.C. was barred by time as the decree was passed on 15-11-1997 and the application was filed after a delay of 5-1/2 years and secondly that the petitioners failed to implead Zia-ud-Din, Advocate as respondent or to produce him as a witness. From the perusal of the impugned judgment and the evidence of the parties, it reflects that the revisional Court

failed to take into consideration the provisions of section 18 of the Limitation Act, 1908 which provide that the application under section 12(2), C.P.C. can be filed within three years from the date of knowledge. In the present case the date of knowledge has been mentioned as 29-6-2003 while filing the application under section 12(2), C.P.C. and thereafter when Syed Manzoor Hussain Shah, petitioner No.2 appeared as AW-1, he categorically asserted his knowledge on the said date. In spite of a lengthy cross-examination, respondent No.2 could not controvert the date of knowledge of the petitioners.

The respondent No.2 appeared as his own witness as RW-I. He deposed that Syed Manzoor Hussain Shah along with Zia-ud-Din, Advocate appeared before the trial Court and made the conceding statement. As per the statement of AW-1, Syed Manzoor Hussain Shah was identified by Zia-ud-Din, Advocate. In cross-examination, he stated that he cannot tell whether the summonses were issued in the name of Basharat Ali, defendant or not. He further stated that he cannot tell that what was written in the suit for declaration against the defendant Basharat Ali. He further stated that Basharat Ali could not appear before the court on account of his old age but his attorney Syed Manzoor Hussain Shah appeared over there. He also could not tell that what was written in the power of attorney in favour of present respondent No.2. However, he denied the suggestion that a fictitious person was produced before the trial Court to get the decree in his favour. In my opinion, the revisional Court committed a grave jurisdictional error while ignoring the provisions of section 18 of the Limitation Act, 1908. The guidance is sought from the case reported as Mst. Rasool Bibi through Legal Heirs v. Additional District Judge, Sialkot and another (PLD 2006 Lahore 181). The relevant portion of the said judgment reads as under:--

"It is the case of the petitioners that the decree was procured fraudulently and by misrepresentation and their predecessor Jehan Khan and they were kept in dark about the passing of the decree in a fraudulent manner, thus according to the above section, the period of limitation, which is prescribed for filing an application under section 12(2), C.P.C. under Article 181, shall commence when the petitioners attained the knowledge in August, 1993, thus the application has been filed within the period of the limitation and the petitioners were not supposed to explain why the application was not filed within the prescribed period; however, if the period of limitation has expired as no case under section 18 was made, then obviously the application under section 5 of the Limitation Act, if applicable to such cause, should have been moved by the petitioner. The view taken by the learned revisional Court is absolutely misconceived and illegal".

The guidance is also sought from the judgment reported as Sheikh Muhammad Sadiq v. Elahi Bakhsh and 2 others (2006 SCMR 12). The relevant portion of the said judgment reads as under:--

"This is settled law that limitation for setting aside an order obtained through fraud or mis-representation, would start from the date of knowledge and in the present case, the respondent has categorically stated that he filed application under section 12(2) C.P.C. immediately on coming to know about the decree in 1986, therefore, in absence of any evidence to the contrary, the presumption would be that respondent had no knowledge of decree, before 1986 and consequently, we would take no exception to the verdict given by the High Court on the question of limitation".

As regards the second reasoning which prevailed upon the revisional Court that the counsel namely Zia-ud-Din, Advocate, who appeared on behalf of the judgment-debtor/defendant was not impleaded as party while filing the application under section 12(2), C.P.C. is also without substance. It is evident from the perusal of the record that an application under Order I, Rule 10, C.P.C. was filed on behalf of the petitioners to implead the said Advocate but that application was seriously opposed by respondent No.2/decree-holder and was turned down by the court below. Since the petitioner discharged this onus to prove that the said Zia-ud-Din, Advocate was never appointed as counsel of Basharat Ali (deceased defendant) through his general attorney Syed Manzoor Hussain Shah then the onus shifted to respondent No.2/decree-holder to rebut the same through production of his evidence and in that eventuality respondent No.2 would have produced the said witness by summoning him through the court to establish that the said Advocate was legally appointed counsel for the judgment-debtor.

The petitioners have also produced certified copies of civil cases as Exhibit A-4 to A-10, wherein respondent No.2 has been benefited in the same circumstances. Exh. P-9 is a copy of the suit for declaration regarding property measuring 72 kanals and 9 marlas of land which was filed on 6-10-1997 and was decreed on 23-12-1997 in the just identical manner wherein the said Advocate Zia-ud-Din was the counsel for the other side who conceded the claim of respondent No.2, the plaintiff in the said suit. All the evidence produced by the petitioners has not been rebutted or controverted by production of any credible evidence by respondent No.2. Without touching the other merits of the case which may affect the rights of the either party, it is held that the judgment dated 4-3-2010 passed by the learned Additional District Judge, Jampur is not sustainable in the eye of law as it has been passed without application of judicious mind and suffers from material illegality and material irregularity.

8. For what has been discussed above, this petition is allowed by setting aside the judgment dated 4-3-2010 passed by the learned Additional District Judge, Jampur and the order dated 7-9-2009 passed by the learned Civil Judge Ist Class, Jampur is upheld.

AG/J-1/L Petition accepted.

**2014 Y L R 1509**

**[Lahore]**

**Before Atir Mahmood, J**

**Malik ZIA BASHIR---Petitioner**

**Versus**

**LAHORE DEVELOPMENT AUTHORITY through Director-General and others---Respondents**

Writ Petition No.6207 of 2009, heard on 4th December, 2013.

**Constitution of Pakistan---**

----Art. 199---Constitutional petition---Adjustment of property in the housing scheme--- Scope--- Contention of respondent-Authority was that petitioner had taken the possession of land in dispute illegally and unlawfully---Validity---Petitioner was owner of land in question and possession of the same was also with him---Petitioner got proprietary rights of property in the year 1973 and subsequently housing scheme was announced by the respondent-Authority but legal rights were not given to him and till 2009 no step was taken against him---Impugned order was passed to undo the orders passed by the High Court in the earlier round of litigation---Respondents-Authority had already exempted more than one plots to its owners---Impugned order passed by the Authority was void ab initio having no legal effect against the rights of petitioner--Authority was directed to process the case of petitioner for adjustment of his plots in the housing scheme---Constitutional petition was accepted in circumstances.

Qamar Zaman Qureshi for Petitioner.

Salman Mansoor for Respondents.

Date of hearing: 4th December, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this constitutional writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the legality of letter No.LDA/DLD-V/6108, dated 28-1-2009 and letter No. LDA-DLD-II/7702, dated 1-9-2006 issued by respondent No.2 (Director Land Development, Lahore Development Authority, Lahore).

2. The cause of action as given in the writ petition is that the petitioner is owner in possession of land measuring 1 kanal-2 marlas-66 sq. ft. situated in Khewat No.62, Khatooni No.190, Khasra No.20, Mauza Nawankot, Lahore (called Irfan Colony Sanda Bhatiyan, Lahore) purchased by him through registered sale-deed duly executed in his favour on 7-6-1973. Soon after the purchase, the petitioner erected

construction on the said land. In the year 1975, the respondents announced "Band Road Scheme (now Gulshan-e-Ravi Scheme)". Since constructions at the site were already in existence, the residents of the colonies approached the LDA for adjustment of said colonies in the scheme. Certain colonies including Irfan Colony, Arain Colony Sanda Bhatiyan were declared as adjusted areas and owners of the houses and plots in the said colonies were required to pay development charges only. The petitioner also deposited development charges with the respondents as per their demand and since then, none on behalf of the respondents have ever interfered with the possession of the petitioner. In the year 2002, it came to the notice of the petitioner that someone on the basis of a fake power of attorney was trying to get the property under reference. The petitioner immediately approached the quarters concerned whereupon an order dated 9-4-2002 was passed by respondent No.2 holding that khasra number 20, wherein the property of the petitioner is situated, falls in adjusted area of E-Block of the scheme and also that the petitioner is owner in possession of the property. The petitioner then approached this Court through Writ Petition No.11272 of 2002 which was disposed of vide order dated 27-6-2002 with the direction to approach the competent forum. The petitioner preferred an Intra-Court Appeal 540 of 2002 wherein this Court vide order dated 3-7-2002 directed the respondents to implement the order dated 9-4-2002. When the respondents failed to comply with the order dated 3-7-2002, the petitioner moved a Contempt Petition No.803-W/2004. The respondents appeared before this Court and made a false statement that the order had already been acted upon, therefore, the petitioner moved another Contempt Petition No.1129-W/2004 which was disposed of vide order dated 16-1-2006 with the direction to the petitioner to provide documents to respondent No.2 required by him who will decide the matter within 15 days. The petitioner produced the documents before the respondents in person and through registered post as well. The matter was ultimately decided by the respondents vide letter dated 28-1-2009 holding that the petitioner had no locus standi as the possession of the land was taken over by the respondents on 21-12-1976 whereafter the possession of the same was taken over by the petitioner illegally and unlawfully. Hence this writ petition.

3. Learned counsel for the petitioner inter alia contends that Khasra No.20/ wherein the property of the petitioner situates comes within the limits of adjusted area of Gulshan-e-Ravi Scheme as recognized in letter dated 9-4-2002 issued by respondent No.2, therefore, the respondents cannot be allowed to back out from what they have earlier settled and admitted; that in Writ Petition No.1186 of 1978 filed by residents of Gulshan-e-Ravi Scheme including mother of the petitioner for adjustment of their plots whereupon the plots and houses of the petitioners were adjusted except that of the petitioner; that the possession of the petitioner over the property is admitted by the respondents but they have illegally refused to adjust the property of the petitioner which is against letter dated 9-4-2002 issued by themselves; that a number of other

properties of the same area have been adjusted by the respondents but the petitioner is being treated discriminately which is against the fundamental rights protected by the Constitution, therefore, this writ petition be allowed and the respondents be directed to adjust Plots No.391 and 392-E of the petitioner situated in Khasra No.20 of Mauza Nawankot, Lahore.

4. On the other hand, learned counsel for the respondents (LDA) has vehemently opposed this writ petition and controverted the averments made by learned counsel for the petitioner. He contends that the case of the petitioner is of adjustment and not that of exemption. He argues that the possession of the property was handed over to the respondents on 21-12-1976 whereafter the petitioner illegally occupied the property, therefore, neither his possession can be protected nor his property can be adjusted under the prevailing policy of the LDA. He further argues that the petitioner has no locus standi over the property. He avers that this writ petition has no merit, therefore, it merits dismissal.

5. I have heard the arguments put forth by learned counsel for the parties and also perused the record with their able assistance.

6. There is no denial to the fact that one Muhammad Ameen filed a Writ Petition No. 19567 of 2001 against the respondents claiming himself to be the general attorney of the present petitioner and sought the issuance of NOC regarding Plot No. 268 Block-F Gulshan-e-Ravi Scheme, Lahore. The said writ petition was disposed of vide order dated 31-10-2001 with a direction to the respondents to pass an appropriate order in accordance with law after hearing the parties. Respondent No.2 in compliance of the said order proceeded to hear the respective parties and the mother of the present petitioner appeared before respondent No.2, who categorically denied the existence of any such power of attorney in favour of the said Muhammad Ameen. It was stated before respondent No.2 that no exemption was claimed by the petitioner. Respondent No.2 vide order dated 9-4-2002 concluded in the following terms:--

"The matter has been thrashed minutely with the help of Legal Wing and Town Planning Wing. The land measuring 1k-2m bearing Khasra No.20min Mouza Nawan Kot was acquired for Gulshan-e-Ravi, Scheme. The said Khasra No falls in the adjusted area of
E-Block of the scheme. The application of the landowner for adjustment is still pending and it is in his/her occupation."

This order dated 9-4-2002 was not complied with in letter and spirit and the petitioner filed a Writ Petition No. 11272 of 2002 which was disposed of by a learned Single Bench of this Court vide order dated 27-6-2002 which was assailed in I.C.A. No.540

of 2002 which was also disposed of vide order dated 3-7-2002 passed by a learned Division Bench of this Court which reads as under:--

"We have examined the file of W.P. in the light of the said submission of the learned counsel and we do find that the order dated 9-4-2002 was passed by the respondent-LDA in favour of the petitioner. Having thus examined the file we dispose of this ICA with a direction to respondents Nos. 1 and 2 to immediately to take steps to further implement the decision taken on 9-4-2002 by respondent No.2 and to report compliance to the Deputy Registrar (Judicial) of this Court within four weeks".

7. The above-referred order was not complied with and a Criminal Original No.803-W of 2004 was filed by the petitioner. The respondents appeared before the learned Division Bench of this Court and the learned counsel for the respondents submitted that the order dated 9-4-2002 of this Court passed in ICA No. 540 of 2002 has been implemented. (As a matter of fact there was no order dated 9-4-2002 passed by this Court). However, this contempt petition was disposed of having borne fruit. Subsequently, the petitioner again filed a Criminal Original No. 1129-W of 2004 in ICA No. 540 of 2002. The then Director Land Development-II, Lahore namely Khawaja Javed Aslam Sahaf appeared before the Court and the Criminal Original was disposed of vide order dated 16-1-2006 in the following terms:--

"Mr. Qamar Zaman Qureshi, Advocate for the petitioner.

Mr. Abdul Ghani, Advocate for the LDA, with Kh. Javed Aslam Sahaf, Director, Land Development-II.

The petitioner claims to be owner of 1-kanal 2-marlas of land in Khasra No.20-min. Mouza Nawan Kot. The said land was acquired for Gulshan Ravi Scheme. The petitioner claims the adjustment of the same in the scheme.

2. Learned counsel for the LDA states that there are certain requirements for adjustment. The petitioner has not provided the relevant documents.

3. In view of the above, learned counsel for the petitioner undertakes to provide the required documents on 26-1-2006. The petitioner shall appear before the Director Land Development-II on the said date alongwith the relevant documents. The application of the petitioner for adjustment of the plot shall be decided within fifteen days. With this direction, this petition is disposed of."

8. Subsequent to the order dated 16-1-2006 passed by this Court, the petitioner allegedly persuade the case before the respondents but instead of adjustment of his

plot a letter dated 28-1-2009 was written by respondent No.2 to the Director, Estate Management, LDA Lahore which reads as under:--

"In compliance with the orders of the Division Bench consisting of Hon'ble Justice Muhammad Saeed Akhtar, Judge and Justice Azmat Saeed, Judge of Lahore High Court, a Speaking Order was passed vide No.LDA/DLD-II/7702 dated 1-9-2006 (copy enclosed), conluding therein that the petitioner does not prove his claim for adjustment. His claim for the exemption of one 10-marlas plot will only be dealt with in the light of prevalent law/policy. The petitioner has no locus standi on the plots subject as cited above which have partially/completely been occupied unauthorizedly, because LDA has evidently taken over physical possession of the land on 21-12-1976.

In view thereof, you are required to please take over the physical possession of the said plots illegally occupied by Mr. Zia Bashir in the interest of the Authority under intimation to this office".

The said order of 1-9-2006 has not been produced by the respondents while filing the written reply. However, as per comments, the claim of the petitioner for adjustment was rejected by respondent No.2 by holding that the case of the petitioner for adjustment is not tenable and he could only claim the exemption of 10 marlas plot in the light of prevalent law and policy for the reason that the petitioner has failed to produce the proof of construction of house/living unit consisting of drawing room, dining room, bedroom, bath and kitchen prior to the acquisition preceding along with other documents which are the pre requisite to proceed the case for adjustment of land. The alleged order dated 1-9-2006 is wholly dependent upon the order dated 1-9-2004 passed by Major (Retd.) the then Director Land Estate Management LDA, Lahore.

9. There is no denial to the fact that the petitioner is lawful owner of land measuring 1 kanal, 2 marlas 66-Sq. ft. vide registered Sale-deed No. 11407 dated 7-6-1973 and the possession of the property in dispute is also not denied by the respondents. However, it is claimed by the respondents that the petitioner was not in possession of the said property prior to the requisite proceedings and taken over physical possession of the said land on 21-12-1976 by the LDA. I am of the opinion that mere assertion of the respondents that there was no construction at the time of acquisition of the land of the petitioner is of no help to them. It is noted with great concern that the petitioner got proprietary rights of the property in the year, 1973 through a registered sale-deed and subsequently scheme was announced by the respondents but the legal rights were not given to the petitioner and till the year 2009 no active step was taken against the petitioner if, according to the respondents, the petitioner was illegal occupant of the property. In view of their own stance taken during the earlier proceedings in the cases

i.e. I.C.A. No. 540 of 2002, Crl. Org. No.803-W of 2002 and Crl. Org. No.1129-W of 2004, I am of the considered opinion that the letter dated 28-1-2009 written by respondent No.2 to the Director Estate Management LDA, Lahore is tainted with mala fide and a result of misuse of authority in order to undo the orders passed by this Court in the earlier round of litigation. As remains the objection taken by the respondents that the case of the petitioner for adjustment is not entertainable as he was not in possession of any constructed property and as such his case only can be considered to the extent of exemption of one plot measuring 10 marlas is also of no avail in view of the order dated 3-7-2002 passed by this court in I.C.A. No. 540 and stance taken by the respondents in Criminal Original No. 1192 of 2004 and furthermore if it was a case of exemption then the respondents should have processed the case for that purpose. Even otherwise it is established that the respondents have already exempted more than one plot to the owners as earlier held by this Court vide order dated 1-3-1992 passed in Writ Petition No. 162 of 1984. The relevant paragraph of the said order is reproduced as under:--

"The petitioner categorically mentioned in paragraph 9 of the petition that she was entitled to exemption of area measuring 1 K - 2 M and 70 Sqf and this position was admitted by the Lahore Development Authority. This clear admission on the part of the L.D.A. precludes it to take a contrary stand particularly when LDA had been allowing exemption for more than one plot to the owners".

Resultantly, this petition is allowed, declaring that the letter dated 28-1-2009 passed by respondent No.2 is void ab initio having no legal effect against the rights of the petitioner and the respondents are directed to process the case of the petitioner for adjustment of his Plots bearing Nos.391-E and 392-E situated at Khasra No. 20 Mouza Nawan Kot, Lahore.

AG/Z-10/L Petition allowed.

**2014 Y L R 1569**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD AFZAL---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE, Faisalabad and 2 others---Respondents**

Writ Petition No. 16244 of 2012, heard on 10th March, 2014.

**West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for recovery of dower, maintenance allowance and restitution of conjugal rights---Deferred dower, claim of---Scope---Wife filed suit for recovery of dower and maintenance allowance whereas husband filed suit for restitution of conjugal rights---Both the suits were consolidated and Trial Court decreed suit of wife whereas suit of husband was dismissed but Appellate Court dismissed suit of wife to the extent of recovery of dower and decreed the suit for restitution of conjugal rights subject to payment of dower as well as maintenance allowance with certain modifications---Validity---No dispute existed with regard to the amount fixed as deferred dower---Husband could not be allowed to aprobate and reprobate at the same time---Deferred dower could only be claimed after dissolution of marriage or in case of death of husband---Impugned judgments and decrees to the extent of grant of dower amount were not sustainable in the eye of law---Husband was liable to maintain his wife according to his means and keeping in view the expenditures which were normally incurred in everyday life---Husband was man of means and was in a position to maintain his wife by making the payment of Rs. 2000 per month---Impugned judgments and decrees to the extent of dower amount and condition to pay the same were set aside---Constitutional petition was accepted in circumstances.

Para 290 of Muhammad Law and Saadia Usman and another v. Muhammad Usman Iqbal Jadoon and another 2009 SCMR 1458 rel.

M. Irshad Chaudhry for Petitioner.

Sardar Mashkoor Ahmed for Respondents.

Date hearing: 10th March, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that on 6-9-2010, respondent No.2 Mst. Shabana filed a suit for recovery of dower of gold ornaments weighing 25 tolas as well as for recovery of maintenance allowance against the petitioner on account of bad behaviour of the petitioner. The petitioner contested the suit by filing written statement. On the other hand, the petitioner filed a suit for restitution of conjugal rights. Both the suits were consolidated. Out of divergent pleadings of the parties, issues were framed. Evidence led by the parties was recorded. After hearing both sides, learned Judge Family Court, Faisalabad vide judgment and decree dated

27-6-2011 decreed the suit for recovery of dower of 25 tola gold ornaments and maintenance allowance at the rate of Rs.2000 per month from the institution of the suit to the expiry of iddat period whereas the suit of the petitioner for restitution of conjugal rights was dismissed. Feeling aggrieved, both sides filed appeals. Vide consolidated judgment and decree dated 28-1-2012, learned lower appellate court dismissed the suit of the petitioner to the extent of dower whereas he decreed his suit to the extent of restitution of conjugal rights subject to payment of dower as well as maintenance allowance. On the other hand, appeal of the respondent for enhancement of maintenance allowance was partially accepted and she was declared entitled to recover maintenance allowance @ Rs. 10,000 per month with 8% per annum increase from March, 2010 to subsistence of the marriage. Hence this writ petition.

2. Learned counsel for the petitioner inter alia contends that the learned courts below have failed to appreciate the evidence adduced by the petitioner, particularly objection No.1 raised by him in his written statement that the golden ornaments weighing 25 tola were handed over to the plaintiff lady at the time of nikah as well as the entry of column No.16 which unambiguously states that the ornaments were given to the plaintiff lady at the time of solemnization of nikah; that the learned lower appellate court has also not considered the entry of column No.17 of nikahnama whereby the maintenance of the plaintiff lady was fixed as Rs.2000; that entries made against Column Nos.13 and 16 clearly show that original amount of dower was fixed as Rs.300,000 and as an alternate measure, golden ornaments weighing 25 tola were fixed as deferred dower but this aspect of the case has totally been ignored; that the deferred dower is only payable at the time of dissolution of marriage either in case of divorce or death of the husband; that the plaintiff has not resorted to dissolution of marriage and the petitioner is still ready to resettle the plaintiff in his house, therefore, the suit of the plaintiff for restitution of conjugal rights should have been decreed without any precondition; that both the learned courts below had not read the oral as well as documentary evidence available on record; that there is misreading and non-reading of evidence, therefore, this writ petition be allowed, the impugned judgments and decrees be set aside and the suit of the respondent be dismissed.

3. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and fully supported the impugned judgments and decrees. It has been contended that the dower of the plaintiff-respondent was fixed as 25 tola gold ornaments in lieu of Rs.300,000, therefore, she is entitled to recover the dower of 25 tola gold ornaments; that it has been written in the nikahnama that the deferred dower on demand; that the value of rupee has depreciated heavily, therefore, it would be just and fair that the plaintiff be given alternate dower of 25 tola gold ornaments to meet the ends of justice; that the petitioner is a Manager in the National Bank and drawing handsome salary therefrom; that the petitioner is owner of 100 kanals of land, car, tractor with trolley, motorcycle etc.; that the petitioner also owns 50 buffalos; that maintenance of wife always commensurate with resources and status of the husband, therefore, her maintenance was rightly increased to Rs.10,000 by learned lower appellate court which the petitioner can easily pay. He avers that this writ petition has no substance and the same be dismissed.

4. Arguments heard. Record perused.

5. The point for determination by this Court is as to whether the respondent No.2 is entitled to demand and get the dower amount mentioned in the nikahnama from the petitioner and as to whether the respondent No.2 is entitled to claim and get the maintenance allowance as granted by the Family Court. The contention of the learned counsel for the petitioner in the beginning was that the Family Court has not framed the issues in accordance with the pleadings of the parties as the objections raised in the written statement were not taken into consideration in their true perspective and as such the case was liable to be remanded but in order to save the parties from agony of further litigation, it was agreed between the parties that this case be decided in accordance with the available record. The issue No.1 pertains to the first question, there is no dispute between the parties that the amount was fixed as deferred dower. The contention of learned counsel for the petitioner that golden ornaments weighing 25 tolas were handed over to the plaintiff-lady at the time of nikah is contradictory to the stand taken by him that haq mehr was deferred and as such the claim of respondent No.2 was unjustified for the simple reason that if it is presumed that the golden ornaments were given at the time of nikah/marriage then the dower amount cannot be said to be deferred dower. The petitioner cannot be allowed to aprobate and reprobate at the same time. The second stance of the petitioner that the dower amount was deferred one, it could not be granted by the courts below as the deferred dower can only be claimed after the dissolution of marriage or in case of death of the husband has force. In this regard para 290 of the Muhammadan Law is relevant which is reproduced as under:--
"290 "Prompt" and "deferred" dower.---(1) The amount of dower is usually split into two parts, one called "prompt," which is payable on demand, and the other called "deferred" which is payable on dissolution of marriage by death or divorce. (underline is mine)

(2) Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, then according to the Shia law, the rule is to regard the whole as prompt but according to the Sunni law, the rule is to regard part as prompt and part as deferred, the proportion referable to each class being regulated by custom, and, in the absence of custom, by the status of the parties and the amount of the dower settled".

The plain reading of the para above reveals that the deferred dower can only be claimed after the divorce takes effect or there is death of the husband. In a similar case decided by the Hon'ble Supreme Court titled Saadia Usman and another v. Muhammad Usman Iqbal Jadoon and another (2009 SCMR 1458) it has been held as under:--
"Thus, we are of the opinion that prompt dower is payable on demand during the subsistence of the marriage tie whereas the deferred dower is payable on the time stipulated between the parties, but where no time is stipulated, it is payable on dissolution of marriage either by death or divorce. But, the deferred dower does not become "prompt" merely because the wife has demanded it. In the instant case, the total amount of dower was fixed at Rs.10,00,000. The prompt dower is to the tune of Rs.5,00,000 was paid at the time of marriage in the shape of golden ornaments, etc.

Since no time was fixed for payment of the deferred dower of Rs.5,00,000, it would be payable in the eventuality of dissolution of marriage either by death or divorce". (underline is mine)
In view of the dictum laid down by the Hon'ble Supreme Court of Pakistan, the impugned judgments and decrees of the courts below to the extent of grant of dower amount are not sustainable in the eye of law.

6. As remains, the question of maintenance allowance, it has now been a settled principle of law that the husband is liable to maintain his wife according to his means and keeping in view the expenditures which are normally incurred upon in the every day life. Admittedly, the marriage took place in the year 1999 and the petitioner undertook to pay an amount of Rs.2000 per month as maintenance allowance which shows that he is a man of means and was in a position to maintain his wife by making the payment of Rs.2000 per month. With the span of time and a price-hike in the country the demand of respondent No.2 was reasonable for increase in the maintenance allowance. It has nowhere been denied by the petitioner that he is not a man of means though he has confronted the respondent No.2 with his pay slip wherein his salary is being reflected as Rs.21,800 but still this pay slip has not been proved in accordance with law. When the defendant appeared as DW-1 as his own witness, he did not produce his pay slip and also did not depose about his salary. In his cross-examination, he did not deny that he is owner of 78 kanals of landed property rather he concealed this fact by stating that if his parents had transferred some property to him he is ignorant about the same. Accordingly, it is held that the respondent No.2 is entitled to have the maintenance allowance from the petitioner.

7. In view of the above discussion, this petition is partly allowed, The judgments and decrees of the courts below to the extent of return of dower amount are set-aside and suit of the respondent No.2 is dismissed whereas to the extent of payment of maintenance allowance the judgment and decree of the appellate court dated 28-1-2012 is upheld. The decree for restitution of conjugal rights passed by the appellate court is upheld with a modification that it will be subject to payment of past maintenance allowance and the condition to pay the dower amount is set aside.

AG/M-135/L Petition disposed.

**2014 Y L R 2160**

**[Lahore]**

**Before Atir Mahmood, J**

**ALLAH DITTA and 3 others---Appellants**

**Versus**

**Mst. MAJIDAN BEGUM and 22 others---Respondents**

F.A.O. No.121 of 2008, heard on 5th November, 2013.

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

----O. VII, R. 24 & O.XLI, R.19---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Restora-tion of appeal dismissed in default---Limitation--- Scope--- Contention of applicants was that they were not residing at the given address rather they had shifted to somewhere else and Appellate Court was bound to serve notice upon them through their counsel---Validity---Counsel for the applicants was well aware about the proceedings---Applicants were having knowledge that their case was transferred before the District Judge but they never contacted their counsel for two years---Knowledge of counsel for applicants was knowledge for them and no concession could be extended to such indolent litigant---Appeal was the continuation of proceedings and time for filing application for restoration of appeal was 30 days from the date of dismissal of the same---No application for condonation of delay was filed---Application for restoration of appeal was time barred which was rightly dismissed by the Appellate Court---Appeal was dismissed in circumstances.

Ch. Abdul Ghani for Appellants.

Malik Sharif Ahmed for Respondents Nos. 1 to 18.

Date of hearing: 5th November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this appeal, appellants Allah Ditta etc. have assailed order dated 26-1-2006 passed by learned Additional District Judge, Vehari whereby application for restoration of appellant's appeal, dismissed in default vide order dated 10-10-2003, was dismissed.

2. Brief facts of the case are that respondents Nos.1 to 18 Mst. Majida Begum etc. (the respondents) filed a suit for specific performance of an agreement to sell in respect of land measuring 99-kanals and 18-marla situated in Chak No.126/WB Tehsil Mailsi, District Vehari against the appellants as well as respondents Nos.19 to 23. The suit was decreed by learned Civil Judge 1st Class, Vehari vide judgment and decree dated 14-11-1993. Feeling aggrieved, the appellants challenged the judgment and decree dated 14-11-1993 before this Court in R.F.A. No.81/1993. In the meanwhile, the

respondents dispossessed the appellants from the suit property. It has been contended in the appeal that since the appellants had no source of income at Chak No.126/WB, Tehsil Mailsi, District Vehari, they went to Rawalpindi. On 17-2-2005, the appellants came to know through their counsel that the appeal vide order dated 17-4-2003 passed by this Court was transmitted to District Judge, Vehari who entrusted it to learned Additional District Judge, Vehari on 30-4-2003 where the same was dismissed in default on 10-10-2003. The appellants filed an application for restoration of the appeal on 21-2-2005 giving details of their inability to pursue the matter. Respondents Nos.1 to 18 contested the application by filing written reply. After hearing both sides, learned Additional District Judge, Vehari dismissed the application of the appellants vide order dated 26-1-2006 deeming it time barred. During the pendency of the appeal, appellants Nos.2 and 3 died whose legal heirs were not impleaded, therefore, the same have been arrayed as pro forma respondents Nos.19 to 23. The order dated 26-1-2006 passed by learned Additional District Judge, Vehari has been assailed in this FAO.

3. Learned counsel for the appellants argues that the learned lower appellate court while dismissing the appeal of the appellants vide order dated 10-10-2003 has travelled beyond its jurisdiction as it was reported to learned lower appellate court that the appellants were not residing at the given address rather they had shifted to somewhere else; that it was incumbent upon the lower appellate court to serve the appellants through their counsel rather than to summon the process server for his statement; that the appellants were summoned firstly vide order dated 3-7-2003 but the summonses were not issued whereafter the appellants were summoned vide order dated 18-7-2003; that the appellants filed application for restoration of the appeal as soon as they came to know about dismissal of the same in default giving reasons in detail for their non-appearance which were not taken into consideration by the learned lower appellate court; that since Article 181 of the Limitation Act was attracted in the circumstances of the case, there was no need to file application for condonation of delay especially when the delay was fully explained in application for restoration of the appeal; that the learned lower court has failed to apply its judicious mind and the application of the appellants has been dismissed whimsically; that settled principle of law that technicalities should not come in the way of justice has altogether been ignored; that valuable rights of the appellants are involved in the case, therefore, this FAO be allowed, the impugned order be set aside and the appeal be restored by allowing application of the appellants for restoration of the same.

4. On the other hand, learned counsel for the respondents has vehemently opposed this appeal and fully supported the impugned order. His main stress is on the point that the application filed by the appellants for restoration of the appeal is badly hit by limitation of time, therefore, the same was rightly dismissed. He has also argued that

the appellants have failed to show sufficient cause for condonation of delay. He also contends that no application for condonation of delay was moved by the appellants, therefore, the delay could not be condoned. He asserts that this appeal is without any merit, as such, the same be dismissed.

5. I have heard the arguments put forth by learned counsel for the parties and also perused the record with their able assistance.

6. The point for consideration before this Court is as to whether the application for restoration of appeal filed by the appellants before the lower appellate court was within time. There is no denial to the fact that initially the appeal was filed before this Court which was subsequently sent to the lower appellate court on account of pecuniary jurisdiction on 28-4-2013 and then it was entrusted to the court of Additional District Judge, Vehari vide order dated 30-4-2003. There is also no denial to the fact that the appellants were duly represented by their counsel namely Rana Muhammad Luqman, who was well aware about the proceedings. In order to reach just conclusion the contents of the application for restoration of appeal have been minutely perused. The paragraph No.5 of the application for restoration of appeal is very relevant which reads as under:--

7. From the bare reading of this paragraph it is evident that the counsel for the appellants was well aware about the proceedings and as on 17-2-2005 when the appellants contacted their counsel they immediately came to know that the case was transferred in the year 2003 before District Judge, Vehari, astonishingly the appellants never bothered to contact their counsel during a long span of about two years. In my opinion, knowledge of the counsel for the appellants is knowledge of the appellants and if they have not bothered to contact their counsel regarding the disposal of their appeal no concession can be extended to such an indolent litigant. Mere contention of learned counsel for the appellants that since the appellants have abandoned their residence and they were not aware about the pendency of appeal before the District Judge is not acceptable as it was incumbent upon the appellants to furnish their fresh address in the court. The Rule 24 of Order VII, C.P.C. is reproduced for ready reference:-.

"Change of address.---A party who desires to change the address for service given by it as aforesaid shall file a verified petition, and the court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

and since the appeal is the continuation of the proceedings the same rule applies in the present case. The time limit for filing the application for restoration of appeal is 30 days from the date of dismissal of appeal but the appellants have not bothered to file

any application for condonation of delay and the lower appellate court after hearing the parties has rightly appreciated the crux of the matter and there is nothing wrong in the impugned order which could be interfered by this Court. The application for restoration of appeal was barred by time and was rightly dismissed by the lower appellate court.

8. Resultantly, this appeal being devoid of any merits, is dismissed.

AG/A-30/L Appeal dismissed.

**2014 Y L R 2370**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD NAEEM and 7 others---Appellants**

**Versus**

**Khawaja MUHAMMAD AKBAR and 2 others---Respondents**

S.A.O. No.144 of 2010, heard on 7th March, 2014.

**West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---**

----Ss.10, 13 & 15---Second appeal against order---Rent Controller allowed the application of the landlord on the grounds of default in payment of rent and personal bona fide need of landlord---First appeal filed by the tenant was allowed by the appellate court---Concurrent findings---Invocation of S. 10 of the West Pakistan Urban Rent Restriction Ordinance, 1959---Easement right of way was granted by the First Appellate Court irrespective of the fact that there existed no more the relationship of landlord and tenant between the parties and that the tenant was in the tenancy of other landlord---Non-framing of issue in such regard by both the courts below---Effect---Provisions of S.10 of the Ordinance were applicable where the relationship of landlord and tenant existed---After the ejectment order passed by the Rent Controller, which was upheld by the lower Appellate Court, respondents were no more tenants under the landlord rather they were, at present, tenants in the premises falling under the share of another landlord---When the tenants were not in the tenancy of the landlord, S.10 could not be applied in case of the landlord to provide passage to the tenants, which was being used by them previously---Easement right of passage in absence of relationship of landlord and tenant was held to be unjustified---Appeal of the landlords was allowed.

Ahmed Waheed Khan for Appellants.

Abdul Ghafoor Sheikh and Usman Sarwar for Respondents.

Date of hearing: 7th March, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**The appellants Muhammad Naeem etc. filed a petition against respondent No.1 Khawaja Muhammad Akbar for his ejectment from property No.B-1-24-415, situated at ground floor of Saeed Manzil Kashmir Road, Wazirabad Road Kotli Behram, Sialkot City on the grounds of default in payment of enhanced rent and personal need. The ejectment petition was contested by respondent No.1-defendant by filing written statement wherein he denied any default in payment of rent. Out of divergent pleadings of the parties, learned Rent Controller, Sialkot settled

four issues including that of relief, recorded evidence led by the parties and after hearing both sides accepted the ejectment petition directing the defendant to vacate the rented premises within one month vide order dated 8-9-2006. Feeling dissatisfied, respondent No.1 filed an appeal which was dismissed by learned Additional District Judge, Sialkot vide judgment dated 1-6-2009 while protecting his right of easement of using passage way by invoking section 10 of the Punjab Rent Restriction Ordinance 1959 (the Ordinance). Hence this Second Appeal against Order.

2. Learned counsel for the petitioner inter alia contends that the impugned order to the extent of invocation of section 10 of the Ordinance is not only without jurisdiction but is a nullity in the eye of law; that there was no issue framed by learned trial court or by the learned lower appellate court regarding the easement right, therefore, no order in this regard could be passed; that the appellate authority while exercising its jurisdiction under the Punjab Rent Restriction Ordinance, 1959 could not pass order for easement rights; that by allowing usage of passage of tenanted portion of the property, the learned lower appellate court has practically nullified the ejectment order; that the learned lower appellate court was also not justified to grant 6 months period to the respondent for vacation of the rented property, therefore, this SAO be allowed and the impugned judgment be set aside to the extent of easement rights.

3. On the other hand, learned counsel for the respondents has vehemently opposed this SAO and fully supported the impugned judgment by submitting that there is no other passage of the tenanted premises and if the easement right of the respondents is not protected, they will not be able to run their business over the tenanted shops which fall in the share of landlords other than the appellants.

4. Arguments heard. Record perused.

5. There are concurrent findings against the respondents as the ejectment petition has been accepted by learned Rent Controller which was upheld by learned lower appellate court but with the restriction that the respondents will hand over vacant possession of the property to the appellants who will protect the right of passage of the respondents by holding that the property of other landlords Muhammad Waleed etc., which is in possession of the respondents as tenants, has no other passage.

6. Since the ejectment order has not been assailed by the respondents which has attained finality, therefore, the only question which is to be resolved by this Court is as to whether the appellate court was justified to direct the appellants to give right of passage to the respondents out of the property exclusively owned by the appellants.

7. Scanning of record shows that the property was initially owned by Haji Muhammad Siddique. The respondents were tenants under Haji Muhammad Siddique. After death of Muhammad Siddique, present appellants and other legal heirs of Muhammad Siddique, i.e. Muhammad Waleed etc. became joint owners of the property. Afterwards, there took place a family partition between the present appellants and Muhammad Waleed etc. The appellants filed ejectment petition against the respondents which was allowed and they were directed to hand over vacant possession of the property to the appellants. However, the respondents are still tenant in the portion owned by Muhammad Waleed etc., adjacent to the property of the appellants.

8. The site-plan of the whole property, i.e. the property of the appellants and the property owned by Waleed etc., has been brought on record as Exh.A4 which has not been denied by any of the parties. Exh. A4 reflects two distinct portions. Both the portions are situated on Kashmir Road commonly known as Wazirabad Road. However, the main gate is shown to be installed in the portion owned by the appellants whereas the property owned by Waleed etc. has a wall towards said Kashmir Road. If the respondents/owners desire a passage towards the main road, i.e. Kashmir Road, they may make their own way towards the Kashmir Road by removing the wall and installing gate/door, whatsoever, therein and it does not seem expedient for them to necessarily pass through the property which exclusively falls within the ownership of the appellants. When the respondents can make approach towards Kashmir Road directly by installing gate/door in the property falling in their possession, the appellants cannot be directed to curtail their right in their property by providing passage to the respondents.

9. Learned lower appellate court while directing the appellants to provide passage to the respondents has relied upon section 10 of Urban Rent Restriction Ordinance, 1959 which reads as under:--

"10. Landlord not to interfere with amenities enjoyed by the tenant.---(1) No landlord or his contractor, workman, or servant shall, without the previous consent of the Controller or save for the purpose of effecting repairs or complying with a requisition from a Municipal Committee or Cantonment or Town Improvement Board, wilfully disturb any convenience or easement annexed to the premises or remove, destroy or render unserviceable anything provided for permanent use therewith or discontinue or cause to be discontinued any supply or service comprised in the fair rent.

(2) A tenant in occupation of a building or rented land may, if the landlord has contravened the provisions of this section, make an application to the Controller complaining of such contra-vention.

(3) If the Controller, on inquiry, finds that the tenant has been in enjoyment of the amenities and that they were cut off or withheld by the landlord without just or

sufficient cause, he shall make an order directing the landlord to restore such amenities."

Perusal of above provision makes it crystal clear that the same is applicable where the relationship of landlord and tenant exists. As noted above, after the ejectment order passed by learned Rent Controller and upheld by learned lower appellate court, the respondents are no more tenants under the appellants, rather they are, at present, tenants in the premises falling under share of Waleed etc. after family partition of the property between the appellants and Waleed etc. When the respondents are not tenants of the appellants, this provision cannot be applied upon the appellants to provide passage to the respondents which even if was being used by them previously. In the circumstances, the learned lower appellate court was not justified to direct the appellants to provide way to the respondents out of the property falling under their share, as such, the impugned judgment cannot sustain in the eye of law.

9. In view of the foregoing, this appeal is allowed, the impugned judgment dated 1-6-2009 to the extent of allowing passage to the respondents from the property of the appellants is set aside and order dated 8-9-2006 passed by learned Rent Controller, Sialkot is restored.

SA/M-108/L Appeal allowed.

**PLJ 2014 Lahore 57**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**RAEES PEHLWAN--Petitioner**

**versus**

**MUHAMMAD SHAFIQUE, etc.--Respondents**

C.R. No. 328 of 2002, decided on 7.10.2013.

**Contract Act, 1872 (IX of 1872)--**

----S. 2(e)--Suit for specific performance of contract--Dismissed by Courts below--Payment of consideration amount could not be proved--No witness stated that any consideration amount was paid by petitioner to vendor--Agreement to sell was a forged and fabricated document having no legal sanctity--PWs admitted that no bargain was struck down in front of him nor any payment was made in his presence--Validity--It was prime duty of predecessor to prove execution of agreement to sell for consideration but no witness had been produced for that purpose--No payment was made in presence of PW which is contradictory to statement--No specific description of the property was alleged subject matter of the suit--Without establishing that consideration amount is paid no document could be considered as an agreement--Agreement to sell and receipt were duly executed had not been assailed by filing in cross objection by defendants, therefore, they cannot attack findings in instant petition--Findings of First Appellate Court were not sustainable in eye of law and by invoking revisional jurisdiction of High Court--Petition was dismissed. [Pp. 60 & 61] A, B, C & D

PLD 2005 Lah. 218 and 2010 SCMR 334, ref.

Mr. Hameed-uz-Zaman, Advocate for Petitioner.

Mr. Ahmed Mansoor Chishti, Advocate for Respondent.

Date of hearing: 7.10.2013.

**Judgment**

Through this civil revision, the petitioner has impugned judgment and decree dated 19.03.2002 passed by learned Additional District Judge, Khanpur who dismissed the appeal of the petitioner and upheld the judgment and decree dated 16.04.2001 passed by learned Civil Judge 1st Class, Khanpur whereby the suit of the petitioner was dismissed.

2. Brief facts of the case are that the petitioner filed a suit for specific performance of contract alleging that Abdul Ghani, predecessor-in-interest of the respondents was owner of the land, fully described in head note of the plaint; that Abdul Ghani agreed to sell the suit land to the plaintiff for consideration of Rs.46,500/- out of which Rs.40,000/- were paid to him as earnest money vide agreement dated 25.01.1977 and rapat dated 25.01.1977; that it was agreed between the parties that the sale mutution will be executed in favour of the petitioner after one year on receipt of balance amount of Rs. 6,500/- that despite repeated requests by the petitioner, the sale mutation was not executed by the respondents-defendants; that Abdul Ghani died two years before filing of the suit; that: the respondents-defendants kept on promising

transfer of the disputed property in favour of the petitioner but, ultimately, they refused to do the same.

3. The suit was hotly resisted by the respondents by filing written statement. Out of divergent pleadings of the parties, learned trial Court framed as many as six issues including that of relief. After recording oral as well as documentary evidence adduced by the parties, learned trial Court dismissed the suit vide judgment and decree dated 16.04.2001. The appeal preferred thereagainst by the petitioner also met with the same fate vide impugned judgment and decree dated 19.03.2002. Hence this civil revision.

4. Learned counsel for the petitioner inter alia contends that the petitioner had purchased the suit property from Abdul Ghani, predecessor-in-interest of the respondents through an agreement to sell dated 25.01.1977 for consideration of Rs.46,500/- out of which major portion of consideration, i.e. Rs.40,000/- were paid to Abdul Ghani; that after death of Abdul Ghani, the respondents were bound to transfer the property in the name of the petitioner as per the agreement but they refused without any lawful justification; that the petitioner has been able to prove the agreement to sell successfully by producing witnesses but the learned Courts below have not appreciated the evidence produced by the petitioner; that the petitioner is in possession of the properly since 25.01.1977 when the agreement to sell was signed; that the learned Courts below have failed to apply their judicious mind; that the impugned judgments and decrees suffer from material irregularities and misreading and non-reading of evidence, as such, these are not sustainable in the eye of law. Learned counsel for the petitioner prays that this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the petitioner be decreed.

5. On the other hand, learned counsel for the respondents vehemently opposes this civil revision and supports the impugned judgments and decrees. He has emphasized more on the point that the payment of consideration amount could not be proved by the petitioner as required under the law as no witness of the plaintiff while appearing before the Court states that any consideration amount was paid by the petitioner to the vendor in his presence, therefore, the petitioner-plaintiff could not prove the payment of consideration amount; that the suit was barred by time; that the agreement to sell was a forged and fabricated document having no legal sanctity. Learned counsel for the respondents avers that this civil revision has no force, therefore, it merits dismissal.

6. I have heard the arguments put forth by learned counsel for the parties and also perused the record with their able assistance.

7. In order to substantiate his claim, the petitioner Rais Pehlwan produced PW-1, Muhammad Aslam, PW-2, Muhammad Ikraam-ul-Haq, PW-3, Ahmad Din, PW-4 Sultan Ahmad and he himself appeared as PW-5. PW-1. Muhammad Aslam deposed that the agreement to sell Exh. P-1 and receipt of payment Exh. P-2 were written in his presence and Abdul Ghani, predecessor of the present respondents put his thumb impression on the Exh. P-l and Exh. P-2. In cross-examination, this witness admitted that no bargain was struck down in front of him nor any payment was made in his presence. PW-2, Muhammad Ikraam-ul-Haq, who was stated to be the son of Malik Ghulam Muhammad, the marginal witness of the said agreement, who only identified the signature of his father on the said agreement to sell as well as on the

receipt. PW-3, Ahmad Din deposed that he used to work with scribe of the document namely Haji Ghulam Rasool. He identified the handwriting of the said Ghulam Rasool. In cross-examination, he submitted that he has brought the register of Haji Ghulam Rasool as that was not in his custody. PW-4, Sultan Jan deposed that initially he was tenant of Abdul Ghani and about 19/20 years ago, Abdul Ghani and Rais Phelwan came to him where Abdul Ghani stated that he has sold the properly to Rais Phelwan. He further deposed that he used to pay lease money as a tenant to Rais Phelwan who is in possession of the property. In cross-examination, he was unable to mention the number/description of the properly owned by Abdul Ghani. He denied the suggestion that he used to pay the lease money to the defendants till last and that he was ejected from the suit property by the defendants. PW-5, Rais Phelwan white appealing as his own witness deposed that he purchased the suit property from Abdul Ghabni for a consideration of Rs. 46,5000/- out of which Rs.40,000/- were paid, possession was taken over and agreement Exh. P.1 and receipt Exh. P-2 was executed in his favour. He further deposed that after the death of Abdul Ghani, he approached the defendants (legal heirs of the deceased), who initially accepted the agreement to sell and promise to mutate the property in his name but there-after mutation was not got entered and suit was filed. In cross-examination, he stated that he is illiterate and cannot recognize the agreement or receipt. He stated that the amount of Rs.40,000/- was paid at the arhat shop of Ghulam Muhammad and the bargain was reduced into writing at Khanpur, Kuchcry which were written by Haji Ghulam Rasool. In cross-examination, he could not tell that what was the denomination of the stamp paper. He also deposed that no time frame was given as it was verbally settled. He further stated that when the payment of Rs.40,000/- was made on the same day the agreement to sell was executed. He denied the suggestion that neither any agreement of sell was executed nor any payment was made to the said Abdul Ghani. He also denied the suggestion that Exh, P-1 and P-2 are forged and fictitious document. In rebuttal DW-1, Muhammad Aktar, DW-2 Liaquat son of Bashir Ahmad and DW-3 Haqiqat Ali and the present Respondent No. 2 (Defendant No. 2) appeared on behalf of the defendants. All these witnesses categorically denied the execution of the alleged agreement to sell and submitted that the suit property was mortgaged with Agriculture Bank since 1986 and as such there was no occasion to sell the property.

8. It was prime duty of the plaintiff/predecessor of the present petitioner to prove the execution of the agreement to sell for a consideration but no witness had been produced by the petitioner/plaintiff for this purpose. PW-1 categorically admitted in cross-examination that only agreement to sell Exh.P-1 and Exh.P-2 receipt were written in his presence. He admitted that no payment was made in his presence which is contradictory to the statement made by PW.5. Perusal of the agreement to sell Exh.P-1 reveals that, it has not been signed by Rais Phelwan, the predecessor of the present petitioner and in view of the Section 2(e) of the Contract Act, 1872, this document does not fall within the definition of agreement which is reproduced below:--

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

and since Exh. P-1 was not signed by the alleged purchaser i.e. Rais Phelwan, therefore, it cannot be termed as an agreement and was not enforceable in view of the law laid down in the case reported as Mst. Gulshan Hamid Versus Kh. Abdul Rehman and others (2010 SCMR 334). The relevant portion of the said judgment reads as under:

"As a sequel to the above discussion, we hold that the unilateral agreement not signed by the respondents was not mutually enforceable".

Further more there is no specific description of the property which was the alleged subject matter of the suit. There is yet another aspect that without establishing that the consideration amount is paid no document could be considered as an agreement. The contentions of the learned counsel for the petitioner that since the findings of the appellate Court on Issues No. 1 and 2 whereby the appellate Court has reversed the findings of the trial Court and held that the agreement to sell Exh. P-1 and receipt Exh. P-2 were duly executed has not been assailed by filing in cross objections by the respondents/defendants, therefore, they cannot attack the findings on Issues No. 1 and 2 in the present revision petition, are not acceptable as it has been held in the case reported as Ali Bahadur and others Versus Nazir Begum and others (PLD 2005 Lahore 218) that:--

"However, if the decree-holder, who is the beneficiary of the decree, is aggrieved of the findings of the Court below on anyone or more issues going against him, but is satisfied with the final verdict of the decree being in his favour. As the respondent in the appeal, can support the judgment and decree, but without filing any cross-appeal or cross-objections can verbally request and pray to the Court to reverse the findings on the issue/issues going against him at the trial stage and to award him decree on the basis of such reversed findings as well".

9. Accordingly, the findings of the Additional District Judge, Khanpur on Issues No. 1 & 2 are also not sustainable in the eye of law and by invoking the revisional jurisdiction of this Court, the findings of Additional District Judge, Khanpur on Issues No. 1 & 2 are versed and those of civil Court are upheld.

10. In view of the above discussion, this revision petition is without any force and the same is hereby dismissed.

(R.A.) Petition dismissed

**PLJ 2014 Lahore 126**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**Syed RIAZ-UL-HASSAN--Appellant**

**versus**

**MUHAMMAD SALEEM, PROPRIETOR ADNAN CORPORATION etc.--Respondents**

R.F.A. No. 182 of 2004, decided on 10.9.2013.

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

----O. XXX, R. 10 & O. XXXVII, R. 2--Suit for recovery--Cheque was dishonoured that signature of appellant did not match--Original plaintiff could not be substituted by new one and the act of trial Court does not commensurate--Bearer cheque in name of corporation and not in name of plaintiff--Prime duty of plaintiff to establish that cheque was issued for fulfillment of any obligation as issuance of cheque was denied--Validity--Signatures were different from those available with bank, then burden to prove execution of cheque in favour of plaintiff and any consideration for issuance of cheque heavily lies with plaintiff which onus could not be discharged by plaintiff and execution of cheque could not be proved by plaintiff beyond reasonable doubt, when there is no allegation in plaint that appellant had put his false signatures on cheque knowingly just to deceive plaintiff and that he is entitled to decree as prayed for--As cheque was not issued in name of plaintiff and admittedly, it was a bearer cheque issued in name of corporation, therefore, suit was not maintainable. [Pp. 131 & 132] A, B & C

**Limitation Act, 1908 (10 of 1908)--**

----S. 22--Limitation for filing of suit is to be reckoned from date when plaintiff was substituted or added--No specific evidence was produced--Validity--Question of limitation is a mixed question of law and fact, therefore, High Court is under legal obligation to determine maintainability of the suit whenever any such objection is raised--Limitation for filing of the suit for recovery of amount on basis of cheque was three years commencing from date of refusal of its encashment of bank--Suit in view of Section 22 of Limitation Act, was barred by time by one year 6 months and 22 days and was liable to be dismissed. [P. 132] C & D

Mr. Muhammad Aslam Khan Dhukkar, Advocate for Appellant.

Mr. Zafar Iqbal Awan, Advocate for Respondents.

Date of hearing: 10.9.2013

**Judgment**

Through this Regular First Appeal, the appellant Syed Riaz-ul-Hassan has called in question the legality of judgment and decree dated 02.10.2004 passed by learned Additional District Judge, Sadiqabad whereby the suit of the respondent-plaintiff under Order XXXVII, Rule 2, C.P.C. for recovery of Rs. 1,61,850/- was decreed with costs.

2. Brief facts of the case are that respondent Muhammad Saleem, Proprietor Adnan Corporation filed a suit under Order XXXVII, Rule 2, C.P.C. for recovery of an amount of Rs. 1,61,850/- from the appellant alleging that the appellant purchased pesticides from the plaintiff and in order to satisfy the price of the pesticides, the appellant issued a cheque of the said amount of his Account No. 1741 being maintained in Allied Bank of Pakistan Ltd. Main Bazaar Sadiqabad which was dishonoured on its presentation before the bank on 01.12.1997 on the ground that the signatures of the appellant did not match with those available with the bank. When contacted by the plaintiff, the appellant refused to pay the said amount. Hence the suit was filed.

3. The appellant contested the suit by filing written statement. He averred that he neither purchased any pesticides from the plaintiff nor issued the disputed cheque and the cheque was result of fraud and forgery. Keeping in view divergent pleadings of the parties, following issues were struck down by the trial Court:

"ISSUES

1. Whether the cheque in dispute is forged document based on fraud? OPD.

2. Whether the suit is time barred? OPD.

3. Whether the plaintiff is entitled to the decree as prayed for in the plaint? OPD.

4. Whether the suit is not competent in view of preliminary Objections No. 8 and 9 of the written statement? OPD.

5. Relief."

4. After recording oral as well as documentary evidence of the parties, learned trial Court decreed the suit of the respondent with costs vide judgment and decree dated 02.10.2004 which is impugned through the instant RFA.

5. Learned counsel for the appellant has argued the case on legal and factual aspects. He submits that the suit of the plaintiff was not maintainable under the provisions of Negotiable Instruments Act as well as Under Section 69(2) of Partnership Act. He avers that no cheque was ever issued to the present respondent/plaintiff as allegedly the disputed cheque (Exh.P1) was issued in the name of Adnan Corporation. He states that the suit was initially filed by Adnan Corporation and when the written statement was filed raising legal as well as factual objections, an application for amendment of the suit was made by the respondent-plaintiff and the original plaintiff was substituted by the present respondent Muhammad Saleem. Learned counsel asserts that the original plaintiff could not be substituted by a new one and the said act of the trial Court does not commensurate with the provisions of Order XXX, Rule 10, C.P.C. In support of his assertions, learned counsel for the appellant has relied upon the law laid down in case cited as 2009 CLD 163.

6. Conversely, learned counsel for the respondent has controverted the arguments raised by learned counsel for the appellant and fully supported the impugned judgment and decree. He states that the impugned judgment and decree is in accordance with law. He avers that the appellant was liable to pay the amount

mentioned in the disputed cheque and that the respondent cannot be non-suited on the basis of mere technicalities.

7. I have heard the arguments put forth by both sides and also perused the record made available before me.

8. My issue-wise findings are given below:

Issues No. 1 & 3

9. Since Issues No. 1 & 3 are inter-connected, therefore, they are being decided together. Primarily, it was incumbent upon the respondent/plaintiff (hereinafter referred to as plaintiff) to prove his case by discharging the onus of Issue No. 3. To prove Issue No. 1, the plaintiff produced as many as four witnesses, i.e. Muhammad Aslam, an Officer of Allied Bank as PW-1, Muhammad Nusrat as PW-3, Muhammad Arshad as PW-4 whereas he himself appeared as PW-2.

10. PW-1 Muhammad Aslam is officer of Allied Bank of which the appellant/defendant was the account holder. He deposed that the disputed cheque was dishonoured on account of difference in signature of the executant. In cross-examination, he stated that when there is a difference of signature, the bank may refuse the encashment of the cheque. He, however, could not tell who signed at the back of the cheque.

11. The plaintiff himself appeared as PW-2. He deposed that he as well as the defendant deal in pesticides and due to this reasons, they have a business relationship with each other; that about 5¬ years ago, the defendant took pesticides of which the payment of Rs. 161,850/- was promised to be made in the November, 1997; that for fulfillment of this obligation, the defendant issued a cheque (Exh.P1) in the presence of Nusrat and Muhammad Arshad; that defendant stated at that time that he did not have a balance in his account and the plaintiff may get encashed the cheque after 12/14 days. When after 12/14 days, the cheque was presented before the Allied Bank for its encashment, the same was dishonoured. In cross-examination, the plaintiff admitted that Adnan Corporation is not a registered firm. He denied the suggestion that he is not the owner of Adnan Corporation. He admitted that on account of business transaction, he used to maintain a register for transactions, however, if any amount is given to someone, the same is not entered in the said register. Then volunteered, they enter the transactions in their register; that he did not enter the transaction of the defendant in the said register. Volunteered that regarding neighbourhood shopkeepers, the transactions are not entered in the register. He denied the suggestion that the defendant has no shop under the name and style of Sada Hussain. He further denied that he has no business relationship with the defendant. He admitted that the witnesses above referred are not marginal witnesses of any writing. He further deposed that there is no witness of sale of the pesticides to the appellant/defendant. He further admitted that he has not mentioned the details of the pesticides in the plaint. At the end, he denied the suggestion that the disputed cheque was not issued by the defendant and the signature on the said cheque are forged and fictitious. He admitted that the cheque was not issued in his name. Volunteered that it was issued in the name of the shop. However, he stated that the defendant malafidely put the false signature on the cheque.

12. PW-3 Muhammad Nusrat deposed that he has a business relationship with the plaintiff and about 5« years ago, he went to Adnan Corporation for receiving his payment of cotton given to the plaintiff; that the plaintiff stated that he has no money and that he has to receive some amount from the defendant and for that reason, he alongwith the plaintiff went to the shop of the defendant where the defendant Riaz-ul-Hassan opened his register and admitted the liability of Rs. 161,000/62,000/- and issued the disputed cheque of Rs. 161,000/62,000/-. In cross-examination, he admitted that he has no business relationship with the defendant. Then volunteered that he used to take pesticides from defendant and the plaintiff. He stated that the name of the shop of the defendant was Sada Hussain. He could not tell the name of the shopkeepers in the surroundings of the shop of the defendant. PW-3 further stated that he used to take pesticides from the plaintiff on credit basis. He admitted that whenever cotton was sold to the plaintiff, he used to issue a receipt. He admitted that the plaintiff did not check his account/khata in his presence regarding liability of the defendant as to how much amount was to be paid by the defendant to him. Volunteered that his khata was checked by the plaintiff himself and the plaintiff had to pay Rs. 161,000/62,000/- to him. Then stated that Rs. 1,15,000/- were due against the plaintiff. He further stated that he took Rs. 50,000/- on that day from the plaintiff. He denied the suggestion that the defendant neither issued any cheque to the plaintiff nor the cheque was signed by the defendant in his presence. He denied the suggestion that the defendant did not do the business of pesticides.

13. Muhammad Arshad appeared as PW-4 and deposed that the defendant gave cheque of Rs. 161,000/62,0000/- to the plaintiff after its due completion and at that time, the defendant stated that he has no balance in his account and the cheque may be got enchased after 10/15 days. In cross-examination, he submitted that the defendant purchased the pesticides from the plaintiff in his presence. He further stated that he has no relationship with the defendant and on account of business transaction, he used to come over there; that he had business transactions with the plaintiff. He, however, denied the suggestion that the defendant was not liable to make any payment to the plaintiff and the disputed cheque is forged one and the signatures on the said cheque were fictitiously and falsely put.

14. Thereafter, the defendant Riaz-ul-Hassan appeared himself as DW-1 and deposed that he has been doing business of transport since 1993 to 2000 when he returned from Saudi Arabia and that he used to run his bus from Sadiqabad to Faisalabad. He categorically stated that he did not have any business of pesticides nor it had any business relationship with the plaintiff; that the disputed cheque was forged and his signatures on the cheque were also fictitious; that he had neither received any amount nor any cheque was issued to the plaintiff. In cross-examination, he denied the suggestion that from 1995 to 2000, he used to do the business of pesticides. He denied the suggestion that after 2000, there existed his shop and he used to open it occasionally. He denied the suggestion that Exh.P1, i.e. disputed cheque, was fraudulently executed by him by putting false signatures. He also denied the suggestion that the plaintiff was entitled to recover from him Rs. 161,850/-.

15. DW-2 Muhammad Jafar Shah supported the version of the defendant by stating that the defendant remained in Saudi Arabia about 7/11 years and after his

return therefrom, he used to ply his bus; that he never remained associated with the business of pesticides nor had any business relationship with the plaintiff. In cross-examination, he denied the suggestion that the defendant used to do the business of pesticides in Grain Market, Sadiqabad.

16. In rebuttal, PW-5 Hameed-ud-Din, officer of the Allied Bank, Main Bazar, Sadiqabad was produced as a witness of the plaintiff who deposed that Account No. 1741 was in the name of Syed Riaz-ul-Hassan son of Muhammad Hussain Shah and in the column of signature, name of Riaz Shahid is written. He deposed that he had no record regarding the loss of cheque nor the loss of cheque book was ever reported to the bank. In cross-examination, he stated that it is necessary that whenever the cheque or cheque book is lost, the matter is to be reported to the bank, however, he stated that he did not know any rule in this regard. He denied the suggestion that there is no such rule.

17. From the perusal of above evidence, it comes on the surface that the disputed cheque was not issued in the name of the plaintiff rather it was issued in the name of Adnan Corporation. It is a bearer cheque in the name of Adnan Corporation and not in the name of the plaintiff. The prime duty of the plaintiff was to establish that the said cheque was issued for the fulfillment of any obligation as the issuance of the said cheque was categorically denied by the defendant not only by filing written statement but also during the course of evidence. The plaintiff has not been able to establish that any sort of pesticides were given to the defendants and for its consideration, the said cheque was issued. The evidence produced by the plaintiff is shaky and appears to be manoeuvred. There is material contraction in the statement of the plaintiff and PW-4 regarding presence of the witnesses at the time when the pesticides were allegedly handed over by the plaintiff to the defendant. The plaintiff while appearing as his own witness did not refer to any document or register of delivery of the pesticides to the appellant-defendant on credit and stated that there was no one present when the pesticides were delivered to the defendant whereas the PW-4 Muhammad Arshad contradicted the stance of the plaintiff by deposing that when the pesticides were given to the defendant, he was present on the spot. In addition, it does not appeal to a prudent mind, particularly in the prevailing circumstances, that the pesticides were given to the appellant-defendant but no such entry was made in any register or khata. Usually, whenever any business transaction is made, such entries are recorded in one sort or the other in a register or kahta etc. But in the presence case, no such khata or register was prepared or produced in evidence.

18. Furthermore, when the signatures of the executant were denied and admittedly, the signatures were different from those available with the bank, then the burden to prove the execution of cheque in favour of the plaintiff by the defendant and any consideration for issuance of the cheque heavily lies with the plaintiff which onus could not be discharged by the plaintiff and the execution of the cheque by the defendant could not be proved by the plaintiff beyond reasonable doubt, particularly when there is no allegation in the plaint that the appellant-defendant has put his false signatures on the cheque knowingly just to deceive the plaintiff and that he is entitled to the decree as prayed for.

19. In view of the above, both the Issues No. 1 and 3 are decided in favour of the defendant and against the plaintiff.

Issue No. 2

20. This issue pertains to the point of limitation. The onus to prove it was placed upon the defendant.

21. From the perusal of the record, it is evident that the suit was originally filed by Adnan Corporation through its proprietor Muhammad Saleem on 13.11.2000. Thereafter, an application for amendment of the plaint was filed on 28.11.2001 which was conceded by the defendant on 22.06.2002 and accordingly, amended plaint was filed on the same day. By allowing the said amendment, the original plaintiff Adnan Corporation was replaced with Muhammad Saleem, the present respondent. Under Section 22 of the Limitation Act, 1908, limitation for filing of the suit is to be reckoned from the date when the plaintiff or defendant was substituted or added. Section 22 of the Limitation Act is reproduced below:

"22. Effect of substituting or adding new plaintiff or defendant.--(1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

22. Though no specific evidence has been produced by the defendant on this issue but as the question of limitation is a mixed question of law and fact, therefore, this Court is under a legal obligation to determine the maintainability of the suit whenever any such objection is raised. The limitation for filing of the suit for recovery of the amount on the basis of the cheque was three years commencing from the date of refusal of its encashment by the bank. Respondent Muhammad Saleem was substituted as plaintiff on 22.06.2002, as such, the suit of the plaintiff will be deemed to have been filed on 22.06.2002 when the amended plaint was filed whereas the cheque in dispute was refused on 01.12.1997, as such, the suit in view of Section 22 of the Limitation Act was barred by time by one year 6 months and 22 days and was liable to be dismissed on this score alone. In this view of the matter, this issue is also decided in favour of the appellant-defendant and against the respondent-plaintiff.

Issue No. 4

23. In view of my findings on Issues No. 1 and 3, as the cheque was not issued in the name of the present plaintiff and admittedly, it was a bearer cheque issued in the name of Adnan Corporation, therefore, the suit was not maintainable.

24. In view of the above discussion, the judgment and decree passed by the trial Court is against the law and fact, as such, it is not sustainable in the eye of law. Resultantly, the instant RFA is allowed, the impugned judgment and decree dated 02.10.2004 is set aside and the suit of the plaintiff is dismissed.

(R.A.) R.F.A. allowed.

**PLJ 2014 Lahore 136**

**[Multan Bench Multan]**

**Present: Atir Mahmood, J.**

**MUHAMMAD AHSAN--Petitioner**

**versus**

**MEMBER BOARD OF REVENUE etc.--Respondents**

W.P. No. 10197 of 2011, decided on 7.11.2013.

**Land Revenue Act, 1967--**

----S. 161--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Creation of additional patti--Applications for appointment of lambardar were called--DOR was directed for completion of formalities for creation of additional patti--Challenge to--Competent authority to create additional patti--No locus standi to file appeal before revenue authority or to file writ petition--Notification--No retrospective effect--Question of--Whether revenue authority was justified in creation of additional patti--Validity--EDOR was competent authority for creation of additional patti/additional lambardari and as such revenue department rightly passed the impugned order--Notification had no restrospective effect as matter was already decided by EDOR who was competent authority and mere pendency of appeal u/S. 161 of Land Revenue Act, before M.B.R. did not create any bar having its retrospective effect--Petition was dismissed. [Pp. 138 & 139] A & B

1991 SCMR 1504, rel.

Mr. Muhammad Younis Sheikh, Advocate for Petitioner.

Ch. Khalid Mehmood Arain, Advocate and Rana Muhammad Hussain, AAG for Respondents.

Date of hearing: 7.11.2013

**Judgment**

Through this writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, the petitioner has assailed the orders dated 07.07.2011 and 22.02.2011 passed by the Member, Board of Revenue, Punjab Lahore, whereby the order dated 11.02.2009 passed by the Executive District Officer (Revenue), Khanewal was upheld.

2. The brief facts of the case are that after the death of one Muhammad Bakhsh on 06.06.2005 who was lambardar of Mouza Batian, the applications were called by the Tehsildar, Kabirwala for the appointment of lambardar and accordingly one Khadim Hussain, Respondent No. 3 was recommended for the same post by the Tehsildar but the District Officer (Revenue), Khanewal appointed one Muhammad Afzal as lambardar of the said Mouza. An appeal was preferred against the appointment of said Muhammad Afzal before the Executive District Officer

(Revenue), Khanewal which was rejected on 14.06.2006 and then a revision petition was filed before the Board of Revenue, Punjab Lahore and out of Court a settlement was arrived in between the parties with the intervention of the inhabitants of the locality to the effect that an application will be filed for creation of additional patti and Muhammad Afzal will be having no objection if Respondent No. 3, Khadim Hussain is appointed as a lambardar of the said additional patti.

3. On the application submitted by Respondent No. 3, proceedings were carried out by the Revenue Department and the case was recommended for creation of additional patti by the District Officer (Revenue), Khanewal. There-after, Respondent No. 2 after receiving the recommendation of field staff etc. summoned the concerned persons to appear before the Executive District Officer (Revenue) but no one entered appearance before the Executive District Officer (Revenue), Khanewal except one Muhammad Muslim and on his behalf, it was asserted that the inhabitants of the Mouza are against the creation of additional patti. This contention of the counsel for the said Muhammad Muslim was rejected by Respondent No. 2 and vide order dated 11.02.2009, the District Officer (Revenue), Khanewal was directed for completion of the formalities for creation of the said additional patti. This order was assailed in appeal by the present petitioner as well as the said Muhammad Muslim before the Senior Member, Board of Revenue, Punjab Lahore. This appeal was filed on 23.02.2009 which was rejected vide order dated 22.02.2011 by Respondent No. 1 and a review petition also met the same fate vide order dated 07.07.2011, hence this writ petition.

4. Learned counsel for the petitioner mainly contended that there was a notification dated 20.01.2011 by which a ban was imposed on the creation of new/azadi patties in revenue estates and subsequent creation of new lambardar posts and the effect of this notification was also extended to the pending cases. Learned counsel for the petitioner submitted that the entire village was against the creation of additional patti and as such the impugned orders are liable to be set-aside. He has relied upon the judgment reported as Muhammad Nawaz Vs. Muhammad Ali and another (2004 CLC 681).

5. On the other hand, learned counsel appearing on behalf of Respondent No. 3 as well as learned AAG has vehemently controverted the submissions made by the learned counsel for the petitioner by asserting that the Executive District Officer (Revenue), Khanewal was the competent authority to create the additional patti in accordance with the needs of the area. He has relied upon the case reported as Shaukat Ali and another Versus Muhammad Shafi and 2 others (1991 SCMR 1504). Further submitted that the petitioner never appeared before the authority i.e. Executive District Officer (Revenue), Khanewal to contest the creation of additional patti and as such he has no locus standi to file the appeal before the revenue authority or to file this writ petition. Reliance has been placed on the cases reported as Gul Muhammad etc. Versus SHO etc. (PLJ 2009 Lahore 952 (DB) and

Hafiz Hamdullah Versus Saifullah Khan and others (PLD 2007 Supreme Court 52). It has also been asserted that the notification issued by the Secretary (Colonies), Board of Revenue Punjab, Lahore on 20.01.2011 had no retrospective effect as the matter was decided by the Executive District Officer (Revenue), Khanewal vide order dated 11.02.2009 much before the imposition of ban which attained the finality after the order dated 22.02.2011 passed by the Member (Judicial-III), Board of Revenue Punjab, Lahore.

6. In view of the submissions made by the learned counsel for the parties as well as perusal of the record, the question which are to be answered by this Court are as to whether the revenue authority was justified in creation of the additional patti of the Mouza and as to whether creation of additional patti was illegal in view of the ban imposed by the Secretary (Colonies), Board of Revenue Punjab, Lahore vide Notification No. 2011/45-C.V. dated 20.01.2011. There is no denial to the fact that Respondent No. 2, Executive District Officer (Revenue), Khanewal before passing the impugned order heard the parties at length and perused the reports of the field staff, Executive District Officer (Revenue), Kabirwala and then directed the revenue staff to proceed with the matter for completion of record for the two "patties". The present petitioner never appeared before Respondent No. 2. Though an objection was raised by the residents of the locality in the shape of a joint affidavit submitted before the Tehsildar, Kabirwala but still the revenue authorities did not exceed to their objection and recommended for the creation of additional patti. I am of the considered opinion that Respondent No. 2 was the competent authority for the creation of additional patti/additional lambardari and as such Respondents Nos. 1 and 2 rightly passed the impugned orders. The guidance is sought from the case reported as Shaukat Ali and another Versus Muhammad Shafi and 2 others (1991 SCMR 1504). The relevant portion of the said judgment reads as under:

"The creation of additional Lambardari is also a question of practical need and other requirements of which the authorities concerned are the best judges. In this case they having shown full justification even on the touchstone of the guidelines laid down in the rules; the High Court rightly refused to give relief to the petitioners in its writ jurisdiction. For all these reasons, leave to appeal is refused".

7. The next question as to the legality of the creation of additional patti after the ban imposed by the Secretary (Colonies), Board of Punjab, Lahore vide notification dated 20.01.2011. It is held that the said notification has no retrospective effect as the matter was already decided by the Executive District Officer (Revenue), Khanewal, Respondent No. 2, who was the competent authority and mere pendency of an appeal under Section 161 of the Land Revenue Act, 1967 before the Member, Board of Revenue, Punjab Lahore did not create any bar having its retrospective effect.

8. For what has been discussed above, the petitioner has not been able to make out a case of interference by this Court in its extraordinary constitutional jurisdiction against the concurrent findings of law and facts and this petition being devoid of any force is hereby dismissed.

(R.A.) Petition dismissed

**PLJ 2014 Lahore 139**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**GHULAM HUSSAIN--Appellant**

**versus**

**MUHAMMAD ASLAM--Respondent**

R.F.A. No. 54 of 2008, heard on 9.9.2013.

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

----O. XXXVII, Rr. 2 & 3--Suit for recovery was decreed--Challenge to--Post dated cheque was issued for fulfillment of his liability--Objection of appellant that suit was time barred because liability of outstanding amount was regarding the year 2000 and suit was filed in the year 2006--Question of--Whether cheque was validity given for its encashment and entitled for decree--Validity--It is settled principle of law that if any liability is admitted or acknowledge at any subsequent stage the date of limitation starts running from that particular acknowledgement while issuing cheque, appellant accepted liability and as such as the period of limitation does not come in the way of plaintiff--Appeal was dismissed. [P. 143] A

Mr. Mumtaz Mustafa, Advocate for Appellant.

Mian Muhammad Suleman Joyia, Advocate for Respondent.

Date of hearing: 9.9.2013

**Judgment**

Through this Regular First Appeal, the appellant Ghulam Husssain has impugned the judgment and decree dated 19.04.2008 passed by learned Additional District Judge, Rahim Yar Khan whereby the suit of the respondent-plaintiff under Order XXXVII C.P.C. for recovery of Rs. 1,00,000/- was decreed with costs.

2. Brief facts of the case are that the respondent Muhammad Aslam filed a suit under Order XXXVII C.P.C. for recovery of an amount of Rs. 1,00,000/- from the appellant alleging that the appellant was liable to pay Rs. 100,000/-; that in order to discharge his liability, the appellant issued a Cheque No. 12625847 dated 10.07.2006 of his Account No. 1466 being maintained in UBL Shahi Road, Rahim Yar Khan; that the cheque was dishonoured when presented before the bank for encashment and Rs. 200/- were also charged from the plaintiff; that when contacted by the plaintiff, the petitioner-defendant refused to pay the amount due against him. Hence this suit was filed.

3. The petitioner-defendant contested the suit by filing written statement. Out of divergent pleadings of the parties, the following issues were framed.

"ISSUES

1. Whether the plaintiff is entitled to recover money amounting to Rs. 1,00,000/- from the defendant on the basis of Cheque No. 12625847 dated 10.07.2007 as prayed for? OPP.

2. Whether the plaintiff has got no cause of action to file the present suit?OPD.

3. Whether the plaintiff filed the instant suit on the basis of fraudulent and fabricated facts, while the disputed cheque was lost from the defendant (as blank) and in this respect, the defendant got entered Rapat No. 37 dated 24.10.2000 at P/S Abadpur, due to which impugned cheque is out-dated and is not maintainable in its present form and is liable to be rejected?OPD.

4. Whether the plaintiff has come to the Court with unclean hands?OPD.

5. Whether the suit is time barred?OPD.

6. Whether the plaintiff has filed this false and frivolous suit, hence, the defendant is entitled to get special costs of Rs. 10,000/-?OPD.

7. Relief."

4. After recording oral as well as documentary evidence of the parties, learned trial Court proceeded to decree the suit vide judgment and decree dated 19.04.2008. Hence this RFA.

5. Learned counsel for the appellant inter alia contends that joint findings of learned trial Court on Issues No. 1 & 3 are against settled principles of dispensation of justice; that the plaintiff during his cross-examination states that he was given the disputed cheuqe on 11.01.2006 on account of amount pertaining to outstanding business money relating to year 2000 whereas the cheque from the face of it appears to have been executed on 10.07.2006 which fact was altogether ignored by learned trial Court; that the suit of the respondent was badly barred by time as it was filed on 22.07.2006 for an amount pertaining to the year 2000; that the cheque in question was forged one; that the appellant denies the execution of cheque; that the appellant did not sign the cheque; that the signature over the cheque did not tally with the signatures of the appellant available with the bank; that the cheque pertains to business account of Ahmad Bilal and Company wherein the plaintiff was employee who misappropriated the cheque and filled in the amount at his own to used it against the appellant; that the version of the appellant has been altogether ignored; that the learned trial Court has failed to appreciate the evidence in its true spirit and picked up the inconsequential portion of evidence without reference to the context; that the impugned judgment and decree suffers from material irregularities and misreading and non-reading of evidence, therefore, it cannot sustain in the eye of law. Learned counsel prays that this RFA be allowed and the impugned judgment and decree be set aside.

6. On the other hand, learned counsel for the respondent has supported the impugned judgment by asserting that the learned trial Court rightly decreed the suit by appreciating the evidence produced by the parties; that onus to prove on Issues No. 2 to 7 was upon the appellant/defendant, who failed to discharge the same by production of any cogent and reliable evidence.

7. After perusal of the record and hearing the arguments, the point for consideration before this Court is whether the cheque in dispute was validly given to the respondent/plaintiff for its encashment and the respondent was entitled for the decree as prayed for.

8. As per contents of the plaint, the appellant issued the disputed cheque for the fulfillment of his liability towards the respondent and while filing the written statement the appellant did not deny the signatures on the disputed cheque but stated that the cheque was misplaced and a Rapt No. 37 dated 14.10.2000 was got registered with the local police. In the preliminary Objection No. 5, the appellant stated that he is not liable to make payment of any amount to the plaintiff and the disputed cheque is without consideration.

9. The respondent appeared himself as PW-1 and deposed that the defendant issued the Cheque No. 12625847 dated 10.07.2006 of UBL Rahimyarkhan for the fulfillment of his liability and when the said cheque Ex. P1 was presented for encashment, it was dishonoured on 10.07.2006. Ex. P2 is the memorandum issued by the bank wherein it has been written that his account was closed. In cross-examination the respondent stated that the said cheque was given on 11.01.2006 and the liability for the said payment was for the year 2000. In cross-examination he categorically denied the suggestion that Ex. P1 was prepared by him by committing fraud and forgery. It has not been suggested to the PW-1 that the signatures of the appellant on the cheque were forged. PW-2 Muhammad Sadiq son of Taj Muhammad and PW-3 Maqsood Ahmad son of Ghulam Muhammad supported the contentions of the respondent and they both categorically stated that the disputed cheque was filled-in by the appellant/defendant himself, who signed the same in their presence. Nothing could be brought on record through cross-examination which could favour the present appellant. PW-4 Ihsan Qadar, the Area Operation Manager of UBL certified the cheque Ex.P1 being of his branch of Railway Road, Rahimyarkhan and stated that the bank account was closed. In cross-examination PW-4 stated that the signatures of Ghulam Hassan on Ex. P1 are different from the signatures on the specimen card retained by the bank. He stated that the defendant has signed the specimen signatures by writing ( ) whereas on Ex. P1, the signatures are different. In rebuttal the present appellant appeared as DW-1 and for the first time deposed that he did not know the plaintiff. He also deposed that the cheque Ex. P1 was misplaced on 25.06.2000 when he came to Rahimyarkhan. He further deposed that on 14.10.2000 a Rapt No. 37 was got entered with Police Station Abadpur, Rahimyarkhan. He further stated that his signatures on Ex. P1 are forged and fictitious. In cross-examination he submitted that he sworn an affidavit on 26.06.2000 for registration of the rapt in the police. He further stated that his rapt was recorded in the police station on the telephone of one Sain Hassan Makhdoom to whom he does not want to produce in his evidence. In my view the appellant/defendant made a departure from the pleadings i.e. written statement by stating that he did not know the plaintiff and that his signatures on the disputed cheque are forged and fictitious. It is un- believable that a person, who is not known to the other how he can put the forge signatures on a document just identical to the originals. Though the appellant denied the execution of his signatures on the disputed cheque but still no effort was made to get the comparison of his signatures with disputed as well as with admitted signatures through examination by a hand-writing expert. I, myself, have examined and compared the signatures of the appellant on the disputed cheque with the signatures of the appellant put on the written statement. In my opinion both the signatures are just identical.

10. As regards the objection raised by the learned counsel for the appellant that the cheque was stated to be given on 11.1.2006 whereas the date for presentation before the bank was written to be 11.7.2006, is no consequence because from the evidence of the respondent/plaintiff, it is established beyond any doubt that the appellant issued the post dated cheque on 11.1.2006 and handed over to the respondent for fulfillment of his liability which pertains to the year 2000. Accordingly, the objection of the appellant that the suit was time barred because the alleged liability of outstanding amount was regarding the year 2000 and the suit was filed in the year 2006 is immaterial. It is settled principle of law that if any liability is admitted or acknowledged at any subsequent stage the date of limitation starts running from that particular acknowledgement and in my considered opinion while issuing the cheque dated 10.7.2006, the appellant accepted the liability and as such the period of limitation does not come in the way of the respondent/plaintiff.

11. I am of the considered opinion that the respondent established his claim against the present appellant through production of convincing and cogent evidence whereas the appellant miserably failed to controvert the respondent and as such the findings of the learned trial Court do not suffer from any illegality or material irregularity and this appeal being devoid of any force is dismissed.

(R.A.) Appeal dismissed

**PLJ 2014 Lahore 193**
**[Bahawalpur Bench Bahawalpur]**
**Present: Atir Mahmood, J.**
**TALIB HUSSAIN--Petitioner**
**versus**
**ADDITIONAL DISTRICT JUDGE etc.--Respondents**

W.P. No. 3573 of 2013, heard on 9.10.2013.

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

----Art. 84--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Signature and thumb impressions be got compared with specimen signatures and thumb impressions--Application for comparison of thum-impressions in a suit for specific performance of an agreement to sell, dismissed--Validity--Signature and thumb impressions on alleged agreement are result of any sort of inducement, coercion, misrepresentation fraud forgery, rather it is case of denial--Court has power to get comparison of finger impressions in order to reach a just and fair conclusion--With passage of time, forensic science has progressed a lot and Courts in appropriate cases prefer to get assistance from experts of fields which not only help the Court to reach a fair conclusion but also to avoid complications and agony to litigants arising out of a wrong decision. [P. 195] A

**Finger Impressions--**

----Report of finger print--Undeniably, finger impressions of one person do not tally with those of any other person on earth and report of finger print experts is always helpful to Court to reach a fair conclusion. [P. 195] B

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

----Art. 84--Dispute regarding genuineness of thumb-impressions--Refusal to get the comparison of thumb impression and the signatures amounts to negation of justice--Signature and thumb impression of respondent be got compared with the specimen signature and thumb-impression from the handwriting and finger experts even at the cost of some delay--Reaching a fair conclusion is more and more necessary for soothing the litigants rather than to deliver a wrong decision hurriedly. [P. 195] C & D

Hafiz Abdul Hameed Bhatti, Advocate for Petitioner.
Mr. Muhammad Sabir Chishti, Advocate for Respondent No. 3.
Date of hearing: 9.10.2013

**Judgment**

Through this writ petition, the petitioner has challenged vires of judgment dated 04.06.2013 passed by learned Additional District Judge, Bahawalnagar who dismissed revision petition filed by the petitioner and upheld order dated 17.10.2012 passed by

learned Civil Judge, Bahawalnagar whereby application of petitioner for comparison of signature and thumb-impression of Respondent No. 3 in a suit for specific performance of an agreement to sell dated 19.06.2004 filed by the petitioner was dismissed.

2. Learned counsel for the petitioner inter alia contends that Respondent No. 3 has sold out the suit property to the petitioner after having received total consideration amount vide agreement to sell dated 19.06.2004 which is duly signed and thumb-impressed by Respondent No. 3 who has denied his signature and thumb-impressions in order to avoid to fulfill his obligations, therefore, it is appropriate that his signature and thumb-impressions be got compared with his specimen signature and thumb-impressions by concerned experts; that comparison of thumb-impressions of Respondent No. 3 is necessary to reach a fair conclusion; that there is no embargo on comparison of signature and thumb-impression under the law; that valuable rights of the petitioner are involved in the matter, therefore, this writ petition be allowed, the impugned judgment and order be set aside and the application of the petitioner for comparison of signature and thumb-impression of Respondent No. 3 be allowed.

3. On the other hand, learned counsel for Respondent No. 3 has vehemently opposed this writ petition and supported the impugned judgment and order. He has emphasized more on the point that the evidence of the parties has already been recorded and the case is fixed for final arguments, therefore, allowing application for comparison of signature and thumb-impressions of Respondent No. 3 at this stage will not only prolong the litigation but also cause prejudice to rights of Respondent No. 3. He prays that this writ petition be dismissed. He has averred that the suit of the petitioner is not maintainable in view of the law laid down in case cited as 2010 SCMR 334. He has placed reliance on the law laid down in case tilted "Muhammad Rizwan Qureshi vs. Shehnaz Akhtar (2010 YLR 3101)".

4. Arguments heard. Record perused.

5. Admittedly, evidence of the parties has already been recorded and the trial is near to completion. This is the only reason given by learned Courts below while declining request of the petitioner for comparison of signature and thumb-impression of Respondent No. 3. Perusal of record reveals that the petitioner produced disputed agreement to sell as Exh.P1, the evidentiary value of which is yet to be determined by the trial Court as per requirement of Article 79 of the Qanun-e-Shahadat Order, 1984 whenever it finally decides the lis pending before it. The respondent has denied the execution of disputed agreement to sell. It is not the case of the respondent that the signature and thumb-impression on the alleged agreement are result of any sort of inducement, coercion, misrepresentation, fraud or forgery, rather it is a case of straightaway denial. The Court under Article 84 of the Qanun-e-Shahadat Order, 1984

has ample powers to get comparison of finger impressions in order to reach a just and fair conclusion. It is observed that with the passage of time, forensic science has progressed a lot and the Courts in the appropriate cases prefer to get assistance from the experts of relevant fields which not only helps the Court to reach a fair conclusion but also to avoid complications and agony to the litigants arising out of a wrong decision.

6. Undeniably, finger impressions of one person do not tally with those of any other person on the earth and the report of finger print expert is always helpful to the Court to reach a fair conclusion. In case of any dispute regarding genuineness of thumb-impressions. Article 84 of the Qanun-e-Shahadat Order, 1984 is an enabling provision of law and in the present case, refusal to get the comparison of thumb-impression and the signatures amounts to negation of justice. Had there been assertion of the respondent that the thumb-impression of the respondent over the disputed document were result of inducement, coercion, misrepresentation, fraud or forgery, the matter would have been different but as the signature and thumb-impression have categorically been denied, the report of handwriting expert and finger print expert will help the Court to reach a right decision which is not going to cause any prejudice to the rights of the respondent-defendant as apprehended by his counsel. It is further observed that the report of finger print and handwriting experts are always open to objection by either side.

7. The whole case of the petitioner depends upon proving the agreement to sell dated 19.06.2004 by which the suit property has allegedly been sold out by Respondent No. 3 to the petitioner. When the petitioner alleges that thumb-impression and signature were put by Respondent No. 3 Muhammad Yaqoob on the alleged agreement to sell dated 19.06.2004, there will be no harm to any party rather it will be appropriate and imperative to reach a just and proper conclusion that signature and thumb-impression of Respondent No. 3 be got compared with the specimen signature and thumb-impression of Respondent No. 3 from the handwriting and finger experts even at the cost of some delay. In my considered view, reaching a fair conclusion is more and more necessary for soothing the litigants rather than to deliver a wrong decision hurriedly.

8. The concept of filling up lacunas, as alleged by learned counsel for the respondent is against Pakistani jurisprudence, the principles of Islam as well as the precedent law on Islamic principles which are being made applicable progressively to the proceedings before the Courts and other forums which are required to record/admit evidence, as held in the case titled "Zar Wali Shah vs. Yousaf Ali Shah and 9 others (1992 SCMR 1778)" .

9. As regards maintainability of the suit in view of the law laid down in case cited as 2010 SCMR 334, the respondent may agitate this objection before the trial Court where the suit is pending adjudication.

10. For the aforementioned reasons, I accept this writ petition and set aside judgment dated 04.06.2013 passed by learned Additional District Judge, Bahawalnagar and order dated 17.10.2012 passed by learned Civil Judge, Bahawalnagar. Resultantly, the application of the petitioner for comparison of signature and thumb-impression of alleged vendor/Respondent No. 3 stands allowed as prayed for. Since the suit is pending for the last more than six years, the trial Court is directed to decide the same expeditiously but within two months from date of receipt of certified copy of this order.

(R.A.) Petition accepted

**PLJ 2014 Lahore 196**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**Malik MUHAMMAD ASHRAF--Petitioner**

**versus**

**DISTRICT JUDGE etc.--Respondents**

W.P. No. 2909 of 2013/Bwp, heard on 9.10.2013.

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

----S. 115 & O. VII, R. 11--Civil revision--Rejection of plaint--Attestation of mutation--Factual controversy between parties which can only be settled by Civil Court after recording of evidence--Validity--Appellate Court while accepting the revision petition and rejecting the plaint of the petitioner has relied upon the order passed by A.C.R. as well as the proceedings initiated against the petitioner before Anti-Corruption Authorities--None of grounds were available to revisional Court to reject plaint of petitioner at the revisional stage. [Pp. 199 & 200] A & B

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

----O. VII, R. 11--Rejection of plaint--Allegation of fraud and forgery in getting attestation of mutation--Challenged through filing an appeal before D.D.O.R. which was dismissed--Challenge to--Validity--Petitioner has disclosed the cause of action in the plaint and respondent while filing the application under Order VII Rule 11, CPC have agitated the matter on basis of fraud and forgery and the revenue Courts are not competent to decide the complicated question of commission of fraud and forgery and that too without the allegation of connivance of the revenue staff--Civil Court being the Court of plenary jurisdiction has the lawful authority to proceed with the civil suit and as such the trial Court was legally justified to reject the application under Order VII Rule 11, CPC whereas the revisional Court has committed gross illegality and jurisdictional error in accepting the revision petition and rejecting the plaint of the petitioner. [P. 200] C

Mr. Muhammad Sultan Wattoo, Advocate for Petitioner.

Ch. Riaz Ahmad, Advocate for Respondents.

Date of hearing: 9.10.2013

**Judgment**

Through this writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, the petitioner has challenged the order dated 27.04.2013 passed by the learned District Judge, Bahawalpur, who accepted the revision petition filed by Respondent No. 7 and set-aside the order dated 07.03.2013 passed by the learned Civil Judge Ist. Class, Bahawalpur, whereby the application under Order VII Rule 11, CPC filed by Respondent No. 7 was dismissed.

2. Brief facts of the case are that the petitioner filed a suit for declaration on the grounds that he is owner in possession of the land measuring 28-Kanals 13-marlas, 546/3200 shares of total land/Khata 160-kanals, vide Mutation No. 820 dated 11.04.2008 situated in Chak No. 12/B.C. according to the Register of Record of

Rights for the year 2006-2007. The Defendants/Respondents No. 3 to 7 have no concern whatsoever with the said property and perpetual and mandatory injunction was also sought that the Defendants/Respondents No. 3 to 7 should be restrained forever from cancellation of the said mutation in any way and also be restrained from challenging revenue record forever but she with mala fide intention and inducement of her father and without any legal justification started litigation relating land of the petitioner, therefore, the petitioner was constrained to file a suit for declaration after unwarranted order of Additional Commissioner, Bahawalpur against Respondents No. 3 to 7 before the Civil Court, Bahawalpur. Respondents No. 3 to 7 appeared before the learned trial Court and submitted their respective written statements. During the pendency of the suit, Respondent No. 7 filed an application under Order VII Rule 11, CPC for rejection of the plaint, which was contested by the petitioner by filing written reply. After hearing the parties and perusing the law, the learned trial Court dismissed the said application filed by Respondent No. 7 vide its order dated 07.03.2013. Being aggrieved of the said order, Respondent No. 7 filed a civil revision before the learned District Judge, Bahawalpur who accepted the same and rejected the suit filed by the petitioner vide order dated 27.04.2013, hence this writ petition.

3. Learned counsel for the petitioners has contended that the impugned order dated 27.04.2013 passed by the learned District Judge, Bahawalpur is illegal, unwarranted and is liable to be set aside; that the learned District Judge, Bahawalpur while passing the impugned order has not applied his judicious mind; that application filed by Respondent No. 7 for rejection of the plaint was found by the learned trial Court as unwarranted; that the orders of the learned trial Court are at variance and need interference; that the order passed by the learned trial Court is well reasoned, which was passed after properly hearing the parties and perusing the law and facts; that neither Respondent No. 7 purchased the suit property nor she had such financial position to purchase the suit property; that there is factual controversy between the parties which can only be settled by the learned Civil Court after recording of evidence; therefore, the impugned order is liable to be set-aside. He has relied upon the judgments reported as Muhammad Sarwar Versus Ahmad Khan through L.Rs. and 2 others (2012 CLC 284) Muhammad Rahim Versus Malik Daud Khan and 6 others (2011 CLC 490), Nazeer Ahmad and others Versus Ghulam Mehdi and others (1988 SCMR 824) and Khushi Muhammad Versus Abdullah Shah (PLD 1964 W.P. (Rev.) 101.

4. On the other hand, learned counsel for Respondents No. 3 to 7 has vehemently opposed this petition and supported the impugned order. Learned counsel for Respondents No. 3 to 7 has contended that the impugned order is well reasoned and the learned District Judge has committed no illegality or irregularity in delivering the same, therefore, this writ petition is liable to be dismissal.

5. I have heard the learned counsel for the parties and have also gone through the available record.

6. From the perusal of application under Order VII Rule 11, CPC, filed by Respondent No. 7, it is revealed that the allegation of fraud and forgery has been levelled against the present petitioner in getting the attestation of Mutation No. 820 dated 11.4.2008, in his favour. The same objection has been taken in the written

statement earlier filed by Respondent No. 7 as Defendant No. 5. This mutation was challenged by Respondent No. 7 through filing an appeal before the Deputy District Officer (Revenue) Bahawalpur, which was dismissed by him vide order dated 11.4.2009 against which, a revision petition was filed before the Additional Commissioner (Revenue) Bahawalpur.

7. In the meanwhile the present suit, out of which this writ petition has arisen, was filed by the petitioner against the revenue authorities as well as against Respondent No. 7. During the pendency of the suit, Respondent No. 5 vide order dated 25.3.2012 accepted the revision petition and cancelled the Mutation No. 820, the subject matter of the civil suit pending before the civil Court. The order passed by Respondent No. 5 has been assailed by the petitioner before the Member Board of Revenue. The learned trial Court dismissed the application under Order VII Rule 11, CPC filed by the Respondent No. 7 whereas the revisional Court by accepting the revision petition reversed the findings of the trial Court and accepted the application under Order VII Rule 11, CPC and the plaint of the petitioner was rejected. Perusal of the impugned judgment manifestly reflects that the appellate Court while accepting the revision petition and rejecting the plaint of the petitioner has relied upon the order passed by the Additional Commissioner Revenue as well as the proceedings initiated against the petitioner before the Anti Corruption Authorities whereby an FIR was registered against the petitioner u/Ss. 420/468/471/419, PPC read with Section 5/2/47 of PCA, 1947.

8. Under the provisions of Order VII Rule 11, CPC the plaint can be rejected on account of conditions which have been enumerated as follows:--

"11. Rejection of Plaint.--The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

(b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law."

9. In my opinion, none of the grounds were available to the revisional Court to reject the plaint of the petitioner at the revisional stage. The case law cited by the revisional Court as 2012 SCMR 730 is not applicable to the present case and the said judgment of Hon'ble Court is quiet distinguishable from the facts of the present case. The petitioner has disclosed the cause of action in the plaint and Respondent No. 7 while filing the application under Order VII, Rule 11, CPC have agitated the matter on the basis of fraud and forgery and the revenue Courts are not competent to decide the complicated question of commission of fraud and forgery and that too without the allegation of connivance of the revenue staff. The civil Court being the Court of plenary jurisdiction has the lawful authority to proceed with the civil suit and as such the trial Court was legally justified to reject the application under Order VII, Rule 11,

CPC whereas the revisional Court has committed gross illegality and jurisdictional error in accepting the revision petition and rejecting the plaint of the petitioner.

10. The upshot discussion is that the impugned judgment dated 27.04.2013 passed by the District Judge, Bahawalpur is set-aside and the order dated 07.3.2013 passed by the trial Court is upheld. Resultantly, suit of the petitioner will be deemed to be pending before the trial Court which shall be decided by the trial Court in accordance with law. Petition allowed.

(R.A.) Petition allowed

**PLJ 2014 Lahore 200**
**[Bahawalpur Bench Bahawalpur]**
**Present: Atir Mahmood, J.**
**Syed ASIF HUSSAIN--Petitioner**
**versus**
**JUDGE FAMILY COURT etc.--Respondents**

W.P. No. 5524 of 2012, heard on 17.9.2013.

**Family Court Rules, 1965--**

----R. 6--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Territorial jurisdiction of Family Court--Application for dismissal of suits on ground of lack of territorial jurisdiction--Challenge to--Validity--A wife can file a family suit at a place of her residence and there arises no question of residence of her ex-husband in such like suits--Even it does not appeal to prudent mind that a plaintiff's wife, who is a lady, will file a suit at a place which is far off from a suit at a of residence which might cause more hardships to herself rather than to her husband who can move in society freely and more easily as compared to counterpart--Trial Court had rightly dismissed applicants to dismiss the suits on account of lack of territorial jurisdiction--No interference was called for--Petition was dismissed. [Pp. 203 & 204] A & C

**Family Court Act, 1964 (XXXV of 1964)--**

----S. 17-B--No law for appointment of local commission for ascertainment of place of residence of a lady in a family suit--It is discretionary upon family Court to appoint a local commission to examine any person or to make a local investigation and inspect any property or document but at same time, it is obligation of a party who arrests some fact to prove same through production of evidence and local commission cannot be appointed to collect evidence or to prove or disprove assertion of a party--Petition was dismissed. [P. 203] B

Mr. Hameed-uz-Zaman, Advocate for Petitioner.
Mr. Zahid-ur-Rehman Tayyab, Advocate for Respondents.
Date of hearing: 17.9.2013

**Judgment**

Through this writ petition, the petitioner has assailed the order dated 20.09.2012 passed by learned Judge, Family Court, Bahawalpur whereby the applications of the petitioner for dismissal of the suits on account of lack of territorial jurisdiction and for appointment of a local commission for ascertainment of place of residence of the respondent-plaintiff was dismissed. The said applications were filed by the petitioner

in suits filed by the respondents for recovery of dower, dowry articles and maintenance allowance.

2. Learned counsel for the petitioner inter alia contends that the learned Judge Family Court had no territorial jurisdiction to entertain the suits of the respondent-plaintiff as these were not filed for dissolution of marriage but for recovery of dower, dowry articles and maintenance allowance. He asserts that without prayer for dissolution of marriage, the suits for recovery of dower, dowry articles and maintenance allowance could not be filed at Bahawalpur because both the respondent and the petitioner were residing in Tehsil Ahmedpur Sharqia. He contends that the learned trial Court has wrongly dismissed the application of the petitioner for appointment of a local commission for determination of place of residence of the plaintiffs. He argues that in order to reach a just and proper conclusion, the trial Court should have appointed a local commission as the plaintiffs have shown their incorrect address in the plaint. He prays that the impugned order be set aside, the applications of the petitioner be allowed and the suit of the petitioner be dismissed on ground of lack of territorial jurisdiction. In support of his assertions, learned counsel for the petitioner has relied upon the law laid down in case titled "Shahzad Hussain vs. Judge Family Court, Lahore and two others (2011 CLC 820)."

3. On the other hand, learned counsel for the respondent-plaintiff submits that the respondent-plaintiff has shown her correct address and she is residing in Islamia Colony, Bahawalpur. He asserts that under the family laws, a wife can file a family suit at a place of her residence and it is not necessarily to be filed at the place of residence of her husband ex-husband. He further asserts that there is no law for appointment of a local commission for ascertainment of place of residence of a lady plaintiff in a family suit. Learned counsel for the respondent submits that the evidence of plaintiff has already been concluded whereas the evidence of petitioner-defendant is yet to be recorded. He avers that moving of applications at such a belated stage is nothing but a mere attempt to linger on the matter. He submits that the applications in question were without any merit and were rightly dismissed by the trial Court.

4. Arguments heard. Record perused.

5. Scanning of record shows that initially, three suits for recovery of dowry articles, haqul mehr and maintenance allowance were filed by the respondent and two minor children of the petitioner. All these suits were tried together through consolidation. Subsequently, a suit for restitution of conjugal rights was filed by the petitioner at Ahmerpur Sharqia. On application of the petitioner-defendant to transfer the suits of the respondent-plaintiff from Bahawalpur to Ahmedpur Sharqia, the learned District and Sessions Judge, Bahawalpur transferred the suit of the petitioner-defendant from Ahmedpur Sharqia to Bahawalpur vide order dated 18.01.2012 which order was not assailed by the petitioner before any competent forum. The suit of the

petitioner was also consolidated with the suit of the respondent, consolidated issues were framed and consolidated evidence of the respondent-plaintiff was recorded till 21.07.2012. Afterwards, the petitioner moved application for dismissal of the suits on the ground of lack of territorial jurisdiction. He also filed an application for appointment of a local commission to determine the place of residence of the respondent-plaintiff. Both the applications were dismissed by the learned trial Court vide order dated 20.09.2012 which has been assailed by the petitioner before this Court.

6. As regards the contention of learned counsel for the petitioner that the Family Court at Bahawalpur had no territorial jurisdiction as the children of the respondent are statedly studying in Ahmedpur Sharqia is misconceived. The respondent has categorically asserted in the plaint and has submitted while appearing as her own witness that she is residing at Bahawalpur. Mere statement of one witness that the minors are studying at Ahmedpur Sharqia cannot oust the territorial jurisdiction of Family Court at Bahawalpur. Evidence of the petitioner/defendant is yet to be recorded who may produce his evidence to prove that the respondent is not residing at Bahawalpur which will be dealt with by the trial Court in accordance with law.

7. Under Rule 6 of West Pakistan Family Court Rules, 1965, the territorial jurisdiction of the Family Court has been specified as under:

"6. The Court which shall have jurisdiction to try a suit will be that within the local limits of which:

(a) the cause of action wholly or in part has arisen, or

(b) where the parties reside or last resided together:

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction." (underline is mine)

8. In view of the above, I am of the considered view that a wife can file a family suit at a place of her residence and there arises no question of residence of her husband/ex-husband in such like suits. Even it does not appeal to a prudent mind that a plaintiff wife, who is a lady, will file a suit at a place which is far off from her ordinary place of residence which might cause more hardships to herself rather than to her husband/defendant who can move in the society freely and more easily as compared to his counterpart.

9. As regards the question of appointment of a local commission, it is discretionary upon the family Court under Section 17-B of West Pakistan Family Court Act, 1964 to appoint a local commission to examine any person or to make a local investigation and inspect any property or document but at the same time, it is the obligation of a party who asserts some fact to prove the same through production of evidence and

local commission cannot be appointed to collect the evidence or to prove or disprove the assertion of a party.

10. The learned trial Court has rightly dismissed the applications of the petitioner to dismiss the suits of the respondent-plaintiffs on account of lack of territorial jurisdiction. Learned counsel for the petitioner has not been able to point out any illegality, irregularity or infirmity in the order impugned which can be interfered with by this Court in its extraordinary constitutional jurisdiction. The law relied upon by learned counsel for the petitioner is also not applicable to the case in hand. No interference is called for.

11. In view of the above, this writ petition is without any substance. The same is dismissed.

(R.A.) Petition dismissed.

**PLJ 2014 Lahore 204**

**[Bahawalpur Bench Bahawalpur]**

**Present: Atir Mahmood, J.**

**RASHID AHMAD & others--Petitioners**

**versus**

**NAZAR HUSSAIN & others--Respondents**

C.R. No. 419 of 2003, heard on 26.9.2013.

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

----S. 9--Consolidation of Holdings Ordinance, 1960, S. 26--Jurisdiction of Civil Court--Suit against proceeding of consolidation authorities--Lack of jurisdiction to hear suits against orders of consolidation officers--Validity--Petitioners were aware of the proceedings of the consolidation but did not opt to file appeal before competent authority--Since the petitioners have not challenged the order of consolidation authorities but has only sought a declaration is misconceived--Petitioners had challenged the process of consolidation and under Section 26 of the Consolidation of Holdings Ordinance, 1960 the jurisdiction of Civil Courts petitioners had not been able to make out a case for interference by High Court, against the concurrent findings of law and facts, in its revisional jurisdiction--Civil revision being devoid of any force, is hereby dismissed. [P. 206] A & B

Malik Abdul Ghafoor Awan, Advocate for Petitioners.

Ch. Parmoon Bashir, Advocate for Respondents.

Date of hearing: 26.09.2013

**Judgment**

Through this civil revision, the petitioners have assailed the judgment and decree dated 03.07.2003 passed by learned Additional District Judge, Ahmedpur East who dismissed the appeal of the petitioners and upheld the order and decree dated 5.05.2000 passed by learned Civil Judge, Ahmadpur East whereby the plaint of the petitioners was rejected.

2. Brief facts of the case are that the petitioners filed a suit for declaration with perpetual injunction against the respondents alleging that they purchased the agricultural land measuring 23 kanals-12 marlas, fully described in para 1 of the plaint, from Mst. Bhiranwan alias Bharai, predecessor-in-interest of the respondents vide registered sale deed dated 14.03.1957; that in light of the aforesaid registered sale deed, Mutation No. 677 was also sanctioned on 12.06.1957 in favour of the petitioners; that in consolidation proceedings initiated in Mouza Chanab Rasool in 1993, the consolidation authority decreased the land of the petitioners in khata No. 40 to the extent of 13 kanals-10 marlas and they were only given land measuring 10 kanals-2 marlas out of total 23 kanals-12 marlas; that the rest of the land was allotted to Mst. Bhiranwan, predecessor-in-interest of the respondents-defendants and after her death, the said land was inherited by the respondents-defendants vide Mutation No. 86, hence the suit was filed.

3. The suit was contested by the respondents on the ground that the suit was barred by provisions of Order VII, Rule 11, C.P.C. They also filed a petition under Order VII, Rule 11, C.P.C. for rejection of the plaint on account of lack of jurisdiction of the civil Court to hear suits/petitions against the orders of consolidation officers.

4. After hearing learned counsel for the parties, learned trial Court rejected the plaint of the petitioners under Order VII, Rule 11, C.P.C. vide order dated 05.05.2000. Feeling aggrieved, the petitioners filed an appeal before the learned Additional District Judge, Ahmedpur East who dismissed the same vide judgment and decree dated 03.07.2003. Both the said order/judgment and decree have been challenged through the instant civil revision.

5. Learned counsel for the petitioners inter alia contends that the consolidation authorities have authority to make wandas from the jamabandi zair kar but they have neither authority to decrease the land of the petitioners or upset the longstanding entries of revenue record which were based on registered sale deed dated 14.03.1957 nor to decide rights of the parties; that the consolidation authorities have also no powers to resolve complicated questions of law and fact and to change revenue record in summary proceedings; that the consolidation authorities have travelled beyond their jurisdiction; that the Civil Court under Section 9, C.P.C. has all powers to strike down the order of the consolidation authorities; that the provisions of Order VII, Rule 11, C.P.C. are not attracted to the suit of the petitioners as the petitioners never challenged the order of the consolidation authorities but sought declaration only; that the impugned order and judgment are against law and fact, therefore, this civil revision be allowed and the impugned order/judgment and decree be set aside and the case be remanded to learned trial Court for decision of the case afresh after recording evidence of the parties.

6. Conversely, learned counsel for the respondents has vehemently opposed this civil revision and supported the impugned order/judgment and decree.

7. Perusal of record reflects that the petitioners by filing the suit agitated against the proceedings of consolidation authorities alleging that in connivance with the defendants the consolidation authorities decreased the area of the petitioners which they have purchased through a registered sale deed dated 14.03.1957. It is stated in the plaint that they purchased 23 kanals 12 marlas of land which was reduced and the area of 13 kanals and 10 marlas was excluded for the entitlement of the petitioners. The Paragraph No. 2 of the plaint has been reproduced by the appellate Court while passing the impugned judgment dated 03.07.2003 which shows that the petitioners were aware of the proceedings of the consolidation but did not opt to file appeal before the competent authority. The submission made by the learned counsel for the petitioners that since the petitioners have not challenged the order of consolidation authorities but has only sought a declaration is misconceived. Apparently, the petitioners have challenged the process of consolidation and under Section 26 of the Consolidation of Holdings Ordinance, 1960 the jurisdiction of Civil Courts, is barred which reads as under:--

"26. Jurisdiction of Civil Courts, barred as regards matter arising under this Ordinance.--No Civil Court shall entertain any suit or application to obtain a decision or order in respect of any matter which Government or the Board of Revenue or any officer is by this Ordinance, empowered to determine, decide or dispose of."

8. The petitioners have not been able to make out a case for interference by this Court, against the concurrent findings of law and facts, in its revisional jurisdiction. This civil revision being devoid of any force, is hereby dismissed.

(R.A.) Revision dismissed

**PLJ 2014 Lahore 247**
**[Bahawalpur Bench Bahawalpur]**
**Present: Atir Mahmood, J.**
**T.M.A.--Petitioner**
**versus**
**Mst. NAJMA ZAKIA etc.--Respondents**

C.R. No. 113 of 2004, decided on 12.7.2013.

**Limitation Act, 1908 (IX of 1908)--**

----Art. 181--Execution petition--Period of limitation for filing of first application for execution of decree--Question of--Whether execution petition filed before executing Court was within time--Period of limitation for filing of first application for execution of a decree as per Art. 181 of Limitation Act, 1908 is three years and mere filing of a civil revision does not extend the period of limitation--Limitation started with the passing of the decree continued till its expiry as it is settled law that the limitation once started will not stop until and unless so ordered by a competent Court of law--Since the decree passed on 26.02.1995 was not suspended nor it was affirmed, reversed or modified but was withdrawn by present respondent therefore, starting point for the computation of period of limitation will be the date of the decree, i.e--26.02.1995 which period expired on 25.02.1998. [P. 251] A

**Execution Petition--**

----Execution petition was filed with delay of about 5 months and 6 days--No plausible explanation was given by decree holder for delay in filing execution petition--Validity--Since no stay was granted by High Court challenging the decree a right has accrued in favour of the petitioner as the period of limitation has been running from the date of decree passed by lower appellate Court--No extension of time can be granted on account of pendency of the civil revision before High Court--Execution petition was barred by time by five months and six days and was liable to be dismissed--Execution petition was filed after withdrawal of the civil revision does not hold water as when no restraint order was passed, the decree holder was at liberty to file the execution petition but he did not do so, therefore, the limitation period expired on 25.02.1998 whereafter the execution petition was not maintainable until and unless the delay was condoned in accordance with law--Execution petition was unlawfully considered within time by the executing Court without condoning delay occurred on the part of the decree holder--Though the decree passed in a suit for mandatory injunction had attained finality and was executable yet the execution petition was filed with a delay of five months and six days without given any explanation for the same, therefore, the execution petition was time barred. [Pp. 252 & 253] B, C & D

Mr. Ahmed Mansoor Chishti, Advocate for Petitioner.
Raja Muhammad Sohail Iftikhar, Advocate for Respondent No. 1.
Mr. Muhammad Sarwar Chaudhry, Legal Adviser for Respondent No. 2.
Date of hearing: 14.6.2013

**Judgment**

Brief facts of the case are that Respondent No. 1 namely Mst. Najma Zakia filed a suit for mandatory injunction regarding Plot No. 52, measuring 8 marla-28 Sq. ft situated at Chah Peepalwala Scheme Model Town A, Bahawalpur against the petitioner and Respondent No. 2. The plaintiff averred in the plaint that she had purchased the said plot from her real aunt, wife of Raja Mukhtar Ali, which was allotted to her in 1968 by the Municipal Committee Bahawalpur after having paid the total cost of the plot. Notices were served upon the petitioner and Respondent No. 2 who contested the suit by filing written statements. After recording oral as well as documentary evidence adduced by the parties, learned trial Court seized with the matter proceeded to dismiss the suit of Respondent No. 1 under Order VII, Rule 11 of Civil Procedure Code, 1908 vide its judgment and decree dated 10.11.1992. Feeling aggrieved, Respondent No. 1 preferred an appeal which was allowed by the learned Additional District Judge, Bahawalpur and the judgment and decree dated 10.11.1992 was set aside with the direction to Respondent No. 1 to deposit the price of land including other charges with Respondent No. 2-Cantonment Board vide judgment and decree dated 26.02.1995. Respondent No. 2 challenged the judgment and decree dated 26.02.1995 in Civil Revision No. 393-D/1995 which ultimately was dismissed as withdrawn vide order dated 04.02.1998.

2. On 31.07.1998, Respondent No. 1 filed an execution petition for execution of judgment and decree dated 26.02.1995 passed by learned Additional District Judge Bahawalpur. In the execution petition, Respondent No. 1 has sought direction to the present petitioner to receive the price of the land in dispute and issue sale-deed in her favour. The execution petition was resisted by the petitioner by way of filing the objection petition taking pleas that the decree under execution was not passed against the petitioner; that the same is illegal and without jurisdiction and that it is badly barred by time. The executing Court framed issues on the objection petition, recorded evidence produced by the parties and after having considered the same proceeded to dismiss the objection petition vide order dated 09.12.2002. The appeal preferred thereagainst also met with the same fate vide order dated 25.10.2003 passed by learned lower appellate Court. Hence this civil revision.

3. Learned counsels for the petitioner and Respondent No. 2 (Cantonment Board) submit that Respondent No. 1 wants to grab the valuable government property; that learned Courts below have failed to comprehend the nature of the decree under execution; that against notice of the Cantonment Board, appeal is provided in the Cantonment Board Act but Respondent No. 1 filed suit illegally and unlawfully which

was not maintainable in the presence of alternate remedy; that the amount deposited with the Cantonment Board was on account of penalty and not as a consideration money; that as per judgment of Hon'ble Supreme Court, the disputed property is owned by the TMA, as such, neither the Cantonment Board has any title nor it could sell or lease out the property to anyone; that the judgment and decree dated 26.02.1995 was awarded merely on the statement of the plaintiff that she is ready to make payment of the property without taking consent of the other side which is against the law of equity; that the judgment and decree dated 26.02.1995 does not call for petitioner to perform any act in pursuance thereof; that both the learned Court below have incorrectly treated the execution petition as within time which in fact was badly barred by time; that the disputed property is owned by the petitioner TMA or its predecessor local council which is a statutory body, therefore, the property owned by it was required to be governed under the provisions of Punjab Local Council (Property) Rules, 1981; that under the provisions of Rule 10 of Punjab Local Council (Property) Rules, 1981, no property owned by TMA/local council can be alienated by way of sale or otherwise except through an open auction, therefore, the judgment and decree dated 26.02.1995 is void ab initio; that without conceding the judgment and decree, it was incumbent upon the decree holder to comply with the direction contained in the decree which has not been done by her, therefore, she has not locus standi to seek execution of the decree; that the learned Courts below have committed gross illegalities which are floating on the face of the record attracting interference by this Court, therefore, this civil revision be allowed and the impugned orders dated 09.12.2002, 25.10.2003 and judgment and decree dated 26.02.1995 be set aside.

4. Conversely, learned counsel for Respondent No. 1 vehemently opposes this civil revision and fully supports the impugned orders as well as the judgment and decree dated 26.02.1995. He contends that the executing Court cannot go beyond the decree; the impugned judgment and decree dated 26.02.1995 was never challenged by the present petitioners which has attained finality, as such, the objection petition was not maintainable. He asserts that this civil revision having no force merits dismissal.

5. I have heard the arguments advanced by learned counsel for the parties at length and also perused the record with their able assistance.

6. The questions to be determine by this Court are whether the execution petition before the executing Court was within time and whether the decree for mandatory injunction was executable or not.

7. So far as passing of a decree by the appellate Court in a suit for mandatory injunction is concerned, I am convinced that the Court can pass the decree as has been done in this case. No doubt, there was no consent of any respondent before the appellate Court and the decree was passed on the mere statement of the Respondent

No. 1-plaintiff but still that decree was not challenged by the present petitioners at the appropriate time nor Respondent No. 2 (Cantonment Board) contested the matter whole-heartedly till at last and withdrew its Civil Revision No. 393-D/1995, therefore, the said decree had attained finality. The executing Court and the appellate Court have rightly held that the executing Court cannot go beyond the decree.

8. Now, I take up the question as to whether the execution petition filed before the executing Court was within time. Scanning of record shows that the impugned judgment and decree was passed on 26.02.1995 by the lower appellate Court whereas the execution petition was filed on 31.07.1998. The judgment and decree dated 26.02.1995 was challenged before this Court in Civil Revision No. 393-D/1995 wherein pre-admission notice was issued to the Respondent No. 1-plaintiff but operation of the judgment and decree dated 26.02.1995 was not suspended. When confronted with, learned counsel for Respondent No. 1 could not deny the fact that operation of the impugned judgment and decree remained unsuspended. In my considered view, the period of limitation for filing of first application for execution of a decree as per Article 181 of the Limitation Act, 1908 is three years and mere filing of a civil revision does not extend the period of limitation. The limitation started with the passing of the decree continued till its expiry on 25.02.1998 as it is settled law that the limitation once started will not stop until and unless so ordered by a competent Court of law. Since the decree passed on 26.02.1995 was not suspended nor it was affirmed, reversed or modified but was withdrawn by present Respondent No. 2, therefore, starting point for the computation of period of limitation will be the date of the decree, i.e. 26.02.1995 which period expired on 25.02.1998. I am guided by the judgment of the Hon'ble Supreme Court of Pakistan in case titled "Abdul Qayyum v. Ali Asghar Shah (1992 SCMR 241)" which reads as under:

"It may be recalled that, according to the High Court, the time started from the date when the First Appellate Court passed the decree. It is manifest from the impugned order that the reason which influenced the decision of the learned Single Judge in synchronizing the accrual of right to apply within the meaning of Article 181, with the date of the decree of the First Appellate Court, and not with that of the High Court, is that the First Appellate Court had stated the execution of the decree and the stay order ceased to be operative on the dismissal of the appeal, but no such prohibitory order was issued in revision by the High Court. Obviously, the learned Single Judge was conscious of the provision of Section 15 of the Limitation Act whereunder in computing the period of limitation for execution of a decree, the time during which the execution proceedings remained suspended has to be excluded; meaning thereby that despite the decree of the Appellate Court, the decree passed by the trial Court continued to maintain its identity and was capable of execution. Quite advantageously, reference here, may be made to Order XLI, Rule 5, C.P.C., which provides that mere

filing of an appeal does not operate as a stay of the decree appealed from. The Appellate Court, is however, empowered to order the stay of the execution of such decree. Seemingly, the object of this rule is that the decree-holder is not deprived of the relief to which he has been found entitled by the Court, and at the same time to ensure that by execution of the decree the appeal is not rendered infructuous. 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 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."

The above judgment has also been relied in latest judgment of the apex Court in case titled "Bakhtiar Ahmed v. Shamim Akhtar (2013 SCMR 5)" wherein the above point has been further elaborated stating that "...where stay is granted by the Appellate/Revisional Court, time can be extended for such period the decree remained under suspension."

9. It is evident from the record that the execution petition was filed on 31.07.1998 with a delay of about five months and six days. Under the law, each and every day of delay is to be explained, however, there is no plausible explanation given by the decree holder for delay of five months and six days in filing the execution petition. In the circumstances, since no stay was granted by this Court in the Civil Revision No. 393-D/1995 challenging the decree dated 26.02.1995, a right has accrued in favour of the petitioner-defendant, as the period of limitation has been running from the date of decree dated 26.02.1995 passed by the learned lower appellate Court till expiry on 25.02.1995 whereas the execution petition was filed on 31.07.1998. In the circumstances, no extension of time can be granted on account of pendency of the civil revision before this Court. Therefore, I am fully convinced that the execution petition was barred by time by five months and six days and was liable to be dismissed on this score alone.

10. The contention of learned counsel for Respondent No. 1 that the execution petition was filed after withdrawal of the civil revision on 04.02.1998 does not hold water as when no restraint order was passed, the decree holder was at liberty to file the execution petition but he did not do so, therefore, the limitation period expired on 25.02.1998 whereafter the execution petition was not maintainable until and unless the delay was condoned in accordance with law. The execution petition was unlawfully

considered within time by the executing Court without condoning delay occurred on the part of the decree holder.

11. For the aforementioned reasons, I am of the view that though the decree passed in a suit for mandatory injunction had attained finality and was executable yet the execution petition was filed with a delay of five months and six days without given any explanation for the same, therefore, the execution petition is time barred. As a result, this civil revision is allowed, the impugned orders dated 09.12.2002 and 25.10.2003 passed by executing Court as well as learned lower appellate Court respectively are set aside and the execution petition filed by Respondent No. 1 is dismissed.

(R.A.) Revision allowed

**PLJ 2014 Cr.C. (Lahore) 275**

**Present: Atir Mahmood, J.**

**ZAFAR IQBAL and 14 others--Petitioners**

**versus**

**STATE and another--Respondents**

Crl. Misc. No. 8791-B of 2013, decided on 15.8.2013.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(i), 337-F(i), 337-F(iii), 337-L(ii), 148, 149--Bail, grant of--Further inquiry--Pre-arrest bail--Confirmed--Case was of free fight--As per police investigation, the possession over the disputed plot was with the petitioner side and the complainant tried to take over possession of the same whereupon the occurrence took place--Both sides have sustained injuries in the occurrence--The complainant has nominated 42 persons which showed that a large number of persons have been roped by throwing wider-net which itself shows mala fide on the part of the complainant--Out of 42 persons accused by the complainant, 25 persons have already been declared innocent by the police--Complainant has nominated the petitioners with photographic memory which seems impossible in ordinary circumstances, therefore, the case of the petitioners falls within the purview of further inquiry, particularly, as at the end of his complaint, the complainant stated that after getting the information, he came to the spot of occurrence, took care of the injured, got prepared the site plan and then took away the injured to the hospital for medical treatment--As the complainant party has been allowed bail, it seems, appropriate that the petitioners be also granted the same relief so as to put both sides on equal footing--Petition was allowed and bail was confirmed. [P. 277] A, B & C

M/s. A.D. Bhatti and Seith Abdur Rehman, Advocate for Petitioners.

Hafiz Allah Yar Sipra, Advocate for Complainant.

Mr. Khurram Khan, Deputy Prosecutor General for State.

Date of hearing: 15.8.2013.

**Order**

Through this petition under Section 497, Cr.P.C., the petitioners seek their pre-arrest bail in case FIR No. 70/13, dated 19.02.2013, for the offences under Sections 337-A(i), 337-F(i), 337-F(iii), 337-L(ii), 148, 149, PPC, lodged with Police Station Waryam, District Jhang. Subsequently, the petitioners moved a C.M. No. 2343-M/2013 for amendment of offences which was accepted and the offences under Sections 337-A(ii) and 337-F(v) were allowed to be added in the main petition.

2. As per contents of the FIR, the complainant has nominated as many as 22 persons alongwith the petitioners and 20 unknown persons have also been implicated in this case. The present petitioners have been attributed specific role of causing injuries to one Aurangzeb, Muhammad Asif, Zubair, Muhammad Riaz and Yasar Imran.

3. Learned counsel for the petitioners submits that it is a case of cross-version which is a result of free fight taken place between the parties; that 22 persons were implicated in the FIR by the complainant out of which 14 were declared innocent by the police; that through a supplementary statement, 20 unknown persons were also nominated by the complainant, out of which 11 have also been declared innocent by the police; that the petitioners were not present at the spot of the occurrence; that the

injuries attributed to the accused are result of due: deliberations and consultations after having obtained the MLR; that the specific injuries have been attributed to the petitioners in a photographic manner which is not possible in ordinary circumstances; that injuries attributed to the petitioners are mostly bailable and offences alleged to the petitioners do not fall within the prohibitory clause of Section 497, Cr.P.C.; that the accused party has also sustained injuries in the occurrence but the complainant side has suppressed the injuries caused by them to the present petitioners; that the complainant party was the aggressor who tried to take over possession of the plot owned and possessed by one of the co-accused of the petitioners namely Zulfiqar.

4. On the other hand, learned counsel for the complainant has submitted that the petitioners are specifically nominated in the FIR; that as many as eight persons were injured and there is no ill-will or motive to falsely implicate the present petitioners.

5. Learned Deputy Prosecutor General states that according to the investigation, the place of occurrence is a plot owned by one of the co-accused of the petitioners namely Zulfiqar; that said Zulfiqar was constructing a wall on the said plot whereupon the occurrence took place; that it is a case of free fight between the parties; that both sides have suffered injuries.

6. After hearing arguments advanced from all corners and going through the record, it is clear that it is a case of free fight which took place on account of raising wall on a plot by one of the co-accused of the petitioners namely Zulfiqar. The petitioners have also got recorded their cross-version wherein the complainant party has been given the concession of bail.

7. As per police investigation, the possession over the disputed plot was with the petitioner side and the complainant tried to take over possession of the same whereupon the occurrence took place. Both sides have sustained injuries in the occurrence. The complainant has nominated 42 persons which shows that a large number of persons have been roped by throwing wider-net which itself shows mala fide on the part of the complainant. Out of 42 persons accused by the complainant, 25 persons have already been declared innocent by the police.

8. The other aspect of the case is that the complainant has nominated the petitioners with photographic memory which seems impossible in ordinary circumstances, therefore, the case of the petitioners falls within the purview of further inquiry, particularly, as at the end of his complaint,. the complainant states that after getting the information, he came to the spot of occurrence, took care of the injured, got prepared the site-plan and then took away the injured to the hospital for medical treatment.

9. As the complainant party has been allowed bail, it seems, appropriate that the petitioners be also granted the same relief so as to put both sides on equal footing.

10. For the aforementioned reasons, this bail petition is allowed and pre-arrest bail already granted to the petitioners is hereby confirmed subject to their furnishing bail bonds in the sum of Rs. 100,000/- (rupees one lac only) with one surety in the like amount each to the satisfaction of the trial Court.

11. It is, however, made clear that the observations made hereinabove are just tentative in nature, meant for disposal of the case in hand and will not prejudice the case of either party.

(A.S.) Bail confirmed.

**PLJ 2014 Lahore 326 (DB)**

**[Bahawalpur Bench Bahawalpur]**

**Present: Muhammad Masood Jahangir and Atir Mahmood, JJ.**

**BABAR BAKHAT DPO BAHAWALPUR etc.--Appellants**

**versus**

**NAEEM AHMAD--Respondent**

I.C.A. No. 62 of 2011/Bwp, heard on 29.1.2014.

**Punjab Civil Servants (Appointments and Conditions of Services) Rules, 1974--**

----R. 17-A--Appointment of brother of (deceased servant) on family claim basis--Entitlement of--Widow consented by submitting affidavit for appointment of brother of deceased employee--Question of--Whether brother of deceased employee can claim appointment with department on family claim basis--Under Rule-17-A of Rules, 1974 under which appointment is being sought by respondent, there is no room for appointment of brother of a deceased servant employee and such right has been given to only one of children of deceased or his widow and not anyone else--Children of deceased employee were yet minors and will become eligible after elapse of certain period and then, one of them can be appointed under said Rule by department--Even otherwise, widow has not surrendered right of her children in favour of brother of deceased though it seems immaterial. [P. 330] A

Mahr Muhammad Iqbal, Assistant Advocate General/Government Pleader with Rao Muhammad Qasim, DSP (Legal) for Appellants

Mr. Jamshaid Akhtar Khokhar, Advocate for Respondents.

Mr. Muhammad Ali, Advocate with Applicant (in C.M. No. 2763/2011).

Date of hearing: 29.1.2014.

**Judgment**

**Atir Mahmood, J.--**Through this Intra Court Appeal, the appellants have challenged impugned order dated 28.02.2011 passed by the learned Single Judge in Chamber whereby the appellants were directed to appoint the respondent in place of his deceased brother Muhammad Nadeem.

2. Brief facts of the case are that Writ Petition No. 5972/2010/Bwp was filed by one Naeem Ahmad Khan against Inspector General of Police and two others by submitting that he is the brother of one Muhammad Nadeem, who was working as plumber in police department and died during his service on 21.06.2005 due to electric shock at Police Rest House, Bahawalpur. It was asserted that he being the real brother of the deceased Muhammad Nadeem was entitled to be appointed against a post available with the police department in accordance with Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Services) Rules, 1974. It was stated that since the children of the deceased were minors and his widow has consented by submitting an affidavit for the appointment of the said writ petitioner in place of her deceased husband on the basis of Family Claim. The said writ petition was remitted to Respondent No. 3. i.e. District Police Officer, Bahawalpur vide order dated

07.12.2010 with a direction to look into the grievance of the petitioner with the following direction:-

"A copy of this writ petition alongwith its annexures be sent to the Respondent No. 3 who shall look into the matter of the petitioner strictly in accordance with law and also provide him an opportunity of personal hearing and thereafter shall take steps to redress the grievance of the petitioner if he is entitled for the said post under the policy of the Government. Disposed of."

Thereafter, a Crl. Org. No. 50/2011/Bwp was filed against the present appellants alleging that the present appellants did not comply with the order of this Court and the grievance of the petitioner was not redressed.

3. The written reply was called for from the appellants/ respondents, wherein it had been stated that the case of the respondent was considered but keeping in view the provisions of Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, the respondent was not entitled to be employed on Family Claim Basis. However, the learned Single Judge in Chamber heard the criminal original and disposed of the same vide order 28.02.2011 which is reproduced for ready reference:-

"The main contention of learned counsel for the petitioner was that already the respondents have appointed one Muhammad Atta Ullah son of Hazoor Ahmad as Constable on Family Claim Basis, therefore, petitioner being the brother of the deceased is also entitled to be appointed in the Police department. On Court query, Malik Naveed, Office Superintendent has admitted that already the said person has been appointed as Constable on Family Claim basis. The case of the petitioner is at par with the said person who has already been appointed by the Department, therefore, the respondents are directed to appoint the petitioner in place of his deceased brother Muhammad Nadeem, under intimation to the Deputy Registrar (Judicial) of this Court. Disposed of."

Being aggrieved of order dated 28.02.2011, the appellants filed this I.C.A. by raising pleas that the Respondent Naeem Ahmad was not entitled to be appointed under Rule 17-A of the Punjab Civil Servants (Appointments and Conditions of Services), Rules, 1974 and accordingly the order passed by the learned Single Judge in Chamber was misdirected and void ab initio. It is contended that the learned Single Judge in Chamber was persuaded by a case of one Muhammad Atta Ullah, who was accommodated on Family Claim Basis by the brother of a deceased employee of the police department.

4. Learned Addl. A.G. contended that on the basis of a wrong order, no precedent can be created, as such, the impugned order is nullity in the eye of law. He has also raised an objection that while proceeding in the matter under Contempt of Court Ordinance, 2003, no direction could be passed against the department to implement an order which was never passed while deciding writ petition of the respondent.

5. During the course of this appeal, an application under Order I, Rule 10 CPC was filed by the widow of the deceased, Muhammad Nadeem (sister-in-law/Bhabi of the respondent), who seriously contested the claim of the respondent and submitted that by appointment of the respondent, the right of his minor son, who will be entitled for

appointment in the police department after attaining the age of majority, will seriously be prejudiced. It is further contended that she had never sworn any affidavit in favour of the respondent.

6. When confronted with the above contentions of learned Assistant Advocate General, learned counsel for the respondent submitted that under the above-said rule, the respondent being the brother of the deceased was entitled for his appointment in the department in place of his deceased brother and as the case of Muhammad Atta Ullah was already in the field, therefore, the learned Single Judge in Chamber rightly passed the impugned order.

7. Arguments heard. Record perused.

8. We have considered the contentions of learned counsel for the parties. The Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Service), Rules, 1974 is reproduced below for ready reference:-

"17-A. Notwithstanding anything contained in any rule to the contrary, whenever a civil servant dies while in service or is declared invalidated/in-capacitated for further service, anyone of his unemployed children, may be employed by the appointing authority against a post to be filled under Rules 16 & 17 for which he/she possesses the prescribed qualifications and experience and such child may be given 10 additional marks in the aggregate by the Public Commission or by the appropriate Selection Board or Committee, provided he/she otherwise qualifies in the test/examination and/or interview for posts in BS-6 and above:

Provided further that one child of a government employee who dies while in service or is declared invalidated/incapacitated for further service shall be provided a job against posts in BS-1 to 5 in the department in which the deceased Government servant was working, without observance or formalities prescribed under the rules/procedure provided such child is otherwise eligible for the post."

The perusal of the above-referred rule nowhere reveals that brother of deceased can claim the appointment with the department on Family Claim Basis. In this view of the matter, the impugned order is not sustainable on two grounds: firstly, that the respondent being brother of the deceased was not entitled to be employed with the government department on account of his Family Claim and secondly that while passing the impugned order in the criminal original petition directing the appellants to appoint the respondent the learned Single Judge did not take into consideration that original order dated 07.12.2010 passed in Writ Petition No. 5972/10 did not reflect that any direction was made for appointment of the respondent to the appellants/department and as such the impugned order was a nullity in the eye of law.

8. So far as the contention of learned counsel for the respondent that in some other case, on Atta Ullah was appointed against his deceased brother carries no force as a wrong cannot make a precedent because under Rule-17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 under which the appointment is being sought by the respondent, there is no room for appointment of brother of a deceased employee and such right has been given to only one of children of the deceased or his widow and not anyone else. The children of the deceased employee are yet minors and will become eligible after elapse of certain period and

then, one of them can be appointed under the said Rule by the department. Even otherwise, the widow has not surrendered right of her children in favour of brother of the deceased though it seems immaterial.

9. Accordingly, this appeal is allowed, the impugned order dated 28.02.2011 passed by the learned Single Judge in Crl. Org. No. 50-W/2011/BWP is set-aside.

(R.A.) Appeal allowed

**2014 LAW NOTES 258 (2014 CLJ 644)**
**[Bahawalpur]**
***Present:*** **ATIR MAHMOOD, J.**
**Bashir Ahmad, etc.**
***Versus***
**Muhammad Ghulam Ali, etc.**

Civil Revision No. 519 of 1996/BWP, decided on 9th September, 2013.

**(a) Pre-emption Act (I of 1913)---**

---Ss. 15, 30---Suit for possession through pre-emption---Limitation period---Held: Time for limitation purpose was to be calculated from attestation of sale mutation---Suit was held to be within time.

(Para 1)

**PRE-EMPTION --- (Enforcement of right)**

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

---S. 115---Pre-emption Act, 1987, Ss. 15, 30---Suit for possession through pre-emption---Period of limitation---Issues---Trial Court decreed suit for possession through pre-emption whereagainst appeal was dismissed---Appreciation of evidence---Validity---Said PW was not cross-examined on material points---Contentions raised by PWs *qua* pre-emption right of plaintiff were not controverted which had otherwise been proved through documentary evidence where respondents-plaintiffs were shown to be co-sharers in khata whereas petitioners-defendants did not figure anywhere---Possession of defendants over suit property prior to sale transaction was allegedly as tenant as such, plaintiffs had a superior right of pre-emption---Limitation for filing the suit for pre-emption was one year---Time for limitation purpose was to be calculated from the attestation of the sale mutation---It was rightly held by Courts below that suit was within time---No illegality or jurisdictional defeat or misreading or non-reading of evidence in impugned judgments/decrees was found by High Court---Civil revision petition dismissed.
(Paras 10, 13, 14, 15)

Ref: NLR 1992 SCJ 56.

[Courts below had rightly passed decree for pre-emption. High Court dismissed civil revision].

*For the Petitioners:* Ch. Muhammad Shafi Mayo, Advocate.
*For the Respondents:* Mumtaz Mustafa, Advocate.

*Date of hearing:* 9th September, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J. ---** Through this civil revision, the petitioners have challenged the judgment and decree dated 12.11.1996 passed by the learned Additional District Judge, Rahimyarkhan who dismissed the appeal filed by the petitioners and upheld the judgment and decree dated 31.01.1995 passed by the learned Civil Judge, Liaquatpur whereby the suit of the respondents for possession through pre-emption was decreed subject to deposit of Rs. 50,000/- as sale price after deducting zar-e-panjum if already deposited and the deficiency of Court-fee and the amount of Rs. 29,000/- upto 20.02.1995.

2. Brief facts of the case are the respondents/ plaintiffs filed a suit for possession through pre-emption in the year 1974, under the Punjab Pre-emption Act, 1913 against the petitioners/defendants in respect of land measuring 431 kanals and 14 marlas comprising Khata No. 9-24, 129/450, 150 and 189, as per record-of-right 1971-72 located in the revenue state Bait Murad Tehsil Liaquatpur. It was alleged that Abdul Qadir, vendor alienated the suit land in favour of defendants No. 1 to 7 *vide* mutation No. 744 attested on 2.2.1973 for a consideration of Rs. 40,000/- but in order to avoid prospective suit of pre-emption and inflated amount of Rs. 50,000/- was fictitiously entered in the alleged mutation. It was asserted that the plaintiffs are owners in the disputed mouza Baid Murad while the defendants are strangers as such plaintiffs have superior right of pre-emption *qua* the defendants.

3. The suit was contested by the defendants/petitioners vehemently by filing written statement. Keeping in view the divergent pleadings of the parties learned Trial Court framed the following issues:---

*"(1) Whether the defendants No. 6 and 7 are minors and the suit is not maintainable in the present form? OPD*

*(2) Whether Ashiq Muhammad is a necessary party to the suit and the suit is bad for non-joinder of necessary party? OPD*

*(3-A) Whether the plaintiffs posses superior right of pre-emption? OPP .*

*(3-B) Whether a sum of Rs. 50,000/- was fixed in good faith or actually paid as the sale price of the suit land? OPD*

*(3-C) If issue No. 3-B is not proved as such what was the fair market value of the suit land at the time of its actual sale? OP-Parties.*

*(3-D) Whether defendant No. 8 is in possession of portion of suit land on the basis of oral exchange, if so to what effect? OP-Parties.*

*(3-E) Whether the suit is barred by limitation? OPD*

*(3-F) Whether the plaintiffs are estopped by their act and conduct to bring the present suit and as such they have waived their right of pre-emption? OPD.*

*(3-G) Whether the plaint is deficient in Court-fees? OPD.*

4. After recording oral as well as documentary evidence of the parties, learned Trial Court decreed the suit for possession through pre-emption in favour of the respondents/plaintiffs subject to deposit of Rs. 50,000/- as sale price after deducting zar-e-panjum if already deposited and the deficiency of Court-fee and the amount of Rs. 29000/- upto 20.02.1995 *vide* judgment and decree dated 31.01.1995. Feeling dissatisfied the petitioners filed an appeal which was dismissed by the learned Additional District Judge, Rahimyarkhan *vide* judgment and decree dated 12.11.1996, hence this civil revision.

5. Learned counsel for the petitioners has contended that the impugned judgments and decrees dated 31.01.1995 and 12.11.1996 passed by the learned Civil Judge, Liaquatpur and Additional District Judge, Rahimyarkhan are liable to be set aside; that both the Courts below have committed error of law by treating the plaint as a legal document; that the findings of the Courts below on issue No. 3-E are contrary to law in as much as the Trial Court in its findings has failed to refer the documentary evidence *i.e.* Ex.D1, an agreement dated 21.05.1971 showing possession of the petitioners/defendants under sale and has dismissed the plea in a sweeping manner; that the learned Court though has impliedly admitted the possession of the petitioners/defendants as tenant-at-will of certain portion of land yet has denied the advantage available under the law on the plea of 'sinker', therefore, this civil revision be allowed, impugned judgments and decrees be set aside and the suit of the petitioners be decreed as prayed for.

6. On the other hand, learned counsel for the respondents has vehemently controverted the contentions raised by the learned counsel for the petitioners and submitted that the petitioners have failed to prove their assertions through production of any convincing evidence; that the possession of the petitioners over the suit property was not on the basis of ownership rather it was through Exh.D1 which could not be considered as possession over the suit property on the basis of sale and that the agreement to sell does not create any right; that while executing the alleged agreement to sell, the entire payment/consideration price was not paid and the said transaction cannot be presumed as a sale. He further submits that the suit was filed within one year from the attestation of sale mutation and as such, the suit was within time. He has lastly submitted that the concurrent findings of law and fact cannot be interfered with

while exercising the revisional jurisdiction of this Court. He maintains that since respondents No. 7 & 8, inducted in the matter, were alien to the alleged sale agreement, therefore, in view of principle of sinker, the petitioners/defendants could not claim their pre-emptive right. He has relied upon the law laid down in cases titled *"Mir Ahmad v. Attaullah alias Atta Muhammad & others* (1992 SCJ 53)" and *"Rana Muhammad Latif Khan and another v. Kanwar Saeed Ahmed Khan* (1978 Lahore 299)".

7. I have heard the arguments of learned counsel for the parties and also perused the record.

8. Learned counsel for the petitioner has raised his grievance to the extent of findings of learned Courts below on issues No. 3-A and 3-E only and no other issue has been pressed before this Court.

9. From perusal of the evidence produced by respondents-plaintiff, it comes on the surface that the plaintiff Ghulam Ali was not cross-examined on material points when he appeared as PW-1. The statement of respondent-plaintiff No. 1 is reproduced as under:---

10. The contentions raised by the plaintiff *qua* their pre-emptive right of the plaintiff were not controverted which has otherwise been proved through documentary evidence produced as Exh.P1 to Exh.P5 where the respondents-plaintiff are shown to be the co-sharers in the khata whereas the petitioners-defendants did not figure anywhere. The possession of the defendants over the suit property prior to the sale transaction was allegedly as a tenant as such, the plaintiffs have a superior right of pre-emption under Section 15 of the Punjab Pre-emption Act.

11. The other contention raised by the petitioners is that the suit was timed-barred is also not proved on record. Exh.D1 which has been relied upon by the petitioners reflects that the sale price was fixed at Rs. 63,000/- out of which Rs. 10,000/- was paid as an earnest money at the time of execution of the said agreement and thereafter another amount of Rs. 3000/- was paid on 05.07.1971 whereas remaining Rs. 50,000/- were yet to be paid. Perusal of Exh. D1 reflects that possession was not handed over to the vendee at the time of its execution.

12. The sale mutation (Exh.P6) was entered on 31.01.1973 and was attested on 02.02.1973 whereas the suit was filed on 01.02.1974. Under Section 30 of the Punjab Pre-emption Act, 1913, the limitation for filing the suit for pre-emption was one year whish is reproduced as under:---

*"30. Limitation.--- In any case not provided for by Article 10 of the Second Schedule of the Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-*

*emption under the provisions of this Act shall, notwithstanding anything in the Article 120 of the said Schedule, be one year:---*

*(1) in the case of a sale of a agricultural land or of village immovable property; from the date of attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutations maintained under the Punjab Land Revenue Act, 1887; or from the date on which the vendee takes under the sale physical possession of any part of such land or property.*

*Whichever date shall be the earlier;*

*(2) ...*

*(3) ..."*

13. As discussed above, the possession of the property was not handed over to the petitioners/defendants at the time of execution of Exh.D1, *i.e.*, the agreement to sell, therefore, the time for limitation purpose was to be calculated from the attestation of the sale mutation. Therefore, it was rightly held by the learned Courts below that the suit was within time.

14. As regards the objection raised by the respondents that the respondents No. 6 to 7 were not in cultivating possession of the property, therefore, they were not the tenant in possession, as such, the case-law relied upon by the respondent is very much applicable. I am guided by the principles laid down by the Hon'ble Supreme Court of Pakistan in case titled *"M/s. Allied Bank of Pakistan Limited v. Super Electric Industries Limited* (NLR 1992 SCJ 56)". Relevant portion of the judgment is reproduced hereunder:---

*"Our final conclusion, after having considered the whole matter at length is that in pre-emption suits where a vendee having an equal or superior right of pre-emption associates a stranger i.e. a person having an inferior right of pre-emption than the pre-emptor, the rule of sinker will apply and the pre-emptor's suit decreed, unless the impugned sale is divisible i.e. it is sale wherein not only the share of each vendee is specified but the amount paid towards the price by each vendee is also specified."*

15. There are concurrent findings of fact against the petitioner which are immune from interference by this Court in its revisional jurisdiction unless there is some gross illegality floating on the surface. The petitioner has also not been able to point out any illegality, jurisdictional defect or misreading or non-reading

of evidence in the impugned judgments and decrees calling for interference by this Court.

16. In view of what has been stated above, this civil revision has no substance. Dismissed.

Civil revision petition dismissed.

**K.L.R. 2014 Criminal Cases 131**
**[Lahore]**
***Present:*** **ATIR MAHMOOD, J.**
**Muhammad Boota**
***Versus***
**The State, etc.**

Criminal Misc. No. 283-B of 2014, decided on 31st March, 2014.

BAIL BEFORE ARREST --- (Business relations)

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

---Ss. 498/497(2)---Pakistan Penal Code, 1860, S. 406---Matter of bail before arrest---Business relationship---Further inquiry---Statedly business relation was established between parties---Investigation of case had already been completed and petitioner was no more required for further investigation purpose---*Ad-interim* pre-arrest bail confirmed.

(Paras 4, 5)

بادی النظر میں مابین فریقین کاروباری تعلقات تھے۔ بجرم زیر دفعہ 406ت پ میں قبل از گرفتاری ضمانت عطا ہوئی۔

[*Prima facie*, there were business relationships between parties. Pre-arrest bail was allowed in offence u/s. 406, PPC].
*For the Petitioner:* Rana Muhammad Rafique, Advocate.
*For the State:* Iftikhar-ul-Hassan, APG with Muhammad Arshad, S.I. alongwith record.
*For the State:* Ch. Muhammad Ismail, Advocate.
*Date of hearing:* 31st March, 2014.

**ORDER**
**ATIR MEHMOOD, J. ---** Through this criminal miscellaneous petition under Section 498, Cr.P.C., petitioner Muhammad Boota has sought his pre-arrest bail in case F.I.R. No. 1170/2013, dated 04.11.2013 for the offence under Section 406, P.P.C. registered with Police Station Kahna, Lahore.

2. As per prosecution story contained in the F.I.R. the precise allegation against the petitioner is that an amount of Rs. 1,55,000/- was outstanding against Muhammad Asghar and Muhammad Boota (the petitioner) as they purchased 150-maunds of paddy from the complainant and promised to pay the amount within two months. After elapsed of two months the accused asked the complainant to receive the said amount from the petitioner, who told them to keep the said amount as a trustee. According to the F.I.R. two months from the registration of the case the complainant

asked for the return of the said amount which was not given to him on one pretext or the other and ultimately the accused refused to return the same.

3. I have heard the arguments put forth from all corners and also perused the record of the case.

4. The learned APG has submitted that the provisions of Section 406, PPC are not attracted in this case. From the bare perusal of the F.I.R. a business transaction is established between the parties. The contention of the learned counsel for the complainant that the total amount was Rs. 1,80,000/- out of which Rs. 25,000/- has already been paid and Rs. 1,50,000/- is outstanding is not in consonance with the contents of the FIR. There is another application filed by the complainant with the Incharge Police Post Jia Bagha, Lahore which reflects that there is an outstanding amount of Rs. 1,65,000/-. According to the record, there are two receipts executed by the complainant regarding receiving of an amount of Rs. 29,000/- as well as Rs. 10,000/- from the petitioner, Muhammad Boota. This receipt shows that after receiving the amount of Rs. 10,000/- an outstanding amount was Rs. 10,000/- which was to be paid by Muhammad Boota till 03.09.2013. All these facts of receiving of the said amount have been concealed by the complainant, which makes the case of the petitioner that of further inquiry. The co-accused of the petitioner namely Shafique, Muhammad Asghar have already been bailed out. The investigation of the case has already been completed and the petitioner is no more required for further investigation purposes. Sending him behind the bars will not serve any useful purpose. However after recording of the evidence if he is proved guilty he will face the consequences but if he is subsequently acquitted from the charge by the competent Court then the period of incarceration will amount to punishment without conviction.

5. For the afore-mentioned reasons, this criminal miscellaneous petition is accepted and the pre-arrest bail already granted to the petitioner *vide* order dated 09.01.2014 is hereby confirmed subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (rupees one lac only) with one surety in the like amount to the satisfaction of learned Trial Court.

6. It is, however, made clear that the observations made herein above are just tentative in nature, meant only for disposal of the case in hand and will have no bearing on the case of either party at trial stage.

*Ad-interim* pre-arrest bail confirmed.

**2014 M L D 1075**

**[Lahore]**

**Before Atir Mahmood, J**

**MAZHAR IQBAL---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE and 2 others---Respondents**

Writ Petition No.13269 of 2013, decided on 12th November, 2013.

**Constitution of Pakistan---**

----Art. 199---Constitutional petition---Omission to submit list of witnesses---"Good cause"---Scope/ambit---Trial Court dismissed defendant's application for submission of list of witnesses and summoning the record at the stage of documentary evidence---Appellate court dismissed appeal---Defendant contended/pleaded that he was not aware of non-submission of the list of witnesses and came to know about the same only at the time of depositing expenses for summoning of witnesses---Validity---Defendant's contention did not come within the definition of "good cause"---Constitutional petition was dismissed for not being maintainable.

The Australasia Bank Ltd. v. Messrs Mangora Textile Industries, SWAT and others 1981 SCMR 150; Naeem Akhtar v. Additional District Judge and others 2005 MLD 1713 and Muslim Insurance Co. Ltd. through Chief Executive and another 2003 MLD 1521 ref.

Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

Ch. Khawar Siddique Sahi for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.---**Through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has impugned the order dated 25-10-2013 passed by the learned Civil Judge Ist. Class, Chichawatni and the order dated 31-10-2013 passed by the learned Additional District Judge, Chichawatni, whereby his application for filing the list of witnesses was dismissed.

2. Brief facts of the case are that respondent No.3 filed a suit for declaration with permanent injunction against the petitioner challenging the validity of registered deed No. 694 dated 23-7-2002 and mutation No. 1432 dated 15-8-2002 and registered deed No. 13 dated 4-1-2003 and Mutation No. 1473 dated 6-3-2003. This suit was contested by the petitioner through filing the written statement denying the averments of the plaint and out of the divergent pleadings of the parties issues were framed on 3-10-2011.There-after the evidence of the plaintiff as well as of the defendant was completed and the case was fixed for production of the documentary evidence of the petitioner/defendant. At this stage, an application dated 9-10-2013 was filed for submission of the list of witnesses and for summoning the record. This application was dismissed by the learned trial court vide order dated 25-10-2013 which was assailed in appeal which too met with the same fate, hence this writ petition.

3. Learned counsel for the petitioner submitted that the courts below have not applied their judicious mind while dismissing the application for submission of the list of witnesses as there was a legitimate right of the petitioner to produce the said witnesses. He has relied upon the judgments reported as The Australasia Bank Ltd. v. Messrs Mangora Textile Industries, SWAT and others (1981 SCMR 150), Naeem

Akhtar v. Additional District Judge and others (2005 MLD 1713) and Muslim Insurance Co. Ltd. through Chief Executive and another (2003 MLD 1521).

4. I have heard the arguments of the learned counsel for the petitioner and have also gone through the record with care.

5. I have perused the contents of the application for submission of the list of witnesses, wherein it has been asserted that the petitioner was unaware regarding the non-submission of the list of witnesses and when he tried to deposit the expenses for summoning the witnesses then he came to know that the list of witnesses has not been filed. I am afraid that the contention raised in this application does not come within the definition of good cause as has recently been held by the Hon'ble Supreme Court of Pakistan in the case reported as Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 Supreme Court 255) in the following terms:--

"Be that as it may, before proceeding with the matter further in the context of answering the propositions herein involved and for the purposes of interpretation of sub-Rules (1) and (2) of Order XVI, C.P.C. and for elucidation of the said question, I would also like to resort to another expression i.e. "sufficient cause" which has been used by the legislature in the provisions of Civil Procedure Code, specially in Order IX, Rule 9 and Order IX, Rule 13 as against the word "good cause" used in Rule 7 of the said Order (IX of C.P.C.); besides Order XLI, Rule 19 thereof. Rules 9 and 13 ibid pertains to setting aside of an ex parte proceedings or the decree on the behest of defendant(s) of a case who must establish a "sufficient cause" while under Rule 7 supra, the plaintiff whose suit has been dismissed for non-prosecution, should show a good cause for seeking its restoration. The distinction between the two expressions shall be made in the succeeding part of the judgment. Anyhow with reference to the proposition(s) in hand, XVI(2) can validly be bifurcated into two parts, firstly, it has been made incumbent upon a party, rather a duty has been cast upon the delinquent party to show 'good cause' for omission to file the list of witnesses or the name of a particular witness and the second part is meant to regulate the power, authority and the discretion of the Court in relation to the grant of permission".

It has also been held in the judgment supra that:--

"In the instant case, the learned Revisional Court while overturning the trial court order has absolutely failed to assign any valid reasons, except invoking the general principle of law that the technicalities of law should not be allowed to thwart the rights of the litigants. I fail to understand as to how the noted principle can be used as a tool to avoid, shun or to defeat the specific rules of law and to save a party from the consequences of its delinquency against the clear command of law on the concept and in terms of legal technicality. It is a well known principle of law that where the law requires an act to be done in a particular manner it has to be done in that manner alone and such dictate of law cannot be terms as a technicality".

Since the petitioner has not been able to establish on record any reasonable or good cause for non-submitting the list of witnesses, the learned courts below have rightly dismissed the same. The orders passed by the courts below are quite in accordance with law and no illegality has been committed which could be reversed by this court in its extraordinary constitutional jurisdiction.

6. In view of the discussion above, in my view this writ petition is not maintainable which is hereby dismissed in limine.

AG/M-61/L Petition dismissed.

**P L D 2014 Lahore 200**

**Before Atir Mahmood, J**

**GENERAL MANAGER, NHA, MULTAN and 2 others---Appellants**

**Versus**

**MUHAMMAD AQEEL AHMEDANI and another---Respondents**

F.A.O. No.50 of 2010, heard on 20th November, 2013.

**Punjab Consumers Protection Act (II of 2005)---**

----Ss. 27, 2(c) & 33---National Highways Authority Act (XI of 1991), S.10(2)---Jurisdiction of Consumer Court---"Consumer" definition and scope of---Toll plaza---Toll tax, collection of---Complainant had sought direction from Consumer Court that Toll Plaza established by the National Highways Authority ("NHA") be shifted to its original place and until such time, no toll be collected from the complainant---Complaint was partially decreed to the effect that Highway Authority would not collect toll plaza till providing him such facility at a new designated place---Contention of the Highway Authority was that Consumer Court had no jurisdiction in the matter---Validity---Under S.10(2) of the National Highways Authority Act, 1991, Authority may levy or collect or cause to be collected toll tax on national highways by establishing toll plazas, which was the prerogative and function of the Authority wherein the court should not have interfered in ordinary circumstances---Consumer Court had been established for protection of consumers of products and services and it had no jurisdiction to pass orders for shifting of tool plazas established in accordance with law or stopping the Authority from collection of toll tax on toll plazas constructed on highways---Consumer Court in the present case had therefore, travelled beyond its jurisdiction and the impugned order could not thus be sustained in the eye of the law and the complainant did not fall within the ambit of a "consumer" as the establishment of a toll plaza was for the purpose of collecting toll tax and no service of any kind was being provided to the complainant---Impugned order of Consumer Court was set aside, and complaint filed by the complainant was dismissed---Appeal was allowed in circumstances.

Malik Muhammad Tariq Rajwana for Appellants.

Respondent: Ex parte.

Date of hearing; 20th November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**---This appeal under section 33 of the Punjab Consumers Protection Act, 2005 is directed against order dated 18-3-2010 and decree dated 5-4-2010 passed by learned District Consumer Court, Dera Ghazi Khan whereby complaint filed by respondent No.1 was partly accepted.

2. Brief facts of the case are that respondent No.1 Muhammad Aqeel filed a complaint before the Consumer Court on 7-12-2009 praying that Sakhi Serwar Toll Plaza Dera Ghazi Khan be shifted to Sakhi Sarwar which, according to the complainant, is its original place. After hearing the parties, learned consumer court proceeded to partly accept the complaint vide order dated 18-3-2010 and decree dated 5-4-2010 to the extent that the appellants will not collect toll tax at the said toll plaza from the

contractor till providing him such facility at a newly designated place. Hence this appeal.

3. Learned counsel for the appellant has mainly contended that the consumer court has no jurisdiction to pass the impugned order as it is the prerogative of the National Highways Authority to establish toll plaza for collection of toll tax on the national highways at the place where the authority deems fit. He has also submitted that the consumer court has no powers to issue writ of mandamus as has been done in this case.

4. Respondent No.1 has already been proceeded against ex parte vide order dated 1-11-2013.

5. Arguments heard. Record perused.

6. Clause (vii) of subsection (2) of section 10 of the National Highways Authority Act, 1991 is relevant which is reproduced as under:--

"10. The Powers of the Authority.-(1) The Authority may take such measures and exercise such powers as it considers necessary or expedient for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the powers conferred by subsection (1), the Authority may for the purpose of carrying out the purposes of this Act-

(vii) Levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon."

Bare perusal of above makes it clear that the NHA may levy, collect or cause to be collected toll tax on national highways etc. which is done by establishing toll plaza on the highways. Under the NHA Act, 1991 and National Highways and Strategic Roads (Control) Rules, 1998, there is no embargo on the National Highways Authority on construction/installation of toll plaza on national highways at a place where the authority deems suitable. This is the prerogative and function of the NHA wherein the court should not interfere in the ordinary circumstances. Furthermore, the consumer court has been established for protection of the consumers of products and services. It has no jurisdiction to pass orders for shifting of toll plazas established in accordance with law or stopping the NHA from collection of toll tax on toll plazas constructed on the highways. In the circumstances, the consumer court has travelled beyond its jurisdiction while passing the impugned order, therefore, the order impugned cannot sustain in the eye of law.

Another aspect of the matter is that respondent No.1 does not fall within the ambit of 'consumer' as the establishment of a toll plaza was only for the purpose of collecting toll tax and no service of any kind was being provided to respondent No.1 by establishing the said toll plaza. Further, the toll plaza which is subject matter of this case has already been shifted by the NHA vide order dated 12-11-2013 from the place objected by respondent No;1.

7. For the aforementioned reasons, this appeal is allowed, the impugned order is set aside and the complaint filed by respondent No.1 is dismissed.

KMZ/G-47/L Appeal allowed.

**2014 Y L R 2506**

**[Lahore]**

**Before Atir Mahmood, J**

**Malik GULZAR MEHMOOD---Appellant**

**Versus**

**MUHAMMAD SALEEM FARUKH---Respondent**

F.A.O. No.100 of 2009, heard on 11th November, 2013.

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

----O.XXXIX, Rr. 1 & 2 & O. XX, R. 16---Suit for rendition of account---Grant of temporary injunction--- Ingredients---Plaintiff had sought rendition of account with regard to "Jharu (sweeping) fund", which was allegedly being collected and misappropriated by the defendants---Plaintiff had prayed injunctive order for restraining the defendants from collection of sweep/jharu fund---Allegations against the defendants were yet to be established by the plaintiff by production of evidence in the suit---Mere levelling allegation would not create any right in favour of a party---Ingredients for grant of temporary injunction i.e. prima facie case, balance of inconvenience and irreparable loss were missing in the present case---Plaintiff would not suffer any irreparable loss if stay order was not granted as if suit was decreed and he was found entitled to any relief then he could be compensated subsequently---No illegality or irregularity had been pointed out by the plaintiff---Order passed by the court below was in accordance with law---Appeal was dismissed in circumstances.

Messrs U. K. International Proprietorship concern through sole Proprietor v. Trading Corporation of Pakistan 2006 CLC 679; Abdul Mannan Fakir v. Province of East Pakistan and others PLD 1965 Dacca 361; Pakistan International Airlines Corporation v. Karachi Municipal Corporation through Chairman/Administrator Karachi and another PLD 1994 Kar. 343; Ch. Muhammad Ali v. Govt. of West Pakistan and others PLD 1966 (W.P.) Lah. 335; Dewan Chand and others v. Balochistan Local Council Election Authority 2000 MLD 1415 and Julius Salik v. Returning Officer and 27 others 1989 CLC 2499 ref.

Mian Hafeez ur Rahman for Appellant.

Muhammad Iqbal Khan for Respondents Nos.1 to 4.

Mujahid Rafique Qureshi for Respondent No.5.

Date of hearing: 11th November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Through this appeal, the appellant has questioned the legality of order dated 27-10-2009 passed by learned Civil Judge Sahiwal, whereby the application under Order XXXXIX Rules 1 and 2 read with section 151, C.P.C. filed by the appellant for grant of temporary injunction in a suit for rendition of accounts was dismissed.

2. Learned counsel for the appellant submits that the appellant owns a shop/property within the area of Ghalla Mandi, Sahiwal; that respondents Nos.1 to 3 are self-styled President, Senior Vice-President and General Secretary of Anjaman-e-Arhtiyan, Ghalla Mandi, Sahiwal since 2007 whereas respondents Nos.4 and 5 are ex-Presidents of the Anjaman; that the Anjaman is not a registered body; that the crops taken to the mandi by the farmers are kept in heaps where the same after due process are filled in bags; that after filling of bags, a reasonable quantity of crops is left over on the Ghalla Mandi floor which is Collected by the so-called Anjaman through their personal servants through sweep and sold in the open market under the name of sweep (Jharu) fund; that the money collected in this way in one year is about Rs.30,00,000; that if any member of the Ghalla Mandi objects to the collection or asks for rendition of accounts, he is thrown out of the mandi by hook or crook; that respondent No.4, ex-President of the anjaman has misappropriated crores of rupees under the garb of sweep fund and has not tendered any rendition of accounts to any member of the Arhtiyan, Ghalla Mandi, Sahiwal; that respondent No.4 is still holding a sum of Rs.10,00,000 on the pretext that some people have dragged him into civil and criminal cases; that respondent No.3 being General Secretary under the ex-presidency of Rana Farooq is also holding a sum of Rs.800,000 and has not tendered rendition of accounts; that respondents Nos.1 to 3 are also collecting a huge amount under the garb of jharu fund and are not presenting the amount so colleted before the members of the Anjaman; that the impugned order is based on surmises and conjectures; that the impugned order is against the law and if the appellant is not granted temporary injunction, he will suffer irreparable loss; that the appellant has a prima facie arguable case, therefore, the respondents be restrained from collection of jharu fund till decision of the suit filed by the plaintiff. Learned counsel prays that this appeal be accepted, the impugned order be set aside and the application under Order XXXIX, Rules 1 and 2, C.P.C. filed by the appellant be allowed.

3. On the other hand, learned counsel for the respondents have controverted the contentions raised by learned counsel for the appellant on legal as well as on factual aspects. They submit that the suit for rendition of accounts is not maintainable as there is no agreement in between the parties for rendition of accounts and that the appellant has no locus standi to challenge the constitution of Anjaman Arhtiyan, Ghalla Mardi,

Sahiwal as out of 300 commission agents, only the appellant has agitated the matter before the civil court; that the ingredients for grant of temporary injunction could not be established by the appellant, as such, the trial court has rightly dismissed the application of the appellant under Order XXXIX, Rules 1 and 2, C.P.C.

They have placed reliance on the law laid down in cases reported as "Messrs U.K. International Proprietorship concern through sole Proprietor v. Trading Corporation of Pakistan (2006 CLC 679)",
"Abdul Mannan Fakir v. Province of East Pakistan and others (PLD 1965 Dacca 361)",
"Pakistan International Airlines Corporation v. Karachi Municipal Corporation through Chairman/ Administrator Karachi and another (PLD 1994 Karachi 343)",
"Ch. Muhammad Ali v. Govt. of West Pakistan and others (PLD 1966 (W.P.) Lahore 335)",
"Dewan Chand and others v. Balochistan Local Council election Authority (2000 MLD 1415)" and
"Julius Salik Vs. Returning Officer and 27 others (1989 CLC 2499)".

4. Arguments heard. Record perused.

5. From perusal of the plaint, it is evident that he appellant has sought rendition of accounts regarding jharu fund which is allegedly being collected and misappropriated by the defendants to the tune of more than Rs.10 crores. In the application filed by the appellant under Order XXXIX Rules 1 and 2 read with section 151, C.P.C., the appellant has prayed for injunctive order for restraining the defendants from collection of sweep/ jharu fund. The contention of the appellant is that the ex-presidents and general secretary of the anjaman have misappropriated lacs of rupees out of jharu fund and the present office bearers of the anjaman are also collecting and misappropriating crores of rupees out of jharu fund.

These allegations against the defendants are yet to the established by the appellant by production of evidence before civil court in the suit filed by him. Mere levelling allegation creates no right in favour of any body.

The, basic ingredients for grant of temporary injunction, i.e. prima facie case, balance of inconvenience and irreparable loss are missing in this case. Even otherwise, the matter requires fiscal liability. In case, stay order is not granted to the appellant, he is not likely to suffer any irreparable loss as if the suit filed by the appellant is decreed and he is found entitled to any relief in the suit, he can be compensated subsequently.

The order passed by learned court below is in accordance with law. Learned counsel for the appellant has failed to point out any illegality or irregularity therein. No interference is called for.

6. For what has been stated above, this appeal has no merit, hence dismissed.

AG/G-13/L Appeal dismissed.

**2014 C L C 1570**
**[Lahore]**
**Before Atir Mahmood, J**
**MANZOOR AHMAD and 2 others----Petitioners**
**Versus**
**GHULAM HASSAN and 2 others----Respondents**

Civil Revision No.800-D of 2013, decided on 19th November, 2013.

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

----O. XXVI, R. 9---Specific Relief Act (I of 1877), S.42---Suit for declaration---Appointment of local commission---Scope---Suit was dismissed by the Trial Court whereagainst appeal was filed in which plaintiffs moved an application for appointment of local commission which was dismissed---Validity---Application for appointment of Local Commission was moved after 10-1/2 years after institution of suit---No such application was filed before the Trial Court---Application for appointment of Local Commission for determination of possession over the suit property could not be allowed at such a belated stage as same would prolong the litigation---Plaintiffs were bound to prove their possession by production of evidence which had already been recorded and Appellate Court was now seized with the matter---Appointment of Local Commission was prerogative of the court and no party could seek such appointment to create evidence in his favour---No illegality had been pointed out in the impugned order---Revision was dismissed in limine.

Jalal Khan and 10 others v. Khandoo Malik and 24 others 2003 SCMR 1351 rel.

Malik Abdul Ghafoor Panwar for Petitioners.

**ORDER**

**ATIR MAHMOOD, J.**--- Through this civil revision, the petitioners have assailed order dated 8-11-2013 passed by learned Additional District Judge, Layyah whereby petitioners' application under Order XXVI, Rule 9 read with section 151, C.P.C. for appointment of a Local Commission was dismissed.

2. Brief facts leading to filing of instant revision petition are that on 10-4-2003, the petitioners filed a suit for declaration regarding the property fully mentioned in the plaint. The suit was contested by the respondents. The issues were framed. After recording evidence and hearing the parties, learned trial Court dismissed the suit of the petitioners with cost vide judgment and decree dated 5-1-2010. Feeling aggrieved, the petitioners filed an appeal before the learned Additional District Judge, Layyah on 4-2-2010. During the pendency of the appeal, the petitioners on 12-10-2013 filed an application for appointment of a Local Commission for ascertainment as to who is in possession of the suit property. The application was opposed by the other side. After hearing learned counsel for the parties, learned Additional District Judge, District Layyah dismissed the application vide his order dated 8-11-2013 which is impugned in this revision petition.

3. Learned counsel for the petitioners though frankly admits that the application for appointment of local commission was moved at a very belated stage, yet he prays that one opportunity be given to the petitioners for proving that they are in possession of the suit property.

4. Arguments heard. Record perused.

5. Scanning of record shows that the suit for declaration was filed by the petitioners on 10-4-2003 on the basis of a Sale-deed No.1862 dated 19-10-1965 allegedly made

by Mst. Mehr Mai, predecessor-in-interest of the respondents-defendants in favour of father of the petitioners-plaintiffs namely Ghulam Hussain with the averment that the possession of the suit property was also delivered to their father, therefore, Mutation No.11, dated 25-9-1995 executed by the said lady in favour of respondents-defendants as well as subsequent mutations, sale-deeds etc. are nullity in the eye of law. However, the suit of the petitioners is being contested by the other side denying execution of any sale-deed in favour of the petitioners. The respondents also aver that the Sale-deed No.1862 dated 19-10-1965 is false and fictitious. After recording oral and documentary evidence adduced by the parties, the suit was dismissed by learned trial Court vide judgment and decree 5-1-2010 whereagainst the appeal was filed by the petitioners on 4-2-2010 which is still pending adjudication. During the pendency of the appeal on 12-10-2013, the application for appointment of Local Commission for determination as to who is in possession of the suit property was moved by the petitioners which was dismissed by the learned lower appellate court vide order dated 8-11-2013.

6. There is no denial that the application for appointment of local commission was moved after 10-1/2 years of institution of the suit by the petitioners. The suit remained pending before trial Court for six years and nine months but no such application was ever filed before the trial court. Afterwards, the appeal was filed before the learned Additional District Judge, Layyah on 4-2-2010. After more than 3-years and 9-months of filing of the appeal, the application for appointment of Local Commission for determination of possession over the suit property was filed which could not be allowed at such a belated stage as it would undoubtedly prolong the litigation between the parties as well as their agonies. Even otherwise, it was incumbent upon the petitioners to prove their possession by production of evidence which has been recorded and appellate court is now seized with the matter. The appointment of local commission is prerogative of the court and no party can seek appointment of a Local Commission to create evidence in his favour and that too at such a belated stage. Guidance can be sought from the dictums laid down by the Hon'ble Supreme Court of Pakistan in case reported as 2003 SCMR 1351 (Jalal Khan and 10 others v. Khandoo Malik and 24 others)." Relevant excerpt is reproduced hereunder:---

"The perusal of record would show that the request of petitioners for appointment of Local Commission was not allowed by the Appellate Court and also by the High Court as sufficient evidence was available on record to decide the case. It appears that petitioners sought appointment of Local Commission for their own convenience as they have not been able to substantiate their plea through any cogent evidence. We having heard the learned counsel for the petitioners, have not been able to find out any misreading or non-reading of evidence by the Appellate Court therefore, the High court has rightly declined to interfere in the concurrent findings of fact which would not be open to challenge on the grounds that before the High Court and before this Court in support of present petition."

7. Learned counsel for the petitioners has also failed to point out any illegality in the order impugned. No interference is called for.

8. For the aforementioned reasons, this civil revision has no merit. The same is dismissed in limine.

AG/M-62/L Revision dismissed.

**2014 C L C 1737**
**[Lahore]**
**Before Atir Mahmood, J**
**BABAR HUSSAIN----Petitioner**
**Versus**
**FARAH HUSSAIN and 2 others----Respondents**

Writ Petition No.10678 of 2011, heard on 16th June, 2014.

**West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Civil Procedure Code (V of 1908), O.IX, R.13---Suit for recovery of dower and dowry articles---Ex parte decree, setting aside of---No sufficient cause for not appearing before the court---Effect---Wife had filed suit for recovery of dower and dowry articles against the husband/petitioner---Petitioner-husband engaged a counsel, but during course of evidence, he stopped pursuing the case---Ex parte proceedings were initiated against the petitioner-husband, and the suit was decreed in favour of the wife---Petitioner-husband filed an application for setting aside ex parte decree with the plea that due to a flood in his mother's village, he went to help his relatives and due to such reason he could neither attend court nor contact his counsel---Validity---Even if petitioner (was away and) not available, his counsel being present in court could appear before the court to pursue the case---Further in today's modern age, telephone and mobile facilities were available everywhere including the villages---No one could take a plea that he being in a village was unable to contact his counsel in the city---Plea taken by the petitioner for setting aside ex parte decree was thus unconvincing---Appellate Court below had correctly upheld the ex parte decree against the petitioner-husband---Constitutional petition was dismissed accordingly.

Mehr Ahmad Bakhsh Bharwana for Petitioner.

Shaigan Ejaz Chadhar for Respondent No.1.

Date of hearing: 16th June, 2014.

**ORDER**

**ATIR MAHMOOD, J.---** Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the legality of judgment and decree dated 7-4-2011 passed by learned Additional District Judge, Jhang who dismissed appeal of the petitioner and upheld order dated 17-2-2011 passed by learned Judge Family Court, Jhang whereby application of the petitioner for setting aside ex parte proceedings dated 18-10-2010 and judgment and decree dated 2-11-2010 was dismissed.

2. Brief facts of the case are that respondent No.1 namely Farah Hussain (the respondent) filed a suit for recovery of haq mahar and dowry articles with the assertions that she was married with the petitioner Babar Hussain on 3-12-2008, however, rukhsati took place on 2-4-2009; that out of this wedlock, minor girl Sajal Fatima was born; that relations between the parties remained cordial in the beginning, however, afterwards, the relations became strained ultimately, the petitioner expelled the respondent from his house after causing physical torture just after one month of the marriage whereafter the respondent settled in the house of her parents; that the respondent was given dowry articles worth Rs.4,44,000 which were lying with the petitioner; that the defendant wrote in the nikahnama that he will give dower

Rs.10,000 and land measuring 26 kanals and 14 marlas to the plaintiff which he has not given yet.

3. The petitioner filed contesting written statement. Out of divergent pleadings of the parties, issues were framed and the parties were directed to produce their respective evidence. During the course of evidence of the plaintiffs the petitioner-defendant gave up to pursue the case, therefore, ex parte proceedings were initiated against the petitioner on 18-10-2010 and remaining evidence of the plaintiffs was recorded against ex parte.

4. After recording evidence of the plaintiff, the learned Judge Family Court, Jhang vide judgment and decree dated 2-11-2010 decreed the suit of the respondent-plaintiff in the terms that she is entitled to receive Rs.10,000 as Haq Mehar and dowry articles as per list Exh.P.1 or in the alternative price Rs.300,000.

5. On 20-12-2010, the petitioner moved an application for setting aside ex parte proceedings as well as ex parte judgment and decree dated 2-11-2010 which was dismissed vide order dated 17-2-2011. Feeling aggrieved, the petitioner preferred appeal which also met with the same fate vide judgment dated 7-4-2011. Hence this writ petition.

6. Learned counsel for the petitioner inter alia contends that the impugned order and judgment and decree of learned family court and judgment of learned lower appellate court are against law and fact; that there was sufficient reason given in the application for setting aside ex parte proceedings and ex parte judgment and decree that the petitioner was struck off in flood at Khanda Kot and situation was beyond his control but this was not taken into consideration by learned courts below: that the petitioner has been condemned unheard; that it is settled principle of law that the cases should be decided on merit ignoring the technicalities, therefore, the impugned orders and judgment and decree passed by learned family court and judgment passed by learned lower appellate court be set aside and the case be remanded for decision afresh.

7. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and fully supported the impugned orders and judgments and decree.

8. Arguments heard. Record perused.

9. Scanning of record reflects that the petitioner was pursuing the case in the beginning by engaging his counsel whereafter he suddenly without any information to the court stopped pursuing the case. The only ground raised by the petitioner in application for setting aside ex parte proceedings and ex parte judgment and decree is that due to flood in his mother's village, he went to help his relatives at Khanda Kot and due to this reason neither he could attend the Court nor contact his counsel. This point has rightly been addressed by both the learned courts below stating that even if the petitioner was not available, his counsel being present in the kutchery could appear before the court to pursue the case. Furthermore, in this modern age, telephone and mobile facilities are available everywhere including the villages and none can take plea that he being in a village was unable to contact even his counsel in the city. The ground taken by the petitioner is unconvincing. The impugned ex parte order and ex parte judgment and decree of learned Family Court as well as impugned judgment of learned lower appellate court are in accordance with law. I see no illegality therein.

10. As a result of above discussion, this writ petition is without any force which is accordingly dismissed.

MWA/B-26/L Petition dismissed.

**PLJ 2014 Cr.C. (Lahore) 720**
**Present: Atir Mahmood, J.**
**SHAHID HAMEED--Petitioner**
**versus**
**STATE and another--Respondents**

Crl. Misc. No. 8865-B of 2013, decided on 22.7.2013.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail before arrest, confirmed--Dishonoured on account of deficiency of amount in bank--No business transaction between parties--Version of investment in business of property could not be established--Cheque were returnable on payment--Validity--Disputed cheque which was presented for encashment before bank was given as a guarantee/ security which was returnable to petitioner upon payment of Rs. 2,00,000/- to complainant--Learned counsel for complainant has not been able to controvert submission made by learned counsel for petitioner that before deposit of cheque in bank for its encashment, petitioner was not served with any sort of notice for payment of said amount--Offence does not fall within prohibitory clause of Section 497, Cr.P.C. [P. 723] A

Mr. Waqar-ul-Hassan Butt, Advocate for Petitioner.
Mr. Aziz Ahmad Bhatti, Advocate for Complainant.
Mr. Khurram Khan, DPG for State.
Date of hearing: 22.7.2013.

**Order**

Through this petition under Section 498, Cr.P.C., the petitioner seeks his pre-arrest bail in case F.I.R. No. 140/2013, dated 20.02.2013, lodged with Police Station Ghalib Market Lahore for offence under Section 489-F, PPC.

2. As per contents of the FIR, the allegation has been levelled against the petitioner that the complainant invested a sum of Rs. 29,00,000/- with the petitioner in the business of property and for re-payment of the said amount, an agreement dated 15.6.2011 was executed between the parties. In accordance with the said agreement, the payment of Rs. 4,00,000/- vide Cheques No. 5952041 and 5952041 was made by the petitioner to the complainant. Thereafter Cheque No. 6952043 issued by the petitioner for an amount of Rs. 2,00,000/- dated 10.12.2012 was bounced.

3. Learned counsel for the petitioner submitted that there was no business transaction between the petitioner and the complainant and infact the alleged amount, which is being claimed by the complainant, was regarding a bet upon a match of IPL; that the petitioner lost the bet; that in the investigation of the police, the version of the complainant that he made any investment in the business of property could not be established; that at the most, the cheques issued by the petitioner can only be considered as a security/guarantee; that the disputed cheque which is subject matter of the present case was not dishonoured on account of deficiency of amount in the bank rather it was returned as the bank account of the petitioner has become dormant for not using for more than six months; that the complainant before presenting the cheque never issued any notice to the petitioner nor asked for the payment of said amount and straight away presented the cheque before the bank; that the investigation has been completed and nothing is to be recovered from the petitioner as the disputed cheque is already in possession of the police. He lastly submitted that matter requires further inquiry and prayed for confirmation of ad-interim pre-arrest bail already granted to the petitioner.

4. On the other hand, learned counsel for the complainant has vehemently opposed this petition and submitted that the issuance of cheque has been admitted by the petitioner and he has defrauded the complainant by issuance of cheque knowingly that the amount was not available in the account of the petitioner. He has further submitted that the petitioner is not entitled to any discretionary relief as he has admitted that he gambled on IPL matches and on account of this admission, he is liable to be proceeded against under the relevant provisions of Gambling Act, 1978. The learned Deputy Prosecutor General has adopted the arguments of the learned counsel for the complainant. It has been stated by the learned Law Officer that during the course of investigation version of the complainant regarding the business transaction of property was not proved, however, it was found that the disputed cheque was given by the petitioner to the complainant dishonestly, therefore, provisions of Section 489-F, PPC are attracted.

5. I have heard the arguments of learned counsel for the parties and also gone through the record.

6. From the perusal of the FIR and arbitration decision arrived at between the parties, prima-facie, the complainant has not been able to establish that the amount of Rs. 29,14,000/- was paid by him to the petitioner for the business of property. In the said arbitration decision dated 15.6.2011 it has nowhere been mentioned that the dispute between the parties was regarding any property matter. It is written therein that there was a dispute of Rs. 29,14,000/-. From Clause 2 of the arbitration decision, it is crystal clear that all the cheques, 15 in number, were returnable to the petitioner on

payment of Rs. 2,00,000/- each. As per Clause 4 of the arbitration decision, the complainant was entitled to proceed against the petitioner for the recovery of monthly installment alongwith costs from the petitioner. In this arbitration decision it is no where mentioned that any criminal proceedings can be initiated on account of non-payment of the cheque amount. During the course of arguments, learned counsel for the complainant has admitted that there was bet between the parties, on account of which the amount in dispute is being claimed by the complainant. Even otherwise, there is nothing on record to show that the complainant has infact paid any amount to the petitioner.

7. In view of the above discussion, I am of the considered opinion that the disputed cheque which was presented for encashment before the bank was given as a guarantee/security which was returnable to the petitioner upon the payment of Rs. 2,00,000/- to the complainant. Learned counsel for the complainant has not been able to controvert the submission made by learned counsel for the petitioner that before deposit of the cheque in the bank for its encashment, the petitioner was not served with any sort of notice for the payment of said amount. The offence does not fall within the prohibitory clause of Section 497 Cr.P.C. Nothing is to be recovered from the petitioner by the police. Sending the petitioner behind the bars at this stage will amount to imprisonment before conviction. On account of above narrated facts, the petitioner has been able to make out a case of pre-arrest bail which is accordingly allowed. The ad-interim pre-arrest bail already granted to the petitioner/ accused is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 200,000/-(Rupees two lac only) with one surety in the like amount to the satisfaction of learned trial Court. It is made clear that the observations made here-in-above shall not prejudice the merits of the case which will be decided on its own merits in accordance with law, by the trial Court.

(A.S.) Bail confirmed

**2015 C L C 285**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD IMRAN YOUNAS and 3 others----Petitioners**

**Versus**

**DISTRICT COLLECTOR (RING ROAD), LAHORE and 2 others----Respondents**

Writ Petition No.283 of 2010, heard on 16th April, 2013.

**Land Acquisition Act (I of 1894)---**

---- Ss.4, 5-A, 17(4) & 17(6)---Constitution of Pakistan, Arts.199, 23 & 24---Constitutional petition---Notification for acquisition of land---Land of petitioners and others was acquired for construction of interchange and notification under S.4 of the Land Acquisition Act, 1894 was issued---Award was made and compensation was paid to all those whose land was acquired for construction of Interchange---Urgency was declared and notification was issued under Ss.17(4) & 17(6) of the Land Acquisition Act, 1894 but the land of the petitioners was not included in the said notification---Fresh notification was issued under S.4 of the Land Acquisition Act, 1894 for acquiring the land of the petitioners---Contention of the petitioners was that the interchange stood completed and their land was being acquired for horticulture purposes only and not for construction of Interchange---Validity---Competent authority might acquire the land in public interest as and when needed---Authorities were well within the law and presumption of correctness was attached to their act, until and unless there was some malice on their part which could not be established by the petitioners---Mere raising allegation of malice or mala fide was nothing until and unless same was proved through cogent evidence---Petitioners had remedy available to them before the Collector under S.5-A of the Land Acquisition Act, 1894 in the shape of raising objections---Property of the petitioners had been acquired in accordance with law and they had not denied receipt of compensation under award and petitions for enhancement of compensation were also pending decision before the Collector---No illegality was committed by the Authorities while issuing notification under S.4 of the Land Acquisition Act, 1894---Constitutional petition was dismissed.
Sub. (Retd.) Muhammad Ashraf v. District Collector Jhelum and others PLD 2002 SC 706 rel.

Ch. Zafar Iqbal for Petitioners.
Rizwan Mushtaq for Respondents.
Date of hearing: 16th April, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this petition, the petitioners have impugned the notification dated 23-11-2009 issued under section 4 of the Land Acquisition Act, 1894 by the revenue authorities to acquire the land of the petitioners measuring 27 kanals-8 marlas, bearing khasra numbers 1638/2, 1639, 3765/1645, 1651/2, 1656/2, 1657 situated in Tehsil Cantt. for "Construction of Lahore Ring Road (Package-9)

Construction of Interchange at Harbanspura Canal Crossing (Horticulture and Service Area)."

2. Brief facts of the case are that earlier, a notification dated 17-11-2006 under section 4 of the Land Acquisition Act, 1894 (the Act) was issued for acquisition of the land which is subject-matter of this petition and some other land. Thereafter, provisions of sections 17(4) and 17(6) of the Act were invoked vide notification dated 18-6-2008 declaring urgency wherein major portion of land mentioned in notification dated 17-11-2006, including the property in dispute, was omitted and the property mentioned in notification dated 18-6-2008 was taken possession of and the Harbanspura Interchange was constructed. The award of the land acquired was also announced on 4-11-2008, however, petitions regarding quantum of compensation are pending decision before the Land Acquisition Collector-I (Ring Road) Lake Road, Lahore. The possession of the disputed property remained intact with the petitioners throughout the aforesaid process. Afterwards, on 23-11-2009, a fresh notification under section 4 of the Act was issued to acquire the land of the petitioners which is under challenge in this writ petition.

3. Learned counsel for the petitioners inter alia contends that the disputed property is owned by the petitioners; that a major portion of the property is already constructed which includes nine shops, one house and a factory; that the shops have been rented out to different persons; that the property in dispute forms part of notification dated 17-11-2006; that since the disputed property was not required by the respondents, it was deliberately omitted in notification dated 18-6-2008; that construction of Harbanspura Interchange stands completed and construction material and debris etc. have also been cleared from the spot; that acquisition of land of the petitioners for the said interchange has become old and past transaction and the respondents are now estopped from issuing the fresh notification intending to acquire land of the petitioners again; that the purpose of construction of Harbanspura Interchange given in the impugned notification is partly false as it already stands completed and is functional at present; that the property in dispute is not required for the said Interchange; that the impugned notification is violative of Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan, 1973 which guarantee a citizen to acquire, hold and dispose of his property. Learned counsel avers that the impugned notification is against the law, therefore, this writ petition be allowed and the impugned notification dated 23-11-2009 be set aside.

4. Learned counsel for the respondents contends that a number of Interchanges at different locations of Ring Road Project have been constructed; that the Harbanspura Interchange Project is undergoing progress for which land was acquired and the owners of the land have also received compensation through award; that at a later stage, it was noticed that a service area was lacking for which a patch of land, including State land as well as the land of the petitioners, was identified to cater the future requirements of the area, therefore, the same is being lawfully acquired by the respondents vide notification dated 23-11-2009 in public interest; that the project is for the betterment of the public and the area; that the petitioners have already received compensation of the land in earlier acquisition proceedings, as such, they have no locus standi to file this writ petition which is not even maintainable; that the

petitioners at the best can ask for a fair compensation which matter is already pending adjudication before the competent authority. Learned counsel for the respondents prays that this writ petition has no force, it be dismissed.

5. I have heard the arguments advanced by learned counsel for the parties and also perused the record with their able assistance.

6. The land of the petitioners and others was acquired by the government for construction of Harbanspura Interchange vide notification 17-11-2006 issued under section 4 of the Land Acquisition Act, 1894. Thereafter, urgency was declared vide notification dated 18-6-2008 invoking under sections 17(4) and 17(6) of the Act. However, in this notification, the land of the petitioners was not included. The award was made vide notification dated 4-11-2008 and the compensation was paid to all those whose land was acquired vide notification dated 17-11-2006 which is not denied by the petitioners. Afterwards, fresh notification dated 23-11-2009 under section 4 of the Act was issued intending to acquire the land of the petitioners, which is impugned in this writ petition by the petitioners mainly on the grounds that the construction of Harbanspura Interchange stands completed which at present is functional; that their land is being acquired for horticulture purposes only and not for construction of Harbanspura Interchange and that the fresh notification could not have been issued by the respondents after completion of the work pursuant to earlier notification dated 17-11-2006.

7. The contention of learned counsel for the petitioners that their land is being acquired for horticulture purpose only has no force as the impugned notification dated 23-11-2009, issued under section 4 of the Act provides that the land is being acquired for the "Lahore Ring Road (Package-9) Construction of Interchange at Harbanspura Canal Crossing (Horticulture and Service Area)" which means that the land is not merely required for horticulture but also for Service Area which is a public requirement and there can be put no embargo if the land is being acquired for a public purpose which is prima facie clear from the record.

8. The other contention of learned counsel for the petitioners is that a fresh notification could not have been issued after completion of the work pursuant to earlier notification dated 17-11-2006 which does not hold water as it is well-settled now that the competent authority may acquire the land in public interest as and when needed. The said contention has been well replied by the respondents that after completion of the Interchange in question, a need to construct service area arose, therefore, the fresh notification was issued. In the circumstances, the respondents were well within the law and presumption of correctness is attached to their act, until and unless there is some malice on their part which could not be established by the petitioners. Mere raising allegation of malice or mala fide is nothing until and unless it is proved through cogent evidence. In this regard, I am guided by the principles laid down by the Hon'ble Supreme Court of Pakistan in case titled "Sub. (Retd.) Muhammad Ashraf v. District Collector Jhelum and others PLD 2002 SC 706)" wherein it has been held that "It is well-settled by now that "mere assertion cannot take place of proof so as to tilt balance in favour of mala fides."

9. Another aspect of the matter is that the petitioners have remedy available to them before the Collector under section 5-A of the Land Acquisition Act in shape of raising objections. Subsections (1) and 2 of section 5-A of the Act are reproduced below:---

[5-A. Hearing of objections.--- (1) Any person interested in any land which has been not under section 5 as being needed for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under subsection (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision of the Commissioner, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the Commissioner on the objections shall be final."

The aforementioned remedy is a proper and equally efficacious remedy provided by the Act but the same has not been availed by the petitioners.

10. As far as contention of learned counsel for the petitioners regarding violation of Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan, 1973 is concerned, it has been held in the judgment cited at (PLD 2002 SC 706) supra that "where a person is deprived of his property under the authority of law and according to the provisions of law, he has no ground for complaint under the Constitution and the only embargo which has been imposed under Article 24 of the Constitution is that no private property can be acquisitioned save in accordance with law and too for a public purpose and on payment of compensation." The property of the petitioners has been acquired in accordance with law. They have also not denied receipt of compensation under award dated 4-11-2008. Further, the petitions for enhancement of compensation are also pending decision before the Collector. In the circumstances, I find no illegality committed by the respondents while issuing impugned notification dated 23-11-2009 under section 4 of the Land Acquisition Act, 1894.

11. In view of the aforementioned reasons, this writ petition has no merit, which is accordingly dismissed.

AG/M-112/L Petition dismissed.

**2015 C L C 667**

**[Lahore]**

**Before Atir Mahmood, J**

**SAIMA PERVEEN and 2 others----Petitioners**

**Versus**

**NAEEM AHMAD NASIR and 3 others----Respondents**

Writ Petition No.13054 of 2012, decided on 30th May, 2014.

**West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 5, Sched. & S.13---Constitution of Pakistan, Art.199---Constitutional petition---Maintenance allowance--- Execution proceedings---Order of attachment of property of husband by Family Court---Subsequent agreement to sell regarding the property attached by the Family Court in the execution proceedings of a decree for recovery of maintenance allowance---Effect---Plaintiff (wife) filed suit for recovery of maintenance allowance for herself and for minors---Trial Court decreed the suit---Plaintiffs being dissatisfied preferred appeal and the appellate court awarded maintenance to minors @ Rs.25,00 per month from the date of institution of suit with an increase of 25% after every three years and @ Rs.15,00 per month to plaintiff (wife) from the date of institution of suit till she was divorced---Plaintiff (wife) after dismissal of constitutional petition of defendant (husband) against the judgment and decree of the appellate court filed an application for restraining respondent (husband) from alienating his share in the property, which was accepted by the executing court---Defendant (judgment debtor) did not appear to execute the decree, therefore, the property in question was attached---Respondent (objector) filed objection petition for setting aside order of attachment of the property on the strength of decree having been passed by the appellate court for specific performance of agreement to sell---Contention of the wife was that the respondent (objector) was brother-in-law of the respondent (husband) and they in connivance with each other had tried to frustrate the object of decree passed by the Family Court in favour of the wife and minors on the basis of a subsequent agreement to sell the property in dispute and decree passed by the appellate court in favour of the respondent (objector)---Pleas of the respondent (objector) were that he being the decree holder was entitled to have the fruits of said decree; that the property in question could not be attached in the execution proceedings for recovery of maintenance allowance passed in favour of the wife and minors---Validity---Agreement to sell dated 8-8-2007 was executed by husband in favour of respondent; suit for specific performance was filed on 3-1-2008, which was dismissed by the civil court, however, the appeal filed by respondent was accepted vide ex parte judgment and decree dated 28-12-2008---Agreement to sell, filing of the suit for specific performance and the judgment and decree passed in favour of respondent (objector) were all subsequent events to the decree of maintenance allowance passed in favour of the wife and minors; respondents (husband and objector) being close relatives in connivance with each other had tried to frustrate the decree of maintenance allowance passed in favour of the wife and minors---Any agreement to sell executed by the respondent (husband) regarding his property after

the decree passed against him was illegal and unlawful and did not create any right in favour of the subsequent purchaser (objector)---Sale-deed executed by husband was result of fraud and connivance which could not be allowed to be made a tool to frustrate the judgment and decree of maintenance allowance passed in favour of the wife and minors---Appellate Court had failed to apply its judicial mind while passing the judgment and decree---Constitutional petition was allowed in circumstances.

Muhammad Sadiq v. Dr. Sabira Sultana 2002 SCMR 1950 rel.
Ch. Muhammad Imran Bhatti for Petitioners.
Respondents proceeded against ex parte on 13-3-2014.
Date of hearing: 22nd April, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners have challenged that the order dated 19-4-2012 passed by learned Additional District Judge, Faisalabad by virtue of which the appeal filed by respondent No.1 was accepted and objection petition filed in executing petition of the petitioner was ordered to be sustained.

2. Brief facts for disposal of this writ petition are that a suit for recovery of maintenance was filed by the petitioner against respondent No.2 which was decreed vide judgment dated 5-7-2006 by the learned family Court. The petitioners feeling themselves dissatisfied filed an appeal before the appellate Court which was contested by respondent No.2. The appellate Court after hearing the parties accepted the appeal vide judgment dated 8-1-2007 by modifying the judgment and decree of the family Court and the petitioners Nos.2 and 3 were held entitled to have maintenance allowance from the respondent @ Rs.2500 per month from the date of institution of suit with an increase of 25% after every three years. Petitioner No.1 was held entitled to receive the maintenance allowance @ Rs.1500 per month also from the institution of suit till she is divorced. The judgment and decree passed by the appellate Court was assailed by respondent No.2 in W.P. No.2257 of 2007 before this Court. After the dismissal of the writ petition the petitioners filed execution petition on 28-2-2007 against respondent No.2. They also filed an application dated 19-12-2007 for restraining respondent No.2 from alienating his share in the property bearing House No.2 street No.4, Hajweri Town, Shadman Road Faisalabad along with his landed property described in the said application. The learned executing Court issued stay order restraining respondent No.2/judgment debtor from alienating his property vide order dated 19-12-2007. Respondent No.2/judgment debtor did not appear to execute the decree, therefore, the above referred property vide order dated 29-10-2010 was attached and a report of Bailiff dated 4-11-2010 was submitted before the Court regarding the attachment of the property. Further, non-bailable warrants of arrest were also issued against respondent No.2.

3. On 10-11-2010, respondent No.1 filed an objection petition for setting-aside order dated 29-10-2010 of the attachment of the property detailed therein. It was asserted by respondent No.1/objector that he filed suit for specific performance of agreement to

sell dated 8-8-2007 regarding constructed house measuring 2M-5S bearing Khasra No.21/1, square No.7, Khewat No.6501, Khatooni No.8529 situated at Chak No.122 J.B (Noor Pur), Tehsil City, District Faisalabad against Muhammad Akram, respondent No.2. According to him the suit was dismissed by the trial Court vide judgment and decree dated 19-5-2008 which was assailed in appeal by respondent No.1/objector and the appeal was decreed on 18-12-2008. It was asserted in the said application that the execution petition for execution of the sale deed is pending before the Court. It was submitted that he being the decree holder was entitled to have the fruits of said decree and the said property cannot be attached in the execution of decree for maintenance passed in favour of the petitioner. The present petitioners contested the objection petition by submitting their written reply. It was asserted that the objector is brother-in-law ( ) of the judgment debtor Muhammad Akram and being in league with him has tried to frustrate the decree passed by the family Court in favour of the petitioner. The learned executing Court dismissed the objection petition filed by respondent No.1 vide order dated 1-12-2010. The appeal filed by respondent No.1 against the said order was allowed by learned Additional District Judge, Faisalabad vide judgment dated 19-4-2012 which is impugned in this writ petition.

4. I have examined the entire record of the case with the able assistance of the learned counsel for the petitioner.

5. The relevant paragraph of the learned appellate Court is reproduced as under:---

"Perusal of record reveals that decree passed in favour of appellant by the competent Court of learned Additional District Judge while accepting the appeal is an admitted fact. Further perusal transpires that order for attachment of property was passed later in time when the judgment and decree dated 18-12-2008 was already in field, passed in favour of appellant/objection petitioner and this decree was passed on the basis of agreement to sell dated 8-8-2007 although on filing of objection petition learned Executing Court has to investigate and enquire into status of title or claim of objection petitioner over the property under attachment but trial Court while deciding objection petition has altogether ignored judgment and decree dated 18-12-2008 passed in favour of the objection petitioner. Even if the order of learned Judge Executing Court remains in field even then attachment and auction of this property may not be effected in presence of judgment and decree in favour of the objection petitioner. A decree in favour of objection petitioner gives him title over the property whereas objection may be sustained on the basis of claim by which the person having objection has any claim over the property. Therefore, order dated 1-12-2010 passed for dismissal of objection petition is not maintainable in eye of law hence the same is set aside and appeal is accepted. Resultantly, objection petition filed by p/appellant is sustained. Copy of this judgment be sent to the learned trial Court immediately. File be consigned to record room." (Underline is mine)

6. It is noted with great concern that the suit for maintenance allowance filed by the petitioner was decreed by the family Court on 5-7-2006, the appeal was allowed vide judgment and decree dated 8-1-2007 and the executing petition was filed against respondent No.2 on 28-2-2007. Then on the application of the decree holders, the

respondent No.2 was restrained to alienate the disputed property vide order dated 19-12-2007. Then allegedly an agreement to sell dated 8-8-2007 was executed by respondent No.2 in favour of respondent No.l. The suit for specific performance was filed on 3-1-2008 which was dismissed by the civil Court however the appeal filed by respondent No.1 was accepted vide ex parte judgment and decree dated 28-12-2008.

7. Undeniably, the alleged agreement to sell, filing of the suit for specific performance and the judgment and decree passed in favour of respondent No.1 are all subsequent events to the decree of maintenance allowance passed in favour of the petitioner. I am of the considered opinion that respondents Nos.1 and 2, closely related, in connivance with each other have tried to frustrate the decree of maintenance allowance passed in favour of the petitioner. Any agreement to sell executed by the judgment debtor regarding his property after the decree passed against him is illegal and unlawful and does not create any right in favour of the subsequent/alleged purchaser. I am fortified by the judgment of the Hon'ble Supreme Court in a case reported as Muhammad Sadiq v. Dr. Sabira Sultana [2002 SCMR 1950]. In the said case, suit for recovery of maintenance was decreed on 23-12-1998 and the property of the judgment debtor was attached on 14-4-1999 whereas the objector claiming to be a vendee under an agreement dated 30-6-1998 filed an objection petition against the property. It was held by the Hon'ble Supreme Court as under:---

"We have heard the learned counsel for the petitioner at length. We find that there is no evidence on record to prove the genuineness and authenticity of the alleged agreements to sell dated 10-10-1996 and 30-6-1998 purported to have been executed by the judgment-debtor and by Muhammad Ashraf respectively in respect of the sale of the attached property. The sale-deed was allegedly executed on 2-6-1999 after the attachment of the property in dispute. Therefore, the sale-deed dated 2-6-1999, even if executed, was rightly held, by all the courts, to be invalid. The judgments relied on by the learned counsel in his behalf are not applicable to the facts and circumstances of the case." (Emphasis provided)

8. In the present case the agreement to sell was allegedly executed on 8-8-2007 and before filing of civil suit by the petitioner, a stay order was passed by the executing Court against the respondent No.2 whereby he was restrained from alienating his property i.e. the disputed property. The sale-deed in favour of the petitioner has not been executed so far and decree in favour of the petitioner is result of fraud and connivance which cannot be allowed to be made a tool to frustrate the judgment and decree of maintenance allowance passed in favour of the respondents. The learned appellate Court has failed to apply its judicious mind while passing the impugned judgment.

9. Resultantly, this writ petition is allowed and the judgment dated 19-4-2012 passed by the learned Additional District Judge, Faisalabad is set aside.

SA/S-100/L Petition allowed.

**2015 C L C 1260**

**[Lahore]**

**Before Atir Mahmood, J**

**Mst. BAKHAT BIBI----Petitioner**

**versus**

**BAHADUR ALI and others----Respondents**

Writ Petition No.1479 of 2013, decided on 13th August, 2014.

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

----S. 25---Constitution of Pakistan, Art.199---Constitutional petition---Custody of minor---Welfare of minor---Statement of minor---Scope---Mother filed an application for custody of minor daughter staying with the father while father moved an application for custody of minor daughter staying with the mother---Both the applications for custody of minor daughters were dismissed concurrently---Validity---Guardian Court had emphasized upon the statement of minor daughter who was 11 years of age---Both the courts below had committed illegalities while relying upon the statement of minor daughter which was recorded on oath---Guardian Court was not competent to record the statement of a minor on oath who was not a witness and in a position to appreciate the legal implications---Minor was neither a witness nor she could be cross-examined by the other party---Minor daughter was mentally poisoned against her mother---Poisoning the mind of minor against her mother or father was itself a disqualification to retain the custody of minor---No one could be a better guardian and custodian of a minor than the real mother---Financial status of father did not give him any preference over the mother---Father was sole responsible to cater the needs of his children irrespective of their place of residence or custody---Togetherness of minor children could not be bifurcated and their welfare had to be taken into consideration---Impugned judgments passed by the courts below were suffering from misreading and non-reading of evidence---Both the courts below had committed the miscarriage of justice---Impugned judgments passed by the courts below were not sustainable in the eye of law which were set aside and application for custody of minor daughter moved by the mother was accepted---Father was directed to handover the custody of minor daughter to the mother and Guardian Court was directed to arrange fortnightly schedule of meeting of minor daughter with her father---Constitutional petition was accepted in circumstances.

Tahira Bibi v. Muhammad Saeed and another 2009 MLD 33 and Muhammad Ashraf v. Mst. Farzana Bibi 1997 MLD 520 ref.

Muhammad Ashraf v. Mst. Farzana Bibi 1997 MLD 520 and Mst. Nazli v. Muhammad Ilyas and another 2010 MLD 477 rel.

Sarfraz Ahmed Cheema for Petitioner.

Luqman Ayub for Respondent No.1.

Date of hearing: 7th May, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Brief facts of the case as narrated in this writ petition are that the petitioner got married with the respondent in the year 1999 and out of this wedlock two daughters namely Mst. Sidra and Mst. Iqra were born. Thereafter, the respondent divorced the petitioner. Both the daughters were staying with the petitioner in good atmosphere and got proper education. Respondent No.1 forcibly took his daughter namely Mst. Iqra from her school and did not return her to the petitioner. The petitioner repeatedly asked the respondent through a Panchait, to return the minor daughter Iqra but the respondent flatly refused to hand over the custody of the minor Iqra to the petitioner. Thereafter, the petitioner filed an application for custody of the minor namely Mst. Iqra before the Judge Family Court, Tandalianwala and the learned Judge Family Court, Tandalianwala dismissed the application of the petitioner vide impugned judgment dated 16-4-2012. Whereas respondent No.1 also filed an application for custody of minor namely Mst. Sidra before the Judge Family Court, Tandalianwala. The learned Judge Family Court also dismissed the application of respondent No.1 vide judgment dated 16-4-2012. Feeling aggrieved by the judgments of the learned Judge Family Court, Tandlianwala both the parties filed their separate appeals before the learned Additional District Judge, Tandalianwala and the learned appellate Court vide impugned judgment dated 31-10-2012 dismissed the appeal of the petitioner as well as respondent No.1. However, the learned appellate Court observed that the learned Guardian Judge/learned trial Court shall arrange fortnightly schedule of meeting of the daughters namely Mst. Iqra and Mst. Sidra with their parents and also for Eid holidays, winter and summer vacations. Hence this writ petition.

2. It is contended by the learned counsel for the petitioner that the learned courts below have failed to apply their judicious mind while passing the impugned judgments; that respondent No.1 had contracted second marriage and it would be harsh for the minor daughter if her custody remains with the father leaving her at the mercy of step mother in presence of her real mother who can properly maintain the minor; that the learned courts below have not taken into consideration the evidence led by the petitioner; that the minor is a girl and in such situation she requires more love and affection of her real mother. He has relied upon the case law cited as Tahira Bibi v. Muhammad Saeed and another (2009 MLD 33) and Muhammad Ashraf v. Mst. Farzana Bibi (1997 MLD 520).

3. On the other hand, learned counsel for the respondent has supported the judgments of the courts below by submitting that the petitioner herself left the minor with the respondent and the minor has developed love and affection with her father as well as her step mother and there is nothing in evidence which could disentitle the respondent from having the custody of the minor.

4. After hearing the parties and perusal of the record, the point for consideration before this Court is as to whether both the courts below have taken into consideration the welfare of the minor while dismissing the application for custody of the minor, filed by the present petitioner.

5. Admittedly, from the wedlock of the parties two daughters namely Mst. Iqra and Sidra were born. As per contents of the petition for custody of the minor, two months prior to filing the same the minor Mst. Iqra was taken away from the school by the respondent and then her custody was not restored to the present petitioner. Whereas, in rebuttal, it was averred that the petitioner herself left the minor with his father and the other minor namely Mst. Sidra was taken away by the petitioner along with her at the time of Talaq on 21-1-2011. After framing of the issues, the parties led their respective evidence. The evidence of the petitioner in the shape of affidavits went un-rebutted as the respondent did not cross-examine the petitioner or her witnesses. In rebuttal, the respondent himself appeared as RW-1 and produced Ijaz Ahmad and Muhammad Akram as RW-2 and RW-3 respectively. During cross-examination, the respondent admitted that after about 9/10 months of dispute with the petitioner he contracted second marriage. He also admitted that the petitioner has not contracted second marriage, however, he denied the suggestion that the petitioner can better look after the minor daughter. RW-2 Ijaz Ahmad while filing his affidavit (Exh.R-2) deposed that minor Mst. Iqra aged about 10 years was living with the respondent and that there is a very little distance between the houses of the parties. During cross-examination, he stated that the dispute between the parties arose about one year ago and the respondent contracted second marriage about 6/7 months back. RW-3 Muhammad Akram while filing his affidavit deposed that the minor did not like the petitioner (her mother) and cannot live without respondent (her father). During cross-examination, he stated that the dispute between the parties arose due to the reason that the petitioner did not want to reside along with the respondent. He stated that the respondent himself divorced the petitioner. After recording the evidence, the learned trial Court vide impugned judgment observed in the following manner:---

"In this particular case, the minor girl is 11 years old and presently living with her father and step mother and her real mother filed this application to have her custody. The contesting matter before me is not that who has superior right to have the custody of the child but actually with whom welfare of the child can best be protected and secured.

To entertain this important question I have examined the child Iqra on oath before me. She was a healthy girl who shows a clear understanding of what was she up to and what was she saying and what does it mean. She testifies the following:---

The most notable fact about the statement of the child was that the learned counsel for the applicant, who was present at that time, did not cross-examine her. This implies to safely presume that the statement was not pampered and it adds further weightage to the statement of the minor girl. (Underline is mine)

The learned trial Court further observed as under:---

"The minor Iqra appeared before the Court on 2-6-2011 and her brilliant elect to live with the respondent is borne out from the interim order and its relevant portion is reproduced as under:--

"Arguments on petitioner's application for interim custody of the minor till the decision of this petition, heard file, perused. The minor was asked to sit with her mother but she instead of going to her started crying badly which shows that she is not willing to even sit with her mother despite of the fact that both the parties live in the same street of the same village." (Underline is mine)

Perusal of the above referred paragraphs clearly shows that the learned trial Court mainly emphasized upon the statement of the minor, who is 11 years of age. The learned appellate Court also followed the judgment of the learned trial Court in almost similar terms. After perusal of the judgments of the courts below I have no doubt in my mind that both the courts below have committed gross illegalities while relying upon the statement of the minor who was hardly 11 years of age and her statement was recorded on Oath. The learned trial Court was not competent to record the statement of a minor on Oath who was not a witness and hardly in a position to appreciate the legal implications. Furthermore, the observation of the trial Court that the minor was not cross-examined by the learned counsel for the petitioner is also unwarranted. The minor was neither a witness nor she could be cross-examined by the counsel. Perusal of the statement given by the minor recorded by the trial Court is reflective of the fact that the minor was mentally poisoned against her real mother. Her conduct also shows that she was not mentally mature as when she was directed to sit along with her mother, as above referred in the impugned judgment, she reacted strongly by crying. In my view, had she been mentally mature and able to make a reasonable preference she might had opted to refuse to sit with her mother or to talk her. Poisoning the mind of the minor against her mother or father, in itself is a biggest disqualification to retain the custody of a minor.

6. There is yet another aspect of the matter that one minor namely Mst. Sidra is residing with the present petitioner for whose custody the respondent filed an application under 25 of the Guardians and Wards Act. The said application filed by the respondent was dismissed by the learned trial Court as well as by the appellate Court at the same time when the present petition as well as appeal filed by the present petitioner was dismissed. The respondent did not assail the judgments of the said application which has attained finality. It is noted with concern that while dismissing the application of the respondent the learned trial Court observed in the following manner:---

"As it is above discussed that both the parties have only two daughters, out of them Mst. Iqra is living with the appellant and Mst. Sidra minor is living with her mother since separation of the parties, so, in these circumstances, right of the appellant to claim the custody of Mst. Sidra minor is not an absolute right and welfare of the minor is paramount consideration in such like case. That she is also affiliated with her mother. That there is no substitute of love and affection bestowed by her on the minor. Therefore, it will be prejudicial to the welfare of Mst. Sidra to hand over her custody to the appellant."

Bare reading of the above referred observation made by the learned trial Court makes it abundantly clear that the Court itself has admitted that no one can be a better guardian and custodian of a minor, that too a female, than the real mother.

7. As remains the finding of the learned appellate Court that the petitioner is residing in a Chak No.407/GB Tehsil Tandalianwala, away from city is also misconceived as both, petitioner as well as respondent are residence of the same vicinity which is evident not only from the pleadings of the parties but also from the evidence led by respondent himself, therefore, the studies of the minor will not be disturbed. Further more, the better financial status of a father does not give him any preference over the mother. By all stretch of imaginations, it is the sole responsibility of the father to cater the needs of his children, irrespective of their place of residence or custody. I am convinced that the judgments of both the courts below lack judicial wisdom.

8. Since the judgments of the courts below in the application filed by the respondent for custody of the other minor namely Mst. Sidra have attained finality whereas the petitioner, asserting her right as real mother of the minor Iqra is strongly agitating against the judgments of the courts below. Therefore, I have come to an irresistible conclusion that both the Courts below have committed a grave miscarriage of justice as both the judgments suffers from misreading and non-reading of evidence as well are classic example of the failure of the application of judicious mind.

9. It is also observed that both the courts below while dismissing the application of the petitioner has ignored the fact that the right of togetherness of children is a well recognized right and the minor children cannot be bifurcated and they cannot be treated as the property of a mother or a father. Their welfare is to be taken into consideration as the top most priority, sentiments of the parents or their wishes are of very little importance. In a judgment of this Court reported as Muhammad Ashraf v. Mst. Farzana Bibi (1997 MLD 520) it has been held as under:---

"I have carefully perused the judgment of the learned Guardian Judge. While giving one minor to the mother and other to father the learned Guardian Judge has divided the custody of both minors. Being a Court enjoying loco parenti jurisdiction each Court has to strictly scrutinize the facts and circumstances of each case. A family is the only juncture where brothers and sisters live together under their parents and enjoy the natural harmonious affection and love and share their small secrets of happiness. It is not in their interest to live apart from each other in different environments, under dispute and hatred which usually arise from the result of a broken home, therefore, the learned appellate Court has rightly interfered in the divided custody of both the minors." (Underline is mine)

In the judgment reported as Mst. Nazli v. Muhammad Ilyas and another (2010 MLD 477) this Court has also held as under:---

"Before dilating upon the above, it may be observed that one of the greatest blessings of the God Almighty for a child is that he should be part of a normal, integrated and unified family, because the children of broken homes grow up with lots of deprivations, deficiencies and carry the sense of loss, and incompleteness throughout their life; later children many a times are rendered a roller coaster or a rolling stone stumbling between the whims and caprice of two estranged parents, who on account of incompatibility or some other reason are not able to survive as husband and wife and as judicially experienced has the tendency and aptitude to use the minors as a tool to settle their grievances and scores qua each other; this undoubtedly has serious reflection on the minors' personality and may cause irreversible damage to his psyche.

However, to control and minimize the impairment in this behalf where there are more than one minor and if no serious legal or factual impediment going against their welfare, it is required of the Courts on the obvious touchstone of the "paramount consideration" to adjudge with whom the minors should live. Because in my candid view, to compel the minors to live aloof shall in the ordinary course violate their right of togetherness, which in a natural right bestowed upon them by the nature as being the member of the clan of social animals (the human being). Thus the separation shall seriously militate regarding the welfare of the minors; resultantly, keeping them intact it should be determined by the Court as to which parent (person) shall be more suitable to retain the custody; this has nexus upon the preponderance of the factors regarding the minor's welfare, which in this case tilts in favour of the mother." (Underline is mine)

10. The upshot of the above discussion is that the judgments of the courts below are not sustainable in the eye of law and are accordingly set aside and the application for custody of the minor namely Mst. Iqra filed by the petitioner is allowed and the respondent is directed to handover her custody to the petitioner.

11. Before parting with this judgment, it is observed that the learned Guardian Judge/learned Trial Court shall arrange fortnightly schedule of meeting of Mst. Iqra with her father Bahadar Ali appellant and also for Eid holidays, winter and summer vacations. Parties are left to bear their own costs.

AG/B-25/L Petition allowed.

**2015 C L C 1295**

**[Lahore]**

**Before Atir Mahmood, J**

**IDREES AHMED AFTAB----Petitioner**

**versus**

**GOVERNMENT OF PUNJAB and others----Respondents**

Writ Petition No.7639 of 2014, decided on 6th November, 2014.

**National Electric Power Regulatory Authority Licencing (Generation) Rules, 2000---**

----R. 3---Punjab Power Generation Policy, 2006 (as revised in 2009), Paras. 9 & 23(b)---Constitution of Pakistan, Art.199---Constitutional petition---Power generation projects---Letter of Interest, issuance of---Grievance of petitioner was that provincial government had issued Letter of Interest in favour of respondent company without any process of selection or competitive bidding and were inclined to lease out a piece of land to respondent for installation of Solar Power Plant (900 MW)---Plea raised by authorities was that petitioner had no locus standi to file petition---Validity---Power generation projects were divided under Punjab Power Generation Policy, 2006 (as revised in year 2009) in two types, i.e. the projects for which feasibility study had already been conducted and projects for which feasibility study was not done and provided for different modes for both types of project; in former type of projects, policy was very much clear that bids would be solicited but in latter type, i.e. raw sites, policy did not ask for calling for bids rather it unambiguously stated that government would initiate feasibility study work on raw sites for exploiting available hydel, oil, gas, coal, bagasse, solar and wind potential---Grievance raised by petitioner was pre-mature and at such stage petitioner had no personal grievance and he could neither be considered as an aggrieved person nor had any cause of action to file petition--- If feasibility study conducted by respondent was accepted by panel of experts of provincial government and respondent would apply to NEPRA for grant of generation licence and for fixation of tariff, then at that stage petitioner would be at liberty to raise his grievance before Authority which would be dealt with by Authority in accordance with law--- Petition was dismissed in circumstances.

Ms. Shehla Raza and others v. WAPDA PLD 1994 SC 693; Dr. Akhtar Hussain and others v. Federation of Pakistan and others 2012 SCMR 455; Dr. Imran Khatak and another v. Ms. Sofia Waqar, P.S. to Chief Justice and others 2014 SCMR 122; Suo Motu Case No.18/2010 2014 SCMR 585; Raja Mujahid Muzaffar and others v. Federation of Pakistan and others 2012 SCMR 1651; Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs,

Islamabad and others PLD 1998 SC 161; Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others PLD 1999 SC 504; PLD 2008 SC 673 and Faiz Bakhsh and others v. Deputy Commissioner/Land Acquisition Officer, Bahawalpur and others 2006 SCMR 219 ref.

Jawad Hassan for Petitioner.

Khawaja Haris Ahmed, Syed Nayyar Abbas Rizvi, Addl. A.-G. and Muhammad Tahir Saeed Ramay, Asstt. A.-G. for Respondents Nos.1 to 4.

Ms. Afifa Jabeen for Respondent No.2.

Najam Ahmad Shah for Respondent No.3.

Ms. Samiya Awais for Respondent No.4.

Feisal Hussain Naqvi for Respondent No.7.

Date of hearing: 6th November, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** At the very outset, learned counsel for the petitioner submits that since he has no grievance against respondent No.5, he wants to delete respondent No.5 from the arrays of the parties. Accordingly, respondent No.5 is deleted from the arrays of the parties.

2. Succinctly, the cause of action as given in the writ petition is that respondents Nos.1 to 4 have awarded project of carrying out feasibility study and installation of Solar Power Plant (900 MW) in the Quaid-e-Azam Solar Park (the Project) to respondent No.7 (M/s Zonergy Company Limited) merely by way of signing Project Commitment Agreement dated 23-7-2014 (the PCA) by respondent No.2 (Punjab Energy Department) and issuance of Letter of Interest dated 23-9-2014 (the LoI) by respondent No.4 (Punjab Power Development Board 'PPDB') without any process of selection or competitive bidding and the government is also inclined to lease out a piece of land measuring 6,000 acres to respondent No.7 for the Project against law, rules, policy and procedure.

3. Pre-admission notices were issued to the respondents at limine stage. The respondents appeared and filed report and para-wise comments.

4. Learned counsel for the respondents 1 to 4 and learned counsel for respondent No.7 raised preliminary issues regarding locus standi of the petitioner and maintainability of this petition on the plea as to how the petitioner is an aggrieved person under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution). In order to meet with the preliminary objections, learned counsel for the petitioner submitted that the petitioner is a consumer of electricity/ power/energy and enjoys fundamental right of protection of life and security under Article 9 of the

Constitution. Reliance is placed on the dictums laid down in case reported as Ms. Shehla Raza and others v. WAPDA (PLD 1994 SC 693). He submitted that 'word' life is significant as it covers all aspects of human existence and that a person is entitled to protection of law from being exposed to any hazard which may be due to installation and construction of any grid station, power station or any such like installation. He submitted that before handing over this project of generation of solar energy, the environmental conditions have not been taken into consideration. He further submitted that the petitioner has inalienable right to be provided electricity at the low cost and the respondents have not taken into consideration the grievance of the consumer, i.e. public at large and the petitioner in particular. Relying upon the case law reported as Dr. Akhtar Hussain and others v. Federation of Pakistan and others (2012 SCMR 455), he maintained that all the public functionaries must exercise their public authorities especially while dealing with public property, public funds and assets in a just, fair, transparent and reasonable manner which according to him is missing in the present case. He also submitted that the High Court has extraordinary discretionary powers to interfere in such like matters in order to safeguard rights of the citizens and the consumers of the electricity which are ultimately going to face the consequences of generation of power at higher rates. In this regard, he has relied upon the case law cited as Dr. Imran Khatak and another v. Ms. Sofia Waqar, P.S. to Chief Justice and others (2014 SCMR 122).

5. Learned counsel for the petitioner also contended that respondent No.2 vide PCA has committed to issuance of LoI in line with the stipulations of the Punjab Generation Policy, 2006 (revised 2009) (the policy) and also to issuance of a letter of Allocation of Project Land to respondent No.7 against signing of the PCA and submission of Bank guarantee amounting to US$ 3000 per MW in favour of respondent No.2; that the bank guarantee when calculated comes to US$ 2,700,000 but bank guarantee of only US$ 9000 has been obtained from respondent No.7; that respondent No.7 has no experience in the field of installation of Power Plants; that while awarding the project, other experienced and technically sound companies have been ignored by the government; that the LoI has been issued without adopting proper procedure; that no advertisement was made in the national press inviting bids from the interested parties and in this way, competitive atmosphere was not created by the government for all who intend to come forward to invest in the project; that ZTE Corporation is a major shareholder of respondent No.7 which is a leading global provider of telecommunication equipment; that ZTE is, in fact, making investment in the project; that ZTE was recently declined a project of even 100 MW by respondent No.4; that the policy allows submission of proposals for project upto 50 MW but respondent No.4 has awarded project of 900 MW to respondent No.7 against the policy; that respondent No.4, in no event, could issue LoI for a project having capacity more than 50 MW; that under the policy, process of selection requires pre-

qualification, issuance of request for proposal, bidding and evaluation as set out in the bidding criteria but the project has been awarded to respondent No.7 without adopting the said procedure; that the proposed project is situated nearby Lal Sohanra Park which is a national park and spreads over an area of 153,000 acres; that a number of species of animals and birds including endangered species can be found in the park, as such, leasing out land measuring 6,000 acres in favour of respondent No.7 is in violation of environmental laws; that the petitioner is aggrieved by acts of respondents 1 to 4 allowing respondent No.7 to develop the project in a non-transparent, arbitrary and unlawful manner and for making investing to install the Solar Power Plant; that the transaction is illegal, unwarranted, non-transparent and uncalled for; that the PCA and LoI are unreasonable and contrary to accepted principles of governance and regulations; that where an investment is to be made by a foreign company, PPRA rules and regulations are to be strictly followed as held by the Hon'ble Supreme Court in cases reported as Suo Motu Case No.18/2010 (2014 SCMR 585) and Raja Mujahid Muzaffar etc. v. Federation of Pakistan etc. (2012 SCMR 1651); that obtaining a feasibility study is pre-requisite before launching a project; that the PCA and the LoI have been issued in contravention of provisions of Articles 129 and 139 of the Constitution of Islamic Republic of Pakistan, 1973; that respondent No.7 has no registered office in Pakistan which is mandatory under section 451 of the Companies Ordinance, 1984; that the rates of electricity to be generated through the project will be much higher and beyond the reach of common man, therefore, this writ petition, learned counsel asserts, is maintainable.

6. On the other hand, learned counsel for respondents Nos.1 to 4 assisted by learned Law Officers submits that the petitioner has no locus standi in the matter, as such, this writ petition is not maintainable; that the government is not going to invest even a single penny from public exchequer in this project; that the project so far has not been awarded to respondent No.7 as asserted by the petitioner; that respondent No.7 has only been allowed to conduct feasibility study of the project at its own cost and risk after fulfilment of requirement of pre-qualifications; that respondent No.7 is a financially and technically sound company; that a bank guarantee of US$ 9,000 has been obtained from respondent No.7; that rest of the bank guarantee will be obtained from respondent No.7 if it is finally selected for completion of the project and in that case, National Electric Power Regulatory Authority (NEPRA) will issue licence after public hearing where the petitioner or anybody else can raise his grievance, as such, this writ petition is pre-mature; that award of the project in question is a federal subject and not the provincial one; that the land is to be allocated only for the purposes of conducting feasibility study which in case of failure, will be taken back from respondent No.7 and the bank guarantee given by it will also be encashed by the government; that under the policy, the government has to invite bids for installation of hydel and thermal projects but the policy has not made any such compulsion upon the

government with regard to installation of solar plants; that the project is transparent and nothing is concealed; that there is acute shortage of energy in our country, as such, anybody including the petitioner is invited to come forward with proposals for installation of the project and if he fulfills requirements of pre-qualifications, he will be given equal opportunity to compete; that the Government of the Punjab and other provinces have adopted energy policy of the Federal Government and keeping in view the severe shortage of energy, the government of the Punjab is in contact with the Federal Government to enhance the limit of capacity of Solar Plant from 50MW to a much higher level; that the tariff will be determined by NEPRA after due process of law and the electricity will be purchased by National Transmission and Despatch Company Limited (NTDC) and nothing is to be done by the government of Punjab in this regard; that the government has not admitted any liability upon it in case of failure in completion of the feasibility study by respondent No.7 which has no right even to claim compensation from the government in any circumstances, therefore, this writ petition, learned counsel avers, has no force, as such, it be dismissed. Learned counsel for respondents No.1 to 4 has relied upon the case law cited as Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1998 SC 161), Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1999 SC 504) and Suo Motu Case No.10 of 2007 (PLD 2008 SC 673).

7. Learned counsel for respondent No.7 adopted the arguments of learned counsel for respondents Nos.1 to 4. He, however, added that various news clippings appended with this writ petition did not constitute valid evidence against respondent No.7; that the ZTE Corporation is the major shareholder in Zonergy/respondent No.7 but Zonergy itself has an independent identity with independent funds and has not been blacklisted anywhere in the world. Regarding argument raised by learned counsel for the petitioner with reference to environmental hazards, he submitted that respondent No.7 would carry out its own detailed environmental examination as part of its feasibility study according to the environmental laws of Pakistan and there will be no violation of any law. He further stated that since that stage has not arrived at so far, therefore, all the allegations are incorrect, false and pre-mature.

8. Arguments heard. Record perused.

9. Perusal of para 12 of the writ petition reflects that the petitioner came to know regarding the disputed project through newspapers that respondents Nos.1 to 4 have approved respondent No.7 for a 900 MW Solar Power Plant (SPP) in Quaid-i-Azam Solar Park (QASP). Through the same report, he got the knowledge that respondent No.7 has no relevant experience in the installation of power plants. According to his

version, the petitioner came to know that respondents Nos.1 to 4 have not responded to a number of other technically and financially sound companies who had shown their interest in medium to large scale solar power plants and they were not entertained. The petitioner had no direct knowledge prior to said press clippings nor he has any expertise to adjudge capabilities and qualifications of respondent No.7. His grievance that issuance of LoI without a transparent process or disclosure as to how respondent No.7 was found competent and eligible to develop the project, does not sound good. He can only be an aggrieved person being a consumer of electricity. He neither participated nor showed any intention to compete with respondent No.7 in any regard whereas no other company, who was allegedly competent to compete, has come forward to contest the issuance of LoI in favour of respondent No.7.

10. The next contention of learned counsel for the petitioner that his fundamental rights, are being infringed by issuing of LoI to respondent No.7 for setting up the SPP in the vicinity of Lal Sohanra Park, Bahawalpur is also unfounded. It has categorically been denied by the respondents that by grant of LoI, any licence for generation of solar energy has been allocated to respondent No.7. It is asserted by the respondents that LoI has only been issued by the provincial government in favour of respondent No.7 for carrying out feasibility study for setting up the SPP which includes conducting of Environmental Impact Assessment (EIA) and once the feasibility study is completed by respondent No.7, then it is to be assessed and approved by the Punjab Power Development Board through its panel of experts and thereafter, respondent No.7 has to apply, for grant of licence to set up the SPP, to the National Electric Power Regulatory Authority (NEPRA). (Emphasis provided).

11. According to Section 15 of the NEPRA Act, a licence can be issued under Rule 3 of the NEPRA Licencing (Generation) Rules, 2000 which reads as under:---

"3. Grant of licence.---

(1) Subject to these rules and the other NEPRA rules and regulations, the Authority may grant a generation licence to any person to engage in the generation business.

(2) The location, size, technology, interconnection arrangements, technical limits, technical functional specifications and other details specific to the generation facilities of the licensee shall be set out in a schedule to the generation licence.

(3) The net capacity of the licensee's generation facilities shall be set out in a separate schedule to the generation licence, after it has been determined to the satisfaction of and in the manner specified by the authority.

(4) The Authority may order a public hearing to be held on any application for a generation licence and shall decide the application consistent with the outcome of the public hearing and the procedure for public hearings prescribed under the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, subject to such modifications as the Authority may specify, shall be applicable to a public hearing on an application for a generation licence.

(5) The Authority may refuse to issue a licence where the site, technology, design, fuel, tariff or other relevant matters pertaining to the generation facility proposed in an application for a generation licence are either not suitable on environmental grounds or do not satisfy the least cost option criteria in which case the Authority shall indicate its preference for alternative sites, technology, design, fuel, tariff or other relevant matters to the applicant and shall, if so desired by the applicant, allow the applicant a reasonable opportunity to amend the application in accordance with the preferences indicated by the Authority.

Explanation--- For the purposes of sub-rule (5), least cost option criteria shall include the following, namely:---

(a) sustainable development or optimum utilization of the renewable or non-renewable energy resources proposed for generation of electric power;

(b) the availability of indigenous fuel and other resources;

(c) the comparative costs of the construction, operation and maintenance of the proposed generation facility against the preferences indicated by the Authority;

(d) the costs and rights-of-way considerations related to the provision of transmission and interconnection facilities;

(e) the constraints on the transmission system likely to result from the proposed generation facility and the costs of the transmission system expansion required to remove such constraints;

(f) the short-term and the long-term forecasts for additional capacity requirements;

(g) the tariffs resulting or likely to result from the construction or operation of the proposed generation facility; and

(h) the optimum utilization of various sites in the context of both the shot-term and the long-term requirements of the electric power industry as a whole.

(6) A generation licence may, for good cause, contain additional terms and conditions, not inconsistent with the provisions of the applicable documents, in order to cater for any special circumstances or matters specific to a particular generation licence or in order to provide for the transition towards or implementation of the pooling and settlement arrangement." (Emphasis provided)

Bare reading of sub-rules (4) and (5) of Rule 3 reproduced above makes it abundantly clear that before issuance of a licence, the Authority (NEPRA) is under obligation to order a public hearing to be held on any application for grant of generation licence. It is prerogative of the Authority to grant or to refuse to issue the licence.

12. As far as the question of determination of tariff is concerned, under Rule 3 of the NEPRA (Tariff Standards and Procedure) Rules, 1998, any licencee or a consumer or a person interested in the tariff may file the petition before the authority. A comprehensive procedure has been laid down in the said rules and the Authority after complying with the rules is liable to decide the petition within four months from the date of its admission. In this view of the matter, it cannot be said or even presumed that the grievance of the petitioner cannot be redressed by any competent authority. At this stage, filing of writ petition amounts to circumvent the powers of competent authorities which include respondent No.4 (PPDB) and respondent No.6 (NEPRA).

13. Furthermore, under the provisions of PCA, respondent No.7 is obligated to levelize tariff at 14 cents per unit (other than charges and taxes). According to the respondents, this is the lowest tariff of electricity prevailing in Pakistan but still, the tariff is to be determined by the NEPRA as per applicable rules, therefore, at this stage, the grievance raised by the petitioner is pre-mature.

14. It has been stated on behalf of respondents Nos.1 to 4 that allocation of land for setting up SPP in the QASP is subject to open bidding between all the LoI holders which are 38 in number and respondent No.7 is not the only LoI holder. It has also been stated that the feasibility study is going to be conducted by respondent No.7 at its own cost and risk and even a single penny has not been paid to respondent No.7 out of public exchequer on this account, rather a bank guarantee of US$ 9,000 has been obtained from respondent No.7 which may be encashed and the land proposed to be given to respondent No.7 will also be resumed in case of failure of respondent No.7 in the assignment given to it. He further argued that under the Punjab Power Policy, 2006 (Revised 2009) as well as Federal Energy Policy, 2006, a number of proposals have already been received from various companies and at present, LoIs have been issued for setting up of SPPs after production of electricity aggregating to 4500 MW. Learned counsel for respondents No.1 to 4 categorically asserted that even today, any person can submit a proposal and if he is found technically and financially sound, he may be issued the LoI for conducting the feasibility study which if approved will

entitle him to set up a SPP as well. This offer has also been extended to the present petitioner.

15. The argument of learned counsel for the petitioner is that paragraph 9 of Punjab Power Generation Policy, 2006 (Revised in 2009) provides for procedure of competitive bidding. Said paragraph 9 is reproduced below:---

"19. In view of the long lead-time required to bring new hydel power plants in the power system, the work on the new power Generation projects has to be started hence forthwith. It is, therefore, the intention of the Government of Punjab:---

i. To solicit bids for Power Generation projects, for which feasibility studies are already available;

ii. To initiate feasibility study work on raw sites for exploiting available hydel, oil, gas, coal bagasse, solar and wind potential;"

Bare reading of above makes it clear that the policy divides the power generation projects in two types, i.e. the projects for which the feasibility study has already been conducted and the projects for which the feasibility study has not yet been done and provides for different modes for both types of projects. In former type of projects, the policy is very much clear that the bids will be solicited but in the latter type, i.e. the raw sites, the policy does not ask for calling for bids rather it unambiguously states that the government will initiate feasibility study work on raw sites for exploiting available hydel, oil, gas, coal, bagasse, solar and wind potential. Para 23(b) of the Policy further states that:---

"Raw site proposals shall be offered to the pre-qualified sponsor. The sponsor shall conduct the feasibility study at his own cost and submit it to the Punjab Power Development Board (PPDB) for approval. The successful sponsor will be selected after the approval of the feasibility study and negotiation of the tariff thereafter. If there is more than one sponsor for a raw site proposal, each sponsor will submit Pre-Qualification Documents (PQD) for the project on intimation from PPDB. The PQDs will be evaluated by PPDB and an LOI will be issued to the qualifying sponsor after submission of the bank guarantee of the specified amount in favour of PPDB."

Perusal of above para reveals that pre-qualified sponsor will be offered raw sites for their development who will conduct feasibility study at their own cost and risk and if the feasibility study conducted by the sponsor is approved by the PPDB, then it will be selected after negotiation of tariff. In case, there are more than one sponsor, each sponsor is obliged to submit their PQDs which will be evaluated by the PPDB and the

LoI will be issued to the qualified sponsor after submission of the bank guarantee. In the circumstances, it is explicitly clear that the policy does not provide for calling of competitive bidding in case of raw sites, therefore, allowing respondent No.7 to conduct feasibility study without calling for competitive bidding is in accordance with the policy. The contention of learned counsel for the petitioner is accordingly repelled.
16. In view of the above discussion, I am of the opinion that the grievance raised by the petitioner through this writ petition is premature and at this stage, the petitioner has no personal grievance and he can neither be considered as an aggrieved person nor has any cause of action to file this petition. Reliance is placed upon the law laid down in cases reported as Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1998 SC 161) and Faiz Bakhsh and others v. Deputy Commissioner/Land Acquisition Officer, Bahawalpur and others (2006 SCMR 219). Relevant portion from the latter judgment is reproduced below:---

"It hardly needs any elaboration that "a person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to perform relating to the right. There must not only be a right but a justifiable right in existence, to give jurisdiction to the High court in the matter. Unless whatever right, personal or otherwise, on which the application is based is established, no order can issue under Article 199". Muntizma Committee v. Director K.A. PLD 1992 Kar. 54 and Mahmoona v. Ilam Din PLD 1984 Lah. 228. It must not be lost sight of that "party to writ petition must show that he had got a clear legal right as not to admit of a reasonable doubt or controversy. Disputed question of fact cannot be determined in Constitutional jurisdiction of a Court which is summary in its character". Khairuddin v. Settlement Commissioner 1988 SCMR 988 and Muhammad Ali v. Government of Sindh 1986 CLC 1123." (Emphasis provided)

If the feasibility study to be conducted by respondent No.7 is accepted by the panel of experts of PPDB and respondent No.7 applies to NEPRA for grant of a generation licence and for fixation of tariff, then at that stage, the petitioner will be at liberty to raise his grievance before the Authority which will be dealt with by the Authority in accordance with law. This writ petition is not maintainable, which is accordingly dismissed.

MH/I-35/L Petition dismissed.

**2015 C L D 1400**

**[Lahore]**

**Before Atir Mahmood, J**

**CEPHALON FRANCE---Appellant**

**versus**

**HIMONT PHARMACEUTICALS---Respondent**

F.A.O. No. 116 of 2008, decided on 24th March, 2015.

**Trade Marks Ordinance (XIX of 2001)---**

----Ss. 17(6), 28 27, 33 & 7---Registration of trade mark---Opposition proceedings---Procedure before the Registrar---Exercise of jurisdiction by Registrar Trade Marks---Determination of ownership of trade mark---Jurisdiction of Registrar to stay opposition proceedings and give direction to parties to approach Civil Court for determination of ownership of trade mark---Scope---Appellant had filed opposition to application for registration of trade mark filed by respondent, on the ground that the said trade mark was owned by the appellant---Registrar vide impugned order stayed opposition proceedings and directed parties to get the question of ownership of trade mark determined by a civil court---Contention of appellant inter alia was that in the impugned order, the Registrar failed to exercise jurisdiction vested in him and that the question of ownership of trade mark was within the domain of the jurisdiction of the Registrar---Held, that the Trade Marks Ordinance, 2001 provided a comprehensive procedure and remedies regarding grant or refusal of a trade mark to a party applying for it and such powers were vested with the Registrar of Trade Marks---Respondent, in the present case, had applied for grant of the trade mark to which the appellant objected by filing an opposition claiming that the said trade mark was already owned by it---Both the parties submitted their affidavits and evidence available with them before the Registrar however, the Registrar did not decide the matter himself and sent the parties to the civil court for determination of their ownership---Power to grant or refuse the trade mark applied for by the respondent and controverted by the appellant was vested with the Registrar, therefore, the same should have been exercised rather than directing the parties to approach the civil court for determination of the ownership of the trade mark---Registrar could advise the parties to approach the civil court only if substantial rights of any or both the parties were involved which could not be determined by preponderance of evidence produced by the parties within the scope of jurisdiction conferred on the Registrar---In the present case, no such substantial right appeared to be involved and only question of grant or refusal of trade mark was before the Registrar, which he could decide himself in accordance with law---High Court observed that Registrar failed to exercise the jurisdiction vested in him in law and had unlawfully sent the parties to the civil court for determination of their

ownership---Impugned order was set aside and Registrar was directed to decide the question of ownership of trade mark on its own---Appeal was allowed, accordingly.
Sanjeda Bano v. Muhammad Saeed Jehangir PLD 1987 Kar. 53 rel.
Jawad Sarwana for Appellant.
Ex parte for Respondent.
Date of hearing: 24th March, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This appeal is directed against decision dated 4-8-2007 passed by the Registrar Trade Marks, Karachi.

2. Brief facts leading to the filing of this FAO are that the appellant (Cephalon France) is a pharmaceutical company incorporated in France; that on 17-10-1994, the appellant entered into a distribution agreement with respondent (Himont Pharmaceutical) for import and sale of appellant's products including the drug under the brand name "SPASFON" for Pakistan; that the appellant came to know through advertisement in Pakistan Trade marks Journal No.642 dated 1-7-2004 that the respondent had applied for registration of trade mark "SPASFON" in its own name with the Trade Marks Registry in Pakistan under application No.130435 dated 7-6-1995 in Class 5 to "Antispasmodic Pharmaceutical Preparation". The appellant filed a notice of Opposition with the Trade Mark Registry claiming that the said trade mark is owned by it and it cannot be granted to the respondent. Both the parties filed their affidavits with evidence in support of the Registration and in support of the Opposition respectively.

3. The respondent contended before the Registrar Trade Mark that since the respondent had already filed a suit in the civil court at Lahore seeking a declaration that they were owners/proprietors of the Trade Mark "SPASFON", therefore, proceedings in the Opposition be stayed. The appellant also filed application under section 3(2) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 for stay of proceedings. The Registrar, Trade Marks vide order dated 8-9-2007 directed the parties to get the question of ownership of the Trade Mark "SPASFON" decided by a civil court and stayed the Opposition proceedings (No.833/04) pending before him. The appellant filed application under sections 11 and 121(2) of the Trade Marks Ordinance, 2001 and Rule 84 of the Trade Marks Rules, 2004 to give reasons for order dated 8-9-2007 which were provided on 4-8-2007 whereagainst this appeal has been filed.

4. Learned counsel for the appellant contends that all the evidence of the parties relating to the ownership was available before the Registrar of Trademarks but he failed to exercise jurisdiction vested in him and did not decide the question of ownership which is his special domain; that the impugned decision is contrary to

provisions of Trade Marks Ordinance, 2001 as well as the judgments of the superior courts; that the learned Registrar by not deciding himself the question of ownership of trademark has acted illegally and unlawfully, therefore, this appeal be allowed, the impugned decision be set aside and the case be remanded to the Registrar of Trademarks to decide the matter himself.

5. The respondent has already been proceeded against ex parte vide order dated 11-3-2009.

6. Arguments advanced by learned counsel for the appellant have been heard and the record also perused.

7. According to the appellant, it entered into a distribution agreement with the respondent for import and sale of appellant's products including the drug under the brand name "SPASFON" for Pakistan. However, it later came to know through an advertisement appeared on 1-7-2004 in Pakistan Trade Marks Journal No.642 that the respondent itself has applied for registration of trademark "SPASFON" with the Trade Marks Registry. The appellant since claims ownership of trade mark "SPASFON; filed a Notice of Opposition with the Trade Mark Registry. Both the parties filed their affidavits and evidence before the Registrar of Trade Mark but he despite deciding the matter himself directed the parties to get determined their ownership by the civil court vide impugned decision where a suit between the parties is pending while staying proceedings in the Opposition filed by the appellant.

8. The Trade Mark Ordinance provides a comprehensive procedure and remedies regarding grant or refusal of a trademark to a party applying for it. Such powers are vested with the Registrar Trade Marks. In this case, the respondent had applied for grant of trade mark "SPASFON" to which the appellant objected by filing an Opposition No.833/2004 claiming that the said trade mark is already owned by it. Both the parties submitted their affidavits and evidence available with them before the Registrar but the Registrar did not decide the matter himself and sent the parties to the civil court for determination of their ownership. In my view, if some powers have been given to an authority, it should exercise its powers in accordance with law. Since the powers to grant or refuse the trademark applied for by the respondent and controverted by the appellant were vested with the Registrar Trade Marks, therefore, he, in my view, should have exercised his powers in accordance with law rather than directing the parties to approach the civil court for determination of their ownership of trademark as the Registrar himself is authorized to grant or refuse the trademark and non-exercising of his own powers by him amounts to defeat the purpose of law. I am of the considered view that the Registrar of Trade Marks could advise the parties to approach the civil court only if substantial rights of any or both the parties were

involved which could not be determined by preponderance of evidence produced by the parties within the scope of jurisdiction conferred on the Registrar. From the record produced before me, no substantial right as noted hereinbefore appears to be involved in this case. The only question of grant or refusal of trade mark was before the Registrar, which he could decide himself in accordance with the provisions of the law. Section 17(6) of the Trade Marks Ordinance, 2001 is replica of section 10(3) of Trade Marks Act, 1940. Reliance is placed on the ratio decidendi laid down in case reported as Sanjeda Bano v. Muhammad Saeed Jehangir (PLD 1987 Karachi 53).

9. In the circumstances, the Registrar Trade Mark has failed to exercise the jurisdiction vested in him and instead of deciding the matter of grant of refusal of trade mark to the respondent, has illegally and unlawfully sent the parties to the civil court for determination of their ownership. Therefore, this appeal is allowed, the impugned decision dated 4-8-2007 is set aside and the Registrar Trade Marks, Karachi is directed to decide the matter of grant or refusal of trademark to the respondent at his own, strictly in accordance with law.

KMZ/C-10/L Case remanded.

**2015 M L D 130**

**[Lahore]**

**Before Atir Mahmood, J**

**SALMAN ASGHAR and others---Petitioners**

**Versus**

**SPECIAL JUDGE RENT CONTROLLER, LAHORE and others---Respondents**

Writ Petition No.3652 of 2014, heard on 5th March, 2014.

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

----O. XXI, Rr. 97, 98, 99, 100 & 101 & S. 144---West Pakistan Urban Rent Restriction Ordinance (VI of 1959), S. 13---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Restoration of possession---Scope---Contention of applicants was that status quo order was passed by the Supreme Court and Rent Controller was bound to issue notice before passing order with regard to door breaking and lock breaking---Application for restoration of possession of rented property was dismissed by the Rent Controller---Validity---Status quo order was passed by the Supreme Court in Civil Petition which was dismissed in default but same was restored later on---Rent Controller issued warrants of possession during the interregnum from dismissal in default to its restoration and possession of disputed property was handed over to the landlords---Decree holder might make an application to the court with regard to resistance or obstruction from taking over possession of property---If any person other than judgment debtor was dispossessed from immovable property by a holder of a decree for possession of such property then an application could be made on his behalf with regard to such dispossession---Order with regard to restoration of possession could be passed if court was satisfied that applicant was in possession of the property on his own account or on account of some other person other than judgment debtor---Applicants were claiming right on the basis of sub-tenancy from original judgment debtors and provisions of O. XXI, Rr.97 to 101, C.P.C. were not attracted in the present case---Applicants were not entitled for restoration of possession as they were enjoying prior to restoration of status quo order---Status quo order was passed by the Supreme Court but position of same was not ordered to be as it was on dismissal of Civil Petition in default---Possession of a property could be restored if decree was varied, reversed or set aside---Ejectment decree was passed by the Rent Controller against original lessee which stood upheld uptill High Court---Possession of rented premises was handed over to the decree holder through process of law---Applicants were not dispossessed from the property in an illegal manner---No illegality had been pointed out in the impugned order---Present application was not maintainable before the Executing Court which was rightly dismissed---Constitutional petition was dismissed in circumstances.

Mst. Khurshid Begum and others v. Mr. Ghulam Kubra and others 1982 SCMR 90; Muhammad Saeed alias Pulla v. The State PLD 1987 Pesh. 31; S.M. Mohsan Zaidi v. Syed Gauhar Ali 1985 SCMR 344; Province of Punjab and others v. Abdul Ghafoor and others 2001 MLD 1621; Haji Abdul Wali Khan and another v. Muhammad Hanif and another 1991 SCMR 2357; Mst. Sahib un Nissa and others v. Mst. Mahmooda Begum PLD 1959 W.P. Lah. 511; Mst. Ghulam Fatima v. Muhammad Shafi and another 2006 YLR 1280; Ghulam Mujtaba v. Mst. Naeema Khanum 1984 CLC 1458; Muhammad Iqbal and others v. Khurshid Ahmad 1984 SCMR 1324; Muhammad Sarwar v. Muhammad Shafi 1986 SCMR 1638; Shafqatullah and others v. Distrcit and Sessions Judge, Nowshera 2001 SCMR 274; Sri Lakshmi Narayan and others v. Sri Surath Lal Chakraborti and others PLD 1964 Dacca 177 and Nirmal Chandra Choudhry v. Nikunja Behari Biswas and others PLD 1956 Dacca 148 ref.

Mst. Khurshid Begum and others v. Mr. Ghulam Kubra and others 1982 SCMR 90; Muhammad Saeed alias Pulla v. The State PLD 1987 Pesh. 31; S.M. Mohsan Zaidi v. Syed Gauhar Ali 1985 SCMR 344; Province of Punjab and others v. Abdul Ghafoor and others 2001 MLD 1621; Haji Abdul Wali Khan and another v. Muhammad Hanif and another 1991 SCMR 2357; Mst. Sahib un Nissa and others v. Mst. Mahmooda Begum PLD 1959 W.P. Lah. 511 and Mst. Ghulam Fatima v. Muhammad Shafi and another 2006 YLR 1280 distinguished.

Mian Asif Mumtaz for Petitioners.
Mian Muhammad Hussain Chotya for Respondents.
Date of hearing: 5th March, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have impugned order dated 30-1-2014 whereby their application under Order XXI Rule 97, C.P.C. against issuance of warrants of possession in favour of the respondents-decree holder and for restoration of possession of the rented property to the petitioners was dismissed by learned Special Judge (Rent), Lahore.

2. Brief facts of the case are that on 11-6-1998, respondent No.2 Sh. Aftab Ahmed filed an ejectment petition against legal heirs of Meraj Din and Mian Muhammad Shafi who were original lessee in the rented property but not against the present petitioners. On 17-9-2001, the learned Rent Controller under section 13(6) of the Punjab Urban Rent Restriction Ordinance, 1959 directed the respondents in the ejectment petition to deposit arrears of rent which was not complied with. Accordingly, right of defence of the said respondents was closed by learned Rent Tribunal vide order dated 10-4-2002. Legal heirs of Miraj Din and Mian Muhammad

Shafi preferred an appeal which was dismissed vide order dated 18-12-2003 passed by learned Additional District Judge, Lahore. The original lessees filed a second appeal i.e. SAO No.3/2004. On 22-12-2006, the present petitioners claiming themselves to be the sub-tenant in the rented premises filed an application under Order I Rule 10, C.P.C. in the said SAO. The said application was disposed of by this Court with the observation that the applicants had already filed an application under section 12(2), C.P.C. on 22-12-2006 which will be decided by the learned District Judge, Lahore whereas the main SAO was dismissed vide order dated 5-9-2007. The application under section 12(2), C.P.C. filed by the present petitioners was dismissed vide order dated 20-4-2009 passed by learned Additional District Judge, Lahore. Feeling aggrieved, the petitioners filed a Writ Petition No.12605/2009 on 20-6-2009. The said writ petition was dismissed by this Court in limine vide order dated 23-6-2009. Thereafter, the petitioners filed a C.P.L.A. No.1810-L/2009 along with an application for interim relief. The Hon'ble Supreme Court vide order dated 1-7-2010 directed the parties to maintain status quo. On 30-5-2013, the C.P.L.A. was dismissed for want of prosecution by the august Supreme Court. Thereafter, the petitioners filed C.M.A. No.122/2013 in C.P.L.A. No.1810-L/2009 which was allowed and the CPLA was restored vide order dated 16-1-2014.

3. In the meanwhile, the ejectment petitioner filed an execution petition on 10-1-2007. On 13-4-2013, learned Special Judge (Rent) keeping in view the status quo order passed by the august Supreme Court adjourned the execution petition sine die. On 28-9-2013, the execution petition was got restored by the decree holder by way of filing an application whereafter warrants of possession were issued by the learned Special Judge (Rent), Lahore. On 27-11-2013 and 6-12-2013, directions were passed by the learned Special Judge (Rent), Lahore for lock breaking and door breaking of the rented premises with the assistance of local police. As such, possession of a number of shops was taken over by the decree holder and the same were rented out to some other persons. On 14-12-2013, the petitioners filed application under Order XXI, Rule 97, C.P.C. against issuance of warrants of possession and restoration of possession. The ejectment petitioner-decree holder also filed application under Order XXI Rule 97, C.P.C. for rejection of the application of the petitioners. Vide order dated 30-1-2014, the application of the petitioners under Order XXI Rule 97, C.P.C. was dismissed by learned Special Judge (Rent), Lahore which has been assailed in this writ petition.

4. Learned counsel for the petitioners inter alia contends that since status quo order was passed by the Hon'ble Supreme Court of Pakistan, therefore, learned Special Judge (Rent) was under legal obligation to issue notice to the petitioners before passing orders of door-breaking and lock-breaking dated 27-11-2013 and 6-12-2013 but no such notice was issued to them; that the possession was taken over by the decree holder in the interregnum from dismissal on 30-5-2013 and restoration on 16-

1-2014 of the C.P.L.A.; that the learned executing court has failed to apply its judicious mind while passing the said orders that the parties will have to be sent on the same position if the CPLA is restored; that the legal possession of the petitioners has been snatched by illegal process of the court which is continuing after passing impugned order dated 30-1-2014; that there was no occasion for the executing court to dispossess the petitioners from their lawful possession; that the petitioners' application under section 12(2), C.P.C. was dismissed by learned Additional District Judge, Lahore on the wrong presumption that ejection petition was not filed against the petitioners-sub tenants; that the ejectment petition was filed collusively by the ejectment petitioner and the respondents in ejectment petition who deliberately did not contest it properly; that though the petitioners were in possession of the rented premises but no notice as required under section 13(a) of the West Pakistan Rent Restriction Ordinance, 1959 was ever served upon them; that the petitioners did not commit any default in payment of the rent; that the order impugned is against law which if not set aside will cause irreparable loss to the petitioners, therefore, the same as well as eviction orders of the petitioners be set aside by way of allowing the instant writ petition. In support of his assertions, learned counsel has relied upon the dictums laid down in cases cited as Mst. Khurshid Begum and others v. Mr. Ghulam Kubra and others (1982 SCMR 90), Muhammad Saeed alias Pulla v. The State (PLD 1987 Peshawar 31), S.M. Mohsan Zaidi v. Syed Gauhar Ali (1985 SCMR 344), Province of Punjab and others v. Abdul Ghafoor and others (2001 MLD 1621), Haji Abdul Wali Khan and another v. Muhammad Hanif and another (1991 SCMR 2357), Mst. Sahib un Nissa and others v. Mst. Mahmooda Begum (PLD 1959 Writ Petition) Lahore 511) and Mst. Ghulam Fatima v. Muhammad Shafi and another (2006 YLR 1280).

5. Conversely, learned counsel for the respondents-decree holders has vehemently opposed this writ petition as well as the averments made by learned counsel for the petitioners. He points out that the petitioners are closely related to the original judgment debtor, particularly petitioner No.7 is son of Mian Muhammad Shafi, the original tenant, as such, they were in knowledge of filing of the ejectment petition since its inception. He submits that the respondents-decree holders are lawful owners of the property in question. He maintains that the respondents did not violate the status quo order in any manner and the possession of the property was taken over when the CPLA had been dismissed and there was no status quo order in the field and this too was done through indulgence of the court. He undertakes that the respondents are law-abiding citizens of the country and neither they have earlier violated the order of the court nor they will do so in future. He avers that this writ petition has no merit and the same is liable to be dismissed. He has relied upon the law laid down in cases cited as Mst. Khurshid Begum and others v. Mr. Ghulam Kubra and others (1982 SCMR 90), Ghulam Mujtaba v. Mst. Naeema Khanum (1984 CLC 1458 Lahore), Muhammad Iqbal and others v. Khurshid Ahmad (1984 SCMR 1324), Muhammad Sarwar v.

Muhammad Shafi (1986 SCMR 1638), Shafqatullah and others v. Distrcit and Sessions Judge, Nowshera (2001 SCMR 274), Sri Lakshmi Narayan and others v. Sri Surath Lal Chakraborti and others (PLD 1964 Dacca 177) and Nirmal Chandra Choudhry v. Nikunja Behari Biswas and others (PLD 1956 Dacca 148).

6. I have heard the arguments put forth by learned counsel for the parties and also perused the record with their able assistance.

7. Learned counsel for the petitioners has extended his lengthy arguments but according to my mind, the said arguments cannot be agitated before this Court in writ jurisdiction as the matter is already sub judice before the august Supreme Court in CPLA No.1810-L/2009. The only question which is to be answered by this Court is as to whether the petitioners were entitled to ask for restitution of possession by filing application before the executing court after the order passed by the august Supreme Court on 16-1-2014 by which the CPLA was restored after its dismissal in default on 30-5-2013.

8. Undeniably, status quo order was passed on 1-7-2010 by the Hon'ble Supreme Court of Pakistan in the CPLA but thereafter the said CPLA was dismissed in default on 30-5-2013. Order dated 30-5-2013 was set aside by the august Supreme Court vide order dated 16-1-2014 and the Civil Petition No.1810-L/2009 was restored to its original number. During the interregnum from dismissal in default on 30-5-2013 to its restoration on 16-1-2014, the learned Rent Controller issued warrants of possession and the possession of the disputed property was handed over to the respondents-landlords. According to the report of the bailiff, the possession of the property was handed over to the decree holders on 12-12-2003.

9. Subsequent to delivery of possession to the decree holder on 12-12-2013, an application for restoration of possession under Order XXI, Rule 97, C.P.C. was filed by the present petitioners before the executing court on 14-12-2013 by submitting that their appeal was pending before the august Supreme Court, as such, they were illegally dispossessed and entitled to be put in possession again. The application was resisted by the respondent-decree holder by stating that the appeal of the petitioners had already been dismissed by the august Supreme Court on 30-5-2013. The executing court after perusal of the record refused to restore the possession of the property to the petitioners by holding that since there was no order passed by the august Supreme Court for restitution of possession to the present petitioners, the possession could not be restored. However, the execution petition was adjourned awaiting orders of the apex court.

10. In the present case, the petitioners filed an application under Order XXI Rule 97, C.P.C. which reads as under:--

"97. Resistance or obstruction to possession to decree-holder or purchaser.---(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

(Emphasis provided)

Bare perusal of above provision of law reflects that if the decree holder is obstructed from taking over possession of the property, he may make an application to the court by complaining of such resistance or obstruction. Rules 98 and 99 of Order XXI of C.P.C. are also of the same effect. However, Rule 100 of Order XXI of C.P.C. provides that if any person other than the judgment debtor is dispossessed from the immovable property by a holder of a decree for possession of such property, then an application can be made on his behalf complaining of such dispossession whereas under Rule 101 of Order XXI, C.P.C., if the court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, then an order can be passed for restoration of the possession. In the present case, the petitioners have not asserted their own independent right rather they are claiming right on the basis of sub-tenancy from the original judgment debtors Meraj Din and Mian Muhammad Shafi who were inducted as lessee by Sheikh Muhammad Zaki, therefore, provisions of Rules 97 to 101 of Order XXI of C.P.C. are not attracted in this case.

11. The contention of learned counsel for the petitioners is that since the CPLA was restored and the status quo order was also restored has some force but at the same time, by restoration of the status quo order analogy cannot be drawn that the petitioners were entitled for restoration of the possession as they were enjoying prior to restoration of status quo order. By reading of the order of the Hon'ble Supreme Court, it is reflected that the status quo order was passed but it was nowhere ordered that the position of status quo would be as it was on 30-5-2013 when the CPLA was dismissed in default.

12. According to section 144 of the C.P.C., there can be restoration of the possession if the decree is varied, or reversed on the application of any of the parties. Section 144 of the C.P.C. provides that:
"Sec. 144---Application for restitution.---(1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)."
Plain reading of the above provision makes it clear that the possession of a property can be restored if the decree is varied, reversed or set aside. In this case, the ejectment decree was passed by the Rent Controller against the original lessee which stands upheld uptil this Court. According to my mind, the possession of the rented premises was handed over to the decree holder-landlord through process of law, the petitioners were never dispossessed from the property in an illegal manner. Even otherwise, the CPLA No.1810-L/2009 arising out of the application under section 12(2), C.P.C. filed by the petitioners is pending adjudication before the august Supreme Court. The petitioners if aggrieved of the impugned order may approach the apex court for redressal of their grievance.

13. The case law relied upon by learned counsel for the petitioners is also of no help to the petitioners. Even the case law relied upon by learned counsel for the petitioners cited as Mst. Khurshid Begum and others v. Mr. Ghulam Kubra and others (1982 SCMR 90) goes against the petitioners as it has been held in para 12 of the said judgment that:--

"12. It follows consistently from these decisions of this Court that an executing Court has the power to entertain and adjudicate an objection petition filed by persons not claiming through the judgment-debtor, even before their physical dispossession from the property. This has to be distinguished from the right conferred by law on such a party to prefer an objection without resisting the execution or without being dispossessed from the property. What remains to be seen is whether this principle is applicable to the facts of this case."
(Emphasis provided)

14. In the above mentioned circumstances, the application filed by the present petitioners was not maintainable before the executing court and was rightly dismissed. Learned counsel for the petitioners has not been able to point out any illegality in the impugned order.

15. Resultantly, this writ petition is devoid of any merit. The same is dismissed.

AG/S-51/L Petition dismissed.

**2015 M L D 280**

**[Lahore]**

**Before Atir Mahmood, J**

**GOVERNMENT EMPLOYEES' COOPERATIVE HOUSING SOCIETY LTD. and others---Petitioners**

**Versus**

**SECRETARY COOPERATIVE SOCIETIES and others---Respondents**

Writ Petitions Nos.4961 of 2012 and 5088 of 2009, decided on 20th January, 2014.

**Co-operative Societies Act (VII of 1925)---**

----Ss. 54, 56 & 59---Constitution of Pakistan, Arts. 199 & 25---Constitutional petition---Scope---Laches, principles of---Applicability---Allotment of plot to the employee in the Government Employees Co-operative Housing Society by the Assistant Registrar of Co-operative Societies---Implementation of allotment order---Appeal---Limitation---Implementation of allotment order of plot by the High Court---Factual controversy---Contention of petitioner was that he was allotted plot in the housing society by the Assistant Registrar of Co-operative Societies but said order had not been implemented whereas society had contended that said order was to be executed through civil court---Validity---Number of persons who became members of the society later than the petitioner were given plots without any draw---Some plots were available with the society but petitioner who was member of the society was not given any plot without any plausible reasons---All citizens of the country were equal before law and were entitled to equal protection of law and there should be no discrimination between them---Assistant Registrar of Co-operative Societies had rightly found that allotment of plots to new members by the society ignoring the old members was unfair and unjust and petitioner being old member of the society was entitled to plot---High Court in its constitutional jurisdiction could not go into factual controversy requiring recording of evidence---Person aggrieved by any order of a competent authority must approach the appellate authority/court within the time stipulated by the statute---Society assailed the order of Assistant Registrar by filing appeal but same was barred by time by more than five months---Question of limitation was not a mere technicality but a mixed question of law and fact---Vested right would create in favour of person holding order of any competent authority---Each and every day of delay in filing the appeal was required to be explained by the society but no plausible reason for delay of more than five months was offered---Society did not agitate the order with regard to dismissal of its appeal till filing of present constitutional petition for a period of more than two years and four months before any competent court of law within reasonable time---Law would favour the vigilant but not the indolent---Constitutional petition filed by the society was liable to be

dismissed on the score of laches---Order passed by the Registrar or a liquidator was like a decree of civil court and same was required to be executed in the same manner as a decree of the court---Such order was not to be executed necessarily by the civil court and not by the court or the authority who passed the same nor same could not be executed by the High Court---Clause (c) of sub-Article (1) of Article 199 of the Constitution empowered the High Court subject to its satisfaction to issue any direction on an application by an aggrieved person or authority including any Government for the enforcement of any of the fundamental rights---High Court had jurisdiction to issue direction to the society to implement order for allotment of plot to the petitioner---Registrar of the Co-operative Societies or any other officer subordinate to him duly authorized was deemed to be a civil court who had power to implement his orders in case of non-compliance of the same---Society was directed by the Deputy Registrar Co-operative Societies to implement the order for allotment of plot but same was not complied with---Decree of Registrar Co-operative Societies or his nominee or arbitrator would be executed by such court itself and there was no need to approach the civil court for execution of the same---High Court had power to issue direction to the judgment debtor for compliance/ implementation of such order/decree---No illegality, irregularity or jurisdictional defect in the impugned order had been pointed out which was based on sound reasons---Constitutional petition filed by the petitioner was accepted whereas that of society was dismissed in circumstances.

Messrs Firdous Trading Corporation v. Registrar Co-operative Societies, Hyderabad Division, Hyderabad and another 1972 SCMR 91; Sheikh Haider v. Registrar, Co-operative Societies, Karachi and others PLD 1966 (W.P.) Kar. 177; Province of Sindh through Chief Secretary Sindh, Karachi and 4 others v. Gul Muhammad Hajano 2003 SCMR 325 and Khalid Mehmood Inspector Police v. Inspector General of Police Punjab, Lahore and another 1998 Lah. 1606 ref.

Malik Muhammad Aslam and Farooq Haider Malik for Petitioners.
Nadeem Iqbal Chaudhry and Muhammad Amar Niaz Bhadera for Respondents Nos. 4(i) to (vi).
Date of hearing: 17th September, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this single judgment, I intend to dispose of Writ Petitions Nos.4961/2012 and 5088/2009 as common questions of law and fact are involved therein.

2. Brief facts of the case are that respondent No.4 deceased Muhammad Jamil S/o Muhammad Mukhtar, Assistant, Lahore High Court, Bahawalpur Bench, Bahawalpur

(petitioners in Writ Petition No. 5088/2009) applied for allotment of 10 marla plot in the year 1989 in Government Employees Cooperative Housing Society Limited, Bahawalpur (petitioner society). In the first draw, respondent No.4 could not succeed. Thereafter, notice for second draw was got published in daily "Nawa-i-Waqt" Multan on 16-11-2006 whereby the members were directed to deposit half price of the plot for all the categories. Since respondent No.4 failed to deposit half price of the plot as given in the notice, his name was not included in the second draw. Third draw was also conducted in the year 2007 but it was for 5 and 7 marla plots only, therefore, respondent No.4 who had applied for 10 marla plots was not entitled to participate in it.

3. Respondent No.4 filed a petition under section 54 of the Co-operative Societies Act, 1925 before the District Officer/Deputy Registrar, Co-operative Societies Bahawalpur (respondent No.2). The petition was transmitted to Assistant Registrar, Cooperatives Societies, Bahawalpur (respondent No.3) for his decision. The Assistant Registrar, Cooperatives Societies, Bahawalpur accepted the petition vide order dated 10-6-2008 with the direction to the petitioner society to allot a 10 marla plot to respondent No.4. The petitioner society filed an appeal before the District Officer Cooperatives/Deputy Registrar, Bahawalpur which was dismissed vide order dated 1-12-2008 on two counts: firstly it was time barred and secondly, appeal under Section 64 of Cooperative Societies Act, 1925 lies with the Provincial Government. The order dated 1-12-2008 was further assailed before the Secretary Cooperatives (respondent No.1) through appeal under Section 64 of the Cooperative Societies Act, 1925 which also met the same fate vide order dated 26-4-2010. All the three orders of Assistant Registrar, Deputy Registrar and Secretary of Cooperative Societies have been challenged in this writ petition. On the other hand, respondent No.4 after obtaining confirmation certificate from the District Officer/Deputy Registrar, Co-operatives, Bahawalpur moved an application for execution/ implementation of order dated 10-6-2008 whereupon a direction was issued to the petitioner society to allot a 10 marla plot to respondent No.4 but to no avail. Hence the petitioner moved Writ Petition No.5088/2009 seeking implementation of order dated 10-6-2008 passed by Assistant Registrar, Cooperative Societies, Bahawalpur. During the pendency of the instant writ petitions in April, 2013, respondent No.4/petitioner in Writ Petition No. 5088/2009 Muhammad Jamil died, therefore, his legal heirs were impleaded in this case.

4. Learned counsel for the petitioner society submit that the orders impugned are illegal, without jurisdiction and without lawful authority; that the orders impugned are neither speaking order nor any cogent reason for allotment of plot to respondent No.4 has been given therein; that the matter under Rule 31 of the Cooperative Societies Rules, 1927 was required to be decided within 60 days of filing of the petition which was not done; that the Deputy Registrar, Cooperative Societies, Bahawalpur was

bound to decide the appeal on merit rather than on technicalities; that the matter was also taken up before the Secretary Cooperatives who also failed to apply his judicious mind while deciding appeal of the petitioner society; that there were certain conditions for allotment of plot including minimum age of 35 years and minimum length of service of 12 years; that respondent No.4 did not fulfil the said conditions; that there was a condition for deposit of half price of the plot for participation in the second draw but the same was not done by respondent No.4, as such, he was neither entitled nor included in the second draw; that for the third draw, respondent No.4 was not eligible as he had applied for allotment of 10 marla plot whereas the third draw was for allotment of 5 and 7 marla plots only; that the Deputy Registrar, Cooperative Societies had no jurisdiction to allot the plot to anyone rather it was within the jurisdiction of the Society to allot plots according to the policy framed for the purpose; that the order of the Deputy Registrar Cooperative Societies is not binding on the petitioner society. Learned counsel avers that the order of the Registrar, Cooperative Societies, Bahawalpur was like that of a decree and executable through the civil court only; that respondent No.4 under the law was bound to seek execution of the order dated 10-6-2008 through the civil court which has not been done rather he has sought implementation of the order impugned through Writ Petition No.5088/2009 which is not maintainable. Learned counsel for the petitioners pray that this writ petition be allowed, the orders impugned be set aside and the Writ Petition No.5088/2009 filed by respondent No.4 be dismissed. In support of his assertions, learned counsel for the petitioners have relied upon the dictums laid down in cases report as 1972 SCMR 91 (Messrs Firdous Trading Corporation v. Registrar, Co-operative Societies, Hyderabad Division, Hyderabad and another) and PLD 1966 (W.P.) Karachi 177 (Sheikh Haidar v. Registrar, Co-operative Societies, Karachi and others).

5. Conversely, learned counsel for respondent No.4 argue that respondent No.4 applied for allotment of the plot on 20-6-1989 but he was ignored; that respondent No.4 filed a petition before the Registrar, Co-operatives Societies which was ultimately decided in his favour by Assistant Registrar, Co-operative Societies with the direction to the petitioner society to allot plot to respondent No.4; that the petitioner society assailed the said order before the Deputy Registrar Co-operative Societies and the Secretary, Co-operative Department but to no avail and the order passed by the Assistant Registrar, Co-operative Society was upheld vide orders dated 1-12-2008 and 26-4-2010 passed by the Deputy Registrar and Secretary, Co-operative Department respectively; that it is not true that the service length and age of respondent No.4 was less than required as he was inducted in service on 14-7-1975 whereas the application for allotment of plot was filed on 20-6-1989; that there are a number of vacant plots available; that a number of plots have been given to different individuals by the petitioner society out of turn; that respondent No.4 has died a few

days before his retirement; that the orders passed by the Assistant Registrar, Cooperative Societies, Bahawalpur is in accordance with law and the appeals preferred by the petitioner society before Deputy Registrar and Secretary Cooperative have also been dismissed. Learned counsel for respondent No.4 pray that the instant writ petition be dismissed and order dated 10-6-2008 passed by Assistant Registrar, Cooperative Societies, Bahawalpur be implemented by allowing Writ Petition No.5088/2009 filed by respondent No.4. In support of their contentions, they have relied upon the law laid down in cased reported as 2003 SCMR 325 (Province of Sindh through Chief Secretary Sindh, Karachi and 4 others v. Gul Muhammad Hajano) and PLJ 1998 Lahore 1606 (Rawalpindi Bench) (Khalid Mehmood Inspector Police No.R-227 Rawalpindi Range, Rawalpindi v. Inspector General of Police Punjab, Lahore and another).

6. I have heard the arguments put forth by learned counsel for the parties and also perused the record.

7. There is no denial to the fact that respondent No.4 applied for allotment of a 10 marla plot and became a member of the petitioner society in the year 1989 but he could not be accommodated by the society. Respondent No.4 aggrieved by the attitude of the petitioner society approached the District Officer/Deputy Registrar, Co-operative Societies (respondent No.2) through a petition under section 54 of the Co-operative Societies Act, 1925 which was referred to Assistant Registrar, Co-operative Societies who being nominee of the Registrar called on both the parties, perused the relevant record and after hearing both sides passed order dated 10-6-2008 in favour of respondent No.4 directing the petitioner society to allot a 10 marla plot to respondent No.4. The petitioner society unsuccessfully assailed order dated 10-6-2008 before the Deputy Registrar Co-operative Societies, Bahawalpur and Secretary Co-operative Department, Government of the Punjab through appeals but the same were dismissed and the order of the Assistant Registrar Co-operative Societies dated 10-6-2008 was maintained.

8. I have gone through order dated 10-6-2008 passed by Assistant Registrar, Co-operative Societies, Bahawalpur. Perusal of the said order shows that the Assistant Registrar, Co-operatives heard both sides and perused the byelaws and relevant record of the society. It was observed by the Assistant Registrar that a number of persons who became member of the society, later than respondent No.4, were allotted plots by the petitioner society without any draw. It was also admitted by representative of the petitioner society that some 10 marla plots were available with the society at that time. Despite the same, respondent No.4 was not given any plot, therefore, the Assistant Registrar directed the petitioner society to allot a 10 marla plot to respondent No.4. Relevant portion therefrom is reproduced below:--

(Underline is mine)

Perusal of above order shows that a number of persons who became members of the society later than the petitioner were given plots without any draw. It also shows categorical admission on part of representative of the petitioner society that some plots measuring 10 marla were available with the petitioner society but respondent No.4 who was a member of the society since 1989 was not given any plot by the society without any plausible reason. This is a clear-cut discrimination with respondent No.4 in violation of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 which unequivocally speaks out that all the citizens of the country are equal before law and are entitled to equal protection of law and that there will be no discrimination in between them. The Assistant Registrar, Co-operative Societies, Bahawalpur while passing order dated 10-6-2008 has rightly held that allotment of plots to new members by the society ignoring the old members is unfair and unjust and respondent No.4 being an old member of the society is entitled to 10 marla plot.

9. All the three orders passed by respondents Nos.1 to 3 have been assailed by the petitioner society raising legal as well as factual controversies. I am afraid that this Court in its constitutional jurisdiction cannot go into factual controversies requiring recording of evidence, particularly when the case has been decided by the three competent forums concurrently against the petitioner keeping in view the facts of the case as well as adverting to the law applicable thereto.

10. Regarding contention of learned counsel for the petitioner that appeal preferred by the society against order dated 10-6-2008 before respondent 2 was required to be decided on merits rather than on technicalities, suffice it to say that any person aggrieved by any order of a competent authority must approach the appellate authority/court within the time stipulated by the statute. In the present case, the order of Assistant Registrar dated 10-6-2008 was assailable under section 56 of the Co-operative Societies Act within a period of one month but the petitioner society filed the appeal on 21-11-2008 which was barred by time by more than five months. The contention of learned counsel for the petitioner that the appellate authority should have decided the case on merit ignoring the technicalities has no force as the question of limitation is not a mere technicality but a mixed question of law and fact and by afflux of time, a vested right is created in favour of the person holding order of any competent authority. Under the law each and every day of delay in filing the appeal was required to be explained by the petitioner society but it could not offer any plausible reason for a delay of more than five months. When the appeal of the petitioner society was barred by time and the petitioner society has not been able to show any plausible ground for delay in filing the appeal, the appeal was liable to be

dismissed on this score alone and there was no need to discuss other merits of the case.

11. There is another aspect of the case that after order dated 26-4-2010 passed by Secretary, Co-operative Department, the petitioner did not agitate the matter before any competent forum till filing of the instant writ petition on 5-9-2012 meaning thereby the petitioner society kept mum for a period of more than two years and four months and could not raise any grievance before any competent court of law within a reasonable time which shows lethargic conduct of the petitioner. It is now well-settled that law favours the vigilant and not the indolent. This writ petition even on the score of laches merits dismissal.

12. Apropos argument of learned counsel for the petitioner qua maintainability of Writ Petition No.5088/2009 filed by respondent No.4 for implementation of order dated 10-6-2008 stating that the petitioner should have approached the civil court for execution of the said order, I have perused the case-law cited by learned counsel for the petitioner and also gone through the relevant law. There is no denial to the fact that the order passed by the Registrar or his nominee or the arbitrator on disputes referred to them is a decree of such court. Section 59(1)(a) of the Co-operative Societies Act, 1925 is relevant in this regard which is reproduced below:--

"59. Money how recovered.---(1) Every order passed by liquidator under section 50, or by the Registrar under section 50-A or by or under clause (g) of section 50 or under section 54 or under subsection (3) of section 54-A, every order passed in appeal, under section 56, every order passed by the Provincial Government in appeal against orders under sections 50, 50-A, 54 or subsection (3) of section 54-A and every order passed under section 64-A shall, if not carried out, --

(a) on a certificate signed by the Registrar or a liquidator, be deemed to be a decree of a Civil Court and shall be executed in the same manner as a decree of such Court"

Bare reading of above provisions of law reveals that the order passed by the Registrar or a liquidator is like that of a decree of a civil court and is required to be executed in the same manner as a decree of the court but it nowhere suggests that the decree will necessarily be executed by the civil court and not by the court or the authority who has passed the order nor it curtails the jurisdiction of this Court in any manner. Clause (c) of sub-Article (1) of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 empowers this Court subject to its satisfaction to issue any direction on an application by an aggrieved person to any person or authority including any Government exercising any power of performing any function in, or in relation to, any territory within the jurisdiction of this Court for the enforcement of any of the

Fundamental Rights conferred by the Constitution to the citizens of this country. Therefore, I am not convinced with the argument of learned counsel for the petitioner society that this Court has no jurisdiction to issue direction to the petitioner society to implement order dated 10-6-2008. Even otherwise, under subsection (5) of section 59 of the Co-operative Societies Act, 1925 (amended in the year 2006), the Registrar of the Co-operative Societies or any other officer subordinate to him, duly authorized, is deemed to be a civil court who has powers vested in the executing court to implement his orders in case of non-compliance of his order/award. It has also come to the notice of the Court that the petitioner society was directed by the Deputy Registrar, Co-operative Societies, Bahawalpur to implement the order dated 10-6-2008 but it did not pay heed to the order of the Deputy Registrar compelling respondent No.4 to invoke jurisdiction of this Court. In this view of the matter, it is quite clear that the Registrar, Co-operative Societies has ample powers to implement his orders and may also take penal action against the delinquents. So, I am of the considered opinion that the decree of the Registrar Co-operative or his nominee or arbitrator will be executed by such court itself and there is no need to approach a civil court for execution of such decree. Further that in case of failure in execution or implementation of such decree/order, the High Court has ample powers to issue direction to the judgment debtor for compliance/implementation of such order/decree.

13. Learned counsel for the petitioner society has not been able to point out any illegality, irregularity or jurisdictional defect in the orders impugned, particularly the order dated 10-6-2008 passed by Assistant Registrar, Co-operative Societies which is not only based on sound reasons but also loudly speaks about conduct of the petitioner society.

14. In view of the aforementioned reasons, Writ Petition No.4961/2012 filed by the petitioner society is dismissed whereas Writ Petition No.5088/2009 filed by respondent No.4-Muhammad Jamil/legal heirs of deceased Muhammad Jamil is allowed and the petitioner society is directed to implement the order dated 10-6-2008 passed by Assistant Registrar, Co-operative Societies, Bahawalpur in letter and spirit within a period of two months positively.

AG/G-6/L Order accordingly.

**2015 M L D 420**
**[Lahore]**
**Before Atir Mahmood, J**
**MUHAMMAD AFZAL---Petitioner**
**Versus**
**MUHAMMAD HAFEEZ-UR-REHMAN through Legal Heirs and others---Respondents**

Civil Revision No.2360 of 2011, heard on 13th December, 2013.

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

----S. 42---Suit for declaration---Insurance policy---Tarka---Scope---Contention of plaintiffs was that they being parents of deceased were entitled to get the share from the insurance amount whereas defendants contended that insurance claim was not a legacy of the deceased as terms and conditions of the insurance policy were that the insurance claim would be given to the survivor---Suit was decreed by the Trial Court which was upheld by the Appellate Court with certain modifications---Validity---Plaintiffs were entitled to have their shares in the claim of insurance policy of the deceased in accordance with their shares---No illegality or irregularity was committed by the courts below while passing the impugned judgments and decrees---No mis-reading or non-reading of evidence or any jurisdictional defect had been pointed out by the defendant---Revision was dismissed in circumstances.

PLD 1991 SC 731 ref.
Mst. Amreen Khatoon v. Mst. Shamim Akhtar and others 2005 SCMR 512 rel.
Abdul Waheed Chadda for Petitioner.
Mian Asad Saeed for Respondents Nos. 1 and 2.
Date of hearing: 13th December, 2013.

**JUDGMENT**
**ATIR MAHMOOD, J.**---Through this civil revision, the petitioner has challenged the judgment and decree dated 19-4-2011 passed by the learned Additional District Judge, Gujranwala who partly accepted the appeal filed by the petitioner against the judgment and decree dated 20-10-2010 passed by the learned Civil Judge 1st Class, Gujranwala whereby the suit for declaration with permanent injunction filed by respondents Nos. 1 and 2 was decreed.

2. Brief facts of the case are that respondents Nos. 1 and 2 filed a suit for declaration with permanent injunction before the learned Civil Judge, Gujranwala. The respondents Nos. 1 and 2 alleged in their plaint that they are parents of deceased

Farrah Tayyaba, who was married with the petitioner on 12-5-2004 and no issue was born from that wedlock. Thereafter Mst. Farrah Tayyaba was murdered on 15-6-2004. It is alleged that the petitioner and Farrah Tayyaba deceased obtained an Insurance Policy under the Plan namely "Jewan Sathi" from respondents Nos. 3 to 5 vide policy No. 507564506-7 dated 31-12-1998. After issuance of the above-said "Jewan Sathi" Policy, the petitioner paid the entire premiums from his own pocket till the death of his wife Mst. Farrah Tayyaba deceased. After death of the wife of the petitioner, the insurance claim matured and being survivor of the spouse of the petitioner was entitled to get the claim from respondents Nos. 3 to 5 under the terms and conditions of "Jewan Sathi" Plan. It is also stated that the present petitioner approached respondents Nos. 3 to 5 for claiming his claim but in the meanwhile, the respondents Nos. 1 and 2 filed the civil suit claiming therein that Farrah Tayyaba was the claimant of the insurance, therefore they being the father and mother of the deceased are entitled to get the share from the insurance amount. The suit was contested by the petitioner on the ground that the insurance claim is not a legacy (Turka) of the deceased because terms and conditions of the insurance policy were that the insurance claim will be given to the survivor. Keeping in view the divergent pleadings of the parties learned trial court framed the following issues:--

"(1) Whether plaintiffs are entitled to the decree for permanent injunction as prayed for? OPP.

(2) Whether the plaintiffs have no cause of action? OPD.

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

(4) Whether the suit has been improperly valued for the purposes of court-fee and jurisdiction? OPD.

(5) Whether the suit has been filed just to cause harassment to defendant? OPD.

(6) Whether the defendants are entitled to special costs? OPD.

(7) Whether the suit is liable to be rejected under Order VII Rule 11 C.P.C.? OPD.

After recording oral as well as documentary evidence of the parties, learned trial court decreed the suit filed by the respondents Nos. 1 and 2 vide judgment and decree 20-10-2010. Feeling dissatisfied the petitioner filed an appeal which was partly accepted by the learned Additional District Judge, Gujranwala vide judgment and decree dated 19-4-2011, hence this civil revision.

4. Learned counsel for the petitioner has contended that the judgments and decrees passed by the courts below are against the law and facts of the case; that the impugned judgments and decrees passed by both the courts below are the result of misreading and non-reading of evidence available on the file; that the impugned judgments and decrees of both the courts below are contradictory in themselves; that the impugned judgments and decrees passed by both the courts below are against the dictum laid down by the Hon'ble Supreme Court of Pakistan in the case reported in PLD 1991 Supreme Court 731, as such, this civil revision be allowed, impugned judgments and decrees are liable to be set aside.

5. On the other hand, learned counsel for the respondents Nos. 1 and 2 has vehemently opposed this civil revision and fully supported the impugned judgments and decrees. He has further contended that the impugned judgments and decrees are well reasoned and the learned courts have committed no illegality or irregularity in delivering the same, therefore, this civil revision is liable to be dismissed.

6. Heard. Record perused.
7. The only question which is to be answered by this Court is as to whether the petitioner is exclusively entitled to receive the amount of life insurance policy and the present respondents Nos. 1 and 2 are not entitled to have any share in the said claim. The case law relied upon by the learned counsel for the petitioner has duly been considered by a subsequent judgment passed by the Hon'ble Supreme Court in the case reported as Mst. Ameeran Khatoon Versus Mst. Shamim Akhtar and others (2005 SCMR 512). The relevant part of the said judgment reads as under:--

"The above question has already been answered by this Court in the judgment reported in the case referred to hereinabove. Relevant para. therefrom is reproduced hereinbelow for convenience.

Applying above test on the facts of instant case we are persuaded to hold that deceased Muhammad Ayub was not entitled for the Benevolent Fund and Group Insurance during his life time and on the death, such amounts shall be deemed to be owned by him. Thus they will devolve upon his legal heirs being his 'Tarka'. Therefore, petitioner would not be entitled exclusively to claim these amounts except to the extent of her entitlement as per Shariat with other legal heirs of the deceased as it has been held by this Court in the case of Mst. Amtul Habib and others v. Mst. Musarrat Parveen and others PLD 1974 SC 185".

8. In view of the facts of the present case the respondents Nos. 1 and 2 are entitled to have their share in the claim of life insurance policy of the deceased namely Farrah Tayyaba in accordance with their share. The courts below have not committed any

illegality or irregularity in passing the impugned judgments and decrees and the learned counsel for the petitioner has not been able to point out any misreading and non-reading of evidence or any jurisdictional defect which could be interfered by this Court in its revisional jurisdiction. Resultantly, this civil revision being devoid of any force is hereby dismissed.

AG/M-71/L Revision dismissed.

**2015 M L D 450**

**[Lahore]**

**Before Atir Mahmood, J**

**Mirza MUHAMMAD ASHRAF BAIG through Legal heirs and others---Petitioners**

**Versus**

**SALEEM ULLAH BAIG and others---Respondents**

C.R. No.2724 of 2013, decided on 5th December, 2013.

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

----S. 12---Civil Procedure Code (V of 1908), S.115---Qanun-e-Shahadat (10 of 1984), Art.100---Suit for specific performance---Revision---Concurrent findings---Trial Court dismissed the suit---Appellate Court dismissed appeal---Plaintiff contended that agreement to sell being a thirty years old document supported by possession of land, presumption of genuineness was attached to such document---Validity---Plaintiffs failed to prove their case---Concurrent findings were immune to interference except where gross illegality or irregularity was floating on the surface of judgments---Revision was dismissed.

Zar Wali Shah v. Yousaf Ali Shah and others 1992 SCMR 1773 and Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others 1994 SCMR 2189 ref.
Allah Dad and 3 others v. Dhuman Khan and 10 others 2005 SCMR 564 rel.
Mirza Aziz-ur-Rehman for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.---**This civil revision is directed against impugned judgment and decree dated 19-9-2013 passed by the learned Additional District Judge, Arifwala who dismissed the appeal filed by the petitioners against judgment and decree dated 31-1-2012 passed by the learned Civil Judge Class II, Arifwala whereby the suit filed by the petitioners for specific performance of contract along with perpetual injunctive relief was dismissed.

2. Brief facts of the case are that the petitioners filed a suit for specific performance of contract regarding agricultural land measuring 42 kanals situated in Khewet No. 134/135 Khatooni No. 369, of Chak No. 207, Tehsil Arifwala, District Pakpattan, on the basis of agreement to sell dated 6-9-1968 for a total consideration of Rs.6500. It is alleged that at the time of agreement Rs.1000 had been paid as down payment whereas the remaining amount of Rs.2000 had been paid on 10-8-1969, Rs.1000 was paid on 21-7-1970. Thereafter, the petitioners paid Rs.1100 whereas the remaining amount of Rs.1400 was made on 9-4-1992 in presence of witnesses and possession of the property was delivered in continuation of the said agreement.

3. The suit was contested by the respondents vehemently by filing written statements. Keeping in view divergent pleadings of the parties, learned trial court framed following issues:--

"(i) Whether the defendant entered into agreement to sell of the suit property with the plaintiff and received the whole amounts? OPP

(ii) Whether plaintiff is entitled to a decree of specific performance as prayed for? OPP

(iii) Whether the plaintiffs have no cause of action to file this suit? OPD

(iv) Whether the defendant never entered into agreement to sell? OPD

(v) Whether the suit of the plaintiff is barred by law and barred by law of limitation? OPD

(vi) Whether suit of the plaintiff is false, frivolous and liable to be dismissed? OPD.

(vii) Whether the defendants are entitled for special costs in case of dismissal of the suit? OPD.

(viii) Relief."

4. After recording oral as well as documentary evidence of the parties, learned trial court dismissed the suit filed by the petitioners vide judgment and decree dated 31-1-2012. Feeling dissatisfied the petitioners filed an appeal which was also dismissed by the learned Additional District Judge, Arifwala vide judgment and decree dated 19-9-2012. Hence this civil revision.

5. Learned counsel for the petitioners has contended that both the judgments and decrees are result of misreading and non-reading of evidence; that learned courts below have not applied their judicious mind while passing the impugned judgments and decrees; that the judgments and decrees of learned courts below have been passed without giving cogent and substantial reasons; that both the courts below have violated the law while passing the impugned judgments and decrees as laid down in the case reported as Zar Wali Shah v. Yousaf Ali Shah and others 1992 SCMR 1778; that both the courts below failed to consider the fact that the agreement dated 6-9-1968 was executed before the enactment of Qanun-e-Shahadat Ordinance, 1984, as such, provisions of the Ordinance ibid were not applicable; that both the courts below failed to consider this fact; that since agreement to sell is 30 years old document which is supported by possession of the land, the presumption towards its genuineness can be drawn in view of Article 100 of the Qanun-e-Shahadat Order, 1984; that findings of learned courts below on issue No.1 are based on misreading and non-reading of evidence and also non-application of judicious mind, therefore, the impugned judgments and decrees are liable to be set aside. In support of his assertions, he has relied upon the law laid down in cases reported as Mrs. Mussarat

Shaukat Ali v. Mrs. Safia Khatoon and others 1994 SCMR 2189 and Allah Dad and 3 others v. Dhuman Khan and 10 others 2005 SCMR 564.

6. I have heard the arguments of learned counsel for the petitioners and also gone through the record.

7. The core issue in this case is as to whether the alleged agreement to sell dated 6-9-1968 (Exh.P1) was executed in accordance with law and as to whether the plaintiffs have been able to prove the same through cogent evidence.

8. In order to prove the agreement to sell, plaintiffs besides plaintiff No.3 produced Mubarak Ali as P.W.2 and Muhammad Sharif as P.W.3. In order to prove the factum of payment, the plaintiffs have annexed with the plaint receipts of payments dated 9-4-1971 (Exh.P2), 11-4-1971 (Exh.P3), 4-5-1971 (Exh.P4), 9-4-1972 (Exh.P5) whereas receipt of payment of Rs.1000 has also been shown on the agreement to sell.

9. Plaintiff No.3 Mirza Iftikhar Baig while appearing as P.W.1 states that the agreement to sell was not written in his presence, therefore, he does not know anything about it and has knowledge only what was told by his father. He further states that possession of the suit property lies with Mubarak Ali who is a tenant under the defendants. Whereas Mubarak Ali when appeared before the court as P.W.2 deposed that he cultivated the suit land as a tenant of P.W.1 Mirza Iftikhar Baig. He deposes that he is unaware of any dispute between the parties and except payment of Rs.1400, he has no knowledge of payment made to the defendants. He states that no receipt of payment was written. He also states that the agreement was not written in his presence. Muhammad Sharif was produced as P.W.3. According to him, receipt of payment of Rs.1100 was written whereas no receipt of payment of Rs.1400 was written. He also could not recall the date of payment. He also states that neither agreement to sell was written in his presence nor he is a witness of the same.

10. The contention raised by learned counsel for the petitioner that the disputed agreement was more than 30 years old and in view of provisions of Article 100 of Qanun-e-Shahadat Order, 1984, presumption of truth is attached therewith, therefore, it cannot be brushed aside. I am afraid that this contention does not hold water in view of the dictums laid down in case reported as 2005 SCMR 564 (Allah Dad and 3 others v. Dhuman Khan and 10 others), produced by learned counsel for the petitioners himself. Relevant portion from the said judgment is reproduced below:--
"10. The principle underlined in Article 100 is that if a document 30 years old or more is produced from proper custody and on its face it is free from suspicion, the Court may presume that it has been signed or written by the person whose signatures appear on it and that it was duly executed and attested by the executant. The age of document, its unsuspicious character, its custody and other circumstances are foundation to raise a presumption of its execution and if a document is proved more than thirty years old, it is admissible in evidence without formal proof but if the genuineness of such a document is disputed, it is the duty of the Court to determine the question of its genuineness and true character. Therefore, the rule is that Court may raise a presumption of existence and execution of a document which is more than

30 years old but it is not necessary that by raising such presumption Court must presume the contents of the document to be true and in such a case, Court may call the parties to produce the evidence. However, the presumption of genuineness of a document is rebuttable and the question whether such a presumption can be raised or not is a question of law which can be raised at any stage." (Underline is mine)

11. From bare perusal of the evidence produced by the petitioners-plaintiffs, it comes crystal clear that there are material contractions in the statements of the P.W.s as P.W.1 Mirza Iftikhar Baig states that the possession of the suit property lies with Mubarak Ali as a tenant of defendants whereas Mubarak Ali states that he is a tenant under P.W.1 Mirza Iftikhar Baig. All the P.Ws. state that the agreement to sell was not made in their presence nor they are witnesses of the same. P.W.2 and P.W.3 also state that the receipts of payment except one were not reduced in writing but the plaintiffs have produced four receipts of payments as Exh. P2, Exh.P3, Exh.P4 and Exh. P5 in addition to receipt of payment shown on back side of alleged agreement to sell meaning thereby the receipts have been managed by the plaintiffs themselves just to support their false claim illegally and unlawfully. When the witnesses produced by the plaintiffs themselves do not support the version of the plaintiffs, it can safely be concluded that the plaintiffs could not prove their case. There are concurrent findings of law and fact against the petitioners which are immune from interference by this Court except when some gross illegality or irregularity is floating on the surface of the judgments which could not be pointed out by learned counsel for the petitioners. The impugned judgments and decrees passed by learned courts below are in consonance with law. I see no reason to interfere therewith.

12. For what has been discussed above, this civil revision has no merit. The same is dismissed in limine.

ARK/M-69/L Revision dismissed.

**2015 M L D 1683**

**[Lahore]**

**Before Atir Mahmood, J**

**ROBIN DAVID JOHN---Petitioner**

**versus**

**Mst. HUMA SAMUEL and others---Respondents**

Writ Petition No.23322 of 2010, heard on 27th May, 2014.

**(a) West Pakistan Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for recovery of dowry articles---Plaintiff-wife and her witnesses were consistent on the point that she was given dowry articles as claimed by her in the plaint---Nothing could be brought out from the said witnesses despite lengthy cross-examination which could support the version of defendant-husband or even weaken the stance of plaintiff-wife---Parents of plaintiff-wife were having reasonable financial status enough to give dowry articles to their daughter---Mere non-production of purchase receipts or non-signing of list of dowry articles by the plaintiff-wife was not sufficient to disentitle her from recovery of her dowry articles---Appellate Court had rightly enhanced the alternate price of dowry articles keeping in view the financial status of parents, wear and tear coupled with the fact that plaintiff-lady was able to give details of dowry articles given to her at the time of marriage---Findings recorded by the Appellate Court were in accordance with law---No illegality, irregularity or non-reading of evidence was pointed out in the impugned judgment and decree passed by the Appellate Court---Constitutional petition was dismissed in circumstances.

**(b) West Pakistan Family Courts Act (XXXV of 1964)---**

----Ss. 14(2)(b) & 5, Sched.---Appeal---Scope---Decree for dowry articles---No appeal would lie against a decree passed for dower or dowry articles not exceeding Rs. 30,000 however an appeal would lie against the decree for less than Rs. 30,000 and even against dismissal of such suit---Embargo of S. 14(2)(b) of West Pakistan Family Courts Act, 1964 had been placed on the defendant only and not on the plaintiff.

Ijaz Farhat for Petitioner.

Rana Muhammad Rafique for Respondent.

Date of hearing: 27th May, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this writ petition, the petitioner has called in question the legality of judgment and decree dated 4-5-2010 passed by learned Additional District Judge, Lahore.

2. Brief facts of the case are that respondent No.1 Mst. Huma Samuel (the respondent) filed a suit for dissolution of marriage, recovery of dowry articles and recovery of maintenance allowance with the averments that the marriage of the parties was solemnized on 8-11-1996 in accordance with Christian Marriages Act, 1872 and the parties lived together till last Sunday of October, 2001; that at the time of marriage, the respondent was given gifts, property, gold ornaments and other household articles

as per list annexed with the plaint which are lying with the petitioner; that the petitioner-defendant developed illicit relations with women of ill-repute; that the plaintiff was beaten by the defendant as well as by his mother and sister time and again; that the plaintiff caught red-handed the defendant when he was busy in sexual intercourse with a woman who fled away on seeing the plaintiff; that the plaintiff has got hatred against the petitioner-defendant; that the defendant is employed in United Professional Movers International Islamabad with monthly income of Rs.30,000; that he has not paid any maintenance allowance to the plaintiff.

3. The suit was resisted by the petitioner who also filed contesting written statement and also annexed therewith a list of dowry articles. Out of divergent pleadings of the parties, issues were framed and the evidence led by the parties was recorded. The suit of the respondent for dissolution of marriage was decreed vide order dated 22-2-2005. Learned Family Court vide judgment and decree dated 2-1-2010 decreed the suit of the respondent for recovery of dowry articles as per list annexed by the petitioner along with the written statement or alternate price of Rs.10,000. Vide said judgment and decree, the plaintiff was also declared entitled to recover maintenance allowance from the petitioner from 22-2-2001 to 22-2-2005 @ Rs.2,000 per month. The petitioner did not challenge the said judgment and decree. However, feeling aggrieved, the respondent filed appeal to the extent of recovery of dowry articles which was allowed by learned Additional District Judge, Lahore vide judgment and decree dated 4-5-2010 and the suit of the respondent excluding gold ornaments and 50 suits or alternate price of Rs.400,000 thereof was decreed. Hence this writ petition.

4. Learned counsel for the petitioner inter alia contends that the appeal of the respondent before learned lower appellate court was barred by law in view of section 14(2)(b) of West Pakistan Family Courts Act, 1964 (the Act) as the decree for recovery of dowry articles was passed by the family court for less than Rs.30,000; that the list of dowry articles was undated and unsigned; that no receipt of purchase of dowry articles could be produced by the plaintiff; that no witness except brothers of the plaintiff could be brought in the witness box by her; that the judgment and decree of learned lower appellate court is against law and fact as the learned court below has failed to apply its judicious mind and take into consideration the evidence adduced by the parties, therefore, this writ petition be allowed, the impugned judgment and decree be set aside and the judgment and decree of learned family court be restored.

5. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and fully supported the impugned judgment and decree. He avers that the learned lower appellate court has passed the judgment and decree under challenge after due appraisal of evidence and no illegality has been committed by it. He further contends that Section 14(2)(b) of West Pakistan Family Courts Act, 1964 is not attracted in this case. He avers that the instant writ petition having been filed after six months of passing of the impugned judgment and decree is hit by laches. He contends that during the execution proceedings, the petitioner undertook to pay the decretal amount while filing his affidavit before the executing court as Exh.C1 on 8-2-2011, therefore, he cannot resile from the said admission. Learned counsel prays for dismissal of the instant writ petition.

6. Arguments heard. Record perused.

7. The only issue put before this Court for determination is regarding suit of the respondent for recovery of dowry articles.

8. In order to prove her case, the respondent-plaintiff appeared before the court as PW.1 and submitted her affidavit as Exh.P1. The list of dowry articles was produced as Exh.P2. She deposed that she was given dowry articles valuing Rs.517,900. She narrated description of dowry articles. In cross-examination, she denied that her marriage was solemnized in a simple manner and that her father was not in such a financial position to give her dowry articles. She also denied that list of dowry articles is forged. She admitted that list of dowry articles is remembered by her. She also narrated the details of the gold ornaments. She also stated that Asif Javed and Kashif Javed are the witnesses of the list. She denied that dowry articles worth Rs.10,000 were given to her. PW.2 Kashif Javed and PW.3 Asif Samuel also supported the version of the plaintiff in verbatim.

9. On the other hand, the petitioner did not appear himself in the witness box. On his behalf, his attorney Justin Austin appeared as DW.1. He produced his power of attorney as Exh.D1 and affidavit as Exh.D2 (which have wrongly been written as Exh.P1 and Exh.P2). He deposed that dowry articles worth Rs.10,000 were given to the respondent and the list of dowry articles which has been produced by the respondent is forged and fictitious. In cross-examination, he showed his ignorance that one brother of the respondent resides in Libya and supports her. A specific suggestion was put to this witness that the gold ornaments were given to the respondent which was denied by him. However, he gave a description of certain documents which according to him were given to the respondent in dowry. He admitted that father of the respondent is a Priest, however, denied that the donations were used to be given to father of the respondent. He stated that the list of dowry articles of Rs.10,000 was given to the father of the defendant. He denied that list of dowry articles worth Rs.6,00,000 was given to the defendant. DW-2 Shakeel Naveed deposed in line with the statement made by DW.1.

10. Perusal of evidence shows that the plaintiff and her witnesses are consistent on the point that she was given dowry articles as claimed by her in the plaint. Despite lengthy cross-examination, nothing could be brought out from the said witnesses which could support the version of the petitioner or even weaken the stance taken by the respondent. It has come on record that one brother of the plaintiff lady resides in Libya and provides financial supports to her and her parents. Even otherwise, the father of the respondent holds the office of Priest which is deemed respectable in the Christian Community. It is custom of our society that the people give gifts in shape of 'donations' to the people holding office of Imam, Priest, Gaddi Nashin etc, therefore, giving of donations to the father of the respondent who is admittedly a priest, cannot be ruled out. In the circumstances, the parents of the respondent seemed to be with reasonable financial status enough to give dowry articles to their daughter which custom is so strong in this society that the people, to meet this objective; even do not hesitate to get loans from others. Mere non-production of purchase receipts or non-signing of list of dowry articles by the plaintiff lady is not sufficient to disentitle her

from recovery of her dowry articles. In my considered view, the learned Judge Family Court has erred while allowing the dowry articles to the respondent to the extent of Rs.10,000 only whereas the learned lower appellate court has rightly enhanced the alternate price to Rs.400,000 keeping in view the financial status of the parties, wear and tear coupled with the fact that the plaintiff lady was able to give details of dowry articles given to her at the time of marriage. Learned lower appellate court while enhancing the alternate price of dowry articles has discussed the matter at length and gave detailed reasons to reach the said conclusion. The findings of learned lower appellate court are in accordance with law which are immune from interference by this Court in its constitutional jurisdiction. Reliance is placed on the law laid down by the Hon'ble Supreme Court of Pakistan in case reported as "Mst. Farah Naz v. Judge Family Court, Sahiwal (PLD 2006 SC 457) wherein it has been held that:--

"It was none of the business of the High Court in writ jurisdiction to substitute its own findings for the findings recorded by the court of appeal after due appraisal of evidence. We would, therefore, set aside the judgment of the High Court as well as that of the Family Court decreeing the suit in the sum of Rs.4,00,000 and restore the judgment of the appellate Court accepting the claim of the appellant, as pleaded in the suit."
Learned counsel for the petitioner has not been able to point out any illegality, irregularity, misreading or non-reading of evidence in the impugned judgment and decree.

11. The emphasis of learned counsel for the petitioner is on the point that the appeal of the respondent was not competent before the learned lower appellate court in view of Section 14(2)(b) of the West Pakistan Family Courts Act, 1964. The said provision is reproduced below:--
"14(2) No appeal shall lie from a decree by a Family Court--
(a)
(b) for dower or dowry not exceeding Rs.30,000.
(c) ..."

The above provision reads loudly that no appeal shall lie against a decree passed for dower or dowry not exceeding Rs.30,000. At the same time, an appeal against decree of the family court is provided under Section 14 of the Act which, not to speak of decree of suit for recovery of dowry articles less than Rs.30,000, is available even against dismissal of such suit. When confronted with, learned counsel for the petitioner has failed to satisfy the court in this regard. In my considered view, the embargo of section l4(2)(b) of the Act is placed on the defendant only and not the plaintiff in any manner. Therefore, the plaintiff being aggrieved of having passed the decree to the extent of Rs.10,000 as alternate price of dowry articles had all rights to challenge such decree at a higher forum. The contention of learned counsel for the petitioner is accordingly repelled.

12. In view of the above, this writ petition is without any substance. Dismissed.

ZC/R-19/L Petition dismissed.

**P L D 2015 Lahore 50**

**Before Atir Mahmood, J**

**MUHAMMAD ZUBAIR RIAZ---Petitioner**

**Versus**

**KALSUM TUFAIL and others---Respondents**

Writ Petition No.29324 of 2013, decided on 4th April, 2014.

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

----S. 7---Constitution of Pakistan, Art. 199---Constitutional petition---"Divorce certificate"---Respondent-wife had challenged genuineness of divorce certificate issued by Secretary, Union Council in an earlier constitutional petition which was disposed of by High Court holding that she had remedy to approach Inspecting Officer/Assistant Director Local Government and Rural Development Department-Respondent wife filed revision before the Assistant Director Local Government who set aside the divorce certificate---Petitioner had challenged the Assistant Director's said order through present constitutional petition-" Validity--- When High Court disposed of respondent wife's earlier petition in 2011-12, law applicable to the case was Punjab Load, Government Ordinance, 2001 and not the Punjab Local Government Ordinance, 1979---Punjab Local Government Ordinance, 2001 did 01 authorize Assistant Director, Local Government and Rural Development Department to look into genuineness of divorce certificate-Issuance of certificate of Talaq could not be challenged under Muslim Family Laws Ordinance, 1961 or Local Government Ordinance, 2001---Under Muslim Family Laws Ordinance, 1961 Chairman of the Arbitration Council was not empowered to issue divorce certificate---Petitioner having participated in proceedings before Assistant Director/Inspecting Officer, was estopped from challenging the order of that authority---Petitioner (husband) was found to have not sent the notice of Talaq/divorce to respondent in original nor copy thereof was sent to the Secretary, Union Council---Even if an order had been passed without jurisdiction yet if such order advanced the cause of justice, court should not interfere with such order as neither any fraud and forgery committed by anyone should come in the way of justice nor constitutional jurisdiction could be invoked in aid of injustice---Impugned order advanced the cause of justice by setting aside a document obtained by fraud and forgery--- Constitutional petition was dismissed.

Hussain Bakhsh Khan v. Deputy Commissioner D.G. Khan and others 1999 CLC 88 ref.

**(b) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction---Scope---Even if an order had been passed without jurisdiction yet if such order advanced the cause of justice, court should not interfere with such order as neither any fraud and forgery committed by anyone should come in the way of justice nor writ jurisdiction could be invoked in aid of injustice.

The Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others PLD 1975 SC 3310 and Mst. Shahida and another v. Board of Intermediate and Secondary Education, Larkana through Chairman at Larkana and 5 others PLD 2001 SC 26). rel.

Nadeem ud Din Malik for Petitioner.
Ghulam Mustafa Chaudhry, Syed Anjum Shakeel, Asstt. Director, Local Government for Respondents.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the vires of order dated 31-10-2013 Passed by respondent No2/Inspecting Officer/Assistant Director, Local Government and Rural Development Department, Lahore whereby the divorce certificate dated 17-11-2012 was set aside.

2. Brief facts of the case as narrated in the writ petition are that the petitioner Muhammad Zubair Riaz got married with respondent No.1 Kalsoom Tufail on 8-7-2010 whereafter, the petitioner went to U.K. Respondent No.1 also went there and started living with the petitioner, From the wedlock, a daughter was born on 10-4-2011. After the birth of the child, the parties came to Pakistan and due to some differences, there was separation between the parties. A divorce deed dated 21-10-2011 was sent to respondent No.1 and its copy was sent to the Secretary Union Council which was duly received by him. The Secretary Union Council did not initiate any proceedings upon the said divorce deed/notice. Respondent No.1, thereafter, went back to U.K. and by ignoring the divorce given to her filed a petition before the Birmingham District Registry for dissolution of marriage. The petitioner received notice from the court of Birmingham.

3. After receiving the said notice, the petitioner again filed an application before the Chairman of the Union Council for issuance of certificate for confirmation of talaq on the basis of divorce deed dated 21-10-2011 but no certificate was issued. Then the petitioner filed a Writ Petition No.27798/12 before this Court seeking direction to Secretary Union Council for issuance of divorce certificate. The writ petition was disposed of vide order dated 8-11-2012 with the direction to the Secretary, Union Council to proceed with the matter in accordance with law. Thereafter, the divorce certificate was issued on 17-11-2012. On placing the divorce certificate before the Birmingham Court, the petition filed by respondent No.1 was dismissed vide order dated 19-7-2013.

4. Feeling aggrieved of issuance of divorce certificate, respondent No.1 filed a writ petition before this Court which met with office objection made vide diary No.123622/12 that writ petition was not competent. The objection was also sustained by the Court vide order dated 31-12-2012. It was held in the order dated 31-12-2012 that the writ petitioner had remedy to approach Inspecting Officer, Local Government and Rural Development Department, Lahore for redressal of her grievance. Respondent No.1 then instituted a revision petition which was allowed and divorce

certificate dated 17-11-2012 was set aside vide order dated 31-10-2013 passed by respondent 2 which is under challenge in this writ petition.

5. Learned counsel for the petitioner inter alia contends that under section 7 of the Muslim Family Laws Ordinance, 1961 (the Ordinance), no appeal or revision is provided, hence respondent No.2 wrongly assumed his jurisdiction; that respondent No.2 has failed to appreciate that in spite of non-compliance of mandatory requirements of section 7 of the Ordinance, the divorce is effective; that the petitioner divorced respondent No.1 on 21-10-2011 but the Secretary Union Council in collusion with respondent No.1 did not issue the divorce certificate; that despite repeated requests even after filing of petition by respondent No.1 before the Birmingham Court for dissolution of marriage, the divorce certificate was not issued; that when the Secretary Union Council failed to issue the divorce certificate after lapse of statutory period of 90 days, the petitioner approached this Court through a writ petition; that after issuance of direction by this Court, the divorce certificate was issued; that the stamps papers upon which the divorce deed was written were found correct by the SHO Police Station Islampura after due verification; that the impugned order is against law and fact; that respondent No.2 has no jurisdiction to deal with the matter in view of section 7 of the Ordinance, therefore, this writ petition be allowed and impugned order dated 31-10-2013 be set aside.

6. Conversely, learned counsel for respondent No.1 has strongly opposed this writ petition and supported the impugned order. Learned counsel asserts that respondent No.2 had jurisdiction to deal with the matter who after perusal of record and in view of evidence led by the parties, has rightly set aside the divorce certificate as the proceedings before the Secretary Union Council were based on a forged and bogus divorce deed, never sent to the respondent-wife or to the Arbitration Council as alleged; that the petitioner participated in the proceedings before respondent No.2 without challenging his authority, as such, he is estopped by his conduct; that Administrator of Union Council did not constitute Arbitration Council as required under section 7(4) of the Ordinance, as such, he had no authority or jurisdiction to deal with the matter; that there is no evidence that efforts for reconciliation of the parties were ever made during the said proceedings; that during the pendency of divorce proceedings before Birmingham Court, respondent No.3 had no lawful authority to conduct proceedings for issuance of divorce certificate, therefore, this writ petition has no force, as such, it be dismissed.

7. I have heard the arguments advanced by learned counsel for the parties and also perused the record.

8. The legal question raised by learned counsel for the petitioner is that this Court erred in law while holding that the respondent lady had remedy before the Inspecting Officer under the Punjab Local Government Ordinance, 1979 against divorce certificate dated 17-11-2012 on the basis of alleged forged divorce deed dated 21-10-2011; that the said law was not applicable at the relevant time and that respondent No.2/Assistant Director, Local Government and Rural Development, Lahore

(Inspecting Officer) who declared the divorce certificate null and void had no authority to deal with the matter.
9. According to the petitioner, he divorced respondent No.1 vide divorce deed dated 21-10-2011 with a copy of the same to the Secretary Union Council at that time but the divorce certificate was issued on 17-11-2012 after a direction made by this Court in Writ Petition No.27798/12 vide order dated 8-11-2012 which divorce certificate was ultimately declared illegal vide impugned order.

10. Scanning of record reveals that respondent No.1 filed Writ Petition No. 27798/12 challenging validity of the divorce certificate dated 17-11-2012 issued on the basis of divorce deed dated 21-10-2011. The learned Judge while relying on the law laid down in case titled "Hussain Bakhsh Khan v. Deputy Commissioner D. G. Khan and others (1999 CLC 88) held that the Inspecting Officer/respondent No.2 under the Punjab Local Government Ordinance, 1979 had authority to call for and inspect the bogus and fictitious record in possession of the Chairman of the Union Council, therefore, the writ petition was not maintainable. With due respect to the Hon'ble Judge, I am of the view that since the matter pertained to the years 2011 and 2012, relevant law applicable to the case was Punjab Local Government Ordinance, 2001 and not the Punjab Local Government Ordinance, 1979. I have gone through the Punjab Local Government Ordinance 2001 but remained unsuccessful to, find out any provision therein giving authority to respondent No.2 to look into the genuineness or otherwise of a divorce certificate. In my view, there is no express provision in the Muslim Family Laws Ordinance, 1961 or in the Local Government Ordinance, 2001 by which the issuance of certificate of talaq could be challenged. But at the same time, I am of the view that there is no specific provision in the Muslim Family Laws Ordinance, 1961 which empowers the Chairman Arbitration Council to issue any certificate in this regard.

11. Subsequent to the said order passed by learned Single Judge, respondent No.1 filed a revision petition before respondent No.2/Assistant Director Local Government with the allegation that the certificate of talaq dated 17-11-2012 issued on the basis of divorce deed dated 21-10-2011 was bogus. The petitioner appeared before respondent No.2 and contested the revision petition of the respondent No. 1. The respondent No.2 after recording statements of the parties, perusing the record and hearing both sides set aside the divorce certificate dated 17-11-2012. It is an admitted fact that the petitioner participated in the proceedings before respondent No.2 without objecting to his authority and has only raised such objection when the decision came against him. As such, he is estopped by his own conduct to challenge the proceedings conducted by respondent No.2.

12. Report and parawise comments were called from respondent No.2. Relevant paragraph of the comments is reproduced below:--

> "In divorce cases the procedure provided under section 7 of the Muslim Family Laws Ordinance 1961 is adopted. The respondent No.1 stated that he sent original divorce paper to his wife and copy thereof to concerned Union Council. Whereas it transpired from the record that the. Attorney of

> respondent No.1 gave an application to the Union Council on 19-7-2012 along with a photocopy of divorce deed and he stated that his son has divorced his wife and have already sent a copy to Union Council, therefore on the basis of that copy divorce certificate might be issued. But it was confirmed by respondent No.4, Secretary Union Council No.37, that no notice of Talaq was ever received before subject application dated 19-7-2012 and he initiated proceedings on basis of that application/photocopy." (Emphasis provided)

In the inquiry held by respondent No.2, it was established that no notice of talaq, in original, was ever received by the Secretary Union Council No.37 prior to application dated 19-7-2012. The said application was filed subsequent to the petition filed by the respondent No.1 before the court of Birmingham.

13. The stance of the petitioner is also belied by a document i.e. special power of attorney executed by the petitioner in favour of his father on 31-5-2012, which has been appended with this writ petition by the petitioner himself, wherein the petitioner has given powers to his father to institute a suit for restitution of conjugal rights against the present respondent No. 1. Relevant paragraphs of special power of attorney dated 31-5-2012 are reproduced below:--

> "(1) To file a suit on my behalf for restitution of conjugal rights against my wife Kalsoom Zubair daughter of Muhammad Tufail, resident of House No.II-B, Street No.16-C, Aziz Park, Mehmood Booti, Baghbanpura, Lahore.
> (2) To serve her in the suit in any manner whatsoever as court may direct and he has to bear all the expenses regarding the above mentioned suit on my behalf and any other suits if filed by my wife.
> (3) To defend any suit if my wife Kalsoom Zubair filed regarding dissolution of marriage, recovery of dowry amount, dowry articles, maintenance, etc. and any other suit if filed by her in any court of law."

14. It is pertinent to note that the special power of attorney was executed by the petitioner in favour of his father on 31-5-2012 giving him authority to file a suit on his behalf for restitution of conjugal rights and also to contest the suit for dissolution of marriage if filed by the respondent No. 1. This clearly shows that at least, till that time, there was no divorce by the petitioner to the respondent No.1. Had the petitioner sent divorce deed dated 21-10-2011 to respondent No.1 and the Secretary Union Council, he would have not asked his father to file a suit for restitution of conjugal rights or contest the suit for dissolution of marriage if filed by the respondent No.1 on 31-5-2012 when the special power of attorney was executed by him in favour of his father. Meaning thereby the marriage was intact at least at the time when the said power of attorney was singed on 31-5-2012.

15. Furthermore, a person who wishes to approach the court for some relief must come to the court with clean hands. The petitioner while instituting the writ petition has failed to bring on record the proceedings conducted by respondent No.2 but has appended only the impugned order. The impugned order clearly depicts that the same

was passed after hearing the parties and recording the statements of the parties but no such record has been produced before this court by the petitioner which shows mala fide on the part of the petitioner. In the circumstances, this writ petition is liable to be dismissed on this score alone.

16. In view of the discussion made in the preceding paragraphs, it is unambiguously clear that no notice of talaq/divorce deed 21-10-2011 was ever served by the petitioner upon the respondent nor any copy thereof was supplied to the Secretary Union Council, as such, the claim of i petitioner to this extent is false and the divorce deed dated 21-10-2011 is result of fraud and forgery. In my firm view, a court cannot be used for protection of gains gotton by someone illegally, unlawfully and fraudulently. Even if an order has been passed without jurisdiction but it advances the cause of justice, the court should not interfere therewith as neither any fraud and forgery committed by anyone should come in the way of justice nor writ jurisdiction can be invoked in aid of injustice. When the impugned order dated 31-10-2013 passed by respondent No.2/Inspecting Officer/Assistant Director, Local Government and Rural Development Department, Lahore advances the cause of justice and sets aside the document which was obtained through fraud and forgery, the same cannot be set aside. Respectful reliance is placed on the dictums laid down by the Hon'ble Supreme Court of Pakistan in cases reported "The Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others (PLD 1975 SC 3310)" and "Mst. Shahida and another v. Board of Intermediate and Secondary Education, Larkana through Chairman at Larkana and 5 others (PLD 2001 SC 26)."

17. In a nutshell, the divorce deed dated 21-10-2011 as well as divorce certificate dated 17-11-2012 are result of fraud and forgery which cannot be protected by this Court. As a result, this writ petition is without any force. The same is dismissed.

ARK/M-145/L Petition dismissed.

**P L D 2015 Lahore 226**
**Before Atir Mahmood, J**
**HASHMAT TAJ---Appellant**
**Versus**
**Mrs. SURAYYA TARIQ and others---Respondents**

F.A.O. No.16 of 2016, decided on 13th November, 2013.

**(a) Cantonments Rent Restriction Act (XI of 1963)---**

----Ss. 24 & 17---Ejectment petition---Appeal---Maintainability---"Aggrieved party"---Scope---Petitioner moved application for impleading him as a party but same was dismissed on the ground that he had no "locus standi"---Contention of petitioner was that he was sub-tenant and was occupying the demised premises under agreement executed by the original tenant---Validity---Cantonments Rent Restriction Act, 1963 was a special law which would prevail upon the general law---Petitioner did not fall within the interpretation of term "aggrieved party" as party could be a person aggrieved but a person who might be affected by a judgment or order of a lis could not be considered as an "aggrieved party"---Petitioner had entered into the property in dispute during the pendency of eviction petition and was not sub-tenant at the time of filing of the same---Petitioner had no rent agreement in his favour rather he had sale agreement in his favour executed by the original tenant who had no authority to enter into such agreement on behalf of landlord---Petitioner was approbating and reprobating at the same time---Rent agreement and agreement to sell were two different things---Petitioner could not claim ownership over the demised premises if he was sub-tenant and could approach the competent court for redressal of his grievance against the original tenant---Petitioner had no locus standi to file present appeal---Impugned order had attained finality---Appeal was not maintainable and same was dismissed accordingly.

Meraj Gul v. Rukhsana Ameen and others 2013 PLC (C.S.) 1089; Dr.Abdul Hafeez v. Province of Punjab through the Secretary Education, Lahore and others PLD 1991 SC 165; Begum Humayun Zulfiqar Ismail and another v. Begum Hamida Saadat Ali 1968 SCMR 828;, Siraj Din and others v. Additional District Judge, Okara 1986 CLC 975 and Ch. Nazir Ahmad v. Mrs. Mariam Salauddin Khawaja and others PLD 1994 Lah. 252 ref.

Meraj Gul v. Rukhsana Ameen and others 2013 PLC (C.S.) 1089; Dr.Abdul Hafeez v. Province of Punjab through the Secretary Education, Lahore and others PLD 1991 SC 165; Begum Humayun Zulfiqar Ismail and another v. Begum Hamida Saadat Ali 1968 SCMR 828; Siraj Din and others v. Additional District Judge, Okara 1986 CLC 975 and Ch. Nazir Ahmad v. Mrs. Mariam Salauddin Khawaja and others PLD 1994 Lah. 252 distinguished.

**(b) Words and Phrases---**

---"Aggrieved party"---Meaning---"Aggrieved party" was one whose legal right was invaded by an act complained of or whose pecuniary interest was directly affected by a decree or judgment.
Blacks Law Dictionary rel.
Waseem Shahab and Muhammad Ali Siddiqui for Appellant.
Mudassar Altaf Qureshi for Respondents Nos. 1 and 2.
Nemo for Respondents Nos.3 to 8.
Date of hearing: 4th November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this appeal under section 24 of Cantonments Rent Restriction Act, 1963, the appellant has assailed order dated 26-11-2005 passed by Rent Controller Multan Cantt who accepted ejectment petition filed by respondents Nos.1 and 2 for ejectment of LRs of Sh. Muhammad Nawaz and Mirza Muzammil Ahmad Baig.

2. Briefly stated the facts leading to filing of instant FAO are that on 1-7-2002, respondents Nos.1 and 2 (landlords) filed an ejectment petition against Muhammad Nawaz and Mirza Muzammil Ahmed Baig on the ground of default and subletting part of premises to defendant No.2 without their permission. The ejection petition was contested by the respondents by filing written statement.

3. Out of divergent pleadings of the parties, issues were framed vide order dated 30-11-2002. In the meanwhile, vide order dated 21-9-2002, the defendants were directed to deposit the monthly rent in the court. The appellant Hashmat Taj moved an application on 2-7-2004 for impleading him as party in the proceedings on the ground that he was given the shop on rent by L.Rs. of Sh. Muhammad Nawaz who was the initial tenant of the ejectment petitioners. The application was opposed by the ejectment petitioners as well as the respondents therein. On 25-6-2005, the ejectment petitioners filed an application under section 17(8) of Cantonments Rent Restriction Act, 1963 to strike off right of defence of respondents for non-compliance of order of the court to deposit monthly rent in the court. Despite direction, the respondents failed to file reply to the said application. Since during the course of arguments, learned counsel for the defendants categorically admitted that the rent was not being deposited by the respondents but by Hashmat Taj, the ejection petition was allowed and the respondents were directed to vacate the premises within three months vide order dated 26-11-2005. The application of the appellant for impleading him party in the ejectment petition was also dismissed holding that the appellant, claiming the sub-

tenancy during the pendency of the ejectment petition, had no locus standi vide same order dated 26-11-2005. Hence this appeal.

4. Learned counsel for the appellant contends that respondent No.1 is owner of lease hold rights of Shop No.44-B situated at Aziz Bahtti Shaheed Road, Multan Cantt; that respondent No.1 rented out shop to one Sh. Muhammad Nawaz, predecessor-in-interest of respondents Nos.3 to 7, through an agreement dated 2-9-1993; that since Sh. Muhammad Nawaz, as per agreement dated 2-9-1993, was authorized to sublet the shop to any person even at increased rent, he rented out the shop to appellant vide agreement dated 18-7-2003; that the appellant paid a sum of Rs.5,00,000 to Sh. Muhammad Nawaz in this regard and established business in the shop; that the appellant is admittedly a sub-tenant of the property on the basis of agreement dated 18-7-2003; that the tenant Muhammad Nawaz as per agreement dated 2-9-1993 was authorized to sublet the shop to the appellant; that the appellant being sub-tenant was a necessary and proper party in the ejectment proceedings but learned Rent Controller dismissed his application for becoming party illegally and unlawfully; that the appellant made several application for supply of challan forms to him for depositing rent in the court but the same was not delivered to the appellant rather these were given to the actual tenants who wanted to cause damage to the appellant; that no opportunity to explain the delay in depositing the rent was given to the appellant; that mere non-payment of rent does not constitute default until it is proved that it was intentional; that no opportunity was given to the appellant to address the arguments of the ejectment petitioners in application for striking off right of defence which is against the principles of natural justice; that respondents Nos.3 to 8 have joined hands with respondents Nos.1 and 2 and they are no more interested in the fate of proceedings. Learned counsel for the appellant submits that valuable rights of the appellant are involved in this case, therefore, this appeal be allowed, the impugned order be set aside and the case be remanded to learned Rent Controller for decision afresh.

5. On the other hand, learned counsel for the respondents Nos.1 and 2 has vehemently opposed this ejectment petition and supported the impugned order.

6. I have heard the arguments advanced by learned counsel for the parties and also perused the record.

7. This FAO has been filed under section 24 of the Cantonments Rent Restriction Act, 1963 which is reproduced as under:--

> "24. Appeal (1) Any party aggrieved by an order, not being an interim order, made by the Controller may, within thirty days of such order, prefer an appeal to the High Court.

(2) The High court may, pending the final disposal of the appeal, make an order staying further proceedings or action on the order of the Controller:
Provided that no such order shall be made if the appeal has been preferred from an order made under subsection (6) of section 17-A.
(3) The High Court shall, after perusing the record of the case and giving the parties an opportunity of being heard and, if necessary after making such further enquiry either by itself or by the Controller as it may deem fit, make an appropriate order which shall be final.
(4) No order of the Controller except by an appeal under this section, and no order of the Appellate Court made under this Act shall be called in question in any court by any suit, appeal or other legal proceedings."

8. Admittedly, the appellant was not a party in the ejectment proceedings and his application for impleading him as respondent in the ejectment proceedings was dismissed before the learned Rent Controller. On query raised by this Court as to how this appeal is maintainable when the appellant does not fall within the definition of term "aggrieved party", learned counsel for the appellant contends that this appeal is maintainable as the appellant was a tenant lawfully occupying the property under the agreement dated 18-7-2003 executed in his favour by initial tenant Waseem Nawaz/respondent No.3 under respondents Nos.1 and 2/landlords. He further submits that the rent was being deposited by the appellant with the court of Rent Controller in favour of respondents Nos.1 and 2/landlords, therefore, he should have been impleaded in the ejectment proceedings as he was a necessary party therein. He further submits that the appellant is directly affected by ejectment order passed by Rent Controller against respondents Nos.3 to 8 as in light of the said order, the appellant will also have to vacate the shop in his possession. In order to bring the appellant within the definition of "aggrieved party", learned counsel has relied upon the law laid down in cases reported as "Meraj Gul v. Rukhsana Ameen and others (2013 PLC (CS) 1089)", "Dr. Abdul Hafeez v. Province of Punjab through the Secretary Education, Lahore and others (PLD 1991 SC 165)", "Begum Humayun Zulfiqar Ismail and another v. Begum Hamida Saadat Ali (1968 SCMR 828)", "Siraj Din and others v. Additional District Judge, Okara (1986 CLC 975)" and "Ch. Nazir Ahmad v. Mrs. Mariam Salauddin Khawaja and others (PLD 1994 Lahore 252)".

9. The Cantonments Rent Restriction Act, 1963 is a special law which prevails upon the general law. The term "aggrieved party" has not been defined anywhere in this Act. In order to come to a conclusion, the term "aggrieved party" will have to be taken by way of its literary meanings. The term "aggrieved party" has been defined in Blacks Law Dictionary as under:--

"One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment. One whose

right of property may be established or divested. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation."

According to the above definition, the appellant does not fall within the interpretation of term "aggrieved party" as a party can be a person aggrieved but a person who may be effected by a judgment or order of a lis cannot be considered as an aggrieved party to fall within the purview of section 24 of the Cantonments Rent Restriction Act, 1963. Furthermore, the appellant, admittedly, entered into the property in dispute during the pendency of the ejection petition as the ejection petition was filed on 1-7-2002 whereas the appellant, according to his own version, was rented out the shop in question vide agreement dated 18-7-2003, as such, he was not a sub-tenant at the time of filing of the ejectment petition, therefore, he is not an aggrieved party within the definition of section 24 of the Cantonments Rent Restriction Act, 1963.

10. The appellant claims himself to be the sub-tenant in view of the agreement dated 18-7-2003, a copy of the same is present on record. Perusal of agreement dated 18-7-2003 shows that it is not a rent agreement rather it is a sale agreement executed by Waseem Nawaz who is one of the L.Rs. of original tenant and had no authority to enter into any such agreement on behalf of the landlords. In the circumstances, it is prima facie clear that the appellant is approbating and reprobating at the same time as on the one hand he claims himself to be a sub-tenant under respondents Nos. 3 to 7 in view of agreement dated 18-7-2003 but perusal of the said agreement shows that it is not a rent agreement but an agreement to sell. Rent agreement and agreement to sell are altogether two different things. If the appellant is a sub-tenant, he cannot claim ownership over the disputed shop and if he is the owner, he might not have said himself to be the sub-tenant. These controversial things make the claim of the appellant doubtful. The said agreement is apparently signed by Waseem Nawaz, who is one of the L.Rs. of the original tenant who had no authority to sign any agreement o sell in favour of any body.

As such, the appellant if feels himself aggrieved may approach the competent court of law for redressal of his grievance against Waseem Nawaz. The title of the appellant over the property in question has vehemently been opposed by respondents Nos.3 to 7 who were actual tenants, as such, it cannot be presumed that any legal right of the appellant was invaded by way of impugned ejectment order against respondents Nos.3 to 8 who have not assailed the impugned ejectment order passed against them, as such, the order impugned has attained finality to their extent. Since the appellant is claiming himself as a sub-tenant under respondents Nos.3 to 7 who in terms of impugned order have been ejected from the property, the appellant has no locus standi

to file the instant appeal. The case-law relied upon by learned counsel for the appellant is also not helpful to him in the circumstances of the case.

11. In view of the above discussion, this appeal is not maintainable. Resultantly, without touching other merits of the case, the same is dismissed on this score alone.

AG/H-5/L Appeal dismissed.

**2015 Y L R 129**

**[Lahore]**

**Before Atir Mahmood, J**

**Dr. IJAZ AHMED---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No.16727 of 2010, decided on 22nd August, 2014.

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

----S. 144---Constitution of Pakistan, Art.199--- Constitutional petition---Restitution of possession of immovable property---Scope---Applicant was in possession of the property in dispute when ejectment order was passed---Applicant was not party in the ejectment proceedings who was ejected from the disputed property---Ejectment petition had been dismissed and ejectment order had been set aside---Applicant had right for restoration of possession---No illegality or jurisdictional defect was pointed out in the impugned orders passed by the courts below---Constitutional petition was dis-missed in circumstances.

Mst. Rehmat Bibi v. Shahzad Waheed and another PLD 1993 SC 69; Mst. Naeema Begum v. Iqbal Ali Khan and others 1999 CLC 1432; Ashfaq Ahmad and 8 others v. Nadeem Ahmad and 3 others PLD 2006 Lah. 643; Abdul Bari v. Muhammad Rasheed Khan and 7 others 1995 SCMR 851; Mst. Imtiaz Bibi and another v. Abdul Qadir Shad and 2 others 1998 CLC 1043 and Mst. Fatima Bibi v. Jan Muhammad 1991 SCMR 1031 ref.

Mst. Rehmat Bibi v. Shahzad Waheed and another PLD 1993 SC 69; Mst. Naeema Begum v. Iqbal Ali Khan and others 1999 CLC 1432 and Ashfaque Ahmad and 8 others v. Nadeem Ahmad and 3 others PLD 2006 Lah. 643 distinguished.

Mst. Imtiaz Bibi and another v. Abdul Qadir Shad and 2 others 1998 CLC 1043 rel.

Ch. Akbar Ali Shad for Petitioner.

Zafar Abbas Khan for Respondent No.5.

Nemo for Respondents Nos.3, 4 and 6.

Date of hearing: 3rd April, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that respondent No.5 Mst. Azizan Begum filed an application under section 144, Civil Procedure Code, 1908 for restitution of possession of the property No. SE-XIV-SE-II-192/RH, commonly known as House No.192, Street No.20, Mustafabad, Lahore measuring 210 Sq. Fts. Situated at Katchi Abadi, Gulistan Colony, Scheme No.2, Mustafabad, Lahore. The petitioner contested the application by filing written reply raising objections that he is bona fide purchaser of the property as he had purchased the same from respondent No.3 Mian Muhammad Jameel vide Sale Deed No. 4418, Volume No. 793 dated 20-7-2006 registered with Sub-Registrar Aziz Bhatti Town, Lahore for a total

consideration of Rs.20,00,000 and also obtained possession thereof; that the petitioner was neither party to the ejectment petition nor to the application under section 12(2), C.P.C. read with Order IX, Rule 13, C.P.C.; that a suit for cancellation of sale deeds filed by respondent No.5 is still pending before the civil court, Lahore. However, after hearing both sides, the application under section 144, Cr.P.C. for restitution of the possession of the property was accepted vide order dated 14-1-2010 and the petitioner was dispossessed on 21-1-2010. Feeling aggrieved, the petitioner filed appeal which was dismissed by learned Additional District Judge, Lahore vide judgment dated 20-5-2010. Hence this writ petition.

2. Learned counsel for the petitioner inter alia contends that the petitioner is a bona fide purchaser of the property from respondent No.3 Mian Muhammad Jameel vide Sale Deed No.4418, Volume No.793 dated 20-7-2006 registered with Sub-Registrar Aziz Bhatti Town, Lahore for a total consideration of Rs.20,00,000; that after obtaining possession of the property, the petitioner spent a huge amount on reconstruction/renovation thereof; that respondent No.3 had purchased the house from respondent No.4 Mst. Dilshad Begum vide registered sale deed No.9467, Bahi No.1, Jild No.234 dated 17-12-2003; that the said transaction was witnessed by respondent No.6 Ikhlaq Ahmed and son of respondent No.5 Zahid Iqbal; that respondent No.4 purchased the property from respondent No.5 Mst. Azizan Begum (who has filed application under section 144, C.P.C.) through her general attorney Akhlaq Ahmad bearing general attorney registration No.5139, Jild No.1974, Bahi No.4, dated 1-12-1999 vide registered sale deed No.13326, Bahi No.1, Jild No.6057 dated 24-8-2000; that respondent No.3 obtained an ex parte order dated 31-1-2005 which was executed against respondent No.4; that respondent No.5 filed an application under section 12(2) read with Order IX, Rule 13, C.P.C. which was accepted vide ex parte order dated 23-7-2008 but the petitioner remained unaware thereof; that during the pendency of application under section 12(2), C.P.C., respondent No.5 filed an application under Order I, Rule 10, C.P.C. for impleading the petitioner in the proceedings but the application remained undecided and even no notices were issued to the petitioner; that respondent No.5 also sought cancellation of general attorney dated 1-12-1999 and sale deeds in favour of Dilshad Begum, Mian Muhammad Jamil and Dr. Ijaz Ahmed which ex facie shows that respondent No.5 was not owner of the property in dispute which matter is still pending adjudication before the court; that the general attorney bearing registration No.5139 dated 1-12-1999 executed by respondent No.5 in favour of respondent No.6 still holds the fields and mere denial of general attorney as well as execution of sale deed by the attorney can neither change the factum of sale deeds nor makes respondent No.5 owner of the property; that the petitioner was neither party to the ejectment petition nor has any knowledge thereof; that since the petitioner is bona fide purchaser with possession of the disputed property, therefore, no lawful order could be passed against him without impleading him in the proceedings; that impugned orders dated 23-7-2008, 14-1-2010 and 20-5-2010 are result of concealment of facts resulting in miscarriage of justice, therefore, this writ petition be allowed and the impugned orders be set aside. He has relied upon the law laid down in case reported as Mst. Rehmat Bibi v. Shahzad Waheed and another (PLD 1993 SC 69), Mst. Naeema Begum v. Iqbal Ali Khan and others (1999 CLC 1432) and Ashfaque Ahmad and 8 others v. Nadeem Ahmad and 3 others (PLD 2006 Lahore 643).

3. On the other hand, learned counsel for respondent No.5 submitted that she is the actual owner of the disputed property and was dispossessed through Bailiff of the Court in compliance of the ejectment order passed on 31-1-2005; that the possession was snatched from respondent No.5 on 9-3-2005 and then she filed an application under section 12(2) of C.P.C. which was allowed and subsequently not only the ejectment order was set aside but also the ejectment petition was dismissed. He further submitted that no appeal was filed against the order of dismissal of the ejectment petition which has attained finality. He has emphasized that since the respondent was ejected from the disputed property on the basis of above referred ejectment order, therefore, the order passed by the learned Rent Controller as well as by the learned appellate Court on the application under section 144, C.P.C. for restitution of possession are quite legal and in consonance with the law laid down by the superior courts. Learned counsel for respondent No.5 has placed reliance on the law laid down in case reported as Abdul Bari v. Muhammad Rasheed Khan and 7 others (1995 SCMR 851), Mst. Imtiaz Bibi and another v. Abdul Qadir Shad and 2 others (1998 CLC 1043) and Mst. Fatima Bibi v. Jan Muhammad (1991 SCMR 1031).

4. Despite repeated calls, none has put appearance on behalf of respondents Nos.3, 4 and 6, as such, they are proceeded against ex parte.

5. The points raised before this Court which needs consideration are as to whether the courts below were justified to pass the order for restitution of possession to respondent No.5 and as to whether the possession of the petitioner cannot be disturbed being bona fide purchaser in possession of the disputed property.

6. There is no denial to the fact that respondent No.3 filed an ejectment petition against respondent No.4 and an ex parte ejectment order was passed. At that relevant time, respondent No.5 was in possession of the property and she was dispossessed in compliance of the ejectment order passed by the learned Rent Controller. It is also an admitted fact that the application filed under section 12(2) read with section 9(13) of C.P.C. filed by respondent No.5 against the said ejectment order was accepted and the ejectment order was set aside vide order dated 23-7-2008. This order dated 23-7-2008 attained finality and thereafter the ejectment petition filed by respondent No.3 was also dismissed by the learned Rent Controller.

7. Perusal of the record also reflects that the petitioner allegedly purchased the disputed property from Muhammad Jamil, respondent No.3 vide registered sale-deed No. 4418 dated 20-7-2006 i.e. during the pendency of the application filed by respondent No.5 under section 12(2) of C.P.C., as referred above. Meaning thereby, that he was inducted in this property subsequent to the dispossession of respondent No.5. It is also an admitted fact that there are civil suits pending between the parties qua the disputed property out of which one suit has been filed by the petitioner himself. The question before this Court as well as before the learned Executing Court and the learned lower appellate Court have a very limited scope. The courts below were required only, to consider as to whether respondent No.5 was entitled for restitution of possession when the ejectment order on the basis of which she was ousted from the disputed property, was set aside by the competent Court and the said

order attained finality. The case law relied upon by the learned counsel for the petitioner has distinguishable features and are not attracted in the present case. The referred case-law may be helpful to the petitioner during the course of civil litigation pending between the parties but not for the purpose of this application. The contention of the learned counsel for the petitioner that he was not impleaded as party during the proceedings of application under section 12(2) of C.P.C., despite the fact that an application was made by respondent No.5 in this regard, is also of no avail to the petitioner for two reasons. Firstly, that no notice was issued to any of the parties on the said application and that application only remained on the file as a piece of paper and secondly that the petitioner himself filed an application under Order XXI, Rule 103, C.P.C. on 29-6-2010 for recalling the order dated 23-6-2008. The said application was dismissed by the learned trial Court vide order dated 18-7-2011 in the following terms:--

"The present application does not fall in the ambit of decree holder or purchaser because the property was not sold in the execution of decree and when there was no eviction order at all. He also does not fall in the Order XXI Rule 100. So, he cannot be treated as applicant under Order XXI Rule 97 and Order XXI, Rule 100. So, the application under Order XXI, Rule 103 is not maintainable in the present form and the same is hereby dismissed."

8. I have no doubt in my mind that when respondent No.5, who was in possession of the disputed property, when the ejectment order was passed, but was not impleaded as the respondent and was subsequently ejected has the legitimate right for restoration of possession when the ejectment order was set aside and ultimately ejectment petition was also dismissed. Reliance is placed upon the judgment of this Court reported as Mst. Imtiaz Bibi and another v. Abdul Qadir Shad and 2 others (1998 CLC 1043) wherein it has been held as under:--

"The concept of restitution is as old as the law itself. It is automatic as it becomes operative the very moment when the order under which a party to the litigation is deprived of his possession is varied, modified or set aside for it is ordained that the Court must remedy the injury or the wrong done to a party because of order of the Court. Section 144, C.P.C. provides the procedure therefore, while the power to order restitution is inherent in Court."

9. The order passed by both the learned courts below did not suffer from any illegality or jurisdictional defect. Therefore, this writ petition being devoid of any force is hereby dismissed.

AG/I-24/L Petition dismissed.

**2015 Y L R 595**

**[Lahore]**

**Before Atir Mahmood, J**

**MANZAR SHAH alias MANZAR HUSSAIN NAQVI---Petitioner**

**Versus**

**Ch. SHAFQUAT HUSSAIN and 2 others---Respondents**

Writ Petition No.6372 of 2012, decided on 6th August, 2014.

**(a) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---**

----S. 13---Constitution of Pakistan, Art. 199--- Constitutional petition---Ejectment of tenant---Default in payment of rent---Denial of relationship of landlord and tenant by the tenant---Scope---Contention of tenant was that he was tenant of brother of landlord---Eviction petition was accepted concurrently---Validity---Tenant could not produce any document in favour of brother of landlord on the basis of which he could be presumed to be owner of demised premises---Litigation between landlord and his brother could neither change the scene that landlord was owner of demised premises nor same could give any right to the tenant to ask the landlord to bring a clearance certificate from the court---Landlord was owner of demised premises and mere filing of suit against him did not deprive him from such status until and unless proved otherwise---Tenant had contumaciously denied the relationship of landlord and tenant and became a party to the litigation between two brothers and tried to get undue benefit from such litigation---Tenant had failed to prove the alleged rent agreement with the brother of landlord---Rent Controller was not supposed to decide the ownership of demised property---No gross illegality, irregularity, jurisdictional defect or mis-reading and non-reading was pointed out in the impugned judgments passed by the courts below---Constitutional petition was dismissed in circumstances.

Khurram Shuja v. Mst. Kishwar Zia and another 2010 CLC 1557; Peer Bakhsh v. Additional District Judge, Multan and 2 others 2005 CLC 1700; Hameed Jilani Tiwana v. Abdul Aziz Ghafoor Khan and 2 others 2005 MLD 1232; Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others 2011 SCMR 1813; Khalid Mehmood v. Collector of Customs, Customs House, Lahore 1999 SCMR 1881; Anjum Niaz Chuahdry and 8 others v. Managing Director, Sui Northen Gas Pipeline Limited and 2 others 2011 MLD 1402 and Muhammad Akbar Shah v. Federation of Pakistan through Secretary Ministry of Information and Broadcasting and 5 others 2011 MLD 1484 ref.

**(b) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction---Scope---Constitutional jurisdiction of High Court against concurrent findings could not be exercised unless there was gross

illegality, irregularity, jurisdictional defect or misreading and non-reading on the record.

Rana Liaquat Hussain for Petitioner.

Islam Ali Qureshi for Respondents.

Date of hearing: 26th May, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that the respondent Ch. Shafquat Hussain instituted an ejectment petition against the petitioner Manzar Shah before the learned Special Judge Rent, Lahore on 19-4-2007 wherein he asserted that he is owner of property bearing House No.28 Alamgir Park, New Shalimar Road, Chowk Nonarian, Multan Road, Lahore which has three portions; that he rented out one shop at Kalyar side Road in September, 2005 to the petitioner at monthly rent of Rs.2,500 with 10% annual enhancement; that there was a dispute between him and his brother on 14-12-2006 whereupon a criminal case was registered against the respondent and he was sent behind the bars; that taking undue benefit of absence of the respondent, his brother Shaukat Hussain occupied lower portion of the property house and started collecting rent from the tenant including the petitioner; that he served notice upon the petitioner to pay the rent which he did not respond to, therefore, he being a wilful defaulter in payment of rent since December, 2006 is liable to be evicted from the property.

2. The petitioner on receipt of summons appeared before the Court and filed his contesting reply. He took plea that he was not tenant under the respondent but under his brother Shaukat Hussain to whom he is paying rent regularly. Since the relationship of landlord and tenant between the parties was denied by the petitioner, the issue to this extent was framed. The parties led their respective evidence. After recording oral as well as documentary evidence and hearing the parties, learned Special Judge Rent, Lahore allowed the ejectment petition vide order dated 3-11-2010 holding that the relationship of landlord and tenant between the parties exists and that the petitioner is defaulter in payment of rent since December, 2006. Feeling aggrieved, the petitioner filed appeal before the learned Additional District Judge, Lahore on 2-12-2010 which remained unsuccessful and was dismissed vide order dated 28-1-2012, hence this writ petition.

3. The only contention of learned counsel for the petitioner is that the petitioner is not tenant of the respondent rather he is tenant under elder brother of the respondent namely Shaukat Hussain. He asserted that the petitioner used to pay the rent to said Shaukat Hussain and the dispute between the two brothers cannot be used against the present petitioner. He contended that the respondent was under a legal obligation to get his title cleared from the civil court and then to proceed against the petitioner in

accordance with law. In this regard, he asserted that a civil litigation between the respondent and his brother Shaukat Hussain is pending before this Court.

4. On the other hand, learned counsel for the respondent vehemently contested this petition by submitting that the petitioner contumaciously denied the tenancy. He maintained that the petitioner was inducted in this shop by the respondent at monthly rent of Rs.2,500 in September, 2005 after the respondent purchased this property in August, 2005 through a registered sale deed; that the brother of the respondent Shaukat Hussain filed a false complaint against the respondent wherein the respondent was arrested in connivance with the local police; that taking undue benefit of absence of the respondent, the said Shaukat Hussain not only occupied the upper portion of the house but also the petitioner stopped to pay rent to the respondent which constrained the respondent to file the ejectment petition. He mainly emphasized that being the lawful owner of the property on the basis of registered sale deed, the respondent was a legitimate owner/landlord of the shop in dispute, as such, the ejection petition was competent against the petitioner. He further contended that after the ejectment order was passed and appeal was filed by the petitioner, the learned lower appellate court directed the petitioner to pay rent under section 15(5) of the Punjab Rent Restriction Ordinance, 1959 which order was not complied with, therefore, the appeal was liable to be dismissed on the sole score of non-compliance of the said order. He lastly submits that there are concurrent findings against the petitioner which are immune from interference by this Court in its constitutional jurisdiction. He also submitted that the impugned orders have already been implemented partly as the possession of the rented premises has been taken over by the respondent through bailiff of the court appointed by the executing court. He has relied upon the dictums laid down in cases reported as Khurram Shuja v. Mst. Kishwar Zia and another (2010 CLC 1557 Lahore), Peer Bakhsh v. Additional District Judge, Multan and 2 others (2005 CLC 1700), Hameed Jilani Tiwana v. Abdul Aziz Ghafoor Khan and 2 others (2005 MLD 1232), Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others (2011 SCMR 1813), Khalid Mehmood v. Collector of Customs, Customs House, Lahore (1999 SCMR 1881), Anjum Niaz Chuahdry and 8 others v. Managing Director, Sui Northen Gas Pipeline Limited and 2 others (2011 MLD 1402) and Muhammad Akbar Shah v. Federation of Pakistan through Secretary Ministry of Information and Broadcasting and 5 others (2011 MLD 1484).

5. Arguments heard. Record perused.

6. It is reflected from the contents of the ejectment petition that the respondent became owner of the property on the basis of registered sale deed dated 22-8-2005 which fact has not been denied by the petitioner while filing his written reply. The contention of the petitioner was that he was inducted in the tenanted premises by brother of the

respondent and he never paid any rent to the respondent meaning thereby induction as a tenant in the disputed property is admitted by the petitioner himself. Since the relationship of landlord and tenant was denied, no order under section 13(6) of the Punjab Rent Restriction Ordinance, 1959 was made by the learned Rent Tribunal.

7. In order to prove his case, the respondent produced his mother Mst. Khadeja Begum as AW.1 who while filing her affidavit as A.1 deposed that she sold out this property to the respondent for a consideration of Rs.380,000. During cross-examination, she stated that initially she was receiving rent from the petitioner. She categorically denied that the respondent fraudulently got transferred the entire house in his name. Volunteered, he purchased the property for an amount of Rs.380,000. She also replied that she understands everything properly. She denied that Shuakat has any rent agreement regarding the disputed property. She also denied that being mother, she has deposed in favour of the respondent.

8. The respondent appeared as his own witnesses as AW.2 and produced his affidavit as Exh.A.2 in line with the contents of his ejectment petition. During cross-examination, he stated that the petitioner has been paying rent from 20-8-2005 till November, 2006 and earlier, he was paying rent to his mother from whom, he (the respondent) purchased the property. He denied that all the construction of the disputed property was made by Shaukat. He stated that he cannot produce the receipts as the rent was being paid verbally (without any receipts). He also stated that his mother is 75 years of age and she is healthy and mentally fit.

9. In rebuttal, the petitioner appeared before the court as his own witness as RW.3. He deposed that he took the shop on rent from Shaukat Hussain on 2-12-2006 and since then, he is paying rent to him. He also deposed that Mst. Khadeja Begum is about 80 years of age and is insane. During cross-examination, he admitted that the entire property was in the ownership of Mst. Khadeja Begum. He admitted that this property was transferred by Mst. Khadeja Begum to Shafquat (the respondent). He admitted that he has no proof of ownership of Shaukat Hussain. However, he denied that he ever paid any rent to the respondent. During his evidence, he never produced any receipt of payment of rent to said Shaukat Hussain. However, certain receipts were tendered in evidence in statement of learned counsel for the petitioner as Exh. R/1 to R/31 (produced under objection) and rent agreement Exh. R/32 in favour of Shaukat Hussain.

10. The petitioner produced Shaukat Hussain as RW.2 who happened to be brother of the respondent. RW.2 deposed that the shop in dispute was constructed by him and was rented out the same to the petitioner on 2-12-2006 and since then, he is regularly receiving the rent. He deposed that his mother Mst. Khadeja Begum is 80 years of age

and that she is insane. He admitted that civil litigation between him and the respondent is continuing. He did not produce any receipt or rent agreement with the petitioner.

Perusal of above evidence unequivocally reveals that the petitioner himself admits that he is a tenant although he takes stance that he is not tenant under the respondent but his brother Shaukat. He also admits that the property was originally owned by Mst. Khadeja Begum who happened to be mother of the respondent Shafquat Hussain and Shaukat Hussain. He also admits that the property was transferred by Mst. Khadeja Begum in favour of the respondent. He could not show any document in favour of the Shaukat on the basis of which he could even be presumed to be owner of the property. Litigation between two brothers Shaukat Hussain and Shafquat Hussain neither can change the scene that the respondent is owner/landlord of the property nor can give any right to the petitioner who himself admits to be a tenant in the property to ask the landlord to bring a clearance certificate from the court. Prima facie, the respondent on the basis of registered sale deed in his favour by the admitted original owner, i.e. Mst. Khadeja Begum, is owner of the property and mere filing of suit against him does not deprive him from this status until and unless proved otherwise.

11. The contention of RW.2 that his mother is insane is falsified by the deposition of AW.1 Mst. Khadeja Begum who while appearing in the witness box not only stood firm but also answered the suggestion put to her in cross-examination confidently. She also firmly stated that she understands everything properly. However, she was never suggested that she was out of her senses.

12. It is crystal clear from the record that the petitioner contumaciously denied the relationship of landlord and tenant and became a party to the litigation between the two brothers, i.e. Shaukat Hussain and Shafquat Hussain and tried to get undue benefit of litigation between the two rival brothers. The contention of learned counsel for the petitioner that the petitioner should not be penalized for litigation between the two brothers lacks force as admittedly, the registered sale deed duly admitted by the vendor in the evidence is in favour of the respondent whereas the other brother Shaukat Hussain has no title document in his favour. It is only his verbal assertion that his mother Mst. Khadeja Begum has transferred the property in favour of the respondent in insanity which he has yet to prove through evidence, though his assertion has been denied by Mst. Khadeja Begum while appearing before the court as AW.1 by stating that she understands everything properly. The petitioner is admittedly a tenant in the property which is owned by the respondent on the basis of registered sale deed in his favour. Therefore, his denial to relationship of landlord and tenant between him and the respondent is contumacious and based on mala fide just to gain

undue benefit from the litigation between the respondent and his brother Shaukat Hussain which he cannot be allowed to.

13. Regarding submission of certain receipts as Exh.R/1 to Exh.R/31 and rent agreement Exh.R/32 in favour of Shaukat Hussain, I am of the considered opinion that production of such receipts or rent agreement R/32 is of no avail to the petitioner as the said receipts as well as alleged rent agreement were never proved by the petitioner in accordance with law. Furthermore, the learned Special Judge Rent was not supposed to decide the ownership of the property. The learned Special Judge Rent after the due appraisal of the evidence came to the conclusion that the petitioner failed to prove that he was tenant of Shaukat Hussain which was upheld by learned lower appellate court. Both the decisions of learned courts below are concurrently against the petitioner which are immune from interference by this Court in its constitutional jurisdiction unless some gross illegality, irregularity, jurisdictional defect or misreading and non-reading is floating on surface which could not be pointed out by learned counsel for the petitioner. No interference is called for.

14. Resultantly, this writ petition is bereft of any force, hence dismissed.

AG/M-360/L Petition dismissed.

**2015 Y L R 1774**

**[Lahore]**

**Before Atir Mahmood, J**

**Syed MUNEEB AHMED SHAH---Petitioner**

**versus**

**ADDITIONAL COLLECTOR and others---Respondents**

Writ Petition No.4937 of 2012/BWP, heard on 25th April, 2013.

**Punjab Local Government Ordinance (XIII of 2001)---**

----Ss.8(2), 67, 117 & 190---West Pakistan Urban Immovable Property Tax Act (V of 1958), S.2(b)---Constitution of Pakistan, Art. 199---Constitutional petition---Notification issued by Additional Collector/Administrator declaring an area to be Rating Area and imposing property tax thereupon---Petitioner's plea was that only the Administrator, but not Additional Administrator, had power to issue such notification---Validity--- District Administrator/Tehsil Municipal Adminis-trator was competent to issue such notification by virtue of Ss.67(i) & 117 of Punjab Local Government Ordinance, 2001---Petitioner's objection petition filed under S.8(2) of Punjab Local Government Ordinance, 2001 had been dismissed by authority, whereagainst he had not availed remedy of appeal provided under S.190 thereof---High Court dismissed constitutional petition in circumstances.

Syed Saleem ud Din for Petitioner.

Saeed Ahmed Chaudhry, Assistant Advocate General for the State.

Date of hearing: 25th April, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this writ petition, the petitioner has challenged the notification No.1613, dated 27-6-2011 issued by respondent No.1 whereby Kot Samaba Tehsil and District Rahim Yar Khan, has been declared as Rating Area and property tax has been levied thereupon. He has challenged the order dated 3-5-2012 passed by respondent No.1.

2. Learned counsel for the petitioner contends that the Kot Samaba is absolutely a rural area situated in U/C No.40; that the people of the area being very poor and illiterate are unable to pay the property tax; that as per Section 2(b) of West Pakistan Urban Immovable Property Tax Act, 1958, only a Collector can declare any area as 'rating area' and such powers do not vest with the Additional Collector/Administrator who has issued the impugned notification and passed the impugned order dated 3-5-2012, as such, these are illegal having no effect qua the rights of the petitioner and be set aside.

3. On the other hand, learned Law Officer states that the Kot Samaba is not a rural area as it has more facilities supposed to be in a village; that it is not true that all the people of the area are illiterate and poor; that under Section 67 of Punjab Local Government Ordinance 2001, hereinafter referred to as the Ordinance, Administrator is competent to declare any area within his jurisdiction as a rating area and impose tax

thereupon; that the remedy of appeal is available to the petitioner under Section 190 of the Ordinance which has not been availed by the petitioner, therefore, this writ petition is not maintainable. He prays that this writ petition having no merit be dismissed.

4. Arguments heard. Record perused.

5. I have gone through the provisions of the Ordinance. Section 3 of the Ordinance is reproduced as under:--
"Ordinance to over-ride other laws:---The Provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force".

6. As per Section 67(i) of the Punjab Local Government Ordinance, 2001, the functions and powers of the Tehsil Council are "to approve taxes, cess, rates, rents, fees, user-charges, tolls, levies, fines and penalties proposed by Tehsil Municipal Administration specified in (part-III) of the Second Schedule". Section 116 of the Ordinance empowers a council to levy taxes, cesses, fees, rates, rents, tolls, charges, surcharges and levies specified in the second schedule. The clause (5) of the Part-III of the said schedule is as follows:-
"Property tax rate as specified in section 117"

7. Section 117 of the Ordinance is reproduced as under:--
"Rating Areas and Property Tax: (1) On commencement of this Ordinance every Tehsil and Town shall be rating areas within the meaning of the Punjab Urban Immovable Property Tax Act, 1958 (V of 1958)
(2) The Tehsil Council or Town Council, as the case may be, shall subject to the provisions of Section 116, determine the rate of property tax in an area within the Tehsil or Town.
Provided that in the areas within a Tehsil or Town where rate has not been determined, the rate shall remain as zero.
(3) Unless varied under sub-section (2), the existing rates in the areas within a Tehsil or Town shall remain in force."

8. Keeping in view the above-mentioned provisions of law I am of the considered opinion that after the amalgamation of the Ordinance the Administrator/Tehsil Municipal Administration, R.Y. Khan was competent to issue the impugned notification against which the petitioner filed an objection petition under section 8(2) of the West Pakistan Urban Immoveable Property Tax Act, 1958 which was dismissed by respondent No.1 vide impugned order dated 3-5-2012. Undeniably, under section 190 of the Punjab Local Government Ordinance, 2001, the appeal is provided against any order passed by Local Government or its functionaries which remedy has not been availed by the petitioner.

9. In view of the above, this writ petition has no force and the same is accordingly dismissed.
SAK/M-198/L Petition dismissed.

**2015 Y L R 2194**

**[Lahore]**

**Before Atir Mahmood, J**

**JAVAID RASHEED---Applicant**

**versus**

**MUHAMMAD SHARIF and others---Respondents**

C.M. No. 3 of 2014 in Writ Petition No.2227 of 2012, decided on 4th July, 2014.

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

----S.12(2)---Applicant sought setting aside of judgment under S. 12(2), C.P.C.---Validity---Party filing application under S.12(2), C.P.C. was to be aggrieved of order which had been passed on the basis of fraud, misrepresentation or want of jurisdiction---No such element existed nor could be established by applicant, therefore, provision of S. 12(2), C.P.C. was not attracted---Application was dismissed in circumstances.

Zaheer Zulfiqar for Applicant.

**ORDER**

**ATIR MAHMOOD, J.**---This is an application under section 12(2), C.P.C. for setting aside order dated 16-4-2014 passed by this Court in titled Writ Petition No.2227/2012 whereby direction was given to learned Special Judge Rent, Lahore for disposal of the ejectment petition filed by respondent No.1/writ petitioner within three months positively.

2. Briefly stated the facts of the case narrated in the application are that after partition of India father of the applicant namely Muhammad Siddique Butt (deceased) took over possession of one of the shops in property No.S-66-R-10 Nila Gumbad Lahore owned by Punjab National Bank, Lahore. The said property was treated as Evacuee property on 24-12-1997 and was allotted to Muhammad Siddique by the name and style of Messrs Muhammad Siddique and Brothers by the Deputy Rehabilitation Commissioner, Lahore but subsequently, on 20-10-1953 the property was restored to the Bank by the Rehabilitation Officer. Later on, there was an agreement to sell dated 10-5-1965 between respondent No.1/writ petitioner and respondent No.2/National Bank. On 11-6-1965, the writ petitioner promised to Muhammad Siddique to sell the property to him. On 6-9-1965, the property was taken over by the Custodian of Enemy Property declaring it as property of the enemy. On 14-2-1996, a joint application signed by parties of agreement to sell was made to Deputy Custodian of Enemy

Properties for permission to sell the same in their favour. On 14-5-1969, the Central Government of Pakistan cancelled the agreement to sell dated 10-5-1965 between respondent No. 1 and respondent No.2. Respondent No.1 challenged order dated 14-5-1969 in Writ Petition No.1420/1969 which was dismissed on 30-5-1981.

During pendency of this writ petition, the Deputy Custodian of Enemy Properties declared the bona fide allottees entitled to purchase the property after paying the price evaluated by the Settlement Department. The writ petitioner assailed order dated 30-5-1981 in ICA which was allowed and resultantly, the agreement to sell dated 10-5-1965 was restored.

On 10-5-1965, respondent No.1 filed a suit for specific performance of an agreement to sell dated 10-5-1965 which was decreed on 28-4-2004. Respondent No.2 challenged it in appeal which was dismissed on 17-12-2004 against which Civil Revision No.396/2005 was instituted which is still pending adjudication before this Court. On 29-5-2004, respondent No.1 filed application for execution of decree dated 28-4-2004 wherein the objections were filed by the applicant which case has been adjourned sine die due to pendency of Civil Revision No.396/2005 before this Court.

3. On 12-4-2010, respondent No.1 filed application against the applicant for his eviction from the property claiming that the applicant is tenant under him. The applicant appeared before the court and leave to defend was granted to him vide order dated 20-7-2011 and respondent No.1 was refused payment of rent by respondent No.3/learned Special Judge Rent against which the titled writ petition was filed wherein the direction for early disposal of the ejectment petition has been made to learned Special Judge Rent vide order dated 16-4-2014, hence this application.

4. Learned counsel for the petitioner inter alia contends that the applicant/his father are in occupation of the shop as tenant under State Bank of Pakistan (Deputy Custodian of Enemy Properties) since 1947 and are regularly paying the rent thereof; that the applicant has got his title of ownership through decree of the court dated 28-4-2004 which is under challenge by respondent No.2 through Civil Revision No.396/2005 before this Court; that the impugned order/direction is likely to cause immediate eviction of the applicant from the property even prior to decision of the said Civil Revision and if happened so, the applicant will have to enter into another round of litigation which is against cannons of justice; that the title writ petition was against an interim order of the Special Judge Rent but this Court while passing the impugned order did not take note thereof; that the impugned order was obtained at the back of the applicant by concealing facts of the case, therefore, this application be allowed and the impugned order be set aside.

5. Arguments heard. Record perused.

6. The contentions of the applicant are not tenable. The order passed by this Court was only to the extent that the Special Judge Rent would conclude the trial within three months as fair and early disposal of the case which is right of each and every litigant. In the instant case, the ejectment petition was filed on 12-4-2010 and since then, the trial has not been concluded by learned Special Judge Rent. According to Section 27 of the Punjab Rented Premises Act, 2009, a rent tribunal is under legal obligation to conclude the trial within four months from the date of institution of the ejectment application. In this case, the ejectment petition was filed more than four years ago but the same has not been decided so far. The issuance of direction for early disposal of the ejectment petition is not going to affect rights of the parties including the applicant adversely in any manner. The applicant is already appearing before the learned Special Judge Rent and he has raised there all the objections agitated before this Court in the instant application. Vide impugned order, learned trial court has only been directed to decide the matter in accordance with law after hearing all the parties, as such, the impugned order does not affect rights of the applicant or any other party in any manner.

7. So far as the contention of learned counsel for the applicant regarding non-affording of opportunity of hearing to him, suffice it to say that every petitioner has right to withdraw his case at any stage with permission of the court and the law does not debar him to do so.

Therefore, disposal of the titled writ petition with a direction of early disposal of his case before the lower court does not affect adversely rights of the applicant/respondent in the writ petition.

8. Furthermore, this application has been filed under Section 12 (2), C.P.C. which reads as under:--

"Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit".

Bare reading of the above provision of law makes it crystal clear that a party filing application under Section 12(2), C.P.C. must be aggrieved of an order which has been passed on the basis of fraud, misrepresentation or want of jurisdiction. No such

element exists nor could be established by learned counsel for the applicant, as such, the provision of section 12(2), C.P.C. is not attracted in this case.

9. For the aforementioned reasons, this application is bereft of any merit, hence dismissed.

MH/J-20/L Application dismissed.

**2015 Y L R 2476**

**[Lahore]**

**Before Atir Mahmood, J**

**AHMED YAR through L.Rs.---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE and others--Respondents**

Writ Petition No.8341 of 1999, heard on 22nd April, 2014.

**West Pakistan Urban Rent Restriction Ordinance (VI of 1959)--**

----S. 13---Constitution of Pakistan, Art. 199--- Constitutional petition---Ejectment of tenant---Default in payment of rent---Denial of relationship of landlord and tenant by the tenant---Scope-- Landlady was bound to prove her ownership in order to prove the relationship of landlord and tenant as same had been denied by the tenant---Witnesses produced by the landlady had proved the factum of her ownership qua the demised premises---Nothing was on record to establish that tenant was in possession of disputed house in his own rights---Person who was not owner of property might be a "landlord" if he received rent---Person who had denied the possession as a tenant and claimed himself to be owner of the property was bound to prove that he was not holding such possession as a tenant---Landlady had not only proved her ownership by producing sale deed but also by production of marginal witnesses and scribe of the same and their credibility could not be shaken---Tenant neither produced any documentary evidence nor any witness to corroborate his statement---Suit for declaration filed by the tenant was dismissed and appeal against the same was also dismissed---Mere pendency of revision petition was not helpful for the tenant in rent proceedings--- Tenant might agitate his right in accordance with law if any subsequent decree was passed by the competent court of law in his favour---Tenant had contumaciously denied the relationship of landlord and tenant and Appellate Court had rightly set aside the order passed by the Rent Controller---No misreading or non-reading of evidence or jurisdictional defect was pointed out in the impugned judgment passed by the Appellate Court--- Constitutional petition was dismissed in circumstances.

Mst. Soniya Sharif v. Bashir Kundi through Legal Heirs and others 2013 MLD 1786 ref.

PLD 1974 SC 139 distinguished.

Salman Badar- for Petitioners.

Farman Ahmad Bhatti for Respondents Nos. 2-a to 2-g.

Date of hearing: 22nd April, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the predecessor of the present petitioner Ahmad Yar (since died) herein-after referred as petitioner challenged the impugned judgment and decree dated 28-6-1999 passed by the learned Additional District Judge, Arifwala, Camp at Pakpattan Sharif, whereby the appeal filed by respondent No.2, the predecessor of the present respondents namely Sardaran Bibi (

since died ) here-in after referred as respondent was accepted against the order dated 19-1-1998 passed by the learned Civil Judge/Rent Controller, Pakpattan Sharif by which the ejectment petition under section 13 of the Rent Restriction " Ordinance, 1959 filed by respondent No.2 was dismissed.

2. The main emphasis of the learned counsel for the petitioner while arguing the case is that the learned appellate court has exceeded its jurisdiction while passing the impugned judgment as it was none of its business to dilate upon the ownership of the property and it was the sole prerogative of the civil Court. No other point was raised. He has relied upon the case-law cited as Mst. Soniya Sharif v. Bashir Kundi through Legal Heirs and others (2013 MLD 1786) in order to substantiate his contention.

3. On the other hand, the learned counsel for the respondent supported the judgment of the learned appellate Court by submitting that no illegality has been committed by the appellate Court and this Court while exercising the constitutional jurisdiction cannot enter into the factual controversy. He has relied upon the case-law reported as (PLD 1974 SC 139).

4. Arguments heard. Record perused.

5. Record reflects that the ejectment petition was filed by the respondent against the petitioner for his eviction from the house fully described in the ejectment petition (here-in-after referred as the house) on the ground of bona fide personal need, default in the payment of rent of four months (September to December 1993) and damaged to the property. It was alleged in the petition that the respondent was the owner of the house vide registered sale deed dated 9-2-1976 executed by one Ghulam son of Inayat in his favour; the house was rented out to the petitioner in the month of January, 1993 @ Rs. 400 per month rent and rent of four months was paid in advance to the respondent and then payment of rent of subsequent four months was made but thereafter he defaulted in the payment of rent and four months rent was due till December, 1993. The tenancy between the parties was allegedly oral. The petitioner contested the ejectment petition by filing his written statement and denied the tenancy by alleging that respondent was not the owner of the house as it belongs to the father of the petitioner Ghulam (the vendor) who died in the year 1984. He alleged that the sale deed in favour of respondent was result of fraud as the property was mortgaged to the respondent and it was fraudulently converted into a sale deed. According to the contents of the written statement the house was never taken on rent a year ago rather it was in possession of his father and after his death he along with other legal heirs is in possession of the same in his own rights. The learned Rent Controller framed the following issues:--

**ISSUES**

(1) Whether the relationship of landlord and tenant does not exists between the parties? OPR

(2) Order.

The onus to prove this issue was upon the petitioner but from the record it appears that the respondent led her evidence prior to the evidence of the petitioner. In order to

prove the relationship of landlord and tenant the respondent was under a legal obligation to prove her ownership as this factum was denied by the petitioner. She produced in evidence Malik Shahid Aziz as AW-1 stamp vendor/Vasiqa Nawees, who deposed that the stamp paper of sale deed was purchased in the name of Ghulam son of Inayat. In cross-examination he admitted that the writing of the document is neither his writing nor that of his father. AW-2 Abdul Rauf appeared who was a petition writer. He deposed that sale deed Exh.A-1 was written by him and was signed by the marginal witnesses in his presence. He further deposed that an amount of Rs.15,000 was received by the vendor Ghulam at that time and possession of the property was also handed over to Sardaran Bibi. In cross-examination he stated that he neither knew Ghulam personally nor Sardaran Bibi however he knew the witness Abdul Shakoor. He denied the suggestion that infact mortgage deed was prepared which was converted into sale deed in connivance with Sardaran Bibi and her husband. AW-3 Abdul Shakoor marginal witness of the document admitted his signatures on the sale deed as Exh.A-1/1. Cross-examination was also to the same effect as made upon the AW-3. Statement of AW-4 Muhammad Aziz was also on the same fact. All the above referred witnesses proved the factum of ownership of the respondent qua the house. Then AW-5 Muhammad Ali deposed in his examination in-chief that about five years back the house was given to, the petitioner on rent by Sardaran Bibi in the presence of her husband Aswaar Ali @ Rs. 400 per month and the rent of four months was given in advance. He deposed that the possession of the house was handed over to the petitioner by Aswaar Ali in his presence and the petitioner is in possession of the same as tenant. In cross-examination he stated that no rent deed was written. He denied the suggestion that the house was not taken on rent; the petitioner never paid advance rent of four months; that the petitioner is residing in the house since his father/grand father were alive. AW-6 Muhammad Shafi also deposed in the same manner by categorically stating that the petitioner took over the property on rent from Sardaran Bibi in his presence as well as in the presence of Muhammad Ali AW-5. In cross-examination he stated that the rent deed was written between the parties. The respondent herself appeared through her special attorney Aswaar Ali as AW-8, who deposed that the house was purchased from Ghulam son of Inayat (father of the present petitioner) vide registered sale deed dated 9-2-1976. Thereafter, this property was given to the petitioner on rent in the year 1993. In cross-examination he denied that Exh.A-1 i.e. sale deed was not in the knowledge of respondent (ejectment petitioner). He further denied that the sale deed had fraudulently been prepared in the name of his wife. He denied that the house is not in possession of the petitioner as a tenant. Despite lengthy cross-examination nothing could be brought on record which could establish that the petitioner was in possession of the house in his own rights. In documentary evidence the respondent produced sale deed, sanctioned site plan of the property and copies of record of rights from the revenue department. Whereas the petitioner did not produce any witness except himself as RW-1 and deposed that the house in question is his personal property and he is in possession in his own rights and further that they are five brothers and one sister, who are all co-sharer in the house. He did not depose that there is no relationship of landlord and tenant between the parties. In cross-examination he admitted that there is no title document in his favour or in favour of his father. He also admitted that he has not seen the title document of revenue record in favour of his father. He denied that the house was sold in the year 1976 to the

respondent. He stated that he is residing in the house independently and other brothers are residing separately. He stated that the house was given to Sardaran Bibi through a. mortgage deed in his presence when all his other brothers were present. He deposed that the mortgage was made in the year 1970. He admitted that they never filed any suit for redemption of the mortgage deed. He stated that he has filed suit for declaration after the filing of the ejectment petition.

6. Perusal of the judgment passed by the learned appellate Court reflects that the entire evidence produced by the parties was thoroughly thrashed and the appellate Court came to the conclusion that there is a relationship of landlord and tenant as the petitioner failed to prove that his possession over the house is in his own rights as owner.

7. I am conscious of the fact that under the Rent Restriction Ordinance, 1959 the landlord is not to establish his ownership and a person who is not owner of the property may be termed as a landlord if he receives the rent but at the same time if any person who denies the possession as a tenant and claims himself to be the owner of the property the burden heavily lies upon him to prove that he is not holding possession as a tenant and accordingly the issue was framed in this regard. The evidence discussed hereinabove reflects that the respondent not only proved her ownership by producing sale deed as Exh.A-1 through production of marginal witnesses and scribe of the document. Their credibility could not be shaken in any regard. Then the witnesses of creation of tenancy, were produced and there credibility also could not be shaken hut when the petitioner appeared as a witness he could not establish his possession of the house as his own. He neither could produce any documentary evidence nor any witness who could corroborate his statement. It is noted with care that even none of his brothers who allegedly were the co-owners in the house appeared to claim their ownership in the house.

8. Furthermore, during the course of argument it has been brought into the notice of the Court that the suit for declaration filed by the petitioner was, dismissed by the learned Civil Court and appeal filed against the judgment and decree has also been dismissed. The learned counsel for the petitioner submitted that a revision petition is pending against the judgments and decrees passed by the courts below, I am afraid that the mere pendency of revision petition, where concurrent findings of facts are against the petitioner, is not helpful for the present petitioner in the rent proceed ings. However, if there is any subsequent decree passed by the competent Court the petitioner may agitate his right in accordance with law. The case-law relied upon by the petitioner is quite distinguish able and not applicable in this case.

9. In view of the above discussion, I am of the considered opinion that the petitioner contumaciously denied the relation-ship of landlord of tenant and therefore the appellate Court rightly set-aside the order passed by the learned Rent Controller and accepted the ejectment petition of the respondent. Learned counsel for the petitioner has not been able to point out any mis-reading and non-reading of evidence or jurisdictional defect. This petition being devoid of any force is hereby dismissed.
ZC/A-101/L Petition dismissed.

**PLJ 2015 Lahore 94**

***Present:*** **ATIR MAHMOOD, J.**

**MUHAMMAD SHAHZAD--Petitioner**

**versus**

**JUDGE FAMILY COURT, LAHORE and 2 others--Respondents**

W.P. No. 7952 of 2014, decided on 24.4.2014.

**Family Courts Act, 1964 (XXXV of 1964)--**

----Ss. 9(6) & 17-A--Suit for dissolution of marriage, recovery of maintenance, allowance, dowery article, delivery expenses--Marriage was dissolved on basis of *khula--Ex-parte* judgment was set aside subject to make payment as well as monthly maintenance allowance for minor--Validity--Condition imposed for suspension of decree was not sustainable as under Section 9(6) of Family Courts Act, Family Court has no power to impose any cost in application for suspending *ex-parte* judgment and decree--Payment of interim maintenance allowance was also not sustainable as provision of Section 17-A of Act comes into field only when written statement was filed by defendant--Family Court, after having filed interim maintenance allowance, order was set aside to extent of imposition of condition of payment as well as payment of interim maintenance allowance for minor--Petition was allowed. [P. 96] A & B

*Raja Ahmed Raza,* Advocate for Petitioner.

*Mr. Hamid Rasheed,* Advocate for Respondents.

Date of hearing: 24.4.2014.

**JUDGMENT**

Brief facts of the case are that Respondent No. 2 filed a suit for dissolution of marriage, recovery of maintenance allowance, dowry article, delivery expenses and 5 *tola* gold ornaments with the averments that she was married with the petitioner on 31.10.2010 for a consideration of Rs.2000/- as dower money which was not paid; that out of this wedlock, a daughter namely Maham was born on 06.08.2012; that delivery expenses of Rs.30,000/- were borne by parents of the plaintiff; that 5 *tola* gold ornaments were gifted to the plaintiff by the defendant which are still in his custody; that the relations between the parties remained cordial in the beginning, however, later on, the petitioner-defendant expelled the plaintiffs from his house in October, 2011; that no maintenance was ever paid to the plaintiffs.

2. Summons were issued and service through publication was also made but none appeared on behalf of the petitioner, therefore, he was proceeded against *ex parte*, evidence of Respondent No. 2 was recorded and the suit of the respondents was decreed *vide ex parte* judgment dated 23.01.2014 in the terms that the marriage was dissolved on the basis of *khula*, the plaintiff was held entitled to recover dowry articles as per list Ex.P1/2 except gold ornaments 5 *tola* or a sum of Rs. 100,000/- in lieu thereof and also for delivery charges to the extent of Rs. 15,000/-. *Vide* said judgment, Plaintiff No. 1 was awarded maintenance allowance @ Rs.2500/- and Plaintiff No. 2 @ Rs.5000/-per month from the date of institution of the suit. The respondent then filed an execution petition wherein notices were issued to the

petitioner. On receipt of notice in the execution petition, the petitioner filed application for setting aside *ex parte* judgment and decree dated 23.01.2014. On 27.02.2014, the learned Judge Family Court passed the following order in the application of the petitioner:

> "As the decree was passed *ex-parte* and by relying upon the affidavit annexed with the application, the operation of the *ex-parte* judgment and decree is, hereby, suspended till the next date of hearing subject to payment of Rs. 15,000/- as well as monthly maintenance for minor respondent at the rate of Rs.5000/- per month as decreed (which shall be adjustable at the time of final decision of the case) alongwith a surety bond for remaining decretal amount on behalf of petitioner/ judgment debtor for the satisfaction of this Court."

3. The order dated 27.02.2014 has been challenged in this writ petition mainly on the ground that the learned Judge Family Court has no jurisdiction to impose condition of payment of cost of Rs.15,000/- as well as interim maintenance allowance in the application for setting aside *ex parte* judgment and decree. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and supported the impugned order. His whole emphasis is on the point that all modes of service were adopted for service of the respondent but he did not appear before the Court, therefore, the Court was left with no option but to pass an *ex parte* judgment and decree.

4. Arguments heard. Record perused.

5. The impugned order reflects that *ex parte* judgment and decree dated 23.01.2014 passed by learned Judge Family Court was suspended on an application filed by the petitioner for setting aside the *ex parte* judgment and decree but at the same time, the condition was imposed to make payment of Rs. 15,000/- as well as monthly maintenance allowance for the minor respondent @ Rs.5,000/- per month as decreed.

6. Perusal of the impugned order reflects that the condition imposed by learned family Court for suspension of the impugned judgment and decree is not sustainable as under Section 9(6) of the learned Family Courts Act, 1964, the family Court has no power to impose any cost in application for suspending *ex parte* judgment and decree. Furthermore, the payment of interim maintenance allowance of Rs.5,000/- is also not sustainable as the provision of Section 17-A of the Act *ibid* comes into field only when the written statement is filed by the defendant. Keeping in view the pleadings as well as circumstances of the case, the family Court, after having filed written statement by the defendant, can pass the order for interim maintenance allowance, therefore, the impugned order dated 27.02.2014 is set aside to the extent of imposition of condition of payment of Rs. 15,000/- as well as payment of interim maintenance allowance for the minor respondent @ Rs.5000/- per month. This writ petition is allowed in the said terms.

(R.A.) Petition allowed

**PLJ 2015 Lahore 133**

***Present:*** **ATIR MAHMOOD, J.**

**NOOR INAYAT--Petitioner**

**versus**

**ADDITIONAL DISTRICT JUDGE, TANDLIANWALA, DISTRICT FAISALABAD and 2 others--Respondents**

W.P. No. 14838 of 2012, heard on 15.5.2014.

**Constitution of Pakistan, 1973--**

----Art. 199--Constitutional petition--Suit for dissolution of marriage and recovery of dowry article--Question of--Whether plaintiff was entitled to recover dowry articles as per list annexed with plaint--Suit for recovery was partially decreed--Gold ornaments were not decreed simply on presumption that gold ornaments are usually kept by ladies with them--Validity--Since there was a categorically assertion that petitioner was ousted from house of respondent in three wearing apparels, then it was incumbent upon respondent to prove through some cogent evidence that she was not ousted from the house Courts below had failed to take into consideration evidence of parties in its true perspective--Petition was allowed.

[P. 137] A

*Mr. Sarmad Ahmed Ghani,* Advocate for Petitioner.

Proceeded against *exparte* on 19.3.2014 for Respondents.

Date of hearing: 15.5.2014.

**JUDGMENT**

Brief facts of the case are that the petitioner filed a suit for dissolution of marriage and recovery of dowry articles before the learned Judge Family Court Tandlianwala on 01.03.2011. The averments contained in the plaint are that the petitioner was married with defendant 1½ years before in accordance with Muslim Rites; that at the time of marriage, she was given valuable dowry, articles; that after sometime, the relations between the parties became strained and the respondent started to beat and maltreat the plaintiff; that he ultimately kicked her out of his house in wearing apparels six months prior to the institution of the suit; that the dowry articles are lying with the respondent; that the respondent is a man of bad character, therefore, she cannot live with her any more. The respondent contested the suit by filing written statement. Out of divergent pleadings of the parties, following issues were framed:

**"ISSUES**

1. Whether the plaintiff is entitled to recover dowry articles as per list annexed with the plaint or in lieu its price Rs. 496500/- ? OPP
2. Relief."

2. After recording the evidence and hearing both sides, learned Judge Family Court, Tandlianwala *vide* judgment and decree dated 24.12.2011 partially allowed the suit of the petitioner for recovery of dowry articles as per list annexed with the plaint

except Items No. 1, 28, 29, 30 and 31 or in alternate a sum of Rs. 90,000/-. The suit of the petitioner for dissolution of marriage was also decreed. Feeling aggrieved, both sides filed appeals which were dismissed by learned lower appellate Court *vide* judgment and decree dated 21.04.2012 maintaining the judgment and decree of learned Family Court. Hence this writ petition.

3. The learned counsel for the petitioner has contended that the learned Courts below have failed to take into consideration the fact that the petitioner in her cross-examination has given details of the dowry articles given to her at the time of marriage; that the impugned judgments and decrees suffer from misreading and non-reading of evidence; that the petitioner has successfully proved her case beyond any shadow of doubt; that DWs themselves admit that it was a watta satta marriage wherein the sister of the respondent was married with brother of the petitioner and was given dowry articles of Rs. 5/6 lacs and that the petitioner was also given the dowry articles of the same value, therefore, this writ petition be allowed and impugned judgments and decrees be modified to the extent of allowing the suit of the petitioner as prayed for. He has relied upon the law laid down in case cited as *Muhammad Umar Islam vs. Mst. Iram Shezadi etc.* (NLR 2009 Civil 303).

4. The respondent has already been proceeded against *ex-parte vide* order dated 19.03.2014.

5. Arguments heard. Record perused.

6. The main grievance of the petitioner is that despite the fact that the petitioner categorically proved her case through production of credible evidence but learned Courts below decreed her suit for recovery of dowry articles much below the claim of the petitioner which she deserved to.

7. Perusal of the plaint reflects that the petitioner asserted that she was given dowry articles at the time of her marriage with the respondent according to the list appended with the plaint as Mark-A. She asserted that she was ousted from the house of the respondent in three wearing apparels after severe beating and her entire dowry articles are lying in possession of the respondent. The respondent while filing written statement completely denied the delivery of dowry articles to the petitioner. Out of divergent pleadings of the parties, issues were framed and evidence led by the parties was recorded.

8. In order to prove her assertions, the petitioner appeared as PW-1 as her own witness and submitted her affidavit as Exh. P1 wherein she deposed in line with the averments of the plaint. In cross-examination, she replied in affirmative that the list of dowry articles was prepared at the time of the marriage. In cross-examination, she elaborated not only the description of dowry articles including the gold ornaments but also their prices. She also stated that her marriage with the defendant was a *watta satta* marriage as sister of the respondent was married with her brother. However, a suggestion that she was not given any dowry articles was categorically denied by her.

9. PW-2 Abdul Ghaffar (brother of the petitioner) deposed while filing his affidavit as Exh.P2 corroborating the stance of the petitioner. In cross-examination, he admitted that the receipts of purchase of dowry articles are not appended with the plaint. He admitted that the list of dowry articles which was prepared on spot had been destroyed. He admitted that he did not mention details of the dowry articles or their prices in his examination-in-chief. He stated that he was told by his sister that she has come out empty handed from the house of the respondent. He denied the suggestion that the list of dowry articles was prepared by him. Volunteered, it was prepared by his sister. Muhammad Ali Khan while appearing as PW-3 filed his affidavit as Exh.P3 in line with the contents of the plaint as well as supporting the version of the petitioner wherein he deposed that the dowry articles worth Rs. 496,500/- were given to the petitioner at the time of her marriage. A suggestion was put to this witness that the petitioner was given the same dowry articles as were given to Bashiran (sister of the respondent who got married with brother of the petitioner). This suggestion is an implied admission on the part of the respondent that the dowry articles were given to the petitioner at the time of her marriage and this suggestion also contradicts the stance taken by the respondent in his written statement wherein he categorically denied the giving of any dowry articles to the petitioner by her parents rather it was asserted in the written statement that the expenses of the marriage were borne by the respondent. No suggestion was put to any of the plaintiff's witnesses that the expenses of the marriage ceremony were borne by the respondent.

10. In rebuttal, DW-I Muhammad Ashraf, the respondent, filed his affidavit as Exh.D1 denying the delivery of dowry articles to the petitioner by submitting that since it was a love marriage and the parents of the petitioner as well as her other relatives were not happy with this marriage, therefore, no dowry articles were given to the petitioner and a condition was imposed that sister of the respondent Bashiran will marry with brother of the petitioner which was fulfilled by the respondent side. In cross-examination, he admitted that in this marriage of *watta satta*, his parents were happy. He also admitted that the petitioner has five brothers. However, he denied that her two brothers were employed: one as Manager of Service Shoe Store and the other as an Agriculturist. He denied that the marriage of the petitioner was arranged by his parents and brothers. He also denied that the dowry articles were given to the petitioner according to the list Mark-A valuing Rs. 496,500/-. He admitted that he had given dowry articles to her sister. This stance of the respondent supports the version of the petitioner as established through cross-examination upon PW-3 that dowry articles of the same amount were given to the petitioner as were given to Bashiran Bibi (sister of the respondent). He denied that the petitioner was ousted from the house after severe beating.

11. DW-2 Muhammad Sarwar filed his affidavit as Exh.D2 supporting the contents of the written statement filed by the respondent. However, in cross-examination, he took a different stance by denying the suggestion that parents of the parties were happy upon *watta satta* marriage. This witness denied that two brothers of the petitioner were employed. He showed his ignorance that one brother Abdul Ghaffar is Manager in Service Shoe Store. He admitted that marriage of the petitioner was managed by her parents. However, he denied the suggestion that the

dowry articles worth Rs. 496,500/- were given to the petitioner according to the list but at the same time, he admitted that the parents of the respondent had given dowry articles worth Rs. 5/6 lacs to their daughter Bashiran Bibi. This part of the statement of DW-2 is taken into consideration with suggestion put to PW-3 which reads as under:

**"یہ غلط ہے کہ مدعیہ کی شادی سے رشتہ دار خوش نہ تھے۔ غلط ہے کہ جتنا سامان مدعیہ کو دیا گیا تھا اتنا سامان بشیراں کو دیا گیا تھا۔"**

This is sufficient to establish that the dowry articles given to the petitioner were if not more than Rs. 5/6 lacs but were at least equal to the same value.

12. DW-3 Mehboob Alam who is brother of the petitioner and brother-in-law of the respondent supported the contention of the respondent by submitting that his parents are poor having no landed property and no dowry articles were given to the petitioner at the time of her marriage. In cross-examination, he denied that his marriage of *watta satta* was with the consent of the parents. He denied that sister of the respondent is rehabilitating with him. He denied that he has come to make the statement on the asking of the respondent. He, however, admitted that Bashiran Bibi was given sufficient dowry articles. He did not remember the price of dowry articles. He also admitted that some dowry articles were given to his sister.

13. After recording evidence of the parties, the learned Family Court decreed the suit of the petitioner for recovery of dowry articles as per list of dowry articles (Mark-A) except items No. 1, 28, 29, 30 and 31 or alternate price of Rs. 90,000/-. Being aggrieved both sides filed appeals which were dismissed by learned lower appellate Court and the judgment and decree of learned family Court was upheld.

14. It is astonishing that the learned lower appellate Court held that PW-1 has given the details of dowry articles in her cross-examination and fully supported her claim but even then, the claim of the petitioner was not decreed according to her prayer, particularly gold ornaments were not decreed simply on the presumption that gold ornaments are usually kept by the ladies with them. In my view, since there was a categorically assertion that the petitioner was ousted from the house of the respondent in three wearing apparels, then it was incumbent upon the respondent to prove through some cogent evidence that she was not ousted from her house as narrated by her. Therefore, in my opinion, both the learned Courts below have failed to take into consideration the evidence of the parties in its true perspective.

15. Accordingly, this writ petition is partially **allowed** and the judgments and decrees passed by learned Courts below are **modified** to the extent that in addition to the dowry articles granted by the learned Courts below or in alternate price of Rs. 90,000/- (keeping in view wear and tear with the passage of time), the petitioner is also entitled to receive gold ornaments weighing 5½ *tolas* (as mentioned in the list Mark 'A' excluding the 1/2 *tola* gents ring) or its equivalent market price at the time of execution of the decree.

(R.A.) Petition allowed

**2015 Law Notes 741**
**[Lahore]**
***Present:*** **ATIR MAHMOOD, J.**
**Muhammad Faisal**
***Versus***
**Muhammad Arshad, etc.**

Civil Revision No. 1923 of 2009, decided on 25th March, 2015.

**PRE-EMPTION --- (Notice of Talb-i-Ishhad)**

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

---S. 115---Punjab Pre-emption Act, 1991, S. 13---Suit for possession through pre-emption---Issues---Courts below decreed suit---Performance of Talb-i-Ishhad---Pleadings and evidence---Judgment of apex Court---Effect---Plaintiffs' suit was pending when the judgment (2007 SCMR 1105) was passed by apex Court, therefore, it should have been applied by Appellate Court below if it could not be done by Trial Court---Respondent-plaintiff assailed that he sent notice Talb-i-Ishhad to petitioner who denied receipt thereof---Held: In circumstances, it was incumbent upon plaintiff to produce the postman to make affirmative statement in his favour but plaintiff could not produce postman, as such, requirement of Talb-i-Ishhad could not be fulfilled by plaintiff---Plaintiff had failed to establish performance of Talb-i-Ishhad required by law laid down by apex Court---As such suit of plaintiff was liable to be dismissed on that score alone---Civil Revision petition allowed/suit dismissed. (Paras 8, 9)

Ref. 2013 SCMR 866, 2007 SCMR 1105, 2009 SCMR 630, PLD 2013 SC 171.
نوٹس طلب اشہاد کے ثبوت میں مُدعی/رسپانڈنٹ نے ڈاکیا بطور گواہ پیش نہ کیا تھا۔ ہائی کورٹ نے نگرانی درخواست منظور کرتے ہوئےشفع دعویٰ خارج کر دیا۔
[Plaintiff did not produce postman as PW to prove the Notice of Talb-i-Ishhad. High Court while allowing revision petition dismissed suit for pre-emption].

*For the Petitioners:* Syed Kaleem Ahmed Khurshid, Advocate.

*For the Respondent:* Ch. Muhammad Rafiq Warriach, Advocate.

*Date of hearing:* 25th March, 2015.

**JUDGMENT**
**ATIR MAHMOOD, J. ---** This civil revision under Section 115, C.P.C. is directed against judgment and decree dated 07.09.2009 passed by learned Additional District Judge, Gujrat who dismissed appeal of the petitioner and upheld judgment and decree dated 22.06.2009 passed by learned Senior Civil Judge, Gujrat whereby suit of the respondent for possession through pre-emption was decreed.

2. Brief facts of the case are that respondent Muhammad Arshad filed a suit for possession through pre-emption against the petitioners alleging that the property measuring 7 kanals, 2 marlas, fully described in the plaint, was sold out to the petitioners *vide* mutation No. 686, dated 19.08.2003; that the plaintiff came to know through Haji Ghulam Hussain about the sale transaction on 01.12.2003 at 4.00 p.m. at his dera situated at Kot Allah Bukhsh in the presence of Muhammad Iqbal, Safdar Hussain and Zia Ullah; that he immediately declared his intention to pre-empt the sale; that he sent notice Talb-i-Ishhad to the petitioners through registered post A.D. but the petitioners-vendees did not admit the right of the plaintiff, therefore, the Talb-i-Khasoomat was fulfilled by filing the instant suit.

3. The suit was contested by the petitioners by filing written statement. Out of divergent pleadings of the parties, issues were framed. After recording evidence and hearing both sides, learned Trial Court decreed the suit of the respondent *vide* judgment and decree dated 22.06.2009. Feeling dissatisfied, the petitioners filed appeal which was dismissed by learned Additional District Judge, Gujrat *vide* judgment and decree dated 07.09.2009. Hence this civil revision.

4. Learned counsel for the petitioners has contended that the respondent-plaintiff was well in knowledge of the sale but he did not object to it at the relevant time; that the whole story narrated in the plaint is fabricated; that no notice was sent to the petitioners-vendees, particularly the plaintiff failed to produce the postman to make affirmative statement in his favour, as such, he failed to perform Talb-i-Ishhad as required under the law, therefore, this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the respondent be dismissed. He has relied upon the law laid down in case reported as *Allah Ditta through LRs and others v. Muhammad Anar* (2013 SCMR 866) and *Muhammad Bashir and others v. Abbas Ali Shah* (2007 SCMR 1105).

5. On the other hand, learned counsel for the respondent has vehemently opposed this civil revision and fully supported the impugned judgments and decrees. He has asserted that the plaintiff has been successful in proving performance of all the Talbs in accordance with law. Regarding production of postman, he has asserted that the suit of the plaintiff was instituted prior to pronouncement of judgments of the Supreme Court reported as *Allah Ditta through LRs and others v. Muhammad Anar* (2013 SCMR 866) and *Muhammad Bashir and others v. Abbas Ali Shah* (2007 SCMR 1105), therefore, these will neither have any effect nor can be applied to the case of the plaintiff as no law is applicable retrospectively. He has relied upon the law laid down in cases reported as *Muhammad Younis and others v. Essa Jan and others* (2009 SCMR 1169).

6. Arguments heard. Record perused.

7. The only controversy emerges from arguments of learned counsel for the parties is as to whether a judgment of Hon'ble Supreme Court of Pakistan will have effect upon a case instituted prior to pronouncement thereof.

8. The respondent-plaintiff asserts that he sent notice Talb-i-Ishhad to the petitioners who denied receipt thereof. In the circumstances, it was incumbent upon the plaintiff to produce the postman to make affirmative statement in his favour but the plaintiff could not produce the postman, as such, the requirement of Talb-i-Ishhad could not be fulfilled by the plaintiff as held by the Hon'ble Supreme Court of Pakistan in cases cited as *Allah Ditta through LRs and others v. Muhammad Anar* (2013 SCMR 866) and *Muhammad Bashir and others v. Abbas Ali Shah* (2007 SCMR 1105). However, learned counsel for the respondent asserts that the said judgment came after institution of the suit by the respondent-plaintiff, therefore, it cannot be applied to the plaintiff's case retrospectively whereas learned counsel for the petitioners submits otherwise. Main emphasis of learned counsel for the respondent-plaintiff is on the judgment of the apex Court reported as *Muhammad Younis and others v. Essa Jan and others* (2009 SCMR 1169) which reads that the law declared by Courts is not effective retrospectively and it only takes effect after announcement of the judgment or the date notified by the Court. However, there are two other judgments of the Hon'ble Supreme Court which speak otherwise. Relevant portions from the latter judgments are reproduced below:---

(i) *Dilber Khan v. Muhammad Ashraf* (PLD 2013 SC 171)

"Being conscious of the dicta of this Court whereby while declaring a particular law as ultra vires of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution) and a specific cut-off date as to when the judgment would take effect and further providing for saving the decision/decree passed prior thereto, we are of the view that latest judgment/verdict of this Court not falling within the above category, which enunciates the principle of law, in respect of a specific particular law by interpreting the same *e.g.* (preemption/rent/family) that such judgment shall be given fullest effect and should be strictly followed till the time the *lis* stands finally terminated/determined. Meaning thereby that it (*lis*) is not pending before any forum (not the apex Court); this should be irrespective when the case was instituted or the decision was passed by the first Court or subsequent Courts. It is the final and conclusive judgment/opinion of the apex Court deciding a question of law, or based upon or enunciates a principle of law which shall have the binding effect and should be adhered to in letter and spirit, obviously if it otherwise qualify the test of precedence over the earlier view, under the known principles of interpretation and application of the "precedent case law". In our opinion, the instant case was/is squarely covered by Pir Muhammad case at the revisional stage and the revisional Court was duty bound to decide the matter as per thereto in terms of Article 189 of the Constitution

(Emphasis provided)

(ii) *Haq Nawaz v. Muhammad Kabeer* (2009 SCMR 630)

As to the next contention of the learned counsel for the petitioner regarding applicability of the above referred case *i.e.* Mian Pir Muhammad (*supra*), on the pending cases filed before the pronouncement of the said judgment, it may be mentioned here that proposition in hand stands answered by this Court in the case of *Mst. Bashiran Begum v. Nazar Hussain and another*, PLD 2008 SC 559, wherein, it was held that the requirement of mentioning the date, place and time in the plaint is also essential even in the pending cases. "

(Emphasis provided)

Bare reading of above makes it crystal clear that the judgments delivered by the Hon'ble Supreme Court of Pakistan are applicable to the cases pending before the Courts, however, these will have no effect upon the cases which are finally decided/determined by the apex Court. As such, there arises no question as to when the case was instituted. However, if a case has ultimately been decided by the apex Court, it will not be reopened on the basis of the law laid down by the apex Court subsequently. The plaintiff's suit was admittedly pending when the judgment *Muhammad Bashir and others v. Abbas Ali Shah* (2007 SCMR 1105) was passed by the Hon'ble Supreme Court of Pakistan, therefore, it should have been applied to by the Appellate Court if it could not be done by the Trial Court. But the learned lower Appellate Court has failed to do so as the law laid down by the Hon'ble Supreme Court was binding upon it. However, this can be done by this Court even at the revisional stage because the judgments of the Hon'ble Supreme Court are binding upon all subordinate Courts in view of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973. Since the plaintiff has admittedly not produced the postman to make affirmative statement in favour of the plaintiff, the plaintiff has failed to establish the performance of Talb-i-Ishhad as required by law laid down by the apex Court in cases reported as *Muhammad Bashir and others v. Abbas Ali Shah* (2007 SCMR 1105) and *Allah Ditta through LRs and others v. Muhammad Anar* (2013 SCMR 866), as such, the suit of the plaintiff is liable to be dismissed on this score alone.

9. For the afore-mentioned reasons, this civil revision is allowed, the impugned judgments and decrees are set aside and the suit of the respondent-plaintiff is dismissed.

Civil Revision petition allowed/suit dismissed.

**PLJ 2015 Lahore 674 (DB)**
**[Bahawalpur Bench Bahawalpur]**
***Present:*** **ATIR MAHMOOD AND SHAHID BILAL HASSAN, JJ.**
***Mst.*** **AMMARA TASNIM BHUTTA--Appellant**
**versus**
***Mst.*** **KHALIDA MUNIR and another--Respondents**

I.C.A. No. 1 of 2015 in T.A. No. 35 of 2014, heard on 11.2.2015.

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

----S. 24--Law Reforms Ordinance, 1972, S. 3--Intra Court Appeal--Application for transfer of suit--Being member of bar association is influencing Court proceedings--Maintainability of I.C.A.--Report of Civil Judge--Validity--Appellant being an advocate of bar is threatening and exerting pressing on Court through office bearers of bar, therefore, he requested for transfer of the case from his Court to any other Court--High Court has vast power to transfer case from one Court to another subordinate to it under Section 24, CPC as such while accepting transfer application, single bench has committed no illegality or acted against law--High Court has passed order under provision of law in supervisory jurisdiction and not in original civil jurisdiction--Provisions of Section 3 of Law Reforms Ordinance, 1972 are not applicable in instant case, as such ICA was not maintainable. [P. 676] A & B

2001 CLC 1319; 2004 MLD 1615; 1991 SCMR 1887 and
1989 SCMR 818 *rel.*

*Mr. Hameed-uz-Zaman,* Advocate for Appellant.
*Mr. Muhammad Atif Qureshi,* Advocate for Respondents.
Date of hearing: 11.2.2015.

**JUDGMENT**

**Atir Mahmood, J.--**By way of filing the instant Intra-Court Appeal, appellant *Mst.* Ammara Tasnim Bhutta, Advocate has called in question *vires* of order dated 08.01.2015 passed by learned Single Judge in Chamber whereby T.A. No. 35/2014 filed by the respondent was allowed.

2. Succinctly stated the facts of the case are that the respondent filed application for transfer of suit titled *'Munir Ahmad v. Ammara Tasnim Bhutta'* and Contempt Petition titled *'Mst. Ammara Tasnim Bhutta vs. Mst. Khalida Munir* from the Court of learned Civil Judge Ahmedpur East to any other Court of competent jurisdiction at Bahawalpur on the ground that the appellant (the respondent in the Transfer Application) being a practicing lawyer and member of the bar at Tehsil Ahmadpur East is influencing the Court proceedings, as such, free trial thereat, the respondent asserted, was not possible. The appellant contested the application. Learned Single Judge sought report from the concerned Court which supported version of the respondent. Learned Single Judge accordingly accepted the transfer application *vide* impugned order. Hence this ICA.

3. Learned counsel for the appellant *inter alia* contends that the appellant never influenced the Court proceedings; that the respondent earlier filed two applications for transfer of the cases which were dismissed by learned District Judge, Bahawalpur which orders were never assailed before any competent forum, as such, these orders attained finality; that the respondent while filing T.A. before this Court concealed fact of dismissal of her earlier applications, therefore, she, not approaching this Court with

clean hands, is not entitled to any relief; that the impugned order is against law as learned Single Judge has himself admitted in the impugned order that the ground raised by the respondent in T.A. is not sufficient for transfer of the case; that the case be transferred to a Court of some other district except Bahawalpur; that the respondent could not file the T.A. directly before this Court. He prays that this ICA be allowed, the impugned order be set aside and the T.A. filed by the respondent be dismissed.

4. On the other hand, learned counsel for the respondent has vehemently opposed this ICA and fully supported the impugned order. He has mainly contended that the ICA is not maintainable. He has relied upon the dictums laid down in cases reported as *Nazar Muhammad and 3 others vs. Roshan Iqbal and 3 others* (2001 CLC 1319 (Lahore); *Begum D.F. Hassan vs. Habib Bank Ltd. Lahore* (PLD 1974 Lahore 117), *Agha Abdul Rahman Khan and others vs. Managing Director, Cholistan Development Authority, Bahawalpur* (2004 MLD 1615 (Lahore), *Muhammad Hussain vs. Fatch Muhammad* (1991 SCMR 1887) and *Usman A. Ghafoor and 2 others vs. Messrs Attock Textile Mills Ltd. and 2 others* (1989 SCMR 818).

5. Arguments heard. Record perused.

6. Perusal of record reveals that the respondent filed application for transfer of cases from the Court of learned Civil Judge, Ahmedpur East to another Court of competent jurisdiction at Bahawalpur which was contested by the appellant. Learned Single Judge being not satisfied with the contention of the respondent that the Courts proceedings were being influenced by the appellant being a member of bar thereat directed the Civil Judge, Ahmedpur East for submission of report. The learned Civil Judge reported that the appellant being an Advocate and member of Tehsil Bar is threatening and exerting pressing on the Court through office bearers of the bar, therefore, he requested for transfer of the case from his Court to any other Court at Bahawalpur. In the circumstances, learned Single Judge in Chambers seems right in transferring the cases sought for by the respondent through the T.A.

7. The contention of learned counsel for the appellant that the cases be transferred to any other district except Bahawalpur is without any force as both the parties belong to Tehsil Ahmedpur and distance of Bahawalpur City is equal for both the parties where they can appear and pursue their cases and no prejudice is going to be caused to any of the parties by the impugned order.

8. Even otherwise, the High Court has vast powers to transfer cases from one Court to another subordinate to it under Section 24 of the C.P.C., as such, while accepting the T.A., the learned Single Judge has committed no illegality or acted against the law.

9. Furthermore, learned Single Judge has passed the order impugned under said provision of law in supervisory jurisdiction and not in the original civil jurisdiction, therefore, the provisions of Section 3 of the Law Reforms Ordinance, 1972 are not applicable in this case, as such, the ICA is not maintainable. Reliance is placed on the ratio laid down in case reported as Begum *D.F. Hassan vs. Habib Bank Ltd. Lahore* (PLD 1974 Lahore 117). Learned counsel for the appellant has failed to pointed out any illegality in the impugned order calling for interference by this Court.

10. For what has been discussed above, this ICA has no merit. The same is dismissed.

(R.A.) I.C.A. dismissed.

**2016 C L C 73**

**[Lahore]**

**Before Atir Mahmood, J**

**KHUDA BAKHSH----Petitioner**

**Versus**

**MUHAMMAD YAR and others----Respondents**

Civil Revision No.533 of 1996, decided on 18th December, 2014.

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

----Ss. 27 (b) & 42---Civil Procedure Code (V of 1908), O.I, R.10---Suit for declaration---Necessary party---Subsequent purchaser---Plea raised by plaintiff was that subsequent purchasers could not file appeal against judgment and decree passed by Trial Court---Validity---Appellants before Lower Appellate Court were subsequent purchasers of suit property and question as to whether they were bona fide purchasers of suit property could only be decided if they were impleaded as defendants in the suit---Appellants before Lower Appellate Court claimed that they purchased the property through sale mutation after due verification of ownership of defendants, as their names were duly incorporated in record of rights and there was no restraining order on record whereby property could not be shown to be under any lien---Appellants were legally entitled to file appeal before the lower Appellate Court against judgment and decree passed by Trial Court.

Sahib Dad v. Province of Punjab and others 2009 SCMR 385 rel.

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

----S. 42---Qanun-e-Shahadat (10 of 1984), Arts.17 & 79---Suit for declaration---Ownership---Proof---Two marginal witnesses, requirement of---Plaintiff filed suit claiming to be owner in possession of suit property and alleged that sale deed in favour of defendants was a forged document---Trial Court decreed suit in favour of plaintiff but Lower Appellate Court dismissed the suit---Plea raised by plaintiff was that defendants did not produce two marginal witnesses to prove sale deed in their favour---Validity---Plaintiff failed to establish on record that disputed sale deed in favour of defendants was forged and fictitious document---Contention of plaintiff that only one marginal witness was produced and there was no other eyewitness, therefore, sale deed was not in accordance with provisions of Qanun-e-Shahadat, 1984, was misconceived, as in year, 1979, Qanun-e-Shahadat, 1984, was not in existence, therefore, provisions of Arts.17 and 79 of Qanun-e-Shahadat, 1984, were not attracted---Appearance of one marginal witness of document, whose credibility could not be shaken in cross-examination, was sufficient to prove existence of valid sale deed which was duly registered with Sub-Registrar---Disputed sale deed was a registered document and in order to discredit the same, very heavy burden was upon plaintiff but he failed to do it by appearing in witness box in his affirmative evidence and thereafter by any cogent evidence produced in rebuttal of defendants---Plaintiff

was not in possession of property at the time of filing of suit and was under legal obligation to seek relief of possession while filing suit, therefore, suit of plaintiff was barred under S.42 of Specific Relief Act, 1877---High Court maintained judgment and decree passed by Lower Appellate Court.

Shujahat Hussain Versus Muhammad Habib and another 2003 SCMR 176; Mst. Aisha Bibi v. Nazir Ahmad and 10 others 1994 SCMR 1935; Muhammad Nawaz and 2 others v. Muhammad Khan and 9 others 2009 CLC 663; Sadiq Ali v. Raj Din and others PLD 1992 Lah. 158; Habib Ahmad v. Muhammad Aslam alias Lashkar 2002 SCMR 1391; Khawaja Muhammad Naeem and others v. Tasleem Jan and others 1980 CLC 1483; Sahib Dad v. Province of Punjab and others 2009 SCMR 385 and Mst. Sharman and 211 others v. Syed Ali Hussain and 8 others 2006 YLR 130 ref.
Muhammad Fazil Muhammad for Petitioner.
Mian Muhammad Akram for Respondents Nos.1 to 3.
Respondents Nos.4 and 5 proceeded against ex parte vide order dated 25-6-2003.
Date of hearing: 18th December, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** The petitioner filed a suit for declaration against respondents No.4 & 5 and one Samiullah, who died on 13.03.1995. The petitioner contended in the plaint that he was owner in possession of the land, described in headnote of the plaint; that when the defendants asserted ownership over the suit land, the petitioner got checked the revenue record whereupon he came to know that defendant No.1/respondent No.4 had got prepared a forged sale deed dated 21.01.1979 in her favour and on the basis of said registered sale deed, she has also mutated the land in her favour vide mutation No.15.05.1979; that afterwards, defendant No.1 further alienated the suit property in favour of defendants No.2 (since died) & 3 (respondent No.5 in this civil revision) vide registered sale deed dated 03.01.1985 and mutation No.251 dated 05.06.1985; that defendant No.1 was not owner of the land at the time of registration of the sale deed, therefore, she could not alienate the suit property in favour of defendants No.2 & 3; that the petitioner-plaintiff being owner of land to the extent of 96 kanals and 1 marla could not alienate the suit property measuring 36 kanals and 1 marla in favour of defendant No.1 as per MLR 115; since the original transaction in favour of defendant No.1 is violative of terms of MLR, subsequent alienation in shape of gift in favour of defendants No.2 & 3 is also illegal and unlawful and liable to be cancelled.

2. The suit was resisted by the respondents-defendants who also filed contesting written statement. Out of divergent pleadings of the parties, learned trial court framed the following issues:-
After recording evidence of the parties and hearing both sides, learned Civil Judge, Lodhran decreed the suit of the petitioner vide judgment and decree dated 25.03.1991. However, in appeal by the respondents, the learned Additional District Judge, Lodhran reversed findings of learned trial court vide judgment and decree dated 14.12.1995 which has been assailed in this civil revision.
3. Learned counsel for the petitioner inter alia contends that the appeal of respondents Nos.1 to 3 was not competent as the alleged transfer of land took place during the

pendency of the suit, as such, keeping in view the principle of lis pendens, respondents No.1 to 3 had no right to file the appeal; that respondents No.1 to 3 could not prove the factum of bona fide purchasers and they also did not move any application for their impleadment in the suit proceedings; that at the most, the learned lower appellate court, if accepted version of respondents Nos.1 to 3 of bona fide purchasers, could send the case back to the trial court for impleading them as defendants in the suit; that findings of learned lower appellate court on issues Nos.1 & 2 are contrary to the evidence available on record and it has also failed to apply correct law in this case, therefore, this civil revision be allowed, the impugned judgment and decree be set aside and the judgment and decree of learned trial court be restored. He has relied upon the judgment of the Hon'ble Supreme Court reported as Shujahat Hussain Versus Muhammad Habib and another (2003 SCMR 176).

4. On the other hand, learned counsel for the respondents No.1 to 3 have supported the judgment and decree of the learned appellate court by submitting that the petitioner failed to discharge the initial onus to prove his case that the impugned registered sale deed is a result of fraud and forgery as he never appeared in his affirmative evidence and only appeared when the evidence of the defendants was already recorded. He submits that the PW-1 admitted the sale of the land which fact remained un-rebutted; that the respondents/defendants being the bona fide purchasers of the property in dispute took over the possession of the property and khasra girdawaries were duly prepared showing the names of the respondents; that the documentary evidence excludes the oral evidence and that the violation of MLR 115 could not be assailed before the Civil Court as it was exclusive domain of the land commission or their subordinate officers. It is also submitted that since the petitioner was out of the possession of the property, therefore, simple suit for declaration without seeking the possession of the property was not maintainable and was liable for dismissal. He has relied upon the judgments reported as Mst. Aisha Bibi Versus Nazir Ahmad and 10 others (1994 SCMR 1935), Muhammad Nawaz and 2 others Versus Muhammad Khan and 9 others (2009 CLC 663), Sadiq Ali Versus Raj Din and others (PLD 1992 Lahore 158), Habib Ahmad Versus Muhammad Aslam alias Lashkar (2002 SCMR 1391) and Khawaja Muhammad Naeem and others Versus Tasleem Jan and others (1980 CLC 1483).

5. Respondents Nos.4 & 5 have already been proceeded against ex parte vide order dated 05.06.2003.

6. Arguments heard. Record perused.

7. The emphasis of the petitioner is on the following points:-

(i) That the respondents Nos.1 to 3 were not eligible to assail the judgment and decree of the learned trial court as they were not party to the proceedings before the trial court and precluded to file the appeal as they never filed any application before the trial court for impleading them as defendants.
(ii) That the respondents Nos.1 to 3 failed to prove that they were bona fide purchasers of the property during pendency of the suit.

(iii) That the respondents Nos.4 and 5, being the beneficiaries of the disputed document, failed to prove the execution of the sale deed by production of two marginal witnesses as well as to prove the payment of consideration amount.

The first two points raised by the learned counsel for the petitioner are not sustainable. It is observed that any person who is adversely effected from any judgment and decree has a right to file an appeal against the same. The case of the respondents Nos.1 to 3 is that they being the bona fide purchasers of the property have every right to contest the judgment and decree. Admittedly, the respondents Nos.1 to 3 are the subsequent purchasers of the property and the question as to whether they are the bona fide purchasers of the property could only be decided if they were impleaded as defendants in the suit. The respondents Nos.1 to 3 claimed while filing their appeal that they purchased the property through sale mutation dated 20.12.1990 after due verification of ownership of the respondents No. 2 to 4 (in the appeal) as the names of the said respondents were duly incorporated in the record of rights and there was no restraining order on the record whereby the property could be shown to be under any lien, therefore, in my view, the respondents Nos.1 to 3 were legally entitled to file the appeal against the impugned judgment and decree. Reliance is placed upon the judgment of the august Supreme Court in a case titled Sahib Dad Versus Province of Punjab and others (2009 SCMR 385). The relevant paragraph of the said judgments is reproduced as under:-

> "It is true that the petitioner was not a party to the said revision petition, but it is equally true that he, under the law, could have challenged the said order. It has been held in the case of H.M. Saya & Co. v. Wazir Ali Industries Limited PLD 1969 SC 65 that a stranger to a suit or a proceeding can file an appeal if he adversely affected by an order in that suit or proceeding". (Emphasis Provided).

8. As far as the next argument of the learned counsel for the petitioner is concerned, it is observed that in order to prove his case the initial burden to prove issues Nos.1 and 2 was upon the petitioner/plaintiff, who produced PW-1 Ghulam Rasool and he deposed in his examination-in-chief that according to his record Mst. Shehzadi Ejaz Parveen (respondent No.4) purchased the disputed property vide registered sale deed No. 31005 dated 24.10.1978 which was duly incorporated through mutation dated 03.12.1979, meaning thereby that the transaction of sale is admitted by the witness of the petitioner. He did not depose that any fraud or forgery was committed by the said respondents at the time of execution of sale deed. He also deposed that on 21.01.1979, Shehzadi Ejaz Parveen respondent No.4 was not owner of the property in village and on the same date she became the owner of the property by purchasing the land from Khuda Bakhsh, the petitioner. The petitioner did not challenge the version of his own witness. However, he did not appear before the learned trial court in his affirmative evidence and reserved his right to appear as his own witness after the evidence of the defendants. I am of the considered opinion that the petitioner failed to discharge the initial onus to prove his case i.e. issues No. 1 and 2. Reliance is placed upon a judgment of this Court reported as Mst. Sharman and 211 others Versus Syed Ali Hussain and 8 others (2006 YLR 130). There is no cavil to the proposition that the contesting defendants, being the beneficiaries of the disputed document were under a

legal obligation to prove the factum of due execution of the registered sale deed. The said respondents/defendants produced Ashiq Husain as DW-1 who deposed that he is a Lumberdar of the area and the petitioner Khuda Bakhsh alienated 36 kanals 8 marlas of land to the defendants and he identified the said Khuda Bakhsh. He also deposed that Khuda Bakhsh, the petitioner put his thumb impression before the petition-writer. He also deposed that the petitioner put his thumb impression before the Sub-Registrar after receiving the cheque of Rs.30,000/-. During cross-examination, he admitted that today he had not seen the original sale deed as it was not produced before him to testify his signature. During the entire cross-examination, no suggestion was put to him that Khuda Bakhsh never put his thumb impression upon the registered sale deed nor it was confronted to him that Khuda Bakhsh never received the cheque of Rs.30,000/-. DW-2 Koray Khan deposed in his examination-in-chief that bargain was struck in his presence for an amount of Rs.30,000/- and payment was to be made before the Sub-Registrar. He deposed that the property in dispute is in possession of the defendant No.1, who subsequently alienated the same to his brother Sami Ullah (defendant No.2). During cross-examination, he stated that at the time of registration of sale deed he was present and Allah Yar petition-writer wrote the sale deed. He denied the suggestion that no bargain was struck in his presence. DW-3, Allah Yar the petition-writer deposed that on the asking of Khuda Bakhsh Exh.D1 was written by him which is duly entered in his register "Wasika Navees" of the year 1997. Even no suggestion was put to this witness that he did not write any sale deed. DW-4 Muhammad. Siddique, Registry Moharrar deposed that Exh.D2 is an attested copy of the registered sale deed which is duly entered in the register vasika navees of the year 1990. He deposed that the said register is thumb marked by Khuda Bakhsh as well as signed by Shehzadi Ejaz Parveen (defendant No.1) identified by Ashiq Hussain Shah. The defendant No.1 Shezadi Ejaz Parveen appeared in the witness box as DW-4 and she deposed that she purchased the property through sale deed from Khuda Bakhsh for a consideration of Rs.30,000/-; that Khuda Bakhsh put his thumb impression; that Khuda Bakhsh is her brother-in-law ( ). She deposed that as a witness of the sale deed, her husband Malik Ashiq appeared and Khuda Bux was duly identified by Ashiq Hussain Shah Lumbardar. She also deposed that payment of Rs.30,000/- was made through cheque. In the cross-examination, no suggestion was put to this witness that the petitioner never appeared before the Sub-Registrar for registration of the sale deed. Though a suggestion has been put that the registered sale deed is forged and fictitious document but it has nowhere been confronted to her that the thumb impressions of the petitioner, on the sale deed are forged and fictitious.

Keeping the evidence of both the parties in juxta position it becomes crystal clear that the petitioner miserably failed to establish on record that the disputed sale deed in favour of the respondent No.4, Shehzadi Ejaz Parveen was forged and fictitious document. The argument of the learned counsel for the petitioner that only one marginal witness was produced in evidence and there is no other eye-witness, therefore, the sale deed is not in accordance with the provisions of Qanun-e-Shahadat Order, 1984, is mis-conceived as in the year 1979, the Qanun-e-Shahadat Order, 1984 was not in existence, therefore, the provisions of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 could not be attracted. The appearance of one marginal witness of the document, whose credibility could not be shaken in the cross-examination, is sufficient to prove the existence of a valid sale deed which is duly registered with the

Sub-Registrar. Even otherwise, the disputed sale deed is a registered document and in order to discredit it a very heavy burden was upon the petitioner but he failed to do it by appearing in the witness box in his affirmative evidence and there-after by any cogent evidence produced in rebuttal of the respondents/ defendants. Reliance is placed upon the judgment of the Hon'ble Supreme Court reported as Habib Ahmad Versus Muhammad Aslam alias Lashkar (2002 SCMR 1394). The relative paragraph of the said judgment reads as under:-

> "As regards the proof of execution of the sale-deed in question suffice it to say that the sale-deed is a registered document and the respondents are in possession of the suit land on the basis thereof therefore, non-examination of its attesting witnesses is not fatal. Last but not the least, no concrete instance of mis-reading or non-reading of evidence has been highlighted by the learned counsel for the petitioners". (Emphasis Provided)

10. As far as the argument of the learned counsel for the petitioner that the sale in favour of the respondent No.4/defendant was in violation of MLR 115 and therefore the transaction was void abi initio is also without any substance as the Civil Court had no jurisdiction to declare any such sale deed as void. The exclusive domain, in order to challenge the same, was of the Land Commission. Reliance is placed upon the judgment of this Court reported as Muhammad Nawaz and 2 others Versus Muhammad Khan and 9 others (2009 CLC 663). The relevant paragraph of the said judgment reads as under:-

> "Apart from the said facts apparent on the face of record the settled rule of law is that jurisdiction to declare any transaction to be void under M.L.R. 115 exclusively vests in the land Commission or its subordinate officers and jurisdiction of the Civil Court as also all other Tribunals/Authorities is absolutely excluded as laid down in the case of Mst. Aisha Bibi being relied upon by the learned counsel and which has since been followed by all Courts in the country. The impugned judgment and decree of the learned Additional District Judge, therefore, is wholly without lawful authority". (Emphasis Provided).

11. There is yet another aspect of the case that the petitioner miserably failed to prove that he is still in possession of the property. His own witness PW-1 admitted that the property was alienated to the respondent No.4/defendant and the witnesses of the respondents categorically deposed that the possession lies with the respondents. Furthermore, the documentary evidence produced as Exh.D3 to Exh.D5 categorically established the possession of the respondent, Mst. Shehzadi Ejaz Parveen in her own rights. It is well settled principle of law that the documentary evidence excludes the oral evidence as a witness can tell a lie but document cannot. Furthermore, Exh.D3 to Exh.D5 remained un-rebutted, therefore, I am of the considered opinion that the petitioner, not being in possession of the property at the time of filing the suit, was under a legal obligation to seek relief of possession while filing the suit, therefore, the suit of the petitioner was also barred under section 42 of the Specific Relief Act. Resultantly, this civil revision being devoid of any force is hereby dismissed.

MH/K-2/L Revision dismissed.

**2016 C L C 1095**

**[Lahore]**

**Before Atir Mahmood and Shahid Mubeen, JJ**

**Messrs MEGA STEEL MILLS PRIVATE LIMITED----Appellant**

**Versus**

**GOVERNMENT OF PUNJAB through Secretary, Environmental Protection Department, Punjab, Lahore and 6 others----Respondents**

W.P. No.17300 converted in F.A.O. No.145 of 2015, decided on 22nd December, 2015.

**(a) Pakistan Environmental Protection Act (XXXIV of 1997)---**

----Ss. 16 & 23---Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, Rgln.20(3)---Environment protection---Sealing of property---Audi Alteram Partem, principle of---Applicability---Appellant company was aggrieved of sealing its factory by authorities under Pakistan Environmental Protection Act, 1997---Plea raised by appellant was that no opportunity of hearing was provided to appellant, before sealing its factory---Validity---Authorities were not empowered under S.16 of Pakistan Environmental Protection Act, 1997, and Regln.20(3) of Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, to seal property---Sealing of property / premises of appellant by authorities was beyond the scope of Pakistan Environmental Protection Act, 1997, and Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000---Action of sealing property of appellant by authorities was violative of principle of audi alteram partem as no notice was given by authorities to appellant---Principles of natural justice had to be observed in all proceedings whether judicial or administrative, if proceedings were to result in consequences affecting person or property or other right of parties concerned---Such rule was applied even though there was no positive words in statute or legal document whereby power was vested to take such proceedings and in such cases such requirement was to be implied into it as the minimum requirement of fairness---High Court set aside the order of sealing of factory of appellant by authorities---Appeal was allowed in circumstances.

Amanullah Khan v. Chief Secretary, Government of NWFP and others 1995 SCMR 1856; The Registrar of University of Dacca v. Zakir Ahmad PLD 1965 SC 90; Mrs. Anisa Rehman v. P.I.A.C. and another 1994 SCMR 2232 and Abdul Hafeez Abbasi and others v. Managing Director, Pakistan International Airlines Corporation, Karachi and others 2002 SCMR 1034 rel.

**(b) Maxim---**

-----Audi Alteram Partem---Applicability---Scope.

Syed Riaz-ul-Hassan Gillani for Appellant.

Mubashar Latif Gill, A.A.G.

Syed Ahsan Raza Hashmi for respondent No.7.

Hafiz Muhammad Tahir and Khalid Iqbal Cheema for Respondents

**ORDER**

Through this First Appeal under section 23 of the Pakistan Environmental Protection Act, 1997, the appellant has prayed that the action of sealing of factory of the appellant by officials of respondent No.3 and order bearing No.297, dated 09.10.2015

passed by respondent No.3 (on the face of letter No.157/AD/R&I/EPA/MN/1090, 1st October, 2015) be declared illegal, without lawful authority and ineffective upon the rights of the appellant.

2. Briefly the facts of the case as discernable from the contents of this appeal are that the appellant purchased land measuring 16 kanals and 11 Marlas situated at Khewat No.91/91, Khatoni No.195, 14-km Lahore-Khanewal Road, Mouza Karplapur, Multan, from respondent No.7 and after obtaining NOCs from all the concerned departments and fulfilling all the codal formalities, constructed a factory thereupon known as Mega Steel Mills (Pvt.) Limited. Respondent No.7 filed an application to the Chief Minister Punjab alleging therein that two furnaces have been installed in the said factory for the production of iron rods and TRs which are polluting the environment and causing diseases of eyes and lungs in the vicinity. This application was converted into complaint before the Environmental Tribunal Lahore by respondent No.3/Director General Environmental Protection Agency Punjab, Lahore, which is pending adjudication. The appellant also filed an appeal before the Environmental Protection Agency for the dismissal of complaint bearing No.44/2014. Said appeal was dismissed in default vide order dated 17.09.2015. However, the same has been restored vide order dated 01.12.2015. During the pendency of said application for restoration of the appeal, the officials of respondent No.3 came to the spot and sealed the factory of the appellant in pursuance of order dated 09.10.2015 passed by respondent No.3. Hence this FAO.

3. It is contended by the learned counsel for the appellant that the respondent/department has no jurisdiction to seal the premises, of the appellant. He further contends that the sealing of premises of the appellant is violation of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973. He further submits that the respondent/ department has no power to seal, the premises of the appellant under sub-Regulation (3) of Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000 as well as under the Punjab Environmental Protection Act, 1997. On the other hand learned Assistant Advocate General assisted by learned counsel for respondent has supported the impugned action of sealing the factory of the appellant by the official of respondent No.3 as well as impugned order dated 09.10.2015.

4. Arguments heard. Record perused.

5. For the following reasons, this appeal is liable to be accepted:--

(a) As regards the contention of the learned counsel for the appellant that the respondent/department has no power and jurisdiction under the Punjab Environmental Protection Act, 1997 as well as Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, for facility of reference, the relevant, provisions of law are reproduced herein below:-

**"16. Environmental protection order.---** (1) Where the Provincial Agency is satisfied that the discharge or emission of any effluent, waste, air pollutant or noise, or the disposal of waste, or handling of hazardous substance, or any other act or omission is likely to occur, or is occurring, or has occurred, in violation of any provision of this Act, rules or regulations or of the conditions of a license, or is likely to cause, or is causing, or has caused an adverse environmental effect, the Provincial Agency may, after giving the person responsible for such discharge, emission, disposal, handling; act or omission

an opportunity of being heard, by order, direct such person to take such measures as the Provincial Agency may consider necessary within such period as may specified in the order.

(2) In particular and without prejudice to the generality of the foregoing power, such measures may include--

(a) immediate stoppage, preventing, lessening or controlling the discharge, emission, disposal, handling, act or omission, or to minimize or remedy the adverse environmental effect;

(b) installation, replacement or alteration of any equipment or thing to eliminate or control or abate on a permanent or temporary basis, such discharge permission, disposal, handling, act or omission,.

(c) action to remove or otherwise dispose of the effluent, waste, air pollutant, noise or hazardous substances; and

(d) action to restore the environment to the condition existing prior to such discharge, disposal, handling, act or omission or as close to such condition as may be reasonable in the circumstances; to the satisfaction of the Provincial Agency.

(3) Where the person, to whom directions under subsection (1) are given, does not comply therewith, the Provincial Agency may, in addition to the proceeding initiated against him under this Act or the rules and regulations, itself take or cause to be taken such measures specified in the order as it may deem necessary, and may recover the costs of taking such measures such person as arrears of land revenue."

The other relevant provision relied upon by the learned counsel for the respondent/department and the learned Assistant Advocate. General contains in sub-Regulation (3) of Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, which is reproduced herein below:-

**"20. Cancellation of approval**

(1)

(2)

(3) On cancellation of the approval, the proponent shall cease construction or operation of the project forthwith."

As is evident from the above quoted provisions of section 16 of the Act ibid as well as sub-Regulation (3) of Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, it does not empower the respondent/department to seal the property, therefore, the sealing of property/premises of the appellant by the officials of respondent No.3 is beyond the scope of Environmental Laws and Regulations relied upon by the respondent/department.

(b) The sealing of property/premises of the appellant by the officials of respondent No.3 is also violative of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973. This would not only deprive the appellant but also the labourers working there from this livelihood, which is not the intention of law.

(c) The word sealing is nowhere mentioned either in the Punjab Environmental Protection Act, 1997 or the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, therefore, if the Legislature has not used the word sealing, this omission cannot be supplied by the Court under the principle of casus

omissus. Reference may be made to case law titled Amanullah Khan v. Chief Secretary, Government of NWFP and others (1995 SCMR 1856). The relevant portion of the judgment is reproduced herein below:--

> "4. The learned counsel for the petitioner perhaps attempted to press into service in his arguments the concept of 'casus omissus'. Casus omissus is a point or case unprovided for. When a given state of affairs does not come within the obvious meaning of the words of the statute, that is, when certain contingencies are not provided for or when the words do not embrace the particular question in hand, it is a case of 'casus omissus' (see Bhadramma v. Kotam Raj (AIR 1955 Hyderabad 140). By the recognized principles of construction of statutes we are not entitled to read words into a statute unless clear reason for it is to be found within the four corners of the statute itself. In Dr. L. Raymond v. Flourence B. Yakehee (AIR 1957 Allahabad 212) the process of casus omissus was depreciated in the following words:--
>
> "A court can construe or interpret existing words but cannot supply missing word in a statute."
>
> In Kamalaranjan v. Secretary of State (AIR 1938 PC 281) this rule of construction was disapproved in the following paragraph at page 383 of the report:--
>
> "The court cannot put into the Act words which are not expressed and which cannot reasonably be implied on an recognized principles of construction. That would be a work of legislation, not of construction, and outside the province of the Court."
>
> Again it is a well-established principle of construction of statutes that the Court cannot supply omissions by implication and analogy, unless existing provisions of a statute by necessary intendment to compel the court. (See Rajammal v. The Chief Justice (AIR 1950 Madras 185). That is only possible that it effectuates the legislative intention."

(d) The act of sealing the property of the appellant by the officials of respondent No.3 is also violative of principle of Audi Alteram Partem as no notice was given by the respondent department to the appellant. It is well settled principle of law that in all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting "the person or property or other right of the parties concerned". This rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases this requirement is to be implied into it as the minimum requirement of fairness. Reference may be made to cases titled (1) The University of Dacca through its Vice-Chancellor and (2) The Registrar of University of Dacca v. Zakir Ahmad (PLD 1965 SC 90); Mrs. Anisa Rehman v. P.I.A.C. and another (1994 SCMR 2232) and Abdul Hafeez Abbasi and others v. Managing Director, Pakistan International Airlines Corporation, Karachi and others (2002 SCMR 1034).

6. Sequel to the above, this appeal is accepted and the action of sealing the premises of the appellant by officials of respondent No.3 and impugned order dated 09.10.2015 are hereby set aside with no order as to cost.

MH/M-21/L Appeal allowed.

**2016 C L C 1604**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD ABID AKRAM CHEEMA----Petitioner**

**Versus**

**ANEELA CHEEMA and others----Respondents**

Writ Petition No.18140 of 2014, decided on 3rd July, 2014.

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

----Ss. 7(2) & 5, Sched---Constitution of Pakistan, Art.199---Constitutional petition---Suits for recovery of dower and maintenance allowance---Additional evidence, production of---Scope---Application for permission to produce documents and witnesses was filed by the plaintiff-wife which was accepted by the Family Court---Validity---Family Court might grant permission for production of any witness at any stage if same was necessary to reach at a just and fair conclusion---Present application was moved at a preliminary stage of trial---Occasion to file the present application arose when defendant-husband denied the existence of a valid marriage and asserted that the same was a paper marriage---Documents and witnesses which were sought to be produced in evidence were necessary for just and fair adjudication of the matter---Plaintiff-wife might not be in a position to confront all such documents if permission to produce said documents was declined at present stage and there would be multiplicity of litigation---Defendant-husband had every right to rebut the evidence intended to be produced by the plaintiff-wife and he had also right of cross-examination upon the witnesses of plaintiff-wife---Each party had a right of fair trial and no prejudice had been caused to the rights of defendant-husband---Family Court had exercised jurisdiction rightly and no illegality or irregularity had been committed---Impugned order was based on convincing reasons---Constitutional petition was dismissed in circumstances.

Muhammad Faheem Bashir for Petitioner.
Ijaz Feroze for Respondent.
Date of hearing: 3rd July, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the legality of order dated 21.05.2014 passed by learned Judge Family Court, Lahore whereby the application of respondent No.1 (the respondent) seeking permission to produce documents and witnesses was allowed. The said application was filed by the

respondent in her suit for recovery of dower amount and maintenance allowance after submission of contesting written statement by the petitioner-defendant and framing of issues by the family court when the suit was fixed for plaintiff's evidence.

2. Learned counsel for the petitioner inter alia contends that the leaned family court has failed to take note of the fact that the application for producing documents and witnesses was filed by the respondent at a belated stage without offering any reason or justification; that the application was aimed at to produce additional evidence on issues, the onus probandi of which is laid on the respondent but this aspect of the case has totally been ignored by learned court below; that learned trial court incorrectly interpreted and applied the provisions of Section 7(2) of the Family Courts Act, 1964 (the Act); that the application of the respondent was hit by Section 11(2) of the Act; that the impugned order has been passed arbitrarily without appreciating the law on the subject; that the learned court below has exercised the jurisdiction illegally while committing material irregularities, therefore, this writ petition be allowed, the impugned order be set aside and the application of the respondent for producing documents and witnesses be dismissed.

3. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and fully supported the impugned order mainly on the ground that the application has been filed at a stage when no evidence of any party was recorded and the petitioner has every right of rebuttal and cross-examination upon the witnesses intended to be produced by the respondent.

4. Arguments heard. Record perused.

5. Learned counsel for the petitioner has, stressed more on Section 7(2) of the Act which is reproduced below:

> "7(2) The plaint shall contain all material facts relating to the dispute and shall contain a Schedule giving the number of witnesses intended to be produced in support of the plaint, the names and addresses of the witnesses and brief summary of the facts to which they would depose:
>
> Provided further that the parties may, with the permission of the Court, call any witness at any later stage, if the Court considers such evidence expedient in the interest of justice:
>
> Provided that a plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children." (Emphasis supplied)

Bare reading of above provision of law reveals that the plaintiff will state material facts in the plaint and furnish therewith a schedule of witnesses giving their names and addresses. At the same time, the first proviso of the said Section reads that the court may grant permission for production of any witness at any later stage if the court considers it necessary to reach a just and fair conclusion. Admittedly, the application for production of documents and witnesses was filed by the respondent when the case was fixed for respondent-plaintiff's evidence after framing of issues, as such, the application was at a preliminary stage of trial. Perusal of application filed by the respondent reveals that the occasion to file the application arose when the petitioner denied the existence of a valid marriage and asserted that it was a paper marriage. The documents and witnesses which were sought to be produced in evidence, prima facie, appear to be necessary for just and fair adjudication of the matter. No doubt, the onus probandi to prove the issue mentioned in the application lies on the petitioner and such documents can be confronted to the petitioner or his witnesses when they appear in the witness box and if the permission to produce such documents is declined at this stage, the respondent may not be in a position to confront all these documents which include photographs, video cassettes and audio cassettes of the marriage ceremony. It was confronted to learned counsel for the petitioner whether the petitioner is ready to give statement that if the said documents are confronted to the petitioner or his witnesses at the time of his evidence, he will not object to it, the answer was in negative. I am of the considered opinion that if the respondent is not allowed to produce the documentary as well as oral evidence, there will be multiplicity of litigation as well. Learned family court while allowing application of the respondent has not committed any illegality and the jurisdiction has rightly been exercised by the court. It is further observed that the petitioner-defendant has every right to rebut the evidence intended to be produced by the plaintiff and he has also right of cross-examination upon the plaintiff's witnesses. In my view, it is the right of each party to have a. fair trial; therefore, allowing the application by the trial court is appropriate and the learned family court has exercised its jurisdiction vested in Section 7(2) of the Act fairly and justly and the same will not cause any prejudice to the rights of the petitioner-defendant.

6. The other contention of learned counsel for the petitioner is that the impugned order is violative of Section 11(2) of the Act which makes necessary for a party to intimate the court within three days of framing of issues. In my view, the said provision deals with summoning of witnesses whereby the party has been bound to give list of witnesses within three, days of framing of issues. However, it does not debar the court to grant permission to a party to produce additional evidence. Section 7(2) of the Act has overriding effect in this regard as it has clearly been stated in first proviso of Section 7(2) that the court at any later stage may grant permission for production of witnesses. Therefore, the contention of learned counsel for the petitioner lacks force.

The order impugned is based on convincing reasons. Learned counsel for the petitioner has not been able to point out any illegality or irregularity therein calling for interference by this Court in its constitutional jurisdiction.

7. For the aforementioned reasons, this writ petition has no merit. The same is dismissed.

ZC/M-291/L Petition dismissed.

**2016 C L C 1618**
**[Lahore (Multan Bench)]**
**Before Atir Mahmood, J**
**PITRAS GILL----Appellant**
**Versus**
**PARVAIZ BHATTI----Respondent**

RFA No.198 of 2014, heard on 26th October, 2015.

**Qanun-e-Shahadat (10 of 1984)---**

----Art. 163---Decision of case on the basis of special oath---Scope---Whenever an offer was made to decide the controversy on special oath and same was accepted by the other side and statement on oath was made, then party who had offered for settlement of issue on the basis of special oath could not be allowed to resile from its stance after such oath had been administered---Defendant himself made offer to put the plaintiff to special oath which was accepted and plaintiff sworn the special oath as demanded by the defendant---Defendant, thereafter could not be permitted to ask for resolution of the controversy other than the mode chosen by himself---Defendant had never objected to the procedure adopted by the Trial Court---Trial Court had rightly decreed the suit---Defendant could not be allowed to take a new plea that suit should have been decided on the basis of evidence available on record even if plaintiff had sworn special oath---Appeal was dismissed in circumstances.

Mst. Khairan Bibi v. Mst. Hajran Bibi 2012 YLR 2054 and Raja Wali v. Mansha Ahmed PLD 1996 Lah. 354 ref.

Mahmood Ali Butt v. Inspector General Police, Punjab, Lahore and 10 others 1998 PSC 53 rel.

Ch. Muhammad Akram for Appellant.
Shakeel Javed Chaudhry for Respondent.

Date of hearing: 26th October, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---** This Regular First Appeal is directed against order and decree dated 01.02.2014 passed by learned Additional District Judge, Multan whereby suit of the respondent-plaintiff for recovery of Rs.1,100,000/- filed on the basis of cheques has been decreed against the appellant-defendant.

2. Brief facts leading to filing of this appeal are that on 21.03.2011, respondent Parvaiz Bhatti filed a suit for recovery of Rs.1,100,000/- against the appellant with the averments that the defendant is his brother-in-law who used to live in Malta; that the defendant came to Pakistan in year 2000 and offered to get the plaintiff and his family settled in Malta to which they agreed and paid a sum of Rs.1,300,000/- to the defendant in the year 2001 through her sister Mst. Alveena, Principal of Covenant School Multan in the presence of Maqsood Qamar son of Ghulam Masih and Emanuel Salamat son of Salamat Masih out of which a sum of Rs.700,000/- was paid through a cheque and rest in cash; that the plaintiff also handed over three passports to the defendant; that when the defendant failed to fulfill his obligation till 2009, the plaintiff and others demanded for return of their money but the defendant refused; that the plaintiff filed an application before Director, FIA, Lahore whereupon the defendant in order to avoid criminal proceedings against him approached the plaintiff; that a panchait took place between the parties wherein a consensus reached between the parties; that the defendant agreed to pay a sum of Rs.1,100,000/- to the plaintiff and for the very purpose, he issued six cheques bearing Nos.9158864 dated 10.09.2009 for Rs.200,000/-, 9158865 dated 10.12.2009 for Rs.200,000/-, 9158866 dated 10.03.2010 for Rs.200,000/-, 9158868 dated 10.06.2010 for Rs.200,000/-, 9158869 dated 10.09.2010 for Rs.200,000/- and 9158870 dated 10.12.2010 for Rs.100,000/-; that the cheques when presented before the bank for encashment were dishonoured due to lack of funds.

3. The appellant-defendant appeared before the Court and contested the suit by filing written statement. Out of divergent pleadings of the parties, issues were framed and the evidence led by the parties was recorded. Later, learned trial court on the basis of statement made by the respondent-plaintiff on Bible, on the offer so made by the appellant-defendant, decreed the suit vide order and decree dated 01.02.2014. Hence this appeal has been preferred by the appellant-defendant.

4. Learned counsel for the appellant-defendant submits that the impugned order and decree is clear-cut violation of Article 163 of Qanun-e-Shahadat Order, 1984; that learned trial court has not decided the case issue-wise; that the impugned order is in violation of Order V, Rule 20, C.P.C. as well as Section 103, C.P.C; that the learned trial court has passed the impugned order and decree arbitrarily and without application of judicious mind. He has emphasized more on the point that even after recording statement on special oath by the plaintiff, it was incumbent upon the court to decide the matter in view of the evidence led by the parties, therefore, the RFA in hand, learned counsel for the appellant prays, be allowed, the impugned order and decree be set aside and the suit of the respondent be dismissed. He has relied upon the law laid down in cased reported as Mst. Khairan Bibi v. Mst. Hajran Bibi (2012 YLR 2054 Lahore) and Raja Wali v. Mansha Ahmed (PLD 1996 Lahore 354).

5. On the other hand, learned counsel for the respondent has vehemently opposed this RFA and also supported the impugned judgment and decree.

6. Out of arguments put forth by learned counsel for the parties, the only question which needs to be resolved is as to whether the learned trial court was justified to decide the case on the basis of special oath or as to whether the court was under obligation to decide the suit on merits even after recording statement of the respondent under special oath.

7. Undisputedly, both the parties are Christian by faith. When the evidence of the respondent had been recorded, the appellant-defendant on 01.02.2014 made an offer on Bible that if the respondent-plaintiff takes oath having the Bible in his hand that he paid the disputed amount for three visas to him, then he would have no objection upon decreeing of the suit which offer was accepted by the respondent-plaintiff. Learned trial court duly recoded statement of the appellant and then respondent was asked to take special oath on Bible. The respondent-plaintiff while keeping the Bible in hand made special oath that he had paid money for three visas to the defendant.

8. It is well settled law that whenever an offer is made by one party to the other to decide the controversy on the basis of special oath and that offer is accepted by the other side and statement on oath is made, then the party who offers settlement of issue on the basis of special oath cannot be allowed to resile from its stance after such oath had been duly administered. In the present case, the defendant himself made offer to put the plaintiff to special oath so as to reach the conclusion of the matter which was duly accepted and the plaintiff sworn the special oath as demanded by the defendant.

Thereafter, the defendant could not be permitted to ask for resolution of the controversy other than the mode chosen by himself. The appellant never objected to the procedure adopted by learned trial court as he was duly represented by his counsel at the time when the special oath was administered. In the circumstances, learned trial court has rightly decreed the suit and the appellant-defendant while filing the appeal cannot be allowed to take a new plea that the suit should have been decided on the basis of evidence available on record even if the plaintiff has sworn the special oath.

In my considered view, when the matter was put by the defendant himself for decision on special oath which was duly done whereafter there was no need to decide the matter on the basis of evidence. Reliance is placed on the dictums laid down in case reported as Mahmood Ali Butt v. Inspector General Police, Punjab, Lahore and 10 others (1998 PSC 53).

9. In view of what has been discussed above, this appeal is bereft of any force which is accordingly dismissed.

ZC/P-2/L Appeal dismissed.

**2016 C L C 1632**

**[Lahore (Multan Bench)]**

**Before Atir Mahmood and Shahid Mubeen, JJ**

**MUHAMMAD RAFIQUE----Appellant**

**Versus**

**DISTRICT GOVERNMENT and others----Respondents**

I.C.A. No.153 of 2009, decided on 3rd December, 2015.

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

----O. XXVI, R.8 & S.175---Intra-court appeal---Dispute with regard to ownership rights of the parties---Appointment of local commission by the High Court to collect evidence---Determination of ownership rights by the local commission---Scope---Both the parties agreed that they would he satisfied if matter was resolved after receiving report from local commission---Single Judge of High Court appointed local commission and disposed of the constitutional petition after receiving its report---Validity---Disputed question of fact could not be decided by the High Court under its constitutional jurisdiction without recording of evidence which was not its domain---Local commission had no jurisdiction to determine ownership rights of the parties---Only civil court had jurisdiction to determine such controversy---No opportunity was given to the appellant to file objection against the report of local commission---Single Judge was bound to fix a date whether parties wanted to file any objection to the report of local commission or not---High Court could not collect evidence to prove ownership rights of the parties through report of local commission---Impugned order passed by Single Judge was set aside---Respondent might file a suit with regard to her ownership rights if so advised---Intra-court appeal was allowed in circumstances.
Chaudhry Shah Muhammad and 6 others v. Muhammad Ishaq and 5 others 2001 MLD 1518 rel.

**(b) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of High Court---Scope---Disputed question of fact could not be decided by High Court without recording of evidence which was not its domain.
Muhammad Irfan Wyne for Appellant.
S.M. Tahir Jamal for Respondent No.5.
Sajjad Hussain Tangra for Respondents Nos.6 to 10.

**ORDER**

Through this Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1973, the appellant has called into question the validity and legality of order dated 09.06.2009 passed by the learned Single Judge in Chambers of this Court whereby writ petition of respondent No.5 was disposed of in terns of para No.5 of impugned order.

2. Briefly the facts of the case giving rise to the institution of the instant appeal are that respondent No.5 filed a writ petition stating therein that she and Mst. Ishrat Qamar wife of Abdul Aziz residents of Mohallah Hassan Parwana Colony, Multan, first of all jointly bought part of house No.893 Ward No.8-Muslim measuring 3-marlas 10-sq yards situated at Kumhar Mandi Double Phatak Multan for a consideration of Rs.3,20,000/- vide registered sale deed dated 19.07.2003. Thereafter, they also purchased another part of the said house measuring 1-marlas, 20-sq yards for a consideration of Rs.2,00,000/- vide registered sale deed No.3170 dated 07.08.2004. The possession of said portions of property was delivered to them who started living there peacefully and without any interruption or objection from any corner. It is also discernable from the writ petition that respondent No.5 and said Ishrat Qamar being parda observing ladies executed a Special Power of Attorney on 23.04.2008 in favour of one Javed Ahmad. In May, 2007, respondent No.5 and Ishrat Qamar were intimated by the Land Acquisition Collector that the District Government intends to acquire their fore-noted property. On coming to know about the wrong measurement of the said property i.e. 240-square feet, respondent No.5 and Ishrat Qamar moved an application for correction of measurement i.e. 330-square yards, which was allowed, award was announced and compensation was given to respondent No.5 in accordance with law. It is further stated in the writ petition that respondent No.1 at the instance of respondent No. 4 started development work on the passage abutting with the house of respondent No.5 which is exclusively owned by her and is not the part of acquired land. Being aggrieved respondent No.5 moved an application to respondent No.3 praying therein that the action of respondents Nos.1 and 4 be declared to be without lawful authority and without jurisdiction but no action was taken thereon. Consequently, respondent No.5 filed writ petition before this Court, praying therein as under:-

> "(i) the aforesaid illegal action of the respondents by way of intruding the private personal property owned and possessed by the petitioner may very graciously be declared as without lawful authority, without jurisdiction, ultra vires, misuse of powers, result of hatched up one conspiracy with the collusion of respondent No.4 who has got no link, title or concern with the said property of petitioner.
>
> (ii) The respondents Nos. 1 to 3 may very kindly be summoned in this Hon'ble Court and after explanation from them that on what capacity and authority they committed such an illegal act of making development work on the property of petitioner, the stern legal action may very kindly be ordered to be taken against them in accordance with law, in the supreme interest of justice.
>
> (iii) Any other relief under the law which this Hon'ble Court may deem fit and appropriate be also awarded in favour of the petitioner."

3. Respondent No.3 submitted their report and parawise comments. The appellant also filed reply to the writ petition.

4. However, vide order dated 16.04.2009 Syed Kabir Mahmood, Advocate, was appointed as Local Commissioner. The order dated 16.04.2009 is reproduced herein below:-

"After arguing the matter at some length bath the parties have agreed that if some counsel of this Court is appointed as Local Commission with the direction to submit report after taking into consideration the relevant documents and after spot inspection they will be satisfied on the findings of the report of Local Commission.

2. Syed Kabeer Mahmood, Advocate, present in court, is appointed as Local Commission for his report. Both the parties are directed to produce the requisite documents in their possession, if any. He is also directed to visit the spot on 26.04.2009 at 4:00 p.m. and thereafter the Local Commissioner shall submit report within a week. This has unanimously been agreed by the learned counsel for the parties that they will be satisfied if the matter is resolved after receiving the report on the basis of the same. The petitioner and respondent No.5 would pay Rs.5000/- each as commission fee to the Local Commissioner within three days."

5. After receiving the report of the Local Commission the learned Single Judge in Chambers, vide impugned order dated 02.06.2009 disposed of the writ petition in terms of para No.5 of the impugned order.

6. The present appellant field ICA No.153 of 2009 which was allowed vide order dated 23.12.2009 by the learned Division Bench of this Court. Respondent No.5 assailed the order dated 23.12.2009 before the Hon'ble Supreme Court of Pakistan in CP No.177 of 2010, which was accepted vide order dated 25.02.2010 and the case was remanded to the High Court for fresh decision of this Intra Court Appeal.

7. It is contended by the learned counsel for the appellant that the appellant was not given opportunity to file objection on the report of Local Commission, therefore, it has no value. He further contends that the Local Commission, while giving his report, has not bothered and determined the fact that the street is situated since 1890. He further contends that the report of the Local Commission is contrary to the ground realities qua the property in dispute. He further states that the High Court has no power to gather and collect evidence. He further states that the writ petition involves disputed question of fact, hence same was not competent. On the other hand learned counsel for respondent No.5 has supported the impugned order.

8. Arguments heard. Record perused.

9. The order of appointing the Local Commission by this Court has already been reproduced in para 4 above. The Local Commission has exceeded his jurisdiction while submitting his report, the operative part whereof is reproduced herein below :--

"I have carefully perused and considered the documentary evidence produced by both, the parties. I have arrived at the conclusion that the alleged disputed street is owned by the writ petitioner Mst. Shahida Rani along with Mst. Ishrat Qamar in equal shares, because the respondents have failed to produce cogent documentary evidence to prove that the alleged disputed property which is being claimed as street was owned by any other person. The fact of receiving the compensation/award by Shahida Rani writ petitioner along with Mst.

Ishrat Rani also support the claim of the writ petitioner. Even otherwise the respondents also produced two photocopy of applications and a receipt for deposit of the old wooden frame of the door in the office of the Union Council dated 24.08.2004 which shows that was removed from the spot in order to avoid any untoward happening. The result of the production of evidence, consideration of relevant documents and the spot inspection is that the alleged disputed street situated on the western side is the property owned by writ petitioner. It is not thorough fare. The findings have been arrived at on the basis of documentary evidence submitted by both the parties and the site inspection."

The Local Commission was not given the power to decide the ownership rights of the parties. From the plain reading of order of appointing the Local Commission, it appears that after collecting the material from the parties in the shape of documents as well as spot inspection he has to place the same before the Court without any finding thereon. Therefore, the reliance on the finding of the Local Commission by the learned Single Judge in Chambers is not justifiable. Reference may be made to case titled Chaudhry Shah Muhammad and 6 others v. Muhammad Ishaq and 5 others (2001 MLD 1518).

10. At the very outset of the arguments, learned counsel for the appellant has stated at bar that the appellant has filed civil suit qua property in dispute. It is also discernable from the record that writ petition involves disputed question of fact which cannot be decided by this Court without recording of evidence, which is not the domain of this Court. The appellant filed reply to writ petition wherein he denied the fact contained in paras No.4 and 5 of the writ petition with the assertion that the property in dispute had been used as thorough fare since 1890 i.e. more than 100 years.

11. The Local Commission has no jurisdiction to determine the ownership rights of the parties, which is the sole domain of civil court. No opportunity was given to the appellant to file objection to the report of Local Commission. It was the duty of the learned Single Judge in Chambers to fix a date whether they want to file any objection to the report of Local Commission or not.

12. During the arguments learned counsel for respondent No.5 has stated that possession of the disputed land has been taken over from her. It is not the domain of this Court to collect evidence to prove the ownership of the parties through the report of Local Commission.

13. Sequel to the above, this ICA is accepted and impugned order dated 09.06.2009 passed by learned Single Judge in Chambers of this Court is set aside. Respondent No.5 if so advised may file a civil suit with will be decided by the learned trial court without being influenced by any observation made by this Court. The parties shall bear their own cost.

ZC/M-22/L Appeal allowed.

**2016 C L C 1655**

**[Lahore (Bahawalpur Bench)]**

**Before Atir Mahmood and Shahid Bilal Hassan, JJ**

**SHABBIR AHMAD ZAFFAR----Applicant**

**Versus**

**MEMBER BOARD OF REVENUE (CONSOLIDATION) and others----Respondents**

Review Application No.17 of 2011/BWP, decided on 11th March, 2015.

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

----S. 114---Arbitration Act (X of 1940), Ss. 21, 23 & 26-A---Review---Scope---Vires of arbitration award---Applicant filed review of order passed in writ petition decided earlier, in order to challenge award made by Arbitrator---Applicant argued that the award had been issued in violation of Ss.21, 23 & 26-A, Arbitration Act, 1940 as Arbitrator/Member Board of Revenue had gone beyond powers conferred upon him---Plea raised by respondents was that scope of review was limited and points not raised during hearing of writ petition (under review) could not be raised through review application being not competent---Validity---Provisions of S.114, C.P.C. did not apply to vires of award issued by Arbitrator or violation of certain provisions of Arbitration Act, 1940---No new horizon could be opened, or grounds which had not been urged at time of hearing of case could be allowed to be introduced or Agitated in review application---No apparent error or any new point or evidence was noticed which was not considered or taken into account at time of passing the judgment---Review application did not satisfy criterion and principles of review---Review could not be granted for re-appraisement of certain facts or re-examination of same arguments or re-arguing/rehearing case on merits and additional grounds---Impugned judgment being based on sound footing could not be interfered with---High Court dismissed application being based on misconception.

Muhammad Sadiq and others v. Ali Asghar Khan and others 1995 CLC 1529; Waheed Ahmad and others v. Additional Commissioner (Revenue)/Settlement Commissioner, Rawalpindi Division, Rawalpindi and others 1990 CLC 220; Jahanzeb Aziz Dar v. Messrs Maersk Line and others PLD 2000 Kar. 258; Haji Bostan v. Sahib Shah Ali and others PLD 1982 SC 102; Sujanmal and others v. Kazi Abdul Hai and others 1993 SCMR 86; Qaimey alias Bhola v. The Settlement and Rehabilitation Commissioner, Bahawalpur Division, Bahawalpur and 3 others PLD 1979 Lah. 535; Mst. Ghulam Fatima and others Sufi Ahmad Khan and others 1981 CLC 76; M. Moosa v. Muhammad and others 1975 SCMR 115; Khairati and 4 others v. Aleem-ud-Din and another PLD 1973 SC 295; Haji Muhammad Boota and others v. Member, BOR and others 2010 SCMR 1049; Mst. Sharif Bibi and another v. Syed Muhammad Nawaz Shah and others 2008 SCMR 1702; PLD 2004 SC 752; 999 MLD 511 and Shams Din and others v. Jalal Din and others 1982 SCMR 445 rel.

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

----S. 114----Review---Scope and principles---For grant of review, there must be some new point based upon discovery of new evidence which could not with diligence had

been found out on previous occasion---Review petition was not competent where neither any new and important matter or evidence had been discovered nor was any mistake or error apparent on face of record---Error may be error of act or of law but it must be self-evident and floating on surface and not requiring any elaborate discussion---Orders based on erroneous assumption of material fact, or without adverting to provisions of ,law, or departure from undisputed construction of law and Constitution, may amount to error apparent on face of record---Error must not only be apparent but must also have a material bearing on fate of case and be not of inconsequential import---If judgment or finding, although suffering from erroneous assumption of facts, was sustainable on other grounds available on record, review was not justifiable and competent notwithstanding error being apparent on face of record.

Haji Muhammad Boota and others v. Member, BOR and others 2010 SCMR 1049 ref.
Irshad Ullah Chattha for Applicant.
Aejaz Ahmad Ansari for Respondents.
Malik Muhammad Mumtaz Akhtar, Addl. A.G. for Respondents.
Muhammad Ishaque Naib Tehsildar and Mubarak Ali Patwari.

**ORDER**
Allegedly, out of Triangle No.473 of 2015, Killa No.22 land comprising 3 kanals, 10 marlas was in the share of Malik Faqir Ahmad, father of respondents NoS.1 10 7, while land measuring 02 kanals 04 marlas fell in the share of Shams Din according to the Register Record of Rights 1964-65. The private respondents allegedly managed their entry in the revenue record germane to 3 kanals 10 marlas land in their name, which necessitated filing of application for correction of record before the Deputy Commissioner, Rahim Yar Khan, who called for the report form Addl. Deputy Commissioner (Consolidation) and corrected the record in accordance with law and land measuring 3 kanals 10 marlas falling in Killa No.22 was reverted to the name of petitioners, which was still existing in the record.

Consolidation started in Chak No.51/NP and scheme No.68/196 in the name of petitioners was confirmed, while scheme No.87 was confirmed in the name of private respondents. The confirmation of the scheme took place on 21.03.1991, under section 10(3) of the Consolidation Act in the record of consolidation of land in the same village which also showed 2 kanals 4 marlas in the name of respondents as was done in the scheme No.87.

The private respondents filed appeal before the respondent No.3 on 15.04.1991, which was dismissed on 08.08.1993 and same was entered in Roznamcha Waqiati, but in the meanwhile respondents filed a revision in the Court of Addl. Commissioner, which was accepted on 06.11.1994 and the present applicants approached the Board of Revenue through R.O.R. No.2889 of 1994, which concluded on 02.04.1998 in terms of Award dated 31.03.1998, according to which it was held that the landed property measuring 3 kanals 10 marlas in killa No.22 should be considered in the Wanda of Shams Din, etc. The petitioners filed a review application against order dated 31.03.1998, which was decided on 11.09.1999, which was assailed through W.P.

No.4584 of 1999 and same was decided on 14.06.2011, through which order of learned Member Board of Revenue dated 11.09.1999 was sliced away, while order dated 02.04.1998 passed by learned MBR and order dated 06.11.1994 passed by Addl. Commissioner were left behind. Allegedly the order dated 11.09.1999 remained in field for about almost 11 years, therefore, the petitioners filed W.P. No.3448 of 2011 against the order dated 02.04.1998 and order dated 06.11.1994 ibid passed by respondent No.2, but it was observed that since this Court has restored the order of MBR dated 02.04.1998 and 06.11.1994, therefore same cannot be entertained; hence, this review application has been filed.

2. Learned counsel for the applicant has argued that the provisions of section 21, 23 and 26-A of the Arbitration Act, 1940 have been violated while issuing Award dated 31.03.1998. Submits that impugned order and award made by the arbitrator is in oblivion of the order passed by Deputy Commissioner, while even the judgment of correction against which no appeal ever has been filed, has attained finality. Contends that the Arbitrator has gone beyond the powers conferred upon him and split out the share of parties on Pakka road; hence, the judgment dated 14.06.2011 may be reviewed and order dated 02.04.1998 passed by Member Board of Revenue (Consolidation), Punjab Lahore and order dated 06.11.1994 passed by Addl. Commissioner (Consolidation), Bahawalpur Division, Bahawalpur may be set aside and private respondents may be directed not to interfere in the peaceful possession of the petitioners over the landed property measuring 3 kanals 10 marlas falling in Killa No.22 of Rectangle No.473/15. Relies on Muhammad Sadiq and others v. Ali Asghar Khan and others (1995 CLC 1529-Peshawar), Waheed Ahmad and others v. Additional Commissioner (Revenue)/ Settlement Commissioner, Rawalpindi Division, Rawalpindi and others (1990 CLC 220-Lahore) Jahanzeb Aziz Dar v. Messrs Maersk Line and others (PLD 2000 Karachi 258).

3. On the contrary, learned counsel for the respondents has argued that the scope of review is limited one and in review no fresh plea or pleas can be introduced and points not raised during hearing of Writ Petition No.4584 of 1999 decided on 14.06.2011, sought to be reviewed, cannot be raised through review application; hence, the review application is not competent and does not merit to acceptance. Relies on Haji Bostan v. Sahib Shah Ali and others (PLD 1982 Supreme Court 102), Sujanmal and others v. Kazi Abdul Hai and others (1993 SCMR 86), Qaimey alias Bhola v. The Settlement and Rehabilitation Commissioner, Bahawalpur Division, Bahawalpur and 3 others (PLD 1979 Lahore 535), Mst. Ghulam Fatima and others v. Sufi Ahmad Khan and others (1981 CLC 76), M. Moosa v. Muhammad and others (1975 SCMR 115); Khairati and 4 others v. Aleem-ud-Din and another (PLD 1973 Supreme Court 295), Haji Muhammad Boota and others v. Member, BOR and others (2010 SCMR 1049) Mst. Sharif Bibi and another v. Syed Muhammad Nawaz Shah and others (2008 SCMR 1702).

4. Heard.

5. First of all this Court has to see what is the scope of review? The principles upon which a review can be granted are well settled and elaborated i.e. there must be some

new point based upon discovery of new evidence which could not with diligence, have been found out on the previous occasion. A review petition is not competent where neither any new and important matter or evidence has been discovered nor is any mistake or error apparent on the face of record. Such error may be an error of fact or of law but it must be self-evident and floating on surface and not requiring any elaborate discussion. Orders based on erroneous assumption of material facts, or without adverting to a provision of law, or a departure from undisputed construction of law and Constitution, may amount to error apparent on face of the record. On the other hand, error must not only be apparent but must also have a material bearing on the fate of the case and be not of inconsequential import. If judgment or finding, although suffering from an erroneous assumption of facts, is sustainable on other grounds available on record, review is not justifiable notwithstanding error being apparent on the face of record, the review petition is not competent and guideline in this regard can be sought from celebrated judgment reported as Haji Muhammad Boota and others v. Member (Revenue) BOR and others (2010 SCMR 1049).

Here we cannot consider the vires of award issued by the Arbitrator or violation of certain provisions of The Arbitration Act, 1940, because in proceedings under 13 Arbitration Act, the provisions of Section 11 of the C.P.C. does not apply as held in PLD 2004 SC 752 and 1999 MLD 511.

In review application no new horizon can be opened or the grounds which have not been urged at the time of hearing of the case cannot be allowed to be introduced or agitated at review stage, as stated above and held in many judgments of Apex Court of the country such as Shams Din and others v. Jalal Din and others (1982 SCMR 445), Haji Bostan v. Sahib Shah Ali and others (PLD 1982 Supreme Court 102); Qaimey alias Bhola v. The Settlement and Rehabilitation Commissioner, Bahawalpur Division, Bahawalpur and 3 others (PLD 1979 Lahore 535).

In the judgment, sought to be reviewed, there is I no apparent error or any new point or evidence which was not considered or taken into account at the time of passing of order dated 14.06.2011; therefore, the instant review application does not come on the criterion and principles as discussed above and held by the Hon'ble Supreme Court of. Pakistan in the judgment ibid; therefore, the judgment sought to be reviewed being based on sound footing cannot be interfered and review cannot be granted for re-appraisement of certain facts or re-examination of same arguments or re-arguing/rehearing case on merits and additional grounds as held in Haji Muhammad Boota and others v. Member Review BOR and others (2010 SCMR 1049).

6. The case law relied upon by learned counsel for the applicant, with utmost respect, is entirely on different subject matter; therefore, same cannot render any assistance or help to the applicant's cause.

7. Pursuant to above discussion, we are not inclined to grant review application, being based on misconception and not maintainable; therefore, same stands dismissed.

SL/S-42/L Application dismissed.

**2016 C L C Note 12**
**[Lahore (Bahawalpur Bench)]**
**Before Atir Mahmood, J**
**MUHAMMAD HANIF and others----Petitioners**
**Versus**
**IMTIAZ SIDDIQUE----Respondent**

Civil Revision No.52 of 2009, decided on 1st July, 2014.

**(a) Qanun-e-Shahadat (10 of 1984)---**

----Art. 79---Exchange deed, proof of---Production of only one marginal witness---Effect---Contention of plaintiffs was that exchange deed was illegal, unlawful and inoperative upon their rights---Suit was dismissed concurrently---Validity---Impugned exchange deed was attested by two marginal witnesses---Onus to prove the execution of exchange deed was on the defendant being beneficiary of the same---Difference between the statements of witnesses of defendant was on record---Only one marginal witness of exchange deed had been produced---No explanation had been given with regard to non-production of other marginal witness in the court---No document could be read in evidence unless two marginal witnesses had appeared before the court to testify the same---Judgments and decrees passed by the courts below were against law and the same could not sustain---Impugned judgments and decrees were set aside and suit was decreed as prayed for---Revision was accepted in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din (deceased) through L.Rs. and others PLD 2011 SC 241; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Ibrar Hussain v. Khalid Hussain and 3 others 2004 YLR 432; Tariq Mahmood v. Ghulam Mustafa Shah and another 2013 SCMR 877; Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Mubarak Ali and others v. Khushi Muhammad and others PLD 2011 SC 155; Bashir Ahmed and others v. Ahmed Yar Khan and others 2013 SCMR 1047; Rasheed Ahmad v. Province of Punjab through District Collector Vehari and another 2004 SCMR 707; Muhammad Nawaz v. Muhammad Shafi and another 2006 YLR 2613; Mubarak Ali v. Muhammad Ramzan and others 2004 SCMR 1740; Cooperative Model Town Society through Secretary v. Mst. Asghari Safdar and others 2005 SCMR 931; Muhammad Bashir and others v. Muhammad Hussain 1994 CLC 1207; Deputy Commissioner, Pishin v. Abdul Salam and others PLD 1993 Quetta 121; Sher Azam v. Fazle Azim Shah 1972 SCMR 649; Nazir Ahmad v. Muhammad Rafiq 1993 CLC 257; Muhammad Bibi and 4 others v. Province of Punjab through Collector, District Sialkot and another 2000 CLC 769; Ch. Allah Bakhsh v. Karam Ellahi and 4 others PLD 1988 Lah. 419; Haji Muhammad Din v. Malik Muhammad Abdullah PLD 1994 SC 291; Sh. Muhammad Sharif Uppal v. Sh. Akbar Hussain and others PLD 1990 Lah. 229; Muhammad Bashir v. Mst. Sattar Bibi and another PLD 1995 Lah. 321; Mst. Sahib Noor v. Haji Ahmad 1988 SCMR 1703; Raees Khan and 3 others v. Naseeb Khatoon 2006 MLD 1443; Binyameen and 3 others

v. Chaudhry Hakim and another 1996 SCMR 336 and Muslim Commercial Bank Limited v. Syed Ahmad Saeed Kirmani 1991 CLC 140 ref.

Hafiz Tassaduq Hussain v. Muhammad Din (deceased) through L.Rs. and others PLD 2011 SC 241 rel.

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

----S. 115---Revision, filing of---Requirements---Revision petition had to be filed along with copy of impugned decree but there was no penal clause if documents were not appended with the same.

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

----S. 115---Limitation Act (IX of 1908), S. 5---Revision---Limitation---Scope---Condonation of delay---Applicability of S.5 of Limitation Act, 1908---Scope---Revision petition had to be filed within 90 days from passing of impugned order---High Court had suo motu powers to thrash out the legality or illegality of impugned order passed by the courts below and there was no limitation for the same---Provisions of S.5 of Limitation Act, 1908 were not applicable for filing of revision petition as specific timeframe of 90 days had been provided for the same.

**(d) Civil Procedure Code (V of 1908)---**

----O. XLI---Appeal from original decree---Requirements---In case of an appeal to be filed under O.XLI, C.P.C. non-filing of impugned decree was fatal.

Muhammad Saleem Faizi for Petitioners.
Ch. Naseer Ahmed for Respondent.
Date of hearing: 12th February, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Through this civil revision, the petitioners impugn judgment and decree dated 20.11.2008 passed by learned Additional District Judge, Chishtian who dismissed appeal of the petitioners and maintained judgment and decree dated 29.07.2004 passed by learned Civil Judge Class-III, Chishtian whereby suit of the petitioners for declaration with permanent injunction was dismissed.

2. Brief facts of the case are that the petitioners filed a suit for declaration with permanent injunction against the respondent on 21.10.1997 with the averments that the petitioners were owners in possession of the land situated in Mari Shauq Shah Tehsil Chishtian, fully described in headnote of the plaint and that the exchange deed dated 15.08.1997 as well as mutation Nos.1429 and 1430 both dated 15.09.1997 sanctioned on the basis of said exchange deed were illegal, unlawful and inoperative upon rights of the petitioners; that the petitioners neither made any exchange deed with the respondent nor appeared before the Sub-Registrar in this regard; that value as well as area of land of the petitioners was much higher as compared to that of respondent-defendant.

3. The suit was contested by the respondent by filing written statement. Out of divergent pleadings of the parties, following issues were framed:

**"ISSUES**

1. Whether the suit is not properly valued for the purposes of court fees and jurisdiction? OPD

2. Whether the suit has been filed with mala fide intention and defendant is entitled to special cost? OPD

3. Whether the mutation of exchange Nos.1429 and 1430 dated 15.09.1997, are against law and facts? OPP

4. Whether the plaintiffs are owner in possession of disputed property? OPP

4-A. Whether the exchange deed No.948 dated 15.08.1997 is against law and facts, and same is liable to be declared as such? OPP

5. Relief."

The evidence led by the parties was recorded. Thereafter, learned Civil Judge, Chishtian after hearing both sides dismissed the suit of the petitioners vide judgment and decree dated 29.07.2004. Feeling aggrieved, the petitioners filed appeal which also met with the same fate vide judgment and decree dated 20.11.2008 passed by learned Additional District Judge, Chishtian. Hence this revision petition.

4. Learned counsel for the petitioners inter alia contends that since only one marginal witness could be produced by the respondent-defendant, learned lower courts have mistakenly and illegally held that the respondent has proved the execution of the exchange deed which finding offends the requirements of Article 79 of Qanun-e -Shahadat Order, 1984; that the alleged exchange deed is a result of fraud and forgery as the petitioners neither exchanged their land with the respondent nor ever appeared before the Sub-Registrar to make statements in this regard; that the scribe has admitted during the evidence, he does not know any of the petitioners/plaintiffs; that mere registration of a document does not ipso facto prove valid and lawful execution of the same; that identification of the plaintiffs could not be established by the respondent-defendant through evidence; that as per khasra girdawari uptill 2002 the petitioners enjoy possession over the property situated in Marri Shauq Shah and there is no documentary evidence that the petitioners were put in possession of property situated in Chak No.14/Gijani owned by the respondent; that non-delivery of possession strengthens the version of the petitioners that no exchange deed was executed; that value of the land of the petitioners than that of the respondent-defendant is much higher which extinguishes any possibility of exchange as the exchange is only made when two things are almost of same value; that the report of Patwari stating price of respondent's land as Rs.65,000/- per marla is neither admissible in evidence nor can be believed upon as the Patwari did not appear before the court to support the contents of the report nor the report can be considered as exclusive evidence of market value of the land; that there is also difference in area of lands allegedly

exchanged between the parties; that the learned courts below have not embarked upon the proper appreciation of evidence adduced by the parties and have failed to even give any plausible reason in support of their findings; that there is misreading and non-reading of evidence; that the revision petition is barred by time as the petitioner failed to append the impugned judgment and decree of learned lower appellate court with the revision petition and subsequently placed it on record after 90 days were elapsed, therefore, this civil revision be allowed, impugned judgments and decrees be set aside and the suit of the petitioners be decreed as prayed for. He has placed reliance on the dictums laid down in cases reported as Hafiz Tassaduq Hussain v. Muhammad Din (deceased) through L.Rs. and others (PLD 2011 SC 241), Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144), Ibrar Hussain v. Khalid Hussain and 3 others (2004 YLR 432 Lahore), Tariq Mahmood v. Ghulam Mustafa Shah and another (2013 SCMR 877), Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245), Mubarak Ali and others v. Khushi Muhammad and others (PLD 2011 SC 155), Bashir Ahmed and others v. Ahmed Yar Khan and others (2013 SCMR 1047), Rasheed Ahmad v. Province of Punjab through District Collector Vehari and another (2004 SCMR 707) and Muhammad Nawaz v. Muhammad Shafi and another (2006 YLR 2613 Lahore).

5. On the other hand, learned counsel for the respondent has vehemently opposed this civil revision and supported the impugned judgments and decrees. He avers that the lands were exchanged between the parties with their mutual consent; that the respondent has successfully proved lawful execution of the exchange deed by producing before the court marginal witness and scribe of the deed; that the possession of the property was also delivered to the respondent who had already cultivated his crop over the land; that the petitioners are no more owners of the land given to the respondent through exchange deed dated 15.08.1997, therefore, this civil revision has no substance and is liable to be dismissed. He places reliance on the dictums laid down in cases reported as Mubarak Ali v. Muhammad Ramzan and others (2004 SCMR 1740), Cooperative Model Town Society through Secretary v. Mst. Asghari Safdar and others (2005 SCMR 931), Muhammad Bashir and others v. Muhammad Hussain (1994 CLC 1207 Lahore), Deputy Commissioner, Pishin v. Abdul Salam and others (PLD 1993 Quetta 121), Sher Azam v. Fazle Azim Shah (1972 SCMR 649), Nazir Ahmad v. Muhammad Rafiq (1993 CLC 257), Muhammad Bibi and 4 others v. Province of Punjab through Collector, District Sialkot and another (2000 CLC 769 Lahore), Ch. Allah Bakhsh v. Karam Ellahi and 4 others (PLD 1988 Lah. 419), Haji Muhammad Din v. Malik Muhammad Abdullah (PLD 1994 SC 291), Sh. Muhammad Sharif Uppal v. Sh. Akbar Hussain and others (PLD 1990 Lahore 229), Muhammad Bashir v. Mst. Sattar Bibi and another (PLD 1995 Lah. 321), Mst. Sahib Noor v. Haji Ahmad (1988 SCMR 1703), Raees Khan and 3 others v. Naseeb Khatoon (2006 MLD 1443 Lahore), Binyameen and 3 others v. Chaudhry Hakim and another (1996 SCMR 336) and Muslim Commercial Bank Limited v. Syed Ahmad Saeed Kirmani (1991 CLC 140 Lahore).

6. After hearing the parties and perusal of record, two points have come on surface for determination by this Court. Firstly, as to whether the revision petition

filed before this Court is barred by time as the impugned judgment and decree of learned lower appellate court was not submitted before this Court within period of 90 days and secondly, as to whether the respondent being beneficiary of the exchange deed failed to prove execution of the same by not producing two marginal witnesses of the disputed document.

7. Admittedly, the petitioner filed the present revision petition on 18.02.2009 against impugned judgment and decree dated 20.11.2008 within period of limitation i.e. 90 days. There was no objection from the Office of this Court, however, a C.M. No.867/2009 was filed on 02.04.2009 to place on record certified copy of impugned judgment and decree. The said application was allowed by this Court vide order dated 16.04.2009 subject to all just and legal exceptions. On that relevant time, C.M. No.868/2009, under section 5 of the Limitation Act, 1908, was also filed for condonation of delay occurred in filing certified copy of the impugned judgment and decree. This application was not decided and kept in waiting for decision along with the main case. It is now well-settled principle of law that the provisions of section 5 of the Limitation Act are not applicable to filing of revision petition under section 115, C.P.C. as a specific timeframe of 90 days has been given by the legislature to file a revision petition. The provisos given under section 115, C.P.C. read as under:

> "Provided that, where a person makes an application under this subsection, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court.
>
> Provided further that such application shall be made within ninety days of the decision of the subordinate Court which shall provide a copy of such decision within three days thereof and the High Court shall dispose of such application within six months."

Bare reading of above provisos makes it clear that a revision petition is to be filed within 90 days from passing of the impugned order along with copies of the documents but there is no penal clause if the documents are not appended with the petition. Whereas in case of an appeal to be filed under Order XLI, C.P.C., non-filing of the impugned decrees is fatal. In the present case, revision petition was filed within period of limitation and the copy of the impugned judgment and decree was also placed on record but the question of limitation was not decided at the preliminary stage, therefore, I am of the opinion that after elapse of more than five years, the petitioner cannot be non-suited on this score alone. Furthermore, this Court has suo motu powers to thrash out the legality or illegality of the impugned order passed by its sub-ordinate courts and there is no limitation in this regard, therefore, I am not inclined to dismiss this petition on this technical ground. Had there been an appeal before this Court, then the matter would have been different.

8. Now I come to second point. Admittedly, the disputed document, i.e. exchange deed No.110 registered on 15.08.1997 with Sub-Registrar Chishtian was

attested by two marginal witnesses namely Ashfaq Saeed and Umar Hayat, both sons of Sardar. This document was written on 13.08.1997 and then it was presented before the Sub-Registrar on 15.08.1997.

9. In order to prove the initial burden of issue No.4, the petitioner produced Karam Hussain who deposed that he was called upon by one Sadiq Dola in the office of A.C. to identify being a pattidar as some loan was being obtained. He stated that he made identification but no exchange deed was identified by him. In cross-examination, he admitted his signatures on Exh.D1 (disputed exchange deed) as Exh. D1/1. He stated that he did not know who was obtaining the loan. He also showed his ignorance as to whether Malhi, Advocate put signatures on the documents or not. He stated that the plaintiffs are still in possession of the disputed property. PW.2 Manzoor Hussain deposed that the plaintiffs are in cultivating possession of the disputed property and they have not made any exchange of their property and that Imtiaz Sadiq (the respondent) is not in possession of the property. He deposed that the property is worth of Rs.2,000,000/-. Nothing adverse to the plaintiffs could be brought out during his cross-examination. Plaintiff Muhammad Hanif appeared as PW.3 as his own witness as well as on behalf of other plaintiffs. He deposed that he and his brother Lakho are owners of 12-3/4 acres of land at Mari Shouq Shah through inheritance and have never exchanged their property with the defendants; that they came to know from some people about 3/4 years before that the suit property had been exchanged and that on inquiry they came to know that the property has been exchanged in the name of defendants, the value of which is Rs.2,000,000/- whereas the property allegedly exchanged consisting of 18 marla is worth of Rs.70,000/-. He also deposed that the entire proceedings are forged and fictitious. In cross-examination, he stated that he is illiterate and puts his thumb impression; that his brother Abdul Raheem alias Lakho can put his signatures. He denied his thumb impressions on Exh.D1. He stated that he has no objection if his thumb impressions are sent for comparison. He also denied the suggestion that he exchanged his property at his own will. He also denied that his brother also signed Exh. D1. No suggestion was put to this witness that he himself purchased the stamp papers of exchange deed nor he was suggested that he appeared before the Sub-Registrar for attestation and registration of the exchange deed.

10. Since the onus to prove the execution of exchange deed shifted to the respondent being beneficiary thereof, he produced DW.1 Faiz Muhammad, Record Keeper of Office of Sub-Registrar, Chishtian who deposed that he has brought the record of exchange between the parties but no record was exhibited. DW.2 Ghulam Rasool, Naib Tehsildar deposed that he was appointed as Naib Tehsildar Chishtian in August, 1997 and was Incharge of the Registry Branch; that Exh.D1 was produced before him in his room and he inquired from the parties and they accepted it as correct; that identifiers were Abdul Razzaq Malhi, Advocate as well as Karam Hussain process server of civil court. He deposed that I.D. Cards were procured which are parts of Exh.D1. He stated that signatures and thumb impressions were put upon Exh.D1 in his presence. In cross-examination, he stated that the entire proceedings are conducted by Registry Moharrar. He denied the suggestion that all the proceedings were conducted by Moharrar and then were

placed before him. He denied that he has only put his signatures. He stated that Exh.D1 bears signature of Lakho Khan. DW.3 Qazi Zahoor Ahmed stated that Exh.D1 is written and signed by him which was written on the instructions of the parties and then it was readover and signed by the parties in his presence. In cross-examination, he stated that the document was written at 10/11 a.m. He could not recall as to whether the marginal witnesses were identified by him or not. He denied the suggestion that the plaintiffs never appeared before him. He also denied that the document was never exhibited.

11. Keeping evidence of DW.3 in juxta position with evidence of DW.2, it is absolutely clear that there is a mark difference between statements of these witnesses as according to DW.3, this document was written on 13.08.1997 and it was thumb marked on the same day whereas DW.2 stated that the disputed document was signed and thumb marked in his presence. It is to be noted that process of registration and attestation took place on 15.08.1997. I have minutely examined Exh.D1, the disputed document. Signatures of DW.3 were not confronted to him nor were identified by him when he appeared in the witness box.

12. Now I come to question of production of one marginal witness for proving the exchange deed. Admittedly, one of the marginal witness. namely Muhammad Ashfaq Saeed appeared in the witness box as DW.6 and deposed that Exh. D1 was executed in his presence and he put his signatures as Exh.D1/c. This witness did not depose that the said document was signed and thumb marked before the Sub-Registrar. According to him, this document was executed before Qazi Sahib (DW.3). The other marginal witness of this document namely Umar Hayat did not appear in the witness box. No explanation has been given by the respondent as to why he could not appear before the court. Another witness Muhammad Razzaq Malhi, Advocate, appeared as DW.5 to depose that he identified the parties and put his thumb impressions as Exh.D1/b before the Sub-Registrar. None of the witnesses other than DW.6 Muhammad Ashfaq Saeed put his signatures on the disputed document as a marginal witness. According to Article 79 of the Qanun-e-Shahadat Order, 1984, no document can be read in evidence unless and otherwise two marginal witnesses have appeared before the court to testify the same. It has been held in the judgment of the Hon'ble Supreme Court of Pakistan reported as Hafiz Tassaduq Hussain v. Muhammad Din (deceased) through LRs and others (PLD 2011 SC 241).

> "8. ...The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise.
>
> 9. Coming to the proposition canvassed by the counsel for appellant that a scribe of the document can be a substituted for 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."

(Emphasis supplied)

13. Keeping the contradiction in evidence produced by the respondent and relying upon the dictums laid down in the judgment of the august Supreme Court supra, I am of the considered opinion that the judgments and decrees of learned courts below are against the law, as such, the same cannot sustain in the eye of law.

14. As a result of above discussion, this revision petition is allowed, impugned judgments and decrees of learned courts below are set aside and the suit of the petitioners-plaintiffs is decreed as prayed for.

ZC/M-290/L Revision allowed.

**2016 C L C Note 48**

**[Lahore]**

**Before Atir Mahmood, J**

**SARFRAZ----Petitioner**

**Versus**

**MUKHTAR AHMED and others----Respondents**

Writ Petition No.3031 of 2011, decided on 6th August, 2014.

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

----Ss. 24 & 15---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant--- Denial of relationship of landlord and tenant by the tenant---Default in payment of rent---Effect---Contention of tenant was that he was owner of premises in question and he had filed a suit for declaration in the civil court---Rent Tribunal accepted petition for leave to contest subject to deposit of rent within 30 days from passing of said order but same was not complied with and eviction petition was allowed---Validity---Rent Tribunal while granting leave to contest had powers to pass order for deposit of arrears of rent as well as future rent---If tenancy between the parties had been admitted then defending party would be deemed to have admitted himself as tenant in the premises---Defending party must produce some documents to show his title over the property to establish his claim when tenancy had been denied---Mere denial of tenancy without any solid proof did not debar Rent Tribunal from passing directions for deposit of rent---Filing of civil suit for determination of title as an owner of the premises would not restrict the powers of Rent Tribunal to pass the order for deposit of rent---Rent Tribunal might pass order for disbursement of amount deposited in favour of landlord if proceedings culminate in his favour and if decision was against him then alleged tenant might be allowed to withdraw the amount deposited by him---Parties must obey the order of the court/tribunal and any non-compliance of such order might result in dismissal or allowing of the petition---Landlord was owner of the premises on the basis of a sale deed whereas tenant could not show his title over the premises---Tenant had rightly been directed to deposit the rent as his denial of relationship was not supported by any documentary evidence---Tenant had attempted to continue his possession over the premises without payment of rent which could not be allowed under the law---Tenant had failed to comply with the order of Rent Tribunal with regard to deposit of rent within the specified period which was mandatory requirement of law and same would entail the penal consequences---Plea of tenant with regard to ownership of premises was just an assertion and same did not create any right or title nor same would give him a licence to continue possession over the premises without payment of rent until and unless case had been proved before the civil court ---No illegality, irregularity or jurisdictional defect had been pointed out in the impugned orders passed by the

courts below---Constitutional petition was dismissed in circumstances. [paras. 7, 8, 9, 11, 13, 14, 15 of the judgment]

Lubna Shuja v. Rent Controller and another 2013 CLC 414; Muhammad Wakil Khan v. Additional District Judge, Lahore and 3 others 2007 CLC 1151; Muhammad Ismail v. Israr Ahmad PLD 1961 (W.P.) Lah. 601; Rehmanullah v. Ali Muhammad and another 1983 SCMR 1064; Abdul Hameed Naz and 7 others v. Mst. Razia Begum Awan and 4 others 1991 SCMR 1376; Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another PLD 2009 SC 453; Shajar Islam v. Muhammad Siddique and 2 others PLD 2007 SC 45; Amjad Mehmood Khokhar v. Farasat Hussain and 2 others 2009 CLC 114 and Haji Abdul Raheem v. Mst. Ummat-ul-Qayyum and 2 others 2011 YLR 455 ref.

Lubna Shuja v. Rent Controller and another 2013 CLC 414; Muhammad Wakil Khan v. Additional District Judge, Lahore and 3 others 2007 CLC 1151; Muhammad Ismail v. Israr Ahmad PLD 1961 (W.P.) Lah. 601; Rehmanullah v. Ali Muhammad and another 1983 SCMR 1064 and Abdul Hameed Naz and 7 others v. Mst. Razia Begum Awan and 4 others 1991 SCMR 1376 distinguished.

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

----Preamble---Object of Act---Punjab Rented Premises Act, 2009 had been promulgated in order to regulate relationship of landlord and tenant with regard to rented premises---Said enactment was aimed at to minimize the tenure of litigation between the parties. [paras. 6 , 7 of the judgment]

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

----S. 2(d)---"Landlord"---Meaning---Landlord was the owner of premises and same would include a person for the time being entitled or authorized to receive rent in respect of the premises. [para. 6 of the judgment]

**(d) Punjab Rented Premises Act (VII of 2009)---**

----S. 2 (l)---"Tenant"---Meaning---Tenant was a person who had undertaken or was bound to pay rent as consideration for the occupation of a premises by him or by any other person on his behalf. [para. 6 of the judgment]

**(e) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---**

----S. 2---"Landlord"---Meaning---Landlord was a person who was entitled to receive rent in respect of any building or rented land whether on his own behalf or on behalf of some other person. [para. 6 of the judgment]

Abdul Razzaq Chadhar for Petitioner.

Tariq Bashir for Respondents.

Date of hearing: 5th June, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the petitioner filed a suit for declaration regarding benami transaction against the respondent in learned Civil Court, Sargodha regarding the property fully described in the plaint. Subsequently, the respondent filed an ejectment petition before learned Rent Tribunal, Sargodha. The petitioner filed petition for leave to contest which was allowed by learned Rent Tribunal vide order dated 06.09.2010 subject to deposit of rent @ Rs.6,000/- per month within 30 days of passing of the order. Since the petitioner did not comply with the said order, the ejectment petition was accepted by learned Rent Tribunal vide order dated 14.10.2010. Feeling aggrieved, the petitioner filed appeal which was also dismissed by learned Additional District Judge V Sargodha vide judgment dated 20.01.2011. Hence this writ petition.

2. Learned counsel for the petitioner inter alia contends that learned courts below have failed to take into consideration the fact that the petitioner has filed a suit for declaration regarding the same property prior to filing the ejectment petition; that neither there exists relationship of tenant and landlord nor any tenancy agreement; that the petitioner is not a tenant but the owner of the property in question; that the alleged rent deed between the parties is not registered with the Rent Registrar and in absence of registered deed, a tenant cannot be ejected under the Punjab Rented Premises Ordinance, 2007 and Punjab Rented Premises Act, 2009; that only ground of personal need taken by the respondent was not available to him under the said Ordinance/Act; that the impugned order/judgment of learned courts below are against law and fact. He has emphasized more on the point that since the relationship of tenant and landlord was denied by the petitioner, it was incumbent upon the learned Rent Tribunal to frame issue on this point and then decide the same and that in case of denial of the relationship of tenant and landlord between the parties, the learned Rent Tribunal was not legally justified to impose condition of payment of rent upon the petitioner for allowing the petition for leave to contest, therefore, this writ petition be allowed, the impugned order and judgment be set aside and the ejectment petition be dismissed.

He has relied upon the law laid down in a case reported as Lubna Shuja v. Rent Controller and another (2013 CLC 414),

Muhammad Wakil Khan v. Additional District Judge, Lahore and 3 others (2007 CLC 1151),

Muhammad Ismail v. Israr Ahmad (PLD 1961 (W.P.) Lahore 601,

Rehmatullah v. Ali Muhammad and another (1983 SCMR 1064) and

Abdul Hameed Naz and 7 others v. Mst. Razia Begum Awan and 4 others (1991 SCMR 1376).

3. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and supported the impugned orders while relying upon the law laid down in cases reported as Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another (PLD 2009 SC 453), Shajar Islam v. Muhammad Siddique and 2 others (PLD 2007 SC 45), Amjad Mehmood Khokhar v. Farasat Hussain and 2 others (2009 CLC 114) and Haji Abdul Raheem v. Mst. Ummat-ul-Qayyum and 2 others (2011 YLR 455).

4. Arguments heard. Record perused.

5. The crux of whole arguments of learned counsel for the petitioner is that since the petitioner had denied the relationship of landlord and tenant between the parties being in possession of the property in his own right and also had filed a suit for declaration regarding the same property before the Civil Court, Sargodha, the learned Rent Tribunal was not justified to pass order under section 24 of the Punjab Rented Premises Act, 2009 directing the petitioner to deposit the rent. His reliance is upon the judgment passed by this Court in case reported as Lubna Shuja v. Rent Controller and another (2013 CLC 414) wherein it has been held that in case of denial of relationship of landlord and tenant between the parties, the learned Rent Tribunal cannot pass the order under section 24 of the Punjab Rented Premises Act, 2009 until and unless such relationship is established.

6. The Punjab Rented Premises Act, 2009 has been promulgated in order to regulate relationship of landlord and tenant in respect of rented premises. The definitions of landlord and tenant given in this Act are a bit different from those given in the old law, i.e. West Pakistan Rent Restriction Ordinance, 1959. In the old law, a landlord was a person who was entitled to receive rent in respect of any building or rented land whether on his own account or on behalf of some other person whereas in the present law, i.e. Punjab Rented Premises Act, 2009, landlord and tenant have been defined in section 2 in the following words:

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

2(1) "Tenant" means a person who undertakes or is bound to pay rent as consideration for the occupation of a premises by him or by any other person on his behalf and includes:

(i) a person who continues to be in occupation of the premises after the termination of his tenancy for the purpose of a proceeding under this Act;

(ii) legal heirs of a tenant in the event of death of the tenant who continue to be in occupation of the premises; and

(iii) a sub-tenant who is in possession of the premises or part thereof with the written consent of the landlord."

7. According to my understanding, the enactment of this special law is aimed at to minimize the tenure of litigation between the parties. If the word 'tenant' is confined to a person who admits the tenancy between the parties, then it may not be in conformity with the definition of tenant as given under section 2(1) of the Act which includes a person who is in occupation of the premises. The Rent Tribunal while granting leave to contest has been given ample powers to pass order to deposit the arrears of the rent as well as the future rent under section 24 of the Punjab Rented Premises Act which reads as under:

"**24. Payment of rent and other dues pending proceedings.**---(1) If an eviction application is filed, the Rent Tribunal, while granting leave to contest, shall direct the tenant to deposit the rent due from him within a specified time and continue to deposit the same in accordance with the tenancy agreement or as may be directed by the Rent Tribunal in the bank account of the landlord or in the Rent Tribunal till the final order.

(2) If there is a dispute as the amount of rent due or rate of rent, the Rent Tribunal shall tentatively determine the dispute and pass the order for deposit of the rent in terms of subsection (1).

(3) In case the tenant has not paid a utility bill, the Rent Tribunal shall direct the tenant to pay the utility bill.

(4) If a tenant fails to comply with a direction or order of the Rent Tribunal, the Rent Tribunal shall forthwith pass the final order."

Perusal of above provision makes it clear that the learned Rent Tribunal can direct a tenant for deposit of rent of the premises. If the tenancy between the parties is admitted, it means that the defending party admits himself as tenant in the property and in such an eventuality, the provision is unambiguous and there is no dispute. The dispute is only on the point where the tenancy is denied and a plea is taken by the defending party that he is in possession of the property in his own rights. In my opinion, if the tenancy is denied and plea of possession over the property in his own right is taken by the defending party, the defending party must produce before the court some documents to prima facie show his title over the property to establish his claim. Mere denial of the tenancy without any such solid proof does not debar the Rent Tribunal from passing direction for deposit of the rent in the interregnum as in such circumstances, the defendant will be deemed to

be a person in occupation of the premises falling under definition of tenant given in section 2(1) of the Act. Even in case of straightaway denial of tenancy on the basis of a civil suit filed by the alleged tenant for determination of his title as an owner of the property cannot restrict the powers of the Rent Tribunal to pass the order for deposit of the rent.

8. If an alleged tenant is allowed to deny the relationship of landlord and tenant without having any proof of title of the disputed property in his favour, then it will be very easy for any person, who takes over a property as a tenant and fails to pay the rent to the landlord/owner, to deny the relationship of landlord and tenant. In case ejectment petition is filed against him, he will gain more and more time on the pretext of determination of such relationship without deposit of any tentative rent, leaving the landlord at his mercy for an indefinite period till the time, the relationship of landlord and tenant is established after recording of evidence which, in my opinion; is not will of the legislature. In order to safeguard rights of both the parties, a mechanism has been given by the legislature whereby the Rent Tribunal is empowered to pass direction for deposit of past and future rent which might or might not be disbursed to the ejectment petitioner till decision of the eviction petition. If the proceedings ultimately culminate in favour of the ejectment petitioner, the tribunal may pass order for disbursement of the amount so deposited in favour of the ejectment petitioner and in case the decision comes against him, the alleged tenant may be allowed to withdraw the amount deposited by him. In all the circumstances, the parties must obey the order of the court/tribunal and any non-compliance of order of the court may result in dismissal or allowing of the petition.

9. In the present case, the ejectment petitioner is prima facie owner of the premises on the basis of a sale deed whereas the petitioner (respondent in the ejectment petition) could not show his title over the disputed property, therefore, he was rightly directed to deposit the rent as his denial of relationship was not supported by any concrete documentary evidence and appeared to be an attempt to continue his possession over the property without payment of rent to the landlord which cannot be allowed under the law.

10. There is yet another aspect of the case that the petitioner filed a Writ Petition No.1768/2010 against order dated 26.07.2010 whereby the petitioner was directed to deposit the tentative rent. The said writ petition was admitted for regular hearing by this Court and while granting the interim relief, it was ordered as under:

**"C.M. No.2/2010**

4. Subject to notice, the petitioner will continue to deposit the rent in terms of order passed by the learned Rent Controller but the said rent will not be withdrawn by the respondent till the next date of hearing."

Then the petitioner withdrew the said writ petition vide order dated 21.06.2011 which reads as under:

"The learned counsel for the petitioner wants to withdraw this petition. The petition is accordingly dismissed as having been withdrawn."

11. Admittedly, the respondent failed to comply with the order passed by learned Rent Tribunal for deposit of rent @ Rs.6000/- per month within the specified time of 30 days which was a mandatory requirement of law which entailed the penal consequences.

12. The case law relied upon by learned counsel for the petitioner is quite distinguishable. So far as the dictums laid down in case reported as Lubna Shuja v. Rent Controller and another (2013 CLC 414) are concerned whereby it has been held that in case of denial of relationship of tenant and landlord between the parties, the learned Rent Tribunal must decide the relationship and without determination, of such relationship, the Tribunal cannot direct the respondent in the ejectment petition to deposit the rent, I, with utmost respect to the Hon'ble Judge, dissent with the same. In my humble opinion where an alleged tenant takes plea of possession over, the property in his own rights and, prima facie, denies the relationship of landlord and tenant contumaciously just in order to avoid payment of rent to the landlord but is unable to submit before the court any title document, he will be considered as a tenant and the ejectment petitioner as landlord and the learned Rent Tribunal in order to safeguard rights of the landlord may allow leave to contest subject to deposit of rent. In case of non- compliance of such order, the penal provision of section 24 of the Act will be attracted and the ejectment petition must be allowed forthwith.

13. In the instant case, the petitioner has taken a specific plea that he is not a tenant under the respondent rather he is real owner of the property and the respondent is mere a benamidar and that he has filed a suit for declaration in the civil court in this regard. Suffice it to say that until and unless, the petitioner proves his case before the civil court and a decree is passed in his favour, the said plea is just his assertion and does not create any right or title in his favour nor gives him a licence to continue his possession over the premises without payment of rent, which is ostensibly owned by the respondent on the basis of a registered sale deed in his favour.

14. There are concurrent findings against the petitioner. The order passed by learned courts below do not suffer from any jurisdictional defect, illegality for irregularity calling for interference by this Court in its constitutional jurisdiction.

15. For the aforementioned reasons, this writ petition has no merit, hence dismissed.

ZC/S-112/L Petition dismissed.

**2016 C L D 383**

**[Lahore]**

**Before Atir Mahmood, J**

**ASKARI BANK LTD. and others---Appellants**

**Versus**

**IRFAN AHMED NIAZI and others---Respondents**

R.F.A. No.211 of 2008, heard on 8th October, 2015.

**(a) Punjab Consumer Protection Act (II of 2005)---**

----Ss. 28, 27, 25 & 3----Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S.7(4)---Constitution of Pakistan, Art.143---Banker and customer---Claim by consumer, dismissal of---Jurisdiction of Consumer Court---Settlement of claim, limitation for---Powers of Banking Court---Subsequent notices issued to Bank for settlement of claim not to affect on prescribed limitation---Punjab Consumer Protection Act, 2005 not in derogation of any other law---Inconsistency between Federal and Provincial Law---Effect---Complainant, while getting activation of his new credit card, was informed by the Bank the transactions having been made through his old credit card, which the complainant denied on ground that he had lost the old card and those transactions had not been made by him---Consumer Court allowed the claim by restraining the Bank to recover amount of the disputed transactions---Validity---Complainant had requested the Bank for blockade of his credit card after the card had already been used for alleged unauthorized transactions---Bank could be held responsible for the unauthorized use of the card only after the Bank had been told about misplacing of the same---Bank could neither stop the transactions nor be held responsible for the same, as there was no intimation to the Bank about loss of the card---Matter in question was between the Bank, which was financial institution, and its customer, which could only be taken up and decided by Banking Court, as provided under S.7(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001---Consumer Court did not have unfettered powers, and certain restrictions existed as embedded in S. 3 of Punjab Consumer Protection Act, 2005---Consumer Court had no jurisdiction to deal with the matter, and had transgressed its powers and erred in law while assuming jurisdiction in the present matter---Financial Institutions (Recovery of Finances) Ordinance, 2001, being Federal statute, had precedence over Punjab Consumer Protection Act, 2005, as provided under Art. 143 of the Constitution---Claim in question had been filed with delay of about one year after cause of action had arisen on pretext that complainant used to issue notices or letter to the Bank in that regard---Mere issuance of subsequent notices after specific denial by the Bank in response to the first notice did not extend period of limitation---Complainant had only thirty days to file his grievance petition in terms of S.28 of Punjab Consumer Protection Act, 2005; whereas, Consumer Court might allow extension of time for filing the same, which had not been done, in the present case---Complaint, being barred by time, should have been dismissed---High Court, setting aside impugned order, dismissed the complaint---Appeal against order was allowed.

**(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)**

----S. 7(4)----Punjab Consumer Protection Act (II of 2005), S. 27---Constitution of Pakistan, Art. 143---Powers of Banking Court---Jurisdiction of Consumer Court---Matter in question was between the Bank, which was financial institution, and its customer, which could only be taken up and decided by Banking Court, as provided under S.7(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001---Financial Institutions (Recovery of Finances) Ordinance, 2001, being Federal statute, had precedence over Punjab Consumer Protection Act, 2005, as provided under Art. 143 of the Constitution.

Tariq Kamal Gazi for Appellants.
Asad Ali Bajwa for Respondents.
Date of hearing: 8th October, 2015.

**JUDGMENT**
**ATIR MAHMOOD, J.---**This appeal is directed against judgment dated 24.04.2008 passed by learned District and Sessions Judge/Consumer Court, Lahore whereby he accepted complaint petition of the respondent.

2. Brief facts leading to filing of this appeal are that the respondent-complainant filed a complaint against the appellants with the assertions that he held a Master Credit Card of appellant bank (Askari Bank) since September, 2006; that since the previous card expired, he was issued a new card on 07.09.2006; that he approached the helpline for activation of the new card when he was informed that, his old credit card had exceeded the limit and transactions of Rs.40,000/- have been made over it; that the complainant on checking found that his card had lost somewhere; that he accordingly requested the bank for blocking the old credit card; that on inquiry, the complainant came to know that his old credit card was used on the night falling between 5th and 6th of September, 2006 on outlets of Zaka Pharmacy, Mehar Gas Station, Yasir Electronic and Bata Pakistan Limited; that the complainant corresponded with the appellants but to no avail.

3. The complaint was contested by the appellants. The respondent produced the evidence which was recorded, however, no evidence was led by the appellants. Thereafter, learned consumer court heard both sides and proceeded to allow complaint in the terms that the appellant bank would not recover the disputed amount of Rs.40,000/- from the respondent rather he will pay Rs.10,000/- as costs vide order dated 24.04.2008. Hence this RFA.

4. Learned counsel for the appellants submits that the complaint was time barred; that the consumer court had no jurisdiction to deal with the matter as even if there was any grievance, this comes within the domain of banking court; that admittedly, the card has been used before report of loss of card was made; that the conduct of the complaint petitioner is not free of suspicion; that he even did not surrender the old card; that there was a contract between the parties according to which, the respondent was liable to make payment in question; that the learned consumer court had erred in

law while passing the impugned order, therefore, this appeal be allowed, the impugned order be set aside and the complaint of the respondent be dismissed.

5. On the other hand, learned counsel for the respondent has vehemently opposed this petition while supporting the impugned order.

6. I have heard the arguments of learned counsel for the parties and also perused the record.

7. The impugned order was passed by learned consumer court in a complaint under Section 25 of the Punjab Consumer Protection Act, 2005 whereagainst an appeal lies as per Section 33 of the Act ibid. This appeal was to be treated by the Office of this Court as an FAO but the instant appeal is marked as RFA. I am not going to change nomenclature of the appeal at this stage as it may cause inconvenience to the parties. However, I am deciding this RFA treating it as an FAO.

8. There is no denial to the fact that the credit card was valid till expiry of September, 2006. Since the old credit card was going to expire, the respondent was issued a new card on 07.09.2006. Till then, there was no objection by the respondent as to misuse of his old card. It is version of the complainant himself given in the complaint that on the day of receipt of the new card, i.e. 07.09.2006, he approached the bank for activation of his new card and also inquired about his outstanding balance when he was informed about transactions of Rs.40,000/-. The complainant checked his old credit card and came to know that his card had lost somewhere. Thereafter, the complainant asked the helpline for blockade of his card and disputed the transactions of Rs.40,000/- stating that these were not made by him. The said lines are sufficient to reach a definite conclusion that the complaint petitioner requested the appellant bank for blockade of his card when the card had already been used for alleged unauthorized transactions. I am of the considered view that the bank could only be held responsible for stopping the unauthorized use of the card when it has been told about misplacing of the card. Since there was no intimation to the bank about loss of the card, the bank could neither stop the transactions nor be held responsible for the same. In the circumstances, one may even presume that the card was used by the complainant petitioner himself or by some other body on his behalf for the disputed transactions and then the fake report of loss of card was lodged with the bank by the respondent to avoid payment of the same.

9. There are also certain legal aspects of the case which have been ignored by learned consumer court. Admittedly, the matter was between a customer of the bank with the bank which is a financial institution. The matters pertaining to the financial institutions with their customers can only be taken up and decided by the banking court as provided under Section 7(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which reads as under:

> "7(4) Subject to subsection (5) no court other than a banking court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of Banking Court extends under this Ordinance including a

decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court."

Whereas the consumer court has no unfettered powers and there are certain restrictions as embedded in Section 3 of the Punjab Consumer Protection Act, 2005 which reads as under:

"The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

Keeping in juxtaposition the above two provisions of different statutes, there remains no doubt that the consumer court had no jurisdiction to deal with the matter, as such, it has transgressed its powers and erred in law while assuming its jurisdiction in the matter. On this score alone, the complaint was liable to be dismissed. Needless to mention here that being a Federal Statute, Financial Institutions (Recovery of Finances) Ordinance, 2001 has precedence over the Consumer Protection Act, 2005 which is Provincial Statute as provided under Article 143 of the Constitution of Islamic Republic of Pakistan, 1973.

10. Furthermore, the cause of action according to the respondent grievance petitioner himself arose on 07.09.2006 but the complaint was filed on 14.09.2007 with delay of about one year. Under Section 28 of the Punjab Consumer Protection Act, 2005, there was only 30 days time available to the complainant to file the grievance petition but he waited for about one year on the pretext that he used to issue notices/letters to the appellants (Mark 'A' to Mark 'F'). I am of the considered opinion that mere issuance of subsequent notices, after specific denial by the Bank in response to the notice dated 09.09.2006 (Mark-A), did not extend the period of limitation. The legislation in its wisdom has specifically fixed the time of 30 days from date of arising of cause of action. Under the said provision of law, the consumer court may allow extension in time for filing the complaint but there is nothing on record even to suggest that any such move was made by the respondent or the period in filing the complaint was condoned by the court. In the circumstances, the complaint being barred by time should have been dismissed on this score as well.

11. For what has been discussed above, the learned consumer court has erred in law while passing the impugned order. Therefore, this appeal is allowed, the impugned order is set aside and the complaint of the respondent is dismissed.

SL/A-156/L Appeal allowed.

**2016 M L D 693**

**[Lahore]**

**Before Atir Mahmood, J**

**Mst. RABIA GULZAR and others---Petitioners**

**Versus**

**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No.27276 of 2011, decided on 13th November, 2014.

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

----S. 5, Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for recovery of maintenance allowance---Neither the plaintiffs (mother and daughter) could establish the monthly expenditures incurred in past or being incurred upon the daughter nor they were able to establish the monthly income of father---Appellate Court had examined the evidence of both the parties and upheld the findings of Family Court qua the quantum of maintenance allowance per month---Evidence of plaintiffs was not confidence inspiring with regard to grant of past maintenance allowance---Dispute/differences had arisen in between the parties on the question of marriage of daughter---Findings of Appellate Court which were recorded after due appraisal of evidence could not be substituted by the findings of High Court---Appellate Court had properly granted maintenance allowance to the daughter from the date of institution of the suit---Constitutional petition was dismissed in circumstances.

PLD 2002 Quetta 38; 2002 SCMR 701; 2008 SCMR 1584 and 1995 MLD 1149 ref.

Farah Naz v. Judge Family Court, Sahiwal PLD 2006 SC 457 rel.

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

----S. 5, Sched.---Limitation Act (IX of 1908), Art. 49---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for recovery of dowry articles---Limitation---Divorce between the parties took place on 14-11-1983 and suit for recovery of dowry articles was filed after elapse of 26 years---Neither wife had asserted as to when for the first time she demanded the return of dowry articles nor she had stated about refusal of husband to return the same---Possession of the dowry articles became wrongful with the husband when divorce took place or when there was specific demand for return of the same which was refused by the husband---Wife had neither asserted any specific date for first denial of husband to return the dowry articles nor she could produce any evidence to substantiate her claim that dowry articles were still lying in the possession of husband---Delay in filing suit for recovery of dowry articles would give rise to a presumption of fact that same were taken back by the wife after dissolution of marriage---Suit for recovery of specific movable property could be filed within three years when the property was wrongfully taken or when the retainer's possession became unlawful---Present suit was barred by time---Constitutional petition was dismissed in circumstances.

PLD 2002 Quetta 38; 2002 SCMR 701; 2008 SCMR 1584 and 1995 MLD 1149 ref.

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

----Art. 49---Civil Procedure Code (V of 1908), O. XX, R. 10---Suit for recovery of movable property---Limitation---Suit for recovery of specific movable property could

be filed within three years when the property was wrongfully taken or injured or when the retainer's possession became unlawful.

**(d) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of High Court---Scope---High Court could not indulge into the factual controversy while exercising constitutional jurisdiction.

Ms. Erum Sajjad Gul for Petitioners.

Muhammad Akbar Shabbir Chohan for Respondents.

Date of hearing: 19th May, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Facts giving rise to the filing of this writ petition are that the petitioners filed a suit for recovery of dowry articles, maintenance allowance of petitioner No.1, medical expenses and expected marriage expenses of petitioner No.1 with the averments that petitioner No.2 Alia Shahnaz was married with respondent No.3 Gulzar Ahmed (the respondent) in the year 1980; that out of this wedlock, petitioner No.1 Rabia Gulzar was born on 28.02.1983; that the marriage, however, could not continue and ended in divorce; that petitioner No.1 remained in custody of petitioner No.2 who borne all her expenses including education, food, clothing etc.; that the respondent contracted second marriage; that the demand of the petitioners for payment of maintenance allowance was refused by the respondent; that petitioner No.2 was given dowry articles valuing Rs.600,000/- and 10 tola gold ornaments at the time of her marriage which were lying with the respondent. The petitioners prayed that dowry articles or their alternate price be given to the petitioner; that petitioner No.1 be given past maintenance allowance @ Rs.3000/- for the period from 1983 to 1986; @ Rs. 5000/- for next eight years, @ Rs.8000/- till she attains age of 26 and future maintenance allowance @ Rs.10,000/- per month. Petitioner No.2 also demanded for medical expenses of Rs.200,000/- and Rs.15,00,000/- for marriage of petitioner No.1.

2. The suit was hotly contested by the respondent by filing the written statement. Out of divergent pleadings of the parties, learned family court framed as many as six issues including that of relief. The evidence led by the parties was recorded. Thereafter, after hearing both sides, learned family court partially decreed the suit of the petitioners in the terms that the petitioner No.1 was entitled to recover maintenance allowance @ Rs.7000/- per month for last three years before filing of the suit and for future maintenance allowance at the same rate till she is married with 20% increase per annum whereas the claim of petitioner No.2 for recovery of dowry articles was decreed to the extent of Rs.100,000/- vide judgment and decree dated 07.05.2011. Feeling aggrieved, both sides filed appeals which were disposed of by learned lower appellate court vide judgment and decree dated 26.10.2011 holding that petitioner No.1 is entitled to recover maintenance allowance @ Rs.7000/- per month from the date of institution of the suit till her marriage with an increase of 10% per annum, however, claim of petitioner No.2 for recovery of dowry articles was declined. Hence this writ petition.

3. Learned counsel for the petitioners inter alia contends that the respondent has a flourishing business in Muscat and earns handsome amount monthly; that he can

easily pay the maintenance to petitioner No.1 as prayed for by her; that learned courts below have erred in law while relying upon income certificate of the respondent who owns side business as well but the same was concealed from the court; that the respondent being father of petitioner No.1 is under obligation to maintain her but he has not paid a single penny to her since her birth; that the respondent is trying to deceive the court by producing few photographs of petitioner No.1 with him and his daughters out of subsequent wife which were taken at two occasions when petitioner No.1 herself visited his house; that the respondent cannot be allowed to escape from his liability; that the health of petitioner No.1 is not good and she has been advised various operations; that she is under medical treatment and is using various medicines which are expensive but learned courts below have not taken into consideration this important aspect of the case; that the children of the respondent from subsequent wife were studying in English medium schools and were being provided all kinds of luxuries but petitioner No.1 was denied the same love, affection and protection of her father; that right of petitioner No.2 has been denied by learned lower appellate court, of her gold ornaments and dowry articles without any lawful justification; that the observation of learned lower appellate court that after 25 years of the marriage, petitioner No.2 is not entitled to recover dowry articles has no legal backing as petitioner No.2 was divorced just after three years of her marriage and the dowry articles since then are in use of the respondent and his second wife; that the learned courts below have failed to appreciate the evidence of the parties in its true perspective, therefore, this writ petition be allowed, the impugned judgments and decrees of learned courts below be set aside and the suit of the petitioners be allowed as prayed for. She has relied upon the cases reported as PLD 2002 Quetta 38, 2002 SCMR 701, 2008 SCMR 1584 and 1995 MLD 1149.

4. On the other hand, learned counsel for the respondent has vehemently opposed this writ petition and fully supported the impugned judgment and decree of learned lower appellate court.

5. Arguments heard. Record perused.

6. After hearing the parties, the questions to be determined by this Court are as to whether the petitioner No.1 is entitled to the decree for grant of maintenance at the rate, as prayed for in the suit and secondly as to whether the learned appellate court committed an error while dismissing the suit to the extent of petitioner No.2 by reversing the judgment and decree passed by the learned trial court. The emphasis of the learned counsel for the petitioners was that the petitioners proved their case beyond any doubt as the petitioner No.1 being the daughter of the respondent No.3 was legally entitled to claim her past as well as future maintenance allowance and the question of limitation does not obstruct the grant of maintenance from the date of birth of the petitioner No.1. In order to substantiate the claim of maintenance, the petitioner No.1 herself appeared as PW-1 and while filing her affidavit as Exh. P.1, deposed that she was entitled to claim her maintenance from the respondent No.3 since her birth as she was brought up by her mother (the petitioner No.2). She claimed her maintenance from the year 1983 till the filing of the suit at different rates i.e mentioned in paragraph No.3 of the plaint. She also claimed medical expenditures of Rs.2,00,000/-

and expected expenditures of her marriage as Rs.15 lacs. She deposed that the respondent No.3 is residing abroad at Masqat for the last 26 years and is earning handsome salary from an international company. In cross-examination, she stated that she did not know the reason of divorce as at that time she was two months of age; that she did not know that what is the education/qualification of her father. She stated that he is working in Masqat. When confronted then she stated that he may be residing in Saudi Arabia. She was unable to give the name of the company but stated that pay of the respondent No.3 is Rs.2 /3 lacs. She stated that she has not seen the pay slip. She failed to give any description of expenditures being incurred upon her living. She further admitted that she has not written the affidavit herself. The petitioner No.2 appeared as her own witness as PW-2. Though her affidavit is on record but that affidavit was never got exhibited when she appeared as her own witness. However, she was cross-examined (obviously treating the said affidavit as her examination-in-chief). She also did not state the expenditures incurred or being incurred upon the petitioner No.1. She was unable to answer the nature of job of the respondent No.3 and also unable to give the name of the company where he is working. She stated that the salary of the respondent No.3 would be Rs.3/3 lacs. She stated that he is employed in Masqat and earlier he was in Saudi Arabia however she denied the suggestion that the respondent No.3 earns Rs.30/35 thousand per month. PW-3 Zaheer-ud-Din Babar, while appearing as a witness deposed through his affidavit Exh. P-2 which is inline with the affidavits of the petitioners. During cross-examination, he admitted that the respondent No.3 is residing at Saudi Arabia and at the time of marriage he was working as a Foreman in Masqat. He admitted that the pay of the respondent No.3 was Rs.30/35 thousand per month; volunteered that it was the pay at that time. He also failed to narrate the expenditures of the petitioner No.1. In rebuttal, the respondent No.3 produced Asghar Ali as DW-1 as his special attorney who filed his affidavit as Exh. D.1. He deposed that the petitioner No.1 is residing with her mother since her birth as the petitioner No.2 was divorced on 14.11.1983. He further deposed that the respondent No.3 has been maintaining Rabia Gulzar (petitioner No.1) regularly and for this reason there was no dispute between the parties. He deposed that the dispute arose when the respondent No.3 wanted to arrange the marriage of the petitioner No.1 in his family and there-after the present suit was filed malafidely. During cross-examination, he stated that he is the real paternal uncle of Rabia Gulzar (petitioner No.1). He stated that the respondent No.3 used to pay the maintenance allowance regularly at different rates i.e. Rs.250, Rs.500/-, Rs.700/- and sometimes at the rate of Rs.1,000/- per head. He also stated that the fee of the school was also used to be paid by the respondent No.3. No suggestion was put to this witness that the respondent No.3 never paid any maintenance to the minors. DW-2 Muhammad Javed Bajwa, submitted his affidavit and special power of attorney as Exh. D.8 and deposed in line with the statement of the DW-1. During cross-examination, he admitted that the maintenance allowance was never paid in his presence. He admitted that the dispute has arisen due to the marriage of the petitioner No.2 with whom the marriage could be solemnized. Muhammad Farooq, DW-3 supported the case of the respondent No.3 by filing his affidavit Exh. D.9 and in cross examination he stood firm to his stance.

7. Keeping the evidence of both the parties in juxta position, I have come to the conclusion that the petitioners did not establish the monthly expenditures incurred in

past or being incurred upon petitioner No.1 nor they were able to establish the monthly income of the respondent. Although, the respondent No.3 did not produce any evidence to establish his income but according to his own version, established through the cross-examination conducted upon the witnesses of the petitioners. He is residing abroad i.e. Saudi Arabia for the last about 26 years, therefore, it cannot be imagined that he is only earning Rs.25/35 thousand per month but at the same time, the petitioners themselves have asserted that he is spending huge amount on the education of his other children from his second wife. The learned appellate court has examined the evidence of both the parties and has upheld the findings of the learned trial court qua the quantum of maintenance allowance per month. As far as the grant of past maintenance is concerned, the evidence led by the petitioners is also not confidence inspiring. It has also been established through evidence of both the parties that the dispute/differences have arisen in between the parties on the question of marriage of petitioner No.1 as the respondent No.3 wanted to arrange the marriage of petitioner No.1 in his own family whereas the petitioners wanted to arrange the marriage of petitioner No.1 in accordance with their own wishes. The conduct of the petitioners in not filing the suit at any earlier stage also reflects that there was no such dispute between the parties as the petitioner No.2 never opted to claim the maintenance of petitioner No.1 through filing of any legal proceedings, therefore, I am in conformity with the judgment of the learned appellate court qua the grant of maintenance allowance to the petitioner No.1 from the institution of the suit. Furthermore, it has been held by the Hon'ble Supreme Court in a number of cases that the findings of the learned appellate court which are after due appraisal of evidence cannot be substituted by the findings of this Court. Reliance is placed upon the case reported as Farah Naz v. Judge Family Court, Sahiwal (PLD 2006 Supreme Court 457).

8. Now comes the question regarding the dismissal of the suit to the extent of dowry articles claimed by the petitioner No.2. It is an admitted fact that the divorce between the petitioner No.2 and respondent No.3 took place on 14.11.1983 whereas the suit was filed on 01.10.2009 in the year, 2009 after elapse of 26 years. While filing the suit, the petitioner No.2 claimed that she was treated with cruelty and mental torture and then she was turned out of the house by the respondent. In paragraph No.6 of the plaint, the petitioner No.2 asserted that she was given dowry articles worth Rs.6,00,000/- along with gold ornaments weighing 10 tolas valuing Rs.3,00,000/- and that despite long repeated demands the dowry articles have not been returned. She did not assert that when for the first time, she demanded the return of dowry articles nor she stated that when the respondent refused to return the dowry articles.

9. The respondent No.3 while filing the written statement contradicted the claim of the petitioner No.2 by submitting in his written statement that the entire dowry articles/all disputes were settled by the parties at the time of dissolution of marriage and a specific objection was raised that the suit filed by the petitioners is barred by time. I am of the opinion that the possession of the dowry articles becomes wrongful with the husband when divorce took place or when there is specific demand for return of dowry articles which is refused by the husband. Admittedly, the petitioner No.2 neither asserted any specific date for first denial of the respondent to return the dowry

articles nor she could produce any evidence to substantiate her claim that the dowry articles are still lying in possession of the respondent No.3. According to Article 49 of the Limitation Act, a suit for recovery of specific moveable property could be filed within three years when the property is wrongfully taken or injured, or when the retainer's possession becomes unlawful. There is no other Article in the Limitation Act which deals with the suit for recovery of dowry articles. I am in conformity with the judgment and decree of the learned appellate court as the delay in filing the suit for recovery of dowry articles gives rise to a presumption of fact that the dowry articles were taken back by the petitioner No.2 after her dissolution of marriage with the respondent No.3. Though the learned appellate court has dismissed the suit on merits after appraisal of evidence but in my view the suit was also liable to be dismissed to that extent being barred by time as well.

10. Another objection has been raised by the learned counsel for the petitioners that the written statement was not signed by the respondent No.3 himself has no evidentiary value and cannot be termed as a written statement filed by the respondent himself. Admittedly, Asghar Ali is the special attorney of the respondent and this petition has also been filed against the respondent No.3 through the said attorney. This objection was never raised before the trial court nor it was raised before the appellate court, therefore, this issue cannot be raised at this point.

11. During the pendency of this writ petition, the petitioner vide C.M. No.1/2013 placed on record additional documents which includes list of dowry articles, certain receipts of purchase of the same and certain photographs. Further, a nikah nama of marriage of petitioner No.1 with one Muhammad Naseer registered on 18.08.2012 showing the date of nikah as 17.08.2012 has been placed on record. None of the documents were produced before the learned trial court as all are subsequent to the decision of the suit.

12. On the other hand, the respondent while filing C.M. No. 163/2014 disputed the date of nikah of the petitioner No.1 with Muhammad Naseer and produced a "Marriage Registration Certificate" showing the date of nikah as 02.09.2011. At this stage, while exercising the constitutional jurisdiction, this Court cannot indulge into the factual controversy and the learned executing court is competent to determine the date, upto which the petitioner No.1 is entitled to receive the maintenance allowance from the respondent.

13. As remains the claim of the petitioner No.1 regarding the expenditures of her marriage, she may, if so advised, can agitate the matter before the competent court afresh which can only be decided after recording of evidence of the parties, in accordance with law.

14. In view of the above discussion, this writ petition being devoid of any force is hereby dismissed.

ZC/R-29/L Petition dismissed

**2016 M L D 67**

**[Lahore]**

**Before Atir Mahmood, J**

**MOHAMMAD TARIQ---Petitioner**

**Versus**

**SAFDAR HUSSAIN and another---Respondents**

Writ Petition No.1675 of 2014, heard on 24th September, 2014.

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

----S. 15---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Application for eviction of tenant---Summoning of witness---Rent Tribunal dismissed application for summoning of witness filed by the tenant---Contention of tenant was that appearance of witness was necessary to prove the execution of agreement---Validity---Name of witness desired to be summoned was given in the list of witnesses relied by the tenant---Said witness appeared before the Rent Tribunal on issuance of his warrants and got recorded his statement that he did not want to appear as witness of tenant and he had no concern with the agreement---Tenant did not object to the statement of witness when he appeared before the Rent Tribunal and did not raise the plea that witness was employee of landlord at such time---After appearance of witness before Rent Tribunal tenant kept mum for a long period of six months---Law did not favour the indolent rather it would favour the vigilant---Six month period had been provided for disposal of eviction petition---Tenant wanted to gain more and more time to prolong the proceedings for as much time as he could---Court could not compel the witness when he did not want to give evidence in favour of any party---Impugned order was not a final order against which no remedy of appeal had been provided---Constitutional petition was not maintainable where appeal had been barred by the legislature as same would defeat the will of legislature---Impugned order was in accordance with law---No illegality or jurisdictional defect had been pointed out in the impugned order---Constitutional petition was dismissed in circumstances.

1998 MLD 678; 2006 MLD 1532 and 2010 CLC 1590 ref.

1998 MLD 678 and 2006 MLD 1532 distinguished.

Muhammad Iftikhar v. Javed Muhammad and 3 others 1998 SCMR 328 and Saghir Ahmad Naqvi v. Province of Sindh and another 1996 SCMR 1165 rel.

**(b) Constitution of Pakistan---**

----Art.199---Punjab Rented Premises Act (VII of 2009), S. 15---Interim order of Rent Controller---Constitutional petition---Maintainability---Constitutional petition was not maintainable where appeal had been barred by the legislature as same would defeat the will of legislature.

Muhammad Iftikhar v. Javed Muhammad and 3 others 1998 SCMR 328 and Saghir Ahmad Naqvi v. Province of Sindh and another 1996 SCMR 1165 rel.

Mian Muhammad Akram for Petitioner.
Makhdoom Ijaz Hussain Bokhari for Respondent.

Date of hearing: 24th September, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this writ petition, the petitioner has assailed order dated 30.01.2014 passed by learned Civil Judge/Rent Tribunal, Dera Ghazi Khan whereby application of the petitioner for summoning Iftikhar Hussain as witness of the petitioner was dismissed.

2. Learned counsel for the petitioner inter alia contends that in order to meet the ends of justice, the appearance of the witness in question is necessary and if he is not called for evidence, the petitioner will not be able to prove the execution of the disputed agreement dated 21.06.2005. He has relied upon the law laid down in cases reported as 1998 MLD 678 and 2006 MLD 1532. He has prayed for acceptance of this writ petition as prayed for.

3. On the other hand, learned counsel for the respondent contends that this writ petition is not maintainable as it has been filed against an interim order. He has relied upon the ratio laid down in case cited as 2010 CLC 1590. Learned counsel argues that a person who refuses to appear before the court as a witness cannot be compelled under any statutory provision of law to give evidence. He prays for dismissal of this writ petition.

4. Arguments heard. Record perused.

5. Scanning of record reveals that respondent No.1 Safdar Hussain (the respondent) filed a petition for eviction of the petitioner from the premises described in the

ejectment petition. The petitioner appeared before the court and filed leave to contest as well as written reply. He also filed list of witnesses on 10.04.2010.

6. The petitioner filed application for summoning Iftikhar Hussain as his witness. It is noted that the name of Iftikhar Hussain is given in the list of witnesses relied upon by the petitioner.

On issuance of bailable warrants of Iftikhar Hussain, he appeared before the court on 16.07.2013 and got recorded his statement that he does not want to appear as witness of the petitioner and that he is not concerned whatsoever with the agreement (Exh. R-1 and Ex.R-2), as such, the learned court below let him go.

7. On 22.01.2014, the petitioner again filed application for re-summoning of Iftikhar Hussain with the assertion that said Iftikhar Hussain is personal employee of the respondent and recording of his statement is necessary to reach a just and fair conclusion which was dismissed vide impugned order. Without commenting upon merits of the case qua truthfulness or otherwise of the agreement dated 21.06.2005 or its applicability in order to decide the ejectment petition as it may cause prejudice to the rights of either party, I am constrained to observe that the petitioner did not object to the statement of Iftikhar Hussain when he appeared before the learned court below on 16.07.2013 and refused to give testimony in this case. The petitioner also did not raise the plea that Iftikhar Hussain is employee of the respondent at that time. After appearance of Iftikhar Hussain before the court on 16.07.2013, the petitioner kept mum for a long period of about six months and then filed the application in question. It is settled law that law does not favour the indolent rather it favours the vigilant. It appears from the conduct of the petitioner that he wants to gain more and more time to prolong the proceedings for as much time as he can. Furthermore, when someone does not want to become a witness or give evidence in favour of any party, there is no law under which the court could compel him to necessarily give his testimony.

8. This ejectment petition has been filed under special law which provides specific period of six months for its disposal but the ejectment petition filed by the respondent on 18.01.2010 is still pending adjudication before the learned Rent Controller. In addition, the impugned order is not a final order against which no remedy of appeal has been provided. It is settled law that where appeal is barred by the legislature, the writ petition is also not maintainable as it will tantamount to defeat the will of the legislature. Reliance is placed on the dictums laid down by the Hon'ble Supreme Court of Pakistan in cases reported as Muhammad Iftikhar v. Javed Muhammad and 3 others (1998 SCMR 328) and Saghir Ahmad Naqvi v. Province of Sindh and another (1996 SCMR 1165). The order impugned is in accordance with law. Learned counsel for the petitioner could not point out any illegality or jurisdictional defect therein. The

case law relied upon by learned counsel for the petitioner is distinguishable on facts and not helpful to the petitioner.

9. In view of what has been stated above, this writ petition is without any substance, the same is dismissed.

ZC/M-366/L Petition dismissed.

**2016 M L D 1779**

**[Lahore (Multan Bench)]**

**Before Atir Mahmood, J**

**PAKISTAN BURMA SHELL COMPANY NOW SHELL PAKISTAN LTD. through Legal Advisor/General Attorney Shell Pakistan Shell, Karachi---Appellant**

**Versus**

**Messrs NAWAZ AND SONS through Proprietor and another---Respondents**

F.A.O. No.182 of 2005, heard on 6th November, 2013.

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

----S.3---Civil Procedure Code (V of 1908), O.XXXVII, Rr.2 & 3---Summary suit---Execution petition---Limitation---Merger, rule of---Applicability---Scope---Contention of decree-holder was that execution petition could not be filed during pendency of appeal---Validity---Appeal was preferred against the judgment and decree of Trial court which was admitted for regular hearing but operation of same was not suspended---Said appeal remained pending for about nine years but decree-holder did not file execution petition and appeal was withdrawn---Execution petition was filed after the dismissal of appeal which was dismissed by the Executing Court holding that same was not filed within specified period of three years commencing from the date of passing of decree---Appeal was continuation of proceedings but rule of merger was applicable when decree of Trial Court was modified, reversed or affirmed by the Appellate Court---Time for execution petition might be extended till the decree remained under suspension if stay was granted by the Appellate Court---Time for filing of execution petition would be computed from the date of passing of the decree if stay was not granted and appeal preferred against the same was withdrawn or disposed of without deciding the same on merits---No stay was granted by the Appellate Court in the appeal preferred by the judgment-debtor against the judgment and decree of Trial Court which was ultimately withdrawn---Decree remained executable despite filing of appeal against the same---Limitation for filing of execution petition would start from the date of passing of decree and same would continue for three years---Decree-holder did not file the execution petition for about nine years which was barred by time---Each and every day of delay was required to be explained but decree-holder had failed to do so---Impugned order passed by the Executing Court was in accordance with law---Appeal was dismissed in circumstances.

Union of Indian and others v. West Coast Paper Mills Ltd. and another AIR 2004 SC 1596; Jokhan Rai v. Baikhunth Singh AIR 1987 Patna 133; Gyaniram v. Gangabai

AIR 1957 MP 85; Saifur Rahman and others v. Haider Shah and another PLD 1967 SC 344; Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others 1992 SCMR 241; Nawabzada Tilla Muhammad Khan v. Haji Muhammad Afzal and 4 others 2012 YLR 2236; Hakim Khan v. Saz Gul and others 2004 YLR 351; Muhammad Umar Gul v. Ikram Ullah Khan 1997 MLD 1917; Dost Muhammad v. Muhammad Rafiq 2003 YLR 1908; Nagendra Nath Dey and another v. Suresh Chandra Dey and others AIR 1932 Privy Council 165 and Uma Shankar Sharma v. The State of Bihar and another AIR 2005 Patna 94 ref.

Bakhtiar Ahmed v. Mst. Shamim Akhtar and other 2013 SCMR 5; Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others 1992 SCMR 241 and Muhammad Nazir and another v. Qaiser Ali Khan and 4 others 2003 SCMR 436 rel.

Union of Indian and others v. West Coast Paper Mills Ltd. and another AIR 2004 SC 1596; Jokhan Rai v. Baikhunth Singh AIR 1987 Patna 133; Gyaniram v. Gangabai AIR 1957 MP 85; Saifur Rahman and others v. Haider Shah and another PLD 1967 SC 344; Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others 1992 SCMR 241; Nawabzada Tilla Muhammad Khan v. Haji Muhammad Afzal and 4 others 2012 YLR 2236; Hakim Khan v. Saz Gul and others 2004 YLR 351; Muhammad Umar Gul v. Ikram Ullah Khan 1997 MLD 1917; Dost Muhammad v. Muhammad Rafiq 2003 YLR 1908; Nagendra Nath Dey and another v. Suresh Chandra Dey and others AIR 1932 Privy Council 165 and Uma Shankar Sharma v. The State of Bihar and another AIR 2005 Patna 94 distinguished.

Sh. Usman Kareem ud Din for Appellant.
Mian Muhammad Asif Rasheed Sial for Respondents.
Date of hearing: 6th November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this appeal, the appellant has impugned order dated 04.06.2005 passed by learned Civil Judge, Mailsi whereby the execution petition of the appellant was dismissed being barred by time.

2. Brief facts of the case are that the appellant filed a suit under Order XXXVII, Rules 1 & 2 C.P.C. for recovery of Rs.50,46,321.60 against the respondents-defendants which suit was decreed by learned Additional District Judge, Vehari vide judgment and decree dated 06.07.1995. Feeling aggrieved, the respondents-defendants preferred R.F.A. No.98/1995 before this Court on 15.10.1995. The appeal was admitted for regular hearing and notice was issued to the appellant. A C.M. for interim injunction was also filed by the defendants along with the RFA wherein notice was issued but no stay was granted. After about nine years of filing of the appeal, the respondents

withdrew the appeal on 14.06.2004. Thereafter, the appellant filed an execution petition on 01.09.2004 which was dismissed by the learned Civil Judge Mailsi vide impugned order dated 04.06.2005 holding that the execution petition was time barred. Hence this appeal.

3. Learned counsel for the appellant inter alia contends that since judgment and decree passed in favour of the appellant was challenged before this Court by the respondents through RFA which was admitted for regular hearing, there was no occasion for the appellant to move an execution petition. He asserts that when the proceedings before an appellate court are pending, the decision of which might deprive execution petitioner at a later stage from the fruits gained by him, the execution petition cannot be filed during the pendency of the appeal before the appellate court as terminus a quo of time limitation will be the date of decision of the appellate Court before which the appeal has been preferred and not from the date of passing of the judgment and decree, therefore, the execution petition of the appellant was within time as RFA filed by the respondents-defendants was dismissed as withdrawn on 14.06.2004 and the execution petition was filed by the appellant on 01.09.2004. He next argues that the executing court has not framed any issue and decided the objection petition without recording the evidence which is against the law. He submits that the act of challenging judgment and decree by way of filing appeal and then withdrawing the same by the respondents amounts to fraud which cannot be protected under the law. He, therefore, prays that this appeal be allowed, the impugned order be set aside and order of execution of the decree be passed. In support of his contentions, learned counsel for the appellant has relied upon the law laid down in cases reported as "Union of Indian and others v. West Coast Paper Mills Ltd. and another (AIR 2004 SC 1596)", "Jokhan Rai v. Baikhunth Singh (AIR 1987 Patna 133)", "Gyaniram v. Gangabai (AIR 1957 MP 85)", "Saifur Rahman and others v. Haider Shah and another (PLD 1967 SC 344)", "Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others (1992 SCMR 241)", "Nawabzada Tilla Muhammad Khan v. Haji Muhammad Afzal and 4 others (2012 YLR 2236)", "Hakim Khan v. Saz Gul and others (2004 YLR 351)", "Muhammad Umar Gul v. Ikram Ullah Khan (1997 MLD 1917)", "Dost Muhammad v. Muhammad Rafiq (2003 YLR 1908)", "Nagendra Nath Dey and another v. Suresh Chandra Dey and others (AIR 1932 Privy Council 165)", Uma Shankar Sharma v. The State of Bihar and another (AIR 2005 Patna 94)" and a judgment dated 26.09.2008 passed by Patna High Court in Civil Revision No.2105/2000.

4. On the other hand, learned counsel for the respondents has vehemently opposed the averments made by learned counsel for the appellant and fully supported the impugned order. He avers that the execution petition filed before executing court was badly barred by time. He maintains that since there was no stay granted to the respondents-defendants in the RFA filed by them, the appellant was at liberty to move

the execution petition before the executing court which was not done within the time limitation, therefore, it could not be entertained by the executing court after expiry of time, as such, the execution petition was rightly dismissed by the lower court. He prays that this appeal having no merit be dismissed. In support of his assertion, learned counsel has relied upon the law laid down by the Hon'ble Supreme Court of Pakistan in case reported as "Bakhtiar Ahmed v. Mst. Shamim Akhtar and others (2013 SCMR 5)".

5. I have heard the arguments advanced by learned counsel for the parties and also perused the record.

6. The appeal was preferred against the judgment and decree passed by the trial court which was admitted for regular hearing by this Court but operation of the impugned judgment and decree was not suspended by this Court. Since the matter remained pending before this Court for considerable time of about nine years but the decree holder despite the fact that operation of the impugned judgment and decree, was not suspended, never opted to file any execution petition. After about 9 years of filing of the appeal the respondent-judgment debtor withdrew the appeal on 14.06.2004.

7. After dismissal of appeal of the respondent-judgment debtor, the execution petition was filed by the appellant on 01.09.2004 which was dismissed by the executing court vide impugned order dated 04.06.2005 on application of the respondent filed under Section 3 of the Limitation Act holding that the execution petition was barred by time as it was not filed within the specified period of three years commencing from the date of passing of the decree. Learned counsel for the appellant has tried to make out a case of merger by submitting that the appeal is continuation of the proceedings, as such, the execution petition was filed within the limitation as the appeal as dismissed on 14.06.2004 and execution petition was filed on 01.09.2004. I am afraid that the contention of learned counsel for the appellant does not hold water. There is no cavil to the proposition that the appeal is continuation of the proceedings but at the same time, rule of merger is applicable when the decree of the trial Court is modified, reversed or affirmed by the appellate court. The contention of learned counsel for the appellant is even not supported by the case law relied upon by him. The principle of merger was elucidated by the Hon'ble Supreme Court of Pakistan in case reported as "1992 SCMR 241 (Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others)" in the following terms:

> " there are some exceptions to the rule of merger, for instance, there will be no merger on the rejection of the appeal under Order XLI, rule 10 or dismissal in default under Order XLI, rule 17 (see Balakanat v. Mst. Muni Dail (AIR 1914 PC 65) or when appeal is withdrawn or abates. These instances are

pointer to the situation when the appeal is not disposed of on merits. Further the merger is for a limited purpose of computation of period of limitation and execution of the decree." (Underline is mine)

This principle was further elaborated by the august Supreme Court in case cited as "2003 SCMR 436 (Muhammad Nazir and another v. Qaiser Ali Khan and 4 others)" as under:--

"The objection of the appellants that the execution petition having not filed within three years from the date of decree, therefore, notwithstanding the pendency of appeal it would become time-barred, has no substance. The appeal being continuation of suit, the decree in the suit would only be finalized on the disposal of appeal as the decree of the Court of first instance would merge into the decree of Appellate Court which alone could be executed. However, till the time appeal or revision was not filed or such proceedings were pending and no stay order was issued, the decree would remain capable of execution but if the decree was under challenge in pending appeal or revision and was not executable, the decree ultimately passed by the decree of the Court of last instance in appeal or revision as the case may be, would be executed irrespective of the fact that the decree of the lower Court was modified affirmed or reversed."

The rule of merger has also been discussed in a recent judgment of the Hon'ble Supreme Court reported as "2013 SCMR 5 (Bakhtiar Ahmed v. Mst. Shamim Akhtar and others)". Relevant portion from the said judgment is given hereunder:

" where stay is granted by the Appellate/Revisional Court, time can be extended for such period the decree remained under suspension. In the instant cast a right has been accrued in favour of the respondent in terms of the order of the High Court and admittedly no stay or leave to appeal was granted by this Court as such the period of limitation would run from the decree passed by the High Court and no extension of time can be granted."

8. For what has been discussed above, it is evident that the appeal though is a continuation of proceedings yet rule of merger will apply if the decree of the trial court is modified, reversed or affirmed by the appellate court. If the stay is granted by the appellate court, the time for execution petition may be extended till the time decree remains under suspension. If the stay is not granted and the appeal preferred against the decree is withdrawn, disposed of or so without deciding the appeal on merits, terminus a quo for computation of time for filing of execution petition will be the date of passing of the decree. In the instant case, no stay was granted by this Court in the appeal preferred by the respondent-judgment debtor against the judgment and decree dated 06.07.1995 which was ultimately withdrawn by him on 14.06.2004.

Despite filing of the appeal against the decree dated 06.07.1995, the decree remained executable, as such, limitation for filing of execution petition started from the date of passing of the decree and continued for three years ending at 05.07.1998. But the decree holder did not file the execution petition for about nine years till 01.09.2004 when he moved execution petition after withdrawal of the appeal by the judgment debtor. In the circumstances, the execution petition was badly barred by time. Under the law, each and every day of delay is required to be explained but the appellant has failed to do so. The order passed by learned executing court is in accordance with law which does not call for interference by this Court. No interference is called for. As a result, this appeal is bereft of any merit, hence dismissed.

ZC/P-7/L Appeal dismissed.

**2016 P Cr. L J 1916**
**[Lahore]**
**Before Atir Mahmood, J**
**YASIR LATEEF---Petitioner**
**Versus**
**The STATE and others---Respondents**

Criminal Miscellaneous No. 9559-B of 2016, decided on 23rd August, 2016.

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

----S. 497---Electronic Transactions Ordinance (LI of 2002), Ss. 36 & 37---Penal Code (XLV of 1860), Ss. 420 & 109---Hacking social media account belonging to someone else and abusing personal information---Bail, refusal of---Accused was nominated in the FIR and had been ascribed with a specific role of hacking Facebook ID of the complainant and misusing the same for uploading her personal pictures on internet without her permission---During the course of investigation, accused had been found guilty of the offence alleged against him---Offence alleged against the accused was heinous in nature as it ruined the entire life of the victim as being disgraced in the eyes of general public and her family---Sufficient evidence was available on record which was not only threatening but obnoxious and filthy in nature and prima facie connected the accused with the commission of the alleged offence--- High Court observed that such offences damaged the fibre of the society and were liable to be curbed very strongly by the law enforcing agencies---Accused was refused bail accordingly.

Shahzad Ahmed v. The State 2010 SCMR 1291 ref.

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

----S. 497---Grant or refusal of concession of bail---Discretionary relief---Same could not be agitated as a matter of right.

Saleem Akram Chaudhry for Petitioner.
Rana Zafar Iqbal, Standing Counsel for Federation.
Sh. Muhammad Siddiq for the Complainant.
Muhammad Atif Rao, DDPP and Muhammad Usman, Assistant Director, Cyber Crime Circle, FIA, Lahore for the State.

**ORDER**

**ATIR MAHMOOD, J.**---This is a petition under section 497, Cr.P.C. for grant of post-arrest bail in case FIR No.36/2016 dated 17.05.2016 for the offences under sections 36, 37, ETO read with 420, 109, P.P.C. registered with Police Station Cyber Crime Circle, Circle/Sub-Circle, NR3C, Lahore.

2. Precisely stated the allegation against the petitioner is that he hacked facebook account/ID of the complainant and loaded her personal pictures over facebook without authority and also used her personal pictures abusively which has allegedly caused damage to reputation of the complainant in the vicinity.

3. Arguments heard. Record perused.

4. The petitioner is nominated in the FIR. He has been ascribed with a specific role of hacking facebook ID of the complainant and misusing the same for uploading her personal pictures on internet without her permission. During the course of investigation, the petitioner has been found guilty of the offence alleged against him and there is sufficient evidence available on record which is not only threatening but obnoxious and filthy in nature and prima facie connects the petitioner with the commission of the alleged offence. To my mind, the offence alleged against the petitioner is heinous in nature as it ruins the entire life of the victim as being disgraced in the eyes of general public and her family. Such like practice and offences damage the fiber of the society and are liable to be curbed very strongly by the law enforcing agencies.

5. Learned counsel for the petitioner has emphasized more on the point that punishment for the offence alleged against the petitioner has been provided `imprisonment or fine', therefore, the case of the petitioner, learned counsel for the petitioner avers, is of further inquiry and he is entitled to concession of bail. Suffice it to say that grant or refusal of concession of bail is a discretionary relief and the same cannot be agitated as a matter of right. Since there is serious allegation of humiliating privacy of the complainant and using her personal pictures abusively, therefore, relying upon the judgment of the Hon'ble Supreme Court of Pakistan in case titled "Shahzad Ahmed v. The State" (2010 SCMR 1291), I am not inclined to allow bail after arrest to the petitioner.

6. For the aforementioned reasons, this bail application is without any merit, hence dismissed.

MWA/Y-3/L Bail refused.

**2016 P L C 360**

**[Lahore High Court (Multan Bench)]**

**Before Atir Mahmood, J**

**TECHNICAL EDUCATION AND VOCATIONAL TRAINING AUTHORITY through Chief Operating Officer and another**

**Versus**

**Hafiz NASEER and 2 others**

Writ Petitions Nos.1385, 1386, 1387, 1388 of 2014 and 15903 of 2012, decided on 23rd December, 2015.

**(a) Punjab Industrial Relations Act (XIX of 2010)---**

----Ss. 44, 1(3) & 2(ix)---Grievance petition---Regularisation of services---Technical Education and Vocation Training Authority whether commercial or industrial organization---Employees filed grievance petition that they were appointed against permanent and vacant posts and were entitled for regularization---Grievance petition was accepted concurrently---Validity---Some manufacturing of blue pottery was done by the department but mere manufacturing with no profit or commercial purpose did not make it a commercial or industrial organization---Department could not be considered as profit making entities, industrial establishment or commercial organization rather might be termed as charitable organization/establishment as it was imparting technical education and vocational training without any cost---Employees of the department did not fall within the definition of "workmen" or "worker"---Labour Court had no jurisdiction to deal with the grievances of the employees---Grievance petition filed by the employees was liable to be dismissed on this score alone---Employees were employed on daily wages for specified period for specified projects till their services were required---Mere payment of fixed monthly salary did not ipso facto declare a payee as "permanent employee"---Daily wage employee had no right to claim regularization of service---Daily worker could neither be considered a permanent employee nor he could be a member of any labour union---Impugned judgments were set aside and grievance petition was dismissed---Constitutional petition was allowed in circumstances. A, B, C, D & F

Trustees of the Port of Karachi v. Muhammad Saleem 1994 SCMR 2213; K.G. Old, Principal, Christian Technical Training Centre, Gujranwala v. Presiding Officer, Punjab Labour Court, Northern Zone and 6 others PLD 1976 Lah. 1097 and Sh. Ahmad Sadiq v. Chief Settlement Commissioner and others PLD 1974 SC 368 ref.

Managing Director, Sui Southern Gas Company Ltd. Karachi v. Ghulam Abbas and others PLD 2003 SC 724; Ikram Bari and 524 others v. National Bank of Pakistan through President and another 2005 SCMR 100; Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others 2008 SCMR 1058; Izhar Ahmed Khan and others v. Punjab Labour Appellate Tribunal Lahore etc. 1999 SCMR 2557; Karachi Chamber of Commerce and Industry, Karachi v. Sindh Labour Court No.5, Karachi and others 2012 PLC 251 and Lahore Development Authority

through D.G. Lahore and another v. Abdul Shafique and others PLD 2000 SC 207 distinguished.

Board of Governors Aitchison College, Lahore v. Punjab Labour Appellate Tribunal and others 2001 PLC 589 rel.

**(b) Industrial dispute---**

----Daily wage employee---Scope---Daily wage employee had no right to claim regularization of his service. D

**(c) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of High Court---Scope---Where there was illegality, irregularity, jurisdictional defect, misreading or non-reading of evidence then High Court could interfere in concurrent findings to undo the wrong. E

Mehr Muhammad Iqbal for Petitioners.
Ch. Saleem Akhtar Warraich for Respondents.
Date of hearing: 8th December, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this single judgment, I intend to dispose of Writ Petitions Nos.1385/2014, 1386/2014, 1387/2014, 1388/2014 and 15903/2012 as common questions of law and fact are involved therein.

2. Brief facts of the case are that the respondents filed grievance petitions against the petitioners alleging therein that they were employed by Project Director, TEVTA, Multan in Institute of Blue Pottery Development, Multan; that they asserted that their appointments were made against permanent and vacant posts; that their salaries were increased from time to time; that they have been performing their duties continuously to the entire satisfaction without any complaint since date of their initial appointments but their services have not been regularized by the respondents with mala fide intention despite the facts that the petitioners requested for the same time and again and that a number of posts of Workers, Helpers, Naib Qasids, Sweepers and Malis etc. were available in TEVTA Multan; that more than 100 workers were employed in TEVTA; that CBA union is also working in this institution; that labour laws are applicable on the workers of respondent institution and the labour court has jurisdiction to deal with the matter. The respondents prayed that their services be regularized.

3. The petitioners contested these grievance petitions mainly on the ground that the labour court has no jurisdiction to adjudicate upon the matter as the TEVTA is running under the control of Punjab Government to provide technical education to the people and it is not a commercial establishment.

4. After recording evidence and hearing both sides, learned Punjab Labour Court, Multan accepted the grievance petitions vide judgment dated 18.01.2011. Feeling aggrieved, the petitioners filed appeal which was dismissed by Punjab Labour Appellate Tribunal, Multan vide judgment dated 04.07.2002. Hence the instant writ petitions have been instituted.

5. Learned counsel for the petitioners inter alia contends that the petitioner department, i.e. TEVTA is neither a commercial nor industrial organization rather it runs under the control of Punjab Government with the aim to impart technical education and training to the residents of the Province, particularly to the poor; that the labour court had no jurisdiction to adjudicate upon the matter; that the respondents were employed on daily wage basis and they were not permanent employees of TEVTA; that even the respondents are not in service since January, 2015 as they themselves have left the department after getting all their dues; that the impugned judgments are against law, therefore, the instant writ petitions be allowed, the impugned judgments be set aside and the grievance petitions filed by the respondents be dismissed. He has relied upon the law laid down in cases reported as Trustees of the Port of Karachi v. Muhammad Saleem (1994 SCMR 2213), K.G. Old, Principal, Christian Technical Training Centre, Gujranwala v. Presiding Officer, Punjab Labour Court, Northern Zone and 6 others (PLD 1976 Lahore 1097), Sh. Ahmad Sadiq v. Chief Settlement Commissioner and others (PLD 1974 SC 368) and Board of Governors Aitchison College, Lahore v. Punjab Labour Appellate Tribunal and others (2001 PLC 589).

6. On the other hand, learned counsel for the respondents has vehemently opposed these writ petitions. He avers that the TEVTA though is imparting technical education but it also manufactures different items; that there are more than 100 workers in TEVTA; that the labour laws fully apply upon the petitioner department and the labour court had jurisdiction to adjudicate upon and decide grievance petitions of the respondents; that the respondents were employed on permanent basis and they were paid salaries on monthly basis and not on daily basis; that they have been working in TEVTA satisfactorily without any complaint but later on, they were expelled from TEVTA and were not allowed to enter in the department; that assertion of learned counsel for the petitioners that the respondents have themselves left the service is against the facts and not true; that the impugned judgments are in accordance with law: that there are concurrent findings against the petitioners which cannot be interfered with as learned counsel for the petitioners has not been able to point out any illegality therein. Learned counsel for the respondents has averred that the instant writ petitions being without any merit are liable to be dismissed. He has placed reliance on the law laid down in cases reported as Managing Director, Sui Southern Gas Company Ltd. Karachi v. Ghulam Abbas and others (PLD 2003 SC 724), Ikram Bari and 524 others v. National Bank of Pakistan through President and another (2005 SCMR 100), Tehsil Municipal Administration, Rahimyar Khan and others v. Hanif Masih and others (2008 SCMR 1058), Izhar Ahmed Khan etc. v. Punjab Labour Appellate Tribunal Lahore etc. 1999 SCMR 2557; Karachi Chamber of Commerce and Industry, Karachi v. Sindh Labour Court No.5, Karachi and others (2012 PLC

251), Lahore Development Authority through D.G. Lahore and another v. Abdul Shafique and others (PLD 2000 SC 207).

7. Arguments heard. Record perused.

8. The moot points in this case is as to whether the petitioner department, i.e. Institute of Blue Pottery Development, Multan, is an industrial or commercial organization or not and as to whether the labour court had jurisdiction to decide the grievance petitions filed by the respondents.

9. The respondents in all the writ petitions in hand filed grievance petitions under Industrial Relations Act claiming themselves to be the workers of the Petitioner Department. Subsection (3) of Section 1 of the Punjab Industrial Relations Act, 2010 is relevant in this case which is reproduced hereunder:

> "1(3) It shall apply to all persons employed in any establishment or industry, but shall not apply to any person employed--
>
> (a)
> (b)
> (c)
> (d)
> (e)
> (f)
> (g)
> (h) in an establishment or institution providing education or emergency services excluding those run on commercial basis."

The term 'establishment' has been defined in Section 2(ix) of the Act ibid which reads as under:

> "establishment" means any office, film factory, society, undertaking, company, shop, premises or enterprise in the Punjab, which employs workmen directly or through a contractor for the purpose of carrying on any business or industry and includes all its departments and branches, whether situated in the same place or in different places having a common balance sheet and except in section 25 includes a collective bargaining unit, if any, constituted in any establishment or group of establishment."

Undeniably, Petitioner No.1, i.e. Technical Education and Vocation Training Authority is a institution which has been established for imparting technical education and vocational training as it is manifested from its name. This is funded by the Punjab Government. The department provides technical education and vocational training to the students to make them useful citizens by equipping them with some kind of art and make them capable of earning their livelihood. Petitioner No.2, i.e. Institution of Blue Pottery Development is a project of petitioner No.1 which is headed by a Project Director. The designation of head of the institution, i.e. Project Director, is reflective of the fact that this institution is just a project of petitioner No.1 and the posts created

therefor are Project based only. Petitioners are providing education and training to its students free of cost rather the students are offered stipends ranging from Rs.1500/- to Rs.3000/- per month depending upon the disciplines in which they have been enrolled. The petitioners have established workshops to impart on-hand technical education and ensure job opportunities to its students. [There is no denial to the fact that some manufacturing of blue pottery is done by petitioner department in such workshops but mere manufacturing with no profit or commercial purpose, particularly to train the students as such workshops are necessary for on-hand training purposes, does not make the petitioner department a commercial or industrial organization rather other aspects of manufacturing includes training of the students. In this view of the matter, petitioners Nos.1 and 2 by no stretch of imagination can be considered as profit making entities, industrial establishments or commercial organizations rather they may be termed as charitable organizations/ establishments as they are serving the community by imparting technical education arid vocational training to them without any cost but with stipends to attract the people to get technical education. In view of clause (h) of Subsection (3) of Section 1 read with Section 2(ix) of the Punjab Industrial Relations Act, 2010, the petitioners do not fall within the definition of the workmen or worker, therefore, neither they can approach the labour court nor the labour court had any jurisdiction to deal with their grievances. As such, the grievance petitions filed by the respondents were liable to be dismissed on this score alone. Reliance is placed on the ratio decidendi laid down by the apex court in case reported as Board of Governors Aitchison College, Lahore v. Punjab Labour Appellate Tribunal and others (2001 PLC 589) wherein it has been held that:]A

> "... it may be noted that said institution was engaged in offering technical education in the filed of woodwork; sheetmental welding, electrician etc., and it had its own workshop but despite of that it was held that it is an educational institution and training establishment and if it is maintaining an industrial unit (workshop) rendering services on payment, adverting its products, it is as an incidence of vocational education and of training programme designed to ensure job opportunities to the trainees. Therefore, what is incidental to the main purpose cannot detract in any manner, from its being an educational institution. Applying this test on the facts in hand we feel no difficulty in concluding that appellant's organization is neither an industry nor it falls within the definition of industrial establishment, therefore, its employees cannot be considered to be worker or workman either under I.R.O. or Ordinance."

10. [Another aspect of the matter is that the petitioners were employed on daily wage basis. Learned counsel for the respondents have emphasized on the point that the petitioners were permanent employees in the petitioner department. I have gone through the applications of the grievance petitioners filed by them for their appointment. For example, grievance petitioner Hafiz Naseer Ahmed filed application for appointment as daily paid worker wherein he himself states that:]B

Following order was passed in the application of said Naseer Ahmed:

> "Allowed as daily paid worker purely on temporary basis @ Rs.4000/- Rupees four thousand only per month w.e.f. 09.06.2008 upto 30.06.2008."

Perusal of above makes it crystal clear that Naseer Ahmed himself asked for appointment against post of daily paid worker and the order was passed by the petitioner department accordingly. Almost same is the situation with other grievance petitioners. Learned counsel for the respondents have taken stance that since the respondents were enjoying fixed monthly salaries, they were permanent employees. In my considered view, [mere payment of fixed monthly salary to an employee does not ipso facto declare a payee as permanent employee. If it is so, then every contract employee who is undisputedly paid fixed monthly salary]C will be deemed to be the permanent employee which in fact is not true. [The respondents might have been paid monthly salaries but their salaries could be calculated according to the days they served in the relevant month. The respondents were employed on daily wage basis for specified periods for specified projects and no daily wage employee has any right to claim regularization of his service merely on the ground that since he has worked as a daily worker, his services be regularized. The employments of the respondents were project based and till the time, their services were required, these were utilized whereafter they were relieved from their services as the project did not require so.]D The argument of learned counsel for the petitioner that since the respondents were being paid monthly salaries, they were permanent employees is without any force, which is accordingly repelled.

11. The contention of learned counsel for the respondents that concurrent findings are immune from interference by this Court in its constitutional jurisdiction is without any force as it is well-settled now that where there is [gross illegality, irregularity, jurisdictional defect, misreading or non-reading of evidence, this Court can interfere in the concurrent findings to undo the wrong.]E The contention of learned counsel for the respondents is accordingly discarded. The law relied upon by learned counsel for the respondents is also not helpful to the respondents as it is distinguishable on facts.

12. [In short, the respondents applied for their appointment on daily wage basis and they were accordingly appointed for specified periods for specified projects. A daily worker can neither be considered a permanent employee nor he can be a member of any labour union. The respondents were employed in a workshop under the petitioners which was meant for imparting on-hand technical education to the students. Though this workshop manufactured some potteries but it was just an incidence and the workshop can be considered a mere ancillary to the main purpose of education and this does not give status of an 'industry' to such workshops, as such, the respondents having no status of worker or workman as defined in the Industrial Relations Act or Ordinance have no locus standi to approach labor court for redressal of their grievances. Both the learned courts below have erred in law while assuming their jurisdiction in the matter. Resultantly, all these writ petitions are allowed, the impugned judgments are set aside and the grievance petitions of the respondents in all the writ petitions in hand are dismissed.]F

ZC/T-9/L Petition allowed.

**2016 P L C (C.S.) 1228**
**[Lahore High Court]**
**Before Atir Mahmood, J**
**MUHAMMAD IBRAHIM**
**Versus**
**DIVISIONAL SUPERINTENDENT RAILWAYS and others**

Writ Petition No.424 of 2012, heard on 19th May, 2015.

**Accommodation Allocation Rules, 2002---**

----R. 15(2)---Constitution of Pakistan, Art.199---Constitutional petition---Civil service---Allotment of residential accommodation---Fundamental rights---Aggrieved person---Scope---Petitioner applied for allotment of residential accommodation on the basis of "Father to Son Policy" but no response was given---Validity---Accommodation which was earlier allotted to the employee could be allotted to his serving spouse or children on his retirement or expiry of his contract---Serving widow or serving legitimate children of deceased employee could be allotted accommodation which was earlier in possession of their predecessor through legitimate allotment but same could only be allotted if the person was eligible or had become eligible within one year of the death of the predecessor---Mother of the petitioner was allowed to retain the possession of the disputed house for five years which period had expired---No employee (other than officers) could be allotted any accommodation beyond his entitlement under any circumstances---Petitioner had joined the service in the year 2007 and till today he had not served for a period of ten years---Petitioner could not claim the allotment of said house as a matter of right---Allotment of a residential accommodation was not a vested or fundamental right of any employee---Petitioner could not be termed as an aggrieved person---Constitutional petition was dismissed in circumstances.

Mst. Altaf Bibi v. Government of Pakistan and others 2006 PLC (C.S.) 803 and Malik Tahir Mehmood v. Chief Executive Islamabad Electric Supply Company, Islamabad and another 2005 PLC (C.S.) 279 rel.
Raja Muhammad Arif for Petitioner.
Suleman Kazmi for Pakistan Railways and Fazak Dayan, Estate Inspector for Respondents.
Date of hearing: 19th May, 2015.

**JUDGMENT**
**ATIR MAHMOOD, J.---** Through this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner seeks direction to the respondent for allotment of quarter No.493-A situated at Bakery Chowk Westridge, Rawalpindi on the basis of Father to Son Policy.

3. (sic) The brief facts of the case are that a quarter No.493-A, situated at Bakery Chowk Westridge, Rawalpindi was allotted to the father of the petitioner being

employee of Pakistan Railway but unfortunately he later on died during his service and the said accommodation was allowed to be retained by the widow of the deceased i.e. mother of the petitioner, for five years. The said retention period expired on 23.02.2012. The petitioner, who is working as Muawan in Pakistan Railways in Loco Shed Rawalpindi, applied for the allotment of the said accommodation on the basis of "Father to Son Policy" but the respondent did not give positive response of it. The petitioner also applied to the Minister for Pakistan Railways, for the allotment of the above-said quarter and the Minister recommended for the allotment of the said quarter in the name of petitioner but even then the respondent did not make allotment of the said quarter to the petitioner. Therefore, the petitioner sought direction through this constitution petition to the respondent for allotment of the above-said quarter to the petitioner on the basis of "Father to Son Policy" of Pakistan Railways.

3. Learned counsel for the petitioner submitted that the respondent cannot refuse to the petitioner about the allotment of above-said quarter in the light of Father to Son Policy of Pakistan Railway and respondent is bound to allot the said quarter in the name of the petitioner in which the petitioner along with his family is living; that the respondent has been allotted several quarters to its employees on the basis of Father to Son Policy; that if the said quarter is not allotted in the name of the petitioner, the petitioner shall suffer an irreparable loss and it will be amounting to violation of the Father to Son Policy. He has relied upon the Rule 15(2) of the Accommodation Allocation Rules, 2002. The emphasis of the learned counsel for the petitioner is upon Rule 15(2) of the Accommodation Allocation Rules, 2002 (amended on 04th of August, 2004). The said provisions are reproduced as under for ready reference:-

> "Provided that the serving spouse or children living with FGS may be allotted the same accommodation, if he is eligible and otherwise entitled for accommodation within six months of the retirement of the FGS. If the accommodation allotted is higher than the entitlement of the spouse or children, he may apply in writing for the allotment of accommodation in accordance with his eligibility, in lieu of the occupied accommodation. The spouse or children shall not be eligible for allotment of accommodation of higher category"; and". (Emphasis provided).

He also argued that rule 29A of the Rules ibid the Federal Government is also entitled to relax any rule governing allotment of accommodation to eligible FGS in public interest for deserving and hardship cases.

4. On the other hand, the learned counsel for the respondents submitted that the mother of the petitioner remained in possession of the disputed quarter for five years without payment of any rent which period expired in the year 2012 and since then the petitioner is in illegal possession of the property; that there is no vested right of the petitioner that he should be provided with an accommodation by the Railways Authorities; that the policy matters cannot be interfered under the constitutional jurisdiction, therefore, the writ petition is not maintainable.

5. Arguments heard. Record perused.

6. Bare perusal of the above-referred rules clearly reveals that the accommodation, which was earlier allotted to the FGS can be allotted to his serving spouse or children. This proviso to the sub-rule (2) is with regard to an allottee on his retirement or expiry of his contract but it is not with regard to a person who died during the service or within six months after his retirement. Rule 15 of the Rules ibid is applicable in the present case. The rule 15(1) is reproduced as under for ready reference:-

> "In case of death of allottee.-- (a) the family of the allottee shall be entitled to retain the accommodation under their occupation for period not exceeding one year on payment of normal rent; and (b) his serving widow or serving legitimate children may be allotted the said accommodation provided he is eligible for the accommodation or becomes eligible for the said accommodation within one year of the event. In case the allottee expires within six months after retirement, his serving spouse or legitimate children may be considered for allotment provided all other conditions are met. Where the accommodation is of a class or category higher than his entitlement, he shall be allotted the first available accommodation in that class or category as the case may be, and shall not be dislodged and shall be charged normal rent till such time as the alternative accommodation of his entitlement has been made available to him" (Emphasis provided).

7. It is reflected from the above-referred rule that serving widow or serving legitimate children of deceased employee can be allotted the accommodation which was earlier in possession of their predecessor through legitimate allotment but there is a rider that it can only be allotted if the person is eligible or becomes eligible within one year of the event i.e. death of the predecessor. In the present case, admittedly the mother of the petitioner was allowed to retain the possession of the disputed house for five years which period expired on 23.02.2012 and then onwards the petitioner has retained the possession of the disputed house under the stay order granted by this Court. According to the policy for allotment of Railway accommodation and retention etc. 1993 (other than Officers), no employee can be allotted any accommodation beyond his entitlement under any circumstances. However, in case of allotment on compassionate grounds following criteria has been laid down:--

> **ALLOTMENT ON COMPASSIONATE GROUNDS**
>
> 8. (a) On retirement of an employee the allotment of a residential unit allotted to him can be transferred to his son/daughter living with him/her provided that:-
>
> (i) He/she belongs to the same or higher category of staff.
>
> (ii) The son/daughter has at least 10 years regular service and:
>
> (iii) Is entitled for such allotment/accommodation (Emphasis Provided).

8. In the present case, the petitioner joined the service in the year 2007 and till today he has not served for a period of ten years, therefore, he cannot claim the allotment of said quarter as a matter of right.

9. Even otherwise, the allotment of a residential accommodation is not a vested or fundamental right of any employee, therefore, he cannot be termed as an aggrieved person under the provisions of Article of 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Reliance is placed upon the cases reported as Mst. Altaf Bibi v. Government of Pakistan and others (2006 PLC (C.S.) 803) and Malik Tahir Mehmood v. Chief Executive Islamabad Electric Supply Company, Islamabad and another (2005 PLC (C.S.) 279).

10. In view of the above discussion, this writ petition being devoid of any force is hereby dismissed.

ZC/M-158/L Petition dismissed.

**P L D 2016 Lahore 474**

**Before Atir Mahmood and Mushtaq Ahmad Tarar, JJ**

**Dr. HAMMAD RAZA KHAN---Appellant**

**Versus**

**Syed SHAH HUSSAIN and 2 others---Respondents**

R.F.A. No.324 of 2010, heard on 11th November, 2015.

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

----Ss. 12, 15 & 17---Civil Procedure Code (V of 1908), O.VII, R.11---Part performance of agreement to sell---Plaint, rejection of---Word "party" contained in S.15 of Specific Relief Act, 1877---Scope---Court could issue decree for part performance of agreement to sell---Plaintiff must fulfil his obligations first and then ask for compliance of the agreement by the other side---If plaintiff had failed to perform in full or the part left unperformed on his part was larger than he had performed or wanted to perform then he was not entitled to the decree---Only the plaintiff could be held entitled for decree in shape of performance of agreement or any compensation in lieu thereof---Mere denial by the defendant to an agreement allegedly executed by him did not entitle him to file an application for rejection of plaint---Defendant could not take plea that the portion which was left unperformed on his part was larger than the left one---Plaint could be rejected if it did not disclose any cause of action against the defendant(s)---Pleadings contained in the plaint and agreement to sell or other documents appended therewith did disclose cause of action against the defendant who was signatory of alleged agreement to sell---Initial burden to prove case was on the plaintiff for which he should have been given opportunity---Trial Court should have proceeded to record evidence of the parties and then decide the suit accordingly rather than rejecting the plaint---Impugned order passed by the Trial Court being against law was not sustainable---Impugned order was set aside and case was remanded to the Trial Court with direction to record evidence of the parties and then decide the matter in accordance with law---Appeal was allowed in circumstances.

Mrs. Anis Haider and others v. S. Amir Haider and others 2008 SCMR 236 rel.

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

----S. 15---Part performance of contract---Word "party" contained in S.15 of Specific Relief Act, 1877---Scope---Word "party" mentioned in S.15 of Specific Relief Act, 1877 would mean the party which approached the court for decree i.e. the plaintiff but it did not mean the defendant.

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

----O. VII, R. 11---Plaint, rejection of---Scope---Provisions of O. VII, R.11, C. P. C would pertain to the suits and plaints.

**(d) Pleadings---**

----Plaint and written statement were mere pleadings and same could not be termed as proof of anything contained therein.

Javaid Ahmad Khan for Appellant.
Respondents proceeded against ex parte vide order dated 6-10-2015.
Date of hearing: 11th November, 2015.

**JUDGMENT**
**ATIR MAHMOOD, J.**--Precise facts of the case are that the appellant filed a suit for specific performance of agreement to sell dated 30.07.2007 regarding suit house, fully described in the plaint, against the respondents-defendants. It was averred in the plaint that the plaintiff purchased the suit property from the defendants for Rs.31,00,000/- out of which Rs.100,000/- were paid through cross cheque dated 30.07.2007; that defendant No.1 on his as well as on behalf of other defendants executed the agreement to sell; that the target date for payment of the remaining amount was set as 15.03.2008 otherwise the earnest money was to be confiscated by the defendants; that the plaintiff is ready to pay the remaining amount but the defendants are not.

2. Defendant No.1 and defendants Nos.2 and 3 opposed the suit by filing written statements separately. Out of divergent pleading of the parties, issues were settled. Afterwards, defendants Nos.2 and 3 filed application under Order VII, Rule 11, C.P.C. on 05.11.2009 for rejection of the plaint with the assertions that they neither executed any power of attorney in favour of defendant No.1 nor they were signatories of the alleged agreement to sell nor they were present in Pakistan at the relevant time. After hearing arguments pro and contra, the said application was accepted by learned trial court vide order and decree dated 20.01.2010 while rejecting the plaint to the extent of defendants Nos.2 and 3. Then, on 05.05.2010, defendant No.1 also filed application under Order VII, Rule 11, C.P.C. for rejection of the plaint. The appellant contested the same but learned trial court after hearing both sides allowed application of defendant No.1 as well and rejected the plains vide order and decree dated 21.09.2010. Hence this RFA has been preferred by the appellant-plaintiff.

3. Learned counsel for the appellant inter alia contends that the impugned orders and decrees are against law and fact; that the plaint could not be rejected as done by learned trial court rather the trial court was bound to look into contents of the plaint; that the court should have recorded evidence and then decide the suit rather than rejecting the plaint; that the plaint could also not be rejected in piecemeal. He prays for acceptance of this appeal and setting aside the impugned orders and decrees.

4. Respondents have already been proceeded against ex parte vide order dated 06.10.2015.

5. Arguments heard. Record perused.

6. Undeniably, the suit house is jointly owned by all the three defendants. Defendants Nos.2 and 3 were admittedly not present in Pakistan at the time when the alleged agreement to sell was written. They did not sign the alleged agreement to sell. There is also no power of attorney or anything else available on record which could suggest that defendants Nos.2 and 3 had appointed defendant No.I as their attorney or they had countenanced so in any manner. Even, it is version of the plaintiff that he went to defendants Nos.2 and 3 for payment of Rs.500,000 but they refused which is sufficient to establish that they did not want to sell the suit house to the extent of their shares. In the circumstances, learned trial court has rightly held that there appears to be no cause of action accrued to the plaintiff against defendants Nos.2 and 3. Then, there remained the suit to the extent of defendant No.1 who also filed application under Order VII, Rule 11, C.P.C. Learned trial court incorrectly and illegally held that after rejection of the plaint to the extent of defendants Nos.2 and 3, the suit of the plaintiff was hit by Section 17 of the Specific Relief Act, 1877 and that it was barred by law. Section 17 of the Act provides as under:

> **"17. Bar in other cases of specific performance of part of contract:** The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections."

The three last preceding paragraphs as mentioned in Section 17 ibid are Sections 14 to 16. I have carefully read the said provisions of law. These provisions deal with part performance of the agreement and there is nothing mentioned therein which could bar the court from issuing decree for part performance of agreement to sell. However, section 15 provides as under:

> **"15. Specific performance of part of contract where part unperformed is large:** Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right of compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

In the above provision of law, there are two conditions for non- entitlement of decree:

> (i) If a party fails to perform his whole part of agreement and the part which must be left unperformed forms a considerable partition of the whole, or
>
> (ii) It does not admit of compensation in money.

Perusal of above makes it clear that the word 'party' mentioned in the above provision means the party approaches to the court for decree, i.e. the plaintiff but it does not mean the defendant in any manner. Meaning thereby, the plaintiff must fulfill his obligations first and then ask for compliance of the agreement by the other side and if

the plaintiff fails to perform in full or the part left unperformed on his part is larger than he has performed or wants to perform then, he is not entitled to the decree. The other condition regarding acceptance of compensation is also for the plaintiff and not for the defendant as it is only the plaintiff which could be held entitled for decree in shape of performance of agreement or any compensation in lieu thereof. Mere denial by a defendant to an agreement allegedly executed by him does not, in our considered view, entitle him to file application under Order VII, Rule 11, C.P.C. He can also not take plea that portion, which is left unperformed on part of the defendants and not on that of the plaintiff, is larger than the left one, therefore, the plaint be rejected under Section 17 of the Specific Relief Act.

7. The application under Order VII, Rule 11, C.P.C. pertains to suits and plaints. This provision of law can only be applied for rejection of the plaint if plaint does not disclose any cause of action against the defendant(s). In the instant case, the pleadings contained in the plaint and the agreement to sell or other documents appended therewith though do not reflect any cause of action accrued to the plaintiff against defendants Nos.2 and 3 but these do against defendant No.1 who is allegedly signatory of the agreement to sell. The plaint could not be rejected on the basis of denial by defendant No.1 as the plaint as well as the written statement are mere pleadings and cannot be termed as proof of anything contained therein. The initial burden to prove the case is yet on the plaintiff for which he should have been given opportunity. In the circumstances, the learned trial court should have proceeded to record evidence of the parties to the extent of defendant No.1 and then decide the suit accordingly rather than rejecting the plaint. The order of learned trial court dated 21.09.2010 to the extent of defendant No.1 being against the law is not sustainable. Reliance is placed on the ratio decidendi laid down by the apex court in case reported as Mrs. Anis Haider and others v. S. Amir Haider and others (2008 SCMR 236).

8. For what has been discussed above, this R.F.A. is partially allowed, impugned order and decree dated 21.09.2010 passed by learned trial court is set aside and the case is remanded to learned trial court with the direction to record evidence of the parties to the extent of share of defendant No.1 in the suit property and then decide the matter after affording opportunity of hearing to both sides, strictly in accordance with law. However, order and decree dated 20.01.2010 passed by learned trial court to the extent of defendants Nos.2 and 3 is upheld.

ZC/H-1/L Order accordingly.

**P L D 2016 Lahore 491**

**Before Atir Mahmood, J**

**KARAMAT HUSSAIN and another---Petitioners**

**Versus**

**ELECTION COMMISSION OF PAKISTAN through Provincial Election Commissioner (Punjab) and 7 others---Respondents**

Writ Petition No.17949 of 2015, heard on 10th December, 2015.

**(a) Punjab Local Government (Conduct of Elections) Rules, 2013--**

----R. 36(2)----Election for local government---Re-counting/verification of rejected votes by the Returning Officer---Candidate submitted application for re-counting/verification of rejected votes which was accepted by the Returning Officer---Validity---Returning Officer had no power to review/recall his own order whereby he had accepted application for re-counting/examination of rejected votes---Returning Officer should scrutinize the rejected votes if there was any objection by either party upon counting of rejected votes and if he found that such votes should not have been rejected then he should count them in favour of the candidate in whose favour those had been polled---If there was any illegality or error on the part of public servant with the affairs of the State then writ of mandamus could be issued to the concerned officer---Returning Officer was directed to re-count/examine the rejected votes and then declare the consolidated results---Consolidated results were set aside---Constitutional petition was disposed of in circumstances.

Muhammad Anwar v. The Deputy Commissioner Delimitation Officer, Faisalabad and 2 othes 1985 MLD 1154 and Muhammad Aslam Abro v. Sardar Muhammad Muqeem Khosa and others 2013 SCMR 1676 rel.

**(b) Constitution of Pakistan--**

----Art. 199---Constitutional jurisdiction of High Court---Scope---Election dispute---Appointment of Election Tribunal---Mere appointment of Election Tribunal would neither curtail nor bar the jurisdiction of High Court when matter was already under adjudication before it.

**(c) Constitution of Pakistan---**

----Art. 199---Writ of mandamus, issuance of---Scope---If there was any illegality or error on the part of public servant with the affairs of the State, writ of mandamus could be issued to the concerned officer.

Muhammad Aslam Abro v. Sardar Muhammad Muqeem Khosa and others 2013 SCMR 1676 rel.

Muhammad Usman Sharif Khosa for Petitioners.

Muhammad Masood Bilal for Respondents Nos. 4 and 5.

Muhammad Naeem Khan, Legal Adviser and Muhammad Younas, Returning Officer, U.C. No.25, Kabirwala for Election Commission.

Date of hearing: 10th December, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This single judgment will dispose of Writ Petitions Nos.17949/2015 and 17933/2015 simultaneously as common questions of law and fact are involved therein.

2. The cause of action as given in this writ petition is that the petitioners as well as respondents Nos.4 to 7 submitted their nomination papers to contest elections of Chairman and Vice-Chairman of Union Council No.25, Marri Sahu, Tehsil Kabirwala, District Khanewal. After due process, the election was conducted on 19.11.2015 and result was announced wherein the petitioners remained the runner-up. Petitioner No.1 Haji Karamat Hussain filed application for re-counting/verification of rejected votes on 20.11.2015 which was duly accepted by the Returning Officer. However, later on, the Returning Officer consolidated the result on 22.11.2015. and vide order of the even date recommended for re-polling. The Writ Petition No. 17949/2015 assails both the said order and recommendation whereas Writ Petition No.17933/2015 challenges the recommendation of re-polling.

3. Arguments heard. Record perused.

4. The moot point in this case is as to whether the Returning Officer could review/recall his own order of acceptance of application of petitioner No.1 for recounting/verification of rejected votes. When confronted with, the Returning Officer, present in person, submits that he did so as the applicant/petitioner No.1 vide another application dated 21.11.2015 showed his no confidence upon him.

5. On 04.12.2015, both the parties developed consensus on the point that they will not press the re-polling in the Polling Station, however, they stuck to the prayer of recounting of 205 rejected votes. Today, learned Legal Adviser for the Election Commission of Pakistan has raised objection upon the said consensus by submitting that the result has already been consolidated and Election Tribunals stand appointed, therefore, the aggrieved party(s) should approach the concerned Election Tribunal for redress of their grievance(s), if any. He submits that the jurisdiction of this Court is barred in the said circumstances. In my opinion, mere appointment of election tribunals neither curtails nor bars the jurisdiction of this Court, particularly when the matter is already under adjudication before this Court, the appointment of election tribunals afterwards is of no consequence in this regard.

6. Sub-rule (2) of Rule 36 of the Punjab Local Government (Conduct of Elections) Rules, 2013 is very much relevant in this case which is reproduced below:

> "(2) Before consolidating the results of the count, the Returning Officer shall examine the ballot papers excluded from the count by the Presiding officers and if he finds that any such ballot paper should not have been so excluded, count it as a valid ballot paper cast in favour of the contesting candidate for whom the vote had otherwise been cast."

Bare reading of above provision reveals that the Returning Officer before consolidation of results of the count is under legal obligation to examine the ballot papers rejected/excluded and after such examination, if he reaches the conclusion that such votes should not have been rejected/excluded, he will count them in favour of the candidate(s) to whom they have been cast. Meaning thereby, the consolidation of results could not take place before such exercise.

7. In this case, petitioner No.1 had moved an application for re counting/verification of rejected votes on 20.11.2015 before the Returning Officer who accepted the same in the following words:

8. Afterwards, the Returning Officer without implementing his own order not only declared the consolidated results in Form XIII but also recommended for re-polling vide order dated 22.11.2015 on the plea that the applicant/petitioner No.1 had shown no confidence upon him vide another application dated 21.11.2015. I am of the view that the Returning Officer had no powers to review/recall his own order whereby he had accepted application of petitioner No.1 for recounting/ examination of rejected votes as no such provision has been given in the electoral laws. Even if there was any objection by either party upon recounting/verification of rejected votes, the Returning Officer could not go beyond his jurisdiction described in sub-rule (2) of Rule 36 ibid, i.e. he will scrutinize the rejected votes and if he finds that these votes should not have been rejected, he will count them in favour of the candidate in whose favour these have been polled. In this regard, judgment of this Court reported as Muhammad Anwar v. The Deputy Commissioner Delimitation Officer, Faisalabad and 2 others (1985 MLD 1154 Lahore) and judgment dated 26.11.2015 passed in Writ Petition No.36004/2015 tilted Muhammad Mamoon Tarar etc. District Returning Officer etc. are referred.

9. Regarding contention of learned Legal Adviser for the Election Commission that the constitutional jurisdiction is barred in this case, suffice it to say that the instant writ petition was filed in the form of Writ of mandamus as it seeks direction to the Returning Officer to implement his order passed in application of petitioner No.1 for recounting/ verification of rejected votes whereby application was accepted by the Returning Officer. If there is any illegality or error on the part of the officer dealing with affairs of the state, a writ of mandamus can be issued to the concerned officer, as such, there is no bar on this Court to deal with the matter in hand in constitutional jurisdiction. Reliance is placed on the law laid down by the Hon'ble Supreme Court of Pakistan in case titled Muhammad Aslam Abro v. Samar Muhammad Muqeem Khosa and others (2013 SCMR 1676).

10. Learned Legal Adviser for the Election Commission has mainly relied upon the judgment of this Court passed in I.C.A. No.1584/2015 tilled Murdan Ali Zaidi etc. v. Election Commission of Pakistan etc. I am afraid that this judgment does not apply to the case in hand as facts and circumstances of both the cases are different from each other, particularly the application for recounting/examination of rejected votes had already been accepted by the Returning Officer in this case but in the referred case, this was not the situation.

11. In a nutshell, since there is no provision of law provided in the electoral laws, the Returning Officer did not have powers to review/recall his own order of acceptance of application of petitioner No.1 for recounting/examination of rejected votes. Rather he was under legal obligation to examine the rejected votes and count them in favour of the candidate in whose favour these were polled if Returning Officer finds that these should not have been excluded. Only after such exercise, the Returning Officer could consolidate the results as provided in Sub-rule (2) of Rule 36 of the Punjab Local Government (Conduct of Elections) Rules, 1976.

12. Resultantly, the Returning Officer is directed to recount/examine the rejected votes first in accordance with Sub-rule (2) of Rule 36 of the Punjab Local Government (Conduct of Elections) Rules, 1976 and then declare the consolidated results in Form XIII. The consolidated result earlier declared by the Returning Officer in Form XIII on 22.11.2015 as well his recommendation for re-polling of the same date are set aside. The writ petitions in hand are disposed of in the said terms.

ZC/K-5/L Petition disposed of.

**P L D 2016 Lahore 553**

**Before Atir Mahmood, J**

**INAM AKBAR---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN through Secretary, Ministry of Interior and others---Respondents**

Writ Petition No38431 of 2015, decided on heard on 22nd January, 2016.

**(a) Constitution of Pakistan--**

---Art. 199---Constitutional jurisdiction of High Court---Territorial jurisdiction---Scope---Where cause of action had accrued to a person, such person could invoke jurisdiction of the court situated in such area---Where the impugned order had been passed by or under a Federal Ministry; the petitioner had a right to invoke the constitutional jurisdiction of any High Court in the country.

Trading Corporation of Pakistan Private) Limited v. Pakistan Agro Forestry Corporation (Private) Limited and another 2000 SCMR 1703 and The Collector, Customs and Central Excise, Peshawar and others v. Messrs Rais Khan Limited through Muhammad Hashim 1996 SCMR 83 rel.

**(b) Exit from Pakistan (Control) Ordinance (XLIV of 1981)--**

----Ss. 2 & 3---Constitution of Pakistan, Art. 15---General Clauses Act (X of 1897), S. 24-A---Power to prohibit exit from Pakistan---Freedom of movement---Natural justice, principles of---Applicability---Non-speaking order---Effect---Alternate remedy---Scope---Petitioner impugned placement of his name on the Exit Control List (ECL) via Office Memorandum of the Federal Investigation Agency (FIA)---Validity---Perusal of impugned order revealed that the same was a non-speaking order which contained no reasons as to why the petitioner had been stopped from travelling aboard and said impugned order stated that the petitioner should approach the Ministry of Interior for further information---Under the law, Ministry of Interior was only competent to place a person's name on the ECL on its own or from advice from any concerned authority reasonably, fairly and justly and if it receives such advice from any concerned authority to place a person's name on ECL, then it had to apply a judicious mind before passing such an order---Impugned order did not reflect such exercise having been undertaken at the Ministry of Interior's end and the same was passed in mechanical manner without giving reasons---No prior notice was issued to the petitioner regarding placing his name on the ECL, and he was not given an opportunity of hearing, which was against principles of natural justice and the impugned order therefore, was hit by S.24-A of the General Clauses Act, 1897---Allegations against petitioner seemed to be based on suspicions and no material evidence was available against him---Mere inquiry was being conducted against him and neither investigation had commenced nor the trial stage had reached, therefore freedom of the petitioner to travel aboard could not be curtailed at such stage as the

same could tantamount to abridge his fundamental right of free movement under the Constitution---Contention that alternate remedy of review under S.3 of the Exit from Pakistan (Control) Ordinance, 1981 was available to the petitioner was not tenable as the impugned order did not contain reasons, therefore, alternate remedy available to affectee of such a non-speaking order would useless to such an affectee as he/she would be unable to file an effective application, appeal, review or representation against such order---Impugned order/memorandum could therefore, not be sustained under the law and was accordingly set aside---Constitutional petition was allowed, in circumstances.

Muhammad Asif v. Chairman NAB and others C.P.No.1728 of 2013; Lubna Salahuddin v. Federation of Pakistan and others Constitution Petition No. D-2763 of 2014 and Irfan Iqbal Puri and others v. Government of Pakistan through Ministry of Interior Pakistan Secreariat Islamabad and others Writ Petition No.2956 of 2002 ref.
Trading Corporation of Pakistan (Private) Limited v. Pakistan Agro Forestry Corporation (Private) Limited and another 2000 SCMR 1703; The Collector, Customs and Central Excise, Pashawar and others v. Messrs Rais Khan Limited through Muhammad Hashim 1996 SCMR 83; Messrs United Bank Limited v. Federation of Pakistan and others 2014 SCMR 856 and Wajid Shamas ul Hassan v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabd PLD 1997 Lah. 617 rel.

**(c) Constitution of Pakistan--**

----Art. 199---Constitutional petition---Maintainability---Alternate remedy---Scope---Maintainability of constitutional petition against "non-speaking order" against which an alternate remedy is available to the petitioner---Scope---Order passed by an authority must contain reasons enabling an affectee of such an order to challenge same before the appropriate forum and if the said impugned order contained reasons the alternate remedy of appeal was duly efficacious and useful, and in such a case constitutional petition would not be maintainable---Where, however, impugned order contained no reasons, then alternate remedy was of no avail as the affectee of such an order would be unable to file an affective application, appeal, review or representation against such an order---Right of appeal in such cases, even if provided by law, becomes useless, and therefore constitutional petition would be maintainable.

Wajid Shamas ul Hassan v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabd PLD 1997 Lah. 617 ref.
Saad Rasool for Petitioner.
Muhammad Akram Javed, Special Prosecutor, NAB, Muhammad Zakria Sheikh, DAG and Zahoor Ahmad, S.I., F.I.A. for Respondents.
Date of hearing: 22nd January, 20016.

**JUDGMENT**
**ATIR MAHMOOD, J.**---Through this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has challenged the placement of his name on the Exit Control List (ECL) vide Office Memorandum dated 25.11.2015.

2. Brief facts of the case are that the petitioner being a businessman and director of advertising companies was required to travel outside of Pakistan in connection with his business activities. On 25.11.2015, the petitioner was going from Lahore to Dubai, United Arab Emirates by Flight No.EK 625 when representatives of respondents Nos.1 to 4 stopped the petitioner and did not allow him to board in the flight: and apprehended him without assigning any reason. Thereafter, the petitioner was forced to sign the impugned memo dated 25.11.2015 issued by respondent No.4 whereby the petitioner has been intimated that his name exists on ECL, therefore, he cannot travel abroad. Hence this writ petition has been filed assailing the order dated 25.11.2015.

3. Learned counsel for the petitioner argues that placement of name of the petitioner on the ECL is illegal and without any jurisdiction; that no notice was issued to the petitioner prior to passing the impugned memorandum; that inclusion of the name of the petitioner on the ECL is a violation of the fundamental right of freedom of movement guaranteed under the Constitution of Islamic Republic of Pakistan; that the petitioner is not a defaulter of any government dues or any utility dues, nor he is a willful defaulter of any of the public or private financial institutions; that the petitioner does not have any criminal history or pending litigation; that the petitioner is holder of a valid passport issued by the Government of Pakistan which entitles him to travel abroad and to return back to the country; that the illegal impugned actions of the respondents as well as the issuance of impugned memo will not only cause irreparable loss to the business of the petitioner but the same also amounts to violation of Articles, 4, 15 and 18 of the Constitution of the Islamic Republic of Pakistan, 1973; that the illegal impugned actions of the respondents violate the mandatory provisions of the FIA Ordinance as well. He lastly prays of acceptance of this writ petition, for setting aside the impugned memorandum issued by the Deputy Director, FIA Immigration AHAP, Lahore and removal of his name from the ECL.

4. On the other hand, learned Deputy Attorney General assisted by learned Special Prosecutor, NAB submits that this Court has no jurisdiction to deal with the matter; that NAB inquiry is pending against the petitioner but it has not been made party and if NAB has been made party, the case should have been put before the Division Bench rather than before the Single Bench; that there is every apprehension that if the name of the petitioner is removed from the ECL, he will flee from the country and will not come back as there are allegations of embezzlement of billions of rupees against him. He accordingly prays for dismissal of this writ petition. He has placed reliance on the law laid down in C.P. No.1728 of 2013 titled "Muhammad Asif v. Chairman NAB and others", Constitution Petition No.D-2763 of 2014 titled "Lubna Salahuddin v. Federation of Pakistan and others" and Writ Petition No.2956/2002 titled "Irfan Iqbal Puri etc. v. Government of Pakistan through Ministry of Interior Pakistan Secretariat Islamabad etc.".

5. Arguments heard. Record perused.

6. So far as territorial jurisdiction of this Court is concerned, the petitioner is admittedly resident of Lahore. As per contention of learned counsel for the petitioner, the petitioner is a businessman and he was going abroad in connection with his

business activities when he was not allowed to travel and was communicated that his name exists on ECL vide impugned order dated 25-11-2015. The fact that the petitioner was stopped, apprehended and disallowed to travel abroad at Lahore Airport has not been denied by the respondents. It is settled law that where the cause of action accrues to a person, he may invoke jurisdiction of the court situated in that area. Furthermore, the impugned order has been passed by FIA/Ministry of Interior which is a Federal Department/Ministry, therefore, the petitioner had every right to invoke jurisdiction of any of the High Court in the country. In the circumstances, I am of the considered view that this Court has ample jurisdiction to deal with the matter. Reliance is placed on the ratios laid down by the Hon'ble Supreme Court of Pakistan in cases reported as Trading Corporation of Pakistan Private) Limited v. Pakistan Agro Forestry Corporation (Private) Limited and another (2000 SCMR 1703) and The Collector, Customs and Central Excise, Peshawar and others v. M/s Rais Khan Limited through Muhammad Hashim (1996 SCMR 83).

7. The impugned order only contains one para which reads as under:

> "You are hereby informed that you had been placed on ECL by the competent authority. Your name/particulars exist in IBMS in ECL category. You are therefore advised to approach the competent authority i.e. Ministry of Interior Islamabad for further information/removal of your name from ECL."

Bare perusal of the above unequivocally reveals that it is a non-speaking order which even contains no reason as to why the petitioner is being stopped from traveling abroad rather it says that the petitioner should approach the Ministry of Interior for further information. Under the law, the Ministry of Interior, Government of Pakistan Islamabad is only competent to place a person's name on the ECL at its own or from advice from any concerned ministry/department/institution/authority reasonably, fairly and justly. If the Ministry of Interior receives any advice from any department/authority to placing a person's name on ECL, it will apply its own judicious mind before passing any such order. The order impugned does not reflect any such exercise having been done at the Ministry's end rather it appears to have been passed in a mechanical manner without applying its mind and giving any reason whatsoever, for reaching such a conclusion, therefore, it neither seems to be issued in accordance with law nor sustainable. There was even no prior notice issued to the petitioner regarding placing his name on the ECL. The Petitioner was also not given any opportunity of hearing to defend his position before placing his name on the ECL which is against the principle of natural justice, i.e. audi alteram partem. In this view of the matter, the impugned order is squarely hit by section 24-A of General Clauses Act, 1897 which provides that any authority vested with powers to pass an order will exercise such powers reasonably, fairly and justly.

8. The Constitution of Islamic Republic of Pakistan guarantees freedom of each and every citizen to move freely inside and go outside Pakistan and to do business of his choice. The case against the petitioner is yet at inquiry stage where there are mere allegations. So far, neither any investigation has initiated nor any concrete evidence is available against him nor the case of the petitioner is in any court of law for adjudication of allegations against him. The allegations against the petitioner at this

juncture appear to be based on suspicious as no material evidence is available against him as is clear from the report and parawise comments filed by the respondents. In my considered view, the freedom of the citizen to travel abroad can only be restricted if anything against the law stands proved against him requiring such restriction. But in this case, there are only allegations against the petitioner and mere inquiry is being conducted by the NAB authorities so far. Neither investigation nor trial stage has yet reached. Therefore, the freedom of the petitioner to travel abroad cannot be curtailed by placing his name on the ECL as it would tantamount to abridge his fundamental right to travel abroad or restrict his right of free movement guaranteed by the Constitution of Islamic Republic of Pakistan, 1973. In this regard, I am fortified by the dictums laid down by the Hon'ble Supreme Court of Pakistan in case reported as Messrs United Bank Limited v. Federation of Pakistan and others (2014 SCMR 856).

9. It has been contended by the respondents that there is inquiry pending against the petitioner, therefore, if his name is removed from the ECL, he will run away and will never come back. They in this regard have referred letter No. 3-2(1)(15)/K/NAB/Dy. Dir (ECL) dated 29-10-2015. The said order reads that inquiry is being conducted against officers/officials of information and Archives Departments, Government of Sindh and others. The petitioner is not an officer/official of any of departments of governments of Sindh but a businessman involved in advertising business though his name exists in said letter at Serial No.2. Admittedly, there are only inquiry proceedings continuing against the petitioner and others. As stated above, the freedom of a citizen cannot be curtailed merely on the basis of suspicion or any inquiry which ultimately may end with or without any result against him.

10. The contention of learned counsel for the respondent is that since alternate remedy is available to the petitioner under section 3 of the Exist from Pakistan (Control) Ordinance, 1981, this writ petition is not maintainable. In this regard, it is submitted that the order passed by an authority must contain reasons enabling an effectee of such order to challenge it before the appropriate forum. If the order contains reasons, the remedy of appeal is duly effacious and useful and in that eventuality, the writ petition is not maintainable. But in the instant case, the impugned order contains no reasons as to why the petitioner was stopped from traveling abroad by way of placing his name on the ECL. If an order does not have any reasons(s), the alternate remedy is of no avail as the affectee of such order is unable to file an effective application, appeal, representation, or review or against such order to meet with the reasons. In such eventuality, the right of appeal even if provided by law becomes useless. Therefore, this writ petition, in my considered opinion, is maintainable. The law laid down by this Court in case reported as Wajid Shamas ul Hassan v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad (PLD 1997 Lahore 617) is referred in this regard.

11. Apropos other contention of learned Deputy Attorney General that the petitioner has deliberately avoided to implead the NAB as respondent and if it had been so, this case must have been heard by a Division Bench and not by a Single bench. Suffice it to say that the petitioner was stopped and not allowed to travel abroad by impugned order dated 25-11-2015 which only indicates that the name of the petitioner has been

placed on the ECL by the competent authority and that the petitioner should approach the Ministry of Interior for any further information or removal of his name from the ECL. The impugned order does not contain any reasons as to why the petitioner's name has been placed on the ECL. There is no order or notice except impugned herein on the file which could suggest that the petitioner's name was placed on ECL prior to the said order. Meaning thereby, there was no such order or notice against the petitioner prior to the impugned order. In the circumstances, the petitioner had to invoke jurisdiction of this Court against an authority which is present in figure, i.e. the FIA and the Ministry of Interior, Government of Pakistan, Islamabad. Even otherwise, under the High Court Rules and Orders, a constitutional petition is required to be heard by a Single Bench and not by Division Bench until and unless so ordered by the Hon'ble Chief Justice. Mere connection of a constitutional petition with NAB does not mandatorily require it to be heard by a Division Bench. The contention of learned Deputy Attorney General is accordingly repelled.

12. For what has been discussed above, this writ petition is allowed, the impugned order dated 25-11-2015 is set aside and the petitioner's name is directed to be removed from the ECL forthwith.

KMZ/I-16/L Petition allowed.

**P L D 2016 Lahore 633**

**Before Atir Mahmood, J**

**NEWZELAND ELECTRONICS TRADING COMPANY LCC through Managing Director---Appellant**

**Versus**

**NADEEM FAROOQ and another---Respondents**

F.A.O. No.49 of 2015, heard on 31st May, 2016.

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

----S. 44-A---Notification SRO 208(I)/2007, dated 6-3-2007---Execution of foreign decree---Term 'superior court'---Connotation---Appellant was holder of decree passed by Federal Court of a foreign country---Appellant filed application for execution of the decree which was passed against respondent---District Judge dismissed execution application on the ground that the foreign court which passed the decree was not 'superior court' in terms of S.44-A, C.P.C.---Validity---Federal Court of a foreign country was court of appeal as it could hear appeals arising out of judgments of the local courts, since it was a court of appeal, therefore, it was 'superior court' and its decree was executable in Pakistan under S.44-A, C.P.C.---Although decree in question was not passed by Federal Court of foreign country in appeal, but the same was passed in its original jurisdiction i.e. as a court of first instance, yet it being a court of appeal was a 'superior court' for the purposes of S.44-A, C.P.C. and any decree passed by that court whether in its original jurisdiction or in its appellate jurisdiction could be executed in Pakistan---Decree in question could be executed in Pakistan to offer fruit of decree to appellant passed in its fovour by Federal Court of foreign country being superior court of that country as provided under Notification No.SRO 208(I)/2007, dated 6-3-2007---High Court set aside the order passed by District Judge as the same was not sustainable in the eye of law---Appeal was allowed in circumstances.

Shaukat Rauf Siddiqui for Appellant.
Malik Muhammad Kabir for Respondents.
Date of hearing: 31st May, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this appeal, the appellant has assailed the vires of order dated 04.02.2015 whereby application under Section 47, C.P.C. filed by the respondents was accepted and execution petition filed by the appellant against the respondents was dismissed by learned Additional District Judge/Executing Court, Chakwal.

2. Succinctly stated facts of the case are that the appellant filed a recovery suit against the respondents in the Federal Court of Sharjah, UAE with the assertions that the respondents were employed in the appellant company as Sales Manager and Accountant where they allegedly committed embezzlements. Respondent No.1 was proceeded against ex parte whereas respondent No.2 contested the suit but after decree

of the suit fled away to Pakistan. The suit was ultimately decreed against the respondents by Federal Court of Sharjah, UAE vide judgment dated 26.09.2013 with total amount of AED 14,33,297/- in addition to legal interest of 9% as from the claim date up to payment in full. Since the respondents were permanently residing in Pakistan, the executing court at UAE vide order dated 23.03.2014 allowed the appellant to follow up the execution of judgment against the respondents outside the state and also issued a certificate in this regard on 27-3-2014.

3. The appellant filed execution petition under Section 44-A, C.P.C. which was entrusted to Additional District Judge, Chakwal. The respondents appeared before the court and filed petition under Section 47, C.P.C. raising objection that the execution petition was not maintainable as the UAE was not a reciprocating state. Learned Additional District Judge, Chakwal after hearing both sides accepted the said application and dismissed the execution petition vide order dated 04.02.2015 which has been assailed in this appeal.

4. Learned counsel for the appellant contends that the Federal Court of Sharjah is a court of appeal as it hears the appeals against decisions of local courts, therefore, it being a court of appeal is a superior court; that since the Federal Court of Sharjah is a superior court, its decree is executable in Pakistan in light of notification No.SRO 208(I)/2007 dated 06.03.2007 read with Section 44-A of the C.P.C., therefore, this appeal be allowed, the impugned order be set aside and the objection petition of the respondents be dismissed.

5. On the other hand, learned counsel for the respondents has vehemently opposed this appeal mainly on the ground that the Federal Court of Sharjah has passed the judgment as a court of first instance, therefore, neither it can be considered as a court of appeal nor the superior court nor the decree can be executed in Pakistan. He accordingly prays for dismissal of this appeal.

6. Arguments heard. Record perused.

7. The controversy between the parties is as to whether the decree in question passed by the Federal Court of Sharjah, UAE as a Court of First Instance is executable or not in Pakistan.

8. The execution petition was filed by the appellant under Section 44-A of the C.P.C. which provides that:

> "44-A. Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.--(1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in Pakistan as if it had been passed by the District Court.
>
> 2. Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree, has been satisfied or adjusted and such certificate, shall, for the purpose of

proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

3. The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13." (Emphasis provided)

Bare perusal of Subsection (1) of Section 44-A of C.P.C. reveals that the decrees passed by the Courts in the United Kingdom and other reciprocating territories can be executed in Pakistan in the same way as such decrees were passed by the Courts in Pakistan. Such execution petition will be filed in the District Court concerned and all the provisions pertaining to execution contained in the Civil Procedure Code will be applicable thereto. Initially, the name of United Arab Emirates was not included in the list of reciprocating territories, however, Government of Pakistan, Law, Justice and Human Rights Division vide its notification No.S.R.O. 208(1)/2007, dated 06.03.2007 included the UAE in the list of reciprocating territory and the Courts of Appeal of the UAE as Superior Courts for the purposes of Section 44-A of the C.P.C. Relevant portion from the said notification is reproduced below:

"S.R.O.- 208(1)/2007 - In exercise of the powers conferred by Section 44A of the Code of Civil Procedure, 1908 (Act V of 1908), the Federal Government is pleased to declare the United Arab Emirates to be a reciprocating territory and the Court of Appeal of the United Arab Emirates to be Superior Courts for the purposes of the said Section." (Underline is mine)

Reading of above makes it unambiguously clear that the UAE is a reciprocating territory of Pakistan which fact even could not be denied by the respondent side. However, the respondent side has taken plea, that since the decree was passed by the Federal Court of Sharjah, UAE as a Court of First Instance and not as a Court of Appeal, the decree could not be considered to have been passed by a superior court, as such, it is inexecutable. In this regard, Explanation 3 given under Section 44A of the C.P.C. is pertinent which is reproduced hereunder:

"Explanation 3.--"Decree, with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) .....

(b) .....

(Emphasis provided)'

The decree in question is undisputedly a money decree which has been passed by the Federal 'Court of Sharjah, UAE as a Court of First Instance.

9. According to Constitution of UAE, there is a three tier system of justice in UAE which includes the Supreme Court, Federal First Instance Court and Local Courts. Sub-Article (3) of Article 102 of the Constitution of UAE (hereinafter called "the Constitution") provides that the Federal Court of First Instance will hear the cases

including personal status cases, civil and commercial cases and other cases between the individuals, which arise in the permanent capital city of the UAE. The judgments of Federal Court of First Instance will be heard by the Federal Supreme Court as per Article 103 of the Constitution of the UAE. Article 105 of the Constitution of UAE reads that:

> "A federal law specifies the cases where a judgment by a local judicial authority in a criminal, civil, commercial or any other law suit may be appealed before a federal court."

This provision is very much relevant to the issue in hand as to whether the federal court is a court of appeal or not. There are certain matters which are raised initially before the local courts and then the judgments of local courts are challenged before the courts of appeal which duly hear such appeals and render decisions thereupon. But there are certain matters which do not come within the jurisdiction of the local courts and are placed by the superior courts such as High Courts and Supreme Court in Pakistan. The High Courts and Supreme Court in Pakistan are always considered and admitted as superior courts either they decide the cases in the appellate jurisdiction or in the original jurisdiction, i.e. as a court of first instance. Keeping this principle in view, the Federal Court of First Instance of Sharjah is a court of appeal as it hears appeals arising out of judgments of the local courts and since this is a court of appeal, it is, in my considered view, is a superior court and its decree is executable in Pakistan under Section 44A of the C.P.C. although I am conscious of the fact that the decree in question was not passed by the Federal Court of Sharjah in appeal but in its original jurisdiction, i.e. as a court of first instance. A Federal Court of Sharjah being a court of appeal is a superior court for the purposes of Section 44-A of the C.P.C. and any decree passed by the said court whether in its original jurisdiction or in its appellate jurisdiction can be executed in Pakistan.

10. Here arises a question that if a decree is passed against someone who does not challenge it in appeal as to whether such decree would become redundant as having been passed by a court of first instance and not by a court of appeal. The answer will definitely be 'no". In my opinion, none can be deprived of fruits of a decree passed in his favour, particularly in the circumstances of the present case according to which the respondents-judgment debtors were employed in the appellant company working in the UAE wherefrom they allegedly fled away to avoid consequences of the legal proceedings initiated against them thereat. In the circumstances, the decree in question can be executed in Pakistan to offer fruit of the decree to the appellant passed in its favour by Federal Court of Sharjah being superior court of UAE as provided under Notification No.S.R.O.208(I)/2007 dated 06.03.2007. The order impugned is accordingly not sustainable in the eye of law.

11. For what has been discussed above, this FAO is allowed, the impugned order is set aside and the objection petition filed by the respondents under Section 47, C.P.C. is dismissed.

MH/N-26/L Appeal allowed.

**2016 Y L R 765**

**[Lahore]**

**Before Atir Mahmood, J**

**TAIMOOR ALAM SATTI---Petitioner**

**Versus**

**Mst. AALIA BIBI and others---Respondents**

Writ Petition No.564 of 2014, decided on 11th May, 2015.

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

----S.5, Sched.----Constitution of Pakistan, Art. 199---Constitutional petition---Pronouncement of Talaq---Mode and proof---Immovable property gifted to wife and entered in Nikkah Nama---Jurisdiction of Family Court---Wife filed suit for maintenance and dower amount---Family Court decreed the suits allowing maintenance to both wife and minor with annual increase, along with recovery of property gifted by husband---Appellate court dismissed the appeals of parties except disallowing annual increase in maintenance of minor and enhancing maintenance of the wife---Contentions raised by husband were that wife, having been divorced, was not entitled to any maintenance, and that the property gifted to wife could only be claimed through civil suit---Validity---Suit for recovery of dower as well as personal property and belongings of wife came within domain of Family Court under Schedule Part I of Family Courts Act, 1964---Property gifted to wife had come within definition of "personal property and belongings of wife"---Husband and his father had admitted to have the property gifted to wife and entered the description of khasra numbers in Nikkah Nama, which was sufficient to negate their contention that Family Court was not competent to decree the suit---Husband had alleged to have divorced the wife in presence of witnesses in Jirga meeting, but he failed to mention date of divorce and holding of said Jirga, but the wife had admitted that matter of divorce had been put before Mufti Sahib who had given Fatwa that divorce had taken place, which was sufficient to establish Talaq between parties---Talaq could be announced orally and could be in written form, but when husband had taken specific stance then it was his duty to prove the same---Date of sending of notice to Chairman of union council could not be proved---Date of pronouncement of Talaq could be taken when written statement had been filed---Wife was entitled to maintenance till completion of Iddat period---No illegality, irregularity, misreading and non-reading of evidence could be pointed out---Constitutional petition was dismissed in circumstances.

Allah Dad v. Mukhtar and another 1992 SCMR 1273 rel.
Al-Haj Habib ur Rehman for Petitioner.
Raja Khurshid Alam Satti for Respondents.
Date of hearing: 11th May, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that respondent-plaintiff No.1 filed a suit for recovery of maintenance allowance for herself as well as for her minor

son namely Somair Tamoor along with dower against the petitioner-defendant. It is alleged that respondent No.1 married with the petitioner-defendant on 07.11.2010 against the dower amount of Rs. 1,49,000/- as deferred and gold ornaments worth Rs.1,49,000/- with 5 marlas plot was fixed as gift which is still unpaid; that out of the wedlock, one minor son was born; that due to illness of her mother, respondent No.1 left for her parents house on 05.10.2011 and the petitioner has not paid any maintenance allowance till that date; that the petitioner is a man of means and he can easily pay the maintenance to the respondents. Thereafter, the petitioner-defendant contested the suit by filing written statement. Issues were framed and evidence was recorded of both the parties. After hearing the arguments of both side, the learned trial court decreed the suit of the respondents vide impugned judgment and decree dated 27.06.2013 in the following terms:-

> i. Maintenance of minor is fixed @ Rs.2500/- per month with 10% annual increase from 05.10.2011 till he is legally entitled. Maintenance of plaintiff No.1 is fixed @ Rs. 1000/- per month from the institution of the suit till she is legally entitled.
> ii. Claim of plaintiff No.1 for recovery of 05 marlas plot is hereby decreed.
> iii. Claim of plaintiff No.1 for recovery of Rs. 1,49,000/- is dismissed."

2. Being aggrieved from the said judgment and decree both the parties preferred appeals before the learned Additional District Judge, Rawalpindi and the learned appellate court vide judgment and decree dated 12.11.2013 dismissed the appeal of the petitioner and partially allowed the appeal of the respondent modify the decree that maintenance allowance of plaintiff No.1 is increased from Rs. 1000/- per month to Rs. 2000/- per month from 05.10.2011 to 09/2012 till her legal entitlement. However, minor shall not be entitled to 10% annual increase in his maintenance allowance @ Rs. 2500/- per month from 05.10.2011 to 09/2012 till his legal entitlement. Hence this writ petition.

3. Learned counsel for the petitioner at the very outset submitted that he did not press this petition to the extent of maintenance of the minor/respondent No.2, however, asserted that respondent No.1 was divorced, therefore, she was not entitled for any maintenance. He further submitted that sending of notice of Talaq to the Chairman Arbitration Council and its effectiveness is not a legal requirement, as the provision of section 7 of Muslim Family Laws Ordinance, 1961 has been declared against the injunction of Islam vide judgment of Shariat Appellate Bench of the Supreme Court of Pakistan in a case titled Allah Dad v. Mukhtar and another (1992 SCMR 1273). He further argued that clause 16 of the nikahnama whereby respondent No.1 was given plot measuring 5 marlas could not be claimed by filing a suit before the family court and for this purpose the remedy available to the respondent No.1 was to file an independent suit before the civil court.

4. On the other hand, learned counsel for the respondent fully supported the impugned judgments and decrees by submitting that there are concurrent findings of fact which are immune from interference by this Court while exercising the constitutional jurisdiction. He argued that the alleged factum of Talaq could not be proved by the

petitioner through any cogent evidence and that the alleged Talaqnama appended with this petition itself, is itself sufficient to contradict its contents according to which the petitioner was divorced on 15.10.2011, whereas the stamp paper was purchased on 18.11.2011.

5. Arguments heard. Record perused.

6. The questions which need determination by this Court are in two folds. Firstly as to whether the suit for recovery of dower i.e. a plot mentioned in column No. 16 of the nikahnama could lawfully be decreed by the family court or as to whether it was a matter pertaining to the civil court and secondly as to whether the respondent was divorced by the petitioner on 15.10.2011 and was not entitled for grant of maintenance thereafter.

7. To decide the first question qua the maintainability of suit for recovery of dower mentioned in column No.16 of the nikahnama, it is observed that column No.16 of the nikahnama speaks about the payment of Haqmehr and it is in continuation of column Nos. 13 to 15 it is not with regard to any subsequent obligation.

8. Perusal of entry in column No. 16 clearly depicts that plot measuring 5 marlas mentioned with the description of khasra numbers was given in the ownership of the petitioner as a gift. This entry has not been denied by the petitioner. According to Schedule [Part 1] of the West Pakistan Family Courts Act, 1964, a suit for recovery of dower as well as personal property and belongings of a wife comes within the domain of the family court. When the said plot was gifted to the respondent, then if at all it is not a dower then it becomes within the definition of personal property and belongings of a wife. The petitioner while appearing in the witness box as DW.1 admitted in his cross-examination that at the time of nikah, the plot measuring 5 marlas was given to respondent No.1 as a gift and was incorporated in column No.16. DW.2 Jamshaid Alam, father of the petitioner, admitted in his cross-examination that the plot in dispute was given to respondent No.1 as a gift. He also admitted that plot is physically present and in the nikahnama khasra numbers have also been written, however, he denied the suggestion that respondent No.1-plaintiff remained in the possession of the property as an owner till she remained with the petitioner-defendant. This statement of the petitioner as well as DW.2 is sufficient to negate the contention raised by the learned counsel for the petitioner that the family court was not competent to decree the suit. Both the learned courts below have rightly dealt with this aspect.

9. Now remains the entitlement of respondent No.1 to claim maintenance allowance. Scanning of record reflects that the petitioner while filing written statement did not mention the date of divorce but stated that she was divorced in the presence of witnesses during a meeting/Jirga which was called to resolve the controversy between the parties. Even the date of holding of meeting/Jirga was not mentioned in the written statement. During the course of evidence the petitioner while submitting his affidavit Exh.D1 also failed to mention the date of divorce and date of holding 'Jirga'. He did not utter a single word that any written Talaqnama was given to respondent No.1 or that any notice of Talaq was sent to the Arbitration Council. During the cross-

examination, he admitted that he has sent a notice of Talaq during the course of litigation. He also admitted that Talaq has not become effective. None of the witnesses from 'Jirga' was produced in defence. Respondent No.1 while appearing as PW.1 admitted in cross-examination that the matter of divorce was went before "Mufti Sahib" and a "Fatwa" was given by him that divorce has taken place but still no suggestion was put to her that when the matter of Talaq was placed before "Mufti Sahib". This is sufficient to establish that Talaq has taken place in between the parties.

10. The contention of the learned counsel for the petitioner that no specific mode for announcement of Talaq has been prescribed under the Islamic Law, as well as, law of the land has weight. I have no doubt in my mind that Talaq can be announced orally and can be in a written form but when husband takes specific stance then it is his duty to prove the same, particularly when the oral pronouncement is not asserted upon the wife. The entire evidence of the petitioner is ambiguous and did not inspire any confidence regarding date of divorce. The factum of sending a notice of Talaq to the Chairman of the Arbitration Council could not be proved as well, therefore, it is held that the date of pronouncement of Talaq can at the most be taken as 10.3.2012 when the written statement was filed by the petitioner and respondent No.1 held entitled to maintenance allowance from the petitioner till the completion of 'Iddit' period.

11. There are concurrent findings of law and facts. No illegality, irregularity, mis-reading or non-reading of evidence could be pointed out by the petitioner.

12. With the above observations, this writ petition being devoid of any force is hereby dismissed.

SL/T-15/L Petition dismissed.

**2016 Y L R 1552**
**[Lahore]**
**Before Atir Mahmood and Masud Abid Naqvi, JJ**
**Khawaja AFTAB AHMAD---Appellant**
**Versus**
**Qazi ABDUL ALI---Respondent**

R.F.A. No.201 of 2001, decided on 8th June, 2015.

**(a) Civil Procedure Code (V of 1908)---**
----O. XXXVII----Qanun-e-Shahadat (10 of 1984), Arts. 17 & 79---Negotiable Instruments Act (XXVI of 1881), S. 118---Summary procedure on negotiable instruments---Comparison of signatures---Finding of court---Principles---Plaintiff filed suit for recovery under O. XXXVII, C.P.C. on basis of pronote claiming that defendants, having executed agreement and promissory note in his favour for payment of money, had failed to pay the same---Both courts below decreed the suit---Contention raised by plaintiff was that presumption of truth was attached to promissory note under S.118 of Negotiable Instruments Act, 1881---Defendants took the plea that said agreement and promissory notes were to be attested by two marginal witnesses under Arts. 17 & 79 of Qanun-e-Shahadat, 1984, whereas promissory note admittedly was not signed by any witness---Validity---Execution of documents could not be proved through cogent and credible evidence, as there were material discrepancies between oral and documentary evidence---None of the witnesses had deposed that any amount was paid in their presence---Plaintiffs had not produced best available evidence and negative inference could be drawn against plaintiffs for withholding the same---Plaintiffs failed to establish the amount claimed to be outstanding against defendants---Report of handwriting expert showed that signatures of defendant did not tally with his signatures on disputed documents---Trial Court, having not relied on the handwriting expert report, failed to give its own finding as to comparison of signatures of defendant---If Trial Court was not satisfied with report of handwriting expert, it should have given its own findings in that regard---Impugned judgment and decree were not sustainable and the same were set aside---Appeal was accepted in circumstances.

Qadir Bakhsh (deceased) through L.Rs. v. Allah Dewaya and another 2011 SCMR 1162; Manzoor Ahmed v. Qamar ul Zaman 2011 CLC 1756 and Manzoor Ahmed Khan v. Mst. Minhajunnisa 1975 SCMR 1657 rel.

**(b) Qanun-e-Shahadat (10 of 1984)---**

----Arts. 17 & 79---Disputed Signatures---Opinion of handwriting expert---Court having not relied on the opinion of expert was to give its own finding as to the comparison of signatures.

Mujeeb ur Rehman Kiyani for Appellant.
Syed Ijaz Hussain Hamdani for Respondent.
Date of hearing: 18th May, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the respondents Qazi Abdul Ali etc. filed a suit under Order XXXVII, C.P.C. for recovery of Rs.904,157/- on the basis of a pronote allegedly executed by the appellant. The averments contained in the plaint are that an organization for collection of contributory committee was formed by the respondents and others; that all the contributions made by the members were to be collected by the appellant; that the appellant used to collect the money and pay the contributory committees to the concerned individuals; that respondents Nos.1 to 3 paid sums of Rs.475,580/-, Rs.269987/- and 159,590/- respectively to the appellant who did not return the same to the respondents; that on demand, the appellant agreed to pay the same and executed iqrar nama (Exh.P1) and promissory note (Exh.P2) both dated 26.04.1993 in favour of the respondents promising to pay the amount due to them till 15.05.1993, however, later on, he backed out from his promise which constrained the respondents to file the instant suit.

2. On receipt of summons, the appellant appeared before the court and filed leave to appear and defend which was ultimately allowed by the court. Thereafter, the appellant filed contesting written statement wherein he denied the allegations of the respondents while asserting that the alleged agreement and the promissory note were result of fraud and forgery as these were never executed by him.

3. Out of divergent pleadings of the parties, following issues were framed:--

1) Whether the defendant borrowed Rs.9,04,157 from the plaintiff and executed pronote and its receipt on 26.04.1993? OPP.

2) Whether the suit is not maintainable? OPD

3) Whether the suit is false and vexatious and the defendant is entitled to special costs under section 35-A, C.P.C., if so, to what amount? OPD.

4) Relief.

Both sides led their respective evidence which was duly recorded by the learned trial court. Thereafter, learned District Judge, Chakwal decreed the suit with costs vide judgment and decree dated 21.11.2001. Hence this RFA.

4. Learned counsel for the appellant inter alia contends that under Articles 17 and 79 of Qanun-e-Shahadat Order, 1984, any document which creates financial liability should be attested by two marginal witnesses but the alleged pro note (Exh.P-2) was admittedly not signed by any witness; that the receipt (Exh.P3) and agreement (Exh.P1) cannot be considered as negotiable instruments as defined in Negotiable Instruments Act; that there are two different pleas of the plaintiffs for their claim as at the one hand, they state that the amount was received by the appellant on account of contributory committees while on the other hand, they say that the appellant obtained qarze hasna from the plaintiffs; that on appellant's request, the signatures of the appellant were sent for comparison to the handwriting expert who submitted report in favour of the appellant; that the handwriting expert also appeared as DW.1 in the court but this important piece of evidence was not given any weightage by the learned trial court; that the plaintiffs also failed to prove that an organization for contributory committee was formed or he ever paid the committee to its members; that the impugned judgment and decree is against law and fact, therefore, this RFA be allowed, the impugned judgment and decree be set aside and the suit of the respondents-plaintiffs be dismissed.

5. On the other hand, learned counsel for the respondents has vehemently opposed this appeal and fully supported the impugned judgment and decree by submitting that the pro note Exh.P2 was duly signed by the appellant and its receipt Exh.P3 was not only signed by the appellant but was also attested by the two marginal witnesses and the same was proved by the respondents through production of marginal witnesses. He argued that the presumption of truthfulness/correctness is attached to a pro note under Section 118 of the Negotiable Instrument Act. He further argued that once a document is exhibited in evidence without any objection by the other side, then it cannot be subsequently objected to through plea that it was insufficiently stamped. He has relied upon Qadir Bakhsh (deceased) through L.Rs. v. Allah Dewaya and another (2011 SCMR 1162), Manzoor Ahmed v. Qamar ul Zaman (2011 CLC 1756) and Manzoor Ahmed Khan v. Mst. Minhajunnisa (1975 SCMR 1657).

6. Arguments heard. Record perused.

7. After hearing the arguments and perusal of record, pivotal issue is issue No.1. In order to prove this issue, respondent No.1 appeared in the witness box as PW. 1 and deposed in line with the averments made in the plaint. In cross-examination, he stated that there are 34 members of the committee which was formed on 01.01.1999 and was

a registered committee. He stated that in July 1992, collection of committee was stopped and then they started demanding for the first time in July 1992.

8. PW.2 Asad Mahmood deposed that he is son of Muhammad Khan who was petition writer and stamp vendor. He identified the writing of his father on Exh.P1 and also identified his signatures on Exh.P1/1 and his seal as Exh.P1/2. He also deposed that the pro note Exh.P2 and receipt Exh.P3 are handwritten by his father. He produced register of stamp vendor and produced a copy of the same as Exh. P4 wherein he stated that the signatures of Aftab Ahmed are affixed. In cross-examination, he denied the suggestion that the page upon which entry No.4969 is present has been subsequently added. Learned trial court on the request of learned counsel for the appellant himself inspected the register and observed that pages have been stitched on 2/3 different places. It was further opined by learned District Judge that the flow of writing and sequence of pages Nos.108 to 110 did not appear to be substitution.

9. PW.3 Zahid Maqbool, marginal witness, deposed that Exh.P1, Exh.P2 and Exh.P3 were executed in his presence. He identified his signatures as Exh.Pl/3 and Exh.P3/2 upon the agreement as well as upon the receipts. In cross-examination, he deposed that he was unaware about any dispute between the parties prior to execution of documents. He also showed his ignorance as to whether the tickets were affixed upon the pronote prior to its writing or were subsequently affixed. He also admitted that in front of him, no amount was exchanged.

10. PW.4 Azadar Shah also identified his signatures on Exh.P1 as Exh.P1/5 and on receipt Exh.P3 as Exh.P3/3. He deposed that the appellant singed the pronote and the receipt in his presence. In cross-examination, he stated that he came to know about the dispute between the parties 15/20 days earlier than the execution of the document. He also stated that Khawaja Sahib (the appellant) singed the pro note on two places, and register and receipt were also signed by him. However, he denied the suggestion that pro note was neither written in his presence nor it was signed by the appellant.

11. In rebuttal, DW.1 Muhammad Bashir Qureshi, Examiner, Forensic Science Laboratory, Lahore appeared before the court to depose that he was deputed to get comparison of the signatures of the appellant with that upon the disputed document and that in his opinion, the signatures on Exh.P1, Exh.P2 and Exh.P3 did not appear identical characteristics with the specimen/routine signatures of Aftab Ahmed (the appellant). He produced his report as Exh.D1, photo analysis chart of the disputed signatures and subsequent signatures as Exh.D2. In reply to the question, as to whether he has mentioned in his report the difference between the angle, placement of dots, space between the letters etc., he replied that he has not mentioned the above

characteristics but the negative points are clearly mentioned in his analysis chart Exh.D2. He denied the suggestion that he made an incorrect report.

12. The appellant himself appeared as DW.2 denying receipt of amount of Rs.9,04,157/- from any of the plaintiffs and also deposed that Exh.P1, Exh.P2 and Exh.P3 were never executed by him and the signatures upon these documents are forged. In cross-examination, he denied that he was convener of the committee to collect committees from the members and that besides collecting the committee in dispute, he did not manage other committees. He admitted that Qazi Mazhar Hussain was got appointed referee to settle the matter in dispute who submitted report against him. He also admitted that the said report was set aside because it was considered to be a report of an arbitrator. He denied that he is having any committee of the plaintiffs. He also denied that Mark 'A' was signed by him and that Exh.P1, Exh. P2 and Exh.P3 bear his signatures. He, however, admitted that after the institution of the suit, he got registered a criminal case against the appellant which was cancelled.

13. Putting evidence of the parties in juxta position, Exh.P2' suggests that the disputed amount was given as qarz-e-hasna. It nowhere suggests that the amount was already lying with the appellant and he undertook to return the same. PW.1 nowhere stated in his examination-in-chief or during the cross-examination that when and on what date, he was entitled to receive the amount of the committee. The pro note has allegedly been signed but the signatures are only present on the tickets underneath the pro note as well as the receipt. The receipt Exh.P3 also does not bear the signatures of the appellant. It is reflected from statement of PW.3 that this witness was not sure as to whether the stamps were affixed upon the pro note prior to its writing or were subsequently affixed. Had the signatures been made upon the tickets in his presence, the said fact must have been in his knowledge. None of the witnesses of the receipt deposed that any amount was paid in his presence. Even none of them was member of the committee. The plaintiffs have not produced any member of the alleged committee in support of their contentions which amounts to withholding of best available evidence and negative inference may be drawn that had there been any member of the committee appeared before the court, he might have deposed against the respondents/plaintiffs. We have also seen the signatures of the appellant over the tickets on receipt pro note Exh.P3. Generally, when ticket having affixed on a document is signed, some part of the signature goes beyond the ticket to the document but the signatures have been made solely on the tickets and even not a dot of the signature is present on the document Exh.P3. Therefore, an inference can be drawn that the tickets were separately signed and then affixed on the Exh.P3 at a later stage. The document Mark 'A' did not reflect in dispute between the parties. Documents Exh. P1, Exh.P2 and Exh. P3 were executed on 26.04.1993 prior to document Mark 'A'. Respondent/ Plaintiff No.1 Qazi Abdul Ali is signatory of Mark 'A' whereas 25 others

were also present in the said meeting but none of them was produced before the court to strengthen the case of the respondents/ plaintiffs. Furthermore, none of the witnesses deposed that when the amount of committee, which was allegedly to be delivered to the plaintiffs, was withheld by the appellant. We are of the considered opinion that the plaintiffs have failed to establish that the amount of Rs.904,157/- was outstanding against the appellant and he was liable to make its payment as well as the execution of Exh.P1, Exh.P2 and Exh.P3 could not be proved through cogent and credible evidence as there is material discrepancy between the oral as well as the documentary evidence.

14. Furthermore, the report of handwriting expert also reveals that the signatures of the appellant do not tally with the signatures on the disputed documents but the learned trial court did not rely upon the same. The learned trail court also failed to give its own findings regarding resemblance of disputed signatures with that of the admitted/specimen signatures of the appellant. In our opinion, if the trial court was not satisfied with the report of handwriting expert, then he should have given its own findings in that regard. In the circumstances, the judgment and decree passed by learned Trial court is not sustainable in the eye of law.

15. Resultantly, this appeal is allowed, the impugned judgment and decree is set aside and the suit of the respondents is dismissed.

SL/A-74/L Appeal allowed.

**2016 Y L R 1845**

**[Lahore (Multan Bench)]**

**Before Atir Mahmood and Mushtaq Ahmad Tarar, JJ**

**The HEAD OF RETAIL FINANCE DIVISION, THE BANK OF PUNJAB and another---Appellants**

**Versus**

**MUSHTAQ AHMAD and others---Respondents**

I.C.A. No.335 in W.P. No.5179 of 2015, decided on 24th November, 2015.

**Constitution of Pakistan---**

----Art. 199---Law Reforms Ordinance (XII of 1972), S. 3---Intra court appeal---Administration of justice---Appellant Bank was aggrieved of order passed by Single Judge of High Court whereby Constitutional petition filed by respondent was disposed of on the basis of undertaking given by Bank Manager---Validity---Appellant Bank was not given proper opportunity to contest constitutional petition nor report and para-wise comments were awaited---No proper hearing was given to appellant and simply on undertaking given by its Manager, the petition was disposed of---Manager of appellant Bank was not authorized by appellant to give the undertaking---Bank had produced official documents which reflected that show cause notice was issued regarding matter in hand to the Manager who in reply had sought unconditional apology for giving said undertaking while submitting that his appearance before Court was only in obedience of the court and nothing else---Division Bench of High Court, set aside the order in question and remanded the matter to Single Judge of High Court for decision afresh in accordance with law---Intra court appeal was allowed accordingly.

Muhammad Saleem Iqbal for Appellants.
Muhammad Adnan Shahid Sherwani for Respondent.

**ORDER**

Through this Intra-Court Appeal, the appellant has challenged order dated 12.08.2015 passed by learned Single Judge in Chamber in Writ Petition No.5179/2015 which was disposed of in view of undertaking given by Manger, Bank of Punjab Vehari Branch/respondent No.3 in writ petition that the vehicle/Suzuki Bolan would be handed over to the writ petitioner within a period of ten days.

2. Arguments heard. Record perused.

3. The only contention of learned counsel for the appellants is that the Manager/respondent No.3 in the writ petition was not competent to make the statement as noted in para 1 above as the Self Employment Scheme for Education Unemployed Youth (SESEUY) whereby the vehicles were being supplied had already

closed which fact was communicated to all Unit Managers, Consumer Finance Centre, The Bank of Punjab vide circular No.HO/RFD/2012/4335 dated 20.11.2012.

4. Scanning of record reveals that in the writ petition, wherein this ICA has been instituted, the notices were issued to the respondents on 08.04.2015. On 27.07.2015, learned Law Officer sought time to file report and parawise comments upon which the case was fixed for 06.08.2015 when respondents Nos.2 and 3 were directed to appear in person on 12.08.2015. On the said date, respondent No.3 appeared before the Court and gave the undertaking in dispute. This shows that the appellants (respondents in the writ petition) were not given proper opportunity to contest the writ petition nor the report and para wise comments were awaited nor proper hearing was given to them and simply on the undertaking given by the Manager, the writ petition was disposed of. Furthermore, the Manager, Bank of Punjab Branch Vehari though was respondent in the writ petition but he does not seem to be authorized by the appellants to give the disputed undertaking. Furthermore, the appellants have produced official documents No.BOP/CFC/MLT/36 dated 10.09.2015 and No.BOP/VRI/2015/90 dated 14.09.2015 which reflect that Show Cause Notice was issued regarding the matter in hand to the said Manager who in reply has sought unconditional apology for giving the disputed undertaking while submitting that his appearance before the court was only in obedience of the Court and nothing else.

5. For what has been discussed above, learned Single Judge has erred in law while passing the impugned order. Resultantly, this ICA is allowed, the impugned order is set aside and the case is remanded to learned Single Judge for decision afresh, strictly in accordance with law.

MH/H-35/L Case remanded.

**2016 Y L R 2128**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD KHAN---Petitioner**

**Versus**

**MONDA through L.Rs. and others---Respondents**

Civil Revision No.2831 of 2011, heard on 10th September, 2011.

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

----S. 42---Suit for declaration---Maintainability---Assertion made in the plaint had not been proved through oral or documentary evidence---Evidence in the case was beyond the pleadings which could not be taken into consideration---Plaintiff was not in possession of the suit property---Suit was not maintainable as claim for possession had not been made---Suit filed by the plaintiff was defective from its very inception---No misreading or non-reading of evidence had been pointed out in the impugned judgments and decrees passed by the courts below---Revision was dismissed in circumstances.

Khalid Mahmood v. Anees Bibi and 2 others PLD 2007 Lah. 626; Muhammad Ismail and others v. Roshan Ara Begum and others PLD 2001 Lah. 28; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983; Abdul Ahad and others v. Roshan Din and 36 others PLD 1979 SC 890; Ahmad Din v. Muhammad Shaft and others PLD 1971 SC 762; Sheikh Muhammad Ashraf v. Mst. Bilqees Akhtar and 4 others 2000 YLR 408; Muhammad Yar v. Mst. Iffat Sultana 2000 MLD 531; Muhammad Sher and others v. Mst. Taj Meena and others PLD 1996 Pesh. 6; Muhammad Saeed and others v. Muhammad Asif and others 2001 MLD 1861; Mst. Perveen Akhtar and others v. Muhammad Hussain and others 2000 SCMR 1881 and Messrs Javed and Co. v. Messrs Daewoo Pakistan Motorway Services Ltd. through Chief Executive 2000 CLC 1611 ref.

Hazrat Khan v. Amanullah Khan and others 1996 SCMR 1217 rel.

**(b) Evidence---**

----Evidence beyond pleadings could not be taken into consideration.

Malik Noor Muhammad Awan for Petitioner.
Ch. Muhammad Naeem and Muhammad Ibrahim Khalil for Respondents Nos.6 to 8.
Proceeded against ex parte vide order dated 19.3.2015 (Respondents Nos.1 to 5).
Date of hearing: 10th September, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This civil revision is directed against judgment and decree dated 04.05.2011 passed by learned District Judge, Sargodha who dismissed appeal of

the petitioner and upheld judgment and decree dated 04.10.1999 passed by learned trial court whereby suit of the petitioner was dismissed.
Brief facts of the case are that petitioner filed a suit for declaration regarding land measuring 18 kanals and 7 marlas bearing Khewat No.13 situated in village Bhiki Khurd Tehsil Bhalwal, District Sargodha challenging mutation Nos.922, 928, 960, 1006, 1088 and 1096 sanctioned in favour of the respondents. The petitioner asserted that Monda and legal heirs of Maulu transferred the suit land in favour of plaintiff/petitioner and also delivered possession thereof in view of judgment and decree dated 26.09.1973. The plaintiff also asserted that the mutation No.898 was also entered on 24.09.1974 in pursuance of said decree but could not be sanctioned due to violation of Martial Law Regulation rather the said mutation was cancelled. The petitioner assailed the said order in appeal which was allowed and mutation No.930 dated 12.11.1985 was sanctioned in favour of the petitioner but prior to sanctioning of the said mutation, Maulu and LRs as well as Munda transferred the land in dispute through various mutations in favour of Hayat, Sultan Ahmad and Muhammad Nawaz illegally and unlawfully.

3. The suit was contested by the respondents by filing written statement. Issues were framed. Evidence led by the parties was recorded. Thereafter, learned trial court after hearing both sides dismissed the suit vide judgment and decree dated 04.10.1999. Feeling aggrieved, the petitioner preferred appeal which was dismissed by learned District Judge, Sargodha vide judgment and decree dated 04.05.2011. Hence this civil revision.

4. Learned counsel for the petitioner inter alia contends that mutation No.930 was attested in view of decree dated 26.09.1973 which decree still holds the field, therefore, mutation No.930 could not be set aside; that since the sanction of mutations in favour of defendants are illegal, therefore, other mutations sanctioned on the basis of sale deeds are ineffective upon the rights of the petitioner but this fact of altogether ignored by learned courts below; that the statement made by PW-1 Ghulam Hussain Patwari supports version of the petitioner that mutation No.898 was incorporated in revenue record on 24.09.1974 but it could not be sanctioned due to MLR No.115; that the impugned judgments and decrees are based on misreading and non-reading of evidence; that learned courts below have committed serious illegalities while passing the impugned judgments and decrees which has caused serious prejudice to the rights of the petitioner, therefore, this civil revision, learned counsel prays, be allowed, the impugned judgments and decrees be set aside and the suit of the petitioner be decreed as prayed for. He has relied upon the law laid down in cased titled Khalid Mahmood v. Anees Bibi and 2 others (PLD 2007 Lahore 626), Muhammad Ismail and others v. Roshan Ara Begum and others (PLD 2001 Lahore 28), Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others (2012 SCMR 983), Abdul Ahad and others v. Roshan Din and 36 others (PLD 1979 SC 890) and Ahmad Din v. Muhammad Shaft and others (PLD 1971 SC 762).

5. On the other hand, learned counsel for respondents Nos.6 to 8 have fully supported impugned judgments and decrees while controverting this civil revision. He contends that the suit filed by the petitioner was barred under Section 42 of the Specific Relief

Act; that the decree relied upon by the petitioner had never been part of the record as it was never produced in the evidence; that the respondents were not made party to the proceedings in the appeal filed by the petitioner before the revenue authorities; that the judgments of learned courts below are concurrent in nature which cannot be upset in revisional jurisdiction as there is no misreading or non-reading of evidence. He has relied upon the dictums laid down in case reported as Sheikh Muhammad Ashraf v. Mst. Bilqees Akhtar and 4 others (2000 YLR 408 Lahore); Muhammad Yar v. Mst. Iffat Sultana (2000 MLD 531 Lahore), Muhammad Sher and others v. Mst. Taj Meena and others (PLD 1996 Peshawar 6), Muhammad Saeed and others v. Muhammad Asif and others (2001 MLD 1861 Karachi), Mst. Perveen Akhtar and others v. Muhammad Hussain and others (2000 SCMR 1881) and Messrs Javed and Co. v. Messrs Daewoo Pakistan Motorway Services Ltd. through Chief Executive (2000 CLC 1611 Lahore).

6. Arguments heard. Record perused.

7. Admittedly, the petitioner filed a suit claiming his title in the suit property on the basis of an entry made in jamabandi for the year 1969-70. He, however, averred that respondent-defendant No.1 and predecessor of respondents-defendants Nos.2 to 5 transferred the suit property in his name through a decree of the court dated 26.09.1973. According to Exh.P3, which is a copy of the Register of Record of Rights for the year 1973-74 the suit land was transferred in the name of the petitioner on the basis of decree of the court mentioned hereinabove but no such decree was ever produced before the courts below. Even, there are no proceedings of any court of law, on record, which could be said to have culminated into the decree. It is surprising that the petitioner claimed himself owner of the property on the basis of jamabandi for the year 1969-70 and at the same time, he asserted that the land was transferred to him through decree of the court in the year 1973. While appearing in the witness box as PW.2, the petitioner is silent as to how he became owner of the property in the year 1969-70. It is not his prayer in the suit that he be declared owner of the suit property on the basis of the decree dated 26.09.1973 passed in his favour (implemented through mutation No.898). Relevant portion of headnote of the plaint as well as prayer clause are reproduced below:

8. It is noticed that the assertion made in the plaint was not proved through any oral or documentary evidence and whatever was asserted in the evidence was beyond the pleadings. It is now settled proposition of law that anything said in the evidence beyond the pleadings cannot be taken into consideration. The main thrust of learned counsel for the petitioner was that the suit property was transferred in his name through decree of the court dated 26.09.1973 which is still intact and never challenged by anyone. I am afraid that as noted above, no such decree or proceedings have ever been brought on record even though the same were denied by the other side in categorical term. The contention of learned counsel for the petitioner lacks force which is accordingly repelled.

9. There is another aspect of the case that the suit as framed was not maintainable under Section 42 of the Specific Relief Act and Order II, Rule 2, C.P.C. when claim of possession has not been made whereas the petitioner himself admitted that he is not in

possession of the property. Further, PW.1 Ghulam Hussain Patwari Halqa admitted in clear words that the plaintiff is not in possession of the disputed property. In the said circumstances, there remains no doubt that the suit filed by the petitioner was defective from its very inception. Reliance is placed upon the law laid down by the Hon'ble Supreme Court in case Hazrat Khan v. Amanullah Khan and others (1996 SCMR 1217).

10. Both the learned courts below have concurrently decided against the petitioner, particularly the appellate court has delivered a comprehensive and detailed judgment touching the entire evidence led by the parties. No misreading or non-reading of evidence is spelt out from the record. As such, there is no occasion to interfere with the impugned judgments and decrees of learned courts below in revisional jurisdiction. This civil revision is without any substance, which is accordingly dismissed.

ZC/M-133/L Revision dismissed.

**2016 Y L R 2435**

**[Lahore]**

**Before Atir Mahmood, J**

**CHAIRMAN, BOARD OF INTERMEDIATE AND SECONDARY EDUCATION and 2 others---Petitioners**

**Versus**

**MUHAMMAD UMAIR---Respondent**

Civil Revision No. 3691 of 2011, heard on 19th January, 2016.

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

----S. 42---Punjab Boards of Intermediate and Secondary Education Act (XIII of 1976), Ss. 29 & 31---Suit for declaration---Date of birth, correction of---Malice---Scope---Contention of plaintiff was that his correct date of birth was 14-11-1993 and not 07-11-1991---Suit was decreed concurrently---Validity---Malice on the part of defendants (Board of Secondary Education) had been asserted in the plaint---Plaintiff was not under any obligation to specify any person of the Education Board with an allegation of any enmity rather it was ridiculous to presume that there would be any enmity or personal grudge of the officials of Education Board against a student---Non-performance of duties in accordance with rules, regulations and principle of natural justice would amount to mala fide on the part of Board officials---Where rights of any one were infringed then civil court had ample jurisdiction to adjudicate upon the matter--Plaintiff had proved his case through cogent evidence---Actual date of birth of plaintiff was 14-11-1993---Revision was dismissed in circumstances.

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

----S. 9---Plenary jurisdiction of civil court---Scope---Civil courts were courts of plenary jurisdiction.

**(c) Words and phrases---**

----'Mala fide'---Meaning.

Black's Law Dictionary Ninth Edn. rel.

**(d) Words and phrases---**

----'Bad faith'---Meaning.

Black's Law Dictionary Ninth Edn. rel.

Mahboob Azhar Sheikh for Petitioners.
Javed Sabir Malik and Ms. Lubna Butt for Respondent.

Date of hearing: 19th January, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.**---This civil revision is directed against the judgment and decree dated 23.08.2011 passed by learned Additional District Judge, Lahore who dismissed appeal of the petitioners and upheld the judgment and decree dated 07.02.2011 passed by the learned Civil Judge Ist Class, Lahore whereby suit of the respondent-plaintiff was decreed.

2. Brief facts of the case are that the respondent (The plaintiff) instituted a suit for declaration with consequential relief against the petitioners (The defendants) stating that the correct date of birth of the respondent is 14.11.1993 but due to inadvertence, the same was mentioned in the official record of the Board of Intermediate and Secondary Education as 07.11.1991, same is wrong and incorrect. Further stated that the plaintiff approached the concerned authority for correction of his date of birth but the petitioners flatly refused to do so; before filing the suit, the respondent moved an application before the Board of Intermediate and Secondary Education, Lahore (The Board) for correction of his date of birth but the same was rejected by the petitioners. The petitioners moved an application under Order VII, rule 11, C.P.C. for rejection of the plaint which was contested by the respondent and the application was rejected by learned trial court vide order dated 23.11.2010. Thereafter, the petitioners-defendants contested the suit by filing written statement. Issues were framed and evidence was recorded. The learned trial court after hearing the arguments of both side, decreed the suit of the respondent-plaintiff vide judgment and decree dated 07.02.2011. Feeling aggrieved from the judgment and decree the petitioners filed an appeal before the learned appellate court which was dismissed by the learned appellate court vide impugned judgment and decree dated 23.08.2011. Hence this civil revision.

3. The emphasis of the learned counsel for the petitioners is that the civil court has no jurisdiction to adjudicate upon the matter on the ground that there is a bar to initiate any proceedings against the petitioners against the acts done in good faith, as provided under sections 29 and 31 of the Punjab Boards of Intermediate and Secondary Education Act, 1976 (The Act). Secondly, the suit is barred by law as the order dated 14.11.1993 passed by the Board has not been assailed while filing the suit. Learned counsel argued that during the proceedings before the Board, the respondent produced a bogus register of the municipal authorities regarding his date of birth, therefore, he is not entitled for any relief from the court.

4. On the other hand, learned counsel for the respondent controverted the arguments of the petitioners.

5. Arguments heard. Record perused.

6. In order to evaluate the arguments of the petitioners that no mala fide has been alleged against the petitioners therefore suit is not entertainable under sections 29 and 31 of the Act, the paragraph No.3 of the plaint is very relevant, part of which is reproduced as under:-.

This paragraph has been denied evasively by the petitioners in the following manners:-

> '3. Denied. In reply to this para it is submitted that plaintiff has submitted the application for correction of his date of birth from 07.1.1991 to 14.11.1993 before the answering defendants. The date of birth committee after hearing the plaintiff and perusing the record has recommended to reject the application of the plaintiff and the same was rejected by the competent authority.'

Keeping the above referred paragraph in juxta position, there remains no doubt that malice on the part of the petitioners has been asserted.

7. In my opinion, the respondent was not under any obligation to specify any person of the Board with an allegation of any enmity rather it is ridiculous to presume that there would be any enmity or personal grudge of the officials of the Board against a student, who may be a minor at the relevant time. In words " Mala fide and "Bad faith" have been defined in the ninth edition of Black's Law Dictionary as under.

> **Bad faith,** n. (17c) 1. Dishonesty of belief or purpose-the lawyer filed the pleading in bad faith---- Also termed mala fides (Mal-e-fi-deez).
>
> "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and

interference with or failure to cooperate in the other party's performance. " Restatement (Second) of Contracts 205 cmt.d (1979)."

It is held that when an order is passed and an act is done without due diligence and application of judicious mind then it clearly comes within the definition of "bad faith" and "mala fide". The non-performance of their duties in accordance with rules, regulations and principle of natural justice amounts to mala fide on the part of the Board officials. Bare reading of orders passed by the Board on application of the respondent (Exh.D3) reveals that a register of birth certificate was produced before the committee of the Board on 11.5.2010 when it was directed that the register earlier to the same as well as after the 'produced register' be requisitioned on 18.5.2010. A register starting from 29.2.1991 was produced and the Board held that earlier register was a bogus one. The relevant order is written as under:-

The Board has given no reason whatsoever as to how the register having entry of date of birth of the respondent was bogus one. It is held that passing such like order without any legal and lawful justification and without any basis is nothing but an act of mala fide, therefore, the objection of the learned counsel for the petitioners that under sections 29 and 31 of the Act the suit was not maintainable, is repelled. It is a settled principle of law that civil courts are the courts of plenary jurisdiction where the rights of any one are infringed, a civil court has ample jurisdiction to adjudicate upon the matter, within the framework of law.

8. As far as the facts of the case are concerned, the case of the respondent is that his date of birth was wrongly mentioned in the result card of 9th class as 07.1.1991 instead of 14.11.1993.

9. In order to prove his case, the respondent who was minor at the relevant time was represented by his father as natural guardian, who appeared in the witness box as PW.1. He deposed that when the admission form of the plaintiff was submitted then the school staff demanded form 'B' (Mark-A) issued by NADRA, which was duly provided. According to form 'B' the daughter of PW.1 namely Afifa Mumtaz is two years elder than the plaintiff whose date of birth is 07.11.1991 and the school staff wrongly incorporated her date of birth as date of birth of the plaintiff. This PW produced copy of the impugned order passed by the Board as Ex.P1, copy of 'B' Form

as Mark 'A', copy of Identity Card as mark-B, copy of disputed result card of 9th class as mark-C, copy of Nikahnama as mark-D, copy of matriculation certificate of Afifa Mumtaz as mark-E, copy of birth certificate of the plaintiff as mark-F and copy of matric result card as mark-G. Beside mark 'A' (Form-B), the most significant document is mark 'E' which is the copy of matriculation certificate of Afifa Mumtaz, the elder sister of the plaintiff showing her date of birth as 07.01.1991, which has been issued by the petitioners-Board itself, there is no denial to this fact, however, a suggestion was put to PW.1 by the petitioners that in the 'Form-B' the date of birth of Afifa Mumtaz with the plaintiff has been interchanged. PW.1 also denied the suggestion that his application for correction of date of birth was dismissed on account of production of fictitious record. The stance of the plaintiff was corroborated by PW.2 Munir Ahmad, who stated that the plaintiff is younger than his sister. This stance was not cross-examined by the petitioners side, however, a suggestion was put to him that he did not knew the date of birth of the plaintiff and his other brother and sister.

10. In rebuttal, the petitioners produced DW.1 Rehmat Ali/Junior Clerk, who produced the original admission form of the plaintiff as Exh.D-1, who showed his ignorance that immediately after receiving the result card of 9th class an application for correction of date of birth was submitted by the plaintiff. DW.2 Muhammad Anwar ul Haq/Assistant Reorganization Section produced copy of application dated 16.3.2010 for correction of date of birth as Exh.D-2 and deposed that in the opinion of the committee that the register of record of birth of union council was fictitious. During the cross-examination, he admitted that the register, which was produced by the union council, had the entry of date of birth of the plaintiff as 14.11.1993. He admitted that in the subsequent register produced by the union council, there is no entry regarding the date of birth of the plaintiff. This statement of DW.2 is sufficient to establish that had there been a wrong entry of the date of birth of the plaintiff in the register subsequently produced before the committee of the Board then that entry must have been reflected therein. This witness also showed his ignorance about the second register as to the date from which it started and thereafter ended. Therefore, I have no doubt in my mind that the actual date of birth of the plaintiff is 14.11.1993.

11. The objection raised by the petitioners that the order dated 18.5.2010 passed by the committee of the Board has not been challenged in the suit and, therefore, suit was liable to be dismissed, is of no legal significance because, firstly, the objection was never raised before the courts below nor before this Court while filing this petition and secondly for the reason that the entire claim of the respondent is based upon the rejection of his application by the petitioners, for correction of his date of birth and there was no need to seek, specifically, the cancellation of the order 18.5.2010 passed by the petitioners.

12. In view of the above discussion, there remains no doubt in my mind that the respondent-plaintiff fully proved his case through production of cogent evidence whereas there is no rebuttal from the petitioner's side to contradict the stance of the plaintiff. Both the courts below have concurrently held against the petitioners. Therefore, this revision petition being devoid of any force is hereby dismissed.

ZC/C-8/L Petition dismissed.

**2016 Y L R 2528**

**[Lahore]**

**Before Atir Mahmood and Shams Mehmood Mirza, JJ**

**BANK AL-FALAH LTD.---Appellant**

**Versus**

**Mrs. SHAHZADI ZARFASHAN SOHAIL---Respondent**

R.F.A. No.669 of 2010, heard on 15th March, 2016.

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

----S. 12---Suit for specific performance of contract---Discretionary relief---Scope---Neither plaintiff made any effort to pay the remaining sale price to the vendor nor sent any notice to perform her part of agreement before expiry of target date---Nothing was on record to suggest that plaintiff was ready to perform its part of agreement and defendant avoided the same---Plaintiff having failed to make payment of balance sale price within the stipulated time, was not entitled to the decree of specific performance which was discretionary relief---Court even if case was proved could refuse to exercise its discretion---No illegality had been pointed out in the impugned judgment and decree passed by the Trial Court---Appeal was dismissed in circumstances.

Mst. Gulshan Hamid v. Kh. Abdul Rehman and others 2010 SCMR 334; Muhammad Sharif and others v. Nabi Bakhsh and others 2012 SCMR 900 and Zahid Rahman v. Muhammad Ali Asghar Rana 2007 CLC 1814 ref.

Abid Hussain Chatha for Appellant.
Agha Abul Hassan Arif for Respondent.
Date of hearing: 15th March, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts leading to filing of this appeal are that the appellant filed a suit on 12.10.2004 for specific performance of agreement to sell with the averments that the respondent entered into an agreement to sell dated 23.07.2003 to sell her House No.35, College Block, Allama Iqbal Town, Lahore (hereinafter called "the suit property") for consideration of Rs.26.50 million with the appellant; that a sum of Rs.10.00 million was paid and six months time was agreed between the parties to facilitate the respondent to arrange alternative accommodation; that as per clause 1 of the agreement, balance sale price of Rs.16.50 million was agreed to be paid at the time of execution of sale deed or before 07.02.2004; that since the respondent neither vacated nor transferred the suit property; that the appellant sent a letter dated 05.04.2004 asking for early completion of the sale deed whereupon the respondent gave verbal assertions; that finally, the appellant served a legal notice dated 23.08.2004 seeking execution of sale deed by end September or otherwise in addition to specific performance, costs towards rent @ Rs.175,000/- per month from

01.10.2004 till delivery of possession were demanded whereupon the respondent refused to execute sale deed on the premise that she was not paid the balance sale price on 07.02.2004 as agreed in the agreement.

2. The respondent-defendant appeared and filed contesting written statement. Following issues were settled:

**ISSUES**

1. Whether the plaintiff has come to this court with un-clean hands? OPD
2. Whether the plaintiff has no cause of action and locus standi? OPD
3. Whether the suit is barred by limitation? OPD
4. Whether the time was essence of the contract? OPD
5. Whether the suit is barred by law? OPD
6. Whether the plaintiff is entitled to a decree for specific performance of the sale agreement dated 23.7.2003; if so, on what terms and conditions? OPP
7. Relief."

After recording evidence of the parties and hearing both sides, learned trial court, vide judgment and decree dated 26.05.2010, dismissed the suit, however, compensation of Rs.11,500,000/- was granted. Hence this RFA has been instituted.

3. Learned counsel for the appellant inter alia contends that learned trial court erroneously held that time was the essence of the agreement and did not consider that simultaneous possession was required and respondent never vacated the property or provided necessary documents to execute sale deed; that learned trial court failed to read and interpret clause 1 of the agreement in its entirety; that evidence of the parties has also not been appraised by the learned trial court in its true perspective; that no weightage was given to the fact that substantial payment was made by the appellant for purchase of the suit house; that the appellant was ever ready and capable to make balance payment to the vendor; that the respondent never asked the appellant that the suit property is vacant or that she be paid balance amount; that the impugned judgment and decree is contrary to the principles of interpretation of documents where the cardinal rule is that document is to be read as a whole; that the impugned judgment and decree is against law, therefore, this appeal be allowed, the impugned judgment and decree be set aside and the suit of the appellant be decreed as prayed for.

4. On the other hand, learned counsel for the respondent argues that the time was essence of the contract and target date in this regard was fixed as 07.02.2004. He asserts that as per agreement, the sale deed was to be executed and the possession was to be delivered on payment of whole consideration but the appellant-plaintiff has badly failed to pay the sale price within the stipulated time. He also refers clause 19 of the agreement to sell which is regarding revocation of the contract by the vendor if she wishes so on or before 07.02.2004. He has relied upon the law laid down in case

reported as Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334), Muhammad Sharif and others v. Nabi Bakhsh and others (2012 SCMR 900) and Zahid Rahman v. Muhammad Ali Asghar Rana (2007 CLC 1814).

5. We have heard arguments of learned counsel for the parties and also perused the record with their able assistance.

6. The agreement to sell dated 23.07.2003 as well as sale price fixed therein is admitted between the parties. The whole crux of arguments of learned counsel for the parties is whether or not the time was essence of the contract between the parties.

7. Clauses 1, 6, 10 and 19 of agreement to sell are relevant regarding the issue in hand which are discussed in the succeeding paragraphs.

8. As per clause 1 of the agreement, the remaining balance price of Rs.16.50 million was required to be paid at the time of execution of sale deed or before 07.02.2004 whichever was earlier. This clause further reads that the possession of the property will be handed over to the vendee upon full and final payment of the entire sale price. This clause clearly binds the appellant-vendee to ensure payment of the sale price within the stipulated time, i.e. by 07.02.2004 as it has been written therein that the balance sale price will be paid at the time of execution of sale deed or before 07.02.2004 whichever time comes first. Since the time of execution of sale deed never came, the target date for sale price was 07.02.2004 and the appellant was bound to pay the remaining sale price on or before 07.02.2004.

9. According to clause 6 of the agreement, the vendor, after receipt of entire sale price within the stipulated time, will execute and register sale deed and do all the acts required for conveying and transfer the ownership of the property in favour of the vendee or its nominee. This clause also reflects that the execution of the sale deed and transferring of the property in the name of the vendee or its nominee was to be done after receipt of whole sale price within the stipulated time and not thereafter.

10. Clause 10 of the agreement also states that remaining sale price of the suit property will first be made and then the vendor will execute the sale deed.

11. There is another clause, i.e. clause No.19 which allows the vendor to revoke the agreement to sell in question and in that eventuality, he was obliged to pay a sum of Rs.11,500,000/- to the vendee. As per this clause, learned trial court while refusing to pass the decree of specific performance of agreement to sell in favour of the appellant has burdened the respondent-vendor with the said amount.

12. Admittedly, neither the appellant made any effort to pay the remaining sale price to the vendor by issuing any pay order/draft in favour of the defendant nor sent any notice to the vendor to perform her part of the agreement before expiry of the target

date, i.e. 07.02.2004. The notices/letters allegedly written to the defendant to perform her part of performance were after the target date of 07.02.2004 as first notice (Exh.P4), according to the appellant side, was written on 05.04.2004 followed by legal notice dated 23.08.2004 (Exh.P5). The appellant produced DW.1 Sohail Yar Khan, as a solitary witness who during the cross-examination admitted that in every circumstances, execution of the sale deed was to be completed till 07.02.2004. There is absolutely no evidence or corroborative evidence which could suggest that the appellant was ready to perform its part of the agreement and the respondent avoided the same. On the other hand, there is overwhelming evidence in the form of statements of DW.1 to DW.3 that no effort was made by the appellant to pay the balance consideration amount within time. It was noteworthy that a suggestion was put by the appellant to DW.2 which was replied in affirmative that the defendant was liable to deliver the possession of the property after entire payment and execution of sale deed. This suggestion is against all the grounds which have been urged now before this Court that the appellant was obliged to pay the balance amount after delivery of possession. In the circumstances, the appellant failed to make payment of balance sale price within the stipulated time, as such, the appellant bank was not entitled to the decree of specific performance which is even otherwise a discretionary relief and the court, even if the case is proved, could refuse to exercise its discretion.

13. The summary of whole discussion is that the appellant has failed to make payment within the stipulated time, therefore, the appellant was not entitled to the decree of specific performance. Furthermore, it was only discretionary relief and the court could refuse the same even if the case was proved by the plaintiff. We see no illegality in the impugned judgment and decree which is accordingly sustained. Resultantly, this appeal fails. Dismissed.

ZC/B-14/L Appeal dismissed.

**PLJ 2016 Cr.C. (Lahore) 108**

***Present*: ATIR MAHMOOD, J.**

**REHAN FAROOQ KHAN--Petitioner**

**versus**

**STATE and another--Respondents**

Crl. Misc. No. 7517-B of 2015, decided on 27.7.2015.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, refusal of--Absconder--Possibility of deliberations before registration fo FIR cannot be assumed--Nominated with specific role of causing injury--Medical evidence corroborate with ocular account--Validity--No justification could be given by petitioner for such abscondance--*Prima-facie,* there is incriminating material against petitioner to connect him with commission of' offence--Accused was not entitled for grant of bail after arrest. [Pp. 109 & 110] A

*Mr. Abdul Rauf Farooqi,* Advocate for Petitioner.

*Ch. Muhammad Akram Tahir,* D.D.P.P. for State.

*M/s. Mushtaq Ahmed Dhoon and Mukhtiar Ahmed Talokar,* Advocates for Complainant.

Date of hearing: 27.7.2015.

**ORDER**

This is a petition under Section 497, Cr.P.C. for grant of post-arrest bail in case F.I.R. No. 330/2013 dated 08.12.2013 for the offence under Sections 302/34, PPC registered with Police Station Kundian, District Mianwali.

2. Brief facts of the case are that the complainant alongwith Auwn Ahmed and Amir Waqas went to R.H.C Kundian for some work. At about 4/5 p.m when they coming on motorcycle, reached in front of Mosque Fezan-i-Madina, Sher Afgan son of Abdul Hayee was standing in front of gate of his house, when suddenly Rehan Farooq Khan and Muhammad Azeem Khan came there on a motorcycle and both of them fired at Sher Afghan with their pistols. Fire of Rehan Farooq hit on the head of Sher Afghan, who fell down. Both the accused went towards north and raised *lalkara* that whoever come forward will be killed. Sher Afghan expired on the spot. Motive behind the occurrence is that Sher Afghan had enmity of murder with the accused and due to that enmity they killed Sher Afghan. Hence this FIR.

3. Arguments heard. Record perused.

4. The main emphasis of the learned counsel for the petitioner is that the petitioner was arrested on 1.12.2014 and remained on physical remand but nothing was recovered from him and that during the investigation he has been declared innocent. He has relied upon the case law oited as *Nisar Ahmad alias Shari and another vs The State* (2004 MLD 1272) and *Ch. Muhammad Yousaf Sindhu vs. The State* (PLD 1990 Lahore 161).

5. Record reflects that the FIR was promptly lodged as the occurrence took place on 4.15 pm on 08.12.2013 and the case was registered at 4.50 pm on the same date. In the said circumstances, possibility of deliberations before registration of the FIR cannot be assumed. The petitioner has been nominated with specific role of causing injury to the deceased Sher Afghan Khan which caused the death. The medical evidence corroborate with the ocular account. The eye-witnesses got recorded their statements under Section 161 Cr.PC in line with the contents of the FIR. In such circumstances, it has rightly been observed by the learned ASJ while dismissing the bail application of the petitioner, that ipsi dixit of the police is not binding on the Court.

6. There is another aspect of the case that after lodging of FIR, the petitioner remained absconder and was arrested on 01.12.2014 and no justification could be given by the learned counsel for the petitioner for such abscondance. *Prima-facie,* there is incriminating material against the petitioner to connect him with the commission of' offence. In these circumstances, the petitioner is not entitled for grant of bail after arrest. Resultantly, this bail application is hereby dismissed.

7. It is made clear that the observations made here-in-above shall not prejudice the merits of the case which will be decided on its own merits in accordance with law by the trial Court.

(R.A.) Bail dismissed

**2016 M L D 1400**
**[Lahore]**
**Before Atir Mahmood, J**
**ALAM BIBI and others---Petitioners**
**Versus**
**QAMAR SULTANA and others---Respondents**

Writ Petition No.11609 of 2013, heard on 15th October, 2015.

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

----O. XVI, R. 1---Specific Relief Act (I of 1877), Ss. 42 & 54---Summoning of witnesses--- Delay in filing list of witnesses--- Suit for declaration and injunction--- Defendant, a lady or ignorant of law---Effect---Petitioners filed suit for declaration and injunction with permanent injunction in year 2003---Trial Court accepted application of defendant containing list of witnesses and summoned some witnesses in 2011--- Orders passed by Trial Court were maintained by Lower Appellate Court--- Validity--- Application was filed on 07-04-2011 whereas defendant lady appeared in witness box on 28-06-2010 when she got recorded her statement--- Even if defendant was considered a Pardanasheen lady, she could tell her counsel on 28-06-2010 when she came to Court about summoning of witnesses but she failed to do so--- Desire of defendant to produce witnesses proposed to be summoned were not due to any cause of action accrued to defendant at later stage as those were the witnesses of documents in dispute and were even available at the time of filing of suit and framing of issues--- Defendant failed to show any cause to produce proposed witnesses--- Mere desire of a party to do an act which was required to be done in a particular manner could not be considered to be good cause--- Being a lady or ignorant of law did not entitle defendant for any special treatment--- High Court set aside the concurrent orders passed by both the courts and dismissed the application filed by defendant--- Petition was allowed in circumstances.

Hakim Habibul Haq v. Aziz Gul and others 2013 SCMR 200 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

Iftikhar Ullah Malik for Petitioners.
Rana Muhammad Arshad Khan for Respondent No.1.

Respondent Nos.2 proceeded against ex parte on 11-11-2013.

Date of hearing: 15th October, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this constitutional petition under Article 199 of the Islamic Republic of Pakistan, 1973, the petitioners have challenged judgment dated 07.01.2013 passed by the learned Additional District Judge, Sialkot who maintained order dated 07.01.2011 passed by learned Civil Judge, Sialkot whereby application filed by respondent No.1 for filing list of witnesses and summoning proposed witnesses was accepted.

2. Brief facts of the case are that petitioners filed a suit for declaration with permanent injunction and cancellation of general power of attorney on 11.06.2003. Respondent No.1 filed contesting written statement whereas respondent No.2 was proceeded against ex parte on 03.01.2005. On 07.04.2011, respondent No.1 filed application for production of list of witnesses and summoning some witnesses which was allowed by learned civil court vide order dated 17.05.2011. The petitioners assailed the said order in revision petition. Learned revisional court below dismissed the revision petition vide judgment dated 07.01.2013. Hence this writ petition has been filed challenging both decisions of learned trial court as well as the revisional court.

3. Learned counsel for the petitioners inter alia contends that the impugned decisions are against law; that respondent No.1 was required to furnish list of witnesses within seven days from framing of issues on 14.10.2006 but she badly failed to do so and filed application for the same after about 4-1/2 years of framing of issues; that she could not be allowed to produce the list of witnesses and summoning of witnesses at such a belated stage, therefore, this writ petition be allowed, the impugned judgment and decree passed by learned courts below be set aside and the application of respondent No.1 be dismissed.

4. On the other hand, learned counsel for respondent No.1 has vehemently opposed this writ petition mainly on the grounds that there are concurrent findings against the petitioners; that respondent No.1 was a parda nasheen lady and could not contact her lawyer well in time and allowing application of the respondents in question will also not prejudice rights of the other side, therefore, this writ petition merits dismissal. He has relied upon the law laid down in case reported as Hakim Habibul Haq v. Aziz Gul and others (2013 SCMR 200).

5. Arguments heard. Record perused.

6. Scanning of record reveals that the petitioners filed a suit for declaration with permanent injunction and cancellation of general power of attorney on 11.06.2003. Respondent No.1 filed contesting written statement whereas respondent No.2 was proceeded against ex parte on 03.01.2005. Issues emerging from divergent pleadings

were framed on 14.10.2006. The petitioners completed their evidence on 25.03.2010 whereas the respondents-defendants on 28.06.2010. The respondents filed application for production of list of witnesses and summoning some witnesses on 07.04.2011 after 04 years, 05 months and 23 days of framing of issues. Under the law, respondent No.1 was required to furnish list of witnesses within 7 days from the date of framing of issues but she could not do so and filed the application in question at a very belated stage, i.e. after 04 years, 05 months and 23 days. Both the learned courts have just observed that since respondent No.1 had desired to do so, therefore, her application should have been accepted. In my view, the application could be acceded to if there was any plausible reason(s) given by the applicant. I have gone through the whole application of respondent No.1 carefully but failed to find any good cause or reason which may be considered as a valid ground to accept the application at such a belated stage as the only reason given in the application is that respondent No.1 being a parda nasheen lady could not contact her lawyer. Needless to observe that the application was filed on 07.04.2011 whereas respondent lady admittedly appeared in witness box on 28.06.2010 herself when she got recorded her statement. Even if she is considered a parda nasheen lady, she could tell her counsel on the said date, 28.06.2010 when she came to the court, about summoning of witnesses but she failed to do so. Furthermore, the desire of respondent No.1 to produce the witnesses proposed to be summoned was not due to any cause of action accrued to respondent No.1 at later stage as these are witnesses of the document in dispute and were even available at the time of filing of suit and framing of issues. There is nothing on record to establish that respondent No.1 was able to show any cause to produce the proposed witnesses. Mere desire of a party to do an act which was required to be done in a particular manner cannot be considered to be a good cause. Furthermore, being a lady or ignorant of law does not entitle respondent No.1 for any special treatment. Reliance is placed on the dictums laid down by the Hon'ble Supreme Court of Pakistan in case titled Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255). Relevant portion therefrom is reproduced below:

> " it may be mentioned that the Court is not vested with an unrestricted authority and discretion to pass any whimsical direction and capricious order it feels like, but obviously the order allowing the permission has to conform to "those reasons which are justifiable in the eyes of law", which reflects the judicial application of mind by the Court and the disposal of the request in a judicial manner.

7. There are though concurrent findings against the petitioners but these are not immune from interference by this Court as the judgment and order passed by learned courts below are without any reason. The law relied upon by learned counsel for respondent No.1, i.e. Hakim Habibul Haq v. Aziz Gul and others (2013 SCMR 200) is also not helpful to him as in the referred case there existed a list of witnesses but

herein this case respondent No.1 has sought to produce the list of witnesses and summoning of witnesses after about 4 years of framing of issues.

8. Consequent to above discussion, this writ petition is allowed, the impugned judgment and order passed by learned courts below are set aside and the application filed by respondent No.1 is dismissed.

MH/A-154/L Petition allowed.

**2016 C L D 1546**

**[Lahore]**

**Before Atir Mahmood, J**

**STANDARD CHARTERED BANK (PAKISTAN) LIMITED through Manager---Appellant**

**Versus**

**SHAFQAT ULLAH TAHIR---Respondent**

F.A.Os. Nos. 158, 223 and 255 of 2008, heard on 14th October, 2015.

**Punjab Consumer Protection Act (II of 2005)---**

----Ss. 33, 27, 25, 13 & 3---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), Ss. 7 (4) & 2(a)---Constitution of Pakistan, Art. 143---Consumer complaint---Liability for defective services---Jurisdiction of Consumer Court regarding matter between financial institutions and their customers---Scope---Respondents filed application for rejection of the complaint on the ground that the Consumer Court had no jurisdiction to try the complaint as the matter was between the financial institution and its customer, which was dismissed by the Consumer Court---Respondent, later on, filed application for revisiting said order of dismissal, which was also dismissed---Petitioner contended that impugned order being interlocutory order present appeal was not competent---Validity---Impugned orders to the extent of the applications were final and not interlocutory orders---Matters in hand were between Bank and customers---Bank fell within the definition of 'financial institutions'---Matters pertaining to the financial institutions with their customers could only be taken up and decided by the Banking Court as provided under S. 7(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001---Consumer Court had no unfettered powers and certain restrictions existed in S. 3 of the Punjab Consumer Protection Act, 2005, which provided that the Act would be in addition to, and not in derogation of, the provisions of any other law---Consumer Court, therefore, had transgressed its powers and erred in law while assuming jurisdiction in the matter in hand and entertaining the complaint---Financial Institutions (Recovery of Finances) Ordinances, 2001, in terms of Art. 143 of the Constitution, being a Federal statute, had precedence over the Consumer Protection Act, 2005---High Court, setting aside the impugned orders, dismissed the complaint---Appeal was allowed in circumstances.

Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another 2015 CLD 196 = PLD 2015 Lah. 140 and Allied Bank Ltd. Faisalabad through Attorneys of the Bank v. Khalid Mehmood PLD 2013 Lah. 454 ref.

Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another 2015 CLD 196 = PLD 2015 Lah. 140 rel.

Ashiq Hussain Hanjra for Appellant.
Usman Malik for Respondent.
Date of hearing: 14th October, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this single judgment, I intend to dispose of F.A.Os. Nos.158, 223 and 255 of 2008 as common questions of law and fact are involved therein.

2. Brief facts leading to filing of the instant appeal are that on 09.02.2008, the respondent filed a complaint against the appellant in the Consumer Court, Lahore on account of damages for defective service filing claim to the tune of Rs.30.02 million; that the appellant filed reply to the complaint; that the appellant also filed an application for rejection of the complaint asserting that the consumer court had no jurisdiction to hear the complaint; that the respondent filed reply to application of the appellants. Learned consumer court dismissed the application of the appellants vide order dated 13.05.2008. The appellant filed application for revisiting order dated 13.05.2008 which application was also dismissed vide order dated 04.07.2008. Hence this F.A.O. has been filed.

3. Learned counsel for the appellants inter alia contends that the impugned orders are against the law; that the learned consumer court had no jurisdiction to try the complaint as the matters raised in the complaints were between the financial institutions and their customers and even if there was any grievance, the respondents should have approached the banking court rather than the consumer court for redress of their grievances, therefore, the F.A.Os. in hand be accepted, the impugned orders be set aside and the complaints filed by the respondents be dismissed. He has relied upon the law laid down in case reported as Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another (2015 CLD 196 Lahore = PLD 2015 Lah. 140).

4. On the other hand, learned counsel for the respondents has vehemently opposed these appeals mainly on account, of maintainability. He asserts that the complaints filed by the respondents are still pending and the orders impugned are just interim orders whereagainst no appeal is provided in section 33 of the Punjab Consumer Protection Act, 2005. He prays that the appeals in hand be dismissed. He has relied upon the, law laid down in case reported as Allied Bank Ltd. Faisalabad through Attorneys of the Bank v. Khalid Mehmood (PLD 2013 Lahore 454).

5. Arguments heard. Record perused.

6. The only point raised in all the three appeals in hand is regarding jurisdiction of the consumer court to decide the issue of damages between a bank and its customer.
7. The emphasis of learned counsel for the respondents is on the point that the appeals in hand are not entertainable as the same have been filed against interlocutory orders. Undeniably, the appellants filed applications for rejection of the complaint on account of lack of jurisdiction which applications stand dismissed by the consumer court finally, as such, the impugned orders, in my considered view, are final orders to the extent of the said applications and not interlocutory orders, as asserted by learned counsel for the respondents. The contention of learned counsel for the respondents is without any force, which is accordingly discarded.

8. Admittedly, the matters in hand are between banks and their customers. The banks undisputedly fall within the definition of 'financial institutions'. The matters pertaining to the financial institutions with their customers can only be taken up and decided by the banking court as provided under section 7(4) of the Financial Institutions (Recovery of Finances), Ordinance, 2001 which reads as under:

"7(4) Subject to subsection (5) no court other than a banking court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of Banking Court extends under this Ordinance including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court."
Whereas the consumer court has no unfettered powers and there are certain restrictions as embedded in section 3 of the Punjab Consumer Protection Act, 2005 which reads as under:

> "The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.".

Keeping in juxtaposition the above two provisions of different statutes, there remains no doubt that the consumer court had no jurisdiction to deal with the matter, as such, it has transgressed its powers and erred in law while assuming its jurisdiction in the matters in hand. On this score alone, the complaint was liable to be dismissed. Needless to mention here that being a Federal Statute, Financial Institutions (Recovery of Finances) Ordinance, 2001 has precedence over the Consumer Protection Act, 2005 which is Provincial Statute as provided under Article 143 of the Constitution of Islamic Republic of Pakistan, 1973. Reliance is placed on the ratio laid down in case reported as Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another (2015 CLD 196 Lahore = PLD 2015 Lah. 140).

9. For what has been discussed above, the learned consumer court has erred in law while entertaining the complaints. Therefore; the appeals in hand are allowed, the impugned orders are set aside and the complaints of the respondents are dismissed.

SL/S-42/L Appeals allowed.

**2016 C L C Note 122**
**[Lahore (Multan Bench)]**
**Before Atir Mahmood, J**
**MUHAMMAD RIAZ---Appellant**
**Versus**
**Mian AAMIR RASHEED and others---Respondents**

F.A.O. No. 1 of 2012, heard on 21st November, 2013.
**Punjab Consumer Protection Act (II of 2005)---**

----S. 28(4)--- Complaint before Consumer Court, filing of--- Limitation--- Condonation of delay---"Sufficient cause"---Period of limitation prescribed for filing a complaint (before Consumer Court) was 30 days from the date of arising of cause of action---Although delay of upto sixty days in filing the complaint could be condoned by the Consumer Court yet it would be subject to 'sufficient cause'---Without offering plausible reasons, the delay could not be condoned by the Consumer Court---Complaint filed in the present case was barred by two months and twelve days, which was even above the mandate of condonation of delay for 60 days given to the Consumer Court---Complainant, in the present case, provided no plausible reasons for the delay---Complaint filed before Consumer Court was barred by time---Appeal was allowed accordingly. [Para. 7 of the Judgment]

Fakhar Raza Malana for Appellant.
Muhammad Saleem Shakoor for Respondents.
Date of hearing: 21st November, 2013.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Through this appeal under section 33 of the Punjab Consumer Protection Act, 2005, the appellant has assailed order dated 24.11.2011 passed by learned Presiding Officer, District Consumer Court, Multan whereby the complaint filed by the respondents was accepted by the consumer court directing the appellant to return the price of the disputed furniture to the respondents and also pay compensation of Rs.20,000/- along with counsel fee on return of disputed furniture to him.

2. The only contention of learned counsel for the appellant is that the complaint filed by the respondents before the consumer court was barred by time as they, if felt aggrieved, were bound to file the complaint before the consumer court within one month of accruing the cause of action which according to the complainant

himself accrued to him within about one month of the purchase of furniture from the appellant but the complaint was filed on 14.04.2011 with a delay of more than two months. He contends that the delay could not be condoned by the court without sufficient cause, therefore, this appeal be allowed, the order impugned be set aside and the complaint of the respondents be dismissed.

3. On the other hand, learned counsel for the respondents submits that the consumer court can condone delay in filing the complaint upto 60 days as per proviso of section 28(4) of the Punjab Consumer Protection Act, 2005. He argues that the impugned order is in accordance with law, therefore, the instant appeal be dismissed.

4. Arguments heard. Record perused.

5. The only plea taken by learned counsel for the appellant before this Court is that the complaint was barred by time which could not be condoned by the consumer court under the law.

6. The respondents filed a complaint before the consumer court on 14.04.2011 alleging that he purchased furniture of Rs.63,500/- from the appellant on 01.12.2010 which was given to respondent No.2 namely Mst. Bushra Siddiqa at the time of her marriage took place on 04.12.2010. It was also alleged in the plaint that the appellant had given guarantee of one year of the furniture in writing. The respondents further stated in the complaint that within one month of marriage of Mst. Bushra Siddiqa, a double bed and a stool out of the furniture purchased by the respondents from the appellant became defective which were neither repaired nor replaced by the appellant.

7. The furniture was admittedly purchased by the respondents from the appellant on 01.12.2010 and was given in dowry to Mst. Bushra Siddiqa (respondent No.2) on 04.12.2010. According to version of the respondents, a double bed and a stool became defective within one month of marriage of Mst. Bushra Siddiqa meaning thereby the said items became defective, at the most, on 03.01.2011. As such, the cause of action accrued to the respondents on 03.01.2011. This is the terminus a quo wherefrom the limitation started and continued uptill 02.02.2011 as a period of 30 days commencing from the date of accrual of cause of action has been provided under section 28(4) of the Punjab Consumer Protection Act, 2005 for filing a complaint by a consumer who has suffered damage on account of defective product or service or bad conduct of the manufacturer or service provider. But the complaint was filed on 14.04.2011

which is barred by time by two months and 12 days. Section 28(4) of the Act ibid is reproduced hereunder:

> "**28(4)** A claim by the consumer or the Authority shall be filed within thirty days of the arising of the cause of act:
>
> Provided that the Consumer court, having jurisdiction to hear the claim, may allow claim to be filed after thirty days within such time as it may allow if it is satisfied that there was sufficient cause for not filing the complaint within the specified period:
>
> Provided further that such extension shall not be allowed beyond a period of sixty days from the expiry of the warranty or guarantee period specified by the manufacturer or service provider and if no period is specified one year from the date of purchase of the products or providing of services."

Bare perusal of the above makes it clear that period of limitation prescribed for filing a complaint is 30 days from the date of arising of the cause of action. Although the delay up to sixty days in filing the complaint can be condoned by the consumer court yet it would be subject to 'sufficient cause'. No 'sufficient cause' has been given by the complainant in the complaint or the application for condonation of delay filed with the complaint. Without offering plausible reasons, the delay could not be condoned by the consumer court. In this case, the delay in even above the mandate of condonation of delay for 60 days given to the consumer court as per second proviso of section 28(4) of the Act ibid. In the circumstances, I am of the considered view that the complaint filed by the respondents before the consumer court was barred by time.

8. Without touching other merits of the case, this appeal is allowed and the order of the consumer court is set aside resulting in dismissal of the complaint filed by the respondents.

MWA/M-63/L Appeal allowed.

**2017 C L C 1066**

**[Lahore]**

**Before Atir Mehmood, J**

**LAWYERS FOUNDATION FOR JUSTICE----Petitioner**

**Versus**

**FEDERATION OF PAKISTAN and others----Respondents**

Writ Petition No.20848 of 2013, heard on 17th April, 2017.

**Constitution of Pakistan---**

----Arts. 91 & 199---Constitutional petition---Petitioner sought direction for appointment of a "shadow cabinet" on the ground that the same was within the Constitutional requirements of Art.91 of the Constitution for a parliamentary form of Government---Petitioner further contended that "shadow cabinets" existed in other parliamentary governments across the world---Validity---Article 91 of the Constitution did not suggest forming of a shadow cabinet and the concept of a shadow cabinet had not been given anywhere in the Constitution---High Court observed that governance of Pakistan had to be conducted in accordance with the Constitution and any parliamentary practice in other parliamentary systems of the world may have persuasive value but it was not per se part of the legal system of Pakistan, unless incorporated through appropriate legislative interventions---Question as to whether there should be a "shadow cabinet" in Pakistan was a matter which could only be decided by political parties representing the citizens of the country in the Parliament and there was no legal inhabitation upon them in such regard---High Court further observed that to give directions to form a "shadow cabinet" did not come within the ambit of the powers of the High Court under Art.199 of the Constitution and the same could only be done through amendment in the Constitution and not by the High Court whilst exercising its Constitutional jurisdiction---Constitutional petition was dismissed in circumstances.

Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others PLD 1994 SC 105; Province of Sindh through Chief Secretary and others v. M.Q.M. Deputy Convener and others PLD 2014 SC 531 and Al-Jehad Trust through Habibul Wahab Al-Khairi, Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others 1999 SCMR 1379 rel.

A.K. Dogar for Petitioner.
Sheraz Zaka for Respondent No.4.
Imtiaz Ahmed Kaifi, Addl. A.G. for the State.
Date of hearing: 7th March, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter called "the Constitution"), the petitioner has prayed that this Court may direct the respondents to enforce the constitutional requirements of parliamentary forms of government under

Article 91 of the Constitution of Islamic Republic of Pakistan, 1973 through appointment of Shadow Cabinet like that of Britain, Canada, Japan in order to check all kinds of corruption and mis-governance at initial stage to promote accountability and eradicate corruption.

2. Learned counsel for the petitioner inter alia contends that the British Parliamentary System is mother of all Parliamentary Governments of the world which is followed by the Canada; that in both the said countries as well as in Japan and other parliamentary systems of governments in the world, there is a shadow cabinet to have check upon the regular cabinet of the respective country; that our country has also parliamentary system of government but here is no shadow cabinet; that the shadow cabinet has full access to activities of the ministries/ government functionaries; that absence of shadow cabinet is promoting uncheck upon the cabinet regarding their mis-governance and corruption; that the shadow cabinet can play a vital and effective role as opposition failing which the majority rule is converted into dictatorship; that the system of shadow cabinet will improve the accountability process to curb all kinds of corruption at the first stage, therefore, this writ petition be allowed and direction be given to the respondents to enforce constitutional requirements of parliamentary forms of government through appointment of shadow cabinet. He relied upon the case reported as Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others (PLD 1994 Supreme Court 105).

3. Learned counsel for respondent No.4 while replying upon the cases reported as Province of Sindh through Chief Secretary and others v. M.Q.M. Deputy Convener and others (PLD 2014 Supreme Court 531 and Al-Jehad Trust through Habibul Wahab Al-Khairi, Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others (1999 SCMR 1379) supported the petitioner. His stress was superior courts can give directions to legislature to frame rules for smooth functioning of the government and curb corruption of the government functionaries. On the other hand, learned Additional Advocate General vehemently opposed this writ petition mainly on the ground that there is no concept of shadow cabinet in the Constitution.

4. Leader of Opposition in National Assembly through his report and parawise comments has also opposed the formation of shadow cabinet.

5. Arguments advanced from all corners have been heard and the record made available before me has also been perused.

6. The emphasis of learned counsel for the petitioner while praying for direction to the respondents to appoint shadow cabinet is on Article 91 of the Constitution. I have gone through the said Article, the same does not suggest forming a shadow cabinet. Even, no concept of shadow cabinet has been given anywhere in the Constitution.

7. So far as the concept of shadow cabinet introduced and implemented in other preliminary systems of governments like that of Britain, Canada, Japan and others is concerned, suffice it to say that each country has its own Constitution and laws which

may or may not be adopted by the other countries. When the Constitution of our country has no such provision of concept, the respondents cannot be issued direction as prayed for rather it is the sphere of the Parliament to amend Constitution in a way as it desires but subject to certain conditions i.e. that the basic structure of the Constitution is not affected by any such amendment.

8. The governance in Pakistan has to be conducted in accordance with the Constitution in its letter and spirit. Any parliamentary practice in other parliamentary systems of Government in the world may have persuasive value but it is not per se part, of the legal system of Pakistan unless incorporated through appropriate legislative interventions.

9. In our country, the opposition has been raising issues of corruption by the government functionaries in the parliament as well as in the media, so it can be said that it has been performing the role of shadow cabinet in other countries. The concept of shadow cabinet is alien to the Constitution and since this Court has to act in accordance with the Constitution and the laws of the land, therefore, no direction as prayed for can be issued to the respondents for an act which is beyond the Constitution by this Court.

10. Furthermore, the rules of procedure of the Provincial Assembly of the Punjab as well as National Assembly recognize the office of the leader of the Opposition and the rules facilitate the opposition members to play an effective role vis-a-vis the proceedings in the respective Assembly, promotion of democratic ideals and establishment of a truly welfare State in line with the injunctions of Islam. Needless to observe that the concept of shadow cabinet wherever in the world may be an effective mode of opposition but it is not the only mode of opposition. The concept of shadow cabinet is not just for accountability but to prepare a cabinet ready to perform functions of the cabinet if the opposition party wins the elections. Process of accountability operates in Pakistan through Public Accounts Committee, various standing Committees in National Assembly and Senate which consist of members of Opposition and treasury benches. The Standing Committees of the Parliament in Pakistan have the powers to require attendance of persons or production of record where it is considered necessary under the Rules of Procedure and Conduct of Business in the National Assembly, 2007 and the Rules of Procedure and Conduct of Business in the Senate, 2012. The Standing Committees have been assigned the functions of examining the expenditures, administration, delegated legislation, public petitions and policies of the Ministry concerned under the rules. The Standing Committees are also empowered to scrutinize and suggest amendments and recommend Ministry's Public Sector Development Program (PSDP) for the next financial year. As such, the opposition through its representation in the Standing Committees can play effective role to have check upon the government, therefore, it cannot be said that without formation of shadow cabinet, the accountability of the government is not possible at all. Even otherwise, whether or not there should be a shadow cabinet in Pakistan is a matter which can only be decided by the political parties representing citizens of the country in the Parliament and there is no legal inhibition upon them in this regard.

11. Direction to form a shadow cabinet does not come within the ambit of powers given to this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and the same can only be done through amendment in the Constitution and not by way of direction by this Court under Article 199 of the Constitution.

12. For what has been discussed above, this writ petition is bereft of any force, hence dismissed.

KMZ/L-5/L Petition dismissed.

**2017 C L C 1533**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD ABBAS----Petitioner**

**Versus**

**MUHAMMAD ISMAIL and 2 others----Respondents**

Civil Revision No.1360 of 2009, heard on 9th February, 2016.

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

----S 12---Qanun-e-Shahadat (10 of 1984), Arts.17, 79 & 82---Limitation Act (IX of 1908), Art. 113---Suit for specific performance of contract---Limitation---Agreement to sell attested by only one witness---Effect---Document, proof of---Procedure---Article 82 of Qanun-e-Shahadat, 1984---Applicability---Plaintiff was bound to produce cogent evidence including two marginal witnesses of agreement to sell before the court in order to prove his assertion---Every document was hit by the provisions of Art.17 of Qanun-e-Shahadat, 1984---Agreement to sell, in the present case was neither executed as required under Art.17 of Qanun-e-Shahadat, 1984 nor it could be proved as per requirement of Art.79 of the said Order---Document required to be proved must be attested by two witnesses and it could not be proved until and unless two attesting witnesses appeared before the court and testified such document---If initial requirements were completed then the provision of Art.82 of Qanun-e-Shahadat,1984 would be applicable---Alleged agreement to sell was attested by one marginal witness only and there existed no other marginal witness of the said document---Article 82 of Qanun-e-Shahadat,1984 might be relevant in a case where two attesting witnesses existed but not in the case of a document where there was only one marginal witness---Witness which did not exist could not be presumed that he had denied or failed to recollect execution of the document---Plaintiff could not be allowed to get benefit from the weaknesses of the other side and he had to stand on its own legs---Plaintiff filed suit for permanent injunction on 17-01-1994 wherein it was asserted that cause of action had accrued prior to 15 days before filing of said suit---Present suit was filed on 21-06-1997 which was beyond the period of three years and was time barred---No misreading or non-reading of evidence 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 LRs and others PLD 2011 SC 241 rel.

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

----Art. 113---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Limitation---Suit for specific performance of agreement to sell could be filed within three years from the day when cause of action accrued.

**(c) Qanun-e-Shahadat (10 of 1984)---**

----Arts. 17, 79 & 82---Document, proof of---Procedure---Document required to be proved must be attested by two witnesses and it could not be proved until and unless

two attesting witnesses appeared before the court and testified such document---If initial requirements were completed then the provision of Art.82 of Qanun-e-Shahadat, 1984 would be applicable.

**(d) Civil Procedure Code (V of 1908)---**

----S. 115---Revisional jurisdiction of High Court---Scope---High Court could not interfere in the concurrent findings of law and fact until and unless there was some illegality, irregularity, misreading or non-reading of evidence.

**(e) Affidavit---**

----Mere presentation of an affidavit was not a valid piece of evidence until and unless it was tendered in evidence by the deponent and cross-examined by the other side.

**(f) Administration of justice---**

----No one could be allowed to get benefit from the weaknesses of the other side---Party had to stand on its own legs.

A.K. Dogar for Petitioner.
Rana Mahmood Khan for Respondent.
Date of hearing: 9th February, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Brief facts of the case are that the petitioner filed a suit for declaration and specific performance of agreement to sell dated 26.11.1992 (Exh.P1) with the assertions that respondents Nos.1 to 3 entered into agreement to sell the property detailed in the plaint with the plaintiff through respondent No.1 for consideration of Rs.428,000/-; that earnest money of Rs.400,000/- was paid to the respondents; that under the agreement, respondent No.1 was required to execute sale deed in favour of the petitioner after receipt of remaining consideration amount of Rs.28,000/- but despite many requests, he did not do so rather the suit property was transferred in favour of respondent No.4 through impugned mutation of exchange No.849 dated 18.11.1996 with mala fide intention and to usurp the valuable amount of Rs.400,000/- paid by the petitioner; that the plaintiff earlier filed suit for permanent injunction which was withdrawn on assurance by the respondents to execute sale deed in his favour. Hence, this suit was filed.

2. The respondents contested the suit by filing written statement. Out of divergent pleadings of the parties, issues were framed. Both sides adduced their evidence. Learned trial court after recording evidence and hearing arguments of learned counsel for the parties dismissed the suit vide judgment and decree dated 30.06.2006. Feeling dissatisfied, the petitioner preferred appeal which also could not muster any result in favour of the petitioner and was dismissed vide judgment and decree dated 18.06.2009 passed by learned lower appellate court. Hence the petitioner-plaintiff has instituted this civil revision challenging both the judgments and decrees of learned courts below.

3. Learned counsel for the petitioner inter alia submits that the petitioner has proved his case through cogent evidence but learned courts below have not appreciated the evidence of the parties in its true perspective; that one marginal witness of agreement to sell was produced whereas an application was filed for production of scribe which

was allowed by learned lower appellate court but in the meantime, the scribe had died, as such, he could not be produced; that affidavit of the scribe was also produced before the court which is the evidence/statement of the scribe; that afterwards, application moved by the petitioner for production of son of the scribe, as a witness, was not acceded to by learned lower appellate court; that in view of Article 82 of Qanun-e-Shahadat Order, 1984 (hereinafter called "the Order, 1984"), production of two attesting witnesses before the court was not mandatory and the case could be proved through production of one attesting witness and other evidence but this aspect of the case was altogether ignored by learned courts below. He argues that the agreement to sell was admitted by the respondents in the earlier suit. In this regard, he has referred Exh.D1, written statement, filed in a suit titled "Muhammad Abbas v. Muhammad Ismail etc.". He has emphasized that since agreement was admitted, the provisions of Articles 17 and 79 of the Order, 1984 were not attracted. He has further argued that the time was not essence of the contract, therefore, findings of learned courts below qua the time limitation are incorrect. Learned counsel for the petitioner asserts that the impugned judgments and decrees are against law and fact, therefore, the same be set aside, the instant civil revision be allowed and the suit of the petitioner be decreed as prayed for.

4. On the other hand, learned counsel for the respondents has vehemently opposed this civil revision and fully supported the impugned judgments and decrees.

5. Arguments advanced by learned counsel for the parties have been heard and record with their able assistance also perused.

6. The execution of the alleged agreement to sell (Exh.P1) has been denied by the respondents who have termed it as a fake and forged document. Respondent No.1 has also denied his signature on Exh.P1. In the circumstances, the heavy onus to prove the agreement was upon the petitioner-plaintiff being its beneficiary. Since respondent No.1/alleged vendor denied the execution of Exh.P1, it was incumbent upon the plaintiff to produce cogent evidence including two marginal witnesses of the agreement before the court as enshrined in Articles 17 and 79 of the Order, 1984 in order to prove their assertion.

7. Under Article 17 of the Order, 1984, any matter pertaining to financial or future obligations should be witnessed and attested, in case it is reduced to writing, by two men or one man and two women. Perusal of Exh.P1 unequivocally shows that it only contains signature of the petitioner, respondent No.1 (who has denied his signature) and one attesting witness namely Zulfiqar Ali. There is no other attesting witness of this document. Article 79 of the Order, 1984 provides that if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses, at least, have been called for the purpose of proving its execution, if there be two attesting witnesses alive the present case, there is only one marginal witness of Exh.P1, therefore, it can safely be concluded that the very document is hit by the provisions of Article 17 of the Order, 1984. In the circumstances, the document Exh.P1 was neither executed as required under Article 17 nor it could be proved as per requirement of Article 79 of the Order, 1984. Reliance is placed on the ratio laid

down by the Hon'ble Supreme Court of Pakistan in case reported as Hafiz Tassaduq Hussain v. Muhammad Din through LRs and others (PLD 2011 SC 241).

8. The main emphasis of learned counsel for the petitioner is on the point that the document could be presented by producing one marginal witness and other evidence, and it was not necessary to produce two marginal witnesses of agreement to sell (Exh.P1), in view of Article 82 of the Order, 1984. Said provision of law is reproduced below for ready reference:

> **"82. Proof when attesting witness denies the execution.---** If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence." (Emphasis provided)

Bare perusal of above provision of law reveals that if an attesting witness does not support version of a party who has to prove a document and denies his signature(s) or execution of the document required to be proved or fails to recollect the execution of such document, then such party can prove the document through production of one witness and other evidence. Articles 17 and 79 come before Article 82, which clearly provide that a document required to be attested must be attested by two witnesses and it cannot be proved until and unless two attesting witnesses appear before the court and testify such document and if initial requirements are complete, then the provisions of Article 82 could be applicable. As stated earlier, the alleged agreement to sell was attested by one marginal witness only and there exists no other marginal witness in this document. As such, there arises no question of denial of one out of two witnesses, which is pre- requisite for attraction of Article 82. In my considered view, Article 82 may be relevant in a case where two attesting witnesses exist but not in the case of a document where there is only one marginal witness. A witness which does not exist at all cannot be presumed by any stretch of imagination that he has denied or failed to recollect execution of the document. Undeniably, there exists only one marginal witness in the alleged agreement to sell who has neither denied nor failed to recollect, therefore, Article 82 of the Order, 1984 is not attracted in this case. In this view of the matter, the contention of learned counsel for the petitioner has no force which is accordingly discarded.

9. The other contention of learned counsel for the petitioner is that an affidavit of the scribe was brought on record by the petitioner, therefore, his son, as the scribe had already passed away, could be produced before the court in lieu of one marginal witness in order to prove the document Exh.P 1. The status of a scribe has been defined by the Hon'ble Supreme Court in the case cited supra. Relevant paragraph is reproduced as under:

> "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 fulfill 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." (Emphasis provided)

Undisputedly, Exh.P1 was neither signed by the scribe nor the name of the scribe is mentioned thereupon. Therefore, mere placing on record an affidavit of a person purporting him to be the scribe of a certain document is not sufficient even to prove that he was scribe of such document. The affidavit was subject to cross-examination upon the deponent who admittedly did not appear before the court. It is well-settled law that mere presentation of an affidavit is not a valid piece of evidence until and unless it is tendered in evidence by the deponent and cross-examined by the other side. In the circumstances, the affidavit could not be proved even if application of the petitioner for production of son of the alleged scribe was allowed as in the first instance, the petitioner was required to prove that the deponent was scribe of the document and then his son can identify signature of his father upon the affidavit as well as upon the disputed agreement. When the affidavit could not be proved by the plaintiff as required by law, identifying signatures of the deponent by his son was of no consequence nor it could help the petitioner in proving his case in any manner. The contention of learned counsel for the petitioner is accordingly repelled.

10. The argument of learned counsel for the petitioner that since there was an admission on the part of defendants qua the execution of the agreement to sell, therefore, there was no need to prove the agreement strictly in accordance with provisions of Articles 17 and 79 of the Order, 1984. Reading of Exh.D1 (written statement of the defendants in earlier suit of the petitioner) makes it clear that though the defendants admitted the agreement/iqrarnama at that time but they, in the same breath, asserted that it was not the same as it was signed by them and that certain amendments had been made by the plaintiff. Furthermore, initial burden to prove the execution of the document was upon the petitioner-plaintiff which he failed to do so. Therefore, he cannot be allowed to get benefit from the weaknesses of the other side as he has to stand on its own legs. The contention of learned counsel for the petitioner is accordingly repelled.

11. Now I come to the contention of learned counsel for the petitioner that the suit was filed within time and findings of learned courts below are incorrect in this regard. The said contention is without any force as admittedly the petitioner filed the first suit for permanent injunction on 17.01.1994 wherein it was asserted that the cause of action initially accrued on 26.11.1992 and lastly 15 days before filing of the suit. Meaning thereby, the cause of action lastly accrued 15 days prior to 17.01.1994. The present suit was filed on 21.06.1997 which was admittedly beyond the period of three years. Under Article 113 of the Limitation Act, 1908, suit for specific performance for agreement to sell can be filed within three years from the day when the cause of action accrued, therefore, learned courts below have rightly held that the suit of the petitioner was hit by time limitation.

12. Furthermore, there are concurrent findings of law and fact against the petitioner which are immune from interference by this Court in its revisional jurisdiction until,

and unless there is some gross illegality, irregularity, misreading or non-reading of evidence floating on their surface which could not be pointed out by learned counsel for the petitioner. As such, I am not inclined to interfere with the impugned judgments and decrees passed by learned courts below after having thrashed out evidence of the parties and taken into consideration the law on the subject correctly.

13. For what has been discussed above, this civil revision is bereft of any force. The same is accordingly dismissed.

ZC/M-73/L Revision dismissed.

**2017 C L C Note 3**

**[Lahore (Multan Bench)]**

**Before Atir Mahmood and Shoaib Saeed, JJ**

**MUHAMMAD SAJID through General Attorney---Appellant**

**Versus**

**MUHAMMAD MASOOD SULTAN and 4 others---Respondents**

R.F.A. No.36 of 2009, heard on 24th September, 2014.

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

----S. 12---Qanun-e-Shahadat (10 of 1984), Arts. 70 & 71---Suit for specific performance of agreement to sell---Oral agreement, proof of---Scope---No document could be produced by the plaintiff with regard to execution of alleged transaction---No receipt for payment of alleged loan amount was produced by the plaintiff---Witnesses, produced by the plaintiff, were not witnesses of any transaction---Transaction was not made in front of witnesses of the plaintiff, nor any document was prepared in their presence---All the facts except the contents of document were required to be proved by oral evidence---Neither the evidence produced by the plaintiff was direct nor it had been of any credence as the same was based upon hearsay---Oral agreement was permissible under the law but to prove its execution unimpeachable evidence was required---No agreement could be produced during the course of evidence---Presumption could be that best available evidence had deliberately been withheld by the plaintiff and had the document been produced in evidence the same might have gone against him---Trial Court had rightly appreciated the evidence of both the parties---No mis-reading and non-reading of evidence could be pointed out by the plaintiff---Case of plaintiff was of no evidence---Findings of Trial Court were unexceptionable and same were upheld---Appeal was dismissed, in circumstances. [Paras. 9, 10, 11, 12 & 14 of the judgment]

**(b) Qanun-e-Shahadat (10 of 1984)---**

----Art. 70--- Proof of facts by oral evidence---Scope---All the facts except the contents of document were required to be proved by oral evidence. [Para. 10 of the judgment]

Malik Muhammad Latif Khokhar for Appellant.
Muhammad Asghar Bhutta for Respondents.
Date of hearing: 24th September, 2014.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts leading to filing of this appeal are that the appellant/plaintiff, Muhammad Sajid (hereinafter referred as appellant) filed a suit for declaration and permanent injunction or alternatively suit for possession through specific performance of the agreement to sell with the averments that respondent No.1/defendant No.1 (hereinafter referred as respondent No.1) was owner in possession of land measuring 95 kanals 7 marlas situated at Mouza Murad Kay Kathia

Tehsil Chichawatni pertaining to Khata No.21 out of total khata No.2782; that he was also owner of land pertaining to Khata No.1784, Khatooni No.1794, Ihata No. 1956 land measuring 8 marlas 7 sarsai; that the appellant and respondent No.1 were in Saudi Arabia in connection with their business in the year 1998 and on 04.08.1998 respondent No.1 borrowed 3,78,000 Saudi Rayal (equivalent to Pakistani Rs.52,92,000/-) from the plaintiff; that the respondent No.1 promised that against the said money, he had sold his above mentioned land to the appellant and after deduction of price of the land according to market price, he would return the balance amount to the plaintiff till December 1999; that total price of the aforesaid land was Rs.18,00,000/-; that after deducting the said amount, the outstanding amount against the defendant was Rs.34,92,000/-; that the respondent No.1 did not return the amount till December 1999 and further promised through agreement dated 04.09.1998 that appellant would be entitled to get rest of the property of respondent No.1; that since the respondent No.1 did not pay the money as promised, therefore, the appellant became exclusive owner of the property mentioned in the plaint; that the respondent No.1 illegally and unlawfully alienated the suit land vide mutation No.8651 dated 16.10.1999 through a gift in favour of his sons/defendants Nos.2 to 4 and also alienated his agricultural land vide mutation No.865 dated 29.02.2000 in favour of defendants Nos. 2 to 4.

2. The suit was vehemently opposed by the respondents by filing written statement. Issues were settled as under:

**"ISSUES**

1. Whether the plaintiff has paid the full sale price of the land detailed in the paragraph No.2 of the plaint and as such is owner of it? OPP

2. Whether the mutation No.8651 dated 16.10.1999 and mutation No.865 dated 29.02.2000 in favour of the defendants Nos.2 to 4 are against law, facts, fraudulent, inoperative qua the right of the plaintiff and is liable to be cancelled? OPP

3. Whether the plaintiff is entitled to the recovery of the possession of the suit land? OPP

4. Whether the plaintiff is entitled to get the decree for specific performance of the contract in alternate? OPP

5. Whether the plaintiff is entitled to get the decree for permanent prohibitory injunction as prayed for? OPP

6. Whether the plaintiff has got no cause of action, locus standi and plaint is liable to be rejected under Order VII, Rule 11? OPD

7. Whether the plaintiff is estopped by his words and conduct to file the instant suit? OPD

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

9. Whether the plaintiff has not come to the court with clean hands? OPD

10. Whether the suit is time barred? OPD

11. Whether the suit is false, frivolous, vexatious and as such the defendants are entitled to get special costs under section 35-A of C.P.C.? OPD

12. Relief."

Evidence led by the parties was recorded. After hearing both sides, learned trial court dismissed the suit of the plaintiff vide judgment and decree dated 29.01.2009, hence this RFA.

3. Learned counsel for the appellant inter alia contends that the impugned judgment and decree is not only against law and fact but also against settled principles of natural justice; that the impugned judgment and decree suffer from material illegalities, irregularities, misreading and non-reading of evidence; that the trustworthy evidence of the appellant was not given due weightage as there are material contradictions in the statements of witnesses produced by the defendants; that the issues were not framed properly, therefore, this RFA be allowed, the impugned judgment and decree be set aside and the suit of the appellant-plaintiff be decreed as prayed for.

4. On the other hand, learned counsel for the respondents-defendants has vehemently opposed this RFA and fully supported the impugned judgment and decree.

5. Arguments heard. Record perused.

6. The points for determination before this Court are that as to whether the appellant is entitled to have a decree for declaration to the effect that he entered into an agreement to sell with the respondent No. 1 after paying the full consideration amount and has become lawful owner of the suit property and as to whether the appellant is entitled to have a decree for specific performance of the agreement to sell.

7. From the perusal of the plaint, it is revealed that the appellant asserted that he entered into an agreement to sell on 04.08.1998 for the agricultural land owned by the respondent No.1, fully described in paragraph No.2 of the plaint. He asserted that an amount of Rs.3,78,000 Saudi Rayal was paid to the respondent No.1 and after determination of actual market price of the suit property which was Rs.18 lacs. The remaining amount of Rs.34,92,000/- remained outstanding against the respondent No.1 which was to be returned to the appellant till December, 1999, therefore, vide agreement dated 04.09.1998, the respondent No.1 was entitled to have the residential property of respondent No.1 mentioned in paragraph No.6 of the plaint. The respondent No.1 categorically denied the receiving of any amount as a loan from the appellant as well as execution of any oral or written agreement. The issues Nos. 1 and

4 are pivotal for the decision of this appeal and the points for consideration as above-referred are based upon the same issues.

8. In order to discharge the onus of the said issues, the appellant produced PW-1 Abdul Shakoor, PW-2 Abdul Sattar, PW-3 Wazir Ali and PW-4 Muhammad Hussain (who appeared as general attorney of the appellant). PW-1, Abdul Shakoor, deposed that an amount of Rs.3,78,000 Saudi Rayal was given to the respondent No.1 as a loan and one year time was stipulated for its return and it was agreed that if the amount is not returned till the stipulated time then the residential house as well as the agricultural property will be given to the appellant. He also deposed that he along with Muhammad Hussain, Haji Abdul Sattar, Sodagar Ali and Wazir Ali went to the house of the respondent No.1 and the respondent No.1 sought a time of 1/2 month but thereafter the property in dispute was transferred in the name of the children of the respondent No.l. In cross-examination, he admitted that he has never been to Saudi Arabia and he was told by the appellant that an agreement has been executed between the parties. He stated that he has seen the document of transactions. He also admitted that he is not a marginal witness of any agreement. He admitted that the facts have been told to him by Muhammad Hussain. PW-2, Abdul Sattar deposed that the amount was disbursed in Saudi Arabia in Saudi Rayal and a document was written in this regard. He further deposed that in case of non-refund of the amount the amount in dispute was to be transferred in the name of the appellant. He deposed that he along with Haji Abdul Sattar and Muhammad Hussain went to the house of the respondent No.1. During cross-examination, he admitted that he is uncle of the plaintiff and he had never gone to Saudi Arabia. He also admitted that no bargain was struck in front of him. He also stated that they went to the house of the respondent No.1 on the asking of Muhammad Hussain. When PW-3, Wazir Ali appeared as a witness he deposed in a similar manner like that of PWs 1 and 2 but did not depose the name of the persons, who visited the house of the respondent No.1. During cross-examination, he admitted that father of the appellant is his paternal uncle; that they went to the house of the defendant in August or September, 1998. He also stated that he along with Abdul Sahkoor, Sodagar Ali and Muhammad Hussain went to his house. He did not utter the name of Abdul Sattar as his companion. None of the said PWs stated the exact date of any alleged agreement or money transaction. According to PW-1 he went to the house of the respondent No.1 in December, 1999 whereas the PW-2 remains silent regarding his alleged visit to the house of the respondent No.1 for asking the return of the disputed amount whereas PW-3 during the course of cross-examination stated that he went to the house of the respondent No.1 in August or September, 1998 which is quite contradictory to the statement of PW 1, as he stated it to be in the month of December, 1999. Now comes the statement of PW-4, who is general attorney of the appellant, who deposed that in the 8th month of 1998, the respondent No.1 took a loan of an amount of 3,78,000 Saudi Rayal with an undertaking to return the same in December, 1999. He deposed that the amount was not returned and the respondent No.1 alienated his property in the name of his sons through "Tamleek". In cross-examination, he stated that he has never been to Saudi Arabia and he was told by the plaintiff that the amount was given to the defendant No.1. He has admitted that the entire story has been told to him by his son, who visited Pakistan after institution of the suit. In rebuttal, DW-1, Mahmood Sultan

categorically deposed that he did not receive any amount from the appellant as loan nor he has any business relation with him. He also denied the execution of any agreement to sell with the appellant. In cross-examination he stood firm and no dent could be made in his evidence despite lengthy cross-examination.

9. It is stated in the plaint that alleged agreement took place on 04.08.1998 in the year 1998, vide which the property was sold to the appellant whereas all the witnesses deposed that the amount was taken as a loan and in case of non-return of the said amount the suit property was to be alienated to the appellant. In paragraph No.4 of the plaint, alleged date of transaction is mentioned as 04.08.1998 and in the subsequent paragraph it is 04.09.1998. Though PW-1 deposed that he had seen written document of the alleged transaction but even then no document could be produced by the appellant. A photo-copy of an agreement dated 04.09.1998 was said to be appended with the plaint but there-after during the course of evidence the alleged agreement or any receipt for the payment of alleged loan amount was not produced.

10. Furthermore, all the witnesses produced by the appellant are not the witnesses of any transaction. PW-1 to PW-3 categorically admitted that neither any transaction was made in front of them-nor any document was prepared in their presence. Under Article 70 of the Qanun-e-Shahadat Order, 1984, all the facts except the contents of the document are to be proved by oral evidence and the criteria which has been laid down by Article 71 of the Order ibid is reproduced as under:-

> " **71. Oral evidence must be direct.** Oral evidence must, in all cases whatever, be direct; that is to say:
>
> If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it:
>
> If it refers to a fact which could be heard it must be the evidence of a witness who says he heard it;
>
> If it refers to a fact which could be perceived by any other sense of in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; ..."

In the present case, neither the evidence produced by the appellant is direct nor it has been of any credence as it is based upon hearsay. Even PW-4, the general attorney of the appellant did not utter the date of execution of alleged agreement nor he stated that any document was written in this regard.

11. We are conscious of the fact that oral agreement is permissible under the law but to prove its execution, unimpeachable evidence is required. In the present case, it is not a case of simple oral agreement, it is a case of some written agreement which took place when a huge amount of 3,78,000/- Saudi Rayal was allegedly given to the respondent No.1 which could not be produced by the appellant during the course of evidence. In this regard presumption could be that the best available evidence, in the

shape of some written agreement, has deliberately been withheld by the appellant and had that document been produced in evidence that might had gone against the appellant.

12. The learned trial court has rightly appreciated the evidence of both the parties. No mis-reading and non-reading could be pointed out by the learned counsel for the appellant. In our view, the case of the appellant is of no evidence. The findings of the learned trial court on issues Nos.1 and 4 are unexceptionable and therefore upheld. There is no need to discuss and dilate upon any other issues as in view of the findings upon the above-referred issues Nos.1 and 4, the other issues have become redundant.

13. Before parting with this judgment, we are constrained to observe that we have taken judicial notice of a fact that the appellant had filed another suit of a similar nature regarding different properties against his two brothers namely Muhammad Masood Sultan and Maboob Sultan etc. wherein he asserted that he had given the amount of 3,78,000 Saudi Rayal to Muhammad Masood Sultan on 25.12.1999 and in this case the same exact amount has allegedly been given as a loan to the present respondent No.1 in the year 1998. The said suit was also dismissed by the learned trial court and today we have also dismissed the appeal filed against the said judgment and decree vide our judgment of even date.

14. Therefore, this appeal being devoid of any force is hereby dismissed with cost.

ZC/M-3/L Appeal dismissed.

**2017 C L C Note 41**

**[Lahore (Bahawalpur Bench)]**

**Before Atir Mahmood, J**

**Mst. ASIYA BIBI---Petitioner**

**Versus**

**MUHAMMAD YOUSAF and others---Respondents**

Civil Revision No.120 of 2010, decided on 24th April, 2015.

**(a) Islamic law---**

----Gift---Oral gift----Burden of proof---Oral gift challenged on basis of fraud and collusion--- Proof--- Doctrine of Marz-ul-Maut---Applicability--- Non-production of independent witness--- Effect---Plaintiff filed suit for declaration and administration of property claiming that predecessor-in-interest had never alienated suit property in favour of defendant and gift mutations were unlawful and ineffective upon rights of plaintiff as defendant had fraudulently got transferred suit property in his favour through alleged general attorney/other defendant while the predecessor-in-interest suffering from cancer was under constant life threat---Both courts below dismissed the suit---Contention raised by plaintiff was that transactions of alleged gifts were hit by doctrine of Marz-ul-Maut---Validity---Plaintiff, both in plaint and statement, had specifically stated that her deceased father was suffering from Marz-ul-Maut and was unable to speak, and that general power of attorney and gift mutations were the result of collusion between defendants---Being beneficiary of disputed power of attorney and gift mutations, onus shifted to defendants to prove through cogent affirmative evidence that power of attorney was duly executed by deceased in favour of defendant to alienate suit property through gift mutations---Defendant/alleged donee, in his examination showed ignorance as to whether his father had died due to cancer or fever, which inferred that he was suppressing truth---Defendant/alleged attorney during examination could not produce original power of attorney executed in his favour---Statements of defendants were contradictory to each other---Such contradictions suggested that father of parties was suffering from Marz-ul-Maut---Alleged attorney being defendant in suit could not be considered as independent witness---Defendant had to rebut allegation of collusion by producing independent witnesses, who were alleged witnesses of disputed gifts---No justification or explanation was given for not producing said independent witnesses---Defendants could state date when disputed gift mutations were made---Defendants' witnesses were contradictory as to place where disputed gift was allegedly made---Defendants failed to prove factum of gift---Findings of courts below were result of misreading and non-reading of evidence, and the same were reversed and were set aside and suit of plaintiff was decreed as prayed for---Revision petition was allowed in circumstances. [Paras. 10, 11, 12, 13, 14, 15 & 16 of the judgment]

**(b) Qanun-e-Shahadat (10 of 1984)----**

----Art. 117---Oral gift---General power of attorney, execution of---Burden of proof---Being beneficiary of disputed power of attorney and gift mutations, onus shifted to defendant/donee to prove through cogent affirmative evidence that power of attorney was duly executed by deceased in favour of defendant/alleged attorney to alienate suit property through mutation. [Paras. 10 & 15 of the judgment]

Mst. Shmal Begum v. Mst. Gulzar Begum 1994 SCMR 818; 2002 SCMR 1938; 2003 SCMR 1920; Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630; Muhammad Hanif through Legal Representatives v. Province of Punjab through District Collector Vehari and others 2007 CLC 1309; Munawar Hussain and 2 others v. Amanat Ali and 6 others PLD 2007 Lah. 83; Muhammad Ibrahim (deceased) through Muhammad Fiaz Rasool and others v. Mst. Kausar Bibi and others PLD 2013 Lah. 162 and Mrs. Kausar A. Ghaffar v. Government of the Punjab and others 2013 SCMR 99 rel.

Mian Ahmed Nadeem Arshad for Petitioner.
Mian Mansoor Ahmed Sheikh for Respondent No.1.
Ch. Naseer Ahmed for Respondents Nos.4, 6 to 8.

Date of hearing: 9th February, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this civil revision, the petitioner has called in question the legality of judgment and decree dated 26.11.2009 passed by learned Additional District Judge, Khanpur who dismissed appeal of the petitioner and upheld judgment and decree dated 25.04.2007 passed by learned Civil Judge Class-II, Khanpur whereby suit of the petitioner for administration of property and declaration was dismissed.

2. Brief facts of the case are that the petitioner filed a suit for declaration and administration of immovable property mentioned in headnote of the plaint. The averments contained in the plaint are that the gift mutation No.380 dated 30.11.1986 regarding property measuring 16 kanals located in Mauza Muhammad Khan, gift mutation No.1107 dated 07.12.1986 regarding property measuring 16 kanals located in Mauza Hasilpur and gift mutation No.1586 dated 30.11.1986 about property measuring 1 kanal 1 marla in Mauza Zahirpir, total property measuring 33 kanals 1 marla, are illegal, unlawful and ineffective upon the rights of the petitioner-plaintiff and revenue record is required to be corrected in favour of the plaintiff; that Nazir Ahmad predecessor-in-interest of the parties was the actual owner in possession of the suit property and he never alienated the same in favour of defendant No.1; that before his death, Nazir Ahmed was suffering from

Throat Cancer, due to which he was always under a life threat and even unable to speak; that defendant No.1 fraudulently got transferred the suit property in his favour through alleged general attorney-defendant No.2 who appeared before the Revenue Officer on behalf of Nazir Ahmad; that the said proceedings were kept secret from the petitioner; that defendant No.1 continued to give respective share of produce to the petitioner until there arose dispute between the parties and the petitioner on approaching the revenue authorities came to know about the fraudulent alienation of the property.

3. The suit was contested by the respondents by filing written statement. Out of divergent pleadings of the parties, following issues were framed:

"**ISSUES**

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

2. Whether the suit is filed to harass the defendants and the same is liable to be dismissed with special costs of Rs.10,000/-? OPD

3. Whether the predecessor-in-interest of the parties Nazir Ahmad gifted suit property to the defendant No.1? OPD (amended on 29.06.2006)

4. Whether the predecessor-in-interest of the parties was not owner of the suit property at the time of his death? OPD

5. Whether initial produce was given to the plaintiff by the defendants? OPP (Amended on 29.06.2006)

6. Whether no ingredient of valid gift has been fulfilled? OPD

7. Whether all the proceedings of the alleged gift mutation No.380 dated 30.11.1986, mutation No.1107 dated 07.12.86 and mutation No.1580 dated 30.11.1986 are forged and fictitious one? OPP (amended on 29.06.2006)

7-A. Whether the alleged general power of attorney dated 07.09.1986 of Nazir Ahmad was obtained by defendant during his MARZ-UL-MOUT? OPP (framed on 15.11.2001).

8. Relief."

Evidence led by the parties was recorded. Thereafter, learned trial court dismissed the suit of the petitioner vide judgment and decree dated 25.04.2007. Feeling aggrieved, the petitioner preferred appeal which also met with the same fate vide judgment and decree dated 26.11.2009 passed by learned lower appellate court. Hence this civil revision.

4. Learned counsel for the petitioner inter alia contends that the learned lower appellate court has failed to exercise jurisdiction vested in it under Order XLI, Rule 33 of C.P.C. rather it has acted illegally and unlawfully; that the impugned gift mutations were made through attorney Allah Ditta on the basis of general power of attorney but neither the name of the donee Muhammad Yousaf was specifically mentioned nor there was any mention of the specified property to be gifted away; that the impugned mutations are not sustainable in view of the law laid down in case reported as Mst. Shmal Begum v. Mst. Gulzar Begum (1994 SCMR 818); that the alleged donee being beneficiary was under obligation to prove the transactions in his favour but he failed to do so; that the defendant neither produced the concerned patwaries who entered the disputed mutation nor any revenue officer who attested the mutations nor any other official from the Revenue Department; that no copy of roznamcha waqiati could be brought on record by the defendants; that the respondents could not produce witnesses of alleged gift namely Siraj Ahmed and Allah Jiwaya and any witness of alleged mutations; that the alleged gift was oral one which could not be substantiated by the defendants through cogent evidence; that since the alleged gifts were aimed at to disinherit legal heirs, these were invalid as held in cases cited as 2002 SCMR 1938 and 2003 SCMR 1920; that the transactions of gifts are hit by doctrine of marz-ul-maut; that the petitioner is a lady, therefore, the learned courts below should have protected her right; that there is no limitation in cases of inheritance; that the issues were not properly framed; that the petitioner could not be non-suited due to mis-description of the property; that the defendants in para 13 of their written statement have evasively denied that the property in dispute were owned by Nazir Ahmed which amounts to admission on their part; that the suit for administration of property is maintainable under section 218, of the Succession Act, 1925; that the findings of learned courts below are against law and fact; that there are material illegalities and irregularities, misreading and non-reading of evidence in the impugned judgments and decrees, therefore, this civil revision be accepted, the impugned judgments and decrees be set aside and the suit of the petitioner be decreed as prayed for.

5. On the other hand, learned counsel for the respondents has vehemently opposed this civil revision and fully supported the impugned judgments and decrees by submitting that the plaintiff failed to prove the factum of fraud and misrepresentation; that Nazir Ahmad, predecessor-in-interest of the parties remained alive for 5 to 7 months after the disputed mutation of tamleek, therefore, no question remains qua marz-ul-maut of Nazir Ahmed; that no specific objection was raised in the pleadings qua the personal sentiments of the deceased, therefore, at revisional stage, this objection can neither be agitated nor entertained; that the

suit was barred by 10 years as no proof of payment of share of produce was established.

He has relied upon the dictums laid down in cases reported as Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630),

Muhammad Hanif through Legal Representatives v. Province of Punjab through District Collector Vehari and others (2007 CLC 1309),

Munawar Hussain and 2 others v. Amanat Ali and 6 others (PLD 2007 Lahore 83),

Muhammad Ibrahim (deceased) through Muhammad Fiaz Rasool and others v. Mst. Kausar Bibi and others (PLD 2013 Lah. 162) and

Mrs. Kausar A. Ghaffar v. Government of the Punjab and others (2013 SCMR 99).

6. Learned counsel for respondents Nos.4, 6 to 8 submits that respondents Nos.4, 6 to 8 though have contested the suit of the petitioner-plaintiff before the learned courts below but now he has instructions not to contest this civil revision.

7. Despite repeated calls, none has put appearance on behalf of respondents Nos.2, 3 and 5, as such, they are proceeded against ex parte.

8. Arguments heard. Record perused.

9. The points for consideration before this Court are:

(i) Whether or not Haji Nazir Ahmed made oral tamleek in favour of respondent-defendant No.1 Muhammad Yousaf.

(ii) Whether or not defendant No.2 Allah Ditta was legally appointed general power of attorney to execute and attest the tamleek mutation in favour of respondent No.1.

(iii) Whether the disputed mutations are not valid transactions and liable to be cancelled.

10. According to para 2 of the plaint, it was specifically asserted that the deceased father of the plaintiff Nazir Ahmed was suffering from Marz-ul-Maut as being a throat cancer patient and was even unable to speak. This fact was denied by the respondents by submitting that the deceased was hale and hearty at the time of execution of disputed tamleek and died about 4/5 months thereafter and no fraud and forgery was committed by defendant No.1. In this regard, issue No.7-A was framed which was decided by learned trial court holding that the plaintiff was required to prove the instant issue but she did not produce any confidence

inspiring evidence. The petitioner while appearing as PW.1 deposed in her examination-in-chief that her father was suffering from throat cancer and was bed -ridden for the last 4/5 years prior to his death and he was unable to speak. In cross-examination, she denied suggestion that his father was healthy and was also able to speak. She also deposed that general power of attorney and mutations were result of collusion of the defendants. Being the beneficiary of the disputed power of attorney as well as tamleek mutations, the onus shifted to defendants to prove that power of attorney was duly executed by the deceased in favour of defendant No.2 to alienate the property through mutation.

11. Respondent No.1 Muhammad Yousaf while appearing as DW.1 deposed that the property was given to him through oral tamleek in presence of Allah Jiwaya, Saraj Ahmed and Allah Ditta at night time which he accepted and possession of the property was also taken over by him the next morning. He deposed that power of attorney was given to defendant Allah Ditta for attestation of mutation in his favour. In cross-examination, he admitted that his father died due to illness. He showed his ignorance as to whether his father died due to cancer or fever. He admitted that his father remained admitted in Bahawal Victoria Hospital, Bahawalpur for 20/25 days. He stated that power of attorney was prepared in Zila Kachery, Bahawalpur.

12. DW.2 Allah Ditta in whose favour the power of attorney was allegedly executed deposed that at the time of tamleek, Allah Jiwaya, Saraj Ahmed and he were present. He also deposed that on the basis of power of attorney, he got the mutation attested. The original power of attorney was not produced by this witness or by DW.1. This witness admitted that his father was suffering from cancer and that he knew that it was a fatal disease which may cause death. He stated that his father came to the courts independently and thereafter, he along with Allah Jiwaya and Siraj went to the courts and that Yousaf did not accompany them to the courts.

13. The statement of DW.2 is quite contradictory to that of DW.1 who stated that he along with Nazir Ahmed, Allah Ditta, Allah Jiwaya and Siraj Ahmed went to the courts for execution of power of attorney. There are also glaring contradictions in the statements of DW.1 and DW.2 qua execution of power of attorney. The original power of attorney was also not produced by the respondents nor any of the alleged witnesses, i.e. Allah Jiwaya and Siraj, could be produced by the defendants in evidence.

14. As discussed above, respondent-defendant No.1 showed his ignorance about nature of disease of his father whereas DW.2 admitted that his father was suffering from cancer and there was every apprehension of his death. This unequivocally and unambiguously suggests that father of the parties Nazir Ahmed was suffering from marz-ul-maut. This is unbelievable that a son, i.e. DW.1

Muhammad Yousaf, was unaware about dangerous and incurable disease of cancer of his father. Showing ignorance about cause of death of his father by DW.1 infers that he is suppressing the truth. It is further observed that if Nazir Ahmed was healthy to go to the courts for execution of general power of attorney then why he himself did not opt to appear before the Revenue Officers for attestation of mutation in favour of respondent No.1. In the circumstances, the findings of learned trial court as well as that of learned appellate court on this issue are clearly result of misreading and non-reading of evidence, therefore, these are not sustainable in the eye of law.

15. Now comes the question as to whether the predecessor-in-interest of parties validly gifted the disputed property to respondent No.1 and tamleek mutations were duly and lawfully executed and attested. In this regard, issues Nos.3 and 7 were framed which are interlinked. Onus to prove issue No.3 was upon respondents-defendants whereas onus to prove issue No.7 was placed upon petitioner.

The petitioner while appearing as PW.1 denied the factum of tamleek as well as attestation of disputed mutations being result of fraud and forgery then the onus shifted to respondent No.1. Being the beneficiary of the alleged gift/tamleek, respondent No.1 was bound to produce cogent affirmative evidence. Allegedly, at the time of tamleek, Allah Ditta, Siraj Ahmed and Allah Jiwaya were present on the spot. Allah Ditta alleged power of attorney holder being defendant in the suit cannot be considered as an independent witness and the allegation of collusion was to be rebutted by the defendants by production of evidence available to them but they could not produce Allah Jiwaya and Siraj Ahmed who could only be considered as independent witnesses in the given circumstances. Neither the said two persons appeared in the witness box nor any justification/explanation could be given for their non-production. Even respondents Nos.1 and 2 while appearing as DW.1 and DW.2 did not utter a single word about the date as to when the said tamleek was made. It is also noted that none of the defendant witnesses asserted the place of alleged tamleek during their examination-in-chief but in cross-examination, versions of DW.1 and DW.2 regarding this aspect are quite different from each other as DW.1 stated that tamleek was made in the courtyard of the house whereas DW.2 stated that tamleek was made in the house of deceased where he used to sleep. In view of the contradictory versions of DW.1 and DW.2 as well as withholding of available evidence, i.e. Allah Jiwaya and Siraj Ahmed, there remains no doubt that the defendants failed to prove the factum of tamleek as well. Therefore findings of both the learned courts below on issues Nos.3 and 7 are also not sustainable in the eye of law and are, therefore, reversed. In view of findings on issues Nos.3, 7 and 7-A, there is no need to dilate upon other issues.

16. In view of the above, this civil revision is allowed, the impugned judgments and decrees passed by learned courts below are set aside and the suit of the petitioner-plaintiff is decreed as prayed for.

SL/A-52/L Petition allowed.

**2017 C L C Note 84**
**[Lahore (Rawalpindi Bench)]**
**Before Atir Mahmood, J**
**MUHAMMAD YOUSAF and another---Petitioners**
**Versus**
**GHULAM MURTAZA---Respondent**
Civil Revision No. 873 of 2012, heard on 17th October, 2016.

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

----S. 8---Transfer of Property Act (IV of 1882), S. 53-A---Suit for possession of immovable property---Agreement to sell---Sale by co-sharer---Protection under S. 53-A, Transfer of Property Act, 1882---Scope---Contention of plaintiffs was that they purchased the suit property through registered sale deed and defendant was in occupation of the same as tenant---Defendant had contended that he had purchased the said property through agreement to sell---Suit was decreed concurrently---Validity---Plaintiffs had failed to prove that defendant was inducted into the suit property as tenant---Relationship between the parties as that of landlord and tenant could not be established---Plaintiffs were bound to prove as to how defendant was inducted into the suit property as alleged by them---Defendant took specific plea that he purchased the suit shop after payment of consideration price and possession was delivered to him---Witnesses of agreement to sell had died and defendant produced sons of said witnesses who identified the signatures of their fathers---Plaintiffs had failed to produce any evidence in rebuttal to the evidence led by the defendant---Evidence led by the defendant in absence of rebuttal would be deemed to be true and believed upon in circumstances---Defendant had proved his case in accordance with law---Executant of agreement to sell being one of the legal heirs of her father had share in the property left by him---Said executant could sell it to the extent of her share but she could not sell a specific portion thereof---Where some immovable property was sold for consideration by a transferor to the transferee in writing signed by him/her and possession was also handed over, such writing though not registered would not provide basis for dispossession other than a right provided by the terms of contract---Defendant was protected to the extent of his possession under S. 53-A of Transfer of Property Act, 1882---If plaintiffs wanted to get specific portion of the property, they should have filed a suit for partition while impleading all the legal heirs---Suit for possession merely on the basis of registered sale deed was defective in the eye of law---Both the courts below had committed material illegality while decreeing the suit of plaintiffs---Impugned judgments and decrees passed by both the courts below were set aside and suit was dismissed---Revision was accepted in circumstances. [Paras. 6, 10, 11, 12 & 13 of the judgment]

Muhammad Sabir Khan v. Rahim Bakhsh and 16 others PLD 2002 SC 303; Manzoor Ahmad and 9 others v. Ghulam Nabi and 5 others 2010 CLC 350; Dilawar Khan and others v. Fazal Hadi and others 2013 CLC 97; Mushtaq Ahmad and others v. Muhammad Saeed and others 2004 SCMR 530; Muhammad Aslam v. Mst. Ferozi and others PLD 2001 SC 213; Sultan Mahmood Shah through L.Rs. and others v. Muhammad Din and 2 others 2005 SCMR 1872; Falak Sher v. Mst. Kanzeez Bibi 2005 YLR 388 and Abdur Rehman and 4 others v. Abdus Sammad Khan through LRs and 4 others 2012 YLR 818 ref.

Javaid Iqbal v. Abdul Aziz and another PLD 2006 SC 66 rel.
Muhammad Amir Butt for Petitioners.
Sh. Zameer Hussain for Respondent.
Date of hearing: 17th October, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the respondent filed a suit for possession and recovery of arrears of rent against the petitioners with the averments that the suit shop along with adjacent house total area measuring 4-1/2 marlas as shown in the site plan annexed with the plaint was owned and possessed by Muhammad Yousaf and Mehboob Elahi sons of Haji Ahmad; that the said property was purchased by the plaintiff vide registered sale deed dated 18.06.2005; that the symbolic/constructive possession of the suit shop and actual possession of the suit house was handed over to the plaintiff being vendee by the vendors; that the defendants were in occupation of the suit shop as tenants under the previous owners and after purchase of the suit shop they automatically became tenants under the plaintiff; that plaintiff served notice upon the defendants that they should pay the rent from 18.06.2005 onwards to him at the rate of Rs.500/- and also hand over the vacant possession of the same to the plaintiff for reconstruction of the shop but they refused while asserting their right of ownership of the suit shop; that the defendants being defaulters in the suit shop are liable to eviction; that earlier to this suit, an ejectment petition was filed by the plaintiff which was dismissed as withdrawn as the suit shop situated in rural area and the Urban Rent Restriction Ordinance, 1959 was not applicable.

2. The petitioners resisted the suit by filing written statement. Out of divergent pleadings of the parties, issues were framed and evidence led by both sides was recorded. Thereafter, learned trial court decreed the suit of the respondent vide judgment and decree dated 27.07.2011. The petitioners feeling aggrieved filed appeal which was dismissed by learned Additional District Judge, Chakwal vide judgment and decree dated 28.09.2012. Hence this civil revision has been filed by the petitioners-defendants.

3. Learned counsel for the petitioners inter alia submits that the suit for possession and recovery of arrears filed by the respondent was not maintainable as the petitioners had purchased the suit property from one of legal heirs of Haji Ahmad namely Mst. Anar Begum to the extent of her share; that the respondent had badly failed to prove that the petitioners were inducted into suit shop as tenant; that earlier, the plaintiff filed two suits and one ejectment petition for eviction of the petitioners from the suit property which were dismissed, therefore, the instant suit was not maintainable on this account as well; that since the petitioners have purchased the property through agreement to sell (Exh.D1) with payment of whole consideration amount coupled with receipt of possession from the very date, protection of section 53-A of Transfer of Property Act, 1882 is available to them; that the impugned judgments and decrees passed by learned courts below are against law and fact, therefore, this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the respondent be dismissed. He has placed reliance on the law laid down in cases reported as Muhammad Sabir Khan v. Rahim Bakhsh and 16 others (PLD 2002 SC 303), Manzoor Ahmad and 9 others v. Ghulam Nabi and 5 others (2010 CLC 350 Lahore), Dilawar Khan and others v. Fazal Hadi and others (2013 CLC 97 Peshawar), Mushtaq Ahmad and others v. Muhammad Saeed and others (2004 SCMR 530), Muhammad Aslam v. Mst. Ferozi and others (PLD 2001 SC 213), Javaid Iqbal v. Abdul Aziz and another (PLD 2006 SC 66), Sultan Mahmood Shah through LRs and others v. Muhammad Din and 2 others (2005 SCMR 1872), Falak Sher v. Mst. Kanzeez Bibi (2005 YLR 388) and Abdur Rehman and 4 others v. Abdus Sammad Khan through LRs and 4 others (2012 YLR 818 Peshawar).

4. On the other hand, learned counsel for the respondent has vehemently opposed this civil revision and fully supported the impugned judgments and decrees while submitting that the agreement to sell in favour of the petitioners is an unregistered document, therefore, it attaches no authenticity; that the petitioners have failed to produce any documentary evidence in support of their assertion of having purchased the suit property from Mst. Anar Begum; that the alleged agreement to sell could not be proved by the petitioners being beneficiaries thereof as required by law. He avers that this civil revision has no substance, hence merits dismissal.

5. Arguments heard. Record perused.

6. According to contents of the plaint, when the plaintiff purchased the property from sons of Haji Ahmad through registered sale deed, the petitioners were enjoying possession of the suit shop as tenants under the vendors. Therefore, the petitioners after purchase of suit property by the plaintiff automatically became tenants of the plaintiff. This was his whole stance for getting possession from the petitioners. Perusal of record reveals that the plaintiff badly failed to prove that the petitioners

were inducted into the suit shop as tenant as no evidence in this regard could be produced by the plaintiff. There is even no receipt of payment of rent to the original owners or to the plaintiff by the petitioners nor any rent agreement is available on record, as such, the relationship between the parties as that of landlord and tenant could not be established. In this view of the matter, the main stance taken by the plaintiff for possession of the property was disbelieved by both the learned courts below which was not challenged by the plaintiff before any forum, as such, the impugned judgments and decrees to this extent attained finality. When the plaintiff has failed to prove that the petitioners were inducted into the suit shop as tenants, the plea taken by the petitioners that they were owners in possession of the suit shop seems to be true as it was the onus upon the plaintiff to prove as to how the petitioners were inducted into the suit property if not as alleged by the petitioners.

7. The petitioners have taken plea that they are owners in possession of the property on the basis of agreement to sell dated 18.10.1984 (Exh.D1) as they have purchased the suit shop after payment of whole consideration amount to one of LRs. of Haji Ahmad namely Mst. Anar Beguman coupled with possession, as such, they are protected under section 53-A of Transfer of Property Act, 1882. I have perused the agreement to sell. The same contains National Identity Card (NIC) Number of Mst. Anar Begum as well as her thumb impression. The plaintiff has not challenged anywhere that Mst. Anar Beguman was not amongst LRs of Haji Ahmad nor he made any effort to get compared her thumb impression with admitted ones which might be available on her NIC. As such, Mst. Anar Begum was one of LRs of original owner of property namely Haji Ahmad and after death of Haji Ahmad, she was entitled to get her legal share from the property left by Haji Ahmed. The property left by Haji Ahmad was admittedly 8/9 marla out of which Mst. Anar Begum, as per version of the petitioners-defendants has sold only to the extent of 3/4 marla which falls within the limit of her share.

8. In order to prove his assertion, the plaintiff has appeared himself and also produced Muhammad Yousaf, one of alleged vendors and daughter of Mst. Anar Begum namely Manzoor Fatima. The plaintiff appeared before the court as PW.1. During his cross-examination, he admits that Mst. Anar Begum being legal heir of Haji Ahmad was entitled to her legal share in the property. He shows his ignorance about sale of any property or about any family partition taken place in between LRs of Haji Ahmad. He has also admitted before the court that he filed two suits earlier which were dismissed. Muhammad Yousaf son of Haji Ahmed appeared before the court as PW.2. During his cross-examination, he does not deny his relationship with Mst. Anar Begum. He, however, takes plea that there was family partition amongst them but in the same breathe, he admits that neither the property was transferred by Mst. Anar Begum to him or his brothers by way of registered sale deed or gift mutation nor the

family partition was got sanctioned from any court of law. He deposes that the property was surrendered by Mst. Anar Begum in favour of her brothers. He has also stated before the court that earlier, the plaintiff filed two suits which were dismissed. The other witness of plaintiff is Mst. Manzoor Fatima daughter of Mst. Anar Begum who appeared as PW.3. In her cross-examination, she deposes that share out of property left by Haji Ahmed was given to her mother Mst. Anar Begum who had not sold the same. She admits that the suit shop is being run by the petitioners but is ignorant of as to when they took over possession of the suit shop. She also did not know about as it was built by the petitioners or some other person. On the other hand, Khalil Akbar, defendant appeared before the court as DW.1 and also produced Mahboob Ahmed son of Muhammad Bakhsh as DW.2 and Abdul Rauf son of Abdullah Khan as DW.3. DW.2 and DW.3 are sons of alleged witness of agreement to sell (Exh.D1) in favour of the petitioners. Both the said DWs depose that they recognize signatures of their respective fathers which are the same as present on Exh.D1.

9. Perusal of above evidence reveals that the plaintiff filed three suits including the instant one. One of them was an ejectment petition which was dismissed as withdrawn as the suit shop did not fall within the limits of urban areas but there is no explanation by plaintiff side regarding other suit admittedly filed by him and was dismissed. Concealing of contents of said suit leads me to inference that the same was on the same subject and for the same cause of action, therefore, the plaintiff deliberately did not disclose its contents in order to avoid legal complications thereof. PW.3 Mst. Manzoor Fatima herself states in her examination-in-chief that her mother got share out of the property left by her maternal grandfather Haji Ahmad though she asserts that Mst. Anar Begum did not sell it. This is sufficient to contradict stance of PW.2 that there was any family partition in between LRs of Haji Ahmad.

10. Furthermore, the petitioners-defendants took specific plea that they had purchased the suit shop from Mst. Anar Begum after payment of whole consideration price and the possession of the suit shop was handed over to them since then. In order to prove this fact, since the witnesses of agreements to sell (Exh.D1) had died, the petitioners produced sons of witnesses of Exh.D1 who categorically stated that the signatures present on Exh.D1 are that of their respective fathers. In rebuttal to this evidence led by defendants, the plaintiff failed to produce any evidence. In absence of any evidence in rebuttal, the evidence led by the petitioners-defendants will be deemed to be true and believed upon.

11. In this view of the matter, I am of the opinion that the petitioners-defendants have proved their case in accordance with law. Mst. Anar Begum being one of legal heirs of Haji Ahmad had legal share in the property left by him and could sell it to the

extent of her share although she could not sell a specific portion thereof. It is nowhere asserted by plaintiff side that the property in possession of the petitioners is beyond the share of Mst. Anar Begum or she was not legal heirs of Haji Ahmad. Therefore, there are sufficient reasons to believe that Mst. Anar Begum had sold her share to the petitioners vide agreement to sell Exh.D1. Section 53-A of Transfer of Property Act, 1882 provides that where some immovable property is sold for consideration by a transferor to the transferee in writing signed by him/her and possession is also handed over to such transferee, such writing, though not registered, will not provide basis for dispossession of such transferee other than a right expressly provided by the terms of the contract. In the circumstances, the petitioners are protected to the extent of their possession under the said provision of law. Reliance is placed on the dictums laid down by the Hon'ble Supreme Court of Pakistan in case titled Javed Iqbal v. Abdul Aziz and another (PLD 2006 SC 66).

12. In the given circumstances, the only recourse available to the plaintiff, if they wanted to get specific portion of the property, was to file suit for partition while impleading all the LRs of Haji Ahmad which has not been done by him. Therefore, the suit for possession merely on the basis of registered sale deed from the very inception was defective in the eye of law, as such, it could not be decreed.

13. For what has been discussed above, both the learned courts below have committed material illegality while decreeing suit of the respondent-plaintiff. Therefore, this civil revision is allowed, the impugned judgments and decrees passed by learned courts below are set aside and the suit of the respondent-plaintiff is dismissed.

ZC/M-203/L Revision allowed.

**2017 M L D 407**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD ASIF SHAHEEN---Petitioner**

**Versus**

**PROVINCE OF PUNJAB and others---Respondents**

Writ Petition No.25588 and C.M. No. 2797 of 2016, decided on 24th August, 2016.

**Co-operative Societies Act (VII of 1925)---**

----S.54---Arbitration---Dispute as to membership of society---Petitioner wrote letter to Registrar Co-operative Societies seeking advice that the plot in the co-operative Housing Society was being transferred in the name of respondent against a membership number which was issued in October, 2014 and no plot was allotted to the said number and since membership was not enjoyed by the member, his membership fee be refunded and plot in question be transferred to a new membership number---Respondent filed petition under S. 54 of Co-operative Societies Act, 1925 seeking declaration to the effect that he was a bona fide and rightful member of the society which was accepted---Petitioner filed appeal which was dismissed, whereafter he filed Constitutional petition---Held, that Byelaw No.8 of the Society provided that it was duty of the Managing Committee to consider the application of respondent and if the process mentioned in Byelaw No.8(1) was not completed, then after completion of his 1-year membership his membership stood automatically confirmed---Byelaw 8(3) further strengthened the case of respondent that had there been any refusal by the society qua eligibility of membership of respondent then it was mandatory to inform him in writing within 2-months of such refusal---Objection that without ownership of the plot membership could not be conferred became irrelevant in such circumstances---Respondent not only was a member of the society but also owner of 50% of the plot at the relevant time and nothing was on record to suggest that society ever objected to membership of respondent in any manner---President of the society was allegedly contesting election against respondent so possibility of mala fide could not be ruled out---Petitioner being finance secretary of society failed to support present petition through any record of the society and only contested application of respondent without any lawful authority conferred upon him by the society through any resolution---Petitioner had no locus standi to challenge the membership of respondent---Constitutional petition was dismissed accordingly.

Javed Iqbal Qureshi, Anas Ghazi and Shahid Iqbal Qureshi for Petitioners.

Raja Muhammad Arif, Additional Advocate General and Ms. Shazia Ashraf Khan, Asstt. A.-G. for Respondents Nos. 1 and 2.

Moazzam Ali Butt, Assistant Registrar, Housing-III on behalf of Respondents Nos. 1 and 2.

Nemo for Respondent No.3.

Messrs Ahsan Bhoon, Saqib Akram Gondal and Sh. Usman Kareem ud Din for Respondent No.4.

Date of hearing: 24th August, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that respondent No.4 filed a petition under Section 54 of Co-operative Societies Act, 1925 (hereinafter called "the Act") before respondent No.2-Registrar Co-operatives Punjab with the prayer that his membership of State Life Insurance Employees Co-operative Housing Society, Lahore (hereinafter called "the Society") be declared lawful and bona fide since 31.10.2014. The petitioner contested the same by filing written reply. After hearing both sides, respondent No.2 accepted petition of respondent No.4 vide order dated 27.07.2016. Feeling aggrieved, the petitioner filed an appeal under Section 64 of the Act which was dismissed by respondent No.1 vide order dated 04.08.2016. Hence this writ petition.

2. Learned counsel for the petitioner inter alia submits that respondents Nos.1 and 2 have failed to consider legal as well as factual aspects of the case; that respondent No.4 claims his membership of the Society on the basis of alleged payment receipt of membership without transfer of plot No.297, Sector-E (hereinafter called "the plot") which was allegedly transferred on 14.06.2016; that membership to transferee of a plot can only be granted upon transfer of plots but in this case no plot was transferred on the relevant date as claimed by respondent No.4, i.e. 31.10.2014, therefore, respondent No.4 could not be granted membership of the Society in view of Bye-laws of the Society; that no membership certificate was ever issued in favour of respondent No.4; that the Society in its written reply before respondent No.1 has admitted that documents relied upon by respondent No.4 are not available in record of the Society and that mere submission of form and fee does not confer rights of membership; that as per provisions of Model Election Rules, it is necessary for a Member and a Voter that he is owner of the plot in the Society; that mere insertion of some documents in file of plot without transfer of a plot does not confer membership rights whereas plots have been transferred on 14.06.2016, therefore, after the transfer of plot, his membership will be placed before the Managing Committee of Society and then he will be selected for membership and thereafter, in case the membership not put before Annual General Meeting of the Society, his membership will automatically be confirmed after one year; that respondent No.4 has illegally been declared member of the Society vide impugned orders; that petition of respondent No.4 was decided in a clandestine manner without issuance of mandatory notice under Rule 32 of the Act; that the impugned orders are against policy of the department as well; that the impugned orders are against law and fact, therefore, the same be set aside by way of allowing the instant writ petition.

3. While relying upon judgments reported as Military Accounts Co-operative Housing Society Ltd. v. Secretary to Government of the Punjab and others (PLD 2016 Lahore 223), Messrs Canal Breeze Cooperative Housing Society Limited v. Agricultural and Transport Development Corporation (Pvt.) Limited (2000 SCMR 506), The Pakistan Employees Co-operative Housing Society Ltd., Karachi v. Mst. Anwar Sultana and others (PLD 1969 Karachi 474), Telecard Limited through Authorized representative v. Pakistan Telecommunication Authority through Chairman (2014 CLD 415) and Muhammad Mujtaba Abdullah and another v. Appellate Authority/Additional Sessions Judge and others (2016 SCMR 893), learned counsel for respondent No.4

have vehemently opposed this writ petition. Learned Law Officer has also supported the impugned orders passed by Registrar, Co-operative Housing Societies and Secretary Co-operative Punjab.

4. Arguments heard. Record perused.

5. Dispute between the parties is regarding membership of respondent No.4 of the Society. Initially, the petitioner wrote letter dated 11.06.2016 to Registrar Co-operative Societies seeking advice that the plot was being transferred in the name of respondent No.4 against membership No.27083 which was issued in October, 2014 without transfer of the plot and since the membership was not used, membership fee be refunded to respondent No.4 and the plot be transferred to a new membership number. After coming into knowledge of this letter, respondent No.4 filed Petition No.54 of the Act seeking declaration that he is a bona fide and rightful member of the Society. The emphasis of learned counsel for the petitioner is that the membership of respondent No.4 was never admitted after selection by the Managing Committee followed by confirmation at a general meeting. He has relied upon the Byelaws of the Society, particularly Byelaw No.8 of the Society which is reproduced below for ready-reference:

> "8.
>
> (1) Members shall be admitted after selection by the Managing Committee subject to confirmation at a General Meeting. In case failure to put up, the membership will stand automatically confirmed after one year.
>
> (2) Application for membership shall be in writing in the prescribed form. Such application will form a part of Register of Members. Every member on admission shall pay the Share Money specified in Bye-Law-18 & 19, which will be refundable. He will also pay Rs.5000/- as admission fee, which after approval of membership shall not be refundable.
>
> (3) Person eligible for membership will not ordinarily be refused. In case of refusal he will be informed accordingly in writing within two months, whereafter, if he desires, he can raise this issue before the General Meeting.
>
> (4) On admission, each member will be issued a membership certificate which will be on prescribed form. In case it is misplaced or lost a duplicate certificate will be issued on payment of a prescribed fee after advertisement in the Daily Newspaper.
>
> (5) Sub-division of plot will be subject to rules and regulations of local development authority or local body. The Managing Committee will decide this issue."
> (Emphasis provided)

Bare reading of above Bye-law makes it abundantly clear that it was duty of the Managing Committee to consider the application of respondent No.4 which was

submitted on 31.10.2014 along with membership fee and share money coupled with consent of his wife for transfer of 50% share of the plot and if the said process as mentioned in Sub-Byelaw (1) was not completed, then there is no fault of respondent No.4 rather after completion of one year, his membership stood automatically confirmed. Byelaw 8(3) further strengthens the case of respondent No.4 that had there been any refusal by the Society qua eligibility of membership of respondent No.4, then it was mandatory to inform him in writing within two months of such refusal. In view of the above circumstances, the objection raised by learned counsel for the petitioner that without ownership of the plot, membership cannot be conferred, also becomes irrelevant. Had there been any inaction on part of the respondent Society, it could not be attributed to respondent No.4. Even otherwise, letter dated 01.11.2014 addressed to the President of the Society makes it clear that previous owner of the Society, Mrs. Anira Mobbin asserted therein that 50% of the share of plot No.297-E were transferred to respondent No.4 on 31.12.2014 and she also surrendered her right of vote in favour of respondent No.4 on 31.12.2014 meaning thereby that respondent No.4 not only was a member of the Society but also owner of 50% of the plot at the relevant time. There is nothing on record to suggest that the Society ever objected to membership of respondent No.4 in any manner. Though there is an alleged contesting written reply on behalf of the Society submitted through Mr. Muhammad Arshad Cheema, Advocate High Court, Lahore before the appellate forum, i.e. Secretary Co-operatives Punjab, a copy of which has been annexed with this writ petition but the said reply is not signed by any of the representatives of the Society. Needless to say that the said President of the Society is allegedly contesting the election against present respondent No.4. Therefore, the mala fide on his part cannot be ruled out. The petitioner being the Finance Secretary of the Society has also failed to support this petition through any record of the Society.

6. The petitioner admitted the insertion of the documents in file of the plot but asserted that without transfer of a plot, membership rights cannot be conferred. Undeniably, the petitioner never challenged the membership of respondent No.4 by agitating the matter before the Society or before the competent authorities. He only contested application of respondent No.4 and that too, without any lawful authority conferred upon him by the Society through any resolution. In my view, the petitioner has even no locus standi to challenge the membership of respondent No.4. The Registrar Co-operatives as well as Secretary Co-operatives have rightly and lawfully decided the matter. No interference is called for.

7. In view of the above, this writ petition is devoid of any force. The same is dismissed.

WA/M-166/L Petition dismissed.

**2017 M L D 948**
**[Lahore (Rawalpindi Bench)]**
**Before Atir Mahmood, J**
**Ch. SULTAN MAHMOOD---Petitioner**
**Versus**
**APPELLATE AUTHORITY/ADJ and 2 others---Respondents**

Writ Petition Nos.2772 and 2773 of 2016, heard on 10th November, 2016.

**Punjab Local Government Act (XVIII of 2013)---**

----S. 2(ii)---Election for the seat of "worker"---Nomination papers, rejection of---Scope---Nomination papers filed by the petitioner and rival candidate were rejected---Validity---Petitioner owned seven marla plot, seven marla residential house, motor bike, five tola jewellery, Bank accounts and also a college---Rival candidate had twenty five kanal of land valuing Rs. 40,00,000/- and Bank account---Petitioner and rival candidate did not subsist on the income being a 'worker' rather they were men of means---Seat reserved for "workers" was meant for those who belonged to a specific class---Persons belonging to such class should only be allowed to contest the election against such seats---If persons not belonging to a class for which seats had been reserved were allowed to contest election against the seats reserved for such class then purpose of reserving the seat for such class would not only fail but rights of such class would injure also---Petitioner and rival candidate had sound financial status and they did not belong to class of 'workers'---Nomination papers had rightly been rejected in the present case---No illegality had been pointed out in the impugned orders passed by the fora below---Constitutional petition was dismissed in circumstances.

Abid Hussain Abid for Petitioner.
Ansar Nawaz Mirza for Respondent No.3 (in W.P. No.2772 of 2016).
Fazal ur Rehman for Election Commission.
Date of hearing: 10th November, 2016.

**JUDGMENT**
**ATIR MAHMOOD, J.**---Through this single judgment, I intend to dispose of Writ Petitions Nos.2772 and 2773 of 2016 as common questions of law and fact are involved therein.

2. Brief facts of both the cases are that the petitioner Ch. Sultan Mahmood and respondent No.3/writ petitioner in connected W.P. No.2772 of 2016 Mian Rehan Ali Ansar (hereinafter called the 'rival candidate') filed their nomination papers for the seat of 'Worker' in Municipal Committee Jhelum. Nomination papers of the petitioner as well as the rival candidate were rejected by the Returning Officer on 18.10.2016. Both the candidates preferred appeal which also were dismissed vide order dated 22.10.2016. Hence these writ petitions have been filed.

3. Learned counsel for the petitioner contends that the impugned orders are against law; that the petitioner duly falls within the ambit of 'Worker' but he was knocked out

illegally and unlawfully on flimsy grounds, therefore, this writ petition be allowed, the impugned orders be set aside and the nomination papers of the petitioner be accepted. Same is the prayer of learned counsel for rival candidate. However, both sides assert that the other is ineligible being not falling within the definition of 'Worker'.

4. On the other hand, learned counsel for the Election Commission has vehemently opposed these writ petitions mainly on the ground that the petitioner does not come within the definition of 'Worker'.

5. Arguments heard. Record perused.

6. The only ground on the basis of which nomination papers of the petitioner as well as the rival candidate were rejected is that they don't fall within the definition of 'Worker' contained in section 2(mmm) of The Punjab Local Government Act, 2013. The said definition is reproduced below:--

> "2(ii) "Worker" means a person directly engaged in work or is dependant on personal labour for subsistence living and includes a worker as defined in the Punjab Industrial Relations Act, 2010 (XIX of 2010)"
>
> (Underline is mine)

This is evident from the above definition that the 'Worker' is a person who is directly engaged in work or is dependant upon labour for his subsistence living. So far as the petitioner is concerned, he, as per his own nomination papers, owns 7 marla plot, 7 marla residential house, Motor Bike, five tola gold jewellery, Bank Accounts is JS Bank Limited and United Bank Limited. In addition thereto, he runs AK College, G.T. Road, Dina and alos holds an NTN. Whereas, the rival candidate owns 25 kanals of land which is alleged to be on roadside valuing Rs.40,00,000/- and Bank Account in Meezan Bank Limited. In view of the aforesaid, it becomes crystal clear that the petitioner as well as the rival candidate do not subsist on the income being a 'Worker' rather they seem to be men of means. They have even not mentioned in their affidavits that their subsistence is on the work being 'Workers'. In my considered view, the seat reserved for workers is meant for those who belong to a specific class, therefore, the persons belonging to such class should only be allowed to contest the election against such seats. If persons not belonging to a class for which the seats have been reserved are allowed to contest election against the seats reserved for such class, the purpose of reserving the seat for such class will not only fall but also the rights of such class protected by the legislature are likely to injure severely. Therefore, the nomination papers of the petitioner as well as his rival candidate having sound financial status and not belong to class of 'Workers' for which the seat of 'Worker' has been reserved by legislature were rightly rejected.

7. There are concurrent findings against the petitioner as well as his rival candidate. Learned counsel for the petitioner as well as learned counsel for rival candidate could not point out any illegality in the impugned orders. Therefore, both the writ petitions in hand having no force are dismissed.

ZC/S-84/L Petition dismissed.

**2017 M L D 1510**
**[Lahore (Bahawalpur Bench)]**
**Before Atir Mahmood, J**
**AZHAR BAKHTIAR KHILJI---Petitioner**
**Versus**
**DISTRICT CO-ORDINATION OFFICER and others---Respondents**

W.P. No.1270 of 2015, decided on 6th April, 2015.

**Constitution of Pakistan---**

----Arts. 16, 17, 25 & 199---Constitutional petition---Freedom of assembly and association---Discrimination---Grievance of petitioner was that authorities had imposed restriction upon petitioner to hold religious meetings---Validity---Authorities did not impose any restriction upon holding gatherings / processions in the area; therefore, petitioner could neither be treated discriminately nor he could be precluded from holding proposed religious gathering on the pretext of law and order situation prevailing in country---District Administration and law enforcing agencies were duty bound to provide security and protection to the lives of participants of such like meetings/gatherings---High Court allowed petitioner to hold religious gathering at proposed venue and directed the respondent/authorities to arrange security and protection of the participants of gathering in accordance with law---Petition was allowed in circumstances.

Muhammad Arshad Khan Khakwani for Petitioner.
Tahir Saeed Ramay, Assistant Advocate General.
Rao Muhammad Sadiq and Rana Muhammad Rashid, Advocates/Legal Advisor for respondents.
Imran Sikandar Baloch, DCO, Bahawalpur.

**ORDER**
Through this writ petition the petitioner has impugned the order dated 20.02.2015 passed by respondent No.1-District Co-Ordination Officer, Bahawalpur being illegal, void and inoperative upon the rights of the petitioner.

2. The brief facts of the case are that the petitioner is Chief Administrator of Tanzeem-i-Islami Organization which is a non political rather a religious organization and previously held meetings with the permission of the respondents vide letters dated 16.11.2011 and 19.2.2014; that the petitioner being a law abiding person applied/ intimated to respondents about the meeting vide letter dated 07.11.2014 but the respondents did not allow to hold meeting due to law and order situation. Thereafter, the petitioner filed a Writ Petition No. 1032/2015 before this Court for seeking a

direction to respondents to grant permission to hold Ejtama. This Court vide order dated 16.02.2015 issued a direction to respondent No.1 to decide the application dated 09.2.2015 filed by the petitioner, which was forwarded by the Home Secretary, Government of the Punjab vide letter dated 10.2.2015. The respondent No.1 vide order dated 20.2.2015 rejected the application of the petitioner, which is being assailed in this writ petition.

3. Arguments heard. Record perused.

4. The main emphasis of learned counsel for the petitioner is that there is no law enforced in the country which could stop the petitioner from professing the religion of Islam or hold any meeting or an Ejtema as a fundamental right to profess religion has been guaranteed to all the citizens of the country under Article 20 of the Constitution of Islamic Republic of Pakistan, 1973. The said Article is reproduced for ready reference:--

> **"20. Freedom to profess religion and to manage religious institutions.** Subject to law, public order and morality -
>
> (a) every citizen shall have the right to profess, practise and propagate his religion; and
>
> (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."

5. The petitioner being the Chief Administrator Tanzeem-e-Islami Organization filed application before respondent No.1 who, after direction given by this Court in Writ Petition No. 1032-15/BWP dated 14.02.2015, declined the same vide impugned order dated 21.02.2014. Relevant paragraph of said order is reproduced as under:--

> "Petitioner was heard and record was perused. On 11-11-2014, petitioner submitted an application to grant permission to hold "Ejtama" on 27-28 Feb and 01st March 2015. Dates were changed to 20-21 & 22 Feb later on. Reports were called from concerned Agencies. The District Police Officer and other intelligence agencies, except Special Branch, did not recommend to grant permission to hold "Ejtema" of Tanzeem-e-Islami in the current security situation of the country.
>
> Keeping in view the reports of District Police Officer Bahawalpur and other agencies in the prevailing threat scenario, permission to hold "Ejtama" of Tanzeem-e-Islami at Bahawalpur cannot be granted. Disposed of."

6. Report and parawise comments submitted by respondent No.1 nowhere suggest that the petitioner or the organization being run by the petitioner is involved in any anti-state activity or that there is any previous record of petitioner or his organization detrimental to the public peace and tranquility. The only reason for refusal of permission to the petitioner from holding Ejtema is stated to be law and order situation of the country particularly recent terrorist attacks on Ejtema/gatherings especially upon Imambargahs of Ahle Tashee at Shikarpur, Rawalpindi and Islamabad. I am of the opinion that it is no ground to stop the petitioner from holding meeting/Ejtema at a private place and that too in the situation where the petitioner himself is taking responsibility of the security of the event. It has also been assured by the petitioner/ organization to the local administration that there will be no speech/talk against State, morality or any sect which could spoil the atmosphere of peace in the area.

7. Furthermore, it has been argued that the petitioner is being treated discriminately as certain other organizations/religious institutions are holding their meetings/processions/ejtama and no objection is being raised thereto on account of security threats. He has produced an invitation card before this Court which shows that the respondents have allowed "Ghulaman Ghamkol Sharif Sunni Council Bahawalpur" for holding of Quran Khawani and Mehfil Melad on 01.04.2015 on a public place which has not been rebutted by the respondent side. It is astonishing that the petitioner is praying for holding of gathering at a private place who is not being allowed by the respondents but the gathering has taken place on 01.04.2015 at a public place with consent and permission of the respondents. It is worth-noting that despite serious threats to life, the "alam processions" as well as gatherings in mosques are continuing which are not being objected to by the respondents rather security is also being provided by them to such processions/gatherings. When confronted with, learned Law Officer frankly admits that no restriction has been imposed by District Management regarding holding of gatherings/processions in the area. Since the respondent-District Management has not imposed any restriction upon holding gatherings/ processions in the area, therefore, the petitioner can neither be treated discriminately nor he can be precluded from holding proposed religious gathering on the pretext of law and order situation prevailing in the country.

8. Be that as it may, it is the legal duty of the District Administration and law enforcing agencies to provide security and protection to the lives of the participants of such like meetings/ gatherings.

9. For what has been discussed above, this writ petition is accepted, the impugned order is set aside and the petitioner is allowed to hold the religious gathering at the proposed venue, the dates of which will be communicated by the petitioner to

respondent No.1 who will arrange security and protection of the participants of the gathering in accordance with law. However, if any illegal activity aiming at to spoil peace and tranquility of the area or provoke any other sect is found by the respondents/law enforcing agencies, the law will take its own course.

MH/A-48/L Petition allowed.

**2017 M L D 1792**

**[Lahore (Bahawalpur Bench)]**

**Before Atir Mahmood, J**

**ABDUL HAQ and others---Petitioner**

**Versus**

**IFTIKHAR AHMAD and others---Respondents**

Civil Revisions Nos.417 and 418 of 2001, decided on 8th April, 2015.

**Punjab Land Revenue Act (XVII of 1967)---**

----S. 42--- Tamleek--- Mutation--- Proof--- Non-production of identifier of parties and fingerprint expert as witnesses---Effect---Principles---Plaintiffs/sisters filed a suit for declaration against defendants/brothers that tamleek mutation executed in favour of brothers was based on fraud and forgery---Defendants were in constructive possession of suit property and gave shares in produce to plaintiffs uptill 1990 when they refused share in produce on basis of tamleek mutation---Suit was partially decreed but appeals preferred by plaintiffs was accepted---Contention was that S. 42 of Punjab Land Revenue Act, 1967 was misconstrued---Onus to prove issues was on plaintiffs that had not been properly discharged---Validity---When execution of disputed tamleek was denied by plaintiffs onus to prove the same shifted upon defendants being its beneficiaries---Section 42(7) of Punjab Land Revenue Act, 1967 stated that there must be at least two identifying witnesses including preferably lamberdar of the same village---Record revealed that disputed tamleek was sanctioned in a village eight miles away from the village where suit property was situated---Sanction of tamleek Mutation by lumberdar of another village made case of defendants doubtful and his non-production as a witness by defendant also cast serious doubts about genuineness of tamleek mutation---Plaintiffs had categorically denied execution of tamleek mutation in favour of defendants by denying their thumb impressions---Defendants had never opted to move court for comparison of their thumb impressions which strengthened the version of plaintiffs---Revision was dismissed.

Muhammad Asif Mahmood Pirzada for Petitioners.

Abdul Ghaffar Khan Chughtai for Respondents Nos. 1 to 6.

Date of hearing: 8th April, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this single judgment, I intend to dispose of Civil Revisions Nos.417 and 418 of 2001 as common questions of law and fact are involved therein.

2. Brief facts of the case are that predecessors of respondents Mst. Khurshid Bibi and Mst. Mukhtar Bibi filed suits for declaration against the petitioners whereby they challenged gift mutation No.692 dated 26.06.1973 alleging that they never appeared

before the Revenue Officer or made statement in favour of the defendants for gifting out their property; that they are in construction possession of the land, fully described in the headnotes of the plaints, through the defendants who happened to be their real brothers and have been giving them share of produce regularly till 1990 when they refused to do so.

3. The suit was contested by the petitioners-defendants by filing writing statement. Out of divergent pleadings of the parties, issues were framed and evidence led by the parties was recorded. Afterwards, learned trial court decreed the suit to the extent of defendants Nos.3 to 9 on their conceding statements, however, it dismissed the suits of the plaintiffs to the extent of other defendants vide judgments and decrees dated 14.03.1998. The appeals preferred by the plaintiffs were allowed and their suits were decreed by learned Additional District Judge, Rahimyarkhan vide judgments and decrees dated 01.06.2001 to the extent of all the defendants. Hence this civil revision.

4. Learned counsel for the petitioners inter alia contends that the judgments and decrees of learned courts below are at variance; that the learned lower appellate court has failed to consider that the onus to prove the issues was upon the plaintiffs who have failed to discharge the same; that the learned lower appellate court has incorrectly held that the mutation in question is illegal and has misconstrued the provisions of Section 42 of the Land Revenue Act; that finger expert could not be produced by the plaintiffs to rebut affixation of their thumb impressions on the disputed mutation; that the learned lower appellate court has travelled beyond its jurisdiction while decreeing the instant suits; that there are material illegalities, irregularities, misreading and non-reading of evidence in the impugned judgment and decree, therefore, it be set aside and the judgments and decrees of learned trial court below be restored by way of allowing the instant civil revisions.

5. On the other hand, learned counsel for the respondents have vehemently opposed the civil revisions in hand and fully supported the impugned judgments and decrees.

6. Arguments heard. Record perused.

7. The moot point in this case is as to whether the disputed tamleek mutation was validly sanctioned or otherwise.

8. Admittedly, the original owner of the suit land was one Qutab ud Din who had three sons namely Muhammad Ishaq, Muhammad Iqbal and Muhammad Razzaq and two daughters Mst. Mukhtiar Bibi and Mst. Khurshid Bibi. The record of rights duly reflects the names of all the aforementioned persons. The defendants have also not denied that the plaintiffs were their real sisters, as such, they were admittedly co-heirs

of the defendants and were in constructive possession of the suit property through their real brothers.

9. According to the plaintiffs, they came to know about the disputed tamleek mutation Exh.P4 allegedly got executed by them in favour of their brothers-defendants when the brothers stopped to give them share of produce. They have taken a specific plea that the disputed tamleek mutation is result of fraud and forgery as they never gifted out their property to their brothers and neither appeared before the Revenue Officer nor thumb marked the tamleek mutation nor participated in any such proceedings. When the execution of the disputed tamleek was denied by the plaintiffs, the onus to prove the same shifted upon the defendants being its beneficiaries.

The record reveals that the disputed tamleek was sanctioned in village Mouza Amangarh in presence of only one identifying witness, i.e. Lumberdar of Mouza Amangarh whereas the property is situated in Mauza Channa which is situated at about 8 miles away from the village Amangarh where the mutation was sanctioned which is in violation of Section 42(8) of the Land Revenue Act which reads as under:--

> "(8) An inquiry or an order under subsection (6) shall be made in the common assembly in the estate to which the mutation, which is the subject matter of the inquiry, relates."
>
> (Emphasis provided)

10. Under Section 42(7) of the Land Revenue Act, there must be at least two identifying witnesses including preferably Lumberdar of the same village where the property is situated but astonishingly, the Lumberdar of some other village, i.e. Amangarh identified the plaintiffs which makes the case of the defendants doubtful as even if the plaintiff ladies were not parda-observing ladies, they are not expected to be known to Lumberdar of village Amangarh situated about 8 miles from their village. Even the identifier was not produced as a witness by the defendants who could be the best available evidence. Non-production of said witness casts serious doubts about the genuineness of the disputed documents. The plaintiffs are ladies but at the time of mutations neither their husbands were present nor any other independent advice was available to them. In addition, the plaintiffs have categorically denied the execution of disputed tamleek mutation in favour of their brothers while asserting them forged documents and denying their thumb impressions thereon but the defendants never opted to move the court for comparison of their thumb impressions which strengthens the version of the plaintiffs. In the circumstances, learned lower appellate court has rightly struck off the disputed tamleek mutation No.692, dated 26.06.1973 while holding them illegal and unlawful and having been sanctioned against provisions of Section 42 of the Land Revenue Act. Learned counsel for the petitioners has

miserably failed to point out any illegality, irregularity, misreading or non-reading of evidence in the impugned judgment and decree. No interference is called for.

11. For what has been discussed above, both the instant civil revisions have no merit. The same are accordingly dismissed.

MM/A-45/L Revision dismissed.

**2017 P L C (C.S.) 238**

**[Lahore High Court]**

**Before Atir Mahmood, J**

**NABID BAIG**

**Versus**

**CHAIRMAN PUNJAB PUBLC SERVICE COMMISSION and 5 others**

Writ Petition No.1794 of 2015, heard on 24th May, 2016.

**(a) Punjab Civil Servants Act (VIII of 1974)---**

----S. 23---Advertisement for appointment of Deputy Director Technical (BPS-18) in Anti-Corruption Establishment Department---Condition for age limit being 35 to 45+5 years---Prayer for reduction in lower age limit---Scope---Public Service Commission advertised post of Deputy Director Technical in Anti-Corruption Establishment wherein age for applying the same was 35 to 45+5 years---Contention of petitioner was that condition of lesser age for the post was against fundamental right---Validity---Condition with regard to minimum age limit of 35 was imposed upon all the candidates while advertising the post in question---Said condition was not put upon the petitioner but upon all those who desired to compete for the post---Each and every prospective candidate as well as departments might be bound by the conditions mentioned in the advertisement---Petitioner was aged about 31-1/2 years on closing date of applications and he being underage could not apply for the post in question---Relaxation of age was the prerogative of the competent authority and it could not be claimed by a candidate as a vested right---Rules for the post in question had been framed on the recommendations of Anti-Corruption Establishment by adopting the procedure---Minimum age limit in different service rules had been prescribed keeping in view the required maturity of the person for a particular job---No discrimination had been committed with the petitioner by imposing age condition which was for all the candidates---Court was not to interfere with the policies of the government unless there was some violation of fundamental rights of the citizen---High Court could neither substitute the policy of government with its own nor could devise a new formula for advantage of one person and disadvantage to the rest-- High Court could not direct the department to reduce the age limit of the candidates for benefit of the petitioner---Impugned condition did not infringe fundamental right of the petitioner---Constitutional petition was dismissed in circumstances

Punjab Public Service Commission and another v. Mst. Aisha Nawaz and others 2011 SCMR 1602 rel.

**(b) Constitution of Pakistan---**

----Art. 25---"Discrimination"---Meaning.

Discrimination means treatment or consideration of, or making a distinction in favour of or against, a person or thing based on the group, class, or category to which that person or thing is perceived to belong to rather than on individual merit. This includes treatment of an individual or group, based on their actual or perceived membership in

a certain group or social category, in a way that is worse than the way people are usually treated.

Mushtaq Ahmad Mohal and Sarfraz Ahmad Chadhar for Petitioner.
Mujeeb-ur-Rehman Kiani for Respondent No.5.
Khurshid Ahmed Satti, Asstt. A.G. with Hafiz Arshad Mahmood, Law Officer and Ahmad Saif Ullah Khan, Assistant Director (Legal), Anti-Corruption Establishment Rawalpindi for the State.
Date of hearing: 24th May, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Through this constitutional petition under Article 199 of the Islamic Republic of Pakistan, 1973, the petitioner seeks direction to the respondents to give 31/2 years relaxation in lower age limit and allow the petitioner to appear in the test/examination for the post of Deputy Director Technical (BPS-18) in Anti-Corruption Establishment Department (ACE) advertised by the Punjab Public Service Commission. He also seeks direction to the respondents to amend the Anti-Corruption Establishment Service Rules, 2007 for the post of Deputy Director Technical (BS-18) and to fix the minimum age for the post of Deputy Director Technical as 28 years.

2. The contentions of learned counsel for the petitioner are that the petitioner has served on a number of key posts such as Assistant Director (Engineering) and Project Director and while his posting in F.I.A., he has successfully pointed out embezzlements of millions of rupees as well as irregularities committed in award of the projects; that the petitioner fulfills all the requirements of the post of Deputy Director (Technical) except condition of lower age limit; that the condition of lower age limit of 35 years is harsh and is also not in line with that of other post in the same grade in the ACE such as Deputy Director I.T. (BS-18) where the prescribed age limit is 28 to 35 years; that imposing condition of lesser age for the post of Deputy Director (Technical) is against fundamental right of the petitioner who otherwise is eligible for the post; that the said condition is against law and is discriminatory to the petitioner, therefore, this writ petition be allowed, the said condition be waived off and the petitioner be given relaxation of 3-1/2 years lower age limit.

3. On the other hand, learned Law Officer assisted by learned counsel for respondent No.5 has vehemently opposed this writ petition mainly on the grounds that the impugned condition of lower age limit is not discriminatory to the petitioner as it applies to all the prospective candidates and this is a policy matter wherein the courts should not interfere with unless fundamental rights of the citizens are infringed which could not be established by the petitioner.

4. Arguments heard. Record perused.

5. Admittedly, the Punjab Public Service Commission through an advertisement sought for applications for the post of Deputy Director (Technical) in the ACE. The petitioner along with others applied for the said post. There was a specific condition regarding age limit in the advertisement which is reproduced below:

**"2. AGE:**

35 to 45 + 5 years: 50 years for Male Candidates across the board, age relaxation is admissible as prescribed by S&GAD Notification No.DS (O&M) 5-3/2004/Contract (MF) dated 29.12.2004 on 29-06-2015." (Underline is mine)

Perusal of above clearly reveals that while advertising the post, a condition regarding minimum age limit of 35 years was imposed upon all the prospective candidates. The said condition was not put upon the petitioner but upon all those who desire to compete for the said position. Each and every prospective candidate as well as the respondent departments may be bound by the conditions mentioned in the advertisement. The petitioner was undeniably aged about 31-1/2 years on the closing date of applications, therefore, he being underage could not apply for the said post as he was ineligible for the said post in view of the said condition of age limit of 35 to 45 years. However, relaxation of age is the prerogative of the competent authority which can be exercised by the Authority in accordance with the rules and regulations framed for the purpose but it can not be claimed by a candidate as that of a vested right.

6. The contention of learned counsel for the petitioner is that for another post, i.e. Deputy Director I.T. (BS-18) in the ACE, the age limit has been prescribed as 28 to 35 years, as such, the condition of age limit for the post of Deputy Director (Technical) be also dragged down to the level of 28 years so that the petitioner may become eligible for the said post. Rules for every post are framed on the recommendations of the Service Rules Committee with the approval of the Chief Minister/Competent Authority under Section 23 of the Punjab Civil Servants Act, 1974. The rules for the post of Deputy Director (Technical) were also framed on the recommendations of ACE by adopting the said procedure. The minimum age limit in different Service Rules is prescribed keeping in view the required maturity of the person for a particular job. The posts of Deputy Director (IT) and Deputy Director (Technical) are different from each other with regard to their functions/responsibilities/duties, as such, they cannot be treated in one and the same way. Even otherwise, it is the prerogative of the concerned department to frame rules, relax or otherwise some condition imposed in accordance with law but none can claim it as a matter of right. Furthermore, there is also a post of Deputy Director Research Development and Training (BS-18) which also entails the age limit of 35 to 45 years which is the same as for the post of Deputy Director (Technical). The contention of learned counsel for the petitioner lacks force which is accordingly discarded.

7. The other argument of learned counsel for the petitioner is that the fixation of minimum age limit is against fundamental rights of the petitioner being citizen of Pakistan ensured by the Constitution of Islamic Republic of Pakistan, 1973. Discrimination means treatment or consideration of, or making a distinction in favour of or against, a person or thing based on the group, class, or category to which that person or thing is perceived to belong to rather than on individual merit. This includes treatment of an individual or group, based on their actual or perceived membership in a certain group or social category, in a way that is worse than the way people are

usually treated. In this case, the age limit has been fixed for all the prospective candidates of the post in question but no specific condition, which is not for other candidates, has been put upon the petitioner. As such, there is no discrimination being committed with the petitioner by imposing the said age condition which is undisputedly for all the candidates including the petitioner.

8. Furthermore, it is the job of the experts in the relevant filed to frame policies, rules, regulations etc. and the courts should ordinarily not interfere with the policies of the government unless there is some gross violation of fundamental rights of the citizens which could not be established by the petitioner. This Court cannot substitute the policy of the government with its own nor can devise a new formula for advantage of one person but disadvantageous to the rest. This Court cannot direct the respondents, as prayed for by the petitioner, to reduce the age limit of the candidates for benefit of the petitioner which may be disadvantage to rest of the candidates. Needless to observe that the petitioner has still opportunity to compete for the post of Deputy Director (Technical) when he attains the required age of 35 years. The impugned condition does not infringe fundamental right of the petitioner nor it is discrimination with the petitioner in any manner. Reliance is placed on the dictums laid down by the apex court in case titled Punjab Public Service Commission and another v. Mst. Aisha Nawaz and others (2011 SCMR 1602).

9. For what has been discussed above, this writ petition is bereft of any merit. Hence, the same is dismissed.

ZC/N-28/L Petition dismissed.

**2017 P L C (C.S.) 404**
**[Lahore High Court (Multan Bench)]**
**Before Atir Mahmood, J**
**NAEEM ABBAS**
**Versus**
**GOVERNMENT OF PUNJAB through Secretary and 4 others**

Writ Petition No.16994 of 2014, heard on 30th November, 2015.

**(a) Civil service---**

----Promotion----Rescinding of---Audi alteram partem, principle of-- Applicability---Employee-petitioner after having clearance report was promoted who took charge of the post but his promotion was rescinded afterwards---Contention of department was that disciplinary proceedings were in progress against the employee-petitioner and he could not be promoted---Validity---Show cause notices were issued after one month of clearance report and few days prior to departmental promotion committee meeting---Mala fide was on record on the part of department to disentitle the employee-petitioner from his promotion---Had there been any complaints against the employee-petitioner then show cause notices might have been issued to him earlier---Nothing was on record that show cause notices were received by the employee-petitioner---No disciplinary proceedings were pending against the employee-petitioner when his clearance report was submitted for consideration of promotion--- Mere pendency of disciplinary proceedings against any person or even imposing of minor penalties could not debar the promotion of civil servant---Employee-petitioner's promotion could not be deferred on the basis of allegations contained in the show cause notices---Impugned notification was illegal and without lawful authority which could not sustain---Employee-petitioner had been promoted after due course of law---Promotion order not be rescinded without giving proper opportunity of defence to the employee-petitioner---Department was required to issue show cause notice to the employee-petitioner for recalling of promotion order---No notice prior to rescinding promotion order was given to the employee-petitioner---No one should be condemned unheard---Impugned notification had been issued in violation of law which was liable to be struck down on such score alone---Promotion order had been implemented which could not be reverted without affording opportunity of defense---Impugned order was set aside---Constitutional petition was allowed in circumstances.

Captain Sarfraz Ahmad Mufti v. Government of the Punjab and others 1991 SCMR 1637; Mrs. Sanjida Irshad, Assistant Director, Nursing, Bahawalpur v. Secretary to Government of the Punjab Health Department, Lahore and others 2008 PLC (C.S.) 1019; Chairman, Selection Committee/Principal, King Edward Medical College, Lahore and 2 others v. Wasif Zamir Ahmad and another 1997 SCMR 15; Tahir Latif

Sheikh v. Federation of Pakistan and another 2000 PLC (C.S.) 582 and Muhammad Afzal Khan v. Government of the Punjab through Secretary to Government of the Punjab, G&W Department and another 2009 PLC (C.S.) 40 ref.

Ali Azhar Khan Baloch and others v. Province of Sindh and others 2015 SCMR 456 rel.

**(b) Civil service---**

----Promotion---Mere pendency of disciplinary proceedings against any person or even imposing of minor penalties could not debar the promotion of civil servant.

**(c) Interpretation of statutes---**

----Law had to take precedence over the policy.

**(d) Constitution of Pakistan---**

----Art. 199---Constitutional petition---Maintainability---Violation of law---Scope---Constitutional petition involving matter pertaining to violation of law and having far reaching effects on service structure was maintainable.

**(e) Maxim---**

----"Audi alteram partem"---Meaning---No one should be condemned unheard.

Ch. Abdul Sattar Goraya and Muhammad Masood Bilal for Petitioner.
Javed Saeed Pirzada, Assistant Advocate General, Mushtaq Hussain, SP Legal and Izhar, S.I. Legal Branch, Multan for State.

Date of hearing: 30th November, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Brief facts of the case are that the petitioner was appointed as Inspector in the Police Department vide order dated 18.07.1998. On 08.04.2014, the Inspector General of Police-respondent No.2 sought clearance reports of the Inspectors for considering them for promotion as DSP. The RPO, Multan forwarded report of the petitioner, which was submitted by CPO, Multan stating therein that there was no adverse entry against the petitioner. On 02.06.2014, CPO again submitted report to respondent on his desire reiterating his earlier recommendations. Accordingly, the Departmental Promotion Committee after considering case of the petitioner recommended his promotion as DSP whereafter the petitioner was

promoted as DSP vide notification dated 15.06.2014. The petitioner was posted as DSP Organized Crime, Muzaffargarh where he took over charge of the post on 02.07.2014. Afterwards, respondent No.2 rescinded notification dated 15.06.2014 vide notification No.5227/EXEC-II dated 08.12.2014 which is under challenge in this writ petition.

2. Learned counsel for the petitioner inter alia contends that the petitioner was promoted after seeking necessary reports from the quarters concerned and considering all aspects of his promotion case; that the petitioner was posted as DSP and he accordingly joined duties meaning thereby the promotion order of the petitioner stood fully implemented; that after promotion, certain rights accrued to the petitioner which could not be brushed aside ordinarily; that alleged show-cause notices were not served upon the petitioner and he remained unaware about the same; that no notice was issued to the petitioner before rescinding his promotion order which is against principles of natural justice, therefore, this writ petition be allowed and impugned notification be set aside. He has relied upon the law laid down in cases reported as Captain Sarfraz Ahmad Mufti v. Government of the Punjab and others (1991 SCMR 1637), Mrs. Sanjida Irshad, Assistant Director, Nursing, Bahawalpur v. Secretary to Government of the Punjab Health Department, Lahore and others (2008 PLC (C.S.) 1019 (Lahore), Chairman, Selection Committee/Principal, King Edward Medical College, Lahore and 2 others v. Wasif Zamir Ahmad and another (1997 SCMR 15), Tahir Latif Sheikh v. Federation of Pakistan and another (2000 PLC (C.S.) 582 Lahore) and Muhammad Afzal Khan v. Government of the Punjab through Secretary to Government of the Punjab, G&W Department and another (2009 PLC (C.S.) 40 Lahore).

3. On the other hand, learned Law Officer assisted by Superintendent of Police (Legal) submits that this writ petition since involves terms and conditions of service, therefore, jurisdiction of this Court is barred under Article 212 of the Constitution of Islamic Republic of Pakistan, 1973. He states that there was certain criteria for promotion of the inspectors laid down in the policy according to which the persons against whom disciplinary proceedings were in progress could not be promoted; that since there were disciplinary proceedings continuing against the petitioner which were deliberately concealed by the petitioner from the competent authority, in connivance with other officers, therefore, his promotion order was rightly rescinded. He prays that this writ petition being without any merit be dismissed.

4. Arguments heard. Record perused.

5. The only allegation against the petitioner is that there were certain disciplinary proceedings continuing against the petitioner which he managed to conceal, therefore, his promotion order was rightly rescinded.

6. According to para 5 of report and parawise comments filed by the respondents, clearance reports in respect of Inspectors was requisitioned on 08.04.2014. The report in respect of the petitioner was sent by RPO, Multan on 17.04.2014 stating therein that there was no departmental proceedings pending against him. This report was undeniably submitted by CPO, Multan to RPO, Multan who forwarded the same with his recommendations. The meeting of Departmental Promotion Committee was held on 12.06.2014. The Committee duly considered the case of the petitioner and recommended him for promotion as DSP. On the recommendations of the DPC, the petitioner was promoted vide order dated 15.06.2014. Afterwards, it came to the notice of the competent authority that three show cause notices were issued to the petitioner on 23.05.2014 whereupon the petitioner's promotion was cancelled.

7. Astonishingly, there was no disciplinary proceedings pending against the petitioner till 17.04.2014 when the report was sent by RPO, Multan to respondent No.2 stating therein `NIL' inquiry proceedings were pending against the petitioner. After dispatch of this report, the petitioner was issued three Show Cause Notices on one and the same day, i.e. 23.05.2014 just after one month of report submitted by RPO and few days prior to DPC meeting. This smacks mala fide on part of the respondents to disentitle the petitioner from his promotion. Had there been any complaints against the petitioner, the Show Cause Notices might have been issued to him much earlier. The petitioner has taken plea that no such show cause notice was received by him. The respondents could not show from the record that the said show cause notice was in fact received by the petitioner. Furthermore, learned Law Officer has raised allegation that the report was submitted in connivance with the officers without saying that these were CPO and RPO Multan. In my view, an Inspector cannot manoeuvre his clearance report or manage collusion with CPO and RPO as such Officers are not supposed to be approached by the Inspectors and they were required to submit the report as per record. Even otherwise, the report and parawise comments are reflective of the fact that the show-cause notices were prepared after the date when the clearance report in favour of the petitioner had already been sent by the CPO and RPO Multan to respondent No.2. Meaning thereby, there was no disciplinary proceedings pending against the petitioner at the time when his clearance report was submitted by the CPO and RPO, Multan, as such, no question of collusion or concealment of facts arises.

8. In addition, mere pendency of disciplinary proceedings against any person or even imposing of minor penalties could not debar the promotion of a civil servant. According to the respondents, only three show cause notices were issued to the

petitioner but there is no allegation of the respondents that the petitioner was punished in any case. The promotion order of the petitioner was rescinded in light of policy of the department according to which mere issuance of three show cause notices could be made basis for deferment of promotion of any officer but the law speaks otherwise. It is settled law that the law has to take precedence over the policy. Since according to law, the petitioner's promotion could not be deferred merely on the basis of allegations contained in the show cause notices, the impugned notification was illegal and without any lawful authority, as such, it could not sustain.

9. Learned Law Officer has taken plea that the petitioner, if aggrieved should have approached the service tribunal being a civil servant and the High Court has no jurisdiction to deal with the matter. I am afraid that this argument lacks force as the matter pertains to the fitness or otherwise of the petitioner. Reliance is placed on the judgment of the Hon'ble Supreme Court of Pakistan in case titled Ali Azhar Khan Baloch and others v. Province of Sindh and others (2015 SCMR 456). Relevant portion therefrom is reproduced below:

> "150. The High Court of Sindh has completely overlooked the intent and spirit of the Constitutional provisions relating to the terms and conditions of service, while entertaining Civil Suits and constitutional petitions filed by the civil servants, which are explicitly barred by Article 212. The expression 'Terms and Conditions' includes transfer, posting, absorption, seniority and eligibility to promotion but excludes fitness or otherwise of a person, to be appointed to or hold a particular post or to be promoted to a higher post or grade as provided under section 4(b) of the Sindh Service Tribunals Act, 1973. (Emphasis provided)

10. Another aspect of the case is that the petitioner was promoted as DSP after due process of law whereafter his promotion order could not be rescinded without giving him proper opportunity of defence. When confronted with, learned Law Officer frankly admits that no notice prior to rescinding order was given to the petitioner. This is against the golden principle of audi alteram partem that no one should be condemned unheard. Even if there was any occasion for recalling of promotion order, the respondents were required by law to issue show cause notice to the petitioner and afford him opportunity to defend his case but no such exercise was done by the respondents before issuing the impugned notification. Therefore, the impugned notification being in violation of settled principles of law is liable to be struck down on this score alone.

11. The epitome of whole discussion is that this writ petition involving matter pertaining to violation of law and having far reaching effects on service structure is maintainable. Nobody can be deprived from promotion merely on the basis of

disciplinary proceedings or on account of minor penalties. The petitioner after having been promoted as DSP and his promotion order having been implemented could not be reverted to the post of Inspector without affording him opportunity of defence. Therefore, this writ petition is allowed and the impugned order is set aside.

ZC/N-4/L Petition allowed.

**2017 P L C (C.S.) Note 81**
**[Lahore High Court (Multan Bench)]**
**Before Atir Mahmood, J**
**GHULAM MUSTAFA**
**Versus**
**DIRECTOR GENERAL AGRICULTURE (Water Management Wing), Lahore and 3 others**

Writ Petition No.17996 of 2015, decided on 2nd December, 2015.

**Civil service---**

----Contract appointment---Scope---Petitioner-employee was issued show-cause notice but he neither replied the same nor appeared for personal hearing---Services of employee were terminated---Contention of petitioner-employee was that due to backache he was unable to travel and the attend the proceedings---Validity---Petitioner-employee had not asserted before the department that he could not join the service on account of ailment---Nothing was on record that medical certificates for grant of leave were received by the department---Plea which was not taken before the competent authority could not be raised for the first time while filing constitutional petition---Conduct of petitioner-employee did not appear to be bona fide---Person who was an unwilling worker or had violated the terms and conditions of contract of service could not force department to keep him in service---Contract employee whose services had been terminated could not be reinstated into service---No illegality or irregularity had been committed by the department while passing the impugned orders---Constitutional petition was dismissed in circumstances. [paras. 8 & 9 of the judgment]

Malik Muhammad Ahsan Karol for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.---** Through this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has challenged the orders dated 06.08.2015, 25.05.2015 and 27.03.2015 passed by the respondents Nos. 1 to 3 whereby the applications filed by the petitioner for reinstatement into service were turned down.

2. The brief facts of the case are that the petitioner was appointed as Supervisor on contract basis under National Program of Improvement of water courses in Pakistan vide order No. 658 dated 14.06.2005 (on Farm Water Management), Bahawalnagar. The petitioner joined the service and performed his duty honestly. There-after, the contract was revised with effect from 01.07.2008 to 30.06.2010 and 01.07.2010 to 30.06.2011 and the petitioner was transferred to Tehsil Jalalpur Peer Wala District Multan and started his duty under the supervision of Deputy District Officer, Jalal Pur Peer Wala, District Multan. It was alleged that the Deputy District Officer, Multan being inefficient person had ill-thoughts for the achievement for articles, and commitment of the petitioner with his work; that due to abovesaid reasons Deputy District Officer got registered a false case bearing F.I.R. No.499/14 under sections

506 and 387 of P.P.C. and 7 ATA at P.S. City Jalalpur Peer Wala against the petitioner, as a result of which, he was arrested in the said case, challan was submitted to the trial court, he face the trial and there-after the petitioner was acquitted from the charge. During the trial of the above-said case, the petitioner was forced by the respondents to accept his guilty including removal from service. Due to this mental torture, the petitioner fell ill and suffer from severe backache and was medically examined by the Medical Superintendent, THQ Hospital, Fortabbas. He also submitted an application in this regard to Deputy District Officer, Water Management, Multan/respondent No.3 but the said respondent, despite knowing all the facts, issued show-cause notices to the petitioner and finally without hearing the petitioner terminated his services vide order dated 27.03.2015. The petitioner being dissatisfied from the said order filed an appeal before the respondent No.2 which was rejected vide order dated 25.05.2915. There-after, the petitioner filed another appeal challenging the order of the respondent No.2 before the respondent No.1 which was also dismissed vide order dated 06.08.2015. Hence this writ petition.

3. Learned counsel for the petitioner, inter-alia, submitted that the order passed by the respondent No.3 is not sustainable as it has been passed without affording an opportunity of hearing to the petitioner; that during the whole period of service, no complaint was registered against the petitioner against his efficiency, dutifulness or commitment; that the respondent No.3 passed the impugned order when the petitioner was suffering from severe backache and was unable to travel and attend the proceedings; that the criminal proceedings against the petitioner terminated in the form of acquittal of the petitioner vide judgment dated 25.04.2015 passed by the learned Anti-Terrorism Court No.11, Multan and thereafter there was no allegation against the petitioner. He lastly prayed that the impugned order passed by the respondents Nos. 1 to 3 be set-aside and they be directed to reinstate the petitioner in the service.

4. Heard.

5. Perusal of the record reflects that the petitioner allegedly submitted applications dated 03.01.2015, 17.01.2015, 30.01.2015 and 28.02.2015 for grant of leave for different periods on the plea that he was suffering from serious backache and was advised bed rest which period comes from 03.01.2015 to 14.03.2015. The petitioner has also submitted medical certificates issued by the Medical Superintendent, Tehsil Headquarter Hospital, Fort Abbas as well as of some private doctors. As per medical prescription of Dr. Abdul Munaf Saud dated 28.02.2015, the petitioner was advised bed-rest for two weeks with effect from 28.02.2015. As such, period advised for bed-rest under the said certificates lasts on 15.03.2015. According to an application dated 17.12.2014 addressed to the Director General, (Agriculture) respondent No.1 reflects that the petitioner prayed for his transfer from District Office, Water Management, District Multan to District Bahawalpur or any near by district which according to the petitioner was not adverted to. The record reflects that a show-cause notice cum personal hearing notice dated 02.02.2015 was issued to the petitioner and the petitioner was asked to show cause in writing within seven days of the receipt of the notice as to why his services may not be terminated, then there are two others show

cause notices dated 17.02.2015 and 28.02.2015 whereby the petitioner was again and again asked to show cause and affording him personal hearing.

6. Admittedly, the petitioner neither replied the show-cause notice nor appeared for personal hearing. The services of the petitioner were terminated vide order dated 27.03.2015 passed by the respondent No.3, District Officer, Water Manager, Multan which reads as under:-

> "Whereas, the accused official was finally served a show cause cum personal hearing notice through registered letter vide No.3435 dated 07.03.2015 which he was given another chance to explain his position and offered to appear before the undersigned for personal hearing. The accused official again failed to furnish reply to the show-cause notice and to avail opportunity of personal hearing on 26th March, 2015, which indicates that he is not serious in his job under PIPIP.
>
> AND WHEREAS, as per his appointment terms and conditions clause VI (C) medical leave continuous beyond 3 months cannot be allowed absolutely in any circumstances. Consequently due to continuous absence of more than 3 month period, contract services of the accused official are liable to be terminated.
>
> NOW THEREFORE, after going through the record/facts of the case I, Abul Barkat Farrukh Nadeem District Officer/Authority in this case hereby terminate contract appointment of Mr. Ghulam Mustafa son of Muhammad Ameen Supervisor (PIPIP) (contract employee) office of Deputy District Officer Multan with immediate effect in the light of clause VI, XII, XV and XVII."

7. Being aggrieved of his termination letter an application was submitted by the petitioner before the Executive District Officer (Agriculture), Multan on 06.05.2015 for his reinstatement. In this application, it was never asserted that the petitioner was seriously sick and was unable to move or was advised bed rest by the doctor. His only assertion was that after being exonerated from the case F.I.R. No.499/2014 under sections 506, 387 of P.P.C. and 7ATA registered with Police Station Jalalpur Peer Wala, he reported to the District Officer, Multan on 11.12.2014 and submitted for his transfer and he was transferred from Tehsil Jalalpur to Deputy District Office, Tehsil Multan and that during this period, he was being threatened of dire consequences. He submitted that during that period show-cause notices were issued to him and without giving him a personal hearing, he has been terminated from service. The respondent No.2 vide impugned order dated 25.05.2015 rejected his appeal in the following terms:

> "Whereas Mr. Ghulam Mustafa Ex-Supervisor office of Deputy District Officer, Water Management, Multan made an appeal against the termination order issued by the District Officer, Water Management, Multan vide his No.3532-37/DO/WM/Estt. Dated 27.03.2015, which has been considered in

the light of the comments offered by the District Water Management Multan vide No.3854/WM/MN dated 19.05.2015.

Whereas the clarification made by S&GAD, Govt. of Punjab Lahore vide No.DS(O&M)5-3/06/2004/contract/agri dated 14.01.2009 is as under:
"It is clarified that under the contract appointment policy, 2004 it is not admissible to reinstate a contractee after his termination from service".
Whereas Mr. Ghulam Mustafa Ex-Supervisor office of Deputy District Officer, Water Management, Multan is a contract employee and to be dealt with under the terms and conditions of appointment under contract Policy 2004 and as such his appeal does not lie with this office hence appeal is rejected".

The petitioner assailed this order before the respondent No.1/Director General, Agriculture (Water Management Wing), Lahore but he again failed to mention that he was medically unfit having severe Backache and was advised bed rest. This request of the petitioner was also turned down by the respondent No.1 vide order dated 06.08.2015 upholding the order passed by the respondent No.2.

8. As discussed above, the petitioner did not assert before the respondents that he could not join the service on account of his serious ailment nor he could establish before this Court that his applications coupled with medical certificates for grant of leave were received by the respondents, therefore the plea which has not been taken before the competent authorities, cannot be raised for the first time before this Court while filing this writ petition. The conduct of the petitioner did not appear to be bona-fide and a person who is an unwilling worker or violate the terms and conditions of the contract service, cannot force his parent department that he be kept in service. Further, according to the provisions of Contract Appointment Policy, 2004, as held by the respondents, a contract employee whose services have been terminated cannot be reinstated into service.

9. No illegality or irregularity has been committed by the respondents Nos.1 to 3 while passing the impugned orders, therefore, this writ petition being devoid of any force is hereby dismissed in limine.

ZC/G-3/L Petition dismissed.

**P L D 2017 Lahore 390**

**Before Atir Mahmood, J**

**Messrs NATIONAL HIGHWAY AUTHORITY through Duly Authorised Director (Legal)---Petitioner**

**Versus**

**The CHIEF SECRETARY, GOVERNMENT OF THE PUNJAB, LAHORE and 5 others---Respondents**

Writ Petition No.1779 of 2005, heard on 24th November, 2016.

**Punjab Mining Concession Rules, 2002--**

----R. 234---Punjab Land Revenue Act (XLVII of 1967), S.49---Constitution of Pakistan, Art. 199---Constitutional petition---Alternate remedy---Factual controversy---Grievance of petitioner was that authorities had issued mining licence for exploration of minerals to respondent for the land which was already acquired by petitioner--- Validity---Question of ownership of land under reference was a matter of factual controversy which could not be decided under Constitutional jurisdiction of High Court---Appeal was provided under R.234 of Punjab Mining Concession Rules, 2002, which remedy was not availed by petitioner and had directly filed Constitutional petition---Constitutional jurisdiction of High Court could not be invoked if there was some alternate remedy available---"Minerals" and "land" were two distinct commodities and land could be owned or acquired by public or private sectors but minerals could not be acquired---All minerals beneath the surface of land, either it was owned by government or any other private person or body, were property of government concerned---Land in question was within the territorial jurisdiction of the Province of Punjab and mines and minerals under the land in question were owned by Punjab Government---Petitioner had no concern therewith and Punjab Government could issue public auction notice for issuance of mining licence and could make lease agreement in result thereof and petitioner had no locus standi to challenge the same---Constitutional petition was dismissed in circumstances.

Water and Power Development Authority and another v. Assistant Director Mines and Minerals, Attock and others PLD 2012 Lah. 83 and Water and Power Development Authority (WAPDA) through its G.M. and Project Director Attock and another v. The Assistant Director, Mines and Mineral Attock and others C.A. No.123/2013 ref.

Ms. Shahina Akbar for Petitioner.

Tanvir Iqbal Khan for Respondents.

Rashid Hafeez, Additional Advocate-General and Rashid Latif, Assistant Director, Mines and Mineral Department for the State.

Date of hearing: 24th November, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.**--By way of filing this writ petition, the petitioner has challenged a Tender Notice of Public Auction dated 1.8.05.2005 in daily newspaper "Khabrain" dated 28.04.2005 (hereinafter called "the auction notice") and Lease Order

bearing No.MM/ML-Attock-Sale Stone Qibla Bandi 3/623 dated 01.06.2005 by Mines and Minerals Department of Government of Punjab (hereinafter called "the respondent department") to respondent No.6 for five years of 99-17 acres of land allegedly acquired by the petitioner.

2. Learned counsel for the petitioner inter alia contends that the respondent department has issued a mining licence for exploration of minerals to respondent No.6 for the land which is already acquired by the petitioner; that the respondent department has erred to have assumed jurisdiction on the piece of land acquired by the petitioner; that the project work of Islamabad-Peshawar Motorway (M-1) is stretched on an acquired area with additional width of 100 meters on both sides of the alignment; that the impugned lease agreement/order dated 01.06.2005 is ultra vires to the provisions of law; that the respondent has not taken into consideration the vires of the Punjab Mining Concession Rules 2002; that the petitioner has not been afforded any opportunity of hearing with regard to auction proceedings conducted on the basis of auction notice. She has prayed that the impugned auction notice and lease order dated 01.06.2005 may be declared illegal and of no legal consequence qua the Right of Way of the petitioner-authority of the Islamabad-Peshawar Motorway (M-1) and the respondents be restrained from illegally interfering in the execution and construction of the project work.

3. On the other hand, learned Additional Advocate General assisted by learned counsel for the respondents has vehemently opposed this writ petition. They aver that the land over which the licence for exploration of mining has been issued is not owned by the petitioner and even if it is agreed for sake of arguments, the minerals contained therein are the property of the provincial government.

4. Arguments heard. Record perused.

5. First of all, there is dispute between the parties regarding ownership of the land. Learned counsel for the petitioner asserts that the land in question was acquired by the NHA. In this regard, she has referred the award dated 15.10.2004 wherein details of the property have been mentioned. However, any such detail is absent in the impugned auction notice. Therefore, it cannot be said with certainty as to whether it is the same land which was acquired by the NHA through the award or it is some other land. In the circumstances, the question of ownership of land under reference is a matter of factual controversy which cannot be decided in writ jurisdiction, as such, this writ petition being not maintainable is liable to be dismissed on this score alone.

6. Another aspect of the matter is that an appeal is provided under Section 234 of the Punjab Mining Concession Rules, 2002 which remedy has not been availed by the petitioner and the petitioner has directly filed this constitutional petition. Under the law, the constitutional jurisdiction of this Court cannot be invoked if there is some alternate remedy available, therefore, this writ petition is liable to be dismissed on this score as well.

7. Regarding issuance of mining licence, Section 49 of the West Pakistan Land Revenue Act, 1967 being relevant is reproduced hereunder:

> **"49. Right of Government in mines and minerals**: Notwithstanding anything to the contrary in any other law, or in any order to decree of Court or other authority, or in any rule of custom or usage, or in any contract, instrument, deed or other document, all mines and minerals shall be and shall always be deemed to have been the property of Government, and Government shall have all powers necessary for the proper enjoyment of its right thereto."
>
> (Emphasis provided)

The minerals and land are two distinct commodities. The land can be owned or acquired by public or private sectors but the minerals cannot be acquired. All the minerals beneath the surface of the land, either it is owned by the government or any other private person or body, are property of the government concerned. Admittedly, the land in question comes within the territorial jurisdiction of the Province of the Punjab, therefore, I have no hesitation to hold that the mines and minerals under the land in question are owned by the Punjab Government and the petitioner has no concern therewith, and the Punjab Government could issue public auction notice for issuance of mining licence and could make lease agreement in result thereof and the petitioner has no locus standi to challenge the same.

8. It has been contended in the writ petition that the impugned mining licence by the Punjab Government is an illegal interference by the respondents in the Project Work of Islamabad-Peshawar Motorway (M-1), therefore, the respondents be restrained from interfering in execution and construction of the Project Work. On Court inquiry, learned counsel for the petitioner frankly admits that the said Motorway stands completed in the year 2009, as such, this issue exists no more.

9. Even otherwise, issues similar to those raised in this writ. petition stand settled in the judgments passed by this Court in case titled "Water and Power Development Authority and another v. Assistant Director Mines and Minerals, Attock and others (PLD 2012 Lahore 83) and by the Hon'ble Supreme Court of Pakistan in C.A. No.123/2013 titled "Water and Power Development Authority (WAPDA) through its G.M. and Project Director Attock and another v. The Assistant Director, Mines and Mineral Attock and others". It has been held in the later judgment:

> "6. It cannot be caviled at that the property wherefrom excavation was made was acquired by the appellant for public purpose. It too cannot be caviled at that the activity embarked upon by the appellant was not mining in its intent and purpose. It as such, it did not have any mens rea as far as the penal provision of Rules is concerned. But whatever was brought forth pursuant to the activity embarked upon by the appellant was minor minerals. Minor minerals in no case could be owned and appropriated by the appellant. It by virtue of section 49 of the West Pakistan Land Revenue Act vested in the government notwithstanding it was excavated from the property acquired by the appellant for public purpose.

7. The question that when what had been excavated was earth and used as such, it could not be construed as minor minerals, cannot be appreciated at this stage, firstly because it was never raised in the fora below and secondly because it being factual goes outside the scope of this appeal. The argument that spirit of Rules has to be kept intact is no doubt correct, but we do not think we can keep the spirit of the Rules intact by interpreting them against the letter and legislative intent behind them."

(Emphasis provided)

10. Learned counsel for the petitioner has prayed that the bank guarantee furnished by the petitioner in compliance of order of this Court be released. In this regard, she has also averred that the excessive rates on account of cess/duty have been imposed by the respondents upon the petitioner. In my view, this is a matter of evidence and this Court in its constitutional jurisdiction cannot decide the same. Needless to observe that the respondents are entitled to encash the bank guarantee furnished by the petitioner. The petitioner has, however, every right to claim differential of the amount due and amount received by the respondents. Therefore, the petitioner may approach the proper forum for determination of petitioner's rights.

11. For what has been discussed above, this writ petition is dismissed on merits as well as maintainability.

MH/N-4/L Petition dismissed.

**P L D 2017 Lahore 584**

**Before Atir Mahmood, J**

**WAJID ALI---Petitioner**

**Versus**

**PAKISTAN BAR COUNCIL and others---Respondents**

Writ Petition No.15279 of 2016, decided on 3rd April, 2017.

**Higher Education Commission Ordinance (LIII of 2002)---**

----S. 10(1)(o)---University of the Punjab Act (IX of 1973), S.28(h)---Constitution of Pakistan, Arts.143---Inconsistency between Federal and Provincial Laws---Powers and functions of the Higher Education Commission---Issuance of degree equivalence certificate by University of the Punjab, in the presence of similar powers available to the Higher Education Commission---Scope---Contention of the petitioner, inter alia, was that the University of the Punjab could not issue an equivalence certificate for a degree issued by its counterpart university and only some other department such as the Higher Education Commission could do the same---Validity---Reading of S.10(1)(o) of the Higher Education Commission Ordinance, 2002 revealed that it was the domain of the Higher Education Commission to determine equivalence and recognition of degrees issued by various institutions within and outside the country---Section 20(2)(h) of the University of the Punjab Act, 1973 gave such powers to the University of the Punjab as well, however, per Art.143 of the Constitution, the Higher Education Commission Ordinance, 2002 having been enacted by the Parliament (Federal Legislature) had precedence over the University of the Punjab Act, 1973 to the extent of repugnancy---High Court observed that respondent University of the Punjab was neither competent nor required to issue equivalence certificates for degrees issued by other universities and the same could be solely done by Higher Education Commission---High Court further observed that practice of a parallel system of issuing equivalence certificates by the University of the Punjab amounted to usurpation of powers of the Higher Education Commission and was unconstitutional as the legislative field for higher education fell within the jurisdiction of the Federal Legislature, which undisputedly prevailed over the Provincial Legislature---High Court declared the act/function of the University of the Punjab in issuing equivalence certificates as illegal, void and of no legal effect---Constitutional petition was allowed, accordingly.

Rais Munir Ahmed v. Returning Officer/Additional District and Sessions Judge, Sadiqabad and 4 others 2008 CLC 1111 rel.

Sheraz Zaka for Petitioner.

Amir Mahmood for Respondents.

Date of Hearing: 14th March, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the petitioner is a practicing lawyer. He wanted to get admission in Master in Law Program of Punjab University (hereinafter called "the university"). When he contacted the university, he was advised to first get Equivalence Certificate from the Equivalence Department of the university which act of the university has been challenged in this writ petition.

2. Learned counsel for the petitioner inter alia contends that the petitioner is a qualified person whose degrees are recognized by the Higher Education Commission as well as by Punjab Bar Council; that one university cannot be allowed to issue equivalence certificate with respect to the degree issued by its counterpart rather some other department (Higher Education Commission in this case) can only declare equivalence or otherwise of degrees issued by two or more universities; that the act of the respondent university is against the provisions of Legal Education Rules 2015 as well as Higher Education Commission Ordinance, 2002; that the functioning of Equivalence Department of the university is illegal and unlawful, therefore, this writ petition be allowed and the function of Equivalence Department of the University to issue Equivalence Certificates be declared illegal, void and unconstitutional.

3. On the other hand, learned counsel for the respondent university has vehemently opposed this writ petition while asserting that the respondent university under Section 28(2)(h) of the University of the Punjab Act, 1973 has all powers to recognize or otherwise the examination of other examining bodies as equivalent to the corresponding examinations of the university.

4. Arguments heard. Record perused.

5. The moot point in this case is as to whether the University of the Punjab can or cannot issue equivalence certificate to a degree issued by some other university of Pakistan. The whole reliance of learned counsel for the respondent is on Section 28 (2)(h) of the University of the Punjab Act, 1973 which is reproduced below:

> **"28. Powers and duties of the Academic Council--** (2) ...the Academic Council shall have the powers to:-
>
> (h) to recognize the examinations of other Universities or examining bodies as equivalent to the corresponding examinations of the University."

The above provision of law undoubtedly empowers the respondent university to declare a degree of some other university as equivalent or otherwise to that issued by the respondent university. In case, degrees issued by other universities are not declared to be equal by the respondent university to those issued by it, the same treatment may be given by other universities to the degrees of the respondent university as well which will create frustration and chaos resulting in uneasiness and discomfort to the students of different universities as well as closing doors of

education by one university to the students of other universities. Therefore, there must be some institution having status upper than that of the (sic) by different universities. Luckily, we have such institution in shape of Higher Education Commission who undeniably has not only such powers but is also exercising the same to recognize and issue equivalence certificate or otherwise. In my view, such powers can be best exercised by the Higher Education Commission having status upper than that of the educational institutions, i.e. universities and if each and every university is allowed to do so, this will not be beneficial to students of any of the universities and may curtail their right to higher education which is a basic and fundamental right of each and every citizen of the country and cannot be taken away under any provision of law.

6. Section 10(1)(o) of Higher Education Commission Ordinance, 2002 is very much relevant in this case which is reproduced below:

> **"10. Powers and functions of the Commission.** (1) For the evaluation, improvement, and promotion of higher education, research and development, the Commission may
>
> (o) determine the equivalence and recognition of degrees, diplomas and certificates awarded by Institutions within the country and abroad;" (Emphasizes provided)

Bare reading of above provision of law reveals that it is the domain of the Higher Education Commission to determine the equivalence and recognition of degrees issued by various institutions within and outside the country. But as noted above, Section 20(2)(h) of the University of the Punjab Act, 1973 gives such powers to the University of the Punjab as well. Here arises a question if there are provisions repugnant to each other in two statutes: one enacted through Provincial Legislation and the other through Federal Legislation, as to which legislation will prevail. The answer to this question is clearly and unambiguously given by the Constitution of Islamic Republic of Pakistan, 1973 in its Article 143 which reads as under:

> ` **"143. Inconsistency between Federal and Provincial law**. - If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of repugnancy, be void." (Emphasis provided)

In light of Article 143 of the Constitution, the Higher Education Commission Ordinance, 2002 being enacted through the Parliament (Federal Legislation) has precedence over the University of the Punjab Act, 1973 (Provincial Legislation) to the extent of repugnancy. In view of the aforesaid, I am of the considered opinion that the respondent university is neither competent nor required to issue equivalence certificate to a degree issued by other universities and if there is any need of

recognition or equivalency of degrees of the universities, it can solely be done by the Higher Education Commission and not by any university including the Punjab University. Consequently, the equivalence department of Punjab University to practice a parallel system of equivalence leads to distortion within the equivalence scheme as provided by Higher Education Commission and amounts to usurpation of powers of the Higher Education Commission. This is even otherwise unconstitutional as the legislative field of Higher Education exclusively falls within the jurisdiction of the Federal Legislature which undisputedly prevails over Provincial Legislature. The judgment of this Court reported as Rais Munir Ahmed v. Returning Officer/Additional District and Sessions Judge, Sadiqabad and 4 others (2008 CLC 1111 Lahore) is referred in this regard.

7. For the aforementioned reasons, this writ petition is allowed and it is held that the act/function of the respondent university regarding issuance of equivalence certificates is illegal, void and of no legal effect.

KMZ/W-5/L Petition allowe

**2017 Y L R 626**

**[Lahore]**

**Before Atir Mahmood, J**

**MUNSHI KHAN through L.Rs. and others---Appellants**

**Versus**

**IKHLAQ AHMAD---Respondent**

R.S.A. No.97 of 2008, heard on 23rd September, 2015.

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

----S. 12---Suit for specific performance of agreement to sell---Unilateral agreement---Scope---Document could not be termed as an agreement/contract until and unless same was signed by both the parties---Alleged agreement to sell on the basis of which present suit had been decreed was not signed by the defendants---Such agreement could neither be said to be an "agreement" nor same could be enforced---Impugned judgments and decrees passed by the courts below were set aside and suit was dismissed---Second appeal was allowed in circumstances.

Mst. Gulshan Hamid v. Kh. Abdul Rehman and others 2010 SCMR 334 and Rashid Ahmad v. Messrs Friends Match Works PLD 1989 SC 503 ref.

Farzand Ali and others v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

Muhammad Shahzad Shaukat for Appellants.

Saeed uz Zafar Khawaja and Ch. Muhammad Naseer for Respondent.

Date of hearing: 23rd September, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**By way of filing the instant RSA, the appellants have assailed judgment and decree dated 28.11.2008 passed by learned Additional District Judge, Shorkot who dismissed appeal of the appellants and upheld judgment and decree dated 15.03.2007 passed by learned Civil Judge Class-I, Shorkot whereby suit of the appellant was decreed.

2. Briefly stated the facts leading to filing of this Regular Second Appeal are that the respondent filed a suit for specific performance of agreement to sell dated 25.02.2004 against one Munshi, appellant-defendant No.1 on 04.03.2004. Since the property was later on transferred in favour of appellant-defendant No.2, she was also impleaded in the suit. The plaintiff asserted that he purchased the suit property from appellant No.1 vide agreement to sell dated 25.02.2004 for consideration of Rs.13,50,000/- out of which a sum of Rs.8,00,000/- was paid whereas the target date for payment of rest of the amount was 21.05.2004; that partial possession of the property was also handed over to the plaintiff; that during the pendency of the suit, defendant No.1 transferred the suit property in favour of defendant No.2 vide mutation No.378; that the plaintiff

asked the defendants to receive the remaining amount and transfer the suit land in his favour but they refused.

3. The suit was contested by the appellants-defendants. Out of divergent pleadings of the parties, issues were framed, evidence led by the parties was recorded, whereafter learned Civil Judge 1st Class, Shorkot decreed the suit vide judgment and decree dated 15.03.2007. Feeling aggrieved, the appellants preferred appeal which was dismissed by learned Additional District Judge, Shorkot vide judgment and decree dated 28.11.2008. The appellants have preferred this appeal against both judgments and decrees of learned trial court as well as learned lower appellate court.

4. Learned counsel for the appellants, at the very outset, submits that in view of the law laid down by the august Supreme Court in cases titled Farzand Ali and others v. Khuda Bakhsh and others (PLD 2015 SC 187) and Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334), a unilaterally signed document is neither an agreement/contract nor it can specifically be enforced.

5. On the other learned counsel for the respondent submits that there are concurrent findings of law and fact against the appellants, which are immune from interference by this Court; that judgments supra are not applicable to the case of the respondent being covered under Section 53-A of the Transfer of Property Act, 1882 as possession of the suit property was handed over to the respondent. He contends that applicability of Section 53-A of the Act ibid has not been discussed by the august Supreme Court in the afore-referred judgments.

6. In rebuttal, learned counsel for the appellants submits that respondent cannot take benefit of Section 53-A as the entire payment was not made to the appellant/vendor. He has relied upon the judgment of the Hon'ble Supreme Court titled Rashid Ahmad v. Messrs Friends Match Works (PLD 1989 SC 503).

7. Arguments heard. Record perused.

8. Both the parties have confined themselves to the legal questions enumerated as under:--

1) Whether or not a unilateral agreement is specifically enforceable?

2) Whether or not case of respondent-plaintiff is protected under section 53-A of The Transfer of Property Act, 1882?

3) Whether or not the concurrent findings are immune from interference by this Court?

9. The first point which is to be deliberated upon is whether a unilaterally signed agreement is enforceable or not. A similar point came before the Hon'ble Supreme Court in case titled Farzand Ali and others v. Khuda Bakhsh and others (PLD 2015 SC 187) wherein it was held that:--

"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 agents 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 assent, 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 appellants, therefore in law and fact it is no contract (agreement)."

(underline is mine)

Perusal of above paragraph makes it crystal clear that until and unless a document is signed by both the parties, it cannot be termed as even an agreement/contract. Admittedly, the alleged agreement to sell on the basis of which the suit has been decreed by learned courts below is not signed by the appellants, as such, neither it can be said an agreement nor could be enforced. The case of the present appellants is even on better footing than those in judgment titled Farzand Ali and others v. Khuda Bakhsh and others (PLD 2015 SC 187) because the agreement to sell in the said case was admitted by the vendors but in this case, the appellants have denied having executed any agreement to sell in favour of the respondent.

10. Regarding protection of section 53A of the Transfer of Property Act, 1882, the contention of learned counsel for the respondent is that since part possession of the property has been handed over to the respondent, his case is protected under the aforesaid provision of law. It is observed that even if the part possession of the

property lies with the respondent, he cannot be benefited on this score as the condition for protection imposed by said provision of law, i.e. Section 53-A of the Transfer of Property Act, 1882, is that there should be a contract. Admittedly, the respondent/ Ikhlaq Ahmed, vendee, has not signed the alleged agreement to sell, as such, this, as discussed hereinabove, is not a contract. I am of the firm view that when there is no contract, there is no protection under Section 53-A of the Transfer of Property Act, 1882. The argument of learned counsel for the respondent is accordingly repelled.

11. Another contention of learned counsel for the respondent is that since there are concurrent findings, this Court has no jurisdiction to interfere therewith. There is a plethora of judgments holding that where there is an illegality, irregularity, mis-reading or non-reading of evidence in the judgments resulting in miscarriage of justice, this Court has ample powers to interfere therewith. Since the above-noted legal aspects of the case have altogether been ignored by learned courts below, I am inclined to exercise my jurisdiction. Accordingly, this appeal is allowed, the impugned judgments and decrees passed by both the learned courts below are set aside and the suit of the respondent is dismissed.

ZC/M-340/L Appeal allowed.

**2017 Y L R 1684**

**[Lahore (Rawalpindi Bench)]**

**Before Atir Mahmood, J**

**SARFRAZ---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE and 5 others---Respondents**

Writ Petition No.2591 of 2016, decided on 19th October, 2016.

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

----S. 5, Sched. & S. 14(2)(b)(c)---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Recovery of maintenance allowance and dowry articles---Appeal---Scope---Family Court had decreed the suit for maintenance to the extent of Rs. 3,000/- per month for the Iddat period for wife and Rs. 4,500/- per month each for the minors till their legal entitlement, with 10% annual increase and wife was also held entitled to recover dowry articles for Rs. 51,300---Appellate Court dismissed the appeal filed by the defendant---Validity---No appeal was entertainable against decree of dowry articles upto Rs. 1,00,000/---Appeal having not been provided by the statute, constitutional petition was also not competent---No mis-reading or non-reading of evidence had been pointed out---Section 14 (2)(c) of Family Courts Act, 1964 mentioned the amount of maintenance allowance for a single person and not the accumulative one for all the children and wife---Amount of maintenance allowance granted to each of the plaintiffs was less than Rs. 5,000/- therefore, appeal was not maintainable---Minors were children of defendant (father) and it was his responsibility to maintain them---Amount of Rs. 4,500/- for each of the minor had been awarded which was hardly sufficient to meet with the requirements of minors---Concurrent findings of law and fact against the defendant were based upon due appraisal of evidence---Constitutional petition was dismissed in limine.

Muhammad Nadeem v. Aneesa Bibi and others 2016 CLC 81 rel.

**(b) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of High Court---Scope---Concurrent findings could not be interfered with while exercising constitutional jurisdiction unless there was some illegality, mis-reading or non-reading of evidence or some jurisdictional defect.

Sh. Kamran Shahzad for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the respondent No.3 filed a suit for recovery of dowry articles and maintenance allowance for herself and for minor children arrayed as respondents Nos.4 to 6 in this writ petition against the petitioner with the averments that she contracted marriage with petitioner on

13.03.2004 in accordance with Muslim rites; that the plaintiff lady after the marriage settled in the house of the petitioner and started to perform her marital obligations; that out of this wedlock, respondents Nos.4 to 6 were born who are alive and living with respondent No.3; that on 09.06.2013, the petitioner expelled the plaintiff from his house in three wearing apparels whereafter she took refuge in the house of her parents; that the petitioner has neither paid any maintenance allowance to the plaintiffs nor returned the dowry articles valuing Rs.165,500/- to the plaintiff lady which was given to her at the time of marriage despite repeated demands.

2. The petitioner-defendant contested the suit by filing written statement. Out of divergent pleadings of the parties, learned Judge Family Court, Fateh Jang, District Attock framed issues, recorded evidence and then after hearing the parties, proceeded to decree the suit of the plaintiffs in the terms that respondent No.3 is entitled to recover maintenance allowance @ Rs.3,000/- per month for Iddat period only, respondents Nos.4 to 6 @ Rs.4,500/- per month each till their legal entitlement with 10% annual increase and respondent No.3 is entitled to recover dowry articles according to Exh.P-2 excluding item No.18 or in alternate 60% of its amount after depreciation vide judgment and decree dated 02.05.2016. The petitioner feeling dissatisfied preferred appeal which was dismissed by learned Additional District Judge, Fateh Jang, District Attock vide judgment and decree dated 29.08.2016. Hence this writ petition has been filed by the petitioner-defendant.

3. Learned counsel for the petitioner inter alia contends that the judgments and decrees of learned courts below are against law and fact; that learned courts below have not taken into consideration the evidence adduced by the parties in its true perspective; that the petitioner is unable to pay the maintenance allowance as awarded by learned courts below; that the evidence produced by the parties has not been appreciated by learned courts below in its true perspective; that the impugned judgments and decrees are based on surmises and conjectures; that the learned courts below have committed material irregularities while passing the impugned judgments and decrees, therefore, this writ petition be allowed, the impugned judgments and decrees be set aside and the suit of the plaintiffs be dismissed.

4. Arguments heard. Record perused.

5. Perusal of record reveals that the plaintiff lady has only been allowed maintenance allowance at Rs.3,000/- per month for only Iddat period whereas the minors have been given maintenance allowance @ Rs.4,500/- per month each.

6. Regarding dowry articles, the plaintiff lady, has been held entitled by learned courts below to get dowry articles given to her at the time of marriage excluding item No.18 or in alternate, 60% of its amount after depreciation. The plaintiff lady had claimed dowry articles valuing Rs.165,500/- including gold ornaments of Rs.80,000/-. Learned courts below did not accede to claim of the plaintiff to the extent of gold ornaments

and dismissed her suit to that extent. Thereafter, claim of the plaintiff left for Rs.85,500/- only upon which 40% reduction as depreciation was imposed. In this way, the plaintiff was allowed just Rs.51,300/- as alternate price of dowry articles. Under Section 14 (2) (b) of the Family Courts Act, 1964 (hereinafter called "the Act"), no appeal is entertainable against decree of dowry articles upto Rs.100,000/-. Since appeal was not provided by the statute, the writ in hand is not competent as there is no misreading or non-reading of evidence, floating on the surface of the record.

7. So far as maintenance allowance awarded to the plaintiffs is concerned, Section 14(2)(c) of the Act reads as under:--

"14(2). No appeal shall lie from a decree passed by Family Court-

(a) . . .
(b) . . .
(c) for maintenance of rupees five thousand or less per month."

Bare reading of above provision of law makes it clear that no appeal will lie against a decree for maintenance if such maintenance is Rs.5,000/- or less per month. Learned lower appellate court while relying upon judgment of this Court reported as Muhammad Nadeem v. Aneesa Bibi and others (2016 CLC 81 Lahore) has noted that the right of appeal to the extent of maintenance allowance of the minors was available to the petitioner as in the referred judgment it has been held while interpreting Section 14(2) (c) of the Act that "it would be the maintenance as a whole which would determine the pecuniary jurisdiction of the appellate court". With utmost respect to the Hon'ble Judge, I feel that the Hon'ble Judge was not properly assisted on the subject. In my considered view, it is not a matter of pecuniary jurisdiction of the court rather it is a matter of right of minors and wives who are constrained to live a deserted life and Section 14(2)(c) of the Act mentions the amount of maintenance allowance for a single person and not the accumulative one for all the children and wife. If it is accepted as held by the Hon'ble Judge, what would happen if such number is five or more as in such a situation, the protection provided by Section 14(2)(c) of the Act would go down even below the level of Rs.1,000/- which was the limit provided before the recent amendment made in 2015 and would be highly insufficient for survival of any individual. In my view, the legislature vide said amendment has desired to increase the earlier limit of Rs.1,000/- to Rs.5,000/- per head and has not fixed it as a whole for all those who have such right against one person. As such, I am of the considered view that since the amount of maintenance allowance granted to each of the plaintiffs was less than Rs.5,000/-, the appeal keeping in view Section 14(2)(c) of the Act was not maintainable.

8. Even otherwise, the minors are admittedly children of the petitioner and it is his responsibility to maintain them for which meager amounts of Rs.4,500/- for each of

the minor have been awarded which are hardly sufficient to meet with the requirements of the minors keeping in view their day-to-day needs of food, abode, clothing, schooling etc. The petitioner being father of the minors cannot be allowed to escape from his responsibilities of maintaining their children under any law of the land.

9. Furthermore, there are concurrent findings of law and fact against the petitioner which are based upon due appraisal of evidence. Under the law, such findings are not to be interfered with until and unless there is some gross illegality, misreading or non-reading of evidence or some jurisdictional defect which could not be pointed out by learned counsel for the petitioner. In the circumstances, no interference is called for.

10. For the aforementioned reasons, the writ petition being not maintainable is hereby dismissed in limine.

ZC/S-85/L Petition dismissed.

**2017 Y L R Note 41**
**[Lahore]**
**Before Atir Mahmood, J**
**BISE, LAHORE and others---Petitioners**
**Versus**
**MUHAMMAD WAQAR SALEEM KHAN---Respondent**

Civil Revision No.308 of 2015, decided on 8th October, 2015.

**(a) Punjab Boards of Intermediate and Secondary Education Act (XIII of 1976)---**

----Ss. 29 & 31---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Correction of date of birth---Bar of suit---Contention of plaintiff was that his date of birth was 20-10-1993 instead of 20-10-1992---Suit was decreed concurrently---Validity---Plaintiff had failed to prove through cogent evidence that his actual date of birth was 20-10-1993 rather than 20-10-1992---Specific bar upon the jurisdiction of court had been imposed---Court was bound to examine the pleadings and evidence on record---No malice, ill-will or any bias had been alleged against the Education Board---Provisions of Ss. 29 & 31 of Punjab Boards of Intermediate and Secondary Education Act, 1976 were attracted to the present case---Trial Court had no jurisdiction to decree the present suit---Findings recorded by both the courts below were not sustainable which were reversed---Impugned judgments and decrees passed by the courts below were set aside being contrary to law and facts of the case---Suit of plaintiff was dismissed---Revision was allowed in circumstances. [Paras. 9, 10 & 11 of the judgment]

**(b) Pleadings---**

----Party could not go beyond its pleadings. [Para. 9 of the judgment]

Mahboob Azhar Sheikh and Ch. Irfan Haider for Petitioners.
Khalid Mahmood, Superintendent, Registration Branch, BISE, Lahore for Petitioners.
Chaudhry Khalil-ur-Rehman for Respondent.
Date of hearing: 8th October, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this civil revision, the petitioners have challenged the judgment and decree dated 01.12.2014 passed by the learned Additional District Judge, Lahore through which the appeal filed by the petitioners-defendants (hereinafter referred as petitioners) was dismissed which was filed against the judgment and decree dated 21.06.2012 passed by the learned

Civil Judge, Lahore whereby the suit filed by the respondent-plaintiff (hereinafter referred as respondent) was decreed.

2. Brief facts of the case are that the respondent filed a suit for declaration with consequential relief against the petitioners stating therein that the actual date of birth of the respondent is 20.10.1993 whereas the date of birth recorded in his secondary school certificate issued by the petitioners as 20.10.1992 is incorrect. It was alleged in the plaint that the respondent approached to the petitioners for the correction of his date of birth in the relevant record and for the issuance of new certificate with correct date of birth but they refused to do so. The petitioners contested the suit by filing their written statement. Out of the divergent pleadings of the parties, the learned trial court framed the following issues:--

"1. Whether the correct date of birth of the plaintiff is 20.10.1993 instead of 20.10.1992 which is liable for correction on Secondary School Certificate and Intermediate School Certificate and plaintiff is entitled to decree for declaration with consequential relief as prayed for in the plaint? OPP.

2. Whether the suit of the plaintiff is false, frivolous and vexatious? OPD.

3. Whether under Sections 29 and 31 of the Punjab Boards of Intermediate and Secondary Education Act, 1976, the court has no jurisdiction to adjudicate upon the matter? OPD

4. Whether as per order VII Rule 11 of C.P.C., the suit is not maintainable? OPD

5. Whether the plaintiff has no cause of action? OPD

6. Whether as per principle of estoppel, the suit is not maintainable? OPD.

7. Relief.

After recording oral as well as documentary evidence of the parties, learned trial court decreed the suit filed by the respondent vide judgment and decree dated 21.06.2012. Feeling dissatisfied the petitioners filed an appeal which was dismissed by the learned Additional District Judge, Lahore vide judgment and decree dated 01.12.2014, hence this civil revision.

4(sic). Learned counsel for the petitioners submitted that the judgments and decrees passed by the courts below are against the law and facts of the case; that the judgments and decrees of the courts below are result of misreading and non-reading of evidence; that the learned courts below have failed to consider the fact that the admission form was filled in by the respondent himself and no other agency, school or tuition center was involved in filling up the admission form; that in view of the provisions contained in sections 29 and 31 of the Board of Intermediate and Secondary Education, Lahore Act, 1976, the learned trial court

has absolutely no jurisdiction to entertain and try the suit; that the learned courts below have mis-appreciated the evidence with regard to the birth certified issued by the Union Council 89, Gulshan Ravi, Lahore as it was issued a few days before institution of the suit; that the learned courts below have not applied their judicious mind while passing the impugned judgments and decrees.

5. On the other hand, learned counsel for the respondent has submitted that the judgments and decrees passed by the learned courts below are well reasoned and they have committed no illegality while producing the impugned judgments and decrees. He prayed for dismissal of the appeal.

6. Arguments heard. Record perused.

7. In order to prove the case, the respondent himself appeared in the witness box as PW1 and produced PW2 Naseeb Khan to corroborate his version. In his examination-in-chief, he deposed that his date of birth is 20.10.1993. He produced Exh. P1, certificate of birth No. 580 dated 20.01.1993 issued by the Metropolitan Corporation, Lahore ( ), Exh. P2 birth certificate issued by the Government of the Punjab and Exh.P3 "B-Form" about the registration of the children less than 18 years of age. He deposed that his date of birth has wrongly been entered on his matriculation certificate as 20.10.1992. He produced copy of the certificate of metric ( ) as Exh. P4. He deposed that he requested the board/petitioners for correction of his date of birth but he was asked to obtain the decree from the civil court for correction of the date of birth. In cross-examination, he admitted that Exh.D1 is his admission form where-upon his date of birth has been written as 20.10.1992. He also admitted that on the certificate of metric, his date of birth has been recorded according to Exh. D1. He volunteered that the form was filled by the school authorities. He also admitted that at the time of his registration, his date of birth has been written as 20.10.1992. He showed his ignorance that why the board refused to correct his date of birth. He however, admitted that birth certificate and "B-Form" were issued in the year 2010. He denied the suggestion that birth certificate, "B-Form" and birth receipt ( ) were prepared to get the correction of date of birth. He also denied that his actual date of birth is 20.10.1992 which is written on the birth certificate. He admitted that against the decision of the board of refusing the correction of his date of birth, he did not file any application before the appellate forum of the board. PW2 Naseeb Khan during the cross-examination, corroborated the contents of the plaint as well as statement made by the respondent. He added that the 'form' which was forwarded by the school to the board was filled by the school authorities themselves. He stated that the respondent is his grandson whose date of birth is 20.10.1993. During cross-examination, he stated that his grandson appeared in the matriculation examination for the year 2007. He admitted that admission form was not written in his

presence. He also stated that he has 14 grandsons/grand-daughters. He admitted that he did not remember the date of births of his grandsons/grand-daughters. He however, stated that he did not appear before the committee for correction of date of birth. He volunteered that he was subsequently called by the committee through a letter. He admitted that no letter was issued by the committee in his name.

8. In rebuttal, DW1 Rizwan Bashir, Junior Clerk of Matriculation Branch Board of Intermediate and Secondary Education, Lahore deposed that the date of birth of the respondent/plaintiff is 20.10.1992 which was written on the admission form (Exh.D1), according to which result card and matriculation certificate ( ) was issued. In cross-examination, he admitted that the respondent/plaintiff was a regular student and the forms of regular students are received through the school. He stated that he could not tell, as to whether, the date of birth of the plaintiff on "Form-B" is correct. DW2 Muhammad Anwaar-ul-Haq Assistant, Regulation Section, Board of Intermediate and Secondary Education, Lahore deposed that the application of the plaintiff for correction of his date of birth was processed by the committee which was rejected after going through the contents of the application and record for the reason that in case of its correction, the age of the plaintiff was going to become less than 14 years. He produced copy of the application and decision of the committee as Exh. D2 and D3 respectively. In cross-examination, he admitted that when the respondent appeared in the matriculation examination at that time, there was no restriction for the candidates of less than 14 years of age to sit in the examination. He showed his ignorance that as to whether, the plaintiff produced "Form-B" before the committee or not. He showed his ignorance, as to whether, the admission forms for the metric examination are filled by the school authorities or by the students.

9. Admittedly, while filing the suit, the respondent nowhere asserted that the admission forms for the matriculation examination were not filled by himself and were filled by the school authorities. His only assertion is that his date of birth recorded in the matriculation certificate ( ) issued by the defendants Nos. 2 and 3 as 20.0.1992 is incorrect and correct date is 20.10.1993, whereas the respondent specifically asserted in the written statement that date of birth was written by himself as 20.10.1992 in his admission form for secondary school examination for the year 2007. The stance that the admission form was filled by the school authority was taken for the first time at the time of recording the evidence. The application for correction of date of birth (ExhD2) is also silent, as to why, the correction of date of birth was required. It is noted that there is a specific column No.9, in the application form, which is meant for incorporation of the reasons for the correction in the date of birth. No such reason is reflected in the said column No.9. It is now a settled proposition of law that a party cannot go beyond its pleadings. Further, no effort was made by the respondent to prove Exh.P1 ( ) by

production of original record of Metropolitan Corporation, Lahore for its comparison and as such no reliance can be placed upon it. As far as Exh P2 and P3 are concerned, both these documents were issued on 09.07.2010 and 11.06.2010 respectively, much after issuance of matriculation certificate. Even otherwise Exh. P2 and P3 have been issued on the information furnished by the parents of the respondent/plaintiff and none of them appeared before the learned trial court as they could be subjected to any cross-examination. There is also no effort on behalf of the respondent to summon the record or any witness from the school attended by the respondent in order to substantiate his stand that the admission forms were filled by the school authorities. The respondent as PW1 did not utter even a single word in his examination-in-chief that his admission form was filled by the school authorities. Though during cross-examination, he volunteered that school authorities obtained their photographs and filled the forms but at the same time he admitted that no such question was made by the learned counsel, as to whether, this form filled by himself.

10. In view of the above discussion, I have no doubt in my mind that the respondent failed to prove through any cogent evidence that his actual date of birth was 20.10.1993 rather than 20.10.1992. There is yet another aspect of the case that under sections 29 and 31 of the Board of Intermediate and Secondary Education Act, 1976, there is a specific bar upon the jurisdiction of the court and in this regard specific issue No.3 was framed and since then was a legal issue that it was incumbent upon the learned trial court to decide the same in accordance with the provisions of law but in a very slipshod manner the learned trial court decided this issue against the petitioners by stating that no reliable and cogent evidence was produced on behalf of the defendants. I am constrained to hold that to decide issue No.3, the court was under a legal obligation to examine the pleadings and evidence on record. According to the plaint or evidence led by the respondent, no malice, ill-will or any bias has been alleged against the petitioners or any staff member of the Board, therefore, the provisions of sections 29 and 31 of the Boards of Intermediate and Secondary Education Act, 1976 are attracted in this case which are reproduced as under for ready reference:--

**"29 Bar of suit**.---No act done, order made or proceeding taken by a Board in pursuance of the provisions of this Act shall be called in question in any court.

**31. Protection of acts and order under the Act**.--- No suit for damages or other legal proceedings shall be instituted against Government, the Controlling Authority, a Board, a committee, a member or a committee or an officer or employee of a Board in respect of anything done or purported to have been done in good faith in pursuance of the provisions of this Act and the regulations and rules made thereunder. (Emphasis provided)

In view of the above provision of law, the learned trial court had no jurisdiction to decree the suit and findings of the courts below on this issue are not sustainable and liable to be reversed.

11. For what has been discussed above, this revision petition is allowed and the judgments and decrees of the courts below are set-aside being contrary to the law and facts of the case and the suit of the respondent is dismissed leaving the parties to bear their own costs.

ZC/B-36/L Revision allowed.

**2017 Y L R Note 43**

**[Lahore]**

**Before Atir Mahmood, J**

**MASOOD AHMED JAVED and others---Petitioners**

**Versus**

**MUKHTAR AHMAD and others---Respondents**

Civil Revision No.1448 of 2008, heard on 1st February, 2016.

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

----S. 12---Suit for specific performance of agreement---Oral agreement---Scope---No date, time and place of alleged oral agreement to sell had been mentioned in the plaint---Oral agreement to sell was permissible under the law but party who alleged the execution of such agreement was bound to prove the same through unimpeachable evidence---Impugned judgment and decree passed by the Appellate Court were set aside and those of Trial Court were restored---Revision was allowed in circumstances. [Paras. 8 & 10 of the judgment]

Ghulam Nabi and another v. Member, Board of Revenue, Punjab and others 1981 SCMR 998; Habibullah Jan and 3 others v. Muhammad Hassan Khan and 6 others PLD 1991 SC 93; Muhammad Nawaz v. Mst. Ahmad Bibi and 3 others 1995 SCMR 266 and Ghulam Rasool through L.Rs. and others v. Muhammad Hussain and others PLD 2011 SC 119 distinguished.

Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.Rs. and others 2013 SCMR 1300 rel.

Sh. Naveed Shaharyar, Ms. Tanvir Zohra, Ms. Shahida Chaudhry and Fayyaz Ahmed Kaleem for Petitioners.

Allah Wasaya Malik for Respondents.

Date of hearing: 1st February, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that on 13.05.1991, respondent No.1 Mukhtiar Ahmad filed a suit for declaration along with specific performance of contract against predecessor-in-interest of petitioner No.1 namely Abdur Rashid (defendant No.1) and predecessor-in-interest of petitioners Nos.2 to 4 namely Ghulam Rasool s/o Sawaya (defendant No.2) with the assertions that defendant No.1 was allottee of the land fully detailed in the headnote of the plaint; that the land was allotted to defendant No.1 under Abadkari Scheme in 1961 when he was an army personnel; that due to his job responsibilities, defendant No.1 could not bring the suit land under cultivation; that in 1962, defendant No.1 entered into an oral agreement with the plaintiff that the plaintiff would cultivate the suit land and would also pay the installments from his own pocket and would get half of share of the produce and on getting proprietary rights, defendant No.1 would keep half land with him and transfer the remaining half to the plaintiff; that

the plaintiff got possession of the suit land in 1963, paid land revenue and also deposited the installments in the government treasury due to which defendant No.1 got proprietary rights but afterwards, defendant No.1 resiled from the said agreement and transferred the whole suit land in favour of defendant No.2 vide mutation No.106 dated 27.04.1998 which was challenged in addition to praying for decree of specific performance of the agreement.

2. The suit was contested by the defendants by filing written statement. Out of divergent pleadings of the parties, issues were framed. Both the parties led their respective evidence which was duly recorded by learned Civil Judge, Bhakkar. Thereafter, learned Civil Judge, Bhakkar dismissed the suit vide judgment and decree dated 28.07.1992. In the appeal preferred by the respondent side, the case was remanded vide order dated 17.07.1995. In post remand proceedings, the suit was again dismissed, however, in appeal, the suit was again remanded. Finally, learned Civil Judge, Bhakkar dismissed the suit vide judgment and decree dated 11.09.1999. Respondent No.1 feeling dissatisfied challenged judgment and decree dated 11.09.1999 passed by learned trial court which appeal was allowed by learned Additional District Judge, Bhakkar vide judgment and decree dated 18.06.2004. Petitioner No.1 along with proforma respondents filed application under Order IX, Rule 13 read with Section 12(2), C.P.C. which application was allowed and judgment and decree dated 18.06.2004 was set aside and the appeal titled "Mukhtiar Ahmad v. Abdur Rashid" was re-heard and decided vide judgment and decree dated 15.07.2006. The petitioners filed Civil Revision No.1739/2006 before this Court which was disposed of vide order dated 25.04.2007 while remanding the case to learned lower appellate court. In post-remand proceedings, learned Additional District Judge, Bhakkar vide judgment and decree dated 30.10.2008 dismissed appeal to the extent of legal heirs of Abdur Rashid and maintained judgment and decree of his predecessor. Hence this civil revision has been filed.

3. Learned counsel for the petitioners contends that the learned lower appellate court did not apply its judicious mind and also ignored the direction of this Court made vide order dated 25.04.2007 in Civil Revision No.1739/2006; that the learned appellate court, while holding that late Abdur Rashid had no locus standi to contest the appeal and that late Ghulam Rasool has not shown any grievance and LRs of Ghulam Rasool did not contest the appeal is factually incorrect. He argued that LRs of Ghulam Rasool challenged judgment and decree dated 15.07.2006 in Civil Revision No.1739/2006 which was allowed and the case was remanded to learned lower appellate court; that the impugned judgment is against law and fact; that the learned appellate court neither discussed the merits nor cared to see whether the alleged verbal agreement to sell relied upon by respondent No.1 was proved and whether the same was legally enforceable. Learned counsel for the

petitioners asserts that the impugned judgment and decree is not sustainable in the eye of law, therefore, it be set aside by way of allowing this civil revision.

4. On the other hand, learned counsel for the respondents has vehemently opposed this civil revision by submitting that against the impugned judgment and decree dated 15.7.2006 passed by the learned Additional District Judge in the earlier round of litigation, the legal heirs of Ghulam Rasool did not file any revision petition and the matter attained finality to their extent. He emphasized that the judgment and decree dated 15.7.2006 passed by the learned Additional District Judge, Bhakkar was set-aside to the extent of legal heirs of Abdur Rashid, therefore, the present revision petition is not maintainable to the extent of legal heirs of Ghulam Rasool. He further argued that Abdur Rashid while alienating the property to Ghulam Rasool lost his right and had no locus standi to contest the appeal and no illegality had been committed by the learned appellate court. He relied upon the case law cited as Ghulam Nabi and another v. Member, Board of Revenue, Punjab and others (1981 SCMR 998), Habibullah Jan and 3 others v. Muhammad Hassan Khan and 6 others (PLD 1991 SC 93), Muhammad Nawaz v. Mst. Ahmad Bibi and 3 others (1995 SCMR 266) and Ghulam Rasool through L.Rs. and others v. Muhammad Hussain and others (PLD 2011 SC 119).

5. After hearing the arguments of learned counsel for the parties the points for consideration by this Court are as follows:--

(i) As to whether the legal heirs of Abdur Rashid have any locus standi to file the revision petition.

(ii) As to whether the legal heirs of Ghulam Rasool could competently file this revision petition.

(iii) and as to whether the judgment of the learned appellate court is liable to be reversed by upholding the judgment and decree passed by the learned trial court.

6. The first objection of the respondents/point for consideration relates to the locus standi of the legal heirs of Abdur Rashid. In this regard, perusal of the plaint filed by the respondent Mukhtiar Ahmad is very relevant and according to which the respondent-plaintiff entered into an oral agreement to sell of the suit property with defendant No.1 Abdur Rashid in the year 1962 and thereafter in violation of the said alleged agreement alienated the same property to defendant No.2 namely Ghulam Rasool. If the respondent-plaintiff was not aggrieved or the defendant No.1 had no locus standi to defend the suit then why the respondent opted to implead him as a defendant, therefore, this contention of the respondents is without any basis. Further, admittedly the late Abdur Rashid was owner of the property, who admittedly alienated the same to defendant No.2 Ghulam Rasool and in case the suit is decreed in favour of the respondent the outcome of the same would be that Ghulam Rasool will cease to have any title in the property and as an

outcome the transaction between Abdur Rashid and Ghulam Rasool would become nullity creating multiplicity of litigation between the two. In my considered opinion the legal heirs of Abdur Rashid have every locus standi to contest the appeal and they are to sink or sail together with the legal heirs of Ghulam Rasool s/o Sawaya, the deceased defendant No.2.

7. The second objection of the respondent that the legal heirs of Ghulam Rasool did not agitate the decree of the learned appellate court dated 15.7.2006 is also incorrect. A Civil Revision No. 1739-2006 was filed by the legal heirs of Abdur Rashid (defendant No.1) and the legal heirs of Ghulam Rasool (defendant No.2) which was decided by this Court in the following terms:--

"The learned counsel for the petitioners contended that the impugned judgment dated 15.7.2006 is erroneous and based on complete mis-reading of record and evidence. The learned lower Appellate Court mis-took the petitioners Nos.1 to 5 as appellants and Mukhtar Ahmad and others as respondent, while actually it was otherwise, therefore, the impugned judgment is fraught with errors of fact.

2. Therefore, both learned counsel concur and agree that the impugned judgment and decree be set-aside, the proceedings be remanded to the lower Appellate Court, wherein both parties be permitted to raise all questions of law and fact, which thereafter be adjudicated and decided on merits.

Order accordingly.

The parties are directed to appear before the learned District Judge, Bhakkar on 30.5.2007, who will either proceed to hear the matter himself or entrust it to a Court of competent jurisdiction, which shall decide it on merits, addressing all question of law and facts raised by the parties, in the shortest possible time."

(Emphasis provided)

From the bare perusal of the order mentioned here-in-above there remains no room to believe that the legal heirs of Ghulam Rasool s/o Sawaya did not challenge the vires of the judgment and decree passed by the learned appellate court. Learned appellate court, after remand order, passed the impugned judgment in the following manner:--

"10. The perusal of order of my learned Predecessor dated 19.4.2006 shows that the present appeal was restored to the extent of rights of Abdul Rashid. Now it had been proved that Abdul Rashid had already extinguished his right in the suit property as he had transferred the suit property to Ghulam Rasool, whereas Ghulam Rasool contested the suit till court of appeal and had not challenged the order of Appellate Court before the Hon'ble Lahore High Court, Lahore and in this connection execution had also been completed.

Therefore, as Abdul Rashid had already lost right in the suit property with the transfer of his land in the name of Ghulam Rasool and now Ghulam Rasool is not contesting the appeal. So the order passed by my learned Predecessor was kept intact to the extent of Ghulam Rasool and the application was allowed to the extent of Abdul Rashid only, therefore, the appeal to the extent of Abdul Rashid has no merits and the same is hereby dismissed. The order passed by my learned Predecessor is maintained and kept intact."

(Emphasis provided)

Therefore, it is held that the impugned judgment and decree dated 30.10.2008 passed by the learned Additional District Judge, Bhakkar is absolutely nullity in the eye of law and as a matter of fact, the findings of the learned appellate court are erroneous.

8. On merits of the case, it is admitted fact that the respondent while filing his suit alleged an oral agreement to sell with regard to the suit property in the year 1962 but neither the name of any witness was mentioned therein the plaint nor date time and place of alleged oral agreement was mentioned. Further, the witnesses produced by the respondent remained silent regarding the date and time of the alleged oral agreement to sell. In cross-examination, PW.1 stated that at the time of agreement Ghulam Rasool son of Sawaya (defendant No.2 in the suit) was present in a room of the house of the plaintiff at Noon whereas when PW.2 Ghulam Rasool s/o Tanpur (not defendant No.2) appeared in the witness box, he in cross-examination stated that they were sitting underneath a tree in the 'Ihata' of Mukhtiar (plaintiff). He also stated that at that time Sufi Rasheed, Ghulam Muhammad, Khushi Muhammad, Abdullah and 2/4 other persons were present whereas PW.1 did not mention the name of any other person present at the relevant time. These are material contradictions which cannot be brushed aside. Further, this PW.1 showed his absolute ignorance that how much amount was paid. He categorically stated that he was not present at the time of any bargain ( ) between the parties. In view of the evidence led by the respondent-plaintiff, I have no doubt in my mind that the respondents failed to prove the factum of any oral agreement to sell with Abdur Rashid. Undoubtedly, the oral agreement to sell is permissible under the law but the party who alleges the execution of an oral agreement to sell is under a heavy obligation to prove the same through unimpeachable evidence. The guidance is sought from the judgment of the Hon.ble Supreme Court of Pakistan reported as Muhammad Nawaz through L.Rs v. Haji Muhammad Baran Khan through L.Rs. and others (2013 SCMR 1300). The relevant portion is reproduced as under:--

"We also hold that although it is not the requirement of law that an agreement or contract 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."

9. There is yet another aspect of the case that in the plaint the year of agreement to sell has been written as 1962 whereas when the respondent himself appeared in the witness box as PW.3 he stated the year of agreement as 1963 which is fatal for the case of the respondents. The case law relied upon by learned counsel for the respondents being distinguishable on facts is also not helpful to the respondents.

10. In view of the above discussion, this revision petition is allowed. The judgment and decree passed by the learned appellate court is set aside and the judgment and decree passed by the learned trial court is upheld.

ZC/M-155/L Revision allowed.

**2017 Y L R Note 228**
**[Lahore (Rawalpindi Bench)]**
**Before Atir Mahmood, J**
**MUHAMMAD NAZIR---Petitioner**
**Versus**
**MUHAMMAD BASHIR and others---Respondents**

Civil Revision No.91 of 2008, heard on 5th May, 2015.

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

----O. XXI, R. 32, O. XXVI, R. 9, O. XXXIX, R. 2(3), O.VII, R.11 & S.2(2)---- Specific Relief Act (I of 1877), S. 52---Suit for permanent injunction---Execution of decree and order---Disobedience of injunctive order---Undertaking before court---Effect---Appointment of local commission---Duty of court---Appellate court accepting appeal on undertaking of defendants dismissed the suit---Plaintiff filed application under O. XXI, R. 32, O. XXVI, R. 9 & O. XXXIX, R. 2(3), C.P.C. on ground that defendants had violated the undertaking and trespassed over plaintiff's property by raising construction and sought restoration of possession and initiation of contempt proceedings---Contention raised by plaintiff was that rejection of plaint on undertaking of defendants was "decree" in terms of S. 2(2), C.P.C.---Defendants took plea that said applications could not be filed before appellate court---Validity---As admitted by defendants there were triable issues which could not be decided without framing of issues and recording of evidence---Contention that appellate court was not competent to frame issues and record evidence was misconceived---If any restraining order was passed by appellate court or there was any undertaking given by any of the parties before it which was subsequently violated, only court which could proceed further on application of any aggrieved party was the same court before whom the undertaking was given or by whom any order was passed---Appellate court should have proceeded with the matter by framing issues and giving an opportunity of hearing to the parties to lead their respective evidence---Denial of appellate court to proceed with the matter amounted to negation of dispensation of justice---When party who had undertaken before court to do an act and on basis of that undertaking proceedings were dropped, said undertaking had the effect of "decree" and was executable against defaulting party in its letter and spirit---Appellate court also failed to pass any order on application for appointment of local commission---Appellate court was duty bound to ascertain exact situation of suit property through demarcation---Impugned order passed by appellate court was nullity in eye of law which was set aside and case was remanded for decision on application---Revision petition was accepted, in circumstance.

[Paras. 8, 9, 10 & 11 of the judgment]

Muhammad Asif Chaudhry for Petitioner.
Raja Muhammad Rashid for Respondents.

Date of hearing: 5th May, 2015.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this civil revision, the petitioner has impugned order dated 12.03.2008 passed by learned Additional District Judge, Rawalpindi whereby the petition under Order XXI, Rule 32, read with Order XXXIX, Rule 2(3) of C.P.C. (hereinafter referred as "the application") for punishment to the respondents for breach of their undertaking, was dismissed.

2. Brief facts of the case are that the petitioner-plaintiff namely Muhammad Nazir, being owner in possession of the suit property, filed a suit for permanent injunction in the court of learned Civil Judge, Kahuta in respect of land measuring 6 marlas bearing property No.38 situated at Thoha Khalsa, which is an evacuee property alleging therein that the said property was allotted to the father of the petitioner through P.T.O. with specific boundaries and he is enjoying the possession of the suit land since long, whereas the respondents have no concern whatsoever with the suit land but they are intended to interfere into the possession of the petitioner and changing the nature of the suit property. Along with the suit, the petitioner also filed an application under Order XXVI, Rule 9 of C.P.C. for appointment of Local Commission for inspection of the spot. The learned Civil Judge vide order dated 15.01.2007 granted ad-interim injunction directing both the parties to maintain the status quo till the next date of hearing and Raja Habib-ur-Rehman, Advocate was appointed as a Local Commission with the direction to visit the site and submit report about the factual position at the spot. The Local Commissioner inspected the spot and submitted his report to the learned trial court. The respondents did not file any objection to the report of the Local Commission. The learned trial court accepted the application under Order XXXIX, Rules 1 and 2 of C.P.C., in the terms that the respondents were restrained from interfering into the possession of the petitioner, encroaching the suit land and from changing its nature, vide order dated 09.06.2007. The respondents being dissatisfied from the said order filed an appeal before the learned Additional District Judge which was disposed of vide order dated 06.02.2008. The operative part of the said order is reproduced as under:-

> "In view of the statement made by the learned counsel for the appellants, the suit of the respondents has born fruit and has become infructuous. This appeal is accordingly accepted, the impugned order is set aside and as a result suit of the respondents stands dismissed. No order as to costs".

Thereafter, the petitioner moved an application under Order XXI, Rule 32 read with Order XXXIX, Rule 2(3) of C.P.C. seeking punishment to the respondents for breach of their undertaking and violation of the orders passed by the learned Additional District Judge and also for restoration of possession. The petitioner also moved an application for grant of status quo and appointment of Local Commission. The learned Additional District Judge having taken cognizance of the matter summoned the respondents, who filed their written statement on 12.03.2008. The learned Additional District Judge after hearing both the parties dismissed the application of the petitioner vide order dated 12.03.2008 which is impugned in the instant civil revision. Hence this civil revision.

3. Learned counsel for the petitioner submitted that the impugned order is against the law and facts of the case; that the impugned order passed by the learned appellate court is result of misreading and non-reading of evidence; that the learned appellate court while dismissing the application remained oblivious of the law that even rejection of the plaint on the undertaking of the respondents was a decree within the meanings of section 2(2) of C.P.C. as held by this Court in the various cases; that the petitioner had moved an application for appointment of Local Commission again before the learned Additional District Judge to ascertain the physical position at the suit property, but the learned appellate court has not adverted to the same at all and dismissed the application on the same day when the respondents filed their reply to the application filed by the petitioner; that the learned appellate court has also not been able to appreciate that if the undertaking given before a court of law is allowed to be violated by any party to the proceedings then no lawful action can be taken against such a party and it will become mockery of law.

4. On the other hand, learned counsel for the respondents has supported the impugned order.

5. Arguments heard. Record perused.

6. Scanning of the record reflects that the petitioner by filing the application asserted that the respondents had violated the undertaking given by them before the learned Additional District Judge on 06.02.2008 and have trespassed over the property and constructed one room and four walls upon the suit property owned and possessed by the petitioner. He sought the restoration of the possession and initiation of proceedings against the respondents for committing the contempt of court by violating the order dated 06.02.2008.

7. In reply to the application, the respondents did not deny the undertaking given by their learned counsel before the learned appellate court but submitted that they have not violated the said undertaking. They however raised an objection that the application could not be filed before the learned appellate court as it was a court of appeal and the application could be decided only after framing of issues and recording of evidence by the learned trial court. The relevant paragraph of the written reply is reproduced as under:-

8. In my view the impugned order passed by the learned Additional District Judge/appellate court is not sustainable for the following reasons:--

> (i) That the learned Additional District Judge failed to appreciate that there was a specific admission of the respondents that there were triable issues raised in the said application which could not be decided without framing of issues and recording of evidence. The contention of the respondents that the learned Additional District Judge was not competent to frame the issues and record the evidence is absolutely misconceived. It is observed that if any restrained order is passed by an appellate court or there is any undertaking given by any of the parties before the said court but subsequently it is violated then the only court which can proceed further on application of any aggrieved

party, is the same court before whom any undertaking was given or any order was passed. Therefore, the learned Additional District Judge should have proceeded with the matter by framing the issues and giving an opportunity of hearing to the parties to lead their respective evidence. The denial by the learned Additional District Judge to proceed with this matter amounts to negation of dispensation of justice.

(ii) That a party who undertakes to do an act before the court and on the basis of that statement/undertaking, the proceedings are dropped i.e. suit or appeal is dismissed then the said undertaking has the effect of a decree and is executable against the defaulting party in its letter and spirit.

9. In the present case, the respondents undertook that they will not interfere in the suit property owned by the petitioner but allegedly they trespassed and made some construction over the suit property therefore, it was incumbent upon the learned Additional District Judge/appellate court to dilate upon the matter itself but the petitioner cannot be directed to get the demarcation of the disputed property and raise his grievance before any other legal forum. I have no doubt in my mind that it was duty of the learned appellate court to ascertain the exact situation of the suit property, it may be through demarcation of the suit property and if there was any violation made by the respondents of their own commitment/undertaking given by their counsel before the learned Additional District Judge then an appropriate order in that regard should have been passed. This aspect becomes more significant when there is an application filed by the petitioner for appointment of a local commission which remained unattended and the learned Additional District Judge failed to take notice of the same nor any order was passed thereupon.

10. The impugned order passed by the learned Additional District Judge is a nullity in the eye of law.

11. In view of the above discussion, this civil revision is allowed, the impugned order dated 06.02.2008 passed by the learned Additional District Judge is set-aside. Resultantly, the application under Order XXI, Rule 32, read with Order XXXIX, Rule 2(3) of C.P.C. along with the application under Order XXVI, Rule 9 of C.P.C. for appointment of local commission shall deem to be pending before the learned Additional District Judge, who shall decide the same afresh in accordance with law.

SL/M-157/L Revision accepted.

**2017 Y L R Note 231**
**[Lahore (Rawalpindi Bench)]**
**Before Atir Mahmood, J**
**MUHAMMAD SAGHIR---Petitioner**
**Versus**
**ADDITIONAL DISTRICT JUDGE and others---Respondents**

Writ Petition No.624 of 2013, heard on 7th May, 2015.

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

----Ss. 24, 25 & 2(b), (h)---Punjab Urban Rent Restriction Ordinance (VI of 1959), S. 13(2)---Constitution of Pakistan, Art. 199--- Constitutional petition---Arrears of rent---Determination---Powers of Rent Tribunal---Petitioner filed eviction petition which was allowed by Trial Court directing tenant to handover possession of rented premises along with payment of arrears of rent, and appeal against said order was dismissed---Contention raised by tenant was that Trial Court could evict him but could not determine arrears of rent as no provision in that regard existed under Punjab Rented Premises Act, 2009, as existed under Punjab Urban Rent Restriction Ordinance, 1959---Validity---Provision of S. 24 of Punjab Rented Premises Act, 2009 had given ample powers to Trial Court to direct tenant to deposit rent admitted between parties in addition to payment of utility bills---Trial Court after awarding tentative rent would proceed with matter and after recording evidence and hearing parties would pass final order, and, while passing final order, it would determine arrears of rent adjusting any amount already paid by tenant---If Trial Court had been given powers to determine tentative rent, it would also finally determine outstanding amount against tenant---Trial Court under Ss. 24 & 25 read with S. 2(b) & (h) of Punjab Rented Premises Act, 2009 was fully empowered to determine arrears of rent---Constitutional petition was dismissed, in circumstances. [Paras. 6, 7 & 8 of the judgment]

Agha Muhammad Ali for Petitioner.
Muhammad Siddiq Awan for Respondents.

Date of hearing: 7th May, 2015.

**JUDGMENT**
**ATIR MAHMOOD, J.**---Brief facts of the case are that on 10.05.2011, respondent No.3- Parveen Akhtar (the respondent) filed a petition for eviction of the petitioner from Shop No.NE-269, Tipu Road, Rawalpindi. The ejectment petition was ultimately allowed by learned Special Judge (Rent), Rawalpindi vide judgment and decree dated 26.09.2012 along with the direction to the petitioner to handover possession of the demised property and also pay arrears of rent @ Rs.11,000/- from June, 2008 with

10% annual increase till vacation of the shop. The appeal preferred there against was dismissed by learned Additional District Judge, Rawalpindi vide judgment and decree dated 02.02.2013. The respondent filed an execution petition which was executed and possession of the shop in question was handed over to the respondent. This writ petition has been filed against judgments and decrees of learned courts below to the extent of payment of arrears of rent.

2. Learned counsel for the petitioner chiefly contends that there was a specific provision for determination of arrears of rent in the old statute, i.e. the Punjab Urban Rent Restriction Ordinance, 1959 but this provision does not exist in the prevailing law, i.e. the Punjab Rented Premises Act, 2009 (hereinafter called "the Act, 2009"); that under the prevailing law, the learned Special Judge (Rent), Rawalpindi while passing the impugned judgment and decree dated 26.09.2012 could eject the petitioner from the rented premises but he could not determine the arrears of rent as no such provision exists in the Act, 2009. He asserts that the powers to determine the rent only vest with the civil court and not with the court of Special Judge (Rent).

3. On the contrary, learned counsel for the respondent has vehemently controverted the assertion of learned counsel for the petitioner by submitting that the learned Special Judge (Rent) had ample powers to determine the arrears of rent due against the petitioner being tenant in the demised property and this writ petition having no force merits dismissal.

4. I have heard the arguments put forth by learned counsel for the parties and also gone through the record made available before me.

5. The only point emerged from arguments of learned counsel for the parties is that whether or not learned Special Judge (Rent) has jurisdiction to determine the arrears of rent.

6. Section 24 of the Act, 2009 provides that in case an ejectment petition is filed, the Rent Tribunal, while granting leave to contest, will direct the tenant to deposit the rent due against him within a specified time and continue to deposit the same in future as well in accordance with the tenancy agreement or as may be directed by the Rent Tribunal. However, if there is any dispute between the parties regarding amount or rate of rent, the Rent Tribunal will tentatively determine the dispute and direct the tenant to deposit the rent accordingly. The Rent Tribunal may also direct the tenant to deposit the utility bills if any such amount is due against him. Needless to say that such order passed by learned Special Judge (Rent) is mandatory to be complied with by the tenant failing which he is liable to be ejected forthwith. According to section 25(5) of the Act, 2009, the Rent Tribunal shall record evidence of the parties and then

after hearing both sides will pass a final order. The words 'final order' and "rent" have been defined in subsections (b) and (h) of section 2 of the Act, 2009 as under:

> (b) "final order" means a final order passed by a Rent Tribunal culminating the proceedings including an order in respect of adjustment of pagri, advance rent, security, arrears of rent, compensation or costs but shall not include an order passed in an execution proceedings."
>
> (h) "Rent" includes arrears of rent, a utility bill and any amount that may be payable by a tenant in relation to the tenancy;

(Emphasis provided)

7. To further elaborate, under section 24 of the Act, 2009, ample powers have been given to the Rent Tribunal to direct the tenant, at the time of grant of leave to contest, to deposit the rent admitted between the parties and in case of dispute regarding quantum of rent in addition to payment of utility bills if due against the tenant. This power vested in the Rent Tribunal does not end here. The Rent Tribunal will then proceed with the matter and after recording evidence and hearing arguments of the parties will pass the final order and at that time, he will determine the arrears of rent while adjusting the tentative rent deposited or paid by the tenant, pagri, security, advance rent etc if any lying with the owner of the property. Even otherwise, if a court, forum or authority is given powers to deposit a certain amount tentatively, it does not appeal to a prudent mind that such authority will not finally determine the outstanding amount against the tenant after having adjusted the amount deposited with the court, paid or kept with the owner in shape of tentative rent, advance rent, pagri, security etc. at the time when such proceedings are culminated. If such power does not vest with it, it will not be possible for it to adjust the amount deposited on its orders. Therefore, contention of learned counsel for the petitioner that such powers were given in the Punjab Urban Rent Restriction Ordinance, 1959 under Section 13(6) but no such power is provided in the prevailing law, i.e. Punjab Rented Premises Act, 2009 is without any foundation and I am not in acquiescence therewith. The provisions of sections 24 and 25 read with Section 2(b) & (h) of the Punjab Rented Premises Act, 2009 are very much clear in this regard and under said provisions of law, the Special Judge (Rent) had ample powers to determine the arrears of rent as stated hereinbefore.

8. For what has been discussed in the preceding paragraphs, I am of the considered opinion that the prevailing statute, i.e. the Punjab Rented Premises Act, 2009, fully empowers the Special Judge (Rent) to direct the tenant to pay the rent agreed and in case of dispute regarding quantum of rent, the tentative rent, utility bills at the time of initial stage of the ejectment petition and then to determine finally the rent outstanding

against the tenant after adjusting the tentative rent deposited with the court or paid to the owner, pagri, security, advance rent, etc. if any lying with the owner. Therefore, this writ petition is without any substance. Dismissed.

SL/M-156/L Petition dismissed.

**PLJ 2017 Lahore 380**

***Present*: ATIR MAHMOOD, J.**

**SHEHZAD ALI KHAN--Petitioner**

**versus**

**ELECTION COMMISSION OF PAKISTAN etc.--Respondents**

W.P. No. 40835 of 2016, heard on 16.1.2017.

**Punjab Local Government Act, 2013 (XVIII of 2013)--**

----S. 27--Provincial Insolvency Act, 1920, S. 6--Punjab Local Government Ordinance, 2001, S. 154--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Undischarged insolvent--Being member and chairman of municipal committee--Disqualification--Decree regarding loan obtained by bank--Declared as returned candidate--Ground of non-dislcosure of decree--Not specifically mentioned decree--Not committed any of acts of insolvency cannot be termed as undischarged insolvent--Repealed--Validity--Election commission submitted that non-repealing of Section 154 was an interim arrangement only in order to protect day-to-day affairs of local bodies and it has no bearing in election matters--When new law on a subject has come into force, there is no fun to continue previous law on same subject. [Pp. 387 & 388] B

2016 SCMR 430, 2016 MLD 846, 2016 SCMR 893 &
2016 SCMR 1215, *rel*.

**Interpretation of Statute--**

----High Court cannot legislate but interpret law or statute passed by legislature--High Court cannot legislate but interpret law or statute passed by legislature--Therefore, prayer of petitioner in that regard is not acceded to. [P. 387] A

*Mr. Hafeez Saeed Akhtar*, Advocate for Petitioner.

*Mr. Azam Nazir Tarar*, Advocate, *Barrister Lehrasip Hayat Dahar*, Advocate , *Mazhar Ali Ghallu*, Advocate, *Ch. Naveed Akhtar Bajwa*, Advocate for Respondent No. 3.

*Mr. Nasir Javaid Ghuman*, Advocate and *Amer Raza*, Returning Officer for Election Commission.

Date of hearing: 16.1.2017

**JUDGMENT**

Through this constitutional writ petition, the petitioner seeks disqualification of Respondent No. 3 (hereinafter called "the respondent") from being the Member and Chairman of Municipal Committee, Teshil Daska, District Sialkot while asserting that a decree regarding loan taken by the respondent duly stands against him which has not

been declared by him while filing the nomination papers. The petitioner has also prayed that Section 27 of the Punjab Local Government Act, 2013 be declared *ultra vires* to the Constitution of Islamic Republic of Pakistan, 1973.

2. Learned counsel for the petitioner submits that the petitioner is a voter of Ward No. 23 of the Municipal Committee, Tehsil Daska; that the respondent obtained loan from the National Bank; that since the respondent did not return the said loan to the bank, a suit was filed wherein a decree of Rs. 11,743,159/- has been passed against the respondent *vide* judgment dated 12.04.2016 but the same has not been mentioned by him while filing the nomination papers; that the respondent being an 'undischarged insolvent' is liable to be disqualified; that Section 27 of the Punjab Local Government Act, 2013 being against Articles 62 and 63 of the Constitution be declared *ultra vires* the Constitution. He has relied upon the law laid down in cases titled *Ch. Muhammad Yusaf Kaselia v. Peer Ghulam Mohy-ud-Din Chishti and others* (PLD 2016 SC 689), *Muhammad Ahmad Chatta v. Iftikhar Ahmad Cheema and others* (2016 SCMR 763), *Allied Bank Ltd. through Authorized person v. Inam Ullah Khan and another* (2013 CLC 1310 Lahore), *Worker's Party Pakistan through General Secretary and 6 others v. Federation of Pakistan and 2 others* (PLD 2013 SC 406), *Rana Muhammad Hayat Khan v. Rana Imtiaz Ahmad Khan* (PLD 2008 SC 85), *Rana Muhammad Arshad v. Additional Commissioner (Revenue), Multan Divison and others* (1998 SCMR 1462), *Ch. Tanvir Khan v. President, Cantt. Board, Rawalpindi and 2 others* (1999 MLD 721 Lahore), *Ghulam Mustafa Jatoi v. Additional District and Sessions Judge/Returning Officer, No. A. 158, Naushero Feroze and others* (1994 SCMR 1299),

3. On the other hand, learned counsel for the respondent as well as learned counsel for the Election Commission have vehemently opposed this writ petition on legal as well as factual grounds. He has relied upon the law laid down in cases reported as *Zahid Iqbal v. Hafiz Muhammad Adnan and others* (2016 SCMR 430), *Liaquat Ali and others v. Returning Officer and others* (2016 MLD 846), *Muhammad Mujtaba Abdullah and another v. Appellate Authority/Additional Sessions Judge Tehsil Liaquatpur District Rahim Yar Khan and others* (2016 SCMR 893) and *Abdul Rasheed and another v. Election Appellate Authority and others* (2016 SCMR 1215).

4. Arguments heard. Record perused.

5. Scanning of record reveals that the respondent filed nomination papers alongwith others for contesting the seat of Councillor, Municipal Committee, Tehsil Daska, District Sialkot. He was declared as the Returned Candidate. Then he contested for the seat of Chairman, Municipal Committee and was elected so. The petitioner is a voter of the Halqa.

6. Main emphasis of learned counsel for the petitioner is on the point that the respondent while filing the nomination papers has since failed to mention the decree passed against him, he is not entitled to hold the Office of the Member as well as Chairman of the Municipal Committee. In this regard, he has referred to sub-rule (5) of Rule 12 of the Punjab Local Government (Conduct of Elections), Rules, 2013 (hereinafter called "the Rules"). I have gone through the said provision of law which duly demands for declaration of the assets and liabilities by the contesting candidate. I have also perused the nomination papers filed by the respondent, a copy of which has been placed before this Court. There is Annexure A to the nomination form which is regarding declaration of assets and liabilities. After declaring the assets in Annexure A, the respondent has mentioned regarding his liability while submitting that there is a house mortgaged with the National Bank, Sialkot and the amount in this regard is yet to be paid, although he has not given details of the loan. In this view of the matter, I am not in consonance with argument of learned counsel for the petitioner that the respondent has not mentioned the liability of loan to be paid by him.

7. Section 14 of the Rules being relevant in this case is reproduced below:

**"14. Scrutiny.**–(1) The scrutiny of nomination papers shall be open to the candidates, their election agents, proposers and seconders, or the persons who made objections against the nomination papers, and any voter of the constituency with the permission of the Returning Officer, before the commencement of the scrutiny, and the Returning Officer shall give all those present reasonable opportunity for examining all nomination papers delivered to him under Rule 12.

(2) The Returning Officer shall, in the presence of the persons attending the scrutiny under sub-rule (1), examine the nomination papers and decide an objection raised by any such person to a nomination.

(3) The Returning Officer may, either on his own accord or on an objection, conduct such summary inquiry as he may think fit and reject a nomination paper if he is satisfied that:--

(a) the candidate is not qualified to be elected as a member, a Chairman and a Vice Chairman, or a Mayor and a Deputy Mayor;

(b) the proposer or the seconder is not qualified to subscribe to the nomination paper;

(c) any provision of Rule 12 or Rule 13 has not been complied with; or

(d) the signature or thumb impression of the proposer or the seconder is not genuine.

(4) The rejection of a nomination paper shall not invalidate the nomination of a candidate by any other valid nomination paper.

(5) The Returning officer may, for purposes of scrutiny, require any agency or authority to produce any document or record.

(6) In case of joint candidacy, the rejection of the nomination of either a Chairman or a Vice Chairman or a Mayor or a Deputy Mayor shall be construed as rejection of nomination of all those joint candidates.

(7) The Returning officer shall not reject a nomination paper on the ground of any defect which is not of a substantial nature and may allow such defect to be remedied forthwith, including an error with regard to the name, serial number in the electoral roll or other particulars of the candidate or his proposer or seconder so as to bring them in conformity with the corresponding entries in the electoral rolls.

(8) The Returning Officer shall not enquire into the correctness or validity of any entry in the electoral roll.

(9) The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting it and, in case of rejection, record brief reasons therefor.

(10) An appeal against the decision of the Returning Officer rejecting or accepting the nomination paper of the candidate(s) may be preferred by any person present at the time of scrutiny under sub-rule (1) to the appellate authority, who shall be the District and Sessions Judge or any other judicial officer, appointed for the purpose by the Election Commission.

(11) The appeal under sub-rule (10) shall be summarily decided within such time as may be notified by the Election Commission and any order passed thereon shall be final.

(12) An appeal not disposed of within the period as notified by the Election Commission shall be deemed to have been rejected."

(Emphasis provided)

Perusal of sub-rules (1) and (2) of Rule 14 of the Rules reflects that these provisions do not restrict objections by a contesting candidate, a proposer or a seconder, rather they state that any person or even a voter of the constituency can raise objection to the nomination papers of a contesting candidate. Such objections are required to be looked into by the Returning Officer which may lead to acceptance or rejection of nomination papers. Against decision of the Returning Officer, an appeal before the appellate authority appointed by the Election Commission in light of sub-rule (10) of the Rules can also be made. Admittedly, the petitioner is a voter of the concerned Halqa. He had every right to raise objection upon nomination papers of the respondent at the time of scrutiny of the nomination papers but he did not do so. Nor

he went to the appellate authority for redressal of his grievance. Even the petitioner has not disclosed as to when and how he came to know about liability of the respondent. This leads me to the conclusion that the petitioner has not approached this Court with *bona fide* intention rather he has approached the Court with some *mala fide* or for the benefit of some other candidate. It is well settled law that any person not approaching the Court *bona fidely* is not entitled to any relief. Therefore, this writ petition is liable to be dismissed on this score alone.

8. As far as the contention of learned counsel for the petitioner that a decree has been passed against the respondent which has not been mentioned in the column of liabilities by him is concerned, suffice it to say that the respondent has challenged the validity of the decree passed against him by filing RFA No. 916/2016 which is still pending decision. It is well-settled proposition of law that an appeal is continuation of the proceedings in the suit, therefore, the decree passed by the banking Court being under-challenge cannot be said to be the final decree against the respondent. The decision in appeal may come in favour of or against the respondent. If the respondent is disqualified on the basis of the said decree but the decree awarded against him is set aside at a later stage, there will be no compensation available for the respondent for the intervening period when he is out of the said offices. Even otherwise, clause (j) regarding the disqualification of a candidate on the basis of default specifically provided under sub-section (1) of Section 152 of Local Government Ordinance, 2001 has been excluded in the Local Government Act, 2013. This Court can only interpret the statue but cannot circumvent the intention of the legislator. In this view of the matter, I am not inclined to upset the election of the respondent merely on the basis of the decree which is under challenge so far.

9. Another aspect of the matter is that an election petition on the same allegation of non-disclosure of the liabilities against the respondent is pending adjudication before the Election Tribunal. If this Court in its constitutional jurisdiction disqualifies the respondent from the positions of the Member and the Chairman, the election petition on the same set of facts and allegations filed against the respondent will become infructuous and the purpose of the remedy available before the Election Tribunal will stand circumvented. Moreover, parallel proceedings for one and the same cause are not permitted under the law. The petitioner either should approach the Election Tribunal for redress of his grievance or wait for decision of the Election Tribunal and then approach this Court for redressal of his grievance if still persists at that time.

10. On one hand, the petitioner on the strength of Section 27 of the Punjab Local Government Act, 2013 has sought disqualification of the respondent on the ground that he is a "discharged insolvent" whereas on the other hand, he has prayed that the said section be declared *ultra vires* to the Constitution. So far as the disqualification of the respondent on the ground of non-disclosure of the decree

passed against him is concerned, no such ground is provided under sub-section (2) of Section 27 of the Act which deals with disqualification of a returned candidate. The disqualification of the respondent under Section 27(2)(c) of the Act, *i.e.* on the ground of "undischarged insolvent", there is no definition provided in the Punjab Local Government Act of "undischarged insolvent". In absence of definition of "undischarged insolvent" in the Act, the applicable law is the Provincial Insolvency Act, 1920 (hereinafter called the PIA, 1920") which deals with the subject of insolvency. Section 6 of the Act *ibid* being relevant is reproduced as under:

> **"6. Acts of insolvency.** A debtor commits an act of insolvency in each of the following cases namely:--
>
> (a) if, in the Provinces and the Capital of the Federation or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;
>
> (b) if, in the Provinces and the Capital of the Federation or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;
>
> (c) if, in the Provinces and the Capital of the Federation or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;
>
> (d) if, with intent to defeat or delay his creditors,---
>
> (i) He departs or remains out of the Provinces and the Capital of the Federation;
>
> (ii) He departs from his dwelling-house or usual place of business or otherwise absents himself;
>
> (iii) He secludes himself so as to deprive his creditors of the means of communicating with him;
>
> (e) If any of his property has been sold in execution of the decree of any Court for the payment of money;
>
> (f) If the petitions to be adjudged an insolvent under the provisions of this Act;
>
> (g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts; or
>
> (h) If he is imprisoned in execution of the decree of any Court for payment of money."

The minute perusal of the above provisions coupled with the allegation levelled by the petitioner against the respondent that he has not specifically mentioned the decree passed against him clearly reveals that the respondent has not committed any of the acts of insolvency detailed in Section 6 of the PIA, 1920, as such, he cannot be termed as "undischarged insolvent". Therefore, the respondent, in my opinion, cannot be

disqualified on the said ground of insolvency in constitutional jurisdiction of this Court. The case law reported as *Liaqat Ali and others v. Returning Officer and others* (2016 MLD 846 Lahore) is referred in this regard.

11. Regarding assertion of learned counsel for the petitioner that Section 27 of the Punjab Local Government Act, 2013 is *ultra vires* to the Constitution, the same matter came before the apex Court in case reported as *Zahid Iqbal v. Hafiz Muhammad Adnan and others* (2016 SCMR 430) wherein it has been held that:

> "It is not the function of the Court to read into any provision and or words that are not part of the statute, unless imported or made applicable specifically as has been done under the Sindh Local Government Act, 2013, wherein Section 36(j) clearly imports disqualification "under any law it reads for the time being in force". It is neither the duty nor the function of the Court to read into or delete any word and or provisions in an enactment, unless specifically adopted or imported by reference. Courts do no legislate but interpret statute according to their ordinary and plain meaning and do not import and or supply word or provisions from "any other law", no matter how laudable and desirable it may appear to be. In this view of the matter, disqualification prescribed under "any law" or even in "The Constitution" unless as noted above are specifically made applicable or adopted by reference, specially penal and or castigatory provisions contained in "any law" cannot be imported, read into or inflicted on a person who put forth his candidature to be elected as a Member or to hold an elected office of Punjab Local Government but his qualification and or disqualification for any office of the Punjab Local Government is to be adjudged strictly under the provisions of "the Act, 2013" only."
>
> (Underline is mine)

In view of the dictums laid down by the Hon'ble Supreme Court of Pakistan in the above case, this Court cannot legislate but interpret the law or statute passed by the legislature. Therefore, the prayer of the petitioner in this regard is not acceded to.

12. The argument of learned counsel for the petitioner is that Section 154 of the Punjab Local Government Ordinance, 2001 has not been repealed in the Punjab Local Government Act, 2013 as per notification dated 13.09.2013. When confronted with, learned counsel for the respondent as well as learned counsel appearing on behalf of the Election Commission submit that non-repealing of Section 154 *ibid* was an interim arrangement only in order to protect day-to-day affairs of the local bodies and it has no bearing in the election matters. Even otherwise, when the new law on a subject has come into force, there is no fun to continue the previous law on the same subject. The said argument of learned counsel for the respondents has force which is accordingly accepted. The case law relied upon by learned counsel for the

petitioner pertains to the elections of Members of National and Provincial Assemblies as well as that of the Senate and is not applicable to the case in hand.

13. For what has been discussed above, this writ petition has no force, hence dismissed.

(R.A.) Petition dismissed

**2017 M L D 856**
**[Lahore (Rawalpindi Bench)]**
**Before Atir Mahmood, J**
**Malik SHAFAQAT HUSSAIN---Petitioner**
**Versus**
**CHIEF ELECTION COMMISSIONER, PUNJAB and 5 others---Respondents**

Writ Petition No.3097 of 2016, heard on 29th November, 2016.

**Punjab Local Government (Conduct of Elections) Rules, 2013---**

----R. 36(5)---Election for local government---Recounting of ballot papers---Scope---Candidate moved application for recounting of votes but same was rejected by the Returning Officer---Validity---Votes would be deemed to be rejected if were rejected by the competent authority i.e. Presiding Officer and not by any other authority---Where no vote rejected was no question of counting rejected votes in favour of opposite candidate would arise---Returning Officer was not bound to recount the ballot papers on each and every request/challenge but for any such action either he himself should be satisfied or by the person who had challenged the validity of the votes---Returning Officer, in the present case, had seen the record produced before him by the candidate as well as the Presiding Officer and found that application for recounting of votes was without merit---Returning Officer was competent to decline application of candidate for recounting of votes---Candidate could approach the Election Tribunal with regard to validity of votes impugned by him if so advised as factual controversy could not be resolved under constitutional jurisdiction---Constitutional petition was dismissed in circumstances.

Karamat Hussain and another v. Election Commission of Pakistan through Provincial Election Commissioner (Punjab) and 7 others PLD 2016 Lah. 491 ref.

Malik Jawwad Khalid for Petitioner.

Fazal ur Rehman and Abdul Qayyum Qasuri, Returning Officer for Respondent.

Date of hearing: 29th November, 2016.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the petitioner and respondent No.6 filed their nomination papers for the seat of "Peasant", Union Council-108, Takhat Parri, Tehsil and District Rawalpindi; that the election was held on

19.11.2016; that both the candidates obtained equal votes whereafter on the basis of toss held on 21.11.2016, respondent No.6 was declared a returned candidate; that on 21.11.2016, the petitioner filed objection that one 'rejected vote' has also been counted in order to favour respondent No.6 illegally which application was dismissed vide order dated 21.11.2016. Hence this writ petition has been filed.

2. Arguments heard. Record perused.

3. The only contention of learned counsel for the petitioner before this Court is that there were 8 votes out of which the petitioner obtained four votes and respondent No.3 obtained 3 votes whereas one vote was rejected but that 'rejected vote' was counted in favour of respondent No.6 to give him undue favour, therefore, the Returning Officer was under legal obligation after objection by the petitioner to order for recounting.

In this regard, he has referred Rule 36(5) of the Punjab Local Government (Conduct of Elections) Rules, 2013 and relied upon judgment of this Court reported as "Karamat Hussain and another v. Election Commission of Pakistan through Provincial Election Commissioner (Punjab) and 7 others (PLD 2016 Lahore 491)".

4. I have gone through the record made available on file by the petitioner as well as the respondents. According to the record, total eight votes were cast. Out of which both the candidates, i.e. the petitioner and respondent No.6, obtained votes in equal number, i.e. four each. The record further reveals that none of the votes cast was rejected by the Presiding Officer. When confronted with, learned counsel of the petitioner submits that since, one vote contained stamp in between the lines over the place where the names of both the contested candidates were written, therefore, it comes within the definition of 'rejected vote".

In my view, a vote will-be deemed to have been rejected if it is rejected by the competent authority, i.e. the Presiding Officer and not by anybody else.

Therefore, I am not in consonance, with argument of learned counsel for the petitioner that there was "one rejected vote" which was counted in favour of respondent No.6. In my considered view, there was no rejected vote, as such, no question of counting 'rejected vote in favour of respondent No.6' arises.

5. Learned counsel for the petitioner in support of his arguments has referred sub-rule (5) of Rule 36 of Punjab Local Government (Conduct of Elections) Rules, 2013 which is reproduced below:--

"36(5) The Returning Officer may recount the valid ballot papers before consolidation of results:--

(a) upon the request or challenge in writing made by, a contesting candidate or his election agent and if the Returning Officer is satisfied that the request or the challenge is reasonable; or

(b) if so directed by the Election Commission.

Bare reading of above, provision of law reveals that the Returning Officer is authorized to recount the ballot papers on the request/challenge by a contesting candidate provided the Returning Officer is satisfied that such request/challenge is reasonable. Meaning thereby it is not mandatory, for the Returning Officer to recount the ballot papers on each and every request/challenge but for the same, either he himself is satisfied or he is satisfied by the person who makes such request or challenge validity of the votes.

Perusal of impugned order reveals that the Returning Officer has seen the record produced before him by the petitioner as well as the Presiding Officer and found application of the petitioner without merit. In this view of the matter, it may be concluded that the Returning Officer was dissatisfied with the averments made by the petitioner in his application, therefore, he did not accede to request of the petitioner.

I have also gone through the application of the petitioner submitted before the Returning Officer. It merely alleges that one rejected vote was also counted in favour of respondent No.6 in order to give him undue favour but it does not state the story asserted before this Court today that the stamp on the vote was in between lines of the names of both the candidates.

Since the petitioner has failed to justify the recounting of votes, the Returning Officer was competent to decline application of the petitioner and the said act of the Returning Officer was within his jurisdiction.

6. Regarding validity or otherwise of, the vote impugned by the petitioner, he, if so advised, may approach the Election Tribunal as this matter, being a factual controversy, cannot be resolved by this Court in its constitutional jurisdiction. The case law relied upon by learned counsel for the petitioner being distinguishable on facts is not helpful to the petitioner. In the circumstances, I see no illegality in the impugned order.

7. In view of what has been discussed above, this writ petition fails which is accordingly dismissed.

ZC/S-83/L Petition dismissed.

**2018 C L C Note 25**

**[Lahore]**

**Before Atir Mahmood, J**

**ABID HUSSAIN SHAH and 2 others---Petitioners**

**Versus**

**AURANGZEB and 5 others---Respondents**

Civil Revision No. 9 of 2014, heard on 15th June, 2017.

**(a) Gift---**

----Ingredients--- Gift mutation--- Proof of--- Procedure--- Family settlement---Scope---Contention of plaintiffs was that transaction of gift was forged and fictitious---Suit was dismissed concurrently---Validity---Onus to prove valid gift was on the defendants being beneficiaries of disputed mutation---Attestation of gift mutation was a subsequent step to the gift transaction---Prior to attestation of gift mutation there was transaction of gift which was required to be established---Ingredients of gift i.e. offer, acceptance and delivery of possession were required to be proved by beneficiary if gift made in his favour was challenged---Written statement and evidence of defendants were silent as to how, when and in presence of whom suit property was gifted by the donor in their favour---Nothing was on record as to when and in whose presence offer was made, when it was accepted and when possession was handed over to the defendants by the donor---Ingredients of gift which allegedly led to attestation of disputed gift mutation were missing in the present case---Defendants had failed to prove the factum of gift in their favour in circumstances---Mutation of gift was required to be proved through credible and unimpeachable evidence as required by law---Ingredients of gift being not complete on the date of entry or attestation of mutation, mere assertion or supposition was not sufficient to reach a conclusion---If there was any settlement between the parties, defendants should have pleaded in the written statement and proved the same through evidence---Non-mentioning of factum of family settlement and non-leading of any evidence to prove thereof would lead an inference that there was no family settlement between the parties---Revision was allowed and suit was decreed in circumstances.

[Paras. 10, 11, 12, 13 & 15 of the judgment]

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

----S. 115--- Revisional jurisdiction of High Court---Scope---Concurrent findings recorded by the courts below not to be interfered with in revisional jurisdiction by the High Court unless there was some material illegality, mis-reading or non-reading of evidence or jurisdictional defect. [Para. 14 of the judgment]

Hafeez-ur-Rehman Mirza for Petitioners.
Arshad Malik Awan for Respondents.

Date of hearing: 15th June, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that the petitioners filed a suit for declaration with the averments that father of the petitioners namely Muhammad Ashraf Ali Shah owned land measuring 41 kanals 19 marlas out of Khata No.515/476 (total land 78 kanals 10 marlas) and land measuring 4-kanals 6 marlas out of Khata No.516/477 (total land 16 kanals) i.e. 46 kanals 5 marlas in the revenue estate of Mauza Farid Mahmood Kathia, Tehsil Shorkot, District Jhang who had two wives; that the petitioners are sons and daughters of his first wife whereas respondents Nos.1 to 5 (hereinafter called "the respondents") are from his second wife; that it is the assertion of the respondents that predecessor of the parties transferred the said property in their favour vide mutation No.1870 on 17.04.2000; that the predecessor of the parties after remaining confined to bed for a long time ultimately expired in March, 2001 on account of failure of his kidney; that the deceased had attack of paralysis and he was unable to speak or move due to which he was confined to bed till his death; that the respondents taking undue benefit of illness of father of the parties got transferred the property through said mutation by way of gift in connivance with the revenue staff; that the deceased never went to Patwari or Revenue Officer nor he appeared before any such officer to make statement with regard to said gift; that the transaction of gift is forged and fictitious, therefore, the same be declared so.

2. The respondents contested the suit by way of filing written statement. Out of divergent pleadings of the parties, following issues were framed:

**ISSUES**

1. Whether the plaintiffs and defendant No.6 are the legal heirs of the deceased Muhammad Ashraf Ali Shah and as such they are owners in possession of the disputed property? OPP.
2. Whether the mutation No.1870 decided on 17.04.2000 in favour of defendants Nos.1 to 5 is against law, based on fraud, collusion and inoperative upon the rights of the plaintiffs? OPP.
3. Whether the plaintiffs are entitled to get the declaratory decree for the suit land as prayed for? OPP.
4. Whether the plaint is not maintainable in its present form and is liable to be dismissed? OPD.

5. Whether the plaintiffs are not in possession over the suit land and the suit is not maintainable? OPD.

6. Whether the suit by the plaintiffs is liable to be dismissed in lieu of concealment of facts as averred through serial No.6 of the written statement? OPD.

7. Whether the suit by the plaintiffs is liable to be dismissed as the same is hit by the rule of estoppel? OPP.

After framing of issues, evidence of the parties was recorded. Then, learned trial court dismissed the suit of the petitioners-plaintiffs vide judgment and decree dated 26.04.2012. The appeal preferred thereagainst was also dismissed vide judgment and decree dated 01.10.2013 passed by learned lower appellate court. Hence this civil revision has been filed assailing both the judgments and decrees of learned courts below.

3. Learned counsel for the petitioners inter alia contends that attestation of gift mutation was a subsequent step prior to which the gift had been made by the donor but the written statement as well as the evidence of the respondents is totally silent as to how, when and in whose presence the property was gifted to them; that no proof of family settlement as asserted by the respondents has been brought on record; that when the ingredients of gift were missing, the gift mutation in favour of the respondents could not sustain; that the learned courts below have utterly overlooked this aspect and have passed the judgments and decrees against the law, therefore, this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the petitioners be decreed as prayed for.

4. On the other hand, learned counsel for the respondents submits that there are concurrent findings of law and fact against the petitioners which are immune from interference by this Court in its revisional jurisdiction; that the predecessor of the parties had gifted the property to the plaintiffs and the defendants; that when the plaintiffs had themselves received the property through gift, they were estopped to challenge the gift made in favour of the defendants; that there was family settlement between the parties in light of which some property was gifted out to the plaintiffs and some to the defendants. He asserts that this civil revision is without any merit and the same merits dismissal.

5. Arguments heard. Record perused.

6. The moot point in this case is as to whether the property was gifted out to the respondents-defendants validly and lawfully or not.

7. The petitioners have specifically challenged gift mutation No.1870 dated 17.04.2000 allegedly got attested by predecessor of the parties Muhammad Ashraf Ali Shah. In response thereto, the defendants have asserted that the gift mutation was got attested by their predecessor while appearing himself before the revenue officer and that the health of the predecessor at that time was very good. They also take plea that the predecessor of the parties has also gifted out the property to the plaintiffs as well and gift mutation No.1001 was attested on 26.02.2001 in favour of plaintiff No.2, 10/13 days prior to death of their predecessor which is sufficient to establish health of their predecessor.

8. So far as gifting of the property to the plaintiffs through gift mutations is concerned, the gifts or gift mutations in favour of the plaintiffs have not been challenged by the defendants, therefore, I am not going to look into their validity. In this suit, validity of gift mutation No.1870 dated 17.04.2000 allegedly made by predecessor of the parties in favour of the defendants is under challenge and I will confine myself to the same only.

9. Petitioner No.1-plaintiff appeared before the court as PW.1 and reiterated the contents of the plaint while alleging that the suit property was never gifted to the defendants by predecessor of the parties and the disputed mutation is result of fraud and forgery.

10. Being beneficiaries of the disputed mutation, the onus to prove the valid gift was on the defendants. The defendants have taken plea that the suit property was gifted by their predecessor to them through oral gift and gift mutation was got attested by their predecessor by appearing himself before the revenue officer. Attestation of mutation of gift is a subsequent step. Prior to attestation of gift mutation, there is transaction of gift which is required to be established. There are three ingredients of gift, i.e. offer, acceptance and delivery of possession which are required to be proved by the beneficiary if the gift made in his favour is challenged. I have gone through the whole written statement as well as the evidence of the defendants. The written statement and evidence of the defendants are silent as to how, when and in presence of whom the suit property was gifted by the predecessor of the parties in favour of the defendants. There is even no mention as to when and in whose presence, the offer was made, when it was accepted by the defendants and when the possession of the property was handed over to the defendants by their predecessor. In the circumstances, all the three ingredients of gift which allegedly led to attestation of disputed gift mutation in favour of the defendants are missing and the defendants have badly failed to prove the factum of gift in their favour.

11. If it is presumed that the oral gift was made at some date other than that of the disputed mutation, the mutation of the gift was required to be proved through credible

and unimpeachable evidence, as required by law. In this regard, the defendants produced DW.2 Allah Baldish Patwari who deposed that Sharaf Shah came to him for attestation of mutation No.1870. In cross-examination, he stated that the mutation was entered at about 1.00 p.m. and attestation of the same was made at 3.00 p.m. He further deposed that the mutation was entered in the Consolidation Office whereas it was attested in Fareed Mahmood Kathia. DW.3, the alleged witness of the mutation in his cross-examination, stated that the mutation was entered at 3.30 p.m. in Colony Qasimabad School and it was not entered in the Consolidation Office. DW.4, the defendant himself, stated the time of attestation of mutation as 1.30 p.m. According to DW.3, Manzoor Hussain, the mutation was entered in Colony Qasimabad in a school whereas DW.4, the defendant, stated that the mutation was entered in the building of old Tehsil. This is a material contradiction in the statements of the witnesses.

12. According to Exh.Pl, the mutation was entered on 24.03.2000 and it was attested on 17.04.2000 but none of the defendant witnesses deposed about the date of entry of the mutation. However, DW.4, in his cross-examination, stated that the attestation was made after 20 days of its entry, which when calculated comes to 24 days. Further, the other witness of the mutation namely Ghulam Baqar was not produced in the witness box which also casts serious doubts about the lawful attestation of the mutation. The entry of the mutation and its subsequent attestation was the outcome of an alleged oral gift. None of the witnesses of the gift produced by the defendants uttered even a single word that at the time of mutation, the property was orally gifted to the defendants. As admitted by DW.4, the defendant, the other beneficiary of the oral gift Shah Jahan was not present. None of the remaining defendants, the daughters of the deceased of Muhammad Ashraf Shah, were present on the spot. This leads me to a definite conclusion that the ingredients were not completed on the date of entry or attestation of the mutation and if the same was not done on that date, then transaction of oral gift was at some earlier date but neither there is any assertion in the written statement nor evidence was produced in this regard.

13. The defendants have taken plea that there was family settlement between the parties. I am afraid that neither this factum was asserted in the written statement nor any evidence to prove the factum of family settlement was led. Mere assertion or supposition is not sufficient to reach a conclusion. If there was any family settlement between the parties, the defendants should have pleaded in the written statement and proved the same through evidence. Non-mentioning of factum of family settlement and non-leading of any evidence to prove thereof leads me to an inference that there was no family settlement between the parties as averred by the defendants.

14. There is contention of learned counsel for the respondents that the concurrent judgments and decrees cannot be interfered with by this Court in its revisional

jurisdiction. There is no cavil to the proposition of law that concurrent findings should not be interfered with in revisional jurisdiction by this Court but where there is some material illegality, misreading or non-reading of evidence or jurisdictional defect, this Court has ample powers to interfere therewith and rectify the illegality committed by learned courts below. The contention of learned counsel for the respondents is accordingly repelled.

15. For the aforementioned reasons, this civil revision is allowed, the impugned judgments and decrees are set aside and the suit of the petitioners-plaintiffs is decreed as prayed for.

ZC/A-88/L Revision allowed.

**2018 C L C 685**

**[Lahore]**

**Before Atir Mahmood, J**

**FARKHANDA BIBI and others----Petitioners**

**Versus**

**MEHMOOD MUNIR and others----Respondents**

Civil Revision No.3123 of 2015, decided on 15th November, 2017.

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

----S. 42---Suit for declaration---Limitation---Transaction in favour of minor---Benami transaction---Ingredients---Contention of plaintiffs was that their predecessor purchased suit property in the name of minor son being Benami and they were entitled for their legal shares---Suit was dismissed concurrently---Validity---Ingredients of Benami transaction were motive, consideration, possession of property and possession of original documents---Predecessor of parties after retirement from service purchased suit property with amount of pension and gratuity---When father of minor defendant purchased suit property from his own declared funds/money then there was no need to hide the same from any one or purchase the same in the name of minor son as a Benami transaction---Defendant at the time of sale deed was minor having no source of income and consideration amount was paid by the predecessor of the parties---Mere infancy or childhood of defendant did not make the sale transaction in his favour as Benami transaction---Possession of suit land was with the defendant---Plaintiffs could not discharge the onus to prove that impugned transaction was Benami transaction---Suit property was knowingly and deliberately purchased by the predecessor of the parties in favour of his only son due to love and affection---Suit property was purchased in the year 1940 and predecessor of the parties remained alive till 1967---Predecessor in his lifetime neither made any effort to get the suit property in his name nor challenged the same before any appropriate forum---Defendant had alienated some land through mutation of gift in favour of her sisters on 12-03-1973---Plaintiffs were aware that suit property was in the name of defendant since 1973---Mother of plaintiffs in whose shoes they had stepped into was alive at that time and remained alive till 2000 but she never challenged the disputed transaction in her life time---Plaintiffs had challenged the disputed transaction after eight years of the death of their mother---Suit was barred by time in circumstances---No illegality was pointed out in the impugned judgments and decrees passed by the courts below---Revision was dismissed in circumstances.

Mst. Farida Malik and others v. Dr. Khalida Malik and others 1998 SCMR 816; Mst. Asia Bibi v. Dr. Asif Ali Khan and others PLD 2011 SC 829; Muhammad Nawaz Minhas and others v. Mst. Surriya Sabir Minhas and others 2009 SCMR 124; Muhammad Sher and another v. Muhammad Sher and others 1986 SCMR 1592 and Chuttal Khan Chachar v. Mst. Shahida Rani and another 2009 CLC 324 ref.

Ghulam Murtaza v. Mst. Asia Bibi and others PLD 2010 SC 569 rel.

**(b) Benami transaction---**

----Ingredients---Ingredients of Benami transaction were motive, consideration, possession of property and possession of original documents. [p. 689] A

Ahmad Waheed Khan, Ali Masood Hayat and Muslim Abbas for Petitioners.
Naveed Shahryar Sheikh, Ms.Humaira Bashir Chaudhury, Talat Farooq Sheikh and Ms. Ayesha Jabeen for Respondents.
Date of hearing: 23rd October, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.---** Brief facts of the case are that on 28.11.2008, the petitioners-plaintiffs filed a suit for declaration with permanent injunction with the averments that the predecessor of the parties namely Raheem Bukhsh was employee in Railway Department as a Station Master; that he purchased land measuring 542 kanals, 3 marlas as Benami in the name of his minor/infant son Muhammad Munir vide sale deed No.594 registered on 08.04.1940 and the fact about the minority of said Muhammad Munir is evident from the contents of the above said sale deed; that accordingly, on 29.06.1942, mutation of sale bearing No.69 was sanctioned in result of above said sale deed in the name of Muhammad Munir; that the suit property remained in the sole possession of the predecessor of the parties till 1954; that throughout this period, Muhammad Munir was just a benamidar; that motive for getting the sale deed registered in the name of defendant No.1 i.e. minor son was government service of Raheem Bukhsh; that Raheem Bukhsh was owner of agricultural as well as residential land measuring about 200 kanals in Chak Kacha Paka Tehsil Patoki District Kasoor and he purchased agricultural as well as residential land measuring about 184 kanals in Village Aaggian Wasoo Tehsil and District Lahore and sale deed was got registered as Benami in the name of his relative namely Hassan Din; that regarding the said land, a case was filed by Muhammad Munir to get declared the sale deed as Benami which was afterward compromised by Muhammad Munir after receiving money; that Raheem Bukhsh in his life time again sold property to his son Muhammad Munir in the presence of close relatives/family members; that the real mother of the plaintiffs and daughter of Raheem Bakhsh namely Zuhra Begum along with legal heirs were entitled to their legal share in all the property owned by the said Raheem Bukhsh in all the three villages i.e. Chak No.39/UCC Tehsil Ferozewala District Sheikhupura, Saggian Wasoo and Chak No.43 Kacha Paka Tehsil Patoki District Lahore; that the suit property situated in Chak No.39/UCC Tehsil Ferozewala District Sheikhupura was only purchased in the name of defendant No.1 Muhammad Munir as Benami as at that time he was minor having no source/purchasing power and total consideration amount was paid by Raheem Bukhsh; that in 1949, the real mother of defendants Nos.1, 2 and 4 died and

afterwards, the maternal grand parents of defendants Nos.1, 2 and 4 took them away from the custody of their real father Raheem Bukhsh because all of them were infants/children; that in 1954, maternal grandfather namely Muhammad Hussain of defendant No.1 pretending himself as guardian and putting undue influence on defendant No.1 and with mala fide intention got mortgaged the suit property in favour of his own son namely Muhammad Akhtar; that afterwards in 1960, the predecessor of the parties namely Raheem Bukhsh in result of an accident lost his eye sight; that during the above-mentioned period Raheem Buksh tried to receive his children back and to redeem the suit property from Muhammad Akhtar which was later on redeemed in 1973; that defendant No.1 after attaining the age of maturity continuously kept the property under encumbrances illegally with malafide intention inspite of having no exclusive title of the suit property and he was just as a trustee; that after the death of Raheem Bukhsh in 1967 Benamidar Muhammad Munir being just as a trustee of the suit property did not deliver the proper share of said property to the legal heirs of Raheem Bukshh; that defendant No.1 with the connivance of revenue employees by misrepresentation and concealment of facts deprived defendants Nos.2, 4 and mother of plaintiffs from their legal share in the suit property; that later on Muhammad Munir defendant No.1 vide oral mutation of hiba No.239 attested on 12.03.1973 alienated the land measuring 141 kanals 4 marlas in the name of defendant No.4 Suraya Jabeen (deceased) defendant No.2 Jameela Begum in lieu of satisfying their shares in the property situated in village Saggian Wasoo and Chak No.43 Kacha Paka Tehsil and District Lahore and defendant No.1 promised defendant No.4 that he is bound to transfer the legal share to all legal heirs of Raheem Bukhsh in the property situated in Chak No.39/UCC, Tehsil Ferozewala, District Sheikhupura and that will be transferred in their names accordingly; that since mother of plaintiffs namely Zuhra Begum was step sister of defendant No.1, she was totally deprived from her 1 /5th legal share in the whole property, specifically in the suit property situated in Chak No.39/UCC, Tehsil Ferozewala District Sheikhupura; that defendant No.1 neither disclosed the suit property as well as the other property situated in other revenue estates nor the transactions in respect of the above mentioned property were disclosed to Zuhra Begum, mother of the plaintiffs till her death with malafide intention; that 8 months ago, the plaintiffs came to know that defendant No.1, Muhammad Munir with the connivance of defendant No.2, Jameela Begum had secretly alienated the land measuring 217 kanals 15 marlas, fully described in para 7 of the plaint, in order to deprive the plaintiffs and other legal heirs from their lawful rights; that the plaintiffs are owners of 1/5th share in the property illegally and fictitiously owned by defendants Nos.1 to 3 situated in Chak No.39/UCC, Tehsil Ferozewala District Sheikhupura; that sale deed No.594 dated 08.04.1940 and in result of that, mutation No.69 attested on 29.06.1940 in the name of defendant No.1 is a benami transaction and the above-said sale deed mutation and afterwards entries in the revenue record to the extent of suit property are illegal and fictitious; that all the entries in the revenue

record regarding ownership of defendants Nos.1 to 3 are illegal, based on malafide and fraud as such, these are inoperative upon the rights of the plaintiffs and liable to cancellation and the plaintiffs are entitled to land/property according to their legal share; that defendants Nos.1 to 3 have flatly refused to admit the claim of the plaintiffs and are bent upon to alienate the suit property, therefore, they be restrained to do so.

2. Summonses were issued. Defendant No.2 was proceeded against ex parte whereas defendants Nos.1 and 3 contested the suit by filing written statement. Out of divergent pleadings of the parties, issues were framed. Evidence led by the parties was recorded whereafter learned trial court proceeded to dismiss the suit vide judgment and decree dated 16.04.2013. The petitioners-plaintiffs feeling dissatisfied preferred appeal which was also dismissed by learned lower appellate court vide judgment and decree dated 03.09.2015. Hence this civil revision has been filed by the petitioners-plaintiffs.

3. Learned counsel for the petitioners inter alia contends that the judgments and decrees of learned courts below are against law and fact; that the learned courts below have failed to apply their judicious mind; that the evidence of the parties has not been appreciated in its true perspective; that the plaintiffs being legal heirs of predecessor of the parties namely Raheem Bukhsh are entitled to their legal share in the property left by him; that the defendants have committed fraud and got transferred the property in their names in connivance of the revenue officials, therefore, the revenue entries showing ownership of the defendants over the suit property be struck down; that the instant civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the petitioners-plaintiffs be decreed as prayed for. He has relied upon the law laid down in cases titled Mst. Farida Malik and others v. Dr. Khalida Malik and others (1998 SCMR 816) and Mst. Asia Bibi v. Dr. Asif Ali Khan and others (PLD 2011 SC 829).

4. On the other hand, learned counsel for the respondents has vehemently opposed this civil revision and fully supported the impugned judgments and decrees. He has placed reliance on the dictums laid down in cases titled Ghulam Murtaza v. Mst. Asia Bibi and others (PLD 2010 SC 569), Muhammad Nawaz Minhas and others v. Mst. Surriya Sabir Minhas and others (2009 SCMR 124), Muhammad Sher and another v. Muhammad Sher and others (1986 SCMR 1592) and Chuttal Khan Chachar v. Mst. Shahida Rani and another (2009 CLC 324 Karachi).

5. Arguments of learned counsel for the parties have been heard and record also perused.

6. The debatable points in this case are (i) as to whether the sale transaction by predecessor of the parties namely Raheem Bakhsh in favour of defendant No.1

Muhammad Munir was a benami transaction and (ii) as to whether the suit was barred by time.

7. There are certain ingredients of benami transaction including motive, consideration, possession of the property and possession of the original title document.

8. The benami transaction was alleged by the plaintiffs and the onus to prove the same was also put upon them. Admittedly, the suit property was purchased by Raheem Bakhsh vide registered sale deed No.594 dated 08.04.1940 in the name of his minor son-defendant No.1 Muhammad Munir. The motive as set up by the plaintiffs in the plaint is that their predecessor was a government servant employed as Station Master in Pakistan Railways, therefore, he, in order to save himself from certain prospective inquiries, avoided to purchase the suit property in his name and preferred to purchase the suit property in the name of his minor son Muhammad Munir. It is evident from the registered sale deed that at the time of the sale deed, Raheem Bakhsh had been retired from the service of Station Master. It appears that Raheem Bakhsh, after his retirement from service, purchased the suit property with the amount of his pension/gratuity. When Raheem Bakhsh was purchasing the property from his own declared funds/money, there was no need to hide the purchase from any one or purchase the same in the name of his minor son as a benami transaction. Even if it is presumed that the property was being purchased through some black money, then, the transaction would not have been in the name of immediate legal heir of Raheem Bakhsh rather in the name of some other relative or friend. Being father of defendant No.1, it was right of Raheem Bakhsh to secure future of his only son which he could not be deprived from by any law of the land. Undeniably, defendant No.1, at the time of the sale deed, was a child having no source of income and the consideration amount was undoubtedly paid by predecessor of the parties. But mere infancy or childhood of defendant No.1 does not make the sale transaction in his favour a benami transaction. The Hon'ble Supreme Court in case reported as Ghulam Murtaza v. Mst. Asia Bibi and others (PLD 2010 SC 569) has gone one step ahead to hold that once a sale transaction is made by father in favour of his minor child, he himself has no right to challenge the same. So far as possession of the suit property is concerned, it is candidly admitted by the plaintiffs that the same, after death of Raheem Bakhsh, has always been remained with defendant No.1. No party has brought on record the original title documents of the suit property on record, rather certified copies of the same after obtaining from the revenue department have been put on file. In the circumstances, the onus to prove that the impugned transaction was a benami transaction could not be discharged by the plaintiffs which leads me to the conclusion that the disputed transaction was not a benami transaction rather the property was knowingly and deliberately purchased by predecessor of the parties in favour of his only minor son due to love and affection.

9. The other debatable point in this case is as to whether the suit was barred by time. The suit property was undisputedly purchased by predecessor of the parties namely Raheem Bakhsh in 1940 in the name of defendant No.1. Raheem Bakhsh remained alive till 1967, according to version taken in the plaint by the plaintiffs themselves, but Raheem Bakhsh in his lifetime neither made any effort to get the suit property in his name nor challenged the same before any appropriate forum. Furthermore, the plaintiffs have admitted in the plaint that defendant No.1 alienated some land through mutation of gift No.239 attested on 12.03.1973 in favour of her real sisters namely Mst. Jameel and Mst. Surriyya Jabeen and at that time, he promised that each and every legal heirs will get his/her share from the property of Raheem Bakhsh. Meaning thereby, they, at least in 1973, were aware that the suit property was in the name of defendant No.1. The mother of the plaintiffs in whose shoe the plaintiffs has stepped into was alive at that time and remained alive till 2000 but she never challenged the disputed transaction in her life time. Even, the plaintiffs have challenged the disputed transaction after eight years of death of their mother, therefore, the suit, in my considered opinion, was badly barred by time and was liable to be dismissed on this score alone.

10. There are concurrent findings against the petitioners which are immune from interference by this Court in its revisional jurisdiction unless there is some gross illegality floating on their surface. Learned counsel for the petitioners has miserably failed to point out any such illegality. No interference is warranted.

11. For what has been discussed above, this civil revision is bereft of any force which is accordingly dismissed.

ZC/F-27/L Revision dismissed.

**2018 C L C 1087**

**[Lahore]**

**Before Atir Mahmood, J**

**Sardar LIAQUAT ALI DOGAR and another---Appellants**

**Versus**

**Sardar AHMAD DIN DOGAR and others---Respondents**

Election Appeal No.13 of 2017, decided on 23rd November, 2017.

**Punjab Local Government Act (XVIII of 2013)---**

----S. 27---Election for the seat of Chairman/Vice-Chairman Union Council---Transfer of vote from one Union Council to another---Effect---Election petition was allowed on the ground that returned candidate had transferred his vote to the concerned Union Council fraudulently---Validity---Application Form for transfer of vote did not carry any cutting or overwriting---Said application was accepted by the concerned authority accordingly---Vote of returned candidate was transferred and included in the voter's list of concerned Union Council---No objection was raised to the nomination papers filed by the returned candidate---Election Tribunal could not look into the aspect of transfer of vote which was the matter to be dealt with before announcement of election schedule and not thereafter---Transfer of vote was not a ground for disqualification of a returned candidate who before announcement of election schedule got transferred his vote to a particular constituency---Election Tribunal had incorrectly and illegally disqualified the returned candidate from being Chairman of the Union Council---Impugned judgment was against law which was set aside and election petition was dismissed---Election appeal was allowed in circumstances.

Sardar Akbar Ali Dogar for Appellants.
Rana Muzaffar Hussain for Respondents.
Date of hearing: 12th September, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that the appellants and respondents Nos.1 to 6 participated in the election of Chairman/Vice-Chairman of Union Council No.36 Veeram Tehsil and District Kasur (hereinafter called "the U.C.") wherein the appellants were declared returned candidates. Respondents Nos.1 and 2 challenged the said election by filing election petition raising different allegations. The appellants contested the same by filing written reply. Issues were framed. After recording evidence of the parties, learned Election Tribunal allowed the election petition vide order dated 16.03.2017. Hence this election appeal has been filed by the returned candidates Sardar Liaquat Ali Dogar and another.

2. Arguments heard. Record perused.

3. After lengthy arguments, the parties have confined themselves to one point as to whether the vote of appellant No.1 was lawfully transferred to the U.C.'s constituency or not. No other issue has been pressed by either side.

4. According to the Election petitioners/respondents, appellant No.1 got transferred his vote to the U.C.'s constituency fraudulently with false and fictitious documents. In this regard, they have referred to application form for transfer of vote submitted by appellant No.1 and a rent deed.

5. I have carefully gone through the application form for transfer of vote which is exhibited as Exh.P2. The same does not carry any cutting or overwriting so far as the contents regarding appellant No.1 are mentioned therein, therefore, it does not appear from the face of it to be doubtful in any manner. The same is duly accepted by the concerned authority whose signature and date on the form can easily be seen with the word "Accepted". At this point, learned counsel for the respondents point out that the word "accepted" is not written at the relevant place/column. In my view, it is a routine matter in our offices that the approval or otherwise are done other than at the specific place or at corner or bottom of the applications or other documents. Though this is not appreciable but it is commonly done in our offices without any objection. Perhaps this happens to avoid nuisance to search the relevant column or place. Since the signatures of concerned authority are not disputed and in pursuance of the same, the vote of appellant No.1 was transferred and included in the voter list pertaining to constituency of the U.C. prior to election schedule, I see no illegality with acceptance of the application of appellant No.1 and transfer of vote to the constituency of the U.C.

6. So far as the rent deed is concerned, the same is present on record as Exh.P3. This shows that a house was given on rent to appellant No.1 by one Muhammad Aslam son of Muhammad Umar, owner of the house. Said Muhammad Aslam appeared before the court as RW.2 and stated that he rented out the house to appellant No.1. He was cross-examined at length by election petitioners but his evidence could not be shattered to the extent of tenancy of appellant No.1 in the house of Muhammad Aslam.

7. The transfer of vote is a matter which is to be looked into prior to announcement of election schedule. According to statement made by respondent No.1 namely Sardar Ahmed Din (one of the election petitioners) himself while appearing as PW.2, he was in knowledge when the application for transfer of vote was moved by appellant No.1 and that he also moved application against the said application but neither this application nor any other relevant record in this regard has been brought on record by the election petitioners-respondents. After acceptation of application for transfer of vote, the name of appellant No.1 was included in the voter list of the constituency of the U.C. Thereafter, appellant No.1 filed nomination papers but no objection to this aspect was raised by the respondents though the election petitioners, as noted above, were in knowledge of transfer of vote of appellant No.1. But they waited for taking place the elections and when the appellants were declared returned candidates, they took this

objection. In my view, after election of the appellants as Chairman and Vice-Chairman, the election tribunal could not look into the aspect of transfer of vote which was the matter to be dealt with before the announcement of election schedule and not thereafter.

8. In addition, the criteria for qualification of a candidate to contest the election and disqualification of an elected member are different. The only section which deals with qualification and disqualification of returned candidates is Section 27 of the Punjab Local Government Act, 2013 Act which is reproduced below:

> **"27. Qualifications and disqualifications for candidates and elected members**.---(1) A person shall qualify to be elected as a member or to hold an elected office of a local government, if he---
>
> (a) is a citizen of Pakistan;
> (b) except the youth member, is not less than twenty five years of age on the last day fixed for filing the nomination papers;
> (c) is enrolled as a voter in the electoral rolls of the ward or the local government from which he is contesting the election.
> (2) A person shall be disqualified from being elected or chosen as, and from being, an elected member of a local government, if he--
> (a) ceases to be citizen of Pakistan or acquires citizenship of a foreign State;
> (b) is declared by a competent court to be of unsound mind;
> (c) is an undischarged insolvent;
> (d) is in the service of Pakistan or of a local government;
> (e) is in the service of any statutory body or a body which is owned or controlled by the Government or a Provincial Government or the Federal Government or a local government or, in which any of such Government or local government has a controlling share or interest, except the holders of elected public office and part-time officials remunerated either by salary or fee; provided that in case of a person who has resigned or retired from any such service, a period of not less than two years has elapsed since his resignation or retirement;
> (f) is under an existing contract for work to be done or goods to be supplied to a local government or has otherwise any direct pecuniary interest in its affairs;
> (g) has been dismissed from public service on the grounds of misconduct unless a period of five years has elapsed since his dismissal;
> (h) has been removed or compulsorily retired from public service on the grounds of misconduct unless a period of three years has elapsed since his removal or compulsory retirement;
> (i) has been convicted by a court of competent jurisdiction for a term not less than two years for an offence involving moral turpitude or misuse of power or authority under any law unless a period of five years has elapsed since his release; and

(j) has been convicted for an offence involving activities prejudicial to the ideology, interest, security, unity, solidarity, peace and integrity of Pakistan unless a period of five years has elapsed since his release

(3) If a person-

(a) is found by the Election Commission to have contravened any provisions of subsection (1) or (2), he shall stand disqualified from being a candidate for election to any office of a local government for a period of four years; or

(b) has been elected as a member of a local government and is found by the Election Commission to have contravened any provision of subsections (1) or (2), he shall cease forthwith to be an elected member or to hold the office of such member and shall stand disqualified from being a candidate for election to a local government for a period of four years.

(4) A candidate who claims to be a Muslim shall submit to the Returning Officer the declaration given in Ninth Schedule along with the nomination papers."

(Underline is mine)

I have carefully gone through the above provisions of law. There is not a ground for disqualification of a returned candidate who before the announcement of election schedule gets transfer of his vote to a particular constituency, then contests elections therefrom and is declared as elected member. In this view of the matter, I am of the considered opinion that learned election tribunal has incorrectly and illegally disqualified appellant No.1 from being Chairman of the U.C. The judgment passed by learned Election Tribunal is against the law, therefore, it cannot sustain.

9. For what has been discussed above, this election appeal is **allowed**, the impugned judgment passed by learned election tribunal is set aside and the election petition filed by the respondents is dismissed.

ZC/L-9/L Appeal allowed.

**2018 C L C 1115**

**[Lahore]**

**Before Atir Mahmood, J**

**NUSRAT ABBAS---Petitioner**

**Versus**

**NIGHAT PARVEEN and others---Respondents**

Writ Petition No.7852 of 2014, decided on 27th December, 2017.

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

----S. 12(2) & O. VII, R. 11---Specific Relief Act (I of 1877), S.42---Suit for declaration---Inheritance---Limitation---Withdrawal of suit without permission to file fresh one---Application under S.12(2), C.P.C.---Scope---Fraud committed by the defendants with the plaintiffs---Effect---Misrepresentation---Plaintiffs-respondents filed suit for their shares in the inheritance of their parents---Suit was withdrawn alleging that defendants assured that they would give due share to the plaintiffs out of court---Contention of plaintiffs was that defendants backed out from their promise and committed fraud with the plaintiffs---Defendants moved an application for rejection of petition filed under S.12(2), C.P.C. which was accepted by the Trial Court but Appellate Court dismissed the same---Validity---Suit was withdrawn by the plaintiffs through their counsel without permission to file fresh one---Court was to record evidence first and then decide the matter when there were disputed questions of facts including the allegations of fraud, fabrication and misrepresentation---Application under S.12(2), C.P.C. could be decided without framing of issues and recording of evidence when situation was not so---Provisions of S.12(2), C.P.C. did not speak about misrepresentation within or outside the Court---Court was bound to take cognizance when alleged misrepresentation took place---Petitioners-plaintiffs had claimed their share in the inheritance left by their parents---No limitation would run in the matter of inheritance having recurring cause of action---Party having its right in the inherited property could claim the same at any time---Application under S. 12(2), C.P.C. required its decision on merits after recording of evidence and could not be dismissed summarily---No illegality had been pointed out in the impugned order passed by the Appellate Court--- Constitutional petition was dismissed in circumstances.

Mrs. Anis Haider and others v. S. Amir Haider and others 2008 SCMR 236 and Malik Shahid Mehmood v. Malik Afzal Mehmood and others 2011 SCMR 551 ref.
Mst. Shabana Irfan v. Muhammad Shafi Khan and others 2009 SCMR 40 and Mst. Nasira Khatoon and another v. Mst. Aisha Bai and 12 others 2003 SCMR 1050 distinguished.

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

----S. 12(2)---Application under S.12(2), C.P.C. was a substitution of fresh suit and same was to be decided like that of a suit.

**(c) Islamic law---**

----Inheritance---No limitation would run in the matter of inheritance.

**(d) Words and Phrases---**
----'Misrepresentation'---Connotation.

Black's Law Dictionary rel.

Nadeem-ud-Din Malik and Intazar Hussain Panjuth for Petitioner.
Awais Kamboh for Respondents.
Dates of hearing: 26th September, 20th, 23rd October and 3rd November, 2017.

**JUDGMENT**
**ATIR MAHMOOD, J.**---Brief facts of the case are that on 19.07.2003, respondents Nos.1 and 2 (hereinafter called "the plaintiffs") filed a suit for declaration before the learned Senior Civil Judge, District Sargodha with the averments that they being successors of Abdul Rehman (father) and Mst. Fatima (mother) are entitled to their shares according to Muhammadan Law but they have been deprived of their share by the present petitioner and respondents Nos.3 to 8 (hereinafter called "the defendants") as they have got sanctioned mutations in favour of respondents Nos.1 to 3 fraudulently. The defendants filed contesting written statement. Issues were framed. However, the plaintiffs withdrew the suits through their counsel vide order dated 12.01.2009.
2. Afterwards, on 01.04.2010, the plaintiffs filed an application under section 12(2), C.P.C. alleging that they had withdrawn the suit on assurance of the defendants out of the court that they will give due share to the plaintiffs out of the inheritance left by their parents but later on, they backed out from the promise. Defendants contested the application by filing written reply. They also filed application under Order VII, rule 11, C.P.C. for rejection of the application. The latter application was allowed by learned trial court and application of the plaintiffs was dismissed vide order dated 10.03.2011. Feeling aggrieved, the plaintiff filed revision petition which was accepted by learned Additional Distinct Judge, Sargodha vide judgment dated 20.02.2014. Hence this writ petition has been instituted by one of the defendants.

3. Learned counsel for the petitioner-defendant mainly contends that since the suit was withdrawn by the plaintiffs themselves without permission of the court to file fresh one, the application under section 12(2), C.P.C. was hit by Order VII, rule 11, C.P.C. and not proceedable, therefore, this writ petition be allowed, the impugned judgment passed by learned lower revisional court be set aside and order of learned trial court be restored. In support of his arguments, learned counsel for the petitioner-defendant has relied upon the law laid down by the Hon'ble Supreme Court of Pakistan in cases Mst. Shabana Irfan v. Muhammad Shafi Khan and others (2009 SCMR 40) and Mst. Nasira Khatoon and another v. Mst. Aisha Bai and 12 others (2003 SCMR 1050).

4. On the other hand, learned counsel for the respondents Nos.1 and 2 (plaintiffs) has vehemently opposed this writ petition and fully supported the impugned judgment. He has placed reliance on the dictums laid down in cases Mrs. Anis Haider and others v. S. Amir Haider and others (2008 SCMR 236) and Malik Shahid Mehmood v. Malik Afzal Mehmood and others (2011 SCMR 551).

5. Arguments heard. Record perused.

6. The contents of the plaint reveal that the plaintiffs had sought their share in the property left by their parents while alleging that the mutations impugned in the suit in favour of respondents Nos.1 to 3 were based on fraud and fabrication. The suit was withdrawn by the plaintiffs through a statement made by their counsel on 12.01.2009. The withdrawal was also a simplicitor withdrawal and neither permission to file fresh suit was prayed for nor was granted by learned trial court in order dated 12.01.2009. The plaintiffs in their application under section 12(2), C.P.C. has also not denied rather admitted that their learned counsel withdrew the suit on their instructions. However, they have taken plea in the application that the defendants, out of the court, assured the plaintiffs that they will give due share to the plaintiffs out of the inheritance left by their parents and requested to withdraw the suit which was acceded to by the plaintiffs and they withdrew the suit but afterwards, the defendants backed out from their words and then manifested upon the plaintiffs that the defendants had deceptively convinced the plaintiffs to withdraw the suit, as such, fraud has been committed by the defendants with the plaintiffs. This assertion has though been denied by the defendants in their written reply. Nevertheless, this is a question of fact which could not be decided summarily and without recording of evidence. There is a plethora of judgments on the point that where there are disputed questions of facts including the allegations of fraud, fabrication and misrepresentation, the Court should resort to recording of evidence first and then decide such matters. However, where the situation is not so, the application under section 12(2), C.P.C. can, however, be decided without framing of issues and recording of evidence.

7. In this case, the plaintiffs in their application under section 12(2), C.P.C. has specifically asserted fraud and misrepresentation on the part of the defendants. According to Black's Law Dictionary, the word "misrepresentation" means:

> **"misrepresentation, n. 1.** The act of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion. 2. The assertion so made; an assertion that does not accord with the facts."
>
> (Emphasis provided)

In the said dictionary, misrepresentation has been defined as under:

> "A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation..... An assertion need not be fraudulent to be misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word 'not' is inadvertently omitted or when inaccurate language is used. But a misrepresentation that. is not fraudulent has no consequence... unless it is material."
>
> (Emphasis provided)

A 'material misrepresentation' has further been defined as:

> "material misrepresentation. 1. Contracts. A false statement that is likely to induce a reasonable person to assent or that the maker knows is likely to induce the recipient to assent. 2. Torts. A false statement to which a reasonable person would attach importance in deciding how to act in the transaction in question or to which the maker knows or has reason to know that the recipient attaches some importance.
>
> (Emphasis provided)

Perusal of above meaning and definition, it is evident that the fraud, and misrepresentation was asserted by the plaintiffs in their application under section 12(2), C.P.C. when they say that the defendants posing dishonestly and deceivingly asked the plaintiffs that they were ready to give their share in the inherited property but later on, they refused to do so. So far as the observation of learned trial court that since the alleged misrepresentation took place out of the court, it was not worthy to be taken cognizance thereof is concerned, the provisions of section 12(2), C.P.C. do not speak about misrepresentation within or outside the court, therefore, wherever the alleged misrepresentation took place does not matter and the court was bound to take cognizance thereof. Therefore, I am not in acquiescence with the observation that since no misrepresentation was committed before the court, this application was not proceedable. Even otherwise, the claim of the plaintiffs pertains to their share in inheritance left by their parents and it is settled law that no limitation runs in inheritance cases having the recurring cause of action and a party having its right in the inherited property can claim the same at any time. Therefore, the application under section 12(2), C.P.C. required, its decision on merits after recording of evidence and it could not be dismissed summarily.

8. Perusal of judgment passed by learned lower appellate court reveals that it has observed that application under Order VII, rule 11, C.P.C. was not maintainable having been filed against an application under section 12(2), C.P.C. as the former application talks rejection of the plaint whereas the latter was an application and not a plaint. I am not in consonance with this observation of learned lower appellate court as the application under section 12(2), C.P.C. is a substitution of the fresh suit and it is to be decided like that of a suit, as such, the application under Order VII, rule 11, C.P.C. was maintainable.

9. The judgment passed by learned lower appellate court to the extent that the application under section 12(2), C.P.C. involving disputed questions of facts was required to be decided on merit after recording evidence of the parties is in accordance with law. Learned counsel for the petitioner has not been able to point out any illegality therein. The case law relied upon by learned counsel for the petitioner being distinguishable on facts is not applicable to the case in hand. No interference is called for.

10. For the aforementioned reasons, this writ petition fails which is accordingly **dismissed.**

ZC/N-32/L Petition dismissed

**2018 C L C 1327**

**[Lahore]**

**Before Atir Mahmood, J**

**DEFENCE HOUSING AUTHORITY LAHORE through Secretary---Petitioner**

**Versus**

**Mst. AYESHA QAYYUM---Respondent**

Civil Revision No. 22159 of 2017, heard on 16th October, 2017.

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

----Arts. 91, 92, 93 & 143---Civil Procedure Code (V of 1908), O. VII, R. 11---Specific Relief Act (I of 1877), Ss. 8 & 39---Suit for possession and cancellation of instrument---Limitation---Recurring cause of action---Scope---Contention of defendant was that suit was hit by Arts. 91, 92 & 93 of Limitation Act, 1908---Application for rejection of plaint was dismissed by Trial Court---Validity---Articles 92 & 93 of Limitation Act, 1908 were applicable to the suits wherein forgery or attempt to enforce a forged document had been assailed---No question or allegation of forgery or attempt to enforce a forged instrument had been made in the present case---Article 91 of Limitation Act, 1908 pertained to the suits wherein cancellation or setting aside of an instrument had been sought but these suits should not have otherwise been provided for in Limitation Act, 1908 for the purpose of limitation---Non-payment of due amount or non-delivery of promised land/plots was a matter in the present case which would come within the ambit of recurring cause of action---Fresh cause of action would accrue to the plaintiff on each denial or non-response by the defendant to redress the grievance of plaintiff---Question of limitation was a mixed question of law and fact and same could not be decided while deciding an application under O. VII, R. 11, C.P.C.---Plaintiff had alleged breach of condition through the present suit for possession which would fall within the domain of Art. 143 of Limitation Act, 1908 wherein limitation of twelve years had been provided---Revision was dismissed in circumstances.

Tariq Masood for Petitioner.
Javaid Sultan Chaudhry for Respondent.
Date of hearing: 16th October, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that on 20.05.2016, the respondent filed a suit against the petitioner for cancellation of registered conveyance deed bearing No.7248 dated 20.12.2006 and mutation No.1211 sanctioned thereupon on 22.12.2006 and possession of the property be given to the plaintiff-respondent.

2. On 23.12.2016, the petitioner authority entered appearance before the court and filed application for rejection of the plaint under Order VII, Rule 11, C.P.C. The application was resisted by the plaintiff-respondent by filing written reply on 24.01.2017. The said application was dismissed on 15.03.2017. Hence this revision petition has been filed by the petitioner-defendant.

3. Arguments heard. Record perused.

4. The contention of learned counsel for the petitioner is that the suit of the respondent is hit by Articles 91, 92 and 93 of the Limitation Act, 1908 (hereinafter called "the Act") wherein the limitation of three years has been provided. The said Articles are reproduced below:

| | | | |
|---|---|---|---|
| "91. | To cancel or set aside an instrument not otherwise provided for. | Three years | When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. |
| 92. | To declare the forgery of an instrument issued or registered. | Three years | When the issue or registration becomes known to the plaintiff. |
| 93. | To declare the forgery of an instrument attempted to be enforced against the plaintiff. | Three years | The date of the attempt." |

(Underline is mine)

Bare reading of Articles 92 and 93 of the Act reveals that these Articles apply to the suits wherein forgery or attempt to enforce a forged document has been assailed. Here in this case, there is no question or allegation of forgery or attempt to enforce a forged instrument as the conveyance deed referred to hereinabove is not disputed by either sides, therefore, Articles 92 and 93 do not attract in this case. Thereafter, Article 91 remains in picture only. This Article pertains to the suits wherein cancellation or setting aside of an instrument has been sought but these suits should not have otherwise been provided for in this Act for the purposes of limitation.

5. The suit of the respondent is for possession after cancellation of the registered conveyance deed bearing No.7248 dated 20.12.2006 and mutation No.1211

sanctioned in pursuance thereof on 22.12.2006. The said registered sale deed at its pages 68 to 71 reads as under:

> "The value of land given in the sale deed is not the value paid to the land owner but given for the purpose of Registration as the land is purchased on exemption."

The contention of learned counsel for the respondent is that no consideration amount or alternate land/plots have yet been paid/given to the respondent despite repeated demands and notice sent to the petitioner. The petitioner has neither denied the said averment nor disputed the sale deed as the petitioner has even not bothered to file the written statement before the trial court and has straightforwardly filed the application under Order VII, Rule 11, C.P.C. solely on the ground that the suit was barred by time as the impugned sale deed was registered on 20.12.2006 whereas the suit was filed on 20.05.2016 after 10 years of registration of the sale deed. According to him, the suit of the respondent-plaintiff is for cancellation of document, therefore, Articles 91, 92 and 93 of the Act, wherein limitation of three years has been provided, are attracted. As noted above, the suit of the respondent is for possession after cancellation of the documents on the ground that despite repeated demands and notice to the petitioner, she has not been compensated through consideration amount or alternate land/plots by the petitioner as it was promised at the time of execution of the sale deed. In my view, the non-payment of due amount or non-delivery of promised land/plots is a matter which comes within the ambit of 'recurring cause of action', therefore, on each denial or non-response by the petitioner to redress the grievance of the respondent, fresh cause of action is accrued to the respondent, therefore, question of limitation, which is a mixed question of law and fact, cannot be decided while deciding the application under Order VII, rule 11, C.P.C. Even otherwise, since the respondent-plaintiff has alleged breach of condition through the suit for possession, the same, in my considered view, comes within the domain of Article 143 of the Act wherein limitation of 12 years is provided.

The said Article reads as under:

| | | | |
|---|---|---|---|
| "143. | Like suit*, when the plaintiff has become entitled by reason of any forfeiture or breach of condition. | Twelve years | When the forfeiture is incurred or the condition is broken." |

As noted above, this suit is for possession of the property after cancellation of the instrument and the limitation for filing such like suit has been provided in Article 143 of the Act. In this view of the matter, the contention of learned counsel for the

petitioner that the suit of the respondents falls within the ambit of Articles 91, 92 and 93 of the Act has no force which is accordingly discarded.

6. For what has been discussed above, this civil revision is bereft of any force. The same is accordingly **dismissed.**

ZC/D-9/L Revision dismissed.

**2018 C L D 1064**

**[Lahore]**

**Before Atir Mahmood, J**

**TANVIR AHMAD BUTT---Appellant**

**Versus**

**The DIRECTOR, ORATIER TECHNOLOGIES (PVT.) LTD. PLD PUBLISHERS---Respondent**

F.A.O. No. 522 of 2015, decided on 22nd May, 2017.

**Punjab Consumer Protection Act (II of 2005)---**

----Ss. 28(4) & proviso, 27 & 33---Jurisdiction of Consumer Court---Settlement of Claim---Limitation period of thirty days to file complaint---Computation of limitation period---Condonation of delay---Scope---Consumer Court had power to extend the time limit for filing of complaint for up to one year but such extension could only be made when sufficient cause was disclosed for not filing complaint within 30 days, by filing a proper application---Complaint, under the Punjab Consumer Protection Act, 2005, if hit by time limitation, then framing of issues and recording of evidence was of no consequence and such complaint was liable to be dismissed.

Muhammad Ilyas Khan Awan for Appellant.

**ORDER**

**ATIR MAHMOOD, J.**---Brief facts leading to filing of this appeal are that on 17.11.2012, the appellant filed a complaint under sections 22 and 25 of the Punjab Consumer Protection Act, 2005 (hereinafter called 'the Act") against the respondent on account of providing faulty and defective services of 'online website' namely 'www.pakistanlawsite.com' which is being run in the name and style of Oratier Technologies (Pvt.) Ltd. by the respondent.

2. The respondent contested the complaint by filing written statement. After recording of evidence, learned Consumer Court dismissed the complaint vide order dated 29.07.2015. Hence this appeal has been filed by the appellant-complainant.

3. Learned counsel for the appellant contends that the respondent blocked the account of the appellant for one week without service of notice due to which the appellant being a lawyer had to suffer a lot in connection with his professional engagements; that the learned consumer court has decided the complaint without framing of issues which is erroneous and illegal; that without framing of issues, the parties could not produce the evidence properly; that the impugned order is a nullity in the eye of law; that learned court below has also misconstrued the law on the subject; that the impugned decision is against the law, therefore, this appeal be allowed, the impugned order be set aside and the case be remanded to learned court below for decision afresh after framing of issues and recording of evidence in accordance therewith.

4. Arguments heard. Record perused.

5. Perusal of record reveals that the account of the appellant, according to his own version given in the affidavit, was blocked on 07.02.2012. Undeniably, the appellant filed complaint on 17.11.2012 with delay of about 10 months.

6. Section 28 of the Punjab Consumer Protection Act, 2005 deals with time limitation regarding filing of the complaint. The same is reproduced below:

> **"28. Settlement of Claims**.---(1) A consumer who has suffered damage, or Authority in other cases, shall, by written notice, call upon a manufacturer or provider of services that a product or service is defective or faulty, or the conduct of the manufacturer or service provider is in contravention of the provisions of this Act and he should remedy the defects or give damages where the consumer has suffered damage, or cease to contravene the provisions of this Act.
>
> (2) The manufacturer or service provider shall, within fifteen days of the receipt of the notice, reply thereto.
>
> (3) No claim shall be entertained by a Consumer Court unless the consumer or the Authority has given notice under subsection (1) and provides proof that the notice was duly delivered but the manufacturer or service provider has not responded thereto.
>
> (4) A claim by the consumer or the Authority shall be filed within thirty days of the arising of the cause of action:
>
> Provided that the Consumer Court, having jurisdiction to hear the claim, may allow a claim to be filed after thirty days within such time as it may allow if it is satisfied that there was sufficient cause for not filing the complaint within the specified period:
>
> Provided further that such extension shall not be allowed beyond a period of sixty days from the expiry of the warranty or guarantee period specified by the manufacturer or service provider and if no period is specified one year from the date of purchase of the products or providing of services.
>
> (Emphasis provided)

Bare reading of subsection (4) of section 28 of the Act makes it explicitly clear that there was 30 days time available to the appellant to file the complaint. The terminus a quo for counting limitation was the date when cause of action accrued to the appellant which in this case, according to the appellant himself, was 07.02.2012 but he filed the instant complaint on 17.11.2012 which was badly barred by time. When confronted with, learned counsel for the appellant contends that the consumer court as per second proviso under section 28 of the Act could extend the time upto one year as there was no guarantee provided by the service provider/respondent. I am in consonance with the argument of learned counsel for the appellant to the extent that the consumer court had powers to extend the time limit upto one year but this extension could only be made when sufficient cause was disclosed by the appellant for not filing the complaint within time limit of 30 days by filing a proper application. Admittedly, the appellant did not file any application for condonation of delay. Therefore, the complaint filed by the appellant was badly barred by time and was liable to be dismissed on this score alone. When the complaint was hit by time limitation, the framing of issues and recording of evidence was of no consequence. The impugned order is in accordance with law. I see no illegality therein.

7. For what has been discussed above, this appeal has no merit which is accordingly **dismissed.**

KMZ/T-10/L Appeal dismissed.

**2018 M L D 401**
**[Lahore]**
**Before Atir Mahmood, J**
**NAVEED RUKHSAR and another---Appellants**
**Versus**
**MUHAMMAD SALIM LAKHANI---Respondent**

F.A.O. No.298 of 2015, heard on 4th May, 2017.

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

----O. XXIII, R. 1 & S. 10---Withdrawal of suit---Subsequent suit---Maintainability---Plaintiff, while filing the suit disclosed in the plaint with regard to pendency of an earlier suit---Plaintiff contended that earlier suit would be withdrawn---Subsequent suit was not hit by provisions of S. 10, C.P.C. as earlier suit had been withdrawn by the plaintiff---Section 10 of Civil Procedure Code, 1908 was not attracted as there was no lis pending before another Court---No bar existed to file subsequent suit in presence of earlier one---When earlier suit was withdrawn after institution of subsequent suit then provisions of O. XXIII, C.P.C. were not attracted and fresh suit could not be declared to be barred by law---Findings recorded by the Trial Court did not suffer from any mis-reading or non-reading of record---Appeal was dismissed in circumstances.

Muhammad Saleem and another v. Messrs M. Yousaf ADI Saleem and Co. through Muhammad Yousaf Adil and 6 others 2011 YLR 3016; Muhammad Hussain and 12 others v. Mst. Arifa Begum and 2 others 2008 YLR 157 and Ghulam Nabi and others v. Seth Muhammad Yaqub and others PLD 1983 SC 344 rel.

Mian Muhammad Shakil Ahmad for Appellant.
Ahmad Farooq Mir for Respondent.

Date of hearing: 4th May, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This appeal is directed against the order dated 21.03.2015 passed by the learned Additional District Judge, Gujrat whereby the application for temporary injunction filed by the respondent-plaintiff was accepted.

2. The brief facts of the case are that the respondent filed a suit for infringement, permanent injunction, passing off, damages and unfair competition under the Trade Marks Ordinance, 2001 along with an application under Order XXXIX, Rules 1 and 2 of C.P.C. for grant of temporary injunction. The suit was contested by the appellants

by filing the written reply. There-after, the learned appellate court fixed the case for the affixation of court-fee by the respondent and after affixation of the court fee case was fixed for the arguments on the application under Order XXXIX, Rules 1 and 2 read with section 151 of C.P.C. The said application was contested by the appellants by filing the written reply. After hearing the parties, the learned Additional District Judge accepted the application filed by the respondent vide impugned order dated 21.03.2015. Hence this appeal.

3. Learned counsel for the appellants submitted that the impugned order passed by the learned Additional District Judge, Gujrat is based on surmises and conjectures; that the impugned order passed by the learned trial court is result of misreading and non-reading of evidence; that the learned appellate court while passing the impugned order has ignored the written statement filed by the appellants, in which the appellants raised the preliminary objections about the single remedy availd and the two suits cannot be proceeded in a parallel position. He lastly prayed for acceptance of this appeal and the impugned order be set-aside. He has relied upon the cases reported as Muhammad Saleem and another v. Messrs M. Yousaf ADI Saleem and Co. through Muhammad Yousaf Adil and 6 others (2011 YLR 3016) and Muhammad Hussain and 12 others v. Mst. Arifa Begum and 2 others (2008 YLR 157).

3(sic) On the other hand, learned counsel for the respondent while supporting the impugned order dated 21.03.2015 passed by the learned Additional District Judge, Gujrat submitted that the said order is well reasoned and the learned appellate Court has committed no illegality while passing the same. He submitted that subsequent to the filing of the present suit, the respondent withdrew his earlier suit filed at Nawabshah. He has relied upon the case reported as Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 Supreme Court 344).

4. Arguments heard. Record perused.

5. Learned counsel for the appellants has mainly argued the case on the maintainability of the suit filed at Gujrat. The merits of the case qua the grant of injunction in favour of the respondent were not attacked through any cogent arguments. Admittedly, the respondent while filing the suit in paragraph No.15 of the plaint disclosed about the pendency of an earlier suit at Nawabshah and there was a categorical assertion that the earlier suit will be withdrawn. The argument of the learned counsel for the appellants that the subsequent suit was hit by provisions of section 10 of C.P.C. is misconceived for the reason that the earlier suit filed by the appellants has been withdrawn by the appellants which fact could not be denied by the appellants, therefore, section 10 of the C.P.C. is not attracted as there is no lis pending before another court.

6. As far as the maintainability of the subsequent suit is concerned, there is no bar under the law to file a subsequent suit in the presence of the earlier one and when earlier suit is withdrawn after institution of the subsequent suit, then the provisions of Order XXIII of C.P.C. are also not attracted and fresh suit could not be declared to be barred by law. In this regard, the law laid down by the August Supreme Court in the case reported as Ghulam Nabi and others v. Seth Muhammad Yaqub and others (PLD 1983 Supreme Court 344) is followed. The relevant portion of the said judgment is reproduced as under for ready reference:--

> "A fresh suit envisaged in the rule is one filed subsequent to the withdrawal of the earlier suit. On the question whether the rule barred a suit which at the time of the withdrawal of the earlier suit had already been instituted and pending, we find that in Ram Mal v. Upendra Datt (1) relying on P. Surja Reddi (2), it was held that a second suit will not be barred in the case of withdrawal of a previous suit unless conditions of Order XXIII Rule 1, C.P.C. are fully satisfied and that if the subsequent suit was already pending at the time of the withdrawal of the previous suit, the provision could not be attracted. A Division Bench of the Lahore Court is Mungi Lal v. Radha Moham (3) held that:--
>
> "Order XXIII, rule 1 refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. It appears to me that the section cannot be read so as to bar a suit which has already been instituted before the other suit had been abandoned or dismissed".
>
> The judgment had been followed in Abdullah v. Bashiran Bibi (4) and it had been held that a fresh suit which had been pending at the time of withdrawal of a previous suit was not barred. The view taken in Mungi Lal's case had also been followed by this Court in Commissioner of Income Tax v. Ashfaq Ahmad (5), wherein it had been held that where one writ petition had been filed during the pendency of a previous writ petition, the withdrawal of the previous writ petition before reaching the stage of hearing on merit would not affect the maintainability of the second petition which could legally proceed in spite of the withdrawal of the previous petition". (Emphasis Provided)

7. As far as the merits of the case are concerned, there is no denial to the fact that the trademark of the respondent is already registered vide No.189205 dated 15.10.2003 whereas the appellants have submitted their case for registration under trademark No.279226 dated 25.02.2010.

The learned trial court has minutely considered the respective contentions of both the parties and the conclusion arrived at did not suffer from any misreading or non-reading of the record.

8. Therefore, this appeal being devoid of any merits is hereby dismissed.

ZC/N-26/L Appeal dismissed.

**2018 M L D 1090**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD MUSHTAQ BHUTTA through legal heirs---Petitioner**

**Versus**

**Ch. MUHAMMAD JAMEEL and 6 others---Respondents**

Civil Revision No.1204 of 2011, heard on 13th September, 2017.

**(a) Gift---**

----Proof of---Fraud and misrepresentation---Burden of proof---Contention of plaintiff was that gift deed in favour of defendant was illegal, void and inoperative upon his rights---Suit was dismissed concurrently---Validity---Beneficiary of document was bound to prove its execution but when same was challenged on account of some fraud and misrepresentation then initial burden to prove such fraud and forgery would rest upon the party who alleged as such---Plaintiff could not prove through any cogent evidence that deceased was under any mental disability at the time of execution of gift deed---Defendant had established execution of impugned gift deed in his favour through production of marginal witnesses---Plaintiff had failed to produce any doctor who treated the deceased nor any medical record was produced---Revision was dismissed in circumstances.

Ashiq Hussain and another v. Ashiq Ali 1972 SCMR 50; Maulvi Abdullah and others v. Abdul Aziz and others 1987 SCMR 1403; Rab Nawaz and others v. Ghulam Rasul 2014 SCMR 1181; Syed Niamat Ali and 4 others v. Dewan Jairam Dass and another PLD 1983 SC 5; Messrs A.R. Builders (Pvt.) Ltd. v. Faisal Cantonment Board and 4 others PLD 2004 Kar. 492; Alam Khan and 3 others v. Pir Ghulam Nabi Shah and Company 1992 SCMR 2375 and Industrial Development Bank of Pakistan v. Messrs Naqi Beverages (Pvt.) Ltd. and 7 others 2002 CLD 712 ref.

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

----O. VIII, R. 6---Claim for set-off---Requirement---Claim for set-off could only be made in a suit for recovery of money.

Tasawar Hussain Qureshi for Petitioners.
Muhammad Waheed Akhtar Mian for Respondents Nos.1 to 6.
Syed Ali Imran Naqvi and Ms. Shah Bano Bukhari for Respondents Nos. 2 to 7.
Ms. Saima Aslam for Respondent No.7, present in person.

Date of hearing: 13th September, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---This civil revision is directed against the judgment and decree dated 12.01.2011 passed by learned Additional District Judge, Sheikhupura, who dismissed appeal of the petitioners which was filed against the judgment and

decree dated 20.05.1993 passed by the learned Civil Judge, Sheikhupura whereby the suit filed by the petitioners-plaintiffs was also dismissed.

2. Brief facts of the case are that the petitioners-plaintiffs and respondent No.7 filed a suit for declaration against the respondents-defendants with the averments that the gift deed dated 30.11.1981 registered on the same date vide document No. 8168, Bahi No.1 Jild No. 603, on pages 268/271 is illegal, void, inoperative and ineffective upon the rights of the plaintiffs along with consequential relief of possession through partition of land measuring 348-Kanals 16 Marlas, bearing Khewat No. 10/9-Min, Khatooni No. 32, the detail of which has been given in the head-note of the plaint. Apart from above, in the plaint, the petitioners-plaintiffs claimed their exclusive ownership over another land measuring 413 kanals 3 marlas on the basis of sale deed allegedly executed by their predecessor Ghulam Muhammad (deceased) in favour of the petitioners. The respondent No.1 contested the suit by filing his written statement denying all the averments of the plaint, protected his rights over the land allegedly gifted in his favour and also denied the execution of the sale deed regarding the suit land measuring 413 kanals 3 marlas in favour of the plaintiffs. The learned trial court framed the following issues:--

(1) Whether the proper court fee has not been affixed on the plaint, if not what is the correct value for the purpose of court fee and jurisdiction? OPD
(2) Whether the court has no jurisdiction to adjudicate the case? OPD.
(3) Whether the suit is barred by time? OPD
(4) Whether the plaintiffs are estopped by their words and conduct to file the present suit? OPD.
(5) Whether the suit has been filed maliciously with mala fide intention to harass the defendant? OPD
(6) Whether the suit is not maintainable in its present form? OPD
(7) Whether the plaintiffs are entitled to share the property in dispute, as owner, if so, to what extent? OPD
(8) Whether the gift deed dated 30.11.81 is illegal, inoperative and ineffective on the right of the plaintiffs? OPD
(9) Whether the gift deed in dispute was executed during Marzul Maut? OPD 2 to 6
(10) Whether the defendants Nos.2 to 6 are entitled to their share in disputed property? OPD 2 to 6
(11) Whether the plaintiffs and the defendant No.1 has not come to the court with clean hand? OPD 2 to 6.
(12) Relief.

3. After framing the issues, the evidence of the parties was invited. After recording the evidence, the case was fixed for arguments and in the meanwhile respondents Nos. 2 to 6 filed an application under Order I Rule 10, C.P.C. on the ground that they were the heirs of predeceased son of the original owner of the land namely Ghulam Muhammad Bhutta. The said application was allowed by the learned trial court vide order dated 12.1.1992. Thereafter, respondents Nos. 2 to 6 also filed their written statements and stated that both the transactions i.e. gift deed and sale deed were executed during Marz-ul-Mout. Thereafter, the learned trial court framed further three

issues. After recording the evidence and hearing the arguments of both side, the learned trial court dismissed the suit of the petitioners-plaintiffs and respondent No.7 vide judgment and decree dated 20.05.1993. Feeling aggrieved from the judgment and decree, the petitioners-plaintiffs filed an appeal before the learned appellate court and vide judgment dated 22.10.1996 the learned appellate court framed the following issue:--

> "Whether the sale deed regarding suit land measuring 413 kanals 3 marlas in favour of the plaintiffs is without consideration, result of fraud and executed during Marzul Maut, if so, its effect? OPD"

and referred the matter to the learned trial court with the direction to take additional evidence and to proceed to decide the issue and then to return the file along with the evidence to the appellate court. Thereafter, the learned trial court recorded the evidence on the additional issue and decided in favour of the respondents-defendants vide judgment dated 03.4.2002 and sent the findings to the learned appellate court. The learned appellate court after hearing the parties, dismissed the appeal of the petitioners and upheld the findings of the learned trial court vide impugned judgment and decree dated 12.01.2011. Hence this civil revision.

4. Learned counsel for the petitioners contends that the findings of the learned courts below on issues Nos. 7 and 8 are erroneous in nature as those are result of misreading and non-reading of evidence; that the alleged donor i.e. Ghulam Muhammad (deceased) during his life time showed his intention to challenge the alleged gift, therefore, his successor has every right to challenge the validity of gift; that the disputed gift in favour of the respondents was not with free will of the donor rather it was under compulsion and domination of respondent No.1. He further argued that the findings of the learned courts below on additional issue are also unwarranted in law as the sale deed was not challenged by any of the respondents independently; that the initial burden to prove that the sale deed in favour of the petitioners was result of fraud, was upon the respondents Nos. 2 to 6, who failed to lead the evidence in affirmative, therefore, any evidence produced by respondent No.1, who did not challenge the sale deed, cannot be used against the petitioners. He relied upon the cases reported as Ashiq Hussain and another v. Ashiq Ali (1972 SCMR 50), Maulvi Abdullah and others v. Abdul Aziz and others (1987 SCMR 1403), Rab Nawaz and others v. Ghulam Rasul (2014 SCMR 1181), Syed Niamat Ali and 4 others v. Dewan Jairam Dass and another (PLD 1983 Supreme Court 5) and Messrs A.R. Builders (Pvt.) Ltd. v. Faisal Cantonment Board and 4 others (PLD 2004 Karachi 492).

5. On the other hand, learned counsel for the respondents supported the judgments of the learned courts below relying upon the judgments reported as Alam Khan and 3 others v. Pir Ghulam Nabi Shah and Company (1992 SCMR 2375) and Industrial Development Bank of Pakistan v. Messrs Naqi Beverages (Pvt.) Ltd. and 7 others (2002 CLD 712).

6. Arguments heard. Record perused.

7. The points for consideration before this Court are the following:--

(i) As to whether, the gift deed dated 30.11.1981 in favour of the respondent No.1 was illegal, inoperative and ineffective upon the rights of the petitioners and

(ii) As to whether, the sale deed in favour of the petitioners qua the land measuring 413 kanals 3 marlas was validly made and cannot be set-aside by the courts below.

8. There is not denial to the pedigree table as the parties to the suit are admittedly the descendants of the deceased Ghulam Muhammad (hereinafter referred as deceased). The case of the petitioners qua the disputed gift is that the respondent No.1 was dominating the deceased as he was residing with him. According to the contents of the plaint, the deceased was being administered certain medicines causing sedation to the deceased and under the such health condition, the respondent No.1 maneuvered to get the signatures and thumb impressions upon the gift deed.

9. In order to discharge the initial burden to prove issues Nos. 7 and 8, PW1 Rasool Bakhsh deposed in his examination-in-chief that Ghulam Muhammad was his maternal uncle who remained seriously ill and he was taken to Mouza Nokarian, District Sheikhupura by the defendants where he remained under medication and was not in his senses; that Ghulam Muhammad remained with the defendants from 1980 to 1984 and did not come to Lahore; that in the year 1984, the plaintiffs brought their father Ghulam Muhammad to Lahore and started his treatment and Ghulam Muhammad became absolutely healthy and then it transpired the alleged gift was made and despite holding of a panchayat, the defendants refused to get the cancellation of the gift. In cross-examination, he stated that in the panchayat there were Chaudhry Atta, Muhammad Tufail and Zia etc. He admitted that after the panchayat, the plaintiffs did not proceed against respondent No.1. PW2 Muhammad Yaqoob, PW3 Haider Ali Siddiqui tried to corroborate the statement of PW1 in most similar words. PW2 in his examination-in-chief stated that he was present in the panchayat; he admitted that in his presence, the plaintiffs never called any doctor in village nokarian. He further stated that 4/5 months after going to Lahore deceased Ghulam Muhammad become healthy and then he told about the gift. This witness stated that Ghulam Muhammad remained alive for about year and a half but no legal proceedings were initiated by him. This witness (PW2) though stated that he was present in the panchayat but he did not mention the name of any other person associated in the alleged panchayat whereas PW1 did not mention that Muhammad Yaqoob (PW2) was associating in the panchayat proceedings. PW3 admitted that he was not part of the panchayat proceedings. PW4 Muhammad Mushtaq (the original plaintiff No. l) appeared in the witness box and deposed that his father remained in village Nokarian for 7/8 years along with the defendants where he remained in sedation due to the medication and in the same period, the alleged gift was executed. He stated that a panchayat took place, wherein the defendants conceded to get the cancellation of gift but thereafter he resiled. The statement of this witness is contradictory to the statements of PW1 to PW3 as none of the PWS (allegedly part of

the panchayat proceedings) stated that the defendants ever conceded to get the cancellation of the gift deed. In cross-examination, PW4 stated that he used to come to village Nokarian to see his father after every 15 days. He also stated that he was being accompanied by his friends. He stated that he himself never got medical check-up of his father by any doctor. He stated that in the year 1984, he took his father along with him and then he was treated by Pro: Dr. Akhtar. He stated that he could not tell, as to whether, Dr. Akhtar is alive or not. He stated that the sale deed in his favour was executed after about 10/11 months of shifting his father from village nokarian. He further admitted that his father remained alive for 5/6 months after attestation of sale deed. He admitted that during the stay of his father at village nokarian along with the defendants, he never filed any application before any competent officer qua the mental health of the father.

10. In rebuttal, DW1 Muhammad Ishaq deposed in his examination-in-chief that Ghulam Muhammad was his real maternal uncle, who died in the year 1985. He deposed that Ghulam Muhammad was mentally and physically hale and healthy and in the year 1981 gifted 45 acres of land in favour of his son Jamil in consideration of his services to look-after him. Despite lengthy cross-examination, nothing detrimental to the rights of the defendants was brought on the record. DW2 Ghulam Mustafa, Lamberdar of village Nokarian deposed that he was told by Ghulam Muhammad that he has gifted his land on the eastern side in favour of Jamil defendant which was being cultivated by Muhammad Sharif tenant and the tenants were directed to pay the share in the produce to Jamil. He specifically denied that Ghulam Muhammad remained under sedation while his stay in village Nokarian. DW3 Muhammad Mukhtar deposed that Ghulam Muhammad was mentally hale and healthy; that Ghulam Muhammad 3/4 times talked about gifting the property to Jamil, defendant and about 9 years ago vide Exh.D1, the property was gifted to Jamil. He stated that he signed the Exh.D1 as attesting witness and Ghulam Muhammad made his signature in English on the gift deed. He further deposed that Ghulam Muhammad admitted that possession of the property was also handed-over to Jamil defendant. In cross-examination certain suggestions were made which are reproduced as under:--

DW4 Muhammad Sharif is the other attesting witness of Exh.D1, who deposed that he is the tenant of Ghulam Muhammad and thumb marked as Exh.D1 after the signatures were made by Ghulam Muhammad. He deposed that Ghulam Muhammad was mentally and physically fit. He further deposed that Ghulam Muhammad specifically asked him to give the share of produce ( ) to Jamil, defendant and since then the

produce is being given to the defendants. In cross-examination, he stated that stamp paper of gift deed was purchased by Jamil. He denied the suggestion that they have fraudulently prepared the gift deed in connivance with Jamil and Mukhtar. He denied the suggestion that the mental health of Ghulam Muhammad got deteriorated. He also denied that the brain of Ghulam Muhammad was intoxicated by injections and medicines. DW5 Muhammad Jamil/defendant deposed that on 30.11.1981 his father gifted away 350 kanals of land in his favour, which was accepted by him and possession was also delivered to him. He deposed that hibanama (Exh.D1) was prepared in the courts and was duly registered. He stated that his father was an illiterate person and after reading and understanding the contents of Hibanama, he signed the same in English and urdu.

11. A lengthy cross-examination was conducted. He denied that his father asked him to get cancel the gift deed. He also denied that some panchayat took place. He also denied that in any such panchayat Rasool Bakhsh and Yaqoob used to appear. He also denied that Haider Ali Siddiqui also came in the village with respect to panchayat.

12. In view of the above evidence the execution of gift deed in favour of the defendants become established. It is obvious that a beneficiary of the document is to prove its execution but when the same is challenged on account of some fraud and forgery then the initial burden to prove such fraud and forgery or misrepresentation rests upon the party who alleges as such. The petitioners could not prove through any cogent evidence that the deceased Ghulam Muhammad was under any mental disability at the time of execution of gift deed. PWs produced by the petitioners made contradictory statements on points but none of them could prove that Ghulam Muhammad was under any mental disability. The petitioners failed to produce any doctor, who treated deceased Ghulam Muhammad nor any medical record, whatsoever, was produced rather there is no attempt on behalf of the petitioners to produce any such medical evidence. On the other hand, Exh.D1 was duly proved through production of marginal witnesses. The emphasis of the learned counsel for the petitioners was that Exh.D1 did not confer any right in favour of the defendants as the transaction of gift was to be proved independently. He stressed that gift was oral which was not proved by the defendants through any oral evidence and any subsequent transaction i.e. Exh.D1 is of no avail. This contention of the learned counsel for the petitioners is unfounded. It is not the case of the defendants that property was initially gifted through any oral gift. His case is that property was gifted to him vide Exh.D1. The contents of Exh.D1 fully support the version of the defendants. Relevant portion of Exh.D1 is reproduced as under:--

**(Underline is mine)**

13. In view of the above evidence, the case law relied upon by the learned counsel for the petitioners is quite distinguishable and not attracted in the present case, therefore, the findings of the learned courts below on issues Nos. 7 and 8 are unexceptionable and did not suffer from any illegality and the same are upheld.

14. With regard to the other point for consideration whereby the learned courts below have decided the additional issues against the petitioners, it is observed that the learned appellate court while framing the additional issue erred in law as no additional issue could be framed. A set-off can only be claimed by a defendant when the same comes within the provisions of Order VIII, Rule 6 of C.P.C. The relevant provision is reproduced as under:--

> "**Particulars of set-off to be given in written statement**.---(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiffs demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sough to be set-off."

**(Emphasis provided)**

There is no other provision to claim any set-off in the entire civil procedure code. In order to claim a set-off, it is mandatory that the suit must be for recovery of money. The present case filed by the petitioners was for cancellation of a registered gift deed in favour of the defendants and if the defendants was aggrieved from any sale deed in

favour of the petitioners, the only remedy available to him was to file a suit for cancellation of the sale deed. In this case, the defendant No.1 despite having knowledge of the sale deed in favour of the petitioners did not file any suit but asserted in his written statement that he reserves his right to challenge the sale deed of the petitioners but the said right was never exercised. Respondents Nos. 2 to 6 became a party to the proceedings after acceptance of their application under Order I Rule 10 of C.P.C., while filing their written statement challenge the sale deed of the petitioners not independently but as a counter claim/alleged set-off but surprisingly they failed to lead any evidence in order to discharge the initial onus to prove the additional issue. In this regard, any evidence led by the petitioner No.1, contrary to its own pleadings, could not be read in evidence.

15. In view of the above discussion, framing of additional issue was void ab initio, therefore, any finding there-upon is of no legal effect, therefore, findings of the courts below on additional issue are **set-aside.** Resultantly, this revision petition is partly **allowed** to the extent of additional issue and is **dismissed** to the extent of remaining issues and judgments and decrees passed by the courts below to that extent are **upheld.**

ZC/M-49/L Order accordingly.

**2018 M L D 1434**

**[Lahore]**

**Before Atir Mahmood, J**

**LAHORE DEVELOPMENT AUTHORITY through Director General and another---Petitioners**

**Versus**

**MANZOOR HUSSAIN---Respondent**

Civil Revision No.36715 of 2017, heard on 12th June, 2018.

**(a) Lahore Development Authority Building Regulations, 2016---**

----Regln. 7---Site plan, approval of---Period of approval---When a site plan was submitted for its sanction before the (Lahore) Development Authority along with the payment of requisite fee and the same remained pending without any objection by the Development Authority for 60 days, it would automatically stand approved.

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

----S.115---Revisional jurisdiction of the High court---Scope---Concurrent findings of law and fact---Such findings were immune from interference by the High Court in its revisional jurisdiction unless there was some gross illegality, jurisdictional defect, misreading or non-reading of evidence.

Mian Tahir Maqsood for Petitioner.
Mohsin Mehmood Bhatti for Respondent.
Date of hearing: 12th June, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the respondent filed a suit for declaration with permanent injunction against the petitioner with the averments that he purchased a plot measuring 18 marlas adjacent to Plot No.28, Industrial Area, Gulberg-III, Lahore from the petitioner-LDA for consideration of Rs.40,000/- per marla vide allotment letter No.DEM.LDA/7044 dated 14.11.1995; that possession of the plot was handed over to the petitioner vide letter dated 28.11.1995 on 30.11.1995; that the petitioner filed application for approval of site plan in the year 1996 followed by application dated 10.07.1997 along with proposed plan; that requisite fee for approval of the site plan was also deposited; that despite repeated visits, the LDA did not sanction the site plan which constrained the petitioner to start the construction; that the petitioner started construction over the suit plot; that the LDA instead of sanctioning the site plan started to threaten the respondent of demolition of the construction without any lawful authority; that the respondent first constructed the

ground floor and then took in hand the construction on the first floor when the petitioner LDA issued notice dated 28.11.2011 for demolition of the construction; that the respondent approached the petitioner LDA but to no avail which constrained him to file the instant suit.

2. The suit was contested by the petitioner LDA by filing written statement. Issues were framed. Evidence led by the parties was recorded. Thereafter learned trial court proceeded to decree the suit of the respondent vide judgment and decree dated 30.01.2012. Feeling dissatisfied, the petitioner filed appeal which was dismissed vide judgment and decree dated 06.01.2017 passed by learned Additional District Judge, Lahore. Hence this civil revision has been preferred.

3. Arguments heard. Record perused.

4. The sole contention of learned counsel for the petitioner is that since the plot was allotted for specific purpose of industrial setup, therefore, the site plan for residential building could not be sanctioned by the petitioner LDA, therefore, the building erected on the suit plot is illegal and unlawful.

5. Admittedly, the suit plot was allotted to the respondent vide allotment letter No.LDA/DEM/7044 dated 14.11.1995 (Exh.P1) and possession of the same was handed over to the respondent vide letter No. LDA/DEM/7282 dated 28.11.1995 (Exh.P3) on 30.11.1995. The allotment letter reads that:--

> " LDA has decided to make an offer of sale of 18 marlas of land situated in Gulberg-III, adjacent to plot No.28-Industrial Block, to you at the rate of Rs.40,000/- per marla "

The above letter does not suggest that the suit plot is an industrial plot rather it says that it is a plot which is located adjacent to Plot No.28, Industrial Block, Gulberg-III, Lahore. Even, there is no clause or condition in the allotment letter that the suit plot will not be used other than for industrial purpose. Same is the position with the possession letter (Exh.P3) whereby the possession of the suit plot was handed over to the respondent. There is no other document on record which may suggest that the suit plot was an industrial plot meant only for industrial activity. In the circumstances, it cannot be said that the suit plot was an industrial plot. Instead thereof, it may or may not be an industrial plot or of some other category viz. residential etc. In this view of the matter, I am not in consonance with argument of learned counsel for the petitioner that the suit plot was meant for the industrial purposes only.

6. There is no denial by learned counsel for the petitioner that the site plan was submitted by the respondent before the LDA authorities for its sanctioning in 1996 but

it could neither be objected to nor sanctioned by the LDA till date. He could also not deny that the requisite fee for approval of the site plan was also deposited by the respondent. In this regard, Regulation 7 of Lahore Development Authority Building Regulations, 2016 being relevant in this case is reproduced below:

**"7. Period of Approval**

(i) Within 60 days after the receipt of an application for permission to carry out Building Works, the Competent Authority shall:-

(a) pass orders granting or refusing permission to carry out such Building Works and in the case of refusal specify the provision of the Regulations violated; or

(b) require further details of the plans, documents, plan scrutiny fees, specifications and any other particulars to be submitted to it.

(ii) If the authority does not pass orders granting or refusing permission specifying the provision of the Regulations violated within 60 days which all the necessary information asked for under 7(i)b has been furnished and all documents, plans, specifications and particulars called for have been submitted and plan scrutiny fee has been paid; or if such additional particulars have not been called for within the required 60 days from the receipt of an application, it shall be deemed to have been sanctioned to the extent to which it does scheme provisions if any, and Controlled Areas requirements as the case may be."

(Emphasis provided)

It is unambiguously clear from the above regulation that if a site plan is submitted for its sanction before the LDA authorities along with the payment of requisite fee and the same remains pending without any objection by the LDA for 60 days, it will automatically stand approved. In this perspective, the site plan submitted by the respondent along with payment of requisite fee, which remained pending without any objection with LDA authorities beyond the period would be deemed to be approved sanctioned plan. Since the petitioner LDA has not objected to the site plant during the period it remained pending with it, the LDA cannot object to it subsequently.

7. There are concurrent findings of law and fact against the petitioner which are immune from interference by this Court in its revisional jurisdiction unless there is some gross illegality, jurisdictional defect, misreading or non-reading of evidence

therein. Learned counsel for the petitioner has not been able to point out any such illegality in the impugned judgments and decrees. No interference is called for.

8. For what has been discussed above, this civil revision has no substance which is accordingly **dismissed.**
MWA/L-5/L Revision dismissed.

**P L D 2018 Lahore 46**

**Before Atir Mahmood, J**

**Malik FARZAND ALI and another---Appellants**

**Versus**

**ASAD ALI and others---Respondents**

Election Appeal No.12 of 2017, heard on 29th June, 2017.

**Punjab Local Government Act (XVIII of 2013)---**

----S. 27---Punjab Local Government (Conduct of Elections) Rules, 2013, R.12(5)---Statement of assets---Failure to declare certain land in the statement of assets---Effect---Appellant sought disqualification of returned candidate on ground that at the time of filing of nomination papers he did not declare certain pieces of land owned by him---Validity---Such was not a ground for disqualification of a returned candidate who at the time of filing of nomination papers, did not declare assets and liabilities---Provisions of R.12(5) of Punjab Local Government (Conduct of Elections) Rules, 2013 were directory and not mandatory in nature---Incorrect mentioning of assets and liabilities neither made nomination papers of a candidate invalid nor disqualified the candidate---High Court declined to interfere in the judgment passed by Election Tribunal being in accordance with law---Appeal was dismissed in circumstances.

Abdul Rasheed and another v. Election Appellate Authority and others 2016 SCMR 1215; Barkhurdar v. Appellate Tribunal/Additional District and Sessions Judge and 3 others PLD 2016 Lah. 101 and Syed Asghar Ali Shah v. Election Tribunal/Additional District and Sessions Judge, Ferozewala and 13 others 2004 MLD 1912 distinguished.

Appellants in person.
Muhammad Shahid Maqbool Sheikh and Maqbool Ellahi Sheikh for Respondents.
Date of hearing: 29th June, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that the appellants filed an election petition against the respondents with the averments that the appellants and the respondents contested the election of Union Council No.82 of Sheikhum Tehsil, Pattoki, District Kasur for the offices of Chairman and Vice-Chairman wherein respondents Nos.1 and 2 were declared returned candidates; that respondents Nos.1 and 2 did not declare their assets correctly nor mentioned their correct valuation and procured their election results through illegal practices.

2. On receipt of summons, respondents Nos.1 and 2 filed their contesting written reply. Respondents Nos.3 to 6 filed conceding written reply whereas respondents Nos.7 and 8 were proceeded against ex parte vide order dated 04.03.2016. Out of divergent pleadings of the parties, following issues were framed:

**"ISSUES**

1. Whether returning officer committed illegality while consolidating the results? OPP

2. Whether respondents Nos.1 and 2 did not declare their assets correctly while submitting nomination papers? OPP

3. Whether respondents No.1 and 2 committed illegal practices during the polling? OPP

4. Whether Election Petition has been filed with a mala fide intention and liable to be dismissed being baseless and frivolous?OPR"

3. Evidence led by the parties was recorded. Thereafter, learned Election Tribunal dismissed the election petition vide order dated 14.03.2017. Hence this election appeal has been filed.

4. Arguments heard. Record perused.

5. Before this Court, the appellants have emphasized only upon issue No.2 which pertains to incorrect declaration of assets by the respondents. He has relied upon the law laid down in cases titled Abdul Rasheed and another v. Election Appellate Authority and others (2016 SCMR 1215), Barkhurdar v. Appellate Tribunal/Additional District and Sessions Judge and 3 others (PLD 2016 Lahore 101) and Syed Asghar Ali Shah v. Election Tribunal/Additional District and Sessions Judge, Ferozewala and 13 others (2004 MLD 1912). None of rest of the issues has been agitated, therefore, I will confine myself to Issue No.2 only.

6. According to the appellants, land measuring 5 kanal 16 marla and 51 kanal 8 marla was not declared by respondent No.1 which makes nomination paper of respondent No.1 as well as respondent No.2's being joint candidature invalid. Learned counsel for respondents Nos.1 and 2 submits that the said property was sold out by respondent No.1 to his brothers namely Jamshaid ul Hassan and Mudassar Zaheer through agreement to sell (Exh.RW-1/B) in 2002-03 and after receipt of consideration amount, handed over possession of the same to his brothers who are owners in possession of the property in question and respondent No.1 has no concern with the said property. On query, he admits that the property still exists in the name of respondent No.1 but states in the same breathe that since the vendor and the vendees are real brothers and there is strong confidence and trust upon each other, the transfer of the property was neither demanded by the vendees nor done so by the vendor. He further submits that since respondent No.1 has no concern with the said property, he did not mention it in the nomination papers bonafidely. In support of his assertions, respondent No.1 produced his brothers before the court who supported the version of respondent No.1. There is no evidence in rebuttal by appellants' side contradicting the stance of respondent No.1. In the circumstances, the preponderance of evidence lies in favour of respondent No.1, therefore, it may be presumed that the land in question was sold out by respondent No.1 to his brothers as asserted by him.

7. Supposedly, the property in dispute is actually not sold by respondent No.1 and the same is still owned by respondent No.1 whereas Exh.RW 1/B is a fictitious document as alleged by the appellants. Under Rule 12(5) of the Punjab Local Government (Conduct of Elections) Rules, 2013 (hereinafter called "the Rules"), each candidate is required to append a statement of assets and liabilities with regard to himself, his spouse and dependants, however, there is no penal clause in the Rules or in the Punjab Local Government Act, 2013 (hereinafter called "the Act") suggesting any penal action to violators of the said rule. The only section which deals with qualification and disqualification of returned candidates is Section 27 of the Act which is reproduced below:

> **"27. Qualifications and disqualifications for candidates and elected members.-** (1) A person shall qualify to be elected as a member or to hold an elected office of a local government, if he-
>
> (a) is a citizen of Pakistan;
>
> (b) except the youth member, is not less than twenty five years of age on the last day fixed for filing the nomination papers;
>
> (c) is enrolled as a voter in the electoral rolls of the ward or the local government from which he is contesting the election.
>
> (2) A person shall be disqualified from being elected or chosen as, and from being, an elected member of a local government, if he-
>
> (a) ceases to be citizen of Pakistan or acquires citizenship of a foreign State;
>
> (b) is declared by a competent court to be of unsound mind;
>
> (c) is an undischarged insolvent;
>
> (d) is in the service of Pakistan or of a local government;
>
> (e) is in the service of any statutory body or a body which is owned or controlled by the Government or a Provincial Government or the Federal Government or a local government or, in which any of such Government or local government has a controlling share or interest, except the holders of elected public office and part-time officials remunerated either by salary or fee; provided that in case of a person who has resigned or retired from any such service, a period of not less than two years has elapsed since his resignation or retirement;
>
> (f) is under an existing contract for work to be done or goods to be supplied to a local government or has otherwise any direct pecuniary interest in its affairs;
>
> (g) has been dismissed from public service on the grounds of misconduct unless a period of five years has elapsed since his dismissal;
>
> (h) has been removed or compulsorily retired from public service on the grounds of misconduct unless a period of three years has elapsed since his removal or compulsory retirement;
>
> (i) has been convicted by a court of competent jurisdiction for a term not less than two years for an offence involving moral turpitude or misuse of power or authority under any law unless a period of five years has elapsed since his release; and

(j) has been convicted for an offence involving activities prejudicial to the ideology, interest, security, unity, solidarity, peace and integrity of Pakistan unless a period of five years has elapsed since his release

(3) If a person-

(a) is found by the Election Commission to have contravened any provisions of subsections (1) or (2), he shall stand disqualified from being a candidate for election to any office of a local government for a period of four years; or

(b) has been elected as a member of a local government and is found by the Election Commission to have contravened any provision of subsection (1) or (2), he shall cease forthwith to be an elected member or to hold the office of such member and shall stand disqualified from being a candidate for election to a local government for a period of four years.

(4) A candidate who claims to be a Muslim shall submit to the Returning Officer the declaration given in Ninth Schedule along with the nomination papers."

I have carefully gone through the above provisions of law. There is not a ground for disqualification of a returned candidate who, at the time of filing of nomination papers, does not declare the assets and liabilities. In this view of the matter, I am of the considered opinion that provision of Rule 12(5) of the Rules is just directory and not that of mandatory nature. Therefore, incorrect mentioning of assets and liabilities neither makes the nomination papers of a candidate invalid nor disqualifies such candidate. The judgment passed by learned Election Tribunal is quite in accordance with law. The appellants have not been able to point out any illegality in the impugned judgment. No interference is warranted. The case law relied upon by the appellants is distinguishable on facts and not attracted in the present case.

8. For what has been discussed above, this appeal has no substance. The same is accordingly dismissed.

MH/F-20/L Appeal dismissed.

**P L D 2018 Lahore 127**

**Before Atir Mahmood, J**

**UMER MEHMOOD and others---Petitioners**

**Versus**

**PUBLIC AT LARGE and others---Respondents**

Civil Revision No.2216 of 2016, heard on 29th May, 2017.

**Qanun-e-Shahadat (10 of 1984)---**

----Arts. 123 & 124---Specific Relief Act (I of 1877), S.42---Suit for declaration---Person having been heard of more than 15-16 years---Presumption---Principle---Suit filed by plaintiffs was concurrently dismissed by Trial Court as well as Lower Appellate Court by applying provisions of Art.123 of Qanun-e-Shahadat, 1984---Plea raised by plaintiffs was that provisions of Art.123 of Qanun-e-Shahadat, 1984 were not applicable as missing person was not heard of for the last 15-16 years---Validity---Provisions of Art.123 of Qanun-e-Shahadat, 1984 related to death of person known to have been alive within thirty years---Plaintiffs did not assert in their plaint that missing person had died but merely sought a declaration that there was a presumption that their missing relative had expired because he had not been herd of more than 15-16 years---Plaintiffs were closest relatives of missing relative and were persons who would have naturally heard of him if he had been alive---Plaintiffs in their evidence deposed in such regard and their statements were not cross-examined by the defendants---High Court, in exercise of revisional jurisdiction set aside judgments and decrees passed by both the courts below as they had committed grave illegality while dismissing the suit of plaintiffs---Revision was allowed in circumstances.

Lal Hussain v. Sadiq and others 2001 SCMR 1036 rel.
Asjad Saeed for Petitioners.
Respondents Nos. 1 and 2 are proceeded against ex parte vide order dated 28-11-2016.
Date of hearing: 29th May, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---The brief facts of the case are that the petitioners filed a suit for declaration with consequential relief against the respondents alleging therein that respondent No.2 Midat Mahmud was the joint owner along with Talaat Mahmud (predecessor of the present petitioners Nos. 1 to 3 and Satvat Mahmud (petitioner No.4), of the property bearing No. 186 Upper Mall Scheme, Lahore (fully described in the plaint) as they inherited the same from their deceased parents namely Sheikh Ahmed Mahmud and Begum Imtiaz Ahmed and a suit for declaration was decreed in their favour vide judgment and decree dated 15.12.2009. It is averred that there-after Talaat Mahmud (predecessor of petitioners Nos. 1 to 3) died on 11.10.2010 and another suit was filed on 02.11.2010 by petitioners Nos. 1 to 3 against the respondents i.e. L.D.A. and Public-at-Large to the effect that they are the only legal heirs of deceased Talaat Mahmud. The said suit was decreed vide judgment and decree dated 16.05.2011. On 12.04.2014, the petitioners filed the third suit seeking declaration with consequential relief with the following prayer:--

"It is, therefore, prayed that as the defendant No.2 has neither been heard of nor are his whereabouts known to the plaintiffs for last almost fifteen years, hence be declared/presumed dead as per Article 124 of the Qanun-e-Shahadat Order, 1984.

It is, further prayed that the suit be decreed in favour of the plaintiffs by declaring them as legal heirs of defendant No.2 who was owner of the suit property to the extent of his share.

It is also prayed that the defendants Nos. 3 and 4 be directed to transfer the ownership of suit property bearing No.186, Upper Mall Scheme, Lahore to the extent of defendant No.2 's share in the names of the plaintiffs in their record.

Any other relief which this learned court deems fit and appropriate in favour of the plaintiffs may kindly be granted".

2. No body except the LDA contested the suit. Out of the divergent pleadings of the parties following issues were framed by the learned trial court:-

**ISSUES:**

1. Whether the suit is not maintainable in its present form? OPD
2. Whether the plaintiffs have no cause of action and locus standi to file instant suit?OPD
3. Whether the suit is barred under sections 42 and 43 of LDA Act 1975?OPD
4. Whether the plaintiffs are entitled to declaratory decree as prayed for?OPP
5. Relief."

3. The petitioners produced their evidence but no evidence was led by the respondent-LDA. The learned trial court, after hearing the parties, dismissed the suit vide judgment and decree dated 08.11.2014. The same was assailed in the appeal by the petitioners, which was dismissed by the learned Additional District Judge, Lahore vide judgment and decree dated 19.04.2016. Hence this revision petition.

4. Learned counsel for the petitioners submitted that the judgments and decrees of the courts below are against law and facts of the case; that the learned courts below have misinterpreted the law on the subject as the provision of Article 124 of the Qanun-e-Shahadat Order, 1984 ("The Order") is applicable whereas the provision of Article 123 of the Order, 1984 was not attracted in the present case. He prayed for acceptance of this revision.

5. No body appeared on behalf of the respondents to contest this revision petition.

6. Arguments heard. Record perused.

7. The point for consideration before this Court is, as to whether, the learned courts below rightly decided the case while relying upon the Article 123 of the Order, 1984

or as to whether the provision of Article 124 of the Order, 1984 is applicable in the present case.

8. There is no denial to the fact that the property in dispute is owned by the present petitioners being successors of predecessors i.e. Sheikh Ahmed Mahmud, Begum Imtiaz Mahmud and Talaat Mahmud. The evidence on record produced by the petitioners goes un-rebutted to the fact that the defendant No.2, Midat Mahmud was not heard of for more than 15/16 years. The learned trial court while dismissing the suit of the petitioners observed that the time period prescribed by Article 123 of the Order, 1984 is 20 years whereas. the defendant No.2 was not heard of for the last more than 15/16 years. This observations of the learned trial court are absolutely incorrect as the Article 123 of the Order, 1984 prescribes a period of 30 years. The relevant provision of Article 123 of the Order, 1984 is reproduced as under:-

> **"Burden of proving death of person known to have been alive within thirty years.** Subject to Article 124, when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it".

The learned appellate court dealing with the relevant issue No.2 observed as follows:--

> "14 Furthermore, it is admitted fact that respondent/defendant No.2 namely Midat Mahmud was alive within thirty years and in this situation, Article 123 of Qanun-e-Shahadat Order 1984 is very much clear which is as under:-
>
> Burden of Proving that person known to have been alive within thirty years.--- Subject to Article 124 when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.
>
> 15. As already mentioned that respondent/defendant No.2 namely Midat Mahmood is alive within thirty years and appellants/plaintiffs asserted that he is not heard from last 15/16 years. So in this respect I am of the view that in this case Article 123 of Qanun-e-Shahadat Order 1984 is applicable instead of Article 124 of Qanun-e-Shahadat Order 1984, therefore, appellants/plaintiffs remain fail to produce evidence in accordance with Article 123 of Qanun-e-Shahadat Order 1984.
>
> 16. In view of my findings given above, the instant issue is decided against the appellant/plaintiffs and findings of learned trial court is confirmed".

9. In my opinion, the learned trial court as well as the learned appellate court erred in law while holding that the provisions of Article 123 of the Order 1984 are attracted. The bare reading of the Article 123 ibid, it is crystal clear that the said Article relates to the burden of proving death of person known to have been alive within thirty years. The petitioners in the present case did not assert in their plaint that defendant No.2 has died. They merely sought a declaration that there is a presumption that defendant No.2

has expired because he has not been heard of more than 15/16 years. The provision of Article 124 ibid is reproduced as under:-

> **"124. Burden of proving that person is alive who has not been heard of for seven years.--** When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who. affirms it",

The present petitioners being the closest relatives of respondent No.2 are the persons, who would have been naturally heard of him if he had been alive. The petitioners in their evidence unequivocally deposed in this regard and their statements were not cross-examined by the respondents. Even it was not a case of the respondent-LDA that defendant No.2 was alive. Both the courts below have committed a grave illegality while dismissing the suit of the petitioners. Reliance is placed upon the case reported as Lal Hussain v. Sadiq and others (2001 SCMR 1036). The relevant portion of the said judgment is reproduced as under for ready reference:-

> "It is common ground between the parties that Roshan Din is unheard of since 1947. The provisions of Article 124 of the Qanun-e-Shahadat Order are thus, fully attracted and there is a presumption of law that he is dead. However, the date of his death is not discernible from the record, therefore, the point for determination is whether his inheritance had opened seven years after 1947 or before the attestation of Mutation No.2868 or institution of the petitioner 's suit. The point can be conveniently determined in the light of the provisions of Article 124 of the Qanun-e-Shahadat Order and its interpretation made in Muhammad Sarwar and another v. Fazal Ahmad and another PLD 1987 SC 1. Article 124 of Qanun-e-Shahadat Order clearly spells out that where a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the person who affirms it". (Emphasis provided)

10. The learned trial court further observed that in the earlier suit the same relief was sought but was not granted by the then trial court, therefore, the present suit is hit by principle of 'res judicata'. As far as the question of "res judicata" is concerned, the petitioners did not seek any declaration qua the presumption of death of Midat Mahmud in their earlier suit as sought in the present suit and therefore findings of the learned courts below are also erroneous in nature and not sustainable in the eye of law.

11. Resultantly, this revision petition is allowed, the impugned judgments and decrees passed by both the courts below are set-aside and the suit of the petitioners is decreed as prayed for.

MH/U-10/L Revision allowed.

**P L D 2018 Lahore 678**

**Before Atir Mahmood, J**

**MUZAFFAR ABBAS---Petitioner**

**Versus**

**ELECTION COMMISSION OF PAKISTAN through Chairman and others---Respondents**

Writ Petition No.9931 of 2017, heard on 21st March, 2018.

**(a) Representation of the People Act (LXXXV of 1976)---**

----Ss. 52, 53, 54, 55, 56, 73 & 2 (v) (vi)---Civil Procedure Code (V of 1908), O.XXIII, Rr. 1, 2 & S.10---Election petition---Withdrawal of---Second election petition---Competency---Petitioner moved application to withdraw election petition with permission to file fresh one and in the meanwhile filed second election petition also---Election Commission dismissed the second election petition being not maintainable---Validity---Section 73 of Representation of the People Act, 1976 did not mention availability of any power with the Election Commission to grant permission to file second election petition but at the same time it did not bar to grant such permission---Representation of the People Act, 1976 was a special statute---When special statute did not bar something then it would be presumed that there was an implied permission---If petitioner had made some errors in the filing of election petition, he could not be stopped from correcting such errors within the applicable law---Election Tribunal while adjudicating upon the election petition had to adopt the procedure of Civil Procedure Code, 1908---Election Tribunal was at liberty to adopt any course of action to regulate the proceedings aimed at to promote the justice instead of following technicalities of C.P.C.---When there was any clash between the provisions of special statute and that of Civil Procedure Code, 1908 the provisions of former would take precedence over that of the latter---Any prohibition provided specifically in the special statute or any express provision thereof would be given preference over Civil Procedure Code, 1908---No bar existed on filing of fresh election petition under the Representation of the People Act, 1976---Court had power to grant permission to withdraw the suit with permission to file fresh one---Same principle would apply in the election matters as well---Election Tribunal could allow the petitioner to withdraw the first election petition with permission to file fresh one subject to question of limitation---If Election Commission found that petitioner while filing the election petition had not fulfilled the requirements of Representation of the People Act, 1976 (Ss.52 to 54) then petition could be dismissed forthwith---If no such fault was noted by Election Commission then it would refer the petition to the Election Tribunal for trial---No allegation existed against the petitioner that he failed to fulfil any of the requirements mentioned in Ss. 52 to 54 of Representation of the People Act, 1976---Only the Commissioner had jurisdiction to dismiss election

petition in case of contravention of any provision of Ss.52 to 54 of Representation of the People Act, 1976 but in the present case such power had been exercised by the Election Commission which could not be said 'the Commissioner'---Election Commission had trespassed its powers and dismissed the election petition using the jurisdiction of "Election Commissioner"---Impugned order being against law was set aside---Election Commission was directed to refer the matter to the Election Tribunal for its trial where question of limitation would be looked into---Constitutional petition was allowed accordingly.

Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar and others 2016 SCMR 1 and Muhammad Afzal v. Niaz Ahmad and another 1999 MLD 1744 rel.

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

----S. 10---Second suit in presence of first one---Competence---Proceedings in the second suit will be stayed until and unless the first suit on the same subject is decided by the court---Second suit can be filed by the plaintiff in presence of the first suit but the proceedings in the second suit will be kept in abeyance till decision of the first suit.

Faiz Rasool Jillani and Syed Sikandar Abbas Gillani for Petitioner.
Fawad Malik and Ziaullah Khan for Respondent No.2.
Respondents Nos.7 to 9, 11, 13, 15, 16 and 24 proceeded against ex parte vide order dated 27-4-2017.

Respondents Nos.3 to 6, 10, 12, 14, 17 to 23 proceeded against ex parte vide order dated 29-5-2017.
Shahzad Shaukat: Amicus Curiae.

Date of hearing: 21st March, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that on 19.01.2017, the petitioner challenged the declaration of respondent No.2 (hereinafter called "the contesting respondent") as returned candidate through Election Petition No.9/2016 (hereinafter referred to as "the first petition"). After filing of the said petition, the petitioner noticed the omission of proper attestation on the verification clause of the election petition, therefore, he filed application under Section 73 of the Representation of the People Act, 1976 (hereinafter called the "ROPA") read with Order XXIII, rules 1 and 2 of the Civil Procedure Code, 1908 for withdrawal of the petition with the permission to file fresh one. The said application was dismissed by the Election Tribunal, Lahore

(hereinafter called as "the tribunal") vide order dated 25.01.2017. On 27.01.2017, the petitioner filed another application under Section 73 of the ROPA for permission to withdraw the petition which was allowed subject to payment of cost of Rs.5,70,000/- vide order dated 22.02.2017. In the meanwhile, the petitioner filed second election petition on 26.01.2017 which was dismissed by the Election Commission (hereinafter called "the Commission") vide order dated 15.03.2017 holding that second petition was not maintainable. Hence this writ petition has been instituted.

2. Learned counsel for the petitioner inter alia contends that Election Commission has fallen in error in holding that the second petition was barred under Section 52 of the ROPA; that first petition of the petitioner was not decided on merit, therefore, no question of res judicata arises; that the second petition was filed within the time prescribed in the ROPA and that too, during the pendency of the earlier petition before the election tribunal, therefore, the bar contained in Order XXIII, rule 1 of the C.P.C. was not fatal to the right of the petitioner to re-file the election petition; that the Election Commission has trespassed its jurisdiction while passing the impugned order, therefore, this writ petition be allowed, the impugned order be set aside and the Election Commission be directed to transmit the election petition to the tribunal for its adjudication in accordance with law.

3. On the other hand, learned counsel for the contesting respondent has hotly opposed this writ petition and fully supported the impugned order.

4. Arguments heard. Record perused.

5. The moot point in this case is as to whether the second petition during the pendency of the earlier petition was barred.

6. Admittedly, the petitioner filed application under Section 73 of the ROPA for withdrawal of the Election Petition which was dismissed by the tribunal vide order dated 25.01.2017 with the observation that it had no authority under the ROPA to grant permission to file fresh one. During the pendency of the first election petition, the petitioner, on 26.01.2017, filed another election petition. After filing the second petition, the petitioner again filed an application under Section 73 of the ROPA for withdrawal of the first petition. On this application, notice was issued to the respondent for 30.01.2017 but the same remained pending till 22.02.2017 when it was allowed by the election tribunal subject to payment of cost of Rs.570,000/-. In the meanwhile, the Commission dismissed the second election petition vide impugned order dated 06.02.2017 on the sole ground that the second petition was not maintainable in the presence of the first petition.

7. In this case as well, the petitioner after having the first election petition noticed that proper attestation from the Oath Commissioner on the verification clause of the

petition was omitted, therefore, he resorted to filing the application for filing fresh petition. The tribunal, however, presumed that it did not have power to grant permission to file fresh one as no such power or authority has been given to the tribunal under Section 73 of the ROPA. I have gone through the said provision which undoubtedly does not mention availability of any such power with the tribunal. But at the same time, no bar by the said provision has been imposed upon the tribunal to grant such permission. The. ROPA is a special statute. In the special statutes, when there is something not barred, it is presumed, that there is an implied permission. In this regard, I am fortified by the dictums laid down in case Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar and others (2016 SCMR 1). Furthermore, if the petitioner has made some errors in filing the petition, he cannot be stopped from correcting such errors within the applicable law.

8. While adjudicating upon the election petitions, the tribunal has to adopt the procedure of the Civil Procedure Code, 1908. The election tribunal is also at liberty to adopt any course of action to regulate the proceedings aimed at to promote the justice instead of following the technicalities of the C.P.C. Where there is any clash between the provisions of the special statutes and that of the C.P.C, the provisions of the former will definitely take precedence over that of the latter. However, the unoccupied fields of the special statutes can be filled in by the C.P.C., as nearly as possible. Any prohibition given specifically in the special statute or any express provision of the special statutes will be given preference to that of the C.P.C. Undisputedly, there is no bar on filing of fresh petition in the ROPA. Under Order XXIII, Rule 1(2)(b) of the C.P.C., the court has been given power to grant permission to withdraw the suit with permission to file fresh one. To my mind, this provision has been provided just to facilitate the plaintiff of a certain suit to rectify the defects in his plaint but this is subject to question of time limitation or any other limitation provided by law. The same principle can be applied in the election matters as well because no provision in contravention thereto has been provided in ROPA. Therefore, the tribunal could, in my view, allow the petitioner to withdraw the first election petition with permission to file fresh one subject to question of limitation of time or any other limitation provided by law and it has wrongly held that it had no such power. Reliance is placed on the dictums laid down in case Muhammad Afzal v. Niaz Ahmad and another (1999 MLD 1744 Lahore).

9. The procedure of filing of the election petition has been given in Sections 52 to 56 of the ROPA. Procedure regarding forthwith dismissal or referring the election petition to the election tribunal has been given in Section 56 of the ROPA which reads that:

> **"56. Procedure on receipt of petition by the Commissioner**.- (1) If the Commissioner finds that any provision of section 52, section 53 or section 54 has not been complied with, the petition shall be dismissed forthwith.
>
> (2) If an election petition is not dismissed under subsection (1), the Commissioner shall refer it for trial to a Tribunal.

It is absolutely clear from the clause (1) of Section 56 that if the Commissioner finds that the petitioner, while filing the election petition, has not fulfilled the requirements of Sections 52 to 54 of the ROPA, he may dismiss the election petition forthwith. The only thing which would call the Commissioner to dismiss the election petition is the contravention of the provisions of Sections 52 to 54 of the ROPA. No other ground has been given in Section 56 of the ROPA which may provide basis for immediate dismissal of the election petition. It has been noted in clause (2) of Section 56 that if no such fault is noted by the Commissioner, he will refer the petition to the tribunal for the trial. In the instant case, there is no allegation upon the petitioner that he could not fulfill any of the requirements mentioned in Sections 52 to 54 of the ROPA and only ground which has been taken by the Commission to dismiss the second election petition filed by the petitioner is that the second petition is not maintainable. There is no such bar provided in Section 56 or anywhere in the ROPA on filing the second election petition. Even, no such embargo has been put in the C.P.C. on filing of the second suit wherein under Section 10 has been desired by the legislature that the proceedings in the second suit will be stayed until and unless the first suit on the same subject is decided by the court. Meaning thereby the second suit can be filed by the plaintiff in presence of the first suit but the proceedings in the second suit will be kept in abeyance till decision of the first suit. Keeping this ratio as well as non-provision of any bar on filing of the second petition in the ROPA in view, I am of the opinion that the second petition was not barred and the same could be filed in presence of the earlier petition. Therefore, the Commission has erred in law while holding that the second petition in presence of earlier one is not maintainable.

10. Another aspect of the matter is that under Section 56 of the ROPA, it is the only jurisdiction of the Commissioner to dismiss the election petition in case of contravention of any provision of Sections 52 to 54 of the ROPA but in the instant case, such power has been used by the Commission which cannot be said "the Commissioner" in any manner as the Commission and the Commissioner have separately been defined in Sections 2(v) and 2(vi) of the ROPA respectively. Therefore, the Commission has trespassed its powers and dismissed the election petition using the jurisdiction of the Commissioner, therefore, the impugned order is against the law, as such, it cannot sustain.

11 For what has been discussed above, this writ petition is allowed, the impugned order is set aside and the Commissioner is directed to refer the matter to the election tribunal for its trial where the question of limitation will be looked into.

ZC/M-81/L Petition allowed.

**P L D 2018 Lahore 693**
**Before Atir Mahmood, J**
**EHSAN ELLAHI BAIG---Appellant**
**Versus**
**MUHAMMAD PERVAIZ---Respondent**

R.S.A. No.250 of 2015, heard on 19th March, 2018.

**(a) High Court (Lahore) Rules and Orders---**

----Vol. IV, Chap. 12, R.5(1)---Administration of oath--- Procedure---Court has to take oath from witness in complete silence and witness who is giving oath must be standing before the Presiding Officer--- Words have to be repeated in a clear voice phrase by phrase--- Each and every word had to be made known to witness so as to make him understand what is the oath which he is going to give--- Such shows importance of oath to be taken from witness by the Court at the time of recording of his evidence.

**(b) Oaths Act (X of 1873)---**

----Ss. 6 & 13---Evidence without oath---Effect---After recording of evidence Trial Court decreed suit filed by plaintiff in his favour and the judgment was maintained by Lower Appellate Court---Plea raised by defendant was that evidence of witnesses of plaintiff was recorded by Trial Court without oath, hence same was illegal---Validity---If evidence of a witness was not taken on oath, such irregularity could be cured by re-recording evidence of that witness on oath but evidence without oath is not permissible in law---Cross-examination of witnesses of plaintiff was in question and if those witnesses were cross-examined again, there would be no harm to plaintiff, as his witnesses could say again on oath what they had earlier said, if they were speaking the truth---Defendant would have the right to rebut whatever was said in cross-examination by those witnesses--- Both the Courts below had failed to take into consideration such aspect of the case---High Court set aside concurrent judgments and decrees passed by two Courts below and remanded the matter to Trial Court for recording of evidence of witnesses in question after administering them oath---Second appeal was allowed in circumstances.

Sajjad Ahmad and another v. The State 1992 SCMR 408 ref.
Tasawar Hussain Qureshi for Appellant.
Khalid Aziz Malik for Respondent.
Date of hearing: 19th March, 2018.

**JUDGMENT**
**ATIR MAHMOOD, J**.--Briefly stated the facts leading to filing of this Regular Second Appeal are that the respondent filed a suit for possession through specific performance of the property mentioned in para 1 of the plaint. It was averred by the respondent that there was agreement to sell dated 06.01.2005 between the parties; the price of the suit property was fixed as Rs.14,50,000/- out of which Rs.300,000/- was

paid as earnest money whereby the rest of the sale consideration was to be paid by 06.05.2005; that the possession of the property was handed over to the respondent who was already residing in the suit property as tenant but afterwards, the appellant refused to transfer the property in the name of the respondent. Hence the suit was filed.

2. The suit was resisted by the appellant by filing written statement. Issues were framed and evidence led by the parties was recorded. Thereafter, learned trial court proceeded to decree the suit of the respondent subject to payment of Rs.800,000/- as additional consideration in addition to the remaining consideration vide judgment and decree dated 10.11.2010. The appellant filed RFA which was dismissed by learned lower appellate court vide judgment and decree dated 14.09.2015. Hence this RSA has been filed.

3. Arguments heard. Record perused.

4. Learned counsel for the appellant has emphasized on the point that the examination-in-chief of the respondent-plaintiff, Muhammad Pervaiz as PW.1, Safdar Hussain, PW.2 and Muhammad llyas PW.3 was recorded on 22.03.2008 but their cross-examination was conducted on 22.10.2018 (i.e. after seven months of recording of their examination-in-chief) without oath, therefore, their evidence neither had any legal value nor it could be relied upon while passing the impugned judgments and decrees. He has referred to Section 6 of the Oaths Act, 1873 (hereinafter called "the Act") in this regard. On the other hand, learned counsel for the respondent has relied upon Section 13 of the Act to state that omission in taking oath at the time of recording of evidence does not vitiate the whole trial, as such, the cross-examination of PW.1 to PW.3 conducted without oath is in accordance with law.

5. Sections 6 and 13 of the Act have been relied upon by both sides in favour of their respective stances which read as under:

**Section 6 of the Act**

> **"6. Affirmation by natives or by person objecting to oaths**. Where the witness, interpreter or juror is a Hindu or Mohammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath."

**Section 13 of the Act**

> "13. Proceedings and evidence not invalidated by omission of oath or irregularity. No omission to take any oath or make any affirmation, no substitution of any one for any other of them and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." (Emphasis provided)

Perusal of above transpires that Section 6 provides that except a Hindu, Mohammadan or an objector to making an oath, each witness, interpreter or juror shall be put to oath. The legislature has used the word 'shall' which makes the taking of oath mandatory. In addition, in Rule 5(1), Chapter 12 of Volume IV of the High Court Rules and Orders, the manner in which the oath is to be taken has been given as under:

> **"5. Manner of administering oath**. (1) Before a witness is called on to give evidence he should be made to stand in front of the Presiding Officer who will himself administer the oath or affirmation to him solemnly and impressively, making the witness repeat the words in a clear voice, phrase for phrase. While the oath or affirmation is thus being administered every one in Court shall be made to stand in complete silence."

It is evident from the rule 5(1) ibid that the court will take oath from the witness in complete silence and the witness who is giving oath must be standing before the Presiding Officer. Furthermore, the words will be repeated in a clear voice phrase by phrase. Meaning thereby, each and every word will be made known to the witness so as to make him understand what is the oath which he is going to give. This shows the importance of the oath to be taken from the witness by the court at the time of recording of his evidence. Even otherwise, the legislature in Section 6 of the Act has used the words "shall make an oath" which makes taking of the oath mandatory. In my considered view, putting a witness to make statement on oath has a specific purpose of stopping him from telling a lie while giving his evidence. When the words and sentences prescribed for the oath are repeated by the witness, he, if he is Muslim, must feel fear of Allah Almighty in him which forces him to speak the truth only, though it is not necessary in all the cases as receipt of education and training and thoughts of people differ from each other. It is common in our society that people who do not hesitate in telling lies generally, but when they are put to state on oath, they usually speak the truth to avoid torment and wrath by Allah Almighty for their lies on oath. Therefore, the oath before recording of evidence, in my considered opinion, is necessary so that the witness who comes to the court for evidence in favour of a party could be forced to speak the truth only and not otherwise, as decision of the court is always based on the documentary as well as oral evidence produced by the parties. The courts are now bound under the law to administer oath from each and every witness failing which the whole proceedings or trial may not vitiate but the evidence taken without oath being unauthentic and suffering from doubts cannot be relied upon to reach a just and fair conclusion.

6. I am not oblivious of the fact that according to Section 13 of the Act, the proceedings of the court will not stand vitiated if the evidence of the witnesses is not taken on oath. This may be taken in the sense that if evidence of a witness is not taken on oath, this irregularity can be cured by re-recording evidence of that witness on oath but evidence without oath is, in my view, not permissible under the law. In this regard, I am fortified by the dictums laid down by the Hon'ble Supreme Court of Pakistan in case Sajjad Ahmad and another v. The State (1992 SCMR 408).

7. Another aspect of the matter is that cross-examination of witnesses of the respondent-plaintiff is in question in this appeal. If the said witnesses are cross-examined again, there will be no harm to the respondent as his witnesses may say again on oath what they have earlier said, if they are speaking the truth. Undoubtedly, the appellant-defendant will have the right to rebut whatever is said in cross-examination by the said witnesses.

8. Both the learned courts below have failed to take into consideration the above aspect of the case, therefore, the impugned judgments and decrees cannot sustain.

9. As a result of above discussion, this appeal is allowed, the impugned judgments and decrees passed by both the learned courts below are set aside and the case is remanded to learned trial court who will provide opportunity to the appellant-defendant to cross-examine PW.1, PW.2 and PW.3 again along with right to rebut the version taken by the said witnesses in the cross-examination and thereafter the suit will be decided afresh, in accordance with law.

MH/E-3/L Case remanded.

**P L D 2018 Lahore 697**

**Before Atir Mahmood, J**

**KHALID MEER and others---Petitioners**

**Versus**

**FAQEERULLAH MINHAJ and others---Respondents**

Civil Revision No.214918 of 2018, heard on 6th June, 2018.

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

----S. 115---High Court (Lahore) Rules and Orders Vol. V, Chap.1, Pt. A, R.9-A---Revision petition, re-filing of---Notice to petitioners---Revision petition was returned to the petitioners due to incompletion of file---Direction to re-file revision petition within three days after removal of office objection---Revision petition re-filed after sixty days without any plausible reason---Question as to whether petitioners ought to have been issued notice by the Office for resubmission of the petition---Held, that the file was admittedly returned to the petitioners on the day it was filed---When the file was lying with the petitioners and not with the Office, the Office was not supposed to issue notice to the petitioners and it was the sole responsibility of the petitioners to resubmit the file within the prescribed time---Had the Office retained the file with it, the situation would have been different and the Office would also have been responsible for issuing notice to the petitioners---Since the file remained with the petitioners from the date when the objection was raised till the date it was re-filed, the Office was not required to issue notice under R. 9-A---Revision petition was dismissed in circumstances.

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

----S. 115---High Court, (Lahore) Rules and Orders, Vol. V, Chap. 1, Pt.A, R. 9---Revision petition, re-filing of---Limitation---Revision petition filed on last day of limitation (90th day) returned to the petitioners due to incompletion of file---Direction to re-file revision petition within 'three days' after removal of office objection---Revision petition re-filed after 'sixty days' without any plausible reason---Petitioners were obliged to comply with the direction given to them through the objection memo and re-file the petition within three days after having removed the objection(s) raised by the office but they took sixty days to do the needful, as such, the revision petition was barred by time by sixty days---Revision petition was dismissed in circumstances.

Lahore Development Authority v. Muhammad Rashid 1997 SCMR 1224 ref.

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

----S. 115---Revision petition, filing of---Limitation---Where the Court itself took note of any error or irregularity in the decision of the court subordinate to it to rectify it, it may exercise its discretionary and supervisory powers of suo motu but where a party aggrieved from order or judgment of a court invoked revisional powers of the court, the time limitation of ninety days provided in second proviso of Section 115, C.P.C. was to be adhered to strictly.

Province of Punjab through District Officer Revenue, Rawalpindi and others v Muhammad Sarwar 2014 SCMR 1358 ref.
Syed Muhammad Kalim Ahmad Khurshid for Petitioners.
Mian Abdul Saeed for Respondent No.3.
Respondent No.3 in person.
Date of hearing: 6th June, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This civil revision is directed against judgment and decree dated 21.12.2017 passed by learned Additional District Judge, Sheikhupura who dismissed appeal of the petitioners and upheld judgment and decree dated 09.12.2012 passed by learned Civil Judge, Sheikhupura whereby suit of respondent No.3 for possession through specific performance was decreed.

2. On 25.05.2018, objection was taken by respondent No.3 that this civil revision is barred by time. In response thereto, the petitioners have filed C.M. No.3-C/2018 under Section 151 of C.P.C. for condonation of delay which has duly been contested by respondent No.3 by filing written reply thereto.

3. Learned counsel for the petitioners inter alia submits that the civil revision was filed within time on 21.03.2018 but the Office raised objection thereupon and returned the same to the petitioners and compelled the petitioners to prepare Paper Books in which a lot of time was consumed and after doing the needful, the civil revision was re-filed on 25.05.2018. He contends that since the revision petition was filed within time, the same could not be treated as barred by time even if filed beyond the prescribed time limit. He argues that even if there is any technical flaw in the revision petition or it is barred by time, the same could not deprive the revisional court of its corrective and supervisory jurisdiction. In support of his arguments, he has relied upon the law laid down in cases Mst. Sabira Bi v. Ahmed Khan and another (2000 SCMR 847), Muhammad Boota v. Basharat Ali (PLD 2014 Lahore 1), Mst. Banori v. Jilani (deceased) through LRs and others (PLD 2010 SC 1186), Farman Ali v. Muhammad Ishaq and others (PLD 2013 SC 392) and Hafeez Ahmad and others v. Civil Judge, Lahore and others (PLD 2012 SC 400).

4. On the other hand, learned counsel for respondent No.3 submits that the revision petition after objection of incompletion of the file by the Office was returned to the petitioners to re-file it within three days but it was re-filed after sixty days without any plausible reason, therefore, it was badly barred by time. He points out that the only objection raised by the Office was regarding incompletion of the petition and no objection of preparation of paper books is reflected from the objection memo, therefore, it is nothing but an afterthought. He has relied upon the law laid down in cases Asif Ali Shah v. The Superintending Engineer, Quetta Circle, Quetta and another (PLD 1963 SC 263), Sultan Muhammad v. Muhammad Ashraf and 4 others (1991 CLC 269 Lahore), Naheed Ahmad v. Asif Riaz and 3 others (PLD 1996 Lahore 702), Muhammad Ahmad v. Muhammad Ali and another (PLD 1996 Lahore 158), Lahore Development Authority v. Muhammad Rashid (1997 SCMR 1224), Mst. Sabiran Bi v. Ahmad Khan and another (2000 SCMR 847) and Safdar Ali and 5 others v. Defence Housing Authority through Secretary and others (2011 YLR 1809 Lahore).

5. I have heard the arguments of learned counsel for the parties and perused the record. I have also gone through the case law cited by both sides.

6. The crux of arguments of learned counsel for the petitioners is that since the revision petition was filed within time but returned with objection(s) by the Office, it cannot be treated as time barred even if it was re-filed after the prescribed period and that even a time barred revision petition could not debar the High Court from exercising its revisional jurisdiction if it satisfies conditions for exercise of its suo motu jurisdiction.

7. The sole ground of learned counsel for the petitioners taken during the course of arguments and also noted in para 2 of C.M. No.3-C/2018 filed by the petitioners for condonation of delay in re-filing the revision petition is that the revision petition was filed within limitation but due to office objections, the same was returned and the office compelled the petitioners to prepare Paper Books which took a lot of time and as soon as the needful was done, the same was re-filed. Learned counsel for the petitioners has argued that if the petitioners after receiving the file had not returned back, the Office was required to issue notice to them under Rule 9-A of the Rules and Order ibid. The file was admittedly returned to the petitioners on the day it was filed, i.e. 21.03.2018. When the file was lying with the petitioners and not with the Office, the Office was not supposed to issue notice to the petitioners and it was the sole responsibility of the petitioners to resubmit the file within the prescribed time. Had the Office retained the file with it, the situation would have been different and the Office would also have been responsible for issuing notice to the petitioners. Since the file remained with the petitioners from the date when the objection was raised till the date it was refilled, the Office was not required to issue notice under Rule 9-A ibid. In this perspective, the contention of learned counsel for the petitioners that the petitioners ought to have been issued notice by the Office for resubmission of the petition has no force which is accordingly discarded. Admittedly, the civil revision was filed on 21.03.2018 on the 90th (last) day of its time limitation which was returned vide Diary No.187025 on the same day through the objection memo which reads as under:

> "26. Incomplete file.
>
> ..
>
> To be re-submitted after removing of the objection within 03 days."

Bare reading of above makes at least two things crystal clear: (i) the only objection put by the office on the petition was that it was incomplete and (ii) the file was returned to the petitioners with direction to re-file it within three days after removing the office objection. This objection was raised by the Deputy Registrar of this Court who has such powers under Rule 9, Chapter 1 of Rules and Orders of Lahore High Court (Volume V). There is no dispute that the Deputy Registrar could raise the said objection in light of the powers conferred upon him under Rule 9 ibid. The petitioners were obliged to comply with the direction given to them through the objection memo and re-file the petition within three days after having removed the objection(s) raised by the office but they took long time of sixty days to do the needful, as such, the revision petition was barred by time by sixty days. Reliance is placed on the dictums

laid down by the Hon'ble Supreme Court in case Lahore Development Authority v. Muhammad Rashid (1997 SCMR 1224) wherein it has been held that:

> "The circumstances pointed out by the learned Judge quite clearly show that the petitioner's officials acted with gross negligence in re-filing the revision petition. They took almost one year in doing what they were required to do in seven days and the explanation offered by them for this inordinate delay has not been found to be convincing by the learned Judge and rightly so, in our view. It has not been denied that the High Court Rules and Orders empowered the Deputy Registrar to raise the objections and fix the time for removing the same. That being so, revision petition re-filed long after the expiry of the period specified by the office was rightly dismissed as time barred." (Underline is mine)

8. Apropos argument of learned counsel for the petitioners that the Office compelled the petitioners to prepare paper books of the file which caused delay in re-filing the petition, therefore, the petitioners could not be penalized for the act of the office. As noted above, the only objection raised by the Office through the objection memo was of incompletion of the petition. The objection memo nowhere states that the paper books will also be prepared by the petitioners before resubmission of the petition. Furthermore, there is neither any such routine nor practice of the Office, particularly for cases of civil revisions, to ask for preparation of paper books. There is nothing on record even to suggest that the office had asked the petitioners to prepare paper books. Even otherwise, there is no provision under the High Court Rules and Orders to compel a revision petitioner to submit a paper book of a 'Revision Petition'. In the circumstances, I am of the view that no direction for preparation of paper books was given by the Office to the petitioners and the said plea is nothing but just an afterthought of the petitioners to avoid the consequences of delay in re-filing the revision petition.

9. Learned counsel for the petitioners while relying upon the law laid down in cases Hafeez Ahmad and others v. Civil Judge, Lahore and others (PLD 2012 SC 400) and Farman Ali v. Muhammad Ishaq and others (PLD 2013 SC 392) has argued that even a time barred revision petition could not debar the High Court from exercising its revisional jurisdiction if it satisfies conditions for exercise of its suo motu jurisdiction, therefore, it is entertainable. In a latest judgment in case of Province of Punjab through District Officer Revenue, Rawalpindi and others v. Muhammad Sarwar (2014 SCMR 1358), the Hon'ble Supreme Court of Pakistan has held that:

> "14. It follows from the above discussion that there are two situations in which the Court can exercise its revisional powers; on its on motion; or on the application by an aggrieved party. The former is the general supervisory power and discretionary in nature where the Court is empowers to examine the record of any case decided by a Court subordinate to it to rectify any error or irregularity. Such power is exercisable where the Court itself finds any error of the nature provided in section 115, C.P.C. without there being any right in favour of a party aggrieved of an order or judgment of a subordinate Court. However, when the revisional jurisdiction is invoked by an aggrieved party, it is subject to the statutory provisions now incorporated in section 115,

> C.P.C. The second proviso thereto in unambiguous terms lays down the period of limitation for applying to the Court by mentioning that "provided that such application shall be made within ninety days". Like all other statutory provisions prescribing time period in which a matter is to be brought before the Court the second proviso to section 115(1), C.P.C. to be applied with the same vigour. Thus, where an aggrieved party seeks redressal against the Judgment or order through the revisional powers of the Court under Section 115, C.P.C. he has ninety days to make the application, failing which the application is liable to be dismissed. (Emphasis provided)

It is evident from the dictums laid down by the apex court noted above that where the Court itself takes note of any error or irregularity in the decision of the court subordinate to it to rectify it, it may exercise its discretionary and supervisory powers of suo motu but where a party aggrieved from order or judgment of a court invokes revisional powers of the court, the time limitation of ninety days provided in second proviso of Section 115, C.P.C. is to be adhered to strictly. Since the petitioners aggrieved of the decisions of learned court below have approached this Court invoking its revisional jurisdiction, there is no occasion of exercising suo motu powers by this Court in light of the judgment of the august Supreme Court supra. The contention of learned counsel for the petitioners is accordingly repelled.

10. Another contention of learned counsel for the petitioners is that the revision petition suffering from some defect, i.e. non-filing of pleadings, could not be dismissed being barred by time and at the best, it could be treated as being not maintainable. In this regard, he has relied upon the law laid down by the apex court in case Mst. Sabiran Bi. v. Ahmad Khan and another (2000 SCMR 847). In the same judgment, it has been held that:

> "Learned counsel also relied on 1992 CLC 296, PLD 1996 Lahore 158, PLD 1996 SC 706 and 1997 SCMR 1224 but in our opinion these judgments are distinguishable on facts from the case in hand because in the reported judgment the memos. of petitions/appeals were handed over by Deputy Registrar to the Advocate for the purposes of removing office objections within the time fixed for this purpose but they did not adhere to the time and refiled petitions etc. after considerable delay. Thus, the Court concluded that in such situation the petitions are time barred; whereas in the instant case the prominent distinction is that memo. of petition was never handed over to the counsel for petitioner for removing office objections." (Emphasis provided)

Perusal of above reveals that in the case relied upon by learned counsel for the petitioners, the memo of petitions/appeals were not handed over to the Advocates/petitioners of those petitions/appeals. The above observation of the apex court suggests that its decision might have been different from that it rendered in the judgment supra, had the petitions were handed over to the petitioners. In this case, the petition was admittedly handed over to the petitioners on the day it was filed, therefore, the said case law is not attracted in this case. Therefore, the instant case is squarely distinguishable from that relied upon by learned counsel for the petitioners, as such, it does not help the petitioners in any manner.

11. The application, C.M. No.3-C/2018, has been filed by the petitioners for condonation of delay under Section 151, C.P.C. which provision is only attracted where no other provision is provided by law. This revision petition has been filed under Section 115, C.P.C. which itself provides time limitation of 90 days from the date of passing of judgment of the lower court, therefore, this application, having been filed under Section 151, C.P.C., is not maintainable.

12. In a nutshell, the revision petition was filed by the petitioners firstly on 21.03.2018, i.e. 90th (last) day of limitation of time when it was returned to the petitioners with the direction to resubmit it within three days after removing objection of incompletion of the petition. Thereafter, it was filed on 25.05.2018, i.e. after sixty days of its return, therefore, it was barred by time. C.M. No.3-C/2018 filed by the petitioners under Section 151, C.P.C. is not maintainable which is accordingly **dismissed.** As a consequence, revision petition in hand is also **dismissed** as being barred by time.

MWA/K-14/L Revision dismissed.

**P L D 2018 Lahore 758**

**Before Atir Mahmood, J**

**Mst. SAFIA BIBI and another---Petitioners**

**Versus**

**MUHAMMAD AKBAR and others---Respondents**

Writ Petition No.2500 of 2014, heard on 27th June, 2018.

**Qanun-e-Shahadat (10 of 1984)---**

----Arts. 59 & 164---Criminal Procedure Code (V of 1898), S.510---Constitution of Pakistan, Art.14---Inviolability of dignity of man---DNA test---Consent for conduct of such test---Scope---No one could be forced to have his/her blood test samples obtained for conducting DNA test---If a person did not give his consent for such test he/she could not be compelled for the same as such test amounted to interference with personal liberty of a person---Court had power to order for DNA test or any blood test in order to ascertain the truthfulness of allegations but such order must be passed with the consent of the party, such order could not be made in routine---Compelling a person to undergo DNA test could have serious consequences---Court was to safeguard and protect personal liberty of every citizen---DNA test was not the sole mode to adjudge and determine legitimacy of the children in matter of inheritance---Paternity issue could be proved by oral and documentary evidence.

Salman Akram Raja and another v. Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others 2013 SCMR 203 rel.

Muhammad Mehmood Chaudhry for Petitioners.

Respondents proceeded against ex parte.

Date of hearing: 27th June, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Through this constitutional petition, the petitioners have challenged the legality of order dated 10.01.2013 passed by respondent No.10/learned Civil Judge Shakargarh, District Narowal, whereby, application of respondents Nos.1 to 7-D for conducting DNA test of petitioner No.2 was accepted and order of learned Additional District Judge, Shakkargarh, District Narowal dated 20.12.2013 whereby appeal of the petitioners filed against order of learned trial Court, was dismissed.

2. Precisely the facts of the case are that respondents Nos.1 to 7-D filed a suit for declaration with consequential relief against the petitioners before learned trial Court, alleging therein that Muhammad Yaqoob (deceased) died issueless, however, petitioner No.2 was his adopted son, therefore, the mutations sanctioned relating to legacy of Muhammad Yaqoob in favour of petitioners are the result of fraud. Suit was contested by the petitioners by way of filing written statement. Issues were framed and evidence of the parties was recorded. When the case was at the verge of final

arguments, respondents Nos.1 to 7-D filed an application before the learned trial Court for issuance of direction for DNA test of petitioner No.2. Petitioners contested this application. Learned trial Court vide impugned order dated 10.01.2013 accepted the application. Feeling dissatisfied, petitioners filed revision petition before respondent No.11/learned Additional District Judge, Shakkargarh, District Narowal which was dismissed vide impugned order dated 20.12.2013.

3. Learned counsel for the petitioners contends that impugned orders are illegal and unlawful; that learned courts below have failed to look into the matter the settled proposition of law that Court is not supposed to aid any litigant or to fill-up lacuna of the case of a litigant, however, it is the duty of litigant to prove its case and filing of application by the respondents is definitely to fill-up lacunas of the case; that DNA Test is not a dependable test, when there is independent evidence available on the record to adjudicate the case; that petitioners have not given their consent for DNA test, to compel a person to undergo or to submit to medical examination of his/her blood without consent tantamount to interference with his/her fundamental right of life and liberty; that there is no provision in the Code of Civil Procedure, 1908 or Qanun-e-Shahadat Order, 1984 or any other law which may be said to authorize the Court to compel a person to undergo such a medical test against the wish of the petitioners; that during the lifetime of deceased, nobody never challenged the paternity of petitioner No.2 and even after three years of sanctioning of inheritance mutations, respondents Nos.1 to 7-D preferred a false application. Lastly, prayed that this writ petition be allowed and impugned orders passed by learned courts below be set aside.

4. Respondent have already been proceeded against ex parte vide order dated 27.09.2017.

5. Arguments advanced by the learned counsel for the petitioners have been heard and record made available before me has also been perused.

6. The only question involved in this case is as to whether paternity of a person in a civil case pertaining to inheritance could be determined by conducting a DNA test when independent evidence is available on the record. Admittedly, father of the petitioner No.2 namely Muhammad Yaqoob is not alive. The DNA test is sought to be conducted by matching blood samples of the petitioner with her mother Mst. Safia Bibi. Admittedly, during the lifetime of deceased, the paternity of the petitioner No.2 was not questioned by the other side, however, when mutations were sanctioned in favour of the petitioner, the respondents sought attestation of paternity of petitioner No.2. The respondents being real brothers, sisters and nephews of the deceased asked for DNA in a routine manner, without prima facie establishing that such test is inevitable. The choice to DNA Test is made in exceptional circumstances.

Entertaining applications for DNA Test as a routine in inheritance cases would open Pandora box and co-sharers in the property would move such applications frequently. In a case reported as "Salman Akram Raja and another v. Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others" (2013 SCMR 203), the august Supreme Court of Pakistan has observed as under:

> It is well settled that the consent of victim is necessary and she/he cannot be subjected to DNA or other medical test forcibly for prosecution purposes because that would amount to infringement of personal liberty of such persons. Reference may be made to the cases of Bipinchandra Shantilal Bhatt v. Madhuriben Bhatt (AIR 1963 Guj. 250), Polavarapu Venkataswarlu v. Polavarapu Subbayya (AIR 1951 Mad. 910), Sabayya Gounder v. Bhoopala Subramanian (AIR 1959 Mad 396), Venkateswarulu v. Subbayya (AIR 1951 Mad. 910), Goutam Kundu v. State of West Bengal (AIR 1993 SC 2295), Ms. X v. Mr. Z and another (96 (2002) DLT 354), Syed Mohd. Ghouse v. Noorunnisa Begum (2001 Cr.LJ 2028) and Haribhai Chanabhai Vora v. Keshubhai Haribhai Vora (AIR 2005 Guj. 157). In Syed Mohd. Ghouse's case (supra), the Andhra Pradesh High Court relying upon the case of Gautam Kandu (supra), quashed and set aside the order for conduction DNA test by observing that before ordering the blood test, either for DNA or other test, the court has to consider the facts and circumstances of the given case and the ramifications of such an order. But the Court cannot compel a person to give the sample of blood. In Haribhai Chanabhai Vora's case (supra) the Gujarat High Court has held that when the petitioner (therein) had not given consent, he could not be compelled to submit himself for DNA test as it would be interfering with the personal liberty, and at the most, adverse inference can be drawn at the final conclusion. Thus, it is held that the Court has power to order for DNA or any blood test in order to ascertain the truthfulness of the allegation levelled by the victim but such order must be with the consent of victim. However, this benefit cannot be extended to the accused. Reference in this behalf may be made to Solaimuthu's case (ibid), wherein the Madras High Court held that DNA test did not offend Article 20(3) of the Indian Constitution.
>
> (Emphasis provided)

7. In above cited judgment it has been held that nobody could be forced to have her blood test samples obtained for conducting of DNA Test. The Court has to consider the facts and circumstances of each case. If a person does not give consent for such test, he/she cannot be compelled for the test. It amounts to interference with personal liberty of a person. It was finally concluded that the Court has power to order for

DNA Test or any blood test in order to ascertain the truthfulness of allegations but such order must be passed with the consent of a party, the order cannot be made in routine. Compelling a person to undergo a DNA Test can have serious consequences. It is the duty of a court to safeguard and protect personal liberty of every citizen. Suffice it to say that the petitioner was required to prove his case through production of independent evidence as DNA test is not the sole mode to adjudge and determine legitimacy of the children in Civil matters of inheritance as a matter of routine, the paternity issue could be proved by oral and documentary evidence.

8. In view of above, this constitutional petition is allowed and the impugned orders passed by both the courts below are declared to be illegal and unlawful, therefore, same are set aside. Resultantly, application of respondents seeking DNA test is dismissed. No order as to cost.

SA/S-38/L Petition allowed.

**2018 Y L R 487**

**[Lahore]**

**Before Atir Mahmood, J**

**Raja MUHAMMAD AMIR KHAN and another---Petitioners**

**Versus**

**Raja SHER AFZAL JASMIN MICHAELA KHAN through Special Attorney and 4 others---Respondents**

Civil Revision No.4163 of 2016, heard on 24th October, 2017.

**Punjab Partition of Immovable Property Act (IV of 2013)---**

----Ss. 6 & 5---Suit for possession through partition---Non-filing of written statement--- Effect--- Judicial record---Scope---Defendants did not file written statement and their right to submit written statement was struck off---Contention of defendants was that only one opportunity to file written statement was given---Validity---Defendant in a partition suit was required to file written statement within thirty days commencing from the date of his first appearance in the Court subject to receipt of notice/summon---Petitioner-defendant appeared on 04-02-2014 whereas other defendant put appearance before the Court on 25-02-2014---Defendants were required to file written statement by 06-03-2014 and 27-03-2014 respectively---Petitioners did not file written statement till 25-07-2016 despite direction and warning that no further opportunity would be granted for filing written statement---Provision of S.6 of Punjab Partition of Immovable Property Act, 2013 was mandatory---When timeframe for doing something had been prescribed by law, it should be followed stricto sensu and no time extension should be given unless there was some lawful justification---No plausible reason or justification could be produced by the petitioners for extension of time for filing the written statement---Judicial record having legal sanctity would prevail over the verbal assertions of defendants---Petitioners did not comply with the mandatory provision of law as well as order of the Court and their right to file written statement was rightly closed---Revision was dismissed in circumstances.

Riaz ul Haq and others v. Muhammad Asghar and others 2017 SCMR 1841 rel.

Muhammad Saeed Sheikh for Petitioners.

Dr. Azeem Raja for Respondent No.1.

Syed Waqar Hussain Naqvi for Respondent No.2.

Hammad Hassan Randhawa for Respondent No.3.

Date of hearing: 24th October, 2017.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that on 23.01.2014, respondent No.1-plaintiff filed a suit for declaration, possession through partition, mesne profits, permanent injunction and consequential relief against the petitioners-defendants and respondents Nos.2 to 5. Since the petitioners did not file written statement despite specific order dated 16.05.2016, their right to file written statement was struck off by learned trial court vide order dated 25.07.2016. Hence this civil revision has been filed by the petitioners-defendants.

2. Learned counsel for the petitioners inter alia contends that the petitioners were given only one opportunity to file the written statement when their counsel was out of station, therefore, it is justified to give them at least one opportunity to file the written statement; that copy of the plaint was not provided to the petitioners; that law favours adjudication on merit rather than on technicalities; that if opportunity to file written statement is not given to the petitioners, they will suffer irreparable loss; that the impugned order is harsh one, therefore, the same be set aside by way of allowing the instant civil revision and at least one opportunity be granted to the petitioners to file the written statement.

3. On the other hand, learned counsel for the respondents have vehemently opposed this civil revision and fully supported the impugned order.

4. Arguments heard. Record perused.

5. Perusal of record reveals that the suit was filed by respondent No.1 on 23.01.2014. Summons were issued to the defendants including the petitioners. Petitioner No.1 appeared on 04.02.2014 through his counsel namely Mr. Shahid Ali, Advocate. Petitioner No.2 appeared through the same counsel on 25.02.2014 when application under Order VII, Rule 11, C.P.C. was filed by both the petitioners by one and the same counsel, i.e. Mr. Shahid Ali, Advocate. The proceedings continued in the said application which was ultimately dismissed on 30.03.2016. Thereafter, the case was fixed for arguments on application for permanent injunction for 16.05.2016 when the court noticed that the petitioners had not filed the written statement as well as the written reply to application, therefore, the court provided one and the last opportunity to the petitioners to do the needful while warning the petitioners that no further time will be given for this purpose. The case was fixed for 25.07.2016 when the right to file written statement was struck off as the petitioners failed to file the written statement.

6. This is a suit for partition wherein the provisions of the Punjab Partition of Immovable Property Act 2012 (hereinafter called "the Act") are applicable. Section 6 of the Act being relevant in this case is reproduced below:

> **6. Written statement**.---(1) Subject to section 5, a defendant in a suit for partition of immovable property shall file the written statement within thirty days of his first appearance in the Court and shall attach with the written statement copies of all the relevant documents in his reach or possession.
> (2) If a defendant fails to file the written statement within the period mentioned in subsection (1), the Court shall strike off his defence and in that event he shall not be entitled to lead any evidence."
>
> (Underline is mine)

Perusal of above provision of law makes it crystal clear that a defendant in a partition suit is required to file written statement within 30 days commencing from the date of his first appearance in the court which, as per Section 5 of the Act, is subject to receipt of notice/summon. In this case, petitioner No.1 appeared on 04.02.2014 whereas petitioner No.2 put appearance before the court on 25.02.2014 through one and the same learned counsel, i.e. Mr. Shahid Ali, Advocate. Both the petitioners are inter se real brother and sister. As per said provision of law, petitioner No. 1 and Petitioner No.2 were required to file written statement by 06.03.2014 and 27.03.2014

respectively but they did not file the written statement despite specific direction and warning that no further opportunity will be granted to them for filing written statement till 25.07.2016, i.e. after about two years and four months of their first appearance before the court. Needless to observe that provision given under subsection (1) of section 6 of the Act is mandatory and not directory in nature as the very next subsection, i.e. subsection (2) of Section 6, provides penal consequences of closure of right of defence for non-filing of the written statement within the prescribed period of 30 days. In my view, when a timeframe for doing something is prescribed by law, it should be followed stricto sensu and no time extension should be given unless there is some lawful justification or cogent reason is given to the court for the same. No plausible reason or justification could be produced by the petitioners for extension of time for filing the written statement, therefore, the time for filing the written statement cannot be extended.

7. The only contentions of learned counsel for the petitioners for granting opportunity to file the written statement are that the petitioner's counsel was out of station on the fateful day, i.e. 25.07.2016 and that copy of plaint was not provided to the petitioners, therefore, the petitioners could not file the written statement. In support of first contention of learned counsel for the petitioner that learned counsel for the petitioners was out of station, a travel history issued by a travel company, namely The Travel Company, Lahore, has been annexed with this revision petition. Although the said document being a private document has no sanctity in the eye of law and cannot be relied upon, yet it reads that Mr. Shahid Ali, Advocate had to travel from Lahore to Karachi on 20.07.2016 and come back on 30.07.2016. This entry of the history sheet is not supported by any travel ticket of the petitioners' counsel to establish that he in fact travelled on the said dates and that he was present in Karachi from 20.07.2017 to 30.07.2016. Interestingly, the said entry is in contradiction to para 5 of the civil revision which reflects that the petitioners' counsel was in Gawadar on 25.07.2016 when the right to file written statement was closed. Both the said versions are proved false from the record of the trial court which clearly marks attendance of the counsel for the plaintiff as well as that of the defendants. In the circumstances, the judicial record having legal sanctity will prevail over the verbal assertions of the petitioners as nothing to disprove the same could be brought on record by the petitioners.

8. The other contention of learned counsel for the petitioners that copy of the plaint was not supplied to petitioners-defendants is also not in line with the record of the trial court. Order dated 04.02.2014 reads that copy of the plaint was supplied to learned counsel for the petitioners when he appeared before the court. Though at that time, he had filed power of attorney on behalf of petitioner No.1 but after few days, he also filed power of attorney on behalf of petitioner No.2. Therefore, it cannot be said that learned counsel for the petitioners was not having copy of the plaint. Furthermore, contents of application under Order VII, Rule 11, C.P.C. filed by the petitioners also suggest that the petitioners were having copy of the plaint. The contention of learned counsel for the petitioners is accordingly repelled.

9. Since the petitioners did not comply with the mandatory provisions of law as well as the order of the court, their right to file written statement was rightly closed. Respectful reliance is placed on the dictums laid down by the Hon'ble Supreme Court

of Pakistan in case reported as Riaz ul Haq and others v. Muhammad Asghar and others (2017 SCMR 1841).

10. For what has been discussed above, this revision petition is bereft of any merit, hence dismissed. The order of learned trial Court is accordingly maintained.

ZC/M-183/L Revision dismissed.

**PLJ 2018 Cr.C. (Lahore) 149 (DB)**

**[Multan Bench Multan]**

***Present*: ATIR MAHMOOD AND SHAH KHAWAR, JJ.**

**MUHAMMAD SARDAR--Petitioner**

**versus**

**STATE and another--Respondents**

Crl. Misc. No. 6522-B of 2014, decided on 24.12.2014.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(b)--Bail after arrest--Grant of--Allegation of--Recovery of Contraband narcotic--As per contents of FIR, 1011 grams *Charas* was recovered from petitioner at time of his arrest--*Prima facie*, same is slightly on higher side of upper limit of Section 9(b) of Control of Narcotic Substances Act, 1997 and if weight of shopper bag and paper is excluded from total weight of contraband narcotics allegedly recovered from petitioner, case against petitioner is a border line case of Section 9(b) of Control of Narcotic Substances Act, 1997--Petitioner is behind bars and no more required for purpose of investigation--Considering all these circumstances, this petition is allowed and petitioner is admitted to bail. [P. 151] A & B

*Syed Jaffar Tayyar Bukhari*, Advocate for Petitioner.

*Mr. Riaz Hussain Saghar*, Deputy Prosecutor General for State.

Date of hearing: 24.12.2014.

**ORDER**

Muhammad Sardar, petitioner seeks bail after arrest in case FIR No. 660 dated 14.09.2014 under Section 9-C of the Control of Narcotic Substances Act, 1997 registered at Police Station Ghalla Mandi, District Sahiwal.

2. Precisely the story mentioned in the FIR is that the police received spy information that present petitioner alongwith his co-accused boarded on a car were heading towards Begum Shahnaz Chowk to sell *Charas* to their customers nearby graveyard. On such information a raiding party was constituted which reached at the spot and intercepted said car. The petitioner and co-accused persons were un-boarded from the car. On body search of petitioner, *Charas* weighing 1105 grams wrapped in a shopper bag was recovered from his possession. It is further alleged that in the meantime, co-accused Sheikh Nasir armed with pistol .30-bore threatened the raiding party to let free his brother (petitioner) and on resistance said Sheikh Nasir made two successive fires from his pistol but the contraband narcotics allegedly recovered from the petitioner, case against the petitioner is a border line case of Section 9(b) of the Control of Narcotic Substances Act, 1997; that the petitioner is not involved in any other case of such like nature; that the petitioner is behind the bars ever since his arrest and is no more required for the purpose of investigation.

4. On the other hand, learned Deputy Prosecutor General opposes this bail petition on the ground that a huge quantity of *charas* was recovered from the petitioner at the time of his arrest.

5. Heard. As per contents of the FIR, 1011 grams *Charas* was recovered from the petitioner at the time of his arrest. *Prima facie*, the same is slightly on higher side of upper limit of Section 9(b) of the Control of Narcotic Substances Act, 1997 and if the weight of shopper bag and paper is excluded from the total weight of the contraband narcotics allegedly recovered from the petitioner, case against the petitioner is a border line case of Section 9(b) of the Control of Narcotic Substances Act, 1997.

6. The petitioner is behind the bars and no more required for the purpose of investigation. Considering all these circumstances, this petition is allowed and the petitioner is admitted to bail after arrest subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (rupees two lakh only) with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) Bail allowed

**PLJ 2018 Cr.C. 736 (DB)**

**[Lahore High Court, Multan Bench]**

***Present*: ATIR MAHMOOD AND SHOAIB SAEED, JJ.**

***Mst.* NOUSHEEN--Petitioner**

**versus**

**STATE, etc.--Respondents**

Crl.Misc. No. 5173-B of 2014, decided on 15.10.2014.

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

----S. 498--Control of Narcotic Substances Act, (XXV of 1997), S. 9-C--Pre-arrest bail--Confirmation of--Ten police officials present on spot, but they failed to arrest accused--*Mala fide* on part of prosecution cannot be ruled out--Noting was recovered from possession of accused--Accused already joined investigation--Pre-arrest bail already granted was confirmed. [P. 737] A

*Mr. Muhammad Umer Bhatti,* Advocate for Petitioner.

*Ch. Muhammad Akbar,* D.P.G. for Respondents.

Date of hearing: 15.10.2014.

**ORDER**

This is a petition under Section 498, Cr.P.C. for grant of pre-arrest bail in Case F.I.R. No. 479/14 dated 6.7.2014 lodged with Police Station Shah Rukan-e-Alam, District Multan for the offence under Section 9-C of Control of Narcotics Substances Act, 1997.

2. Arguments heard. Record perused.

3. As per story narrated in the FIR, one Ghulam Dastgir *alias* Sunny accused in another FIR Bearing No. 478/14 disclosed that the petitioner alongwith her husband are going to shift charas and opium in huge quantity from one place to another. On receipt of this information, a police party comprising of 10 police officials alongwith said Ghulam Dastgir went to Hayat Chowk. On Seeing the policy party, a Suzuki Mehran Car coming from Block 'Z ' stopped away from the police party. The husband of the petitioner Qamar Javed was on the driving seat and the petitioner was sitting on rear seat of the car. In the meanwhile, a motorcycle rider came behind the car and the pctitioner and her husband fled away alongwith him on a motorcycle. However, a person present on front seat of the car was arrested by the police. On search of the car, 40 Kg *charas* and 10 Kg *opium* was recovered from the car.

4. Bare reading of the FIR makes it crystal clear that nothing was recovered from possession of the present petitioner. Furthermore, it is astonishing that there were 10 police officials present on the spot but they failed to arrest the petitioner who happened to be a lady. In such like situation, *mala fide* on part or the prosecution cannot be ruled out. Furthermore, admittedly, the petitioner has a suckling baby. The suckling child of the petitioner is undoubtedly innocent. If the mother is sent to jail,

the baby will also go with her which is against the concept of welfare of minor being incompatible with jail life So, instead of detaining the innocent child infant in the jail for the crime allegedly committed by his mother, it would be in the interest of justice as well as welfare of minor that the mother be allowed bail. If the offence alleged against her is ultimately proved, she will face the consequences. Reliance is placed on the law laid down by the Hon'ble Supreme Court of Pakistan in case reported as *Mst. Nusrat vs. The State* (1996 SCMR 973).

5. In addition nothing is to be recovered from the petitioner. She has already joined the investigation. Therefore, sending her behind the bars will not serve any lawful purpose. Therefore, we are inclined to grant bail before arrest to the petitioner.

6. For what has been stated above, this bail application is accepted and pre-arrest bail already granted to the petitioner is herby confirmed subject to her furnishing bail bonds in the sum of Rs.200,000/ (rupees two lacs only) with one surety in the like amount to the satisfaction of learned trial Court.

(K.Q.B.) Bail confirmed

**2018 C L C 1699**

**[Lahore]**

**Before Atir Mahmood, J**

**Dr. FAROOQ ANWAR KHAWAJA----Petitioner**

**Versus**

**Mst. NAILA ANWAR KHAWAJA and 3 others----Respondents**

Writ Petition No.38561 of 2016, decided on 20th December, 2017.

**Qanun-e-Shahadat (10 of 1984)---**

----Art.163---Civil Procedure Code (V of 1908), O.XXI, R.3--- Decision on oath---Principle---Plaintiff withdrew suit filed by him on the plea of compromise but later on filed application to restore the same and sought decision on oath by parties---Plea raised by plaintiff was that Lower Appellate Court did not decide application under Art. 163 of Qanun-e-Shahadat, 1984, filed by him---Validity---Only plaintiff and defendant could make statements on oath in support or rebuttal of claims made in suit---For being a plaintiff and a defendant, there should be a suit pending in court---Application to decide the matter on oath was filed before Lower Appellate Court under revisional jurisdiction---Appeal was continuation of suit but a revision petition was not---As when there was no suit, there was no plaintiff or defendant in revision petition---When there was no plaintiff or defendant, application under Art. 163 of Qanun-e-Shahadat, 1984, was not entertainable and the same merited dismissal---Even if application was not decided by Lower Appellate Court in exercise of revisional jurisdiction, it involved no consequences---High Court declined to interfere in concurrent findings of law and fact against plaintiff, as he could not point out any illegality therein---Petition was dismissed in circumstances.

Umar Bakhsh and 2 others v. Azim Khan and 12 others 1993 SCMR 374; Hadi Bux Memon through Attorney v. City District Government Karachi and 5 others PLD 2006 Kar. 16 and Hasnain Ahmed Shah v. Ijaz Ahmed Shah and another 2006 CLC 334 ref.

Ch. Muhammad Ishaq for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the petitioner filed a suit for declaration, cancellation of documents etc. which was dismissed as withdrawn on the statement of the petitioner that a compromise has been effected between the parties vide order dated 28.01.2009. On 14.01.2010, the petitioner filed application under section 151, C.P.C. for restoration suit which was dismissed by learned trial court vide order dated 08.03.2013. Against the said order, the petitioner filed revision petition which also met with the same fate vide judgment dated 16.05.2016 passed by learned Additional District Judge, Lahore. Hence this writ petition has been instituted.

2. The contention of learned counsel for the petitioner before this Court is that the suit was withdrawn by the petitioner on the basis of unwritten compromise and since there was no compromise on record, learned trial court could not decide the matter on the basis of the same. He has also pointed out that an application under Article 163 of the Qanun-e-Shahadat Order, 1984 was not decided by learned lower revisional court. He

has relied upon the law laid down in cases Umar Bakhsh and 2 others v. Azim Khan and 12 others (1993 SCMR 374), Hadi Bux Memon through Attorney v. City District Government, Karachi and 5 others (PLD 2006 Karachi 16) and Hasnain Ahmed Shah v. Ijaz Ahmed Shah and another (2006 CLC 334).

3. Arguments heard. Record perused.

4. Perusal of record reveals that the petitioner withdrew his suit himself while submitting that since a compromise had been effected between the parties, he did not want to prosecute the suit any more. Learned trial court accordingly allowed the petitioner to withdraw the suit and the suit was dismissed as withdrawn vide order dated 28.01.2009. Neither any permission to file fresh suit or to file any application for restoration of the suit was sought for by the petitioner nor the same was granted by the court. Afterwards, the petitioner filed application on 14.01.2010 for restoration of the suit while asserting that the respondent has failed to honour the compromise which application was not acceded to by both the learned courts below. In my opinion, in absence of any permission by the court at the time of withdrawal of the suit, the petitioner could not pray for restoration of the suit by way of filing application under section 151, C.P.C. The courts cannot exercise the inherent powers under section 151, C.P.C. when there are certain other provisions of the C.P.C. to deal with the matter. The said application was not maintainable and liable to be dismissed on this score alone.

5. The contention of learned counsel for the petitioner is that without written compromise, the court could not allow withdrawal of the suit. Suffice it to say that the law gives right to each and every person who approaches the court for some relief to prosecute or forego his matter. The same may be through written application supported by documents or verbally. Furthermore, when someone does not want to proceed with his own cause, how the court can move further for the same. In my considered opinion, the petitioner being plaintiff of the suit could exercise his right to withdraw the suit. This right was exercised by him in accordance with law and there was no reason to refuse the same by the court. The case law relied upon by the petitioner is distinguishable on facts and does not apply to the case of the petitioner.

6. Another contention of learned counsel for the petitioner is that application of the petitioner under Article 163 of the Qanun-e-Shahadat Order, 1984 offering the respondent to accept or deny the claim of the petitioner on oath was not decided by learned revisional court. Said provision is reproduced below:

> **"163. Acceptance or denial of claim on oath**: (1) When the plaintiff takes oath in support of his claim, the Court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.
> (2) The Court may pass such orders as to costs and other matters as it may deem fit.
> (3) Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases."
>
> (Underline is mine)

Perusal of underlined portion of above .provision of law makes it crystal clear that only a plaintiff and a defendant can make statements on oath in support or rebuttal of the claims made in the suit. For being a plaintiff and a defendant, there should be a suit pending before the court. Admittedly, the said application was filed by the petitioner before learned revisional court in a civil revision. Appeal is a continuation of suit but a revision petition is not. Since there was no suit, there was no plaintiff or defendant in the revision petition and when there was no plaintiff or defendant, the application under Article 163 of Qanun-e-Shahadat Order, 1984 was not entertainable and the same merited for dismissal. Therefore, even if the said application has not been decided by learned lower revisional court, it involves no consequences.

7. There are concurrent findings of law and fact against the petitioner. Learned counsel for the petitioner has not been able to point out any illegality therein. No interference is warranted.

8. For the aforementioned reasons this writ petition has no merit. The same is accordingly **dismissed.**

MH/F-1/L Petition dismissed.

**2019 C L C 164**

**[Lahore]**

**Before Atir Mahmood, J**

**NAIK MUHAMMAD----Petitioner**

**Versus**

**MUHAMMAD SHABBIR and others----Respondents**

C.R. No.113978 of 2017 and C.M. No. 2-C of 2018, decided on 9th May, 2018.

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

----O. IX, R. 13 & O. III, R. 4---Limitation Act (IX of 1908), S. 5---Withdrawal of application for setting aside of ex-parte decree by counsel without consent of party---Scope---Second application for setting aside of ex-parte decree---Res judicata, principle of---Applicability---Limitation---Condonation of delay---Maxim: Audi alteram partem, principle of---Applicability---Application for setting aside of judgment and decree by the petitioners passed against their predecessor---Maintainability---Application for setting aside of ex-parte decree was moved which was withdrawn by the counsel without consent of petitioner---Other application for setting aside of ex-parte decree was filed but same was dismissed---Contention of petitioner was that he was paralyzed and unable to walk therefore he could not get knowledge of withdrawal of application by his counsel---Validity---Nothing was on record with regard to illness of the petitioner---Petitioner had appointed his counsel before the Trial Court---Counsel of petitioner was vested with the authority to do any act on his behalf and his statement was binding upon the petitioner---Authority of counsel duly appointed by the party to act on his behalf in a Court would be deemed to be in force until determined with the leave of the Court by a writing signed by that party or counsel and filed in it or until party or the counsel died or until all proceedings in the matter had ended---Petitioner had not filed any complaint against the counsel before competent forum i.e. Punjab Bar Council in time---Cases were be decided on merits after hearing both the sides and nobody should be condemned unheard---Conduct of a party should be kept in mind while deciding the matters---Applicant for condonation of delay had to explain each and every day's delay---No such explanation had been made in the present case---Limitation was not a mere technicality rather it was mandatory statutory provision---Legislature while enacting Limitation Act, 1908 had fixed the period of limitation for a particular action---Valuable right would accrue in favour of opposite party after period of limitation---Petitioner remained indolent towards his right and kept silent for four months in filing second application---Second application filed by the petitioners would be hit by the principle of res judicata---Nothing was on record that address mentioned in the plaint was incorrect and petitioner was not served through publication of Court notice in the newspapers---Presumption of truth was attached to the proceedings of the Court unless proved otherwise---Predecessor of petitioners was served in accordance with law but he did not appear before the Trial Court to defend the suit---Present application was not signed by the father of petitioner rather he himself signed the same---Petitioner had

committed forgery by making signatures of his father---Petitioner did not approach the Court with clean hands and tried to deceive it by his act---Original judgment debtor in his life time never agitated the matter and did not challenge the ex-parte judgment and decree passed against him---Present petitioners being successors had no right to ask for setting aside the judgment and decree passed against their predecessor---Revision was dismissed in circumstances.

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

----S. 115---Revisional jurisdiction of High Court---Scope---Concurrent findings of Courts below could not be reversed unless there were illegality, irregularity, misreading or non-reading of evidence and record.

**(c) Administration of justice---**

----Cases to be decided on merits after hearing both the sides and nobody was to be condemned unheard.

**(d) Administration of justice---**

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

**(e) Limitation---**

----Delay would defeat equity.

Mian Tariq Hussain for Petitioners.

**ORDER**

**C.M.No.2-C of 2018**

**ATIR MAHMOOD, J.**---This is an application to place, on record some documents. Allowed, subject to all just and legal exceptions. Documents appended with the application be made part of the file.

MAIN CASE

2. Through this civil revision, petitioners have challenged the legality of order dated 30.10.2015 passed by learned Civil Judge, Kamalia, whereby, application filed by the predecessor in interest of petitioners for setting aside the ex parte judgment and decree dated 02.11.2010 was dismissed and judgment dated 03.02.2017 passed by learned Additional District Judge, Kamalia whereby appeal of the petitioners also met with the same fate.

3. Precisely, the facts of the case are that respondents filed a suit for declaration and possession against the predecessor in interest of the petitioners before learned Civil Judge, Kamalia on 20.11.2008, facts of which are well mentioned in the plaint. Vide judgment and decree dated 02.11.2010, suit was ex parte decreed in favour of respondents. Afterwards, on 03.10.2011 predecessor in interest of petitioners through his counsel namely Sardar Siddique Akbar Khatana, Advocate filed application for setting aside the said exparte judgment and decree which was resisted by the other side but the counsel for the petitioners without his

consent had withdrawn the said application on 10.11.2012. The predecessor in interest of petitioners after getting knowledge of withdrawal of application, filed second application for the said purpose on 05.03.2013 along with the application under section 5 of Limitation Act which was vehemently contested by the other side through filing of written reply. Issues were framed and evidence of both the parties was recorded. Learned Civil Judge, Kamalia vide impugned order dated 30.10.2015 dismissed the application of the petitioners. Feeling dissatisfied, petitioners assailed the said order by filing appeal before learned Additional District Judge, Kamalia which met with the same fate.

4. Learned counsel for the petitioners contended that impugned order as well as judgment passed by the learned courts below are against the law and facts of the case; that the findings of the courts below are the result of misreading and non-reading of evidence available on the record; that previous counsel of the petitioners namely Sardar Siddique Akbar Khatana, Advocate without his consent had withdrawn the application for setting aside the aforementioned ex parte judgment and decree; that the predecessor in interest of the petitioners was paralyzed and unable to walk, therefore, he could not get knowledge of the withdrawal of the application; that the cases should be decided on merit while ignoring the technicalities coming in the way of justice; that the petitioners were condemned unheard. Lastly, prayed that this revision petition be accepted and orders of both the courts below be set aside.

5. Arguments of learned counsel for the petitioners have been heard. Record has also been perused.

6. The case of the petitioners is that he had not been served and ex-parte judgment and decree dated 02.11.2010 was passed in his absence without service, by the learned trial Court. After having knowledge, predecessor in interest of the petitioners filed application for setting aside the said judgment and decree and when it was replied by the other side; his counsel namely Sardar Siddique Akbar Khatana, Advocate withdrew the same without his consent taking benefit of illness of predecessor in interest of the petitioners as he was paralyzed at that time. Thereafter, he again filed application for the same purpose along with application for condonation of delay that was dismissed vide impugned order 30.10.2015. The result of appeal of the petitioners was also the same.

7. The petitioners mainly contended that he was paralyzed and was unable to appear before the Court and his counsel having edge of this, in connivance with the other party had withdrawn the suit without his knowledge and consent. To prove this contention, petitioner No.4, Muhammad Babar appeared as AW-4 in the witness box but he could not utter even a single word with regard to the proof of his father's illness. Mere asserted that he was paralyzed and could not walk. There is no denial on the part of petitioners that Sardar Siddique Akbar Khatana, Advocate was their duly appointed counsel in the suit before the learned trial court. The petitioners are resisting the consequences of said statement on the ground that statement was recorded by their counsel without any consent/authority from all the petitioners or their father. The power of attorney executed by the petitioners' father in the name of said advocate clearly reflects that he was vested

with the authority to do any act on behalf of petitioners. Therefore, there is no ambiguity that he was a duly appointed counsel and his statement was binding upon the petitioners. Order III of The Code of Civil Procedure (V of 1908) deals with the matter of appearance by a person or his recognized agent or pleader in the proceedings before the court. The appointment of pleader is governed by Rule 4 of Order III of "C.P.C." which reads as under:-

> "4. Appointment of pleader.---(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.
>
> (2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regard the client.
>
> (3) For the purposes of sub-rule (2) an application of review of judgment, an application under S.144 or S.152 of this Code, any appeal from any decree or order in the suit and any application or act, for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit."

From the above, it is manifestly clear that authority of an advocate duly appointed by the father of the petitioners to act on his behalf in a court shall be deemed to be in force until determined with the leave of the Court by a writing signed by the petitioners or the advocate, as the case may be, and filed in Court or until the petitioner or the advocate dies, or until all proceedings in the suit are ended so far as regards the petitioners. Therefore, the plea of the petitioners that the statement was recorded by counsel without their consent is highly ill-founded. Furthermore, the petitioners have not filed any complaint against the said Advocate before the competent forum i.e. Punjab Bar Council in time rather statedly; same is filed on 25.04.2017 which proves that same is afterthought.

8. Another contention of the petitioners is that they cannot be ousted from the proceedings merely on the basis of technicalities. No doubt, it is settled law that the cases should be decided on merits, after hearing both the sides, and nobody should be condemned unheard, its maxim of Audi alteram partem, is very consistently followed by the Courts, which is also the principle of natural justice but at the same time the conduct of the petitioners should also be kept in mind while deciding the matters as whether he is vigilant or proved as indolent. It is also settled law that in case of condonation, the applicant has to explain each and every day's delay, but in the case in hand, no such explanation by the petitioners has been given. Limitation is not a mere technicality rather is a mandatory statutory provision and treating it a formality would amount to make the entire Limitation Act, as redundant. While enacting the Limitation Act, 1908, the legislature in its wisdom has fixed the period of limitation for a particular action.

The structure of the law is founded upon the legal maxims, that delay defeats equity, time and tide wait for none and law helps the vigilant not the indolent. The object of law of limitation is to help the vigilant and not the indolent. Helping hand could not be extended to a litigant on having become forgetful of his rights. Besides, invoking remedy by some aggrieved person beyond the period of limitation prescribed for redressal of grievance, creates a valuable right in favour of the opposite party, therefore, in such case, delay of each day has to be explained by the defaulting party to the satisfaction of the court, which could not be condoned lightly or as of routine, as such arbitrary exercise of discretion would cause serious prejudice to the opposite party. In the case in hand, petitioners proved themselves indolent towards their rights and kept silent for four months in filing another application. Even otherwise, for the sake of arguments, if contention of the petitioners is accepted, then the second application tiled by the petitioners squarely hits by the maxim of res judicata. Therefore, from all angles, the. petitioners could not establish their case.

9. Even on merits of the case, petitioners while filing his application for setting aside ex parte judgment and decree did not state that the address given in the plaint was incorrect. It was merely asserted that his service was not effected. Under Order V Rule 20 of C.P.C., the law has prescribed the mode of service through substituted means. This fact has not been denied by the petitioners through their application that they were not served through publication of Court notice in the newspaper. Presumption of truth is attached to the proceedings of the courts unless proved otherwise, therefore, it is held by this Court that predecessor of the petitioners was served in accordance with law but he did not appear before the learned trial Court to defend the suit which was subsequently decreed ex parte against him. There is another aspect of the matter that the application dated 13.10.2011 was not signed by the petitioner/judgment debtor Naik Muhammad himself as the petitioner No.4, Muhammad Babar who stated himself to be special attorney of the petitioners admitted in cross-examination that power of attorney was not attested by any notary public. He further admitted that the application (which was submitted through Sardar Siddique Akbar Khatana, Advocate) was not signed by his father rather he himself signed the same. He further stated that power of attorney was executed two years ago whereas his statement was recorded on 07.09.2015 and the second application (subject matter of the present case) was filed on 05.03.2013. This witness further admitted that he signed the application himself and according to him this application was filed 8/9 months ago which is absolutely contrary to the record. So, petitioner No.4 in fact has committed forgery by making signatures of his father. These admissions by petitioner No.4 clearly reveal that the petitioners did not approach the Court with clean hands and tried to deceive the Court by their acts.

10. In view of the above circumstances, I am in consonance with the findings of the learned courts below. Furthermore, I am of the view that the original judgment debtor, in his lifetime, never agitated the matter and did not challenge the ex parte judgment and decree passed against him, therefore, the present petitioners being the successors had no right to ask for setting aside the judgment and decree passed against their predecessor. There are concurrent findings against

the petitioners which cannot be reversed in revisional jurisdiction of this Court until and unless there is some gross illegality, irregularity, misreading or non-reading of evidence and record therein which could not be proved by learned counsel for the petitioner. No interference is called for.

11. For what has been discussed, this civil revision is without any substance. The same is dismissed. No order as to cost.

ZC/N-17/L Revision dismissed.

**2019 C L C 562**

**[Lahore]**

**Before Atir Mahmood, J**

**Dr. SAJJAD HAIDER SHAMI----Petitioner**

**Versus**

**Mst. SADAF PERVAIZ and others----Respondents**

Civil Revision No.4546 of 2016, decided on 9th November, 2018.

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

----Ss. 13 & 115---Civil Revision---Suit for declaration and permanent injunction---Jurisdiction of Court---Foreign judgment---Plaintiff was UK national and assailed judgment passed in UK against him---Suit as well as appeal filed by plaintiff was dismissed---Plea raised by plaintiff was that since both parties were Pakistani citizens by origin who married in Pakistan under Muslim Family Laws Ordinance, 1965 and their marriage was registered in Pakistan, therefore, UK law was not the applicable on parties but that of Pakistan---Validity---Parties having immigrated to and got UK nationality, were UK nationals and subject of UK laws as well as to laws of Pakistan and jurisdiction of UK courts could not be curtailed---Plaintiff could not establish any of exceptions given in S.13, C.P.C. attracted in his case---High Court declined to exercise revisional jurisdiction as there were concurrent findings of law and fact against plaintiff which were immune from interference unless there was some gross illegality floating on surface---Plaintiff failed to point out any illegality therefore no interference was warranted by High Court---Revision was dismissed in circumstances.

Athar Mansoor Butt for Petitioner.

Sikandar Nisar Saroya for Respondents Nos.2 and 3.

Ex-parte Respondents Nos. 1, 4 to 6.

Date of hearing: 9th November, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.**----Succinctly stated facts of the case are that on 16.10.2012, the petitioner filed a suit for declaration and permanent injunction alleging that he got married to respondent No.1 Mst. Sadaf Pervaiz on 27.02.1997 under Muslim Family Laws Ordinance, 1961 which was duly registered in Pakistan vide Nikah Nama (Exh.P1); that the parties were Muslim and Pakistani National but later on, they shifted to U.K. for the purposes of education and job; that after getting U.K. nationality in September, 2005, they started to live thereat as UK nationals; that afterwards, relations between the parties became strained

whereupon respondent No.1 obtained divorce from U.K. Court and got 50% share of the petitioners' immovable property situated in U.K. in addition to share in pension amount of the petitioner. The petitioner challenged the said order by way of filing appeal which was dismissed vide order dated 30.03.2012 passed by U.K. Court of Appeal. The petitioner through the instant suit prayed that the orders of learned U.K. courts be declared contrary and violative to section 13 of C.P.C. and that the same are not effective upon rights of the petitioner.

2. Notices were issued to the respondents but none appeared on their behalf, as such, they were proceeded against ex parte vide order dated 27.02.2013 and 14.03.2013 and after recording ex parte evidence of the petitioner, the suit of the petitioner was dismissed vide ex parte judgment and decree dated 09.02.2015. The petitioner assailed the said judgment and decree in appeal which also met with the same fate vide judgment and decree dated 29.09.2016. Hence this civil revision has been preferred.

3. Learned counsel for the petitioner inter alia contends that the judgments and decrees of learned courts below are not sustainable as evidence of the petitioner has not been taken into consideration by them; that there is misreading and non-reading of evidence; that there are material illegalities in the impugned judgments and decrees; that the orders passed by learned courts of UK are contrary to the law enforced in Pakistan, as such, these are neither sustainable nor effective upon the rights of the petitioners and that the respondent No.1 got the impugned order from the British Court by concealment of material facts as she did not disclose that she was the owner, to the extent of her share, in the property left behind by her deceased father in Pakistan, therefore, this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the petitioner be decreed as prayed for.

4. Respondents Nos. 1, 4 to 6 have been proceeded against ex parte vide order dated 15.10.2018 whereas learned counsel for respondents Nos.2 and 3 has vehemently opposed this civil revision and fully supported the impugned judgments and decrees.

5. Arguments heard. Record perused.

6. Admittedly, after leaving Pakistan, both the parties became U.K. nationals and getting UK nationality in September, 2011, as such, all the matters relating to the parties were to be decided by the Courts thereat. It is also admitted fact that respondent No.1 approached the U.K. Court for dissolution of marriage who dissolved the matter and gave decision regarding properties of the petitioner situated in U.K. on 25.08.2011, much prior to petitioner's approaching the courts in Pakistan on 16.10.2012. The said properties since do not situate within the territorial jurisdiction of courts of Pakistan but that of U.K., the courts hereat have

no jurisdiction to take decision regarding the said properties but the courts situated at U.K. Record unambiguously reflects that the petitioner has been contesting the cases filed by respondent No.1 in U.K., therefore, he was well within knowledge of that proceedings and cannot be said to have been condemned heard. The proceedings in Pakistan appear to have been initiated by the petitioner maliciously and malafidely just to save the skin from what has already been ordered by the Courts of U.K. which cannot be permitted under lame excuses. Even otherwise, the orders of the Arbitration Counsel for commencement and conclusion of the proceedings after receiving alleged notice of 'Talaq' were not produced before the trial Court at Lahore nor relied upon before the British Courts.

7. The contention of learned counsel for the petitioner is that since both the parties were Pakistani by origin who married hereat under Muslim Family Laws and their marriage was registered in Pakistan, therefore, the U.K. law is not applicable upon the parties but that of Pakistan. Suffice it to say that having immigrated to and got U.K. nationality, the parties were U.K. nationals and subject of U.K. laws as well as to the law of Pakistan and jurisdiction of the U.K. courts cannot be curtailed. The contention of learned counsel for the petitioner is misconceived, hence cannot be acquiesced to.

8. Another contention of the petitioner is that the orders/judgments of the British Courts cannot sustain as these fall within the exceptions given in section 13 of the C.P.C. which reads as under:

"13. When foreign judgment not conclusive:--

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except--

(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force in Pakistan."

Suffice it to say that the petitioner could not establish any of the above exception being attracted in the present case.

9. Even otherwise, there are concurrent findings of law and fact against the petitioner which are immune from interference by this Court in its revisional

jurisdiction unless there is some gross illegality floating on their surface. No such illegality could be pointed out by learned counsel for the petitioner, therefore, no interference is warranted.

10. For the foregoing reasons, this civil revision is meritless, hence dismissed.

MH/S-56/L Revision dismissed.

**2019 C L C 626**

**[Lahore]**

**Before Atir Mahmood, J**

**MUHAMMAD ALI----Petitioner**

**Versus**

**SOHAWA (DECEASED) through L.Rs. and others----Respondents**

Civil Revision No.1457 of 2017, heard on 13th November, 2018.

**(a) Punjab Land Revenue Act (XVII of 1967)---**

----S. 42(7)---Qanun-e-Shahadat (10 of 1984), Arts. 79 & 80---Limitation Act (IX of 1908), Art. 95---Suit for declaration---Limitation---Mutation---Proof---Procedure---Contention of plaintiff was that he sold land measuring 4 kanals and 5 marlas but land measuring 7 kanals and 15 marlas had been included in the impugned mutation---Suit was dismissed concurrently---Validity---Plaintiff had categorically stated that he neither appeared before the Revenue Officer nor thumb marked or signed the impugned mutation---

Onus to prove valid and lawful execution of sale mutation shifted upon the defend ants---None of the witnesses produced by the defendants had stated that sale consideration was paid in his presence---When payment of sale consideration had not been established then case of defendants could not be said to have been proved but to the extent admitted by the plaintiff---No application was moved under Art. 80 of Qanun-e-Shahadat, 1984 to prove the mutation by other means as one of the witnesses of the same had allegedly died---Even other witness of said mutation had not been produced in witness-box---Contradictions with regard to market value of suit property were on record in the present case---Sale consideration of Rs.45,000/- was the price of land measuring 4 kanals and 5 marlas which was paid to the plaintiff by the defendants and rest of land had fraudulently been entered in the mutation in question---Defendants had failed to prove the execution of alleged mutation as well as original transaction---Only one transaction with regard to land measuring 4 kanals and 5 marlas had been admitted by the plaintiff---Other land which was included by the defendants fraudulently at the back of vendor was neither permissible nor could be protected---Sale mutation itself revealed that two transactions between the parties had taken place in the present case---Documentary evidence did override the oral evidence---Oral evidence if led in contradiction to the contents of sale mutation was of no consequence and could not be relied upon---Plaintiff had sold land measuring 4 kanals and 5 marlas whereas other land mentioned in the alleged mutation was added afterwards without consent and agreement of plaintiff---Revenue Officer while attesting mutation was bound to ensure presence of the person whose right was going to be acquired by such mutation---Identification of such person by two respectable persons was also required---Alleged mutation did not carry signatures or thumb

impressions of vendor nor he was identified at the time of attestation of mutation---Vendor did not appear before Revenue Officer nor he was identified at the time of attestation of sale mutation---Sale mutation had been attested in violation of S. 42(7) of Punjab Land Revenue Act, 1967---Where fraud had been alleged while seeking some relief then period of limitation would be three years which would commence from the date of knowledge---Date of knowledge, in the present case, had been alleged few days prior to the institution of suit which could not be rebutted by the other side by any solid evidence---Present suit was instituted within time, in circumstances---Courts below had erred in law while dismissing the suit---Impugned judgments and decrees passed by the Courts below were set aside---Suit filed by the plaintiff was decreed as prayed for.

Muhammad Shafi and others v. Allah Dad Khan PLD 1986 SC 519 rel.

**(b) Qanun-e-Shahadat (10 of 1984)---**

----Art. 103---Documentary evidence overrides the oral evidence.

Malik Rab Nawaz for Petitioner.

Ch. Hafeez ur Rehman Atif for Respondents.

Date of hearing: 13th November, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.**----Brief facts of the case are that on 15.10.2005, the petitioner filed a suit for declaration and permanent injunction alleging that he sold land measuring 4 kanals and 5 marlas from Khewat No.9 to predecessor of the respondents namely Sohawa through Mutation No.538 dated 26.07.1994 but the vendee in connivance with the revenue staff managed further land measuring 7 kanals and 15 marlas in the said mutation. He prayed that the said mutation as well as entries made in pursuance thereof be corrected in the revenue record and the defendants be restrained from interfering in the possession of the petitioner over the suit property.

2. The defendants filed contesting written statement. Out of divergent pleadings of the parties, following issues were framed:

ISSUES

i. Whether plaintiff is owner in possession over suit land? OPP

ii. Whether oral sale mutation No.538 dated 26.07.1994 and subsequent entries in Jamabandi are against law/facts, null and void on rights of plaintiff? OPP

iii. If above issues are proved in affirmative, plaintiff is entitled to decree for declaration along with consequential relief for perpetual injunction? OPP

iv. Whether plaintiff has no cause of action? OPD

v. Whether suit is wrongly valued regarding court fee and jurisdiction? OPD

vi. Whether suit is barred by time? OPD

vii. Whether plaintiff is estopped to sue on ground of word and conduct? OPD

viii. Whether description of suit property in plaint is not correct? OPD

ix Whether suit is frivolous, be dismissed with special costs under section 35-A, C.P.C.

x. Relief.

The evidence of the parties was recorded and then suit of the petitioner was dismissed by learned trial court vide judgment and decree dated 15.09.2011. Feeling dissatisfied, the petitioner filed appeal which also met with the same fate vide judgment and decree dated 15.02.2012 passed by learned Additional District Judge, Chiniot. Hence this civil revision has been preferred.

3. Learned counsel for the petitioner inter alia contends that the petitioner-plaintiff categorically alleged that a fraud has been committed with him, as such, the onus to prove the mutation shifted upon the defendants, being beneficiaries of the same, but they badly failed to prove the same as required by law; that the petitioner sold 4 kanals and 5 marlas land to the predecessor of the defendants and not 12 kanals of land, as mentioned in the disputed mutation; that the petitioner never appeared before the revenue officer to sign or thumb mark the mutation; that since it was a case of fraud, the limitation was to start from the date of knowledge, as such, the suit was within time, therefore, this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of the petitioner be decreed as prayed for.

4. On the other hand, learned counsel for the respondents has vehemently opposed this civil revision and fully supported the impugned judgments and decrees.

5. Arguments heard. Record perused.

6. The moot point in this case is as to what quantum of land was sold by the petitioner-plaintiff to the predecessor of the defendants through the disputed mutation - whether it was 4 kanals 5 marlas or 12 kanals.

7. The case of the petitioner is that he sold only 4 kanals and 5 marlas land to the predecessor of the defendants but the defendants managed the sale mutation of 12 kanals of land by adding 7 kanals 15 marlas therein unauthorizedly and fraudulently. On the other hand, the defendants have taken plea that the plaintiff sold 12 kanals of land to their predecessor but after his death, he backed out from his words and filed the instant suit with mala fide intention.

8. In order to prove his case, the petitioner appeared before the court as PW.1 to reiterate the averments made in the plaint. He stated that he sold only 4 kanals and 5 marlas of land to the predecessor of the defendants but the defendants got managed the sale mutation of 12 kanals of land, by getting added 7 kanals and 15 marlas land therein fraudulently. He categorically stated that he neither appeared before the revenue officer nor thumb marked or signed the mutation in question. The petitioner also claims possession of the suit property till date. After this allegation, the onus to prove the valid and lawful execution of the sale mutation shifted upon the defendants.

9. On behalf of the defendants, Younas son of Sohawa (son of the vendee) appeared before the court as DW.1 and deposed in his examination-in-chief that the plaintiff sold 12 kanals land to them. He deposed that the plaintiff appeared before the Patwari Halqa and got entered the mutation. He further deposed that the plaintiff also appeared before the Tehsildar when he admitted receipt of sale consideration from and delivery of possession to the defendants. In cross-examination, he stated that the deal took place in the house of the plaintiff when he, Ibrahim, Ismail, Sharif, Gaman, and his father were present. He deposed that 15/16 years before, they made the payment to the plaintiff on 6th and the mutation was entered on 7th which was attested on 26th. In cross-examination, he states that none of relatives of the plaintiff was present on the occasion. Regarding market price of the land, he states that at the time of deal, the price of land was Rs.30,000/- per acre. He denied the suggestion that the land price per acre was more than Rs.100,000/- at that time. He also denied that the plaintiff only sold 4 kanals and 5 marlas of land to them and entry of 7 kanals 15 marlas land in the mutation was result of connivance of the defendants with the Patwari.

10. Sharif son of Sher appeared as DW.2 to depose that the land measuring 12 kanals was sold by the plaintiff to the predecessor of the defendants namely Sohawa and possession was also handed over to him and the plaintiff also made such statement, in his (DW.2) presence, before Tehsildar who attested the mutation. During cross-examination, he states that at the time of the deal, the market price per acre was Rs.25,000/- to Rs.30,000/-. He states that the mutation was attested in the Chak at the Dera of Lumberdar but neither the Lumberdar nor the Chowkidar put their signatures/thumb impressions on the mutation.

11. D.W.3 Ibrahim son of Sher deposed in line with D.W.2. In cross-examination, he deposed that he is witness of the mutation; that he singed the mutation and was also present at the time of the deal. He further deposed that the deal took place in the house of the plaintiff when all his relatives were present. He stated that the sale money was paid in the house of the plaintiff and after one day of the payment, they went to Chiniot where the Patwari entered the mutation and got their thumb impressions. He stated that none of Lumberdar, Imam or Chowkidar was present at the time of attestation of the mutation. He deposed that the price of land was less than Rs.100,000/- per acre at the time of the deal. He could not tell as to when the mutation was attested. He denied fraudulent insertion of 7 kanals and 15 marlas in the disputed mutation.

12. D.W.4 is Ahmed Khan, Patwari from office of Qanungo, Jhang who merely produced the register of mutations for the year 1994-95. In cross-examination, he admitted that neither the mutation was entered nor attested in his presence.

13. D.W.5 is Patwari namely Nazir Husain who entered the mutation in question. In his examination-in-chief, he deposed that he entered the mutation at the instance of the plaintiff Muhammad Ali. He stated that price of 12 kanals was written thereover as Rs.45,000/- which was attested by the Revenue Officer after getting confirmation from the plaintiff that he had received the sale money. In cross-examination, he admitted that at the time of the deal, the market price of the land was from Rs.80,000/- to Rs.100,000/- per acre. He admitted that no deal between the parties took place before him. He further admitted that no payment was made in his presence. He further admitted that the mutation carries thumb impressions of the witnesses but the signature of the vendor-plaintiff were not present thereover. He further admitted that the mutation was attested at the dera of Lumbedar but no identification of the vendor was made by anybody at that time. He denied the suggestion that the mutation was got entered to the extent of 4 kanals and 5 marlas pertaining to khewat No.9 by the plaintiff and land of khewat No.8 has collusively been entered in the mutation by him at the behest of the defendants. He expressed his ignorance about as to why the plaintiff sold land from two khatas.

14. Perusal of evidence given in the preceding paragraphs reveals that none of the witnesses states that the sale money was paid in his presence. When the payment of sale money is not established, the case of the defendants cannot be said to have been proved but to the extent admitted by the plaintiff himself. D.W.1, who is son of the vendee, states that no relative of the plaintiff was present at the time of the deal whereas D.W.3 deposes that all the relatives of the plaintiff were present at that time which is a material contradiction in their statements. None of the witnesses could tell the exact dates of the deal. None of the witnesses

of the mutation has been brought in witness box. Though it has come on record that Ahmed son of Fateh Muhammad, one of the witnesses of the mutation, had died prior to recording of evidence yet no application under Article 80 of Qanun-e-Shahadat Order, 1984 (the Order, 1984) was moved to prove by other means that the document in question was lawfully executed. Even otherwise, the other witness of the disputed mutation namely Ismail son of Samand was not produced in the witness box, as such, the provisions of Article 79 of the Order, 1984 are fully attracted. There are also contradictions between the statements of the DWs regarding market price of the land at the time of the deal. DW.1 states the market price per acre as Rs.30,000/-. DW.2 tells it as Rs.25,000/- to Rs.30,000/-. According to D.W.3, per acre market price was less than Rs.100,000/- whereas the Patwari deposes that the market price at the time of the deal was Rs.80,000/- to Rs.100,000/- per acre. These contradictions in the statements of the D.Ws. lead me to an inference that D.Ws. 1 and 2 deposed before the court as they were tutored. D.W.3, however, admitted the price less than Rs.100,000/- which reflects the land price slightly less than Rs.100,000/- which is close to the value disclosed by the Patwari, D.W.5. In view of the afore said, I am of the opinion that the land price per acre was about Rs.80,000/- per acre which, when looked in juxta position with statement of plaintiff regarding price of land measuring 4 kanals 5 marlas, leads me to a definite conclusion that Rs.45,000/- was the price of the land measuring 4 kanals and 5 marlas which was paid to the plaintiff by predecessor of the defendants and the rest of the land, i.e. 7 kanals and 15 marlas has fraudulently and collusively been entered in the disputed mutation. The defendants have badly failed to prove the lawful execution of the mutation as well as the original transaction, i.e. the deal of sale of the property between the parties in pursuance of which the mutation was attested, therefore, the suit of the plaintiff was liable to be decreed.

15. I have gone through the sale mutation (Exh.D.1) carefully. Bare reading of this document shows that the writing thereover is in two parts. First part of the writing clearly suggests that the vendor sold out land measuring 4 kanals 5 marlas to predecessor of the defendants for consideration of Rs.45,000/-. The second part of the document reads that further 7 kanals 15 marlas of land was sold by the petitioner to the predecessor of the defendants for consideration of Rs.45,000/-. Meaning thereby, there were two transactions between the parties, i.e. sale of 4 kanals 5 marlas for consideration of Rs.45,000/- and sale of 7 kanals 5 marlas for consideration of Rs.45,000/-. In this eventuality, there should have been made payments of Rs.45,000/- twice but the case of the petitioner is that he received a sum of Rs.45,000/- for land of 4 kanals 5 marlas whereas the defendants also claim that a sum of Rs.45,000/- only was paid to the petitioner-plaintiff though they assert that the said price was for land measuring 12 kanals of land. This

version of the defendants contradicts the contents of the mutation which clearly and unambiguously suggests two sale transactions with two different payments of Rs.45,000/- each between the parties but both the parties are persistent and inflexible on the point that a sum of Rs.45,000/- was only once paid to the plaintiff by the predecessor of the defendants. Meaning thereby only one transaction regarding land measuring 4 kanal 5 marla, which is admitted by the petitioner-plaintiff, took place between the parties and the other land was got included by the defendants fraudulently at the back of the vendor which was neither permissible nor can be protected. When the sale mutation itself reveals two transactions between the parties entailing two payments which is neither case of the plaintiff nor that of the defendants, it can safely be concluded that one out of the two transaction did not take place. It is settled law that documentary evidence overrides the oral evidence. In this view of the matter, the oral evidence if led in contradiction to the contents of the sale mutation is of no consequence and cannot be relied upon. Reliance is placed on the law laid down in case Muhammad Shafi and others v. Allah Dad Khan (PLD 1986 SC 519). The petitioner despite knowing that his signature/thumb impressions do not exist on the mutation has not denied the sale of his land mearuing 4 kanals and 5 marlas, he seems to be true. The aforesaid leads me to the conclusion that the petitioner sold land measuring 4 kanals and 5 marla (reflected in first part of the mutation as noted above) whereas the other land mentioned in the mutation, i.e. 7 kanals and 5 marlas (reflected in second part of the mutation) was added afterwards without consent and agreement of the plaintiff, as such, the mutation to the latter extent was liable to be struck down.

16. Subsection (7) of section 42 of the Land Revenue Act, 1967 binds the Revenue Officer, who is going to attest the mutation, to ensure the presence of a person whose right is going to be acquired by such transaction. The said provision of law also requires the identification of such person by two respectable persons. But the disputed sale mutation neither carries signatures or thumb impressions of the vendor nor the vendor was identified at the time of attestation of the mutation which establishes his non-appearance and non-identification at the time of attestation of the sale mutation. As such, the sale mutation was attested in violation of Subsection (7) of section 42 of the Act ibid.

17. Learned counsel for the respondents has contended that the suit was barred by time. The plaintiff has taken plea in the plaint that few days prior to institution of the suit, he came to know that the suit property was got included in the disputed mutation by the defendants in connivance with the revenue staff. Article 95 of the Limitation Act, 1908 provides that where while seeking some relief, fraud has been alleged, the period of limitation will be three years which will commence to be computed from the date of knowledge. The date of knowledge is, as per version

of the plaintiff, few days prior to institution of the suit which could not be rebutted by the other side by any solid evidence, as such, the suit was, in light of Article 95 of the Limitation Act, 1908, instituted within time.

18. Reading of impugned judgments reveals that following line of the statement of the plaintiff led the learned courts below to pass decrees against the plaintiff

In my view, there is a categorical stance of the plaintiff that he got entered the mutation with Patwari for land measuring 4 kanal 5 marla and he has no objection to the attestation of mutation to that extent whereas his land measuring 7 kanals 15 marlas has fraudulently been included in the mutation. Meaning thereby he has no objection upon attestation of mutation to the extent of land measuring 4 kanals and 5 marlas, sold by him. In my view, the above noted single line from the statement of the plaintiff cannot be read in isolation of his whole statement and stance taken by him in his plaint as well as evidence. Learned courts below appeared to have been misled from the above line to reach an incorrect conclusion that the disputed mutation was attested with consent of the petitioner-plaintiff. This incorrect finding cannot sustain in the given circumstances.

19. For what has been discussed above, the impugned judgments and decrees are against the law, facts and evidence available on record, as such, these cannot sustain. Accordingly, this civil revision is allowed, the impugned judgments and decrees passed by both the learned courts below are set aside and the suit of the petitioner is decree as prayed for.

ZC/M-195/L Revision allowed.

**2019 C L C 1041**

**[Lahore]**

**Before Atir Mahmood, J**

**Mst. DELTEX COURIER SERVICE----Appellant**

**Versus**

**SAJID IMRAN GILL and others----Respondents**

F.A.O. No. 172 of 2008, heard on 9th January, 2019.

**Punjab Consumer Protection Act (II of 2005)---**

----Ss. 28(4) & proviso, 27 & 33---Cause of action for consumer---Limitation period of thirty days to file a complaint---Computation---Scope---Cause of action for a consumer under Punjab Consumer Protection Act, 2005 only arose when grievance of consumer was put before the seller/service provider/manufacturer, in terms of a notice, and if there was refusal from their side to redress such grievance---No time-limit was fixed by Legislature to serve a notice in writing upon seller/service provider/manufacturer and when a notice under Punjab Consumer Protection Act, 2005 was served, such seller/service provider/ manufacturer may redress the grievance of the consumer---However, if no reply to such notice was forthcoming, then terminus a quo for computing limitation under Punjab Consumer Protection Act, 2005 was the date when fifteen days expired after receipt of notice by supplier and non-reply on the same and on such date cause of action under Punjab Consumer Protection Act, 2005 arose.

Muhammad Azam v. National Bank of Pakistan and others PLD 2013 Lah. 73 and Messrs Dawlance United Refrigeration Industries Private Ltd. through Branch Coordinator v. Muhammad Asim Chaudhry PLD 2016 Lah. 425 ref.

Raja Nadeem Haider and Ms. Ambreen Anwar Raja for Appellant.

Mahmood Tahir Ch. and Mian Abdul Saeed for Respondent No.1.

Date of hearing: 9th January, 2019.

**JUDGMENT**

**ATIR MAHMOOD, J.---**Brief facts of the case are that the respondent No.1 filed a complaint under Section 13 of Punjab Consumer Protection Act, 2005 (the "Act") against the appellant in the District Consumer Court, Faisalabad alleging that he engaged the services of appellant company for delivery of a packet worth Rs.45,000/- to Khurram Qadri case of Paradize Printing Press, Karachi and paid delivery charges to the tune of Rs.30/- to the appellant company who issued a receipt having consignment note No.12258 dated 29.09.2007 with the assurance that delivery of said packet will be made within 48-days at the destination which on inquiry after three days of receipt, found undelivered, therefore, respondent No.1 approached the appellant's company who categorically denied receiving of said parcel from respondent and issuance of receipt No.12258 dated 29.09.2007. Respondent No.1 resisted the complaint by filing written statement. After hearing both sides, learned Consumer Court allowed complaint of the respondent while directing the appellant to pay Rs.56,000/- as loss to the value of consignment

alongwith litigation charges vide order dated 10.07.2008. Hence, this appeal has been filed.

2. Learned counsel for the appellant has contended that the complaint was badly barred by time as it was not filed within 30 days of alleged cause of action; that no evidence about the value of C.D. Software/alleged consignment was produced by respondent No.1; that the order of learned consumer court is against the law, therefore, it cannot sustain. Learned counsel for the appellant accordingly prays that this appeal be allowed, the impugned order be set aside and the complaint of respondent No.1 be dismissed. He relied upon "Muhammad Azam v. National Bank of Pakistan and others" (PLD 2013 Lahore 73) and "Messrs Dawlance United Refrigeration Industries Private Ltd. through Branch Coordinator v. Muhammad Asim Chaudhry" (PLD 2016 Lahore 425).

3. On the other hand, learned counsel for respondent No.1 has hotly opposed this appeal and fully supported the impugned order. According to him, the complaint was filed within time limitation and it was not time barred, therefore, this appeal is liable to be dismissed.

4. Arguments heard. Record perused.

5. Only two points have been put before this Court for adjudication. Firstly, as to whether the complaint was filed within limitation of time. Secondly, as to whether the valuation of the alleged consignment had been proved through evidence by the appellant.

6. According to the respondent No.1, he hired the service of the appellant for sending a packet containing a "C.D./Software" to one Khurram Qadri at Karachi vide receipt issued on 29.09.2007 which was not delivered on the destination. On 01.10.2007, the respondent No.1 approached the appellant and protested upon non-delivery of parcel but the appellant company could not offer any cogent reason about non-delivery of said consignment to the addressee inspite of the fact that a request was made by respondent No.1 to inquire the matter. However, when grievance of the respondent was not redressed, he issued legal notice dated 22.11.2007 and then approached the consumer Court through the complaint on 15.12.2007. The plea of learned counsel for the appellant is that the cause of action accrued to the respondent on 01.10.2007, when he first approached the appellant, therefore, it was the starting point for counting limitation whereas the complaint was filed on 15.12.2007 with delay of about fifteen days without showing sufficient cause through filing a proper application for condonation of delay, therefore, not only the complaint was barred by time but also the delay in filing the complaint could not be condoned. On the other hand, learned counsel for the respondent submits that the time was to start after expiry of 15 days given by the appellant itself.

7. According to my understanding of law, the accrual of cause of action cannot be restricted to the date when some wrong is done with the complainant/consumer or it comes in his knowledge. As a matter of fact cause of action only arises when the grievance of the consumer is put before seller/service provider or the manufacturer (as the case may be) and there is a refusal from their side to redress the grievance of the consumer. In order to reach this conclusion the provision of

Section 28 of the Punjab Consumer Protection Act, 2005 (hereinafter called "the Act") is reproduced as under:

> "28. Settlement of Claims.- (1) A consumer who has suffered damage, or Authority in other cases, shall, by written notice, call upon a manufacturer or provider of services that a product or service is defective or faulty, or the conduct of the manufacturer or service provider is in contravention of the provisions of this Act and he should remedy the defects or give damages where the consumer has suffered damage, or cease to contravene the provisions of this Act.
>
> (2) The manufacturer or service provider shall, within fifteen days of the receipt of the notice, reply thereto.
>
> (3) No claim shall be entertained by a Consumer Court unless the consumer or the Authority has given notice under subsection (1) and provides proof that the notice was duly delivered but the manufacturer or service provider has not responded thereto.
>
> (4) A claim by the consumer or the Authority shall be filed within thirty days of the arising of the cause of action:
>
> Provided that the Consumer Court, having jurisdiction to hear the claim, may allow a claim to be filed after thirty days within such time as it may allow if it is satisfied that there was sufficient cause for not filing the complaint within the specified period:
>
> Provided further that such extension shall not be allowed beyond a period of sixty days from the expiry of the warranty or guarantee period specified by the manufacturer or service provider and if no period is specified one year from the date of purchase of the products or providing of services.

Bare reading of the above provision of law makes it abundantly clear that no time is fixed by the legislature to serve a notice, in writing, upon the manufacturer/service provider and when a notice is served upon him, the service provider/manufacturer may redress the grievance of the consumer. If the grievance is redressed, no cause of action arises but if not so then written reply of the notices is to be given within 15-days of the receipt of notice. If the contention of the appellant that cause of action arose when the consignment sent by the respondent did not reach the destination and the respondent received the said information, then the subsections (2) and (3) of Section 28 of the Act, referred hereinabove, will become redundant for all practical purposes. It depicts that the respondent issued notice on 22.11.2007 which was to be replied within fifteen days from its receipt. Therefore, the terminus a quo for counting the time limitation was the date when the time of fifteen days expired after receiving legal notice. The appellant in his cross-examination admitted that he received the notice but he did not reply. If the date of receiving the notice is considered as 22.11.2007 which in fact was the date of sending of the notice, then the period of 15-days expired on 07.12.2007 which will be the date for arising of the cause of action. Therefore, the complaint filed on 15.12.2007 was within the time limitation of 30 days provided by subsection (4) of section 28 of the Act.

7. So far as the second question as to whether the valuation of the alleged consignment had been proved through evidence by the appellant or not, is concerned, the plea of learned counsel for respondent No.1 was that he handed over a packet of Compact Disc/Software having intellectual work done by respondent No.1 and his staff amounting to Rs.45,000/- which was not delivered at the destination whereas the appellant flatly denied this aspect. In Ex.D-W-1 Shabbir Hussain, DW-1 deposed that:

Whereas in cross-examination he stated as under:

It has also been stated that:

From above, it is very much clear that there are contradictory versions taken in Ex.D-W-1 and in cross examination. At one place, he stated that no one approached the appellant for non-delivery of parcel whereas at other place he stated that shipment was not traceable, it means the respondent No.1 approached the appellant, put his grievance and appellant found that shipment was not traceable. Furthermore, during cross examination, the appellant had not put question with regard to the valuation of parcel, therefore, presumption of truth goes in favour of respondent No.1. The learned court below has rightly passed the impugned order and no illegality or irregularity has been committed therein.

8. For the aforementioned reasons, this appeal is bereft of any merit, hence dismissed with no order as to cost.

KMZ/D-3/L Appeal dismissed.

**2019 C L C 1343**

**[Lahore]**

**Before Atir Mahmood, J**

**ABDUL GHAFOOR----Appellant**

**versus**

**MUHAMMAD SHAFFI and others----Respondents**

Regular Second Appeal No. 16 of 2017, heard on 20th February, 2019.

**(a) Punjab Land Revenue Act (XVII of 1967)---**

----Ss. 135, 172 & 3---Specific Relief Act (I of 1877), Ss. 42, 54 & 8---Suit for declaration, possession and permanent injunction---Partition of agricultural property---Exclusive jurisdiction of Revenue Court---Jurisdiction of civil court barred---Exclusion of site of a town or village from operation of the Punjab Land Revenue Act, 1967---Scope---Plaintiff filed suit for declaration, partition and possession with permanent injunction claiming therein that he and defendants were co-sharers in the property and that defendants were cultivating crops as well as raising construction over the property---Trial Court decreed the suit whereas Lower Appellate Court dismissed the suit on the ground that the disputed land did not fall within the limits of a town or village, therefore, jurisdiction of Civil Court was barred---Validity---Held, Jamabandi revealed that the whole Khewat was consisted of land measuring 99-Kanals and 10-Marlas and the land measuring of 93-Kanals and 19-Marlas was cultivable whereas only 5-Kanals and 11-Marlas was 'Ghair Mumkin' (non-cultivable)---Khasra Girdawri showed that major part of the land was cultivable---No sound proof of Abadi at the disputed land was available, rather the same was cultivable---Lower Appellate Court had rightly relied upon S. 3(2) of Punjab Land Revenue Act, 1967 and held that plaintiff had not produced any notification of Collector, or special orders of the Board of Revenue showing that the land in question had been included within the site of town or village, however, documents produced by plaintiff showed that major portion of disputed property was agricultural land and cultivable---Suit property, being agricultural land, came under the exclusive jurisdiction of Revenue Court and the jurisdiction of Civil Court was barred---Appeal was dismissed.

**(b) Punjab Land Revenue Act (XVII of 1967)---**

----S. 135---Partition of agricultural property---Exclusive jurisdiction of Revenue Court---Jurisdiction of Civil Court---Scope---Partition of agricultural land falls within the exclusive domain of Revenue Officer and the jurisdiction of Civil Court is barred---Decree passed by Civil Court relating to the partition of agricultural land is without jurisdiction and nullity in the eyes of law.

Qamar Sultan v. Mst. Bibi Sufaidan 2012 SCMR 695 rel.

**(c) Punjab Land Revenue Act (XVII of 1967)---**

----Ss. 135 & 172---Partition of agricultural property---Exclusive jurisdiction of Revenue Court---Bar on jurisdiction of Civil Court---Scope---Section 135, Punjab

Land Revenue Act, 1967 confers power upon a Revenue Officer to make partition of land, on application of any joint owner, whereas, S. 172 of the said Act expressly excludes the jurisdiction of Civil Courts in any matter in which the Government, Board of Revenue or any Revenue Officer, is empowered by the Punjab Land Revenue Act, 1967 to dispose of---Civil Court has no jurisdiction to adjudicate upon a suit praying partition of agricultural land.

**(d) Punjab Land Revenue Act (XVII of 1967)---**

---S. 135---Partition of agricultural property---Construction on agricultural property---No hard and fast rule can be laid down regarding the type and extent of constructions on agricultural land, which do not exclude it from the purview of section 135, Punjab Land Revenue Act, 1967 for the purposes of partition proceedings, subject to peculiar facts and circumstances of the case.

**(e) Words and phrases---**

----Land---Meaning.

**(f) Punjab Land Revenue Act (XVII of 1967)---**

----S. 136---Restrictions and limitations on partition---Scope---Section 136(b)(iii) of Punjab Land Revenue Act, 1967 provides that partition of any land which is occupied as the site of a town or village, may be refused if, in the opinion of the Revenue Officer, such partition is likely to cause inconvenience to the co-sharers or other persons directly or indirectly interested therein, or to diminish the utility thereof to those persons.

**(g) Punjab Land Revenue Act (XVII of 1967)---**

----S. 3---Exclusion of certain land from operation of the Punjab Land Revenue Act, 1967---Scope---Agricultural land which is occupied as the site of a town or village remains under the purview of the Punjab Land Revenue Act, 1967 unless such land is not assessed to land revenue----Agricultural land in a town or village, which is built upon, comes out of the scope of the term "land" and quits from the purview of the Punjab Land Revenue Act, 1967.

Muhammad Sadiq v. Abdul Aziz 1990 CLC 1387 rel.
Rana Aamir Iftikhar for Appellant.
Barrister Usman Ghani Rashid Cheema and Ijaz Yousaf for Respondent No.1.
Asad Abbas Dhothar for Respondents Nos. 2 to 7.
Date of hearing: 20th February, 2019.

**JUDGMENT**

**ATIR MAHMOOD J.----**Through this appeal appellant has challenged the judgment and decree dated 19.12.2016 passed by learned Additional District Judge, Gujranwala, whereby, appeal filed by the respondents was allowed.

2. Precisely, the facts of the case are that appellant/plaintiff filed a suit for declaration, partition and possession with permanent injunction against the respondents before learned Civil Judge, Gujranwala, alleging therein, that the appellant and respondents are co-sharers in the disputed property measuring 99-

Kanals, 10-Marlas bearing khewat No.10, Khatooni Nos.22-28, qitat 18 situated at Ladhewala Goraya, District Gujranwala vide registered Haqdaran Zameen for the year 2007-08; that respondents are cultivating crops on the disputed land as well as illegally raising the construction over it and on request to restrain from this act, they refused to do so, hence, the present appellant filed the suit. The suit was resisted by the respondents. Out of the divergent pleadings of the parties, issues were framed. Thereafter, evidence from both the parties was called for which was adduced and recorded, accordingly. After hearing the arguments, learned trial Court vide judgment and decree dated 07.10.2015 decreed the suit. Feeling dissatisfied, respondents assailed this judgment and decree before learned lower appellate Court while filing an appeal which was accepted vide impugned judgment and decree dated 19.12.2016 and suit was dismissed. Hence, this appeal has been filed.

3. It is contended by the learned counsel for the appellant that impugned judgment and decree passed by learned lower appellate Court is the result of misreading and non-reading of evidence available on the record; that the learned lower appellate Court has committed illegality and material irregularity while passing the impugned judgment and decree; that the respondent No.13 has admitted in his written statement that there are illegal occupants in the disputed suit land, therefore, same could not be partitioned, however, this important aspect of the case has been overlooked by the learned lower appellate Court. Lastly, prayed for acceptance of this appeal and setting aside of impugned judgment and decree passed by learned Additional District Judge, Gujranwala.

4. On the other hand, learned counsel for the respondents has vehemently opposed this appeal and fully supported the impugned judgment and decree passed by learned lower appellate Court. He accordingly prays for dismissal of the instant appeal.

5. Arguments heard. Record perused.

6. There are two primary questions involved in this case which require determination:

i) Whether the suit land is agricultural in nature, if yes, then, how the civil court has jurisdiction to adjudicate the matter.

(ii) What type and extent of constructions on agricultural land do not exclude it from the purview of section 135 of the Punjab Land Revenue Act, 1967, for the purposes of partition proceedings?

7. Firstly, I come to the first question, that whether the suit land is agricultural land or not. In this regard, I perused the record available on the file wherein Jamanbandi for the year 2008 was exhibited as Ex.P-1 in which it is mentioned that whole Khewat is relating to land 99-Kanals, 10-Marlas and out of total said land, the land consisting of 93-Kanals and 19-Marlas is cultivable whereas only 5-Kanals, 11-Marlas is "Ghair Mumkan" (non-cultivable). Ex-P-2 which is Khasra Girdawri also shows that major part of land is cultivable. So, it is manifestly clear that the suit land is agricultural. It is settled law that the matter of partition of

agricultural land falls within the exclusive domain of Revenue Officer and the jurisdiction of Civil Court, is barred under the law, therefore, a decree passed by a Civil Court relating to the partition of the agricultural land is without jurisdiction and nullity in the eye of law. In this regard, I am fortified with the judgment of august Supreme Court of Pakistan reported as "Qamar Sultan v. Mst. Bibi Sufaidan" (2012 SCMR 695), wherein it has been held that:

> "The proposition that when the relief vis-a-vis partition of an agricultural property lay within the jurisdiction of the Revenue Court, any decree passed by the Civil Court in this behalf is nullity in the eye of law, is no doubt correct, but in this case the Civil Court has not passed any such decree. Yes, no secondary evidence has been produced in the Court to prove the signature of the deceased on the application mentioned above but, to our mind that was not necessary, because it was a certified copy of the application thus moved. When considered in this background, we don't think the impugned finding can be said to have been based on misreading and non-reading of evidence or erroneous assumptions of law and facts. We, therefore, do not feel persuaded to grant leave in this case."

8. It would be advantageous to reproduce the sections 135 and 172 of the Punjab Land Revenue Act, 1967:

> "135. Application for partition.- Any joint owner of land may apply to a Revenue Officer for partition of his share in the land if-
>
> (a) at the date of the application the share is recorded under Chapter VI as belonging to him; or
>
> (b) his right to the share has been established by a decree which is still subsisting at the date; or
>
> (c) a written acknowledgment of that right has been executed by all persons interested in the admission or denial thereof."
>
> "172. Exclusion of jurisdiction of Civil Courts in matters within the jurisdiction of Revenue Officers.- (1) Except as otherwise provided by this Act, no Civil Court shall have jurisdiction in any matter which Government, the Board of Revenue, or any Revenue Officer, is empowered by this Act to dispose of, or take cognizance of the manner in which Government, the Board of Revenue, or any Revenue Officer exercises any powers vested in it or him by or under this Act.
>
> (2) Without prejudice to the generality of the provisions of subsection (1), a Civil Court shall not exercise jurisdiction over any of the following matters, namely:-
>
> (i) ..
> (ii) ..
> (iii) ..
> (iv) ..
> (v) ..

(vi) ..
(vii) ..
(viii) ..
(ix) ..
(x) ..
(xi) ..
(xii) ..
(xiii) ..
(xiv) ..
(xv) ..
(xvi) ..
(xvii) ..
(xviii) any claim for partition of an estate or holding, or any question connected with or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought;"

The bare reading of above quoted provisions of law makes it very much clear that section 135 of the Act ibid confers power upon a Revenue Officer to make partition of land, on application of any joint owner, whereas. Section 172 of the Act ibid excludes expressly jurisdiction of civil courts in any matter which the Government, Board of Revenue, or any Revenue Officer, is empowered by the Act to dispose of. Hence, in view of above provisions of law, there leaves no confusion to hold that a Civil Court has no jurisdiction to adjudicate upon a suit praying partition of agricultural land.

9. So far as the second question with regard to that what type and extent of constructions on agricultural land do not exclude it from the purview of section 135 of the Act, 1967, for the purposes of partition proceedings, is concerned, there is no any hard and fast rule in this regard, however, it is subject to the peculiar facts and circumstances of every case. However, guidance may be sought from the judgments of Apex Courts as well as of High Courts and from the definition of the term "land" given in section 2(3) of the Punjab Alienation of Land Act, 1900 which is re-produced hereinbelow for ready reference:

Section-2: Definition (1) .

(2)
(3) the expression "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes-
(a) the sites of buildings and other structures on such land;
(b) a share in the profits of an estate or holding;
(c) any dues or any fixed percentage of the land-revenue payable by an inferior landowner to a superior landowner;
(d) a right to receive rent;
(e) any right to water enjoyed by the owner or occupier of land as such;
(f) any right of occupancy; and
(g) all trees standing on such land,"

In view of above mentioned provision of law the term "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and further includes the above mentioned provisions of law i.e. 2(3)(a) to 2(3)(g). Whereas, in Section 3(1) of the Punjab Land Revenue Act, 1967 it has been stated that:

> 3. Exclusion of certain land from operation of this Act.---(1) Except so far as may be necessary for the record, recovery and administration of village cess, or for purposes for survey, nothing in this Act applies to land which is occupied as the site of a town or village, and is not assessed to land revenue.

Section 136(b) (iii) of the said Act provides that partition of any land which is occupied as the suit of a town or village, may be refused if, in the opinion of the Revenue Officer, the partition of such property is likely to cause inconvenience to the co-sharers or other persons directly or indirectly interest therein, or to diminish the utility thereof to those person. Plain reading of these enactments reveals that the expression "as the site of any building in a town or village" has been used in the Act of 1900 and the expression "as the site of a town or village" has been employed in the Act, 1967 which clearly shows the difference of both these expressions as in the first expression word "any building" has been used whereas in the second expression said words have been omitted which in my point of view has some rationale as it reflects that an agricultural land (not any building) which is occupied as the site of town or village still remains under the purview of the Act, 1967 unless and until it is not assessed to land revenue, however, agricultural land, viz, the agricultural land in a town or village, is built upon; the same comes out of the scope of the term "land" and quits from the purview of the Act of 1967. I would like to cite here the judgment of this Court in case titled "Muhammad Sadiq v. Abdul Aziz" (1990 CLC 1387) wherein it has been held that:

> 21. Reading the definitions of the expressions "land", "village immovable property" and "urban immovable property" together, in the light of the guidance to be gained from decided cases, it appears that the essence of the definition of agricultural land is its agricultural or pastural character. In order to determine whether the land is agricultural land, the definition prescribes two tests, one negative that is the property should not be occupied as the site of a building in town or village and the other positive that it should be occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture. Thus, if a land is occupied as the site of any building, the Court must approach the matter by asking itself objectively:
>
> (i) whether the locality where it is situate is a town or village; and
>
> (ii) whether it is occupied or let for agricultural purposes.
>
> If the answer to the first question be in the affirmative, then depending upon its' situation in a town or village, it is either urban or village immovable property; it is not agricultural land. But if it be land occupied or let for

agricultural purposes, then the buildings on it are also agricultural land. If the land satisfies the test that it is a site of a building in a town or village, then it cannot be agricultural land and it appears to follow logically that in that case the second question would not arise. There may be difficulty in drawing the line between the two cases, but a judge of fact should be able to resolve the difficulty. As Lord Simonda said in 1954 A.C. 429, 445:

.... I am not as a rule impressed by an argument about the difficulty of drawing the line since I remember the answer of a great Judge, that though he knew not when day ended and night began, he knew that mid-day was day and mid-night was night:'

22. There are many big bungalows and residential houses in the big cities such as Lahore and Faisalabad which have gardens and vacant lands attached to them; in those lands, sometimes crops are sown; but can it be reasonably predicated that such lands or gardens should be regarded as things apart from the bungalows or residential houses of which they form part. Even in some residential localities on The Mall, Lahore, there are houses in which vacant lands attached to them are sometimes used for crop sowing. Yet, they are occupied as the sites of the buildings to which they are attached, as much as the site actually under the building."

The portion of said judgment as reproduced above manifestly determined the status of an agricultural land and extent of constructions on agriculture land.

10. In the present case, the appellant filed suit for declaration, partition and possession with permanent injunction against the respondents with regard to the land in dispute, wherein at paragraph No.4 of the plaint he mentioned as under:

It is admitted by the appellant that the land is agricultural wherein the respondents have raised illegal construction of tubewell, daira, murgi khana and passage and remaining land is under cultivation by the respondents. The appellant in his examination in chief approximately taken the same stance, however, in place of "Abadi" he mentioned that some "Kothay" have been built. In his cross-examination he stated that there is no existence of poultry farm on the land and there are some houses on the said land. So, there is no any sound proof of Abadi at the disputed land which shows that the said land is not agricultural, rather the same is proved as cultivable. The learned lower appellate Court has rightly relied upon Section 3(2) of the Land Revenue Act, 1967 and held that appellant had not produced any notification of Collector, or special orders of Board of Revenue which show that the land in question has been included within the site of town and village, however, the documents produced by the appellant as Ex.P-1 and Ex.P-2 shows that major portion of disputed property as agricultural land and cultivable (mazrua). As stated above, the suit property being agricultural land comes under the exclusive jurisdiction of Revenue Court and the jurisdiction of Civil Court is barred in this regard.

11. From the above discussion, it can easily be observed that the learned lower appellate Court has passed the impugned judgment after properly evaluating the facts as well as available record. The said judgment is based on reasoning. No misreading or non-reading of evidence has been pointed out by the counsel for the appellant.

12. As a consequence of above discussion, this appeal is without any force which is accordingly dismissed. No order as to cost.

SA/A-50/L Appeal dismissed

**2019 P L C (C.S.) 681**

**[Lahore High Court]**

**Before Amin ud Din Khan and Atir Mahmood, JJ**

**PUNJAB FOOD AUTHORITY through Assistant Director**

**Versus**

**ZEESHAN MUNAWAR and others**

I.C.A. No. 224681 of 2018 in W.P. No. 25833 of 2017, heard on 5th December, 2018.

**(a) Civil service---**

----Contract employees---Regularization of service---Agreement as to non-regularization of contract employment---Effect---Discrimination---Employees filed constitutional petition for regularization of services which was accepted by the Single Judge of High Court with the direction to the department to constitute a committee to consider their case for regularization---Validity---Government had issued a letter whereby autonomous bodies were directed to make appointment on regular basis of the contract appointees in BS-1 to 15---Employers being autonomous body were required to comply with the said letter but they remained failed---High Court observed that agreement that contract appointment did not confer any right of regularization was an obstructive tool in the way of regularization of service of employees---Contract employees could not be deprived from their legal right of regularization in any way when a policy of regularization had been framed by the Government---Employee at the time of appointment on contract while signing the agreement had no position of bargaining with the employer and employer could coerce them to waive their legal protection and accept, contractual terms or face the risk of losing the jobs---Department was bound to implement the policy of Government with regard to regularization of contract employees---Employees were still working in department but employers had deprived them from their legal right---Departments could not be allowed to follow the policy of pick and choose rather they were bound to treat all employees equally qua their service as well as their benefits---Employers were to deal with the employees fairly, justly and honestly qua the matter of regularization of service---Employees were to be treated in accordance with law without any discrimination---In the present case posts against which employees had been appointed were of permanent nature---Employees had been discharging their duties entirely to the satisfaction of employers---Retaining services of employees on the contract instead of on permanent basis was mala fide and unfair---Employees had now become overage for further appointment---No one should be prevented from earning his livelihood---Employees were entitled for regularization of services in circumstances---Competent authority had not applied its mind while exercising its discretion to the grievance of employees rather it had resulted in pick and choose in the exercise of discretion---Intra-court appeal was dismissed in circumstances.

Chairman NADRA, Islamabad through Chairman, Islamabad and another v. Muhammad Ali Shah and others 2017 SCMR 1979 distinguished.

Habibullah v. Government of the Punjab PLD 1980 Lah. 37; Pakistan v. Public at Large PLD 1987 SC 304; Qayyum Khan v. Divisional Forest Officer, Mardan and others 2016 SCMR 1602; Khyber Pakhtunkhwa through Secretary Agriculture and others 2016 SCMR 1375; Zulfiqar Ali v. The State 1998 SCMR 1016; Muhammad Akram Solangi and 17 others v. District Coordination Officer, Khairpur and 3 others 2013 PLC (C.S.) 121 and Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others 2015 SCMR 1257 rel.

**(b) Constitution of Pakistan---**

----Art. 4---Every individual had right to be dealt with in accordance with law.

Malik Muhammad Awais Khalid and Amir Shafiq for Appellant.
Mahmood Ahmad Qazi and Junaid Jabbar Khan for Respondents.
Date of hearing: 5th December, 2018.

**JUDGMENT**

**ATIR MAHMOOD, J.----**Through this single judgment, we intend to decide I.C.A. No.224681 of 2018 and I.C.A. No.224680/2018 as common question of law and facts are involved in these appeals.

2. This Intra-Court appeal has been directed against the judgment dated 27.04.2018 passed by learned Single Judge in Chamber in Writ Petition No.25833/17.

3. Brief facts of the case are that respondents were appointed on contract basis in the appellant organization after due process on 11.01.2012 which contract was extended time to time and finally extended upto 11.01.2017. Government of Punjab regularized the services of all contract employees including the employees of autonomous bodies through notification dated 02.03.2013. In the light of said notification a meeting was convened by the appellants wherein it was decided that firstly the service rules will be notified and then the said notifications for regularization of services will be followed accordingly. Consequently, on 16.05.2016 vide Gazette Notification No.DG(PFA)ADM/2-92/2012 the service rules were notified. As a result, the respondents approached the appellants for their regularization but their request was declined which resulted into filing of W.P. No.83233/2017 and W.P. No.42667/2017 which were disposed of by learned Single Judge in Chamber with the direction to the concerned to decide the matter of the respondents, however, they rejected the representation of the respondents vide order dated 15.08.2017. Feeling aggrieved, respondents filed W.P. No.25833/2017 before learned Single Judge of this Court which was accepted in the following terms:

"For what has been discussed above, both the above writ petitions are allowed. The petitioners are reinstated in service from the date of their termination. Respondent No.1 is directed to constitute a committee as required in the

regularization policy for the year 2013 to consider the case of the petitioners for regularization and complete this exercise within two months from the date hereof."

Hence, these intra-court appeal have been filed.

4. Learned counsel for the appellant contends that impugned judgment has no sanctity in the eye of law as the appellant, Punjab Food Authority has no regularization policy to make appointments on regular basis; that the impugned judgment has been passed without applying the judicious mind; that the High Court could not renegotiate, alter and amend the terms of employment offered by the authorities to its contractual employees; that contractual employee cannot invoke constitutional jurisdiction of the High Court under Article 199 of the Constitution; that the respondents have no vested right for regularization of their services beyond the scope of terms and conditions of their contracts. Argued that impugned judgment and decree is the result of misreading and non-reading of evidence, therefore, same is liable to be set aside. He relied upon "Chairman NADRA, Islamabad through Chairman, Islamabad and another v. Muhammad Ali Shah and others" (2017 SCMR 1979).

5. Conversely, learned counsel for the respondents submitted that no illegality has been committed by the learned Single Judge while passing the impugned judgment, therefore, no interference is called for and appeal is liable to be dismissed.

6. Arguments heard. Record perused.

7. The primary question involved in this case that whether the respondents were entitled to be re-instated and regularized or not.

8. Perusal of record reveals that respondents were appointed on contract basis with the appellant on 11.01.2012 and the contract period of the respondents was extended time to time which was lastly extended upto 11.01.2017. During their period of contract they time and again requested for regularization of service, however, that request was declined repeatedly. Thereafter, during the continuation of employments of the respondents, Government of the Punjab issued a letter No.DS/(O&M)(S&GAD)5-
3/2013 dated 01.03.2013 whereby the autonomous bodies were directed to make a ppointments on regular basis of the contract appointees in BS-1 to 15 in the following terms:

"In continuation of this Department's Notification No.DS(O&M) 5-3/2004/Contract(MF) dated 14.10.2009, the Chief Minister of the Punjab has been pleased to direct that all Autonomous/Semi-Autonomous, Bodies/Special Institutions in the Punjab may make appointments on regular basis of the contract appointees in BS-1 to 15 in line with the Services and General Administration Department notification No. DS(O&M) (S&GAD)5-3/2013) dated 01.03.2013."

The respondents being employees of an autonomous body approached to the authority for regularization of their service in light of above said letter, however, instead of regularization, their contract period was extended and finally on 11.01.2017 they were terminated from their service which resulted into filing of constitutional petition before learned Single Bench of this Court. Learned Single Bench, after hearing both sides allowed the writ petition through impugned judgment and reinstated the respondents in service from the date of their termination and appellant was further directed to constitute a committee as required in the regularization policy for the year 2013 to consider the case of the petitioners for regularization and complete this exercise within two months from the date hereof

9. We have minutely perused the judgment passed by learned Single Judge in Chamber, impugned in this appeal as well as perused all the available record and this thing comes to the surface that through afore-mentioned notification issued by Government of the Punjab dated 02.03.2013 autonomous bodies were directed to make appointments on regular basis, of the contract appointees in BS-1 to 15, therefore, the appellant being autonomous body was liable to comply with the said letter, however, they remained failed in this regard. The plea taken by the appellant is that they have made appointment of respondents purely on contract basis and in their contract agreement it was clearly mentioned at Sr. No.10 that contract appointment shall not confer any right of regular appointment nor such appointment will be regularized under any circumstances, therefore, the respondents are barred to claim regularization through constitutional petition. The Hon'ble Supreme Court of Pakistan has not appreciated rather discouraged this practice of departments, government or the private, who hire the services of the poor people by issuing the appointment letters by inserting the clause that the appointee will not claim any right of regularization, 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 people who served with the appellant for years. The Hon'ble Supreme Court of Pakistan many a times through elaborative judgments has deprecated this practice and regularized the services of employees working of contract basis. As there is huge rate of unemployment in the country and the jobless persons try to get job on the terms and conditions which sometimes deprives them from their legal right and on this score alone the departments are not allowed to use said agreement of contract as an obstructive tool in their way of regularization of their service and contract employees cannot be deprived from their legal right of regularization in any way especially when a policy of regularization is framed by the Government and the department has exclusive jurisdiction/authority to do this. Furthermore, at the time of appointment on contract and while signing the agreement, the employees have no position of bargaining with the employer and employer could always coerce them to waive their legal protection and accept, contractual terms or face the risk of losing their jobs. Reliance is placed upon case reported "Habibullah v. Government of the Punjab" (PLD 1980 Lah. 37) and "Pakistan v. Public at Large" (PLD 1987 SC 304). In the present case, the Punjab Food Authority while recognizing the right of the respondents held its 12th meeting on 28.11.2014 wherein it was decided that

after formulation of service rules, the notification of Government of Punjab qua the regularization of service of respondents would be implemented. Thereafter, service rules of the employees of Punjab Food Authority were duly approved and notified, however, the services of the respondents were not regularized but terminated after extension of their contract period instead of implementation of their decision taken in afore-mentioned 12th meeting as well as in compliance of notification of Punjab Government, despite the fact that some other employees are still working there, however, the respondents were deprived from their legal right. Under Article 25 of the Constitution, the authority cannot be allowed to follow the policy of pick and choose rather they are duty bound to treat all employees equally qua their service as well as their benefits. We are fortified with the judgment of August Supreme Court of Pakistan titled as "Qayyum Khan v. Divisional Forest Officer, Mardan and others" (2016 SCMR 1602) wherein it has been held that:

> "The present appellant was appointed in the year 2010 on contract basis in the project after completion of all the requisite codal formalities, when on 25.05.2012 the project was taken over by the Khyber Pakhtunkhwa Government. It appears that the appellant was not allowed to continue after the change of hands of the project. Instead, the Government by cherry picking, had appointed some other person in place of the appellant. The case of the present appellant is covered by the principles laid down by this Court in the case of Civil Appeals Nos. 134-P of 2013 etc. (Government of KPC through Secretary, Agriculture v. Adanullah and others), as the Appellants was discriminated against and was entitled to continue the job with the employees who were similarly placed and were allowed induction on regular basis."

In another case reported as "Khyber Pakhtunkhwa through Secretary Agriculture and others" (2016 SCMR 1375) it has been held as under:

> "The record further reveals that the Respondents were appointed on contract basis and were in employment/service for several years and Projects on which they were appointed have also been taken on the regular Budget of the Government, therefore, their status as Project employees has ended once their services were transferred to the different attached Government Departments, in terms of Section 3 of the Act. The Government of KPK was also obliged to treat the Respondents at par, as it cannot adopt a policy of cherry picking to regularize the employees of certain Projects while terminating the services of other similarly placed employees."

The appellant also objected on the maintainability of the writ petition filed before the learned Single Judge in Chamber. It is now well settled law that the object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness, and openness in consonance with the command of the Constitution enshrined in different Articles. The importance of the above principle that the appellant is expected to deal with respondents qua the matter of regularization for fairly, justly, honestly,

transparently and in accordance with law and instructions of higher authorities so that the concerned persons should be treated in accordance with law without any discrimination, have also been highlighted in various judgments by the superior courts in "Zulfiqar Ali v. The State" (1998 SCMR 1016) and "Muhammad Akram Solangi and 17 others v. District Coordination Officer, Khairpur and 3 others", (2013 PLC (C.S.) 121). Learned Single Judge in Chamber has rightly relied upon the landmark judgment titled as "Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others", (2015 SCMR 1257) wherein a principle laid and grievance with regard to the terms and conditions of service can be invoked in constitutional jurisdiction. Hence, the writ petition filed before learned Single Judge was fully competent; therefore, this contention of the appellant has no force.

10. Even otherwise, the contract agreement of the respondents was extended time to time for a period of 05-years and repeated renewal of their contract of employment clearly shows that the posts against the appointment of the respondents was made are of permanent nature and it also ascertains that respondents have been discharging their duties entirely to the satisfaction of appellant, therefore, retaining the services of the respondents on the contract, instead of, on the permanent basis is absolutely mala fide and unfair. The respondents have served five years of his life to the organization and if they deems as terminated, they have become overage for further appointment. Hence, while discharging official functions, efforts should be made to ensure that no one is prevented from the earning his livelihood because of unfair and discriminatory act on their part. There is nothing in the afore-mentioned notification that employees of which particular department are entitled for regularization rather perusal of said notification clears that employees of all autonomous bodies are entitled for this benefit.

11. Looked from whatever angle, it is evident that the authority has not applied its mind while exercising its discretion to the grievance of the respondents rather it has resulted in pick and choose in the exercise of discretion. Having observed that the respondents were eligible for regularization, yet not regularized, therefore, it had militated against the command of Article 4 of the Constitution according to which it is an inalienable right of individual to be dealt in accordance with law and the law on the subject. Learned Single Judge has discussed each and every aspect of the case and then passed the impugned judgment. We see no illegality therein. The case law relied upon by the appellant "Chairman NADRA, Islamabad through Chairman, Islamabad and another v. Muhammad Ali Shah and others" (2017 SCMR 1979) being distinguishable on facts is not attracted in this case, as such, it is not helpful to the appellant.

12. As a result of above discussion, this appeal is without any substance which is accordingly dismissed. No order as to cost.

ZC/P-1/L Appeal dismissed.

**P L D 2019 Lahore 160**

**Before Atir Mahmood, J**

**AMANAT ALI---Petitioner**

**Versus**

**Mst. NADIA SHAUKAT---Respondent**

Writ Petition No.258984 of 2018, decided on 27th December, 2018.

**(a) Family Courts Act (XXXV of 1964) [as amended by the Punjab Family Courts (Amendment) Act, 2015--**

----S. 10(3)---"Khula"---Pre-trial proceedings---Reconciliation between parties---Not mandatory for Family Court seized of the matter of effect compromise or reconciliation between the parties, rather, the same was subject to the facts of the case or if the Court deemed it necessary---Where the wife had recorded her statement before the Family Court stating that she had developed hatred for her husband, and was unwilling to join him due to his cruel attitude and denied any possibility of reconciliation, it was not mandatory for the Family Court to effect compromise between the parties before passing decree for khula.

Al-Qur'an Sura Baqra Verse 229 and Mst. Bilqis Fatima v. Naimul Ikram Qureshi PLD 1959 Lah. 566 ref.

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

----Sched., Pt. I---"Khula"---Grounds---Aversion against husband---Islam did not allow subsistence of marriage if it meant forcing the wife into a hateful union---Wife could not be forced to live with her husband without her consent and liking---Wife was not required to present logical objective and sufficient reasons regarding her claim of khula, rather it was enough for her to show that she had developed a fixed aversion against her husband.

**(c) Constitution of Pakistan--**

----Art. 199---Constitutional petition---Maintainability---Where an appeal was specifically barred by the legislature, writ jurisdiction was also not available.

Saqib Mubarik Bhatti for Petitioner.

**ORDER**

**ATIR MAHMOOD, J.**---Through this constitutional petition, petitioner has challenged the legality of order and decree dated 21.12.2018 passed by respondent No.2/learned Judge Family Court, Lahore.

2. Precisely, the facts of the case are that petitioner filed a suit for restitution of conjugal rights against respondent No.1 on 05.11.2018, alleging therein that the petitioner was married with respondent No.1 on 07.04.2018 according to the injunctions of Islam in lieu of Rs.5000/- as dower amount which was paid to respondent No.1 at the time of Nikkah; that from the first day of marriage the respondent No.1 was treated by the petitioner with all possible love and affection and use to pay her the maintenance allowance; that relationship between the

spouses remained cordial for few days, thereafter, the differences arose between them and respondent No.1 despite requests remained adamant in mending her attitude and finally on 24.09.2018, in absence of petitioner, respondent No.2 left the house along with valuable articles and gold ornaments; that she in spite of hectic efforts refused to rehabilitate with the petitioner. Respondent No.1 filed written statement to the suit. The learned trial Court adjourned the case for reconciliation proceedings for 15.12.2018, however, before reaching of petitioner in the Court, the statement of respondent No.1 was recorded by the learned Judge Family Court. Petitioner requested to the learned Judge Family Court for providing him an opportunity for reconciliation while sending the matter to Arbitration Court through filing an application, however, same request was declined. The learned counsel for the petitioner requested for referring the case to learned District Judge but this request was rejected by the learned Judge Family Court and suit of the petitioner was dismissed while granting the decree of dissolution of marriage in favour of respondent No.1 vide order dated 21.12.2018, impugned in this constitutional petition.

3. Learned counsel for the petitioner contends that impugned order passed by learned Judge Family Court is illegal, unlawful, void ab initio, having been passed without lawful authority and without taking into consideration material points; that no opportunity for reconciliation was provided to the petitioner by the learned Judge Family Court; that statement of respondent No.1 was recorded in absence of the petitioner. Lastly, prayed for acceptance of this constitutional petition and setting aside of impugned order.

4. Arguments heard. Record perused.

5. The main grievance of the petitioner is that the impugned order and decree dated 21.12.2018 was passed by learned Judge Family Court on the basis of the statement of the respondent No.1 which was recorded in his absence, whereas, her statement would have been recorded in his presence.

6. Earlier, under Section 10(3) of the West Pakistan Family Courts Act, 1964 provided a mechanism in pre-trial proceedings. For ease reference, I deem it proper to reproduce section 10(3) of the Act ibid herein below:-

"S.10 Pre-trial proceedings.-(1)

(2) .

(3) At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise of reconciliation between the parties, and their counsel."

(Emphasis provided)

Afterwards vide Punjab Amendment, (The Family Courts (Amendment) Act, 2015), in the year 2015, Family Courts Act 1964, Act XXXV was amended in order to speed up the litigation and as a consequence of this, Section 10(3) also amended as follows:

"S.10 Pre-trial proceedings:-

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

From the reproduction of Section 10(3) as above, it depicts that before amendment the legislature used the word "shall" in order to determine the points at issue between the parties and try to effect a compromise of reconciliation between the parties, however after amendment in the Section 10(3), the word "may" has been used in place of "shall", which means that it is not mandatory for the Court seized with the matter to effect compromise of reconciliation between the parties, rather, it is subject to the facts of the case or if the Court deems necessary for the same. In the present case, on 15.12.2018, when the case was fixed for reconciliation, respondent No.1 recorded her categorical statement before the learned Judge Family Court, Lahore which is reproduced herein below:

Aforementioned, statement of respondent No.1 clearly shows that she has refused to join the petitioner due to his alleged cruel attitude and she categorically denied the possibility of reconciliation with the petitioner. So, in the light of relevant law as stated above, it was not mandatory for the Family Court to effect compromise between the parties when the lady was not ready to do so. Even, on the same the stance of the petitioner was also recorded by the learned Judge Family Court which the respondent No.1 not accepted.

Moreover, the above quoted section and particularly the proviso to its subsection (4) is fully in consonance with Muslim Law. The Legislature while introducing amendment in the Family Courts Act, 1964 has derived wisdom from Quran and Sunnah. The right and mode of "Khula" has been described by Almighty Allah in verse No.229 of Sura Baqra, translation of which is as under:-

"229. The divorce is twice, after that, either you retain her on reasonable term or release her with kindness. And it is not lawful for you (men) to take back (from wives) any of your Mahr (bridal money given by the husband to his wife at the time of marriage)which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she given back (Mahr or a part of it) for her 'Al-Khul' (divorce). These are the limits ordained by Allah, so do not transgress them. And whoever transgress the limits ordained by Allah, then such are the Zalimun (wrong-doers, etc.)".

The above quoted verse from the Holy Quran allows the wife for the dissolution of a marriage on restoration of the dower consideration to the husband. Furthermore, for dissolution of marriage, the consent of husband is not necessary as the words "if you fear" are addressed to the State, or the Judge, and the Judge would determine if the circumstances are such that there is apprehension that the spouses would not observe the limits of God. The reference to the Judge can only mean that he is empowered to pass an order even if the husband does not agree. In support of the above interpretation, reference may be made to two instances of "Khula" whereby marriage of Sabit Ibn-i-Qais was dissolved by the Holy Prophet Hazrat Muhammad (Peace be upon him) on a complaint made by Jamila for relieving her from the Nikah of Sabit Ibn-i-Qais in the following words:--

"Oh Prophet of God. Nothing can bring me and him together. When I raised my veil, he was coming from the front with some men. I saw that he was out of them the shortest and the ugliest. I swear by God I do not hate him because of any defect in him, religious or moral, but I hate his ugliness. I swear by God that if it was not for fear of God I would have spit at his face when he came to me. Oh Prophet of God, you see how handsome I am, and Sabit is an ugly person. I don't blame his religion or his morals but I fear heresy in Islam"

After hearing this the Prophet of God (PBUH) said to Jamila:--

"Are you prepared to return the garden that he gave you". She said: "Yest, Oh Prophet of God, and even more". The Holy Prophet said: "No more, but you return the garden that he gave you", and then the Holy Prophet said Sabit: "Take the garden and divorce her"

Khula is the right of the wife to claim her dissolution of marriage is recognized by the Holy Quran and Hadees. In a case reported as "Mst. Bilqis Fatima v. Naimul Ikram Qureshi" (PLD 1959 Lahore 566) it has been held that:--

"Islam does not force on the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some default on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault, there has to be restoration of property received by the wife"

7. Admittedly, the relationship of the spouses became strange at very initial stage of matrimonial life even they remained issueless. The argument of the petitioner that respondent No.1 be directed to live in order to perform her matrimonial obligations, is without substance. The record indicated that respondent No.1 had developed hatred against the petitioner hence in such a case Islam does not allow subsistence of marriage for that would mean forcing the wife into a hateful union. A wife cannot be forced to live with her husband without her consent and liking. She need not come out with logical objective and sufficient reasons regarding her claim of Khula', it is enough to show that she had developed a fixed aversion against her husband and as per her own statement to the effect that she had developed hatred against the husband she was entitled to the dissolution of marriage on the ground of Khula.

8. It reveals that right of appeal has not been provided against the decree of dissolution of marriage, under the West Pakistan Family Courts Act, 1964 and it is settled principle of law that where appeal is specifically barred by the legislature, writ jurisdiction is also not available.

9. Learned Judge Family Court had exercised its jurisdiction in accordance with law. Learned counsel for the petitioner has not been able to point out any illegality in the impugned order. No interference is called for.

10. For what has been discussed above, this writ petition is dismissed in limine having no force.

MWA/A-81/L Petition dismissed.

**2020 C L C 264**

**[Lahore (Rawalpindi Bench)]**

**Before Atir Mahmood and Mirza Viqas Rauf, JJ**

**MUHAMMAD NADEEM KHAN and others----Appellants**

**Versus**

**MUNICIPAL CORPORATION through Administrator, Jhelum and others----Respondents**

I.C.A. No.60 of 2019, decided on 12th November, 2019.

**Punjab Local Government Act (XIII of 2019)---**

----Ss. 3, 15 & 301--- Arbitration Act (X of 1940), S. 39--- Law Reforms Ordinance (XII of 1972), S. 3(2)--- Intra-Court Appeal--- Maintainability--- Alternate remedy--- Availability--- Appellants were holding tenancy rights in shops owned by Municipal Corporation and they were aggrieved of their auction---Single Judge of High Court declined to interfere in order of auction passed by municipal authorities--- Validity--- Term 'order' used in S. 301 of Punjab Local Government Act, 2019 could not be circumscribed into a particular form--- Any direction, determination in pursuance to some proceedings like proceedings of District Assessment Committee, resulting into finalization of assessment of rent could be termed as an 'order' contemplated in S.301 of Punjab Local Government Act, 2019--- Rent agreements executed inter se parties contained arbitration clause and had provided a mechanism for resolution of disputes inter se parties--- Appellants did not invoke arbitration clause and instead filed Constitutional petition but they had opted to invoke the same that should be proceeded as per mandate of Arbitration Act, 1940 which had provided remedy of appeal in terms of S. 39 of Arbitration Act, 1940--- Division Bench of High Court in view of provisions of S. 39 of Arbitration Act, 1940 declined to interfere in the matter as appellants, under provisions of S. 3(2) of Law Reforms Ordinance, 1972 were precluded to file Intra court appeal--- Intra-court appeal was dismissed in circumstances.

The Webster's New Twentieth Century Dictionary of the English Language Unabridged (Second Edition); Black's Law Dictionary (Tenth Edition); Cambridge Advanced Learner's Dictionary (4th Edition); Oxford Advanced Learner's Dictionary (New 8th Edition); Kitabistan's New Millennium Two-In-One Composite Dictionary; Abdul Jabbar and others v. General Manager (Personnel) Pakistan Railways and others 2018 SCMR 64; Mst. Karim Bibi and others v. Hussain Bakhsh and another PLD 1984 SC 344; Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore PLD 1985 SC 107; Secretary to the Government of Punjab, Revenue Department and others v. Sajjad Ahmad and another 2012 SCMR 114; Secretary to the Government of Punjab, Revenue Department and others v. Sajjad Ahmad and another 2012 SCMR 114; Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others PLD 2009 SC 284; National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others 2011 SCMR 446; Messrs Wak Limited Multan Road, Lahore v. Collector

Central Excise and Sales Tax, Lahore (now Commissioner Inland Revenue, LTU Lahore) and others 2018 SCMR 1474 and Messrs Al-Mahmudia (Pvt.) Ltd. v. Pakistan through Secretary, Ministry of Housing and Works, Islamabad and others PLD 2007 SC 79 ref.

Malik Ghulam Mustafa Kandwal for Appellants.

Mujeeb-ur-Rehman Kiani, Additional Advocate-General for Punjab.

Raja Muhammad Farooq Raza for Respondent TMA.

**ORDER**

Through this single judgment, we intend to decide the instant Intra Court Appeal as well as Intra Court Appeals Nos.61, 65 and 66 of 2019 as in all these appeals, there is a commonality and similarity on question of facts and law. Moreover, all these appeals are arising out of a common judgment dated 16th September, 2019 passed by the learned Single Judge in Chamber in Writ Petitions Nos.2466, 2469, 2470 and 2471 of 2019.

2. Facts in brief are that the appellants are holding tenancy rights in the shops owned by the Municipal Corporation, Jhelum. It is claim of the appellants that they are occupying the shops in question since long and regularly paying the rent. The grievance of the appellants starts with a publication in daily newspaper "Express" dated 24th August, 2019 issued by the respondents Nos.2 and 3 under the instructions of respondent No.1 for the auction of shops, hotels and buildings etc. of District Jhelum, which includes the shops and buildings under the tenancy of the appellants. The auction was scheduled w.e.f 16th September, 2019 to 25th September, 2019. The appellants in the instant appeal as well as connected appeals voiced their grievance against the proceedings of the District Assessment Committee, Jhelum dated 1st June, 2019, the publication dated 24th August, 2019 and auction proceedings through W.P.No.2471 of 2019 W.P.No.2469 of 2019, W.P.No.2466 of 2019 and W.P. No.2470 of 2019. The matter came up before the learned Single Judge in Chamber, who proceeded to dismiss all the constitutional petitions by way of order dated 16th September, 2019, which is now under challenge in these appeals.

3. Learned counsel for the appellants submitted that the proceedings of the assessment committee were without any lawful authority. He added that District Assessment Committee, Jhelum revised the rent without associating the appellants in the process and as such they have remained condemned unheard. It is contended that the auction proceedings have been launched by the respondents in order to benefit their blue eyed. Learned counsel emphasized that in presence of rent agreement, the respondents were precluded to put on auction the shops/ buildings in question. It is argued that the certain material facts escaped notice of the learned Single Judge, which resulted into dismissal of constitutional petitions.

4. Contrary to the submissions made by learned counsel for the appellants, learned Law Officer, at the very outset raised a preliminary objection with regard

to the maintainability of these appeals. It is contended that proceedings in question arise out of the Punjab Local Government Act, 2019, which provides remedy of appeal. Learned Law Officer submitted that even otherwise, in terms of arbitration clause in the agreement, the instant appeals are not maintainable.

5. We when confronted this aspect to the learned counsel for the appellants, he submitted that no remedy was available to the appellants against the impugned action of the respondents and even otherwise, there is no order in field against which an appeal would lie.

6. After having heard learned counsel for the appellant and the leaned Law Officer, we deem it appropriate to first examine the aspect of competency of these appeals before this Court.

7. It is an admitted fact that properties in question are ownership of Tehsil Municipal Administration, Jhelum. The appellants are holding tenancy rights under an agreement. The grievance of the appellants emerges from a publication issued by the respondents proposing to auction the properties in question through open competition at the rates determined by the District Assessment Committee, Jhelum in its meeting held on 1st June, 2019.

8. The term "Local Government" was defined in Section 2 (v) of The Punjab Local Government Act, 2013 as under: -

> 2(v) "Local Government" means a Union Council, a Municipal Committee, a Municipal Corporation, the Metropolitan Corporation, a District Council or an authority;

The Punjab Local Government Act, 2013 was, however, repealed through Section 312 of the Punjab Local Government Act, 2019 (Act XIII of 2019) wherein all the local governments constituted or continued under the Punjab Local Government Act, 2013 were dissolved and in place Administrators were appointed. The latter Act provides the definition of "local government" in Section 2 (ss) as under:-

> 'local government' means a local government constituted under subsection (2) of section 3 of this Act;

For the purpose of clarity, Section 3 of the Act ibid is also reproduced below: -

> 3. Dissolution of existing local governments.- (1) All local governments constituted or continued under the Punjab Local Government Act, 2013 (Act XVIII of 2013) are hereby dissolved.
>
> (2). As soon as may be but not later than one year of the commencement of this Act, the Government shall constitute succeeding local governments in accordance with the provisions of section 15 of this Act.

Section 15 of "The Act, 2019" reads as under:-

> 15. Constitution of local governments.- (1) The Government shall, having regards to the provisions of subsection (2) of section 3 of this Act, constitute local governments of various classes in the following manner: -

(a) a Metropolitan Corporation for each Metropolitan;

(b) a Municipal Corporation for each Municipality with a population of not less than two hundred and fifty thousand as per the latest censes;

(c) a Municipal Committee for each Municipality with a population of not less than seventy-five thousand as per the latest census;

(d) a Town Committee for each Town; and

(e) a Tehsil Council for each Tehsil in the Punjab.

(2) Every local government shall be a body corporate having perpetual succession and a common seal, and, subject to the provisions of this Act, shall have power to acquire, hold and transfer property, both movable and immovable, to contract and to do all other things necessary for the purposes of its constitution; and shall by its name sue and be sued.

9. The revision in the rate of rent was made by the District Assessment Committee, Jhelum on the mandate of "The Act, 2019". Section 301 of the said Act provides remedy of appeal against any order passed by the local government or its officers or servants or other functionaries. The term "Order" used in Section 301 is nowhere defined in "The Act, 2019". In order to discover the true impact of the term "Order" we thus have to advert to the legal dictionaries. The dictionary meaning of word "Order" in different law dictionaries is given as follows:-

a. The Webster's New Twentieth Century Dictionary of the English Language Unabridged (Second Edition): "Order" 1. To arrange; to organize; to put or keep in order. 2. To regulate; to manage; to subject to rules or laws. 3. To instruct (another) to do something; to direct; to command; as, the general ordered his troops to advance. 4. To deal with; to treat. 5. To ordain; to admit to holy orders. 6. To request (something) to be supplied; as, to order a carload of goods.

b. Black's Law Dictionary (Tenth Edition): "Order" 1. A command, direction, or instruction. 2. A written direction or command delivered by a government official, esp. a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.-Also termed Court order; judicial order.

c. Cambridge Advanced Learner's Dictionary (4th Edition): "Order" 1. a request to make, supply, or DELIVER food or goods: 2. A product or a meal that has been asked for by a customer: 3. Be on order if something is on order, you have asked for it but have not yet received it 4. Do/make sth to order to do or make something especially for a person who has asked for it: 5. The way in which people or things are arranged, either in relation to one another or according to a particular characteristic; 6. Something that someone tells you must do: 7. Be under orders to have been told that you must do something by someone in authority 8. An official instruction telling someone what they can or cannot do, or a written instruction to a

bank to pay money to a particular person 9. In order to do sth (also in order that sth) with the aim of achieving something: 10. A situation in which everything is arranged in its correct place. 11. Leave/put sth in order to organize something well: 12. The state of working correctly or of being suitable for use: 13. A situation in which rules are obeyed and people do what they are expected to do: 14. Order. Formal an expression used in parliament or a formal meeting to get people's attention and make them stop talking, so that the meeting or discussion can start or continue 15. A social or political system: 16. A group of people who join together for religious or similar reasons and live according to particular rules 17. A group that people are made members of as a reward for services they have done for their country. 18. The type or size of something: 19. Of the order of (UK also in the order of ) approximately: 20. Specialized (used in the classification of plants and animals)

d. Oxford Advanced Learner's Dictionary (New 8th Edition): "Order" 1. The way in which people or things are placed and arranged in relation to each other. 2. The state of being carefully and neatly arranged: 3. The state that exists when people obey laws, rules or authority: 4. Instructions. Something that sb is told to do by sb in authority 5. Goods. A request to make or supply goods 6. Goods supplied in response to a particular order that sb has placed. 7. Food/drinks. A request for food or drinks in a restaurant, bar, etc; the food or drink that you ask for: 8. Money. A formal written instruction for sb to be paid money or to do sth. 9. System. The way that a society, the world, etc. is arranged, with its system of rules and customs: 10. Social class. 11. Biology. A group into which animals, plants, etc. that have similar characteristics are divided, smaller than a class and larger than a family: 12. Religious community. A group of people living in a religious community, especially monks or nuns: 13. Special honour. A group of people who have been given a special honour by a queen, king, president, etc: 14. A BADGE OR RIBBON worn by members of an order who have been given a special honour. 15. A secret society whose members meet for special ceremonies: Synonyms. Tell. Instruct. Direct. Command. Order to use your position of authority to tell sb to do sth: tell to say to sb that they must or should do sth. Instruct to tell sb to do sth, especially in a formal or official ay: direct to give an official order: command to use your position of authority to tell sb to do sth:

e. Kitabistan's New Millennium Two-In-One Composite Dictionary: "Order" 1. Tidy arrangement 2. Command by order of, under the orders of (someone's) orders. 3. Written direction to (on bank, post office, etc.) to pay the stated sum 4. Working condition, in good working order, out of order 5. Peaceful atmosphere (in a meeting or country) by obedience to rules or to the law, law and order situation in the country 6. Quiet, silence, be called to order (of the President) to call to order 7. Request to supply (goods) an order (for an amount), an made to order, 8. Social status, group holding it, 9. Group holding it. 10. Authority to a priest on being ordained,

take holy orders, in order that, so that in order (to do something), with a view to (doing it) v.t. 1. Give an order to (someone to do something) 2. Place an order for (goods from someone or from some place) 3 arrange (something) neatly.

After going through various definitions of the word "Order", we are unanimous that term "Order" used in Section 301 of "The Act, 2019" cannot be circumscribed into a particular form. Any direction, determination in pursuance to some proceedings like the proceedings of the District Assessment Committee, resulting into finalization of the assessment of the rent can be termed as an order contemplated in the Section 301 of "The Act, 2019".

10. The provisions of Section 301 of "The Act, 2019" are akin and similar to Rule 4 of The Civil Servant (Appeal) Rules, 1977. The Hon'ble Supreme Court of Pakistan in the case of "Abdul Jabbar and others v. General Manager (Personnel) Pakistan Railways and others" (2018 SCMR 64) outlined the term "Order" as under:-

"9. Under the circumstances, there has to be an order altering, interpreting to his disadvantage, reducing or withholding maximum pension and allowances of a civil servant for preferring an appeal in terms of Rule 4 of the Civil Servant (Appeal) Rules, 1977. In such grievances/ proceedings no particular form of order is required and even pension fixation notices could be treated as an order for the purposes of availing the remedy of appeal under section 4 of the Civil Servants (Appeal) Rules, 1977. Likewise Section 4 of the Service Tribunals Act, 1973 provides that any civil servant aggrieved by any final order whether original or appellate made by the departmental authority in respect of any of the terms and conditions of his service may within 30 days of the communication of such order to him, prefer an appeal to the Tribunal. The proviso to Section 4 further provides that if an appeal or representation or review preferred to the departmental authority is not decided within a period of 90 days, then such person may prefer an appeal before the Service Tribunal. Consequently, the obvious conclusion which one can draw is that an order which is the root of grievance coupled with an un-responded appeal or representation and/or the order of appellate authority deciding such appeal or representation would entitle a civil servant to approach the Service Tribunal for redressal of his grievance and in this particular case in respect of his pay allowances or pension."

11. There is no cavil that Section 3 of The Law Reforms Ordinance, 1972 (hereinafter referred as "The Ordinance, 1972") provides the remedy of Intra Court Appeal in certain eventualities but no such appeal is available or competent if an application brought before the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 arises out of any proceedings in which the law applicable provided for at least one appeal or one revision or one review to any Court, tribunal or authority against the original order. The scope of proviso to subsection (2) of Section 3 of "The Ordinance, 1972" when came under

consideration before the Hon'ble Supreme Court of Pakistan in the case of "Mst. Karim Bibi and others v. Hussain Bakhsh and another" (PLD 1984 Supreme Court 344), it was ruled as under: -

"7. A plain reading of the proviso to subsection (2) of section 3 of the Law Reforms Ordinance means that no appeal will be available or competent before a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court in a Constitutional Petition, if such petition arises out of "any proceedings" in which the law applicable provided for at least one appeal against the original order. The reference is clearly to the proceedings taken under any statue which prescribes a hierarchy of officers or authorities for the carrying into effect the purposes of such statue including the enforcement of rights, if any, created thereunder. In such a case clearly the law envisages an original order against which the remedy of appeal was provided by the relevant statue. In the facts of the present case the relevant statue is the Displaced Persons (Compensation and Rehabilitation) Act, 1958 which had created a hierarchy of officers to deal with the rights created thereunder in favour of persons entitled under the said Act and the Schemes framed thereunder, inter alia, to the transfer of erstwhile Evacuee Properties from the compensation pool of such properties constituted under the provisions of the Act. By section 19 of the said Act a right of appeal was provided to the next higher officer in rank from the original order passed by an officer of the settlement establishment. Apart from the remedy of appeal so provided the Act also vested powers of revision in the higher officers of the settlement establishment under section 20 as well as the power of review. However, by the Evacuee Property and Displaced Persons Laws (Amendment) Act, 1973 which came into force on 30-7-1973 section 19 of the Displaced Persons (Compensation and Rehabilitation) Act, 1958 was omitted with the result that remedy of appeal was abolished with effect from the said date. The Constitutional Petition was filed by the first respondent hereinbefore the High Court much later on 8-12-1973 which was allowed by the learned Single Judge on 8-7-1974. The Letters Patent Appeal, as already stated, was presented by the appellants in the High Court on 31-8-1974. It is urged on behalf of the appellants that the relevant date for the application of the proviso to subsection (2) of section 3 of the Law Reforms Ordinance would be the date on which the Constitutional Petition was filed in the High Court and construing the provisions of the proviso accordingly, the Letters Patent Appeal was competent in law inasmuch as, on that date no appeal lay from the original order passed in the proceedings. It was further argued that the word "proceedings" occurring in the proviso is used in the restricted sense and would connote, in the present case, the proceedings commenced by the Additional Settlement Commissioner by issuing notice of the suo motu revision to the parties and as there was no appeal provided against the order passed in suo motu revision, in terms of the proviso the Letters Patent Appeal was competent. Learned counsel for the appellants also advanced an alternative argument

that the proceedings in the case had arisen out of the order of the Additional Settlement Commissioner passed on 24-11-1973, at which time the Displaced Persons (Compensation and Rehabilitation) Act, 1958 was amended taking away the right of appeal.

8. After giving our anxious consideration to the arguments urged in support of this appeal we are, however, not impressed by any of the contentions raised. The test laid down by the Legislature in the proviso is that if the law applicable to the proceedings from which the Constitutional Petition arises provides for at least one appeal against the original order, then no appeal would be competent from the order of a Single Judge in the constitutional jurisdiction to a Bench of two or more Judges of the High Court. The crucial words are the "original order". It is clear from the wording of the proviso that the requirement of the availability of an appeal in the law applicable is not in relation to the impugned order in the Constitutional Petition, which may be the order passed by the lowest officer or authority in the hierarchy or an order passed by higher authorities in appeal, revision or review, if any, provided in the relevant statute. Therefore, the relevant order may not necessarily be the one which is under challenge but the test is whether the original order passed in the proceedings subject to an appeal under the relevant law, irrespective of the fact whether the remedy of appeal so provided was availed of or not. Apparently the meaning of the expression "original order" is the order with which the proceedings under the relevant statute commenced. The word "proceedings" has been used in different enactments and has been subject to judicial interpretation in a number of cases wherein it has received either restricted or wide meaning according to the text and subject-matter of the particular statute. I do not consider it necessary to notice the various judgments in which this word was so construed. Suffice it to refer to the case of Nawab Din v. Member Board of Revenue (1) in which this Court had occasion to examine the scope and meaning of the word as it occurs in section 2(2) of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. A useful discussion will be found in this case with reference to precedents as the meaning of the term "proceedings". An earlier case of Jan Muhammad and another v. Home Secretary, West Pakistan and others (2) was referred to in this connection and the view taken therein was declared by this Court as the correct enunciation of the law on the subject. In the latter case reference was made to the definition of the term "proceedings" in the book "Words and phrases" which may usefully be reproduced as under;

"The term 'proceedings' is a very comprehensive term, and, generally speaking, means a prescribed course of action for enforcing a legal right, and hence it necessarily embraces the requisite steps by which judicial action is invoked. A 'proceedings' would include every step taken towards the further progress of a cause in Court or before a Tribunal, where it may be pending. It is the step towards the objective to be achieved, say for instance the judgment in a pending suit. The proceeding commences with

the first step by which the machinery of the law is put into motion in order to take cognizance of the case. It is indeed a comprehensive expression and includes all possible steps in the action under the law, from its commencement to the execution of the judgment."

Reference in this respect can also be made to "Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore" (PLD 1985 Supreme Court 107) wherein the Hon'ble Supreme Court of Pakistan reiterated the principles laid down in "Mst. Karim Bibi and others supra.

12. Attending the contention of learned counsel for the appellants that in the light of principles laid down in the case of "Secretary to the Government of Punjab, Revenue Department and others v. Sajjad Ahmad and another" (2012 SCMR 114) Intra Court Appeal is maintainable, it is observed with all reverence that facts of the said case rest on entirely different footings. The proceedings arising out in the said case are from the Punjab Land Acquisition Rules, 1983 wherein no remedy of appeal was provided. Above all, the judgment in the said case was rendered with consent of both the sides. Even otherwise, the judgment in the case of "Secretary to the Government of Punjab, Revenue Department and others v. Sajjad Ahmad and another" (2012 SCMR 114) cited by the learned counsel for the appellants was delivered by the Hon'ble Bench comprising of three members whereas the judgment in the case of "Mst. Karim Bibi and others v. Hussain Bakhsh and another" (PLD 1984 Supreme Court 344) was rendered by four Hon'ble Judges of the Hon'ble Supreme Court of Pakistan.

13. Coming to the binding effect of the judgments, it is observed that in case of conflict between the judgments of Hon'ble Supreme Court of Pakistan on a point of law, the judgment of larger Bench shall prevail. The above principle is annunciated in "Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others" (PLD 2009 Supreme Court 284), which was later on followed in "National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others" (2011 SCMR 446) and "Messrs Wak Limited Multan Road, Lahore v. Collector Central Excise and Sales Tax, Lahore (now Commissioner Inland Revenue, LTU Lahore) and others" (2018 SCMR 1474). Reference in this respect can also be made to "Messrs AL-Mahmudia (Pvt.) Ltd. v. Pakistan through Secretary, Ministry of Housing and Works, Islamabad and others" (PLD 2007 Supreme Court 79).

14. There is yet another important aspect that matter in issue arises out of rent agreement executed interse parties, which contains an arbitration clause, and provides a mechanism for resolution of disputes interse parties. Though the appellants have not invoked the arbitration clause and instead filed constitutional petition but had they opted to invoke the same that should be proceeded as per mandate of The Arbitration Act, 1940, which provides remedy of appeal in terms of Section 39 of The Act ibid. Even on said premises, appellants were precluded to invoke Section 3 of "The Ordinance, 1972".

15. After having a threadbare discussion, we are of the considered view that the instant Intra Court Appeal as well as Intra Court Appeals Nos.61, 65 and 66 of

2019 are not maintainable in view of proviso to subsection (2) of section 3 of "The Ordinance, 1972" and as such the same are dismissed in limine.

MH/M-189/L Intra Court Appeals dismissed.

**2020 C L C 709**

**[Lahore]**

**Before Atir Mahmood, J**

**Messrs IHSAN SPORTS through Managing Partner----Petitioner**

**Versus**

**PAKISTAN CARGO SERVICES (PVT.) LIMITED through Chief Executive / Secretary----Respondent**

Civil Revision No233563 of 2018, heard on 15th October, 2019.

**(a) Shipper and Agent---**

----Recovery of money---Concurrent findings by two courts below---Plaintiff was Cargo Agent who claimed to have delivered cargo in question on behalf of defendant who was shipper---Suit was concurrently decreed in favour of plaintiff by Trial Court and Lower Appellate Court---Validity---Consignment was not sent to consignee at proper address nor there was any evidence that consignee had not received consignment willingly and refused to pay charges---Plaintiff failed to establish through any evidence that he had any cause of action against defendant---Findings of courts below regarding decree of recovery, which was core issue, were result of misreading and non-reading of evidence as well as ignorance of law---Both courts failed to appreciate term 'Free on Board (FOB)' and distinction between 'Airway Bill (AWB)', 'House Airway Bill (HAWB)' and 'Master Airway Bill (MAWB)' which resulted into miscarriage of justice---Normally High Court did not interfere in concurrent findings of facts recorded by two courts below but when there was gross misreading or non-reading of evidence and patent violation of law floating on surface of such concurrent findings, High Court could not shut its eyes---High Court was under obligation to rectify error by interference in illegal findings---Courts below had failed to analyze facts and law on the subject and committed grave irregularity and illegality while passing judgments and decrees which could not be sustained in eyes of law---High Court set aside judgments and decrees passed against defendant as both courts below erroneously decreed suit filed by plaintiff while being contrary to law and to usage having force of law and same were liable to be interfered with--- Revision was allowed in circumstances.

Cress LPG (Pvt.) Ltd. through authorized representative v. M.T. Maria III through Master/Chief Engineer/Chief Officer and others 2018 CLD 972; Mubarik Ali through L.Rs. v. Amroo Khan through L.Rs. 2007 SCMR 1714; Abdul Sattar v. Mst. Anar Bibi and others PLD 2007 SC 609; Province of Punjab through Collector, Faisalabad and another v. Rana Hakim Ali and another 2003 MLD 67; State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal 2011 SCMR 1013; Messrs. India, Coffee and Ten Distributing Co., Ltd v. The State of Madras, represented by the Collector of Madras AIR 1954 Madras 1030 and Commissioner Income Tax and Wealth Tax, Gujranwala Zone, Gujranwala and others v. Messrs Asif Industries, Alipur Chatta Wazirabad and others 2005 PTD 1145 ref.

Nazim ud Din and others v. Shaikh Zia ul Qamar and others 2016 SCMR 24 and Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001 rel.

**(b) Civil Procedure code (V of 1908)---**

----S.115---Revisional jurisdiction of High Court---Scope.

Ms. Saddia Malik for Petitioner.
Respondents proceeded ex parte.
Date of hearing: 15th October, 2019.

**JUDGMENT**

**ATIR MAHMOOD, J.----**Brief facts of the case are that respondent filed a suit for recovery of Rs.28,78,860/- on 04.09.2004 against the petitioner alleging therein that in order to onward shipment of a consignment, handed over by the petitioner related to Airway Bill No.172-23854261 containing 634 cartons, weighing 12680 kg worth US $ 53200/-, the respondent incurred freight and other expenses to the tune of Rs.28,78,860/- through a cheque, drawn on PICIC Commercial Bank Ltd, Uggoke Road, Shahabpura Branch, Sialkot; that the respondent was approached to reimburse the said amount, however, he refused to do so. Suit was contested by the petitioner by way of filing written statement. Out of the divergent pleadings of the following issues were framed:

ISSUES

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

2. Whether the alleged resolution is not according to company Ordinance which is bogus, hence plaintiff Muhammad Nauman has no power to file the present suit? OPD

3. Whether the suit of the plaintiff is liable to be dismissed due to non-joinder of necessary parties? OPD

4. Whether the suit of the plaintiff is liable to be rejected under Order VII, Rule 11 of the C.P.C.? OPD

5. Whether the suit of the plaintiff is time barred? OPD

6. Whether the plaintiff has filed the present suit just to harass the defendant, hence defendant is entitled special costs under section 35-A of C.P.C.? OPD

7. Whether the plaintiff is entitled to the decree for recovery of Rs.28,78,860/-? OPP

7-A. Whether the defendants are entitled for recovery of one Crore as set off as their claim in para No.5 of the written statement? OPD

8. Relief.

Thereafter, evidence led by the parties was recorded. Learned trial Court after hearing both the parties, decreed the suit of the respondent vide judgment and decree dated 15.06.2012. Feeling dissatisfied, petitioner preferred an appeal before learned lower appellate Court which met with the same fate vide judgment and decree dated 21.04.2018. Hence, this revision petition has been filed.

2. Learned counsel for the petitioners reiterated the grounds raised in this revision petition while contending that impugned judgments and decrees passed by learned courts below are the result of misreading and non-reading of evidence; that the suit was not filed by duly authorized person whereas, Ex.P-1, the authorization, has no legal value as is not filed in consonance with law; that the impugned judgments are not based with application of judicial mind; that the impugned judgments and decrees are against the law and facts of the case, therefore, same are liable to be set aside. He has placed his reliance upon cases reported as "Cress LPG (Pvt.) Ltd. through authorized representative v. M.T. Maria III through Master/Chief Engineer/Chief Officer and others" (2018 CLD 972), "Mubarik Ali through L.Rs. v. Amroo Khan thorugh L.Rs." (2007 SCMR 1714), "Abdul Sattar v. Mst. Anar Bibi and others" (PLD 2007 Supreme Court 609), "Province of Punjab through Collector, Faisalabad and another v. Rana Hakim Ali and another" (2003 MLD 67), "State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal" (2011 SCMR 1013), "Messrs. India, Coffee and Ten Distributing Co., Ltd v. The State of Madras, represented by the Collector of Madras" (AIR 1954 Madras 1030) and "Commissioner Income Tax and Wealth Tax, Gujranwala Zone, Gujranwala and others v. Messrs Asif Industries, Alipur Chatta Wazirabad and others" (2005 PTD 1145).

3. Process for service of respondents was issued but none has entered appearance on their behalf, even after proclamation in the newspaper, therefore, they were proceeded against exparte vide order dated 14.12.2018.

4. After hearing the arguments and perusal of the record, the point for consideration before this Court is as to whether the respondent had the cause of action to file the suit and was entitled to the decree as prayed for.

5. Before dilating upon the merits of the case, certain terms, which will come under discussion, as those regulate the transactions between the parties and have been defined under the Air Cargo Tariff Manual (applicable in the terms in question), are reproduced are under:

Airway Bill (AWB)

"Means the document made out by or on behalf of the shipper which evidences the contract between the shipper and carrier(s) for carriage of goods over routes of time carrier(s)."

Master Air Waybill

"Means an Air Waybill covering a consolidated consignment showing the consolidator as shipper."

House Air Waybill (HAWB)

"Means the document which covers each individual shipment of a consolidation. It is issued by the consolidator and contains instructions to the break bulk agent."

Consignee

"The person whose name appears on the AWB as the party to whom the goods are to be delivered by the carrier."

Charges Collect (Freight Collect)

"The charges entered on the AWB for Collection from the Consignee."

Consignment, Consolidated

"A consignment of multi-packages which has been originated by more than one person each of whom has made an agreement for carriage by air with another person other than a scheduled air carrier. Conditions pertaining thereto, applied to that agreement, may or may not be the same as the conditions pertaining thereto, applied by the scheduled air carrier for the same carriage."

Consolidation

"See Consignment, Consolidated."

Further term "Free on Board" (FOB) has been defined in the International Commerce Terms known as INCOTERMS published by International Chamber of Commerce (ICC) as under:-

"The Seller delivers the goods on board the ship and clears the goods for export. From that point, the Buyer bears all costs and risks of loss or damage."

6. Admittedly, the respondent's company is a cargo agent with whom the petitioner entered into an agreement for dispatch of goods and a letter of instructions was written (produced in the evidence as Exh.P5). The respondent booked the consignment relating to Airway Bill No.172-23854261 dated 08.06.2002 containing 634 cartons, weighing 12680 kg having US $ 53200/-. The freight and other expenses incurred thereon were statedly amounting to Rs.2878860/-. According to the respondent, the above said amount was paid to air carrier for the transportation of consignment in question. The respondent claimed the reimbursement of said amount through a letter dated 26.03.2003 (Ex.P-4) and a final letter dated 24.06.2004 (Ex.P-3). The petitioner controverted the contents of the plaint by filing a written statement and specifically raised the plea that as per airway bill (AWB) and letter of instructions, all the expenditures were the liability of the Consignee under the rule of free on board (FOB). It was further stated in the written statement that the respondent was cargo agent of the PEPSI-COLA MEXICANA, S.A. D.E. A.V, VASCO, De Quiroga, No.300 PISO 4 Col. Lomas Santa FE, 01210 Mexico D.F. R.F.C PMC-8702010-EC8 (hereinafter referred to as "the Consignee") and therefore, the payment of freight was a matter between the Consignee and the cargo agent and the petitioner being the shipper

had nothing to do with any payment made by the cargo agent. It is further asserted that the respondent / cargo agent on its own, without any instructions from the petitioner, changed the name of Consignee and the goods were not delivered to the Consignee of the petitioner which caused damages to the petitioner company.

7. After framing of issues the evidence of the parties was recorded. The PW-1 Mohammad Nouman Yahya, reiterated the contents of the plaint and produced Ex.P-1 Board Resolution, Ex.P-2 Master Airway Bill dated 12.06.2002, Ex.P-3 final notice dated 24.06.2004 Ex.P-4 letter dated 06.03.2003 and also produced documents as Mark 'A' to Mark-D. In cross-examination he stated that Ex.P-2 is the original airway bill, whereas, Ex.P-6 is house airway bill. He stated that in Ex.P-2 shipper is Pakistan Cargo Service. He explained the reason that when freight is to be charged from the Consignee, then in master (airway bill) the name of the receiver of money is mentioned, whereas, in house (airway bill) the name of sender is written. He admitted that the shipment was made under the principle of FOB. He denied the suggestion that under FOB the payment is to be made by the person who purchases the goods (the Consignee). He volunteered that under FOB the shipment is then forwarded when shipper undertakes to pay freight if the goods are not collected by the Consignee. The stance of the respondent becomes crystal clear that the cargo agent can only claim the freight from the shipper when the consignment goods are not received by the Consignee.

8. As per statement of PW-1, Ex.P-2 is master air freight bill showing the name of Pakistan Cargo Services (Pvt.) (Ltd.) (respondent) as the shipper but perusal of Ex.P-2 clearly reflects that it is airway bill and not master airway bill and the petitioner company is not the shipper. In this document, the name of Consignee is RR. Shipping and Chartering S.A. DE.C.V. MEXICO. The Ex.P-4 which is letter dated 06.03.2003 suggests that the shipment was confiscated by the local authorities and further that under Rule 2.8 IATA Rules and Regulations, the shipper is liable for all charges and expenses relating from or in the connection with the failure to take the delivery of the shipment by Consignee. But there is no evidence on record which could establish that the consignee did not receive the consignment on its own and the consignment was confiscated on any fault of the consignee.

9. When this Ex.P-4 is read in juxta position with cross examination conducted upon PW-4 it becomes crystal clear that the shipment was not delivered to the Consignee i.e. PEPSI COLA, Mexicana. It is noticed that PW-1- made inconsistent statement in order to prove his case but instead of proving he damaged the entire case. He stated that the name of shipper and Consignee had not been changed, whereas, name of shipper on Ex.P-2 is Pakistan Cargo Services Ltd. and in Ex.P-5 name of shipper is Ihsan Sports and Consignee is PEPSI COLA, Mexicana. Furthermore, Ex.P-6 airway bill is dated 08.06.2002, wherein, MAWB number has been mentioned as 172-2385-4261 and it is astonishing that when this Ex.P-2 is dated 12.06.2002 then how that number could be mentioned in Ex.P-6 which is dated 08.06.2002 executed earlier than Ex.P-2. In rebuttal DW-1 Muhammad Shahbaz stated on oath that Pakistan Cargo did not take any permission from the petitioner for sending the shipment to any other than the

Consignee/PEPSI COLA Mexicana. This statement was not cross-examined by the respondent and no suggestion was put that the consignment was delivered to the Consignee who did not pay the freight or that the consignment was confiscated by the authorities due to any act of the Consignee. It has never been the case of the respondent that consignment was delivered but the Consignee refused to pay the charges/freight. In this regard, the clause-III of shipper letter of instructions for dispatch is relevant which is reproduced as under:

> "(iii) Undertakes and binds themselves legally to pay Air Freight Amount mentioned in Airway Bill under which consignment is booked WHEN the AWB of the consignment is executed by PAKISTAN CARGO SERVICES (PVT.) LTD. and pay all charges at once on intimation, incurred on the transportation of consignment if it is on chares collect basis and the consignee refuses to make payment at destination. We shall make this payment irrespective of any other dispute with PAKISTAN CARGO SERVICES (PVT.) LTD., or the carrier concerned."
>
> (Emphasis provided)

10. In view of the above discussion, I am of the considered opinion that the consignment was not sent to the Consignee at the proper address nor there is an iota of evidence that the Consignee did not receive the consignment willingly and refused to pay the charges. The respondent miserably failed to establish through any evidence that he had any cause of action against the petitioner. Further, the findings of the learned courts below on issue No.7 which is core issue, are result of misreading and non-reading of evidence as well as a result of ignorance of law. Both the learned courts below failed to appreciate the term 'FOB' and distinction between the terms 'AWB', 'HAWB' and 'MAWB', which resulted into miscarriage of justice. There is no cavil to the proposition that normally this Court does not interfere in the concurrent findings of fact recorded by two courts below but when there is gross misreading and non-reading of evidence and patent violation of law, floating on the surface of such concurrent findings, this Court cannot shut its eyes and is always under obligation to rectify the error by interference in such like illegal findings. Reliance can be placed upon the judgments reported as "Nazim ud Din and others v. Shaikh Zia ul Qamar and others" (2016 SCMR 24) and "Ghulam Muhammad and 3 others v. Ghulam Ali" (2004 SCMR 1001).

11. Keeping in view of what has been discussed above, I feel no hesitation to observe that both the Courts below badly failed to analyze the facts and law on the subject and committed grave irregularity and illegality while passing the impugned judgments and decrees, which cannot be sustained in the eye of law. Both the courts below have erroneously decreed the suit filed by the plaintiff while being contrary to law and to usage having the force of law cannot be sustained and same are liable to be interfered with by this Court. Consequently, this revision petition is allowed, impugned judgments and decrees passed by learned courts below are hereby set aside and suit filed by the plaintiff is hereby dismissed. No order as to cost.

MH/I-25/L Revision allowed.

**2020 C L C 1094**

**[Lahore]**

**Before Atir Mahmood, J**

**SALEEM MAHMOOD AKHTAR and 2 others----Petitioners**

**Versus**

**ASSISTANT DISTRICT OFFICER and 5 others----Respondents**

Writ Petition No.20536 of 2020, decided on 30th April, 2020.

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

----O. XXXIX, Rr. 1 & 2---Interim injunction---Basic ingredients---Three basic ingredients required for grant of interim injunction were prima facie arguable case; irreparable loss and balance of convenience ---Even if one of the said ingredients was missing, relief could not be granted to party seeking interim injunction.

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

----O. XXXIX, Rr. 1 & 2---Interim injunction, grant of---Scope---Interim relief which did not flow out of the main suit could not be granted through an application for interim injunction.

**(c) Constitution of Pakistan---**

----Art.199---Constitutional jurisdiction of the High Court---Concurrent findings of law and fact by courts below---Such findings were immune from interference by the High Court in its constitutional jurisdiction until and unless there was some gross illegality, misreading or non-reading of evidence therein.

Syed Khurshid Anwar Rizvi for Petitioners.

Barrister Haris Azmat for Respondents (On watching brief).

Malik Naveed Akram, Assistant Advocate-General.

**ORDER**

**ATIR MAHMOOD, J**.---Brief facts of the case are that the respondent No.3 filed an application before respondent No.2 challenging the amendment in the Memorandum/ Articles of Association which was resisted by the petitioners by filing written replies thereto. However, respondent No.2 accepted the application vide order dated 02.06.2018. Petitioner No.3 challenged the said order in Writ Petition No.221892/2018 which was dismissed by this Court vide order dated 27.07.2018. Order dated 27.07.2018 was then assailed by the petitioners in CPLA No.3824/2018 which was withdrawn vide order dated 08.05.2018 as under:

> "Mr. Arif Chaudhry, learned counsel appearing for the petitioner through instant Civil Miscellaneous Application on instructions states that a suit has already been filed to seek the relief, therefore, instant petition (CP 3824 of 2018) is not pressed stated that any observation made in the judgment may not impede rights and interests of the party. Order accordingly."

2. Prior to filing the above-mentioned writ petition, the petitioner filed a civil suit titled "Saleem Mahmood Akhtar and others v. Assistant District Officer and others" challenging the notices issued by respondent No.1. Upon the application of respondent No.3, the said suit was withdrawn after order of the Hon'ble Supreme

Court and a fresh suit (the present suit) was instituted. The petitioners also filed application for interim injunction which was dismissed by learned trial court vide order dated 10.06.2019. The petitioners filed FAO which was also dismissed by learned Additional District Judge, Lahore vide order dated 06.02.2020. Hence this writ petition has been preferred.

3. Arguments heard. Record perused.

4. There are three basic ingredients, i.e. prima facie arguable case, irreparable loss and balance of inconvenience which are required to be established for grant of interim injunction and even if one of the said ingredients is missing, relief cannot be granted to the party seeking interim injunction.

5. The prayer clause of the application for grant of interim injunction is that "a restraining order may graciously be passed against the respondents by directing them not to interfere with the affairs of the Executive Board of Methodist Church in Pakistan in any manner whatsoever." However, in the plaint, the petitioners have prayed that "The amended Constitution and list of office bearers of the Executive Board of Methodist Church in Pakistan may kindly be restored." In the plaint, no prayer has been made to restrain the respondents from interfering in the affairs of the Execution Board, therefore, an interim relief which does not flow out of the main suit cannot be granted in the application for interim injunction.

6. There already exists an order of this Court against the petitioners, i.e. order dated 27.07.2018 passed in Writ Petition No.221892/2018. Though the order of the apex court dated 08.05.2018 says that any observation made in the judgment may not impede rights and interests of the party. But this effect is to be seen by the learned trial court while deciding the suit and not at this stage. Therefore, the principle of prima facie arguable case does not lie in favour of the petitioners.

7. The respondents are, as per version of the petitioners themselves, office bearers after setting aside the amendment in the constitution. Till the date the amendment is not restored or any other lawful process is adopted for throwing the respondents out of their offices, the respondents are likely to continue their status as office bearers. Therefore, the balance of inconvenience also lies in favour of the respondents.

8. Another contention of the petitioner's counsel is that the order (subject matter of the suit) passed by the respondent No.2 was without jurisdiction, but the said contention cannot be considered at this stage being sub judice before the trial court who has to decide the matter in accordance with law.

9. There are concurrent findings of law and fact against the petitioners which are immune from interference by this Court in its constitutional jurisdiction until and unless there is some gross illegality, misreading or non-reading of evidence therein which could not be pointed out by learned counsel for the petitioners. No interference is called for in the given circumstances.

10. For the aforementioned reasons, this writ petition is without any force, hence dismissed in limine.

MWA/S-28/L Petition dismissed.

**P L D 2020 Lahore 85**

**Before Atir Mahmood and Ch. Muhammad Masood Jahangir, JJ**

**MUHAMMAD AFZAL---Appellant**

**Versus**

**CIVIL DEFENCE OFFICER, JHELUM and others---Respondents**

L.C.A. No. 93 of 2018, decided on 31st January, 2019.

**Civil Defence (Special Powers) Rules, 1951-**

----R. 9---Prevention/Extinction of fire---Sealing of premises---Appellant was owner of a Marriage Hall and same was sealed by Civil Defence Officer for not having proper equipment to extinguish fire---Validity---No provision existed in Civil Defence (Special Powers) Rules, 1951 to Civil Defence Officer to issue notice for sealing of property of appellant---Possibility could not be ruled out that just to take revenge of filing of earlier Constitutional petition before High Court and orders passed therein, Civil Defence Officer had issued notice to teach appellant a lesson---Single Judge of High Court, without realizing such aspect of the case passed judgment against appellant and same was not sustainable---Division Bench of High Court set aside judgment passed by Single Judge of High Court and quashed notice issued by Civil Defence Officer against appellant as same was without any legal background---Intra-court appeal was allowed in circumstances.

Barrister Osama Amin Qazi for Appellant.

Shams Tabraiz, A.A.G. for Respondents.

**ORDER**

Undeniably, the appellant is proprietor of Haweli Marriage Hall and BBQ Restaurant at G.T. Road, Dina, Jhelum. Respondents Nos.1 and 2 on 21.03.2018 visited the same and found it to be deficient with the fire safety measures, as such they closed the premises with metal wires compelling the former to approach this Court through Writ Petition No.928 of 2018 and vide order dated 30.03.2018 the same was entertained while observing as under:--

> Learned Assistant Advocate General Punjab, in attendance on Court's call in receipt of copy of this petition, shall seek instructions so as to assist the Court. Seemingly reckless invocation of penal provisions in the backdrop of alleged violation under sections, 5, 8 of the Punjab Marriage Function Act, 2016 is not sustainable. Learned Law Officer shall take up the matter with Deputy Commissioner as well as District Police Officer, Jhelum to ensure that official authority is not abused.

Thereafter, on 14.04.2018 notice was served upon the appellant and to call in question its vires W.P.No.1286 of 2018 was preferred by him, which was declined on 09.05.2018 by the learned single Judge in Chamber while imposing cost of Rs.50,000/- as well as to seal the premises of appellant besides lodging of a criminal case against him, which is under challenge of this Appeal.

2. Inaugurally, it was emphasized by learned counsel for the appellant that respondent No.1 being offended from the orders dated 30.03.2018 reproduced above while misusing his official authority issued notice for sealing the premises of the appellant and destroyed his business, which was being run for the last many years, whereas from the very first day all safety measures were adopted to protect it from fire. It is also added by him that in fact the gratification demanded by respondent No.2 was refused to be paid by the appellant and respondent No.1 being his tool just to harass and humiliate the appellant issued the process for sealing his property, which being illegal, erroneous and contrary to law was not sustainable, but learned single Judge in Chamber without taking into consideration the said backdrop of the situation erred in law to pass the impugned judgment in a hasty manner.

On the other side learned Law Officer supported the impugned judgment and sought for dismissal of this Appeal.

3. Arguments heard and record perused.

4. Undisputedly, the fundamental rights of each and every citizen of the State are protected under Articles 9, 14, 18 and 23 to 25 of the Constitution of Islamic Republic of Pakistan, 1973. There is no ambiguity that no one is above the law and cannot take advantage of his position or status to infringe the rights as well as liberty of the people, whereas every authority while discharging its functions is bound to act fairly, justly and in accordance with law, thus any act in derogation of the mandate of the law cannot be protected. The learned Law Officer after going through the provisions of the Civil Defence (Special Powers) Rules, 1951 was not in a position to say that respondent No.1 had authority to issue subject notice for sealing of the property of the appellant. The possibility cannot be ruled out that just to take revenge of the filing of earlier Writ Petition before this Court and the orders passed therein the appellant was issued the notice to teach him a lesson, but learned single Judge in Chamber without realizing this aspect of the case passed the impugned judgment, which is not sustainable. Resultantly, this Appeal succeeds, judgment impugned herein is set aside and while allowing W.P.No.1286 of 2018, the notice questioned thereunder issued by respondent No.1 being without any legal back is also quashed. However, if the safety measures are still found to be deficient at spot, then the concerned competent Authority may initiate fresh proceedings as warranted under the law, rules/policy, but with prior notice to the appellant in this regard.

MH/M-143/L Appeal allowed.

**2020 Y L R 232**
**[Lahore]**
**Before Atir Mahmood, J**
**MUHAMMAD MUNIR AHMED---Petitioner**
**Versus**
**ANWAAR UL HAQ---Respondent**

Civil Revision No. 231030 of 2018, heard on 17th October, 2019.

**Specific Relief Act (I of 1877)---**
----S. 12---Civil Procedure Code (V of 1908), O. XXI, Rr. 32, 23 & S.11---Suit for specific performance of agreement to sell---Consent decree, objection to---Scope---Plaintiff had claimed that he had deposited part payment of sale consideration and the remaining amount was agreed to be paid on execution of sale-deed---Parties entered into compromise during pendency of suit---Plaintiff thereafter deposited the balance sale consideration with the Trial Court---Trial Court decreed the suit by holding that defendant was entitled to receive the balance sale consideration deposited by the plaintiff---Plaintiff challenged the said decree upto to the Supreme Court on the ground that since the defendant had not fulfilled his commitment therefore, he was not entitled to receive the balance sale consideration and the Trial Court should have passed the decree in his favour in lieu of part payment---Plaintiff filed application under O. XXI, R. 32, C.P.C. before the executing court on the said ground which was dismissed---Plaintiff assailed the said order in appeal which was allowed by the Appellate Court--- Validity--- Consent decree was passed by the Trial Court whereby the plaintiff's suit for specific performance of agreement to sell was decreed whereby the defendant was held entitled to receive the balance sale consideration deposited by plaintiff---Plaintiff, in compliance of the decree, had got executed the sale deed in his favour and had also taken possession of the suit property---Order XXI, R. 32, C.P.C. did not apply or attracted in the case in any manner and principle of res judicata was applicable---Plaintiff had taken benefit of the consent decree therefore he had no ethical or lawful justification to create hurdles in the way of the defendant to get benefit of the said decree---Plaintiff was approbating and reprobating at the same time---Plaintiff, on failure up to the Supreme Court in the first round of litigation, had no lawful reason or justification to agitate the matter again and again on one and the same plea of non-fulfilment of the commitment by the defendant---Order passed by Appellate Court was set aside and that of Trial Court/executing court was restored---Civil revision was allowed.

Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others PLD 2018 SC 828 rel.
Rana Rashid Akram Khan for Petitioner.
Syed Mumtaz Hussain Bokhari for Respondent.
Date of hearing: 17th October, 2019.

**JUDGMENT**
**ATIR MAHMOOD, J.**---Brief facts of the case are that the petitioner filed application for withdrawal of consideration amount of Rs.70,00,000/- deposited by the respondent in a suit for specific performance of agreement to sell dated 20.02.2014

reached between the parties. The respondent filed objection petition which was dismissed by learned trial court vide order dated 02.04.2018 and held that the petitioner is entitled to the said amount. The respondent challenged the said order in revision petition which was dismissed by learned Additional District Judge, Okara vide judgment dated 05.06.2018. The respondent then filed application under Order XXI Rule 32 of Civil Procedure Code, 1908 which was also dismissed by learned trial court vide order dated 22.06.2018. Thereafter, the respondent filed appeal which was allowed by learned Additional District Judge, Okara vide judgment dated 25.08.2018 disentitling the petitioner to receive the said consideration money deposited by the respondent. Hence this writ petition has been filed.

2. Arguments heard. Record perused.

3. The sole controversy between the parties is as to who is entitled to receive the amount of Rs.70,00,000/- deposited by the respondent-plaintiff in the suit for specific performance of the agreement to sell.

4. The chequered history of this case shows that on 16.05.2014, the respondent-plaintiff filed a suit for specific performance of agreement to sell dated 20.02.2014 regarding land measuring 18 kanals situated in Chak No.38/GD, Tehsil and District Okara. During the pendency of the suit, there was a compromise between the parties. As per Mark-A, i.e. affidavit furnished by the respondent-plaintiff himself, the land was purchased by the plaintiff for consideration of Rs.120,00,000/- out of which a sum of Rs.50,00,000/- was paid through pay order while the remaining amount of Rs.70,00,000/- was to be paid on 20.01.2015 and defendant was bound to execute the sale deed in favour of the plaintiff on receipt of the balance consideration amount. The petitioner-defendant submitted Mark B, i.e. affidavit by the petitioner, and acceded to the terms and conditions of the agreement to sell. The respondent deposited the balance consideration of Rs.70,00,000/- with the court on 09.03.2015. Thereafter, the case remained pending for about one year mainly due to strikes of the lawyer community. However, learned trial court on the basis of compromise decreed the suit of the plaintiff vide judgment and decree dated 22.04.2016 wherein it was specifically held that the defendant was entitled to receive the balance sale consideration of Rs.70,00,000/- deposited by the plaintiff. The petitioner-judgment debtor did not challenge the said decree but it was challenged by the decree holder-respondent by filing R.F.A. No.619/2016 before this Court to the extent that since the petitioner did not fulfill his commitment of compromise, he was not entitled to receive the amount of Rs.70,00,000/- deposited by him and the court should have passed the decree in his favour in lieu of Rs.50,00,000/-. The R.F.A. was, due to enhancement of pecuniary jurisdiction, remitted to the District and Sessions Judge, Okara. The R.F.A. was ultimately dismissed by learned Additional District Judge, Okara vide judgment and decree dated 27.10.2016. The respondent challenged the said order in R.S.A. No.298/2016 which was also dismissed by this Court vide judgment dated 27.10.2017. The respondent then preferred C.P.L.A. No.2968-L/2017 before the Hon'ble Supreme Court which was later on withdrawn by him vide order dated 24.01.2018. As such, the judgment and decree passed by learned trial court dated 22.04.2016 attained finality.

5. Firstly on 03.05.2016, the petitioner filed application for withdrawal of the balance consideration money of Rs.70,00,000/- deposited by the respondent-plaintiff. Again, on 14.12.2017, the petitioner filed application for withdrawal of the said money. The respondent filed objection petition while raising almost the same objections which were taken in the appeals filed by him in first round of litigation. The objection petition filed by the respondent was, however, dismissed and the petitioner was declared entitled to recover the said amount by learned trial court vide order dated 02.04.2018. The respondent assailed the said order in revision petition which was dismissed by learned Additional District Judge, Okara vide judgment dated 05.06.2018. The respondent then filed Writ Petition No.219381/2018 challenging judgment dated 05.06.2018 which was ultimately withdrawn by him on 12.06.2018.

6. In third round of litigation, the respondent on 22.06.2018 filed application under Order XXI, Rule 32, C.P.C. on the same plea that since the petitioner did not fulfill the commitment as per compromise (Mark A and Mark B), he is not entitled to recover the sum of Rs.70,00,000/- deposited by the respondent. This application was dismissed by learned trial court in limine vide order dated 22.06.2018. The petitioner attacked the said order in appeal which was allowed by learned Additional District Judge vide impugned judgment dated 25.08.2018.

7. Perusal of history given in the preceding paragraphs reveals that a consent decree was passed by learned trial court whereby the respondent's suit for specific performance of agreement to sell was decreed whereas the petitioner was held entitled to recover the sum of Rs.70,00,000/- deposited by the respondent-plaintiff on account of balance consideration amount of the suit property. In compliance of the said decree, the respondent got executed the sale deed in his favour in lieu of Rs.50,00,000/- only in utter disregard to the fact that the sale price of the property was Rs.1,20,00,000/- and the civil court while decreeing the suit of the respondent had also considered the same amount. In this way, he saved a reasonable amount by cheating the state/revenue department. The petitioner got benefit of the consent decree more than he was entitled to. But at the same time, he created hurdles in the way of the petitioner to get his due benefit of the consent decree. Had the consent decree not been acceptable to the respondent, he would have not taken any benefit thereof. Meaning thereby he accepts the part of the consent decree which favours him but opposes the part of the same which favours the other side. This clearly shows mala fide on his part. Furthermore, when, in first round of litigation, the respondent had failed upto the Hon'ble Supreme Court of Pakistan to take any decision in his favour on the sole plea of dishonouring of commitment made by the petitioner in his affidavit Mark-A, the respondent could not be allowed to take the same plea in second round of litigation. However, in this round too, he failed to get decision in his favour. But he did not ended here and after failure in two rounds of litigation, he initiated the third round of litigation by filing application under Order XXI, Rule 32, C.P.C. on the same plea which was not accepted by civil court to the apex court/this Court.

8. Order XXI, Rule 32, C.P.C. reads as under:

"32. (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it the decree

may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation, or with the leave of the Court, by the detention in prison of the directors or other principal officers thereof or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year if the judgement debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court. At the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

(Emphasis provided)

Bare reading of above reveals that Sub-Rules (1) and (2) of Rule 32 of Order XXI, C.P.C. come in action in case judgment-debtor fails to comply with the decree passed by the court which is not the case here. Sub-Rules (3) and (4) deal with attachment of the property whereas Sub-Rule (5) is with regard to non-compliance of the decree of the court. These two provisions also do not attract in this case. Therefore, Order XXI, Rule 32, C.P.C. does not apply or attract in the instant case in any manner. I am conscious of the fact that this Court in R.S.A. No.298/2016 (dismissed vide judgment dated 27.10.2017) has observed that this matter can be resolved under Order XXI, Rule 32, C.P.C. As earlier noted, the provisions of Order XXI, Rule 32, C.P.C. are not applicable in this case, therefore, the observation made by this Court being against the law is of no legal effect and the application filed by the respondent under the said provision was required to be dealt with strictly in accordance with law and not in view of the said observation of this Court.

9. The application under Order XXI, Rule 32, C.P.C. was nothing but a mischief on part of the respondent and the principle of res judicata was duly applicable. Learned trial court in view of the facts narrated above seems fully justified to dismiss the said application in limine. However, learned Additional District Judge allowed the application while observing that since the petitioner failed to fulfill his commitment to execute the sale deed till cut-off-date, he is not entitled to the amount deposited by the respondent. It is worthy to note that the cut-off-date to fulfill the terms and compromise by the parties was 20.01.2015 but the balance consideration amount was deposited by the respondent-plaintiff on 09.03.2015. Therefore, the compromise was violated by the respondent-plaintiff himself. If mere non-compliance of the compromise is taken in consideration, the respondent was not entitled to the decree granted to him by the civil court. However, it appears from order dated 20.01.2015 of learned trial court that the time was extended with mutual consent of the parties till 19.02.2015. Order dated 07.03.2015 of learned trial court further extended time to the respondent to deposit the balance consideration amount. Thereafter, the matter remained pending before the civil court for multiple reasons mainly for strike of the lawyers and ultimately, the suit of the respondent was decreed holding the petitioner entitled to recover the amount of Rs.70,00,000/-. Granting said amount to the petitioner was challenged by the respondent before the district court, this Court and the apex court but that order remained intact. In second round of litigation, the situation remained the same as writ petition filed by the respondent against orders passed in favour of the petitioner was withdrawn by him. In the said scenario, there was no occasion for learned Additional District Judge to pass judgment against the decisions given by this Court as well by the apex court. The case of the respondent is also hit by the "doctrine of election". Reliance is placed on the ratio laid down by the Hon'ble Supreme Court of Pakistan in case Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others (PLD 2018 SC 828). Relevant portion therefrom is reproduced below:

"We have noted that facts and ground in both set of the proceedings are substantially same. The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceedings/actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceedings/ action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule 2, C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res judicata as articulated in section 11, C.P.C. and its explanations. Doctrine of election apply both to the original proceedings/action as well to defences and so also to challenge the outcome on culmination of such original, proceedings/action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an

order/ judgment/ decree etc. emanating from proceedings of civil nature, which could be challenged/ defended under Order IX rule 13 (if proceedings are ex-parte), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order XXI, rules 99 to 103 C.P.C. and section 96, C.P.C. (appeal against the order/ judgment) etc."
(Emphasis provided)

10. The respondent has taken benefit of the consent decree of the civil court by getting executed sale deed in his favour and has also taken possession of the suit property. Therefore, he had no ethical or lawful justification to create hurdles in the way of the petitioner to get benefit of the same decree. The respondent is approbating and reprobating at the same time. On one side, he supports part of the consent decree which favours him but on the other side, he opposes the part of the decree which favours the petitioner which cannot be permitted under any law.

11. It appears from the record that the respondent contested the withdrawal of the amount deposited by him with sheer mala fide intention merely to cause agony and deprive the petitioner from his lawful right. On failure upto the apex court in the first round of litigation, there was no lawful reason or justification with the respondent to agitate the matter again and again on one and the same plea of non-fulfillment of the commitment by the petitioner made by him in affidavit Mark-B. Therefore, his conduct of raising one and the same objection and taking one and the same plea each time to contest the matter is shameful, reprehensible, inexcusable and condemnable which calls for imposing heavy penalty upon him. But taking lenient view, I am refraining myself from doing so. Learned Additional District Judge has ignored the above facts of the case and passed the impugned judgment while sitting over the judgments of the superior courts illegally and unlawfully which cannot sustain.

12. For what has been discussed above, this civil revision is allowed, impugned judgment dated 25.08.2018 passed by learned Additional District Judge, Okara is set aside and order dated 22.06.2018 passed by learned trial court/executing court is restored.

SA/M-196/L Petition allowed.

**2020 Y L R 1437**

**[Lahore (Rawalpindi Bench)]**

**Before Atir Mahmood, J**

**RUSTAM ALI and others---Petitioners**

**Versus**

**GHULAM WARIS and others---Respondents**

Civil Revision No. 525 of 2009, decided on 12th July, 2019.

**Partition Act (IV of 1893)---**

----Ss. 4, 2 & 3---Suit for possession through partition---Preliminary decree---Sale of suit property---Word "request" in S.3, Partition Act, 1893---Scope---Trial Court passed final decree in the terms that subject to payment of share of defendants the plaintiffs would be owner of suit property---Validity---Court had jurisdiction to decide whether suit property was partitionable or not---If suit property was not divisible due to its nature and sale proceed was more beneficial, then Court might pass order for sale of suit property and distribution of sale proceeds amongst the shareholders---"Request" for sale of suit property might be written or verbal---Where preliminary decree had been passed then S.2 of Partition Act, 1893, was not applicable---Mere non-filing of written application for sale of suit property would not defeat the right of any of the parties to purchase the same---Possession of suit property was with the defendants who had 5/6 shares as compared to 1/6 of the plaintiffs in the suit land---Share of defendants was much bigger than that of plaintiffs in addition to the fact they had possession of suit property---Defendants were to be given opportunity to purchase the minor share of plaintiffs in the suit property, in circumstances---No illegality had been pointed out in the impugned judgments and decrees passed by the Courts below---Revision was dismissed, in circumstances.

Messrs Conforce Ltd. v. Messrs Rafique Industries Ltd. PLD 1989 SC 136 and Sheikh Iftikhar Ahmed and another v. Dr. Muhammad Ilyas 2003 MLD 338 ref.

Fiurdous Begum's case 2008 CLC 248; Badri Narain Prasad Chaoudhary and others v. Nil Ratan Sarkar AIR 1978 SC 845 and Kalyan Kumar Basak v. Salil Kumar Basak and others AIR 1989 Cal. 159 rel.

Ch. Imran Hassan Ali for Petitioners.

Muhammad Ilyas Sheikh for Respondents Nos. 1 to 3.

Barrister Talha Ilyas Sheikh, Ch. Mazhar Hussain Minhas, Taimoor Malik and Mst. Farhat Majeed Chaudhry for L.Rs. of Respondent No. 4.

Date of hearing: 4th July, 2019.

**JUDGMENT**

**ATIR MAHMOOD, J.**---Brief facts of the case are that on 31.07.1991, respondent No.1 Ghulam Waris filed a suit for declaration and in alternate, suit for possession through partition against the petitioners and others regarding property comprising godown measuring 92 sq. ft. and a shop fully described in headnote of the plaint (hereinafter referred to as "the suit properties") with the averments that the suit properties were evacuee Non-Muslim properties; that Inayat Ali was

predecessor-in-interest of respondents Nos.1 to 8 had a verified claim and was issued a compensation book valuing Rs.35,580/-; that said Inayat died and compensation book was issued in favour of his said LRs; that in the year 1959, the said properties were transferred; that respondent No.1 was a minor while female respondents were 'parda nasheen' ladies; that Muhammad Iqbal, respondent No.2 (defendant No.1), got issued PTD of godown in his favour exclusively notwithstanding the fact that price was adjusted against the said compensation book; that shop, which was also purchased in auction and price was paid for from the said compensation book, was transferred in favour of LRs in equal share; that respondent No.2 effected the family settlement and the shop came in the share of other LRs; that Respondent No.1 came to know about 4 years ago that respondent No.2 had obtained PTD of godown in his name and has proceeded to sell the same in favour of Bahadur Khan, predecessor-in-interest of respondents Nos.9 to 17 vide registered sale deed dated 12.05.1977; that he transferred 234 sq. ft. out of the shop in favour of present petitioners by means of collusive decree dated 16.06.1982; that respondent No.2 had no share in the shop; that the alternate plea taken was that even if respondent No.2 is entitled to any share, same was 1/6 which comes to 157 sq. ft. and said transfer in excess from the shop is void. The plaintiff accordingly prayed for possession of godown as well as the shop and in the alternate, a decree for separate possession by partition.

2. Defendants Nos.8 and 9 and 10 to 18 contested the suit by filing written statements. Out of divergent pleadings of the parties, issues were framed and evidence led by the parties was recorded. Thereafter, learned trial court dismissed the suit vide judgment and decree dated 07.02.1996. Respondent No.1 filed appeal which was partially allowed by learned Additional District Judge, Chakwal vide judgment and decree dated 27.05.1997 in the terms that the godown was exclusively transferred to and owned by Muhammad Iqbal, as such, it was validly sold by him to Bahadar Khan. Regarding the shop, he found that Muhammad Iqbal had only 1/6 share which comes to 157 sq. ft. in the shop and transaction inter se the present petitioners and said Iqbal would be binding only to the said extent. He also declared that the shares of the parties with reference to said transfer document and also death of Khatoon Begum, mother of respondent No.1. The case was accordingly remanded back for passing a final decree.

3. Feeling dissatisfied, both sides preferred revision petitions. Vide consolidated judgment and decree dated 09.10.2003 passed by this Court, the revision petition filed by the petitioners was dismissed whereas the revision petition filed by respondent No.1 was partly allowed and a preliminary decree was passed determining the shares of the parties as follows:

| | | |
|---|---|---|
| 1. | Ghulam Waris, plaintiff | 7/30 |
| 2. | Muhammad Iqbal respondent No.2 and consequently, petitioners | 1/6 |
| 3. | Mst. Moaafia Begum | 1/5 |
| 4. | Mst. Mobina Begum | 1/5 |
| 5. | Mst. Surayya Begum (predecessor-in-interest of respondents Nos. 5 to 8) | 1/5 |

Vide above-referred judgment, this Court directed the learned trial court to pass a final decree in light of the above declared shares of the parties.

4. Thereafter, learned trial court passed final decree in the suit of the plaintiff/respondent No.1 in the terms that subject to payment of Rs.8,66,666/- to defendants Nos. 8 and 9, the plaintiff and defendants Nos.2 to 7 will be owner of the suit shop vide judgment and decree dated 27.06.2006. Feeling aggrieved, the petitioners filed appeal which was partially allowed by learned Additional District Judge, Chakwal vide judgment and decree dated 26.02.2009 as under:

> " the plaintiff and respondents Nos.2 to 7 are ready to buy the same as per market value determined by the Court. In this case, as per report of local commission, the value of the suit property is Rs.25,00,000/-. According to statement of Rustam Ali as AW-1, its value is Rs.40,000/- and the Court fixed Rs.52,00,000/- and now the defendants in additional evidence demanded Rs.18,00,000/- per marla is accepted and the impugned judgment and decree is modified in terms of said demand."

Hence, this civil revision has been preferred.

5. Learned counsel for the petitioners inter alia contends that it was overlooked that the shop, adjacent to godown and connected exclusive passage are all a compact one unit property and was partitionable but learned courts below have incorrectly held otherwise; that the learned courts below could not go beyond the preliminary decree passed by this Court; that the impugned judgments and decrees are in violation of sections 2 and 3 of the Partition Act, 1893; that the law laid down in Fiurdous Begum case (2008 CLC 248) was misapplied; that the petitioners were always willing to buy share of other co-owners but their request was not acceded to; that learned courts below have committed material illegalities while passing the impugned judgments and decrees, therefore, these cannot sustain. He accordingly prays that this civil revision be allowed, the impugned judgments and decrees be set aside and the suit of respondent No.1-plaintiff be dismissed. In support of his arguments, learned counsel for the petitioners has placed reliance on the ratios laid down in cases Messrs Conforce Ltd. v. Messrs Rafique Industries Ltd. (PLD 1989 SC 136), Sheikh Iftikhar Ahmed and another v. Dr. Muhammad Ilyas (2003 MLD 338 Lahore) and Firdous Begum and others v. Mst. Salamat Bibi and another (2008 CLC 248 Lahore).

6. On the other hand, learned counsel for the respondents have vehemently opposed this civil revision and fully supported the impugned judgments and decrees.

7. Arguments heard. Record perused.

8. The main thrust of arguments of learned counsel for the petitioners is on the point that learned trial court could no go beyond the preliminary decree passed by this Court. This ground was not taken before the learned lower appellate court, therefore, it cannot be raised at this stage. Nevertheless, this Court passed a preliminary decree while determining shares of the parties which have not been disturbed by learned courts below and the quantum of shares as determined by this

Court has been kept intact. Ordering sale of the suit property and disbursement of the sale proceeds as per shares of the parties, determined by this Court, does not mean that learned courts have travelled beyond the preliminary decree passed by this Court. The contention learned counsel for the petitioners in this regard is misconceived which is accordingly repelled.

9. The other contention of learned counsel for the petitioners is that the impugned judgments and decrees are against the provisions of Sections 2 and 3 of the Partition Act, 1893 as no written application by any of the parties was ever moved for sale of the suit property instead of division or to buy it. Sections 2 and 3 of the Act ibid are reproduced below:

> "2. Power to Court to order sale instead of division in partition suits.--- Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property, an distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.
>
> 3. Procedure when sharer undertakes to buy.--(1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation in the share or shares of the party of parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.
>
> (2) If two or more shareholders severally apply for leave to buy as provided in subsection (1), the Court shall order a sale of the share of shares to the shareholder who offers to pay the highest price above the valuation made by the Court.
>
> (3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications."
>
> (Emphasis provided)

Bare reading of above provisions makes it crystal clear that it is the jurisdiction of the court to decide whether the property is partitionable or not as it is clearly written in Section 2 reproduced above that in a suit for partition, if it appears to the court that the property is not divisible due to its nature and the sale proceeds is more beneficial, then the court may pass order for sale of the property and distribution of the sale proceeds amongst the shareholders. The court, having satisfied that the property due to its nature was indivisible, ordered for sale of the

suit property which was within its jurisdiction. So far as non-moving of written application is concerned, the above provision mentions nowhere the words 'written application' but the word 'request'. In my opinion, a request may be the written or verbal and non-filing of written application by any of the parties for sale of the suit property neither makes the court functus officio or ineffective nor could take away authority of the court to pass such an order. Even otherwise, where a preliminary decree stands passed, the provision of Section 2 of the Act is not applicable and the court has to move ahead to proceed in accordance with Section 3 of the Act. In this regard, judgment of this Court in case Firdous Begum and 6 others v. Mst. Salamt Bibi and another (2008 CLC 248 Lahore) is referred. Relevant portion therefrom is reproduced below:

> "Bare perusal of section 2 of Act, 1893 (ibid) reflects that request for sale can be made, where a decree for partition might have been made. Legislature has consciously used the phrase "where a decree for partition might have been made". Sale, according to provisions of Section 2(ibid), pertains to the cases, where decree might have been made. The above provision of law is not applicable to the case where the decree has been passed. Partition decree consists of two decrees so to say the preliminary decree and final decree. Once the preliminary decree is passed, the provisions of section 2 of the Partition Act, will not apply and the Court has to pass final decree. The court, in such circumstances, will resort to the provisions of Section 3 and in case of failure of any shareholder to apply for leave to buy the share, the property is liable to be auctioned."
>
> (Emphasis provided)

10. So far as the contention of learned counsel for the petitioners that no written application was made by any of the parties to buy the property is concerned, it is true that no written application was ever made by the parties to buy the suit property. But it is also true and admitted fact that both sides have made verbal requests to the courts to buy the suit property which is evident from the record and even such requests have been reiterated by the parties before this Court. In Section 3 of the Act, there is no mention of words 'written application' but the word 'leave' which means the 'request' or 'prayer'. The request or leave may be verbal or written, therefore, mere non-filing of written application for the said purpose will not defeat the right of any of the parties to buy the suit property as both sides are still willing to buy share(s) of the other(s). The argument of learned counsel for the petitioners does not hold water which is accordingly discarded.

11. Apropos argument of learned counsel for the petitioners that the petitioners were always willing to buy the suit property but their request was not acceded to. Suffice it to say that both sides were willing to buy the shares of the others in the suit property, therefore, it was to be sold to one of them. Here arises a question as to who is more entitled to buy the property - the petitioners or the respondents. Admittedly, the possession of the suit property lies with the respondents who have 5/6 shares as compared to 1/6 share of the petitioners in the suit property, as such, their share is much bigger than that of the petitioners in addition to the fact that they hold possession of the property. In the circumstances, it seems more

appropriate and equity demands as well that the respondents having major share in and possession of the suit property be given opportunity to purchase the minor share of the petitioners in the suit property. Reliance is placed on the dictums laid down by the learned High Court of Judicature at Bombay (Nagpur Bench, Nagpur) in its judgment dated 18.12.2013 passed in Second Appeal No.42/2013 titled "Smt. Vandana and others v. Pradip and others" wherein it has been held that:

> " I find that the parties already in possession of the suit property should retain the same and party not in possession thereof should get compensation equal in value of his share in the suit property, on the basis of principle of owelty. The appeal deserves to be allowed in these terms."
>
> (Emphasis provided)

Another judgment from Indian Jurisdiction allowing possessor of the property to purchase the property is in case Badri Narain Prasad Chaoudhary and others v. Nil Ratan Sarkar (AIR 1978 Supreme Court 845 (Patna)). Relevant portion from the said judgment is as under:

> " the defendant is the smaller co-sharer and he is using the property as a shop-cum-residence. Equity requires that he should be given a preferential right to retain the whole of the suit property on payment of compensation being the just equivalent of the value of the plaintiffs' share to them."
>
> (Emphasis provided)

There is another judgment from Indian Jurisdiction in case Kalyan Kumar Basak v. Salil Kumar Basak and others (AIR 1989 Calcutta 159) wherein it was held that the court should allow a majority shareholder in a property to be sold to buy shares of minority shareholders. Relevant part of the said judgment reads as under:

> "The Court can always allow some of the co-sharers having a major share to buy up the shares of other co-sharers in order to protect the family dwelling house from being sold in auction."
>
> (Emphasis provided)

Even otherwise, the petitioners themselves demanded price of the suit property as Rs.18,00,000/- before the learned lower appellate court which was accepted by the respondents and the decree of learned trial court was accordingly modified by learned lower appellate court. When the price demanded by the petitioners before learned lower appellate court was accepted and granted to them, they, at this stage, cannot be permitted to again pray for sale of the property to them.

12. Both the learned courts below have passed the impugned judgments and decrees concurrently against the petitioners which are immune from interference by this Court in its revisional jurisdiction unless there is some glaring illegality therein which could not be pointed out by learned counsel for the petitioners, therefore, no interference is warranted.

13. For what has been discussed above, this civil revision has no substance. The same is accordingly dismissed.

ZC/R-19/L Revision dismissed.

**2020 Y L R 2421**

**[Lahore]**

**Before Atir Mahmood, J**

**PCBL---Petitioner**

**Versus**

**ZEENAT BIBI and others---Respondents**

Co-operative Petition No. 31 of 2016 and other connected Petitions, decided on 12th June, 2020.

**Punjab Urban Rent Restriction Ordinance (VI of 1959)---**

----S.13---Punjab Undesirable Cooperative Societies (Dissolution) Act (I of 1993), Ss. 7, 16 & 17--- Cooperative petition---Maintainability--- Ejectment petition against Pakistan Development Cooperative Corporation Limited ("Cooperative Corporation")---Execution petition for recovery of arrears of rent from Cooperative Corporation---Auction of property of the Cooperative Corporation---Scope---Ejectment petition against Cooperative Corporation was moved wherein tenant appeared and moved application for rejection of said ejectment petition which was dismissed--- Cooperative Corporation thereafter disappeared from the ejectment proceedings and eviction petition was accepted ex parte and Cooperative Corporation was directed to pay arrears of rent to the ejectment petitioner---Landlady moved execution petition for recovery of arrears of rent against the Cooperative Corporation wherein auction of property of tenant was conducted and registered sale deed was issued---Contention of petitioner-Cooperative Board was that Rent Controller was not competent to execute its ejectment order unless same was confirmed by the Cooperative Judge and proceedings of auction and sale of property of Cooperative Corporation were illegal---Validity---Cooperative Board or its Chairman had no power to challenge any order, judgment or decree of any court even if passed without jurisdiction before Cooperative Judge---Right to approach Cooperative Judge had not been extended to the Cooperative Board rather such right had been bestowed upon the decree-holder or the beneficiary of the order passed by some other Court---Respondent being owner of demised premises filed ejectment petition which had been accepted with arrears of rent to be paid by the Cooperative Corporation and said order had been executed---Cooperative Corporation was tenant under the respondent who had not challenged the ownership of any of assets of the Cooperative Corporation rather prayed for ejectment of her tenant from her property---Ejectment proceedings initiated by the respondent were not with regard to any asset of defunct Cooperative Corporation---Cooperative Board could raise objections during execution proceedings or file an appeal against the order of Executing Court but none of the said remedies had been availed by the petitioner---Cooperative Judge was a persona designata and could only act in accordance with the powers specifically given to him and not otherwise--- Cooperative Judge had no power to set aside the impugned ejectment order of the Rent Controller or cancel a registered sale deed---If any decree, order or document had been executed without jurisdiction then same would be nullity in the eye of law but Cooperative

Judge could not nullify the effect of such judgment, decree or sale deed and same could only be assailed before proper forum---Cooperative petition being not maintainable was dismissed, in circumstances.

Muhammad Ashfaq v. The State PLD 1973 SC 368; Begum Syeda Azra Masood v. Begum Nosheba Moeen and others 2007 SCMR 914; Nazir Ahmad v. Imdad Hussain and others 2005 YLR 1096; Syed Mehmood Ali v. Network Television Marketing (Pvt.) Ltd. and another PLD 2005 Kar. 399; Evacuee Trust Property Board through Secretary v. Deputy Commissioner, Sahiwal and another 1994 CLC 939; Mehdi Khan and 2 others v. Board of Revenue, Punjab, Lahore and 25 others 2000 CLC 638; Waheed Shahzad Butt v. Federation of Pakistan through Director Legal-II President (Appellant Authority) and another PLD 2016 Lah. 872 and Messrs Conforce Ltd. v. Syed Ali Shah and others PLD 1977 SC 599 ref.

Messrs Umar Auto Store and others v. The Judge Banking Court and others 2014 CLD 1452; The Collector of Sales Tax and Central Excise, LTU, Karachi v. Messrs Pak Suzuki Col. Ltd. Karachi 2016 SCMR 646; Dr. Muhammad Afzal Hussain v. Additional District Judge, Lahore and 5 others 2015 CLC 1546; Muhammad Umar Mir, and others v. Dr. Muhammad Afzal Hussain and others PLJ 2016 SC 120; Tanveer Ahmad v. Muhammad Sharif and 2 others 1997 MLD 1913; Mian Umar Ikram ul Ha1ue v. Dr. Shahida Hasnain and another 2016 SCMR 2186; Securities and Exchange Commission of Pakistan through Authorized Officer v. Adnan Faisal and another PLD 2019 Sindh 235; Muhammad Asif Nawaz v. Additional Sessions Judge/Justice of Peace Multan and 2 others 2014 CLD 45; Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another PLD 2015 Lah. 140; Muhammad Asif Nawaz v. Additional Sessions Judge/ Justice of Peace Multan and 2 others 2014 PCr.LJ 1; Messrs Noorani Traders Karachi through Managing Partner v. Pakistan Civil Aviation Authority through Airport Manager, Karachi PLD 2002 Kar. 83; The Province of Punjab and another v. National Industrial Cooperative Credit Corporation and another 2000 SCMR 567; 2003 PTD (Trib.) 613; Muhammad Ayub and others v. Mst. Nusrat Begum 2003 YLR 793; United Bank Limited through Attonrey v. Messrs Blessed International (Pvt.) Limited and 6 others 2003 CLD 39; Defence Housing Authority, Islamabad v. Shafqat Rasool and others 2017 YLR 538; S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, Messrs Housing and Works, Islamabad and others 2013 SCMR 338; Muhammad Saleem and 2 others v. Khuda Bux and 4 others 2013 MLD 266; Nazir Ahmed Panhwar v. Government of Sindh through Chief Secretary Sindh, Karachi and 3 others 2005 PLC (C.S.) 189; Makhdum Raju Shah v. Member Board of Revenue, Punjab and 17 others 2011 YLR 1724; Faizullah v. Muhammad Sarwar and another 2013 CLC 1054; Brothers Sugar Mills Limited and others v. Punjab Cooperative Board for Liquidation and others 2012 CLC 1369 and Zia Ullah Shah v. Muhammad Khaqan and 6 others 2018 MLD 1869 distinguished.

Nadeem ud Din Malik, Khalid Bashir and Mahmood Tahir Ch. for Petitioner.

Sh. Usman Karim ud Din for Respondent No. 1.

Proceeded against ex parte vide order dated 26.10.2018 (Respondent No.2).

Date of hearing: 28th February, 2020.

**JUDGMENT**

**ATIR MAHMOOD, J.---**This single judgment will dispose of Cooperative Petitions Nos.31/2016, 45328/2019, 61575/2019, 74356/2019, 35784/2019, 45325/2019, 35795/2019, 45329/2019, 8825/2020, 24163/2019, 44051/2019, 59695/2019 and 50607/2019 and common questions of law and fact are involved therein.

2. Brief facts of the case in hand are that on 21.09.1992, respondent No.1 Mst. Zeenat Bibi being land lady filed ejection petition against defunct Pakistan Development Cooperative Corporation (PDCCL) who was a tenant on the ground floor of Property No.8, Block No.3, Jahanian, District Khanewal (rented premises) on account of default in rent. The PDCCL first appeared before the court to contest the ejectment petition, however, later on, they disappeared and ex parte proceedings were initiated against them. However, they appeared later on and filed application under Order VII, Rule 11, C.P.C. for rejection of the ejectment petition which was dismissed vide order dated 30.03.1993 whereafter, they again disappeared and were proceeded against ex parte. Having recorded evidence of the ejectment petitioner ex parte, the learned Rent Controller allowed the ejectment petition with direction to PDCCL to pay Rs.72,600/- as arrears of rent to the ejectment petitioner vide ex parte order dated 30.03.1994. Respondent No.1 then filed petition for execution of order dated 30.03.1994. During the execution proceedings, an agricultural property of PDCCL was attached and put to auction which was purchased by respondent No.2 through registered sale deed dated 19.05.2004 (hereinafter referred to as the disputed property), as such, order dated 30.03.1994 stands executed. Hence this cooperative petition has been preferred.

3. Learned counsel for the petitioner inter alia contends that the Punjab Undesirable Cooperative Societies (Dissolution) Ordinance, 1992 was promulgated which was later on enacted as Act I of 1993 (hereinafter referred to as "the Act"); that under Section 5 of the Act, the petitioner-PCBL was appointed as liquidator for defunct societies including the PDCLL vide notification dated 21.05.1992; that the property in question was no more owned by the defunct PDCCL rather it was under the control of the PCBL since 21.05.1992, therefore, it could neither be attached nor auctioned by the court, as such, the sale deed in favour of respondent No.2 is illegal and unlawful; that Section 17 of the Act bars the jurisdiction of any other court in cooperative matters whereas Section 16 provides that proceedings before any court against an undesirable cooperative society in respect of its assets and liabilities shall stand abated on the appointment of liquidator and that all the decrees, judgment and order passed by any court, except the apex court, will be inexecutable after 01.07.1990 unless confirmed by the Cooperative Judge; that the orders passed by learned rent controller as well as the executing court are without jurisdiction in view of Sections 16 and 17 of the Act, therefore, these are nullity in the eye of law. He accordingly prays that the orders of learned Rent Controller as well as learned executing court be set aside and the sale deed in favour of respondent No.2 be cancelled by way of allowing this cooperative petition. He has relied upon the law laid down in cases Messrs Umar Auto Store and others v. The Judge Banking Court and others (2014 CLD 1452 Lahore), The Collector of Sales Tax and Central Excise, LTU, Karachi v.

Messrs Pak Suzuki Col. Ltd. Karachi (2016 SCMR 646), Dr. Muhammad Afzal Hussain v. Additional District Judge, Lahore and 5 others (2015 CLC 1546 Lahore), Muhammad Umar Mir, and others v. Dr. Muhammad Afzal Hussain and others (PLJ 2016 SC 120), Tanveer Ahmad v. Muhammad Sharif and 2 others (1997 MLD 1913 Lahore), Mian Umar Ikram ul Haque v. Dr. Shahida Hasnain and another (2016 SCMR 2186), Securities and Exchange Commission of Pakistan through Authorized Officer v. Adnan Faisal and another (PLD 2019 Sindh 235), Muhammad Asif Nawaz v. Additional Sessions Judge/Justice of Peace Multan and 2 others (2014 CLD 45 Lahore), Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another (PLD 2015 Lahore 140), Muhammad Asif Nawaz v. Additional Sessions Judge/ Justice of Peace Multan and 2 others (2014 PCr.LJ 1 Lahore), Messrs Noorani Traders Karachi through Managing Partner v. Pakistan Civil Aviation Authority through Airport Manager, Karachi (PLD 2002 Karachi 83) The Province of Punjab and another v. National Industrial Cooperative Credit Corporation and another (2000 SCMR 567), (2003 PTD (Trib.) 613), Muhammad Ayub and others v. Mst. Nusrat Begum (2003 YLR 793 Peshawar), United Bank Limited through Attonrey v. Messrs Blessed International (Pvt.) Limited and 6 others (2003 CLD 39 Lahore), Defence Housing Authority, Islamabad v. Shafqat Rasool and others (2017 YLR 538 Islamabad), S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, M/s Housing and Woks, Islamabad and others (2013 SCMR 338), Muhammad Saleem and 2 others v. Khuda Bux and 4 others (2013 MLD 266 Sindh), Nazir Ahmed Panhwar v. Government of Sindh through Chief Secretary Sindh, Karachi and 3 others (2005 PLC (C.S.) 189), Makhdum Raju Shah v. Member Board of Revenue, Punjab and 17 others (2011 YLR 1724 Lahore), Faizullah v. Muhammad Sarwar and another (2013 CLC 1054 Lahore), Brothers Sugar Mills Limited and others v. Punjab Cooperative Board for Liquidation and others (2012 CLC 1369 Lahore) and Zia Ullah Shah v. Muhammad Khaqan and 6 others (2018 MLD 1869 Islamabad).

4. On the other hand, learned counsel for respondent No.1 has vehemently opposed this petition and fully supported the impugned orders. He argues that this petition is not maintainable as under Section 11 of the Act, only a person aggrieved by order of the cooperative board, its chairman or delegatee of the Chairman can filed cooperative petition but the cooperative board can't. He avers that the only remedy available to the petitioner board was to challenge the order of learned Rent Controller in appeal or file application under Section 12(2), C.P.C. and the order of the executing court in appeal but the orders impugned could not be challenge before the Cooperative Judge who is a persona designata and has no power to set aside the decree or order passed by any court. He has relied upon the law laid down in cases Muhammad Ashfaq v. The State (PLD 1973 SC 368), Begum Syeda Azra Masood v. Begum Nosheba Moeen and others (2007 SCMR 914), Nazir Ahmad v. Imdad Hussain and others (2005 YLR 1096 Lahore), Syed Mehmood Ali v. Network Television Marketing (Pvt.) Ltd. and another (PLD 2005 Karachi 399), Evacuee Trust Property Board through Secretary v. Deputy Commissioner, Sahiwal and another (1994 CLC 939 Lahore), Mehdi Khan and 2 others v. Board of Revenue, Punjab, Lahore and 25 others (2000 CLC 638 Lahore), Waheed Shahzad Butt v. Federation of Pakistan through Director Legal-

II President (Appellant Authority) and another (PLD 2016 Lahore 872) and Messrs Conforce Ltd. v. Syed Ali Shah and others (PLD 1977 SC 599).

5. Arguments heard. Record perused.

6. The petitioner-Board while filing this application has invoked the jurisdiction of this Court under Sections 7, 16 and 17 of the Act. Section 7 gives the powers to the board to do certain acts. Subsections (s) to (v) of this Section are relevant for the purpose of decision of this case which are reproduced as under:

"(s) delegate to the Chairman, or any member or committee or officer or adviser, any of its powers under this Ordinance or the rules;

(t) apply to the Co-operatives Judge for guidance, in relation to any particular matter arising in winding up proceedings;

(ta) direct the eviction of tenants from any of the properties in the Board;

(tb) create a fund for social sector development in the Punjab with surplus assets if any;

(u) maintain accounts in such manner as may be prescribed; and

(v) refer a case, for the recovery of a loan advanced by an Undesirable Co-operative Society or for the execution of any decree, order or award passed in favour of such a society, at any stage of its proceedings to the Co-operatives Judge who may dispose it of or otherwise dealt with it in accordance with such procedure as may be prescribed and until the procedure is prescribed as may be determined by the Co-operatives Judge."

The above provisions of law nowhere empower the Board or its Chairman to challenge any order, judgment or decree of any court (even if passed without jurisdiction) before this Court.

7. Learned counsel for the petitioner has emphasized more on Sections 16 and 17 of the Act. I take both the said provisions one by one.

8. Section 16 provides as under:

"16. Abatement of all suits, proceedings etc.---(1) All suits or proceedings pending before any Court or authority against an Undesirable Cooperative Society in respect of its assets and liabilities shall stand abated on the appointment of the Liquidator:

Provided that fresh proceedings against such a society may be initiated before the Co-operatives Judge within 60 days of such abatement.

(2) All decrees, judgments and orders passed by any Court, except the Supreme Court against an Undesirable Co-operative Society or against properties and assets thereof on or after the first day of July, 1990 shall be unexecutable and of no legal effect, unless such judgment, decree or order

is confirmed by the Co-operatives Judge after hearing the concerned parties.

(3) Any person who relies on such decrees judgments or orders, may within 60 days of the appointment of the Liquidator, apply to the Co-operative Judge for its confirmation.

(Emphasis provided)

The crux of Section 16 of the Act is that after appointment of the Liquidator, all the suits and the proceedings pending before any Court or authority in respect of assets and liabilities of an undesirable cooperative society shall stand abated and if any order or decree has been passed in respect of assets and liabilities of such society, it will be got confirmed by such decree holder or beneficiary of such order from the Cooperative Judge, as such, the right of approaching the Cooperative Judge under this provision, as well, has not been given to the cooperative board rather such right has been bestowed upon the decree holder or the beneficiary of the order passed by some other court. In this case, respondent No.1 being owner of the property filed ejectment petition against her tenant PDCCL, the defunct society. Though the PDCCL contested the suit from its very inception and also filed application under Order VII, Rule 11, C.P.C. but the said application was dismissed by the Rent Controller vide order dated 30.03.1993 which was not assailed before the higher forum. The Rent Controller continued its proceedings and ultimately allowed the ejectment petition with arrears of rent to be paid by the PDCCL to the ejectment petitioner which order was duly got executed through the executing court. From the aforesaid, it is obvious that the PDCCL was tenant under respondent No.1 who did not challenge the ownership of any of assets of the PDCCL rather prayed for ejectment of her tenant from her owned property. The ownership and title of respondent No.1 qua the rented premises has never been disputed by the petitioner board till today nor the rent controller or the executing court could declare her title or ownership in the rent proceedings. Meaning thereby the rent proceedings initiated by respondent No.1 were not in respect of any assets of defunct PDCCL, therefore, there arises no question of proceedings against assets of the PDCCL in the ejectment proceedings initiated by respondent No.1.

9. So far as the sale deed in favour of respondent No.1 is concerned, the executing court, for recovery of arrears of rent from the PDCCL, attached its property and auctioned it which was purchased by respondent No.2 in the auction held under orders of the court through the impugned sale deed. The petitioner board could raise objections during the execution proceedings or could file appeal against order of the executing court but none of these remedies has been availed by the petitioner board rather it has preferred to file the cooperative petition which is not maintainable as noted hereinabove.

10. Section 17 of the Act reads as under:

"17. Exclusive jurisdiction of Co-operatives Judge.---Save as otherwise provided in this Act, no Court shall have jurisdiction in respect of any

matter which a Co-operatives Board and the Co-operatives Judge are empowered by or under this Ordinance to determine and no injunction or process or order shall be granted by any Court or authority in respect of any action taken or to be taken in exercise of any power conferred by or under this Act."

(Emphasis provided)

This provision reads that no court shall have jurisdiction in respect of any matter which comes within the jurisdiction of the Cooperative Board or the Cooperative Judge. It is pertinent to mention here that the Cooperative Judge is a persona designata. and can only act in accordance with the powers specifically given to him and not otherwise. Emphasis was laid by the learned counsel for the petitioner upon an order dated 06.03.2013 passed in W.P. No.2425/2008 titled "PCBL v. Mst. Naseem Yousaf etc." which was also challenged in Review Application No.512 of 2013 but with the same result. In the said case, a civil suit was filed by the respondent in the civil court at Islamabad who assumed the jurisdiction and an application under Order VII, Rule 11, C.P.C. filed by the PCBL was dismissed. The matter was then agitated before the Additional District Judge, Islamabad who affirmed the said order. Then a writ petition was filed by the PCBL which was allowed and application under Order VII, Rule 11, C.P.C. was accepted. This clearly means that the jurisdiction of the High Court was invoked under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 which was accordingly exercised but this Court, being persona designata has no such jurisdiction to set aside the impugned ejectment order of the court or cancel a registered sale-deed in favour of respondent No.2. Therefore, Section 17 of the Act does not attract in the given circumstances.

11. Needless to observe that if any decree, order or document executed is without jurisdiction, the same is a nullity in the eye of law but even if it is a nullity in the eye of law, this Court cannot nullify the effect of such judgment, decree or sale deed and the same can only be assailed before the proper forum, if so advised.

12. As far as question of liability regarding arrears of rent is concerned, the same could be countered by the petitioner before the executing court which was the proper forum in the present case. Regarding sale deed in favour of respondent No.2, the same already stood registered. The question whether it was lawfully registered or not, could only be raised before the executing court who passed the order in this regard and not before this Court.

13. The case law relied upon by learned counsel for the petitioner board being distinguishable on facts is not attracted in the instant case, as such, it is not helpful to the petitioner in any manner.

14. Cooperative Petitions Nos.44051 of 2019 and 50607 of 2019 are different in the sense that the civil suit in the matter of former petition is still pending decision whereas in the latter petition, application under Order VII, Rule 11, C.P.C. was filed by petitioner side which was dismissed vide order dated 27.02.2019 which order was not further assailed before any forum except through

the instant petition. Therefore, if so advised, the petitioner in Cooperative Petition No.44051 of 2019 may file application under Order VII, Rule 11, C.P.C. whereas the petitioner in Cooperative Petition No.50607 may assail the order impugned before the appropriate forum. If done so, the respective courts will decide the matters put before them in view with the provisions of the Punjab Undesirable Cooperative Societies (Dissolution) Act, 1993 and of course,' other law on the subject.

15. For what has been discussed above, all the cooperative petitions are dismissed.

ZC/P-9/L Petitions dismissed.

**PLJ 2020 Lahore (Note) 114**

***Present:*** **ATIR MAHMOOD AND SHAMS MEHMOOD MIRZA, JJ.**

***Syed*** **WASEEM HUSSAIN KADRI--Appellant**

**versus**

**DEUTSCHE BANK and 6 others--Respondents**

E.F.A. No. 82 of 2016, heard on 7.3.2016.

**Financial Institution (Recovery of Finances) Ordinance, 2001 (XLVI of 2001)--**

----S. 12--Civil Procedure Code, (V of 1908), S. 12(2)--Suit for recovery--Application for validity of order--Dismissed--Facts for delaying execution proceedings--Ignorance of basic principles of law--Perusal of order clearly reveals that appellant was not present before Banking Court and in that eventuality only course available to Banking Court was to dismiss application filed by appellant and matter could not be decided on merits--Impugned order is clearly reflective of fact that Court below is either ignorant of basic principles of law as initiated under Section 24-A of General Clauses Act or deliberately avoided to pass any speaking order by application of judicious mind--Appeal was allowed. [Para 6] A & B

*Mr. Usman Jillani*, Advocate for Appellant.

*Mr. Pervaiz Ahmad Barki*, Advocate for Respondent No. 1.

*Mr. Qaisar Mehmood Sra*, Advocate for Respondents Nos. 3 to 6.

Date of hearing: 7.3.2016.

**JUDGMENT**

**Atir Mahmood, J.--**The brief facts of the case are that a suit was filed for recovery of Rs. 2,86,61,987.55 by Respondent No. 1 against Respondent Nos. 2 to 6 which was decreed to the tune of Rs. 28,661,987.55 alongwith cost of suit and cost of funds. The present appellant filed an application under Section 12(2) of CPC read with Section 12 of the Financial Institution (Recovery of Finances) Ordinance, 2001 raising legal as well as factual grounds. The said application was contested by the decree-holder/Respondent No. 1 by filing its written reply. The learned Banking Court proceeded to dismiss the application of the present appellant vide impugned order dated 19.12.2015. Hence this appeal.

2. Learned counsel for the appellant at the very outset submitted that the appellant has been condemned unheard as he was not present on 19.12.2015 and the learned trial Court should have adjourned the case or at the most the application might have been dismissed for non-prosecution and the law did not permit the trial Court to dismiss such an application on merits in the absence of the appellant. He further argued that the impugned order is an absolutely non-speaking order and is not, sustainable on that score alone.

3. Learned counsels for the respondents submitted that the appellant by using different tactics are delaying the proceedings of the execution and the decree could not be satisfied till today. He argued that the learned trial Court heard the detailed

arguments of the respondent/decree-holder and then passed the impugned order. He prayed for dismissal of this appeal.

4. Arguments heard. Record perused.

5. The impugned order passed by the learned Judge Banking Court-I, Lahore is reproduced as under for ready reference:

> *"Arguments of learned counsel for decree holder heard and in view of his arguments, it appears that there is nothing on record to suggest that judgment and decree under execution dated 27.06.2014 is result of fraud or misrepresentation and is bad due to want of jurisdiction. In view of this situation, the application under Section 12(2) is dismissing being devoid of any force.*
>
> *Court Auctioneer be asked to submit fresh auction schedule on 18.01.2016".*

6. Perusal of the order clearly reveals that the appellant was not present on 19.12.2015 before the learned Banking Court and in that eventuality the only course available to the Banking Court was to dismiss the application filed by the appellant and the matter could not be decided on merits. Even otherwise, the impugned order is a nullity in the eye of law as no reason, whatsoever, has been given by the learned Banking Court to dismiss the application of the appellant. The impugned order is clearly reflective of the fact that the learned Court below is either ignorant of the basic principles of law as initiated under Section 24-A of the General Clauses Act or deliberately avoided to pass any speaking order by application of judicious mind.

7. In view of the above discussion, this appeal is allowed and the impugned order dated 19.12.2015 passed by the learned Judge, Banking Court-I, Lahore is set-aside. Resultantly, the application under Section 12(2) of CPC read with Section 12 of the FIO, 2001 filed by the appellant shall deem to be pending before the learned Banking Court, who shall decide the same afresh in accordance with law. The parties are directed to appear before the learned Banking Court on 17.03.2016.

(Y.A.) Appeal allowed.