CHIEF JUSTICE
LAHORE HIGH COURT, LAHORE

FOREWORD

Justice Ch. Muhammad Masood Jahangir secured his LL.B degree in 1986 from Punjab University Law College, Lahore and started his legal practice at Sargodha. In a short time by dint of his hard work and dedication to his profession he earned a repute of a highly competent lawyer capable of ably conducting cases in Civil/District Courts, Tribunals, High Courts & Supreme Court. His abilities were duly acknowledged when he was elevated as an Honourable Judge of the Lahore High Court on 29.10.2013.

Mr. Justice Ch. Muhammad Masood Jahangir is one amongst those whose valiant efforts in every stage of his career are reflected by the presence of many who continue to follow in his footsteps. He is a mentor, especially for the judges of Punjab. His in-depth understanding of the law, coupled with his outstanding dedication to dispense substantial justice has allowed him to decide the most complex and intricate cases. Since elevation to the Bench, his lordship has earned a reputation for efficient administration of the court and expeditious dispensation of justice. His humble role in making justice more accessible will always be remembered. At the end of his career, he is leaving us with a show of insurmountable, commitment, honesty and integrity.

In my personal capacity as Justice Ch. Muhammad Masood Jahangir's senior and colleague, I always found him to be respectful, kind and generous.

His retirement may be the end of his journey as the serving judge of the LHC but all of us are excited to see how it continues ahead in other avenues of life. Thank you for your service. I commend you for all that you have done and achieved. All the best of luck for the future.

MUHAMMAD AMEER BHATTI
CHIEF JUSTICE

Verily, I mostly practised at trial level and never dreamed to be elevated. Still don't know, how I was picked. Anyhow, this esteemed institution afforded me recognition, whereas my colleagues and all others affiliated to it became source of my strength as well as inspiration. Du'as & regard to them.

(CH. MUHAMMAD MASOOD JAHANGIR)
JUDGE

PROFILE

JUSTICE CH. MUHAMMAD MASOOD JAHANGIR was born on 03.12.1960 in a noble family of Sargodha. His father Ch. Muhammad Jahangir was a highly respected practicing lawyer of District Bar Association Sargodha, who was elected as Member National Assembly on general seat from 1970 to 1977. During this period he was appointed Federal Minister and also held the portfolio of Secretary of the Committee entrusted with the task of drafting Constitution of Islamic Republic of Pakistan, 1973.

His lordship received his early education from Cantt. He graduated from Government Degree College, Sargodha. He secured LLB degree in 1985-86 from Punjab University Law College, Lahore and started legal practice at Sargodha. In a short time by dint of his hard work and dedication to profession he earned a repute of a highly competent lawyer capable of ably conducting cases in Civil/District Courts, Tribunals, High Courts & Supreme Court. His talent abilities were duly acknowledged when he was elevated as an Honourable Judge of the Lahore High Court on 29.10.2013. Soon his faculties as a genius in Civil Law became talk of the legal professionals at all levels and his judgments commanded remarkable respect before the superior as well as subordinate Courts. He indeed is a symbol in his profession and known for his integrity, skill and speedy disposal besides being respected among his learned brothers as well as members of legal fraternity. Being part of this hon'ble Institution he had the opportunity to represent the Honourable High Court in trainings/seminars held in U.K, Hong Kong and Dubai.

As a Judge of Lahore High Court, his lordship decided more than 25000 cases of different categories and including 9746 oldest cases. Out of those 170 decisions have been reported in various law journals covering numerous important issues. His lordship has a son, Asad Jahangir and daughter, Nida Masood, who are enjoying their independent matrimonial life.

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2014 C L C 318
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUZAFFAR KHAN----Petitioner
Versus
ADDITIONAL DISTRICT JUDGE and others----Respondents

Civil Revision No.2466 of 2013, decided on 1st November, 2013.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Qanun-e-Shahadat (10 of 1984), Art.133---Talb-e-Muwathibat and Talb-e-Ishhad, performance of---Plaintiff's plea in plaint was that he made jumping demand on 23-12-2005 at 2.30 noon in presence of witnesses; and that he sent notice of Talb-e-Ishhad to defendant---Proof---Plaintiff in his deposition in Court did not state any word regarding delivery of such notice to defendant---Informer and second witness to such notice in their depositions in Court stated that plaintiff was informed about suit sale in summer season---Such contradictions in statements of plaintiff and his witnesses regarding performance of jumping demand proved his story to be concocted---Informer did not depose regarding delivery of such notice to defendant---Second witness of such notice in his deposition in Court denied same to have been read over to him---Defendant's deposition in Court denying to have received such notice would be deemed to be admitted by plaintiff due to failure to cross-examine him---Plaintiff in evidence could not prove sending of such notice and its receipt by defendant---Suit was dismissed in circumstances.

2011 SCMR 762; 2007 SCMR 1105 and 2013 SCMR 721 rel.

(b) Punjab Pre-emption Act (IX of 1991)---
----S. 13---Talb-e-Ishhad, notice of---Duty of plaintiff would be to prove sending of such notice and its receipt by defendant.

2011 SCMR 762; 2007 SCMR 1105 and 2013 SCMR 721 rel.

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

----Art. 133---Failure to cross-examine a portion of statement of witness made in examination-in-chief---Effect---Such portion of statement would be deemed to be admitted by other party.

PLD 2011 SC 296 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---Such jurisdiction being narrower and restricted was meant for correcting errors of law committed by Courts below.

2007 SCMR 236 and 2011 SCMR 762 rel.

Rai Muhammad Hussain Kharal for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Brief facts germane for the disposal of revision petition are that the petitioner filed suit for possession through pre-emption which was dismissed by the learned trial Court vide judgment and decree dated 12-9-2012. The petitioner filed an appeal before the learned appellate court which was also dismissed vide judgment and decree dated 15-8-2013. Feeling aggrieved, the respondents have assailed the said findings through this revision petition.

2. The learned counsel for the petitioner contends that the learned courts below have acted in exercise of jurisdiction illegally and caused material irregularity. Further contends that both the judgments under question are illegal, without jurisdiction and against the law and facts of the case. Also contends that both the learned courts below proceeded on wrong assumption as to the material facts on the controversy between the parties.

3. Arguments heard. Record perused.

4. The pivotal issue which was decided by both the learned courts below against the petitioner is issue No.2, which is as under:---

`Whether the plaintiff has fulfilled all requisite Talbs of pre-emption according to provisions of law? OPP

5. The petitioner/plaintiff alleged in the paragraph No.3 of the plaint, which reads as under---

6. To prove the said issue No.2 and the assertion narrated supra, the petitioner/plaintiff appeared himself as P.W.1 and asserted that the sale was disclosed to him by Muhammad Tufail, the other P.W. at 2/2-30 in the Noon on 23-12-2005 and then he made his jumping demand while performing Talb-e-Muwathibat in presence of Allah Ditta and Wali Muhammad. The plaintiff/petitioner as P.W.1 has not stated any word regarding the delivery of notice of Talb-e-Ishhad to the defendants

7. Keeping in mind the statement of the plaintiff, when this court scanned the statement of P.W.2 Muhammad Tufail, the informer, he states in the cross-examination which reads as under:---
The said witness also did not disclose anything regarding the delivery of the notice of Talb-e-Ishhad to the respondents/defendants.
8. The other witness, Wali Muhammad, P.W.3 has frankly stated in the examination-in-chief that no notice was read over to him. The said portion of his testimony is reproduced hereunder:---
He further stated during his cross examination as under:---
9. According to the version of the plaintiff and his statement, the alleged disputed sale came into the knowledge of the plaintiff in the end of month of December, 2005, i.e. on 23-12-2005, whereas, while scanning the evidence available on the record, the portion of statement of P.Ws.2 and 3, which is referred above, it has come to the light that plaintiff was informed about the disputed sale in the season of summer. Such contradiction in the statements of plaintiff and P.W.2 and P.W.3 cannot be considered to be minor or clerical. Such contradiction speaks the volume that the plaintiff managed a concocted story regarding the performance of Talb-e-Muwathibat. The learned courts below rightly observed that plaintiff/petitioner failed to perform Talb-e-Muwathibat.

10. Now coming to the performance of Talb-e-Ishhad, it is well settled law now that not only the plaintiff is required to prove the sending of the notice of Talb-e-Ishhad to the defendant, but it is a so obligatory upon the plaintiff to prove the delivery of the notice to the defendant. This fact is also not proved on the file through the evidence of the plaintiff. In this regard reliance can be placed on "2011 SCMR 762", "2007 SCMR 1105" and "2013 SCMR 721".

11. Further the defendant/respondent through their written statement and while appearing as D.W.1 categorically denied the receipt of notice of Talb-e-Ishhad. The said portion of examination-in-chief of D.W.1 was not put to cross-examination by the petitioner. It is a settled principle of law that if a portion of statement in-chief is not cross-examined, then such portion deemed to be admitted by the other side. In this regard reliance can be placed on dictum laid down by apex Court is on "PLD 2011 Supreme Court 296".

12. The impugned judgments and decrees are not reflective of any misreading and non-reading of evidence, rather those are free from taint of mis and non-reading of

evidence. The learned trial Courts below eminently passed the impugned judgments reasonably and proceeded with the cogent reasons.

13. Furthermore, the concurrent findings recorded by the learned courts below are not open to any exceptions. Safe reliance can be placed on "2007 SCMR 236" and "2011 SCMR 762".

14. Since concurrent findings of fact on face of record are neither arbitrary nor fanciful. The scope of revisional jurisdiction of this Court is restricted and narrower which is only meant for correcting errors of law committed by subordinate Courts, as there appears nothing wrong and both the learned courts below have passed the impugned judgments according to the material available on record. There is no merit in this civil revision which is hereby dismissed in limine.

SAK/M-281/L
Revision dismissed.

2014 C L C 1425
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
IFFAT BEGUM and another----Petitioners
Versus
ROBINA SHAHEEN----Respondent

Civil Revision No.678 of 2010, decided on 7th November, 2013.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Talbs, performance of---Requirements---Right of pre-emption could not be activated unless Talb-i-Muwathibat was performed---Performance of Talb-i-Muwathibat was not a mere technicality vis-a-vis the superior right of pre-emption and that was more important than the superior right---Witness of plaintiff did not utter a single word with regard to performance of Talb-i-Muwathibat by her---Notice of Talb-i-Ishhad was not got exhibited in the statement of plaintiff and her witness had not stated that it was scribed---Pre-emptor had not got declared her witness hostile who was bound by the statement of her own witness---Performance of Talb-i-Muwathibat and Talb-i-Ishhad could not be said to have been proved in the present case---Appellate Court had wrongly declared that performance of Talb-i-Muwathibat had been proved by the plaintiff---Averments of plaint and testimony of witnesses of plaintiff were silent with regard to delivery of notice of Talb-i-Ishhad---Plaintiff had failed to produce "registry booking clerk" of post office and postman to prove the dispatch of notice of Talb-i-Ishhad and its delivery to the defendants---Pre-emptor was bound to produce postman to prove that notice of Talb-i-Ishhad had been served upon the defendants but she had failed which was fatal to her claim---Defendants' appeal was accepted in oblivion of record of the case---Impugned judgment and decree passed by the Appellate Court could not sustain in the eye of law---Judgment and decree of Appellate Court were set aside and those of Trial Court were restored---Revision was accepted and suit was dismissed with costs.

Fazal Din through L.Rs. v. Muhammad Inayat through L.Rs. 2007 SCMR 1; 2013 SCMR 866; 2013 YLR 2016 and 2007 SCMR 1105 rel.

Nemo for Petitioners.

Abdul Rasheed Awan for Respondent.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Brief facts giving rise to this revision petition are that the respondent/plaintiff Rubina Shaheen had filed a suit for possession through pre-emption regarding the suit property which is fully mentioned in the plaint. The respondent/plaintiff pre-empted the sale in favour of the petitioners/ defendants regarding the suit property affected vide Mutation No.4732 dated 28-4-2004 against a consideration of Rs.45,000. It is further alleged

in the plaint that in fact petitioners/defendants had purchased the suit property against a consideration of Rs.30,000, but to deprive the plaintiff/respondent from exercising her lawful right, an exorbitant amount of Rs.45,000 as sale price was got entered in the said mutation. It is further narrated in the plaint that sale had been kept secret from the plaintiff/respondent, who came to know about the same on 6-5-2004 at 6.00 p.m. through her husband Shaukat Ali at her house and immediately she announced the intention to exercise her right of pre-emption in presence of Shaukat Ali and Muhammad Arif. It is also alleged in the plaint that the plaintiff-respondent had performed Talb-e-Ishhad by sending notice to the defendants-petitioners through registered post.

2. The suit was contested by the petitioners/defendants by filing their written statement. The petitioners/defendants alleged that neither the Talb-e-Muwathibat had been performed by the plaintiff/respondent nor any notice of Talb-e-Ishhad was delivered to them.

The factual area of dispute is reflected in the issues framed by learned trial court and for brevity sake only pivotal Issue No.5 is reproduced hereunder:---

"Whether the plaintiff has fulfilled the requiste Talbs in accordance with law? OPP"

4. The learned trial Court after recording evidence of the parties dismissed the suit vide the judgment and decree dated 13-4-2010. The respondent/plaintiff filed an appeal, which was heard by Mr. Abul Hasnat Muhammad Zulqarnain, Additional District Judge, Chakwal, who vide the judgment and decree dated 10-6-2010 accepted the appeal and decreed the suit filed by the respondent/plaintiff. Feeling dissatisfied, with the latter judgment and decree, the petitioners/ defendants have come up with the instant revision petition before this court.

5. Today on call of the case, no one has appeared on behalf of the petitioners/defendants, whereas, Mr. Abdul Rashid Awan, Advocate, learned counsel for the respondent-plaintiff has addressed his arguments and supported the impugned judgment and decree dated 10-6-2010. He has argued that performance of Talbs is merely a technical affair and the basic requirement of law is whether the pre-emptor has superior right or not. He has further argued that the right of pre-emption has been determined in favour of the plaintiff/respondent by both the learned courts below.

6. With the assistance of the learned counsel for the respondent-plaintiff, the record of the suit has been perused. The relevant paragraph No.2 of the plaint filed by the respondent-plaintiff regarding the performance of Talbs for ready reference is reproduced hereunder:---

7. On the other hand the petitioners/defendants had denied the alleged factum of performance of Talb-e--Muwathibat and Talb-e-Ishhad in para No.2 of their written

statement. The onus of issue No.5 was on the respondent/plaintiff and to discharge the said onus, the she produced Muhammad Arif as P.W.1. It is important to note that Muhammad Arif PWI is the person in whose presence Talb-e-Muwathibat and Talb-e-Ishhad had been performed as alleged by the plaintiff in para No.2 of the plaint. The whole statement of Muhammad Arif (P.W.1) is of significant nature which is reproduced here:--

10. A perusal of the testimony of P.W.1 as reproduced above shows that P.W.1 did not utter a single word regarding the performance of Talb-e-Muwathibat by the respondents/plaintiffs. Furthermore, the said witness also showed his ignorance that any jumping demand had been performed or not by the plaintiff-respondent. He further stated that he was not aware where the said notice had been got scribed. Even alleged notice of Talb-e-Ishhad was not got exhibited in the statement of P.W.1 nor the plaintiff/respondent got declared the said witness hostile. The respondent/plaintiff is bound by the statement of her own witness. In the light of said statement of P.W.1, the performance of Talb-e-Muwathibat and Talb-e-Ishhad cannot declare to have been proved. The performance of Talb-e-Muwathibat is not a mere technicality viz-a-viz the superior right of pre-emption. The law is now clear that the very right of the pre-emption is not activated unless Talb-e-Muwathibat is performed. It should not be dubbed as a mere technicality, but at times it acquires such dimension that it becomes more important than the superior right because it essentially is a sine qua non of the right of the pre-emption. The same is the verdict of the Hon'ble Supreme Court of Pakistan which has been rendered in a case reported as "Fazal Din through L.Rs. v. Muhammad Inayat through L.Rs." (2007 SCMR 1). The learned lower appellate court wrongly declared that performance of Talb-e-Muwathibat had been proved by the plaintiff/respondent by adducing cogent evidence. The evidence available on record has been viewed and it is clear that plaintiff/petitioner had failed to perform Talb-e-Muwathibat in accordance with law. If the contradictions appearing on the surface of record in the statements of P.Ws. are ignored, even then statement of P.W.1 Muhammad Arif is sufficient to dislodge the findings of the learned lower' appellate court to the extent of performance of Talb-e-Muwathibat by the plaintiff-respondent.

11. The averments of the plaint and the testimony of P.Ws. produced by the plaintiff/respondent are also silent about the delivery of alleged notice of Talb-e-Ishhad to the petitioners/defendants or they had ever received the same. The plaintiff-respondent also failed to produce Registry Booking Clerk of the concerned Post Office and relevant Postman to prove the of dispatch of notice Talb-e-Ishhad by the plaintiff-respondent and its delivery to the petitioners-defendants. To my mind, in order to succeed in the suit for pre-emption, it was imperative for the

plaintiff to produce evidence including the Postman to prove that in fact notice had been served upon the petitioners-defendants. The respondent/plaintiff failed to perform the said job, which is fatal to her claim. The reliance can be placed on "2013 SCMR 866", "2013 YLR 2016" and "2007 SCMR 1105".

12. In the above perspective, it is found that the respondent's appeal was allowed in complete oblivion of the record of the case and the impugned judgment passed by the learned lower appellate court dated 10-6-2010 cannot sustain in the eyes of law, which is set aside by allowing this Civil Revision Petition and the suit filed by the respondent-plaintiff is dismissed with costs and the judgment and decree dated 13-4-2010 passed by learned trial Court is restored.

AG/I-38/L

2014 C L C 1708

[Lahore]

Before Ch. Muhammad Masood Jahangir, J

MUHAMMAD ISMAIL----Petitioner

Versus

REHMAT BIBI through L.Rs. and 25 others----Respondents

Civil Revision No.1994 of 2012, decided on 29th November, 2013.

Specific Relief Act (I of 1877)---

----S. 12---Qanun-e-Shahadat (10 of 1984), Arts.17, 79 & 129(g)---Suit for specific performance of contract---Except first agreement to sell, other agreements did not find mention of thumb-impressions or signature of its executant and even same did not contain her name---Such agreements had no binding force on the defendant---Only one marginal witness of agreement to sell was produced and other was withheld---Plaintiff was bound to prove the execution of agreement to sell by production of legal evidence but he had withheld the same---Mode for payment of earnest money to the defendant had not been disclosed---Best evidence had been withheld and inference would be against the plaintiff that if such evidence was produced then same would not support his version---Defendant was not paid share from the further amount and new agreements were executed by her exclusion---No misreading or non-reading of evidence on record had been pointed out---Impugned judgment passed by the Appellate Court was based on cogent reasons---Revision was dismissed in circumstances.

Ch. Akbar Ali Shad for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- By means of this Civil Revision filed under section 115, C.P.C., the petitioner-plaintiff has challenged the judgment and decree dated 23-6-2009 passed by the learned Civil Judge, Gojra whereby the suit filed by the petitioner-plaintiff for specific performance of the agreement of sale was dismissed as well as the judgment and decree dated 13-3-2012 passed by the learned Additional District Judge, Gojra whereby the appeal filed by the petitioner-plaintiff was partialy allowed in consequence whereof the suit was partially decreed to the extent of Ghulam Muhammad deceased, who is succeeded by respondents Nos.3 to 26 and partially dismissed to the extent of Rehmat Bibi, who is succeeded by the respondents at Nos.1 and 2 as a result of which the judgment and decree of the learned trial court regarding dismissal of suit to the extent of Rehmat Bibi was maintained.

2. The precise facts are that the petitioner filed a suit for specific performance of agreement to sell about the land measuring 6.M, 12 S.ft (fully described in the head note of the plaint) and herein after to be referred as "disputed Ihata" alleging therein that Mst. Rehmat Bibi and Ghulam Muhammad being owners in possession of the disputed Ihata had agreed to sell it to the petitioner for a sum of Rs.30,000, who were paid the earnest money amounting to R.6300 and agreement dated 25-8-1981 was reduced into writing. The petitioner shifted to the disputed Ihata after incurring a huge amount over its construction and he also paid Rs.20,300 to the vendors or different occasions, who also executed the agreements dated 7-11-1981, 25-5-1982 and 1-10-1986 and the balance amount was settled to be paid at the time of execution of registered sale deed. However, Ghulam Muhammad died after some months whereupon his legal heirs as well as Mst. Rehmat Bibi were asked that the sale deed be got completed after receiving the balance amount, who refused to perform their part, which necessitated filing of the instant suit by the petitioner.

3. The suit was contested by the respondents-defendants by filing the written statement and out of the divergent pleadings of the parties as many as 8 issues were framed. Both the parties led their evidence in support of their respective contentions and the learned courts below decided the fate of the suit as well as the appeal filed by the petitioner as indicated in para 1 ante. Hence this Civil Revision has been filed before this court.

4. The learned counsel for the petitioner-plaintiff contends that the learned appellant court has erred in law while partially dismissing the suit to the extent of Mst. Rehmat Bibi and omitted to take into consideration that the first agreement dated 25-8-1981 (Exh.P.2) had been signed by both Rehmat Bibi and Ghulam Muhammad, which was proved by producing the material evidence on the record; that Mst. Rehmat Bibi during the pendency of the appeal also made a compromise with the petitioner, who not only had sworn an affidavit, but also made a statement before the learned lower appellate court while admitting the factum of compromise, but this fact has not been considered by the learned lower appellate court, and it is a clear cut case of misreading and non-reading of the material evidence on the record, which has resulted in arriving at an erroneous view that the suit was partly dismissed.

5. Arguments heard and the documents appended with this file have been minutely perused. The learned trial court had dismissed the suit as a whole, but on an appeal filed by the petitioner-plaintiff, the suit was partly decreed to the extent of Ghulam Muhammad and partly dismissed to the extent of Rehmat Bibi, and both of them have been succeeded through their heirs in the memo. of parties. The petitioner-plaintiff has been non-suited to the extent of Rehmat Bibi mainly on the ground of

non-proving the agreements to her extent. Issue No.1 for the purposes of this Civil Revision is relevant, which is reproduced as under:---

"(1) Whether defendant No.1 and predecessor of defendants No. 2 to 26 agreed to sell the disputed property to the plaintiff for a consideration of Rs.30,000 as earnest money and handed over the disputed property to the plaintiff under the sale transaction? OPP."

6. The claim set up by the petitioner-plaintiff is that Mst. Rehmat Bibi and Ghulam Muhammad had agreed to sell the disputed Ihata to the petitioner for a sum of Rs.30,000, who were paid the earnest money amounting to R.6300 and agreement dated 25-8-1981 was executed, which was followed by the other agreements dated 7-11-1981, 25-5-1982 and 1-10-1986 whereby a further amount of Rs.20,300 was also paid and the remaining amount was settled to be paid at the time of execution of registered sale deed. It is an admitted fact even by the learned counsel for the petitioner during the course of arguments and also from the record available on the record, that except the first agreement dated 25-8-1981 (Exh.P.2), the other agreements did not find mention the thumb-impressions or signatures of Mst. Rehmat Bibi and even these did not contain her name. As such all the three subsequent agreements have no binding force on Rehmat Bibi, who is succeeded by respondents 1 and 2.

7. Now the case against Mst. Rehmat Bibi only rested upon agreement dated 25-8-1981 (Exh.P.1). The petitioner produced as many as 8 P.Ws. in support of his claim. Sajid lqbal (P.W.1), was the Record Keeper of the office of DOR, who only produced record regarding Exh.P.2. Waseem Raza (P.W.2) was nephew of lbn-e-Ali, who was the alleged scribe of the said document and he was produced to identify the signatures and handwriting. lrshad Ahmad (P.W.3) was the brother of Nisar Ahmad, who was the scribe of the agreement dated 25-8-1981 and he only identified the signatures and handwriting of his deceased brother Nisar Ahmad. Muhammad Aslam (P.W.4) and Nawab, Din (P.W.5) are the marginal witnesses of the agreement of sale which was lastly executed on 1-10-1986. Similarly Mauladad (P.W.6) was the marginal wetness of agreement (Exh.P.3) while Muhammad Ramzan (P.W.7) was son of Abdul Ghafoor, the alleged marginal witness of the first agreement (Exh.P.2), who appeared in the secondary evidence and only identified the signatures of his father on the said agreement. Muhammad Ismail petitioner-plaintiff himself appeared as P.W.8. No other witness has been produced. A perusal of the agreement (Exh.P.2) reveals that Sibt-e-Hassan Shah and Abdul Ghafoor were the marginal witnesses thereof, but none of them appeared in the trial court and in the secondary evidence P.W.7 appeared to prove the signatures of Abdul Ghafoor. As such only one marginal witness was produced and the other was

withheld. Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 are relevant for resolving the controversy involved herein, which are reproduced here for ready reference:---

"17. Competence and number of witnesses.--- (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:"

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law:---

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

"79. Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shell not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

In the written statement the execution of the agreement had been specifically denied and it was mandatory upon the plaintiff-petitioner to prove its execution by the production of the legal evidence, but he withheld the same for the reasons best known to him. Even otherwise the payment of mode of earnest money to Mst. Rehmat Bibi was not disclosed. The learned counsel for the petitioner has failed to disclose that any efforts were made by the petitioner to produce the other marginal witness. If the best evidence in spite of its availability is withheld by the person, who is bound to produce it, inference under Article 129 Illustration (g) of Qanun-e-Shahadat Order, 1984, which reads as under:---

Illustrations.

The Court may presume.---

"(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

is to be drawn against him with the impression that if such evidence was produced by them, that would not support their version. After perusal of the evidence on the record, I concur with the finding arrived at by the learned lower appellate court to the effect that the petitioner failed to adduce the legal evidence to prove that Rehmat Bibi had affixed her thumb impressions on the agreement (Exh.P.2) and it could not be used against her.

8. In addition to above, this court has also observed that according to the first agreement dated (Exh.P.2) dated 25-8-1981 out of the total amount of Rs.30,000 agreed upon between the parties, only an amount of Rs.6300 had been paid as earnest money and the remaining was to be paid at the time of registration of the sale deed, but subsequent thereto three other agreements dated 7-11-1981, 25-5-1982 and 1-10-1986 were also executed in between the petitioner and Ghulam Muhammad only whereby a further amount of Rs.20,300 was paid. It is not case of the petitioner-plaintiff that Mst. Rehmat Bibi had conferred any power upon her brother Ghulam Muhammad to make the agreement with the petitioner regarding her sale as well by receiving the remaining amount. As such the agreement (Exh.P.2) to the extent of Mst. Rehmat Bibi had become redundant and of no legal effect as she was not paid share from the further amount and the new agreements were executed by her exclusion.

9. The contention of the learned counsel for the petitioner that Mst. Rehmat Bibi had herself appeared in the appellate court and admitted the contents of the Affidavit (Mark-A) sworn by her, according to which she agreed to sell her share and receive the total sale price has already been dealt with by the learned lower appellate court through the impugned judgment and turned down in the following terms:---

" . The perusal of the order dated 13-4-2010 shows that the respondents moved the application in this court to record the statement of Rehmat Bibi respondent No.1 about her affidavit. The learned predecessor of this court observed that Rehmat Bibi respondent No.1 was physically infirm and unable to make her statement, therefore, the affidavit Mark-A has lost its significance."

and I do not find any good reason to differ therewith. The learned counsel for the petitioner has failed to point out if the above order dated 13-4-2010 was further challenged and the said finding was reversed. At this stage no exception can be taken to it having attained finality and even otherwise Mst. Rehmat Bibi also died subsequently during the pendency of appeal.

10. For the foregoing discussion, I am of the view that the impugned judgment and decree to the extent of dismissal of appeal and suit to the extent of Mst. Rehmat Bibi deceased, who is succeeded by respondents 1 and 2 is not reflective of any

misreading or non-reading of the material evidence on the record and the same does not warrant any interference by this court in the exercise of revisional jurisdiction rather the same is based on cogent reasons and supported by law. This revision petition having no force is dismissed in limine.

11. Before parting with this order, I deem it appropriate to clarify that the findings arrived at by this court are restricted only to the disposal of this civil revision keeping in view the merits of the case of Rehmat Bibi alone and these are not meant to affect the merits of the case regarding Ghulam Muhammad.

AG/M-68/L Revision dismissed.

2014 M L D 1751
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Malik DILAWAR KHAN---Petitioner
Versus
BAKHTIAR AHMED and others---Respondents

Civil Revision No.217 of 2011, decided on 9th April, 2014.

Punjab Pre-emption Act (IX of 1991)---

----S. 24---Deposit of Zar-e-Soam---Scope---Plaintiff did not deposit the amount of Zar-e-Soam in compliance with order of Trial Court and his suit was dismissed---Contention of plaintiff was that Trial Court only directed to submit index of net profit to determine Zar-e-Soam and no order was passed for the deposit of the same---Validity---Presumption of truth was attached to the judicial proceedings and strong and unimpeachable evidence was required to rebut such presumption---Pre-emptor was bound to deposit Zar-e-Soam within a maximum period of 30 days which was mandatory in nature---Ignorance of law could not be an excuse for the failure to act and save its consequences---Plaintiff failed to deposit Zar-e-Soam due to his own act and his suit had rightly been dismissed---Judgments and decrees passed by both the courts below were in accordance with law---No good reason or ground had been put forth with regard to failure on the part of plaintiff to deposit Zar-e-Soam within the stipulated period---Revision was dismissed in circumstances.
Muhammad Ramzan v. Lahore Development Authrity, Lahore 2002 SCMR 1336 and Fayyaz Hussain v. Akbar Hussain and others 2004 SCMR 964 rel.
Shahid Mehmood Khilji for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---The petitioner/plaintiff filed a suit for pre-emption before the learned trial Court on 31-7-2010 and on the same day, the learned trial Court directed the petitioner/plaintiff to deposit the Zar-e-Soam within a period of 30 days. The said order in verbatim is reproduced hereunder for ready reference:--
On the next date of hearing, the learned trial Court after observing that the petitioner/plaintiff did not deposit the amount of Zar-e-Soam in compliance with order dated 31-7-2010, dismissed the suit of the petitioner/plaintiff vide order dated 15-9-2010. The petitioner/plaintiff filed an appeal before the learned lower appellate Court while assailing the order dated 15-9-2010 passed by the learned trial Court which has also been dismissed by the learned Addl. District Judge vide judgment and decree dated 13-11-2010, hence, the instant civil revision has been filed by the petitioner/plaintiff.
2. The learned counsel for the petitioner/plaintiff has argued that the impugned order and judgment passed by both the courts below are illegal having been passed against the spirit of law; that the interim order sheet of learned trial court reflects

that at the time of hearing (on 31-7-2010), the learned trial court only directed the petitioner to submit index of net profit before the court to determine Zar-e-Soam, but there was no order for deposit of Zar-e-Soam; that in the said order, the words "Zar-e-Soam" were inserted by the learned trial court subsequently, which was not in the knowledge of the petitioner and the learned trial court has non-suited the petitioner/plaintiff due to his own act.

3. Arguments heard and record perused.

4. The contention of the learned counsel for the petitioner that the learned trial court did not direct the petitioner/plaintiff to deposit Zar-e-Soam within a period of 30 days vide order dated 31-7-2010 and the learned trial court subsequently inserted the words "Zar-e-Soam" in the said order, is misconceived as presumption of truth is always attached to the judicial proceedings and strong and unimpeachable evidence is required to rebut such presumption. Reliance in this respect can safely be placed on the case law reported as "Muhammad Ramzan v. Lahore Development Authrity, Lahore" (2002 SCMR 1336) and "Fayyaz Hussain v. Akbar Hussain and others (2004 SCMR 964). For the sake of arguments, if it is presumed that the said insertion was made by the learned Judicial Officer, then the petitioner/plaintiff could have initiated proceedings against the said Judicial Officer. The order dated 31-7-2010 is very much clear, wherein, the petitioner/plaintiff was directed to deposit Zar-e-Soam within a period of 30 days. The said proceedings have already attained the presumption of correctness and therefore mere oral assertion of learned counsel for the petitioner is not acceptable to deviate therefrom.

5. Even otherwise, under section 24 of the Punjab Pre-emption Act, 1991, the pre-emptor is bound to deposit Zar-e-Soam within a maximum period of 30 days. The said provision of law is mandatory in nature. The ignorance of law cannot declare to be an excuse for the failure to act thereupon and save from its consequences. When the suit of pre-emption was filed by the petitioner/plaintiff, he was required to deposit the Zar-e-Soam within a maximum period of 30 days. The petitioner/plaintiff failed to deposit the said amount due to his own act and no the blame of learned counsel for the petitioner/plaintiff upon the learned Presiding Officer of the learned trial court is without any substance. As a natural consequence for having failed to deposit Zar-e-Soam of the pre-empted amount as required by the mandatory provision of law, the suit of the petitioner has rightly been dismissed and no scope was also left with the lower appellate court to warrant interference, who has also eminently dismissed the appeal filed by the petitioner.

6. Sequel of the above discussion is that the order and judgment and decree passed by both the courts below are quite in accordance with law warranting no interference by this Court in revisional jurisdiction as learned counsel has failed to put forth any good reason or ground regarding failure on the part of the petitioner to deposit Zar-e-Soam within the stipulated period rather he has chosen to level the allegation against the Presiding Officer of the learned trial curt without any substance or strong footing. This revision petition having no force is dismissed in limine.

AG/D-5/L Revision dismissed.

2014 M L D 1192
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
BASHIR AHMAD---Petitioner
Versus
DISTRICT OFFICER (REVENUE), NAROWAL through Province of Punjab and 9 others---Respondents

Civil Revision No.92 of 2013, decided on 1st November, 2013.

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

----S. 11 & O. VII, R. 11---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Res judicata, principle of---Applicability---Scope---Rejection of plaint without framing of issues---Effect---Mutation was attested on the basis of decree passed by a competent court of law and said decree was not challenged and had attained finality---Competent court passed a well reasoned decree and dispute of inheritance was resolved---Doctrine of res judicata had universal application and same was based on principle of public policy that one cause should not be tried for the second time and there must be an end of litigation---Subsequent suit could not be considered if it was hit by the doctrine of res judicata which could be decided at any stage of proceedings---Present suit had been filed on oblique motives which was hit by the principle of res judicata---Plaintiffs could not again agitate same matter which had already been decided---Both the courts below had rightly rejected the plaint---Concurrent findings were neither arbitrary nor fanciful or perverse for interference by the High Court---No illegality or material irregularity had been committed by the courts below---Revision was dismissed in limine.

Akram and 3 others v. Nazar Ali and others 2011 YLR 2969; Sanesra Star Screen Industries through Partner v. Jamia Masjid Eid Gah through Secretary-General Trustee and another 2009 CLC 67; Abdul Hadi and others v. Jami Masjid Eid Gah and another 2009 MLD 679 and Mst. Rabia Khatoon v. Abbas Ali and another 2013 YLR 736 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---Revisional jurisdiction of High Court was for correcting errors of law committed by subordinate court which was restricted and narrower.

2007 SCMR 236 and 2011 SCMR 762 rel.

Sh. Naveed Shahryar for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Brief facts of the case are that the petitioner and respondents Nos.9 and 10 filed a suit for declaration before the learned trial court regarding disputed property situated in Chak Oriya, Tehsil Shakargarh, District Narowal. The respondents/defendants contested the suit by filing their written statement. The respondent/defendant Tariq Mehmood also filed a separate application under Order VII, Rule 11, C.P.C.

2. The learned trial court framed the following preliminary issues:--

"(1) Whether the plaintiff has no cause of action to institute the instant suit, therefore, the plaint is liable to be rejected under Order VII, Rule 11, C.P.C.? OPD

(2) Relief."

3. The learned trial court was pleased to reject the plaint vide order dated 28-4-2012. Thereafter, the petitioners/plaintiffs filed an appeal before the learned lower appellate court, which met the same fate. The petitioner feeling aggrieved of the said orders dated 28-4-2012 and 6-9-2012 passed by the learned courts below filed the instant revision petition.

4. The learned counsel for the petitioner contends that both the learned courts below have rejected the plaint on wrong inferences. Further contends that the petitioners have cause of action and locus standi to file the suit. It is argued that principle of res judicata cannot be applied without recording of evidence. Reliance has been placed on the case "PLJ 2004 Peshawar 194".

5. Arguments heard. Record perused.

6. The perusal of record shows that initially mutation No.414 was attested under a decree dated 3-6-2010 passed by a competent court of law and the said decree was

never agitated before any higher forum and attained the finality. In the said decree, the dispute of inheritance was resolved by the competent court in favour of the female legal heirs who were deprived by the other side.

7. Reverting to the objection of the learned counsel for the petitioner that plaint cannot be rejected on the score of res judicata without framing of issues and recording of evidence. In this behalf reliance can be placed on the case "Akram and 3 others v. Nazar Ali and others" (2011 YLR 2969), "Sanesra Star Screen Industries through Partner v. Jamia Masjid Eid Gah through Secretary-General Trustee and another" (2009 CLC 67), "Abdul Hadi and others v. Jami Masjid Eid Gah and another" (2009 MLD 679) and "Mst. Rabia Khatoon v. Abbas Alil and another" (2013 YLR 736).

8. In the light of said esteemed judgments, it is crystal clear that doctrine of res judicata is of universal application and is based on principle that public policy demands that one cause should not be tried for the second time and there must be an end to the litigation. It is the mandate of section 11, C.P.C. that if the subsequent suit is hit by the doctrine of res judicata then the same could be considered and decided at any stage of proceedings.

9. As observed earlier that females were deprived from the property which they have to be inherited from their ancestrals and in the first round the competent court passed a well reasoned decree. Now the present suit has been filed on oblique motives. The earlier judgment had attained its finality and was not open to the plaintiffs/petitioner to again agitate the same matter before the learned courts below. I, find no legal force in the contentions of Sh. Naveed Shahryar, Advocate, learned counsel for the petitioner that the plaint has been rejected without framing of issues. The suit filed by the petitioner in the circumstances was hit by the principle of res judicata and both the learned courts below have rightly rejected the plaint. Since concurrent findings on the face of record are neither arbitrary nor fanciful or perverse, there is no scope of interference by this Court in the exercise of revisional jurisdiction, which is essentially meant for correcting errors of law, committed by subordinate Court. Needless to emphasize such jurisdiction is restricted and

narrower. Both the learned courts below have not committed any material irregularity or illegality while passing the impugned judgments. A safe reference may be made to the dictum laid down in "2007 SCMR 236" and "2011 SCMR 762".

10. There is no force in this revision petition and the same is hereby dismissed in limine.

AG/B-31/L Revision dismissed.

P L D 2014 Lahore 144
Before Ch. Muhammad Masood Jahangir, J
FALAK SHER---Petitioner
Versus
MUHAMMAD NAEEM and another---Respondents

Civil Revision No.2600 of 2013, decided on 18th November, 2013.

Civil Procedure Code (V of 1908)---

----S. 47 & O.XXI, R.99---Specific Relief Act (I of 1877), S.12---Suit for specific performance of contract---Disposal of objection petition without framing of issue---Scope---Execution petition was filed wherein objection petitions were submitted which were dismissed by the Executing Court---Validity---Executing Court dismissed objection petition and said order had not been challenged before any appellate forum and same had attained finality---Second objection petition on the same ground was not maintainable---Execution of decree could not be stopped by filing repeated objection petitions---Only objection petition filed in good faith could be considered---Objection petitions, in the present case, were based on oblique motive---Executing Court had rightly dismissed the same without framing of issues or recording of evidence---If Executing Court was allowed to disposed of objections in terms of issues framed in each and every case then entire jurisdiction of court could be subverted and fresh endless proceedings would start which was not the mandate of law---Petitioner had not approached the High Court with clean hands, revision was dismissed in circumstances.
Muhammad Ahmad Khan Kasuri for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Brief facts of the case are that respondent No.1/plaintiff had instituted a suit for possession through specific performance of agreement and permanent injunction in the learned trial/Civil Court against respondent No.2 and one Tahir Mehmood son of Feroze Din to the effect that they had entered into an agreement to sell regarding the suit property with respondent No.1 for a consideration of Rs.93,00,000/- out of which Rs.5 lac were received by them from the plaintiff-respondent No.1 as earnest money. The respondent No.1-plaintiff averred in the plaint that on account of mala fide, the defendants had refused to execute the sale deed in his favour while the respondent No.1/plaintiff was ready to perform his part of performance. The suit was contested by the respondent-defendant No.2 but defendant No.1 Tahir Mahmood during trial of the case affected compromise with the plaintiff-respondent and the suit was partly decreed to his extent.

2. The learned trial Court framed the following issues out of the divergent pleadings of the parties:--

(1) Whether the plaintiff is entitled to a decree for possessions through specific performance of the agreement to sell as prayed for? OPP

(2) Whether the plaintiff has no cause of action to file this suit? OPD
(3) Whether the suit of the plaintiff is false, frivolous and is liable to be dismissed? OPD

(4) Relief.

3. Both the parties produced their respective evidence and the learned trial court vide its judgment and decree dated 26-1-2011 decreed the suit of the plaintiff. Feeling dissatisfied with the judgment and decree dated 26-1-2011 passed by the learned Civil Judged, the respondent No.2 preferred an appeal before this Court which also met the same fate on 31-1-2013. The petitioner Falak Sher filed an application under 12(2) of C.P.C. for setting aside the judgments and decrees dated 26-1-2011 and 31-1-2013 in which the petitioner was directed to approach the proper forum. The respondent No.1/plaintiff filed execution petition against respondent No.2 before the learned Executing Court/trial Court while the petitioner filed objection petition in the said execution petition. The learned Executing Court vide order dated 25-7-2013 dismissed the objection petition. Then the petitioner filed a second objection petition which too has been dismissed by the learned Executing Court vide order dated 30-10-2013, hence this Civil Revision.

4 The learned counsel for the petitioner has argued that the impugned order is against law and facts as the first objection petition
was dismissed without framing the issues and no opportunity was afforded to the petitioner for the production of his evidence to prove his version. He has further argued that the learned lower court has not
applied its judicial mind and knocked out the petitioner on technical grounds through the impugned order, which is liable to be set aside.
5. Arguments heard and record appended with this petition also perused.
6. The perusal of the record reveals that the suit for specific performance filed by respondent No.1 was decreed vide judgment and decree dated 26-1-2011 and the appeal filed against the judgment and decree by the judgment debtor was also dismissed by this Court vide judgment dated 31-1-2013. The decree holder filed execution petition before the learned Executing Court. The petitioner preferred an objection petition before the said learned Executing Court, which was dismissed vide order dated 25-7-2013. The said order having not been challenged before any appellate forum, has attained the finality and the second objection petition on the same grounds filed by the petitioner before the learned Executing Court was not maintainable and has rightly been dismissed vide impugned order dated 30-10-

2013. The contention of the learned counsel for the petitioner that the earlier objection petition was dismissed by the learned Executing Court without framing of issues and recording of evidence, therefore, the said order dated 25-7-2013 was not a bar in filing the second objection petition before the learned Executing Court is misconceived as the said order has attained finality. The filing of second objection petition on the similar grounds by the same person/petitioner is nothing, but to create hindrance in the way of execution proceedings regarding the judgment and decree dated 26-1-2011 passed by the learned Civil Judge, which has also attained finality and its execution cannot be stopped by filing repeated objection petitions on behalf of the petitioner. It is the mandate of Order XXI, Rule 99, C.P.C. that only the objections or resistance, if claimed in good faith can be considered, but in the present case the learned Executing Court has rightly observed that the series of objection petitions filed by the petitioner is based on oblique motive and the learned Executing Court has rightly dismissed the same without framing of issues or recording of the evidence. The decree holder had to face the proceedings for years and in different courts, right up to this Court as well the august Supreme Court. If the Executing Court is allowed to dispose of the objections in terms of issues framed by it in each and every case, then the entire jurisdiction of the Court, which passed the original decree, would be subverted and fresh endless proceeding in the nature of review or re-hearing will start and that is not the mandate of law. The petitioner has not approached this Court with clean hands entitling him to discretionary relief under the revisional jurisdiction. Resultantly, the instant Civil Revision having no force is dismissed in limine.

7. Before parting with the order, this court is constrained to observe that Execution is process for enforcement of decree or in order to enable the decree-holder to derive the benefits from the judgment and the courts have inherent powers to carry out their orders, but it is a drawback to attain judgment is easier than to have its execution. It is a fact that the decree is to be executed in the manner prescribed by the provisions of Order XXI read with section 47, C.P.C., which provide a complete procedure. The scheme and the mandate behind Order XXI, C.P.C. is to afford speedy relief to the parties in matters arising out of execution of a decree, but the said wisdom of draftsmen of the legislature is not abided by rather different hurdles and obstacles are created during the execution proceedings. The Executing Courts should have to be vigilant and should adopt the measures as given in rule 23-A of the said Order to block the gateway of the frivolous litigation. It is, therefore, directed that the execution proceedings should be carried out on expeditious basis arid if found necessary, in the cases of real hardship, even on day to day basis. This court is vigilant that there is a heavy load of litigation on the shoulders of the subordinate courts and they are also working day and night for the dispensation and administration of justice, but their efforts and hardworking will be more appreciated when the orders/judgments and decrees passed by them have borne fruit rather the same are hanging unnecessarily without any compliance, which will definitely lessen the confidence of the people in the process of courts. The Registrar of this

Court shall issue necessary directions to the Judicial Officers of the subordinate court in this regard.
AG/F-39/L Revision dismissed.

2014 Y L R 1456
[Lahore]
Before Ch. Muhammad Masood Jehangir, J
Mst. KUBRA BEGUM and others---Petitioners
Versus
SHAMS DIN and another---Respondents

Civil Revision No.1983 of 2002, heard on 18th November, 2013.

Specific Relief Act (I of 1877)---

----Ss.42 & 54---Evacuee Property and Displaced Persons Laws (Repeal) Act (XIV of 1975), S.2---Qanun-e-Shahdat (10 of 1984), Art. 129 (g)---Suit for declaration and permanent injunction---Evacuee property--- Settlement authorities, jurisdiction of---Evidence, withholding of---Presumption---Settlement authorities on 20-9-1976 declared that property owned by plaintiff was in fact part of property purchased by defendant in auction---Trial Court and Lower Appellate Court concurrently dismissed the suit and appeal filed by plaintiff---Validity---On promulgation of Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975, entire rural and urban evacuee properties vested in Provincial Government by operation of law---Except to the extent of pending matters specified in Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975, no property was available to Settlement or Rehabilitation authorities for disposal in any manner---Neither disputed property was pending for disposal nor was the matter regarding such property remanded by superior Court to Settlement authorities, as there was no such entity as Deputy Settlement Commissioner under any of the statutory laws in force after repeal of Settlement Laws---Defendant did not produce in his evidence record keeper of Settlement authorities to prove genuineness of disputed documents---Defendant withheld the best evidence, if any, for reasons best known to him, therefore, High Court derived inference against defendant---Settlement authorities were not competent to pass order dated 20-9-1976 and issue Transfer Order in favour of defendant---High Court, in exercise of revisional jurisdiction, set aside findings of two Courts below, as after repeal of Settlement Laws ultimate jurisdiction only vested with Civil Court and plaintiff had rightly challenged Transfer Order before Civil Court having been passed by Deputy Settlement Commissioner without jurisdiction---Suit filed by plaintiff was not only competent but Civil Court had also jurisdiction---High Court set aside judgments and decrees passed by both the Courts below and suit was decreed in favour of plaintiff---Revision was allowed in circumstances.

Sher Zaman Khan for Petitioners.
Dr. Muhammad Irtaza Awan, Nauman Maqbool, Senior Clerk with original record for Respondent No.2.
Respondent No.1 proceeded ex parte on 7-3-2013.

Date of hearing: 18th November, 2013.

JUDGMENT

CH. MUHAMMAD MASOOD JEHANGIR, J.---The facts of the case are that the present petitioners are the successors of Abdul Jamil Qureshi (deceased) who was a refugee and after partition settled at a place in Lahore known as Ahata Bansi Lal, presently, known as Bengali Mohallah, Saddar Bazar, Lahore Cantt. The said predecessor-in-interest of the petitioners Abdul Jamil Qureshi applied for the transfer of House No.1260/A in which he was settled. In the ground-floor of the said house, Khursheed and Balloo were residing whereas the predecessor-in-interest of the petitioners was in occupation of the first floor of the said house. The Settlement Authorities issued a Provisional Transfer Order No.468239 (Exh.P-2) dated 4-2-1960 in favour of Abdul Jamil Qureshi (deceased) with regard to the disputed house and thereafter a permanent transfer deed (Exh.P-3) dated 6-10-1965 was also issued in favour of the predecessor-in-interest of the petitioners. Another Property bearing No.1263 was auctioned on 4-9-1967 and transfer order dated 10-12-1976 was issued in favour of Muhammad Sharif and prior to the issuance of transfer order, respondent No.2/Deputy Settlement Commissioner passed the order dated 20-9-1976 to the effect that the ground floor of House No.1260/1 was in fact the House No.1263 which had been purchased by respondent No.1 Shams Din. The predecessor-in-interest of the petitioners filed a Civil Suit for declaration and permanent injunction against the respondents seeking a declaration to the effect that he was the owner of House No.1260/A and no portion of it was bearing Property No. 1263. He also challenged the order of respondent No.2 and sought an injunction against respondent No.1 not to claim any right, title or interest in the property owned and possessed by him. The said suit was contested by the respondents by filing their written statement.

2. The learned trial Court framed the following issues out of the divergent pleadings of the parties:--

(1) What are the boundaries of Property No.1260/1 horizontally and vertically?
(2) Whether defendant No.1 has been transferred any porton out of Property No.1260/1? If so to what extent and with what effect?
(3) Whether the impugned order dated 20-9-1976 is lawful, without jurisdiction and violation of a valid transfer order already passed?
(4) Whether the suit is barred by law? If so, to what effect?
(5) Whether the suit is barred by time?
(6) Whether this Court lacks jurisdiction to entertain and try this suit?
(7) Relief.

3. After recording evidence of the parties, the suit instituted by the predecessor-in-interest of the petitioners was dismissed by the learned trial Court vide its judgment

and decree dated 14-2-1982. Feeling dissatisfaction of the said judgment and decree, said Abdul Jamil predecessor-in-interest of the petitioners filed an appeal before the learned lower appellate Court which was taken up by the learned Addl. District Judge, Lahore, who also dismissed the said appeal vide his judgment and decree dated 6-6-2002.

4. The petitioners have assailed the concurrent findings of facts arrived at by both the courts below through the impugned judgments and decrees by filing the instant Civil Revision.

5. The learned counsel for the petitioners has argued that the findings of the two courts below to the extent of Issues Nos. 1 to 3 are against law and facts as they failed to appreciate the evidence in its proper perspective. He has further argued that the respondent No.1 had never challenged the order dated 21-11-1959 passed by Deputy Settlement Commissioner (Exh.P-1) and Provisional Transfer Order dated 4-2-1960 and PTD dated 6-10-1965 (Exh.P-3) issued in favour of Abdul Jamil, which are still intact having attained finality and in the presence of such documents respondent No.2 had no jurisdiction to review his previous order. The learned counsel for the petitioners has also argued that after the repeal of the Settlement Laws in 1974, respondent No.2 had no legal entity to pass the order dated 20-9-1976 (Exh.P-5) and he was also not authorized to issue the Transfer Order (Exh.D-2) in favour of respondent No.1. He has next argued that after the issuance of PTD with regard to the house in favour of the predecessor of the petitioners, the Settlement Department having become functus officio had no jurisdiction to pass any order regarding same property, which had been finally transferred to the predecessor-in-interest of the petitioners. It is further argued that even no record regarding the Property bearing No.1263 is available with the Settlement Department till now and the judgments and decrees passed by the two courts below are reflective of misreading and non-reading of evidence, which may be set aside and the suit be decreed.

6. None appeared on behalf of respondent No.1 and the order sheet of this Court shows that he has already been proceeded ex parte on 7-3-2013.

7. Conversely, the learned counsel for respondent No.2 has controverted the arguments advanced by the learned counsel for the petitioners and supported the judgments and decrees.

8. Arguments heard and record appended with the civil revision perused.

9. Before dealing with the matter, it revealed from the order sheet of this Court that record of the learned trial Court was requisitioned, but the same has not been produced despite the repeated reminders. Anyhow, today the learned counsel for the parties have shown their willingness to address arguments on this old matter as perusal of the file with their assistance has depicted that each and every document got exhibited by the parties during the trial has been appended with the instant Civil Revision and nothing special has to be seen from the record of the lower court. As such the production of the record of the lower court is dispensed with.

10. The petitioners in their oral evidence produced Syed Masood Ahmad as P.W.1 and Muhammad Ali as P.W.2 while predecessor-in-interest of the petitioners Abdul Jamil Qureshi himself appeared as P.W.3. The said witnesses fully corroborated the facts as narrated in the plaint. The documentary evidence produced by the petitioners is relevant for the disposal of the instant case. Exh.P-1 is the copy of order dated 21-11-1959 which pertains to the House No.1260/A and perusal of the said document depicts that upper portion of the house was shown to be in possession of Abdul Jamil Qureshi, predecessor-in-interest of the petitioners while the lower portion was shown to be in possession of Khursheed Ali and Balloo Khan. However, the perusal of Transfer Order (Exh.P-2) has revealed that full House No.1260/1 had been provisionally transferred to Abdul Jamil Qureshi, the predecessor-in-interest of the petitioners whereas Exh.P-3 copy of PTD has also confirmed the transfer of the said house in favour of Abdul Jamil Qureshi. These are the documents pertaining to the transfer of the house in favour of Abdul Jamil Qureshi, predecessor-in-interest of the petitioners, which admittedly had never been questioned before the Settlement Authorities or any Court of law so far by anyone including respondent/defendant No. 1. These documents have strong presumption of truth. It is also admitted by the learned counsel for the present parties that the petitioners are in occupation of the full house and no portion thereof is under possession of respondent No.1.

11. The petitioners have assailed the order dated 20-9-1976 (Exh.P-5) in favour of respondent No.1 issued by the respondent No.2. The order pertains to the year 1976. It is an admitted fact that the Displaced Persons (Compensation and Rehabilitation) Act, 1958 (XLVIII of 1958) was repealed by the promulgation of EVACUEE PROPERTY AND DIS-PLACED PERSONS LAWS REPEAL) ACT, 1975 (ACT XIV OF 1975) on 28-1-1975. There is much force in the arguments addressed by Mr. Sher Zaman Khan, Advocate learned counsel for the petitioners that respondent No.2 as an entity has ceased to exist. I find that after the repeal of said Laws the respondent No.2 possessed no jurisdiction to dispose of any of the properties. By virtue of section 2 of the Evacuee Property and Displaced Persons Laws (Repeal) Ordinance XV of 1974 and later under section 2 of the Evacuee Property and Displaced Persons Law (Repeal) Act, 1975, several Acts including the said Displaced Persons (Compensation and Rehabilitation) Act, 1958 were repealed. subsection (2) of section 2 of the said Act 1975 provides that upon the repeal of the aforesaid Acts and Regulations, all proceedings, which immediately before such repeal, may be pending before the authorities appointed thereunder shall stand transferred for final disposal to such officers as may be notified by the Provincial Government in the official Gazette and all cases decided by the Supreme Court or a High Court after such repeal which would have been remanded to any such authority in the absence of such repeal shall be remanded to the officers notified as aforesaid.

12. Only such matters which were either actively pending consideration before Authorities for final disposal or had been remanded by the High or Supreme Court were to be finalized by the "Notified Officers". The Settlement or Rehabilitation

Authorities by express positive assertion had no jurisdiction to entertain any fresh petition or representation. In the present case undisputedly question of entitlement concerning property had neither been remanded by Supreme Court nor were any such directions made by the High Court whereby notified officer on its strength could commence proceedings. As such, any petition or representation filed with regard to matter, which otherwise stood finalized long back or even where aggrieved person may believe to have legitimate claim, the same could not be entertained by Deputy Settlement Commissioner or notified officer or any other Settlement Authority by virtue of Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. Thus, the proceedings drawn by Deputy Settlement Commissioner, which culminated in passing of order were devoid of lawful authority and deemed to have no legal effect. On the touchstone of the established principle of law entire edifice constructed over it shall automatically crumble and fall to the ground. After finalization of claim and grant or house to the claimant, matter connected with disposal of property had been finalized and closed. On promulgation of "The Repealing Act" entire rural and urban evacuee property vested in Provincial Government by operation of law. Therefore, except to the extent of sending matters specified in above enactment, said property was not available to Settlement or Rehabilitation Authorities for disposal in any manner.

13. It is an admitted fact that neither the disputed property allegedly bearing No.1263 was pending for disposal nor was the matter regarding such property remanded by the superior court to the respondent No.2. I am, therefore, in complete agreement with the learned counsel for the petitioners that there was no such entity as Deputy Settlement Commis-sioner under any of the statutory laws in force after repeal of the said Act 1958. It is also worth-mentioning that under section 3 of the said Act, 1975, all properties which were available for disposal immediately before the repeal of the said Act or which become available for disposal after such repeal as a result of final order to be passed under section 2(3) of the said Act, 1975 stood transferred to Provincial Government for disposal, in case of urban property, by the Provincial Government under the scheme to be prepared by it in this behalf.

14. The order dated 20-9-1976 does not disclose that respondent No.2 in which capacity had decided the matter after the repeal of the said enactment. Nauman Maqbool, Senior Clerk, present before the Court today with record of the disputed Property No.1260/A states that there is no record of alleged Property No.1263. He with the assistance of his counsel has shown the available record to the Court wherein Property No.1263 was never transferred to any person through an auction. The record which he has brought before this Court is silent about the issuance of Transfer Order in favour of Shamas Din respondent No.1 or the order dated 20-9-1976 passed by respondent No.2, copies of which were brought on record as Exh.P-5 and Exh.D-3. On the basis of said order, which is not available on the record produced by the clerk of Settlement Department the issuance of transfer order in favour of respondent No.1 is declared to be illegal and ineffective qua the rights of the petitioners. Further respondent No.1 has not produced in his evidence the Record-keeper of the Settlement to prove the genuineness of documents Exh.D-2

and Exh.D3. He has withheld the best evidence, if any, for the reasons best known to him. This Court has no option but to derive an inference against the respondent No.1. The findings of both the courts below on issues Nos.1 to 3 are based on the document Exh.D-1 which is an extract from the survey plan prepared by the office of Cantonment Board. The said document reflects that House No.1260/A is a different property than the Property bearing No.1263. However, the said document Exh.D-1 is neither based on any settlement record nor has solid proof regarding the transfer of the properties to the aggrieved persons.

15. Be that as it may, since I have already held that Deputy Settlement Commissioner was neither authorized nor was an entity muchless legally entitled after the repeal of the settlement laws therefore he was not competent to pass the impugned order dated 20-9-1976 and issue Transfer Order dated 10-12-1976. So, the findings on issues Nos.1 to 3 of both the learned courts below are set aside and are answered in favour of the petitioners. Findings of both the court below on issues Nos.4 and 6 are also reversed as after the repeal of Settlement Laws the ultimate jurisdiction only vests with Civil Court and petitioners had rightly challenged the impugned order and transfer order before the Civil Court having been passed by respondent No.2 without any jurisdiction and the suit filed by the predecessor-in-interest was not only competent but the Civil Court had also the jurisdiction.

16. Sequel of the above discussion is that the instant Civil Revision is allowed, the impugned judgments and decrees passed by both the Courts below are hereby set aside and the suit filed by the predecessor-in-interest of the petitioners before the learned trial Court stands decreed in favour of the petitioners and against the respondents. However, there is no order as to costs.

MH/K-1/L Revision allowed.

2014 Y L R 2347
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
KARAM ELAHI through L.Rs.---Petitioner
Versus
MUHAMMAD ASHRAF and others---Respondents

Civil Revision No.2766 of 2012, heard on 19th May, 2014.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Talbs, performance of---Requirements---Death of original pre-emptor---Legal heirs of pre-emptor (deceased)---Status---Plaintiff (pre-emptor) and informer had tried to improve the case against the version narrated in the plaint---No person could be allowed to prove his case beyond his pleadings---Name of one of the plaintiff was not mentioned in the plaint nor he was signatory of notices of Talb-i-Ishhad who introduced himself to be present at a later stage---Statement of son of deceased pre-emptor had no evidentiary value as he was not present at the time of performance of Talb-i-Muwathibat by his deceased father who filed the suit and his statement was beyond pleadings---Version set up against the pleadings of the plaint could not be considered---Statement of one pre-emptor could not be considered on behalf of other pre-emptors to prove the performance of requisite talbs---Non-appearance of other plaintiffs before the Trial Court in a suit for pre-emption was fatal with regard to performance of talbs and said suit could not succeed---Evidence led by the plaintiffs was out of scope of their pleadings which had rightly been ignored by the courts below---Suit was dismissed by the courts below while rendering sound reasons---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.

Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others PLD 2007 SC 302; Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965; Muzaffar Hussain v. Mst. Bivi and 7 others PLD 2012 Lah. 12 and Humayun Naseer Cheema and 3 others v. Muhammad Saeed Akhtar and others 2007 CLC 819 rel.

Muhammad Ahsan Bhoon, Mubee-ud-Din Qazi and Iftikhar Ahmed Rajput for Petitioners.
Jari Ullah Khan for Respondents.
Date of hearing: 19th May, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Brief facts for disposal of the instant Civil Revision are that Karam Elahi, the predecessor-in-interest of petitioners No.1-A to 1-C and respondent No.4, pre-empted a sale reflected in Mutation No.5118 dated 18-5-2009 by filing a suit for possession through pre-emption against the respondents/defendants before the learned trial Court regarding the disputed property, fully mentioned in para-1 of the plaint with the assertions that the disputed sale was kept secret and no notice was published about the attestation of disputed mutation as per law. He pleaded that he was sitting in house on 27-7-2009 at 8.00 p.m. when Ali Akbar son of Farzand Ali, the informer, told about the disputed sale. He then and there performed the requisite Talb-e-Muwathibat and thereafter dispatched the notices Talb-e-Ishhad through registered post A.D. to the respondents/defendants on 5-8-2009, but they did not reply the same. The said suit was pending before the learned trial when Karam Elahi the original pre-emptor/ plaintiff died prior to recording of evidence and the present petitioners No.1-A to 1-C and respondent No.4 filed amended plaint before the learned trial Court by impleading themselves as plaintiffs. While filing the amended plaint the present petitioners (1-A to 1-C) and respondent No.4 did not make any amendment in para-3 of the plaint wherein the alleged story regarding the performance of Talbs alleged to have been made by Karam Elahi, the original pre-emptor was pleaded. The said suit was resisted by the respondents/ defendants with the assertions that the petitioners/plaintiffs did not perform the requisite Talbs as per law. The learned trial Court from the pleadings of the parties, framed the following issues:--

(1) Whether the plaintiff has got superior right of pre-emption qua the defendant? OPP

(2) Whether the plaintiff has performed talbs according to the law? OPP

(3) Whether the plaintiff is entitled to a decree for possession through pre-emption on the averments as mentioned in the plaint? OPP

(4) Whether the instant suit is not proceedable in its present form? OPD

(5) Whether the plaintiff has not come to the court with clean hands? OPD

(6) Whether the suit has been filed just to harass and blackmail the defendants? OPD

(7-A) Whether suit property was sold and purchased for Rs.1,70,000 and Rs.5,00,000 were ostensibly mentioned in impugned mutation just to defeat the right of pre-emption, if so, what is market value of suit property? O.P.Parties.

(8) Relief.

2. The learned trial Court after recording the evidence of both the parties dismissed the suit of the petitioners/ plaintiffs vide judgment and decree dated 10-4-2012. The petitioners/plaintiffs filed an appeal against the said judgment and decree before the learned lower appellate court which has also been dismissed vide judgment and decree dated 19-7-2012, hence, the instant civil revision.

3. Before opening the arguments, learned counsel for the petitioners made a request that Amanat Ali was also the legal heir of original deceased pre-emptor who inadvertently could not be impleaded as party in the array of respondents as he refused to file the instant revision petition along with the petitioners, so the petitioners may be allowed to implead him as respondent. The request was not opposed by the learned counsel for the respondents, therefore, learned counsel for petitioners has been allowed to add said Amanat Ali as respondent and the learned counsel for the petitioners added him as respondent No.4 in the memo of parties.

4. The learned counsel for the petitioners has argued that the impugned judgments and decrees of both the courts below suffer from serious misreading and non-reading of evidence; that it was not necessary to mention the names of the witnesses in the plaint; that the petitioners/ plaintiffs were non-suited only on the ground that Amanat Ali P.W. was nowhere mentioned in the body of the plaint; that the petitioners/plaintiffs produced qualitative and quantitative evidence to prove the requisite Talbs; that the Courts below wrongly observed that P.W.3 made a false statement and that both the courts below have non-suited the petitioners/ plaintiffs on the basis of minor contradictions occurred in the statements of the petitioners/ plaintiffs, which were natural being lapses of time. He has lastly prayed for the acceptance of the instant civil revision, setting aside of the impugned judgments and decrees passed by the two courts below and that the suit filed by the petitioners/ plaintiffs be decreed. Learned counsel for the petitioners/plaintiffs has relied upon the judgments reported as "Mian PIR MUHAMMAD and another v. FAQIR MUHAMMAD through L.Rs. and others (PLD 2007 Supreme Court 302).

5. Conversely, the learned counsel for the respondents/plaintiffs has supported the impugned judgments and decrees passed by the two courts below and also argued that P.W.3 set up a different story about performance of requisite Talbs in his

statement which was beyond the pleadings in the plaint and such piece of evidence can neither be considered nor can be relied upon. He has lastly prayed for dismissal of the instant civil revision.

6. I have heard the arguments of the learned counsel for the parties and also perused the entire record with their able assistance.

7. Both the courts below have non-suited the petitioners/plaintiffs on the basis of their findings rendered on issue No.2 and observed that petitioners/plaintiffs failed to prove performance of the Talbs as per law. The petitioners/plaintiffs to discharge the onus of issue No.2 produced Ali Akbar, the alleged informer as P.W.4 who narrated different story as pleaded in para-3 of the plaint. He deposed in examination-in-chief that on 27-7-2009 at 8.00 P.M. he had informed Karam Elahi and Amanat Ali regarding the disputed sale. The same version was narrated by Amanat Ali, plaintiff No.1-B/respondent No.4 when he appeared before the learned trial Court as P.W.3. The perusal of para-3 of the plaint reveals that the presence of Amanat Ali has not been shown therein. Both P.W.3 and P.W.4 tried to improve the case against the version which was narrated in the plaint. The learned counsel for the respondents has rightly placed reliance on the case-law reported as "Muhammad Wali Khan and another v. Gul Sarwar Khan and another" (PLD 2010 SC 965), wherein, it has been observed that no person can be allowed to prove his case beyond the scope of his pleadings. The learned counsel for the respondents/defendants has further relied upon the case-law reported as "Muzaffar Hussain v. Mst. Bivi and 7 others" (PLD 2012 Lahore 12), wherein the original pre-emptor/plaintiff expired during the pendency of the suit, whose L.Rs. were impleaded as plaintiffs and one of them while appearing as P.W. made a statement about performance of Talbs showing himself to be present with his father when alleged informer told the deceased pre-emptor regarding the sale transaction. Admittedly, his name was not mentioned in the plaint, who introduced himself to be present at a later stage and the august Supreme Court of Pakistan held that the statement of the son of deceased pre-emptor has no evidentiary value. Likewise, in the present case, a perusal of the evidence of Liaqat Ali the son of the deceased pre-emptor (P.W.3) in court reveals that he was present along with his father at the time of performance of Talb-e-Muwathibat whereas the plaint does not find mention that he was also present at the time of performance of Talb-e-Muwathibat by his deceased father Karam Elahi, who originally filed the suit. Thus I have no hesitation in observing that version set up by P.W.3 being against the pleadings of the plaint cannot be considered as it has been held in "MUHAMMAD WALI KHAN's case" that no person can be allowed to prove his case beyond the scope of his pleadings.

The said statement of the son was not plausible as it was beyond the pleadings and was inadmissible.

8. The plaintiffs also produced in evidence the copies of notices Talb-e-Ishhad on the file as Exh.P-5 to Exh.P-7. A perusal thereof reveals that P.W.3 was not signatory of the said notices. The said fact also nullifies the stance as improved by the said P.Ws. that Amanat Ali was present at the time of performance of demands. If he was present at that occasion then his name should also have been reflected in the said notice Talb-e-Ishhad as well as a witness thereof. If it is presumed that Amant Ali P.W.3/son of the original pre-emptor was also present at the time of performance of Talb-e-Muwathibat, then his statement on behalf of other three L.Rs. of Karam Elahi (deceased) cannot be considered as they neither appeared before the learned trial Court to prove the performance of requisite Talbs nor were shown to be present at the time of performance of requisite Talbs, so, the non-appearance of the other plaintiffs before the learned trial Court in a suit for pre-emption is also fatal to the extent of performance of Talbs and the suit of pre-emption cannot succeed. Reliance is placed upon the case-law reported as "HUMAYUN NASEER CHEEMA and 3 others v. MUHAMMAD SAEED AKHTAR and others (2007 CLC 819), wherein it has been held as under:--

"6. Applying the above rule to this case, P.W.10 Babar Naseer Cheema, who though is a co-plaintiff in the matter, but it is not established that he has filed the suit on behalf of the other plaintiffs, as an attorney or has made the Talbs on behalf of his brothers as a previously authorized agent. While appearing as P.W.10, it is not even stated by him.

In the light of the above, I am constrained to hold that due to their non-appearance, the three plaintiffs have failed to discharge the onus, if they have made Talb-i-Muwathibat, the statements of P.W.4 and P.W.10 can only be used as a corroborative piece of evidence, but where the foundational evidence has not been led by them, the corroborative evidence has no much value."

9. It is pertinent to note that Amanat Ali (P.W.3) who is one of the legal heir of Karam Elahi the original pre-emptor along with the petitioners has not assailed the judgment and decree passed by the learned trial Court by filing an appeal before the learned lower appellate court, who even has not assailed the impugned judgment passed by the learned Addl. District Judge before this Court and only the petitioners/other legal heirs have challenged the impugned judgments and decrees who did not appear as witnesses before the learned trial Court to prove the performance of Talbs. The case law cited by learned counsel for the petitioners is not helpful to them.

10. Even otherwise during the pendency of the instant civil revision, the petitioners/plaintiffs Nos.1-A to 1-C filed C.M.No.2-C/2013 under Order VI, Rule 17 C.P.C. for the amendment of the plaint filed by the L.Rs. of Karam Elahi (deceased) before this court with the assertion that in para-3 of the amended plaint filed by them before the learned trial Court they inadvertently could not mention the name and presence of Amanat Ali, whereas he was present at the time of performance of Talb-e-Muwathibat and Talb-e-Ishhad, but inadvertantly, Karam Elahi pre-emptor could not mention his name. The said request of the petitioners was turned down by this Court while dismissing the said C.M. vide order dated 31-5-2013. So after the dismissal of their application for amendment of plaint, there is left no case with the petitioners and the evidence led by them was clearly out of the scope of their pleadings which has rightly been ignored by the courts below, while observing that the petitioners/plaintiffs tried to improve their case beyond the scope of their pleadings and dismissed the suit as well as the appeal filed by the petitioners/plaintiffs while rendering sound reasons. The learned counsel for the petitioners/plaintiffs has remained unable to point out any misreading or non-reading of evidence by the two courts below.

11. Consequently, the instant civil revision having no force and substance is dismissed.

AG/K-33/L Revision dismissed.

PLJ 2014 Lahore 363
[Bahawalpur Bench Bahawalpur]
Present: Ch. Muhammad Masood Jahangir, J.
DIL MUHAMMAD BHATTI etc.--Petitioner
Versus
MUHAMMAD RASHEED etc.--Respondents

C.R. No. 541 of 2009, heard on 13.1.2014.

Benami--

----Where a person buys property with his own money but in name of another person or buys property in his own name and subsequently transfers it in name of another without any intention, either in case to benefit such other person, transaction is called benami. [P. 367] A

Benami Transaction--

----Essential elements must exist for benami transaction between ostensible owner and the purchaser for purchase of property in the name of ostensible owner for the benefit of person who has to make payment of consideration and importantly existence of motive for creation of benami title is relevant--For purpose of determining whether title vesting is merely benami, absence of motive always goes against plaintiff. [P. 368] B

Arbitration Act, 1940 (X of 1940)--

----Ss. 14 & 17--Rule of Court--Award did not create any right or title regarding disputed plot--Un-registered award--It was not made a rule of Court and if it is presumed to be so even then no lawful award had been announced in favour of petitioners/plaintiff, which neither fulfill requirements of an award as same was not got registered nor petitioners/plaintiff had ever applied for making said award rule of Court u/Ss. 14 & 17 of Arbitration Act--Alleged award did not create any right or title regarding disputed plot in favour of petitioners/plaintiff and they cannot claim decree for declaration on basis of said award as award only becomes effective when it is made rule of Court and until passing of such decree by Court of law, award has no status in eyes of law--Un-registered award even if received in evidence will not operate to create, declare, assign, limit or extinguish, which in present or future, any right or interest whether vested or contingent to or in immoveable property. [P. 369] D & E

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

----S. 115--Civil revision--Concurrent findings--Damages was awarded for breach of contract--Benami transaction--Bona fide purchaser without notice--Contradictory pleas about ownership of disputed property--No motive for executing a benami transaction--Validity--Respondent/defendant was a benamidar owner could not be proved during trial Court by producing convincing and cogent

evidence--High Court was not inclined to interfere with well reasoned judgments and decrees passed by Courts below in exercise of revisional jurisdiction conferred upon High Court by Section 115 CPC, scope whereof is narrower and it can be exercised only if judgments or orders under challenge are found to be fanciful, perverse and illegal or those were passed without jurisdiction, which is not case in hand--Revision being devoid of any merit was dismissed. [P. 369] C & F

Mr. Muhammad Aslam Khan Dhukkur, Advocate for Petitioners.

Mr. Muhammad Bilal Bhatti, Advocate for Repsondent No. 2.

Ch. Muhammad Tahir Saeed Ramay, A.A.G. with Abdul Majeed, Housing Management Officer.

Date of hearing: 13.1.2014.

JUDGMENT

The facts of the case as narrated in the plaint are that Muhammad Amin plaintiff (predecessor of the present petitioners) and Muhammad Rasheed are real brothers, that Respondent No. 1/Defendant No. 1 had been living with the plaintiff, who also arranged his marriage and in the year of 1984 Respondent No. 1/Defendant No. 1 had sent his four children from Lahore to live with the plaintiff for getting education whereas he himself stayed with his others kids and wife in his house at Lahore, that Housing and Physical Department Bahawalpur had advertised for auction of plots for shops and the plaintiff/petitioner purchased Shop No. 9-C in his name and got recorded the name of his brother Respondent No. 1-Defendant No. 1 as vendee of plot No. 8/C as benamidar and the petitioner/plaintiff himself deposited the amount of the said plot before the concerned department. It is further pleaded in the plaint that the plaintiff/petitioner had deposited the installments of balance auction money before the Housing and Physical Department Bahawalpur, that the plaintiff is exclusive owner of the disputed plot, that thereafter disputes arose between the plaintiff and Defendant No. 1 and ultimately the parties agreed for settlement of their disputes through the six Arbitrators, who made the Award in writing on 16.11.1985, that in the light of said Award dated 16.11.1985 the petitioner/plaintiff agreed to sell the disputed plot to Dr. Muhammad Tariq and received the earnest money from the said purchaser, that Respondent No. 1-Defendant No. 1 also acknowledged the said agreement by receiving part payment through receipt, that in pursuance to the said agreement Respondent No. 1-defendant got recorded his statement for transfer of disputed plot in favour of Dr. Muhammad Tariq, but the departmental authorities did not act upon the same as the purchaser was not present in person and the attorney was not possessing any power of attorney executed by Dr. Muhammad Tariq in his favour, that thereafter Respondent No. 1- Defendant No. 1 backed out from the Award and in fact transferred the suit property

in favour of Defendant No. 2, which necessitated of filing the suit for declaration before the learned trial Court.

2. The suit was resisted by said Muhammad Khalil Respondent No. 2/Defendant No. 2 with the assertion that he was a bona fide purchaser for value and without notice. He further pleaded in the written statement that Respondent No. 1/Defendant No. 1 was the actual owner of the disputed plot and that the petitioner/plaintiff has failed to allege any reason and motive in the plaint regarding benami transaction in favour of Respondent-Defendant No. 1. He further submitted that contradictory pleas have been raised by the petitioner/ plaintiff and that Respondent No. 1/Defendant No. 1 remained in possession of the disputed plot since after its purchase. The defendants/ Respondent No. 3 to 6 who are functionaries of government department also contested the suit by filing their separate written statements with the assertion that the disputed plot had been purchased by the Respondent No. 1 in open auction and thereafter he transferred the same to defendant/Respondent No. 2. However, defendants-Respondents No. 1, 7 & 8 were proceeded ex-parte.

3. Factual area of dispute is reflected in the issues framed by the learned trial Court after the remand of the case by the learned Additional District Judge, which are reproduced hereunder:-

1. Whether the Defendant No. 1 was benamidar of the suit property and the Plot No. 9/C was in fact purchased by the plaintiff? OPP
2. If Issue No. 1 is proved in affirmative, whether the plaintiff is owner in possession of the suit plot? OPP
3. Whether the arbitration between the parties took place and for the violation of the terms arbitrated by Defendant No. 2, the plaintiff has become full owner of the suit property? OPP
4. Whether the plaintiff is entitled to the decree for specific performance of the agreement arbitrated and alternative. If so on what terms and conditions? OPP
5. Whether the alienation of the property by Defendant No. 1 in favour of Defendant No. 2 is illegal, collusive, void and thus inoperative? OPP
6. Whether the Defendant No. 2 Khalil Ahmad is a bona fide purchaser of the suit property without notice and for the consideration paid? OPD
7. Whether the plaintiff's suit is not maintainable in view of preliminary objections No. 2 and 3 raised by Defendant No. 2 in his written statement? OPD
8. Whether the plaintiff's suit is incompetent for the inconsistent pleas pleaded by the plaintiff in his plaint. If so, with what effect? OPD
9. Relief.

4. The plaintiff appeared himself as PW9 and also got examined Fateh Muhammad (PW1), Abdul Rashid Khan, Stamp Vendor (PW2), Ghulam Sabir, Senior Clerk Housing & Physical Department (PW-3), Abdul Salam Chughtai, Stamp Vendor as (PW4), Muhammad Mohsin Stamp Vendor (PW5), Amir Ali (PW6), Haji Faqir Muhammad (PW7), Akhtar Hussain Stamp Vendor (PW8) and Hafiz Abid Hassan Jamal the other Stamp Vendor (PW10). Besides the said oral

evidence the plaintiff also produced the documentary evidence in the shape of Exh.P.1 to P13. In rebuttal the respondent/Defendant No. 2 Muhammad Khalil himself appeared as DW1 and also produced Allah Wasaya (DW2) in his oral evidence. He tendered documentary evidence in the shape of Exh.D1 to D9.

5. After appreciating the evidence available on file the learned trial Court vide judgment and decree dated 14.11.2000 dismissed the suit of the petitioner/plaintiff to the extent of defendants/Respondents No. 2 to 5 whereas the suit of the plaintiff/petitioners was decreed against the defendant/Respondent No. 1 by declaring the plaintiff/petitioners entitled for the return of 5 marlas plot in Mouza Mannawan, Lahore besides a sum of Rs.15,200/- regarding cheque received by Defendant No. 1 and Rs.55,000/-as observed while answering Issue No. 3. The plaintiff was also awarded damages of Rs.50,000/- agaisnt Defendant No. 1 for breach of contract. Feeling dissatisfied the petitioner-plaintiff filed an appeal before the learned lower appellate Court which met with the same fate vide judgment and decree dated 31.7.2008 passed by the learned Additional District Judge Bahawalpur. Hence the instant civil revision has been filed by the successors of Muhammad Amin plaintiff, who died during the pendency of the appeal.

6. The learned counsel for the petitioners has argued that the impugned judgments and decrees are reflective of misreading and non-reading of evidence; that the judgments and decrees are self contradictory as on the one hand the plaintiff has been awarded a decree of Rs.70,200/-in addition to transfer of plot of measuring 5 marlas from Muhammad Rasheed Respondent-Defendant No. 1, but on the other hand both the Courts below have dismissed the suit regarding the disputed plot/shop, which are liable to be set aside by allowing the instant civil revision.

7. Conversely the learned counsel for the respondent/Defendant No. 2 has supported the impugned judgments and decrees while arguing that the respondent/Defendant No. 1 had purchased the disputed plot in an open auction and thereafter the same was transferred by him to Defendant No. 2, which fact has been fully supported by the functionaries of the relevant department; that Defendant-Respondent No. 2 is a bona fide purchaser without notice and that the suit filed by the petitioner is collusive to usurp the plot in dispute from him, and that that the suit filed by the plaintiff/petitioners being based on contradictory pleas about the ownership of the disputed plot/shop has rightly been dismissed to the said extent after appreciating the evidence available on the record in a proper manner and the concurrent findings arrived at by the learned Courts below are not open to any interference in the revisional jurisdiction.

8. Arguments heard record perused.

9. In various authoritative judgments rendered by the superior Courts (BENAMI) is defined as that where a person buys property with his own money but in the name of another person or buys property in his own name and subsequently transfers it in the

name of another without any intention, either in case to benefit such other person, the transaction is called Benami. Literally Benami means without name, viz; a transaction effected by a person without using his own name. The factors to be taken into consideration are:--

(i) Source of Consideration.
(ii) From whose custody original title deed came.
(iii) Who is in possession of the property, and
(iv) Motive of benami.

The essential elements must exist for benami transaction between ostensible owner and the purchaser for purchase of property in the name of ostensible owner for the benefit of person who has to make payment of consideration and importantly existence of motive for creation of benami title is relevant. For purpose of determining whether title vesting is merely benami, absence of motive always goes against plaintiff. As per claim in the suit, Muhammad Amin plaintiff was the actual owner of the disputed plot/shop while his brother Muhammad Rasheed Defendant-Respondent No. 1 was only a benamidar and the heavy onus laid on the shoulder of the plaintiff to prove that actually he had purchased the disputed plot from the Housing and Physical Department after making full payment to the said department, but for some certain reason-motive he got transferred the disputed plot in the name of his brother/Defendant No. 1 and he was in continuous physical possession thereof along with the original title documents.

10. To prove the elements of benami transaction the plaintiff produced Ghulam Sabir Senior Clerk, Housing and Physical Department (PW-3). whose testimony has itself contradicted the stand taken by the plaintiff/petitioners when he categorically stated that the disputed plot had been purchased by defendant/Respondent No. 1. During the cross examination PW-3 conceded that the receipts Exh.P-2 & P-3 contained no signature of the plaintiff whereas Abdul Salam while appearing as PW-4 narrated that he had sold the stamp paper of Exh.P-9/agreement and also obtained the signature of Defendant-Respondent No. 1 on the said stamp paper as well as in the Register maintained for the said purpose, Muhammad Mohsin PW-5 stated that he is son of Stamp Vendor and he identified the signatures of his father Abdul Rasheed over the stamp paper Exh.P3 & P4. Amir Ali while appearing before the learned trial Court as PW-6 stated that he was one of the arbitrators and Defendant No. 1 had admitted the plaintiff to be real owner before the arbitrators. Whereas the plaintiff while appearing as PW-9 affirmed the stance which he took in his plaint. A minute scrutiny of the statements of the said PW-s depicts that plaintiff remained fail to prove that he had actually paid the entire price of the disputed plot. Even no motive for executing a benami transaction in favour of the Defendant No. 1/Respondent No. 1 was also disclosed in the entire evidence produced by the plaintiff. However the plaintiff succeeded to prove the fact that the Defendant No. 1 had received certain amount from Dr. Muhammad Tariq, but there is no convincing evidence available on the record to support the plaintiff/petitioners' version that transfer of the

disputed plot/shop in the name of Respondent-Defendant No. 1 was a benami transaction. The title documents issued by the Housing and Physical Department pertaining to the transfer of the disputed plot/shop are in favour of Defendant-Respondent No. 1, which carry strong presumption to negate the version of the plaintiff and the possession of the disputed property is also lying with Defendant No. 2. In such facts and circumstances, the plaintiff has miserably failed to prove that Defendant No. 1 did not purchase the disputed plot rather he himself had purchased the plot in dispute. So the plea of the petitioners/plaintiff that Respondent No. 1/Defendant No. 1 was a benamidar owner could not be proved during the trial Court by producing convincing and cogent evidence.

11. As regards the other plea raised by the petitioners/plaintiff that he had become owner of the disputed plot/shop on account of arbitration proceedings as a result whereof award (Exh.P9) was announced, suffice it to say that a perusal of the said document itself makes clear that it was not made a rule of Court and if at all it is presumed to be so even then no lawful award had been announced in favour of the petitioners/plaintiff, which neither fulfils the requirements of an award as the same was not got registered nor the petitioners/plaintiff had ever applied for making the said award rule of the Court under sections 14 & 17 of the Arbitration Act. In such facts and circumstances, the alleged award did not create any right or title regarding the disputed plot in favour of the petitioners/plaintiff and they cannot claim decree for declaration on the basis of said award as the award only becomes effective when it is made rule of Court and until passing of such decree by the Court of law, the award has no status in the eyes of law. The unregistered award even if received in evidence will not operate to create, declare, assign, limit or extinguish, which in present or future, any right or interest whether vested or contingent to or in immoveable property. Reliance can be placed upon Haji Nawab Din vs. Sh. Ghulam Haider and another (1988 SCMR 1623).

12. On the other hand as defendant/Respondent No. 1, who is real brother of the plaintiff, has never appeared in the Court as a witness nor contested the suit, but he was proceeded ex-parte, therefore, has been rightly burdened with the partial decree of Rs.55,000/-and Rs.15,200/- along with damages for the breach of contract.

13. In the light of above discussion I am not inclined to interfere with the well reasoned judgments and decrees passed by the Courts below in exercise of revisional jurisdiction conferred upon this Court by Section 115 CPC, the scope whereof is narrower and it can be exercised only if the judgments or orders under challenge are found to be fanciful, perverse and illegal or those were passed without jurisdiction, which is not the case in hand. The instant civil revision being devoid of any merit is dismissed.

(R.A.) Revision dismissed.

PLJ 2014 Lahore 1136
[Bahawalpur Bench Bahawalpur]
Present: Ch. Muhammad Masood Jahangir, J.
MUHAMMAD NASIR--Petitioner
Versus
SULTAN AHMED—Respondent

C.R. No. 98 of 2014, decided on 19.2.2014.

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

----O. XXXIX, Rr. 1 & 2--Application for grant of temporary injunction--Agreement to sell was forged and fictious document--Execution of agreement to sell was denied--Validity--It is a settled principle of law that mere execution of agreement to sell neither creates, nor extinguishes any right or title in immoveable property--Disputed property is still owned by respondent/defendant and petitioner/ plaintiff is supporting his claim on basis of an agreement to sell--Execution of the agreement is yet to be proved by producing cogent and reliable evidenced--It is now well settled principle that where execution of alleged agreement to sell is disputed by executant with assertion that such agreement was forged and fabricated then refusal of temporary injunction is a rule but where terms and conditions of agreement are admitted then, in such an event, temporary injunction to maintain status quo is issued by Courts--Respondent/defendant has denied execution of disputed agreement with assertion that it is a forged and fabricated document, therefore, lower appellate Court while observing that petitioner/plaintiff has no prima facie case has rightly dismissed application of petitioner/plaintiff for grant of temporary injunction while allowing appeal preferred by respondent/ defendant--Petitioner is found to have no prima facie case and he will also not suffer any irreparable loss as balance of inconvenience also does not tilt in his favour, therefore, there is no ground existed to interfere with judgment passed by lower appellate Court, who has eminently dealt with matter--Revision was dismissed..

[P.] A, B, C & D

Mr. Muhammad Saleem Faiz, Advocate for Petitioner.

Date of hearing: 19.2.2014

ORDER

Brief facts of the case for the disposal of the instant civil revision are that the petitioner/plaintiff filed a suit for performance of an agreement to sell dated 10.12.2012. Alongwith the suit, the petitioner/plaintiff also filed an application for grant of temporary injunction. The respondent/defendant contested the said suit with the assertion that the agreement to sell was forged and fictitious document. The application filed under Order XXXIX Rules 1 & 2 of CPC was also resisted by the respondent/defendant by filing written reply. The learned trial Court accepted the said application vide order dated 21.6.2013 which was questioned by the respondent/defendant before the learned lower appellate Court by filing an appeal which came up for hearing before learned Addl. District Judge, Chishtian who accepted the appeal and dismissed the application of the petitioner/plaintiff under Order XXXIX Rules 1 & 2, CPC vide judgment dated 17.2.2014. Feeling dissatisfied, the petitioner/plaintiff has filed the instant civil revision.

2. The learned counsel for the petitioner/plaintiff has argued that the petitioner/plaintiff has a prima facie case; that balance of convenience also tilts in favour of the petitioner/plaintiff but the learned lower appellate Court without considering the merits of the case has allowed the appeal filed by the respondent/defendant and dismissed the application for grant of injunctive order filed by the petitioner/plaintiff before the learned trial Court; that the learned lower appellate Court has exercised those powers which were not vested on it by law and not exercised those powers which were vested on it by law. He has lastly prayed for acceptance of the instant civil revision and setting aside of the impugned judgment dated 17.2.2014 passed by the learned lower appellate Court and further prayed for restoration of the order dated 21.6.2013 passed by the learned trial Court.

3. Arguments heard and record perused.

4. The respondent/defendant by filing his written statement categorically denied the execution of the agreement to sell. He also asserted in his written statement that the disputed agreement was forged and fabricated document, which had been maneuvered by playing fraud. It is a settled principle of law that mere execution of agreement to sell neither creates, nor extinguishes any right or title in the immoveable property. The disputed property is still owned by the respondent/defendant and the petitioner/plaintiff is supporting his claim on the basis of an agreement to sell. The execution of the said agreement is yet to be proved by producing cogent and reliable evidenced. At present, the petitioner/plaintiff cannot be equipped with temporary injunction as still it is the respondent/defendant who is the owner of the disputed property. It is now well settled principle that where the execution of the alleged agreement to sell is disputed by the executant with the assertion that such agreement was forged and fabricated then refusal of temporary injunction is a rule but where the terms and conditions of agreement are admitted then, in such an event, temporary injunction to maintain status quo is issued by the Courts.

In the present case, as the respondent/defendant has denied the execution of the disputed agreement with the assertion that it is a forged and fabricated document, therefore, the learned lower appellate Court while observing that the petitioner/plaintiff has no prima facie case has rightly dismissed the application of the petitioner/plaintiff for the grant of temporary injunction while allowing appeal preferred by the respondent/defendant. Further rule of lis pendens is also available and if the property in dispute is further alienated during the pendency of lis filed by the petitioner/plaintiff, then the said transfer will be fully covered by the said rule as stated supra. For the time being the petitioner is found to have no prima facie case and he will also not suffer any irreparable loss as balance of inconvenience also does not tilt in his favour, therefore, there is no ground existed to interfere with the judgment passed by the learned lower appellate Court, who has eminently dealt with the matter.

Resultantly, this Civil Revision having no force and substance is hereby dismissed in limine.

(R.A.) Revision dismissed.

2014 C L C 520
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
NATIONAL HIGHWAY AUTHORITY through Chairman and another----Petitioners
Versus
ABID MUGHAL and 2 others----Respondents

Writ Petition No.1265 of 2011, heard on 4th November, 2013.

Civil Procedure Code (V of 1908)---

----O. VI, R.17---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of damages---Application for amendment of plaint---Scope---Trial Court dismissed application for amendment of plaint but same was accepted by the Revisional Court---Validity---Trial Court had passed fanciful order in a clandestine manner---Trial Court had failed to appreciate the provisions regarding amendment of pleadings and dismissed application for amendment of plaint on the assumption that plaintiff had availed many opportunities to adduce evidence---Order of Trial Court was not according to the mandate of O.VI, R.17, C.P.C.---Application under O.VI, R.17, C.P.C. could only be dismissed on the ground that the proposed amendment would change the nature or complexion of plaint/written statement---Illegality and material irregularity committed by the Trial Court had rightly been corrected by the Revisional Court in circumstances---Case could not be remanded merely for the reason that defendants were not heard by the Revisional Court as defendants had even failed to make out case before the High Court that the proposed amendment would change the nature or complexion of plaint--Findings of Revisional Court were based on proper appraisal of law---Constitutional petition was dismissed with costs.

Muhammad Khan Zaman for Petitioners.
Nemo for Respondents.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The facts necessitated for the disposal of the instant writ petition are that respondent No.1 (Abid Mughal) filed a suit for recovery of damages to the tune of Rs.25,00,000 on the ground that the

petitioner/NHA had demolished his residential house situated in land bearing Khewat No.245, Khatooni No.343, Khasra No.2. The petitioners/defendants resisted the said suit by filing their written statement. Due to the divergent pleadings of the parties, the learned trial Court framed the issues and fixed the Case for evidence of the plaintiff/respondent No.1. In the meanwhile the plaintiff/respondent No.1 filed an application under Order VI, Rule 17, C.P.C. for the amendment of the plaint. The petitioners/defendants contested the said application and the learned trial Court was pleased to dismiss the said application vide his order dated 6-4-2010. Feeling aggrieved, the plaintiff/respondent No.1 filed a civil revision before the learned Additional District Judge, Rawalpindi. The revisional court conducted ex parte proceedings against the petitioner on 6-10-2010 and allowed the civil revision vide order dated 15-10-2010 and also accepted the application for amendment of plaint through the said order. The petitioners assailed the said order before the said learned Additional District Judge by filing an application for setting aside ex parte order dated 15-10-2010, which has been dismissed by the learned Additional District Judge, Rawalpindi, vide order dated 12-3-2011. The petitioners have assailed the orders dated 12-3-2011, 15-10-2010 and 6-10-2010.

2. The learned counsel for the petitioners has argued that the impugned orders are illegal, void and coram non judice. He further submitted that the learned Additional District Judge/revisional court passed the impugned orders in violation of principle of natural justice and fundamental rights of the petitioner. He further submitted that the order dated 12-3-2011 of dismissing the application of the petitioners for setting aside order of ex parte proceedings and ex parte final order is sheer violation of law. His next submissions is that the revisional court failed to examine the report of Process Server as well as the postal receipt regarding the address of the petitioners and respondent No.1 fraudulently procured the ex parte order against the petitioners before the revisional court

3. Arguments heard. Record perused.

4. The respondent No.l/plaintiff sought amendment in his plaint by filing application under Order VI, Rule 17, C.P.C. which is on file as Annexure-C. The proposed amendment in para No.1 of the plaint is reproduced hereunder:---

"That plaintiff is owner in possession of land measuring 12 Marlas out of total land measuring 42 Kanals, 16 Marlas bearing Khewat No.245, Khatooni No.343, Khasra No.2 Qittas land measuring 1 kanal out of total land measuring 301 Kanals, 7 Marlas bearing Khewat No.284, Khatooni Nos.401 to 417 Qitta 23 situated in the revenue estate of Village Barra Hotar, Tehsil Murree, District Rawalpindi."

5. The learned trial Court vide his order dated 6-4-2010 dismissed the said application filed by the plaintiff/respondent No.1. The operative para of order dated 6-4-2010 passed by the learned trial Court is reproduced hereunder:---

"Plaintiff has filed this suit for recovery of Rs.25 lacs as damages against the defendants which is pending since 2007, it is a suit for damages and amendment in the plaint regarding any property will not effect the real contention and dispute between the parties, as it is suit for damages, issues have already been framed on 15-12-2008 and final and last opportunity to the plaintiff for production of evidence has already been granted, so at this stage, this application is not maintainable as it is old one direction case, so the application for amendment in the plaint is hereby dismissed. Plaintiff is directed to produce his entire evidence on 11-5-2010."

6. Sorry to say that the learned trial Court passed a fanciful order while dismissing the application of the respondent/plaintiff in a clandestine manner. The learned trial Court failed to appreciate the provisions regarding amendment of pleadings i.e. Order VI, Rule 17, C.P.C. and dismissed the said application on the assumption that plaintiff/respondent No.1 has availed many opportunity to adduce the evidence, therefore, the plaintiff/respondent No.1 is not entitled for the amendment of his plaint. The said verdict is not according to the mandate of Order VI, Rule 17, C.P.C. The application under Order VI, Rule 17, C.P.C. can only be dismissed on the ground if the proposed amendment changes the nature or complexion of plaint/written statement.

7. It will be enough to say that the lower courts must adhere to the agonies of general public which are being caused by such like order as mentioned supra. The proceedings and the orders of the Judiciary should not be shorn of the sanction of social justice, law and morality. It must be added that from the creation of Judicial System and especially now-a-days after the restoration of our Higher Judiciary, the courts of law in our society have been strengthened much lot and when such a pedestal is available to the Judiciary, then learned courts below are bound to pay the attention to dispense with the justice after applying judicious mind, because it is the basic mandate of law that justice should be administered. Thus, it is obvious and clear that no court in the country has jurisdiction to decide about the rights of the parties wrongly or in sheer violation of law and the courts have no exception to the said rule. Such like orders are meant to prolong the litigation which cannot be recommended by any court of law. The illegality and material irregularity committed by the learned trial court has very rightly been corrected by the learned revisional court in true spirit of law by allowing the revision petition filed by the plaintiff/respondent and also by accepting his application filed under Order VI, Rule

7, C.P.C. for the amendment of the plaint. The case cannot be remanded merely for the reason that the petitioners/defendants were not heard by the learned revisional court while passing the impugned order as the learned counsel for the petitioners has failed to make out the case even before this court that the proposed amendment will change the nature or complexion of the plaint filed by the respondent/plaintiff.

8. The findings of the learned Additional District Judge are based on proper appraisal of law and do not call for any interference in exercise of constitutional jurisdiction of this court. This writ petition is without merit and the same is hereby dismissed with costs. The learned trial Court should decide the suit expeditiously.
AG/N-59/L Petition dismissed.

2014 C L C 1384
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Syed SULTAN SHAH----Petitioner
Versus
GHULAM QADIR and 8 others----Respondents

Writ Petition No.1958 of 2005, heard on 14th April, 2014.

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

----S. 12(2)---Specific Relief Act (I of 1877), S.12 ---Suit for specific performance of an agreement to sell---Decree allegedly obtained by fraud and collusiveness without knowledge of owner of property---Application under S.12(2), C.P.C., filing of---Limitation---Plaintiffs filed a suit for specific performance against the defendant regarding an oral agreement to sell---Defendant filed written statement objecting that he had no nexus with the disputed property and that the petitioner was the actual owner of the property, who should be impleaded as a party to the suit---Trial Court decreed the suit despite such objection from the defendant---Subsequently upon coming to know about the decree petitioner filed an application under S.12(2), C.P.C. for setting aside the same---Appellate court dismissed said application on ground of limitation---Legality---Defendant to the suit had taken a clear stance and objection that disputed property was owned not by him but by the petitioner, who should be impleaded as a party to the suit---Trial Court in light of such objection also framed a specific issue, but despite that did not take care of such issue while passing the decree---Question of limitation was pivotal, but where allegation of fraud and collusiveness was raised by the petitioner in his application under S.12(2), C.P.C., then courts below should have framed issues, collected evidence and then decided the matter---Application under S.12(2), C.P.C. filed by petitioner could not have been decided summarily as the petitioner had raised allegation of fraud and collusion---Petitioner had a cause of action against the plaintiffs, therefore in his absence no valid judgment and decree could have been passed---Impugned judgment of appellate court below was set aside and High Court directed that application filed by petitioner under S.12(2), C.P.C. would be deemed to be pending before the lower appellate court, which shall decide the same after framing of issues and collecting evidence afresh in accordance with law---Revision petition as allowed accordingly.

Mian Muhammad Amin and another v. Mst. Khursheed Begum alias Naseem Begum through Legal Heirs PLD 2006 Lah. 371; Muhammad Ilyas v. Muhammad Bashir PLD 2006 Lah. 365; Mst. Rasool Bibi through Legal Heirs v. Additional District Judge, Sialkot and another PLD 2006 Lah. 181 and Faizum alias Toor v. Nader Khan and others 2006 SCMR 1831 distinguished.

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

----S. 12(2)---Specific Relief Act (I of 1877), S.12---Suit for specific performance of agreement to sell---Decree obtained by fraud and collusion---Application under S.12(2), C.P.C., filing of---Limitation---Procedure to be adopted by the court---Question of limitation was pivotal and important to decide a lis, but where allegation of fraud and collusiveness was raised by an applicant in his application under S.12(2), C.P.C., then proper course for the Trial Court was to frame issues, collect evidence and then decide the matter.

(c) Limitation---

----Limitation was a mixed question of law and fact.

(d) Fraud---

----Fraud vitiated all solemn acts.

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

----S. 12(2)---Challenging a decree, judgment, instrument or deed obtained by fraud---Limitation---Such decree, judgment, instrument or deed was a nullity in the eyes of law and could be questioned at any time.

(f) Fraud---

----Question of fraud was never purely a question of law and could be thrashed after recording of evidence.

Mst. Zulaikhan Bibi through L.Rs. and others v. Mst. Roshan Jan and others 2011 SCMR 986 rel.

Shaigan Ijaz Chadhar for Petitioner.

Muhammad Baleegh uz Zaman for Respondents.

Date of hearing: 14th April, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The facts germane for disposal of the instant civil revision are that Ghulam Qadir and Munir Mehfooz respondents Nos.1 and 2 filed a suit for specific performance against Anwar Shah respondent No.3 regarding an oral agreement to sell dated 15-2-1994. The said suit was contested by Anwar Shah respondent No.3 with the assertions that he had no nexus with the disputed property, which was owned by Syed Sultan Shah the present petitioner.

2. The learned trial Court framed the following issues out of the divergent pleadings of the parties:---

(1) Whether the plaintiff has no cause of action and locus standi to file this suit? OPD

(2) Whether the suit is bad for non-joinder of necessary parties? OPD

(3) Whether one Sultan Shah was in fact owner of the suit-land and the defendant did not have any concern thereof? OPD

(4) Whether the plaintiffs are entitled to get decree for specific performance of contract as prayed for? OPP

(5) Relief.

3. After collecting stock of evidence the suit was decreed by the learned trial Court vide judgment and decree dated 10-2-2001, which was assailed by Anwar Shah respondent No.3 by filing an appeal before the learned lower appellate court, who has dismissed the same vide judgment and decree date 17-1-2002. The respondent No.3 also filed a review application before the learned lower appellate court which was also dismissed vide judgment dated 3-3-2003.

4. Syed Sultan Shah the present petitioner filed an application under section 12(2), C.P.C. for setting aside of the judgment and decree dated 10-2-2001 passed by the learned trial Court and the judgments and decrees dated 17-1-2002 and 3-3-2003 passed by the learned appellate court whereby review application filed by respondent No.3 was dismissed. The learned lower appellate court dismissed the application filed by petitioner under section 12(2), C.P.C. vide judgment dated 7-7-2005. The petitioner has challenged the said judgment by filing the instant civil revision.

5. The learned counsel for the petitioner has argued that learned lower appellate court has passed the judgment against law and facts, that without framing of issues and recording of evidence the learned lower appellate court travelled beyond his jurisdiction while dismissing the application under section 12(2), C.P.C., that factual controversy between the petitioner and decree-holder existed and the matter could not be disposed of in a summary manner without making the factual inquiry, that the judgment-debtor/defendant of the main suit for specific performance had disclosed the facts by filing written statement that disputed property was owned by the petitioner then it was incumbent upon the decree-holder/plaintiff as well as the learned trial Court to have impleaded the petitioner in the said suit, that in the light of written statement the learned trial Court also framed a specific Issue No.3 in this regard but even then the petitioner was not impleaded in the said proceedings, that the learned lower appellate court dismissed the application under section 12(2),

C.P.C. filed by the petitioner on the ground of limitation, which was mixed question of law and fact and that the learned lower appellate court exercised its jurisdiction in an illegal manner and committed material irregularity. He lastly prayed for the acceptance of the instant civil revision, setting aside of the impugned judgment passed by the learned lower appellate court and further that the matter be remanded to the learned lower appellate court with a direction to decide the same afresh after striking issues and collecting evidence of the parties.

6. Conversely the learned counsel for the respondents has supported the impugned judgment and stated that that the question of limitation is not only important factor rather it affected roots of the case and the learned lower appellate court has rightly dismissed the application under section 12(2), C.P.C. filed by the petitioner. He placed his reliance on the judgments reported as Mian Muhammad Amin and another v. Mst. Khursheed Begum alias Naseem Begum through Legal Heirs (PLD 2006 Lahore 371), Muhammad Ilyas v. Muhammad Bashir (PLD 2006 Lahore 365), Mst. Rasool Bibi through Legal Heirs v. Additional District Judge, Sialkot and another (PLD 2006 Lahore 181) and Faizum alias Toor v. Nader Khan and others (2006 SCMR 1831) and lastly prayed for the dismissal of the instant civil revision.

7. Arguments heard record perused.

8. The original plaint of the suit for specific performance of an oral agreement filed by the respondents Nos.1 and 2 against Anwar Shah respondent No.3 is, available at pages 7 to 11. The contesting written statement filed by respondent No.3/defendant of the suit is also appended with the instant civil revision at page 14. The perusal thereof clearly reveals that respondent No.3 being defendant took a clear stance that disputed property was owned by Sultan Shah. The learned trial Court in the light of above said objection of the respondent No.3 framed a specific Issue No.3 in this regard, which is reproduced in para-1 ante. The said issue is also narrated supra. Thereafter the learned trial Court decided the said issue along with Issue No.4 in favour of the plaintiffs/respondents Nos.1 and 2 vide judgment and decree dated 10-2-2001. A perusal of the judgment of the learned trial Court does reflect that while deciding Issue No.3 along with Issue No.4 the question, of ownership of disputed property in favour of Sultan Shah the present petitioner has been discussed in detail by the learned trial Court but despite the fact that respondent No.3 being defendant specifically pleaded in his written statement that Sultan Shah the present petitioner was not impleaded as party by respondent No.1/plaintiff of the said suit nor the learned trial Court took care of said fact. The appeal filed by the respondent No.3 has also been dismissed by the learned lower appellate court without taking into consideration the said aspect. The assertion of the petitioner that despite the fact that it was disclosed before the learned trial Court that the disputed property was owned

by the petitioner, who was to be impleaded as party, but the impugned judgments were rendered by both the courts below without any jurisdiction has substance and force. The petitioner asserted in his petition under section 12(2), C.P.C. that the proceedings of the suit, appeal and reviews application were neither in his knowledge nor any intimation/notice had been served upon him and the proceedings conducted in the said matters was kept secret from him, which came into his knowledge two days prior to the institution of the application under section 12(2), C.P.C. The said assertion has been denied by the respondent in his written statement merely while replying that the same was wrong and baseless, but it has not been negated by the respondent/decree-holder in clear words. No doubt the question of limitation is pivotal and important fact to decide the lis, but where the allegations of fraud and collusiveness are raised by a petitioner in his petition under section 12(2), C.P.C. then a proper course for learned lower appellate court was to frame the issues, collect the evidence and then to decide the matter.

9. The averments contained in the petition are presumed to be correct unless it is rebutted and when allegation of fraud was also averred therein, the matter could not have been resolved without record of evidence. The petitioner has categorically stated in the petition that disputed judgments were based upon fraud and collusiveness, which came into their knowledge two days prior to the institution of their petition under section 12(2), C.P.C. It is a well-settled principle of law that limitation is a mixed question of law and fact and proper appreciation of evidence was the only requirement for the decision of adjudication of the question raised in the application submitted by the petitioner. The petition under section 12(2), C.P.C. filed by the petitioner also prima facie discloses cause of action against the respondent and establishes that it was asserted before the learned trial Court that disputed property was belonging to the petitioner, therefore, in his absentia no valid judgment and decree could be passed.

10. As the patent wrong is found in the impugned judgments passed by the learned trial Court as well as of the learned lower appellate court which went to the roots of the case, the petition filed by the petitioner under section 12(2), C.P.C. could not be decided summarily. As the petitioner has alleged fraud and collusiveness in his petition and the fraud vitiates all solemn acts and any instrument, deed, or judgment or decree obtained through fraud is a nullity in the eye of law and can be questioned at any time so much so that they can be ignored altogether by any court of law before whom they are produced in any proceedings. Question of fraud is never purely a question of law and same can be thrashed after recording of evidence. In this regard reliance can be placed upon the judgment reported as Mst. Zulaikhan Bibi through L.Rs. and others v. Mst. Roshan Jan and others (2011 SCMR 986).

The operative paragraphs Nos.12 to 14 thereof being relevant are reproduced hereunder:---

"12. Fraud defined.--- Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it

(4) any other act fitted to deceive;

(5) any such act or omissioin as the law specially declares to be fraudulent.

13. It is by now a settled proposition of law that fraud vitiates all proceedings. In Muhammad Younas Khan v. Government of N.-W.F.P. (1993 SCMR 618) this court observed as follows:---

"There is no cavil with the proposition that fraud vitiates all solemn acts and any instrument, deed, or judgment, or decree obtained through fraud is a nullity in the eye of law and can be questioned at any time so much so that they can be ignored altogether by any Court of law before whom they are produced in any proceedings. Fraud is defined in section 17 of the Contract Act as the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; the active concealment of a fact by one having knowledge or belief of the fact; a promise made without any intention of performing it; any other act fitted to deceive; and any such act or omission as the law specially declares to be fraudulent. It was observed by this Court in the case of Abdul Wahid v. Mst. Zamrut (PLD 1967 SC 153) that a question of a fraud is never purely a question of law as it involves firstly a finding with regard to fact, that is to say conduct on the part of the party alleged to consider whether such proved conduct amounts in the circumstances of the case of fraud."

14. In the suit filed on 22-1-1946 in which the ex parte judgment and decree was obtained, that fact was concealed that the suit-land was a State land and no transfer could be effected without permission of the competent authority under section 19 of the Colonization of Government Lands (Punjab) Act and Provincial Government or Collector were not impleaded as party. Having obtained the ex parte decree it was

kept secret for years i.e. till the filing of the instant suit on 3-7-1972. The exact address of respondent/defendant (donee) Abbas Khan was withheld for reasons other than bona fide and he was wrongly shown to be residing at Loyalpur. It was further concealed that the defendant/donee in the said suit had been gifted the land in terms of Mutation No.10 dated 18-4-1942 (Exh.P1). These circumstances indicate that the facts were concealed by the predecessor-in-interest of the appellant/plaintiff Niaz Bibi having full knowledge of the actual facts and with a view to deceive not only the court but also respondent/defendants' predecessor-in-interest i.e. donee Abbas Khan. The judgment procured pursuant through such acts of concealment is fraudulent and would be hit by section 17 of the Contract Act. Fourth; it is in evidence that the appellant/plaintiffs had made abortive attempts to challenge the ownership of Abbas Khan, predecessor-in-interest of the respondent/plaintiffs as the learned Additional District Judge in para 13 of the judgment had specifically referred to it that they had earlier on filed a civil suit which was withdrawn on 4-9-1963. This finding remained unchallenged by the appellant/plaintiffs in the body of the civil revision before the High Court which we have examined as part of the record, fifth; the constructive possession of the predecessor-in-interest of the respondents namely Abbas Khan is evident from the testimony of D. W.2 Manzoor ul Haq, his son, who is Numberdar of the area. He stated that the suit-land was given to Hawas Khan and Khawas Khan in the year 1949/1950 on share produce basis and they used to give the share till 1969 when his father Abbas Khan was arrested in a criminal case and thereafter Khawas and Khawas stopped giving them the share produce. When his father was acquitted in 1972 by the High Court and asked for his share in produce, they filed the suit, sixth; it is not disputed that Abbas Khan remained Numberdar all along and he was succeeded by Manzoorul Haq his son who appeared as D.W.2. This is yet another circumstance which vindicates the case of respondent/ defendants."

11. The contention of the learned counsel for the respondent that disputed judgment and decree came into the knowledge of the petitioner on 29-4-1999 when presence of Tassaduq Hussain the real son of petitioner was marked during the proceedings of the suit by the learned trial Court is without any force. The perusal of file reveals that no doubt on 29-4-1999 the learned trial Court observed the presence of Tassaduq Hussains but it is not reflected by said order that he was son of present petitioner nor the knowledge of son of petitioner can be assumed the knowledge of the petitioner.

12. Both the courts below have taken a wrong inference from the said interim order, which is not based on reasoning and the instant decree was passed in the suit for

specific performance filed by the respondents on the basis of an oral agreement, which does not bear any mention of title document that the disputed property was owned by the respondent No.3/defendant of the said suit.

13. The case-law cited by the learned counsel for the respondents runs on different footings. In Rasool Bibi's case the matter was decided after framing of issues and recording of evidence. Whereas in Mian Amin's, case the matter was again decided by courts after framing of issue regarding limitation and recording of evidence. In the said case the issue No.2 was: Whether the suit was in time? OPP. So the judgment in the said case is also not helpful to the case of the respondents. Then in Muhammad Ilyas's case the judgment was passed in a suit for pre-emption by this Court while taking into consideration sections 30 and 31 of Punjab Pre-emption Act 1991 and in Faizum alias Toor's case the said matter was also decided after full dressed trial and the august Supreme Court of Pakistan observed, that "in fact the petitioner was seeking extension of limitation under section 18 of Limitation Act on the ground of fraud".

14. Sequel of the above discussion is that the impugned judgment passed by the learned lower appellate court whereby application under section 12(2) filed by the petitioner was dismissed summarily is without lawful authority having been passed in sheer violation of law. The civil revision is allowed, and the impugned judgment dated 7-7-2005 passed by the learned lower appellate court is hereby set aside and the application filed by the petitioner under section 12(2), C.P.C. shall be deemed to be pending before the learned lower appellate court who will decide the same after framing of issues and collecting evidence afresh in accordance with law. He is further directed to decide the same within a period of four months positively. The parties are directed to appear before the learned District Judge, Gujrat on 5-5-2014 who may hear the matter himself or entrust the same to the court of competent jurisdiction.

MWA/S-57/L Revision allowed.

2014 M L D 532
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
LAEEQ AHMED KHAN and 2 others---Petitioners
Versus
Mst. FOUZIA ASIF and another---Respondents

Writ Petition No.2596 of 2013, decided on 5th November, 2013.

Cantonments Rent Restriction Act (XI of 1963)---
----Ss. 17 & 24---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Application for ejectment of tenant---Reasonable time---Laches, principle of---Striking off right of cross-examination of tenant---Interlocutory order---Scope---Landlady filed eviction petition wherein right of cross-examination of tenants was struck off by the Rent Controller---Validity---Tenants sought numerous adjournments for cross-examination but they failed to cross-examine the witnesses of landlady---Ample opportunities to cross-examine the witnesses were granted and even last opportunity subject to payment of cost was allowed---Rent Controller could not await for unspecified period for the tenants to cross-examine the witnesses---Procedure provided in the Cantonments Rent Restriction Act, 1963 for trial of an eviction petition was of summary manner but tenants for one reason or the other delayed the proceedings despite warning and imposition of fine---No appeal was competent against an interim order passed by the Rent Controller---When statute did not provide an appeal against an interlocutory order the same could not be challenged by way of constitutional petition---Remedy which was not directly available could not be sought through indirect means---If statute had provided remedy against order then constitutional jurisdiction of High Court could not be invoked to bypass provisions of said statute---Impugned order which caused no damage to the tenants and was incapable to cause any loss had been challenged---Right of appeal would accrue to the tenants when impugned order would be substituted by the final order and such right would be more extensive and beneficial---Impugned order had been challenged after a lapse of one year and two months---Constitutional jurisdiction of High Court could be invoked within a reasonable time which was 90 days---Present petition suffered from laches---Constitutional petition was dismissed being not maintainable.

1996 SCMR 1165; Muhammad Saeed v. Saratul Fatima and others PLD 1978 Lah. 1459; PLD 1975 SC 678 and PLD 2011 SC 676 rel.

Zaheen Akhtar Siddiqui for Petitioners.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---The petitioner Laeeq Ahmad Khan etc. being tenants through this constitutional petition have called in question the validity of order dated 12-9-2012 passed by learned Rent Controller, Wah Cantt, District Rawalpindi, whereby the petitioner's right of cross-examination has been struck off.

2. Briefly stated the facts are that respondent No.1 Mst. Fozia Asif filed a petition for ejectment regarding the disputed property, the description of which is fully described in Para No.1 of the writ petition, on the grounds of default, sublet and for personal bona fide requirement. In response to the summons, the petitioners appeared before the learned Rent Controller and submitted a contesting written reply. The learned Rent Controller framed the issues on 15-6-2011 in the light of the divergent pleadings of the parties. The landlord/respondent No.1 along with the witnesses filed affidavits and appeared before the learned Rent Controller for cross-examination. The petitioners and his counsel were afforded opportunities for cross-examination but they avoided the same and consequently the learned Rent Controller struck off the right of cross-examination of the petitioner vide his order dated 12-9-2012. Feeling aggrieved, the petitioners have questioned the said order through this petition.

3. The learned counsel for the petitioners submits that the petitioners/tenants were not afforded fair opportunities to cross-examine the respondent and her witness. He further submitted that on numerous occasions the witness and the respondent/landlord were not present in the court for subjecting to cross-examination. He further submitted that the impugned order is harsh one, which being against the law and facts of the case is not sustainable in the eyes of law and is liable to be set aside.

4. Arguments heard. Available record perused.

5. The ejectment application was filed by Fozia Asif, respondent No.1 on 14-10-2010 before the learned Rent Controller under the Cantonment Rent Restriction Act, 1963, for ejectment of the petitioners from the disputed property. The learned Rent Controller framed the issues vide order dated 15-6-2011 and fixed the case for evidence of the respondent No.1/landlady. The affidavits of the witnesses of the landlady were submitted before the learned Rent Controller, but the petitioners/ tenants sought numerous adjournments for cross-examination of the witnesses. Finally a last opportunity was granted to the petitioners to cross-examine the witnesses of respondent No.1, but petitioners failed to cross-examine the witnesses of the respondent No.1. The learned Rent Controller granted another last opportunity subject to costs to the petitioners to cross-examine the witnesses vide his order dated 4-7-2012, but they again failed to do so and finally their right to cross-examine the witnesses of respondent No.1 was struck off vide impugned order

dated 12-9-2012. It is clear from the record that ample reasonable opportunities were allowed to the petitioners and the learned Rent Controller could not wait for unspecified period for the tenants/ petitioners to cross-examine the said witnesses of the landlady. The procedure provided in the Rent Restriction Act for trial of an ejectment petition is of a summary manner, but the petitioners for one reason or the other delayed the proceedings despite warnings and imposition of fine and ultimately the learned Rent Controller passed the impugned order.

6. There is another aspect of the case that whether a constitution petition filed by the petitioners against the interlocutory order is maintainable or not. According to section 24 of the Act ibid, no appeal is competent against an interim order passed by learned Rent Controller. The relevant provisions of section 24 of the said Act for ready reference is hereby reproduced as under:--

"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 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:

Provide 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."

7. The law is well settled now that when a Statute does not provide an appeal against an interlocutory order then the same cannot be challenged by way of constitutional petition because it would create negation of the provisions of the Statute. If a remedy which is not directly available cannot be sought through indirect means. The Hon'ble Supreme Court of Pakistan in the case "1996 SCMR 1165" has held that Statute excluding a right of appeal against interim orders cannot be availed by bringing under attack such interim order in constitutional jurisdiction but the affected party has to wait till it merges into a final order and then to attack it before the proper exclusive forum created for examining such order. It has also been observed by the superior Courts that if a Statute provides the remedy against the order passed thereunder, then constitutional jurisdiction of High Court cannot be invoked to bypass the provisions of said Statute. In case "Muhammad Saeed v. Saratul Fatima and others" (PLD 1978 Lahore 1459) this Court observed that "the constitutional jurisdiction is invoked and made available in cases of imminent, grave and tangible threat to valuable personal and proprietary right and that too subject, inter alia, to the condition that the legal remedy, if at all any available in the circumstance, is not efficacious or adequate. In this case, an order which by itself caused no tangible damage to the petitioners, and is incapable causing any loss was

challenged. In order to pose a real threat it has to be substituted by another order and the moment it so happens a right of appeal would accrue to the affected party, which right is certainly more extensive and beneficial being available in the same hierarchy and on both questions of law as well as of facts.

8. Finally it is apparent on the file that the impugned order was passed by the learned Rent Controller on 12-9-2012 and the petitioners have challenged the same before this Court on 2-11-2013 through the instant petition for the first time, meaning thereby after a lapse of almost one year and two months for setting aside the same. It has been settled time and again by the Hon'ble Supreme Court of Pakistan in various judgments that constitutional jurisdiction under Article 199 can be invoked within a reasonable time and reasonable time is interpreted to 90 days. The present writ petition also suffers from latches. This view is strengthened in case-law "PLD 1975 SC 678" and "PLD 2011 SC 676".

9. In view of the above, the petition in hand has no force and substance and further is also not maintainable accordingly dismissed.

AG/L-15/L Petition dismissed.

2014 P L C (C.S.) 1315
[Lahore High Court]
Before Ch. Muhammad Masood Jahangir, J
SAEED AHMAD and 2 others
Versus
FEDERATION OF PAKISTAN through Secretary Establishment Division, Islamabad and 5 others

Writ Petition No.32249 of 2013, heard on 6th May, 2014.

Constitution of Pakistan---

----Art. 199--- Constitutional petition--- Notification No.F-1-1/2011, dated 14-10-2011---Civil service---Grant of 20% Deputation Allowance and upgradation as per the criteria laid down by the Federal Government vide Notification dated 14-10-2011 regarding the employees of education department for their promotion---Contention of the petitioners was that neither they had been given the benefit of upgradation as per the criteria of the Federal Government, nor 20% deputation allowance---Validity---Employees of similar cadre although belonging to Federal as well as Provincial Governments had to be treated alike---Federal Government of Pakistan through Establishment Division for disbursement of deputation allowance @ 20% had already issued letter dated 29-2-2012 to the Chief Secretary, Government of the Punjab with a request for payment of the said allowance---High Court directed the respondents to take all necessary steps to remedy the grievances of the petitioners as early as possible---Provincial Government was also directed to give effect to the letter dated 29-2-2012 in letter and spirit by way of disbursing 20% deputation allowance to the petitioners from the date of their entitlement---Constitutional petition was disposed of accordingly.

Dr. Naveeda Tufail and 72 others v. Government of Punjab and others 2003 SCMR 291 rel.
Mian Jaffar Hussain for Petitioners.
Aamir Rehman, Dy. A.-G. and Muhammad Arif Yaqoob Khan, A.A.-G. for Respondents.
Date of hearing: 6th May, 2014.

JUDGMENT

CH. MUHAMMD MASOOD JAHANGIR, J.--- The petitioners by filing the instant writ petition have prayed as under:---

(i) An appropriate writ may graciously be issued.

(ii) The respondents Nos.2 and 4 may kindly be directed to extend the benefit of Notification No.14-11-2011 to the petitioners as well and also to make appropriate speedy legislation for the upgradation of the petitioners posts.

(iii) The respondents Nos.5 and 6 may kindly be directed to release the petitioners 20% deputation allowance along with arrears without further delay.

(iv) Writ Petition may kindly be accepted with all consequential benefits.

(v) Any other and better relief, which this Honourable Court deemed appropriate in the circumstances of the case, may also be awarded to the petitioners.

2. The learned counsel for the petitioners has argued that the petitioners are working in the same scales since decades, but they have not been promoted to the next scale on the pretext that no post is available in the service structure due to which the petitioners promotion is blocked, that after the 18th Amendment in the Constitution of Islamic Republic of Pakistan the concerned department of the petitioners was handed over to the Provincial Government and the petitioners are working under School Education Department, Government of Punjab since then as their services were also surrendered in consequence of Provincial autonomy on deputation but the petitioners are not being paid 20% deputation allowance without any justification, that vide notification dated 14-10-2011 the Federal Government has followed the formula of up-gradation in TIME Scale from BS-16 and above under the Federal Directorate of Education w.e.f. 1-1-2011 as provided in the said notification, that the petitioners submitted representation to respondents Nos.2 and 4 for redressal of their grievance, but the same has not been acceded to vide reply dated 23-4-2013 on the sole score that they have been working on deputation basis and the petitioners have been deprived of their lawful rights without any fault on their part, that the petitioners are not being paid 20% deputation allowance as per law as provided by the Federal Government to the other employees, that the attitude of the respondents is vivid as the petitioners have been deprived from their right of promotion as well as release of 20% deputation allowance.

4. Conversely the learned D.A.-G. assisted by the learned A.A.-G. refuted the arguments advanced by the learned counsel for the petitioner and argued that according to policies which are in field the petitioners are not entitled for grant of any relief and that the writ petition under Article 212 of the Constitution of Islamic Republic of Pakistan is not maintainable as the controversy relates to administration act.

5. Arguments heard and record perused.

6. The admitted facts of the case are that the petitioner No.1 had joined the services in National Equipment Centre School Education Department, Lahore as Subject Specialist (Chemistry) in BS-17 on 1-8-1983. Then

after 23 years service he was given current charge to the post of Deputy Director (BS-18) in the year 2006 and was regularly promoted to said scale in the year 2007 after the retirement of Deputy Director, who is working in the said scale till now. However, petitioner No.2 joined the said department as Subject Specialist (Physics) BS-17 on 20-11-1988 and even after twenty-five years service he has not been promoted so far on the pretext that there was only one post of BS-18 which has already been filled. Similarly petitioner No.3 had been posted in the said department as Workshop Superintendent in BS-16 in the year 1982, who was promoted in the year 2006 to BS-17 and is serving there since then. The Federal Government vide notification dated 14-10-2011 has made a criteria regarding the employees of education department for their promotion. The case of the petitioners is similar to the said employees.

7. The comments have been filed by the different respondents, who have principally agreed the claim of the petitioners, but showed their inability to promulgate the same as it requires special legislation both at the Federal and Provincial level. For ready reference, the relevant extracts from their comments are reproduced hereunder:---

"Respondent No.1.

"Paras. 6-8.--- The matter relating to career progression of devolved employees shall be addressed after promulgation of the Provincial legislation. Moreover, with the approval of the Prime Minister of Pakistan, the issue of Provincial Legislation has been forwarded to the forum of Council of Common interests."

Respondent No.5.

"6. The facts narrated in this para are based on record, hence the same are admitted, however, it is submitted that the recommendations of any high up cannot give a right to any public servant until and unless the relevant Ministries make service structure/rules.
7. Admitted to the extent that the Notification No.F.1-1/2011-EDU Dated 14-10-2011, issued by the Federal Government has adopted the formula of up-gradation in TIME SCALE from B-16 and above. The Federal Government may promote the petitioners under application of this Notification, however, the said Notification does not pertain to the petitioners specifically.

8. Matter of record. The reply of Joint Secretary Devolution Cell, Cabinet Division indicates that the formulation of legislation regarding the promotion of employees transferred on deputation under 18th amendment is subject to the promulgation at Federal as well as Provincial legislation.

Respondent No.2.

"Para.2.--- The matter of posting and transferring of government servants under section 10 of Civil Servants Act, 1973 as well as upgradation of posts and grant of 20% deputation allowance etc falls within the purview of the Establishment Division and the Government of the Punjab."

8. The said question has already been dealt with by the learned Islamabad High Court in the order dated 12-3-2013 passed in W.P.No.1442 of 2012 and relevant portion thereof is reproduced below:---

"3. There is no denial that petitioners are lurking in the arena of uncertainty due to inaction on the part of respondents. Bureaucratic approach to shift the responsibility on others is, culture in our set up and instant matter is no exception. Respondents are not ready to realize that merely paying salary to Government Employees is not sufficient, as seniority of any Government Employee is pride for which every employee aspire.

4. In this view of the matter instant petition is allowed and respondents are directed to take all remedial steps to undo the wrong and redress the grievance of the petitioners within one month of the receipt of instant order."

9. The august Supreme Court of Pakistan in the judgment reported as Dr. Naveeda Tufail and 72 others v. Government of Punjab and others (2003 SCMR 291) has resolved the controversy that the employees of similar cadre although belonging to Federal as well as Provincial Governments have to be treated alike. The relevant portion from the said judgment is reproduced as follows:---

"The petitioners, being ad hoc employees of Provincial Government, cannot claim regularization as of right in the light of policy of Federal Government but the principle of equality as embodied in Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, would demand that they while facing the similar circumstances, should be treated in the same manner. The principle of equality

would impliedly be attracted in favour of the petitioners as they being ad hoc lecturers in the Provincial Government and therefore, it would be fair, just and proper to consider their cases for regularization."

10. As regards the claim of the petitioner for disbursement of deputation allowance @ 20% the Federal Government of Pakistan through the Establishment Division has already issued letter dated February 29, 2012 to the Chief Secretary, Government of the Punjab, Lahore with the request for payment of the said allowance. For facility of reference the said letter is reproduced hereunder:---

"Subject:--- PAYMENT OF DEPUTATION ALLOWANCE TO THE EMPLOYEE OF DEVOLVED MINISTRIES/DIVISIONS.

My dear

As you are aware the Federal Government, in pursuance of Constitutional (Eighteenth Amendment) Act, 2010 (Act X of 2010), transferred Federal employees to all Provincial Governments along with offices, on deputation basis under section 10 of the Civil Servants Act, 1973, on their existing posts. Some of these employees have pointed out that the Deputation Allowance @ 20% is not being disbursed to them.

2. The payment of deputation allowance to all the Federal employees transferred to the Provincial Governments on deputation basis was decided in the meeting of the Federal Secretaries held on 11th November, 2010.

3. I shall be grateful if instructions are issued to relevant authorities for payment of 20% deputation allowance to all Federal Government employees working in the devolved entities/offices in your Province with effect from the date of their transfer to the Provincial Government."

Sd/-
(Khushnood Akhtar Lashari)
Mr. Nasir Mehmood Khosa,
Chief Secretary,
Government of the Punjab, Lahore.

11. In view of the above discussion, since it is found that the petitioners are performing their duties without any complaint and stigma on their service file and they have a right to achieve their seniority, therefore, the respondents are directed to take all necessary steps to remedy the grievances of the petitioners as early as

possible. The Provincial Government is also directed to ensure that the aforesaid letter dated 29-2-2012 is taken effect in letter and spirit and 20% deputation allowance will be disbursed to the petitioners from the date of their entitlement.

12. This writ petition stands disposed of accordingly.

SA/S-90/L

Order accordingly.

PLJ 2014 Lahore 542
[Bahawalpur Bench Bahawalpur]
Present: Ch. Muhammad Masood Jahangir, J.
MUHAMMAD NAWAB--Petitioner
Versus
PROVINCE OF PUNJAB through COLLECTOR BAHAWALNAGAR etc.--Respondents
W.P.No. 3564 of 2005, heard on 9.1.2014.

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

----O. VII, R. 11--Scope--Rejection of plaint--Applicability of--Contention--Bona fide purchaser of land was entitled for decree of declaration--Validity--It is a settled principle of law that Court has only to examine the contents of the plaint at the time of deciding the application under Order VII Rule 11 of, CPC for rejection of the plaint, that petitioner/plaintiff being the bonafide purchaser of the land was entitled for the decree of declaration, that impugned order passed by lower revisional Court was illegal, ineffective, void abinitio and was liable to be set aside. [P. 545] A

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

----O. VII, R. 11--Rejection of plaint--Suit for declaration to effect that being bona fide purchaser of property was entitled to claim its proprietary rights--Application for rejection of plaint was accepted by First Appellate Court--Challenge to--Order and its implementation in revenue record was against law, without jurisdiction ex-parte, malafide and collusive--Validity--It is a settled principle of law that plaint can be rejected in a suit and Court in addition to memo of plaint can also look into admitted/disputed documents such as regards of previous litigation--Civil Court is competent to determine that whether order has been passed on basis of mala fides by a functionary while exercising its jurisdiction illegally and nullity in eye of law and where statutory provisions have not been complied with, Civil Court can set aside such order--No doubt Civil Court has got no jurisdiction about proceedings of the Border Area Allotment Committee in respect of allotment of state land to the army personnels, but in the present case after issuing patta malkiat and further transfer of the disputed property to a private party/petitioner, the interest of the petitioner is involved and his remedy clearly lies in approaching the Civil Court for the redressal of his grievance. [Pp. 545, 546 & 547] B, F & G

Interpretation of Statute--

----If a statute provides that an order made by an authority acting under it shall not be called in question in ay Court at all and is necessary to oust the jurisdiction of the Court that the authority should have been constituted as required by the statute, the person proceeded against should be subject to the jurisdiction of the authority, ground on which the action is taken should be stated by the statute and the order made should be such as could have been made under statute--If these conditions are fulfilled, the ouster is complete but where the proceedings are taken malafide and

statute is used merely to cover an act which in fact is not taken though it purports to have been taken under the statute, the order will not be in accordance with the precedents as delivered by Superior Courts. [P. 546] E

Administrative Order--

----Jurisdiction of Civil Court--When the administrative order is challenged, Civil Court being a Court of ultimate jurisdiction, even if jurisdiction is barred, is competent to see illegality and malafide committed by any forum, tribunal or authority and where any act/order of the authority is prima facie found to be without jurisdiction and illegal such matter can be decided after framing of issues and recording the evidence. [P. 546] D

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

----O. VII, R. 11--Rejection of plaint--Question of--Whether suit was barred by law, averments contained in plain can only be looked into and decision in any case on assertion based on material foreign to record cannot be made--Validity--Court is duty bound to look whether from the statement made in the plaint there was any cause of action available and whether the suit was barred by law or not--Assertion/statement made in plaint reflects that allegations of collusiveness and malafide have been alleged, which amount to playing fraud and in such facts and circumstances, the plaint cannot be rejected while invoking the provisions under Order VII Rule 11 of, CPC as such allegations cannot be resolved in a summary manner, but recording of evidence was must. [P. 546] C

Mr. Imran Khan Bhadera, Advocte for Petitioner.
Mr. Sher Muhammad Shahid, Advocate Malik Mumtaz Akhtar, Addl. A.G. for Respondents.
Date of hearing: 9.1.2014.

JUDGMENT

Brief facts of the case are that petitioner/plaintiff filed a suit for declaration to the effect that he being bona fide purchaser of the suit property fully mentioned in the head-note of the plaint was entitled to claim its proprietary rights and nobody including the respondents was justified to interfere with his possession. The said suit was contested by the respondents/defendants by submitting their separate written statements. The respondents/Defendants No. 1 to 3 filed an application under Order VII Rule 11 of, CPC for rejection of the plaint before the learned trial Court. The learned trial Court dismissed the said application vide order dated 10.2.2005. The respondents/Defendants No. 1 to 3 preferred a revision petition against the said order and the learned lower revisional Court/Additional District Judge Bahawalnagar accepted the said revision petition vide order dated 21.9.2005. Hence, this writ petition.

2. The learned counsel for the petitioner has argued that both the orders passed by the two Courts below are at variance, that the provisions of Order VII Rule 11 of, CPC did not apply in the instant case and that it is a settled principle of law that Court has only to examine the contents of the plaint at the time of deciding the application under Order VII Rule 11 of, CPC for rejection of the plaint, that the petitioner/plaintiff being the bona fide purchaser of the land was entitled for the decree of declaration, that the impugned order passed by the learned lower revisional Court is illegal, ineffective, void ab initio and is liable to be set aside.

3. Conversely the learned counsel for the respondents/ defendants has supported the impugned order. He further argued that the disputed land stood cancelled from the name of the original allottee and then the Border Area Committee was competent to allot the said land in favour of any deserving personnel and in this regard the jurisdiction of Civil Court has been specifically barred by the statute promulgated for the allotment of Border Area land. He further mooted that the Civil Court could not adjudicate the matter when the jurisdiction of the said Court is specifically barred.

4. Arguments heard record perused.

5. The perusal of the plaint reveals that the disputed property had been allotted to Subedar Kanwar Javed Ahmad
respondent/ Defendant No. 4 and patta malkiat was also attested in his favour on 12.5.1980, which was followed by Mutation No. 24 dated 02.7.1981 duly sanctioned by the Revenue Officer in favour of the said respondent. Thereafter the respondent/Defendant No. 4 transferred the said disputed property to Mushtaq Ahmad respondent/Defendant No. 5 through registered sale-deed No. 194 dated 24.4.1985 and then the suit property was alienated in favour of the plaintiff/petitioner vide Mutation No. 52 dated 18.3.1992. Now on the strength of said transfer/Mutation No. 52 the petitioner/plaintiff is in occupation of disputed property as exclusive owner. The respondent/Defendant No. 2 Chairman Border Area Committee without notice and affording opportunity of hearing to the petitioner/plaintiff has cancelled the original allotment of Defendant No. 4 vide order dated 26.9.1998. The petitioner has challenged the said order and its implementation in the revenue record on the ground that the same is against law, without jurisdiction, ex-parte, malafide and collusive, which is liable to be set aside. No doubt respondents/ Defendants No. 1 to 3 contested the suit and thereafter filed an application for rejection of the plaint, which was dismissed by the learned trial Court vide his order dated 10.2.2005, but the learned lower revisional Court has

allowed the revision petition through the impugned order dated 21.9.2005 with the following observation:

"Thus Civil Court is not competent to try the suit. Learned trial Court has not scrutinized the material available on file properly while disposing of applications moved under Order VII Rule 11, CPC. Thus has committed illegality and material irregularity. Both the plaints were liable to be rejected under Order VII Rule 11, CPC. Orders under discussion are not sustainable, hence set aside. The sits are not pending in this Court, therefore, the matter is left at the option of learned trial Court to dispose of the suits in the light of discussion mentioned above. Revisions thus succeed which are allowed."

6. As per provisions of Order VII Rule 11, CPC, plaint in a suit can be rejected in the following cases:--

(i) Where it does not disclose a cause of action.
(ii) Where the relief claimed is under-valued.
(iii) Where the Court fee of full valuation has not been paid, and
(iv) Where the suit on the face of averments of memo of plaint and relief claimed is barred by any law.

7. It is a settled principle of law that plaint can be rejected in a suit and Court in addition to memo of plaint can also look into admitted/disputed documents such as regards of previous litigation. The reading of plaint for such purpose should not be formal but practical, meaningful, realistic and rational so as to draw correct conclusion from pleadings rather than giving some artificial and functional meaning. Court while doing such exercise has to keep in mind true spirit of such provisions. For determination whether the suit is barred by law, averments contained in plaint can only be looked into and a decision in any case on assertion of defendants based on material foreign to record cannot be made. The Court is duty bound to look whether from the statement made in the plaint there was any cause of action available and whether the suit is barred by law or not. The assertion/statement made in the plaint reflects that allegations of collusiveness and mala fide have been alleged, which amount to playing fraud and in such facts and circumstances, the plaint cannot be rejected while invoking the provisions under Order VII Rule 11 of, CPC as such allegations cannot be resolved in a summary manner, but recording of evidence is must. When the administrative order is challenged, Civil Court being a Court of ultimate jurisdiction, even if jurisdiction is barred, is competent to see illegality and mala fide committed by any forum, tribunal or authority and where any act/order of the authority is prima facie found to

be without jurisdiction and illegal such matter can be decided after framing of issues and recording the evidence.

8. If a statute provides that an order made by an authority acting under it shall not be called in question in any Court at all and is necessary to oust the jurisdiction of the Court that the authority should have been constituted as required by the statute, the person proceeded against should be subject to the jurisdiction of the authority, the ground on which the action is taken should be stated by the statute and the order made should be such as could have been made under statute. If these conditions are fulfilled, the ouster is complete but where the proceedings are taken mala fide and statute is used merely to cover an act which in fact is not taken though it purports to have been taken under the statute, the order will not be in accordance with the precedents as delivered by the Superior Courts.

9. In the present case the respondents are alleged to have mala fidely cancelled the allotment of the original allottee after a longtime when the disputed properly was transferred to the petitioner/plaintiff, therefore, the Civil Court could competently proceed to entertain and adjudicate the case even if the jurisdiction of Civil Court was expressly barred and confer upon Special Tribunal as Civil Court being Court of ultimate jurisdiction has the jurisdiction to examine the acts of such forum to ascertain that whether those were taken in accordance with law, within the sphere allotted to it by such law, illegal, mala fide or contrary to principle of natural justice. The Civil Court is competent to determine that whether order has been passed on the basis of mala fides by a functionary while exercising its jurisdiction illegally and nullity in the eye of law and where statutory provisions have not been complied with, the Civil Court can set aside such order.

10. No doubt Civil Court has got no jurisdiction about proceedings of the Border Area Allotment Committee in respect of allotment of State land to the Army personnels, but in the present case after issuing patta malkiat and further transfer of the disputed property to a private party/petitioner, the interest of the petitioner is involved and his remedy clearly lies in approaching the Civil Court for the redressal of his grievance. The learned lower revisional Court has erred in law while allowing the revision petition filed by the respondents.

11. In the light of the above discussion the instant writ petition is allowed, the impugned judgment and decree dated 21.9.2005 passed by the learned Additional District Judge Bahawalnagar is set aside and order passed by the learned trial Court dated 10.2.2005 is restored. However the respondents/defendants will be at liberty to raise preliminary issues before the learned trial Court, who after recording evidence on preliminary as well as factual issues will decide the fate of the suit

without being influenced by the observations made by this Court in this judgment in any manner.

(R.A.) Petition allowed.

2014 C L C 1454
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Messrs ADAM MOTOR COMPANY LIMITED through Chief Executive----Appellant
Versus
Major (R) WASEEM MEHMOOD BUTT and 3 others----Respondents

First Appeal from Order No.210 of 2008, heard on 23rd May, 2014.

(a) Punjab Consumers Protection Act (II of 2005)---

----Ss. 28, 33 & 27---Complaint, rejection of---Interlocutory order---Appeal---Scope---Respondent moved an application under S.28 of Punjab Consumers Protection Act, 2005 for rejection of complaint on the ground of limitation which was dismissed by the Trial Court---Validity---No exact limitation had been provided for a consumer to lodge a claim as he had firstly to issue a written notice that a product or service was defective or faulty or the conduct of manufacturer or service provider was in contravention of provisions of Punjab Consumers Protection Act, 2005 and he should remedy the defects or give damages---Manufacturer or service provider had to reply the said notice within fifteen days after receipt of the same---Consumer Court should not entertain any claim unless the consumer or the Authority had given notice and provided proof that same was duly delivered but manufacturer or service provider did not respond the said notice---Period of thirty days for filing a claim by the consumer or the Authority had been provided from arising of cause of action---Consumer Court could extend the stipulated period in filing a claim up to sixty days from the expiry of warranty or guarantee period specified by the manufacturer or service provider and if no period was specified one year from the date of purchase of the product or providing of services---Period of limitation had to be calculated from the date when cause of action accrued---No remedy had been provided against the interlocutory order in Punjab Consumers Protection Act, 2005 but an appeal could only be filed against the final order---Appeal was not maintainable which was dismissed in circumstances.

Muhammad Aslam v. General Manager Pioneer Pakistan Seed Limited, Lahore and 4 others 2014 CLC 154 and Coca-Cola Beverages Pakistan Limited v. Ashiq Ali PLD 2014 Lah. 196 ref.

Muhammad Aslam v. General Manager Pioneer Pakistan Seed Limited, Lahore and 4 others 2014 CLC 154 and Coca-Cola Beverages Pakistan Limited v. Ashiq Ali PLD 2014 Lah. 196 distinguished.

(b) Punjab Consumers Protection Act (II of 2005)---

----S. 33---Interlocutory order---Appeal---Scope---No remedy had been provided against the interlocutory order in Punjab Consumers Protection Act, 2005, but an appeal could only be filed against the final order.

Azmat Lodhi for Appellant.

Abid Raza Shaheen and Mehmood Anwar Butt for Respondent No.1.

Date of hearing: 23rd May, 2004.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- This appeal has been directed under section 33 read with section 34 of the Punjab Consumer Protection Act, 2005 against the order dated 31-7-2008 passed by the learned Presiding Officer, District Consumer Court, Lahore whereby the application filed by the appellant under section 28 of the Act ibid seeking rejection of the complaint filed by respondent No.1 under section 27 of the Act ibid, being barred by time, has been dismissed.

2. Arguments heard and the record perused.

3. The respondent No.1 filed a complaint under section 27 of the Consumer's Court Act, 2005 on 7-5-2008 with the assertion that on 13-3-2006 he had purchased a car from the appellant on leasing financed by Habib Bank Ltd. (respondents Nos.2 and 3), which was found to be a faulty product, but the same continued despite issuances of notices to the appellant and the promises made by him. The respondent No.1 made the prayer as under:---

In the light of the above it is humbly requested that the respondents be ordered to return the amount already paid by the plaintiff:

It is also prayed that respondents be ordered to make the payment to the Plaintiff for the expenditure incurred on this motor car.

Moreover it is also requested that the Plaintiff and his family having faced a great amount of mental agony, torture and humiliation by mere acts of the respondents be ordered to pay, Rs.20,00,000 as compensation/damages.

Any other relief which Plaintiff is entitled, may also be granted, please."

The said application was duly replied by the appellant with almost 15 preliminary objections that the same was not maintainable on the score of limitation and on merit the stance has been taken that respondent No.1 (plaintiff) committed gross negligence in maintaining the car in violation of the Handbook and warranties. Moreover, the performance thereof might have been affected due to lack of reasonable care and neglect during usage besides use of substandard spare parts. Then during the pendency of the said complaint, the appellant filed an application under section 28 of the Act ibid for rejection of the complaint being not maintainable on account of limitation. The learned trial court has dismissed the said application vide order dated 31-7-2008 and the operative part thereof reads as under:---

"4. After hearing the arguments of both the learned counsel for the parties and perusing the record. The petitioner has placed on record Letters dated 19-8-2007 and 24-1-2008 to prove that correspondence had taken place between the parties and as a result respondent No.1 had apprised the petitioner vide Letter dated 29-4-2008 that spare parts are available and he may contact them. Grievance of the petitioner is that from the day one the car is creating problem and respondent No.1 has failed to respond. The petitioner has a continuing cause of action, as the grievance was never redressed by respondent No.1. However, Limitation is a mixed question of law and fact, which cannot be decided without recording the evidence of the parties.

In view of the aforesaid reasons, the application under section 28 of the PCPA, 2005 of respondent No.1 is dismissed.

4. The main contention of learned counsel for the appellant is that the car had been purchased by the plaintiff-respondent No.1 on 13-3-2006 the warranty whereof expired on 12-3-2007 and as per proviso second to section 28 ibid such claim could be filed on or before 12-5-2007, but the respondent No.1 filed the instant claim with the delay of about one year on 7-5-2008, which was hopelessly barred by time. In support of his contention he has placed reliance on the case-law reported as Muhammad Aslam v. General Manager Pioneer Pakistan Seed Limited, Lahore and 4 others (2014 CLC 154) and Coca-Cola Beverages Pakistan Limited v. Ashiq Ali (PLD 2014 Lahore 196).

5. The learned counsel for the appellant has stressed that by invoking the provisions of section 28 ibid the complaint filed by respondent No.1 before the learned Consumer Court be rejected while declaring the same to be time-barred. For ready reference, the said provision 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."

6. From the bare perusal of the aforesaid section it may be observed that no exact limitation has been provided for a consumer to lodge a claim, who has suffered damage as he has firstly to issue a written notice by calling upon a' manufacturer or provider of services that a product or service was defective or faulty, or the conduct of the manufacturer or service provider was in contravention of the provisions of this Act and he should remedy the defects or give damages whereas the consumer has suffered damage or ceased to contravene the provisions of this Act. Then the manufacturer or service provider has to reply the said notice within fifteen days after the receipt thereof. It has been further provided that the Consumer Court will

not entertain any claim unless the consumer or the Authority has given notice under subsection (1) and provided proof that the notice was duly delivered but the manufacturer or service provider did not respond thereto. A period of thirty days for filing a claim by the consumer or the Authority has been provided from the arising of the cause of action. However, through the provisos the powers of the Consumer Court have been defined for allowing extension in the stipulated period in filing a claim up to 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.

7. According to the said provision the period of limitation has to be calculated from the date when the cause of action accrued. Moreover no claim can be lodged unless a notice is issued and proof is provided that the notice was duly delivered but the manufacturer or service provider did not respond thereto. As such the impugned order passed by the learned Consumer Court to the effect that "***Limitation is a mixed question of law and fact, which cannot be decided without recording the evidence of the parties" does not suffer from any illegality or jurisdictional defect, but the same is perfectly in consonance/with the aforesaid provision. The case-law relied upon by learned counsel for the appellant is not applicable to the facts and circumstances of the present case as therein the matter was finally adjudicated upon by the concerned Consumer Courts after recording of the evidence whereas the instant appeal has been filed against the interlocutory order and the parties have still to adduce the evidence in support of their respective claims/stances including the point of time when the cause of action exactly accrued especially in view of the observation "***The petitioner has placed on record Letters dated 19-8-2007 and 24-1-2008 to prove that correspondence had taken place between the parties and as a result respondent No.1 had apprised the petitioner vide Letter dated 29-4-2008 that spare parts are available and he may contact them***" in the impugned order.

8. Apart from the above, this court is also constrained to observe that the Legislature by the promulgation of the Punjab Consumer Protection Act, 2005 has not provided any remedy against the interlocutory order, but an appeal can only be filed against the final order. For ready reference both these provisions are reproduced hereunder:-

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"33. Appeal.--- Any person aggrieved by any final order of the Consumer Court may file an appeal in the Lahore High Court within 30 days of such order.

34. Finality of Order.--- Every order of the Consumer Court, if no appeal has been preferred against such order under the provisions of this Act, shall become final."

The instant appeal filed under section 33 read with section 34 ibid against the interlocutory order is not maintainable and the office of this court is directed to take care of these provisions in future while entertaining such like appeals against the interlocutory orders passed by the District Consumer Courts.

9. Consequently, I do not find any exception to interfere with the impugned order, which is maintained and this appeal on merits as well as being incompetent is dismissed.

AG/A-117-L Appeal dismissed.

2014 P L C (C.S.) 1088
[Lahore High Court]
Before Ijaz Ahmad and Ch. Muhammad Masood Jahangir, JJ
PAKISTAN through Chief Engineer Works/Project Director
Versus
Raja MUHAMMAD ZAMAN KHAN

Regular First Appeals Nos.94 or 1998 and 67 of 1999, heard on 7th November, 2013.

Contract---

----Building construction contract---Delay in execution of work caused by contractor/employer---Claim of overhead charges by employee---Hudson's formula of calculating offsite overheads---Applicability and scope---Plaintiff/employee through suit claimed compensation of the overhead charges from the employer on account of delay caused by the employer---Trial Court partially accepted/decreed the claim of employee/plaintiff and granted him 15% overhead expenses on the final work under the Hudson's formula---Validity---Trial court had observed that there was no evidence on the basis of which it could be estimated that how much actual loss had been suffered by the employee/plaintiff, therefore employee/plaintiff was entitled to the extent of 5% instead of 15% of the total value of the contract---Impugned judgment and decree was modified to such effect.

Karachi Transport v. Karachi Tameerat Ltd. PLD 1992 SC 479 rel.
Saeed Akhtar for Appellant.
Muhammad Shoaib Abbasi for Respondent.
Date of hearing: 7th November, 2013.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR.--- These appeals have its genesis in a suit for recovery filed by Raja Muhammad Zaman Khan, respondent (hereunder will be referred as employee) against Federation of Pakistan, appellant, (hereunder will be referred as employer) before the learned trial Court, Rawalpindi, and the brief facts germane for the disposal of appeals are that the employer invited tenders for construction of a multi storey building and ancillary structure etc, including water supply, sewerage and internal electrification complete in all respect. The employee along with the others submitted tenders for the said work and ultimately after completion of all the formalities, the tenders submitted by the employee were accepted by the employer on 20-3-1980. The value of the work was fixed Rs.1,54,19,328/14 and completion period was agreed to be 24 months from the date of commencement of the work. The contractual terms and conditions were agreed by the parties to be governed as mentioned in the document PAFW-2249. The employer issued work order dated 6-

4-1980 fixing the commencement date as 10-4-1980 and Completion date 9-7-1982. The site of the project was handed over to the employee on 10-4-1980.
The aforesaid said facts are admitted between the parties according to their pleadings.
2. The dispute between the parties, in brief, which has been gathered from the pleadings, is that during the progress of work, certain hurdles, difficulties, complications, obstructions, impediment were caused and according to the version of the employee, the work could not be completed within the specified time and employee incurred expenses on the supervisory establishment, travelling expenses, damage to the plant and injury to labour etc. Thus the employee through his suit claimed compensation of the over head charges to the tune of Rs.1,73,40,105/76 from the employer.
However, the employer controverted and refuted the said allegations of the employee on the assertion that delay in completion of the project occurred due to the fault of the employee and no hindrance and complication were created by the employer in the completion of the project.
3. The learned trial court framed the following issues due to the divergent pleadings of the parties:---

(1) Whether the plaintiff has no cause of action? OPD

(2) Whether the plaintiff is stopped by his words and conduct to bring this suit? OPD

(3) Whether the defendant is entitled to special costs under section 35-A of C.P.C.? OPD

(4) Whether the plaintiff is entitled to recovers Rs.1,73,40,105.76 from the defendant? OPP

(5) Relief."

4. That before the learned trial court, employee himself appeared as P.W.1 to collaborate his stance as taken by him the plaint and no other witness was produced by the employee. However, quantitative documents were also produced by the employee in his documentary evidence. In rebuttal Mr. Salah--ud-Din Ahmad, Works Manager, was produced and D.W.1 and volumeness documentary evidence was also tendered before the learned trial court by the employer.
5. That the learned trial court after appreciating the evidence available on record decided Issues Nos.1 to 3 against the employer and partially decided issue No.4 in favour of the employee. The learned trial court partially decreed the suit filed by the employee to the extent of Rs.88,70,145/33 in favour of the employee. The operative part of the judgment is reproduced hereunder:---

"Considering the whole facts, default and fault of both the parties, I, am of the view that the plaintiff is entitled to 15% over heading expenses on the final work amounting to Rs.1,98,38,604/63 for the period of 310 weeks since 9-10-1982 to 25-3-1988. He has failed to produce any cogent and confidence inspiring evidence just to claim compensation of Rs.1,73,40,105/76 @ Rs.25 % over head expenses as claimed in para 69 under the Hudson's Formula. So far the question of interest is concerned, I, do not feel justify to grant to the plaintiff. Hence this issues is accepted to the extent of 15% compensation under the Hudson's Formula i.e. Rs.88,70,145/33 (rupees eighty eight lacs seventy thousand one hundred forty five and paisa thirty three).

6. That both the parties being dissatisfied with the impugned judgment and decree dated 27-7-1998 filed the instant appeals (R.F.A. No.94 of 1998 and R.F.A. No.67 of 1999) before this Court. As both the appeals arise from the same judgment and decree, we propose to dispose them of by this single judgment.

7. The learned counsel for the employer has argued that on the basis of solitary statement of the employee, the learned trial court erred to decree the suit. He further argued that very weak evidence was led by employee to support his version and that either in the plaint or in the evidence of the employee, the detail of over head charges was not mentioned and that learned trial court inspite of observing in the impugned judgment that the employee failed to produce any cogent and confident e vidence, has decreed the suit in his favour.

He further argued that impugned judgment and decree is not free from taint of misreading and non-reading of evidence. The learned counsel for the employer has also drawn our attention to the Clause 12(7) of the Mutual Contract i.e. Exh.D93 and asserted that under the said clause of the agreement, the employee was stopped to claim any compensation from the employer. In the fag end of his extensive arguments, Mr. Saeed Akhtar, Advocate, learned counsel for the employer submitted that Hudson's Formula has not been recognized by the Hon'ble Supreme Court of Pakistan and in this regard, he placed his reliance on "Karachi Transport v. Karachi Tameerat Ltd." (PLD 1992 Supreme Court 479).

8. Then on his turn, Mr. Muhammad Shoaib Abbasi, Advocate, learned counsel for the employee at the very outset has stated that he also relies on the same judgment which has been referred to by the learned counsel for the employer and his client feels satisfied if the claim of the employee for over head charges is restricted to 5 % of the value of the contract for the actual period as observed by the Hon'ble Supreme Court in the cited judgment.

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

10. Both the learned counsel for the parties have relied upon "Karachi Transport's case (supra) in which the issue involved herein between the parties has been authoritatively discussed. The operative portion of the said judgment is reproduced as follows:---

"Flat rate of 10 % which according to learned counsel for the appellant is supported by the Hudson's Formula, cannot be applied for the reasons that as stated earlier, it does not exclude the profit which cannot be made a basis for calculating the over

head expenses on percentage basis. There is no other evidence on the basis of which it can be estimated that the actual loss suffered by the appellant would have been the amount claimed by the appellant @ 10 % of the value of the contract. In the absence of any such evidence, it would be safe to restrict for over head's claim to 5 % of the total value of the contract for the period of two months."

11. The facts and the circumstances of this case are almost the same which are discussed and decided in the case mentioned (supra). We are in agreement with the observations of the learned trial court that there is no evidence on the basis of which it can be estimated that how much actual l oss had been suffered by the employee. So in the light of esteemed judgment, supra, which has been relied upon by both the parties, we are left with no other option except to partially allow R.F.A. No.94 of 1998 filed by the employer and the impugned judgment and decree is modified to the effect that the employee/plaintiff will be entitled to the extent of 5 % instead of 15% of the total va lue of the contract for the period spreading over 9-10-1982 to 25-3-1988 amounting to Rs.29,56,715/11. Consequently, R.F.A. No.67 of 1999 filed by the employee is dismissed having become infructuous as the employee has not pressed for enhancement of overhead claims. The parties shall bear their own costs. Decree sheets be drawn accordingly.

JJK/F-6/L Order accordingly.

2015 C L C 157
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
KARAMDAD----Petitioner
Versus
MANZOOR AHMAD and 2 others----Respondents

Civil Revision No.523 of 2012, decided on 26th May, 2014.

Specific Relief Act (I of 1877)---

----S. 12---Qanun-e-Shahadat (10 of 1984), Arts.17 & 79---Suit for specific performance of contract---Oral agreement---Plaintiff had not disclosed the name of witnesses in the plaint before whom the alleged oral sale was struck between the parties---Even no period for completion of agreement to sell had been mentioned by the plaintiff in his plaint---Oral agreement to sell was permissible in law but same had to be proved through credible and un-impeachable evidence---Contradiction with regard to alleged witnesses of bargain of sale was on record---Plaintiff had failed to prove that possession of suit property was handed over to him as a result of agreement to sell---No sale consideration was ever paid to the defendant at the time of alleged transaction of sale---Plaintiff had failed to prove his case by pleading relevant details with regard to name of witnesses and period fixed for completion of agreement to sell---Both the courts below had committed material illegality and decreed the suit on the basis of surmises and conjectures---Suit filed by the plaintiff had wrongly been decreed by the courts below---Impugned judgments and decrees were the result of misreading and non-reading of evidence which could not sustain in the eye of law---Impugned judgments and decrees passed by the courts below were set aside and suit was dismissed with costs---Revision was accepted in circumstances.

2013 SCMR 1300; 2008 CLC 418; 1987 CLC 2307; 2010 CLC 734 and 2012 YLR 521 rel.

Sh. Naveed Shehryar, Muhammad Yasin Hatif and Humaira Bashir Chaudhary for Petitioner.

Ehsan Qadir Sial for Respondents.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The facts germane for the disposal of instant civil revision are that Manzoor Ahmad respondent No.1/plaintiff filed a suit for specific performance on the basis of oral agreement dated 2-4-1992 regarding the suit property fully mentioned in the head note of the plaint with the assertion that the said property was sold to the petitioner/defendant by brother of the plaintiff secretly, whereupon, the latter showed his intention to file a suit for pre-emption and with the intervention of the respectables, the defendant/petitioner promised to sell the suit property for a consideration of Rs.60,000 in presence of

witnesses; that the defendant/petitioner had also assured that after receiving consideration amount from the plaintiff, the suit property would be transferred to him; that at the time of settlement of bargain of sale, the possession of the disputed property was delivered to him; that subsequently a document dated 15-5-2008 was reduced into writing between the parties and both the parties put their thumb-impressions and signed the same. Then on refusal to transfer the suit property, the suit for specific performance on the basis of oral agreement dated 2-4-1992 was filed. The said suit was contested by the petitioner/defendant by filing written statement with the assertion that no such bargain of sale regarding the disputed property was struck between the parties, no sale consideration was ever paid by the plaintiff to the defendant and the possession was never delivered to the plaintiff, who concocted a false story. The petitioner denied the execution of any document dated 15-5-2008, which was never signed or thumb marked by him. The learned trial court framed the following issues:---

"1. Whether the plaintiff is estopped by his words and conduct to file this suit? OPD
2. Whether the plaintiff has not come to the court with clean hands? OPD
3. Whether the suit is not maintainable in its present form? OPD
4. Whether the suit has not been properly valued for the purpose of court-fee and jurisdiction? OPD
5. Whether the plaintiff is entitled to the decree for specific performance as prayed for? OPP
6. Relief."

2. Both the parties produced stock of evidence in support of their respective claims and the learned trial court decreed the suit vide judgment and decree dated 2-10-2010. Feeling dissatisfied the petitioner filed an appeal before the learned lower appellate court, who also dismissed the same vide judgment and decree dated 23-11-2011, hence this civil revision.

3. Learned counsel for the petitioner has argued that the respondent/plaintiff based his claim on alleged oral agreement to sell; that the petitioner/plaintiff did not mention any detail regarding the alleged oral sale; that both the learned courts below without appreciating the evidence available on file decreed the suit filed by the respondent and that the judgments and decrees passed by both the learned courts below are not free from taint of misreading and non-reading of evidence. He lastly prayed for the acceptance of the instant revision petition and setting aside of the impugned judgments and decrees passed by both the learned courts below.

4. Conversely, learned counsel for the respondents has refuted the arguments advanced by the learned counsel for the petitioner while supporting the impugned judgments and decrees passed by both the learned courts below.

5. Arguments heard. Record perused.

6. The perusal of plaint reveals that respondent/plaintiff did not disclose the name of witnesses before whom the alleged oral sale was struck between the parties. Even no period has been mentioned by the respondent/plaintiff in his plaint for

completion of oral agreement to sell. No doubt, an oral agreement to sell is permissible in law, but it has to be proved through credible and un-impeachable evidence.

7. To discharge the onus of Issue No.5, the plaintiff/respondent himself appeared as PW2 and produced Muhammad Ramzan as PW1, Muhammad Sadiq as PW3 and Maali as PW4. Plaintiff/respondent being PW2 did not depose in his examination-in-chief that any sale consideration was paid by him to the vendor/petitioner, rather he deposed that the disputed property had been sold by his brother to the petitioner/defendant and on gaining knowledge he along with Muhammad Sadiq and Maali approached the petitioner/defendant, who was agreed to transfer the disputed property against a consideration of Rs.60,000 and that the plaintiff/respondent accepted the said offer. The said oral transaction of sale had taken place on 2-4-1992 and possession of the property was handed over to the plaintiff. The plaintiff (PW2) further stated that the petitioner/defendant went abroad, who promised to transfer the disputed property to him after his return, that the defendant/petitioner returned back on 14-5-2008, when the plaintiff/ respondent approached him and ultimately it was settled between them to appoint an arbitrator in this regard and agreement (Exh.P1) regarding appointment of arbitrator was also executed by them; that the plaintiff was ready to pay the sale consideration and that the arbitrator did not announce the award as the petitioner did not approach him and his suit being based on true facts was liable to be decreed. Muhammad Sadiq appeared as PW3 and did not depose that he along with petitioner/ respondent had gone to the defendant/petitioner and the alleged bargain was struck in his favour, rather he deposed that plaintiff along with Ali son of Sultan and Maali son of Muhammad had gone to the defendant/petitioner. However, PW3 only claimed him to be a witness of agreement for appointment of arbitrator (Exh.P1), which was thumb marked by him. Maali was produced as PW4, who also did not depose that Muhammad Sadiq was present when bargain of sale was struck between the parties, but it was stated by him that he, Manzoor plaintiff and one Ali had gone to the petitioner/defendant, who promised to transfer the suit land in favour of the plaintiff after the receipt of Rs.60,000 after return from England as the possession was already with the plaintiff party. He was also witness of agreement Exh.P1.

8. From the minute perusal of the evidence of the PWs, they are found to be in contradiction with each other regarding the alleged witnesses of bargain of sale as the plaintiff (PW2) stated that he along with Maali and Muhammad Sadiq had approached the petitioner/ defendant when the said bargain was struck, whereas, PW4 Maali stated that he along with Manzoor plaintiff and Ali had gone to defendant/ petitioner when the alleged bargain of sale was arrived at between the parties. It is further noticed that the plaintiff did not give the names of the witnesses of bargain of sale and he produced the evidence against the pleadings, which cannot be given any weight. Even otherwise, only one witness of the alleged bargain of sale was produced i.e. Maali (PW4), whereas, Muhammad Sadiq the second witness of the said bargain as claimed by the plaintiff (PW2) while appearing as PW3 did not pose him the witness of the alleged sale transaction and Ali introduced by Maali

(PW4) was not produced during the trial. In any case, the plaintiff/ respondent failed to produce the proof to prove the alleged bargain of sale as provided by Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984. It is also noteable that PW3 and PW4 did not give any date and time of striking the alleged bargain of sale. The plaintiff also failed to prove that the possession of the suit property was handed over to the plaintiff as a result of oral agreement to sell as PW4 during his examination-in-chief stated that possession of the suit property was already with the plaintiff party when the defendant/petitioner had agreed to transfer the suit property in the name of the plaintiff. It is also admitted position that no sale consideration was ever paid to the petitioner/defendant. On the other hand, the defendant/petitioner, namely Karam Dad appeared as DW1 and produced Maanik (DW2) and Zafar Iqbal (DW3), who vehemently controverted the claim set up by the plaintiff/respondent. As such, the petitioner/plaintiff badly failed to prove his case, but both the learned courts below have committed material illegality and illegality while answering issue No.5 in favour of the plaintiff/respondent and against the petitioner/defendant on erroneous premises of law and against the evidence on the record, which findings are reversed.

9. The copy of agreement (Exh.P1) for appointment of the arbitrator is also not helpful to the plaintiff as according to the said document the matter was referred to a arbitrator for determination of price of the disputed property. So it is affirmed from the evidence of the plaintiff/respondent that no sale consideration had been paid or determined by the parties at the time of alleged transaction of sale. If it was settled between the parties as Rs.60,000, then the reference to arbitrator regarding the fixation of sale price nullify the story as pleaded by the petitioner/defendant. The plaintiff/respondent failed to plead the relevant details, the name of the witnesses and period fixed for completion of oral agreement to sell in the plaint, but in spite of that both the learned courts below on surmises and conjectures decreed the suit on the basis of weak type of evidence which is available on file with lot of contradictions.

10. While relying upon the cases reported as (2013 SCMR 1300), (2008 CLC 418), (1987 CLC 2307), (2010 CLC 734) and (2012 YLR 521), this court has no hesitation in the mind that the suit filed by the petitioner has wrongly been decreed by both the learned courts below through the impugned judgments, which being tainted with misreading and non-reading of evidence cannot be sustained in the eye of law.

11. Consequently, this civil revision is allowed, and the impugned judgments and decrees passed by the learned courts below are hereby set aside and the suit filed by the respondent/plaintiff is dismissed with costs.

AG/K-50/L Petition accepted.

2015 C L C 536
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
FAZAL DIN through Legal Heirs and others----Petitioners
Versus
Mir MUHAMMAD JAN and another----Respondents

Civil Revision No.476-D of 2013, heard on 5th November, 2013.

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

----O. VII, R. 11 & S.141---Suit for possession through partition---Rejection of plaint---Scope---Contention of defendants was that plaint did not disclose cause of action---Application for rejection of plaint was accepted concurrently---Validity---Only contents of plaint were to be considered while invoking provisions of O.VII, Rule 11, C.P.C. wherein cause of action was disclosed---Plaintiffs had a right to have a fair trial by producing evidence and to have a judicial opinion of the court on merits of case---Court had to presume that averments made in the plaint were true---Power to reject plaint under O.VII, R.11, C.P.C. must be exercised only in a clear case wherein court had concluded that even if the averments of plaint were proved the plaintiffs would not be entitled to any relief---Averments of plaint had disclosed cause of action and Trial Court was not justified to reject the plaint---Assertions made in the written statement or documents annexed with the same were to be ignored while deciding application under O.VII, R.11, C.P.C.---Pleadings of parties could not be considered as evidence when its maker was not examined in its support and cross-examined by his opponent---Provisions of S.141, C.P.C. would not attract to such applications---Requirement of recording evidence on question of fact could not be bye-passed to justify invoking the provisions of O.VII, R.11, C.P.C.---Trial Court should record evidence and decide preliminary as well as factual issues through its judgment---Provisions of O.VII, R.11, C.P.C. could not be invoked in case of controversial questions of fact or law---Proper course in such cases was to decide all the objections after recording evidence of parties---Vendee in joint holdings was sharer in the same---Both the courts below had failed to exercise their jurisdiction so vested to them and had acted in excess of their jurisdiction illegally and with material irregularity---Judgments and decrees passed by both the courts below were set aside---Revision was accepted in circumstances.

Abdul Waheed v. Mst. Ramzanu and others 2006 SCMR 489; Mrs. Anis Haider and others v. S. Amir Haider and others 2008 SCMR 236; Muhammad Tariq Mahmood and 2 others v. Anjuman Kashmiri Bradari Khisht Faroshan through President Abdul Ashfaq and 21 others 2003 CLC 335; Egypt Air v. Sarfraz Ahmad Tarar 2003 CLC 1425; Muhammad Muzaffar Khan v. Muhammad Yusaf Khan PLD 1959 SC Pak. 9 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

(b) Words and Phrases---

----"Cause of action"---Meaning---Cause of action was bundle of facts which if traversed, a suitor claiming relief was required to prove for obtaining judgment.

Rafaqat Hussain Shah for Petitioners.

Mujeeb-ur-Rehman Kiani for Respondents.

Date of hearing: 5th November, 2013.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Brief facts of the case are that the petitioners/plaintiffs filed a suit for separate possession through partition, permanent injunction and mandatory injunction against the respondents with the averments that the petitioners are co-sharers in the disputed property which is fully described in paragraph No.1 of the plaint.

2. The respondents/defendants contested the suit by filing their written statement controverting the averments of the plaint. The factual area or dispute is reflected in the issues framed by the learned trial Court vide its order dated 23-9-2011. For ready reference the issues are reproduced hereunder:---

ISSUES

1. Whether this Court lacks jurisdiction to adjudicate the matter in hand? OPD

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

3. Whether this suit is barred by law? OPD

4. Whether the suit is hit by section 11, C.P.C.? OPD

5. Whether the suit is bad due to misjoinder and non-joinder of necessary parties? OPD

6. Whether the plaintiffs are entitled to separate possession after partition of the suit property by metes and bounds? OPP

7. Whether the plaintiffs are entitled to consequential relief of permanent injunction as prayed for? OPP

8. Relief.

3. Thereafter, before the evidence of the petitioners/plaintiffs started, the respondents/defendants filed an application under O.VII, Rule 11, C.P.C. for rejection of the plaint which was allowed by the learned trial Court vide its judgment dated 4-6-2012. The petitioners/plaintiffs filed an appeal before the learned lower Appellate Court which met the same fate and the learned Additional District Judge Taxila was pleased to dismiss the appeal filed by the petitioners/plaintiffs vide his judgment and decree dated 15-4-2013.

4. The petitioners/plaintiffs have assailed the impugned judgments and decrees through the instant Civil Revision.

5. The learned counsel for the petitioners/plaintiffs argued that the learned lower Courts have not exercised their jurisdiction which was vested to them rather they have exercised the jurisdiction with material irregularity and illegality. He further argued that after the framing of issues, the learned trial Court cannot reject the plaint. He further argued that for the rejection of the plaint the learned two Courts below were required to confine to the contents of the plaint and the contents of the plaint were deemed to be admitted by the two Courts below and if the contents of the plaint do not disclose any cause of action then the learned trial Court could have rejected the plaint. The learned counsel has further argued that factual controversy is involved in the case in hand but the learned Courts below have non-suited the petitioners/plaintiffs while rejecting the plaint. The learned counsel further contends that the contents of the plaint required full dress trial but the learned two Courts below have technically rejected the plaint and non-suited the petitioners/plaintiffs.

6. Conversely, controverting the arguments and submissions of the learned counsel for the petitioners/plaintiffs, Mr. Mujeeb-ur-Rehman Kiani, Advocate, learned counsel for the respondents supported the impugned judgments and further submitted that against the concurrent findings the Civil Revision is not maintainable. He further argued that the name of the petitioners is not mentioned in the column of owners of Register Haqdaran Zameen rather the petitioners/plaintiffs are entered in the column of cultivation as vendees. He further relies on the judgment reported as "Raza Khan through Legal Heirs and 3 others v. Member, Board of Revenue, N.-W.F.P., Peshawar and others" (1999 SCMR 873) and contends that in view of the dictum laid down in the said judgment, the petitioners/plaintiffs cannot be considered to be the owners or co-sharers in the disputed holdings.

7. I have heard the arguments of the learned counsel for the parties and have perused the record with their able assistance.

8. The contention of the learned counsel for the petitioners/ plaintiffs has force that while invoking the provisions under Order VII, Rule 11, C.P.C., only the contents of the plaint are to be considered, wherein cause of action is disclosed. Plaintiffs had a right to have a fair trial by producing the evidence and to have a judicial opinion of a Court on merits of this case. Courts have to presume that every averment made in the plaint was true, therefore, power to reject the plaint under Order VII, Rule 11, C.P.C. must be exercised only in a clear case, wherein the Court comes to the conclusion that even if all the averments of the plaint are proved, the plaintiffs would not be entitled to any relief. I have observed that power to reject the plaint should not be exercised except in a clear case, if the plaint does not disclose cause of action. The averments of the plaint filed by the petitioners/plaintiffs apparently disclose the cause of action and the learned trial Court was not justified to reject the plaint. It may be added that the assertions made in the written statement or documents annexed with the written statement are to be ignored while deciding the application under Order VII, Rule 11, C.P.C. This is the mandate of the apex Courts of the country which has been maintained in reported judgments titled as "Abdul Waheed v. Mst. Ramzanu and others" (2006 SCMR 489) and "Mrs. Anis Haider and others v. S. Amir Haider and others (2008 SCMR 236). In the said judgments, it has been held that provisions of the Order VII, Rule 11, C.P.C. pertaining to the suits and plaints in particular would be attracted only when the plaint by itself did not disclose any cause of action and Order VII, Rule 11, C.P.C. could not be attracted on the basis of written statement as initial burden would remain on plaintiff to prove his case on the basis of assertions made in the pleadings. The ratio of the said dictum also strengthens the submissions of the learned counsel for the petitioners that pleadings of the parties could not be taken as evidence, particularly, when its maker was not even examined in its support and cross-examined by his opponent. Provision of section 141, C.P.C. would not attract to such applications. Substantial requirement of recording the evidence on pure and serious questions of fact could not be by-passed by unjustifiably invoking provisions of Order VII, Rule 11, C.P.C. However, such applications could not be decided on mere written statement or assertions raised by the defendant without recording of evidence. In this regard, the learned counsel for the petitioners/plaintiffs has based his foundation on the finding of this Court in a reported case titled as "Muhammad Tariq Mahmood and 2 others v. Anjuman Kashmiri Bradari Khisht Faroshan through President Abdul Ashfaq and 21 others" (2003 CLC 335) and "Egypt Air v. Sarfraz Ahmad Tarar" (2003 CLC 1425).

The next contention of the learned counsel for the petitioners/ plaintiffs is that after framing the issues, the rejection of the plaint is not permissible. Adverting to the issues framed by the learned trial Court, it is found that apart from issue No.7 which was framed regarding the controversy of the facts the learned trial Court also framed the issues regarding cause of action, maintainability and jurisdiction also. The proper course for the Court in such eventuality was that the learned trial Court should record the evidence and thereafter decide the preliminary as well as factual issues through its judgment. It is well-settled that term of cause of action meant bundle of facts which if traversed, a suitor claiming relief was required to prove for obtaining judgment; it did not mean that even if one such fact, a constituent of cause of action was in existence, the claim could succeed. Totality of facts must co-exist and if anything was wanting the claim would be incompetent. One part was included in the whole but the whole could never be equal to one part. So, in case of controversial questions of fact or law, the provision of O.VII, R.11, C.P.C. could not be invoked rather proper course for Court in such cases was to decide all the objections raised in issues after recording the evidence of the parties.

10. Both the Courts have rejected the plaint of the petitioners/ plaintiffs on the sole score that the copy of Register Haqdaran Zameen appended with the plaint depicts that the name of the petitioners/plaintiffs is mentioned in column No.4 which pertaining to the cultivators and that the name of the petitioners/plaintiffs is not mentioned in the column No.3 which pertains to the owners. The copy of relevant Register Haqdaran Zameen has been appended with this file as Annexure-F whereas the photocopy of Annexure-F has been produced by the learned counsel for the respondents. The perusal of these documents reveals that the petitioners/plaintiffs are mentioned in column No.4 (meant for cultivators) but at the end of their names they have been recorded as vendees. It is also noted that the name of defendant No.1 is also mentioned in the same column No.4 meant for cultivator and in the end of his entry he is also shown to be vendee (Mushtri). No doubt, the name of said defendant is also appearing in the column No.3 of the Register Haqdaran Zaman. This is the moot point between the parties and both the learned counsel for the parties have extensively argued on this pivotal point. The learned counsel for the respondents has relied upon "Raza Khan through Legal Heirs and 3 others v. Member, Board of Revenue, N.-W.F.P., Peshawar and others" (1999 SCMR 873) whereas the learned counsel for the petitioners/plaintiffs has relied upon a reported judgment titled as "Amir Shah v. Ziarat Gul" (1998 SCMR 593). Both the judgments have been passed by the apex Court and for resolving the issue it will be better to reproduce the operative parts of the said judgments. First of all, I would

like to reproduce the operative part of the case of Raza Khan (supra) which reads as under:---

"The contention of the respondents' counsel that they have acquired right in the joint property by a mutation of sale but the same has been sanctioned in the cultivation column instead of "Malkiati" column as there was ban on sale of land, is without any substance or force. The respondents can claim remedy for such disputes in a regular Civil Court instead of asking for relief from the Revenue Officer dealing with a partition case ....". It is not the case of the appellants that any one of the observations made by the respondent-A.C. or by the respondent-Additional Commissioner in their respective orders dated 28-2-1994 and 29-12-1994, suffers from any inaccuracy whatsoever."

11. In response to the above Raza Khan case, the operative part of the Amir Shah's case cited by the learned counsel for the petitioners/plaintiffs is reproduced as under:---

"9. The only point that survived for determination before us, therefore, is as to whether the sale out of a particular Khasra number finding its way in the column of cultivation confers a status of co-sharership on the vendee. It does not require much discussion on the point because this Court in the precedent case of Muhammad Muzuffar Khan v. Muhammad Yusaf Khan (PLD 1959 SC Pak. 9) has already held that the vendee of a co-sharer who owns an undivided khata in common with another, is clothed with the same rights as the vendor has in the property no more and no less. If the vendor is in exclusive possession of a certain portion of the joint land and transfers its possession to his vendee, so long as there is no partition between the co-sharers, the vendee must be regarded as stepping into the shoes of his transferor qua his ownership rights in the joint property, to the extent of the area purchased by him, provided that the area in question does not exceed the share which the transferor owns in the whole property. It was further held that alienation of specific plots transferred to the vendee would only entitle the latter to retain possession of them till such time as an actual partition by metes and bounds takes place between the co-sharers

10. Under the Rules contained in the Land Record Manual whenever a co-sharer in a joint khata sells a particular Khasra number of a portion in the particular khasra number, the sale is entered only in the column of cultivation containing the names of vendor and vendee and the ownership column remains unchanged.

11. It is difficult to see in these circumstances why the vendee of specific plots acquired from a co-owner, in an undivided khata does not become a co-sharer in

that khata. We have, therefore, no hesitation to hold that the respondent having purchased portions of khasra number in the column of cultivation from his co-owner/vendor became a co-owner in those khatas and on that basis he could validly lay claim to be a co-sharer and enforce his right of pre-emption on that score."

12. After analyzing both the judgments it is apparent from the judgments cited by the learned counsel for the respondents that in the Raza Khan's case the honourable Supreme Court of Pakistan held that the persons whose names are entered in cultivation column instead of "Malkiati" column could claim their remedy for such a dispute in a regular Civil Court instead of asking for relief from Revenue Officer dealing with a partition case. Alter analyzing the said judgment, the facts came on record that a partition proceedings was initiated before the revenue hierarchy which went up to the apex Court and the honourable Supreme Court of Pakistan held that in such like disputes, petition under section 135 of West Pakistan Land Revenue Act is not permissible rather such dispute can be resolved through a regular Civil Suit. In case in hand, there is a Civil suit between the parties which was rejected by the learned trial Court. In response to the Raza Khan's case, in Amir Shah's case it is held that vendee of specific plot acquired from co-owners in undivided khata, thus becomes co-owner in that khata and the said dictum has supported the version of the present petitioners/plaintiffs. The other case "Muhammad Muzaffar Khan v. Muhammad Yusaf Khan (PLD 1959 SC Pak. 9)" cited by the learned counsel for the petitioner also strengthens his contention. The other contention of the learned counsel for the respondents/defendants that concurrent findings cannot be questioned in Civil Revision is also misconceived and without merits. In this respect, safe reliance can be placed on the reported judgment titled as "Muhammad Anwar and others. v. Mst. Ilyas Begum and others" (PLD 2013 Supreme Court 255) wherein it is held that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. This is the mandate of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 and we are not persuaded if there is any specific bar on the High Courts that while exercising its authority in term of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, no interference can be made in the Revisional orders. So, High Court can decide in which cases the interference is warranted. So, this Court is clear in mind that a vendee in joint holdings whose name is mentioned in the column No.4 is sharer in the joint holdings. The learned lower Courts have failed to exercise their jurisdiction so vested to them and have acted in excess of their jurisdiction illegally and with material irregularity while rejecting the plaint of the petitioners/plaintiffs. On the touchstone of the above, both the impugned judgments and decrees are

hereby set aside by allowing the Civil Revision. Consequently, the plaint shall be deemed to be pending before the learned trial Court to be proceeded with purely in accordance with law.

AG/F-38/L Revision accepted.

2015 C L C 549
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. AKBAR JAN through L.Rs. and 9 others----Petitioners
Versus
Mst. KALSOOM BIBI and 6 others----Respondents

Civil Revision No.1407 of 2013, heard on 20th November, 2013.

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

----Ss. 42 & 39---Transfer of Property Act (IV of 1882), S. 54---Qanun-e-Shahadat (10 of 1984), Arts.17, 79 & 129(g)---Constitution of Pakistan, Art.4---Suit for declaration and cancellation of registered sale deed---Production of certified copy of document instead of original one---Secondary evidence. production of---Condition---Plaintiffs filed suit for declaration whereas defendants filed suit for cancellation of registered sale deed---Contention of plaintiffs was that they were owners of suit house and gift deed in favour of defendants was void and illegal---Both the suits were consolidated and suit of plaintiffs was decreed whereas that of defendants was dismissed concurrently---Validity---Whenever a party had claimed on the basis of sale deed then onus to prove validity of the same would shift on the person in whose favour such sale took place---Onus to prove the registered sale deed would shift to the vendee/beneficiary if execution of same was denied by the executant/vendor or his legal heirs----Beneficiary/vendee of sale deed was bound to prove the bargain and payment of money with regard to property by producing sufficient evidence---Presumption of truth attached to registered document was always rebuttable when the execution of same was denied---Registration of sale deed would not operate to pass the title to the vendee---Registration of deed was an event which would take place after the parties had already settled the transaction at some prior point of time at a particular place in presence of some witnesses and after having completed that transfer of sale they would proceed to reduce the same into writing and in the shape of registered deed thereof---Bargain between the vendor and vendee had not been proved through evidence in the present case---Sale deed was executed without the attestation of any marginal witnesses and said defect was sufficient to declare the disputed sale deed against the law---Any document/instrument which would create right had to be reduced into writing in presence of at least two witnesses---Mandate of Arts.17 & 79 of Qanun-e-Shahadat, 1984 had been violated when said sale deed was drafted---Plaintiffs had failed to produce the Scribe, Sub-Registrar and Stamp Vendor before the Trial Court to prove the contents and execution of said document---Said witnesses were available to the plaintiffs but they had withheld the best evidence and inference would be against them that if witnesses were produced, then they would not support their version---Plaintiffs did not produce the original sale deed before the Trial Court and had tendered the attested copy of the same without seeking permission for leading secondary evidence---Evidentiary value of

certified copy of sale deed without seeking prior permission from the court would lose its importance and such copy would not be sufficient to prove the same---Both the courts below had failed to realize that the document produced on record was a certified copy and had been tendered in evidence without seeking prior permission from the court---No presumption of correctness could be attached to the certified copy of sale deed and said copy produced on the record was not admissible in evidence as condition precedent to the admission of secondary evidence had not been fulfilled---Onus was on the defendants to prove that a valid sale deed had been executed and even the admission of vendor of affixing thumb-impressions on the documents was not a proof of its execution and contents as documents purporting to create a right must be proved to have been actually executed by the persons who allegedly had executed the same, through production of evidence---Defendants had failed to prove the disputed sale deed---No bar existed on the High Court with regard to interference in revisional orders---Both the courts below had failed to analyze the facts and law in the present case and had committed irregularity and illegality while passing the impugned judgments and decrees--Impugned judgments and decrees were the result of misreading and non-reading of evidence available on record---Disputed sale deed had not been proved by producing witnesses, scribe, stamp vendor and Sub-Registrar---Both the courts below had failed to exercise jurisdiction vested to them properly---Impugned judgments and decrees passed by both the courts below were set aside and suit filed by the plaintiffs was dismissed whereas that of defendants was decreed---Revision was accepted in circumstances.

Al-Qur'an Verse No.282 of Sura Al-Baqra and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

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

----S. 54---"Sale"---Ingredients---Ingredients of "sale" were the parties, the subject matter, the transfer of conveyance and price or consideration.

Shahzad Mahmood Butt for Petitioners.

Zahid Aslam Malik for Respondents.

Dates of hearing: 18th and 20th November, 2013.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The present litigation has its genesis in a house measuring six marlas situated in Mauza Davi Pura, Shalimar Town, Lahore and the facts germane for disposal of the instant revision petition are that the respondents filed a suit for declaration, cancellation of documents and permanent injunction on the basis of registered sale deed bearing No.6793 dated 20-5-1991 with the assertion that Mst. Akbar Jan had transferred the said house in the

name of Ijaz Mehmood, the predecessor of the respondents-plaintiffs and sought a declaration that gift deed dated 18-8-2003 executed by Mst. Akbar Jan petitioner No.1 in favour of petitioners Nos.2 to 6 regarding the disputed house was absolutely void, illegal and against the rights of the plaintiffs-respondents.

2. The suit was contested by the present petitioners and during the pendency of the said suit filed by the respondents, petitioners Nos.1 to 6 also filed a suit for cancellation of sale-deed No.6793 dated 20-5-1991 allegedly executed by Mst. Akbar Jan petitioner No.1 in favour of Ijaz Mehmood, the predecessor of the respondents. The respondents-plaintiffs contested the said suit by thing their written statement before the learned trial court. Both the suits were consolidated and the learned trial court framed the following issues:---

1. Whether the registered sale-deed No.28905 dated 20-5-1991 in favour of the plaintiff's predecessor namely Ijaz Mehmood was legally executed by the defendant No.1? OPP

2. Whether the alleged registered sale-deed being a repercussion of fraud and misrepresentation is liable to be cancelled? OPD

3. Whether the gift deed dated 18-8-2003 is liable to be cancelled being void ab initio qua the plaintiffs' rights? OPD.

4. Whether the plaintiffs have got no cause of action against the defendants? OPD.

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

6. Relief.

3. The learned trial court after recording the evidence of the parties and hearing the arguments advanced by their learned counsel ultimately decreed the suit filed by the respondents and dismissed the suit filed by the petitioners vide his consolidated judgment and decrees dated 22-11-2011. Feeling aggrieved therewith, the petitioners filed a single appeal before the learned lower appellate court which came up for hearing before the learned District Judge, Lahore, who dismissed the same vide judgment and decree date 6-4-2013. The petitioners have assailed both the said judgments and decrees by filing this Civil Revision.

4. Learned counsel for the petitioners contends that both the courts below have failed to evaluate the facts and law on the subject and committed grave irregularity and illegality while passing the impugned judgments and decrees, which are reflective of misreading and non-reading of evidence; that the disputed sale deed has not been proved by producing its marginal witnesses, scribe and stamp vendor; and that the onus to prove the valid execution and contents of the disputed document was shifted to the beneficiary/respondents, who have failed to discharge the said onus.

5. On the other hand the learned counsel for the respondents has refuted the arguments advanced by learned counsel for the petitioners and submitted that the disputed sale deed is a registered document, which attaches strong presumption of truth and at the time of production of the said document on the record during the evidence, the adversary having failed to raise any objection, the document deemed to be admitted by them; both the courts below have given valid reasons to arrive at concurrent findings on facts which are not open to any exception by this court in the exercise of revisional jurisdiction and this petition is liable to dismissal.

6. Arguments heard and the documents appended with this petition perused.

7. Mst. Kalsoom Bibi respondent/plaintiff No.1 appeared as PW3 and produced Allah Ditta (PW-1), Muhammad Siddique (PW2) and Mushtaq Ahmed, Record Keeper (PW-4). On the other hand the petitioner-defendant No.1 appeared as DW1 and also produced Ilyas Ahmad (DW2) and Aleem-ud-Din (DW3). Both the parties also brought certain documents on the record. The plaintiffs-respondents have based their claim on a sale which was executed through the disputed sale-deed (Exh.P1). Before analyzing the said document, it will be proper to gather the essentials of sale, which are reproduced in section 54 of the Transfer of Property Act, 1882 and the ingredients of sale are the parties, the subject matter, the transfer of conveyance and the price of consideration. It is a well settled law that whenever a party alleges his claim on the basis of sale, then the onus to prove validity thereof shifts on the person in whose favour the sale took effect. If the execution of the registered sale-deed is denied by the executant/vendor or his legal heirs, then the onus to prove the registered sale-deed shifted to the vendee/beneficiary, who is under obligation to prove the bargain and payment of money regarding the property by producing sufficient evidence. Although the alleged sale-deed in favour of the respondents-plaintiffs is a registered document and attained presumption of truth, but such presumption is always rebuttable when the execution thereof is denied, then the

vendee must have proved the payment of consideration to the vendor. Mere registration of the sale deed would not operate to pass the title to the vendee. The registration of a deed was an event, which would take place after the parties had already settled the transaction at some prior point of time at a particular place in the presence of some witnesses and after having completed that transfer of sale, they would proceed to reduce the same into writing and in the shape of the registered deed thereafter. In the present case even the bargain between the vendor and the vendees has not been proved through evidence. The assertion of learned counsel for the respondents that the sale-deed under question is a registered document and there was no need to prove its execution is misconceived and found to be without force. A perusal of the alleged sale-deed (Exh.P1) reveals that the said document was executed without the attestation of any marginal witnesses and the said defect is itself sufficient to declare the disputed sale deed against the law. It is mandatory provision of law that any document/instrument, which creates right has to be reduced into writing in presence of at least two witnesses. The mandate of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, which are reproduced here for ready reference:---

"17. Competence and number of witnesses.--- (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:"

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law:---

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant."

"79. Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at-least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."
and the ordained of Allah Almighty in verse No.282 of Sura Al-Baqra the translation whereof is given below:---

"O ye who believe!

when ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing.

Let a scribe write down faithfully as between the parties:

let not the scribe refuse to write, as Allah has taught him, so let him write.

Let him who incurs the liability dictate, but let him fear his Lord Allah, and not diminish aught of what he owes.

If the party liable is mentally deficient, or weak, or unable himself to dictate,

Let his guardian dictate faithfully.

And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her.
The witnesses should not refuse when they are called on (for evidence).
Disdain not to reduce to writing (your contract) for a future period, whether it be small or big:
it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves;
but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing.

But take witnesses whenever ye make a commercial contract;

and let neither scribe nor witness suffer harm.

If ye do (such harm), it would be wickedness in you. So fear Allah;

for it is Allah that teaches you. And Allah is well acquainted with all things."

has been violated when the said disputed sale deed was drafted. Even the respondents-plaintiffs failed to produce the scribe, Sub-Registrar and the Stamp Vendor before the learned trial court to prove the contents and execution of the document. These were the witnesses, who were available to the respondents-plaintiffs, but they withheld the best evidence for the reasons best known to them. Inference under Article 129 Illustration (g) of Qanun-e-Shahadat Order, 1984, which reads as under:---

Illustrations.

The Court may presume---

"(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

is to be drawn against the respondents with the impression that if such witnesses were produced by them, then they would not support their version.

8. There is yet another aspect, which has seriously damaged the case of the respondents-plaintiffs that they did not produce the original sale deed before the learned trial court and had tendered the attested copy thereof without seeking permission for leading secondary evidence. The evidentiary value of the certified copy of the sale deed without seeking prior permission from the court loses its importance and such a copy would not suffice to prove the same. Both the courts below failed to realize that the document produced on the record was merely a certified copy and had been tendered in evidence without seeking prior permission from the court. No presumption of correctness could be attached to the certified copy of the sale-deed and the said copy produced on the record was not admissible in evidence because the condition precedent to the admission of the secondary evidence had not been fulfilled

9. So far as the contention of learned counsel for the respondents-plaintiffs that Mst. Akbar Jan while appearing as DW1 has admitted her thumb impression on the registered sale deed is concerned, suffice it to say that from the perusal of her statement it has revealed that she is an illiterate lady, who took the specific plea that without being aware of the contents of the documents she put her thumb-impressions on it with the understanding that these documents were for proceeding on hajj. The onus shifted to the respondents-defendants to prove that a valid deed had been executed by the petitioner/defendant No.1 as even the admission of vendor

of affixing the thumb-impressions on the documents is not a proof of its execution and contents because documents purporting to create a right must be proved to have been actually executed by the persons who allegedly executed the same through the production of the legal evidence, but the respondents-plaintiffs could not prove the same as discussed above.

10. The contention of learned counsel for the respondents that concurrent findings of fact cannot be questioned in civil revision is misconceived and without any merits. In this respect safe reliance can be placed on Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255) wherein it is held that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. This is the mandate of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 and we are not persuaded if there is any specific bar on the High Court that while exercising its authority in term of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, no interference can be made in the revisional orders. So, this court can decide in which cases the interference is warranted. From the discussion above, I have no hesitation in my mind to observe that both the courts below have failed to analyse the facts and law on the subject and committed grave irregularity and illegality while passing the impugned judgments and decrees, which are reflective of misreading and non-reading of evidence. The disputed sale-deed has not been proved by producing witnesses, scribe, stamp vendor and the Sub-Registrar. The onus to prove the valid execution and contents of the disputed document was upon the beneficiary/respondents, who have failed to discharge the said onus, but both the courts below have omitted to take into consideration the said aspect of the case, which has rendered the judgments and decrees passed by them without jurisdiction having failed to exercise the jurisdiction vested to them in a judicious manner.

11. In view of what has been discussed above, this Civil Revision is allowed, the impugned judgments and decrees passed by both the courts below are set aside and the suit filed by the respondents for declaration, cancellation of documents and permanent injunction on the basis of registered sale-deed bearing No.6793 dated 20-5-1991 is dismissed while the suit for cancellation of sale-deed No.6793 dated 20-5-1991 filed by the petitioners is decreed with costs.

AG/A-35/L Revision allowed.

2015 C L C 657
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MACHIA through L.Rs. and others----Petitioners
Versus
ALTAF HUSSAIN SHAH through L.Rs. and others----Respondents

Civil Revision No.2636 of 2000, heard on 8th September, 2014.

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

----S. 8---Suit for possession of immovable property---Limitation---Contention of plaintiff was that sale deed attested in favour of defendants was illegal, void and ineffective against his rights---Suit was decreed concurrently---Validity---Document alleged to have been procured by fraud and foul-play could be agitated at any time as any fresh entry in the revenue record would give a fresh cause of action---Present suit was therefore within time---Statement of witness could not be considered in isolation rather accumulative effect of the whole statement was to be considered by the court---Party could not be penalized for slip of tongue imprudent/utterance---Court had to visualize and evaluate the veracity, capacity and mental level of witness and should not test and expect from a layman to improve, compose, extempore answers who was not used to face tricky, abrupt and intricate questions---Court should concentrate on theme, pith and substance of a statement and not to chalk out a selective piece of evidence---Impugned sale deed was got attested by practising fraud---Neither original sale deed was produced by the beneficiaries nor any attested or photocopy of the same was produced in secondary evidence---Oral assertions with regard to sale deed could not be taken into consideration as said document was not put to the witnesses during the trial---Beneficiaries of sale deed had failed to produce deed-writer who scribed the impugned sale deed as well as revenue officer who endorsed registration of the same---Best evidence had been withheld by the defendants---Portion of examination-in-chief which was not subjected to cross-examination would be deemed to have been admitted---Appellate Court had rightly dismissed appeal on valid reasons---No misreading or non-reading of evidence or any jurisdictional defect was pointed out in passing the impugned judgments and decrees---Revision was dismissed in circumstances.

Mrs. Shamim Akhtar and others v. Mrs. Sultana Mazhar Baqai and 5 others 2003 CLC 1521; Wahid Bakhsh and another through Legal Heirs v. Ghulam Muhammad through Legal Heirs PLD 1990 Lah. 193 and Muhammad Aslam v. Mst. Ferozi and others PLD 2001 SC 213 ref.

Mrs. Shamim Akhtar and others v. Mrs. Sultana Mazhar Baqai and 5 others 2003 CLC 1521; Wahid Bakhsh and another through Legal Heirs v. Ghulam Muhammad through Legal Heirs PLD 1990 Lah. 193 and Muhammad Aslam v. Mst. Ferozi and others PLD 2001 SC 213 distinguished.

Ali Bahadur v. Muhammad Ishaq 2013 YLR 2555; Haji Din Muhammad through Legal Heirs v. Mt. Hajra Bibi and others PLD 2002 Pesh. 21; Saleem Akhtar v. Nisar Ahmad PLD 2000 Lah. 385 and Wali and 10 others v. Akbar and 5 others 1995 SCMR 284 rel.

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

----S. 115---Revisional jurisdiction---Scope---Scope of revisional jurisdiction was narrower to correct the error of law if found to have been committed by the court below in discharge of judicial functions.

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

----Arts. 132 & 133---Recording of statement of witness---Duty of Court---Statement of witness could not be considered in isolation rather accumulative effect of the whole statement was to be considered by the court---Party could not be penalized for slip of tongue imprudent/ utterance---Court had to visualize and evaluate the veracity, capacity and mental level of witness and should not test and expect from a layman to improve, compose, extempore answers who was not used to face tricky, abrupt and intricate questions---Court should concentrate on theme, pith and substance of a statement and not to chalk out a selective piece of evidence.

Taki Ahmed Khan for Petitioners.

Khalid Aseer Chaudhary or Respondents.

Date of hearing: 8th September, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- This is a civil revision against the judgment and decree dated 30-10-1995 passed by the learned Senior Civil Judge, Jhang and the judgment and decree dated 16-10-2000 passed by the learned District and Sessions Judge, Jhang, whereby, the suit filed by the respondent No.1/plaintiff was decreed and the appeal filed by the present petitioners/defendants was dismissed respectively.

2. The facts germane for the disposal of the instant civil revision are that the respondent No.1/plaintiffs filed a suit for possession regarding the disputed property fully mentioned in the body of the plaint with the assertions that defendants Nos.1 to 3 in connivance with the other defendants got attested a sale-deed dated 2-2-1977 followed by mutation No.284 dated 14-3-1977 in their favour which was illegal, void and ineffective against his rights. The said suit was contested by the

petitioners/defendants and ultimately after conducting the full fledged trial it was decreed by the learned Senior Civil Judge and appeal filed by the present petitioners/defendants was dismissed by the learned District Judge, Jhang as reflected in Para-1 of the judgment.

3. Arguments heard and record perused.

4. The main contention of learned counsel for the petitioners/ defendants is that respondent No.1/plaintiff while appearing as PW.1 admitted the transaction reflected in the disputed sale deed (Exh.P3), who was estopped by his words and conduct to file the instant suit, which is without any substance. It is settled principle of law that statement of a witness cannot be considered in isolation rather accumulative effect of the whole statement is to be considered by the court of law. Even otherwise a party cannot be penalized for slip of tongue imprudent/utterance and a Judge should visualize and evaluate the veracity, capacity and mental level of witnesses, but should not test and expect from a layman to improvise, compose extempore answers, who as a matter of fact is not used to face lawyer's tricky abrupt and intricate questions. The courts are supposed to concentrate on theme, pith and substance of a statement and not to chalk out a selective piece of evidence. Both the courts below after considering the gist of the statement of PW-1 have rightly concluded that disputed sale-deed (Exh.P3) was got attested by practicing fraud. Reliance is placed upon the judgments reported as Ali Bahadur v. Muhammad Ishaq (2013 YLR 2555) and Haji Din Muhammad through Legal Heirs v. Mt. Hajra Bibi and others (PLD 2002 Peshawar 21). As regards the other contention of learned counsel for the petitioners that the suit filed by the respondents was badly time-barred, suffice it to say that respondent No.1-plaintiff filed a suit for possession, which was well in time as provided under the law. Even otherwise a document alleged to have been procured by playing fraud and foul-play can be agitated at any time as any fresh entry in the revenue record on the basis of said document gives a fresh cause of action to the affected party. Reliance in this respect is placed on the judgments reported as "Saleem Akhtar v. Nisar Ahmad" (PLD 2000 Lahore 385) and "Wali and 10 others v. Akbar and 5 others" (1995 SCMR 284).

5. The last contention of the learned counsel for the petitioners that the petitioners/defendants while producing marginal witnesses fully proved the valid execution of the disputed sale-deed (Exh.P3) and also independently proved the sale transaction by producing the witnesses thereof is also of no value as it is borne out from the record that neither the original sale deed was produced by the beneficiaries nor they produced any attested or photocopy of the said document in secondary evidence. The oral assertions of the alleged witnesses of the said document

produced by the petitioners cannot be taken into consideration as the said document was not put to them during the trial. The petitioners/beneficiaries also failed to produce the deed-writer, who scribed the disputed sale-deed as well as the Revenue Officer, who endorsed the registration of the disputed sale-deed. Both the courts below rightly drew the inference against the petitioners/defendants for withholding the best available evidence. Both the courts below also took notice of the fact that when the disputed property was situated in Tehsil Chiniot, why the sale deed which in routine was to be attested before the Sub-registrar, Chiniot, was got registered at District Headquarter, Jhang and the same casts serious doubt about the veracity thereof.

6. The learned counsel for the petitioners/defendants has remained unable to make any reply to the above said queries. Even Lal Khan, one of the marginal witnesses of the disputed sale deed, who is the real brother of the petitioners Nos.1 and 2/beneficiaries while appearing as DW.2 also conceded during the cross-examination that some cases of fraud had been registered against him. The respondent No.1/plaintiff while appearing as PW.1 deposed in his examination-in-chief that he was at the age of 75 years when the disputed sale-deed was allegedly got attested, but in the sale deed his age was reflected as 35 years. The said portion of his examination-in-chief has not been subjected to cross-examination by the defendants/petitioners and it is a well-settled law that if a portion of examination-in-chief is not subjected to cross-examination, the same is deemed to be admitted by the said party. The learned lower appellate court has rightly dismissed the appeal filed by the petitioners/ defendants on the valid reasons, which are reproduced hereunder:---

(i) The plaintiff specifically asserted that the impugned registered sale deed was neither executed by him nor signed by him. It shifted the onus upon the appellants/defendants to prove the execution of the original sale deed. Unfortunately, they failed to produce the original sale deed in the court. They explained that it was given to the patwari Halqa for attestation of the impugned mutation which was not returned by him to them. The appellants/defendants did not prove this fact through cogent evidence. In this way, they withheld the best evidence easily available to them.

(ii) In the absence of primary evidence, the appellants/defendants could produce the Stamp Vendor along with his register, the Scribe of original sale deed along with his register the Registri Moharrar as well as the Joint Registrar in whose presence the respondent/plaintiff had made his signatures over the registered sale deed according to the version of the appellants/ defendants which they did not. Hence it could very safely be said that the appellants/defendants withheld the best evidence available to

them and a clear cut presumption could be drawn against them that the primary as well as secondary evidence if produced by them, it would have favoured the respondent/ plaintiff:

(iii) The appellants/defendants were the residents of Tehsil Chiniot. The suit property was situated in Tehsil Chiniot but they selected the place to get the sale deed executed/registered at District Headquarter, Jhang by the Joint Registrar. This showed mala fide on the part of the appellants/defendants.

(iv) Lal Khan (P.W.2) identified the vendor before the Joint Registrar. He was the real brother of vendees/defendants Nos.1 and 2. He was an interested witness. Moreover, earlier to this, a case under sections 420/468/471, P.P.C. had already been registered against Lal Din (P.W.2), the real brother of defendants Nos.1 and 2 at P.S. Kotwali Jhang for wrongly identifying the person. FIR No.4 dated 21-8-1997 (Exh.P-5) registered at P.S. Kotwali shattered the integrity of Lal Din (P.W.2). In view of this, the testimony of the witness could not be given due credit.

(v) The impugned registered sale-deed was effected on 2-2-1977. According to birth certificate, the date of birth of the plaintiff was 5-3-1917. On the alleged date of execution of the sale deed, he was about 60 years old but in the impugned registered sale deed, his age was shown as 35 years. There was a hell of difference between 35 and 60 years and one could very easily presume that a person aged 35 years might have been produced by the defendants before the Joint Registrar at the time of execution of the sale-deed.

(vi) The plaintiff was an old graduate. He was holding his identity card but its number was not mentioned in the impugned registered sale-deed at the time of its registration.

(vii) The impugned registered sale-deed revealed that nothing was paid before the Joint Registrar by the vendees to the vendor at the time of its execution. According to the impugned registered sale-deed, the plaintiff had received whole of the consideration of the suit land from the vendees. In order to prove this fact, the defendants/ vendees relied upon the oral testimony of Noor (D.W.3) and Inayat (D.W.4). In the year 1977, a sum of Rs.1,30,000 was a huge amount and in order to show a genuine transaction, the defendants/vendees should have brought this transaction into black and white but it was not done so by them which fact could very safely lead the court to draw a presumption that nothing was paid to the vendor by the vendees as a consideration of the suit land. Even no independent witness was produced by the defendants/vendees to prove the factum of consideration allegedly received by the vendor from the vendees."

7. The learned counsel for the petitioners is unable to point out any misreading or non-reading of the evidence on the part of the learned lower appellate court in

arriving at the above findings or any jurisdictional defect in passing of the impugned judgment and decree to warrant interference by this Court in the exercise of the revisional jurisdiction the scope whereof being narrower is restricted to correct the errors of law, if found to have been committed by the courts below in the discharge of their judicial functions, which is not the case in hand. The case law reported as "Mrs. Shamim Akhtar and others v. Mrs. Sultana Mazhar Baqai and 5 others" (2003 CLC 1521 Karachi),"Wahid Bakhsh and another through Legal Heirs v. Ghulam Muhammad through Legal Heirs" (PLD 1990 Lahore 193), "Muhammad Aslam v. Mst. Ferozi and others" (PLD 2001 Supreme Court 213) relied upon by the learned counsel for the petitioners/defendants is not applicable to the facts and circumstances of the case as the same runs on different footing.

8. The sequel of the above discussion is that the instant civil revision has no force and the same is hereby dismissed.

AG/M-353/L Revision dismissed.

2015 C L C 1216
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
HYUNDAI CORPORATION----Petitioner
Versus
SUI NORTHERN GAS PIPELINES LIMITED and 3 others----Respondents

Civil Revision No.1874 of 2004, heard on 12th September, 2014.

(a) Civil Procedure Code (V of 1908)---
----O. XXXIX, Rr. 1 & 2---Specific Relief Act (I of 1877), S.54---Suit for permanent injunction---Bank guarantee, encashment of---Grant of temporary injunction ---Scope---Bank guarantee was a special kind of contract depending upon the happening of a specific event and when it was discharged, the guarantee would vanish off---Bank guarantee was an independent contract between a party in whose favour the same was issued and the bank which issued the same---Encashment of bank guarantee could not be stopped or restrained by issuance of injunctive order---Obligations emanating from such guarantee were independent of the obligations bearing out of contract entered between the parties---Question of fact had to be proved after production of evidence---Plaintiff had failed to make out prima facie case for grant of temporary injunction---Encashment of bank guarantee had no relevance with the obligations arrived at between the parties through a contract which was independent containing its own terms and conditions---Suit for specific performance was to be filed by the plaintiff if he had a grouse against the fulfilment of conditions of contract on the part of defendants and suit for permanent injunction was not maintainable---Encashment of bank guarantee had nothing to do with the alleged dispute between the parties which must be decided independently on the obligations of parties imposed by the contract through its forms and conditions---Impugned order passed by the Appellate Court was in accordance with law---Trial Court was directed to decide the suit within a specified period---Revision was dismissed in circumstances.
Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd. PLD 2003 SC 191 and Pakistan Petroleum Limited v. BBJ Pipe Industries (Pvt.) Ltd. and another 2005 MLD 1710 rel.

(b) Contract Act (IX of 1872)---
----S. 126---Bank guarantee---Encashment---Injuctive order against encashment---Scope---Bank guarantee being an independent contract between the party in whose favour the same was issued and the Bank which issued the same, its encashment could not be stopped or restrained by an injuctive order---Obligations emanating from Bank guarantee were independent of obligations bearing out of the contract entered upon by the parties.
Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd. PLD 2003 SC 191 fol.

(c) Administration of justice---

----High Court observed that unless the proceedings before Courts below were stayed by any specific order, courts were bound to continue with the trial of the case irrespective of the pendency of the matter before High Court.

Ghulam Mujtaba for Petitioner.

Umar Sharif for Respondent No.1.

Rana Muhammad Saeed for Respondent No.4.

Date of hearing: 12th September, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- This petition is directed against the judgment dated 26-10-1999 passed by the learned Civil Judge, Lahore as well as judgment dated 12-5-2004 delivered by learned Additional District Judge, Lahore, whereby, the application for grant of temporary injunction filed by the plaintiff was dismissed.

2. The facts emanate from the case file are that the petitioner being plaintiff brought a suit for mandatory and permanent injunction against the respondents/defendants before the learned trial court on 19-10-1998. Along with the suit the petitioner also filed an application under Order XXXIX, rules 1 and 2 of C.P.C. for grant of injunctive order with the prayer that pending disposal of the main suit, defendants be restrained from encashing/making/receiving any payment against Bank guarantee dated 18-7-1996 in the sum of US Dollars. The suit as well as said application were contested by the defendants Nos.1 and 2 by filing their written statements as well as written replies. After hearing the parties, the learned trial court vide judgment and decree dated 26-10-1999 dismissed the application under Order XXXIX, rules 1 and 2 and also dismissed the suit while declaring the same to have become infructuous. Aggrieved, the petitioner/plaintiff preferred an appeal before the learned lower appellate court which was partially accepted to the extent that the judgment and decree dated 26-9-1999 vide which suit of the petitioner was dismissed was set aside and partially dismissed to the extent of dismissal of the stay application. Being dissatisfied the present revision petition has been moved.

3. Mr. Ghulam Mujtaba, Advocate has appeared on behalf of original learned counsel for the petitioner and made a request for an adjournment which has been opposed by the learned counsel for the respondent. The instant petition was filed 10 years ago against interlocutory order whereby the application for temporary injunction was dismissed and unfortunately could not be decided within such long period. No prior intimation was preferred on behalf of learned counsel for the

petitioner for adjournment of the case and I am also not inclined to further adjourn this matter any further keeping in view; peculiar facts and circumstances thereof. So, I am left with no other option except to decide the same after hearing arguments of learned counsel for the respondent and perusal of the record.

4. The prayer clause of the plaint filed by the present petitioner is relevant, which is reproduced hereunder:---

"In view of the above submissions it is respectfully prayed that this honorable Court be pleased to pass a decree in favour of the plaintiff against the defendants in the following terms:---

(a) Defendants Nos.1 and 2 may be permanently restrained from encashing Bank Guarantee No.LG 1417/1996/0844 dated 18-7-1996 in the sum of US Dollars 153,606.60 and Bank Guarantee No.LG 1417/1996/6923 dated 7-8-1996 in the amount of US Dollars 49,999.88 issued by defendant No.4, and the same may be ordered to be returned to the plaintiff: Furthermore, defendants Nos.1 and 2 may also be directed to pay the plaintiff all costs, charges and expenses which it may have to incur to keep the guarantees alive.

(b) Defendants Nos.1 and 2 be permanently restrained from receiving any payment against the aforesaid guarantees from defendant No.4.

(c) Defendant No.4 be permanently restrained from making any payment against the aforesaid guarantee.

(d) Defendants be permanently restrained from taking any action against the plaintiff for recovery of the disputed freight, charges through encashment of the performance guarantee or otherwise.

(e) Any other relief which this honorable Court may deem fit under the facts and circumstances of the case may also be allowed.

(f) Costs of the suit may also be granted."

5. Along with the said prayer embodied in the plaint the plaintiff also filed application under Order XXXIX, rules 1 and 2 of C.P.C. with the prayer already mentioned in the preceding para of this judgment.

6. Arguments heard and record perused.
7. It is a settled principle of law that a Bank Guarantee is an independent contract between a party in whose favour the same is issued and the bank who issued the same and its encashment cannot be stopped or restrained by issuance of injunctive order on the reasons that a dispute is pending inter se the parties to the main agreement. This view is fortified from the judgment delivered by the august Supreme Court of Pakistan reported as "Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd." (PLD 2003 Supreme Court 191) (at page 201) wherein it has been held as follows:---

(i) The performance of guarantee stands on the footing similar to an irrevocable letter of credit of Bank, which gives performance guarantee must honour guarantee according to its terms. It is not concerned in the least with the relations between the supplier has performed his contracted obligation or not, nor with question whether the supplier is in default or not. The Bank must pay according to its guarantee all demand if so stipulated without proof or conditions exception is when there is a clear fraud of which Bank has notice.

(ii) There is an absolute obligation upon the banker to comply with the terms and conditions as enumerated in the guarantee and to pay the amount stipulated therein irrespective of any disputes there may be between buyer and seller as whether goods are up to contract or not.

(iii) The bank guarantee should be enforced on its own terms and against the bank guarantee would not affect or prejudice the case of contractor, ultimately the dispute is referred to arbitration for the reason, once the terms and conditions of the guarantee were fulfilled, the bank's liability under the guarantee was absolute and it was wholly independent of the dispute proposed to be raised.
(iv) The contract of bank guarantee is an independent contract between the bank and the party concerned and is to be worked out independently of the arising out of the work agreement between the parties concerned to such agreement and, therefore, the extent of the dispute and claims or counter were matters extraneous to the consideration of the question of enforcement of bank and were to be investigated by the arbitrator.

(v) Where the bank had undertaken to pay the stipulated sum to respondent, at any time, without demur, reservation, recourse, contest or protest, and without reference

to the contractor, no interim injunction restraining payment under guarantee could be granted.
(vi) The Bank guarantee is an autonomous contract and imposes an obligation on the bank to fulfill the terms and the payment on the bank becomes due on the happening of a contingency on the occurrence of which guarantee becomes enforceable.
(vii) When once bank guarantee is discharged, the obligation of the bank ends and there is no question of going behind such discharge bank guarantee. Courts should refrain from probing into the nature of the transactions between the bank and customer, which led to the furnishing of the bank guarantee.
(viii) In the absence of any special equities and the absence of any clear fraud, the bank must pay on demand, if so stipulated and whether the terms are such must have to found out from the performance guarantee as such.
(ix) The unqualified terms of guarantee could not be interfered with by irrespective of the existence of dispute.

8. In the above referred case the august Supreme Court of Pakistan refused to grant injunctive order for restraining the party from encashment of Bank guarantee. The above referred view has also been followed by this court in the judgment reported as "Pakistan Petroleum Limited v. BBJ Pipe Industries (Pvt.) Ltd. and another" (2005 MLD 1710), while holding that court should not interfere with the performance of a bond or bank guarantee on the touchstone that a bank guarantee was not concerned with the underlying contract between the parties to the contract as it is quite distinct from the underlying contract and gave rise to a separate cause of action.
9. A Bank Guarantee is a special kind of contract depending upon the happening of a specific event and when once it is discharged, the guarantee vanishes off. The obligations emanating from the said guarantee are independent of the obligations bearing out of contract specifically entered between the parties.

10. In the present case, the version of the petitioner/plaintiff was that in response to a tender for supply of pipes the petitioner had submitted a bid, which was accepted and an order for supply of pipes was placed to the petitioner by the defendants and that in compliance of contract entered between the parties the petitioner through respondent No.4 submitted performance guarantee for an amount equal to 10% of the contract price and when the shipments were completed on 31-10-1996, respondent No.1 demanded excessive payment from the petitioner which was refused by the petitioner and as respondent No.1 threatened to encash the performance guarantee the petitioner preferred his suit. The question of excessive

demand by respondent No.1 from the petitioner is a question of fact which has to be proved by the petitioner after production of strong evidence. At present stage both the courts below have rightly concluded that petitioner failed to make out prima facie case for grant of temporary injunction. It can safely be inferred that encashment of bank guarantee has no relevancy with obligations arrived at between the parties through a contract which being independent containing its own terms and conditions has to be performed by the parties independently. The petitioner has brought a suit for permanent injunction before the learned trial court which in its present form is hardly maintainable. If the petitioner has a grouse against the fulfillment of conditions of the contract on the part of respondents, then a suit for specific performance was to be filed by the petitioner but the encashment of bank guarantee has nothing to do with the alleged dispute between the parties, which must be decided independently on the basis of obligations of the parties imposed by the contract through its forms and conditions.

11. Sequel of the discussion is that the impugned order passed by the learned trial court to the extent of dismissing application for grant of stay and the impugned judgment delivered by learned Additional District Judge, Lahore to the extent of dismissal of appeal whereby the dismissal of stay application by the learned trial court was maintained are strictly in accordance with law and do not call for any interference. The revision petition is without any substance and force which is dismissed. It is pointed out by the learned counsel for the respondents that the main suit is still pending before learned Civil Judge, Lahore and next date of hearing is 2-10-2014, who is directed to decide the said suit within a period of five months positively with a report to this Court through the Deputy Registrar (J) as it is sad state of affairs that the main suit could not be finalized for the last about 10 years in spite of that proceedings thereof were never stayed by this Court. It is once again directed that unless the proceedings before the learned courts below are stayed by any specific order they are bound to continue with the trial of the case irrespective of the pendency of the matter before this Court. The Registrar of this Court shall communicate this direction to the members of the subordinate Judiciary through the respective District and Sessions Judges in the Punjab.

AG/H-21/L

Revision dismissed.

P L D 2015 Lahore 103
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD YASIN---Petitioner
Versus
MUHAMMAD JAMIL and others---Respondents

Civil Revision No.2147 of 2004, heard on 2nd June, 2014.

(a) Islamic Law---
----Gift---Ingredients-Marz-al-Maut---Competency to make intelligent decision---Effect---Contention of plaintiff was that donor was suffering from Marz-al-Maut at the time of attestation of gift mutation which was result of fraud---Suit was dismissed by the Trial Court but same was decreed by the Appellate Court to the extent of shares of disputed property---Validity---If a material fact had been deposed in the examination-in-chief but same was not questioned during cross-examination then it would be deemed to have been admitted---Donor who was at the age of 70 years was not in a position to make an intelligent decision with regard to his landed property---Donee had a motive to usurp the property of deceased donor to deprive other legal heirs who at the time of attestation of mutation was living with him and was totally dependent on him---Deceased donor was suffering from Marz-al-Maut at the time of entry of Rapt Roznamcha Waqiati and attestation of mutation, therefore impugned transaction was hit by the vice of mischief---Donee had failed to prove alleged Rapt Roznamcha Waqiati and mutation of gift which were result of fraud and connivance---Donee was bound to prove the transaction of gift independently as well as attestation of mutation and entry of Rapt Roznamcha Waqiati---Defendant had not pleaded any of the three ingredients of gift in his written staiement as to where and in whose presence oral transaction of gift was effected as he had failed to give any date, time, venue and even the name of witnesses---Donee had failed to prove the transaction of gift through his evidence---Offer on behalf of donor with regard to gift of suit property to the donee should be made which should be accepted b3i, him and possession of property should also be handed over by the donor to the donee which should be followed by entry in the Rapt Roznamcha Waqiati by the patwari and attestation of mutation---Donee was bound to prove the alleged transaction of gift as well as the following events by producing reliable and cogent evidence and in absence of the same the mutation of oral gift was liable to be cancelled---Findings recorded by the courts below were erroneous and were not supported by evidence on record--- Appellate Court had passed contradictory order which was to be declared null and void---Impugned judgments and decrees passed by the courts below were set aside and suit was decreed with costs throughout---Suit property would devolve upon all the legal heirs of deceased according to their legal shares---Revision was accepted in circumstances.

Khan Muhammad v. Muhammad Din through LRs. 2010 SCMR 1351; Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688;

Haji Ilahi Bakhsh v. Noor Muhanunad and others PLD 1985 SC 41; Zulfiqar and others v. Shandat Khan PLD 2007 SC 582; Allah Wasaya and another v. Falak Sher and another 2001 CLC 280; Muhammad Maqbool v. Muhammad Akbar and others 1999 MLD 2536; Waqqar Ambalvi v. Faqir Ali and others 1969 SCMR 189; Chief Engineer, Irrigation Department, N.-W.F.P. Peshawar and 2 others v. Mazhar Hussain and 2 others PLD 2004 SC 682; Hafiz Tassaduq Hussain v. Lal Khatoon and others PLD 2011 SC 296; Mst. Chanan Bibi and 4 others v. Muhammad Shafi and 3 others PLD 1977 SC 28; Noor Muhammad Khan and 3 others v. Habibullah Khan and 27 others PLD 1994 SC 650; Karam Begum and 3 others v. Allah Ditta and 3 Others PLD 1986 SC (AJ&K) 27; Muhammad Bakhsh v. Ellahi Bukhsh and others 2003 SCMR 286; Barkat Ali through Legal Heirs and others 2002 SCMR 1938; Mukhtar Ahmad v. Mst. Rasheeda Bibi and another 2003 SCMR 1664; Jewan Khan and others v. Feroze PLD 1951 Lah. 433; Mst. Jivanee v. Feroze Din and another PLD 1962 W.P..(Rev.54) and Mst. Chanan Bibi and 4 others v. Muhanunad Shafi and 3 others PLD 1977 SC 28 ref.

Jewan Khan and others v. Feroze PLD 1951 Lah. 433; Mst. Jivanee v. Feroze Dirr and another PLD 1962 VV.P..(Rev.54) and Mst.
Chanan Bibi and 4 others v. Muhammad Shafi and 3 others PLD 1977 SC 28 distinguished.
Khan Muhammad v. Muhammad Din through Lrs. 2010 SCMR 1351); Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688; Haji Ilahi Bakhsh v. Noor Muhammad and others PLD 1985 SC 41; Zulfiqar and others v. Shandat Khan PLD 2007 SC 582; Waqqar Ambalvi v. Faqir Ali and others 1969 SCMR 189; Chief Engineer, Irrigation Department, N.-W.F.P. Peshawar and 2 others v. Mazhar Hussain and 2 others PLD 2004 SC 682; Hafiz Tassaduq Hussain v. Lal Khatoon and others PLD 2011 SC 296; 2009 YLR 289; 2000 MLD 404; PLD 1967 Lah. 1138; 1999 SCMR 1049; 1992 SCMR 553 and Muhammad Siddique and 3 others v. Muhammad Boota and others 2009 MLD 917 rel.

(b) Words and phrases--
---"Marz-al-Maut"---Meaning---"Marz-al-Maut" was a disease where a person had apprehended that death was more probable than his chalice to live.

S. M. Tayyab for Petitioner.
Taffazul H.Rizvi for Respondents.
Date of hearing: 2nd June, 2014.

JUDGMENT

CH. MUHAMMD MASOOD JAHANGIR, J.---This judgment will decide C.R.No.2147 of 2004 and C.R.No.1369 of 2004, Which involve common questions of law and facts and are between the same parties.

2. The facts germane for the disposal of the instant civil revisions are that Muhammad Yasin petitioner (hereinafter will be referred as plaintiff) filed a suit for declaration against Muhammad Jamil and Saidan Bibi respondents (hereinafter will be referred as defendants) with the assertion that the disputed property was owned by Majeed son of Karman (the description of the property is fully mentioned in para-1 of the plaint), who was an old age person and also due to brain paralysis in the beginning of March 1993 he became incapable of speaking, moving and thinking. He also became unconscious in the last twenty five days of his life and ultimately he died on 5-4-1993, that defendant No.1 Muhammad Jamil was the nephew of the deceased whereas defendant No.2 Saidan Bibi was his widow, that defendant No.1 got entered Rapt Roznamcha dated 22-3-1993 and thereafter mutation of oral gift No.519 dated 27-3-1993 in his favour in connivance with Revenue officials and the said Rapt as well as the disputed mutation were product of fraud as at that time the alleged donor Majeed was not capable of making offer of gift and the said deceased did not get enter the said rapt or got attested the disputed mutation as he was suffering from Marz-al-Maut. The said suit was resisted by the defendant Muhammad Jamil by filing his written statement. No doubt the said written statement also bears the name of Saidan Bibi the other defendant but it transpired from the record that latter on defendant No.2 denied the filing of the said written statement along with Muhammad Jamil defendant No.l.

3. The learned trial court captured the disputed area of facts by striking following issues:-

> (1) Whether the mutation No.519 dated 27-3-1993 was got sanctioned by the deceased Majeed during Marzul Maut? OPP
>
> (2) If issue No.1 is proved in affirmative, so, its effect? OPP
>
> (3) Whether the plaintiff is entitled to the decree of declaration and possession as well as permanent injunction as prayed for? OPP
>
> (4) Whether the plaintiff has got no cause of action? OPD
>
> (5) Whether this suit is improperly valued for the purposes of court fee and jurisdiction, if so, what is real valuation of this suit? OPD

(6) Whether this suit is hit by the provisions of Section 172 of the Land Revenue Act? OPD '

(7) Whether this suit is false and frivolous, if so, whether the defendants are entitled to recover the special costs under section 35-A of C.P.C.? OPD

(8) Relief.

4. Both the parties produced their evidence before the learned trial court in pros and cons and ultimately the suit was dismissed vide judgment and decree dated 16-3-2001. Being aggrieved the plaintiff filed an appeal before the learned lower appellate court and the learned lower appellate court vide judgment and decree dated 6-5-2004 declared the gift as a valid transaction only to the extent of 1/3 share of the disputed property whereas the rest of the disputed property was declared the legacy of deceased and was to be inherited by legal heirs according to Islamic shares. The plaintiff filed Civil Revision No.2147 of 2004 and defendant No.1 filed Civil Revision No.1369 of 2004 against the said judgments and decrees passed by both the courts below, which are being disposed of jointly this single judgment.
5. The learned counsel for the plaintiff has argued that both the courts below while passing the impugned judgments and decrees did not consider that onus of issues Nos.1 and 2 was on the parties and the plaintiff produced best available evidence to discharge his part of onus, but in its rebuttal the defendant No.1 failed to discharge his onus, therefore, the impugned judgments and decrees passed by both the courts below are not sustainable, that deceased was an ailing person having 70/72 years age who died just after 8/9 days of the so called execution of oral gift and these facts coupled with the late/ailing age of the deceased itself would show that the deceased was suffering from a disease which could be fatal, as such proceedings, of oral gift were made in a hasty manner which casted shadow of doubt on the conduct of defendant No.1, that both the courts below while passing the impugned judgments also overlooked the statement of DW-7 (Muhammad Jamil defendant No.1) that deceased was suffering from brain paralysis, that once it was admitted by defendant No.1 being DW-7 that deceased did suffer from brain paralysis thus onus heavily shifted on him to prove that he was capable of making valid gift by the production of medical evidence regarding his treatment. He lastly prayed that the impugned judgments and decrees passed by both the courts below being result of misreading and non-reading are liable to be set aside by declaring the same illegal, unlawful and without jurisdiction. The learned counsel for the plaintiff has relied upon the judgments reported as KHAN MUHAMMAD V. MUHAMMAD DIN THROUGH L.RS. (2010 SCMR 1351), MUHAMMAD AKRAM AND ANOTHER V. ALTAF AHMAD (PLD 2003 SC 688), HAJI ILAHI BAKHSH V. NOOR MUHAMMAD AND OTHERS (PLD 1985 SC 41), ZULFIQAR AND OTHERS V. SHAHDAT KHAN (PLD 2007 SC 582), ALLAH WASAYA AND ANOTHER V. FALAK SHER AND ANOTHER (2001 6LC 280), MUHAMMAD MAQBOOL V. MUHAMMAD AKBAR AND OTHERS (1999 MLD 2536),

WAQQAR AMBALVI V. FAQIR ALI AND OTHERS (1969 SCMR 189), CHIEF ENGINEER, IRRIGATION DEPARTMENT, N.W.F.P. PESHAWAR AND 2 OTHERS V. MAZHAR HUSSAIN AND 2 OTHERS (PLD 2004 SC 682), HAFIZ TASSADUQ HUSSAIN V. LAL KHATOON AND OTHERS (PLD '2011 SC 296), MST. CHANAN BIBI AND 4 OTHERS V. MUHAMMAD SHAFI AND 3 OTHERS (PLD 1977 SC 28), NOOR MUHAMMAD KHAN AND 3 OTHERS V. HABIBULLAH KHAN AND 27 OTHERS (PLD 1994 SC 650), KARAM BEGUM AND 3 OTHERS V. ALLAH DITTA AND 3 OTHERS (PLD 1986 SC (AJ & K) 27), MUHAMMAD BAKHSH V. ELLAHI BUKHSH AND OTHERS (2003 SCMR 286), BARKAT ALI THROUGH LEGAL HEIRS AND OTHERS (2002 SCMR 1938) and MUKHTAR AHMAD V. MST. RASHEEDA BIBI AND ANO7HER (2003 SCMR 1664) to contend that the suit was liable to be decreed as a whole.

6. Conversely the learned counsel for the defendant has argued that heavy onus was laid upon the plaintiff to prove that deceased having been affected with mental incapacity and physical infirmity could not constitute a valid gift as an independent person, but he neither produced any medical certificate nor the physician to discharge the onus of issue No.1, that the learned Additional District Judge after holding that mutation was properly sanctioned could not held that the gift had been made by the deceased during Marzul Maut, that the learned lower appellate court has failed to consider that when the parties adduced their evidence and onus of issue No.1 was on the parties, which loses its significance, that the learned lower appellate court without assessing the material available on file has passed the impugned judgment and decree on erroneous premises of law. The learned counsel for the defendant relied upon the judgments reported as JEWAN KHAN AND OTHERS V. FEROZE (PLD 1951 LAHORE 433), MST. JIVANEE V. FEROZE DIN AND ANOTHER (PLD 1962 (W.P.) REV.54, MST. CHANAN BIBI AND 4 OTHERS V. MUHAMMAD SHAFI AND 3 OTHERS (PLD 1977 SC 28). He lastly prayed for setting aside of the impugned judgment and decree passed by the learned lower appellate court and prayed for restoration of the judgment and decree passed by the learned trial court.

7. Arguments heard and record perused.

8. It is an admitted fact that Majeed son of Karman was the owner of the disputed property and he died on 5-4-1993 leaving behind his brother/plaintiff, widow Saidan Bibi defendant No.1 and his nephew Muhammad Jamil defendant No.l. His death was got entered in the relevant register of death on 20-5-1993 by Muhammad Jamil defendant No.l. This document is available on file as Exh.D8 at page 64. The column No.8 is relevant, which assigned the reason of death as brain paralysis. It is significant that the said entry was got recorded by defendant No.1 himself and prior to the death of deceased Majeed a Rapt in Roznamcha Waqiati of the Patwari Exh.D2 was alleged to be got entered on 22-3-1993 by the alleged donor Majeed deceased. It is also admitted by the counsel for the defendant No.1 that mutation of gift No.519 Exh.D I was attested by the Revenue Officer on 27-3-1993 in the absence of alleged donor Majeed deceased on the strength of Rapt Roznamcha

Exh.D2. These documents Exh.D1 & D2 are relevant for consideration by this Court.

9. To prove the fact that deceased had been suffering from mental incapacity/brian paralysis, the plaintiff himself appeared as P.W.1 and produced Muhammad Usman as P.W.2. Both the said P.Ws. categorically deposed in their examination in chief that deceased had been affected with mental infirmity and also a man of old age. The said portion of their deposition has not been cross examined by defendant, No.l. It is a settled principle of law that if a material fact has been1 deposed in the examination in chief, but is not questioned during the cross examination, the same shall be deemed to have been admitted in view of the dictum laid down by the superior Courts in the judgments reported as WAQQAR AMBALVI V. FAQIR ALI AND OTHERS (1969 SCMR 189), CHIEF ENGINEER, IRRIGATION DEPARTMENT, N.W.F.P. PESHAWAR AND 2 OTHERS V. MAZHAR HUSSAIN AND 2 OTHERS (PLD 2004 SC 682), (2009 YLR 289), (2000 MLD 404), (PLD 1967 LAH. 1138) and (PLD 2011 SC 296).

10. The deposition of P.W.1 and P.W.2 is further corroborated by Ali Jan P.W.3, who was Lumberdar of the village while stating that entry of death in register of death (Exh-.D8) maintained by him was got entered by defendant No.1 himself after appearing before him. The said entry was thereafter incorporated in the register of death maintained by the Secretary Union Council. The perusal of basic document Exh.P3 and P4 maintained by village headman depicts that in column No.10 of the said register the duration of ailment of the deceased was shown to be 25 days whereas such duration was not shown in the copy of register of death Exh.D8, which was maintained by Union Council concerned. The bird's eye view of the said death certificate (Exh.D8) depicts that column of duration of ailment was not visible and has been intentionally omitted to be photocopied as the other columns are shown in seriatim but the said column is missing. To prove the cause of death, the plaintiff produced relevant Lumberdar Ali Jan as P.W.3 who corroborated the entry of Exh.P3 and P4. The said P.W. was cross examined by the counsel for the defendant No.1 but the veracity of his evidence could not be shaken

11. To rebut the evidence of said P.W.3, defendant No.1 produced Nasir Mehmood, Secretary Union, Council as DW8, who deposed that in his register column No.10 regarding the duration of ailment was left blank by the former Secretary, Union Council and only dash was marked in the said column. Nasir Mehmood DW8 was not a concerned person who had entered death entry of the deceased Majeed rather during the cross-examination it was clarified that Abdul Karim Chatiary. Secretary, Union Council had entered the said entry, but the said Secretary was not produced by defendant No.1 to prove the contents of Exh.D8. As a column of duration of ailment was provided in Exh.D8 and Exh.P3 and in the initial record maintained by Lumberdar the duration of ailment was mentioned, which has been proved by the said Lumberdar, the non-mentioning of duration of ailment in the register of death by Secretary, Union Council which has also not been proved by producing the relevant Secretary, Union Council an inference can be drawn that prior entry made in the register of Lumberdar had a preference over the entry which was

subsequently made by Secretary Union Council on the basis of the record maintained by the Lumberdar but omitted to copy the duration of ailment of the deceased.

12. The contention of learned counsel for defendant No.1 that plaintiff was under obligation to prove the fact that at the time of entry of Rapt Roznamcha and attestation of mutation regarding the gift of disputed property, the donor was suffering from death illness was on the plaintiff, but he failed to prove the said fact is misconceived. Marzul Maut means a disease aggravated that deceased person apprehended that death was more probable than a chance to live, it was only where a person had become so much aggravated that he was depending to apprehend that death was more probable than his chance to live, then the person can be considered to be suffering from Marzul Maut.

13. The plaintiff proved the said fact by producing P.W.1 and P.W.2, whose testimony to the extent that Majeed had been suffering from death illness has not been cross examined and deemed to be admitted by defendant No.1 as observed supra. The said oral evidence has also been supported by the documentary evidence (Exh.P3 and P4) wherein duntion of ailment of said deceased spread over twenty five days and the entry' of Rapt Roznamcha Waqiati Exh.D2 and attestation of mutation Exh.D1 definitely fell in the said duration. The defendant No.1 in his written statement denied the old age of deceased Majeed at the time of his death, but same has also been affirmed by death entry as mentioned in Exh.P3 and P4 and Exh.D8 that deceased was almost about 70 years of age at the time of his death. After reading entire evidence available on file it does not appeal to a prudent man that Majeed deceased at the age of 70 years while confined to bed had the mental capacity to make an intelligent decision With regard to his landed property. Muhammad Jamil defendant No.1 had a motive to usurp the property of deceased to deprive the other legal heirs of Majeed deceased, who at the relevant time was admittedly living with defendant Muhammad Jamil and totally dependent on him. The Rapt Roznamcha Waqiati Exh.D2 was got recorded on 22-3-1993 and the mutation was attested on 27-3-1993 whereas Majeed took his last breathe on 5-4-1993 after 8/9 days of the attestation of said mutation.

14. In the above fact and circumstances of the case it is proved that on 22-3-1993 and 27-3-1993, at the time of entry of the Rapt Roznamcha Waqiati and attestation of mutation, Majeed deceased had been suffering from Marzul Maut, who was not a person competent to make an intelligent decision, hence the so called transaction reflected in the Rapt Roznamcha Waqiati as well as in the mutation in my view was hit by the vice of mischief and also could not be proved by defendant No.1 Muhammad Jamil. Reliance in this respect can be placed upon the judgments reported as (1999 SCMR 1049), (1992 SCMR 553) and MUHAMMAD SIDDIQUE AND 3 OTHERS V. MUHAMMAD BOOTA AND OTHERS (2009 MLD 917). The case-law cited by the learned counsel for the defendant No.1 is not applicable to the facts and circumstances of the instant case.

15. The plaintiff (P.W.1) stated, on oath that disputed, Rapt Roznamcha Waqiati as well as mutation (Exh.D2 & D3) were result of fraud and connivance, thus the onus

was shifted upon defendant No.1 to prove the transaction of gift independently as well as the attestation of mutation and entry of Rapt in dispute. The defendant No.1 did not plead any of the three ingredients of gif in his written statement that when, where and in whose presence the oral transaction of gift was effected as he failed to give any date, time, venue and even the name of witnesses. Furthermore the defendant also failed to prove the transaction of gift through his evidence. There must be an offer on behalf of the donor regarding the gift of the disputed property to the donee and that offer must be accepted by the alleged donee and possession of the disputed property was also to be handed over by the donor to the donee, which should be followed by the subsequent event that the said transaction was reported to the patwari for the entry of the same in the register Roznamcha Waqiati and attestation of mutation. The beneficiary/defendant No.1 was bound to prove the alleged transaction of gift as well as the following events by producing reliable and cogent evidence and in the absence of such proof, the mutation of oral gift No.519 in favour of defendant No.1 is liable to be cancelled. Reliance in this respect is placed upon the judgments reported as (2010 SCMR 1351), (PLD 2003 SC 688), (PLD 1985 SC 41) and (PLD 2007 SC 582). The findings rendered by the learned courts below on issues Nos.1 to 3 are erroneous and not supported by the evidence on the record as well as the law on the subject. Even the learned lower appellate court has passed. the contradictory order as on the one hand it was observed that the transaction of gift was made by Abdul Majeed deceased during Marz-al-Maut, but surprisingly the disputed gift was upheld to the extent 1/3rd of the property whereas in such an eventuality the same was to be declared null and void as a whole because in view of the observation of this Court in the preceding paras, having been falling in the state of Marz-al-Maut due to paralysis of brain, was unable to make intelligent decision with regard to this landed property. As such the findings of the learned courts below on issues Nos.1 to 3, which are inter linked with each other, are reversed and the said issues are decided in favour of the petitioner/plaintiff. However, remaining issues Nos.4 to 7 were already answered by the learned trial court against the defendant/respondent No.1 and the said findings were not challenged by filing any cross-objections, hence the said findings cannot be re-opened when the learned counsel for respondent No.1/defendant has also failed to contradict the said findings of the learned trial court from any evidence available on the record.

16. Sequel of the above discussion is that the instant civil revision is allowed, the judgments and decrees passed by both the courts below are set aside and the suit filed by the plaintiff is decreed with costs throughout. The suit property will be devolved upon all the legal heirs of Abdul Majeed deceased according to their legal shares. The civil Revision No.1369 of 2004 filed by the defendant is dismissed.

AG/M-330/L Revision allowed.

P L D 2015 Lahore 396
Before Ch. Muhammad Masood Jahangir, J
MUNIR AHMAD KHAN---Petitioner
Versus
BURMA SHELL OIL COMPANY through General Manager and another---Respondents

Civil Revision No.730 of 2012, decided on 23rd December, 2013.

Civil Procedure Code (V of 1908) ---

----S. 12(2) & O. III, R. 2---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Compromise by counsel on behalf of client---Power-of-attorney---Scope---Application for setting aside of compromise decree---Allegation of fraud and defeating the rights of client by counsel---Contention of applicant-defendant was that his counsel was not authorized to enter into compromise with the respondent-plaintiff---Application for setting aside decree was accepted by the Trial Court---Validity---Trial Court did not decree the suit rather directed the parties to appear before the Sub-Registrar for registration of deed with regard to suit property---Impugned order was in no way helpful to the plaintiff as same was not executable in the eye of law---Plaintiff had not produced the counsel to prove the contents of power-of-attorney---Defendant had authorized his counsel only to receive amount on his behalf deposited in his account---Counsel had not been authorized to receive amount from the plaintiff unless same was deposited in the account of defendant---No authority had been conferred on the counsel to settle the dispute in the shape of compromise---Power of attorney should be construed strictly and power/authority which had not been specifically given to any attorney or omitted to flow from contents of document should not be deemed to have been conferred on the said attorney---General terms occurring in such document should be interpreted with reference to the object for which such power of attorney was executed---Statement made by the counsel for compromise was nothing but a deviation from the authority conferred upon him by the defendant---Attorney committed fraud with the court as well as with his client to defeat his rights---No misreading or non-reading had been pointed out by the plaintiff---Revision was dismissed in circumstances.

PLD 1987 Lah. 392; 1987 CLC 813; PLD 1969 Kar. 123; 1995 CLC 1572; 1992 SCMR 1488; PLD 1985 SC 341 and 1991 CLC 67 rel.
Ch. Imtiaz Ahmad Kamboh for Petitioner.
M. Tariq Malik, Advocate for Respondent No.1.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---The petitioner/plaintiff had filed a suit for declaration as well as specific performance of contract dated 29-12-

2003 regarding the land measuring 5 Kanals 8 Marlas before the learned trial court on 16-10-2009. The respondent/defendant No.1 contested the suit by filing the written statements through Mian Muhammad Afzal, Advocate, but afterwards the alleged compromise was recorded on 7-4-2010 between the petitioner/plaintiff and the alleged appointed counsel of the respondent/defendant No.1. On the basis of said compromise, the learned trial court disposed of the suit vide order dated 9-4-2010.

2. The respondent/defendant No.1 assailed the aforesaid order dated 9-4-2010 by filing an application under section 12(2) of C.P.C. The petitioner/plaintiff contested the said application and the learned trial court after analyzing the divergent pleadings of the parties, framed the following issues:--

(a) Whether in the light of averment of written statement i.e. blanket refusal of agreement to sell counsel for the petitioner company Mian Muhammad Afzal Advocate was not authorized to make consenting written statement and to receive any amount of consideration? OP Parties.

(b) Whether the concessional statement dated 7-4-2010 by submitting a new agreement Mark-A was not permitted as per Wakalat Nama of the company issued in the name of Mian Muhammad Afzal, Advocate? OP. Parties.

(c) Relief.

3. After recording the evidence of the parties, the learned trial court accepted the application filed by respondent/defendant No.1 vide order dated 9-12-2011, hence the instant Civil Revision.

4. The learned counsel for the petitioner/plaintiff has argued that the impugned order passed by the learned trial court is against facts and circumstances of the case; that the learned trial court has committed illegality and material irregularity while passing the impugned order; that the counsel for respondent/defendant No.1 being the attorney was fully authorized to enter into compromise on the basis of power of

attorney, who had rightly entered into compromise with the petitioner/plaintiff after receiving the amount on behalf of respondent/defendant No.1; that the learned trial court has failed to exercise the jurisdiction vested to it in a proper manner through the impugned order, which is liable to be set aside by allowing the instant revision petition.

5. On the other hand, learned counsel for respondent/defendant No.1 has refuted the arguments advanced by the learned counsel for the petitioner/plaintiff and submitted that the alleged agreement to sell dated 29-12-2003, the bone of contention of the suit for specific performance filed by the petitioner-plaintiff, was a forged document having been prepared without the knowledge and consent of the respondent/defendant No.1; that Mian Muhammad Afzal, Advocate had been appointed as a counsel for appearance in the court to contest the suit, who was not especially authorized by respondent/defendant No.1 to settle the dispute while effecting compromise with the petitioner-plainiff or to make any Iqrarnama and the act of the said counsel was apparently based on fraudulent and without authorization, therefore, the learned trial court has rightly exercised the jurisdiction vested in it while invoking the provision under section 12(2), C.P.C. on valid reasons through the impugned order, which is liable to be maintained while dismissal of the titled revision petition having no merit.

6. Arguments heard and record perused.

7. The petitioner/plaintiff had filed a suit for specific performance on the basis of alleged agreement to sell dated 29-12-2003 against the respondent/defendant No.1. The said suit was contested by respondent/defendant No.1 as well as respondents Nos.3 to 14 by filing independent written statements. It is pertinent to note that in para 3 of the preliminary objections, respondent/defendant No.1 categorically asserted that the impugned agreement dated 29-12-2003 was a fraudulent document having been forged and maneuvered by the petitioner-plaintiff as M. H. Shah, the alleged executants/signatory thereof had been retired from their company on 16-12-1996 and thereafter he died on 14-9-2002. Respondents Nos.3 to 14 also denied the existence of the disputed agreement on the objection as narrated above as well as

other factual aspects. Thereafter, the counsel appointed by respondent No.1 made a statement on 7-4-2010 and furnished a compromise deed Exh-R-2 before the learned trial court on the basis whereof the suit was disposed of vide order dated 9-4-2010 in the following manner:-

"Hence, suit is disposed of in the light of statements of parties dated 7-4-2010 but for the purpose of registration of suit property in the name of plaintiff parties are directed to approach the concerned registering authority who after verifying the title documents of defendants No.1 qua suit property and after taking the requisite stamp duty/transfer fee etc. will do the needful to transfer the suit property in the name of plaintiff. It is also mentioned here that the plaintiff and defendants Nos.3 to 14 are claiming themselves to be occupants of the suit property, therefore, both these parties are directed to avail alternate remedy in this regard. No order regarding determination of possession of these parties is made here".

A perusal of the said order reveals that the learned trial court did not decree the suit rather directed the parties to appear before the Sub-Registrar for registration of the deed regarding the suit property. The said order dated 9-4-2010 passed by the learned trial court was in no way helpful to the petitioner/plaintiff as to may view it is not executable in the eye of law.

8. The respondent/defendant No.1 came forward by filing an application under section 12(2), C.P.C. on the ground that the aforesaid order having been based on fraud and misrepresentation was liable to be set aside and the counsel for the respondent-defendant No.1 had acted beyond the authority conferred upon him. In support thereof, the respondent-defendant No.1 produced its authorized agent Iftikhar Ahmad, as AW-1, who stated that although Mian Muhammad Afzal, Advocate had been appointed as a counsel, but he was not authorized to enter into compromise with the petitioner/plaintiff while delegating any specific authority to him in this respect and he was also not authorized to receive the amount from the petitioner/plaintiff on behalf of respondent/defendant No.1 and he has done all this

without the permission and at the back of respondent-defendant No.1. Conversely, the petitioner-plaintiff himself appeared as RW-1 and produced Muhammad Ijaz (RW2) and Intikhab Alam (RW3). The stance of the said RWs that compromise deed (Exh.R2) had been executed in their presence and it was signed by Mian Muhammad Afzal, Advocate on behalf of the respondent-defendant No.1 is not helpful to the petitioner-plaintiff as their testimony is silent on the issue that the said attorney had specifically been authorized to effect compromise on behalf of the respondent-defendant No.1 and he had acted in letter and spirit of the authority conferred upon him through the power of attorney (Exh.R1). Even otherwise the petitioner-plaintiff also failed to produce Mian Muhammad Afzal, Advocate to prove the contents of power of attorney (Exh.R1). On the other hand a careful study of the said Vakalatnama-power of attorney (Exh.R1) reveals that the executent/respondent-defendant No.1 had authorized the said Advocate only to receive on his behalf the sums and amounts deposited in his account. So, said clause of the power of attorney appears to have not been strictly construed and it can be safely inferred that Mian Muhammad Afzal, Advocate had never been authorized to receive amounts from the petitioner/plaintiff unless it was deposited in the account of respondent/defendant No.1. A further perusal of the said power of attorney (Exh.R1) also reveals that no specific authority had been conferred on the counsel/attorney for formation of compromise deed (Exh.R2) and production thereof before the court to settle the dispute in the shape of compromise.

9. It is settled principle of law that power of attorney should always be construed strictly and the power/authority having not been specifically given to any attorney or omitted to flow from the contents of document should not be deemed to have been conferred on the attorney concerned. General terms occurring in such document for the purpose of appointing the attorney should be interpreted with reference to the object for which such power of attorney was executed. So intention and object for which such power of attorney was construed is an important factor. It has been held in PLD 1987 Lahore 392 that under Order III,, Rule 2, C.P.C. specific powers to be given to the recognized agent otherwise acts should not be binding. A

safe reliance can also be placed on 1987 CLC 813. Moreover, on the authority of the case-law declared in PLD 1969 Karachi 123 and 1995 CLC 1572 it is observed that power of attorney confers only those powers, which are specified therein and the agent may neither go beyond nor deviate from the terms of this instrument. The august Supreme Court in the case reported as 1992 SCMR 1488 has held that in case of conflict and ambiguity it should be construed for benefit of the executant whereas in PLD 1985 SC 341 the law was laid down that the courts should be vigilant particularly when allegation by the Principal is of fraud. Moreover, as held in 1991 CLC Notes 67, the duty of the counsel is very sacred and he represents parties in adjudication of their rights.

10. For the foregoing discussion, this court is left with no option except to observe that Mian Muhammad Afzal, Advocate having not been authorized specifically by respondent/defendant No.1 to settle the dispute in the suit through compromise, the statement made by him before the court and the compromise deed (Exh.R2) were nothing, but a deviation from the authority actually conferred by respondent/defendant No.1 upon him to contest the suit while executing power of attorney in his favour and the order dated 9-4-2010 impugned by filing application under section 12(2), C.P.C. cannot be sustained in the eye of law as the act of the attorney amounted to play fraud with the court as well as the client to defeat his rights. As such the said order has rightly been struck off by the learned trial court while exercising powers conferred under section 12(2), C.P.C. through the impugned order, which cannot be interfered with by this court in the revisional jurisdiction as the same is not found to be illegal or tainted with misreading or non-reading of the evidence on the part of the learned trial court. Resultantly, this Civil Revision having no force is dismissed.

AG/M-20/L Revision dismissed.

2015 Y L R 229
[Lahore]
Before Ch. Muhammad Masood Jehangir, J
MUHAMMAD HAFEEZ through Attorney---Petitioner
Versus
MUHAMMAD RIAZ---Respondent

Civil Revision No.639 of 2008, decided on 30th May, 2014.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Civil Procedure Code (V of 1908), S. 115---Talbs, performance of---Requirements---Revision---Decree sheet, non-filing of---Effect---Discrepancies with regard to performance of Talb-i-Muwathibat were of minor nature which were bound to occur as a lapse of time and same could not be fatal---Plaintiff had failed to produce Booking Registry Clerk of the post office and postman before the Trial Court to prove that notice of Talb-i-Ishhad had not only been dispatched through post but same was actually received by the defendant---Registered post acknowledgement-due was also not got exhibited by the plaintiff in evidence---Personal service or refusal to accept the post on behalf of vendee/addressee should be on record which had to be proved through official of postal department---Mere endorsement on acknowledgement-due card to the effect that same was served or refused would not constitute service when vendee had appeared and denied the said endorsement---Pre-emptor was not only required to prove the sending of notice of Talb-i-Ishhad to the defendant but he was bound to prove the delivery of said notice by production of postman and failure to do such was fatal for pre-emptor---Pre-emptor had failed to prove notice of Talb-i-Ishhad and his suit could not succeed---Defendant could not be bound to suffer merely on technicality, who on the other hand had a very good case on merits---Courts were custodian of the rights and same could not be washed away due to the defects committed in the procedure---When composite judgment was passed and challenged in revision then no procedural illegality and rather technicalities should stand in the way of disposal of said revision on merits---Defendant had brought on record the attested copy of decree sheet prepared by the Appellate Court---Appellate Court had decided the appeal as well as cross-objection through consolidated judgment and non-filing of decree sheet of one case along with the consolidated judgment could not render revision incompetent---Impugned judgment and decree passed by the Appellate Court were set aside and that of Trial Court were restored---Suit filed by the plaintiff was dismissed---Revision was accepted in circumstances.

District Coordination Officer, Sukkur and 8 others v. Khan Muhammad through General Attorney and 3 others 2013 MLD 1369 and Mubarik Ali v. Muhammad Ramzan 2004 SCMR 1740 ref.

District Coordination Officer, Sukkur and 8 others v. Khan Muhammad through General Attorney and 3 others 2013 MLD 1369 and Mubarik Ali v. Muhammad Ramzan 2004 SCMR 1740 distinguished.

Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866; Rabia Bibi and another v. Jahana through L.Rs. 2013 YLR 2016; Islam ud Din v. Muhammad Younis and others 2013 YLR 947; Sultan Ali v. Ghulam Hussain and another 2012 YLR 2545; Mushtaq Hussain and others v. Muhammad Inayat and others PLD 2012 Lah. 234; Muhammad Ajmal Khan v. Muhammad Younis Khan 2009 MLD 549; Muhammad Yousaf v. Raza Muhammad and another 2011 YLR 1972; Munawar Hussain and others v. Afaq Ahmed 2013 SCMR 721; Bashir Ahmed v. Ghulam Rasool 2011 SCMR 762; Saraswathi Ammal and another v. Rajagopal Ammal A.I.R. (39) 1952 Madaras 81 (C.N.39) and Shukar Din and others v. Nazir Ahmed and others 1993 CLC 1367 rel.

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

----S.115---Revision---Scope.

Ch. Amjad Hussain for Petitioner.

Sh. Naveed Shehryar for Respondent.

Dates of hearing: 28th, 30th May, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The facts germane for disposal of the instant civil revision are that Muhammad Riaz, respondent-plaintiff filed a suit for possession through pre-emption against the petitioner-defendant before the learned trial court, fully mentioned in para-1 of the plaint, with the assertions that the disputed property had been purchased by the present petitioner-defendant vide Mutation No. 2069 dated 16-7-2002 against a consideration of Rs.1,60,000, which came into the knowledge of the respondent-plaintiff on 16-7-2002 at 3.00 p.m. while sitting at his Dera along with Shaukat Ali and Saif Ullah, when Muhammad Azam and Muhammad Feroze came there and informed the respondent-plaintiff about the alleged sale, who immediately performed Talb-i-Muwathibat. Then on 18-7-2002 he dispatched notice to the petitioner-defendant showing his intention to pre-empt suit property and thus fulfilled the requirement of Talb-i-Ishhad. The said suit was contested by the petitioner-defendant by filing his written statement with the assertions that the disputed property had been gifted out to him by the donor and the respondent-plaintiff badly failed to fulfil the requisite Talbs as per law. The learned trial court captured the disputed area of facts by framing the following issues:-

(1) Whether the plaintiff has performed the talbs as required by law? OPP

(2) Whether the plaintiff has got a right of pre-emption with respect to the suit land? OPP

(3) Whether the plaintiff is entitled to a decree for possession through right of pre-emption as prayed for? OPP

(4) Whether the land in disputed was sold out to the defendant for a consideration of Rs.1,60,000?OPP

(5) Whether the plaintiff has no cause of action to file this suit? OPD
(6) Whether the suit is not maintainable in its present form? OPD
(7) Whether the suit is based upon mala fide and the defendant is entitled to recover special costs under section 35-A C.P.C.? OPD
(8) Whether the suit does not legally lie in view of preliminary objection No.1 of the written statement? OPD
(9) Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD
(10) Relief.

2. The parties produced their evidence in pros and cons before the learned trial court, which dismissed the suit of the respondent-plaintiff vide judgment and decree dated 8-6-2006 while rendering findings on issue No.1 against the respondent-plaintiff regarding non-performance of Talbs. However, the learned trial court while dealing with issue No.4 declared the disputed transaction as a sale and answered the said issue against the present petitioner-defendant. The respondent-plaintiff filed an appeal before the learned lower appellate court against the dismissal of his suit whereas the petitioner-defendant also filed cross objections while questioning the findings of the learned trial court on issue No.4. The learned lower appellate court accepted the appeal filed by the respondent-plaintiff and decreed the suit for pre-emption whereas the cross objections filed by the present petitioner-defendant were dismissed vide consolidated judgment and decree dated 8-5-2008. Being dissatisfied, the petitioner-defendant has assailed the impugned judgment and decree passed by the learned Addl. District Judge, Gujrat by filing the instant civil revision.

3. The learned counsel for the petitioner-defendant has argued that the learned lower appellate court wrongly decided issue No.1 against the evidence available on the file; that the respondent-plaintiff failed to prove the fulfilment of requisite Talbs as per law; that the disputed property had actually been alienated by the donor to the petitioner-defendant through a gift, but the respondent-plaintiff in connivance with the revenue Patwari after fabrication converted mutation of gift into mutation of sale; that the findings of learned lower appellate on issues Nos.1 and 4 being erroneous and against the evidence on the record are liable to be set aside. He has lastly prayed for setting aside of the impugned judgment and decree passed by the learned lower appellate court and that the suit of the respondent-plaintiff be dismissed.

4. Conversely, the learned counsel for the respondent-plaintiff has supported the impugned judgment and decree passed by the learned lower appellate court and also argued that the respondent-plaintiff by producing qualitative and quantitative evidence fully proved the requisite Talbs; that it stood proved on record through the evidence that the petitioner-defendant had purchased the disputed property from the previous owner; and that the learned lower appellate court while passing a well reasoned judgment has decreed the suit, which is liable to be maintained after dismissal of this Civil Revision on merits. The learned counsel for the respondent has also argued that the petitioner-defendant failed to append attested copy of

decree sheet maintained by the learned lower appellate court in appeal filed by the respondent with the instant civil revision at the time of filing thereof and in view of the case-law declared in District Coordination Officer, Sukkur and 8 others v. Khan Muhammad through General Attorney and 3 others (2013 MLD 1369) and Mubarik Ali v. Muhammad Ramzan (2004 SCMR 1740), the revision petition being not competent is liable to be dismissed on this score as well.

5. Arguments heard and record perused.

6. The pivotal question, which requires determination first by this court is issue No.1 regarding performance of requisite Talbs and to prove the same, the respondent-plaintiff himself appeared as P.W.1, who fully supported his version as narrated in the plaint. The respondent-plaintiff also produced Muhammad Azam the alleged informer as P.W.2 and Muhammad Feroze the participant of the Majlis as P.W.3. Although regarding the performance of Talb-i-Muwathibat some discrepancies are found to have emerged from the cross-examination of P.W.1 to P.W.3, but those can be considered as natural and minor discrepancies, which were bound to occur as lapses of time and cannot be declared fatal. However, it is observed that as regards performance of Talb-i-Ishhad the respondent-plaintiff failed to produce Booking Registry Clerk of the Post Office and the concerned postman before the learned trial court to prove that the notice Talb-i-Ishhad had not only been dispatched through post, but it was actually received by the petitioner-defendant. Even the registered post A.D. was also not got exhibited by the respondent-plaintiff in the evidence. The contention of learned counsel for the respondent-pre-emptor that the respondent-plaintiff was not required to establish on record that the said notice had been actually received by the petitioner-defendant rather he was only to show that the notice was dispatched to the vendee cannot be accepted as there was no personal notice and the requirement of sending notice through registered post acknowledgement due reflects the intent of the law-maker that there should be personal service on the vendee/addressee or refusal to accept the post on his part, which has to be proved through a responsible official of the Postal Department, but mere endorsement on acknowledgement due card to the effect that it was served or refused would not constitute service particularly when the vendee appeared and denied the said endorsement. The said question has already been resolved by the august Supreme Court of Pakistan in the judgment reported as Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105). The relevant portion reads as under:--

"The requirement of "Sending a notice in writing" is followed by a rider i.e. "Under registered cover acknowledge due". This signifies that the intention of law is not merely a formal notice on the part of the pre-emptor conveying his intention to pre-empt but a notice served on the addressee to appraise him about his intention to pre-empt. To say that mere "sending of notice" is enough would make the expression "acknowledge due" redundant. The service of the addressee as prescribed in law therefore, is imperative."

Then relying upon the same judgment the august Supreme Court of Pakistan has pronounced another judgment reported as Allah Ditta Through L.Rs. and others v.

Muhammad Anar (2013 SCMR 866) and once again has observed in para-2 as under:-

"As regards, the issuance of notice of Talb-i-Ishhad is concerned, admittedly the postman has not been examined by the respondent-pre-emptor in terms of the law laid down in Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105). The argument of the respondent's side that the attorney of the petitioner while appearing as DW. has admitted the receipt of the notice and, therefore, the respondent-plaintiff was not obliged to prove the same, suffice it to say that the affirmative onus to prove Talb-i-Ishhad was on the plaintiff and as the petitioner had denied the factum in the written statement, therefore, notwithstanding any subsequent admission of the defendant's attorney, it was obligatory on the plaintiff-pre-emptor to have proved the sending of the notice by leading affirmative evidence, which undoubtedly required the production and examination of the postman. This vital aspect has also eluded the attention of the two courts below."

7. The above said view has also been followed by this Court in various judgments reported as Rabia Bibi and another v. Jahana through L.Rs. (2013 YLR 2016), Islam ud Din v. Muhammad Younis and others (2013 YLR 947), Sultan Ali v. Ghulam Hussain and another (2012 YLR 2545), Mushtaq Hussain and others v. Muhammad Inayat and others (PLD 2012 Lahore 234), Muhammad Ajmal Khan v. Muhammad Younis Khan (2009 MLD 549) and Muhammad Yousaf v. Raza Muhammad and another (2011 YLR 1972). It is thus borne out that plaintiff-pre-emptor is not only required to prove the sending of notice of Talb-i-Ishhad to the defendant, but it is also obligatory upon him to prove the delivery of the notice to the defendant by the production of postman. Such a failure on the part of the respondent-plaintiff is fatal and in view of the dictum laid down by the august Supreme Court of Pakistan in Munawar Hussain and others v. Afaq Ahmed (2013 SCMR 721) Bashir Ahmed v. Ghulam Rasool (2011 SCMR 762), and Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105) the suit for pre-emption cannot succeed. In the light of the above dictums, the respondent-plaintiff failed to prove Talb-i-Ishhad, therefore, the findings of learned lower appellate court to the extent of issue No.1 are reversed and that of learned trial court are restored. Since the respondent-plaintiff has failed to cross the barrier of the requisite Talbs failing which the suit for pre-emption cannot succeed, I do not feel it necessary to dilate upon the other issues including issue No.4.

8. As regards the contention of learned counsel for the respondent-plaintiff that the petitioner-defendant failed to append the attested copy of decree sheet drawn by the learned lower appellate court in the appeal filed by the respondent along with this civil revision and on this score alone this civil revision being not maintainable is liable dismissed, suffice it to say that from the perusal of file it reveals that attested copy of one of the decree sheet prepared by the learned lower appellate court is appended with the civil revision, which is available at page-25, wherein, it is mentioned that the cross objection/appeal is dismissed. The learned counsel for the respondent/plaintiff has argued that the said decree sheet was drawn by the learned lower appellate court while dismissing cross objection No.40 of 2008 filed by the

petitioner-defendant whereas the appeal filed by the respondent-plaintiff was marked as Appeal No.39 of 2008 wherein a separate decree sheet was drawn by the learned lower appellate court regarding acceptance of the appeal, but the petitioner having failed to append the said decree sheet should have faced the consequences. I have minutely perused the certified copies of the documents including the impugned judgment and the decree sheet appended with the file of this Civil Revision and apparently it is found that due to some omission or oversight on the part of the staff of the lower appellate court or the Copying Agency the attested copy of the decree sheet drawn in the file of Cross-Objections was issued instead of the same drawn in the appeal file as the consolidated judgment was passed in appeal file whereas only copy of the cross-objections filed by the petitioner was issued, but no copy of any order passed therein was supplied. The petitioner cannot be bound to suffer merely on technicality who on the other hand has a very good case on merits and an order/judgment passed by the learned courts below, if is liable to be set aside, cannot be legitimated on such score alone as actually the courts are custodian of the rights of the people and the same cannot be washed away due to the defects committed in the procedure. The case-law cited by learned counsel for the respondent-defendant runs on different footing and cannot be applied to the facts and circumstances of the present case. I am of the view that when composite judgment was passed and challenged in Civil Revision, no procedural illegality and rather technicalities should stand in way of disposal of Civil Revision on merits. Even otherwise at the time of filing of instant civil revision, no objection was raised by the Office of this Court and pre-admission notice was issued to the respondent. Moreover, the petitioner-defendant by filing C.M.No.1-C-2014 has also brought on record the attested copy of the decree sheet prepared by the learned lower appellate court whereby appeal filed by the respondent-plaintiff was accepted, so any irregularity, if committed, stands rectified. In the instant case, the learned lower appellate court decided the appeal as well as the cross-objections through a consolidated judgment and non-filing of decree sheet of one case along with the consolidated judgment cannot render revision petition incompetent. Reliance in this respect is placed on the judgments reported as Saraswathi Ammal and another v. Rajagopal Ammal (AIR (39) 1952 MADARAS 81 (C.N.39) and Shukar Din and others v. Nazir Ahmed and others (1993 CLC 1367). Consequently, the contention of the learned counsel for the respondent-plaintiff that the instant civil revision is not maintainable on the ground that the petitioner-defendant failed to append certified copy of the decree sheet, which was actually drawn in the appeal, along with the instant civil revision is repelled.

9. In view of what has been discussed above, the instant civil revision is allowed, the impugned judgment and decree passed by the learned lower appellate court is set aside and that of learned trial court whereby the suit filed by the respondent-plaintiff was dismissed is restored.

AG/M-329/L Revision allowed.

2015 Y L R 1332
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUZAFFAR ALI and others---Petitioners
Versus
Dr. ZAFAR ULLAH MALIK---Respondent

C.R. No.1775 of 1998, decided on 22nd August, 2014.

Civil Procedure Code (V of 1908)---

----O. IX, Rr. 13 & 6 & S. 151---Limitation Act (IX of 1908), Art. 181---Specific Relief Act (I of 1877), S. 8---Suit for possession of immovable property---Ex parte decree, setting aside of---Limitation---Appeal---Delay, condonation of---Word "date of hearing"---Scope---Applicants moved an application for setting aside of ex parte decree which was dismissed concurrently on the ground of limitation---Validity---Court could proceed against defendant ex parte and pass a decree without recording evidence if he/she had failed to appear before the court when suit was called for hearing---Suit had to be proceeded on various steps and court had to fix dates for certain actions to be taken---Routine dates could not be called for hearing of the suit and could only be attributed for hearing of such particular matter which was specified in the order of the court---Defendant did not appear before the court when suit was fixed for submission of his written statement and he was proceeded against ex parte---Case was not fixed for hearing but same was fixed for submission of written statement which was not a "date of hearing" and defendant could not be proceeded against on the said date---No period of limitation had been prescribed for setting aside ex parte order and Art. 181 of Limitation Act, 1908 provided a period of three years---Trial Court had erred in law while declaring the application for setting aside ex parte proceedings as barred by time---Period of limitation had been prescribed for setting aside ex parte decree under O. IX, R. 13, C.P.C. but suit was not fixed for hearing when defendant was proceeded ex parte---Trial Court was not justified while treating the application for setting aside ex parte order as beyond limitation---No limitation would run against the impugned order as same had no legal effect---Ex parte proceedings could be set aside even under S. 151, C.P.C.---Article 181 of Limitation Act, 1908 would govern the issue which had provided three years limitation period when provisions of S. 151, C.P.C. were taken into cognizance---Delay of 9/10 days in filing of appeal could not be held fatal to non-suit the applicants as impugned order had been passed without jurisdiction and in an illegal manner---Impugned order could not be allowed to remain in the field merely on technicality---Appeal was duly instituted by the applicants---Mechanical and arbitrary manner was not to be adopted while passing ex parte decree without considering the factual and legal aspects of the matter---Party claiming for a relief could not be absolved of its liability to produce sufficient evidence in support of his version---Prior to cancellation of sale, a decree for possession could not be granted even on the strength of ex parte evidence without any rebuttal---Trial Court had decreed the suit without taking into consideration the oral evidence led by the

plaintiff---Facts and circumstances of the case would demand that the suit should be heard and decided on merits---Impugned order was set aside and suit filed by the plaintiff would be deemed to be pending before the Trial Court---Revision was accepted in circumstances.

PLD 1977 SC 658; Kanchhedilal Umrao Singh v. Maursi Ranjeet Kachhi AIR 1960 Madia Pradesh 140; Pir Bakhsh v. Chanan Din AIR 1927 Lah. 734; Muhammad Hussain v. Allah Dad and 13 others PLD 1991 SC 1104; Rahim Bux and another v. Gul Muhammad and 2 others PLD 1971 Lah. 746; Provincial Government through Collector, Kohat and another v. Shabbir Hussain PLD 2005 SC 337; Mst. Hakumat Bibi v. Imam Din and others PLD 1987 SC 22; Sh. Abdul Saboor and Brother v. Ganesh Flour Mills Co. Ltd. Lyallpur PLD 1967 Lah. 779; Muhammad Rehman Hashmi and 4 others v. Mian Muhammad Ali through Mian Nisar Ahmad Warsi 2005 CLC 204; Sheikh Abdul Rahman v. Shib Lal Suhu and others AIR 1922 Patna 252; Sheikh Muhammad Saleem v. Faiz Ahmad PLD 2003 SC 628; Province of Punjab and others v. Ghulam Shabbir 2004 YLR 10; Dr. Muhammad Shahid Mian and another v. Faiz Ur Rehman Faizi PLD 2011 SC 676; Messrs Fabnus Construction (Pvt.) Ltd. through Chief Executive/Director v. Iftikhar Ahmad and 4 others PLD 2010 Lah. 452; Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139; Atiqur Rehman Through (Real Father) and another v. Muhammad Amin PLD 2006 SC 309 and Mst. Hajra Bibi v. Zarai Taraqiati Bank Ltd. (ADBP) through Manager 2005 CLD 1116 ref.

Muhammad Hussain v. Allah Dad and 13 others PLD 1991 SC 1104; Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar PLD 1975 SC 678; Muhammad Tariq v. Hasin Jahan 1993 SCMR 1949; Hashim Khan v. National Bank of Pakistan 1992 SCMR 707; Abdul Sattar v. Muhammad Akbar Shah PLD 1990 SC 285 and Hyderabad Development Authority through M.D., Civil Centre Hyderabad v. Abdul Majeed and others PLD 2002 SC 84 rel.

Ali Muhammad Chaudhry for Petitioners.

Mehmood A. Sheikh for Respondent.

Date of hearing: 18th August, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing the instant civil revision Muzaffar Ali etc. the petitioners have assailed the judgment dated 12-6-1995 passed by the learned Civil Judge Sheikhupura whereby he dismissed the application under Order IX, Rule 13, C.P.C. filed by the petitioners seeking setting of the ex parte judgment and decree dated 28-2-1990 and the judgment dated 7-12-1995 passed by the learned Additional District Judge Sheikhupura through which the appeal filed by the petitioners against the above referred order passed by the Civil Court has been dismissed on score of limitation.

2. The facts germane for the disposal of the instant revision petition are that respondent/plaintiff filed a suit for possession against Bashir (here-in-after will be referred as defendant) the predecessor-in-interest of the present petitioners regarding the land measuring 10 marlas bearing Square No.106 Killa No.3/2 situated at Mouza Bhikhi District Sheikhupura before the learned trial court on 4-12-1987.The defendants put in appearance before the learned trial court on 11-1-1989 and the learned trial court thereafter required him to file the written statement, but the defendant failed to comply with the order. However, when the case was fixed for 12-12-1989 for submission of written statement, none appeared on behalf of the defendant and the learned trial court proceeded against ex parte against him then after recording ex parte evidence led by the respondent/ plaintiff the suit was ex parte decreed in his favour vide judgment and decree dated 28-2-1990.

3. The defendant filed an application under Order IX, Rule 13, C.P.C. for setting aside the ex parte proceedings as well as ex parte judgment and decree before the learned trial court on 23-7-1990 with the assertion that he had been prosecuting and also engaged Ch. Muhammad Tufail, Advocate as a counsel who shifted to Karachi without any intimation and his clerk was being contacted to know about the proceedings of the suit, who afterwards also became off sight. The defendant claimed that he came to know about ex parte decree dated 28-2-1990 only when warrant of possession was issued. During the pendency of the said application the defendant passed away and he was succeeded by the present petitioners. The respondent contested the said application by filing his written reply and the learned trial court framed the following issues:--

(1) Whether the petitioner has sufficient ground for setting aside ex parte decree dated 28-2-1990? OPA

(2) Relief.

4. Both the parties produced their evidence in pros and cons and ultimately the learned trial court dismissed the said application vide order dated 12-6-1995. The said order was questioned by the present petitioners before the learned lower appellate court by preferring an appeal, which met the same fate having been

dismissed by the learned lower appellate court vide judgment dated 7-12-1995 on the sole ground of limitation.

5. Feeling aggrieved with the order and judgment rendered by both the courts below the instant civil revision was filed before this Court in the year 1998 and at one stage this Court dismissed the instant civil revision vide order dated 20-5-2002. The petitioners filed C.P.No.1822 of 2003 before the august Supreme Court of Pakistan and vide judgment dated 23-8-2004 the instant civil revision has been remanded to this Court. The relevant portion thereof for ready reference is reproduced as under:--

"8. Without commenting on merits of the submissions of the learned counsel, which might be relevant at the hearing of revision application, it would suffice to say that the High Court acted illegally by dismissing the revision application on merits. Adverting to the question of period of limitation, it is settled law that there is no period of limitation prescribed in the statute for making an application under Section 151, C.P.C. and such application would likely be governed by the provisions of Article 181 of the Schedule to the Limitation Act prescribing a period of three years from the date when right to apply accrues. In the backdrop of the facts and circumstances explained by the petitioners' counsel, it is difficult to hold at this stage that the petitioners deliberately committed delay in making an application for recall/re-admission of revision application notwith-standing the vital circumstance that the revision application was wrongly decided on merits

9. Taking up second submission of the learned counsel that the remedy of appeal against dismissal order being available to the petitioners, recourse to an application under section 151, C.P.C. was wrongly made, suffice it to say that since the order of High Court itself was without jurisdiction, the petitioners were not bound to challenge it by way of a petition for leave to appeal before this Court. In the facts and circumstances, it was a fit case for exercise of inherent jurisdiction by the High Court itself since the earlier order suffered from misconception of law. We have gone through the precedent case-law relied upon by the respondent and without expressing any cavil to the proposition of law laid down therein, would observe that these cases are of no avail to the respondent.

10. For the above facts, circumstances and reasons without touching the merits of the case, we convert this petition into appeal, set aside the impugned orders dated 20-5-2002 and 3-7-2003 and remand the case to the High Court for expeditious decision of revision application on merits and preferably within three months. No order as to costs."

6. The learned counsel for the petitioners has argued that ex parte decree was based upon ex parte proceedings which were conducted on a date fixed for filing of written statement, which could not be considered a date fixed for hearing and the learned trial court was not justified to conduct ex parte proceedings, that the learned trial court without appreciating the evidence available on file dismissed the petition filed by the petitioners under Order IX, Rule 13, C.P.C. in spite of that it was fully proved on record that the counsel for the petitioners had left the profession without informing them and, therefore, they were prevented from appearance before the learned trial court, that the sufficient cause for non-appearance had been shown by the petitioners before the learned trial court by production of evidence, but the learned trial court misread and non-read the evidence available on record and committed material irregularity as well as illegality while non-suiting the petitioners/defendants merely on technicality, that the learned lower appellate court without touching the merits of the case has passed the impugned judgment dated 7-12-1995 on the sole score of limitation, that law favours the adjudication of the cases on merits, but the case of the petitioners has been thrown away on technical grounds in spite of that basic order vide which ex parte proceedings were initiated against the petitioners was erroneous and without jurisdiction and the petitioners could assail the said order at any stage. The learned counsel for the petitioners while placing his reliance upon the judgments reported as (PLD 1977 SC 658), Kanchhedilal Umrao Singh v. Maursi Ranjeet Kachhi (AIR 1960 Madia Pradesh P 140), Pir Bakhsh v. Chanan Din (AIR 1927 Lahore 734), Muhammad Hussain v. Allah Dad and 13 others (PLD 1991 SC 1104), Rahim Bux and another v. Gul Muhammad and 2 others (PLD 1971 Lahore 746) and Provincial Government through Collector, Kohat and another v. Shabbir Hussain (PLD 2005 SC 337)

prayed for acceptance of the instant civil revision, setting aside of the impugned order and judgment passed by the lower courts and the main suit be remanded for decision on merits after setting aside ex parte judgment and decree dated 28-2-1990.

7. Conversely the learned counsel for the respondent/plaintiff supported the impugned order and judgment passed by learned courts below and argued that the defendant had himself absented from the proceedings of the case and failed to file written statement on 12-12-1989 before the learned trial court and the learned trial court was authorized to proceed him against ex parte. He further submitted that the application filed under Order IX Rule 13, C.P.C. as well as appeal preferred before the learned lower appellate court were badly time barred and both the courts below after thrashing the merits of the case as well as legal development passed the impugned order and judgment while rendering convincing reasonings. He has further argued that when the predecessor-in-interest of the petitioners/defendants failed to file written statement despite availing numerous opportunities and then absented from the Court proceedings, the learned trial court was quite justified to conduct ex parte proceeding against him. The learned counsel for the respondent has lastly placed his reliance upon the judgments reported as Mst. Hakumat Bibi v. Imam Din and others (PLD 1987 SC 22), Sh. Abdul Saboor and Brother v. Ganesh Flour Mills Co. Ltd. Lyallpur (PLD 1967 Lahore 779), Muhammad Rehman Hashmi and 4 others v. Mian Muhammad Ali through Mian Nisar Ahmad Warsi (2005 CLC 204), Muhammad Hussain v. Allah Dad and 13 others (PLD 1991 SC 1104), Sheikh Abdul Rahman v. Shib Lal Suhu and others (AIR 1922 Patna 252), Sheikh Muhammad Saleem v. Faiz Ahmad (PLD 2003 SC 628), Province of Punjab and others v. Ghulam Shabbir (2004 YLR 10 Lahore, Dr. Muhammad Shahid Mian and another v. Faiz Ur Rehman Faizi (PLD 2011 SC 676), Messrs Fabnus Construction (Pvt.) Ltd. through Chief Executive/Director v. Iftikhar Ahmad and 4 others (PLD 2010 Lahore 452), Abdul Hakeem v. Habibullah and 11 others (1997 SCMR 1139), Atiqur Rehman Through (Real Father) and another v. Muhammad Amin (PLD 2006 SC 309) and Mst. Hajra Bibi v. Zarai Taraqiati Bank Ltd. (ADBP)

through Manager (2005 CLD 1116) and prayed for dismissal of the instant civil revision.

8. Arguments heard and entire record gone through carefully.

9. Before dealing with the arguments addressed at the bar it is worthwhile to examine the relevant provisions i.e. Order IX, Rule 6, C.P.C. under which a court can proceed ex parte which is reproduced hereunder for ready reference:--

"Order IX: APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

Rule-6. Procedure when only plaintiff appears (1) where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

When summons duly served.---(a) if it is proved that the summons was duly served, the Court may proceed ex parte, [and pass decree without recording evidence];

When summons not duly served.---(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served, but not in due time.---(c) if is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement."

10. The above quoted provision has empowered the court to proceed against the defendant ex parte and pass a decree without recording evidence if the defendant failed to appear before the court when the suit was called on for hearing. The words "suit was called for hearing" according to provision ibid possess weight and legal importance. The word "hearing" has not been defined in C.P.C. but obviously the said word has been used in different provision with a view to state the different purposes for which a date for hearing of the suit is fixed. The suit has to proceed on various steps to be taken by the Court for dispensation of justice to the parties and many actions at the stages in order to enable or compel the parties to take necessary steps in prosecution of the case the court has to fix dates for certain actions to be taken. The routine dates could not be called for hearing of the suit and could only be attributed for hearing of that particular matter which is specified in the relevant

order of the court. The word hearing has been interpreted by the superior Courts of the State in the following manner:--

(a) a date fixed for framing of issues

(b) a date fixed for evidence

(c) a date fixed for hearing of final arguments of the suit.

The said view has been fortified by the judgments reported as Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar (PLD 1975 SC 678), Muhammad Tariq v. Hasin Jahan (1993 SCMR 1949), Hashim Khan v. National Bank of Pakistan (1992 SCMR 707), Muhammad Hussain v. Allah Dad and 13 others (PLD 1991 SC 1104) and Abdul Sattar v. Muhammad Akbar Shah (PLD 1990 SC 285).

11. Keeping in view the above observation in mind the perusal of case diary maintained by the learned trial court reflects that suit was filed by the plaintiff/ respondent on 5-12-1988 and the defendant put in his appearance before the learned trial court for the first time on 11-1-1989 and on the very next date i.e. 6-2-1989 he was proceeded against ex parte but thereafter his application for setting aside ex parte proceedings was accepted by the learned trial court as respondent/plaintiff made a statement for the acceptance of said petition on 17-5-1989 before the said court. Thereafter the case was fixed by the learned trial court for submission of written statement on 7-6-1989, 27-6-1989, 19-7-1989 and 9-7-1989. The perusal of interlocutory order dated 19-9-1989 reveals that written statement was submitted by the defendant and the learned trial court adjourned the case for framing of issues to 9-10-1989, when the learned trial court framed almost four issues and the case was adjourned for recording of evidence of the plaintiff/respondent for 6-12-1989. On the said date it was brought to the knowledge of the court by the learned counsel for the plaintiff/respondent that the defendant had filed written statement in another suit titled as Muhammad Shahid and others v. Zafarullah and he be directed to file fresh written statement whereupon the learned trial court not only deleted the issues already framed vide order dated 9-10-1989 but also adjourned the case for 12-12-1989 for submission of written statement. However, on said adjourned date none appeared on behalf of the defendant and the learned trial court proceeded him

against ex parte. It is vivid from the perusal of above interlocutory orders passed by the learned trial court that the case was not fixed for a date of hearing on 12-12-1989, which was a routine date fixed by the learned trial court for submission of written statement and the ex parte proceedings could not be conducted under Order IX, Rule 6, C.P.C.

12. The contention of the learned counsel for the respondent that the learned trial court passed ex parte proceedings order against the petitioners/defendants in further progress of the suit under Order VIII, Rule 10, C.P.C. is without any substance, as court in further progress of the suit directed the respondent/plaintiff to produce his ex parte evidence. So the submission of the learned counsel for the respondent/plaintiff has no substance as the order dated 12-12-1989 seems to have been passed by the learned trial court while invoking provisions of Order IX, Rule 6, C.P.C. The next contention of the learned counsel for the respondent/plaintiff that the defendant could be proceeded against ex parte for non-appearance on the date when the case was fixed for submission of written statement is also without any substance. The defendant could not be proceeded for non-appearance on the date when only a written statement was to be filed by him as the said date of filing of written statement is not a date of hearing. In this regard reliance is placed upon the judgment reported as (PLD 1991 SC 1104). The relevant paragraph of the judgment is reproduced hereunder:--

Firstly, we have not yet agreed with the learned counsel that a date for filing of the written statement has to be treated as a date for hearing of the suit. And secondly, the order-sheet does not at all support the learned counsel for the respondents. Regarding the presumption that according to C.P.C. the defendant was required and could file a written statement on any of the dates fixed for the filing of the reply to a miscellaneous application. Suffice it to observe that there was no order by the Court requiring the defendant under Order VIII of the C.P.C. to file a written statement. Regarding the other categories of written statements, the argument of the learned counsel also has no force as it has to be established from the order-sheet that a

particular date was fixed for the filing of any written statement as a reply to the plaint. See also Sakhawatuddin v. Muhammad Iqbal (1987 SCMR 1365).

13. It is a settled principle of law that no period of limitation is prescribed for setting aside ex parte order and the residuary Article 181 of the Limitation Act 1908 provides a limitation of three years. The learned trial court erred in law while declaring the application of the petitioners/ defendants for setting aside ex parte proceedings as barred by time. No doubt there is a period of limitation has been prescribed for setting aside ex parte decree under Order IX Rule 13, C.P.C., but as the defendant was proceeded against ex parte on 12-12-1989, which was not a date fixed for hearing, and application was filed for setting aside of said order on 23-7-1990, the learned trial court was not justified while treating the same as beyond limitation. No doubt the ex parte judgment and decree dated 28-2-1990 has been passed on merit after discussing the ex parte evidence adduced by the plaintiff/ respondent but as observed supra since the above referred ex parte proceedings were of no legal effect therefore, no limitation would run against above referred order, which even could be set aside even under section 151, C.P.C. Once the provisions of section 151, C.P.C. are taken into cognizance, then residuary Article 181 of Limitation Act, 1908 will govern the issue, which provides three years limitation period

14. The next contention of the learned counsel for the respondent/plaintiff that appeal filed by the petitioners/defendants against the order dated 12-6-1995 was time barred and rightly dismissed by the learned lower appellate court vide judgment dated 7-12-1995 is not tenable in view of the dictum laid down by the judgment reported Hyderabad Development Authority through M.D., Civil Centre Hyderabad v. Abdul Majeed and others (PLD 2002 SC 84). In this case the conclusion arrived at by the august Supreme Court of Pakistan in this behalf is reproduced hereunder:--

" .therefore, keeping in view the merits of the case which have been discussed hereinabove we are of the opinion that if there is delay of 8 days in filing the appeal that is to be condoned in the interest of justice because merely for such technical

reason appellant cannot be non-suited and the impugned order dated 4th November, 1999 passed by the High Court cannot be upheld which on face of it is not sustainable in the eye of law as it has been pointed out hereinabove while discussing merits of the case. Therefore, while condoning the delay it is held that the appeals were duly instituted. Even otherwise if on merits the respondents have no case then limitation would not be a hurdle in the way of appellant for getting justice and in such-like situation the Courts should not feel reluctant in condoning the delay depending upon facts of the case under-consideration."

15. As such the delay of 9/10 days in filing of the appeal cannot be held fatal to non-suit the petitioners as the order impugned therein is found to have been passed without jurisdiction and in an illegal manner, and merely on technicality such order cannot be allowed to remain in the field by the court of law. As such, after condoning the delay it is held that the appeal was duly instituted.

16. Besides the above, the peculiar merits of the case would also fully justify exercise of revisional jurisdiction by this Court to do complete justice notwith-standing the technical objections raised on behalf of the respondent/plaintiff, have been separately dealt with and found to be untenable. The contents of the plaint filed by the respondent/plaintiff need thorough probe, which related to the interest and rights of the parties regarding the disputed property. The courts of law must always keep in mind that even where law requires passing of ex parte decree the Judicial Officers should not adopt the said course in a mechanical and arbitrary manner while omitting to take into consideration the factual and legal aspects involved in the matter as it is sacred duty of the Courts to do complete justice after applying correct law and justice cannot denied as a penalty, but the party claiming for a relief cannot be absolved of its liability to produce sufficient evidence according to law in support of the version.

17. In the present case the respondent/plaintiff has himself admitted in the contents of the plaint that a mutation No.1459 has been sanctioned in favour of the defendant and paras 4 and 5 being relevant are reproduced hereunder:--

"4. That although the plaintiff has become the owner of the land detailed mentioned in para No.1 of the plaint through mutation No.598 but Professor Hafiz Ullah procured through fraud mutation No.1459 whereby allegedly the land was sold by Saddat Ullah, Mst. Kalsoom Begum, Khalil Ahmed, Saeed Ahmed and Neelam Nagin for a consideration of Rs.500 in favour of Hafizullah and the plaintiff. It is pertinent to note that Saeed Ahmad, Khalil Ahmad and Neelam Nagin were minors in 1982. Malik Saddat Ullah, Mst. Kalsoom Begum, Khalil Ahmad, Saeed Ahmad and Neelum Nagin were not owner of any land in Bhikhi revenue estate in 1982, as such question of sanctioning of Mutation No.1459 does not arise. The said mutation has also been reviewed by the order dated 28-8-1988, passed by the Collector Consolidation, Sheikhupura.

5. That the fraud has been practised upon the plaintiff and Hafizullah has tried to deprive the plaintiff from his right of ownership by transferring land measuring 10 marlas out square No.106 killa No.3/2 vide mutation No.1503 attested on 5-12-1982. Hafizullah has no right or title upon the suit land and he can not alienate the said land. This fraud has been practiced by Hafizullah by taking undue advantage of the absence of the plaintiff from Pakistan as such the defendant want to deprive the plaintiff from his legitimate rights of ownership. The defendant has knowingly purchased the suit land while he was well aware that Hafizullah is not owner of the suit land."

The perusal of said paragraph also reveals that prior to the cancellation of sale reflected in above referred mutation a decree for possession could not be granted by the learned trial court even on the strength of ex parte evidence without any rebuttal thereto. Para-3 of ex parte judgment dated 28-2-1990 for ready reference is reproduced hereunder:-

"3. The plaintiff in order to substantiate his claim has examined one witness over and above himself and he has produced the copy of Mutation No.598 as Exh.P-1, a copy of Mutation No.1459 as Exh.P-2, copy of mutation No.883 as Exh.P-3, a copy of the order of the Collector Consolidation as Exh.P-4 and a copy of register Haqdaran Zameen as Exh.P-5 the ex parte evidence adduced by the plaintiff fully

supports his contention and since, there is no evidence in rebuttal to it, therefore, relying on the ex parte decree for possession of the land in dispute comprised in square No.106 killa No.3/2 measuring 10 marlas after removal of super structure thereon in favour of the plaintiff and against the defendant."

18. It is also relevant to point out that in the prayer clause the respondent/plaintiff requested for twofold reliefs of possession firstly after removal of superstructure on the disputed property and alternatively decree for declaration that the sale of specific field number in favour of the defendant was illegal and claimed for partition of the suit property. For facilitation of reference the prayer clause is also reproduced as under:--

"It is therefore, respectfully prayed that a decree for possession of land after removal of super structures thereon measuring 10 marlas bearing square No.106 killa No.3/2 situated at Bhikhi Revenue Estate, Tehsil and District Sheikhupura or in the alternative decree for declaration that the sale of specific filed number in favour of the defendant is illal, void and ineffective upon the rights of the plaintiff and possession through partition of the land through metes and bounds may please be passed in favour of the plaintiff and against the defendant with costs."

The learned trial court without taking into consideration the oral evidence led by the plaintiff/respondent decreed the suit against the mandate of law. As the dispute relates to a property where the petitioners/ defendants have raised their construction, the peculiar facts and circumstances of the case demand that the suit should be heard and decided on merits. Consequently the instant civil revision is allowed, the impugned order dated 12-12-1989 regarding ex parte proceedings against petitioners/ defendants and ex parte judgment dated 28-2-1990 vide which the suit filed by the respondent/plaintiff was ex parte decree passed by the learned trial court and the judgment dated 12-6-1995 vide which the application under Order IX Rule 13, C.P.C. was dismissed as well the judgment dated 7-12-1995 passed by the learned Additional District Judge vide which the appeal filed by the petitioners/defendants was dismissed are hereby set aside.

19. The suit of the filed by the respondent/plaintiff will be deemed to be pending before the learned trial court who will proceed therewith from the stage of filing written statement by the petitioners/ defendants while granting fair opportunity and also ensure that it being an old matter the main suit is decided within a period of four months. The petitioners/defendants are also penalized with costs of Rs.15,000 (Rupees fifteen thousand only) for their irresponsible attitude in the case.

20. The parties are directed to appear before the learned District Judge Sheikhupura on 15-9-2014 who will entrust the case to the court of competent jurisdiction for further proceedings.

AG/M-352/L Case remanded.

2015 Y L R 1598
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
WAPDA through Chairman and 3 others---Petitioners
versus
KHALID PERVAIZ---Respondent

C.R. No.846 of 2006, heard on 26th August, 2014.

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

----S. 26(6)---Theft of electricity---Detection bill---Civil court, jurisdiction of---Scope---Objection raised with regard to question of law---Effect---Contention of WAPDA (defendant) was that when detection bill was issued due to theft of electricity against a consumer with regard to metering equipment then civil court had no jurisdiction in the matter---Suit was decreed concurrently---Validity---Detection bill was issued on the charge of slowness of meter---Jurisdiction of civil court was barred with regard to allegation of theft of electricity against the consumer due to metering equipment---Both the courts below had omitted to consider the said aspect of the case while passing the impugned judgments and decrees---Question of jurisdiction being a question of law could be raised by any party at any stage of proceedings even court itself was required to examine whether it had jurisdiction to proceed or not---Party would not be debarred from raising objection at later stage of proceedings even before higher forum merely that it had not raised any objection out of ignorance or for want of proper advise---Neither silence of party nor even waiver would confer the jurisdiction on a court not vested in law---Question of jurisdiction would go to the roots of case and same would render the entire proceedings coram non judice thereby vitiating the entire proceedings and making the judgment illegal and void---Question of jurisdiction should be firstly decided by the court---Suit was remanded to the Trial Court without touching upon merits of the case---Impugned judgments and decrees were set aside---Trial Court was directed to decide the matter afresh considering the objection of jurisdiction---Revision was accepted in circumstances.

Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd Okara and others PLD 2012 SC 371 and Executive District Officer Schools and Literacy, District Dir Lower and others v. Qamar Dost Khan and others 2006 SCMR 1630 ref.

Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd Okara and others PLD 2012 SC 371 and Executive District Officer Schools and Literacy, District Dir Lower and others v. Qamar Dost Khan and others 2006 SCMR 1630 rel.

(b) Jurisdiction---

----Objection to jurisdiction---Scope---Question of jurisdiction being a question of law could be raised by any party at any stage of proceedings even court itself was required to examine whether it had jurisdiction to proceed or not---Party would not

be debarred from raising objection at later stage of proceedings even before higher forum merely that it had not raised any objection out of ignorance or for want of proper advise---Neither silence of party nor even waiver would confer the jurisdiction on a court not vested in law---Question of jurisdiction would go to the roots of case and same would render the entire proceedings coram non judice thereby vitiating the entire proceedings and making the judgment illegal and void---Question of jurisdiction should be firstly decided by the court.

Aurangzeb Mirza for Petitioners.
Nemo for Respondent.
Date of hearing: 26th August, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Brief facts of the case are that respondent/plaintiff instituted a suit for declaration expressing that he was regular consumer of the petitioners/defendants, who used to check the meter installed at his residence regularly which was found to be sealed and stamped regularly by the petitioners/defendants, that the respondent had been paying electricity bill regularly, that in the month of June 2000 the petitioners/defendants issued a bill of Rs.325,707 out of which Rs.158,283 were extra beyond reading on the meter and the respondent/plaintiff claimed that the petitioners/defendants were not entitled to receive the extra amount. The said suit was contested by the petitioners/defendants by filing written statement before the learned trial court and it was submitted that the respondent/plaintiff had been filing various suits against the department and the amount mentioned in the present suit was mentioned in the bill of June, 2000 as it had been included on account of slowness of meter.

2. The learned trial court framed the issues, recorded evidence of the parties and appreciating the evidence of the parties decreed the suit filed by the respondent/ plaintiff vide judgment and decree dated 20-10-2004. The petitioners filed an appeal before the learned lower appellate court which has also been dismissed vide judgment and decree dated 16-1-2006. Feeling dissatisfied the petitioners have filed the instant civil revision to assail the judgments and decrees passed by both the courts below.

3. The learned counsel for the petitioners has argued that in the cases of theft of electricity against a consumer relating to metering equipment, when detection bill is issued, the jurisdiction of the Civil Court is exclusively barred under section 26(6) of the Electricity Act, 1910 and only an Electric Inspector for possessing special expertise in examining working of metering equipment and other related apparatus had jurisdiction to entertain reference under section 26(6) of the Electricity Act 1910, but both the courts below while overlooking the said aspect of the case had not only entertained the suit in hand, but also decreed the same beyond the scope of their jurisdiction and the appeal was also dismissed without seeing the case from such angle. He has relied upon the judgment reported as Water and Power

Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd Okara and others (PLD 2012 SC 371) to support his contention. While responding to a query that whether the said objection was raised before the trial court, learned counsel for the petitioners has argued that any legal objection to the extent of jurisdiction of the Court can be raised for the first time even while appearing before the highest Court of country. He has placed his reliance upon the judgment reported as Executive District Officer Schools and Literacy, District Dir Lower and others v. Qamar Dost Khan and others (2006 SCMR 1630).

4. The instant revision came up for hearing before this Court on 2-5-2006 when notice was issued to the respondent/plaintiff and his learned counsel put in his appearance before this Court on 8-1-2007 when C.M.No.1-C of 2006 was considered by this Court. On the last date of hearing i.e.11-8-2014 none appeared on behalf of the respondent, but in the interest of justice the office of this Court was directed to relist the case for today and today again none has appeared on behalf of the respondent without any intimation in spite of that name of learned counsel for the respondent (Mian Muhammad Rafique, Advocate) is duly reflected in the cause list, therefore the respondents is proceeded against ex parte.

5. Arguments of the learned counsel for the petitioners heard and record perused.

6. From the perusal of the pleadings of the parties it is found that the detection bill had been issued to the respondent on the charge of slowness of meter and according to the dictum laid down in the case-law Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd. Okara and others (PLD 2012 SC 371) in regard to the allegation of theft of electricity against the consumer related to the metering equipment. The jurisdiction of the Civil Court is barred. For ready reference para-12 of the said judgment is reproduced hereunder:--

(12) In Appeals Nos. 1514 and 1515 of 2006 arising out of the same metering equipment at the premises of the respondent, the allegation of theft by the appellant related to the metering equipment. The respondent/consumer had questioned the detection bill in a civil suit and interestingly the appellant (licensee) had raised objection to the jurisdiction of the civil court before the High Court on the ground that since the matter related to the correctness or otherwise of the metering equipment, the matter fell within the exclusive jurisdiction of the Electric Inspector. In view of our above discussion, such objection is sustained and we hold that the civil court had no jurisdiction in the matter.

7. The learned counsel for the petitioners has rightly pointed out that both the learned courts below while passing the impugned judgments and decrees have omitted to take into consideration the said aspect of the case. It has been declared in the judgment reported as Executive District Officer Schools and Literacy, District Dir Lower and others v. Qamar Dost Khan (2006 SCMR 1630) that question of limitation goes to the root of case and can be raised for the first time even while appearing before the highest court of country. The respondent/plaintiff has been proceeded ex parte.

8. It is well settled principle now that a question of jurisdiction being a question of law could always be raised by any party at any stage of proceeding, even Court itself is required before proceeding with the case, to examine whether it has jurisdiction in law to proceed or not. Merely because a party to the proceedings has not raised any objection to the jurisdiction out of ignorance or for want of proper advice, shall neither debar a party from raising such objection at the later part of proceeding even before higher forum nor the silence of the party nor even waiver shall confer the jurisdiction on a court not vested in law. Question of jurisdiction goes to the roots of the case and renders the entire proceedings coram non judice thereby vitiating the entire proceedings and making the judgment illegal and void. As question regarding its jurisdiction has to be firstly decided by the same Court, it is felt appropriate to remand the main suit to the learned trial court without touching upon merits of the case lest it may not prejudice the case of either party.

9. Consequently, the instant civil revision is allowed, the impugned judgments and decrees passed by the courts below are set aside and the suit will be deemed to be pending before the learned trial court, who will decide the suit afresh after taking into consideration the objection of jurisdiction raised by the learned counsel for the petitioners while seeking guidance from above referred esteemed judgments.

10. The petitioners will approach the learned District Judge, Faisalabad on 8-9-2014 who will entrust the file of the suit titled as Khalid Pervaiz v. Wapda and others to a court of competent jurisdiction and the said court after issuing notice pervi and procuring the attendance of the respondent/plaintiff will decide the same in the light of observation and direction made in this judgment.

AG/W-10/L Revision allowed.

2015 Y L R 2162
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
LAHORE GYMKHANA CLUB through Chairman---Petitioner
Versus
Sahibzada SARFARAZ ALI KHAN---Respondent

C.R. No.1942 of 2013, decided on 2nd June, 2014.

Specific Relief Act (I of 1877)---

----S. 42---Suit for declaration---Membership of social club---Plaintiff filed suit impugning the vires of a letter issued by the Social Club (Lahore Gymkhana) whereby an amount in lieu of membership of the plaintiff had been demanded---High Court, on consensus of the parties, directed that the Social Club (Lahore Gymkhana), to issue a letter within a period of ten days indicating balance amount against the plaintiff, who was directed to deposit half of said amount as first installment on deposit of which, a provisional membership certificate would be issued to the plaintiff to avail the facility of the club by him and his family members as per law---Plaintiff, on his undertaking that he would withdraw the suit, was directed to pay the remaining amount within a period of three months---Revision was disposed off, accordingly.

Barrister Rafay Altaf for Petitioner.
Tariq Mehmood Mughal for Respondent.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- By filing this Civil Revision, the petitioner has challenged the order dated 6-2-2013 passed by the learned trial court, whereby, the application filed by the respondent under Order XXXIX, Rules 1 and 2, C.P.C. has been accepted, which has been filed in a suit for declaration challenging the vires of letter dated 13-8-2012 through which an amount of Rs.476600 in lieu of membership of the petitioner club has been demanded as well as the judgment dated 4-6-2013 passed by the learned District Judge, Lahore, whereby, the appeal filed by the petitioner has been dismissed.
2. During the course of arguments a consensus has been developed between learned counsel for the parties according to which the respondent has agreed to deposit the outstanding charges w.e.f. 1-11-1995 in two installments and in that eventuality learned counsel for the petitioner assures that on deposit of the first installment by the respondent towards the dues regarding development charges and temporary deposit prevailing in the year 1995 whereas monthly subscription with effect from 1-11-1995 at the prevalent rate of each month to be assessed by the petitioner, the provisional membership certificate with immediate effect shall be issued to the

respondent, who will withdraw the main suit in consequence thereof. However, the entrance fee of Rs.25,400 already got deposited by the respondent will not be charged again.

3. It is, therefore directed the petitioner will issue a letter within a period of 10 days while indicating balance amount against the respondent w.e.f. 1-11-1995, who will deposit half of the said amount till 16-6-2014 as first installment on deposit whereof with the petitioner, a provisional membership certificate with immediate effect will be issued to the respondent to avail the facility of the club by him and the family members as per law. In such an eventuality, the learned counsel for the respondent has given an undertaking that the main suit will be withdrawn as infructuous. However, the rest of the amount will be paid by the respondent to the petitioner within a further period of three months up till 15-9-2014.

4 Consequently, this Civil Revision is disposed of in the above terms and both the parties will abide by the above said commitment arrived at between them.

KMZ/L-11/L Order accordingly.

2015 Y L R 2340
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
PERVAIZ AKHTAR and others---Petitioners
Versus
MUHAMMAD MANSHA and others---Respondents

C.R. No.304 of 1999, heard on 9th September, 2014.

Specific Relief Act (I of 1877)---

----S. 12---Qanun-e-Shahadat (10 of 1984), Art. 129 (g)---Suit for specific performance of agreement to sell---Unilateral agreement---Scope---Plaintiff was bound to produce his whole evidence in proof of his respective stance and if any witness had deposed against his interest then he could be declared hostile enabling him to cross-examine the said witness for bringing truth on the record---Party could not be absolved from such duty to bring on record all the available evidence due to fear that a witness if was produced would not support its version---Plaintiff had not only failed to prove the transaction of sale as well as valid execution of agreement to sell but he also failed to prove that any sale consideration was paid to the defendant---Plaintiff had failed to produce marginal witnesses as well as Registrar who attested the agreement to sell---Non-production of said witnesses had created a dent in the case of plaintiff---No explanation was available on file for withholding such evidence of important nature---Inference would be that if such witnesses were produced, they would have deposed against the version of plaintiff---Plaintiff could neither prove the settlement of bargain nor the payment of balance consideration---Private document was required to be proved by production of its marginal witnesses as well as Registering Officer---None of the marginal witnesses of agreement to sell was produced in the present case---Scribe could not be considered as attesting witness---Impugned agreement to sell was unilateral which was not enforceable under the law---Mis-reading and non-reading of evidence by courts below was on record in the present case---Impugned judgments and decrees passed by the courts below were set aside---Revision was accepted in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs PLD 2011 SC 241; Noor Begum v. Abdul Ghaffar 2003 YLR 1494; Muhammad Sarwar Khan v. Salamat Ali 2012 CLC 94; Mst. Gulshan Hamid v. Kh. Abdul Rehman and others 2010 SCMR 334 and Sher Shah v. Muhammad Suleman 2013 YLR 1017 rel.

Taqi Ahmad Khan for Petitioners.
Muhammad Arif Gondal for Respondents.
Date of hearing: 9th September, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This civil revision is directed against the judgment and decree dated 29-4-1991 passed by the learned Civil Judge, Arifwala and judgment and decree dated 17-12-1995 delivered by the learned Additional District Judge, Arifwala whereby the suit filed by Muhammad Mansha plaintiff/respondent No.1 for specific performance of agreement to sell dated 28-8-1968 was decreed and appeal filed by the present petitioners/defendants was dismissed respectively.

2. The facts of the case are that the petitioners were owners of disputed property measuring 100 kanals 17 marlas in Chak No.14/EB Pakpattan Sharif and Muhammad Mansha plaintiff/respondent No.1 brought a suit against the present petitioners/defendants that the disputed property was owned by Provincial Government, which was allotted to Mst. Taj Mehlan defendant No.1, who then executed an agreement to sell in favour of the plaintiff on 28-8-1968 Exh.P1 against a consideration of Rs.10,600 and Rs.5,000 were paid by the plaintiff/respondent No.1 to defendant No.1 as earnest money whereupon she promised to execute sale deed in favour of plaintiff after getting proprietary rights from the Government of Punjab. It was further averred in the plaint that plaintiff would pay in installment the price of the disputed property to the Punjab government out of balance consideration of Rs.5,600, that defendant No.1 also executed a power of attorney on the same day in favour of Muhammad Ramzan father of the plaintiff/respondent No.1 with regard to the disputed land and the possession was also handed over by the defendant/ respondent No.1 to the plaintiff/respondent No.1 in lieu of agreement to sell Exh.P1, that disputed property was developed by the plaintiff/respondent No.1 after spending a lot of money and arrears of installments were also paid by him to the Punjab government, that subsequently sale deed Exh.P16 was also attested in favour of respondent No.1, that the defendant No.1, who instead of honouring the agreement to sell Exh.P1 got transferred the disputed property vide sale deed dated 27-4-1981 Exh.P17 in favour of defendant No.2 Muhammad Yaqoob. The latter further transferred the said disputed property to the present petitioners/defendants Nos.3 and 4 Pervaiz Akhtar and Mureed Hussain, and that plaintiff/respondent No.1 had asked the defendants many times for performance of agreement Exh.P1, but on their refusal he was constrained to file a suit for specific performance of the said agreement before the learned trial court. The said suit was contested by defendant No.1 as well as defendants No.3 and 4/present petitioners by filing their independent written statements. The defendant No.1 in her written statement denied the execution of agreement to sell Exh.P1 as well as power of attorney. However, subsequently she absented herself from court proceedings and the learned trial court initiated ex parte proceedings against her. Defendants Nos.3 and 4/petitoners while submitting their written statement also denied the execution of agreement to sell Exh.P1.

3. The learned trial court in the light of divergent pleadings of the parties framed the following issues:--

(1) Whether the plaintiff is owner in possession of the suit-land with reference to agreement to sell dated 28-8-1968? OPP

(2) Whether the registered sale deed dated 27-4-1981 executed by defendant No.1 in favour of defendant No.2 is void, illegal and ineffective as against the rights of the plaintiff? OPP

(3) On proving issue No.2 in the affirmative whether the subsequent sale vide Mutation No.121 dated 17-1-1983 is illegal, void and ineffective as against the rights of the plaintiff? OPP

(4) Whether the suit is not maintainable in its present form? OPD

(5) Whether the suit is not by principle of res judicata? OPD

(6) Whether defendants Nos.1 and 2 are unnecessary parties to the suit? OPD

(7) Whether the suit is barred by limitation? OPD

(8) Whether the plaintiff has no locus standi? OPD

(9) Whether the agreement to sell dated 28-8-1968 is not by law? OPD

(10) Whether the defendants Nos.3 and 4 are bona fide purchasers for consideration? OPD

(11) Whether the plaintiff has no cause of action? OPD

(12) Whether the suit has been incorrectly valued for the purposes of court fee and jurisdiction? If so, what is the correct valuation and what effect? OPD

(13) Whether the defendants are entitled to special costs? If so, up to what extent? OPD

(14) Relief.

4. Both the parties produced their evidence in pros and cons and ultimately the learned trial court decreed the suit filed by the plaintiff/respondent No.1 and the learned lower appellate court dismissed the appeal filed by the present petitioners/ defendants Nos.3 and 4 vide impugned judgments and decrees referred in para-1 ante.

5. The learned counsel for the petitioners has argued that the impugned judgments and decrees passed by the courts below suffer from infirmity being tainted with misreading and non-reading of material/evidence available on file, that the learned courts below have misinterpreted the evidence available on record, that findings on issues Nos.1 3 are against standard of proof laid down by the Qanun-e-Shahadat Order 1984 as the required number of witnesses were not produced by the plaintiff/respondent No.1 to prove the valid execution of agreement to sell, that the disputed agreement to sell was allegedly got executed by an illiterate paradanasheen lady and independent corroboration was required by the beneficiary/plaintiff to prove the bargain as well as its execution but he failed to bring on file strong and confidence inspiring evidence, that the disputed alleged agreement was a conditional agreement as the balance sale consideration was to be paid by plaintiff/ respondent No.1 who failed to deposit the installments with the Government of Punjab and due to said failure, the agreement, if any, had been executed between the plaintiff/respondent No.1 and petitioners, the same being unilateral in form was not enforceable in the eye of law, that only Deed Writer was produced by the plaintiff/respondent No.1 to prove the valid execution of agreement, which did not fulfil the requirement of law for proving the said private document, that both the courts below overlooked the said aspect and passed the impugned judgments and decrees while misinterpreting the law as well as evidence available on file. He has lastly prayed for acceptance of the instant civil revision, setting aside of the impugned judgments and decrees and further for dismissal of the suit filed by the plaintiff/respondent No.1.
6. Conversely the learned counsel for the plaintiff/respondent No.1 has refuted the arguments advanced by the learned counsel for the petitioners and pleaded that execution of agreement to sell Exh.P1 as well as the bargain of sale struck between the plaintiff/respondent No.1 and defendant No.1 had been fully proved before the learned trial court by producing qualitative and quantitative evidence and after appreciating the same the courts below rendered concurrent findings of facts through the impugned judgments and decrees, which cannot be interfered with by this Court while exercising revisional jurisdiction. He has lastly prayed for dismissal of the instant civil revision.

7. Arguments heard and record perused.

8. The pivotal issue in the present case is issue No.1 and the onus of said issue was upon the plaintiff/respondent No.1. To discharge the said onus Falak Sher Deed Writer P.W.1 was produced who deposed that the agreement to sell dated 28-8-1968 Exh.P1 was scribed by him on the direction of defendant No.1 in favour of plaintiff/respondent No.1. He further deposed that Muhammad Aslam brother of Mst. Taj Mehlan was also present at the time of its execution. The perusal of Exh.P1 reveals that Muhammad Aslam son of Sikandar has been reflected as marginal witness Exh.P1, but record of this file reveals that said witness was not produced by the plaintiff/respondent No.1. On a query put by this Court to the learned counsel

for the plaintiff/respondent No.1 that whether said marginal witness was got summoned for recording his evidence he has spontaneously replied that it was the duty of defendant No.1 to bring him in the witness box as the said marginal witness was her brother, but the plaintiff/ respondent No.1 could not produce him as a P.W. because he might have deposed against the interest of the plaintiff/ respondent No.1. The said version of the learned counsel for the respondent No.1 is without any substance. Even the finding of the learned trial court while deciding issues Nos.1 to 3 that said Muhammad Aslam was required to be produced by defendants as he was real brother of alleged executant is not sustainable as it was duty of the plaintiff/ beneficiary of the document in question to produce whole of the evidence in proof of his respective stance and if any witness deposed against the interest of the plaintiff, he could be got declared hostile enabling the said party to cross-examine its own witness for brining the truth on the record. However, due to the fear that a witness, if is produced, will not support its version cannot absolve the party from its bounded duty to bring on record all the available evidence. Reliance can be placed upon the judgments reported as Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs (PLD 2011 SC 241) para-12 of which judgment is of great importance and is reproduced hereunder:--

"12. For the argument that as the second attesting witness of the agreement was the son of the respondent, therefore, the appellant could not take the risk of examining him, it may be held-that as ordained above the mandatory provisions of law had to be complied and fulfilled and only for the reason or the perception that such attesting witness if examined may turn hostile does not absolve the concerned party of its duty to follow the law and allow the provisions of the Order, 1984, relating to hostile witness take its own course. Before parting it may be mentioned that the judgment reported as Abdul Wali v. Muhammad Saleh (1998 SCMR 760) which find mention in the leave granting order is not relevant for the proposition in hand as it relates to a document before the enforcement of the Order, 1984 when Article 17 was not there.

9. The plaintiff/respondent No.1 produced Abdul Wahid as PW.2 who produced death certificate of Khushi Muhammad, Lumberdar, the alleged identifier of Mst. Taj Mehlan before the Sub-Registrar at the time of registration of the disputed agreement to sell Exh.P1. PW.2 claimed to have identified signatures of his deceased uncle over the disputed agreement Exh.P1, but during cross-examination he deposed that he was not an expert of documents and signatures. The statement of P.W.2 is not much helpful to the plaintiff/respondent No.1. Plaintiff further produced Noor Hassan as PW3 who deposed in his examination in chief that Mst. Taj Mehlan defendant No.1 and the plaintiff/respondent No.1 were known to him and that a bargain of sale regarding disputed property had been settled between the plaintiff and defendants for Rs.10,600 and Rs.5,000 part payment was made before the Tehsildar to defendant No.1 whereas balance consideration was to be deposited by the plaintiff/respondent No.1 before the government treasury, who deposited one

or two instalments in the said treasury, but failed to calculate that how much amount was paid by him, that after the payment of entire instalments the ownership was to devolve on defendant No.1 and thereafter the disputed property was to be transferred to the plaintiff/ respondent No.1 and that at the time of execution of Exh.P1 he was also present before the Deed Writer and defendant No.1 thumb marked Exh.P1 in his presence. The said P.W. in his cross-examination admitted that Exh.P1 did not bear his signature. He further deposed that he could not recognize/ identify the thumb impression of defendant No.1 on the stamp paper Exh.P1. He further deposed that he also could not identify the signature or thumb impression of Muhammad Aslam, alleged marginal witness of the disputed agreement to sell. He even admitted further during the cross-examination that he was not in a position to identify the signature or thumb impression of any of the witnesses of the agreement to sell Exh.P1. He also showed ignorance about the names of husband as well as the children of defendant No.1. Shamoon PW4 produced by the plaintiff/respondent No.1, although claimed that bargain was struck between the plaintiff/respondent No.1 and defendant No.1 against a consideration of Rs.10,600 out of which Rs.5,000 were paid as token money and agreement to sell Exh.P1 was also scribed before him, when Khushi Muhammad, Muhammad Ramzan and Mansha were also present, but it was straightaway admitted in the cross-examination that he was not the marginal witness of the agreement to sell. Plaintiff/ respondent No.1 Muhammad Mansha himself appeared as PW6 and deposed on the same lines as pleaded in his plaint. He also produced original challans Exh.P4 & P5 through which two instalments were paid by him in the government treasury and in last lines of his statement he deposed that after these two instalments the rest of the amount of installment had been secretly paid by defendant No.1 and she acquired the property rights. In cross-examination he clearly admitted that defendant No.1 had acquired the proprietary rights in the year 1981 and the she transferred the same to defendant No.2 in the same year, who further alienated the said land to defendants Nos.3 and 4. He also claimed to have earlier filed a suit in the year 1973 against defendant No.1 which was dismissed by the Civil Court. The last lines of the cross-examination of PW6 are worth mentioning and he himself has falsified his case. The relevant portion in verbatim for ready reference is reproduced as under:--

The said admission on the part of plaintiff that he himself had not paid any consideration to the defendant No.1 is sufficient to hold that plaintiff/respondent No.1 had not only failed to prove the transaction of sale as well as valid execution of agreement to sell Exh.P1, but he also failed to prove that any sale consideration was paid to defendant No.1 in lieu of alleged sale. No other oral evidence was produced. However in documentary evidence the record of revenue hierarchy including copies of jamabandi, khasra girdawri ranging Exh.P1 to P12, copy of Mutation No.113 Exh.P13, copy of Mutation No.112 Exh.P14, copy of Mutation No.121 Exh.P15, copy of sale deed in favour of defendant No.1 Exh.P16 and copy

of sale deed in favour of defendant No.2 Exh.P17 were produced by the plaintiff/respondent No.1.

10. On the other hand when defendant No.1 namely, Mst. Taj Mehlan herself appeared as DW1 before the learned trial court, the plaintiff/respondent No.1 failed to recognize the said lady. The record further reveals that the learned trial court appointed Raja Masood Akhtar, Advocate as local commission to ascertain whether the lady appearing before the learned trial as defendant No.1 was actually defendant No.1 or not who thoroughly probed the said matter and after recording statement of various persons he submitted his report dated 12-12-1989 before the learned trial court to the effect that the lady who appeared before the learned trial court and to whom the plaintiff/respondent No.1 objected that she was not defendant No.1 was the actual defendant No.1. Mst. Taj Mehlan/defendant No.1 being DW1 denied the execution of agreement to sell Exh.P1 and she was subjected to cross-examination by the learned counsel for the plaintiff/ respondent No.1, but nothing favourable could be gained to support case of the plaintiff. Even she was not confronted with the claim of the plaintiff that she also executed power of attorney in favour of Muhammad Ramzan father of the plaintiff with regard to the disputed property. The detailed report submitted by the Commission is available at pages 283 to 361 of this civil revision. In this state of affairs, when the petitioner failed to recognize defendant No.1, the alleged executant of the agreement to sell Exh.P1 at the time of recording her statement as DW1, how it could be believed that transaction of sale had been earlier settled between them, which was followed by execution of agreement to sell and thereafter the plaintiff had been approaching her for the performance of her part to get transferred the land in his favour, who made refusal in this regard, but this is sufficient to draw an inference that they were never confronted with each other previously. This fact has thrown a sufficient clog about the genuineness of agreement to sell (Exh.P1).

11. The scanning of evidence available on record reveals plaintiff/respondent No.1 failed to produce the marginal witnesses as well as Registrar who attested the agreement to sell Exh.P1. The non-production of said relevant witnesses had created a dent in the case of the plaintiff/respondent No.1. No plausible explanation is available on file for withholding such evidence of important nature. Inference under Article 129(g) of Qanun-e-Shahadat Order 1984 has to be drawn against the plaintiff/respondent No.1 that if such evidence was brought on the record, they would have deposed against his version. The plaintiff/respondent No.1 neither could prove the settlement of bargain nor the payment of balance consideration as discussed above and P.Ws. who are alien of agreement to sell Exh.P1 deposed that amount was paid before Tehsildar, who registered the Exh.P1 was not produced in the witness box. The contention of the learned counsel for the respondent/plaintiff that as the disputed agreement Exh.P1 was a registered document and it attained presumption of truth is not believable. Under the law the document Exh.P1 being a private document was required to be proved by production of its marginal witnesses

as well as Registering Officer. Reliance can be placed upon the judgments reported as Noor Begum v. Abdul Ghaffar (2003 YLR 1494).

12. Both the courts below failed to consider the said aspect and wrongly decided issues Nos.1 to 3 in favour of plaintiff/respondent No.1 and against the petitioners/defendants. Although the contention of the learned counsel for the plaintiff/respondent No.1 that Exh.P1 was scribed before the promulgation of Qanun-e-Shahadat Order, 1984 and only one attesting witness was sufficient to prove the valid execution of agreement to sell Exh.P1 under the Evidence Act is in accordance with law, but in the present case none of the marginal witnesses was produced by the plaintiff/respondent No.1. No doubt Abdul Wahid nephew of Khushi Muhammad the alleged marginal witness of Exh.P1, who had died before recording the plaintiff's evidence was produced in the secondary evidence as PW2, who claimed to have identified the signatures of his uncle, but such evidence is also not helpful to the plaintiff to prove the transaction of sale alleged to have been settled between the parties as well as valid execution of the agreement. In response to the said situation the learned counsel for the plaintiff/ respondent No.1 has responded that Deed Writer was produced as PW1 and the statement of said witness is to be considered as statement of attesting witness. The statement of PW1 has once again been perused and it is found that nowhere he has mentioned in his statement that bargain was struck before him. He even did not depose that the sale consideration was paid in his presence. Even the perusal of Exh.P1 reveals that Deed Writer did not attest the agreement to sell Exh.P1 as marginal witness. So it is a settled principle of law now that a scribe cannot be considered as attesting witness. Reliance in this respect is placed upon the judgments reported as Muhammad Sarwar Khan v. Salamat Ali ((2012 CLC 94) and Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs (PLD 2011 SC 241). Para-5 of the cited judgment is relevant which is reproduced below:--

5. Notwithstanding the above, now attending to the legal propositions urged, it is expedient to comprehend the true import of Article 17 (2)(a) of The Order, 1984, the relevant portion whereof reads as follows:--

(1) .

(2) Unless otherwise provided in any law relating to the enforcement of Hadood or any special law,-

(a) in matter pertaining to financial or future obligation, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant"

From the clear and unambiguous language of the Article, in order to bring a case within its purview in the context of present case, two ingredients must co-exist, firstly there must be an instrument, secondly, it should pertain or relate to a matter either of a financial or future obligations. If the above two conditions are met, it is mandated that the instrument must be attested in terms of the Article. There can be no cudgel that an agreement of sale or to sell immovable property being a written document is an instrument within the meaning of law, however, to ascertain; its nature, the Black's Law Dictionary, Fifth Edition defines it as under:

"Agreement of sale; agreement to sell.---An agreement of sale may imply not merely an obligation to sell, but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. Treat v. White, 181 U.S. 264, 21 S.Ct. 611, 45 L.Ed. 853. It is a contract to be performed in future, and, if fulfilled, results in a sale; it is preliminary to sale and is not the sale."

The noted meaning is also fortified by the provisions of section 54 of the Transfer of Property Act, 1882 which defines the sale of immovable property, prescribes the mode and mechanism how it is made; and by virtue of its clear language distinguish it from a contract/agreement of sale, when it is ordained that: "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties". Furthermore, in the above context, a clear distinction and contract is drawn in the same provision, wherein it is provided that a contract for sale itself shall neither create any interest in or a charge on such property. Thus, the former transaction (if not a conditional sale) is the conclusive transfer of an absolute title and ownership of the property unto the vendee in presentee, while the later is meant for accomplishing the object of sale in futurity and for all intents and purposes it pertains to the future obligations of the parties thereto, resultantly there is no room for doubt that a sale agreement/ agreement to sell is duly covered and is hereby so declared to fall within the pale of said Article.

13. Irrespective of the above facts and circumstances, it is also notable after perusal of the impugned agreement to sell (Exh.P1) that the same was unilateral having not been signed by one of the party i.e. plaintiff/respondent. Under the law the said agreement was not enforceable. Safe reliance can be placed on the judgment reported as Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334). This view has further been fortified in the case-law reported as Sher Shah v. Muhammad Suleman (2013 YLR 1017) and the relevant portion is reproduced as under:--

"Performance of an agreement is required by both the parties and if it is unilateral and signed by one party and signatures of the other party is not available on the said document, the same is not an agreement enforceable under law."

14. On the touchstone of above referred discussion, this Court is of the view that the learned trial court as well as learned lower appellate court while misreading and non-reading the evidence decided issues Nos.1 to 3 in favour of the plaintiff/respondent No.1 and against the petitioners/defendants. The findings of learned trial court as well as learned lower appellate court on these issues are not sustainable which are reversed and these issues are decided in favour of the petitioners/defendants. However, as the learned counsel for the parties have not stressed on the other issues, those need not to be thrashed by this Court any further.

15. Sequel of the above discussion is that the instant civil revision is accepted, the impugned judgments and decrees passed by the courts below are set aside and the suit filed by the plaintiff/respondent No.1 stands dismissed with costs.

ZC/P-22/L Revision allowed.

PLJ 2015 Lahore 460
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
CHAIRMAN FESCO, FAISALABAD and 3 others--Petitioners
Versus
***Haji* GULZAR AHMAD, etc.--Respondents**

C.R. No. 2093 of 2014, decided on 12.6.2014.

Civil Procedure Code, 1908 (V of 1908)--
----S. 115--Qanun-e-Shahadat Order, (10 of 1984), Art. 129(g)--Civil revision--Issuance of bill without any prior notice--No arrears were payable--Neither given any notice before issuance of disputed bill nor consumer was joined in any audit proceedings--Failed to produce any inquiry member before trial Court--Burden to prove--Audit objection was neither binding on consumer nor he can be held responsible due to fault of department--Validity--In order to save skin of its own employee, amount was added to account of consumer without any prior notice and without hearing him--No amount could be recovered from consumer on basis of audit report as he audit affair is between WAPDA and its audit department and no audit report could in any manner make consumer liable for any amount and same could not bring about any agreement between WAPDA and consumer making consumer liable on basis of audit report--Disputed bill was issued to respondent/plaintiff without providing him an opportunity to be heard and he was not liable to pay said amount as audit report as well as report could not be proved. [P. 464] A & B

1988 CLC 501, 2008 YLR 308, 2007 SCMR 236 & 2011 SCMR 762, *rel.*
Syed Murtaza Ali Zaidi, Advocate for Petitioners.
Date of hearing: 12.6.2014.

ORDER

The facts germane for the disposal of instant civil revision are that Respondent No. 1 being consumer of the petitioners/FESCO had been consuming the energy through the connection obtained from the petitioners/FESCO, who issued the bill for the month of September, 2007, amounting to Rs. 13,11,558/- on account of bill adjustment against the respondent/plaintiff. The respondent/plaintiff challenged the vires of the said disputed bill before the learned trial Court by filing a suit for declaration against the petitioners/FESCO with the assertion that he was regularly paying the bills for the consumption of energy and nothing was due against him, but the petitioners/FESCO *mala fidely* issued the disputed bill without any prior notice

in spite of that not any amount and arrears were payable by him till August, 2007. It was also alleged that no complaint was ever lodged against the respondent/plaintiff and there was no dispute between the parties, but the petitioners/FESCO without assigning any reason, issued the disputed bill while relying upon an alleged audit report and he prayed for the cancellation/correction of the disputed bill.

2. On the other hand, the suit was resisted by the petitioners/FESCO by filing written statement with the assertion that the respondent/plaintiff was not paying the bills according to his consumption; that the respondent/plaintiff, and the other consumers manipulated the record of the department in connivance with the officials of the department and when the said fact was revealed to the department, they got lodged an FIR/criminal case against the officials; that loss had been caused by the respondent/plaintiff and the bill issued by the petitioners/FESCO was based on exact consumption.

3. The learned trial Court captured the disputed area of facts by striking the issues keeping in view the divergent pleadings of the parties. Both the parties produce, their evidence in *pros* and *cons* and after appreciating the same, learned trial Court decreed the suit filed by the respondent/plaintiff *vide* judgment and decree dated 21.02.2013. Feeling dissatisfied, the petitioners/FESCO filed an appeal before the learned lower appellate Court, who dismissed the same *vide* judgment and decree dated 28.02.2014, hence this civil revision.

4. Learned counsel for the petitioners/FESCO has argued, that the impugned judgments and decrees passed by both the learned Courts below are not sustainable on legal as well as factual side of the case; that in fact after, observation of less billing by the Revenue Officer and on his request to the Chief Executive FESCO, a high powered committee was constituted, who thoroughly probed the matter and after examination of the record of billing, a detailed report was prepared regarding the less billing amount of the present respondent as well as some other consumers; that the report was verified by the Deputy Chief Auditor, Headquarter FESCO; that both the learned Courts below without adverting to the said substantial and material aspect of the case, decreed the suit filed by the respondent/plaintiff; that both the learned Courts below without appreciating the evidence available on file passed the impugned judgments and decrees, which are not free from any taint of misreading and non-reading of evidence; that the learned trial Court had no jurisdiction to entertain the suit, but both the learned Courts below without adverting to the said legal aspect, passed the impugned judgments and decreed the suit filed by the respondent/plaintiff. He lastly prayed for the acceptance of the instant revision petition, setting aside of the judgments and decrees passed by both the learned Courts below and that the suit be dismissed.

5. Arguments heard. Record perused.

6. It is straight away noticed that the petitioners/FESCO while filing written statement did no raise any objection regarding the jurisdiction of the Court. Even during the proceedings of the case, the petitioners/FESCO did not make any application for rejection of the plaint or for striking of the issue regarding the jurisdiction of the said Court. Further the petitioners/FESCO did not raise the same question of jurisdiction in the memorandum of appeal filed before the learned lower appellate Court. The learned counsel for the petitioners/FESCO has raised the said objection for the first time before this Court by filing the instant civil revision, which cannot be hardly allowed to be agitated at this forum for the first time.

7. Both the learned Courts below while rendering their findings mainly on Issue No. 1, decreed the suit filed by the respondent/plaintiff. The said issue is reproduced here-under for ready reference:--

> "Whether the plaintiff is entitled to get the decree for declaration as prayed for? OPP"

8. To discharge the onus of said issue, the plaintiff/respondent produced Haji Abdul Aziz as PW-1, Mohammad Ilyas as PW-2, Sabir Hussain Jafri, Record Keeper/Assistant Manager Operation, SDO FESCO, Chiniot, as PW-3, Mohammad Yousaf Record Keeper office of XEN FESCO, Chiniot as PW-4, Syed Own Abbas Shah LDC/Record Keeper, office of R.O. FESCO, Chiniot, as PW-5, Arshad Iqbal Commercial Superintendent/Record Keeper office of FESCO, Faisalabad as PW-6, Sarfraz Ahmad, Head Constable/Moharrar P.S. City Chiniot, as PW-7, and Mohammad Azim, Addl. Chief Auditor FESCO, Faisalabad as PW-8. He also produced documentary evidence Ex:P1 to Ex:P9. The petitioners/FESCO produced Mohammad Yasir, Audit Officer (DW-1) and Nadeem Sajid, Revenue Officer (DW-2) besides the documentary evidence. The statement of Own Abbas PW-5 is relevant who deposed in his examination-in-chief that there was no notice in their record which could have been given to the respondent/plaintiff prior to the completion of audit note and that completion of audit note was not given by the audit party. He further deposed that the investigation report was not in his record and it belonged to higher authority and proceedings of audit teem were not part of his record. He further admitted that order for audit of department was not on his record. The deposition of said PW- makes it clear that no notice was issued by the petitioners/FESCO to their consumer/plaintiff prior to the issuance of the disputed bill. Other witness Mohammad Azim PW-8 Addl. Chief Auditor FESCO, Faisalabad, deposed in his examination-in-chief that he had brought audit note prepared by the department against the respondent/plaintiff which belonging to the period from July 2006 to December

2006. He further deposed that the audit note did not contain any note written by the Revenue Officer, Chiniot, and the same also did not bear the stamp of Revenue Officer. The deposition of the said PW- is also of grate importance that the alleged audit note neither contained any writing on behalf of Revenue Officer, Chiniot, nor it bore stamp of the officer, who issued the same. The said deposition could not be rebutted by the respondent/defendant, whereas, Sarfraz Ahmad, Moharrar P.S. City Chiniot, was produced as PW-7, who deposed that FIR No. 547/2007 was got registered by the Assistant Manager Customer Services FESCO/ WAPDA Chiniot and the case was investigated.

9. The respondent/defendant has produced Nadim Sajid, Revenue Officer, FESCO Chiniot, as DW-2, who admitted during the cross examination that FIR was discharged after investigation. He further deposed that the case was referred to FIA as per direction by the police. The deposition of the above said DW-2 that the culprits of FIR have been discharged by the Investigating Agency is of great significance.

10. There is no document on file which could prove that the petitioners/FESCO had moved any complaint against respondent/ consumer before the Federal Investigating Agency. The evidence available on file makes it clear that the petitioners/FESCO had neither given any notice to the plaintiff/consumer before the issuance of disputed bill nor the consumer was joined in any audit proceedings. Furthermore, the contention of the learned counsel for the petitioners/FESCO that High Powered Committee was constituted, who after investigation made a report and in the light of the same, the disputed bill was issued, has no substance as the petitioners/FESCO failed to produce any of the Inquiry Member before the learned trial Court to prove the said inquiry report. The best evidence was available to the petitioners/FESCO which has been with-held by them for the reasons best known to them. Inference under Article 129(g) of Qanoon-e-Shahadat Order, 1984, has to be drawn against the petitioners/ FESCO for with-holding the best evidence. Reliance can be placed upon the cases reported as (2004 CLC 1), (1996 SCMR 137), (2007 MLD 1554) and (2009 YLR 1113).

11. The burden to prove the said investigation report on the basis of which the disputed bill was issued to the respondent/plaintiff was on the shoulders of the petitioners/FESCO, but nothing is available on file, whereby, it could be assessed that the petitioners /FESCO had discharged the onus by producing the same. The petitioners/FESCO had set up claim on the basis of said inquiry report conducted by High Powered Committee and also on the audit report allegedly issued by the auditor of the petitioners/FESCO. The evidence available on record has proved the fact that before initiating proceedings against respondent/consumer on the basis of

said audit report, neither any show-cause notice was issued to the plaintiff/consumer nor he was joined in the said proceedings to justify the same. The audit objection is neither binding on the plaintiff/consumer nor he can be held responsible due to the fault of the department as pointed out in the audit report. Even the petitioners/FESCO failed to produce any relevant person before the learned trial Court through which it could be gathered that the said audit report was based on any material. The said material has also not been produced which could be made basis of the said report. It is also viewed from the report that in order to save the skin of its own employee, the amount was added to the account of plaintiff/consumer without any prior notice and without hearing him. Both the Courts below rightly observed that no amount could be recovered from the consumer on the basis of audit report as he audit affair is between the WAPDA and its audit department and no audit report could in any manner make the consumer liable for any amount and the same could not bring about any agreement between the WAPDA and consumer making consumer liable on the basis of audit report. Reliance can be placed upon the case reported as *"Water and Power Development authority etc vs. Umaid Khan"* (1988 CLC 501) and *"WAPDA through Chairman and 3 others vs. Fazal Karim and 5 others"* (2008 YLR 308). The culprits of the FIR/officials of the petitioners/FESCO have already been discharged by the Investigating Agency.

12. Both the learned Courts below after appreciating the evidence available on file have rightly concluded that the disputed bill was issued to the respondent/plaintiff without providing him an opportunity to be heard and he was not liable to pay the said amount as the audit report as well as High Powered Committee report could not be proved. The findings of both the learned Courts below on Issue No. 1 are affirmed. The findings of other issues need not to be discussed as those have already been decided in negative against the petitioners/FESCO.

13. The learned counsel for the petitioners/FESCO has not been able to point out any misreading and non-reading of evidence available of file or material irregularity and illegality in the judgments and decrees passed by both the learned Courts below which having been passed keeping in view the material on record as well as the relevant law, cannot be interfered with in the revisional jurisdiction by this Court the scope of whereof is narrower and restricted only to correct errors of law committed by the subordinates Courts. Safe reliance can be placed on the judgments passed by august Supreme Court of Pakistan reported as *"Aurangzeb through L.Rs and others vs. Muhammad Jaffar and another"* (2007 SCMR 236" and *"Bashir Ahmed vs. Ghulam Rasool"* (2011 SCMR 762)".

14. For the foregoing discussion, the instant revision petition having no merit and substance is hereby dismissed *in limine*.

(R.A.) Petition dismissed.

PLJ 2015 Lahore 960
[Multan Bench Multan]
Present: CH. MUHAMMAD MASOOD JAHANGIR, J.
ABDUL SATTAR (deceased) through Legal Heirs--Petitioners
Versus
SHAUKAT ALI and another--Respondents

C.R. No. 472-D of 2015, decided on 4.5.2015.

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

----S. 115--Civil revision--Claim regarding disputed property on basis of agreement to sell--Agreement was not signed by original vendee--Marginal witnesses were not produced to prove valid execution of agreement--Validity--Disputed agreement being unilateral is not enforceable as per law and both Courts below had rightly non-suited plaintiff/petitioner through impugned judgments and decrees on valid grounds. [P. 964] A

Sh. Irfan Ali, Advocate for Petitioners.

Date of hearing: 4.5.2015

ORDER

By filing the instant civil revision the petitioner have challenged judgments and decrees dated 26.9.2011 and 24.3.2015 respectively passed by the Courts below by virtue of which suit for declaration alongwith specific performance of agreement to sell dated 16.1.1988 filed by their predecessor Abdul Sattar deceased was concurrently dismissed.

2. Arguments heard and record perused.

3. The petitioners have based their claim regarding the disputed property on the basis of agreement to sell dated 16.1.1988 Exh.P1 and the execution of the same has been denied by the Defendant/Respondent No. 1. The copy of said agreement is available at page 36 of the instant file. The perusal of said agreement reveals that it has not been signed by the original vendee/plaintiff and even none of the marginal witnesses were produced by the petitioners to prove the valid execution of agreement Exh.P1. It is a well settled principle that a unilateral document is not enforceable under the law. Reliance is placed on the judgment delivered by the august Supreme Court of Pakistan reported as *Mst. Barkat Bibi and others vs. Muhammad Rafique and others* (1990 SCMR 28) and the operative part of the said judgment is reproduced hereunder:--

> "A perusal of the above "Iqrarnama" shows that there is no reference made therein specifically to the exact consideration for the agreement. Moreover, we observe that it is a unilateral offer made by Muhammad Din to recovery the land as soon as they (the vendors) themselves have raised the money. No indication is to be found in the document that this offer was accepted by

> the respondents for no one on the side of the respondents has signed this "Iqrarnama" in token of its acceptance. It was no more than a proposal because unless the person to whom the offer is made signifies his willingness to accept it, the proposal does not, in law, ripen into an agreement. Now it is only an "agreement", as the term is understood in law, which can be enforced by a suit for specific performance. Accordingly, it is only if the so-called "Iqrarnama" qualified as an agreement would it have the effect of creating a legal relationship between the parties so as to give rise to jural, as opposed to moral, obligations and then only would a suit for specific performance be maintainable on its basis. The so-called "Iqrarnama" dated 24-7-1953, on close examination, however, does not qualify to be an "agreement". Hence a suit to specifically enforce it was not competent. "

This view has also been strengthened by the judgments reported as *Mst. Gulshan Hameed vs. Abdul Rehman and others* (2010 SCMR 334). In the said authoritative judgments delivered by the Superior Court, it has been held that an agreement was required to be singed by both the parties and if it was not signed by any one of the parties (vendee), then the same cannot be enforced as per law. Moreover, in an un-reported judgment dated 1.1.2015 passed in C.A.No. 261-L of 2014 titled *Farzand Ali and another Vs. Khuda Bakhsh and others* authored by his Lordship Mian Saqib Nisar, J, the apex Court has authoritatively clinched the instant controversy and after thrashing the plethora of judgments on the subject rendered by the superior Courts held that the unilateral agreement not signed by the vendee, if is denied and not acted upon by the vendor is not enforceable in the eye of law and request for granting leave on the ground that in some other cases leave was granted was declined on the ground that judgment (PLD 1971 SC 784) was not attracted. para-9 of the said judgment being relevant is reproduced hereunder for ready reference:

> "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 is a common understanding of the parties in the formation of the contract in the absence of which there is neither a concept nor the possibility of a valid contract. But in this case this is conspicuously lacking by virtue of non-execution (non-signing) of the agreement by the appellants, therefore in law and fact it is no contract (agreement). The argument that the agreement to sell in favour of the appellants has been admitted by the vendors and, therefore, is valid and the non-signing has lost its efficacy, suffice it to say that despite the above, the respondent has joined with the appellants vis a vis the validity and valid execution of the agreement, therefore, the appellants cannot rely upon and take advantage of any admission made by the vendors, because of the law, that an admission made by a co-defendant is not binding on other even if made in the written statement. Reliance in this regard can be placed on the judgments reported as *Shah Muhammad and 2 others Vs. Dulla and 2 others* (2000 SCMR 1588), *Allah Rakha through L.Rs. Vs. Nasir Khan and 4 others* (2007 CLC 154), and *Zeeshan Bhatti Vs. Maqbool Bhatti and another* (PLD 2001 SC 79). Besides the above, in the judgment reported as *Mst. Gulshan Hamid Vs. Kh. Abdul Rehman and others* (2010 SCMR 434) (three members bench of this Court) while considering the specific proposition, whether the plaintiffs in a suit for specific performance was entitled to enforce the agreement which was not signed by them (the vendee), it has been categorically held that "Such unilateral agreement not signed by plaintiff-vendee was not mutually enforceable, whereupon no decree could be passed." The arguments of the learned counsel for the appellants that in some case(s), leave has been granted, therefore, leave on this account should also be allowed in the present matter, we are not persuaded to grant leave in this case on that account alone; learned counsel for the appellants has relied upon the judgment reported as *Messrs Jamal Jute Baling & Co., Dacca Vs. Messrs M. Sarkies & Sorts, Dacca* (PLD 1971 SC 784) to argue to the contrary, wherein it has been held that "terms of agreement reduced into writing and proved to have been accepted and acted upon by both parties--Agreement, proper and valid, even if one party had not signed such agreement" However the conditions are that the agreement should be accepted by the parties who are actually in dispute qua the validity thereof and the agreement should have been acted upon. In this case as explained earlier in the light of the facts of the case the real dispute is between the appellants and the respondent, who (respondent) has never admitted the agreement and it has also not been acted upon. It may be even relevant to reiterate here that *Mst.* Zakia even denied the agreement when she appeared

as PW-1, however, she was never even cross-examined by the appellants. Resultantly the judgment supra relied upon by the learned counsel for the appellants is not attracted."

4. On the touchstone of above discussion it can safely be concluded that the disputed agreement Exh.P1 being unilateral is not enforceable as per law and both the Courts below have rightly non-suited the plaintiff/petitioner through the impugned judgments and decrees on the valid grounds. The learned counsel for the petitioner has failed to point out any illegality, perversity or jurisdictional defect in the impugned judgments and decrees, which are also not tainted with any misreading or non-reading of the evidence available on the record calling for any interference by this Court in the exercise of revisional jurisdiction, the scope whereof is narrower and restricted only to the extent of correcting errors of law and fads, if are found to have been committed by the subordinate Courts in the discharge of judicial functions. Resultantly, the instant civil revision being devoid of any merit is dismissed *in limine*.

(R.A.) Revision dismissed.

PLJ 2015 Lahore 989

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

FAISALABAD ELECTRIC SUPPLY COMPANY through Chief Executive and 5 others--Petitioners

Versus

SYED MUHAMMAD ALI SHAH, through L.Rs.--Respondents

C.R. No. 3379 of 2014, decided on 31.10.2014.

Electricity Act, 1910 (IX of 1910)--

----S. 20--Suit regarding disputed utility connection--No notice was given before checking meter--Witnesses were employees of FESCO who were not subjected to cross-examine--Validity--A licency or any person duly authorized by licensee may, at any reasonable time and on infoming occupier of his intention, enter premises subject to proviso of section which makes it obligatory upon petitioner that prior to taking any action in that regard and intimation notice is requirement of law--It is settled principle of law that if a portion of examination-in-chief of a witness is not challenged in cross-examination by opposite-party, that amounts to admission and lapse on part of petitioners about non-cross-examining PWs has really damaged their case--Evidence produced by petitioners/ defendants also did not depict that any notice had been issued before conducting proceedings against plaintiff/respondent.

[P. 990]

A & B

Ch. Muhammad Shahid Iqbal, Advocate for Petitioners.

Date of hearing: 31.10.2014.

ORDER

The synopsis of the case are that the Syed Muhammad Ali Shah, Respondent No. 1 brought a suit for declaration and mandatory injunction against the petitioners regarding the disputed utility connection to the effect that notice dated 16.8.2005 issued by Defendant No. 5 as well as the audit note prepared by Defendant No. 6 and the disputed bills being illegal and unwarranted were inoperative upon the rights of the plaintiff and also liable to be cancelled. The said suit was contested by the petitioners and after full-fledged trial the same was decreed while the appeal filed by the petitioners dismissed *vide* judgments and decrees dated 7.9.2011 and 5.7.2014 passed by the learned Courts below respectively.

2. Arguments heard. Record perused.

3. The Petitioner/Respondent No. 1 to prove his case produced Ehtasham-ul-Haq, SDC Senior Clerk FESCO as PW-1, Muhammad Aslam Commercial Assistant, Revenue office FESCO as PW-2, Ehsan Ali UDC, Sub-Division FESCO as PW-3 and Arshad Ali Litigation Clerk of FESCO as PW-4, who while deposing their statements admitted that no notice was given to the plaintiff before checking the meter. All said witnesses PW-1 to PW-4 produced by the Plaintiff/Respondent No.

1 are employees of petitioners/defendants/ department, who were not subjected to cross-examine by the petitioners and they deposed categorically in favour of the plaintiff/ Respondent No. 1. Under Section 20 of Electricity Act, a licency or any person duly authorized by the licensee may, at any reasonable time and on infoming the occupier of his intention, enter the premises subject to the proviso of the section which makes it obligatory upon the petitioner that prior to taking any action in this regard and intimation/notice is the requirement of law. It is settled principle of law that if a portion of examination-in-chief' of a witness is not challenged in the cross-examination by the opposite-party, that amounts to admission and the lapse on the part of the petitioners about non-cross-examining the PW-s has really damaged their case. The evidence produced by the petitioners/defendants also did not depict that any notice had been issued before conducting the proceedings against plaintiff/respondent. As the petitioners department without mandate of law proceeded against the Plaintiff/ Respondent No. 1, both the learned Courts below rightly decreed the suit filed by him.

4. The learned counsel for the petitioner had failed to point out any illegality or jurisdictional defect in the impugned judgments or that these are reflective of any misreading and non-reading of evidence. The concurrent findings of the fact on face of record have been eminently arrived at by both the learned Courts below, which are not open to any exception by this Court in the exercise of revisional jurisdiction the scope whereof being narrower is only restricted to correct errors of facts and law found to have been committed by the subordinate Courts. Safe reliance can be placed on the judgments passed by august Supreme Court of Pakistan reported as "2007 SCMR 236" and "2011 SCMR 762".

5. Sequel of the above discussion is that the instant revision petition being devoid of any merit and force is dismissed *in limine*.

(R.A.) Petition dismissed.

PLJ 2015 Lahore 991

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

CHAIRMAN FESCO, FAISALABAD and 3 others--Petitioners

Versus

ABDUL RAUF--Respondents

C.R. No. 2096 of 2014, decided on 12.6.2014.

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

----Art. 129(g)--Civil Procedure Code, (V of 1908), S. 115--Civil revision--Withholding best evidence--Correction of disputed bill--Order for audit of department--No notice was issued to consumer prior to issuance of disputed bill--No document on file--Burden to prove on shoulders of FESCO--Validity--FESCO had neither given any notice to consumer before issuance of disputed bill nor consumer was joined in any audit proceedings--FESCO had set up claim on basis of inquiry report and on audit report allegedly issued by auditor of FESCO--Before initiating proceedings against consumer on basis of audit report, neither any show-cause notice was issued nor he was joined proceedings--Audit objection was neither binding on consumer nor he can be held responsible due to fault of department--Courts below rightly observed that no amount could be recovered from consumer on basis of audit report as audit affair was between WAPDA and its audit department and no audit report could in any manner make consumer liable for any amount and same could not bring about any agreement between WAPDA and consumer making consumer liable on basis of audit report--Disputed bill was issued without providing an opportunity to be heard and was not liable to pay amount as audit report--Petition was dismissed. [Pp. 994 & 995] A, B, C & D

Syed Murtaza Ali Zaidi, Advocate for Petitioners.

Date of hearing: 12.6.2014.

ORDER

The facts germane for the disposal of instant civil revision are that Respondent No. 1 being consumer of the petitioners/FESCO had been consuming the energy through the connection obtained from the petitioners/FESCO, who issued the bill for the month of September, 2007, amounting to Rs.94,366/- on account of bill adjustment against the respondent/plaintiff. The respondent/plaintiff challenged the vires of the said disputed bill before the learned trial Court by filing a suit for declaration against the petitioners / FESCO with the assertion that he was regularly paying the bills for the consumption of energy and nothing was due against him, but the petitioners/FESCO *malafidely* issued the disputed bill without any prior notice in spite of that not any amount and arrears were payable by him till August, 2007. It was also alleged that no complaint was ever lodged against the respondent/ plaintiff and there was no dispute between the parties, but the petitioners/FESCO without

assigning any reason, issued the disputed bill while relying upon an alleged audit report and he prayed for the cancellation/correction of the disputed bill.

2. On the other hand, the suit was resisted by the petitioners/FESCO by filing written statement with the assertion that the respondent / plaintiff was not paying the bills according to his consumption; that the respondent/plaintiff and the other consumers manipulated the record of the department in connivance with the officials of the department and when the said fact was revealed to the department, they got lodged an FIR/criminal case against the officials; that loss, had been caused by the respondent/plaintiff and the bill issued by the petitioners/FESCO was based on exact consumption.

3. The learned trial Court captured the disputed area of facts by striking the issues keeping in view the divergent pleadings of the parties. Both the parties produce their evidence, in *pros* and *cons* and after appreciating the same, learned trial Court decreed the suit filed by the respondent/plaintiff *vide* judgment and decree dated 21.02.2013. Feeling dissatisfied, the petitioners/FESCO filed an appeal before the learned lower appellate Court, who dismissed the same *vide* judgment and decree dated 28.02.2014, hence this civil revision.

4. Learned counsel for the petitioners/FESCO has argued that the impugned judgments and decrees passed by both the learned Courts below are not sustainable on legal as well as factual side of the case; that in fact after observation of less billing by the Revenue Officer and on his request to the Chief Executive FESCO, a high powered committee was constituted, who thoroughly probed the matter and after examination of the record of billing, a detailed report was prepared regarding the less billing amount of the present respondent as well as some other consumers; that the report was verified by the Deputy Chief Auditor, Headquarter FESCO; that both the learned Courts below without adverting to the said substantial and material aspect of the case, decreed the suit filed by the respondent/plaintiff; that both the learned Courts below without appreciating the evidence available on file passed the impugned judgments and decrees, which are not free from any taint of misreading and non-reading of evidence; that the learned trial Court had no jurisdiction to entertain the suit, but both the learned Courts below without adverting to the said legal aspect, passed the impugned judgments and decreed the suit filed by the respondent/plaintiff. He lastly prayed for the acceptance of the instant revision petition, setting aside of the judgments and decrees passed by both the learned Courts below and that the suit be dismissed.

5. Arguments heard. Record perused.

6. It is straight away noticed that the petitioners /FESCO while filing written statement did no raise any objection regarding the jurisdiction of the Court. Even during the proceedings of the case, the petitioners/FESCO did not make any application for rejection of the plaint or for striking of the issue regarding the jurisdiction of the said Court. Further the petitioners / FESCO did not raise the same question of jurisdiction in the memorandum of appeal filed before the learned lower appellate Court. The learned counsel for the petitioners/FESCO has raised the said objection for the first time before this Court by filing the instant civil revision, which cannot be hardly allowed to be agitated at this forum for the first time.

7. Both the learned Courts below while rendering their findings mainly on Issue No. 1, decreed the suit filed by the respondent/plaintiff. The said issue is reproduced here-under for ready reference:--

> "Whether the plaintiff is entitled to get the decree for declaration as prayed for? OPP"

8. To discharge the onus of said issue, the plaintiff/respondent produced Abdul Rauf as PW-1, Sabir Hussain Jafri, Record Keeper/Assistant Manager Operation, SDO FESCO, Chiniot, as PW-2, Mohammad Yousaf Record Keeper office of XEN FESCO, Chiniot as PW-3, Syed Own Abbas Shah LDC/Record Keeper, office of R.O, FESCO, Chiniot, as PW-4, Arshad Iqbal Commercial Superintendent/ Record Keeper office of FESCO, Faisalabad as PW-5, Sarfraz Ahmad, Head Constable/Moharrar P.S. City Chiniot, as PW-6, and Mohammad Azim, Addl. Chief Auditor FESCO, Faisalabad as PW-7. He also produced documentary evidence Ex:P1 to Ex:P8. The petitioners/ FESCO produced Mohammad Yasir, Audit Officer (DW-1) and Nadeem Sajid, Revenue Officer (DW-2) besides the documentary evidence. The statement of Own Abbas PW-4 is relevant who deposed in his examination-in-chief that there was no notice in their record which could have been given to the respondent/plaintiff prior to the completion of audit note and that completion of audit note was not given by the audit party. He further deposed that the investigation report was not in his record and it belonged to higher authority and proceedings of audit team were not part of his record. He further admitted that order for audit of department was not on his record. The deposition of said PW- makes it clear that no notice was issued by the petitioners/FESCO to their consumer/plaintiff prior to the issuance of the disputed bill. Other witness Mohammad Azim PW-7 Addl. Chief Auditor FESCO, Faisalabad, deposed in his examination-in-chief that he had brought audit note prepared by the department against the respondent/plaintiff which belonging to the period from July 2006 to December 2006. He further deposed that the audit note

did not contain any note written by the Revenue Officer, Chiniot, and the same also did not bear the stamp of Revenue Officer. The deposition of the said PW- is also of grate importance that the alleged audit note neither contained any writing on behalf of Revenue Officer, Chiniot, nor it bore stamp of the officer, who issued the same. The said deposition could not be rebutted by the respondent/defendant, whereas, Sarfraz Ahmad, Moharrar P.S. City Chiniot, was produced as PW-6, who deposed that FIR No. 547/2007 was got registered by the Assistant Manager Customer Services FESCO/ WAPDA Chiniot and the case was investigated.

9. The respondent/defendant has produced Nadim Sajid, Revenue Officer, FESCO Chiniot, as DW-2, who admitted during the cross examination that FIR was discharged after investigation. He further deposed that the case was referred to FIA as per direction by the police. The deposition of the above said DW-2 that the culprits of FIR have been discharged by the Investigating Agency is of great significance.

10. There is no document on file which could prove that the petitioners/FESCO had moved any complaint against respondent/ consumer before the Federal Investigating Agency. The evidence available on file makes it clear that the/petitioners/FESCO had neither given any notice to the plaintiff/consumer before the issuance of disputed bill nor the consumer was joined in any audit proceedings. Furthermore, the contention of the learned counsel for the petitioners/FESCO that High Powered Committee was constituted, who after investigation made a report and in the light of the same, the disputed bill was issued, has no substance as the petitioners/FESCO failed to produce any of the Inquiry Member before the learned trial Court to prove the said inquiry report. The best evidence was available to the petitioners/FESCO which has been with-held by them for the reasons best known to them. Inference under Article 129(g) of Qanun-e-Shahadat Order, 1984, has to be drawn against the petitioners/ FESCO for with-holding the best evidence. Reliance can be placed upon the cases reported as (2004 CLC 1), (1996 SCMR 137), (2007 MLD 1554) and (2009 YLR 1113).

11. The burden to prove the said investigation report on the basis of which the disputed bill was issued to the respondent/plaintiff was on the shoulders of the petitioners/FESCO, but nothing is available on file, whereby, it could be assessed that the petitioners/FESCO had discharged the onus by producing the same. The petitioners/FESCO had set up claim on the basis of said inquiry report conducted by High Powered Committee and also on the audit report allegedly issued by the auditor of the petitioners/FESCO. The evidence available on record has proved the fact that before initiating proceedings against respondent/consumer on the basis of

said audit report, neither any show-cause notice was issued to the plaintiff consumer nor he was joined in the said proceedings to justify the same The audit objection is neither binding on the plaintiff/consumer nor he can be held responsible due to the fault of the department as pointed out in the audit report. Even the petitioners/FESCO failed to produce any relevant person before the learned trial Court through which it could be gathered that the said audit report was based on any material. The said material has also not been produced which could be made basis of the said report. It is also viewed from the report that in order to save the skin of its own employee, the amount was added to the account of plaintiff/consumer without any prior notice and without hearing him. Both the Courts below rightly observed that no amount could be recovered from the consumer on the basis of audit report as he audit affair is between the WAPDA and its audit department and no audit report could in any manner make the consumer liable for any amount and the same could not bring about any agreement between the WAPDA and consumer making consumer liable on the basis of audit report. Reliance can be placed upon the case reported as *"Water and Power Development authority etc Vs. Umaid Khan"* (1988 CLC 501) and *"WAPDA through Chairman and 3 others Vs. Fazal Karim and 5 others"* (2008 YLR 308). The culprits of the FIR/officials of the petitioners/FESCO have already been discharged by the Investigating Agency.

12. Both the learned Courts below after appreciating the evidence available on file have rightly concluded that the disputed bill was issued to the respondent/plaintiff without providing him an opportunity to be heard and he was not liable to pay the said amount as the audit report as well as High Powered Committee report could not be proved. The findings of both the learned Courts below on Issue No. 1 are affirmed. The findings of other issues need not to be discussed as those have already been decided in negative against the petitioners/FESCO.

13. The learned counsel for the petitioners/FESCO has not been able to point out any misreading and non-reading of evidence available of file or material irregularity and illegality in the judgments and decrees passed by both the learned Courts below which having been passed keeping in view the material on record as well as the relevant law, cannot be interfered with in the revisional jurisdiction by this Court the scope of whereof is narrower and restricted only to correct errors of law committed by the subordinates Courts. Safe reliance can be placed on the judgments passed by august Supreme Court of Pakistan reported as *"Aurangzeb through L.Rs and others vs. Muhammad Jaffar and another"* (2007 SCMR 236)" and *"Bashir Ahmed vs. Ghulam Rasool"* (2015 SCMR 762)"

14. For the foregoing discussion, the instant revision petition having no merit and substance is hereby dismissed *in limine*.

(R.A.) Petition dismissed.

PLJ 2015 Lahore 1039
[Rawalpindi Bench Rawalpindi]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
TEHSIL COUNCIL PIND DADAN KHAN through Nazim Tehsil Council--Petitioner
Versus
Khawaja MUHAMMAD HANIF and another--Respondents
C.R. No. 334 of 2005, decided on 13.4.2015.

Arbitration Act, 1940 (X of 1940)--

----Ss. 30 & 33--Civil Procedure Code, (V of 1908), S. 115--Contract for collection of octroi/tehsil tax contention--Arbitrator without summoning announced award was misconceived--Interlocutory orders--Validity--Arbitrator before announcement of award had not only summoned petitioner rather his representative also joined proceedings on each and every date--Petitioner was present before arbitrator on date when award was announced--Arbitrator after conducting his proceedings in judicial manner announced elaborated and comprehensive award--Arbitrator who was officer of local Government had no nexus rather he himself was functionary of local Government to which petitioner was also an organ--Council had remained unsuccessful to refute claim of contractor not only before arbitrator rather before Courts below--Revision was dismissed. [P. 1041] A, B, C & D

Mr. Ibrar Sarwar Awan, Advocate for Petitioner.
Mr. Ajmal Kamal Mirza, Advocate for Respondent No. 1.
Date of hearing: 13.4.2015.

JUDGMENT

By filing the instant civil revision, the petitioner has challenged the order dated 8.10.2001 passed by the learned trial Court whereby objections filed by the petitioner under Sections 30/33 of the Arbitration Act, 1940 were dismissed as well as the judgment dated 4.3.2005 delivered by the learned Addl. District Judge, Jhelum by virtue of which the appeal filed by the petitioner was also dismissed.

2. The brief facts of the case are that a contract for the collection of octroi/Tehsil Tax for the year 1992-93 was auctioned by the petitioner to Respondent No. 1 against the highest bid amounting to Rs. 8,76,000/-. As per clausel4 of the agreement settled between the parties Respondent No. 1/contractor was to admit any increase in the lease amount to be made by the petitioner and admittedly the increase in the lease amount was made by the petitioner who reassessed the rate and demanded the same from the respondent/contractor, which became a bone of contention between the parties. Then as per clause 15 of the agreement, Respondent No. 1 referred the matter to the arbitrator/Respondent No. 2 for its resolution, who announced his Award on 8.1.1994 and re-determined the enhanced fixation initially determined by petitioner. The petitioner submitted objections under Section 30/33 of the Arbitration Act, 1940, which were

concurrently dismissed by both the Courts below *vide* impugned order and judgment referred in Para-1 ante.

3. It is argued by the learned counsel for the petitioner that the arbitrator/Respondent No. 2 without issuance of any notice had announced the Award. He also mooted that arbitrator/Respondent No. 2 was bound to give reasons for the Award but the said Award was totally silent in this regard, but both the Courts below without considering the said aspect of the case passed the impugned order and judgment. He has lastly prayed for setting aside of the impugned order and judgment while acceptance of the instant civil revision.

4. Conversely, the learned counsel for Respondent No. 1 has supported the impugned order and judgment passed by the Courts below and prayed for dismissal of the, instant civil revision.

5. Arguments heard and recorder perused.

6. The argument of learned counsel for the petitioner that the arbitrator without summoning the petitioner had announced the Award is misconceived. The learned counsel for Respondent No. 1 has drawn the attention of this Court towards the interlocutory orders maintained by the arbitrator/Respondent No. 2, the attested copy whereof is available at pages-134 to 136, which reveals the presence of representative of the petitioner before the said arbitrator/Respondent No. 2 on each and every occasion. The learned counsel for the petitioner after perusal of said interlocutory orders has remained unable to refute the stance of the learned counsel for Respondent No. 1 that the arbitrator before announcement of Award had not only summoned the petitioner rather his representative also joined the proceedings on each and every date. Even the perusal of Award reveals that petitioner was present before the arbitrator on the said date when the Award was announced.

7. The other ground of attack of learned counsel for the petitioner that Award was without reasoning is also misconceived. The, arbitrator after conducting his proceedings in a judicial manner announced an elaborated and comprehensive Award (Exh.A3). The arbitrator who was an officer of the Local Government had no nexus with Respondent No. 1 rather he himself was a functionary of the Local Government to which the petitioner is also an organ. The present petitioner by signing lease agreement with Respondent No. 1 of his own accord had agreed for appointment of Respondent No. 2 as arbitrator to resolve the dispute if arose between the parties. The petitioner has remained unsuccessful to refute the claim of Respondent No. 1/contractor not only before the arbitrator rather before the Courts below. The main arguments advanced by learned counsel for the petitioner today at bar are not found to be supported by the record available on the file. The learned counsel for the petitioner has remained unable to point out any infirmity or perversity and jurisdictional defect in the impugned order and judgment passed by the Courts below. Resultantly, the instant civil revision being devoid of any force is dismissed.

(R.A.) Revision dismissed.

PLJ 2015 Lahore 457

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

Rana **NAJAM-UL-ABBAS--Petitioner**

Versus

LUBNA SHAMIM and 2 others--Respondents

W.P. No. 7334 of 2010, heard on 11.11.2014.

Constitution of Pakistan, 1973--

----Art. 199--Civil Procedure Code, (V of 1908), S. 151--Constitutional petition--Suit for cancellation of document--Affixation of Court fee--Neither Court fee was affixed on plaint nor assailed by filing any appeal or revision--Validity--In order to determine proper Court fee payable on plaint in, particular suit, correct principle was that plaint as a whole should be looked at and that it was substance of plaint not its ostensible form which really mattered. [P. 459] A

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

----Ss. 39 & 42--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Cancellation of document--Affixation of Court fee as value of basic agreement--Difference between suit for cancellation of document and suit for declaration of title--Value of subject matter--Validity--It is settled principle that whenever plaintiff files a declaratory suit to establish his right in property and there is document which he must get declared null and void before relief can be granted it would be suit for all intents and purposes one for cancellation of document and Court fee payable under Court Fees Act, though filed under garb of declaratory such.

[P. 459] B

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

----S. 39--Cancellation of document--Affixation of Court fee as value of basic agreement--Relief for cancellation of document has been sought by plaintiff and possible result would be that in a suit for cancellation of document ad valorem Court fee is to be paid.

[P. 459] C*Ch. Muhammad Imran,* Advocate for Petitioner.

Nemo for Respondents.

Date of hearing: 11.11.2014.

JUDGMENT

By filing the instant constitutional petition the petitioner/defendant has assailed judgment dated 22.12.2009 whereby learned Additional District Judge Faisalabad accepted the revision filed by Plaintiff/Respondent No. 1 and set aside the order dated 21.2.2009 through which the learned trial Court required the plaintiff/respondent to affix Court fee as well as the order dated 17.9.2009 passed by the learned trial Court through which the review application filed by Plaintiff/Respondent No. 1 was dismissed.

2. The synopsis of the case are that Plaintiff/Respondent No. 1 filed a suit for cancellation of document/agreement to sell dated 20.3.2002 regarding the alleged sale of disputed property fully mentioned in the head note of the plaint which was contested by the petitioner/defendant and on objection raised by petitioner/defendant the Plaintiff/Respondent No. 1 was required by the learned trial Court *vide* order dated 21.2.2009 for affixation of Court fee on the plaint. The petitioner/plaintiff neither affixed the Court fee on the plaint as required by the learned trial Court nor assailed the same by filing any appeal or revision before higher forum rather he moved a review application before the same Court for setting aside the order dated 21.2.2009. The learned trial Court dismissed the said review application *vide* order dated 17.9.2009. Both these orders passed by the learned trial Court were assailed by Plaintiff/Respondent No. 1 by filing civil revision before the learned lower revisional Court, which has been accepted *vide* impugned order referred in Para-1 ante and assailed through the instant writ petition.

3. Despite service no one appeared on behalf of the Respondent No. 1 although power of attorney has been filed on her behalf by Mr. Abdul Qayyum Sheikh, Advocate whose name is duly reflected in the cause list, therefore respondent is proceeded *ex-parte*.

4. Arguments of the learned counsel for the petitioner heard and record perused.

5. There was no doubt that in order to determine the proper Court tee payable on the plaint in, a particular suit, the correct principle was that the plaint as a whole should be looked at and that it was the substance of the plaint and not its ostensible form which really mattered. The veil could be pierced through by a searching eye for judging the true substance of the plaint to determine the taxability of Court fee on the plaint. There was a difference between a suit for cancellation of a document under Section 39 of the Specific Relief Act and a suit for declaration of title filed under Section 42 of the Specific Relief Act. When a party seeks for the cancellation of document the plaintiff was liable to payment of ad valorem Court fee on the value of the subject matter in dispute under Article 1, Schedule 1 of the Court Fees Act and that valuation was already given in the agreement to sell sought to be cancelled in the suit by the plaintiff. It is settled principle that whenever a plaintiff files a declaratory suit to establish his right in a property and there is document which he must get declared *null* and *void* before the relief can be granted it would be a suit for all intents and purposes one for the cancellation of such a document and the Court-fee payable under the Court Fees Act though filed under the garb of the declaratory suit. In this view of the matter the learned trial Court rightly required the Plaintiff/Respondent No. 1 for the affixation of Court fee as value of the basic agreement dated 20.3.2002 the cancellation whereof is sought is determined at Rs. 840,000/-. The relief for cancellation of document has been sought by the Plaintiff/Respondent No. 1 u/S. 39 of the Specific Relief Act and the possible result would be that in a suit for cancellation of document *ad valorem* Court fee" is to be paid. The learned trial Court rightly issued direction to Respondent No. 1/plaintiff for the affixation of Court fee and the review petition filed by the respondent/plaintiff was also dismissed *vide* order dated 21.2.2009 and 17.9.2009 after due appreciation of law, but the learned lower revisional Court reversed the said orders through the impugned judgment without application of judicial mind, which is illegal, perverse and nullity in the eye of law.

6. The analysis of the above discussion is that the instant writ petition is **allowed,** the impugned order passed by the learned Additional District Judge is hereby set aside and the orders passed by the learned trial Court are restored.

(R.A.) Petition allowed.

2015 M L D 1605

[Lahore]

Before Ch. Muhammad Masood Jahangir, J

MUHAMMAD FAZIL through L.Rs.---Appellant

Versus

Ch. ABDUL MAJEED and others---Respondents

R.S.A. No.180 of 2005, heard on 2nd April, 2014.

(a) Defamation---

----Suit for damages---Second appeal---Maintainability---Principles---Accusation, withdrawal of---Concurrent findings of facts---Suit filed by plaintiff was concurrently decreed in favour of plaintiff and against defendant by Trial Court and Lower Appellate Court---Plea raised by defendant was that accusation was subsequently withdrawn by counsel for defendant before High Court---Validity---Once false allegations were levelled, its subsequent withdrawal did not restore honour/respect of affected party and absolve defendant from consequences thereof---Defendant himself repeated same allegations by filing petition before Supreme Court---Lower Appellate Court rightly maintained findings of Trial Court to the extent of defendant.

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

----S. 100---Second appeal---Second appeal to High Court was maintainable against any decree passed in appeal by Lower Appellate Court/subordinate to High Court on the grounds provided in S.100, C.P.C. and the right was restricted and limited to such grounds---While dealing with second appeal High Court could not enter into reappraisal of evidence stretching down concurrent findings of facts---High Court declined to interfere in judgment and decree passed by Lower Appellate Court as appeal did not fall within any of the exceptions provided under S. 100, C.P.C.---Second appeal was dismissed in circumstances.

Abdul Rauf v. Abdul Razzak and another PLD 1994 SC 476; United Bank Limited and 5 others v. Raja Ghulam Hussain and 4 others 1999 SCMR 734; Khawaja Muhammad Naseem v. Shafiqur Rehman 1996 CLC 1460; Azeem Food Industries Ltd. and 4 others v. Industrial Development Bank of Pakistan through Managing Director/Principal Officer 1999 CLC 1915; Naila Junaid v. Additional District Judge and 2 others 2005 MLD 834; Abdul Majeed Khan v. Tawseen Abdul Haleem and others PLD 2012 SC 80; Abdul Wahab Abbasi v. Gul Muhammad Pajano PLD 2008 Kar. 558; Haji Syed Iqbal Ahmed v. Sahibzada Syed Liaquat Ali PLD 2013 Sindh 494; Muhammad Rafiq Memon v. Hakim Ali 2010 CLC 1957; Abdul Rasheed v. State Bank of Pakistan PLD 1970 Kar. 344; Ex.Hav. Mirza Mushtaq Baig v. General Court Martial 1994 SCMR 1948; Hassan Akhtar and others v. Azhar Hameed and others PLD 2010 SC 657; Muhammad Akram v. Mst. Farman Bi PLD 1990 SC 28; PLD 1957 Lah. 283; Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another 1988 SCMR 4; Fazal Muhammad Bhatti and another v.

Mst. Saeeda Akhtar and 2 others 1993 SCMR 2018 and Abdul Karim v. Haji Noor Badshah 2012 SCMR 212 ref.
Rana Rashid Akram Khan for Appellant.
Ch. Sharafat Ali Sidhu for Respondents.
Date of hearing: 2nd April, 2014.

JUDGMENT

CH. MUHAMMD MASOOD JAHANGIR, J.---Briefly the facts are that Abdul Majeed, plaintiff (to be referred hereinafter as respondent No.1) filed a suit for recovery of Rs.400,000 as defamation on account of malicious prosecution against Muhammad Fazil, defendant No.1 (to be referred hereinafter as the appellant) and his brother Ranjha, defendant No.2 (to be referred hereinafter as respondent No.2) before the learned trial court. Both the appellant and respondent No.1 contested the said suit by filing written statement. The learned trial court framed the following issues out of the divergent pleadings of the parties:--

(1) Whether the plaintiff has no cause of action and locus standi to file this suit? OPD

(2) Whether the defendants are entitled to special costs under section 35-A, C.P.C.? OPD

(3) Whether the defendants levelled false allegation of illicit relations against the plaintiff? OPP

(4) Whether the plaintiff is entitled to the decree for recovery of Rs.4,00,000 as damages as prayed for? OPP

(5) Relief.

After collecting the stock of oral as well as documentary evidence led by them and decreed the suit against the appellant and his brother respondent No.2 vide judgment and decree dated 1-4-2005. The appellant along with respondent No.2 being dissatisfied with the said judgment and decree filed an appeal and vide judgment and decree dated 29-10-2005 passed by the learned lower appellate court, the same was partly allowed and while setting aside the judgment and decree to the extent of respondent No.2 and the suit was partly dismissed whereas while maintaining the judgment and decree passed by the learned trial court to the extent of the appellant, the appeal has partly dismissed. Being aggrieved by judgments and decrees passed by both the learned courts below, the appellant has filed the instant Regular Second Appeal.

2. The learned counsel for the appellant has argued that both the courts below have wrongly decided issues Nos.1 to 5 against appellant and failed to appreciate the

evidence/material available on record in true perspective, that the courts below while rendering their findings on issue No.1 omitted to consider that respondent No.1 failed to prove the quantum of damages, that the accusation was not levelled by the appellant in Crl. Misc. No.214-H of 1997 (Exh.P2) filed by him, rather it was asserted by his counsel and thereafter at the time of hearing of said Crl. Misc. the said accusation was withdrawn before the Court, that in the present case no regular prosecution was ensued followed by recording of evidence and rendering some judgment by the court of competent jurisdiction while declaring that it was malicious prosecution on account of some malice proved on the record, but in the present case only a miscellaneous petition in the nature of habeas corpus was filed before this Court wherein finally the allegation of illicit relations allegedly leveled against respondent No.1 were withdrawn and this Court did not decide the said miscellaneous petition in the light of said accusation, that both the courts below have acted illegally and committed material irregularity in the exercise of their jurisdiction while decreeing the suit filed by respondent No.1, that the learned trial court had failed to frame proper issue regarding malicious prosecution and, therefore, just and fair trial could not be conducted; that both the courts below have passed the impugned judgments and decrees in sheer violation of law as material issue has not been answered and the case of the appellant was seriously prejudiced, that substantial error/defect is floating on the surface of the record of the case and the impugned judgments and decrees passed by both the courts below are liable to be set aside. In support of his contentions, the learned counsel for appellant has relied upon the judgments reported as Abdul Rauf v. Abdul Razzak and another (PLD 1994 SC 476), United Bank Limited and 5 others v. Raja Ghulam Hussain and 4 others (1999 SCMR 734), Khawaja Muhammad Naseem v. Shafiqur Rehman (1996 CLC 1460), Azeem Food Industries Ltd. and 4 others v. Industrial Development Bank of Pakistan through Managing Director/Principal Officer (1999 CLC 1915) and Naila Junaid v. Additional District Judge and 2 others (2005 MLD 834) and prayed for acceptance of the instant regular second appeal, setting aside of the impugned judgments and decrees passed by both the courts below and for dismissal of the suit filed by respondent No.1.

3. On the other hand the learned counsel for respondent No.1 has supported the impugned judgments and decrees passed by both the courts below by arguing that there is no denial that the appellant had leveled the allegation of illicit liaison against respondent No.1 along with Mst. Sakina wife of respondent No.2, the brother of the appellant, that the learned counsel for the appellant appeared before this Court in Crl.Misc.No.214-H of 1997 (Exh.P2) on behalf of appellant, no doubt the said counsel withdrew the said allegation but he admitted while recording his

statement that these were leveled against the respondent on the instructions of the appellant, that appellant filed an appeal before the august Supreme Court of Pakistan against the order dated 14-4-1997 (Exh.P1) passed by this Court in Crl.Misc.No.214-H of 1997 and in the said memo of appeal the appellant again reiterated the said allegations; that respondent No.1 is a man of repute and also gained respect in the Society, which was acknowledged by Muhammad Akbar DW2 and the appellant as DW1 before the learned trial court during the course of evidence. The learned counsel for the respondent while relying upon the judgments reported as Abdul Majeed Khan v. Tawseen Abdul Haleem and others (PLD 2012 SC 80), Abdul Wahab Abbasi v. Gul Muhammad Pajano (PLD 2008 Karachi 558), Haji Syed Iqbal Ahmed v. Sahibzada Syed Liaquat Ali (PLD 2013 Sindh 494) and Muhammad Rafiq Memon v. Hakim Ali (2010 CLC 1957) has prayed for dismissal of the instant regular second appeal.

4. After hearing the learned counsel for the parties and perusal of the record, I have noticed that these are the admitted facts that Muhammad Fazil, the appellant had filed Crl.Misc.No.214-H of 1997 (Exh.P2) before this Court against Abdul Majeed, respondent No.1 which was also supported by affidavit (Exh.P3) furnished by the appellant in support of the contents of the said criminal miscellaneous; that in Paragraphs Nos.2 and 4 the following allegations were leveled by the appellant against respondent No.1:-

"2. That about 1-1/2 years ago the respondent took Ranjha, along with his family members, house hold goods and his cattle to his "Daira" in his land situated in Chak No.319/JB Tehsil and District Toba Tek Singh. He has been living at this "Daira" of respondent Abdul Majeed for about 1-1/2 years and during this period the respondent Abdul Majeed developed illicit relations with Mst. Sakina the wife of Ranjha (brother of the petitioner).

4. That on account of the forcible abduction of Mst. Samina daughter of Ranjha and illicit relations of the respondent with the wife of Ranjha, the petitioner and Ranjha felt aggrieved. The petitioner took away Ranjha, his house hold goods family members and Cattle to village Hassi Chak No.376/JB Tehsil and District Toba Tek Singh-Ranjha and the petitioner demanded restoration of detenues Mst. Asia and Abdia minor daughters of Ranjha from the respondent but he (respondent) refused flatly. He further said that he would return the minor daughter of Ranjha only to Mst. Sakina the wife of Ranjha. The petitioner and Ranjha sent Mst. Sakina for fetching the minor daughters of Ranjha from illegal custody of the respondent about 16/18 days ago. Till today she (Mst. Sakina) has not turned up with the minor daughters of Ranjha. It appears that Mst. Sakina has also been detained by the respondent illegally. It seems that Mst. Sakina with whom the respondent had

developed illicit relations, has also been detained by him (respondent). The petitioner and Ranjha sent massage (message) to respondent for the release of determs (detenus) but no reply has been received."

that the said criminal miscellaneous was clubbed with Crl. Misc. No.139-H of 1997 earlier filed by Mst. Samina daughter of Mst. Sakina and both the said petitions came up for hearing before this Court on 14-4-1997. Then this Court passed the following order (Exh.P1) in the connected Crl.Misc. No.139-H of 1997,which reads as under:--

"Fazil respondent has brought Mst. Najma and Mst. Aisha. Mst. Najma who is the daughter of Mst. Sakina is about 14 years of age while Mst. Aisha is about 5 years of age. Both the girls want to go with their mother. So be it. Fazil respondent prays for a short adjournment to honour the commitment that he had made to this Court on 25-3-1997 with respect to the transfer of the land in question in names of the minor children.

2. The learned counsel for the respondent submitted that Mst. Sakina had illicit relations with Ch. Abdul Majeed with whom she was living. The learned counsel for the petitioner submits that this was a false accusation and produced Ch. Abdul Majeed in Court who is a beared man of about 80 years of age. His left arm is invalid on account of sickness. On seeing this Ch. Abdul Majeed, the learned counsel for the respondent withdraws the accusation that he had leveled under instructions from the respondents.

and that the said order was assailed by the appellant before august Supreme Court of Pakistan by filing an appeal which was also dismissed.

5. From the aforesaid admitted facts, there is no denial that the appellant had leveled allegation of illicit liaison against respondent No.1 along with Mst. Sakina by filing Criminal Miscellaneous No.214-H of 1997 (Exh.P2) before this Court. The said allegations were also reiterated by the appellant while swearing an affidavit (Exh.P3), which was filed in support of the said criminal miscellaneous. No doubt the counsel got recorded his statement on 14-4-1997 for withdrawal of such accusation, but he categorically stated that these allegations were leveled upon respondent No.1 on instructions of appellant.

6. For the just decision of the case, it will be appropriate that the factors, which are required to be established by a plaintiff before a decree for malicious prosecution could be awarded read as follows:-

"(i) That the plaintiff was prosecuted by the defendant;

(ii) That the prosecution ended in plaintiff's favour;

(iii) That the defendant acted without reasonable and probable cause;

(iv) That the defendant was actuated by malice;

(v) That the proceedings had interfered with plaintiff's liberty and had also affected his/her reputation; and finally

(vi) That the plaintiff has suffered damages."

The term "malice" has been elaborated and defined in the authoritative judgment reported as "Abdul Rasheed v. State Bank of Pakistan" (PLD 1970 Karachi 344). The operative para No.7 is relevant and for ready reference is reproduced hereunder:--

"7. The term 'malice' in a prosecution of the nature which is before me, has been held not to be spite or hatred against an individual but of `malus animus' and as denoting the working of improper and indirect motives. The proper motive for a prosecution is the desire to secure the ends of justice. It should, therefore, be shown that the prosecutor was not actuated by this desire but by his personal feelings-See Mitchell v. Jenkins ((1833) 5 B & Ad. 588); Pike v. Waldrum ((1352) 1 Lloyd's Rep. 431) and Stevens v. Midland Counties Ry. ((1854) 10 Ex. 352). Further, malice should be proved by the plaintiff affirmatively:-Abrath v. N. E. Ry. ((1886) 11 A. C 247). Malice may sometime be inferred from absence of reasonable and probable cause, but this rule has no general application and there may be cases where it would be appropriate not to infer malice from unreasonableness. Further, if reasonable and probable cause is proved, the question of malice becomes irrelevant, and also defect of want of reasonable and probable cause cannot be supplied by evidence of malice-See Turner v. Ambler ((1847) 10 QB 252); Mitchell v. Jenkins; Brown v. Hawkes ((1891) 2 QB 718) and Herniman v. Smith ((1938) A C 305). It would be proper here to quote the following observation of Denning, L.J. (as he then was) in Tempest v. Snowden ((1952) 1 K B 130):--

"Even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution."

The same rule has been applied by the Courts in India and Pakistan. Several decisions on this point were brought to my notice by Mr. Fazeel. The first case on this point is the decision of the High Court, Lahore, in Abdul Shakoor v. Lipton & Co. (AIR 1924 Lah. 1) where it was held that in suits for malicious prosecution, proof of the existence of malice itself is not sufficient but should be accompanied by proof of absence of reasonable and probable cause. The Lahore High Court reiterated this view in Nur Khan v. Jiwandas (AIR 1927 Lah. 120) and Gobind Ram

v. Kaju Ram (AIR 1939 Lah. 504). The same view prevailed with the High Court of Madras in V. T. Srinivasa Thathachariar v. P. Thiruvenkatachariar (AIR 1932 Mad. 601). This view also found approval of the Judicial Committee of the Privy Council in Balbhaddar Singh v. Badri Sah (AIR 1926 PC 46) and in Raja Braid Sunder Deb and others v. Bamdeb Das and others (AIR 1944 PC 1) in which last case it was further observed that malice cannot be inferred from the anger of the prosecutor."

7. The stance of appellant that the said allegations were levelled by counsel for the appellant and not by the appellant is without any substance and force. Even otherwise the appellant was bound by the deeds and words of his counsel. During the course of arguments the learned counsel for the appellant has frankly admitted that appellant did not initiate any proceedings against his counsel, who allegedly had leveled the said allegations upon respondent No.1. Furthermore the appellant again repeated the said allegations not only in his affidavit (Exh.P3) filed in support of his criminal miscellaneous (Exh.P2), but also repeated same allegations in C.P. filed in the august Supreme Court of Pakistan. The said criminal miscellaneous was filed by the appellant through his counsel and the said relationship between the appellant and his counsel continued even during the proceedings thereof before this court. Neither the said relationship had come to an end nor it is the case of the appellant that appellant had withdrawn power of attorney of his counsel. It is settled principle of law that till the relationship between the counsel and client is found to be in existence, the client is bound by the act of his counsel in view of the dictum laid down by the august Supreme Court in the judgments reported as Ex.Hav. Mirza Mushtaq Baig v. General Court Martial (1994 SCMR 1948) and Hassan Akhtar and others v. Azhar Hameed and others (PLD 2010 SC 657) and the appellant cannot be permitted to say that the said allegations were merely levelled by his counsel as he himself had not only introduced the story regarding the alleged illegitimate relationship between the respondent and Mst. Sakina in Crl.Misc.No.214-H of 1997, but also repeated the same in the affidavit sworn in support of the said application as well as the C.P. filed before the august Supreme Court of Pakistan. It is borne out from the record that earlier Mst. Samina elder daughter of Mst. Sakina had filed Crl.Misc. No.139-H of 1997 against the present appellant and 2 others, who happened to be her real paternal uncles for the recovery of her mother Mst. Sakina and afterwards the present appellant brought up Crl.Misc. No.214-H of 1997 with the aforesaid accusation against respondent No.1 without reasonable and probable cause existing for it merely to hurt, humiliate and defame him, who had good reputation in the society as well as a prominent figure in the Society, which fact he has proved while appearing as P.W.1 and produced Ata ur Rehman as P.W.2, who also asserted that by the false accusation levelled by the appellant, the honour of

respondent No.1 was defamed in the society. On the other hand the appellant appeared as DW1 and produced Muhammad Akbar (DW2), who failed to prove if the said allegations were levelled due to some reasonable belief and it was not intended to defame respondent No.1 without any just cause and reason. Even otherwise the true picture is depicted from the order dated 25-3-1997 passed by this Court in Crl. Misc. No.139-H of 1997 according to which said Mst. Sakina Bibi while entering appearance in court stated her husband Ranjha was of a low intellect whose 3 acres land was mutated by Fazil appellant inspite of that said Ranjha having 5 daughters. This fact was also admitted by Fazil appellant at the relevant time and offered to mutate 1-1/2 acres of land in question in the name of the children of Ranjha. The malice on the part of the appellant was alleged in para-3 of the plaint that the accusation was levelled against respondent No.1 just to defame and pressurize him from withdrawing to support Mst. Sakina Bibi so that they should succeed in their nefarious design. The said malice on the part of appellant is borne out from the facts and circumstances of the case as enumerated above and unrebutted by the appellant by the production of any evidence of unimpeachable character.

8. The other contention of the learned counsel for the appellant that since the said accusation was subsequently withdrawn by the counsel for the appellant before this Court during the proceedings of the Crl. Misc. on 14-4-1997 is misconceived as once the false allegations were leveled, its subsequent withdrawal does not restore the honour/respect of the affected party and absolve the appellant from the consequences thereof. Even otherwise the appellant himself repeated the same allegations before the august Supreme Court of Pakistan by filing C.P. So the learned lower appellate court to the extent of appellant No.1 has eminently maintained the findings of the learned trial Court.

9. The next question raised by the learned counsel for the appellant is that both the courts below have not ascertained the quantum of damages and respondent No.1 also failed to mention the detail of his loses in the body of the plaint or while appearing in the witness box as P.W.1. The perusal of plaint of the suit filed by respondent No.1 reveals that he had assessed his losses and claimed recovery of damages of a specific amount of Rs.400,000. In this regard the judgment referred by the learned counsel for the appellant reported as 1999 CLC 1915 is of no help to the case of the appellant. The august Supreme Court of Pakistan in the judgment reported as Muhammad Akram v. Mst. Farman Bi (PLD 1990 SC 28) while relying upon the judgment of this court reported as PLD 1957 LAHORE 283 held that exact amount was not determinable for the assessment of damages and for this reason a

suit for malicious prosecution cannot be dismissed. Moreover, owning to the reliance placed upon the judgment reported as PLD 1994 SC 476 the contention raised by learned counsel for the appellant that said damages could be awarded only on strict proof and when while deciding the said criminal miscellaneous (Exh.P2) no cost was awarded by this Court, therefore, the suit filed by respondent was not maintainable is also misconceived. In Muhammad Akram's case (supra) while dealing with the same question it has been held that the right for initiating proceedings against malicious prosecution always lies even if there is a specific provision in the statute for imposition of actual cost and compensatory cost. Both the courts below have determined the damages specifically and awarded a decree in favour of respondent No.1 and against the appellant after appreciating the evidence available on file.

10. The other judgment reported as 2005 MLD 834 cited by learned counsel for the appellant is also not applicable to the facts of the instant case rather the same runs on different footings as in the said case the party had withdrawn the prejudicial statement before the same court and it was held that proceedings under section 476, Cr.P.C. could not proceed whereas in the present case both the courts below have decided the suit for recovery of damages on account of defamation. Even otherwise if the allegations were withdrawn by the appellant or his counsel during the proceedings of the Crl. Misc. petition before this court, but then the same were again repeated by the appellant in the C.P. filed before the august Supreme Court of Pakistan. However, in the judgment reported as 1999 SCMR 734 the ingredients for the recovery of damages on account of the malicious prosecution have been described and the learned courts below after considering the said ingredients have passed by the impugned judgments and decrees.

11. So far as the contention raised by learned counsel for the appellant that learned trial court did not frame the proper issues in the light of divergent pleadings of the parties is concerned, suffice it to say that the issues were framed by the learned trial court on 4-5-1999 and the matter kept pending before the said court till 1-4-2005 when finally the suit was decided, but during such a long period neither any objection was raised by the appellant nor any petition moved for amendment or correction of issues. Even the appellant did not raise any such question in the memo of first appeal filed before the learned lower appellate court. It is found that both the parties produced their evidence before the learned trial court keeping in view their pleadings and the said evidence has been duly appreciated by both the courts below. At this stage the objection that proper issues were not framed is not tenable and even the grounds taken by the appellant in the present appeal do not find mention any such objection. The learned counsel for the appellant has also failed to point out

that as to what prejudice was caused to the appellant by not framing any other issue as claim set up by respondent No.1 mainly rested on the admitted fact that the appellant had levelled a false accusation of illicit liaison between him and Mst. Sakina Bibi, which was a matter of record and the appellant failed to rebut the same. The august Supreme Court of Pakistan has dealt such question authoritatively while holding that where the parties have led evidence keeping in mind their pleadings, objection regarding non-framing of any issue or improper framing of issue loses its weight. Reliance in this respect can be placed upon the judgments reported as Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another (1988 SCMR 4), Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others (1993 SCMR 2018) and Abdul Karim v. Haji Noor Badshah (2012 SCMR 212).

12. No doubt second appeal to this Court is maintainable against any decree passed in an appeal by lower appellate court/subordinate to this Court on the grounds as provided in section 100, C.P.C. and the right is restricted and limited to the said grounds. However, it is not expected that while dealing with second appeal this Court will enter into reappraisal of evidence stretching down the concurrent findings of facts. It is found that the instant appeal does not fall within any of the exceptions provided under section 100, C.P.C. and, therefore, the instant Regular Second Appeal being devoid of any force is dismissed

MH/M-173/L Appeal dismissed.

2015 M L D 247
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Ch. SAIFULLAH---Appellant
Versus
ALI SALEEM and another---Respondents

R.S.As. Nos.108 and 109 of 2010, heard on 14th May, 2014.

Punjab Pre-emption Act (IX of 1991)---
----S. 13---Civil Procedure Code (V of 1908), S.100 & O.XVIII R.17---Qanun-e-Shahadat (10 of 1984), Art.129(g)---Suits for possession through pre-emption---Non-appearance of the appellant (plaintiff) as his own witness---Effect---Performance of Talb-e-Muwathibat by the attorney---Principles---Appellant filed two independent suits, which were dismissed, whereafter the appellant filed two separate appeals and the same met the same fate---Contention of the appellant was that the Trial Court committed gross illegality by not following the provisions of O. XVIII, R. 17, C.P.C. and recorded the evidence in one case and copied the same in verbatim in the other case---Plea of the respondent (defendant) was that the appellant did not appear himself before the Trial Court and elected to be represented through his attorney through a special power of attorney, which had been executed on 9-12-2005, meaning thereby that the appellant could not be represented through the said attorney at the time when the requisite Talb-e-Muwathibat had allegedly been performed on 26-4-2002, therefore, the said attorney was not even authorized as a witness on behalf of pre-emptor with regard to performance of Talb-e-Muwathibat---Validity---Pre-emptor could be represented through an attorney, but the powers should have been delegated prior to the performance of requisite demands so that he could perform the same and then depose in the court about the performance thereof on behalf of the attorney on the strength of his power of attorney---Best evidence with regard to performance of Talb-e-Muwathibat was the person who had made such demands, but in the present case, such piece of evidence in spite of availability was withheld for the reasons best known to the appellant and under Art. 129(g) of the Qanun-e-Shahadat, 1984, both the courts below had rightly drawn inference against the appellant, who himself had damaged his case by not appearing before the Trial Court as his own witness---Contention by the appellant/plaintiff that evidence recorded in one case was copied in verbatim in the other file in the peculiar facts and circumstances of the present case could not be declared fatal and the appellant/plaintiff could have objected the mode of recording of evidence before the trial court, if he was prejudiced in any manner, but he having failed to do so, could not raise objection at the belated stage before the third forum---Appellant had not been able to point out that as to how the appellant was prejudiced by the alleged mode adopted by the Trial Court in recording the evidence of the parties and how the evidence of one case had damaged the stance of the appellant in the other case and how the same were different from each other---

Appellant had not stated that there were different sets of witnesses in both the cases and separate witnesses were to be examined, whose mind set would vary from each other---Substance could be found in the argument of the appellant that the evidence of a witness recorded in one case was copied in verbatim in the other case of a different witness on the similar issue---Appellant had been non-suited on his own omissions and commissions made during the proceedings of the cases, but he was not aggrieved of any procedural defect on the part of the Trial Court in losing the cases on merits, therefore, after the lapse of about 12 years, the High Court did not find any good ground to throw the parties in another round of litigation in a suit for pre-emption, which was a feeble right---Appellant had remained unable to urge any good ground provided under S. 100 of C.P.C. to warrant interference by this court in the present appeals---Findings rendered by both the courts below against the appellant had not been found by the High Court to be either excessive or offensive---Both the appeals were dismissed in the circumstances.

PLD 2014 SC 39; PLD 2003 SC 184; 2012 CLC 841; 2014 CLC 112; 2008 YLR 326 and 1990 MLD 588 ref.

2007 CLC 1887; 2012 SCMR 1106; 2007 SCMR 957; 2012 MLD 242; 2012 CLC 651; 2011 YLR 1488; Fateh Muhammad through L.Rs. and others v. Fida Hussain Shah through L.Rs. 2007 CLC 1885; Noor and others v. Mst. Sattan through Legal Representatives and others PLD 2013 Lah. 30; Mst. Sardar Begum and 5 others v. Muhammad Ilyas and another 2013 CLC 1013; Muhammad Asghar v. Hussain Ahmad and others PLD 2014 SC 89; Bahadar Ali v. Syed Ghulam Shabir Gilani 1990 MLD 588; Muhammad Ramzan v. Muhammad Jahangir and another 2012 CLC 844; Muhammad Sharif v. Muhammad Yousaf 2008 MLD 307; Khushi Muhammad v. Muhammad Yousaf 2008 YLR 362 and Salehon Muhammad and another v. Allah Yar 1989 SCMR 540 rel.

M. Baleegh-uz-Zaman Chaudhary for Appellant.

Muhammad Mehmood Chaudhary for Respondents.

Date of hearing: 14th May, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This judgment will dispose of R.S.As. Nos.108 and 109 of 2010 which are between the same parties and the common questions of law and facts are involved therein.

2. The facts germane for the disposal of both the appeals are that the respondents had purchased the property vide sale deeds Nos.1187 and 1192 dated 3-4-2002 and the present appellant filed two independent suits (Nos.260 and 119 of 11-5-2002)

for possession through pre-emption before the learned trial court which were resisted by the respondents and the same were dismissed vide independent judgments and decrees dated 29-10-2009. Feeling dissatisfied, the appellant filed 2 separate appeals bearing No.141/2009 and 140/2009 before the learned lower appellate court, which were also dismissed vide judgment and decree dated 11-3-2010, hence the instant appeals before this court.

3. Learned counsel for the appellant has argued that the learned trial court recorded the evidence of the parties in one case and the same was copied in verbatim over the other file and while doing so the learned trial court committed gross illegality and travelled beyond the mandatory provisions of law; that due to said lapse on the part of learned Trial Court, the trial of the suit had not been conducted in accordance with law and such illegality is of such a nature which cannot be cured; that the learned trial court did not follow the mandatory provisions contained in Order XVIII, C.P.C. and as such the proceedings of the learned trial court are liable to be vitiated as those were conducted in sheer derogation of above said provision of law; that non-appearance of the appellant as his own witness was not fatal as his attorney appeared before the learned trial court as P.W.1 and proved the factum of performance of requisite demands. He lastly mooted that the impugned judgments and decrees passed by both the learned courts below are nullity in the eyes of law and the cases are required to be remanded back to the learned trial court for fresh decision after de novo trial. Relied upon the cases reported as (PLD 2014 Supreme Court 39) and (PLD 2003 Supreme Court 184).

4. Conversely, learned counsel for the respondents has argued that the appellant had filed two suits before the learned trial court on 11-5-2002, who concluded the same after consuming a period of more than 7 years; that during the course of recording of evidence, the appellant/plaintiff did not raise any objection regarding the mode of recording the evidence before the learned trial court; that the appellant/plaintiff did not appear himself before the learned trial court as his own witness, but in his place Shahid Inayat P.W.3 was produced as attorney and the non-appearance of the pre-emptor was declared to be fatal by both the learned courts below; that the appellant/plaintiff now to cover up the said lacuna for the first time has raised the objection; that the appellant/plaintiff during the course of proceedings before the learned lower appellate court did not raise any such question and cannot set up a new ground in his second appeal; that the provision of Order XVIII, Rule 14, C.P.C. are directory in nature and not of mandatory to be followed in stricto sensu. He has relied upon the cases reported as (2012 CLC 841), (2014 CLC 112), (2008 YLR 326), (1990 MLD 588), (2013 CLC 1013), (2007 CLC 1887) and (PLD 2013

Lahore 30) in support of his contentions and prayed for the dismissal of the instant appeal.

5. Arguments heard. Record perused.

6. The pivotal question only stressed by both the parties is that whether the learned trial court committed gross illegality by not following the provision of law and recorded the evidence in one case and copied the same in verbatim over the other case. The grouse of the appellant is only to this extent, otherwise, on merit it is an admitted fact that the appellant did not appear himself before the learned trial court and elected to be represented through his attorney Shahid Inayat P.W.3. Special power of attorney Exh.P3 had been executed on 9-12-2005, which shows that Shahid Inayat P.W.3 was not attorney of the appellant at the time when the requisite Talb-e-Muwathibat had allegedly been performed on 26-4-2002. A perusal of special power of attorney (Exh.P3) further indicates that P.W.3 was not even authorized as a witness on behalf of pre-emptor with regard to performance of Talb-e-Mowathibat.

7. There is no doubt in the mind of this court that a pre-emptor could be represented through an attorney, but the powers should have been delegated prior to the performance of requisite demands so that he could perform the same and then depose in the court about the performance thereof on behalf of the attorney on the strength of his power of attorney. The best evidence with regard to performance of Talb-e-Muwathibat was the person who had made such demands, but in the present case, the such piece of evidence in spite of availability was withheld for the best reasons known to the appellant and under Article 129(g) of the Qanun-e-Shahadat Order, 1984, both the learned courts below have rightly drawn inference against the appellant, who himself had damaged his case by not appearing before the learned trial court as his own witness.

8. A perusal of plaint further reveals that the appellant/plaintiff did not assert in his plaint that at the time of performance of Talb-e-Muwathibat and Talb-e-Ishhad, the said attorney Shahid Inayat P.W.3 was also present in the first Majlis and he was also accompanying the appellant when he got scribed the notice Talb-e-Ishhad and dispatched the same to the respondents/vendees. So the statement of Shahid Inayat P.W.3 as attorney is not helpful to the appellant/plaintiff, who failed to prove the performance of requisite Talb-e-Muwathibat and Talb-e-Ishhad and both the learned courts below have rightly decided issue No.2 in favour of the appellant/plaintiff. After seeking guidance from the dictum laid down in (2012 SCMR 1106), (2007 SCMR 957), (2012 MLD 242), (2012 CLC 651) and (2011 YLR 1488), I do not find any illegality or jurisdictional defect committed by both the learned courts below in arriving at the aforesaid findings.

9. The only grouse of the appellant/plaintiff is that the learned trial court in derogation of the mandatory provision of law had recorded the evidence in one file and copied the same in verbatim over the other file has some substance, who seeks that to cure the said illegality the matter should be remanded to the trial court for de novo trial, but in the present case history of the case goes against the appellant/plaintiff. It is an admitted fact that the appellant/plaintiff himself filed two independent suits before the learned trial court on 11-5-2002 which remained pending before the learned trial court for a period of more than seven years. During the said long period in the course of proceedings, the appellant/plaintiff had neither raised any question nor had made any prayer for recording the evidence of the parties in both the suits independently. The perusal of plaints in both the suits reveals that the alleged performance of requisite Talb-e-Muwathibat regarding the two sale transactions had been made at the same time, venue and before the similar witnesses as well. The second demand was also allegedly performed in the similar manner. The contents of both the plaints are also identical rather the stance took by the plaintiff/appellant in one plaint appears to have been copied in verbatim over the other plaint. The plaintiff/appellant did not agitate any such objection in his memorandum of appeal filed before the learned lower appellate court. The objection to this extent for the first time has been raised by the appellant/plaintiff in the instant second appeal. The learned counsel for the respondents has argued that the appellant/plaintiff cannot raise a new objection in the instant second appeal. The dictum laid down in the cases reported as Fateh Muhammad through L.Rs. and others v. Fida Hussain Shah through L.Rs. (2007 CLC 1885), Noor and others v. Mst. Sattan through Legal Representatives and others (PLD 2013 Lahore 30) and Mst. Sardar Begum and 5 others v. Muhammad Ilyas and another (2013 CLC 1013) lends support to the contention raised by learned counsel for the respondents that the plea, which, at the relevant time, was not raised before both the learned courts below cannot be raised in the second appeal.

10. The contention of learned counsel for the appellant/plaintiff that in the recent judgment reported as Muhammad Asghar v. Hussain Ahmad and others (PLD 2014 Supreme Court 89) the august Supreme Court of Pakistan has declared that the provisions of Order XVIII C.P.C. are of mandatory nature, thus the learned trial court while recording the evidence in one case and copying the same in verbatim over the other case travelled beyond the mandatory provision of law, is without substance. With utmost care and due respect the judgment of august Supreme Court of Pakistan has minutely been perused and it is found to have been rendered in the context of Order XVIII, Rule 17, C.P.C., whereas the proposition in the present case

relates to Order XVIII, Rule 14 which does not entail any penal clause. For ready reference both the said provisions are reproduced hereunder:--

"14.-(1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record."

"17. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit."

So the contention of learned counsel for the respondent that the said provision is directory in nature appeals to this court. In arriving at such view, I am fortified by the judgment reported as Bahadar Ali v. Syed Ghulam Shabir Gilani (1990 MLD 588) wherein, this court observed as under:--

18. As indicated in Nand Lal and another v. Pooran and another AIR 1956 Rajasthan 9, the learned Judge was examining the case in which the learned trial Judge had completely defied the clear mandate of the law in an extremely brazen manner occasioning serious doubt about the record of the case.
19. The ratio emerging from the aforesaid principles is:-

(i) that the provisions of the procedural law are intended to facilitate and not to throttle the administration of justice. The calls of substantial justice must prevail over the logic on the basis of technicalities.

(ii) that the object of Rules 8 and 14 of Order XVIII of the Code of Civil Procedure is to ensure the accuracy of the record. The preparation of correct record is the foundation of dispensation of justice as finally the judgment is to be rendered on the basis of this record;

(iii) that the trial Court shall prepare the record in accordance with these rules in order to obviate any allegations or counter allegations in preparation of the incorrect record;

(iv) that the duty cast upon the Courts is for the benefit of the litigant public. If there is any non-compliance or neglect in the performance of the duty that is subject to waiver if the parties do not choose to make objection at the time of neglect or non-compliance;

(v) that non-compliance or neglect of duty in the context of afore-noted rules in absence of allegations of inaccurate preparation of record or prejudice is irregularity and is not illegality.

20. Applying these principles to this case I have no difficulty in coming to the conclusion that neither the appellant raised any objection in respect of this non-compliance before the trial Court nor raised any objection with respect to any accuracy in the preparation of the record occasioning prejudice or injustice to him. Therefore, I am clear in my mind that the objection rooted in technicalities must fail and is accordingly repelled."

11. The said view has further been affirmed by this court in another case reported as Muhammad Ramzan v. Muhammad Jahangir and another (2012 CLC 844), wherein, it was held that 'unnecessary technicalities should not be allowed to deter the due process of law on trifling grounds, particularly where no prejudice is likely to be caused to any litigant, meaning thereby, the procedural environment must be made conducive to facilitate the flow of the stream of justice.' The identical controversy was also clinched in many other cases by this court as well as the august Supreme Court of Pakistan. Reference can be made on the cases reported as Muhammad Sharif v. Muhammad Yousaf (2008 MLD 307) and Khushi Muhammad v. Muhammad Yousaf (2008 YLR 362). After placing reliance upon the case reported as Salehon Muhammad and another v. Allah Yar (1989 SCMR 540) this court is of the firm view that the plea raised by the appellant/plaintiff that evidence recorded in one case copied in verbatim over the other file in the peculiar facts and circumstances of the instant case cannot be declared fatal and the appellant/plaintiff could have objected the mode of recording of evidence before the learned trial court, if he was prejudiced in any manner, but he having failed to do so, at this stage before the third forum such an objection cannot be considered. Even today, the learned counsel for the appellant has not been able to point out that how the appellant was prejudiced by the alleged mode adopted by the learned trial court in recording the evidence of the parties and that how the evidence of one case has damaged the stance of the appellant in the other case and how the same were different from each other. It is not the case of the appellant that there were different sets of witnesses in both the cases and separate witnesses were to be examined, whose mind set would vary from each other. There could be substance in the

argument of learned counsel for the appellant that the evidence of a witness recorded in one case was copied in verbatim in the other case of a different witness on the similar issue. Even otherwise, the appellant has been non-suited on his own omissions and commissions made during the proceedings of the cases, but he is not aggrieved of any procedural defect on the part of the learned trial court in losing the cases on merits. Hence, after the elapse of about 12 years, I do not find any good ground to throw the parties in another round of litigation in a suit for pre-emption, which is a feeble right.

12. The learned counsel for the appellant has remained unable to urge any good grounds provided under section 100, C.P.C. to warrant interference by this court in the instant appeals. The findings rendered by both the learned courts below against the appellant have not been found by this court to be either excessive or offensive. In these facts and circumstances, no occasion has cropped out to vary the impugned judgments and decrees, which are maintained and both these appeals are dismissed.

SA/99/L Appeals dismissed.

PLJ 2015 Lahore 720
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
Syed **ZAHEER HAIDER, etc.--Appellants**
Versus
SHAUKAT ALI, etc.--Respondents

R.S.A. No. 33 of 2004, heard on 23.2.2015.

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

----S. 22--Suit for specific performance of agreement to sell, dismissal of--Agreement based on fraud and misrepresentation--Discretionary relief--Grant of a decree for specific performance of agreement to sell regarding immovable property is discretionary relief. [P. 722] A

2010 SCMR 1217, 2007 SCMR 1047 & 1994 SCMR 111, *rel*.

Contract--

----Pre-requisite of contract were found to be missing--Bound to plead facts regarding contract--Validity--Where pre-requisite of contract are found miss--Plaintiff is not entitled for decree of specific performance of contract. [P. 722] B

Contract--

----Intention of parties to contract must be looked to determine--Question of--Whether contract had been executed or not--Where no intend to enter into contract can be no contract--Validity--Contract for sale of immoveable property is a contract that sale of such property shall take place on terms settled between parties--If essential terms of sale of immovable property are determinable in agreement between parties with certainty, it may constitute valid agreement of sale between parties. [P. 722] C & D

PLD 1984 Kar. 233, ref.

Agreement to sell--

----Agreement was not signed--Question of--Whether agreement to sell was valid because if it is not valid question of enforcement through process of law and exercise of discretion does not arise--Validity--Agreement were not signed by appellants and such an agreement is not enforceable as per law. [P. 723] E

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

----S. 22--Suit for specific performance of agreement to sell, based on fraud and misrepresentation agreement, dismissal of--Agreement was not signed by vendee--Not enforceable in eye of law--Validity--Disputed agreement being unilateral are

not enforceable as per law and Courts below had rightly non-suited appellant through decree on valid ground--Appellant had failed to point out any illegality or jurisdictional defect--Appeal was dismissed. [Pp. 725 & 726] F

Ch. Muhammad Aslam Shahryar, Advocate for Appellants.

M/s. Imran Muhammad Sarwar and Nasir Ali Wasti, Advocates for Respondents.

Date of hearing: 23.2.2015.

JUDGMENT

By filing the instant appeal the appellants have challenged the judgment and decree dated 30.5.1978 passed by the learned Civil Judge, Sialkot whereby the suit for specific performance of agreement to sell filed by the appellants was dismissed and the judgment and decree dated 20.9.2003 delivered by the learned Additional District Judge, Sialkot by virtue of which the appeal filed by the appellants was also dismissed.

2. The precise facts of the case are that *Mst.* Hajra Begum the predecessor-in-interest of the present appellants filed a suit for specific performance regarding a house and plot fully mentioned in the body of the plaint on the basis of agreements dated 11.7.1969 and 7.5.1970 (Exh.P1 & P2). The said suit was resisted by the respondents/ defendants with the assertions that no agreement of sale was executed between the parties and agreement referred in the plaint were based on fraud and misrepresentation. The learned trial Court after capturing the disputed area of facts framed the issues, collected stock of evidence led by the parties and after appreciating the same dismissed the said suit whereas the appeal filed by the appellants was also dismissed by the learned lower Appellate Court through the impugned judgments and decrees referred in Para-1 ante. Hence the instant appeal.

2. Arguments heard and record perused.

3. There is no cavil with the preposition that grant of a decree for specific performance of an agreements to sell regarding immoveable property is a discretionary relief. The language of Section 22 of Specific Relief Act 1877 affirms the same. Even in the judgments reported as (2010 SCMR 1217), (2007 SCMR 1047) and (1994 SCMR 111), the said view has further been affirmed.

4. In a suit for specific performance of agreement, the petitioner/plaintiff has to assert that a contract existed between him and defendant/respondent. The petitioner/plaintiff was also bound to plead the facts regarding the contract, which he desired to be specifically performed and where pre-requisite of a contract are found, to be missing, the petitioner/plaintiff is not entitled for a decree of specific performance of contract. The intention of the parties to a contract must be looked to determine that whether a contract had been executed or not and where they did not intend to enter into a contract, there can be no contract. A contract for the sale of immovable property is a contract that a sale of such property shall take place on the

terms settled between the parties. It is clear from the above proposition of law that the essential terms of the sale of immovable property are:--

(a) Payment of the sale price of property or promise to pay the same by the purchaser to the seller; and

(b) The delivery of possession of the property sold by the seller to the purchaser.

If these two essential terms of sale of the immovable property are determinable in the agreement between the parties with certainty, it may constitute a valid agreement of sale between the parties as laid down in the case of *Messrs Karachi Gas Company Ltd. v. Messrs Fancy Foundation* (PLD 1984 KAR. 233)

5. In the above context the only requirement is, whether 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. There is no denial that the above referred agreements Exh.P1 & P2 were not signed by the appellants and such an agreement is not enforceable as per law. In forming such view, this Court is fortified by the judgment delivered by the august Supreme Court of Pakistan reported as *Mst. Barkat Bibi and others vs. Muhammad Rafique and others* (1990 SCMR 28) and the operative Para of the said judgment is reproduced hereunder:

> "A perusal of the above "Iqrarnama" shows that there is no reference made therein specifically to the exact consideration for the agreement. Moreover, we observe that it is a unilateral offer made by Muhammad Din to recovery the land as soon as they (the vendors) themselves have raised the money. No indication is to be found in the document that this offer was accepted by the respondents for no one on the side of the respondents has signed this "Iqrarnama" in token of its acceptance. It was no more than a proposal because unless the person to whom the offer is made signifies his willingness to accept it, the proposal does not, in law, ripen into an agreement. Now it is only an "agreement", as the term is understood in law, which can be enforced by a suit for specific performance. Accordingly, it is only if the so-called "*Iqrarnama*" qualified as an agreement would it have the effect of creating a legal relationship between the parties so as to give rise to jural, as opposed to moral, obligations and then only would a suit for specific performance be maintainable on its basis. The so-called "*Iqrarnama*" dated 24-7-1953, on close examination, however, does not qualify to be an "agreement". Hence a suit to specifically enforce it was not competent."

This view has also been strengthened by the judgments reported as *Mst. Gulshan Hameed vs. Abdul Rehman and others* (2010 SCMR 334). In the said authoritative judgments delivered by the Superior Court, it has been held that an agreement was required to be singed by both the parties and if it was not signed

by any one of the parties (vendee), then the same cannot be enforced as per law. On the touchstone of said discussion the agreement Exh.P1 and Exh.P2 were not enforceable even if it is presumed that those were got executed.

6. Moreover, in a recent judgment dated 1.1.2015 passed in C.A. No. 261-L of 2014 titled *Farzand Ali and another vs. Khuda Bakhsh and others* authored by his Lordship Mian Saqib Nisar, J, the apex Court has authoritatively clinched the instant controversy and after thrashing the plethora of judgments on the subject rendered by the superior Courts hold that the unilateral agreement not signed by the vendee, if is denied and not acted upon by the vendor is not enforceable in the eye of law and request for granting leave on the ground that in some other cases leave was granted was declined on the ground that judgment (PLD 1971 SC 784) was not attracted Para-9 of the said judgment is relevant which is reproduced hereunder:--

> "9. In the above context, the first and the foremost aspect of the case is, if the agreement to sell of the appellants was valid because if it is not valid the question of its enforcement through the process of law and the exercise of discretion does not arise. It is an undisputed fact that appellants agreement has not been signed by them. And an agreement to sell immovable property is not a "**deed poll**", unlike e.g. a power of attorney which is only executed by the principal and the 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 is a common understanding of the parties in the formation of the contract in the absence of which there is neither a concept nor the possibility of a valid contract. But in this case this is conspicuously lacking by virtue of non-execution (non-signing) of the agreement by the appellants, therefore in law and fact it is no contract (agreement). The argument that the agreement to sell in favour of the appellants has been admitted by the vendors and, therefore, is valid and the non-signing has lost its efficacy, suffice it to say that despite the above, the respondent has joined with the appellants *vis a vis* the validity and valid execution of the agreement, therefore, the appellants cannot rely upon and take advantage of

any admission made by the vendors, because of the law, that an admission made by a co-defendant is not binding on other even if made in the written statement. Reliance in this regard can be placed on the judgments reported as *Shah Muhammad and 2 others vs. Dulla and 2 others* (2000 SCMR 1588). *Allah Rakha through L.Rs. vs. Nasir Khan and 4 others* (2007 CLC 154), and *Zeeshan Bhatti vs. Maqbool Bhatti and another* (PLD 2001 SC 79). Besides the above, in the judgment reported as *Mst. Gulshan Hamid vs. Kh. Abdul Rahman and others* (2010 SCMR 434) (three members bench of this Court) while considering the specific proposition, whether the plaintiffs in a suit for specific performance was entitled to enforce the agreement which was not signed by them (the vendee), it has been categorically held that "Such unilateral agreement not signed by plaintiff-vendee was not mutually enforceable, whereupon no decree could be passed. The arguments of the learned counsel for the appellants that in some case(s), leave has been granted, therefore, leave on this account should also be allowed in the present matter, we are not persuaded to grant leave in this case on that account alone; learned counsel for the appellants has relied upon the judgment reported as *Messrs Jamal Jute Baling & Co., Dacca vs. Messrs M. Sarkies & Sorts, Dacca* (PLD 1971 SC 784) to argue to the contrary, wherein it has been held that "terms of agreement reduced into writing and proved to have been accepted and acted upon by both parties--Agreement, proper and valid even if one party had not signed such agreement"

However the conditions are that the agreement should be accepted by the parties who are actually in dispute *qua* the validity thereof, and the agreement should have been acted upon. In this case as explained earlier in the light of the facts of the case the real dispute is between the appellants and the respondent, who (respondent) has never admitted the agreement and it has also not been acted upon. It may be even relevant to reiterate here that *Mst.* Zakia even denied the agreement when she appeared as PW-1, however, she was never even cross-examined by the appellants. Resultantly the judgment supra relied upon by the learned counsel for the appellants is not attracted."

7. On the touchstone of above discussion it can safely be concluded that both the disputed agreements being unilateral are not enforceable as per law and both the Courts below, have rightly non-suited the appellants through the impugned judgments and decrees on the valid grounds. The learned counsel for the appellant has failed to point out any illegality, perversity or jurisdictional defect in the impugned judgments and decrees, which are also not tainted with any misreading or non-roading of the evidence available on the record calling for any interference by this Court in the exercise of revisional jurisdiction, the scope whereof is narrower and restricted only to the extent of correcting errors of law and facts, if are found to

have been committed by the subordinate Courts in the discharge of judicial functions. Resultantly, the instant appeal being devoid of any merit is **dismissed**.

(R.A.) Appeal dismissed.

2015 Y L R 2095

[Lahore]
Before Ch. Muhammad Masood Jahangir and Ch. Muhammad Iqbal, JJ
NISAR AHMAD SABRI through L.Rs. and others---Appellants
Versus
GOVERNMENT OF PUNJAB through Secretary, Labour Department and others---Respondents

R.F.A. No.397 of 2013, decided on 11th February, 2015.

(a) Land Acquisition Act (I of 1894)---

----Ss. 4, 6, 17(4), 18 & 23----Acquisition of land---Compensation, determination of---Potential value of land---Land of plaintiffs was acquired by Government for public purpose and after proceedings conducted under Ss. 4, 6 & 17(4) of Land Acquisition Act, 1894, possession of the same was taken-over---Award was announced after several years and landowners were awarded compensation, compulsory acquisition charges along with compound interest from date of possession till date of payment---Landowners filed reference under S. 18 of Land Acquisition Act, 1894 asserting that compensation was wrongly assessed on basis of land being agricultural whereas suit property was urban, and that Collector had determined value of the land arbitrarily while ignoring status, location and potential of acquired property---Authorities contested the reference---Referee court, partially accepting the reference, enhanced rate of compensation but declined compulsory acquisition charges and compound interest---Both parties assailed judgment and decree of referee court---Contentions raised by landowners were that referee court failed to appreciate available evidence and consider location, high potential value of acquired land and its fitness for locality---Authorities took plea that Acquisition Collector had considered high potential value of land and prevailing market-price while passing award of compensation--- Validity--- Landonwers were entitled to compensation and not just market-value---Loss or injury occasioned by its severing from other property of landowners, by changing of residence or place of business and loss of profits were also relevant---Valuation, as proved through evidence, was not itself conclusive evidence with regard to value of property, but the same had to be taken note of particularly in absence of any evidence to contrary and other factors reflected in evidence with regard to potential value of property---Evidence available supported that land under acquisition was situated in urban area---Landowners succeeded to prove that both Collector and referee court had failed to assess compensation of the land according to its potential value---Referee court totally ignored documentary evidence while awarding compensation of acquired property---High Court, allowing the appeal, modified judgment and decree of referee court by increasing amount of compensation and declared landowners

entitled to compulsory acquisition charges and compound interest from date of taking-over the possession by authorities.

Abdur Rauf Khan v. Land Acquisition Collector/D.C. 1991 SCMR 2164; Land Acquisition Collector GSC NTDC (WAPDA), Lahore v. Surraya Mehmood Jan 2015 SCMR 28 and Province of Punjab Through Land Acquisition Collector and another v. Begum Aziza 2014 SCMR 75 rel.

(b) Land Acquisitions Act (I of 1894)---
----S. 23----Assessment of value of land---Principles---Value assessed to be paid to landowners under Land Acquisition Act, 1894 was not price of land acquired, rather it was compensation to landowners---Land was acquired from landowners without considering their need and consent or any immediate requirement of landowners for the amount paid to them in lieu of acquisition---Amount of compensation should not be less than sale price of property in market but may be more keeping in mind circumstances of each case---Term "market-value" as employed in S. 23 of Land Acquisition Act, 1894 implied the price what a willing purchaser will pay to a willing buyer in open market.

(c) Land Acquisition Act (I of 1894)---
----S. 23(2)----Compulsory acquisition charges, award of---Referee court, in the present case, refused to award compulsory acquisition charges and compound interest on the ground that landowners had not claimed the same---Validity---Compulsory acquisition charges were payable under S.23(2) of Land Acquisition Act, 1894, under which it was obligatory upon Referee court to award compulsory acquisition charges keeping in view the purpose for which land was being acquired and said charges could not be refused merely on ground that same had not been claimed by landowners---Landowners, held, were entitled to compulsory acquisition charges.

(d) Land Acquisition Act (I of 1894)---
----S. 34----Compound interest, award of---Section 34 of Land Acquisition Act, 1894 provided that when amount of compensation was not paid or deposited on or before taking possession of land, Collector would pay amount awarded with compound interest at the rate of 8% per annum from time of taking possession until it should have been paid or deposited---Any waiver of said right by landowner would be void---Landowners were entitled to receive compound interest from date of taking over possession of acquired property---Referee court erred in law while refusing the same---Findings of the court regarding issue of compound interest were reversed.

Muhammad Shahzad Shaukat for Appellants (in R.F.A. No.397-13) and respondents (in R.F.A. No.377-13).

Muhammad Arif Yaqoob Khan, AAG for Respondents (in R.F.A. No.397-13) and Appellants (in R.F.A. No.377-13).

Date of hearing: 11th February, 2013.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This single judgment will dispose of R.F.As. Nos.397 and 377 of 2013 jointly, which have been filed by the rival parties against each other challenging the same judgment and decree passed in the reference under section 18 of the Acquisition Act, 1894 and the common questions of facts and law are involved.

2. The facts germane for the disposal of the case in hand are that property measuring 58 kanals 7 marlas situated in Kasur (androon) Tehsil and District, Kasur was owned by the appellants of R.F.A.No.397 of 2013 and the said property along with other property total measuring 187 kanals 8 marlas had been acquired vide notification under section 4 of the Land Acquisition Act, 1894 published in the Government of Punjab Gazette dated 14-12-1980, which was followed by publication of the notification under section 17(4) read with section 6 ibid in the Government of Punjab Gazette on 2-11-1983 for the construction of Technical Training Centre, Kasur. The possession of the disputed land had been taken over by the respondents on 16-5-1981 whereas the award was announced on 24-3-1998 and the appellants were awarded the compensation @ Rs.102.93 per marla plus 15% compulsory acquisition charges along with compound interest @ Rs.8 per annum from the date of possession to the date of payment. The said award was challenged by the appellants by filing Reference under section 18 of the Land Acquisition Act, 1894 before the learned Senior Civil Judge, Kasur with the assertion that compensation was wrongly assessed in spite of that the disputed property was not agricultural, but the same was urban, which was situated inside Kasur Municipality. It is further averred that Collector had determined the value of the land arbitrarily while ignoring the status, location and potential of the acquired property. The said reference was contested by the respondents. The learned Referee Court captured the disputed area of facts by framing the following issues:--

(1) Whether award is an independent one? OPA

(2) Whether land acquisition collector determined inadequate price of the disputed land and the petitioners are entitled to take value of land at the rate of Rs.10,000 per Marla with compensation? OPA

(3) Whether the petitioners filed reference with mala fide intention? OPR

(4) Relief.

3. After recording evidence of the parties the learned Referee Court partially accepted the reference and enhanced the rate of compensation from Rs.102.93 to Rs.1500 per marla vide judgment and decree dated 20-12-2012. The concluding para of said judgment is reproduced hereunder:--

"In peroration of my finding on each issues above, the award being paranoid, and without having any backing of reasons is set aside and same is hereby partially accepted and it is held that proper amount of compensation which is payable to the petitioners is Rs.1500 per Marla instead of Rs.10,000 Per Marla from the date of possession of the property."

However, the learned referee court did not award compulsory acquisition charges and compound interest while observing on issues Nos.1 and 2 that the appellants did not claim the same and they were not entitled to receive the same.

4. The said judgment and decree dated 20-12-2012 has been challenged by both the parties by filing the above referred appeals. The appellants of R.F.A.No.397 of 2013 are seeking enhancement of compensation along with 15% compulsory charges and 8% compound interest whereas the respondents, who are also appellants of R.F.A.No.377 of 2013 are also seeking setting aside of the impugned judgment and decree.

5. The learned counsel for the appellants has argued that while determining the amount of compensation @ Rs.1500 per marla the learned Referee Court has miserably failed to fully appreciate the entire documentary evidence available on the record and to consider the location of the land the high potential value and the use to which it could be put in the future and its fitness for Abadi. He has further argued that the learned Referee Judge has failed to award 15% compulsory acquisition charges and compound interest @ 8% per annum as awarded by the Land Acquisition Collector on the flimsy ground that the appellants had not prayed for the compulsory acquisition charges and interest. He has further prayed that the impugned judgment and decree being a result of misreading and non-reading of documentary evidence produced by the appellants are liable to be set aside by allowing the instant appeal and the compensation be enhanced and the compulsory acquisition charges and compound interest be also awarded.

6. Conversely the learned Law Officer appearing on behalf of the respondent has argued that the impugned judgment passed by the learned Referee Court is against law and facts of the case, that the Land Acquisition Collector had considered high potential value of the land while awarding compensation which fact has been escaped by the learned Referee Court, that Member Board of Revenue after taking into consideration the prevailing market price has passed the order. He has last prayed for dismissal of the instant appeal and setting aside of the impugned judgment.

7. Arguments heard and record perused.

8. The pivotal issue in the cases in hand is that what should be the actual compensation of the acquired land. The mode for determining the same is provided in section 23 of the Act of 1894, which reads as under:--

23. Matters to be considered in determining compensation.---(1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration--
firstly, the market-value of the land on the date of the publication of the notification under section 4, subsection (1)
secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;
thirdly, the damage (if any) sustained, by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;
fourthly, the damage (if any) sustained by the person interested at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, if ay other manner, or his earnings;
fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and
sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.
(2) In addition to the market-value of the land as above provided, the court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition.
9. An analysis of the aforesaid provisions reflects that the landowner is entitled to compensation and not just market-value and, therefore, loss or injury occasioned by its severing from other property of the landowner, by change of residence or place of business and loss of profits are also relevant. The delay in the consummation of the acquisition proceedings cannot be lost sight off. While conducting the aforesaid exercise, oral evidence, if found, credible and reliable can also be taken into account. In Abdur Rauf Khan v. Land Acquisition Collector/D.C. (1991 SCMR 2164) the august Supreme Court while dilating upon the question of rate of compensation laid down the following principles germane to section 23 of the Land Acquisition Act, which may be kept in view. Those are as follows:--

"(i) That an entry in the Revenue Record as to the nature of the land may not be conclusive, for example, land may be shown in Girdawari as Maira, but because of the existence of a well near the land, makes it capable of becoming Chahi land;

(ii) That while determining the potentials of the land, the use of which the land is capable of being put, ought to be considered;

(iii) That the market value of the land is normally to be taken as existing on the date of publication of the notification under section 4(1) of the Act but for determining

the same, the prices on which similar land situated in the vicinity was sold during the preceding 12 months and not 6-7 years may be considered including other factors like potential value etc."

10. The appellants produced Muhammad Afzal as AW1, Muhammad Bashir as AW2 and one of the appellants himself appeared as AW3 a perusal of whose evidence shows that they remained consistent on the point that the acquired property situated within the local limits of Kasur Municipality, which was also surrounded by residential colonies and its potential value was not below Rs.10,000 per marla. Besides the said oral evidence, the appellants also produced copy of letter issued by Deputy Commissioner to Secretary (Settlement) Board of Revenue, Lahore Exh.A14 and copy of letter issued by AC/LAC to Deputy Commissioner Kasur along with report as Exh.A18. The perusal of said report shows that average price of land was Rs.5,220 per marla and prevailing market price was shown to be Rs.18,000/20,000 per marla. Although the said valuation by itself might not furnish conclusive evidence qua value of property, but it has to be taken note of particularly in absence of any evidence to the contrary regarding value of the property and other factors reflected in the evidence with regard to the potential value of property. The said letters had been issued by the Revenue hierarchy prior to the announcement of award. Besides the above, the appellant produced attested copies of mutations as well as sale deed Exh.A23 to A33, which also fully support the version of the appellants. The copies of notifications published in the Punjab Gazette under section 27 of the Stamp Act pertaining to the year 1998-99 relating to the other property situated in Kasur (androon) are also available as Exh.A19 to A20, which too support the potential value of the acquired property as claimed by the appellants. On the other hand no relevant oral or documentary evidence could be produced by the defendants to negate the stance of the appellants.

11. The evidence available on record fully proves the fact that the land under acquisition situated in the Kasur Municipality limits and in the vicinity housing colonies had been developed whereupon the potential value of the said land was enhanced from agricultural to Urban. In the recent judgment reported as Land Acquisition Collector GSC NTDC (WAPDA), Lahore v. Surraya Mehmood Jan (2015 SCMR 28) the apex court after taking into consideration guidelines laid down in the judgment reported as Province of Punjab Through Land Acquisition Collector and Another v. Begum Aziza (2014 SCMR 75) and discussing the plethora of judgments on the subject has held that the term "market-value" as employed in section 23 of the Act of 1894 implies the price that a willing purchaser would pay to a willing buyer in an open market arms length transaction entered into without any compulsion and for ready reference para 9 of (2015 SCMR 28) is reproduced as under:--

"9. The principles that can be gleaned from the aforesaid judicial precedents are that the term "market-value" as employed in section 23 of the Act of 1894 implies the price that a willing purchaser would pay to a willing buyer in an open market arms length transaction entered into without any compulsion. Such determination must be

objective rather than subjective. While undertaking this exercise, contemporaneous transactions of the same, adjoining or adjacent as well as the land in the same vicinity or locality; in dissenting precedents, may be taken into account. An award of compensation of a similar, adjacent, adjoining land or in respect of the land acquired in the same vicinity or locality cannot be ignored. The classification of the land in the Revenue Record cannot be the sole criteria for determining its value and its potential i.e. the use of which the said land can be put, must also be a factor. In this behalf, the use of the land in its vicinity needs to be examined."

12. We are of the considered view that the value assessed to be paid to the appellants under the Land Acquisition Act, 1894 was not the price of land acquired rather its compensation to the land owners from whom the property was being taken. On the other hand an owner of some of the property has to first make mind to sell his property after considering his need and the amount to be paid to him as a consideration as well as use of the said land. However, the land is acquired from the land owners without considering urgent need and consent of land owners or any immediate requirement of the land owners for the amount paid in lieu of acquisition of that property. As such the amount of compensation should not be less than sale price of the property in the market but may be more keeping in mind the circumstances of each case.

13. While keeping in mind the evidence available on record and the above referred judgments we are of the view that the appellants succeeded to prove that both the collector as well as referee court failed to assess the compensation of the subject land according to its potential value and the documentary evidence available on record was totally ignored by the learned Referee Court while awarding the compensation of the acquired property payable to the landowners, which was not in any case less than Rs.10,000 per marla.

14. Now we advert towards the question of awarding compulsory acquisition charges and compound interest. The learned referee court has refused the same merely on the ground that the appellants did not claim the same. Compulsory acquisition charges are payable under section 23(2) of the Act of 1894, which reads as under:--

"In addition to the market-value of the land as above provided, the Court shall award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition, if the acquisition has been made for a public purpose and a sum of twenty five per centum on such market-value if the acquisition has been made for a company."

A perusal of the afore quoted provision has made it clear that it was obligatory upon the learned referee court to award compulsory acquisition charges keeping in view that for which purpose the land was being acquired and the same could not be refused merely on the ground that the same were not claimed by the appellants. There is no conflict between the parties that the land of the appellants had been acquired for the establishment of the Technical Training Centre, which is definitely a public purpose and, therefore, the appellants are also held entitled to 15% compulsory acquisition charges.

15. Similarly the controversy for awarding compound interest is covered by the provisions of Section 34 of the Land Acquisition Act, 1894 which provides that when the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with compound interest at the rate of eight per centum per annum from the time of so taking possession until it shall have been so paid or deposited. It is also clarified in the proviso that any waiver of the said right by the land owner shall be void, but he shall be entitled to the said interest notwithstanding any agreement to the contrary. For ready reference, the said provision is reproduced hereunder:--

"34. Payment of interest.---When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with compound interest at the rate of eight per centum] per annum from the time of so taking possession until it shall have been so paid or deposited.
Provided that any waiver of the above right by the land owner shall be void and he shall be entitled to the said interest notwithstanding any agreement to the contrary".
16. The admitted facts of the case are that the Notification under Section 4 was published on 14-12-1980 followed by publication of subsequent Notification under Section 17 on 2-11-1983 and the possession of the disputed property was taken over by the Land Acquisition authority prior to the said Notification on 16-5-1981, whereas, award was announced after elapse of about 17 years on 24-3-1998. As such the land owners are entitled to receive 8% compound interest from the date of taking over possession of the acquired property. The learned Referee Court has erred in law while refusing the same and the findings of the learned referee court on issues No.1 and 2 are reversed.
17. In the light of the facts and circumstances discussed above, R.F.A.No.397 of 2013 filed by the appellants is accepted, the impugned judgment and decree passed by the learned referee court is modified in the terms that compensation awarded by the learned referee court is enhanced from Rs.1500 per marla to Rs.10,000 per marla and the appellants are also held entitled to compulsory acquisition charges at the rate of 15% and compound interest at the rate of 8% per annum from the date of taking over possession of the acquired property.

SL/N-11/L Appeal allowed.

2015 C L D 679
[Lahore]
Before Ch. Muhammad Masood Jahangir and Ch. Muhammad Iqbal, JJ
Mst. SAFIA AKHTAR---Appellant
Versus
LIFE INSURANCE CORPORATION and 2 others---Respondents

Insurance Appeal No.1092 of 2013, decided on 22nd January, 2015.

Insurance Ordinance (XXXIX of 2000)---

----Ss. 118 & 122---Limitation Act (IX of 1908), Ss. 19, 149 & Art. 86(a)---Civil Procedure Code (V of 1908), O. VII, R. 11---Life insurance claim---computation of period of limitation---Effect of acknowledgment in writing in relation to life insurance claim---Application of claimant for insurance claim along with liquidated damages was rejected by Insurance Tribunal on the ground that the same was barred by time---Contention of claimant was, inter alia, that fresh period of limitation would be computed from the time acknowledgment in writing of liability was given by the Insurance Corporation before Federal Ombudsman---Held, the insured deceased died on 23-8-2007 and claim of claimant was repudiated on 13-8-2009 by the Insurance Corporation after which claimant filed complaint before Federal Ombudsman before whom vide letter dated 28-6-2012; an acknowledgement in writing of liability of right of claimant was issued by the Insurance Corporation; therefore fresh period of limitation was to be computed from 28-6-2012 when the said acknowledgement of liability was signed and S. 19 of the Limitation Act, 1908 was therefore applicable to the present case---Question of limitation was a mixed question of law and facts and same could not be adjudged without recording of evidence and the Insurance Tribunal failed to consider applicability of S. 19 of the Limitation Act, 1908 and application of the claimant could not be summarily rejected while applying Art. 86(a) of the Limitation Act, 1908---Article 86(a) of the Limitation Act, 1908 would be applicable if the claim of the claimant was payable, whereas in the present case claim of the claimant was reputiated, and such aspect of the case was ignored by the Insurance Tribunal while passing impugned order---High Court aside impugned order and remanded the case to the Insurance Tribunal for decision afresh---Appeal was allowed, accordingly.

Mst. Robina Bibi v. State Life Insurance Corporation of Pakistan 2013 CLD 477 rel.

Liaqat Ali Butt for Appellant.

Ibrar Ahmad for Respondents.

Date of hearing: 22nd January, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Akhtar Hussain the husband of the appellant was insured against a policy commencing from 1-11-2006 by the

respondents who took his last breathe on 23-8-2007 and claim forms were filed by the appellant before the respondent No.2 on 17-9-2008, but the same were repudiated by the respondent No.2 vide letter dated 13-8-2009. Then the appellant moved a complaint before the Federal Ombudsman on 28-4-2010 and respondent No.2 vide his letter dated 28-6-2012 required certain documents from the appellant, but the said complaint was also decided against the appellant on 12-4-2013. Thereafter the appellant filed an application under section 122 of the Insurance Ordinance, 2000 for recovery of Policy Proceeds under Policy No.507895184-0 along with liquidated damages under section 118 ibid before the Insurance Tribunal, Punjab Lahore/respondent No.3 on 14-9-2013 and the learned Insurance Tribunal vide impugned order dated 20-9-2013 after hearing preliminary arguments rejected the claim of the appellant while declaring the same being time barred. Hence the instant appeal.

2. The learned counsel for the appellant has argued that issue of limitation is a mixed question of law and fact and could not be decided without recording of evidence of the parties, but the learned Tribunal without adverting to the said aspect has erred in law and non-suited the appellant on the point of limitation while omitting to consider that the claim was initially entertained before the Insurance Company within the stipulated period, who repudiated the said claim in an arbitrary manner without affording opportunity of hearing to the appellant to prove her claim and the period consumed by the said company is liable to be excluded, but the said question having not been discussed in the verdict of Full Bench of this Court reported as Mst. Robina Bibi v. State Life Insurance Corporation of Pakistan (2013 CLD 477), the same is not applicable to the facts and circumstances of the present case and moreover the cases called in question therein were decided after full fledged trial whereas the appellant has been technically knocked out without affording him opportunity to prove her version by leading evidence. He has further contended that the concept of computation of limitation is merely a mode of calculating period of limitation by excluding time which is permitted to be excluded under Limitation Act and without affording any opportunity to explain bona fide delay on the part of the appellant due to his complaint filed before the Ombudsman the learned Tribunal erred in law while rejecting the claim. He has lastly prayed for acceptance of the instant appeal, setting aside of the impugned order and the matter may be remanded to the Tribunal for decision afresh on merits.

3. On the other hand, the learned counsel for the respondent No.2 has resisted this appeal while contending that under Article 86(a) of the Limitation Act 1908 only a period of three years was available to the appellant commencing from the death of the policy holder to file a claim before the Tribunal, but the instant claim was filed before the learned Tribunal beyond limitation, who while keeping in mind the verdict of Full Court of this Court rendered in Mst. Robina's case (supra) has rightly rejected the claim of the appellant. He has lastly prayed for dismissal of the instant appeal.

4. Arguments heard and record perused.

5. Admittedly the insurer died on 23-8-2007 and the claim of appellant was repudiated on 13.8.2009 by the respondent No.2. Feeling aggrieved the appellant filed a complaint before the Federal Ombudsman on 28-4-2010 before whom vide letter dated 28-6-2012 issued by respondent No.2 an acknowledgment of liability in respect of such right had been made in writing by requiring certain documents from the appellant. A fresh period of limitation was to be computed from the time when the acknowledgment was so signed. In this regard section 19 of the Limitation Act is fully applicable in the instant case. For ready reference the said provision is reproduced hereunder:--

"19. Effect of acknowledgment in writing.---(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provision of the Evidence, Act, 1872, oral evidence of its contents shall not be received.

Explanation L For the purposes of this section an acknowledgement may be sufficient through it, umits to spec; the exact nature of the property or right, or avers that the time for payment, delivery performance or enjoyment has not yet-come, or is accompanied by a refusal to pay, deliver, deform or permit to enjoy, or is coupled with a claim a to set-off or is addressed to a person other than the person entitled to the property or might.

Explanation IL For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.

Explanation III. For the purposes of this section an application for the execution of a decree or order is an application in respect of a right."

The appellant specifically pleaded for taking the benefit of aforesaid provision in para-9 of his application, which reads as under:--

"9. That this honourable Tribunal has the exclusive jurisdiction in terms of section 122(3) of the Insurance Ordinance to adjudicate upon the matter. Instant application is not barred by limitation in terms of section 19 of Limitation Act, 1908."

However, the learned Tribunal/respondent No.3 omitted to take into consideration the said aspect of the case. We are fully in agreement with the learned counsel for the appellant that the limitation is a mixed question of facts and law and the same cannot be adjudged without recording of evidence. The learned Tribunal failed to consider the applicability of section 19 of the Limitation Act, 1908 and the application filed by the appellant could not be summarily rejected while applying Article 86(a) of the Limitation Act, which provides a limitation of three years from

the date of death of the insurer. To our mind Article 86(a) ibid would be applicable, if his claim was payable, whereas in the present case the claim of the appellant was repudiated by the Insurance Company (respondent No.2), but this aspect has been totally ignored by the learned Tribunal while passing the impugned order. The case law cited by the learned counsel for the parties is not applicable to the facts and circumstances of the instant case as said verdict was given in the cases of final adjudication and applicability of sections 14 and 19 of the Limitation Act, 1908 was also not discussed.

7. Consequently the instant appeal is allowed, the impugned order is set aside and the application filed by the appellant will be deemed to be pending before the learned Tribunal, who will decide the same afresh in the terms noted above. The parties are directed to appear before the learned Tribunal on 9-2-2015.

KMZ/S-15/L Appeal allowed.

2015 C L D 1208
[Lahore]
Before Ch. Muhammad Masood Jahangir and Ch. Muhammad Iqbal, JJ
Mst. ABIDA ALTAF---Appellant
Versus
STATE LIFE INSURANCE CORPORATION and others---Respondents
Insurance Appeal No. 198 of 2014 heard on 22nd January, 2015.

Insurance Ordinance (XXXIX of 2000)---

----Ss. 122 & 118---Limitation Act (IX of 1908) Ss. 14 & 19 & Art. 86(a)---Civil Procedure Code (V of 1908), O.VII R. 11---Life insurance claim---Computation of limitation---Adjudication of question of limitation---Scope---Application of claimant for recovery of life insurance claim along with liquidated damages was rejected by Insurance Tribunal on the ground that the same was barred by time---Contention of claimant was that question of limitation was a mixed question of law and fact and could not be summarily rejected---Held, that the insured deceased died on 18-3-2010 and insurance claim was repudiated by the Insurance Corporation on 7-5-2012 thereafter application of claimant was filed before Insurance Tribunal on 12-1-2013---Question of limitation was a mixed question of law and facts and same could not be adjudged without recording of evidence and the Insurance Tribunal failed to consider applicability of Ss. 14 & 19 of the Limitation Act, 1908 and application of the claimant could not be summarily rejected while applying Art. 86(a) of the Limitation Act, 1908---Article 86(a) of the Limitation Act, 1908 would be applicable if the claim of the claimant was payable, whereas, in the present case, claim of the claimant was repudiated, and such aspect of the case was ignored by the Insurance Tribunal while passing impugned order--- High Court set aside impugned order and remanded the case to the Insurance Tribunal for decision afresh.

Mst. Robina Bibi v. State Life Insurance Corporation of Pakistan 2013 CLD 477 rel.

Liaqat Ali Butt for Appellant.

Ibrar Ahmad for Respondents.

Date of hearing: 22nd January, 2015

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Muhammad Altaf, the husband of the appellant was insured against two policies commencing from 6-10-2009 and 29-10-2009 by the respondents, who took his last breathe on 18-3-2010 and claim forms were filed by the appellant before respondent No.2, but the same were repudiated by the respondent No.2 vide letter dated 7-5-2012. Thereafter the appellant by filing an application under section 122 of the Insurance Ordinance, 2000 for the recovery of death claim amounting to Rs.1,08,30,000 along with liquidated damages under section 118 of Insurance Ordinance, 2000 before the Insurance Tribunal, Punjab Lahore-respondent No.3 on 12-10-2013, who vide impugned order dated 28-1-2014 after hearing preliminary arguments rejected the claim of the appellant while declaring the same being time barred. Hence the instant appeal.

2. The learned counsel for the appellant has argued that issue of limitation is a mixed question of law and fact and could not be decided without recording of evidence of the parties, but the learned Tribunal without adverting to the said aspect has erred in law and non-suited the appellant on the point of limitation while omitting to consider that the claim was initially entertained before the Insurance Company within the stipulated period, who repudiated the said claim in an arbitrary manner without affording opportunity of hearing to the appellant to prove her claim and the period consumed by the said company is liable to be excluded, but the said question having not been discussed in the verdict of Full Bench of this Court reported as Mst. Robina Bibi v. State Life Insurance Corporation of Pakistan (2013 CLC 477), the same is not applicable to the facts and circumstances of the present case and moreover the cases called in question therein were decided after full fledged trial whereas the appellant has been technically knocked out without affording him opportunity to prove her version by leading evidence. He has lastly prayed for acceptance of the instant, appeal and setting aside of the impugned order.

3. Conversely, the learned counsel for the respondent No.2 has argued that under Article 86A of the Limitation Act, 1908 only a period of three years was available to the appellant commencing from the death of the policy holder, but the instant claim was filed before the learned Tribunal beyond limitation, who while keeping in mind the verdict of Full Court of this Court rendered in Mst. Robina's case (supra) has rightly rejected the claim of the appellant. He has lastly prayed for dismissal of the instant appeal.

4. Arguments heard and-record perused.

5. Admittedly the insurer died on 18-3-2010 whereas the insurance claim of appellant was repudiated on 7-5-2012 by the respondent No. 2 and thereafter the appellant filed the application for the recovery of death claim before the learned Tribunal on 12-10-2013. We are fully in agreement with the learned counsel for the appellant that the limitation is a mixed question of facts and law and the same cannot be adjudged without recording of evidence. Moreover, the learned Tribunal failed to consider the applicability of sections 14 and 19 of the Limitation Act, 1908 and the application filed by the appellant could not be summarily rejected while applying Article 86(a) of the Limitation Act, which provides a limitation of three years from the date of death of the insurer. To our mind Article 86(a) ibid would be applicable, if his claim was payable, whereas in the present case the claim of the appellant was repudiated by the Insurance Company (respondent No.2), but this aspect has been totally ignored by the learned Tribunal while passing the impugned order. The case-law cited by the learned counsel for the parties is not applicable to the facts and circumstances of the instant case as said verdict was given in the cases of final adjudication and applicability of sections 14 and 19 of the Limitation Act, 1908 was also not discussed.

6. Consequently the instant appeal is allowed, the impugned order is set aside and the application filed by the appellant will be deemed to be pending before the

learned Tribunal, who will decide the same afresh in the terms noted above. The parties are directed to appear before the learned Tribunal on 9-2-2015.

KMZ/A-11/L

Case remanded.

2015 C L D 1184
[Lahore]
Before Ch. Muhammad Masood Jahangir and Ch. Muhammad Iqbal, JJ
Mst. SHAFIA BIBI---Appellant
Versus
STATE LIFE INSURANCE CORPORATION and others---Respondents

Insurance Appeal No. 413 of 2014 heard on 22nd January, 2015.

Insurance Ordinance (XXXIX of 2000)---
----Ss. 118 & 122---Limitation Act (IX of 1908) Ss. 19, 149 & Art. 86(a)---Civil Procedure Code (V of 1908), O. VII, R. 11---Life insurance claim---Computation of period of limitation---Effect of acknowledgement in writing in relation to life insurance claim---Application of claimant for liquidated damages was rejected by Insurance Tribunal on the ground that the same was barred by time---Contention of claimant was, inter alia, that fresh period of limitation would be computed from the time the main life insurance claim was paid in compliance of the direction of the Federal Ombudsman, therefore application of claimant for liquidated damages was filed within time---Held, that the insurance policy commenced on 31-8-2007 whereas the insured died on 27-12-2007 and claim of claimant was repudiated on 25-11-2008 by the Insurance Corporation after which claimant filed complaint before Federal Ombudsman which was concluded on 6-2-2010 and in compliance thereof, the main life insurance claim amount was paid to the claimant on 25-5-2012 and therefore fresh period of limitation was to be computed from 25-5-2012 when claim was paid without liquidated damages; as the same amounted to acknowledgement of liability and S. 19 of the Limitation Act, 1908 was therefore applicable to the present case---Even otherwise question of limitation was a mixed question of law and facts and same could not be adjudged without recording of evidence and the Insurance Tribunal failed to consider applicability of Ss. 14 & 19 of the Limitation Act, 1908 and application of the claimant could not be summarily rejected while applying Art. 86(a) of the Limitation Act, 1908---Article 86(a) of the Limitation Act, 1908 would be applicable if the claim of the claimant was payable, whereas, in the present case claim of the claimant was repudiated, and such aspect of the case was ignored by the Insurance Tribunal while passing impugned order---High Court set aside impugned order and remanded the case to the Insurance Tribunal for decision afresh---Appeal was allowed, accordingly.

Mst. Robina Bibi v. State Life Insurance Corporation of Pakistan 2013 CLD 477 rel.
Liaqat Ali Butt for Appellant.
Ibrar Ahmad for Respondents.
Date of hearing: 22nd January, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Muhammad Shafi the husband of the appellant was insured against a policy No. 604004994-9 commencing from 31-8-2007 by the respondents, who took his last breathe on 27-12-2007 and the claim was paid on 25-5-2012, but the liquidated damages were not paid. Then the appellant filed an application for recovery of liquidated damages regarding the said policy amounting to Rs.3,00,000 under section 118 of the Insurance Ordinance, 2000 on 18-9-2012 till realization against respondents Nos.1 and 2. The said application was resisted by respondents Nos.1 and 2, issues were framed and the parties were invited to lead their evidence. In the meanwhile, the respondents Nos.1 and 2 filed an application under Order VII, rule 11, C.P.C. for rejection of the main application filed by the appellant. The learned Tribunal/respondent No.3 vide order dated 17-3-2014 has allowed the said application and rejected the main insurance application being hopelessly time barred.

2. The learned counsel for the appellant has argued that issue of limitation is a mixed question of law and fact and could not be decided without recording of evidence of the parties, but the learned Tribunal without adverting to the said aspect has erred in law and non-suited the appellant on the point of limitation while omitting to consider that the cause of action accrued to the appellant on 25-5-2012 when the original claim was paid without liquidated damages, which was the implied term of the contract in lieu of section 118 of the Insurance Ordinance, 2000. It is further contended that in the present case section 19 of the Limitation Act, 1908 is applicable as fresh period of limitation was to be commuted from the date of acknowledgment i.e. 23-2-2009, which expired on 22-2-2012, but thereafter claim amounting to Rs.3,15,000 was paid without liquidated damages on 25-5-2012, which amounted to acknowledgment of liability with the result that fresh period of limitation started from the said date, therefore, the application filed by the appellant was still within time, but the appellant has been technically knocked out by the learned trial court while omitting to take into consideration the said aspect of the case, which has rendered the impugned order wholly illegal and without jurisdiction. Also contends that verdict of Full Bench of this Court reported as Mst. Robina Bibi v. State Life Insurance Corporation of Pakistan (2013 CLD 477), relied upon by the learned Tribunal in the impugned order is not applicable to the facts and circumstances of the present case as the cases called in question therein were decided after full fledged trial whereas the appellant has been technically knocked out without affording her opportunity to prove her version by leading evidence. He has next contended that the concept of computation of limitation is merely a mode of calculating period of limitation by excluding time which is permitted to be excluded under Limitation Act and without affording any opportunity to explain bona fide delay on the part of the appellant the learned Tribunal erred in law while rejecting the claim. He has lastly prayed that while allowing this appeal, the impugned order be set aside and the matter be remanded to the learned Tribunal for decision on merits.

3. On the other hand, the learned counsel for the respondent No.2 has resisted this appeal and supported the impugned order.
4. Arguments heard and record perused.
5. There is no denial that the Insurance Policy commenced on 31-8-2007 whereas the insurer died on 27-12-2007 and the claim of appellant was repudiated on 25-11-2008 by the respondent No.2. Feeling aggrieved the appellant filed a complaint before the Federal Ombudsman on 3-2-2009 and the said proceedings were concluded on 6-2-2010 in compliance whereof the claim amounting to Rs.3,15,000 was paid to the appellant by respondents Nos.1 and 2 on 25-5-2012. We are in agreement with the learned counsel for the appellant that fresh period of limitation was to be computed from 25-5-2012 when claim amounting to Rs.3,15,000 was paid without liquidated damages on 25-5-2012 as the same amounted to acknowledgment of liability and section 19 of the Limitation Act, 1908 was applicable. For ready reference the said provision is reproduced hereunder:--

"19. Effect of acknowledgment in writing.---(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provision of the Evidence, Act, 1872, oral evidence of its contents shall not be received.

Explanation I. For the purposes of this section an acknowledgement may be sufficient through it, umits to spec; the exact nature of the property or right, or avers that the time for payment, delivery performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, deform or permit to enjoy, or is coupled with a claim to a set-off or is addressed to a person other than the person entitled to the property or right.

Explanation II. For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.
Explanation III. For the purposes of this section an application for the execution of a decree or order is an application in respect of a right."
However, the learned Tribunal/respondent No.3 omitted to take into consideration the said aspect of the case. Even otherwise, the limitation is a mixed question of facts and law and the same cannot be adjudged without recording of evidence. The learned Tribunal failed to consider the applicability of section 19 of the Limitation Act, 1908 and the application filed by the appellant could not be summarily rejected while applying Article 86(a) of the Limitation Act, which provides a limitation of three years from the date of death of the insurer. To our mind Article 86(a) ibid

would be applicable, if his claim was payable, whereas in the present: case the claim of the appellant was repudiated by the insurance Company (respondent No.2), but this aspect has been totally ignored by the learned Tribunal while passing the impugned order. The case-law relied upon by the Tribunal while passing the impugned order is not applicable to the facts and circumstances of the instant case as said verdict was given in the cases of final adjudication and applicability of sections 14 and 19 of the Limitation Act, 1908 was also not discussed.

6. Consequently the instant appeal is allowed, the impugned order is set aside and the application filed by the appellant will be deemed to be pending before the learned Tribunal, who will decide the same afresh in the terms noted above. The parties are directed to appear before the learned Tribunal on 9-2-2015.

KMZ/S-14/L Case remanded.

2016 C L C 1197
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
RAFHAN BEST FOODS LIMITED through Legal Manager----Petitioner
Versus
Messrs RASHID AND BROTHERS through Proprietor and 2 others----Respondents

C.R. No.2915 of 2011, heard on 23rd April, 2014.

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

----S. 20, O.XXXVII, R.2, O.VII, R.10 & O.XIV, R.2---Contract Act (IX of 1872), S.28---Recovery suit---Territorial jurisdiction---Agreement in restraint of legal proceedings---Defendant raised objection to the jurisdiction of the court and sought decision on the issue of jurisdiction before decision on merits---Validity---Issue of jurisdiction of court being a question of law could be raised by any party at any stage of the trial, even court itself was required to examine whether it had jurisdiction to seize with the matter or not---Merely because a party to the proceedings had not taken objection relating to jurisdiction, such a party would not be barred from taking such objection at any stage of proceedings---Parties could not confer jurisdiction on a court where the court was not vested with jurisdiction---Proceedings without jurisdiction were coram non judice---Question of (absence of) jurisdiction vitiated the entire proceedings---Section 20, C.P.C. provided that every suit would be filed in a civil court within whose local limits or jurisdiction the defendant resided or carried on business or where the cause of action wholly or in part occurred---Under S.28 of the Contract Act, 1872 every agreement by which any party thereto was restricted absolutely from enforcing his rights under or in respect of any contract by legal proceedings in the ordinary tribunals or which limited the time within which any party may thus enforce his rights was void to that extent---Civil courts exercised jurisdiction under Civil Procedure Code, 1908, where such courts did not have jurisdiction under the Civil Procedure Code, 1908, jurisdiction would not be conferred on civil courts by mutual agreement of parties to a dispute---Where two or more courts had jurisdiction to try a suit under Civil Procedure Code, 1908, parties could select a particular court having territorial and pecuniary jurisdiction for the determination of their dispute---Trial Court had to determine first whether it had jurisdiction or not---Revision was allowed with direction to Trial Court to treat the issue of jurisdiction as preliminary and decide the same prior to decision of other issues.

2006 CLC 210 and 2011 SCMR 806 ref.

State Life Insurance Corporation of Pakistan v. Rana Muhammad Saleem 1987 SCMR 393 and Messrs Kadir Motors (Regd.), Rawalpindi v. Messrs National Motors Ltd., Karachi 1992 SCMR 1174 rel.

(b) Contract Act (IX of 1872)---

----S. 28---Agreement in restraint of legal proceedings---Validity/ effect---Under S.28, Contract Act, 1872 every agreement by which any party thereto was restricted absolutely from enforcing his rights under or in respect of any contract by legal proceedings in the ordinary tribunals or which limited the time within which any party may enforce his rights was void to that extent.

Syed Ijaz Ali Akbar Sabzwari for Petitioner.
Sh. Naveed Shehryar for Respondents.
Date of hearing: 23rd April, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Brief facts of the case are that the petitioner is engaged in a business of manufacturing of different articles. The respondents vide distribution agreements dated 15.2.1999 and 30.10.2002 became distributors of the petitioner. The respondents filed a suit for recovery of Rs.1,62,98,232.00 in the Civil Court at Faisalabad which was contested by the petitioner by filing written statement and raised a preliminary objection with regard to lack of territorial jurisdiction of the Civil Court at Faisalabad. In this regard, the petitioner filed an application under Order VII, rule 10, C.P.C. for the return of the plaint, which was, however, dismissed by the learned trial court vide order dated 07.2.2007. The petitioner assailed the said order by filing a Writ Petition No.19467/2010 which was dismissed as withdrawn vide order dated 15.9.2010 upon the request of the learned counsel for the petitioner to approach the learned trial court with a request for framing of an issue regarding territorial jurisdiction and treating the same as a preliminary issue. Thereafter, the petitioner moved an application under Order XIV, rule 2 of C.P.C. to the effect that issue No.3 being an issue of law should be treated a preliminary issue and decided before going into the merits of the case. The learned trial court dismissed the said application vide order dated 25.6.2011 which has been assailed by the petitioner through the instant civil revision.

2. The learned counsel for the petitioner has argued that the parties through distribution agreements dated 15.2.1999 and 30.10.2002 had chosen a competent legal forum at a particular place and, therefore, the respondents/plaintiffs could not be allowed to resile therefrom; that the alleged dispute between the parties has arisen out of the agreements referred to above; that the learned trial court has erred in law while coming to the conclusion that under Section 28 of the Contract Act the parties were debarred either to confer or oust jurisdiction upon the court; that earlier order dated 7.2.2007 was not a hurdle before the learned trial court to decide the application of the petitioner under Order XIV, rule 2, C.P.C. and that the learned trial court has dismissed the application of the petitioner on erroneous premises of law.

3. Conversely, the learned counsel for the respondents has refuted the arguments advanced by the learned counsel for the petitioner and has argued that the order dated 7.2.2007 passed by the learned trial court which is still intact, is a barrier before the petitioner and petitioner cannot be allowed to re-agitate the same matter rather the said order has already attained finality; that even otherwise by the consent of the parties jurisdiction of court cannot be created. Learned counsel for the respondents/plaintiffs while relying upon 2006 CLD 210 and 2011 SCMR 806 has prayed for dismissal of the instant civil revision.

4. Arguments heard and record perused.

5. The issue of jurisdiction of the court being a question of law can be raised by any party at any stage of the trial and even the court itself while proceeding with the case is required to examine that whether it has jurisdiction in law to seize with the matter or not, but merely because a party to the proceedings has not taken an objection relating to the jurisdiction, shall not debar a party from taking such an objection at any stage of proceedings and even otherwise they cannot confer a jurisdiction on a court which is not vested in it in law. The question of jurisdiction goes to the very root of the case which renders the entire proceedings coram non judice and thereby vitiated the same.

6. It is an admitted fact that the respondents/plaintiffs started business with the petitioner/defendant on the basis of distribution agreements, the existence of which is not denied. Clause 46 of the said agreement reads as under:-

> "46. This agreement shall be governed by the laws of Pakistan and an action shall be instituted in the courts at Lahore."

A perusal of the said Clause reveals that for the resolution of the disputes arising out of the agreement inter se the parties the court at Lahore will be the competent court

whereas the respondents/plaintiffs instituted the said suit against the petitioner for recovery of disputed amount at Faisalabad.

7. The only question for resolution in the instant case is that as to which court out of the Civil Courts set up at Lahore or Faisalabad would have jurisdiction to adjudicate upon the lis between the parties. The legislature has inducted specific provisions under section 20 of the Civil Procedure Code, which deal with the jurisdiction of the Court and for ready reference the same is reproduced as under:

> **"20. Other suits to be instituted where defendants reside or cause of action arises.--** Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction:-
>
> (a) the defendant, or each of the defendants where there are more than one at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business; or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (c) the cause of section, wholly or in part, arises."

8. However, to avoid the aforesaid clause of the agreement the learned counsel for the respondents/plaintiffs has referred to section 28 of the Contract Act, 1872, which provides that every agreement in restraint of legal proceedings is void. For ready reference the said provision is reproduced as under:--

> 28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> Exception 1.-- This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in

respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.-- Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

9. The perusal of the provisions of section 20, C.P.C. provides that every suit will be filed in a civil Court within whose local limits or jurisdiction the defendant resides or carries on business or where the cause of action wholly or in part occurred whereas section 28 of the Contract Act lays down that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights, is void to that extent. From a bare perusal of the aforesaid provisions there does not appear any complete elimination of jurisdiction under section 20 of the Code of Civil Procedure and there is also no violation of the provisions of section 28 of the Contract Act. The civil Courts exercise their jurisdiction under the Code of Civil Procedure and if they do not possess such jurisdiction under the Code, it cannot he conferred on them through a mutual agreement of the parties to a dispute. However, in a situation where two or more Courts have jurisdiction to try a suit under the Code of Civil Procedure, the parties can select a particular Court having territorial and pecuniary jurisdiction for the determination of their dispute and there does not appear anything wrong or illegal in it or opposed to public policy. In arriving at this view I am fortified by the judgment reported as State Life Insurance Corporation of Pakistan v. Rana Muhammad Saleem (1987 SCMR 393), which has further been affirmed by the august Supreme Court of Pakistan in Messrs Kadir Motors (Regd.), Rawalpindi v. Messrs National Motors Ltd., Karachi (1992 SCMR 1174). The case law referred to by the learned counsel for the petitioner runs on different footing and is not applicable in the instant case. The learned trial court while dealing with a matter has to determine first that whether jurisdiction vests on it or not. The impugned order has been passed without lawful authority and in derogation of the verdict rendered in above said judgments. The learned counsel for the petitioner has made out a case with full strength that the impugned order passed by the learned trial court is without jurisdiction, which cannot be sustained in the eye of law. By allowing this Civil Revision, the said order is set aside with direction to learned trial court to treat

issue No.3 as preliminary issue and decide the same prior to the decision of other issues.

ARK/R-11/L

Revision allowed.

2016 C L C 322
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
GHULAM QADIR and 2 others----Petitioners
Versus
SHABBIR HUSSAIN CHEEMA----Respondent

C.R. No.2544 of 2009, decided on 29th October, 2015.

(a) Civil Procedure Code (V of 1908)---
----O. VII, R. 2, O. VI, R. 4 & O. XVIII---Qanun-e-Shahadat (10 of 1984), Arts.70, 72 & 130---Suit for recovery---Pleadings--Necessary particulars and details not set in plaint---Examination of witnesses---Burden of proof---Proof of facts by oral evidence---Order of production and examination of witnesses---Plaintiff filed suit for recovery claiming that defendant had damaged his crops, which was dismissed by Trial Court; whereas, appellate court decreed the same---Validity---Plaintiff had neither mentioned time nor names of persons who witnessed the occurrence, to prove as to when and before whom the defendants had damaged his crop---Registration number of tractor, whereby the crops were alleged to have been damaged by ploughing, was also not mentioned in the plaint---Plaintiff himself and his son alone had appeared as witnesses, and no independent witness had been produced by plaintiff to substantiate his version---Contradiction on major points were apparent in statements of plaintiff witnesses, and the same were lacking necessary details---Onus probandi was on plaintiff to prove his case positively, but he had failed to discharge the same by not producing convincing and independent evidence---Plaintiff could not benefit from weaknesses of the case of defendant---Question of disproof or rebuttal would come only when plaintiff had established his case through positive evidence; and, when plaintiff had failed to prove his case, then defendant was not obliged to lead any evidence---Appellate court, discarding the reason recorded by Trial Court, had passed impugned judgment and decree on erroneous premises---High Court, setting aside judgment and decree of appellate court, restored that of trial court---Revision petition was accepted in circumstances.

(b) Civil Procedure Code (V of 1908)---
----O. XVIII---Qanun-e-Shahadat (10 of 1984), Arts.130 & 72---Examination of witnesses---Order of production and examination of witnesses---Burden of proof---Question of disproof or rebuttal would come only when plaintiff has established his case through positive evidence; and, when plaintiff has failed to prove his case, then defendant is not obliged to lead any evidence---Plaintiff cannot be benefitted from the weaknesses of the case of defendant.

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

----Art. 70----Oral evidence---Proof of facts by oral evidence---Admissibility---Statement of witness matters only when he deposes correctly, truly and categorically; but the same is to be ignored from consideration, if he shows ignorance about material facts or withholds truth and makes shaky, mysterious, vague or contradictory statement.

(d) Evidence---

----Court, while deciding a case, had to consider quality of evidence.

Shaigan Ijaz Chadhar for Petitioners.

Ch. Muhammad Anwar Bhindar for Respondent.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The concise facts of the case are that the respondent/plaintiff instituted a suit for recovery of Rs.25000/- as compensation for the damage allegedly caused to his crop. The said suit was contested by the petitioners/defendants with the assertion that they had never made any loss to the crop of the respondent/plaintiff. The learned trial court put the parties into the trial while framing the issues, collected the stock of evidence adduced by the parties and after appreciating the material available on record dismissed the suit vide judgment and decree dated 14.5.2008. Feeling dissatisfied, the respondent/plaintiff preferred appeal before the learned lower appellate court, who accepted the same vide impugned judgment and decree dated 23.10.2009 and decreed the suit while setting aside the judgment and decree passed by the learned trial court, hence this civil revision.

2. Arguments heard. Record perused.

3. The possession of the respondent over the suit property as well as its cultivation by him was admitted on the record and basic grouse to be resolved is whether the crop of the respondent/plaintiff was damaged by the petitioners/defendants or not. It is significant to note that in the plaint neither the specific time nor the names of persons, who witnessed the said occurrence is mentioned to prove that when and before whom the defendants damaged the crop of the plaintiff/respondent. Even the registration number of the tractor whereby the crop was damaged through ploughing has also not been disclosed in the contents of the plaint. To prove the said stance, the respondent/plaintiff himself appeared as

PW1 and produced his real son as PW2. None other independent witness was brought into the witness box by the respondent/plaintiff to prove his stance. The contradictions on major points in the statements of both the PWs are flouting on the surface of record. In cross-examination, plaintiff (PW-1) deposed that when his crop was damaged, he alongwith his two sons and one un-known servant was present there and the petitioners/defendants took two to three hours to damage the crop. He further deposed that no one informed them that the defendants/petitioners were damaging their crop and they themselves went there on their car, but details regarding their servant as well as car could not be disclosed by him. The statement-in-chief of PW-1 is also silent to the extent that occurrence of aerial firing was also committed by the defendants. On the other hand, Ghazanfar son of the respondent while appearing as PW-2 deposed that when the crop was being damaged, some other persons of their party were also present there, who had informed them regarding the occurrence; that the firing was also made by the persons details whereof could not be disclosed by him; and that Munawar had also witnessed the occurrence, but neither said Munawar nor any other employee, who allegedly witnessed the occurrence was produced. The details of the said persons also could not be disclosed and even no other independent witness was brought into the witness box to substantiate the version of the respondent. It is the quality of the evidence, which is to be considered by a court while deciding a lis. Evidence/statement of a witness only matters when he deposes correctly, truly and categorically, but his statement is to be ignored from the consideration, if he shows ignorance about the material facts or withholds the truth and makes a shaky, mysterious, vague or contradictory statement. The onus probandi was on the shoulders of the plaintiff/respondent to prove his case positively, but he failed to discharge the same by producing convincing and independent evidence. He cannot be benefitted by the weaknesses of the case of petitioner/defendant, if any. The question of disproof or rebuttal will come only when the plaintiff has, by positive evidence, established his case, but when the plaintiff failed to prove his case, then the defendant is not obliged to lead any evidence. The learned lower appellate court without discussing the evidence of PW-1 and PW-2 has discarded the eminent reasons recorded by the learned trial court through judgment and decree dated 14.5.2008 and passed the impugned judgment and decree on erroneous premises, which cannot be sustained in the eye of law.

4. Sequel of the above discussion is that the instant civil revision is accepted, the impugned judgment and decree dared 23.10.2009 passed by the learned lower appellate court is hereby set aside and consequently the judgment and decree dated

14.5.2008 rendered by the learned trial court whereby the suit filed by the respondent/plaintiff was dismissed, is restored.

SL/G-46/L

Revision accepted.

2016 C L C 1236
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD RAMZAN----Petitioner
Versus
MUHAMMAD TARIQ----Respondent

Civil Revision No.1161 of 2009, heard on 18th December, 2015.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Talb-i-Ishhad, performance of---Procedure---Affirmative onus to prove Talb-i-Ishhad was on the pre-emptor---Pre-emptor had to prove the sending of notice of Talb-i-Ishhad by affirmative evidence which required examination of booking postal clerk as well as postman in witness box---Non-production of said officials in the witness box was fatal for the success of pre-emption suit---Pre-emptor, in circumstances, had failed to prove performance of Talb-i-Ishhad---Findings recorded by the Appellate Court were not sustainable which were reversed---Impugned judgment and decree passed by the Appellate Court were set aside and those of Trial Court were restored---Revision was allowed in circumstances.

Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105 and Allah Ditta v. Muhammad Anar 2013 SCMR 866 ref.
Khan Afsar v. Afsar Khan and others 2015 SCMR 311 rel.
Ejaz Feroze for Petitioner.
Shaigan Ijaz Chadhar for Respondent.
Date of hearing; 18th December, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The facts germane for the disposal of the instant civil revision are that suit property fully mentioned in para 1 of the plaint was purchased by the petitioner (hereinafter to be referred as vendee) by means of attestation of mutation No.551 dated 6.1.2003. The said sale was pre-empted by the respondent (hereinafter to be referred as pre-emptor) while claiming to have preferential right of pre-emption over the sale of disputed property and that he performed the requisite demands as per law. The suit was contested by the vendee with the specific defence that the pre-emptor had no such preferential right and no notice of Talb-e-Ishhad was dispatched to him. While facing with the contest of the vendee, the learned trial court put the parties into trial after settling the issues and both the parties produced their evidence in pros and cons. The preferential right being co-sharer of the pre-emptor stood proved on file and the findings on issue No.1 even today have not been agitated by the learned counsel for the vendee.

However, the learned trial court after answering issue No.2 regarding performance of Talbs in the negative dismissed the suit filed by the pre-emptor vide judgment and decree dated 22.1.2007. Being aggrieved, an appeal was preferred by the pre-emptor before the learned lower appellate court, who vide impugned judgment and decree dated 6.5.2009 reversed the findings of the learned trial court on issue No.2 and while deciding the same in affirmative in favour of the pre-emptor, decreed the suit. Feeling dissatisfied, the instant civil revision has been filed by the pre-emptor.

2. The learned counsel for vendee submitted that the vendee categorically denied that either any notice of Talb-e-Ishhad was dispatched by the pre-emptor through registered post A.D. or it was served upon him and as per dicta laid down in the judgments reported as "Muhammad Bashir and others v. Abbas Ali Shah" (2007 SCMR 1105), "Allah Ditta v. Muhammad Anar" (2013 SCMR 866) and "Khan Afsar v. Afsar Khan and others" (2015 SCMR 311), the pre-emptor having failed to prove the fulfillment of second demand as per law, the suit is liable to be dismissed while acceptance of the instance civil revision and setting aside of the impugned judgment and decree passed by the learned lower appellate court.

3. In response, the learned counsel for the pre-emptor submitted that notice of Talb-e-Ishhad was dispatched to the vendee, which was served upon him by the concerned Postman and in this regard he has referred to the Postal Booking Receipt (Ex:P2) and Acknowledgment Due Receipt (Ex:P3), which is sufficient proof that the pre-emptor succeeded to prove performance of requisite Talb-e-Ishhad as per law. He has lastly prayed for the dismissal of the instant civil revision.

4. Arguments heard. Record perused.

5. The perusal of paras 7 and 8 of the plaint reveal, that the pre-emptor categorically pleaded that notice Talb-e-Ishhad was dispatched to the vendee on 16.1.2003 and that was received by him, whereas, the vendee in relevant paras of the written statement categorically denied the said fact. This was also reiterated by the vendee in the witness box while appearing as DW2. There is no cavil with the proposition that affirmative onus to prove Talb-e-Ishhad was on the pre-emptor and as the vendee specifically denied this factum in his written statement as well as in his deposition being DW2, it was obligatory on the pre-emptor to have proved the sending of notice Talb-e-Ishhad by giving affirmative evidence, which undoubtedly required examination of Booking Postal clerk as well as Postman in the witness box. The production of said officials from the Post Office to prove the performance of requisite second demand was essential for pre-emptor and non-production thereof in evidence has already been declared fatal for the success of pre-emption suit by the superior courts in the above referred judgments referred to by the learned counsel for the pre-emptor. For ready reference the relevant portion of Khan Afsar's case (supra) is reproduced hereunder:-

"The fact that the notice was merely sent would not suffice for the making of Talb-i-Ishhad. The vendee must be apprised about the intention of the pre-emptor. The acknowledgment due slip that was presented (Exhibit P.W.6/2) was also signed by the said Rashid Khan, and not by Muhammad Aslam Khan. Therefore, it cannot be stated that the requisite Talb-i-Ishhad had been made. The notice should have been served upon the vendee/addressee, Muhammad Aslam Khan. Pre-emption is attended to by its own law and also provides for the manner of sending notice. The general law as contained in section 26 (supra) of the Provincial General Clauses Act, 1956 would not be applicable. Section 13(3) of the N.-W.F.P. Pre-emption Act, 1987 stipulates, "under registered cover acknowledgment due" (emphasis added) whereas the words "acknowledgment due" are not mentioned in section 26 of the General Clauses Act, 1956 applicable to the Province of Khyber Pakhtunkhwa. In the case of Muhammad Bashir (supra) it was held, that:--

"11. The requirement of, "sending a notice in writing" is followed by a rider i.e. "under registered cover acknowledgement due". This signifies that the intention of law is not merely a formal notice on the part of the pre-emptor conveying his intention to pre-empt but a notice served on the addressee to apprise him about his intention to pre-empt. To say that mere "sending of notice" is enough would make the expression "acknowledgment due" redundant'. The service of the addressee as prescribed in law therefore is imperative. If the acknowledgement card carried an endorsement of "refusal" or "not accepted", a presumption of service would arise unless it is rebutted. The expression "sending notice" came up for consideration in Thammiah b. v. Election Officer [1980] 1 Kant L.J. 19 and the Court held that it means, "that it should reach the hands of the person to whom it has been given and the giving is complete when it has been offered to a person but not accepted by it."

6. The said lapse on the part of the pre-emptor was fatal, who miserably failed to prove the performance of requisite second demand as per law laid down by the apex court and the learned lower appellate court erred in law while answering the issue No. 2 in affirmative in favour of the Pre-emptor which being not sustainable and the said findings are reversed. Since the pre-emptor failed to cross the barrier of performance of requisite talbs as per law in absence whereof a suit for possession through pre-emption cannot succeed, I do not want to dilate upon other issues, which will be sheer wastage of time.

7. Sequel of the above discussion is that the instant civil revision is accepted, the impugned judgment and decree dated 06.05.2009 passed by the learned lower appellate court is hereby set aside and the judgment and decree dated 22.01.2007

delivered by the learned trial court, by virtue of which, the suit for possession through pre-emption filed by the pre-emptor was dismissed, is restored..
ZC/M-90/L
Revision allowed.

2016 C L C 1258
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD YOUSAF----Petitioner
Versus
MEHMOOD and 2 others----Respondents

C.R. No.268-D of 2008, heard on 9th September, 2015.

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

----Ss. 8 & 12----Qanun-e-Shahadat (10 of 1984), Arts. 72 & 74---Suit for possession and specific performance of oral agreement---Proof of contents of document---Secondary evidence---Oral agreement---Principles as to validity and proof---Plaintiff filed suit seeking possession of suit property claiming that defendants had been in possession as his licensee---Defendants later filed suit for specific performance on ground that plaintiff had agreed to exchange suit land with their land under oral agreement---Trial court, through consolidated judgment, decreed suit of defendants, and dismissed that of plaintiff---Appellate court maintained decision of trial court---Validity---Ownership of plaintiff regarding suit property had been admitted by defendants by producing Register Haqdaran Zameen---Defendants, in their written statement, had not mentioned that against how much property alleged transaction of "exchange" had been made---Defendants did not plead date, month, venue and names of witnesses to explain as to when, where and before whom "oral exchange contract" had been settled between plaintiff and defendants; instead, only year of oral agreement had been mentioned---Defendants, in their suit for specific performance, for the first time, had pleaded that oral agreement had been settled by plaintiff against different land owned by all defendants---Defendants, in their suit, again failed to plead venue and names of witnesses to explain as to where and before whom alleged transaction had been settled---Glaring major contradictions in statements of defendants' witnesses had badly damaged their case---Defendants' witness had made statement in complete departure of stance as pleaded in their written statement---Defendant's witness had mis-stated area of land which she had alleged to have exchanged with plaintiff against suit property---Defendants had based their claim on oral contract without narrating basic ingredients---None of defendants' witnesses had mentioned exact date regarding settlement of oral contract, terms and conditions of same or exact specification of property owned by defendants, which was alleged to have been exchanged with plaintiff---Written statement and later suit filed by defendants and evidence produced in proof thereof had made their posture highly doubtful---Oral agreement was valid just like written contract provided same fulfilled conditions of valid agreement and also provided through convincing and strong evidence---Impugned judgments and decree were tainted with mis-reading and non-reading of evidence having been passed in complete derogation of settled law, and same,

therefore were illegal, unlawful, ultra vires and without jurisdiction---High Court, setting aside impugned judgments and decrees, dismissed suit of defendants and decreed that of plaintiff---Revision petition was allowed in circumstances.

Nazir Ahmad and another v. Yousaf PLD 2011 SC 161; Muhammad Nawaz through L.Rs v. Haji Muhammad Baran Khan through L.Rs and other 2013 SCMR 1300; Farzand Ali and others v. Khuda Bukhsh and others PLD 2015 SC 187; Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

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

----O. XLI, R. 31----Judgment in appeal---Principles---Observance of parameters set down in O. XLI, R. 31, C.P.C. was mandatory---Where Appellate Court overlooked, ignored or failed to consider evidence on record or judgment of appellate court lacked application of mind, it would amount to failure to comply provisions of O. XLI, R. 31, C.P.C.---Recitals of judgment passed by Lower Appellate Court must have shown that it has made sincere endeavour to make proper appraisement of merits of case put forward by parties, which was lacking in judgment of lower appellate court---Appellate Court was bound and obliged to render its independent findings on each point of determination---Appellate Court, in the present case, had ignored said mandate of law, thus impugned judgment was found not qualified to be called "judgment" in eye of aw---Impugned judgment could be termed as cursory judgment for mainly depending upon surmises, although sufficient material in shape of evidence was available before appellate court.

(c) Pleadings---

----Plaint---Proof---When basic ingredients are missing in plaint, then no evidence can be led on such points---Nobody can be allowed to lead evidence in departure of his pleadings.

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

----S. 115----Revision---Scope---Although scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by High Court under S.115, C.P.C. if courts below appeared to have either misread evidence on record or while assessing evidence have omitted from consideration some important piece of evidence, which has direct bearing on issue involved.

Khizar Hayat Khan Punian and Muhammad Masood Bilal for Petitioner.
Mian Fazal Hussain Bhatti for Respondents.
Date of hearing: 9th September, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The facts germane for the disposal of instant civil revision are that Muhammad Yousaf present petitioner (hereinafter to be referred as 'plaintiff') filed a suit for possession before the learned trial court on 31.05.2002 regarding the property measuring 3-Kanal 11-Marla bearing Khawat No.43 Khasra No.64/23/1 (hereinafter to be referred as 'suit property') against Ameer and Mehmood, respondents Nos.1 and 2 only with the assertion that same is owned by him and respondents Nos.1 and 2 being licensees were put into possession and prayed for decree of possession. The said suit was resisted by the said respondents by filing their written statement on 17.02.2003 with the sole ground that suit property had already been exchanged by the plaintiff against the land bearing Khawat No.35 owned by Ayesha (respondent No.3) wife of Mehmood respondent No.1 through an oral agreement settled between the parties in the year 1996. Thereafter Mehmood, Ameer and Ayesha respondents (hereinafter to be referred as 'defendants') filed a suit for specific performance of an oral agreement while mentioning its date of settlement as 03.04.1996 before the learned trial court on 08.03.2003 against the plaintiff with the assertion that the plaintiff had agreed to exchange suit property along with property measuring 02-kanals and 19-marlas bearing Khawat No.46/43 owned by the defendants. The learned trial court consolidated the suit for specific performance of oral agreement to sell instituted by defendants along with the suit for possession filed by the plaintiff and framed the following consolidated issues:-

> "1. Whether the plaintiff is owner of the suit property measuring 3-K, 11-M described in the head note of the plaint? OPP
>
> 2. Whether the plaintiff is entitled to decree for possession of the suit property against the defendant? OPP
>
> 3. Whether the parties entered into an agreement of exchange of land with respect to the suit property and agricultural land owned by the wife of the defendant No.1 ?OPP
>
> 4. Whether the defendants are entitled to the decree for specific performance of agreement of exchange of land dated 03.4.1996? OPD
>
> 5. Whether the defendants have handed over their property in khewat No.43, kahtooni No. 480 to the plaintiff inconsequence of this alleged agreement of exchange of land and have performed their part? OPD
>
> 6. Whether the suit of the defendant is within time? OPP

7. Whether the suit of the defendants is not correctly valued for the purpose of court fees and jurisdiction? If so, what is correct value? OPP

8. Whether the suit of the plaintiff is frivolous and filed just to harass the defendants? OPD

9. Whether the suit is mala fide and the plaintiff has no cause of action to file the present suit? OPP

10. Relief."

2. Both the parties were put to trial, who produced their stock of evidence in pros and cons and after scanning the same the learned trial court dismissed the suit for possession of the plaintiff and decreed the suit for specific performance of oral agreement to sell instituted by the defendants vide judgment and decree dated 23.12.2005, which remained intact when two appeals bearing No. 16/13 of 2007 and 18/13 of 2007 preferred by the plaintiff were dismissed by the learned Addl. District Judge, Vehari vide impugned judgment and decree dated 10.04.2008. Being aggrieved, this single civil revision has been filed by the plaintiff against the above referred consolidated judgments and decrees passed by the two courts below.

3. It is argued by the learned counsel for the plaintiff that the defendants were bound to plead the necessary ingredients of an oral contract, which they desired to be specifically performed to explain that when, where and in whose presence and on what terms and conditions the said oral agreement was settled between the parties, but where pre-requisites of an oral agreement are missing, the plaintiff is not entitled to a decree of specific performance; that in the plaint filed by the defendants neither venue nor the name of witnesses were pleaded and even the terms and conditions of the alleged contract were missing from it, but both the courts below erred in law while decreeing the suit filed by the defendants and dismissing the suit instituted by the plaintiff, and that the impugned judgments are result of misreading and non-reading of evidence, which being nullity in the eye of law are liable to be set aside by allowing this civil revision.

4. Conversely, learned counsel for the defendants has refuted the arguments of learned counsel for the plaintiff and supported the impugned judgments and decrees of the two courts below; that concurrent findings of fact recorded by the two courts below cannot be interfered with by this court while exercising revisional jurisdiction and the instant civil petition is liable to be dismissed.

5. Arguments heard and record perused.

6. The ownership of the plaintiff regarding the suit property is admitted by the defendants and even proved by rendering the copy of Register Haqdaran Zameen for the year 1991-92 (Ex.P.1), copy of Register Haqdaran Zameen for the year

1995-96 (Ex.P.2) and copy of Register Haqdaran Zameen for the year 1999-2000 (Ex.P.3). However, the stance of defendants Nos.1 and 2 in the written statement filed by them on 17.2.2003 in the suit for possession (prior to filing of their suit for specific performance of oral contract) was that the plaintiff had agreed to exchange the suit property along with the property of Ayesha defendant No.3 bearing khewat No.35 without mentioning that against how much property the said transaction was done. It is significant to note that in their written statement, the defendants did not plead date, month, venue and names of witnesses to explain that when, where and before whom the oral exchange contract had been settled between the plaintiff and Ayesha defendant No.3 rather in preliminary objection No.3, it was only pleaded that the said oral agreement had been settled between the parties in the year 1996. However, by filing separate suit for specific performance of oral contract before the learned trial court on 08.03.2003, the defendants, for the first time, pleaded that on 03.04.1996 the alleged oral agreement had been settled by the plaintiff against a different property measuring 2 Kanals 19 Marlas owned by all the defendants bearing Khawat No. 46/43, however, they again failed to plead the venue and names of witnesses to explain that where and before whom the transaction of the alleged transaction was settled.

7. The defendants to prove their alleged oral contract produced Falak Sher (DW/1), who during the cross-examination deposed as under:-

However, the other supporting witness, Nawab (DW-2), brought by the defendants into the witness-box, in response to a question put forwarded by the learned counsel for the plaintiff, stated as under:

He also deposed that:-
He further deposed as under:-

The said glaring major contradictions in the statements of DWs have badly damaged the case of the defendants. Falak Sher DW/1 deposed that the other relatives of the defendants were also present, but he could not tell their names. Whereas DW/2 deposed the names of said relatives as Fateh Muhammad, Dur Muhammad and Muhammad Shafi, but admittedly none of them was produced by the defendants in proof of their stance.

8. However, one of the defendants Ayesha Bibi appeared as DW/3, who even did not depose during her examination-in-chief that on what date, month or year the alleged oral agreement had been settled. The first seven lines of her examination-in-chief are important, which in verbatim are reproduced hereunder:-

However, during the cross-examination she (DW3) deposed as under:-

she further deposed that:-

In response to a question put forwarded by the learned counsel for the plaintiff, she (DW3) again replied as under:-

9. A minute perusal of the deposition of Ayesha Bibi (DW.3), reveals that she made the statement in complete departure of the stance, which the defendants pleaded before the learned trial court in the shape of their written statement in the suit for possession filed by the plaintiff wherein defendants Nos.1 and 2 averred that the plaintiff had agreed to exchange the suit property with the property bearing Khawat No.35 owned by Ayesha whereas, as per contents of the plaint in a suit for specific performance of oral contract filed by the defendants, the suit property was exchanged with the property measuring 02-Kanal 19-Marlas bearing Khawat No.46/43 owned by all the defendants. Ayesha DW/3 against her pleadings deposed that property measuring 3-1/2 Kanals, owned by her was exchanged by the defendants with the suit property. whereas the copy of Register Haqdaran Zameen pertaining to year 1999-2000 (Ex.D/1) reflects that Ayesha was only owner of 02-Kanal 19-Marlas. No other documentary evidence was produced to prove her testimony. Even the defendants failed to prove any entry in Register of Khasra gardawari, which proves their stance that at the time of alleged transaction of exchange the possession of the property, which was previously owned by the defendants was also handed over to the plaintiff. Furthermore the other glaring contradiction in the evidence led by DW1 and DW3 has not been captured by the courts below when both of them deposed a different time regarding settlement of bargain of exchange because as observed supra Falak Sher DW/1 deposed that bargain of exchange was settled at 2/3 p.m. whereas Ayesha defendant/DW/3 stated that the said contract was settled prior to 11:00 a.m. The said major contradictions are not ignorable and the defendants, who based their claim on an alleged oral contract without narrating the basic ingredients, in their pleadings badly failed to prove their stance by leading evidence. When the basic ingredients are missing in the plaint, then no evidence can be led on such points as it is settled law that nobody can be allowed to lead evidence in departure of his pleadings. Even none of the witnesses mentioned the exact date regarding settlement of the oral contract, terms and conditions of the contract or the exact specification of the property owned by the defendants, which was allegedly exchanged with the suit property. The critical analysis of the written statement filed by the defendants in the suit for possession as well as their plaint filed in the suit for specific performance of oral agreement with the elapse of 21-days thereafter and the evidence adduced by the defendants has made their posture highly doubtful. Undoubtedly, an oral agreement is valid just like a written contract provided the same fulfills the conditions of a valid agreement and also proved through convincing and strong evidence. In the recent era, the apex court while rendering the judgment reported as Nazir Ahmad and another v. Yousaf (PLD 2011 SC 161) and Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.Rs. and other (2013 SCMR 1300) has authoritatively held that a suit for specific performance of oral contract wherein beneficiary had neither mentioned the terms and conditions of the bargain nor disclosed the names of

witnesses in whose presence the oral agreement to sell was arrived at cannot succeed. There is also no second opinion other than that even in the cases where the agreement is proved by the party relying on the same, the courts may refuse to allow the discretionary relief of specific performance. This view has again been affirmed by the apex court while interpreting Section 22 of the Specific Relief Act, 1877 and referring plethora of judgments in case Farzand Ali and others v. Khuda Bukhsh and others (PLD 2015 SC 187).

10. It is also heart burning to observe that the learned lower appellate court while rendering the impugned judgment, no doubt, referred the evidence of the parties but failed to appreciate with a comparative analysis and even to give its findings on any of the issues settled by the learned trial Court. The observance of the parameters set down in Order XLI, rule 31 of the Code of Civil Procedure, 1908 is mandatory and where appellate court over looks, ignores or fails to consider evidence on record or judgment of appellate court lacks application of mind, it would amount failure to comply therewith. Recital of the judgment passed by the learned lower appellate court must show that he made a sincere endeavor to make proper appraisement of merits of case put forward by the parties, which is, unfortunately, lacking in the judgment of learned lower appellate Court. The basic theme of the provision ibid and its sub-clauses is that the appellate court is bound and obliged to render its independent findings on each point of determination, but in the present case the mandate of law was ignored by the learned lower appellate court, therefore, the impugned judgment is found not qualified to be a judgment in the eye of law and same can be termed as cursory judgment mainly depending upon surmises, although sufficient material in the shape of evidence was available before it. The superior courts time and again have laid down certain principles and made it incumbent upon the appellate court to deal with each and every aspect of the case while hearing the appeal, but the same were ignored by the learned Addl. District Judge while passing the impugned judgment, which is really gloomy on his part.

11. At the fag end of the arguments, learned counsel for defendants has argued that concurrent findings recorded by both the courts below cannot be interfered with by this Court while exercising jurisdiction under Section 115 of Civil Procedure Code, 1908. The said contention is also without any force. Although, the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under Section 115, C.P.C. if courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such view this court is fortified by the dictum laid down in the judgment reported as Abdul Hakeem v. Habibullah and 11 others (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:-

> "6. Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction

> under section 115, C.P.C. is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C. cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C. if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C. if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record."

This question has also been dealt with by the august Supreme Court of Pakistan in the judgment report as Muhammad Anwar and others v. Mst. llyas Begum and others (PLD 2013 SC 255) while holding that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law and the law alone. So, this court can decide in which cases the interference is warranted. The circumstance of the instant case to maintain the impugned judgments and decrees, which are found to be illegal, unlawful and perverse being the result of misreading and non-reading of the evidence on the record and surely suffered from excess of jurisdiction exercised by the learned courts below, which is exceptionable by this court in the exercise of revisional jurisdiction. The judgments and decrees passed by both the courts below are tainted with misreading and non-reading of evidence and have been passed in complete derogation of law settled by the apex Court as referred supra, which has rendered the same illegal, unlawful, ultra vires and without jurisdiction.

12. Consequently, the instant civil revision is allowed, the impugned judgments and decrees passed by the learned courts below are hereby set aside and the suit for specific performance on the basis of exchange filed by the defendants is hereby dismissed whereas suit for possession instituted by the plaintiff is decreed with cost throughout.

SL/M-316/L
Petition accepted.

2016 C L C 1390
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
RIASAT ALI----Petitioner
Versus
MUHAMMAD RAFIQ----Respondent

C.R. No.2866 of 2010, decided on 30th March, 2016.

(a) Civil Procedure Code (V of 1908)---
----O. IX, R. 13 & O. XVII, R. 3---Petition for setting aside ex parte decree---Closure of evidence---Scope---Applicant was afforded numerous opportunities to produce evidence and respondent did not raise any objection on the adjournment granted by the Trial Court---When no objection was taken on the preceding date with regard to adjournment of case, O.XVII, R.3, C.P.C. could not be invoked on the next falling date---Law required disposal of case on merits and not on technicalities---Impugned orders passed by the courts below were set aside---Application for setting aside ex-parte decree would be deemed to be pending before the Trial Court who should afford only one fair opportunity to the applicant for production of his entire oral as well as documentary evidence subject to payment of cost of Rs.10,000/- to the respondent---Revision was allowed in circumstances.
Syed Tasleem Ahmad Shah v. Sajawal Khan, and others 1985 SCMR 585 rel.
(b) Administration of justice---
----Law required disposal of case on merits rather than technicalities.
Mohammad Yasin Hatif for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Succinctly the facts of the case are that Mohammad Rafique, respondent instituted a suit for specific performance of agreement to sell dated 2.5.2000 against the petitioner before the learned trial court with the assertion that the respondent had entered into the said agreement to sell with the petitioner, but subsequently, he refused to honour the same. The learned trial court after initiating ex parte proceedings against the petitioner, decreed the suit through ex parte judgment and decree dated 25.6.2005, which was assailed by the petitioner by filing an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 with the averments that neither any transaction of sale was settled between the parties nor the alleged agreement to sell was executed by him; that no summonses were served upon him and that the proceedings of the suit were never brought into his knowledge. The said application was contested by the respondent/decree holder and while facing with the contest issues were framed, but the petitioner failed to adduce his evidence, whereupon, the learned trial court while invoking the provisions of Order XVII, Rule 3 of the Code of Civil Procedure, 1908, dismissed the application of the petitioner for want of evidence vide order

dated 30.9.2009. The said order was maintained when appeal filed by the petitioner was also dismissed by the learned lower appellate court vide judgment dated 14.4.2010. By filing the instant civil revision, the propriety and legality of the order and judgment passed by the learned two courts below has been assailed.

2. The case diary maintained by this court reveals that the respondent/decree holder was duly served through notice issued by this court, but he did not turn up and was proceeded against ex-parte by this Court vide order dated 19.2.2015.

3. Arguments of learned counsel for the petitioner heard. Record perused.

4. The perusal of interlocutory orders passed by the learned trial court while proceeding with the application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 filed by the petitioner reveals that the said court framed the issues on 20.6.2006 and the petitioner was invited to lead his evidence. No doubt, the petitioner was afforded numerous opportunities, but he failed to produce evidence. It is vivid from the perusal of case diary maintained by the learned trial court that on the preceding date of hearing, the respondent/decree holder failed to raise any objection on the adjournment granted by the learned trial court and as per principle settled by the apex Court in the judgment reported as "Syed Tasleem Ahmad Shah v. Sajawal Khan, etc." (1985 SCMR 585) it was held that in case no objection is taken on the preceding date regarding the adjournment of the case, subsequently on the next falling date application of Order XVII, Rule 3 of the Code of Civil Procedure, 1908 could not be invoked. The dicta laid down by the apex Court has left no room to conclude that the learned courts below failed to examine the said ratio while passing the impugned order and judgment. The respondent/decree holder has also not entered appearance to contest the instant civil revision. Even otherwise, the law requires the disposal of cases on merits and not to decide the same on technicalities.

5. Consequently, the instant civil revision is accepted, the impugned orders dated 25.6.2005 and 30.9.2009 passed by the learned trial court as well as judgment dated 14.4.2010 delivered by the learned lower appellate court are hereby set aside and the application filed by the petitioner under Order IX Rule 13 of the Code of Civil Procedure, 1908 will be deemed to be pending before the learned trial court, who will afford only one fair opportunity to the petitioner for production of his entire oral as well as documentary evidence subject to payment of cost of Rs.10,000/-, which shall be paid to the respondent/decree holder. The petitioner is directed to appear before the learned District Judge, Pakpattan on 18.4.2016, who will entrust the lis to a court of competent jurisdiction for further proceedings. The said court after procuring the service of respondent/decree holder will proceed as per law.

ZC/R-12/L

Revision allowed.

2016 M L D 1271
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
FAYYAZ AHMAD and others---Petitioners
Versus
Mst. ANAZA BUKHARI and others---Respondents

C.R. No.488 of 2009, heard on 27th May, 2014.

Civil Procedure Code (V of 1908)---

----O. XVIII, Rr. 8 & 14---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Recording of statement of witness by the Reader of the court---Effect---First Appellate Court remanded the case to the Trial Court with the observation that said court had not recorded the evidence in his own hand but same was recorded by Reader of said court in violation of provisions of O. XVIII, Rr. 8 & 14, C.P.C.---Validity---Statement of witness was recorded by reader of the court but same was signed by the judicial officer and no objection was advanced by the defendants---Provisions of procedural law were meant to help and not to create obstacles for the litigants to achieve their rights---Technicalities had to be avoided unless same were found essential to comply with---Non-compliance of provisions of O. XVIII, Rr. 8 & 14, C.P.C. in absence of any allegation of prejudice was not of invalidating nature and the same was irregularity and not illegality---Object of provisions of O. XVIII, Rr. 8 & 14, C.P.C. was to ensure the accuracy of record which was foundation of dispensation of justice as finally judgment was to be rendered on the basis of said record---Trial Court should prepare the record in accordance with law in order to obviate any allegation or counter allegation in preparation of incorrect record and same was for benefit of litigants---No prejudice had been pointed out by the petitioners/defendants to be caused to their case---Impugned judgment passed by the Appellate Court below was set aside and direction was passed to decide the appeal in accordance with law---Revision was accepted in circumstances.

2008 CLC 590 and Mst. Sardar Bibi and 7 others v. Hameed and another 2000 CLC 1311 ref.

Hussain Buksh v. Muhammad Ali 1995 CLC 1257; Abdul Majeed and 2 others v. Abdul Ghani 1995 MLD 8; Bahadur Ali v. Syed Ghulam Sabir Gilani 1990 MLD 588; Nand Lal and another v. Pooran Lal and another AIR 1956 RAJ.9; Pulukuri Kottaya and others v. Emperor AIR 1947 PC 67; Allah Jiwaya v. Judge Family Court, Ahmadpur Sharqia 1990 MLD 239; Mst. Sardar Bibi and 7 others v. Hameed and another 2000 CLC 1311; Muhammad Ramzan v. Muhammad Jahangir 2012 CLC 844; Liaquat Ali v. Additional District Judge, Jhelum and 2 others 2014 CLC 112 and in Mst. Sardar Bibi and 7 others v. Hameed and another 2000 CLC 1311 rel.

Muzammil Akhtar Shabbir for Petitioners.

Miss Kashwar Naheed for Respondents.

Date of hearing: 27th May, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The facts necessitated for the disposal of the instant civil revision are that the disputed property measuring 2213 Kanals 19 Marlas situated in mouza Mundeykey Tehsil Chunian District Kasur was owned by one Mst. Moosi the mother of petitioner No.11 and maternal grandmother of petitioners Nos.12 to 14 whereas petitioners No.1 to 10 purchased the said land from petitioners Nos.11 to 14 vide Mutations Nos.3458 and 3459 dated 15.3.2003. However, one Irshad Hussain Bukhari predecessor-in-interest of respondents Nos.1 to 4 preferred a suit for declaration against Bhudhu Khan etc. to the effect that he was owner of the disputed property which was contested by said Mst. Moosi, the previous owner of subject matter of the suit. The said suit was decreed by the learned trial court on 17.4.1982 and was assailed by said Mst. Moosi the original owner of the property by filing an appeal which was allowed on 26.4.1993 and the plaintiffs of said suit were directed to amend their suit for declaration to the suit for specific performance. Mst. Moosi filed Civil Revision No.1215 of 1993 against the said judgment passed by the learned Additional District Judge dated 26.4.1993 and the civil revision was allowed by this Court. The same was assailed by said Irshad Hussain Bukhari the plaintiff of said suit by filing a petition for grant of leave to appeal before the august Supreme Court of Pakistan which was accepted and the case was remanded to the civil court and amendment was allowed with the following observation:--

> "Consequent upon above arrangement between the parties, appeal is allowed, impugned judgment of the High Court as well as that of the Civil Judge are set aside and the case is remanded to Civil Judge for decision in accordance with the above directions. Case shall be disposed of expeditiously as early as possible preferably within a period of six months, as matter is pending between the parties since long."

2. After remand of the case the learned trial court recorded the statement of Din Muhammad respondent No.11 as DW6 and ultimately dismissed the said suit vide his judgment and decree dated 22.3.2006. The respondents Nos.1 to 4 filed an appeal before the learned lower appellate Court Chunian and the learned lower appellate court vide impugned judgment dated 12.2.2009 remanded the case to the learned trial court with the observation that the learned trial court had failed to record the evidence of said DW in his own hand, but it was reduced into writing by Reader of the said court in violation of provisions of Order XVIII, Rules 8 and 14 of C.P.C. Through the instant civil revision petitioners have assailed the impugned judgment passed by the learned lower appellate Court.

3. The learned counsel for the petitioners has argued that the impugned judgment passed by the learned lower appellate court is against fact of the case and law on the subject, that the learned lower appellate court while placing his reliance on case law reported as 2008 CLC 590 has wrongly set aside the well reasoned and a comprehensive judgment and decree passed by the learned trial court, that the learned lower appellate court has wrongly interpreted the provisions of Order XVIII, Rules 8 and 14 of C.P.C., that the learned trial court had signed the evidence of DW6, but while ignoring that sanctity is attached to the judicial act, the case has been wrongly remanded by the learned lower appellate court on erroneous premises of law, that DW6 was produced by the respondents and at the time of recording his statement even by Reader of the court no objection was advanced by the respondents at the relevant time, that the petitioners had cross examined the said DW on the next date of hearing and even at that time no objection was raised, that even in the memo of appeal the petitioners did not agitate the said objection and made a separate application before the learned lower appellate court and learned lower appellate court without any plausible ground remanded the case on the basis of mere technicalities. The learned counsel for the petitioners has prayed for acceptance of the instant civil revision and setting aside of the impugned judgment. The learned counsel for the petitioners relied upon the judgment reported as Mst. Sardar Bibi and 7 others v. Hameed and another (2000 CLC 1311).

4. Conversely the learned counsel for the respondents has supported the impugned judgment passed by the learned lower appellate court and also argued that it is an admitted fact that the statement of DW6 was recorded by the Reader of the court, but no memo was taken down by the learned Judicial Officer under Order XVIII, Rules 8 and 14, C.P.C., that the said provisions of law are mandatory in nature and its non compliance has rendered the statement of DW6 illegal and of no legal effect, hence the learned lower appellate court had no other option except to remand the said case to rectify the said order. He has lastly prayed for dismissal of the instant civil revision.

5. Arguments heard and record perused.

6. Admittedly the suit was filed before the learned trial court on 09.9.1968, which was earlier decided by the learned trial Court on 17.4.1982 and the matter went upto the level of august Supreme Court of Pakistan. However, the case was remanded by the august Supreme Court of Pakistan and in post remand proceedings the statement of DW6 was recorded by the learned trial court. It is an admitted fact that the statement of DW6 Din Muhammad was recorded on 26.5.2005 by Reader of the Court. However the said statement which is available at page-136 depicts that was signed by the learned Civil Judge and on the next date of hearing the rival party

cross examined the said DW when it was again signed by the said judicial officer at the end of his cross examination on 31.5.2005. Thereafter, the learned counsel for the respondents/defendants got his statement recorded for closing the evidence of respondents/defendants, but no such objection was advanced by defendants/respondents at the time of recording examination-in-chief or cross examination of the said DW.6 before the learned trial court till 22.3.2006 when ultimately the said suit was dismissed by the said court. Even in the memo of appeal filed by respondents before the learned lower appellate court no such objection was raised by them. The legal objection advanced by respondent by filing a miscellaneous application before the learned lower appellate court that the mandate of provisions embodied in Rules 8 and 14 of Order XVIII, C.P.C. was of compulsory nature and the learned lower appellate court remanded the matter to the learned trial court for rewriting the evidence of said DW6. The above referred rules read as under:--

> **"Rule 8:-- <u>Memorandum when evidence not taken down by Judge</u>.---** Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall term part of the record.
>
> **Rule 14:---<u>Judge unable to make such memorandum to record reasons of his inability.</u>---**(1) Where the Judge is unable to make a memorandum as required by this Order he shall cause the reasons of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court."

7. It is settled principle of law by the passage of time now that to assess that whether a provision is mandatory or directory in nature the use of word "shall" or "may" is not the only criteria for such determination. The object of relevant provision has to be taken into consideration after examination of the whole of the statute in which those provisions are embodied. The provisions of procedural law are meant to help and not to create obstacles for the litigants to achieve their rights and mere technicalities have to be avoided unless those are found essentially to comply with.

8. The issue regarding non-compliance of Rules 8 and 14 of Order XVIII, C.P.C. has already been considered by the superior courts in various judgments. In all the judgments as referred below it was laid down that non compliance with the afore-noted rules in absence of any allegation of prejudice was not of invalidating

nature. Hussain Buksh v. Muhammad Ali (1995 CLC 1257), Abdul Majeed and 2 others v. Abdul Ghani (1995 MLD 8), Bahadur Ali v. Syed Ghulam Sabir Gllani (1990 MLD 588), Nand Lal and another v. Pooran Lal and another (AIR 1956 Raj.9), Pulukuri Kottaya and others v. Emperor (AIR 1947 PC 67), Allah Jiwaya v. Judge Family Court, Ahmadpur Sharqia (1990 MLD 239), Mst. Sardar Bibi and 7 others v. Hameed and another (2000 CLC 1311), Muhammad Ramzan v. Muhammad Jahangir (2012 CLC 844), Liaquat Ali v. Additional District Judge, Jhelum and 2 others (2014 CLC 112) and in Mst. Sardar Bibi and 7 others v. Hameed and another (2000 CLC 1311) in paragraph Nos.5 and 6 it was held as under:--

> "5. Admittedly, the evidence was produced by the parties. It was recorded by a Court official in the presence of the Presiding Officer of the Court. Both the parties had cross-examined the witnesses of each other through their learned counsel. At the closure of the evidence of each of the parties, their learned counsel had put signatures on the order sheet in token of correctness of the proceedings. At no stage any such objection was taken before the learned Trial Court, not even during the course of arguments at the final stage. The matter was agitated before the first appellate Court and that too during the course of arguments when it was not a ground of challenge in memorandum of appeal. The conduct of the parties is quite evident from the proceedings of the case. The respondent in the circumstances turned round and objection when the case was decided by the trial Court against him. There has been no prejudice whatsoever caused to either of the parties. Had it been so the matter would have been agitated before the trial Court itself or objection taken in that regard. There is an affidavit by Ch. Muhammad Latif, Advocate, who represented the petitioner before the appellate Court denying his inclination for the remand of the case on this ground. It has remanded uncontroverted.
>
> 6. In the circumstances, I am constrained to observe that the remand was wholly unwarranted and will result in duplication of the proceedings only. It could not be the objective of the procedural provisions of the Code which are meant for the advancement of the cause of justice. It was not such a deviation or violation as would have rendered the proceedings null and void, despite waiver on the part of the parties and their conduct, specially when no prejudice is alleged even. The judgment cited by the learned counsel for the respondent proceeds on its own peculiar facts and is not attracted to the facts and circumstances of the present case.

The ratio emerging from the aforesaid principles is:--

(i) That the provisions of the procedural law are intended to facilitate and not to throttle the administration of justice. The calls of substantial justice must prevail over the logic on the basis of technicalities.

(ii) That the object of Rules 8 and 14 of Order XVIII of the Code of Civil Procedure is to ensure the accuracy of the record. The preparation of correct record is the foundation of dispensation of justice as finally the judgment is to be rendered on the basis of this record.

(iii) That the trial Court shall prepare the record in accordance with these rules in order to obviate any allegations or counter allegations in preparation of the incorrect record and the duty casts upon the Courts is for the benefit of the litigants.

(iv) That non-compliance or neglect of duty in the context of afore-noted rules in absence of allegations of inaccurate preparation of record or prejudice is irregularity and is not illegality.

9. The suit is pending before the learned trial court since 1966 and the parties cannot be thrown to the court of first instance after decades on the alleged omission of the learned trial court as the respondents have failed to point out that as to what prejudice was caused to their case and whether the statement of the said DW was recorded out of the context or against the narration made by him and if the same is allowed to be re-written, how the same will be different from the statement already on the record and it will be more beneficial to the case of the respondents/ defendants.

10. For the above reasons, I am not inclined to uphold the view taken by the learned Additional District Judge in the matter. The civil revision is accepted and the judgment impugned herein is, thus, set aside. Resultantly, the appeal filed by the respondent before he first appellate Court shall be deemed to be pending, which shall he heard and decided in accordance with law after hearing the parties concerned on the basis of the evidence already on the record within a period of three months positively. The parties are directed to appear before the learned District Judge, Kasur on 16.6.2014, who may hear the appeal himself, if possible, or entrust the same to some other Additional District Judge for further proceedings.

ZC/F-24/L

Revision allowed.

2016 M L D 1524
[Lahore (Multan (Bench)]
Before Ch. Muhammad Masood Jahangir, J
Sheikh MUHAMMAD LATIF---Petitioner
Versus
Malik MUHAMMAD ASHIQ and another---Respondents

C.R. No.888 of 2002, decided on 15th June, 2015.

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

----O. XVII, R. 3---Closing of evidence---Sufficient opportunities already granted---Matter could not be left on the choice of parties to choose the time for production of evidence according to their own choice----Case proceedings had to be controlled by Court according to its roster---Petitioner who had been already granted sufficient opportunities was not entitled to any further leniency by Court.

Mian Abdul Karim v. Province of Punjab through District Officer (Revenue) Lodhran and 5 others PLD 2014 Lah. 158 and Syed Tahir Hussain Mehmoodi and others v. Agha Syed Liaqat Ali and others 2014 SCMR 637 rel.

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

----O. XVII, R. 3---Closure of petitioner's evidence for failing to produce evidence---Scope---Contention of petitioner was that he was suffering from cancer and was not able to appear before trial court on account of his chronic ailment, therefore, he may be allowed at least one more opportunity to lead his evidence----Validity----Law favoured disposal of cases on merits however, law helps vigilants and not the indolents---Courts were not supposed to go behind litigants who were not interested in disposal on merits----Held, that if it was admitted that petitioner was suffering from ailment even then petitioner could have produced other witnesses as well as documentary evidence to satisfy the Court that he was vigilant in pursuing his case with due care---Petitioner did not even appoint any attorney to make a statement on his part or never made a request to trial court for appointment of local commission to record his statement at his residence---Trial Court had already showed patience for a period of two years and adjourned the case during said period mostly on the request of petitioner---Despite availing sufficient opportunities, petitioner failed to produce a single witness or document in his evidence---Revision petition was dismissed in circumstances.

Sheikh Khurshid Mahboob Alam v. Mirza Hashim Baig and another 2012 SCMR 361; Syed Tasleem Ahmad Shah v. Sajawal Khan etc. 1985 SCMR 585; Qutab ud Din v. Gulzar and 2 others PLD 1991 SC 1109; Haji Muhammad Ramzan Saifi v. Mian Abdul Majid and others 1986 SC 129; Muhammad Hussain and 5 others v. Akram Baig and 3 others PLD 1988 Lah. 183; Mst. Bilquis Fatima and 3

others v. Nasim Ahsan and 2 others 1996 SCMR 1057; Muhammad Ramzan v. Abdul Majeed and 4 others 2009 CLC 386; Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584; Taj Muhammad Khan and others v. Bakht Shery and others 2003 CLC 1176; Muhammad Shafiq v. Mst. Resham Bibi and 3 others PLD 2001 Lah. 206 and Messrs Friends Vegetable Ghee Mills (Pvt.) Ltd. v. Privatization Commission, Ministry of Finance, Government of Pakistan through Chairman and 2 others 2000 CLC 1955 distinguished.

(c) Administration of justice---

----Law help the vigilants and not the inodlent---Courts were not supposed to go behind litigants who were not interested in disposal of lis on merits.

Malik Muhammad Tariq Rajwana, Malik Kashif Rafique Rajwana and Javed Ahmad Khan for Petitioners.

Nemo for Respondents.

Date of hearing: 15th June, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Precisely the facts for disposal of the instant civil revision are that present petitioner brought an application under section 12(2) of the Civil Procedure Code of 1908 for setting aside of the judgment and decree dated 17.5.1999 passed by the learned Civil Jude 1st Class, Sahiwal whereby suit for specific performance of agreement to sell dated 29.7.1998 filed by the respondents was decreed on the basis of alleged compromise. The said application was resisted by the decree holders and the learned trial court captured the disputed area of facts by framing certain issues on 09.3.2000. Thereafter the petitioner was invited to lead his evidence but he remained fail and the learned trial court while invoking the provisions of Order XVII Rule 3 of the Civil Procedure Code of 1908 closed the right of the petitioner to lead his evidence vide order dated 16.1.2002 and dismissed the lis. Being aggrieved, the petitioner filed a revision petition before the learned Additional District Judge, Sahiwal which was returned for want of pecuniary jurisdiction vide order dated. 20.7.2002 and the instant civil revision has been filed by the petitioner before this Court.

2. Arguments heard and record perused.

3. The case diary maintained by the learned trial court, copy whereof is appended with the instant civil revision, reveals that the petitioner was granted various opportunities for production of his evidence, but he failed to produce the same. The petitioner, in addition to routine dates, also requested for adjournment to produce his evidence on 23.5.2000, 28.6.2000, 27.7.2000, 25.9.2000, 02.12.2000, 25.1.2001, 6.2.2001, 16.4.2001 and 17.9.2001, but he remained fail to produce any evidence. Even on the last three dates adjournments were granted to the petitioner on his request with the warning that it would be the last opportunity to produce his

evidence, but case was adjourned while showing sympathetic attitude in spite of that the petitioner time and again failed to produce his evidence. Ultimately on 29.11.2001, the case was again adjourned on the request of the petitioner for 16.1.2002. On the said date as well the position remained the same and the learned trial court closed the right of evidence of the petitioner and dismissed the application under section 12(2) of the Civil Procedure Code of 1908 filed by the petitioner. The attitude of the petitioner shows that he remained indolent before the learned trial court during the proceedings of the application under section 12(2) of the Civil Procedure Code of 1908 and the learned trial court was left with no other option except in invoke the provisions of Order XVII Rule 3 of the Civil Procedure Code of 1908 as it cannot be left on the choice of the parties to choose the time for production of evidence according to their choice, but the case proceedings have to be controlled by the Court according to its Roster and the petitioner having already been granted more than sufficient opportunities, is not entitled to any further leniency by this Court, who has rightly been knocked out for want of evidence while invoking the provisions of Order XVII Rule 3 of the Civil Procedure Code of 1908. Reliance in this respect is placed upon the judgments reported as Mian Abdul Karim v. Province of Punjab through District Officer (Revenue) Lodhran and 5 others (PLD 2014 Lahore 158) and Syed Tahir Hussain Mehmoodi and others v. Agha Syed Liaqat Ali and others (2014 SCMR 637).

4. The contention of learned counsel for the petitioner that the petitioner was suffering from cancer, who was not able to appear before the learned trial court on account of his chronic ailment and may be allowed at least one more opportunity to lead his evidence is without any substance. The case law referred by him reported as Sheikh Khurshid Mahboob Alam v. Mirza Hashim Baig and another (2012 SCMR 361), Syed Tasleem Ahmad Shah v. Sajawal Khan etc. (1985 SCMR 585), Qutab ud Din v. Gulzar and 2 others (PLD 1991 SC 1109), Haji Muhammad Ramzan Saifi v. Mian Abdul Majid and others (1986 SC 129), Muhammad Hussain and 5 others v. Akram Baig and 3 others (PLD 1988 Lahore 183), Mst. Bilquis Fatima and 3 others v. Nasim Ahsan and 2 others (1996 SCMR 1057), Muhammad Ramzan v. Abdul Majeed and 4 others (2009 CLC 386), Sherin and 4 others v. Fazal Muhammad and 4 others (1995 SCMR 584), Taj Muhammad Khan and others v. Bakht Shery and others (2003 CLC 1176), Muhammad Shafiq v. Mst. Resham Bibi and 3 others (PLD 2001 Lahore 206) and Messrs Friends Vegetable Ghee Mills (Private) Ltd. v. Privatization Commission, Ministry of Finance, Government of Pakistan through Chairman and 2 others (2000 CLC 1955) runs on different footings. If it is admitted that the petitioner was suffering from ailment even then the petitioner could have produced the other witnesses as well as documentary evidence to satisfy the Court that he was vigilant in pursing his case with due care. He even did not appoint any attorney to make a statement on his part or never made a request to the learned trial court for appointment of local commission to record his statement at his residence. The learned trial court had already showed patience for a period of two years and adjourned the case during the said period mostly on the request of the petitioner, but

despite availing sufficient opportunities the petitioner remained fail to produce a single witness or document in his evidence and the learned trial court was quite justified to pass the impugned order for dismissal of the lis for want of evidence. This Court is cognizant of the principle that law favours disposal of cases on merits, but at the same time the other famous principle cannot be ignored that the law helps the vigilants and not the indolents and the Courts are not supposed to go behind the litigants, who are not interested in disposal of the lis on merits.

5. The learned counsel for the petitioner is unable to point out any illegality or perversity committed by the court below while passing the impugned order. The instant civil revision having no force and is dismissed.

RR/M-227/L

Revision dismissed.

2016 M L D 1535
[Lahore (Multan (Bench)]
Before Ch. Muhammad Masood Jahangir, J
ALLAH WASSAYA---Petitioner
Versus
Mst. HALIMA MAI and 12 others---Respondents

Civil Revision No.46-D of 2005, decided on 11th May, 2015.

(a) Gift---

----Ingredients---Mutation---Proof of---Procedure---Defendants being beneficiary of disputed gift mutation were bound to prove the transaction of Tamleek which might have been settled at some prior point of time of attestation of the same---Donee did not plead any date, time, place and the names of witnesses to explain as to when and where and in whose presence alleged offer to gift out suit property had been made---Donee remained fail to prove the transaction of disputed gift in absence of such details in the written statement---Mutation per se was not a deed of title but it would indicate some previous oral transaction between the parties---Whenever any mutation was challenged then burden would lie on the beneficiary to prove the same as well as original transaction which he was required to fall back upon---Only one witness of mutation of Tamleek was produced to prove its valid attestation---Said witness did not depose that donor had ever made any offer to gift out the suit property to the donee and he accepted the said offer in his presence---Transaction could not be declared to have been validly proved in absence of two basic ingredients of gift---Testimony of said witness was not helpful to the beneficiary---Disputed mutation was attested by practicing fraud misrepresentation---Attestation of disputed mutation by two real brothers had created doubt regarding its authenticity---Beneficiary of disputed mutation had failed to produce revenue officials who had entered and attested the same---Revenue officials were the best persons who could prove the valid attestation of Tamleek mutation---Best evidence had been withheld by the beneficiaries without showing any justification and inference would be against them---Revenue Officer was bound to conduct the proceedings in a common assembly in the concerned revenue estate to attest the mutation but same was not conducted therein---Beneficiaries of gift had failed to prove ingredients of the same---Transaction of gift and valid attestation of mutation could not be declared to have been proved---Nothing was on record that prior to alleged sale of suit property any inquiry with regard to title of the same was conducted---Impugned judgment passed by the Appellate Court was not sustainable in the eye of law which was set aside whereas that of Trial Court was restored---Revision was allowed in circumstances.

Muhammad Ishfaque through L.Rs. v. Ch. Muhammad Nawaz and others 2008 SCMR 1095; Rasheeda Begum v. Ghulam Ahmed and another 2007 CLC

172; Mir Muhammad alias Miral v. Ghulam Muhammad PLD 1996 Kar. 202 and Chiragh Din v. Bakhat Bhari and 4 others 2007 YLR 2941 distinguished.

(b) Mutation---

----Mutation per se was not a deed of title.

Tahir Mehmood for Petitioner.
Mohammad Khalid Mehmood Ayaz for Respondents Nos. 1 to 11.
Date of hearing: 11th May, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The facts germane for the disposal of the instant civil revision are that the petitioner brought a suit for declaration regarding the disputed property fully mentioned in the body of the plaint with the assertion that he was owner in possession of the same and mutation of Tamleek No.133 dated 30.11.1991 (Ex:P6) and subsequent mutation of oral sale No.386 dated 17.3.1996 being illegal were in effective upon the rights of the plaintiff. It is also asserted in the plaint that although defendants No.1 and 2/respondents Nos.11 and 12 were his real sons, but he had also six daughters and he never made any declaration of Tamleek in favour of defendants No.1 and 2 and that mutation of Tamleek (Ex.P6) as well as subsequent mutations were liable to be cancelled. The said suit was contested by defendant No.1/ one of the alleged donnee and defendants Nos.3 to 5, who were subsequent vendees. The learned trial court captured the disputed area of facts by framing the following issues:--

"1. Whether the plaintiff is in possession of suit property as owner and mutation of Tamleek No.133 dated 30.11.91 & mutation of sale No.386 dated 17.3.96 are against the law, against the facts, based on fraud, void and ineffective upon plaintiff's rights? OPP

2. Whether the suit is incorrectly valued for the purposes of court fee? OPD

3. Whether the suit of plaintiff is time barred? OPD

4. Whether the suit of plaintiff is liable to dismissal in view of preliminary objection No.2 of written statement? OPD.1

5. Whether the suit of plaintiff is not maintainable in its present form? OPD 3 to 5.

6. Whether the defendants Nos.3 to 5 are bona fide purchaser of suit property for consideration and without notice? OPD 3 to 5

7. Whether the defendants Nos.3 to 5 have made any improvements over the suit property, if so, to what extent and with what effect? OPD 3 to 5.

8. Whether the plaintiff is stopped to file this suit by his words and conduct? OPD 3 to 5.

9. Whether the plaintiff has got no cause of action to file the suit? OPD 3 to 5.

10. Relief."

After collecting the stock of evidence led by the parties, the suit of the petitioner was decreed by the learned trial court. Both the disputed mutations (Ex:P6) and (Ex:P7) were cancelled and respondents No.1 and 2/defendants Nos.1 and 2 were directed to make payment of Rs.1,00,000/- to the subsequent transferees/defendants Nos.3 to 5. Being aggrieved, the Tatters filed an appeal before the learned lower appellate court, who vide impugned judgment and decree dated 2.10.2004 while setting aside the judgment and decree dated 24.5.2003 passed by the learned trial court dismissed the suit filed by the plaintiffs, hence this civil revision.

2. It is argued by the learned counsel for the petitioner that the impugned judgment and decree passed by the learned lower appellate court is against the law and facts; that the learned lower appellate court without discussing the evidence available on file passed the impugned judgment and decree illegally and without lawful authority and that the beneficiary failed to prove the transaction of gift embodied in the disputed mutation as well as its valid attestation.

3. Conversely, the learned counsel for respondents Nos.1 to 11 has supported the impugned judgment and decree while refuting the arguments advanced by the learned counsel for the petitioner and also prayed for the dismissal of the instant revision petition. He relies upon the case law reported as "Muhammad Ishfaque through L.Rs. v. Ch. Muhammad Nawaz and others" (2008 SCMR 1095), "Rasheeda Begum v. Ghulam Ahmed and another" (2007 CLC 172), "Mir Muhammad alias Miral v. Ghulam Muhammad" (PLD 1996 Karachi 202) and "Chiragh Din v. Bakhat Bhari and 4 others" (2007 YLR 2941).

4. Arguments heard. Record perused.

5. The case of the petitioner is that he had neither made any declaration/offer to make a gift in favour of respondents/defendants No.1 and 2 nor he appeared before the concerned Patwari as well as the Revenue Office for the entry and attestation of disputed mutation and that he being illiterate old aged person had been deprived of

his property by defendants Nos.1 and 2 while practicing fraud and misrepresentation. The plaintiff himself appeared as PW-1 and fully supported his stance. The defendants Nos.1 and 2 were beneficiaries. of the disputed gift mutation and heavy onus was upon their shoulders to prove the transaction of Tamleek which might have been settled at some prior point of time of attestation of disputed mutation. Out of the alleged donnees, only defendant No.1 submitted his contesting written statement and perusal of same reveals that he did not plead any date, time, place and the names of witnesses to explain that when, where and in whose presence the alleged offer to gift out the suit property had been made by the petitioner, which was accepted by them and followed by the delivery of possession of the suit property in lieu thereof. In the absence of giving details of such ingredients in the written statement, defendant No.1 remained fail from the very inception of the suit to prove the transaction of disputed gift.

6. By now, it is well settled principle that mutation per se is not a deed of title but merely an indicative of some previous oral transaction between the parties and keeping in view said principle whenever any mutation is challenged, then burden heavily lies on the shoulders of beneficiary of the transaction to prove the mutation as well as original transaction which he was required to fall back upon. In the present case only one of the attesting witness of mutation of Tamleek (Ex:P6) Muhammad Younis, Councilor (DW2) was produced by the defendants to prove its valid attestation, who deposed that he and his brother along with the parties of the mutation had appeared before the Tehsildar, who sanctioned the mutation on their (DW2 and his brother) attestation. DW2 further deposed that his brother had since died. The perusal of entire statement of DW2 reveals that he neither mentioned the date of attestation of the disputed mutation nor he uttered a single word that Allah Wasaya, the alleged donor had ever made any offer to gift out the suit property to the donees or that the latter had accepted the said offer in his presence. In the absence of two very basic ingredients of gift, the transaction could not declare to have been validly proved. It is also noteworthy that the plaintiff-petitioner while appearing as PW1 has levelled the allegation against DW3 that as he had refused to cast vote in favour of DW3 at the time of his elections for the seat of Councilor and due to said grudge DW-3 had made fictitious identification before the Revenue Officer. The said DW-3/the alleged identifier during the cross-examination stated that he did not remember the names of the Patwari or the Tehsildar, who had attested the mutation. So the testimony of said witness is not helpful to the beneficiary. DW-3 also deposed that the disputed mutation was attested at Shah Sadar ud Din whereas Ghulam Farid DW-2 one of the beneficiary deposed that the mutation was attested at D.G. Khan. The said contradiction cannot be treated minor or natural variation rather the same is sufficient to hold that the disputed mutation (Ex:P6) was got attested by practicing fraud and misrepresentation as none of the beneficiary or the attesting witnesses could prove the valid attestation of the same. Even otherwise the attestation of the disputed mutation by the two real brothers has also created serious doubt regarding its authenticity. In the present case the

beneficiaries also failed to produce the concerned Patwari as well as relevant revenue officer, who had allegedly; entered and attested the same. The revenue officer as well as Patwari were the best persons, who could prove the valid attestation of Tamleek mutation, wherein, the alleged transaction of Tamleek was incorporated, but the said best evidence was with-held by the beneficiaries without showing any justification and inference under Article 129(g) of Qanun-e-Shahadat Order, 1984, has to be drawn against them. Even one of the donnees, namely, Ghulam Murtaza neither controverted the allegations levelled in the plaint by filing written statement nor he appeared in the witness box to prove the transaction of Tamleek. Moreover, Ghulam Farid, one of the alleged donnees while appearing as DW2 in his statement-in-chief deposed that the mutation of Tamleek was attested at Dera Ghazi Khan, which shows that the revenue officer committed material illegality while sanctioning gift mutation (Ex:P6) at a different place as he was bound to conduct the proceeding in a common assembly to be assembled in the concerned revenue estate. DW2 also did not utter a single word that the disputed property had been offered to him along with his brother as a gift by the petitioner, which was accepted by them and possession of the disputed property in lieu of alleged gift was transferred to them. It can safely be held that the beneficiaries badly failed to prove the ingredients of gift and due to such lapse the settlement of effecting transaction of gift and valid attestation of mutation cannot declare to have been proved.

7. The contention of learned counsel for respondents Nos.1 to 11 that they are bona fide purchasers for consideration and their transaction is fully protected, is misconceived. No evidence is available on record which could suggest that prior to alleged sale of property they had made any inquiry regarding the title of defendants Nos.1 and 2 in the I disputed property. In absence of such material evidence, the learned trial court while canceling mutations in dispute has already directed defendants Nos.1 and 2 to pay back the sale consideration received by them to defendants Nos.3 to 5/subsequent transferees and such part of the judgment has never been assailed by defendants Nos.1 and 2, which attained finality to their extent. The contention of the learned counsel for the contesting respondents/defendants that the petitioner-plaintiff had alleged fraud and he was bound to prove the elements of fraud by producing convincing evidence is misconceived for the reason that the moment, the plaintiff made a statement on oath as PWI, the onus was shifted upon the beneficiary to prove the valid attestation of the mutation. The case law referred by the learned counsel for respondents Nos.1 to 11 is not applicable to the facts and circumstances of the case, which runs on different footing. The impugned judgment and decree passed by the teamed lower appellate court is not sustainable in the eye of law which is based on misreading and non-reading of evidence and also against the principles settled by the superior courts on the subject.

8. Resultantly, the instant revision petition is accepted, impugned judgment and decree dated 2.10.2004 passed by the learned lower appellate court is set aside and the judgment and decree dated 24.5.2003 delivered by the learned trial Court is restored.

ZC/A-123/L

Revision allowed.

P L D 2016 Lahore 383
Before Ch. Muhammad Masood Jahangir, J
ABDUL MAJEED through Legal Heirs---Petitioner
Versus
ABDUL RASHEED and others---Respondents

C.R. No.427 of 2006, heard on 7th April, 2015.

(a) Transfer of Property Act (IV of 1882)---
----S. 41----Qanun-e-Shahadat (10 of 1984), Art. 72, 75, 78, 79 & 140----Civil Procedure Code (V of 1908), O. XIII, R. 4---Specific Relief Act (I of 1877), Ss. 8 & 42---Suit for declaration and possession through partition---Benami transaction---Essentials---Proof---Execution of document---Onus of proof---Admission of document under O. XIII, R.4, C.P.C.---Effect---Cross-examination as to previous statement in writing---Non-confrontation of document during examination---Effect---Contradictory defences---Effect---Plaintiff filed suit for declaration and possession through partition regarding suit property asserting that suit property was owned by his father and after his death parties became owners-in-possession of the same and that defendant (one of the sons) had obtained affidavit in his favour for sanction of site plan from the other legal heirs/parties---Defendant resisted said claim on grounds that he was actual owner of suit property, whereas father of parties was only a Benami owner thereof and that all other legal heirs had surrendered their legal share in his favour by executing an affidavit---Suit was dismissed concurrently---Contention of plaintiff was that defendant had neither pleaded motive of alleged Benami transaction in his written statement nor had he asserted the same in his evidence---Defendant, alleging Benami title and surrender of shares by other legal heirs through affidavit, had taken contradictory defences---Said affidavit could not be termed as sale deed as the same was executed only for sanction of site plan and transfer of shares could only be made through registered document---Plea taken by defendant was that suit property was transferred in name of his father as ostensible owner and all legal heirs, acknowledging said transaction as Benami, had surrendered their rights regarding suit property in his favour---Validity---Suit property had admittedly been transferred in name of father of parties, and defendant had never filed suit against his father in his life time on basis of Benami transaction---Defendant failed to prove any motive in his written statement as to why suit property had been got transferred in name of his father---Permanent Transfer Deed issued by Settlement Authorities in favour of father of parties contained price/consideration for transfer---Defendant neither produced previous owner nor any documentary evidence to prove that sale consideration had been paid by him---Defendant through oral evidence had proved payment of sale consideration but the same could not be preferred over documentary evidence in shape of "Permanent Transfer Deed" to which strong presumption of truth was attached---No agreement to sell or mode of payment was brought on record to prove that defendant had purchased suit property---Defendant's witnesses were

contradictory---Original Permanent Transfer Deed was not produced by defendant---Defendant failed to prove necessary elements of Benami---Defendant also failed to prove that other legal heirs had surrendered their share in his favour---Mere production of copy of affidavit was insufficient to hold that rights of plaintiff had been surrendered in favour of defendant---Affidavit had admittedly been executed for sanction of site plan and the same was submitted to concerned Authority for said purpose, but original affidavit was not summoned from custody of said Authority---Plaintiff was not confronted with affidavit during cross-examination---Affidavit was not a public document and the same was to be proved in terms of Art.79 of Qanun-e-Shahdat, 1984---Party relying on affidavit must produce deponent for cross-examination and if deponent fails to submit to cross-examination, affidavit would lose all its force as probative piece of evidence and the same could not be acted upon---Onus to prove the affidavit was on defendant but neither stamp vendor nor scribe, Notary Public, Oath Commissioner were produced to prove contents of the affidavit---Affidavit got exhibited under O. XIII, R. 4, C.P.C. on statement of witness who was not related to said affidavit--- Admission of document in evidence under O. XIII, R. 4, C.P.C., was not binding on parties---In cross-examination, it was suggested to plaintiff that an affidavit had been executed by him but on his denial that he did not intend to surrender his rights, it was required under the law that he should have been confronted with the writing of said affidavit---Under Art.140 of Qanun-e-Shahadat, 1984, such confrontation was mandatory---Non-confrontation of affidavit to plaintiff had damaged the case of defendant---Affidavit could not be proved under Qanun-e-Shahadat, 1984 and the same could not be made basis of dismissal of suit---Defendant failed to prove the defences set up by him---Findings of courts below regarding said affidavit were not sustainable under law---Courts below fell in legal error while dismissing suit of plaintiff who had fully proved his claim---High Court, allowing revision petition, set aside judgments and decrees of courts below and remanded the suit to Trial Court with direction to pass preliminary decree after determining legal shares of parties---Revision petition was accepted in circumstance.

Sikandar Hayat and 4 others v. Master Fazal Karim PLD 1971 SC 730; Ghulam Rasool through Lrs. v. Muhammad Shafi and another 2013 SCMR 1501 and The President--Referring Authority v. Justice Shaukat Ali PLD 1971 SC 585 rel.

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

----O. XIII, R. 4---Production of document---Admission of document in evidence under O. XIII, R. 4, C.P.C., is not binding on parties---Unproved documents could not be regarded as proved merely because the same has been admitted in evidence by court without any objection---Order XIII, R. 4, C.P.C. must be strictly complied with---Document once brought on record and exhibited, even if no objection is taken from other side when the same is exhibited, court is not prevented from adjudicating its nature to ascertain that whether same is valid and not fake.

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

----S. 41---Transfer by ostensible owner---Essentials---Benami transaction---Importance of motive of Benami transaction---Essentials for proof of Benami transaction were that what was the source of consideration for Benami transaction, that in whose custody original title documents were and who was in possession of Benami property; and that what was the motive of Benami transaction---Essential elements must exist to prove Benami transaction between ostensible owner and purchaser for purchase of property in name of ostensible owner for benefit of person who was to make payment of consideration---Existence of motive for creation of Benami title was relevant---For determining as to whether title vesting with opposite party in disputed property was merely Benami, absence of motive always goes against claimant.

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

----Art. 79---Proof of handwriting and signatures---Affidavit---Proof---Affidavit was not a public document and the same had to be proved in terms of Art.79 of Qanun-i-Shahadat, 1984---Party relying on affidavit must produce deponent for cross-examination and if deponent fails to submit to cross-examination, affidavit would lose all its force as probative piece of evidence and the same could not be acted upon.

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

----Art. 140----Cross-examination as to previous statement in writing---Non-confrontation of document---Effect---Where in cross-examination, it was suggested to plaintiff that an affidavit surrounding his rights in property had been executed by him but on his denial that he did not intend to surrender his rights in suit land, it was required under the law that he should have been confronted with the writing of said affidavit---Under Art.140 of Qanun-e-Shahadat, 1984, such confrontation was mandatory.

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

----S. 41----Transfer by ostensible owner---Essentials---Benami transaction---Motive of Benami transaction---Existence of motive for reation of Benami title is relevant---For determining that whether title vesting with opposite party in disputed property was merely benami, absence of motive always goes against the claimant.

Babar Ali for Petitioner.
Zafar Abbas Mir for Respondents.
Date of hearing: 7th April, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J: By filing the instant civil revision, the petitioners have challenged the judgment and decree dated 21.2.2004 passed by the learned trial court, whereby, suit for declaration and possession

through partition filed by Abdul Majeed, the original plaintiff, was dismissed and the judgment and decree dated 16.5.2006 delivered by the learned lower appellate court by virtue of which the appeal filed by Abdul Majeed (plaintiff) was also dismissed.

2. The brief facts of the case are that Abdul Majeed, the original plaintiff, brought a suit for declaration and possession through partition regarding the house measuring 4-1/2 Marlas bearing No.1/411 situated at Mohallah Chitian Hattian, Rawalpindi with the assertions that the said house was owned by Muhammad Ismail, the father of plaintiff, who died in the year 1972 and being legal heirs the parties became co-sharers in the suit property, hence Abdul Majeed, petitioner/plaintiff was entitled for his due share in the suit house. It was further pleaded in the plaint that defendant No.1/respondent No.1 to obtain NOC for the sanction of site plan got executed a document in the shape of affidavit from all the legal heirs, which was only executed in his favour for getting sanction of site plan. The said suit was resisted by respondent No.1/defendant No.1 on two fold-grounds, who on the one hand claimed that Muhammad Ismail, the father of the parties was only Benami owner of the disputed house but he (respondent No.1) was the actual owner and on the other hand he set up the defence that all other legal heirs of Muhammad Ismail had surrendered their rights in his favour regarding the suit house by executing affidavit. The learned trial court in the light of the divergent pleadings of the parties framed the following issues:-

1. Whether the plaintiff is estopped by his words and conduct to file the suit? OPD
2. Whether the suit is not maintainable in its present form? OPD
3. Whether the proper court fee has not been affixed? OPD
4. Whether the suit is bad by mis-joinder and non-joinder of necessary parties? OPD
5. Whether the suit is time barred? OPD
6. Whether the suit has been filed with mala fide intention, hence liable to be dismissed? OPD
7. Whether the plaintiff is entitled to the decree as prayed for? OPP

7-A. Whether the predecessor of the parties laid Muhammad Ismail was Benami owner and defendant No.1 is real owner? OPD

7-B. Whether the defendant No.1 Abdul Rasheed has made construction of the suit house except walls of the two rooms? If so, its effects?OPD

8. Relief.

3. Both the parties produced their evidence in pros and cons and ultimately the suit of the plaintiff was dismissed and the appeal filed by Abdul Majeed the petitioner/plaintiff was also dismissed vide judgments and decrees referred in Para-1 ante. Hence, the instant civil revision.

4. It is argued by the learned counsel for the petitioners that both the courts below erroneously dealt with issue No.7-A while relying upon the oral statement of

D.Ws.; that neither any motive was pleaded in the written statement nor asserted in the evidence by the defendant No.1 to prove that the transfer of disputed property in favour of father of the parties was a Benami transaction; that defendant No.1 took contradictory defence in the written statement, one on the point of Benami title in the name of Muhammad Ismail and in the same breath in total disregard thereto respondent No.1 alleged that rest of the parties through an affidavit had surrendered their shares in the suit property in his favour; that the alleged affidavit was only obtained for getting sanction of the new site plan, which could not be termed as a sale deed, but the courts below without appreciating the fact that either there should be a surrender deed in favour of respondent No.1 or property should have been partitioned with metes and bounds because the same was valuing more than 100 rupees and required to be transferred through registered document and not otherwise and that the impugned judgments and decrees passed by the courts below being result of misreading and non-reading of evidence available on the file are liable to be set aside by allowing this civil revision.

5. Conversely, the learned counsel for the respondents has supported the impugned judgments and decrees passed by the courts below and argued that no error of law and procedure has been pointed out in the impugned judgments and decrees by the learned counsel for the petitioners which could justify interference by this Court and that the disputed property was transferred in the name of Muhammad Ismail real father of the parties as an ostensible owner and while acknowledging the said transaction as Benami, all his legal heirs including Abdul Majeed plaintiff had surrendered their rights regarding the disputed house in favour of respondent No.1/defendant No.1. He has lastly prayed for dismissal of the instant civil revision.

6. Heard and record perused.

7. Abdul Majeed, petitioner/plaintiff by producing attested copy of PTD (Exh.P3) fully proved that the disputed house had been permanently transferred to Muhammad Ismail (deceased) predecessor-in-interest of the parties by the Settlement Authorities in the year 1970. Admittedly, defendant No.1 never filed any suit against his father in his life time to get declared the same as a Benami transaction. In a case of Benami, the following factors are to be fulfilled by a party, who alleges the transaction as ostensible:-

i. Source of consideration.

ii. From whose custody original title deed came.

iii. Who is in possession of the property and

iv. Motive of Benami.

The essential elements must exist for proving Benami transaction between ostensible owner and the purchaser for purchase of property in the name of ostensible owner for the benefit of person who has to make payment of

consideration and importantly existence of motive for creation of Benami title is relevant. For purpose of determining that whether title vesting with the opposite party in the disputed property was merely Benami, absence of motive always goes against claimant. It is straightaway noticed that defendant No.1 failed to plead any specific motive in the written statement that why the disputed property had been got transferred in favour of Muhammad Ismail deceased.

8. In the present case as per PTD (Exh.P3), the disputed property had been transferred by the Settlement Authorities to Muhammad Ismail deceased and the said document did not disclose that any price/consideration was passed on against the said transfer. No doubt, defendant No.1 has produced oral evidence to prove that sale consideration was paid by him, but the same cannot be given preference over the documentary evidence in the shape of PTD (Exh.P3) to which a strong presumption is attached. Neither any agreement to sell nor any mode of payment has been brought on record by defendant No.1 to prove his stance that the disputed property had been actually purchased by him. Even the figure of sale consideration is not mentioned in the written statement nor deposed by defendant No.1 in his statement being D.W.2 against which it was purchased. Even Mst. Mumtaz Begum widow of Niaz Muhammad (D.W.1) could not tell the name of previous owner from whom the suit house was purchased by defendant No.1, whereas Mumtaz Begum (D.W.3) deposed in her cross-examination that the disputed house was purchased in the year 1967-68, but the perusal of Exh.P3 reveals that the disputed house was transferred by the Settlement Authorities in the year 1970 to Muhammad Ismail deceased. Moreover, Abdul Hameed (D.W.4) contradicted the stance of D.W.3 when he deposed in cross-examination that the disputed property had been purchased in the year 1968-69. Furthermore, there is nothing on record to establish that what had persuaded defendant No.1 to transfer the disputed house in favour of his father. Even the original PTD was not produced by defendant No.1 on the record of the suit file. The onus was on defendant No.1 that he was the actual owner, who failed to produce the previous owner as well as any documentary evidence regarding the purchase of the disputed property to prove that sale consideration was paid by him. So the necessary element as enumerated above could not be proved by defendants.

9. The other stance of defendants that the plaintiff along with other legal heirs had surrendered their rights in the disputed house in favour of defendant No.1 could also not be proved. The mere production of copy of affidavit (Exh.D1) on the file is insufficient to hold that through the said affidavit the rights of the plaintiff were transferred or surrendered in favour of defendant No.1. It is an admitted fact that affidavit Exh.D1 was procured by the defendants at the time of sanctioning of site plan and definitely the said document was submitted by the defendants before the Municipal Authorities. Neither the said original affidavit (Exh.D1) was got summoned from the official custody of said Municipal hierarchy nor it was confronted to the plaintiff when he appeared as P.W.1. Though in the cross-examination, it was suggested to the plaintiff that an affidavit was executed by him but on his denial that he did not intend to surrender his rights, it was required under

the law that he should be confronted with the writing of the said affidavit. According to Article 140 of the Qanun-e-Shahadat Order, 1984 which corresponds to Article 145 of the Evidence Act, 1872, such confrontation is mandatory. In Sikandar Hayat and 4 others v. Master Fazal Karim (PLD 1971 SC 730), it was ruled that:-

> "Where a party has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box involves the denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with the specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in section 145, the admission contained in the previous statement cannot be used as legal evidence against that party. Where the statements relied on as admissions are ambiguous or vague, it is obligatory on the party who relies on them to draw in cross-examination the attention of opponent to the said statements before he can be permitted to use them for the purpose of contradicting the evidence on oath of the opponent."

The same view has also been fortified by the apex Court in the judgment reported as Ghulam Rasool through LRs v. Muhammad Shafi and another (2013 SCMR 1501), wherein, it is held that a document can be used against a person if it is confronted to him under Article 145 of the Evidence Act. On the touchstone of such discussion, it can safely be held that the non-confrontation of affidavit (Exh.D1) to the plaintiff while appearing in the witness-box as P.W.1 has damaged the case of the defendants.

10. Admittedly, affidavit (Exh.D1) was not a public document and the same was to be proved in accordance with Article 79 of the Qanun-e-Shahadat, Order 1984. The onus to prove the same was on the defendants. Neither the stamp vendor nor the scribe/notary public/oath commissioner was produced to prove the contents of said affidavit (Exh.D1). It was also not confronted to the plaintiff when he appeared in the witness-box as P.W.1. It is strange that when Ijaz Ahmed P.W/2 appeared, then during his cross-examination the said affidavit was put to him and was got exhibited on the record of the suit in spite of that neither he was the attesting witness nor he was the signatory of the said document. The document was got exhibited as Exh.D1 under Order XIII rule 4 of C.P.C. during the cross-examination of P.W.2. There is no denial with the proposition of law that admittance of document under Order XIII, rule 4, C.P.C. is not binding on the parties and unproved document cannot be regarded as proved merely that it was so admitted in evidence by the Court without any objection. Order XIII, rule 4 of C.P.C. must be strictly complied with. In this view of the matter, when the affidavit (Exh.D1) was not proved under the provisions of Qanun-e-Shahadat Order, 1984, it could not have been made basis for the dismissal of the suit filed by the plaintiff.

Hence, the findings of courts below on the basis of said affidavit (Exh.D1) being not based on correct appreciation of the evidence available on the file cannot be sustained in the eye of law.

11. The argument of learned counsel for the defendants that the document once was got exhibited in evidence without objection by the opposite party, then the said party subsequently cannot challenge its admissibility in the Court is without any substance. It is settled law that a document once brought on record and exhibited, even if no objection was taken from the other side when the document was exhibited, the court was not prevented from adjudicating its nature to ascertain that whether it is valid or not, or whether it is fake or not. The burden was on defendant No.1 to prove his claim that plaintiff had surrendered his rights in the disputed property by executing the affidavit, therefore, the relevant witnesses were required to be summoned by him for proof of affidavit (Exh.D1). It is also well settled principle of law that a party relying on the affidavit must produce the deponent for cross-examination and if the deponent fails to submit to the cross-examination, the affidavit shall lose all its force as a probative piece of evidence and cannot be acted upon. Safe reliance in this respect is placed on the judgment reported as The President -Referring Authority v.. Mr. Justice Shaukat Ali (PLD 1971 Supreme Court 585).

12. In the light of the above said discussion, it is borne out that defendant No.1 badly failed to prove any of the defences set up by him while producing cogent and convincing evidence, but both the courts below without appreciating the evidence available on the file and especially ignoring PTD (Exh.P3) fell in legal error while dismissing the suit of the plaintiff in spite of that he fully proved his case that the disputed property was owned by Muhammad Ismail deceased, predecessor-in-interest of the parties and after his death the same was to be devolved upon his legal heirs according to their respective Shari shares. Hence, the instant civil revision is accepted, the impugned judgments and decrees passed by the courts below are set aside and the suit for declaration and possession through partition filed by Abdul Majeed plaintiff remanded to the learned trial court with a direction to pass preliminary decree after determining legal shares of the joint owners/parties in the suit property. The parties are directed to appear before the learned District Judge, Rawalpindi on 17.4.2015, who will entrust the file of the main suit to a court of competent jurisdiction for further proceedings.

SL/A-46/L
Case remanded.

P L D 2016 Lahore 428
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD RAFIQUE---Petitioner
Versus
NASIR MEHMOOD---Respondent

Civil Revision No.1210 of 2011, decided on 12th March, 2015.

(a) Oaths Act (X of 1873)----

----Ss. 8, 9, 10 & 11----Qanun-e-Shahadat (10 of 1984), Art. 163---Administration of oath---Procedure---Decision on oath---Effect---Principle of approbate and reprobate---Applicability---Plaintiff filed suit for declaration against his son/defendant, which Trial Court dismissed on basis of special oath on Holy Quran administered to defendant as per offer made by plaintiff---Appellate court affirmed judgment and decree of Trial Court---Plaintiff contended that he could not understand the consequences of his offer made to defendant for administration of oath---Validity---Plaintiff had, out of his free will and consent, made the offer for decision of suit on special oath administered to defendant---Special oath, administered under Oaths Act, 1873, was different from the one made on oath provided by Art.163 of Qanun-e-Shahadat, 1984---Plaintiff had not made the offer for administration of special oath as provided under Art.163 of Qanun-e-Shahadat, 1984, rather oath had been administered in the light of his mutual agreement with defendant---Mutual consent was basic theme as provided under Oaths Act, 1873---Court had administered special oath to defendant after he had accepted the offer made by plaintiff---Plaintiff being bound by his offer could not pray for reopening the matter---Plaintiff could not retract from his offer, which had already been acted upon, on the ground that he could not understand consequences thereof-Offer made by plaintiff could not be considered as having been made without his free will and volition, as Trial Court had recorded separate statements of parties for administration of special oath, and said statements were duly signed by parties---Sanctity was attached to judicial proceedings, and it could not be presumed that Trial Court had acted in hasty manner while deciding the suit---Plaintiff, after accomplishment of process in response to the offer made by him, could not resile from his offer---Plaintiff was not obliged to challenge validity of decision of the suit which had been decided on basis of special oath administered by defendant---Decision on basis of oath had more fruits as compared to any other form of decision if oath had been administered in accordance with law---Once offer made by plaintiff had been accepted and acted upon by defendant, he could not wriggle out from the output thereof---Such offer and acceptance would be an agreement of binding nature---Principle of approbate and reprobate was applicable with full force to the present case---No material illegality or irregularity or jurisdictional defect was committed by courts below while passing impugned judgments and decrees to warrant interference by revisional court---Revision petition was dismissed in limine being devoid of any merit.

(b) Oaths Act (X of 1873)---

----Ss. 8, 9, 10 & 11----Decision on basis of oath---Validity---Decision on basis of oath has more fruits as compared to any other form of decision, if oath has been administered in accordance with law---Once offer made by one party has been accepted by the other party and the same is acted upon, the parties cannot wriggle out from output thereof, as such offer and acceptance will be an agreement of binding nature.

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

----Art. 163----Oaths Act (X of 1873), Ss. 8, 9, 10 & 11---Acceptance or denial of claim on oath---Administration of oath---Procedure---Decision on Special oath administered under Oaths Act, 1873 is different from the one made on oath provided by Art.163 of Qanun-e-Shahadat, 1984, under which initiative is to be taken by plaintiff whose first stance is to take oath in support of his lis, whereafter, on his request, court has to call upon the other side to refute said statement of plaintiff on oath---Court is bound to pass any order in the light of said statements of parties---Provision of Art.163 of Qanun-e Shahadat, 1984 and that of Ss. 8, 9, 10 & 11 of Oaths Act, 1873 are opposite to each other.

(d) Judicial proceedings---

----Sanctity---Sanctity was attached to judicial proceedings.

Ch. Ahmad Saifullah Khatana for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing he instant Civil Revision the petitioner has challenged the order dated 10.2.2010 passed by the learned trial court whereby the suit for declaration filed by the petitioner against his real son Nasir Mehmood, respondent on the basis of special oath administered by the respondent as per offer made by the petitioner has been dismissed as well as the judgment and decree dated 7.4.2010 passed by the learned Additional District Judge, Chinot, whereby the appeal filed by the petitioner has also been dismissed.

2. Heard the learned counsel for the petitioner and perused the record

3. A perusal of order sheet maintained by the learned trial court reflects that on 10.2.2010, the petitioner-plaintiff appeared before the learned trial court and made an offer for decision of the suit on the special oath of the respondent-defendant on Holy Quran, which statement was reduced into writing by the learned trial court. The said statement was duly signed by the petitioner/plaintiff on the margin thereof. The respondent/defendant while present in the court along with his counsel in response to the said offer administered special oath on Holy Quran and his statement was also recorded by the learned trial court. In the light of said statements got recorded by both the parties, the learned trial court proceeded to dismiss the suit filed by the petitioner-plaintiff on the same day. From the perusal of the proceedings conducted on 10.2.2010 and reduced into writing by the learned trial court, it can safely be inferred that the offer for decision of the suit on the special oath

administered by the respondent-defendant was duly made by the plaintiff- petitioner out of his free will and consent. In this regard sections 8 to 11 of Oaths Act, 1873 are relevant which are reproduced hereunder:-

> **"8. Power of Court to tender certain oaths.-** If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by persons of the race or persuasion to which he belongs and not repugnant to justice or decency and purporting to affect any third person the Court may, if it thinks fit, notwithstanding person, anything herein-before contained, tender such oath or affirmation to him.
>
> **9. Court may ask party or witness whether he will make oath proposed by opposite Party.-** If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceedings, the court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation.
>
> Provided that no party or witness shall be compelled to attend personally in court solely for the purpose of answering such question.
>
> **10. Administration of Oath if accepted.-**If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it and authorize him to take the evidence of the person to be sworn, or affirmed and return it to the Court.
>
> **11. Evidence conclusive as against person offering to be bound.-**The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

4. The special oath administered under Oaths Act, 1873 is different to the oath provided by Article 163 of Qanun-e-Shahadat Order 1984. For ready reference the said provision is reproduced hereunder:-

> **"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."

The bare perusal of the said provisions of law reflects that an initiative has to be taken by plaintiff who's first stance is to take an oath in support of his lis whereafter on his request the court has to call upon the other side to refute the said statement of

the plaintiff on oath and the Court is bound to pass any order in the light of the said statements of the parties. Both the provisions as discussed supra i.e. Article 163 of Qanun-e-Shahadat Order and Sections 8 to 11 of Oaths Act, 1873 are opposite to each other. In the present case the plaintiff-respondent did not make an offer for administering special oath as provided in Article 163 of Qanun-e-Shahadat Order rather the respondent/defendant administered oath in the light of a mutual agreement of the parties and the said mutual consent is the basic theme as provided in the above referred provisions of Oaths Act 1873. The respondent/defendant after acceptance of the offer made by the petitioner/plaintiff administered special oath and to my mind the petitioner/plaintiff being bound by his words cannot reopen the matter. The mere contention urged by learned counsel that the petitioner-plaintiff could not understand the consequences of the offer so made is no ground to retract from the offer, which has already been acted upon. Even otherwise, the sanctity is attached to the judicial proceedings. The learned trial court recorded separate statements of the parties whereby the petitioner/plaintiff had made an offer to the respondent-defendant for administering special oath regarding the fact which he narrated in his statement, which was duly signed by him and it cannot be considered that such offer was not made by him of his own free will and volition. Thereafter the statement of respondent/defendant was recorded, who on the offer made by the petitioner/plaintiff administered special oath on Holy Quran. The said proceedings must have taken a reasonable time and it cannot be presumed that the learned trial court acted in a hasty manner for decision of the suit filed by the petitioner-plaintiff.

5. The petitioner/plaintiff after accomplishment of the process in response to the offer made by him could not resile therefrom rather he waited for the acceptance of the said offer and it was not only accepted rather in response thereto the respondent/defendant administered the special oath as desired by the petitioner/plaintiff in his statement. Being Muslims our belief should be that the decision of a case on the basis of oath has the more fruits as compared to any other form of decision, if the oath has been administered in accordance with law. Once the offer made by one party has been accepted by the other party and the same is acted upon, they cannot wriggle out from the output thereof as such offer and acceptance would be an agreement of binding nature. The principle of approbate and reprobate would be applicable with full force and according to such princip1e the petitioner/plaintiff is not obliged to challenge the validity of the decision of the suit on the basis of special oath administered by the respondent.

6. The learned counsel for the petitioner has failed to point out any material illegality or irregularity besides any jurisdictional defect to have been committed by the learned courts below in the impugned order/judgment and decree to warrant interferences by this court in the exercise of revisional, jurisdiction. The Civil Revision being devoid of any merit is dismissed in limine.

SL/M-106/L

Petition dismissed.

2016 Y L R 110
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. RIFFAT SULTANA and others---Petitioners
Versus
NADIR HAYAT and others---Respondents

C.R. No.828 of 2005, heard on 12th November, 2014.

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

----Ss. 51 & 54---Qanun-e-Shahadat (10 of 1984), Art. 78---Suit for declaration---"Sale"---Ingredients---Mutation---Burden of proof---Pleadings---Scope---Plaintiff had neither mentioned date for striking of bargain nor witnesses in whose presence oral sale was finalised---Even terms and conditions of bargain were missing from the contents of plaint---Benefit of S. 51 of Transfer of Property Act, 1882 could not be claimed in the absence of requisite formalities being accomplished in the seriatim---Application of S. 51 of Transfer of Property Act, 1882 was not a question of law simpliciter which could be agitated at any stage of proceedings rather factual foundation within the said provisions of law had to be laid at the very inception of the case i.e. the pleadings of the parties---Plaintiff had failed to establish the exact venue, time, date, month, year and the names of the witnesses to show as to where, when and in whose presence the sale transaction was negotiated and finalized between the parties---Fact not asserted in the pleadings could not be proved by producing evidence and even if any evidence was led, the same had to be ignored---No one could be allowed to prove his case beyond the scope of his pleadings---Plaintiff had deviated from his pleadings---Pleadings in the shape of plaint or written statement could not be treated as a piece of evidence unless the same were proved by the production of evidence and adversaries were afforded opportunity to rebut the same through cross-examination of the witnesses and produced the evidence---Mere filing of conceding written statement by one of the defendants containing somersault plea could not be used for the benefit of plaintiff---Revenue officer cancelled the mutation in the common assembly but said order was not challenged by the plaintiff before the higher forum in the revenue hierarchy for a long period---Plaintiff was estopped to directly file suit in the civil court without availing the adequate remedy---Plaintiff had failed to prove the requisite essential ingredients of "sale"---If payment of sale had not been proved on record, there could be no sale in the eye of law---Plaintiff got attested mutation just to deprive the ladies from their property---Mutation per se was not a deed of title but merely indicative of some previous oral transaction of sale---Whenever any right of title had been asserted on the basis of mutation, burden would be on the beneficiary of transaction to prove the valid attestation of the same as well as the original transaction---Plaintiff had failed to prove the basic transaction of alleged sale---Mere admission of putting thumb impression or signatures by any person on some

instrument without proving the contents thereof would not amount to prove its execution---Impugned judgments and decrees were result of misreading and non-reading of evidence on record and suffered from excess of jurisdiction exercised by the courts below---Impugned judgments and decrees passed by both the courts below were set aside and suit was dismissed with costs---Revision was accepted, in circumstances.

Inayat Ali Shah v. Anwar Hussain 1995 MLD 1714; Pir Wali Khan v. Niaz Badshah 2013 MLD 1106; Mir Laiq Khan v. Sarfraz Jehan 2013 MLD 1449; Mst. Ghazala Yasmeen v. Sarfraz Khan Durrani 2013 CLC 1406; Messrs Choudhary Brothers Ltd., Sialkot v. Jaranwala Central Co-operative Bank Ltd., Jaranwala 1968 SCMR 804; Ahmad Ali v. Bashir Ahmed 2013 YLR 1870; Muhammad Akram v. Altaf Ahmad PLD 2003 SC 688; Fida Hussain v. Murid Sakina 2004 SCMR 1043; Muhammad Munir v. Muhammad Saleem 2004 SCMR 1530; Fida Hussain v. Abdul Aziz PLD 2005 SC 343; Muhammad Afzal v. Matloob Hussain PLD 2006 SC 84; Abdul Hameed v. Mst. Aisha Bibi 2007 SCMR 1808 and Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah 2007 SCMR 1884 rel.

Daulat Ali through legal heirs and 2 others v. Ahmad through legal heirs and 2 others PLD 2000 SC 792; Muhammad Nafeez Khan v. Gulbat Khan and others 2012 SCMR 235; Haji Abdul Ghafoor Khan through his L.Rs. v. Ghulam Sadiq through his L.Rs. PLD 2007 SC 433; Ch. Hakim Ali v. Sultan Khan and 3 others 2001 MLD 563; Muhammad Ashiq and 2 others v. Muhammad Aslam and another 2004 CLC 902; Muhammad Amir v. Khan Bahadur and another PLD 1996 SC 267(b); Atiq-ur-Rehman through (Real Father) and another v. Muhammad Amin PLD 2006 SC 309; Abdul Aziz v. Sheikh Fateh Muhammad 2007 SCMR 336; Moulvi Muhammad Azeem v. Alhaj Mehmood Khan Bangish and another 2010 SCMR 817; Muhammad Rashid Ahmed v. Muhammad Siddique PLD 2002 SC 293; Fayyaz Ali Khan and others v. Ashfaq Ali Khan and others 2004 YLR 2868; Sardar Ali v. Abdul Hameed and others 2000 YLR 2851; G.R. Syed v. Muhammad Afzal 2007 SCMR 433 and Zaitoon and others v. Muhammad Akram and others 2003 SCMR 1359 distinguished.

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

s----S. 115---Revisional jurisdiction of High Court---Scope---Revisional jurisdiction of High Court against concurrent findings of fact was limited but such findings could be interfered with if courts below had misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence which had direct bearing on the issue involved.

Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

(c) Pleadings---

----Pleadings in the shape of plaint or written statement could not be treated as a piece of evidence----Fact not asserted in the pleadings could not be proved by producing evidence---No person could be allowed to prove his case beyond the scope of his pleadings.

(d) Mutation---

----Mutation per see was not a deed of title.

Barrister Mian Belal Ahmed, Rashid Mehmood Gill and Mian Shaoor Ahmad for Petitioners.
Malik Noor Muhammad Awan for Respondents.
Date of hearing: 12th November, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This revision petition is directed against the judgment and decree dated 16.12.2000 passed by learned Civil Judge, Jhang, whereby, suit for declaration filed by Nadir Hayat, respondent No.1 (herein after to be referred as plaintiff) was decreed as well as the judgment and decree dated 13.4.2005 delivered by the learned Addl. District Judge, Jhang through which the appeal filed by the present petitioners, namely, Riffat Sultana, Saima Sial, Mrs. Akhtar Sheikh and Nighat Sultana as well as respondents Nos.4, 5 and 6 as well as one Samra Sial-defendants (hereinafter to be referred as petitioners) was dismissed.

2. The brief facts are that the plaintiff filed a declaratory suit before the learned trial court on 9.10.1990 against the petitioners and other respondents-defendants while asserting that subject land measuring 384 Kanals 16 Marlas situated in village Kot Khan Tehsil and District Jhang was owned by Mst. Shamshad Begum, respondent No.2 and Nighat Bokhari, petitioner No.4; that the said respondent No.2 and petitioner No.4 orally sold out the disputed property to him against a consideration of Rs.50,000/- and possession was also handed over to the plaintiff; that Mst. Shamshad Begum respondent No.2 and Nighat Begum, petitioner No.4, duly attested mutation No.426 dated 6.2.1984 (Exh.P-3) in favour of the plaintiff and oral agreement to sell was also acknowledged in his favour; that general attorney of defendant No.2,one of the alleged vendor with mala fide intention and to deprive the plaintiff of his right got cancelled mutation No.426 (Exh.P3) attested in favour of the plaintiff in connivance with the revenue officials and the order for its cancellation was ineffective upon his rights and the defendants were not legally entitled to take back the said property which was duly alienated in favour of the plaintiff and that too after obtaining the sale consideration; that aforesaid Umar

Hayat subsequently in order to further affect the rights of the plaintiff got attested mutation No.601 dated 11.2.89 (Exh.P1) in his own favour and thereafter mutation No.619 (Exh.P4) was got attested in favour of defendants Nos.8 and 9 and both the mutations being based on fraud and illegal were liable to be cancelled, which necessitated the plaintiff filing of the instant suit before the learned trial court. Mst. Shamshad Begum defendant No.1 and Mst. Imtiaz Begum defendant No.7/respondents Nos.2 and 3 herein did not contest the suit by filing their independent conceding written statements before the learned trial court. However, defendants Nos.2 to 6 and 8 to 9 by filing separate written statements contested the said suit with the assertion that when mutation No.426 (Exh.P3) was cancelled on its review, the disputed property was sold out and possession thereof was also handed over to the subsequent transferee. They also denied that any sale transaction had been affected or mutation No.426 (Exh.P3) was got attested in favour of the plaintiff and on having gained knowledge thereof, a representation for its review was moved on their part whereupon the District Collector sanctioned the review vide his order dated 14.11.1987. Thereafter in presence of the plaintiff, the Revenue Officer had cancelled the said mutation on 25.2.1988, but the plaintiff neither assailed the order of District Collector dated 14.11.87 nor filed any appeal against the cancellation of mutation No.426 (Exh.P3) and thereafter consequent transfer of the disputed land was affected, which was in the knowledge of the plaintiff from the very first day. The learned trial court captured the disputed area of facts by framing the following issues:--

(1) Whether the plaintiffs are collusive with defendants Nos.1 and 7?OPD 2 to 6

(2) Whether the suit is not maintainable in its present form? OPD

(3) Whether the plaintiff has no cause of action? OPD

(4) Whether the plaintiff is estopped by his conduct? OPD

(5) Whether the suit is hit by laches? OPD

(6) Whether the suit is not within time? OPD

(7) Whether the description of the suit property is defective, if so, with what effect? OPD

(8) Whether the plaintiff is entitled to get a decree as prayed for? OPP

(9) Relief.

3. Both the parties led evidence in support of their respective pleas before the learned trial court, who after analyzing the same decreed the suit. Being aggrieved, the petitioners preferred an appeal before the learned lower appellate court, which has been dismissed vide judgment and decree mentioned in Para-1 supra. Being dissatisfied, the petitioners have filed the instant civil revision.

4. Learned counsel for the petitioners has argued that plaintiff while practicing fraud got attested mutation No.426 (Exh.P3), which was later on cancelled by the revenue officer after obtaining sanction from the District Collector as per law; that the petitioners had been deprived of their valuable property by practicing fraud by the plaintiff through attestation of mutation No.426 (Exh.P3) and on gaining knowledge, the same was recalled by the revenue officer under the order dated 25.2.1988; that both the attesting witnesses of mutation No.426 (Exh.P3) i.e. Mapal (DW.1) and Muhammad Riaz (DW.8) supported the stance of the petitioners and categorically deposed that no such mutation on the basis of oral sale was attested in favour of the plaintiff in their presence; that Muhammad Nawaz in whose presence mutation No.426 (Exh.P3) was attested in favour of the plaintiff also made a statement as DW.10 and negated the stance of the plaintiff. He has lastly argued that the plaintiff failed to prove the transaction of oral sale independently as well as valid attestation of mutation No.426 (Exh.P3).

5. Conversely, learned counsel for the plaintiff has argued that by producing cogent and convincing evidence not only the transaction of sale was proved rather the attestation of mutation No.426 (Exh.P3) was also established by the plaintiff; that mutation No.426 (Exh.P3) was attested in favour of the plaintiff in the common assembly, which attained the presumption of truth, but the revenue officer without any notice to the plaintiff cancelled the said mutation against law and facts; that concurrent findings recorded by both the courts below are backed up with the material available on record and this Court while exercising its jurisdiction under Section 115 C.P.C. cannot disturb the well-reasoned findings; that when the marginal witnesses namely Mapal (DW.1) and Muhammad Riaz (DW.8) admitted their signatures on mutation No.426 (Exh.P3), then there was left no room to further prove the valid attestation of the same. He has lastly prayed for the dismissal of the instant civil revision.

6. Arguments heard and record perused.

7. The basic case of respondent No.1/plaintiff as embodied in the plaint is that the disputed property was owned by petitioner No.3 and respondent No.2, who had sold the same to him against a consideration of Rs.50,000/- through oral sale, in confirmation whereof mutation No.426 (Exh.P3) was attested in his favour and thereafter the review/cancellation of the said mutation was void, ultra vires and inoperative upon his rights whereafter further transfer of the disputed property vide mutations No.601 dated 11.2.1989 (Exh.P1) and 619 (Exh.P4) dated 24.5.1989

were liable to be cancelled. The perusal of plaint reveals that plaintiff-respondent No.1 had neither mentioned date for striking of bargain nor witnesses in whose presence the oral sale was arrived at between the parties. Even the terms and conditions of the said bargain are missing from the contents of the plaint. In the absence of said requisite formalities being accomplished in the seriatim, no benefit could be attained under S.51 of Transfer of Property Act, 1882. Application of S.51 of Transfer of Property Act, 1882 was not a question of law simpliciter, which could be agitated at any stage of the proceedings, rather the factual foundation within the parameters of S.51 had to be laid at the very inception of the case i.e. the pleadings of the parties so that the right conferred thereby could be legally enforced. No doubt, the plaintiff tried to improve his case by producing oral evidence and through Muhammad Aslam PW.1 and Sher Muhammad PW.2. The perusal of statements of PW.1 and PW.2 reveals that the exact date and the names of the witnesses are also missing and the deposition of the said PWs is lacking to establish the exact venue, time, date, month, year and the names of the witnesses to show that where, when and in whose presence the sale transaction was allegedly negotiated and finalized between the parties. Even otherwise, the deposition of PW.1 and PW.2 that bargain of sale was settled about 9½ years ago at a specific place is a departure from pleadings of the plaintiff. It is well settled principle of law that the fact not asserted in the pleadings cannot be proved by producing evidence and even if an iota of evidence is led, that has to be ignored. Reliance in this respect is placed on the judgments reported as Inayat Ali Shah v. Anwar Hussain (1995 MLD 1714), Pir Wali Khan v. Niaz Badshah (2013 MLD 1106), Mir Laiq Khan v. Sarfraz Jehan (2013 MLD 1449), Mst. Ghazala Yasmeen v. Sarfraz Khan Durrani (2013 CLC 1406) and Messrs Choudhary Brothers Ltd., Sialkot v. Jaranwala Central Co-operative Bank Ltd., Jaranwala (1968 SCMR 804), wherein, it has been held that no person could be allowed to prove his case beyond the scope of his pleadings. The plaintiff produced Muhammad Aslam (PW.1), who stated in his examination-in-chief that the disputed property was purchased by the plaintiff from defendants Nos.1 and 2 against a consideration of Rs.50,000/-, which was received by the alleged vendor at the residence situated in Satellite Town about 9½ years ago and possession thereof was also handed over to the plaintiff. The examination-in-chief of the said PW was got recorded on 26.10.92. He did not mention any specific date and it could not be proved that when and before whom the bargain was struck and the alleged sale consideration was paid. The plaintiff also produced Sher Muhammad PW.2 who deposed that Mst. Shamshad Begum and Mst. Nighat Begum defendants settled the bargain with the plaintiff and Umar Hayat, the attorney of the defendants, received the sale consideration about 9½ years ago at the residence. The said witness also failed to give the exact date to prove that when the bargain of sale was affected. He in contradiction to the statement of PW.1 stated in his deposition that the sale consideration was received by Umar Hayat, whereas PW.1 stated in his examination-in-chief that the sale consideration was received by defendants Nos.1 and 2. PW.2 further admitted in his cross-examination that Muhammad Aslam (PW.1) was an employee of the plaintiff. He also deposed that

in summer vacation at 8/9.00 A.M. the bargain of sale was settled. PW.1 stated in his cross-examination that plaintiff paid the sale consideration to the defendants from pocket of his jacket whereas PW.2 deposed in his cross-examination that the amount was paid by the plaintiff from the pocket of his shirt. He further deposed that the amount was consisting of 100/100 notes comprising of five packets. He also deposed that bargain was not struck when he appeared but only consideration was paid in his presence.

8. The plaintiff produced Jaffar Shah (PW.4), Consolidation Officer, who deposed that he had attested mutation No.426 on 6.2.84 on the attestation of Mapal and Muhammad Riaz, who also identified the vendees. He also stated in his examination-in-chief that on behalf of Mst. Nighat defendant her general attorney namely Umar Hayat appeared. He further deposed that he did not remember that who had appeared on behalf of Mst. Shamshad Begum, defendant before him. During his cross-examination, the said PW deposed that he did not remember that whether original power of attorney of Umar Hayat was produced before him or not. He further admitted that power of attorney was not reflected in his order, wherein neither the presence of Mst. Shamshad Begum was recorded nor anything was mentioned therein regarding the presence of Mst. Shamshad Begum. He also showed his ignorance that the Patwari had entered the name of Mst. Shamshad Begum thereafter. Abdul Rehman was produced by plaintiff/respondent No.1 as PW.5 who deposed that Ch. Ghulam Rasul had entered Rapt No.319 in his Register Roznamcha Waqiati on 7.5.83 regarding the entry of mutation No.426 (Exh.P3). He again stated that Ghulam Rasool Patwari, who by that time died, had entered the mutation and according to the said Rapt, the mutation was entered on behalf of Umar Hayat in favour of Nadir Hayat respondent No.1/plaintiff. He further admitted that signatures of Patwari and Naib Tehsildar were not available against the entry of said Rapt. The plaintiff himself appeared as PW.6 whose deposition is worthwhile and for ready reference an extract from his examination-in-chief is reproduced in verbatim as under:--

PW.6 during the cross-examination further deposed as under:-

9. The above referred portion from the evidence of the plaintiff proves that Umar Hayat Sial had never been shown attorney of respondent No.2 and petitioner No.4 through whom the alleged settlement of sale was struck against a consideration of Rs.50,000/- by him and his alleged appearance before the revenue authorities in relation to the attestation of mutation No.426 (Exh.P3) was of no legal effect. It is also worthwhile that plaintiff failed to produce any copy of power of attorney executed by petitioner No.4 or respondent No.2 in favour of Umar Hayat as mentioned in mutation No.426 (Exh.P3). It is admitted fact that the disputed property was jointly owned by petitioner No.4 and respondent No.2 in equal shares and Umar Hayat Sial the alleged general attorney of petitioner No.4 had alienated the land to the extent of her share and there is no mention about other owner i.e.

Mst. Shamshad Begum, but even then the entire land measuring 384 Kanals 16 Marlas had been allegedly alienated in favour of respondent No.1/plaintiff. It is also proved from the record that the alleged vendors i.e. petitioner No.4 and respondent No.2 had never appeared before the revenue officer for the attestation of the mutation and as such the question of their identification did not arise. It is also borne out from the record that after the review/cancellation of mutation No.426 (Exh.P3), Mst. Shamshad Begum, respondent No.2 had transferred her share to the extent of 192 Kanals 8 Marlas out of the disputed property to Umar Hayat and in this regard, sale mutation No.601 was attested in common assembly by the revenue hierarchy. The perusal of testimony of plaintiff PW.6 also proves that he took a different stand when he deposed that the land in question was purchased through Umar Hayat and bargain was also settled with him on 7.5.1983 at his residence and the entire sale consideration was also paid to him. The said stance of the plaintiff is a clear deviation from his pleadings and both the courts below misinterpreted the contradictory deposition of the plaintiff in this regard too.

10. The arguments of learned counsel for respondent No.1/plaintiff that respondent No.2 had filed a conceding written statement in favour of the plaintiff and admitted the oral sale as well as attestation of mutation No.426 (Exh.P3), is without any substance on the ground that admission made by the maker after transferring his/her share to someone else can be conceived as binding on such person. Although the alleged conceding written statement filed on behalf of respondent No.2 is available on the file, but respondent No.2 neither herself appeared before the learned trial court as witness to prove the contents of her written statement nor the plaintiff in whose favour the said conceding written statement was filed by respondent No.2 got summoned the said lady for the proof of his version. It is settled principle of law that the pleadings in the shape of plaint or written statement cannot be treated as a piece of evidence unless the same are proved by the production of evidence and the adversaries are afforded opportunity to rebut the same through cross-examination of the witnesses and produce the evidence. The contention of the learned counsel for the plaintiff that whenever conceding written statement is filed by the defendant, the same provides a valid proof and no further evidence is required to prove the same might have some force in a case of single defendant, but herein respondent No.2 had filed conceding written statement against the version of her co-defendants in the suit and unless they were afforded opportunity of cross-examination to shatter the credibility of her version, the same could not be treated as a gospel truth. Even otherwise in recognition of the cancellation of mutation No.426 (Ex:P3) from the name of the plaintiff, respondent No.2 had further transferred her share out of the disputed property to Umar Hayat Sial, which was never challenged by her before any forum, therefore, mere filing of conceding written statement by respondent No.2 containing summersault plea cannot be used for the benefit of the plaintiff.

11. The evidence of the plaintiff has been fully rebutted by the petitioners/ defendants by producing Mapal (DW1) and Muhammad Riaz (DW8), the marginal

witnesses of mutation No.426 (Ex.P3), who categorically deposed that no such mutation was attested by the revenue officer in their presence. They further categorically deposed that none out of Mst. Shamshad Begum, respondent No.2, Mst. Nighat petitioner No.4 and Umar Hayat sold the disputed property to the plaintiff. The deposition of both of the attested witnesses of the mutation on which the plaintiff/respondent No.1 has based his claim has falsified the entire story of the plaintiff/respondent No.1. The petitioners-defendants also produced Muhammad Nawaz son of Haji Allah Ditta (DW.10), who deposed that he was the agent of the plaintiff and it was not in his knowledge that any sale was settled in between Nadir Hayat plaintiff, Mst. Shamshad Begum and Mst. Nighat. He further deposed that neither any bargain of sale was settled in his presence nor any consideration was paid before him. He further deposed that possession was also not delivered to the plaintiff before him and no mutation was attested in his presence. The order passed by the revenue officer for attestation of mutation No.426 (Exh.P3) reveals that the plaintiff was not present before the revenue officer rather his agent Muhammad Nawaz (DW.10) was shown to be present at the time of attestation of the said mutation on 6.2.1984. The said DW.10 while appearing as a witness on behalf of petitioners has fully falsified the attestation of mutation (Exh.P3). Umar Hayat Sial, the alleged attorney of Mst. Nighat had died prior to the institution of the suit and on behalf of his legal heirs Nazir Ahmed (DW.9) being attorney appeared before the learned trial court and deposed that he had been serving with Umar Hayat Sial since 1974 to 1981 and thereafter from March 1987 to uptil now. He deposed in his examination-in-chief that defendants Nos.1 and 2 (Mst. Shamshad Begum and Nighat) had never authorized Umar Hayat Sial to alienate their property. He further deposed that no such power of attorney was available in the record of Umar Hayat Sial and that Mst. Nighat was still owner in occupation of her property whereas Mst. Shamshad Begum had alienated her property in favour of Umar Hayat Sial vide mutation No.601 (Exh.D2).

12. The above referred DWs produced by the petitioners have not only fully rebutted the evidence adduced by plaintiff, but the aforementioned DWs could be the best evidence for the plaintiff to prove his stance, but they were never got summoned or attempted to be produced by the plaintiff. Conversely, they were produced by the petitioners, who fully negated the settlement of alleged bargain of sale between the parties and payment of any sale consideration as well as attestation of the disputed mutation No.426.

13. There is yet another aspect of the case that an application for review of mutation No.426 (Exh.P3) was filed and the District Collector vide order dated 14.11.1984 accorded sanction to the revenue officer for the cancellation of the said mutation in pursuance thereof the revenue officer in the common assembly cancelled the said mutation vide his order dated 25.2.1988, the copy of which is available as Exh.D1 and Nadir Hayat Khan plaintiff was also marked present in the said order, but he never challenged the said orders of cancellation of mutation No.426 before the

higher forum in the revenue hierarchy for a long period and was estopped to directly file the suit in the civil court without availing the adequate remedy. It is found that the said review order was competently passed as one of the vendor never appeared at the relevant time whereas general power of attorney allegedly executed by petitioner No.4 in favour of Umar Hayat Sial was never produced even at the time of attestation of mutation as admitted by the attestation officer (PW4) nor the same has been tendered in evidence of this case, which would show that what was the authority conferred thereby on the attorney and whether he had acted accurately in accordance therewith. The non-production of such an important document on the record is also fatal to the case of the plaintiff and the inference has to be drawn against the plaintiff that either the same was non-existent or the authority conferred thereby was not acted in accordance therewith.

14. The above analysis of the evidence available on the file has proved that the plaintiff badly failed to prove the requisite essential ingredients of the sale as per law. If the payment of alleged sale has not been proved on record then there can be no sale in the eyes of law. The entire exercise for attestation of mutation No.426 (Exh.P3) is apparently found to be bogus and frivolous, which was carried out at the behest of the plaintiff just to deprive the ladies from their property. By now it is well settled principle that mutation per se is not a deed of title, but merely an indicative of some previous oral transaction of sale between the parties and keeping in view such principle, whenever any right of title is asserted on the basis of mutation then burden heavily lies on the shoulders of beneficiary of the transaction to prove the valid attestation of the same as well as the original transaction, which he is required to fall back upon. Reliance is placed upon the judgments reported as Ahmad Ali v. Bashir Ahmed (2013 YLR 1870), Muhammad Akram v. Altaf Ahmad (PLD 2003 SC 688), Fida Hussain v. Murid Sakina (2004 SCMR 1043), Muhammad Munir v. Muhammad Saleem (2004 SCMR 1530), Fida Hussain v. Abdul Aziz (PLD 2005 SC 343) and Muhammad Afzal v. Matloob Hussain (PLD 2006 SC 84). In the present case the plaintiff badly failed to prove the basic transaction of alleged sale.

15. The other submission of learned counsel for the plaintiff that Mapal and Muhammad Riaz, the marginal witnesses of mutation (Exh.P3) while appearing as DW1 and DW8 respectively had admitted their thumb impressions on the mutation, therefore, the plaintiff was not required to further prove the transaction as well as the contents of mutation, is without any substance as it has been borne out from their testimony that they had put their signatures on the blank paper before the Patwari for exchange of their property inter se and mere admission of putting thumb impression or signatures by any person on some instrument without proving the contents thereof would not amount to prove its execution in terms of Article 78 of Qanun-e-Shahadat Order 1984. In arriving at this view, I am fortified by the verdict laid down in the landmark judgments reported as Abdul Hameed v. Mst. Aisha Bibi

(2007 SCMR 1808) and Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah (2007 SCMR 1884).

16. At the fag end of his arguments, learned counsel for respondent No.1/plaintiff has argued that concurrent findings recorded by both the courts below cannot be interfered with by this Court while exercising jurisdiction under Section 115 C.P.C., is also without any force. Although, the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under Section 115, C.P.C. if courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such view this court is fortified by the dictum laid down in the judgment reported as Abdul Hakeem v. Habibullah and 11 others (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:--

> "6.Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C. is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C. cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C. if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C. if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record."

This question has also been dealt with by the august Supreme Court of Pakistan in the judgment reported as Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255) while holding that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law and the law alone. So, this court can decide in which cases the interference is warranted.

17. The case law reported as "Daulat Ali through legal heirs and 2 others v. Ahmad through legal heirs and 2 others" (PLD 2000 SC 792), "Muhammad Nafeez Khan v.

Gulbat Khan and others" (2012 SCMR 235), "Haji Abdul Ghafoor Khan through his L.Rs. v. Ghulam Sadiq through his L.Rs." (PLD 2007 SC 433), "Ch. Hakim Ali v. Sultan Khan and 3 others" (2001 MLD 563), "Muhammad Ashiq and 2 others v. Muhammad Aslam and another" (2004 CLC 902), "Muhammad Amir v. Khan Bahadur and another" (PLD 1996 SC 267(b)}, "Atiq-ur-Rehman through (Real Father) and another v. Muhammad Amin" (PLD 2006 SC 309), "Abdul Aziz v. Sheikh Fateh Muhammad" (2007 SCMR 336), "Moulvi Muhammad Azeem v. Alhaj Mehmood Khan Bangish and another" (2010 SCMR 817), "Muhammad Rashid Ahmed v. Muhammad Siddique" (PLD 2002 SC 293), "Fayyaz Ali Khan and others v. Ashfaq Ali Khan and others" (2004 YLR 2868), "Sardar Ali v. Abdul Hameed and others" (2000 YLR 2851), "G.R. Syed v. Muhammad Afzal" (2007 SCMR 433) and "Zaitoon and others v. Muhammad Akram and others" (2003 SCMR 1359) referred to by the learned counsel for the plaintiff being distinguishable cannot be applied to the facts and circumstance of the instant case to maintain the impugned judgments and decrees, which are found to be illegal, unlawful and perverse being the result of misreading and non-reading of the evidence on the record and surely suffered from excess of jurisdictional exercised by the learned courts below, which is exceptionable by this court in the exercise of revisional jurisdiction.

18. Consequently, the instant civil revision is allowed, the impugned judgments and decrees passed by the learned courts below are hereby set aside and the suit filed by the respondent No.1/plaintiff is hereby dismissed with costs.

ZC/R-4/L
Revision allowed.

2016 Y L R 1233
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
FARZAND ALI and others---Petitioners
Versus
BASHIR AHMAD---Respondent

C.R. No.807 of 2005, heard on 16th January, 2015.

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

----S. 42---Transfer of Property Act (IV of 1882), S. 54---Qanun-e-Shahadat (10 of 1984), Arts. 129 (g) & 78---Suit for declaration---Limitation---Sale deed---Proof---Non-appearance of plaintiff in witness box---Effect---Contention of plaintiff was that he was owner in possession of suit land and sale deed in favour of defendant was illegal, void and was result of fraud and misrepresenta-tion---Suit was decreed by the Trial Court but the same was dismissed by the Appellate Court---Validity---Defendant being beneficiary of sale deed had failed to produce the scribe, identifier, Sub-Registrar and one of the marginal witnesses of the same before the Trial Court to prove the valid execution of sale deed---Best evidence had been withheld by the defendant without any justification---Inference under Art. 129 (g) of Qanun-e-Shahadat, 1984 had to be drawn against the defendant---Solitary statement of one marginal witness of sale deed was not sufficient to prove its valid execution---Beneficiary could not succeed to prove his case as pleaded in the written statement in absence of such best evidence---No presumption of truth would attach to the registered document the execution of which had been disputed---Execution of such document had to be proved by production of relevant evidence---Defendant being beneficiary was bound to prove that executant had validly sold out the suit property in terms of disputed sale deed after receiving the entire sale consideration and possession of suit land was delivered to him in pursuance thereof---Defendant being beneficiary should have produced the witnesses in whose presence the bargain of sale was struck and price was paid to the vendor---If payment or the consideration of the alleged sale had not been proved on record, there could be no sale in the eye of law---Whenever any instrument/deed/ document was challenged, the burden would lie on its beneficiary to prove the same as well as original transaction embodied in the said document which he was required to fall back upon---Beneficiary had failed to prove the sale transaction alleged to have been effected between the parties---Plaintiff was an illiterate person and there was no evidence on record that he was aware of the contents of sale deed when he had put his thumb impression thereon---Mere admission of putting thumb impression on the instrument would not amount to prove its execution---Non-appearance of plaintiff in the witness box was not fatal as defendant had failed to prove valid execution of sale deed as well as settlement of transaction by production of relevant witnesses---No limitation would run against fraud---Every new entry in the revenue record on the basis of a forged document would create a fresh cause of action---Impugned judgment and decree passed by the Appellate Court were set aside and that of Trial Court were restored---Revision was accepted in circumstances.

Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Muhammad Akram v. Altaf Ahmad PLD 2003 SC 688; Fida Hussain v. Murad Sakina 2004 SCMR 1043; Fida Hussain v. Abdul Aziz PLD 2005 SC 343; Muhammad Afzal v. Matloob Hussain PLD 2006 SC 84; Mir Ajam Khan v. Mst. Quresha Sultana and others 2006 SCMR 1927; Gul Daraz v. Gul Noor 2010 CLC 1331; Saleem Akhtar v. Nisar Ahmad PLD 2000 Lah. 385; Ahmad Ali v. Bashir Ahmed 2013 YLR 1870 and Abdul Rahim v. Jannatay Bibi 2000 SCMR 346 rel.

(b) Court Fees Act (VII of 1870)---

----Sched. I, Art. 1---Specific Relief Act (I of 1877), Ss. 42 & 39--- Suit for declaration and cancellation of document---Court fee, determination of---Procedure---Plaint as a whole should be looked at in order to determine the court fee payable on the same---Substance of the plaint and not its ostensible form would matter for the purpose of determining the court fee---When a party had sought to establish a title to the property in himself and could not establish that title without removing as obstacle such as deed by which he was otherwise bound, he must get that deed avoided and his suit though camouflaged in a declaratory form must in reality be a suit for cancellation of the document---Plaintiff was alleged to have sold out properties in favour of the defendant and unless sale deed was avoided in toto the plaintiff could not succeed in his suit for cancellation of document---Registered sale deed was an insuperable obstacle in the way of the plaintiff for getting the appropriate relief claimed by him---Suit was put in the form of declaratory relief for avoidance of registered sale deed yet the suit was visibly intended for cancellation of sale deed---Plaintiff was liable to payment of ad valorem court fee on the value of the subject matter in dispute---Plaintiff was directed to affix court fee of Rs. 15,000/- on the instant civil revision and another court fee of Rs. 15,000/- should also be affixed by the plaintiff on the plaint before the Trial Court within a specified period.

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

----S. 54---"Sale"---Ingredients---Essential ingredients of "sale" were the parties; the subject matter; the transfer of conveyance and the price or consideration.

(d) Fraud---

----Limitation---No limitation would run against fraud.

Mehdi Khan Chohan and Tahir Naved Mughal for Petitioners.

Sarfraz Khan Gondal for Respondent.

Date of hearing: 16th January, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing the instant Revision Petition the petitioners have challenged judgment and decree dated 08.4.2005 whereby appeal filed by respondent was accepted and suit for declaration instituted by the predecessor-in-interest of the petitioners was dismissed.

2. The synopsis of the case are that admittedly the disputed property measuring 37-Kanal, 11-Marla fully mentioned in para 1 of the plaint was owned by Farzand Ali, the predecessor-in-interest of the petitioners, who filed a suit for declaration regarding the said property against Bashir Ahmad respondent (now deceased) before the learned trial court on 08.12.1997 with the assertion that he was owner in possession of the suit land as co-sharer and that the impugned sale deed dated 01.06.1988 Ex.P 1 in favour of the respondent/defendant was illegal and void being result of fraud and misrepresentation. The case as set up in the plaint was that the plaintiff was illiterate and the land was given to the respondent/defendant on lease through lease deed (Patta nama), which was duly executed but the respondent/defendant while practicing fraud got executed sale deed, which was also without consideration. The said suit was contested by the respondent/defendant by filing written statement with the assertion that Farzand Ali predecessor-in-interest of the petitioners had sold away the suit land in favour of the respondent through the registered sale deed after receiving the sale price amounting to Rs.2,00,000/- and he had never paid any share of produce to Farzand Ali or to his successors

3. The learned trial court captured the disputed area of facts by framing the following 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 this suit?OPD
3. Whether the plaintiff has not come to the Court with clean hands?OPD
4. Whether the suit is barred by limitation ?OPD
5. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD
6. Whether the suit is Benami, if so, its effect? OPD
7. Whether the suit had incorrectly been valued for the purpose of Court fee, if so, its effect? OPD
8. Whether the suit is false, frivolous and vexatious, if so, its effect? OPD
9. Whether the plaintiff is entitled to a decree for declaration along with permanent injunction, as prayed for? OPP
10. Relief.

4. Both the parties produced evidence in pros and cons and after appreciating the same, the learned trial court decreed the suit vide judgment and decree dated 06.05.2004. Being aggrieved, respondent filed an appeal before the learned lower appellate court, which came up for hearing before the learned Additional District Judge, Daska, who vide impugned judgment and decree accepted the same, set-a-side the judgment and decree passed by learned trial court and dismissed the suit filed by the petitioner, while observing as under:--

"For what has been discussed above, there is mis-reading and non-reading of evidence while deciding the impugned judgment and decree and I, therefore, accept the instant appeal and I set aside the impugned judgment and decree. Resultantly, the suit under appeal filed by the respondents is hereby dismissed with no order as to costs.

Before parting with this judgment it is important to mention here that as I have already observed under issue No.7 that the suit under appeal has incorrectly been valued for the purpose of Court fee and the respondents are now directed to make up the deficiency of court fee amounting to Rs. 15,000. So the appellant who has also not affixed the requisite Court fee on the memorandum of appeal is also directed to make up the said deficiency of court fee. The appellant is directed to pay the court fee amounting to Rs. 15,000/- within a period of I5-days from this judgment, failing which the instant appeal would be deemed to have been dismissed. File be consigned after due completion whereas the record of lower court be sent back forthwith."

5. Being dissatisfied the instant Civil Revision has been filed by the petitioners.

6. Arguments heard, record perused.

7. The perusal of instant file reveals that the respondent/defendant has also filed a Civil Miscellaneous No. 1/12 on 21.03.2012 before this court with the following prayer:--

"It is, therefore, most respectfully prayed that this application may kindly be accepted and the direction may graciously be issued to the petitioner to submit court fee of Rs. 15,000/- along with the above said civil revision and the petitioner be directed to place on record that whether the court fee of Rs.15,000/- has been paid for the civil suit as directed by the additional district judge, while deciding the appeal, in the interest of justice and fair play."

8. Before touching upon the merits of civil revision, I would like to decide the above said civil miscellaneous. It is argued by learned counsel for Bashir Ahmad respondent that the petitioners for all intents and purposes filed a suit for cancellation of sale deed and court fee was required to be affixed on the plaint under residuary Article, Schedule 1, Article 1, Court Fees Act. Conversely, the learned counsel for the present petitioners has argued that where specific relief claimed in a declaratory suit is either surplusage or consequential relief and same being flowed from the origin of declaration claimed in the plaint then the suit does not require affixation of advalorum court fee.

9. The contentions of learned counsel for the parties as well as the case law referred to by them have been considered. In order to determine the proper court-fee

payable on the plaint in a particular suit, the correct principle is that the plaint as a whole should be looked at and that it is the substance of the plaint and not its ostensible form which really matters. The veil could be pierced through by a searching eye for judging the true substance of the plaint to determine the taxability of court-fee on the plaint. There is a difference between a suit for cancellation of a document under section 39 of the Specific Relief Act and a suit for declaration of title filed under section 42 of the Specific Relief Act. When a party had sought to establish a title to the property in himself and could not establish that title without removing an obstacle such as a deed by which he was otherwise bound, then quite clearly he must get that deed avoided and his suit, though camouflaged in a declaratory form must in reality be a suit for cancellation of the document. The plaintiff was alleged to have sold out properties in favour of the defendant-respondent and unless sale deed was avoided in toto, the plaintiff could not succeed in his suit for cancellation of document. Registered sale deed was an insuperable obstacle in the way of the plaintiff for getting the appropriate relief claimed by him. Therefore, though the suit was put in the form of declaratory relief for avoidance of registered sale deed yet the suit was visibly intended for cancellation of the sale deed alleged to be executed by the deceased plaintiff in his lifetime. Therefore, the plaintiff was liable to payment of ad valorem court- fee on the value of the subject matter in dispute under Article 1, Schedule 1 of the Court Fees Act and that valuation was already given in the registered sale deed sought to be avoided in the suit by the plaintiff.

10. On the touch stone of above observation, the above referred C.M. is accepted and the present petitioners are directed to affix Court fee of Rs.15,000/- on the instant civil revision and another Court fee of Rs.15,000/- should also be affixed by the petitioners on their plaint filed by them before the learned trial court on or before 28.02.2015.

11. Now, I advert towards merits of the main case. The copy of disputed original sale deed Ex.D.5 is available at page 72 of the instant file, which reveals that at the time of its execution the same was attested by Muhammad Rafique Lamberdar and Ahmad Ali son of Allah Rakha being marginal witnesses. It is noticed that the defendant/respondent being beneficiary of the said instrument failed to produce the scribe, identifier, Sub-registrar and Muhammad Rafique Lamberdar (one of the marginal witnesses) before the learned trial court to prove the valid execution of the disputed sale deed. In absence of such best evidence it cannot be assumed that the beneficiary had succeeded to prove his case as pleaded in the written statement. The contention of the learned counsel for the respondent that presumption of truth was attached to the registered disputed documents is without any force as where the

execution of a registered document is disputed, no such presumption attaches to it and its valid execution has to be proved by the production of relevant evidence. In arriving at this view I am fortified by the dictum laid down in the judgments reported as Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245) and Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144). The respondent being beneficiary was to prove that executant had validly sold out the suit property in terms of disputed sale deed after receiving the entire sale consideration and the possession of the suit land was delivered to him in pursuance thereof.

12. The defendant/respondent only produced Ahmad Ali DW.3 one of the marginal witness of the disputed sale instrument but surprisingly he stated that no sale consideration was paid in his presence. For ready reference, the relevant extract from his deposition in verbatim is reproduced as under:--

13. It is also significant to observe that no other documentary or oral evidence was produced by the respondent/defendant to prove that any sale consideration was passed to the vendee. The defendant/ respondent appeared before the learned trial court as DW.2 and deposed as under in his cross-examination:--

14. It was incumbent upon the defendant/respondent being beneficiary that he should have produced the witnesses in whose presence the bargain of sale was struck and the price was paid to the alleged vendor. Before dealing with the above referred evidence and arguments of learned counsel for the parties addressed at the bar, it is pertinent to mention the definition of sale provided in section 54 of Transfer of Property Act 1882 as under:-

> "Sale is transfer of ownership in exchange for a price paid or promised or part paid and part promised."

The essential ingredients of the sale are:--

1. the parties;
2. the subject matter;
3. the transfer of conveyance; and
4. the price or consideration.

15. The perusal of same reveals that if payment of the consideration of alleged sale has not been proved on the record, then there can be no sale in the eye of law. The case of the petitioner/plaintiff is that the subject property had been leased out to defendant and no transaction of sale was effected or settled between the parties. To prove the same the petitioner/plaintiff produced Muhammad Rafique Lumberdar PW3 one of the marginal witness of sale deed, who in his examination-in-chief deposed as under:--

16. When the evidence of the parties is put in a juxtaposition to the extent of version of the parties, it is borne out from the same that one of the attesting witness Ahmad All DW.3 categorically stated that no sale consideration was passed in his presence whereas the other marginal witness Muhammad Rafique PW3 categorically stated that transaction of lease was effected between the parties and no sale price was paid by the defendant to the plaintiff. As such the plaintiff fully discharged the onus of issue No. 9 whereas the respondent, who was the beneficiary, could not rebut the same and failed to produce the scribe, identifier and Sub- registrar, who had allegedly executed and attested the disputed sale deed wherein the alleged transaction of sale was incorporated. As the said best evidence was withheld by the respondent/defendant without showing any justification, the inference under Article129(g) of Qanun-e-Shahadat Order, 1984 has to be drawn against the respondent/ defendant. Only the statement of Ahmad Ali DW.3 was not sufficient to declare that respondent/defendant had succeeded to prove the valid execution/attestation of the disputed sale deed. Even otherwise, whenever any instrument/deed/document is challenged then burden heavily lies on the beneficiary of the said document to prove the same as well as original transaction embodied in the said document, which he is required to fall back upon. Reliance can be placed upon "Muhammad Akram v. Altaf Ahmad" (PLD 2003 SC 688), "Fida Hussain v. Murad Sakina" (2004 SCMR 1043), "Fida Hussain v. Abdul Aziz" (PLD 2005 SC 343), "Muhammad Afzal v. Matloob Hussain" (PLD 2006 SC 84). In the case in hand the beneficiary badly failed to prove the sale transaction alleged to have been effected between the parties.

17. The submission of learned counsel for the respondent/defendant that plaintiff admitted his thumb impression over the disputed sale deed and the respondent-defendant was not required to prove the contents of the same is also without substance as it has been borne out from the record that plaintiff was an illiterate person and there is no evidence on the record that he was aware of the contents of sale deed when he had put his thumb impression thereon whereas he took the specific stance that the thumb impression were put under the disguise that it was being executed for the transaction of lease. As such mere admission of putting thumb impression on the instrument would not amount to prove its execution in terms of Article 78 of Qanun-e-Shahadat Order, 1984.

18. The next contention of the learned counsel for the respondent that plaintiff did not appear in person before the learned trial court as his own witness rather he produced Arshad Mehmood PW.1 as his attorney and the inference has to be drawn against the plaintiff, who did not put him in the witness-box for subjecting cross-examination to test the veracity of his version. From the perusal of record it appears

that the statement of PW1 was recorded on 26.09.2001 on the strength of special power of attorney Exh.P. I, which was executed by the plaintiff in favour of PW.1 while assigning reason that on account of old age and sickness, he was unable to appear before the court for pursuing this case. It is also vivid from the record that during the pendency of such suit the plaintiff died and he was succeeded by his legal heirs. The death of the plaintiff affirmed his sickness as well as old-age due to which he could not appear before the learned trial court as his own witness. It is also significant to note that when respondent-defendant being beneficiary failed to prove the valid execution of the disputed sale deed as well as the settlement of transaction by production of the relevant witnesses, then non-appearance of the plaintiff cannot be declared fatal. Reliance in this respect is placed upon the judgment reported as Mir Ajam Khan v. Mst. Quresha Sultana and others (2006 SCMR 1927) and Gul Daraz v. Gul Noor (2010 CLC 1331).

19. At the fag end of the arguments, learned counsel for the defendant-respondent has contended that the suit was filed beyond period of limitation, which is found to be without any force as it has already been observed that the disputed sale deed was a product of fraud and against fraud no limitation runs. It is settled principle of law that every new entry in the revenue record on the basis of a forged document creates a fresh cause of action. Reliance in this respect is placed on the judgments reported as Saleem Akhtar v. Nisar Ahmad (PLD 2000 Lahore 385), Ahmad Ali v. Bashir Ahmed (2013 YLR 1870) and Abdul Rahim v. Jannatay Bibi (2000 SCMR 346). As such the findings of the learned lower appellate court on issue No.4 are also reversed, which is answered against the respondent-defendant.

20. For the forgoing discussion, this civil revision is allowed, the impugned judgment and decree passed by the learned lower appellate court is set aside and that of the learned trial court whereby the suit filed by Farzand Ali, plaintiff/predecessor-in-interest of the petitioners was decreed is restored. However, the petitioners/plaintiffs will affix the court fee of Rs.15,000/- on their plaint and will also affix court fee of the same value on the instant Civil Revision on or before 28.02.2015 as observed in para No.10 of the instant judgment failing which the plaint will deem to be rejected and instant Civil Revision will also deem to be dismissed.

ZC/F-11/L

Revision allowed.

2016 Y L R 2339
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
HASHMAT BIBI---Petitioner
Versus
PROVINCE OF PUNJAB through District Officer Revenue, Vehari and others---Respondents

Civil Revision No. 1087-D of 2006, decided on 6th October, 2015.

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

----S. 19-A---Punjab Board of Revenue Act (XI of 1957), S. 8---Inheritance of allottee of a Co-operative Farming Society---Scope--- By-laws of a Co-operative Society---Review of order by Board of Revenue---Scope---Contention of plaintiffs was that they were entitled for their legal share out of the property (land in question) left by their predecessor-in-interest---Suit was dismissed concurrently---Validity---Suit land was allotted to the predecessor-in-interest of the parties by the Co-operative Farming Society---Defendant was only a nominee of the allottee---Inheritance of allottee of a Co-operative Society would be governed by Shariah Law and not through the by-laws---By-laws of a Co-operative Society or a practice or custom or usage could not override the express provisions of law---No gift had either been claimed or alleged to have been made in favour of defendant---Suit land was to be devolved upon all the legal heirs of the deceased---Member Board of Revenue had reviewed his earlier order without considering the scope and mandate of review while ignoring the grounds of the same---Both the courts below had non-suited the plaintiffs in derogation of law---Impugned judgments and decrees passed by both the courts below were set aside and suit was decreed with cost throughout---Revision was allowed in circumstances.

Muhammad Tufail v. Yaqub and others PLD 1985 Rev. 158(1); Mst. Amtul Habib and others v. Mst. Musarrat Parveen and others PLD 1974 SC 185; Fazal Shah v. Muhammad Din and others 1990 SCMR 868; Manzoor Ahmad v. Mst. Salaman Bibi and others 1998 SCMR 388 and Muhammad Bakhsh v. Mst. Ghulam Fatima through L.Rs. and others 2007 SCMR 1227 rel.

(b) Punjab Board of Revenue Act (XI of 1957)---

----S. 8---Review of order---Grounds---Scope---Review petition could only be entertained when new and important grounds were advanced which could not be brought on record at the time of hearing at early stage or there was error apparent on

the face of record---Error which did not require any extraneous matter to show its incorrectness could be treated as being apparent---Such errors were not demonstrated by any process of close reasoning---Any erroneous view of law on a controversial matter or a wrong exposition of law or a wrong application of law or failure to apply correct law could not be treated as a mistake or error apparent on the face of record---If court applied its mind to a particular fact or law and then came to a wrong conclusion then it could never be assumed that error was one apparent on the face of record---Scope of review was limited---Opportunity of review could not be availed of for re-agitating entire case---Review was not an appeal and same could not be allowed to be treated as an appeal.

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

----S. 115---Revisional jurisdiction of High Court---Scope---High Court had limited revisional jurisdiction to interfere with concurrent findings of facts but such findings could be interfered with if courts below had either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence which had direct bearing on the issue involved and there was violation of law apparent on the face of record.

Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001; Mushtari Khan v. Jehangir Khan 2006 SCMR 1238 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

Mian Mohammad Akram for Petitioner.
Ch. Abdul Ghani for Respondent No.3.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Precisely the facts of the case are that a suit for declaration was filed by the present petitioner and Mst. Sharifan Bibi (plaintiff No.2) with the assertion that they along with other legal heirs of Moosa were also entitled to get their legal share out of the property left by Moosa (deceased) predecessor-in-interest of the petitioner as well as the private respondents/defendants, who was in possession of lot in dispute owned by Government of Punjab as tenant through Co-Operative Farming Society being its regular member, whereas, the conveyance deed dated 13.9.1988 attested in favour of Ali Mohammad respondent/defendant No.3 and order dated 25.1.1999 passed by the Member Board of Revenue pertaining to the suit land were liable to be cancelled/set aside. The said suit was resisted by defendants Nos.1 and 3 by filing their independent written statements. The learned trial court after framing certain issues arising out of the divergent pleadings of the parties invited the parties to produce their evidence in pros and cons and while appreciating the same dismissed the suit filed by the petitioner and Mst. Sharifan Bibi vide judgment and decree

dated 25.2.2005. Feeling dissatisfied, the petitioner as well as Mst. Sharifan Bibi preferred an appeal before the learned lower appellate court, who also dismissed the same vide judgment and decree dated 24.1.2006, hence this civil revision.

2. It is argued by the learned counsel for the petitioner that Moosa (deceased) was the original allottee of the disputed land, who was member of the Society and as soon as he died, the inheritance was to open in favour of all the legal heirs of deceased Moosa within the meaning of section 19-A of the Colonization of Government Lands (Punjab) Act, 1912; that subsequent transfer of land by the revenue hierarchy or the Co-operative Farming Society in favour of single heir/defendant/ respondent No. 3 by attestation of conveyance deed was result of fraud and misrepresentation and was rightly annulled by the Member Board of Revenue vide his earlier order dated 1.6.1995, but the same was erroneously reviewed vide order dated 25.1.1999, which is liable to be set at naught. He has lastly prayed for the acceptance of the instant civil revision, setting aside of the impugned judgments and decrees passed by the learned courts below and that the suit filed by the petitioner be decreed.

3. Conversely, learned counsel for the respondent/defendant No.3 has supported the impugned judgments and decrees passed by both the learned courts below while refuting the arguments advanced by the learned counsel for the petitioner and submitted that during the meeting of General House of the Co-operative Farming Society, the membership of defendant No.3 was approved without objections from either side and since defendant No.3 was the contributory of membership fee as well as other revenues of the Society pertaining to the lot in dispute, hence, the conveyance deed was rightly sanctioned in his favour against his own rights; that defendant No.3 deposited the required amount for the conferment of proprietary rights, but even then no body objected to the conferment of the proprietary rights and the sanctioning of conveyance deed in his favour; that land was never allotted to Moosa and the same was granted by the society to defendant No.3 as an independent member and that both the learned courts below while considering the said aspect of the case eminently dismissed the suit filed by the petitioner. He has lastly prayed for the dismissal of the instant civil revision.

4. Arguments heard. Record perused.

5. As per divergent pleadings of the parties the bone of contention emerges whether the disputed property was originally allotted to Moosa or it was independently allotted to Ali Mohammad, defendant No. 3 and whether Member Board of Revenue could review his order. The petitioners/plaintiffs by tendering copy of Register of Membership of the Society (Ex:P1) tried to prove that Moosa acquired membership of the society on 18.6.1949. By producing copy of Register Taqseem (Ex:P2) the petitioner also succeeded to prove that the suit land was allotted to Moosa by the Society on 18.6.1949. As per contents of Ex:P1, Ali Mohammad defendant No.3 was only a nominee on behalf of the allottee in the concerned Register maintained by the Society. No doubt Mohammad Din Manager of the Society entered into the witness box as DW4 and by tendering documents of membership and allotment executed by the Society in favour of defendant No.3

(Ex:Dl to Ex:D4) deposed that copy of 'Register Taqseem Arazi' (Ex:P2) in favour of Moosa tendered by the petitioners/plaintiffs is fictitious and forged but the perusal of cross-examination of the said witness (DW4) reveals that the record of the Society which he brought along with him regarding the allotment was full of overwriting and cutting. The learned trial court at a subsequent stage of proceeding summoned the said record and also scanned the same which brought this court to the conclusion that the statement of DW4 as well as the record maintained by the Society is not trustworthy. The above noted controversy could be unfolded by the learned courts below if the other admitted documents available on the record were examined. The perusal of copy of review petition No.263/1995 (Ex:P4) filed by respondent/defendant No.3 before the Member (Colonies) Board of Revenue, Punjab, Lahore, reveals that in first 4 lines of para 4 the respondent/defendant No.3 claimed himself to be the nominee of original allottee. The said acknowledgment of respondent/defendant No.3 is reproduced in verbatim as under:-

> "That Musa son of Ilyas was admitted as regular member of the Co-operative Farming Society, Chak No.309-EB on 18.4.1949. The respondent is son of Ali Muhammad was accepted as nominee after his death on 30.11.1953."

Even before the Member Board of Revenue, the learned counsel for respondent/defendant No.3 reiterated the same stance as was pleaded in the memo of appeal, which finds mentioned in the order dated 25.01.1999 (Ex.P/5) passed by said authority and is reproduced as under:-

> "He referred to the decision of the learned Member Colonies) dated 23.7.1998 in ROR No.2089/1995, where the nominee of the allottee was allowed to retain the land."

So the said stance of respondent/defendant No.3 which he had already taken before the revenue hierarchy where he had already admitted that property was allotted to Moosa and he being nominee was entitled to retain the same. These admitted documents, which were prepared on behalf of defendant/respondent No.3 cannot be withdrawn by him in the second round of litigation. During the course of arguments when these relevant documents were confronted to Ch. Abdul Ghani, Advocate learned counsel for respondent No.3, he could not respond reasonably and submitted that if for the sake of argument the membership and allotment of Moosa is admitted, even then, respondent/defendant No.3 being nominee of original allottee was entitled for the transfer of the land in his favour. The said stance of the learned counsel is not tenable and against the mandate of section 19-A of the Colonization of Government Lands (Punjab) Act, 1912. For ready reference, the said provision is reproduced hereunder:-

> **[19-A.Succession to the tenancy.**

When after the coming into force of the Colonization of Government Lands (Punjab) (Amendment) Act, 1951, any Muslim tenant dies, succession to the tenancy shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat), and nothing contained in sections 20 to 23 of this Act shall be applicable to his case:

Provided that when the tenancy rights are held by a female as a limited owner under this Act, succession shall open out on the termination of her limited interest to all persons who would have been entitled to inherit the property at the time of the death of the last full owner had the Muslim Personal Law (Shariat) been applicable at the time of such death, and in the event of the death of any of such persons before the termination of the limited interest mentioned above, succession shall devolve on his heirs and successors existing at the time of the termination of the limited interest of the female as if the aforesaid such person had died at the termination of the limited interest of the female and had been governed by the Muslim Personal Law (Shariat):

Provided further that the share, which the female limited owner would have inherited had the Muslim Personal Law (Shariat) been applicable at the time of the death of the last full owner shall devolve on her if she loses her limited interest in the property on account of her marriage or remarriage and on her heirs under the Muslim Personal Law (Shariat) if her limited interest terminates because of her death].

6. The inheritance of allottee of a Co-operative Farming Society is governed by Shariat Laws and not through the bye-laws. An identical question has already been clinched by the apex revenue hierarchy in a case reported as "Muhammad Tufail v. Yaqub etc." (PLD 1985 Rev. 158(1)), wherein, it was observed that the bye-laws of Co-operative Farming Society could not supersede the law of Shariat and all the legal heirs were entitled to get their share in the legacy of allottee of Co¬operative Farming Society. The bare reading of Section 19-A of the Colonization of Government Lands (Punjab) Act, 1912 (added in 1951) leaves no room that the succession lo the tenancy of a Muslim tenant shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat). Section 2 of the Muslim Personal Law (Shariat) Application Act, 1948 also lays down that in all questions regarding succession, rule of decision shall be the Muslim Personal Law (Shariat) in case the parties are Muslims. These provisions of the law are very clear and there is no ambiguity about it and any order, which contravenes the provisions of this law cannot be sustained. It has, inter alia, been held by the Supreme Court of Pakistan in Civil Appeal No. 139 of 1987, titled as Mst. Aisha, etc. v. Member (Colonies), Board of Revenue, Punjab and others decided on 21.11.1990 that the statute i.e. section 19-A of the Colonization of Government Lands Act has to prevail over any bye-law of a Society. It was similarly held in the judgment reported as (PLD 1974 SC 185) by the apex court that :-

> "Unless a nomination can amount to a valid gift inter vivos, it cannot pass title to the nominee in respect of immovable property, nor can the making of a nomination give the right to the nominator at his own choice to change the law of succession, which would otherwise be applicable in the case of his death. Obviously, the nomination cannot operate as a valid gift under the Muhammadan Law, because, such a gift in order to confer title on the donee, must be accompanied by delivery of possession of the property gifted."

There is, thus, no doubt that the bye-laws of a Society or a practice or custom or usage cannot override the express provisions of the law. No such gift was either claimed or alleged to have been made in favour of the respondent/defendant No.3. It has also been held in the judgment reported as "Fazal Shah v. Muhammad Din and others" (1990 SCMR 868) that nomination by a member of Co-operative Society does not operate either as a gift or as a will and, thus, could not deprive the other heirs, who might be entitled thereto, under the law of succession applicable to the deceased. This view has also been laid down in the judgment reported as "Mst. Amtul Habib and others v. Mst. Musarrat Parveen and others" (PLD 1974 SC 185) wherein while interpreting section 27 of the Co-operative Societies Act, 1915, it has been observed as under:-

> "We are of the opinion, however, that the correct view has been taken in the cases referred to earlier, namely, that the nomination merely confers a right to collect the money or to "receive the money". It does not operate either as a gift or as a will and, therefore, cannot deprive the heirs of the nominator who may be entitled thereto under the law of succession applicable to the deceased. The nominee thus collects as a trustee for the benefit of all persons entitled to inherit from the decease employee. It is not without significance that section 5 of the Provident Funds Act neither vests the amount in the nominee nor declares him to be the owner thereof. It merely gives him the exclusive right to receive the amount and nothing more. In any event the position under section 27 of the Bombay Co-operative Societies Act is different because the wording of this section is materially different. There is no analogy between the two.

7. This view has further been affirmed by the apex Court in the judgments reported as "Manzoor Ahmad v. Mst. Salaman Bibi and others" (1998 SCMR 388) and "Muhammad Bakhsh v. Mst. Ghulam Fatima through L.Rs. and others" (2007 SCMR 1227). So when it is proved that the disputed property had originally been allotted to Moosa, predecessor-in-interest of the parties, the same was to be devolved upon his all legal heirs. The stance of learned counsel for respondent/defendant No.3 that the disputed property had been independently allotted to the respondent/defendant No.3 is misconceived.

8. The other backdrop of the case is that after the death of Moosa when the membership of the society and allotment of the property was transferred to

respondent/ defendant No.3, a complaint was moved by the petitioner/plaintiff against the said transfer, the matter went upto the apex Court of revenue hierarchy, who vide order dated 1.6.1995 (Ex:P3) set aside the Conveyance Deed executed in favour of respondent/defendant No.3 and declared that the disputed property should be devolved upon all the legal heirs of Moosa deceased, the original allottee but thereafter vide order dated 25.1.1999 (Ex:P5) the Member Board of Revenue while accepting review application filed by respondent/ defendant No.3 recalled his earlier order, which was also impugned by the petitioner/plaintiff in her suit. There is no other cavil that a review petition can only be entertained when new and important grounds are advanced which could not be brought on the record at the time of hearing at earlier stage or there is error apparent on face of record. Some illustrations may be given as to what have been taken to be erroneous apparent on the face of the record. An error which does not require any extraneous matter to show its incorrectness can be treated as being apparent. Such errors are not demonstrated by any process of close reasoning. Any erroneous view of law on a controversial matter, or a wrong exposition of law, or a wrong application of law, or failure to apply correct law has never been treated as a mistake or error apparent on the face of record. If the court applies its mind to a particular fact or law and then comes to a wrong conclusion after conscious reasoning, it can never be assumed that the error is one apparent on the face of record and can be corrected by means of a review. It cannot be converted into instrument of harassment of parties. The scope of review is quite limited and opportunity cannot be availed of for reagitating entire case and this power cannot be exercised to undertake re¬examination of matters of fact or re-exposition of law. It is only available in certain special circumstances as provided in Section 8 of the West Pakistan Board of Revenue Act, 1957. The ground that the court has fallen into error in deciding on a particular question, or that a new ground which could have been urged at the original hearing, is not a ground for review, for, a review is not an appeal and cannot be allowed to be treated as an appeal. Any matter which if is disputed and requires an elaborate inquiry for determination cannot possibly be described as a patent fact justifying a review of an opinion already formed. The Member Board of Revenue without considering the scope and mandate of review while ignoring the grounds of review and submissions of the learned counsel for respondent/defendant No 3 (as referred in para No.5) reviewed his earlier order dated 1.6.1995 (Ex:P3). Both the courts below in derogation of the law declared by the superior Courts on the subject and while twisting the material on the record erred in law in non-suiting the plaintiff through the impugned judgments and decrees, which cannot be sustained in the eye of law.

9. At the fag end of his arguments, learned counsel for the petitioner has argued that concurrent findings recorded by both the courts below cannot be interfered with by this Court while exercising jurisdiction under section 115, C.P.C., is also without any force. Although, the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under section 115, C.P.C. if courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some

important piece of evidence, which had direct bearing on the issue involved. In arriving at such view this court is fortified by the dictum laid down in the judgment reported as "Abdul Hakeem v. Habibullah and 11 others" (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:-

> "6. Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C. is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C. cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C. if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C. if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record."

This question has also been dealt with by the august Supreme Court of Pakistan in the judgments reported as "Ghulam Muhammad and 3 others v. Ghulam Ali" (2004 SCMR 1001), "Mushtari Khan v. Jehangir Khan" (2006 SCMR 1238) and "Muhammad Anwar and others v. Mst. Ilyas Begum and others" (PLD 2013 SC 255) while holding that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law and the law alone. So, when there is gross misreading and non-reading of evidence and patent violation of the law apparent on the face of record the revisional court/High Court is under legal obligation to rectify the error by interference in such illegal findings.

11. On the touchstone of the above discussion, the instant civil revision is accepted, impugned judgments and decrees passed by both the learned courts below are hereby set aside and the suit filed by the plaintiff is hereby decreed with cost throughout.

ZC/H-33/L

Revision allowed.

2016 Y L R 2711

[Lahore]

Before Ch. Muhammad Masood Jahangir, J

ZAFAR HAYAT---Petitioner

Versus

Mst. JASEEMA YASMEEN---Respondent

C.R. No.455 of 2008, heard on 5th November, 2015.

(a) Punjab Pre-emption Act (IX of 1991)---

----S.13---Talb-i-Ishhad, performance of---Scope---Pre-emptor was not only bound to prove that he dispatched notice of Talb-i-Ishhad to the vendee but also to establish that the said notice was delivered to the addressee---Pre-emptor had committed negligence by drafting notice of Talb-i-Ishhad against a wrong name---Plaintiff had failed to prove that said notice was delivered to the vendee which was requirement of law---Findings recorded by the Appellate Court decreeing the suit were not sustainable---Impugned judgment and decree passed by the Appellate Court were set aside and suit was dismissed---Revision was allowed in circumstances.

Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Sultan Ali v. Ghulam Hussain 2012 YLR 2545; Rabia Bibi and another v. Jahana through L.Rs. 2013 YLR 2016; Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866; Zabiullah and others v. Awal Khan 2014 CLC 976 and Khan Afsar v. Afsar Khan and others 2015 SCMR 311 rel.

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

----O. XLI, R. 22---Non-filing of cross-objection or cross-appeal---Effect---Party while supporting impugned judgment could assail findings on the issues which were decided by the courts below against him without filing cross-appeal or cross-objections through his oral assertion.

Muhammad Yar and others v. Allah Wasaya and others 2013 YLR 1013; Suba and others v. Abdul Aziz and others 2008 SCMR 332 and Ghulam Rasool through L.Rs. and others v. Muhammad Hussain and others PLD 2011 SC 119 rel.

(c) Registration Act (XVI of 1908)---

----S. 17---Registered document---Scope---Registered document had presumption of truth over a private document.

(d) Registration Act (XVI of 1908)--

----S. 60---Certificate of registration---Scope---Presumption attached to the certificate of registration could not be rebutted by the beneficiary of document by production of agreement or sale receipt.

(e) Pleadings---

---Party had to first plead facts and pleas in the pleadings and then to prove the same through evidence---No one could be allowed to improve its case beyond what was originally set up in the pleadings---Evidence led by a party beyond its pleadings should be ignored.

Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965 and Haider Ali Bhimji v. Vth Additional District Judge, Karachi (Sourth) and another 2012 SCMR 254 rel.

(f) Pleadings---

----Plaint and written statement could not be treated as a piece of evidence.

Hakim-ud-Din through L.Rs. and others v. Faiz Bakhsh and others 2007 SCMR 870 and Muhammad Iqbal v. Ali Sher 2008 SCMR 1682 rel.

Ch. Khurseed Ahmad for Petitioner.
Hafiz Khalil Ahmad for Respondent.
Date of hearing: 5th November, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Through this civil revision, the judgment and decree dated 02.04.2008 of the learned lower appellate court rendered in Civil Appeal No. 314/ 2007 has been assailed. The said appeal was filed against the judgment and decree dated 13.01.2007 passed by the learned trial court whereby the suit for possession through pre-emption filed by the respondent/pre-emptor was dismissed.

2. Briefly, the facts are that the respondent/pre-emptor filed a suit for possession through pre-emption in respect of Shop No. 3-S-41/P situated in Block No. 11, Sargodha, alleged to have been purchased by the petitioner/vendee vide sale deed No. 507-1 dated 06.02.2003 with the assertion in the plaint that the said sale

was kept secret and she immediately expressed her intention of pre-emption by proclaiming Talb-i-Muwathibat on 14.03.2003 at 11:00 a.m. in the Majlis consisting upon Jamil Ahmad, Abdul Haq and Abdul Ghaffar on having received information from Muhammad Usman, which was followed by issuance of a notice dated 17.03.2003 to the petitioner/vendee in the discharge of requisite Talb-i-Ishhad through registered post acknowledgement due, which was received by the vendee, but as it was not acted upon, the suit was filed. The same was contested by the petitioner/ vendee by filing written statement with the assertion that neither the respondent/pre-emptor possessed superior right of pre-emption nor due Talbs were performed as per law and specially that notice Talb-i-Ishhad was not dispatched to him. The learned trial court captured the disputed area of facts by framing the following issues:--

1. Whether plaintiff has no cause of action and locus-standi to file the instant suit? OPD

2. Whether suit is time barred? OPD

3. Whether suit has been filed with malice, therefore, the defendant is entitled to get special costs under section 35-A of C.P.C.? OPD

4. Whether defendant is entitled to receive incidental charges and expenses of improvement, if the suit of the plaintiff is decreed? OPD

5. Whether plaintiff was aware of the disputed sale since beginning? OPD

6. Whether the consideration amount has been fixed at Rs.16,00,000/- and actual paid? OPD

7. If the above issue is decided in negative then what is the actual sale price of suit property at the time of sale? OP-parties.

8. Whether the plaintiff has superior right of pre-emption qua the defendant/vendee?OPP

9. Whether the requisite talks have been fulfilled in accordance with law? OPP

10. Whether the plaintiff is entitled to a decree for possession through pre-emption of the suit property? OPP

11 Relief.

3. The pre-emptor to prove her stance produced Muhammad Arshad, Booking Clerk of the post office as PW/1, Abdul Waheed, Postman as PW/2, Muhammad Hanif, Advocate scribe of notice talb-i-Ishhad as PW/3, Muhammad Usman, the alleged informer as PW/5, Jamil Ahmad, the alleged participant of Majlis as PW/6, Manzoor Ahmad, Patwari as PW/7 and she herself appeared as PW/4. Besides the oral evidence, the respondent/pre-emptor also produced documentary evidence ranging from Ex.P/1 to Ex.P/7. In response, the petitioner/vendee also produced DW/1 to DW/5 and also tendered documentary evidence ranging from Ex.D/1 to Ex.D/9. The learned trial court after thrashing the entire material available on record dismissed the suit filed by the pre-emptor vide judgment and decree dated 13.01.2007 while answering issues Nos. 8 and 9 in negative against the respondent/pre-emptor. Being aggrieved, an appeal was preferred by the respondent/pre-emptor before the learned lower appellate court, which was allowed and after setting aside the judgment and decree of the learned trial court, the suit for pre-emption was decreed while enhancing market price of the property in dispute from Rs.2,25,000/- to Rs.16,00,000/- vide judgment and decree referred in para 1 ante.

4. Ch. Khursheed Ahmad, Advocate, learned counsel for the petitioner/vendee has argued that the respondent/pre-emptor failed to prove her preferential right being Shafi-shareek, but the learned lower appellate court, while misinterpreting available evidence on the record wrongly answered issue No.8 in her favour; that the findings on issue No.9 relating to performance of talbs are result of complete misreading and non-reading of evidence on the record, which being not sustainable are liable to be reversed; that sending of notice Talb-i-Ishhad could not be duly proved as name of the petitioner/vendee was wrongly written on the envelope and the same was never proved to be received by the petitioner/vendee; that the perusal of statement of postman (PW-2) reflects that notice Talb-i-Ishhad was dispatched to one Zafaryab, but neither the same was delivered to Zafaryab or the petitioner namely Zafar Hayat nor acknowledgment due receipt (Ex.P/2) contained signatures of the recipient; rather signatures of some unknown persons are available on the same and respondent/pre-emptor failed to prove that notice talb-i-Ishhad was actually received by the petitioner/vendee, and that the petitioner in his statement categorically denied receiving of said notice, but learned lower appellate court erred

in law while answering issue No.9 in favour of respondent/pre-emptor. He has lastly prayed for acceptance of the instant civil revision, setting aside of the impugned judgment and decree passed by the learned lower appellate court and suit be dismissed while restoration of the judgment and decree delivered by the learned trial court.

5. On the other hand, no doubt Mian Shah Abbas, Advocate one of the counsel for respondent/pre-emptor has sent a written request for adjournment on account of his pre-occupation before the apex Court, whereas Hafiz Khalil Ahmad, Senior Advocate, who is also learned counsel for the respondent/pre-emptor has put his appearance and on instructions has argued the case. He has supported the impugned judgment and decree passed by learned lower appellate court and submitted that by production of concerned Patwari (PW/7), the preferential right being Shafi-shareek has fully been proved by the respondent/pre-emptor; that no doubt, notice Talb-i-Ishhad was inadvertently dispatched to one Zafaryab and initially suit was also filed in his name but thereafter an application under Order VI, Rule 17 of the Code of Civil Procedure, 1908 filed by the respondent/pre-emptor was allowed and the correct name of the petitioner/vendee was mentioned in the amended memo of the plaint by the respondent/pre-emptor and if any lacuna was available, that was cured by the leave of the Court. The learned counsel for the respondent/pre-emptor has urged that the pre-emptor also filed cross-objections regarding the findings on issues Nos. 6 and 7, but neither the cross-objections are available with the file nor any diary number could be disclosed by the learned counsel for the respondent/pre-emptor but even then the findings of learned lower appellate court regarding enhancement of sale price were questioned by the learned counsel for the respondent/pre-emptor during the course of his arguments. He has lastly prayed for setting aside of findings of issues Nos.6 and 7 while maintaining the rest of the judgment and decree passed by the learned lower appellate court and dismissing the instant civil revision.

6. Arguments heard and minutely perused the record.

7. This court is very much clear on the point that a party while supporting impugned judgment can assail the findings on the issues, which were decided by the learned courts below against him without filing cross appeal or cross-objections through his oral assertion. This view finds support from the dictum laid down by the superior courts in the judgments reported as "Muhammad Yar and others v. Allah Wasaya and others" (2013 YLR 1013), "Suba and others v. Abdul Aziz and others" (2008 SCMR 332), "Ghulam Rasool through L.Rs. and others v. Muhammad

Hussain and others" (PLD 2011 Supreme Court 119). In Suba's case (supra), it was observed in para No.5 of the judgment as under:--

> "It is clear from the judgment dated 28-1-1999 passed by the Additional District Judge, Jampur, that the petitioners were precluded from addressing arguments as to the correctness of the finding of the trial Court on other issues including Issue No.4 merely on the ground that they had not filed any cross-objections or cross-appeal in the case. The course adopted by the Additional District Judge was violative of the provisions of Order XLI, Rule 22, C.P.C. and the judgment by a Full Bench of this Court in the case of Abdul Haque and others v. Shaukat Ali and 2 others 2003 SCMR 74, authored by one of us (Faqir Muhammad Khokhar, J.). It was held therein that a party in whose favour a decree was passed, was not necessarily required to file an appeal or cross-objection as it could defend the decree on all the available grounds in support of the decree in appeal as provided by Order XLI, Rule 22, C.P.C., even though such grounds had been found against it. In Province of Punjab through Collector, Rajanpur District and 2 others v. Muhammad Akram and 2 others 1998 SCMR 2306 this Court had taken the view that where a respondent had neither preferred a petition nor filed an appeal, the Court had ample authority and full powers to extend relief to him provided that it was necessary either to do complete justice between the parties or the case otherwise involved invocation of Court's inherent powers. Beneficial provisions of Order XLI of Rule 23, C.P.C. could also be invoked to do complete justice or to prevent the ends of justice from being defeated and to adjust the rights of the parties in accordance with justice, equity and good consciences as laid down in the case of Salah-ud-Din Butt and others v. Punjab Service Tribunal and others PLD 1989 SC 597.

8. It is significant to note that learned trial court without discussing any evidence available on the suit file declared issues Nos. 6 and 7 regarding sale price being redundant. However, learned lower appellate court after appreciating the material available on record decided the same against the respondent/pre-emptor while fixing the sale price of the suit property as Rs.16,00,000/-. The perusal of sale deed (Ex.P/4) by virtue of which disputed property was purchased by the petitioner/vendee reflects that it was attested against a sale consideration of Rs.2,25,000/- and the petitioner/vendee in his written statement without giving any detail asserted that the disputed property was purchased against a sale consideration of Rs.16,00,000/-. No doubt, to prove the said assertion, the petitioner produced

copy of agreement dated 06.10.2002 (EX.D/1) coupled with receipts dated 06.10.2002 and 04.02.2003 (Ex.D-2 and 3) besides Muhammad Sarwar, Stamp Vendor/deed writer (DW-1), Nabi Bukhsh (DW-2), attesting witness of Ex.D-1 to Ex.D-3, Muhammad Shafique (DW-3) the other attesting witness of Ex.D/1 and Ex.D/2, Muhammad Inayat (DW-4), attesting witness of receipt (Ex.D-3) whereas the petitioner himself appeared as DW-5, but neither the detail of the agreement (Ex.D/1) as well as receipts (Ex.D/2 and 0/3) was mentioned in the body of the written statement nor any such case was developed by the petitioner/vendee. It is settled law that a party has to first plead facts and pleas in the pleadings and then to prove the same through evidence. A party is not allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of "secundum allegata et probata" that a fact has to be alleged by a party before it is allowed to be proved is fully applicable in this case, which has full command of provisions of Order VI Rule 2 and Order VIII Rule 2 of the Civil Procedure Code, 1908. As such any evidence led by a party beyond the scope of its pleadings is liable to be ignored. Reliance can be placed upon the dicta laid down in the case law reported as Muhammad Wali Khan and another v. Gul Sarwar Khan and another (PLD 2010 SC 965) and Haider Ali Bhimji v. Vth Additional District Judge, Karachi (South) and another (2012 SCMR 254), wherein it was held that in absence of specific pleadings, the court could not allow a party to grope around and draw remote inferences in his favour from his vague expressions. The perusal of receipts (Ex.D-2 and D-3) reveals that some of the amount out of the total consideration was allegedly paid by the petitioner/vendee through cheques, but to prove the said factum, no official from the concerned bank was got summoned by the petitioner/vendee and in absence of such evidence, it cannot be assumed that property in dispute had in fact been purchased against the consideration mentioned in agreement (Ex.D-1). Even otherwise, a registered document i.e. sale deed (Ex.P-4) attains presumption of truth over a private document. The presumption attached to the certificate of Sub-Registrar under section 60 of the Registration Act, 1908 could not be rebutted by the beneficiary of the document by production of agreement and sale receipts. It is settled principle of law that the price mentioned in disputed sale deed is always given preference over the contrary assertions. The petitioner/vendee had himself got executed and attested sale deed (Ex.P/4) against a consideration of Rs.2,25,000/- and if the same was got attested to save the public exchequer, then his other stance cannot be considered. If he could play fraud or misrepresentation against the government functionary to save the duties/fees, then on the same analogy, he could have also made fictitious document regarding the exorbitant sale price of the disputed property after having received knowledge that

the suit for pre-emption was filed. So the findings of the learned lower appellate court on issues Nos. 6 and 7 are reversed and sale price of the disputed property is fixed @ Rs.2,25,000, which was mentioned in the sale deed.

9. From the perusal of sale deed (Ex.P/4), it reveals that part of disputed property i.e. shop bearing Khawat No. 25, Khatooni No. 25 and khasra No. 83 was sold out to Zafar Hayat, petitioner/vendee and as per statement of Manzoor Ahmad, Patwari (PW-7), the respondent/pre-emptor is also owner in the same khawat and khasra number by means of mutation No. 24397 dated 21.01.1986 (Ex.P/8). This factum has also been proved through copy of Register Haqdaran-e-Zameen for the year 1998-99 (Ex.P/6). So the findings of learned lower appellate court to the extent of issue No.8 are affirmed.

10. The pivotal question in the instant case is covered by issue No. 9 regarding the fulfillment of talbs. No doubt, respondent/pre-emptor by producing Muhammad Usman, the informer as (PW/5) and Jameel Ahmad, the participants of Majlis as (PW-6) and by appearing herself as (PW-4) fully proved the performance of talb-i-Muwathibat as narrated in the plaint although some minor discrepancies are visible in the statements of the said PWs, but the same cannot be declared fatal regarding the fulfillment of first demand. So, the finding of learned lower appellate court regarding fulfillment of 1st demand by the respondent/pre-emptor are affirmed.

11. It is pertinent to note that respondent/pre-emptor specifically and positively pleaded in para No.5 of the plaint that notice talb-i-Ishhad was received by the petitioner/vendee, whereas the petitioner/ vendee not only in his written statement but also in his examination-in-chief as DW.5 categorically denied the said factum and asserted/deposed that no such notice was ever delivered to him. In said scenario, it was obligatory upon the respondent/pre-emptor to substantiate his avowal as recited in para-5 of the plaint by producing affirmative evidence, but neither the respondent/pre-emptor nor her informer (PW-5) and even participant of the Majlis (PW6), who were also the attesting witnesses of notice Talb-i-Ishhad (Ex.P-3) deposed a single word in their statement-in-chief that the dispatched notice Talb-i-Ishhad was received by the petitioner/ vendee. The deposition of Muhammad Hanif, Advocate scribe of the notice Talb-i-Ishhad is also silent to this extent. There is no cavil with the proposition that a plaint and a written statement cannot be treated as a piece of evidence and a party is required to prove the contents of its pleadings by production of persuasive and tangible evidence. Reliance in this respect is placed upon the judgments reported as Hakim-ud-Din through L.Rs. and others v. Faiz Bakhsh and others (2007 SCMR 870) and Muhammad Iqbal v. Ali

Sher (2008 SCMR 1682). The respondent/pre-emptor initially instituted the instant suit on 12.05.2003 against Zafaryab son of Muhammad Abdullah. The perusal of sale deed (Ex.P/4) clearly depicts that it was Zafar Hayat son of Muhammad Abdullah, who purchased the disputed property, but the perusal of Booking Registry Receipt (Ex.P/1), Acknowledgement Due Receipt (Ex.P/2) and copy of notice Talb-i-Ishhad (Ex.P/3) reveals that notice Talb-i-Ishhad was not only drafted against some other person, namely, Zafaryab, rather the same was also booked against the same person for its delivery. The petitioner/vendee approached the court and by filing written statement specifically raised a plea that neither notice Talb-i-Ishhad was dispatched in his name nor it was delivered to him. However, to prove second demand and to cover the above referred lacuna regarding the execution of notice Talb-i-Ishhad against a different name and its delivery to him, the pre-emptor produced Muhammad Arshad, Booking Clerk as (PW-1), who categorically stated in his cross-examination that registered post was booked against Zafaryab. The receipt (Ex.P/1) also proved, the fact that it was not booked against vendee, namely, Zafar Hayat. Abdul Waheed, the concerned postman was brought into the witness box as (PW-2), who nowhere deposed in his statement that he delivered the same to the petitioner/vendee rather he made a vague statement that registered post was received by him for its delivery, which he delivered on the required premises. He admitted in his cross-examination that Zafaryab was not available at the house where the said registered envelope was delivered. He also admitted that the person of the same name was also not resident of the said locality and that acknowledgement due receipt (Ex.P/2) did not bear the signatures of Zafaryab or Zafar Hayat. The said portion of the statement of the concerned postman has really shattered the case of the respondent/pre-emptor regarding the factum that the notice Talb-i-Ishhad was actually delivered to the petitioner/vendee. The pre-emptor was not only bound to prove that he got dispatched notice Talb-i-Ishhad to the petitioner/ vendee, but also to establish that the said notice was delivered to the addressee.

12. It is significant to note that to examine the signature over the acknowledgement due receipt (Ex.P/2), the original record of the suit file was summoned by this Court. During the course of arguments, the suit file was placed before Hafiz Khalil Ahmad, learned counsel for respondent/pre-emptor for the comparison of the signature available on Ex.P/2 with the signature of petitioner/ vendee appearing on attested copy of sale deed as well as on written statement filed by the petitioner/vendee, who after examination stated that the signatures over Ex.P/2 did not match with the signature over the above referred two documents. I have also viewed the signature over all the three above referred documents and

found that the signature over Ex.P/2 have no similarity with the signatures of petitioner/vendee over the sale deed (Ex.P/4) as well as original written statement. In the present case, there was neither any ambiguity in the sale deed regarding the correct name of vendee nor any such ambiguity has been disclosed by the respondent/pre-emptor during her statement as (PW-4). So the respondent/ pre-emptor by committing gross negligence got drafted notice Talb-i-Ishhad against a wrong name and she badly failed to prove that said notice was delivered to the petitioner/vendee, which was required to be proved by her as per following dicta of the apex court.

i) Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105)
ii) Sultan Ali v. Ghulam Hussain (2012 YLR 2545)
iii) Rabia Bibi and another v. Jahana through L.Rs. (2013 YLR 2016)
iv) Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866)
v) Zabiullah and others v. Awal Khan (2014 CLC 976) and
vi) Khan Afsar v. Afsar Khan and others (2015 SCMR 311)

The perusal of above aphorisms leaves no room that it is sine qua non for a pre-emptor to prove that notice Talb-i-Ishhad dispatched to the vendee/defendant through registered post A.D. was actually delivered to him. No doubt, in the instant case, the respondent/pre-emptor produced Booking Registry Clerk as well as the concerned postman, but their statements, as discussed supra, are not adequate and satisfactory to hold that respondent/pre-emptor succeeded to prove that notice Talb-i-Ishhad was actually delivered to the petitioner/ defendant. In the said state of affairs, the findings of the learned lower appellate court on issue No.9 regarding the fulfillment of second demand are not sustainable, which are hereby reversed and the said issue is answered against the respondent/pre-emptor.

13. Consequently, the instant civil revision is accepted, impugned judgment and decree dated 02.04.2008 delivered by learned Additional District Judge, Sargodha is hereby set aside and suit for possession through pre-emption filed by the respondent/pre-emptor is hereby dismissed with no order as to cost.

ZC/Z-7/L Revision allowed.

PLJ 2016 Lahore 271
[Multan Bench Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
Haji MUHAMMAD--Petitioner
Versus
BASHIR AHMAD--Respondent

C.R. No. 168 of 2010, heard on 5.10.2015.

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

----O. XXXVII, Rr. 1 & 2--Suit for recovery on basis of pronote--Summary suit--Applications for resummoning of plaintiff witness and for presentation of receipt cash memos, dismissal of--Challenge to--**Held**: It is also settled principle of law that a party to lis cannot be allowed to fill up lacunas, which he had left during course of recording of evidence and law favours vigilant and not indolent.

[P. 272] A

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

----O. XXXVII, Rr. 1 & 2--Suit for recovery on basis of pronote--Required witnesses resummoned for cross-examination--Validity--If such documents were duly entered in list of reliance, then petitioner could bring on record said receipts through modes provided in statutory provisions of law by producing author or signatory of said receipts--However without examination of said persons, private document could not be received on file by Court.

[Pp. 272 & 273] B

Mr. Faisal Bashir Ch., Advocate for Petitioner.
Mr. Sagheer Ahmad Bhatti, Advocate for Respondent.
Date of hearing: 5.10.2015.

JUDGMENT

The precise facts leading for disposal of the instant civil revision are that Bashir Ahmad respondent instituted a suit under Order XXXVII Rules 1 & 2 of the Code of Civil Procedure, 1908 for the recovery of an amount of Rs. 2,00,000/- on the basis of pronote dated 18.08.2004 against the petitioner/defendant before the learned trial Court on 11.04.2005. The petitioner/defendant was granted leave to contest the suit *vide* order dated 23.05.2005 and in due course of the proceedings, the written statement was also filed by the petitioner/defendant. The learned trial Court captured the disputed area of facts by framing certain issues on 16.06.2005 and invited the plaintiff/respondent to lead his evidence. Then in compliance of direction of the Court, the respondent/plaintiff got recorded statements of Ashiq Hussain PW/1, Ijaz Hussain PW/2 and he himself appeared as PW/3 on 29.11.2005. Then the petitioner got recorded his part examination-in-chief as DW/1 on 13.01.2010 and on the same day the petitioner/defendant moved an application for re-summoning of plaintiff/respondent (PW/3) for further cross-examination. Another application for presentation of receipts/cash memos. was also moved by the petitioner/defendant on the same day. Both the said applications were

dismissed by the learned trial Court *vide* impugned order dated 09.02.2010, hence the instant civil revision.

2. Arguments heard and record perused.

3. The respondent/plaintiff instituted a summary suit before the learned trial Court under Order XXXVII Rules 1 & 2 of the Civil Procedure Code, 1908 on 11.04.2005 and PW/1 to PW/3 were examined by the learned trial Court on 29.11.2005, who were duly cross-examined by the learned counsel for the petitioner/defendant. The perusal of statement of plaintiff/PW/3 reveals that learned counsel for the petitioner/defendant cross-examined the said PW at length, which was reduced into writing over three pages. This matter remained pending for another four years and two months, when only part examination-in-chief of Haji Muhammad DW/1 was got recorded by the petitioner/defendant on 13.01.2010 and on the same date the above referred two applications were moved by the petitioner/defendant. The perusal of first application for re-summoning of the respondent/PW-3 reveals that no plausible ground was pleaded therein by the petitioner/defendant to re-cross-examine the said witness. Even, today again learned counsel for the petitioner/defendant feels himself handicapped to respond that on what count PW/3 is required to be re-summoned for cross-examination. It is also settled principle of law that a party to the lis cannot be allowed to fill up lacunas, which he had left during the course of recording of evidence and the law favours the vigilant and not the indolent. The learned trial Court rightly dismissed the said application while assigning eminent reasons. However, as far as the other application for bringing on record the receipts/cash memos. is concerned, suffice it to say that no plausible ground has been urged by the petitioner/defendant in the said application that as to why these receipts/cash memos. could not be appended by the petitioner/defendant along with his written statement or entered in the list of reliance. If such documents were duly entered in the list of reliance, then the petitioner could bring on record the said receipts through the modes provided in statutory provisions of law byproducing author or signatory of the said receipts. However without the examination of said persons, the private documents could not be received on file by the Court. The filing of both the applications before the learned trial Court at a later stage in a suit of summary nature was nothing, but to prolong the suit pending before the learned trial Court for the last about 10-years and 06 months and the learned trial Court could not finalize its proceeding, despite the fact that the same were required to be finalized by the trial Court in a summary manner. The learned counsel for the petitioner has failed to point out any illegality or perversity in the impugned order rendered by the learned trial Court calling for any interference by this Court in the exercise of revisional jurisdiction, the scope whereof is narrower and restricted only to the extent of correcting errors of law and facts, if are found to have been committed by the subordinate Courts.

4. Resultantly, the instant civil revision being devoid of any merit is **dismissed** with costs of Rs. 10,000/-

(R.A.) Revision dismissed.

PLJ 2016 Lahore 287
[Multan Bench Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
QAZI NOOR MUHAMMAD and 3 others--Petitioners
Versus
KH. ABDUL HAMID ALI and 2 others—Respondents

C.Rs. Nos. 776-D & 775-D of 2002, heard on 21.5.2015.

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

----Art. 129(g)--Presumtion of truth--Adverse inference--Attestation of mutation--Executed on behalf of minor, illegal--Validity--Transactions had taken place at prior point of time could not be proved--Petitioners being beneficiary had failed to prove original transaction as well as valid attestation of mutations--Petitioners had failed to sustain their ownership in suit property and Courts below had rightly non-suited to extent of suit property--Courts below after appreciating evidence decreed the suit filed by respondent and dismissed suit filed by petitioners after assigning eminent reasons--Revisions were dismissed. [P. 289] A

Revisional Jurisdiction--

----Scope--Jurisdictional defect--Whereof is narrower and restricted to extent of correcting errors of law and facts, if were found to had been committed by subordinate Courts in discharge of judicial functions--Revisions were dismissed. [P. 289] B

M/s. Syed Tajamal Hussain Bukhari, & Muhammad Faisal Bashir Ch., Advocates for Petitioners.

Mr. Tariq Muhammad Iqbal Ch., Advocate for Respondents.

Date of hearing: 21.5.2015.

JUDGMENT

Through this single judgment, I intend to dispose of Civil Revisions No. 776 and 775 of 2002 jointly as common questions of law and facts are involved.

2. The precise facts of the case are that Khawaja Abdul Hamid Ali, Respondent No. 1 brought a suit for Declaration No. 230 on 15.12.1994 before the learned trial Court regarding property measuring 10-*kanals* with the assertion that Qazi Noor Muhammad present petitioner in connivance with the revenue officials got attested Mutations No. 248, 258, 259, 303, 348 & 349 by practicing fraud at the time when the petitioner was a 'minor'. The said suit was contested by the petitioners/defendants. Qazi Noor Muhammad and *Mst.*Zahida Bibi/petitioners also brought a suit for declaration along with possession through partition No. 31/95, which was contested by the respondents with the assertion that the alleged executant was minor at the time of attestation of above referred mutations. Both the suits were tried independently and after full fledged trial tried Suit No. 230 filed by Kh. Abdul Hamid Ali, Respondent No. 1 was decreed while Suit No. 31 filed by the present petitioners Qazi Noor Muhammad etc. was dismissed *vide* independent judgments and decrees dated 31.03.2001. The present petitioners by filing two Civil Appeals Nos. 62/2001 and 63/2001 challenged the said judgments and decrees passed by the learned trial Court, which were dismissed *vide* independent judgments and decrees dated 11.06.2002 passed by the learned lower appellate Court. Being aggrieved, the instant civil revisions were filed by the petitioners.

3. Arguments heard and record perused.

4. Kh. Abdul Hamid Ali, Respondent No. 1 brought a suit before the learned trial Court with the clear cut assertion that at the time of attestation of disputed mutations, he was minor and any alleged transaction executed on behalf of minor was illegal. The copy of guardianship certificate (duly exhibited in both the suit files) issued by the Guardian Judge on 15.06.1994 reveals that application for the appointment of guardian of said plaintiff and other minors was filed and the age of majority of the said plaintiff was reflected as 14.7.1997, whereas the disputed Mutations No. 248, 258, 259, 303, 348 and 349 were got attested in the year 1994. The said judicial record attains strong presumption of truth and the present

petitioners failed to rebut the same by producing any tangible evidence. Kh. Abdul Hamid Ali fully proved his stance by producing copy of guardianship certificate. Even perusal of files of both the cases reveals that Qazi Noor Muhammad Petitioner No. 1 only got recorded his solitary statement in the suit for declaration filed by him whereas in other suit filed by Kh. Abdul Hamid Ali, Respondent No. 1 the petitioners produced Ghulam Fareed DW/1 and he himself appeared as DW/2. No other witness including the attesting witnesses of the disputed mutations, Patwari and Revenue Officer, who allegedly sanctioned the disputed mutations were produced to prove the stance of petitioners. The said best evidence was available to the petitioners but the same was with held for the reasons best known to them and both the Courts below rightly drew an adverse inference against the petitioners under Article 129(g) of the Qanoon-e-Shahadat Order, 1984. The alleged transactions embodied in the mutations, which might have taken place at some prior point of time also could not be proved by the petitioners by producing any iota of evidence. The petitioners being beneficiary failed to prove the alleged original transactions as well as valid attestation of mutations. Moreover the same were result of fraud and misrepresentation, which were got sanctioned on behalf of the minor, which have been rightly cancelled by the learned Courts below and I concur with the same. Since, the petitioners failed to sustain their ownership in the suit property and both the Courts below have rightly non-suited them to the extent of the suit property. Both the Courts below after appreciating the evidence available on file concurrently decreed the suit filed by the Respondent No. 1 and dismissed the suit filed by the petitioners after assigning eminent reasons.

3. The learned counsel for the petitioners has failed to point out any illegality, perversity or jurisdictional defect in the impugned judgments and decrees, which are also not tainted with any misreading or non-reading of the evidence available on the record calling for any interference by this Court in the exercise of revisional jurisdiction, the scope whereof is narrower and restricted only to the

extent of correcting errors of law and facts, if are found to have been committed by the subordinate Courts in the discharge of their judicial functions. Resultantly, both the civil revisions being devoid of any merit are dismissed with costs throughout.

(R.A.) Revision dismissed.

PLJ 2016 Lahore 312
[Multan Bench Multan]

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUHAMMAD ALI (deceased) through is Legal Heirs, etc.--Petitioners

Versus

JAN MUHAMMAD, etc.--Respondents

C.R. No. 29-D of 1996, heard on 9.6.2015.

Colonization of Government Land (Punjab) Act, 1912 (V of 1912)--

----S. 19-A--Muslim Personal Law (Shariat) Application Act, 1948, S. 2—Co-operative Farming Society--Scope--Succession to tenancy--By laws of Society--Inheritance--Subsequence mutation and transfer of land by revenue hierarch or farming society--Fraud and misrepresentation--Validity--Inheritance of allottee of a Co-operative Farming Society is governed by Shariat Laws and not through bye laws--Bye-laws of C.F.S. could not supersede law of shariat and all legal heirs were entitled to get their share in legacy of allottee of C.F.S.--Succession to tenancy of a Muslim tenant shall devolve on his heirs in accordance with Muslim Personal Law (Shariat)--Application Act, 1948--Questions regarding succession rule of decision shall be Muslim Personal Law (Shariat) in case parties are Muslims--Bye-laws of a society or a practice or custom or usage cannot override express provisions of law--No such gift is either claimed or alleged to have been made in favour of petitioner--Nomination by a member of Co-operative Society does not operate either as a gift or as a will and, thus, could not deprive other heirs, who might be entitled thereto, under law of succession applicable to deceased--Being nominee of his father was entitled for transfer of disputed property and at that stage, a new version cannot be introduced--High Court does not normally interfere in concurrent conclusion arrived at by Courts below unless same was found to be illegal, perverse or suffered from any jurisdictional defect or tainted with any mis-reading and non-reading of evidence. [Pp. 315, 316 & 317] A, B, C, D, E, F, G & H

2007 SCMR 236, 2007 SCMR 368, 926, 2010 SCMR 984 & 2011 SCMR 762, *rel*.

Mr. Muhammad Ramzan Khalid Joiya, Advocate for Petitioners.

Mian Habib-ur-Rehman Ansari, Advocate for Respondents.

Date of hearing: 9.6.2015.

JUDGMENT

Precisely, the facts of the case are that a suit for declaration was filed by Jan Muhammad (now deceased) Respondent No. 1 and *Mst.* Amina Bibi (now deceased) Respondent No. 3 with the assertions that they along with defendants/petitioners being heirs were entitled to get their legal share out of the property left by Nathu (deceased), predecessor of the parties; that Nathu was in

possession of the lot in dispute owned by Government of the Punjab as a tenant through Co-operative Farming Society and Mutation No. 12 dated 28.8.1979, sale-deed No. 339 dated 14.5.1985 and Mutation No. 58 dated 13.11.1985 for grant of proprietary rights allegedly attested in favour of Muhammad Ali Defendant No. 1/the predecessor of present petitioners were liable to be cancelled. The said suit was resisted by the Petitioner/ Defendant No. 1 by filing written statement. Respondents/Defendants No. 2 and 3 also contested the said suit by filing joint written statement. The learned trial Court conducted full-fledged trial and ultimately after appreciating evidence available on file decreed the suit *vide* judgment and decree dated 26.3.1995. The same remained intact when the appeal filed by Petitioner/Defendant No. 1 was dismissed by the learned lower appellate Court *vide* judgment and decree dated 2.1.1996. Being aggrieved, the instant civil revision was filed by the petitioners in the year 1996.

2. It is argued by the learned counsel for the petitioners that the impugned judgments and decrees are hit by the mandatory provisions of Order XX of the Civil Procedure Code, 1908; that the Courts below did not properly appreciate the entire evidence available on the file; that during the meeting of the General House, membership of the Petitioner/Defendant No. 1 was approved without objections from either side and since the Petitioner/Defendant No. 1 was the contributory of membership fee as well as other revenues of the Society pertaining to the lot in dispute, hence, the mutation was sanctioned in his name in his own right as well the nominee of Nathu (deceased); that the Petitioner/Defendant No. 1 deposited the required amount for the conferment of proprietary rights, but even then nobody objected to the conferment of the proprietary rights and the sanctioning of mutation and that the Courts below did not consider the said fact while deciding the lis. He has lastly prayed for acceptance of instant civil revision and setting aside of the impugned judgments and decrees.

3. Conversely, learned counsel for the respondents has submitted that Nathu was allottee of the disputed land, who was member of the society and as soon as he died, the inheritance was to open in favour of all the legal heirs of deceased Nathu within the meaning of Section 19-A of the Colonization of Government Land (Punjab) Act, 1912; that subsequent mutation and transfer of land by the revenue hierarchy or the Farming Society in favour of single heir/Petitioner/Defendant No. 1 attested/sanctioned being result of fraud and misrepresentation was rightly annulled by both the Courts below. He has lastly prayed for dismissal of the instant civil revision.

4. Arguments heard and record perused.

5. The perusal of pleadings of the parties reveals that relationship of respondents was never denied by the Petitioner/ Defendant No. 1 and it is also admitted fact that predecessor-in-interest of the parties, namely, Nathu was tenant under the Co-operative Farming Society, whose membership remained intact till his death. His tenancy over the suit land has also not been denied by the Petitioner/Defendant No. 1. As per law at the time of death of a tenant of the suit property owned by the Government, his inheritance was to be opened and the revenue hierarchy was bound to sanction his inheritance mutation in favour of all his legal heirs, but surprisingly this exercise was not conducted by the revenue officials. However, Mutation No. 12 was sanctioned only in favour of the Petitioner/ Defendant No. 1 while treating him a full member. Thereafter, on the strength of said mutation, its implementation in the revenue record by attesting sale-deed and other mutation was carried out by the revenue hierarchy without keeping in mind the mandate of Section 19-A of the Colonization of Government Land (Punjab) Act, 1912. For ready reference, the said provision is reproduced hereunder:--

> **[19-A.Succession to the tenancy.**
>
> When after the coming into force of the Colonization of Government Lands (Punjab) (Amendment) Act, 1951, any Muslim tenant dies, succession to the tenancy shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat), and nothing contained in Sections 20 to 23 of this Act shall be applicable to his case:
>
> Provided that when the tenancy rights are held by a female as a limited owner under this Act, succession shall open out on the termination of her limited interest to all persons who would have been entitled to inherit the property at the time of the death of the last full owner had the Muslim Personal Law (Shariat) been applicable at the time of such death, and in the event of the death of any of such persons before the termination of the limited interest mentioned above, succession shall devolve on his heirs and successors existing at the time of the termination of the limited interest of the female as if the aforesaid such person had died at the termination of the limited interest of the female and had been governed by the Muslim Personal Law (Shariat):
>
> Provided further that the share, which the female limited owner would have inherited had the Muslim Personal Law (Shariat) been applicable at the time of the death of the last full owner shall devolve on her if she loses her limited interest in the property on account of her marriage or

remarriage and on her heirs under the Muslim Personal Law (Shariat) if her limited interest terminates because of her death],

6. The inheritance of allottee of a Co-operative Farming Society is governed by Shariat Laws and not through the bye-laws. An identical question has already been clinched by the apex revenue hierarchy in a case reported as *Muhammad Tufail vs. Yaqub, etc*. (NLR 1985 Revenue 97 (1), wherein, it was observed that the bye-laws of Co-operative Farming Society could not supersede the law of Shariat and all the legal heirs were entitled to get their share in the legacy of allottee of Co-operative Farming Society. The bare reading of Section 19-A of the Colonization of Government Lands (Punjab) Act, 1912 (added in 1951) provides that the succession to the tenancy of a Muslim tenant shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat). Section 2 of the Muslim Personal Law (Shariat) application Act, 1948 lays down that in all questions regarding succession rule of decision shall be the Muslim Personal Law (Shariat) in case the parties are Muslims. These provisions of the law are very clear and there is no ambiguity about it. Any order which contravenes the provisions of this law cannot be sustained. It has, inter alia, been held by the Supreme Court of Pakistan in *Civil Appeal No. 139 of 1987,* titled as *Mst. Aisha, etc. v. Member (Colonies), Board of Revenue, Punjab and others* decided on 21.11.1990 that the statue i.e. Section 19-A of the Colonization of Government Lands Act has to prevail over any bye-law of a Society. It was similarly held in PLD 1974 SC 185 that:

> "Unless a nomination can amount to a valid gift inter vivos, it cannot pass title to the nominee in respect of immovable property, nor can the making of a nomination give the right to the nominator at his own choice to change the law of succession, which would otherwise be applicable in the case of his death. Obviously, the nomination cannot operate as a valid gift under the Muhammadan Law, because, such a gift in order to confer title on the donee, must be accompanied by delivery of possession of the property gifted."

There is, thus, no doubt that the bye-laws of a Society or a practice or custom or usage cannot override the express provisions of the law. No such gift is either claimed or alleged to have been made in favour of Petitioner/Defendant No. 1. It has also been held in the judgment reported as *Fazal Shah vs. Muhammad Din and others* (1990 SCMR 868) that nomination by a member of Co-operative Society does not operate either as a gift or as a will and, thus, could not deprive the other heirs, who might be entitled thereto, under the law of succession applicable to deceased. This view has also been laid down in the judgment reported

as *Mst. Amtul Habib and others vs. Mst. Musarrat Parveen and others* (PLD 1974 Supreme Court 185), wherein while interpreting Section 27 of the Co-operative Societies Act, 1915, it was observed as under:

> "We are of the opinion, however, that the correct view has been taken in the cases referred to earlier, namely, that the nomination merely confers a right to collect the money or to "receive the money", It does not operate either as a gift or as a will and, therefore, cannot deprive the their heirs of the nominator who may be entitled thereto under the law of succession applicable to the deceased. The nominee thus collects as a trustee for the benefit of all persons entitled to inherit from the decease employee. It is not without significance that Section 5 of the Provident Funds Act neither vests the amount in the nominee nor declares hi to be the owner thereof. It merely gives him the exclusive right to receive the amount and nothing more. In any event the position under Section 27 of the Bombay Co-operative Societies Act is different because the wording of this section is materially different. There is no analogy between the two.

7. So when it was admitted by the Petitioner/Defendant No. 1 that the disputed property had been originally allotted to Nathu, predecessor-in-interest of the parties, the same was to be devolved upon his all the legal heirs. For ready reference, Para-1 on merit of the written statement filed by Petitioner/Defendant No. 1 in verbatim is reproduced infra:

> **یہ کہ فقرہ نمبر 1 اس حد تک درست ہے کہ اراضی متدعویہ والد کو شروع میں تحت کو آپریٹوفارمنگ سکیم الاٹ ہوئی تھی۔ لیکن اس نے بوقت ممبر شپ خود مدعا علیہ نمبر 1 کو اپنا نامزد وارث مقرر کیا تھا۔**

8. The stance of learned counsel for the petitioners that the disputed property had been independently allotted to Petitioner/Defendant No. 1 is misconceived. The defence raised by Petitioner/Defendant No. 1 in his written statement as referred above was that he alone being nominee of his father was entitled for the transfer of the disputed property and at this stage, a new version cannot be introduced. Both the learned Courts below have rightly decreed the suit and dismissed the appeal through the impugned judgments and decrees on the valid reasons.

9. There is found nothing wrong with the impugned judgments and decrees passed by the two Courts below, who have arrived at concurrent findings of fact and law. This Court does not normally interfere in the concurrent conclusion arrived at by the Courts below unless the same is found to be illegal, perverse or suffered from any

jurisdictional defect or tainted with any misreading and non-reading of the evidence. Reliance in this respect is placed on the judgments reported as *"Aurangzeb through LRs vs. Muhammad Jaffar"* (2007 SCMR 236), "*Shafi Muhammad vs. Khanzada Gul"* (2007 SCMR 368), *"Rashid Ahmad vs. Said Ahmad"* (2007 SCMR 926), *Ahmed Nawaz Khan vs. Muhammad Jaffar Khan and others* (2010 SCMR 984) and *"Bashir Ahmed vs. Ghulam Rasool"* (2011 SCMR 762). The learned counsel for the petitioners has failed to bring the case within the parameter of illegality and material irregularity as prescribed under Section 115 of CPC, 1908, hence, the instant Civil Revision is dismissed.

(R.A.) Revision dismissed.

PLJ 2016 Lahore 839

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUZUWAR HUSSAIN and another--Petitioners

Versus

***Mst*. SALMA BEGUM and 13 others--Respondents**

C.R. No. 4162 of 2010, heard on 28.1.2016.

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

----O.XLI R. 31--Qanun-e-Shahadat Order, (10 of 1984), Art. 127--Re-writing judgment--Visitorial supervisory jurisdiction--Subsequent sale mutation--Illiterate lady intended to transfer her share to her daughter--Thumb-impressions were got on blank papers--By playing fraud and misrepresentation attested gift mutation--Validity--Mutation per se was not a deed of title but merely an indicative of some oral transaction settled between parties at some prior point of time, whenever authenticity of any mutation is challenged, then burden heavily lies on shoulders of beneficiary of transaction to prove mutation as well as original transaction embodied therein--Beneficiaries of original mutation despite their service neither submitted their written statement before trial Court nor any of them appeared in witness-box to prove declaration of gift--Neither attesting witnesses nor revenue officers, who entered and sanctioned original mutation of gift were produced to prove valid attestation of gift mutation--No direct affirmative evidence was available on record to prove genuineness of transaction as well as valid attestation of gift mutation as envisaged in Art. 127 of in favour of beneficiaries--They had failed to prove impugned mutation of gift--Any such act of trial Court for reproducing evidence of one file in other file in cases of similar facts was a mere technicality--Parties cannot be thrown in another round of litigation, because no such objection was raised by defendants at relevant time and by doing so they accepted such practice adopted by trial Court, which cannot be nullified at that stage when defendants had not only failed to file their written statement, but also failed to lead their evidence as well as cross-examine witnesses of rival parties--Revision was dismissed. [Pp. 844, 845 & 850] A, B, C, D, K & L

2005 SCMR 1859, 2012 SCMR 1373, PLD 2012 Lah. 483,
PLD 2007 SC 287, 2014 SCMR 1181 *rel.*

Transaction of Sale--

----Subsequent transferees--Thumb-impressions were got on blank paper--Fraud and misrepresentation--Gift of mutation--Transaction--Subsequent transferees failed to prove that disputed property was purchased by them for due consideration and in good faith--Evidence led by them is deficient, sketchy and unreliable--Additionally, it is settled principle of law that any superstructures built on basis of fraudulent transaction must collapse upon failure of such transaction--Fraudulent transaction has no foundation to stand and whenever such transaction

is declared null and void, then whole series alongwith superstructure built upon it is bound to collapse. [P. 847] E & F

2015 SCMR 1704 *ref.*

Substantial Justice--

----Consequential relief--Technicalities--Suit for declaration without seeking consequential relief of possession was not maintainable and suit cannot be decreed--A party seeking declaration, if has failed to claim consequential relief, cannot be non-suited on technical ground--Mere technicalities cannot be allowed to create any hurdle in way of substantial justice--A heavy duty is cast upon Courts to do substantial justice and not to deny same on mere technicalities--His lis cannot be defeated on technical ground that he failed to claim a proper relief--Court being custodian of rights of litigants, is vested with powers to grant relief even if it has not been claimed/prayed for. [P. 848] G, H, I & J

1991 SCMR 2114, 2003 SCMR 318.

M/s. Rana Nasrullah Khan, Advocate for Petitioner in C.R. No. 4162 of 2010).

Ch. Sarfraz Ali Dayal, Advocate for Petitioners (in C.R. No. 470 of 2011 as well as Respondents 12 to 14 in C.R. No. 4162 of 2010).

M/s. Naheed Baig, Nasir Iqbal Rai and Mian Asif Mumtaz, Advocates for Respondents No. 1 to 9.

Date of hearing: 28.1.2016.

JUDGMENT

The leading facts of the case are that *Mst.* Salma Begum (widow), Jameel Hussain (son), Shamim Akhtar and Naseem Akhtar (daughters) of Manzoor Hussain, respondents (hereinafter to be referred as plaintiffs) on 11.6.2005 instituted a suit for declaration with permanent injunction against the present petitioners (hereinafter to be referred as defendants) and other respondents (hereinafter to be referred as subsequent transferees) with the assertion that they were owners in possession of the disputed property fully mentioned in the body of the plaint and *Mst.* Salma Begum, Plaintiff No. 1/mother of other plaintiffs, who was an old aged and illiterate lady had a desire to transfer her share in the disputed property in favour of her daughters/Plaintiffs No. 3 and 4 by means of declaration of gift. It was further alleged that the plaintiffs along with the defendants in order to get the mutation attested contacted the concerned revenue Patwari and Plaintiff No. 1 showed her intention about transfer of her share in the disputed property in favour of her daughters, who obtained thumb impressions of the plaintiffs on various documents with assurance that as per their desire the mutation was entered by him and the same would be attested thereafter by the revenue officer, but later on, it transpired to the plaintiffs that the land measuring 14 *Kanals* 2 Marlas had been mutated by the

revenue authorities in favour of defendants by practicing fraud and misrepresentation, which being result of collusiveness was ineffective upon their rights. It was also averred by the plaintiffs in the plaint that defendants had no relations with the plaintiffs and there was no occasion for them to make any declaration of gift in their favour. They further pleaded that neither any offer of gift was made by them nor it was accepted by defendants and the possession in lieu thereof was also not transferred. It was also disclosed in the plaint that Defendant No. 1 just to strengthen the fraud further transferred a part of property in favour of subsequent transferees by attesting an oral sale Mutation No. 1193 dated 31.5.2005 and prayed that both the mutations be cancelled. It is significant to note that defendants neither submitted their written statement nor produced any evidence before the learned trial Court rather the suit was only contested by subsequent transferees. While facing with the contest of the suit, the learned trial Court captured the disputed area of facts by framing the following issues:--

1. Whether the plaintiff has no cause of action and *locus standi* to file the instant suit? OPD
2. Whether the suit is false, frivolous and fabricated one and suit is liable to be dismissed? OPD
3. Whether the plaintiff has not come to the Court with clean hands? OPD
4. Whether the suit is time barred? OPD
5. Whether the proper Court fee has not been affixed? OPD
6. Whether the plaintiffs have filed the suit in connivance with the Defendants No. 1 to 4, just to harass the Defendants No. 5 to 7, who are *bona fide* purchasers? OPD-5 to 7.
7. Whether the Defendants No. 5 to 7 are *bona fide* purchasers? OPD 5 to 7
8. Whether the Defendants No. 5 to 7 are entitled to receive sale price with cost from the Defendant No. 1, if the suit, of the plaintiffs is decreed? OPD 5 to 7
9. Whether the suit of the plaintiffs is bad for mis-joinder and non-joinder of the parties? OPD
10. Whether the Hiba Mutation No. 1061 dated 13.1.2003 in favour of Defendant No. 1 and subsequent Mutation No. 1193 dated 31.5.2005 in favour of Defendants No. 5 to 7 are against law and facts, based, on fraud and inoperative upon the rights of the plaintiffs? OPP
11. Whether the plaintiffs are entitled to a decree as prayed for? OPP

11-A. Whether the Khasra Nos. 1142 and 1143 consist of Ghair Mumkin Havelly and the plaintiffs are in possession of the same? OPP

12. Relief.

2. Thereafter stock of evidence led by plaintiffs as well as subsequent transferees was collected and after appreciating the same, the learned trial Court dismissed the suit *vide* judgment and decree dated 21.4.2010. Being aggrieved, an appeal was preferred by the plaintiffs before the learned lower appellate Court and the learned Addl. District Judge *vide* impugned judgment and decree dated 7.12.2010 accepted the same and decreed the suit of the plaintiffs. Seeming aggrieved, defendants have filed instant C.R.No. 4162/2010 and subsequent transferees also preferred C.R.No. 470/2011 before this Court. As having common questions of law and facts are involved, both these civil revisions are going to be decided jointly by this single judgment.

3. Rana Nasrullah Khan, Advocate, learned counsel for defendants argued that the learned lower appellate Court without rendering its findings on each and every issue passed a mechanical judgment in complete derogation of Order XLI Rule 31 of the Code of Civil Procedure, 1908; that the impugned judgment and decree is result of misreading and non-reading of evidence of the parties available on record; that Issue No. 7 was the most important issue, the onus whereof was placed on the subsequent transferees, who fully proved the same and the learned trial Court while answering the said issue in their favour dismissed the suit instituted by the plaintiffs, but the learned lower appellate Court without reversing the findings on the said issue erred in law while decreeing the suit of the plaintiffs; that admittedly the defendants/subsequent transferees are in use and occupation of the disputed property and a simple suit for declaration without seeking relief of possession was not maintainable, but the-learned lower appellate Court without application of judicious mind while ignoring the said aspect of the case passed the impugned judgment and decree; that the trial of the case was not conducted as per prescribed procedure as evidence recorded in another suit pending between the plaintiffs and defendants was also reproduced in verbatim on the other suit file, who while relying upon the judgments reported as *Ali Muhammad and another vs. Muhammad Bashir and another* (2012 SCMR 930), *Ghous Bakhsh vs. Syed Ali Nawaz Shah and 8 others* (PLD 2014 Sindh 306), *Nasir Abbas vs. Manzoor Haider Shah* (PLD 1989 Supreme Court 568), *Shamim Akhtar vs. Muhammad Rasheed* (PLD 1989 Supreme Court 575), *Syed Iftikhar-ud-Din Haider Garderzi and 9 others vs. Central Bank of India Ltd, Lahore* (1996 SCMR 669), *Allahyar and others vs. Jiand and others* (2010 CLC 1931), *Mst. Saeed Bibi and another vs. Addl. District Judge, Jampur, District Rajanpur and 2 others* (2010 CLC 1938-Lahore), *Masood-ul-Hassan Khan through legal heirs and another vs. Iftikhar Ali and 3 others* (2011 MLD 1792 Lahore), *Nadar Khan and another vs. Mst. Kamin Taja and others* (2011 MLD 1796), *Malik Muhammad Tufail and another vs. Messrs Fauji Fertilizer Coi. Ltd. through Attorney General and Marketing Manager* (2000 CLC 1838), *Muhammad Sarwar and others vs. Khushi Muhammad and another* (2008 SCMR 350) and *Shah Nawaz through L.Rs. vs. Abdul Ghafoor and others* (2008 SCMR 352) has prayed for acceptance of the instant civil revisions, setting aside of

the impugned judgment and decree passed by the learned lower appellate Court and prayed for remand of the suit to the learned trial Court for *de novo* trial.

4. Learned counsel for subsequent transferees also endorsed the arguments advanced by the learned counsel for the defendants, whereas, learned counsel for the plaintiffs supported the impugned judgment and decree delivered by the learned lower appellate Court and prayed for dismissal of the instant civil revisions.

5. Arguments heard and record scanned.

6. No doubt, there is much force in the argument of learned counsel for the defendants that the learned lower appellate Court while violating the mandate provided in Order XLI Rule 31 of the Code of Civil Procedure, 1908, passed the impugned judgment and decree without rendering its independent Findings on each and every issue and time and again, the Superior Courts have condemned such like practice and matter is required to be remanded. But the chequered history of the case reveals that the suit was filed by the plaintiffs before the learned trial Court on 17.6.2005, which remained pending before it for a period of five years and after the decision of the appeal, these civil revisions are pending for the last 5/6 years, thus, and I am not persuaded to remand the case to the learned lower appellate Court for rewriting judgment alone as the entire material is available on record and while exercising the visitorial/supervisory jurisdiction, each and every aspect of the case can be examined and decided by this Court, therefore, instead of throwing the parties into a new round of litigation, I am compelled to decide the matter on merits after appreciating the evidence available on the record.

7. The basic thrust of the plaintiffs as visible from the contents of the plaint is that Plaintiff No. 1 who was an old, feeble and illiterate lady intended to transfer her share in the disputed property to her daughters/Plaintiffs No. 3 and 4 and for that purpose, the plaintiffs accompanied by defendants contacted the concerned Patwari so that they being witnesses could attest the entry of a gift mutation, who got thumb impressions of plaintiffs on some blank papers with the assurance that the gift mutation had been entered on behalf of Plaintiff No. 1 in favour of Plaintiffs No. 3 and 4 and would be attested by the revenue officer in due course of proceedings. Plaintiffs No. 1 and 3 being PW-.1 and PW-.2 respectively stated on oath that the revenue Patwari as well as revenue officer by playing fraud and misrepresentation attested the disputed gift mutation regarding the disputed property in favour of defendants, who had no relations with the plaintiffs and that mutation of gift as well as subsequent sale mutation being product of fraud and misrepresentation were liable to be set aside. By now, it is also well settled principle that mutation per se is not a deed of title but merely an indicative of some oral transaction settled between the parties at some prior point of time and keeping in view such principle, whenever authenticity of any mutation is challenged, then burden heavily lies on the shoulders of beneficiary of the transaction to prove the mutation as well as original transaction embodied therein, which he was required to fall back upon. Reliance in this respect is placed on the judgments reported as *Arshad Ahmad alias M. Arshad and others vs. Muhammad Yar and others* (PLD 2012 Lahore 483), *Abdul Rasheed through L.Rs. and others vs. Manzoor Ahmad and others* (PLD 2007 SC 287) and *Rab*

Nawaz and others vs. Ghulam Rasul (2014 SCMR 1181). The moment two of the plaintiffs deposed as PW-. 1 and PW-.2 in line with the contents of the plaint, the onus was shifted upon defendants/beneficiaries to prove the valid attestation of the disputed gift mutation as well as the transaction embodied therein.

8. Astonishingly, defendants/beneficiaries of original Mutation No. 1061 despite their service neither submitted their written statement before the learned trial Court nor any of them appeared in the witness-box to prove the declaration of gift alleged to have been made by the plaintiffs in their favour, which was accepted by them and in lieu thereof the possession was also handed over to them. Additionally, neither the attesting witnesses nor the Patwari as well as Tehsildar, who entered and sanctioned the original mutation of gift were produced to prove the valid attestation of gift mutation.

9. No direct affirmative evidence is available on record to prove the genuineness of transaction as well as valid attestation of gift Mutation No. 1061 as envisaged in Article 127 of the Qanun-e-Shahadat Order, 1984 in favour of beneficiaries/defendants. In view of such facts and circumstances, it can safely be concluded that they failed to prove the impugned mutation of gift. Reliance can be placed on the judgment reported as *Arshad Khan vs. Mst. Resham Jan and others* (2005 SCMR 1859) and *Noor Muhammad and others vs. Mst. Azmat-e-Bibi* (2012 SCMR 1373). Para-9 of the latter judgment referred to above being relevant is reproduced as under:--

> "9. It has been consistently been held by this Court that mutation by itself does not create a title and the person deriving title thereunder has to prove that the transfer did part with the ownership of the property voluntarily. The onus lay on the beneficiaries to prove that it was *bona fide* transaction. No unimpeachable evidence was led by them to prove that Azmat-e-Bibi/plaintiff was present at the time of attestation of mutation or that she had instructed Babu, her step-father to make a gift in favour of her step-brothers. The statement of Muhammad Ashraf D.W.8 who at the relevant time was Naib Tehsildar and attested Mutation No. 2659 would be of no avail as he admitted in cross-examination that he knew the parties personally nor the persons who allegedly identified the donor/Azmat-e-Bibi. There is no endorsement on the mutation either that the attestation was made in a public gathering (Jalsa-e-Aam). The evidence of Babu D.W.11, the step-father who purportedly appeared on her behalf to make the report about gift in favour of his real sons and without there being any ostensible reason and to the deprivation of her own children, would not be a credible transaction."

10. There is much force in the argument of learned counsel for the plaintiffs that defendants/beneficiaries were not related to plaintiffs and without assigning any reason, the gift in favour of aliens was not valid. No doubt, a Muslim is free to transfer his property by making a declaration of gift in favour of any person, but when the closely blood related persons of the donor were available then as per dicta

laid down in the judgments reported as Barkat Ali through Legal Heirs and others *(Muhammad Ismail through Legal Heirs and others* (2002 SCMR 1938) and *Meraj Din vs. Mst. Sardar Bibi and 5 others* (2010 MLD 843), there should be reasons to be highlighted as to why the donor was going to make a gift in favour of an alien. On the touchstone of above discussion, it can safely be concluded that defendants failed to prove the transaction of oral gift, genuineness and validity of the disputed mutation by withholding the best available evidence. Therefore, I am inclined to hold that Mutation No. 1061 dated 13.1.2003 having been managed fraudulently was void and inoperative upon the rights of the plaintiffs.

11. The argument of learned counsel for the subsequent transferees that the subsequent transferees had purchased part of the disputed property from one of the defendants for due consideration and without notice, which fact was fully proved, thus their rights were to be protected, is also not well founded. A subsequent vendee is required to prove the following facts:--

(1) that he acquired the property for due consideration and thus is a transferee for value, meaning thereby that his purchase is for the price paid to the vendor and not otherwise;

(2) that there was no dishonesty of purpose or tainted intention to enter into the transaction, which shall state that he acted in good faith or with *bona fide*;

(3) that he had no knowledge or the notice of the original sale agreement between the plaintiff and the vendor at the time of his transaction with the later.

12. In the afore-noted context, it is thus required that a subsequent vendee should adduce cogent and convincing evidence to the extent of above referred elements. The perusal of evidence available on record led by the subsequent transferees reveals that they neither produced the concerned Patwari, who entered alleged sale mutation in their favour nor the revenue officer, who attested the same to prove that prior to attestation of their mutation, they duly verified the revenue record. Even none of the attesting witnesses of the sale Mutation No. 1193 was produced in the witness-box by the said subsequent transferees. Only one of the subsequent transferees, namely, Ahmed Saleh being DW.1 deposed that they had purchased the property from Muhammad Arshad Defendant No. 1 against a consideration of Rs. 7,00,000/-, but the other two witnesses, namely, Mushtaq Ahmed (DW.2) and Muhammad Akhtar (DW.3) did not utter a single word to the extent that against how much consideration, the same was purchased by the subsequent transferees. They also did not depose that transaction of sale of the disputed property was settled before them and the subsequent transferees purchased the same *bona fidely*. Thus, the subsequent transferees miserably failed to prove that the disputed property was purchased by them for due consideration and in good faith. The evidence led by them is deficient, sketchy and unreliable. Additionally, it is settled principle of law that any superstructures built on the basis of fraudulent transaction must collapse upon failure of such transaction. The law has been expounded on the subject by the august Supreme Court in the recent judgment reported as *Baja through L.Rs. and*

others vs. Mst. Bakhan and others (2015 SCMR 1704). For ready reference, the relevant text is referred as under:

> "Since the appellants have failed to prove the validity of the gift allegedly made by Respondent No. 1 in favour of Respondents No. 2 to 4, we are inclined to hold that the consequent entry in the revenue record had been managed fraudulently and thus it is void. It is a settled principle of law that any superstructure built on the basis of a fraudulent transaction must collapse on failure of such transaction. Therefore, the contention of the appellants that they are *bona fide* purchasers of the joint holding, including the 9-*Kanals*, 1-*marla* and owned by Respondent No. 1, hence, protected under Section 41 of the Transfer of Property Act, 1882, does not carry any weight."

In the wake of above discussion, it goes without saying that a fraudulent transaction has no foundation to stand and whenever such transaction is declared *null* and *void*, then the whole series alongwith superstructure built upon it is bound to collapse. Therefore, Issues No. 7 and 10 are answered in favour of the plaintiffs and against the defendants as well as subsequent transferees.

13. The learned trial Court answered Issues No. 1 to 6, 9 and 11 against the defendants and the subsequent transferees while dismissing the suit of the plaintiffs, which were not assailed by them any further by filing appeal or cross objections before the learned lower appellate Court, so, the findings on these issues are maintained. However, the findings of Issue No. 11-A are found to be result of misreading and non-reading of evidence and when the basic Issues No. 7 and 10 have already been decided in favour of the plaintiffs, then findings of Issue No. 11-A are also reversed and the same is answered in favour of the plaintiffs.

14. The contention of Rana Nasrullah Khan, Advocate for defendants that simple suit for declaration without seeking consequential relief of possession was not maintainable and the suit instituted by the plaintiffs cannot be decreed, is not well founded. As it is proved on record that defendants managed transfer of the disputed property without any independent transaction by means of declaration of gift, which even otherwise could not be proved to have been validly effected. A party seeking declaration, if has failed to claim consequential relief, cannot be non-suited on technical ground. There is unanimity among the superior Courts that mere technicalities cannot be allowed to create any hurdle in the way of substantial justice. Rules and regulations are made to foster the cause of justice and those are not to be interpreted to thwart the same. A heavy duty is cast upon the Courts to do substantial justice and not to deny the same on mere technicalities. In forming this view, I am fortified by the dicta laid down in the case reported as *Ch. Akbar Ali vs. Secretary, Ministry of Defence, Rawalpindi and another* (1991 SCMR 2114). The apex Court once again after approving the verdict of *Ch. Akbar Ali's case (supra)* and clinching the issue under discussion in a case reported as *Mst. Arshan Bi through Mst. Fatima Bi and others vs. Maula Bakhsh through Mst. Ghulam Safoor and others* (2003 SCMR 318) held as under:--

"The denial of relief to a party simply on the ground that consequential relief was not claimed would, in no circumstances, advance the case of justice.

It has been held time and again that the natural result of declaration would be that consequential relief has to be given by the Court even if it is not claimed. The trial Court in such like circumstances may call upon a party to amend the plaint to that extent and direct him to pay Court fee, if any. Reliance in this respect is placed upon the case of *Ahmad Din v. Muhammad Shafi and others* (PLD 1971 SC 762) where it was observed as under:--

> "The contention of the learned counsel for the appellant that the suit could not fail merely by reasons of the fact that the consequential relief by way of possession had not been claimed is not altogether without substance. If his suit was otherwise maintainable and he was otherwise entitled to the relief it was open to the Courts to allow him to amend the plaint by adding a prayer for possession and paying the appropriate ad valorem Court fees and then to grant him relief even though he had not specifically asked for it."

The Judges while dispensing justice are duty bound to apply the provisions of law in their true perspective and the same cannot be avoided simply on the ground that such provisions were not brought to their notice by the parties. We are fortified in this regard from an earlier judgment of this Court in the case of *Board of Intermediate and Secondary Education, Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others* (PLD 1992 SC 263) wherein it was held as under:--

> "18. The learned counsel who represented the respondents in the High Court by not bringing to the notice of the High Court the law laid down by this Court on the subject did not render good service to their clients. Besides, it has been laid down by this Court in *Muhammad Sarwar v. The State* (PLD 1969 SC 278) that a Judge must know the adage that a Judge must wear all the laws of the country on the sleeve of his robe and failure of the counsel to properly advise him is not a complete excuse in the matter."

Apart from the above there is another aspect of this case which cannot be lightly ignored. The present respondents have suffered during all this time due to the failure of the Revenue Department to implement the decree in its true perspective. They for the reasons best known to them in collusion with the petitioners got incorporated those Khasra numbers which were never decreed by the trial Court. All the forums below have accepted this mistake. If this be so, why the respondents should suffer for the wrong acts of the functionaries/ departments. It has been held in the *State v. Asif Adil and others* (1997 SCMR 209) that a party should not be made to suffer on

account of an act or omission on the part of the Court or other State functionaries. In the case in hand the petitioners successfully kept the respondents out of their property on technical grounds wrongly created by the functionaries of the Revenue Department to which they had no right either morally or legally.

Resultantly, for what has been stated above, the learned Single Judge of the Lahore High Court through his impugned judgment has advanced the cause of justice to which no exception can be taken by this Court on any ground. The instant petition being devoid of any merit and force is, hereby dismissed and leave declined."

15. No doubt, a different and contrary thought of dicta laid down by the Superior Court is also available on this, subject, but each case has to be decided on its own merits and where the main factual issue has been determined by the Court of law in favour of a party on merits, then to my mind, his lis cannot be defeated on the technical ground that he failed to claim a proper relief. The Court being custodian of the rights of the litigants, is vested with the powers to grant relief even if it has not been claimed/prayed for.

16. The other argument of learned counsel for the defendants that evidence recorded by the learned trial Court in one file has been reproduced in verbatim in the other suit file and the suit requires to be remanded to the learned trial Court for *de novo* trial is also not tenable. Neither any such objection was raised by the learned counsel for the defendants before the learned trial Court when the evidence was got recorded nor any prejudice caused to the defendants could be highlighted by the learned counsel for the defendants during the course of their arguments. This controversy has already been clinched by the apex Court in the judgment reported as *Salehon Muhammad and another vs. Allah Yar* (1989 SCMR 540), while observing that any such act of learned trial Court for reproducing evidence of one file in the other file in the cases of similar facts was a mere technicality. As such, on this score alone, the parties cannot be thrown in another round of litigation, because no such objection was raised by the defendants at the relevant time and by doing so they accepted such practice adopted by the learned trial Court, which cannot be nullified at this stage when the defendants had not only failed to file their written statement, but also failed to lead their evidence as well as cross-examine the witnesses of rival parties. The case law referred to by the learned counsel for the defendants being distinguishable is not applicable to the facts and circumstances of the instant case.

17. Consequently, both the civil revisions having no merits are dismissed with no orders as to cost.

(R.A.) Revision dismissed.

PLJ 2016 Lahore 1069

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUHAMMAD YOUNAS and another--Petitioners

Versus

GHAZANFAR ABBAS and 12 others--Respondents

C.R. No. 3745 of 2014, heard on 2.3.2016.

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

----S. 115--Civil revision--Male dominant society--Legacy--Gift deed--Suit for declaration along with cancellation of gift deed and mutations--Factum of death was not got entered in register--Doctrine of lis pendends--Validity--There is no cavil with proposition that a document prepared during pendency of lis is squarely hit by rule of *lis pendens* and on such score same can neither be-'relied upon nor considered--Doctrine of *lis pendens* in pith and substance was not only based on equity, but also on good conscience and justice, which is based on maxim *"pendente lite nihil innoveture"* and theme of said maxim is that during litigation nothing should be changed. [P. 1075] A

Documentary evidence--

----Scope--Comparing with original document--Documentary evidence has to be given preference to oral evidence--Document was admissible in evidence until original record was presented before trial Court to compare with same--Copy of death certificate on its face value is to be taken out of consideration for reasons that neither secretary, UC nor nazim, who put their signatures on same, were brought into witness-box to prove contents of document--Production of document on record and its proof are two independent aspects and latter aspect is vital, which makes a fact to be proved. [P. 1076] B & C

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

----Art. 87--Evidence Act, 1872--S. 76--Document--Attested copy--Copy of original record--Copy of death certificate was signed by secretary/nazim, same could not be treated to be attested copy falling within ambit of Art. 87 of Q.S.O. or under Section 76 of Evidence Act, 1872--Public officer having custody of public document, which any person has a right to inspect, shall give copy of it on payment of legal fee thereof, therefore, a certificate written at foot of document that it was a true copy of original record or part thereof, as case may be and after such certificate is added and scribed by authorized officer with signature and designation, such copies so certified shall be called certified copies. [P. 1076] D

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

----Art. 87--Cerified copy of public documents--Object of appending certificate--If there is an endorsement of officer issuing copy, which satisfies Court that it is a true copy--There was no such endorsement which could satisfy that it was a correct copy of original. [P. 1077] E

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

----Art. 129(g)--Adverse inference--Custodian of register of death entries--Copy of death entry--It is well established principle of law that best evidence, which was withheld by a party if was brought on record might have gone against version of that party--No objection was taken to certificate at time of its exhibition would not make same admissible in evidence, which otherwise, could not be admitted under law--Admittedly, copy of death entry as observed was not copy of judicial record, which could not be received in evidence without proof of signatures and writing of person alleged to have signed or written same, even if, such documents brought on record were exhibited without objection. [P. 1077] F & G

Gift Deed--

----Scope--Contentions of--Registered instrument attained strong presumption of truth--Validity--It is by now well settled principle of law that whenever execution or validity of a purportedly registered document is denied, such registered document loses sanctity of, being presumed to be correct, but its veracity would depend upon quantum and quality of evidence to be produced to prove its execution. [P. 1078] H

Registration Act, 1908 (XVI of 1908)--

----S. 60--Registration proceedings--Attesting officer--Presumption--Gift deed--Presumption attached to its certificate is always rebutable and whenever execution of an instrument is denied, then presumption is deduced to have been sufficiently rebutted and onus lies upon person, who alleges execution to prove that document was executed and transaction did take place--Presumption in favour of a registered instrument does not dispense with necessity of showing that person, who admitted execution before attesting officer was not an imposter, but same person. [P. 1078] I

Evidence Act, 1872 (I of 1872)--

----S. 68--Qanun-e-Shahadat Order, 1984--Preamble--Gift deed--Executed prior to promulgation of Q.S.O.--Attesting witness--Only one attesting witness was sufficient to prove its execution/ attestation--Defendants no doubt, brought attesting witness, in witness-box and got recorded his statement-in-chief, but he was not produced for cross-examination despite availing of numerous opportunities and as per well established principle, his statement without cross-examination would not carry any weight. [P. 1079] J

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

----Art. 100--Admissibility of document--Contention of--Marginal witnesses--Production of--Gift deed--Thirty years old documents--It is well established principle of law that there is difference between admissibility of document and evidentiary value of document having a life of more than 30-years under provision of Art. 100 of Q.S.O., which is admissible without production of marginal witnesses or executers, but Court under such provision is not required to presume contents of such documents to be true.

[P. 1081] K

Inheritance--

----Limitation--Joint corpus of undivided immovable property--Irrespective of fact--Question of--Whether entries in revenue record with regard to agricultural land were made in their names or not--Matter of inheritance--Validity--Neither limitation nor conduct of plaintiffs could estop them from claiming their legal share and mere passage of time does not extinguish their rights, but every new entry in revenue record on basis of fraudulent instrument gives rise to a fresh cause of action and it being a case of recurring cause of action, suit cannot be declared time barred. [P. 1082] L

Gift instrument--

----Scope--Fraudulently got attested gift instrument--Transaction--No benefit can be derived by a person claiming title in immoveable property based on fraudulent transaction because it is well-settled principle that fraud, if established on record, is sufficient to vitiate most solemn proceedings. [P. 1082] M

M/s. Mushtaq Ahmad Mohal and Anwaar Hussain Janjua, Advocates for Petitioners.

M/s. Muhammad Iqbal Akhtar and Ahmad Ikram, Advocates for Respondents 1 & 8.

Date of hearing: 2.3.2016.

JUDGMENT

Ch. Muhammad Masood Jahangir, J:--This is another case of male dominant society, wherein the two brothers deprived their sister, namely Sardaran Bibi (deceased) of the legacy of their father by maneuvering gift deed in their favour regarding the property of their deceased father.

2. The facts germane for the disposal of the instant civil revision are that respondents being legal heirs of Sardaran Bibi, sister, (hereinafter to be referred as "Plaintiffs") instituted a suit for declaration along with cancellation of gift deed dated 02.03.1976 and mutations dated 18.04.1977, 17.03.1996 and 09.07.1996 with the/assertions that disputed property was owned by their maternal grand-father, namely, Rehana, who had two sons, namely, Muhammad Younas and Sher Muhammad, petitioners (hereinafter to be referred as

"Defendants No. 1 and 2") and one daughter Sardaran Bibi, the mother of the plaintiffs, who passed away on 22.06.2001 and when the plaintiffs claimed their share from Defendants No. 1 and 2, they turned down their request and on inquiry, the plaintiffs came to know that Defendants No. 1 and 2 had got attested gift deed on 02.03.1976 in their favour, whereas, Rehana, the predecessor-in-interest of the parties, had already passed away in December, 1974, but Defendants No. 1 and 2 by practicing fraud, misrepresentation and impersonation in connivance with the revenue officials succeeded to procure a fictitious gift deed to deprive their sister of the legacy of her father. The plaintiffs claimed that the above referred gift deed as well as subsequent mutations attested in favour of the remaining defendants being the result of fraud and misrepresentation were liable to be cancelled. The suit was contested by the defendants with the assertion that Rehana, predecessor-in-interest of the parties, passed away on 10.03.1979, who during his life time made a declaration of gift in favour of Defendants No. 1 and 2, which was accepted by them and in lieu thereof the possession of the disputed property was also handed over to them. Then gift deed was duly attested in their favour, which was free from any element of fraud, misrepresentation, impersonation and connivance. The learned trial Court white facing with the contest settled the following issues:--

1. Whether the plaintiffs have got no cause of action to bring the instant suit? OPD
2. Whether the plaintiffs did not come to the Court with clean hands, so, they were not entitled to get any relief? OPD
3. Whether the suit is not maintainable in its present form? OPD
4. Whether the plaintiffs have filed false and fictitious suit, therefore, the defendants are entitled to recover special costs u/S. 35-A of, CPC? OPD
5. Whether the suit has been filed within time? OPD
6. Whether the plaintiffs are entitled to get cancellation of impugned gift *vide* Mutation No. 1431 dated 18.04.1977, Mutation No. 2618 dated 17.03.1996 and Mutation No. 2635 dated 09.07.1996, if so, on what ground? OPP
7. Relief.

3. During the trial, Imdad Hussain, one of the plaintiffs, appeared as PW/1, whereas, Inayat was produced as PW/2 and in documentary evidence they tendered documents (Ex.P/1 to Ex.P/5). Conversely, Muhammad Younas, Defendant No. 1 appeared as DW/1 and also produced Muhammad Yousaf, Bukhsha and Mudassar Shehzad as DW/2 to DW/4, whereas the documentary evidence ranging from Ex.D/1 to Ex.D/5 was also brought on record on their behalf. After appreciating the evidence available on file, the learned trial Court passed the judgment and decree dated 04.03.2011 and dismissed the suit

instituted by the plaintiffs. Being despondent, the plaintiffs preferred an appeal before the learned Addl. District Judge, Pindi Bhattian, who *vide* impugned judgment and decree dated 05.12.2014 accepted the same and while setting aside the judgment and decree passed by the learned trial Court, the suit filed by the plaintiffs was decreed. Seeming aggrieved, the instant civil revision has been filed by Defendants No. 1 and 2.

4. Mr. Mushtaq Ahmad Mohal, learned counsel for Defendants No. 1 and 2 has argued that the learned lower appellate Court miserably failed to appreciate that, even according to the contents of the plaint, the mother of the plaintiffs died on 22.06.2001, who remained alive for 25 years after the execution of impugned gift deed in the year 1976, but she never challenged the said gift deed executed in favour of her brothers/Defendants No. 1 and 2 during her life time and the plaintiffs were estopped to challenge the validity as well as propriety of the gift deed executed in favour of Defendants No. 1 and 2 that the suit was hopelessly time barred and the findings of the learned trial Court on Issue No. 5 were perfect and strictly in accordance with law as well as evidence available on the record, while the findings of learned lower appellate Court on the said issue are erroneous, illegal and unlawful being result of misreading and non-reading of evidence; that the Defendants No. 1 and 2 fully proved the execution/attestation of the disputed impugned gift deed as well as the transaction reflected therein, but the learned lower appellate Court while misinterpreting and twisting the material available on file passed the impugned judgment and decree; that the possession of the disputed property is vested with the Defendants No. 1 and 2 since 1976/from the inception of declaration of gift made in favour of the defendants by their father, which also corroborated their stance and mother of the plaintiffs was not given any Hissa Batai. He has relied upon the judgments reported *Muhammad Rustam and another vs. Mst. Makhan Jan and others* (2013 SCMR 299), *Noor Din & another vs. Additional District Judge, Lahore & others* (2014 SCMR 513), *Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others* (PLD 2015 SC 212), *Mst Grana through Legal Heirs & others vs. Sahib Kamala Bibi & others* (PLD 2014 SC 167) and *Lal Khan through Legal Heirs vs. Muhammad Yousaf through Legal Heirs* (PLD 2011 SC 657) in support of his contentions. He has lastly prayed for the acceptance of instant civil revision, setting aside of the impugned judgment and decree passed by learned lower appellate Court and restoration of the judgment and decree dated 04.03.2011 rendered by the learned trial Court, whereby, suit filed by the plaintiffs was dismissed.

5. Conversely, M/s. Muhammad Iqbal Akhtar and Ahmad Ikram, Advocates on behalf of plaintiffs have refuted the arguments of learned counsel for Defendants No. 1 and 2, supported the impugned judgment and decree and prayed for dismissal of the instant civil revision.

6. Arguments of learned counsel for the parties heard and record perused.

7. From the perusal of record, it boils out that plaintiffs brought their suit before the learned trial Court with the specific plea that their maternal grand-father, namely, Rehana had died in December, 1974 and after his death, his property was got transferred by the Defendants No. 1 and 2 through attestation of gift deed on 02.03.1976 to deprive their mother of her share from the legacy of her father. Whereas Defendants No. 1 and 2 through their written statement while refuting the stance of the plaintiffs asserted that Rehana, their father, was alive in the year 1976 when he had executed the gift deed in their favour and subsequently he died on 10.03.1979. The basic document to dislodge the offence raised by the plaintiffs is copy of death certificate of Rehana deceased (Ex.D/3), which was brought on record through statement of Muhammad Younas, Defendant No. 1 (DW/1). It is worth-mentioning to note that the plaintiffs instituted their suit before the learned trial Court on 19.03.2007, whereas, death of Rehana as per Ex.D/3 was got entered in the Register of Death on 16.05.2007 and thereafter the written statement was filed by the defendants before the learned trial Court on 18.07.2007 while asserting therein that their predecessor had died on 10.03.1979. Admittedly, till the institution of the suit the factum of death of Rehana was not got entered in the relevant Register and the possibility cannot be ruled out that after getting knowledge of the filing of the suit, Defendants No. 1 and 2 while succeeding to get incorporated death entry of their father procured copy of death certificate (Ex.D/3) on the same day when it was entered in the said Register on 16.05.2007. There is no cavil with the proposition that a document prepared during the pendency of the lis is squarely hit by the rule of *lis pendens* and on such score same can neither be relied upon nor considered. The doctrine of *lis pendens* in pith and substance was not only based on equity, but also on good conscience and justice, which is based on the maxim *"pendente lite nihil innoveture"* and the theme of the said maxim is that during litigation nothing should be changed.

8. Additionally, the document Ex.D/3 was exhibited in evidence in the statement of Defendant No. 1(DW/1). The perusal of said document also reveals that it simply bears the signature and seal of the Secretary as well as Nazim of the Union Council. When questioned that as to why the original record pertaining to Ex.D/3 was not produced before the learned trial Court and the said document was not got compared with the original Register, the learned counsel for Defendants No. 1 and 2 replied that it was not necessary at all as Ex.D/3 copy of the death entry contained in the relevant Register maintained by the Union Council was a sufficient proof and the documentary evidence has to be given preference to the oral evidence adduced by the plaintiffs. The said submission of Mr. Mushtaq Ahmad Mohal, Advocate, learned counsel for Defendants No. 1 and 2 has no force as Ex.D/3 was merely signed by the Secretary, Union Council and the Nazim, which cannot be treated to be certified copy of the document issued from the public record by the authority competent to issue while comparing with the original document of Register. Mere factum that signature of Secretary, Union Council as well as Nazim were appearing on the said document was not sufficient to hold that the said document was admissible in evidence until the original record was presented before the learned

trial Court to compare Ex.D/3 with the same. The copy of death certificate (Ex.D/3) on its face value is to be taken out of consideration for the reasons that neither the Secretary, Union Council nor the Nazim, who put their signatures on the same, were brought into the witness-box to prove the contents of the said document. The production of document on record and its proof are two independent aspects and the latter aspect is vital, which makes a fact to be proved. For the mere reason that Ex.D/3 was signed by the Secretary/Nazim, the same could not be treated to be the attested copy falling within the ambit of Article 87 of the Qanoon-e-Shahadat Order, 1984 or under Section 76 of the Evidence Act, 1872. As per above referred provisions, every Public Officer having the custody of public document, which any person has a right to inspect, shall give copy of it on payment of the legal fee thereof, therefore, a certificate written at the foot of said document that it was a true copy of the original record or part thereof, as the case may be and after such certificate is added and scribed by the authorized officer with signature and designation, such copies so certified shall be called certified copies. For ready reference, Article 87 of the Order ibid along with its explanation is reproduced hereunder:--

> **87. Certified copies of public documents:** Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
>
> **Explanation:** Any officer, who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this Article.

The object of appending certificate as required by Article 87 ibid is to ensure that it is a true copy. The requirement of the Article would, therefore, be perfectly met, if there is an endorsement of the officer issuing the copy, which satisfies the Court that it is a true copy. In the present case, there was no such endorsement on Ex.D/3, which could satisfy that it was a correct copy of the original. In forming this view, I have to my credit a plethora of judgments delivered by superior Courts and for ready reference the following case law is referred:--

1. *The commissioner of Sales Tax & Income Tax, Rawalpindi Zone, Rawalpindi vs. Messrs Pakistan Television Corporation Ltd., Rawalpindi* (PLD 1978 Lahore 1027);
2. *Mehboob Ali and another vs. Mst. Sharifan Bibi and 21 others* (1991 CLC 1201);

3. *Muhammad Aslam and another vs. Senior Civil Judge, Gujrat (Mian Nisar Hussain) and 2 others* (2000 MLD 1581); and

4. *Mina Bibi vs. Manak Khan and others* (2013 CLC 115).

Defendants No. 1 and 2 also withheld the best evidence, which was available to them in the shape of Custodian of Register of death entries in whose custody the same was lying and an adverse inference under Article 129 illustration (g) of the Qarioon-e-Shahadat Order, 1984 has to be drawn against the Defendants No. 1 and 2. It is well established principle of law that the best evidence, which was withheld by a party if was brought on the record might have gone against the version of that party.

9. The emphasis of learned counsel for Defendants No. 1 and 2 that document (Ex.D/3) was brought on the record without any objection and learned lower appellate Court erred in law while discarding the same is also without any substance. Mere fact that no objection was taken to said certificate at the time of its exhibition would not make the same admissible in evidence, which otherwise, could not be admitted under the law. Admittedly, the copy of death entry Ex.D/3 as observed supra was not copy of judicial record, which could not be received in evidence without the proof of signatures and writing of the person alleged to have signed or written the same, even if, such documents brought on record were exhibited without objection. Reliance is placed upon the judgment reported as *Muhammad Yousaf Khan vs. S.M. Ayub and 2 others* (PLD 1973 SC 160) and *Muhammad Akram and another vs. Mst. Farida Bibi and others* (2007 SCMR 1719).

10. The argument of Mr. Mushtaq Ahmad Mohal, learned counsel for the Defendants No. 1 and 2 that gift deed being registered instrument attained strong presumption of truth and the learned lower appellate Court without dilating upon the said aspect of the case erred in law while decreeing the suit is not tenable. It is by now well settled principle of law that whenever the execution or validity of a purportedly registered document is denied, such registered document loses sanctity of being presumed to be correct, but its veracity would depend upon quantum and quality of evidence to be produced to prove its execution. Reliance can be placed upon *Abdul Ghafoor and others vs. Mukhtar Ahmad Khan and others* (2006 SCMR 1144); and *Abdul Majeed and 6 others vs. Muhammad Subhan and 2 others* (1999 SCMR 1245). In the latter case the apex Court concluded in the following words:

> It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction of which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these

documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness of document.

Additionally, under Section 60 of the Registration Act, 1908, only a restricted presumption is attached that registration proceedings were regularly and honestly carried out by the attesting officer, but the said presumption attached to its certificate is always rebutable and whenever the execution of an instrument is denied, then the presumption is deduced to have been sufficiently rebutted and onus lies upon the person, who alleges execution to prove that the document was executed and the transaction did take place. Presumption in favour of a registered instrument does not dispense with the necessity of showing that person, who admitted the execution before the attesting officer was not an imposter, but the same person. Reliance can be placed upon the judgment reported as *Gopal Das vs. Siri Thakir Gee and others* (AIR 1943 P.C. 83). This view has also been conceived by the Division Bench of this Court in a case reported as *Siraj Din vs. Jamila and another* (PLD 1997 Lahore 633).

11. Admittedly, the impugned gift deed was executed prior to the promulgation of the Qanoon-e-Shahadat order, 1984 and as per Section 68 of the Evidence Act, 1872, only one attesting witness was sufficient to prove its execution/attestation. Defendants No. 1 and 2, no doubt, brought Muhammad Yousaf, the attesting witness, in the witness-box and got recorded his statement-in-chief as (DW/2), but he was not produced for cross-examination despite availing of numerous opportunities and as per well established principle, his statement without cross-examination would not carry any weight. The other attesting witness, namely, Muhammad Aslam had already passed away. No doubt, his brother DW/5 was produced to verify the signatures of said Muhammad Aslam over Ex.D/1, but that could not be considered sufficient to prove the contents/execution/ attestation of gift deed. To prove that Rehana being alive had validly gifted the suit property in terms of impugned gift deed, neither Stamp Vendor, Deed Writer and Irshad ullah Identifier were produced nor the Sub-Registrar was got examined, who could be the star witnesses to prove that genuinely the executant had appeared for the purchase of stamp paper, who got executed the gift deed and after due identification and verification instrument was validly attested. To prove the transaction of gift embodied in the instrument, one of the beneficiaries, namely, Muhammad Younas, Defendant No. 1, being DW/1 in his cross-examination deposed as under:

ہمارے والد نے اراضی ہبہ کرنے کی بات 2.3.1976 کوکی تھی۔ اس وقت بخشہ ولد بہادر اور اسلم ولد تاجہ موجود تھے۔ شام کا وقت تھا۔ یہ بات ہمارے والد کے گھر ہوئی تھی۔ اگلے روز والد نے اراضی ہمارے نام ہبہ کروا دی تھی۔ اگلے روز یونس، شبیرا، والام، اسلم، بخشہ ساتھ تھے۔

The study of his deposition belies the transaction on the following counts:--

(a) As per statement, the donor on 02.03.1976 declared his offer of gift in favour of his two sons and gift deed was executed on the following

day i.e. 03.03.1976, whereas, the perusal of gift instrument (Ex.D/1) reveals that stamp papers were purchased on 02.03.1976 and the instrument was not only executed but was also attested on the same day.

(b) DW/1 did not state that on the day of declaration of gift or execution of document, Muhammad, Yousaf, the attesting witness, was also present. Non-production of said marginal witness for cross-examination was, therefore, intentional on the part of the beneficiaries.

Whereas Bukhsha son of Bahadar before whom the alleged offer of gift was made by the donor being DW/3 in his cross examination stated as follows:--

ریحانہ نے 1976 میں ہبہ کی بات کی تھی۔ ان پڑھ ہونے کی وجہ سے تاریخ نہ بتا سکتا ہوں۔ اس وقت اسلم، شیرا، یونس، بخشہ موجود تھے۔ دوسرے، تیسرے دن اراضی انہوں نے مدعا علیہم کے نام ہبہ کروا دی تھی ..... ریحانہ کی تاریخ وفات نہ بتا سکتا ہوں۔ از خود کہا کہ ہبہ کے تین سال بعد فوت ہوا تھا۔ اس وقت تقریبا 70 سال کا تھا۔

The statement of DW/3 is not found to be in league with the statement of above referred DW/1, rather major contradiction is reflected therein to the extent of day of execution of the gift deed. Furthermore, the deposition of DW/3 has completely shattered the authenticity of death entry (Ex.D/3) of Rehana deceased. He stated that at the time of death, Rehana was about 70-years of age whereas column No. 7 of Ex.D/3 reveals that he died at the age of 90-years. The beneficiaries/ Defendants No. 1 and 2 remained unable to produce sufficient material on the suit file to independently prove the transaction of gift.

12. The submission of learned counsel for Defendants No. 1 and 2 that Imdad Hussain, one of the plaintiffs being PW/1 stated in his deposition recorded in the Court on 18.05.2010 that his age was 35 years and Rehana died when said PW was of the age of 6/7 years, which is sufficient proof that Rehana died much after execution of gift deed, is not tenable. Luckily, from the perusal of file, copy of I.D. Card Bearing No. 34302-1208535-1 belonging to PW/1, which was issued on 23.10.2001 much prior to recording of his statement, is found to be annexed with power of attorney of learned counsel for the plaintiffs and the perusal thereof reveals that PW-1 was born in the year 1966. It is thus borne out that the age of PW/1 was mistakenly written in the cross-examination as 35 years. If it is calculated that Rehana died when PW/1 was of the age of 6/7 years old, then it would become 1972-73 and even the said year of death of Rehana is much prior to the alleged attestation of impugned gift deed in the year 1976.

13. The other submission of the leaned counsel for Defendants No. 1 and 2 that gift deed having a life of more than 30-years attained strong presumption of truth under Article 100 of the Qanoon-e-Shahadat Order, 1984 and Defendants No. 1 and 2 were not required to prove the same, but it must be relied upon, is without any substance. It is well established principle of law that there is difference between

admissibility of document and evidentiary value of document having a life of more than 30-years under the provision of Article 100 of the Qanoon-e-Shahadat Order, 1984, which is admissible without production of the marginal witnesses or the executers, but the Court under this provision is not required to presume contents of such documents to be true and reliance can be placed upon the judgment reported as *Allah Dad and 3 others vs. Dhuman Khan and 10 others* (2005 SCMR 564), wherein it was observed as under:--

> "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 singed or written by the person whose signature appear on it and that it was duly executed and attested by the executants. The age of documents, its unsuspicious character, its custody and other circumstances are foundation to raise a presumption of its execution and if a document is proved more then 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 then 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 case, Court may call the parties to produce the evidence. However, the presumption of genuineness of 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."

This view has again been approved by the august Supreme Court of Pakistan in case titled as *Jang Bahadar and others vs. Toti Khan and another* (2007 SCMR 497).

14. When it is proved on the record that gift deed Ex.D/1 was procured by Defendants No. 1 and 2 while practicing fraud, misrepresentation and impersonation, then every legal heir became the co-owner in the legacy of his predecessor as soon as he died, irrespective of the fact, whether entries in the revenue record with regard to an agricultural land were made in their names or not. To oust a co-owner from the joint corpus of an undivided immovable property, cogent, tangible and un-rebutted evidence was required, which is lacking in the case in hand. In the matters of inheritance neither limitation nor conduct of plaintiffs could estop them from claiming their legal share and mere passage of time does not extinguish their rights, but every new entry in the revenue record on the basis of fraudulent instrument gives rise to a fresh cause of action and it being a case of recurring cause of action, the suit cannot be declared time barred. Reference can be placed upon the judgments reported as *Abdul Rahim and another vs. Mrs. Jannatay Bibi and 13 others* (2000 SCMR 346), *Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi* (PLD 1990 SC 1) and *Khair Din vs. Mst. Salaman and others* (PLD 2002 SC 677). When it is proved that Defendants No. 1 and 2 had fraudulently got attested the gift instrument, no benefit can be

derived by a person claiming title in the immoveable property based on fraudulent transaction because it is well-settled principle that fraud, if established on record, is sufficient to vitiate most solemn proceedings. Reference can be made to the judgments reported as *Lal and anothers vs. Muhammad Ibrahim* (1993 SCMR 710). The Court of law cannot remain oblivious of the erosion of moral values and the conduct of Defendants No. 1 and 2 is worth quoting as a classic example in this regard. On the strength of material available on record, the learned trial Court fell in error while dismissing the suit, but learned lower appellate Court correctly appreciated the evidence of the parties and interpreted the law available on the subject while decreeing the suit instituted by the plaintiffs. The case law referred to by the learned counsel for the Defendants No. 1 and 2 being distinguishable runs on different footings.

15. Learned counsel for Defendants No. 1 and 2 is unable to point out any illegality, perversity or jurisdictional defect in the impugned judgments and decrees, which are also not found to be tainted with any misreading or non-reading of the material available on the record calling for any interference by this Court in the exercise of revisional jurisdiction. Resultantly, the instant civil revision being devoid of any force is dismissed with cost throughout.

(R.A.) Petition dismissed.

2016 C L C 1553
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ABDUL LATIF----Petitioner
Versus
ADDITIONAL DISTRICT JUDGE, KASUR and 4 others----Respondents

Writ Petition No.13400 of 2011, decided on 4th April, 2014.

Inheritance---
----Parentage, determination of---Dispute as to inheritance---DNA Test for determination of parentage of defendant who was adopted son of plaintiff's parents---Scope and validity---DNA Test was the safest way to depict the true picture of relationship---If a person conducting DNA test committed any foul play, such person could be dealt with in accordance with law by courts---DNA test could be helpful in deciding (expeditiously) cases involving disputed inheritance transactions by adoptive parents---Constitutional petition was dismissed.

Aman Ullah v. The State PLD 2009 SC 542 and Khizar Hayat v. Additional District Judge, Kabirwala and 2 others PLD 2010 Lah. 422 distinguished.

Adeel Mumtaz Mian for Petitioner.

Ch. Mohammad Hanif for Respondent No.1

Date of hearing: 4th April, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The facts necessitated for the disposal of the instant writ petition are that Hafiz Mohammad Idrees and Mst. Aasia Bibi respondents Nos.3 and 4/plaintiffs filed a suit for declaration against the petitioner and respondent No.5 before the learned trial court alleging that Abdul Latif petitioner was not son of Noor Din, rather he was actually son of Khair Din, brother of said Noor Din; that the petitioner/defendant No.1 is not entitled to inherit property of said Noor Din and in this respect inheritance mutation No.1790 dated 07.06.1997 of said deceased while declaring to be forged, fabricated and misrepresentation, was liable to be cancelled. The petitioner/defendant No.1 contested the said suit by filing a written statement.

2. The respondent No.5 also filed a declaratory suit of identical nature which was also contested by the present petitioner. The suit filed by respondent No.5 was consolidated with the suit filed by respondents Nos.3 and 4/plaintiffs by the learned trial court. While contesting the suit filed by the plaintiffs/respondents Nos.3 and 4 the petitioner categorically asserted that he was in fact son of Noor Din and the disputed mutation of inheritance was sanctioned by revenue hierarchy in accordance with law and facts. During the course of proceedings of the said suit, the plaintiffs/respondents Nos.3 and 4 filed an application before the learned trial court

for conducting of Deoxyribonucleic Acid (DNA) Test, who dismissed the same vide order dated 07.12.2010. Feeling dissatisfied, the plaintiffs/respondents Nos.3 and 4 filed a revision petition before the learned lower appellate court, who has allowed the same vide order dated 10.05.2011, hence this writ petition.

3. Learned counsel for the petitioner has argued that the petitioner was born out of the wedlock of Noor Din and Zeenat Bibi; that the record regarding the parentage of the petitioner since his birth till now reflects that he is son of Noor Din. He has drawn the attention of this court to the said record which consists of Birth Certificate, NIC, academic certificate, domicile, Nikah Nama and copy of Register Haqdaran Zameen. He further argued that Noor Din was his real father and the said record affirms the said fact, therefore, conducting of Deoxyribonucleic Acid (DNA) Test is not warranted; that skill and equipments in the hospitals and laboratories of our country are not of standard mark and the said test cannot be treated conclusive proof to determine the paternity of any person and that learned lower revisional court wrongly exercised the jurisdiction not vested to it by allowing the revision petition filed by the petitioner. Reliance has been placed upon the cases reported as "Aman Ullah v. The State" (PLD 2009 Supreme Court 542) and "Khizar Hayat v. Additional District Judge, Kabirwala and 2 others" (PLD 2010 Lahore 422). He lastly prayed for the acceptance of the instant writ petition, setting aside of the impugned judgment passed by the learned lower revisional court and that the order passed by the learned trial court be restored.

4. Conversely, the learned counsel for the respondents has supported the impugned judgment while arguing that if the petitioner actually is son of Noor Din deceased then he has to undergo DNA test, the authenticity whereof is highly recognized all over the world and it is the best and possible mode to ascertain relationship of petitioner/ defendant No.1 along with plaintiffs/respondents Nos.2 and 3 which will diminish the ambiguity once for all. He lastly prayed for the dismissal of the instant writ petition.

5. Arguments heard. Record perused.

6. Adoption is a gift of heart. A child adopted by others is involved in the feelings of love of adoptive family. In the present case it is alleged by plaintiffs/respondents Nos.2 and 3 that petitioner/defendant No.1 had been adopted by their parents when they were issueless and under the control/command of love and affection, the sir name of their father Noor Din was attributed to petitioner/defendant No.1 and that is why, the record as mentioned supra bears the name of Noor Din as his father's name, whereas, actually petitioner/defendant No.1 is the son of Khair Din, the brother of Noor Din, from whom, he was adopted.

7. The only pivotal question in this case is that whether the petitioner/defendant No.1 is the son of Noor Din or his brother Khair Din. Now, we are passing through modern era of life. The medical science has developed a lot in the recent span of life while the Forensic Lab has attained the level of perfection and the skill of expert cannot be denied. A person can tell a lie, but the medical science and its findings based upon skilled tests through most modern devices definity will be an aiding factor for the court to resolve the controversy. Matching

of relationship of one person to the other person through DNA test with the aid of most modern devices, to my mind, is the safest way to depict the true picture of relationship. Throughout the world, these tests have attained a symbol of standard and correctness. It will be highly unsafe to suggest that in Europe and other modern countries, the report of such type of tests is fully followed, but in our society, due to lack of knowledge or unfairness, the result of such type of test is not being given preference. If such an approach is to be kept under consideration, then other test arising out of medical science would also become valueless. We have to trust upon our skill and we have to wait for the result of such a test which is yet to be gathered. Before the said report comes into existence, one cannot say that such report may be unsafe due to lack of skill or defective devices.

8. In the near past, the institutions and departments have grown up and it became possible due to the revolution, which happened in the Judicial System. At present, the judiciary is at its strongest pedestal when each and every organ of the State is answerable to it regarding its deeds and work/progress. If a matter is referred to the Lab for comparison or a test then it cannot be assumed with certainity that any foul play can be applied by any such conductor and if it is found to be done, then the Courts can put such a person to task under the law. We have to rely upon the skill and high level performance of our own departments. A large number of like nature cases are pending before the Courts of law regarding the adopted child, where the inheritance transactions of adoptive parents are under question which may take years to years for its final adjudication. The most modern scientific test (DNA) will definitely be helpful in such like cases too.

9. The case law cited by the learned counsel for the petitioner is not applicable to the facts and circumstances of the instant case as in Amanullah's case (supra) it was a bail matter and the allegation of committing sexual intercourse with a young virgin girl was found to be prima facie supported by the medical evidence and the police having been found in league with the accused, he was declared innocent and it was held that in presence of ocular evidence, the report of the Expert cannot be preferred, which is only of corroborative nature. Similarly, Khizar Hayat's case (supra) has been passed in a family matter where the child was admittedly born during the subsistence of the marriage of the spouses and the mother admitted the paternity of the said minor child, but the father had challenged the legitimacy of the child and to save the latter to be stigmatized in the latter life the DNA Test was refused. Here the position is different and it is not a case of legitimacy of the petitioner, but it is claimed that he was born out of the wedlock of some other known spouses and he was adopted son of the parents of respondents Nos.3 and 4, who at that time were issueless. Here the objects are known and in case of any ambiguity or doubt in the veracity of the report, the parties will be at liberty to file objections and the same will be resolved keeping in view the direct evidence likely to be produced by the parties.

10. The learned lower revisional court has eminently dealt with the matter and rightly referred the petitioner to go through the said matching test. As respondent No.5 Mst. Zaineb Bibi has been pointed out to be dead at present, therefore, it will

be appropriate that the petitioner and respondents Nos.3 and 4 whom he himself admitted to be his real brother and sister will be referred to Forensic Lab to go through the DNA test. The conducting of said test is not likely to prejudice the case of petitioner/defendant No.1 and the learned revisional court has exercised the legal authority after taking into consideration due care. So the learned trial court is directed to refer the petitioner as well as respondents Nos.3 and 4 (Mst. Aasia Bibi and Hafiz Mohammad Idrees son of Noor Din) to some known Lab under the control of Government for the purpose of conducting DNA Test to ascertain their relationship as real brothers and sister out of common father and mother. The expenditures of the said test will be borne by respondents Nos.3 and 4.

11. The instant writ petition being devoid of any merits is hereby dismissed.

ARK/A-74/L

Petition dismissed.

2016 C L C 1796
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD YOUSAF and another----Petitioners
Versus
ADDITIONAL DISTRICT JUDGE and 5 others----Respondents

Writ Petition No.21702 of 2009, heard on 30th January, 2015.

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

----O. XVII, R. 3---Specific Relief Act (I of 1877), S.12---Constitution of Pakistan, Art.199--- Constitutional petition--- Scope--- Suit for possession through specific performance---Striking off right of cross-examination of defendant's witnesses---Scope---Plaintiff filed suit for possession through specific performance wherein right of cross-examination of plaintiff was struck off by Trial Court---Plaintiff sought numerous adjournments for cross-examination but he failed to cross-examine the witnesses of defendant despite being given ample opportunities to cross-examine witnesses---When defendant had succeeded in recording statements of witnesses, plaintiff slipped out of court room without cross examining witnesses---Trial court closed right of cross-examination by plaintiff and revisional court also dismissed petition assailing said order---Validity---No illegality, perversity or jurisdictional defect having been found in the order passed by courts below, High Court dismissed constitutional petition.

(b) Administration of justice---

----Prime duty of courts is to ensure that case is decided on merit as early as possible and it cannot be left at the choice of parties to linger on matter for illegal gain in aid of injunctive order usually issued by court during pendency of suit.

Ch. Masood Ahmad Zafar for Petitioners.
Nemo for Respondents.
Date of hearing: 30th January, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- By filing the instant Constitutional Petition, the petitioners have challenged the order dated 28.05.2009 passed by learned trial court whereby right of cross examination of petitioners on DW1 to DW5 was closed and judgment dated 05.10.2009 delivered by learned Additional District Judge by virtue of which Civil Revision filed by the petitioners was also dismissed. Being aggrieved, instant writ petition has been filed.

2. Arguments of learned counsel for the petitioners heard. On the other none has turned up on behalf of respondent No.3, who was served personally as well as respondent No.6, who was duly represented by an advocate, and as such they are proceeded ex-parte. Record perused.

3. The facts germane for the disposal of instant petition are that petitioners filed a suit for possession through specific performance of oral agreement to sell coupled with receipt dated 22.05.1995 against the respondents on 20.11.2000 (almost 13-1/2 years ago). It is significant to note that respondent No.1 was real sister of petitioner No.1. The said suit was resisted by the respondents/defendants and the learned trial court captured the disputed area of fact by framing issues on 07.01.2004 (it is also a sad state of affairs that even the trial court took 3-1/2 years to frame the issues). Thereafter, the petitioners/plaintiffs were invited to lead evidence, but despite availing various adjournments they remained fail to lead any evidence and the learned trial court dismissed the suit for want of evidence vide judgment and decree dated 11.10.2004. The petitioners went in appeal, which was accepted and the suit was remanded for its decision afresh with a direction to grant only two opportunities to the petitioners to produce their evidence before the learned trial court. It is again another gloomy aspect of the case that in spite of that appellate court had granted only two opportunities to the petitioners to lead evidence, the trial court once again closed the eyes and awarded 14-opportunities to the petitioners to conclude their evidence spreading over a period ranging from 17.06.2006 to 19.06.2007 without keeping in mind the judgment of the learned lower appellate court, which conduct of the judicial officer (Tariq Saleem Chohan, Civil Judge) is condemnable. Such practice conducted by the judicial officer should be checked by the District Judges under whom command the civil judges are functioning.

4. After conclusion of evidence of the petitioners, it is also vivid from the record that on each and every date of hearing the respondents brought their witnesses before the learned trial court, but the same could not be recorded for the one or the other pretence put forward by the learned counsel for the petitioners. It is gleaned from the case diary maintained by the learned trial court that on 23.04.2009 five witnesses of the respondents were present whereas on 09.5.2009, 12.05.2009, 14.05.2009 and 19.05.2005(sic) four witnesses were brought by the respondents for recording their statement but they could not be examined due to the delaying attitude of the petitioners and on 28.5.2009 when the examination-in-chief of DW1 to DW5 was recorded by the learned trial court, the counsel for the petitioners

instead of cross-examining the said witnesses slipped away from the court room without any information and the trial court was left with on other option except to struck off the right of cross-examination of the petitioners. The interlocutory order dated 28.05.2009 passed learned trial court in verbatim is reproduced here under

The above referred order was assailed by the petitioners by filing a revision before the learned lower revision court, which came up for hearing before learned Additional District Judge, Chunian and was dismissed vide impugned judgment dated 05.10.2009.

5. The attitude adopted by the petitioners during the trial of suit, which was filed 13-1/2 years ago is a clear example that the petitioners are playing delaying tactics to linger on disposal of the suit in order to deprive the respondent No.1, who is real sister of petitioner No.1 from the fruits of her land, which is in possession of the petitioners on the basis of alleged receipt dated 22.05.1995. It is the prime duty of the courts to ensure that the cases are decided on merits as early as possible and it cannot be left at the choice of the parties to linger on the matter for illegal gain in the aid of injunctive orders usually issued by the courts during the pendency of the suit to maintain harmony and peace between the parties. The case diary maintained by the learned trial court shows that the petitioners initially tried their best that the DWs should not be examined, who had been appearing on successive dates and when ultimately, the defendants succeeded to get recorded 5-DWs on 28.05.2009, the learned counsel for the petitioners did not appear in the court and plaintiff No.1 remained present during the recording of statement of DW.1 to DW.4 and slipped away from the court when statement of DW.5 was in progress, without any information to the learned trial court and thereafter neither plaintiff No.1 nor his counsel appeared to cross-examine the DWs. As such the learned trial court has rightly passed the impugned order for closing the right of cross-examination as the witnesses cannot be allowed to be treated just like accused for appearance in the courts to give evidence in a case for the benefit of the parties concerned. In such facts and circumstances, I do not find any illegality, perversity or jurisdictional defect to have been committed by the learned courts below while passing the impugned judgment/order and this writ petition having no merits is dismissed.

6. Before parting with the judgment I would like to comment that this court time and again has passed directions to the subordinate courts/District Judiciary for strict compliance of the directions embodied in the orders/judgments passed by Appellate/Revisional/Superior Courts, but lethargic attitude of some of the judicial

officers in this regard is highly condemnable, which is a main factor that the confidence of the litigants is being shaken upon the judicial institutions. The instant case conducted by the above referred judicial officer is its classic example. The copy of this judgment should also be placed in the service file of the said officer by the Registrar of this court, who is also directed to circulate the copy of this judgment to all the judicial officers of the subordinate courts through the learned District and Sessions Judges in the Punjab with a clear cut understanding that in future, non-compliance of directions embodied in the judgments/orders delivered by the Revisional/Appellate/Superior Courts will not be excused.

MM/M-75/L
Petition dismissed.

2016 P Cr. L J 1226
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mrs. HUMAIRA KHURRAM KHAN----Petitioner
Versus
SECRETARY MINISTRY OF INTERIOR and 3 others----Respondents

Writ Petition No.31218 of 2013, decided on 30th December, 2013.

Exit from Pakistan (Control) Ordinance (XLVI of 1981)---
----S. 2---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Exit Control List---Removal of name---Alternate remedy---Criminal case, pendency of---Petitioner was government official alleged to have embezzled huge amount from public funds and was facing criminal investigation---Petitioner sought removal of her name from Exit Control List on the plea that she had to attend marriage ceremony of her daughter in Canada---Validity---Grounds for placing name of petitioner on Exit Control List were not communicated to her---If there was any flaw in the action, no prejudice was shown to have been caused to petitioner because she had a right of filing review petition before competent authority---Without availing remedy of review, Constitutional petition before High Court was not maintainable---High Court declined to issue direction for removal of name of petitioner from Exit Control List during pendency of criminal case involving embezzlement of huge public exchequer---Petitioner was required for investigation and recovery purposes, as she was enlarged on ad-interim pre-arrest bail---Petitioner failed to make out any valid ground involving urgency of emergent nature to remove her name from Exit Control List---Authorities placed name of petitioner on Exit Control List after following proper procedure and it could not be declared to have been issued without jurisdiction or any authority---Petition was dismissed in circumstances.

Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others PLD 2010 Lah. 230 and Shariq Imran Khan v. Federation of Pakistan and others 2003 YLR 3104 distinguished.

Ahmad Awais for Petitioner.

Mohammad Sohail, Standing Counsel with Fayyaz Muhammad XEN, PWD and Altaf Watto, FIA, ACC, Lahore for Respondents.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Briefly the facts of the case are that some senior officers of Works Department had made a complaint against the corruption in the Ministry of Housing and Works to the honourable Supreme Court

of Pakistan on 17.4.2012 with a request for taking suo motu action. Thereafter different inquiries at the departmental side as well as by FIA were conducted and the petitioner along with other officers/officials of the said department was found to have embezzled government funds allocated for certain schemes. After completion of the inquiries, an FIR No.117 of 2013 dated 25.10.2013 under sections 409, 420, 468, 471, 109, P.P.C. read with sections 5(2), 47, P.C.A. at Police Station FIA Anti-Corruption Circle, Lahore was registered. Since the petitioner has dual nationality, the respondents have got her name entered in the Exit Control List vide order dated 07.11.2013 passed by respondent No.1, which has been challenged by the petitioner through the instant writ petition mainly on the ground that she has to attend the marriage ceremony of her daughter to be scheduled on 12.01.2014 at Toronto Canada.

2. The learned counsel for the petitioner has contended that the petitioner has been serving as an Executive Engineer in PWD; that a complaint had been made by some officers of the department against the alleged corruption in the Department, which was reported to be false and frivolous by the concerned Ministry of Housing and Works after thorough inquiry, that the departmental proceedings were initiated against the said group of complainant officers and they were placed under suspension, that the petitioner earlier filed W.P. No.26835/2013 and this Court vide order dated 22.10.2013 while passing an injunctive order directed the respondents not to take any adverse action against the petitioner but in spite of that subsequently an FIR No.117/2013 has been registered on 25.10.2013 against the petitioner, which has been followed by the order dated 07.11.2013 passed by respondent No.1 for placing name of the petitioner on the ECL at the request of respondent No.2, that the impugned order for placing the name of the petitioner at the ECL has been passed without making any probe into the so-called allegations or affording the opportunity of hearing to the petitioner, that the marriage ceremony of daughter of the petitioner has been scheduled for 12.01.2014 in Toronto Canada where the daughter of the petitioner is presently residing and the allied functions will start from 10/11-01-2014, that the petitioner being mother has to go there to join the said ceremony, that the impugned order is non-speaking, arbitrary and mala fide, which has been passed in violation of the fundamental rights as envisaged by Articles 9 and 10A of the Constitution of Islamic Republic of Pakistan, 1973, that the petitioner being a public servant enjoys protection under the law and the respondents without conducting inquiry about the authenticity of the allegations cannot impose restriction upon the petitioner to go abroad for participation in the marriage ceremony of her daughter by placing her name on the ECL, that no independent inquiry was conducted by the department or the FIA, but the same was

conducted by one of the officers, who made the complaint, that name of petitioner has been placed at the ECL without following the proper procedure and taking into consideration that no public interest was involved in the matter in hand through the impugned order, which is liable to be set aside while allowing this writ petition. The learned counsel for the petitioner has relied upon the judgments reported as Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others (PLD 2010 Lahore 230) and Shariq Imran Khan v. Federation of Pakistan and others (2003 YLR 3104) in support of his contentions.

3. Conversely the learned Standing Counsel while appearing on behalf of the respondents has argued that there is sufficient material available on the record to prima facie connect the petitioner with the charges of corruption and misappropriation of huge public money, that person of the petitioner is required for the purposes of investigation and recovery purposes, who is on interim pre-arrest bail for the last more than two months by the court of the learned Special Judge (Central), Lahore and if her name is removed from the ECL, then there is every possibility of her escape from law, who has been found guilty of the offence during the inquiries conducted by the department as well as FIA, that no ground of emergent nature exists to remove the name of the petitioner from the ECL and the restriction has been imposed upon the petitioner for proceeding abroad in good faith and to safeguard the public exchequer through the impugned order, which has been passed after adopting the prescribed procedure and this writ petition having no force is liable to be dismissed.

4. Arguments heard record perused.

5. The impugned order for including the name of the petitioner in the Exit Control List had been passed under section 2 of the Exit from Pakistan (Control) Ordinance, 1981 and for ready reference the said provision is reproduced hereunder:-

> **"Power to prohibit exit from Pakistan.--** (1) The Federal Government may, by order, prohibit any person or class of persons from proceeding from Pakistan to a destination outside Pakistan, not withstanding the fact that such person is in possession of valid travel documents.
>
> (2) Before making an order under subsection (1), it shall not be necessary to afford an opportunity of showing cause against the order.

(3) If, while making an order under subsection (1) it appears to the Federal Government that it will not be public interest to specify the grounds on which the order is proposed to be made, it shall not be necessary for the Federal Government to specify such grounds (emphasis supplied)."

6. A bare perusal of the above said provision makes it clear that the Federal Government has been empowered to restrain any person from exiting outside the boundaries of Pakistan to any foreign State and subsection (2) thereof also clarifies that it is not obligatory upon the Federal Government to afford an opportunity to the person against whom such an order has been passed. The said provision also provides that the reasoning for passing the proposed order may not be explained in the public interest, if it so appears to the Federal Government. Moreover, section 3 of the Ordinance ibid provides for a right of review within 15 days of making of the order under section 2 by providing a right to an aggrieved person to make a representation to the Federal Government setting out in the representation the grounds on which he seeks the review.

7. It is an admitted fact that a complaint had been lodged by the high ups of the department before the Human Rights Cell set up by the august Supreme Court of Pakistan and then during the inquiries conducted at the departmental level, the petitioner along with the other officers was found guilty of misappropriating an amount of Rs.43 million. A large quantum of public exchequer is involved and the petitioner is stated to be required to the different agencies for further probing the matter. During the arguments when confronted with the query by this court that whether the petitioner has applied for ex-Pakistan leave and the NOC has been granted by the competent authority, the learned counsel for the petitioner has simply replied that the petitioner is a dual national, but failed to produce any such record.

8. The learned counsel for the petitioner has produced on the file an envelope containing an invitation card for marriage ceremony of the daughter of the petitioner, which contains recipient's address as 192 TECH Society, Lahore Punjab Pakistan 54590 while the sender's address has been recorded as Unit No.606, 55 DC Bors Dr. Toronto, ON, M3J0G5 Canada. This is a private document, which cannot form sufficient proof for deleting the name of the petitioner from the ECL, who has been charged with the allegation of misappropriating the public exchequer in huge quantity. Even otherwise, the petitioner also failed to produce any authentic document like booking of the Hall at Toronto Canada to conduct the marriage ceremony. The case law cited by the learned counsel for the petitioner is

distinguishable from the facts and circumstances of the instant case as in none of the said cases neither the petitioners were involved in the embezzlement of huge public exchequer nor their names were deleted on the ground of participation in the marriage ceremony of their close relation in abroad.

9. It is not denied that besides the departmental inquiry an inquiry was conducted by officers of the FIA, Anti-Corruption Circle as well wherein the petitioner along with others has also been found involved in the misappropriation of public exchequer. So there is left no force in the argument of the learned counsel for the petitioner that inquiry had been conducted by one of the complainants, who is interested in the prosecution of the petitioner being inimical towards her and certain applications were made by her for change of the inquiry. In the present case public exchequer to the tune of Rs.43 million is alleged to have been misappropriated and, therefore, the public interest is very much involved.

10. During the course of arguments it has come on surface that the petitioner and her husband are presently residing in Pakistan who are also in government job here, whereas the alleged bridegroom is a Pakistani national as well, but surprisingly the marriage of the petitioner's daughter seems to be suddenly scheduled to have been performed at Toronto Canada as no such ground had been earlier taken in the application seeking pre-arrest bail, which is pending for the last more than two months. Moreover, the petitioner has not so far applied to her parent department for granting ex-Pakistan leave or issuance of NOC in this regard and even no such documents of her husband, who is also in government job, have been produced on the file to show the bona fide of the petitioner. In such facts and circumstances, there is found force in the contention raised by the learned Standing Counsel that there is a reasonable belief that if the petitioner is allowed to go abroad, she will make escape from law and proceedings of the case involving embezzlement of huge public exchequer will be hampered. Therefore it cannot be said that the action taken against the petitioner in the present case was either unreasonable or that the same was not in public interest. No doubt, the grounds for placing the petitioner's name on ECL were not communicated to the petitioner but nevertheless if there was any flaw in the impugned action, no prejudice is shown to have been caused to petitioner because she had a right of filing a review petition before the competent authority as discussed above and without availing the said remedy, this writ petition was not maintainable.

11. In view of the aforesaid discussion, I do not find any sufficient ground to issue direction for removal of the name of the petitioner from the ECL during the pendency of the criminal case involving embezzlement of huge public exchequer, who is stated to be required for investigation and recovery purposes as still she is enlarged on ad interim pre-arrest bail for the last more than two months. On the other hand the petitioner has failed to make out any valid ground involving the urgency of emergent nature to remove her name from the ECL while interfering with the order dated 7.11.2013, which has been passed by respondent No.1 after following the proper procedure and it cannot be declared to have been issued without jurisdiction or any authority. This writ petition having no force is dismissed.

12. Before parting with this order, I am constrained to observe that the petition for pre-arrest bail filed by the petitioner is pending for the last more than two months in spite of that no restraint order has been issued by this court and mere pendency of the writ petition provides no justification for lingering on the bail applications pending before the court of competent jurisdiction, which have to be decided on its own merits in accordance with law. The learned Special Judge (Central), Lahore is directed to ensure that bail application filed by the petitioner is decided as early as possible in accordance with law without being influenced by the observations made by this Court in this order in any manner.

MH/H-1/L
Petition dismissed.

P L D 2016 Lahore 617
Before Ch. Muhammad Masood Jahangir, J
MEHRAM KHAN and others---Petitioners
Versus
GULZAR AHMAD and others---Respondents

Writ Petition No.3204 of 2010, decided on 16th February, 2016.

(a) Mental Health Ordinance (VIII of 2001)---

----S. 32---Punjab Land Revenue Act (XVII of 1967), S. 163---Mentally disabled person---Review of mutation by the Revenue Officer---Scope---Revenue hierarchy was bound to ensure that its record was free from element of fraud---Whenever fraud was unfolded to the Revenue Officer or brought to his notice at any time, he should rectify the revenue record---Question of limitation would be irrelevant in such like matters---Medical Superintendent had declared the respondent to be mentally retarted person---Revenue Officer was justified in recalling the impugned mutations---Mentally disabled person was deprived of his valuable property and revenue hierarchy was perfect in exercise of its jurisdiction---Revenue Officer was appointed as 'Receiver' of said land who would take charge/possession of the same and invest the income of the property upon the treatment and upbringing of respondent until and unless his manager was appointed by the Protection Court---Constitutional petition was dismissed in circumstances.

Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 SC 153; United Bank Limited and others v. Noor-un-Nisa and others 2015 SCMR 380; Dildar Ahmad and others v. Member (Judicial-III) BOR, Punjab, Lahore 2013 SCMR 906; Muhammad Amir and others v. Mst. Beevi and others 2007 SCMR 614; Muhammad Younus Khan and 12 others v. Government of N.W.F.P. through Secretary, Forest and Agriculture, Peshawar and others 1993 SCMR 618 and Mst. Zulaikhan Bibi through L.Rs and others v. Mst. Roshan Jan and others 2011 SCMR 986 ref.

(b) Fraud---

----Fraud would vitiate all solemn acts and any instrument/mutation/ judgment or decree obtained through fraud would be nullity in the eye of law and had to fall down whenever it was challenged.

Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others 1993 SCMR 618 and Mst. Zulaikhan Bibi through L.Rs and others v. Mst. Roshan Jan and others 2011 SCMR 986 rel.

Malik Abdul Wahid for Petitioners.
Mohammad Hanif Dahar for Respondent No.1.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--Succinctly the facts of the case are that Gulzar Ahmad (hereinafter to be referred as respondent No.1) was owner of landed property, which was got transferred by respondents Nos. 2 to 4 and petitioners in their favour by means of attestation of mutations Nos.322 dated 8.5.1997, 323 dated 10.5.1997, 325 dated 5.12.1997, 328 dated 21.4.1998, 329 dated 21.4.1998, 330 dated 21.4.1998 and 342 dated 30.6.1998. Mst. Sughran Bibi, the real sister of respondent No.1, preferred an application before the District Officer (Revenue), Hafizabad with the averments that as her brother, respondent No.1 was an unsound and retorted person since his birth, who was unable to protect his interests and property affairs; that the respondents Nos. 2 to 4 and present petitioners got attested disputed mutations regarding property of respondent No.1 by practicing fraud and misrepresentation through connivance with the revenue field staff and prayed for their cancellation. The District Collector assigned the inquiry to the Deputy District Officer (Revenue), Pindi Bhattian for probing into the complaint launched by Mst. Sughran Bibi. Thereafter, the District Collector vide order dated 7.2.2007 consigned the said application while directing the complainant to approach the court of ultimate jurisdiction for redressal of her grievance. Being despondent, an appeal was preferred by her before the Executive District Officer (Revenue), Hafizabad, who vide order dated 5.10.2009 accepted the appeal and while reviewing the above referred mutations, cancelled the same with a direction to the Revenue Officer to correct the revenue record accordingly. The said order was assailed by the present petitioners by filing ROR No.1607/2009 before the Member (Judicial-1),

Board of Revenue, Punjab, Lahore, which was dismissed vide order dated 21.10.2009. By filing the instant constitutional petition, the petitioners have challenged the orders dated 5.10.2009 and 21.10.2009 passed by the Executive District Officer (Revenue), Hafizabad and Member (Judicial-I), Board of Revenue, Punjab, Lahore.

2. Today C.M. No.553-2016 has been filed on behalf of the respondent No. 1 to place on record certain relevant documents, which has not been resisted by the petitioners, hence, is allowed. Now, I proceed to deal with the main writ petition on merits.

3 Malik Abdul Wahid, Advocate, learned counsel for the petitioners has submitted that the impugned orders are result of misreading and non-reading of record available on the file, which have been passed by respondents Nos.5 and 6 without application of judicious mind; that a chain of transactions through attestation of different mutations regarding the property owned by respondent No.1 took place, spreading over a considerable time and not only the title but the possession also changed hands but at a belated stage the application for recalling of the mutations was filed by Mst. Sughran Bibi, which was neither maintainable nor the impugned orders could be passed by the revenue hierarchy on the said application; that the proper course for the relatives of respondent No. 1 was to seek their remedy before the Protection Court to get themselves declared to be the Manager of respondent No.1, but neither any such order was obtained from the said court nor the crucial aspect of the case as required under Section 29 of the Mental Health Ordinance, 2001 was considered by respondents Nos.5 and 6 before passing the impugned orders; that under Section 29 of the Ordinance ibid, it is also necessary that a Manager is to be appointed by the Protection Court, who could proceed regarding the property and person of any unsound mind; that the question of title was involved, which could not be resolved in summary manner and proper course was to approach the Civil Court, but while ignoring the said aspect, respondents Nos.5 and 6 passed the impugned orders in an illegal manner. He has lastly prayed for the acceptance of the instant constitutional petition and setting aside of the impugned orders passed by respondents Nos.5 and 6.

4. Conversely, Mr. Mohammad Hanif Dahar, Advocate learned counsel for the respondent No. 1 supported the impugned orders and prayed for dismissal of the instant writ petition.

5. Arguments heard. Record perused.

6. It is an admitted fact that respondent No.1 was owner of the disputed property, out of which Shahbaz Khan, respondent No.2, got transferred property measuring 31 kanals 3 marlas against a consideration of Rs.1,61,000/- through mutation No.322 dated 10.5.1997, the copy whereof is available at page 40 of the instant file. Study of the same reveals that respondent No.1 was identified by Moazam Ali Lumberdar and same was seconded by Zulfiqar before the revenue officer. On the same day other chunk of land measuring 71 kanals 4 marlas against a consideration of Rs.1,98,000/- was alienated in favour of Yara, respondent No.3 vide mutation No.323, the copy of which is also available at page 42. At the time of attestation of this mutation, respondent No.1 was identified by Moazam Ali Lumberdar and Shahbaz Khan respondent No.2 in whose favour mutation No.322 was attested. The property which was mutated in favour of Yara, respondent No.3 was further transferred to Shehbaz Khan respondent No.2 within a period of two months vide mutation No.325 on 5.12.1997 and this mutation was again attested by the same persons, who earlier attested mutation No.322. At the time of attestation of above referred mutations Moazam Ali Lumberdar identified respondent No.1 before the revenue officer. It is significant to note that I.D card number of respondent No. 1 is also not entered over the said mutations, whereas I.D card number of the vendees and attesting witnesses are mentioned therein which is also a proof that due to his insanity the respondent No. 1 could not get issued his ID card. The said property was further transferred by means of other impugned mutations in favour of the petitioners and on a complaint filed by Mst. Sughran Bibi, the real sister of respondent No.1, the District Collector got a fact finding report from the Deputy District Officer (Revenue), Pindi Bhattian. Moazam Ali, Lumberdar, the attesting witness of all the disputed mutations appeared before the Inquiry Officer and got recorded his statement that respondent No.1 was an insane person since his birth and he was not capable to transfer his property. The Imam Masjid and other notable persons of the concerned revenue estate also endorsed the statement of Lamberdar. Neither in the said drill work any witness or record was produced by the beneficiaries nor became available before the inquiry officer to prove otherwise. Through his enquiry report the Deputy District Revenue Officer recommended for the review of the disputed mutation. Mst. Sughran Bibi sister of respondent No.1 also made an application before the learned District Judge, Hafizabad for declaring respondent No.1 to be a man of unsound. The learned Additional District Judge while proceeding with the said petition referred respondent No.1 to the Medical Superintendent, Tehsil Headquarter Hospital, Pindi Bhattian and thereafter to the

District Headquarter Hospital, Hafizabad for ascertaining the mental health of respondent No.l. Thereupon, the Medical Superintendent, District Headquarter Hospital, Hafizabad through his report endorsed the version of Sughra Bibi and the learned Additional District Judge, Hafizabad vide order dated 04.01.2005 declared respondent No.1 to be mentally retorted person. On the strength of fact finding report and judicial verdict the respondent No.6 was quite justified in recalling the impugned mutations. The contention of learned counsel for the petitioners while relying upon the judgments reported as "Hakim Muhammad Buta and another v. Habib Ahmad and others" (PLD 1985 Supreme Court 153), "United Bank Limited and others v. Noor-un-Nisa and others" (2015 SCMR 380), "Dildar Ahmad and others v. Member (Judicial-III) BOR, Punjab, Lahore" (2013 SCMR 906) and "Muhammad Amir and others v. Mst. Beevi and others" (2007 SCMR 614) that the revenue hierarchy after a considerable delay was not within its jurisdiction to review the mutations, is misconceived. In fact, a duty is cast upon revenue hierarchy to ensure that his record is free from the elements of fraud and whenever such element of fraud is unfolded to him or brought to his notice in any manner whatsoever and at any time, he should rectify the same. The question of limitation is wholly irrelevant in such like matters. When it is proved at two different forums that respondent No.1 was not a mentally fit person and his property was got transferred by practicing fraud and this is the element which vitiates all solemn acts and any instrument/mutation/judgment or decree obtained through fraud is nullity in the eye of law and has to fall down whenever it is challenged. Safe reliance can be placed upon the judgments reported as "Muhammad Younus Khan and 12 others v. Government of N.W.F.P. through Secretary, Forest and Agriculture, Peshawar and others" (1993 SCMR 618) and Mst. Zulaikhan Bibi through L.Rs and others v. Mst. Roshan Jan and others" (2011 SCMR 986).

7. The argument of learned counsel for the petitioners that a detailed inquiry was needed and the District Officer (Revenue) was justified to refer the complainant to approach the Civil Court, is not tenable. When both the revenue as well as judicial forums had already declared respondent No.1 a mentally retorted person, then the mutations regarding the property of such person could not be sustained. In the instant case, the concurrent impugned orders have not occasioned injustice rather it cured a manifest illegality through which a mentally disabled person was deprived of his valuable property and revenue hierarchy/respondents Nos.5 and 6 were perfect in exercise of their jurisdiction, which calls for no interference. The property and the personality of a mentally retarted person is involved in the matter in hand. The revenue officer concerned where the disputed property of respondent

No.1 falls is appointed as 'Receiver' of the said land, who will take charge/possession of the same and will secure and invest the income of the property upon the treatment and upbringing of respondent No.1 until and unless his manager is duly appointed by Protection Court under the provisions of Mental Health Ordinance, 2001. The instant constitutional petition is without any force and substance, which is hereby dismissed.

ZC/M-94/L
Petition dismissed.

2016 Y L R 887
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
AYYUB KHAN and 4 others---Petitioners
Versus
MUHAMMAD YOUSAF and 7 others---Respondents

Writ Petition No.10020 of 2009, heard on 13th January, 2016.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Suit for specific performance---Contention of petitioner was that lower revisional court while rendering impugned judgment failed to apply independent judicious mind and findings of Trial Court in verbatim were reproduced in its judgment---Validity---Duty and obligation of superior courts to decide controversy between parties after application of judicial mind---Any superior court while hearing appeal or revision had to decide the same after application of independent mind and mere reproduction of findings of Trial Court to concur therewith while dismissing revision was not in consonance with law---High Court remanded civil revision filed by petitioner to revisional court for decision afresh and avoided to dilate upon merits of case in its constitutional jurisdiction.

Punjab Industrial Development Board v. United Sugar Mills Ltd. 2007 SCMR 1394 rel.

Mohammad Qamar-uz-Zaman for Petitioners.

Ch. Zahid Javed for Respondents.

Date of hearing: 13th January, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The precise facts of the case are that respondent No.1 and the predecessor-in-interest of respondent No.2 were allotted land measuring 22 acres 7 kanals and 19 marlas, in Chak No.501, Tehsil Shorkot, District Jhang in equal shares under Tube-well Sinking Scheme, who entered into an agreement to sell dated 1.12.1976 with respondent No.3 for the purchase of suit land. Respondent No.3 instituted a civil suit for declaration regarding the said land, which was decreed in his favour on the basis of conceding statements vide order and decree dated 18.2.1981. Thereafter, Rashida Begum widow of Mohammad Sharif and her children filed a suit for specific performance against respondents Nos.1 to 3 before the Civil Court, Shorkot alleging therein that

respondents Nos.1 and 2 through agreement to sell dated 22.2.1977 had agreed to sell half share of the above referred disputed property. Rashida Begum also filed an application under section 12(2) of the Code of Civil Procedure, 1908, for setting aside the judgment and decree dated 18.2.1981, earlier passed in favour of respondent No.3 on the ground that the same was procured while playing fraud and misrepresentation. The learned Civil Judge, Shorkot after conducting full- fledged trial vide judgment dated 28.11.1987 dismissed the application under Section 12(2) of the Code of Civil Procedure, 1908, whereas, the above referred suit was also dismissed vide judgment and decree dated 30.1.1988 and the revision petition filed by Rashida Begum against judgment dated 28.11.1987 was dismissed for non-prosecution on 17.12.1988. Thereafter, the application for its restoration was also dismissed vide order dated 16.1.1990, which was assailed by Rashida Begum by filing a writ petition before this Court, whereas, appeal against the judgment and decree dated 30.1.1988, by virtue of which, Civil Court dismissed the suit filed by Rashida Begum was also dismissed by the learned Addl. District Judge, Shorkot vide judgment and decree dated 29.6.1988, which was further assailed by said Rashida Begum by filing a civil revision before this Court.

2. The above said civil revision as well as writ petition filed by said Rashida Begum was dismissed by this Court vide order dated 17.4.1993. Being aggrieved, Rashida Begum filed Civil Appeals Nos.327/1995 and 328/1995 before the apex Court against the judgment passed by this Court in civil revision as well as writ petition and the same were dismissed vide judgment dated 11.4.2002. Para No.14 of the said judgment is relevant, which is reproduced hereunder:--

> "Civil Appeal No.328/1995 is also devoid of substance because appellants have not only failed to prove that the consent decree in favour of Mst. Jamila Begum was the outcome of fraud and misrepresentation, but they also have no cause of action to assail the same having been non suited in the main case."

Thereafter, the said land changed hands and the petitioners also became owners of certain portion of the said land, where some construction was also raised by him. On 5.6.2007, Mohammad Yousaf respondent No.1 and the legal heirs of Hadayat filed an application under Section 12(2) of the Code of Civil Procedure, 1908 against respondents Nos.3 to 6 as well as petitioners, while challenging the judgment and decree dated 18.2.1981, which was contested by the petitioners. The learned Civil Judge vide judgment and decree dated 26.7.2008 accepted the application filed

under Section 12(2) of the Code of Civil Procedure, 1908 and set aside the judgment and decree dated 18.2.1981. The same was assailed by the petitioners by filing a revision petition before the learned lower revisional court, who dismissed the same vide judgment and decree dated 25.4.2009, hence the instant writ petition.

3. At the very outset of the arguments, learned counsel for the petitioners has pointed out that the learned lower revisional court while rendering the impugned judgment failed to apply independent judicious mind, but the findings of the learned trial court in verbatim were reproduced in its judgment. For instance, he has referred to para 9 of the judgment of learned trial court dated 26.7.2008 which was reproduced in verbatim by the learned lower revisional court in para No.14 of the impugned judgment dated 25.4.2009. With the able assistance of the learned counsel for the parties, both the paras have been read over and the same are found to be identical, which fully supports the contention of learned counsel for the petitioners that jurisdiction vested in the revisional court was not properly exercised in the judicious manner, which practice cannot be appreciated. The learned counsel for the respondents has remained unable to satisfy this court that how the judgment passed by the learned revisional court can be maintained.

4. It is the duty and the obligation of the superior courts to decide the controversy between the parties after application of judicious mind. Any superior court while hearing the appeal or revision has to decide the same after the application of independent mind and mere reproduction of the findings of learned trial court to concur therewith while dismissing the revision is not found to be in consonance with the law laid down by the apex court in the case reported as "Punjab Industrial Development Board v. United Sugar Mills Limited" (2007 SCMR 1394), wherein on having been confronted with such situation, the matter was again remanded to the same court for decision afresh after application of judicious and independent mind on the basis of the material available on the record.

5. Keeping in view the above discussion, I am left with no other option except to remand the civil revision filed by the petitioners to the learned lower revisional court for decision afresh and I have intentionally avoided to dilate upon merits of the case lest the same should prejudice the case of either party before the learned lower revisional court. This writ petition is accepted, the impugned judgment passed by the learned lower revisional court is set aside and the revision petition filed by the petitioners will be deemed to be pending before the learned lower revisional court, which will decide it afresh while rendering independent findings on each and

every issue while applying judicious mind on the basis of the evidence already avail-able on the file within a period of three months positively. The parties are directed to appear before the learned lower revisional court on 1.2.2016 for further proceedings.

RR/A-23/L
Petition accepted.

PLJ 2016 Lahore 20

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

GOHAR ALI--Petitioner

Versus

MUHAMMAD YOUSAF, etc.--Respondents

W.P. No. 26121 of 2011, heard on 2.9.2015.

West Pakistan Land Revenue Rules, 1968--

----R. 17--Constitution of Pakistan, 1973--Art. 199--Constitutional petition--Appointment of permanent lumberdar--Controversy of eligibility to be decided according to law while taking into consideration requirements--Hereditary claim--Personal influence, character, ability and extent of property in estate--Validity--Appointment of lumberdar is purely an administrative matter and it is obligatory upon revenue hierarchy to appoint a suitable candidate as because office of lumberdar is a link between villagers and administration and suitability or otherwise regarding appointment to offer lies with relevant revenue authorities—M.B.R. had failed to consider qualifications of available candidates as per requirement of Rule 17 and parameters settled--Which has rendered impugned orders illegal, unlawful, *ultra vires* and without jurisdiction and same are amenable by High Court in exercise of writ jurisdiction. [Pp. 26] A, B & C

M/s. Hafiz Agha Rooh-ul-Amin Zafar and Qazi Muhammad Arshad Bhatti, Advocates for Petitioner.

Ch. Nawab Ali Mayo, Advocate for Respondent No. 1.

Mr. Muhammad Arif Yaqoob Khan, Addl. A.G. for Respondent No. 2 to 4.

Date of hearing: 2.9.2015

JUDGMENT

The facts germane for the disposal of the instant Constitutional petition are that Muhammad Jaimal son of Sader Din was Lumberdar of the village Bhagokay Arain, Tehsil Chunain, District Kasur, who was removed from his office by the competent authority/District Collector *vide* his order dated 22.09.1942. The said vacancy was temporarily filled by the competent authority while appointing Barkhurdar father of Respondent No. 1 as Lumberdar of the said village and on his death the affairs of Lumberdari were handed over to Respondent No. 1 on temporary basis. The revenue hierarchy initiated process for the appointment of Lumberdar and applications were invited from the candidates. Gohar Ali, present petitioner, Muhammad Yousaf, Respondent No. 1 and Muhammad Ibrahim preferred their applications for the said post. The revenue staff right from Naib Tehsildar to Assistant Commissioner had recommended the present petitioner being eligible candidate for the said post. One of the above referred candidates, namely,

Muhammad Ibrahim withdrew his application in favour of the petitioner and the District Collector, Kasur *vide* his order dated 01.02.2006 appointed the present petitioner as Lumberdar against the said vacant post. The order of the District Collector was assailed by Respondent No. 1 by filing an appeal before the Executive District Officer (Revenue), Kasur, which was dismissed *vide* order dated 23.08.2006. Being aggrieved, Respondent No. 1 brought R.O.R No. 1699 of 2006 before the Board of Revenue, which was accepted *vide* order dated 25.11.2009 and order dated 01.02.2006 passed by the District Collector as well as order dated 23.08.2006 delivered by the Executive District Officer (Revenue), Kasur was set aside and Respondent No. 1 was appointed as Lumberdar of the concerned village. The petitioner being dissatisfied with the said order filed Review Petition No. 428 of 2009 in ROR No. 1699 of 2006 before the Board of Revenue, which was dismissed *vide* order dated 29.10.2011. The petitioner being aggrieved of the orders dated 25.11.2009 and 29.10.2011 passed by Board of Revenue has assailed the same by filing the instant writ petition.

2. It is submitted by the learned counsel for the petitioner that impugned orders suffer from serious misreading and non-reading of record and were passed in a mechanical manner without application of judicious mind; that the Revenue field staff as well as the District Collector and Executive District Officer (Revenue) after considering the merits and demerits of the candidates rightly found the petitioner eligible for the post of Lumberdar, but the Member, Board of Revenue passed the impugned orders in complete derogation of record and without application of his judicious mind. It is further argued that Respondent No. 1 had been convicted in a criminal case *vide* F.I.R. No. 310 of 2002 registered under Section 430 of Pakistan Penal Code, 1860 at Police Station Kanganpur, District Kasur and a fine of Rs. 1,000/- was imposed against him, which was deposited by him, but the said fact has been ignored by the MBR/Respondent No. 4 while passing the impugned orders; that Respondent No. 1 also remained involved in a criminal case F.I.R. No. 285/2008 registered under Sections 302, 324, 148, 149 of Pakistan Penal Code, 1860; that Respondent No. 1 being not a man of good character was not entitled for the appointment against the post of Lumberdar; that petitioner had neither been involved in any criminal case nor was convicted rather he is a popular, famous and influential person of the locality; that the petitioner owns more chunk of land than Respondent No. 1 and also possesses the hereditary claim, but the said aspect of the case has been ignored by the Board of Revenue while passing the impugned orders. He has lastly prayed for the acceptance of writ petition, setting aside of the impugned orders and restoration of orders passed by the District Collector as well as Executive District Officer (Revenue), Kasur.

3. Conversely, learned counsel for the Respondent No. 1 has refuted the arguments advanced by the learned counsel for the petitioner and submitted that being son of Ex- Lumberdar, Respondent No. 1 possess the hereditary claim and that Board of Revenue after considering the merits and demerits of the case rightly appointed the Respondent No. 1 as Lumberdar of the concerned village.

4. Arguments of both the parties heard and record perused.

5. For the appointment of permanent Lumberdar of the village the controversy of eligibility is to be decided according to law while taking into consideration all the requirements provided under Rule 17 of the West Pakistan Land Revenue Rules, 1968. Among other matters which have to be seen conjunctively, those are (i) the hereditary claim of the candidates; (ii) extent of property in the estate, if there are no sub-divisions of the estate, and in case there be sub-divisions of the estate the extent of the property in the sub-division for which appointment is to be made, possessed by the candidate; (iii) services rendered to the Government by him or by his family; (iv) his personal influence, character, ability and freedom from indebtedness; (v) the strength and importance of the community from which selection of a headman is to be made; and (vi) his ability to undergo training in Civil Defence in the case or headman in Tehsils situated along the Border. There is no denial of the fact that Muhammad Jaimal was the permanent Lumberdar of the village, who was removed from the said post on account of his inefficiency and thereafter Barkhurdar, the father of Respondent No. 1 was appointed as temporary Lumberdar and on his demise Respondent No. 1 also performed the duties of Lumberdar on temporary basis. During the course of arguments, it is admitted that last permanent Lumberdar Muhammad Jaimal was real brother of grand-father of the present petitioner and Muhammad Ibrahim, who withdrew his candidature in favour of the present petitioner is the real grand- son of the above referred permanent Lumberdar, whereas Respondent No. 1 is not related to Muhammad Jaimal, ex-Lumberdar. The revenue officials also indicated the said fact in their report dated 25.01.2006 so the factor of hereditary claim, if is advanced, will must favour the present petitioner. No doubt, Barkhurdar the father of Respondent No. 1 had been appointed as Lumberdar of the concerned village after the removal of Muhammad Jaimal, but he was never appointed as permanent Lumberdar and the said post was filled for interim period on temporary basis. The father of Respondent No. 1 was appointed as temporary Lumberdar and as at the time of such appointment hereditary claim was not considered, then how the factor of hereditary claim can be extended to any of legal heir of temporary Lumberdar at the time of appointment of a permanent Lumberdar.

6. According to report of revenue officials, the petitioner owned land measuring 115-*kanal* 17-*marla* whereas Respondent No. 1 was owner of land measuring 64-*kanal* 19-*marla*. The factor to the extent of the property in the estate was also in favour of the present petitioner. The withdrawal of candidature of Muhammad Ibrahim grandson of Muhammad Jaimal ex-Lumberdar of the village in favour of the petitioner was also a plus point in his favour. The petitioner had been elected as Councilor of the village for four times and his son was also elected as Councilor, which is also an evidence of his personal influence and credibility in the area. It is also admitted during the course of arguments that Respondent No. 1 had been convicted in the above referred criminal case under Section 430 of the Pakistan Penal Code, 1860, whereas the petitioner does not possess any such discredit and therefore, on moral side, the petitioner has also better edge over Respondent No. 1. However, the petitioner as well as Respondent No. 1 are of similar age, who belong to the Jutt community and also illiterate persons, thus on all these three aspects, one cannot be given preference over the other.

7. The above referred discussion reflects that the case of the present petitioner is on better footings than Respondent No. 1 on the count of hereditary claim, his personal influence, character, ability and extent of property in the estate. The apex Court in landmark judgment reported as *Maqbool Ahmad Qureshi vs. The Islamic Republic of Pakistan* (PLD 1999 SC 484) after discussing plethora of judgments and while relying upon various Verses of Holy Quran has observed as under:

> All these principles laid down by the Holy Qur'an and the Sunnah of the Holy Prophet (SAW) are sufficient to indicate that the appointments to an office of the Government are to be made on the basis of merits. Verse 2:124 of the Holy Qur'an has not approved the concept of hereditary claim as sole basis or criteria for appointment to an office, what to say of applying rule of primogeniture in making appointment of a successor to the office and the principle deducible appear to be that offices which are regarded as sacred trust are to be passed on to those who are entitled thereto i.e. to those who are qualified and trustworthy to discharge the duties of office honestly. Thus, merits of the appointee with reference to the requirements of the job assigned is to be the criteria. What should be the qualifications of the person to be appointed would naturally depend on the nature of the employment, service or the job keeping, however, in view the distinction between employment against a job or service and tilling a public office which entails discharge of obligations of State or functions of sovereign nature.

> The principle deducible from the Injunctions of Islam noted above is that appointment against an office, official agency, job or employment has to he made on merit of a person who is honest, trustworthy, bodily strong and possessed of qualities of head and heart and that blood relationship or descent cannot be made basis for claiming preference in the matter of appointment. Thus the provisions contained in sub-rule (1) of Rule 19 of the Rules providing for rule of primogeniture as the basis of appointment successor, though interpreted by the Supreme Court as directory rule designed to select a most fit person from amongst eligibles who is free from any of the disqualifications, is violative of the aforenoted principle deducible from Injunctions of Islam. The objection with regard to provision of hereditary claim amongst other factors to be considered in matter of appointment under Rule 17 is without merit as this rule provides the relevant considerations which the Collector is to keep in view while making selection of the most suitable persons amongst the candidates. The cause to raise objection in respect of this Rule arose as the officer in the graded hierarchy of, the Revenue administration in their judgments came to accord "hereditary claims", overriding effect, as against other considerations of area, tribe community etc. If "hereditary claim" is taken only as one of the relevant considerations, as contemplated in the rules, in favour of a candidate whose other merits are favourable comparable with other contestants, no cause of grievance will arise, rather it will meet the plea of the administration that by appointing a person from amongst the nearest eligible heir of previous Lambardar continuity in the work and in the liaison created between the land owners and the administration is intended to be achieved. Rule 17 is, therefore, not repugnant to any Injunction of Islam.

The bare perusal of the above referred dicta has left no room that a suitable person acquiring more qualifications as referred in Rule 17 ibid is to be given preference.

8. There is much force in the contention of the learned counsel for the petitioner that choice of the District Collector in appointment of Lumberdar should be given preference. Member, Board of Revenue/Respondent No. 4 while passing the impugned orders has brushed aside the choice of District Collector in the selection of Lambardar, which as per various decisions of the Member, Board of Revenue itself, is not to be interfered with, especially when the Collector exercised his discretion in a reasonable manner. Reliance is placed upon the judgments reported as *Abdus Salam Rajput vs. Muhammad Amin Khan Rajput* (PLD 1972 Revenue 16) and *Haji Burhan vs. Haji Ibrahim* (PLD 1974 Revenue 82). The apex revenue hierarchy can only upset the choice of the District Collector when his choice is

found to be perverse. No finding of perversity of choice has been recorded by the Member, Board of Revenue/Respondent No. 4 in the impugned orders. The appointment of Lumberdar is purely an administrative matter and it is obligatory upon the revenue hierarchy to appoint a suitable candidate as Village Headman because office of Lumberdar is a link between villagers and administration and suitability or otherwise regarding appointment to offer lies with the relevant revenue authorities. The Member, Board of Revenue has failed to consider the qualifications of the available candidates i.e. petitioner and Respondent No. 1 as per the requirement of Rule 17 ibid and the parameters settled in *Maqbool Ahmed Qureshi's case (supra),* which has rendered the impugned orders illegal, unlawful, *ultra vires* and without jurisdiction and the same are amenable by this Court in the exercise of writ jurisdiction.

9. Consequently, the instant writ petition is accepted, impugned orders dated 25.11.2009 and 29.10.2011 passed by Member, Board of Revenue are hereby set aside, while the orders dated 01.02.2006 and 23.08.2006 passed by the District Collector, Kasur and Executive District Officer (Revenue), Kasur respectively are restored.

(R.A.) Petition accepted.

PLJ 2016 Lahore 290
[Multan Bench Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
TAJ MUHAMMAD etc.--Petitioners
Versus
GOVERNMENT OF THE PUNJAB, etc.—Respondents

W.P. No. 3018 of 2015, decided on 16.10.2015.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Non-payment of salaries--Salary of an employee--Fundamental rights--Validity--While holding an inquiry wherein all concerned will also be joined and if petitioners were found to be still in service, their emoluments will be released without loss of any further time--Petition was disposed of. [P. 291] A

Mr. Muhammad Faisal Bashir, Advocate for Petitioners.
Mr. Mubashir Lateef Gill, AAG for Respondents.
Date of hearing: 16.10.2015.

ORDER

By filing the instant Constitutional petition, the petitioners have prayed as under:

> "In the light of the above submission it is most respectfully prayed that the writ petition may kindly be accepted and a writ of mandamus be issued in favour of the petitioners against the respondents directing for payment of the salaries for the work done."

2. It is contended by the learned counsel for the petitioners that the petitioners are still working against their jobs, but their salary is not being disbursed by the respondents-department, which is against their fundamental rights.

3. On the other hand, the learned Law Officer appearing on behalf of the respondents is unable to rebut the argument of the learned counsel for the petitioners or satisfy this Court that how the salary of an employee during the

continuation of his job can be stopped and even an employee is entitled to draw his salary during the period of his suspension.

4. Heard and record perused.

5. Keeping in view the afore-said facts and circumstances of the case, it is felt appropriate to direct the office that a copy of this writ petition along with all the annexures be transmitted to Respondent No. 1, who will look into the grievance urged by the petitioners in the writ petition while holding an inquiry wherein all the concerned will also be joined and if the petitioners are found to be still in service, their emoluments will be released without loss of any further time. This drill work will be completed within four months positively.

6. The instant writ petition stands disposed of accordingly.

(R.A.) Petition disposed of.

PLJ 2016 Lahore 760 (DB)
***Present*: SADAQAT ALI KHAN AND MRS. ERUM SAJAD GULL, JJ.**
MUHAMMAD JAWAD HAMID--Petitioner
Versus
HASEEB AKBAR, etc.--Respondents
W.P. No. 2666 of 2016, decided on 25.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Pakistan Penal Code, (XLV of 1860), Ss. 302, 34, 324, 353, 186, 148, 149, 290, 291, 427, 506-B, 109 and Ss. 365, 452, 295-B, PPC added--Pakistan Arms Ordinance, 1965, S. 13--Police Order, 2002, Art. 155-C--Anti-Terrorism Act, 1997, S. 7--Constitutional petition--Criminal case against different set of accused with different version regarding same occurrence--Commencement of trials in different cases separately--Validity--Law is settled by now that different versions of same incident advanced by rival parties through cross-cases and different sets of accused persons is to be held simultaneously and side by side. [P. 764] A

PLJ 1978 SC 221 & PLD 2016 SC 70 *rel.*
Rai Bashir Ahmad, Advocate for Petitioner.
Date of hearing: 25.2.2016

ORDER

Through the instant writ petition, petitioner has challenged the order dated 7.01.2016 passed by the learned Judge ATC-II, Lahore whereby the application moved by the petitioner for consolidating both the criminal cases registered for the same occurrence i.e. case FIR No. 510 dated 17.6.2014, registered under Sections 302/34/324/353/186/ 148/149/290/291/427/506-B/109, PPC, Section 13/13-B of the Pakistan Arms Ordinance (XX of 1965) and 7 of the Anti-Terrorism Act, 1997 and case FIR No. 696 dated 28.8.2014, registered under Sections 302, 324, 109, 148, 149, 395, 427, 506 PPC, Section 155/C of the Police Order, 2002 (later on Sections 365/452/295-B PPC read with Section 7 of the Anti-Terrorism Act, 1997 were added) at Police Station Faisal Town, Lahore was dismissed.

2. We have heard the learned counsel for the petitioner and perused the record.

3. Brief facts of the case are that FIR No. 510 dated 17.6.2014, under Sections 302/34/324/353/186/148/149/290/291/427/506-B, 109 PPC and Section 13/13-B of the Pakistan Arms Ordinance (XX of 1965) at Police Station Faisal Town, Lahore

was registered on the complaint of Rizwan Qadir Hashmi, Inspector/SHO, Police Station Faisal Town, Lahore against the accused mentioned in the FIR. On the other hand, Muhammad Jawad Hamid, Director Administration, Minhaj-ul-Quran International, Lahore being complainant of the FIR No. 696 dated 28.8.2014, under Sections 302/324/109/148/149/395/427/506 PPC, Section 155/C of the Police Order, 2002 (later on Sections 365/452/295-B PPC read with Section 7 of the Anti-Terrorism Act, 1997 were added), also got registered criminal case against different set of accused with different version regarding the same occurrence detail of which is mentioned in FIR No. 510/14. Reports under Section 173 Cr.P.C pertaining to case FIR No. 510/2014 and case FIR No. 696/2014 have been submitted in the trial Court separately. Learned trial Court has commenced the trials in these two different cases separately but proceedings in these two cases are being held simultaneously. Petitioner earlier moved an application on 17.11.2015 before the trial Court with the following prayer:

> "In the above circumstances it is humbly prayed before this Hon'ble Court that a separate trial may be conducted for two wholly different sets of accused persons challaned in the case FIR No. 510/14."

The aforementioned application was dismissed as not being pressed, thereafter the petitioner on 7.1.2016 moved another application with following prayer:

> **اندریں حالات استدعا ہے کہ ہر دو مقدمات مندرجہ بالا 510/14 مورخہ 17/6/14، مقدمہ نمبر 696/14 مورخہ 28/8/14 دوبارہ ترمیمی فرد جرم عائد کیا جائے کیونکہ دونوں مقدمات ایک ہی وقوعہ کے بارے میں ہیں اور ایک ہی طرح کے سیٹ آف ملزمان ہیں۔**

4. The learned trial Court after hearing arguments of the petitioner dismissed the application on 7.1.2016 by observing as under:

> "Learned counsel for the some of accused have submitted that under Article 13 of the Constitution of Pakistan no one can be tried twice for the same offence therefore, it is essential that the charges in cases FIR No. 510/2014 and 696/2014 registered with regard to the same occurrence against almost

same accused be consolidated so as to rule out possibility of separate illegal trials.

The learned Prosecutor have opposed the application put on behalf of the accused on the ground that the cases FIR No. 510/2014 and 696/2014 Police Station Faisal Town, Lahore stand lodged at the instance of different complainants on the basis of different assertions whereas the investigation of aforementioned both cases were conducted by different JITs and sets of accused being produced in custody to some extent are also different in nature whereas the charges in both the cases, already stand framed hence the consolidation of trials of both the cases as desired by some of the accused is not possible. The dismissal of the application is prayed.

As regards Article 13 of Constitution of Pakistan 1973, the same relates to double jeopardy cases and has nothing to do with the present proposition. The prospective consolidated of charges in both the cases referred to above is bound to hamper the conclusion of the trials of both the cases. The investigations in both the cases stand conducted differently and all the accused already stand opined guilty of the commission of offence in question. Under the aforementioned circumstances and to avoid prejudice to any of the parties, the trials of both the cases are being conducted separately but simultaneously which certainly would not cause prejudice to the accused persons. I am supported by PLJ 2006 Crl. 721, 2000 SCMR 641 and PLD 2003 Lahore 71. In view of what has been stated above, the application in hand is also dismissed."

5. The arguments of the learned counsel for the petitioner that under Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 no one can be tried twice for the same offence and case FIR No. 510/14 and 696/14) registered regarding the same occurrence against almost the same accused may be consolidated has no substance. Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 is hereby reproduced as under:--

13. Protection against double punishment and self-incrimination. No person--

(a) shall be prosecuted or punished for the same offence more than once, or

(b) shall, when accused of an offence, be compelled to be a witness against himself."

6. Hon'ble Supreme Court of Pakistan has interpreted the word 'Prosecution' used in Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 by observing in case *Syed Alamdar Hussain Shah v. Abdul Baseer Qureshi & two others* (PLJ 1978 Supreme Court 221) which is reproduced as under:--

"8. The important word in Article 13 is "prosecution". According to *corpus juris secundum* the term "prosecution" has different meanings when used in different relations and it is regarded as a word of limited or extended signification according to the intention of the law maker or the person using it. In its broadest sense the term would embrace all proceedings in the course of justice or even elsewhere for the protection or enforcement of a right or the punishment of a wrong, whether of a public or private character. In a more limited sense the term includes the act of conducting or waging a proceeding in Court: the following up or carrying on of an action or suit already commenced until the remedy be attained; the institution and carrying on of a suit in a Court of law or equity to obtain some right or to redress and punish some wrong. It includes commencing, conducting and carrying a suit to a conclusion in a Court of justice. It is in this limited sense that the word "prosecution" appears to have been used in Article 13 of the Constitution. Significantly, the marginal heading indicates this Article is a protection against double punishment, which tends to show that it is only where the prosecution has finally concluded and ended either in acquittal or conviction that a fresh prosecution for the same offence would be barred. Stroud's Judicial Dictionary explains the term "prosecution" amongst others in the following manner:--

"The "prosecution" of an action ends with the FINAL JUDGMENT therein (*Hume v. Druyff,* L.R. 8 Ex. 214)."

The word "prosecute" is derived from a Latin word and signifies not only "to follow", but "to follow intensively" without intermission; thus, to follow or pursue with a view to reach, execute or accomplish.

According to the Webster's New International Dictionary (Second Edition) "prosecution" means, *inter alia*, "the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the State or Government as by indictment or information." And in the Oxford English Dictionary "prosecution" means "the following up, continuing, or carrying out of any action, scheme, or purpose, with a view to its accomplishment."

9. The petitioner was, in the first instance, tried by the Military Court, but Martial Law was lifted before judgment could be pronounced and the case thus remained undecided. He was then tried by a Magistrate, before whom the trial was still in progress when the case was ordered to be transferred to the Sessions. In none of these forums was prosecution pursued to the end, with a view to its accomplishment: and it cannot be said that the petitioner's present trial is in any way derogatory to the principles of *autrcfois* acquit or *autrefois* convict, or violative of Article 13 of the Constitution assuming its provisions were operative, which, however, in not the case.

This petition is accordingly dismissed."

7. Admittedly, both the cases (FIR No. 510/14 and 696/14) have been registered regarding the same occurrence with different versions and different set of accused well mentioned in both the FIRs. The law is settled by now that different versions of the same incident advanced by the rival parties through cross-cases and different sets of accused persons is to be held simultaneously and side by side. Reliance is

place on *Niaz Ahmed v. Hasrat Mahmood and others* (PLD 2016 Supreme Court 70) which is reproduced as under:--

> "We have attended to the said argument advanced by the learned counsel for the petitioner and have also perused the precedent cases referred to by him in support of such contention. The law is settled by now that if different versions of the same incident are advanced by the rival parties through cross-cases and such different versions contain different sets of accused persons then trial of such cross-cases is to be held simultaneously and side by side and a reference in this respect may be made to the cases of *Muhammad Sadiq v. The State* and another (PLD 1971 SC 713), *Abdul Rehman Bajwa v. Sultan and 9 others* (PLD 1981 SC 895), *Rashid Ahmad v. Asghar Ali, etc.* (1987 PSC 646) and *Mst. Rasool Bibi v. The State and another* (2000 SCMR 641). The law is equally settled on the point that where the same party lodging the FIR also institutes a private complaint containing the same allegations against the same set of accused persons then the trial Court is to hold a trial in the complaint case first and in the meanwhile the Challan case is to be kept dormant awaiting the fate of the trial in the complaint case."

8. For the foregoing reasons, this writ petition has no merits and is dismissed in limine.

(R.A.) Petition dismissed.

2016 M L D 337
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD FAAZAL---Appellant
Versus
ABDUL HAMEED MUGHAL and others---Respondents

R.S.A. No.221 of 2010, heard on 28th April, 2014.

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

----S. 29---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Sale of property of minors by the mother of minors not duly appointed or having prior permission of court---Effect---Unilateral agreement---Scope---Contention of minors-defendants was that agreement to sell was executed by their mother which was not binding upon them and said agreement being not signed by one of the parties was not enforceable---Suit was decreed by the Trial Court but same was dismissed by the Appellate Court---Validity---Mother was not an appointed guardian of minors-defendants from competent court of law---Suit property had been sold by mother of minors-defendants who were less than 18 years of age---Mother of minors-defendants could not validly enter into sale contract on their behalf and same was void ab initio having no legal existence---No rights or liabilities would arise in favour of vendee from such void transaction which could neither be enforced nor set up as a valid defence plea to claim right or title---Invalidity of such transaction would arise from a legal incapacity which was incurable---Such sale was void and not voidable---Sale of property of minors-defendants by their mother as a defecto guardian was not "sale" in the eye of law---Such "sale" would be invalid unless guardian had obtained permission from the court of law to sell out the said property after her appointment as a guardian---Court was not bound to grant leave to dispose of property of minors to an appointed guardian unless benefit or welfare of minor was proved for the same---Alleged agreement to sell had been executed by the mother on behalf of minors-defendants without prior permission of court which was void and plaintiff could not seek enforcement of such agreement---Minors-defendants could not be burdened with liability of void contract---Impugned agreement to sell was unilateral having not been signed by the plaintiff which was not enforceable under the law---No grounds of second appeal had been made out by the plaintiff---Second appeal was dismissed in circumstances.

2004 SCMR 729; 2003 CLC 1058; PLD 2006 Lah. 571 and 2009 SCMR 114 ref.

2004 SCMR 729; 2003 CLC 1058; PLD 2006 Lah. 571 and 2009 SCMR 114 Distinguished.

2000 SCMR 961; PLD 1994 SC 674; 2008 SCMR 352; 2010 SCMR 334 and 2013 YLR 1017 rel.

(b) Words and phrases---

----"Agreement of sale and agreement to sell"---Meaning---"Agreement of sale" was not merely an obligation to sell but an obligation on the part of other party to purchase while "agreement to sell" was simply an obligation on the part of vendor or promisor to complete his promise of sale.

Black's Law Dictionary and Hafiz Tassadiq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241 rel.

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

----S. 100---Second appeal---Scope---High Court could interfere if courts below had committed error of law or error in procedure which might have affected decision of the case upon merits or findings recorded by the courts below were not supported by evidence on record but same were the result of surmises and conjectures as a result of fallacious appraisal of evidence.

Khurram Hussain for Appellant.

Muhammad Rafique Chaudhary for Respondent No.1.

Shahbaz Siddique for Respondents Nos. 2 to 6.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Brief facts of the case are that Muhammad Faazal, appellant/plaintiff filed a suit for possession through specific performance of an agreement to sell dated 10.1.2004 with the assertions that the disputed property, fully mentioned in the head note of the plaint had been purchased by him against a consideration of Rs.4,00,000/- and he paid a sum of Rs.1,00,000/- as earnest money to Mst. Gul Zamina, defendant No.1. However as per settlement, the remaining amount of Rs.3,00,000/- would be paid by the appellant/plaintiff to defendant No.1 at the time of execution of registered sale deed in his favour after getting guardian certificate of the minors(defendants No.2 to 4 and 6) and permission to sell their shares as they were minors at the time of execution of agreement to sell dated 10.1.2004. Whereas, defendant No.1 transferred the disputed property in the name of respondent No.1 vide sale deed No. 2213 dated 10.2.2005 and on coming to know about the said fact the appellant/plaintiff filed the above suit before the learned trial court for possession through specific performance of an agreement to sell dated 10.1.2004 and cancellation of above said sale deed.

The suit was resisted by defendants Nos.1 and 5 by filing written statement. The learned trial court, out of the divergent pleadings of the parties, framed the following issues:--

(1) Whether the sale deed No. 2213 dated 10.2.2005 and subsequent mutation is against law and facts, mis-representation and is liable to be set aside? OPD

(2) Whether the plaintiff has no cause of action to file the instant suit? OPP

(3) Whether the plaintiff is estopped by his words and conduct from filing this suit? OPD

(4) Whether the suit is false and frivolous and has been filed just to harass and pressurize the defendants and the defendants are entitled to special costs under section 35-A, C.P.C.? OPD

(4-A) Whether the plaintiff is entitled to the decree for specific performance of the contract dated 10.2.2004?OPP

(5) Relief.

2. After recording evidence of both the parties the learned trial court decreed the suit of the appellant/plaintiff vide judgment and decree dated 23.12.2009. The respondents/defendants filed an appeal before the learned lower appellate court which came up for hearing before learned Addl. District Judge, who allowed the same vide judgment and decree dated 24.6.2010 and dismissed the suit of the appellant/plaintiff, hence, the instant civil revision.

3. Learned counsel for the appellant/plaintiff has argued the impugned judgment and decree passed by the learned lower appellate court is against law and facts; that the learned lower appellate court without taking into consideration the actual and real facts of the case available on the record has dismissed the suit filed by the appellant/plaintiff; that the impugned judgment has been passed without applying its judicious mind, which is also reflective of mis-reading and non-reading of evidence as the appellant/plaintiff had not only paid Rs.1,00,000/- to defendant No.1 but also deposited the balance consideration in compliance with judgment and decree passed by the learned trial court. The learned counsel for the appellant/plaintiff in support of his contention has relied upon the judgments reported as "2004 SCMR 729, 2003 CLC 1058, PLD 2006 Lahore 571(DB) and 2009 SCMR 114. He has lastly prayed for the acceptance of the instant appeal, setting aside of the impugned judgment and decree passed by the learned lower appellate court and prayed that the suit of the appellant/ plaintiff be decreed.

4. Conversely, the learned counsel for the Respondents has argued that the questioned agreement to sell dated 10.1.2004 had been allegedly executed by defendant No.1, the mother of the other defendants Nos.2 to 4 and 6 who were minors at the time of alleged execution of the said agreement, which was not binding upon them having no value in the eyes of law; that the said agreement was also unilateral as the same being not signed by one of the party was not enforceable in accordance with law. He has lastly prayed for dismissal of the instant appeal.

5. Arguments heard and record perused.

6. The learned lower appellate court has non-suited the appellant/ plaintiff mainly on the findings recorded on issue No.4-A. The appellant/ plaintiff himself admitted in the plaint that at the time of execution of the disputed agreement to sell, defendants Nos.2 to 4 and 6 were minors and defendant No.1, the mother of the said minor defendants was not their appointed guardian at the time of execution thereof.

7. The agreement to sell is defined in Black's Law Dictionary, Fifth Edition which reads as under:--

> **"Agreement of sale; agreement to sell.**---An agreement of sale may imply not merely an obligation to sell, but any obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. Treat v. White, 181 U.S. 264, 21 S.Ct. 611, 45 L.Ed. 853. It is a contract to be performed in future, and, if fulfilled, results in a sale; it is preliminary to sale and is not the sale."
>
> The said definition has further been elaborated by the august Supreme Court of Pakistan in a case reported as "Hafiz Tassadiq Hussain v. Muhammad Din through Legal Heirs and others" (PLD 2011 Supreme Court 241) and relevant para-5 is reproduced hereunder for ready reference:--
>
> "The noted meaning is also fortified by the provisions of section 54 of the Transfer of Property Act, 1882 which defines the sale of immovable property, prescribes the mode and mechanism how it is made; and by virtue of its clear language distinguish it from a contract/agreement of sale, when it is ordained that: "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties". Furthermore, in the above context, a clear distinction and contract is drawn in the same provision, wherein it is provided that a contract for sale itself shall neither create any interest in or a charge on such property. Thus, the former transaction (if not a conditional sale) is the conclusive transfer of an absolute title and ownership of the property unto the vendee in presentee, while the later is meant for accomplishing the object of sale in futurity and for all intents and purposes it pertains to the future obligations of the parties thereto, resultantly there is no room for doubt that a sale agreement/agreement to sell is duly covered and is hereby so declared to fall within the pale of said Article.

8. It is an admitted fact that the disputed property had been agreed to sell by defendant No.1, i.e. mother of the other defendants, who were less than 18 years of age and could not validly enter into sale contract on their behalf, which was void ab

initio having been contracted incapacity of vendors, thus, had no legal existence. No rights or liabilities would arise in favour of vendee from such void transaction, which could neither be enforced nor set up as a valid defence plea to claim thereunder a right or title. Invalidity of such transaction arose from a legal incapacity, which was, thus, incurable. Such sale was void and not voidable. Sale of minors's property by their mother as a defecto guardian was not sale in the eyes of law. Such sale would be invalid, unless the guardian obtained permission from the court of law to sell out the said property after her appointment as a guardian. The court is not even bound to grant leave to dispose of property of minors to an appointed guardian unless and until it is expressly proved to be for benefit or welfare of minor. Section 29 of the Guardians and Wards Act, 1890 reads as under:-
-

> 29. Limitation of Powers of guardian of property appointed or declared by the Court. Where a person other than a Collector, or other than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court:
>
> (a) mortgage, or charge or transfer by sale, gift, exchange or otherwise any part of the immovable property of his ward; or
>
> (b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.
>
> After perusal of the aforesaid provisions, there is left no doubt that the agreement to sell (Exh.P1) alleged to have been executed by defendant No.1 in favour of the appellant on behalf of the minor children without prior permission of the Court is void and the appellant could not seek performance of such agreement with the aid of Court by filing Civil suit. In arriving at this view, I am also fortified by the dictum laid down by the august Supreme Court of Pakistan in the judgments reported as "2000 SCMR 961, PLD 1994 SC 674 and 2008 SCMR 352.

9. In the present case, it is even admitted by the learned counsel for the appellant/plaintiff during the course of arguments that defendant No.1 was not an appointed guardian of the minor defendants from the competent court of law. As such the said defendants cannot be burdened with liability of void contract and the learned lower appellate court has validly refused relief to the vendee from his contracting minor party.

10. The case law referred to by the learned counsel for the appellant/plaintiff runs on different footing. In the case reported as "2003 CLC 1058", the agreement

had been executed by the father of the minor child being their natural guardian, who was also appointed as such by the Guardian Court subsequently and permission to sell the suit property was also obtained. In the present case it is not the case of the appellant/plaintiff rather the disputed agreement was allegedly executed by the mother of the minors who was not their natural guardian or appointed guardian by the court. The case law reported in 2004 SCMR 729 also runs on different footing and is not applicable on the instant case. Even otherwise, there is no evidence available on the file that the mother/defendant No.1 had entered into an agreement with the appellant/plaintiff in the interest of other defendants who were minors and the agreement by defecto guardian in favour of appellant is not protected under the law. Hence the case law reported as PLD 2006 SC 571 is also not applicable to the present case.

11. Irrespective of the above facts and circumstances, it is also notable after perusal of the impugned agreement to sell (Exh.1) that the same was unilateral having not been signed by one of the party i.e. plaintiff/appellant. Under the law the said agreement was not enforce-able. Safe reliance can be placed on the judgment reported as 2010 SCMR 334. This view has further been fortified in the case law reported as 2013 YLR 1017, the relevant portion is reproduced as under:--

> "Performance of an agreement is required by both the parties and if it is unilateral and signed by one party and signatures of the other party is not available on the said document, the same is not an agreement enforceable under the law."

12. No doubt, regular second appeal is maintainable against the judgment passed by the learned lower appellate court, but this Court can interfere if the lower court is found to have committed error of law or error in procedure, which may have effected decision of the case upon merits or that finding arrived at by the first appellate court is not supported by the evidence on record, but the same is result of surmises and conjectures as a result of fallacious appraisal of evidence. The learned counsel for the appellant is unable to make out a case on the touchstone of the grounds provided by Section 100, C.P.C.

13. Sequel of the above discussion is that the instant appeal having no force is dismissed with no order as to costs.

ZC/M-279/L

Appeal dismissed.

P L D 2016 Lahore 587
Before Ch. Muhammad Masood Jahangir, J
SARDARA AND ALLAH DITTA through Legal Heirs and others---Appellants
Versus
Mst. BASHIR BEGUM and another---Respondents

R.S.A. No.64 of 2008, decided on 25th January, 2016.

(a) Gift--

----Oral gift---Alleged donor an old illiterate village lady---Gift in favour of alien---Requirements---Gift mutation sanctioned on the basis of consent decree---Scope---Non-claiming of consequential relief---Effect---Judicial proceedings---Presumption of truth---Scope---Contention of plaintiffs was that gift mutation sanctioned through consent decree was illegal, void and ineffective upon their rights---Suit was dismissed concurrently---Validity---Nothing was on record as to when, where and before whom declaration of gift was made by the donor which was accepted by the donee and possession was delivered in lieu thereof---Oral gift was permissible but same was required to be proved by production of persuasive and trustworthy evidence---Trial Court proceeded to decree the suit merely on the basis of conceding written statement as well as conceding statement of donor without taking precautionary measures whether all such proceedings were being conducted without any coercion or misrepresentation on the part of donor-lady---Consent decree being an agreement between the parties to the lis when brought under challenge was required to be proved by beneficiary through production of convincing and cogent evidence---Trial Court without issuance of summons to the rival party for any further date of hearing received written statement of defendant-donor and after recording her conceding statement suit was decreed on the same day---Identification of a lady by the advocate before the court who had not been engaged through execution of power of attorney would have no sanctity in the eye of law---No other independent advice was available to the donor who was an illiterate and old age folk lady---Gift mutation for its completion required independent witnesses and identifiers which were not available to the donee in the present case---Principles.

Donee managed to get transferred the suit property through the alleged consent decree. Judicial Officer was required to exercise his jurisdiction while dealing with the case file as provided by the enactment. Court could not decide the lis without following the procedure and that too in a haste. Defendant being beneficiary of impugned decree was required to prove that donor had made a declaration of gift and same was accepted by her and possession was delivered to her in lieu thereof. No convincing and reliable evidence had been led by the defendant to prove the alleged transaction of gift. Neither any official of the court nor counsel who filed the suit on behalf of defendant were brought into witness-box by the defendant to prove that donor had appeared before the court. Fictitious decree

was obtained by the defendants. Presumption of truth was attached to the judicial proceedings but when such proceedings were challenged then beneficiary was required to prove the same. Consent decree was not implemented till the death of donor. lf decree was passed with the free consent of donor then same must have got implemented in her life time. Revenue hierarchy was bound to implement decree in common assembly to be convened in the concerned revenue estate and same must have come in the knowledge of donor as well as her legal heirs. Donee was not related to donor and without assigning any reason gift in favour of alien was not valid. When legal heirs of donor were available then reasons should be highlighted as to why the donor made the gift in favour of an alien. Donee had failed to prove the transaction of oral gift, genuineness and validity of decree by withholding the best evidence. Plaintiffs being the legal heirs of donor could not be deprived of their share in the disputed property on technical grounds. If party seeking declaration had failed to claim consequential relief, it could not be non-suited on such count. Rules and regulations were made to foster the cause of justice and those were not to be interpreted to thwart the same. Court should not deny substantial justice on mere technicalities. When main factual issue had been determined in favour of a party on merits, his lis could not be defeated on the technical ground that he failed to claim a proper relief. Court being custodian of rights of litigants was vested with the powers to grant relief even if it had not been claimed/prayed for. Impugned judgments and decrees passed by both the courts below were not based on proper examination of material available on record which were set aside. Suit filed by the plaintiffs was decreed with further relief that they would be entitled for recovery of possession of suit property. Plaintiffs were directed by High Court to affix court fee of Rs.15,000/- on the plaint as well as on the memo of appeals within a period of two months otherwise their suit as well as present appeal would be deemed to be dismissed. Second appeal was allowed in circumstances.

Abdul Majid and others v. Khalil Ahmad PLD 1955 FC 38; Mt. Kapoori and 4 others v. Man Khan and 6 others 1992 SCMR 2298 and Haji Sultan Ahmed through Legal Heirs v. Naeem Raza and 6 others 1996 SCMR 1729 ref.

Habib and 8 others v. Haji Muhammad and 3 others PLD 1970 Kar. 495; Ghulam Akbar Khan v. Haji Sher Jan and others 1989 CLC 1789; Pir Dil and others v. Dad Muhammad 2009 SCMR 1268; Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others 2002 SCMR 1938; Meraj Din v. Mst. Sardar Bibi and 5 others 2010 MLD 843; Ch. Akbar Ali v. Secretary, Ministry of Defence, Rawalpindi and another 1991 SCMR 2114; Pakistan v. Khuda Yar and another PLD 1975 SC 678; Mst. Arshan Bi through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others 2003 SCMR 318 and Muhammad Khan v. Rasul Bibi PLD 2003 SC 676 rel.

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

----S. 100---Second appeal---Scope---High Court could rebuff the concurrent findings of courts below if same were based on improper and perverse appreciation of evidence.

Khushi Muhammad v. Liaquat Ali PLD 2002 SC 581 and Iftikhar v. Khadim Hussain PLD 2002 SC 607 rel.

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

----Arts. 129(e) & 58---Judicial proceedings---Presumption of truth---Scope---Presumption of truth was attached to the judicial proceedings but when such proceedings were challenged, beneficiary was required to prove the same.

(d) Administration of justice---

----Technicalities could not be allowed to create any hurdle in the way of substantial justice.

(e) Administration of justice--

----Court could mould relief according to merits of the case.

Sheikh Naveed Shahryar, Humaira Bashir Ch. and Javed Imran Ranjha for Appellants.

Abid Hussain Minto for Respondent No.1.

Dates of hearing: 18th December, 2015 and 25th January, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--Succinctly the facts of the case are that the property fully mentioned in para-1 of the plaint belonged to Mst. Allah Jawai daughter of Nizam Din, regarding which a suit for declaration was instituted by Mst. Bashir Begum, respondent No.1 contending therein that she was owner in possession of the land as the same was orally gifted to her by said Mst. Allah Jawai due to love and affection on account of services rendered by her and Mst. Allah Jawai be permanently restrained from interfering into her possession with a further direction for implementation of gift mutation qua the suit property in her favour. The said suit was filed before the Civil Court on 7.4.1970 and the same was decreed within two days i.e. on 09.4.1970 as the claim of Mst. Bashir Begum, respondent No.1, was allegedly conceded by Mst. Allah Jawai while submitting her conceding written statement besides making conceding statement before the Court.

2. After the demise of Mst. Allah Jawai, inheritance mutation No.162 of her estate was sanctioned in favour of the appellants being her collaterals/legal heirs. On the other hand, the Revenue Officer rejected the gift mutation No.166, which was entered by the Revenue Patwari in favour of respondent No.1 on the basis of consent decree. Ultimately, mutation of inheritance No.162 sanctioned in favour of the appellants was cancelled and gift mutation No.166 was attested in favour of respondent No.1 by the appellate revenue forum. Subsequently, Sardara, etc, the present appellants instituted suit in hand for declaration alleging therein that they being the collaterals/legal heirs of Mst. Allah Jawai were in possession of the land in dispute whereas respondent No.1 had no concern with the same and by way of consequential relief prayed for restraining respondent No.1 permanently from interfering into their possession over it and that the gift mutation sanctioned through the fictitious decree of the court was illegal, void and ineffective for the reasons that neither any declaration of gift was made by Mst. Allah Jawai in favour of respondent No.1 nor it was accepted by her and possession of the property was also not delivered to respondent No.1 in lieu of alleged gift; that respondent No.1, the alleged donee, was not related to Mst. Allah Jawai and there was no occasion for the alleged donor to make a gift of land in her favour and that neither any statement was got recorded by Mst. Allah Jawai nor she was identified by any notable person before the Civil Court, which passed the fictitious consent decree. The said suit was hotly resisted by respondent No.1. While facing with the contest of the suit, the learned trial court captured the disputed area of facts by framing the following issues:-

1. Whether Allah Jawai was owner of the land in dispute? OPP

2. Whether the plaintiffs are collateral heirs of Mst. Allah Jawai? OPP

3. If issue No.2 is proved in affirmative, whether the plaintiffs are owners in possession of the disputed land? OPP

4. Whether Mst. Allah Jawai validly gifted her property in dispute in favour of the defendant? OPD

5. Whether the gift made by Mst. Allah Jawai is void, inoperative and not binding upon the plaintiffs due to the reasons stated in para No.4 of the plaint? OPD

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

7. Relief

3. After recording evidence of both the parties, the learned trial court dismissed the suit of the appellants vide judgment and decree dated 28.11.1977. Being aggrieved, the present appellants filed an appeal before the learned lower appellate

court, which came up for hearing before the learned Addl. District Judge, Gujrat, who allowed the same vide judgment and decree dated 20.4.1982, set aside the judgment and decree passed by the learned trial court and decreed the suit filed by the present appellants. Feeling dissatisfied, respondent No.1 filed RSA No.225/1982 before this Court, which was disposed of by Justice Muhammad Sair Ali, as he then was, vide judgment dated 18.4.2006 in the following terms:-

> "Examination of the impugned judgment and decree dated 20.4.1982 of the learned Additional District Judge, Gujrat shows that the ADJ failed to deal with and determine issue No.6 framed on the maintainability of the suit and also decided the remaining issues (per consensus of the learned counsel for the parties) contrary to the law. In view of the joint request of the learned counsel for the parties and for the above recorded reasons, the impugned judgment and decree dated 20.4.1982 of the learned Additional District Judge, Gujrat is set aside. Civil Appeal No.746 of 1988 titled "Sardara and another v. Mst. Bashir Begum" shall be deemed to be pending before the learned first appellate court. The appeal shall be reheard and re decided in accordance with law and on the basis of record reconstructed in this Court. The record herein constructed shall expeditiously be transmitted to the learned District Judge, Gujrat. The parties shall appear before the learned District Judge, Gujrat on 15.5.2006. The learned District Judge, Gujrat may hear and decide the appeal himself or may assign the same to any other learned Addl. District Judge. Endeavour shall be made to decide the appeal expeditiously."

4. In post remand proceedings, the learned lower appellate court vide judgment and decree dated 7.7.2008 dismissed the appeal filed by the present appellants. Seeming aggrieved, the instant second appeal under Section 100 of the Code of Civil Procedure,1908 has been filed by the appellants before this Court.

5. Learned counsel for the appellants has argued that the impugned judgments and decrees passed by both the learned courts below are against facts and law and suffer from material illegalities and irregularities; that there is no evidence on record that when alleged offer of gift was made by Mst. Allah Jawai, before whom it was accepted by Mst. Bashir Begum, respondent No.1 and delivery of possession under the alleged gift was made to her and as such necessary ingredients could not be proved by respondent No.1/beneficiary, but both the courts below without application of judicious mind passed the impugned judgments and decrees in complete derogation of material available on record; that the impugned consent decree dated 9.4.1970 and the proceedings recorded in the said suit could not be made basis to sanction gift mutation regarding the suit property owned by Mst. Allah Jawai the alleged donor, without proving all its ingredients, but the courts below failed to consider the said aspect of the case in true perspective; that neither Mst. Allah Jawai herself appeared before the Civil Court nor any statement was got recorded by her and the said alleged facts could not be proved by respondent No.1

/beneficiary and the present appellants being the legal heirs of Mst. Allah Jawai deceased are entitled to be declared owners of the disputed property while setting aside of the impugned judgments and decrees. He has lastly prayed for acceptance of the instant appeal, setting aside of the impugned judgments and decrees passed by the two courts below and that the suit filed by appellants be decreed as prayed for.

6. Conversely, the learned counsel for respondent No.1 has refuted the arguments advanced by the learned counsel for the appellants with the assertions that Mst. Allah Jawai herself appeared before the learned Civil Court in the company of her learned counsel, who did not only submit conceding written statement, but also got recorded her conceding statement while admitting the claim of respondent No.1 pleaded in the said plaint on the strength of which, order and decree dated 09.4.1970 was passed in her favour; that respondent No.1 succeeded to prove that declaration of gift was made by Mst. Allah Jawai deceased in her favour, which was accepted by her and in lieu thereof, possession of the disputed property was also handed over to her who is still in use and occupation of the same since the day of inception of the gift; that appellants were and are out of possession, who simply filed suit for declaration without seeking relief of possession, which being not maintainable was dismissed by two courts below and such findings of two courts below having been based on true appreciation of evidence, cannot be interfered with, and that strong presumption of truth is attached to the judicial proceedings, which cannot be vitiated merely on oral assertion. He while relying upon the judgments reported as Abdul Majid and others v. Khalil Ahmad (PLD 1955 Federal Court 38), Mt. Kapoori and 4 others v. Man Khan and 6 others (1992 SCMR 2298) and Haji Sultan Ahmed through Legal Heirs v. Naeem Raza and 6 others (1996 SCMR 1729) contended that concurrent findings of fact recorded by two courts below cannot be struck down by this Court while dealing with the second appeal. He has lastly prayed for dismissal of the instant appeal.

7. Arguments heard and record perused.

8. It is admitted fact that on 7.4.1970 respondent No.1 instituted suit against Mst. Allah Jawai on the basis of declaration of oral gift allegedly made by her and the copy of the plaint thereof is available at page-87 of the instant file. The perusal of contents of the plaint clearly reveals that it is nowhere mentioned that when, where and before whom the declaration of gift was made by the alleged donor/owner, which was accepted by respondent No.1/donee and possession was also delivered in lieu thereof. There is no denial of the factum that an oral gift is permissible under the law and can be made by a Muslim owner in favour of a donee, but the same is required to be proved by production of persuasive and trustworthy evidence. As observed supra in the plaint the venue, date and the names of the witnesses are missing to prove that when, where and before whom the oral declaration of gift was effected. These are the basic ingredients to be incorporated in the body of the plaint of the suit, which are missing from its inception, but without taking into consideration the said aspect, the Civil Court proceeded to decree the suit instituted by respondent No.1 merely on the basis of conceding written

statement as well as conceding statement allegedly preferred and made by Mst. Allah Jawai through order dated 09.4.1970 and no precautionary measures were adopted to satisfy the conscious of the court whether all such proceedings were being conducted without any coercion or misrepresentation on the part of the lady. The appellants being collaterals/legal heirs of Mst. Allah Jawai challenged the said decree while claiming it fictitious and against facts. There is much force in the argument of Sh. Naveed Shahryar, Advocate, learned counsel for the appellants, that the controversy arising between the parties is based on alleged consent decree, which being an agreement between the parties to the said lis, when brought under challenge, was required to be proved by the beneficiary through production of convincing and cogent evidence. This view is supplemented by the dicta laid down in the judgments reported as Habib and 8 others v. Haji Muhammad and 3 others (PLD 1970 Karachi 495), Ghulam Akbar Khan v. Haji Sher Jan and others (1989 CLC 1789) and Pir Dil and others v. Dad Muhammad (2009 SCMR 1268), wherein it is held that the consent decree passed in favour of a person does not stand on a higher footing than a contract so far as its legal character is concerned notwithstanding the fact that it has been recorded by and bears the seal of the Court. By following the ratio in the above referred dicta, it can safely be concluded that the consent decree is just an agreement between the parties of the lis, which after having been taken under dispute requires to be proved independently by production of direct affirmative evidence.

9. As per copy of the plaint, which is available at page 87, the same was instituted on 07.4.1970 by respondent No.1 and the Senior Civil Judge marked the same to the Civil Judge for 08.4.1970. As per copy of interlocutory order sheet (Exh.P2), which is available at page 89, the suit file was presented before the learned Judicial Officer on 8.4.1970, who adjourned the same to 9.4.1970 for its scrutiny. The official of the court produced the suit file after scrutiny before the learned Judicial Officer on 9.4.1970, who without issuance of summons to the rival party for any further date of hearing, received written statement on behalf of Mst. Allah Jawai, defendant, recorded her conceding statement to the effect that contents of plaint were correct and the suit was decreed on the same day. The copy of written statement filed by Mst. Allah Jawai is also available at page-90, but it is surprising to note that apparently the same was drafted on 07.4.1970 when the suit was instituted by respondent No.1, which means that the plaint and the alleged written statement of Mst. Allah Jawai were drafted on the same day. The said written statement was not signed by any counsel, rather on its back, the alleged statement attributed to Syed Ijaz Hussain, Advocate is available, who endorsed that Mst. Allah Jawai was personally known to him and she affixed her thumb impression on the conceding written statement in his presence. Admittedly, as per case diary maintained by the Civil Court, neither said Advocate put in appearance before the said Court by presenting his Vakalatnama on behalf of Mst. Allah Jawai nor power of attorney of any counsel on her behalf was ever filed on the suit file. The identification of a lady by some Advocate before the court of law, who had not been

engaged through execution of any Vakalatnama attains no sanctity in the eye of law. It is also significant to note that there is no mention in the case diary that Mst. Allah Jawai had been identified by said Syed Ijaz Hussain, Advocate, before the judicial officer when the conceding written statement was filed or her statement was got recorded. It is astonishing to note that this written statement finds mention filing date as 8.4.1970 at its back, but as per case diary the same was submitted on 9.4.1970, which has also created serious doubt that how the proceedings of the court were conducted in a clandestine manner to deprive an illiterate lady from landed property.

10. Additionally, the record also affirms that no other independent advice was available to Mst. Allah Jawai, who admittedly was an illiterate and old age folk lady. If the said lady had made a declaration of gift in favour of respondent No.1 and the property of the donor was also not under any clog, then why the donee did not get it transferred by means of attestation of gift mutation or instrument. Naturally both the said deeds for its completion required independent witnesses and identifiers, which definitely were not available to respondent No.1, who managed to get it transferred through the alleged consent decree. The judicial officer to whom the case file was presented, without issuance of formal summons for the service of Mst. Allah Jawai, the defendant of the said suit, proceeded to decree the same within a span of only one or two days and that too without fetching any document of title of Mst.Allah Jawai regarding the suit property or getting her identified through any male member of the family. A judicial officer is required to exercise his jurisdiction while dealing with a case file as provided by the enactment. There was no occasion for him to decide the lis without following the procedure and that too in such a haste, which has made the proceedings conducted by him doubtful and unreliable.

11. Being beneficiary of the impugned decree, it was incumbent upon the decree holder/respondent No.1 to prove that Mst. Allah Jawai had made a declaration of gift, the same was accepted by her and possession was handed over to her in lieu thereof, and that this oral transaction was acknowledged by Mst. Allah Jawai while appearing before the Civil Court on 09.4.1970, but no convincing and reliable evidence was led by respondent No.1 in this regard to prove the alleged transaction of gift. Additionally, neither any official of the court nor the counsel/Advocate, who filed the suit on behalf of respondent No.1 and even Syed ljaz Hussain, the learned Advocate, whose statement was shown to have been recorded on the back of the written statement, allegedly filed by Mst. Allah Jawai, defendant, were brought into the witness-box by respondent No.1/beneficiary to prove that Mst. Allah Jawai, donor had appeared before the Court, who not only filed her written statement, but also got recorded her conceding statement. The other backdrop of the case is that the learned Civil Court decreed the suit vide order dated 09.4.1970 on the strength of alleged conceding statement of Mst. Allah Jawai, but the perusal of first page of decree a sheet available at pages 92-93 of the instant file reveals that it was chalked out on 08.4.1970, whereas back side thereof reflects that it was drawn on 09.4.1970,

which is another strong proof to observe that a fictitious decree was obtained by respondent No.l. No doubt, under Article 129(e) of the Qanun-e-Shahadat Order, 1984, presumption of truth is attached to the judicial proceedings, but whenever these are brought under the clog/question, then beneficiary is required to prove the same under Article 58 of Order ibid, which is lacking in the case in hand.

12. It is also significant to note that the consent decree dated 09.4.1970 was kept in dark by respondent No.1 /beneficiary throughout the life of Mst. Allah Jawai, which was not implemented till her death i.e. 07.11.1972 and after the death of Mst. Allah Jawai when inheritance mutation No.162 of her legacy was sanctioned in favour of her collaterals/appellants, then respondent No.1/beneficiary brought the consent decree into light for the first time before the revenue hierarchy for its implementation and got entered mutation No.166 in her favour, but the same was rejected by the Revenue Officer. Being aggrieved, respondent No.1 assailed the same and ultimately mutation of inheritance No.162 was cancelled whereas gift mutation No.166 was attested in her favour. The silence of respondent No.1/beneficiary regarding the implementation of consent decree in the lifetime of Mst. Allah Jawai is another serious factor, which has shattered the genuineness and validity thereof. If the decree was passed with free consent of Mst. Allah Jawai in favour of respondent No.1/beneficiary, then she must have got implemented the same in the life time of Mst. Allah Jawai, who remained alive for next about 2-3/4 years having taken her last breath on 07.11.1972, if any effort for entry or attestation of mutation in compliance of consent decree was made, it must be presented before the revenue Patwari and revenue officer, who were obliged to implement the same in the common assembly to be convened in the concerned revenue estate and the said decree must have come into the knowledge of Mst. Allah Jawai as well as her collaterals and others, but it was kept secret, which is sufficient to draw an irresistible conclusion that all this drama was played to usurp the landed property of an old age woman.

13. There is much force in the argument of Sh. Naveed Shahryar, Advocate, learned counsel for the appellants that respondent No.l/ beneficiary was not related to Mst.Allah Jawai and without assigning any reason, the gift in favour of an alien was not valid. No doubt, a Muslim is free to transfer his property by making a declaration of gift in favour of any person, but when the collaterals/legal heirs of the donor were available then as per dicta laid down in the judgments reported as Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others (2002 SCMR 1938) and Meraj Din v. Mst. Sardar Bibi and 5 others (2010 MLD 843), there should be reasons to be highlighted as to why the donor was going to make a gift in favour of an alien. On the touchstone of above discussion, it can safely be concluded that beneficiary/respondent No.1 failed to prove the transaction of oral gift, genuineness and validity of the decree by withholding the best available evidence, therefore, the findings of the courts below on issues Nos.3 to 5 are not to be well founded being result of misreading and non-reading of evidence available on record, which are hereby reversed and are answered in favour of the appellants.

14. The contention of Mr. Abid Hussain Minto, Advocate, learned counsel for respondent No.1 that simple suit for declaration without seeking consequential relief of possession was not maintainable and especially when both the courts below concurrently rendered their findings to this extent, the suit instituted by the appellants cannot be decreed is not well founded. As it is proved on record that respondent No.1 managed transfer of the disputed property without any independent transaction by means of a consent decree, which even otherwise could not be proved to have been validly passed. The appellants, who admittedly are legal heirs of Mst. Allah Jawai could not be deprived of their share in the said property on technical grounds and a party seeking declaration if has failed to claim consequential relief, cannot be non-suited on such count. There is unanimity among the superior Courts that mere technicalities cannot be allowed to create any hurdle in the way of substantial justice. Rules and regulations are made to foster the cause of justice and those are not to be interpreted to thwart the same. A heavy duty is cast upon the courts to do substantial justice and not to deny the same on mere technicalities. In forming this view, I am fortified by the dicta laid down in the case reported as Ch. Akbar Ali v. Secretary, Ministry of Defence, Rawalpindi and another (1991 SCMR 2114), wherein it is held as under:-

> "In the exercise to do justice in accordance with law the Courts and forums of law cannot sit as mere spectators as if at a high pedestal, only to watch who out of two quarreling parties wins. See the judgment of this Court in the case of Muhammad Azam v. Muhammad lqbal and others (PLD 1984 SC 95 at page 132) and Civil Appeal No. 789 of 1990, decided on 26-6-1991 (Syed Phul Shah v. Muhammad Hussain PLD 1991 SC 1051). On the other hand, deep understanding and keen observance of proceedings is a sine qua non for doing justice in the Constitutional set up of Pakistan. Those rules of adversary system based merely on technicalities not reaching the depth of the matter, are now a luxury of the past. Neither of the parties can be permitted to trap an improperly defended or an undefended or an unsuspecting adversary by means of technicalities when the demand of justice is clearly seen even through a perfect trap. It will make no difference if the litigant parties are citizens high or low and/or is Government or state institution or functionary action as such."
>
> Reference is also made to the case of Manager, Jammu and Kashmir, State property in Pakistan v. Khuda Yar and another (PLD 1975 SC 678), wherein the learned Judges of this Court held that mere technicalities, unless offering insurmountable hurdles, should not be allowed to defeat the ends of Justice. The learned Judges further quoted the following passage from an earlier illuminating judgment of this Court rendered by Kaikaus, J in Imtiaz Ahmad v. Ghulam Ali (PLD 1963 SC 382):
>
> "I must confess that having dealt with technicalities for more than forty years, out of which thirty years are at the Bar, I do not feel much impressed

with them. I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on ground of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defect. Any system which by giving effect to the forum and not to the substance defects substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his."

The apex Court once again after approving the verdict of Ch. Akbar Ali's case (supra) and clinching the issue under discussion in a case reported as Mst. Arshan Bi through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others (2003 SCMR 318) held as under:-

"The denial of relief to a party simply on the ground that consequential relief was not claimed would, in no circumstances, advance the cause of justice.

It has been held time and again that the natural result of declaration would be that consequential relief has to be given by the Court even if it is not claimed. The trial Court in such like circumstances may call upon a party to amend the plaint to that extent and direct him to pay court fee, if any. Reliance in this respect is placed upon the case of Ahmad Din v. Muhammad Shafi and others (PLD 1971 SC 762) where it was observed as under: -

The contention of the learned counsel for the appellant that the suit could not fail merely by reasons of the Act that the consequential relief by way of possession had not been claimed is not altogether without substance. If his suit was otherwise maintainable and he was otherwise entitled to the relief it was open to the Courts to allow him to amend the plaint by adding a prayer for possession and paying the appropriate ad valorem court fees and then to grant him relief even though he had not specifically asked for it."

The Judges while dispensing justice are duty bound to apply the provisions of law in their true perspective and the same cannot be avoided simply on the ground that such provisions were not brought to their notice by the parties. We are fortified in this regard from an earlier judgment of this Court in the case of Board of Intermediate and Secondary Education, Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others (PLD 1992 SC 263) wherein it was held as under:-

"18. The learned counsel who represented the respondents in the High Court by not bringing to the notice of the High Court the law laid down by this Court on the subject did not render good service to their clients. Besides, it

has been laid down by this Court in Muhammad Sarwar v. The State (PLD 1969 SC 278 that a Judge must know the adage that a Judge must wear all the laws of the country on the sleeve of his robe and failure of the counsel to properly advise him is not a complete excuse in the matter."

Apart from the above there is another aspect of this case which cannot be lightly ignored. The present respondents have suffered during all this time due to the failure of the Revenue Department to implement the decree in its true perspective. They for the reasons best known to them in collusion with the petitioners got incorporated those Khasra numbers which were never decreed by the trial court. All the forums below have accepted this mistake. If this be so, why the respondents should suffer for the wrong acts of the functionaries/departments. It has been held in the State v. Asif Adil and others (1997 SCMR 209) that a party should not be made to suffer on account of an act or omission on the part of the Court or other State functionaries. In the case in hand the petitioners successfully kept the respondents out of their property on technical grounds wrongly created by the functionaries of the Revenue Department to which they had no right either morally or legally.

Resultantly, for what has been stated above, the learned Single Judge of the Lahore High Court through his impugned judgment has advanced the cause of justice to which no exception can be taken by this Court on any ground. The instant petition being devoid of any merit and force is hereby dismissed and leave declined."

15. No doubt, a different and contrary thought of dicta laid down by the Superior Court is also available on this subject, but each case has to be decided on its own merits and where the main factual issue has been determined by the court of law in favour of a party on merits, then to my mind, his lis cannot be defeated on the technical ground that he failed to claim a proper relief. The court being custodian of the rights of the litigants, is vested with the powers to grant relief even if it has not been claimed/prayed for. The Court is possessed with the jurisdiction to provide and mould the relief, according to the merits of the case. For instance, I would like to refer to Order VII rule 7 of the Code of Civil Procedure, 1908, which reads as under:

> **"7. Relief to be specifically stated.-** Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

The bare perusal thereof makes it open to the court to provide, mould and grant adequate relief even if not claimed in the plaint as per circumstances of the case. Both the courts below without attending to the above discussed dicta of the apex Court as well as the mandate of provisions ibid erred in law while answering issue

No.6 against the appellants, which reasoning being not maintainable is reversed and said issue is also decided in favour of the appellants.

16. The argument of learned counsel for respondent No.1 that concurrent findings of fact cannot be upset by this Court while exercising jurisdiction under Section 100 of the Code of Civil Procedure, 1908, has some force, but it is not an absolute principle. However, certain criteria have been laid down by the apex Court for interference in its various judgments. In the case reported as Muhammad Khan v. Rasul Bibi (PLD 2003 SC 676), the apex Court while upholding the judgment of this Court held as under:-

> "Ordinarily concurrent findings recorded by the courts below could not be interfered with by the High Court while exercising jurisdiction in the second appeal howsoever erroneous the findings may be, unless such findings had been arrived at by the courts below either by ignoring a piece of evidence on record or through perverse appreciation of evidence. High Court, in the present case, was justified in interfering with concurrent findings, after noticing that the judgments of the courts below suffer from acute miscarriage of evidence and exclusive of material available on the record, resulting in gross miscarriage of justice."

By now it has been established that the concurrent judgments of the courts below if originated from improper and perverse appreciation of the evidence on record, the same can be rebuffed by this Court in exercise of power under Section 100 of the Code of Civil Procedure, 1908. In another case reported as Khushi Muhammad v. Liaquat Ali (PLD 2002 SC 581), concurrent judgments were obtained without proving the execution of gift deed, properly and the august Supreme Court of Pakistan upheld the interference of this Court under Section 100 of the Code of Civil Procedure, 1908 while observing in para-11 as under:-

> "11. We have not been persuaded to agree with Mr. Gul Zarin Kiani, learned Advocate Supreme Court that in view of section 100, C.P.C. the concurrent findings arrived at by the Courts below cannot be reversed for the simple reason that no such bar has been enumerated in section 100, C.P.C. and in case of non- reading and misreading of evidence such findings could be reversed ."

Likewise, in case titled as Iftikhar v. Khadim Hussain (PLD 2002 SC 607), the apex court of the country has enumerated the area where this Court can interfere in the concurrent findings recorded by the lower courts and held as under:-

> "Concurrent findings are not sacrosanct and can be reversed when such findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of facts, patent errors of law or consideration of inadmissible or something so outrageous or so gross as to shock they very basis of justice."

17. In the present case, the issues of fact and law have not been properly determined by the two courts below and the impugned judgments and decrees being based on non- examination of material available on record in its true perspective are not sustainable in the eye of law. Consequently, the instant Regular Second Appeal is accepted, the impugned judgments and decrees passed by the two courts below are set aside and the suit filed by the appellants is decreed with further relief that the appellants are also entitled for the recovery of possession of the disputed property with a further direction to them to affix court fee of Rs.15,000/- on the plaint as well as on the memo of appeals within a period of two months positively otherwise their suit as well as instant appeal will be deemed to be dismissed. No order as to costs.

ZC/S-37/L
Appeal allowed.

2016 Y L R 565
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD BASHIR---Appellant
Versus
GOHAR NASEEM---Respondent

R.S.A. No.155 of 2010, heard on 15th October, 2014.

(a) Specific Relief Act (I of 1877)---
----S. 12---Qanun-e-Shahadat (10 of 1984), Art. 78---Suit for specific performance of contract---Illiterate executant of document---Document, proof of---Scope---Sale of property in case of contract would take effect in the terms settled therein between the parties---Agreement to sell would not itself create any interest or charge and onus would lie on the beneficiary to prove the same---Stamp vendor was not produced in witness box in the present case---Agreement was not scribed by a license holder deed writer rather same was drafted by an advocate---Advocate could not be treated at par with Petition Writer and his deposition would have no evidentiary value for not having produced his register for examination of court---Advocate was not bound to keep any such record and such a writer could not be treated as a licensed Petition Writer who maintained a register with page marking and entries were carried with serial numbers and dates---Statement of advocate was of no help to the plaintiff---Defendant was an illiterate person---Where document was allegedly executed by an illiterate person the beneficiary of said document was bound to establish by satisfactory and strong evidence that not only the document had been executed by said person but also that such person had fully understood the contents of such document---Impugned agreement to sell had not been read over to the executant after its writing---Witnesses of plaintiff were not consistent with regard to the venue where transaction was settled---Such contradictions could not be considered to be of minor nature but same was on material point---Evidence available on record was not sufficient to prove the valid execution of agreement to sell---Execution of document was to be proved by its beneficiary---Execution of document would not mean mere signing or putting thumb impression but something more than signing or putting thumb impression by the executant---Plaintiff was bound to prove that thumb mark was made in the presence of marginal witnesses of agreement to sell which was read over and also understood by the vendor---Identification of executant of document should also be proved by reliable and authentic evidence that a person who had affixed thumb marks or signature was the same person who owned the land and sold the same to the vendee---Plaintiff had failed to prove the execution of impugned agreement to sell---Impugned judgments and decrees passed by both the courts below were set aside and suit was dismissed---Defendant was directed to surrender Rs. 5 lac in favour of plaintiff which he had admitted to have been borrowed by him as security---Appeal was accepted in circumstances.

Qasim Ali v. Khadim Hussain through Legal Representatives and others PLD 2005 Lah. 654; Altaf Hussain Shah v. Nazar Hussain Shah 2001 YLR 1967; Mst. Safia Begum v. Muhammad Ajmal 2007 YLR 3030; Abdul Hameed v. Mst. Aisha Bibi and another 2007 SCMR 1808 and Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others 2007 SCMR 1884 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---Scope of interference with concurrent findings of fact was limited but if such findings appeared to have either mis-read the evidence on record or while assessing the same omitted from consideration some important piece of evidence which had direct bearing on the issue involved then revisional jurisdiction could be exercised.

Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139 rel.

Ali Raza Khan for Appellant.

Ahmad Raza Malik for Respondent.

Date of hearing: 15th October, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This appeal is directed against the judgment and decree dated 21.12.2009 passed by the learned Civil Judge, Sialkot, whereby, the suit for specific performance of agreement to sell dated 25.6.2005 (Exh.P1) filed by the respondent/plaintiff was decreed and the judgment and decree dated 29.4.2010 delivered by the learned Addl. District Judge, Sialkot, through which, the appeal filed by the appellant/defendant was dismissed.

2. Brief facts of the case are that respondent/plaintiff brought a suit for specific performance of an agreement to sell dated 25.6.2005(Exh.P1) before the learned trial court against the appellant/ defendant with the assertions that the disputed house No.XVI-13S-41/8/3 measuring 05 Marlas fully mentioned in the body of the plaint, owned by the appellant/ defendant was agreed to sell through above referred agreement to the respondent/ plaintiff against a consideration of Rs.16 lac and received Rs.13 lac as earnest money whereas the agreement was to be fulfilled till 26.9.2005.However, the appellant/ defendant failed to execute the sale deed in favour of respondent/plaintiff and he was constrained to file the said suit before the learned trial court. The said suit was resisted by the appellant/defendant with the assertions that a loan was taken by him and he surrendered the registered sale deed

in favour of respondent/plaintiff as security for repayment of loan, but the respondent/ plaintiff fraudulently converted the thumb impression affixed on the plain stamp paper into the disputed agreement to sell regarding the sale of suit house. The learned trial court, out of the divergent pleadings of the parties, framed the following issues:--

(1) Whether the defendant entered into an agreement to sell dated 25.6.2005, with the plaintiff regarding his property fully described in para No.1, of the plaint in lieu of Rs.16,00,000/- and had received Rs.13,00,000/- as earnest money and promised to get sale deed registered till 26.9.2005, after receiving of balance amount of Rs.300,000/-OPP

(2) If issue No.1, is proved in affirmative, whether the plaintiff is entitled to get decree as prayed for? OPP

(3) Whether the plaintiff has not come to the court with clean hands and is not entitled to discretionary relief? OPD

(4) Whether the suit is false and frivolous and in case of dismissal of suit, defendant is entitled to get the special cost? OPD

(5) Relief.

3. After recoding evidence of both the parties the learned trial court decreed the suit of the respondent/plaintiff vide judgment and decree and the appellant/ defendant filed an appeal before the learned lower appellate court which has also been dismissed through judgments and decrees as narrated in Para-1 ante.

4. Learned counsel for the appellant/ defendant has argued that both the courts below while misreading and non-reading the evidence available on record rendered the impugned judgments on erroneous premises of law; that the respondent/ plaintiff himself deposed that the sale consideration was paid by him to the appellant/defendant in the presence of Muhammad Ameen who was not produced by the respondent/plaintiff and withheld the said best evidence due to which inference was to be drawn against him under Article 129(g) of Qanun-e-Shahadat Order, 1984; that the said Muhammad Ameen was produced by the appellant/defendant before the learned trial court as DW.2 who negated the stance of the respondent/ plaintiff; that both the courts below while misinterpreting the said deposition committed material irregularity as well as illegality and that the evidence

available on record failed to prove the valid execution of agreement (Exh.P1). He has lastly prayed for the acceptance of the instant appeal, setting aside of the impugned judgments and decrees passed by both the courts below and prayed that the suit of the respondent/plaintiff be dismissed.

5. Conversely, the learned counsel for the respondent/plaintiff has supported the impugned judgments and decrees passed by both the courts below and also argued that the respondent/plaintiff produced scribe namely Mr. Tahir Naeem, Advocate, as PW. 4, Babar Rafique and Muhammad Ali as PW.2 and PW.3, the marginal witnesses of the disputed agreement to sell (Exh.P1), who fully proved the valid execution of the disputed agreement to sell (Exh.P1) and this Court has no jurisdiction to interfere in the concurrent findings recorded by both the courts below. He has lastly prayed for dismissal of the instant appeal.

6. Arguments heard and record perused.

7. The disputed agreement (Exh.P1) is available at page-31 of the instant file. It is a settled principle of law that sale of property in case of contract would take effect in terms settled therein between the parties but such contract would not by itself create any interest or charge thereon and heavy onus lies on the beneficiary to prove that any transaction was settled between the parties on the terms and conditions embodied in the said agreement. It is straightway noticed that stamp vendor of Exh.P1 was not produced by the respondent/plaintiff. The writing of the stamp vendor over the second page of first leaf of Exh.P1 does not disclose that in whose favour the disputed stamp paper was purchased by the appellant/defendant rather it only reveals that it was purchased for the purpose of "Iqrarnama" by the appellant/ defendant. Even the said agreement was not scribed by a licence holder deed writer rather it was drafted by Mr. Tahir Naeem, Advocate (PW.4). An Advocate could not be treated at par with petition writer whose deposition would have no evidentiary value for not having produced his Register for examination of Court as an Advocate is not obliged to keep any such record and such an author cannot be treated as a licensed petition writer, who maintains a Register with page marking and entries are carried with serial numbers and dates. As such statement of PW.4 is of no help to the respondent. Reliance in this respect is placed on the judgments reported as "Qasim Ali v. Khadim Hussain through Legal Representatives and others" (PLD 2005 Lahore 654), "Altaf Hussain Shah v. Nazar Hussain Shah" (2001 YLR 1967) and "Mst. Safia Begum v. Muhammad Ajmal" (2007 YLR 3030).

8. It is also admitted fact that the appellant/defendant was an illiterate person and this fact also stood proved from the perusal of Exh.P1 wherein the appellant was shown to have put his thumb impression only. It is now well settled principle

that where the document is allegedly executed by the illiterate person, the beneficiary of the document is bound to establish by highly satisfactory and strong evidence that not only the document has been executed by such illiterate person but also that such person had fully understood the contents of the document. The perusal of Exh.P1 further reveals that nowhere it is mentioned therein that document after its writing had been read over to the executant and he after considering the same to be true had put his thumb impression over there. Even respondent/plaintiff as PW.1 never deposed in his examination-in-chief that the contents of agreement (Exh.P1) were read over to the appellant/defendant. He also did not depose in his examination-in-chief the date, time, venue and the names of the witnesses before whom the bargain was settled between the parties. However, in his cross-examination he deposed as under:--

Similarly, Babar Rafique (PW.2) also did not depose the date, venue and the names of the witnesses before whom the disputed bargain was settled, rather he deposed in his examination-in-chief that the bargain was settled through him and the amount was paid in advance to the appellant/defendant. However, during the cross-examination, he deposed as under:--

While the other marginal witness Muhammad Ali was produced as PW.3 who also did not narrate any date, time or venue and also the names of witnesses before whom the said bargain was settled. However, in his cross-examination, he deposed as under:-

While the alleged scribe Mr. Tahir Naeem, Advocate (PW.4) in his cross-examination deposed as under:-

9. The perusal of Exh.P1 reveals that earnest money had been paid at the time of its execution whereas the above referred PWs. deposed that earnest money was paid for execution of Exh.P1 in the house of the appellant. As observed supra, PW.1 stated that transaction was made in the office of Tahir Naeem, Advocate (PW.4). Babar Rafique (PW.2) stated that transaction was settled in Jinnah Stadium Chowk but the other marginal witness Muhammad Ali PW.3 has altogether described a different venue where the transaction was settled and that place was the shop of respondent/ plaintiff. The said contradictions in the statements of PW.2 to PW.4 cannot be considered to be of minor nature rather the same was on material point. Furthermore, the respondent/plaintiff while appearing as PW.1 deposed that the token amount was paid in presence of Muhammad Ameen and said Muhammad Ameen had not been produced by the respondent/plaintiff which could be the star witness to prove the payment of sale consideration, rather said Muhammad Ameen had been produced by the appellant/defendant as DW.2 who had negated the stance

of the respondent/ plaintiff and categorically stated in his statement that no consideration was paid in his presence regarding the sale of the disputed house. He further clarified that a loan of an amount of Rs.5 lac was borrowed by the appellant and the appellant surrendered the original sale deed of the suit house to the respondent/plaintiff as a security for repayment of said loan and the respondent/plaintiff fraudulently used the thumbs impression of the appellant on the stamp paper to write the disputed agreement Ex.P1. The evidence available on the record is not found sufficient to prove the valid execution of the agreement (Exh.P1). The argument of learned counsel for the respondent/plaintiff that appellant/defendant had admitted his thumb impression over Exh.P1 and admitted facts need not to be proved, is without any force. According to Article 78 of the Qanun-e-Shahadat Order 1984, the execution of a document is to be proved by its beneficiary and the execution of document would not mean mere signing or putting thumb impression but something more than signing or putting thumb impression by the executant. The respondent/plaintiff was obliged to prove that thumb mark was made in the presence of marginal witnesses of Exh.P1, which was read over and also understood by the vendor, but it would not only be limited to merely signing a name or putting thumb impression upon a blank sheet of paper. However, to prove the document to have been validly executed, the identification should also be proved by reliable and authentic evidence that a person who had affixed thumb marks or signature was the same person who owned the land and sold the same to the vendee. Reliance in this respect is placed on the judgment reported as "Abdul Hameed v. Mst. Aisha Bibi and another" (2007 SCMR 1808), para-5 of which is reproduced hereunder:--

> "5. After hearing the learned counsel for the parties and perused the record with their assistance, we find that sole question requiring determination would be whether the admission of vendor of his thumb-impression on the agreement to sell was sufficient to prove its execution and contents, the answer is in the negative as the document purporting to create a right in the property must be proved to have been actually executed by the person who allegedly executed such document. It appears from the record that Din Muhammad was an illiterate person and without being aware of the contents of the document put his thumb-impression on it at the instance of his son in good faith with the "understanding that it was compound deed. This is a matter of common sense that in the normal circumstances, father would certainly trust his son and may act on his advice and thus in these circumstances, the inference drawn by the High Court that the vendor

having no knowledge of the contents of the document, affixed his thumb-impression at the instance of his son with the impression that document pertained to the settlement regarding encroachment of the house was quite natural and denial of Din Muhammad to have put his thumb-impression on blank paper, would seriously reflect upon the genuineness of the agreement in question. In view thereof, the admission of Din Muhammad of his thumb-impression on the agreement in question, would not ipso facto prove its contents to raise the presumption of it being a genuine document to have the legal force. This may be seen that High Court having discussed the evidence in detail has held that the agreement to sell was not proved to have been executed by Din Muhammad and we in the given facts have no reason to differ with the conclusion drawn by the High Court. The learned counsel for the appellant has not been able to satisfy us that on the basis of evidence brought on record and in the facts and circumstances of the case, an equitable relief of specific performance could be granted to the appellant or the findings arrived at by the High Court was suffering from any misreading or non-reading of evidence or there was any other legal defect in the impugned judgment calling for interference of this Court."

10. The above fact has been reaffirmed by the august Supreme Court of Pakistan in judgment reported as "Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others" (2007 SCMR 1884), wherein it was observed that execution of a document would mean series of acts, which would complete the execution and mere signing or putting thumb mark would not amount to execution in terms of Article 78 of Qanun-e-Shahadat Order, 1984. It is further held in the said landmark judgment that a document which is not proved is inadmissible in evidence unless strict proof of it is waived. In the instant case, the beneficiary was bound to prove the due execution of the agreement by the vendor in accordance with law, but the respondent/ plaintiff failed to prove the same.

11. The last submission of the learned counsel for the respondent/plaintiff that concurrent findings of courts below cannot be interfered with by this Court while exercising jurisdiction under section 115, C.P.C. is also without any force. Although the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under Section 115, C.P.C., if courts below appeared to have either misread evidence on record or while assessing evidence omitted from consideration some important piece of evidence which had direct bearing on the issue involved. In arriving at such view this Court is fortified by the dictum laid down in the judgment reported as "Abdul Hakeem v. Habibullah

and 11 others" (1997 SCMR 1139) and "Muhammad Anwar and others v. Mt. Ilyas Begum and others" (PLD 2013 SC 255).

12. The findings of both the courts below on issues Nos. 1 and 2 which were answered by both the courts below in favour of respondent/plaintiff are hereby reversed and answered against him, while the findings on the rest of the issues are not required to be dilated any further

13. Sequel of the above discussion is that the instant appeal is accepted, the impugned judgments and decrees passed by the learned courts below are set aside and the suit for specific performance of agreement filed by the respondent/plaintiff is hereby dismissed. However, the appellant/defendant admitted that a loan amounting to Rs.5 lac had been borrowed by him from the respondent/plaintiff and registered sale deed was surrendered in favour of the plaintiff/respondent as security for the repayment of the said amount. It is also proved on record that said amount was still due and he was ready to repay the same. In view of such admission of the appellant/ defendant, the respondent/plaintiff is held entitled to recover an amount of Rs.5 lac and alternatively the decree for the recovery of the said amount is passed in favour of the respondent/ plaintiff.

ZC/M-384/L

Appeal allowed.

2016 C L C 1417
[Lahore (Bahawalpur Bench)]
Before Ch. Muhammad Masood Jahangir, J
SUB-DIVISIONAL OFFICER (OPERATION), FESCO----Appellant
Versus
MUHAMMAD ILLYAS----Respondent

FAO No.418 of 2013, heard on 22nd April, 2014.

(a) Punjab Consumers Protection Act (II of 2005)---
----Ss. 25, 27, 30 & 31--- Electricity Act (IX of 1910), S.39-A---Complaint, filing of---Detection bill---Jurisdiction of Consumer Court---Scope---Illegal order---Limitation---Consumer Court could issue direction if products complained against suffered from any of the defects specified in the claim or all the allegations contained in the same with regard to service provided were true---Complaint by the complainant was not with regard to any defective product or faulty services rather same was with regard to correction of detection bill which would fall within the jurisdiction of civil court---Criminal case had also been got registered against the complainant under S.39-A of Electricity Act, 1910---Matter of issuance of detection bill with regard to charge of theft of energy by the consumer through metering equipments or relating to reading would fall within the jurisdiction of Electric Inspector but not civil court---Consumer Court had to first identify a consumer availing service and if the said service was found defective, only then court could fix damages and award the same---Said court could not issue a direction for reduction in the detection bill issued by WAPDA which was the exclusive domain of civil court---Present complaint was incompetent and Consumer Court had wrongly assumed the jurisdiction in the matter as complainant had already invoked the jurisdiction of civil court---Impugned order had been passed without jurisdiction which was illegal and no limitation would run against such order---Impugned order passed by the Consumer Court was set aside and complaint filed was dismissed---Appeal was accepted in circumstances.

WAPDA and others v. Kamal Foods (Pvt.) Ltd. PLD 2012 SC 371; MEPCO Ltd. v. Muhammad Ashiq PLD 2006 SC 328; Dr. Muhammad Rafiq Chaudhry v. WAPDA and others 1983 CLC 2397; Mst. Zainab v. Chief Engineer, Electricity, WAPDA and 2 others 1983 CLC 3314; Chief Executive, FESCO, Faisalabad and 2 others v. Nayab Hussain PLD 2010 Lah. 95 ref.

WAPDA and others v. Kamal Foods (Pvt.) Ltd. PLD 2012 SC 371; MEPCO Ltd. v. Muhammad Ashiq PLD 2006 SC 328; Evacuee Trust Property Board and others v. Mst. Sakina Bibi and others 2007 SCMR 262 and Mehreen Zaibun Nisa v. Land Commission PLD 1975 SC 397 rel.

(b) Punjab Consumers Protection Act (II of 2005)---

----Preamble---Object---Punjab Consumers Protection Act, 2005 had been promulgated to provide for protection and promotion of the rights and interests of consumers.

Hafiz Shahzad Ahmad for Appellant.
Malik Abdul Sattar Chughtai for Respondent.
Date of hearing: 22nd April, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Precisely the facts are that respondent was consumer of the appellant, who got installed electricity meter and on 8.2.2013 he was caught red handed while stealing electricity by the staff of the appellant after directly connecting his connection to the main line. Thereupon a criminal case under section 39-A of the Electricity Act, 1910 was got registered against the respondent besides issuance of a detection bill amounting to Rs.47,799/- for consumption of 4495 units. The respondent filed a complaint under section 25 of the Punjab Consumer Protection Act, 2005 seeking direction to the appellant for issuance of disputed bill for the month of March, 2013 as per consumption. The said petition was contested by the appellant by filing written reply, who also took the specific objection regarding jurisdiction of the District Consumer Court into the matter in hand and the civil suit filed by the respondent on the same subject was already pending in the Civil Court at Sargodha. Vide order dated 23.5.2013, the learned Presiding Officer, District Consumer Court, Sargodha passed the following direction:--

> "I have gone through the record, connected load of the consumer is 5-KW and according to the formula of the respondents, in cases of theft of electricity 146 units per 1-KW is to be charged to the domestic consumers. Keeping in view the formula consumer could have been charged by the respondents 730 units per month against connected load of 5-KW for 3 months which comes to 2190 units:-
>
> 5-KW x 146 = 730 x 3 = 2190
>
> The bill charged to the consumer is not based on facts and law, which is set aside. The respondents are directed to charge the consumer as mentioned above. The amended bill be sent to the consumer and any amount already paid in this regard by the consumer shall also be adjusted. During the course of arguments learned counsel for the respondent Malik Nadir Ali Advocate pointed out that complainant has also filed a civil suit on the same cause of action which is pending before the court of Mr. Abdul Sattar Kallu, learned Civil Judge at Sargodha. Counsel for the complainant stated that as and

when the instant case is decided either way, he will withdraw the said civil suit forthwith. Complaint is disposed off accordingly. File be consigned to record room after due completion."

which has been challenged by the appellant through the instant appeal.

2. Learned counsel for the appellant contends that the impugned order is illegal and against the facts which has caused miscarriage of justice; that the respondent was found to be involved in a criminal offence against whom a criminal case was also got registered under the relevant provisions and the proceedings thereof could not be thwarted by invoking the jurisdiction of the learned District Consumer Court whereas under section 26 of the Electricity Act, 1910 cases involving theft of electricity fall within the jurisdiction of Electric Inspector. Also contends that as regards the dispute of detection bill the civil court has the exclusive jurisdiction whereas the impugned order is an example of transgression of jurisdiction by the learned Presiding Officer of the District Consumer Court, which is liable to be set aside by allowing this appeal. Relies upon WAPDA and others v. Kamal Foods (Pvt.) Ltd. (PLD 2012 SC 371) and MEPCO Ltd. v. Muhammad Ashiq (PLD 2006 SC 328). As regards question of limitation, learned counsel for the appellant contends that no limitation run against the orders passed illegally and without jurisdiction. Also pointed out that on the similar facts and law another case bearing FAO No.354 of 2013 is fixed today for hearing before this court and if the delay in filing this appeal is not condoned, there will be possibility of conflicting judgments in both the matter on the similar point, which will not be appreciable by the canon of justice.

3. Conversely, the learned counsel for the respondent has supported the impugned order and refuted the arguments advanced by the learned counsel for the appellant/company on the ground that the respondent fell within the definition of consumer as provided by section 2(c) of the Electricity Act, 1910 according to which consumer means any person who is supplied with energy by a licensee or whose premises are for the time being connected for the purposes of a supply of energy with the works of a licensee. Also contends that this appeal is hopelessly barred by time and there being no sufficient ground tendered by the appellant, this appeal is liable to dismissal on the score as well. Reliance has been placed on Dr. Muhammad Rafiq Chaudhry v. WAPDA and others (1983 CLC 2397), Mst. Zainab v. Chief Engineer, Electricity, WAPDA and 2 others (1983 CLC 3314), and Chief Executive, FESCO, Faisalabad and 2 others v. Nayab Hussain (PLD 2010 Lahore 95).

4. I have heard the learned counsel for the parties and perused the record.

5. As per its website available on the internet, the appellant/ FESCO distributes and supplies electricity to about 3.23 million customers within its territory with a

population over 21 million under a Distribution License granted by National Electric Power Regulatory Authority (NEPRA) pursuant to the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA Act) whereas the respondent got installed electricity meter from the appellant and on 8.2.2013 he was allegedly caught red handed while stealing electricity after directly connecting his connection to the main line by the staff of the appellant whereupon a criminal case under section 39-A of the Electricity Act, 1910 was got registered against the respondent besides a detection bill amounting to Rs.47,799/- for consumption of 4495 units was also issued to him. The pivotal question to be firstly resolved by this court is that whether the Consumer Court possessed jurisdiction to take cognizance in the matter in hand. As per its preamble, the Punjab Consumer Protection Act, 2005 has been promulgated to provide for protection and promotion of the rights and interests of the consumers and the complaint before the learned Consumer Court is filed under section 25 thereof, which reads as follows:-

> **"25. Filing of Claims.--** A claim for damages arising out of contravention of any provisions of this Act shall be filed before a Consumer Court set up under this Act."

However, the procedure to be followed by the Consumer Court has been defined in section 30 ibid, which is reproduced hereunder for ready reference:-

> **"30. Procedure on receipt of complaint.-** (1) The Consumer Court shall, on receipt of a claim if it relates to any products,-
>
> (a) forward a copy of the claim to the defendant mentioned in the claim directing him to file his written statement within a period of fifteen days or such extended period not exceeding fifteen days;
>
> (b) where the defendant, on receipt of claim referred to him under clause (a), denies or disputes the allegations contained in the claim, or omits or fails to present his case within the time specified, as the case may be, the Consumer Court shall proceed to settle the consumer dispute in the manner specified hereafter.
>
> (c) where the claim alleges that products are defective and do not conform to the accepted industry standards, the Consumer Court may decide the dispute on the basis of the evidence relating to the accepted industry standards and by inviting expert evidence in this regard;
>
> (d) where the dispute cannot be determined without proper analysis or test of products, the Consumer court shall obtain sample of the products from the complainant, seal it and authenticate it in the manner prescribed and refer the sample to a laboratory along with a direction to make analysis

or manner prescribed and refer the sample to a laboratory along with a direction to make analysis or test, whichever may be necessary, with a view to finding out if such products suffer from any defect and to report its findings to the Consumer Court within a period of thirty days of the receipt of the reference or within such period as may be extended, not exceeding fifteen days by the Consumer Court; and

(e) the Consumer Court may require the claimant to deposit to the credit of the Consumer Court such fees as may be specified, for payment to the laboratory for carrying out the necessary analysis or test and the fee so deposited by the claimant shall be payable by the defendant if the test or analysis support the version of the claimant.

(2) The Consumer Court shall, if the claim relates to any services,--

(a) forward a copy of such claim to the defendant directing him to file his written statement within a period of fifteen days or such extended period not exceeding fifteen days as may be granted by the Consumer Court; and

(b) on receipt of the written statement of the defendant, if any, under clause (a), proceed to settle the dispute on the basis of evidence produced by both the parties:

Provided that if the defendant does not deny or dispute the allegations made in the complaint or fails to present his case within the specified period, the dispute shall be settled on the basis of the evidence brought by the claimant.

(3) For the purposes of this section, the Consumer Court shall have the same powers as are vested in civil court under the Code of Civil Procedure, 1908 (Act XX of 1908), while trying a suit, in respect of the following matters, namely:-

(a) the summoning and enforcing attendance of any defendant or witness and examining him on oath;

(b) the discovery and production of any document or other material object which may be produced as evidence;

(c) the receiving of evidence on affidavits;

(d) issuing of any commission for the examination of any witness; and

(e) any other matter which may be prescribed.

(4) Every proceeding before the Consumer Court shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code 1860 (Act XLV of 1860); and section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898):

Provided that the personal presence of the claimant before the Consumer Court shall not be required till the defendant has put up appearance before it.

(5) The Consumer Court shall decide the claim within six months after the service of summons on the respondent.

6. The powers of the District Consumer Court have been described by section 31 ibid and the same is reproduced as under:-

"31. Order of Consumer Court.-- If, after the proceedings conducted under this Act, the Consumer Court is satisfied that the products complained against suffer from any of the defects specified in the claim or that any or all of the allegations contained in the claim about the services provided are true, it shall issue an order to the defendant directing him to take one or more of the following actions, namely:-

(a) to remove defect from the products in question;

(b) to replace the products with new products of similar description which shall be free from any defect;

(c) to return to the claimant the price or, as the case may be, the charges paid by the claimant;

(d) to do such other things as may be necessary for adequate and proper compliance with the requirements of this Act:

(e) to pay reasonable compensation to the consumer for any loss suffered by him due to the negligence of the defendant;

(f) to award damages where appropriate:

(g) to award actual costs including lawyers' fees incurred on the legal proceedings;

(h) to recall the product from trade or commerce;

(i) to confiscate or destroy the defective product;

(j) to remedy the defect in such period as may be deemed fit; or

(k) to cease to provide the defective or faulty service until it achieves the required standard."

A perusal of the above provisions shows that in order to invoke the jurisdiction by the Consumer Court, it must have satisfied that the products complained against suffered from any of the defects specified in the claim or that any or all of the allegations contained in the claim about the services provided are true, then it could issue direction in the above said manner. However, from the bare reading of the complaint filed by the respondent before the learned Consumer Court, one can find that it is not regarding any defective product or a faulty services rather the dispute raised by the respondent related to correction of detection bill, which falls within the exclusive jurisdiction of the Civil Court in view of the dictum laid down by the august Supreme Court of Pakistan in PLD 2006 SC 328, rightly relied upon by learned counsel for the appellant.

7. There is also no denial that a criminal case has also been got registered against the respondent by the appellant under section 39-A of the Electricity Act, 1910 with the alleged allegation that he was caught red handed while stealing electricity by the staff of the appellant after directly connecting his connection to the main line, which is punishable with imprisonment of either description for a term and may extend to three years, or with fine which may extend to five thousand rupees, or with both; and if it is proved that any device, contrivance or artificial means for such abstraction, consumption or use exists or has existed on a premises, it shall be presumed, unless the contrary is proved, that such person has committed an offence under this subsection. It has been held by the august Supreme Court in PLD 2012 SC 371 that in case of issuance of detection bill regarding the charge of theft of energy by the consumer through metering equipment or relating to reading thereof, the Civil Court had no jurisdiction in such matter and only Electric Inspector had powers to take cognizance thereof.

8. After perusal of the provisions of Punjab Consumers Protection Act, 2005, it is found that the District Consumer Court established under section 26 thereof assumes jurisdiction provided by section 27 ibid, which reads as under:-

"27. Jurisdiction of Consumer Courts.-- Subject to the provisions of this Act, the Consumer Court shall have jurisdiction to entertain complaints within the local limits of whose jurisdiction--

(a) the defendant or each of the defendants, where there are more than one, at the time of filing of the claim, actually and voluntarily resides or carries on business or personally works for gain; or

(b) any of the defendants where there are more than one, at the time of the filing of the claim, actually and voluntarily resides, or carries on business, or personally works for gain; provided that in such a case the permission is, granted by the Consumer Court or the defendants who do not reside, or carry on business, or personally work for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action wholly or in part arises."

and the jurisdiction of the Consumer Court is distinct from the constitutional jurisdiction of this court, which has to first identify a Consumer availing service and when the said service is found to be defective, only then the Consumer Court can fix damages and award the same. However, the Consumer Court cannot issue a direction for reduction in the detection bill issued by the appellant, which is the exclusive domain of the Civil Court as has been held in the preceding paras. The case law relied upon learned counsel for the respondent is not applicable to the facts and circumstances of the instant case. This court is very much in agreement with the argument of learned counsel for the appellant that the complaint made by the respondent to the Consumer Court was incompetent and the said court has wrongly assumed the jurisdiction in the matter in hand when even otherwise the respondent had already invoked the jurisdiction of the civil court in the same matter.

9. So far as the delay in filing this appeal is concerned, suffice it to say that since the impugned order has been declared without jurisdiction and illegal, it is now well settled principle that no limitation runs against such orders. A safe reliance can be placed on the judgment reported as Evacuee Trust Property Board and others v. Mst. Sakina Bibi and others (2007 SCMR 262). Even otherwise on the similar facts and law, another FAO No.354 of 2013 is also fixed before this court for today. In Mehreen Zaibun Nisa v. Land Commission (PLD 1975 SC 397), out of several appeals some were time barred and as all the appeals were to be decided on merits, the delay was condoned by the august Supreme Court. I am of the view that when the impugned order has been found to be illegal, the same cannot be allowed to perpetuate merely on technicality, which will amount to discrimination as well if conflicting orders are passed in the similar matters. Hence, CM No.3 of 2013 filed by the appellant for condonation of delay in filing this appeal is allowed and the delay is condoned.

10 For the foregoing discussion, this appeal is allowed, the impugned order dated 23.5.2013 passed by the learned Presiding officer, District Consumer Court, Sargodha is set aside and the complaint filed by the respondent is dismissed.

ZC/S-74/L

Appeal allowed.

2016 C L C 1085
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
SALMAN FAROOQI----Appellant
Versus
Messrs ROSETEX through Muhammad Tariq----Respondent

F.A.O. No.243 of 2013, heard on 28th October, 2014.

Civil Procedure Code (V of 1908)---

----Ss. 39, 42, 46 & O. XXI, R.6---Execution of decree---Transfer of decree---Powers of Court executing transferred decree---Precepts---Territorial jurisdiction of executing court---Determination---Executing Court at place "F" attached the Bank accounts of the judgment debtor at place "K" and in satisfaction of the decree transferred the amount lying in those accounts in the account of the decree holder---Validity---Under S.39(1), C.P.C., transfer of the decree might be made on application of the decree holder; whereas, S.39(2), C.P.C. gave Suo Motu powers to the executing court to transfer the decree to the court of competent jurisdiction---Term 'competent jurisdiction' referred to territorial and pecuniary jurisdiction to deal with the decree and not the competence of the court to entertain the suit, in which the decree was passed---Under S.42, C.P.C., the transferee court could exercise the same powers as those exercised by the transferor court---Impugned order of the executing court to attach and transfer the amount lying in the Bank accounts at "K" was beyond its territorial jurisdiction---Under S.46 (1) & (2), C.P.C., proper procedure for the executing court was to issue a precept for the attachment of the bank accounts of the judgment debtor to the court in whose territorial jurisdiction the same were located---Executing court should have transferred the execution petition under S.39 read with O.XXI, R.6, C.P.C. to the court where the bank accounts of the judgment debtor were lying or where the judgment debtor was residing---No provision of law existed under which the executing court could attach or make an order for transfer of the amount lying in the Bank account falling outside of its territorial jurisdiction---Courts were bound to follow the procedure prescribed by the law---High Court, setting aside impugned order, restored the execution petition for the executing court to pass appropriate order---Appeal was allowed in circumstances.

Ijaz Ahmed Chadhar for Appellant.

Muhammad Chand Khan for Respondent.

Date of hearing: 28th October, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- By filing the instant appeal, the appellant has challenged the order dated 22.4.2013 passed by the learned Executing Court, whereby, an amount of Rs.27,64,626.65/- lying in Accounts being operated by the appellant in the Banks at Karachi has been ordered to be transferred to the Account of decree holder/respondent to satisfy the part of decree.

2. The facts of the case are that the respondent filed a suit for recovery of an amount of Rs.5189920/- under Order XXXVII rules 1 and 2, C.P.C. before the learned District Judge, Faisalabad, which was partially decreed vide judgment and decree dated 19.2.2010 in favour of respondent/plaintiff to the tune of Rs.5189920/-. The said judgment and decree of the learned lower appellate court was assailed by the present appellant by filing RFA No.396/2010 before this Court, which was accepted and the decree dated 19.2.2010 was set aside and the suit filed by the respondent/plaintiff was remanded to the learned trial court. However, the suit was again decreed by the learned trial court vide judgment and decree dated 3.2.2011. Thereafter, the respondent/decree holder filed an execution petition before the learned Executing Court on 15.10.2012 and the learned Executing Court attached the Bank Accounts of the appellant/judgment debtor and thereafter vide impugned order dated 22.4.2013 the learned Executing Court has transferred the amount of Rs.27,64,626.65/-in the Account of decree holder. Being dissatisfied the instant appeal has been filed.

3. Learned counsel for the appellant/judgment debtor has argued. that some of the Accounts which have been attached by the learned Executing Court relate to the Banks situated at Karachi and fall out of the territorial jurisdiction of the learned Executing Court and that the impugned order for transfer of amount of the appellant lying in Banks Accounts at Karachi to the Bank Account of the decree holder at Faisalabad is without jurisdiction and the learned Executing Court while ignoring the provisions of law has passed the impugned order which being without lawful authority is liable to be set aside.

4. On the other hand, learned counsel for the respondent has frankly admitted that the amount of the judgment debtor was lying in the Banks Accounts situated at

Karachi and the learned Executing Court vide impugned order has issued a direction for its transfer to the Bank Account of the decree holder lying in Bank at Faisalabad.

5. Arguments heard and record perused.

6. The part II ranging from Sections 36 to Section 74 read with Order XXI, C.P.C. deals with the execution of decree. Section 39 permits the transfer of decree for execution to another court and for ready reference, same is reproduced hereunder:-

> **39. Transfer of decree.**--- (1) The Court which passed a decree may, on the application of the decree holder, send it for execution to another court,---
>
> (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or
>
> (b) if such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or
>
> (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it, or
>
> (d) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.
>
> (2) The Court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction."

7. Under Subsection (1) the transfer of decree may be made on an application of the decree holder, whilst Subsection (2) authorizes suo motu powers to an Executing Court to transfer the same to a court of competent jurisdiction. The term "competent jurisdiction" definitely refers to territorial and pecuniary jurisdiction to

deal with the decree and not the competence of the Court to entertain the suit in which the decree was passed. The transferee court can exercise the same powers as possessed by a transferor court and Section 42, C.P.C. deals with the said aspect, which is also reproduced hereunder for reference:-

> **42. Powers of Court executing transferred decree---**
>
> (1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner act if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.
>
> (2) Without prejudice to the generality of the foregoing provision, the Court executing a decree sent to it shall have the following powers, namely:--
>
> (a) power under section 39 to transfer the decree to another Court, if necessary;
>
> (b) power under subsection (1) of section 50 to permit execution to proceed against the legal representatives of a deceased judgment-debtor;
>
> (c) power under section 152 to correct clerical or arithmetical errors;
>
> (d) power under rule 16 of Order XXI to recognize the assignment of a decree;
>
> (e) power under sub-rule (2) of rule 50 of Order XXI to grant leave to a decree-holder to proceed against a person not already recognized as a partner in a firm in an execution proceeding against the firm;
>
> (f) power under clause (b) of sub-rule (1) of rule 53 of Order XXI to give notice of attachment of decree passed by another Court.] "

8. It is strange to observe that how an Executing Court possessing powers at Faisalabad could pass the order for attachment or transfer of amount lying in the

Bank Accounts at Karachi, which was beyond its territorial jurisdiction. The proper procedure for the learned Executing Court was to issue a precept for the attachment of the property/Bank accounts of the judgment debtor to a court in whose territorial jurisdiction the same located in accordance with subsections (1) and (2) of Section 46 of C.P.C., which read as under:--

> **"46. Precepts.---** (1) Upon the application of the decree holder the Court which passed the decree may, whenever it thins fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.
>
> (2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree."

9. The analysis of above referred provisions makes it clear that if the judgment-debtor does not own property within the local limits/ territorial jurisdiction of the court passing the decree sufficient to satisfy the decree, the decree can be transferred to the court within the local limits of whose jurisdiction the judgment-debtor's other property is situated and the said transferee court can execute the decree against such property as is situated within its territorial limits, otherwise, no purpose will be served by keeping execution petition pending in the court which had passed the same. The proper course for the court below was that it should have transferred the execution petition under Section 39 read with Order XXI, rule 6, C.P.C. to the court where the bank accounts of the judgment-debtor were lying or where the judgment-debtor was residing for the satisfaction of the decree.

10. There is no other provision of law according to which an Executing Court can attach or make an order for transfer of the amount lying in the Bank account falling outside its territorial jurisdiction. The contention of the learned counsel for the respondent that decree passed in his favour will be frustrated if not satisfied is no ground to maintain wholly illegal and without jurisdiction order passed by the lower court. The courts are bound to follow the procedure prescribed by the law makers in the statutes and any deviation there-from will amount to declare the said order without jurisdiction.

11. Sequel of the above discussion is that the instant appeal is accepted and the impugned order passed by the learned Executing Court is set aside and the

execution petition filed by the respondent will be deemed to be pending before the learned Executing Court, who will be at liberty to pass the appropriate orders afresh.

SL/S-33/L **Appeal allowed**

PLJ 2016 Lahore 26
[Multan Bench Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
MUHAMMAD RAMZAN--Appellant
Versus
***Mst.* AYESHA BIBI--Respondent**

F.A.O. No. 113 of 2007, heard on 10.9.2015.

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

----O. XXXVII, Rr. 1 & 2--Suit for recovery on basis of pronote--Plaint of suit was returned for institution before Court of ordinary jurisdiction--Pronote was signed by two witnesses--Negotiable instrument--Validity--Promissory note even if was attested by two witnesses, same remains within definition of pro-note and a recovery suit on basis of negotiable instrument is triable by District Court under Order XXXVII Rules 1 & 2 of CPC. [P. 28] A

Syed Muhammad Aurangzeb Gilani, Advocate for Appellant.
Nemo for Respondent.
Date of hearing: 10.9.2015

JUDGMENT

The precise facts of the case are that Muhammad Ramzan appellant filed a recovery suit under Order XXXVII Rules 1 & 2 of the Civil Procedure Code of 1908 against the respondent/defendant on the basis of a pro-note dated 6.1.2005 with the assertion that she had borrowed an amount of Rs. 95,000/-from him for two months and promised to return the same till 06.3.2005, but on demand she refused to repay the same. The respondent/defendant was proceeded against *ex parte* on 09.2.2007. However she put in appearance before the learned trial Court on 21.3.2007 by filing two separate applications one for leave to defend the suit and the other for setting aside of *ex parte* order dated 09.2.2007 and the case was fixed for arguments for 03.7.2007 when the plaint of the suit filed by the appellant/plaintiff was returned to him for institution before the Court of Ordinary jurisdiction *vide* order dated 03.7.2007. Hence the instant appeal.

2. On calls none has appeared on behalf of the respondent. The report of the Process Server shows that the respondent was once served through her husband and twice she refused to accept service of the notice. It appears that the respondent is not interested to pursue this matter on merits, who is proceeded against *ex parte*.

3. ***Arguments of learned counsel for the appellant heard and record perused.***

4. The learned trial Court after having found that the pro- note was signed by two witnesses and while relying upon the dicta laid down in judgment reported as *Abdul Rauf Vs. Farooq Ahmed and another* (PLD 2007 Lahore 114) observed that the disputed pro-note on the basis of which suit was filed did not fall within the definition of negotiable instrument rather the same would be covered by the definition of bond and while passing the impugned order returned the plaint of the

suit to the appellant/plaintiff to institute the same before the Court of ordinary jurisdiction.

5. The view rendered by the learned Division Bench of this Court in case of *Abdul Rauf (supra)* has not been approved by the apex Court while accepting Civil Appeal No. 1784 of 2008 *vide* judgment dated 5.6.2014 authored by his lordship Ejaz Afzal Khan, J observed as under:--

> "…For the word bond as defined in Section 2(5)(b) of the Stamp Act means and includes any instrument attested by witnesses and not payable to order or bearer whereby a person obliges himself to pay money to another. When we confronted the learned ASC for the respondent whether the instrument contains an unconditional undertaking to pay on demand or at a fixed or determinable future time, a certain sum of money either to the order of a certain person or the bearer of the instrument, he answered in the affirmative. When so the mere fact that it bears attestation of witnesses would not make it a bond. Therefore, the impugned judgment and the judgments relied upon being against the letter and spirit of Section 4 of the Negotiable instruments Act cannot be upheld. The case of *"Farid Akhtar Hadi vs. Muhammad Latif Ghazi and another" (supra)* being in tune with the letter and spirit of Section 4 of the Act may well be cited in this behalf. Reference to the case of "*Ram Narayan Bhagat and another vs. Ram Chandra Singh and others (supra)* is misconceived as in that case there was nothing in the instrument indicating that the amount was payable to order or bearer. If thus follows that the promissory note containing all the conditions described in Section 4 of the Negotiable Instrument Act cannot be treated as bond."

6. On the touchstone of above dicta a promissory note even if was attested by two witnesses, the same remains within the definition of pro-note and a recovery suit on the basis of negotiable instrument is triable by the District Court under Order XXXVII Rules 1 & 2 of the Civil Procedure Code of 1908. The pronouncement of the apex Court is binding on all the subordinate Courts under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973 and the impugned order cannot be maintained. Consequently, the instant appeal is accepted, impugned order is hereby set aside and the suit filed by the appellant/plaintiff will be deemed to be pending before the learned trial Court for decision in accordance with law, who before proceeding with the trial will ensure that service is effected upon the respondent-defendant.

7. The appellant/plaintiff is directed to appear before the learned District Judge, Multan on 01.10.2015, who may hear the suit himself or entrust the same to any other Court of competent jurisdiction for further proceedings.

(R.A.) Appeal accepted.

2016 C L C 848
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
GULZAR MEHMOOD KHAN----Appellant
Versus
ABDUL WHAEED----Respondent

R.F.A. No.119 of 2009, heard on 16th September, 2015.

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

----O. XXXVII, Rr. 1 & 2---Negotiable Instruments Act (XXVI of 1881), S.118---Qanun-e-Shahadat (10 of 1984), Arts.17 & 79---Suit for recovery of loan amount on basis of promissory note---Summary procedure on negotiable instrument---Presumptions as to negotiable instrument---Pronote---Principles as to execution and proof---One of marginal witnesses to pronote and receipt of payment not produced---Effect---Plaintiff filed suit for recovery alleging that defendant, having received loan on execution of promissory note, refused to return same, which was decreed by trial court---Validity---Defendant had specifically denied execution of pronote and receipt of payment---Initial onus was on shoulders of plaintiff to prove payment of loan consideration, besides valid execution of pronote and receipt---Only one of attesting witnesses had been produced, who deposed that neither loan amount was paid to defendant nor other attesting witness had signed pronote in his presence---Other attesting witness had not been produced---Pronote was not required to be attested by any witness, but receipt attached therewith must have been attested by two witnesses, and those witnesses were required to be produced to prove same---Plaintiff's contention that other marginal witness had moved abroad, and in such eventuality, trial court was justified in not drawing inference against plaintiff, was misconceived---Plaintiff's omission not to produce marginal witness was fatal as to proof of both pronote and receipt---Scribe of document could not be treated as attesting witness, particularly, when he had never deposed that loan amount was paid in his presence---Scribe of pronote had deposed that one of marginal witness had not signed pronote and receipt before him---Pronote and receipt had been scribed by layman and not by licensed deed writer---Plaintiff had not produced register of deed writer to support his version, thus inference was to be drawn against him--Under Art. 118 of Negotiable Instruments Act, 1881, although certain presumptions were attached to negotiable instrument, but same were rebuttable--Evidence produced by plaintiff was not sufficient to hold that disputed amount had been paid and pronote and receipt had been duly executed---Trial court, while decreeing suit, misinterpreted evidence available on record and erred in law---High Court, setting aside impugned judgment and decree, dismissed suit with costs---Appeal was allowed in circumstances.

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

----Arts. 150 & 151---Question by party to his own witness---Impeaching credit of witness---Hostile witness---Principles as to declaring a witness as hostile---Plaintiff's contention that his witness, who had deposed that consideration was not paid in his presence, had been declared hostile witness by trial court, and he, therefore, was not bound by statement of hostile witness, was without any substance---Such witness would not necessarily be declared as hostile for only reasons that he was unfavourable to party calling him and he was not desirous of telling truth---Trial court, to ascertain as to whether or not a witness was desirous of telling truth, might allow conducting of cross-examination by party, who had called him as witness---No reason existed for declaring a witness as hostile simply because a portion of his statement had gone against party, who had called him---If portion of statement of witness was not inconsonance with deposition made by other witnesses, such witness would not be unnecessarily treated as hostile witness and permitted to be cross-examined---Witness was declared hostile when he resiled from material parts of his earlier statement, and it was not safe to rely upon testimony of such witness---In the present case, however, plaintiff's witness had never been examined on any previous occasion---Inference had to be drawn against party who had produced the witness---Plaintiff was bound by statement of his own witness.

(c) Negotiable Instruments Act (XXVI of 1881)---

----S. 118---Presumptions as to negotiable instrument---Under Art.118 of Negotiable Instruments Act, 1881, although certain presumptions are attached to negotiable instrument, but same are rebuttable.

(d) Negotiable Instruments Act (XXVI of 1881)---

----S. 118---Qanun-e-Shahadat (10 of 1984), Art.17---Presumptions as to negotiable instrument---Competency and number of witnesses---Pronote is not required to be attested by any witness, but receipt attached therewith must be attested by two witnesses, and those witnesses are required to be produced to prove the same.

Mian Hafeez-ur-Rehman for Appellant.

Sheikh Ahmed Saeed for Respondent.

Date of hearing: 16th September, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- This regular first appeal is directed by the appellant/defendant (hereinafter to be referred as appellant) against the judgment and decree dated 16.6.2009 passed by the learned District Judge, Sahiwal whereby the suit filed by the respondent/plaintiff (hereinafter to be referred

as respondent) under Order XXXVII, rules 1 and 2 of the Civil Procedure Code, 1908 seeking to recover an amount of Rs.250,000/-was decreed.

2. Briefly, the facts are that the respondent filed a suit under Order XXXVII, rules 1 and 2 of the Civil Procedure Code, 1908 for recovery of Rs.250,000/- against the appellant with the assertion that he was known to the appellant for a considerable time and on the basis of mutual trust, he lent an amount of Rs.250,000/- to him for a period of six months vide promissory note dated 09.5.2002, but the appellant refused to repay the same, hence the respondent was constrained to file the suit.

3. The appellant after seeking leave to appear and defend the suit filed written statement before the learned trial court and contested suit of the respondent on the ground that he had neither taken any loan from the respondent nor executed any promissory note and that the alleged promissory note was a fictitious, forged and fabricated document, which was got prepared on the instigation of brother of the respondent, who was posted as Manager, National Bank of Pakistan, Grain Market, Sahiwal.

4. The learned trial court captured the disputed area of facts by framing the following issues:-

1. Whether the plaintiff has no cause of action? OPD
2. Whether the defendant has executed the pronote and the receipt dated 9.5.2002? OPP
3. Whether the suit is bad in view of preliminary objection No.3? OPD
4. Whether the plaintiff is entitled to the recovery of Rs.2,50,000/-as prayed for? OPP
5. Whether the suit is liable to be dismissed with special costs? OPD
6. Relief.

5. To prove his posture, the respondent produced Nadeem Ahmad, one of the attesting witnesses of promissory note as well as receipt as PW2, Altaf Hussain (PW3), the scribe of the promissory note and respondent himself appeared as PW4 whereas Muhammad Hanif, Officer of MCB, Sahiwal was also produced by the respondent as PW1. Moreover, in documentary evidence, promissory note Exh.P1 and receipt Exh.P2 were duly received by the learned trial court on the file. On the other hand, the appellant himself appeared as DW1 only. The learned trial court after having appraised the evidence on record proceeded to decree the suit vide judgment and decree referred in para-1 ante, mainly, on the ground that pronote Exh.P1 attained presumption of truth. Being aggrieved, the appellant has challenged the impugned judgment and decree by filing the instant appeal.

6. It is argued by the learned counsel for the appellant that the impugned judgment and decree passed by the learned trial court is result of misreading and non-reading of evidence, who failed to take into consideration that one of the attesting witnesses, Haji Muhammad Aslam was not produced whereas the other attesting witness Nadeem Ahmad PW2 did not support the stance of the respondent, thus, the respondent failed to prove his stance by providing sufficient evidence on

the record, therefore, his suit was liable to be dismissed. He has lastly prayed for acceptance of the instant appeal, setting aside of the impugned judgment and decree and dismissal of the suit filed by the respondent.

7. Conversely, the learned counsel for the respondent has supported the impugned judgment and decree and prayed for dismissal of the instant appeal.

8. Arguments heard and record perused.

9. The appellant specifically denied the execution of the pronote (Exh.P1) as well as receipt (Exh.P2) and the initial onus was on the shoulders of the respondent to prove the payment of loan consideration besides the valid execution of the pronote and receipt (Exh.P1 and Exh.P2). Admittedly, only one alleged attesting witness Nadeem Ahmad as PW2 was produced by the respondent, who during the course of examination-in-chief, deposed that Abdul Waheed respondent had not paid Rs.250,000/-to Gulzar Mehmood appellant in his presence. He further stated that Haji Muhammad Aslam did not sign the pronote (Exh.P1) before him, while the other witness Haji Muhammad Aslam was not put in the witness-box by the respondent to establish the valid execution of pronote as well as receipt (Exh.P1 & Exh.P2). It is, no doubt, well settled that a pronote is not required to be attested by any witness, but it is equally true that the receipt attached therewith to be effective must be attested by two witnesses and that the said witnesses are also required to be produced to prove the same.

10. The argument of the learned counsel for the respondent that Haji Muhammad Aslam, the second marginal witness of the receipt (Exh.P2) was produced by the respondent on many occasions before the learned trial court for recording of his statement, but his statement could not be recorded due to delaying tactics played by the appellant, who subsequently proceeded abroad and in such eventuality the learned trial court was justified not to draw inference against the respondent, is misconceived. The trial court's record of the suit filed by the respondent is available with this Court, the perusal whereof reveals that issues were framed by the learned trial court on 16.4.2003 and thereafter the proceedings were adjourned for production of evidence of the respondent on different dates i.e. 8.5.2003, 28.5.2003, 18.6.2003, 21.7.2003, 9.9.2003, 30.9.2003 and 28.10.2003, but the evidence could not be produced by the respondent. On the said dates of hearing, only one witness Muhammad Hanif, official of MCB, Sahiwal was brought by the respondent but his statement also could not be recorded. Then respondent moved an application under Order XIII, rule 3 of the Civil Procedure Code, 1908 for production of documents, which was disposed of by the learned District Judge, Sahiwal vide order dated 18.11.2003 and case was fixed for evidence of the respondent. Thereafter statement of PW1 was got recorded on 18.11.2003 and again on 16.12.2003, 20.1.2004, 24.2.2004, 6.4.2004, 6.5.2004 and lastly on 11.5.2004 the evidence could not be produced by the respondent whereupon the case was dismissed on account of default on the said date. However, the suit was restored vide order dated 27.1.2005 and thereafter evidence could not be recorded for the next four dates, rather evidence of PWs 2 to 4 was got recorded on 25.5.2005 and at this stage counsel for the respondent closed the affirmative evidence of the

respondent. Then the case was adjourned for the evidence of the appellant. Thereafter respondent moved an application for production of Haji Muhammad Aslam, attesting witness of receipt (Exh.P2), in additional evidence, which was allowed by the learned trial court on 28.7.2006 and case was adjourned for 05.8.2006 for recording of statement of said witness. Then only on the one date of hearing i.e. 5.8.2006 Haji Muhammad Aslam allegedly appeared before the learned trial court when counsel for the appellant was not available on account of his pre-occupation before this Court. Thereafter on the next dates of hearing i.e. 4.8.2006, 10.10.2006, 12.12.2006, 7.2.2007, 28.2.2007, 4.4.2007, 8.5.2007, 6.6.2007, 11.7.2007 and 16.7.2007, the said witness could not be produced and the learned counsel for the respondent got recorded his statement that he did not want to produce any further evidence. However, he reserved the right of the respondent for production of rebuttal evidence and the learned trial court fixed the case for evidence of the appellant, which was duly got recorded. Then the learned trial court on the basis of available evidence proceeded to decree the suit. The case diary maintained by the learned trial court itself negates the conclusion drawn by the said court through the impugned judgment that statement of Haji Muhammad Aslam could not be recorded due to lapse on the part of the appellant. It was bounden duty of the respondent to produce the attesting witness of the receipt (Exh.P2), but he was not produced for a considerable time. This omission on the part of respondent is highly fatal in so far as proof of the pronote as well as receipt (Exh.P1 & P2) is concerned.

11. It is also settled principle that the scribe of a document cannot be treated as an attesting witness particularly when he never deposed that the amount of loan was paid in his presence. The scribe of the pronote also deposed that Haji Muhammad Aslam one of the attesting witnesses did not sign before him on the pronote as well as receipt (Exh.P1 and Exh.P2). It is also note-worthy that pronote as well as receipt (Exh.P1 and Exh.P2) were scribed by a layman and not by a license holder deed writer whereas the licenses are issued by the competent authority to the skilled deed writers so that the interests and rights of the parties could be secured as the license holder deed writers are required to maintain the registers to make entry of the document and also to obtain signatures/thumb impressions of the executants against the said entry in the registers to cross check the authenticity of the signatures/thumb impression of the executants found to have been affixed on the relevant instruments. In the present case no such documentary evidence of corroborative nature in the shape of registers of deed writer is available on the record to support the version of the respondent and in the absence of such evidence inference has to be drawn against the respondent/ beneficiary.

12. There is left only statement of Nadeem Ahmed PW2, who being witness of respondent in his statement-in-chief specifically stated that neither the other attesting witness signed the pronote as well as receipt (Exh.P 1 and P2) nor any loan consideration was paid by the respondent to the appellant in his presence. No doubt, the learned trial court under Article 150 of the Qanun-e-Shahadat Order, 1984 allowed the counsel for the respondent to cross examine the said PW, who

conducted lengthy cross-examination, but nothing favourable could be gathered therefrom. The argument of the learned counsel for respondent that PW2 was declared as hostile witness by the learned trial court and respondent was not bound by his statement, is also without any substance as by now it is well settled principle that such a witness would not necessarily be declared a hostile witness for the reasons that he was unfavourable to the party calling him and he was not desirous of telling the truth. In order to ascertain as to whether a witness is desirous or not of telling the truth, the Court may allow conducting of cross-examination by the party, who has called him as witness. The necessary corollary would be that there can be no reason that why a witness should be declared hostile simply because a portion of his statement goes against the party, who called him. If at all a portion of his statement is not in consonance with the deposition made by other witnesses, such witness would not be unnecessarily treated as hostile witness and permitted to be cross-examined. A witness is declared hostile when he resiles from the material parts of his earlier statement. It is not safe to rely upon the testimony of such witness, but in the instant case, PW2 was never examined on any previous occasion. Moreover, the respondent is bound by statement of his own witness and there are also contradictions in the statement of respondent being PW4, who deposed that loan amount was borrowed by the appellant in presence of the attesting witnesses, but one of the attesting witnesses was not produced by the respondent and the other (PW2) deposed that no consideration was paid in his presence, hence legally the inference was to be drawn against the party who produced the said witness.

13. No doubt according to section 118 of the Negotiable Instrument Act, 1881 certain presumptions are attached to the negotiable instrument, which include that every negotiable instrument was made or drawn of consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed negotiated or transferred for consideration, that every negotiable instrument bearing a date was made or drawn on such date but the said presumption is rebuttable and evidence adduced by the respondent is not sufficient to hold that disputed amount was paid and pronote and receipt (Exh.P1 & Exh.P2) were duly executed. The respondent has miserably failed in this regard by bringing on record convincing and cogent evidence and the learned trial court erred in law while decreeing the suit through the impugned judgment and decree, which is a classical example of misinterpreting the evidence on record and cannot be sustained in the eye of law.

14. Consequently, the instant appeal is accepted, impugned judgment and decree dated 16-6-2009 is hereby set aside and the suit filed the respondent is dismissed with costs throughout.

SL/G-42/L
Appeal accepted.

2016 M L D 1553
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
Malik MUHAMMAD NAWAZ---Appellant
Versus
MOHSIN SALEEM---Respondent

R.F.A. No.29 of 2009, decided on 2nd October, 2015.
(a) Civil Procedure Code (V of 1908)---

---O. XXXVII, Rr. 2 & 3---Suit for recovery of money on the basis of cheque---Application for leave to appear and defend the suit---Scope---Facts supported by affidavit---Substantial question of fact---Plausible defence---Scope---Defendant filed application for leave to appear and defend the suit which was dismissed and suit was decreed---Contention of defendant was that plaintiff had committed theft of his cheque---Validity---Defendant moved application for leave to appear and defend the suit within time---Court could rarely refuse leave to defend application where defendant had not failed to disclose any defence---Real question to be determined would be whether leave should be conditional or unconditional---Where defence had raised and disclosed a triable issue or a plausible defence or a prima facie case was made out then leave should be granted as a rule---Court should neither go into the merits of the case to determine if defence was good nor it should go into the truth or falsity of the defence---If plausibility of defence so raised appeared to be determinative then court must exercise its jurisdiction in favour of defendant while providing him opportunity to defend the suit---If court while deciding the application for leave to appear and defend the suit had reached to the conclusion that apparently defence was not bonafide but same required recording of evidence then leave could be granted by imposing equitable condition for due performance of decree---Such condition should not be harsh, unjust and oppressive---Defence raised by the defendant in the present case was not illusory---Said defence required recording of evidence for its proof or disproof which could not be determined without proper inquiry---Application for leave to defend was supported by affidavit which was not controverted by filing counter affidavit---Any person acquainted with facts might make a declaration of the same in writing and sworn on oath by an affidavit---Any application supported by an affidavit if not controverted by counter affidavit alongwith written reply should be taken as correct statement of fact---Defendant had succeeded to disclose a plausible defence while raising substantial question of fact which required to be tried or investigated---Defendant was entitled

for leave to appear and defend the suit---Trial Court, in the present case, had failed to exercise its jurisdiction judiciously and properly and impugned order had been passed in a hasty manner---Defendant had admitted his signatures over the cheque so he was liable to be burdened with the condition to satisfy the decree if ultimately passed against him---Impugned judgment and decree passed by the Trial Court were set aside---Application for leave to defend the suit was accepted subject to deposit of specified amount in cash and furnishing of surety bond to the extent of remaining amount before the Trial Court within specified period---Defendant was directed to appear before the Trial Court on the date fixed for further proceedings---Appeal was allowed in circumstances.

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

---O. XXXVII, Rr. 2 & 7---Suit for recovery of money on the basis of negotiable instant---Procedure---Summary suit had provided a special procedure for the parties and the defendant had no right to contest the suit unless he had sought permission to defend the same and leave was granted to him by the court through speaking order---Plaint filed under Order XXXVII, C. P. C. should disclose an open and shut case for the plaintiff to prove and for the defendant to defend with regard to negotiable instrument relied upon in the same.

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

----O. XXXVII, Rr. 2 & 3---Suit for recovery of money on the basis of negotiable instrument---Leave to defend the suit---Scope---Court could rarely refuse leave to defend application where defendant had not failed to disclose any defence---Real question to be determined would be whether leave should be conditional or unconditional---Where defence had raised and disclosed a triable issue or a plausible defence or a prima facie case was made out then leave should be granted as a rule---Court should neither go into the merits of the case to determine if defence was good nor it should go into the truth or falsity of the defence---If plausibility of defence so raised appeared to be determinative then court must exercise its jurisdiction in favour of defendant while providing him opportunity to defend the suit---If court while deciding the application for leave to appear and defend the suit had reached to the conclusion that apparently defence was not bonafide but same required recording of evidence then leave could be granted by imposing equitable condition for due performance of decree---Such condition should not be harsh, unjust and oppressive.

Muhammad Yafis Naveed Hashmi for Appellant.

Nemo for Respondent.
Date of hearing: 2nd October, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHNAGIR, J.---By filing the instant appeal, the appellant/defendant has assailed the judgment and decree dated 16.01.2009 passed by learned trial court by virtue of which petition for leave to appear and defend the suit was dismissed and resultantly, summary suit for recovery of Rs.59.0,000/- instituted by the respondent/plaintiff was decreed.

2. According to the contents of the plaint, the respondent/plaintiff had advanced a I6an of Rs.5,00,000/- to the appellant/defendant and for its return cheque Mark-A was issued by the appellant/defendant, but the same was not honored and the respondent/plaintiff instituted the suit for its recovery under Order XXXVII Rule 2 of the Civil Procedure Code, 1908 before the District Judge, Rajanpur. The appellant/defendant put his appearance before the Court and filed an application under Order XXXVII Rule 3 of the Civil Procedure Code, 1908 to defend the suit with the assertion that he being accountant in the DHO office Rajanpur was performing his duties and respondent/plaintiff was also serving in the same office as a junior clerk, who committed theft of a cheque from the drawer of his writing table and on the basis of which, the suit was filed by the respondent/plaintiff. The said application was also supported by an affidavit. The respondent/plaintiff contested the said application by filing his reply, but failed to support the same by filing any affidavit. The learned trial court vide impugned judgment and decree dismissed the said application and straightaway decreed the suit of the respondent/plaintiff. Hence, the instant appeal.

3. Despite repeated calls today none has appeared on behalf of the plaintiff/respondent, who is duly represented through Syed lrfan Haidar Shamsi, Advocate whose power of attorney is available on file and his name is also duly published in the cause list. Case diary maintained by this Court also reveals that

same was the position on last date of hearing i.e. 08.9.2015, but as on the date the name of learned counsel for the said date the name of learned counsel for the respondent/plaintiff was not displayed in the cause list, so it was adjourned for today and this time the office of this court has duly reflected his name in the cause list, who is absent without any prior intimation. The instant appeal is pending for the last more than 61/2 years and this court is not inclined to further adjourn the case. Hence, the respondent/plaintiff is proceeded against ex parte. Record of learned trial court is available, which has been scanned and arguments of learned counsel for the appellant/defendant heard.

4. The summary suit filed under Order XXXVII Rules 1 and 2 of the Civil Procedure Code, 1908 provides a special procedure for the parties and the defendant has no right to contest the suit unless he seeks permission to defend the same and leave is awarded to him by the court through a speaking order. The scheme introduced in Order XXXV11 requires that the plaint should disclose an open and shut case for the plaintiff to prove and for the defendant to defend with reference to negotiable instrument relied upon in the plaint. In the case in hand, the appellant/defendant filed his application before the learned trial court well within time provided in sub-rule (2) of rule 2 of the Order ibid. No doubt, signature over the cheque were admitted by the defendant, but at the same time, he pleaded that he was Accountant of a department and his said cheque was lying in the drawer of his office table from where his subordinate/junior clerk i.e. plaintiff removed the same and instituted the suit in hand. It is also averred in the application that respondent/plaintiff remained in jail as he was involved in a criminal case of fraud, which was lodged against him. Copy of FIR No. 467 dated 29.11.2008 under sections 419, 420, 468, 471 of the Pakistan Penal Code, 1860 duly registered against the respondent/plaintiff by the concerned police under a letter issued by the EDO(Health), Rajanpur is also appended with the appeal. The respondent/plaintiff admitted in his reply that both of them were employed in Health department and working in the same office, however, it was denied that the cheque was stolen by him. A court could rarely refuse leave to defend the suit, where the defendant failed

to disclose any defence and the real question to be determined is whether the leave should be conditional or unconditional. Where the defence raises and discloses a triable issue or a plausible defence or a prima facie case is made out, then leave should be granted as a rule. The court will neither go into the merits of the case to determine if the defence is good nor will it go into the truth or falsity of the defence. If the plausibility of the defence so raised appears to be determinative, then the court must exercise its jurisdiction in favour of the defendant while providing him opportunity to defend the suit. However, while deciding the application for leave to appear and defend the suit if the court reaches the conclusion that apparently the defence is not bona fide, but same requires recording of evidence, then leave can be granted by imposing equitable condition for the due performance of the decree and the condition should not be harsh, unjust and oppressive.

5. In the case in hand, the defence raised by the appellant/defendant is not illusory. He was admittedly working as Accountant whereas the respondent/plaintiff being his subordinate was also working in the same office and in such circumstances the defence so raised by the appellant/defendant that the cheque had been removed by the plaintiff from the drawer of his office table required recording of evidence for its proof and disproof, which could not be determined without proper inquiry. It is yet ascertainable whether a junior clerk was financially so sound to extend a loan of Rs.5,00,000/- to the appellant/defendant and that too in the year 2008 or prior to that when it was a handsome amount. The plea raised by the appellant/defendant that plaintiff remained involved in a fraud case is supported by copy of FIR, which has also not been specifically denied by the respondent/plaintiff. Furthermore, the application for leave to defend filed by the appellant/defendant is supported by affidavit, which was not controverted by filing counter affidavit. Any person acquainted with facts may make a declaration of facts in writing and sworn on oath by filing an affidavit. It is well established that any application supported by an affidavit, if not controverted by filing counter affidavit along with the written reply should be taken as correct statement of fact.

6. On the touchstone of above discussion, I have no hesitation to hold that the appellant/defendant succeeded to disclose a plausible defence while raising substantial question of fact, which needed to be tried or investigated, so he is entitled for leave to appear and defend the suit, but the learned trial court failed to

exercise its jurisdiction judiciously and properly, which passed the impugned order in a hasty manner. However, as the appellant/defendant has admitted his signature over the cheque, so he is liable to be burned, with the condition to satisfy the decree, if ultimately passed against him after going through the process of trial.

7. Consequently, the instant appeal is accepted, impugned judgment and decree dated 16.01.2009 passed by the learned District Judge, Rajanpur is hereby set aside and the application for leave to defend the suit field by the appellant/defendant is accepted subject to deposit of Rs.2,50,000 in cash and furnishing of surety bond to the extent of remaining amount i.e. 2,50,000 before the learned trial Court till 12.11.2015. The appellant/defendant will appear before learned District Judge/trial Court on 19.10.2015 for further proceedings.

ZC/M-337/L
Appeal allowed.

PLJ 2016 Lahore 686 (DB)

Present: **CH. MUHAMMAD MASOOD JAHANGIR AND CH. MUHAMMAD IQBAL, JJ.**

NATIONAL HIGHWAY AUTHORITY through Project Director (A.C.W.)--Appellant

Versus

FIAZ MUHAMMAD KHAN--Respondent

R.F.A. No. 71 of 2002, heard on 20.1.2015.

Land Acquisition Act, 1894 (I of 1894)--

----Ss. 23 & 24--Compensation of acquired land--Value of--It is settled principle of law that Land Acquisition Act, is founded on doctrine of *"Salus pouli Suprema lex"* that interest of public is supreme and that private interest is subordinate to interest of state, therefore, it is well established canon of interpretation that benefit has to be given to subject--Procedure for determination of compensation of acquired land has been provided under Sections 23 and 24 of Act, 1894. [P. 689] A

Land Acquisition Act, 1894 (I of 1894)--

----S. 23(1)--Market value of land--Scope of--Phrase "market value of land" as used in Section 23(1), of Act means "value to owner" and, therefore, such value must be basis for determination of compensation. [P. 689] B

Land Acquisition Act, 1894 (I of 1894)--

----Ss. 17 & 118--Notification--Compensation of acquired land--Valued acquired land--No mention of date of acquisition or date of judgment of referee Court--Instant appeal is partially accepted to extent that respondent will be entitled to interest on excess compensation from date of possession till day of payment of excess compensation whereas impugned judgment passed by referee Court was modified and respondent were entitled to recover interest at rate of 8% per annum instead of 6% per annum and appeal was dismissed to extent of other prayers regarding reduction in compensation determined by referee Court. [P. 691] C & D

Mr. Jehanzeb Khan Bharwana, Advocate for Appellant.

Ch. Anwar-ul-Haq, Advocate for Respondent.

Date of hearing: 20.1.2015.

JUDGMENT

Ch. Muhammad Masood Jahangir, J.--The facts germane for the disposal of instant appeal are that National Highway Authority/appellant acquired property of the respondent measuring 08-Kanal, 16-marla situated in Chak No. 110/12-L, Tehsil Chechawatni, District Sahiwal for the construction of National Highway, section Mian Chanu to Sahiwal. In this regard notification under Section 4 of the

Land Acquisition Act, 1894 (hereinafter referred to as act) was issued on 16.6.1987 whereas notification under Section 17 of the Act was issued on 08.2.1989 and thereafter award by the collector was announced on 23.10.1994 determining the compensation of the acquired land @ Rs. 2,07,947 per acre.

2. By filing the reference under Section 18 of the Act, the respondent averred that market value of the acquired land was Rs. 12,000/- per marla as the same was situated within the urban area of Municipal Committee Chechanwatni. It was further pleaded that due to the acquisition of land, the rest of the land was bifurcated in pieces. The respondent claimed compensation of acquired land at the rate of Rs. 12,000/-per marla.

3. Conversely, the appellant resisted the said reference by filing written reply before the Referee Court with the assertion that compensation had been correctly determined as per law. The Referee Court captured the disputed area of facts by framing the following issues:

1. Whether the reference is within time? OPA
2. Whether the petitioner is estoped by his words and conduct to bring the reference? OPR
3. Whether the amount of compensation is required to be enhanced if so, to what extent? OPA
4. Relief.

4. Both the parties produced their evidence before the learned Referee Court and the learned trial Court *vide* impugned judgment dated 30.11.2001 determined compensation of the acquired land at the rate of Rs. 2,300/- per marla along with 15% compensatory acquisition charges with 8% compound interest already awarded and interest at the rate of 6% per annum on the excess compensation from the date of acquisition. Being aggrieved the instant appeal has been filed by the authority/appellant.

5. Learned counsel for the appellant has argued that the Referee Court while deciding the reference ignored the evidence led by the appellant; that the authority successfully proved their contentions raised in the written reply as to the fact that the collector had determined the compensation at a just and fair rate according to the potential of the acquired land. It is also mooted by the learned counsel for the appellant that the Referee Court erred in law while awarding the interest on the enhanced compensation from the date of acquisition rather it was to be awarded from the date of taking over possession of the acquired property.

6. Conversely, learned counsel for the respondent has supported the impugned judgment and argued that learned trial Court was bound to award interest at the rate of 8% per annum on the excess compensation as per law, but the learned Referee Court ignored the said provision and awarded interest on the excess compensation at a lower rate

7. **Arguments heard. Record perused.**

8. The findings on Issue No. 3 are pivotal and relevant, which require redetermination by this Court. To comment on the award to the effect that the property had not been assessed according to its worth and value, Bashir Ahmad Patwari PW. 1 was examined, who produced the revenue record as well as map Exh.P.1 of the acquired property. Muhammad Zia-ul-Haq PW.2 , record-keeper of D.C. Office was produced as PW.2, who produced the file of the award of the subject land and got exhibited Notifications Exh.P3, Exh.P4, letter dated 29.11.1989 Exh.P5, Award Exh.P6, Supplementary Award Exh.P7 and copy of Award Exh.P8. Bashir Ahmad Bhatti PW.3 Assistant Revenue Officer of Commissioner Officer, Multan also tendered in evidence copy of letter Exh.P9. Nazir Ahmad Patwari, National Highway Authority PW.4 also produced copies of documents/letters issued by the revenue authority in respect to the acquiring of disputed land. PW.5 attorney of the petitioner deposed on the lines according to his version. Copies of different mutations and revenue record Exh.P-11 to Exh.P-61 were also produced in the documentary evidence by the respondent.

9. Conversely, solitary statement of Syed Mazhar Abbas Patwari, National Highway Authority was got recorded by the appellant, whereas documentary evidence ranging from Exh.R-1 to Exh.R-19 was also produced by the appellant. The learned Referee Court after assessing the documentary evidence/copies of mutations Exh.A-11, 12, 15, 20, 31, 32, 33 produced by the respondent and copies of mutations Exh.R-1 to Exh.R-3 and Exh.R-8 to R-11 answered the above referred Issue No. 3 partially in favour of the respondent. It is settled principle of law that Land Acquisition Act, 1894 is founded on the doctrine of *"Salus pouli Suprema lex"* that the interest of public is supreme and that the private interest is subordinate to the interest of the State, therefore, it is well established canon of interpretation that the benefit has to be given to the subject. The procedure for the determination of the compensation of the acquired land has been provided under Sections 23 and 24 of the Act *ibid*. The perusal of said provisions has reflected that neither value of the land nor the market vale of the land has been darned therein, but the said provisions have laid down the circumstances to be taken into consideration for the purpose:--

1. The market value or market price means the price property would fetch in the market. The price will be highest price a willing buyer would pay a willing seller would accept both being fully informed and the property being exposed for a reasonable period of time.

2. The market value may be a different from the price a property can actually be sold at a given time. The market value is that price which might be expected to ring if offered for sale in a fair market.

3. In assessing the compensation the potential value i.e. the benefits, advantages arising from the present use and future use to be taken into consideration.

4. The inflationary trend and depreciation in currency of the country between the date of acquisition under Section 4 of the Act and the date of award also should not be totally ignored and be taken into consideration.

The phrase "market value of the land" as used in Section 23(1), of the Act means "value to the owner" and, therefore, such vale must be the basis for determination of compensation. The standard must be no, subjective standard but an objective one. Ordinarily, the objective standard would be the price that owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser. The property must be valued not only with reference to its condition at the time of the determination but its potential value must be taken into consideration. It is well-settled law that in cases of compulsory acquisition effort has to be made to find out what the market value of the acquired land was or could be on the material date. While so venturing the most important factor to be kept in mind would be the complexion and - character of the acquired land on the material date. The potentialities it possessed on that date are also to be kept in view in determining a fair compensation to be awarded to the owner who is deprived of his land as a result of compulsory acquisition under the Act.

10. The learned Referee Court after considering the copies of mutations attested in respect of other property situated in the same locality assessed the compensation of the acquired property. There is yet another aspect of the matter, which may have a bearing on the value of the property and that is the award wherein the character of property as agricultural as well as urban has been conceded. Even the appellant failed to rebut the evidence led by the respondent. RW.1 in his solitary statement deposed as under:-

"علم نہ ہے کہ یہ رقبہ چیچہ وطنی شہر کے ملحقہ ہے ..... اراضی متدعویہ میں نے نہ دیکھی ہے علم نہ ہے کہ 1987 میں اس اراضی کی بازاری قیمت دس ہزار روپے فی مرلہ تھی۔"

11. On the touchstone of above discussion as well as analysis of the evidence led by the parties, the learned Referee Court was justified to enhance the compensation at the rate of Rs. 2,300/- per marla. However, the contention of learned counsel for the appellant that learned Referee Court erred in law while imposing interest on the excess amount from the day of acquisition has force. Before considering the said contention it will be advantageous to take notice of Section 28 of the Act, which is reproduced hereunder for ready reference:

> **"28. Collector may be directed to pay interest on excess compensation.--**If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum with the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court."

Further amended, which is as follows:

> "In Section 28, for the words "interest on such excess at the rate of six per centum" the words "compound interest on such excess at the rate of eight per centum" shall be substituted; and the following proviso be added at the end:
>
> Provided that in all cases where the Court has directed that Collector shall pay interest on such excess at the rate of six per centum from the date on which possession was taken and the payment of compensation or a part thereof has not been made up to the commencement of the Land Acquisition (West Pakistan Amendment) Act, 1969, the rate of compound interest on such excess or balance shall be eight per centum.

The perusal of the referred provision makes no mention of the date of the acquisition or of the date of the judgment of the learned Referee Court, who enhanced the compensation. Having sought guidance from the judgment rendered by the apex Court reported as *Nishat Sarhad Textile Mills Ltd. vs. Sher Ahmed Khan and others"* (PLD 1976 SC 531), we are of the view that the respondent will be entitled to receive the rate of interest from the date when the collector took possession of the property up to the date the enhanced compensation determined by learned Referee Court is paid.

12. The contention of the learned counsel for the respondent that Section 28 of the Act has stood amended and the learned Referee Court was bound to award 8% interest on the enhanced compensation has also force. Even while showing his grace learned counsel for the appellant conceded that the order of the learned trial Judge directing payment of interest at the rate of 6% is not inconformity with the prevailing law. Therefore, the order of the learned Referee Court awarding interest is modified to the extent that the respondent will be paid compound interest at the rate of 8% per annum on the excess amount of compensation (difference between the compensation ordered by the referee, Court and the one awarded by the collector) from the day of the collector took the possession of the property.

11. The epitome of above discussion is that instant appeal is partially accepted to the extent that respondent will be entitled to interest on the excess compensation from the date of possession till the day of payment of excess compensation whereas impugned judgment passed by learned referee Court is modified and respondent are entitled to recover interest at the rate of 8%'per annum instead of 6% per annum and the appeal is dismissed to the extent of other prayers regarding the reduction in the compensation determined by the learned referee Court.

(R.A.) Appeal accepted.

2017 C L C 352
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ISFIAAN HAIDER----Petitioner
Versus
MUHAMMAD HUSSAIN and 2 others----Respondents

Civil Revision No.3444 of 2010, heard on 26th April, 2016.

Gift---

----Maxim: "secundum allegata et probata---Applicability---Donor died within a period of 43 days from the date of attestation of gift deed---Donor apprehended death at the time of attestation of impugned instrument---Death certificate was admissible in evidence and contents thereof attained presumption of truth---No objection was raised by the rival party at the time of exhibition of death certificate and same could not be objected thereafter---Donor was not healthy when instrument of gift was attested---Donor required an independent advice for making a declaration of gift and execution of instrument which was missing in the present case---No date, time, venue or names of witnesses were mentioned in the written statement to explain as to when, where and in whose presence alleged declaration of gift was made by the donor which was accepted by the donee followed by delivery of possession---Donee failed from the very inception of suit to prove the transaction of disputed gift---Party had to first plead facts and pleas in the pleadings and then to prove the same through evidence---No one could be allowed to improve its case beyond what was originally set up in the pleadings---Donee had failed to plead and prove the transaction of gift as well as execution/attestation of gift deed in his favour---Whenever execution or validity of a registered document was denied then same would lose sanctity of being presumed to be correct and its lawful veracity would depend upon quantum and quality of evidence to be produced to prove its execution---Nothing was on record that donor at the relevant time did not have cordial relations or had strained relations with the other legal heirs to exclude them from his property to be devolved upon them after his death---Written statement could not be read as a piece of evidence in favour of defendant---Donee had failed to prove as to for what reasons other legal heirs were deprived of their due shares in the property of donor---Impugned judgment and decree passed by the Appellate Court were nullity in the eye of law and could not be sustained and were set aside and those of Trial Court were restored---Revision was allowed accordingly.

Muhammad Aslam and another v. Mst. Sardar Begum alias Noor Nishan 1989 SCMR 704; Iftikhar Mehmood and another v. Qaiser Iftikhar and others 2011 SCMR 1165; Muhammad Farooq v. Abdul Waheed Siddiqui and others 2014 SCMR 630; Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965; Haider Ali Bhimji v. VIth Additional District Judge, Karachi

(South) and another 2012 SCMR 254; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Gopal Das v. Siri Thakir Gee and others AIR 1943 P.C. 83; Siraj Din v. Jamila and another PLD 1997 Lah. 633 and Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others 2002 SCMR 1938 rel.

(b) Registration Act (XVI of 1908)---

----S. 60---Certificate of registration---Scope---Only a restricted presumption was attached that registration proceedings were regularly and honestly carried out by attesting officer but said presumption attached to its certificate was always rebuttable---Whenever execution of an instrument was denied, the presumption would be deduced to have been sufficiently rebutted and onus would be upon the person who had alleged execution to prove that document was executed and transaction did take place---Presumption in favour of a registered instrument did not dispense with the necessity of showing that person who admitted the execution before the attesting officer was not an imposter but the genuine one.

Gopal Das v. Siri Thakir Gee and others AIR 1943 P.C. 83 and Siraj Din v. Jamila and another PLD 1997 Lah. 633 rel.

(c) Pleadings---

----Evidence led beyond the scope of pleadings was liable to be ignored.

(d) Maxim---

----"Secundum allegata et probata"---Applicability---Scope.

Shakeel Farooq Chishti and Anwaar Hussain Janjua for Petitioner.
Hafiz Khalil Ahmad and Aftab Hussain Qureshi for Respondents.
Date of hearing: 26th April, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- The leading facts of the case are that Syed Sharaf Hussain Shah (hereinafter to be referred as donor), grandfather of the petitioner (hereinafter to be referred as plaintiff) and father of the respondents (hereinafter to be referred as defendants) was owner of suit property measuring 200 Kanals, fully detailed in the caption of the plaint, who died on 09.8.2002. After his demise, the plaintiff on 20.8.2002, when he was minor, instituted a suit for declaration through his mother being his next friend and asked for his share in the legacy of his grandfather/donor while claiming cancellation of gift deed executed on

26.06.2002 and attested on 27.06.2002 being forged and fictitious. It was further pleaded in the plaint that donor six months prior to his death suffered an attack of paralysis and lost his senses, which condition prevailed till his death, who ultimately took his last breath on 09.08.2002, that the donor had neither made any declaration of gift in favour of defendant No.1 nor he signed the gift deed; that he had neither appeared before the registering authority for the attestation of gift deed nor he was capable to make any decision qua his property, that defendant No.1 in connivance with the Naib Nazim of the Union Council to deprive the other legal heirs from their shares in the legacy of the donor got attested gift deed. The suit was contested by the defendants by filing a joint written statement while claiming that donor was a healthy person, who with his free consent got executed the gift deed in favour of defendant No.1 and only one week prior to his death suffered with fever. The learned trial court after capturing the disputed area of facts framed the following issues:-

(1) Whether the plaintiff is entitled to decree for declaration and perpetual injunction as prayed for? OPP

(2) Whether the gift deed dated 26.06.2002 registered on 27.06.2002 with Sub-Registrar, Khushab regarding the suit property is illegal, against law and facts, based on fraud and misrepresentation and as such ineffective upon the rights of the plaintiff? OPP

(3) Whether the plaintiff has no cause of action and locus standi to file this suit? OPD

(4) Whether the plaintiff is estopped by his words and conduct to file the suit? OPD

(5) Whether the defendants are entitled to special costs under section 35-A C.P.C.? OPD

(6) Relief.

2. The learned trial court after collecting evidence of the parties in pros and cons answered issue No.2 in affirmative in favour of the plaintiff and his suit was decreed vide judgment and decree dated 29.1.2010, however, the same was set aside, when the appeal filed by the defendants was accepted and suit of the plaintiff was dismissed by the learned Additional District Judge vide impugned judgment and decree dated 16.7.2010. Having felt aggrieved, the instant civil revision has been filed.

3. Arguments heard and record perused.

4. It is an admitted fact that donor was owner of the suit property, who at the time of his death on 09.8.2002 left behind one son-defendant No.1, two daughters-defendants Nos.2 and 3 and the plaintiff as grandson being son of his predeceased son. His death was entered in the relevant Register of Death (Exh.P2) on the same day and as per Columns Nos.7 and 8,the donor at the time of his death was 70 years old and he breathed his last due to paralysis. Whereas, the gift deed (Exh.D1) was alleged to have been executed on 26.6.2002 and it was attested on 27.6.2002 by the Sub-Registrar.

5. To prove the fact that the donor had been suffering from mental incapacity/paralysis, the plaintiff himself appeared as PW1 and produced copy of death entry of the donor as (Exh.P2) as well as copy of Nikah Nama as (Exh.P3). The plaintiff categorically deposed in his examination-in-chief that the donor had been suffering from paralysis 5/6 years prior to his death, who could neither speak nor could walk and the disputed gift deed was forged and fictitious, which was not signed by the donor and that the donor had never made any declaration of gift or delivered the possession of the same to defendant No 1. The contention of learned counsel for defendant No.1 that plaintiff was under legal obligation to prove the fact that at the time of declaration of gift and attestation of instrument, the donor was suffering from death illness, but he failed to prove the same, is misconceived. To my mind, such disease means that a person is apprehending the probability of death than his chance to live. In the present case, as per record, the impugned instrument was executed on 26.6.2002 and it was registered by the attesting authority on the very next day and the death entries of (Exh.P2) speaks that the alleged donor passed away within a period of 43 days on 09.8.2002. The death of the donor within the said shortest period proves the stance of the plaintiff that at the time of attestation of impugned instrument, the alleged donor was probably apprehending death. Additionally, the said document (EX.P2) as per Article 85 of Qanun-e-Shahadat Order, 1984 is admissible in evidence and the contents thereof attained presumption of truth. Reliance can be placed on the judgment reported as Muhammad Aslam and another v. Mst. Sardar Begum alias Noor Nishan (1989 SCMR 704). The entries of the same had also neither been challenged independently nor through his deposition by defendant No.l. The entry of death of the donor was got promptly made in the relevant Register by the Chowkidar of the revenue estate, who being an independent person must have got recorded the same as per reality. Moreover, at the time of exhibition of the said document as Exh.P2, no objection was raised by the rival party and the same cannot be objected thereafter. Reliance can be made to the judgments reported as Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165) and Muhammad Farooq v. Abdul Waheed Siddiqui and others (2014 SCMR 630). Conversely, the defendants in their written statement alleged that the donor was a healthy person, who died due to fever, which suffered him only one week prior to his death, but his own witness, Saleem Murtaza (DW4) admitted in his cross-examination that the donor was suffering from paralysis and that being a disabled person as well he could not walk without the aid of crutches, when the

instrument was attested, which left nothing to believe that the doner was not a healthy person and he definitely required an independent advice for making a declaration of gift and execution of instrument and admittedly the same was missing.

6. Apart from above, when the written statement is glanced, it reveals that no date, time, venue or names of the witnesses were mentioned to explain that when, where and in whose presence the alleged declaration of gift was made by the donor, which was accepted by defendant No.1 followed by delivery of possession of the suit property in lieu thereof. In absence of giving details of such ingredients in the written statement defendant No.1 remained fail from inception of the suit to prove the transaction of disputed gift. It is also noteworthy that written statement is also completely silent to the effect that when the instrument was scribed and before whom it was attested. It is settled law that a party has to first plead facts and pleas in the pleadings and then to prove the same through evidence. A party cannot be allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of "secundum allegata et probata." that a fact has to be alleged by a party before it is allowed to be proved is fully applicable in this case, which has full command of provisions of Order VI, rule 2 and Order VIII, rule 2 of the Civil Procedure Code, 1908. As such any evidence led by a party beyond the scope of its pleadings is liable to be ignored. Reliance can be placed upon the dicta laid down in the case law reported as Muhammad Wali Khan and another v. Gul Sarwar Khan and another (PLD 2010 SC 965) and Haider Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another (2012 SCMR 254), wherein it was held that in absence of specific pleadings, the court could not allow a party to grope around and draw remote inferences in his favour from his vague expressions. Anyhow, in order to prove his alleged transaction as well as execution/attestation of gift deed defendant No.1 produced Sub Registrar as DW2, who admitted in his cross-examination that the donor was not personally known to him and he could not tell his exact age as much time had elapsed. However, DW2 clarified that on the identification of Saleem Murtaza, the Nazim, he attested the gift deed. The latter (Saleem Murtaza) while appearing as DW4 deposed that the gift deed was attested in favour of defendant No.1 on his identification, who during the cross-examination, however, conceded that the donor died due to paralysis, but with the clarification that attack of paralysis suddenly affected him and he died. He further deposed that the donor was a disabled person, who fell from a tree and could walk only with the aid of crutches. Whereas Syed Zafar Hussain (DW5) and Syed Qasim Raza (DW6), the alleged attesting witnesses of gift deed, were brought into the witness-box to prove the oral transaction as well as execution of gift deed. Syed Zafar Hussain (DW5) deposed that on 26.6.2002 in the evening time, the declaration of gift was made by the alleged donor at his residence in favour of defendant No.1 in presence of Qasim Raza, Zameer-ul-Hassan and Ghulam Hussain. It was also stated by him that on the next day the gift deed was executed, but it could not be attested on that day because the Lumbadar, Councilor, or Nazim of the Union Council concerned

were not available for the verification as well as identification of the donor and that is why the same was attested on the following day. On the other hand Syed Qasim Raza (DW6) deposed without mentioning the month and year that on 25th day after the prayer of evening, the disputed property was gifted out by the donor in favour of defendant No.1 and gift deed was got scribed on the following day. The critical analysis of statements of both these witnesses has shattered the stance of defendant No.1. As observed supra DW5 deposed that the declaration of gift was made on 26.2.2002 followed by the execution of gift deed on 27.2.2002 and it was attested on 28.2.2002, which itself is contradictory to the contents of gift deed, the perusal of which reflects that it was scribed on 26.2.2002 and attested on 27.2.2002. Whereas DW6 could not tell the month as well as year of the settlement of transaction or attestation of the instrument, but he only deposed that transaction of gift was effected on 25th day and on the next day, the gift deed was scribed, which was ultimately registered on the very next day. The contradiction in the statements of the said two witnesses has caused suspicion qua the execution/attestation of the instrument as well as transaction embodied therein. However, the testimony of DWs5 and 6 is found to be consistent only to the effect that on the day when the gift deed was scribed, the same could not be attested due to the non-availability of the identifier but Saleem Murtaza, identifier being DW4 deposed nothing in this regard to corroborate the deposition of DWs.5 and 6. The copy of original gift deed Exh.D1 is available on the file, which is found to be scribed on a plain paper, whereas such an instrument is required to be drafted on stamp paper after having affixed stamp duty. No doubt, execution of gift deed is not prohibited on a plain paper, but in such a situation, the authentic evidence in the shape of stamp vendor and his Register could not be made available by the beneficiary for its proof. In the case in hand, the deed writer could also not be produced on account of his death. No doubt, his son being DW3 was brought into the witness-box, but he did not depose that in the deed writing Register of his father, the signatures or thumb impression of the donor were also available against the entry qua the gift deed. During the cross-examination DW3 also showed his inability to read out the contents of Exh.D1 as well as the entries of the Register, which was produced in the Court at the time of his evidence. The minute analysis of the testimony of aforementioned DWs as well as study of written statement has left nothing for this Court except to conclude that defendant No.1 failed to plead and prove the basic transaction of gift as well as execution/attestation of the gift deed in his favour.

7. The argument of learned counsel for defendant No.1 that gift deed being registered instrument attained strong presumption of truth and defendant No.1 was no more required to prove its contents is not well founded. It is by now well settled principle of law that whenever the execution or validity of a purportedly registered document is denied, the same loses sanctity of being presumed to be correct, but its lawful veracity would depend upon quantum and quality of evidence to be produced to prove its lawful execution. Reliance can be placed upon judgments reported as Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144)

and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245). In the latter case, the apex court concluded in the following words:-

> It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction of which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness of document.

Additionally, under section 60 of the Registration Act, 1908, only a restricted presumption is attached that registration proceedings were regularly and honestly carried out by the attesting officer, but the said presumption attached to its certificate is always rebutable and whenever the execution of an instrument is denied, then the presumption is deduced to have been sufficiently rebutted and onus lies upon the person, who alleges execution to prove that the document was executed and the transaction did take place. The presumption in favour of a registered instrument does not dispense with the necessity of showing that person, who admitted the execution before the attesting officer was not an imposter, but the genuine one. Reliance can be placed upon the judgment reported as Gopal Das v. Siri Thakir Gee and others (AIR 1943 P.C. 83). This view has also been conceived by the Division Bench of this Court in a case reported as Siraj Din v. Jamila and another (PLD 1997 Lahore 633) wherein, it was observed that everything, which found mention in the registered deed must not invariably be accepted without proof of its execution, genuineness and authenticity.

8. The other glaring factor omitted to have been considered by the learned lower appellate court while passing the impugned judgment is that admittedly defendant No.1 was not the sole legal heir of the donor, rather, he had two daughters/defendants Nos.2 and 3 and a minor grandson/plaintiff when the alleged transaction was settled. No overwhelming evidence is available on record that the donor at that relevant time did not have cordial relations or had strained relations with the other legal heirs to exclude them from his property to be devolved upon them after his death. The argument of learned counsel for the defendants that the daughters of the donor/defendants Nos.2 and 3 had conceded the transaction while submitting joint written statement along with defendant No.1, is also not well founded. No doubt, the alleged joint written statement on their part is available on file, but none of them appeared in the witness-box to prove the same. The written statement alleged to be submitted on their behalf cannot be read as a piece of evidence in favour of defendant No.1. Admittedly, only defendant No.1 while appearing as DW7 deposed that at the time of declaration of gift, the donor expressed to deprive the plaintiff due to his untoward/balky attitude, but the said

deposition was not supported by any other witness, rather same is also found to be alien to the contents of the written statement. Moreover, qua the daughters/defendants Nos.2 and 3 no such reason was assigned by defendant No.1 in his deposition. On the touchstone of above discussion, it can safely be concluded that defendant No.1 failed to prove that for what reasons the plaintiff and defendants Nos.2 and 3 were deprived of their due shares in his property by the donor. In the absence of a sufficient ground and explanation or logical defence, defendant No.1 miserably failed to prove the special circumstances/reasons/motive for the transfer of entire property to him by the donor while excluding the other legal heirs. This view is fortified with the dictum laid by the apex Court in the judgments reported as Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others (2002 SCMR 1938) and Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144). I have found that the learned lower appellate court in disregard of the evidence on the record and the law on the subject as well as the principle declared by the superior Courts has passed the impugned judgment and decree, which being nullity in the eye of law cannot be sustained.

9. Consequently, the instant civil revision is allowed, the impugned judgment and decree dated 16.07.2010 passed by the learned lower appellate court is hereby set aside and judgment and decree dated 29.1.2010 passed by the learned trial court, whereby, the suit filed by the plaintiff was decreed, is restored with no orders as to costs.

ZC/I-22/L Revision allowed.

2017 C L C 463
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ALI MUHAMMAD----Petitioner
Versus
MALKA HUSSAIN----Respondent

Civil Revisions Nos.763, 762 of 2011, 726 and 727 of 2016, heard on 30th November, 2016.

Punjab Pre-emption Act (IX of 1991)---

----S. 13(3)---Suit for pre-emption---Notice of 'Talb-i-Ishhad', sending of---Proof---Pre-emptor had claimed that vendee refused to receive the notice of 'Talb-i-Ishhad'---Heavy onus was placed upon the pre-emptor in such circumstances to prove that he had not only dispatched the said notice through registered post but also that vendee refused to receive the same---Postal receipt clerk was not examined by the pre-emptor---Testimony of postman revealed that he did not depose a single word that he had tried to deliver registered post containing the notice of 'Talb-i-Ishhad'---Postman conceded in his cross-examination that he did not visit the residence of pre-emptor to deliver the registered post---Pre-emptor thus failed to prove that registered post containing the notice of 'Talb-i-Ishhad' was ever served upon the vendee or that the vendee refused to receive the same---Suit for pre-emption was rightly dismissed by the trial court---Revision petition was disposed of accordingly.

Shaigan Ijaz Chadhar for Petitioner.

Ch. M. Lehrasib Khan Gondal for Respondent.

Date of hearing: 30th November, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- This judgment will dispose of C.R. No.763/2011, C.R. No.762/2011 C.R. No.726/2016 and C.R. No.727/2016, which are between the same parties and common questions of law as well as facts are involved therein. However, reference point will be C.R. No.763/2011.

2. In concision, the facts of the case are that Ali Mohammad, present petitioner had purchased chunk of property through oral sale mutations Nos.795 and 796 dated 25.03.2008 and the respondent through two separate suits bearing Nos.118/2008 and 119/2008 pre-empted the same while claiming to have fulfilled requisite demands besides alleging his superior pre-emptive right qua the petitioner. Both the suits were independently tried by the learned Trial Court and the same were dismissed while answering issue qua performance of requisite demands against respondent through separate judgments and decrees of even date i.e., 11.11.2010, which were further assailed by respondent through Civil Appeals Nos.119/2010 and 153/2010 before the learned Lower Appellate Court, who partially accepted both the appeals vide judgments and decrees dated 26.02.2011 while equally sharing the property among parties under the mandate of provision of Section 20 of the Punjab Pre-emption Act, 1991. The petitioner/vendee by filing C.R. Nos.762 and 763 of 2011 assailed the impugned judgments and decrees whereby to the extent of half of the property involved therein, both the suits were partially decreed in favour of respondent/pre-emptor, whereas, the latter also impugned the same through preferring time barred rest of two Civil Revisions through which his suits to the extent of remaining half land were partially dismissed.

3. Arguments heard. Record perused.

4. The perusal of plaints instituted by respondent/pre-emptor reveals that both mutations Nos.795 and 796 dated 25.03.2008 were attested in favour of petitioner/vendee on one and the same day i.e. 25.03.2008. The study of both the plaints reveals that qua the sales under pre-emption involved therein a single information was allegedly communicated by Muhammad Latif (PW) to respondent/pre-emptor before Muhammad Siddique (PW) and the former spontaneously performed the first demand in the said Majlis, which was followed by issuance of notice Talb-i-Ishhad through registered post A.D, but it was not received by petitioner/vendee. The stance of respondent/pre-emptor regarding

performance of Talbs was specifically denied by petitioner/ vendee through submission of written statement as well as his deposition being DW in both the suits.

5. So far as the fulfillment of second demand is concerned, it is noticed that when respondent/pre-emptor pleaded in his plaint that notices were not delivered to petitioner/vendee rather he refused to receive the same, in such an eventuality heavy onus was upon him to prove that he had not only dispatched the said notices through registered post and it was also sine qua non for him to prove that petitioner refused to receive the same. Admittedly, in the case in hand, Postal Receipt Clerk was not examined by respondent/pre-emptor, whereas, Noor Ahmad, Postman was produced in both the cases as PW4, who deposed the same words to words in both the suits and perusal of his testimony reveals that he did not depose single word that he had tried to deliver registered post containing notice Talb-e-Ishhad to petitioner/vendee, rather he only stated that report (Ex.P2) was endorsed by him, which was accompanied by Ex.P3, whereas, he conceded in his cross-examination that neither the report was signed by him nor he visited the residence of petitioner/vendee to deliver the registered post. His statement-in-chief as well as cross examination recorded as PW4 in both the cases word to word is similar and is reproduced hereunder:

After having a glance over said statement, it is straightaway noticed that respondent/pre-emptor failed to prove that registered post containing notices Talb-e-Ishhad was ever served upon petitioner/vendee or he refused to receive the same. In this view of the matter, I am of the view that the learned Lower Appellate Court after misinterpreting the evidence on the record erred in law while partially decreeing the suits in spite of that respondent failed to prove performance of requisite second Talb as per law, which was sine qua non to succeed in a suit for pre-emption and the findings arrived at by him are reversed.

6. Resultantly, C.R. No.763 as well as C.R. No.762 of 2011 filed by petitioner/vendee are hereby allowed, whereas, connected C.R. No.726 and C.R. No.727 of 2016 preferred by respondent/pre-emptor are hereby dismissed and while setting aside the impugned judgments and decrees passed by the learned Lower Appellate Court, judgments and decrees delivered by learned Trial Court, whereby suits for possession through pre-emption were dismissed are restored. The parties to bear their own cost.

MWA/A-5/L Order accordingly.

2017 C L C 1731
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD MUKHTAR and 4 others----Petitioners
Versus
Mst. ZUBAIDA and 2 others----Respondents

C.R. No.2897 of 2010, heard on 13th May, 2016.

(a) Gift---

----Proof---Memo of gift---Basic ingredients with regard to date, venue and names of witnesses to disclose as to when, where and before whom, declaration of gift was made by donor, were missing on the memo. of gift---Intention of oral gift as well as its acceptance had taken place prior to the execution of memo.--Non-disclosure of the ingredients with regard to time, venue and witnesses in the memo. of gift as well as in the plaint would create a serious doubt about declaration of gift---No evidence was led on such points---Basic ingredients of valid gift had not been proved in circumstances.

Pakistan v. Abdul Ghani PLD 1964 SC 68 and Hyder Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another 2012 SCMR 254 rel.

(b) Gift---

----Essentials---Essential features of a valid gift were declaration, its acceptance and delivery of possession in lieu thereof---Where any of the said ingredient was found missing, such transaction could not be declared a valid gift---Prerequisites for valid gift i.e. offer, acceptance and delivery of possession were not proved in the present case---Donees had not proved the essential features of a valid gift in circumstances.

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

-----Arts. 17(2)(a) & 79 ---Gift---Execution of memo. of gift---Proof---Attesting witnesses---Petitioners alleged that their father had gifted suit property in their favour through memo. of gift but respondents alleged the same to be forged, fictitious and result of collusion---Validity---Admittedly, the memo. of gift was attested by two witnesses---Memo. of gift could not be used until two attested witnesses were examined---Petitioners got examined only one attesting witness who failed to depose as to the contents of the document and could not verify his signature or thumb impressions thereon---Said witness could not be treated as an attesting witness---Requirements of law with regard to a valid gift were not fulfilled, in circumstances.

(d) Gift---

----Gift made in favour of some (but not all) legal heirs of donor---Scope---Donor was free to gift out his property to any person of his choice, but when some of the legal heirs were deprived, it was imperative upon the beneficiary to bring on record the special circumstances/motive for depriving other heirs of their due share in the property---Petitioners had failed to provide the required motive in the present case -- Petitioners were rightly non-suited in circumstances.

(e) Administration of justice---

----Production of false and forged document by a party in a court---Judicial Officer having found a document to be result of fraud and forgery could have taken suo motu cognizance for committing forgery by the party---High Court observed that if such action was not initiated by the court at appropriate time, other party could approach the concerned quarter for initiating criminal proceedings against the delinquents.

Syed Iqbal Hussain Shah Gillani for Petitioners.
Zahid Hussain Khan for Respondents.
Date of hearing: 13th May, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.-- For delivering this judgment, reference to the pleaded facts in brief is that Ghulam Hussain, father of the parties, was admittedly, owner of agricultural property measuring 653 Kanals and 18 Marlas besides residential and commercial properties, who died leaving behind sons/petitioners and daughters/respondents 1 to 3. Thereafter, the petitioners instituted a suit for declaration and permanent injunction against their sisters/respondents on 03.03.1996 with the assertion that above referred suit properties, fully detailed in body of the plaint were gifted out by their father in their favour and on 19.7.1989 a memorandum of gift was also executed by the father/donor. The suit was contested by one of the sisters/respondents No.1 with the averment that neither any declaration of gift was made by father of the parties in favour of the petitioners nor memo. of gift was executed by him, which being forged and fictitious was inoperative upon her rights. While facing with the hot contest, the learned trial court captured the disputed area of facts through settlement of issues, which also collected evidence in pros and cons and ultimately decreed the suit vide judgment and decree dated 21.6.2001, but the same was reversed by the learned lower appellate court through the impugned judgment and decree dated 13.5.2010 and resultantly the suit of the petitioners was dismissed. Having felt forlorn, the instant Civil Revision was preferred in the year 2010.

2. Heard the learned counsel for the parties and perused the available record.

3. The pictorial view of the plaint, copy of which is available on file, exposes that the petitioners neither mentioned the date, venue and names of the witnesses to disclose that when, where and before whom the alleged donor made a declaration of gift in favour of the petitioners, which was accepted by them and in lieu thereof the possession of the suit properties changed hands. No doubt, it was disclosed in the plaint that while acknowledging the oral transaction, gift memo. was got executed on 19.7.1989 by the alleged donor in favour of the petitioners, but study of said memorandum (mark-A) also reflects that qua the original transaction, the basic ingredients with regard to date, venue and name of witnesses were once again missing. The declaration of oral gift as well as its acceptance must have taken place prior to the execution of memo. dated 19.7.1989, but non-disclosure of the said ingredients therein as well as the plaint has created a serious doubt about declaration of gift. When these requirements were missing therein, then no evidence could be led on such points. Principle of "secundum allegate et probate" was fully applicable, which means that a fact had to be pleaded first by party before it was allowed to be proved. This principle is enunciated by order VI rule 2 and Order VIII rule 2 of the Code of Civil Procedure 1908, which has also been affirmed by the apex court in judgments reported as Pakistan v. Abdul Ghani (PLD 1964 SC 68) and Hyder Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another (2012 SCMR 254). The relevant extract from the former case for ready reference is reproduced hereunder:-

> "The appellant was legally bound by the case set up in his pleadings. He did not have freedom to depart therefrom and raise a different case. Also that in absence of specific pleadings, the court could not allow the appellant to grope around and draw remote inferences in his favour from his vague expression."

4. To prove their oral transaction Muhammad Mukhtar one of the beneficiaries/petitioners appeared as PW2 and also brought Muhammad Yasin and Karam Elahi into the witness-box as PW3 and PW4 respectively. The scanning of statements of said PWs divulges that they are not found harmonious/consistent with regard to the settlement of alleged transaction. PW2 for the first time in his statement without disclosing the date, month and year qua the declaration of gift disclosed that it was made in presence of PW3 and PW4 at evening time at the house of the parties and after 5/6 months of declaration of gift the memorandum of gift was executed. Whereas, Karam Elahi PW4, who was brother-in-law of one of the beneficiaries stated that about one month of the oral transaction memo. of gift was executed. PW2 disclosed in his testimony that Muhammad Yasin (PW3) remained there for a considerable time whereas Muhammad Yasin (PW3) deposed that neither he sit among the donor and donees nor he stayed there. Whereas, Karam

Elahi PW4 stated that Muhammad Yasin had not only stayed there for 45 minutes, but had also taken meal there among other participants of the said assembly. PW2 also deposed in his statement-in-chief that possession of the suit properties was delivered to the petitioners after making of declaration of gift, but PW3 and PW4 deposed otherwise while claiming that possession of the suit properties was already vested with the petitioners. The other salient feature of the case is that rest of the beneficiaries/petitioners did not make their entry in the witness-box to prove the ingredients of gift. Whereas, the sole petitioner, who appeared as PW2 nowhere in his statement-in-chief stated that offer of gift made by father of the parties was accepted by the petitioners. The essential features of a valid gift are; declaration, its acceptance and delivery of possession in lieu thereof, but if any of the ingredients is found missing, then such transaction cannot declared to be a valid gift.

5. It is an admitted fact, which has also been conceded by PW2 that the donor as well as petitioners were not only residents of Tehsil Noorpur rather the suit properties also located there. PW2 also conceded in his cross-examination that in Tehsil Noorpur and at Jauharabad stamp vendors and deed writers were available, but memo. of gift was executed at Sargodha. The respondent No.1 in her written statement specifically averred that Qazi Muhammad Shafi, stamp vendor and Qazi Noor Elahi, the deed writer of gift memo. had a repute to prepare forged and ante-dated documents, who also remained involve in criminal cases. Although, to prove the execution of gift deed, Qazi Muhammad Shafi, stamp vendor appeared as PW5, but he did not bring his stamp vending Register at the time of making his statement. A license holder stamp vendor is required to maintain a Register so that authenticity of a stamp paper issued by stamp vendor could be checked and verified from the entry made in the said Register. He withheld the said Register without any plausible reason. He conceded in his cross-examination that Ghulam Hussain donor was not earlier personally known to him. He also conceded in his cross-examination that he remained involve in a criminal case for preparation of antedated document. Whereas deed writer, Qazi Noor Elahi being PW6 put his appearance before the learned trial court and admitted that parties to the memo. of gift were not known by him. He also conceded the lodgment of criminal case qua the preparation of forged document against him.

6. There is yet another aspect of the case that Muhammad Irshad one of the attesting witness of gift deed appeared PW1, who was brother-in-law of one of the beneficiaries/petitioners and in his cross-examination he clarified that memo. of gift was not read over before him. He also could not tell that what was written in the said document. An attesting witness is one who not only sees document being executed, but also appends his signatures/thumb impressions after understanding the contents of the same and if the said attesting witness while appearing in the witness-box to prove the contents of document fails to depose what were the contents of the document or could not verify his signatures or thumb impressions, then he could not be treated as an attesting witness. Whereas the other attesting witness was father of

PW1, who could not be brought into the witness box, as he had already passed away. Both the attesting witnesses i.e. PW1 and his father are found to be resident of Aziz Colony, Sargodha. Meaning thereby that none of the residents of Tehsil Noorpur District Khushab had accompanied the alleged donor as well as the petitioners/donees at the time of execution of memorandum of gift. It is also admitted fact that the disputed properties were free from encumbrance and even no injunctive order qua its transfer was in field when memo. of gift was executed. If father of the parties was willing to transfer his entire properties to the petitioners through attestation of mutation or gift deed, same could be done, but for that purpose notable persons of the vicinity were required. There is much force in the arguments of learned counsel for respondent No.1 that memo. of gift was antedatedly got prepared in connivance with its attesting witnesses, who were close relatives of the beneficiaries/petitioners and as well as badly reputed stamp vendor and deed writer.

7. The other limb of the case is that respondent No.1 as well as other defendants/daughters were also entitled to inherit the legacy of their father at the time of his death. No evidence is available on record to prove that the daughters were untoward/balky to their father and for that reason he was bent upon to deprive them from their share in inheritance qua the suit properties. There is no cavil with the preposition that a donor is free to gift out his property to any person of his choice, but when some of the legal heirs are required to be deprive then it is imperative upon the beneficiary to bring on record the special circumstances/motive for depriving them of their due share in the property.

8. Consequence to the above analysis neither original transaction nor the execution of (mark-A) could be proved by the petitioners. In this case, the petitioners/brothers tried at their part to deprive their sisters/respondents even by manipulating a forged and antedated document. Although such type of efforts to deprive the females of the family in our society to get their due share from the inheritance/legacy has already been condemned by the superior courts of the State, yet our male dominant society is still bent upon to usurp their rights of inheritance, which the Almighty ALLAH has vested to them. In the case in hand the petitioners managed to get a fraudulent document executed from another district through the aid of ignominious/discreditable stamp vendor and deed writer besides the closely related witnesses. In such facts and circumstances, I have no hesitation to hold that the learned lower appellate court has rightly non-suited the petitioners through the impugned judgment and decree while assigning eminent reason, which do not call for any interference by this court in the exercise of revisional jurisdiction, the scope whereof is restrict and narrower. This civil revision having no merit is dismissed.

9. Before parting with this judgment, I am constrained to observe that in normal course, a judicial officer after having found a document to be result of fraud and forgery could have taken suo motu cognizance for committing forgery in

preparation of false and forged document, but such action was never initiated by the learned Additional District Judge at appropriate time and this court thinks it befitting that if any action so far has not been taken, then respondent No.1 or any of his family members may approach the concerned quarter for initiating criminal proceedings against the delinquents.

JK/M-141/L .

2017 C L C 996
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
NAZIR ABBAS through L.Rs.----Petitioners
Versus
GHULAM MUHAMMAD through L.Rs.----Respondents

Civil Revision No.2281 of 2006, heard on 9th June, 2016.

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

----S. 12---Suit for specific performance---Oral agreement---Plaintiff alleged that defendant had agreed to sell suit property in his favour on the basis of oral transaction---Validity---Neither any date, month or year of the bargain were feel mentioned in the plaint nor names of witnesses were provided therein to prove that as to when and where and before whom the said transaction was settled---Evidence if any led to prove the said fact was to be simply ignored---Suit was dismissed accordingly.

Hafiz Tassadiq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241; Visoount Dunedin, Lords Darling and Tomlin and Sir George Lowndes and Sir Binod Mitter Siddik Mahomed Shah v. Mst. Saran and others AIR 1930 PC 57; Lord Simonds, Sir John Beaumont and Sir Lionel Leach AIR 1950 PC 68; Choudhary Brothers Ltd, Sialkot v. The Jaranwala Central Co-Operative Bank Ltd., Jaranwala and others 1968 SCMR 804; Bashir Ahmad and others v. Abdul Latif and others 2005 YLR 2655; Nazir Ahmad and another v. Yousaf PLD 2011 SC 161 and Muhammad Nawaz through L.Rs. v. Haji Mohammad Baran Khan through L.Rs. and others 2013 SCMR 1300 rel.

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

----Arts. 17(2)(a) & 79 ---Execution of document---Proof---Attesting witnesses---Non-placing on record---Plaintiff alleged that receipt in respect of bargain was executed by the defendant but defendant denied the execution of said receipt while pleading it to be forged, fictitious and result of collusion---Validity---Admittedly, the receipt was not attested by any of the witness, whereas law provides that in the matter pertaining to financial or future obligation, if reduced into writing, the document should be attested by two men or one man and two women and such document could not be used as document until two attested witnesses were not examined---Revision petition was allowed accordingly.

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

----Art. 61---Signature, authenticity of---Comparison by expert---Scope---Where alleged executant/defendant denied his signature on the alleged receipt, plaintiff should apply to the court for getting the signature of defendant executant compared from the expert---Plaintiff having not done the same, incurred presumption against him---Revision petition was allowed accordingly.

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

----Art. 118---Version alleged---Proof---Whoever invoked the aid of law should be the first to prove his case---Anyone who alleged any fact in affirmative had to prove the same.

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

----Art. 79---Beneficiary of document---Proof and rebuttal---Scope---Beneficiary of the document was bound to produce positive evidence to prove the execution of the same---Stage of disproof or rebuttal would only come into play when the beneficiary of the transaction succeeded to produce positive evidence to prove his case.

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

----S. 12---Suit for specific performance---Oral agreement---Proof---Cogent and convincing evidence not produced---Effect---Plaintiff was duty bound to produce cogent, convincing and reliable evidence to prove oral agreement which was conspicuously missing---Relief could not be given to plaintiff in circumstances---Revision petition was allowed accordingly and suit was dismissed.

Shahid Mehmood Khan Khilji for Petitioners.

Zia Ullah Khan Niazi and Anwaar Hussain Janjua for Respondents.

Date of hearing: 9th June, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- For delivering this judgment reference to the pleaded facts in short compass is that original respondent, Ghulam Mohammad, now deceased represented through his legal heirs (hereinafter to be

referred as the plaintiff) brought a suit for specific performance of an oral agreement to sell qua the suit property while claiming that Nazir Abbas, petitioner, now deceased represented through his legal heirs (hereinafter to be referred as defendant No.1) agreed to sell his owned property for total sale consideration of Rs.45000/- and received Rs.33,500/- through receipt (Mark-A). The plaintiff also sought for cancellation of agreement dated 12.9.1997 executed by Nazir Abbas in favour of rest of the defendants and the same will not be subject of the instant judgment as the separate suit for specific performance of agreement instituted by rest of the defendants against Nazir Abbas, defendant No.1 was dismissed by the learned Trial Court along with the suit instituted by the plaintiff through consolidated judgment and decrees dated 20-6-2005, which having not been assailed any further to such extent attained finality as the plaintiff only challenged the aforementioned decree by filing an appeal before the learned lower appellate court, who through impugned judgment and decree dated 10.7.2006 while accepting the appeal has decreed the suit of the plaintiff, hence this civil revision by defendant No.1.

2. Arguments heard. Record perused.

3. Before embarking upon the merits of the case, it will be advantageous to go through the definition of 'Agreement' as provided in Section 2 (e) of the Contract Act, 1872, which reads as under:--

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

Whereas, the same term is defined in Black's Law Dictionary, Fifth Edition which reads as under:---

> **"Agreement of sale; agreement to sell.---** An agreement of sale may imply not merely an obligation to sell, but any obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. Treat v. White, 181 U.S. 264, 21 S.Ct. 611, 45 L.Ed. 853. It is a contract to be performed in future, and, if fulfilled, results in a sale; it is preliminary to sale and is not the sale."

The said definition has further been elaborated by the august Supreme Court of Pakistan in a case reported as "Hafiz Tassadiq Hussain v. Muhammad Din through Legal Heirs and others" (PLD 2011 Supreme Court 241) and relevant extract from para-5 is reproduced hereunder for ready reference:-

> "The noted meaning is also fortified by the provisions of section 54 of the Transfer of Property Act, 1882 which defines the sale of immovable

property, prescribes the mode and mechanism how it is made; and by virtue of its clear language distinguish it from a contract/agreement of sale, when it is ordained that: "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties". Furthermore, in the above context, a clear distinction and contract is drawn in the same provision, wherein it is provided that a contract for sale itself shall neither create any interest in or a charge on such property. Thus, the former transaction (if not a conditional sale) is the conclusive transfer of an absolute title and ownership of the property unto the vendee in presentee, while the later is meant for accomplishing the object of sale in futurity and for all intents and purposes it pertains to the future obligations of the parties thereto, resultantly there is no room for doubt that a sale agreement/agreement to sell is duly covered and is hereby so declared to fall within the pale of said Article."

4. It is thus clear that an agreement to sell is meant for accomplishing the object of sale in future and for all intents and purposes it pertained to future obligations of the parties thereto. The case of the plaintiff that he had purchased the disputed property from Nazir Abbas, defendant No.1 through an oral settlement of bargain. Neither any date, month or year of the bargain were found to have been mentioned in the plaint instituted by the plaintiff nor the names of witnesses were provided therein to prove that when, where and before whom the said transaction was settled. Therefore, the evidence if any led to prove the said fact is to be simply ignored. It is clear from Order VI, Rules 2 and 4 that a fact has to be pleaded before it could be proved. This court is fortified in forming this view by the dictum laid down in the judgments reported as "Visoount Dunedin, Lords Darling and Tomlin and Sir George Lowndes and Sir Binod Mitter Siddik Mahomed Shah v. Mst. Saran and others" (AIR 1930 Privy Council 57), "Lord Simonds, Sir John Beaumont and Sir Lionel Leach" (AIR 1950 Privy Council 68) and "Choudhary Brothers Ltd., Sialkot v. The Jaranwala Central Co-Operative Bank Ltd., Jaranwala and others" (1968 SCMR 804). Moreover, a glance over the deposition of plaintiff (PW1) and Muhammad Ashraf (PW2) reveals that none of them disclosed the date, month, year and venue etc to explain that when and where the alleged sale was settled. I am afraid until corroborative evidence about the date, month, year, and the payment of consideration was produced, the plaintiff could not succeed to affirm his said oral transaction. Reliance can be placed upon the judgments reported as "Bashir Ahmad and others v. Abdul Latif and others" (2005 YLR 2655), Nazir Ahmad and another v. Yousaf" (PLD 2011 Supreme Court 161) and "Muhammad Nawaz through L.Rs v. Haji Mohammad Baran Khan through L.Rs. and others" (2013 SCMR 1300).

5. The case of the plaintiff solely hinges on receipt dated 10.4.1991 (Mark-A) allegedly executed by Nazir Abbas, defendant No.1, through which, the part sale consideration was received by him at different occasions. Nazir Abbas specifically denied the execution of said receipt while pleading it to be forged, fictitious and

result of collusion. The pictorial view of the receipt (Mark-A), copy of which is available at page 121 of the instant file reveals that the same was not attested by any of the witnesses, whereas, Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 provides that in the matters pertaining to financial or future obligation, if reduced into writing, the document shall be attested by two men or one man or two women and such document cannot be used as document until two witnesses at least were examined under Article 79 of the Order ibid for such purpose. Learned counsel for the plaintiff has failed to offer any explanation as to why receipt (Mark-A) in question could not be witnessed by any one and its non-attestation by witnesses was highly unusual, particularly when the same contained recital relating to payment of amount. Such omission was not only significant, but has also destructed the case of plaintiff, particularly with regard to payment of amount specified therein. This discrepancy remained unexplained in the plaint as well as in the evidence led by the plaintiff.

6. From the perusal of statement of the plaintiff/PW1 it transpired that receipt Mark-A had been scribed by Nazir Abbas himself, who before the time of recording of his statement had already passed away and the document could not be confronted to him, but the fact remains that neither the said document was got attested by two witnesses nor the same could be proved on record as per law. Besides having remained fail to prove the said receipt (Mark-A) as per modes provided in Article 72 of the Qanun-e-Shahadat Order, 1984, the plaintiff was left with another mode provided under Article 61 of the Order ibid by applying to the court for getting the signatures of defendant No.1 compared from an expert. It is now well established principle of law that where the executant of a document has denied its execution, it becomes duty of the beneficiary under the document to apply to the court for getting the writing/signatures thereon compared from an expert. Although report of the expert is not conclusive proof, but in the peculiar circumstances of the case the plaintiff was left with the said mode only to prove his receipt, which was not availed by him. By not resorting to this exercise, the plaintiff has incurred a presumption against him that had the alleged writing/signatures of Nazir Abbas defendant No.1 on Mark-A been got compared from the Handwriting Expert, the report would have received against him. The plaintiff himself appeared as PW1 and got examined Muhammad Ashraf (PW2), the sole corroborating witness, to prove the original transaction of oral sale as well as payment of sale consideration at different occasions through the receipt, which was not only meager, insufficient and discrepant, but also did not fulfil the requirement of law.

7. The joint findings of learned lower appellate court on Issues Nos.7, 13, 15 and 16 appear to be based on the weaknesses allegedly available in the evidence of defendant No.1 or on a suggestion made by learned counsel for the defendant No.1 to the plaintiff when he being PW1 was cross-examined. It is well established law of the State that a party, who asserts a fact in affirmative, has to prove the same. In the case in hand the onus probandi, therefore, was on the shoulders of the plaintiff

to prove the settlement of bargain, its terms and condition and the payment of sale consideration as well as execution of the receipt through production of affirmative evidence, but he could not succeed on the weaknesses or short comings of the evidence of his adversary. The stage of disproof or rebuttal only will come into play when the beneficiary of the transaction succeeded to produce positive evidence to prove his case. Likewise any suggestion advanced by counsel of a party against the case set up by his client in his pleadings cannot be made basis for delivery of a judgment against the said party. Thus any suggestion, which was not permitted would be of no legal value and would not mean that the claim of the plaintiff stood admitted by the defendant No.1.

8. The nutshell of the above discussion is that, it was the duty of the plaintiff to have proved his oral sale by the production of convincing, cogent and reliable evidence, which is conspicuously missing and the learned trial court was perfect in dismissing the suit of the plaintiff, but the learned Additional District Judge for extraneous/supervenient reasons while misreading and non-reading the material available on suit file has erred in law while allowing the appeal and decreeing the suit through the impugned judgment and decree, which cannot be maintained and bound to be set aside. Consequently instant civil revision is allowed, the impugned judgment and decree delivered by the learned lower appellate court is set aside and by upholding that of the learned trial court, the suit of the plaintiff stands dismissed with no order as to costs.

JK/N-36/L

Revision dismissed.

2017 C L C Note 53
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
GHULAM MUHAMMAD---Petitioner
Versus
SHAHID NADEEM---Respondent

Civil Revision No.2954 of 2010, heard on 11th May, 2016.

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

----S. 115---Revision---Scope---Scope of revision was narrower and restricted only to the extent of correcting errors of law and facts, if found to be committed by the subordinate courts in the discharge of their judicial functions. [Para. 4 of the judgment]

(b) Punjab Pre-emption Act (IX of 1991)---

----S. 13(1)(a)--- Talbs--- Talb-i-Muwathibat--- No exact time of performance---Effect---Pre-emptor as well as other supporting witnesses could not depose whether sale was communicated to the pre-emptor at 9.00 a.m. or 10.00 a.m. or between the said period; all of them deposed that at about 9/10 a.m. the first demand (Talb-i-Muwathibat) was fulfilled---Said time period having the difference of one hour could not be declared to be the "exact time" which was basic requirement of proof qua the performance of first demand---Civil revision was dismissed accordingly. [Para. 3 of the judgment]

(c) Punjab Pre-emption Act (IX of 1991)---

----S. 13(1)(a)---Talbs---Talb-i-Muwathibat---Pre-emptor to plead the specific portion of dera where the first demand was performed---Sine qua non for a pre-emptor to plead specific venue qua the fulfilment of Talb-i-Muwathibat and if dera of the pre-emptor comprised more than one compartments then he was under legal obligation to plead the specific portion where the first demand was performed---Pre-emptor could not clarify in his statement that Baithak was also a compartment of his Dera---Plaint also did not show the time of gaining communication about the sale and fulfilling the first demand, and that the Majlis was constituted inside the

Baithak where it was performed---Pre-emptor, in circumstances, failed to produce any valid evidence to prove the performance of first demand as per law---Revision was dismissed accordingly. [Para. 3 of the judgment]

(d) Punjab Pre-emption Act (IX of 1991)---

----S. 13(1)(b)---Talbs---Talb-i-Ishhad---Production of informer of sale before court---Production of informer in pre-emption cases was imperative for the pre-emptor to prove the fulfilment of first demand, whose deposition being as a star witness was considered to be relevant having direct bearing qua the proof of said fact---Pre-emptor, in the present case, did not produce the vendee being his informant in the witness box---Pre-emptor was duty bound to bring the informant into witness box and at the moment he deposed against his version he could be relieved by declaring him a hostile witness and cross-examined by counsel for the pre-emptor to elucidate the truth on the record---Vendee (informant) who inspite of availability was withheld by the pre-emptor an inference had to be drawn against him on account of non-examination of said star witness---Revision was dismissed accordingly. [Para. 3 of the judgment]

Muhammad Irfan Malik for Petitioner.

Sh. Naveed Shahryar for Respondent.

2017 C L C Note 88
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
RAZA TAUFEEQ and another---Petitioners
Versus
HAMMAD HUSSAIN and 4 others---Respondents

Civil Revision No. 386 of 2016, decided on 23rd November, 2016.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Civil Procedure Code (V of 1908), O. VII, R. 11 & S. 99---Suit for possession through pre-emption---Non-payment of court-fee---Plaint, rejection of---Scope---Plaint was rejected for non-payment of court-fee---Validity---Ministerial staff of the Court was bound to pinpoint non-payment as well as deficiency of court fee which the staff failed to do---No effective order was passed at the relevant time for enabling the plaintiffs to make up deficiency of court-fee---Trial Court had framed issue with regard to court fee but without answering the same, in the middle of proceedings required the plaintiffs to make up the deficiency without specifying the exact amount---Order for rejection of plaint despite the fact that plaintiffs did not pay requisite court fee was protected by mandate of S. 99, C.P.C.---Plaint could not be rejected on the ground of mere error or irregularity which did not affect the merits of the case or jurisdiction of the Court---Trial Court without calculating the exact amount of deficiency in court fee had non-suited the plaintiffs which was against law---No punitive action could be taken against the plaintiffs without determining the exact deficiency of court fee---Impugned order and judgment of courts below result of irregularity and wrong exercise of jurisdiction were set aside---Case of plaintiffs would be deemed to be pending before the Trial Court who should determine the exact amount of deficiency of court fee and grant specified time to the plaintiffs to make it up within prescribed time---If plaintiffs failed to make up the deficiency of court fee in time as required by the court law would take its course---Revision was allowed in circumstances. [Paras. 4, 5 & 6 of the judgment]

Sardar Noor Ahmed Yar Jang v. Sardar Noor Ahmed Khan PLD 1994 SC 688 ref.

Mubarak Ahmad and 2 others v. Hassan Muhammad through Legal Heirs 2001 SCMR 1868 and Riffat Iqbal v. Mst. Fatima Bibi and others 2007 SCMR 494 distinguished.

Qazi Shams-ur-Rehman and another v. Mst. Chamam Dasta and others 2004 SCMR 1798; Siddique Khan and 2 others v. Abdul Shakur Khan and another PLD 1984 SC 289; Muhammad Nawaz Khan and another v. Makhdoom Syed Ghulam Mujtaba Shah and another PLD 1970 SC 37; Noor Muhammad v. Hassan Muhammad 1986 SCMR 1345; Muhammad Bashir and another v. Syed Altaf Hussain Shah through Legal Heirs and 5 others 1990 SCMR 3; Muhammad Iqbal

and others v. Abdul Hamid 1991 SCMR 978; Sakhi Muhammad and 9 others v. Hakim Ali and 14 others PLD 1992 SC 404 and Sardar Noor Ahmed Yar Jang v. Sardar Noor Ahmed Khan PLD 1994 SC 688 rel.

Ch. Nisar Ahmed, Mirza Yahya Farid and Anwaar Hussain Janjua for Petitioners.

Shahid Ali Shakir and Mian Aslam Pervaiz for Respondents.

Date of hearing: 16th November, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This revision petition has arisen out of a pre-emption suit. It would be advantageous to express a little milieu of the case. The land in dispute measuring 08 kanals was sold out by Khalid Mansoor, real brother of the petitioners to respondents for an amount of Rs.600,000/- through mutation No. 1260 dated 05.04.2013. The petitioners by bringing their suit on 08.05.2013 pre-empted the sale and in paragraph No.12, they assessed the value of the suit equivalent to 30 times of revenue of preceding year, which being not determined, the value for the purpose of court fee was fixed at Rs.500/-, whereas an application was going to be moved for determination of produce index units and any deficiency of court fee would be made good. It appears that while admitting the suit, the Presiding Officer himself or concerned official of the court did not conduct proper scrutiny to ascertain whether plaint was duly stamped or not. This suit was definitely revisited by respondents and with regard to non-affixation of proper court fee, a specific objection was also raised by them. While facing with the contest, learned Trial Court while framing necessary issues invited the petitioners to examine their evidence and in meantime on 21.05.2015 on a vocal objection, learned Trial Court without specifying or determining the exact amount of deficiency directed petitioners to furnish stamps of court fee according to produce index units up till 10.06.2015. For ready reference this basic order of learned Trial Court in verbatim is reproduced hereunder:-

Verily, this order was not honoured and the learned Trial Court adjourned the matter to 01.07.2015 for the same purpose but on the said date, judicial officer was on leave and it was again adjourned to 06.07.2015 when while invoking jurisdiction under Order VII, rule 11(c) of the Civil Procedure Code, 1908, the plaint of the suit of petitioners was rejected for non-¬payment of court fee. Despite challenging the same, petitioners remained unsuccessful before learned Lower Appellate Court, when their appeal was also dismissed through the impugned judgment and decree dated 06.01.2016. Hence, the instant civil revision.

2. The headmost emphasis of learned counsel for petitioners is that in case of deficiency in the court fee, the court was required to specify exact amount of deficiency, which the petitioners were required to make up and on the basis of such defective order dated 21.05.2015 without specification of the real amount of deficiency while granting time to make up dearth, no penal action was required to be taken against the petitioners and the impugned orders being result of material irregularity, illegality and wrong exercise of jurisdiction cannot be sustained. He has supplemented his submissions while relying upon dicta laid down by the Full Bench comprising five honourable Judges of the apex court in case reported as Sardar Noor Ahmed Yar Jang v. Sardar Noor Ahmed Khan (PLD 1994 Supreme Court 688).

3. Conversely, on their turn, learned counsel for respondents have supported impugned orders on the ground that it was a case where petitioners failed to affix court fee of the value prescribed under the Court Fees Act at the time of institution of suit for which time was also awarded to them and it was their bounden duty to themselves calculate the value of the suit for the purposes of court fee according to law applicable on the day of institution of suit, but they intentionally failed to do so, therefore it was not a case where court was under obligation to specify the amount at which the suit should have been valued for afore-referred purpose. They while relying upon the dicta laid down in Mubarak Ahmad and 2 others v. Hassan Muhammad, through legal heirs (2001 SCMR 1868) and Riffat Iqbal v. Mst. Fatima Bibi, etc. (2007 SCMR 494), submitted that case in hand is classic example of failure of the petitioners to discharge their legal obligation and it being contumacy act on the part of petitioners, both the courts below rightly non-suited the petitioners through verdicts impugned herein, which need no interference by this court in the exercise of revisional jurisdiction.

3. Arguments of learned counsel for the parties considered in relation to the facts and circumstances of this case and the relevant law.

4. Sole question to be resolved is, whether the deficiency in court fee on the asking of respondents could be made a ground for rejection of plaint. Suffice it to say that subject sale was effected on 05.04.2.013 whereas the suit was instituted on 08.05.2013, much prior to the expiry of prescribed limitation of four months and definitely it was the duty of ministerial staff of the learned Civil Court to pinpoint non-payment as well as deficiency of court fee, who having failed to discharge the said effective order could be passed at the relevant time for the petitioners to make up deficiency of court fee. The said objection was also raised by respondents through their written statement, but without attending to the same, learned Trial Court felt it proper to frame the issue and when issues were framed, then without answering the same in either way after examination of evidence, the learned Trial court in midway required the petitioners to make up the deficiency without specifying the exact amount. The respondents in the case in hand have not disputed

the fact that jurisdiction of the learned Trial Court to adjudicate upon the suit and order passed thereon was not affected adversely on account of non-payment of court fee. Therefore, to my mind, the basic order for rejection of plaint, despite the fact that petitioners did not pay the requisite court fee is fully protected by the mandate of section 99 of the Code of Civil Procedure, 1908 and plaint could not be rejected on the ground of mere error or irregularity, which was not affecting the merits of the case or jurisdiction of the court. For ready reference section 99 of the Code ibid is reproduced hereunder:-

> "No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

While keeping in mind, the mandate and scheme of the afore-noted provision, the apex court in a case reported as Qazi Shams-ur-Rehman and another v. Mst. Chamam Dasta and others (2004 SCMR 1798) laid down as under:-

> "This Court in the case of Muhammad Swaleh PLD 1964 SC 97 has held that every irregularity or illegality in exercise of jurisdiction will not render the order of Court void and without jurisdiction. Any party aggrieved of such irregularity has to further show that there was such violation of statutory provision which rendered proceedings coram non judice. It is a known principle of law that a procedural irregularity cannot be allowed to stand in the way of justice unless the irregularity has caused a serious miscarriage of justice."

5. To my knowledge the mother judgment on the subject, rendered by Full Bench comprising five judges of the apex Court is Siddique Khan and 2 others v. Abdul Shakur Khan and another (PLD 1984 SC 289), which still holds the field wherein after thorough visit to the provisions of the Court Fees Act, 1870 as well as sections 148 and 149 of the Code of Civil Procedure, 1890, it was observed that matter requiring court fee was purely of fiscal nature and under section 12(ii) of the Court Fees Act, the revenue in case of deficiency could be collected even by the Appellate Court without resort to the dismissal of the plaint as barred by law. It is only the contumacy of a party, which could damage him for non-compliance with the order/demand of court fee if while granting him time he was directed to furnish specified stamps. In the said authoritative judgment, it was further concluded that section 10 of the Court Fees Act was confined to a limited field while sections 12 and 28 thereof were of wider application and that consequences of payment or non-payment within the time fixed was of similar import regarding the advantage of serving process or losing it for non-prosecution and sections 148 and 149 of the

Code of Civil Procedure, 1908 would apply thereto them as proviso. Undeniably, it is clear that Order VII, rule 11 of the Code ibid puts an obligation to reject the plaint where court fee is deficient, but prior to applying the same it is sine qua non for the court to direct the party concerned to make up the specific deficiency of court fee within the time to be prescribed. In the case in hand, admittedly, the learned Trial Court without calculating the exact amount of deficiency in court fee has non-suited petitioners, which is against the dicta laid down by the apex court in the following pre-emption cases:-

i) Muhammad Nawaz Khan and another v. Makhdoom Syed Ghulam Mujtaba Shah and another (PLD 1970 SC 37);

ii) Noor Muhammad v. Hassan Muhammad (1986 SCMR 1345)

iii) Muhammad Bashir and another v. Syed Altaf Hussain Shah through his Legal Heirs and 5 others (1990 SCMR 3)

iv) Muhammad Iqbal and others v. Abdul Hamid (1991 SCMR 978)

v) Sakhi Muhammad and 9 others v. Hakim Ali and 14 others (PLD 1992 SC 404) and

vi) Sardar Ahmed Yar Jang v. Sardar Noor Ahmed Khan (PLD 1994 SC 688)

In Muhammad Nawaz Khan's case (supra) it was concluded in bottommost as under:-

> "Apart from these weighty judgments it would, indeed, be anomalous if limitation is not saved in case in which law requires the Court to allow the plaintiff to correct the valuation of the relief claimed in the suit which must necessarily entail making up deficiency in the stamp paper affixed on the plaint, but time should automatically be enlarged in cases in which the Court has the discretion to grant time to pay the whole or part of the court fee prescribed. This will offend against the rule of harmonious construction. The provisions of Order VII, rule 11 and section 149 are, therefore, to be read together. Consequently where the plaintiff is required to correct the valuation of the relief claimed in the suit, he shall further be required to supply the requisite stamp paper and on compliance it shall have the same force and effect as if such fee had been paid in the first instance."

Similarly; in Noor Muhammad's case, (supra) identical proposition arose and the apex court resolved the same to the following effect:-

"In this case it is not denied that the actual amount of the court-fee was never specified by the court although if the petitioner had obtained Naqsha Paidawar the same could have been utilized by the court for determining the court-fee and then directing the petitioner (plaintiff) to make the deposit on or by a certain date. This was not done. It is also clear from the case law relied upon by the learned counsel that the question of limitation in reality does not arise in this case because when time is allowed under Order VII, rule 11 or is extended under any relevant provision of law, the period of limitation gets extended automatically. No suit can be dismissed on the ground of limitation in circumstances like those of the present case. It has been fully made clear in the case of Siddique Khan already cited as PLD 1984 SC 289.

Learned counsel for the respondent remained unable to meet the arguments of the learned counsel for the petitioner which have been stated above. He only mentioned that the petitioner was in possession of the Naqsha Paidawar since 11.11.1974. Even if that is so, it was the duty of the court to utilize that Naqsha Paidawar for determining and specifying the required court-fee and then directing the plaintiff to make the deposit by a certain date under O. VII, Rule 11. It was only on failure thereof that the plaint could have been rejected or time could further be extended under other provision of law."

6. The august Supreme Court of Pakistan in the above cited case law has already laid down without any ambiguity that without recourse to the provision of Order VII, rule 11 of the Code of Civil Procedure, 1908, no punitive action could be taken against the petitioners without determining exact deficiency of court fee. The case law referred to by learned counsel for respondents with all respect being not applicable to the facts of case in hand cannot be given preference over judgments of the same court rendered by its larger Benches. Therefore, this Civil Revision is accepted, impugned order and judgment of the courts below being result of material irregularity and wrong exercise of jurisdiction are set aside and suit of petitioners will be deemed to be pending before the learned Trial Court, who while determining the exact amount of deficiency of court fee will grant specified time to the petitioners to make it up within prescribed time and in case of compliance as required, the suit will proceed, otherwise the law will take its own course. The parties are directed to appear before the learned District Judge, Faisalabad on 05.12.2016, who will entrust the main suit to the court of competent jurisdiction for further proceedings.

ZC/R-23/L Case remanded.

2017 C L C Note 117
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Haji MAKHAN through Legal Representatives---Petitioners
Versus
Mian MUHAMMAD ZAMAN---Respondent

C.R. No. 3063 of 2010, heard on 12th January, 2017.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Superior right---Talbs, performance of---Requirements---Acknowledgement-due card of the Post office---Scope---Maxim: Secundum allegata et probata, principle of---Applicability---Performance of talbs was sine qua non for a pre-emptor otherwise decree could not be awarded to him despite he succeeded to establish superior right---Pre-emptor did not mention in the plaint that vendor was his real sister---Person having judgmatic sense could not believe that factum of sale by the sister of a brother of suit property situated in the same khewat and khasra number could have remained secret from his knowledge---Disputed sale was already in the knowledge of pre-emptor since its beginning---Pre-emptor allowed another person to purchase the suit property and thereafter pre-empted the same to blackmail the vendee---Plaintiff without disclosing any specific venue vaguely pleaded in the plaint that he performed Talb-i-Muwathibat at his residence but when he appeared in the witness-box he, while making improvement, stated that it was performed in his drawing room---Such contradiction was dent in the version of pre-emptor as to where first demand was actually performed---Pre-emptor did not bring on record the acknowledgement-due card of the Post Office to prove that registered post containing notice of Talb-i-Ishhad was delivered to the vendee---Entry of register maintained by the postman could not be equated at par of acknowledgement due card---Notice of Talb-i-Ishhad had to be dispatched through registered post acknowledgement-due---Pre-emptor did not make any effort to trace out acknowledgement-due card or seek leave of the Court to prove the same by leading secondary evidence on the ground of being lost---Mere production of copy of register maintained by the postman could not be assumed that notice of Talb-i-Ishhad had been served upon the vendee---Pre-emptor in his statement-in-chief got exhibited postal receipt without summoning the concerned postal booking clerk which was lapse on his part---Pre-emptor had failed to perform talbs in accordance with law---Impugned judgments and decrees passed by the Courts below were set aside and suit was dismissed---Revision was allowed in circumstances. [Paras. 6, 7, 8, 9, 10 & 12 of the judgment]

Muhammad Bakhsh v. Nisar Ahmad 1985 CLC 1974; Mst. Hameedan Begum and 11 others v. Muhammad Jafar 2006 MLD 1034; Basharat Ali Khan v. Muhammad Akbar 2011 CLC 696; Naseer Ahmad v. Ahmad PLD 1984 SC 403; Abdul Hameed and others v. Muzamil Haq and others 2005 SCMR 895; Ghulam Sarwar and 6 others v. Mushtaq Ahmad and others 2006 YLR 1019; Muhammadi

Begum v. Abdul Latif and others 2006 YLR 1588 and Muhammad Rafique and 7 others v. Noor Ahmad 2004 MLD 1554 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---High Court could not intrude in the concurrent findings of fact recorded by the courts below unless there was mis-reading and non-reading of evidence or violation of law in such findings. [Para. 11 of the judgment]

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

----O. VI, R. 2 & O. VIII, R. 2---Pleadings---Scope---Party had to first plead facts and pleas in the pleadings and then prove the same through evidence---No one could be allowed to improve its case beyond what was originally set up in the pleadings---Evidence led by a party beyond the scope of its pleadings was liable to be ignored. [Para. 7 of the judgment]

Muhammad Wali Khan and another v. Gull Sara Khan and another PLD 2010 SC 965 and Haier Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another 2012 SCMR 254 rel.

(d) Evidence---

----Documentary evidence could not be excluded by oral assertions. [Para. 7 of the judgment]

(e) Maxim---

----"Secundum allegata et probata"---Meaning---Fact has to be alleged by a party before it is allowed to be proved. [Para. 7 of the judgment]

Sh. Naveed Shahryar and Humera Bashir Chaudhry for Petitioners.

Zaheer Zulfiqar for Respondent.

Date of hearing: 12th January, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The concise facts of the case are that undeniably the suit property was owned by Mst. Kishwar Sultana, the real sister of respondent, who sold it out to petitioner (now represented through LRs) vide mutation No.1170 dated 28.01.2003. On 28.05.2003 respondent pirated the transaction through institution of a suit for possession while pre-empting it with the assertion that same was kept secret, which came into his knowledge on 21.05.2003 at 4.00 p.m. while present at his residence along with Nasir Mehmood (PW3), when Muhammad Iqbal (PW2) came there and communicated its information to him, who then and there fulfilled the first demand by proclaiming his intention to pre-empt it. Thereafter, on 22.05.2003 alleged second demand was fulfilled by dispatching notice Talb-i-Ishhad (Exh.P1) through registered post A.D. and the suit was instituted by respondent on 28.05.2003 without waiting whether (Exh.P1) was served upon the vendee or not and that is why he could not narrate in his plaint that it was received by petitioner or not. The suit was vehemently contested by petitioner with the stance that disputed sale from its genesis was in the knowledge of respondent, who was available when bargain was settled with his sister and that

requisite demands were also not fulfilled. The learned Trial Court in the light of divergent pleadings of the parties settled the following issues:-

1. Whether the actual sale price of suit land Rs. 1000000/- but in order to defeat the right of pre-emption Rs.1200000/- has been incorporated in the mutation? OPP

2. Whether the plaintiff has superior right of pre-emption qua the defendant? OPP

3. Whether the plaintiff has fulfilled the requirements of necessary Talbs as per law? OPP

4. Whether the plaintiff is estopped by his words and conduct to file this suit? OPD

5. Whether the suit is incorrectly valued for the purposes of court fee and jurisdiction, if so, what is correct valuation of the suit? OPD

6. Whether the defendant has incurred incidental charge amounting to Rs. 13,32,000/-and he is entitled to recover the same in case the suit is decreed? OPD

7. Whether the defendant is entitled to recover improvements charges, in case the suit is decreed in favour of the plaintiff? OPD

8. Whether the suit is frivolous and vexatious and defendant is entitled to compensatory costs? OPD

9. Relief.

2. After recording evidence of the parties and appreciating the same, learned Trial Court decreed the suit of respondent through judgment and decree dated 15.10.2008, which was further congealed by the learned Lower Appellate Court when appeal of the petitioner was dismissed vide judgment and decree dated 24.08.2010, which are subject matter of the instant civil revision.

3. It is mainly contended by Sh. Naveed Shahryar, Advocate, learned counsel for petitioner that impugned judgments and decrees passed by both the courts below are classic example of misreading and non-reading of evidence; that both the courts below failed to consider the aspect that vendor as well as the pre-emptor were sister and brother inter se and the sale was in the knowledge of respondent from the day of its inception, whereas the fulfillment of alleged first demand alleged to have been made after almost four months was fictitious and concocted story; that respondent was required to bring on record the acknowledgment due receipt to prove that

registered post containing notice Talb-i-Ishhad had actually been served upon petitioner and that Booking Registry Clerk was also not got summoned by respondent to prove that registered post was dispatched to the petitioner. He while highlighting the contradictions in the statements of PW1 to PW4 as well, has prayed for acceptance of instant civil revision, setting aside of impugned judgments and decrees and dismissal of suit of respondent.

4. Conversely, Mr. Zaheer Zulfiqar, Advocate, learned counsel for respondent has refuted the arguments advanced by learned counsel for petitioner and while supporting the impugned judgments and decrees has submitted that concurrent findings recorded by both the courts below cannot be interfered with by this Court while exercising its jurisdiction under section 115 of the Code of Civil Procedure, 1908. He has further submitted that neither any major contradiction could be pinpointed in the statements of PWs nor respondent was aware of the transaction of sale settled by his sister as relations among vendor and respondent were strained when the sale was effected.

5. With able assistance rendered by learned counsel for both the parties, I have considered and perused the record thoroughly.

6. In pre-emption cases, issue qua performance of Talbs is vital and in every such case, it is sine qua non for a pre-emptor to cross the said barrier while bringing on record cogent, and convincing evidence for its proof as per law, otherwise, a decree could not be awarded to him despite he succeeded to establish his superior right. While commenting upon merits of the case, it is straightaway noticed that respondent omitted to mention in the plaint that vendor was his real sister, but while appearing in the witness-box being PW1, he was compelled to concede the reality. The aforenoted omission appears to be engineered one and based on mala fide to graft the story for the performance of belated demands and that is why in his statement, respondent being PW1 worded that his relations with the vendor were not harmonial since three years prior to attestation of sale mutation, but if said version introduced in statement-in-chief of respondent is admitted to be correct, then while keeping in mind that impugned mutation was attested on 28.01.2003, as per calculation, his relationship with the sister became strained on or before 28.01.2009, whereas, learned counsel for petitioner while drawing attention of this Court towards attested copy of mutation No.1005 dated 12.09.2000 (Exh.D4) has succeeded to belie/disprove the aforenoted testimony of PW1. The perusal of Exh.D4 reveals that Kishwar Sultana, the sister of respondent, appointed her brother/respondent being her general attorney and the latter while performing said authority alienated the other property of his sister to Muhammad Hussain etc., meaning thereby that the vendor had not only cordial relations with respondent/pre-¬emptor, but she had also confidence in him till 12.09.2000 when Exh.D4 was attested. The respondent in his cross examination also admitted that Exh.D4 was got attested by him being general attorney of the vendor. The admission on the part of

respondent has left nothing, but to believe that respondent made a false statement beyond his pleadings that his relations with his sister/vendor were not amicable.

7. In this regard, the other admission of PW1 that his residential house was still common with his sister/vendor is also of great importance and the argument of learned counsel for respondent that after her marriage, the vendor had migrated to Kharian, but the perusal of notice Talb-i-Ishhad (Exh.P1) reveals that respondent in his notice had himself averred that she was resident of the same village where he was residing. It is well-established principle that the documentary evidence cannot be excluded by oral assertions. So respondent failed to prove that his sister was residing in Kharian. Even if it is presumed that relationship of respondent with vendor/sister were not cordial and she was not residing in the same village at the time of attestation of mutation in favour of petitioner, then this fact should have been pleaded by respondent in the plaint, but neither it was mentioned therein nor except oral statement of respondent, any other material is available on file to substantiate the same and it is settled law that a party has to first plead facts and pleas in the pleadings and then to prove the same through evidence. A party is not allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of "secundum allegata et probata" (that a fact has to be alleged by a party before it is allowed to be proved) is fully applicable in this case, which has full command of provisions of Order VI, rule 2 and Order VIII, rule 2 of the Civil Procedure Code, 1908. As such any evidence led by a party beyond the scope of its pleadings is liable to be ignored. Reliance can be placed upon the judgments reported as Muhammad Wali Khan and another v. Gull Sara Khan and another (PLD 2010 SC 965) and Haier Ali Himeji v. Vito Additional District Judge, Karachi (South) and another (2012 SCMR 254), wherein it was held that in absence of specific pleadings, the court could not allow a party to grope around and draw remote inferences in his favour from his vague expression. Additionally, except for sole statement of respondent, no other supporting witness was examined by him for vindicating his testimony. The vendor/sister of respondent being the best person was available to him to prove that her relations with him were not cordial at the relevant time. The argument of Mr. Zulfiqar Zaheer, Advocate that when relations of both of them were not harmonial, then she would have not made statement in favour of her brother, is misconceived. Had she been got summoned and made statement militant to the stance of the respondent, then he could have availed the right of cross-examination while getting her declared hostile and true picture could be brought on the record regarding alleged strained relations, but despite availability, she or any other member of the family was withheld and adverse inference has to be drawn against respondent under Article 129 Illustration (g) of the Qanun-e-Shahadat Order, 1984.

8. A person having judgmatic sense cannot believe that factum of sale of pre-empted property by the sister of a brother situated in the same khewat and khasra number where the property of pre-emptor also located and possession of the same

was also handed over to the vendee forthwith, could have remained secret from his knowledge for a long time. It is also not the case of respondent that he was not residing in the same village where the pre-empted property was situated. The general attorney of petitioner being DW1 specifically deposed in his statement-in-chief that respondent was aware of the disputed sale from the day of its commencement as he was also involved in the settlement of bargain. Despite lengthy cross-examination by learned counsel for respondent, DW1 not only remained consistent with his said part of statement-in-chief, but he also disclosed that bargain was settled in the drawing room of respondent in his presence besides some other persons, whose names were also disclosed by him and notwithstanding the fact that respondent was awarded a chance to produce his rebuttal evidence, neither he nor the persons whose names were unveiled by DW1 were examined to shatter his testimony. So the argument of learned counsel for petitioner that the disputed sale was already in the knowledge of respondent since its beginning and stance qua performance of first demand after an elapse of four months was concocted and self-grafted, has force and convincible. The superior courts have already clinched the controversy under discussion in the judgments reported as Muhammad Bakhsh v. Nisar Ahmad (1985 CLC 1974), Mst. Hameedan Begum and 11 others v. Muhammad Jafar (2006 MLD 1034), Basharat Ali Khan v. Muhammad Akbar (2011 CLC 969), Naseer Ahmad v. Ahmad (PLD 1984 SC 403) and Abdul Hameed and others v. Muzamil Haq and others (2005 SCMR 895) and in Naseer Ahmad's case (supra), it was held as under:-

> "7. It is universally accepted that pre-¬emption is a piratory right, where a person plugs in his claim to purchase a certain piece of land or property after another person has purchased it. There is no dearth of cases, in actual practice, where the pre-emptors are close relatives of the vendors themselves and knew all about the transaction while it took place, but did not come forward to purchase it at that time. They allow another person to purchase it; wait for the whole year and then, on the last date of the period of limitation, they suddenly spring a surprise on him by filing a suit for pre-¬emption with the object (as appears to be the intention in the present case) to obtain the property in question at a nominal price, because it is expected that the case shall be decided after many years, by which time price of the land shall have been enhanced manyfold and the price that he would be required to pay shall be the one prevailing at the time of the transaction. As a matter of fact, we have come across cases where the father sells land and his son files a suit for pre-emption, which cannot but lead one to assume that there was collusion between the two. We feel that such suits are very often mala fides because if the pre-emptor is genuinely so keen to purchase the land or property in question, he would gladly pay the price which is being offered to the vendor by another person or come forward and tender the highest bid at an auction rather than wait till the transaction is complete and thereafter spend twenty years of his life in litigation and incur huge

expenditure which was in many cases be even more than the actual price of the land or the property at the time of the sale or auction. Apparently the motive behind it is to create a hurdle in the way of the vendee for his own benefit, because the vendee is compelled in many cases to dish out large sums of money as a price for the withdrawal of the suit by the plaintiff. The latter does not therefore deserve relief through courts of law."

The scanning of the same re-affirms that where the pre-emptor was close relative of the vendor, having knowledge about transaction when it took place, who instead of stepping ahead to purchase it at that time allowed another person to purchase the property, but thereafter his attempt to pre-empt the same is nothing, except to blackmail the vendee and to curb the said tendency the superior courts have already took its serious notice in the cited judgments.

9. There is yet another damaging factor that respondent without disclosing any specific venue vaguely pleaded in para-4 of the plaint that he performed first demand at his residence, but when he appeared in witness-box as PW1, he while making improvement, stated that it was performed in his drawing room, whereas, Muhammad Iqbal (PW2) one of the participants of Majlis in his cross-examination deposed that first demand was fulfilled by respondent in his western bed room of his residence. This glaring contradiction has also made a serious dent in the version of pre-emptor that where first demand was actually made.

10. The third vital aspect of the case is that respondent did not bring on record the acknowledgment due card to prove that registered post containing notice Talb-i-Ishhad was delivered to petitioner. No doubt the postman was got summoned, who along with his record made statement being PW4 and alleged that on 25.05.2003, the registered Dak was delivered to petitioner. The copy of the entry made by him in his register was also tendered in his statement as Exh.P3, who also deposed that acknowledgment due card was returned by him to the concerned Post Office. Perusal of Exh.P3 unfolds that neither it bears the signatures of the addressee/petitioner to whom it was allegedly delivered nor any report of the postman along with his signatures is available therein that the same was delivered to the actual person. The entry of the Register maintained by the postman cannot be equated at par of acknowledgment due card. The Legislature while drafting section 13 of the Punjab Pre¬emption Act, 1991 mandated that the notice Talb-i-Ishhad should have to be dispatched through registered post A.D. The respondent/pre-emptor, who allegedly dispatched notice through registered post was under obligation to have made a search for the A.D. receipt, which was tagged with the registered post containing notice Talb-i-Ishhad and that was to be received by him for the affirmation of the due delivery. It is borne out from the record that he never made any effort to trace out A.D.card or sought leave of the court to prove the same by leading secondary evidence on the ground of being lost and merely by production of copy of Register maintained by the postman, it cannot be assumed

that notice Talb-i-Ishhad was actullay served upon petitioner especially in the scenario that respondent also remained silent as per contents of his plaint, if the said notice was ever received by petitioner. When it was in the knowledge of respondent that A.D. receipt was not received by him and he also deposed so in his examination-in-chief, then the substitute thereof should be brought on the record after seeking permission from the court in this regard. In such a situation, Exh.P3 is liable to be ignored. Reliance can be placed on the judgments reported as Ghulam Sarwar and 6 others v. Mushtaq Ahmad and others (2006 YLR 1019), Muhammadi Begum v. Abdul Latif and others (2006 YLR 1588) and Muhammad Rafique and 7 others v. Noor Ahmad (2004 MLD 1554). Moreover, the respondent in his statement-in-chief got exhibited postal receipt (Exh.P2) without summoning the concerned Postal Booking Clerk, which lapse on the part of respondent has also compelled this court to draw an adverse inference against him. In the wake of such discussion, the findings of courts below on issue No.3 are unwarranted, which are hereby reversed and the said issue is answered in the negative. Since respondent failed to cross the barrier of proving performance of requisite Talbs as per law, which is sine qua non to succeed in a suit for pre-emption, I do not feel it necessary to dilate upon the other issues, which will be sheer wastage of time.

11. At the remnant stage of his arguments, learned counsel for the respondent has submitted that the concurrent findings of the courts below cannot be derailed by this court while exercising revisional jurisdiction provided under section 115 of the Code of Civil Procedure, 1908. It is correct that normally this Court does not intrude in the concurrent findings of the fact recorded by two courts below, but when there is gross misreading and non-reading as well as patent violation of the law is floating on the surface of such concurrent findings, this Court cannot shut the eyes and is always under obligation to rectify the error by making interference in such like illegal findings. In this view of the matter, the said contention of learned counsel for respondent is also not tenable as both the judgments and decrees after having been found to be the result of misreading and non-reading of evidence as well as non-adherence to the law applicable in this regard cannot be sustained.

12. The accumulative effect of the above discussion is that instant civil revision is accepted, impugned judgments and decrees passed by learned courts below are hereby set aside and suit instiuted by respondent stands dismissed while leaving the parties to bear their own costs.

ZC/M-56/L Revision allowed.

2017 Y L R 794
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD SHARIF (deceased) through LRs. and others---Petitioners
Versus
PROVINCE OF PUNJAB through District Collector Layyah and 10 others---Respondents

C.R. No.377-D of 2001, heard on 7th October, 2015.

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

---S. 42---Limitation Act (IX of 1908), Art. 120---Qanun-e-Shahadat (10 of 1984), Art. 129 (g)---Suit for declaration---Limitation---Condonation of delay---Sale---Proof of---Instrument---Attestation of---Procedure---Contention of plaintiffs was that they had purchased the suit land but sale deed could not be incorporated in the revenue record---Suit was decreed by the Trial Court but same was dismissed by the Appellate Court---Validity---No sale deed or copy of mutation had been produced in the court---Plaintiffs had not produced attesting witnesses, identifiers and attesting officer of sale deeds---Stamp vendors and scribes were also not produced by the plaintiffs to prove due execution and attestation of sale deeds---Said witnesses were the best persons to prove the transaction embodied in the sale deeds as well as their execution---When sale deeds had been denied then plaintiffs were bound to prove the same by producing affirmative evidence which had been withheld without any justification---Adverse inference would be drawn against the plaintiffs in circumstances---Initial onus to prove the execution of instrument was upon the plaintiffs who had failed to discharge the same---Attestation of alleged sale deed was a subsequent event but transaction embodied therein must have been effected at some prior point of time---Plaintiffs were bound to prove such transaction by producing cogent and convincing evidence---If any ingredients of sale was missing then beneficiary of the same had to suffer---Plaintiff was bound to plead and prove the ingredients of sale---Plaintiffs had failed to prove the settlement of sale bargain by producing relevant, cogent and convincing evidence---Attestation of disputed sale deed through commission had damaged the case of plaintiffs---Party could not take benefit of the weakness of his adversary and he had to prove his case on his own strength---Any evidence beyond pleadings if led on the record of suit file had to be ignored---Limitation provided by the statute to perform any action or agitate the remedy within specified period was not a mere technicality but it was a mandatory statutory provision and treating same as a formality would tantamount to declare the Limitation Act, 1908 redundant---Delay of each and every day had to be explained by the defaulting party to the satisfaction of court---Delay could not be condoned as a matter of right but arbitrary exercise of discretion would cause prejudice to the opposite party---Suit was time barred---No infirmity or

perversity had been pointed out in the impugned judgment and decree passed by the Appellate Court---Revision was dismissed in circumstances.

Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Abdul Ghafoor and others v. Mukhtar Ahmed Khan and others 2006 SCMR 1144; Khan Muhamamd v. Muhammad Din through L.Rs. 2010 SCMR 1351; Mst. Hameeda Begum and others v. Mst. Irshad Begum and others 2007 SCMR 996; Rab Nawaz and others v. Ghulam Rasool 2014 SCMR 1181; Sudhangshu Bimal Biswas v. MD. Mustafa Chowdhury 1968 SCMR 213; MD. Anwarullah Mazumdar v. Tamina Bibi and others 1971 SCMR 94; Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965 and Manzoor Afzal Pasha and another v. DHA, Karachi and another 2008 SCMR 877 rel.

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

----S. 42---Limitation Act (IX of 1908), Art. 120---Suit for declaration---Limitation---Six years period for filing a suit for declaration had been provided.

(c) Registration Act (XVI of 1908)---

----S. 39---Registration of document when vendor could not appear personally---Procedure---If due to physical infirmity or on account of any other inability executant was not in a position to appear in person before the Registering Officer then vendee would be bound to bring the circumstances due to which vendor could not appear personally by filing an application before the Registrar who after due inquiry could issue commission and delegate his power for attestation of an instrument---Registrar was not authorized in routine to further delegate his powers to a local commission for the attestation of an instrument without assigning any justification.

(d) Administration of justice---

----Party could not take benefit of the weakness of his adversary and he had to prove his case on his own strength.

(e) Evidence---

----Pleadings---Any evidence beyond the pleadings if led had to be ignored.

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

----Preamble---Object---Object of limitation was to help the vigilant and not the indolent.

Rana Akhtar Ali and Ch. Abdul Ghani for Petitioners.

Malik Fazal Hussain for Respondents Nos. 7 to 11.
Muhammad Ali Siddiqui for Respondent No.2.
Mubashir Lateef Gill, A.A.G.
Date of hearing: 7th October, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The facts germane for the disposal of instant civil revision are that present petitioners/plaintiffs instituted a suit for declaration regarding property measuring 401 kanals 15 marlas situated in Chak No.291/TDA, Naushera Kallan, Tehsil Karor, District Layyah (hereinafter to be referred as suit land) against the respondents/defendants before the learned trial court on 10.1.1989 with the assertion that originally suit land was owned by Mian Bashir Ahmad, father of Mian Manzar Bashir respondent/defendant No.2, who had transferred the same in lieu of gift to his above referred son respondent/defendant No.2 and it was further alienated by respondent/defendant No.2 to Mrs. Sibghat Ullah respondent/defendant No.3, who vide sale deed No.302 dated 2.10.1961 had further transferred the same to the petitioners/plaintiffs Nos.1 to 4 and respondents/defendants Nos.4 and 5; that respondent/defendant No.4 vide sale deed No.2152 dated 10.10.1974 transferred his share to petitioner/plaintiff No. 5 whereas the respondent/defendant No.5 also transferred his share to petitioners/plaintiffs Nos.6 and 7 through sale deed No.916 dated 2.3.1976. It was further pleaded in the plaint that the above referred sale deeds, could not be incorporated in the revenue record and when revenue hierarchy refused to do the needful, the petitioners/ plaintiffs were constrained to file the instant suit before the learned trial court. The said suit was contested by Mian Manzar Bashir respondent/defendant No.2 with the assertion that he had never transferred the suit property to Mrs. Sibghat Ullah respondent/defendant No.3 and any document/sale deed procured on his behalf being the result of fraud and cheating was ineffective upon his rights.

2. The learned trial court framed the following issues arising out of the divergent pleadings of the parties:--

1. Whether this Court has no jurisdiction to entertain this suit? OPD

2. Whether the plaintiffs have no locus standi and cause of action to bring this suit? OPD

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

4. Whether the suit land is not properly described? OPD

5. Whether the suit is bad for non-joinder of necessary parties? OPD

6. Whether the suit is not properly valued for the purposes of Court fee and jurisdiction and proper Court fee is not paid? OPD

7. Whether the suit is barred by res judicata? OPD

8. Whether the plaintiffs are owners in possession of the suit land on the basis of sale deed No.302 dated 2.10.61, sale deed No.2152 dated 10.10.1974 and sale deed No.916 dated 2.3.1976 and the contrary entries in the revenue record are unlawful and ineffective upon the plaintiffs rights? OPP

8-A. Whether the suit is barred by limitation? OPD

9. Relief.

3. Both the parties produced their respective evidence in support of their respective stances and the learned trial court after appreciating the evidence of both the parties decreed the suit filed by the petitioners/plaintiffs vide judgment and decree dated 23.9.1996, however, in appeal the same was reversed by the learned lower appellate court vide impugned judgment and decree dated 31.3.2001 and the suit was dismissed. Hence the instant civil revision.

4. It is argued by learned counsel for the petitioners that statement of Mian Manzar Bashir DW2 has been misinterpreted by the learned lower appellate court; that the impugned judgment and decree is result of misreading and non-reading of evidence; that the learned lower appellate court also ignored admission on the part of DW2 that letter written by his father was correct and signatures of his father and other relatives were also attested by him therefore, in these circumstances, it was proved that Mian Manzar Bashir (DW2) had sold the suit land to Mrs. Sibghat Ullah respondent/defendant No.3, who had further alienated the same to the petitioners/plaintiffs; that the learned appellate court has not considered Fard Taqseem Exh.P4, which denotes the factual position of suit land that the same was transferred by Mian Bashir Ahmad and ultimately it was alienated to Mrs. Sibghat Ullah by respondent/defendant No.2. He has lastly prayed for acceptance of the instant civil revision, setting aside of the impugned judgment and decree passed by the learned lower appellate as well as restoration of the judgment and decree passed by the learned trial court.

5. Conversely, the learned counsel for the respondents/defendants have supported the impugned judgment and decree passed by the learned lower appellate court and contended that petitioners/plaintiffs failed to produce any iota of evidence through which it could be gathered that Mian Manzar Bashir respondent/defendant No.2 had alienated the suit land to Mrs. Sibghat Ullah, respondent/defendant No.3 and in absence of any proof of said alienation the sale deed attested in favour of the

petitioners/plaintiffs had no value in the eye of law. It is further argued that being beneficiary of the alleged sale deed No.302 dated 02.10.1961 by virtue of which suit land was transferred to the petitioners/ plaintiffs, they were bound to prove the transaction embodied therein as well as its valid execution, but they failed to bring any relevant witness into the witness-box for proving the same. They have lastly prayed for dismissal of the instant civil revision.

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

7. The basic bone of contention between the parties is whether the suit land had been transferred in favour of Mrs. Sibghat Ullah respondent/defendant No.3 or not and whether the same was validly transferred by her to the petitioners/ plaintiffs by means of sale deed Exh.P1 to Exh.P3. To prove their stance petitioners/plaintiffs produced Ahmad Ali as PW1 and Laskhar Ali as PW2. Both these witnesses are not signatory of any of the sale deed/mutation duly attested in favour of either of the parties regarding the suit property. Few lines of cross-examination of PW1 are reproduced hereunder:--

The perusal of same reveals that he is not only an interested witness rather resident of a different revenue estate and most importantly ignorant of the disputed transaction. He did not depose that any transaction of sale was settled in his presence. Statement of Laskhar Ali PW2 is also on the same lines. No detail like time, date, venue and names of the witnesses is also provided by him to prove that when, where and before whom the alleged transactions were settled. He is also not the marginal witness of any of the instruments executed/attested qua the suit land, so his statement is also not helpful to the petitioners/plaintiffs. Muhammad Sharif one of the plaintiffs also appeared PW3, who could not depose that when and through which instrument the transaction in favour of Mrs. Sibghat Ullah respondent/defendant No.3 was attested. No other witness was produced by the petitioners/plaintiffs in oral evidence. The petitioners/plaintiffs produced as many as eight documents on file. Exh.Pl is sale deed No.302, Exh.P2 is sale deed No.2152, Exh.P3 is sale deed No.916. The perusal of said documents reveals that through these sale deeds the suit land was transferred in favour of petitioners/plaintiffs. Exh.P4 is the copy of Fard Taqseem and entries of above sale deeds are also reflected therein, but no sale deed or copy of any mutation has been produced by the petitioners/plaintiffs to prove that suit land had ever been alienated to Mrs. Sibghat Ullah. Even no copy of revenue record such as Register Haqdaran Zamin is available on record showing ownership of Mrs. Sibghat Ullah respondent/defendant No.3, on the basis of which, sale deed could be executed in favour of petitioners/plaintiffs. The learned counsel for the petitioners have failed to produce or refer to any title document from the record through which it could be established that the ownership of the suit land had ever been transferred by respondent/defendant No.2 in favour of Mrs. Sibghat Ullah, respondent/defendant No.3.

8. The petitioners/plaintiffs even being beneficiaries of sale deeds (Exh.PI, Exh.P2 and Exh.P3) never produced their attesting witnesses, identifiers and the attesting officers. The stamp vendors and scribes were also not produced by them to prove their due execution and attestation. These were the best persons to prove the transaction embodied in the said sale deeds as well as their execution. No doubt, sale deeds are registered documents, but when their execution was specifically denied by the adversary then the petitioners/plaintiffs were under legal obligation to prove the same by producing affirmative evidence, which was withheld without any justification and adverse inference under Article I29(g) of the Qanun-e-Shahadat Order, 1984 has to be drawn against them. In arriving at this view, I am fortified by the dictum laid down in the judgments reported as Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245) and Abdul Ghafoor and others v. Mukhtar Ahmed Khan and others (2006 SCMR 1144). In the former case it is observed as under:--

> "....This is a sweeping and very wide argument and it is not so that every thing which finds mention in the registered deed or Revenue Record must invariably be accepted without proof of their execution, genuineness and authenticity. It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction to which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness and execution of that to which they relate unless the transaction covered by them is substantiated from independent and reliable source. Admissibility is to be distinguished from proof required by law for determining the execution and genuineness of document...."

In the recent era the apex Court in another authoritative judgment reported as Khan Muhammad v. Muhammad Din through LRs. (2010 SCMR 1351) has clinched the proposition in the following words:--

> "... It is settled principle of law that who lodges a fact must prove it on the well known maxim of Secundum allegata et probata. It is also settled principle of law that the appellant is a beneficiary of the aforesaid documents, therefore, it is the duty and obligation of the appellant to prove the documents as pointed out by the learned counsel in accordance with the provisions of Qanun-e-Shahadat Order, 1984. See 1979 SCMR 549 (Akhter Ali v. University of the Punjab), 1992 SCMR 2439 (Haji Muhammad Khan and others v. Islamic Republic of Pakistan). It is well settled principle of law that initial burden to prove execution of documents is on party which is

relying on documents. Once this onus is discharged, burden to prove factum of fraud or undue influence or genuineness of documents shifts to party which alleges fraud. The appellant, as mentioned above, had failed to discharge its initial onus to prove the documents mentioned hereinabove by the appellant……"

The mandate of law as well as dicta of the above referred judgments left no room that initial onus to prove the execution of the instrument was upon the petitioners/ plaintiffs who failed to discharge the same by producing any iota of evidence.

9. Moreover, the attestation of alleged sale deed was a subsequent event, but the transaction embodied therein must have been effected between the parties at some prior point of time and the petitioners/beneficiaries were under legal obligation to prove the same by producing cogent and convincing evidence. Ahmad Ali PW1 did not depose a single word in his statement-in-chief that transaction of sale had been settled in his presence between respondent/defendant No.3 and petitioners/plaintiffs against such and such consideration and specific token amount was paid by the petitioners/plaintiffs to the vendor. He also did not depose that when, where and before whom the alleged bargain was settled. Same is the position of the statement of Laskhar Ali PW2. Even Muhammad Sharif PW3, one of the petitioners/plaintiffs, did not depose that against what consideration, the petitioners had purchased the suit land. He also failed to point out exact date of settlement of alleged bargain as well as execution of the sale deed Exh.P1. In the absence of such elements, the transaction embodied in the disputed sale deed cannot be claimed to have been proved. It is settled principle of law that if any of the ingredients of the sale is missing, then the beneficiary has to suffer as it was his duty to plead and prove the same. In arriving at this conclusion, I am fortified by the dicta laid by the apex Court in the judgments reported as Mst. Hameeda Begum and others v. Mst. Irshad Begum and others (2007 SCMR 996) and Rab Nawaz and others v. Ghulam Rasool (2014 SCMR 1181).

10. When the evidence of the parties is put in juxtaposition the petitioners/plaintiffs miserably failed to prove the settlement of sale bargain as well as execution/attestation of sale deed Exh.P1 by producing relevant, cogent and convincing evidence and the statements of PW1 and PW2 as observed supra are nothing but hearsay as they were neither the attesting witnesses of Exh.P1 nor its signatory. So, the petitioners/plaintiffs failed to prove the transaction embodied in the alleged sale deed as well as its execution.

11. The other limb of the case is that the perusal of Exh.P1 reveals that it was scribed on 29.9.1961 and same was attested through local commission on the same day, who conducted the proceedings as per his endorsement at Lahore. The said local commission was also not brought into the witness-box by the petitioners/beneficiaries. There is not an iota of evidence available on record

regarding the filing of any application by the executant of the disputed sale deed to the Sub-Registrar for appointment of local commission and even no order for appointment of local commission was produced by the petitioners/plaintiffs on the suit file to prove that local commission had been duly appointed by the concerned authority while assigning any reason for attestation of disputed sale deed. The Registering Officer should have passed a speaking order for the issuance of local commission on a separate application, which would have been filed before him. If actually due to physical infirmity or on account of any other inability, the executant was not in a position to appear in person before the Registering Officer, then it was obligatory on the petitioners/vendees to bring the circumstances due to which the vendor could not appear personally by filing an application before the Registrar, who after due inquiry could issue commission and delegate his powers for attestation of an instrument.

12. As observed supra the petitioners/beneficiaries failed to prove that any such application was moved before the Registering Authority and he passed any detailed order in this regard. Even in the absence of statement of local commission as well as Sub-Registrar, it cannot be assumed that the powers of attestation were duly delegated to the local commission by the Sub-Registrar. In routine, the Registrar was not authorized to further delegate his powers to a local commission for the attestation of an instrument without assigning any justification. So, the attestation of the disputed sale deed through Commission has also damaged the case of petitioners/plaintiffs.

13. The arguments of learned counsel for the petitioners/plaintiffs that statement of defendant No.2, DW-2 is also full of contradictions and on such grounds the learned trial court justifiably decreed the suit is ill founded. It is settled by now that a party cannot take benefit of the weaknesses of his adversary and he has to prove his case on his own strength. In this respect reference may be made to the judgments reported as Sudhangshu Bimal Biswas v. MD. Mustafa Chowdhury (1968 SCMR 213) and MD. Anwarullah Mazumdar v. Tamina Bibi and others (1971 SCMR 94).

14. The next submission of learned counsel for the petitioners/plaintiffs that copy of letter written by Mian Bashir Ahmad father of respondent/defendant No.2 is also a sufficient proof that the property had changed hands, is also not tenable on the grounds that the alleged letter is nowhere found mentioned in the contents of plaint and any evidence beyond the scope of pleading if led on the record of the suit file, same has to be ignored. Reliance can be placed upon the judgment reported as Muhammad Wali Khan and another v. Gul Sarwar Khan and another (PLD 2010 SC 965). Neither the said letter was duly tendered in evidence nor proved by summoning its author or the signatory.

15. The other argument of learned counsel for the petitioners that by producing copy of Fard Taqseem (Ex:P4), the petitioners/plaintiffs fully proved that the

disputed property had been transferred to them through sale deed (Ex:P 1) is also misconceived as the basic document/sale deed allegedly executed in favour of defendant No.3 is missing and no evidence was led by the plaintiffs regarding the factum of proof of transfer of property in favour of defendant No.3. The entries of Fard Taqseem (Ex:P4) cannot be made basis for proof of transfer of disputed property by Mian Manzar Bashir in favour of Mrs. Sibghat Ullah defendant No.3 and the contents of "Khana Kafiat" thereof were required to be proved by production of relevant revenue officials, who endorsed the same, but neither the said officials were got summoned nor the original record was produced before the learned trial court by the petitioners/plaintiffs. As Fard Taqseem (Ex:P4) was not duly proved by the petitioners/plaintiffs, the learned lower appellate court has rightly ignored the same while passing the impugned judgment and decree.

16. It is also pertinent to mention that the disputed sale deeds were attested on 2.10.1961, 10.10.1974 and 2.3.1976 whereas the suit in hand was filed on 10.1.1989, which was badly time barred as the limitation for filing such a suit was only six years as provided under Article 120 of the Limitation Act, 1908. The limitation provided by the Statute to perform any action or agitate the remedy within the specified period is not a mere technicality, but it is a mandatory statutory provision and treating it as a formality would tantamount to declare the entire Limitation Act, 1908 redundant the object whereof is to help the vigilant and not the indolent. The availing of remedy by the aggrieved party beyond the period of limitation prescribed, therefore, by the Statute creates a valuable right in favour of the opposite party. In such an eventuality delay of each and every day has to be explained by the defaulting party to the satisfaction of the Court, which cannot be condoned as a matter of right in routine, but arbitrary exercise of discretion would cause serious prejudice to the opposite party. In Manzoor Afzal Pasha and another v. DHA, Karachi and another (2008 SCMR 877) the suit was filed after the lapse of more than thirteen years and the plaint was rejected by invoking the provisions of Order VII, Rule 11 of the Civil Procedure Code, 1908.

17. On the touchstone of above discussion, the findings recorded by the learned lower appellate court are unexceptional which are maintained. The learned counsel for the petitioners is unable to point out any infirmity or perversity in the impugned judgment and decree passed by the learned lower appellate court, who has discussed all aspects of the case and no good ground is found to warrant interference by this Court in the exercise of revisional jurisdiction. Resultantly, the instant civil revision having no force is dismissed.

18. Before parting with this judgment, it is pertinent to observe that the revenue hierarchy often fails to perform their duty for the attestation of deeds/instruments and delegate their powers to the Local Commission for attestation thereof without assigning any reason, which creates doubts about the veracity of such instrument and the parties are constrained to knock the door of Court of law for the

determination of their legal rights. The Registrar of this Court is directed to circulate a copy of this judgment to all the District Registrars, working in Punjab through the Inspector General of Registration Punjab, Lahore for observing the criteria pointed out by this Court in paragraphs Nos. 12 and 13 of this judgment for attestation of deeds/ instruments through Local Commissions so that the valuable rights of the parties can be secured while saving them from further endless litigation.

ZC/M-336/L Revision dismissed.

2017 Y L R 844
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. KAMALAN BIBI and others---Petitioners
Versus
RAB NAWAZ and others---Respondents

C.R. No.3625 of 2010, heard on 16th February, 2016.

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

----S. 12---Qanun-e-Shahadat (10 of 1984), Arts. 54, 55, 56 & 58---Suit for specific performance of contract---Agreement to sell---Proof of---Procedure---Unilateral agreement---Scope---Nothing was on record as to when and in whose presence bargain was settled and consideration amount was paid to the defendant---Scribe or anybody who did not put his signature on the document as attesting witness could not be considered as attesting witness---Copies of non-judicial record could not be received in evidence without the proof of signature/thumb impression and writings of the person alleged to have signed/thumb marked or written the same even if such documents brought on record were accepted without objection---If a party was in possession of some document/evidence in support of his claim but he did not produce the said document/evidence then presumption would be that the evidence not produced and withheld, if was produced, would have gone against his version---Departmental/tribunal proceedings had presumption of truth but defendant had also a right to rebut the same by raising defence---Even judicial proceedings could be attacked under Art.85 of Qanun-e-Shahadat, 1984---Alleged agreement to sell was unilateral in nature having not been signed by the vendees which was not enforceable under the law---No decree for specific performance could be granted in the present case---Impugned judgments and decrees passed by both the courts below were result of mis-reading and non-reading of evidence---Both the courts below had erred in law while decreeing the suit which could not be sustained---Impugned judgments and decrees passed by both the courts were set aside and suit was dismissed---Revision was allowed in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din through legal heirs and others PLD 2011 SC 241; Farid Bakhsh v. Jind Wadda and others 2015 SCMR 1044; Muhammad Yousaf Khan v. S.M. Ayub and 2 others PLD 1973 SC 160; Mst. Barkat Bibi v. Muhammad Rafique 1990 SCMR 28; Gulshan Hameed v. Kh. Abdul Rehman 2010 SCMR 334 and Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---High Court could not interfere with the concurrent findings of facts except when there was mis-reading and non-reading of evidence and violation of law.

Nazim ud Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 and Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001 rel.

Muhammad Afzal for Petitioners.

Ch. Nazir Ahmad Kamboh for Respondents.

Date of hearing: 16th February, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The leadings facts of the case are that respondents Nos.1 and 2 (hereinafter to be referred as plaintiffs) instituted a suit for declaration through specific performance of agreement against the petitioners (hereinafter to be referred as defendants) before the learned trial court with the assertion that Muhammad Jaffar (herein after to be referred as defendant No. 1) predecessor-in-interest of the defendants, was allottee of property measuring 56 Kanals 7 Marlas, who settled a bargain of sale regarding property measuring 52 Kanals 7 Marlas out of said property against a consideration of Rs.730,000/-at prior point of time and thereafter, defendant No.1 again agreed to sell his remaining allotted property measuring 4 Kanals against a consideration of Rs.70,000/-and after having received this consideration the agreement Exh.P1 and receipt Exh.P2 were executed by him on 14.2.2001 in favour of the plaintiffs; that while executing Exh.P1 and Exh.P2 the sale, settled at earlier point of time, was also acknowledged by defendant No.1; that on 07.8.2002, defendant No.1 moved an application under section 19 of the Colonization of Government Lands (Punjab) Act, 1912 before the District Officer, Revenue for transfer of the disputed property to the plaintiffs and while doing so, execution of agreement (Exh.P1) was also acknowledged by him, but after acquiring proprietary rights, defendant No.1 refused to acknowledge the agreement, whereupon the plaintiffs were compelled to file the above referred suit, which was contested by defendant No.1 by filing his written statement, wherein he averred that neither any bargain of sale of disputed land was settled nor the plaintiffs had paid any sale price to him. He further pleaded that plaintiffs being tenants were in possession of the suit property and that no application under section 19 of the Colonization of Government Lands (Punjab) Act, 1912 was made by him before the revenue hierarchy. It was also asserted in the written statement by defendant No.1 that agreement Exh.P 1 and receipt Exh.P2 were forged and

fictitious documents. While facing with the contest, the learned trial court captured the disputed area of facts by settling the following issues:--

1. Whether the disputed property was allotted to the defendant under dakheel kari scheme? OPP

2. Whether the defendant No.1 agreed to sell the disputed property to the plaintiffs and executed agreement dated 14.2.2001 by receiving Rs.8 lacs from the plaintiffs? OPP

3. Whether the plaintiffs are entitled to get incorporation of their names in the revenue record as being owners under the alleged agreement dated 14.2.2001?OPP

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

5. Whether the plaintiffs have not come to the court with clean hands? OPD

6. Whether the plaintiffs are estopped to file the instant suit by their words and conduct? OPD

7. Whether this court has got no jurisdiction to entertain and decide the suit? OPD

8. Whether the suit is hit by Order-II Rule-2 of C.P.C.? OPD

9. Relief.

2. The learned trial court after collecting and appreciating evidence of the parties decreed the suit vide judgment and decree dated 28.4.2010, which was maintained when appeal filed by the defendants was dismissed by the learned lower appellate court vide judgment and decree dated 09.9.2010. Hence the instant civil revision.

3. It is argued by the learned counsel for the defendants that both the courts below committed material irregularity while decreeing the suit of the plaintiffs; that the judgments and decrees passed by the courts below are not free from taint of misreading and non-reading of evidence and the impugned judgments and decrees are based on surmises and conjectures. It is also added by him that learned lower

appellate court without rendering independent findings on each and every issue violated the mandate of Order XLI Rule 31 of the Code of Civil Procedure, 1908 and the same, on the face of it, is not sustainable. He has lastly prayed for acceptance of the instant civil revision, setting aside of the impugned judgments and decrees and for dismissal of the suit.

4. Conversely, the learned counsel for the plaintiffs has supported the impugned judgments and decrees passed by the courts and prayed for dismissal of the instant civil revision.

5. Arguments heard and record scanned.

6. While glancing over impugned judgment dated 09.9.2010 passed by District Judge, Toba Tek Singh, it is straightaway noticed that the said court neither reflected the issues framed by the learned trial court, nor discussed them independently therein. Additionally, he did not care to appreciate, even mentioning the evidence led by the parties on suit file. He was the last court of fact and heavy responsibility was upon him to render a judgment as per mandate of Order XLI Rule 31 of the Code of Civil Procedure, 1908, but he decided the appeal in clandestine and fanciful manner while concluding as under:--

> "7. I have seen Ex.P1. Date of its execution is written on it. If time is not written, it makes no difference. No doubt to prove a private document two marginal witnesses are required. Sabir appeared as PW-1. According to death certificate of Riaz, Ex.P. 14, he died on 15.9.2003. Therefore, Saeed Hashmi scribe, PW-4, is competent witness when he stated in cross-examination that parties were known to him. In the light of statements of PW-1 and PW-4 this court is of the view that nothing is wrong with the impugned judgment and decree of learned trial court. There is no force in this appeal. Therefore, the decision of the learned trial court is upheld and this appeal is dismissed with costs. Record of this appeal be consigned to record room and that of learned trial court be returned immediately with a copy of this judgment."

The study of impugned judgment has left nothing to observe that the District Judge, who should be the role model for his team subordinates, neither took pain to scan the evidence available on file nor appreciated it as per spirit of law and did not pay any heed to resolve the controversy among the parties in just and fair manner. I have the option to remand the appeal to him for fresh decision while setting aside his

judgment, but when entire evidence is available on file and the parties are involved in the litigation since the year 2004 (when the suit was instituted before the learned trial court), it will be appropriate to decide the lis on my own end instead of throwing the parties for another round of litigation.

7. The study of plaint as well as agreement Exh.P1 reveals that prior to execution of Exh.P1, the major portion of the disputed property measuring 52 Kanals 7 Marlas was allegedly purchased by the plaintiffs from defendant No.1 but admittedly neither the specific date/period nor the names of the witnesses were disclosed therein to prove that when the said bargain was settled and before whom the consideration of Rs.730,000/-was paid to defendant No.1. The agreement Exh.P1 was executed at a subsequent point of time on 14.2.2001 when rest of the property measuring only 4 Kanals was allegedly purchased by the plaintiffs against a price of Rs.70,000/-. No doubt in the said document, the earlier bargain/sale was found to be acknowledged by defendant No.1 but the execution of agreement (Exh.P1) was specifically denied by him and to prove the transaction of sale as well as execution of agreement (Exh.P1), one of the plaintiffs, namely, Rab Nawaz appeared as PW2, whose statement-in-chief is completely silent to the extent that before whom the bargain of sale at two different times was settled. He only deposed that sale consideration was paid to the vendor in the presence of Sabir Ali and Muhammad Ramzan. Admittedly, Muhammad Ramzan, out of above two witnesses, is neither signatory of agreement (Exh.P1) nor he was produced by the plaintiffs to prove that in his presence, sale consideration was paid. The plaintiff admitted in his cross-examination that at the time of execution of contract no sale consideration was paid. He further deposed that bargain was settled in the year 2000, whereas Exh.P1 is found to be scribed on 14.2.2001. Sabir Ali who is one of the attesting witnesses of agreement (Exh.P1) came into the witness-box as PW l and deposed that at the time of execution of agreement and receipt Exh.Pl and Exh.P2, sale consideration was not paid rather at a prior point of time, the same was made to the vendor in the village. However, he specifically conceded in his cross-examination that Muhammad Riaz, the other attesting witness of Exh.Pl and Exh.P2, did not sign the said documents in his presence. Muhammad Saeed Hashmi Deed Writer PW4, during his examination-in-chief also deposed that Muhammad Riaz was neither present nor he put his thumb mark on the said documents in his presence when he scribed the agreement and receipt (Exh.P1 and Exh.P2). He also conceded that no sale consideration was paid in his presence. Admittedly, the other attesting witness namely Muhammad Raiz was not produced by the plaintiffs to prove the valid execution of Exh.P1 and Exh.P2. The argument of learned counsel for the plaintiffs that Muhammad Riaz had already died on 5.9.2003 prior to

recording of evidence of the parties, which was proved by production of copy of death certificate Exh.P11. No doubt, the said witness had already passed away, but to verify his signatures over Exh.P 1 and Exh.P2 any person familiar with his signature could be brought into the witness-box to verify his signatures. Besides these witnesses, Lal son of Muhammad Ali was also examined by the plaintiffs, who endorsed the proceedings of application filed by defendant No.1 under section 19 of the Colonization of Government Lands (Punjab) Act, 1912, which were conducted before the revenue authority but he too admitted that no sale price was paid by the plaintiffs to defendant No.1 in his presence. No other witness including the stamp vendor, who issued the stamp paper of Exh.P1 was produced by the plaintiffs before the learned trial court.

8. The argument of learned counsel for the plaintiffs that by producing scribe PW4 as well one of the attesting witnesses (PW1), the plaintiffs succeeded to prove the execution of above documents, is misconceived. It is by now well settled principle that a scribe or anybody else who did not put his signatures on the document as attesting witness cannot be considered as such. Reliance can be placed upon the judgment reported as Hafiz Tassaduq Hussain v. Muhammad Din through legal heirs and others (PLD 2011 SC 241) wherein his lordship Mian Saqib Nisar while authoritatively clinching the said proposition held that a scribe cannot be considered as a substitute for the attesting witness unless he signed the document being attesting witness also. The same view has once again been affirmed by the apex Court in the recent judgment reported as Farid Bakhsh v. Jind Wadda and others (2015 SCMR 1044).

9. The plaintiffs prior to filing the suit in hand almost five months ago on 8.6.2004 also filed a suit for permanent injunction (Exh.P5) against the defendants on the basis of sale dated 14.2.2001 but regarding the property measuring 112 Kanals 13 Marlas, which was dismissed vide order dated 27.11.2004 on account of non-deposit of diet money whereas in the suit in hand they claimed their rights on the basis of agreement of the same date regarding property measuring 56 Kanals 7 Marlas. The contradiction regarding total measurement of the property in both the suits instituted by them with a difference of almost five months of time, has also made the veracity of agreement (Exh.P1) as doubtful.

10. The contention of the learned counsel for the plaintiffs that the plaintiffs succeeded to prove that defendant No.1 made an application under section 19 of the Colonization of Government Lands (Punjab) Act, 1912 before District Collector and he not only appeared before the revenue hierarchy but also acknowledged the

execution of the agreement to sell (Exh.P1) by making his statement through production of certified copies of Exh.P3 to Exh.P6 is also not tenable. Defendant No.1 by filing an application on 03.12.2002 before the revenue hierarchy had not only denied the filing of said application under section 19 of the Act ibid rather he also denied the execution of agreement (Exh.P1) in favour of the plaintiffs, and the application filed under section 19 of the Act ibid was ultimately dismissed. The said stance had also been followed by defendant No.1 in his written statement as well as during statement got recorded by one of the legal heirs of defendant No.1. In such scenario the plaintiffs were required to prove that defendant No.1 not only filed the said application but also got recorded his statement before the revenue authority. Admittedly, the certified copies of Exh.P3 to Exh.P6 are not copies of judicial record, which could not be received in evidence without the proof of signatures/thumb impression and writings of the person alleged to have signed/thumb marked or written the same, even if, such documents brought on record are accepted without objection. Reliance is placed upon the judgment reported as Muhammad Yousaf Khan v. S.M. Ayub and 2 others (PLD 1973 SC 160). The plaintiffs only produced Lal (PW3) to prove that in his presence defendant No.1 got recorded his statement before the revenue officer but he, too, admitted in his cross-examination that no sale consideration was paid to defendant No.1 in his presence and at the time of his statement neither the original record was before him nor his solitary statement is sufficient to prove that defendant No.1 preferred any such application or he made the statement. The plaintiffs neither got summoned the original record of the application filed under section 19 of the Act ibid from the custodian of the record nor confronted the same to the legal heir of defendant No.1 when he appeared before the learned trial court to make his statement. The revenue officer/official could also be brought into the witness-box by the plaintiffs to negate the stance of defendant No.1 that he had neither made any application nor recorded any statement to acknowledge the sale in favour of the plaintiffs. This best evidence despite its availability was withheld by the plaintiffs without any justification. The settled legal position is that if a party is in possession of some document/evidence in support of his claim but he does not produce the said document/evidence, the presumption would be that the evidence not produced and withheld by him, if was produced, it would have gone against his version. Additionally, the plaintiffs also did not make any application for the comparison of alleged thumb impression appearing on the said application or against his statement made before the revenue authority. It is clear to my mind that departmental/tribunal proceedings attain presumption of truth but defendant No.1 has also a right to rebut the same by raising a defence. Even the judicial proceedings which have relevancy

and presumption under Articles 54, 55 and 56 of the Qanun-e-Shahadat Order, 1984 can be attacked under Article 58 of the Order ibid. The said scheme of law can be made applicable in the instant case. Furthermore, the proceedings before the revenue hierarchy came to an end without its logical conclusion. In view of the specific denial of the deceased defendant No.1 contained in the written statement that he neither made application nor made any statement before the revenue hierarchy, it became incumbent upon the plaintiffs to prove their stance otherwise but they failed to do so.

11. The other limb of the case is that bare perusal of agreement dated 14.2.2001 (Ex:P1) reveals that it was unilateral in nature having not been signed by one of the parties i.e. vendees, which is not enforceable under the law. In arriving at this view, this court is fortified by the dictum laid down by the august Supreme Court of Pakistan in the judgment reported as Mst. Barkat Bibi v. Muhammad Rafique (1990 SCMR 28) and the operative para thereof is reproduced hereunder:--

> "A perusal of the above Iqrarnama "shows that there is no reference made therein specifically to the exact consideration for the agreement. Moreover, we observe that it is a unilateral offer made by Muhammad Din to re-convey the land as soon as they (the vendors) themselves have raised the money. No indication is to be found in the document that this offer was accepted by the respondents for no one on the side of the respondents has signed this "Iqrarnama" in token of its acceptance. It was no more than a proposal because unless the person to whom the offer is made signifies his willingness to accept it, the proposal does not, in law, ripen into an agreement. Now it is only an "agreement", as the term is understood in law, which can be enforced by a suit for specific performance. Accordingly, it is only if the so-called "Iqrarnama" qualified as an agreement would it have the effect of creating a legal relationship between the parties so as to give rise to jural, as opposed to moral, obligations and then only would a suit for specific performance be maintainable on its basis. The so-called ""Iqrarnama" dated 24.7.1953, on close examination, however, does not qualify to be an "agreement". Hence a suit to specifically enforce it was not competent."

This view has also been strengthened by the apex Court in the judgment reported as Gulshan Hameed v. Kh. Abdul Rehman (2010 SCMR 334) while observing that an agreement is required to be signed by both the parties and if it is not signed by anyone of the parties, then the same cannot be enforced as per law. Even in the

recent judgment delivered by the apex court in case styled as Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187) it has been observed as under:--

> "Thus for the purposes of a valid contract there should be the meeting of minds of the contracting parties. 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."

12. On the touchstone of above discussion, there is no hesitation to hold that the agreement (Ex:P1) was unilateral in nature, which was not enforceable as per law and a decree for its specific performance cannot be granted.

13. At the fag end of his arguments, the learned counsel for the plaintiffs has submitted that the concurrent findings of the courts below cannot be disturbed by this court while exercising revisional jurisdiction provided under section 115 of C.P.C. The said contention is also not tenable as both the judgments and decrees having been found to be the result of misreading and non-reading of evidence as well as non-adherence to the law applicable in this regard are not sustainable. It is correct that normally this Court does not interfere in the concurrent findings of the fact recorded by two courts below, but when there is gross misreading and non-reading of evidence and patent violation of the law is 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. Sheikh Zia-ul-Qamar and others (2016 SCMR 24), and Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001).

14. So, this court can decide in which cases the interference is warranted. From the discussion above, I have no hesitation in my mind to observe that both the courts below have failed to analyze the facts and law on the subject and committed grave

irregularity and illegality while passing the impugned judgments and decrees, which are reflective of misreading and non-reading of evidence. The onus to prove the valid execution and contents of the disputed document was upon the beneficiaries/plaintiffs, who failed to discharge the said onus, but both the courts below have omitted to take into consideration the said aspect of the case, which has rendered the judgments and decrees passed by them illegally and unlawfully having failed to exercise the jurisdiction vested to them in a judicious manner. Both the courts below have erred in law while decreeing the suit filed by the plaintiffs while misinterpreting the evidence on the record, which has rendered the impugned judgments and decrees patently illegal, unlawful and perverse as well as without jurisdiction, which cannot be sustained in the eyes of law.

15. Accumulative effect of the above discussion is that the instant civil revision is accepted, impugned judgments and decrees passed by the courts below are hereby set aside and suit filed by the plaintiffs is dismissed with costs throughout.

ZC/K-14/L Revision allowed.

2017 Y L R 1249
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MOHAMMAD HUSSAIN---Petitioner
Versus
ALLAH DITTA---Respondent

Civil Revision No.1790 of 2009, heard on 20th October, 2016.

(a) Punjab Land Revenue Act (XVII of 1967)---

----S.42---Suit for declaration---Oral sale---Ingredients---Mutation of oral sale---Proof---Requirements and procedure--- Rapt roznamcha--- Scope--- Contention of plaintiff was that sale mutation was result of fraud and misrepresentation---Suit was dismissed concurrently---Validity---Entries in the mutation had no presumption of correctness prior to incorporation in the record-of-rights---Such entries were admissible in evidence but these required to be proved by the person relying upon it independently through affirmative evidence---Oral transaction reflected in mutation entries neither conferred the title in favour of its beneficiary nor could establish the same---When plaintiff had made statement on oath and alleged commission of fraud in attestation of mutation and denied the transaction reflected therein then onus would shift upon its beneficiary to prove the valid attestation as well as transaction embodied therein---When any witness of mutation had died, beneficiary would be bound to produce any person familiar to his thumb impression to verify it on the disputed mutation---Defendant had failed to prove the payment of sale price to the plaintiff---If payment of consideration of alleged sale had not been proved on record, there could be no sale in the eye of law---Defendant had not been able to establish on record the essential elements of valid sale---If any of the ingredients of sale was missing then vendee had to suffer---Vendee had failed to produce Revenue Officer who attested the mutation in his favour---Best evidence had been withheld by the defendant---Revenue Officer was the best person who could prove the valid attestation of mutation---Party knowing whole circumstance of the case should give evidence on his behalf and to submit for cross-examination---Vendee's non-appearance in the witness box would be possible circumstance going to discredit the truth of his version---Defendant by not appearing in the witness box had failed to discharge the onus shifted on him---Non-appearance of vendee before the Court had created doubts with regard to attestation of oral sale mutation---Statement of special attorney was liable to be ignored as he was neither witness of sale mutation nor any bargain was finalized before him---Plaintiff having affixed his thumb impression on a revenue paper could not be considered sufficient to declare that the same was obtained for attestation for oral sale mutation---Rapt roznamcha did not bear signatures of alleged vendor or vendee which was a requirement of law---Rapt roznamcha had no presumption of truth unless and until its maker was produced to prove the same---Vendee had failed to prove recording of event of sale in the

register roznamcha waqiati, attestation of oral sale mutation as well as transaction of sale---Findings recorded by the courts below were result of mis-reading and non-reading of evidence which were set aside---Suit was decreed---Revision was allowed in circumstances.

Mst. Hameeda Begum and others v. Mst. Irshad Begum and others 2007 SCMR 996; Khan Muhammad v. Muhammad Din through L.Rs. 2010 SCMR 1351; Feroze Khan and others v. Mst.Waziran Bibi 1987 SCMR 1647; Roshan Din and others v. Abdul Qayum and others PLD 1979 SC 890; Haji Abdullah Khan and others v. Nisar Muhammad Khan and others PLD 1959 Pesh. 81; Abdul Hameed v. Mst. Aisha Bibi and another 2007 SCMR 1808; Mst. Raj Bibi and others v. Province of Punjab through District Collector Okara and 5 others 2001 SCMR 1591; Messrs Islamabad Farming Cooperative Society and others v. Ghulam Abbas Khan and others 2011 SCMR 153; Shahid and 2 others v. The State and others 1996 SCMR 1386 and Zulfiqar and others v. Shahadat Khan PLD 2007 SC 582 rel.

(b) Punjab Land Revenue Act (XVII of 1967)---

----S. 42---Mutation---Purpose---Mutation was sanctioned through summary proceedings intended to keep the record update for the collection of land revenue.

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

----S. 115---Revisional jurisdiction of High Court---Scope---High Court could not interfere with concurrent findings of fact unless same were based on mis-reading or non-reading of evidence.

Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

Iqbal Ahmad Malik for Petitioner.

Ch. Tanvir Ahmad Hinjra for Respondent.

Date of hearing: 20th October, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This revision petition under section 115 of the Code of Civil Procedure, 1908 is directed against judgment and decree dated 4.10.2005 passed by learned trial court and judgment and decree dated 25.9.2009 delivered by learned lower appellate court, through which, declaratory suit as well as appeal filed by present petitioner was dismissed respectively.

2. The brief facts of the case are that petitioner on 18.7.2001 filed a declaratory suit before learned trial court against respondent/defendant with the assertion that subject land measuring 22-kanals 4-marlas situated in Mauza Tibbi Jond Singh, Tehsil Pakpattan was owned by him and respondent wanted to get the same mortgaged by paying Rs.50,000/- and they went to Aman Ullah, Halqa Patwari to enter a Rapt in this regard, where respondent paid an amount of Rs.7000/- to petitioner. The remaining mortgage money was to be paid before Tehsildar at the time of attestation of mutation and delivery of possession to respondent. Thereafter, it was heard by petitioner that oral sale mutation No.501 (Ex:P8) had been got attested by respondent through connivance of revenue officials, while getting benefit of his illiteracy; that neither the disputed land was sold nor any sale consideration was received as no bargain of sale was struck among the parties, which being result of fraud, misrepresentation and collusion was assailed. The said suit was contested by respondent and learned trial court after capturing the disputed area of fact, framed the following issues:--

> "1. Whether the suit of the plaintiff is liable to be dismissed due to non-affixing of court fee? OPD
>
> 2. Whether the plaintiff has filed a false and frivolous suit just to harass defendant and in case of dismissal the defendant is entitled to recover Rs.25000/- as special costs? OPD
>
> 3. Whether the plaintiff is estopped by his act and conduct to file the suit? OPD
>
> 4. Whether the mutation of sale No.501 dated 24.5.2001 is result of fraud and against the facts? OPP
>
> 5. Whether the plaintiff is entitled to decree of suit as prayed for? OPP
>
> 5-a. Whether the plaintiff is in possession of the property in dispute? OPP
>
> 5-b Whether any contract of mortgage was agreed upon between the parties? OPP
>
> 5-c Whether the plaintiff received amount of Rs.7000/- as earnest money, in view of agreement of mortgage? OPP
>
> 5-d Whether the plaintiff got registered Rapt Roznamcha Waqiati in favour of defendant and mutation of sale No.501 dated 24.5.2001 is with consideration and lawful? OPD
>
> 6. Relief."

3. The learned trial court after collecting stock of evidence of the parties dismissed the suit and the same was maintained when appeal filed by the petitioner was disallowed by learned lower appellate court vide judgment and decree referred in para 1 ante.

4. Learned counsel for the petitioner has submitted that petitioner is an illiterate person and respondent while practicing fraud got attested impugned mutation; that respondent being beneficiary of mutation and transaction neither appeared himself nor produced the revenue officer, who attested Ex:P8, but both the courts below without capturing the said aspect of the case erred in law while dismissing the suit of the petitioner. He while drawing attention of this court toward the statement of Mohammad Hussain, DW5 submitted that the said witness was neither signatory of the mutation nor as per his own deposition, he was available at the time of alleged transaction, but even then, is the learned courts below while relying upon his statement were wrong to hold that the respondent succeeded to prove the sale transaction. He also highlighted that Sakhi Mohammad, cousin of the respondent being DW4 did not mention that Mohammad Yasin, DW8 was also present at the time of transaction, but without considering the said portion of the statement of DW4, the learned courts below erred in law while relying upon the statement of DW8; that the statement of concerned Patwari being PW4 and DW3 left no room to believe that 'Rapt Roznamcha Waqiati' qua the entry of transaction in the relevant register was not made by him, but the learned courts below while misinterpreting the evidence available on record passed the impugned judgments and decrees which are not sustainable.

5. Conversely, the learned counsel for respondent while supporting the impugned judgments and decrees submitted that respondent through production of qualitative and quantitative evidence not only succeeded to prove valid attestation of mutation, but also payment of sale consideration. He emphasized with great vehemence that the concurrent findings rendered by the learned two courts below could not be checked by this court while exercising jurisdiction under section 115 of the Code of Civil Procedure, 1908.

6. Arguments heard. Record perused.

7. Before embarking upon merits of the case and to proceed with the determination of respective stances of the parties, I feel it appropriate to comment on the principle dealing with oral transfer of immovable property effected through mutation. It is well established by now that mutation is always sanctioned through summary proceedings and is intended to keep the record update for the collection of land revenue. Such entries are made in the register concerned under section 42 of Land Revenue Act, which attains no presumption of correctness prior to incorporation in the record of rights. No doubt that the entries in the mutation are admissible in evidence in a case, but these require to be proved by the person

relying upon it independently through affirmative evidence because an oral transaction reflected therein neither confers the title in favour of its beneficiary nor can establish the same.

8. Reverting, now to the merits, it is the basic case of the petitioner as embodied in the plaint that subject property had been mortgaged in favour of respondent against a consideration of Rs.50,000/-, who after paying Rs.7000/- fraudulently got attested disputed mutation of oral sale and to discharge the onus, he himself while appearing as PW1 stated on oath in lines with the contents of plaint. Nothing adverse could be brought on record despite lengthy cross-examination by respondent. The moment petitioner made statement on oath and alleged commission of fraud in attestation of disputed mutation and denied the transaction reflected therein, the onus was shifted upon its beneficiary relying upon the entries of mutation to prove the valid attestation as well as transaction embodied therein and for this purpose he examined Sakhi Mohammad (DW4) one of the attesting witnesses of the disputed mutation, who admittedly was cousin of respondent and deposed that on 23.5.2001 bargain among the parties was settled in his house in his presence against a consideration of Rs.4,12,500/-, which was paid to petitioner through him by respondent. It is interesting to note that his deposition is silent to the extent that Mohammad Yasin (DW8) and Nazir Ahmed (DW5) were also present at that stage. However, he added that Mohammad Anwar and Mohammad Yasin along with Nazir Ahmed also accompanied them, when they approached the Patwari for entry of 'Rapt Roznamcha Waqiati', who on the statement of the petitioner made an entry in the daily diary, issued the challan for deposit of transfer fee, which was deposited by the respondent on the same day and it was delivered to the concerned Patwari on 24.5.2001 when he along with the Revenue Officer and Qanoongo came at the dera of Hakim Ali. Then after recording statement of petitioner in the presence of Mohammad Anwar, Hakim Ali, Yasin and Nazeer besides him the mutation was attested. It is eye catching that said star witness did not depose that on 23.05.2001 when the entry was made in the daily diary, the patwari also entered the mutation, but the perusal thereof divulges that it was also entered on that day.

9. The petitioner also produced Nazir Ahmad, DW5, who admittedly is not an attesting witness of the questioned mutation and in his statement-in-chief it was straightaway admitted that he was not present at the time of settlement of sale transaction, rather he explained that sale consideration was paid after 2/3 days prior to the settlement of bargain. The statement of Nazir Ahmad is contradictory to the deposition of Sakhi Mohammad, DW4, who deposed that on 23.05.2001 the transaction was settled at his residence and entire sale consideration was paid then and there. The deposition of DW5 is also militant to the documentary evidence i.e. Rapt Roznamcha Waqiati (Exh.P 3/3) and mutation in dispute (Exh.P8). As per Exh. P3/3 the sale price was paid on the day when it was entered i.e. on 23.05.2001 whereas, as per Exh.P8, which was attested on 24.05.2001 the said price had already been received by the petitioner. If statement of DW5 is admitted as correct, then it

would be presumed that sale consideration was paid to the petitioner on 25th or 26th day of May, 2001, meaning thereby that till attestation of mutation, no amount was paid to the vendor. So the statement of Nazir Ahmad, DW5 has totally dislodged the case of the respondent. The statement of Haji Mohammad Yasin, DW8, who is also not signatory of mutation under challenge in any capacity, is also contrary to the stance of respondent when he deposed in opening lines of his cross-examination that transaction was settled 3/4 days prior to the attestation of mutation, meaning thereby that it was struck on 20th or 21st day of May, 2001. He also admitted that he was not present when it was struck. No other witness was examined for the proof of settlement of bargain and payment of alleged sale consideration. No doubt, some of the official witnesses were brought into the witness-box by respondent, who had no direct nexus with the transaction, which was to be proved independently. Whereas, Mohammad Anwar, the other witness of the disputed mutation could not be examined by respondent as prior to recording of evidence he had already passed away. It is notable that learned trial court at prior point of time after initiating ex parte proceedings against respondent recorded ex parte evidence of petitioner and at that stage said Mohammad Anwar was alive, who put his appearance as PW2 and fully supported the stance of petitioner while deposing that subject property was mortgaged with respondent and no sale was effected among the parties, but unfortunately the said witness thereafter could not appear on account of his death. In such situation it was sine qua non for the beneficiary to produce any person familiar to his thumb impression to verify it on the disputed mutation, but such exercise was not done.

10. After thrashing the statements of private witnesses of respondent it is concluded, without shadow of doubt that he failed to prove the payment of alleged sale price to petitioner and if payment of consideration of alleged sale has not been proved on the record, then there can be no sale in the eye of law. The respondent has not been able to establish on record the essential elements of valid sale and if any of the ingredients is missing, then the respondent has to suffer as it was his duty being beneficiary of the transaction to prove the sale. In arriving at this view, I am fortified by the dictum laid down in the judgments reported as "Mst. Hameeda Begum and others v. Mst. Irshad Begum and others (2007 SCMR 996) and "Khan Muhammad v. Muhammad Din through L.Rs." (2010 SCMR 1351) wherein it has been held that there is left no cavil with the proposition that in case of transfer of immovable property executant having denied the transaction, onus of proof would shift to the beneficiary of the instrument. In the present case, the respondent also failed to produce the revenue officer, who had allegedly attested the mutation (Ex:P8) in his favour. He was the best person, who could prove the valid attestation of the mutation, wherein; even the alleged transaction of sale was incorporated, but the said best evidence was withheld by him.

11. The argument of learned counsel for the respondent that the revenue officer at the time of recording of evidence was not available, rather he had gone abroad, is

not tenable. Neither any documentary evidence was available on the record in this regard nor any application for summoning him or to appoint local commission for recording his statement by the respondent was tabled and only statement of DW4, one of the attesting witnesses was not sufficient to declare that respondent succeeded to prove valid attestation of mutation. Furthermore, there is no cavil with the preposition that it is the duty of the parties knowing whole circumstance of the case to give evidence on their behalf and to submit them for cross-examination. The respondent's non-appearance in the witness box would be strongest possible circumstances going to discredit the truth of his version. By non-appearance, therefore, he failed to discharge the onus and to reverse the onus of the pivotal issues to the petitioner despite the fact that he was available. The contention of learned counsel for the respondent that due to his ailment, he could not appear before the learned trial court is also without any substance. It is vivid from the statement of his attorney DW9 that on 17.09.2005, the respondent purchased the stamp paper from the stamp vendor and got executed power of attorney (Mark-A) in his favour. If respondent was able to approach the stamp vendor and the deed writer for execution of (Mark-A), then he could also appear before the learned trial court on 26.09.2005 when statement of his attorney being DW9 was got recoded before the court. No documentary proof regarding his ailment was produced on the suit file. Moreover, if it is presumed that the respondent was not able to approach the court, then through an application, the local commission could be got appointed for recording his statement but he deliberately avoided facing the cross-examination. In such state of affairs, the non-appearance of the respondent has created many doubts regarding attestation of oral sale mutation. Reliance is placed upon the case reported as "Feroze Khan and others v. Mst.Waziran Bibi" (1987 SCMR 1647), "Roshan Din and others v. Abdul Qayum and others" (PLD 1979 Supreme Court 890) and Haji Abdullah Khan and others v. Nisar Muhammad Khan and others" (PLD 1959 Peshawar 81). In the former judgment it is observed as under:--

> "So far as the other defendant-appellants are concerned, none of them appeared in the witness-box except Mir Afzal Khan. It is a Settled law that it is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. By non-appearance, therefore, the defendant-appellants except Mir Afzal Khan failed to discharge the onus or shift the onus on to the plaintiffs."

The statement of Muhammad Sharif, DW9, special attorney is also liable to be ignored as neither he was attesting witness of the sale mutation nor any other DW uttered a single word qua his presence when the alleged bargain was finalized.

12. The other argument of learned counsel for respondent that petitioner had admitted his thumb impression over the mutation (Ex:P9), therefore, the respondent

was not required to prove it, is misconceived. It is the stance of petitioner that he along with respondent had approached the revenue Patwari for entry of `Rapt Roznamcha Waqiati' qua mortgage transaction, but they while practicing fraud got attested oral sale mutation and in such scenario, the admission if any that petitioner affixed his thumb impression on a revenue paper that cannot be considered sufficient to declare that the same was obtained for attestation for oral sale mutation. Reliance in this respect is placed upon the judgment reported as "Abdul Hameed v. Mst. Aisha Bibi and another" (2007 SCMR 1808). Para No.5 of the said judgment is relevant which is reproduced hereunder:--

> 5. After hearing the learned counsel for the parties and perused the record with their assistance, we find that sole question requiring determination would be whether the admission of vendor of his thumb-impression on the agreement to sell was sufficient to prove its execution and contents, the answer is in the negative as the document purporting to create a right in the property must be proved to have been actually executed by the person who allegedly executed such document. It appears from the record that Din Muhammad was an illiterate person and without being aware of the contents of the document put his thumb-impression on it at the instance of his son in good faith with the "understanding that it was compound deed. This is a matter of common sense that in the normal circumstances, father would certainly trust his son and may act on his advice and thus in these circumstances, the inference drawn by the High Court that the vendor having no knowledge of the contents of the document, affixed his thumb-impression at the instance of his son with the impression that document pertained to the settlement regarding encroachment of the house was quite natural and denial of Din Muhammad to have put his thumb-impression on blank paper, would seriously reflect upon the genuineness of the agreement in question. In view thereof, the admission of Din Muhammad of his thumb-impression on the agreement in question, would not ipso facto prove its contents to raise the presumption of it being a genuine document to have the legal force. This may be seen that High Court having discussed the evidence in detail has held that the agreement to sell was not proved to have been executed by Din Muhammad and we in the given facts have no reason to differ with the conclusion drawn by the High Court. The learned counsel for the appellant has not been able to satisfy us that on the basis of evidence brought on record and in the facts and circumstances of the case, an equitable relief of specific performance could be granted to the appellant or the findings arrived at by the High Court was suffering from any mis-reading or non-reading of evidence or there was any other legal defect in the impugned judgment calling for interference of this Court.

13. The next contention of the learned counsel for respondent that petitioner in explicit terms through his pleadings and deposition averred/stated that it was

Amanullah, Patwari who entered the Rapt, Roznamcha Waqiati, in his diary while practicing fraud and it was incumbent for him to produce him, but he failed and an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, 1984 has to be drawn against him is also not tenable. As per available record, petitioner examined Abdul Ghaffar Patwari as PW4 who deposed that charge was handed over to him by Amanullah Patwari on 12.5.2001 and Rapt No.395 was entered by him in his register/diary on 23.5.2001. At this juncture, the learned counsel for the petitioner while claiming that the Rapt was not entered by PW4 requested the court for declaring him as hostile, which was acceded to and PW-4 was cross-examined by learned counsel for the petitioner, who conceded that there was difference of handwriting against the entries bearing Nos.398, 399 and 397 with the handwriting made against entries No.407 of his daily register, who further voluntarily stated that it might have been caused due to the change of pen. The learned trial court at this stage of cross-examination of its own procured two samples of the handwriting with different pens of PW-4, but prior to conducting its comparison, the respondent himself produced the said official as DW3 in his evidence and in response to first question of his cross-examination, he straightaway conceded that Rapt No.407 was not made by him in the relevant diary rather it was authored by his student on his dictation, which has left nothing to believe that the entry of Roznamcha Waqiati, was not made by the Patwari holding the charge at that relevant time. The student, who allegedly made the said entry was also not produced by the respondent to prove its contents. It is also visible from the perusal of the said entry (Ex-p-3/3) that it did not bear signatures of the alleged vendor or the vendee, which was a requirement of law. Reliance can be placed on the judgments reported as "Mst. Raj Bibi and others v. Province of Punjab through District Collector Okara and 5 others" (2001 SCMR 1591), "Messrs Islamabad Farming Cooperative Society and others v. Ghulam Abbas Khan and others" (2011 SCMR 153). It is also well established principle by now that Rapt Roznamcha Waqiati, attains no presumption of truth unless and until its maker is produced to prove the same. Reliance is placed on the judgments reported as "Shahid and 2 others v. The State and others" (1996 SCMR 1386), "Zulfiqar and others v. Shahadat Khan" (PLD 2007 SC 582). As a result of probe of the evidence of the respondent, this, court is of the considered view that he failed to prove recording of event of his sale in the Register Roznamcha Waqitai, attestation of oral sale mutation as well as alleged transaction of sale and both the courts below committed material irregularity and illegality while concluding otherwise, whose findings being outcome of misreading and non-reading of evidence are not sustainable in the eye of law.

14. At the fag end of his arguments, learned counsel for the respondent has argued that concurrent findings recorded by both the courts below cannot be interfered with by this Court while exercising revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908 is also misconceived. Although, the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under section 115 of the Code of Civil Procedure, 1908

if courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such view this court is fortified by the dictum laid down in the judgment reported as "Abdul Hakeem v. Habibullah and 11 others" (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:--

> "6. Before considering the contentions of the parties on merit, we would like to mention here that the scope of 'interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C. is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C. cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C. if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C. if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record."

This question has also been dealt with by the august Supreme Court of Pakistan in the judgment report as "Muhammad Anwar and others v. Mst. Ilyas Begum and others" (PLD 2013 Supreme Court 255) while holding that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law alone. So, this court can decide in which cases the interference is warranted.

15. Consequently, the instant civil revision is allowed impugned judgments and decrees passed by learned courts below being outcome of misreading and non-reading of evidence are hereby set aside and suit filed by the petitioner stands decreed with no order as to costs.

ZC/M-215/L Revision allowed.

2017 Y L R 2229
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD YOUNAS and another---Petitioners
Versus
GHAZANFAR ABBAS and 12 others---Respondents

C.R. No.3745 of 2014, heard on 2nd March, 2016.

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

---S. 42---Qanun-e-Shahadat (10 of 1984), Arts. 87, 100 & 129 (g)---Evidence Act (I of 1872), Ss. 76 & 68---Registration Act (XVI of 1908), S. 60---Suit for declaration--- Limitation--- Inheritance---Gift deed---Proof---Procedure---Document more than 30-years old---Scope---Fraud---Effect---Contention of plaintiffs was that gift deed in favour of defendants was based on fraud---Suit was dismissed by the Trial Court but same was decreed by the Appellate Court---Validity---Mere factum that signatures of Secretary Union Council as well as Nazim appeared on the death certificate of donor was not sufficient to hold that said document was admissible in evidence until original record was presented before the Trial Court to compare with the same---Neither Secretary Union Council nor Nazim who put their signatures on the death certificate were brought to the witness-box to prove the contents of said document---Copy of death certificate was to be taken out of consideration---Production of document on record and its proof were two independent aspects---Death certificate could not be treated to be attested copy only for the reason that same was signed by the Secretary/Nazim---No appending certificate on the said document was available which could satisfy that it was a correct copy of the original---Mere fact that no objection was taken to said certificate at the time of its exhibition would not make the same admissible in evidence which otherwise could not be admitted under the law---Defendants had withheld the best evidence which was available to them in the shape of Custodian of Register of death entries and an adverse inference would be drawn against them---Copy of death entry was not copy of judicial record which could not be received in evidence without the proof of signatures and writing of the person alleged to have signed or written the same even if such documents brought on record were exhibited without objection---Whenever execution or validity of a registered document was denied then such document would lose sanctity of being presumed to be correct---Veracity of such document would depend upon quantum and quality of evidence to be produced to prove its execution---Only restricted presumption would attach that registration proceedings were regularly and honestly carried out by the attesting officer---Said presumption attached to its certificate was always rebutable---Whenever execution of an instrument was denied then such presumption was deduced to have been sufficiently rebutted---Onus to prove that document was executed and transaction did take place would lie upon the person who had alleged

said execution---Presumption in favour of a registered instrument did not dispense with the necessity of showing that person who admitted the execution before the attesting officer was not an imposter but the same person---Alleged gift deed was executed prior to the promulgation of Qanun-e-Shahadat, 1984---Only one attesting witness was sufficient to prove the execution/attestation of impugned gift deed---Defendants produced one attesting witness of said deed in the witness-box and got recorded his statement-in-chief but he was not produced for cross-examination---Statement without cross-examination would not carry any weight---Neither Stamp Vendor, Deed Writer and Identifier of donor were produced nor Sub-Registrar was got examined who could be star witnesses to prove that executant had appeared for purchase of stamp paper who got executed the gift deed and after due identification and verification instrument was validly attested---Beneficiaries/ defendants had failed to prove the transaction of gift independently through sufficient material---Admissibility of document and evidentiary value of the same having a life of more than 30-years were two different aspects---Document more than 30-years old was admissible without production of the marginal witnesses or the executant of the same but court was not required to presume contents of such documents to be true---Impugned gift deed was procured while practicing fraud, misrepresentation and impersonation---Every legal heir would become co-owner in the legacy of his predecessor as soon as he died irrespective of the fact whether entries in the revenue record with regard to an agricultural land were made in their names or not---Cogent, tangible and un-rebutted evidence was required to oust a co-owner from the joint corpus of an undivided immovable property which was lacking in the present case---Neither limitation nor conduct of plaintiffs could estop them from claiming their legal share---Mere passage of time did not extinguish inheritance rights of plaintiffs---Every new entry in the revenue record on the basis of fraudulent instrument would give rise to a fresh cause of action---Present suit could not be declared to be time barred---Appellate Court had correctly appreciated the evidence of the parties while decreeing the suit---No illegality, perversity or jurisdictional defect had been pointed out in the impugned judgments and decrees passed by the Appellate Court---Revision was dismissed with cost throughout.

Muhammad Rustam and another v. Mst. Makhan Jan and others 2013 SCMR 299; Noor Din and another v. Additional District Judge, Lahore and others 2011 SCMR 513; Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others PLD 2015 SC 212; Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others PLD 2014 SC 167 and Lal Khan through Legal Heirs v. Muhammad Yousaf through Legal Heirs PLD 2011 SC 657 distinguished.

The Commissioner of Sales Tax and Income Tax, Rawalpindi Zone, Rawalpindi v. Messrs Pakistan Television Corporation Ltd., Rawalpindi PLD 1978 Lah. 1027; Mehboob Ali and another v. Mst. Sharifan Bibi and 21 others 1991 CLC 1201; Muhammad Aslam and another v. Senior Civil Judge, Gujrat (Mian Nisar Hussain) and 2 others 2000 MLD 1581; Mina Bibi v. Manak Khan and others 2013

CLC 115; Muhammad Yousaf Khan v. S.M. Ayub and 2 others PLD 1973 SC 160; Muhammad Akram and another v. Mst. Farida Bibi and others 2007 SCMR 1719; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Gopal Das v. Siri Thakir Gee and others AIR 1943 P.C. 83; Siraj Din v. Jamila and another PLD 1997 Lah. 633; Allah Dad and 3 others v. Dhuman Khan and 10 others 2005 SCMR 564; Jang Bahadar and others v. Toti Khan and another 2007 SCMR 497; Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others 2000 SCMR 346; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Khair Din v. Mst. Salaman and others PLD 2002 SC 677 and Lal and another v. Muhammad Ibrahim 1993 SCMR 710 rel.

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

----Art. 87---Certified copy of public document---Every Public Officer having custody of public document which any person had a right to inspect should give copy of it on payment of legal fee---Certificate written at the foot of said document that it was a true copy of the original record or part thereof would be called certified copies---Object of said certificate was to ensure that it was a true copy.

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

----S. 52---Lis pendence, doctrine of---Scope---Document prepared during the pendency of lis would be hit by the rule of lis pendence and on such score same could neither be relied upon nor considered---Doctrine of lis pendence was based on equity, good conscience and justice.

(d) Maxim---

----"Pendente lite nihil innovetur"---Meaning---Pending a litigation, nothing new should be introduced.

(e) Registration Act (XVI of 1908)--

----S.60---Qanun-e-Shahadat (10 of 1984), Arts. 87, 100 & 129(g)---Certificate of registration---Public document---Proof---Certified copy of public document---Presumption---Scope---Whenever execution or validity of a registered document was denied then such document would lose sanctity of being presumed to be correct---Veracity of such document would depend upon quantum and quality of evidence to be produced to prove its execution---Only restricted presumption would attach that registration proceedings were regularly and honestly carried out by the attesting officer---Said presumption attached to its certificate was always rebutable---Whenever execution of an instrument was denied then such presumption was deduced to have been sufficiently rebutted---Onus to prove that document was

executed and transaction did take place would lie upon the person who had alleged said execution---Presumption in favour of a registered instrument did not dispense with the necessity of showing that person who admitted the execution before the attesting officer was not an imposter but the same person.

Mushtaq Ahmad Mohal and Anwaar Hussain Janjua for Petitioners.

Muhammad Iqbal Akhtar and Ahmad Ikram for Respondents Nos. 1 and 8.

Date of hearing: 2nd March, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This is another case of male dominant society, wherein the two brothers deprived their sister, namely Sardaran Bibi (deceased) of the legacy of their father by maneuvering gift deed in their favour regarding the property of their deceased father.

2. The facts germane for the disposal of the instant civil revision are that respondents being legal heirs of Sardaran Bibi, sister, (hereinafter to be referred as "Plaintiffs") instituted a suit for declaration along with cancellation of gift deed dated 02.03.1976 and mutations dated 18.04.1977, 17.03.1996 and 09.07.1996 with the assertions that disputed property was owned by their maternal grand-father, namely, Rehana, who had two sons, namely, Muhammad Younas and Sher Muhammad, petitioners (hereinafter to be referred as "Defendants Nos. 1 and 2") and one daughter Sardaran Bibi, the mother of the plaintiffs, who passed away on 22.06.2001 and when the plaintiffs claimed their share from defendants Nos. 1 and 2, they turned down their request and on inquiry, the plaintiffs came to know that defendants Nos. 1 and 2 had got attested gift deed on 02.03.1976 in their favour, whereas, Rehana, the predecessor-in-interest of the parties, had already passed away in December, 1974, but defendants Nos. 1 and 2 by practicing fraud, misrepresentation and impersonation in connivance with the revenue officials succeeded to procure a fictitious gift deed to deprive their sister of the legacy of her father. The plaintiffs claimed that the above referred gift deed as well as subsequent mutations attested in favour of the remaining defendants being the result of fraud and misrepresentation were, liable to be cancelled. The suit was contested by the defendants with the assertion that Rehana, predecessor-in-interest of the parties, passed away on 10.03.1979, who during his life time made a declaration of gift in favour of defendants Nos. 1 and 2, which was accepted by them and in lieu thereof the possession of the disputed property was also handed over to them. Then gift deed was duly attested in their favour, which was free from any element of misrepresentation, impersonation and connivance. The learned trial court while facing with the contest settled the following issues:--

1. Whether the plaintiffs have got no cause of action to bring the instant suit? OPD

2. Whether the plaintiffs did not come to the court with clean hands, so, they were not entitled to get any relief? OPD

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

4. Whether the plaintiffs have filed false and fictitious suit, therefore, the defendants are entitled to recover special costs under section 35-A of C.P.C.? OPD

5. Whether the suit has been filed within time? OPD

6. Whether the plaintiffs are entitled to get cancellation of impugned gift vide mutation No. 1431 dated 18.04.1977, mutation No. 2618 dated 17.03.1996 and mutation No. 2635 dated 09.07.1996, if so, on what ground? OPP

7. Relief.

3. During the trial, Imdad Hussain, one of the plaintiffs, appeared as PW/1, whereas, Inayat was produced as PW/2 and in documentary evidence they tendered documents (Ex.P/1 to Ex.P/5). Conversely, Muhammad Younas, defendant No.1 appeared as DW/1 and also produced Muhammad Yousaf, Bukhsha and Mudassar Shehzad as DW/2 to DW/4, whereas the documentary evidence ranging from Ex.D/1 to Ex.D/5 was also brought on record on their behalf. After appreciating the evidence available on file, the learned trial court passed the judgment and decree dated 04.03.2011 and dismissed the suit instituted by the plaintiffs. Being despondent, the plaintiffs preferred an appeal before the learned Addl. District Judge, Pindi Bhattian, who vide impugned judgment and decree dated 05.12.2014 accepted the same and while setting aside the judgment and decree passed by the learned trial court, the suit filed by the plaintiffs was decreed. Seeming aggrieved, the instant civil revision has been filed by defendants Nos. 1 and 2.

4. Mr. Mushtaq Ahmad Mohal, learned counsel for defendants Nos. 1 and 2 has argued that the learned lower appellate court miserably failed to appreciate that, even according to the contents of the plaint, the mother of the plaintiffs died on 22.06.2001, who remained alive for 25 years after the execution of impugned gift deed in the year 1976, but she never challenged the said gift deed executed in favour of her brothers/defendants Nos. 1 and 2 during her life time and the plaintiffs were estopped to challenge the validity as well as propriety of the gift deed executed in favour of defendants Nos. 1 and 2 that the suit was hopelessly time barred and the findings of the learned trial court on issue No.5 were perfect and strictly in

accordance with law as well as evidence available on the record, while the findings of learned lower appellate court on the said issue are erroneous, illegal and unlawful being result of misreading and non-reading of evidence; that the defendants Nos. 1 and 2 fully proved the execution/attestation of the disputed impugned gift deed as well as the transaction reflected therein, but the learned lower appellate court while misinterpreting and twisting the material available on file passed the impugned judgment and decree; that the possession of the disputed property is vested with the defendants Nos. 1 and 2 since 1976/from the inception of declaration of gift made in favour of the defendants by their father, which also corroborated their stance and mother of the plaintiffs was not given any Hissa Batai. He has relied upon the judgments reported Muhammad Rustam and another v. Mst. Makhan Jan and others (2013 SCMR 299), Noor Din and another v. Additional District Judge, Lahore and others (2011 SCMR 513), Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others (PLD 2015 SC 212), Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others (PLD 2014 SC 167) and Lal Khan through Legal Heirs v. Muhammad Yousaf through Legal Heirs (PLD 2011 SC 657) in support of his contentions. He has lastly prayed for the acceptance of instant civil revision, setting aside of the impugned judgment and decree passed by learned lower appellate court and restoration of the judgment and decree dated 04.03.2011 rendered by the learned trial court, whereby, suit filed by the plaintiffs was dismissed.

5. Conversely, M/s Muhammad Iqbal Akhtar and Ahmad Ikram, Advocates on behalf of plaintiffs have refuted the arguments of learned counsel for defendants Nos.1 and 2, supported the impugned judgment and decree and prayed for dismissal of the instant civil revision.

6. Arguments of learned counsel for the parties heard and record perused.

7. From the perusal of record, it boils out that plaintiffs brought their suit before the learned trial court with the specific plea that their maternal grand-father, namely, Rehana had died in December, 1974 and after his death, his property was got transferred by the defendants Nos. 1 and 2 through attestation of gift deed on 02.03.1976 to deprive their mother of her share from the legacy of her father. Whereas defendants Nos. 1 and 2 through their written statement while refuting the stance of the plaintiffs asserted that Rehana, their father, was alive in the year 1976 when he had executed the gift deed in their favour and subsequently he died on 10.03.1979. The basic document to dislodge the offence raised by the plaintiffs is copy of death certificate of Rehana deceased (Ex.D/3), which was brought on record through statement of Muhammad Younas, defendant No.1 (DW/1). It is worth-mentioning to note that the plaintiffs instituted their suit before the learned trial court on 19.03.2007, whereas, death of Rehana as per Ex.D/3 was got entered in the Register of Death on 16.05.2007 and thereafter the written statement was filed by the defendants before the learned trial court on 18.07.2007 while asserting therein that their predecessor had died on 10.03.1979. Admittedly, till the institution of the

suit the factum of death of Rehana was not got entered in the relevant Register and the possibility cannot be ruled out that after getting knowledge of the filing of the suit, defendants Nos.1 and 2 while succeeding to get incorporated death entry of their father procured copy of death certificate (Ex.D/3) on the same day when it was entered in the said Register on 16.05.2007. There is no cavil with the proposition that a document prepared during the pendency of the lis is squarely hit by the rule of lis pendens and on such score same can neither be relied upon nor considered. The doctrine of lis pendens in pith and substance was not only based on equity, but also on good conscience and justice which is based on the maxim "pendente lite nihil innoveture" and the theme of the said maxim is that during litigation nothing should be changed.

8. Additionally, the document Ex.D/3 was exhibited in evidence in the statement of defendant No.1(DW/1). The perusal of said document also reveals that it simply bears the signature and seal of the Secretary as well as Nazim of the Union Council. When questioned that as to why the original record pertaining to Ex.D/3 was not produced before the learned trial court and the said document was not got compared with the original Register, the learned counsel for defendants Nos.1 and 2 replied that it was not necessary at all as Ex.D/3 copy of the death entry contained in the relevant Register maintained by the Union Council was a sufficient proof and the documentary evidence has to be given preference to the oral evidence adduced by the plaintiffs. The said submission of Mr.Mushtaq Ahmad Mohal, Advocate, learned counsel for defendants Nos.1 and 2 has no force as Ex.D/3 was merely signed by the Secretary, Union Council and the Nazim, which cannot be treated to be certified copy of the document issued from the public record by the authority competent to issue while comparing with the original document of Register. Mere factum that signature of Secretary, Union Council as well as Nazim were appearing on the said document was not sufficient to hold that the said document was admissible in evidence until the original record was presented before the learned trial court to compare Ex.D/3 with the same. The copy of death certificate (Ex.D/3) on its face value is to be taken out of consideration for the reasons that neither the Secretary, Union Council nor the Nazim, who put their signatures on the same, were brought into the witness-box to prove the contents of the said document. The production of document on record and its proof are two independent aspects and the latter aspect is vital, which makes a fact to be proved. For the mere reason that Ex.D/3 was signed by the Secretary/Nazim, the same could not be treated to be the attested copy falling within the ambit of Article 87 of the Qanun-e-Shahadat Order, 1984 or under section 76 of the Evidence Act, 1872. As per above referred provisions, every Public Officer having the custody of public document, which any person has a right to inspect, shall give copy of it on payment of the legal fee thereof, therefore, a certificate written at the foot of said document that it was a true copy of the original record or part thereof, as the case may be and after such certificate is added and scribed by the authorized officer with signature and designation, such copies so certified shall be called certified copies. For ready

reference, Article 87 of the Order ibid along with its explanation is reproduced hereunder:--

> **87. Certified copies of public documents:** Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
>
> **Explanation:** Any officer, who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this Article.

The object of appending certificate as required by Article 87 ibid is to ensure that it is a true copy. The requirement of the Article would, therefore, be perfectly met, if there is an endorsement of the officer issuing the copy, which satisfies the court that it is a true copy. In the present case, there was no such endorsement on Ex.D/3, which could satisfy that it was a correct copy of the original. In forming this view, I have to my credit a plethora of judgments delivered by superior courts and for ready reference the following case law is referred:--

1. The Commissioner of Sales Tax and Income Tax, Rawalpindi Zone, Rawalpindi v. Messrs Pakistan Television Corporation Ltd., Rawalpindi (PLD 1978 Lahore 1027),

2. Mehboob Ali and another v. Mst. Sharifan Bibi and 21 others (1991 CLC 1201),

3. Muhammad Aslam and another v. Senior Civil Judge, Gujrat (Mian Nisar Hussain) and 2 others (2000 MLD 1581) and

4. Mina Bibi v. Manak Khan and others (2013 CLC 115).

Defendants Nos. 1 and 2 also withheld the best evidence, which was available to them in the shape of Custodian of Register of death entries in whose custody the same was lying and an adverse inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984 has to be drawn against the defendants Nos.1 and 2. It is well established principle of law that the best evidence, which was withheld by a party if was brought on the record might have gone against the version of that party.

9. The emphasis of learned counsel for defendants Nos.1 and 2 that document (Ex.D/3) was brought on the record without any objection and learned lower appellate court erred in law while discarding the same is also without any substance. Mere fact that no objection was taken to said certificate at the time of its exhibition would not make the same admissible in evidence, which otherwise, could not be admitted under the law. Admittedly, the copy of death entry Ex.D/3 as observed supra was not copy of judicial record, which could not be received in evidence without the proof of signatures and writing of the person alleged to have signed or written the same, even if, such documents brought on record were exhibited without objection. Reliance is placed upon the judgment reported as Muhammad Yousaf Khan v. S.M. Ayub and 2 others (PLD 1973 SC 160) and Muhammad Akram and another v. Mst. Farida Bibi and others (2007 SCMR 1719).

10. The argument of Mr. Mushtaq Ahmad Mohal, learned counsel for the defendants Nos. 1 and 2 that gift deed being registered instrument attained strong presumption of truth and the learned lower appellate court without dilating upon the said aspect of the case erred in law while decreeing the suit is not tenable. It is by now well settled principle of law that whenever the execution or validity of a purportedly registered document is denied, such registered document loses sanctity of being presumed to be correct, but its veracity would depend upon quantum and quality of evidence to be produced to prove its execution. Reliance can be placed upon Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144) and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245). In the latter case the apex court concluded in the following words:--

> It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction of which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness of document.

Additionally, under section 60 of the Registration Act, 1908, only a restricted presumption is attached that registration proceedings were regularly and honestly carried out by the attesting officer, but the said presumption attached to its certificate is always rebutable and whenever the execution of an instrument is denied, then the presumption is deduced to have been sufficiently rebutted and onus lies upon the person, who alleges execution to prove that the document was executed and the transaction did take, place. Presumption in favour of a registered instrument does not dispense with the necessity of showing that person, who admitted the execution before the attesting officer was not an imposter, but the same person. Reliance can be placed upon the judgment reported as Gopal Das v. Siri

Thakir Gee and others (AIR 1943 P.C. 83). This view has also been conceived by the Division Bench of this Court in a case reported as Siraj Din v. Jamila and another (PLD 1997 Lahore 633).

11. Admittedly, the impugned gift deed was executed prior to the promulgation of the Qanun-e-Shahadat Order, 1984 and as per section 68 of the Evidence Act, 1872, only one attesting witness was sufficient to prove its execution/attestation. Defendants Nos. 1 and 2, no doubt, brought Muhammad Yousaf, the attesting witness, in the witness-box and got recorded his statement-in-chief as (DW/2), but he was not produced for cross-examination despite availing of numerous opportunities and as per well established principle, his statement without cross-examination would not carry any weight. The other attesting witness, namely, Muhammad Aslam had already passed away. No doubt, his brother DW/5 was produced to verify the signatures of said Muhammad Aslam over Ex.D/1, but that could not be considered sufficient to prove the contents/execution/attestation of gift deed. To prove that Rehana being alive had validly gifted the suit property in terms of impugned gift deed, neither Stamp Vendor, Deed Writer and Irshad Ullah Identifier were produced nor the Sub-Registrar was got examined, who could be the star witnesses to prove that genuinely the executant had appeared for the purchase of stamp paper, who got executed the gift deed and after due identification and verification instrument was validly attested. To prove the transaction of gift embodied in the instrument, one of the beneficiaries, namely, Muhammad Younas, defendant No.1, being DW/1 in his cross-examination deposed as under:--

The study of his deposition belies the transaction on the following counts:--

a. As per statement, the donor on 02.03.1976 declared his offer of gift in favour of his two sons and gift deed was executed on the following day i.e. 03.03.1976, whereas, the perusal of gift instrument (Ex.D/1) reveals that stamp papers were purchased on 02.03.1976 and the instrument was not only executed but was also attested on the same day.

b. DW/1 did not state that on the day of declaration of gift or execution of document, Muhammad Yousaf, the attesting witness, was also present. Non-production of said marginal witness for cross-examination was, therefore, intentional on the part of the beneficiaries.

Whereas Bukhsha son of Bahadar before whom the alleged offer of gift was made by the donor being DW/3 in his cross-examination stated as follows:--

The statement of DW/3 is not found to be in league with the statement of above referred DW/1, rather major contradiction is reflected therein to the extent of day of execution of the gift deed. Furthermore, the deposition of DW/3 has completely shattered the authenticity of death entry (Ex.D/3) of Rehana deceased. He stated that at the time of death, Rehana was about 70-years of age whereas column No. 7 of Ex.D/3 reveals that he died at the age of 90-years. The beneficiaries/Defendants

Nos.1 and 2 remained unable to produce sufficient material on the suit file to independently prove the transaction of gift.

12. The submission of learned counsel for defendants Nos.1 and 2 that lmdad Hussain, one of the plaintiffs being PW/1 stated in his deposition recorded in the court on 18.05.2010 that his age was 35 years and Rehana died when said PW was of the age of 6/7 years, which is sufficient proof that Rehana died much after execution of gift deed, is not tenable. Luckily, from the perusal of file, copy of I.D. Card bearing No. 34302-1208535-1 belonging to PW/1, which was issued on 23.10.2001 much prior to recording of his statement, is found to be annexed with power of attorney of learned counsel for the plaintiffs and the perusal thereof reveals that PW-1 was born in the year 1966. It is thus borne out that the age of PW/1 was mistakenly written in the cross-examination as 35 years. If it is calculated that Rehana died when PW/1 was of the age of 6/7 years old, then it would become 1972-73 and even the said year of death of Rehana is much prior to the alleged attestation of impugned gift deed in the year 1976.

13. The other submission of the learned counsel for defendants Nos.1 and 2 that gift deed having a life of more than 30-years attained strong presumption of truth under Article 100 of the Qanun-e-Shahadat Order, 1984 and defendants Nos.1 and 2 were not required to prove the same. but it must be relied upon, is without any substance. It is well established principle of law that there is difference between admissibility of document and evidentiary value of document having a life of more than 30-years under the provision of Article 100 of the Qanun-e-Shahadat Order, 1984, which is admissible without production of the marginal witnesses or the executers, but the court under this provision is not required to presume contents of such documents to be true and reliance can be placed upon the judgment reported as Allah Dad and 3 others v. Dhuman Khan and 10 others (2005 SCMR 564), wherein it was observed as under:--

> "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 signature appear on it and that it was duly executed and attested by the executants. The age of documents, its unsuspicious character, its custody and other circumstances are foundation to raise a presumption of its execution and if a document is proved more then 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 case, Court may call the parties to produce the

evidence. However, the presumption of genuineness of 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."

This view has again been approved by the august Supreme Court of Pakistan in case titled as Jang Bahadar and others v. Toti Khan and another (2007 SCMR 497).

14. When it is proved on the record that gift deed Ex.D/1 was procured by defendants Nos.1 and 2 while practicing fraud, misrepresentation and impersonation, then every legal heir became the co-owner in the legacy of his predecessor as soon as he died, irrespective of the fact, whether entries in the revenue record with regard to an agricultural land were made in their names or not. To oust a co-owner from the joint corpus of an undivided immovable property, cogent, tangible and un-rebutted evidence was required, which is lacking in the case in hand. In the matters of inheritance, neither limitation nor conduct of plaintiffs could estop them from claiming their legal share and mere passage of time does not extinguish their rights but every' new entry in the revenue record on the basis of fraudulent instrument gives rise to a fresh cause of action and it being a case of recurring cause of action, the suit cannot be declare time barred. Reference can be placed upon the judgments reported as Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others (2000 SCMR 346), Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1) and Khair Din v. Mst. Salaman and others (PLD 2002 SC 677). When it is proved that defendants Nos.1 and 2 had fraudulently got attested the gift instrument, no benefit can be derived by a person claiming title in the immoveable property based on fraudulent transaction because it is well-settled principle that fraud, if established on record, is sufficient to vitiate most solemn proceedings. Reference can be made to the judgments reported as Lal and another v. Muhammad Ibrahim (1993 SCMR 710). The court of law cannot remain oblivious of the erosion of moral values and the conduct of defendants Nos.1 and 2 is worth quoting as a classic example in this regard. On the strength of material available on record, the learned trial court fell in error while dismissing the suit, but learned lower appellate court correctly appreciated the evidence of the parties and interpreted the law available on the subject while decreeing the suit instituted by the plaintiffs. The case law referred to by the learned counsel for the defendants Nos.1 and 2 being distinguishable runs on different footings.

15. Learned counsel for defendants Nos.1 and 2 is unable to point out any illegality, perversity or jurisdictional defect in the impugned judgments and decrees, which are also not found to be tainted with any misreading or non-reading of the material available on the record calling for any interference by this court in the exercise of revisional jurisdiction. Resultantly, the instant civil revision being devoid of any force is dismissed with cost throughout.
ZC/M-101/L Revision dismissed.

2017 Y L R 2276
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ABDUL REHMAN and others---Petitioners
Versus
GHULAM FATIMA and others---Respondents

C.R. No.2743 of 2010, heard on 19th December, 2016.

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

----Ss. 12 & 27---Limitation Act (IX of 1908), Art. 113---Qanun-e-Shahadat (10 of 1984), Art. 100---Evidence Act (I of 1872), S. 68 [since repealed]---Suit for specific performance of contract---Limitation---Agreement to sell---Proof of---Procedure---Attesting witness---Statement on special oath---Principles---Document more than 30 years old---Beneficiary of document---Evidentiary value---Scope---Sale of property through contract would take effect in terms and conditions incorporated therein but it did not by itself create any interest or change in the same---Onus would lie on the beneficiary to prove that transaction had been duly settled between the parties on such terms and conditions---Alleged agreement to sell had been signed/thumb marked by one of the vendees---Beneficiary could neither be a judge of his own cause nor could be treated as an attesting witness of his own transaction even if he had signed the agreement in such capacity---Vendee was an interested person who got recorded his evidence as attesting witness---Statement of vendee could not be treated at par with that of attesting witness---Plaintiff had not examined other attesting witnesses of agreement to sell as they had passed away prior to the recording of evidence---Person whose statement was recorded to prove the signature of deceased attesting witness could not prove the execution of agreement to sell---Stamp vendor was neither examined nor stamp vending register was got summoned which might have been retained in the safe custody---Alleged contract was scribed by an un-licensed deed writer---No documentary evidence of corroborative nature in shape of register of stamp vendor/deed writer was available on record---Party had to succeed on its own footing and no premium could be extended to him merely on account of making a statement on special oath which remained unproved through evidence led by him on record---If a party without consent of his adversary at his own made a statement on special oath and in rebuttal the latter did not opt to make such type of statement then no adverse inference could be drawn against him---Unilateral statement of a party if any made on special oath had to be collaborated by the other independent evidence---Court could only decide a lis on the basis of statement made on special oath provided both the parties agreed thereto---Court in absence of any agreeable situation among the parties neither could enforce an unwilling party to make statement on such oath nor could decide the lis on its basis which was administered without the consent of other party---Alleged agreement to sell was not a registered document but only notarized one but notary was not

examined by the beneficiaries---Court was not bound to attach presumption of execution to a document more than 30 years old without considering the other facts of the case to draw such inference---Terms of documents and intention of the parties as to character of document must be gathered after considering its terms as a whole but not in isolation---Expression of the entire document was to be taken into consideration while interpreting the same---Nothing was on record that possession of suit property was delivered to the plaintiffs in consequence of transaction reflected in agreement to sell---Party approaching the Court for seeking some relief had to stand on its own legs---Any weakness in the defence of adversary would neither improve the case of a party nor would he be entitled for any relief on such score alone---Plaintiff had failed to establish execution of agreement to sell as well as transaction reflected therein---Findings recorded by the Courts below were result of twisting the material available on record---No target date for performance of contract had been provided therein---Period for filing of suit would start from the time when executant refused to honour his/her part---Present suit was filed after the period of 21 years after the death of original promisor---No specific date for refusal to execute the agreement to sell had been provided in the plaint---Present suit was barred by time---Judgments and decrees passed by both the Courts below were result of mis-reading and non-reading of evidence---Impugned judgments and decrees were set aside and suit was dismissed with special cost of Rs.100,000/-- Revision was allowed in circumstances.

Sudhangshu Bimal Biswas v. MD Mustafa Chowdhary 1968 SCMR 213 and MD Anwarullah Mazumdar v. Tamina Bibi and 5 others 1971 SCMR 94 rel.

(b) Oaths Act (X of 1873)---

----S. 8---Special oath--- Principles.

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

----S. 115---Revisional jurisdiction of High Court---Scope---High Court could not interfere in concurrent findings of fact recorded by the Courts below but when there was mis-reading and non-reading of evidence and violation of law on the surface of such findings then High Court could rectify such error.

Muhammad Faheem Bashir and Ehsan Ahmed Bhindar for Petitioners.

Muhammad Abbas Shah for Respondents.

Date of hearing: 19th December, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This civil revision is directed against judgment and decree dated 05.05.2009 passed by learned Civil Judge, Jaranwala, whereby suit for specific performance of agreement to sell dated 03.04.1974 (Exh.P1) instituted by respondents was decreed as well as judgment and decree dated 10.06.2010 delivered by learned Additional District Judge through which appeal filed by petitioners was dismissed.

2. Admittedly, Mst. Gullai Bibi and Allah Bukhsh were sister and brother inter se and the petitioners are successors of Mst. Gullai Bibi whereas respondents are siblings of Allah Bukhsh. Mst. Gullai Bibi, predecessor of petitioners, was owner of her share measuring 12 Kanals 9 Marlas situated in Chak No.566/GB Tehsil Jaranwala, District Faisalabad and after long time of her demise, the respondents instituted a suit for declaration as well as permanent injunction and in alternative for possession through specific performance of agreement to sell dated 03.04.1974 (Exh.P1) against petitioners with the assertion that their aunt Mst. Gullai Bibi, had agreed to sell aforementioned subject property against a consideration of Rs.9,000/- and after receiving the same, its possession was also handed over to them, which was honoured by the promisor throughout her remaining life, but she could not transfer the title to the promises being under coercion of the petitioners, who were opposing the said agreement and after her death when petitioners reprobated to acknowledge the Exh.P1, respondents were compelled to institute the instant suit. The suit was hotly contested by petitioners with the stance that agreement to sell (Exh.P1) was forged and fictitious document and that Gullai Bibi had neither entered into any bargain of sale nor received its consideration from the respondents. The learned Trial Court out of divergent pleadings of the parties framed the following issues:--

1. Whether the plaintiffs entered into an agreement with the Gulai Bibi regarding the suit land for the consideration of Rs.9000/-on 03.04.1974 and the whole consideration was paid? OPP

2. Whether plaintiffs are entitled to a decree as prayed for? OPP

3. Whether the agreement dated 03.04.1974 is the result of fraud? OPD

4. Whether the suit is time barred? OPD

5. Relief.

3. After recording evidence of both the parties and while appreciating the same, suit of respondents was decreed whereas appeal of petitioners was dismissed by the courts below through judgments and decrees as narrated in para-1 ante, which are subject matter of the instant civil revision.

4. The learned counsel for petitioners has argued that both the courts below while misreading and non-reading the evidence available on record rendered impugned judgments and decrees on erroneous premises of law; that respondents failed to produce stamp vendor as well as deed writer to prove valid execution of agreement (Exh.P1) and that only Sher Afzal, one of the vendees was examined by respondents to prove the contents of Exh.P 1, but both the courts below erred in law while relying on his statement without taking into consideration that he being vendee/beneficiary could not be treated as a witness of his own transaction; that both the courts below also failed to consider that stamp paper of (Exh.P1) was not purchased by Gullai Bibi, that agreement (Exh.P1) was forged and fictitious document, the valid execution whereof could not be proved by respondents through production of independent witnesses and due to withholding of best evidence, it was sine qua non for courts below to draw an adverse inference against respondents under Article 129(g) of the Qanun-e-Shahadat Order, 1984; that both the courts below mis-appreciated the material available on suit file and committed material irregularity and illegality while answering issues Nos.1 to 3 in favour of respondents and that evidence available on record was not sufficient to hold that they succeeded to prove valid execution of agreement to sell Exh.P1; that suit was badly time barred and no cogent evidence was available to shatter stance of the petitioners, but courts below erred in law while deciding issue No.4 in favour of respondents. He has lastly prayed that while accepting instant civil revision and setting aside of impugned judgments and decrees, suit of respondents be dismissed.

5. Conversely, learned counsel for respondents has supported the impugned judgments and decrees on the ground that Exh.P1 was got executed prior to promulgation of Qanun-e-Shahadat Order, 1984 and under section 68 of the Evidence Act, 1872, the beneficiary was required to produce only one attesting witness, which requirement of law was complied with by examining Sher Afzal PW1; that other witness Muhammad Ramzan had already passed away, whose signatures and thumb impressions were got identified through production of Saqlain Abbas (PW3), who was familiar therewith and respondents succeeded to prove valid execution of agreement; that Sher Afzal PW1 during his statement made an offer to administer oath on the Holy Quran that transaction was settled with Mst. Gullai, but neither the offer was accepted by petitioners nor in response they made any such

attempt to negate the version of respondents on special oath and both the courts below were perfect to draw an adverse inference against them; that Exh.P1 was a thirty years old document, which was brought on the file from proper custody and under the law presumption of correctness was attached to its contents, and that concurrent findings of facts arrived at by the courts below are not liable to be interfered with by this Court while exercising jurisdiction under section 115 of Code of Civil Procedure, 1908. He has lastly prayed for dismissal of the instant civil revision.

6. Arguments heard and record perused.

7. There is no cavil with the proposition that sale of the property through contract takes effect in terms and conditions incorporated therein, but it would not by itself create any interest or charge in the same and heavy onus lies on the beneficiary to prove that transaction had been duly settled between the parties on such terms and conditions. The copy of disputed agreement (Exh.P.1) is available at page 68 of the instant file and perusal of same reveals that it was signed/thumb marked by Sher Afzal one of the respondents/vendees, Fazal ur Rehman son of promisor and Muhammad Ramzan, Lumberdar being its attesting witnesses. No doubt, there is much force in the argument of learned counsel for respondents that Exh.P1 was executed prior to promulgation of Qanun-e-Shahadat Order, 1984 and under section 68 of the Evidence Act, 1872, its contents could be proved while examining single attesting witness, but to my mind, Sher Afzal (PW1) was also included in the group of vendees and there is no cavil with the proposition that a beneficiary could neither be judge of his own cause nor could be treated as an attesting witness of his own transaction, even if he had signed the agreement in such capacity. He was an interested person and both the courts below skipped the aspect that his statement could not be treated at par of attesting witness. The other attesting witnesses, namely, Fazal ur Rehman as well as Muhammad Ramzan, Lumberdar were not examined by respondents as admittedly prior to recording of evidence they had already passed away. No doubt, Saqlain Abbas, grandson of Muhammad Ramzan, was examined as PW3, whose statement at the most could only prove that his grandfather had put his signature over (Exh.P1) being its one of the attesting witnesses, but he was not able to prove the construction and execution thereof.

8. Let us pause here for a while to see whether statements of these witnesses as well as Ghulam Akbar (PW2) are of such significance that suit of the respondents could be decreed and whether their evidence was appreciated by courts below in true perspective while rendering impugned judgments. Sher Afzal (PW-1) could

only depose that contract was settled in 1974, who despite asking in cross-examination neither could disclose the exact date and month nor the weather when it was agreed. He also admitted in his cross-examination that property and residence of the parties to the agreement was located in Tehsil Jaranwala, District Faisalabad, but could not justify why the stamp paper was purchased and scribed at Nankana Sahib, the then Tehsil of District Sheikhupura. Additionally he stated that bargain was settled 8/10 days prior to execution of Exh.P1 at the residence of promisor and for scribing of agreement they went to Nankana Sahib on tonga, whereas Ghulam Akbar (PW2), who is not the signatory of Exh.P1 in any capacity, but claimed to be available among the parties during entire proceedings of bargain and execution of Exh.Pl has belied the deposition of star witness (PW1) while stating in his cross-examination that 10/20 days prior to execution of Exh.Pl, the bargain was effected at the residence of PW1 and for scribing the contract they went to the stamp vendor on lorry. PW2 also conceded that at the time of execution of contract, Sher Afzal (PW1), one of the vendees, presented his CNIC to the deed writer. The copy of the same as well as copy of CNIC of Muhammad Ramzan, the other attesting witness were brought on the suit file along with Exh.Pl as Marks A & B respectively and Mark-B divulges that it was issued to Muhammad Ramzan in 1975, one year after the execution of Exh.P1, which is another question mark on its genuineness. Sher Afzal (PW1) in answer to a question worded that stamp paper had been purchased by Muhammad Ramzan, but Ghulam Akbar PW2 again contradicted him while replying in his cross-examination that it was purchased by Sher Afzal, whereas, the endorsement of stamp vendor on the back page of stamp paper (Exh.P1) transpires that it was issued to Mst. Gullai through her son Fazal ur Rehman.

9. When it is proved through the evidence of the respondents on record that stamp paper of Exh.P1 was not purchased by Gullai Bibi, the alleged executant of same, rather it was purchased through Fazal ur Rehman son of Gullai and petitioners specifically denied the execution of Exh.P1 while claiming it to be forged and fictitious document, then in such scenario, stamp vendor of Exh.P1 was left with the respondents being an independent witness to prove whether any authority was conferred upon said Fazal ur Rehman for purchase of stamp paper on her behalf, who was neither attempted to be examined nor his stamp vending Register was got summoned, which might have been retained in the safe custody. It is also borne out from the record that contract (Exh.P 1) was scribed by an un-licensed deed writer whereas the licenses are issued by competent authority to the skilled deed writers so that interest of the parties could be secured as the license holder deed writers are required to maintain a register to make entries of the documents and signatures/thumb impressions of the executants against the said

entries in their registers to cross check its authenticity by all means. In the present case, no such documentary evidence of corroborative nature in shape of register of stamp vendor/ deed writer is available on record to support the version of respondents and adverse inference has to be drawn against the beneficiaries. The argument of learned counsel for respondents that by examining Saglain Abbas (PW3), the grandson of Muhammad Ramzan, one of the attesting witnesses of Exh.P1, who had already passed away, the respondents succeeded to prove its contents is misconceived. The said witness not only admitted that his grandfather was closely related to the respondents, but also conceded that he was born on 10.08.1988 and his grandfather also died in the same year. He was examined by the respondents to identify the signatures of his grandfather, but neither he could be presumed to identify the signature of his relative, who had already died prior to his birth or within 2/3 months thereafter nor he was in the position to prove contents of Exh.P1, alleged to have been executed 14 years prior to his birth. In absence of any other witness on the record to prove the construction of Exh.P1 as well as transaction mentioned therein, both the courts below were not justified to answer issue No.1 in favour of respondents.

10. I have noticed that both the courts below proceeded to draw an adverse inference against the petitioners on account of an offer made by Sher Afzal (PW1) during his cross-examination that he was ready to take special oath on the Holy Quran to the effect that respondents had purchased the suit property from Mst. Gullai. To my mind, there was no reason and ground to draw such inference. There is established principle that a party has to succeed on its own footing and no premium can be extended to him merely on account of making a statement on special oath with regard to his stance, which remained unproved through evidence led by him on record. There is also no cavil with the proposition that if a party without consent of his adversary at his own made a statement on special oath and in rebuttal the latter did not opt to make such type of statement, then no adverse inference could be drawn against him. The fact remains that unilateral statement of a party, if any, made on special oath has to be collaborated by the other independent evidence. The court could only decide a lis on the basis of statement made on special oath provided both the parties agreed thereto. In absence of any agreeable situation among the parties, the court neither can force an unwilling party to make statement on such oath nor can decide the lis on its basis, which was administered without the consent of other party.

11. The submission of learned counsel for respondents that Ehx.P1 having age more than 30 years attained presumption of its correctness within the meaning of

Article 100 of the Qanun-e-Shahadat Order, 1984 and the conclusion drawn by the courts below with respect to it was unexceptionable, is not well founded. The perusal of Exh.P1 reflects that the same was not a registered document, but only notarized document and admittedly the notary was also not examined by the beneficiaries. It is not essential for a court to attach presumption of execution to a document more than 30 years old in all the cases without considering the other related facts of the case to draw such inference. On account of appreciation of evidence available on suit file, the presumption under discussion as to validity and execution of Exh.P1 would not apply.

12. The next argument of learned counsel for respondents that possession of suit property was handed over to respondents at the time of execution of agreement and benefit of section 27-B of the Specific Relief Act, 1877 was to be extended to them, is not tenable. It is well established principle that terms of the documents and intention of the parties as to the character of document must be gathered after considering its terms as a whole, but not in isolation and expression of the entire document is to be taken into consideration while interpreting the same. The minute perusal of basic document is completely silent to the effect that at the time of its execution, the possession of suit property was also delivered to respondents in consequence of the transaction reflected therein. Even no evidence in the shape of revenue record/khasra girdawari is available on the suit file through which it could be established that on 03.04.1974 when the alleged agreement was settled between parties, possession of suit property was also handed over to respondents. Although copy of khasra girdawari is available on file, but its perusal reflects that possession of respondents was entered being co-sharers in the joint holding. The oral deposition of PW 1 that possession of suit property was handed over to respondents in lieu of execution of agreement (Exh.P1) cannot be believed as the same is beyond the scope of their master document. So the stance of respondents that Gullai Bibi had handed over possession of suit property to them at the time of settlement of bargain, which constituted a notice to her, could also not be proved.

13. So far as contention of learned counsel for respondents that Gullai Bibi in her remaining life as well as the petitioners being her successors neither claimed possession of disputed property from respondents nor any suit for cancellation of agreement (Exh.P 1) was filed by them and, therefore, petitioners were estopped to question the genuineness of disputed agreement is concerned, suffice it to say that there is well settled legal proposition that a party approaching the court for seeking some relief has to stand on its own legs and in the absence thereof any weakness in the defence of the adversary would neither improve his case nor will he be entitled

for any relief on such score alone. If any case law is needed, reference may be made to the decisions of the honourable Supreme Court of Pakistan reported as Sudhangshu Bimal Biswas v. MD Mustafa Chowdhary (1968 SCMR 213) and MD Anwarullah Mazumdar v. Tamina Bibi and 5 others (1971 SCMR 94). When the respondents failed to establish the execution of Exh.P1 as well as transaction reflected therein, then on the score of any silence as well as inaction on the part of Mst. Gullai or petitioners, no benefit could be extended to the respondents to grant them a discretionary relief in the shape of decree for specific performance. The findings of courts below on issues Nos.1 to 3 being found to be result of twisting the material available on suit file are reversed while answering the same against respondents.

14. Admittedly, qua performance of agreement dated 03.04.1974, respondents instituted their suit before the court of first instance on 18.04.2007 with the elapse of 33 years and in para No.3 of the plaint, it was pleaded that Mst. Gullai being under coercion of petitioners could not perform her part during her lifetime. Undeniably, Mst. Gullai died on 15.08.1986, but respondents again wasted another period of 21 years to bring their suit against the petitioners, who, as per their own version, were militant to the agreement in the lifetime of promisor and there is no plausible reason in the pleadings as well as evidence of the respondents that why they consumed such a long span of time to institute their suit. Irrespective of the fact that whether time was essence of the contract or not?, the point remains that which part of Article 113 of the Limitation Act, 1908 would apply in the present case. Undeniably, no target date for its performance was provided in contract (Exh.P1), therefore, the case in hand would definitely fall within the second part of the provision ibid and period for filing of suit would start from the time when Mst. Gullai refused to honour her part due to the resistance of the petitioners, which fact was already in the notice of the respondents, but they lost a further period of 21 years to bring their suit even after the death of original promisor. Additionally, neither any specific date of refusal of the petitioners to perform their part was provided in the plaint nor the same was deposed by (PW1), one of the respondents, in this deposition. In this view of the matter, it can safely be concluded that the suit was badly time barred, but the courts below failed to consider the aforenoted reasons while answering issue No.4 in negative, which findings are also reversed and same is replied in affirmative.

15. At the fag end of his arguments, the learned counsel for the respondents has submitted that the concurrent findings of the courts below cannot be disturbed by this court while exercising revisional jurisdiction provided under section 115 of

C.P.C. The said contention is also not tenable as both the judgments and decrees having been found to be the result of misreading and non-reading of evidence as well as non adherence to the law applicable in this regard are not sustainable. It is correct that normally this Court does not interfere in the concurrent findings of the fact recorded by two courts below, but when there is gross misreading and non-reading of evidence and patent violation of the law is 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.

16. The accumulative effect of the above discussion is that instant civil revision is accepted, impugned judgments and decrees passed by learned courts below are hereby set aside and suit instituted by respondents stands dismissed with special cost of Rs.100,000/-(Rupees one lac only).

17. Before parting with the judgment, it is added that judicial officers, who are working honestly, assiduously and with good behavior, command respect in the society, but there is no space in this institution for mendacious, inactive and clumsy officers. A judicial officer is assigned with the duty to dispense with justice as per law on the basis of material before him, but in the case in hand, the findings of both the judicial officers do not appear to be result of appreciation of record in its true perspective, whereas both of them appear to have intentionally twisted the material while formulating their impugned findings, therefore, I am constrained to direct that this judgment should be placed in personal files/ACR dossiers of Mr. Manzer Ali Gill, Additional District Judge as well as Mohammad Amin Shahzad, Civil Judge so that the same may be confronted to them at the time of their promotion.

ZC/A-16/L Revision allowed.

2017 Y L R 2358
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ARSHAD IQBAL---Petitioner
Versus
MUHAMMAD HAYAT---Respondent

C.R. No.2050 of 2010, decided on 5th April, 2016.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Talbs, performance of---Requirements---Vendor being brother of pre-emptor--- Effect--- Right of substitution---Waiver of---Scope---Pre-emptor without disclosing that vendor was his real brother had pre-empted the sale---Pre-emptor in case of any adverse statement made by vendor could have made a request for declaring him hostile and by subjecting him to cross-examination the veracity of his statement could be elucidated on record---Prudent man could not believe that factum of sale of pre-empted property by the brother of pre-emptor had remained secret from the knowledge of pre-emptor for a long period---Pre-emptor was residing in the same village where pre-empted property was situated---Pre-emptor being brother of vendor could be presumed to have knowledge of sale transaction from its inception---Nothing was on record that pre-emptor asked his brother to sell the land in question to him---Both pre-emptor and vendor had understanding between them---Change of possession of immovable property could be considered a notice to all the inhabitants of the locality with regard to effecting of the transaction---Sale was in the knowledge of pre-emptor from the day one, when it was effected---Alleged fulfillment of Talb-i-Muwathibat was not genuine rather fictitious and concocted---Pre-emptor was bound to prove the service of notice of Talb-i-Ishhad through registered post on the vendee by production of concerned postman who was alleged to have actually delivered the same---Postman who was produced in the court was not posted as a postman when the alleged delivery of notice was effected upon the vendee---Postman had got recorded his statement without producing the delivery register wherein endorsement was made by the postman qua the effect that registered post was delivered or it was refused---Statement of postman in absence of such register as well as report over acknowledgement due had no evidentiary value with regard to registered post containing notice of Talb-i-Ishhad---Findings of Trial Court with regard to service of notice of Talb-i-Ishhad were not based on appreciation of material available on record---If any portion in statement-in-chief was not specifically cross-examined by the pre-emptor then same should be deemed to have been admitted---Pre-emptor had neither asked the vendor to sell the land in question to him nor did he notify the vendee with regard to his intention to claim his right of pre-emption---Right of substitution could be waived either by express refusal to purchase the property or by conduct on the part of pre-emptor showing lackadaisical attitude in purchase of property---Impugned judgments and decrees

were illegal, unlawful and perverse being result of mis-reading and non-reading of evidence on record which were set aside---Suit was dismissed with costs throughout---Revision was allowed in circumstances.

Abdul Qayum through Legal Heirs v. Mushk-e-Alam and another 2001 SCMR 798 and Muhammad Tariq and 4 others v. Asif Javed and another 2009 SCMR 240 ref.

Muhammad Bakhsh v. Nisar Ahmad 1985 CLC 1974; Mst. Hameedan Begum and 11 others v. Muhammad Jafar 2006 MLD 1034; Basharat Ali Khan v. Muhammad Akbar 2011 CLC 969; Naseer Ahmad v. Arshad Ahmad PLD 1984 SC 366; Waqar Ambalvi v. Faqir Ali and others 1969 SCMR 189; Chief Engineer, Irrigation Department, N.W.F.P., Peshawar and 2 others v. Mazhar Hussain and 2 others PLD 2004 SC 682; Hafiz Tassaduq Hussain v. Lal Khatdon and others PLD 2011 SC 296; Abdul Hameed and others v. Muzamil Haq and others 2005 SCMR 895 and Hassan Din and others v. Manzoor Hussain and others 2010 SCMR 810 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---Scope of interference with the concurrent findings of facts was limited but such findings could be interfered with by the High Court if courts below had either mis-read or non-read the evidence having direct bearing on the issue involved.

Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

Naveed Shehryar Sh., Humaira Bashir, Muhammad Ali Naveed, Bashir Ahmad Mirza and Anwaar Hussain Janjua for Petitioner.

Ghulam Fareed Sanotra for Respondent.

Date of hearing: 5th April, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The brief facts of the case are that property measuring 09-Kanals 10-Marlas was owned by Muhammad Inayat, which was sold out to the petitioner/ defendant (hereinafter to be referred as 'Vendee') through mutation No. 3926 dated" 07.10.2004. The respondent/plaintiff (hereinafter to be referred as 'Pre-emptor') pre-empted the said sale by filing a suit for possession through pre-emption while alleging his superior right as well as due performance of talbs. The said suit was contested by the vendee and after

conducting full-fledged trial, the same was decreed by the learned trial court vide judgment and decree dated 18.03.2010. The appeal filed by the vendee was partially accepted vide impugned judgment and decree dated 22.05.2010 delivered by the learned Additional District Judge, Mandi Bahauddin. Being aggrieved, the vendee has filed this civil revision.

2. It is mainly contended by the learned counsel for the vendee that impugned judgments and decrees passed by both the courts below are result of misreading and non-reading of evidence; that both the courts below failed to consider the aspect that the vendor and the pre-emptor were real brothers and the disputed sale was in the knowledge of the pre-emptor from the day of its inception whereas the fulfilment of alleged first demand after 21-days was fictitious and concocted; that the pre-emptor was required to produce the concerned post-man, who allegedly served the notice upon the vendee, but he was not produced rather another postman (PW/5) was brought into the witness-box by the pre-emptor, who admittedly neither served the notice upon the vendee nor he was present at the relevant time when the notice was allegedly delivered to the vendee. He has lastly prayed for the acceptance of the instant civil revision, setting aside of the impugned judgments and decrees passed by both the courts below and that the suit instituted by the pre-emptor be dismissed.

3. Conversely, learned counsel for the pre-emptor has refuted the arguments advanced by the learned counsel for the vendee and while supporting the impugned judgments and decrees passed by both the courts below has submitted that concurrent findings recorded by both the courts below cannot be interfered with by this Court while exercising its jurisdiction under section 115 of the Code of Civil Procedure, 1908. He has relied upon the judgments reported as Abdul Qayum through Legal Heirs v. Mushk-e-Alam and another (2001 SCMR 798) and Muhammad Tariq and 4 others v. Asif Javed and another (2009 SCMR 240) and prayed for the dismissal of the instant civil revision.

4, Arguments heard and perused the record thoroughly.

5. The main thrust of arguments of learned counsel for the vendee is that pre-emptor failed to discharge the onus of issue No.2 qua the performance of requisite demands and that pre-emptor had also waived his right of pre-emption and could not discharge onus of issue No.5, which was shifted upon him. These are the vital and pivotal issues, which for brevity sake, are reproduced hereunder:--

2) Whether the plaintiff has fulfilled the requirements of Talbs in accordance with law? OPP

5) Whether the plaintiff has waived his right of pre-emption? OPD

6. The study of plaint reveals that the pre-emptor without disclosing that vendor was his real brother pre-empted the sale effected by him by filing the suit before the learned trial court. However, while appearing in the witness-box as PW/1, the pre-emptor candidly conceded that the vendor Muhammad Inayat was his real brother. No doubt, he further added that his relationship with the vendor were not cordial since one year, but the said statement was made by the pre-emptor on 26.01.2009 and inference can be drawn that at the time of attestation of sale mutation dated 07.10.2004, the relationship between the said two brothers were not strained. Even if it is presumed that his relationship with the vendor brother were not cordial at the time of attestation of mutation, then this fact should have been pleaded by the pre-emptor in his plaint, but neither it was mentioned therein nor except statement of pre-emptor no other supporting evidence is available on file. Even to prove his stance that his relations were not cordial with his brother/vendor at the time of attestation of disputed mutation, the pre-emptor was required to produce his brother, but despite his availability he was withheld by him and adverse inference has to be drawn against him under Article 129 illustration (g) of Qanun-e-Shahadat Order, 1984. The argument of Mr. Ghulam Fareed Sanotra, learned counsel for pre-emptor that as the relationship of the pre-emptor with the brother/vendor were strained, so if he was produced or summoned by the pre-emptor, then he might have deposed against the stance of the pre-emptor is without force. The pre-emptor in case of any adverse statement made by the vendor could have made a request for declaring him hostile witness and by subjecting him to cross-examination the veracity of his statement could be elucidated on the record. The story launched by the pre-emptor about getting knowledge of the disputed sale and then fulfillment of first demand after an elapse of 20-21 days appears to be fictitious and concocted. A prudent man cannot believe that factum of sale of the pre-empted property by real brother of the pre-emptor situated in the same khewat and khasra numbers wherein the property of the pre-emptor also located and possession of the same was also handed over to the vendee forthwith, had remained secret from the knowledge of the pre-emptor for a long period. It is not the case of the pre-emptor that he was not residing in the same village where the pre-empted property was situated. The pre-emptor being brother of the vendor can be presumed to have complete knowledge of sale transaction from its inception, but there is no evidence that he had ever asked his brother to sell the land to him, which shows that

there was a complete understanding between the pre-emptor as well as vendor, from whom the disputed property was purchased by the vendee. The change of possession of immovable property has always been considered a notice to all the inhabitants of the locality about effecting of the transaction. The pre-emptor failed to rebut or deny any such notice and in the absence of cross examination on DWs it can hardly be accepted that the pre-emptor had got knowledge of sale of the disputed property falling in the same khewat and khasra numbers by his brother wherein the property owned by him is also located with the delay of 20/21 days. So the argument of the learned counsel for the vendee that the disputed sale was already in the knowledge of the pre-emptor since its inception and stance qua the performance of first demand after an elapse of 20/21 days is concocted and self-grafted has force and convincible. In this regard, reliance can be placed on the judgments reported as Muhammad Bakhsh v. Nisar Ahmad (1985 CLC 1974), Mst. Hameedan Begum and 11 others v. Muhammad Jafar (2006 MLD 1034), Basharat Ali Khan v. Muhammad Akbar (2011 CLC 969) and Naseer Ahmad v. Arshad Ahmad (PLD 1984 SC 366). It can safely be concluded that the sale was in the knowledge of the pre-emptor from the day first when it was effected and the alleged fulfillment of demand by him on 21.10.2004 is not genuine rather fictitious and concocted, but both the courts below without capturing the said fact erred in law while holding that pre-emptor succeeded to prove performance of requisite Talb-i-Muwathibat.

7. The other back-drop of the case is that the vendee by filing his written statement as well as while appearing as DW/1 categorically deposed that pre-emptor had not only failed to perform the requisite talbs rather no notice Talb-i-Ishhad was ever served upon him. In such scenario, the pre-emptor was required to prove the service of notice Talb-i-Ishhad through registered post on the vendee by production of concerned postman, who was alleged to have actually delivered the same to the vendee. But in the case in hand admittedly Muhammad Anwar (PW/5) was not the original postman, who actually delivered the registered post containing notice Talb-i-Ishhad to the vendee and from the study of his statement, it appears that he was posted as postman of the concerned village later on whereas the alleged delivery of notice was already effected upon vendee. The perusal of copy of receipt of Ex.P/3 available at pages 44 and 45 also reveals that no report was endorsed on it by the concerned postman to the effect that it was delivered to the vendee. The postman (PW/5) got recorded his statement without producing the delivery Register wherein endorsement is made by the postman qua the effect that registered post was delivered or it was refused to have been received by the addressee. In the absence of such vital register as well as report over AD (Ex.P/3), the statement of PW/5 has no

evidentiary value to the effect that registered post containing notice Talb-i-Ishhad was actually served upon the vendee. This aspect has also not been thrashed by the two courts below while rendering their findings on issue No.2. Thus, the findings of two courts below on the said issue are not based on appreciation of material available on record rather the said issue was answered while misinterpreting the said material and the findings are not sustainable in the eye of law, which are reversed while answering the same in negative against the pre-emptor.

8. The vendee being DW1 and his supporting witness Muhammad Hadayat (DW2) specifically stated in their examinations-in-chief that pre-emptor was firstly offered to purchase the land from his real brother and after his refusal, it was purchased by the vendee, which portion in statements-in-chief of said DWs has not been specifically cross-examined by the learned counsel for the pre-emptor, it shall be deemed to have been admitted. Reliance can be placed upon the judgments reported as Waqar Ambalvi v. Faqir Ali and others (1969 SCMR 189), Chief Engineer, Irrigation Department, N.W.F.P., Peshawar and 2 others v. Mazhar Hussain and 2 others (PLD 2004 SC 682), Hafiz Tassaduq Hussain v. Lal Khatoon and others (PLD 2011 SC 296). The pre-emptor despite having knowledge about the transaction had never asked the vendor, who, according to pre-emptor, was his real brother, to sell the land to him nor did he notify the vendee about his intention to claim his right of pre-emption. There is no cavil with the proposition that right of substitution can be waived either by express refusal to purchase the property or by conduct on the part of the pre-emptor, showing lackadaisical attitude in the purchase of the property. Reliance can be placed upon the judgments reported as Abdul Hameed and others v. Muzamil Haq and others (2005 SCMR 895) and Hassan Din and others v. Manzoor Hussain and others (2010 SCMR 810). In former case, it is held as under:--

> "16. The afore-referred circumstances indicate that the respondent/plaintiff all along knew about the sale transaction, that he never asked the vendor, his father to sell the land to him, that there was a complete understanding between the two so much so that even the sale price was deposited in the account of the respondent/plaintiff, that the suit was filed with connivance of the vendor and that it was not merely a case of implied waiver but also collusion."

On the touchstone of above discussion, the finding of the courts below on issue No.5 are also not sustainable and while reversing the same, this issue is answered in affirmative.

9. At the fag end, the argument of learned counsel for the pre-emptor that concurrent findings of fact recorded by both the courts below cannot be interfered with in revisional jurisdiction of this Court, is also misconceived. Although, the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under section 115 of Civil Procedure Code, 1908, if courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such view this court is fortified by the dictum laid down in the judgment reported as Abdul Hakeem v. Habibullah and 11 others (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:--

> "6. Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C. is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C. cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C. if the Courts below have either misread the evidence on record or while assessing or evaluating; the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C. if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record."

This question has also been dealt with by the august Supreme Court of Pakistan in the judgment report as Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255) while holding that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law alone. So, this court can decide that in which cases the interference is warranted. The impugned judgments and decrees are found to be illegal, unlawful and perverse being the result of misreading and non-reading of the

evidence on the record and surely suffered from excess of jurisdiction exercised by the learned courts below, which is exceptionable by this court in the exercise of revisional jurisdiction. The judgments and decrees passed by both the courts below are not only tainted with misreading and non-reading of evidence, but the same were also passed in complete derogation of law settled by the apex Court as referred supra, which has rendered the same illegal, unlawful, ultra vires and without jurisdiction. The case law cited by the learned counsel for the vendee is not applicable to the facts and circumstances of the instant case as the same runs on different footing.

10. Consequently, the instant civil revision is accepted, impugned judgments and decrees delivered by both the courts below are hereby set-aside and the suit for possession through pre-emption filed by the pre-emptor is hereby dismissed with costs throughout.

ZC/A-77/L Revision allowed.

2017 Y L R 1734
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD INTIZAR HUSSAIN---Petitioner
Versus
MUHAMMAD IQBAL---Respondent

C.R. No. 310 of 2011, heard on 16th March, 2017.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Talbs, performance of---Requirements---Pre-emptor was bound to prove performance of talbs for grant of decree of pre-emption---Vendor was sister of pre-emptor but he did not disclose said relationship in the plaint---Plaintiff had nowhere asserted that either relations between them at relevant time were not cordial or he was not available in the village when sale was sanctioned---Story launched by the pre-emptor with regard to gaining knowledge of disputed sale and then fulfilment of first demand after a period of more than one month of transaction was fictitious and concocted---Pre-emptor being brother of vendor could be presumed to have knowledge of sale from its commencement---Plaintiff had not produced the informant before the Court who reported the transaction---Best evidence had been withheld without any justification---Courts were bound to draw adverse inference against the pre-emptor---Plaintiff had failed to perform Talb-i-Muwathibat in circumstances---Nothing was on record that notice of Talb-i-Ishhad was received by the vendee---Acknowledgement due card was neither put to the postman nor got exhibited in his statement---Postal acknowledgement due card was not available on the file---If a witness was not subjected to cross-examination with regard to a fact deposed in his examination-in-chief then it would be deemed to be admitted---Courts below had failed to record just and fair findings---Impugned judgments and decrees passed by the Courts below were set aside and suit was dismissed---Revision was allowed in circumstances.

Naseer Ahmad v. Arshad Ahmad PLD 1984 SC 403; Abdul Hameed and others v. Muzamil Haq and others 2005 SCMR 895; Hassan Din and others v. Manzoor Hussain and others 2010 SCMR 810; Mst. Zahida Perveen v. Mst. Perveen Akhtar 2012 CLC 1497; Noor Jan v. Abdul Deyan and others 2014 MLD 891; Abdul Rehman v. Haji Ghazan Khan 2007 SCMR 1491; Muhammad Hafeez through attorney v. Muhammad Riaz 2015 YLR 229; Falak Niaz v. Amal Din and another 2016 YLR 2047; Mst. Razia Begum v. Adam Khan and another 2016 YLR 172 and Aqal Zaman and others v. Balqiat Khan and others 2016 MLD 245 rel.

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

----S.115---Revisional jurisdiction of High Court--- Scope--- High Court while exercising revisional jurisdiction could interfere in concurrent findings of facts if there was mis-reading or non-reading of material on record.

Muhammad Yasin Hatif for Petitioner.
Mian Muhammad Hussain Chotya for Respondent.
Date of hearing: 16th March, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Mst. Salma Bibi, real sister of respondent/pre-emptor, transferred the subject property to present petitioner/ vendee by means of oral sale mutation No.2083 dated 14.01.2004, which was pirated by the respondent through institution of a suit for pre-emption while claiming his superior right as well as performance of requisite Talbs, it was resisted by the petitioner while maintaining that neither the former had superior pre-emptive right nor he performed the requisite demands as per law. Both the parties during the trial adduced their evidence in pros and cons and ultimately the learned Trial Court while appreciating it decreed the suit through judgment dated 02.03.2009. However, appeal of the petitioner was partially accepted by learned Additional District Judge through judgment and decree dated 10.11.2010 while observing that he was already co-owner in the suit Khata and according to the philosophy laid down in section 20 of the Punjab Pre-emption Act, 1991 the suit property was equally shared among the parties to the lis. The sharing was not challenged any further by respondent through appeal or cross-objections, however findings returned by the two courts below on issue No.4 qua performance of requisite Talbs were attacked by the petitioner by filing the instant civil revision.

2. Inaugurally, it was argued by Mr. Muhammad Yasin Hatif, Advocate, learned counsel for the petitioner that the vendor was the real sister of the respondent, who had complete knowledge of the attestation of mutation dated 14.01.2004 from the day of its inception, but he concocted the false story that on 25.02.2004 it was communicated to him for the first time, which was not believable and the courts below omitted to consider it in its true perspective. He emphasized with great vehemence that respondent also failed to examine/summon the informant and in absence of statement of star witness, it was sine qua non for the courts below to draw adverse inference against the respondent, but they failed to apply the correct law. Mr. Hatif, further added that it was imperative upon the pre-emptor to prove that registered post A.D. containing notice Talb-i-Ishhad was actually served upon the petitioner and to prove the same acknowledgment due card was to be brought on the suit file, which admittedly was not, but both the courts below without considering the dicta laid down by the apex Court in his regard main erred in law while answering the issue under discussion in favour of respondent.

3. On his turn Mr. Muhammad Hussain Chotya, Advocate, learned counsel for respondent while supporting the impugned judgments replied that the respondent by adducing quantitative and qualitative evidence fully proved the fulfillment of the requisite demands; that the concurrent findings of the courts below on issue No.4 were based on well appreciation of evidence in its true perspective, which could not be disturbed by this Court while invoking jurisdiction under section 115 of the Code of Civil Procedure, 1908. He submitted that informer of the sale was petitioner himself and if he was examined, he being adversary definitely might have deposed against the respondent and in such a situation, a risk could not be taken and the respondent was justified in not summoning him, who through other affirmative evidence succeeded to establish the performance of first demand. Mr. Chotya further added that the Postman concerned appeared before the learned Trial Court as PW2 and proved explicitly that registered post containing notice Talb-i-Ishhad was served upon the vendee. He today while placing on record attested copies of list of documents and reliance appended by the respondent with his plaint on the suit file tried to convince that acknowledgment due card was placed on the suit file, but due to some omission, the same could not be tendered exhibited in the statement of Postman and on the basis of said lapse the pre-emptor could not be non-suited. He lastly worded that the PWs were not subjected to cross-examination regarding portions of their statements-in-chief, wherein they specifically deposed that Talb-i-Muwathibat and Talb-i-Ishhad were performed by respondent and the courts below were perfect while deeming such uncross-examined portions of statements-in-chief of PWs as admitted on behalf of the petitioner while rendering findings of issue No.4.

4. Verily, the vendor was the real sister of respondent, but surprisingly he did not disclose this close relationship in the body of the plaint, whereas petitioner in his written statement unequivocally pleaded that at the time of attestation of mutation the respondent was available along with his sister, however, when respondent appeared as PW6, he, for the first time, conceded his relationship with the executant of the mutation under pre-emption, but he nowhere asserted that either relations between them at that relevant point of time were not cordial that he was not available in the village when sale was sanctioned. The story launched by respondent about gaining knowledge of the disputed sale and then fulfillment of first demand after a period of more than one month of the transaction settled by his sister appears to be fictitious and concocted. A prudent person cannot believe that sister and brother living in the same vicinity having harmonial relation and one of them could remain unlearned qua the transaction of part of holding falling in common khewat, the possession of which also changed hands forthwith. In such like situation, the pre-emptor being brother of the vendor could be presumed to have complete knowledge of sale transaction from its commencement, but there was no evidence that the former had ever asked the latter to sell the suit land to him, which shows that there was a complete understanding between them and the property was sold out to an alien so that transaction could be pirated to blackmail him. In such

situation, the argument of learned counsel for the petitioner that the disputed sale was already in the knowledge of the respondent since its genesis has force being convincible. The identical proposition has already been clinched by the apex Court in cases reported as Naseer Ahmad v. Arshad Ahmad (PLD 1984 SC 403), Abdul Hameed and others v. Muzamil Haq and others (2005 SCMR 895) and Hassan Din and others v. Manzoor Hussain and others (2010 SCMR 810).

5. As per contents of para-4 of the plaint it was the stance of respondent that on 25.02.2004 at 10.00 a.m. he along with three witnesses was present in his field falling in square No.76 where the petitioner and Muhammad Baqar, husband of the vendor/brother-in-law of the respondent, were raising boundary wall and on inquiry the petitioner replied that he had purchased it, but none of the tattler was summoned to prove the said story. Under the mandate of the judgments of the Superior Courts in cases Mst. Zahida Perveen v. Mst. Perveen Akhtar (2012 CLC 1497), Noor Jan v. Abdul Deyan and others (2014 MLD 891) and Abdul Rehman v. Haji Ghazan Khan (2007 SCMR 1491) it was made imperative upon the pre-emptor to produce the person, who had imported the transaction, but the best evidence in spite of availability was withheld without any justification. Mr. Chotya, learned counsel for respondent on having been faced with the situation that in absence of statement of informant, who was the source of fulfillment of first demand, it cannot be concluded that pre-emptor succeeded to prove its performance as per law, he without wasting any time responded that if any of the informants was summoned, he being inimical might have deposed against the respondent is not tenable. It cannot be presumed that a witness under the oath could make a wrong statement, but for the sake of arguments if submission of learned counsel is taken to be correct, even then the petitioner or the husband of the vendor could be summoned for examination as PW and if they had made any adverse statement against the respondent, then he had the right for declaring him hostile and through conducting cross-examination the truth could be elucidated. Under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984 the Courts were bound to draw adverse inference against the respondent for withholding the direct affirmative evidence despite its availability. It is surprising that petitioner while appearing as DW1 categorically stated that transaction of sale was effected in presence of respondent, who never performed the demands, but despite his saying so he was not suggested during cross-examination that on his information the first demand was fulfilled. Moreover, respondent could not give specific venue in the plaint where it was performed, but he vaguely pleaded that it was pronounced in Square No.76. No doubt, being PW, respondent worded that Talb-i-Muwathibat was accomplished in Killa No.12 of the said square but it being improvement from the contents of plaint was to be simply ignored.

6. The other damaging factor of the case was that it was nowhere asserted by respondent in his plaint that notice Talb-i-Ishhad was received by the petitioner. However, while appearing in the witness-box, he categorically asserted that it was served on the addressee on 27.02.2004 in the following words:--

The respondent in his support examined the Postman as PW2, who in his statement-in-chief deposed altogether differently that the post was delivered by him to the petitioner on 28.02.2004. The difference of one complete day qua receipt of notice Talb-i-Ishhad by the petitioner as per statements of PW2 and 6 made the stance of respondent skeptical. The A.D. card was neither put to the Postman nor got exhibited in his statement, who during the cross-examination conceded that the A.D. card was not returned by him but it was retained by him which was still available at his residence. For ready reference, the complete statement of the Postman is reproduced hereunder:--

It is strange that the said card could not be produced on the suit file despite the fact that it remained pending before the learned Trial Court for another 3-1/2 years after recording statement of the postman, but no effort was made to direct him to produce it, which was lacking on the suit file and in absence of it, it was not just for the Courts below to conclude that respondent succeeded to establish the receipt of Notice by the petitioner, who otherwise was denying that it was not served upon him. After the analysis of cross-examination of PW2, the argument of Mr. Chotya that original acknowledgment due card was already brought on the suit file, but due to some omission the same could not be exhibited has been falsified. The attested copies of list of documents as well as reliance are also silent that the original A.D. Card was brought on the suit file. However, on having been faced with the situation that if A.D. Card was available on suit file, then why attested copy of the same along with aforereferred attested copies of the lists could not be brought on the file in hand, the learned counsel for respondent replied that as the same was not exhibited, its attested copy was not issued is not believable on the counts; firstly, had the A.D. Card was available on the suit file and the respondent applied for its attested copy, the Copying Agency might have issued it or would have refused to deliver its copy due to its non-signing by the Judicial Officer or being non-exhibited document by endorsing a report on the "Swal Form", secondly, deposition of the Postman that the A.D. Card was available at his residence, there left nothing but to hold that the document was deliberately not brought on the suit file, which was mandatory in view of provisions of section 13 of the Punjab Pre-emption Act, 1991 and such non-compliance thereof was fatal for the respondent, but Courts below erred in law while ignoring this lapse on the part of the respondent as per dicta laid down by the Superior Courts in the cases 'Muhammad Hafeez through attorney v. Muhammad Riaz' (2015 YLR 229), 'Falak Niaz v. Amal Din and another' (2016 YLR 2047), 'Mst. Razia Begum v. Adam Khan and another' (2016 YLR 172) and 'Aqal Zaman and others v. Balqiat Khan and others' (2016 MLD 245).

7. Undisputedly, it is well established principle of law that if a witness was not subjected to cross-examination regarding a fact deposed in his examination-in-chief, then it would be deemed to be admitted. In the case in hand, Muhammad Intizar (PW5) and Muhammad Yousaf (PW6) provided the same detail qua fulfillment of Talb-i-Muwathibat in their deposition in line with the contents of the plaint, who

were totally not subjected to cross-examination to this part of their statements-in-chief and there might have some force in the argument of learned counsel for the respondent that the courts below were perfect while admitting their statements on the part of the petitioner, but each case has to be dealt with keeping in view peculiar facts and circumstances thereof. The onus of issue qua performance of demands is always placed on the shoulders of the pre-emptor and it is sine qua non for him to discharge the same as per its requirement even if the rival party might not be in picture. Both the courts below erred in law while giving undue weight to the lapse on the part of learned counsel for the petitioner, who failed to cross-examine the PWs on such portions of their statements-in-chief. Moreover, the statements-in-chief of the said PWs are totally silent to extent that second demand was fulfilled through delivery of notice by the respondent. The courts below were required to decide the lis on its own merits as per law and when law requires specific act was to be done in a particular manner, then the pre-emptor was required to perform the same in such a manner, but in the case in hand as observed supra, the respondent failed to cross the barrier of Talbs.

8. The accumulative effect of the appreciation of evidence and its discussion is that respondent miserably failed to discharge the onus of issue No.4 and both the courts below failed to return its just and fair findings, which being illegal, unlawful and against the material on record cannot be sustained and thus are reversed. Despite the fact that the respondent was also co-sharer in the joint holding along with petitioner, but his suit could not be decreed as he remained unsuccessful to prove the requisite Talbs. Although the concurrent findings recorded by the courts below are not interfered, but in the instant case, it has been proved that the said concurrent findings were suffering from misreading and non-reading of the material on the record and in such circumstances this Court is very much competent to interfere therewith in the exercise of revisional jurisdiction, which is meant to correct errors of law committed by the subordinate judiciary in the discharge of their judicial functions.

9. Resultantly, this petition is allowed, the judgments and decrees of the courts below are hereby set aside and suit of the respondent is dismissed with no order as to cost.

ZC/M-86/L Revision allowed.

2017 Y L R Note 49
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Ch. GHULAM NABI through L.Rs. and 2 others---Petitioners
Versus
Malik FAQEER MUHAMMAD alias FAQIR ALI through L.Rs. and others---Respondents

C.Rs. Nos.1617 and 1654 of 2005, heard on 10th December, 2014.

(a) Islamic law---

----Inheritance--- Limitation--- Custom--- Hearsay evidence--- Scope--- Absolute owner---No documentary proof was on record that deceased died after the death of common predecessor-in-interest of the parties---Hearsay evidence had no value in the eye of law---Present suit was filed after 32 years of the death of legal heir of propositus which was beyond the period of limitation--- Propositus of the parties was governed by custom and inheritance mutations had rightly been sanctioned---Plaintiffs had no locus standi to challenge the impugned mutations---Suit of the plaintiffs had rightly been dismissed by the courts below on merits as well as on limitation---Propositus of the parties died prior to the enforcement of Punjab Muslim Personal Law (Shariat) Application Act, 1948 when custom was still applicable and rule of inheritance was custom---If a person had acquired property under custom from a Muslim, he should be deemed to have become an absolute owner of such land as if the land had been devolved on him under the Muslim Shariat Law provided such acquisition has been acquired prior to the enforcement of Muslim Personal Law (Shariat) Application Act, 1948---Impugned judgments passed by the courts below were based on valid reasons---No mis-reading, non-reading, infirmity or perversity was pointed out in the impugned judgments and decrees passed by the courts below---Revision was dismissed, in circumstances. [Paras. 11, 14, 15, 16, 17 & 18 of the judgment]

Mst. Sunar Begum and 3 others v. Federal Government of Pakistan through Secretary, Ministry of Justice, Islamabad and another PLD 1988 FSC 1; Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others 1999 SCMR 2883; National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others 2011 SCMR 446; Muhammad Muzaffar Khan v. Muhammad Yusuf Khan PLD 1959 SC (PAK) 9; Muhammad Asghar Shah v. Muhammad Gulsher Khan and Khadim Hussain PLD 1949 Lah. 116; Khan Baig and others v. Mst. Irshad Begum and others 1988 SCMR 1775; Walyat Ali and others v. Mst. Alif Noor alias Alif Bibi and others 2001 MLD 192; Falak Sher and others v. Mst. Banno Mai and others 2006 SCMR 884; Musa Khan v. Begum Jan and others PLD 1990 SC 982; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Muhammad Ashraf and others v. Naseem Akhtar and 4 others 2008 CLC 1720; Mohsin Khan and 3 others v.

Ahmad Ali and 2 others PLD 2004 Lah. 1; Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801; Mst. Fazeelat Jan and others v. Sikandar through His Legal Heirs and others PLD 2003 SC 475; Sardar v. Mst. Nehmat Bi and 8 others 1992 SCMR 82; Mst. Fatima Begum and another v. Khush Naseeb Khan and others PLD 2005 Lah. 641; Mst. Ghulam Jannat v. Ghulam Jannat 2003 SCMR 362; Ghulam Haider and others v. Murad through Legal Representatives and others PLD 2012 SC 501; Muhammad Zubair and others v. Muhammad Sharif 2005 SCMR 1217; Pakistan Telecommunication Company Limited through Chairman and 3 others v. Messrs Muhammad Saeed Wazir Former General Manager (T&R) PTCL and another 2005 SCMR 1225; Abdul Ghafoor and others v. Muhammad Shafi and others PLD 1985 SC 407; A.F.Ferguson and Co. v. The Sind Labour Court and another PLD 1985 SC 429; Shamshad Ali v. Senior Post Master (DLY), Islamabad G.P.O. Islamabad and 2 others 2003 SCMR 367; Mst. Sharam v. Taj Muhammad and others 2002 CLC 2001; Multiline Associates v. Ardeshir Cowasjee and 2 others PLD 1995 SC 423; Bashir Ahmed v. Abdul Aziz and others 2009 SCMR 1014; Federation of Pakistan and another v. Irfan Tariq and others 2009 SCMR 1018; Mrs. Anis Haider and others v. S. Amir Haider and others 2008 SCMR 236; Mst. Fazal Nishan and others v. Ghulam Qadir and others 1992 SCMR 1773; Khuda Bakhsh through His Legal Heirs v. Mst. Niaz Bibi and another PLD 1994 SC 298; Muhammad Hussain and others v. Muhammad Shafi and others 2008 SCMR 230; Suba through His 8 L.Rs v. Mst. Fatima Bibi through Her L.Rs and others 1992 SCMR 1721 and Muhammad Asghar and 3 others v. Rehmat Ullah and 2 others 2012 MLD 1791 ref.

Mst. Sunar Begum and 3 others v. Federal Government of Pakistan through Secretary, Ministry of Justice, Islamabad and another PLD 1988 FSC 1; Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others 1999 SCMR 2883; National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others 2011 SCMR 446; Muhammad Muzaffar Khan v. Muhammad Yusuf Khan PLD 1959 SC (PAK) 9; Muhammad Asghar Shah v. Muhammad Gulsher Khan and Khadim Hussain PLD 1949 Lah. 116; Khan Baig and others v. Mst. Irshad Begum and others 1988 SCMR 1775; Walyat Ali and others v. Mst. Alif Noor alias Alif Bibi and others 2001 MLD 192; Falak Sher and others v. Mst. Banno Mai and others 2006 SCMR 884; Musa Khan v. Begum Jan and others PLD 1990 SC 982; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Muhammad Ashraf and others v. Naseem Akhtar and 4 others 2008 CLC 1720; Mohsin Khan and 3 others v. Ahmad Ali and 2 others PLD 2004 Lah. 1; Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801; Mst. Fazeelat Jan and others v. Sikandar through His Legal Heirs and others PLD 2003 SC 475; Sardar v. Mst. Nehmat Bi and 8 others 1992 SCMR 82 and Mst. Fatima Begum and another v. Khush Naseeb Khan and others PLD 2005 Lah. 641 distinguished.

Abdul Ghafoor and others v. Muhammad Shafi and others PLD 1985 SC 407; Ghulam Haider and others v. Murad through L.Rs. and others PLD 2012 SC 501; Suba through Legal Heirs v. Fatima Bibi through legal heirs and others 1996 SCMR 158 and Suba through 8 Legal Heirs v. Mst. Fatima Bibi and others 1992 SCMR 1721 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope---High Court could not interfere in concurrent findings recorded by the courts below while exercising revisional jurisdiction unless there was illegality or material irregularity therein. [Para. 18 of the judgment]

Aurangzeb through L.Rs. v. Muhammad Jaffar 2007 SCMR 236; Shafi Muhammad v. Khanzada Gul 2007 SCMR 368; Rashid Ahmad v. Said Ahmad 2007 SCMR 926 and Bashir Ahmed v. Ghulam Rasool 2011 SCMR 762 rel.

Ch. Muzaffar Ali Khan and Zawar Ahmad Sheikh for Petitioners (in C.R.No.1617 of 2005).

Ahmad Waheed Khan for Petitioners (in C.R.No. 1654 of 2005).

Muhammad Hussain Awan and Ijaz Khalid Niazi for respondents/defendants.

Date of hearing: 10th December, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This judgment will dispose of C.R.No.1617 and C.R.No.1654 of 2005 jointly, which have been filed against the consolidated judgment and decrees dated 13.4.2002 whereby two separate suits filed by the petitioners were dismissed by the learned trial court as well as the judgments and decrees dated 6.5.2005 whereby the appeals filed by the petitioners were dismissed and common question of facts and law are involved.

2. The facts in brief are that the petitioners of C.R. No.1617 of 2005 are the descendents of Mst. Sardaran Bibi daughter of Noor Din, who was grandson of Ladha and they brought a suit for declaration styled as Ch. Ghulam Nabi and others v. Malik Faqir Muhammad and others while challenging the vires of mutation of inheritance No.56 dated 6.6.1917 (Exh.P2) of Ladha, mutation No.142 (Exh.P4) of life estate of Mst. Karam Bibi and subsequent Mutation No.503 dated 5.8.1969, Mutation No.542 dated 12.5.1971, and Mutations Nos.574, 575, 576 and 577 dated 22.3.1973 with the assertion that they were entitled to inherit the agricultural land left by Ladha, the common ancestor, and that Noor Din grandson of Ladha died some days after the death of Ladha, who was not the pre-deceased grandson of Ladha and as such they were entitled to

inherit to the extent of ½ share from the disputed property left by Ladha deceased. The said suit was resisted by the defendants-respondents/descendents of Muhammad Ali, who also filed an application under Order VII Rule 11, C.P.C. for rejection of the plaint, which was dismissed by the learned trial court vide order dated 8.12.1993. However, their civil revision was accepted by this Court vide judgment dated 15.6.1994 and the plaint of the above referred suit filed by the descendents of Mst. Sardaran Bibi was rejected. Against the said judgment Civil Appeal No.1423 of 1995 as well as Civil Appeal No.1424 of 1995 were filed before the august Supreme Court of Pakistan, which were accepted by the apex Court vide judgment dated 28.5.1999 and the suit was remanded to the learned trial court with the direction that same should be decided after recording evidence of the parties.

3. After the remand of said suit filed by the descendents of Mst. Sardaran Bibi, the petitioners of C.R.No.1654 of 2005/ descendents of Mst. Begum Bibi, the granddaughter of Ladha deceased on 7.7.1999 also filed a suit for declaration titled as "Muhammad Hussain and others v. Nooran Bibi and others" before the learned trial court with the assertion that as descendents of Mst. Begum Bibi the granddaughter of Ladha were entitled to get 1/3rd share out of the estate left by deceased Ladha as the parties were Muslim and inheritance was to be governed by Shariah on the principle that nearer in blood must exclude the remote from inheritance and that decendents of Sardar Bibi cannot claim any share in the suit property. Both these suits filed by the plaintiffs/petitioners were contested by the respondents/defendants, who are descendents of Muhammad Ali whom the disputed property left by Ladha deceased was mutated vide mutations No.56 Exh.P2 and mutation No.142 Exh.P4. The learned trial court framed the following consolidated issues:--

1. Whether the plaintiff of the suit titled Ch. Ghulam Nabi and others v. Malik Faqir Muhammad and others are entitled to inherit 1/2 share of the land left by Noor Din and Ldha deceased under the Muslim Law of inheritance on the grounds mentioned in the plaint? OPP

2. Whether the plaintiffs of suit titled Muhammad Hussain and others v. Nooran Bibi and others are entitled to inherit 1/3 shares of the land left by Ladha deceased as legal heirs of Mst. Begum Bibi on the grounds mentioned in the plaint?OPP

3. Whether the mutation No.56 dated 6.6.1917 mutation No.142 dated 26.9.1927, mutation No.503 dated 5.8.1969, mutation No.542 dated

12.5.1971, and mutation Nos.574, 575, 576 and 577 dated 22.3.1973 are null and void inoperative and ineffective qua the rights of the plaintiffs on the grounds mentioned in the plaint?OPP

4. Whether the plaintiffs are entitled to get possession of the land to the extent of shares from the defendants by way of mandatory injunction?OPP

5. Whether the plaintiffs of the suit titled Muhammad Hussain and others v. Mst. Nooran Bibi and others are entitled to get the relief of permanent injunction as prayed for?OPP

6. Whether the plaintiffs of both the suits have no cause of action and locus standi to file their respective? OPD

7. Whether both the suits are within time? OPP

8. Whether both the suit for declaration without the prayer of possession are barred under section 42 of the Specific Relief Act? OPD

9. Whether Mst. Sardar Bibi was not entitled to inherit the land in dispute under the customary law and thus the plaintiffs of suit titled Ghulam Nabi and others v. Malik Faqir Muhammad and others have no vested right to file this suit under the law? OPD

10. Whether Mst. Begum Bibi was not entitled to inherit the land in dispute under the customary law and thus the plaintiffs of the suit titled Muhammad Hussain and others v. Mst. Nooran Bibi and others have no vested right to file this suit under the law? OPD

11. Whether the parties had been governed by the customary law of Rajput of Lahore if so, its effect?OPD

12. Whether the plaintiffs are estopped by their words and conduct of the present suits?OPD

13. Whether the suits are barred under section 2-A of Ordinance VIII of 1983?OPD

14. Whether both the suits are false and frivolous and the defendants (contesting) are entitled to special costs under section 35-A of C.P.C.?

15. Whether the suit titled Muhammad Hussain v. Nooran Bibi and others is bad for mis-joinder of necessary parties?OPD

16. Relief.

4. The parties produced evidence in support of their respective claims.

5. Initially the learned trial court, vide consolidated judgment and decrees dated 13.4.2002 dismissed the above styled two suits. However the learned lower appellate court, vide judgment and decrees dated 5.10.2004 remanded the suits to the learned trial court to decide the same afresh. Being aggrieved the respondents-defendants assailed the remand order dated 5.10.2004 passed by the learned Additional District Judge by filing two separate civil revisions before this Court, which were allowed vide judgment dated 14.2.2005 and the appeals filed by the petitioners were remanded to the lower appellate court for decision on merits as there was no reasons to remand the suits to the learned trial Court, who vide impugned judgment and decree dated 6.5.2005 dismissed the appeals filed by the petitioners. Being aggrieved the above referred two revision petitions have been filed by the petitioners/plaintiffs of both the suits.

6. The learned counsel for the petitioners of C.R.No.1617 of 2005 i.e. the descendents of Mst. Sardaran Bibi has argued that both the courts below have delivered impugned judgments and decrees on erroneous premises of law and without application of their judicious mind. It is further argued that the courts below never considered paras 3 and 4 of the written statement filed by the respondents as well as Exh.P22 pertaining to petition for leave to appeal before the apex Court besides mutation No.142 Exh.P4 wherein Mst. Sardaran Bibi was shown to have died on 26.9.1927, who was admittedly alive at the time of death of Ladha and the plea of the petitioners that she was intentionally and fraudulently shown as dead has not been considered by the courts below. He has further mooted that the courts below wrongly observed that life estate devolved upon Mst. Karam Bibi stood terminated automatically with her death/murder and violated the dictum laid down by the apex Court as well as Federal Shariat Court to the effect that maintenance holders are given some land for maintenance till life. He has further argued that Mst. Sardaran Bibi was never given anything as life estate, which is proved on the record and how the life estate could be terminated especially when she was deprived of her rights fraudulently. He has next contended that findings of the courts below that Noor Din died prior to the death of Ladha is also erroneous. He has further submitted that Mst. Karam Bibi was murdered by Muhammad Ali predecessor-in-interest of respondents Nos.1 to 23 in order to usurp the property left by her of which she was a limited owner and the learned courts below have ignored the said aspect of the case. He has next argued that being murderer Muhammad Ali was not entitled to inherit the property of deceased Mst. Karam Bibi under the

Muslim Law. He has further added that the apex Court while interpreting the Muslim Personal Law (Shariat) Application Act, 1962 and section 2-A inserted through Punjab Amendment Ordinance XIII of 1983 held that property inherited and left by a Muslim before 15.3.1948 under custom shall be devolved upon all his legal heirs male and female, but the said dictum has been violated by the courts below while passing the impugned judgments and decrees. The learned counsel for the petitioners while relying upon the judgments reported as Mst. Sunar Begum and 3 others v. Federal Government of Pakistan through Secretary, Ministry of Justice, Islamabad and another (PLD 1988 FSC 1), Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others (1999 SCMR 2883), National Bank of Pakistan through Chairman v. Nasim Arif Abbasi and others (2011 SCMR 446), Muhammad Muzaffar Khan v. Muhammad Yusuf Khan (PLD 1959 SC (PAK) 9), Muhammad Asghar Shah v. Muhammad Gulsher Khan and Khadim Hussain (PLD 1949 Lahore 116), Khan Baig and others v. Mst. Irshad Begum and others (1988 SCMR 1775), Walyat Ali and others v. Mst. Alif Noor alias Alif Bibi and others (2000 PSC 589), Falak Sher and others v. Mst. Banno Mai and others (2006 SCMR 884), Musa Khan v. Begum Jan and others (PLD 1990 SC 982), Khair Din v. Mst. Salaman and others (PLD 2002 SC 677), Muhammad Ashraf and others v. Naseem Akhtar and 4 others (2008 CLC 1720), Mohsin Khan and 3 others v. Ahmad Ali and 2 others (PLD 2004 Lahore 1), Mst. Gohar Khanum and others v. Mst. Jamila Jan and others (2014 SCMR 801), Mst. Fazeelat Jan and others v. Sikandar through His Legal Heirs and others (PLD 2003 SC 475), Sardar v. Mst. Nehmat Bi and 8 others (1992 SCMR 82) and Mst. Fatima Begum and another v. Khush Naseeb Khan and others (PLD 2005 Lahore 641) has prayed for acceptance of the civil revision, setting aside of the impugned judgments and decrees passed by the courts below and further for decreeing the suit filed by the petitioners.

7. Similarly, the learned counsel for the petitioners of C.R.No.1654 of 2005 has argued that both the courts below misinterpreted the provisions of section 2-A of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 inserted through Punjab Amendment Ordinance XIII of 1983. He has further argued that both the courts below wrongly observed that Muhammad Ali, the predecessor-in-interest of respondents had become the absolute owner of the suit land left by Ladha, which is contrary to the spirit of laws on the subject introduced from time to time. He has further mooted that the impugned judgments and decrees are not only contrary to the spirit of Islam and dictate ordained by Almighty Allah in the Holy Quran, but also the verdict of apex

Court delivered in the judgments reported as Mst. Ghulam Jannat v. Ghulam Jannat (2003 SCMR 362). He has further argued that Rajpoots of Mauza Shamkey Bhattian, Lahore were not governed by any custom and that the females were entitled to inherit the property under the Shariah. The learned counsel for the petitioners while relying upon the judgments reported as Ghulam Haider and others v. Murad through Legal Representatives and others (PLD 2012 SC 501), Muhammad Zubair and others v. Muhammad Sharif (2005 SCMR 1217), Pakistan Telecommunication Company Limited through Chairman and 3 others v. Messrs Muhammad Saeed Wazir Former General Manager (T&R) PTCL and another (2005 SCMR 1225), Abdul Ghafoor and others v. Muhammad Shafi and others (PLD 1985 SC 407), A.F.Ferguson and Co. v. The Sindh Labour Court and another (PLD 1985 SC 429), Mst. Ghulam Janat and others v. Ghulam Janat through Legal Heirs and others (2003 SCMR 362), Shamshad Ali v. Senior Post Master (DLY), Islamabad G.P.O. Islamabad and 2 others (2003 SCMR 367), Mst. Sharam v. Taj Muhammad and others (2002 CLC 2001), Multiline Associates v. Ardeshir Cowasjee and 2 others (PLD 1995 SC 423) has prayed for acceptance of the civil revision, setting aside of the impugned judgments and decrees passed by the courts below and further for decreeing the suit filed by the petitioners.

8. Conversely the learned counsel for the respondents-defendants i.e. descendants of Muhammad Ali supported the impugned judgments and decrees passed by the courts below and also argued that at the time of death of Ladha, custom was being governed in the region and accordingly out of the disputed property 1/2 share was given to Muhammad Ali whereas other 1/2 share was devolved upon Mst. Karam Bibi, the widow of Noor Din pre-deceased grandson of Ladha vide mutation No.56 Exh.P2 and under prevailing custom the life estate vested in Mst. Karam Bibi after its termination was again reverted to Muhammad Ali vide mutation No.142 Exh.P4 being the sole male heir of Ladha. He has further argued that Muhammad Ali was only surviving male heir of Ladha deceased and he accordingly inherited whole of the suit property as Muslim under the custom and, therefore, on the strength of section 2A inserted through Punjab Amendment Ordinance XIII of 1983, Muhammad Ali became the absolute owner of the disputed property. He while relying upon the judgments reported as Bashir Ahmed v. Abdul Aziz and others (2009 SCMR 1014), Federation of Pakistan and another v. Irfan Tariq and others (2009 SCMR 1018), Mrs. Anis Haider and others v. S. Amir Haider and others (2008 SCMR 236), Mst. Fazal Nishan and others v. Ghulam Qadir and others (1992 SCMR 1773), Khuda Bakhsh through His Legal Heirs v. Mst. Niaz Bibi and

another (PLD 1994 SC 298), Muhammad Hussain and others v. Muhammad Shafi and others (2008 SCMR 230), Suba through His 8 L.Rs v. Mst. Fatima Bibi through Heir L.Rs and others (1992 SCMR 1721), Muhammad Asghar and 3 others v. Rehmat Ullah and 2 others (2012 MLD 1791) and Ghulam Haider and others v. Murad through Legal Representatives and others (PLD 2012 SC 501) has prayed for dismissal of these civil revisions.

9. Arguments heard and record perused.

10. The case emerges from the pleadings of the parties is that one Ladha, the common predecessor-in-interest of the parties was owner of agricultural land measuring 2560 kanals 17 marlas situated in Mauza Shamkey Bhattian, Lahore. His son Karam Elahi was pre-deceased leaving behind Muhammad Ali and Begum Bibi his son and daughter as well as other pre-deceased grandson Noor Din, who was survived by Mst Sardaran Bibi daughter and Mst. Karam Bibi widow. Ladha died in the year 1917 and on his death agricultural property left by him was mutated under inheritance mutation No.56 dated 6.6.1917 Exh.P2 in favour of Muhammad Ali the predecessor-in-interest of respondents to the extent of 1/2 share and Mst. Karam Bibi widow of Noor Din to the extent of remaining 1/2 share as a life estate. Mst. Karam Bibi was murdered in the year 1923 and mutation of her life estate was also sanctioned in favour of Muhammad Ali the predecessor-in-interest of respondents vide mutation No.142 dated 26.9.1927 Exh.P4.

11. The perusal of plaint filed by Ghulam Nabi (deceased) etc. petitioners of C.R.No.1617 of 2005/descendents of Mst. Sardaran Bibi reveals that their grouse is that Noor Din, the father of Mst. Sardaran Bibi/grandson of Ladha deceased had died some days after the death of Ladha, the common predecessor-in-interest of the parties and was entitled to inherit the legacy of Ladha deceased. Admittedly no documentary proof to the effect that Noor Din had died after the death of Ladha is available on file. Even no direct oral evidence has been produced by the said plaintiffs/petitioners through which it could be gathered that Noor Din was alive at the time of death of Ladha. Muzaffar Ali, one of the plaintiffs, appeared as PW1 and Muhammad Rasheed aged 55/56 years was produced as PW2. The latter deposed nothing in his examination-in-chief regarding the above fact of the case. Then there is left only statement of PW1, who deposed in his examination-in-chief that Noor Din had died some days after the death of Ladha. However, he conceded during the cross-examination that this fact was heard by him from the others and through hearsay evidence a fact cannot be proved as the same attains no value in the eye of law.

Only solitary statement of PW1 regarding the death of Noor Din and that too on the basis of hearsay is insufficient to hold that Noor Din had died after the death of Ladha.

12. The perusal of mutation No.56 (Exh.P2) further reveals that 1/2 share out of the legacy left by Ladha was devolved upon Muhammad Ali, the real brother of Noor Din and if Noor Din was alive at that moment, then other ½ share would have been mutated in his favour. Moreover, if it was the intention to deprive Noor Din from the legacy of Ladha, then why the other ½ share out of the disputed property was mutated in favour of her widow Mst. Karam Bibi. This fact proves that Muhammad Ali did nothing to deprive Noor Din from the estate of Ladha as he was not alive at that moment, so life estate was created in favour of his widow as per custom. It is also important feature of the case that the death entry of Ladha was brought on the file by the respondents/ defendants as Exh.P12, which shows that family of Ladha was vigilant to incorporate the death entries of their family members in the relevant record. On the other hand the death entry of Noor Din was neither produced on record nor any effort was made or application moved by the descendents of Noor Din to summon the concerned register maintained by Union Council in this regard. If there was a difference of some days in the death of Ladha as well as Noor Din, then the death entry of Noor Din might also have been got incorporated in the relevant register, but non-production of record regarding death entry of Noor Din leaves a question mark about the claim introduced by the plaintiffs. The inference drawn by the courts below that Noor Din had died prior to the death of Ladha is born out from the evidence available on file. Even otherwise, the fact that Noor Din was not pre-deceased grandson of Ladha, the onus was on the shoulders of above referred plaintiffs, who failed to prove the same.

13. The other contention of the learned counsel for the petitioners of C.R.No.1617 of 2005 that Mst. Karam Bibi was murdered by Muhammad Ali and being murderer, he was not entitled to inherit the property of Mst. Karam Bibi is also without any force on the following two grounds:--

1. Muhammad Ali had been acquitted by the competent Court of law of the charge of murder of Mst. Karam Bibi, which fact was also conceded by PW1 during the cross-examination.

2. Even according to their own version, Mst. Karam Bibi was only life estate holder of the land in dispute till her life and after termination thereof on her death the property retained by her as life estate was returned to Ladha, the

actual owner and common predecessor in interest of the parties under the law. For the sake of arguments, if it is presumed that Muhammad Ali had committed murder of Mst. Karam Bibi, although there is no evidence in this regard, even then he being the sole heir of Ladha deceased had rightly inherited the disputed property, which ultimately fell in the ownership of Ladha on the death of Karam Bibi.

14. It is also pertinent to note that Mst. Sardaran Bibi remained alive till 1970, who took his last breath on 18.9.1970, but during her lifetime, she had never filed any suit challenging the disputed mutation Exhs.P2 and P4. Even after 23 years of her death the suit was filed by her descendents before the learned trial court. The said aspect of the case made it clear that Ladha was governed by custom and inheritance mutation No.56 dated 6.6.1917 (Exh.P2) had been rightly sanctioned in favour of Muhammad Ali as grandson and the remaining ½ share out of the total legacy was mutated in favour of Mst. Karam Bibi widow of pre-deceased grandson of Ladha as life estate. So the plaintiffs/petitioners of C.R.No.1617 of 2005 had no locus standi to challenge the impugned mutations and both the courts below have rightly dismissed the suit filed by them on merits as well as on limitation. The next submission of learned counsel for the petitioner that defendants/respondents as well as the rival plaintiffs conceded the claim of the plaintiffs is also misconceived as from the perusal of the written statement or Exh.P22 no such admission on their part is found available on the record.

15. The other suit filed by descendents of Mst. Begum Bibi, the granddaughter of Ladha deceased/petitioners of C.R.No.1654 of 2005 hinges upon the principle that whether the legacy of Ladha was to be distributed according to custom or Shariah. The version of the plaintiffs of the said suit is that parties were never governed by custom and under Shariah they being descendents of Ladha are entitled to get 1/3 share in the disputed property. There is no cavil with the proposition that if it is proved that Ladha was governed by Shariah, then her granddaughter cannot be deprived of her legal share. Admittedly Ladha died prior to the enforcement of Shariat Application Act 1948 when still custom was applicable. Ladha deceased was Muslim and Muhammad Ali was his grandson and being sole male heir, he acquired agricultural land left by Ladha in the Province of Punjab before 15.3.1948 under custom through mutation No.56 Exh.P2 as well as mutation No.142 Exh.P4. Muhammad Ali by virtue of such acquisition was deemed to have become absolute owner of entire land acquired by him as if such land had been devolved upon him under Islamic Shariat Law.

This view has been fortified in the judgment reported as Abdul Ghafoor and others v. Muhammad Shafi and others (PLD 1985 SC 407) wherein it has been held that the purview of newly-added section 2-A in the 1962 Act read with its clause (a) provides that any owner who as a "male heir" had inherited agricultural land before 15.3.1948 under custom shall, by virtue of the new statutory command, be deemed to have inherited it under the Muslim (Shariat) Law and was thus absolute owner enjoying full power over it under the said law and that being so, no restriction as visualised by custom would annul the alienation. This view has recently been once again affirmed by the apex Court in the judgment reported as Ghulam Haider and others v. Murad through L.Rs and others (PLD 2012 SC 501) while observing that by virtue of section 2-A introduced through Ordinance XIII of 1983 a male heir acquiring any agricultural land in the Province of the Punjab before March 15, 1948 under custom from a person who at the time of such acquisition was a Muslim was to be deemed to have become, upon such acquisition, an absolute owner of the entire land acquired by him as if such land had devolved on him under the Muslim Personal Law (Shariat). For ready reference the relevant portion thereof is reproduced as under:--

> "For the purposes of understanding the true scope, effect and application of the said Ordinance we have attended to each and every word of the same quite carefully and have observed that, according to the Preamble to the said Ordinance, the purpose of introduction of that legislation was "to amend the West Pakistan Muslim Personal (Shariat) Act, 1962 so as to bring it in conformity with the Shariah in the manner hereinafter appearing." It is, therefore, quite clear that the effort made by the said Ordinance was to bring the Act of 1962 in conformity with the Shariah but the "manner" chosen for achieving that object was the one provided for in that Ordinance and, thus, any other mode conceivable for achieving the same object was meant to be ignored or disregarded and the purpose was to be achieved only in the manner specified in that piece of legislation. The next thing noticed by us is that the provisions of the newly introduced section 2-A through that piece of legislation were to have their effect "Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any Court". This shows that what the new legislation wanted to achieve was that successions prior to Act IX of 1948 were meant to be governed only by the freshly introduced section 2-A introduced through Ordinance XIII of 1983 and not by any other law or judicial

intervention or interpretation. It is but obvious that by introducing Ordinance XIII of 1983 the legislature intended to put to rest all controversies and litigation in respect of successions prior to Act IX of 1948 and to hold for all times to come that all such successions were to be governed and covered by the freshly introduced section 2-A. It was in that background that section 2-A introduced through Ordinance XIII of 1983 had categorically provided that "---where before the commencement of the Punjab Muslim Personal Law (Shariat) Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim:--(a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat)---."

16. The plaintiffs/revision petitioners of above referred revision petition failed to bring any material on record that at the time of death of Ladha deceased he was not governed by custom. The solitary statement of PW3 on their behalf is available on file, who during the course of cross-examination categorically stated as under:-

and a perusal thereof reveals that in fact he supported the stance of the respondents/defendants that the female heirs of a deceased were excluded from the inheritance of their ancestors as per custom. The learned counsel for the respondents/defendants has referred to the judgments reported as Suba through Legal Heirs v. Fatima Bibi through legal heirs and others (1996 SCMR 158) and Suba through 8 Legal Heirs v. Mst. Fatima Bibi and others (1992 SCMR 1721) which he states pertains to the land falling in the same Mauza Shamkey Bhattian wherein it was held that custom was prevailing in the said locality and tribes prior to the promulgation of Muslim Personal Law (Shariat) Application Act, 1962. It is settled principle that rule of inheritance at certain time was custom and if a person acquired the property under a custom from a Muslim, he shall be deemed to have become an absolute owner of such land as if such land had been devolved on him under the Muslim Shariat Law provided such acquisition had been acquired prior to the enforcement of Muslim Personal Law (Shariat) Application Act, 1948 and such devolution had been declared absolute by section 2A introduced through Ordinance XIII of 1983.

17. It is also significant to note that Ladha had died in the year 1917 whereas Begum Bibi, the predecessor-in-interest of the plaintiffs of C.R.No.1654 of 2005 had died in the year 1964, who did not agitate the disputed mutation throughout her life. Moreover, Muhammad Ali upon whom the property was devolved died

in the year 1969 and in this era other mutations were also attested in due process of law, but the plaintiffs remained silent for a long time. The suit was filed in the year 1993 after an elapse of 76/77 years from the attestation of mutation No.56 Exh.P2, 66 years after the attestation of second mutation No.142 Exh.P4, 30 years after the death of Mst. Begum Bibi and after 23 years from the death of Muhammad Ali, which was filed beyond period of limitation. The case law cited by the learned counsel for the petitioners is not applicable to the facts and circumstances of these cases. Both the learned courts below have non-suited the petitioners through the impugned judgments and decrees on the valid reasons.

18. The learned counsel for the petitioners have failed to highlight or point out any misreading or non-reading or any infirmity and perversity in the impugned judgments and decrees passed by the courts below. Both the courts below have given concurrent conclusion against the petitioners. This Court does not normally interfere in the concurrent conclusion arrived at by the Courts below unless the same are found to be falling within the parameters under section 115, C.P.C. Reliance in this respect is placed on the judgments reported as Aurangzeb through L.Rs. v. Muhammad Jaffar (2007 SCMR 236), Shafi Muhammad v. Khanzada Gul (2007 SCMR 368), Rashid Ahmad v. Said Ahmad (2007 SCMR 926) and Bashir Ahmed v. Ghulam Rasool (2011 SCMR 762). The learned counsel for the petitioners have failed to bring the cases within the parameter of illegality and material irregularity as prescribed under Section 115 of C.P.C., 1908, hence, these Civil Revisions are dismissed.

ZC/G-7/L Revision dismissed.

2017 Y L R Note 224
[Lahore (Rawalpindi Bench)]
Before Ch. Muhammad Masood Jahangir, J
Mst. GULAB JAN and 6 others---Petitioners
Versus
RDA through Director, Land Development and Estate Management, Rawalpindi and 5 others---Respondents

C.R. No.167 of 2007, heard on 16th April, 2015.

(a) Land Acquisition Act (I of 1894)---

----S. 4--- Town Improvement Act (IV of 1922), Preamble--- Award, finality of--- Notification for acquisition of land was issued by acquiring department in year 1961--- Property was acquired under the Town Improvement Act, 1922--- Initial award had been announced in year 1978--- Supplementary award was also announced by Land Acquisition Collector in year 1983 and compensation was paid to land owners---Such proceedings had attained finality when no reference challenging the award was filed by any of the aggrieved persons. [Para. 5 of the judgment]

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

----O. XXXIX, Rr.1 & 2---Stay of proceedings---Scope---High Court directed the courts below not to stay proceedings in cases until a specific order to stop proceedings of Trial Court was not issued--- Registrar of High Court was directed to circulate copy of present judgment to all Judicial Officers working within jurisdiction of High Court that until proceedings of courts below were not stopped through a specific order, the same would continue with proceedings of lis--- Mere pendency of any matter before High Court against interlocutory order would not be taken as an automatic bar to continue normal proceedings of main lis--- If proceedings of any lis were found to be stayed/adjourned sine die without any specific order passed by superior court, such cases would be stream lined to normal proceedings. [Para. 7 of the judgment]

Malik Sardar Khan, Vice Counsel for Petitioners.
Sh. Muhammad Suleman, Mirza Muhammad Asif Abbas for Respondent No.4 and Kashif Ali Malik for Respondent No.1.
Date of hearing: 16th April, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing the instant civil revision, the petitioners have challenged the order dated 3.7.2006 and judgment dated 21.12.2006 by virtue of which both the courts below concurrently dismissed

the application under Order XXXIX, Rules 1 and 2, C.P.C. for grant of temporary injunction filed by petitioners in their suit for declaration and permanent injunction.

2. The facts of the case are that petitioners being plaintiffs filed a suit for declaration and permanent injunction before the learned trial court with the assertions that they were owners of the disputed property and the respondents after carving out plots thereon were bent upon to auction the said property. It is also alleged that the petitioners earlier filed a suit for permanent injunction against the respondents/defendants and an injunctive order was granted in the said suit by competent court of law but in violation of said order fictitious auction proceedings were conducted and disputed plots were given to the present respondents Nos.2 to 6 and when they tried to take over its possession, the plaintiffs/petitioners were constrained to file the instant suit. Along with the said suit the petitioners also filed an application for grant of ad interim injunction. The suit as well as application under Order XXXIX, Rules 1 and 2, C.P.C. was contested by the respondents/ defendants and ultimately the said application as well as appeal were dismissed by the courts below vide order and judgment referred in para-1 ante. Hence the instant civil revision.

3. Today on call Malik Sardar Khan, Advocate proxy counsel appeared on behalf of the principal counsel for the petitioners and made a request for an adjournment on account of his personal engagement. The instant civil revision arising out of an interlocutory order is pending since 2007 and suit pending before the learned trial court has also not been decided by the learned trial court on account of pendency of instant civil revision. The request for adjournment is declined as the cases cannot be kept pending for indefinite period on the whims and desires of the parties without any plausible cause, therefore the request for adjournment is declined.

4. Arguments of learned counsel for the respondents heard and record as well as ground urged in the civil revision perused.

5. There is no denial that a notification for acquisition of the land was issued by the acquiring department in the year 1961 and under the said proceedings, the property including the suit land was also acquired under Town Improvement Act, 1922 and in due compliance of the provisions of Act ibid an initial award had been announced in the year 1978 whereas supplementary award was also announced by the Land Acquisition Collector, Rawalpindi in the year 1983 and the Compensation was paid to the land owners. The said proceedings had attained finality when no

reference challenging the award was filed by any of the aggrieved person. In due process of law a mutation No.335 had also been sanctioned regarding the acquired property and the petitioners were left with no ownership regarding any inch of the suit property. Even the petitioners had never assailed the said mutation No.335 before any appropriate forum. Thereafter as per scheme the Authority carved out the plots on the acquired land and the disputed plots were auctioned by respondent No.1 in favour of respondents Nos.2 to 6 in due performance of its public duties. At an early stage the petitioners filed a civil suit and obtained an injunctive order, but the said suit was dismissed as withdrawn. However, prior to its withdrawal, the instant suit was filed and ad interim injunctive order initially was granted to the petitioners, but when the facts were argued by the parties before the learned trial court, the same was recalled and application under Order XXXIX, Rules 1 and 2, C.P.C. was dismissed and the appeal also met the same fate by the courts below.

6. The petitioners are neither owner of the disputed property nor in possession of the same and there exists no title document in favour of the petitioners, who are unable to make out a prima facie case in their favour. The other two ingredients i.e. balance of inconvenience and irreparable also do not tilt in favour of the petitioners. Both the courts below have rightly passed the impugned order/judgment on the valid reasons, which are not open to any exception by this Court in the exercise of revisional jurisdiction. The instant civil revision being devoid of any merits is dismissed.

7. Before parting with this order, it is sad to note that time and again this Court has specifically issued direction to the courts below not to stay proceedings in the cases until a specific order to stop the proceedings of the learned trial court is not issued, but unfortunately these directions are not being complied with by the Judicial Officers and in future such a practice will not be tolerated. The Registrar of this Court is directed to circulate copy of this judgment to all the Judicial Officers working within the jurisdiction of this Court that until the proceedings of the courts below are not stopped through a specific order, they will continue with the proceedings of the lis and mere pendency of any matter before this Court against the interlocutory order will not be taken as an automatic bar to discontinue the normal proceedings of the main lis. The learned District and Sessions Judges in the Punjab in their first monthly meeting to be convened in May, 2015 will require the Judicial Officers working under their control to prepare a list of cases/detailed report that in which cases the proceedings of the suit are stayed or no further step is being taken by the Court seized of the same on account of pendency of any lis before this Court. If the proceedings of any lis are found to be stayed/adjourned sine die without any

specific order passed by the superior Court in this regard and such cases will be stream lined to the normal proceedings. Moreover, list of such cases wherein the proceedings have been stayed by this Court will be forwarded to the Registrar of this Court, who will ensure that the said list is annexed with the respective case files, so that the same may be given preference.

RR/G-23/L Order accordingly.

2017 Y L R Note 292
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
QASIM ALI and 5 others---Petitioners
Versus
Mst. NOOR BAKHAT through L.Rs. and others---Respondents
C. Rs. Nos.2375 and 2376 of 2009, heard on 21st July, 2016.

(a) Punjab Laws Act (IV of 1872)---

----S. 5---Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948), S.2-A [Since repealed]----Claim of inheritance--- Custom / Riwaj-i-Aam---Proof---Plaintiff (daughter of predecessor in-interest of parties) filed suit, claimed her share and sought cancellation of inheritance mutations---Defendants (sons) filed rival declaratory suit and contended that predecessor in-interest of parties was governed by custom and plaintiff (daughter) was not entitled to inherit legacy of her father and prayed for cancellation of mutation---Defendants (sons) had alleged in pleadings that their deceased father had died in January, 1948 while their witnesses stated that deceased took his last breath 2-1/2-3 months prior to partition---Defendants (sons) tried their best to prove that their father died prior to promulgation of Punjab Muslim Personal Law (Shariat) Application Act, 1948 but they did not endeavor to bring on record copy of Riwaj-i-Aam or any other material to prove that deceased was governed by custom and the plaintiff (daughter) was not entitled to inherit legacy of her propositus---Plaintiff (daughter's) written statement did not exclusively deny time period of death of propositus but alleged custom was explicitly rebuffed by her---Objection regarding limitation raised by defendants (sons) could not be a bar to the suit instituted by plaintiff (daughter)---Revision was dismissed accordingly. [Paras. 6, 9 & 10 of the judgment]

(b) Punjab Laws Act (IV of 1872)---

----S. 5---Decision in certain cases to be according to native law---Scope---Decision pertaining to succession etc. might be taken as per custom applicable to the parties concerned---Muslims were to be governed by Islamic law in matter of succession etc. [Para. 6 of the judgment]

Malik Noor Muhammad Awan and Ijaz Khalid Khan Niazi for Petitioners.
Jahangir A. Jhoja for Respondents.
Date of hearing: 21st July, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---There is no denial of the fact that Sarja Khan, the predecessor-in-interest of the parties, was owner of the properties situated in different revenue estates, who left behind petitioners/four

sons, namely, Abdul Khaliq, Allah Yar, Ahmad Yar, Abdul Manaf, and respondent No.1/a daughter, Mst. Noor Bakhat besides widow Mst. Sardar Begum. On his demise, the revenue hierarchy attested inheritance mutation No.15 dated 13.6.1948 regarding his property situated in Mouza Dullaykay Muhar as well as mutation No.8 dated 13.6.1948 about his property falling in Mouza Kund Dullaykee Muhar, whereby Noor Bakhat, respondent No.1/daughter was deprived of her share from the said legacy, who through institution of Civil Suit No.290 of 2000 on 5.7.1999 before the Civil Court, Depalpur claimed her share while seeking cancellation of aforementioned inheritance mutations, which were only attested in favour of the petitioners/sons of the deceased, whereas mutation No. 130 dated 25.02.1956 regarding other property owned by same predecessor of the parties falling in Mouza Hammu Naoabad, Tehsil Depalpur had been attested in favour of the petitioners/sons as well as respondent No.1/daughter of the deceased. The petitioners through institution of rival declaratory suit No.26 of 2000 on 29.11.1999 sought declaration that predecessor-in-interest of the parties was governed by custom and respondent No. 1 being, female legal heir was not entitled to inherit the legacy of her father and prayed for cancellation of mutation No 130 dated 25.2.1956 to that extent.

2. The sole controversy in both the suits to be responded was whether legacy of Sarja Khan, predecessor-in-interest of the parties, was to be devolved as per Sharia or according to the alleged custom prevailing at the time of his death. The learned trial court conducted the trial of both the suits independently and through separate judgments and decrees dated 04.9.2004, suit of respondent No.1, was decreed whereas suit instituted by the petitioners was dismissed. Having felt aggrieved, two separate appeals bearing Nos.92 and 93 of 2004 dated 21.9.2004 were preferred by the petitioners before the learned lower appellate court, who vide independent judgments and decrees dated 19.10.2009 dismissed the same. Being despondent, Civil Revision No.2375 of 2009 has been filed by the petitioners against the said judgments, whereby declaratory suit instituted by respondent No.1 was decreed, whereas connected Civil Revision No.2376 of 2009 has also been preferred by the petitioners while questioning the validity of judgments through which suit instituted by petitioners was dismissed. In both the civil revisions a common question of law and facts is involved and the parties are also the same, I purport to decide the same jointly through this single judgment.

3. It is argued by Malik Noor Muhammad Awan, Advocate, learned counsel for the petitioners that Sarja Khan died prior to promulgation of the West Punjab Muslim Personal Law (Shariat) Application Act, 1948 and the revenue hierarchy had rightly attested mutations of inheritance in their favour alone being sons as per custom prevailing at the time of his demise while depriving his daughter as well as widow and the said mutations were to be maintained, but the courts below misconstrued the evidence available on record and committed material illegality; that in the suit instituted by the petitioners, respondent No.1 while submitting her

written statement did not specifically deny the date of death of Sarja Khan and the evasive denial amounted to an admission, which was not further required to be proved, but the said aspect of the case was skipped from the notice of the courts below while rendering their judgments; that inheritance mutation No.130 dated 25.2.1956 (Exh.P13) regarding other property of Sarja Khan was also attested in favour of the petitioners alone, which was never assailed by respondent No.1, who was, thus, estopped to assail the disputed mutations; that said mutations had been attested in favour of the petitioners in the year 1948, whereas suit was instituted by respondent No.1 after an elapse of fifty years, which being time barred was liable to be dismissed, but this aspect has also been disregarded by the courts below and that the impugned judgments and decrees being not free from taint of misreading and non-reading of evidence, are liable to be reversed by allowing these Civil Revisions.

4. Conversely, Mr. Jahangir A. Jhoja, Advocate, learned counsel for respondent No.1 has supported the impugned judgments and decrees while arguing that petitioners have miserably failed to prove that at the time of death of Sarja Khan, any custom for exclusion of female legal heirs to inherit the legacy was dominating in the family/tribe of the parties or vicinity and finally prayed for dismissal of these civil revisions.

5. Arguments heard and record perused.

6. Before commenting upon the merits of the case, it would be advantageous to reproduce section 5 of the Punjab Laws Act, (IV of 1872) which reads as follows:-

> "5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be;
>
> (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and has not been declared to be void by any competent authority,.
>
> (b) the Muhammadan law, in cases where the parties are Muhammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to".

The bare perusal of provision ibid unveils that the decisions pertaining to the succession etc must be taken as per custom applicable to the parties concerned, otherwise, the Muslims were to be administered by the Muhammadan Law for effecting succession etc among them. It is well established principle that the onus

always lies upon the person claiming or asserting a fact positively and in the case in hand, the petitioners pleaded that the legacy of their propositus was to be devolved as per applicable custom as such they were to prove that what the custom was, which remained consistent with a length of period continuously and uninterruptedly so as to confer upon the said practice, who were also under devoir to prove that the custom was applicable among the tribe as per their common will and unanimous intention. In the absence of such evidence a female cannot be deprived of her Shari share of inheritance, which vests in her automatically through the Muhammadan Law upon the death of her propositus and while keeping in mind the aforementioned provision and its legal impact, the courts below were required to answer the sole question cropped up before them. When adverted to the pleadings of the petitioners, it emanates that they alleged therein that Sarja Khan had died in January 1948, whereas Abdul Manaf, one of the petitioners as well as other witnesses produced by them while appearing in the witness-box stated that Sarja Khan took his last breath 2½/3 months prior to the partition of sub-continent and they miserably failed to prove the exact date and time period of his death as averred in their pleadings. The courts below took a serious notice of the said lapse, but to my mind, the relevant fact to be proved was that whether on the day of death of their propositus, either died prior to partition of sub-continent or in January 1948, a custom qua the exclusion of female heirs was in usage/practice and applicable. Benefit as provided in subsection (a) of section 5 of the Act ibid could only be extended if it was proved that he was ruled by the practice, while taking decision of the succession of the deceased by the revenue hierarchy, otherwise regarding inheritance of a Muslim deceased, the Muhammadan Law was to be applied. The petitioners through their entire evidence available on the lis files only tried their level best to prove that Sarja Khan died prior to the promulgation of the West Punjab Muslim Personal Law (Shariat) Application Act, 1948, but they did not endeavour to bring on record copy of Riwaj-i-Aam or any other material to prove that deceased was governed by a custom and the female co-heir was not entitled to inherit the legacy of her propositus.

8(sic). Malik Noor Muhammad Awan, Advocate, learned counsel appearing on behalf of the petitioners has made an attempt to convince that by tabling an application before the learned lower appellate court under Order XLI, Rule 27 of the Code of Civil Procedure, 1908 for production in additional evidence, the copies of mutations No.7 dated 25.9.1942, No.16 dated 25.01.1973 and No.18 dated 20.06.1973 the petitioners tried to bring on lis file the relevant documents to prove that tradition was prevailing among the tribe of the parties, but the said application was wrongly dismissed without taking into consideration that the said documents were necessary to arrive at a just decision and judicial notice thereof must be taken by this Court. I am afraid that no judicial notice can be taken of a fact or document, which was not proved on record. Mere presentation of a document on file without its proof while bringing into the witness-box the germane parties as well as its witnesses or the revenue officials, who sanctioned the same is per se not a proof to conclude that a custom was in usage and was also applicable towards the propositus

of the parties. Moreover, the perusal of inheritance mutation No.7 dated 25.09.1942 divulges that it is silent to the extent that it was attested with reference to any custom, whereas, rest of the mutations sought to be taken into consideration are not relevant and the learned lower appellate court was perfect in disallowing the said application.

9. The next argument of learned counsel for the petitioners that in plaint of the suit instituted by the petitioners, it was specifically averred that Sarja Khan died prior to promulgation of the West Punjab Muslim Personal Law (Shariat) Application Act, 1948, which was not specifically denied by respondent No.1 in her written statement, therefore, the same was deemed to be admitted by her as per mandate of Order VIII rule 5 of the Code of Civil Procedure, 1908, but the courts below failed to attend this aspect of the case, is also not tenable. A perusal of written statement submitted by respondent No.1 shows that although time period of death of Sarja Khan was not exclusively denied, but application of alleged custom was explicitly rebuffed by her within the meaning of Order VIII rule 3 of the Code ibid and alleged evasive denial does not amount to an admission within the scope of rule 5 of aforesaid Order that Sarja Khan was administered by any custom, which was the sole important fact to be viewed in the totality of the material/evidence available on the suits files.

10. So far as the contention of Malik Noor Muhammad Awan, Advocate, learned counsel for the petitioners that the suit filed by respondent No.1 was badly time barred as well she was also estopped through her conduct and words to institute the same is concerned, suffice it to say that the right of inheritance neither can be created nor extinguished, therefore, respondent No.1 being the co-heir was entitled to get her share by way of inheritance in the estates, immediately upon the death of her propositus. In view of the matter, the objection regarding limitation raised by the learned counsel for the petitioners cannot be a bar to the suit instituted by her. Reliance can be placed upon judgments reported as Mst. Reshman Bibi v. Amir and others (2004 SCMR 392), Muhammad Zuabir and others v. Muhammad Sharif (2005 SCMR 1217), Muhammad Saleem Ullah and others v. Additional District Judge, Gujranwala and others (PLD 2005 Supreme Court 511) and Mst. Gohar Khanum and others v. Mst. Jamila Jan and others (2014 SCMR 801). Moreover, the principle of estoppel in inheritance matters is also not applicable.

11. The courts below rightly passed the impugned judgments with which this court cannot take any legitimate exception. The learned counsel for the petitioners is unable to point out any infirmity or perversity and any misreading or non-reading of evidence committed by the courts below while dismissing the suits of the petitioners. This Court does not normally interfere in the concurrent conclusion arrived at by the Courts below unless the same are found to be illegal, perverse or suffered from any jurisdictional defect or tainted with any misreading and non-reading of the evidence. Reliance in this respect is placed on the judgments reported as Aurangzeb through L.Rs. v. Muhammad Jaffar (2007 SCMR 236), Shafi

Muhammad and others v. Khanzada Gul and others (2007 SCMR 368), Rashid Ahmad v. Said Ahmad (2007 SCMR 926) and Bashir Ahmed v. Ghulam Rasool (2011 SCMR 762).

12. Consequently, these civil revisions having no substance are dismissed with no order as to costs.

WA/Q-9/L Revisions dismissed.

2017 Y L R Note 312
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
PROVINCE OF THE PUNJAB through Collector Sheikhupura and 2 others---Petitioners
Versus
Syed GHAZANFAR ALI SHAH and others---Respondents

C. Rs. Nos.1575, 1882, 1883 of 1999, heard on 20th March, 2015.

Specific Relief Act (I of 1877)---

----S. 8---Suit for recovery of possession of immovable property---Misreading or non-reading of evidence---Suit filed by plaintiffs was partially decreed by Trial Court in their favour but Lower Appellate Court decreed the suit in toto---Validity---Allotment in favour of plaintiffs was not challenged by defendants---Plaintiffs were lawful owners of suit property whereas defendants having no title or right to retain possession of suit property after the expiry of lease period in year, 1980, were liable to part with possession thereof in favour of plaintiffs as title documents issued by competent authority in their favour were still intact---Lower Appellate Court, clinching the facts and circumstances, rightly passed judgment and decree while decreeing suit filed by plaintiffs in toto on valid reasons---Defendants failed to point out any illegality, irregularity or jurisdictional defect committed by Lower Appellate Court while passing impugned judgment and decree, which was not even tainted with any misreading or non-reading of evidence and could not be interfered with by High Court in exercise of revisional jurisdiction under S. 115, C.P.C.---Revisions were dismissed in circumstances. [Paras. 10 & 11 of the judgment]

Forest Department through Divisional Forest Officer, Chhanga Managa Lahore v. Muhammad Amin and 26 others 2002 SCMR 703; Shabbir Hussain and another v. Mst. Siraj Bibi and 10 others 2003 MLD 75 and Muhammad Ayub and others v. The Province of Punjab 1989 SCMR 1033 distinguished.

Wali Muhammad v. Settlement Commissioner, Sargodha Division, Sargo-dha and another 1984 SCMR 1574 rel.

Maqbool Elahi Malik for Petitioners.

Tahir Naeem for Respondents Nos.2, 3 (in C.R. No.1575 of 1999), 8, 9 (in C.R. No.1883 of 1999 and 11, 12 (in C.R. No.1882 of 1999).
Muhammad Shahzad Shaukat for Applicants (in C.M. No.3-C of 2008, in C.Rs. Nos.1575, 1883 of 1999) and for Respondents Nos.1 to 8 (in C.R. No.1882 of 1999).

Ch. Muhammad Masood Akhtar Khan for Respondents Nos.10 to 15 (in C.Rs. Nos.1575 of 1999), 1 to 6 (in C.R. No.1883 of 1999) and 20 to 24 (in C.R. No.1882 of 1999).

Malik Amjad Pervaiz for Applicants (in C.M. No.2-C of 2007 in C.R. No.1882 of 1999).

Ch. Javed Akhtar Jajja for Applicants (Ameer Ali etc.).

Najaf Muzammal Khan for L.Rs. of Respondent No.1 (in C.R. No.1575 and L.Rs. of Respondent No.10 in C.R. No.1882 of 1999).

Date of hearing: 20th March, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Briefly the facts are that Syed Ghazanfar Ali Shah and legal heirs of Syed Raza Ali Shah respondents (hereinafter to be referred as plaintiffs) brought a suit for possession with the assertion that land measuring 117 acres fully mentioned in the body of the plaint was evacuee property, which was leased out to the petitioners/Forest Department (hereinafter to be referred as the defendants) for a term of twenty years vide notification dated 27.7.1950. However, out of the said property a chunk of land measuring 13 acre 5 kanals and 12 marlas was released and restored to the original owners on 27.1.1959 whereas rest of the property measuring 103 acres 2 kanals and 8 marlas remained in occupation of the defendants. It is also averred in the plaint that whole of the disputed land being evacuee property was available for allotment to the displaced persons and after due verification of claims of the plaintiffs the same was proposed to them, which was subsequently confirmed to the plaintiffs by duly attestation of R L -II in pursuance of the issuance of No Objection Certificate by the Forest Department/ defendants. It is also pleaded in the plaint that as the disputed property was proposed to the plaintiffs and later on it was confirmed, therefore property in disputed became private property and no nexus was attached with the Rehabilitation/Settlement authorities whereas the lease period of defendants was extended for another ten years, which expired on 26.7.1980, but despite of the best efforts made by them, the plaintiffs could not succeed to take physical possession in spite of that the defendants had no right to retain possession thereof, which constrained the plaintiffs to institute the suit for possession. The said suit was resisted by the defendants with the assertions that disputed property is owned by them and that no NOC was issued on behalf of the department.

2. The learned trial court captured the disputed area of facts by framing certain issues, recorded the evidence adduced by the parties and after appreciating the same vide judgment and decree dated 3.4.1996 partially decreed the suit of the plaintiffs to the extent of 13 acres, 5 kanals and 12 marlas whereas the suit to the extent of 103 acres 2 kanals and 8 marlas was dismissed. Being aggrieved, three Appeals Nos.102 to 104 of 1997 were filed by the plaintiffs before the learned lower appellate court, which came up for hearing before the Additional District Judge,

Sheikhupura, who vide judgment and decree dated 17.7.1999 accepted the appeals, set aside the judgment and decree passed by the learned trial court and decreed the suit filed by the plaintiffs with costs while holding that the plaintiffs being lawful owners of the suit land were entitled to get its possession, the suit was maintainable and the defendants were not owner of the suit property. Being aggrieved C.Rs. Nos. 1575, 1882 and 1883 of 1999 have been filed by the defendants against the judgment and decree dated 17.7.1999, which are being disposed of jointly by this single judgment as the common questions of facts and law are involved.

3. The learned counsel for the defendants (petitioners) has argued that the Chief Settlement Commissioner vide memorandum dated 27.2.1965 (Exh.D4) had put a ban on the allotment of notified or un-notified evacuee land falling under possession of Forest Department for its transfer against claims under the provisions of West Pakistan Rehabilitation Settlement Scheme and during the said ban the disputed property could not be confirmed to the plaintiffs; that the said memorandum was challenged in various cases and this Court as well as the august Supreme Court of Pakistan declared the same as valid having been issued by the lawful authority. He has placed his reliance upon the judgments reported judgments (Forest Department through Divisional Forest Officer, Chhanga Managa Lahore v. Muhammad Amin and 26 others (2002 SCMR 703), Shabbir Hussain and another v. Mst. Siraj Bibi and 10 others (2003 MLD 75) and Muhammad Ayub and others v. The Province of Punjab (1989 SCMR 1033) to contend that disputed land having been proposed to the plaintiffs against their claims prior to the issuance of memorandum Exh.D4 in the year 1964 did not create any right or title in favour of the plaintiffs and the confirmation of the disputed property on 22.5.1965 after the issuance of above referred memorandum Exh.D4 was against law, void ab initio and without lawful authority, but the learned lower appellate court without considering the said memorandum decreed the suit in favour of the plaintiffs through the impugned judgment and decree, which is liable to be set aside on said score alone. It is further argued that the plaintiffs had already agitated their claims up to the level of Supreme Court of Pakistan, but remained unsuccessful when their C.P.L.A. No.115 of 2005 was dismissed and the learned lower appellate court in derogation of the said judgment committed serious illegality and irregularity while decreeing the suit for possession filed by the plaintiffs. He has further contended that vide notification dated 27.7.1950 the suit land was foreclosed as protected forest and the defendants having spent a huge amount for brining up a jungle and making the payment of the price of the suit land on 28.6.1974 to Settlement Department had become owners of the disputed land, but this fact was escaped from the notice of the learned lower appellate court while passing the impugned judgment and decree, which is liable to be set aside while allowing these civil revisions and judgment of the learned trial court be restored.

4. Conversely, the learned counsel for the plaintiffs has argued that the property in disputed being evacuee was available for allotment against the verified

claims and the plaintiffs duly presented their claims before the Settlement Department, who after due verification proposed the said land in their favour in the year 1964; that later on the said competent hierarchy confirmed the land to the plaintiffs by attestation of RL-II Exh.D9 and D10; that defendants had never challenged the proposal as well as confirmation of land to the plaintiffs; that land measuring 13 acres, 5 kanals and 12 marlas had already been released by the defendants of their own and by releasing the said chunk of property the defendants had conceded the allotment of the plaintiffs as well; that the disputed land was originally foreclosed in favour of defendants for a period of twenty years vide notification Exh.P3, but the foreclosure remained intact up to 26.7.1980 as the initial lease period was extended for another 10 years and after the expiry thereof, the plaintiffs were entitled to get the possession of the disputed property on the basis of their title, which has been duly done by the learned lower appellate court while passing the impugned judgment and decree and these civil revisions are liable to be dismissed.

5. Heard the arguments and perused the record.

6. It is not denied by the parties that disputed property was owned by non-muslims, which, on their migration after creation of this country, attained the status of evacuee property and was proposed by the Additional Settlement Commissioner to the plaintiffs on 30.11.1964 with the specific condition that the suit land was in possession of the Forest Department/defendants and the same would be confirmed to them, if the same was de-notified by the Forest Department, otherwise it would be their own responsibility that the disputed property was de-notified from the defendants/department and prior to confirmation of disputed land in favour of the plaintiffs, an NOC was presented before the DSC duly issued by the defendants/department. Then after considering the said NOC the disputed property was allotted to the plaintiffs against their claims. This fact is duly proved from the perusal of copy of RL-II Exh.D9 and D10, which was brought on record of the suit by the defendants themselves. No doubt the disputed property was confirmed to the plaintiffs after the issuance of memorandum dated 27.2.1965, but the fact remains that if such a ban was imposed, then why the defendants/department had issued the said NOC. The contention of learned counsel for the defendants that NOC presented before the DSC was fictitious document is misconceived as if it was so, then department/defendants must have challenged the confirmation of the disputed land in favour of the plaintiffs while alleging that it was confirmed on the basis of a fictitious NOC, but admittedly no such effort had ever been made by the defendants/department at the relevant time. Even otherwise the department/defendants of their own de-notified a chunk of land measuring 13 acres 5 kanals and 12 marlas and by doing so the department/defendants had again conceded the confirmation of the disputed property in favour of the plaintiffs. Furthermore, in another round of litigation regarding the disputed property the apex

Court while deciding CPLA No.115 of 1992 wherein defendants department/government of Punjab was also party, observed as under:-

> "3. The present petitioners then filed suit for declaration to the effect that they were owners in possession of the land in dispute and that the Forest Department, respondent No.2, had no right whatsoever in the said land. The suit was filed against the Province of Punjab and Forest Department, respondents Nos. 1 and 2. It was asserted that the land was proposed on 30.4.1965 and then confirmed in their names on 22.5.1965 and on challenge made by the Forest Department, the learned Addi-tional Settlement Commissioner, vide order dated 22.4.1969, upheld the allotment of the land in dispute in their favour and further held that Forest Department has no concern with the land in dispute. The said respondents Nos.1 and 2 resisted the suit and the parties also produced some evidence, when an application was made by Hasham and Asghar, respondents Nos.3 and 4, for being impleaded as defendants on the plea that they were the allottees of the land by virtue of order dated 7.2.1978, passed by the Settlement Commissioner in revision. This revision petition was filed against the order dated 22.4.1969 of the Additional Settlement Commis-sioner allotting the land to the petitioners and the same was accepted and order dated 22.4.1969 was set aside. It was also pointed out that the order of the Settlement Commissioner was challenged by the plaintiffs/ petitioners in the High Court in Writ Petition No.377-R of 1977 and the said writ petition was dismissed. These respondents were then impleaded as defendants and they in the written statement asserted that they were owners of the land and that the suit in the presence of the order passed in the writ petition was not maintainable. The plaint was ultimately rejected by the learned trial Court under Order VII, Rule 11, C.P.C. vide order dated 24.9.1989. The appeal filed challenging this order also failed vide impugned judgment dated 18.9.1991. The revision petition filed against this order was also dismissed by a learned Single Judge on 15.10.1991 "

7. So the proposal and confirmation of land in favour of plaintiffs was also acknowledged. The copy of letter dated 18.12.1980 available on record as Exh. P20/1 reveals that Solicitor, Government of Punjab had addressed the same to the Secretary, Forest/Wild Life Department etc. to the effect that since the maximum period of thirty years foreclosure under the law had expired and there being no provision for extension or fresh notification it could neither be extended nor could fresh notification be issued except with the consent of the owners of the private property. The said letter is reproduced in verbatim hereunder for ready reference:--

> "Tele No. 53564 Government of the Punjab
>
> Top Priority Solicitor's Department

Will the Secretary to Government of the Punjab, Forestry and Wildlife Department, Lahore, kindly refer to his Department's U.O.No. SO.FT(Ext.) 705/70, dated the 21st September, 1980, on the above subject?

2. It appears that notifications in this case were issued with the consent of the owners for closing the said land for the purpose of degeneration for a period of twenty years on the 27th July, 1950. Subsequent notification extending the period further for ten years was issued on the 12th April, 1971. Apparently these notifications were issued by the Forest Department treating the land as private property under Section 38 of the Forest Act XVI of 1927, and accordingly under Section 30(b) ibid, the Government may by notification declare the closure of any land for such term not exceeding thirty years as the Provincial Government thinks fit. Obviously the term for closing the land for improvement thereof cannot exceed thirty years.

3. Since the maximum period of thirty years for closure under the law has expired and there being no provision for extension for fresh notification it can neither be extended nor can fresh notification be issued. However, if the owners of private property so desire, fresh notification can be issued with their consent.

Sd/-

Solicitor to Government of the Punjab

The Secretary,

Forestry and Wildlife Deptt.

U.O.No.Op/80/L/30381/80

Dated 18.12.1980

In the light of said documentary evidence, the plaintiffs succeeded to prove on record that disputed property was duly proposed to them against their verified claim, which was later on confirmed to them by the competent authority and the same is intact till today whereas the disputed property was only foreclosed in favour of the defendants for a certain period, but after the expiry of said term the defendants were liable to restore the possession of the disputed property to its owners/plaintiffs.

8. The main grouse of the defendants before this Court that disputed property could not be confirmed to the plaintiffs after the issuance of memorandum dated 27.2.1965 Exh.PD4 is without any force as it is an admitted fact that prior to the issuance of said memorandum the disputed property had already been proposed to

the plaintiffs in the year 1964 and the said memorandum neither covered the proposed property nor it could be concluded that mere proposal did not create right or title in whose favour the land was proposed. The said question has already been resolved by the apex court in the judgment reported as Wali Muhammad v. Settlement Commissioner, Sargodha Division, Sargodha and another (1984 SCMR 1574) and relevant portion thereof for ready reference is reproduced as under:--

> "The importance of a proposal, under the Rehabilitation Settlement Scheme has been highlighted by a remarkable decision given by a Division Bench of the Lahore High Court (consisting of Muhammad Iqbal, C. J. and S. S. Jan, J.) in the case of Mst. Inayat Bibi etc. v. Assistant Settlement Commissioner and Chief Settlement Commissioner (PLD 1978 Lah. 252). In this case, the proposal for allotment of land were made in favour of the petitioners before the High Court, who possessed verified claims of agricultural land abandoned in India in accordance with the provisions of, paragraph 64 of the Rehabilitation and Settlement Scheme, Part II. However, before the proposals could be confirmed, the Office of the Chief Settlement and Rehabilitation Commissioner, Punjab, issued a memorandum on 25-6-1973 addressed to all settlement authorities in the Province ordering that the allotment of rural evacuee agricultural land against verified claims/entitlement certificates be stopped with immediate effect and all concerned officers were directed not to make further allotment of rural evacuee agricultural land against any claim/entitlement certificates. The proposals already made and not yet confirmed were ordered to stand cancelled. This memoran-dum of the Chief Settlement Commissioner was challenged before the High Court on the ground that it was ultra vires the powers of the Chief Settlement Commissioner. The learned Judges of the Division Bench, in a carefully considered judgment, held that the memorandum in question was of no legal effect and directed that the proposals already existing in favour of the petitioners should be considered as still subsisting and be disposed of in accordance with law. "

9. The other grouse of the learned counsel for the petitioners that Forest Department had paid the sale consideration and as such the petitioners became owners of the disputed property and decree for possession cannot be passed against them is without any merit. The document Exh.P21, which is copy of minutes of the meeting 14.07.1985, shows that the price of the land was determined to be Rs.1,32,00,000/- whereas vide challan Exh.D6 the Forest Department only deposited an amount of Rs. 12,71,371/-, but it does not spell out that how the Settlement Department could sell land, which had already been transferred by it by way of a valid confirmed entry on RL-II. So any deposit of Rs.12,71,734/-in pursuance thereof is of no legal consequence. Moreover, the perusal of letter Exh.P23 dated 13.11.1988 and Exh.P24 reveals that the Forest Department i.e. Forest Minister had issued a policy decision to release the properties in favour of the

present respondents and for ready reference Exh.P23 dated 13.11.1988 is reproduced hereunder:-

"Phone 213749

219403

MINISTER FOR FORESTRY AND TOURISM, PUNJAB

Dated Lahore, the 13/11/1988

The Secretary,

Forestry, Wildlife and Fisheries

Department,

Govt. of the Punjab, Lahore.

Subject:- **REQUEST OF SYED GHAZANFAR ALI SHAH AND OTHERS FOR RELEASE OF LAND MEASURING 103 ACRES FROM ILLEGAL POSSES-SION OF FOREST DEPARTMENT.**

Under the instructions of Chief Minister, Punjab the case has been re-examined thoroughly and found that the land measuring 117 Acres was placed at our disposal by the Custodian of Evacuee Trust Property for forestation under section 38(b) of Forest Act, 1927 for a period of 28 years, vide Notification No.2493-D(F), dated 27.7.1950. Later on the Custodian of the Evacuee Trust Property allotted the land in question to the petitioners in 1965, after getting "No Objection Certificate" from the Forest Department.

The land measuring 13 Acres, 5 Kanals and 12 Marlas out of total land of 117 Acres has already been de-notified by our department and the possession of the same is already with the petitioners.

In the light of the recommenda-tions of Law Department vide U.O.letter dated 18.12.1980, we do not enjoy a sound legal position in the case and since the petitioners are ready to withdraw from litigation concerning this case, it is hereby ordered in the interest of justice that remaining land along with possession be returned immediately to the petitioners, being the rightful owners of the land.

The petitioners may, however, be asked to deposit the amount of Rs.11546/- to avoid any audit objection, if any, at the later stage.

Sd/-

(SARDAR ATIF RASHID)

MINISTRY FOR FORESTRY,

WILDLIFE AND FISHERIES

DEPARTMENT

1. Chief Minister, Punjab
2. Syed Ghazanfar Ali Shah
3. Syedah Imtiaz Fatima
4. Mian Muneer Ahmad

For information with reference to representa-tion on subject matter.

Admittedly the above referred letters have not been recalled/cancelled by the Forest Department or Government of the Punjab. The Forest Department had already denotified 13 Acres of land out of the disputed property vide notification dated 27.1.1959 Exh.P20 and this document has to be operated as an estoppel against the version of the Forest Department that the remaining disputed property had been purchased by them. So this very argument of the Forest Department being without any foundation and cannot stand in the eyes of law.

10. The case law cited by the learned counsel for the defendants runs on different footing as in such cases the allotment of the land was challenged whereas in the present case the allotment in favour of the plaintiffs was never challenged by the defendants. The plaintiffs are lawful owners of the suit property whereas the defendants having no title or right to retain possession of the suit property after the expiry of the lease period in the year 1980 were liable to part with possession thereof in favour of the plaintiffs as the title documents issued by the competent authority in their favour are still intact. While clinching the said facts and circumstances, the learned lower appellate court has rightly passed the impugned judgment and decree while decreeing the suit filed by the plaintiffs in toto on the valid reasons. The learned counsel for the defendants has failed to point out any illegality, irregularity or jurisdictional defect committed by the learned appellate court while passing the impugned judgment and decree, which is not even tainted with any misreading or non-reading of evidence and cannot be interfered with by this court in the exercise of revisional jurisdiction under section 115, C.P.C.

11. Sequel of the above discussion is that these civil revisions are without any substance and merit, which are dismissed accordingly.

12. Before parting with this order, it is also noteworthy to observe that during the pendency of these civil revisions, certain applications were filed under Order I, rule 10, C.P.C. by different persons seeking to implead them as party keeping in view their independent rights in the suit property agitated in the applications. Since all the civil revisions have been dismissed, the said applications have become redundant and the applicants thereof may agitate their claim before the proper forum during the appropriate proceedings, if need be.

MH/P-18/L Revisions dismissed.

PLJ 2017 Lahore 87

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

FESCO through Chief Executive Officer, Faisalabad and 3 others--Petitioners

Versus

MUHAMMAD ALI SHAH through Legal Heirs--Respondents

C.R. No. 4074 of 2010, heard on 8.6.2016.

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

----S. 115--Civil revision--Suit for declaration, decreed--Appeal was dismissed--Challenge to--Delay of three days--Application for condonation of delay--Grounds of--Certified copies was misplaced by clerical staff cannot be considered to be correct--Neither name of official nor any affidavit on his behalf was annexed to support grounds--Disbelieving grounds for condonation of delay--Validity--It is prime duty of Court to watch interest of a litigant and law of limitation imposes certain restrictions in filing suits as well as appeals to save parties from endless litigation--Limitation provided by statute can only be condoned, if circumstances enumerated are found to be beyond control of litigant and reasons assigned seem to be plausible. [P. 89] A

Limitation--

----Scope of--Condonation of delay--Grounds of--Certified copies of judgment was misplaced by clerical staff--Disbelieving grounds--No valid exercise in filing lis beyond limitation--Validity--It is now well settled that when lis is not filed within time prescribed by statute, valuable rights accrue in favour of opposite party, which cannot be taken away unless strong and convincing ground is shown for condoning delay--No such sort of explanation is perceptible from record to exercise indulgence in favour of petitioners. [P. 89] B

PLD 2008 SC 462, *ref.*

Mr. Sarfraz Ahmad Cheema, Advocate for Petitioners.

Mr. Muhammad Imran Bhatti, Advocate for Respondents.

Date of hearing: 8.6.2016.

JUDGMENT

The precise facts of the case are that suit for declaration filed by the respondent (now represented through LRs) was decreed by the learned trial Court *vide* judgment and decree dated 30.10.2009 and appeal preferred by the petitioners was dismissed by the learned lower appellate Court *vide* judgment and decree dated 17.7.2010. Hence the instant civil revision.

2. Arguments heard and record perused.

3. The perusal of record available on the instant file divulges that the petitioners had applied for obtaining the certified copies of the impugned judgment and decree dated 30.10.2009 passed by the learned trial Court on 03.11.2009, which was

prepared on 10.11.2009, whereas the same was delivered on 14.11.2009, but the appeal was preferred before the learned lower appellate Court by the petitioners on 12.12.2009 with a delay of three days. Although an application for condonation of delay before the learned lower appellate Court has been filed by the petitioners, but the grounds that the certified copies of the judgment and decree passed by the learned trial Court was misplaced by some clerical staff cannot be considered to be correct. Neither the name of said official nor any affidavit on his behalf was annexed with the said application to support the grounds mentioned therein and the learned lower appellate Court was perfect while disbelieving the grounds urged by the petitioners for condonation of delay. Moreover, again the attitude of the petitioner remained indolent, who filed the instant civil revision with the delay of twenty days. Along with main case C.M.No. 3-C of 2010 for condonation of delay has been filed without any plausible ground. It is the prime duty of the Court to watch the interest of a litigant and the law of limitation imposes certain restrictions in filing the suits as well as appeals etc. to save the parties from endless litigation. The limitation provided by the statute can only be condoned, if the circumstances enumerated are found to be beyond the control of the litigant and reasons assigned seem to be plausible. The reasons assigned by the petitioners in their application for condonation of delay before the learned lower appellate Court as well as before this Court are not appealable to a prudent man and the same do not provide a valid excuse in filing the lis beyond limitation. It is now well settled that when the lis is not filed within time prescribed by the statute, valuable rights accrue in favour of the opposite party, which cannot be taken away unless strong and convincing ground is shown for condoning the delay. No such sort of explanation is perceptible from the record to exercise indulgence in favour of the petitioners. In the judgment reported as *Imtiaz Ali v. Atta Muhammad and another* (PLD 2008 SC 462), it has been observed by the apex Court that the appeal having been filed with one day after the period of limitation had created valuable right in favour of the respondents and such delay was not condoned as no sufficient cause was found for filing of the appeal beyond the period of limitation. No sufficient reason has been assigned by the petitioners for condonation of delay, who were bound to explain the delay of each and every day in filing of the revision petition, but nothing of such sort has been pleaded in the application for condonation of delay before the learned lower appellate Court and this Court as well. The learned lower appellate Court rightly dismissed the appeal filed by the petitioners treating the same to be time barred. Similarly C.M.No. 3-C of 2010 seeking condonation of delay in filing the instant civil revision before this Court having no substance is turned down.

4. Consequently, the instant revision petition being barred by time is *dismissed*.

(R.A.) Petition dismissed.

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***Present*: CH. MUHAMMAD MASOOD JAHANAGIR, J.**

ZAKA ULLAH--Petitioner

Versus

PROVINCE OF PUNJAB, etc.--Respondents

C.R. No. 793 of 2016, heard on 4.11.2016.

Land Revenue Act, 1967 (XVII of 1967)--

----S. 42--Civil Procedure Code, (V of 1908), S. 115--Civil revision--Declaratory suit--Gift--Cancellation of mutation was allowed--Donar was old age ailing person who died within couple of days of attestation of mutation--Beneficiary of mutation and transaction--Validity--It is well established by now that mutation is always sanctioned through summary proceedings and is intended to keep record update for collection of land revenue--Such entries are made in Register under Section 42 of Land Revenue Act, 1967 which attains no presumption of correctness prior to incorporation in Record of Rights--No doubt, that entries in mutation are admissible in evidence in a case, but these require to be proved by person relying upon it independently through affirmative evidence because an oral transaction reflected therein neither confers title in favour of its beneficiary nor can establish same--No doubt, attesting witnesses, and revenue officer, appeared in witness-box and tried to prove attestation of mutation, but exercise was not sufficient, rather beneficiary was independently required to prove transaction which might have been settled prior to attestation of mutation--Muslim is free to transfer his property by making a declaration of gift in favour of any person, but when legal heirs of donor were available--It is settled law that findings on questions of fact or law recorded by Court of competent jurisdiction cannot be interfered with in revisional jurisdiction unless those findings suffer from jurisdictional defect, illegality or material irregularities--Disputed mutation being result of fraud was got attested by petitioner by playing fraud to deprive ladies and their brother and frivolous litigation based on *mala fide* as initiated by petitioner, High Court is inclined to direct to take legal action against petitioner or his family members, if they are still enjoying possession of disputed property and after their ejectment, possession should be delivered to respondents without any failure--If any illegal hindrance is created by petitioner or his family members, then through all coercive measures, even by aid of police to be provided by DPO, if needed (Judl). [Pp. 108, 109 & 110] A, E, F, G & H

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

----O. VII, R. 2 & O. VIIII, R. 2--Declaration of gift--Attestation of mutation--Cancellation of mutation was allowed--Beneficiary--Reflection from plaint--Declaration of gift was accepted without disclosing time, date, venue and names of witnesses when where and before whom transaction was effected--Principle of *"secundum allegata et probate"*--It is settled law that a party has to first plead

facts and pleas in pleadings and then to prove same through evidence--A party is not allowed under law to improve its case beyond what was originally set up in the pleadings. [P. 109] B

Pleading--

----Scope of--Evidence led by a party beyond the scope of its pleadings is liable to be ignored--In absence of specific pleadings, Court could not allow a party to grope around and draw remote inferences in his favour from his vague expressions. [P. 109] C & D

PLD 2010 SC 965 & 2012 SCMR 254, *rel*.

Mr. Qadeer Ahmed Rana, Advocate for Petitioner.

Mr. Muhammad Arif Yaqoob Khan, Addl. A.G. for Respondents Nos. 1 to 4.

Mr. Imdad Ali Naikokara, Advocate for Respondent No. 4.

Date of hearing: 4.11.2016.

JUDGMENT

This revision petition under Section 115 of the Code of Civil Procedure, 1908 is directed against judgment and decree dated 07.12.2012 passed by learned trial Court and judgment and decree dated 22.01.2016 delivered by learned lower appellate Court, through which, declaratory suit as well as appeal filed by present petitioner was dismissed respectively.

2. The brief facts of the case are that petitioner on 24.01.2008 instituted a declaratory suit with the assertion that subject land 06 *Kanals* 10 *Marlas* fully detailed in Para No. 1 of the plaint was owned by his brother, Manzoor Ahmed, who made declaration of gift in his favour, which was accepted by him and in lieu thereof, possession was also handed over to him and while acknowledging the transaction, the disputed property was also alienated in his favour by the donor through attestation of Mutation No. 431 dated 11.05.2006; that after the death of donor, one of his daughters Nusrat Begum Respondent No. 5/Defendant No. 4 filed an application on 27.06.2006 before DDO(R) Wazirabad/Respondent No. 2 for cancellation of Mutation No. 431, which was allowed by him *vide* order dated 18.10.2006 and the appeal of the petitioner was also dismissed by EDO(Rev)/Respondent No. 3 through order dated 22.01.2008, consequent thereupon, disputed mutation was cancelled and that the impugned orders being illegal and ineffective upon his rights were liable to be set aside. The suit was contested by Respondents No. 5 to 7 defendants with the stance that donor was an old age person, who was defrauded in the last days of his life by petitioner to deprive his daughters and son to inherit his legacy and when this fraud came into light, the same was challenged before the revenue hierarchy who cancelled it. The learned trial Court while facing with the contest captured the disputed areas of fact

and law through settlement of issues and invited the parties to lead their evidence, who to prove their respective stance examined oral as well as documentary stock of evidence and after scanning the same, suit of petitioner was dismissed by the Court of first stance which was further congealed by learned lower appellate Court on their part through judgments and decrees referred to in opening para.

3. Mr. Qadeer Ahmed Rana, Advocate, learned counsel for petitioner emphasized with great vehemence that neither the application for cancellation of mutation tabled by Respondent No. 5/defendant was maintainable before DDO(Rev)/Respondent No. 2 nor could he annual the same; that EDO(Rev)/Respondent No. 3 while skipping that aspect also erred in law when he dismissed the appeal of petitioner and that petitioner through production of qualitative and quantitative evidence not only succeeded to prove the valid attestation of mutation, but also proved the declaration of gift, its acceptance and delivery of possession in liue thereof. He also submitted that learned Courts below while misinterpreting the evidence available on record passed the impugned judgments and decree, which are not sustainable.

4. Conversely, learned counsel for Respondent No. 5 and learned Law Officer on behalf of Respondents No. 1 to 4 have submitted that donor was an old age ailing person, who died within couple of days of attestation of disputed mutation and petitioner while practicing fraud got attested it to deprive his daughters and son from inheriting the subject property; that petitioner being beneficiary of mutation and transaction was obliged to prove the same independently and Courts below after appreciation of material available on lis file were immaculate to dismiss the suit as well as appeal. He further argued that concurrent findings of fact rendered by two Courts below could not be checked by this Court while exercising jurisdiction under Section 115 of the Code of Civil Procedure, 1908.

5. Heard, record thrashed.

6. The headmost argument of Mr. Rana that revenue authority was not competent to entertain an application for the cancellation of oral gift mutation on the score of fraud or on other intricated allegations might have substance, but after the pronouncement of order dated 18.10.2006 by D.D.O. (Rev), the petitioner himself availed the remedy of appeal provided in that hierarchy and after his failure, he without availing efficacious remedy provided in that forum, approached the Civil Court through institution of a civil suit. Instead of going into the controversy whether without availing the efficacious remedy on revenue side, a declaratory suit was maintainable or not and while ignoring whether revenue authorities were equipped with the jurisdiction to annual the mutation on the grounds mention in the application preferred by Respondent No. 5 and also while leaving those aside I am proceeding to resolve the real controversy involved herein whether Manzoor Ahmed made any declaration of gift in favour of petitioner and thereafter he personally got attested disputed mutation to acknowledge the oral transaction for the resolution of dispute.

7. Before embarking upon merits of the case and to proceed with the determination of respective stances of the parties, I feel it appropriate to comment on the principle dealing with oral transfer of immovable property effected through mutation. It is well established by now that mutation is always sanctioned through summary proceedings and is intended to keep the record update for the collection of land revenue. Such entries are made in the Register concerned under Section 42 of the Land Revenue Act, 1967 which attains no presumption of correctness prior to incorporation in the Record of Rights. No doubt, that the entries in the mutation are admissible in evidence in a case, but these require to be proved by the person relying upon it independently through affirmative evidence because an oral transaction reflected therein neither confers the title in favour of its beneficiary nor can establishe the same.

8. Resuming now to merits, it is the basic case of the petitioner as reflected from the plaint that his brother made a declaration of gift in his favour, which was accepted by him without disclosing the time, date, venue and names of witnesses when, where and before whom the said transaction was effected. No doubt, through his testimony being PW-1, petitioner tried to improve his case that on 11.05.2006 when disputed mutation was attested, the donor made offer of gift before him and Zafarullah (PW-3). Manzoor Ahmed, PW-2 and Zafarullah, PW-3 also worded in the same lines. As observed *supra*, no such case was developed in the pleadings of the plaint. It is settled law that a party has to first plead facts and pleas in the pleadings and then to prove the same through evidence. A party is not allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of *"secundum allegata et probate"* that a fact has to be alleged by a party before it is allowed to be proved, is fully applicable in this case, which has full command of provisions of Order VI Rule 2 and Order VIII Rule 2 of the Civil Procedure Code, 1908. As such any evidence led by a party beyond the scope of its pleadings is liable to be ignored. Reliance can be placed upon the dicta laid down in the case law reported as *Muhammad Wali Khan & another vs. Gul Sarwar Khan & another* (PLD 2010 SC 965) and *Haider Ali Bhimji v. VIth Additional District Judge, Karachi (Sourth) & another* (2012 SCMR 254), wherein it was held that in absence of specific pleadings, the Court could not allow a party to grope around and draw remote inferences in his favour from his vague expressions. The probe of statement of PWs further affirms that on the day of attestation of mutation, the vendor was a man of old age suffering with asthema and died just within 17 days of its attestation and the disputed mutation came into the knowledge of his legal heirs after his death, when they approached the revenue officials for attestation of inheritance mutation. The study of evidence examined by petitioner affirms that he failed to prove the oral gift transaction embodied in the mutation. No doubt, attesting witnesses, (PW-2) and (PW-3) and revenue officer, (PW-4) appeared in the witness-box and tried to prove the attestation of questioned mutation, but this exercise was not sufficient, rather the beneficiary was independently required to prove the transaction which might have been settled prior to attestation of mutation.

9. Another important aspect of the case was that admittedly the donor has two daughters and one son but the gift was made in favour of brother while depriving the legal heirs. No doubt, a Muslim is free to transfer his property by making a declaration of gift in favour of any person, but when legal heirs of the donor were available then as per dicta laid down in the judgments reported as *Barkat Ali through Legal Heirs and others (Muhammad Ismail through Legal Heirs and others* (2002 SCMR 1938) and *Meraj Din vs. Mst. Sardar Bibi and 5 others* (2010 MLD 843), there should be reasons to be highlighted as to why the donor was going to make a gift in favour of an alien, which is missing in this case.

10. As a result of probe of evidence available on file, this Court is of the considered view that petitioner failed to prove his case and both the Courts below were perfect in non-suiting him. It is settled law that the findings on questions of fact or law recorded by the Court of competent jurisdiction cannot be interfered with in revisional jurisdiction unless those findings suffer from jurisdictional defect, illegality or material irregularities. The concurrent findings of facts were recorded by both the Courts below, which are based on proper appreciation of evidence, oral and documentary, produced by the respective parties before the learned trial Court. No case of misreading or non-reading of evidence has been made out and neither any legal infirmity has been pointed out by the learned counsel for petitioner even during the course of arguments nor illegal exercise of jurisdiction or failure of exercise of jurisdiction by both the Courts below has been attributed to warrant interference by this Court under Section 115 of the Civil Procedure Code, 1908. Reliance is placed on the case law reported as *Abdul Rahim & another vs. Mst. Janatay Bibi and others* (2000 SCMR 346), *Anwar Zaman & 5 others vs. Bahadur Sher & others* (2000 SCMR 431), *Aziz ullah Khan & others v. Gul Muhammad Khan* (2000 SCMR 1647), *Altaf Hussain vs. Abdul Hameed and Abdul Majeed through legal heirs an another* (2000 SCMR 314), *Haji Noor Muhammad v. Abdul Ghani & 2 others* (2000 SCMR 329), *Haji Muhammad Din vs. Malik Muhammad Abdullah* (PLD 1994 SC 291) and *Muhammad Rashid Ahmad vs. Muhammad Siddique* (PLD 2002 SC 293).

11. Resultantly, the instant civil revision being devoid of any merit is dismissed with special cost of Rs. 100,000/- to be paid to Respondents No. 5 to 7.

12. Before parting with this judgment, when it is proved on record that disputed mutation being result of fraud was got attested by petitioner by playing fraud to deprive the ladies and their brother and the frivolous litigation based on *mala fide* as initiated by the petitioner, this Court is inclined to direct the Revenue Officer concerned to take legal action against the petitioner or his family members, if they are still enjoying the possession of the disputed property and after their ejectment, the possession should be delivered to Respondents No. 5 to 7 without any failure. If any illegal hindrance is created by the petitioner or his family members, then through all coercive measures, even by the aid of police to be provided by the DPO concerned, if needed, the possession should be delivered to Respondents No. 5 to

7. Compliance report should also be submitted to this Court through Deputy Registrar (Judl).

s

PLJ 2017 Lahore 294

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

FESCO through Chief Executive and 5 others--Petitioners

Versus

TEHSIL MUNICIPAL ADMINISTRATION, SHAHPUR through Tehsil Nazim Shahpur, District Sargodha--Respondent

C.R. No. 224 of 2008, decided on 27.9.2016.

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

----S. 115--Revisional jurisdiction--Consumer of energy supply--Utility bill--Challenge to--Defective, slowness of meter--Ulterior motive--Correction of errors of facts and law--Consumer of energy supply is a public department and it cannot be believed that for ulterior motive, equipment/meter could be tampered by its functionaries for saving payment to be made out of allocated budget for consumed units--Equipment/meter could be defective due to its life as well as weather or its mechanism--No iota of evidence is available on suit file to believe that meter was damaged by respondents for any ulterior motive--Meter might have gone slow when same was checked, but case history of equipment reflects that prior to issuance of disputed bill neither any complaint *qua* meter was made nor any notice was ever served upon any official of respondents--Report regarding its slowness is available on suit file, but maker of the-same was not got examined by petitioners and contents of same could not be proved as per law--Scope of interference in revisional jurisdiction by High Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by subordinate Courts in discharge of their judicial functions. [Pp. 295] A, B & C

Mr. Siddique Ahmad Chaudhary, Advocate for Petitioners.

Mian Tahir Maqsood, Advocate for Respondent.

Date of hearing: 27.9.2016.

JUDGMENT

Ch. Muhammad Masood Jahangir, J.--The admitted facts of the case are that the respondents being public functionaries were consumers of energy supply, who instituted a declaratory suit against the petitioners while challenging the vires of utility bill for the month of May, 2004 with the averments that the same contained extra units and prayed for its cancellation/rectification. The said suit was resisted by the petitioners with the stance that on the surprise checking, the equipment/meter was found to be defective while reflecting slowness of 30%. The learned trial Court after completing the trial and appreciating the material available on the file, decreed the suit through judgment and decree dated 14.4.2007, which was also maintained when the learned lower appellate Court dismissed the appeal preferred by the

petitioners *vide* impugned judgment and decree dated 2.11.2007, which have been assailed by filing the instant civil revision.

2. Arguments heard. Record perused.

3. Admittedly, the consumer of the energy supply/respondents is a public department and it cannot be believed that for ulterior motive, the equipment/meter could be tampered by its functionaries for saving the payment to be made out of the allocated budget for the consumed units. The equipment/meter could be defective due to its life as well as weather or its mechanism. No iota of evidence is available on suit file to believe that the meter was damaged by the respondents for any ulterior motive. The meter might have gone slow when the same was checked, but case history of the equipment reflects that prior to issuance of disputed bill neither any complaint *qua* the meter was made nor any notice was ever served upon any official of the respondents. Even otherwise, there is no evidence that defective meter was sent to the concerned laboratory and same was examined in presence of respondents or any agent authorized by them. Moreover, no doubt, report regarding its slowness is available on the suit file, but maker of the same was not got examined by the petitioners and contents of the same could not be proved as per law. In such facts and circumstances, the Courts below were quite justified to decree the suit through the impugned judgments and decrees.

4. The learned counsel for the petitioners has failed to point out any illegality or irregularity in the impugned judgments and decrees or that these are reflective of any misreading and non-reading of evidence. The concurrent findings of fact on the face of record have been eminently arrived at by both the learned Courts below. The scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by the subordinate Courts in the discharge of their judicial functions. Safe reliance can be placed on the judgments passed by the august Supreme Court of Pakistan reported as *"Aurangzeb through L.Rs. and others vs. Muhammad Jaffar and another"* (2007 SCMR 236) and *"Bashir Ahmed vs. Ghulam Rasool"* (2011 SCMR 762).

5. Sequel of the above discussion is that the instant civil revision is devoid of any merit and force, which is hereby dismissed.

(R.A.) Revision dismissed.

PLJ 2017 Lahore 474

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

WAPDA/FESCO through Chairman and 3 others--Petitioners

Versus

AZMAT MIR—Respondent

C.R. No. 1014 of 2010, heard on 2.2.2017.

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

----S. 115--Civil revision--Employee of WAPDA consumer of energy--Audit note--Demand was advanced to consumer without issuance of show-cause notice--Liability for payment of amount--Validity--Demand based on audit note being violative but despite that petitioners/department is in consistent habit to demand same from consumers, which tendency, is not .only intolerable but also contemptuous and bulk of cases are pending in different Courts on basis of illegal demands of petitioners/department. [P. 475] A

Dr. Muhammad Irtaza, Advocate for Petitioners.

Nemo for Respondent.

Date of hearing: 2.2.2017

JUDGMENT

Undeniably respondent/plaintiff was an ex-employee of petitioners-department, who was also consumer of energy supply and on the basis of an audit note No. 32 dated 29.07.2000 through disputed bill, he was directed to deposit an amount of Rs. 22,599/-qua consumption of 5956 units and the said demand was successfully assailed by him through institution of a declaratory suit. The petitioners-department remained fail to substantiate their claim and through impugned judgments and decrees the suit of respondent was concurrently decreed by the two Courts below, which are under attack of this civil revision.

2. Despite repeated calls no one has put in appearance on behalf of respondent in spite of his service, who is proceeded against ex parte.

3. Arguments of learned counsel for petitioners heard and record scanned.

4. Without going into deeper appreciation of available record, when it was confronted to learned counsel for petitioners that audit note is neither binding on the consumer nor he could be held responsible for the fault of department as pointed out in audit report and the demand was advanced to the consumer without issuance of any show-cause notice or affording him opportunity of hearing to adjudge the consumer's liability for payment of the questioned amount, he has remained handicapped to respond satisfactorily. The superior Courts of the State in the following chain of judgments reported as *Water and Power Development Authority etc. vs. Umaid Khan* (1988 CLC 501), *Khalid Pervaiz vs. Water and Power*

Development Authority through Chairman, WAPDA and another (1999 CLC 1591) Islamic Republic of Pakistan through Secretary Defence, Defence Secretariat, Rawalpindi and another vs. Messrs Abdul Ghani Abdul Rehman Limited through Managing Director (2002 CLC 1039) and WAPDA through Chairman and 3 others vs. Fazal Karim and 5 others (2008 YLR 308) have already declared the demand based on audit note being violative but despite that petitioners/department is in consistent habit to demand the same from the consumers, which tendency is not only intolerable but also contemptuous and bulk of cases are pending in different Courts on the basis of illegal demands of the petitioners/ department. The instant case is a classic example of wrongful act of the petitioners/defendants, whereby its consumers are forced to agitate the same by over burdening the Courts.

5. This civil revision having no merit and merely a burden on this Court is dismissed with special cost of Rs. 25,000/-(Rupees twenty five thousand only).

(R.A.) Revision dismissed.

2017 Y L R Note 324
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
GOHAR ALI---Petitioner
Versus
MUHAMMAD YOUSAF and 3 others---Respondents

W.P. No.26121 of 2011, heard on 2nd September, 2015.

(a) Punjab Land Revenue Rules, 1968---

----R. 17----Constitution of Pakistan, Art. 199---Constitutional petition---Lambardar, appointment of---Matters to be considered in first appointment---Withdrawal of candidature in favour of other candidate---Effect---Hereditary claim, determination of---Application of petitioner for appointment as Lambardar on permanent basis was accepted both by Executive District Officer (Revenue) and District Collector, but Member, Board of Revenue, setting aside orders of said authorities, appointed respondent as Lambardar---Review filed by petitioner was dismissed by Member Board of Revenue---Validity---Grandfather of petitioner was permanent Lambardar of village, who had been removed from said post on account of his inefficiency---Father of respondent, after said removal, was appointed as Lambardar on temporary basis, and, after his death, respondent performed duties as Lambardar on temporary basis---Respondent was not related to said permanent Lambardar---Candidate, who had withdrawn his candidature in favour of petitioner, was real grandson of said permanent Lambardar---Factor of hereditary claim, if same was advanced, must favour petitioner---Father of respondent was never appointed as permanent Lambardar, and at time of his appointment on temporary basis, hereditary claim had not been considered---Factor of hereditary claim, therefore, could not be extended to any legal heirs of temporary Lambardar, at time of appointment of permanent Lambardar---Petitioner owned larger area of land as compared that was owned by respondent---Factor as to extent of property in estate was, therefore, also in favour of petitioner---Withdrawal of candidature in favour of petitioner was also plus point for petitioner---Petitioner and his son had been elected as Councillor of the estate, which was evidence of petitioner's personal influence and credibility in the area---Respondent had been convicted in criminal case---Petitioner, having no criminal record, had better edge over the respondent---As both petitioner and respondent were of same age, illiterate and belonged to Jutt community, thus they could not be given preference over each other on those three aspects---Member, Board of Revenue, while passing impugned order, had brushed aside choice of District Collector in selection of Lambardar---No findings as to perversity of choice had been recorded by Member, Board of Revenue in impugned order---Member, Board of Revenue failed to consider qualifications of available candidates as per requirements of R. 17 of Punjab Land Revenue Rules, 1968, which had rendered impugned order illegal, unlawful, ultra vires and without

jurisdiction, and same was amendable under Constitutional jurisdiction---High Court, setting aside impugned order, restored orders of appointment passed by District Collector and Executive District Officer (Revenue)---Constitutional petition was allowed in circumstances. [Paras. 5, 6, 7, 8 & 9 of the judgment]

Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan PLD 1999 SC 484; Abdus Salam Rajput v. Muhammad Amin Khan Rajput PLD 1972 Revenue 16 and Haji Burhan v. Haji Ibrahim PLD 1974 Revenue 82 rel.

(b) Punjab Land Revenue Rules, 1968---

----R. 17---Lambardar, appointment of---Nature---Matters to be considered in first appointment---Appointment of Lambardar is purely an administrative matter; it is obligatory upon revenue hierarchy to appoint suitable candidate as Village Headman, because office of Lambardar is linked between villagers and administration. [Para. 8 of the judgment]

(c) Punjab Land Revenue Rules, 1968---

----R. 17---Lambardar, appointment of---Matters to be considered in first appointment---Selection of Lambardar by District Collector, interference with---Principles---Choice of District Collector in appointment of Lambardar should have been given preference---Selection by District Collector was not to be interfered with, especially when District Collector had exercised his discretion in reasonable manner---Apex revenue hierarchy could upset choice of District Collector only when his choice was found to be perverse. [Para.8 of the judgment]Haji Burhan v. Haji Ibrahim PLD 1974 Revenue 82 rel.

(d) Punjab Land Revenue Rules, 1968--

----R.17---Lambardar,, appointment of---Matters to be considered in first appointment---Principles---For appointment of permanent Lambardar of village, controversy of eligibility was to be decided taking into consideration all requirements of R. 17 of Punjab Land Revenue Rules, 1968---Person acquiring more qualifications under R. 17 of Punjab Land Revenue Rules, 1968 was to be given preference. [Paras. 6 & 7 of the judgment]

Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan PLD 1999 SC 484 rel.Hafiz Agha Rooh-ul-Amin Zafar and Qazi Muhammad Arshad Bhatti for Petitioner.Ch. Nawab Ali Mayo for Respondent No.1.Muhammad Arif Yaqoob Khan, Addl. A.-G. for Respondents Nos.2 to 4.

Date of hearing: 2nd September, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The facts germane for the disposal of the instant Constitutional petition are that Muhammad Jaimal son of Sader Din was Lumberdar of the village Bhagokay Arain, Tehsil Chunain, District Kasur, who was removed from his office by the competent authority/District Collector vide his order dated 22.09.1942. The said vacancy was temporarily filled by the competent authority while appointing Barkhurdar father of respondent No.1 as Lumberdar of the said village and on his death the affairs of Lumberdari were handed over to respondent No.1 on temporary basis. The revenue hierarchy initiated process for the appointment of Lumberdar and applications were invited from the candidates. Gohar Ali, present petitioner, Muhammad Yousaf, respondent No.1 and Muhammad Ibrahim preferred their applications for the said post. The revenue staff right from Naib Tehsildar to Assistant Commissioner had recommended the present petitioner being eligible candidate for the said post. One of the above referred candidates, namely, Muhammad Ibrahim withdrew his application in favour of the petitioner and the District Collector, Kasur vide his order dated 01.02.2006 appointed the present petitioner as Lumberdar against the said vacant post. The order of the District Collector was assailed by respondent No.1 by filing an appeal before the Executive District Officer (Revenue), Kasur, which was dismissed vide order dated 23.08.2006. Being aggrieved, respondent No.1 brought R.O.R No. 1699 of 2006 before the Board of Revenue, which was accepted vide order dated 25.11.2009 and order dated 01.02.2006 passed by the District Collector as well as order dated 23.08.2006 delivered by the Executive District Officer (Revenue), Kasur was set aside and respondent No.1 was appointed as Lumberdar of the concerned village. The petitioner being dissatisfied with the said order filed Review Petition No. 428 of 2009 in ROR No. 1699 of 2006 before the Board of Revenue, which was dismissed vide order dated 29.10.2011. The petitioner being aggrieved of the orders dated 25.11.2009 and 29.10.2011 passed by Board of Revenue has assailed the same by filing the instant writ petition.2. It is submitted by the learned counsel for the petitioner that impugned orders suffer from serious misreading and non-reading of record and were passed in a mechanical manner without application of judicious mind; that the Revenue field staff as well as the District Collector and Executive District Officer (Revenue) after considering the merits and demerits of the candidates rightly found the petitioner eligible for the post of Lumberdar, but the Member, Board of Revenue passed the impugned orders in complete derogation of record and without application of his judicious mind. It is further argued that respondent No.1 had been convicted in a criminal case vide FIR No. 310 of 2002 registered under section 430 of Pakistan Penal Code, 1860 at Police Station Kanganpur, District Kasur and a fine of Rs.1,000/- was imposed against him, which was deposited by him, but the said fact has been ignored by the MBR/respondent No.4 while passing the impugned orders; that respondent No.1 also remained involved in a criminal case F.I.R. No. 285/2008 registered under sections 302, 324, 148, 149 of Pakistan Penal Code, 1860; that respondent No.1 being not a man of

good character was not entitled for the appointment against the post of Lumberdar; that petitioner had neither been involved in any criminal case nor was convicted rather he is a popular, famous and influential person of the locality; that the petitioner owns more chunk of land than respondent No.1 and also possesses the hereditary claim, but the said aspect of the case has been ignored by the Board of Revenue while passing the impugned orders. He has lastly prayed for the acceptance of writ petition, setting aside of the impugned orders and restoration of orders passed by the District Collector as well as Executive District Officer (Revenue), Kasur.3. Conversely, learned counsel for the respondent No.1 has refuted the arguments advanced by the leaned counsel for the petitioner and submitted that being son of Ex-Lumberdar, respondent No.1 possess the hereditary claim and that Board of Revenue after considering the merits and demerits of the case rightly appointed the respondent No.1 as Lumberdar of the concerned village.4. Arguments of both the parties heard and record perused.5. For the appointment of permanent Lumberdar of the village the controversy of eligibility is to be decided according to law while taking into consideration all the requirements provided under Rule 17 of the West Pakistan Land Revenue Rules, 1968. Among other matters which have to be seen conjunctively, those are (i) the hereditary claim of the candidates; (ii) extent of property in the estate, if there are no sub-divisions of the estate, and in case there be sub-divisions of the estate the extent of the property in the sub-division for which appointment is to be made, possessed by the candidate; (iii) services rendered to the Government by him or by his family; (iv) his personal influence, character, ability and freedom from indebtedness; (v) the strength and importance of the community from which selection of a headman is to be made; and (vi) his ability to undergo training in Civil Defence in the case or headman in Tehsils situated along the Border. There is no denial of the fact that Muhammad Jaimal was the permanent Lumberdar of the village, who was removed from the said post on account of his inefficiency and thereafter Barkhurdar, the father of respondent No.1 was appointed as temporary Lumberdar and on his demise respondent No.1 also performed the duties of Lumberdar on temporary basis. During the course of arguments, it is admitted that last permanent Lumberdar Muhammad Jaimal was real brother of grand-father of the present petitioner and Muhammad Ibrahim, who withdrew his candidature in favour of the present petitioner is the real grandson of the above referred permanent Lumberdar, whereas respondent No.1 is not related to Muhammad Jaimal, ex-Lumberdar. The revenue officials also indicated the said fact in their report dated 25.01.2006 so the factor of hereditary claim, if is advanced, will must favour the present petitioner. No doubt, Barkhurdar the father of respondent No.1 had been appointed as Lumberdar of the concerned village after the removal of Muhammad Jaimal, but he was never appointed as permanent Lumberdar and the said post was filled for interim period on temporary basis. The father of respondent No.1 was appointed as temporary Lumberdar and as at the time of such appointment hereditary claim was not considered, then how the factor of hereditary claim can be extended to any of legal heir of temporary Lumberdar at the time of appointment of a permanent

Lumberdar.6. According to report of revenue officials, the petitioner owned land measuring 115-kanal 17-marla whereas respondent No.1 was owner of land measuring 64-kanal 19- marla. The factor to the extent of the property in the estate was also in favour of the present petitioner. The withdrawal of candidature of Muhammad Ibrahim grandson of Muhammad Jaimal ex-Lumberdar of the village in favour of the petitioner was also a plus point in his favour. The petitioner had been elected as Councilor of the village for four times and his son was also elected as Councilor, which is also an evidence of his personal influence and credibility in the area. It is also admitted during the course of arguments that respondent No.1 had been convicted in the above referred criminal case under section 430 of the Pakistan Penal Code, 1860, whereas the petitioner does not possess any such discredit and therefore, on moral side, the petitioner has also better edge over respondent No.1. However, the petitioner as well as respondent No.1 are of similar age, who belong to the Jutt community and also illiterate persons, thus on all these three aspects, one cannot be given preference over the other.7. The above referred discussion reflects that the case of the present petitioner is on better footings than respondent No.1 on the count of hereditary claim, his personal influence, character, ability and extent of property in the estate. The apex Court in landmark judgment reported as Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan (PLD 1999 SC 484) after discussing plethora of judgments and while relying upon various Verses of Holy Quran has observed as under:--All these principles laid down by the Holy Qur'an and the Sunnah of the Holy Prophet (SAW) are sufficient to indicate that the appointments to an office of the Government are to be made on the basis of merits. Verse 2:124 of the Holy Qur'an has not approved the concept of hereditary claim as sole basis or criteria for appointment to an office, what to say of applying rule of primogeniture in making appointment of a successor to the office and the principle deducible appear to be that offices which are regarded as sacred trust are to be passed on to those who are entitled thereto i.e. to those who are qualified and trustworthy to discharge the duties of office honestly. Thus, merits of the appointee with reference to the requirements of the job assigned is to be the criteria. What should be the qualifications of the person to be appointed would naturally depend on the nature of the employment, service or the job keeping, however, in view the distinction between employment against a job or service and tilling a public office which entails discharge of obligations of State or functions of sovereign nature.The principle deducible from the Injunctions of Islam noted above is that appointment against an office, official agency, job or employment has to be made on merit of a person who is honest, trustworthy, bodily strong and possessed of qualities of head and heart and that blood relationship or descent cannot be made basis for claiming preference in the matter of appointment. Thus the provisions contained in sub-rule (1) of Rule 19 of the Rules providing for rule of primogeniture as the basis of appointment successor, though interpreted by the Supreme Court as directory rule designed to select a most fit person from amongst eligibles who is free from any of the disqualifications, is violative of the aforenoted principle deducible from Injunctions of Islam. The objection with regard to provision of hereditary claim

amongst other factors to be considered in matter of appointment under Rule 17 is without merit as this rule provides the relevant considerations which the Collector is to keep in view while making selection of the most suitable persons amongst the candidates. The cause to raise objection in respect of this Rule arose as the officer in the graded hierarchy of' the Revenue administration in their judgments came to accord "hereditary claims", overriding effect, as against other considerations of area, tribe community etc. If "hereditary claim" is taken only as one of the relevant considerations, as contemplated in the rules, in favour of a candidate whose other merits are favourable comparable with other contestants, no cause of grievance will arise, rather it will meet the plea of the administration that by appointing a person from amongst the nearest eligible heir of previous Lambardar continuity in the work and in the liaison created between the land owners and the administration is intended to be achieved. Rule 17 is, therefore, not repugnant to any Injunction of Islam.The bare perusal of the above referred dicta has left no room that a suitable person acquiring more qualifications as referred in Rule 17 ibid is to be given preference.8. There is much force in the contention of the learned counsel for the petitioner that choice of the District Collector in appointment of Lumberdar should be given preference. Member, Board of Revenue/respondent No.4 while passing the impugned orders has brushed aside the choice of District Collector in the selection of Lambardar, which as per various decisions of the Member, Board of Revenue itself, is not to be interfered with, especially when the Collector exercised his discretion in a reasonable manner. Reliance is placed upon the judgments reported as Abdus Salam Rajput v. Muhammad Amin Khan Rajput (PLD 1972 Revenue 16) and Haji Burhan v. Haji Ibrahim (PLD 1974 Revenue 82). The apex revenue hierarchy can only upset the choice of the District Collector when his choice is found to be perverse. No finding of perversity of choice has been recorded by the Member, Board of Revenue/respondent No.4 in the impugned orders. The appointment of Lumberdar is purely an administrative matter and it is obligatory upon the revenue hierarchy to appoint a suitable candidate as Village Headman because office of Lumberdar is a link between villagers and administration and suitability or otherwise regarding appointment to offer lies with the relevant revenue authorities. The Member, Board of Revenue has failed to consider the qualifications of the available candidates i.e. petitioner and respondent No.1 as per the requirement of Rule 17 ibid and the parameters settled in Maqbool Ahmed Qureshi's case (supra), which has rendered the impugned orders illegal, unlawful, ultra vires and without jurisdiction and the same are amenable by this Court in the exercise of writ jurisdiction.9. Consequently, the instant writ petition is accepted, impugned orders dated 25.11.2009 and 29.10.2011 passed by Member, Board of Revenue are hereby set aside, while the orders dated 01.02.2006 and 23.08.2006 passed by the District Collector, Kasur and Executive District Officer (Revenue), Kasur respectively are restored.

SL/G-40/L Petition allowed.

2017 C L C 45
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ZAFAR ALI----Petitioner
Versus
ADDITIONAL DISTRICT JUDGE, PAKPATTAN and another----Respondents
Writ Petition No.1096 of 2011, heard on 7th October, 2016.

(a) Defamation Ordinance (LVI of 2002)---

----Ss. 13, 10 & Preamble----Civil Procedure Code (V of 1908), S.9---Defamation resulting from malicious prosecution---Suit for damages---Ultimate jurisdiction of civil court under the CPC---Defamation Ordinance, 2002 does not oust the jurisdiction of the civil court under CPC--- Question before the High Court was whether a suit for damages on account of defamation resulting from alleged malicious prosecution was maintainable before the court of ultimate jurisdiction under S.9 of the C.P.C. or the same could only be adjudicated under S.13 of the Defamation Ordinance, 2002---Held, that S.13 of the Defamation Ordinance, 2002 prescribed the remedy to enforce a right before the District Court, however, the same did not contain any repealing or ouster clause regarding jurisdiction of civil court to entertain a suit under the general law, that was S.9 of the C.P.C.---Remedy/right against defamation was already recognized and actionable under general law even prior to promulgation of the Defamation Ordinance, 2002 hence without a clause ousting general jurisdiction of the civil court, any person aggrieved by an act of defamation could avail said remedy either by filing a suit before the civil court under S.9 of the C.P.C. or by making complaint under provisions of the Defamation Ordinance, 2002 before District Court, and neither avenue was closed for such an aggrieved person---Impugned order was set aside---Constitutional petition was allowed, accordingly.

Ch. Zulfiqar Ali Cheema v. Farhan Arshad Mir PLD 2015 SC 134 rel.

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

----S.9---General jurisdiction of the civil court under CPC---Scope---Door of the civil court, being the court of ultimate jurisdiction, could be knocked at in respect of all civil matters, unless its jurisdiction was expressly or impliedly barred by statute regarding any specific matter.

A.D. Naseem for Petitioner.

Arshad Ali Chohan for Respondent.

Date of hearing: 7th October, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- A short question is involved in this writ petition whether a suit for recovery of amount as damages on account of malicious prosecution is maintainable before the court of ultimate jurisdiction under Section 9 of the Civil Procedure Code, 1908 or the same can be adjudicated upon before the District Court under Section 13 of the Defamation Ordinance, 2002.

2. Precise facts of the case are that a suit for recovery of Rs.10,00,000/- as damages was instituted on 27.09.2004 by the petitioner on account of malicious prosecution against the respondent before the Civil Court. The respondent initially filed contested written statement, but after an elapse of 3-1/4 years made an application under Order VII, rules 10/11 of the Code of Civil Procedure, 1908 for rejection or return of the plaint, which was declined by the civil court through order dated 20.4.2010. However, in Civil Revision, the order passed by the civil court was reversed and the plaint of the suit instituted by the petitioner was rejected through the impugned judgment, which is under question in the instant writ petition.2.(sic) Arguments heard and record scanned.

3. Undoubtedly, Section 13 of the Defamation Ordinance, 2002 prescribes the remedy to enforce the right thereunder before the District Court, but a close recital

of the said Ordinance would reveal that the same does not contain any repealing or ouster clause regarding the jurisdiction of civil court to entertain such a suit under the general law i.e. Section 9 of the Civil Procedure Code, 1908. The door of Civil Court being the court of ultimate jurisdiction can be knocked at in respect of all the civil matters, unless its jurisdiction is expressly or impliedly barred by the statute regarding any specific matter. Since the right against defamation was already recognized and actionable under general law even prior to the promulgation of the Ordinance ibid, hence without a clause ousting the general jurisdiction of the civil court, any person aggrieved by an act of defamation can avail of such remedies and he may either pursue his case by filing a regular suit before the civil court under section 9 of the Civil Procedure Code, 1908 or by making a complaint under the provisions of the Ordinance ibid before the District court as any of the avenue is not closed for such an aggrieved person.

4. In the present case, the Petitioner filed a regular suit for recovery of damages on account of defamation under section 9 of the Civil Procedure Code, 1908 and did not avail of the remedy as provided by the Ordinance ibid, therefore, the observation of the learned lower appellate court through the impugned judgment that Civil Court lacked jurisdiction to adjudicate upon the suit is without any mandate of law. The apex Court has already clinched the said proposition authoritatively in the judgment reported as Ch. Zulfiqar Ali Cheema v. Farhan Arshad Mir PLD 2015 SC 134 and observed that the reading of the Ordinance as a whole did not preclude a person from initiating an action for damages under the law of Torts by filing a suit for damages under Civil Procedure Code, 1908. The verdict of the apex court under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973 is binding on every organ of the State including the subordinate judiciary.

5. In view of the above discussion, I have no hesitation to observe that the impugned judgment dated 28.09.2010 has been passed while exercising the

jurisdiction in an illegal and arbitrary manner, which being ultra vires, coram non judice and void is not sustainable. Consequently while allowing this Constitutional Petition the impugned judgment is set aside and the suit instituted by the petitioner will be deemed to be pending before the learned trial court, who will decide the same on merits. The parties are directed to appear before the learned District Judge, Pakpattan on 24.10.2016, who will entrust the suit file to a court of competent jurisdiction for further proceedings.

KMZ/Z-25/L Petition allowed.

2017 C L C 1601
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. KAUSAR BIBI----Petitioner
Versus
Mst. AYESHA BIBI and 6 others----Respondents

W.P. No.34536 of 2015, decided on 11th November, 2015.

(a) Civil Procedure Code (V of 1908)---
----S. 12(2)---Inheritance--Fraud and misrepresentation---Decree, setting aside of---Scope---Decree was passed without impleading necessary party in the suit---Effect---Application moved under S.12(2), C.P.C. was accepted concurrently---Validity---If applicants were minors at the relevant time even then they were necessary party to be impleaded through their guardian---Decree with regard to the property owned by the applicants could not be passed without impleading them in the proceedings---Impugned decree was result of fraud and misrepresentation which could not be justified by conceding statement from some of the affectees of the same---When impugned decree was obtained by practicing fraud and misrepresentation then any part thereof could not be allowed to remain intact---Islam had determined the share of women and children in the inheritance---Islam did not only give women a social and legal personality with men but also give the rights of inheritance as mother, daughter, sister, grandmother and granddaughter etc by mentioning their relations/shares separately---Such rights could not be taken away from them through deceitful and fraudulent act---Instrument, deed, judgment or decree based on fraud being nullity in the eye of law had to collapse---When fraud was apparent and visible from the record then it was not necessary to record evidence for deciding application filed under S.12(2), C.P.C.---Constitutional petition was dismissed in circumstances.

Surah Al-Nisaa (the fourth Chapter) verses 11 and 12, verse 176; Surah Baqarah, chapter 2 verse 180; Surah Baqarah, chapter 2 verse 240; Surah Nisa, chapter 4 verse 7-9; Surah Nisa, chapter 4 verse 19; Surah Nisa, chapter 4 verse 33; Surah Maidah, chapter 5 verses 106-108; Muhammad Younas Khan and 12 others v. Government of N.W.F.P. through Secretary Forest and Agriculture, Peshawar and others 1993 SCMR 618 rel.

(b) Civil Procedure Code (V of 1908)---
----S. 12(2)---Fraud and misrepresentation---Decree, setting aside of--Procedure---When fraud was apparent and visible from the record then it was not necessary to record evidence for deciding application filed under S.12(2), C.P.C.

(c) Islamic law---
----Inheritance---Islam had determined the shares of women and children in the inheritance---Islam does not only give women a social and legal personality with men but also gives the rights of inheritance as mother, daughter, sister, grandmother

and granddaughter etc. by mentioning their relations / shares separately---Such rights could not be taken away from them through deceitful and fraudulent act.

(d) Fraud---

----Fraud would vitiate all the proceedings.

Mehdi Khan Chauhan for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.--- By filing the instant writ petition, the petitioner has called in question the vires of the order dated 29.3.2013 passed by the learned trial court whereby application under Section 12(2) of the Civil Procedure Code, 1908 filed by respondents Nos.1 to 3 was allowed, the judgment dated 8.7.2013, whereby, revision petition filed by the petitioner was dismissed and order dated 30.9.2015 whereby review application filed by the petitioner was also dismissed.

2. It is admitted position that the subject matter of the instant file as well as the other property falling in districts Faisalabad and Chiniot was owned by one Mukhtar Ahmed, who died in the year, 1990 leaving behind six daughters and a son and then, the disputed property as well as other property was devolved upon the above mentioned legal heirs by attestation of inheritance mutations. After the death of Mukhtar Ahmed and attestation of inheritance mutations, his son namely Iftikhar Ahmed/respondent No.5 instituted a suit for declaration with the assertion that the land owned by the deceased falling in both the districts had orally been gifted out to him by his deceased father in his life time and inheritance mutations having been attested after his death, being illegal were liable to be set aside. The said suit was contested by all the sisters except Sairah Bibi. During the proceedings of the said suit, Mst. Kausar Bibi, the present petitioner, who is wife of Iftikhar Ahmed, respondent No.5, instituted a petition under Sections 14/17 of the Arbitration Act, 1940 against her husband/respondent No.5 and Manzoor Ahmed, the alleged arbitrator, regarding the suit property asserting therein that about 18 years ago, the said property had been purchased by her against a consideration of Rs.21,00,000/- (twenty one lac) and since then, she was owner in possession of the same, but on refusal of her husband to transfer the title of the disputed property, they appointed Manzoor Ahmed, the sole arbitrator for amicable settlement of the dispute, who resolved the said dispute by announcing Award dated 22.11.2010 and the same was sought to be made rule of the court. After its institution, the earlier suit filed by respondent No.5/husband of the present petitioner was withdrawn by him.

3. The learned trial court on the basis of conceding statement of respondent No.5 and that of Manzoor Ahmed, the alleged arbitrator, made the Award dated 22.11.2010 rule of the Court vide judgment and decree dated 6.12.2010 while declaring the petitioner owner of the suit property. On becoming aware of the judgment and decree dated 6.12.2010, respondents Nos.1 to 3 (three daughters of Mukhtar Ahmed deceased/sisters of Iftikhar Ahmed, respondent No.5) preferred an application under Section 12(2) of the Civil Procedure Code, 1908 for setting aside of the said judgment and decree. The learned trial court vide order dated 29.3.2013 accepted the same and annulled the judgment and decree dated 6.12.2010 by virtue

of which arbitration Award dated 22.11.2010 was made rule of the court. Being aggrieved, the present petitioner filed a revision petition before the learned lower revisional Court, which was dismissed vide impugned judgment dated 08.7.2013. Thereafter, the petitioner filed review application, which was also dismissed by the learned Additional District Judge vide order dated 30.9.2015. Hence the instant writ petition.

4. Arguments heard, record scanned.

5. During the course of arguments, in response to a query put forward by this Court that admittedly the property was owned by six daughters and one son of Mukhtar Ahmad, then how an Award could be passed by the alleged arbitrator regarding the property owned by the said ladies when they had not made any reference to the arbitrator for resolution of dispute or pronouncement of Award and further how a decree could be passed by the learned Civil Court without impleading the said ladies, Mr. Mehdi Khan Chauhan, learned counsel for the petitioner has stated that they were minors and their brother Iftikhar Ahmed respondent No.5 being guardian, referred the matter through arbitration agreement to the arbitrator and on his conceding statement the decree under dispute was passed by the competent court of law. The said contention is not well founded on the ground, firstly, the said ladies were not minors in the year 2010 when the disputed Award was announced and the petition under Sections 14/17 of the Arbitration Act, 1940 was filed by the petitioner, because the alleged guardian (respondent No.5), who happens to be husband of the petitioner had earlier filed a declaratory suit as observed supra against his sisters prior to the pronouncement of said Award as well as institution of the above referred petition. Secondly, for the sake of arguments, if it is assumed that the ladies were minors at that relevant time, even then they were necessary party to be impleaded through their guardian and without impleading them in the reference of the arbitration and proceedings before the Civil Court, a decree regarding the property owned by them could not be passed.

6. The other argument of learned counsel for the petitioner that during the course of proceedings of application under Section 12(2) of the Civil Procedure Code, 1908 before the learned trial court, some of the ladies submitted their affidavits and made statements regarding the withdrawal of their petition under Section 12(2) of the Civil Procedure Code, 1908, hence to their extent, the decree cannot be set aside, is misconceived because when it was established on record that the impugned decree was product of fraud and misrepresentation, then how it could be justified by procuring conceding statement from some of the affectees as it is being regularly noted by this Court that the male heirs in order to deprive the females of their due share in the legacy of their predecessor often used different tactics, which practice cannot be appreciated. When the disputed decree was obtained from the court by practicing fraud and misrepresentation, then any part thereof cannot be allowed to remain intact.

7. The voracity of respondent No.5 and his wife (present petitioner) is floating on the surface of the record. It is extremely regrettable that our society is commanded by its male members and the female members are treated like sheep

and goats. Unfortunately, no male is willing to give the shari and legal share to his mother, daughter or even his sister notwithstanding the fact that the law of inheritance has been promulgated by our Creature given in the Qur'an in Surah Al-Nisaa (the fourth chapter) verses 11 and 12 and then in verse 176. The translation of the related portions of these verses (as I understand them) is given below:

> 4:11:
>
> "Allah enjoins you about [the share of inheritance of] your children: A male's share shall equal that of two females …. in case there are only daughters, more than two shall have two-thirds of what has been left behind. And if there be only one daughter, her share shall be half --and if the deceased has children, the parents shall inherit a sixth each, and if he has no children and the parents are his heirs then his mother shall receive a third, and if he has brothers and sisters then the mother's share is the same one-sixth. [These shares shall be distributed] after carrying out any will made by the deceased or payment of any debt owed by him (the deceased). You know not who among your children and your parents are nearest to you in benefit. This is the law of Allah. Indeed Allah is wise, all knowing."

The Glorious Qur'an contains specific and detailed guidance regarding the division of the inherited wealth, among the rightful beneficiaries. The Qur'anic verses that contain guidance regarding inheritance are:

* Surah Baqarah, chapter 2 verse 180
* Surah Baqarah, chapter 2 verse 240
* Surah Nisa, chapter 4 verse 7-9
* Surah Nisa, chapter 4 verse 19
* Surah Nisa, chapter 4 verse 33 and
* Surah Maidah, chapter 5 verse 106-108.

The mentality of Jahiliyyah that is still continuing in the minds of some people living in the advance era, which was prevailing prior to Islam.

8. In our religion that was propounded by Prophet Muhammad (peace be upon him), women gained dignity, honour and social status. Islam guarantees civil, social, economic and legal rights for women and by raising the status of women as daughters, wives and mothers, gives them rights and privileges equivalent to that of men. Islam has determined the share of women and children in the inheritance. It does not only give them a social and legal personality together with men, but also gives the rights of inheritance to the mother, daughter, sister, grandmother and granddaughter, etc by mentioning their relations/shares separately and such rights cannot be taken away from them through the deceitful and fraudulent act although the same bore a seal of the court. It is well settled by now that fraud vitiates all proceedings and in arriving at this view I am fortified by the dicta laid down by the apex Court in the judgment reported as Muhammad Younas Khan and 12 others v. Government of N.W.F.P. through Secretary Forest and Agriculture, Peshawar and others (1993 SCMR 618). For ready reference relevant portion of paragraph No.15 of the said judgment is as under:-

> "15. There is no cavil with the proposition that fraud vitiates all solemn act and any instrument, deed, or judgment, or decree obtained through fraud is a nullity in the eye of law and can be questioned at any time so much so that they can be ignored altogether by any Court of law before whom they are produced in any proceedings. Fraud is defined in section 17 of the Contract Act as the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; the active concealment of a fact by one having knowledge of belief of the fact; a promise made without any intention of performing it; any other act fitted to deceive; and any such act or omission as the law specially declares to be fraudulent...."

9. It is borne out from the record that earlier dispute arose between the brother and sisters and during the pendency of said litigation, the brother used his wife/petitioner as well as the alleged arbitrator as a tool by preparing fraudulent award and procured the disputed decree. The instrument, deed, judgment or decree based on fraud being nullity in the eyes of law has to collapse.

10. Mr. Mehdi Khan Chauhan, learned counsel for the petitioners has finally emphasized with great vehemence that the controversy had arisen in relation to the factual aspect of the case, which could only be decided by the learned trial court after framing of issues and grant of opportunity to produce the evidence. The said contention is also not tenable. The petitioner or her husband had neither placed on record any document through which it could be determined that at the time of referring the alleged dispute to the arbitrator, the brother/respondent No.5 was duly appointed guardian of his sisters or possessing any authority on their behalf regarding the suit property to refer any dispute to the arbitrator nor learned counsel for the petitioner could satisfy that how the arbitrator was within his jurisdiction to announce the award regarding the property of the females. It is also admitted fact that neither any dispute was referred by the females to the arbitrator nor the learned trial court could make the said award rule of the court in absentia of the said ladies. It is not necessary that all the applications filed under section 12(2) of the Code of Civil Procedure, 1908 be decided after recording of evidence, especially when fraud is apparent and visible from the surface of the record.

11. For what has been discussed above, it is held that substantial justice has been done between the parties by the courts below, therefore, this Constitutional Petition has no force and the same is hereby dismissed in limine.

12. Before parting with this order the agony and pain, I personally feel that the Judicial Officer whoever he may be passed the said judgment and decree involved himself in the sin committed by one brother through his wife along with his real daughters. Such Judicial Officers should not be tolerated any more in our judicial system. The judicature of the State is the custodian of the rights attached with the properties and the person of the public. A Judicial Officer is answerable to his conscious, his appellate/superior court and above all to the Almighty Allah who by his grace has given/delegated some of his powers to an Aadil/Qazi/Judicial Officer to promote and dispense with justice among the litigants. It is my strong belief that the Almighty Allah has provided a third eye with full of light to every Aadil through

which he can see and adjudge the merits of the case and the said eye and light prevails till the Aadil/Qazi/Judicial Officer performs his duties diligently and honestly. The moment he becomes dishonest, the said third eye along with light is disappeared although he might have possessed the said post. In the instant case, the Judicial Officer must had lost his third eye and he passed the impugned decree in hurry while depriving the females from their valuable inherited property. I believe that not only the beneficiaries rather the said Judicial Officer should be made answerable for his acts which are floating on the surface of the record. The District Judiciary is the basic foundation of our judicial system and it is our belief that by leaving some of the members of District Judiciary all of them are performing hard and honestly and their superior court recognizes it at every level but the exception to this have no room in this judicial system which is one of the last hope for the survival of this State.

13. The Registrar of this Court is directed to trace the Judicial Officer, who passed the judgment and decree dated 06.12.2010 and if he is still in service then the matter must be reported to the honourable Administrative Judge concerned for further proceedings and copy of this judgment should also be circulated among every member of the District Judiciary working under the jurisdiction of this Court for care and guidance.

ZC/K-2/L Petition dismissed.

2017 Y L R 2368
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. IQBAL FATIMA through Special Attorney---Petitioner
Versus
KHALID NAEEM and 2 others---Respondents

W.P. No.21676 of 2012, heard on 19th February, 2015.

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

----O. VI, R.17 & S. 12(2)---Constitution of Pakistan, Art. 199---Amendment of plaint---Principles---Plaintiff's suit was revived upon application of defendant under S. 12(2) after almost twenty six years---Plaintiff moved application to amend the plaint, which was dismissed by both Trial Court and revisional court on ground of delayed filing---Validity---While considering request of a party for amendment of pleadings technicalities should have been avoided, as rules of procedure were meant to advance justice and mere delay could not be made basis for dismissal of such application---High Court allowed constitutional petition; order passed by both the courts below was set aside and application for amendment of plaint was accepted subject to payment of cost in circumstances.

Khair Muhammad and others v. Nawab Bibi and others 2008 SCMR 515; Mst. Imam Hussain v. Shr Ali Shah and others 1994 SCMR 2293; Sher Afzal v. Abdul Malik and 2 others 2002 MLD 199; m.v. Kaptan Yousuf Kalkavan v. Semco Salvage (Pvt.) Ltd. 1992 CLC 143 and Muhammad Shafi and others v. Abdul Hameed and others 2008 SCMR 654 ref.

Mst. Ghulam Nabi v. Sarsa Khan PLD 1985 SC 345 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Scope---No court has jurisdiction to decide about rights of parties in violation of law---High Court has powers to decide on issues where interference is warranted, in its constitutional jurisdiction.

Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

Sh. Naveed Shehryar for Appellant.

Mian Mohammad Aslam for Respondent No.1.

Date of hearing: 19th February, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing the instant constitutional petition, the petitioner has challenged the orders dated 15.11.2011 and 29.5.2012 passed by the learned trial court as well as learned lower revisional court,

by virtue of which, application for amendment of plaint filed by the petitioner/ plaintiff was concurrently dismissed.

2. The precise facts of the case are that the petitioner and respondent No.1 are real sister and brother inter se. Respondent No.1 regarding property of present petitioner/plaintiff filed a suit for declaration before the learned trial court on 24.6.1970 which was decreed on 23.7.1970. The same was assailed by the petitioner/plaintiff by filing a declaratory suit. At one stage, the said suit filed by the petitioner was decreed vide judgment and decree dated 17.9.1974. However, on an application under Section 12(2), C.P.C. filed by respondent No.1 the said judgment and decree passed in favour of petitioner/ plaintiff was set aside by the learned trial court vide judgment and decree dated 15.10.2010, which attained finality when the revision petition filed by the petitioner/plaintiff was also dismissed on 1.3.2011. The suit filed by the petitioner/ plaintiff for challenging the validity of judgment and decree dated 23.7.1970 was revived by the learned trial court in the year 2011 and on its revival, the petitioner moved an application under Order VI, Rule 17, C.P.C. for amendment of the plaint, which was concurrently dismissed by both the learned courts below vide orders referred in para 1 ante, hence this writ petition.

3. Learned counsel for the petitioner has argued that the impugned orders dated 15.11.2011 and 29.5.2012 passed by both the learned courts below are against law and facts of the case; that both the learned courts below failed to consider the facts and circumstances of the case while dismissing the application for amendment of plaint filed by the petitioner; that the amendment sought by the petitioner is of formal nature and no complexion of the case would have been changed due to amendment sought by the petitioner and that the impugned orders passed by both the learned courts below being contrary to law and dictum laid down by the apex Court are liable to be set aside while allowing the instant writ petition.

4. Conversely, learned counsel for the respondent No.1 defendant has refuted the arguments advanced by the learned counsel for the petitioner and also prayed for the dismissal of the instant writ petition while relying upon the cases reported as "Khair Muhammad and others v. Nawab Bibi and others" (2008 SCMR 515), "Mst.

Imam Hussain v. Sher Ali Shah and others" (1994 SCMR 2293), "Sher Afzal v. Abdul Malik and 2 others" (2002 MLD 199), "m.v. Kaptan Yousuf Kalkavan v. Semco Salvage (Pvt.) Ltd." (1992 CLC 143) and "Muhammad Shafi and others v. Abdul Hameed and others" (2008 SCMR 654).

5. Arguments heard. Record perused.

6. Admittedly the parties are real sister and brother inter se and respondent No.1/brother filed a suit for declaration regarding the property owned by the present petitioner before the learned trial court, which was admittedly decreed on the statement of father of the parties, but neither the petitioner herself appeared before the said court nor she got recorded any statement during the proceedings of the suit. During the course of arguments in response to a query of this court, learned counsel for respondent No.1 has furnished a copy of registered Special Power of Attorney executed in favour of father of the parties by the petitioner, which was attested on 13.5.1970 by the Sub-Registrar, Toba Tek Singh, a perusal whereof reveals that the petitioner/plaintiff had never authorized her father to appear before the court or make any statement on her behalf in the suit filed by the respondent/defendant. By moving an application for amendment of plaint, the petitioner-plaintiff intend to introduce her version regarding the authority of her father on whose statement the suit against the petitioner/plaintiff was decreed. The petitioner/plaintiff has not proposed any amendment, which would have changed the complexion or nature of the suit.

7. The provision of Order VI, Rule 17, C.P.C. has to keep in view the interest of justice and to allow case to run on correct lines for decisions of real controversy. The fact remains that the amendment in pleadings may be allowed at any stage of the proceedings to secure and serve ultimate ends of justice. The procedural provisions have to be invoked and interpreted with the aforesaid ends in view and must be subordinated to the object of dispensation of justice for securing which the entire judicial system has been evolved and is functioning. Therefore, discretion that vests in the Court, in the sphere in question, has to be liberally exercised, of course, without trampling legitimate interests of the other side. The provisions of Order VI,

Rule 17, C.P.C. cast duty upon the Court keeping in view the interest of justice and to allow the case to run on correct lines for decision of real controversy and an amendment of plaint is almost the right of a party when it relates to the cause of action on which the suit is based. The Court is required by law not only to allow the application for amendment made by a party in that behalf, but is also bound to direct the litigants to amend their pleadings for the sake of dispensation of justice. This provision is, however, subject to the condition that the cause of action does not change the main substance and nature of the suit.

8. Both the learned courts below mainly dismissed the application of the petitioner/plaintiff on the sole ground that the same was filed at a belated stage. The chequered history of the case has negated the said conclusion of the learned courts below. No doubt, to challenge the judgment and decree dated 23.7.1970 the petitioner/ plaintiff had filed a declaratory suit on 24.6.1974 before the learned trial court and the same was decreed on 17.9.1974, but the matter was again re-opened when an application under section 12(2), C.P.C. filed by respondent No.1 on 28.6.2006 after having remained pending before various courts was ultimately allowed and the suit was revived in the year 2011. It means that during the interregnum period i.e. 17.9.1974 to 2011 the suit was not pending before any Court and on its revival in the year 2011, the petitioner/plaintiff moved the instant application on 9.9.2011 before the same court for amendment of the plaint. Even otherwise, the delay alone in submission of the application under Order VI Rule 17, C.P.C. is no ground to disallow the same. The principle of granting amendment in the pleadings has been laid down in the case reported as "Mst. Ghulam Nabi v. Sarsa Khan" (PLD 1985 Supreme Court 345), wherein, it has been concluded that while considering the request of a party for amendment of the pleadings, technicalities should be avoided as rules of procedure are meant to advance justice and mere delay could not be made basis for dismissal of such application. It has been further held therein that all rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore, essential that those should be made to serve and be subordinate to that purpose, so that full powers of

amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.

9. As observed supra, since the main substance of the suit and its nature will remain the same in spite of the proposed amendment carried out in the said application, the same is permissible and necessary to avoid multiplicity of actions between the parties and to finally and effectively adjudicate upon the disputes between the parties. The case-law cited at the bar by the learned counsel for the respondent/defendant runs on different footings and is not applicable to the facts and circumstances of the instant case. The contention of learned counsel for respondent No.1 that concurrent findings of fact cannot be questioned in writ jurisdiction is misconceived and without any merits. In this respect, safe reliance can be placed on Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255) wherein it is held that it is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. This is the mandate of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 and we are not persuaded if there is any specific bar on the High Court that while exercising its authority in term of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, no interference can be made in the revisional orders. So, this court can decide in which cases the interference is warranted. It will be enough to say that the lower courts must adhere to the agonies of general public which are being caused by such like order as mentioned supra. The proceedings and the orders of the Judiciary should not be shorn of the sanction of social justice, law and morality. It must be added that from the creation of Judicial System and especially now a days after the restoration of our Higher Judiciary, the courts of law in our society have been strengthened much lot and when such a pedestal is available to the Judiciary, then learned courts below are bound to pay the attention to dispense with the justice after applying judicious mind, because it is the basic

mandate of law that justice should be administered. Thus, it is obvious and clear that no court in the country has jurisdiction to decide about the rights of the parties wrongly or in sheer violation of law and the courts have no exception to the said rule. Such like orders are meant to prolong the litigation which cannot be recommended by any court of law.

10. From the discussion above, I have no hesitation in my mind to observe that both the courts below failed to analyse the facts and law on the subject and committed grave irregularity and illegality while passing the impugned order/judgment, which are amenable by this court in writ jurisdiction. Consequently, the instant writ petition is accepted, the impugned order/ judgment passed by both the learned courts below are hereby set aside and the application for amendment of plaint filed by the petitioner/plaintiff is accepted subject to payment of Rs.25,000/- as cost of the amendment. However, after such amendment of the plaint, the defendant/ respondent No.1 will also, if he so requests, be allowed a proper opportunity to amend his written statement.

MM/I-17/L Petition accepted.

2017 Y L R Note 212
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ALI KHAN through L.Rs. and others---Petitioners
Versus
MUHAMMAD KHAN and others---Respondents
Writ Petition No.4816 of 2011, heard on 16th February, 2017.

Punjab Land Revenue Act (XVII of 1967)---
----Ss. 164 & 135---Revisional powers of Board of Revenue---Scope---Partition proceedings---Petitioners contended that though respondents were owners of 25% of joint property but Revenue Officer unfairly gave respondents 93% of valuable front facing towards metalled road in ex-parte proceedings on application for partition of respondents decades back---Petitioners further agitated that revenue hierarchy moved in mechanical way by successively maintaining the basic order of Revenue Officer and no Authority set aside ex-parte order against the petitioners---Respondents contended that as there was no one there to oppose before the Revenue Officer so he was right to pass the said order---Validity---Even after initiating ex parte proceedings, the court being custodian of rights of litigants was required to dispense with justice while keeping in mind their entitlement, but Revenue Officer omitted to act fairly and justly---Other higher forums also acted arbitrarily while tackling the issue in mechanical manner---Tribunal/authority delegated with the powers to decide the personal rights of the parties or the rights attached to their properties were required to decide the same judiciously on its merit under the mandate of law---Record revealed that merits of the case were not dealt with by any of the authorities, rather the petitioners were mainly non-suited on the ground that the partition proceedings had already been implemented in the record of rights through attestation of mutation, but none of them paid attention to observe as to how the respondents being owners of lesser part of the common holding were given almost entire frontal part thereof and why the petitioners being major partners were forced to get their wanda in the hindmost part of the holding, who were bound to consider the category, value, location, and potential of the property while partitioning it, which was the most important factor to be followed while conducting said proceedings---Section 164 of the Punjab Land Revenue Act, 1967 gave unfettered powers to Board of Revenue, Commissioner and Collector to call for the record of any case pending before or even disposed of by any subordinate revenue officer and in such a case, if record thereof had been called for, Board of Revenue as well as Commissioner could pass such order as they deemed fit---Revisional jurisdiction conferred upon the Board of Revenue was not subject to restrictions rather the same was very vast and main object was to curtail miscarriage of justice and the apex revenue hierarchy could interfere with the orders of subordinate authorities even if implemented or acted upon by any of parties---High Court observed that Member Board of Revenue, in the present case, without commenting upon the merits of the case or without considering legality and propriety of the

orders assailed before it erred in law while upholding the same in mechanical manner, which practice neither could be protected nor perpetuated--Orders passed by revenue hierarchy lacked lawful authority which was set aside and High Court directed that application for partition would be deemed to be pending before the Revenue Officer concerned, who would re-decide the same fairly and justly after considering the principles of partition---Constitutional petition was accepted. [Para. 2, 4, 5(sic) & 6 of the judgment]

Malik Saleem Iqbal Awan for Petitioners.

Ameer Abdullah Khan Niazi for Respondents.

Date of hearing: 16th February, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Admittedly, property measuring 65-kanals 09-marlas falling in Khewat No.644/612, Khatooni Nos.2192 to 2194, Khasra Nos.4694, 4943/4693/1, 4944/4693/2 and 4691 situated in Mouza Chakrala, Tehsil and District Mianwali was joint among the parties and for its partition respondents made an application under section 135 of the West Pakistan Land Revenue Act, 1967 before the concerned Revenue Officer, who during its proceedings got prepared 'Naqsha Alaf' from the Patwari, which is available at page 57 of the file, wherein, petitioner No.1 was shown to be owner of property measuring 28-kanals 13-marlas, petitioner No.2 of 16-kanals 07-marlas and respondents of 16-kanals 07-marlas, whereas, rest of its part was falling underneath a road passing nearby as well as a graveyard. As per Aks Shajra Kishtwar subject property had a front of 30-karams facing to the metalled road and the Revenue Officer while initiating ex pare proceedings against the petitioners, awarded 28-karams on the front to the respondents in their wanda, whereas rest of the parte of common property having a front of only 2-karams was given to the petitioners through order dated 31.07.1991. The said ex parte order was assailed by the petitioners before the higher forums but through impugned orders dated 28.02.2005, 15.04.2009 and 19.03.2010, the basic order was concurrently maintained, hence the instant constitutional petition.

2. Today, Malik Saleem Iqbal Awan, Advocate, learned counsel for the petitioners, at the very outset of his arguments, has submitted that almost entire valuable front of the holding available on the metalled road was given to the respondents, which neither was fair nor equitable and to strengthen his aphorism, he offered that the petitioners were ready to surrender property measuring 22 kanals of land from their wanda awarded to them through the impugned orders in rear part of the holding to the respondents against their entitlement of 16 kanals 07 marlas, who were accommodated on the road side, if in lieu thereof the respondents surrender their vanda to the petitioners, but the offer was not accepted by respondents, out of whom one in person was also present along with his learned counsel. Mr. Ameer Abdullah Khan, learned counsel for respondents, in response, has tried to argue on

technical aspects of the case, but he could not deny that almost entire property facing towards the metalled road was given to respondents, he stressed that petitioners having been proceeded against ex parte, there was no one to oppose the request of respondents before the revenue officer, who was perfect to pass the basic order, is not tenable. Even after initiating ex parte proceedings, the court being custodian of rights of litigants was required to dispense with justice while keeping in mind their entitlement, but Revenue Officer omitted to act fairy and justly. The other higher forums also acted arbitrarily while tackling the issue under discussion in mechanical manners. The tribunal/authority delegated with the powers to decide the personal rights of the parties or the rights attached to their properties are required to decide the same judiciously on its merit under the mandate of law. The perusal of impugned orders reveals that those were passed in contravention of norms of justice. The District Collector while declining the first appeal of the petitioners concluded as under:-

Despite the fact that petitioners assailed it while preferring a review, application before the same authority but he again decided it in arbitrary manner without considering the grounds urged in the review petition through order dated 24-02-2009 which reads as under:---

Whereas, in the same manner, the Executive District Officer (Revenue) through order dated 15.04.2009 disallowed the revision of the petitioners in same manner while observing as follows:--

> "I have heard the arguments and perused the impugned order which revealed that said review petition was filed before the District Officer (Revenue) Mianwali against order dated 28.02.2005 of his predecessor whereby he held that during passing order dated 28.02.2005, the then District Officer (Revenue) had heard both the parties and rejected the appeal, therefore, there is no reason to review order dated 28.02.2005 of the then District Officer (Revenue) Mianwali. After giving careful consideration to the facts of the case, I am of the view that to review or confirming on review of previous order, no appeal or revision can lie, therefore, petitioners are directed to seek their remedy from competent court of law."

The apex revenue hierarchy/respondent No.22 also followed the same pattern in his impugned order dated 19.03.2010, which reads as under:--

> "I have heard the learned counsel for the parties and perused the record carefully. The order of partition has since been implemented in the revenue record through Mutation No.1457 sanctioned on 30.03.1995 and parties have since occupied their 'Wandas' on the spot but paper fight is going on. The counsel for the petitioners could not be able to point out any infirmity or legal flaw in the impugned orders of the lower courts which are hereby upheld and the revision petition, being devoid of any force, is dismissed accordingly."

After going through the orders under challenge there left nothing, but to observe that merits of the case were not dealt with by any of the authorities, rather the

petitioners were mainly non-suited on the ground that partition proceedings had already been implemented in the record of rights through attestation of mutation, but none of them paid any heed to observe how the respondents being the owners of lessor part of the common holding were given almost entire frontal part thereof and why the petitioners being major partners were forced to get their Wanda in the hindmost part of the holding, who were bound to consider the category, value, location and potential of the property while partitioning it, which was the most important factor to be followed while conducting said proceedings.

5(sic).Section 164 of the West Pakistan Land Revenue Act, 1967 gives unfettered powers to Board of Revenue, Commissioner and Collector to call for the record of any case pending before or even disposed of by any subordinate Revenue Officer and in any such case, if record thereof has been called for, Board of Revenue as well as the Commissioner can pass such order as they deem fit. Proviso of Section 164 ibid further elaborates that interference in revision can also be made in any proceedings or order of the subordinate Revenue authority, which makes it clear that revisional jurisdiction of the relevant authorities can be invoked in any case pending before a subordinate Revenue Officer or disposed of by him and it is also attributed to any proceedings or order of any subordinate Officer. The revisional jurisdiction conferred upon the Board of Revenue is not subject to restrictions rather the same is very vast and the main object of the provision under discussion is to curtail miscarriage of justice and the apex revenue hierarchy can interfere with the orders of the subordinate authorities even if implemented or acted upon by any of the parties, but I am surprised that respondent No.22 without commenting upon the merits of the case or without considering legality and propriety of the orders assailed before it erred in law while upholding the same in mechanical manner, which practice neither can be protected nor perpetuated. The impugned orders rendered by the revenue hierarchy are short of reasoning, which have been passed without application of judicious mind and ignoring category, potential, value, location and compactness of the property while its distribution.

6. Resultantly, the instant writ petition is accepted, impugned orders passed by the revenue hierarchy being lacking of lawful authority and having no legal effect are hereby set aside and the application for partition of joint holding will be deemed to be pending before the Revenue Officer concerned, who will re-decide the same fairly and justly after considering the principles to be followed for partition as well as value, category, location of property and entitlement of each party. The parties are directed to appear before concerned Revenue Officer on 13.3.2017 for further proceedings.

MQ/A-39/L Petition accepted.

PLJ 2017 Lahore 299

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

FESCO through Chief Executive Officer, etc.--Petitioners

versus

ADDL. DISTRICT JUDGE, etc.--Respondents

W.P. No. 22166 of 2011, heard on 13.10.2016.

Constitution of Pakistan, 1973--

----Art. 199--Civil Procedure Code, (V of 1908), S. 115--Constitutional jurisdiction--Remedy--Consumer of electricity connection--Disconnected--Detection bill--Either any show-cause notice was issued--Period of 90 days having been already expired--Validity--It is settled principle that in presence/availability of alternate appropriate remedy, constitutional jurisdiction of High Court cannot be invoked--Writ petition can also be converted into revision petition, but that would be hit by limitation, which cannot be condoned automatically unless delay of each and every day is specifically explained by moving an application in that behalf and same was lacking in instant case--Petition was dismissed. [P. 301] A

Mian Muhammad Javed, Advocate for Petitioners.

Mr. Hussain Ahmed Madni, Advocate for Respondents No. 4 to 9.

Date of hearing: 13.10.2016.

JUDGMENT

This writ petition is directed against the judgment and decree dated 10.12.2009 passed by the learned Addl. District Judge, Jhang, whereby, appeal filed by Respondents No. 2 and 3 was allowed, the judgment and decree dated 7.7.2009 of the learned trial Court was set aside and their suit for declaration was decreed as prayed for.

2. In brief, the facts of the case are that Respondents No. 2 and 3, after purchase of weaving factory from Respondents No. 4 to 9, became consumers of the disputed electricity connection and at that time, the same was disconnected, but subsequently, it was got restored by them after paying arrears amounting to Rs. 17,340/- and they started paying the monthly bill regularly for the energy consumed by them. Afterwards, the petitioners issued detection bill of Rs. 48850/- against Respondents No. 4 to 9, who assailed the same through institution of a declaratory suit styled as *"Muhammad Ishaq vs. WAPDA, etc."*, which remained fail and detection bill was ultimately paid in installments to the petitioners in pursuance of order passed by the learned District Judge, Jhang. In this view of the matter, there was left nothing on the part of premises or consumers of the utility, but in June, 2000, the petitioners again sent a detection bill of Rs. 55,135/- on the basis of an

audit note No. 46 dated 05.07.1995 without issuance of any show-cause notice, which was assailed by Respondents No. 2 and 3 through institution of suit.

3. The learned trial Court after collecting stock of evidence of the parties and appreciating the same, dismissed the suit of Respondents No. 2 and 3, whereas it was decreed in appeal by the Addl. District Judge through judgment and decree referred to above in para-1 ante, which is the subject matter before this Court.

4. Arguments heard and record perused.

5. There was nothing available on record that prior to initiation of proceedings against Respondents No. 2 and 3 on the basis of audit report, either any show-cause notice was issued to them or they were joined in the said proceedings to justify the audit report. This Court in a case reported as *Water and* Power *Development Authority, etc. v. Umaid Khan* (1988 CLC 501) has already held that audit objection is neither binding on the consumer nor the consumer can be held responsible for the fault of the department as pointed out in the audit report and there is considerable force in the contention of learned counsel for the respondents that the amount was added to their account without issuing any show-cause notice or affording them opportunity of hearing to declare them liable for the payment of the questioned amount. In this view of the matter, I am satisfied that the learned lower appellate Court was quite justified to decree the suit of the respondents/plaintiffs on the valid reasons.

6. There is yet another aspect of the case that the impugned judgment and decree dated 10.12.2009, at the most, was revisable against which the remedy was available under Section 115 of the Civil Procedure Code, 1908, but the period of 90 days prescribed for the same having been already expired, even the petition for obtaining certified copy was moved on 18.3.2011, which was supplied on 22.08.2011 and apparently to avoid the said lapse, the petitioner chose to file the instant constitutional petition on 26.09.2011. It is settled principle that in the presence/availability of the alternate appropriate remedy, the constitutional jurisdiction of this Court cannot be invoked. This Court is cognizant of the fact that this writ petition can also be converted into revision petition, but that would be hit by the limitation, which cannot be condoned automatically unless the delay of each and every day is specifically explained by moving an application in this behalf and the same is lacking in the instant case.

7. Resultantly, the instant writ petition being not maintainable as well as on merits is dismissed in limine.

(R.A.) Petition dismissed.

PLJ 2017 Lahore 735
[Multan Bench, Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
***Mst.* SUMAIRA ISHAQ--Petitioner**
Versus
ADDL. DISTRICT JUDGE, DISTRICT SAHIWAL and others--Respondents
W.P. No. 14035 of 2013, heard on 18.4.2017.

Witness--

----Appreciation of evidence--Suit for dissolution of marriage, recovery of dowry articles and maintenance allowance filed by petitioner was partially decreed--Statements of supporting witness--Not participate in marriage ceremony--Bridegroom had refused delivery of dowry article--Tendered in evidence receipts for purchase of dowry article--Validity--Statement of supporting witness cannot be given any weight for simple reason that during cross examination, he frankly conceded that he was not participant of marriage ceremony, who also admitted that terms and conditions of nikah were not settled--Petition was allowed. [P. 736] A

M/s. Syed Jafar Tayar Bokhari and
Muhammad Naeem Ullah Khan, Advocates for Petitioner.

Proceed against *exparte* on 1.3.2016 for Respondent No. 3.

Date of hearing: 18.4.2017.

JUDGMENT

The petitioner instituted a suit for dissolution of marriage, recovery of dowry articles and maintenance allowance while leveling certain allegations against Respondent No. 3, which was resisted by him through filing of written statement that only 48 items out of the list of the dowry articles appended by the petitioner were retained by him. The learned Judge Family Court after settling issues and recording evidence of the parties decreed the suit of petitioner as follows:

> "Keeping in view my findings in Issue No. 1, the plaintiff is entitled to get maintenance allowance at rate of Rs. 4000/- for her Iddat period and get dowry articles as mentioned in written statement along with Rs. 30,000/- in alternate of remaining dowry articles. So, the suit of the plaintiff is decreed accordingly."

Being despondent, both the parties preferred their independent appeals before the learned lower Appellate Court, wherein the petitioner sought for the recovery of dowry articles as per her claim in the plaint, whereas Respondent No. 3 for reduction of decretal amount. The learned Addl. District Judge *vide* consolidated judgment dated 24.08.2013 dismissed the appeal of petitioner as a whole, however cross appeal was partially accepted and impugned judgment to the extent of additional amount of Rs. 30,000/- was set aside, however, she was entitled to recover 48 items admitted by Respondent No. 3 as per his written statement or its alternative value Rs. 200000/-, which has been assailed by the petitioner through the instant Constitutional Petition.

2. Respondent No. 3 has already been proceeded against ex parte by this Court *vide* order dated 01.03.2016.

3. This is not the case wherein a bridegroom had refused the delivery of dowry articles to a bride by the parents. The petitioner in her plaint claimed for the recovery of 66 items of the dowry articles or in alternative its price amounting to Rs. 315152/-, and she while appearing as PW.1 corroborated her version, which was also supported by Muhammad Hussain PW.2, but despite undergoing the test of lengthy cross-examination, their veracity could not be shaken, who remained consistent on vital aspects of the case. In order to strengthen her case petitioner also tendered in evidence receipts for purchase of dowry articles (Exh.P1 to Exh.P12). Conversely, Respondent No. 3 in his statement admitted that dowry articles were given to petitioner with a stance that these were only 48 in number and failed to refute the claim of the petitioner regarding rest of the articles. The statement of supporting witness of Respondent No. 3 Faryad Ali (DW.2) is not of much significance and cannot be given any weight for the simple reason that during the cross-examination, he frankly conceded that he was not participant of marriage ceremony, who also admitted that terms and conditions of Nikah were not settled before him. He further stated during the cross-examination that dowry articles were not transported in his presence, whereas he worded that lastly 10/12 days before his examination, he witnessed the dowry articles lying in the house of Respondent No. 3

4. The accumulative effect of the evidence as well as above referred discussion is that the learned Judge Family Court was justified in awarding Rs. 30,000/- for the remaining dowry articles,which were not admitted by Respondent No. 3 in the written statement, but the learned lower Appellate Court without showing any valid reason set it aside, which finding being against the evidence on record cannot be sustained in the eye of law.

5. Resultantly, the instant Constitutional Petition is allowed, the judgment and decree of the learned lower Appellate Court is set aside and that of learned Trial Court is restored with no order as to costs.

(Z.I.S.) **Petition allowed.**

2017 C L C Note 144
[Lahore]
Before Shahid Waheed and
Ch. Muhammad Masood Jahangir, JJ
Mst. MUQADDAS SIDDIQUI---Appellant
Versus
TAHIR JAVED and another---Respondents

R.F.A. No. 2529 of 2015, heard on 4th May, 2016.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 24---High Court (Lahore) Rules and Orders Vol. I, Part-B---Civil Procedure Code (V of 1908), O. IV, R. 1 & O. VII, R. 11---Suit for pre-emption---Zar-e-Soam, deposit of---Limitation---"Institution of plaint" and "filing of suit"---Distinction---Words "of the filing of the suit" in S. 24, Punjab Pre-emption Act, 1991---Scope---Plaintiff filed suit during summer vacations which was marked for 01-09-2014 on which day Trial Court directed to deposit the Zar-e-Soam within 30 days which was deposited on 22-09-2014 within 30 days of day of making the said order but same was beyond 30 days from the day when plaint was presented before the Senior Civil Judge/receiving officer---Defendant moved application for rejection of plaint and Trial Court rejected the plaint while considering the day of presentation as day of filing of the suit---Validity---Day of presentation of plaint would be the day of institution of suit---Day of "institution of plaint" was not the day of "filing of the suit"---Trial Court was required to direct the pre-emptor to deposit Zar-e-Soam in cash within such period fixed by it---Senior Civil Judge could not direct for deposit of Zar-e-Soam---Filing of suit was the day when assignee court after its due entry in the relevant register had taken cognizance thereof while passing the first order in further progress of the suit---Suit of pre-emptor could only be dismissed if plaintiff failed to deposit Zar-e-Soam within the period required by the court---Plaintiff was not at fault for depositing the Zar-e-Soam as required by the Trial Court---Court was to facilitate the litigants approaching the courts conveniently---Plaintiff could not be taxed for the omission on the part of the Court---Plaint could not be rejected in circumstance---Impugned order and decree were illegal, unlawful and without jurisdiction which were set aside---Suit filed by the pre-emptor was to be deemed to be pending before the Trial Court who should decide the same on merits---Appeal was allowed in circumstances. [Paras. 4, 5, 6, 7, 8, 9 & 10 of the judgment]

Hafiz Muhammad Ramzan v. Muhammad Bakhsh PLD 2012 SC 764; Hasnain Nawaz Khan v. Ghulam Akbar and another PLD 2013 SC 489 and Raja v. Tanveer Riaz and others PLD 2014 SC 466 distinguished.

(b) Administration of justice---

----Litigant could not be penalized due to omission on the part of court. [Para. 8 of the judgment]

Muhammad Ejaz and others v. Muhammad Shafi through LRs 2016 SCMR 834 rel.

(c) Interpretation of statutes---

----All parts of a provision of law should be read together and efforts must be made to harmonize the seeming inconsistent provision. [Para. 6 of the judgment]

(d) Interpretation of statutes---

----If two provisions of law were found to be militant/repugnant with each other, last one or latter was to prevail. [Para. 6 of the judgment]

Ch. Nemat Ali Nagra for Appellant.

Adeel Mumtaz Mian for Respondent No.1.

Khurrum Shehzad Chugtai, Anwaar Hussain Janjua and Sabrena Munnawar for Respondent No.2.

Date of hearing: 4th May, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This appeal basically requires to draw a difference between the day of institution of the suit and filing of the same.

2. Admittedly, the appellant in summer vacation, on 16-8-2014 presented the plaint along with an application for grant of temporary injunction before the Senior Civil Judge/receiving officer, who while receiving the same on the said day endorsed/marked the suit file to a specific judicial officer/court for 01-09-2014 and on the said day the assignee Court directed the appellant to deposit the Zar-e-Soem within 30 days, which was deposited on 22.9.2014 within 30 days of the day of making of said order, but the same was beyond 30 days from the day when the plaint was presented before the Senior Civil Judge/receiving officer. The learned trial court after receiving an application for rejection of the plaint on behalf of respondent No.1, rejected the plaint of the suit of the appellant vide impugned order and decree dated 11-11-2015 while considering the day of presentation as day of filing of the suit. Hence the instant appeal.

3. Arguments heard and record scanned.

4. Before dilating upon merits of the case, we would like to unfold the question referred in para 1 (supra) mainly involved in this case. Volume 1, Part-B of the Rules and Orders of Lahore High Court, Lahore, deals with reception of plaint by a Judge/officer to whom powers in this regard are delegated for its endorsement/assignment to a court for its trial. The review of said part of the Rules ibid makes it clear that the receiving/distributing officer only deals with plaint of the suit for its endorsement/assignment to a specific court and at the end of day such officer is also obliged to exhibit a list in his court while displaying the cases, so distributed. The distributing officer has no other function at his end to deal with the suit in any manner unless and until the same is assigned by him to himself. As per Order IV, rule 1 of the Civil Procedure Code, 1908, every suit shall be deemed to be instituted by presenting a plaint to the court or such officer as it appoints in this behalf, which makes it vivid that in fact day of presentation is the day of institution of the suit.

5. It is worth-mentioning that phrase "of the filing of the suit" is nowhere available in the Rules and Orders of this Court as well as Code of Civil Procedure, 1908, rather the said terminology is deployed in section 24 of the Punjab Pre-¬emption Act, 1991. As we are dealing with a suit filed under special enactment/Punjab Pre-emption Act, 1991, therefore, the purpose and use of aforesaid phrase is tried to be gathered from the said Act. The bare reading of section 24 of the Punjab Pre¬emption Act, 1991 will be advantageous to conclude that day of institution of the plaint in fact is not the day of filing of the suit and for ready reference the said provision is reproduced hereunder:-

> **24. Plaintiff to deposit sale price of the property**.---(1) In every suit for pre-emption, the Court shall require the plaintiff to deposit in such Court one-third of the sale price of the property in cash within such period as the Court may fix:
>
> Provided that such period shall not extend beyond thirty days of the filing of the suit:
>
> Provided that if no sale price is mentioned in the sale deed or in the mutation, or the price so mentioned appears to be inflated, the Court shall require deposit of one-third of the probable value of the property.
>
> (2) Where the plaintiff fails to make a deposit under subsection (1) within the period fixed by the Court, or withdraws the sum so deposited by him, his suit shall be dismissed.
>
> (3) Every sum deposited under sub¬section (1) shall be available for the discharge of costs.

(4) The probable value fixed under sub¬section (1) shall not affect the final determination of the price payable by the pre-¬emptor.

As per subsection (1) supra, it is imperative for the court to require the pre-emptor to deposit Zar-e-Soem in cash within such period fixed by it. The same cannot be required by the Senior Civil Judge before whom the plaint is instituted for its endorsement/marking, who only acts as post office and can only be required by a court, which has to take cognizance of the suit for its further progress. The intention of the Legislature in using the phrase "of the filing of the suit" in the relevant provision has its own wisdom and the following example may also be helpful to draw a distinction between the day of institution of the suit and its filing:-

i) In case, a suit is instituted before the Senior Civil Judge for its marking, who marks the same to a specific court for the same day, but during the process of transmission, the file is genuinely lost or misplaced and that is traced after elapse of 30 days, in such scenario whether day of institution of the suit to said authority would be considered the day of filing of the suit, the answer would be in negative: or

ii) A suit is instituted on the first day of summer vacation i.e. first of August and the receiving court marked the same immediately after the vacation for 1st of September, then before any further proceedings on the said suit the period of 30 days must have been elapsed without any fault on the part of the pre¬-emptor and in such situation the day of institution cannot be made applicable for invoking penal consequences of section 24 ibid.

So we are clear that the draftsman of the legislature had intentionally used the phrase "of the filing of the suit", which has its independent intent and scope and its introduction in the provision ibid is aimful, which has made it clear that filing of the suit is the day, when the assignee court after its due entry in the relevant Register takes cognizance thereof while passing the first order in further progress of the suit.

6. Moreover, the first proviso of section 24 of the Act ibid requires that the court is not vested with the powers to extend the time beyond 30 days of filing of the suit, whereas sub¬section (2) thereof prescribes that where pre-emptor fails to make a deposit under subsection (1) ibid within the period fixed by the court, his suit shall be dismissed. The inclusion of subsection (2) after the first proviso of subsection (1) will be construed to be purposeful, which has safeguarded the pre¬-emptor from any omission on part of the trial court and a suit for pre-emption can only be dismissed, if the pre-emptor fails to deposit Zar-e-Soem within the period required by the court. This was the philosophy of the legislature behind the latter clause. To comprehend the intention of the legislature, the provision of subsection (2) will have to be read with the aforementioned provision because it is settled rule

of interpretation that all parts of a provision are to be read together and efforts must be made to harmonize the seeming inconsistent provision. It is also well established and known rule that if two provisions are found to be militant/repugnant with each other, then last one or latter will have to prevail.

7. Resuming to facts of the case, admittedly, the plaint along with stay application was instituted in summer vacation on 14-8-2014 to the Senior Civil Judge, who marked the suit to a specific court for 01-9-2014. No doubt, the stay application being affair of emergent nature was taken up on 14-8-2014, but neither the suit was marked for the said day nor the Presiding Officer took any cognizance thereof on that day and absolutely he could not do so on the said day as it was specifically marked for 01-9-2014. Subsequently, on 01-9-2014, when the suit file was presented before the learned trial court, the same was duly registered and appellant was specifically directed to deposit 1/3rd amount of the sale price within 30 days, which was complied with by the appellant while making its deposit on 22-9-2014.

8. While referring to the judgments reported as Hafiz Muhammad Ramzan v. Muhammad Bakhsh (PLD 2012 Supreme Court 764), Hasnain Nawaz Khan v. Ghulam Akbar and another (PLD 2013 Supreme Court 489) and Raja v. Tanveer Riaz and others (PLD 2014 Supreme Court 460), the contention of learned counsel for respondent No.1 that the trial court rightly passed the impugned order and decree while concluding that Zar-e-Soem was deposited beyond the period of 30 days of filing of the suit is not correct. The careful study of the said dictum has altogether different bearing and those run on different lines. The point involved in suit in hand was neither thrashed in the said dicta nor it was concluded that day of institution of the suit is the day of filing of the same. Rather the main theme of the said dicta is that a pre-emptor is required to deposit 1/3rd of the sale price within 30 days of the filing of the suit even if that is not required by the trial court. But in the case in hand, the situation is altogether different where on the first day when the cognizance of the suit was taken by the learned trial court on 01.9.2014, it required the appellant to deposit the said amount within 30 days. On that day the learned trial court was aware of the difference between the day of institution and filing of the suit and if he was not clear of the said difference, then he could have passed the order that Zar-e¬-Soem be deposited within 30 days of the institution of suit i.e. within 30 days starting from 16.08.2014 and in that eventuality the appellant might have deposited the said amount on or before 14-9-2014, but it was not acted so, which has left nothing except to conclude that appellant was not at any fault for-depositing the amount as required by the learned trial court vide its order dated 01.09.2014 and when the compliance of the order passed by the learned trial court was made good in its letter and spirit, then the appellant could neither be blamed nor could he be held to be at fault because it is the legal obligation of the court to facilitate the litigants approaching the courts conveniently and on account of any omission on the part of court required by the law in the prescribed manner, the

litigant cannot be penalized. The apex court has also clinched the said question in the judgment reported as Muhammad Ejaz and others v. Muhammad Shafi through L.Rs. (2016 SCMR 834) while observing that there is a well-known maxim "Actus Curiae Neminem Gravabit" (an act of the court shall prejudice no man), thus, where any court is found to have not complied with the mandatory provision of law or omitted to pass an order, required by law in the prescribed manner then, the litigants/parties cannot be taxed, much less penalized for the act or omission of the court. On the touchstone of the above dicta, the appellant could not be taxed for the omission on the part of the court.

9. On the touchstone of the above discussion, there was no occasion or justification whatsoever for dismissal of the suit or rejection of the plaint as the terms of the penalty clause/sub¬section (2) ibid do not stand fulfilled. The learned trial court has fallen in error to non-suit the appellant/pre-emptor without any fault on his part, as such impugned order and decree is found to be illegal, unlawful and without jurisdiction, which cannot be sustained in the eye of law.

10. Resultantly, this appeal is allowed, the impugned order and decree dated 11.11.2015 passed by the learned trial court is set aside and the application filed under Order VII, rule 11 of the Civil Procedure Code, 1908 filed by respondent No.1/defendant is dismissed. The suit filed by the appellant/pre¬-emptor will be deemed to be pending before the learned trial court and dealt with on merit. The parties are directed to appear before the learned District Judge, Lahore on 01.6.2016, who will entrust the main suit to the court of competent jurisdiction for further proceedings.

ZC/M-138/L **Appeal allowed.**

2017 Y L R 735
[Lahore]
Before Ch. Muhammad Masood Jahangir and Ch. Muhammad Iqbal, JJ
Malik SAJJAD AMIN---Appellant
Versus
Mst. SHAGUFTA MAZHAR and 4 others---Respondents

R.F.A. No.480 of 2011, heard on 14th January, 2015.

Specific Relief Act (I of 1877)---

----Ss. 8 & 42---Partition Act (IV of 1893), S. 4---Suit for possession, declaration, rendition of accounts and partition---Limitation---Legal shares---Plaintiffs were real sisters of defendant and sought recovery of their legal shares in property as well as business left by their deceased father---Trial Court passed preliminary decree in favour of plaintiffs---Plea raised by defendant was that suit filed by plaintiffs was barred by limitation---Validity---Plaintiffs fully proved the stance that they being legal heirs were sharers in business as well as in disputed property and were entitled for declaration sought in their suit that they were owners thereof as per their legal shares of inheritance---Question of limitation did not arise in such like cases of inheritance as on the death of principal, all his legal heirs were deemed to step into his shoes as owners of the legacy according to their shares drawn by Shariah and they could not be deprived of their legal rights/shares on any score unless it was proved that they themselves relinquished the same---No evidence was led by defendant regarding the fact or to prove alleged family settlement about distribution of properties left by predecessor-in-interest of parties through the agreement---High Court declined to interfere in judgment and decree passed by Trial Court---Appeal was dismissed, in circumstances.

Khalid Ikram Khatana for Appellant.

Haseeb Ahmed for Respondents.

Date of hearing: 14th January, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing the instant appeal the appellant/defendant has assailed the preliminary judgment and decree dated 23.5.2011, which was passed by the learned Civil Judge, Lahore in a suit for declaration, injunction, partition, possession and rendition of accounts filed by the respondents-plaintiffs.

2. The facts germane for the disposal of the instant appeal are that respondents/ plaintiffs are real sisters of present appellant/defendant and the respondents/ plaintiffs filed the referred suit seeking a decree for declaration to the effect that:--

1. Messrs Malik Sajjad and Co was a partnership firm between late Malik Muhammad Amin and company and the defendant;
2. That the property bearing No.79/80, New Timber Market, Lahore was the exclusive ownership of late Malik Muhammad Amin and also devolved upon his legal heirs after his death;
3. That the rental value of the above referred property from 8.6.1993 to date be delivered and deposited in the court for its distribution amongst the parties according to their shares under the Islamic Law; and
4. That the plaintiffs being daughters of Malik Muhammad Amin deceased were lawfully entitled to get possession of their shares in the said property and business by metes and bounds as also the allocation of the moveable like clauses/Band Saw Machinery and installations in accordance with the shares of inheritance as per Quranic Injunctions;
5. That as a consequential relief permanent injunction be granted as well for restraining the defendant from selling, mortgaging, encumbering, alienating or transferring the above said moveable and immoveable properties to anybody else in any manner whatsoever till the same were partitioned apportioned; and
6. That a decree be also passed in favour of the plaintiffs and against the defendant towards the rent collected on behalf of the plaintiffs from July 1993 to November, 1995 as well as mesne profits in partnership business from July, 1993 to date.

3. The said suit was resisted by the appellant/defendant by filing written statement with the assertion that the property bearing No.79/80, New Timber Market was owned by Malik Sajjad and Co. and the same was not in the exclusive ownership of late Malik Muhammad Amin, the father i.e. the predecessor-in-interest of the parties, who vide written agreement dated 27.7.1992 had agreed to transfer, and in fact he had transferred the property in the name of defendant, plaintiffs and his wife and prayed for dismissal of the suit.

4. The learned trial court captured the disputed area of facts by framing the following issues:--

1. Whether the plaintiff is entitled to get a decree for declaration, partition, rendition of accounts and possession as prayed for? OPP
2. Whether the plaintiff has not come to the court with clean hands? OPD

3. Whether the plaintiff has no locus standi against the defendant? OPD

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

5. Whether the suit is barred by time? OPD

6. Whether the suit is bad for mis-joinder of cause of action? OPD

7. Whether the suit is false, frivolous and the defendants are entitled to special costs under section 35-A, C.P.C.? OPD

8. Relief.

5. Both the parties produced evidence in support of their respective claims and thereafter the suit of the plaintiffs/ respondents was preliminary decreed vide impugned judgment and decree referred in para-1 ante. Hence the instant appeal.

6. The learned counsel for the appellant has argued that admittedly Malik Muhammad Amin deceased was owner of many properties, but he distributed some of those in his life time amongst his legal heirs, which fact has not been considered by the learned trial court while passing the impugned preliminary judgment and decree; that according to the family settlement, the predecessor-in-interest of the parties had distributed some of his properties in favour of plaintiffs/respondents and exclusively distributed the partnership and property bearing No.79/80 New Timber Market, Ravi Road, Lahore to the appellant/ defendant, which fact stood proved by producing oral as well as documentary evidence at the trial, but the learned trial court passed the impugned preliminary judgment and decree while misinterpreting and twisting the evidence on the record; that there was no occasion for the learned trial court to disbelieve the agreement dated 27.7.1992, which was produced by the appellant/defendant on the record of the suit file and the learned trial court also failed to consider other documentary evidence available on file and that the instant appeal is liable to be accepted and while setting aside the impugned preliminary judgment and decree, the suit filed by the plaintiffs/respondents be dismissed.

7. Conversely, the learned counsel for the respondents/plaintiffs has supported the impugned preliminary judgment and decree and prayed for dismissal of the instant appeal.

8. We have heard the arguments addressed by learned counsel for the parties and perused the record.

9. The issue No.1 is pivotal which requires redetermination by us. It is an admitted fact that Malik Muhammad Amin was the predecessor-in-interest of the parties, who expired on 8.6.1993 and till his last breath he had been running the business of Timber at the disputed plot No.79/80, New Timber Market, Ravi Road,

Lahore, which was allotted to Messrs Malik Sajjad and Co. by Lahore Improvement Trust vide title document dated 3.5.1962 Exh.P10.

10. Mst. Shagufta Mazhar, one of the plaintiffs/respondents appeared as PW2 before the learned trial court and deposed that the father of the parties started business on the disputed property in the year 1962 and the said plot was duly transferred in favour of above referred company through Malik Muhammad Amin vide sale deed Exh.P11, which was attested on 15.4.1976 and till that time the defendant/appellant was not a sharer in the company to which the said property was transferred rather defendant/appellant came into picture on 24.7.1976, when a partnership deed was registered before the Registrar of Firms. The copy of partnership deed is available on file and its certificate of registration is also tendered as Exh.P14. PW2 further stated in her examination-in-chief that the appellant/defendant had only invested Rs.5,000/- in the running business of father of the parties and remaining Rs.45,000/-were invested by the latter. The said PW-2 while bringing on record various documents pertaining to partnership firm also deposed that Malik Muhammad Amin deceased was sole owner of the disputed property and after his death the rental consideration was started to be collected from the tenants by the appellant, who deprived the plaintiffs/ respondents from the fruit and income of the disputed property, but when the pressure was built up on appellant/ defendant, he started to pay profit to the other legal heirs from the partnership business and rental income of the disputed property through money orders. The receipts of money orders have been brought on record ranging from Exh.P16 to P94. Thereafter the appellant/ defendant did not pay any share of profit from the business as well rental considera-tion received by him from the disputed property and the plaintiffs/ respondents were constrained to file the said suit.

11. The deposition of PW2 was further corroborated by Mazhar Yazdani PW1 and Mst. Shaista Ijaz PW5. The plaintiffs also produced Anwar ul Haq PW3, an employee of Income Tax Department, who produced income tax returns as well as assessment orders on file. The plaintiffs also produced Nazir Shahzad, Senior Clerk, Office of Director Estate Management, LDA (PW4) and Shakeel Ahmad, Senior Assistant Incharge, Registrar Office (PW6) to prove their stance.

12. To rebut the said evidence appellant himself appeared as DW1 and claimed him to be sole proprietor of the business and that an agreement had been executed by deceased father of the parties on 27.7.1992 and vide said agreement late father of the parties distributed his entire properties amongst his surviving legal heirs. Rana Mubarak, Property Dealer produced by the appellant as DW2 deposed that he was

very close to late Malik Muhammad Amin, predecessor-in-interest of the parties, who had purchased stamp paper from him for transfer of disputed property. He further deposed that Malik Muhammad Amin in his presence had distributed the properties amongst his legal heirs. The appellant/defendant further produced Iftikhar Rasool DW3, who also deposed that in his presence Malik Muhammad Amin had distributed all the properties amongst his legal heirs.

13. From the scanning of above referred evidence brought on the file by the parties, it is established and proved on the record that disputed property bearing No.79/80, New Timber Market, Ravi Road, Lahore had been transferred to Messrs Malik Sajjad and Co through Malik Muhamamd Amin deceased on 3.5.1962 vide agreement for sale by Lahore Improvement Trust and the said property was finally transferred to the said company through Messrs Malik Muhammad Amin sole proprietor vide sale deed No.13812 dated 15.4.1976 Exh.P11 and till that time the appellant/defendant was not a partner in the said firm rather Malik Muhammad Amin late remained as sole proprietor of Malik Sajjad and Co. The partnership deed available on the file whereby the appellant/ defendant claimed to be inducted in the above referred business was executed on 1.7.1976 whereas from the perusal of the registration certificate (Exh.P14) it is vivid that the said partnership dated 1.7.1976 was got registered for the first time from the Registrar of Firm on 24.7.1976. A bare perusal of the above referred documents leads to reveal that the disputed property where the business was being run was exclusively owned by the predecessor-in-interest of the parties and appellant/ defendant was inducted in the business only after the transfer of the disputed property in favour of predecessor-in-interest of the parties. So the stance of the appellant/ defendant that the disputed property was owned by company in which he was also a partner is without any force and proof. Even today during the course of arguments, the learned counsel for the appellant has remained unable to satisfy this court by referring any oral as well as documentary evidence that at the time of execution of sale agreement as well as sale deed the appellant/defendant was a partner of the said company. The above referred sale agreement Exh.P10 as well as sale deed Exh.P11, which are also admitted registered documents have attained the status of more than "thirty years old documents" and a perusal thereof clearly reflects that Malik Sajjad and Co was in the sole proprietorship of Malik Muhammad Amin. The name of the appellant is not being reflected as a partner in the said authentic documents and appellant remained failed to rebut the said documents, which attained strong presumption of truth.

14. The contention of the learned counsel for the appellant that disputed property was distributed by late father in favour of appellant/defendant through the

family settlement vide agreement dated 27.7.1992 is also without any substance. No doubt a photocopy of the said agreement is available on the file, but a perusal thereof reveals that the same was neither attested by any marginal witness nor the original document was brought on file through the statement of any witness and mere presentation of a photocopy of a document on file does not mean that it was duly proved as per law. The contention of the learned counsel for the appellant/ defendant that the court can take judicial notice of any document available on file is also without any force as a private document has to be proved by producing its marginal witnesses as well as scribe, but none of the said witnesses were brought on record by the appellant/defendant. The stance of the appellant/defendant that the property owned by the predecessor-in-interest of the parties had been distributed by him amongst the legal heirs through a family settlement was based on agreement dated 27.7.1992, which was neither proved as per law nor did the appellant/defendant depose anything regarding the said agreement in his examination-in-chief. The above referred agreement was allegedly executed on 27.7.1992 by the predecessor of the parties, who died on 8.6.1993, but during the span of about one year in the life time of the owner of the disputed property after the execution of the alleged agreement, the appellant/defendant did not try to get transferred the same in his favour and even after the death of late Malik Muhammad Amin the appellant/defendant did not file any suit on the basis of said agreement claiming such declaration or title in the disputed property.

15. The crux of the above discussion is that disputed property bearing No.79/80, New Timber Market Lahore was solely owned by late Malik Muhammad Amin whereas the appellant/defendant had no nexus with the title thereof and the partnership business of Messrs Malik Sajjad and Co. after its registration was started running by father of the parties as well as appellant/defendant, but the said partnership terminated at the death of predecessor-in-interest of the parties. The learned trial court has rightly answered issue No.1 in favour of respondents/ plaintiffs and against the appellant/ defendant.

16. The contention of the learned counsel for the appellant/defendant that suit was barred by time and the learned trial court wrongly answered issue No.5 through imputed judgment is also misconceived. The plaintiffs/respondents fully proved the stance that they being legal heirs were sharers in the business as well as the disputed property and entitled for the declaration sought in their suit that they were owners thereof as per their legal share of inheritance. There is a series of judgments rendered by the superior courts that the question of limitation does not arise in such like cases of inheritance as on the death of the principal all his legal heirs are deemed to step into his shoes as owners of the legacy left by him according to their

respective shares drawn by the Shariah and they cannot be deprived of their legal rights/share on any score unless it is proved that they themselves relinquished the same and there is no iota of evidence led by the appellant/defendant regarding this fact or to prove the alleged family settlement about distribution of the properties left by the predecessor of the parties through the aforesaid agreement. The learned trial court also answered the said issue against the appellant-defendant and we are in full agreement with the findings rendered by the learned trial court in this regard. The findings on rest of the issues have not been pressed by the learned counsel for the appellant-defendant during the course of arguments and the findings of the learned trial court on these issues are also not liable to any exception by this court, which are maintained.

17. Consequently, the instant appeal having no force is dismissed with costs.

18. Before parting with this judgment we are constrained to observe with heavy heart that still the tendency, which was derived from the Hinduism, who used to give the share of females in the shape of dowry at the time of their marriage, while living in the subcontinent jointly for hundreds of years, is still going in our society in this modern era even 68 years after the creation of this country purely on the name of Islam that the male heirs are not ready to give the share of inheritance to the other female heirs by playing fraud and all other tactics in spite of that these shares have been fixed by our Creator in the Holy Quran and Sunnah of the Prophet, which are to be distributed amongst the legal heirs as successors only without there being any effort of them that they were born in the family whose head had left the legacy to be inherited by them. It is also pertinent to note that keeping in view the dominant position of a males, the share of a son has been doubled as compared to the daughter and the Quranic injunctions have to be followed by the followers and also to be applied by the courts as well as the legislators. It is also painful for us to note that the female legal heirs are often constrained to take help of the law by filing the suits in the courts and then they have to wait for years and years even upto the level of the apex court to get the fruit of their legal shares in the inheritance due to our legal system as the courts are already over burdened and such like cases of real controversy and hardship are also intermingled with the other cases of general nature. Alike, in the present case the respondents/plaintiffs being real sisters of the defendant-appellant had filed a suit on 31.7.1999 before the learned Civil Court for receiving their share in the business as well as properties left by their deceased father, but the relief could not be granted to them despite elapse of fifteen years as firstly the learned trial court took almost twelve years to pass the impugned judgment and decree and thereafter the instant appeal is pending before this Court. The delay in dispensation of justice has really damaged the repute of our legal

system and such like tendency has to be condemned. We are also mindful of the famous principle that justice hurried is justice buried but at the same time we also cannot ignore the other principle that justice delayed is justice denied and in such like case of real hardship as observed supra the courts are required to take special care and spare extra time for speedy disposal of such like cases so that the female legal heirs and in some cases main legal heirs as well may be able to obtain justice and derive fruit of their share in their life. As such we can firstly expect from the learned trial Courts that such like cases involving inheritance matters will finally be decided expeditiously as early as possible while proceeding with the trial. The Registrar of this court is directed to ensure that a copy of this judgment be circulated to the subordinate judiciary through all the District Judges in the Punjab for compliance and a progress report about the number of pending and decided cases of such nature will also be procured on quarterly basis.

MH/S-37/L

Appeal dismissed.

2017 Y L R Note 86
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
UMAR DARAZ and others---Appellants
Versus
MUHAMMAD YAR alias MAHMAN and others---Respondents

C.Ms. Nos. 662-C, 656-C, 657-C, 658-C, 660-C and 659-C of 1995, in C.Rs. Nos. 479-D, 474-D, 475-D, 476-D, 478-D and 477-D of 1994, heard on 4th June, 2015.

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

----S. 12 (2)---Specific Relief Act (I of 1877), S. 12---Qanun-e-Shahadat (10 of 1984), Arts. 79 & 129(g)---Suit for specific performance of agreement to sell---Fraud and misrepresentation--- Compromise decree, setting aside of---Attestation of document---Document, proof of---Licensed Deed writer---Responsibilities---Special power of attorney---Attesting witness---Contention of applicants-defendants was that they had not authorized any person to appear and make conceding statement on their behalf and special power of attorneys executed on their behalf were forged and fabricated documents---Validity---Stamp papers for reducing into writing power of attorneys were not purchased by all the applicants-defendants rather same were purchased by only one of the defendants---When execution of a document was denied then the burden to prove the same would shift on the party who was beneficiary of said document---Respondents-plaintiffs were beneficiaries of power of attorneys---Deed writer of power of attorneys was not licensed deed writer---Licenses were issued by the competent authority to the skilled deed writers so that the interest and rights of the parties could be secured---License deed writers were required to maintain registers to make entry of document and also to obtain signatures/thumb impressions of the executants against the said entry in the same to cross check the authenticity of the signatures/ thumb impressions of executants found to have been affixed on the relevant instruments---No such documentary evidence of corroborative nature in the shape of registers of deed writer was available on record to support the version of respondents-plaintiffs---Inference had to be drawn against the respondents-plaintiff due to non-production of register of stamp vending despite its availability---Respondents-plaintiffs had failed to produce the attesting witnesses to prove the valid execution of special power of attorneys which was mandatory under Art. 79 of Qanun-e-Shahadat, 1984---Valid execution of special power of attorneys could not be proved---Nothing was on record that scribe in addition to the writing of document had also acted as an attesting witness---Alleged scribe did not sign the said power of attorneys being scribe of the same and he could not be treated as an attesting witness---Mere signature of a person without witnessing the actual execution of deed could not be treated as attestation of document---Respondents-plaintiffs were required to get examined at least two witnesses to prove the execution of power of attorneys---No document could be

used in evidence until the attesting witnesses were got examined in proof thereof---Non-production of said witnesses was fatal to the admissibility of power of attorneys---Applications for compromise were not got signed by all the applicants-defendants--- Proceedings conducted for effecting compromise were doubtful---Impugned orders and decrees in favour of respondents-plaintiffs were result of fraud and misrepresentation of facts which could not be sustained---Impugned orders and decrees with regard to proceedings effecting compromise were set aside---Revisions filed by the plaintiffs were restored to its original numbers for disposal on merits. [Paras. 11, 12, 14, 15 & 16 of the judgment]

Answ Enterprises and 2 others v. Askari Commercial Bank Ltd., Lahore through Head Office, Rawalpindi PLD 2001 SC 107; Muhammad Humayun Khan v. Akber Jan 1972 SCMR 567; Dr. Ansar Hassan Rizvi v. Syed Mazhir Hussain Zaidi and 3 others 1971 SCMR 634; Noor Muhammad and others v. Muhammad Siddique and others 1994 SCMR 1248; Muhammad Bakhsh and 15 others v. Allah Wasayia and 2 others PLD 2007 Lah. 380 and Messrs Gul Ahmed Textil Mills Ltd. through Authorized Signatory v. Shakoor and 4 others 2010 CLC 1272 distinguished.

(b) Interpretation of document---

----Attesting witness---Meaning---Attesting witness was the person who happened to see the process of a document being executed and also put his name as well as signature at the end of document. [Para. 12 of the judgment]

Syed Muhammad Ali Gillani for Applicants.

Ch. Habib Ullah Nahang for Petitioners.

Date of hearing: 4th June, 2015.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By this single judgment I intend to dispose of the above C.Ms. which have been filed under section 12(2) of the Civil Procedure Code, 1908 against the order dated 24-5-1995, whereby, main Civil Revisions were accepted and the suits were decreed on account of the alleged compromise arrived at between the parties, as commons questions of facts and law are involved in the same.

2. Precisely, the facts of the lis are that on the basis of an agreement to sell dated 9.10.1985, which was allegedly executed between Naurang, Ahmad Yar, Muhammad Nawaz, Sarfraz, Muhammad Yar and Noor Ahmed sons of Fazil and

Muhammad Nawaz, six civil suits for specific performance thereof to the extent of their respective share were independently filed by said six sons of Fazil (hereinafter to be referred as plaintiffs) against the legal heirs of Muhammad Nawaz (hereinafter to be referred as defendants) in the year, 1990. After conducting full-fledged trial, all the six suits were dismissed by the learned trial Court vide separate judgments and decrees dated 3.5.1992. The plaintiffs being aggrieved filed six separate appeals before the learned lower appellate Court, which came up for hearing before the learned Addl. District Judge, Sahiwal who vide consolidated judgment and decrees dated 9.2.1994 dismissed the said appeals. Being dissatisfied, the plaintiffs brought six independent Civil Revisions Nos.474-D to 479-D-1994 before this Court and vide orders dated 10.4.1994 pre-admission notices were ordered to be issued to the defendants. The perusal of files reveals that no notice was over issued to the defendants by the Office of this Court. In all the above civil revision, on 24.4.1995 six C.Ms. bearing Nos.332 to 337/1995 under Order XXIII, Rules 1 and 2 read with sections 107/151 of the Civil Procedure Code, 1908 for effecting compromise were separately filed in each Civil Revision respectively, which were endorsed to be heard on 25.4.1995 but files reveal that these C.Ms. were taken up by this Court on 24.5.1995, that too without any prior notice and on the said date, vide separate orders the civil revisions filed by the plaintiffs were accepted and their suits were decreed on the basis of compromise.

For ready reference, the order dated 24.5.1995 is reproduced hereunder:--

"24.5.1995. Mian Habib-ur-Rehman Ansari, Advocate for the Petitioner.

Nusrat Hayat, Spl. Attorney of the Respondents.

Mian Ashiq M. Jamal, Advocate for the Respondents.

The special power of attorney executed by respondents Nos.2 to 7 in favour of respondent No.1 has been filed. Both the learned counsel for the parties state that the parties have reached a compromise whereby it has been agreed that the suit of the petitioner/plaintiff may be decreed as prayed for. Since the revision petition is still at motion stage and the same is to be accepted in view of the terms of the compromise reached between the parties, therefore, the revision petition is admitted to regular hearing.

2. Notice.

3. Mr. Ashiq M. Jamal, Advocate accepts notice on behalf of the respondents. Let the main case be heard.

Main Case.

4. Both the learned counsel for the parties state that the parties have reached a compromise whereby it is agreed that the suit of the petition/plaintiff may be decreed as prayed for. It is added that the respondents have already received the total consideration and that nothing is outstanding against the petitioner.

5. In view of the matter, the revision petition is accepted with the result that the suit of the petitioner/plaintiff is hereby decreed as prayed for."

3. Thereafter, titled C.Ms. bearing Nos.656-C to 659-C-1995 and 662-C-1995 under section 12(2) of the Civil Procedure Code, 1908 were filed by the defendants for setting aside the order as well as proceedings dated 24.5.1995 with the following prayer:---

"It is, therefore, respectfully prayed that this petition may kindly be accepted, the judgment and decree fraudulently obtained by the plaintiff / respondent / revision petitioner of this Hon'ble Court dated 24.5.1995 may be set aside and the revision petition may be dismissed in consequence, with special costs all throughout.

It is further prayed that the respondents may be convicted and sentenced under section 476, P.P.C. besides as also under the Contempt of Court Act.

It is also prayed that criminal prosecution of the respondents may also be directed under sections 419, 420, 467, 468 and 471, P.P.C.

In the meanwhile the operation of the impugned judgment and decree of this Hon'ble Court dated 24.5.95 may please be held in abeyance as the respondents are trying to enforce the same through the Revenue Officer."

4. The said C.Ms. were contested by the plaintiffs and this Court vide order dated 5.6.2003 transmitted the instant applications under section 12(2) of the Civil Procedure Code, 1908 filed by the defendants along with the main cases to the learned District Judge, Sahiwal with a direction to obtain reply from the plaintiffs on the above referred applications and after framing necessary issues arising out of

the pleadings of the parties to record evidence and transmit the files to this Court within a period of eight months. In compliance of order of this Court, the learned District Judge obtained replies and on 18.11.2003 framed the following issues:---

1. Whether the judgment and decree dated 24.5.1995 is result of fraud and misrepresentation of facts? If so, its effect? OPA

2. Whether Nusrat Hayat petitioner No.2 was validly appointed as Special Attorney by the other petitioners? OPR

3. Whether the petitioner No.5 Sajjad and petitioner No.6 Mst. Noor Mahal were minors at the time of execution of Special Power of Attorney dated 4.5.1996? OPA

4. Relief.

5. The learned District Judge after recording evidence of the parties transmitted the original proceedings to this Court along with forwarding letter dated 4.5.2006.

6. The defendants produced Dr. Mehmood Afzal, Addl. Superintendent (A.W.1), Dr. Tariq Mehmood, Radiologist (A.W.2), Allah Yar, teacher (AW.3) and Nusrat Hayat (AW.4) besides the documentary evidence ranging from Exh.A1 to Exh.A13. Conversely, the plaintiffs produced Muhammad Iqbal Naeemi, stamp vendor, (RW.1) Ch. Muhammad Nawaz, Advocate/Notary Public (RW.2), Mian Ashiq Muhammad Ashiq Jamal, Advocate (RW.3) and one of the plaintiffs namely Muhammad Yar (RW.4).

7. Arguments heard and record perused.

8. My issue-wise findings are as under:--

ISSUE NO. 2

9. The case of the defendants in their applications under section 12(2) of the Civil Procedure Code, 1908 is very simple and straight, who alleged in their petitions that they had neither appointed Mian Ashiq M. Jamal, Advocate as their counsel nor he or any other person was authorized to appear and make conceding statements on their behalf whereas so-called special power of attorneys executed on

their behalf in favour of Nusrat Hayat were absolutely forged and fabricated documents; that Nusrat Hayat, who is one of the defendants, had neither signed the said special power of attorneys nor had he appeared before this Court and the conceding statements had never been made by him, but while practicing fraud, misrepresentation and through impersonation, the alleged conceding statements were engineered before this Court by the plaintiffs for their benefit; that defendants Nos.5 and 6 namely Sajjad and Mst. Noor Mahal were minors at the time of alleged compromise and on behalf of the said minors neither special power of attorney could be executed nor it had any legal sanctity; that the defendants contested the suits as well as appeals with full force before the courts below and the plaintiffs remained unable to prove the execution of the alleged agreement to sell dated 9.10.85 but to usurp the property of the defendants after having been confident that they could not succeed, they malafidely engineered the forged device/execution of special power of attorney as well as appointment of counsel and got decreed their suits by practicing fraud and misrepresentation, hence, these petitions are liable to be accepted and the main Civil Revisions be decided on merits.

10. Conversely, the plaintiffs brought a defence that Nusrat Hayat had duly been appointed as Special Attorney on behalf of rest of the defendants, who further appointed Mian Ashiq Muhammad Jamal, Advocate, as a counsel for the defendants; that Nusrat Hayat, Special Attorney through the counsel for the defendants along with the plaintiffs presented joint applications for the disposal of civil revisions as per compromise and this Court after having been satisfied with the genuineness of the alleged compromise arrived at between arrived at between the parties rightly passed the impugned order and there being no element of fraud and misrepresentation, these applications are liable to be dismissed, which have been filed with the ulterior motive and gain undue benefit while putting the plaintiffs under pressure.

11. The defendants have categorically denied the execution of special power of attorneys in favour of Nusrat Hayat and appointment of Mian Ashiq M. Jamal, Advocate by the said Special Attorney as their counsel. Six special power of attorneys (Exh.RW-3 to Exh. RW8) in original are available on the file, the perusal whereof reveals that the stamp papers for reducing into writing said power of attorneys were not purchased by all the defendants rather the same were shown to have been purchased only by Umar Draz, one of the defendants. The original I.D. Card of said Umar Draz was brought on record as (Exh.RW.7) and its perusal reveals that his correct I.D. Card No.335-59-309118 was not written over the sale writing of said stamp papers which reads 335-59-309218 and this fact has been

conceded by the stamp vendor while appearing as RW.1. It is settled law that when the execution of a documents is denied, then the burden to prove it shifts on the shoulders of the party who got benefit out of the said document and in this case, the beneficiaries of power of attorneys are the plaintiffs. No doubt, the plaintiffs produced Muhammad Iqbal Naeemi, stamp vendor, as RW.1, but he got recorded his statement without bringing the Register of Stamp vending, who deposed in his statement that he had not only issued the stamp papers for executing special power of attorneys, but he also scribed the same on the demand of the parties. Admittedly, RW.1 was not a license holder deed writer, which fact was conceded by him at the beginning of this cross-examination. It is noteworthy that licenses are issued by the competent authority to the skilled deed writers so that the interest and rights of the parties could be secured as the license holder deed writers are required to maintain the Registers to make entry of the document and also to obtain signatures/thumb impressions of the executants against the said entry in the Registers to cross-check the authenticity of the signatures/thumb impressions of the executants found to have been affixed on the relevant instruments. In the present case, no such documentary evidence of corroborative nature in the shape of Registers of deed writer is available on the record to support the version of the plaintiffs and due to non-production of Register of stamp vending despite availability, the inference has to be drawn against the plaintiffs.

12. The plaintiffs also failed to produce the attesting witness namely Sarfraz as well as Abbas to prove the valid execution of Special Power of Attorneys, which was mandatory under Article 79 of the Qanun-e-Shahadat, 1984 and for ready reference the same is reproduced below:---

> **"79. Proof of execution of document required by law to be attested.**---If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

The above referred provision provides procedure to prove the execution of the documents required by law to be attested. The non-examination of attesting witnesses has provided justification for holding that valid execution of the Special Power of Attorneys could not be proved. No reason has been assigned for withholding the said star witnesses despite their availability and inference has to be drawn against the petitioners under Article 129(g) of the Qanun-e-Shahadat, 1984. The argument of learned counsel for the plaintiffs that the producing stamp vendor, deed writer and a Notary Public, the contents and execution of power of attorneys have been proved, is devoid of force. An attesting witness is the person, who happens to see the process of a document being executed and also puts his name as well as signature at the end of document. Obviously it is not shown with reference to the questioned documents that scribe, in addition to the writing of document, had also acted as an attesting witness, who cannot be treated as such and his examination at trial as a scribe will not be sufficient compliance of the requirement contained in the Qanun-e-Shahadat, 1984. From the perusal of Special Power of Attorneys it is further borne out that Muhammad Iqbal Naeemi (RW.1), the stamp vendor and alleged scribe did not sign the said documents being scribe of the same and mere signatures of Ch. Muhammad Nawaz, Advocate (RW.2) as Notary Public on the Power of Attorneys, who never signed the said documents in the capacity of attesting witness cannot declare to be sufficient compliance of the requirement contained in Article 79 of the Qanun-e-Shahadat, 1984. Mere signature of a person without witnessing the actual execution of the deed cannot be treated as attestation of the document. The plaintiffs were under legal obligation to get examined, at least, two witnesses as required under the provisions of Article 79 of the Qanun-e-Shahadat, 1984 to prove the execution of Power of Attorneys. Admittedly, both the attesting witnesses of Special Power of Attorney being alive were subject to the process of the Court and capable of giving evidence, hence no such document can be used in evidence until the attesting witnesses were got examined in proof thereof. The non-production of said witnesses is fatal to the admissibility of the said documents.

The plaintiffs, no doubt, produced Mian Ashiq Jamal Muhammad, Advocate, as RW.3, who deposed that Nusrat Hayat had approached him, executed Wakalatnamas in his favour and on his instructions he (RW.3) filed applications under Order XXXIII, Rules 1 and 2 read with sections 107/151 of the Civil Procedure Code, 1908 for effecting compromise. The said Wakalatnamas in original are also available on file as Exh.RW.3/1 to Exh.RW.3/6, the perusal of which reveals that the said Wakalatnamas were not only signed by Nusrat Hayat, the alleged attorney, but the same also bore signatures of Fakhar Abbas and Umar Draz,

some of the defendants, who had allegedly executed power of attorneys in favour of Nusrat Hayat as well. The said aspect has also made execution of those Wakalatnamas highly doubtful because when Nusrat Hayat was attorney of the defendants along with Fakhar Abbas and Umar Draz, then there was no fun to obtain the signatures of Umar Draz and Fakhar Abbas, defendants. It is pertinent to note that the applications for compromise were not got signed from those defendants, which makes it clear that at the time of any agreement, the said defendants were not available as Wakalatnamas were executed on 23.4.1995 and applications under Order XXIII, Rules 1 and 2 read with sections 107/151 of the Civil Procedure Code, 1908 were also drafted on the same day. If Nusrat Hayat was accompanied by the defendants, namely, Fakhar Abbas and Umar Draz, then their signatures could also be obtained on the said petitions for effecting compromise along with signatures of Nusrat Hayat to authenticate the same. The Wakalatnamas were also attested by one Muhammad Nawaz, being identifier. The statement of Mian Ashiq Muhammad Jamal, Advocate (RW.3) that Nusrat Hayat was known to him prior to the execution of Wakalatnamas, stood falsified due to such identification. If Nusrat Hayat was known to the said counsel, then there was no need to obtain the signatures of Muhammad Nawaz being identifier of Nusrat Hayat etc., the executants of Wakalatnamas. It is also noteworthy that neither Muhammad Nawaz, the alleged identifier, was produced by the plaintiffs during the trial nor these Wakalatnamas or the signatures appearing on the same were confronted to Nusrat Hayat (AW.4), the alleged Special Attorney, whose signatures are available on the said Wakalatnamas. The said aspect has also made the execution of Wakalatnamas suspicious. By referring the judgments reported as Answ Enterprises and 2 others v. Askari Commercial Bank Ltd., Lahore through Head Office, Rawalpindi (PLD 2001 SC 107), Muhammad Humayun Khan v. Akber Jan (1972 SCMR 567), Dr. Ansar Hassan Rizvi v. Syed Mazhir Hussain Zaidi and 3 others 1971 SCMR 634, Noor Muhammad and others v. Muhammad Siddique and others (1994 SCMR 1248), Muhammad Bakhsh and 15 others v. Allah Wasayia and 2 others (PLD 2007 Lah. 380) and Messrs Gul Ahmed Textil Mills Ltd. through Authorized Signatory v. Shakoor and 4 others (2010 CLC 1272), the contention of learned counsel for the plaintiffs that Mian Ashiq Muhammad Jamal was a senior Advocate, whose statement being AW.3 was of much importance and, therefore, the same should be considered as sacred, is misconceived. When the appointment of said counsel could not be proved, then his statement is of no value. The defendants had leveled allegations against the said counsel, so, merely on the ground that he was a Senior Advocate, his statement could not be given preference over the direct evidence available on the file. The case law referred to by the learned counsel for

the plaintiffs is not applicable to the facts and circumstances of the instant case, which also runs on different footings. On the touchstone of the above discussion and appreciation of evidence, it is established that the defendants fully discharged the onus of this issue, which is answered against the plaintiffs and in favour of the defendants.

ISSUE NO. 3.

13. The defendants got examined Mehmood Afzal, Additional Medical Superintendent (AW.1) and Dr. Tariq Mehmood Radiologist (RW.2), who stated that according to their examination conducted on 27.10.2003, the age of Sajjad Ahmad son of Muhammad Nawaz was determined approximately around 23 years and that of Mst. Noor Mahal to be approximately around 24 years. In this view of the matter, in the year 1995, when the disputed compromise was allegedly affected, their ages were to be 15 and 16 years respectively. Nothing adverse could be gathered by the plaintiffs from the cross-examination over AW.1 and AW.2, who being independent witnesses made their testimony on the basis of medical examination and reports of the said defendants. The argument of learned counsel for the defendants that the said defendants were not declared minors by the Dentist, is without any force. AW.1 categorically deposed in his examination-in-chief that the Dental Specialist failed to give correct findings due to the age factor of the said defendants. Even otherwise, the minority of above said defendants has also been proved by producing Allah Yar, Teacher, (AW.3) who brought the school record and produced school record and verified the entries of school leaving certificate (Exh.AW.3) of Sajjad Ahmad, defendant, the perusal of which reveals that Sajjad Ahmad was born on 4.4.1980. It also affirms that in the year 1995, the said defendant was attaining the age of 15 years. This document (Exh.AW.3) which was duly proved by AW.3, also corroborates the medical evidence produced through AW.1 and AW.2. Even otherwise, in the plaint as well as memorandum of appeal filed by the plaintiffs before the learned trial Court as well as learned lower appellate Court, they themselves had arrayed the said defendants as minors. Furthermore, out of six revision petitions, in the memo of parties of five revision petitions, the words of their minority and their representation through guardian at litem were scored out. The said cutting on five revision petitions is also without any signatures and initials of the counsel, which also proves the stance of the above said defendants that they were minors even on the day of filing of civil revisions. No evidence in rebuttal could be brought on record by the plaintiffs, so, the minority of Sajjad Ahmad and Mst. Noor Mahal, defendants was fully proved by the defendants

by producing cogent, convincing, strong and reliable evidence, therefore, this issue is decided in favour of the defendants and against the plaintiffs.

ISSUE NO. 1

14. In view of my findings on Issues Nos.2 and 3, it is fully proved on record that neither Nusrat Hayat had been appointed as their Special Attorney by the other defendants nor Nusrat Hayat had appointed Mian Ashiq Muhammad Jamal, Advocate as counsel, therefore, the proceedings conducted before this Court on 24.5.95 for effecting compromise on the basis of said Special Powers of Attorneys and Wakalatnamas have become doubtful. I have yet come across another angle of the case that the plaintiffs asserted in their application filed for compromise that after the receipt of Rs.20,000 the defendants had arrived at a compromise and were ready to make a statement for the acceptance of civil revisions filed by them. Neither any receipt of payment of Rs.20,000 was executed between the parties nor any independent witness was produced, who could depose that in his presence the compromise was effected between the parties. Even if any compromise had been affected between the parties, then the plaintiffs by producing the defendants before the Patwari could have got entered mutation in their favour or when the Special Power of Attorneys by producing all the defendants before the deed writer were got executed, then why the sale-deed was not got executed to bury the litigation. There seems no fun that despite the availability of the defendants and compromise the Special Power of Attorneys were executed at Tehsil Chechawatni and thereafter counsel at Multan was engaged, who submitted applications for compromise and after recording of statements of counsel for the parties the suit for special performance was got decreed in consequence whereof the plaintiffs were obliged to file an execution petition to seek implementation of the decree by attestation of sale-deed. This all exercise could be saved by entry of mutation or attestation of sale-deed at the local level if really a compromise had been effected in between the parties.

15. In the above facts and circumstances, I have no hesitation to hold that the orders and decrees dated 24.5.1995 in favour of the plaintiffs were result of fraud and misrepresentation of facts, which cannot be sustained in the eye of law and are liable to be struck off while exercising the jurisdiction under section 12(2) of the Civil Procedure Code, 1908. So, this issue is answered in the affirmative.

RELIEF

16. In view of my findings on the above issues, the instant C.Ms. are accepted, the orders and decrees dated 24.5.1995 along with the proceedings respecting the alleged compromise are hereby set aside and Civil Revisions Nos.474-D to 479-D-1979 filed by the plaintiffs are restored to its original numbers for disposal on merits. The office is directed to fix the same in routine in the cause list as the same pertain to the oldest category.

ZC/U-9/L Applications accepted.

2017 Y L R 1217
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
QADEER AHMAD---Petitioner
Versus
EJAZ AHMAD through L.Rs. and others---Respondents

C.M. No.1/C of 2016 and C.R. No.3616 of 2014, heard on 21st October, 2016.

(a) Partition Act (IV of 1893)---

----S. 4---Civil Procedure Code (V of 1908), O. VII, R. 11---Suit for possession through partition---Rejection of plaint---Principle---Suit was dismissed on the ground that no proof of ownership of commercial property could be brought on record and rest of the property was agricultural in nature---Validity---When most of the properties were of residential/commercial nature, Civil Court being the court of ultimate jurisdiction was the sole forum to decide the lis brought before it---If suit qua the cluster of properties was instituted before the Civil Court which possessed the jurisdiction in respect of any of the said properties, court, to the extent of other properties regarding which it had no jurisdiction could adjudicate upon being court of ultimate jurisdiction---Plaint could not be rejected or returned in piecemeal, it could only be rejected if all reliefs claimed were barred under the law---Most of the properties involved in the present case were residential/commercial and among those if any of the property was found to be agricultural falling in the joint holding of the parties requiring partition, then plaint to such extent could neither be partially rejected/returned nor suit could be dismissed on said score---Courts below had erroneously non-suited the plaintiff---Impugned judgments and decrees were nullity in the eye of law which were set aside---Case was remanded to the Trial Court for decision afresh on merits within a period of four months---Revision was allowed in circumstances.

(b) Admission---

----Scope---Admission which was wrong in point of fact or was made in ignorance of legal right had no binding effect on party to lis even if it was made by an expert during the course of argument before a court of law.

Ahmad Khan v. Rasul Shah and others PLD 1975 SC 311 rel.

Ch. Inayat Ullah for Petitioner.

Shezada Mazhar for Respondents.

Date of hearing: 21st October, 2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This civil revision under section 115 of the Code of Civil Procedure, 1908 calls in question ex parte judgment and decree dated 05.11.2012 passed by the learned trial court as well as judgment and decree dated 18.09.2014 delivered by the learned lower appellate court, whereby suit for possession through partition instituted by the petitioner and respondents Nos.5 to 11/plaintiffs was concurrently dismissed.

2. The factuality of the case is not under any dispute and admittedly as a result of protracted litigation decided upto the level of the apex court, Mst. Mumtaz Begum alias Taj Begum, mother of the petitioner and respondents Nos. 5 to 11 was declared one of the legal heirs of Muhammad Shafi (deceased) to inherit 1/6th share in his patrimony. In this round of litigations, the petitioner and other legal heirs of Mst. Mumtaz Begum through institution of lis in hand prayed for separate possession of their shares through partition of the joint properties detailed in the following schedule:--

Sr. No.	**Khewat/ Khatuni Nos.**	**Khasra No.**	**Measurement of property**
I	Nil	Nil	Seven shops bearing No.B-ix/751
II	341/581	481	04 Kanals 18-1/2 Marlas
III	366/608	481	01 Kanal 18 Marlas
IV	378/620	480	01 Kanal 13 Marlas
V	379/621	474	11 Marlas
VI	389/623	2380/962	01 Kanal 12 Marlas
VII	381/623	2458/719	02 Kanals 02 Marlas
VIII	877/1491	495	01 Kanal 06 Marlas
IX	401/643	3354/230	02 Marlas
X	401/643	3359/2390	03 Marla

3. To resist the suit, respondents Nos.1 and 2/defendants advanced their written statement and after settling issues, when the lis was fixed for evidence of plaintiffs, respondents Nos.1 and 2 avoided their appearance whereupon they were proceeded against ex parte and after recording ex parte oral as well as documentary evidence of the plaintiffs, the learned trial court dismissed the suit on the sole ground that qua

commercial property mentioned at serial No. I ante, no proof of ownership could be brought on record, whereas rest of the properties were agricultural in nature and only the revenue forum could entertain the lis for the redressal of grievance of the petitioner/plaintiff, whose counsel also made a statement during the final arguments showing his intention not to press the suit to the extent of afore-referred properties. Despite assailing, the learned Additional District Judge maintained it while disallowing the appeal of the petitioner/plaintiff through judgment and decree referred in para. 1 ante.

4. It is argued by learned counsel for the petitioner/plaintiff that qua the jurisdiction of the Civil Court, no issue was framed by learned trial court and while dismissing the suit on the said score, learned trial court committed material irregularity and illegality; that without appreciating the un-rebutted ex parte evidence of the petitioner/plaintiff, especially copies of Record of Rights (Exh.P4 to Exh.P6), findings of learned trial court that except property detailed at serial No.I of the above schedule, rest of the properties were agricultural, is result of misreading and non-reading of evidence, and that if the courts below were of the view that the proceedings for partition were to be initiated before revenue forum, then at the most, plaint of suit of petitioner/ plaintiff could be returned, but they were not obliged to decide the lis on merits.

5. Conversely, learned counsel for the respondents Nos.1 and 2/defendants has supported the impugned judgments and decrees while maintaining that the petitioner/plaintiff was estopped to further assail the same before this court after the statement of his counsel made before trial court during the course of final arguments that Civil Court has no jurisdiction to entertain a suit for possession through partition qua the agricultural property as it is specifically barred.

6. Arguments heard and record perused.

7. Two questions requiring determination in the instant lis are; firstly, whether Civil Court is equipped with jurisdiction to try and decide a suit for possession through partition qua the common agricultural and urban properties falling in joint holding of the parties and secondly whether an admission against the record and fact made at bar before a court of law is to be treated conclusive or not? There is no denial of the fact that only ex parte evidence of the petitioner/plaintiff is available on the lis file without any rebuttal thereof, whereas Exh.P4 is copy of Register Haqdaran Zameen and its perusal reveals that properties mentioned at serial Nos.II and VII of the schedule were shown to be "Ghair Mumkan Ahatas", whereas

properties mentioned against Serial Nos.III to VI and VIII to X of the schedule ibid were mentioned as "Ghair Mumkan Makan", which totally skipped the sight of the two courts below and after its bird eye view has left nothing except to conclude that both the courts below without realizing the entries of the said document erroneously considered the said properties being agricultural. Moreover, respondents Nos.1 and 2/defendants filed C.M.No.1/ 2015 before this Court for vacation of stay and along with the same they also appended copies of sale deeds No. 3568 dated 08.6.2006, 5051 dated 21.7.2010 and 5576 dated 11.8.2010 qua the disputed properties, a perusal whereof reveals that those were attested while showing the properties being residential. So the documents of the respondents Nos.1 and 2/defendants brought on record during the proceedings of this civil revision itself have also affirmed the stance of learned counsel for the petitioner/plaintiff that the trial court erred in law while considering properties mentioned at serial Nos.II to X of the schedule being agricultural. When it is proved on record through the documents duly got exhibited during trial of the suit file as well as copies of sale deeds brought on instant file by respondents/defendants through the civil miscellaneous that most of the properties are of residential/commercial nature, then definitely the Civil Court being the court of ultimate jurisdiction is the sole forum to decide the lis brought before it. The argument of learned counsel for respondents Nos.1 and 2 while referring to a judgment dated 29.6.2016 of learned Division Bench of this Court passed in I.C.A. No. 1114/2016 that petitioner/ plaintiff is bound by the act of his counsel qua the admission made by him before trial court that suit qua properties mentioned at serial Nos.II to X would be filed by him before the revenue forum, was conclusive and as per principle of acquiescence, he is estopped to maintain the instant civil revision qua the said properties, is not tenable. No doubt, learned trial court while dictating the final judgment observed that learned counsel made aforementioned admission during the arguments, but admittedly neither his independent statement was recorded nor any specific order was spontaneously passed on the strength of such admission while returning the plaint. It is also not an intricate question to acquiesce the proposition that such an admission can be treated conclusive or not. It is settled principle of law that an admission, which is wrong in point of fact or is made in ignorance of legal right, has no binding effect on party to lis, even if it is made by an expert during the course of arguments before a court of law and in arriving at this conclusion, I am fortified by the dictum laid down in case titled as Ahmad Khan v. Rasul Shah and others (PLD 1975 Supreme Court 311), wherein it is observed as under:--

> "Therefore, an admission which is wrong in point of fact or is made in ignorance of legal right, has no binding effect on the person making it. This

> is however, subject to two well recognized exceptions. First: such admissions become conclusive and are binding on a party making them only if it amounts to a representation on a matter of fact made to the other party, who in consequence of such representation has altered its position. When admission is thus acted upon by the party to whom it is made, it operates as estoppel and becomes in a way conclusive, inasmuch as the party making it is not then permitted to show that the admission was wrong. Such admission is really hit by rule of estoppel in section 115 of the Evidence Act, 1872".

And in the light of said dicta, if any wrong admission against the fact and record is made on part of a party or his counsel, that cannot be treated as conclusive or absolute.

8. I am also of the firm view that if a suit qua the cluster of properties is instituted before the Civil Court and in respect of anyone thereof, the said court possessed jurisdiction to try it, then obviously the same to the extent of other properties regarding which the said Court had no jurisdiction, could also be adjudicated upon by it being the court of ultimate jurisdiction. Moreover, it is an elementary principle that a plaint of a suit cannot be rejected or returned in piecemeal rather it can only be rejected if all the reliefs claimed by the plaintiff are barred under the law. In the case in hand, mostly residential/commercial properties are involved and among those if any of the property is found to be agricultural, but falling in the joint holdings of the parties requiring partition through separate possession, then plaint to such extent can neither be partially rejected/returned nor suit can be dismissed on the said score rather requires its adjudication and decision on merits as per law. So far as the last submission of Mr. Shezada Mazhar, Advocate, learned counsel for respondents Nos.1 and 2 that petitioner/plaintiff has already transferred his share falling in the joint holding, therefore, the instant Civil Revision has become in fructuous is concerned, suffice it to say that this is not an issue under the instant Civil Revision and any subsequent event, if happened, as per version of learned counsel for respondents Nos.1 and 2, then the same can be propounded before the court to whom the said suit is being remanded.

9. In view of the above discussion, I have no hesitation to hold that both the courts below have erroneously non-suited the petitioner/plaintiff through impugned judgments and decrees, which being nullity in the eye of law are not sustainable and the matter needs to be remanded to learned trial court for decision afresh on merits. Resultantly, this civil revision is accepted, impugned judgments and decrees are set

aside and the suit of the petitioner/plaintiff will be deemed to be pending before learned trial court, who will decide the same afresh on merits within a period of four months positively. The parties are directed to appear before learned District Judge, Gujrat on 15.11.2016, who will entrust the main suit to the court of competent jurisdiction for further proceedings.

ZC/Q-12/L Case remanded.

CONTENTS

2018 C L C Note 29
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
NAZAR HAYAT---Petitioner
Versus
MUHAMMAD IJAZ HUSSAIN and 5 others---Respondents

Writ Petition No. 26203 of 2010, heard on 15th March, 2017.

Punjab Land Revenue Rules, 1968---

----R. 17---Lambardar, appointment of---Requirements---Revenue field staff from patwari to Assistant Commissioner and District Collector recommended the petitioner for appointment as Lambardar whereas Executive District Officer and Member Board of Revenue recommended the respondent---Validity---Post of Lambardar was purely an administrative one---Revenue authorities were bound to select the best amongst the candidates---Respondent was son of outgoing Lambardar whereas petitioner was not related to him; he possessed hereditary claim whereas no such qualification could be claimed by the petitioner; he was owner of land measuring 162 kanal and 7 marla in the concerned revenue estate and petitioner had a chunk of land measuring 132 kanal and 5 marla; respondent, in circumstances, had an edge over the petitioner---Petitioner belonged to Dhoon tribe which consisted of 145 land owners having property measuring 990 acres and respondent was a part of Pathan kinfolk consisting of 235 family members having 1881 acres land; respondent was matriculate but petitioner had no educational qualification, respondent, therefore, had better influence in the Mauza than the petitioner---Respondent was performing the duties of Headman being Sarbrah of his father fifteen years prior to his appointment and had spotless career with a credit of experience on his part which could not be equated with any of the qualification---Order passed by the District Collector was merely based on the negative reports furnished by the revenue field staff as well as police hierarchy but same was not supplemented with any material---Respondent was not involved in criminal activities and litigation---Executive District Officer and Member Board of Revenue rightly passed the impugned orders on valid reasons---No illegality, perversity or jurisdictional defect had been pointed out in the impugned orders---Constitutional petition was dismissed in circumstances. [Paras. 4, 5, 6 & 7 of the judgment]

Abdul Ghafoor v. The Member (Revenue) Board of Revenue and another 1982 SCMR 202 ref.

Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan PLD 1999 SC 484 rel.

Zafar Iqbal Chohan and Ihsan Ahmad Bindhar for Petitioner.

Kazim Ali Malik for Respondents.

Mohammad Arif Yaqoob Khan, AAG for Respondents Nos. 4 to 6.

Date of hearing: 15th March, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undeniably, Mohammad Feroze Khan son of Mohammad Aslam, father of respondent No.1 was permanent Lumberdar of the concerned Mauza and after his demise on 17.10.2008, the post of Lumberdar stood vacant and to fill it, sixteen candidates including petitioner as well as respondent No.1 applied for it. The Revenue Field Staff right from Patwari to Assistant Commissioner recommended the present petitioner being suitable out of the contestants and the District Collector while concurring with it appointed him against the said vacancy through order dated 21.10.2009, which could not hold the field when his superiors i.e. Executive District Officer (Revenue)/respondent No.5 and Member Board of Revenue respondent No.6 concurrently preferred respondent No.1 over the petitioner for the job of Headman through the impugned orders dated 05.05.2010 and 28.10.2010 respectively, which are under resistance of the instant constitutional petition.

2. It is submitted by Mr. Zafar Iqbal Chohan, Advocate, learned counsel for the petitioner that the impugned orders suffered from serious misreading and non-reading of material on record, which were passed in a mechanical manner without application of judicious mind; that the Revenue Field Staff as well as the District Collector after considering the merits and de-merits of the candidates rightly declared the petitioner to be eligible for the post under discussion, but both the higher forums without analyzing the credentials of the competitors erred in law while preferring respondent No.1, who did not possess any better qualification than the petitioner besides that the police hierarchy also made a negative report against him, which put a smudge on his character and respondents Nos.5 and 6 committed material illegality while passing the impugned orders without considering said reports; that respondent No.1 being a man of crummy character was not entitled for appointment against the post under discussion. Mr. Chohan lastly worded that petitioner had neither been involved in any criminal case nor was convicted rather he belonged to a popular, prominent and laudable family of the locality and that he also owned more chunk of land, better in age than that of his contestants and being the veracious choice of the District Collector, could not be ignored.

3. Conversely, Mr. Kazim Ali Malik, Advocate, learned counsel for respondent No.1 submitted that the Revenue Field Staff as well as the District Collector had favoured the petitioner on account of his local political influence and respondents Nos.5 to 6 after comparing credentials of the petitioner vis-a-vis respondent No.1 were perfect in appointing the latter being son of outgoing Lumberdar, who on the day of appointment also possessed 15 years experience on his credit; that after appointment till today neither any complaint was lodged against his performance by the land owners under his command nor by the Revenue Field Staff, who gained another experience of 7 years till today and his such proficiency was to be given weight and was rightly considered, which deserves no interference; that in addition to experience, not only extra degree of hereditary claim tilted in favour of respondent No.1, but he also had better edge over the other candidates on account of

strength of tribe, quantum of landed property and educational qualification. Mr. Malik, further added that concurrent findings of fact returned by respondents Nos.5 and 6 could not be disturbed while invoking constitutional jurisdiction, he while supporting his arguments has placed reliance upon the judgments reported as "Abdul Ghafoor v. The Member (Revenue) Board of Revenue and another" (1982 SCMR 202) and "Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan" (PLD 1999 Supreme Court 484).

4. After giving due consideration to the arguments of learned counsel for the parties and making probe of the record, before embarking upon merits of the case, it is noteworthy that while appointing permanent Lumberdar of the village the controversy of eligibility is to be decided according to law while taking into consideration all the requirements provided under Rule 17 of the West Pakistan Land Revenue Rules, 1968, among other matters which have to be seen conjunctively, those are (i) the hereditary claim of the candidates; (ii) extent of property in the estate, if there are no sub-divisions of the estate and in case there be sub-divisions of the estate the extent of the property in the sub-division for which appointment is to be made, possessed by the candidate; (iii) services rendered to the Government by him or by his family; (iv) his personal influence, character, ability and freedom from indebtedness; (v) the strength and importance of the community from which selection of a headman is to be made and (vi) his ability to undergo training in Civil Defence in the case or headman in Tehsils situated along with the Border. The post of Lumberdar is purely an administrative post and after the dicta laid down by the apex Court in Maqbool's case supra, the revenue authorities are bound to select the best among the candidates.

5. Reverting to the comparison of the contestants, it is found that respondent No.1 was son of outgoing Lumberdar, whereas the petitioner was not related to him and as such the former possessed hereditary claim, whereas no such qualification could be claimed by the latter. In the concerned revenue estate respondent No.1 was owner of 162-kanals 07-marlas and against it petitioner had a chunk of land measuring 132-kanals 05-marlas. The submission of Mr. Chohan that petitioner was owner of 252-kanals could not be proved by him by bringing any revenue record to corroborate the same, whereas Mr. Malik as well as the learned Law Officer responded that the petitioner might have been in cultivation of any further land in some other Mauza, but in the concerned revenue record he was owner of land not more than 15-Acres and their submission found support through the contents of the application preferred for the appointment against the post wherein petitioner himself averred that he was owner of about 15-Acres, which left nothing to conclude that in this circle of qualification respondent No.1 again had an edge over the petitioner. The latter belonged to Dhoon tribe, which was consisting of 145 land owners having property measuring 990- Acres against their title and in contra the former/respondent No.1 was a part of Pathan kinfolk and out of them 235 family members acquired 1881-Acres, which was double in quantum than the land of the Dhoon tribe. Respondent No.1 was a matriculate, but the petitioner was again not having such educational qualification. No doubt, the family of the petitioner was

involved in local politics, but only two of the contestants could withdraw themselves in his favour, whereas seven out of sixteen candidates voluntarily receded for respondent No.1, which again was indicative of the fact that he had better influence in the Mauza than the petitioner. Although age wise the petitioner is younger than respondent, but to me, respondent No.1, who is present in the court appears to be healthy, strong and matured person. Above all, respondent No.1 was performing the duties of Headman being Sarbrah of his father fifteen years prior to his appointment and after that he was also engaged in the business for the last seven years and as such he possessed spotless career with a credit of experience on his part, which could not be equated with any of the qualifications, the petitioner might have other than referred above.

6. The contention of learned counsel for the petitioner that choice of the District Collector should be given preference, is ill founded because the said choice should be based on merits and cannot be treated as a last word. In present case, the order passed by the Collector was merely based on the negative reports furnished by the Revenue Field Staff as well as police hierarchy, but the same was not supplemented with any material. Even today despite query of this Court, learned counsel for petitioner failed to produce any record to show that respondent No.1 was involved in criminal activities and litigation or that he was engaged in unhealthy activities or that he was not free from indebtedness. It is, therefore, clear that credential-wise, respondent No.1 had a prominent edge over the petitioner and respondents Nos.5 and 6 while minutely considering the said aspects rightly passed the impugned orders on the valid reasons, which do not suffer from any illegality, perversity or jurisdictional defect to call for interference by this Court in the exercise of constitutional jurisdiction.

7. Sequel of the above discussion is that petition in hand being devoid of any merit is hereby dismissed.

ZC/N-15/L Petition dismissed.

2018 C L C 307
[Lahore (Multan Bench]
Before Ch. Muhammad Masood Jahangir, J
MUKHTAR AHMAD and 3 others----Petitioners
Versus
PROVINCE OF PUNJAB through District Collector, Sahiwal and others----Respondents

C.R. No.235-D of 2003, heard on 17th May, 2017.

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

----S. 30(2)---Transfer of Property Act (IV of 1882), S.41---Specific Relief Act (I of 1877), Ss.42 & 54---Suit for declaration and injunction---Cancellation of allotment---Non-framing of proper issues---Concurrent findings of facts by two courts below---Plaintiffs assailed order passed by revenue authorities revoking allotment of land in question---Trial Court as well as Lower Appellate Court concurrently dismissed suit and appeal filed by plaintiff---Plea raised by plaintiffs was that Trial Court omitted to frame proper issues with regard to protection provided under S.41 of Transfer of Property Act, 1882---Validity--- Plaintiffs did not press such issue before two courts below where protracted trial of suit was conducted---Trial Court was to settle issues as per pleadings of the parties and plaintiffs were also contributory towards such obligations who remained quiet---Entire pleadings were in knowledge of plaintiffs and they were under legal obligation to prove the same by production of best available evidence during trial of suit---Plaintiffs failed to lead inspiring evidence who for such lapse could blame themselves and not anybody else---Original allottee himself appeared before revenue authorities while claiming that he was already awarded land against his entitlement whereas, allotment of suit property was result of forgery and fraud---Neither any protection could be extended to subsequent purchaser of suit property nor a fraud could be perpetuated---Plaintiffs failed to pinpoint any misreading and non-reading of material evidence available on record to declare judgments and decrees passed by two courts below to be illegal, unlawful and without jurisdiction---High Court in exercise of its revisional jurisdiction declined to interfere in judgments and decrees passed by two courts below---Revision was dismissed in circumstances.

Hafiz Tassaduq Hussain v. Lal Khatoon and others PLD 2011 SC 296; Haji Abdullah Khan and others v. Nisar Muhammad Khan and others PLD 1959 (W.P.) Pesh. 81; Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another 1988 SCMR 04; Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others 1993 SCMR 2018; Abdul Karim v. Haji Noor Badshah 2012 SCMR 212; Muhammad Yamin and others v. Settlement Commissioner and others 1976 SCMR 489; Alhajj Shahzadi Mumtaz Jahan and 2 others v. Rana Akhtar Saeed and 13 others PLD 2000 Lah. 84; Muhammad Siddique v. Additional Settlement

Commissioner and others 1993 CLC 1947; Muhammad Liaqat and 5 others v. Member Board of Revenue (Colonies), Punjab, Lahore and 3 others 2000 CLC 953; Shahzadi Mumtaz Jehan v. Mst. Aqeela Parveen Ijaz and others 2001 CLC 1860; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Rehmatullah and others v. Saleh Khan and others 2007 SCMR 729; Mst. Zulaikhan Bibi through L.Rs and others v. Mst. Roshan Jan and others 2011 SCMR 986 and Ghulam Farid and another v. Sher Rehman through L.Rs. 2016 SCMR 862 ref.

Ch. Muhammad Riaz Jahania for Petitioners.

Mian Muhammad Siddique Kamyana for Respondent No.3.

Mubashar Latif Gill, A.A.G.

Date of hearing: 17th May, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.--- Uncontroversially, Kareem Bakhsh was an oustee of Islamabad, who was allotted subject property with regard to his entitlement in 1977, which was also implemented in the revenue record through attestation of mutation followed by conferment of proprietary rights through a conveyance deed attested in his favour on 24.09.1977 and thereafter, the subject property changed hands through different transactions and ultimately it was transferred to the petitioners. The District Collector at his own after consulting the record forwarded a reference to the Member (Colonies) Board of Revenue, Punjab, with the endorsement that Kareem Bakhsh, original allottee, prior to allotment of the suit property had already got allotment against his eligibility certificate in another revenue estate and requested for the cancellation of allotment and revocation of the conveyance deed under Section 30(2) of the Colonization of Government Lands Act, 1912 Pursuant thereto the learned Member while exercising its suo motu powers fixed the case in Peshi, consequent to issuance of notice, the original allottee in its acquiescence put appearance before him and made a statement that neither he had applied for the allotment of disputed land not it was ever allotted to him, whereupon the learned Member cancelled the allotment as well as conveyance deed through order dated 20.11.1983, while observing as under:-

> 3. I have heard the learned counsel for the respondents. He contended that one Muhammad Jan managed to obtain allotment in the name of the respondent through fraud and in token of the obtaining allotment Chit Muhammad Jan signed the allotment order. He contended that Muhammad Jan thereafter sold the land. He also further contended that a criminal case has been registered on 26.8.1981 against Muhammad Jan and others on the information of the respondent. He contended that he obtained allotment in

Tehsil Lodhran of Multan District on a genuine eligibility certificate issued by the Capital Development Authority. He urged that he has no objection if the allotment in Sahiwal District is cancelled.

4. I have, considered the arguments and examined the record of the case. It is evident from the record that the allotment in Sahiwal District was obtained through fraudulent means on a false eligibility Certificate which cannot stand. The Board of Revenue can competently exercise its jurisdiction under section 30(2) of the Colonization of Government Land (Pb.) Act, 1912. Consequently I would cancel the allotment obtained in the name of the respondent in Chak No.56/12-L, revoke the deed of conveyance executed in his name and rescind mutation No.416 entered and decided in favour of Karim Bakhsh on the basis of the conveyance deed. Mutation No.417 of further sale in favour of Muhammad Bakhsh etc. is also rescinded. The possession of land should immediately be taken over and files of illicit cultivation be prepared. The Suo Motu revision petition is thus disposed off.

This order was challenged by the petitioners/subsequent transferees through a declaratory suit before the learned Civil Court, but they could not succeed before it as well as the Appellate Court, who through impugned judgments and decrees dated 19.12.2000 and 03.03.2003 respectively dismissed the suit as well as appeal. Hence the Civil Revision in hand.

2. Heard. Record scanned.

3. Before deliberation, in reply to a query extended by this Court, it was conceded by Ch. Muhammad Riaz Jahania Advocate that during the trial not an iota of evidence could be led to belie the statement of the original allottee, which he had made before, the Member/respondent No.2. Having gone through the evidence of the parties, it was also established on suit file that in fact the original allottee had already been adjusted against his eligibility certificate in Lodhran Tehsil and his alleged attorney managed to have the double allotment by means of cheating, misrepresentation and fraud, however, Mr. Riaz emphasized with great vehemence that petitioner No.1 had purchased the land in good faith with consideration after consulting the revenue record, but the Courts below erred in law while ignoring the mandate of Section 41 of the Transfer of Property Act, 1882. There is no doubt that as per general principle, a person cannot transfer to another a right or title better than what he himself possesses and he gives not what hath not, but to this principle there is exception enshrined in Section 41 of the Act ibid that if actual owner of the property permits another to hold himself out as the real owner as by entrusting him with the documents of title or in some other way, a third person, who bonafidely deals therewith may acquire a good title to the property as against the true owner. Necessary ingredients for protection under section 41 of the Transfer of Property

Act, 1882 are that transferor is an ostensible owner; that he is so by the consent, express or implied, of the real owner; that transfer is, for consideration; and that transferee has acted in good faith, taking reasonable care to ascertain that the transferor has power to transfer. Protection of the provision ibid can only be extended if the requirements referred hereinabove will be available, however, if any of such essentials is lacking, the transferee shall be denied this protection. Obviously the existence of aforementioned facts and the ascertainment thereof is an issue between the parties, which requires resolution from the Court. The apex Court in a case cited as Hafiz Tassaduq Hussain v. Lal Khatoon and others (PLD 2011 SC 296), after elaborating scheme provided in Articles 117 to 120 of Qanun-e-Shahadat Order, 1984 affirmed that initial onus to prove his bona fide purchase is always on the shoulder of the subsequent vendee. On the touchstone of this principle when case of the petitioners is visualized, it is borne out that it was their stance that after conferment of proprietary rights to Kareem Bakhsh through sale deed dated 24.09.1977, he sold out the disputed property to respondents Nos.5 to 9, who further transferred land measuring 98 Kanals and 14 Marlas to Mukhtar Ahmed petitioner No.1 through sale deed dated 17.01.1982, whereas rest of 97 Kanals and 10 Marlas land was also purchased by him through another sale deed dated 15.04.1982, but later on through mutation No.609 dated 30.05.1982 entire land was transferred by him to his father by means of gift, whereas the donee again alienated this land to his four sons/petitioners through oral gift mutation No.762 of 1985. All this shows that ultimately the petitioners were not the purchasers rather by means of oral gift they acquired the title and on confrontation with the said situation, Mr. Riaz, Advocate for the petitioners stressed that Mukhtar Ahmed petitioner No.1 was the bona fide purchaser, who through sale deeds dated 24.09.1977 and 17.01.1982 acquired it. At this juncture, he on asking, after going through the record admitted that Mukhtar Ahmed did not appear in the witness-box to prove his plea of bona fide purchaser. No doubt, his brother Masood Akhter, petitioner No.2, was examined as PW2, but neither it was narrated in the plaint that petitioner No.1 made the consideration through petitioner No.2 or that probe was conducted by the latter prior to making the said purchase. So, his statement was of no help to the claim of bona fide purchaser. It is well established till now that a party having personal knowledge with regard to a fact must appear in the witness-box to prove the same, otherwise adverse inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984 will come into play against him. This view has already been elaborated in case a reported as Haji Abdullah Khan and others v. Nisar Muhammad Khan and others (PLD 1959 (W.P.) Peshawar 81) wherein it was held as under:-

> … So far as the other defendant-appellants are concerned, none of them appeared in the witness-box except Mir Afzal Khan. It is a settled law that it is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his behalf, and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. By non-

> appearance, therefore, the defendant-appellants except Mir Afzal Khan failed to discharge the onus or shift the onus on to the plaintiffs...

It is also taken by surprise that neither the revenue Patwari was examined to prove that from his record the probe was made or that the copies of the record were obtained from him to verify about the title of the vendor nor the attesting witnesses of the sale deed or any other person of corroborative nature were summoned to affirm that there was no dishonesty, purpose or tainted intention to enter into the transaction, rather it was settled with bona fide intention.

4. The submission of learned counsel for the petitioners that learned Trial Court omitted to frame proper issue with regard to protection provided under Section 41 of the Act ibid is forceless. The petitioners did not press the said issue before both the Courts below, where protracted trial of the suit was conducted. This Court is conscious of the fact that it was the prime duty of the learned Civil Court to settle the issues as per pleadings of the parties, but the petitioners were also contributory towards that obligation, who remained mum before it. Moreover, the entire pleadings were in their knowledge and they were under legal obligation to prove the same by production of the best available evidence during trial of the suit, but they omitted to lead inspiring evidence, who for that lapse could blame themselves and not any else. The august Supreme Court of Pakistan has dealt with such question authoritatively while holding that where the parties have led evidence keeping in mind their pleadings, objection regarding non-framing of any issue or improper settling of issue loses its weight. Reliance in this respect can be placed upon the judgments reported as Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another (1988 SCMR 04), Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others (1993 SCMR 2018) and Abdul Karim v. Haji Noor Bakhsh (2012 SCMR 212).

5. As discussed above that original allottee himself appeared before the learned Member, Board of Revenue while claiming that he had already been awarded land against his entitlement, whereas, the allotment of subject property was result of forgery and fraud and in such scenario, neither any protection could be extended to the subsequent purchaser nor a fraud could be perpetuated. The apex Court while dealing with identical proposition in a case reported as Muhammad Yamin and others v. Settlement Commissioner and others (1976 SCMR 489) concluded as under:-

> As to the argument that the petitioners are bona fide purchasers for value, it is clear that no protection be afforded to them when it has been found that their vendor had no right, title or interest in the demised property.

6. In the fag end of his arguments while relying upon judgments reported Alhajj Shahzadi Mumtaz Jahan and 2 others v. Rana Akhtar Saeed and 13 others

(PLD 2000 Lahore 84), Muhammad Siddique v. Additional Settlement Commissioner and others (1993 CLC 1947), Muhammad Liaqat and 5 others v. Member Board of Revenue (Colonies), Punjab, Lahore and 3 others' (2000 CLC 953) and Shahzadi Mumtaz Jehan v. Mst. Aqeela Parveen Ijaz and others (2001 CLC 1860) it was emphasized by Mr. Riaz, Advocate that powers under section 30(2) of the Act ibid were only available to the Board of Revenue for the period during which the transferee from the crown retained title to the said land, might have some force, but each case has to be decided on its own facts. In the case in hand, Kareem Bakhsh, the original allottee is not in league with the transferee, rather he came forward with the stance that not only the State but he was also defrauded by his attorney. In such situation, the case law referred hereinabove being run on different lines is not applicable. The basic allotment having been procured by means of fraud, there can be no second voice, but to say that fraud vitiates solemn proceedings as held in the judgments reported as Khair Din v. Mst. Saluman and others (PLD 2002 SC 677), Rehmatullah and others v. Saleh Khan and others (2007 SCMR 729), Mst. Zulaikhan Bibi through L.Rs and others v. Mst. Roshan Jan and others (2011 SCMR 986) and Ghulam Farid and another v. Sher Rehman through L.Rs. (2016 SCMR 862) and it, therefore, neither can be protected nor perpetuated, thus, no protection was available to the petitioners. It is; however, open to the petitioners to make a claim against them from whom the property was transferred to them. I am satisfied that the Courts below were quite justified in non-suiting the petitioners on the valid reasons.

7 The learned counsel for the petitioners has failed to pinpoint any misreading and non-reading of the material evidence available on the record to render the impugned judgments and decrees passed by the two courts below to be illegal, unlawful and without jurisdiction for calling interference by this Court in the exercise of revisional jurisdiction. Consequently, the instant revision petition being devoid of any merit is hereby dismissed with no order as to costs.

MH/M-185/L **Revision dismissed.**

P L D 2018 Lahore 132
Before Ch. Muhammad Masood Jahangir, J
AZIZ ULLAH through Legal Heirs---Appellant
Versus
MUHAMMAD HANEEF through Legal Heirs---Respondent

R.S.A. No.52 of 2004, heard on 27th April, 2017.

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

----O. XIII, R.4---Exhibiting of document by Court---Object, purpose and scope---Word 'exhibit' means a document or tangible object produced before court for its inspection or shown to a witness while giving evidence or referring the same in his deposition so that it can be taken into possession and retained by court on the lis file for reference as well as identification in judgment---When a party intends to prove a document through witnesses, he only refers that document for its proof, the court exhibits the same---Witness has no role in marking document as exhibit rather it is sole duty of court to assign exhibit number to document so that in latter part of proceedings it may be referred as identified from said number---Ex-Hypothesi exhibit means a document exhibited for purpose for being taken into consideration in deciding some question or other in respect of proceedings in which it is filed---Any question with regard to admissibility of a particular document for purposes of proceedings must be decided at the time when document is tendered and before it is actually marked as an exhibit whereas, its proof is altogether a different subject.

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

----Arts. 117, 118, 119 & 120---Burden of proof---Shifting of burden---Principle---Party to litigation through modes provided under law, can prove a fact and once initial onus has been discharged by a party, same shifts to the other party for its rebuttal thereof or for proof otherwise.

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

----Arts. 17 & 79---Marginal/attesting witness---Scope---"Attesting witness" is one who not only sees document being executed but also appends his signature/thumb impression on it after understanding its contents---If attesting witness while appearing in witness box, to prove contents of document, fails to depose about the contents of documents or cannot verify his signature/thumb impression, such person cannot be treated as an "attesting witness"

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

----Ss. 12 & 42---Qanun-e-Shahadat (10 of 1984), Art.129(g)---Evidence, withholding of---Presumption---Criminal cases, pendency of---Suit for specific performance of agreement to sell and declaration was filed by plaintiff on grounds that despite payment of full consideration amount, defendants did not transfer property in his favour---Validity---Defendants had disputed execution of agreement from its inception and in such a situation, promisee was under obligation to prove every aspect of its construction---Any omission on part of stamp vendor could only be proved through examination of his stamp vending register, and on account of its non-production in spite of availability, inference under Art.129, illustration (g) of Qanun-e-Shahadat, 1984 had to be drawn against the promisee---High Court declined to believe that when on the one hand criminal litigation was going on between the parties then on the other hand, an agreement without intervention of some respectable was settled and accused of a pending criminal case had paid entire sale consideration to complainant of said case without getting property transferred in his name or execution of any registered instrument in such behalf---High Court declined to interfere in judgments and decrees already passed against plaintiff---Second appeal was dismissed in circumstances.

Ch. Habib Ullah Nehang and Raja Muhammad Hanif for Appellant.
Rana Muhammad Nazir Saeed for Respondent.
Date of hearing: 27th April, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Verily, subject property measuring 98 Kanals falling in Khewat No.22 of Mouza Rakh Mari, Tehsil Rajanpur was owned by two brothers, namely, Muhammad Hanil, Muhammad Latif and their mother Maqsood Mai (hereinafter to be referred as promisors). Aziz Ullah, plaintiff now deceased represented through present appellants (hereinafter to be referred as promisee) instituted a suit for declaration while claiming his exclusive ownership with regard to property on the basis of alleged sale settled among them through agreement dated 11.11.1996 (Exh. P-1) with the assertion that it was purchased by him against a consideration of Rs.12,00,000, the possession whereof was also handed over to him after paying the entire price and in alternate he prayed for the relief of specific performance of the same. The suit was not only contested by promisors with the stance that on 20.01.1996 the promisee had illegally taken over the possession of their residential house against whom case F.I.R. No.35 of 1996 was got registered at Police Station Saddar Rajanpur and was arrested therein; that another criminal case was also lodged against him for devastating their crops forcibly and that neither any transaction qua sale of the subject property among the parties followed by the disputed agreement was settled nor consideration was received on their part. They also lodged their independent suit while asserting their

possession as well as ownership and prayed for the cancellation of agreement being forged, fictitious and fraudulent document. After settlement of issues and recording evidence of the parties, the learned Trial Court in terms of its consolidated judgment dated 29.10.2003 decreed the suit of the promisee and dismissed the rival suit of the promisors, which was successfully assailed by the latter through appeal and the learned Additional District Judge, Rajanpur on 28.06.2004 while setting aside the judgment of the Court of first instance not only dismissed the suit of the promisee, but the other one of his rivals was decreed, which is under resistance of this appeal.

2. Inaugurally, it is submitted by Mr. Habib Ullah Nehang, Advocate, learned counsel for the promisee that while applying philosophy laid down in Article 79 of the Qanun-e-Shahadat Order, 1984, the promisee fully proved the basic agreement (Exh P-1) through examination of its two attesting witnesses (PWs 2 and 3) and the Deed Writer (PW-4), whose statements are harmonious with regard to the settlement of bargain, payment of sale consideration and its construction and the learned Trial Court after due appreciation of the same was perfect in decreeing the suit, whereas the learned Lower Appellate Court erroneously dismissed the same on the sole ground that the agreement (Exh. P-1) was exhibited in the statement of his counsel despite the fact that it was tendered without any objection and that the findings of learned Additional District Judge to the extent that (Exh. P-1) could not be proved was erroneous, who failed to appreciate the deposition of the related witnesses. He further added that at the time of execution of contract in revenue record the name of predecessor of the promisors was wrongly mentioned, therefore, property in dispute could not be transferred to the promisee and the agreement was executed with the mutual understanding that after its correction, the same will be transferred to the latter, but despite the requisite correction, the former did not fulfill their obligation, whereupon the promisee was constrained to invoke the jurisdiction of the Court of law for its enforcement by filing a civil suit which was wrongly dismissed by the learned lower Appellate Court through the impugned judgment.

3. On the contrary, Rana Muhammad Nazir Saeed, Advocate, learned counsel for the promisors submitted that the promisee was a land-grabber who on account of illegally occupying the residential houses of the promisors was arrested and during subsistence of criminal litigation it could not be expected that a mutual transaction could be struck among them without the intervention of some other person(s) and that too without transfer of title in favour of promisee despite making of the entire payment. He further added that the disputed document was forged and fictitious, which was neither scribed by a license holder Deed Writer nor the stamp paper was purchased by the promisors. Moreover, the Stamp Vendor was also not examined

and the learned lower Appellate Court was perfect in dismissing the suit after well appreciation of the material available on suit file, whose judgment was also to be given preference over the judgment of his subordinate Court.

4. Due consideration paid to the arguments of learned counsel for the parties and record of the learned Trial Court scanned.

5. The bone of contention among the parties is agreement (Exh.P-1) and despite the fact that its marginal witnesses as well as the scribe were examined, but it could not be marked or assigned any exhibit number, which was done when learned counsel for the promisors subsequently made his statement for closure of evidence. The learned lower Appellate Court at para No. 13 of the impugned judgment took serious view of the fact that it was not given any exhibit number in the statements of its signatories and author, which reads as under:-

> ....The learned Trial Court after going through the evidence of the parties has declared that the respondent No.1 has established the execution of this agreement to sell. But perusal of the file does not support the conclusion reached at by the learned Trial Court. The alleged agreement to sell Exh. P-1 is a private document. But it has been produced in the evidence through the statement of the learned counsel for the respondent No.1, which could not be exhibited under the law. The scribe and the marginal witnesses of the alleged agreement to sell have deposed that an agreement to sell was executed but they have not stated that the said agreement to sell was Exh. P-1. As such their statements are vague and do not relate to Exh. P-1. Neither the scribe nor the marginal witnesses have stated thdt Exh. P-I is the agreement to sell which was allegedly executed by the appellant. As such it is declared that agreement to sell Exh. P-1 is not proved according to law."

6. Before embarking upon merits of the case, it is necessary and appropriate to assimilate the true meaning and purport of word "Exhibit" as well as its object and effect. After consulting various dictionaries, I have come to the conclusion that it means a document or tangible object produced before the Court for its inspection or shown to a witness while giving evidence or referring the same in his deposition so that it could be taken into possession and retained by the Court on the lis file for reference as well as identification in the judgment and when a party intends to prove a document through witnesses, he only refers that document for its proof, then the Court exhibits the same. The witness has no role in marking the document as exhibit rather it is the sole duty of the Court to assign exhibit number to it so that in the

latter part of the proceedings it may be referred and identified from said number, so ex hypothesi exhibit means a document exhibited for the purpose of being taken into consideration in deciding some question or other in respect of proceedings in which it is filed. Any question with regard to admissibility of a particular document for the purposes of the proceedings must be decided at the time when the document is tendered and before it is actually marked as an exhibit, whereas its proof is altogether a different subject, which is going to be discussed in latter part of the judgment. After going through the evidence, it is revealed that Ghulam Qasim (PW-2), one of the marginal witnesses of Exh. P-1 while making his statement-in-chief stated as under:-

In same terms the other attesting witness Muhammad Ramzan (PW-3) deposed as follows:-

The Deed Writer, Muhammad Abbas (PW-4) also followed PW-2 and PW-3, when while referring the contract in his statement he uttered that:-

This all shows that the reference of the document was explicitly made by all the relevant witnesses and the omission that it was not labeled with exhibit number could not score out the document from its consideration at the time of final adjudication. Moreover, the perusal of Exh. P-1 reveals that it was not only tagged with the file but marked being Exh.P-1 on 14.03.2000 when statements of PW-2 to PW-4 were recorded. So, it is clear that due to some omission on the part of the Court, the exhibit number could not be referred to despite the fact that the document was so assigned and to rectify the omission, on 13-4-2000 the learned counsel for the promisee was allowed to make a reference of Exh.P-1 in his statement without any objection. Ultimate conclusion of the said discussion is that above referred finding of learned Additional District Judge does not appear to be justified to that extent.

7. Resuming to the facts of the case, it is an admitted fact that alleged agreement (Exh. P-1) was scribed after the promulgation of Qanun-e-Shahadat Order, 1984 and being beneficiary the onus probandi to prove the same was upon its beneficiary. The principles regarding burden of proof are enumerated in Articles 117 to 120 of the Order ibid, which read as under:-

> **117. <u>Burden of proof</u>** (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

118. <u>On whom burden of proof lies</u>. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

119. <u>Burden of proof as to particular fact.</u> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

120. <u>Burden of proving fact to be proved to make evidence admissible</u>. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

It is vivid from the perusal of the afore-referred provisions of law that Party to the lis through the modes provided there-under could prove a fact and once initial onus has been discharged by the party upon whom it was resting, it would shift to the other party for its rebuttal thereof or for the proof otherwise. The case of the promisee hinges on agreement (Exh.P-1) and it relates to matter of financial and future obligation, which mandated that it must be attested in terms of Article 17(2)(a) of the Order ibid, the contents whereof could only be proved at least through examination of two male marginal/attesting witnesses. The attesting witness is one, who not only sees document being executed, but also appends his signature/thumb impression on it after understanding its contents and if the said attesting witness while appearing in the witness-box to prove the contents of document fails to depose that what were the contents of the document or could not verify his signature/thumb impression, then he cannot be treated an attesting witness. So under the philosophy of afore-referred Article, if a document of such nature is not attested by the required number of witnesses or could not be proved by the said witnesses, it shall not be used as piece of admissible evidence. No doubt, Exh.P-1 was attested by required number of witnesses and to ascertain whether beneficiary succeeded to prove its contents as well as the transaction reflected therein requires its reappraisal by this Court as both the Courts below scanned it with different angles.

8. The basal document/agreement (Exh.P-1) was executed on a stamp paper and study of the original one available on the suit file reveals that it was issued only

in favour of Muhammad Hanif and Muhammad Latif, whereas their mother's name was not shown by the Stamp Vendor while making an endorsement on its back, when the same was issued. The most alarming fact was that it was not signed and thumb marked by any of the promisors. The doubt about its issuance due to non-signing of its purchasers could be diluted through examination of the Stamp Vendor, but surprisingly he was withheld without any excuse. The submission of learned counsel for the promisee that the Stamp Vendor might have omitted to obtain thumb-impressions of the purchaser and on this score alone the genuineness of its issuance could not be disputed is not correct. The promisors were disputing execution of the agreement from its inception and in such situation, the promisee was under obligation to prove every aspect of its construction. Moreover, the alleged omission on the part of Stamp Vendor could only be proved through examination of his Stamp Vending Register and on account of its non-production in spite of availability, the inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984 has to be drawn against the promisee. The other independent person, who scribed it was, however, examined by the beneficiary, who being PW-4 explicitly admitted that neither the promisors were earlier known to him nor sale consideration was paid in his presence and he also conceded in his cross-examination that he joined the inquiry conducted by GAR/MIC regarding genuineness of Exh.P-1 but despite asking he could not give the detail of said proceedings, whereas the promisors brought on record certified copy of PW-4's statement (Ex.D-5) made before the Magistrate, which was duly signed by him and its perusal reveals that therein he absolutely denied to have scribed and signed it. This document could not be rebutted by the promisee, which being copy of judicial record attained strong presumption of truth. Moreover, both the attesting witnesses (PWs 3 and 4) neither could give the exact date of the execution of Exh.P1 nor could explain the description of the disputed property for which the sale consideration was paid to the promisors, even they failed to highlight its terms and conditions.

9. It was the defence of the promisors that earlier the promisee along with others forcibly occupied their house on 20.01.1996 and in this regard, FIR No.35 was lodged against them on 13.03.1996, who during its investigation remained behind the bars and for taking revenge, a false suit with regard to the subject property was instituted. The promisee being PW-1 conceded that he was arrested in the said criminal case. This fact was also admitted by other witnesses of the promisee. A prudent man cannot believe that when, on one hand, criminal litigation was going on between the parties, then, on the other hand, an agreement without intervention of some respectable was settled and the accused of a pending criminal

case paid entire sale consideration to the complainant of said case without getting the property transferred in his name or execution of any registered instrument in this behalf. The submission of learned counsel for the promisee that the property in dispute could not be transferred in favour of the promisee despite making entire sale consideration as the parentage of promisors Nos. 1 and 2 and that of husband of promisor No.3 was wrongly mentioned in the revenue record, is not tenable on two counts; firstly; that the promisee nowhere asserted the said ground in his plaint and secondly he while appearing in the witness-box being PW1 in response to a question surprisingly replied that property was not transferred in his favour because he had no more funds to pay the mutation fee. The relevant glimpse of PW-1's statement is reproduced hereunder:-

The same stance was also deposed by the attesting witness (PW-2) with following words:-

It is not believable that a person having such a financial status, who paid a huge amount without its withdrawal from the Bank did not have a petty amount to pay as government fee for its transfer in his favour.

10. The accumulative effect of the appreciation of evidence on record and discussion supra is that this appeal bounds to fail, which is dismissed with cost throughout.

MH/A-83/L

Appeal dismissed.

2018 M L D 757
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD YOUSAF and 5 others---Petitioners
Versus
MUHAMMAD SIDDIQUE and 9 others---Respondents

Civil Revision No. 630 of 2014, heard on 12th October, 2017.

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

----Ss.42 & 54---Suit for declaration and injunction---Concurrent findings of facts by two Courts below---Fraud, limitation against---Ex-parte evidence---Plaintiffs assailed mutation of oral sale in favour of defendants on the plea of collusiveness and fraud etc.---Suit was decreed in favour of plaintiffs and appeal was dismissed by Lower Appellate Court---Plea raised by defendants was that during ex-parte evidence Trial Court did not allow defendants to cross examine witnesses and the suit was barred by limitation---Validity---Defendants despite having been proceeded against ex-parte could join proceedings and cross-examine witnesses of their adversary if they desired so---Prosecution witnesses were recorded in presence of counsel of defendants and they were not subjected to cross examination, who had relinquished such right and thereafter Trial Court was perfect in declining them to cross examine those witnesses---Power of attorney was procured through impersonation on identification of uncle of the agent---When it was proved beyond any shadow of doubt that power of attorney was outcome of fraud, such document could not be perpetuated and could be assailed at any point of time---High Court in exercise of revisional jurisdiction declined to interfere in judgments and decrees passed by two Courts below as defendants failed to point out any irregularity or illegality as well as misreading and non-reading of evidence---Revision was dismissed in circumstances.

Ch. ZuIfiqar Ali v. Mian Akhtar Islam and Mian Bashir Ahmad PLD 1967 SC 418; Baqa Muhammad v. Muhammad Nawaz and others PLD 1985 Lah. 476; Lal Khan and others v. Khizar Hayat and others 1994 SCMR 351; Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others 2000 SCMR 346; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Jamil Akhtar and others v. Las Baba and others PLD 2003 SC 494; Mst. Bandi v. Province of the Punjab and others 2005 SCMR 1368; Muhammad Taj v. Arshad Mehmood and 3 others 2009 SCMR 114 and Mst. Naila Kausar and another v. Sardar Muhammad Bakhsh and another 2016 SCMR 1781 rel.

(b) Registration Act (XVI of 1908)---

----Ss. 17 & 60---Registered document---Presumption---Principle---Whenever execution or validity of purportedly registered document is denied, such registered document loses sanctity of being presumed to be correct---Lawful veracity of such document depends upon quantum and quality of evidence to be produced to prove its lawful execution.

Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Abdul Majeed and 6 others v. Muhammad Suhhan and 2 others 1999 SCMR 1245; Gopal Das v. Siri Thakir Gee and others AIR 1943 PC 83 and Siraj Din v. Jamila and another PLD 1997 Lahore 633 rel.

Ch. Abdul Majeed for Petitioners.

Asif Iqbal Khan Shahani for Respondents.

Date of hearing: 12th October, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---In concision, the facts of the case are that Hafizaan Bibi, Hameedan Bibi and Safia Bibi were three real sisters, whereas petitioner No.1 was the husband of the latter. On behalf of all the three sisters on 09.06.2004 a power of attorney (Exh.P1) was procured in favour of Ghulam Rasool son of petitioner No.1 and before the Sub-Registrar on the very next day the executants/ladies were identified by Muhammad Abdullah, real brother of petitioner No.1. Then the shares of his aunts were transferred by the attorney in favour of his father/petitioner No.1. On 12.04.2008, Mst. Hameedan Bibi as well as legal heirs of Hafizaan Bibi through a civil suit challenged the power of attorney Exh.Pl as well as oral sale mutation Exh.P2 while claiming that the same being the result of collusiveness, fraud, misrepresentation and impersonation were ineffective upon their rights and liable to be cancelled. Despite due service none appeared on behalf of petitioners before the learned Civil Court, which on 12.12.2008 was compelled to initiate ex parte proceedings against them. Only beneficiary/respondent No.1 filed an application for setting aside of ex parte proceedings, but without any fruit having been dismissed by the learned Court of first instance and that order was further affirmed when his Civil Revision as well as Writ Petition was also dismissed up to the level of this Court. No doubt, learned counsel on behalf of petitioners off and on joined the proceedings of the trial in whose presence the ex parte evidence of the PWs and CWs was recorded, but they were not cross-examined and the learned Trial Court while relying upon ex parte evidence besides keeping in mind the philosophy rendered in catena of judgments by the superior Courts that an attorney without seeking special permission of his principal could not transfer the property of the latter in his own name or to some close fiduciary relation, decreed the suit on 22.10.2011. The petitioners also remained unsuccessful before the learned District Court when their Appeal was dismissed vide judgment and decree dated 22.01.2014. Hence the instant Civil Revision.

2. It is contended by learned counsel for the petitioners that on the basis of substituted service ex parte proceedings were initiated against the petitioners, who

could not be deprived of their legitimate right to contest the suit and the learned Trial Court erroneously dismissed the application of the petitioners for setting aside of ex parte proceedings is without any merit. As observed supra, the effort through application was made on behalf of petitioner No.1 for setting aside of ex parte proceedings, which was not only declined by the learned Trial Court rather the Civil Revision as well as Constitutional Petition was also dismissed by the learned District as well as this Court respectively. Now the same question cannot be reagitated as per views rendered in the judgments by the superior Courts reported as Ch. ZuIfiqar Ali v. Mian Akhtar Islam and Mian Bashir Ahmad (PLD 1967 SC 418), Baqa Muhammad v. Muhammad Nawaz and others (PLD 1985 Lahore 476) and Lal Khan and others v. Khizar Hayat and others (1994 SCMR 351). The next submission of learned counsel for petitioners that even if the petitioners were proceeded against ex parte, the Court was bound to allow them an opportunity to cross-examine the PWs as well as CWs is again misconceived. No doubt under the law petitioners despite having been proceeded against ex parte could join the proceedings and cross-examine the witnesses of his adversary if they desired so, but in spite of that the PWs were recorded in presence of their learned counsel, admittedly they were not subjected to said task, who thus relinquished the said right and thereafter the learned Civil Court was perfect in declining them to cross-examine those witnesses.

3. The other submission of learned counsel for petitioners that power of attorney being registered instrument attained strong presumption of truth and learned Courts below without dilating upon the said aspect of the case erred in law while decreeing the suit is not tenable. It is by now well settled principle of law that whenever the execution or validity of a purportedly registered document is denied, such registered document loses sanctity of being presumed to be correct, but its lawful veracity would depend upon quantum and quality of evidence to be produced to prove its lawful execution. Reliance can be placed upon judgments reported as Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144) and Abdul Majeed and 6 others v. Muhammad Suhhan and 2 others (1999 SCMR 1245). In the latter case, the apex Court concluded in the following words:--

> It is axiomatic principle of law that a registered deed by itself without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction of which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness of document.

Additionally, under section 60 of the Registration Act, 1908, only a restricted presumption is attached that registration proceedings were regularly and honestly

carried out by the attesting officer, but the said presumption attached to its certificate is always rebuttable and whenever the execution of an instrument is denied, then the presumption is deduced to have been sufficiently rebutted, then onus lies upon the person, who alleges execution to prove that the document was executed and the transaction did take place. The presumption in favour of a registered instrument does not dispense with the necessity of showing that person, who admitted the execution before the attesting officer was not an imposter, but the genuine one. Reliance can be placed upon the judgment reported as Gopal Das v. Siri Thakir Gee and others (AIR 1943 P.C. 83). This view has also been conceived by the Division Bench of this Court in a case reported as Siraj Din v. Jamila and another (PLD 1997 Lahore 633).

4. The emphasis of Ch. Abdul Majeed, Advocate, learned counsel for the petitioners that Courts below failed to take notice that the suit was badly time barred is also not forceful. In the present case, perspicuous stance of the executants that the impugned power of attorney was procured through impersonation on the identification of uncle of the agent and when it is proved beyond any shadow of doubt that the power of attorney was outcome of fraud, such a document cannot be perpetuated, which can be assailed at any point of time. Reliance is placed upon the judgments reported as Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others (2000 SCMR 346) and Khair Din v. Mst. Salaman and others (PLD 2002 SC 677). Moreover, for the sake of arguments, if it is assumed that a valid power of attorney had been executed in favour of petitioner No.2, even then transfer of the property of the principal by the agent to his own father/petitioner No.1 without seeking any permission from the principal cannot be recognized and validated under the law. Reliance can be placed upon judgments reported as Jamil Akhtar and others v. Las Baba and others (PLD 2003 SC 494), Mst. Bandi v. Province of the Punjab and others (2005 SCMR 1368), Muhammad Taj v. Arshad Mehmood and 3 others (2009 SCMR 114) and Mst. Naila Kausar and another v. Sardar Muhammad Bakhsh and another (2016 SCMR 1781). In such scenario, I am satisfied that the Courts below were perfect in decreeing the suit on the valid reasons through the impugned judgments.

5. The learned counsel for petitioners is unable to point out any irregularity or illegality as well as misreading and non-reading of evidence committed by the learned Courts below while passing the impugned judgments and decrees to be interfered with by this Court in exercise of revisional jurisdiction, hence this civil revision being devoid of any merit is dismissed accordingly.

MH/M-194/L Revision dismissed.

2018 Y L R 776
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
AFTAB AHMAD---Petitioner
Versus
MEMBER (JUDICIAL-I) BOARD OF REVENUE PUNJAB, LAHORE and another---Respondents

Writ Petition No.279 of 2011, decided on 30th March, 2017.

(a) Punjab Land Revenue Rules, 1968---

----R. 17---Punjab Board of Revenue Act (XI of 1957), S. 8---Constitution of Pakistan, Art. 204---Lambardar, appointment of---Appointment order was maintained upto the Supreme Court---Member, Board of Revenue passed order in review whereby he recalled the said appointment---Validity---District Collector, Member, Board of Revenue and High Court through comprehensive orders had considered the petitioner to be the best amongst the contestants---Supreme Court had upheld the said view and appointment attained finality---Member, Board of Revenue without considering the scope and mandate of review passed the impugned order---Petitioner was not given preference over respondent on the sole score of academic qualification rather he had been given an edge with distinction in hereditary claim, extent of property, personal influence, strength and importance of his tribe---No allegation with regard to bogus certificate having been agitated upto Supreme Court in the earlier litigation, respondent was not competent to raise any new plea in the review petition as the alleged certificate was issued subsequent to the orders passed in the earlier round of litigation---Review could not be based on happening of subsequent events---Member, Board of Revenue was not competent to reopen the facts of the case which had already been determined by his predecessor---Time barred review application was entertained which was not accompanied by application for condonation of delay---Order passed by the Court/Tribunal should be indicative of the fact that it was aware and conscious of the question of limitation---Impugned order had been passed erroneously without attending the issue of limitation---Member, Board of Revenue could not sit over the orders passed by the High Court as well as Supreme Court---Order of Member, Board of Revenue having been passed without legal authority was set aside---Member, Board of Revenue had committed contempt of Court and he was issued show-cause notice---Chief Secretary was directed by the High Court that if said officer was still in service he should not be assigned any judicial work---Constitutional petition was allowed in circumstances.

Maqbool Ahmad Qureshi v. The Islamic Republic of Pakistan PLD 1999 SC 484 rel.

(b) Punjab Board of Revenue Act (XI of 1957)---
----S. 8---Review---Scope.
Mushtaq Ahmed Kashmiri for Petitioner.
Muhammad Arif Yaqoob, Addl. A.G. for Respondent No.1.
Irfan Akram Sheikh and Ihsan Ahmed Bhindar for Respondent No.2.
Dates of hearing: 27th and 30th March, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undeniably, Riaz Ahmed, father of the petitioner was permanent Lumberdar of the concerned Mauza, after his demise on 14-04-2003, the post of Lumberdar stood vacant, seven candidates including petitioner as well as respondent No.2 applied for it. The Revenue field staff right from Patwari to Revenue Officer recommended the present petitioner being suitable out of the contestants, despite the fact that D.D.O.(R), in disagreement of the reports of his subordinates made commendation in favour of respondent No.2, the District Collector while concurring with the reports of field staff appointed the petitioner against the said vacancy through order dated 24.07.2004, which could not hold the field when his superior i.e. Executive District Officer (Revenue) preferred respondent No.2 over the petitioner for the job of Headman through the order dated 31-05-2005, but the apex Revenue Court/respondent No.1 on 16-01-2006 while allowing ROR of the petitioner restored his appointment. Not only the writ petition of respondent No.2 was disallowed by this Court through order dated 06-03-2006, but leave to appeal was also refused to him by the august Supreme Court. Portentously, more than three years thereafter, on a review application filed by respondent No.2 the order of his predecessor-in-office, which was maintained upto the level of the apex Court, was recalled by respondent No.1 through the impugned order dated 14-12-2010 whereby the petitioner was removed and the post was awarded to respondent No.2, which has been attacked through the petition in hand.

2. After giving due consideration to the arguments of learned counsel for the parties and making probe of the record, before embarking upon merits of the case, it is noteworthy that while appointing permanent Lumberdar, the controversy of eligibility is to be decided according to law while taking into consideration all the requirements provided under Rule 17 of the West Pakistan Land Revenue Rules, 1968, among other matters which have to be seen conjunctively, those are (i) the hereditary claim of the candidates; (ii) extent of property in the estate, (iii) services rendered to the Government by him or by his family; (iv) his personal influence, character, ability and freedom from indebtedness; (v) the strength and importance of the community from which selection of a headman is to be made and (vi) his ability to undergo training in Civil Defence in the case of headman in Tehsils situated along with the Border. It is purely an administrative post and after the dicta laid down by the apex Court in the judgment reported as Maqbool Ahmad Qureshi v.

The Islamic Republic of Pakistan (PLD 1999 SC 484), the revenue authorities are bound to select the best among the candidates.

3. The District Collector, Member, Board of Revenue and even this Court through their comprehensive orders (mentioned in para-1) while considering the credentials of the applicants on the touchstone of Rule ibid considered the petitioner to be the best among all other contestants, the apex Court of the State also fell in agreement with their views, therefore, for all intents and purposes the appointment of the petitioner having attained finality, it became a past and closed chapter. There is no other cavil that a review petition can only be entertained when new and important grounds are advanced, which could not be brought on the record at the time of hearing at earlier stage or there was error apparent on face of record. Some illustrations may be given as to what have been taken to be erroneous apparent on the face of the record. An error, which does not require extraneous matter to show its incorrectness can be treated as being apparent. Such errors are not demonstrated by any process of close reasoning. Any erroneous view of law on a controversial matter, or a wrong exposition of law, or a wrong application of law, or failure to apply correct law has never been treated as a mistake or error apparent on the face of the record. If the court applies its mind to a particular fact or law and then comes to a wrong conclusion after conscious reasoning, it can never be assumed that the error is one apparent on the face of record and can be corrected by means of a review. It cannot be converted into instrument of harassment of parties. The scope of review is quite limited which remedy cannot be invoked for reagitating entire case and this power cannot be exercised to undertake re-examination of matters of fact or re-exposition of law. It is only available in certain special circumstances as provided in Section 8 of the West Pakistan Board of Revenue Act, 1957. The ground that the court has fallen into error in deciding a particular question, or that a new ground, which could have been urged at the original hearing, is not a ground for review as a review is not an appeal and cannot be allowed to be treated as an appeal. Even if any matter on having been disputed requires an elaborate inquiry for determination, the same cannot possibly be described as a patent fact justifying a review of an opinion already formed. The Member Board of Revenue without considering the scope and mandate of review as provided in section 8 of the Act ibid passed the impugned order, which to me is liable to be quashed on the following grounds: firstly that the petitioner was not given preference over respondent No.2 on the sole score of academic qualification rather he had been given an edge over the latter with distinction in hereditary claim, extent of property, personal influence, strength and importance of his tribe; secondly respondent No.2 during first round of litigation never agitated up to the level of the apex Court that petitioner had introduced a bogus certificate of his academic qualification and in subsequent phase he was neither competent to raise a new plea nor it could be considered by respondent No.1 while entertaining a review as the alleged certificate of Board of Intermediate and Secondary Education was issued subsequent to the orders in earlier round of litigation and as per settled principle, a review cannot be

based on happening of subsequent event; thirdly the respondent No.1 apart from his alleged bogus matriculation certificate erred in law while considering the petitioner being absentee from the concerned revenue estate and concluding respondent No.2 being more influential and comparatively fit candidate through the impugned order, whereas these aspects had already been adjudged by this Court while deciding W.P.No.2005 of 2006 through order dated 06.03.2006, moreover the learned Member was not competent to reopen the facets of the case which had already been determined by his predecessor; fourthly, respondent No.1 entertained a badly time barred review application, which was also not accompanied by an application for condonation of delay. There is no cavil with the proposition that any order passed by a Court/Tribunal should be indicative of the fact that it was not only aware and conscious of the question of limitation and the same was to be dealt with diligence and application of mind prior to dilating upon and deciding the controversy on merit because disposal on merit alone would not mean to presume that the delay was condoned, but respondent No.1 through impugned order without attending to the pivotal issue of limitation erroneously passed the impugned order, above all; fifthly; how the learned Member could sit over the orders passed by this Court as well as the apex Court, which being precedent and law were not only to be honoured and respected rather binding upon him. If such a tendency is permitted, then neither the litigation will ever come to an end nor the orders of the superior Courts will have any command or authority. Sequel of the above discussion is that the impugned order being vice of grave and glaring illegality cannot be sustained, therefore, while allowing this writ petition same is declared to be unlawful having passed without legal authority and set aside.

4. Before parting with this judgment, this Court is constrained to observe that Mr. Rizwan Ullah Beg, Member, Board of Revenue was prima facie guilty of gross contempt of court, who in disregard of the orders dated 6-3-2006 and 19.04.2006 of the superior Courts passed the impugned order to review the earlier order dated 16.1.2006 of his predecessor in office in spite of that the same had attained finality, so he shall appear in person before this Court to show cause that why he should not be prosecuted under Article 204 of the Constitution of Islamic Republic of Pakistan, 1973. Notice be issued to him for 05-06-2017. Moreover, from the resume of above conclusion, it is observed that Mr. Rizwan Ullah Beg, Member, Board of Revenue either had no judicial wisdom or he while acting dishonestly passed the impugned order, which has caused grave miscarriage of justice and therefore, the Chief Secretary, Punjab is directed that if said officer is still in service, he should not be assigned judicial work in any capacity.

5. The Registrar of this Court is directed to transmit a copy of this order to the Chief Secretary, Government of the Punjab for further action.

ZC/A-79/L Petition allowed.

P L D 2018 Lahore 426
Before Ch. Muhammad Masood Jahangir, J
Mst. SHAH JAHAN BEGUM through Legal Heirs---Petitioners
Versus
ZAFAR AHMED and others---Respondents

Civil Revision No.3109 of 2011, decided on 12th February, 2018.

Islamic law---

----Inheritance---"Full sister" of the propositus---Doctrine of "Radd" or "Rule of exclusion"---Applicability---Propositus was survived by his widow, full sister and sons of predeceased brother---Revenue authorities distributed legacy of propositus by giving 1/4th share to widow, 2/4th share to full sister and 1/4th share to nephews (sons of predeceased brother)---Plea of full sister that being full sister in default of full brother and the others, she being nearer as a residuary was entitled to inherit 3/4th share while excluding the remote sons of predeceased brother under the doctrine of "Radd" or "rule of exclusion; held, that the propositus died without leaving any child, child of a son, father, grandfather, brother or consanguine brother, hence the full sister had to inherit being a sharer---Although there might be an eventuality when status of a sister being sharer may also be converted into residuary, but condition precedent for such capacity would be either when she had a brother or in his default there be a daughter or daughters, or son's daughter or daughters, or even if there was one daughter and a son's daughter or daughters---In the present case, no such situation arose and the full sister as well as sons of predeceased brother were rightly awarded shares as per dictates of Holy Quran and Sunnah hence the full sister was not entitled to take the residue---Revision petition was dismissed in circumstances.

Saadullah and others v. Mst. Gulbanda and others 2014 SCMR 1205; Muhammadan Law by D.F. Mullah and Sura An-Nisa Verse No.176 ref.
Ch. Ehsan ul Haq Virk and Ahmed Faheem Bhatti for Petitioners.
Sh. Sajid Mehmood for Respondents.

Date of hearing: 30th January, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.-- There is no dissension that Muhammad Yasin son of Muhammad Farooq was adherent of Hanfi sect, who departed in 1993 leaving behind Umut-ul-Mateen, widow, Mst. Shah Jehan, sister/ petitioner and sons of predeceased brother/respondents. The Revenue Hierarchy distributed the legacy after due inquiry conducted in public gathering through attestation of mutations Nos.74 and 471 dated 28.02.1994 in the following terms:-

i) Widow/respondent No.7 1/4th share

ii) Sister/petitioner 2/4th share

iii) Nephews/contesting respondents

(sons of pre-deceased brother) 1/4th share

Mst. Shah Jehan, petitioner, being unhappy to this arrangement assailed the mutations before the Revenue Forum contending therein that being full sister in default of full brother and the others, she being nearer as a residuary was entitled to inherit 3/4th share while excluding the remote/sons of predeceased brother under the doctrine of "Radd" or "rule of exclusion", but ultimately she failed and the apportionment set by the Revenue Officer was maintained upto the level of apex Court of Revenue Forum. The petitioner did not surrender her struggle and instituted a declaratory suit before the Civil Court with the same posture, which having been concurrently dismissed by the two Courts below through the judgments and decrees, impugned herein.

2. Ch. Ehsan ul Haq Virk, Advocate, learned counsel for the petitioners while relying upon Saadullah and others v. Mst. Gulbanda and others (2014 SCMR 1205) and quoting verses of Sura An-Nisa interpreted by Peer Muhammad Karam Shah, an eminent religious scholar submitted that petitioner/plaintiff being full sister of the propositus under Para 65 of the Muhammadan Law of D.F. Mulla falls at serial No.6 of the residuary table, whereas the full brother's sons to whom inheritance was also shared are figuring at serial No.9, but both the Courts below erred while ignoring doctrine of "Radd" or "rule of exclusion", whereby the latters/remote were to be excluded by the full sister being nearer.

3. I have gone through the esteemed judgment of the apex Court with great care and found that almost in an identical situation, the full sisters of issueless brother excluded consanguine brother even figuring at serial No.7 of the residuary table, more nearer to the full brother's son as the case in hand, but with all reverences, I am of the view that while rendering such view by the august Supreme Court and concurring with concurrent findings of the Courts below, the capacity of full sister as referred in residuary table provided under sub-para (6) of Para 65 of Muhammadan Law by D.F. Mulla was partly placed before their lordships as depicted in Para-6 of cited judgment to the following effect:-

> **(6).FULL SISTER-** In default of full brother and the other residuaries above named, the full sister takes the residue.

Whereas, her complete reference as per afore-noted law is as follows:-

> **(6).FULL SISTER-** In default of full brother and the other residuaries above named, the full sister takes the residue if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even there be (3) one daughter and a son's daughter or daughters h.l.s.

Thereby being default of perfect reference the view in Saadullah's case (supra) was formed. Had it been plenary placed/pleaded before the apex Court during the hearing of precedent case, the position might be otherwise and after giving thoughtful consideration to Verse No.176 of Sura An-Nisa as well as the relevant provision of Muhammadan Law (supra), this Court is clear in mind that full sister may inherit in the following three categories:-

> **Firstly:** As a Sharer, when child, (ii) child of a son h.l.s. (iii) father (iv) true grandfather (v) full brother or (vi) consanguine brother will not be available;
>
> **Secondly:** As a Residuary in the presence of brother and failing to inherit in either of these two capacities; and
>
> **Thirdly:** As a Residuary with daughters or son's daughter or daughters h.l.s. or one daughter and son's daughter h.l.s. provided there is no nearer residuary.

In the present case, the propositus died without leaving child, child of a son, father, grandfather, brother or consanguine brother, hence the petitioner as a sister had to inherit being sharer.

Although there might be eventuality when status of a sister being sharer may also be converted into residuary, but condition precedent for that capacity would be either she has a brother or in his default there be (a) a daughter or daughters or (b) son's daughter or daughters h.l.s. or even if there be (c) one daughter and a son's daughter or daughters h.l.s., but in the case in hand, no such situation arose and she as well as sons of predeceased brother were rightly awarded shares as per dictates of the

Holy Quran, Sunnah and Muhammadan Law (supra), hence neither she was entitled to take the residue nor the ultimate conclusion of the Revenue Forum and that of two Courts below was erroneous, which being unexceptionable requires no interference by this Court in the exercise of revisional jurisdiction.

4. Consequently, instant Civil Revision being meritless is dismissed with no order as to costs.

MWA/S-14/L Petition dismissed.

2018 Y L R 1028
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
Mst. ANWAR KALSOOM and 2 others---Petitioners
Versus
GHULAM RAZA and another---Respondents

C.R. No. 899-D of 2011, heard on 23rd May, 2017.

(a) Gift---

----Valid gift---Essentials---Mutation---Proof--- Procedure--- Maxim: Secundum allegata et probata, principle of---Applicability---Transaction with illiterate lady---Requirements---Plaintiff failed to appear in the witness-box---Non-framing of issue---Fraud---Effect---Contention of plaintiffs was that they neither made any proposal of gift in favour of defendant nor same was accepted by him---Suit was dismissed concurrently---Validity---Defendant being beneficiary, was bound to plead and prove the original transaction of gift which might have been effected prior to the day of attestation of mutation or at least on the day when it was entered by the revenue official---Conditions of gift i.e. offer, acceptance and delivery of possession must be established by the donee through his evidence---Donee was bound to prove that donor approached revenue officials for the entry and attestation of mutation in the assembly convened for the said purpose and made statement to acknowledge the oral transaction in presence of two notables of the vicinity---Party before proving an act had to narrate its details in pleadings---Written statement of defendant-donee was silent to the extent of essential details i.e. time, date, venue and names of witnesses to disclose when, where and before whom donors had made declaration of gift which was accepted by him and possession changed hands in lieu thereof---Neither any gift was made nor donor ever appeared before the revenue officer for attestation of impugned mutation of oral gift---When donor deposed that he/she did not appear before revenue officer for attestation of mutation, onus would shift upon the beneficiary to prove the attestation of mutation as well as transaction reflected therein---If any of the three ingredients of gift was not proved then it would not be a valid transaction---Major and vital contradictions existed in the statements of witnesses of defendant-donee---Number of cuttings in the relevant register while making entry and attestation of impugned mutation as well as recording of statements of the donors were on record which had made it dubious and suspicious---Attestation of mutation was a series of acts which was required to be proved independently---Mere signing or putting thumb impression on the mutation would not amount to valid attestation/execution---Witnesses on whose identification and

attestation impugned mutation was sanctioned were not examined despite their availability---Adverse inference would be drawn against the beneficiary of gift mutation in circumstances---Donors were folk and illiterate ladies and when mutation was allegedly attested no independent advice was available to them---Lady who was ignorant and illiterate was equally entitled for the same treatment which was available to a pardanasheen lady---Courts of law could not remain oblivious regarding erosion of moral values---Defendant had deprived his real sisters of their valuable property---Plaintiffs being married had their independent families including husband as well as siblings---Prudent man could not conceive that while ignoring their families why they were compelled to make a gift of their property to one of their brothers---Muslim could transfer his property through declaration of gift in favour of any person---Some reason should exist as to why donor was compelled to make a gift in favour of alien while eliminating his/her heirs which was lacking in the present case---Party having personal knowledge of facts must examine himself to depose those facts and face the test of cross-examination---If sufficient infirmity on the part of party existed then he might be immuned from his personal appearance in the witness-box---Rights of simpleton, folk and illiterate ladies were involved who might not be aware of judicial proceedings and could not face the test of intricate questions to be put to them in their cross-examination---Donors-ladies were justified to appoint their close relatives as special attorney who being conversant with the facts of the case magnified entire details of the lis---No adverse inference could be drawn against the donors-ladies in circumstances---Where parties had led their evidence keeping in mind their pleadings then objection regarding non-framing of any issue or improper settling of issue would lose its weight---Donee had failed to prove the validity of gift allegedly made by the plaintiffs---Entry in the revenue record had been managed fraudulently which was void---Any superstructure built on the basis of a fraudulent transaction must collapse upon failure of such transaction---Findings recorded by the Courts below were based on mis-reading and non-reading of evidence---Defendant remained unsuccessful to establish his bona fide purchase whereas plaintiffs succeeded to establish that mutations were void, illegal, against law, based on fraud, misrepresentation and inoperative upon their rights---Impugned judgments and decrees passed by the Courts below were set aside---Suit filed by the plaintiffs was decreed with costs throughout---Revision was allowed in circumstances.

Abdul Hameed v. Mst. Aisha Bibi and another 2007 SCMR 1808; Mst. Rasheeda Bibi and others v. Mukhtar Ahmad and others 2008 SCMR 1384; Mt.Farid-un-Nisa v. Munshi Mukhtar Ahmad and another AIR 1925 P.C 204; Chainta Dasya v. Bhalku Das AIR 1930 Cal. 591; Jannat Bibi v. Sikandar Ali and

others PLD 1990 SC 642; Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi and others 2013 SCMR 868; Ghulam Farid and another v. Sher Rehman through L.Rs. 2016 SCMR 862; Phul Peer Shah v. Hafeez Fatima 2016 SCMR 1225; Mst. Khurshid Bibi and others v. Ramzan and others 2006 CLC 1023; Meraj Din v. Mst. Sardar Bibi and 5 others 2010 MLD 843; Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others 2002 SCMR 1938; Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another 1988 SCMR 4 and Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others 1993 SCMR 2018 and Abdul Karim v. Haji Noor Badshah 2012 SCMR 212 rel.

(b) Punjab Land Revenue Act (XVII of 1967)---

----S. 42---Mutation---Oral transfer of immovable property effected through mutation---Scope---Mutation is always sanctioned through summary proceedings and is intended to keep the record update for the collection of land revenue---Such entries are made in the concerned Register under S. 42 of the Land Revenue Act, 1967, which attain no presumption of correctness prior to its incorporation in the Record of Rights---No doubt, the entries in the mutation are admissible in evidence of a case, but the same are required to be proved independently by the person relying upon it through affirmative evidence, because an oral transaction reflected therein neither confers the title in favour of its beneficiary nor can establish the same.

Ch. Khawar Siddique Sahi for Petitioners.
Respondent No.1 already proceeded ex parte vide order dated 31.01.2012.
Muhammad Hayat Hiraj for Respondent No.2.
Date of hearing: 23rd May, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Three real sisters/ petitioners instituted a declaratory suit against their brother respondent No.1 as well as subsequent transferee/respondent No.2 while claiming their exclusive ownership qua the subject property measuring 23 Kanals 06 Marlas with the assertion that it was leased out to respondent No.1 as well as other brother Ghulam Qamar, but the petitioners neither made any proposal of gift in favour of respondent No.1 nor the same was accepted by him whereas the possession of the suit property also did not change hands in lieu thereof; that respondent No.1 procured their thumb impressions in the garb of lease deed and might have used the same for transfer of property in his name through oral gift mutation No.474, which being result of fraud, misrepresentation and collusiveness was liable to be cancelled; that the subsequent

alienation of the suit property by respondent No.1 to respondent No.2 through sale deed No.1318 dated 21.11.2005 reflected in mutation No.734 dated 28.02.2006 being superstructure of fraudulent transaction was also liable to cancellation. The suit was resisted by respondents through filing of their independent written statements.

2. The learned Trial Court as per divergent pleadings of the parties settled the following issues:--

1. Whether the oral gift mutation No.474 dated 08.01.1997 and registered deed No.1318/1 dated 28.02.2006 are against the law and facts, based on the fraud, collusion, ulterior motive, ineffective upon the rights of the plaintiffs? OPP

2. Whether the plaintiffs have no cause of action? OPD

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

4. Whether the suit is against the law and facts, based on mala fide, hence the same be dismissed with compensatory costs under section 35-A, C.P.C.? OPD

5. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction, if so its effects? OPD

6. Whether the suit is time barred and liable to be rejected under Order VII, Rule 11, C.P.C.? OPD

7. Relief.

3. After recording and appreciating evidence, the Court of first instance while answering issues Nos.1 to 3 against the petitioners and rest of the issues against the respondents dismissed the suit in terms of judgment and decree dated 07.12.2010, which was affirmed by the learned Additional District Judge through impugned judgment and decree dated 27.07.2011, when appeal of the petitioners was disallowed. Hence the instant civil revision.

4. Heard and record perused.

5. Before embarking upon merits of the case and proceeding further for the determination of respective stances of the parties, I feel it appropriate to dilate upon the principles dealing with oral transfer of immovable property effected through mutation. It is well established by now that mutation is always sanctioned through summary proceedings and is intended to keep the record update for the collection of

land revenue. Such entries are made in the concerned Register under section 42 of the Land Revenue Act, 1967, which attain no presumption of correctness prior to its incorporation in the Record of Rights. No doubt, the entries in the mutation are admissible in evidence of a case, but the same are required to be proved independently by the person relying upon it through affirmative evidence, because an oral transaction reflected therein neither confers the title in favour of its beneficiary nor can establish the same.

On the touchstone of this principle and its scheme, this case is to be dealt with, where the oral gift transaction is the inbuilt of the impugned mutation allegedly effected by the petitioners in favour of respondent No.1, who being its beneficiary was under obligation to plead and prove; firstly the original transaction of gift, which might have effected prior to the day of attestation of mutation or at least on the day when it was entered by the concerned revenue official and to that effect the basic three conditions i.e. "offer", "acceptance" and "delivery of possession" must have been established through his evidence, secondly, it was also sine qua non for the donee to prove that petitioners approached revenue officials for the entry and attestation of mutation in the assembly convened for this purpose and made their statements to acknowledge the oral transaction in presence of two notables of the vicinity. It is well established by now that a party before proving an act has to narrate its detail in his pleadings under the mandate of well recognized principle "secundum allegata et probata", which has full command of provisions of Order VII Rule 2 and Order VIII Rule 2 of the Code of Procedure, 1908, but written statement of respondent No.1 is silent to the extent of essential details i.e. time, date, venue and names of witnesses to disclose that when, where and before whom the donors had made declaration of gift, which was accepted by him (the donee) and in lieu thereof the possession changed hands.

6. As per available record, Nadeem Afzal, Special Attorney of the petitioners, (PW1) and Ghulam Qamar (PW2) the other brother of the petitioners and respondent No.1 to whom along with the latter, the land was leased out, congenially and explicitly worded that neither any gift was made nor the petitioners had ever appeared before the Revenue Officer for attestation of impugned mutation of oral gift (Exh.D2). The moment they deposed so, the onus was shifted upon the beneficiary/respondent No.1 to prove the attestation of mutation as well as transaction reflected therein, who while appearing as DW4 failed to disclose the afore-referred detail, rather in vague terms only deposed that declaration of gift offered by the alleged donors was accepted by him, that the petitioners/ sisters had alienated the suit property in his favour through oral gift mutation, which was thumb marked by them in presence of Abdul Qadoos Kiani, Advocate and Muhammad Ashraf Khan attesting witnesses before the Revenue Officer and no fraud was committed for attestation of impugned mutation, but in opening lines of his cross-examination he deposed as under:--

Whereas the Revenue Officer being DW1 in his cross-examination made a contradictory statement and for ready reference the same in verbatim is reproduced hereunder:--

He further added that:--

He further stated that:--

This part of deposition of star witness/ Revenue Officer is sufficient to conclude that if any offer of gift was reiterated by the donors before the Revenue Officer then the donee was not available before him for its acceptance. There is no second opinion that if any of the three ingredients of gift is not proved then it will not be a valid transaction. Moreover, the Revenue Officer also stated in his cross-examination as under:--

He further conceded that:--

The above captured major and vital contradictions found in the statements of DW1 and DW4 as well as number of cuttings in the relevant Register while making entry and attestation of impugned mutation as well as recording of statements of the donors on separate papers and subjoining of those with the mutation has really made it dubious and suspicious.

7. A bare perusal of copy of impugned mutation (Exh.D2) (available at pages 76 to 80) reveals that it was entered by Patwari on 22.12.1996 on behalf of five sisters in favour of their brother/respondent No.1, which was allegedly presented for the first time before Revenue Officer (DW1) on the same day, the ladies were identified by Abdul Qadoos Kiani, Advocate in presence of Muhammad Ashraf before the Attesting Officer but the latter deferred the same as till that time the required fee was not deposited and prior to its further proceedings, two out of five sisters/donors approached the Revenue Officer with the complaint that they had never made a gift and requested for the cancellation of mutation, the officer on 31.12.1996 while endorsing an order on the mutation summoned the parties and pursuant thereto the son of donee/respondent No.1 and petitioners on 08.01.1997 appeared before the Revenue Officer in presence of Ghulam Qamar (PW2), Muhammad Waris and Nazir Ahmed Chowkidar. The proceedings of the said day and statements of two sisters, who denied the transaction as well as statements of the petitioners were purportedly recorded on separate papers, whereas the order of attestation of mutation was authored on the "pert" of mutation. There is much force in the submission of Mr. Khawar, Advocate, learned counsel for the petitioners that the thumb impressions procured on blank papers for the execution of lease deed were utilized by respondent No.1 in connivance with the Revenue Officer to complete the proceedings of the impugned mutation, especially when the latter conceded in his deposition that no other mutation in his relevant Register was

available wherein the statements of the parties or marginal witnesses were recorded on separate sheets. The reply of Mr. Hayat Hiraj, Advocate, learned counsel for respondent No.2 that as the petitioners had admitted their thumb impressions on the sheets attached with the mutation, therefore, respondent No.1 was no more required to prove its attestation, is misconceived. The attestation of mutation was a series of acts, which is required to be proved independently and mere signing or putting thumb impression would not amount to its valid attestation/execution in terms of Article 78 of the Qanun-e-Shahadat Order, 1984. Reliance in this respect is placed upon the judgment reported as Abdul Hameed v. Mst. Aisha Bibi and another (2007 SCMR 1808), para-5 of which is reproduced hereunder:--

> 5. After hearing the learned counsel for the parties and perused the record with their assistance, we find that sole question requiring determination would be whether the admission of vendor of his thumb-impression on the agreement to sell was sufficient to prove its execution and contents, the answer is in the negative as the document purporting to create a right in the property must be proved to have been actually executed by the person who allegedly executed such document. It appears from the record that Din Muhammad was an illiterate person and without being aware of the contents of the document put his thumb-impression on it at the instance of his son in good faith with the understanding that it was compound deed. This is a matter of common sense that in the normal circumstances, father would certainly trust his son and may act on his advice and thus in these circumstances, the inference drawn by the High Court that the vendor having no knowledge of the contents of the document, affixed his thumb-impression at the instance of his son with the impression that document pertained to the settlement regarding encroachment of the house was quite natural and denial of Din Muhammad to have put his thumb-impression on blank paper, would seriously reflect upon the genuineness of the agreement in question. In view thereof, the admission of Din Muhammad of his thumb-impression on the agreement in question, would not ipso facto prove its contents to raise the presumption of it being a genuine document to have the legal force....

The apex Court in case reported as Mst. Rasheeda Bibi and others v. Mukhtar Ahmad and others (2008 SCMR 1384) while dealing with registered gift deed challenged through civil suit by some ladies wherein their appearance before the Attesting Officer was an admitted fact, in its para-11 observed as under:--

> 11. The execution or appearance of the party before the Registrar/Sub-Registrar is not conclusive proof of the execution of gift. In such a case, the Court will have an overall view of all the attending circumstances of transaction and no presumption could be attached to such type of document. Reliance can be placed on the cases of Qazi Altaf Hussain and another v.

Ishfaq Hussain 1986 SCMR 1427 and Muhammad Khan v. Mst. Rasul Bibi PLD 2003 SC 676. There is no doubt that the certificate of registration or endorsement on the registered document carries a presumption but no such presumption can be drawn therefrom that such person has really executed the same and it will be open to the parties to prove that the document in question was not really executed by the person shown to have executed the same. The certificate of registration is only to show the execution of the document and presumption beyond that cannot be drawn therefrom. This view is supported by the dictum laid down in the cases of Gopal Das and others v. Sri Thakurji and others AIR 1943 PC 83 and Siraj Din v. Mst. Jamilan and another PLD 1997 Lah. 633. In the latter case, a Division Bench of the Lahore High Court observed that the endorsement made by the Registrar on questioned document would not prove that such document was executed by donor in favour of donee; contents of gift-deed and constituents of gift must be proved in consonance with the provisions of "Qanun-e-Shahadat" and rules of gifts under Muhammadan Law.

It is also taken by surprise that the alleged donors, five in number for the first time on 22.12.1996 were not identified before Revenue Officer by any of the notable of the said revenue estate rather one Abdul Qadoos Kiani, Advocate was shown to be their identifier at that time, who neither was related to the petitioners nor was examined. Morever, Muhammad Waris and Nazir Ahmed on whose identification and attestation the impugned mutation was ultimately sanctioned on 08.01.1997 were not examined despite their availability for the reasons best known to respondent No. 1. They might be the star witnesses, who could prove the proceedings and statements recorded on separate sheets, but their non-examination has compelled this Court to draw an adverse inference against the beneficiary under Article 129(g) of the Qanun-e-Shahadat Order, 1984, whereas, Ghulam Qamar, the third available person on that crucial day, appeared on behalf of the petitioners as PW2 and denied their appearance before the Revenue Officer. He in his statement-in-chief unequivocally worded as under:--

It was the high time, when he was to be confronted with the proceedings allegedly conducted by the Revenue Officer in his presence, but nothing was asked from him during his cross-examination. So there is not an iota of evidence except statement of Revenue Officer to prove the proceedings and the recording of statements of the petitioners carried out on 08.01.1997. The stress of Mr. Hayat, Advocate, learned counsel for respondent No.2 that Muhammad Ashraf (DW5) was examined to prove the transaction as well as attestation of subject mutation is not tenable. His entire deposition is reflective of the fact that he did not utter a single word that prior to attestation of mutation, any transaction of gift was effected before him. Moreover, he was the witness of the proceedings when five sisters on 22.12.1996 made a statement before the Revenue Officer, but as per available record these proceedings

were not accepted by two of the alleged donors and final proceedings were thereafter initiated on 08.01.1997, with which this witness had no relevancy.

8. Respondent No.1 also could not bring on record copy of Rapt Roznamcha Waqiati to prove that the impugned mutation had genuinely been entered by the concerned revenue Patwari on the asking of petitioners. The probe of record further affirms that donors were folk and illiterate ladies and when the mutation No.474 was allegedly attested, no independent advice was available to them. The argument of learned counsel for respondent No.2 that petitioners were not Parda observing ladies and cannot be equated with illiterate ladies, is not well founded. A lady, who is ignorant and illiterate, is equally entitled for the same treatment, which is available to a `Parda Nashin' woman for the object to protect that weak and helpless lady. So even in the case of a folk lady, who is outside the group of Parda Nashin and knows nothing regarding the transaction to be effected qua her property due to her illiteracy and ignorance, is to be treated at par with the regular parda observing ladies class and in such like cases, as per principle laid down by the superior Courts in the cases reported as Mst. Farid-un-Nisa v. Munshi Mukhtar Ahmad and another (AIR 1925 P.C 204), Chainta Dasya v. Bhalku Das (AIR 1930 Cal. 591), Jannat Bibi v. Sikandar Ali and others (PLD 1990 SC 642) and Mian Allah Ditta through L.Rs. v. Mst. Sakina Bibi and others (2013 SCMR 868), it is sine qua non for the beneficiary to establish that she entered into the transaction voluntarily and with full knowledge and import of what the transaction meant for. The apex Court recently has again approved the afore-referred principle in cases cited as Ghulam Farid and another v. Sher Rehman through L.Rs. (2016 SCMR 862) and Phul Peer Shah v. Hafeez Fatima (2016 SCMR 1225). His lordship Dost Muhammad Khan while speaking for the apex Court laid down the parameters for a beneficiary of a transaction struck with illiterate/parda observing ladies to be complied with to prove it legit. In Phul Peer Shah's case he authoritatively laid down some conditions in para-8 of the judgment in this regard, which for ready reference is reproduced hereunder:--

> "8. In a case of such transaction with old, liberate/rustic village Parda Nasheen' lady onus to prove the transaction being legitimate and free from all suspicions and doubts surrounding it, can only be dispelled if the lady divesting herself of a valuable property, the following mandatory conditions are complied with and fulfilled through transparent manner and through evidence of a high degree. Amongst this condition, the pre-dominantly followed are as follows:--
>
> i. That the lady was fully cognizant and was aware of the nature of the transaction and its probable consequences;
>
> ii. That she was having independent advice from a reliable source/ person of trust to fully understand the nature of the transaction;

iii. That witnesses to the transaction are such, who are close relatives or fully acquainted with the lady and were having no conflict of interest with her;

iv. That the very nature of transaction is explained to her in the language she understands fully and she was apprised of the contents of the deed/receipt, as the case may be."

But none of these conditions was fulfilled by respondent No.1 while bringing on record convincing, reliable and cogent evidence. The Courts of law cannot remain oblivious regarding the erosion of moral values and the conduct of respondent No.1 is worth quoting as a classic example to deprive his real sisters of their valuable property.

9. The additional backdrop of the case was that the petitioners/ladies being married had their independent families including their husbands as well as siblings. A prudent man cannot conceive that while ignoring their families why they were compelled to make a gift of their property to one of their brothers. There is no second opinion and this Court is also conscious of the fact that a Muslim is free to transfer his property through declaration of gift in favour of any person, but there should be some reasons that why the donor was compelled to make a gift in favour of alien while eliminating his/her heirs, but in the case in hand this fact is totally lacking, which being militant to the ratio of judgments of superior Courts passed in cases reported as Mst. Khurshid Bibi and others v. Ramzan and others (2006 CLC 1023), Meraj Din v. Mst. Sardar Bibi and 5 others (2010 MLD 843) and Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others (2002 SCMR 1938) has forced this Court to disapprove the transaction alleged by the beneficiary.

10. In the fag end of his arguments, Mr. Hayat Hiraj, Advocate, learned counsel for respondent No.2 emphasized with great vehemence that the petitioners did not appear in the witness-box to make a statement in support of their pleadings and failed to depose the facts exclusively within their knowledge, which stance might have some force, but each case has to be decided on its own merits. Ordinarily a party having personal knowledge of facts must examine himself to depose those and face the test of cross-examination as well for ascertaining the truth or otherwise of his claim failing which an adverse presumption under Article 129(g) of the Order, 1984 can be drawn against him, but if sufficient infirmity on part of party is existed, then he may be immuned from his personal appearance in the witness-box. In the case in hand the rights of the simpleton folk and illiterate ladies were involved, who might not be aware of the judicial proceedings and could not face the test of intricate questions to be put to them in their cross-examination and were justified to appoint their close relative as special attorney, who being conversant with the facts of the case magnified entire detail of the lis and succeeded to remain consistent to

the stance advanced by the petitioners in their pleadings. So in the case in hand no adverse inference can be drawn against the ladies.

11. Having remained unsuccessful on all the above referred points, the stance of learned counsel for respondent No.2 that the learned Trial Court omitted to frame specific issue with respect to protection provided under section 41 of the Transfer of Property Act, 1882 despite his assertion in the written statement and suit may be remanded to do the needful is not sustainable. Respondent No.2 did not agitate the said issue before both the Courts below, where protracted trial of the suit was conducted. This Court is conscious of the fact that it was the prime duty of the learned Civil Court to settle the issues as per pleadings of the parties, but respondent No.2 was contributory towards that negligence, who remained mum throughout. Moreover, the entire pleadings were in his knowledge and he was under legal obligation to prove the same by production of the best available evidence during trial of the suit. The august Supreme Court of Pakistan has dealt with such question authoritatively while holding that where the parties led evidence keeping in mind their pleadings, objection regarding non-framing of any issue or improper settling of issue lost its weight. Reliance in this respect can be placed upon the judgments reported as Mst. Sughra Bibi alias Mehran Bibi v. Asghar Khan and another (1988 SCMR 04), Fazal Muhammad Bhatti and another v. Mst. Saeeda Akhtar and 2 others (1993 SCMR 2018) and Abdul Karim v. Haji Noor Badshah (2012 SCMR 212). Moreover, respondent No.2 being DW6 neither uttered a single word that he bona fidely purchased the disputed property after making a probe with regard to its title nor he examined any supporting witness in this respect. Moreover, since respondent No.1 has failed to prove the validity of the gift allegedly made by the petitioners, this Court is inclined to hold that the consequent entry in the revenue record had been managed fraudulently and thus it was void. It is settled principle of law that any superstructure built on the basis of a fraudulent transaction must collapse upon failure of such transaction. Therefore, the contention of respondent No.2 that he was bona fide purchaser of the subject property and such transaction was protected under section 41 of the Transfer of Property Act, 1882 does not carry any weight.

12. Having thus, going through the entire record and the submissions advanced by learned counsel for the parties, this Court finds that the impugned judgments of the Courts below although are consistent with each other, but those did not attain respect usually attached to such concurrent findings as the same are based on misreading and non-reading of material evidence, which was available before them, but escaped from their notice. The minute examination of available evidence leads this Court to conclude that respondent No.1 failed to prove the making of valid gift of the subject property by his sisters in his favour as well as the other respondent also remained unsuccessful to establish his bona fide purchase whereas the petitioners succeeded to establish that mutations were void, illegal, against law, based on fraud, misrepresentation and consequently inoperative upon their rights.

Resultantly, the findings of the Courts below on issues Nos.1 to 3 are reversed while answering the same in favour of the petitioners.

13. In view of above discussion, the instant civil revision is accepted, impugned judgments and decrees passed by the Courts below are hereby set aside and suit filed by the petitioners is decreed with costs throughout.

ZC/A-1/L Revision allowed.

2018 Y L R Note 145
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
SHAHZAD ADIL and 2 others---Petitioners
Versus
QAMAR-UN-NISA and others---Respondents
Civil Revision No.2696 of 2010, heard on 15th June, 2016.

(a) Registration Act (XVI of 1908)---
----S. 60---General power of attorney---Gift by attorney to his fiduciary relations---Secondary evidence---Production of---Requirements---Expert report---Evidentiary value---Fraud---Limitation---Contention of plaintiff was that general power-of-attorney and gift mutation were result of fraud and misrepresentation---Suit was dismissed by the Trial Court but Appellate Court decreed the same---Validity---When plaintiff appeared in witness-box and deposed that neither she appointed her general attorney nor authorized him to alienate her property through gift, onus to prove the valid execution of general power of attorney as well as attestation of mutation and transaction reflected therein would shift upon the defendants being beneficiaries---Basic document i.e. original general power of attorney was not tendered in evidence by the defendants---Original document was required to be brought on file so that genuineness of signatures/thumb impression of the executant over the same could be ascertained---If said document had been lost or destroyed defendants were bound to file application for seeking permission to tender its attested copy as secondary evidence---Attested copy of general power of attorney was brought on file but without seeking any such permission for its exhibition as secondary evidence---Had defendants moved such an application, they were bound to first prove its lost or destroy and thereafter could be permitted to lead the same in evidence---Attested copy of attorney deed did not suffice the purpose of proving the same---Presumption attached to copy of a registered document would be to the extent of document having been registered and not to the effect having been executed by a particular person---Attesting Officer should procure signature and thumb impression of the principal against the entry made by his official in Behi Register---Application could be made for comparison through expert in such circumstances---No application for comparison of signature/thumb impression through expert had been moved by the defendants---Report of expert was not conclusive evidence but if it was proved, the same could be used as corroborative piece of evidence---Beneficiary had incurred an adverse presumption against him by not resorting to such exercise---Deed Writer, Stamp Vendor and one of the attesting witness who played their role in construction of attorney deed could not be examined being already departed---Attesting Officer was not brought into the witness-box and only one marginal witness was examined but his sole statement

was insufficient to prove the contents as well as the signature of executant---Defendants had failed to prove the execution of their documents---Agent on behalf of his principal could not make a gift to his fiduciary relations without seeking prior permission to transfer the property---No embargo of limitation could be imposed to challenge a fraudulent instrument---Document being result of misrepre-sentation was liable to be struck down and could not be protected with rule of limitation---Fraud would vitiate the most solemn proceedings and could not be perpetuated due to some hitch/ objections---Alienation of suit property by the brother of plaintiff in favour of his sons on the basis of general power of attorney was not sustainable---Revision was dismissed in circumstances. [Paras. 3, 4, 5, 6, 8 & 9 of the judgment]

Hamid Qayyum and 2 others v. Muhammad Azeem through Legal Heirs and another PLD 1995 SC 381; Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others 1994 SCMR 818; Fida Muhammad v. Pir Muhammad Khan (deceased) through Legal Heirs and others PLD 1985 SC 341; Mst. Bandi v. Province of Punjab and 5 others 2005 SCMR 1368; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Abdul Rahim and others v. Mst. Jannatay Bibi and 13 others 2000 SCMR 346; Khair Din v. Mst. Salman and others PLD 2002 SC 677; Ghulam Farid and others v. Sher Rehman through L.Rs. 2016 SCMR 862; Rehmatullah and others v. Saleh Khan and others 2007 SCMR 729 and Mst. Zulikhan Bibi through LRs. and others v. Mst. Roshan Jan and others 2011 SCMR 986 rel.

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

----S. 115--- Revision--- Scope--- Revisional jurisdiction was meant to correct the error of law and facts if were found to have been committed by the Courts below. [Para. 8 of the judgment]

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

----S. 115---Revision---Scope---Judgment of Trial Court and Appellate Court---Inconsistency---Preference---In case of such inconsistency findings of Appellate Court must be given preference in absence of any cogent reason to the contrary. [Para. 7 of the judgment]

Madan Gopal and 4 others v. Maran Bepari and 3 others PLD 1969 SC 617; Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.Rs. and others 2013 SCMR 1300 and Amjad Ikram v. Mst. Asya Kausar and 3 others 2015 SCMR 1 rel.

(d) Fraud---

----Fraud would vitiate the most solemn proceedings. [Para. 6 of the judgment]

Ahmad Waheed Khan for Petitioners.

Majid Jahangir, Muhammad Sharif Chohan and Raja Muhammad Riaz Satti for Respondents Nos. 1 and 2.

Date of hearing: 15th June, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---In brevity, the facts of the case are that respondent No.1 and petitioner No.3 are sister and brother inter se, whereas petitioners Nos.1 and 2 are sons of the latter. Respondent No.1 through a civil suit with regard to subject property disputed genuineness of General Power of Attorney dated 17.06.1986 purportedly executed on her behalf in favour of her brother besides assailing vires of oral gift mutation No.1218 dated 11.12.190 sanctioned in favour of petitioners Nos.1 and 2 by their father being her attorney while claiming it to be illegal, void and inoperative upon her rights being result of misrepresentation, fraud and collusion and ultimately prayed for its cancellation. Both the Courts below appreciated evidence available on suit file with different angles and the first one dismissed the suit, however, it was decreed by the learned lower Appellate Court through the impugned judgment, which is under challenge of this civil revision.

2. Heard. Record perused.

3. The relationship among the parties is admitted. The moment, respondent No.1 appeared in witness-box being PW1 and deposed on oath that neither she had appointed her brother being her general attorney nor authorized him to alienate her property through gift, but they managed the impugned documents fraudulently by means of fake proceedings, onus to prove the valid execution of general power of attorney as well as attestation of mutation and transaction reflected therein was shifted upon the petitioners being beneficiaries. The basic questioned document i.e. original general power of attorney was not tendered in evidence by the petitioners, which compelled the learned Additional District Judge to draw adverse inference against the petitioners under Article 129 illustration (g) of the Order 1984, however, when Mr. Ahmad Waheed Khan, Advocate for the petitioners was faced with this situation, he tried to handle it while responding that Muhammad Afzal (DW5) fully explained in his statement that the original instrument was handed over to the Revenue Officer when oral gift mutation in favour of petitioners Nos.1 and 2 was attested, therefore when the document was not in possession of the beneficiaries, how it could be brought on the suit file, is not tenable. There was no fun to leave the document with the Revenue Officer after attestation of mutation and for the sake of argument, if it is admitted as correct, then the beneficiaries were required to summon the said Revenue Officer along with the original general power of attorney, but no effort in this regard was made and mere oral explanation of (DW5) could not be made basis to believe that document was out of possession of the petitioners. It was the specific stance of respondent No.1 that she had neither appeared before any scribe or Registrar nor did she sign the alleged forged general power of attorney and in such a situation, the original document was required to be essentially brought on file so that genuineness of the disputed signature/thumb impression of the executant over it could be ascertained. Had it been lost or destroyed by the Revenue Officer

and was not in custody of the petitioners, then they under the law were bound to file an application for seeking permission to tender its attested copy in secondary evidence. No doubt, attested copy of general power of attorney was brought on the file, but without seeking any such permission for its exhibition in secondary evidence. Had the petitioners filed such an application, they were bound to first prove its lost or destroy and thereafter, they could be permitted to lead it in evidence. In these circumstances, the attested copy of the attorney deed did not suffice the purpose of proving the same; presumption attached to copy of a registered document goes merely to the extent of document having been registered and not to the effect having been executed by a particular person. Moreover, at the time of execution of general power of attorney, Stamp Vendor and Deed Writer might have obtained signature as well as thumb expression of the executant/respondent No.1 in their relevant Registers, otherwise, at the time of attestation thereof, it was imperative upon Attesting Officer to procure signature and thumb impression of the principal against the entry made by his officials in Behi Register and in that eventuality allegation of the lady that she did not sign the questioned document could be belied by making any application by the petitioners for its comparison through an expert, but this request was also not tabled either before Courts below or before this Court. Although report of an expert is not conclusive evidence, but the apex Court in the case reported as 'Hamid Qayyum and 2 others v. Muhammad Azeem through Legal Heirs and another' (PLD 1995 SC 381) has concluded that such a report, if is properly proved, can be used as corroborative piece of evidence. By not resorting to such exercise, the beneficiary has incurred an adverse presumption against him. The Deed Writer, Stamp Vendor and one of the attesting witness, who played their role in construction of the attorney deed could not be examined by the beneficiary, being already departed prior to recording of evidence. The Attesting Officer was not brought into the witnessbox, whereas only the second marginal witness, Ashiq Ali Chatha, Advocate being DW8 was examined, but his sole statement is insufficient to prove the contents as well as the signature of the executant. The corollary of appreciation of evidence discussed so far is that petitioners miserably failed to prove the execution of their hub document.

4. Once again, Mr. Ahmad Waheed Khan was faced with the query whether an agent on behalf of his principal could make a gift in violation of principle settled for all the times by the apex Court in a case cited as Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others (1994 SCMR 818), wherein it was concluded as under: -

> ….Love and affection cannot be expressed by any attorney on behalf of the donor. The sentiments which were the consideration for gift in the present suit must be established to have come from the donor. Gifts are voluntarily and gratuitous in the present suit transfer from the donor to the donees. The essentials of these transactions are, the capacity of donor, intention of donor to make gift, complete delivery of the gift property to the donee and acceptance of gift by donee. In order to establish a valid gift of the property

by the donor in favour of the donee where gift, is made through a person authorized by the donor, the intention of donor to make the gift must be established in clear terms. In such a case the authority given by the donor in favour of another person to make a gift of his property besides containing the power to make the gift must also clearly specify the property and the donee in the case. In the case before us gift made by Said Ghawas in favour of his wife Mst. Gulzar Begum on the basis of the power of attorney executed in his favour by Said Nawab cannot be upheld for two reasons Firstly, the power of attorney executed in favour of respondent No.2 by the deceased Said Nawab did not contain any specific provision authorizing him to make a gift of his properties and secondly, even if we assume that such power was given, there is no indication in the said document that the donor intended to make gift of all his properties in favour of the wife of respondent No.2 (the donor).

He having remained speechless could not cite any other verdict of the apex Court to counter aforenoted dicta.

5. Mr. Ahmad Waheed Khan, Advocate has been again tested while confronting whether property of a principal could be transferred by an agent to his kith and kins, whose reply that the principal through the execution of registered power of attorney had authorized her agent to transfer the disputed property and while acting on her behalf being agent the attorney was not required to seek prior permission to transfer the disputed property to his kith and kin is not correct. It is a wrong presumption that every agent on account of description of general power of attorney means and includes the power to alienate/dispose of property of the principal to his fiduciary relations. In order to achieve that object, it must contain a clear separate clause devoted to the said object. The principal as well as attorney must have paid particular attention to such a clause regarding alienation of the property to the kith and kin with a view to avoid any uncertainty or vagueness. Implied authority to alienate property would not be readily deducible from words spoken or written, which do not clearly convey the principal's knowledge, intention and consent about the same. The Courts have to remain vigilant regarding interpretation of the clauses of the power of attorney, particularly, when the allegation by the principal is of fraud or misrepresentation. These views have been conceived from another authoritative judgment rendered by the Supreme Court reported as Fida Muhammad v. Pir Muhammad Khan (deceased) through legal heirs and others (PLD 1985 SC 341), which has also been followed by the Supreme Court in the case cited as Mst. Bandi v. Province of Punjab and 5 others (2005 SCMR 1368).

6. The submission of the learned counsel for the petitioners that the suit was instituted by respondent No.1 beyond limitation and the learned Additional District Judge erred in law while ignoring the said aspect is incorrect. When it is established on record that the petitioners failed to prove the valid execution of general power of

attorney and also remained unsuccessful to rebut the allegation that it was procured by means of fraud, then no embargo of limitation can be imposed to challenge a fraudulent instrument. There is no dearth of case law on this point and for ready reference some of those judgments reported as Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1), Abdul Rahim and others v. Mst. Jannatay Bibi and 13 others (2000 SCMR 346), Khair Din v. Mst. Salman and others (PLD 2002 SC 677) are referred. Moreover, the document being result of misrepresentation has to strike down and cannot be protected with rule of limitation. This is the recent voice of the apex Court of the State in a case cited as Ghulam Farid and others v. Sher Rehman through LRs. (2016 SCMR 862). It is well established by now that fraud vitiates most solemn proceedings and cannot be perpetuated due to some legal hitch/ objections. Reliance can be placed upon the cases known as Rehmatullah and others v. Saleh Khan and others (2007 SCMR 729) and Mst. Zulikhan Bibi through LRs and others v. Mst. Roshan Jan and others (2011 SCMR 986).

7. The argument of learned counsel for petitioners that learned Civil Court was perfect in appreciating the evidence available on lis file and dismissing the suit of respondent No.1 whereas judgment of the learned lower Appellate Court being result of misreading and non-reading of evidence is liable to be set at naught has no weight in the light of aforenoted appreciation of evidence and the conclusion drawn by this Court. It is also again established up till now that in case of inconsistency between the learned trial Court and the learned lower appellate Court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by the apex Court in the judgments reported as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617), Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs and others (2013 SCMR 1300) and Amjad Ikram v. Mst. Asya Kausar and 2 others (2015 SCMR 1).

8. In view of the above stated legal position, this Court is of the view that alienation of the property of respondent No.1 by her brother/petitioner No.3 in favour of his sons petitioners Nos.1 and 2 on the basis of purported general power of attorney was not sustainable in law and learned Additional District Judge was perfect in reversing judgment of his subordinate Court and decreeing the suit of the respondent No. 1 through the impugned judgment, which does not call for interference by this Court in the exercise of revisional jurisdiction, which is only meant to correct the errors of law and facts, if are found to have been committed by the Courts below in the discharge of their judicial functions.

9. Consequently this civil revision bounds to fail, which is dismissed with costs throughout.

ZC/S-60/L Revision dismissed.

2018 M L D 959
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jehangir, J
MUHAMMAD AHMAD FAROOQ and another---Petitioners
Versus
PROVINCE OF PUNJAB through Member Judicial-VII, Board of Revenue Punjab, Lahore through DCO/Collector District Sahiwal and 12 others---Respondents

Civil Revision No.60 of 2017, heard on 19th April, 2017.

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

----O. XXXIX, Rr. 1 & 2---Suit for declaration---Temporary injunction, grant of---Ingredients---General Power of Attorney on the basis of which impugned mutation was attested was a fake document---Ingredients for grant of temporary injunction were prima facie case, balance of convenience and irreparable loss---Court was required to weigh said elements while considering whether plaintiff had approached the Court with clean hands or grant of injunction would result into an undue advantage to the party---Plaintiffs had not approached the Court with clean hands as their case was based on a forged and fictitious document---Mere possession of suit property could not be made basis to equip the plaintiffs with the injunction for an indefinite period---Plaintiffs had failed to make out a prima facie case while the other two factors did not tilt in their favour---Revision was dismissed in circumstances.

Muhammad Ali v. Mahnga Khan 2004 SCMR 1111 rel.

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

----O. XXXIX, Rr. 1 & 2---Temporary injunction---Ingredients---Ingredients for grant of temporary injunction were: Prima facie case, balance of convenience and irreparable loss.

Syed Athar Hassan Bukhari for Petitioners.

Charagh Muhammad Maan and Ihsan Ahmad Bhindar for Respondents Nos.4 to 7.

Malik Bashir Ahmad Lakhesir, A.A.G. for Respondents Nos.1 to 3.

Date of hearing: 19th April, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Verily, respondents Nos.4 to 7 are the lawful owners of disputed property, but respondent No.8 while posing himself to be their General Attorney transferred it to the petitioners through oral sale mutation No.649 dated 31.08.2007. Learning about it, the same was unsuccessfully assailed by respondents Nos.4 to 7 through an appeal before respondent No.3, however the mutation was cancelled by respondent No.2 when second appeal of said respondents was allowed. The petitioners remained bootless before the Board of Revenue when their RoR as well as Review Petition was dismissed on 18.01.2011 and 19.07.2012 respectively, who lastly approached the learned Civil Court through the suit in hand for the restoration of their mutation and setting aside of the orders passed by respondents Nos. 1 and 2. The suit was also accompanied by an application under Order XXXIX, rules 1 and 2 of the Code of Civil Procedure, 1908 and same has been declined by the Courts below through the impugned order and judgment, which are now being attacked through the instant Civil Revision.

2. The bone of contention among the parties is the alleged General Power of Attorney purportedly presented by respondent No.8 for the transfer of the subject property before the Revenue Officer, which as per the stance of respondents Nos.4 to 7 was a forged, fictitious and nonexistent document, whereas the petitioners claimed it to be otherwise. The available record affirms that respondent No.2 during adjudication of second appeal summoned report from the concerned Sub-Registrar by whom it was attested, whose Office endorsed that on the given number and date the disputed General Power of Attorney was not attested in favour of respondent No.8, rather on this number and date a Special Power of Attorney was attested in favour of Mst. Masooda Jabeen by her husband Abdul Rehman Malik. This exercise was again confirmed by the Member, Board of Revenue, who during the proceedings of RoR also procured another certificate dated 21.08.2007 from the said Office. Today during the course of arguments, the learned counsel for

respondents Nos.4 to 7 presented copy of Special Power of Attorney and its study reveals that the same was attested on 07.04.1999 at serial No. 510 Book No. 4 Vol. No. 62 in favour of a lady by her husband, but the impugned mutation was also found to be sanctioned on the basis of a copy of General Power of Attorney attested on that date at the same serial number. The probe of the revenue hierarchy has left no room that the purported General Power of Attorney on the authority whereof the mutation impugned under the suit had been attested was a fake document. Moreover, Mr. Charagh Muhammad Maan, Advocate, learned counsel for respondents Nos. 4 to 7 also offered that if the disputed General Power of Attorney in original or its attested copy is brought on the record by the petitioners, then this revision and application for grant of temporary injunctive order may be allowed. In response, Syed Athar Hassan Bukhari, Advocate, learned counsel for the petitioners has found himself speechless and handicapped, who also showed his inability to accept the offer of learned counsel for respondents Nos. 4 to 7 through bringing on record the original General Power of Attorney or even attested copy thereof. The petitioners so far could not bring on record the attested copy or the original instrument on any of the lis files conducted by the revenue forums, learned Civil, District as well as this Court to establish its execution, attestation, genuineness and existence.

3. Vehemence of Mr. Athar that the petitioners are in possession of the disputed property, therefore, they have a case for the issuance of temporary injunction, suffice it to say that under the relevant provision of law, there are three essential ingredients for grant of temporary injunction, which must co-exist in favour of quester i.e. prima facie case, balance of convenience and irreparable loss. The Court is required to weigh these elements while considering whether the seeker has approached the Court with unclean hands and whether grant of injunction shall result into an undue advantage being awarded would perpetuate injustice. In case of answer of any of the elements in affirmative, such a discretionary relief cannot be accorded. In the case in hand, it can safely be concluded that petitioners had not

approached the Court with clean hands, their case is hinging on a forged and fictitious document and a strict action against the wrongdoers has to be initiated, if not pressed so far because sparing the criminals will encourage the others to usurp the properties of the lawful owners by means of fake instruments. Mere possession cannot be made basis to equip them with the injunction for an indefinite period. Reliance can be placed upon judgment of the apex Court reported as Muhammad Ali v. Mahnga Khan (2004 SCMR 1111).

4. The accumulative effect of the above discussion is that the petitioners failed to make out a prima facie case, whereas the other two factors also do not tilt in their favour and the Courts were quite perfect in dismissing their application. This Civil Revision being meritless is dismissed.

ZC/M-3/L Revision dismissed.

P L D 2018 Lahore 502
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD TARIQ and others---Petitioners
Versus
AMJAD ALI and others---Respondents

Criminal Revision No. 158016 of 2018, decided on 6th February, 2018.

Court Fees Act (VII of 1870)---

----S. 7(iv)(a)---Civil Procedure Code (V of 1908), Ss. 96 & 149---Appeal without affixation of court fee---Effect---Limitation---Making up deficiency of court-fee---Scope---Appellate Court dismissed appeal on the ground that same was preferred without affixation of requisite court-fee---Validity---Plaintiffs-appellants through their suit had claimed themselves to be the owners of suit property valuing at least Rs.2,000,000/- on the basis of alleged gift---Valuation of suit for the purpose of court-fee was to be affixed as per its market price---Plaintiffs at the time of institution of suit fixed market value of suit property for the purpose of court-fee as Rs.24000/- only---Plaintiffs on debriefing of Trial Court furnished maximum court-fee of Rs.15000/---Appellants after dismissal of suit preferred appeal without affixation of any court-fee---Appellate Court before dismissal of appeal was not bound to direct the appellants to affix requisite court-fee as they were aware as to what stamps of court-fee was to be furnished---Appellants were not only negligent but their conduct was contumacious---No indulgence could be extended to the appellants to make good the court-fee and that too beyond the period of limitation---Appeal remained pending for more than two years and ten months but deficiency of court-fee was not made good despite the fact that Appellate Court required the same---Benefit of S.149, C.P.C. could not be extended for relaxation of limitation beyond the prescribed period---No legitimate explanation was provided as to why appellants failed to affix court-fee well within limitation of filing of appeal---Appellate Court had rightly non-suited the appellants through impugned order---Impugned order was neither perverse nor infirm---Revision being devoid of any merit was dismissed in limine.

Mr. Safia Siddiq v. Haji Fazal-ur-Rehman and 2 others 2009 CLC 262 and Assistant Commissioner and Land Acquisition Collector, Badin v. Haji Abdul Shakoor and others 1997 SCMR 919 rel.

Ch. Sameed Ahmad Wains for Petitioners.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Verily, Samreen Kausar, sister of present petitioners was owner of property measuring 01 Kanal 09 Marlas, who transferred it to Amjad Ali respondent No.1 through execution of sale deed dated 08.07.2006 (Exh.P5). Though in earlier round of litigation, Muhammad Tariq petitioner No.1 pirated the said sale through suit for pre-emption (Exh.D 1) and one day prior to its withdrawal, suit in hand was filed on 14.09.2011 with the stance that property involved in Exh.P5 was in fact owned by their father Muhammad Manzoor, who gifted it out to them through memo of gift executed on a plain paper dated 13.01.2006 (Exh.P 1) and on the next day, earlier suit of pre-emption was withdrawn vide order dated 15.09.2011 (Exh.D2). After collecting and thrashing evidence of the parties in pros and cons, learned Trial Court dismissed the suit through judgment and decree dated 22.01.2015. Though appeal was preferred by the petitioners well within time on 03.02.2015 yet without affixation of requisite Court fee and for that sole ground, the appeal was dismissed vide impugned order dated 15.12.2017, hence instant Civil Revision.

2. Heard. Record perused.

3. Through their suit, the petitioners claimed themselves to be the owners of property valuing at least Rs.2000000/- on the basis of alleged gift and under the law, valuation of the suit for the purposes of court fee was to be affixed by them as per its market price, but at the time of its institution, they fixed its value for that purpose only Rs.24000/-, however, subsequently on debriefing of learned Civil Court as per requirement of section 7(iv)(a) of the Court Fees Act 1870, the maximum court fee of Rs.15000/- was furnished. It was amazing that after the dismissal of suit by the learned Civil Court, despite the fact that while filing appeal, Rs.200000/- was fixed its value for that purpose, but this time again without affixation of any court fee. The petitioners were very much aware what stamps of court fee they had to furnish and no confusion was in their way in this regard. The submission of Ch. Sameed

Ahmed Wains, Advocate for the petitioners that learned lower Appellate Court prior to dismissal of appeal did not direct the petitioners to levy the requisite Court fee is not well founded. It was not the case where situation with regard to the fixation of valuation of the lis was foggy or tangled and the petitioners were required any clarification. As observed supra, not only the valuation requiring affixation of maximum Court fee was determined by them rather they on the asking of Court of first instance without objection affixed it on their plaint. The study of memorandum of appeal again affirmed that they were certain that Court fee of the highest value was to be affixed, but they remained mum for more than two years, hence they were not only negligent, but their conduct was contumacious and there existed no reason to extend any indulgence to them to make good the court fee and that too beyond the period of limitation. The appeal remained pending for more than two years and ten months but despite the fact that learned lower Appellate Court time and again required the court fee, but the deficiency was not made good. The provision of section 149 of the Code of Civil Procedure, 1908 cannot be extended for relaxation of limitation beyond the prescribed period. Reliance is placed on Mrs. Safia Siddiq v. Haji Fazal-ur-Rehman and 2 others (2009 CLC 262) and Assistant Commissioner and Land Acquisition Collector, Badin v. Haji Abdul Shakoor and others (1997 SCMR 919). Apart from that, no legitimate explanation was provided as to why the petitioners failed to affix court fee well within limitation of filing of appeal, therefore, learned Addl. District Judge was perfect to non-suit them through the impugned order.

4. On facts, it is also admitted by learned counsel for the petitioners that earlier Muhammad Tariq, petitioner No.1 had instituted a suit for possession through pre-emption (Exh.D1) against sale reflected in sale deed dated 08.07.2007 (Exh.P5) made by respondent No.2 in favour of respondent No.1 and thereafter the antipodal stance of the petitioners that in fact the property had already been gifted out to them by their father on 13.09:-2006 is not adequate. Had there been a valid gift, then they would have assailed the sale while basing their claim on the gift allegedly made

prior to earlier transaction, but while filing a suit for the exercise of right of substitution, petitioner No.1 acknowledged the transaction of sale while disregarding their alleged gift, hence judgment as well as order of Courts below are neither perverse nor infirm, which do not call interference by this Court in the exercise of revisional jurisdiction. Learned counsel for the petitioners has also remained abortive to pinpoint any illegality or irregularity in the impugned judgment and order. Consequently, instant Civil Revision being devoid of any merit is hereby dismissed in limine.

ZC/M-48/L

Revision dismissed.

PLJ 2018 Lahore 617

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUHAMMAD TARIQ, etc.--Petitioners

Versus

AMJAD ALI, etc.—Respondents

C.R. No. 158016 of 2018, decided on 6.2.2018.

Constitution of Pakistan, 1973--

----Art. 199--Court Fees Act, 1887, S. 7(iv)(a)--Civil Procedure Code, 1908 (V of 1908), S. 149--Suit for pre-emption was withdrawn on a plea that father of petitioner gifted suit property--Suit for owner of property--Dismissed--Appeal--Dismissed--Revisional Jurisdiction--Challenge to--Petitioners claimed themselves to be owners of property valuing at least Rs. 2000000/- on basis of alleged gift and under law, valuation of suit for purposes of Court fee was to be affixed by them as per its market price, but at time of its institution, they fixed its value for that purpose only Rs. 24000/-, however, subsequently on debriefing of learned Civil Court as per requirement of Section 7 (iv) (a) of Court Fees Act, 1887, maximum Court fee of Rs. 15000/- was furnished--Suit for exercise of right of substitution, petitioner acknowledged transaction of sale while disregarding their alleged gift, hence judgment as well as order of Courts below are neither perverse nor infirm, which do not call interference by this Court in exercise of revisional jurisdiction--Petition was dismissed.

[Pp. 619 & 620] A & D

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

----S. 149--Fixation of value of lis--Court-fee--Determination--Appeal remained pending for more than two years and ten months but despite fact that learned lower Appellate Court time and again required Court fee, but deficiency was not made good--Provision of Section 149 of Code of Civil Procedure, 1908 cannot be extended for relaxation of limitation beyond prescribed period--Apart from that, no legitimate explanation was provided as to why petitioners failed to affix Court fee well within limitation of filing of appeal, therefore, learned Addl. District Judge was perfect to non-suit them through impugned order. [P. 619] B & C

*Mrs. Safia Siddiq vs. Haji Fazal-ur- Rehman and 2 others*2009 CLC 262 *ref.*

Ch. Sameed Ahmad Wains, Advocate for Petitioners.

Date of hearing: 6.2.2018.

ORDER

Verily, Samreen Kausar, sister of present petitioners was owner of property measuring 01 Kanal 09 Marlas, who transferred it to Amjad Ali Respondent No. 1 through execution of sale-deed dated 08.07.2006 (Exh.P5). Though in earlier round of litigation, Muhammad Tariq Petitioner No. 1 pirated the said sale through suit for pre-emption (Exh.D1) and one day prior to its withdrawal, suit in hand was filed on 14.09.2011 with the stance that property involved in Exh.P5 was in fact owned by their father Muhammad Manzoor, who gifted it out to them through memo. of gift executed on a plain paper dated 13.01.2006 (Exh.P1) and on the next day, earlier suit of pre-emption was withdrawn *vide* order dated 15.09.2011 (Exh.D2). After collecting and thrashing evidence of the parties in pros and cons, learned Trial Court dismissed the suit through judgment and decree dated 22.01.2015. Though appeal was preferred by the petitioners well within time on 03.02.2015 yet without affixation of requisite Court fee and for that sole ground, the appeal was dismissed *vide* impugned order dated 15.12.2017, hence instant Civil Revision.

2. Heard. Record perused.

3. Through their suit, the petitioners claimed themselves to be the owners of property valuing at least Rs. 2000000/- on the basis of alleged gift and under the law, valuation of the suit for the purposes of Court fee was to be affixed by them as per its market price, but at the time of its institution, they fixed its value for that purpose only Rs. 24000/-, however, subsequently on debriefing of learned Civil Court as per requirement of Section 7 (iv) (a) of the Court Fees Act, 1887, the maximum Court fee of Rs. 15000/- was furnished. It was amazing that after the dismissal of suit by the learned Civil Court, despite the fact that while filing appeal, Rs. 200000/- was fixed its value for that purpose, but this time again without affixation of any Court fee. The petitioners were very much aware what stamps of Court fee they had to furnish and no confusion was in their way in this regard. The submission of Ch. Sameed Ahmed Wains, Advocate for the petitioners that learned lower Appellate Court prior to dismissal of appeal did not direct the petitioners to

levy the requisite Court fee is not well founded. It was not the case where situation with regard to the fixation of valuation of the lis was foggy or tangled and the petitioners were required any clarification. As observed supra, not only the valuation requiring affixation of maximum Court fee was determined by them rather they on the asking of Court of first instance without objection affixed it on their plaint. The study of memorandum of appeal again affirmed that they were certain that Court fee of the highest value was to be affixed, but they remained mum for more than two years, hence they were not only negligent, but their conduct was contumacious and there existed no reason to extend any indulgence to them to make good the Court fee and that too beyond the period of limitation. The appeal remained pending for more than two years and ten months but despite the fact that learned lower Appellate Court time and again required the Court fee, but the deficiency was not made good. The provision of Section 149 of the Code of Civil Procedure, 1908 cannot be extended for relaxation of limitation beyond the prescribed period. Reliance is placed on *Mrs. Safia Siddiq vs. Haji Fazal-ur-Rehman and 2 others* (2009 CLC 262) and *Assistant Commissioner and Land Acquisition Collector, Badin vs. Haji Abdul Shakoor and others* (1997 SCMR 919). Apart from that, no legitimate explanation was provided as to why the petitioners failed to affix Court fee well within limitation of filing of appeal, therefore, learned Addl. District Judge was perfect to non-suit them through the impugned order.

4. On facts, it is also admitted by learned counsel for the petitioners that earlier Muhammad Tariq, Petitioner No. 1 had instituted a suit for possession through pre-emption (Exh.D1) against sale reflected in sale-deed dated 08.07.2007 (Exh.P5) made by Respondent No. 2 in favour of Respondent No. 1 and thereafter the antipodal stance of the petitioners that in fact the property had already been gifted out to them by their father on 13.09.2006 is not adequate. Had there been a valid gift, then they would have assailed the sale while basing their claim on the gift allegedly made prior to earlier transaction, but while filing a suit for the exercise of right of substitution, Petitioner No. 1 acknowledged the transaction of sale while

disregarding their alleged gift, hence judgment as well as order of Courts below are neither perverse nor infirm, which do not call interference by this Court in the exercise of revisional jurisdiction. Learned counsel for the petitioners has also remained abortive to pinpoint any illegality or irregularity in the impugned judgment and order. Consequently, instant Civil Revision being devoid of any merit **is hereby dismissed *in limine*.**

(M.M.R.) **C.R. dismissed.**

PLJ 2018 Lahore 620

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

TAJAMAL ABBAS--Petitioner

Versus

INAMULLAH--Respondent

C.R. No. 2081 of 2016, heard on 28.2.2018.

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

----O. XXXIX, Rr. 1 & 2--Suit for permanent injunction--Tenant in possession--Suit was dismissed as withdrawn on basis of compromise--Petitioner was agreed to vacate property in possession within six months--Petitioner did not honour his statement--Execution petition--Rejected--Appeal for recalling *exparte* orders--Allowed--Challenge to--An undertaking made by a party before Court of law has to be given sanctity while applying principle of estoppel as well to respect moral and ethical rules and if retraction therefrom is allowed as a matter of right, then it will definitely result into distrust of public litigants over Judiciary and would damage sacred image of Courts that they are infertile to make implementation of orders passed by them in judicial proceedings--It is again well established that conduct of a party is always considered to be relevant in Court of law, latter has to take exception to conduct of litigant like in case in hand--Petitioner voluntarily opted to surrender himself before Court of law to evict rented premises, then it becomes final and absolute for him to vacate it and any retraction cannot be permitted because sanctity to judicial proceedings has to be safe guarded at any cost--Petition was dismissed. [Pp. 622 & 623] A & B

Farzana Rasool and 3 others vs. Dr. Muhammad Bashir and others 2011 SCMR 1361; *Mst. Kishwar Sultan Jehan Begum vs. Aslam Awais Arw 3 others* PLD 1976 Lahore 580

Mr. Fawad Malik Awan, Advocate for Petitioner.

M/s. Rai Shahid Saleem Khan, Ehsan Ahmed Bhindar, Ziaullah Khanand Imran Haider Bhatti, Advocates for Respondents.

Date of hearing: 28.2.2018

JUDGMENT

The present petitioner on 11.12.2013 approached the learned Civil Court, Jhang with a suit for permanent injunction, admitting therein that he occupied the demised house being tenant and his ultimate prayer was that respondent be restrained from snatching its possession through illegal means and during its proceedings on 24.03.2014, he at his own, made a statement as under:

Pursuant thereto, the Court then and there passed the order to the following effect:

> In view of above recorded statement of the parties recorded above, the instant suit of the plaintiff is hereby dismissed as withdrawn. However, both the parties will abide by and bound to comply with their statement.

Admittedly, the petitioner did not honour his words and the respondent/defendant was compelled to bring an execution petition for its realization, but it failed being incompetent having been rejected by the learned Executing Court on the very first day of its hearing on 31.01.2015. On appeal, the petitioner did not turn up, compelling the Appellate Court to set at naught the view of learned Executing Court and it did so on 15.08.2015 directing the learned Executing Court to summon the present petitioner and decide the Execution Petition strictly in accordance with law. The present petitioner filed an application under Order XLI Rule 21 of the Code of Civil Procedure, 1908 before the same Court for recalling his *ex-parte* order dated 15.08.2015, which was allowed and appeal of respondent was revived for its decision afresh, but again on merit it was allowed on 13.04.2016 and through instant Civil Revision it was attacked.

2. The inaugural argument of Mr. Fawad Malik Awan, Advocate for petitioner that the suit was dismissed as withdrawn and decree sheet was not drawn and that consent of the parties also did not fall within definition of a decree under sub-section (2) of Section 2 of the Code, 1908 and that execution proceedings could not be initiated was not tenable. Apart from Order XXI of Code *ibid,* Section 36 thereof is the most relevant provision to be applied, which might have escaped notice of Mr. Fawad and it would be advantageous to go through it, which reads as follows:--

36. Application to Orders.--The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

A bare perusal thereof in express terms makes all the provisions relating to the execution of decree applicable also to the execution of orders. Moreover, the Court is equipped with the jurisdiction not only to adjudicate upon disputes and pass an order rather it possesses ample powers to get its orders implemented, otherwise machinery of the Courts working under the mandate of law would become dormant. It was not a case of simple withdrawal of the suit, rather same was decided as per undertaking given by the petitioner and he was specifically bounded to comply with it, hence there was no occasion for him to fall back or reneged. An undertaking made by a party before the Court of law has to be given sanctity while applying the principle of estoppel as well to respect moral and ethical rules and if retraction therefrom is allowed as a matter of right, then it will definitely result into distrust of the public litigants over the Judiciary and would damage the sacred image of the Courts that they are infertile to make implementation of orders passed by them in the judicial proceedings. Reliance can be placed upon *Farzana Rasool and 3 others vs. Dr. Muhammad Bashir and others* (2011 SCMR 1361). It is again well established that conduct of a party is always considered to be relevant in the Court of law, the latter has to take exception to the conduct of litigant like in case in hand.

The petitioner voluntarily opted to surrender himself before the Court of law to evict the rented premises, then it becomes final and absolute for him to vacate it and any retraction cannot be permitted because sanctity to the judicial proceedings has to be safe guarded at any cost. Full Bench of this Court in a case reported as *Mst. Kishwar Sultan Jehan Begum vs. Aslam Awais Arw 3 others* (PLD 1976 Lahore 580), observed as under:

> An undertaking given to the Court by a party or his counsel has exactly the same force as an order made or an injunction granted by a Court; once an undertaking is given in the Court by a party or on his behalf by his counsel he becomes bound to fulfill the same.

Whereas, in a case cited as *Izhar Alam Farooqi, Advocate and another vs. Sheikh Abdul Sattar Lasi and others* (2008 CLD 149), the apex Court observed as follows:--

> It is true that a Court which has the jurisdiction to adjudicate the dispute and pass an order has also implicit power to have the order implemented and mere an erroneous order passed by the Court of competent jurisdiction does not render the order without jurisdiction.

Moreover, this Court in the judgment syled as *Khawar Saeed Raza vs. Wajahat Iqbal* (2003 CLC 1306) clinched the identical controversy in hand while concluding as under:

> Compromise is admitted which became part of the order, which stipulated the withdrawal of the suit by the respondent. Under Section 36 Civil Procedure Code, 1908, the provisions of the Code relating to the execution of decree are also applicable to orders. Even if there was no decree in existence an order disposing of the suit in terms of the compromise is very much there, binding upon and operative qua the parties. In *Kilachand Devchand and Co. vs. Ajodhuaprasad Sukhamnand and others* AIR 1934 Bombay 452, it was observed that if the Court had jurisdiction to make the order it had necessarily the power and jurisdiction to enforce the same and the law does not allow its machinery to be clogged in this respect. Likewise in *Ranjit Singh Hazari and others vs. Juman Meah and another* PLD 1961 Dacca 842 Section 36 of the Civil Procedure Code was considered by the learned Division Bench of the then High Court of Dacca (East Pakistan) and it was observed that the provisions regarding execution of decree were applicable to orders as well.

Hence, apart from reasoning of the learned Addl. District Judge, the above referred precedents also support his view. Reliance of learned counsel for the petitioner on the case law cited as *Shaukat Ali vs. Muhammad Sharif* (2013 CLC 1558) and *Messrs Singer Pakistan Ltd.*

Through Director Personal and Administration and another vs. Nasir Ali Meer and another (2015 MLD 267) is not apt, because scope of Section 36 of Code *ibid* was

absolutely not considered therein. Even otherwise, each case has to be dealt with keeping in view its own peculiar facts and circumstances.

4. As a result of the above, impugned order of the learned Addl. District Judge, Jhang do not call for any interference by this Court and petition in hand being devoid of merit as well as force is accordingly dismissed with costs.

(M.M.R.)
Petition dismissed.

2018 M L D 1253
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MALIK BOARD AND PAPER INDUSTRIES (PVT.) LTD.---Petitioner
Versus
TARIQ SAEED and others---Respondents

C. R. No.4088 of 2016, heard on 6th March, 2018.

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

----O. VIII, R. 10 & S. 115---Malicious prosecution---Suit for recovery of damages---Defendant having not been delivered copy of the plaint---Effect---Non-filing of written statement---Striking off defence---Revision---Limitation---Defendant was directed to submit written statement but same was not filed and right of defence was struck off---Revision was filed within time which was entertained but was returned when it was fixed for final argument being beyond pecuniary jurisdiction of the Court---Validity---District Judge was contributory to the delay for presentation of revision before High Court; had he objected at the very first point of time while realizing that Court lacked jurisdiction to entertain the revision petition, revision might have been filed within time before the High Court---Suit was instituted by the plaintiffs without fixation of court-fee on the plaint---Suit was not competent to be proceeded any further without fixation of court-fee---Suit was adjourned in routine without specifically requiring the filing of written statement and delivery of copy of plaint---Only four days time was provided to the defendant to file written statement which was not sufficient---Trial Court while delivering copy of plaint had not specifically required to do the needful---Period of ten months was allowed to the plaintiffs to furnish court fee to make their suit competent---One chance was to be afforded to the defendant to submit written statement---Law favoured adjudication on merits---Impugned order was set aside subject to payment of costs of Rs. 15,000/---Trial Court was directed to proceed with the suit from the stage when defence was struck off---Revision was allowed in circumstances.

Sardar Sakhawatuddin and 3 others v. Muhammad Iqbal and 4 others 1987 SCMR 1365; The Secretary, Board of Revenue, Punjab, Lahore and another v. Khalid Ahmad Khan 1991 SCMR 2527; Col. Retd. Ayub Ali Rana v. Dr. Carlite S. Pune and another PLD 2002 SC 630; Ghulam Hussain v. Shahzada Khurram Nazir 2011 YLR 763; Adil Textile Mills through Chief Executive and another v. Sui Northern Gas Pipeline Limited through Authorized Officer PLD 2012 Lah. 300; Chief Secretary/Provincial Government G.B. Gilgit and 3 others v. Abdur Raziq 2017 YLR 863 and Riaz ul Haq and others v. Muhammad Asghar and others 2017 SCMR 1841 rel.

(b) Administration of justice---

----Law favours adjudication on merits.

Mian Tahir Maqsood for Petitioner.

Waqas Qadeer Sh. for respondent No.1, whereas Respondent No.2 was proceeded against ex parte on 06.12.2016.

Date of hearing 6th March, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Although suit for recovery of damages of Rs.500 million on account of malicious prosecution was instituted by the respondents/plaintiffs on 12.07.2012, but without affixation of court fee. Learned Trial Court time and again required them to make up the said deficiency, which was ultimately made good on 15.05.2013. No doubt, prior to 15.05.2013, learned Trial Court had directed the petitioner/defendant to submit written statement, but neither prior to that date nor thereafter till 09.07.2013 it was filed, whereupon by applying penal consequences of Order VIII, Rule 10 of the Code, 1908, the right of submission of written statement of petitioner/ defendant was struck off. Initially, the petitioner/defendant assailed the said order well within time before the learned District Court by filing Civil Revision, which was entertained and process was issued for summoning of respondents/plaintiffs, who appeared as well and when it was fixed for final arguments, the Revision Petition being beyond its pecuniary jurisdiction was returned by learned Addl. District Judge vide order dated 28.06.2016 for its presentation before this Court, resultantly it was filed before this Court along with an application under section 14 of the Limitation Act, 1908 for condonation of delay.

2. Arguments heard and record perused.

3. The learned Addl. District Judge became contributory to cause delay for the presentation of instant Civil Revision before this Court. Had he objected at very first point of time while realizing that the said Court lacked jurisdiction to entertain the same, then the same might be filed by the petitioner/defendant well within time before this Court. The respondents/plaintiffs also raised no objection that learned District Court had no pecuniary jurisdiction to proceed any further for a considerable time despite their appearance, hence, C.M No.1/C-2016 for condonation of delay is allowed.

4. It is an admitted fact that suit was instituted by the respondents/ plaintiffs without affixation of court fee on the plaint, which was furnished on 15.05.2013 after almost ten months of its institution and prior to it the suit was not competent to be proceeded any further, what to talk to direct the petitioner/defendant to submit his written statement. The case diary maintained by learned Trial Court further reveals that no doubt on 15.05.2013 when the deficiency of the court fee was made good, the case was adjourned to 12.06.2013 for filing of written statement, but on the said day the file was placed before some other Judicial Officer being transferred on Administrative side and it was further adjourned by the Transferee Court in routine to 05.07.2017 without specifically requiring the filing of written statement,

whereas on 05.07.2013 without delivering copy of plaint, the case file was adjourned to 09.07.2013, while providing only four days' time to the petitioner to file his written statement and on his failure, the right of defence was struck off through the impugned order passed on that very day. The appreciation of case diary of the learned Trial Court left no doubt in mind that after the suit when it was made competent neither any sufficient time was afforded to the petitioner nor learned Trial Court while delivering the copy of the plaint had specifically required it from him. The apex Court in the judgment reported as Sardar Sakhawatuddin and 3 others v. Muhammad Iqbal and 4 others (1987 SCMR 1365) while dealing with the provisions of Order VIII, Rules 1, 9 and 10 of the Code of Civil Procedure, 1908 has held as under:-

> It is clear from the combined reading of Rules 1 and 9 that amongst others three types of written statements can be filed by a defendant.
>
> 1. As a right without any formal permission of the Court. (Rule 1).
> 2. When it is so required by the Court to file a written statement (Rule 1 and Rule 9).
> 3. When under some circumstances it is by the leave of the Court (Rule 9).
>
> It is obvious from Rule 10 that no adverse results under these Rules are to follow on failure to file written statement in cases mentioned in items Nos.1 and 3 above. But penal consequences of "pronouncement of judgment against" him when the defendant fails to file written statement when "so required"- - -as is indicated in item No.2 above, would follow.
>
> As it is a penal provision it will have to be strictly construed. Hence wherever a reasonable doubt arises regarding its interpretation or implementation, it shall have to be resolved in favour of the victim of its application. Otherwise too, its requirements would have to be established like those of Order XVII, Rule 3 which is similarly penal in nature. See Industrial Sales and Service, Karachi and another v. Archifar Opal Laboratories Ltd., Karachi PLD 1969 Kar.418.

This Court having perused the order sheet is satisfied that the rule laid down by the apex Court in the afore-noted judgment as well as in cases reported as The Secretary, Board of Revenue, Punjab, Lahore and another v. Khalid Ahmad Khan (1991 SCMR 2527), Col. Retd. Ayub Ali Rana v. Dr. Carlite S. Pune and another (PLD 2002 SC 630), Ghulam Hussain v. Shahzada Khurram Nazir (2011 YLR 763) and Adil Textile Mills through Chief Executive and another v. Sui Northern Gas Pipeline Limited through Authorized Officer (PLD 2012 Lahore 300) regarding the "requirement" of the Court was not complied with and a speaking order after handing over copy of the plaint to the defaulting party is lacking in this case. Moreover, almost a period of 10 months was allowed to the respondents to furnish the court fee to make their suit competent, hence there would be no injustice, if one more chance is afforded to the petitioner to submit his written statement, whereas law also favours adjudication on merits. Although learned counsel for respondent has placed reliance on judgments reported as Chief Secretary/Provincial

Government G.B. Gilgit and 3 others v. Abdur Raziq (2017 YLR 863) and Riaz ul Haq and others v. Muhammad Asghar and others 2017 SCMR 1841), but with all compliments, those run on different aspects and cannot be stricto sensu applied to support the impugned order.

6. For what has been discussed above, instant Civil Revision is allowed and subject to payment of costs of Rs.15000/-, which shall be paid by the petitioner/defendant to the respondents/plaintiffs before learned Trial Court, impugned order is set aside and learned Trial Court will proceed with the suit immediately before the stage when defence of the petitioner was struck off. The parties are directed to appear before learned Trial Court on 26.03.2018 for further proceedings, which will afford one fair opportunity to petitioner/defendant spreading over not more than twenty days to file his written statement, failing which law will take its own course.

ZC/M-79/L

Revision allowed.

PLJ 2018 Cr.C. 535
[Lahore High Court, Multan Bench]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
REHMAT ULLAH--Petitioner
Versus
STATE and another—Respondents

Crl. Misc. No. 121-B of 2018, decided on 12.2.2018.

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

----S. 498 & 497--Pakistan Penal Code, (XLV of 1860), Ss. 337A(iii), 34 337A(ii), 427--Pre-arrest bail--Confirmed--Allegation that petitioner damage a car belonging to complainant party--Petitioner was arrested and consequently area magistrate declaring him Juvenile and granted him bail--Complainant sought cancellation for bail--ASJ cancelled bail--Only alleged role of petitioner had damaged a car--Petitioner is responsible only 427, PPC--Bail is confirmed.

[P. 536] A

Syed Jaffar Tayyar Bukhari, Advocate for Petitioner.

Mirza Abid Majeed, DPG with for State.

Date of hearing: 12.2.2018.

ORDER

The petitioner, namely, Rehmat Ullah seeks pre-arrest bail in case FIR No. 330, dated 15.10.2016, registered under Sections 337-A(ii)/337-A(iii)/427/34, PPC, at Police Station City Taunsa, District Dera Ghazi Khan.

2. As per record, during the occurrence, which resulted into an injury to Muhammad Zaman PW-, at the hands of Abdul Karim co-accused, the petitioner had damaged a car belonging to the complainant party.

3. On registration of the FIR, the petitioner was arrested and consequently the learned Area Magistrate, while declaring him as a juvenile had granted bail to him on 19.11.2016. The complainant through an application had sought cancellation of the bail, granted to the petitioner and the learned Additional Sessions Judge Taunsa Sharif, District Dera Ghazi Khan, through order dated 17.01.2017, had cancelled the bail of the petitioner, where-after he, for pre-arrest bail had approached the same learned Court but declined on 22.12.2017.

4. No injury to Muhammad Zaman PW- was attributed to the petitioner, rather it was assigned to Abdul Karim co-accused, who had been admitted to bail. The only alleged role of the petitioner was that he had damaged a car belonging to the complainant party. In this way, at the most he is responsible for offence under Section 427, PPC, which is bailable in nature.

5. Consequently, while considering the above mentioned and circumstances, the role of the petitioner and the offence attributed to him, he has been found entitled to the relief claimed for.

6. Resultantly, the petition in hand is ***allowed*** and ad-interim pre-arrest bail already granted to the petitioner is ***confirmed***, subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount, to satisfaction of the learned trial Court.

(M.N.K.) Bail confirmed.

2018 C L C 1640
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. SURRAYA BIBI----Petitioner
Versus
IMTIAZ AHMAD and 3 others----Respondents
C.R. No.2715 of 2014, heard on 25th April, 2018.

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

----Ss.42, 12, 10 & 39---Suit for declaration, possession and cancellation of document---Sale of immovable property---Enforcement of sale---Essential conditions---In order to enforce a sale, it was sine qua non for a vendee to establish; firstly, that transaction was struck with a title-holder or a person having authority to create title; secondly, it was settled against consideration and thirdly, such sale was accompanied by delivery of possession---Mere execution and registration of a sale deed by itself did not furnish proof of ingredients of transaction---Whenever such document as well as transaction cited therein were questioned or denied, onus lay on the beneficiary to prove both of these.

(b) Pleadings---

----Party had to first assert facts and pleas in the pleadings and prove the same through evidence---Party was not allowed under law to improve its case beyond what was originally setup in the pleadings.

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

----Arts. 17 & 79---Two attesting witnesses---Requirement---Under Art. 17 of Qanun-e-Shahadat, 1984 it was imperative that a required number of persons must attest document being its marginal witnesses---Article 79 of the Qanun-e-Shahadat provided that such document could only be used as evidence when two attesting witnesses, at least, had been called for the purpose of proving its contents, execution and construction; nothing short of it could prove the same.

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

----Arts. 17 & 79---Two attesting witnesses---Requirement---Attestation of document by identifier---Scope---Any signatory of a document involving financial obligation could not be treated as its marginal witness, until he had signed it in such capacity---Construing the requirements of Arts. 17 and 79 of Qanun-e-Shahadat, 1984 as being procedural rather than substantive and equating the testimony of an identifier with that of attesting witness would not only defeat philosophy of the said

provisions, but it would also be violative of its intent and purpose of Qanun-e-Shahadat, 1984.

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

----Ss.42, 12, 10 & 39---Suit for declaration, possession and cancellation of document---Sale of immovable property---Pardanashin lady---Independent advice, non-availability of---Effect---Where sale deed was executed on behalf of illiterate lady, the legal protection was to be extended to her, which was available to a pardanashin lady---For proving that independent advice was available to the lady, it was sine qua non for the beneficiaries to prove that not only independent advice was available with her, but she had settled bargain with conscious mind of transferring the property.

Taleh Bibi and others v. Mst. Maqsooda Bibi and another 1997 SCMR 459; Mian Allah Ditta through LRs v. Mst. Sakina Bibi and others 2013 SCMR 868; Ghulam Farid and another v. Sher Rehman through LRs. 2016 SCMR 862 and Phul Peer Shah v. Hafeez Fatima 2016 SCMR 1225 rel.

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

----Art. 85(5)---Registered document---Denial of execution and its validity---Presumption---Scope---Whenever execution or validity of a purportedly registered document was denied, such registered document would loose sanctity of being presumed to be correct---Lawful veracity of such document would depend upon quantum and quality of evidence to be produced to prove its lawful execution.

Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144 and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245 rel.

(g) Registration Act (XVI of 1908)---

----S.60---Certificate of registration---Registration proceedings--- Presumption---Scope---Under S. 60, Registration Act, 1908, only a restricted presumption was attached that registration proceedings were regularly and honestly carried out by the attesting officer--- Presumption attached to certificate of registration was rebuttable.

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

----S.115---Revisional jurisdiction of High Court---Concurrent findings---Misreading and non-reading of evidence---Interference by High Court---Scope---Normally High Court did not interfere with concurrent findings of fact recorded by two courts below, but when there was gross misreading and non-reading of evidence and patent violation of law was floating on the surface of concurrent

findings, court could not shut its eyes and was under obligation to rectify the error by interference in illegal findings.

Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001 and Mushtari Khan v. Jehangir Khan 2006 SCMR 1238 rel.

Ghulam Farid Sanotra for Petitioner.

Sh. Sakhawat Ali for Respondents.

Date of hearing: 25th April, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The brief facts for resolving the dispute arising out of the Revision Petition in hand were that Mst. Surraya Bibi, present petitioner, was exclusive owner of land measuring 14 Kanals 17 Marlas. Hidayat Ullah, father of the respondents, was her real brother. The property of petitioner lady was transferred to the respondents, sons of her brother vide sale deed No.807 dated 25.06.2003 (Exh.P1) and the former within next three months brought a suit for declaration, possession and cancellation of Exh.P1 contending therein that actually the property had been leased out to father of the respondents, who in its garb manevoured a sale deed in favour of his sons, which being result of fraud, misrepresentation and without consideration was liable to cancellation. The suit was contested on behalf of respondents/defendants through written statement, but surprisingly without giving any details with regard to time, date, month, year, venue and names of witnesses to disclose that when, where and before whom transaction of sale reflected in impugned sale deed was effected, however, it was only pleaded that subject land was purchased for value of Rs.100,000/-, which was paid before the respectables. Facing with the contest, issues were settled, evidence of the parties was collected and as a result of its appreciation, initially the suit was decreed vide judgment dated 16.11.2006, but it could not hold the field as the learned District Court on 12.06.2007 remanded the suit to his subordinate after resettling the issues with slight modification and afforded opportunity to the parties to lead further evidence. Pursuant thereto, one of the beneficiaries, respondent No. 1 (DW1), Hidayat Ullah and Zafar Ullah the signatories of the sale deed being DW2 and 3 respectively as well as Aftab Ahmed (DW5), the Registering Officer were again examined, whereas the earlier statements of DW1 and 2, recorded prior to remand order were also kept intact. Anyhow, second time, not only learned Trial Court dismissed the suit vide judgment and decree dated 04.06.2012, but appeal of the petitioner before the learned Appellate Court also failed through judgment and decree dated 15.04.2014, hence Petition in hand.

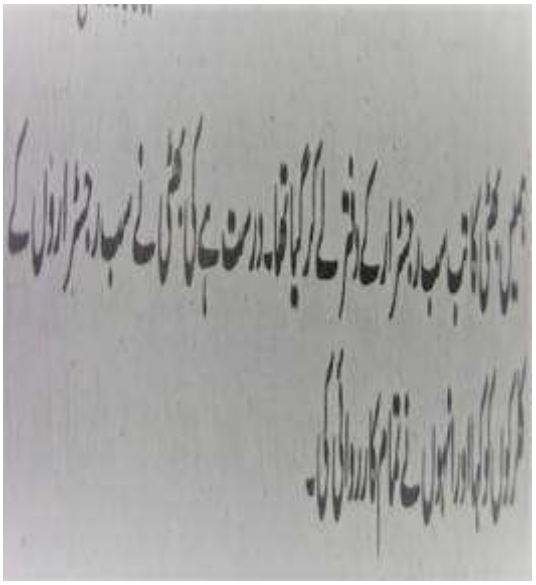
2. Mr. Ghulam Farid Sanotra, Advocate, learned counsel for petitioner/plaintiff has submitted that impugned sale deed being a document of financial liability was required to be attested at least by two marginal witnesses, whereas it was only witnessed by Hidayat Ullah, the father of the respondents and Zafar Ullah put his thumb impressions on it being identifier of the vendor, who could not be equated with a marginal witness; that the alleged vendor was illiterate, folk lady and sale deed on her behalf had been executed/sanctioned without any independent advice with her; that no convincing and reliable evidence was examined on behalf of beneficiaries to prove alleged transaction, whereas available evidence being full of contradictions was neither believable nor persuasive and that the impugned judgments being tainted with misreading and non-reading of evidence were liable to be set aside. In contra, Sh. Sakhawat Ali, Advocate, learned counsel for respondents refuted the arguments of his counterpart while accentuating that although sale deed being a registered instrument was clothed with strong presumption of correctness, which was not required to be formally proved, yet each and every signatory of the sale deed (Exh.P1) was examined to prove its construction as well as transaction reflected therein and that on the basis of minor contradictions or infirmities the statements of D.Ws. could not be discarded, whereas substances and gist of their depositions fully proved the case of respondents. He further argued with great concern that concurrent finding of fact rendered by two Courts below could not be disturbed while invoking jurisdiction available to this Court under Section 115 of the Code, 1908.

3. Heard and record perused.

4. In order to enforce a sale, it is sine qua non for a vendee to establish; firstly, that transaction was struck with a titleholder or a person having authority to create right; secondly it was settled against consideration, and thirdly such sale was accompanied by delivery of possession. Mere execution and registration of sale deed by itself do not furnish proof of aforenoted ingredients of the transaction and whenever such document as well as transaction cited therein is questioned or denied, onus lies on the beneficiary to prove both of these.

At the cost of repetition written statement of the contesting respondents was silent with regard to essential details of transaction and it is settled law that a party has to first assert facts and pleas in the pleadings and then it can prove the same through evidence. A party is not allowed under the law to improve its case beyond what was originally setup in the pleadings.

Anyhow, as per available record the lady herself while appearing being P.W.1, explicitly worded in her statement-in-chief that Hidayat Ullah was her real brother to whom the property was leased out, but with him neither any sale transaction was settled nor any consideration was received and that she never executed the sale deed, whereas Hidayat Ullah procured her thumb impression on some papers to accomplish lease deed. The petitioner examined Zafar Iqbal (P.W.2), her son, who seconded her mother to that extent and also denied to have received any amount from the respondents. The moment P.Ws. denied the transaction and execution of sale deed, onus was shifted to the persons claiming benefit of disposition of the land and to discharge it, Imtiaz respondent No.1, one of the beneficiaries being D.W.1, for the first time, exposed the details of transaction while stating therein that on 25.06.2003 the transaction was settled against Rs.100,000/-, which was paid, then they came to Narowal where stamp paper was purchased, scribed and registered as per desire of his aunt. In response to a specific question, D.W.1 categorically nominated that Riaz Cheema, family member of the vendor and son of the latter were present during entire proceedings, but surprisingly none of them witnessed the sale deed despite their availability nor any of them was summoned by the respondents to affirm that some independent advice was with her to have understood the import and magnitude of the transaction for which instrument was executed. Regardless of it, the beneficiary (D.W.1) failed to point out particular persons, who being witnesses thumb marked the sale deed. The perusal of impugned instrument left no doubt that Zafar Ullah, one of its signatories, did not sign it being its marginal witness, rather he being identifier of the vendor, thumb marked it in such capacity. He as D.W.3 did not depose that after execution of the sale deed by the Deed Writer it was signed/thumb marked before him, rather he indeed stated in his statement-in-chief that the document was thumb marked after accomplishment of its registration by the Sub-Registrar. This witness completely failed to pinpoint that the lady was known to him or that she was identified by him before the concerned officer. He was the sole independent witness, who even failed to identify his thumb impression over the sale deed with the pretext to have lost eyesight, however, his deposition in cross-examination to the following effect:-



has left an impression that Sub Registrar did nothing on his part to attest the sale deed. Then comes the statement of Hidayat Ullah (DW2), the signatory of Exh.D1 being its marginal witness. He being father of the beneficiaries was the most interested person, whose statement could not be given due weight, however he also did not state that sale deed after its execution was read over to the vendor or that the parties along with him as well as DW3 put their signatures/thumb marks before the Deed Writer, rather he was also of the view that they did so before the Attesting Officer. The Deed Writer, Muhammad Azam (DW4) in his cross-examination stated that Riaz Cheema, a relative of the lady/vendor was also available at the time of execution of sale deed, but due to non-availability of his CNIC, he was not added as marginal witness of the sale deed. Although Registering Officer (DW5) was examined too, but he did not utter a single word that petitioner had appeared before him for the execution of sale deed or that she made a statement before him, rather he simply stated that sale deed (Exh.D1) was registered by him. Some of the glimpses of his cross-examination given below would be relevant to expose his irresponsible attitude towards discharge of his official duty:-

5. There is no denying of the fact that a document involving financial obligation has to be executed, constructed and proved as per mode provided under Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984. What are requisites can be understood by reading said provisions, which are reproduced hereunder:-

> 17. Competence and number of witnesses.-
>
> (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah.
>
> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,
>
> (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and
>
> (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.
>
> 79. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the executant of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

As per former provision, it was made imperative that a required number of persons must attest any such document being its marginal witnesses and as per requirements of the latter provision, such a document can only be used as evidence when two attesting witnesses, at least, have been called for the purpose of proving its contents,

execution and construction, but nothing short of it can even be imagined for proving the same. As observed supra, the document under challenge was thumb marked only by Hidayat Ullah (DW2) being its marginal witness, whereas Zafar Ullah (DW3) put his thumb mark as an identifier, hence the document was not constructed as per requirement of Article 17 ibid, as such was not admissible in evidence. The emphasis of Mr. Sakhawat Ali, learned counsel for the respondents that DW3 proved the transaction as well as execution of sale deed and merely for the elision on the part of Deed Writer, that he was written as identifier could not be made basis for not treating him as marginal witness, was misconceived. It was not a case where judicial discretion of the Court could be invoked to treat identifier being attesting witness. It is well established by now that any signatory of a document involving financial obligation cannot be treated as its marginal witness, until he has signed it in such capacity. Construing the requirement of Articles ibid as being procedural rather than substantive and equating the testimony of an identifier with that of attesting witness would not only defeat philosophy of the said provision, but it would also be violative of its intent and purpose, which was specifically introduced while re-enacting the law on evidence. The attestation of sale deed by the identifier, who had an independent role in the series of facts and registration of the instrument was highly unusual. Such omission was not only significant but was also destructive to the case of the plaintiffs hence for violation of mandatory requirement of the provision under discussion sale deed was inadmissible and was wrongly relied upon by the Courts below.

6. The other glaring backdrop of the case was that the sale deed under litigation in hand was executed on behalf of an illiterate lady and as per judgments of the apex Court rendered in cases reported as Taleh Bibi and others v. Mst. Maqsooda Bibi and another (1997 SCMR 459), Mian Allah Ditta through LRs v. Mst. Sakina Bibi and others (2013 SCMR 868), Ghulam Farid and another v. Sher Rehman through LRs. (2016 SCMR 862) and Phul Peer Shah v. Hafeez Fatima (2016 SCMR 1225), the legal protection is to be extended to her, which is available to a pardanashin woman and in such situation, it was sine qua non for the beneficiaries to have proved that not only independent advice was available with her, but she had settled the bargain with conscious mind of transferring the property in dispute to the respondents. The Deed Writer (D.W.4), Identifier (D.W.3) and the Attesting Witness (D.W.2) admitted in their testimonies that either son or a relative of the lady/vendor was available, but non-signing of the document on their part raised serious question about its genuineness. The disputed transaction on behalf of lady was effected in favour of siblings of her brother. The latter was in a position to exert his pressure or had got a relation of great confidence to wield influence upon her

and in such situation that was to be seen with doubt and care. The submission of Mr. Sakhawat, learned counsel that each of the D.Ws. specifically deposed in his statement that the Scribe as well as the Registering Officer confirmed from the lady with regard to receipt of sale amount, who thereafter scribed and registered the sale-deed, hence there was no further requirement for making the document and transaction understandable to her was not well founded. It was the defence of the lady that the property was never sold out, rather it was leased out, as such it was imperative upon the beneficiaries to have proved that the consideration, if any paid, was for the sale.

7. The argument of learned counsel for the respondents that thumb mark upon Exh.D1 having already been admitted by the petitioner/plaintiff, the respondents were no more required to prove its valid construction, was not plausible. Admittedly the lady pleaded and deposed that her brother procured her thumb impression for the execution of lease deed, so in such situation, her admission would not ipso facto prove the sale deed as well as transaction reflected therein to raise presumption of it being a genuine document having legal value. The other emphasis of learned counsel that sale deed was a duly registered document and it being a public document attained presumption of correctness, as such Courts below were perfect to rely upon it, was not persuasive. As per reference to Article 85 (e) of the Order ibid, whenever the execution or validity of a purportedly registered document is denied, such registered document loses sanctity of being presumed to be correct, but its lawful veracity will depend upon quantum and quality of evidence to be produced to prove its lawful execution. Reliance can be placed upon judgments reported as Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144) and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245). In the latter case, the apex Court concluded in the following words:-

> It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction of which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness of document.

Additionally, under section 60 of the Registration Act, 1908, only a restricted presumption is attached that registration proceedings were regularly and honestly

carried out by the attesting officer, but the said presumption attached to its certificate is always rebuttable.

8. The argument of learned counsel for the respondents that the concurrent findings of the Courts below cannot be disturbed by this Court while exercising revisional jurisdiction provided under section 115 of Code, 1908 is not tenable as both the judgments and decrees having been found to be the result of misreading and non-reading of evidence as well as non-adherence to the law applicable in this regard are not sustainable in the eye of law. It is correct that normally this Court does not interfere with the concurrent findings of the fact recorded by two Courts below, but when there is gross misreading and non-reading of evidence and patent violation of the law is 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 Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001) and Mushtari Khan v. Jehangir Khan (2006 SCMR 1238).

9. Corollary of the appreciation of evidence and legal aspects discussed hereinabove is that this Civil Revision is accepted, impugned judgments and decrees are hereby set aside and suit of the petitioner/plaintiff is decreed. No order as to costs.

SA/S-30/L Revision accepted.

2018 Y L R 2118
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
Mst. RUQIYA BIBI and 10 others---Petitioners
Versus
ALLAH DITTA and 17 others---Respondents

C.R. No. 419-D of 2012, heard on 28th November, 2017.

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

----S. 12---Transfer of Property Act (IV of 1882), S. 54---Qanun-e-Shahadat (10 of 1984), Arts. 17, 79, 80 & 129 (g)---Civil Procedure Code (V of 1908), O. VI, R. 2, O. VIII, R. 2, Ss. 148 & 151---Suit for specific performance of agreement to sell---"Sale"--- Ingredients--- Document---Proof---Procedure---Non-examination of summoned witness--- Effect--- Maxim: Secundum allegata et probata---Applicability---Suit was decreed subject to payment of balance sale consideration within thirty days---Plaintiffs failed to deposit the balance sale price within specified time and application for extension of said period was allowed---Validity---Mere execution of agreement, attestation of mutation or even registration of sale deed by itself did not furnish proof of ingredients of "sale"---Beneficiary was bound to prove such document as well as transaction of sale---Allotment of property in question did not exist in favour of the vendor at the time of execution of agreement to sell---Vendor was not competent to settle sale with the plaintiff in circumstances---Mere admissibility of document as evidence was not ipso facto the proof of its execution---Due execution of document was required to be proved in consonance with the provisions of Qanun-e-Shahadat, 1984---Document could only be used as evidence if two attesting witnesses, at least, had been called for the purpose of proving its contents, execution and construction---Son of one deceased marginal witness was summoned at the request of plaintiff to testify signatures of his father but he was not examined---Non-examination of summoned witness would compel the Court to draw an adverse inference against the concerned party---Agreement to sell was not required to be notarized and Notary Public could not be equated at par with the author of document---Plaintiffs had not examined the scribe of agreement to sell whereas one of its attesting witnesses had died---Maxim: Secundum allegata et probata that a fact had to be alleged by a party before it was allowed to be proved had full command of O.VI, R.2 & O.VIII, R.2, C.P.C.; as such any evidence led by a party beyond the scope of pleadings was liable to be ignored---Other marginal witness was one of the plaintiffs and his statement being that of an interested person could not be given due weight---Decree passed by the Court was final and Court had no power to extend time to deposit the balance sale price---Impugned order for extension of time to deposit sale consideration was set aside---Suit filed by the plaintiffs was dismissed---Revision was allowed in circumstances.

Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965; Haider Ali Bhimji v. VI Additional District Judge, Karachi (South) and another 2012 SCMR 254; Muhammad Ismail v. Muhammad Akbar Bhatti PLD 1997 Lah. 177 and Muhammad Iqbal through Legal Heirs v. Bashir Ahmad and 19 others PLD 2002 Lah. 88 rel.

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

----S. 115---Revision---Scope---Normally the revisional jurisdiction is not invoked, where the Courts below has rendered a concurrent view of fact, but when it is based on extraneous reasoning High Court is competent and equipped with the jurisdiction to annul such concurrent findings.

(c) Pleadings---

----Party could not be allowed to improve its case beyond what had been originally set-up in the pleadings.

(d) Pleadings---

----Any evidence led by a party beyond the scope of its pleadings was liable to be ignored.

(e) Words and phrases---

---'Attestation'---Attesting witness---Meaning---"Attestation" means the act of witnessing the construction of document acquiescing ones name as witness to that effect, which also includes putting his thumb impression-signatures to testify that he witnessed its execution and such a signatory is called an "attesting witness".

(f) Maxim---

----"Secundum allegata et probata": Fact has to be alleged by a party before it is allowed to be proved.

Tariq Zulfiqar Ahmad Chaudhary for Petitioners.

Ch. Asif Amin and Ch. Aftab Shabbir Arain, Mubashar Latif Gill, AAG for Respondent No.18.

Date of hearing: 28th November, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undeniably subject land was allotted to Rab Nawaz son of Kamal Din, predecessor of the petitioners, under Grow More Food Scheme in 1974, which was purportedly cancelled on 31.01.1989 by the District Collector, however, ultimately vide order dated 30.07.1995 his lot was restored and consequently, proprietary rights were also awarded to his legal heirs on 02.03.2005. Thereafter on 28.12.2005 respondents Nos. 1 to 6 and 8 to 17 filed a declaratory suit while setting their claim on agreement to sell dated 03.09.1989 or in alternative for its specific performance with the assertion that the allottee in his lifetime had agreed to sell his allotment rights for a consideration of

Rs.1,50,000/- and after receiving Rs.1,49,000/-, contract (Exh. P.1) was executed, whereas rest of the sale price was to be paid at the time of transfer of the subject land. It was further averred in para No.4 of the plaint that Muhammad Ashraf, respondent No.7 was also one of the vendees, but he subsequently sold out his share to plaintiff No.1, therefore, was not impleaded in the original suit. The suit was contested on behalf of the petitioners with the averments that plaintiffs were in occupation of the property as their tenants and on their demand of the cultivation share, they not only denied to pay, but a forged and fictitious contract was grafted to deprive them of their valuable property. In pros and cons evidence in bulk was examined and ultimately the suit was decreed by the learned trial Court vide judgment and decree dated 23.10.2010 while directing respondents/plaintiffs to make payment of balance sale price within 30 days. Though the judgment of the learned Trial Court was assailed by the present petitioners through an appeal before the learned Lower Appellate Court, but on the other side, the respondents/decree holders failed to deposit the balance sale consideration and the latters filed an application beyond the stipulated period on 25.11.2010, before the Court of first instance for extension of time, which was declined on 09.12.2010. The respondents/ decree holders successfully assailed the same through Civil Revision, which was allowed on 15.03.2012 and appeal of the present petitioners against the judgment and decree of the learned Trial Court failed on the same day. On one hand, the petitioners through Civil Revision in hand have assailed the judgments and decrees of two Courts below, whereby they concurrently decreed the suit of the respondents/ plaintiffs and on the other hand by filing connected Writ Petition No.4984/2012, the order dated 15.03.2012 of the learned Lower Revisional Court whereby time period for deposit of balance sale consideration was extended, has been assailed. As common questions of law and facts inter se the parties with regard to same property are involved in both the files, therefore, this Court has proposed to decide both the lis jointly through this single judgment. However, the source point for reference will be Civil Revision in hand.

2 Mr. Tariq Zulfiqar Ahmad Chaudhary, Advocate/learned counsel for the petitioners submitted that alleged agreement to sell (Exh. P.1) being a document of financial liability and future obligations was required to be proved at least by producing two witnesses, but none of them was examined; that the stamp paper of Exh. P.1 was also not purchased by the alleged vendor, therefore, it was to be excluded from the evidence, but both the Courts below erred in law while ignoring the mandate of Articles 17 and 79 of Qanun-e-Shahadat Order, 1984; that Rab Nawaz, the alleged executant of Exh. P.1, was an illiterate person and the contract was maneuvered by the tenants to prolong their possession over the land, but the

Courts below failed to consider the statements (Exh. D-2 and Exh.D-3) of Sardar Muhammad brother of the Attorney as well as that of Rafique, one of the plaintiffs, wherein they deposed that no transaction of sale qua the subject property had ever been effected; that the judgments being tainted with misreading and non-reading of evidence available on file were illegal and unlawful, which were liable to be set aside and that the learned Revisional Court was not within its jurisdiction to extend the time limit for deposit of remaining sale consideration, hence the impugned judgments of both Courts below as well as afore-noted order of the Revisional Court are liable to be set aside.

3. In contra, learned counsel for the respondents/plaintiffs refuted the arguments of learned counsel for the petitioners and emphasized with great vehemence that unshaken quality evidence was examined to prove the contents of the agreement as well as transaction reflected therein; that on the basis of minor contradictions or infirmities, the statements of the witnesses could not be discarded, but the substance and gist of their depositions fully proved the case of the plaintiffs; that concurrent judgments of two Courts below cannot be interfered with while exercising powers under section 115 of the Code of Civil Procedure, 1908 and finally prayed for the dismissal of instant Civil Revision as well as connected Writ Petition No.4984/2012.

4. I have heard the arguments advanced by learned counsel for the parties, perused the record as well as judgments of two Courts below and order of the Revisional Court with their able assistance.

5. As per contents of the plaint four persons; Allah Ditta son of Wali Muhammad, Muhammad Ashraf, Allah Ditta son of Din Muhammad and Muhammad Akram purchased specific shares from Rab Nawaz, but originally the suit was instituted by Allah Ditta son of Wali Muhammad, legal heirs of other Allah Ditta and widow of Muhammad Akram, without impleading the fourth vendee, Muhammad Ashraf, while extrapolating that the latter had agreed to sell his purchased share to plaintiff No.1 through a subsequent independent agreement dated 06.06.1996, however, during trial proceedings, Muhammad Ashraf filed an application for his impleadment contending therein that he neither sold out his share nor executed a contract, anyhow his petition was accorded and he was impleaded in the group of plaintiffs, but without bringing any change in its contents, the amended plaint was filed. It was also taken by surprise that the alleged agreement executed between Muhammad Ashraf and Allah Ditta plaintiff No.1 was not brought into picture despite the fact that the former being DW-8 in his cross-examination denied

its execution. A specific fact pleaded by the plaintiffs in their plaint was not only left unattended by them, but explicit dichotomy and contradiction among them to this extent has forced the Court to draw a negative inference.

6. The case of respondents/plaintiffs hinges on a sale and prior to probe of pleadings and evidence of the parties, it will be advantageous to advert to the definition of sale provided in section 54 of the Transfer of Property Act, 1882, which envisages transfer of immoveable property for price, paid or promised. In order to enforce sale, it is sine qua non for the vendee to establish; firstly, that transaction was struck with a title holder or having authority to create a right, secondly, it was settled against consideration and thirdly, that it was accompanied by delivery of possession. Mere execution of agreement, attestation of mutation or even registration of sale deed by itself does not furnish proof of ingredients of sale, referred herein above and whenever any of such documents as well as transaction of sale reflected therein is questioned or denied, the onus lies on the beneficiary to prove the transaction as well as his document, if executed for its acknowledgement.

7. It was not an issue that property under the lis titled by the State was allotted to Rab Nawaz, the predecessor of the petitioners on 31.07.1974 and as per detail referred in order dated 02.06.2003 (Exh. P-13) of the DO (R), it was cancelled and the land was resumed on 31.01.1989, however the allotment was restored by the learned Member Board of Revenue while allowing ROR on 30.07.1995, meaning thereby that on the day when agreement Exh. P-1 dated 03.09.1989 was executed, there was no allotment in favour of Rab Nawaz for its further sale. This fact was also admitted by one of the plaintiffs, Muhammad Ashraf (PW-8), while deposing as under:--

In such a situation, question arose whether the alleged vendor, who was neither title holder nor equipped with the allotment rights, was competent to settle the sale?, the answer would be "no" and learned counsel for respondents on confrontation found himself in trouble to defend the alleged sale.

8. Anyhow, the pivotal question involved in the case in hand was that the petitioners/defendants not only specifically denied the execution of agreement, rather claimed it to be forged, fictitious, outcome of fraud and in such situation, the respondents being its beneficiaries were bound to prove its execution as well as transaction reflected therein. Mere admissibility of document as evidence is not ipso facto the proof of its execution. Due execution of document is required to be proved in consonance with the provisions of Qanun-e-Shahadat Order, 1984, which in itself

is a complete code to provide the mode of proof of facts by way of oral and documentary evidence. The question agreement (Exh.P.1) being a document involving financial obligation was to be proved as per mode provided under Article 79 of the Qanun-e-Shahadat Order, 1984. What are its requirements for proving such a document, can be understood by reading it, which for facility of reference is reproduced hereunder:--

> If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the executant of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

This provision explicitly lays down that such a document can only be used as evidence until two attesting witnesses, at least, have been called for the purpose of proving its contents, execution and construction, but nothing short of it can even be imagined for proving the same. The word "attestation" means the act of witnessing the construction of document acquiescing ones name as witness to that effect, which also includes putting his thumb impression-signatures to testify that he witnessed its execution and such a signatory is called an "attesting witness". To test whether the respondents through the material available on suit file succeeded to prove their hub document as well as sale mentioned therein, when adverted to the basic agreement, it was found to have been attested by Sultan Ahmad as well as Muhammad Latif son of Allah Ditta Parbana Sial, residents of Chak No. 100/ 15-L being its marginal witnesses. Verily, the former had already died prior to recording of evidence. No doubt as per requirement of Article 80 of the Order, ibid an attempt through an application was made by the plaintiffs for summoning of his son, Ghulam Abbas, to testify signatures of his father available over Exh. P-1, which was accorded, but surprisingly, he was given up without assigning any reason through a statement dated 23.01.2010 made by their counsel and when learned counsel for the respondents was called upon to justify, why despite his summoning, he was not examined, his reaction was that in the meantime the witness had already been approached by the petitioners, therefore he was no more reliable to be examined, was not appealable. Had he been examined and he would have made an inimical

statement, facing with such a situation, he would have been declared hostile and subjected to cross-examination, so that truth could be elucidated. Moreover, Muhammad Latif (PW-10) who portrayed himself to be second marginal witness though deposed in his statement-in-chief that agreement was signed by Sultan Ahmed deceased, but he did not utter a single word to verify the signatures of the latter. Additionally no effort on behalf of plaintiffs was made for the comparison of signatures of the attesting witness available at Exh.P1 with any of his admitted one. The scheme provided in the Order, 1984 does not appear to allow a party to rely on presumptive or other evidence of execution when he is unable to comply with the provision of Article, ibid. So non-examination of summoned witness compelled the Court to draw an adverse inference.

Mr. Tariq Zulfiqar Ahmad Chaudhary, Advocate for the petitioners emphasized that other marginal witness Muhammad Latif, was also not examined, rather for ulterior motive, designedly Muhammad Latif (PW-10), son of one of the vendees/plaintiffs while getting benefit being name sake portrayed himself to be attesting witness of Exh. P-1 and to persuade, he while drawing attention of this Court succeeded to establish that the marginal witness of Exh. P-1 was Parbana Sial by his caste and shown to be resident of Chack No. 100/15-L, whereas Muhammad Latif son of vendee when appeared as PW-10, he exposed himself to be an Arain by his class and resident of Chak No.101/15-L. The diversity to the extent of caste as well as residence between them appearing on the surface of record could not be over ruled by mere saying that it was a pen mistake. Nevertheless moving ahead, when his statement was scanned, it appeared to be inadequate to prove the contents of the agreement as well as transaction referred therein. Muhammad Latif, PW-10 stated as follows in his cross-examination as under:--

This proved that he did not witness the transaction, who also failed to disclose how much sale price was paid by each of the vendees. He while deposing as under:--

obliterated the case of the plaintiffs. Rana Muhammad Yousaf, Stamp Vendor (PW-2) in clear terms deposed that Stamp of Exh. P-1 was purchased by Rab Nawaz. He also did not allege that the contract was scribed by him, whereas PW-10 antipodal to him deposed that Stamp was purchased by Ashraf from Saghir Ahmad and the latter scribed it, hence PW-10 fully falsified the statement of PW-2. This Court is conscious of the fact that prior to promulgation of Qanun-e-Shahadat Order, 1984 a document could be proved by calling a person who signed or scribed it or a person in whose presence the document was written or signed but thereafter Article 17 of the Order is distinct departure, which ordains that a document creating financial

liability or future obligation has not only to be attested by at least two witnesses and in order to prove such document he has to call those two attesting witnesses otherwise it has to be excluded from consideration. The case in hand is a classic example where requirement of aforenoted provisions were not followed.

9. Though the plaintiffs in order to prove the original transaction examined, Bashir Ahmad (PW-6), but contrary to Stamp Vendor (PW-2), he stated that on 03.09.1989 when the agreement was executed only one Stamp Paper was purchased by Rab Nawaz, whereas the other Stamp Paper for the execution of Power of Attorney had already been purchased by the latter. He further deposed in his cross-examination that bargain was settled through him and one Abdul Aziz, but one of the plaintiffs, Muhammad Ashraf (PW-8) negated PW-6 while wording that sale was struck through one Manan. Neither the broker, Manan and Abdul Aziz were brought into picture by the plaintiffs, nor Allah Ditta, plaintiff No.1 despite his availability examined himself. The formers could be the best persons to prove that bargain was settled and sale price was paid, whereas the latter could affirm that the agreement was executed and the vendor was not impersonated. No doubt Muhammad Ashraf, one of the plaintiffs (PW-8) appeared being witness, but was not originally impleaded in the plaint rather it was the stance of the other plaintiffs that he had sold out his share through a specific agreement to plaintiff No.1 and in such situation withholding of the aforementioned witnesses compelled the Court to draw an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, 1984.

Moreover, no doubt as per its perusal the stamp paper of agreement (Exh.P1) was issued to Rab Nawaz, but the endorsement made by the Stamp Vendor on its back did not bear signatures/thumb impression of the former. Though, the Stamp Vendor, Rana Muhammad Yousaf (PW2) along with his Register was examined, who deposed that he had issued two stamp papers as per demand of Rab Nawaz, one for execution of agreement to sell in favour of Muhammad Ashraf and the other for execution of power of attorney in favour of one Haji Bashir, yet he in his cross-examination not only admitted that the stamp paper of Exh. P-1 did not bear the thumb impression/signatures of Rab Nawaz, but he also conceded that the parties were not personally known to him, whereas the Deed-Writer or his relevant Register was not examined without any justification despite his/its availability. The emphasis of learned counsel for the respondents that Notary Public, who notarized the agreement was produced being PW3, hence any lacuna on the part of respondents, if any, stood cured, was not tenable on the counts; firstly, that an agreement was not required to be notarized by any imagination of law, secondly, the Notary Public could not be equated at par with the author of a document. Moreover, this PW

admitted in his cross-examination that the endorsement on Exh.P1 as well as his Register was made by his clerk, so his deposition was of no help to prove the contents authored by the scribe.

10. Ch. Asif Amin and Ch. Aftab Shabbir Arain, Advocates for the respondents emphasized with great vehemence that at the time of execution of Agreement, the vendor for its acknowledgement also executed General Power of Attorney (Exh.P2) in favour of Bashir Ahmad (PW-6), which fact was duly proved through examination of Zubair Ahmad, Stamp Vendor (PW-4), Notary Public (PW-3) and Rustam Ali, the Registrar (PW-9), therefore, Courts below were perfect while relying upon it, was misconceived. A careful study of the plaint revealed that its contents were silent to the effect that a supporting document i.e. General Power of Attorney to supplement the sale for its acknowledgement was also executed on the same day. It is settled by now that a party is not allowed under the law to improve its case beyond what was originally set up in the pleadings. As per principle of "secundum allegata et probata" a fact has to be alleged by a party before it is allowed to be proved, which has full command of provisions of Order VI Rule 2 and Order VIII Rule 2 of the Civil Procedure Code, 1908. As such any evidence led by a party beyond the scope of its pleadings is liable to be ignored. Reliance can be placed upon judgments reported as Muhammad Wali Khan and another v. Gul Sarwar Khan and another (PLD 2010 SC 965) and Haider Ali Bhimji v. VI Additional District Judge, Karachi (South) and another (2012 SCMR 254), wherein it was held that in absence of specific pleadings, the Court could not allow a party to grope around and draw remote inferences in one's favour from his vague expression, hence evidence, if any, led by the respondents to establish Exh. P-2 was of no help to them being departure to their pleadings. Moreover, as the execution of Exh. P.2 was also denied by the petitioners, therefore, the respondents being its beneficiary were bound to prove the same independently, but they did not examine its scribe, whereas one of its attesting witness, Ch. Shakar Din, had already departed. The other marginal witness, Muhammad Ashraf was one of the plaintiffs and his statement being an interested person could not be given due weight. Regardless of the fact that it was not proved as per law, when both the documents i.e. agreement (Ex:P-1) and General Power of Attorney (Ex:P-2) were minutely gone through, this Court was not persuaded to conclude that General Power of Attorney was executed/attested to supplement the agreement. Adverting to the contents of Exh.P.1, there was although specific clause which reads as under:--

but admittedly prior to execution of Exh.P1, neither Exh. P.2 was scribed nor registered, rather on the same day it was written, whereas attested on the following

day. The deep study of the latter affirmed that it was completely silent that any contract of sale was effected with the respondents, rather the powers delegated to the agent affirmed that he was authorized to transfer the suit land through sale, gift, exchange etc. as well as to receive token sale price. Had Exh. P-2 been executed/attested for the confirmation of sale in favour of the respondents, the following powers would have not been delegated to the agent:-

11. It would also be pertinent to note that despite the fact that alleged Power of Attorney in favour of PW-6 was executed and registered on 3/4.09.1989, but the agent or the vendees did not pursue the case of the vendor for the restoration of the lot. Memorandum of ROR (Exh.D1) was reflective of the fact that on 07.09.1991 (two years after the execution of agreement as well as Power of Attorney) it was personally filed by Rab Nawaz, allottee, wherein on 09.08.1997 much prior to institution of suit, not only the latter made a statement (Exh.D4) that neither he had sold his property nor executed an agreement to sell, rather Sardar Muhammad, the real brother of the alleged General Attorney also got recorded his statement (Exh.D2) that the allottee was illiterate and folk person, who had appointed him being special Attorney to follow up the case and above all Mohammad Rafique plaintiff No.3 also made a statement (Exh.D3) that the suit land was not cultivated by them rather it was being ploughed by the allottee, and that the latter had not settled any agreement of sale with them. Neither during the proceedings of ROR nor in the suit in hand any effort was made to challenge the said statement.

12. Corollary of the above appreciation of the evidence is that the alleged vendor had no title or allotment rights to enter into sale; stamp paper of agreement (Exh.P.1) was not purchased by the vendor; both the marginal witnesses were not examined and if for the sake of agreement, one was examined, he not only failed to prove the contents of the contract as well as transaction, but he being interested one was not trustworthy; the scribe as well as one of the available vendees besides the brokers through whom the alleged transaction was settled were also withheld; stricto sensu General Power of Attorney (Ex:P-2) was not proved and more importantly the powers delegated to the agent were reflective of the fact that prior to it no sale/bargain with the respondents qua suit land was effected, hence both the Courts below not only committed material irregularity as well as illegality to pass the impugned judgment rather the same being its wrong estimation cannot be sustained. This Court is conscious of the fact that normally the revisional jurisdiction is not invoked, where the Courts below rendered a concurrent view of fact, but when it is based on extraneous reasoning then obviously, this Court is competent and equipped with the jurisdiction to annul such concurrent findings.

13. The additional fact for non-suiting the respondents/plaintiffs was that admittedly the learned Court of first instance while dealing with their suit for specific performance decreed the same conditionally while directing them to deposit balance sale consideration of Rs.1,000/- within 30 days of that order, failing which suit would deem to have been dismissed. The sole related fact of the case to that extent is, whether the Civil Court had become functus officio or still having seisin over the decree was legally competent to pass an order to extend time for deposit of decretal amount by the private respondents. Moreover, the nature of decree would also to be considered as the preliminary or final and what should be the just and fair order to have been passed by a Court in this regard.

14. The aforesaid question after discussing the earlier judgments rendered by superior Courts in pros and cons on the proposition in hand has already been authoritatively clinched by this Court in the judgment reported as Muhammad Ismail v. Muhammad Akbar Bhatti (PLD 1997 Lahore 177) and the relevant para No. 7 thereof is reproduced hereunder:--

> "The ratio, deducible from the preceding examination, is: Firstly, that decree passed by court, in an action for specific performance of agreement of sale, is in the nature of preliminary decree. It actually partakes the character of a contract; vendee has to deposit the purchase price, cost for purchase of necessary stamps for the execution of conveyance deed and so on so forth; while the seller had to appear in the Court, sign the conveyance deed and receive purchase price. In this state of affairs, it clearly follows that decree, passed in such an action, is not final but preliminary in nature and the court passing the decree retain seisin over the lis and has power to enlarge/extend the time for payment of purchase price fixed therein. The court, however, had to pass such orders after objectively assessing the merits of such applications. Secondly, Specific Relief Act is an adjective law and substantive law is to be looked for elsewhere. It presents a codification of principles derived from long series of precedents and practices of English Courts of Equity. Specific Relief Act so is based upon principle of Equity, reason and good conscience. The most leading principle is that 'who comes to get the equity, must do equity to others'. Thirdly section 35 of the Specific Relief Act lays down a procedure for rescission of the written contract. It applies to both vendor and vendee. Any one of such party may move the Court by motion in the action for an order for putting an end to contract. This mechanism is, however, subject to following limitation/namely where the trial court has decreed the suit for specific

performance of contract subject to condition that purchase price shall be deposited in court within a specific time and also ordered that if that money is not put in within that time, the suit shall stand dismissed, the court has no power to extend the time as in such a case; that the decree by court is final and self-operative and in case of default of payment of purchase price; the mandate of court tantamounts to rescission of the contract. In such a case recourse to section 148 of C.P.C. or section 151, C.P.C. will not be permissible. Fourthly, the court will not allow the plea for extension of time if it finds that it will occasion a wrong to the other side. Furthermore, in order to succeed in an action for specific performance, the plaintiff had to show that he had been willing and ready to perform his part of contract."

This view has also been followed by this Court in case reported as Muhammad Iqbal through Legal Heirs v. Bashir Ahmad and 19 others (PLD 2002 Lahore 88).

15. Resultantly, this Civil Revision and connected Writ Petition No.4984 of 2012 are allowed, impugned judgments and decrees of two Courts below as well as order dated 15.03.2012 passed by the learned Revisional Court are hereby set aside and suit of respondents/plaintiffs besides their application for extension of time to deposit balance sale consideration while restoring order dated 09.12.2010 of the Court of first instance are dismissed. There is no order as to costs.

ZC/R-5/L Revision allowed.

PLJ 2018 Lahore 851

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

AZIZ ULLAH through Legal Heirs--Appellants

Versus

MUHAMMAD HANEEF through Legal Heirs--Respondents

R.S.A. No. 52 of 2004, heard on 27.4.2017.

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

----O. XIII, R. 4--Exhibiting of document by Court--True meaning and purport of word "Exhibit"--Scope--Object and effect--It means a document or tangible object produced before Court for its inspection or shown to a witness while giving evidence or referring same in his deposition--It could be taken into possession and retained by Court on lis, file for reference as well as identification in judgment--If a party intends to prove a document through witnesses, he only refers that document for its proof, then Court exhibits same--Witness has no role in working document, as exhibit rather Court assign the exhibit number to it--Ex-hypothesi exhibit means a document exhibited for purpose of being taken into consideration--Any question with regard to admissibility of document be decided when it is actually exhibit--Its proof is altogether different. [Pp. 854 & 855] A

Ch. Habib Ullah Nehang and Raja Muhammad Hanif, Advocates for Appellant.

Rana Muhammad Nazir Saeed, Advocate for Respondents.

Date of hearing: 27.4.2017.

JUDGMENT

Verily, subject property measuring 98 *Kanals* falling in Khewat No. 22 of Mouza Rakh Mari, Tehsil Rajanpur was owned by two brothers, namely, Muhammad Hanil, Muhammad Latif and their mother Maqsood Mai (hereinafter to be referred as promisors). Aziz Ullah, plaintiff now deceased represented through present appellants (hereinafter to be referred as promisee) instituted a suit for declaration while claiming his exclusive ownership with regard to property on the basis of alleged sale settled among them through agreement dated 11.11.1996 (Exh. P-1) with the assertion that it was purchased by him against a consideration of Rs. 12,00,000, the possession whereof was also handed over to him after paying the entire price and in alternate he prayed for the relief of specific performance of the same. The suit was not only contested by promisors with the stance that on 20.01.1996 the promisee had illegally taken over the possession of their residential house against whom case F.I.R. No. 35 of 1996 was got registered at Police Station Saddar Rajanpur and was arrested therein; that another criminal case was also lodged against him for devastating their crops forcibly and that neither any transaction qua sale of the subject property among the parties followed by the disputed agreement was settled nor consideration was received on their part. They also lodged their independent suit while asserting their possession as well as

ownership and prayed for the cancellation of agreement being forged, fictitious and fraudulent document. After settlement of issues and recording evidence of the parties, the learned Trial Court in terms of its consolidated judgment dated 29.10.2003 decreed the suit of the promisee and dismissed the rival suit of the promisors, which was successfully assailed by the latter through appeal and the learned Additional District Judge, Rajanpur on 28.06.2004 while setting aside the judgment of the Court of first instance not only dismissed the suit of the promisee, but the other one of his rivals was decreed, which is under resistance of this appeal.

2. Inaugurally, it is submitted by Mr. Habib Ullah Nehang, Advocate, learned counsel for the promisee that while applying philosophy laid down in Article 79 of the Qanun-e-Shahadat Order, 1984, the promisee fully proved the basic agreement (Exh P-1) through examination of its two attesting witnesses (PWs 2 and 3) and the Deed Writer (PW-4), whose statements are harmonious with regard to the settlement of bargain, payment of sale consideration and its construction and the learned Trial Court after due appreciation of the same was perfect in decreeing the suit, whereas the learned Lower Appellate Court erroneously dismissed the same on the sole ground that the agreement (Exh. P-1) was exhibited in the statement of his counsel despite the fact that it was tendered without any objection and that the findings of learned Additional District Judge to the extent that (Exh. P-1) could not be proved was erroneous, who failed to appreciate the deposition of the related witnesses. He further added that at the time of execution of contract in revenue record the name of predecessor of the promisors was wrongly mentioned, therefore, property in dispute could not be transferred to the promisee and the agreement was executed with the mutual understanding that after its correction, the same will be transferred to the latter, but despite the requisite correction, the former did not fulfill their obligation, whereupon the promisee was constrained to invoke the jurisdiction of the Court of law for its enforcement by filing a civil suit which was wrongly, dismissed by the learned lower Appellate Court through the impugned judgment.

3. On the contrary, Rana Muhammad Nazir Saeed, Advocate, learned counsel for the promisors submitted that the promisee was a land-grabber who on account of illegally occupying the residential houses of the promisors was arrested and during subsistence of criminal litigation it could not be expected that a mutual transaction could be struck among them without the intervention of some other person(s) and that too without transfer of title in favour of promisee despite making of the entire payment. He further added that the disputed document was forged and fictitious, which was neither scribed by a license holder Deed Writer nor the stamp paper was purchased by the promisors. Moreover, the Stamp Vendor was also not examined and the learned lower Appellate Court was perfect in dismissing the suit after well appreciation of the material available on suit file, whose judgment was also to be given preference over the judgment of his subordinate Court.

4. Due consideration paid to the arguments of learned counsel for the parties and record of the learned Trial Court scanned.

5. The bone of contention among the parties is agreement (Exh.P-1) and despite the fact that its marginal witnesses as well as the scribe were examined, but it could not be marked or assigned any exhibit number, which was done when learned counsel for the promisors subsequently made his statement for closure of evidence. The learned lower Appellate Court at Para No. 13 of the impugned judgment took serious view of the fact that it was not given any exhibit number in the statements of its signatories and author, which reads as under:

> ".... The learned Trial Court after going through the evidence of the parties has declared that the Respondent No. 1 has established the execution of this agreement to sell. But perusal of the file does not support the conclusion reached at by the learned Trial Court. The alleged agreement to sell Exh. P-1 is a private document. But it has been produced in the evidence through the statement of the learned counsel for the Respondent No. 1, which could not be exhibited under the law. The scribe and the marginal witnesses of the alleged agreement to sell have deposed that an agreement to sell was executed but they have not stated that the said agreement to sell was Exh. P-1. As such their statements are vague and do not relate to Exh. P-1. Neither the scribe nor the marginal witnesses have stated that Exh. P-1 is the agreement to sell which was allegedly executed by the appellant. As such it is declared that agreement to sell Exh. P-1 is not proved according to law."

6. Before embarking upon merits of the case, it is necessary and appropriate to assimilate the true meaning and purport of word "Exhibit" as well as its object and effect. After consulting various dictionaries, I have come to the conclusion that it means a document or tangible object produced before the Court for its inspection or shown to a witness while giving evidence or referring the same in his deposition so that it could be taken into possession and retained by the Court on the lis file for reference as well as identification in the judgment and when a party intends to prove a document through witnesses, he only refers that document for its proof, then the Court exhibits the same. The witness has no role in marking the document as exhibit rather it is the sole duty of the Court to assign exhibit number to it so that in the latter part of the proceedings it may be referred and identified from said number, so *ex hypothesi* exhibit means a document exhibited for the purpose of being taken into consideration in deciding some question or other in respect of proceedings in which it is filed. Any question with regard to admissibility of a particular document for the purposes of the proceedings must be decided at the time when the document is tendered and before it is actually marked as an exhibit, whereas its proof is altogether a different subject, which is going to be discussed in latter part of the judgment. After going through the evidence, it is revealed that Ghulam Qasim (PW-2), one of the marginal witnesses of Exh. P-1 while making his statement-in-chief stated as under:

اقرار نامہ جو میرے سامنے ہے یہ وہی ہے انگوٹھا بطور گواہ میرا ہے۔

In same terms the other attesting witness Muhammad Ramzan (PW-3) deposed as follows:

بوقت تحریر اقرار نامہ میں موجود تھا اقرار نامہ پیش کردہ وہی ہے جس پر میں نے انگوٹھا لگایا تھا۔

The Deed Writer, Muhammad Abbas (PW-4) also followed PW-2 and PW-3, when while referring the contract in his statement he uttered that:

بیان کیا کہ اقرار نامہ پیش کردہ میں نے تحریر کیا ہے۔

This all shows that the reference of the document was explicitly made by all the relevant witnesses and the omission that it was not labeled with exhibit number could not score out the document from its consideration at the time of final adjudication. Moreover, the perusal of Exh. P-1 reveals that it was not only tagged with the file but marked being Exh.P-1 on 14.03.2000 when statements of PW-2 to PW-4 were recorded. So, it is clear that due to some omission on the part of the Court, the exhibit number could not be referred to despite the fact that the document was so assigned and to rectify the omission, on 13-4-2000 the learned counsel for the promisee was allowed to make a reference of Exh.P-1 in his statement without any objection. Ultimate conclusion of the said discussion is that above referred finding of learned Additional District Judge does not appear to be justified to that extent.

7. Resuming to the facts of the case, it is an admitted fact that alleged agreement (Exh. P-1) was scribed after the promulgation of Qanun-e-Shahadat Order, 1984 and being beneficiary the onus probandi to prove the same was upon its beneficiary. The principles regarding burden of proof are enumerated in Articles 117 to 120 of the Order ibid, which read as under:--

> 117. *Burden of proof* (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 118. *On whom burden of proof lies.* The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 119. *Burden of proof as to particular fact.* The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 120. *Burden of proving fact to be proved to make evidence admissible.* The burden of proving any fact necessary to be roved in order to enable any person to give evidence of any other fact is on the person who wishes' to give such evidence.

It is vivid from the perusal of the afore-referred provisions of law that Party to the lis through the modes provided there-under could prove a fact and once initial onus has been discharged by the party upon whom it was resting, it would shift to the

other party for its rebuttal thereof or for the proof otherwise. The case of the promisee hinges on agreement (Exh.P-1) and it relates to matter of financial and future obligation, which mandated that it must be attested in terms of Article 17(2)(a) of the Order ibid, the contents whereof could only be proved at least through examination of two male marginal/attesting witnesses. The attesting witness is one, who not only sees document being executed, but also appends his signature/thumb impression on it after understanding its contents and if the said attesting witness while appearing in the witness-box to prove the contents of document fails to depose that what were the contents of the document or could not verify his signature/thumb impression, then he cannot be treated an attesting witness. So under the philosophy of afore-referred Article, if a document of such nature is not . attested by the required number of witnesses or could not be proved by the said witnesses, it shall not be used as piece of admissible evidence. No doubt, Exh.P-l was attested by required number of witnesses and to ascertain whether beneficiary succeeded to prove its contents as well as the transaction reflected therein requires its reappraisal by this Court as both the Courts below scanned it with different angles.

8. The basal document/agreement (Exh.P-1) was executed on a stamp paper and study of the original one available on the suit file reveals that it was issued only in favour of Muhammad Hanif and Muhammad Latif, whereas their mother's name was not shown by the Stamp Vendor while making an endorsement on its back, when the same was issued. The most alarming fact was that it was not signed and thumb marked by any of the promisors. The doubt about its issuance due to non-signing of its purchasers could be diluted through examination of the Stamp Vendor, but surprisingly he was withheld without any excuse. The submission of learned counsel for the promisee that the Stamp Vendor might have omitted to obtain thumb-impressions of the purchaser and on this score alone the genuineness of its issuance could not be disputed is not correct. The promisors were disputing execution of the agreement from its inception and in such situation, the promisee was under obligation to prove every aspect of its construction. Moreover, the alleged omission on the part of Stamp Vendor could only be proved through examination of his Stamp Vending Register and on account of its non-production in spite of availability, the inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984 has to be drawn against the promisee. The other independent person, who scribed it was, however, examined by the beneficiary, who being PW-4 explicitly admitted that neither the promisors were earlier known to him nor sale consideration was paid in his presence and he also conceded in his cross-examination that he joined the inquiry conducted by GAR/MIC regarding genuineness of Exh.P-1 but despite asking he could not give the detail of said proceedings, whereas the promisors brought on record certified copy of PW-4's statement (Ex.D-5) made before the Magistrate, which was duly signed by him and its perusal reveals that therein he absolutely denied to have scribed and signed it. This document could not be rebutted by the promisee, which being copy of judicial record attained strong presumption of truth. Moreover, both the attesting witnesses

(PWs 3 and 4) neither could give the exact date of the execution of Exh.P1 nor could explain the description, of the disputed property for which the sale consideration was paid to the promisors, even they failed to highlight its terms and conditions.

9. It was the defence of the promisors that earlier the promisee along with others forcibly occupied their house on 20.01.1996 and in this regard, FIR No. 35 was lodged against them on 13.03.1996, who during its investigation remained behind the bars and for taking revenge, a false suit with regard to the subject property was instituted. The promisee being PW-1 conceded that he was arrested in the said criminal case. This fact was also admitted by other witnesses of the promisee. A prudent man cannot believe that when, on one hand, criminal litigation was going on between the parties, then, on the other hand, an agreement without intervention of some respectable was settled and the accused of a pending criminal case paid entire sale consideration to the complainant of said case without getting the property transferred in his name or execution of any registered instrument in this behalf. The submission of learned counsel for the promisee that the property in dispute could not be transferred in favour of the promisee despite making entire sale consideration as the parentage of promisors Nos. 1 and 2 and that of husband of promisor No. 3 was wrongly mentioned in the revenue record, is not tenable on two counts; firstly; that the promisee nowhere asserted the said ground in his plaint and secondly he while appearing in the witness-box being PW1 in response to a question surprisingly replied that property was not transferred in his favour because he had no more funds to pay the mutation fee. The relevant glimpse of PW-1's statement is reproduced hereunder:

انتقال میں نے فیس کی کمی کے پیش نظر درج نہ کرایا تھا۔

The same stance was also deposed by the attesting witness (PW-2) with following words:

اس کے بعد لطیف حنیف نے کہا کہ تم انتقال کروالو لیکن عزیز نے کہا کہ میرے پاس انتقال کا خرچہ نہ ہے لہذا فی الحال تم اقرار نامہ لکھ لو۔

It is not believable that a person having such a financial status, who paid a huge amount without its withdrawal from the Bank did not have a petty amount to pay as government fee for its transfer in his favour.

10. The accumulative effect of the appreciation of evidence on record and discussion supra is that this appeal bounds to fail, which is dismissed with cost throughout.

(K.Q.B.) Appeal dismissed.

PLJ 2018 Lahore 905
[Multan Bench Multan]

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

NAZAR MUHAMMAD and another--Petitioners

Versus

***Mst.* AYESHA BIBI (WIDOW) deceased through her Legal Heirs and another--Respondents**

C.R. No. 366-D of 2009, decided on 21.9.2015.

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

----S. 42--Suit for declaration--Decreed--Appeal--Allowed--Illirate lady--Suit land was inherted by her father, mother and sister--Preparation of forged power of attorney--Mutation deed--Concurrent findings--Revisional jurisdiction--Challenge to--At time of execution of power of attorney neither any independent advice was available with plaintiff/respondent nor any independent witness attested said power of attorney being marginal witness--There is not an iota of evidence that prior to attestation of mutation by attorney in favour of his father, attorney take his principal into confidence--Said lapse is also sufficient to annul disputed sale reflected in mutation--Concurrent findings of fact on face of record have been eminently arrived at by both learned Courts below and they rightly decreed suit filed by respondent on valid reasons through impugned judgments and decrees--Scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by subordinate Courts in discharge of their judicial functions--Civil revision was dismissed.

[Pp. 906 & 907] A, B & C

M/s. Muhammad Maalik Khan Langah and Muhammad Atif Rana, Advocate for Petitioners.

Mr. Jamil Ahmad Chauhan, Advocate for Respondents.

Mr. Mubashar Latif Gill, AAG for Respondent.

Date of hearing: 21.9.2015.

ORDER

The precise facts of the case are that by filing a declaratory suit *Mst.* Ayesha Bibi, Respondent No. 1/plaintiff claimed-that she was an illiterate lady aged about 72 years and the suit land was inherited by her from the legacy of her father, mother and sister; that Nazar Mohammad petitioner/Defendant No. 1, who was her nephew along with his son Abdul Shakoor, Defendant No. 2 mamauvered to prepare a forged power of attorney dated 7.2.1995 with regard to the suit property and transferred the same to Defendant No. 1/petitioner through mutation dated 28.3.1995, which was liable to be cancelled while declaring the same to be fictitious

and fraudulent document. Both the learned Courts below after appreciating the evidence available on file concurrently decreed the suit of the plaintiff/respondent. Feeling dissatisfied, the instant civil revision, has been filed by the petitioners/defendants.

2. Arguments heard. Record perused.

3. It is straightaway noticed that neither the scribe nor stamp vendor were produced by the petitioners/beneficiary to prove the valid execution of power of attorney. The Plaintiff/Respondent No. 1 is an illiterate old aged lady and at the time of recording her evidence as PW1, she was about 90 years of age and she stated that her nephew along with his son by making fictitious power of attorney had deprived the said lady from her valuable property. It reveals that at the time of execution of power of attorney neither any independent advice was available with the plaintiff/respondent nor any independent witness attested the said power of attorney being marginal witness. There is not an iota of evidence that prior to attestation of mutation by the attorney in favour of his father, the attorney take his principal into confidence. The said lapse is also sufficient to annul the disputed sale reflected in the mutation. Reliance can be placed upon the cases reported as *"Jamil Akhtar and others vs. Las Baba and others"* (PLD 2003 Supreme Court 494) and *"Rasool Bukhsh and another vs. Muhammad Rmzan"* (2007 SCMR 85). Even by exercising alleged authority, the attorney transferred the disputed property in favour of his father, which act is sufficient to annul the transfer in favour of Defendant No. 1. Reliance can be placed upon the cases reported as *"Muhammad Yasin and another vs. Dost Muhammad through Legl Heirs and another"* (PLD 2002 Supreme Court 71) and *"Mst Hajyani Bar Bibi through L.R vs. Mrs. Rehana Afzal Ali Khan and others"* (PLD 2014 Supreme Court 794). The concurrent findings of the fact on face of record have been eminently arrived at by both the learned Courts below and they rightly decreed the suit filed by Respondent No. 1 on the valid reasons through the impugned judgments and decrees.

4. The scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by the subordinate Courts in the discharge of their judicial functions. Safe reliance can be placed on the judgments passed by the august Supreme Court of Pakistan reported as *"Aurangzeb through L.Rs. and others vs. Muhammad Jaffar and another"* (2007 SCMR 236) and *"Bashir Ahmed vs. Ghulam Rasool"* (2011 SCMR 762).

5. Sequel of the above discussion is that the instant revision petition being devoid of any merit and force is dismissed.

(Y.A.) Revision dismissed.

PLJ 2018 Lahore 929
[Multan Bench Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
MUHAMMAD ARSHAD and 2 others--Appellants
Versus
HAQ NAWAZ and others--Respondents

R.S.A. No. 8 of 1998, heard on 28.11.2017.

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

----S. 42--Civil Procedure Code, (V of 1908), S. 100--Appointment of General power of attorney for management of land--Revocation deed--Oral sale mutation by general attorney in favour of his sons--Mutation deed was annulled by A.C/Collector--Appeal--Dismissed by Additional Commissioner--Suit for specific performance on basis of oral sale deed--Decreed--Appeal--Allowed--Appellate Jurisdiction--Concurrent findings--As per opening contents of Power of Attorney it was executed for management of land, no doubt, that it also contained a clause therein that agent was authorized to dispose of land, but under law agent was required to act for gain of principal and if agent intended to derive benefit for his own or his kith and kin, he should have informed his principal prior to entering into any such transaction--Any furtive surreptitious transaction would not be binding upon Principal nor it could be protected under law--General Power of Attorney itself was neither a document for transfer of property as well as a conveyance deed nor it was agreement to sell property, rather it was a document for constitution of agency and as per settled principle of law neither agent himself could claim his ownership rights in suit land of his Principal merely on basis of agency document nor for his own kith and kins--Stamp Paper was not purchased for plaintiffs, whereas, signatures of person on whose behalf it was issued were also not procured--Neither Stamp Vendor, who issued it was examined, nor his relevant Register which as per practice was to be consigned to Record Room was summoned--Petition Writer, who scribed it besides his Register was also withheld--They could be best persons/record to belie allegation of lady that it was an antedated, fabricated and collusive document grafted after execution of Revocation Deed (Exh. D1)--It is correct that normally this Court does not interfere in 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 surface of such concurrent findings, this Court cannot shut its eyes and is always under obligation to rectify error by interference in such like illegal findings--Both Courts below badly failed to analyze facts and law on subject and committed grave irregularity and illegality while passing impugned judgments and decrees, which cannot be sustained in eye of law--Both Courts below have erroneously decreed suit filed by plaintiffs which being contrary to law and to usage having force of law cannot be sustained and same are liable to be interfered with by this Court while exercising jurisdiction u/S. 100 of Code of Civil Procedure, 1908--Appeal allowed.

[Pp. 935, 937 & 938] A, B, C & D

2016 SCMR 24 & 2004 SCMR 1001, *ref.*

Mian Anwar Mubeen Ansari, Advocate for Appellants.

Malik Javaid Akhtar Wains, Advocate for Respondents No. 1 & 2.

Date of hearing: 28.11.2017.

JUDGMENT

In short the background of the case out of which titled Regular Second Appeal has arisen was that subject land had been allotted to one *Mst.* Channan Jan alias Channu under Islamabad Oustees Scheme. Undeniably, she appointed Ghulam Rasool-Respondent No. 3 as her General Attorney, through Registered Deed dated 17.02.1973 (Exh.P6). The latter on behalf of his Principal got entered oral sale Mutation No. 61 on 14.10.1974 (Exh.P1) in favour of his real sons respondents (No. 1 & 2).Despite the fact that General Power of Attorney was rescinded through Revocation Deed dated 05.09.1974 (Exh.D1), even then the suit property was transferred to the sons of the agent, when aforenoted mutation was sanctioned on 18,11.1974, but it could not hold the field having been annulled by A.C./Collecter on 30.04.1975 while allowing appeal of *Mst.* Channan Jan and that order was further maintained when appeal of the Respondents No. 1 and 2 was dismissed by the Court of Additional Commissioner through order dated 25.10.1975 (Exh. D-5). Without assailing their orders any more before Revenue Forum, Respondents No. 1 & 2 opted to institute the suit in hand on 30.10.1975 before the Civil Court for declaration while claiming their ownership qua the subject property on the basis of oral sale mutation, which had already been cancelled or in alternative for grant of decree for specific performance of agreement to sell dated 02.09.1974 (Exh.P7), contending therein that *Mst.* Channan Jan being allottee orally agreed to sell the suit land to their father, Ghulam Rasool against consideration of Rs.40,000/- and after receiving full sale price she executed Power of Attorney on 17.02.1973 in his favour for the protection of his rights while authorizing him to pay the dues on her behalf to the State and after attestation of Conveyance Deed, he was empowered to transfer the land to anyone else; that the latter paid the arrears to the Crown and after attestation of Conveyance Deed on 1.8.1974 the agent on behalf of his Principal on the same day when proprietary rights were transferred to her, agreed to sell the suit land to his sons, Respondents No. 1 & 2 against a consideration of Rs. 40,000/- and after receiving Rs.38,000/- the contract (Exh.P7) was executed, whereas remaining sale price was paid at the time of attestation of afore-referred mutation. *Mst.* Channan Jan the alleged vendor resisted the suit with the firm defence that she had appointed the Attorney only for the management of the suit land; that she had never agreed to sell the suit land and the contract being outcome of forgery and collusion was inoperative upon her rights; that she had already revoked the General Power of Attorney attested in favour of Ghulam Rasool on 5.9.1974, but the agreement was grafted subsequently to usurp her property. After

recording evidence of the parties, the suit was initially dismissed on 14.09.1985, but thereafter it was remanded *vide* order dated 11.11.1986 by the District Court. Subsequently during proceedings of trial, the suit land was transferred by *Mst.* Channan Jan to the present appellants through oral sale Mutation No. 389 dated 8.2.1994, who were impleaded in the group of defendants and they too contested the suit while claiming themselves to be the bona fide purchasers. After culmination of trial, the suit was concurrently decreed by the two Courts below through judgments and decrees dated 21.1.1996 and 23.7.1998 respectively, hence instant appeal.

2. Mian Anwar Mubeen Ansari, Advocate, learned counsel for appellants has argued that an Attorney was not competent to transfer the suit land of her/his Principal to his kith and kins without any specific permission of him in this behalf, but the Courts below failed to attend this aspect of the case while rendering the impugned judgments; that Respondents No. 1 & 2 being beneficiaries of the contract failed to prove the valid execution of agreement to sell as well as the transaction reflected therein and findings of the Courts below that the General Power of Attorney was with consideration were without foundation; that the General Power of Attorney (Exh.P6) at the most had been executed for the management of the property and words "**زرثمن یازر بدل وصول کرلے**" specifically cited therein, revealed beyond any shadow of doubt that consideration of the suit property was not paid to the Principal at the time of its execution or prior to it; that at the time of attestation of mutation or Rapt Roznamcha, the impugned sale agreement (Exh.P7) was not brought into light and after cancellation of the mutation, the antedated agreement was designed to institute the suit and that the impugned judgments and decrees being tainted with misreading and non-reading of evidence were liable to be set aside while accepting instant appeal.

3. In contra, Malik Javaid Akhtar Wains, Advocate, learned counsel for Respondents No. 1 & 2 has submitted that the property in dispute had been purchased by Ghulam Rasool Respondent No. 3 after paying its consideration to *Mst.* Channan Jan, who pursuant to the said sale authorized the former being her agent to deal with the subject land for all intents and purposes; that revocation deed (Exh.D1) provided a solid proof that an agency was created; that General Power of Attorney being executed against consideration neither could be revoked nor the agent was required under the law to seek special permission from his Principal to further transfer the property to Respondents No. 1 & 2. He further emphasized that concurrent judgments of the Courts below as a result of well appreciation of material evidence available on suit file cannot be interfered with in second appeal until and unless the same are brought into the mischief of Section 100 of the Code of Civil Procedure, 1908 and that the appellants, who purchased the disputed property during the pendency of the suit could not claim any independent right or interest being its bona fide claimants.

4. Heard, record scanned and impugned judgments perused with the able assistance of learned counsel for the parties.

5. Though in the original suit Respondents No. 1 & 2 did not aver that Power of Attorney in favour of their father had been executed against any sale transaction or after making payment of sale consideration, yet subsequently after accord of permission, amended plaint was filed by the plaintiffs, wherein it was specifically pleaded that Ghulam Rasool, their father had settled the sale against consideration of Rs.40,000/- with the lady principal and resultantly the Attorney Deed was executed, but further details of this oral sale with regard to its time, date, month, year, venue and names of witnesses to disclose that when, where and before whom the transaction was affected, were totally missing, rather it was contended therein in vague terms that it was settled in favour of their father Respondent/ Defendant No. 3. In the given circumstances, either the beneficiary of the original sale the father had instituted the suit or at least he was to be transposed in the class of plaintiffs, but he never came forward to assert his right or interest on the basis of alleged oral sale independently settled by him, moreover he in his written statement not only failed to explain the afore-discussed essential details, rather it was completely silent that any such oral sale was ever affected by him. As much as, after the submission of amended plaint he was again in a position to assert his transaction independently, but he again missed the chance. Admittedly, neither an independent agreement or receipt was executed in favour of Ghulam Rasool nor the alleged oral sale struck with him was disclosed in the General Power of Attorney (Exh.P6). There was much force in the submission of Mr. Ansari, Advocate, for the appellants that if Exh.P6, had been executed against consideration, then the agent would not have been empowered on behalf of the Principal to receive the sale consideration. Had it been so then the said clause would have not been incorporated rather his own sale was given effect in its contents.

5. Adverting to the evidence available on the lis file Ghulam Rasool, the agent for the first time, was examined as PW4 on 21.05.1985, who simply deposed that the allottee had appointed him as her Attorney while authorizing him to deal with the land and as per his authority, he being her agent on her specific verbal permission settled the sale with the Plaintiffs/Respondents No. 1 & 2 against Rs.40,000/-. For ready reference, the relevant extract from his statement-in-chief in verbatim reads as under:--

Whereas a glimpse of his deposition out of cross examination is also given below:

Second time, after the amendment of the plaint and remand of the case without discarding his earlier deposition being PW4, his statement as PW7 was again recorded on 07.11.1995, wherein for the first time in contradiction with his earlier statement disclosed while stating that in presence of Allah Diwaya and Allah Wasaya he had purchased the suit land for his minor sons from *Mst.* Channan against Rs.40,000/- when Khadija, the daughter as well as Banaras, the son of the vendor and one Muhammad Hasnain were also available, but he again failed to give the date and venue to disclose when and where the bargain was struck, whereas during cross-examination he admitted himself to be in occupation of the suit property being tenant of Mst.Channan, who further admitted as under:--

To support his statement Allah Wasaya (PW-5) was examined, who stated that 22 3/4 years ago payment of Rs.40,000/- was made by Ghulam Rasool before him as well as Allah Diwaya. He in his cross-examination admitted that Ghulam Rasool was his cousin, whereas Diwaya was his brother. He further deposed as under:--

Whereas Allah Diwaya, PW6 being antipodal to him stated as under:

Despite the major contradiction among them, it was also significant that they did not utter that *Mst.* Khadija the daughter of the allottee was also available, when sale price was made good. No more material qua oral sale was examined and close scrutiny of the evidence discussed supra persuaded this Court to conclude that firstly there was no independent sale between the Principal and Ghulam Rasool and if it was presumed that an oral sale was struck then onus was on the latter to prove it. The entire evidence on the subject under issue was indicative of the fact that there was neither offer on behalf of the allottee nor acceptance on the part of the agent. As much as there was no fraction of evidence to draw an inference that even mutuality in this regard was existed between them. Had the payment was made to the vendor by her attorney then there was no fun that the latter received the same amount from his minor sons while executing agreement/mutation in their favour, hence it can safely be concluded that General Power of Attorney was not executed against any consideration and the law laid down in the judgment reported as *Abdul Rahim vs. Mukhtar Ahmad and 6 others* (2001 SCMR 1488) was of no help to the respondents.

6. As per opening contents of Power of Attorney it was executed for the management of the land, no doubt, that it also contained a clause therein that the agent was authorized to dispose of the land, but under the law the agent was required to act for the gain of the principal and if the agent intended to derive benefit for his own or his kith and kin, he should have informed his principal prior to entering into any such transaction. Any furtive or surreptitious transaction would not be binding upon the Principal nor it could be protected under the law. The General Power of Attorney itself was neither a document for transfer of property as well as a conveyance deed nor it was agreement to sell the property, rather it was a document for the constitution of agency and as per settled principle of law neither the agent himself could claim his ownership rights in the suit land of his Principal merely on the basis of agency document nor for his own kith and kins. It was *sine qua non* for him to have sought prior approval of the Principal in that behalf after acquainting her with material circumstances on the subject, failing which the Principal was at liberty to repudiate the transaction and the following two examples given u/S. 215 of the Contract Act are illustrative of the intention of law, which are reproduced hereunder:--

> *(a) A directs B to sell A's estate. B buys the estate for himself in the name of C.A, on discovering that B has bought the estate for himself, may repudiate he sale, if he can show that B has dishonestly*

concealed any material facts, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate, 'B' on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at option.

The case of the Respondents No. 1 and 2, when is examined on the touchstone of Section 211 read with Section 215 of the Act ibid as well as the principle settled by apex Court through judgments reported as *Fida Muhammad vs. Pir Muhammad Khan (deceased) through Legal Heirs and others* (PLD 1985 SC 341), *Muhammad Yasin and another vs. Dost Muhammad through Legal Heirs and others* (PLD 2002 SC 71) and *Maqsood Ahmad and others vs. Salman Ali* (PLD 2003 SC 31), was found to be violative enunciated therein.

7. Adverting to the second aspect of the case, whether Respondents No. 1 and 2 succeeded to establish independent sale. First of all adverting to the definition of sale provided in Section 54 of the Transfer of Property Act, 1882, which envisages transfer of ownership of immoveable property for price, paid or promised. In order to enforce sale, it is imperative upon the vendee to establish, firstly that transaction was struck with the titled holder or having authority to create a right, secondly it was settled against consideration and thirdly that it was accompanied by delivery of possession. Mere execution of agreements, attestation of mutation or even registration of document by itself does not furnish proof of ingredients of sale referred herein above and whenever any of such document as well as transaction of sale reflected therein is denied or questioned, the onus lies on the beneficiary. It was the stance of *Mst.* Channan from the day first that after revocation of General Power of Attorney, antedated agreement was fabricated. On the face of it, agreement to sell (Exh.P7) was allegedly executed on 02.09.1974. Now to ascertain, whether it was engineered/manoeuvred after the Revocation Deed dated 05.09.1974 or not, this Court has to return to the said document as well as evidence examined by Respondents No. 1 and 2. The perusal of agreement reveals that its Stamp Paper was not purchased for the plaintiffs, whereas, signatures of the person on whose behalf it was issued were also not procured. Neither the Stamp Vendor, who issued it was examined, nor his relevant Register which as per practice was to be consigned to the Record Room was summoned. The Petition Writer, who scribed it besides his Register was also withheld. They could be the best persons/record to belie the allegation of the lady that it was an antedated, fabricated and collusive document grafted after the execution of Revocation Deed (Exh. D1). Though both the attesting witnesses (PW-1 & 2) of the contract were examined, but it was taken by surprise that none of them mentioned the date of its execution. At the cost of repetition, it would be relevant to recall that if the agreement (Exh. P7) was

genuinely executed on 02.09.1974, then it was to be reflected in the Rapt Roznamcha (Exh.P-9) and mutation (Exh.P-1), which were entered much thereafter on 14.10.1974, whereas in both these documents it was averred that the land had been orally sold/purchased, which casted serious doubt about genuineness of the agreement. In the above context, the allege sale transaction being full of infirmity on legal and factual sides neither can be approve nor enforced legally. The narrative emerges from the above discussion and appreciation of the record was that the tenant, Ghulam Rasool fraudulently maneuvered/grafted the contract to deprive the old age, infirm, folk and illiterate lady of her property.

8. The argument of learned counsel for Respondents No. 1 & 2 that the present appellants had purchased the disputed property during the pendency of lis, without permission of the Court, therefore, their sale was violative is not tenable. As per mandate enshrined from Section 52 of the Transfer of Property Act, a transfer of immoveable property subject of a pending suit to which any right is directly or specifically claimed is not forbidden, but it envisages that property cannot be transferred or dealt with, without the leave of the Court by any party to the suit, so as to affect rights of other party thereto under any decree or order, which might be passed therein. So there is no complete embargo upon transfer of property without permission of the Court, but subject to aforenoted reservations, however, there is no denial that transferee would acquire title or right therein only subject to the verdict of the Court to be passed in the suit. Since in civil litigation an issue is to be decided by preponderance of evidence, the initial burden was upon the plaintiffs to prove their prior contract/mutation, which if successfully discharged, the burden of proving a valid sale through subsequent *bona fide* transfer for value without notice would be on the appellants, but as observed supra the plaintiffs miserably failed to prove their prior sale, so they have to suffer and cannot succeed on the sole ground that the judgments and decrees were not assailed by *Mst.* Channan Jan.

9. At the fag end of his arguments, the learned counsel for the plaintiffs has submitted that the concurrent findings of the fact recorded by the Courts below cannot be disturbed by this Court while exercising appellate jurisdiction provided under Section 100 of the Code of Civil Procedure, 1908 is not plausible. The Courts below were bound to draw inference in legal manner, but they did not adhere to the law applicable in this regard. It is correct 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 vs. Sheikh Zia ul Qamar and others* (2016 SCMR 24), and *Ghulam Muhammad & 3 others vs. Ghulam Ali* (2004 SCMR 1001).

From the discussion above, I have no hesitation in my mind 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 plaintiffs which 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 while exercising jurisdiction u/S. 100 of the Code of Civil Procedure, 1908.

10. Consequently, the instant appeal is allowed, impugned judgments and decrees passed by the learned Courts below are hereby set aside and suit filed by the plaintiffs/Respondents No. 1 & 2 is dismissed, leaving the parties to bear their cost.

(Y.A.) Appeal allowed.

2018 Y L R 2524
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD AMIN through Legal Heirs and 2 others---Petitioners
Versus
Mst. ASHRAF BIBI through Legal Heirs and another---Respondents

Civil Revision No.20533 of 2017, heard on 13th June, 2018.

(a) Muslim Personal Law (Shariat) Application Act (IX of 1948)---

----S. 5--- Custom--- Succession--- Limitation--- Claimants' predecessor-in-interest having been deprived of his share from the legacy of father on the ground that he had been adopted by his maternal grandfather and had inherited from him---Effect---Plea of plaintiff was that she was entitled to inherit from the estate of her propositus whereas defendants contended that predecessor-in-interest of plaintiff was deprived of inheritance in accordance with the custom---Suit was dismissed by the Trial Court but Appellate Court decreed the same--- Validity--- Customary appointment of an heir did not involve the transplantation of a person from one family to another---Tie of kinship with the natural family would not dissolve and the fiction of blood relationship with the members of new family had no application to the appointed one---Relationship created among the appointer and appointee was personal by choice and did not extend beyond the contracting parties on their sides---Decisions with regard to succession must take place as per custom applicable to the parties concerned otherwise Muslims were to be administered by Islamic Law for succession among them---Defendants were bound to prove that custom prevailed for years and years without any interruption among their tribe as per their common will and unanimous intention---Heir ordained by Islamic law in absence of custom could not be deprived of his legal share from inheritance which would vest in him automatically upon the death of his propositus---Benefit of S. 5 of Muslim Personal Law (Shariat) Application Act, 1948 could only be extended if it was proved that parties were governed by the practice otherwise Islamic Law was to be applied---Nothing was on record that family of the parties was governed by custom that an heir could be deprived of his shari share from the legacy of his father---Impugned inheritance mutation could neither be supported nor perpetuated in circumstances---Fraud would vitiate every solemn transaction and Court should not endorse and perpetuate a fraud once it was proved to have been committed---Any transaction found to be result of misrepresentation could not be protected on the sole score of limitation---Limitation did not apply in case of inheritance; no limitation would run for a co-sharer and barrier of limitation would not be any hurdle in the enforcement of rights of inheritance---Entries in the revenue record would afford fresh cause of action to the plaintiff and adverse entries if allowed to remain unchallenged did not extinguish right of a party against whom such entry had been made---Every fresh

entry in the revenue record would give fresh cause of action to the plaintiff to challenge the same---Revision was dismissed in circumstances.

Customary Law authored by Om Parkash Aggarawala ref.

Kala Khan and others v. Rab Nawaz and others 2004 SCMR 517; Muhammad Rustam and another v. Mst. Makhan Jan and others 2013 SCMR 299 and Ghulam Abbas and others v. Muhammad Shafi through L.Rs. and others 2016 SCMR 1403 distinguished.

Muhammad Umar Khan and others v. Muhammad Nia-ud-Din Khan 126 P.R. 1912 (P.C.); Gaman and another v. Nadir Din and another 35 P.R. 1896; Muhammad Sadiq and 3 others v. Mst. Seemi Bibi through Legal Heirs and others 2017 MLD 94; Lal Khan through Legal Heirs v. Muhammad Yousaf through Legal Heirs PLD 2011 SC 657; Jamila Khatoon and others v. Aish Muhammad and others 2011 SCMR 222; Noor Din and another v. Additional District Judge, Lahore and others 2014 SCMR 513; Abdul Rahim and another v. Mrs. Jannatay Bibi 2000 SCMR 346; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Maqbool Ahmed v. Govt. of Pakistan 1991 SCMR 2063; Mst. Reshman Bibi v. Amir and others 2004 SCMR 392; Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801; Noor Muhammad (decd) through L.Rs. v. Jan Muhammad (decd) through L.Rs. and others PLJ 2015 SC 831 and Wali and 10 others v. Akbar and 5 others 1995 SCMR 284 rel.

(b) Fraud---

----Fraud would vitiate the most solemn transaction.

(c) Limitation---

----Inheritance---No limitation would run in case of inheritance.

Muhammad Mahmood Ch. for Petitioners.

Muhammad Sarwar Javi and Mian Muhammad Nawaz for Respondents.

Date of hearing: 13th June, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undisputedly, subject land measuring 1387-Kanals 10-Marlas was titled by Lashker Din, who departed leaving behind two sons, Noor Din and Muhammad Din. The Revenue Officer while

sanctioning inheritance mutation No.33 dated 28.09.1940 deprived Muhammad Din to inherit any share for the sole reason that he had been adopted by his maternal grandfather, from whom he also got some land, as such the entire estate was distributed to the other son, Noor Din. Although Muhammad Din survived for about 39 years and in his life his brother gifted out entire property to his four sons/petitioners vide mutation No.07 dated 12.03.1969, but he did not question the afore-noted mutations, however, after his death, Mst. Ashraf Bibi, respondent No.1, while claiming her to be daughter of late Muhammad Din, brought a civil suit in 1981 against the petitioners and the other legal heirs of both the brothers for the cancellation of those mutations contending therein that both the sons of Lashker Din as per Shariat and Custom were equally entitled to inherit his estate, but Noor Din in connivance with revenue field staff defrauded his illiterate brother to usurp his share. In paras Nos. 3 and 4 of the plaint, the case of the lady/respondent No.1 was fully pleaded and for better understanding her case, it would be advantageous to reproduce those here:--

In their defence, through written statement, the relationship inter se Lashker Din, Noor Din and Muhammad Din was admitted by the petitioners, but with the addition that inheritance in favour of Noor Din was rightly sanctioned as per law, however relation of respondent No.1 with Muhammad Din was disputed. The reply of afore-noted paras of the plaint was the real defence of the petitioners and for case it would be appropriate to reproduce the same here:--

The bare study of these paras is reflective of the fact that it was nowhere asserted that any custom was prevailing in the creed or the vicinity to the effect that if an adopted child got some land from the adopter, the adoptee would be deprived to inherit his share from the legacy of his natural family. Anyhow, the real contest arising out of pleadings of the rival parties was narrowed down through following issues:--

1. Whether the suit is within time? OPD

2. Whether the suit is bad due to non-description of the mutation in dispute? OPD

3. Whether the suit is bad due to non-description of the total area of the suit land, if so its effect? OPD

4. Whether the plaintiff has got no locus standi and cause of action against the defendant? OPD

5. Whether the mutation No.33 dated 28.09.1940 is illegal, void, fictitious and in-effective qua the rights of the plaintiffs? OPP

6. Whether the subsequent mutation No.7 dated 12.03.69 is illegal, void and ineffective qua the rights of the plaintiff? OPP

7. Relief.

Both the parties as per desire produced their respective evidence. The Court of first instance by and large on the score of limitation, locus standi and cause of action dismissed the suit vide judgment dated 19.02.1988. Its perusal affirmed that no doubt issues Nos. 5 and 6 were also decided against the plaintiff, but without referring any law or custom to convince that a real son could be deprived of his share from the legacy of the father. Definitely the judgment of the Civil Court was assailed by respondent No.1, but it was such an unfortunate case, which was twicely remanded by the august Supreme Court and as a result of last remand order dated 11.04.2016, the matter was directly sent to the lower Appellate Court for making a decision of appeal preferred against judgment and decree dated 19.02.1988, who on 08.04.2017 allowed the appeal and decreed the suit of respondent No.1, impugned in this Civil Revision.

2. Despite the fact that it was nowhere case of the petitioners/defendants that Muhammad Din had been adopted by his maternal grandfather and for any custom he was rightly deprived of his share, but today Mr. Muhammad Mahmood Chaudhary, Advocate for the petitioners while referring certain paras of 'Customary Law' authored by "Om Prakash Aggarawala" tried to convince that an adoptee had no right to seek share of inheritance out of his natural family, but its perusal in depth depicts that this custom was prevailing in the Hindus, whereas under Muhammadan Law adoption was never recognized and even if it was made, it carried no right of inheritance. The Chief Court through its judgment reported as 'Muhammad Umar Khan and others v. Muhammaa Nia-ud-Din Khan' (126 P.R. 1912 (P.C.) has already observed that even if an adoption by a Muhammadan was permissible under any valid custom in Punjab, it could not be proved that the parties to the suit belonged to a family to which the Punjab Agricultural or other similar restrictive customs must be presumed to apply. Moreover, as per para 35 of the Book the practice of adoption was restricted to a sonless proprietor to appoint one of

his kinsman to succeed him as his legal heir. In the case in hand, not an iota of evidence was examined to prove that the maternal grandfather, who allegedly adopted Muhammad Din was a sonless proprietor, whereas there is general guiding principle set up till today by the Courts of land that Muhammadan Law has to be followed unless a special custom modifying or verifying is proved. I have no doubt in mind to observe that customary appointment of an heir does not involve the transplantation of a person from one family to another. The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members of new family has no application to the appointed one. The relationship created among the appointer and appointee is purely personal by choice and does not extend beyond the contracting parties on their sides vide inter alia.

3. While referring para 48 of the Book ibid, the argument of Mr. Mehmood Chaudhry that Lashker Din died prior to promulgation of the West Pakistan Muslim Personal Law (Shariat) Application, Act, 1948 and the Revenue Officer was perfect to deprive Muhammad Din from the legacy of his father, when Noor Din, the other son was available, is not well founded. It would be salutary to attend to section 5 of the Punjab Laws Act (IV of 1872), which runs as follows:--

> "5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be:--
>
> (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and has not been declared to be void by any competent authority;
>
> (b) the Muhammadan law, in cases where the parties are Muhammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to".

The bare perusal of provision ibid unveils that the decisions pertaining to the succession must be taken as per custom applicable to the parties concerned, otherwise, the Muslims were to be administered by the Muhammadan Law for effecting succession among them. In such situation, the petitioners were under

obligation to have proved that the custom prevailed for years and years without any interruption among their tribe as per their common will and unanimous intention. In absence of its proof. an heir ordained by Sharia cannot be deprived of his legal share from inheritance, which vests in him automatically upon the death of his propositus. Benefit as provided in sub-section (a) of Section 5 of the Act, ibid can only be extended, if it is proved that the parties were governed by the practice, otherwise, Muhammadan Law was to be applied. Reverting to merits of the case, it was not the case of the petitioners through their pleadings that under a custom, Muhammad Din was not entitled to inherit his shari share. The evidence on their behalf to this extent was also lacking in totality, whereas they did not endeavor to bring on record copy of Riwaj-e-Aam or other material to prove that such a custom was prevailing. In case cited as 'Gaman and another v. Nadir Din and another' (35 P.R. 1896) on Appellate side, it was concluded that a custom with regard to adoption was not valid among Arains tribe and the conclusion of said Court is reproduced hereunder:--

> In several recent cases this Court has found against the existence of the custom of adoption or appointment of an heir among the Muhammadan tribes of the district Gujrat. The question was fully considered in one of the latest of them, No.140 of 1893, and it was found, after a careful examination of the authorities, that adoption, at least eo nomine, is not recognized among those tribes. See also No.102, Punjab Record, 1893, in which it was held that among the Paswal Gujjars of Tehsil Kharian the same rule prevails, the Riwaj-i-Am in that case being worded exactly like that of the Khokhars in the present one. See also No.79, Punjab Record, 1893, where the parties were Arains of Gujrat tehsil, and No.81, Punjab Record, 1892, a case among Kalwal Jat of Kharian tehsil, the Riwaj-i-Am in both being to the same effect as in the two previous cases. The Divisional Judge has relied on No.104,Punjab Record, 1891, but that was a decision regarding the Bhatti Jats of Kharian tehsil, and its correctness was doubted in No.140 of 1893 on what we considered are cogent grounds. We are of opinion that defendants have failed to prove that Nadir Ali was competent to make a valid adoption of Imam Din by custom.

No doubt, the afore-referred verdict was with regard to Arains of Gujrat tehsil, whereas the parties to the list belong to Okara tehsil, but of the same tribe.

The sole defence agitated by the petitioners that respondent No.1 was not daughter of Muhammad Din was dislodged by the lady while bringing on record copy of her Birth Entry (Exh.P5). This manuscript was not rebutted through any document,

which being copy of public record attained strong presumption of correctness. In such state of evidence, when relationship of father of respondent No.1 with Lashker Din stood admitted and in absence of any evidence on record that the family was governed by such a custom that an heir could be deprived of his Shari share from the legacy of his father, the impugned inheritance mutation neither could be supported nor perpetuated and this Court feels no hesitation to approve the findings of the learned Appellate Court on issues Nos.5 and 6.

4. It was next emphasized with great vehement by learned counsel for the petitioners while relying upon judgments rendered in cases Muhammad Sadiq and 3 others v. Mst. Seemi Bibi through Legal Heirs and others' (2017 MLD 94), 'Lal Khan through Legal Heirs v. Muhammad Yousaf through Legal Heirs' (PLD 2011 SC 657), Jamila Khatoon and others v. Aish Muhammad and others' (2011 SCMR 222) and 'Noor Din and another v. Additional District Judge, Lahore and others' (2014 SCMR 513), that mutations in dispute were challenged after 41 years and the suit on the face of record was barred by time, as such the Civil Court was perfect to dismiss it, whereas learned Appellate Court could not comprehend this legal aspect of the case, was not well founded. Not only the averments of the plaint reflected plausible grounds to institute the suit with delay, rather after a thorough probe and scrutiny the learned Additional District Judge arrived at conclusion that the impugned mutation was manipulated with some insertions as well as change of digits, which could not be efuted by Mr. Mehmood Chaudhary. Above all, when with the able assistance of learned counsel for the parties, the statement of one of the petitioners, namely, Muhammad Amin (DW- 1) was considered, there left no room that Muhammad Din, who admittedly was an illiterate person was kept unaware of the inheritance mutations. The words uttered by DW-1 in his statement were sufficient to disbelieve the inheritance mutation, but were not considered till this day at any forum, which are reproduced hereunder:--

Not only Muhammad Din, the father of respondent No.1, was confident that half of the property of his father was devolved upon him, but the father of the petitioners also solaced the latters to that effect, which they uttered in the words referred hereinabove. There is no cavil that fraud vitiates every solemn transaction and Court of law shall, in no eventuality, endorse and perpetuate a fraud once it is proved to have been committed. Any transaction found to be result of misrepresentation cannot be protected on the sole score of limitation. It is a settled principle of law that whenever such transaction is pressed into service or is pleaded, the Court has to refuse to give effect to the same, much less to endorse and acknowledge it. Reliance can be placed upon the judgments reported as `Abdul Rahim and another v. Mrs.

Jannatay Bibi' (2000 SCMR 346) and Khair Din v. Mst. Salaman and others' (PLD 2002 SC 677).

Moreover, limitation in case of inheritance does not apply. Reliance can be placed upon the case law reported as 'Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi' (PLD 1990 SC 1), 'Maqbool Ahmed v. Govt. of Pakistan' (1991 SCMR 2063), 'Khair Din v. Mst. Salaman and others' (PLD 2002 SC 677). 'Mst. Reshman Bibi v. Amir and others' (2004 SCMR 392), 'Mst. Gohar Khanum and others v. Mst. Jamila Jan and others' (2014 SCMR 801) and 'Noor Muhammad (decd) through L.Rs. v. Jan Muhammad (decd) through L.Rs. etc.' (PLJ 2015 SC 831), wherein it was concluded that devolution of inheritance is automatic and a co-heir becomes co-sharer, the moment inheritance opens, even the entry of mutation is also not essential. In this scenario, it is settled by now that there is no limitation for a co-sharer and the barrier of limitation will not be any hurdle in the enforcement of the rights of inheritance.

The respondent No.1/plaintiff has prayed for declaring the mutation in dispute as illegal, which has been entered in the Record of Right. The entries in the Revenue Record afforded fresh cause of action to the plaintiff and adverse entries in the Revenue Record even if allowed to remain unchallenged do not necessarily extinguish the right of the party against whom such entry had been made. Every fresh entry in the record of right gives fresh cause of action to the plaintiff. This view has been affirmed by the apex Court in the judgment reported as 'Wali and 10 others v. Akbar and 5 others' (1995 SCMR 284). The case law referred by the learned counsel for petitioners does not apply to the facts and merits of the case and runs on different footing, which has also been deliberated by learned Addl. District Judge in his judgment to form a different view. Even otherwise, each case has to be decided as per its own facts.

5. Next argument of learned counsel for the petitioners while referring judgments cited as 'Kala Khan and others v. Rab Nawaz and others' (2004 SCMR 517), 'Muhammad Rustam and another v. Mst. Makhan Jan and others' (2013 SCMR 299) and 'Ghulam Abbas and others v. Muhammad Shafi through L.Rs. and others' (2016 SCMR 1403) that Muhammad Din died after considerable length of time, who did not assail the impugned inheritance mutation in his lifespan, therefore, his daughter/respondent No.1 had no locus standi and cause of action to dispute the mutation, is not tenable. After perusal, it reveals that the said case law is based on different facts. In Kala Khan's case (supra), on the death of Alladad (issueless), his brother Massu Khan approached the Patwari for the entry of

inheritance mutation of the deceased while disclosing that he was also survived by his widow, Mst.Jannat Bibi and in common assembly convened for that purpose, inheritance mutation No.126 in presence of Mewa Khan and Allah Dewaya brothers of the deceased was sanctioned in their favour as well as Mst. Jannat Bibi, however, after the death of Massu Khan and Allah Dewaya in whose presence the referred mutation was entered and sanctioned, the same was challenged for the first time with the stance that Alladad deceased was Shia by sect, therefore, his issueless widow, Mst. Jannat Bibi was not entitled to inherit the property of her deceased husband and the apex Court in such circumstances concluded that the L.Rs. of Massu Khan and Allah Dewaya having no locus standi as well as cause of action were estopped by the conduct of their predecessors, who raised no question qua sect of the deceased although the mutation was sanctioned in their presence, whereas in the case in hand, Muhammad Din was not shown to be available at the time when impugned mutation of inheritance was sanctioned, rather its perusal avowed that through an interlocutory order, he was summoned for a particular day, but prior to that epoch, after changing the digit, the impugned mutation was attested, as such the facts of the case under discussion are totally different with that of instant case.

In Muhammad Rustam's case (supra), the inheritance mutation No.571 dated 09.07.1927 (might have been attested under customary law) was challenged by the party while claiming his share of inheritance as successor of Mst. Karam Jan, who remained alive till 1975 and the apex Court maintained the judgment of this Court while applying law of estoppel with the conclusion that it was never the case of the party (plaintiff) that either he or his predecessor-in-interest were unaware of the said mutation, whereas situation in the present case is totally different.

In Ghulam Abbas's case (ibid) as per facts narrated therein, one Feroze had two wives; Mst. Bibi and Mst. Sardaran. Mst. Bibi had two sons, Muhammad Nawaz and Faqeer Muhammad, whereas Mst. Sardaran had one son, Muhammad Shafi and four daughters. After demise of Feroze, as per custom his estate devolved upon his three sons only. Subsequently, Faqeer Muhammad, one of his sons out of Mst. Bibi died issueless, but his inheritance mutation No.1147 was sanctioned in favour of his real mother, brother Muhammad Nawaz as well as step-brother and sisters, whereas under the law it was only to be attested in favour of Muhammad Nawaz and Mst. Bibi, being the real brother and mother. Being unhappy, inheritance mutation No.1147 was assailed by Muhammad Nawaz and Mst. Bibi through declaratory suit in 1957, which was withdrawn by them unconditionally under a compromise in the same year and after their departure from this world, a subsequent suit filed in 2000 by the L.Rs. of Muhammad Nawaz was dismissed and

the same was maintained by the apex Court under the mandate of Order XXIII Rule 1(3) of the Code, 1908 while applying the principle of estoppel. In that case too, predecessor of the plaintiffs had filed the suit in his life to challenge inheritance mutation, so the facts on the basis of which second suit was filed were not only in the complete knowledge of their predecessor, rather he challenged it and withdrew his case, therefore, apex Court concluded that latter or his L.Rs. had no locus standi to institute a second suit on the same subject with identical prayer. The facts of the said case are again altogether different than the case in hand.

6. No other ground was agitated by learned counsel for the petitioners to make a different opinion, which was formed by learned lower Appellate Court. Moreover, his judgment has to prevail over the verdict rendered by his subordinate Court, hence, in the light of above discussion, instant Civil Revision having no merit and force is dismissed with no order as to costs.

ZC/M-122/L Revision dismissed.

2018 Y L R 2574
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
BASHIRAN BIBI---Petitioner
Versus
ZAIB UN NISA and others---Respondents

C.R. No.2628 of 2016, heard on 10th October, 2017.

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

----S. 42---Qanun-e-Shahadat (10 of 1984), Arts. 79 & 129 (g)---Suit for declaration---Sale mutation---Proof---Requirements---Maxim: secundum allegata et probata---Applicability---Contention of plaintiff was that impugned sale mutation was outcome of fraud and misrepresentation---Suit was decreed concurrently---Validity---Sale mutation did not create any title or right in the immovable property---Beneficiary of mutation was bound, not only to prove its attestation but also establish the original transaction reflected therein---Attestation of mutation was a subsequent stage whereas prior to it the transaction must have been effected among its parties---Essential details with regard to settlement of transaction pertaining to time, month, venue and names of witnesses before whom it was struck down should be provided by the beneficiary in his pleadings so that same could be proved later on---No such detail had been provided by the defendant in his written statement---Oral sale mutation being a document involving financial obligation had to be proved as per mode provided under Art. 79 of Qanun-e-Shahadat, 1984---Such document could only be used as evidence until two attesting witnesses at least had been called for the purpose of proving its contents, execution and construction---If beneficiary failed to examine required number of witnesses to prove sale mutation then there would be adverse presumption against him---Nothing was on record with regard to payment of sale consideration to the vendor---Impugned mutation having been attested in the office of Revenue Office, which being militant to the basic provisions, could not sustain in the eye of law---Vendor was on death bed when impugned mutation was sanctioned---Courts below were justified to decree the present suit---No illegality, irregularity or mis-reading or non-reading of evidence had been pointed out in the impugned judgments and decrees---Revision was dismissed in circumstances.

Niaz Ali and 16 others v. Muhammad Din through Legal Heirs and others 1993 CLC 1374; Ghulam Hussain and others v. Imam Bakhsh and 9 others 1995 MLD 1165 and Qasim Ali v. Sher Muhammad 2007 YLR 1770 rel.

(b) Words and phrases---

----'Marz-ul-mout'--- Meaning--- Marzul Maut means that person aggravated with a disease apprehended that death was more probable than chance to live.

Muddasir Abbas Maghiana for Petitioner.

Moeen Ahmed for Respondents.

Date of hearing: 10th October, 2017.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Verily Muhammad Saee, real brother of respondents Nos.1 and 2 was owner of subject property and eleven to twelve days prior to his death, oral sale mutation No.3556 was got entered on 03.06.2009, which was attested on the very next day against a consideration of Rs.800,000/- in favour of present petitioner, but thereafter on 15.06.2009, as per death certificate (Exh.P4) the alleged vendor passed away without any issue. Within next three months, the respondents Nos.1 and 2 sisters of the vendor brought a declaratory suit while claiming that Muhammad Saee suffering from Marzul Maut, whereas the petitioner to usurp the valueable property managed to transfer the subject property in her name through impugned mutation, which being outcome of fraud, misrepresentation, collusiveness and without consideration was liable to be cancelled, despite the suit was contested by the petitioner, but both the Courts below concurrently decreed it through judgments dated 27.03.2015 and 05.05.2016 respectively. Hence the instant civil revision.

2. Heard and record scanned.

3. The pivotal question involved in the lis in hand is, whether any transaction with regard to the subject property had been effected among the parties prior to attestation of mutation (Exh.P 1). There is no other saying that it is a document, which neither creates right nor title in the immovable property and heavy onus rests on the beneficiary not only to prove its attestation, but also to establish original transaction reflected therein. There will be no second saying that attestation of mutation is a subsequent stage, whereas prior to it the transaction must have been effected among its parties and as per principle of "secundum allegata et probata", the essential detail with regard to settlement of transaction pertaining to time, month, venue and names of witnesses to prove that when, where and before whom it was struck are to be detailed by the beneficiary in his pleadings, so that it could be proved latter on. The perusal of record unfolds that in para No.3 of the written statement it was only disclosed that transaction through payment of Rs.800,000/- was struck before the witnesses on 04.06.2009, but no further detail therein was provided by the petitioner. It is well settled up till now by the apex Court that oral sale mutation being a document involving financial obligation has to be proved as per modes provided under Article 79 of the Qanun-e-Shahadat Order, 1984. What

are its requirements for proving such a document, can be understood by reading it, which is reproduced hereunder:--

> If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the executant of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

This provision explicitly lays down that such a document can only be used as evidence until two attesting witnesses, at least, have been called for the purpose of proving its contents, execution and construction, but nothing short of it can even be imagined for proving the same and if beneficiary fails to examine required number of witnesses to prove it in accordance with requirements of law, such failure in absence of any plausible explanation, will also give rise to an adverse presumption against him under Article 129 illustration (g) of the Order ibid.

4. The study of impugned mutation (Exh.P1) affirms that it was, attested by Faiz ul Hassan, Lumberdar as well as Muhammad Ijaz and out of them only the former being DW2 was examined, whereas the latter was withheld without any explanation, moreover, DW2 admitted in his cross-examination that:--

It is also not deposed by Gul Nawaz, Patwari DW3 and Abdul Wakeel Humayun, Revenue Officer (DW4) that sale consideration was paid in their presence. No other independent witness was examined to prove the said vital ingredient of sale. A solitary statement of petitioner (DW 1) without any corroboration is available on record, who deposed that three months ago the entire sale consideration was paid to the alleged vendor. Had the payment been made three months prior to the entry of the mutation, then why any agreement or receipt was not executed on that point of time and there was no reason to delay the attestation of the impugned mutation for such a long period. The other backdrop of the case was that petitioner admitted in her deposition that mutation was attested in the office of the Revenue Officer whereas the latter was required to attest the same in common assembly to be convened in the concerned Revenue Estate and mutation (Exh.P1) being militant to the basic provision cannot sustain in the eye of law. Reliance can be placed upon case law cited as Niaz Ali and 16 others v. Muhammad Din through Legal Heirs and others (1993 CLC 1374), Ghulam Hussain and others v. Imam Bakhsh and 9 others (1995 MLD 1165) and Qasim Ali v. Sher Muhammad (2007 YLR 1770).

5. The petitioner as well as his supporting witness Faiz ul Hassan admitted in their cross-examination that the vendor was physically incapacitated person, whereas the witnesses of respondents also succeeded to establish through their testimonies that he was on the death bed when impugned mutation was sanctioned. The contention of the learned counsel for petitioner that plaintiffs were under obligation to prove that at the time of attestation of mutation the vendor was suffering from death illness, but they failed to prove the said fact is not tenable. Marzul Maut means that person aggravated with a disease apprehended that death was more probable than chance to live, which fact stood proved by PWs through oral evidence duly supported by death certificate (Exh.P4) according to which the vendor died within 11/12 of the attestation of impugned mutation. In such facts and circumstances, both the Courts below were quite justified to decree the suit through the impugned judgments on the valid reasons after well appreciation of the evidence on the record.

6. The learned counsel for petitioner is unable to point out any irregularity or illegality as well as misreading and non-reading of evidence committed by the Courts below while passing the impugned judgments to be interfered with by this Court in exercise of revisional jurisdiction, hence this civil revision being devoid of any merit is **dismissed** accordingly.

ZC/B-7/L Revision dismissed.

2018 C L C 1833
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
TAJAMAL ABBAS----Petitioner
Versus
INAMULLAH----Respondent

C.R. No.2081 of 2016, heard on 28th February, 2018.

(a) Civil Procedure Code (V of 1908)---
----Ss. 36 & 2 (2)---Specific Relief Act (I of 1877), S. 54---Suit for permanent injunction by the tenant---Compromise between the parties---Undertaking by plaintiff (tenant) to vacate the suit property---Execution of order---Scope---Compromise was effected between the parties and plaintiff-petitioner got recorded his statement that he would vacate the premises within six months---Plaintiff-petitioner did not honour his undertaking and defendant-respondent moved execution petition which was dismissed by the Executing Court but Appellate Court remanded the matter with the direction to decide the same in accordance with law---Validity---Provision relating to execution of decree were also applicable to execution of orders---Court was equipped with the jurisdiction not only to adjudicate upon disputes and pass order rather it possessed power to get its order implemented---Suit was not simply withdrawn rather same was decided as per undertaking given by the plaintiff-petitioner---Plaintiff-petitioner was bound by his undertaking and there was no occasion for him to fall back---Undertaking made by a party before the Court had to be given sanctity while applying the principle of estoppel as well as moral and ethical rules---Conduct of a party was relevant in the Court---Plaintiff-petitioner had voluntarily opted before the Court to evict the rented premises---Said undertaking had become final and absolute for him to vacate the premises and any retraction could not be permitted---Sanctity of judicial proceedings had to be safeguarded at any cost---Scope of S.36, C.P.C. was not considered by the Executing Court---Impugned order passed by District Judge did not call for interference---Revision was dismissed in circumstances.
Shaukat Ali v. Muhammad Sharif 2013 CLC 1558 and Messrs Singer Pakistan Ltd. through Director Personal and Administration and another v. Nasir Ali Meer and another 2015 MLD 267 distinguished.
Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others 2011 SCMR 1361; Mst. Kishwar Sultan Jehan Begum v. Aslam Awais and 3 others PLD 1976 Lah. 580; Izhar Alam Farooqi, Advocate and another v. Sheikh Abdul Sattar Lasi and others 2008 CLD 149 and Khawar Saeed Raza v. Wajahat Iqbal 2003 CLC 1306 rel.

(b) Administration of justice---

----Each case had to be dealt with keeping in view its own peculiar facts and circumstances.

Fawad Malik Awan for Petitioner.
Rai Shahid Saleem Khan, Ehsan Ahmed Bhindar, Ziaullah Khan and Imran Haider Bhatti for Respondent.

Date of hearing: 28th February, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The present petitioner on 11.12.2013 approached the learned Civil Court, Jhang with a suit for permanent injunction, admitting therein that he occupied the demised house being tenant and his ultimate prayer was that respondent be restrained from snatching its possession through illegal means and during its proceedings on 24.03.2014, he at his own, made a statement as under:-

"21-3-14 مدعی حاضر۔ بر حلف بیانی ہے کہ راضی نامہ ہو گیا ہے اور اراضی متدعویہ میں اندر 6 ماہ خالی کر دوں گا۔ راضی نامہ کی وجہ سے دعوی ہذا کہ مزید پیروی درکار نہ ہے خارج فرمایا جاوے۔ اس بابت دستخط حاشیہ لئے گئے۔ انعام اللہ حاضر عدالت کو بھی بیان بالا سنایا گیا جو اس راضی نامہ کو تسلیم کرتا ہے مدعا علیہ کے بھی دستخط حاشیہ لئے گئے۔"

Pursuant thereto, the Court then and there passed the order to the following effect:-

> In view of above recorded statement of the parties recorded above, the instant suit of the plaintiff is hereby dismissed as withdrawn. However, both the parties will abide by and bound to comply with their statement.

Admittedly, the petitioner did not honour his words and the respondent/defendant was compelled to bring an execution petition for its realization, but it failed being incompetent having been rejected by the learned Executing Court on the very first day of its hearing on 31.01.2015. On appeal, the petitioner did not turn up, compelling the Appellate Court to set at naught the view of learned Executing Court and it did so on 15.08.2015 directing the learned Executing Court to summon the present petitioner and decide the Execution Petition strictly in accordance with law. The present petitioner filed an application under Order XLI rule 21 of the Code of Civil Procedure, 1908 before the same Court for recalling his ex parte order dated 15.08.2015, which was allowed and appeal of respondent was revived for its decision afresh, but again on merit it was allowed on 13.04.2016 and through instant Civil Revision it was attacked.

2. The inaugural argument of Mr. Fawad Malik Awan, Advocate for petitioner that the suit was dismissed as withdrawn and decree sheet was not drawn and that consent of the parties also did not fall within definition of a decree under subsection (2) of section 2 of the Code, 1908 and that execution proceedings could not be initiated was not tenable. Apart from Order XXI of Code ibid, section 36 thereof is the most relevant provision to be applied, which might have escaped notice of Mr. Fawad and it would be advantageous to go through it, which reads as follows:-

> **36. Application to Orders.**----The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

A bare perusal thereof in express terms makes all the provisions relating to the execution of decree applicable also to the execution of orders. Moreover, the Court is equipped with the jurisdiction not only to adjudicate upon disputes and pass an order rather it possesses ample powers to get its orders implemented, otherwise machinery of the Courts working under the mandate of law would become dormant. It was not a case of simple withdrawal of the suit, rather same was decided as per undertaking given by the petitioner and he was specifically bounded to comply with it, hence there was no occasion for him to fall back or reneged. An undertaking made by a party before the Court of law has to be given sanctity while applying the principle of estoppel as well to respect moral and ethical rules and if retraction therefrom is allowed as a matter of right, then it will definitely result into distrust of the public litigants over the Judiciary and would damage the sacred image of the Courts that they are infertile to make implementation of orders passed by them in the judicial proceedings. Reliance can be placed upon Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others (2011 SCMR 1361). It is again well established that conduct of a party is always considered to be relevant in the Court of law, the latter has to take exception to the conduct of litigant like in case in hand. The petitioner voluntarily opted to surrender himself before the Court of law to evict the rented premises, then it becomes final and absolute for him to vacate it and any retraction cannot be permitted because sanctity to the judicial proceedings has to be safe guarded at any cost. Full Bench of this Court in a case reported as Mst. Kishwar Sultan Jehan Begum v. Aslam Awais and 3 others (PLD 1976 Lahore 580), observed as under:-

> An undertaking given to the Court by a party or his counsel has exactly the same force as an order made or an injunction granted by a Court; once an undertaking is given in the Court by a party or on his behalf by his counsel he becomes bound to fulfill the same.

Whereas, in a case cited as Izhar Alam Farooqi, Advocate and another v. Sheikh Abdul Sattar Lasi and others (2008 CLD 149), the apex Court observed as follows:-

> It is true that a Court which has the jurisdiction to adjudicate the dispute and pass an order has also implicit power to have the order implemented and mere an erroneous order passed by the Court of competent jurisdiction does not render the order without jurisdiction.

Moreover, this Court in the judgment syled as Khawar Saeed Raza v. Wajahat Iqbal (2003 CLC 1306) clinched the identical controversy in hand while concluding as under:-

> Compromise is admitted which became part of the order, which stipulated the withdrawal of the suit by the respondent. Under section 36 Civil Procedure Code, 1908, the provisions of the Code relating to the execution of decree are also applicable to orders. Even if there was no decree in existence an order disposing of the suit in terms of the compromise is very much there, binding upon and operative qua the parties. In Kilachand Devchand and Co. v. Ajodhuaprasad Sukhamnand and others AIR 1934 Bombay 452, it was observed that if the Court had jurisdiction to make the order it had necessarily the power and jurisdiction to enforce the same and the law does not allow its machinery to be clogged in this respect. Likewise in Ranjit Singh Hazari and others v. Juman Meah and another PLD 1961 Dacca 842 section 36 of the Civil Procedure Code was considered by the learned Division Bench of the then High Court of Dacca (East Pakistan) and it was observed that the provisions regarding execution of decree were applicable to orders as well.

Hence, apart from reasoning of the learned Addl. District Judge, the above referred precedents also support his view. Reliance of learned counsel for the petitioner on the case law cited as Shaukat Ali v. Muhammad Sharif (2013 CLC 1558) and Messrs Singer Pakistan Ltd. through Director Personal and Administration and another v. Nasir Ali Meer and another (2015 MLD 267) is not apt, because scope of section 36 of Code ibid was absolutely not considered therein. Even otherwise, each case has to be dealt with keeping in view its own peculiar facts and circumstances.

4. As a result of the above, impugned order of the learned Addl. District Judge, Jhang do not call for any interference by this Court and petition in hand being devoid of merit as well as force is accordingly dismissed with costs.

ZC/T-7/L Revision dismissed.

2018 C L C Note 120

[Lahore]

Before Ch. Muhammad Masood Jahangir, J

TEHSIL MUNICIPAL ADMINISTRATION through Administrator, TMA, Mandi Baha-ud-Din and another---Petitioners

Versus

KHALID RAFIQUE AHMED---Respondent

Civil Revision No. 1681 of 2016, heard on 5th March, 2018.

Civil Procedure Code (V of 1908)---

----O. XXXIX, Rr. 1 & 2---Suit for declaration---Temporary injunction, grant of---Plaintiff submitted site-plan for approval to construct hospital in the residential area---Tehsil Municipal Administration sent notice for deposit of conversion fee---Plaintiff filed suit wherein application for temporary injunction was moved which was accepted by the Courts below---Validity---Hospital had already been approved and constructed adjacent to suit property over a residential plot owned by the father of plaintiff---Plaintiff had failed to make out a prima facie case who at the most was to face the loss in terms of coins, which could not be considered to be an irreparable loss---Elements for grant of temporary injunction did not exist in favour of plaintiff---Impugned orders passed by the Courts below were set aside---Application for temporary injunction was dismissed---Revision was allowed in circumstances. [Paras. 4 & 5 of the judgment]

Tasawar Hussain Gondal for Petitioners.

Shaigan Ijaz and Ihsan Ahmad Bhindar for Respondent.

Date of hearing: 5th March, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---By filing the instant Civil Revision, the petitioners have assailed order as well as judgment of the two Courts below whereby application for grant of temporary injunction made by respondent/plaintiff in his declaratory suit was concurrently allowed.

2. As per facts disclosed in the plaint, the respondent claimed himself to be the owner of property measuring 07-1/2 marlas and in January, 2010 he approached the petitioners for the approval of map to renovate the hospital already constructed at site and on its receipt the petitioners through notice dated 01.08.2011 required deposit of conversion fee amounting to Rs.9,00,000/-, but subsequently through notice dated 05.09.2011, half of the said amount was demanded and the vires of these notices were assailed through institution of

declaratory suit accompanied by an application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908 for restraining the petitioners/ defendants to act upon the impugned notices. The suit as well as application was contested with the defence that respondent/plaintiff as per the Punjab Land Use (Classification, Restrictions and Re-development) Rules, 2009 was under obligation to pay the fee, and that without paying the fee, neither nature of a property could be allowed to be converted nor its site plan would be sanctioned. The application for grant of temporary injunction was concurrently allowed vide orders referred in para 1 ante, hence the instant Civil Revision.

3. Arguments heard. Record perused.

4. It was not denied by the learned counsel for the respondent/ plaintiff that the latter submitted the site plan for its approval to construct hospital in the residential area. The original record was brought by the learned counsel for the petitioners and recital of application made by the respondent to the former was reflective of the fact that he was eager to raise a new commercial building having three floors up to the height of 35 feet. No doubt adjacent to it, a hospital had already been approved and constructed over a residential plot titled by father of the respondent and it appeared that for the extension thereof, the plan was submitted by respondent. It was a simple case to the extent of refusal of temporary injunction, as the respondent failed to make out a prima facie arguable case, who at the most was to face the loss in terms of coins, which could not consider to be an irreparable loss, hence all the three elements did not tilt in favour of the respondent, but both the Courts below without adverting thereto passed the impugned orders.

5. Consequently, this Civil Revision is allowed, the impugned order as well as judgment passed by the learned Courts below is hereby set aside and application moved under Order XXXIX, Rules 1 and 2 of the Code ibid stands dismissed. However, it is clarified that the above findings being based on tentative assessment of the material on record are not meant to prejudice the case of either party at the time of final adjudication, which will be dealt with on the basis of the evidence likely to be adduced by the parties during the trial.

6. Before parting with this judgment, to this Court, most apposite and imperative question would be; whether after paying the conversion fee, a hospital or any commercial building could be allowed to be erected in residential area. There is no cavil to admit that use of property is a recognized right, but it has to remain subject to reasonable restriction and no one can be allowed to construct or use his premises in whatever manner he likes, even at the cost of discomposure and nuisance to the others breathing in the immediate neighborhood or exactly in the vicinity thereof. I must add here that although some Rules/Regulations are in field to countenance any such conversion amounting to distract the peace, coziness, health, greenery/flora, smooth flow of traffic and most significantly in violation of master plan approved for the

domiciliary region, but the Rules/Regulations are envisioned to homogenize the associations inter se neighbourers as well as among State and the Nationals, which neither can be supported nor perpetuated and there is no other axiom that every organ of the State including Federal and Provincial Governments as well as Local Government besides Cantonment Boards is bound to follow the law to perform its obligations and none can claim exception to it. A master plan for a Housing Scheme without reserving independent plots for academic institutions, hospital, commercial areas/shops/malls, mosque, playgrounds or banquet halls having independent areas for parking cannot be approved. The departments of the State especially Municipalities, Local Government and Cantonment Boards are functioning to mint money or raise their revenue without sensing the problems to be faced by the citizens for whom comfort/ease they were established and for that reason each of the residential area has changed its character. The schools, hospitals, clinics, marriage halls, gymnasiums, snooker clubs, saloons, shopping malls, shops hotels, guest rooms and offices have rapidly been erected in our residential areas without realizing that its outcome will be nuisance, pollution, congestion, discomfort, injury to privacy and hurdle to flow of traffic. We have ruined our civilization and no heed is being paid on behalf of the concerned State organs or the authorities including Local Government Bodies to overcome these problems. The plans of the commercial buildings without examining its suitability or considering its backdrop are being approved on the whims and desires of the persons, who are either financially sound or have some influential personality at their back. Practically plans for raising most of the commercial buildings are being sanctioned without comprehending that parking area was reserved or not, but even if at the time of sanction, it was shown therein, then after construction same starts utilizing for commercial activities and the officials of building wings of the concerned authorities/Local Bodies are benefitted thereof, whereas traffic hurdles are to be faced by the citizens and the command of the traffic police ceased its effect to restore the flow of traffic. To adjudge civilization of a society, traffic discipline may be one of its indicators and we have been flopped so far to achieve any respect to this extent. Much water has flown under the bridges and there left no much time to save our society from further destruction. It is high time for the awakening of individuals as well as organs of the State to remove the infirmities wherever those are and to advance forward while realizing that every step has to be taken as per law and law only, hence any Rules/Regulations, if are made and still in field, may not be applied to militate the master plan of a scheme, even at the cost of generating revenue cannot be enforced, but have to be revisited at appropriate forums. Let a copy of this judgment be forwarded to the Chief Secretary, Secretary Local Bodies, Government of Punjab, Lahore, Attorney General of Pakistan, Islamabad and Advocate General, Punjab, Lahore to examine the relevant law/rules on the subject for conversion of residential area to commercial one and make/propose necessary amendments/improvements to eliminate the hurdles created thereby for maintaining beautification of the

vicinity as per its original plan. They are also required to look that in future no residential building will be allowed to be converted into another class to cause nuisance for the other inhabitants and on commercial areas/roads no commercial building to be approved without reserving adequate area/spot for parking of vehicles and also ensure that the same is not used except for the said purpose as well. The relevant Authorities are also obliged to take action for the shifting of commercial activities going on in the residential areas to restore its original position as well as peace and also revisit the earlier approved plans of the commercial buildings available on commercial zones/roads and if anyone is found short of basic necessities, it should be given a notice to get rid of the inadequacies within maximum period of four months and even then if they fail, stringent action for the stoppage of their proscribed and irrational activities triggering problems for the others shall be commenced and unless the deficiencies are made good, no such commercial buildings, which are providing big source for blocking traffic in our main cities, will be allowed to exist.

ZC/T-9/L Revision allowed.

2019 M L D 429
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD REHAN and another---Petitioners
Versus
AKBAR SHAHZAD and others---Respondents

Review Application No.25 of 2014, heard on 5th December, 2018.

Civil Procedure Code (V of 1908)---

----S. 114 & O. XLVII, Rr. 1 & 2---Review---Scope---Conscious, deliberate and reasoned verdict passed by Court after appreciating the material available on record could not be called in question through the process of review either on the ground of erroneousness of decision or incorrectness of the view arrived at---Philosophy of finality attached to a judgment was the paramount consideration with the aim to put an end to litigation and review was merely an exception to the said principle---Review jurisdiction could only be invoked if the error of fact or law was certain, evident, patent and apparent on the face of record, which should not require any elaborate probe to prove its correctness, otherwise it would be a case of appeal.

Sh. Mehdi Hassan v. Province of Punjab through Member, Board of Revenue and 5 others 2007 SCMR 755 foll.
M. Baleegh-uz-Zaman Ch. for Petitioner.
Munnawar Hussain for Respondent.
Date of hearing: 5th December, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The compendium facts of the case were that Muhammad Aslam, father of the applicants and Muhammad Ashraf, predecessor-in-interest of respondents Nos.1(a) to 1(h) were brothers inter se and admittedly Muhammad Ashraf was the exclusive titleholder of the subject property. The applicants on 05.05.2008 instituted a declaratory Suit No.231-1 styled as "Muhammad Rehan, etc. v. Muhammad Ashraf, etc.", against their uncle Muhammad Ashraf and others for the confirmation of their ownership with regard to subject property contending therein that the latter through unregistered memo. of gift had transferred the property to their father and in acknowledgement thereof, a registered Power of Attorney was also executed in his favour, who subsequently transferred the same by means of another unregistered agreement of gift to the applicants. In contra, their uncle Muhammad Ashraf also instituted a rival Suit No.233-1 on 04.06.2008 to call in question the unregistered memos. of gift as well as registered Power of Attorney claiming those to be forged, fictitious and result of fraud as well as misrepresentation. Although in both the suits, the issues were settled separately

and evidence was also recorded independently, yet at a later stage, with consent of the parties, both were consolidated and ultimately the suit of the applicants was dismissed, whereas the cross one was decreed vide single judgment and decrees dated 12.12.2012. Being offended, two appeals were preferred by the applicants, but without any success having been dismissed through common judgment dated 08.07.2014. The applicants being unhappy filed RSA No.213 of 2014 to call in question judgments of the Courts below, whereby their suit and appeal were dismissed and on the other hand, the connected Civil Revision No.3572/2014 was also preferred to assail the decrees whereby suit of Muhammad Ashraf respondent was decreed and appeal of the applicants was dismissed. It is pertinent to note that RSA No.231/2014 was fixed before this Court on 29.09.2014, which on the same day, was dismissed in limine, however, the connected Civil Revision was not fixed on that day and is still lingering on for its decision. Now through application in hand, the applicants have prayed for setting aside of order dated 29.09.2014 passed in RSA No.213/2014 through invocation of review powers.

2. Arguments heard and record perused.

3. Before adverting to the grounds raised herein, it will be advantageous to have a glance over the conclusion drawn by this Court to dismiss the afore-noted RSA, which is reproduced here:--

> "6. Both the Courts below have unanimously observed that the basic document was the agreement (Ex:P1), which did not find mention that defendant No.1 had gifted out the suit property, but according to the contents thereof defendant No.1 had given the possession of the suit property to his brother Muhammad Aslam and the same also did not disclose that any offer and acceptance regarding transaction of gift of the suit property had ever been made between the parties of the agreement. As such it has been rightly concluded by the learned courts below that Ex:P/1 at the most could not be treated as a gift deed wherein a specific clause was inserted that in case of default by the first party/defendant No.1, the second party Muhammad Aslam could have availed the remedy for the specific performance of the agreement.
>
> 7. The other document adduced by the plaintiffs was registered power of attorney (Ex:P2) of the similar date according to which defendant No.1 had appointed his brother Muhammad Aslam as attorney to administer arrangement of the suit property, but it did not find mention that any gift deed was executed on the same date in favour of Muhammad Aslam by defendant No.1, who was only authorized to gift or sale or exchange the property after the mutation. Admittedly no such mutation was ever executed in favour of Muhammad Aslam and it has been rightly concluded by the learned courts below that the plaintiffs failed to produce any valid document on the record to the effect that Muhammad

> Aslam predecessor-in-interest of the plaintiffs had become complete owner of the suit property, who was incompetent to further transfer the same to the plaintiffs through gift. Even as per settled principle of law a father being general attorney is not authorized to transfer the property of the principal to his own kith and kins. The said question has already been resolved by the august Supreme Court in the judgment reported as Mst. Shumal Begum v. Mst. Gulzar Begum and 3 others (1994 SCMR 818)"

After giving the detail of Mst. Shumal Begum's case, it was further held as under:--

> "8. The perusal of the said dictum rendered by the august Supreme Court of Pakistan has left no room for the learned counsel to controvert the findings arrived at by the learned court below, which are not found to be tainted with any misreading or non-reading of the evidence and cannot be upset merely on the technical ground that the learned trial court failed to frame the proper issues after consolidation of the suits filed by the parties against each other. Admittedly the trials in both the suits were conducted separately, which were consolidated at the final stage and the parties did not opt to lead any other evidence thereafter. It is found that both the parties produced their evidence before the learned trial court keeping in view their pleadings and the said evidence has been duly appreciated by both the courts below. The learned counsel for the appellant has also failed to point out that as to what prejudice was caused to the appellants by non framing of any other issue as claim set up by the appellants mainly rested on the documentary evidence, which has been rightly appreciated by both the court below in a true perspective. The august Supreme Court of Pakistan has already dealt with such question authoritatively while holding that where the parties have led evidence keeping in mind their pleadings, the objection regarding non-framing of any issue or improper framing of issue loses its weight."

4. Today Mr. Baleegh-uz-Zaman Ch. Advocate exhausted himself at full length and failed to make out a case within the encompass of rules 1 & 2 of Order XLVII of the Code, 1908 establishing that the judgment under review suffered from a patent error of law or fact on the face of record followed by material consequences on the merit of the case. Admittedly, neither Muhammad Ashraf transferred the title of the subject property to his brother Muhammad Aslam nor the latter could pass the better title to his sons/applicants. The father of the applicants being purported Agent of his brother was also not competent under the law settled by the apex Court to make a gift in favour of his sons. The conscious, deliberate and reasoning verdict after appreciating the material available on record was rendered by this Court, which cannot be called in

question through the process of review either on the ground of erroneousness of decision or incorrectness of the view arrived at. The philosophy of finality attached to a judgment always remains the paramount consideration with the aim to put an end to litigation and review is merely an exception to this golden principle and can only be invoked if the error of fact or law should be certain, evident, patent and apparent on the face of the record, which should not require any elaborate probe to prove its incorrectness, otherwise in such a situation it would be a case of an appeal. Reliance can be placed on the judgment reported as Sh. Mehdi Hassan v. Province of Punjab through Member, Board of Revenue and 5 others (2007 SCMR 755), wherein it was concluded as under:--

> "8.We having heard the learned counsel for the parties at length and perused the record with their assistance have found that the contentions raised by the learned counsel in support of this petition have been exhaustively dealt with in the judgment under review. This is settled law that the points already raised and considered before the Court, cannot be re-agitated in review jurisdiction which is confined to the extent of patent error or a mistake floating on the face of record which if not corrected may perpetuate illegality and injustice. The mere fact that another view of the matter was possible or the conclusion drawn in the judgment was wrong, would not be a valid ground to review the judgment unless it is shown that the Court has failed to consider an important question of law. The learned counsel has not been able to point out any such error of law in the judgment or interference in the review jurisdiction."

Learned counsel for the applicants was abortive to pinpoint any such error of law in the judgment for interference in the review jurisdiction. Resultantly, this Petition having no force is dismissed with costs of Rs.100000/-.

SA/M-191/L

Petition dismissed.

PLJ 2019 Lahore 1

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

T.M.A., etc.--Petitioners

Versus

KHALID RAFIQUE AHMAD--Respondent

Civil Revision No. 1681 of 2016, heard on 5.3.2018.

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

----S. 42--Suit for declaration--Civil Procedure Code, (V of 1908), O. XXXIX, Rr. 1 & 2--Application for grant of temporary injunction--Allowed Appeal--Allowed--Application for approval of map to renovation of hospital--Notice for deposit of conversion fee--Constitution of hospital in residential area--Question of--Whether after paying conversion fee, a hospital or any commercial building could be allowed to be created in residential area--Challenge to--It was a simple case to extent of refusal of temporary injunction, as respondent failed to make out a *prima facie* arguable case, who at most was to face loss in terms of coins, which could not consider to be an irreparable loss, hence all three elements did not tilt in favour of respondent, but both Courts below without adverting thereto passed impugned orders--There is no cavil to admit that use of property is a recognized right, but it has to remain subject to reasonable restriction and no one can be allowed to construct or use his premises in whatever manner he likes, even at cost of discomposure and nuisance to others breathing in immediate neighborhood or exactly in vicinity thereof--Departments of State especially Municipalities, Local Government and Cantonment Boards are functioning to mint money or raise their revenue without sensing problems to be faced by citizens for whom comfort/ease they were established and for that reason each of residential area has changed its character--Plans of commercial buildings without examining its suitability or considering its backdrop are being approved on whims and desires of persons, who are either financially sound or have some influential personality at their back--Civil revision was allowed. [Pp. 3 & 4] A, B, C & D

Mr. Tasawar Hussain Gondal, Advocate for Petitioners.

M/s. Shaigan Ijaz and Ihsan Ahmad Bhindar, Advocates for Respondent.

Date of hearing: 5.3.2018

JUDGMENT

By filing the instant Civil Revision, the petitioners have assailed order as well as judgment of the two Courts below whereby application for grant of temporary injunction made by respondent/plaintiff in his declaratory suit was concurrently allowed.

2. As per facts disclosed in the plaint, the respondent claimed himself to be the owner of property measuring 07½ *marlas* and in January, 2010 he approached the

petitioners for the approval of map to renovate the hospital already constructed at site and on its receipt the petitioners through notice dated 01.08.2011 required deposit of conversion fee amounting to Rs. 9,00,000/-, but subsequently through notice dated 05.09.2011, half of the said amount was demanded and the vires of these notices were assailed through institution of declaratory suit accompanied by an application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 for restraining the petitioners/defendants to act upon the impugned notices. The suit as well as application was contested with the defence that respondent/plaintiff as per the Punjab Land Use (Classification, Restrictions and Redevelopment) Rules, 2009 was under obligation to pay the fee, and that without paying the fee, neither nature of a property could be allowed to be converted nor its site-plan would be sanctioned. The application for grant of temporary injunction was concurrently allowed *vide* orders referred in para 1 ante, hence the instant Civil Revision.

3. Arguments heard. Record perused.

4. It was not denied by the learned counsel for the respondent/plaintiff that the latter submitted the site-plan for its approval to construct hospital in the residential area. The original record was brought by the learned counsel for the petitioners and recital of application made by the respondent to the former was reflective of the fact that he was eager to raise a new commercial building having three floors up to the height of 35 feet. No doubt adjacent to it, a hospital had already been approved and constructed over a residential plot titled by father of the respondent and it appeared that for the extension thereof, the plan was submitted by respondent. It was a simple case to the extent of refusal of temporary injunction, as the respondent failed to make out a *prima facie* arguable case, who at the most was to face the loss in terms of coins, which could not consider to be an irreparable loss, hence all the three elements did not tilt in favour of the respondent, but both the Courts below without adverting thereto passed the impugned orders.

5. Consequently, this Civil Revision is allowed, the impugned order as well as judgment passed by the learned Courts below is hereby set aside and application moved under Order XXXIX Rules 1 & 2 of the Code *ibid* stands dismissed. However, it is clarified that the above findings being based on tentative assessment of the material on record are not meant to prejudice the case of either party at the time of final adjudication, which will be dealt with on the basis of the evidence likely to be adduced by the parties during the trial.

6. Before parting with this judgment, to this Court, most apposite and imperative question would be; whether after paying the conversion fee, a hospital or any commercial building could be allowed to be erected in residential area. There is no cavil to admit that use of property is a recognized right, but it has to remain subject to reasonable restriction and no one can be allowed to construct or use his premises in whatever manner he likes, even at the cost of discomposure and nuisance to the others breathing in the immediate neighborhood or exactly in the vicinity thereof. I

must add here that although some Rules/Regulations are in field to countenance any such conversion amounting to distract the peace, coziness, health, greenery/flora, smooth flow of traffic and most significantly in violation of master plan approved for the domiciliary region, but the Rules/Regulations are envisioned to homogenize the associations inter se neighbourers as well as among State and the Nationals, which neither can be supported nor perpetuated and there is no other axiom that every organ of the State including Federal and Provincial Governments as well as Local Government besides Cantonment Boards is bound to follow the law to perform its obligations and none can claim exception to it. A master plan for a Housing Scheme without reserving independent plots for academic institutions, hospital, commercial areas/shops/malls, mosque, playgrounds or banquet halls having independent areas for parking cannot be approved. The departments of the State especially Municipalities, Local Government and Cantonment Boards are functioning to mint money or raise their revenue without sensing the problems to be faced by the citizens for whom comfort/ease they were established and for that reason each of the residential area has changed its character. The schools, hospitals, clinics, marriage halls, gymnasiums, snooker clubs, saloons, shopping malls, shops hotels, guest rooms and offices have rapidly been erected in our residential areas without realizing that its outcome will be nuisance, pollution, congestion, discomfort, injury to privacy and hurdle to flow of traffic. We have ruined our civilization and no heed is being paid on behalf of the concerned State organs or the authorities including Local Government Bodies to overcome these problems. The plans of the commercial buildings without examining its suitability or considering its backdrop are being approved on the whims and desires of the persons, who are either financially sound or have some influential personality at their back. Practically plans for raising most of the commercial buildings are being sanctioned without comprehending that parking area was reserved or not, but even if at the time of sanction, it was shown therein, then after construction same starts utilizing for commercial activities and the officials of building wings of the concerned authorities/ Local Bodies are benefitted thereof, whereas traffic hurdles are to be faced by the citizens and the command of the traffic police ceased its effect to restore the flow of traffic. To adjudge civilization of a society, traffic discipline may be one of its indicators and we have been flopped so far to achieve any respect to this extent. Much water has flown under the bridges and there left no much time to save our society from further destruction. It is high time for the awakening of individuals as well as organs of the State to remove the infirmities wherever those are and to advance forward while realizing that every step has to be taken as per law and law only, hence any Rules/Regulations, if are made and still in field, may not be applied to militate the master plan of a scheme, even at the cost of generating revenue cannot be enforced, but have to be revisited at appropriate forums. Let a copy of this judgment be forwarded to the Chief Secretary, Secretary Local Bodies, Government of Punjab, Lahore, Attorney General of Pakistan, Islamabad and Advocate General, Punjab, Lahore to examine the relevant law/rules on the subject for conversion of residential area to commercial one and make/ propose necessary

amendments/improvements to eliminate the hurdles created thereby for maintaining beautification of the vicinity as per its original plan. They are also required to look that in future no residential building will be allowed to be converted into another class to cause nuisance for the other inhabitants and on commercial areas/roads no commercial building to be approved without reserving adequate area/spot for parking of vehicles and also ensure that the same is not used except for the said purpose as well. The relevant Authorities are also obliged to take action for the shifting of commercial activities going on in the residential areas to restore its original position as well as peace and also revisit the earlier approved plans of the commercial buildings available on commercial zones/roads and if anyone is found short of basic necessities, it should be given a notice to get rid of the inadequacies within maximum period of four months and even then if they fail, stringent action for the stoppage of their proscribed and irrational activities triggering problems for the others shall be commenced and unless the deficiencies are made good, no such commercial buildings, which are providing big source for blocking traffic in our main cities, will be allowed to exist.

(Y.A.) Civil revision allowed.

PLJ 2019 Lahore 30

Present: CH. MUHAMMAD MASOOD JAHANGIR, J.

MUHAMMAD AZAM--Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, etc.--Respondents

W.P. No. 26983 of 2012, heard on 23.5.2018.

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

----O. V--Oral exchange mutation--Application for decision of case on basis of special oath during suit proceedings--Accepted--Resiling from solumn offer--Civil Revision before session Judge--Allowed--Challenge to--Application for decision of suit on special oath of Holy Quran was filed through a counsel, who happened to be Hafiz of that Holy Book and might be well acquainted with import and veneration of such an oath than any other ordinary lawyer--Such like offer is made on behalf of a party on supposition that adversary, who will accept it is not only conscious of trust of this Holy Book, but has a dynamic belief therein and while making affirmation thereon, shall deem itself to be before its maker and certainly deposed truth on account of fear of wrath and antagonism of Him--It was authoritatively laid down that settlement to decide matter on oath constituted a valid agreement from which parties could not conveniently wriggle out until contract was ex facie shown to be void or incapable of implementation, which is not case of present petitioner--As such this Court is of view that learned Addl. District Judge was justified in refusing to permit petitioner to resile from his offer, but he was to abide by same--Petitioners was dismissed. [Pp. 32 & 33] A & C

Substantial Evidence--

----Discretion of Court--Substantial evidence--Facts of case in hand as discussed hereinabove compelled me to exercise my discretion in favour of respondent, who had an important witness of impugned mutation along with him, which being substantial evidence was enough to splinter genuineness of mutation. [P. 33] B

M/s. Sh. Naveed Shehryar and Humaira Bashir Ch., Advocates for Petitioner.

M/s. Arshad Jhangir Jhojha, Iftikhar Chohan and Imtiaz Hussain Rehan, Advocates for Respondents No. 3.

Mr. Muhammad Arif Yaqoob Khan, Addl. A.G. for Respondent No. 4.

Date of hearing: 23.5.2018

JUDGMENT

This litigation runs between two real brothers. Muhammad Sohna Respondent No. 3 brought a suit against the petitioner and Province of the Punjab to assail vires of oral exchange mutation No. 4645 dated 29.07.1992. In due course of proceedings, on 08.05.2012 the present petitioner/defendant filed an application for the decision of case on special oath to be administered by Respondent No. 3/plaintiff and the matter

was adjourned to 11.05.2012 for latter's reply, who showed his willingness to administer the oath, but at the same time, petitioner tabled a written request to resile from the offer earlier made by him. The request of petitioner was accorded by learned Civil Judge and case was fixed for further proceedings on merit. Respondent No. 3 challenged it by filing a Civil Revision before the learned District Court, which was allowed on 10.10.2012 compelling the petitioner to approach this Court by means of Writ Petition in hand, but during its pendency, the statement on special oath of the Holy Quran was administered by Respondent No. 3 and as a result thereof, his suit was decreed on 30.11.2012. Although it was assailed in Appeal, but without any success when it was dismissed by learned Addl. District Jude on 03.07.2014, which forced the petitioner to approach this Court through connected Civil Revision No. 3112 of 2014. As common questions of law and facts are involved in both the lis, which have arisen out of a single suit instituted by Respondent No. 3, I intend to dispose of the same jointly through this single judgment.

2. Arguments heard and record perused.

3. Before commenting upon issue involved in the case in hand, it would be advantageous to use up the headway as well as situation of the suit proceedings, which constrained the petitioner/defendant to table an application for the resolution of suit through special oath of the Holy Quran and thereafter to make an effort to retract therefrom.

The suit was instituted by respondent/plaintiff on 20.10.2007, but despite observance of prescribed modes provided under Order V of the Code, 1908, the petitioner/defendant did not turn up and ultimately was proceeded against *ex parte* on 28.02.2008. Pursuant thereto, in *ex parte* evidence Muhammad Rasheed (DW2), one of the marginal witnesses of the impugned exchange mutation was examined, who explicitly worded in his statement that neither he had appeared in the public gathering for the attestation of mutation nor he signed it. This statement being uncontroverted by any corner forced the Civil Court to pass an *ex parte* decree in favour of respondent on 26.09.2008. Thereafter, petitioner turned up with an application for its setting aside, which was granted on 07.12.2011. The respondent did not assail it any further and opted for the decision of his suit after its full-fledged trial. Nevertheless, not only the suit was invigorated, but after settlement of issues, it was also fixed for 08.05.2012, when partial evidence of the respondent was available and Muhammad Rasheed, the marginal witness of the impugned mutation, would again be there that the application for decision of suit on special oath of the Holy Quran was filed through a counsel, who happened to be Hafiz of that Holy Book and might be well acquainted with the import and veneration of such an oath than any other ordinary lawyer. Such like offer is made on behalf of a party on the supposition that the adversary, who will accept it is not only conscious of the trust of this Holy Book, but has a dynamic belief therein and while making the affirmation thereon, shall deem itself to be before its maker and certainly deposed the truth on account of fear of wrath and

antagonism of Him. This offer was not made in haste, rather the petitioner was confident that one of the witnesses to the suit mutation had already deposed against him and was going to repeat it. The Court was also not in hurry to record the reply of the respondent on the same day, rather proceedings were postponed for next three days and on 11.05.2012, the respondent came prepared to administer the special oath, then application was filed by the petitioner to claim right of resiling from the solemn offer, which had already been accepted, constituting a valid contract. Had there been a denial on the part of respondent, there would be no occasion to make a request for resiling from the offer. In this regard, the contents of application are very much relevant narrating therein that he learnt from the people of village that the respondent would make a false statement on oath. Had it been so, there were two clear days available to the petitioner in between the preceding and forthcoming date of hearing, who might have approached the Court with his request in those two days or on the day of hearing, the moment Judicial Officer appeared in the Court, this application would have been tabled, but the petitioner kept on waiting till the offer was accepted by the adversary, thereafter moved the application when much water had already flown through the bridge while accruing vested right to the other party.

4. Sh. Naveed Shehryar, Advocate for the petitioner by and large while relying upon the dicta laid down in *Mst. Asifa Sultana vs. Honest Traders, Lahore and another* (PLD 1970 Supreme Court 331) accentuated with great concern that a party offering to abide by a statement on oath can resile from such offer prior to administration of oath. I have meticulously scanned this illustrious judgment and come to the conclusion that it was left upon the discretion of the Court dealing with such proposition to decide it on the facts and circumstances of each case. The facts of the case in hand as discussed

hereinabove compelled me to exercise my discretion in favour of the respondent, who had an important witness of the impugned mutation along with him, which being substantial evidence was enough to splinter the genuineness of the mutation. As per reported judgments of the apex Court delivered in the following cases:--

(i) *Saleem Ahmad vs. Khushi Muhammad* (1974 SCMR 224)

(ii) *Muhammad Ali vs. Major Muhammad Aslam and others* (PLD 1990 SC 841)

(iii) *Muhammad Mansha and 7 others vs. Abdul Sattar and 4 others* (1995 SCMR 795)

(iv) *Nasrullah Jan vs. Rastabaz Khan* (1996 SCMR 108)

It was authoritatively laid down that settlement to decide the matter on oath constituted a valid agreement from which parties could not conveniently wriggle out until contract was ex facie shown to be void or incapable of implementation, which is not the case of present petitioner. As such this Court is of the view that learned

Addl. District Judge was justified in refusing to permit the petitioner to resile from his offer, but he was to abide by the same.

5. The ultimate result of the discussion is failure of the connected matters, hence, while maintaining the impugned order/judgments/decrees, instant Writ Petition and connected Civil Revision No. 3112-2014 having no force are dismissed.

(Y.A.) Civil revision dismissed.

2019 M L D 732
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
MEHBOOB-UD-DIN and others---Petitioners
Versus
Mst. ZUBAIDA and others---Respondents

Civil Revisions Nos. 784-D and 785-D of 2006, decided on 20th December, 2018.

(a) Registration Act (XVI of 1908)---

----S. 17---Qanun-e-Shahadat (10 of 1984), Art. 129, Illus. (e)---Registered document---Presumption---Document, registered by an authority while performing its official function, attains presumption of truth but only in cases where authenticity and genuineness thereof is not challenged.

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

----Art. 85(5)---Registered document---Execution, proof of---Whenever execution or contents of any such document are disputed, presumption so attached to it loses its significance; it becomes sine qua non for beneficiary thereof to have it proved through mode required to prove a private document.

Muhammad Sher and 2 others v. Muhammad Azim and another PLD 1977 Lah. 729; Abdul Majeed and others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Mrs. Khalida Azhar v. Viqar Rustam Bakhshi and others 2018 SCMR 30 and Fareed and others v. Muhammad Tufail and another 2018 SCMR 139 rel.

(c) Gift---

----Registered gift deed---Onus to prove---Plaintiffs claimed to be owners of suit property and asserted that registered gift deed relied upon by defendants was a forged and fake document---Suit was dismissed by Trial Court but Lower Appellate Court reversed said findings and decreed the suit in favour of plaintiffs---Validity---Construction of gift deed in question as well as transaction referred by defendants was attacked with serious allegations---Onus was shifted on defendants to prove facts but from first day defendants failed to assert and prove ingredients of their purported transaction to the effect that when, where and before whom declaration of gift was offered by donors which was accepted by them and possession changed hands in lieu thereof---Stamp paper for gift deed in question was not purchased by any of the purported donors rather it was issued to father of donees who admittedly had no authority on their behalf---Purchase of stamp paper by an unauthorized person despite availability of ladies on whose behalf it was written, made it dubious from day of its

inception---Defendants did not succeed to establish authenticity and veracity of document in question because none among stamp vendor, petition writer, registry Muharir, sub-registrar and attesting witnesses was examined---High Court declined to interfere in the judgment and decree passed by Lower Appellate Court as no wrong was committed---Revision was dismissed in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241; Muhammad Qayyum and 2 others v. Muhammad Azeem Through Legal Heirs and another PLD 1995 SC 381; Sadar Abbas v. Province of Punjab and others 2015 CLC 822; Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others 2002 SCMR 1938; Mst. Manzoor Begum (deceased) through L.Rs. v. Mst. Fateh Bibi and others 2016 SCMR 1596 and Allah Ditta and others v. Manak alias Muhammad Siddique and others 2017 SCMR 402 rel.

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

----O. VII, R. 1(e)---Cause of action---Principle---No right to sue existed until an accrual of right is asserted in the plaint and its infringement or clear unequivocal threat to injure that right by defendant against whom suit is instituted is also pleaded in clear terms.

Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others 2000 SCMR 346 and Khair Din v. Mst. Salaman and others PLD 2002 SC 677 ref.

Syed Tajammul Hussain Bukhari for Petitioners.

Rana Muhammad Aslam for Respondents (in C. R. No. 784-D of 2006)

Muhammad Saleem for Respondent No.2(b) in person (in C.R. No.785-D of 2006) on behalf of legal heirs of Mst. Rashida Begum.

Date of hearing: 20th December, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Inessential detail apart, the precise history of the case was that subject house had been transferred to Mst. Zubaida Begum and Mst. Rashida Begum, respondents Nos.1 and 2 along with their mother Mst. Zainab by the Settlement Department vide Permanent Transfer Order, which was subsequently alienated through impugned registered Gift Deed dated 05.08.1984 (Exh.D2) to present petitioners, who were nephews as well as maternal grandsons of the purported donors. In 1998, respondents Nos.1 and 2 at their end instituted two independent suits for the cancellation of afore-noted instrument contending therein that neither they had offered the gift nor executed instrument to such effect, which was managed by their brother Fakhar-ud-Din in favour of his sons to deprive his mother and sisters from their property and it being forged, fictitious and having been obtained through misrepresentation was

illegal as well as ineffective upon their rights. Both the suits were contested with the defence that respondents Nos.1 and 2 along with their mother had voluntarily transferred the house through the instrument genuinely constructed on their behalf. It was also pleaded in the written statements that Mst. Rashida Begum respondent No.2 was compensated with some other property, whereas in favour of Mst. Zubaida, respondent No.1, the rooms of House No.706 were transferred vide registered instruments Nos.1543 and 1544 executed/attested on the day when impugned deed was attested. As both the suits pertained to the same subject matter and parties, the learned Trial Court was perfect to consolidate it through formulation of joint issues and after examination as well as appreciation of evidence brought on record by the respective parties, learned Trial Court dismissed both the suits vide common judgment and decrees dated 25.06.2005, which could not hold the field for any considerable period when two independent Appeals of the respondents were allowed and through consolidated impugned judgment dated 19.07.2006, not only the verdict of the subordinate Court was set aside, but the suits were also decreed cancelling the Gift Deed, hence Civil Revision in hand and connected one bearing No.785-D-2006. As did the Courts below, this Court is also inclined to decide both these jointly through this single judgment.

2. Syed Tajjamal Hussain Bokhari, Advocate for the petitioners/ donees emphasized with great vehemence that property had been transferred through registered instrument, which under the law attained strong presumption of correctness and learned Trial Court was perfect to honour its authenticity, whereas learned lower Appellate Court without considering that on the same day, some other property had also been alienated in favour of respondent No.1/donor through registered instruments, but those were never challenged at any forum erred in law to undo one of the transactions and other two attested in her favour were kept solemn. Added that suit was badly time barred, but this aspect of the case was not considered in its true perspective. It was next argued that despite the fact that plaintiffs had denied their thumb impressions over the questioned document, but they did not tender a request to refer the specimens of their thumb impressions for comparison to the Finger Print Bureau and their silence in this regard was sufficient proof to hold that their imprints over the questioned document were identical. It was finally pleaded that impugned judgment being classic example of misreading and non-reading of evidence was liable to be set aside and prayed for acceptance of Civil Revisions and restoration of judgment and decrees of learned Trial Court.

In contra, Messrs Rana Muhammad Aslam, Advocate for respondent No.1 and Muhammad Saleem, respondent No.2(b) on behalf of remaining respondents submitted that Stamp Vendor, Deed Writer, Registry Moharrar, Sub-Registrar and the Attesting Witnesses despite their availability were deliberately withheld, as such learned lower Appellate Court was perfect to draw a hostile inference against the beneficiaries. It was next added that the petitioners did not refer the

essential details with regard to time, date, month, year, venue and names of witnesses in their written statement to disclose that when, where and before whom the original transaction was settled. It was further pleaded on their behalf that evidence of the petitioners was also lacking to confirm the basic three ingredients of the transaction of gift. They also argued that impugned document was surreptitiously engineered through fraud and misrepresentation by Fakhar-ud-Din father of the petitioners for his greed, which could not be perpetuated on the score of limitation or for some other legal infirmity. It too was their stance that the judgment of the learned lower Appellate Court has to be preferred over that of its subordinate Court and lastly prayed for the dismissal of Petitions in hand.

3. Arguments heard and record perused.

4. First of all, this Court deems it apposite to attend to inaugural as well as sweeping and wide argument of Mr. Bukhari that impugned instrument being registered by an Authority while performing its official functions attains presumption of truth might have substance, but only in the cases where authenticity and genuineness thereof is not challenged. I must endorse that public documents are the acts of public functionaries in Executive, Legislative and Judicial Departments of the Government including those under the general head the transactions, which official persons are required to enter in Books and Registers in the course of their public duties and which occur within the circle of their own personal knowledge and observations, however, as per sub-clause (e) of Article 85 of the Qanun-e-Shahadat Order, 1984 whenever the execution or contents of any such document are disputed, the presumption so attached to it loses its significance and it becomes sine qua non for the beneficiary thereof to have it proved through mode requires to prove a private document. Article 78 of the Order ibid prescribes that if any document is alleged to be signed/ thumb marked or to have been written by any person, the signatures/imprints or writing must be proved in that person's handwriting. Although this provision does not lay down any particular manner for proving it, but any mode of proof recognized by this statute can be availed by the party upon which onus probandi is rested. The pivotal aspect of provision ibid is that, it addresses to prove the identity of its scribe as well as other signatories, but mere proof of handwriting, signatures and imprints will not be sufficient to prove transaction couched therein. Reliance can be placed upon judgments reported as Muhammad Sher and 2 others v. Muhammad Azim and another (PLD 1977 Lahore 729), Abdul Majeed and others v. Muhammad Subhan and 2 others (1999 SCMR 1245), Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144), Mrs. Khalida Azhar v. Viqar Rustam Bakhshi and others (2018 SCMR 30) and Fareed and others v. Muhammad Tufail and another (2018 SCMR 139). The conclusion drawn by the apex Court in Abdul Majeed's case (supra) in this regard being directly applicable in the situation discussed herein above is reflected below:-

"It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction to which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness and execution of that to which they relate unless the transaction covered by them is substantiated from independent and reliable source. Admissibility is to be distinguished from proof required by law for determining the execution and genuineness of document."

In this view of the matter, when not only through various paras of the plaint as well as deposition of the plaintiff (PW-1) the construction of impugned Gift Deed as well as transaction referred therein was attacked with serious allegations, the onus was shifted on the petitioners to prove those facts, but surprisingly from the day first, the petitioners failed to assert and prove the ingredients of their purported transaction to the effect that when, where and before whom declaration of gift was offered by the donors, which was accepted by them and the possession changed hands in lieu thereof. Moreover, minute appraisal of copy of impugned Gift Deed divulged that its Stamp Paper was not purchased by any of the purported donors, rather it was issued to Fakhar-ud-Din, the father of the donees, who admittedly had no authority on their behalf. Important that Gift Deed was scribed on that very day when Stamp Paper was issued and if the donors were present at the time of its writing, then what was the fun that its paper was not personally purchased by any of them. The purchase of Stamp Paper by an unauthorized person despite availability of the ladies on whose behalf it was written, made its dubious from the day of its inception. Over and above, the petitioners did not succeed to establish the authenticity and veracity of impugned document because none among the Stamp Vendor, Petition Writer, Registry Moharrir, Sub-Registrar and Attesting Witnesses was examined. Only Muhammad Nazir, Lumberdar (DW-2), the alleged identifier was produced, but his sole deposition was insufficient to fulfil the requirement for proof of document, especially keeping in mind his answers uttered during the test of cross-examination, which being relevant are referred as under:--

It left no iota in mind that the ladies allegedly identified by him were not personally known to him, as such, his identification lost its significance.

5. The emphasis of learned counsel for the petitioners that both the marginal witnesses of the Gift Deed were sons of the plaintiffs/donors and there was a risk that had they been summoned for examination in the witness-box, they might have supported their mothers is fallacious. In recent era, the apex Court in

a case reported as Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others (PLD 2011 SC 241) has already dealt with this situation while concluding therein that irrespective of fear and risk the beneficiary of a document has to produce its signatories even if related with his adversary and the moment he/they depose(s) inimical to its examiner, the latter may extend a request for declaring him/them hostile. The relevant Para-12 of this esteemed judgment is given below:-

> "12. For the argument that as the second attesting witness of the agreement was the son of the respondent, therefore, the appellant could not take the risk of examining him, it may be held that as ordained above the mandatory provisions of law had to be complied and fulfilled and only for the reason or the perception that such attesting witness if examined may turn hostile does not absolve the concerned party of its duty to follow the law and allow the provisions of the Order, 1984, relating to hostile witness take its own course. Before parting it may be mentioned that the judgment reported as Abdul Wali v. Muhammad Saleh (1998 SCMR 760) which find mention in the leave granting order is not relevant for the proposition in hand as it relates to a document before the enforcement of the Order, 1984 when Article 17 was not there."

Although Feroze-ud-Din, one of the donees (DW-3), Abdul Rasheed (DW-4), Muhammad Tayyab (DW-5) and Fakhar-ud-Din (DW-6) father of the petitioners were examined on behalf of the latters, but none of them was signatory of Exh.D2, as such, their testimony was of no importance.

6. The emphasis of Mr. Bukhari that on the crucial day, on one side, Exh.D2 was attested, whereas on the other side, two rooms of the other house were transferred to respondent No.1 through documents of similar nature, but the latters were not challenged, as such, respondent No.1 was estopped to challenge Exh.D2 was without merit. The plaintiff (PW-1) in her cross-examination unequivocally denied that any document was executed in her favour with regard to said rooms. In such situation to counter PW-1, the petitioners were required to have examined their mother, the alleged transferor/executant of those instruments or these were confronted to PW-1, but none of the modes was followed, hence the Court was perfect to draw an adverse inference. Moreover, Feroze-ud-Din (DW-3), one of the petitioners in his cross-examination stated as below:-

Had in lieu of subject property, the two rooms been actually transferred to respondent No.1, there was no fun to retain its original deeds despite losing their title by the executant. The purported documents registered in favour of respondent No.1 might have been executed for the days to come to guard the impugned document (Exh.D2).

7. The next argument on behalf of petitioners that to prove that questioned document was not thumb marked by the ladies, it was obligatory for them to have requested for referring the specimen of their imprints for comparison to the Finger Print Bureau is not tenable. The onus as discussed earlier was shifted upon the petitioners and in such eventuality, they being beneficiaries especially when no direct evidence to prove the questioned document was examined, could avail this alternative mode while making a prayer for the matching test, but no such effort at their end was made and by not resorting to this exercise, they themselves incurred a presumption against them. See Muhammad Qayyum and 2 others v. Muhammad Azeem through Legal Heirs and another (PLD 1995 SC 381).

8. The emphasis of Advocate for the petitioners that Gift Deed was executed in 1984 and the suit was subsequently filed with the delay of 14 years in 1998, which was badly time barred, is misconceived. In the case in hand, it was specifically pleaded by the plaintiffs that alleged transfer of property had been kept secret from them and for the first time, it came into their knowledge one and half month prior to institution of the suit that through disputed instrument they had been defrauded. There can be no right to sue until an accrual of right is asserted in the plaint and its infringement or clear unequivocal threat to injure that right by the defendant against whom the suit is instituted is also pleaded and in clear terms, it was in the plaint by the plaintiffs, who also prayed for declaring the Gift Deed in dispute as illegal besides that it was fictitious, forged as well as fabricated and on having been proved as such, the same could not be perpetuated, but could be assailed at any point of time. Reliance in this respect can be placed on the case law reported as Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others (2000 SCMR 346) and Khair Din v. Mst. Salaman and others (PLD 2002 SC 677).

9. The additional setback of the controversy would be that the alleged donors had their siblings as well, but no reason was ever furnished in the memo of gift or pleadings that for what evil deeds they were deprived of the said benefit. See Sadar Abbas v. Province of Punjab and others (2015 CLC 822), Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others (2002 SCMR 1938), Mst. Manzoor Begum (deceased) through L.Rs. v. Mst. Fateh Bibi and others (2016 SCMR 1596), and Allah Ditta and others v. Manak alias Muhammad Siddique and others (2017 SCMR 402).

10. All it germanes that while dismissing the suit, learned Trial Court failed to appreciate the evidence available on record as well as law on the subject, but his Appellate Court perfectly accumulated and thrashed it in its true perspective to decree the suit, whose judgment being based on reasoning has to be preferred especially when learned counsel for the petitioners was not able to persuade that any wrong was committed and this Court being sanguine feels no hesitation to confirm the impugned judgment and decrees, hence, these Civil Revisions

having no merit are bound to fail, which are dismissed accordingly with no order as to cost.

MH/M-10/L

Revision dismissed.

2019 C L C 797
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Chaudhry MUHAMMAD YOUNAS----Petitioner
Versus
MUHAMMAD KHURSHEED and 10 others----Respondents

C.R. No. 546 of 2015, heard on 2nd November, 2018.

(a) Islamic law---

----Gift--- Conditions---Document---Proof---Procedure---Inheritance---Limitation---Scope---Procedure---Res judicata, principle of---Applicability---Conditions for valid gift were declaration of gift, acceptance and delivery of possession of corpus---Written instrument in any case did not create a gift but same would be a mere piece of paper to record a past transaction---Beneficiary of gift was bound to prove the components of gift besides execution of document as well---Nothing was on record with regard to any date or month and specific name of the witnesses of transaction---Only photocopy of gift deed was brought on record and no effort was made to prove the same through secondary evidence---Defendant did not examine any of the marginal witnesses, scribe and stamp vendor of alleged deed---No attempt was made for identification of signatures of alleged deceased witness of impugned gift deed---Nothing was on record as to why evidence of stamp vendor as well as scribe was withheld in the present case---Only one of the beneficiaries was examined and the other did not appear to face the test of cross-examination---Nothing was on record to corroborate the factum that offer of gift was ever made which was accepted and possession was changed in lieu thereof---No evidence had been produced on behalf of plaintiff to prove the original transaction as well as construction of subsequent documents to acknowledge the same---If a document was tendered in evidence without objection even then it could not be treated as original having been signed and written by the persons who purported to have written or signed the same unless the writing and signatures were proved in terms of Arts. 78 & 79 of Qanun-e-Shahadat, 1984---Nothing was on record as to why deceased donor deprived of the other legal heir from the suit land---Beneficiaries had failed to discharge the onus duly shifted upon them---Impugned gift transaction was forged and fictitious one which was not to be perpetuated only at the point of limitation---Interlocutory order having attained finality could not be re-agitated---Law of limitation or principle of res judicata was not applicable in the matter of inheritance---Revision was dismissed accordingly.

Yasmeen Qureshi v. Tariq Qureshi and 2 others PLD 2006 Lah. 311; Mehbub Alim v. Razia Begum and others PLD 1949 Lah. 263; Syed Mehdi Hussain Shah v. Mst. Sahadoo Bibi and others PLD 1962 SC 291; Muhammad Sharif and 2 others v. Mst. Aisha Bibi 1994 MLD 677; Chanar Gul and 4 others v. Province of Sindh through Secretary, Sindh Secretariat and 3 others 2017

YLR Note 434; Murad Bakhsh and 4 others v. Mst. Syeda Ashraf Jhan and 4 others 2017 CLC 646; Chandu Lal Agarwala and others v. Khalil ur Rehman and others PLD 1949 Privy Council 239; Muhammad Akbar and others v. Mst. Sahib Khatoon and others 1991 SCMR 1196 and Rashid Ahmed and others v. Allah Ditta and others 2014 YLR 1748 distinguished.

Allah Ditta and others v. Manak alias Muhammad Siddique and others 2017 SCMR 402; Khan Muhammad Yousaf Khattak v. S.M. Ayub and others PLD 1973 SC 160; Sadar Abbas v. Province of Punjab and others 2015 CLC 822; Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others 2002 SCMR 1938; Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others 2000 SCMR 346; Khair Din v. Mst. Salaman and others PLD 2002 SC 677; Gulistan Textile Mills Ltd. and another v. Soneri Bank Ltd. and another PLD 2018 SC 322; Ghulam Muhammad and others v. Muhammad Hussain and others 2006 CLJ 633 and Muhammad Zubair and others v. Muhammad Sharif 2005 SCMR 1217 rel.

(b) Pleadings---

----Pleadings could not be treated as evidence until and unless its maker was called upon to testify it on oath.

(c) Islamic law---

----Inheritance---Law of limitation or principle of res judicata was not applicable in the matter of inheritance.

Maqbool Elahi Malik, Muhammad Umar Riaz, Muhammad Sajid Chaudhry and Shahzada Babar for Petitioner (in C.R. No.546 of 2015) and respondent No.10 (in C.R. No.547 of 2015).

Khalil Ahmed and Hassan Iqbal Warriach for Respondent No.10 and Petitioner (in C.R. No.547 of 2015).

Sh. Naveed Shahryar, Imtiaz Hussain Rehan, Fatima Malik and Tariq Siddique for Respondents Nos.1 to 3.

Date of hearing: 2nd November, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undisputedly, Ch. Maula Bakhsh was exclusive owner of House No.111-D, Model Town, Lahore, who expired on 04.07.1996 leaving behind five sons and three daughters, out of whom Mehmood Ahmed, respondent No.3, on 12.03.2001 instituted a suit for administration, declaration and permanent injunction against his other brothers and sisters to claim his share in the legacy pertaining to the subject House left by their father. Although a joint written statement (Exh.P7) on behalf of rest of

the brothers and sisters was filed to contest the suit with the defence that their father had already gifted out the House to his two sons (petitioner and respondent No.10) in 1989, but during its proceedings, out of them, Muhammad Khursheed and Mst. Surriya Begum (respondents Nos.1 and 2) filed independent applications and also made statements before the Court seized of the suit to resile that said written statement was filed on their behalf, who also sought leave to raise their independent defence. Although their request was accorded, but prior to its submission on 05.12.2008, the suit was dismissed for want of evidence while attracting penal consequences of Order XVII rule 3 of the Code of Civil Procedure, 1908 and the appeal as well as Civil Revision preferred by respondent No.3 also failed up to the level of this Court, however in the meantime, Muhammad Khursheed respondent No.1 on 15.12.2008 and Mst. Surriya Begum respondent No.2 on 26.01.2010 instituted two independent civil suits before the learned Trial Court to basically claim separate possession of their legal and shari shares in the demised House through partition, which were consolidated and much thereafter, Ch. Muhammad Younas, petitioner of instant Civil Revision also instituted a suit for recovery of possession, mesne profit and damages only against respondent No.1, which was not tagged with the earlier suits for the reasons that the latters had ripped till then. Although declension in this regard was assailed by the petitioners, but without any success and as a result of common protracted trial suits under these Petitions were decreed vide consolidated judgment dated 21.05.2014, which was further congealed when independent appeals of the petitioner and respondent No.10/beneficiaries of the alleged gift failed on 22.12.2014, hence Civil Revision in hand along with connected one bearing No.547 of 2015. As common questions of law and facts inter se the parties are involved in these lis having arisen out of joint trial and consolidated judgments of the Courts below, hence for all intents and purposes, I intend to decide those jointly through this single judgment. However, the reference and source point for rendering this judgment will be Civil Revision in hand.

2. Heard and record perused.

3. Messrs Maqbool Elahi Malik, Ch. Khalil Ahmed, Muhammad Umar Riaz, Muhammad Sajid Chaudhry, Shahzada Babar and Hassan Iqbal Warriach, Advocates appearing on behalf of Civil Revisioners/beneficiaries inaugurally emphasized that mere affirmation of plaintiffs regarding denial of ownership rights of the defendants/beneficiaries did not absolve them of their obligation to produce cogent evidence in order to substantiate their assertions, who not only

failed to lead tangible evidence, but also remained unsuccessful to plead and prove the alleged forgery with regard to acknowledgement of gift executed by Maula Bakhsh in their favour was not well founded. Ex facie Paras-4 to 7 of the plaint of respondent No.1 were very much elaborated to disclose the wrongdoings engineered by beneficiaries to usurp the shares of the other co-owners. Moreover, the moment Ch. Muhammad Khursheed/plaintiff (PW1) while appearing in the witness-box deposed that their father had never alienated the house and his brothers/beneficiaries had managed fictitious documents through forgery, onus was shifted upon the latters to prove the original transaction as well as documents executed in this regard. Reliance can be placed upon judgment reported as "Allah Ditta and others v. Manak alias Muhammad Siddique and others (2017 SCMR 402).

Before embarking any further, I would like to add that under the Mohammadan Law, a gift, in order to be valid and binding upon the parties, must fulfil the following conditions:-

(a) a declaration of gift by the donor;

(b) acceptance of gift by the donee; and

(c) delivery of possession of corpus.

On the accomplishment of these ingredients, a valid gift comes into existence. A written instrument in any case would not create a gift but was mere piece of paper to record a past transaction and in such eventuality it was sine qua non for its gainer to independently prove the aforenoted three components of the gift besides the execution of the document as well.

4. During the proceedings of earlier suit instituted by Mehmood Ahmed regarding the identical controversy, the beneficiaries in their written statements without mentioning any date or month and specific names of the witnesses of the transaction simply disclosed that their father with his free will in presence of witnesses had made a declaration of gift in 1989 in lieu whereof, the possession was also handed over to them, but absolutely there was no disclosure to the extent that any instrument was constructed as well to acknowledge the transaction. The beneficiaries again in the instant suits failed to give essential details regarding any writing executed for the confirmation of oral gift. Anyhow, in evidence only photocopies of different documents (Mark-A, B and Exh.DW3/5) were brought on suit file to prove that oral transaction of gift was ultimately admitted by its executant/donor, but neither the original one thereof

were brought into picture nor any effort was made to prove the same through secondary evidence. It was again stunning that beneficiaries did not examine any of its marginal witnesses, scribe and stamp vendor.

The contention of learned counsel for the beneficiaries that out of attesting signatories, one had already departed, whereas the other having become crippled could not be summoned, but at the same time, they were compelled to concede that even no attempt was made for the identification of their signatures through some persons familiar therewith. The learned counsel also failed to justify why the stamp vendor as well as scribe was withheld. The other setback was that out of two beneficiaries, only one was examined, whereas other despite his availability did not appear to face the test of cross-examination. It was also shocking that no one in corroboration was produced to prove the factum that offer of gift was ever made, which was accepted before him, what to talk of the change of possession in lieu of alleged transaction, so it was a case of no evidence on behalf of petitioners to prove their original transaction as well as construction of subsequent documents to acknowledge it. The stress of learned counsel that in earlier suit rest of the siblings of the donor had conceded the stance of the petitioners, as such their admission was binding upon them was fallacious. It is well established that pleadings cannot be treated as evidence until and unless its maker is called upon to testify it on oath. It is to be recalled that the plaintiffs of the lis in hand during the proceedings of earlier suit resiled to have filed any such written statement while leveling serious allegations upon the beneficiaries that they had fictitiously invented it. In these circumstances, the mere fact that a conceding written statement was filed, cannot be taken as proof of the disputed gift.

At this stage, Mr. Umar Riaz accented that instrument of gift (Ex:DW3/5) was received in evidence without any objection, as such it stood proved, was not correct. The pivotal question in the litigation was its genuineness or otherwise. Articles 78 and 79 of the Qanun-e-Shahadat Order, 1984 are the relevant provisions, which provide procedure for proof of such like instrument. Even if it was brought on record without objection, but it could not be treated as evidence of the original having been signed and written by the persons, who purported to have written or signed it, unless the writing and their signatures were proved in terms of aforenoted provisions. The identical controversy has already been clinched by the apex Court in a case reported as Khan Muhammad Yousaf Khattak v. S.M. Ayub and others (PLD 1973 SC 160).

5. The next emphasis of learned counsel for the beneficiaries that gift was duly recorded in the relevant record of Model Town Housing Society and after its transfer to their clients in the life of the donor, neither there left any requirement to prove it nor the other siblings of the donor had any locus standi to dispute the same, is not well founded. Although Record Keeper (DW3) of the Society was examined by the beneficiaries, who tendered copies of some documents as per availability thereof in Office File, but admittedly none of these was either scribed or signed in any capacity by him. Anyhow, the testimony of this star witness was of no help to the petitioners and for ready reference some relevant extract from his cross-examination in verbatim is reproduced as under:-

During the cross-examination, the specific question as follows:

was extended to him by learned counsel for the plaintiffs and he replied:-

So, nothing was made available on the record during the trial to prove that Maula Bakhsh had ever appeared before the Society to make a request for transfer of suit property through gift in favour of his two sons/petitioners. The entire proceedings for transfer of the House were allegedly conducted by the Secretary of the Society, but despite availability, he was also not examined and Courts below were perfect to draw an adverse inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984, that had he been examined, he would have not acknowledged the proceedings of transfer available in the relevant file and the alleged transfer of said house to beneficiaries without any legal back was of no legal effect. Under the law, a property could only be transferred either through mutation, registered instrument or by orders of Court of law, whereas its transfer was made by the Society without securing identification of the donor or recording his statement, hence Courts below were perfect to disbelieve those proceedings.

The additional setback of the controversy would be that the alleged donor had five sons and two daughters or their siblings, if any out of them had already departed, but no reason was ever furnished either in the memo of gift or record of the Society that for what evil deeds rest of the sons as well as daughters were deprived of the said benefit. See Sadar Abbas v. Province of Punjab and others (2015 CLC 822) and Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others (2002 SCMR 1938). The apropos of entire discussion is that beneficiaries failed to discharge onus of Issue No.5 duly shifted upon them and this Court being sanguine to unanimous findings returned by the Courts below feels no hesitation to confirm it.

6. The next argument of learned counsel for the beneficiaries that suits were badly time barred having been filed after many years of the departure of Maula Bakhsh is also not forceful. In the present case, perspicuous stance of the plaintiffs was that the impugned memos of gift were fictitious, forged as well as fabricated and on having been proved as such beyond any shadow of doubt, the same could not be perpetuated, but those can be assailed at any point of time. Reliance in this respect can be placed on the case law reported as Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others (2000 SCMR 346) and Khair Din v. Mst. Salaman and others (PLD 2002 SC 677).

7. The next submission of learned counsel for the beneficiaries that after dismissal of earlier suit instituted by Mehmood Ahmed respondent No.3, a fresh suit could not be instituted on behalf of the defendants of afore-noted lis and both the Courts below failed to apply principle of res judicata is again not tenable.

Admittedly, during trial of suits in hand, application under section 11 of the Code, 1908 seeking rejection of plaint being barred by law was filed by the petitioners, but was declined and maintained upto the level of this Court, hence interlocutory order having attained finality could not be re-agitated. Reliance in this respect is placed on the judgment reported as Gulistan Textile Mills Ltd. and another v. Soneri Bank Ltd. and another (PLD 2018 SC 322). Moreover, in cases reported as Ghulam Muhammad and others v. Muhammad Hussain and others (2006 CLJ 633) and Muhammad Zubair and others v. Muhammad Sharif (2005 SCMR 1217) the Superior Courts have already concluded that right of inheritance could not be defeated by law of limitation or principle of res judicata as no law or judgment could override law of Sharia being a superior law, hence the arguments in this regard being meritless are repelled.

8. Learned counsel for the beneficiaries while relying upon judgments reported as Yasmeen Qureshi v. Tariq Qureshi and 2 others (PLD 2006 Lahore 311), Mehbub Alim v. Razia Begum and others (PLD 1949 Lahore 263), Syed Mehdi Hussain Shah v. Mst. Sahadoo Bibi and others (PLD 1962 SC 291), Muhammad Sharif and 2 others v. Mst. Aisha Bibi (1994 MLD 677), Chanar Gul and 4 others v. Province of Sindh through Secretary, Sindh Secretariat and 3 others (2017 YLR Note 434), Murad Bakhsh and 4 others v. Mst. Syeda Ashraf Jhan and 4 others (2017 CLC 646), Chandu Lal Agarwala and others v. Khalil ur Rehman and others (PLD 1949 Privy Council 239), Muhammad Akbar and others v. Mst. Sahib Khatoon and others (1991 SCMR 1196) and Rashid Ahmed

and others v. Allah Ditta and others (2014 YLR 1748) put their best to persuade that concurrent findings of two Courts below were liable to be interfered with, but minute perusal of the referred case law reveals that these being distinguishable from the facts and circumstances of the instant case cannot be made basis to reverse unanimous impugned judgments, which having been based upon well appreciation of evidence and application of law on the subject are approved and confirmed.

9. Consequently, these Civil Revisions being devoid of any force and merit are dismissed with cost throughout.

ZC/M-171/L Revision dismissed.

2019 Y L R 1195
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
MOHAMMAD AKRAM---Appellant
Versus
Mst. NOORO MAI---Respondent

R.S.A. No.57 of 2012, decided on 21st December, 2018.

(a) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Qanun-e-Shahadat (10 of 1984), Art. 129 (g)---Talbs, performance of---Talb-i-Muwathibat was sine qua non for the right of pre-emption---Statements of witnesses of pre-emptor were contradictory with regard to time of performance of Talb-i-Muwathibat---Once evidence of pre-emptor had become shaky or his rival succeeded then superstructure had to collapse---Pre-emptor had failed to mention the date of execution and dispatch of the notice of Talb-i-Ishhad in the contents of plaint---Plaintiff had failed to plead that notice of Talb-i-Ishhad was served upon the vendee---Pre-emptor had failed to prove fulfillment of requisite demands as per requirements of law---Plaintiff was not co-sharer in the Khewat in question---Pre-emptor was bound to produce on record copy of Aks Shajrah besides examination of its maker and the copy of Warabandi to prove that she was Shafi Jar as well as Shafi Khaleet---Said documents were not produced thus best evidence had been withheld---Adverse inference would be drawn against the pre-emptor, in circumstances---Both the Courts below had failed to appreciate the evidence in its true perspective---Findings recorded by the Courts below were result of mis-reading and non-reading of evidence on record---Impugned judgments and decrees passed by the Courts below were set aside---Second appeal was allowed, in circumstances.

Mian Pir Muhammad and others v. Faqir Muhammad through L.Rs. and others PLD 2007 SC 302; Mst. Saleem Akhtar v. Ch. Shauk Ahmed 2009 SCMR 673; Muhammad Ismail v. Muhammad Yousaf 2012 SCMR 911; Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965 Haider Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another 2012 SCMR 254; Muhammad Aslam v. Mst. Ferozi and others PLD 2001 SC 213; Khushi Muhammad v. Liaquat Ali represented by Muhammad Irshad and others PLD 2002 SC 581; Iftikhar through legal heirs and others v. Capt. Khadim Hussain through legal heirs and others PLD 2002 SC 607; Muhammad Khan v. Mst. Rasul Bibi PLD 2003 SC 676 and Muhammad Yousaf Baig v. Rehmat Ali 2009 SCMR 642 rel.

(b) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Suit for possession through pre-emption---Requirements---In order to succeed in a suit for pre-emption, the pre-emptor has to show that he has

superior right of pre-emption qua the vendee(s) at three stages; firstly on the day of sale, secondly, when the suit is to be instituted and lastly the date when it is finally culminated.

Baldeo Misir v. Ramlagan Shukul AIR 1924 Alahabad 82; Rai Tulley Khan v. Ahmed Hassan Khan and others 1981 SCMR 1075; Muhammad Khan and others v. Muzaffar PLD 1983 SC 181 and Hasil and another v. Karam Hussain Shah and others 1995 SCMR 1385 rel.

(c) Punjab Pre-emption Act (IX of 1991)---

---S. 13---'Talb-i-Muwathibat'---Require-ments---Right of pre-emption is not activated unless Talb-i-Muwathibat is performed, which should not be dubbed as mere technicality, but at times it acquires such dimension that it becomes more important than the superior right because it essentially is a sine qua non of the right of the pre-emption---Talb-i-Muwathibat is termed as immediate demand and must be performed as early as possible on receiving the information about the sale and its immediate performance is, in fact, its beauty and if such fact is not proved, then definitely it can safely be held that demand was not performed in its true spirit.

(d) Maxim---

---"Secundum allegata et probata": Any evidence led to prove a fact, which was omitted to be pleaded, had to be ignored.

Abdul Rasheed Bodla and Sabir Ali Cheema for Appellant.

Tahir Mehmood and Malik Mohammad Latif Khokhar for Respondent.

Dates of hearing: 20th and 21st December, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The precise facts of the case emerging from the pleadings of parties are that Sajjad Ahmad and others, title holders of land measuring 08-Kanals 07-Marlas falling in Khewat No.73, sold it out to the appellant vide oral sale mutation No.2005 of 4th July, 2007, which was pirated through institution of a suit for pre-emption by the respondent/ pre-emptor claiming her superior right being Shafi Shareek, Shafi Khaleet, Shafi Jar as well as due performance of requisite demands, averring therein that she accompanied by Malik Ghulam Farid (PW8) and Riaz Hussain (PW9) was available in her house on 21.10.2007 at 10.00 a.m. where, Ghulam Rasool (PW5) appeared and passed on information about the sale of suit property, the respondent in the said gathering spontaneously pronounced her intention to pre-empt it. No doubt, it was pleaded that Notice Talb-i-Ishhad through registered post was consigned to the appellant, but the date of its execution, dispatch as well as names of the marginal witnesses, who attested it were not disclosed. It was also not specified that the Post containing Notice Talb-i-Ishhad was acted upon the vendee or it being unserved was received back.

The appellant after his due appearance submitted written statement specifically denying pre-emptive right of respondent as well as performance of requisite Talbs by her. The learned Trial Court after settlement of issues recorded evidence of parties and as a result of its appreciation decreed the suit vide judgment of 31st May, 2012, which was also congealed by the Appellate Court on 11th July, 2012 and now bootless appellant has approached this Court to assail their said concurrent judgments through the Appeal in hand.

2. Messrs Abdul Rasheed Bodla and Sabir Ali Cheema, Advocates learned counsel for appellant emphasized that the exact time as referred in plaint about fulfillment of first demand could not be proved and difference in this regard between the contents of plaint as well as disclosure made by PWs in the witness-box was a major contradiction, but both the learned Courts below erred in law to ignore it. They further added that non-mentioning of date and names of witnesses to divulge that when and by whom the Notice Talb-i-Ishhad was scribed, attested as well as dispatched was a vital setback, but it was overlooked as well. They also argued that it was not pleaded in the plaint that Notice was delivered to the vendee, as such the evidence examined to prove a fact not narrated in plaint was to be ignored as per principle of secundum allegata et probata. The learned counsel for the appellant while referring documents tendered on behalf of the pre-emptor pleaded that it was sine qua non on behalf of the latter to establish her superior pre-emptive right at three crucial stages, but she could not maintain the same, whereas both the learned Courts below failed to appreciate Exh.P 4, 6, 7 and 8 in its true perspective, as such their findings being illegal, erroneous and tainted with misreading and non-reading of evidence are not sustainable in the eye of law.

3. In contra, Messrs Tahir Mehmood and Malik Mohammad Latif Khokhar, Advocates, learned counsel for respondent submitted that concurrent findings of fact arrived at by learned Courts below being result of well appreciation of the evidence of parties as per its gist and substance cannot be interfered with by this Court while invoking jurisdiction vested in it under section 100 of the Code, 1908. It was further argued by them that their counterpart could only point out minor discrepancies in the statements of PWs, which were recorded after a considerable delay and while dispensing with justice, these were rightly ignored by the Courts below. It was also stressed in the interest of pre-emptor by her counsel that not only quantitative rather qualitative evidence was examined to prove superior right as well as performance of due demands and learned Courts below were perfect to appreciate it in returning affirmative finding on the pivotal issues struck in this regard.

4. Arguments heard. Record scanned with able assistance of learned counsel for parties.

5. The crux of the case detailed by the pre-emptor in para-3(iii) of the plaint being significant to comprehend is reproduced below:-

6. In the light of above referred part of pleadings, the learned Trial Court rightly formulated issues Nos.2 and 3 among others and only the formers being relevant are detailed as under:-

> 2. Whether the plaintiff has superior right of pre-emption qua the defendant? OPP
>
> 3. Whether the plaintiff has fulfilled the requirements of Talbs as required under the law of pre-emption? OPP

7. Dealing with issue No.3, it will be useful to make a reference to Section 13 of the Punjab Pre-emption Act, 1991 in extenso:-

> 13. Demand of pre-emption. (1) The right of pre-emption of a person shall be extinguished unless such person makes demands of pre-emption in the following orders, namely:-
>
> (a) 'Talb-i-Muwathibat';
>
> (b) 'Talb-i-Ishhad'; and
>
> (c) 'Talb-i-Khusumat'.
>
> Explanation
>
> I. 'Talb-i-Muwathibat' means immediate demand by a pre-emptor in the sitting or meeting (Majlis) in which he has come to know of the sale, declaring his intention to exercise the right of pre-emption.
>
> Note. Any words indicative of intention to exercise the right of pre-emption are sufficient.
>
> II. 'Talb-i-Ishhad' means demand by establishing evidence.
>
> III. 'Talb-i-Khusumat' means demand by filing a suit.
>
> (2) When the fact of sale comes within the knowledge of a pre-emptor through any source, he shall make Talb-i-Muwathibat.
>
> (3) Where a pre-emptor has made Talb-i-Muwathibat under sub-section (2), he shall as soon thereafter as possible but not later than two weeks from the date of knowledge make Talb-i-Ishhad by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgement due, to the vendee, confirming his intention to exercise the right of pre-emption:

As we all are aware of the fact that a Full Bench of the Supreme Court of Pakistan comprising five Hon'ble Judges in the case cited as Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302) after plausibly discussing all the authorities and references has already made it incumbent upon the pre-emptor to specifically mention the time, date and place of making Talb-i-Muwathibat in the plaint, so that calcula-tion of fixed period for the performance of next Talb can be exactly made and possi-bility of concoction as well as improve-ment can be eschewed. It is requirement of law that the very right

of pre-emption is not activated unless Talb-i-Muwathibat is performed, which should not be dubbed as mere technicality, but at times it acquires such dimension that it becomes more important than the superior right because it essentially is a sine qua non of the right of the pre-emption. Talb-i-Muwathibat is termed as immediate demand and must be performed as early as possible on receiving the information about the sale and its immediate performance is, in fact, its beauty and if such fact is not proved, then definitely it can safely be held that demand was not performed in its true spirit.

In the present case, as per contents of plaint referred hereinabove, the moment transaction was disclosed by the informer, Ghulam Rasool, pre-emptor vocally announced her intention at 10.00 a.m. before Ghulam Farid and Riaz Hussain. No doubt, in his statement the informer (PW5) sticked to the timing as specified above, whereas Ghulam Farid (PW8) although in first part of his statement-in-chief maintained that Majlis was constituted at 10.00 a.m., but in second part he stated that after loss of 10 to 15 minutes, the transaction was disclosed by the informer (PW5), forcing pre-emptor to pronounce Talb-i-Muwathibat. He in his cross-examination further delineated in the following words:--

The other partaker, Riaz Hussain (PW9) further doubted the performance of first demand by making statement that after another 30 minutes to 10.00 a.m. it was pronounced and the exact words, he uttered in his statement-in-chief, are:--

On the same motif pre-emptor (PW10) also exposed a difference of 15/20 minutes about fulfillment of first demand than pleaded in the plaint. When in Mian Pir Muhammad's case, the mentioning of timing besides other detail was made imperative for the pre-emptor, then of course it was also obligatory for him to veraciously prove it. The due performance of Talb-i-Muwathibat is the foundation of the case of the pre-emptor and once his evidence becomes shaky or his rival succeeds to make a dent therein, the superstructure has to collapse. The timing being one of the basic/vital ingredients to prove the fact of constitution of Majlis and prompt performance of first demand was not maintained as pleaded in this case, but lower fora committed material irregularity and illegality to conclude that Talb-i-Muwathibat was duly performed.

8. The other setback of the case was that pre-emptor failed to mention the date of execution and dispatch of the Notice Talb-i-Ishhad in the contents of plaint. No doubt, copy of the same was brought on record, but as per principle settled by the apex Court in cases reported Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302), Mst. Saleem Akhtar v. Ch. Shauk Ahmed (2009 SCMR 673) and Muhammad Ismail v. Muhammad

Yousaf (2012 SCMR 911), it was obligatory upon the pre-emptor to disclose the same in the plaint, whereas the Courts below again failed to take Notice of the ratio of the afore-noted judgments. Moreover, no doubt, Ghulam Farid and Riaz Hussain, the attesting witnesses of Notice Talb-i-Ishhad, were examined as PWs. 8 and 9, but out of them, the former during cross-examination (at page 22) in unequivocal terms stated as under:--

Although the other attesting witness, PW9 in his statement-in-chief stated that Notice was scribed and attested on 22.10.2007, but during the test of cross-examination which is a tool to elucidate truth, he fairly deposed that:-

Whereas, PW9 was purported participant of the gathering in which allegedly one day prior first demand was made. This all proved that the PWs were tutees, who exposed only that detail, which was learnt to them, but in the cross test they failed to keep up their tuition.

There is much substance in the argument of learned counsel for the appellants that pre-emptor failed to plead that Notice Talb-i-Ishhad was acted upon the vendee, as such the evidence so adduced to prove this fact by the pre-emptor could not be considered. The scrutiny of record unfolds that mutation under pre-emption was sanctioned on 04.07.2007, first talb on 21.07.2007 and the next one was performed on the following day. Whereas according to Booking Receipt (Exh:P1), the Notice was booked on 22.07.2007 and perusal of A.D. Card (Exh:P2) as well as statement of Postmen (PW3 and 4), shows that Exh.P1 was delivered to the vendee on 30.07.2007 and Exh:P2 might have been received back to addressor/pre-emptor within next two three days, but suit was instituted by the latter after about three months of the alleged delivery on 30.10.2007. In such situation there was no deterrent to plead this fact, but it was held back for the reasons best known to the pre-emptor and as per principle secundum allegata et probata any evidence led to prove a fact, which was omitted to be pleaded, had to be ignored. See Muhammad Wali Khan and another v. Gul Sarwar Khan and another (PLD 2010 SC 965) and Haider Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another (2012 SCMR 254). So this lacuna was also fatal for the pre-emptor. In view of above discussion, the respondent/pre-emptor failed to prove fulfillment of requisite demands as per requirement of law and the principles settled by the superior Courts, but lower fora decided it otherwise and their findings being illegal and result of misreading and non-reading of evidence cannot be sustained, hence their decision on issue No.3 is reversed and answered against the pre-emptor.

9. Adverting to issue No.2, both learned counsel for the contesting parties are in agreement on the legal phrase that in order to succeed in a suit for pre-emption, the pre-emptor has to show that he has superior right of pre-emption qua the vendee(s) at three stages; firstly on the day of sale, secondly, when the suit is to be instituted and lastly the date when it is finally culminated. In this regard, reference may be made to Baldeo Misir v. Ramlagan Shukul (AIR 1924

Allahabad 82), Rai Tulley Khan v. Ahmed Hassan Khan and others (1981 SCMR 1075), Muhammad Khan and others v. Muzaffar (PLD 1983 SC 181) and Hasil and another v. Karam Hussain Shah and others (1995 SCMR 1385). Needless to state that well-founded rule laid down by the apex Court has also been recognized by introducing Section 17 in the Punjab Pre-emption Act, 1991.

In this case, the mutation (Exh.P4) under pre-emption was sanctioned on 04.07.2007 with regard to land forming share of Khewat No.73. To prove that pre-emptor was also Shafi Shareek, along with Exh.P4, copy of Jamabandi for the year 2000-01 was tendered as Exh.P6 and its study exposed that pre-emptor was not recorded as sharers of impugned Khewat, rather her father, Ghulaman was mentioned in the column of owners. So this document was of no significance for the pre-emptor to prove that she was a co-sharer. Moreover, Exh:P6 pertained to an earlier era, which otherwise was not relevant. The other two copies of Register Haqdaran Zameen (Exh:P7 and 8) for the year 2004-05 and 2008-09 respectively although reflected pre-emptor being co-owner but not of the disputed Khewat No.73, rather it pertained to Khewat Nos.74/73 and 74/74. No other document was exhibited to prove that pre-emptor was Shafi Shareek, whereas all the documents available on her part were insufficient to prove that at any of the three stages referred hereinabove the pre-emptor/respondent was sharer in the joint holding wherefrom part of it was mutated to the vendee/appellant. Furthermore, there is nothing in black and white on the record to prove that property of pre-emptor was adjacent to the subject land having common passage and source of irrigation. In this regard, it was imperative upon the pre-emptor to bring on record copy of Aks Shajrah besides examination of its maker and the copy of Warabandi to prove that she was Shafi Jar as well as Shafi Khaleet, but withholding of such evidence has forced this Court to draw adverse inference against her under Article 129 illustration (g) of Qanun-e-Shahadat Order, 1984, as such, the findings of the Courts below on issue No.2 are also not sustainable, which too are reversed and said issue is answered against the respondent.

10. Now diverting towards the contention of learned counsel for the respondent that this Court cannot set aside concurrent judgments of the lower Courts in exercise of the powers vested under Section 100 of the Code, 1908. No doubt, in Second Appeal ordinarily this Court is reluctant in disturbing the unanimous decisions, but it is not a rule of thumb and this Court cannot close its eyes where Courts below misinterpreted the available material in its true perspective or overlooked to comprehend it. The manifest injustice cannot be permitted to perpetrate simply for the reason that in Second Appeal reappraisal of evidence is not permissible by this Court even if ended in wrong conclusion or contrary to law. In forming this view, I have to my credit cases titled Muhammad Aslam v. Mst. Ferozi and others (PLD 2001 SC 213), Khushi Muhammad v. Liaquat Ali repre-sented by Muhammad Irshad and others (PLD 2002 SC 581), Iftikhar through legal heirs and others v. Capt. Khadim Hussain through legal heirs and

others (PLD 2002 SC 607) and Muhammad Khan v. Mst. Rasul Bibi (PLD 2003 SC 676). In the latter case, the apex Court held:--

> Ordinarily concurrent findings recorded by the Courts below could not be interfered with by the High Courts while exercising jurisdiction in the Second Appeal, howsoever erroneous the findings may be, unless such findings had been arrived at by the Courts below either by ignoring a piece of evidence on record or through perverse appreciation of evidence. High Court, in the present case, was justified in interfering with concurrent findings, after noticing that the judgments of the Courts below suffer from acute miscarriage of evidence and exclusive of material available on the record, resulting in gross miscarriage of justice.

This view has again been affirmed by the same Court in Muhammad Yousaf Baig v. Rehmat Ali (2009 SCMR 642).

11. The epitome of the above discussion is that both the Courts below failed to appreciate evidenced in its true perspective as well as applying correct law on the subject and it is a fit case to be interfered with by this Court while invoking jurisdiction vested under section 100 of the Code, 1908. Hence this Appeal is allowed, judgments of the two Courts below are hereby set aside and suit of the pre-emptor is dismissed with no order as to costs.

ZC/M-9/L
Appeal allowed.

2019 Y L R 1548
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
FATEH MUHAMMAD and others---Petitioners
Versus
SAFDAR ALI alias ZAFAR ALI and others---Respondents
Civil Revision No. 3354 of 2010, heard on 27th November, 2018.

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

----S. 12---Suit for specific performance of agreement to sell---Limitation---Power of attorney---Cancellation of---Transfer of property on behalf of attorney---Scope---Power of attorney had to be strictly construed---Agent, in the present case, was not competent to alienate the suit property through sanction of oral sale mutation---Defendants had terminated the agency and alienation of suit land through sanction of mutation, was neither justified nor valid---Agent was aware of condition as well as withdrawal of his authority---Present suit had been filed after four years and five months which was time-barred---Courts below had failed to appreciate the material available on record in its true perspective---Impugned judgments and decrees passed by the Courts below were set aside and suit was dismissed---Revision was allowed in circumstances.

Noor Alam through L.Rs. and another v. Muhammad Bashir and another 2015 CLC 1675 and Imam Din and 4 others v. Bashir Ahmed and 10 others PLD 2005 SC 418 rel.

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

----S. 42---Registration Act (XVI of 1908), S. 49---Suit for declaration on the basis of unregistered sale agreement---Maintainability--- Unregistered sale agreement was neither a document of title nor it created right or interest in the subject matter---Declaratory suit on the basis of such document was not maintainable.

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

----S. 115---Revisional jurisdiction of High Court---Where can be invoked.

Revisional jurisdiction of High Court under section 115 is invoked only in the cases wherein the lower Courts have exercised the jurisdiction not vested in them by law or they failed to exercise it so vested or it was exercised in an illegal manner or that some material irregularity was committed, but in a case wherein it is found that the findings of the subordinate Courts were suffering from misreading and non-reading of evidence or that the conclusions drawn was in absolute disrespect to the law and facts of the case, High Court must interfere in the matter in its revisional jurisdiction and correct the illegality committed by the subordinate Courts.

Shumal Begum v. Gulzar Begum 1994 SCMR 818 rel.
Muhammad Shahid Tassawar Rao for Petitioner.
Muhammad Ijaz Lashari for Respondents.
Date of hearing: 27th November, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The dispute between the parties pertained to land measuring 264 Kanals 06 Marlas and the claim of the respondents/plaintiffs in their suit for 'declaration and in alternative specific performance of agreement to sell was that petitioner No.1 Fateh Muhammad and Mst. Hakim Bibi, the predecessor-in-interest of petitioners Nos. 2 to 5/ defendants were brother and sister inter se, who being occupancy tenants agreed to sell the land to respondents against a consideration of Rs.130000/- and after receiving it, not only agreement to sell (Exh.P1), receipt (Exh.P2) were executed rather possession was also delivered and in acknowledgement thereof, General Power of Attorney (Exh.P3) in favour of Ghulam Muhammad, father of plaintiff/ respondent No.1, was also attested on 17.07.1980 authorizing him to transfer the subject land after attestation of Conveyance Deed; that with the efforts of Agent, Conveyance Deed, (Exh.P5) was attested on 26.07.1984 and thereafter vide mutation No. 79 dated 31.03.1985 (Exh.P8), the subject land was transferred to the respondents/plaintiffs; that the petitioners / defendants subsequently approached the Revenue Hierarchy for the review of mutation (Exh.P8), which was accorded by the Collector and despite assail it was maintained by his Appellate Court, compelling the respondents/ plaintiffs to file the lis to save their mutation from its cancellation as well as to protect their purported sale. The suit was resisted by the petitioners/defendants with the firm stance that property had been allotted to them, who being illiterate and 'parda observing' persons appointed Ghulam Mohammad, father of respondent No.1 as their General Attorney while executing Deed of Attorney (Exh.P3) to acquire its proprietary rights in their favour, whereas neither transaction of sale was ever settled nor they received any consideration; that the contract (Exh.P1) and receipt' (Exh.P2) were forged and fictitious, which might have been procured during the course of execution as well as attestation of Exh.P3. It was also pleaded in the written statement that the moment they noticed that the Agent/Ghulam Muhammad had become hostile to their interest, they revoked his powers through registered Cancellation Deed dated 07.02.1983 (Exh.P10), whereas Conveyance Deed (Exh.P5) was attested in their favour on 26.07.1984, as such subsequent attestation of mutation No.79 dated 31.03.1985 in favour of the respondents/plaintiffs was nothing, but result of collusion, fraud and

misrepresentation. The learned Civil Court narrowed down the legal as well as factual controversy among the parties by settling following issues:-

1. Whether the suit is not maintain-able in its present form? OPD
2. Whether the plaintiffs have got no cause of action and locus standi to bring this suit? OPD
3. Whether the suit of the plaintiffs is within time? OPP
4. Whether the suit of the plaintiff is not competent in view of preliminary objection No. 4, if so with what effect? OPD
5. Whether the plaintiffs are estopped by their act and course of conduct to bring this suit? OPD
6. Whether the alleged agreement of sale is a forged document and is based upon fraud and the plaintiffs have come in the court with the unclean hands in view of preliminary objection No.6, if so with what effect? OPD
7. Whether the suit of the plaintiffs is false, vexatious and frivolous and the defendants are entitled to special costs under section 35-A of C.P.C., if so, to what amount? OPD
8. Whether the plaintiffs have become owners in possession of the suit property by way of transfer of proprietary rights in their favour through their general attorney Ghulam son of Hayat Khan vide mutation No.79 dated 9.3.1985?OPP

8-A. If issue No.2 is not answered in affirmative then whether the defendant No.1 Fateh Muhammad and Hakim Bibi predecessor of defendants Nos.2 to 5 entered into agreement to sell dated 17.7.1980 in respect of suit land measuring 264 Kanals 06 marla in favour of the plaintiffs against the sale consideration of Rs.1,30,000/-? OPP

8-B. Whether the defendant No.1 and Hakim Bibi predecessor of defendants Nos.2 to 5, received the entire sale consideration of Rs.1,30,000/- against the written receipt dated 17.7.1980 and delivered physical possession over the suit property in favour of plaintiffs? OPP

8-C. Whether the defendant No.1 and Mst. Hakim Bibi predecessor in interest of defendants Nos.2 to 5 executed general power of attorney in favour of Ghulam son of Hayat Khan (father of plaintiff No. 1) dated 17.7.1980? OPP

8-D. Whether the sale price of the land at Rs. 12,389.84 were subsequently deposited by the plaintiffs into government treasury and the defendants subsequently agreed to consider the said payment as an additional sale

consideration in addition to previously paid amount of Rs.1,30,000/ in pursuance of agreement to sell?OPP

9. Relief.

2. After a trial spreading over more than 10 years, in earlier round of litigation, the suit of the respondents/ plaintiffs was dismissed on 07.09.2000, however, it was remanded by learned District Court and pursuant thereto in second phase, it was not only decreed by learned Civil Court, but Appeal of the petitioners also failed, hence, the concurrent judgments dated 20.05.2005 and 24.04.2010 are the subject of Petition in hand.

3. Mr. Muhammad Shahid Tassawar Rao, Advocate, learned counsel for the petitioners emphasized with great vehemence that the disputed agreement to sell was allegedly executed on 17.07.1980, but it was brought into light after about 10 years through the suit, which on the face of it, was time barred; that Article 113 of the Limitation Act, 1908 was to be applied, but the Courts below erroneously attracted Article 120 thereof; that contract of sale (Exh.P1) and receipt (Exh:P2) were forged and fictitious documents, which might have been procured during the course of execution of General Power of Attorney (Exh.P3), but both the Courts below failed to take notice that the executants of these documents were illiterate and 'parda observing' persons having no independent advice with them and in such situation, beneficiaries/respondents were under obligation to have proved that the vendors had such an advice to fully understand the nature of transaction couched therein, whereas they failed to prove this fact. The next forceful submission of Mr. Rao was that the Agent/Ghulam Muhammad played fraud to usurp the property of the infirm petitioners, whereas powers delegated to him having already been withdrawn, who otherwise was not competent to transfer the property by means of mutation and that too in favour of his kith and kin.

4. In contra, it was argued by Mr. Muhammad Ijaz Lashari, Advocate,. learned counsel for respondents that both the Courts below after appreciating the evidence in detail concurrently, decreed the suit, as such this Court cannot invoke its jurisdiction under section 115 of the Code, 1908 to disturb those. It was further pleaded that the Power of Attorney (Exh.P3) was executed against consideration, hence under the law, it could not be revoked and that it being a registered instrument had presumption of correctness. He further added that each and every signatory of documents executed among plaintiffs and defendants were examined to fulfil the requirements of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984. It was also argued on his behalf that the moment sale

consideration was paid, the possession of the property was also transferred to his clients and the declaratory suit was maintainable, as such both the Courts below were perfect to apply Article 120 of the Act, whereas the suit was instituted within prescribed limitation.

5. Arguments heard and record also perused through the able assistance of learned counsel for the parties.

6. The axis and admitted document among the parties was General Power of Attorney (Exh.P3) and its vital part would be advantageous to reproduce hereunder:-

All it manifested that Principal being illiterate and 'parda observing' were not in position to acquire proprietary rights of the allotted land and for this purpose, the Attorney was appointed to proceed with the codal formalities and after having proprietary rights in favour of the executants, the property could only be transferred through Sale Deed by the Agent whereas the latter was not delegated any power to have it alienated through mutation. This principle had already been settled by the Superior Court by now that general words do not confer unfettered powers, but are restricted for the purpose only for which the authority was given. See Rana Nisar Ahmad v. Sher Bahadur Khan and others (2006 CLC 999), Noor Alam through L.Rs. and another v. Muhammad Bashir and another (2015 CLC 1675) and Imam Din and 4 others v. Bashir Ahmed and 10 others (PLD 2005 SC 418). In former case, the conclusion of the apex Court being relevant and in all four corners applicable as per facts of this case is reproduced hereunder:--

> "The power of attorney is a written authorization by virtue of which the principal assigns to a person as his agent, and confers upon him the authority to perform specified acts on his behalf and thus primary purpose of instrument of this nature is to assign the authority of the principal to another person as his agent. The main object of such type of agency is that the agent has to act in the name of principal and the principal also purports to rectify all the acts and deeds of his agent done by him under the authority conferred though the instrument. In view of nature of authority, the power of attorney must be strictly construed and proved and further the object and scope of the power of attorney must be seen in the light of its recital to ascertain the manner of the exercise of the authority in relation to the terms and conditions specified in the instrument. The rule of construction of such a document is that special powers contained therein followed by general words are to be construed

as limited to what is necessary for the proper exercise of special powers and where the authority is given to do a particular act followed by general words, the authority is deemed to be restricted to what is necessary for the purpose of doing the particular act. The general words do not confer general power but are limited for the purpose for which the authority is given and are construed for enlarging the special powers necessary for that purpose and must be construed so as to include the purpose necessary for effective execution. This is settled rule that before an act purported to be done under the power of attorney is challenged as being in excess of the powers, it is necessary to show on fair construction, that the authority was not exercised within the four corners of the instrument."

As discussed supra, Ghulam Mohammad was confined in selling the land through attestation of Sale Deed after having it executed on non-judicial Stamp Papers and in the light of strict rule that Power of Attorney has to be strictly construed, the Agent was not competent to alienate it through sanction of oral sale mutation dated 31.03.1985, hence the authority for want of explicit delegated powers was invalid. To form such view, this Court again sought guidance from other part of Imam Din's case (supra), in the following terms:-

Be that as it may, even if a presumption of existence of the power of attorney is raised, the transaction would still be not considered genuine and within authority of agent for want of explicit power of oral sale. The attorney was specifically authorized to sell the property through registered sale-deed and in the light of strict rule of construction of power of attorney, the implied authority of oral sale could not be presumed. The attorney was not given general authorization for disposal of property in any manner rather his authority of sale was restricted by registered deed and consequently, his failure to act in the manner as provided in the document would render the transaction, invalid. It was held in Fida Muhammad v. Muhammad Khan (PLD 1985 SC 341 as under:--

"It is wrong to assume that every "general" Power of Attorney on account of the said description means and includes the power to alienate/dispose of property of the principal! In order to achieve that object it must contain a clear separate clause devoted to the said object. The draftsman must pay particular attention to such a clause if attended to the included in the Power of Attorney with a view to avoid any

uncertainty or vagueness. Implied authority to alienate property, would not be readily be deducible from words spoken or written which do not clearly convey the principal's knowledge, intention and consent about the same. The courts have to be vigilant particularly when the allegation by the principal is of fraud and/or misrepresen-tation."

The perusal of attested copy of the power of attorney would show that various acts relating to the management of property, litigation and all other matters concerning the property, including the power of selling through registered sale deed were mentioned therein in explicit terms and the attorney was bound to act strictly in the manner as specified in the power of attorney to ensure that the transaction was transparent and free of fraud and misrepresentation.

The property in respect of which the power of attorney was executed, was allotted to the vendor by the Rehabilitation Department and the powers given therein in the power of attorney were in respect of the litigation of property with the departments, including the power of filing of suits, written statements, appeal, revision in the Civil Court, High Court and Supreme Court, the management of the property, the ejectment of tenant, receipt produce and rent from the tenants to pursue litigation, civil and criminal to file affidavits and applications in the suits as well as in execution proceedings and let out property on lease. In addition, the attorney was also empowered to sell the property on receipt of the sale price through registered sale deed and appoint the Advocate for his assistance. The perusal of this document would show that the power of sale of land was given to the attorney specifically by means of a registered sale deed and probably the purpose of restricting the power of sale only by registered sale deed was to avoid any misuse of the said power and to ensure that the sale was with consent and knowledge of the principal, therefore, in the light of rule of strict construction of such instrument, it could be visualized that the oral sale was not within the authority of agent under the instrument."

The other aspect of the case was that the Agency was terminated by the petitioners/defendants. through instrument (Exh.P10) on 07.02.1983 and thereafter alienation of land through sanction of mutation No.79 dated 31.03.1985 was neither justified nor valid. The recital of Deed of Attorney envisaged that mainly it was executed by languid persons for the conferment of proprietary rights upon them and other allied activities. The specific devoted

clause for its further sale at a subsequent stage through a restricted mode might have been delegated to secure his land from any misuse. The Agent was well aware of the condition as well as withdrawal of his authority. In such situation, it was not possible for him to have transferred the property through a Sale Deed as required by the adoring clause for the reason that the Registering Officer prior to attestation of Sale Deed might have confirmed that Deed of Attorney was intact or not, therefore for ulterior motive an engineered mode was followed to usurp the subject land of feeble persons.

7. The emphasis of Muhammad Ijaz Lashari, Advocate for the respondents/ plaintiffs that Power of Attorney was scribed against consideration, therefore it could not be revoked by its Principal was not well founded. No doubt on the same day when Attorney Deed was executed, the contract of sale (Exh.P1) and Receipt (Exh.P2) against sale price of Rs.130000/- were also scribed, but admittedly both of these (Exhs.P1 and 2) were neither referred in the Agency Deed nor it was disclosed therein that property had been purchased against some consideration for such and such person, whereas the instrument of Deed of Attorney must have contained a clear clause devoted to the said object, which on the face of it was missing. It was correct that in the contract of sale (Exh.P1) there was a reference that Power of Attorney had already been executed in favour of father of one of the vendees, but execution of it as well as Receipt (Ex:P2) was specifically denied with certain allegations. It is to be remembered that infirmity of the purported vendors was not only a pleaded plea, on their behalf, rather it was particularly explained through the contents of Agency Deed, which was an admitted document among the contesting parties and in such situation besides that execution of the Agreement was to be proved, it was also sine qua non for the beneficiaries to have established that the vendors had independent advice from a reliable source of trust to fully understand the nature of the transaction couched therein. The statement of Rehmat Ali (PW4), alleged cousin of the vendors could not be treated a source of trust for them. He, no doubt, exposed in his statement that contract was read over to the executants for their understanding, but it was nowhere pleaded in written statement or deposed either by PW4 as well as Attorney of the plaintiffs (PW10) that Rehmat Ali being independent advice played any role to have understood the transaction to the illiterate and 'pardanashin' vendors. Rehmat Ali, admitted in his statement that plaintiffs were also known and related with him, so in such situation, he, if any, lost his status being independent advisor to the vendors. He being departure to contents of the plaint in his statement exposed that at the time of settlement of transaction, he besides his cousin as well as Lumberdar was present, which was

struck in the village, 15/20 days prior to scribe of documents (Exhs.P1 to 3), but neither the cousin nor the Lumberdar, who purportedly witnessed the earlier transaction, was examined. Rana Gulzar Ahmad (PW5) the next signatory of Exhs.P1 to 3 although stated that consideration was paid before him, but admitted that sale was not struck before him. It was also a hard fact that he was neither resident of the Revenue Estate where the vendors were residing nor of the locality where the land situate. By wording that on the day of execution of these documents, he was called upon by Rehmat Ali, the impartiality of the latter was further doubted. It was also surprising that out of the vendees/ plaintiffs, none appeared in the witness box, rather on their behalf Ghulam Mohammad (PW9), being Special Attorney appeared. He is the same person, who being General Attorney was appointed by the petitioners/defendants and in his statement-in-chief, he explicitly stated that at the time of transaction of sale, the consideration was paid. He in cross-examination (at page 53) exposed that transaction was settled 15/10 days before the execution of transaction. If this part of his statement is taken as correct, then deposition of Rana Gulzar Ahmad (PW5) that consideration was paid before him, whereas he admittedly was not participant of the gathering where the transaction originally struck, becomes contrary to PW9. Zulfiqar Ali, another attesting witness of the under discussion documents was not examined. No doubt, PWs.4 and 5, two out of three attesting witnesses were examined, but their testimony as discussed above was not of credence to prove the construction of questioned documents as well as sale reflected therein, whereas, Mr. Ijaz Lashari, Advocate on behalf of respondents failed to justify the withholding of his clients as well as Zulfiqar Ali, the third marginal witness of the contract and the receipt, as such hostile inference under Article 129(g) of the Order, 1984 was to be drawn that had they been examined they might have failed to prove the pleas and facts with regard to their purported documents as well as transaction, but both the Courts below also disregarded this aspect.

8. The statement of Zafar Iqbal, Oath Commission, who merely attested the Sale Agreement and Receipt was of no value, especially when he admitted that neither it was entered in his relevant Register nor the consideration was paid in his presence and the parties were also not known by him.

Although Mohammad Islam (PW4) was also examined on behalf of the plaintiffs/respondents, but his deposition during cross-examination is not beneficial to them when he stated as under:-

Among rest of the PWs, no one being direct witness to the documents or transaction referred therein was important to be discussed here. In the light of minute appreciation of available evidence on record, there left no doubt that Courts below failed to evaluate it as per its substance, hence their findings on issues Nos. 6, 8, 8(a), 8(b) being result of misreading and non-reading of evidence are reversed and answered against the plaintiffs/respondents.

9. The next focal issue would be the institution of suit within limitation or not. The entire case of the plaintiffs/ respondents hinges on contract of sale (Exh.P1) allegedly scribed on 17.07.1980. To resolve this issue, Court has to advert to provisions of Article 113 of the Limitation Act, which visualizes two conditions; one when the date for performance is fixed in the contract itself and the other when no such date is fixed. In the former case, the starting point would be the fixed date, but in the latter, the limitation would remain suspended and start to run only when the promisee is put under notice of its refusal. Admittedly, the first part of the Article is not attracted in the case in hand. It is only second part which would govern the case and Court has to make a search whether there was a refusal on the part of promisors in this case, if so, when it was refused. The General Power of Attorney was cancelled on 07.02.1983 through registered Revocation Deed, which being notice to public at large was also a refusal on the part of the promisors with regard to alleged transaction. The other notified denial was their move, whereby they approached the Collector for accord of review to cancel mutation No.79 attested in favour of the respondents/plaintiffs, which was granted on 09.06.1985. Both these acts on behalf of the petitioners were more than notice that performance of the purported sale was refused and at least these came in the knowledge of the promisees when they preferred Revision before Additional Commissioner (Revenue) on 08.11.1985. As such, period of limitation would start running from 08.11.1985 and the suit could be instituted till 07.11.1988, which having been filed on 08.04.1990 after four years and five months was clearly out of limitation. Admittedly, respondents had instituted suit for declaration mainly basing their claim upon Agreement to Sell or in alternate for specific performance thereof. The deed of contract being unregistered was neither a document of title nor it created right or interest in the subject property as envisaged under section 49 of the Registration Act, 1908 whereas declaratory suit under section 42 of the Specific Relief Act, 1877 on the basis of such document was not maintainable. So, there was no scope to attract the Article 120 of the Limitation Act, 1908 to bring the suit within time. The Courts below failed to decide issue No.3 as per law, which findings are reversed and also answered in favour of petitioners.

10. The argument of learned counsel for respondents that concurrent findings cannot be interfered with is fallacious. There is no quibble to the proposition that the revisional jurisdiction of this Court under section 115 of the Code, 1908 is invoked only in the cases wherein the lower Courts have exercised the jurisdiction not vested in them by law or they failed to exercise it so vested or it was exercised in an illegal manner or that some material irregularity was committed, but this is the established law that in case wherein it is found that the findings of the subordinate Courts were suffering from misreading and non-reading of evidence or that the conclusions drawn was in absolute disrespect to the law and facts of the case, this Court must interfere in the matter in its revisional jurisdiction and correct the illegality committed by the subordinate Courts. In this regard, I have sought guidelines from the case reported as Shumal Begum v. Gulzar Begum (1994 SCMR 818). The operative para for ready reference is reproduced as under:--

> "The revisional jurisdiction under section 115, C.P.C. exercised by the High Court is attracted only in case where the lower Courts have exercised a jurisdiction not vested in it by law or it has failed to exercise jurisdiction so vested in it or while jurisdiction the Courts below have acted illegally or with material irregularity. It is, therefore, quite clear that the High Court while exercising revisional jurisdiction cannot disturb the finding of fact arrived at by the lower Court in proper exercise of the jurisdiction in the Court and upon consideration of the relevant evidence on record. The finding of fact by the lower Court could not be disturbed in revisional jurisdiction by the High Court. If it is found to be fanciful, perverse or it has been arrived at by a process which had rendered the exercise of the jurisdiction vested in the Court defective. In case of misreading of evidence of non-consideration of legal evidence on record, the exercise of jurisdiction and power possessed by the Court is rendered defective, justifying interference by the High Court in exercise of its revisional jurisdiction. The fact that the High Court on reappraisal of the evidence, find that the finding of fact recorded by the trial Court is preferable to the finding of fact recorded by the first appellate Court cannot justify interference with such finding in exercise of revisional jurisdiction by the High Court. The first appellate Court is the final Court in so far the findings of fact are concerned and such finding can only be distributed in revisional jurisdiction by the High Court if it is arrived at by the first appellate Court either by misreading the evidence or through perverse

appreciation of evidence on record or due to non-consideration of legal evidence on record."

11. The impugned judgments of the Courts below, although are unanimous, but are tainted with material irregularity, illegality, infirmity, which not only failed to appreciate the material available on record in its true perspective, but also erred in application of correct law, hence cannot be approved. Consequently, this Civil Revision being forceful is allowed, judgments and decrees impugned herein are set aside and suit of the respondents/ plaintiffs is dismissed, with no order of cost.

ZC/F-4/L

Revision allowed.

PLJ 2019 Lahore (Note) 46

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

FAISALABAD ELECTRIC SUPPLY COMPANY LIMITED (FESCO) through Sub-Divisional Officer and 3 others--Petitioners

Versus

ZAHID HAMEED--Respondent

C.R. No. 3308 of 2014, heard on 15.2.2018.

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

----S. 42--Declaratory suit for cancellation of energy consumption bill--Decreed--Appeal--Dismissed--Audit note--Fault of department--Non-issuance of show cause notice--Non affording opportunity of hearing--Wrongful Act--Concurrent findings--Challenge to--That audit note is neither binding on consumer nor he could be held responsible for fault of Department as pointed out in Audit Report and demand was advanced to consumer without issuance of any show cause notice or affording him opportunity of hearing to adjudge consumer's liability for payment of questioned amount, he has remained handicapped to respond satisfactorily--Instant case is a classic example of wrongful act of petitioners/defendants, whereby its consumers are forced to agitate same by over burdening Courts--In Such facts and circumstances, there does not appear any good ground to interfere with impugned judgments and decrees--Civil revision was dismissed. [Para 3] A & B

Ch. Fiaz Ahmed Singhairah, Advocate for Petitioners.

Mr. Muhammad Imran Bhatti, Advocate for Respondents.

Date of hearing: 15.2.2018.

JUDGMENT

The instant Civil Revision calls in question concurrent findings of two Courts below whereby declaratory decree for cancellation of energy consumption bill based on audit/objection note was granted to the respondent/plaintiff.

2. Arguments heard and record scanned.

3. Without going into deeper appreciation of available record, on having been confronted with the situation that audit note is neither binding on the consumer nor

he could be held responsible for the fault of Department as pointed out in Audit Report and the demand was advanced to the consumer without issuance of any show-cause notice or affording him opportunity of hearing to adjudge the consumer's liability for payment of the questioned amount, he has remained handicapped to respond satisfactorily. The superior Courts of the State in the chain of judgments reported as Water and Power Development *Authority etc. vs. Umaid Khan* (1988 CLC 501), *Khalid Pervaiz vs. Water and Power Development Authority through Chairman, WAPDA and another* (1999 CLC 1591), *Islamic Republic of Pakistan through Secretary, Defence, Defence Secretariat, Rawalpindi and another vs. Messrs Abdul Ghani Abdul Rehman Limited through Managing Director* (2002 CLC 1039) and *WAPDA through Chairman and 3 others vs. Fazal Kdrim and 5 others* (2008 YLR 308) have already declared the demand based on audit note being violative, but despite that petitioners/Department is in consistent habit to demand the same from the consumers, which tendency is not only intolerable but also contemptuous and bulk of cases are pending in different Courts on the basis of illegal demands of the petitioners/Department. The instant case is a classic example of wrongful act of the petitioners/defendants, whereby its consumers are forced to agitate the same by over burdening the Courts. In Such facts and circumstances, there does not appear any good ground to interfere with the impugned judgments and decrees.

4. This Civil Revision having on merit is hereby dismissed.

(M.M.R.) Civil revision dismissed.

PLJ 2019 Lahore 295
[Rawalpindi Bench Rawalpindi]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
UNITED BANK LIMITED--Petitioner
Versus
PUNJAB LABOUR APPELLATE TRIBUNAL, etc.--Respondents
W.P. No. 2366 of 2011, decided on 19.2.2019.

Constitution of Pakistan, 1973--

----Art. 199--Industrial Relations Ordinance, 2002, S. 46 2(xxx)--Constitutional Petition--Retirement after superannuation--Receiving of pensionary benefits without objection--Grievance petition--Allowed--Appeal--Dismissed--Jurisdiction--Challenge to--There is no denial that under Section 46 of Ordinance ibid only a Workman as defined under Section 2(xxx) of said Ordinance can invoke jurisdiction of learned Punjab Labour Court--Whereas admittedly Respondent No. 2 was never dismissed, discharged, retrenched and laid-off or otherwise removed from service, rather he remained in job till date of his superannuation, therefore, he was not falling within definition of Worker or Workman, hence learned Labour fora definitely lacked jurisdiction to entertain and decide Grievance Petition, whose orders impugned herein being unlawful, nullity and having no legal authority cannot be sustained--Petition was allowed. [Pp. 296 & 297] A & B

Mr. Faisal Mehmood Ghani, Advocate for Petitioner.
Kh. Muhammad Arif, Advocate for Respondents.
Date of hearing: 19.2.2019.

JUDGMENT

Undeniably, Ch. Muhammad Qayyum, Respondent No. 2 was employed by the writ petitioner, who on attaining superannuation was retired as Officer Grade-Ill from service on 12.07.2007. Pursuant thereto, the pensioner benefits so calculated were received by him without any objection. However, subsequently he filed a Grievance Petition before the learned Labour Court, which was granted on 11th June, 2009 and the Appeal filed by the petitioner to assail it before the Punjab Labour Appellate Tribunal, Lahore was dismissed on 14th June, 2011, hence this Constitutional Petition.

2. The sole argument of learned counsel for the petitioner is that the learned Labour Court lacked jurisdiction to adjudicate upon Grievance Petition of Respondent No. 2, who being a retired employee did not fall within the definition of Workman in terms of Section 2 (XXX) of the Industrial Relations Ordinance, 2002, which was controverted by the learned counsel for Respondent No. 2 with emphasis that both the learned Courts below have already tackled this issue eminently and they were perfect to allow the Grievance Petition of the appellant.

3. There is no denial that under Section 46 of the Ordinance ibid only a Workman as defined under Section 2 (XXX) of the said Ordinance can invoke the jurisdiction of learned Punjab Labour Court and it would be advantageous to reproduce said provision here:

> *"Worker" and "Workman" means any and all persons not falling within the definition of employer who is employed in an establishment or industry for remuneration or reward either directly or through a contractor, whether the terms of employment be express or implied, and for the purpose of any proceedings under this Ordinance in relation to an industrial dispute includes a person, who has been dismissed, discharged, retrenched, laid-off or otherwise removed from employment in connection with or as a consequence of that dispute or whose dismissal, discharge, retrenchment, lay-off or removal has led to that dispute but done not include any person who is employed mainly in a managerial or administrative capacity."*

Its bare perusal has left no doubt in my mind that only an employee in the establishment or industry, who was dismissed, discharged, retrenched, laid-off or otherwise removed from the employment in connection with or as a consequence of some dispute or whose dismissal, discharge, retrenchment, lay-off or removal led to that dispute, whereas admittedly Respondent No. 2 was never dismissed, discharged, retrenched and laid-off or otherwise removed from service, rather he remained in job till date of his superannuation, therefore, he was not falling within the definition of Worker or Workman, hence the learned Labour fora definitely lacked jurisdiction to entertain and decide the Grievance Petition, whose orders impugned herein being unlawful, nullity and having no legal authority cannot be sustained.

5. Consequently, the Writ Petition in hand is allowed, orders under challenge are set aside and the Grievance Petition of Respondent No. 2 is also dismissed, however, the latter may avail his remedy before the available forum.

(Y.A.) Petition allowed.

PLJ 2019 Lahore (Note) 73
[Multan Bench Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
JAMSHED AKHTAR KHAN--Petitioner
Versus
MUHAMMAD SHARIF, etc.--Respondents
C.R. No. 427-D of 2001, heard on 22.6.2015.

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

----S. 12--Agreement to sell--Suit for specific performance--Dismissed--Appeal--Allowed--Challenge to--Since Exh.P1 and Exh.2 being unilateral agreements are not enforceable under law, therefore, suit filed by respondents/plaintiffs could not be decreed, but this aspect has been ignored by learned lower appellate Court while delivering judgment and decree--There is no hesitation to hold that Exh.P1 and Exh.P2 being unilateral agreements were not enforceable as per law and on basis of said agreements, a decree for specific performance cannot be granted, but learned lower appellate Court passed impugned judgment and decree on wrong premises of law while ignoring principles settled by superior Courts on subject and misconstruing evidence on record, which having been rendered illegally, unlawfully and without jurisdiction cannot be sustained in eye of law. [Para 3 & 4] A & B

1990 SCMR 28, *ref.*

Mr. Qaiser Amir Khan, Advocate for Petitioner.

Rana Muhammad Nazir Khan Saeed, Advocate for Respondents.

Date of hearing: 22.6.2015

JUDGMENT

Ch. Muhammad Masood Jahangir, J.--A suit for specific performance of agreement to sell filed by the respondents/plaintiffs against the petitioner/defendant on the basis of alleged agreements to sell (Exh.P1 and Exh.P2) was dismissed by the learned trial Court *vide* judgment and decree dated 27.3.1996. However, in appeal, the said judgment and decree was reversed and the suit filed by the

respondents/plaintiffs was decreed by the learned lower appellate Court while allowing the appeal filed by the respondents/plaintiffs, *vide* impugned judgment and decree dated 27.3.2001.

2. At the very outset of the arguments, when it is confronted with the proposition that the alleged agreements to sell (Exh.P1 and 2), on the face of it, are unilateral having not been signed by one of the party i.e. vendee and a suit for specific performance on the basis of such lapse cannot be decreed, the learned counsel for the respondents/plaintiffs feels himself handicapped to reply the same.

3. Since Exh.P1 and Exh.2 being unilateral agreements are not enforceable under the law, therefore, the suit filed by the respondents/plaintiffs could not be decreed, but this aspect has been ignored by the learned lower appellate Court while delivering the judgment and decree. In arriving at such view, this Court is fortified by the judgment delivered by the august Supreme Court of Pakistan reported as "*Mst. Barkat Bibi vs. Muhammad Rafique"* (1990 SCMR 28) and the operative para of the said judgment is reproduced hereunder:--

> *"A perusal of the above Igramani "shows that there is no reference made therein specifically to the exact consideration for the agreement. Moreover, we observe that it is a unilateral offer made by Muhammad Din to re-convey the land as soon as they (the vendors) themselves have raised the money. No indication is to be found in the document that this offer was accepted by the respondents for no one on the side of the respondents has signed this "Iqrarnama" in token of its acceptance. It was no more than a proposal because unless the person to whom the offer is made signifies his willingness to accept it, the proposal does not, in law, ripen into an agreement. Now it is only an "agreement", as the term is understood in law, which can be enforced by a suit for specific performance. Accordingly, it is only if the so-called "Iqrarnama" qualified as an agreement would it have the effect of creating a legal relationship between the parties so as to give rise to jural, as opposed to moral, obligations and then only would a*

suit for specific performance be maintainable on its basis. The so-called "Iqrarnama" dated 24.7.1953, on close examination, however, does not qualify to be an "agreement". Hence a suit to specifically enforce it was not competent."

This view has also been strengthened by the judgment reported as *Gulshan Hameed vs. Kh. Abdul Rehman* (2010 SCMR 334). In the said authoritative judgment/dicta delivered by apex Court of the State, it has been held that an agreement is required to be signed by both the parties and if it was not signed by anyone of the parties, then the same cannot be enforced as per law. Even in the recent judgment reported as *Farzand Ali and another vs. Khuda Bakhsh and others* (PLD 2015 SC 187), it has been observed as under:

Thus for the purposes of a valid contract there should be the meeting of minds of the contracting parties. 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.

4. On the touch stone of above discussion, there is no hesitation to hold that Exh.P1 and Exh.P2 being unilateral agreements were not enforceable as per law and on the basis of said agreements, a decree for specific performance cannot be granted, but the learned lower appellate Court passed the impugned judgment and decree on wrong premises of law while ignoring the principles settled by the superior Courts on the subject and misconstruing the evidence on record, which having been

rendered illegally, unlawfully and without jurisdiction cannot be sustained in the eye of law.

5. Resultantly, the instant civil revision is accepted and the impugned judgment and decree passed by the learned lower appellate Court is set aside and that of learned trial Court whereby suit for specific performance filed by the respondents/plaintiffs was dismissed, is restored.

(Y.A.) Civil revision accepted.

PLJ 2019 Lahore (Note) 75

[Multan Bench, Multan]

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

SIRAJ DIN--Petitioner

Versus

Mst. **ASGHARI BIBI, etc.--Respondents**

C.R. No. 679-D of 2001, decided on 24.6.2015.

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

----S. 42--Suit for declaration--Dismissed--Appeal--Dismissed--Owner of property was missing for last twenty years--Missing person was never produced before Courts below--Concurrent findings--Conditionally attestation of inheritence mutation in favour of all legal heirs--Direction to--Qutabi was missing since long--When confronted with such situation, learned counsel for respondents feels handicapped and on instructions from respondent/Defendant No. 1 present in Court has replied that instant civil revision may be disposed of in terms that Revenue Officer be directed to conditionally attest inheritance mutation of legacy of Qutabi in favour of all available legal heirs according to their respective shares and in future at any point of time if said Qutabi came into picture as alive, said mutation of inheritance will be cancelled forthwith--Learned counsel for petitioners has also agreed said arrangement--Direction to concerned Revenue Officer that he will enter inheritance mutation of Qutabi in favour of all his available heirs according to their respective shares as per law and then present same before Revenue Officer in common assembly of concerned village, who after due verification will attest inheritance mutation of Qutabi deceased in favour of all his available legal heirs as per law with condition that in future at any point of time if said Qutabi is produced as alive before Revenue Officer, then said inheritance mutation will be recalled by him after due notice to parties--Civil Revision disposed of. [Para 2 & 3] A & B

Rana Muhammad Aftab, Advocate for Petitioner.

Ch. Azam Hussain Hanjra, Advocate for Respondents.

Date of hearing: 24.6.2015

JUDGMENT

The admitted fact of the case are that one Qutabi was actual owner of the suit property. The petitioners being collaterals filed a suit for declaration before the learned trial Court with the assertion that said Qutabi had been missing for the last

20-years whose whereabouts were not known to anyone and as such while treating him as dead, the petitioners/plaintiffs be declared owners of the disputed property owned by missing Qutabi to the extent of their legal and shari sharers. The said suit was contested by the wife/widow and daughters of said Qutabi by filing their contested written statement. Both the Courts below concurrently dismissed the suit filed by the petitioners.

2. It is an admitted fact that Qutabi was never produced by the respondents/defendants before the learned Courts below, to dislodge the claim of the petitioners/plaintiffs that he was not missing rather in the written statement as well as in her deposition as DW/1 Respondent/Defendant No. 1 has impliedly conceded that Qutabi was missing since long. When confronted with such situation, the learned counsel for the respondents feels handicapped and on instructions from Respondent/Defendant No. 1 present in the Court has replied that the instant civil revision may be disposed of in the terms that Revenue Officer be directed to conditionally attest inheritance mutation of the legacy of Qutabi in favour of all the available legal heirs according to their respective shares and in future at any point of time if said Qutabi came into picture as alive, the said mutation of inheritance will be cancelled forthwith. The learned counsel for the petitioners has also agreed to the said arrangement.

3. In the light of above consensus developed between the learned counsel for the parties, the instant civil revision is disposed of with the direction to the concerned Revenue Officer that he will enter the inheritance mutation of Qutabi in favour of all his available heirs according to their respective shares as per law and then present the same before the Revenue Officer in common assembly of the concerned village, who after due verification will attest the inheritance mutation of Qutabi deceased in favour of all his available legal heirs as per law with the condition that in future at any point of time if said Qutabi is produced as alive before the Revenue Officer, then the said inheritance mutation will be recalled by him after due notice to the parties.

(Y.A.) Order accordingly.

2019 P L C (C.S.) 1241
[Lahore High Court (Multan Bench)]
Before Ch. Muhammad Masood Jahangir and Rasaal Hasan Syed, JJ
MUHAMMAD RASHID
Versus
GOVERNMENT OF PUNJAB and 4 others

I.C.A. No. 306 of 2018, decided on 18th December, 2018.

(a) Civil service---

----Contract employee---Detention of employee in criminal case---Absence from duty---Termination of service---Wilful absence---Scope---Employee was arrested in a criminal case---Employee was terminated due to wilful absence from duty---Constitutional petition filed by the employee was dismissed by the Single Judge of High Court---Contention of employee was that he had not willfully absented himself from duty but he was in police custody---Validity---Person who was physically prevented by reasons beyond his control from participating in a process could not be saddled with penalty entailing "willfulness"---Mere implication in criminal case from which petitioner was able to clear his name by demonstrating his innocence could not be used to deprive him of his employment---Proper course, when absence of the petitioner from duty was due to circumstances beyond his control, might be issuance of show-cause notice followed by an opportunity of reply and provision of personal hearing---Department should pass an impartial decision supported by valid reasons---Due process had not been adopted in the present case which had rendered the impugned action untenable---Impugned orders were set aside and employee was ordered to be reinstated in service forthwith---Department could hold inquiry for determination of facts in accordance with law---Intra-court appeal was allowed, in circumstances.

Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others 1998 SCMR 2268 and Superintending Engineer GEPCO, Sialkot v. Muhammad Yousaf 2007 SCMR 537 rel.

(b) Words and phrases---

----'Wilful'---Meaning.

Shorter Oxford English Dictionary (Oxford University Press - Edition 2007) rel.

Israr Hayat Sulehri for Appellant.

Shahid Riaz, A.A.G. along with Rashed Ahmad, Dy. DFO.

ORDER

This intra court appeal impugns order dated 14.9.2018 whereby Writ Petition No.13164/2018 filed by the appellant against his termination from service was dismissed.

2. Facts pertinent to disposal of this appeal are that the appellant was appointed on contract basis as ESE (Science-Math) through Memo. No.4447 dated 31.7.2017 on recommendation of District Recruitment Committee against open merit in BPS-9 for a period of five years at Government Girls Primary School 35/KB, Burewala. As fate would have it, he got implicated in FIR No.682/2015 dated 18.11.2015 under section 302/34, P.P.C. and was arrested on 11.10.2017. His absence from work resulted in his termination vide order No.8912/ESR dated 30.11.2017. An appeal was filed before present respondent No.3 which remained undecided, prompting the petitioner to file W.P. No.8540/2018, wherein a direction dated 01.6.2018 was issued for timely decision of pending appeal. By order dated 04.7.2018 the appeal was dismissed.

3. The petitioner filed W.P. No.13164/2018 wherein the termination of the petitioner was challenged. Learned Single Judge in Chambers vide Order dated 14.9.2018 dismissed the same which is now the subject-matter of this intra court appeal.

4. Learned counsel for the appellant has argued that the termination of the appellant on ground that he was willfully absent w.e.f. 11.10.2017 is totally unjustified; that he had been detained by the police for investigation consequent to his wrongful nomination in FIR No.682/15 wherein he was later found innocent; and that as such ground of wilful absence from duty was inoperative qua the rights of the appellant. Learned counsel for the respondents opposed the arguments of the learned counsel for the appellant and iterated that an enquiry was conducted, the petitioner was provided opportunity of hearing which he did not avail, and as such his termination was warranted.

5. Arguments have been heard and available record duly perused. The petitioner was appointed under Memo. No.4447 dated 31.7.2017 for an initial period of five years further extendable by five years on the basis of good performance. The said document at clause 8 recorded inter alia the following grounds upon which the employment could be terminated:-

"f. The Contract will be terminated on the following GROUNDS:

i. If the Educator is willfully absent from duty or does not achieve Student Teacher Ratio (STR). (40:1), 100% their retention financial embezzlement, misconduct and quality education to be judged on the basis of Examination / Assessment by the Department or any agency."

(emphasis supplied)

6. It appears that due to the appellant's entanglement in police investigation and purported detention after lodgment of FIR No.682/2015 dated 18.11.2015 he was allegedly prevented from attending his duty at the school. His absence was noticed and when an explanation could not be found vide order No.8912/ESR dated 30.11.2017 the services of the appellant were terminated with effect from the date of his reported absence on 11.10.2017 as follows:

"Whereas I, Muhammad Maroof District Education Officer (EE-M) Vehari being competent authority invited proceedings against Mr. Muhammad Rashid ESE (Sci-Math) Government Primary School 35/KB Tehsil Burewala District Vehari under section 8- II of Contract Agreement, on the charge of wilful absence from duties w.e.f. 11.10.2017 to up till now, during the visit of AEO/MEA and reported by the Deputy District Education (EE-M) Tehsil Burewala vide Letter No. 1132 dated 12.10.2017 and 1162 dated 17.10.2017.

An opportunity of personal hearing was offered to the accused vide No.7937/ESR dated 31.10.2017 No. 8054/ESR dated 02.11.2017 and No. 8227/ESR dated 14.11.2017 but he failed to appear before the undersigned and failed to submit his written defense/statement.

Whereas the undersigned has gone through the record of the case and given anxious consideration to meet ends of the justice. The personal record reveals that the said

charge of wilful absence w.e.f. 11.10.2017 to up till now has been proved against Mr. Naeem Aslam ESE Government Primary School 162/EB Tehsil and District Vehari.

Now therefore in exercise of power conferred upon section 8-II of the letter of agreement I, Muhammad Maroof District Education Officer (EE-M) Vehari being a competent authority hereby terminate contract w.e.f. 11.10.2017 (the date of absence).

7. The reasons recorded for terminating the services of the appellant were his wilful absence from duties w.e.f. 11.10.2017 till the date of the order i.e. 30.11.2017. It is stated in the termination order supra that he was provided opportunities of hearing on 31.10.2017, 02.11.2017 and 14.11.2017 but he failed appear before the respondents on those dates.

8. At the time the appeal was heard by respondent No.3 pursuant to direction of this Court dated 01.6.2018 in W.P No.8540/2018 the appellant presented himself and submitted that he had not willfully absented himself but was in police custody. It has also been submitted that while in police custody a number of postal attempts were made to notify the respondents of his whereabouts. Despite indication of these factors the decision passed by the respondents still concluded that opportunity of hearing was duly provided which he did not avail and that he was guilty of wilful absence.

9. It appears that the respondents in characterizing the absence of the appellant from duty as "wilful" and ignoring his explanation of being in police custody, appear to have not considered the meaning of the word "wilful" as it occurs in ordinary use which Shorter Oxford English Dictionary (Oxford University Press - Edition 2007) defines as "asserting or disposed to assert ones own will contrary to persuasion, instructions or command; headstrong; obstinate; determined to have ones own way".

10. Notwithstanding the factual aspect of the explanation offered, the reasoning adopted by the respondents in arriving at the conclusion that his absence was wilful, is inherently defective, because a person who is physically prevented by reasons

beyond his control from participating in a process, could not be saddled with penalty entailing willfulness that presupposes existence of "choice".

11. The August Supreme Court in "Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others" (1998 SCMR 2268) has observed that:-

"It has consistently been held that while routine contractual disputes between private parties and public functionaries are not open to scrutiny under the Constitutional jurisdiction, breaches of such contracts, which do not entail inquiry into or examination of minute or controversial questions of fact, if committed by Government, Semi Government or Local Authorities or like controversies if involving dereliction of obligations, flowing from a statute, rules or instructions can adequately be addressed for relief under that jurisdiction ... public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation."

12. Mere implication in FIR No.682/2015 dated 18.11.2015 from which the appellant was able to clear his name by demonstrating his innocence, could not be used to deprive him of his employment. Reliance in this regard may be placed on "Superintending Engineer GEPCO, Sialkot v. Muhammad Yousaf" (2007 SCMR 537).

13. The proper course to adopt once it had come to light that the absence of the appellant from duty was allegedly due to circumstances beyond his control, might be issuance of specific show-cause notice, followed by an opportunity of reply and provision of personal hearing wherein chance to defend and explain was provided, and thereafter to pass a completely impartial decision supported by valid reasons. These indeed are the basic requirements of due process guaranteed by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. This not having been done renders the action of terminating the appellant from employment legally untenable.

14. For reasons recorded above this appeal is allowed and impugned orders dated 30.11.2017 and 04.7.2018 are set aside. The appellant shall be reinstated to service forthwith. It is however clarified that this order shall not prevent the respondents from proper determination of facts through inquiry conducted in accordance with law by meeting the requirements of due process.

ZC/M-199/L Appeal allowed.

2019 C L C 1392

[Lahore]

Before Ch. Muhammad Masood Jahangir, J

ATTA MOHAMMAD (DECEASED) through L.Rs. and others----Petitioners

Versus

HASSAN NAWAZ----Respondent

C.R. No. 2144 of 2013, decided on 5th December, 2018.

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

----O. XVIII, Rr. 8 & 14---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Examination of witnesses---Memorandum---Scope---Memorandum, when evidence was not recorded by the Judge---Procedure---Local Commission while recording evidence of witnesses of defendants did not perform his job honestly---Replies of said witnesses during cross-examination were recorded against the gist as well as substance of statement-in-chief---Court was bound to follow the law and proceed with the trial as per procedure laid down in C.P.C.---If Judge was unable to make memorandum then he should record reasons of his inability to record evidence---Memorandum so made should form part of record of the Court---Oral evidence, in the present case, was recorded by the Local Commission but same was not signed or sealed by the Judge---Agreement to sell having been scribed on the plain paper was received in evidence---Trial Court was bound to impound the said agreement---Trial Court had acted in perfunctory manner---Evidence recorded without following the mandatory procedure could not be treated as part of record of the suit---Impugned judgments and decrees passed by the Courts below were set aside---Suit filed on behalf of plaintiffs should be deemed to be pending before the Trial Court who was directed to examine the witnesses of the parties himself and decide the same afresh within a period of six months---Revision was allowed, in circumstances.

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

----S. 115---Revisional jurisdiction of High Court---When can be invoked---Principles.

Revisional jurisdiction of High Court under Section 115, C.P.C. is invoked only in the cases wherein the lower Courts have exercised the jurisdiction not vested in them by law or they failed to exercise it so vested or it was exercised in an illegal manner or that some material irregularity was committed, but this is the established law that in case wherein it is found that the findings of the subordinate Courts were suffering from misreading and non-reading of evidence or that the conclusion drawn was in absolute disrespect to the law and facts of the case, High Court must interfere in the matter in its revisional jurisdiction and correct the illegality committed by the subordinate Courts.

Shumal Begum v. Gulzar Begum 1994 SCMR 818 rel.

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

----S. 115---Time barred revision petition---Suo motu exercise of jurisdiction under S.115 of C.P.C. by High Court---Scope---While invoking suo motu revisional powers strict compliance of law of limitation could be avoided for disposal of such cases where not only connivance of an advocate with his fellow/Local Commission rather pressure of the former on the Judicial Officer was on record.
Hafeez Ahmad and others v. Civil Judge, Lahore and others PLD 2012 SC 400 rel.

(d) Administration of justice---

----Court was bound to follow the law.

(f) Administration of justice---

----Each case had to be dealt with on its own merits. [p. 1395] C

(g) Limitation---

----Law of limitation was a substantive law and could not be considered as a mere technicality.

Malik Ali Imran and Ch. Mohammad Saeed Zafar for Petitioners.

Sheraz Mahmood and Imtiaz Hussain Rehan for Respondent.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undisputedly, subject land fully detailed in para 2 of petition in hand was titled by Atta Mohammad, predecessor-in-interest of present petitioners. On 15.08.2008 Hassan Nawaz, respondent through his real brother Ch. Waqar Ahmad Bhatti, Advocate instituted a suit for specific performance of purported agreement to sell dated 15.08.2008 scribed by the Clerk of said Advocate on a plain paper contending therein that transaction was struck against Rs.15 lac with the late vendor, who after receiving Rs.13 lac not only executed the contract rather possession also changed hands. The suit was resisted by legal representatives of alleged vendor/petitioners with the firm stance that agreement to sell was forged and fictitious document, which was collusively managed through fraud and misrepresentation, but neither any transaction of sale was struck nor consideration was received by him. It was further pleaded that possession of disputed property was with their uncle, who was also maternal uncle of plaintiff and to sustain his possession, the suit was instituted for ulterior motives. After settlement of issues, the evidence was recorded through Local Commission and ultimately the suit was decreed, whereas appeal of the petitioners was dismissed, hence this Civil Revision.

2. During the course of deliberation, learned counsel for the petitioners emphasized that despite the fact that in memorandum of the appeal, it was specifically pleaded that document was fictitiously managed through the Clerk, but no heed was paid by the Court to dilate upon this fact. On asking, learned counsel for respondent failed to deny that Munawar-uz-Zaman, the purported scribe was the Clerk of Advocate, whereas the latter was real brother of the respondent. Having confirmed so, notwithstanding that suit was unanimously

decreed, this Court was inclined to probe the record deeply with more care and when evidence was scanned with the able assistance of learned counsel for the parties, it was observed that the Local Commission while recording the statements of the DWs did not perform his job honestly, who during course of cross-examination recorded some of replies totally against the gist as well as substance of their statements-in-chief. Although, neither specific objection was raised during course of trial nor it was agitated in the Civil Revision in hand, yet being the Court of visitorial and corrective jurisdiction, I was persuaded that some wrong for some ulterior motive with collusiveness was committed. Undoubtedly, a Court is bound to follow the law of land and to proceed with the trial as per procedure laid down in the Code, 1908. The rule 8 of the Order XVIII thereof prescribes the mode for recording of evidence other than by the Judicial Officer, which being applicable is advantageous to be reproduced here:-

> "Memorandum when evidence not taken down by Judge.-When the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record."

This mandatory requirement was introduced so that the Judicial Officer should be cognizant of the testimony deposed by the witness to obviate any chance of its misconstruction or misinterpretation. Moreover, the referred provision is also followed by its rule 14, which reads as under:-

> "Judge unable to make such memorandum to record reasons of his inability.-(1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall, cause the memorandum to be made in writing from his dictation in open Court.
>
> (2) Every memorandum so made shall form part of the record."

It demonstrates that if the Judicial Officer is unable to make a memorandum, he shall record reason of his inability and its sub-rule (2) further requires that the memorandum so made, shall form part of record, but in this case the oral evidence so recorded by the Local Commission was not even signed or sealed by the learned Judicial Officer. Moreover, the contract Ex:P 1 having been scribed on the plain paper as it is, was received in evidence, whereas under the law it was to be impounded, as such the Trial Court acted in perfunctory manner and the provisions referred hereinabove were not adhered to, therefore, evidence recorded without following the mandatory procedure cannot be treated part of record of the suit and deserves to be bulldozed.

3. The argument of learned counsel for the respondent that this Petition was filed beyond time and is liable to be dismissed on this short ground might have

some force, but each case has to be dealt with on its own merits. No doubt, law of limitation is a substantive law and in routine cases cannot be considered as a mere technicality, but I am of the firm belief that under one part of section 115 of the Code, 1908, the strict compliance of law of Limitation can be avoided while invoking suo motu powers for disposal of such like cases where not only connivance of an Advocate with his fellow/Local Commission rather pressure of the former on the Judicial Officer is vivid from the record, as such it is not a case where the judgments of Courts below can be given any shelter by application of law of Limitation. This view finds support from the conclusion drawn by the Larger Bench of the apex Court in a case reported as "Hafeez Ahmad and others v. Civil Judge, Lahore and others" (PLD 2012 Supreme Court 400).

4. The next stance of learned counsel for respondents that concurrent findings cannot be interfered with is fallacious. There is no quibble to the proposition that the revisional jurisdiction of this Court under section 115 of the Code, 1908 is invoked only in the cases wherein the lower Courts have exercised the jurisdiction not vested in them by law or they failed to exercise it so vested or it was exercised in an illegal manner or that some material irregularity was committed, but this is the established law that in case wherein it is found that the findings of the subordinate Courts were suffering from misreading and non-reading of evidence or that the conclusion drawn was in absolute disrespect to the law and facts of the case, this Court must interfere in the matter in its revisional jurisdiction and correct the illegality committed by the subordinate Courts. See "Shumal Begum v. Gulzar Begum (1994 SCMR 818).

5. Consequently, this Civil Revision is allowed, impugned judgments and decrees of both the learned Courts below are hereby set aside and the suit instituted on behalf of the petitioners will deem to be pending before the learned Civil Court, who will examine the witnesses of the parties himself and decide the same afresh keeping in view the mandate of Order XX, Rule 5 of the Code, 1908 in either way within a maximum period of six months positively. The parties are directed to approach learned District Judge, Hafizabad on 07.01.2019 for entrustment of suit file to a Court of competent jurisdiction for further proceedings.

6. Before parting with this judgment, it is clarified that if the learned Court or the respondents feel that some pressure is exerted by the local Bar to make a favourable order, then either of them may refer/approach this Court for transfer of the lis to some other district.

ZC/A-3/L Case remanded.

2019 C L C 1405
[Lahore (Rawalpindi Bench)]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD ARIF and 7 others----Petitioners
Versus
MEMBER, BOARD OF REVENUE PUNJAB LAHORE and 4 others----Respondents

W.P. No. 1035 of 2012, heard on 11th January, 2019.

(a) Punjab Land Revenue Act (XVII of 1967)---

----Ss. 117, 175 & 3---Power of Revenue Officer to define boundaries---Prevention of encroachment upon common lands---Exclusion of land occupied as site of a town or village from operation of Punjab Land Revenue Act, 1967---Scope---Respondent filed application for demarcation of public thoroughfare, which was carried out and ultimately petitioner and respondent were found encroachers---Petitioner's appeal before Collector was allowed, revision petition filed by respondent against said order was allowed by Additional Commissioner and review filed against the same was dismissed by Member, Board of Revenue---Plea of petitioner was that residential building had been built on the spot since long and as such demarcation proceedings fell outside the jurisdiction of revenue authorities---Validity---Section 175, Punjab Land Revenue Act, 1967 provided procedure for eviction of an encroacher over the land reserved for common purposes irrespective of the fact that a building had been erected thereupon---Petitioner had never mentioned that either he was co-sharer in the subject khasra or he had not raised construction over the same---Demarcation report unfolded that the Revenue Officer in presence of parties as well as other notables started the proceedings to define the limits of khasra when son of petitioner being sure that his encroachment would be highlighted slipped away from the scene---Petitioner had no right or interest with the land of public thoroughfare and could not be allowed to remain in its possession, which was meant for common use of the public---Petitioner could not point out any infirmity or perversity in the impugned orders, which were neither coram non judice nor ultra vires---Constitutional petition was dismissed with costs.

(b) Punjab Land Revenue Act (XVII of 1967)---

----S. 117---Power of Revenue Officer to define boundaries---Scope---Revenue Officer is empowered to define the limits of any estate, or of any holding, field or other portion of the estate on an application of any person and as a result of such proceedings, a person found to be in wrongful possession of some land can be evicted.

(c) Punjab Land Revenue Act (XVII of 1967)---

---S. 175---Prevention of encroachment upon common lands---Scope---Section 175, Punjab Land Revenue Act, 1967 provides procedure for eviction of an

encroacher over the land reserved for common purposes irrespective of the fact that a building has been erected thereupon.
Rizwan Niaz for Petitioner.
Irfan Ahmed Khan Niazi, AAG for Respondents Nos.1 to 4 with Sabir Hussain Patwari.
Imran Saeed Mirza and Sabir Ali Cheema for Respondent No.5.
Date of hearing: 11th January, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The brief facts giving rise to the litigation in hand were that respondent No.5 and the petitioners were residents of same Revenue Estate. The former preferred an application for demarcation of public thoroughfare comprising Khasra No.405 of the said village, which was carried out and ultimately report was formulated finding the petitioners unauthorized possessors of the public thoroughfare measuring 10 Marlas and respondent No.5 an encroacher over 04 Marlas. Being dejected, petitioners preferred Appeal before the Collector-respondent No.3, whereas respondent No.5 also moved an application for removal of unauthorized constructions of the petitioners. The Authority allowed the Appeal and dismissed Petition of respondent No.5 vide order of 28th October, 2010 on the sole ground that jurisdiction of the Revenue Authorities was ousted under sections 3 and 117 of the West Pakistan Land Revenue Act, 1967 and the matter warranted its adjudication by Civil Court only, but this order could not hold the field when not only Revision Petition preferred by respondent No.5 was allowed by the Additional Commissioner / respondent No.2 rather ROR preferred by the petitioners was also declined by learned Member, Board of Revenue and to call in question the Demarcation Report as well as unanimous orders of respondents Nos.1 and 2, this Constitutional Petition was filed.

2. It is emphasized by learned counsel for the petitioners that admittedly at spot residential building having been built since long, the matter did not fall within the ambit of Revenue Authorities and any such exercise falls outside their jurisdiction as per sections 3 and 117 of the West Pakistan Land Revenue Act, 1967. He further added that respondent No.5 initiated parallel civil litigation with regard to the same dispute having already been decided in favour of the petitioners and thereafter the Revenue Hierarchy was not within its jurisdiction to reopen the same chapter after its decision by the Court of ultimate jurisdiction. It was also stressed on his part that the Collector/respondent No.3 himself after visiting the spot rendered specific opinion that disputed Khasra number was situated in Abadi and the Revenue Officer was not competent to carry out its demarcation, but both of his superior Authorities without considering said aspect of the matter passed the impugned orders, which being erroneous and illegal cannot be sustained. He further pleaded that the entire demarcation proceedings carried out by the Revenue Authorities were in sheer violation of law and rules on the subject.

In contra learned counsel for respondent No.5 as well as learned Law Officer appearing on behalf of respondents Nos.1 to 4 submitted that it was nowhere denied before any forum by the petitioners that they had not encroached upon land of public thoroughfare and the Revenue Hierarchy under the mandate of section 117 of the Act ibid read with Rule 67A of the Punjab Land Revenue Rules, 1968 was within the jurisdiction to define the limits of any portion of a Revenue Estate. It was also argued that demarcation proceedings were carried out in conformity to the requirement of relevant law/rules and all the concerned including petitioners joined the same. It was also their stance that an illegal and unauthorized construction on public thoroughfare could not be declared as property meant for site of a village or town and the Revenue Authorities were very much competent to pass the orders for its removal.

3. Arguments heard and record perused.

4. To deal with the controversy in hand, it would be advantageous to reproduce section 117 of the Act ibid, which reads as under:-

> Section 117: Power of Revenue Officers to define boundaries
>
> (1) A Revenue Officer may, for the purpose of framing any record or making any assessment under this Act, or on the application of any person interested, define the limits of any estate, or of any holding field or other portion of an estate and may, for the purpose of indicating those limits, require boundary marks to be erected or repaired.
>
> (2) In defining the limits of any land under subsection (1) the Revenue Officer may cause boundary marks to be erected on any boundary already determined by, or by order of any Court of Revenue Officer or any Forest Settlement Officer appointed under the Forest Act, 1927 (Act XVI of 1927), or restore any boundary mark already set up by, or by order of, any Court or any such Officer.

It left no doubt that a Revenue Officer is empowered to define the limits of any estate, or of any holding, field or other portion of the estate on an application of any person and as a result of such proceedings, a person found to be in wrongful possession of some land can be evicted on a subsequent application under Rule 67B of the Rules ibid. I have gone through the contents of Appeal as well as the Petition preferred by the petitioners before the Collector and this Court respectively, wherein petitioners had never mentioned that either they were co-sharers in the subject Khasra or they had not raised any construction over it. Even during course of submissions learned counsel for the petitioners did not emphasize that his clients had not erected any building over the land of common use. In support of such situation, section 175 of the Act being further relevant is reproduced below:-

> Section 175: Prevention of encroachment upon common lands. (1) Where land which has been reserved for the common purposes of the persons residing in the estate in which such land is situate has been encroached upon by any person, and the land has been shown encroachment as so reserved, a Revenue Officer may, on the application

of a land owner in the estate, and after giving an opportunity to the person alleged to have encroached upon it to appear before him and show cause against the proposed action-

a) eject from the land the person who has encroached thereupon; and

b) by order proclaimed in the manner provided in section 26, forbid repetition of the encroachment.

which has provided procedure for eviction of an encroacher over the land reserved for common purposes irrespective of the fact that a building had been erected thereupon. As such the view of the learned Collector that Revenue Hierarchy had no jurisdiction to exercise its powers for removal of encroachment was rightly struck down by his superiors / respondents Nos.1 and 2.

The study of demarcation report unfolded that the Revenue Officer in presence of parties as well as other notables started the proceeding to define the limits of the impugned Khasra, when Zafar Iqbal, petitioner No.3 being sure that their encroachment would be highlighted slipped away from the scene, who till today did not file an affidavit to rebut this fact disclosed by the Revenue Officer in his report while discharging his official duty. The argument of learned counsel for the petitioners that in other round of litigation initiated by respondent No.5 before the Civil Court, he failed and thereafter had no locus standi to reopen the same issue before the Revenue Hierarchy was not well founded. The issue with regard to determination or demarcation of the limits of portion of estate and removal of encroachment of land used for common purposes vested with the Revenue Authorities and any other move before some different forum could not be made basis to put a restraint on its jurisdiction. The Revenue Officer after keeping in mind all the measures provided by Rule 67A of the Rules ibid performed the demarcation proceedings, who not only declared petitioners in wrongful possession rather respondent No.5, who was the suitor was also found to be encroacher of the common passage, as such he was fair enough and committed nothing wrong. The petitioners having no right or interest with the land of public thoroughfare cannot be allowed to remain in its possession, which was meant for common use of public and they deserved to be dealt with iron hands. The learned counsel for petitioners could not point out any infirmity or perversity in the impugned orders, which are neither coram non-judice nor ultra vires. Hence this Writ Petition being devoid of any merit and force is dismissed with costs of Rs.25,000/-.

SA/M-42/L Petition dismissed.

PLJ 2019 Lahore (Note) 59

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

SUI NORTHERN GAS PIPELINE LIMITED through Chief Officer--Appellant

versus

CH. KHALID SAEED--Respondents

C.R. No. 355 of 2010, heard on 13.3.2018.

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

----S. 115--Suit for recovery--Dismissed--Appeal dismissed--Installation of meter--Gas supply was disconnected on request of consumer--Issuance of disputed bill of next seven months after removal of meter--Meter tempering report--Right of audience--Concurrent findings--Challenge to--Hub document to demand amount was Report of Laboratory (Exh.P4), which was tendered on record through statement of PW2, but admittedly neither he was signatory not he prepared it, therefore, his statement was of no importance to prove that meter was tampered by consumer--Both Courts below were perfect in dismissing of suit as well as appeal of petitioner on valid reasons--Counsel for petitioner is unable to point out any infirmity and perversity in their findings which being result of well appreciation of evidence available on suit file cannot be interfered with by this Court in exercise of jurisdiction vested u/S. 115 of Code, 1908--Civil revision was dismissed. [Para 3] A & B

Mr. Umar Sharif, Advocate for Petitioner.

Malik Amjad Pervaiz, Advocate for Respondent.

Date of hearing: 13.3.2018.

JUDGMENT

Through a recovery suit instituted on behalf of petitioner it was asserted that facility of commercial Gas connection was extended to the respondent-consumer, which on the request of latter was disconnected on 26.4.2001 and after removal, the meter equipment was sent to the laboratory for checking, who after due inspection thereof confirmed its tampering *vide* report dated 20.6.2002, where upon the respondent was served with a revised bill of Rs. 114,676.64 on the basis of average gas bill for the year 1999-2000 and after the adjustment of surety amount of Rs. 13,200/- the consumer was demanded to pay the disputed amount, but on his refusal the suit was instituted, which was resisted and through judgments and decrees passed by the learned Courts below, the petitioner was concurrently non-suited, hence instant Civil Revision.

2. Heard and record perused.

3. It was undisputed among the parties that as per routine the new equipment/meter was installed on 25.04.2000 and as per request of the consumer gas supply was disconnected on 20.04.2001, followed by removal of meter from the premises on

26.4.2001. It was also agreed by the learned counsel for the petitioner that till the day of disconnection the consumer regularly paid the amount against consumption of gas and there was nothing outstanding till 26.04.2001. The documents available on record further affirmed that for next seven months after the removal of the equipment it was not referred to the laboratory for analysis, rather the latter received it on 11.11.2001 and submitted report on 20.06.2002, whereas the disputed bill was again issued after another year on 30.06.2003, however all these events were kept in dark and the consumer was neither served with notice to join the proceedings nor he was given a right of audience. The hub document to demand the amount was Report of the Laboratory (Exh.P4), which was tendered on record through the statement of PW-2, but admittedly neither he was signatory not he prepared it, therefore, his statement was of no importance to prove that meter was tampered by the consumer, hence both the Courts below were perfect in dismissing of the suit as well as appeal of the petitioner on the valid reasons. The learned counsel for petitioner is unable to point out any infirmity and perversity in their findings which being result of well appreciation of evidence available on suit file cannot be interfered with by this Court in the exercise of jurisdiction vested u/S. 115 of the Code, 1908. This Civil Revision being devoid of any merit and force is dismissed with costs throughout.

(Y.A.) Civil revision dismissed.

PLJ 2019 Lahore (Note) 68

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

FESCO LTD. Through its Chief Executive, Faisalabad and 3 others--Petitioners

versus

Sardar **TARIQ SAGHIR (deceased) through Legal Heirs--Respondents**

C.R. No. 1610 of 2015, decided on 22.2.2018.

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

----S. 115--Declaratory decree for cancellation of energy consumption bill based on audit objection--Opportunity of hearing--Issuance of show-cause notice--Concurrent findings--Challenge to--Without going into deeper appreciation of available record, on having been confronted with situation that audit note is neither binding on consumers nor they could be held responsible for fault of Department as pointed out in Audit Report and demand was advanced to consumers without issuance of any show cause notice or affording them opportunity of hearing to adjudge their liability for payment of disputed amount, he has remained handicapped to react adequately. [Para 3] A

1999 CLC 1591; 2002 CLC 1039 and 1988 CLC 501 *ref.*

Duty of Court--

----Appeal filed by petitioner before Lower Appellate Court was three days beyond limitation--Revisional jurisdiction--It is prime duty of Court to watch interests of a litigant, but law of limitation imposes some restrictions in filing of suits as well as appeals in order to save rival party from interminable litigation and such limitation can only be condoned, if circumstances mentioned in such petition are found to be beyond control of litigant or some plausible reasons have been assigned, but in this particular case, petitioners did not append any application for condonation of delay with appeal filed by them before learned lower Appellate Court--So learned lower Appellate Court justly and elaborately knocked out petitioners on point of limitation--In such facts and circumstances, there does not appear any good ground to interfere with impugned judgments and decrees in exercise of revisional jurisdiction--Civil revision was dismissed. [Para 4] B

Mehr Shahid Mehmood, Advocate for Petitioners.

Mr. Muhammad Imran Bhatti, Advocate for Respondents.

Date of hearing: 22.2.2018.

JUDGMENT

The instant Civil Revision calls in question concurrent findings of two Courts below whereby declaratory decree for cancellation of energy consumption bill based on

audit/objection note was granted to the respondents/plaintiffs vide judgments impugned herein.

2. Arguments heard and record scanned.

3. Without going into deeper appreciation of available record, on having been confronted with the situation that audit note is neither binding on the consumers nor they could be held responsible for the fault of Department as pointed out in Audit Report and the demand was advanced to the consumers without issuance of any show cause notice or affording them opportunity of hearing to adjudge their liability for payment of the disputed amount, he has remained handicapped to react adequately. The superior Courts of the State in the chain of judgments reported as *Water and Power Development Authority etc. vs. Umaid Khan* (1988 CLC 501), *Khalid Pervaiz vs. Water and Power Development Authority through Chairman, WAPDA and another* (1999 CLC 1591), *Islamic Republic of Pakistan through Secretary, Defence, Defence Secretariat, Rawalpindi and another vs. Messrs Abdul Ghani Abdul Rehman Limited through Managing Director* (2002 CLC 1039) and *WAPDA through Chairman and 3 others vs. Fazal Karim and 5 others* (2008 YLR 308) have already declared the demand based on Audit Note being violative, but regardless of that petitioners/Department is in consistent habit to demand the same from the consumers, which tendency is not only excruciating, but also contemptuous and bulk of cases are pending in different Courts on the basis of illegal demands of the petitioners/Department. The instant case is a classic example of wrongful act of the petitioners/defendants, whereby its consumers are forced to agitate the same by over burdening the Courts.

4. Another backdrop of this case was that admittedly the appeal filed by the petitioners before the learned lower Appellate Court was three days beyond limitation. Undoubtedly, it is the prime duty of the Court to watch the interests of a litigant, but the law of limitation imposes some restrictions in filing of suits as well as appeals in order to save the rival party from interminable litigation and such limitation can only be condoned, if the circumstances mentioned in such petition are found to be beyond the control of the litigant or some plausible reasons have been assigned, but in this particular case, the petitioners did not append any application for condonation of delay with appeal filed by them before the learned lower Appellate Court. So learned lower Appellate Court justly and elaborately knocked out the petitioners on point of limitation. In such facts and circumstances, there does not appear any good ground to interfere with the impugned judgments and decrees in the exercise of revisional jurisdiction.

5. This Civil Revision having no merit is hereby dismissed.

(M.M.R.) Civil revision dismissed.

PLJ 2019 Lahore 366
[Bahawalpur Bench Bahawalpur]
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J**
Mst. **ZENAB BIBI--Petitioner**
Versus
AHMAD YAR--Respondent

C.R. No. 17-D of 2012, heard on 16.05.2018

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

----S. 115--Suit for specific performance of agreement--Concurrently decreed--Jurisdiction--Challenge to--Although, scope thereof is limited, but such findings can be distressed by this Court, if Courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on issue involved--It can safely be concluded that both Courts below while misconstruing evidence of parties to lis decreed suit of respondent, who designed Exh.P1 to deprive landlady of her valuable property and verdicts of Courts below being classic example of misreading and non-reading of evidence on record are illegal, unlawful and *corum non judice*, which cannot be sustained in eye of law--Resultantly, instant Civil Revision is allowed. [Pp. 372 & 373] H & I

2014 SCMR 914, 2016 SCMR 24, *ref.*

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

----O. XX, R. 5 & XLI, R. 31--Concurrent findings--Without sensing pleadings and evidence--It was achy for me to observe that both Courts below without sensing pleadings and evidence of parties in its true perspective rendered their concurrent findings in favour of respondent in complete derogation of Order XX rule 5 as well as Order XLI rule 31 of Code, 1908. [P. 369] A

Cross-examination--

----Statement of witnesses--It was claim of respondent that bargain was settled on 10.01.2003 and advance amount was paid then and there and in lieu thereof possession changed hands before witnesses, but respondent/beneficiary being PW2 omitted to disclose date of transaction in his statement-in-chief and when he was specifically questioned about it in his cross/examination, he again failed to tell date when sale was struck--This was again surprising that respondent for first time disclosed in his statement that transaction was spontaneously struck through Ghulam Ali at Court premises of Haroon Abad, but one of marginal witnesses, Muhammad Zaman (PW3) antipodal to plaintiff (PW2) stated that sale was settled at Basti Khatal--Disparity with regard to venue among them could neither be treated as minor contradiction nor it can be lightly ignored--

Moreover, not only plaintiff (PW2) rather other attesting witness, Baqir Ali (PW4) in their cross-examination exposed that day when stamp paper was purchased, not only advance amount was paid, rather contract was also written then and there, but this fact was totally negated by agreement (Exh.P1), recital of which proved stance of petitioner that its stamp paper was issued by Stamp Vendor on 07.01.2003, whereas it was scribed on 10.01.2003--This glaring contradiction was sufficient to disbelieve case of respondent--Baqir Ali (PW4) was also fair enough to depose that bargain was settled by plaintiff before their arrival--Both of marginal witnesses (PW3 and 4) were not residents of locality either where vendor resided or suit plot was located and even where contract was executed. [Pp. 370 & 371] B & E

Marginal Witnesses--

----Position of marginal witnesses of agreement was also not different--Among them, Muhammad Khan (DW3) mentioned that about seven years earlier, it was settled, whereas other Baqir Ali (PW4) uttered that six or seven years prior to his deposition, sale was struck--When every concerned signatory is found to' be unaware of date, month and year of transaction besides writing of document relating to it, then how discretionary relief against an ignorant and illiterate lady, who from day first after commencement of trial was calling it a fictitious and forged document could be awarded. [P. 370] C

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

----O. VI, R. 2 & O.VIII, R. 2--Principle of "Secundum allegata et probata"--It is well settled proposition of law that if any fact is not asserted in pleadings, then no evidence can be led to prove it, however, even if recorded, that has to be ignored as per principle of ***"secundum allegata et probata"*** which means that a fact has to be pleaded first in plaint or written statement by a party before it is allowed to be proved. [P. 370] D

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

----Art. 80--Documentary record--Validity--Bare perusal of agreement was again an affirmation that CNIC numbers of vendor and alleged marginal witnesses were not entered on it either by Scribe or by Stamp Vendor, who issued its stamp paper--Now there left statement of Muhammad Anwar, (PW1), Stamp Vendor, despite fact that he explicitly disclosed that relevant Register was consigned to Record Room after its due completion, it was not summoned through Record Keeper concerned--It could be best independent documentary record to authenticate issuance of stamp paper to petitioner to rebut her allegation that she did not appear before Vendor for its purchase, but it was deliberately withheld, as such adverse inference was to be drawn, had it been examined that would have proved allegations of petitioner--Civil revision was allowed. [P. 371] F & G

2013 SCMR 868 & PLD 1990 SC 642, *ref.*

Mr. Muhammad Saleem Faiz, Advocate for Petitioner

Mr. Shah Muhammad Khokhar, Advocate for Respondent

Date of hearing: 16.5.2018

JUDGMENT

Instant Civil Revision has been filed by lady petitioner to throw challenge on concurrent judgments and decrees dated 08.09.2009 and 23.11.2011 rendered by the Courts below, whereby suit for specific performance of agreement instituted against her by the respondent was decreed and appeal of the former failed.

2. In concision, facts of the case were that petitioner was exclusive titleholder of the suit plot situated in urban area of Bahawalnagar. The respondent with regard to it instituted suit for specific performance of contract on 14.07.2005, contending therein that he purchased the disputed plot against consideration of Rs.60,000/- and after making payment of Rs.50,000/-, not only the contract dated 10.01.2003 (Exh.P1) was scribed, but the possession also changed hands in his favour before the witnesses. For ease, it would be better to reproduce his stance as disclosed in para-1 of the plaint, which is as under:--

It was also pleaded in para-2 that not only personally, rather through Punchayat, efforts were made to pay the rest of the sale price, but the promisor was found to be reluctant, forcing the promisee/respondent to approach the Court for having a decree of performance of his contract (Exh.P1). The petitioner defended the suit through her written statement alleging therein that she neither ever settled a bargain nor received advance amount. She also claimed that Exh.P1 was a fake, forged and fictitious document, which was prepared collusively to deprive her of the valuable property. She in the inception of the litigation specifically highlighted the factors in her pleadings to prove that Exh.P1 was a counterfeited document for the counts; firstly, that had the bargain been settled on 10.01.2003, there was no occasion to purchase the stamp paper of Exh.P1 three days prior to its execution and secondly that the respondent was even not aware of the name of her husband, who disclosed the name of her ex-husband in spite of that he had divorced her five years prior to alleged contract, whereas prior to the day of alleged execution of contract, she had already contracted second marriage with Muhammad Arshad, but disclosure of petitioner being wife of a person, who was no more her husband, was a solid proof that the contract was fakely constructed. After settlement of issues both the parties led evidence, however it was achy for me to observe that both the Courts below without sensing the pleadings and evidence of the parties in its true perspective rendered their concurrent findings in favour of respondent in complete derogation of Order XX rule 5 as well as Order XLI rule 31 of the Code, 1908 and it was very simple for this Court to remand the suit on this count, but having entire material before me, I opted to decide it on merit at my end rather than to throw the parties to face agony of another round of litigation.

3. Arguments heard and record perused.

4. There is no cavil to conclude that agreement to sell (Exh.P1) neither generates nor quenches right, title or interest in the immovable property and being beneficiary, it was imperative upon respondent to have proved its valid execution as well as transaction cited therein. As observed supra, it was the claim of respondent that bargain was settled on 10.01.2003 and advance amount was paid then and there and in lieu thereof possession changed hands before the witnesses, but the respondent/beneficiary being PW2 omitted to disclose the date of transaction in his statement-in-chief and when he was specifically questioned about it in his cross/examination, he again failed to tell the date when the sale was struck. The position of the marginal witnesses of the agreement was also not different. Among them, Muhammad Khan (DW3) mentioned that about seven years earlier, it was settled, whereas the other Baqir Ali (PW4) uttered that six or seven years prior to his deposition, the sale was struck. When every concerned signatory is found to' be unaware of the date, month and year of the transaction besides writing of the document relating to it, then how discretionary relief against an ignorant and illiterate lady, who from the day first after the commencement of trial was calling it a fictitious and forged document could be awarded. Moreover, rest of his (PW2) entire statement to the effect that petitioner after settling the oral contract fled away with Muhammad Arhsad to Haroon Abad, where on having been approached by him along with witnesses, she agreed to execute the agreement, which was scribed there, was contrary to the contents of his plaint. It is well settled proposition of law that if any fact is not asserted in the pleadings, then no evidence can be led to prove it, however, even if recorded, that has to be ignored as per principle of ***"secundum allegata et probata"*** which means that a fact has to be pleaded first in the plaint or written statement by a party before it is allowed to be proved. This principle is enunciated by Order VI rule 2 and Order VIII rule 2 of the Code 1908, which has also been affirmed by the apex Court in judgments reported as *Pakistan Vs. Abdul Ghani* (PLD 1964 SC 68) and *Hyder Ali Bhimji Vs. VITH Additional District Judge, Karachi (South) & another* (2012 SCMR 254).

This was again surprising that respondent for the first time disclosed in his statement that transaction was spontaneously struck through Ghulam Ali at Court premises of Haroon Abad, but one of the marginal witnesses, Muhammad Zaman (PW3) antipodal to the plaintiff (PW2) stated that sale was settled at Basti Khatal. The disparity with regard to venue among them could neither be treated as minor contradiction nor it can be lightly ignored. Moreover, not only plaintiff (PW2) rather the other attesting witness, Baqir Ali (PW4) in their cross-examination exposed that the day when stamp paper was purchased, not only advance amount was paid, rather contract was also written then and there, but this fact was totally negated by the agreement (Exh.P1), the recital of which proved the stance of the petitioner that its stamp paper was issued by the Stamp Vendor on 07.01.2003, whereas it was scribed on 10.01.2003. This glaring contradiction was sufficient to disbelieve the case of respondent. Baqir Ali (PW4) was also fair

enough to depose that bargain was settled by the plaintiff before their arrival. Both of the marginal witnesses (PW3 and 4) were not residents of the locality either where the vendor resided or the suit plot was located and even where the contract was executed.

5. The other setback of the case was that admittedly contract was neither scribed by a regular Deed Writer nor signed by the person, who wrote it. Moreover, the Scribe was also not examined, however, on query it was disclosed by learned counsel for the respondent that he had already passed away, but he was forced by the record to admit that none familiar with his writing was summoned as per requirement of Article 80 of the Order, 1984. The bare perusal of agreement was again an affirmation that CNIC numbers of the vendor and the alleged marginal witnesses were not entered on it either by the Scribe or by the Stamp Vendor, who issued its stamp paper. It was kept in dark by the respondent who identified the lady before the Vendor and the Scribe. Now there left statement of Muhammad Anwar, (PW1), the Stamp Vendor, despite the fact that he explicitly disclosed that relevant Register was consigned to Record Room after its due completion, it was not summoned through the Record Keeper concerned. It could be the best independent documentary record to authenticate the issuance of stamp paper to the petitioner to rebut her allegation that she did not appear before the Vendor for its purchase, but it was deliberately withheld, as such adverse inference was to be drawn, had it been examined that would have proved the allegations of the petitioner.

6. The other salient feature of the case was that admittedly petitioner was ignorant and illiterate lady, who specifically denied settlement of bargain as well as receipt of consideration and in such scenario, it was *sine qua non* for the beneficiary/respondent to have established that petitioner had independent advice, who settled the transaction voluntarily with full knowledge and import of what the transaction was meant for. The argument of learned counsel for the respondent that petitioner was not parda observing lady and as such she was not entitled for the treatment extended to such class was not well founded. The petitioner being ignorant as well as illiterate lady was to be equated with pardanasheen lady and equally entitled for the same treatment, which is available to such group of women. Despite the fact that PW2 and PW4 stated in their cross-examination that the petitioner was in the company of a male, but he was not associated elsewhere, when Exh.P1 was constructed. As such contract and the transaction being militant to the judgments of the superior Courts rendered in the cases reported as *Mt. Farid-un-Nisa Vs. Munshi Mukhtar Ahmad and another* (AIR 1925 P.C 204), *Chainta Dasya Vs Bhalku Das* (AIR 1930 Cal. 591), *Jannat Bibi Vs. SikandarAli and others* (PLD 1990 S.C 642), *Mian Allah Dita through LRs Vs. Mst Sakina Bibi and others* (2013 SCMR 868), *Ghulam Farid and another Vs. Sher Rehman through L.Rs* (2016 SCMR 862) and *Phul Peer Shah Vs. Hafeez Fatima* (2016 SCMR 1225) could not be given any weight.

7. At the fag end of his arguments, stress of learned counsel for respondent/plaintiff that concurrent findings recorded by both the Courts below cannot be interfered with by this Court while invoking jurisdiction under Section 115 of the Code, 1908, is also without any force. Although, the scope thereof is limited, but such findings can be distressed by this Court, if Courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such conclusion this Court is fortified by the dictum laid down in the judgments reported as *Muhammad Nawaz alias Nawaza and others Vs. Member Judicial Board of Revenue and others* (2014 SCMR 914) and *Nazim-ud-Din and others Vs. Sheikh Zia-ul-Qamar and others* (2016 SCMR 24). It is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. Even otherwise it has also been held by the Superior Courts that a Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law and the law alone. So, this Court can decide, in which cases, the interference is warranted.

8. In such facts and circumstances, it can safely be concluded that both the Courts below while misconstruing the evidence of the parties to the lis decreed the suit of respondent, who designed Exh.P1 to deprive the landlady of her valuable property and verdicts of the Courts below being classic example of misreading and non-reading of the evidence on record are illegal, unlawful and *corum non judice*,

which cannot be sustained in the eye of law. Resultantly, instant Civil Revision is allowed, impugned judgments and decrees of the Courts below are set aside and the suit of respondent is dismissed with coste throughout.

(M.M.R.) Civil revision allowed.

PLJ 2019 Lahore 500
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
***Mst.* NAGHMANA ZAIDI--Appellant**
Versus
TAYYABA BEGUM (deceased) through L.Rs.—Rspondents

F.A.O. No. 539 of 2010, decided on 24.4.2019.

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

----S. 12--Suit for specific performance--Dismissed--RFA--Dismissed--Barred by time--Delay of six years--Application for restoration of appeal--Rejected--Challenge to--Application for condonation of delay along with Appeal was filed with averment that appellant became ill, but certificate for "bed rest" appended therewith issued by a private Doctor reflected' that it was issued for a period commencing from 08.03.2010 to 21.03.2010, but no explanation for remaining period spreading over 85 days was detailed as to why these were wasted in filing Appeal--No justification was brought on record that how almost six years were wasted to approach learned Appellate Court against dismissal of suit. [P. 501] A and B

Limitation Act, 1908 (IX of 1908)--

----S. 3--Application for condonation of delay--Jurisdiction--Limitation--Scope of--Court before which any suit, appeal or application is instituted, preferred or made is obliged to dismiss same--Jurisdiction, of a Court is always subject to law of limitation--If proceedings before Court are launched beyond scope of limitation, Court cannot assume jurisdiction--There is no second opinion that law of limitation, which is statute of repose is designed to quit title and to bar, stale and water logged disputes, must be strictly complied with and Courts cannot refrain from applying said law--After prescribed period has elapsed, door of justice is closed and no plea of illness, poverty, distress, ignorance or mistake can be availed--Moreover, legality or illegality of order/judgment can be checked by Appellate Forum only when jurisdiction of said Court is invoked

within statutory period by availing of proper remedy--Appeal was dismissed. [Pp. 501 & 502] C

1978 SCMR 367, 1989 SCMR 1149 and PLD 1990 SC 692, *ref.*

Syed Muhammad Nisar Safdar, Advocate for Appellant.

Date of hearing : 24.4.2019

ORDER

Inessential details apart, the present appellant on 04.12.1993 approached the learned Civil Court for grant of decree of specific performance of oral contract dated 25.07.1990, which was further acknowledged by executing written contract. The suit was contested by the respondents with the stance that no bargain was settled and that the contract was forged and fabricated document. After full-fledged trial, ultimately learned Civil Court while appreciating evidence available on suit file in depth dismissed the suit *vide* comprehensive judgment of 24th September, 2001, though it was assailed by filing Regular First Appeal before the learned District Court, yet after a delay of almost six years, which again was not vigilantly pursued and ultimately it was dismissed in default on 5th September, 2009. Although for its restoration, application was preferred, which failed *vide* impugned order of 22nd February, 2010. The appellant again went in slumber and lastly filed the Appeal in hand on 16th June, 2010 when provided period was over.

2. Arguments heard and record scanned.

3. Although application for condonation of delay along with the Appeal was filed with the averment that appellant became ill, but the certificate for "bed rest" appended therewith issued by a private Doctor reflected' that it was issued for a period commencing from 08.03.2010 to 21.03.2010, but no explanation for the remaining period spreading over 85 days was detailed as to why these were wasted in filing the Appeal. The arguments of learned counsel for the appellant that his client being lady deserves leniency and that law favours adjudication of cases on

merit is not well-founded. No justification was brought on record that how almost six years were wasted to approach the learned Appellate Court against the dismissal of the suit. The submission of learned counsel for the appellant that counsel of his client did not communicate her with regard to decision of the suit was not rational. It is not only the duty of a counsel to peruse the case rather basically it is the function of the litigant to watch the proceedings of his case. There is unanimity of the view among the superior Courts that because of the mandatory nature of Section 3 of the limitation Act, 1908, the Court before which any suit, Appeal or application is instituted, preferred or made is obliged to dismiss the same. The jurisdiction, of a Court is always subject to law of limitation.

If the proceedings before the Court are launched beyond the scope of limitation, the Court cannot assume jurisdiction. There is no second opinion that law of limitation, which is statute of repose is designed to quit title and to bar, stale and water logged disputes, must be strictly complied with and the Courts cannot refrain from applying the said law. After the prescribed period has elapsed, the door of justice is closed and no plea of illness, poverty, distress, ignorance or mistake can be availed. Moreover, the legality or illegality of the order/judgment can be checked by the Appellate Forum only when the jurisdiction of the said Court is invoked within the statutory period by availing of the proper remedy. The question of limitation cannot be considered a "technicality" simpliciter as it has got its own significance, which would have substantial bearing on merits of the case, and the law of limitation must be followed. In arriving at this view, this Court is fortified by the dicta laid down by the apex Court in the judgments reported as *S. Sharif Ahmad Hashmi v. Chairman, Screening Committee Lahore and another* (1978 SCMR 367), *Muhammad Naseem Sipra v. Secretary, Government of Punjab (*1989 SCMR 1149) and *Fazal Illahi Siddiqi vs. Pakistan* (PLD 1990 SC 692).

4. For the delay in filing of the instant Appeal, it is the appellant, who - can. blame herself. No doubt, she also filed **CM.No.2-C of 2010** for condonation of

delay in preferring the Appeal merely on the ground of sickness, but it as observed hereinabove cannot be given force.

5. For what has been discussed above, the C.M.No.2-C-2010 as well as instant Appeal is dismissed.

(MMR) Appeal dismissed.

2019 C L C 1726
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
WAPDA EMPLOYEES COOPERATIVE HOUSING SOCIETY LTD. through Administrator----Petitioner
Versus
Dr. KHALID RANJHA and another----Respondents

C.R. No.2224 of 2007, heard on 6th March, 2019.

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

----S.42---Suit for declaration---Compromise before the Court---Meaning and effect---Suit was filed on the basis of compromise deed---Contention of defendant was that compromise was procured without permission from competent authority---Suit was decreed concurrently---Validity---Compromise meant an agreement among the parties to settle the dispute for all times to come and receipt of consideration by a party thereto will not be deemed to be sacrifice of right rather relinquishment of claim---Compromise made before the Court had to be given sanctity while applying principle of estoppel---If retraction from compromise was allowed as a matter of right then it would result into distrust of public litigants over the judiciary and same would damage the image of judicial system---Parties could settle their dispute during its pendency---Resolution of dispute through compromise was a valid as well as binding arrangement between the parties---Compromise before Court of law was not to be allowed to be denied, ignored or resiled without valid reasons---Court was to honour the compromise made between the parties---Revision was dismissed, in circumstances.

Abid Hussain and others v. Aziz Fatima and others PLD 1995 SC 399; Mrs. Akram Yaseen and others v. Asif Yaseen and others 2013 SCMR 1099; Government of Pakistan v. Premier Sugar Mills and others PLD 1991 Lah. 381; Messrs Shadman Cotton Mills Ltd. through Director v. Federation of Pakistan through the Chairman Central Board of Revenue (Revenue Division), Islamabad and another PLD 2009 Kar. 169; Messrs Nishat Ghunian Ltd. through Chief Officer v. Province of Punjab through Secretary, Local Government and 2 others 2013 CLC 34; Khan Iftikhar Khan of Mamdot (Represented by 6 Heirs) v. Messrs Ghulam Nabi Corporation Ltd., Lahore PLD 1971 SC 550 and Messrs Canal Breeze Cooperative Housing Society Limited v. Agricultural and Transport Development Corporation (Pvt.) Limited 2000 SCMR 506 ref.

Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others 2011 SCMR 1361; Upendra Nath Bose v. Bindeshiri Prosad AIR 1916 Cal. 843; Srimati Sabitri Thakurain v. Mrs. F.A. Savi and others AIR 1933 Patna 306 and Khawar Saeed Raza v. Wajahat Iqbal 2003 CLC 1306 rel.

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

----Art. 113---Admitted facts need not to be proved.

Muhammad Naeem Sadiq for Petitioner.
Malik Noor Muhammad Awan and Saima Hanif for Respondent No.1.
Date of hearing: 6th March, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The subject of Civil Revision in hand was a declaratory suit filed by respondent No.1 claiming to be owner in possession of the disputed property fully detailed in the plaint, which was concurrently decreed by the two Courts below through the impugned judgments and decrees.

2. Although, at the very outset, Malik Noor Muhammad Awan, Advocate for respondent No.1 while referring judgments reported as Abid Hussain and others v. Aziz Fatima and others (PLD 1995 Supreme Court 399), Mrs. Akram Yaseen and others v. Asif Yaseen and others (2013 SCMR 1099), Government of Pakistan v. Premier Sugar Mills and others (PLD 1991 Lahore 381), Messrs Shadman Cotton Mills Ltd. through Director v. Federation of Pakistan through the Chairman Central Board of Revenue (Revenue Division), Islamabad Land another (PLD 2009 Karachi 169), Messrs Nishat Ghunian Ltd. through Chief Officer v. Province of Punjab through Secretary, Local Government and 2 others (2013 CLC 34), Khan Iftikhar Khan of Mamdot (Represented by 6 Heirs) v. Messrs Ghulam Nabi Corporation Ltd., Lahore (PLD 1971 Supreme Court 550) and Messrs Canal Breeze Cooperative Housing Society Limited v. Agricultural and Transport Development Corporation (Pvt.) Limited (2000 SCMR 506) raised objections with regard to filing of this Petition beyond prescribed limitation and that it was instituted through an unauthorized person, but I avoided to indulge in these legal issues and opted to decide it on its facts.

3. Arguments heard and record gone through.

4. Shorn of inessential details, admittedly earlier civil as well as criminal litigation boiled out inter se the parties and during pendency of Writ Petition No.9889 of 1992 ultimately the parties to this lis congenially settled their disputes and submitted deed of compromise dated 25.03.1997 (Exh.P7) before this Court to bury the ongoing dimensional and elongated litigation. Consequently, not only the proceedings initiated on behalf of respondent No.1 /plaintiff was backed away and criminal cases lodged against officials/officers of the petitioner were withdrawn under section 494 of the Criminal Procedure Code, 1898, rather Rapt Roznamcha No.474 (Exh.P6) besides Mutation No.768 (Exh.P12) was also entered, wherein the ownership as well as possession of the

former over the subject land was admitted, however, it was not sanctioned, compelling him to institute the suit. Although it was contended by the petitioner, but importantly the deed of compromise (Exh.P-7) and withdrawal of earlier litigation including criminal cases against officials of the petitioner thereunder was not denied in any manner, however, it was merely claimed that Exh.P7 had been procured without permission from competent Authority. The result of the protracted trial was that the suit was decreed and the appeal of the petitioner failed vide unanimous decrees of the learned lower Fora as disclosed in para-1 ante.

5. The emphasis of Mr. Muhammad Naeem Sadiq, Advocate for petitioner that compromise deed could not be proved as per requirement of law was not tenable on the sole ground that admitted facts need not to be proved, whereas record reflected that both of the marginal witnesses (PWs1 and 2) thereof even then were examined, moreover the solitary witness (DW1) on behalf of the petitioner also conceded in his deposition that Exh.P7 was executed among the parties. Admittedly, the compromise was settled to save the petitioner-Society from the prospect of protracted as well as uncertain litigation besides to save its officials from arrest by police. The compromise was acted upon without raising any objection when the civil and criminal cases were dropped by respondent No.1, but it turned objectionable where it became advantageous to latter. As such, the petitioner being acquiesced to Exh.P7 was not in a position to demur with it subsequently.

The next accentuation of Mr. Muhammad Naeem Sadiq, Advocate for the petitioner that the affairs of the petitioner/ Society were being run and managed by the elected Managing Committee and the supreme Authority of the Society vested to its General Body, but without fetching any sanction, the President alone was not authorized to deal with its affairs, as such compromise on behalf of latter without any prior accord from the Registrar, Cooperative Societies was void ab initio and illegal, was also not well founded, for the counts; firstly, that to prove all it, Makhdoom Altaf Hussain, Ex-President, who executed Exh.P7 despite availability was not examined in spite of that he could be the best person to prove the fact, so asserted by learned counsel, as such hostile inference under Article 129 illustration (g) of the Order, 1984 would come into play that had he been summoned, he would have negated this plea; secondly, that it was proved on record that Registrar of the Cooperative Societies had accorded permission to settle the compromise, and thirdly, that the solitary witness of the petitioner in his cross-examination also admitted that the Committee had granted permission

to the then President. For ready reference, the words uttered by DW1 in the cross examination, in verbatim are reproduced, hereunder:-Had there been no permission granted on behalf of Competent Authority, some penal as well as disciplinary proceedings against the executant of settlement on behalf of petitioner might have been initiated, but neither any other well-conversant officer was produced nor single document was tendered to show that alleged culprit of the petitioner was put to task and merely a sham defence was grafted just to defer the fruit of the compromise to respondent No.1 for indefinite period by the petitioner, who succeeded in his object.

6. After delving deep in the merits of the case as discussed herein above, I would like to add that a compromise made before the Court of law has to be given sanctity while applying principle of estoppel as well to respect moral and ethical rules and if retraction therefrom is allowed as a matter of right, then it will definitely result into distrust of the public litigants over the Judiciary, which would definitely damage the sacred image of the judicial system that the Courts are infertile to make implementation of orders passed by them in the judicial proceedings. Reliance can be placed upon Farzana Rasool and 3 others v. Dr. Muhammad Bashir and others (2011 SCMR 1361).

There is no cavil that during the pendency of a dispute between the parties, amicable settlement thereof by them is always welcomed by the Court of law and its resolution in this manner is clearly a valid as well as binding arrangements by the parties thereto, who subsequently cannot be permitted to deny, ignore or resile therefrom without any valid reason. In arriving at this view, I am fortified by the dictum laid down in Upendra Nath Bose v. Bindeshiri Prosad (AIR 1916 Calcutta 843) to the following effect:-

> "a compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases, the consideration which each party receives is the settlement of the dispute, the real consideration is not, the sacrifice of a right but the abandonment of claim."

In another case titled Srimati Sabitri Thakurain v. Mrs. F.A. Savi and others (AIR 1933 Patna 306) with more clarity it was concluded as under:-

> "Now this determination may be arrived in one of two ways; either after contest by the Court coming to its own conclusion on the materials placed before it, or on the parties themselves agreeing to settle their difference on certain lines and asking the Court to adjudicate their

> respective rights and liabilities in accordance with that settlement. In both cases the Court has to pass orders. In one case the order is based on the decision of the Court itself and in the other the Court, after being informed of the agreement of the parties makes a formal adjudication on the basis of the agreement. In both cases the court will generally order the parties to carry out their respective obligations. An adjudication may in some cases, be purely declaratory; this will happen if a declaration be sufficient to give the party having a right all the relief he is in need of. If on the other hand, a declaration is not enough, the Court will order the party, who has infringed the right of another to restore that right to the rightful party as found by the Court, or as admitted by the other party. What the parties do in a compromise of a suit is to adjust their rights and liabilities outside the Court and then come and ask the Court to recognize those rights and liabilities and pass its formal expression of adjudication accordingly. This is what is provided in O. XXIII, R. 3. The Court is required to record the compromise, which thus really takes the place of a judgment in a contested suit."

In the same pattern, this Court in the judgment styled as Khawar Saeed Raza v. Wajahat Iqbal (2003 CLC 1306) clinched the identical controversy while concluding as under:-

> Compromise is admitted which became part of the order, which stipulated the withdrawal of the suit by the respondent. Under section 36 Civil Procedure Code, 1908, the provisions of the Code relating to the execution of decree are also applicable to orders. Even if there was no decree in existence an order disposing of the suit in terms of the compromise is very much there, binding upon and operative qua the parties. In Kilachand Devchand and Co. V. Ajodhuaprasad Sukhamnand and others AIR 1934 Bombay 452, it was observed that if the Court had jurisdiction to make the order it had necessarily the power and jurisdiction to enforce the same and the law does not allow its machinery to be clogged in this respect.

The sequitur of all this would be that compromise means an agreement among the parties to settle the dispute for all times to come and receipt of consideration by a party thereto will not be deemed to be sacrifice of right rather relinquishment of claim.

7. The narrative of discussion herein above would be that Courts below were perfect to equip respondent No.1 with the decree while honouring the

compromise. The learned counsel for the petitioner had nothing at his end to persuade that any wrong was committed by them, as such being sanguine, their unanimous views are approved, the Civil Revision being meritless is dismissed **with costs throughout.**

ZC/W5/L

Revision dismissed.

2019 C L C Note 49
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
AHMAD HUSSAIN and others---Petitioners
Versus
MUNAWAR HUSSAIN and 2 others---Respondents

C.R. No. 3506 of 2015, heard on 16th May, 2019.

Specific Relief Act (I of 1877)---

----S. 42---Contract Act (IX of 1872), S. 11---Suit for declaration---Transaction on behalf of minor---Effect---Sale deed---Proof of---Procedure---Contention of plaintiff was that he was minor at the time of sale deed---Suit was decreed concurrently---Validity---When executant of sale deed had appeared in the witness-box and deposed that he was minor at the time of its execution then beneficiary of the sale deed was bound not only to prove the bargain but also payment of sale consideration---Executant of sale deed was minor at the time of its execution---Mere oral assertion was not sufficient to rebut the documentary material---Impugned transaction was void ab initio as plaintiff was minor at the time of its completion---When any document was based on fraud then same could be assailed at any time---Every fresh entry in the record-of-rights did give fresh cause of action---No illegality or irregularity had been pointed out in the impugned judgments passed by the Courts below---Revision was dismissed in circumstances. [Paras. 4, 6 & 7 of the judgment]

Mst. Razia Khatoon through Legal Heirs v. Dr. Roshan H. Nanji and another 1991 SCMR 840; Syed Akhtar Hussain Zaidi v. Muhammad Yaqinuddin 1988 SCMR 753; The Chairman, District Screening Committee, Lahore and another v. Sharif Ahmed Hashmi PLD 1976 SC 258; Allah Ditta through Legal Representatives and others v. Naeem Raza and others 2004 SCMR 982; Muhammad Ali through L.Rs. and another v. Manzoor Ahmed 2008 SCMR 1031; Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others 2000 SCMR 346; Khair Din v. Mst. Salaman and others PLD 2002 SC 677 and Wali and 10 others v. Akbar and 5 others 1995 SCMR 284 rel.

Malik Noor Muhammad Awan and Ijaz Khalid Khan Niazi for Petitioners.

Iftikhar Ahmad Chohan and Imran Mushtaq for Respondent No.1.

Respondent No.2 proceeded ex parte on 29.03.2019.

Tahir Mahmood Mughal, Ch. Ghulam Abbas Tarar and Riaz Begum for Respondent No.3.

Date of hearing: 16th May, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undeniably, subject land was titled by Munawar Hussain, respondent No.1, which was transferred to petitioner No.1 vide registered sale deed dated 26.05.1988 (Exh D1) and implemented in the revenue record vide mutation No. 793 dated 29.09.1988 (Exh.D6). Thereafter through declaratory suit, these were challenged by the former alleging therein that at the time of its execution/attestation, he was minor and these being void ab initio were inoperative upon his rights. The legality of further alienation vide oral gift mutation by the vendee/petitioner No.1 in favour of his sons being superstructure of subject documents was also called in question. The suit was contested by the petitioners with the firm stance that plaintiff was major, who was born on 24.12.1970 as per entry of birth register, the copy whereof would be brought on record during course of evidence. The learned Trial Court narrowed down the disputed area of facts as well as law by settling issues, which after receiving and appreciating the evidence not only decreed the suit, but appeal of the petitioners also failed, compelling the petitioners to carry the concurrent decrees of learned Courts below to this Court through Civil Revision in hand.

2. Messrs Malik Noor Muhammad Awan and Ijaz Khalid Khan Niazi, Advocates for the petitioners emphasized with great vehemence that the respondent-plaintiff was major when the original deal couched in the impugned sale deed (Exh.D1) was effected. He while drawing attention of this Court towards said document argued that at the time of its registration, the identity card number of the vendor was duly entered therein, which was a solid proof of his majority. He further added that besides other family members of plaintiff, his younger brother, Bashir also transferred his share to petitioner No.1, who too challenged the alienation of his share on the score of minority by means of independent civil suit, but it was withdrawn, which was another sufficient proof that plaintiff was not minor, but the Courts below failed to appreciate the evidence in its true perspective. They next added that Exh.D1, being registered instrument attained presumption of correctness and sanctity was attached to it, whereas through examining positive and direct evidence the original transaction and passing of sale price was also proved, but the learned Courts below by

misconstruing it passed the impugned decrees, which being tainted with misreading and non-reading of evidence on record were not sustainable. The learned counsel further pleaded that possession was spontaneously delivered to the vendee/ defendant, which was also clear notice to the public at large that transaction had been struck, but the suit was instituted after decades and decades, hence both the learned Courts below erred in law to decree a badly time barred suit.

In contra, Messrs Iftikhar Ahmad Chohan and Imran Mushtaq, Advocates on behalf of respondent No.1 supported the impugned judgments while arguing that no doubt initial onus was upon the plaintiff to prove that he was below the age of majority, who while bringing on record copy of matriculation certification (Exh.P3) issued by Board of Intermediate and Secondary Education, character certificate (Exh.P4) put out by the concerned school, copy of service roll (Exh.P5), copy of birth entry (Exh.P10) and through original I.D. card (Exh.P9) shifted the onus towards the beneficiary, who not only failed to rebut it, but while tendering copies of birth certificate (Exh.D2) as well as birth register (Exh.D3), further strengthened that plaintiff was minor at the key day. Lastly, learned counsel for respondent No.1 emphasized that Exh.D1 and 6 were void documents and as per settled law, limitation would neither run, nor efflux of time extinguished the right of ownership of his client/plaintiff.

3. Arguments heard. Record perused.

4. Admittedly, the impugned sale deed (Exh.D1) was a registered instrument, but the moment it was challenged and its alleged executant while appearing in the witness-box deposed on oath that he was minor, which was further supported by documentary record (Exhs.P3 to 5, 9 and 10), onus was shifted to its beneficiary, who was under obligation not only to prove the bargain and payment of sale price because presumption attached to the registered document goes on to prove merely extent of document having been registered, but it is not a conclusive proof that same has been executed by the competent person, when execution thereof is denied by such person. In the case in hand, exclusive stance of the plaintiff was that he being minor was incapacitated to settle the deal and execute the instrument, whereas in defence, petitioner not only pleaded that plaintiff was major rather also provided his specific date of birth duly recorded in the relevant birth register and further undertook to produce its copy/record at the time of evidence, which admittedly was not examined. Malik Noor Muhammad Awan, Advocate, for the petitioners on having been faced to the contents of the written statement to this effect being positive, admitted

shortcomings of his client, however, again while inviting attention of the Court towards original sale deed (Exh.D1), emphasized that during proceedings of its registration, the Attesting Officer particularly entered the I.D. card number of the executant, which could only be issued to a major, hence he was not minor. Although I.D. card number under the name of the vendor was found to be written on Exh.D1, but it was not so on its attested copy (Exh.P1) tendered by the plaintiff. However, in response Mr. Iftikhar Ahmad Chohan, Advocate for the plaintiff highlighted that wrong I.D. card number of the latter was fakely entered on Exh.D1 and to falsify the said entry original I.D. card of the plaintiff was exhibited on suit file as Exh.P9, but the petitioners deliberately did not annex its copy with the file in hand and to elucidate the reality, the original record through special messenger was fetched, which proved that over the original sale deed (Exh.D1) I.D. card number 289-88512681 against the name and signature of Munawar Hussain, plaintiff was entered thereon, but study of original I.D. card (Exh.P9), established that it contained different numbers i.e. 289-76-512681, which not only doubted the veracity of Exh.D1, rather Exh.P9 also confirmed that plaintiff was born on 02.11.1976 being recorded in its relevant column. It is worth to say that national identity card has got its probative value and importance, which fact also finds support from the judgment of the august Supreme Court reported as Mst. Razia Khatoon through Legal Heirs v. Dr. Roshan H. Nanji and another (1991 SCMR 840). The date of birth referred in identity card was duly endorsed by academic and service record, detail whereof has been duly mentioned in preceding lines, was never rebutted, rather strengthened by the petitioner through their various documents like Exhs.D2 and 3, which proved as well that on the day of execution of questioned document (Exh.D1) the executant/plaintiff was minor. It is well settled by now that mere oral assertion is not sufficient to rebut documentary material. See Syed Akhtar Hussain Zaidi v Muhammad Yaqinuddin (1988 SCMR 753). There left no doubt that the plaintiff proved his stance, whereas the beneficiary/petitioners failed to rebut it, hence Exh.D1 being hit by section 11 of the Contract Act, 1872 was void ab initio and law forbids enforcement of such transaction even if minor was to ratify the same after attaining the majority. Reliance can be placed upon reported judgments as The Chairman, District Screening Committee, Lahore and another v. Sharif Ahmed Hashmi (PLD 1976 SC 258), Allah Ditta through Legal Representatives and others v. Naeem Raza and others (2004 SCMR 982) and Muhammad Ali through L.Rs. and another v. Manzoor Ahmed (2008 SCMR 1031).

5. The further study of Exh.D1 revealed that the vendor was identified by Muhammad Salehon before the Registering Officer, whereas sale deed was attested by the said Muhammad Salehon and Lal Khan being marginal witnesses. The latter was not examined claiming to have already expired, whereas Muhammad Salehon (DW-2) stated that the sale consideration was paid before him to the plaintiff, but he nowhere stated that it was made before the Sub-Registrar, whereas the latter being DW-4 stated that it was paid in his presence. The Petitioner No.1 (DW-1) himself bulldozed his case by stating that the transaction was settled with mother of the plaintiff and consideration was also paid to her, whereas admittedly the mother was not in picture at the time of registration of instrument. His said stance was not only antagonistic to his pleadings, but he impliedly admitted that plaintiff being minor was neither competent to settle the bargain nor sale price was paid to him and that is why all was done by his mother, who in terms of section 361 of the Mohammadan Law, at the most was de facto guardian, but certainly was not competent to settle any transaction on behalf of adolescent and any such act if committed on her behalf was also illegal.

6. The emphasis of Malik Noor Muhammad Awan, Advocate, learned counsel for the petitioners that Courts below failed to take notice that the suit was badly time barred is also not forceful. In the present case, perspicuous stance of respondent No.1 was that he was minor and Exh.D1 was procured through fraud, but when it is proved so, such a document cannot be perpetuated, which can be assailed at any point of time. Reliance is placed upon the judgments reported as Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others (2000 SCMR 346) and Khair Din v. Mst. Salaman and others (PLD 2002 SC 677). Additionally the plaintiffs also prayed for declaring the subject sale deed as illegal duly entered in the revenue record of rights, which afforded cause of action to the plaintiff and adverse entries in the said record, even if are allowed to remain unchallenged, do not necessarily extinguish the right of the party against whom such entry was made. Every fresh entry in the record of rights gives fresh cause of action to the plaintiff. This view has already been affirmed by the apex Court in the judgment reported as Wali and 10 others v. Akbar and 5 others (1995 SCMR 284). Both the vital facets that the plaintiff was major and the transaction was settled by him were not proved on record by beneficiary to whom the onus was shifted, as such learned Courts below were perfect to pass the impugned decrees.

7. Learned counsel for the petitioners is unable to point out any material irregularity or illegality in the impugned judgments or that these were tainted with misreading or non-reading of evidence on record to call for interference by this Court in the exercise of jurisdiction vested under section 115 of the Code, 1908, therefore, this Civil Revision being devoid of any merit is hereby dismissed with costs throughout.

ZC/A-61/L
Revision dismissed.

2019 Y L R 1974
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD ANDLEEB RAZA---Appellant
Versus
MUHAMMAD NAZAR and another---Respondents
R.S.A. No.135 of 2009, heard on 5th March, 2019.

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

----S. 12---Qanun-e-Shahadat (10 of 1984), Arts. 17 (2), 79 & 80---Transfer of Property Act (IV of 1882), S. 54---Suit for specific performance of contract---Agreement to sell---Requirements---Evidence of scribe, marginal witness and Expert opinion---Value---Plaintiff examined only one out of three marginal witnesses of agreement to sell---Contention of plaintiff was that one of the marginal witnesses had settled abroad while other had been won-over by the rival party---Suit was decreed concurrently---Validity---Agreement to sell immovable property was a contract enforceable by law, however, such agreement did not itself create interest, right or title in the suit property such being a document of financial liability was to be attested by two male or one male and two female witnesses---Execution of agreement to sell could only be proved in accordance with mode provided under Art. 79 of Qanun-e-Shahadat, 1984---Agreement to sell could not be proved until and unless two marginal witnesses of the same had been examined---Only one marginal witness of agreement to sell had been examined by the plaintiff in the present case; proper course for the plaintiff was to prove the signatures of a witness who was not available through a person familiar therewith---Requirements of Art. 80 of Qanun-e-Shahadat, 1984 were not complied with in the present case---Agreement to sell was not signed by the scribe and no consideration was paid before him---Scribe or anyone who did not put his signatures as marginal witness on the document required to be attested could not be considered as such---Report of Expert was a weak type of evidence and was not of conclusive nature---Expert's testimony recorded could not be treated as substitute of available direct evidence---Statement of Scribe, report of Expert and deed of power of attorney could only be treated as corroborative evidence but it could not be considered as substitute of required number of attesting witnesses---Admission made on behalf of defendant could not be applied to co-defendant---Agreement was to be proved in accordance with Art. 79 of Qanun-e-Shahadat, 1984; provision of Art. 79 was mandatory and without its compliance a document could not be used as evidence---Impugned judgments and decrees passed by the Courts below were set aside and suit was dismissed---Second appeal was allowed, in circumstances.

Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241; Muhammad Sarwar v. Salamat Ali 2012 CLC 2094; Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187; Nazir

Ahmad and another v. M. Muzaffar Hussain 2008 SCMR 1639; Farid Bakhsh v. Jind Wadda and others 2015 SCMR 1044; Muhammad Abaidullah v. Ijaz Ahmed 2015 SCMR 394; Syed Muhammad Umer Shah v. Bashir Ahmed 2004 SCMR 1859; Mst. Saadat Sultan and others v. Muhammad Zahur Khan and others 2006 SCMR 193; Qasim Ali v. Khadim Hussain through Legal Representatives and others PLD 2005 Lah. 654 and Iftikhar v. Khadim Hussain PLD 2002 SC 607 rel.

(b) Administration of justice---

----Where law had provided a procedure for doing a thing in a particular manner then same had to be done in that manner or should not be done.

(c) Administration of justice---

----Court should deliver justice which should not only be done but should be seen to have been done.

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

----Art.79---Execution of document---Proof---Provisions of Art.79, Qanun-e-Shahadat, 1984 being mandatory, non-compliance of said provision would render the document as inadmissible in evidence.

(e) Precedent---

----Judgment announced by a larger Bench should prevail, if subsequently a Bench comprising less number of Judges while ignoring the earlier view announced by larger Bench formed another view, but where after taking due notice of the judgment of the larger Bench, a different panorama was announced by the other Bench of the said Court even consisting of less Judges until holds the field has to be followed.

Farid Bakhsh v. Jind Wadda and others 2015 SCMR 1044 rel.

Muqtedir Akhtar Shabir for Appellant.

Tanveer Bashir and Kashif Shahzad for Respondent No.1.

Respondent No.2 Ex parte (vide order dated 17.12.2015).

Date of hearing: 5th March, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Muhammad Nazar, respondent No.1 on 28.01.1999 instituted a suit for specific performance of Agreement to Sell dated 29.10.1997 (Exh.P1) against appellant as well as Tahir Mehmood Bhatti, respondent No.2 alleging therein that the subject shop was sold by the latter to him for a consideration of Rs.12,00,000/-, out of which, in advance Rs.1,20,000/- on 16.06.1997 as well as Rs.2,05,000/- on 22.09.1997 had already been paid, whereas balance amount of Rs.8,75,000/ -was paid before the witnesses on the day of execution of Exh.P- 1 when a General Power of Attorney (Exh.P-3) was also scribed and registered by the vendor in favour of the vendee. It was further pleaded that subsequently the vendor while rescinding Exh.P3 transferred the disputed shop to the appellant vide Sale Deed (Exh.D 1)

and the ultimate prayer of respondent No. 1 was for grant of decree for specific performance of Exh. P-1 as well as cancellation of Exh. D1. Although the suit was contested by respondent No.2, contending therein that neither transaction was settled nor alleged consideration was received; that a false, fabricated, and fraudulent agreement was grafted with the active connivance of Petition Writer and Stamp Vendor, however, the execution of Agency Deed was admitted in the sense that for supervision, it was scribed at the behest of brother-in-law and brother of the plaintiff. It was also averred that possession of the shop was never handed over to the plaintiff against any transaction, rather it was already with him as a tenant under him. Obviously, suit of respondent No.1 was also contested by appellant stating therein that his vendor was brother-in-law of former's brother and being connived with each other the suit was instituted after transfer of the suit property to him.

The learned Civil Court, keeping in mind divergent pleadings of the parties narrowed down its disputed areas by settling issues and after receiving and appreciating evidence, suit was decreed vide judgment of 25th March, 2009, despite its assail before the learned District Court by appellant, his appeal was declined and to call in question these concurrent views, this Second Appeal was filed.

2. Mr. Muqtedar Akhtar Shabbir, Advocate learned counsel for appellant inaugurally argued that plaintiff examined only one out of three marginal witnesses, as such he failed to comply with the relevant provision of law; that the Courts below were under legal obligation to draw an inference under Article 129(g) of the Order, 1984 for withholding the available best evidence, but they failed to take its notice. It was also added by him that Scribe was not substitute of a marginal witness, but while treating him at par with him, the dictum already laid down by the apex Court in this respect was violated by the Courts below. Mr. Muqtedar, also emphasized that opinion of Handwriting as well as Finger Print Experts was not conclusive proof regarding execution of the impugned contract, but both the Courts below erred in law to rely upon their report in decreeing the suit. The next main stay of his arguments was that the vendor and vendee inter se were related to each other, who after the attestation of Sale Deed (Exh.D1) for ulterior motive, instituted a collusive suit, whereas the admission of respondent No.2 with regard to General Power of Attorney after transferring the suit shop could not be made applicable to the appellant/co-defendant.

In contra, Mr. Tanvir Bashir, Advocate, learned counsel for respondent No.1 submitted that both the Courts below appreciated the evidence available on suit file in its true perspective and their concurrent findings cannot be disturbed while invoking power vested under section 100 of the Code, 1908. He further added that not only the agreement was scribed, but at the same time in its acknowledgement registered Agency Deed (Exh.P3) was also executed, which otherwise were proved through leading evidence of unimpeachable character. It was also argued on his behalf that the Trial Court to dispense with justice and to

elucidate the truth referred the disputed document along with specimen signatures as well as thumb impressions of the executant to the Forensic Science Laboratory, who rendered positive report, which was duly proved by its makers and the Courts below were perfect to form their unanimous views.

3. Arguments heard and record perused.

4. Before adverting to the facts of the case, I will add that an agreement to sell of immovable property is a contract enforceable by law, but section 54 of the Transfer of Property Act, 1882 expressly provides that it does not itself create interest, right or title in such property, and as a matter of law to constitute ownership thereof, another instrument in its pursuance is required. Admittedly, there is no legal impediment that an agree-ment has to be registered, but for its con-struction, it being a document of financial liability and future obligation under the provision of the Qanun-e-Shahadat Order, 1984, is required to be attested by two male or one male and two female witnesses, as the case may be. For better appreciation, Sub-Article (2) of Article 17 of the Order ibid is reproduced here:-

> ...in matters pertaining to financial or future obligations, if reduced to writing, the instrument, shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly.
>
> If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.

The execution of agreement can be proved, only in accordance with mode provided under Article 79 of the Order ibid, which reads as under:--

> "Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses [at] least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."

As such after the promulgation of Order, 1984, a document of alike character has to be executed and proved as per scheme provided herein above.

5. Now reverting back to the facts of the case, the impugned document of contract (Exh.P- 1) as per requirement of law was signed by Muhammad Afzal,

Sh. Muhammad Rasheed and Malik Muhammad Arif, being its marginal witnesses, which could only be proved until and unless two out of them were examined. Admittedly only Muhammad Afzal (PW2) out of the attesting witnesses was produced, whereas the latter two were not brought in the witness-box by the beneficiary/respondent No.1 and when his learned counsel was faced with the situation, he submitted that one of them was not available being settled abroad at the time of recording of evidence while the other had already been won over by the rival party, which was not enough to ignore the mandatory provision of law. If one of them was not available, then proper course was to prove his signatures through a person familiar therewith, but admittedly the requirements of Article 80 of the Order, 1984 were not complied with. Moreover, for any apprehension of menace or risk, law does not give the way to withhold a witness, as such, in not summoning the alleged won over available witness for the pitfall that had he been examined, he would not realize his attestation, was not a legal excuse. The apex Court while dealing with almost similar proposition in a case reported Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others (PLD 2011 SC 241) has already held that even if one of the marginal witnesses of a document of similar nature related to rival party and the other for a risk opted not to examine him was a drawback, whereas it was sine qua non for the beneficiary to examine him and the moment he made an adverse statement, a prayer for declaring him hostile might be made and subjected to cross-examination, so that requirement of law could be complied with. For ready reference the relevant conclusion is given below:-

> 12. For the argument that as the second attesting witness of the agreement was the son of the respondent, therefore, the appellant could not take the risk of examining him, it may be held that as ordained above the mandatory provisions of law had to be complied and fulfilled and only for the reason or the perception that such attesting witness if examined may turn hostile does not absolve the concerned party of its duty to follow the law and allow the provisions of the Order, 1984, relating to hostile witness take its own course. Before parting it may be mentioned that the judgment reported as Abdul Wali v. Muhammad Saleh (1998 SCMR 760) which find mention in the leave granting order is not relevant for the proposition in hand as it relates to a document before the enforcement of the Order, 1984 when Article 17 was not there.

Hence, explanation for non-examination lacks plausibility.

6. The emphasis of learned counsel for respondent No.1 that Muhammad Aslam (PW-1) Scribe of Exh.P1 was examined, therefore, if any lapse was on the part of his client that stood cured/covered is not tenable. Admittedly, Exh.P-1 was not signed by PW-1 being marginal witness, who in his statement-in-chief did not depose that bargain was struck in his presence, rather during the cross-

examination he explicitly admitted that no consideration was made before him. It is settled by now that a Scribe or anybody else, who did not put his signatures as marginal witness on documents required to be attested, cannot be considered as such. See Muhammad Sarwar v. Salamat Ali (2012 CLC 2094) and Hafiz Tassaduq's case (supra), Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187). The extract from para 9 of Hafiz Tasadduq's case being relevant is given below.

> 9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute 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.

This Court is conscious of the fact that in Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639), Full Bench consisting of three Hon'ble Judges of Supreme Court had already declared that Scribe of a document of financial/future obligation could be treated at par with that of attesting witness whereas contrary view reproduced above was expressed in Hafiz Tassaduq's case (supra) by two Hon'ble Judges of the same Court, and which was to be followed, although not pressed here, yet may be agitated at a later stage of proceedings before the higher forum is also a question to be dealt with here. I must add that judgment announced by a larger Bench should prevail, if subsequently a Bench comprising less number of honourable Judges while ignoring the earlier view announced by larger Bench formed another view, but where after taking due notice of the judgment of the larger Bench, a different panorama was announced by the other Bench of the said Court even consisting of less hon'ble Judges until holds the field has to be followed. In Hafiz Tassaduq's case the judgment announced by three honourable Judges was not only specifically referred, but it was discussed therein and after considering it, the honourable two Judges rendered the recent view, which again has been affirmed by the same number of Judges in a case reported as Farid Bakhsh v. Jind Wadda and others (2015 SCMR 1044). Moreover, as per paragraph No. 10 of Hafiz Tassaduq's case, it was affirmed that in Nazir's case (supra) the scribe being an attesting witness had signed the contract, hence the law laid down in such perspective cannot be followed. In addition to it, the five member Bench of the Hon'ble Supreme Court, though in a pre-emption case reported as Muhammad Abaidullah v. Ijaz Ahmed (2015 SCMR 394), but while dealing with Article 79 (ibid) did not endorse the view of Nazir's case (supra).

7. The submission of learned counsel for respondent No.1 that the report of Handwriting as well as Finger Print Experts was enough to prove the construction of (Exh.P1) was also not well founded. The report of an Expert is

always a weak type of evidence and is not that of conclusive nature. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence. In view of this infirmity, the Expert's testimony recorded in the case in hand cannot be treated as substitute of available direct evidence. It is settled practice of Courts not to base findings merely on expert's opinion. In this regard, reference can be made to a case reported as Syed Muhammad Umer Shah v. Bashir Ahmed (2004 SCMR 1859) wherein it was held as under:-

> After scanning the entire evidence on record and after going through the concurrent findings, we are of the firm view that the only opinion of a Handwriting Expert, otherwise a weak piece of evidence, should not be allowed to prevail against strong circumstances and strong evidence giving inference, altogether, to the contrary. When once the petitioner had failed to prove his case on the basis of the very evidence produced by him, he cannot be given the benefit of the only favourable opinion by the Expert, being otherwise a weak piece of evidence."

This view was again repeated by the same Court in case Mst. Saadat Sultan and others v. Muhammad Zahur Khan and others (2006 SCMR 193) in the following words:-

> We have carefully examined the contentions as adduced on behalf of petitioners in the light of relevant provisions of law and record of the case. We have scanned the entire evidence and perused the judgments of learned trial and Appellate Courts as well as the judgment impugned. Let we make it clear at the outset that the opinion of Handwriting Expert is a very weak type of evidence and is not that of a conclusive nature. It is well-established by now that expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence cannot be given preference where confidence inspiring and worthy of credence evidence is available. In this regard we are fortified by the dictum as laid down in Yaqoob Shah v. The State PLD 1976 SC 53. There is no doubt that the opinion of Handwriting Expert is relevant but it does not amount to conclusive proof as pressed time and again by the learned Advocate Supreme Court on behalf of petitioner and can be rebutted by overwhelming independent evidence. In this regard reference can be made to Abdul Majeed v. State PLD 1976 Kar. 762. It is always risky to base the findings of genuineness of writing on Expert's opinion. In this behalf we are fortified by the dictum as laid down in case of Ali Nawaz Gardezi v. Muhammad Yousuf PLD 1963 SC 51."

8. The next emphasis of learned counsel for plaintiff that along with contract Exh.P1, another document i.e. registered Power of Attorney was also executed on the same day, which not only attained presumption of correctness rather its happening was explicitly admitted by the vendor, whereas the execution of the contract was malafidely denied. The perusal of Agency Deed reflected that it

was silent to the extent that either any transaction with the plaintiff was settled or that agreement (Exh.P1) was executed, rather vide this Agency Deed besides other facts, the Agent was also authorized to sell out the disputed shop on behalf of the Principal, as such the contents of that Power of Attorney are not in line with the contract. No doubt, in the latter document, the execution of Agency Deed is referred specifically, but it being a disputed document and having not been proved, cannot extend benefit to the plaintiff.

It is again an admitted fact that the vendor after having transferred the disputed property through impugned Sale Deed to the appellant made admission with regard to execution of Power of Attorney and under the law in such a situation, admission made on behalf of defendant cannot be applied to his co-defendant. This view finds support from the dictum laid down in the judgment reported as Qasim Ali v. Khadim Hussain through Legal Representatives and others (PLD 2005 Lahore 654). Paragraph No.5 thereof being relevant is reproduced hereunder:-

> 5. I have heard the learned counsel for the parties. The two Courts below in fact have basically relied upon the admission of the respondent Nazar Muhammad about the execution of the agreement to sell. But according to the settled law, an admission of a co-defendant is not binding upon the other. This rule, in my view, shall more stringently be applicable to the present case, because the petitioner had already purchased the suit property from Nazar Muhammad and a mutation in this behalf had been attested in his favour. Though, Nazar Muhammad in his written statement, as a defendant, had denied the sale and asserted to challenge it in appropriate proceedings, but he never did so. Therefore, for all intents and purposes, throughout the petitioner possessed the legal title to the suit property and had every right to defend and protect his rights as lawful owner thereof. Nazar Muhammad when had ostensibly transferred his interest and rights in the suit property in favour of the petitioner, and never challenged the alienation independently before any forum, except setting up the defence in this case, his admission about the execution of Exh.P. 1, cannot be received as an admission binding the petitioner, being a co-defendant of the case. Reliance in this behalf can be placed upon Saleem and another v. Malik Jalal-ud-Din and 7 others PLD 1982 SC 457. Therefore, despite the admission of Nazar Muhammad in the circumstances of the case, when the petitioner has denied the execution and attestation of Exh. P.1 and claimed it to be the result of fraud and collusion between Nazar Muhammad and the respondent Khadim Hussain, it was incumbent upon the plaintiff to have proved the valid execution and attestation of Exh.P. 1.

9. The epitome of above discussion would be that the contract having been executed after promulgation of Order 1984, ibid, its execution ought to have

been proved in accordance with Article 79 ibid, but the evidence on record is restricted to only one attesting witness, which does not meet the requirement of the referred provision. The apex Court in a recent case reported as Farid Bakhsh v. Jind Wadda and others (2015 SCMR 1044) has elaborately defined Article 79 and finally concluded that its requirement was mandatory and without its strict compliance such a document cannot be used as evidence. The ratio of this judgment being all four corner applicable in the case in hand, as such the relevant conclusion for ready reference is given below: -

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

So, the statement of Scribe, report of Expert and the Attorney Deed could only be given weight as corroborative evidence, but it cannot be treated as a substitute of the required number of attesting witnesses. It would not be out of context to realize the well established principle of law that where law provides a procedure for doing a thing in a particular manner then it has to be done in prescribed manner and in no other etiquette or should not be done, as such both the Courts handed down their views without considering the material in its true perspective and especially the relevant law in this behalf, which are vulnerable.

10. Now adverting towards the last contention of learned counsel for the respondent No.1 that this Court cannot set aside the concurrent judgments of the lower Courts in exercise of powers under section 100 of the Code, 1908. Suffice it to say that manifest injustice could not be permitted to be perpetuated simply for the reason that in second Appeal concurrent finding howsoever erroneous may be, cannot be disturbed. Enumerating the areas where this Court can interfere the concurrent judgments of the lower Courts, the apex Court, in case reported as Iftikhar v. Khadim Hussain (PLD 2002 SC 607) has defined the extent of this power and held:--

> Concurrent findings are not sacrosanct and can be reversed when such findings are based on insufficient evidence, misreading of evidence,

non-consideration of material evidence, erroneous assumption of facts, patent errors of law or consideration of inadmissible or something so outrageous or so gross as to shock the very basis of justice.

Since the Courts are expected to deliver justice which is not only be done but also to be seen, it cannot shut its eyes and turn a deaf ear to perverse conclusion based on patent errors of law.

11. The narrative of the above is that this Appeal succeeds, the decrees of learned lower Fora are hereby set aside and suit of the respondent No.1 is also dismissed with no order as to costs.

ZC/M-79/L
Appeal allowed.

PLJ 2019 Lahore 609

Present **: CH. MUHAMMAD MASOOD JAHANGIR, J**

ZULFIQAR ALI etc.--Appellants

Versus

LIAQAT ALI etc.—Respondents

E.F.A. No. 117859 of 2017, decided on 22.5.2019.

Surety--

----Surety under the law has no right to restrain an action against him rather having stood guarantor, he had substituted himself for his principal and afterwards it was the choice of the decree-holder to proceed any of them severally or both of them jointly

. [P. 611] A

Financial Institution (Recovery of finances) Ordinancc, 2001--

----S. 10--The reason being that leave to contest the suit was accorded only on the surety of the appellants and in absence, the Court might have not allowed the judgment debtor to proceed with the suit, which would have been decreed on that very first day, whereas on the fulfillment of condition, the trial was conducted for years and when the stage for realization of the decree reached, it was tried to be avoided for the aforenoted objection. [P. 611] B

Judgment Debtor--

----Scope-- appellants at their own accord had stepped into the shoes of the judgment debtor, as such they were equally responsible for the satisfaction of the decree. [P. 611] C

1989 CLC 2441, 2006 CLD 687, PLD 2014 429 Lah. 2005 SCMR 72, AIR 1924 LHR 428 & PLD 1953 LHR 22, *ref.*

Ch. Muhammad Rafique Warraich, Advocate for Appellants.

M/s. Malik Iftikhar Ahmad and Muhammad Faheem Mazhar, Advocate for Respondent No.1.

Date of hearing : 22.5.2019.

ORDER

The background of the instant E.F.A. was that Respondent No.1 instituted recovery suit of summary nature on the basis of some cheque against Barash Ali, ascendant of Respondents No.2a to 2i, who in his life appeared before the learned Trial Court and submitted application to defend the suit, which having been granted subject to furnishing of surety bonds, the appellants jointly stood as such and ultimately the suit was decreed. Thereafter, the learned Executing Court *vide* order dated 07.10.2017 proceeded to initiate proceedings for its satisfaction against the

appellants, which was contested before the same Court by the appellants/sureties on the sole ground that unless the principal debtor or his legal heir(s) is/are proceeded against in the first instance, the recovery proceedings against the appellant was not warranted, but the objection was turned down on 02.12.2017. The appellants carried both the said orders before this Court through this Appeal.

2. Arguments heard and record perused.

3. Admittedly, the appellants were not the judgment debtors, but the moment they at their own submitted surety bonds and undertook while recording their statements to the following effect:--

they bounded themselves and subsequently it was not open for them to wriggle out of it. Thus prior to discharge of their liability, they had no right to dictate terms to the creditor and asked to pursue his remedy against the principal in the first instance. The surety under the law has no right to restrain an action against him rather having stood guarantor, he had substituted himself for his principal and afterwards it was the choice of the decree-holder to proceed any of them severally or both of them jointly. The crux of the contract of guarantee is that it binds the surety in a co-extensive manner. The reason being that leave to contest the suit was accorded only on the surety of the appellants and in absence, the Court might have not allowed the judgment debtor to proceed with the suit, which would have been decreed on that very first day, whereas on the fulfillment of condition, the trial was conducted for years and when the stage for realization of the decree reached, it was tried to be avoided for the aforenoted objection. The appellants at their own accord had stepped into the shoes of the judgment debtor, as such they were equally responsible for the satisfaction of the decree. Reliance is placed on the judgments reported as *Mirza Anwar Ahmad Vs. Habib Bank Ltd., Faisalabad and others* (1989 CLC 2441), *Messrs State Engineering Corporation Ltd. Vs. National Development Finance Corporation and others* (2006 CLD 687), *Muhammad Bashir through Legal Heir Vs. Zarina Bibi and others* (PLD 2014 Lahore 429), *Rafique Hazquel Masih Vs. Bank Alfalah Ltd. and other* (2005 SCMR 72). In the case of *M/s. State Engineering* (supra) it was held as under:-

> *Section 128 is applicable in the given circumstances. The liability of the guarantor/surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract as envisaged in Section 128 of the Contract Act, 1872. They are jointly and severally liable to pay the outstanding amount to the creditor. A guarantor cannot shirk from the liabilities incurred by him through the execution of documents.*

Almost same has also been concluded in *Rafique's case* (supra) and its relevant extract is reproduced hereunder:--

> *The liability of the surety under Section 128 of the Contract Act is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract- - - In absence of any specific stipulation in the contract, a*

guarantor cannot take up the plea that the Bank should enforce the liability against the principal debtor before proceedings against the guarantor. The reason being that the Bank grants loan only on the guarantee and in absence of letter/contract of guarantee the Bank may not have sanctioned the loan.

Besides, Section 145 of the Code, 1908 is more than clear on this point.

4. The emphasis of learned counsel for the appellants that the moment, Barash Ali, judgment debtor died for whom his clients became surety, their liability stood absolved was not well founded. This proposition has already been clinched by this Court in case reported as *Maula Dad Vs. Wadhawa Singh and others* (A.I.R.1924 Lahore 428) wherein it was concluded that:-

> The surety rendered himself liable for any decree which might be passed against his principal and in consideration for his doing so the plaintiff dropped his proceedings against the very tangible sum of Rs.1,400. The mere fact that the principal has since died does not absolve the surety from performing his contract, and, following *Chandulal Dalsukhram v. Jehang-bhai Chhotalal* (1). I find that there is no force whatever in the objection, and I dismiss the appeal with costs.

5. The next grouse of the appellants that they were not party to the original *lis*, as such decree was not executable against them, has also been dealt with by this Court in cases reported as Khan *Muhammad Ishaq Khan Vs. The Azad Sharma Trnasport Co. Ltd. and others* (PLD 1953 Lahore 22), *Mrs. Muhammad Shafi through Agent Vs. Sultan Ahmed* (2000 CLC 85) and *Habib Bank Limited Vs. Malik Atta Muhammad and 4 others* (2000 CLC 451). In latter case it was held as under:--

> *As far the objection that the petitioner Bank being surety was not a party to the original suit or appeal, therefore, the execution of the decree passed against Agent Domez Borie could not be taken out against them, suffice it to refer to Section 145, C.P.C. whereby it is provided that even though a surety is not arrayed as a party to the suit or appeal, the decree against the judgment debtor can also be executed against the surety and rightly so because it is well accepted that the liability of the surety is co-extensive with the judgment debtor and continues till such time that the decree is either satisfied by the judgment debtor or by the surety. The provision of Section 145, C.P.C. eminently makes it clear that such surety shall, for the purpose of appeal, be deemed to be a party within the meaning of Section 47, C.P.C. The expression "deemed to be" manifestly refers to the law whereby a thing is presumed to be in existence while in fact it is not in existence. A surety need not be made a party to the proceedings until execution is sought against him. If any authority is needed, reference may be made to Khan Muhammad Ishaq Khan v. The Azad Sharma Transport Co. Ltd. and others PLD 1953 Lah. 22, Cholappa Gattina Sanna and*

another v. Rachandra Anna Pai AIR 1920 Bom.331 and Parkash Chand Mahajan v. Madan Theatres, Ltd. AIR 1936 Lah.463.

Hence, learned Executing Court was justified to proceed with the measures for satisfaction of the decree against them. The learned counsel for the appellants is unable to point out any illegality or jurisdictional defect committed by the Court below while passing the impugned orders. This Appeal having no merit and force is dismissed, with no order as to cost.

(Y.A.) Appeal dismissed.

PLJ 2019 Lahore 647

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

JAVED AKHTAR KHAN--Petitioner

Versus

DCO/DISTRICT COLLECTOR SHEIKHUPURA--Respondent

W.P.No.25768 of 2014, decided on 23.4.2019.

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

----S. 8--Constitution of Pakistan, 1973--Art. 199--Suit for possession--Decreed--Appeal--Allowed--Civil Revision--Dismissed--Evacuee property--Displaced person--Allotment of evacuee property to father of petitioner--Duly implemented in revenue record--A part of property was encroached by Liaqat Memorial High School--Challenge to--Title in evacuee property stood transferred and vested in its transferees on making a record of transfer by competent Authority on settlement side, which itself would be complete regardless of fact whether transferee had obtained an attested copy of such order or not--Original record might be available with Settlement department, wherefrom his title could be verified, but respondent was not perfect in passing impugned order for reason that petitioner failed to submit copy of Register RL-II--Title in disputed property came to vest in petitioner by virtue of entries made in Register RL-II long ago followed by its due implementation in Revenue Record without any interruption coupled with long standing continuous possession, which could not be bulldozed by Authority having no jurisdiction even to take any step towards it--Settlement Department even after repeal of relevant laws was not competent to reopen matter, which was not actively pending at time of its repeal and what to talk about powers of District Collector--Unwarranted assumption of jurisdiction amounted to flagrant abuse of authority and Revenue Hierarchy as such was vested with no authority to interfere with allotment made in favour of claimants/displaced person, hence in absence of such an authority, it inherently lacked jurisdiction to go behind allotment made by Settlement Authorities or act against Settlement Records on any pretext or pretended plea against facts of case--Adverting to resistance that without availing efficacious remedy writ jurisdiction cannot be exercised, suffice it to say that it is not obsolete rule, but in exceptional cases for ends of justice strict observance of said rule can be dispensed with and extraordinary remedy of constitutional jurisdiction in exceptional cases can be invoked--Order impugned herein is a void order, which was passed without lawful authority and non-availing of alternate remedy would not debar this Court to annul such an order in

Writ jurisdiction, especially when *mala fide* is apparent on face of record--Petition was allowed.

[Pp. 650, 651, 652] A, B, D & E

2010 SCMR 1942, *ref.*

Land Settlement Act, 1958--

----S. 16--Attestation of mutation--There was no necessity for attestation of mutation in favour of claimant/displaced person rather confirmation of his land could directly be given effect in Record of Rights--Moreover, Section 16 of Land Settlement Act, 1958 made it clear that land on which a displaced person was permanently settled would absolutely vest to him, therefore, there was no occasion for respondent to check vires of allotment/confirmation of land to any Refugee. [P.] C

M/s. Muhammad Shahzad Shaukat and Atif Mohtashim Khan, Advocates in instant Writ Petition for Petitioner.

Syed Muhammad Kaleem Ahmed Khursheed, Advocate for Petitioners (in W.P.No.29643 of 2014).

M/s. Ch. Riasat Ali and Amer Farooq, Advocates for Petitioner (in W.P.No.32654 of 2014).

Mr. Shadab Hassan Jarfi, Addl. A.G. for Respondent.

Date of hearing : 23.4.2019

JUDGMENT

Ch. Muhammad Masood Jahangir, J.--By means of Petition in hand as well as connected Writ Petition Nos.29643 and 32654 of 2014, the vires of order dated 17.09.2014 passed by respondent have been called in question whereby it was held that ownership/confirmation of the subject land to the claimants was not perfect and declared it to be titled by Provincial Government directing the Revenue Field Staff to correct revenue entries in its favour. As common questions of law and facts are involved in all the connected matters, hence it will be appropriate to decide the same conjunctively through this single order, however, for reference, source point will be the file in hand.

2. Briefly put, Ameer Hussain the father of the present petitioner being a claimant/displaced person had been allotted urban property measuring 62 *Kanals* 11 *Marlas* in Sheikhupura city, which was duly implemented in the Revenue Record. Subsequently a part of it was encroached

by Liaqat Memorial High School, Sheikhupura compelling the allottee to institute suit for possession, which after full-fledged trial was decreed. In the meantime the school was nationalized and Appeal against the decree was preferred by the Province of the Punjab through the District Collector/respondent, which did not succeed and Civil Revision preferred before this Court also failed. The decree having become final was brought before the Executing Court, which was satisfied. Thereafter impugned order referred in para-1 ante was passed by the respondent on the grounds; firstly that the allottee failed to present the copy of Register RL-II to prove his allotment and secondly that it was directly given effect in the Revenue Record without attestation of mutation.

3. It is argued by learned counsel for the petitioner that previous litigation pertaining to Liaqat Memorial School was finalized against District Collector/respondent, who for that grudge re-opened the past and closed chapter. It was also added that had there been no allotment/title of the petitioner, the respondent might have resisted the suit on this ground as well, which having not been agitated before the Court of ultimate jurisdiction at that point of time could not be subsequently pressed, but the respondent became judge of his own cause and erred in law to pass the impugned order. It was next argued that under Section 3 of the Land Revenue Act, 1967 jurisdiction of the Revenue Authority/Hierarchy had been taken off with regard to urban as well as constructed properties, but the respondent while omitting to take notice thereof targeted the petitioner through the impugned order which having been passed without lawful authority and aimed at ulterior motive cannot be maintained. In contra learned Law Officer supported the impugned order with the addition that it could only be assailed in Appeal and without availing provided remedy, this Court cannot invoke its jurisdiction under Article 199 of the Constitution.

4. Argument heard, record appreciated.

5. The play of round on civil side, which finally culminated right upto the level of this Court followed by its realization was an admitted fact that the decree was passed under Section 8 of the Specific Relief Act, 1877 and the declaration of the ownership was its inbuilt relief granted to the decree- holder. Reliance can be placed upon judgment reported as *Hazratullah and others Vs. Rahim Gul and others* (PLD 2014 SC 380). Moreover, the title/allotment of the petitioner at the best could be disputed before the forum where judicial scrutiny proceeded for years and years, but no such defence was introduced at that point of time and once it was finalized on judicial side, it was not permissible to be reopened on administrative side. See *Chuttan and others Vs. Sufaid Khan and others* (NLR 1987 Revenue 122)

and *Commissioner of Income-tax, East Pakistan Vs. Fazlur Rahman* (PLD 1964 SC 410). It was also a proven fact that in connected matters prior to the impugned order, the predecessor of the respondent had also pronounced a similar order to annul the allotments, but its superior Authority while exercising appellate jurisdiction on judicial side set aside the decision of his subordinate, which having not been agitated any further became final and could not be reopened on executive side by the same Authority as well whose order stood already quashed and such practice is not permissible. In the case law referred herein above it was vividly held that administrative order may be set aside on judicial side, but there is no legal panorama of a reverse case.

6. The other relevant feature of the case would be that Section 3 of the Land Revenue Act, 1967 denuded the respondent or any other authority in the Revenue Hierarchy to take cognizance of the property falling in the urban limits or constructed one. The disputed property was not assessed to land revenue and also exempted from the operation of the provisions of the Act ibid, hence the impugned order on this score too having been passed without lawful authority was illegal.

7. Leaving aside all the legal aspects discussed herein above, the admitted position was that title in evacuee property stood transferred and vested in its transferees on making a record of transfer by the competent Authority on settlement side, which itself would be complete regardless of the fact whether transferee had obtained an attested copy of such order or not. Original record might be available with the Settlement department, wherefrom his title could be verified, but the respondent was not perfect in passing the impugned order for the reason that petitioner failed to submit copy of the Register RL-II. The identical proposition has already been dealt with by the Apex Court in a case reported as *Member Board of Revenue/Chief Settlement Commissioner, Lahore and 2 others Vs. Mst. Sajida Parveen and others* (2010 SCMR 1942) . The title in disputed property came to vest in petitioner by virtue of entries made in Register RL-II long ago followed by its due implementation in the Revenue Record without any interruption coupled with long standing continuous possession, which could not be bulldozed by the Authority having no jurisdiction even to take any step towards it. The Settlement Department even after the repeal of relevant laws was not competent to reopen the matter, which was not actively pending at the time of its repeal and what to talk about the powers of District Collector.

8. The other ground that without sanctioning mutation, the allotment made in favour of the petitioner could not be implemented in the Revenue Record was also not available to the respondent to pass the impugned order, who skipped to take

notice of Rule 7-A of the Displaced Persons (Land Settlement) Rules, 1959 which reads as follow:--

> ***7-A. Mutation. (****1) After the acquisition of the land under Section 4, the Revenue Officer of the area concerned shall cause a mutation of extinction of all evacuee rights and interests in the entire estate to be entered and disposed of and the Central Government shall be substituted for the evacuee holders of right in the estate.*
>
> *(2) After the land has been finally allotted and settled as prescribed by the preceding rule, the Revenue Authority of the area concerned shall, for the purpose of making entries in respect of rights and interests of the allottees in the record of rights or register Haq Daran Zameen or in village form No.VII, as the case may be, treat the entries in R.L.II at par with those in a register of mutation and it shall not be necessary to sanction any mutation for the purpose.*

The study of the same reveals that there was no necessity for the attestation of mutation in favour of claimant/displaced person rather the confirmation of his land could directly be given effect in the Record of Rights. Moreover, Section 16 of the Land Settlement Act, 1958 made it clear that the land on which a displaced person was permanently settled would absolutely vest to him, therefore, there was no occasion for the respondent to check the vires of the allotment/confirmation of the land to any Refugee. The District Collector or the Deputy Commissioner under the Land Revenue Act, 1967 or even as Notified Officers was wholly incompetent to interfere with or render any lawful direction in the matter of allotment made in settlement of claims under the Displaced Persons (Land Settlement) Act ibid in respect of which no proceedings were open since before the repeal of Evacuee laws by Act XIV of 1974. The unwarranted assumption of jurisdiction amounted to flagrant abuse of authority and the Revenue Hierarchy as such was vested with no authority to interfere with the allotment made in favour of claimants/displaced person, hence in absence of such an authority, it inherently lacked jurisdiction to go behind the allotment made by the Settlement Authorities or act against Settlement Records on any pretext or pretended plea against the facts of the case.

9. Adverting to the resistance that without availing efficacious remedy writ jurisdiction cannot be exercised, suffice it to say that it is not obsolete rule, but in exceptional cases for the ends of justice the strict observance of the said rule can be dispensed with and extraordinary remedy of constitutional jurisdiction in exceptional cases can be invoked. The order impugned herein is a void order, which was passed without lawful authority and non-availing of alternate remedy would not

debar this Court to annul such an order in Writ jurisdiction, especially when the *mala fide* is apparent on the face of record.

10. Resultantly all these Writ Petitions are allowed and impugned order is quashed.

(Y.A.) Petitions Allowed.

PLJ 2019 Lahore 664

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

***Rana* MUHAMMAD ASLAM KHAN--Petitioner**

Versus

SHAH NAWAZ, etc.--Respondents

Civil Revision No. 2383 of 2009, heard on 14.3.2019.

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

----S. 12 & 39--Suit for specific performance--Decreed--Suit for cancellation of documents--Dismissed--Suit property was mortgaged--Redemption of property--Transfer of property--Appeals--Dismissed--Concurrent findings--Requirement of Law--Challenge to--Impugned documents i.e, contract (Ex:P1) and receipt (Ex:P2), as per requirement of law, although were signed by Gul Hassan and Ghulam Shabbir Khan being its marginal witnesses, which could only be proved if they were examined. Admittedly, Ghulam Shabbir Khan (PW4), out of them was produced, whereas other one was not brought into witness-box by beneficiary/Respondent No. 1 and on having been faced with said situation, his learned counsel submitted that said witness had already departed--Glaring contradiction with regard to venue of payment was not ignorable, but Courts below failed to consider that neither present evidence was cogent, reliable nor that vital documents having been executed after promulgation of Order 1984, were proved as per prescribed scheme provided in afore- referred provisions of Order, 1984--Although scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under Section 115 C.P.C, if Courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on issue involved--Civil Revision was Allowed.

[Pp. 668, 669] C, D & E

1997 SCMR 1139, PLD 2013 SC 255 & 2016 SCMR 24, *ref.*

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

----S. 54--Agreement to Sell--An agreement to sell of immovable property is a contract enforceable by law, but Section 54 of Transfer of Property Act, 1882 expressly provides that it does not itself generate interest, right or title in such property, and as a matter of law to constitute ownership thereof, another instrument in its pursuance is required. [P. 666] A

Registration Act, 1908 (XVI of 1908)--

----S. 17--Inclusion of amendment--Registration of document—Financial liability--

When impugned contract was purportedly scribed, there was no requirement for

its registration, but now through recent amendment introduced in Section 17 of Registration Act, 1908, it is mandatory that such type of document should be registered, anyhow, for its construction, it being a document of financial liability and future obligation under provision of Qanun-e-Shahadat Order, 1984, was required to be attested by two male or one male and two female witnesses, as case may be. [P. 666] B

M/s. Farhan Mustafa Jaffery and Sardar Akbar Ali Khan Dogar, Advocates for Petitioners.

Mr. Muhammad Ashraf Sagoo, Advocate for Respondent.

Date of hearing : 14.3.2019

JUDGMENT

Admittedly, Rana Muhammad Aslam Khan, petitioner was exclusive owner of subject land, who *vide* mutation No.6298 dated 05th March, 2002 transferred it to his son Rana Abdul Qayyum, Respondent No.2. Thereafter, on 4th April, 2002 Shah Nawaz, Respondent No.1 filed suit for specific performance of contract contending therein that despite the subject property was mortgaged, it was purchased by him on 14th January, 1993 *vide* contract and receipt (Ex:P1 & 2) respectively against Rs.2,00,000/-, out of which Rs.1,64,000/- were paid before the witnesses, but after its redemption to frustrate the agreement, property was dishonestly transferred by petitioner in favour of his son. The petitioner and his son not only by filing their written statement denied the settlement of transaction as well as execution of Ex:P1 & 2 with the firm stance that plaintiff was their tenant, who managed aforenoted forged and fictitious documents, but independent suit was also instituted by the petitioner for cancellation of these documents. As a result of a conjunctive trial, the suit of Respondent No.1 was decreed and that of the petitioner was dismissed *vide* consolidated judgment of 9th May, 2006. Although two independent appeals were preferred, but those were dismissed on 2nd October, 2009 and to call in question the vires of concurrent decrees of learned lower fora, this Civil Revision was preferred.

2. Arguments heard. Record perused.

3. Before adverting to the facts of the case, I must add that an agreement to sell of immovable property is a contract enforceable by law, but Section 54 of the Transfer of Property Act, 1882 expressly provides that it does not itself generate interest, right or title in such property, and as a matter of law to constitute ownership thereof, another instrument in its pursuance is required. Admittedly, when impugned

contract was purportedly scribed, there was no requirement for its registration, but now through recent amendment introduced in Section 17 of the Registration Act, 1908, it is mandatory that such type of document should be registered, anyhow, for its construction, it being a document of financial liability and future obligation under the provision of the Qanun-e-Shahadat Order, 1984, was required to be attested by two male or one male and two female witnesses, as the case may be. For better appreciation, Sub-Article (2) of Article 17 of the Order ibid is reproduced here:--

> *In matters pertaining to financial or future obligations, if reduced to writing, the instrument, shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly.*
>
> *If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.*

The execution of agreement can be proved, only in accordance with mode provided under Article 79 of the Order ibid, which reads as under:--

> *Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses [at] least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.*
>
> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."*

The apex Court in a recent case reported as *"Farid Bakhsh Vs. Jind Wadda and others"* (2015 SCMR 1044) has elaborately defined Article 79 and finally concluded that its requirement was mandatory and without its strict compliance, such a document cannot be used as evidence. The relevant conclusion for ready reference is given below:--

> *This Article in clear and unambiguous words provides that a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution. The words "shall not be used as evidence" unmistakably show that such document shall be proved in such and no other manner. The words "two attesting witnesses at least" further show that calling two attesting witnesses for the purpose of proving its execution is a bare minimum. Nothing short of two attesting witnesses if alive and capable of giving*

evidence can even be imagined for proving its execution. Construing the requirement of the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce. We, thus, have no doubt in our mind that this Article being mandatory has to be construed and complied with as such.

As such after the promulgation of Order, 1984, a document of alike character has to be executed and proved as per scheme provided in the afore-referred Articles.

4. Now reverting back to the facts of the case, the impugned documents i.e, contract (Ex:P1) and receipt (Ex:P2), as per requirement of law, although were signed by Gul Hassan and Ghulam Shabbir Khan being its marginal witnesses, which could only be proved if they were examined. Admittedly, Ghulam Shabbir Khan (PW4), out of them was produced, whereas other one was not brought into the witness-box by the beneficiary/Respondent No.1 and on having been faced with the said situation, his learned counsel submitted that the said witness had already departed. The learned counsel, however, conceded that neither in contents of plaint the fact of his alleged death was exposed nor any document was brought on record to affirm said plea. Mere oral statement was not enough to prove his non-availability. Anyhow, in such a situation, there were two modes available to the plaintiffs; firstly that a person familiar with the signatures of Gul Hassan was to be examined to comply with the requirement of Article 80 of the Order, 1984 and secondly the plaintiff might have applied to the learned Trial Court for referring the disputed documents (Ex:P1 & 2) to the Handwriting Expert for the comparison of the alleged signatures affixed over there with some admitted one of the purported executant. Although, report of such an Expert is not conclusive proof, but in absence of one of the marginal witnesses, when requirement of Article 80 of the Order, 1984 was also not complied with, this mode was to be followed. See *"Hamid Qayum and others Vs. Muhammad Azeem through L.Rs and another"* (PLD 1995 Supreme Court 381), wherein it was held that the report of Expert is one of the modes of proving the document and if the said report is properly exhibited, the same can be used as corroborative piece of evidence. By not resorting to this exercise at any stage, the plaintiff incurred an adverse presumption against him.

5. The emphasis of learned counsel for plaintiff/Respondent No.1 that Muhammad Asghar (PW2) scribe of Ex.P1 & 2 was examined, therefore, any lapse on the part of his client stood cured/covered is not tenable. Admittedly, the documents were not signed by PW2 being marginal witness, who in his statement-in-chief did not depose that bargain was struck in his presence, rather during cross- examination he explicitly admitted that consideration was not paid before him. It is settled by now that a Scribe or anybody else, who did not put his signatures being marginal witness on documents required to be attested, cannot be considered as such. See *"Muhammad Sarwar Vs. Salamat Ali"* (2012 CLC 2094), *"Hafiz Tassaduq Hussain Vs. Muhammad Din through L.Rs and others"* (PLD 2011 SC 241)

and *"Farzand Ali and another Vs. Khuda Bakhsh and others"* (PLD 2015 SC 187). The relevant extract from Para-9 of *Hafiz Tasadduq's case* for ready reference is reproduced below:--

> *"9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute 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."*

6. Having gone through the evidence of the plaintiff available on record, it was picked that plaintiff (PW3) in his cross-examination disclosed that advance sale consideration was paid one day prior to execution of referred documents (Ex:P1 & 2) and the exact words uttered by him in this regard are given below:-

Whereas, the marginal witness (PW4), antipodal to plaintiff stated that sale price was paid in Court premises and relevant extract of his cross-examination in verbatim is reproduced hereunder:--

The glaring contradiction with regard to venue of the payment was not ignorable, but Courts below failed to consider that neither the present evidence was cogent, reliable nor that the vital documents having been executed after promulgation of Order, 1984, ibid, were proved as per prescribed scheme provided in the afore-referred provisions of the Order, 1984 ibid.

7. Now adverting towards the last contention of learned counsel for the plaintiff/Respondent No.1 that this Court cannot set aside the concurrent judgments of the lower Courts in exercise of powers under Section115 of the Code, 1908. Although the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under Section 115, C.P.C, if Courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such view, this Court is fortified by the dictum laid down in the judgment reported as *Abdul Hakeem vs. Habibullah and 11 others* (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:--

> *"6.Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under Section 115, C.P.C is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under Section 115, C.P.C cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under*

*Section 115, C.P.C if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under Section 115, C.P.C if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record.***"*

This view has again been reaffirmed by the same Court in the judgments reported as *"Muhammad Anwar and others vs. Mst. Ilyas Begum and others"* (PLD 2013 SC 255), *"Muhammad Nawaz alias Nawaza and others vs. Member Judicial Board of Revenue and others"* (2014 SCMR 914) and *"Nazim-ud- and others vs. Sheikh Zia-ul-Qamar and others"* (2016 SCMR 24) to confirm that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it is bound and obligated to render decisions in accordance with law and the law alone, hence this Court can invoke its jurisdiction in the cases where interference is warranted.

8. The narrative of the above discussion is that this Civil Revision succeeds, the decrees of learned lower for a are hereby set aside and suit of Respondent No. 1 is also dismissed with no order as to costs.

(Y.A.) Civil Revision Allowed.

PLJ 2019 Lahore 671

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

SARFRAZ, etc.--Petitioners

Versus

SENIOR MEMBER BOR, etc.--Respondents

Writ Petition No.512 of 2011, heard on 12.6.2019.

Constitution of Pakistan, 1973--

----Art. 199--Punjab Consolidation of Holdings Ordinance, 1960, S. 13 & 52--Initiation of consolidation scheme--Issuance of order regarding quashment of scheme--Appeal against order--Pendency of appeals--Jurisdiction of--Filling of writ petitions--One was dismissed and other was dismissed as withdrawn--There is no ambiguity that Board of Revenue is vested with jurisdiction whether invoked by aggrieved person through a petition or *suo motu* to go into consolidation proceedings/scheme for its affirmation or otherwise, but scheme itself cannot be abrogated without taking action provided under rule 52 of Punjab Consolidation of Holdings Rules, 1998--Respondents in earlier round had lost upto level of Board of Revenue on judicial side--Learned Member, second time, while exercising his powers ignored material aspect that said order had also been merged into orders passed by this Court when two different writ petitions were dismissed--Moreover, scheme might have been implemented/acted upon not only in record, but also at spot--It cannot be denied that process of consolidation is not an easy job, which after being started in 1984-85, scheme was finally confirmed in 2003 and thereafter was maintained on 20.10.2005, thus question of commission of some irregularities or allocation of more or less land lost its significance, but even then *vide* earlier order dated 20.10.2005 an avenue was provided to right holders to agitate their individual grievances by means of appeals before appropriate forum--Thereafter dozens of appeals were preferred out of which some were disposed of while others still in pipe line, learned Member at this stage was not within jurisdiction to bulldoze entire scheme--Once matter was decided on judicial side, exercise of executive or judicial authority thereafter to nullify effect of earlier judicial decision will be an improper exercise of authority, which is alien to our system of law and cannot be perpetuated--Petition was allowed.

[Pp. 674, 675, 676] A, B, C & D

NLR 1987 Revenue 122 *ref.*

M/s. Malik Noor Muhammad Awan, Ch. Muhammad Aslam and Saima Hanif, Advocates for Petitioners.

Mr. Umair Khan Niazi, A.A.G. for Respondents No.1 to 4.

Mr. Shezada Mazhar, Advocate for Respondents No.5 to 210.

Date of hearing : 12.6.2019

JUDGMENT

This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 called in question vires of the order dated 28.07.2010 passed by learned Member (Judicial-VII), Board of Revenue, Lahore, whereby he accepted RoR preferred by private contesting respondents while exercising his powers vested under Section 13 of the Consolidation of Holdings Ordinance, 1960 against the consolidation of village Kot Sarwar, Tehsil Pindi Bhattian, District Hafizabad in consequence whereof, the entire consolidation scheme was annulled/quashed and pre-consolidation position of the revenue estate was maintained.

2. No doubt, this case has chequered history, however, leaving aside its inessential details, admittedly the consolidation scheme of afore-noted mouza had been initiated in 1984-85 and finally confirmed on 31.03.2003, followed by chain of litigation and ultimately learned Member (Consolidation) while dealing with the scheme on judicial side maintained it *vide* order dated 20.10.2005, however, the avenue was provided to the individuals/right holders for agitating their personal grievances by preferring appeals before the appropriate forum under the provision of Consolidation of Holdings Ordinance, 1960. Although Writ Petitions No.s 2380/2006 and 2964/2006 were preferred by the individuals to call in question the last order of learned Member, but the former petition was dismissed in limine on 25.04.2006, whereas the other was dismissed as withdrawn, however, different appeals were preferred by the right holders before the appropriate forum as per spirit of afore-noted order dated 20.10.2005, some of those stood disposed of, whereas the others were still pending when an application for setting aside of the confirmed consolidation scheme was tabled by Mian Shahid Hussain Bhatti, the then Member, Provincial Assembly of the concerned constituency before the Chief Executive of the province as well as some other high-ups, which was referred to the Senior Member, Board of Revenue on 21.02.2009, however till then RoR No.1345/2008 had also been preferred by the contesting respondents before the Board of Revenue on 4.12.2008 to render the impugned order, causing filing of this petition, which though initially was allowed on 07.05.2015, yet on 01.06.2016 was remanded by the august Supreme Court for its fresh decision while observing below:--

> *The primary basis of the impugned judgment which can be gathered therefrom appears to be that the dispute pertaining to the Consolidation Scheme has been settled and adjudicated upon and was a past and closed transaction and furthermore, the 3rd party may have interest in the land, subject matter of the consolidation. A perusal of the record reveals that in the previous round of litigation, the matter was heard by the Member, Board of Revenue, Punjab in ROR No. 646 of 2005, filed by the present petitioners, which no doubt, was dismissed. However, in the said order, it was clarified that the remedy against the Consolidation Scheme as sanctioned was available to such persons as were aggrieved*

thereby. In the circumstances, in law, the matter was neither a past and closed transaction nor finally adjudicated upon, leaving all the remedies available to the aggrieved parties. It is in the light of the aforesaid observations that the present round of litigation was commenced by the petitioners which culminated in the order dated 28.07.2010 decided by the Member, Board of Revenue, Punjab, whereby ROR No.1345 of 2008, filed by the petitioners, was allowed. In the above circumstances, the Constitutional Petition filed by respondents Nos. 1 to 3 against the said order could not be allowed, as is happened in the instant case, without adverting to the rival contentions of the parties emanating from order dated 28.07.2010 by merely holding that the matter has already been decided. The said assumption that the disputes had been concluded and the matter has attained finality is not borne out from the record. In the circumstances, it (is) appears to be clear and obvious that the real matter in controversy has escaped adjudication by way of the impugned judgment dated 07.05.2015, which is based on an incorrect assumption that the matter has been concluded in the previous round of litigation. Consequently, the impugned judgment dated 07.05.2015 is not sustainable in law and is liable to be set aside and the matter needs to be remanded to the learned High Court for decision afresh.

In view of the above, this Civil Petition is converted into an appeal and allowed. The impugned judgment dated 07.05.2015 is set aside and the case is remanded to the learned Lahore High Court. The Writ Petition bearing No.512 of 2011, filed by present respondents No.1 to 3 shall deem to be pending, which shall be decided afresh after hearing the parties.

3. M/s. Malik Noor Muhammad Awan, Ch. Muhammad Aslam and Saima Hanif, Advocates for the Writ Petitioners argued that learned Member had no jurisdiction to quash the entire scheme from its inception, which on judicial side had already been affirmed by his predecessor; that only individual grievances of the right holders could be ascertained and for it they had already preferred appeals, but with such observation the successor authority had no power to annul the complete scheme already affirmed after the litigation of eighteen years; that only under Rule 52 of the Punjab Consolidation of Holdings Rules, 1998, confirmed scheme could be quashed for the reasons provided thereunder, but despite the fact that no such ground was available, even then due to the political pressure, the impugned order was passed when the right holders had not only already availed their efficacious remedy before the appellate Court, rather some of those were still pending; that learned Member failed to appreciate that orders passed by his predecessor had also been congealed by this Court while dismissing Writ Petitions, as such he could not act as an appellate authority to this Court.

In contra, Mr. Shezada Mazhar, Advocate for the contesting private respondents maintained that under Section 13 of the Consolidation of Holdings Ordinance, 1960, Board of Revenue was conferred ample jurisdiction to revisit the scheme; that while

confirming the scheme, not only incurable irregularities committed by the Consolidation Officer and his Staff were disregarded, rather entitlement of the majority of the land owners was decreased, whereas few were given extraordinary benefits by allotting them double area, compelling the authority to cause its failure, as such, it was a fit case for initiation of fresh proceedings.

4. Arguments heard. Record perused with the able assistance of learned counsel for the parties.

5. There is no ambiguity that Board of Revenue is vested with jurisdiction whether invoked by aggrieved person through a petition or *suo motu* to go into the consolidation proceedings/scheme for its affirmation or otherwise, but the scheme itself cannot be abrogated without taking the action provided under Rule 52 of the Punjab Consolidation of Holdings Rules, 1998, which being relevant is reproduced hereunder:--

> *52. Collection of Data. (1) Subject to the provisions and procedure laid down under Section 13 of the Ordinance, if the Board of Revenue or the Commissioner on their own motion or on a petition by an aggrieved person, is seized of the issue of annulment of the entire consolidation scheme of the estate, or its sub-division, action shall be taken as under:--*
>
> *a) Total number of khatas, land owners and cultivable land of the estate shall be noted.*
> *b) All the pending litigation with the Collector, Commissioner and the Board of Revenue shall be tabulated.*
> *c) The number of khatas/Scheme numbers, land owners, area of cultivable land challenged/involved in appeals, revision petitions and applications shall be tabulated and compared to the total numbers as in (a) above.*
> *d) The issues and points of dispute omissions and irregularities shall be listed giving specific facts.*
> *e) The issues will be checked/got checked from the record and if necessary on the ground. The aggrieved persons shall be heard.*

Mr. Shezada on having been faced with the said rule when asked whether any of the acts was adopted before passing the impugned order, he impliedly admitted that it was not followed, which otherwise is proved that the actions provided thereunder were not adhered to. The next calamitous feature of the impugned order was that remedial actions as provided by the following Rule 53 were also not adopted, hence even if there were some reasons to upset the concluded scheme, it could not be done in manner as espoused in this case.

6. Undisputedly, the respondents in earlier round had lost upto the level of Board of Revenue on judicial side. The learned Member, second time, while exercising his powers ignored the material aspect that the said order had also been merged into the orders passed by this Court when two different writ petitions were dismissed. Moreover, the scheme might have been implemented/acted upon not only in the

record, but also at spot. It seems that the matter remained dormant for years, then the respondents despite all the above legal developments and physical changes firstly through their political representative and subsequently by filing RoR/petition under Section 13 of the Ordinance approached the learned Member, who without considering that order dated 20.10.2005 of his predecessor for all intents and purposes had become final, erred in law to review it especially when such power was not provided in the Ordinance of 1960. *Prima facie* there was substance in the contention of learned counsel for the petitioners that when the earlier order had attained finality, no de novo proceedings could directly be initiated by the landowners or through their any such representative. It appears that learned Member to avoid the earlier decisions rendered by the superior Courts in series of cases, whereby the jurisdiction exercised by the Consolidation authorities on the move of political/executive personnels had been quashed, purposely neither referred the petition so received by his office from the Secretariat of Chief Minister of Punjab nor decided it independently and while keeping it aside, decided the designed petition of the respondents, as such exercise of jurisdiction by the learned Member was colourful and without lawful authority.

7. It cannot be denied that process of consolidation is not an easy job, which after being started in 1984-85, the scheme was finally confirmed in 2003 and thereafter was maintained on 20.10.2005, thus question of commission of some irregularities or allocation of more or less land lost its significance, but even then *vide* earlier order dated 20.10.2005 an avenue was provided to the right holders to agitate their individual grievances by means of appeals before appropriate forum. Thereafter dozens of appeals were preferred out of which some were disposed of while the others still in pipe line, the learned Member at this stage was not within jurisdiction to bulldoze the entire scheme. The accentuation of learned counsel for the respondents that earlier order of the Board of Revenue being void was rightly revisited was fallacious. If it is considered to be so, even then subsequent RoR preferred after years was barred by time and the learned counsel botched to vindicate that how second petition was competent when earlier one was judicially culminated and further congealed. The other grounds assailing the scheme at the most related to the individuals grievances, which could be cured by the appropriate forum while exercising its jurisdiction and additional reasons agitated by Mr. Shezada Mazhar had no proper foundation to proceed further with the consolidation proceedings already finalized in 2003. Once the matter was decided on judicial side, the exercise of executive or judicial authority thereafter to nullify the effect of earlier judicial decision will be an improper exercise of the authority, which is alien to our system of law and cannot be perpetuated. Reliance can be placed upon case reported as *Chuttan and others vs. Sufaid Khan and other* (NLR 1987 Revenue 122).

8. In view of the above discussion, this Writ Petition is allowed, the impugned order dated 28.07.2010 passed by the learned Member (Judicial-VII), Board of Revenue, Punjab, Lahore being void ab initio and nullity in the eye of law is

quashed/set aside and the consolidation scheme already confirmed on 31.03.2003 will deem to be intact.

9. Before parting with this judgment, it is held that as per mandate of order dated 20.10.2005, if some appeals or any other proceedings are still sub judice or having been declared redundant through the impugned order, those must be revived for its decision on merit.

(Y.A.) Petition Allowed.

P L D 2019 Lahore 717
Before Ch. Muhammad Masood Jahangir, J
NIAMAT ALI and others---Petitioners
Versus
GULAM JILIANI and others---Respondents

Civil Revision No.2871 of 2011, heard on 22nd May, 2019.

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

----S. 42---Qanun-e-Shahadat (10 of 1984), Art. 114---Limitation Act (IX of 1908), S. 3---Suit for declaration---Limitation---Estoppel, principle of---Applicability---Scope---General power of attorney---Judicial record---Presumption of correctness---Suit property was transferred through general attorney which was not challenged by the principal during his life time---Contention of plaintiffs was that impugned mutation and subsequent transactions were based on fraud and misrepresentation---Suit was decreed by the Trial Court but Appellate Court dismissed the same---Validity---Predecessor-in-interest of plaintiffs survived for fifteen years after attestation of impugned mutation but he did not assail the same during his life time---If any authority was not conferred upon the agent but subsequently it was acknowledged by the principal then it carried value in the eye of law---Conduct of predecessor-in-interest was sufficient to prove that he was not claiming the ownership of suit property---Principle of estoppel was applicable in the present case---Judicial record had presumption of correctness and did not require any proof---Decision of Court of competent jurisdiction could not be equated as at par with the statement of witness---Present suit had been filed after twenty eight years and same was time barred---Any suit instituted beyond the statutory period was to be dismissed---Jurisdiction of Court would depend on law of limitation---If proceedings before the Court were beyond the scope of limitation then it could not assume jurisdiction---Plaintiffs had failed to point out any illegality or irregularity in the impugned judgment and decree passed by the Appellate Court---Revision was dismissed, in circumstances.

Ghulam Muhammad and others v. Malik Abdul Qadir Khan and others PLD 1983 SC 68; Muhammad Ramzan v. Lahore Development Authority, Lahore 2002 SCMR 1336; Fayyaz Hussain v. Akbar Hussain and others 2004 SCMR 964; Abdul Haq and another v. Mst. Surrya Begum and others 2002 SCMR 1330; Kala Khan and others v. Rab Nawaz and others 2004 SCMR 517; Muhammad Rustam and another v. Mst. Makhan Jan and others 2013 SCMR 299; Ghulam Abbas and others v. Mohammad Shafi through LRs and others 2016 SCMR 1403 and Nasir Fahimuddin and others v. Charles Philips Mills and others 2017 SCMR 468 rel.

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

----S. 3---Any suit, appeal or application instituted, preferred or made beyond statutory period was to be dismissed.

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

----S. 96 & O. XLI, R. 33---Variation between judgment of Trial Court and First Appellate Court---Effect---Judgment of First Appellate Court would be given preference over the judgment of Trial Court.

Madan Gopal and 4 others v. Maran Bepari and 3 others PLD 1969 SC 617; Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs and others 2013 SCMR 1300 and Amjad Ikram v. Mst. Asya Kausar and 2 others 2015 SCMR 1 rel.

(d) Words and phrases---

----'Ratification'---Connotation.

The expression "ratification" means the making valid of an act already done. This principle is derived from the latin maxim "ratihabitio mandato aequiparatur" meaning thereby a subsequent ratification of an act is equivalent to a prior authority to perform such act.

Fakhar-uz-Zaman Akhtar Tarar for Petitioners.

Najam Iqbal for Respsondents Nos. 9 to 24.

Atif Mohtashim Khan and Razia Begum for Respondent No.2(b).

Date of hearing: 22nd May, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undoubtedly, Sadhu son of Janku was owner in possession of the suit land, which through Muhammad Hussain, general attorney of the former vide Mutation No. 1074 dated 08.05.1973 was transferred to Ghulam Jillani, respondent No.1. Although, Sadhu survived till 15.10.1988, but the said alienation was never disputed, however after about 13 years of his death, his son, Niamat Ali and grandson, Muhammad Bashir instituted suit for declaration to assail the general power of attorney as well as said mutation and subsequent transfers being fake, forged, fictitious and result of fraud. The beneficiaries of the impugned mutation resisted the suit on factual and legal grounds; that sale vide mutation No.1074 was pre-empted by one Sona Khan and during its proceedings, Sadhu himself appeared and acknowledged the agency deed as well as the transaction, as such petitioners were not only estopped by the conduct of their predecessor, rather they had no locus standi to institute the suit and that suit was badly time barred. After settling of issues, collecting and appreciating the evidence, though the suit

was decreed by the learned Trial Court, yet its judgment was reversed and suit was dismissed by the learned Appellate Court vide impugned judgment.

2. Mr. Fakhar-uz-Zaman Akhtar Tarar, Advocate for the plaintiffs inaugurally submitted that by examining official witnesses (PW1&2), it was successfully established that fake, forged, fictitious and fabricated general power of attorney was maneuvered by Muhammad Hussain, who collusively transferred the suit land to respondent No.1 vide basic mutation No.1074, but learned lower Appellate Court not only ignored their credible and unrebutted evidence, rather twisted it to reverse the comprehensive decree of its subordinate court. He added that evidence recorded in other file of pre-emption suit could not be shifted and relied upon in the file in hand to base its decision. He further emphasized that mutation proceedings were not judicial in nature, which did not happen to confer title and when its genuineness was challenged, burden squarely lies on the beneficiaries to prove the actual transaction, but despite the fact that not an iota of evidence was brought on record in this regard, the learned lower Appellate Court erred in law to perpetuate it. He lastly pleaded that subject documents being product of collusiveness, fraud and impersonation could be challenged at any point of time, especially whenever its entry was repeated in the revenue record, which afforded fresh cause of action, but through the impugned judgment, the learned Appellate Court omitted to consider the well-established principle of law to this effect as well.

In Contra, Mr. Najam Iqbal Balal, Advocate for the contesting respondents Nos.9 to 24 submitted that after the registration of general power of attorney, the original mutation was attested on 08.05.1973 and soon thereafter the transaction of sale was pirated through a suit for pre-emption, which was not only in the complete knowledge of the vendor from the day of inception of the said suit, rather he appeared as DW and acknowledged the execution of agency deed besides sale through the afore-noted mutation, hence if at the most the execution of the power of attorney was not proved, even then the vendor had ratified the same in his life by his own act. He further added that attested copy of judgment and decree passed in the pre-emption suit was brought on record without any objection, which having strong presumption of correctness was duly noticed by the learned Appellate Court that decree passed in the pre-emption was in the complete notice of the petitioners from the day of filing of the suit under this petition, but it was not assailed through collateral remedies or in the suit in hand, hence it being admitted became final and was rightly relied upon. He lastly emphasized that the basic mutation was attested in 1973, whereas the suit was instituted after 28 years by the son and the grandson of the original vendor, who had no locus standi as well as estopped to call these in question having not been assailed by their predecessor, moreover, the suit was badly time barred, hence nothing wrong was committed by the learned lower Appellate Court in reversing the findings of learned Trial Court.

3. Arguments heard and record perused.

4. No doubt, plaintiffs brought some tangible evidence on record to prove that general power of attorney was fakely managed for the alienation of suit land, but it was also a hard fact that the original transaction settled by the agent on the basis thereof was never disputed by its principal, who while appearing during proceedings of the suit for pre-emption admitted the construction of agency deed as well as alienation made in favour of respondent No.1 through the agent, whereas Sadhu despite surviving for years and years himself did not question his statement recorded in the pre-emption suit or the judgment (Exh.D30) passed thereunder, whereas some part of it being relevant is reproduced hereunder:-

> "Defendant in order to prove the sale price shown in the Mutation produced 2 witnesses Sadho son of Janko appeared as PW2. He is the person who sold the land in question to defendant Ghulam Jillani He deposed that he had executed General power of attorney to one Muhammad Hussain son of Chaudhri Pir Bakhsh for the sale of the suit property who sold the same to defendant for Rs.9000 and also stated that this is the actual amount which he received through his general attorney but plaintiffs failed to put any question in cross-examination.

It was also admitted position that pre-emption decree was promptly incorporated in the revenue record vide mutation No.1107 of 1977 (Exh.D18). A glance over plaint filed by the petitioners reflected that they were also aware of the said decree, but till today through collateral remedies or even by the lis in hand, its setting aside was not sought for. So it being unchallenged, unrebutted and especially part of judicial record attained strong presumption of correctness and did not require its anymore proof. See Ghulam Muhammad and others v. Malik Abdul Qadir Khan and others (PLD 1983 SC 68), Muhammad Ramzan v. Lahore Development Authority, Lahore (2002 SCMR 1336) and Fayyaz Hussain v. Akbar Hussain and others (2004 SCMR 964). The final decision of the court of competent jurisdiction cannot be equated at par with statement of some witness, so Article 57 of the Qanun-e-Shahadat Order, 1984 will not come into play.The emphasis of Mr. Tarar that Sadhu was impersonated in the said proceedings was fallacious. Had the decree been challenged, only then such an objection could be raised and on account of mere oral assertion, a document arising out of judicial proceedings could not be rebutted.

5. There is much substance in the argument of Mr. Najam Iqbal Balal, Advocate for respondents Nos.9 to 24 that Sadhu while appearing in the pre-emption suit validated general power of attorney as well as subsequent transfer, who rightly referred Section 196 of the Contract Act,1872 to strengthen his said argument and its bare reading affirmed that if any authority was not conferred upon the agent, but subsequently it was acknowledged by the principal, then it carried value in the eye of law. The expression "ratification" means the making valid of an act already done. This principle is derived from the latin maxim

"ratihabitio mandato aequiparatur" meaning thereby a subsequent ratification of an act is equivalent to a prior authority to perform such act. It is for this reason, the ratification assumes an invalid act which is retrospectively validated. As such the moment agency deed and the transaction struck on its basis was ratified by Sadhu in his life, the chapter was closed for all times to come.

Apart from what has been discussed so far, Sadhu, predecessor-in-interest of petitioners, survived for 15 years after the attestation of subject mutation, but during all this period, he neither asked the beneficiary to vacate the property nor impugned the mutation through initiation of any proceedings, meaning thereby that he himself acknowledged through his conduct and silence that the property had already been sold by him in favour of respondent No.1 and, therefore, he had no concern, right or interest therein. Obviously in such facts and circumstances, his conduct was sufficient to prove that he was not claiming the ownership of the property and, therefore, was estopped in terms of Article 114 of the Qanun-e-Shahadat Order, 1984. Consequently, no valid locus standi would pass on to his son as well as grandson for demanding ownership of suit land. See Abdul Haq and another v. Mst. Surrya Begum and others (2002 SCMR 1330), Kala Khan and others v. Rab Nawaz and others (2004 SCMR 517), Muhammad Rustam and another v. Mst. Makhan Jan and others (2013 SCMR 299), Ghulam Abbas and others v. Mohammad Shafi through LRs and others (2016 SCMR 1403) and Nasir Fahimuddin and others v. Charles Philips Mills and others (2017 SCMR 468).

The other aspect of the case was that the disputed mutation was attested in the year 1973, whereas the suit in hand was instituted in 2001 after an elapse of almost 28 years and the same was badly time barred. There is unanimity of the view among the superior courts that because of the mandatory nature of section 3 of the Limitation Act, 1908, the court before which any suit, appeal or application is instituted, preferred or made beyond the statutory period is obliged to dismiss the same. The jurisdiction of a court is always dependent on law of limitation. If the proceedings before the court are propelled beyond the scope of limitation, it cannot assume jurisdiction. There is no second opinion that law of limitation, which is statute of repose, is intended to quit title and to bar, stale and water logged disputes must be stringently followed and the courts cannot desist from applying the said law. After the expiry of prescribed period, the door of justice is closed and no plea of scarcity, anguish, ignorance or mistake can be availed. So the learned lower appellate court was perfect to declare that the suit was filed beyond the prescribed period of limitation.

6. It is also recognized till now that in case of variation between the judgments of learned Trial Court and the learned lower Appellate Court, the findings of the latter must be given preference in the non-existence of any persuasive reason to the contrary as has been held by the apex Court in the judgments reported as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617),

Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs and others (2013 SCMR 1300) and Amjad Ikram v. Mst. Asya Kausar and 2 others (2015 SCMR 1). The learned counsel for petitioners is unable to point out any irregularity or illegality as well as misreading and non-reading of evidence committed by the learned lower Appellate Court while passing the impugned judgment, which is not open to any exception by this Court in exercise of revisional jurisdiction, hence this Civil Revision being devoid of any merit is dismissed accordingly. No order as to costs.

ZC/N-22/L

Petition dismissed.

2020 C L C 10
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
SHUMAILA MEHMOOD----Petitioner
Versus
ADDITIONAL DISTRICT JUDGE and 4 others----Respondents

Writ Petition No. 42763 of 2019, decided on 11th July, 2019.

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

----O. XVI, R.1---Presentation of list of witnesses within seven days after settlement of issues---None of the parties filed its list of witnesses within statutory period of seven days---Application of respondent already allowed and witnesses summoned---Application of petitioner for the same purpose was dismissed---Validity---Held, that admittedly petitioner was allowed to submit list of witnesses beyond the provided time, therefore there was sufficient reason to also allow the respondent to submit list of witnesses---Discretion exercised in such behalf in favour of respondent was neither arbitrary nor whimsical---Petition being meritless was dismissed.

Gulistan Textile Mills Ltd. and another v. Soneri Bank Ltd and another PLD 2018 SC 322; The Australasia Bank Ltd. v. Messrs Mangora Textile Industries, Swat and others 1981 SCMR 150; Agha Zahid Ali Hilali v. Muhammad Riaz and others C.P. No.1278 of 2013 and Mst. Musarrat Bibi and 2 others v. Tariq Mahmood Tariq 1999 SCMR 799 ref.

(b) Constitution of Pakistan---

----Arts. 189 & 185(3)---Binding effect of decision/judgment of Supreme Court---Order refusing petition for leave to appeal did not lay down any law---Such order could not be termed as decision/judgment having binding effect under Art.189 of the Constitution.

Haji Zarwar Khan through L.Rs. v. Haji Rehman Bangash and others 2016 SCMR 1976 rel.

(c) Constitution of Pakistan---

----Art. 189---Judgment of larger Bench of the Supreme Court---Preference---Judgment delivered by larger Bench was to be given preference.

Dr. Professor M.A. Cheema, Surgeon, PIC, Lahore v. Tariq Zia and others 2016 SCMR 119 and Faiz ur Rehman v. Haji Yaz Mir and 5 others 2013 YLR 950 rel.

Aamir Iqbal Basharat, Ch. Saeed Zafar and Umair Yasin Khan for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.----Through the suit under this writ petition, it was averred by the petitioner/plaintiff that her husband being one of the members of the Housing Society/respondent No.4 had applied for allotment of plot, who after due scrutiny was found eligible and on his request, suit plot was allotted to petitioner/plaintiff by accepting certain amount; that thereafter utility connections were also installed on her request; that in 2007 defendant No.1/respondent No.3 tried to interfere into the possession of the petitioner compelling her earlier to institute suit for permanent injunction, when it was disclosed that not only vide sale deed dated 25.11.2004, subject plot had been alienated to respondent No.3 by one Ch. Muhammad Khan besides transfer letter was issued and site plan also sanctioned, therefore, the petitioner approached the civil court for the confirmation of her title as well as cancellation of above referred documents, which was contested by the other side. As a result of variant pleadings, initially issues were settled on 02.03.2016, whereas additional issue 9-A was struck on 21.09.2017, but none of the parties filed its list of witnesses within the statutory period at either of the occasion, however, despite said omission, the petitioner subsequently was allowed to summon the Record Keeper of respondent No.4. Thereafter, application tabled by respondent No.3 seeking permission to file list of witnesses was also allowed by the learned trial court on 18th March, 2019, which despite being assailed before the revisional court was not disturbed, compelling the petitioner to approach this court for setting aside of the concurrent orders through this petition.

2. Heard.

3. Leaving aside the merits of the case for a while, Civil Procedure Code, 1908 being the general law had been enacted for the dispensation of substantial justice among the parties to the lis after affording them right of audience. This law has two parts; substantive and procedural. The former part deals with the rights of the litigants, whereas the latter one defines the mechanism of proceedings/trial till its culmination, the utmost object whereof is to foster justice and frustrate hurdles in the administration of justice. When this philosophy of the law makers repeatedly interpreted by the Superior Courts was confronted to learned counsel for the petitioner, he while relying upon case law reported as 'Muhammad Anwar and others v. Mst. Ilyas Begum and others' (PLD 2013 Supreme Court 255) and 'Haji Zarwar Khan through L.Rs. v. Haji Rehman Bangash and others' (2016 SCMR 1976) emphasized that as per Article 189 of the Constitution, the decisions made therein were binding on the subordinate courts, but they erroneously omitted to consider the same through impugned orders while allowing the contesting respondent to submit her list of witnesses despite the fact that it was not only beyond statutory period, but also lacked probable cause. Undeniably, the orders in the referred cases were passed by the august Supreme

Court while refusing petitions for leave to appeal, which did not lay down the law and could not be termed as decision/judgment having binding effect under Article ibid. See 'Gulistan Textile Mills Ltd. and another v. Soneri Bank Ltd and another' (PLD 2018 Supreme Court 322). Moreover, in Haji Zawar's case (supra), while dismissing the petition, the apex court also allowed the applicant to approach the learned trial court through a proper application under rule 2 of Order XVI of the Code, 1908, meaning thereby the defaulted party was provided another chance to again get a favourable order. It is also pertinent that in case law quoted on behalf of the petitioner, orders were passed by the Hon'ble Benches of the apex court comprising of two Judges each, but earlier to these, a larger Bench of the same court in appeal reported as 'The Australasia Bank Ltd. v. Messrs Mangora Textile Industries, Swat and others' (1981 SCMR 150) had already ruled that if reasonable explanation is given and no prejudice is caused to the opposite-party in its defence and the court is also not unduly inconvenienced, the party's evidence should not be shut out for its failure to file the list of witnesses within seven days of the framing of the issues. Admittedly, while rendering their views in the cases cited by the learned counsel for the petitioner, the afore-noted prior verdict of the larger Bench of their court was not apprised to their Lordships. It is also pertinent to note that in another recent case reported as 'Dr. Professor M.A. Cheema, Surgeon, PIC, Lahore v. Tariq Zia and others' (2016 SCMR 119), three members of Hon'ble Bench of the apex court while allowing the appeal, set aside the order passed by this court and restored that of learned civil court whereby the party was permitted to submit the list of witnesses beyond the provided period concluding therein that the latter fora was justified in exercising its discretionary jurisdiction. As per well settled principle of law that the judgment delivered by a larger Bench has to be given preference, reliance can be placed upon case reported as 'Faiz ur Rehman v. Haji Yaz Mir and 5 others' (2013 YLR 950), hence, the case law relied upon by learned counsel for the petitioner with respect deserves to be distinguished. The additional relevant factor for my views would be that the apex court itself in an unreported judgment passed in C.P. No.1278 of 2013 styled 'Agha Zahid Ali Hilali v. Muhammad Riaz and others' wherein Muhammad Anwar's case (supra) cited by the petitioner and earlier judgment of the same court styled 'Mst. Musarrat Bibi and 2 others v. Tariq Mahmood Tariq' (1999 SCMR 799) were also referred, concluded that omission on the part of counsel for the defaulting party due to his inexperience or lack of understanding, could not be considered a ground to refuse him to summon the witnesses. In such background, when it is admitted that present petitioner was allowed to summon a witness, whose name was cited in the list of witnesses submitted beyond provided days, there was sufficient reason to allow the adversary to submit her list of witnesses. The discretion so exercised in this behalf is neither arbitrary nor whimsical, which indeed has been performed in aid of justice and by doing so, the justice is not only done, but it is seen that it has been done.

4. No case of interference is made out, rather against the order of Revisional Court, especially when an interlocutory order of the subordinate fora is affirmed, the Constitutional Petition is not maintainable, hence, the unanimous orders of the learned courts below, which otherwise being based on reasonings are approved and this Petition being meritless is hereby dismissed in limine.

MFB/S-63/L

Petition dismissed.

2020 C L C Note 1
[Lahore (Bahawalpur Bench)]
Before Ch. Muhammad Masood Jahangir, J
Mst. ZENAB BIBI---Petitioner
Versus
AHMAD YAR---Respondent

C.R. No. 17-D of 2012, heard on 16th May, 2018.

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

----S. 12---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Agreement to sell---Material contradictions---Withholding best evidence---Non-production of Register of Stamp Vendor--- Effect---Plaintiff filed suit for specific performance of contract--- Trial Court and appellate court concurrently decreed the suit of plaintiff---Validity---Plaintiff and marginal witnesses had failed to disclose the date of transaction---Plaintiff, contrary to his plaint, deposed that defendant after settling oral contract had fled away, where on having been approached she executed the agreement---Plaintiff had disclosed in his statement that transaction was struck at court premises of "H", but one of the marginal witnesses had stated that sale was settled at place "BK"---Disparity with regard to venue among witnesses could neither be treated as minor contradiction nor it could be lightly ignored---Plaintiff and an attesting witness had stated during cross-examination that the day when stamp paper was purchased, not only advance amount was paid rather contract was also written then and there---Agreement to sell revealed that stamp paper was issued by the Stamp Vendor, three days prior to the date of its drafting---One of the marginal witnesses had admitted that bargain was settled by the plaintiff before their arrival---Marginal witnesses were not residents of the locality---CNIC numbers of the plaintiff and marginal witnesses were not entered either by the Scribe or by the Stamp Vendor---Plaintiff had not disclosed as to who identified the defendant before the Vendor and the Scribe---Register of Stamp Vendor had not been produced rather it was deliberately withheld, as such adverse inference had to be drawn that had the same been examined that would have proved the allegations of defendant---Verdicts of courts below, being outcome of misreading and non-reading of evidence on record, were illegal, unlawful and coram non judice, which could not be sustained in the eyes of law---Civil revision was allowed, judgments and decrees of the courts below were set aside, in circumstances.

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

----S. 12---Agreement to sell---Pardanashin lady---Scope---Vendor filed suit for specific performance of contract against pardanashin lady---Vendee, admittedly, was an ignorant and illiterate lady, who specifically denied settlement of bargain as well as receipt of consideration and in such a scenario, it was sine qua non for the beneficiary/vendor to have established that vendee voluntarily settled the

transaction and that she had independent advice with full knowledge and import of what the transaction was meant for---Vendor and a marginal witness of the agreement to sell stated in their cross-examination that the vendee was generally in the company of male, but said male person was not associated when the agreement to sell was constructed---High Court held that such contract and transaction could not be given any weight.

Mt. Farid-un-Nisa v. Munshi Mukhtar Ahmad and another AIR 1925 PC 204; Chainta Dasya v. Bhalhu Das AIR 1930 Cal. 591; Jannat Bibi v. Sikandar Ali and others PLD 1990 SC 642; Mian Allah Ditta through LRs v. Mst. Sakina Bibi and others 2013 SCMR 868; Ghulam Farid and another v. Sher Rehman through LRs 2016 SCMR 862 and Phul Peer Shah v. Hafeez Fatima 2016 SCMR 1225 ref.

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

----S. 12---Agreement to sell---Burden of proof---Agreement to sell neither generates nor quenches right, title or interest in the immovable property---Beneficiary has to prove its valid execution as well as transaction.

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

----O. VI, R. 2 & O. VIII, R. 2--- Pleadings to state material facts and not evidence---New facts must be specifically pleaded in written statement---Maxim: Secundum allegata et probata---Scope---Where any fact is not asserted in the pleadings then no evidence can be led to prove it, however, even if recorded, that has to be ignored---Fact has to be pleaded first in the plaint or written statement by a party before it is allowed to be proved.

Pakistan v. Abdul Ghani PLD 1964 SC 68 and Hyder Ali Bhimji v. VIth Additional District Judge, Karachi and another 2012 SCMR 254 ref.

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

----S. 115---Revisional jurisdiction---Concurrent findings---Scope---Scope of interference in the concurrent findings of the courts below while invoking S. 115, C.P.C. is limited---Such findings can be disturbed by High Court, if the courts below has either misread the evidence on record or while assessing evidence has omitted from consideration some important piece of evidence, which has direct bearing on the issue involved.

Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others 2014 SCMR 914 and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 ref.

(f) Administration of justice---

----Duty of court---Court cannot pass an order of its liking, solely on the basis of its vision and wisdom, rather it is bound and obligated to render decisions in accordance with law and law alone.

Muhammad Saleem Faiz for Petitioner.

Shah Muhammad Khokhar for Respondent.

Date of hearing: 16th May, 2018.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Instant Civil Revision has been filed by lady petitioner to throw challenge on concurrent judgments and decrees dated 08.09.2009 and 23.11.2011 rendered by the Courts below, whereby suit for specific performance of agreement instituted against her by the respondent was decreed and appeal of the former failed.

2. In concision, facts of the case were that petitioner was exclusive title holder of the suit plot situated in urban area of Bahawalnagar. The respondent with regard to it instituted suit for specific performance of contract on 14.07.2005, contending therein that he purchased the disputed plot against consideration of Rs.60,000/- and after making payment of Rs.50,000/-, not only the contract dated .10.01.2003 (Exh.P1), was scribed, but the possession also changed hands in his favour before the witnesses. For ease, it would be better to reproduce his stance as disclosed in para-1 of the plaint, which is as under:-

It was also pleaded in para-2 that not only personally, rather through Punchayat, efforts were made to pay the rest of the sale price, but the promisor was found to be reluctant, forcing the promisee/respondent to approach the Court for having a decree of performance of his contract (Exh.P1). The petitioner defended the suit through her written statement alleging therein that she neither ever settled a bargain nor received advance amount. She also claimed that Exh.P1 was a fake, forged and fictitious document, which was prepared collusively to deprive her of the valuable property. She in the inception of the litigation specifically highlighted the factors in her pleadings to prove that Exh.P1 was a counterfeited document for the counts; firstly, that had the bargain been settled on 10.01.2003, there was no occasion to purchase the stamp paper of Exh.P1 three days prior to its execution and secondly that the respondent was even not aware of the name of her husband, who disclosed the name of her ex-husband in spite of that he had divorced her five years prior to alleged contract, whereas prior to the day of alleged execution of contract, she had already contracted second marriage with Muhammad Arshad, but disclosure of petitioner being wife of a person, who was no more her husband, was a solid proof that the contract was fakely constructed. After settlement of issues both the parties led evidence, however it was achy for me to observe that both the Courts below without sensing the pleadings and evidence of the parties in its true perspective rendered their concurrent findings

in favour of respondent in complete derogation of Order XX, rule 5 as well as Order XLI, rule 31 of the Code, 1908 and it was very simple for this Court to remand the suit on this count, but having entire material before me, I opted to decide it on merit at my end rather than to throw the parties to face agony of another round of litigation.

3. Arguments heard and record perused.

4. There is no cavil to conclude that agreement to sell (Exh.P1) neither generates nor quenches right, title or interest in the immovable property and being beneficiary, it was imperative upon respondent to have proved its valid execution as well as transaction cited therein. As observed supra, it was the claim of respondent that bargain was settled on 10.01.2003 and advance amount was paid then and there and in lieu thereof possession changed hands before the witnesses, but the respondent/beneficiary being PW2 omitted to disclose the date of transaction in his statement-in-chief and when he was specifically questioned about it in his cross-examination, he again failed to tell the date when the sale was struck. The position of the marginal witnesses of the agreement was also not different. Among them, Muhammad Khan (DW3) mentioned that about seven years earlier, it was settled, whereas the other Baqir Ali (PW4) uttered that six or seven years prior to his deposition, the sale was struck. When, every concerned signatory is found to be unaware of the date, month and year of the transaction besides writing of the document relating to it, then how discretionary relief against an ignorant and illiterate lady, who from the day first after the commencement of trial was calling it a fictitious and forged document could be awarded. Moreover, rest of his (PW2) entire statement to the effect that petitioner after settling the oral contract fled away with Muhammad Arhsad to Haroon Abad, where on having been approached by him along with witnesses, she agreed to execute the agreement, which was scribed there, was contrary to the contents of his plaint. It is well settled proposition of law that if any fact is not asserted in the pleadings, then no evidence can be led to prove it, however, even if recorded, that has to be ignored as per principle of "secundum allegata et probata", which means that a fact has to be pleaded first in the plaint or written statement by a party before it is allowed to be proved. This Principle is enunciated by Order VI, rule 2 and Order VIII, rule 2 of the Code 1908, which has also been affirmed by the apex Court in judgments reported as Pakistan v. Abdul Ghani (PLD 1964 SC 68) and Hyder Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another (2012 SCMR 254).

This was again surprising that respondent for the first time disclosed in his statement that transaction was spontaneously struck through Ghulam Ali at Court premises of Haroon Abad, but one of the marginal witnesses, Muhammad Zaman (PW3) antipodal to the 'plaintiff (PW2) stated that sale was settled at Basti Khatal. The disparity with regard to venue among them could neither be

treated as minor contradiction nor it can be lightly ignored. Moreover, not only plaintiff (PW2) rather the other attesting witness, Baqir Ali (PW4) in their cross-examination exposed that the day when stamp paper was purchased, not only advance amount was paid, rather contract was also written then and there, but this fact was totally negated by the agreement (Exh.P1), the recital of which proved the stance of the petitioner that its stamp paper was issued by the Stamp Vendor on 07.01.2003, whereas it was scribed on 10.01.2003. This glaring contradiction was sufficient to disbelieve the case of respondent. Baqir Ali (PW4) was also fair enough to depose that bargain was settled by the plaintiff before their arrival. Both of the marginal witnesses (PWs.3 and 4) were not residents of the locality either where the vendor resided or the suit plot was located and even where the contract was executed.

5. The other setback of the case was that admittedly contract was neither scribed by a regular Deed Writer nor signed by the person, who wrote it. Moreover, the Scribe was also not examined, however, on query it was disclosed by learned counsel for the respondent that he had already passed away, but he was forced by the record to admit that none familiar with his writing was summoned as per requirement of Article 80 of the Order, 1984. The bare perusal of agreement was again an affirmation that CNIC numbers of the vendor and the alleged marginal witnesses were not entered on it either by the Scribe or by the Stamp Vendor, who issued its stamp paper. It was kept in dark by the respondent who identified the lady before the Vendor and the Scribe. Now there left statement of Muhammad Anwar, (PW1), the Stamp Vendor, despite the fact that he explicitly disclosed that relevant Register was consigned to Record Room after its due completion, it was not summoned through the Record Keeper concerned. It could be the best independent documentary record to authenticate the issuance of stamp paper to the petitioner to rebut her allegation that she did not appear before the Vendor for its purchase, but it was deliberately withheld, as such adverse inference was to be drawn, had it been examined that would have proved the allegations of the petitioner.

6. The other salient feature of the case was that admittedly petitioner was ignorant and illiterate lady, who specifically denied settlement of bargain as well as receipt of consideration and in such scenario, it was sine qua non for the beneficiary/respondent to have established that petitioner had independent advice, who settled the transaction voluntarily with full knowledge and import of what the transaction was meant for. The argument of learned counsel for the respondent that petitioner was not parda observing lady and as such she was not entitled for the treatment extended to such class was not well founded. The petitioner being ignorant as well as illiterate lady was to be equated with pardanasheen lady and equally entitled for the same treatment, which is available to such group of women. Despite the fact that PW2 and PW4 stated in their cross-examination that the petitioner was in the company of a male, but he was not associated elsewhere, when Exh.P1 was constructed. As such contract

and the transaction being militant to the judgments of the superior Courts rendered in the cases reported as Mt. Farid-un-Nisa v. Munshi Mukhtar Ahmad and another (AIR 1925 PC 204), Chainta Dasya v. Bhalku Das (AIR 1930 Cal. 591), Jannat Bibi v. Sikandar Ali and others (PLD 1990 SC 642), Mian Allah Ditta through LRs v. Mst. Sakina Bibi, and others (2013 SCMR 868), Ghulam Farid and another v. Sher Rehman through L.Rs (2016 SCMR 862) and Phul Peer Shah v. Hafeez Fatima (2016 SCMR 1225) could not be given any weight.

7. At the fag end of his arguments, stress of learned counsel for respondent/plaintiff that concurrent findings recorded by both the Courts below cannot be interfered with by this Court while invoking jurisdiction under section 115 of the Code, 1908, is also without any force. Although, the scope thereof is limited, but such findings can be disturbed by this Court, if Courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such conclusion this Court is fortified by the dictum laid down in the judgments reported as Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others (2014 SCMR 914) and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others (2016 SCMR 24). It is obvious and clear that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. Even otherwise it has also been held by the Superior Courts that a Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it was bound and obligated to render decisions in accordance with law and the law alone. So, this Court can decide, in which cases, the interference is warranted.

8. In such facts and circumstances, it can safely be concluded that both the Courts below while misconstruing the evidence of the parties to the lis decreed the suit of respondent, who designed Exh.Pl to deprive the landlady of her valuable property and -verdicts of the Courts below being classic example of misreading and non-reading of the evidence on record are illegal, unlawful and coram non judice, which cannot be sustained in the eye of law. Resultantly, instant Civil Revision is allowed, impugned judgments and decrees of the Courts below are set aside and the suit of respondent is dismissed with costs throughout.

SA/Z-16/L

Petition allowed.

PLJ 2020 Lahore (Note) 9
[Multan Bench, Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J**
MUHAMMAD KHAN--Petitioner
Versus
GHULAM FATIMA etc.—Respondents

C.R. No. 264-D of 2001, decided on 16.6.2015

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

---S. 9--Punjab Pre-emption Act, 1991, Ss. 35 & 35(2)--Suit for possession through pre-emption--Decreed--Appeal--Dismissed--Purchase of land--Oral sale mutation--Talb-i-Muwahibat--Talb-i-Ishhad--Non-pleading of names of witnesses, venue, date and time--Right of pre-emption--Challenge to--I have noticed that not only contents of plaint but also statements of PWs are deficient to plead and prove performance of requisite demands as per law--Absence of mentioning necessary details with regard to time, date, place and names of witnesses to explain that when, where and in whose presence first demand was fulfilled, has already been declared fatal by apex Court in plethora of judgments and in presence of said dicta impugned judgments and decrees passed by Courts below are not sustainable in eye of law--Hence, findings of both courts below to this extent are not sustainable, which are hereby reversed and issue No. 2 is answered against pre-emptor--As pre-emptor failed to cross barrier of performance of requisite Tabls, so I need not to dilate my findings on others issues, which will be sheer wastage of time--Civil revision was accepted. [Para 8] A

PLD 1994 SC 1 *ref.*

Mr. Muhammad Bilal Masood, Advocate for Petitioner.

Syed Muhammad Ali Gillani, Advocate for Respondents.

Date of hearing: 16.6.2015

JUDGMENT

By filing the instant civil revision the petitioner (hereinafter to be referred as vendee) has challenged the judgment and decree dated 04.5.1995 passed by the learned Senior Civil Judge, Vehari whereby the suit for possession through pre-emption brought by Muhammad Yousaf deceased, the predecessor-in-interest of the respondents, (hereinafter to be referred as pre-emptor) against the vendee was decreed as well as the judgment and decree dated 8.2.2001 delivered by the learned Additional District Judge, Vehari by virtue of which the appeal filed by the vendee was dismissed.

2. The brief facts necessary for the adjudication of the lis in hand are that Muhammad Yousaf pre-emptor brought a suit for possession through pre-emption

against the present vendee in respect of suit land measuring 10 kanals 11 marks situated in Chak No. 53/WB Tehsil & District Vehari which was purchased by the vendee through oral sale mutation No. 346 dated 5.3.1989. The said suit was concurrently decreed by the learned Courts below vide judgments and decrees referred in para-1 ante, which have been assailed by the vendee through the instant civil revision.

3. The learned counsel for the vendee has argued that the requirements of Talbs were not fulfilled by the pre-emptor in accordance with law and that major contradictions are reflected in the statements of PWs which have been ignored by the Courts below while exercising wrong jurisdiction. He has further contended that mutation in dispute was attested on 5.3.1989 while the suit was filed on 21.12.1989 and in the plaint time, place and names of witnesses in respect of performance of Talbs were not mentioned. It is further submitted by him that the instant suit was filed in the interregnum period when the Punjab Pre-emption Act of 1913 had ceased to exist in view of the judgment of the Shariat Appellate Bench of the apex Court reported as *Government of N.W.F.P. through Secretary, Law Department vs. Malik Said Kamal Shah* (PLD 1986 SC 360) and before the Punjab Pre-emption Ordinance, 1990 was promulgated, hence, the suit was to be proceeded in accordance with the classical Islamic Law inclusive of the requirements of Talb-i-Muwathibat and Talb-i-Ishhad. He while relying upon the judgment reported as *Muhammad Ali and 7 others vs. Mst. Humera Fatima and 2 others* (2013 SCMR 178) has added that Section 35 of the Punjab Pre-emption Act of 1991, does not preclude the necessity of Talb-i-Muwathibat as Talb-i-Ishhad presumes an earlier Talb-i-Muwathibat and merely re-affirms the same and that the pre-emptor failed to plead Talb-i-Muwathibat with the requisite particulars as to time, date and place nor proved the same in evidence as per mandate of law. He has lastly prayed for acceptance of the instant civil revision, setting aside of the impugned judgments and decrees and for dismissal of the suit filed by the pre-emptor.

4. The learned counsel for the pre-emptor has controverted the arguments advanced by the learned counsel for the vendee with the assertion that the case in hand is fully covered by the provisions of Section 35(2) of the Punjab Pre-emption Act of 1991 and in this behalf pre-emptor was only required to establish Talb-i-Ishhad in respect whereof the necessity of issuing notice was dispensed with. He has further contended that the evidence available on record fully proved the performance of Talb-i-Ishhad as per mandate of above referred provisions of law. He has lastly prayed for dismissal of the instant civil revision.

5. ***Arguments heard and record scanned.***

6. The copy of plaint is available at page 11 of the instant file and no doubt the pre-emptor asserted in para-5 of the plaint that he had not only performed Talb-i-Muwathibat but also Talb-i-Ishhad. It is significant to note that no time, date, venue and the names of witnesses were pleaded in the plaint to explain that when, where and before whom the said demands were fulfilled. The said suit was filed by the

pre-emptor on 21.12.1989 and admittedly no law of pre-emption was in progress on the said crucial date, hence the suit was required to be filed in accordance with the classical Islamic Law of pre-emption wherein performance of Talb-i-Muwathibat was sine qua non for exercising a right of pre-emption. Reliance in this respect is placed upon the judgment reported as *Haji Rana Muhammad Shabbir Ahmad Khan vs. Government of Punjab Province, Lahore* (PLD 1994 SC 1).

7. It is also noteworthy that during the pendency of the suit the Punjab Pre-emption Act of 1991 came into force. No doubt, as per Section 35 of the said Act, only Talb-i-Ishhad while dispensing with notice was the only requirement to enforce the pre-emptive right. Among others the provision of said section was also challenged on the ground of being repugnant to the injunctions of Islam and Section 35(2) of the Punjab Pre-emption Act of 1991 was declared to be against the injunctions of Islam in so far as it exempts the cases pending or instituted during the period from 1.8.1986 to 28.3.1990 from the requirement of Talb-i-Muwathibat and extends the right of limitation for them up to one year. The instant suit for pre-emption filed by pre-emptor was decreed for the first time on 4.5.1995 and prior to the said decree, the judgment reported as *Haji Rana Muhammad Shabbir Ahmad Khan vs. Government of Punjab Province, Lahore* (PLD 1994 SC 1) took effect on 31.12.1993, which is fully applicable to the instant case and the pre-emptor was under obligation to plead and prove Talb-i-Muwathibat in order to obtain a decree for pre-emption both in terms of classical Islamic Law as well as the Punjab Pre-emption Act, 1991. The similar question has already been clinched by the apex Court in the judgment reported as (2013 SCMR 178) and paragraphs No. 7 to 10 are relevant, which are reproduced hereunder:

> *"7. With regards to the necessity of pleading the requisite details of Talb-i-Muwathibat, the matter recently yet again came up before this Court. After noting and quoting the previous judgments of this Court on the point including, Pir Muhammad v. Faqir Muhammad (PLD 2007 SC 302), Bashiran Begum v. Nazar Hussain (PLD 2008 SC 559), Haq Nawaz v. Muhammad Kabir (2009 SCMR 630) and Ghafoor Khan v. Israr Ahmed (2011 SCMR 1545), this Court in its judgment, reported as Muhammad Ismail v. Muhammad Yousaf (2012 SCMR 911), held as follows:*
>
> > *"4. Having heard learned counsel for the petitioner at some length, we find that a bare reading of para 2 of the plaint in the suit filed by the petitioners/pre-emptor indicates that petitioner did mention that he came to know about the impugned sale on 5-3-1996 and immediately declared that he would preempt but neither mentioned the place where he acquired knowledge of the sale nor the time or the witnesses in whose presence he performed Talb-i-Muwathibat."*
>
> *8. We have examined the plaint in the instant case in the light of the requirement of pleading Talb-i-Muwathibat with the necessary details and*

particulars and find that the same does not fulfil the criterion laid down by this Court quoted above. The absence of the necessary details with regard to time, date and place and the witnesses in whose presence Talb-i-Muwathibat was made was fatal to the suit, as was correctly held by the trial Court and the First Appellate Court.

9. Furthermore, not only Talb-i-Muwathibat has to be pleaded in the plaint with the requisite details and particulars, but also has to be proved through cogent evidence. After appraisal of the evidence of the record, the trial Court returned a finding that the Talb-i-Muwathibat has not been proved. The said finding was affirmed by the First Appellate Court. This concurrent finding of fact has been upset in the limited jurisdiction of a Second Appeal without any legal or factual basis. In the impugned judgment no misreading or non-redding of evidence or misapplication of law, pertaining to evidence has been mentioned. Consequently, there was no occasion to set aside the concurrent findings of fact.

10. In view of the above, Talb-i-Muwathibat having neither been pleaded in accordance with law nor proved in evidence, the suit filed by the respondents could not succeed. Thus, the impugned judgment dated 13.2.2007, is not sustainable in law on this ground alone, hence, the others contentions raised by the learned counsel for the appellants need not be adjudicated upon."

8. The parameters formulated by the apex Court in the above referred case regarding the suits filed during the interregnum period are fully applicable in the present case. I have noticed that not only the contents of the plaint but also the statements of PWs are deficient to plead and prove performance of the requisite demands as per law. The absence of mentioning the necessary details with regard to time, date, place and names of witnesses to explain that when, where and in whose presence the first demand was fulfilled, has already been declared fatal by the apex Court in plethora of judgments and in presence of said dicta the impugned judgments and decrees passed by the Courts below are not sustainable in the eye of law. Hence, the findings of both the courts below to this extent are not sustainable, which are hereby reversed and issue No. 2 is answered against the pre-emptor. As the pre-emptor failed to cross the barrier of performance of requisite Tabls, so I need not to dilate my findings on others issues, which will be sheer wastage of time.

9. Consequently, the instant civil revision is ***accepted,*** the impugned judgments and decrees passed by both the courts below are hereby set aside and the suit for possession through pre-emption filed by the pre-emptor is dismissed with no orders as to costs.

(Y.A.) Civil Revision Accepted.

2020 C L C 768
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD SUMAK MALIK and anthers----Petitioners
Versus
MUHAMMAD ASIF KHAN and 3 others----Respondents

Writ Petition No.11256 of 2019, heard on 12th November, 2019.

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

----O. XL, R. 1---Receiver, appointment of---Object, purpose and scope---Custodia legis, principle of---On appointment of receiver by court, property comes into custody of court and passes into legal custody (Custodia legis)---Main object behind appointment of receiver is to preserve suit property and safeguard interest of true owner--- No doubt receiver is appointed to receive and preserve property or fund in litigation (pendente lite) when it does not seem reasonable to court that either party should hold it or where party is incompetent to do so--- Appointment of receiver is not to be made to prejudice case of either party in anyway--- Discretion is rested with court to make such appointment or not; it has to be exercised judiciously by following norms of justice, so as to protect rights of parties.

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

----O.XL, R.1---Receiver, appointment of---Prerequisites--- Remedy provided in terms of O.XL, R.1, C.P.C. by its very nature is onerous which is to be exercised providently.

Muhammad Usman v. Muhammad Shahbaz and 7 others 2007 MLD 1121 rel.

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

----Ss. 39, 42 & 54--- Civil Procedure Code (V of 1908), O. XXXVIII, R.5, O.XXXIX, Rr. 1 & 2, O.XL, R.1 & O.XLI, R.1---Suit for declaration, injunction, cancellation of document and recovery of money--- Appointment of receiver--- Attachment of property--- Plaintiff filed application for appointment of receiver and attachment of property before judgment regarding suit property---Applications were allowed by Trial Court and order was maintained by Lower Appellate Court---Validity---Trial Court could not to appoint receiver so as to oust defendants from use, command and control, particularly when plaintiff had already assessed his reparable loss in terms of specific amount--- Relief granted under order XXXVIII, R.5, C.P.C. or O.XXXIX, Rr.1 & 2, C.P.C. bore a similar analogy to that of appointment of receiver--- O. XXXVIII, R.5, C.P.C. or O.XXXIX, Rr. 1 & 2, C.P.C. were essentially preventive in nature having common object insofar as they required to preserve subject matter till final disposal of lis--- Receiver had no independent title to property thus it was sine

qua non for court to ensure rights of owners of subject property--- Though, in the present case, there were concurrent findings and court exercised restraint while interfering with such conclusion especially in Constitutional jurisdiction but such by itself was not rule of thumb--- Any illegality or perversity in proceedings of court below offending rights of litigants neither could be protected nor perpetuated--- Court could not shut its eyes only for reasons that unanimous orders were under challenge before it despite being illegal--- High Court set aside orders passed by two courts below as appointment of receiver was passed without reasoning and lawful authority and was not liable to sustain---Constitutional petition was allowed in circumstances.

Lala Roshan Lal v. Ch. Muhammad Afzal PLD 1949 Lah. 60; and Owen v. Homan 94 RR 516; Ayub Lambat (Advocate) v. Messrs Valika Properties (Pvt.) and another 2016 CLC (Note) 109 and Mst. Hifsa Naseer v. A.D.J. Gujar Khan and 3 others PLD 2017 Lah. 153 rel.

(d) Constitution of Pakistan---

----Art.199---Constitutional petition---Interlocutory order---Maintainability of petition---Constitutional petition against interim orders passed by courts below is not maintainable but such is not an absolute rule and case has to be dealt with keeping in view peculiar facts and circumstances---Where courts below on face of it proceed beyond jurisdiction vested to them same can be checked on having been noticed at such early stage to set right path instead of waiting for final culmination of lis.

Sh. Muhammad Siddiq v. Khurram Gulraiz and 2 others 1998 MLD 624; Robina Yasmeen and others v. Rana Javed Iqbal and others 2011 CLC 1779 and Khurram Farooq v. Bank Al-Falah Limited and another 2018 CLD 1417 rel.

Muhammad Sameer Iqbal Awan, Muhammad Aamir Javed Bhatti and Ch. Saeed Zafar for Petitioners.

Syed Muhammad Kaleem Ahmed Khursheed for Respondent No.1.

Mustafa Haroon for Respondent No.2.

Date of hearing: 12th November, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----In brevity, facts of the case were that respondent No.1 originally instituted suit only against respondent No.2 for declaration, cancellation of rent note and recovery of Rs.3,26,70,000/- along with permanent injunction. The suit was also accompanied by three applications; one for attachment of property, second with regard to grant of temporary injunction and third under Order XL, Rule 1 of the Code, 1908 for appointment

of receiver till final decision of the suit. The present petitioners while claiming themselves to be the exclusive owners of the disputed property tabled application under Order I rule 10 of the Code ibid for their impleadment in the group of defendants. The learned Trial Court vide order dated 18.10.2018 while confirming their title added them in the group of defendants. No doubt, some chances were afforded to all the petitioners as well as defendant No.1 to submit their written statements and the reply of the aforenoted applications, but needful was not done. The learned Trial Court on 14.12.2008 while closing right of reply/defence on one side restrained the petitioners from further alienation of the disputed property and on the other hand appointed Mr. Anjum Nazir, Advocate as receiver to collect rent of the demised premises from tenant/respondent No.2. Despite being assailed before the learned District Court, it was maintained and to call in question the order with regard to appointment of receiver, this constitutional petition has been preferred.

2. It is contended by learned counsel for the petitioners that impugned orders have been illegally passed without adverting to the principles set for the appointment of a receiver. According to him, there was no prima facie evidence and the respondent/plaintiff had no nexus with the disputed property. He while adding that on one side the petitioners/titleholders of the property were restrained from transferring the property, but on the other hand, through appointment of receiver they were deprived of their legitimate right to derive its fruits and especially when the respondent/plaintiff has already put forward claim for recovery of the specific amount, then there was no apprehension to cause any loss to him. In contra, learned counsel for the respondent No.1/plaintiff while referring to certain documents emphasized that his client also invested funds for the purchase of property and there created partnership, as such nothing wrong was committed by the Courts below in appointing the receiver. He further emphasized that constitutional petition was not maintainable against interlocutory order and during its exercise as well concurrent findings of fact recorded by Courts of competent jurisdiction cannot be disturbed.

3. I have gone through the record of learned Trial Court as well as the detail of proceedings conducted before it with the assistance of learned counsel for the parties.

4. It is settled proposition till now that on the appointment of receiver by the Court, the property comes into the custody of the Court. The property passes into legal custody (custodia legis), as such main object behind appointment of receiver is to preserve the suit property and safeguard the interest of the true owner. No doubt receiver is appointed to receive and preserve the property or fund in litigation pendente lite when it does not seem reasonable to Court that either party should hold it or where a party is incompetent to do so, but the appointment is not be made to prejudice the case of either party in anyway. The discretion always rested with the Court to make such appointment or not, but it

has to be exercised judiciously by following norms of justice, so as to protect the rights of the parties, whereas in case in hand, it is, indeed, shocking that learned Trial Court in first instance restrained the petitioners from creating charge of third party over the subject property and in second breath appointed the receiver, which is self-contradictory. Although learned Trial Court after considering some of the documents made available to it by the respondent No.1/plaintiff proceeded to appoint the receiver directing him to take over the affairs of suit property and to start collecting rent, but a bare perusal of impugned order would show that it omitted to consider the conditions laid down in this behalf. It has consistently been held that the remedy provided in term of Order XL, Rule 1 of the Code, by its very nature is onerous which is to be exercised providently. This Court in judgment reported as Muhammad Usman v. Muhammad Shahbaz and 7 others (2007 MLD 1121) has enumerated certain conditions for appointment of receiver, which for ready reference are reproduced as under:-

(i) A court is not to appoint a receiver except upon "proof" by the plaintiff that he has a prima facie chance of success in the suit;

ii). The plaintiff himself show a case of adverse and conflicting claims to the property;

iii). The plaintiff himself show some emergency or danger or loss demanding immediate action;

iv). A receiver shall not be appointed where it has the effect of depriving a defendant of a de facto possession as it will definitely cause irreparable loss; and

v). The conduct of the applicant is very much relevant. It has to be free from blame.

but sorry to say that Courts below have not, at all, adverted to any of the said conditions, especially in the case where the plaintiff neither established the specific instances of alleged wastage, mismanagement, misappropriation nor there was any urgency demanding immediate action. In case where the application under Order XXXVIII, Rule 5 for the attachment of the property was attended to and injunction with regard to further alienation of the disputed property was also awarded, there was no scope for the Trial Court to appoint the receiver so as to oust the petitioners from use, command and control, particularly when the respondent/plaintiff had already assessed his reparable loss in terms of specific amount. The relief granted under Order XXXVIII, Rule 5 or Order XXXIX, Rules 1 and 2 bears a similar analogy to that of appointment of receiver, as such, both are essentially preventive in their nature, having common object in so far as these require to preserve the subject matter till the final disposal of the lis. It is well established by now that receiver has no independent

title to the property, thus it was sine qua non for the Court to ensure the rights of owner of the subject property. The main principles upon which discretion provided by Rule 1 of Order XL should be rested have been laid in cases cited as Lala Roshan Lal v. Ch. Muhammad Afzal (PLD 1949 Lahore 60) and Owen v. Homan (94 RR 516). In former case, his lordship, as he then was, held as under:-

> The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation, which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of interim protection of the property. Where, indeed, the property is as it were in medio, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. (1) No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to anyone by taking it, and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the Court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case.

It is matter of record that plaintiff/respondent No.1, earlier instituted suit for permanent injunction, which for want of evidence was dismissed. An eviction petition before the Rent Tribunal was preferred as well, but this too failed, who has also instituted another suit to claim that he was actual owner, whereas the petitioners were mere benamidar, which independently is still sub judice and until and unless it is proved, there would be no scope for the Courts below to put caution on the fruit/control of the legitimate owner. It is also confirmed by learned counsel for defendant No.1/tenant that he was inducted in the premises by the petitioners and possession of the same has already been returned to them, which fact could also not be controverted by the respondent/plaintiff. In such situation, had there been any chance for the appointment of receiver, which otherwise in the case in hand is not proved, has lost its force.

4. It is correct proposition of law that constitutional petition against interim orders passed by the Courts below is not maintainable, but it is not an absolute rule and case has to be dealt with keeping in view peculiar facts and circumstances. In the instant lis the Courts below on the face of it proceeded beyond the jurisdiction vested to them, which can be checked on having been noticed at this early stage to set the right path instead of waiting for final culmination of the lis. See Sh. Muhammad Siddiq v. Khurram Gulraiz and 2 others (1998 MLD 624), Robina Yasmeen and others v. Rana Javed Iqbal and others (2011 CLC 1779) and Khurram Farooq v. Bank Al-Falah Limited and another (2018 CLD 1417). Though there are concurrent findings and this Court always exercises restraint while interfering with such conclusion especially in constitutional jurisdiction, but this by itself is not rule of thumb. Any illegality or perversity in the proceedings of the Courts below offending the rights of litigants neither can be protected nor perpetuated and this Court cannot shut its eyes only for the reasons that the unanimous orders were under challenge before it, despite being illegal. Reliance can be placed upon cases reported as Ayub Lambat (Advocate) v. Messrs Valika Properties (Pvt.) and another (2016 CLC (Note) 109) and Mst. Hifsa Naseer v. A.D.J. Gujar Khan and 3 others (PLD 2017 Lahore 153).

5. For the reasons discussed above, the impugned orders to the extent of appointment of receiver having been passed without reasoning and lawful authority are not liable to sustain, which are set aside by allowing instant constitutional petition.

MH/M-190/L

Petition allowed.

. **2020 C L C 792**

[Lahore High Court]

Before Ch. Muhammad Masood Jahangir, J

AMEER ABBAS SIAL---Appellant

Versus

PROVINCE OF PUNJAB---Respondent

R.F.A. No. 65999 of 2019, decided on 4th November, 2019.

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

----S.10 ---Punjab Land Revenue Act (XVII of 1967), S. 53---Civil Procedure Code (V of 1908), O. VII, R. 11--- Suit for declaration and injunction---Plaint, rejection of--- Jurisdiction of court---Alternate remedy---Plaintiff was allottee of suit property and was aggrieved of rejection of his plaint---Validity---Better course for plaintiff was to wait for decision of forum originally set up to deal with such grouses and after culmination of all remedies provided under Punjab Land Revenue Act, 1967 before same hierarchy, jurisdiction of civil court could definitely be invoked, if it was shown that orders passed by concerned authorities were excess or abuse of its jurisdiction---Statute provided proper procedure for grouse of petitioner who had rightly set it into motion before proper forum---Approach of Trial Court, leaving it unattended, was unwarranted whereas it should have been last resort---High Court declined to interfere in order passed by Trial court---Appeal was dismissed in circumstances.

Mian Sultan Ali Nanghiana v. Mian Nujr Hussain PLD 1949 Lah. 301; Sultan Ali Nanghiana v. Nur Hussain AIR (36) 1949 Lah. 131; Central Government through the Income Tax Officer, Dera Ismail Khan v. Sher Muhammad Khan and others PLD 1971 Pesh. 153; Abdul Aziz v. Syed Arif Ali and 6 others PLD 1978 Lah. 441 and Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others PLD 2018 SC 828 ref.

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

----O. VII, R. 11--- Rejection of plaint--- Suo motu powers of court--- Procedure--- If on examination of plaint, court comes to conclusion that suit is barred by some provisions of law or it does not disclose cause of action, then it is not only proper rather statutory duty of court to reject plaint; reasons being firstly, that a stillborn suit should be buried in its inception so that no further time is wasted on fruitless litigation; and secondly, that rejection of plaint of suit would give plaintiff a chance to retrace his steps at earliest possible moment--- Court is even empowered to reject plaint suo motu without there being an application filed by defendant so that incompetent suit would be taken off file--- Appellate court is vested with all powers conferred upon Trial court and appeal otherwise is continuation of original proceedings.

Muhammad Ali v. Province of Punjab and others 2005 SCMR 1302 rel.
Munawar-ul-Islam for Appellant.
Waqar Saeed Khan, AAG on Court's call for Respondent.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.----The appellant approached the Civil Court seeking declaration that being assignee of the original lessee was sub-tenant, who could not be termed as illicit possessee and was entitled to have purchased State land under his occupation after attestation of sale deed as per Government policy vide notification dated 01.11.2002. The suit was also accompanied by application for grant of temporary injunction, but ad interim injunction was refused by the said Court, compelling the appellant to approach learned District Court, which while dismissing the appeal also rejected his plaint, hence this appeal.

2. Inessential detail apart, it is the case of the appellant that initially State land measuring 400-kanals comprising square No.15 killa Nos.1 to 25 and square No.16 killa Nos. 1 to 25 under Bara Temporary Scheme had been allotted to one Zulfiqar Ali son of Humayun on 11.12.1961. Thereafter its tenancy rights were equally shared by said Zulfiqar Ali and his brother Mapal. As per terms and conditions of the scheme, subsequently out of said area, half of it in equal share was transferred to both the said brothers vide registered instrument dated 13.07.1980. After death of Mapal, one of the allottees/transferees, the father of the appellant vide mutation No.556 dated 29.01.2005, purchased 100-kanals unspecified area out of 400-kanals, who also occupied remaining part of the subject lot, as such to that extent he was recorded as illicit cultivator in the revenue record. After demise of his father, the appellant substituted him in such capacity, who firstly preferred applications to the District Collector for the transfer of rest of untransferred area to him besides he be recorded as sub-tenant in the relevant record, but without waiting for its result, he instituted suit in hand. The perusal of its plaint indicates that in substance the appellant sought for the determination of his entitlement to allot/transfer of remaining unallotted area of 200-kanals of the basic lot through the Civil Court. There is no gainsaying that originally it is the job of the authorities functioning under the Colonization of Government Lands Act,1912 to determine the merits or otherwise of entitlement of contender for grant of lease or conferment of proprietary rights of the State land. I am in agreement with Mr. Munawar-ul-Islam, Advocate to the effect that Tribunals of restricted jurisdiction cannot be judges of the fact and if order passed by them is without jurisdiction, the appellant will have to approach the Court of ultimate jurisdiction for scrutiny of such order, but if the practice of bypassing the special Tribunals constituted under special laws is allowed, then the basic aim for what the law was promulgated and rules were framed will become superfluous. For such intent and object, this Court is fortified by the dictum laid down in "Mian Sultan Ali

Nanghiana v. Mian Nujr Hussain" (PLD 1949 Lah. 301), wherein it was held that a special tribunal has been constituted under the Statute to decide the grouses of the aspirants, its jurisdiction to determine the question touching such rights shall be exclusive and the Civil Court would not be its substitute.

The only reason specified in the plaint by the appellant to directly approach Civil Court is that applications so made before the appropriate authority were not attended to can hardly be categorized as a legitimate reason to allow him to directly invoke jurisdiction of the Civil Court to seek relief for which his grouse is still sub judice before the competent authority. The basic rule is firstly to exhaust all the remedies provided by Statute within the same hierarchy. In cases reported as "Sultan Ali Nanghiana v. Nur Hussain" (AIR (36) 1949 Lahore 131), "Central Government through the Income Tax Officer, Dera Ismail Khan v. Sher Muhammad Khan and others" (PLD 1971 Peshawar 153) and "Abdul Aziz v. Syed Arif Ali and 6 others" (PLD 1978 Lahore 441), brought without first exhausting remedies at various tiers of the special hierarchy were held incompetent. Thus without having recourse thereto at first instance, the suit was barred and its continuation would otherwise amount to encourage availing of various remedies through collateral proceedings simultaneously, which again will be violative to the doctrine of election/selection, authoritatively elaborated by the apex Court in recent judgment reported as "Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others" (PLD 2018 SC 828). In such panorama, better course for the appellant was to wait for the decision of the forum originally set up to deal with such grouses and after culmination of all the remedies provided under the Act before the same hierarchy, the jurisdiction of the Civil Court could definitely be invoked, if it was shown that the orders passed by the concerned authorities were excess or abuse of its jurisdiction. This Court is cognizant of the fact that most of the institutions/forums/authorities are not performing vigilantly and matters of the litigants at that level are pending since long for its final adjudication, but for this sole attitude, the litigants cannot be allowed to approach the Civil Court while leaving their unattended matters to the said authorities. The Courts have been involved in most of the affairs likely to be decided by the others for slackness on their part and if such practice is allowed any more, then not only the workload on our side will multiply, rather the basic object of the promulgation of special laws and constitution of Tribunals in this behalf will also lose its importance. In such situation, this Court must appreciate that learned Additional District Judge took a correct view in rejecting the plaint at its inception.

3. Mr. Munawar-ul-Islam, Advocate while referring plethora of judgments of the superior Courts emphasized with great vehemence that lower Appellate Court erred in law to reject the plaint when neither was it seized of the suit nor plaint was before it. Suffice it to say that Order VII, rule 11 of the Code, 1908 confers wide powers on the Court to reject the plaint at any stage of its

proceedings. Indeed, if on examination of the plaint, the Court comes to the conclusion that suit is barred by some provisions of law or it does not disclose cause of action, then it is not only proper, rather statutory duty of the Court to reject the plaint and definitely there are reasons for it; firstly that a still born suit should be buried in its inception so that no further time is wasted on fruitless litigation and secondly that rejection of plaint of the suit would give the plaintiff a chance to retrace his steps at the earliest possible moment. There is no cavil to the proposition that the Court is even empowered to reject the plaint suo motu without there being an application filed by the defendant so that incompetent suit shall be taken off the file. It is again well established that Appellate Court is vested with all the powers conferred upon Trial Court and appeal otherwise is continuation of original proceedings. I am fortified by the dicta laid down by the Hon'ble Supreme Court in "Muhammad Ali v. Province of Punjab and others" (2005 SCMR 1302) wherein while covering identical situation in the similar facts and circumstances involved herein, the rejection of the plaint by the lower Appellate Court in appeal against interlocutory order with regard to stay matter was declared to be genteel and correct approach.

4. The next grouse agitated by the learned counsel that his client was not an encroacher, rather he was sub-tenant and at least to the extent of his second prayer for correction of revenue record, as per section 53 of the Land Revenue Act, 1967, the suit was perfect and plaint could not be rejected in parts is not well founded. During the course of arguments, learned counsel at his choice also presented copy of application dated 14.04.2006 addressed to District Officer (Revenue) seeking correction of entry of his status as cultivator in the revenue record, which is alleged to be still sub judice before the same authority, so once again, he admitted that his client had already approached the right forum for redressal of his grievance. Moreover, the moment, Mr. Munawar-ul-Islam produced copy of Challan, whereby amount of Rs.339375/- stood already deposited by the appellant against illicit cultivation, in fact, the existing status as recorded in the relevant record deemed to be admitted by him without any ambiguity and his emphasis that it was deposited under protest is not supported by the contents of said Challan.

5. The outcome of the discussion is that Statute provided proper procedure for resolution of grouse of the petitioner, who rightly set it into motion before the proper forum and leaving it unattended, the approach to the learned Civil Court was unwarranted, whereas it would be the last resort. In the given circumstances and for the reasons discussed hereinabove, the impugned order does not require any interference, which is approved by dismissing this appeal in limine.

MH/A-100/L

Appeal dismissed.

2020 C L C 849
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
SAKINA BIBI and another----Petitioners
Versus
ADDITIONAL DISTRICT JUDGE, PAKPATTAN SHARIF and 15 others----Respondents

Writ Petition No.79631 of 2017, heard on 25th November, 2019.

Civil Procedure Code (V of 1908)---

----S.12(2)---Setting aside of judgment on ground of fraud, misrepresentation etc.---Adjudication under S.12(2), C.P.C.---Petitioners, impugned in a constitutional petition, orders of courts below whereby their application under S.12(2), C.P.C. was dismissed concurrently---Petitioners sought setting aside of judgment on ground that a fake suit was instituted using their names---Validity---Advocate/counsel who allegedly represented petitioners in said suit was not made party to application under S.12(2), C.P.C. and was not prosecuted---Trial Court compared signatures of petitioners on plaint with the ones made on their application under S.12(2), C.P.C. and found the same identical---Impugned orders were therefore, based on valid reasons---Constitutional petition was dismissed, in circumstances.

Muhammad Ahmad Qayyum for Petitioners.
Shadab Hussain Jaffary, Addl. A.G. for Respondents Nos.3 to 5.
Muhammad Yasin Hatif for Respondent No.6.
Ch. Nasrullah Nasir Bhangu and Zubair Ahmad Virk for Respondent No.7.
Date of hearing: 25th November, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Inessential details apart, the present petitioners along with another instituted declaratory suit on 17.12.1999 to call in question orders of revenue hierarchy, which having been contested by the rival party, the formers were required to examine their evidence, but they failed and ultimately suit was dismissed for want of evidence on 12.01.2002. Thereafter, application for setting aside of said proceedings was tabled by the petitioners under section 12(2) of the Code, 1908 alleging therein that fake suit with their names was instituted, whereas at that very point of time they were not available, but both the learned Courts below being dissatisfied with their stance concurrently dismissed the said application as well as civil revision, hence this Constitutional Petition.

2. During course of arguments, learned counsel for the petitioners admitted that neither the Advocate, who represented the petitioners was made party to the application under section 12 (2) of the Code ibid nor he was prosecuted at any level. Moreover, learned Trial Court as per mandate of Article 84 of the Qanun-e-Shahadat Order, 1984 itself compared the signatures of the petitioners

available on plaint as well as margin of ordersheet and observed that those were identical to the one made on application under section 12(2) of Code ibid. The petitioners so far have not filed any application for its comparison, as such, the conclusion of learned Trial Court that suit was instituted by the petitioners is very much substantiated from the record. The perusal of the record also reflects that some of the co-applicants subsequently withdrew application under section 12(2) to their extent. Moreover, the rival parties were being represented by senior members of the local Bar and in absence of any solid evidence to shatter their credibility there was no reason to believe that they being connived with each other had conducted collusive proceedings of the suit at back of the petitioners against their interest. Most importantly, in the interlocutory order dated 02.01.2001 maintained in the said suit, both the petitioners were marked present along with their counsel and they also affixed their signatures, which is sufficient proof that the institution of the suit was not only very much in their knowledge, rather proceedings thereof were actively followed up by them.

3. In addition to above, on having been faced with the situation that if suit instituted by the petitioners is taken out of the scene, then the orders impugned therein being passed against the petitioners by the revenue hierarchy would definitely hold the field and even in that eventuality only the petitioners would have to suffer, the learned counsel for the petitioners felt handicapped to respond satisfactorily. In such facts and circumstances, I am satisfied that the learned lower fora was quite justified to knock out the petitioners on the valid reasons through the impugned orders, which being well narrative of the material on file are not open to any exception by this Court in the exercise of writ jurisdiction. Resultantly, this Constitutional Petition being devoid of any merit and force stands dismissed accordingly.

KMZ/S-20/L

Petition dismissed.

2020 C L C 884
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
FAZAL MAQSOOD and another----Petitioners
Versus
Mst. NASEEM BEGUM and 3 others----Respondents

C.R. No.233259 of 2018, heard on 30th January, 2020.

(a) Islamic law---

----Inheritance---Gift---Compromise---Requirements---Relinquishment by a female from the inheritance---Not public policy---One of defendants having admitted the transaction of gift---Effect---Inheritance mutations in favour of all the legal heirs of deceased were sanctioned according to law---Plaintiffs filed suit with the contention that their father in his life time had gifted entire property in their favour and impugned inheritance mutations were based on fraud---Defendants filed written statement that alleged gift being forged, fictitious and fabricated had been prepared to disinherit the sisters from the legacy of deceased father---Plaintiffs did not produce alleged gift deed during proceedings before the Trial Court---Contention of plaintiffs was that one of the defendants had admitted the transaction of gift before Trial Court whereas another defendant had recorded compromising statement before Appellate Court---Defendants had contended that alleged statements on behalf of defendants were result of coercion and influence and same could not be treated as lawful compromise---Suit was dismissed concurrently---Validity---Plaintiffs had failed to produce original gift deed before the Trial Court---One of the defendants while appearing in the witness box in favour of plaintiffs had admitted the transaction of gift but she had not stated that compromise had been effected---Statement of said witness of plaintiffs was contrary to her written statement---Trial Court was justified to disbelieve the deposition of said witness in circumstances---One of the defendants had submitted compromise deed before the Appellate Court and had even recorded her statement that compromise had been effected---Said defendant thereafter had filed an application that plaintiffs while practicing fraud had procured her statement and no compromise had been effected---Intention to settle the things/disputes through compromise must exist---Defendants had claimed that alleged gift deed was forged and fictitious---Courts below had no other option but to dismiss the suit---Defendants being brothers were dominants of the family and they had procured compromise deed to settle the dispute---Even compromise deeds had been signed only on behalf of defendants and plaintiffs were not its signatories

in any capacity---Nothing was on record as to why compromise had been effected and whether defendants had accommodated the sisters against said compromise---Governing words in R.3, O.XXIII, C.P.C. appeared to be not 'compromise' but an 'adjustment' and in absence of an intention and adjustment to other party it could not be termed as lawful---Claim of plaintiffs was based on forged and fictitious document and there was no occasion for its adjustment---Suit property was joint therefore until and unless it was bifurcated a lawful compromise could not be made by some of its co-shares which might have prejudiced the rights/interests of the others---Statements recorded on behalf of defendants had not been acted upon and they had withdrawn the same---Court had discretion to accord compromise as per its satisfaction---Courts below, in the present case, were not satisfied that either there as possibility of lawful compromise or it could be effected---High Court observed that no compromise had been effected rather it was merely a relinquishment which was not favourable to the plaintiffs to establish their right as such relinquishment by a female being against public policy was unlawful---Plaintiffs had failed to point out any irregularity or illegality in the impugned judgments and decrees passed by the Courts below---Revision was dismissed in circumstances.

Syed Muhammad Ramzan v. Muslim Zaidi and 4 others PLD 1986 SC 66; Mirza Muhammad Siddique v. Muhammad Abdullah 1989 MLD 54; Mehran v. Settlement Commissioner (Lands), Multan, Additional Commissioner (Consolidation), Multan and 21 others 1994 CLC 1079; Sh. Muhammad Fazil v. Sh. Abdul Qadir and 7 others 1997 CLC 243; Muhammad Aslam and others v. Saleem ud Din and others 2006 CLC 1911 and Sardara and Allah Ditta through Legal Heirs and others v. Mst. Bashir Begum and another PLD 2016 Lah. 587 ref.

Sh. Afzal Ahmad v. Ijaz Ahmad and others PLD 1975 Lah. 464; H. Gharibullah v. Mst. Mumtaz Begum and others 1990 CLC 1609; Khushi Muhammad and others v. Dost Muhammad and others 1997 CLC 1995; Allah Wasaya and 5 others v. Irshad Ahmad and 4 others 1992 SCMR 2184; Umar Din and another v. Muhammad Sadiq Hussain and 15 others 1993 SCMR 1089 and Muhammad Mansha and 7 others v. Abdul Sattar and 4 others 1995 SCMR 795 distinguished.

Vir Singh and others v. Kharak Singh and others AIR 1925 Lah. 280; Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Umar Bakhsh and 2 others v. Azim Khan and 12 others 1993 SCMR 374 and Asifa Sultana v. Honest Traders, Lahore and another PLD 1970 SC 331 rel.

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

----O.XXIII,R.3,provisos---'Compromise'---Connotation---Compromise---Conditions.

The proviso of R.3, O.XXIII, C.P.C., in fact overrides the provision by elaborating certain procedure for giving effect to the compromise. Anyhow, a compromise is usually sign of weakness, or an admission of defeat, which, however is a way of settling differences by making concessions to each other. Compromise comes from the latin compromissum, which means "mutual promise." In order that a compromise be accepted, there are three conditions; (i) an adjustment of the suit; (ii) to the satisfaction of the Court; (iii) by means of lawful agreement or compromise.

Syed Muhammad Kaleem Ahmed Khursheed for Petitioners.

Waris Ali, Shehroz Tahir, Muhammad Zubair Virk for Respondents Nos.2 and 4.

Muhammad Mehmood Chaudhry and Muhammad Yasin Hatif for Respondent No.3.

Date of hearing: 30th January, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Inessential detail apart, Maqsood Ali was a big landlord having his estate in three villages, who unfortunately departed on 30.01.1992 leaving behind two sons/petitioners, three daughters/respondents Nos.2 to 4 and widow/respondent No.1. Consequently with regard to area falling in different revenue estates, three inheritance mutations in favour of afore-referred descendants were sanctioned in the year 1992, but thereafter on 15.04.1997 the sons/petitioners brought suit against their mother as well as sisters/respondents claiming that their father in his life vide unregistered memo of gift dated 24.12.1991 had already transferred the entire area to them; that there was no estate to be devolved, but respondents/defendants despite having complete knowledge managed to sanction three impugned inheritance mutations, which being collusive and based upon fraud were not only inoperative rather liable to be cancelled. The suit was contested by respondents Nos.2 and 3 vide joint written statement as well as by respondent No.4 through her independent written defence, but while raising similar allegations that forged, fictitious and fabricated memo. of gift was prepared to

disinherit the sisters. It was admitted position that during trial proceedings, the alleged memo. of gift was kept under the carpet and never brought in light. Consequently after protracted and comprehensive trial, the suit was finally dismissed vide judgment dated 12.11.2012, compelling the petitioners to prefer appeal and during its proceedings they tabled application for bringing on record the purported memo. of gift, which was declined by the learned lower Appellate Court, but while exercising revisional jurisdiction this Court allowed the said request, however, the honourble Supreme Court vide order dated 17.11.2017 set aside the latter order and restored former one. In absence of basic document, no case of the petitioners left, resultantly their appeal was dismissed vide impugned decree dated 12.07.2018. To call in question the unanimous judgments of the learned lower fora, this civil revision was preferred.

2. Syed Muhammad Kaleem Ahmed Khursheed, Advocate, learned counsel for the petitioners mainly emphasized that one of the defendants/respondent No.3 while appearing before the learned Trial Court as (PW4) admitted the transaction of gift and also raised no objection for grant of decree in favour of the petitioners, who again reiterated the same stance before the learned lower Appellate Court, whereas in the like terms another defendant/respondent No.2 had also compromised, who too made statement before learned lower Appellate Court on the same lines, as such, no justification left with the learned Court to have refused to decide the lis on the basis of said statements as the same were lawful compromise within the meaning of Order XXIII, Rule 3 of the Code, 1908. In support of his submissions, Syed Kaleem has placed reliance on case law cited as Sh. Afzal Ahmad v. Ijaz Ahmad and others (PLD 1975 Lah. 464), H. Gharibullah v. Mst. Mumtaz Begum and others (1990 CLC 1609), Khushi Muhammad and others v. Dost Muhammad and others (1997 CLC 1995), Allah Wasaya and 5 others v. Irshad Ahmad and 4 others (1992 SCMR 2184), Umar Din and another v. Muhammad Sadiq Hussain and 15 others (1993 SCMR 1089) and Muhammad Mansha and 7 others v. Abdul Sattar and 4 others (1995 SCMR 795).

In contra, Messrs Muhammad Mehmood Chaudhry, Waris Ali, Shehroz Tahir, Zubair Virk and Yasin Hatif, Advocates on behalf of respondents/defendants submitted that one of the petitioners is practicing senior advocate of the local Bar, who along with his brother is enjoying the fruits of entire legacy despite that inheritance mutations stood already attested in favour of mother as well as sisters. It is further added that alleged statements being result of coercion and influence could not be treated as lawful compromise and Courts below were

perfect in ignoring the same. It was also added on their behalf that the alleged compromise would be completed only when it was accepted by the Court, which never finalized rather retracted and in such situation, the suit as well as appeal was perfectly decided while ignoring the purported statements. At the fag end of their arguments, learned counsel for the respondents stressed that statements of the sisters in favour of their influential brothers, at the most, could be taken as relinquishment of their shares, which being nocuous to public policy could not be given effect. To strengthen their submissions, the learned counsel placed reliance upon case law cited as Vir Singh and others v. Kharak Singh and others (AIR 1925 Lahore 280), Syed Muhammad Ramzan v. Muslim Zaidi and 4 others (PLD 1986 SC 66), Mirza Muhammad Siddique v. Muhammad Abdullah (1989 MLD 54), Mehran v. Settlement Commissioner (Lands), Multan, Additional Commissioner (Consolidation), Multan and 21 others (1994 CLC 1079), Sh. Muhammad Fazil v. Sh. Abdul Qadir and 7 others (1997 CLC 243), Muhammad Aslam and others v. Saleem ud Din and others (2006 CLC 1911), Sardara and Allah Ditta through Legal Heirs and others v. Mst. Bashir Begum and another (PLD 2016 Lahore 587), Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1) and Umar Bakhsh and 2 others v. Azim Khan and 12 others (1993 SCMR 374).

3. Heard, record perused.

4. Admittedly, having failed to bring on record, the impugned original memo. of gift dated 24.12.1991, there left nothing in the case of the petitioners/plaintiffs, hence, being aware of this dereliction, Syed Muhammad Kaleem Ahmed Khursheed, learned counsel restricted his arguments to the effect that lawful compromise was effected and under the law it was sine qua non for the Court below to accept it while granting decree to the extent of defendants who made their statements. To deal with submissions of learned counsel for the petitioners, record was consulted and apprised that Fariha Naeem/defendant No.3 being PW-3 was produced by the petitioners, who contrary to her written statement, supported stance of the plaintiffs that gift was pronounced and inheritance mutations were wrongly sanctioned, she also stated that decree might be awarded to the petitioners yet she never asserted that any compromise was effected. In such situation, when defendant No.3 was just examined to corroborate that alleged gift was made, in absence of any trust worthy supportive evidence, the learned Trial Court was perfect to disbelieve her deposition. No doubt for the first time, on behalf of defendants Nos.2 and 3 affidavits/compromise deeds were filed besides they also recorded statements

before learned Additional District Judge during the pendency of appeal that through notable of the family compromise had been effected and prayed for acceptance of appeal and grant of decree to their extent, but soon thereafter out of them, defendant No.2 tabled application that petitioners by practicing fraud without redressing her grievance procured her statement, whereas no compromise was effected, which was independently allowed vide order of even date when appeal was dismissed. Today during the course of deliberation, learned counsel for the other sister/defendant No.3, also adopted the same stance, which was pleaded by defendant No.2 in her application before the learned lower Appellate Court.

5. Before commenting any further it would be advantageous to attend to relevant provision i.e. Order XXIII, Rule 3 of the Code ibid, which being relevant is reprduced below:-

> "(3) Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be record, and shall pass a decree in accordance therewith so far as to relates to the suit."

The said provision was further amended by adding following provisos:-

> "Provided that the hearing of a suit shall proceed and no adjournment shall be granted in it for the purposes of deciding whether there has been any adjustment or satisfaction, unless the Court for reasons to be recorded in writing, thinks fit to grant such adjournment, and provided further that the judgment in the suit shall not be announced until the question of adjustment or satisfaction has been decided.
>
> Provided further that when an application is made by all the parties to the suit, either in writing or in open Court through their counsel, that they wish to compromise the suit, the Court may fix a date on which the parties or their counsel should appear and the compromise be recorded, but shall proceed to hear those witnesses in the suit who are already in attendance, unless for any other reason to be recorded in writing, it considers it impossible or undesirable to do so. If upon the date fixed no compromise has been recorded, no further adjournment shall be granted for this purpose, unless, the Court for reasons to be recorded in writing

considers it highly probable that the suit will be compromised on or before the date to which it proposes to adjourn the hearing."

The proviso in fact overrides the provision by elaborating certain procedure for giving effect to the compromise. Anyhow, a compromise is usually sign of weakness, or an admission of defeat, which, however is a way of settling differences by making concessions to each other. Compromise comes from the latin compromissum, which means "mutual promise." In order that a compromise be accepted, there are three conditions; (i) an adjustment of the suit; (ii) to the satisfaction of the Court; (iii) by means of lawful agreement or compromise.

6. The questions debated at the Bar entailed a decision as to (a) whether the statements made on behalf of respondents Nos.2 and 3 could be treated as lawful compromise; and (b) whether a compromise prior to approval by the Court could be repudiated. There is no cavil that there must be an intention to settle the things/disputes through compromise. As per history of this case, the alleged gift was not brought in light throughout the life of its alleged maker/father. The petitioners further waited and with the passage of time, when inheritance devolved upon all the descendants/parties to the lis, then the memo. of gift was exposed through contents of their plaint filed in suit. The sisters/respondents by filing their independent written statements claimed it to be forged and fictitious. It was matter of record that to belie said allegations during trial proceedings, the basic document was kept out of scene. In the absence of original memo. of gift, the learned Trial Court had no other option, but to dismiss the suit. Then after losing the case upto level of the apex Court with regard to bringing on record the alleged memo. of gift, situation changed and the petitioners, who being brothers were dominants of the family, procured the affidavits/compromise deeds besides statements of their two sisters to assert that against a compromise the dispute with them had been settled, whereas having gone through the affidavits/compromise deeds, most interestingly though these were signed/thumb marked by sisters, but petitioners/plaintiffs were not its signatories in any capacity, as such these were unilateral. Definitely a compromise involved "give and take", but in this case the intention to settle the dispute through compromise was absolutely not explained nor in lieu of giving up their entire shares, the sisters were accommodated against any inch of this or some other property. To me, governing word in Rule 3 of Order XXXIII appears to be not "compromise" but "adjustment" and in absence of an intention and adjustment to other party, it could not be termed as lawful. The next salient factor in not

accepting the alleged compromise would be that had there been any valid claim of the plaintiffs with regard to subject matter, that could be satisfied by the defendants, whereas in the case in hand there was guileful and manipulated claim based on forged and fictitious document, which was not allowed by the apex Court to be brought on suit file, as such no occasion existed for its adjustment. In addition thereto, the suit was instituted when legacy of the ascendant had already been devolved upon the contestants vide mutations under litigation, hence the suit property was/is joint, thus indivisible, therefore, until and unless it was bifurcated, a lawful compromise could not be made by some of its co-sharers, which might have prejudiced the rights/interest of the others. In case reported as Vir Singh and others v. Kharak Singh and others (AIR 1925 Lahore 280), while dealing with somewhat similar proposition; it was held that compromise not having been assented to by all the proprietors was contrary to law and the Court was fully justified in refusing to enforce it.

7. The second question may not detain me any longer as in such like situation the same has already been answered in the case cited as Asifa Sultana v. Honest Traders, Lahore and another (PLD 1970 SC 331) while holding that the question where the party, who made the offer, could resile from it depended on the facts and circumstances of each case. Admittedly despite that statements were recorded, but those were not acted upon by any proceedings of the Court and the learned Additional District Judge vide specific order refused to give effect thereto. The respondent No.2 before the learned Appellate Court and the other/respondent No.3 before this Court desired to withdraw their statements, which were never accepted by any forum so far. A Court can only consider the compromise when both the parties freely agree to it and reendorse the same before it. Today before this Court none of the respondents sticked to her statement, then obviously it cannot be termed as compromise. The apex Court in Umar Bakhsh's case (supra) already provided guideline to be kept in mind by the courts while deciding the cases on compromise basis in the manner that the compromise would be completed only when it is accepted by the Court and orders are passed by the Court as desired by the parties, whereas the Court would consider the document to be compromised when both the parties signing it agree and reiterate the contents before the Court, but before the Court if one party to the document resiles from it, then it can be called anything but not an agreement of compromise. Here in this case, the affidavit-compromise was unilateral, as such the signatory was free to repudiate it. It was matter of record that the Court despite receiving affidavit/compromise neither considered to follow the procedure introduced through the proviso of the relevant provision,

nor it was pressed by the petitioners at that crucial point of time. Moreover, under afore-referred provision ultimate discretion vests to the Court to accord the compromise as per its satisfaction. As per facts of this case, the Court is not satisfied that either there was possibility of lawful compromise or it could be effected. Even if it is assumed that statements of the two sisters were freely made, those at the most could not be treated more than relinquishment. Having come to the conclusion that no lawful compromise was effected, rather it was merely a relinquishment, which too was not favourable to the petitioners to establish right to them, because the apex Court in Ghulam Ali's case (supra) has already declared such like "relinquishment" by a female unlawful being opposed to "public policy".

8. There is no cavil to say that Court does not act as an idle. It works under the command of law and its dignity is source of trust of the litigants. If the wrong doers are allowed to get their fake claims adjusted from the Courts through arm twisting of feeble organ of the society, then definitely it would promote such evils. Court acts to inspire confidence and commands respect, whose decision must be based on record or material beyond suspicion or odium. The case law relied upon by the learned counsel for the petitioners has been minutely gone through, which runs on different footing as in-

Khushi Muhammad's case: the compromise effected before Assistant Commissioner had already been given effect through attestation of mutation;

Sh. Afzal's case: each of the parties was fairly adjusted;

Muhammad Mansh's case: after making offer of oath to decide the suit, the Court did not allow to resile;

Umar Din's case: in fact suit for pre-emption where some of the vendees against receipt of price of their share admitted the superior right of the pre-emption, thus the defendants were also compensated/adjusted;

H. Garibullah's case, the fact pleaded in plaint was admitted by the defendants without waiting for the determination of any other question and thereby decree to their extent under Order XII, Rule 6 of the Code, 1908 was awarded; and

Allah Wasaya's case: the Court declined to interfere while observing that the impugned decree was passed after contest on the basis of admissions and confessions made by the respective parties, which would not amount

to decree on the basis of compromise and could not be assailed under the provisions of 12(2) of the Code, 1908;

thus being distinguishable is not helpful to their case.

9. For the reasons recorded above, the unanimous decrees of the learned lower fora being correct narrative of material available on file, whereas learned counsel for the petitioners failed to point out any irregularity or illegality therein, hence are not liable to be interfered with by this Court in exercise of jurisdiction vested under section 115 of the Code, 1908, as such are approved by dismissing civil revision in hand. No order as to costs.

ZC/F-7/L

Revision dismissed.

2020 C L C 1039
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD KHUBAIB----Appellant
Versus
GHULAM MUSTAFA (DECEASED) through LRs----Respondents

R.S.A. No.219 of 2016, heard on 14th January, 2020.

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

----S. 54---Registration Act (XVI of 1908), S. 60---Civil Procedure Code (V of 1908) O. VI, R. 2 & O. VIII, R. 2---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Sale deed---Fraud and misrepresentation---Document, proof of---Requirements---Maxim: Secundum allegata et probata, principle of---Applicability---Registered instrument---Presumption of correctness---Appreciation of evidence---Requirements---Admission against fact---Effect---Contention of plaintiff was that impugned sale deed in favour of defendant was based on fraud and misrepresentation---Suit was dismissed concurrently---Validity---Written statement was silent with regard to essential details qua venue, date and names of witnesses to assert as to when, where and before whom original transaction was settled leading to execution of impugned sale deed---Plaintiff while appearing in the witness box had fully endorsed his pleadings---Onus had shifted upon the beneficiary of sale deed not only to rebut the allegations raised by the adversary but to prove that actually a fair deal of sale was effected and alleged consideration had been paid and plaintiff had voluntarily appeared before Stamp Vendor, Scribe and Sub-Registrar as well---Plaintiff had admitted that his signatures/thumb impressions were procured but with clarity that same were obtained in garb of his affidavit to be submitted for his treatment and admission in the hospital---Defendant being beneficiary was bound to prove the contents of document on which the executant had admitted his signature---Mere admission of putting thumb impression or signatures by any person on some disputed instrument without proving the content thereof would not amount to proving its execution---Whenever execution or validity of a registered document had been denied then such instrument would lose its sanctity of being presumed to be correct rather veracity of registered document would depend upon quantum and quality of evidence to be produced to prove its execution---Only restricted presumption under S.60 of Registration Act, 1908 was attached that registration proceedings had regularly and honestly been carried out by the attesting officer---Said presumption attached to certificate of

the document was always rebuttable---Whenever execution of an instrument had been denied then presumption would be deduced to have been sufficiently rebutted and onus would lie upon the person who had alleged execution to prove that the document was executed/registered for the transaction effected between the parties---Presumption in favour of a registered instrument did not dispense with the necessity of showing that person who had admitted the execution before the attesting officer was not an imposter but the genuine one---Possession of suit property had never been handed over to the defendant---Payment of sale consideration followed by delivery of possession was mandatory for sale transaction---Mere registration of sale deed without payment of sale consideration and delivery of possession would not be operative to pass title to the vendee---Neither Lumberdar nor Councilor of concerned revenue estate was accompanying at the time of attestation of impugned sale deed rather Lumberdar of city had identified the vendor which had created doubt to the attestation of sale deed---Identifier, Stamp Vendor and Sub-Registrar were independent witnesses but they had not been produced before the trial Court---Non-production of said witnesses would constrain the Court to infer that had they been examined they would have gone hostile to the beneficiary---Court should appreciate the statement of a party as per its substance and pith---No one should be non-suited while turning out one or two sentences of his deposition---Admission which was wrong on a point of fact or was made in ignorance of a legal right could not be given binding effect---Impugned judgments and decrees passed by the Courts below were set aside and suit was decreed---Second appeal was allowed in circumstances.

Abdul Hameed v. Mst. Aisha Bibi 2007 SCMR 1808; Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah 2007 SCMR 1884; Amjad Ikram v. Mst. Asiya Kausar and 2 others 2015 SCMR 1; Khan Muhammad v. Muhammad Din through L.Rs. 2010 SCMR 1351; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245; Gopal Das v. Siri Thakir Gee and others AIR 1943 PC 83; Siraj Din v. Jamila and another PLD 1997 Lah. 633; Fakhar-ud-Din through L.Rs. v. Muhammad Iqbal and others 2015 CLC 994; Sikandar Hayat and 4 others v. Master Fazal Karim PLD 1971 SC 750; Syed Muhammad Sultan v. Kabir ud Din and others 1997 CLC 1580; Mukhtar Ahmad and 4 others v. Taj Din and 3 others 2002 YLR 2660 and Barkhurdar v. Muhammad Razzaq PLD 1989 SC 749 rel.

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

----S.100---Second appeal---Interference---Scope---Interference can be made when decision is found to be result of any mis-reading of evidence or ended in wrong conclusion being contrary to law.

Mst. Nazir Begum v. Muhammad Ayyub and another 1993 SCMR 321 rel.

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

----S. 54---'Sale'---Definition.

"Sale" is transfer of ownership of immoveable property in exchange for a price paid or promised or partly paid or partly promised. In order that a transaction may be "sale", the payment of price must be contemplated. It must be followed by delivery of possession. Whenever these ingredients are lacking, mere registration of sale deed will not be operative to pass title to the vendee.

(d) Pleadings---

----No one could be allowed to set up a new case beyond pleadings.

Moiz Abbas v. Mrs. Latifa and others 2019 SCMR 74 rel.

(e) Maxim---

----"Secundum allegata et probata"---Applicability---Scope.

Malik Abdul Wahid and Zubair Ahmad Virk for Appellants.
Khawar Ikram Bhatti for Respondent.
Date of hearing: 14th January, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----In short, necessary facts of instant appeal were that present appellant instituted suit for declaration and permanent injunction asserting therein that disputed property was devolved upon him from the legacy of his father through attestation of inheritance mutation; that the appellant was addict of heroin and the respondent being his co-villager took him to hospital on 17.02.1991 for his treatment where under the garb of affidavit to be submitted for treatment, his signatures/thumb impressions were procured on blank stamp as well as ordinary papers; that subsequently it learnt that sale deed dated 17.02.1991 (Exh.D1) qua afore noted area of the appellant was executed and registered in favour of respondent by playing fraud/misrepresentation, whereas neither transaction of sale effected nor

consideration was passed on; that possession also never changed hands and the appellant also did not appear before the Sub-Registrar for attestation of sale deed. Through the suit instituted on 26.05.1991 (just after three months of the registration of impugned sale deed), its cancellation was sought, which obviously was resisted by the defendant/beneficiary. The learned Trial Court after receiving and appreciating the available evidence dismissed the suit on 11.04.2013, which despite being assailed through appeal was maintained by the learned District Court vide judgment dated 02.06.2016 and to call in question their unanimous decisions this second appeal was preferred.

2. Malik Abdul Wahid, Advocate, learned counsel for the appellant/plaintiff argued that the sale deed (Exh.D1) was challenged while raising serious allegations, as such, the onus was upon the beneficiary to prove its execution/attestation as well as transaction reflected therein, but despite non-availability of solid and trustworthy evidence the pivotal issues were answered in his favour. He further emphasized that neither in his pleadings the defendant provided essential details with regard to purported original transaction nor the latter could prove it through the available material. Mr. Malik while going through the evidence examined on behalf of defendant further pleaded that the basic ingredients of the sale transaction were not established and that whatever evidence was led by respondent, it being beyond pleadings as per principle of secundum allegata et probata was liable to be ignored. He also added that both the marginal witnesses (DWs.1 and 2) of impugned sale deed examined on behalf of defendant/beneficiary were closely related and their depositions being interested were not trustworthy. It is next argued on behalf of learned counsel for appellant that Identifier, Scribe, Stamp Vendor and Sub-Registrar being the independent persons could belie the allegations raised by the appellant, but they were withheld despite their availability, as such Courts below were bound to antagonistically infer against the beneficiary and well established law so far on the subject was not applied, hence the impugned decrees cannot be sustained.

In contra, Mr. Khawar Ikram Bhatti, Advocate, learned counsel for the respondent/defendant submitted that the moment appellant admitted his signatures over the disputed sale deed (Exh.D1), there left nothing for the beneficiary to prove the same through scheme provided under the law. He further emphasized that the disputed sale deed being registered instrument attained strong presumption of correctness and learned Courts below were perfect to hold that appellant/plaintiff was under obligation to prove his case. He lastly added that concurrent decrees of the learned lower fora cannot be

interfered with while invoking jurisdiction provided under section 100 of the Code, 1908 and prayed for dismissal of appeal.

3. Arguments heard and record perused.

4. Having gone through the contents of plaint and written statement, this Court came to the conclusion that vide paras 4 to 8 ex facie, the appellant raised serious questions with regard to alleged original transaction as well as execution of disputed sale deed (Exh.D1), but admittedly written statement is silent regarding essential details qua venue, date and names of witnesses to assert when, where and before whom the original transaction was settled leading to execution/attestation of document under challenge. The principle of "secundum allegata et probata" that a fact has to be alleged by a party before it is allowed to be proved is fully applicable in such situation, which has full command of provisions of Order VI, Rule 2 and Order VIII, Rule 2 of the Civil Procedure Code, 1908. Anyhow, the appellant/plaintiff while appearing as PW3 fully endorsed his pleadings and the moment he reiterated that he was took to hospital for his treatment and some blank papers were managed to be signed/thumb marked in the garb of his admission in the hospital, whereas neither sale settled nor consideration paid, rather by using said papers, forged and fictitious disputed sale deed was grafted, onus shifted upon the beneficiary not only to rebut the allegations raised by the adversary, but to prove that actually a fair deal of sale was effected, alleged consideration paid and plaintiff voluntarily appeared before Stamp Vendor, Scribe and Sub-Registrar as well. The emphasis of Mr. Bhatti, learned counsel for beneficiary that the moment executant admitted his signatures over disputed document, beneficiary was not required to prove the same as per scheme of law is not well founded. No doubt, the appellant/plaintiff admitted that his signatures/thumb impressions were procured, but with clarity/distinction that those were obtained in the garb of his affidavit to be submitted for his treatment and admission in the hospital. In such situation, it was imperative upon the beneficiary to prove the contents of document on which the executant admitted his signature. It is well established by now that mere admission of putting thumb impression or signatures by any person on some disputed instrument without proving the contents thereof would not amount to prove its execution in terms of Article 78 of the Qanun-e-Shahadat Order 1984. In arriving at this view, I am fortified by the verdict laid down in the landmark judgments reported as Abdul Hameed v. Mst. Aisha Bibi (2007 SCMR 1808) and Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah (2007 SCMR 1884).

The next contention of learned counsel for respondent/beneficiary that registered instrument attained strong presumption of correctness, as such it was not mandatory to strictly prove its attestation is again fallacious. It is by now well settled principle of law that whenever the execution or validity of a purported registered document is denied, such instrument loses sanctity of being presumed to be correct, rather its veracity would depend upon quantum and quality of evidence to be produced to prove its lawful execution. Reliance can be placed upon judgments reported as Amjad Ikram v. Mst. Asiya Kausar and 2 others (2015 SCMR 1), Khan Muhammad v. Muhammad Din through L.Rs. (2010 SCMR 1351), Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144) and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others (1999 SCMR 1245). In the latter case, the apex Court concluded in the following words:-

> It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction of which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness of document.

Whereas, the Hon'ble Supreme Court in Khan Muhammad's case supra while dealing with one disputed registered sale deed held as under:-

> It is settled principle of law that who lodges a fact must prove it on the well-known maxim of Secundum allegata et probata. It is also settled principle of law that the appellant is a beneficiary of the aforesaid documents, therefore, it is the duty and obligation of the appellant to prove the documents as pointed out by the learned counsel in accordance with the provisions of Qanun-e-Shahadat Order, 1984. See 1979 SCMR 549 (Akhtar Ali v. University of the Punjab), 1992 SCMR 2439 (Haji Muhammad Khan and others v. Islamic Republic of Pakistan). It is well settled principle of law that initial burden to prove execution of documents is on party which is relying on documents. Once this onus is discharged, burden to prove factum of fraud or undue influence or genuineness of documents shifts to party which alleges fraud.

Additionally, under section 60 of the Registration Act, 1908, only a restricted presumption is attached that registration proceedings were regularly and honestly carried out by the attesting officer, but the said presumption attached to its certificate is always rebuttable and whenever the execution of an instrument is denied, then the presumption is deduced to have been sufficiently rebutted and onus lies upon the person, who alleges execution to prove that for the transaction effected between the parties, the document was executed/registered. The presumption in favour of a registered instrument does not dispense with the necessity of showing that person, who admitted the execution before the attesting officer was not an imposter, but the genuine one. Reliance can be placed upon the judgment reported as Gopal Das v. Siri Thakir Gee and others (AIR 1943 PC 83). This view has also been conceived by the Division Bench of this Court in Siraj Din v. Jamila and another (PLD 1997 Lahore 633) and Fakhar-ud-Din through L.Rs. v. Muhammad Iqbal and others (2015 CLC 994).

5. Adverting to evidence led on behalf of beneficiary, the first one was Riaz Ahmed (DW1), one of the attesting witnesses of sale deed (Exh.D1), who without giving the detail of original transaction as well as execution of sale deed, simply worded that plaintiff had sold out 44 Kanals 07 Marlas of his area to respondent/defendant and in lieu thereof sale deed was executed, which after being signed by him and co-witness Muhammad Akram, in presence of Ghulam Mustafa and Lumberdar was presented before the Revenue Officer, who attested the same. The said star witness during his cross-examination in clear words uttered that:-

He also admitted that second marginal witness (DW2) was his relative. Whereas Muhammad Akram (DW2), the other signatory in the capacity of attesting witness in his statement-in-chief did not utter that transaction settled or payment was made before him, whereas, he thereafter in his cross-examination deposed as under:-

His such part of deposition was not only beyond the contents of impugned sale deed, wherein it was specifically mentioned that:--

rather also contrary to that of DW1. Whereas, the defendant (DW3) in his statement-in-chief stated on oath that on 17.02.1991 he had purchased the land by making payment of Rs.333,000/-. He also admitted during cross-examination that plaintiff and his brother were addicted to heroin. Although the beneficiary lastly examined Bank Manager (DW4) to prove that through two bearer cheques (Exh.D6 and 7), an amount of Rs.150,000/- out of sale consideration was paid to

the vendor/plaintiff, but his statement was not liable to be relied upon for the counts; firstly that the defendant/respondent in his written statement absolutely made no reference that any part of sale price was paid through cheques, and in such situation, it could not be considered, because no one can be allowed to set out a new case beyond the scope of his pleadings. Reference may be made to Moiz Abbas v. Mrs. Latifa and others (2019 SCMR 74); secondly, the cheques were written and drawn on 06.03.1991 and 14.04.1991, whereas the impugned sale deed had already been executed/registered on 17.02.1991; thirdly, neither it was established that those contained signatures/thumb impressions of the appellant/plaintiff nor confronted to the latter, as such the cheques were liable to be discarded because it would be unfair to the party against which these were going to be used. The principle that a document can only be used against a party/person is covered by Article 140 of the Qanun-e-Shahdat Order, 1984, which corresponds to section 145 of the Evidence Act, 1872, hence such confrontation was mandatory. See Sikandar Hayat and 4 others v. Master Fazal Karim (PLD 1971 SC 750), Syed Muhammad Sultan v. Kabir ud Din and others (1997 CLC 1580) and Mukhtar Ahmad and 4 others v. Taj Din and 3 others (2002 YLR 2660) and finally, DW4 in his cross-examination admitted that at the time of presentation of these cheques, he was not posted in the concerned branch, as such his deposition was not helpful to the beneficiary in any sense.

6. The additional setback of the case of vendee/respondent was that during cross-examination, he frankly admitted that possession was never handed over to him. As defined under section 54 of the Transfer of Property Act, 1882, "sale" is transfer of ownership of immoveable property in exchange for a price paid or promised or partly paid or partly promised. In order that a transaction may be "sale", the payment of price must be contemplated. It must be followed by delivery of possession. Whenever these ingredients are lacking, mere registration of sale deed will not be operative to pass title to the vendee.

7. Despite the fact that there were four Lumberdars and a Councilor in the concerned Revenue Estate, but none of them was accompanied at the time of attestation of sale deed (Exh.D1), rather Lumberdar of city Gujranwala was made available to identify the vendor before the Registering Officer, which further doubted the valid/genuine attestation of the deed in dispute.

8. Mr. Khawar Ikram Bhatti, Advocate, learned counsel for the respondent/defendant has no answer on his part to justify withholding of Identifier, Stamp Vendor and Sub-Registrar. There is nothing on record that they at the relevant time of trial were not available. Indeed, they being independent

persons were the best witnesses to belie the allegations of the appellant/plaintiff. Through them, it was possible to prove that stamp papers were purchased, sale deed scribed at the instance of the alleged executant and it was he who voluntarily appeared before the Sub-Registrar to acknowledge the transaction and contents of documents when these were presented for registration. Non-production of these vital witnesses has constrained this Court to infer under Article 129(g) of the Qanun-e-Shahadat Order, 1984 that had they been examined, might have gone hostile to the beneficiary.

9. In fact, both the Courts below without appreciating the evidence available on behalf of vendee to consider whether the transaction was proved or not proceeded to dismiss the suit merely for the reason that sale detailed in Exh.D1 was pre-empted by mother of the plaintiff and the latter also made some admissions. Suffice it to hold that the act of any other (even if she was mother of the plaintiff) would not amount to apply principle of estoppel to a person, who asserted his own independent right to sue. This Court has minutely gone through the statement of the plaintiff (PW3) and found nothing alleging to have made admission qua any of the ingredients of transaction or series of acts performed for the registration of Exh.D1. The Courts below should be conscious of the fact that PW3 was an addicted person and might not be as alert as a prudent one. The Court was bound to appreciate his statement as per its substance and pith, who could not be non-suited while torning out one or two sentences of his deposition. It is well established by now that admission, which is wrong on a point of fact or is made in ignorance of a legal right, cannot be given binding effect. See Barkhurdar v. Muhammad Razzaq (PLD 1989 SC 749).

10. The last argument of learned counsel for the respondent that concurrent findings of fact rendered by the learned Courts below cannot be disturbed while exercising jurisdiction under section 100 of the Code, 1908 is without any substance as well. The same can be interfered with when it is found to be result of any mis-reading and non-reading of evidence or ended in wrong conclusion being contrary to law. To arrive at this view, I am fortified by the judgment reported as Mst. Nazir Begum v. Muhammad Ayyub and another (1993 SCMR 321) wherein the apex Court held in the following manner:-

> "Concurrent findings of fact recorded by the trial Court and the first appellate Court can only be disturbed in second appeal if there is a mis-reading or non-reading of evidence which has led to wrong conclusions."

Since the Courts are expected to deliver justice, which is not only to be done, but also seen to be made and cannot shut their eyes or turn a deaf ear to perverse conclusion based on patent errors of law. In this particular case, the said principle was not followed, rather the findings of the learned lower fora were based against the available material and law on the subject was also not applied correctly, as such impugned decrees could not sustain.

11. The narrative of the above discussion is that this Appeal succeeds, the decrees of learned lower fora are hereby set aside and suit of the appellant is decreed. No order as to cost.

ZC/M-24/L Appeal allowed.

2020 C L C Note 28
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
LIAQAT ALI---Petitioner
Versus
The STATE and 11 others---Respondents

W.P. No. 32045 of 2016, heard on 6th May, 2019.

Constitution of Pakistan---

----Art. 199---Board of Revenue Memo No. 1065070/1177-CIIV dated 18-04-1970---Constitutional petition---Village site, conversion of---Scope---Respondents being in possession of half of village site moved application before Collector for change of its category and allotment, which was accepted in their favour---Validity---Half of village site after change of its category had been allotted in favour of respondents which had never been challenged by the petitioner or anyone else---Collector being competent to change the category of village site was not bound to require prior approval of Board of Revenue in that regard---Revenue hierarchy for whose field staff the village site had been reserved was not in its occupation rather it being abandoned was encroached by the respondents---Competent authority had allotted village site after change of its category as per mandate of Policy Letter No. 565-2002/310-CL-IV dated 13-03-2002 and price so fixed had also been received---Petitioner had no claim over the questioned plot---Constitutional petition was dismissed, in circumstances. [Paras. 3, 4 & 5 of the judgment]

Naseer Ahmad v. Member, Board of Revenue and others 1985 MLD 1277 and Sardar Muhammad and another v. Akram and others 2000 SCMR 807 rel.

Mian Shah Abbas for Petitioner.

Rana Shamshad Khan, Additional A.-G. for Respondents Nos.10 to 12.

Ch. Muhammad Mustansar Kaleem and Atif Mohtashim Khan for Respondents Nos. 2 to 9.

Date of hearing: 6th May, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---In concision, the facts of the case were that the subject village site meant for "Patwar Khana" was measuring 2-Kanals 2-Marlas 2-Sarsahi and half of its part was under occupation of

respondents Nos.2 to 9, who made two fold application before the Collector for change of category as well as its allotment. The latter required the reports from Field Staff through his subordinates , wherein not only longstanding possession of respondents Nos.2 to 9 was acknowledged, but it was also disclosed that two more ihatas meant for "Patwar Khana" were lying vacant as well, which on need could be utilized and being satisfied on 23rd April, 2003 the Collector accorded first request, whereas latterly vide order of 17th May, 2003 it was also allotted to them @ of Rs.750/- per marla along with 50% penalty besides 10% surcharge, where they also raised some construction. The allottees subsequently approached the concerned Authority for conferment of Proprietary Rights, which on 12th December, 2012 for certain clarification was remanded by the District Collector to the Colony Office. Being dejected, the allottees preferred Appeal, which was allowed by the Additional Commissioner on 12th August, 2013 and despite being assailed by the present petitioner through ROR as well as Review before the Board of Revenue, the same was maintained. Now to call in question the unanimous orders of respondents Nos.10 and 11, this Constitutional Petition has been preferred.

2. Arguments heard. Record perused.

3. Admittedly, the order dated 17th May, 2003, whereby after change of category half of village site allotted to respondents Nos.2 to 9 was never ever challenged by the petitioner or any one else. The argument of learned counsel for the petitioner that category of village site meant for public welfare could never be changed, is not well founded. This controversy has already been dealt with by this Court in the case reported as "Naseer Ahmad v. Member, Board of Revenue and others" (1985 MLD 1277) while observing that under Memo No.1065070/1177-CIIV dated 18th April, 1970, the District Collector was fully empowered to change the category of village site. Moreover, in a case titled "Mehmood Ahmad deceased through L.Rs v. Haroon-ur-Rashid and others" bearing Appeal No.1078 of 2000, while dealing with controversy of identical nature the apex Court formulated the following points for consideration:-

"(i) Who out of the two i.e. the District Collector and Member Board of Revenue under the relevant law is competent to change the category of 'Talab' into the residential area.

(ii) If a change into a category/status of certain land is made by the learned Member Board of Revenue then can such a change be nullified by the High Court in writ jurisdiction in exercise of its discretionary power.

(iii) Whether in absence of any misreading/non-reading of evidence and lack of jurisdiction, the High Court could set aside the judgment of learned Member Board of Revenue and submitted its own judgment for it in a purely discretionary matter."

and while finally dealing with point No.(i) vide judgment dated 10.03.2006, in para No.8, it was concluded as under:-

> "As regards the contention of the learned counsel for the appellants that the change of the nature of the land from 'Talab' to residential by the Collector was subject to the approval of the Board of Revenue, the same is not supported by any law. Section 10 of the Colonization Act, relied upon by the learned counsel for the appellants, only requires that the Collector may allow land under the Act in accordance with the statements of conditions issued by the Provincial Government and that such allotment was subject to the control of the Board of Revenue. No rule has been pointed out to show that the Collector required prior approval of the Board of Revenue for change in the nature of the land. In any case, the District Collector in the present proceedings had carried out the exercise of determining the nature of the land and the suitability of its change to residential and the party to whom the same could be allotted, on the direction of the Board of Revenue given in its order dated 29.09.1994, which was duly upheld by the Lahore High Court. Whereas the Collector had given reasons for the change of the status of the land to residential, the Board of Revenue had advanced none for reversing the decision."

There left no doubt that Collector was competent to change the category of village site and was not bound to require prior approval of the Board of Revenue in this regard.

4. In this case, the Revenue Hierarchy for whose field staff the village site had been reserved was not in its occupation for said purpose, rather it being abandoned was encroached by the respondents and to regularize their possession, the competent Authority at its own while changing the category allotted it as per mandate of Policy Letter No.565-2002/310-CL-IV dated 13th March, 2002, moreover, the price so fixed was also received. The Revenue Field Staff for whom the plot in dispute had been reserved at the most could be the aggrieved party, but petitioner lacked locus standi to make any claim over the disputed plot. See "Sardar Muhammad and another v. Akram and others" (2002

SCMR 807). Firstly, the Additional Commissioner and then learned Member Board of Revenue twicely while examining the record passed the impugned orders under their lawful authority, which are neither coram non judice nor ultra vires to call for interference by this Court in the exercise of Constitutional jurisdiction.

5. This Writ Petition being devoid of any merit and force stands dismissed.

ZC/L-8/L
Petition dismissed.

2020 Y L R 1356
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
AMAN ULLAH KHAN---Petitioner
Versus
MUZAFFAR KHAN and others---Respondents

Civil Revision No. 4335 of 2016, heard on 16th January, 2020.

Islamic law---

----Oral gift--- Proof--- Concurrent findings by two courts below---Plaintiffs claimed that property in question was transferred to them by oral gift but Trial Court and Lower Appellate Court dismissed suit of plaintiffs---Validity---Oral gift could be made by a Muslim but such transaction was required to be proved through high standard of evidence---Essential details with regard to venue, time, date and names of witnesses to when, where and before whom declaration of oral gift was made should be specifically detailed in plaint---Plaintiff not only failed to mention date of such event rather failed to recall his memory when specifically asked during cross-examination---Offer so extended was not accepted by plaintiff and he failed to establish one of the basic ingredients of his purported transaction---Other damaging feature was that alleged fact being purely an event involving future obligation could only be proved by examination of at least two witnesses as required by law---Despite nominating such number of persons before whom it affected, one out of them was deliberately withheld and only single witness in corroboration was produced which was not enough to comply with mandatory requirement of law---Sole supporting witness not only gave different time of transaction which was disclosed in contents of plaint, rather he also admitted that possession was not delivered to plaintiff---Plaintiff failed to prove his alleged transaction as such suit was rightly dismissed by courts---High Court declined to interfere in concurrent findings by two courts below as plaintiff could not point out any illegality or irregularity, non-reading or misreading of evidence---Plaintiff also could not point out any jurisdictional

defect to call for interference by court in exercise of revisional jurisdiction scope of which was restricted only to correct errors of laws and facts, if were found to be committed by courts below in discharge of their judicial functions---Revision was dismissed in circumstances.

Malik Khadim Hussain for Petitioner.

Malik Mateen Ullah and Muhammad Iqbal for Respondents Nos.1 and 2.

Ch. Saeed Zafar for Respondents Nos.3(a) to 3(f).

Date of hearing: 16th January, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The concurrent decrees of the two Courts below are the subject matter of Civil Revision in hand, whereby declaratory suit as well as appeal of the petitioner was dismissed.

2. Inessential detail apart, through his suit, it was the stance of the petitioner/plaintiff that one Ghulam Jan alias Jahan Khan was his unmarried paternal uncle, who was residing with the family of the plaintiff and on account of services rendered by the latter, his uncle for love and affection on 30.01.2004 in presence of Zafar Nawaz Khan and Gull Nawaz Khan made declaration of gift in his favour, who accepted it and possession in lieu thereof also changed hands, therefore, the respondents/ defendants being tenants kept on paying share of produce to the plaintiff, but afterwards stopped to pay it and managed to transfer the disputed area in their favour through inheritance mutations No.6512 dated 11.03.2006 and 6002 dated 30.10.2009 while showing that said Jehan Khan died, whereas he was still alive. The suit was contested by the respondents alleging that oral gift was never pronounced by the alleged donor, what to talk that it was accepted by the plaintiff/donee. It was also pleaded that latter was not inducted into possession against any transaction. It was further asserted by the defendants that after the demise of predecessor, the inheritance mutations were

correctly attested in favour of his descendants including the plaintiff, which was never agitated by him in the Revenue Forum. After due trial, while appreciating the available evidence examined on behalf of the parties concerned, the suit and appeal of the petitioner were dismissed, as such, instant civil revision was preferred to call in question its unanimous judgments.

2(sic). Arguments heard and record scanned.

4(sic). This Court is fully cognizant of the fact that oral gift can be made by a Muslim, but such transaction is required to be proved through high standard evidence. No doubt, essential details with regard to venue, time, date and names of the witnesses to prove when, where and before whom the declaration of oral gift was made, specifically detailed in the plaint, but plaintiff (PW1) not only failed to mention the date of said event in his statement-in-chief, rather he failed to recall his memory when specifically asked during cross-examination. Moreover, it was not deposed that offer so extended was ever accepted by him/plaintiff. In such situation, the latter failed to establish one of the basic ingredients of his purported transaction. The other damaging feature was that the alleged fact being purely an event involving future obligation could only be proved by examination of at least two witnesses as required by scheme of law, but despite nominating said number of persons before whom it affected, one out of them was deliberately withheld and only single witness in corroboration was produced, which was not enough to comply with mandatory requirement of law. The sole supporting witness (PW2) not only gave the different time of the transaction, which was disclosed in the contents of the plaint, rather he also admitted that possession was not delivered to the donee. In such situation, the petitioner badly failed to prove his alleged transaction, as such suit was rightly dismissed by the Courts below while deciding all the issues involved therein in true perspective. The learned counsel for the petitioner could not point out any illegality or irregularity, non-reading or misreading of evidence besides any jurisdictional defect to call for interference by this Court in the exercise of

revisional jurisdiction, the scope whereof is restricted only to correct the errors of law and facts, if are found to have been committed by the Courts below in the discharge of its judicial functions. The petitioner dragged the respondents into frivolous litigation for ulterior motives, who also wasted precious time of the Courts and cannot be let free without burdening heavy cost, hence civil revision is dismissed with fine of Rs.1,00,000/- to be paid to the respondents.

MH/A-9/L

Revision dismissed.

2020 M L D 1312
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Rana MUHAMMAD ASLAM KHAN---Petitioner
Versus
SHAH NAWAZ and others---Respondents

Civil Revision No. 2383 of 2009, decided on 14th March, 2019.

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

----Ss. 12 & 39---Qanun-e-Shahadat (10 of 1984), Arts. 17(2), 79 & 80---Registration Act (XVI of 1908), S. 17---Transfer of Property Act (IV of 1882), S. 54---Suit for specific performance of contract and cancellation of instrument---Agreement to sell---Proof of---Procedure---Scribe of a document---Report of Handwriting Expert---Evidentiary value---Executant of agreement to sell transferred suit property in favour of his son after execution of alleged contract in favour of plaintiff---Plaintiff filed suit for specific performance of contract whereas son of executant filed suit for cancellation of agreement to sell---Suit filed on behalf of plaintiff for specific performance was decreed whereas that of defendant for cancellation of instrument was dismissed---Validity---Agreement to sell of immovable property was a contract enforceable by law---Contract itself did not create interest, right or title in such property and such type of document should be registered---Agreement to sell being document of financial liability and future obligation was required to be attested by two male or one male and two female witnesses---Such a document must be proved according to requirements of Art. 79 of Qanun-e-Shahadat, 1984 otherwise it could not be used as evidence---Alleged agreement to sell having been signed by two marginal witnesses could be proved if said witnesses were examined---Plaintiff had produced only one marginal witness of agreement to sell while other had not been examined---Nothing was on record whether said witness had already departed or was not available---Mere oral statement was not sufficient to prove non-availability of said witness---If said witness had departed then a person familiar to his signatures should be examined or plaintiff should apply to the Court for referring the disputed document to Handwriting Expert for comparison of alleged signatures with some admitted one of the executant---Report of such an expert was not conclusive but it was requirement of Art. 80 of Qanun-e-Shahadat, 1984---Plaintiff had not complied with the said mode to prove the alleged agreement to sell---Alleged contract was neither signed by its scribe nor bargain was struck in his presence and even consideration amount was not paid in his presence---Scribe or anyone else who had not put his signatures being marginal witness on documents required to be attested could not be considered as such---Contradictions with regard to venue of payment of consideration were on record---Courts below had failed to consider that neither evidence of plaintiff was cogent nor alleged contract had been proved as per law---Impugned

judgments and decrees passed by the Courts below were set aside---Revision was allowed, in circumstances.

Farid Bakhsh v. Jind Wadda and others 2015 SCMR 1044; Hamid Qayum and others v. Muhammad Azeem through L.Rs and another PLD 1995 SC 381; Muhammad Sarwar v. Salamat Ali 2012 CLC 2094; Hafiz Tassaduq Hussain v. Muhammad Din through L.Rs and others PLD 2011 SC 241 and Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

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

----S. 115---Revisional jurisdiction of High Court---Scope.

Abdul Hakeem v. Habibullah and 11 others 1997 SCMR 1139; Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255; Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others 2014 SCMR 914 and Nazim-ud- and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 rel.

Farhan Mustafa Jaffery and Sardar Akbar Ali Khan Dogar for Petitioner.

Muhammad Ashraf Sagoo for Respondents.

Date of hearing: 14th March, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Admittedly, Rana Muhammad Aslam Khan, petitioner was exclusive owner of subject land, who vide mutation No.6298 dated 05th March, 2002 transferred it to his son Rana Abdul Qayyum, respondent No.2. Thereafter, on 4th April, 2002 Shah Nawaz, respondent No.1 filed suit for specific performance of contract contending therein that despite the subject property was mortgaged, it was purchased by him on 14th January, 1993 vide contract and receipt (Exs: P1 and 2) respectively against Rs.2,00,000/-, out of which Rs.1,64,000/- were paid before the witnesses, but after its redemption to frustrate the agreement, property was dishonestly transferred by petitioner in favour of his son. The petitioner and his son not only by filing their written statement denied the settlement of transaction as well as execution of Exs: P1 and 2 with the firm stance that plaintiff was their tenant, who managed aforenoted forged and fictitious documents, but independent suit was also instituted by the petitioner for cancellation of these documents. As a result of a conjunctive trial, the suit of respondent No.1 was decreed and that of the petitioner was dismissed vide consolidated judgment of 9th May, 2006. Although two independent appeals were preferred, but those were dismissed on 2nd October, 2009 and to call in question the vires of concurrent decrees of learned lower fora, this Civil Revision was preferred.

2. Arguments heard. Record perused.

3. Before adverting to the facts of the case, I must add that an agreement to sell of immovable property is a contract enforceable by law, but section 54 of the Transfer of Property Act, 1882 expressly provides that it does not itself generate interest, right or title in such property, and as a matter of law to constitute ownership thereof, another instrument in its pursuance is required. Admittedly, when impugned contract was purportedly scribed, there was no requirement for its registration, but now through recent amendment introduced in Section 17 of the Registration Act, 1908, it is mandatory that such type of document should be registered, anyhow, for its construction, it being a document of financial liability and future obligation under the provision of the Qanun-e-Shahadat Order, 1984, was required to be attested by two male or one male and two female witnesses, as the case may be. For better appreciation, Sub-Article (2) of Article 17 of the Order ibid is reproduced here:-

> In matters pertaining to financial or future obligations, if reduced to writing, the instrument, shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly.
>
> If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.

The execution of agreement can be proved, only in accordance with mode provided under Article 79 of the Order ibid, which reads as under:-

> Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses [at] least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."

The apex Court in a recent case reported as "Farid Bakhsh v. Jind Wadda and others" (2015 SCMR 1044) has elaborately defined Article 79 and finally concluded that its requirement was mandatory and without its strict compliance, such a document cannot be used as evidence. The relevant conclusion for ready reference is given below:--

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

As such after the promulgation of Order, 1984, a document of alike character has to be executed and proved as per scheme provided in the afore-referred Articles.

4. Now reverting back to the facts of the case, the impugned documents i.e, contract (Ex:P1) and receipt (Ex:P2), as per requirement of law, although were signed by Gul Hassan and Ghulam Shabbir Khan being its marginal witnesses, which could only be proved if they were examined. Admittedly, Ghulam Shabbir Khan (PW4), out of them was produced, whereas other one was not brought into the witness-box by the beneficiary/respondent No.1 and on having been faced with the said situation, his learned counsel submitted that the said witness had already departed. The learned counsel, however, conceded that neither in contents of plaint the fact of his alleged death was exposed nor any document was brought on record to affirm said plea. Mere oral statement was not enough to prove his non-availability. Anyhow, in such a situation, there were two modes available to the plaintiffs; firstly that a person familiar with the signatures of Gul Hassan was to be examined to comply with the requirement of Article 80 of the Order, 1984 and secondly the plaintiff might have applied to the learned Trial Court for referring the disputed documents (Ex:P1 & 2) to the Handwriting Expert for the comparison of the alleged signatures affixed over there with some admitted one of the purported executant. Although, report of such an Expert is not conclusive proof, but in absence of one of the marginal witnesses, when requirement of Article 80 of the Order, 1984 was also not complied with, this mode was to be followed. See "Hamid Qayum and others v. Muhammad Azeem through L.Rs and another" (PLD 1995 Supreme Court 381), wherein it was held that the report of Expert is one of the modes of proving the document and if the said report is properly exhibited, the same can be used as corroborative piece of evidence. By not resorting to this exercise at any stage, the plaintiff incurred an adverse presumption against him.

5. The emphasis of learned counsel for plaintiff/respondent No.1 that Muhammad Asghar (PW2) scribe of Exs.P1 and 2 was examined, therefore, any lapse on the part of his client stood cured/covered is not tenable. Admittedly, the documents were not signed by PW2 being marginal witness, who in his statement-in-chief did not depose that bargain was struck in his presence, rather during cross-examination he explicitly admitted that consideration was not paid before him. It is settled by now that a Scribe or anybody else, who did not put his signatures being marginal witness on documents required to be attested, cannot be considered as such. See "Muhammad Sarwar v. Salamat Ali" (2012 CLC 2094), "Hafiz Tassaduq Hussain v. Muhammad Din through L.Rs and others" (PLD 2011 SC 241) and "Farzand Ali and another v. Khuda Bakhsh and others" (PLD 2015 SC 187). The relevant extract from Para- 9 of Hafiz Tasadduq's case for ready reference is reproduced below:-

> "9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute 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."

6. Having gone through the evidence of the plaintiff available on record, it was picked that plaintiff (PW3) in his cross examination disclosed that advance sale consideration was paid one day prior to execution of referred documents (Ex:P1 & 2) and the exact words uttered by him in this regard are given below:-

Whereas, the marginal witness (PW4), antipodal to plaintiff stated that sale price was paid in Court premises and relevant extract of his cross-examination in verbatim is reproduced hereunder:-

The glaring contradiction with regard to venue of the payment was not ignorable, but Courts below failed to consider that neither the present evidence was cogent, reliable nor that the vital documents having been executed after promulgation of Order 1984, ibid, were proved as per prescribed scheme provided in the afore-referred provisions of the Order, 1984 ibid.

7. Now adverting towards the last contention of learned counsel for the plaintiff/respondent No.1 that this Court cannot set aside the concurrent judgments of the lower Courts in exercise of powers under section 115 of the Code, 1908. Although the scope of interference with concurrent findings of fact is limited, but such findings can be interfered with by this Court under Section 115 C.P.C, if Courts below appeared to have either misread evidence on record or while assessing evidence had omitted from consideration some important piece of evidence, which had direct bearing on the issue involved. In arriving at such view, this Court is fortified by the dictum laid down in the judgment

reported as Abdul Hakeem v. Habibullah and 11 others (1997 SCMR 1139) and the relevant portion thereof is reproduced as under:-

> "6. Before considering the contentions of the parties on merit, we would like to mention here that the scope of interference with concurrent finding of fact by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C is very limited. The High Court while examining the legality of the judgment and decree in exercise of its power under section 115, C.P.C cannot upset a finding of fact, however erroneous it may be, on reappraisal of evidence and taking a different view of the evidence. Such findings of facts can only be interfered with by the High Court under section 115, C.P.C if the Courts below have either misread the evidence on record or while assessing or evaluating the evidence have omitted from consideration some important piece of evidence which has direct bearing on the issues involved in the case. The findings of facts will also be open to interference by the High Court under section 115, C.P.C if the approach of the Courts below to the evidence is perverse meaning thereby that no reasonable person would reach the conclusions arrived at by the Courts below on the basis of the evidence on record.***"

This view has again been reaffirmed by the same Court in the judgments reported as "Muhammad Anwar and others v. Mst. Ilyas Begum and others" (PLD 2013 SC 255), "Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others" (2014 SCMR 914) and "Nazim-ud- and others v. Sheikh Zia-ul-Qamar and others" (2016 SCMR 24) to confirm that no Court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of law and the Revisional Court has no exception to this rule. It has also been held therein that Court could not pass an order of its liking, solely on the basis of its vision and wisdom, rather it is bound and obligated to render decisions in accordance with law and the law alone, hence this Court can invoke its jurisdiction in the cases where interference is warranted.

8. The narrative of the above discussion is that this Civil Revision succeeds, the decrees of learned lower fora are hereby set aside and suit of respondent No.1 is also dismissed with no order as to costs.

ZC/M-114/L
Revision allowed.

2020 C L C 1440
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
JUBILEE GENERAL INSURANCE COMPANY LTD.----Petitioner
Versus
RAVI STEEL COMPANY through Proprietor----Respondent
C.R. No.1339 of 2017, decided on 3rd May, 2019.

Civil Procedure Code (V of 1908)---

----S.12(2)---Fraud and misrepresentation---Application under S.12(2), C.P.C. for setting aside of judgment filed during pendency of appeal---Maintainability---Petitioner seeking remedy of appeal and remedy under S.12(2), C.P.C. simultaneously against the same judgment---Effect---Doctrine of election of remedy---Scope---Contents of application filed under S.12(2), C.P.C. as well as grounds of appeal were verbatim/analogous---Petitioner had not claimed that impugned order had been procured through fraud and misrepresentation---Components of the provision of S.12(2), C.P.C. were missing in the application---Pleadings without specifying essential details per se were not sufficient to declare the order having been obtained by practising fraud---Petitioner had failed to make out a case of fraud and misrepresentation whereas other grounds were not enough to bring his case within the ambit of relevant provision---Any order passed erroneously or illegally could not be assailed under S.12(2), C.P.C.---Application under S.12(2), C.P.C. would lie only if order/judgment / decree was obtained by practising fraud---Section 12(2), C.P.C. was not substitute of an appeal and same could not be equated or treated at par to the remedy of review or revision---Remedy provided under S.12(2), C.P.C. could not be availed on the ground that decree had been obtained on the basis of perjured evidence---Questions with regard to credibility of evidence produced in the case was to be decided therein---Application under S.12(2), C.P.C. would not be maintainable merely on the ground that claim was false or lis was incompetent---Decree could not be challenged on merits when applicant was aware of the facts forming the application but had not asserted the said facts in the Court before whom proceedings had been finalized---Findings based on wrong exercise of jurisdiction could only be agitated under S.96 or 115, C.P.C.---Scope of S.12(2), C.P.C. was restricted and applicant was required to prove that fraud and misrepresentation had been committed by the adversary in connection with the proceedings---Applicant could not be allowed to reopen the matter which had been finally disposed of---Applicant prior to filing of present petition had already preferred an appeal and had remained unsuccessful in the same---Applicant against the impugned judgment had three remedies i.e. appeal, review and an application under S.12(2), C.P.C. and one remedy did not exclude the other---Once petitioner had availed the remedy of appeal then Court could not entertain application under S.12(2), C.P.C.---Applicant had no lawful excuse or justification to re-agitate the settled controversy again by resorting to

another/different remedy---Revision being not maintainable, was dismissed, in circumstances.

R.V. Narayanaswami Chetti v. Soundarabajan & Co AIR 1958 Madras 43; Messrs Raj Spinning Mills v. Messrs A.N.G.King Ltd. AIR 1959 Punjab 45; Haji Moosa Haji Oomer v. Ahmed Abdul Ghani and another PLD 1968 Kar. 320; Mercantile Fire and General Insurance Co. of Pakistan Ltd. v. Messrs Imam and Imam Ltd. 1989 CLC 2117; Haji Habib & Co. v. Alpha Insurance Co. Ltd. 1992 CLC 1586; Muhammad Iqbal through duly authorized Attorney v. Muhammad Ahmed Ramzani and 2 others 2014 CLC 1392; Ahsan Ali and others v. District Judge and others PLD 1969 SC 167; Mansab Ali v. Amir and 3 others PLD 1971 SC 124; Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 SC 153; Mst. Dilbar Hamid v. Dr. Ghulam Bheek Khan and others 1997 SCMR 610; Gatron (Industries) Limited v. Government of Pakistan and others 1999 SCMR 1072; Dil Mir v. Ghulam Muhammad and 2 others PLD 2002 SC 403; Muhammad Sami v. Additional District Judge, Sargodha and 2 others 2007 SCMR 621; Almas Ahmad Fiaz v. Secretary Government of the Punjab Housing and Physical Planning Development, Lahore and another 2006 SCMR 783; Mrs. Amina Bibi through General Attorney v. Nasrullah and others 2000 SCMR 296; Muhammad Hussain v. Mukhtar Ahmad 2006 SCMR 71; Mst. Sabiran Bibi and others v. Ahmed Khan and others 2008 SCMR 226; S.M. Sohail v. Mst. Sitara Kabir-ud-Din and others PLD 2009 SC 397; Lahore Development Authority v. Firdous Steel Mills (Pvt.) Ltd. 2010 SCMR 1097; Allah Ditta v. Ahmed Ali Shah and others 2003 SCMR 1202; Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another PLD 2016 SC 358; Haji Farman Ullah v. Latif ur Rehman 2015 SCMR 1708 and Terrance Williams v. Pennsylvania 2016 SCMR 1561 distinguished.

Waheed Ullah Khan and 2 others v. Kalim Ullah and 3 others PLD 1977 SC 75 (sic); Rehmat Ali v. Additional District Judge 1988 SCJ 761 (sic); Mrs. Amina Bibi through General Attorney v. Nasrullah and others 2000 SCMR 296; Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others PLD 2018 SC 828 and Major (Retd.) Pervez Iqbal v. Muhammad Akram Almas and others 2017 SCMR 831 rel.

Hamid Khan and Tariq Saeed for Petitioner.

Zaheer-ud-Din Babr, Rana Itizar and Atif Mohtashim Khan for Respondents.

Dates of hearing: 5th and 12th, April, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The titled Revision Petition was initially dealt with by my two Hon'ble brothers, one of them, Amin-ud-Din Khan, J. not only held that application under section 12(2) of the Code, 1908 preferred by the same litigant during the pendency of his RFA was maintainable,

rather the said application was allowed when not only R.F.A. had already been dismissed by this Court and also upheld in C.P. as well as Review by the apex Court, whereas the other, Ch. Muhammad Iqbal, J. adopted dissenting view while dismissing application under section 12(2) being not maintainable.

On account of difference of opinions between the two, the case was referred to me by the Hon'ble Chief Justice as a third Judge under Clause 26 of Letters Patent in order to render opinion as per Rule (5), Part-H, Chapter-4 of Vol: V of the Rules and Orders of the Lahore High Court, Lahore read with section 98 of the Code, 1908, however, the point of dissent was not reduced in the form of question/issue while referring it, but to me absence of formulation of the point of difference would not render the reference illegal and having gone through the verdicts of both my learned brothers, the specific points requiring determination would be; firstly whether a case covered by the mischief of section 12(2) of the Code ibid was made out, and secondly whether two parallel remedies can be launched and after exhausting one upto the level of the last Court, the second one can also be pressed into by the failing party and granted.

2. Undisputedly, the petition under section 122 of the Insurance Ordinance, 2000 preferred by respondent against the civil revisioner after settling issues, recording and appreciating the evidence, so led by the contesting parties, was culminated on 3rd October, 2012 in favour of the former by the learned Tribunal. The petitioner firstly assailed it on 3rd November, 2011 through Appeal under section 124(2) of the Ordinance ibid before this Court, and it was still sub judice, when after losing more than a year, the application under section 12(2) of the Code ibid was preferred, which was not activated, however, the Appeal of the petitioner was finally dismissed on the score of limitation vide judgment of 6th April, 2016 and it though was assailed through C.P. as well as Review before the apex Court, but both failed and the verdict of this Court, whereby RFA was dismissed became final. Thereafter, the application under section 12(2) was agitated for its logical end, but resulted in divergent opinions, as observed supra.

As the file was received being fixed for actual date, learned counsel for the parties requested for right of audience, who exhausted themselves on the same lines, which they had already addressed when this petition was heard by my brothers, as such it will be unnecessary for the sake of repetition to reproduce their submissions here, however, Mr. Hamid Khan, Advocate, counsel for the petitioner in support of his arguments relied upon the judgments reported as R.V. Narayanaswami Chetti v. Soundarabajan & Co (AIR 1958 Madras 43), Messrs Raj Spinning Mills v. Messrs A.N.G.King Ltd. (AIR 1959 Punjab 45), Haji Moosa Haji Oomer v. Ahmed Abdul Ghani and another (PLD 1968 Karachi 320), Mercantile Fire and General Insurance Co. of Pakistan Ltd. v. Messrs Imam and Imam Ltd. (1989 CLC 2117), Haji Habib & Co. v. Alpha Insurance Co. Ltd. (1992 CLC 1586), Muhammad Iqbal through duly authorized Attorney v. Muhammad Ahmed Ramzani and 2 others (2014 CLC 1392), Ahsan Ali and

others v. District Judge and others (PLD 1969 SC 167), Mansab Ali v. Amir and 3 others (PLD 1971 SC 124), Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 SC 153), Mst. Dilbar Hamid v. Dr. Ghulam Bheek Khan and others (1997 SCMR 610), Gatron (Industries) Limited v. Government of Pakistan and others (1999 SCMR 1072), Dil Mir v. Ghulam Muhammad and 2 others (PLD 2002 SC 403), Muhammad Sami v. Additional District Judge, Sargodha and 2 others (2007 SCMR 621), Almas Ahmad Fiaz v. Secretary Government of the Punjab Housing and Physical Planning Development, Lahore and another (2006 SCMR 783), Mrs. Amina Bibi through General Attorney v. Nasrullah and others (2000 SCMR 296), Muhammad Hussain v. Mukhtar Ahmad (2006 SCMR 71), Mst. Sabiran Bibi and others v. Ahmed Khan and others (2008 SCMR 226), S.M. Sohail v. Mst. Sitara Kabir-ud-Din and others (PLD 2009 SC 397), Lahore Development Authority vs. Firdous Steel Mills (Pvt.) Ltd. (2010 SCMR 1097) Allah Ditta v. Ahmed Ali Shah and others (2003 SCMR 1202), Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another (PLD 2016 SC 358), Haji Farman Ullah v. Latif ur Rehman (2015 SCMR 1708) and Terrance Williams v. Pennsylvania (2016 SCMR 1561).

3. Emerging of available record affirms that firstly RFA No.992 of 2012 was preferred under section 124(2) of the Insurance Ordinance ibid and the para-11 being relevant is given below:-

> 11. The written statement to the suit was filed by the Appellant on 05.01.2009 and issues were framed by the Hon'ble Insurance Tribunal on 22.01.2009. In the written statement, it was contended on behalf of the Appellant that the Respondent had no right to claim under the Policy as the risk in the consignment had passed on to the consignee under CIF sale with the Respondent paid in advance. The written statement also stated that the claim had been rejected on the basis of survey report, which attributed the damage to improper/inadequate lashing and securing of the cargo on the carrying trucks.

The grounds of attack to assail the impugned judgment in RFA agitated in para. 14 from "A to T" for ready reference are also reproduced hereunder:-

A). That the impugned judgment is liable to be set aside as it awards compensation to a complete stranger, who has suffered no harm whatsoever. This renders the Impugned Judgment unsafe and bad in law, and nullity in the eyes of law.

B). That the impugned judgment is liable to be set aside as it ignores the basic principle of CIF contracts in which the risk passes to the buyer the moment the goods are dispatched to it by the seller whereafter the seller retains no risk in the goods and therefore becomes ineligible to claim under the insurance policy.

C). That the impugned judgment is liable to be set aside as it fails to take into account the basic point of limitation which renders the claim by the respondent barred by law, having been filed more than three years after the alleged cause of action.

D). That the Hon'ble Insurance Tribunal erred in ignoring admitted position that notice to the carrier was a pre-requisite to a claim under the policy and that the Respondent had admittedly not given any such notice to the carriers, thereby failing in his duty to secure the legitimate interests of the Appellant insurance company and disentitling himself in the process to claim under the Policy.

E). That the impugned Judgment is liable to be set aside as it is based on incorrect appraisal and patent misreading of the facts on the one hand and unlawful and unjustifiable disregard of the evidence on the record on the other.

F). That the Honourable Insurance Tribunal erred in ignoring admitted evidence, including independent statement from the consignee of the cargo, showing the real cause of the damage being improper or inadequate lashing and securing of the consignment on the carrying trucks, which was duly excluded from the scope of the Policy under Institute Cargo Clauses Act.

G). That the Honourable Insurance Tribunal erred in concluding that the Appellant had not adduced any document in support of its contentions as the Appellant was under the bona fide and the legitimate impressing all along that the documents sought to be relied upon by the Appellant have been duly admitted by the Respondent and would in due course be brought on the record by virtue of the Appellant's application under Order XII, Rules 2 and 4, C.P.C., which application was not decided at all by the Honourable Insurance Tribunal, contrary to the law on the subject which requires all pending applications to be decided before the final disposal of a matter.

H). That the Honourable Insurance Tribunal erred in not deciding at all Appellant's application under Application under Order XII, Rules 2 and 4, C.P.C. in dismissing appellants application under Order XIII, Rule 4 read with section 151, C.P.C. and Order XIII, Rule 1 read with section 151, C.P.C. These errors proved fatal in this case as they seemingly led the Honourable Court to conclude that the Appellant had not adduced any evidence and also to completely disregard the evidence that was otherwise admitted at the evidence stage even by the respondent himself.

I). That the honourable Trial Judge ignored the facts of the case pertaining to recordal of evidence, to the effect that since the Respondent admitted all the documents written by the parties, the Appellant's witness tendered

all these documents without any objection. Due to procedural error however the documents were not shown as exhibited or numbered. It was this mistake that was sought to be rectified by the aforesaid applications, which applications were unjustly dismissed/not decided by the honourable Trial Court. Without prejudice it is submitted that even if there was any human mistake in this regard it can be ascribed to the counsel's negligence and the Appellant should not be penalized for no fault of their own.

J). That the documents the admission of which was sought to be placed on record and which were sought to be numbered and exhibited formally, clearly demonstrated the true cause of the damage. While the honourable Trial Court allowed a new document to be brought on record by the Respondent at an extremely late stage of the trial, holding that "the provisions of law are always meant to administer justice and not the technicalities", similar requests by the Appellant were unlawfully rejected on the ground that "the petitioner did not produce the same at the time of recording of evidence and now at such belated stage has filed applications one after the other". This obvious discrimination in the treatment of the two parties by itself renders the entire impugned judgment unsafe in law and liable to be set aside.

K). That the evidence allowed to be placed on record on the Respondent's later application was not even related to the issues in hand, whereas the applications by the Appellant were all very pertinent and would have not only helped the Honourable Trial Court in reaching a lawful decision but were actually vital to the just conclusion of the trial.

L). That the honourable Trial Judge erred in law allowing the survey report to be brought on the record as not only was this report crucial to the real controversy in the matter, it being an electronic document, was actually admissible under the Electronic Transactions Ordinance, 2002.

M). That the honourable Trial Judge appears to have based the Impugned Judgment on the flawed understanding of the law on burden of proof, as the apparent understanding displayed on the face of the impugned judgment is that it was for the Appellant to prove that the loss was not covered by the terms and conditions of the Policy, whereas the law on the point is that the Respondent, having made the claim and the application under the Policy was duty bound to prove how the loss was covered by such terms and conditions of the Policy. Not only is this the legal position, but also the facts being solely in the possession of the Respondent or his agents, it had to be the respondent alone who was bound under the law to prove each of his contentions.

N). In decreeing the Respondent's application 'as prayed', the Honourable Trial Court has effectively awarded the Respondent- a stranger- full insurance coverage amount when it was not even the Respondent's own case that the entire consignment had been destroyed. By all accounts, the damage was at the most worth US$100,000 and even that could not be proved by the Respondent in his evidence. To award the entire coverage amount therefore renders the Impugned Judgment clearly wrong and accordingly, liable to be struck down.

O). The Respondent also claimed cost of the application, along with counsel's professional fee. The Impugned Judgment in decreeing the application "as prayed" appears to have awarded the cost of the application, along with the counsel's professional fee, without even being addressed on these amounts and whether or not they may even be awarded under the law. The same goes against the norms and practices of the land and is a patent manifestation of the general apathy with which that the merits of the claim were considered, rather not considered, by the Honourable Trial Court.

P). That the award of liquidated damages by the Honourable Trial Judge is equally indefensible as, admittedly, the damage occurred due to improper or inadequate lashing and securing of the consignment on the carrying trucks. There is therefore no question of any liquidated damages being awarded against the Appellant.

Q). The case was heard by various presiding officers at the Insurance Tribunal and the Honourable Judge who ultimately authored the Impugned Judgment had been in the office for just days when he passed the Impugned Judgment. The Honourable Judge was also under severe pressure to decide the case urgently as the Respondent had filed petitions in the Honourable Supreme Court for early disposal of this case, even though it was the Respondent himself who had been delaying the proceedings all along. A decision under such intense pressure, with respect, is never a safe decision in law, particularly with various applications to decide and all the evidence to be considered. The Impugned Judgment is therefore liable to be set aside on this ground alone.

R). That the Honourable Trial Court failed to take into account the fact that the Respondent had filed the claim in the court and had acted all along with unclean hands and was therefore not entitled to any remedy.

S). That the Honourable Trial Court failed to take into account that no cause of action whatsoever had been shown by the Respondent against the Appellant.

T). The Appellant reserves the right to add more or further grounds during the pendency of these proceedings.

and when the contents of the application under section 12(2) are gone through, those were found to be verbatim/analogous of the afore-noted para as well as grounds of RFA. There was no ground in this petition to claim that order dated 3rd October, 2012 had been procured through fraud, misrepresentation, collusiveness or any such other element, what to talk about the detail thereof, so these basic components of the provision to deal with the said application were absolutely missing since its inception. Without specifying the essential detail, the pleadings per se were not sufficient to declare that the order was obtained by practicing fraud. In this respect, the provisions contained in Order VI, Rule 4 of the Code, 1908 are worth perusal. To substantiate this aspect of the case, reliance is placed on Waheed Ullah Khan and 2 others v. Kalim Ullah and 3 others (PLD 1977 SC 75) (sic), wherein it has been held that:-

> In particular, Rule 4 of Order VI of the Civil Procedure Code lays down that in all cases in which the party pleading relies any misrepresentation, fraud, breach of trust, willful default or undue influence and in all other cases in which particulars may be necessary beyond such as are in the form exemplified aforesaid, particulars (with dates and items if necessary(1) shall be stated in the pleadings. In Bal Gangadhar Tilk and others Shrinivas Pandi and others (AIR 1915 PC 7), it was held that in pleadings, general allegations, however, strong may be, the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice.

Hence, the petitioner failed to clearly spell out case of fraud and misrepresentation out of the above stated facts, whereas other quoted grounds were not enough to bring his case within the ambit of relevant provision. Mr. Hamid Khan, learned counsel for the petitioner on having been faced with the contents of application tabled by his client submitted that respondent being a consigner had no right to claim amount as well as liquidated damages, who in spite of lacking locus standi to prefer his claim before learned Tribunal through cheating procured a favourable decree, the judgment under attack of application under section 12(2) of the Code being tainted with misreading and non-reading of evidence was liable to be set aside for want of jurisdiction, was not well founded. The petition under section 12(2) of the code ibid had been contested on this score as well before the learned Tribunal, which were adhered to as per facts and law, but anything even having been rendered erroneously or illegally could not be assailed under section 12(2) of the Code ibid, especially when the basic judgment discussed the entire evidence issue-wise in detail. In fact the grounds and submission pleaded/urged travelled beyond the scope of section 12(2). The application under this provision only lies if the order/judgment/decree was obtained by practicing fraud etc. In the present case, such ingredients are

certainly missing, whereas section 12(2) is not substitute of appeal, which also cannot be equated or treated at par to the remedy of review or revision. In the present case the entire controversy had already been culminated and become final. For the sake of arguments, if submissions of Mr. Hamid Khan are taken to be correct, it was, at the best, a case in which the judgment was obtained by false evidence or the learned Tribunal misread or misconstrued the available material. It is well established that the remedy provided under section 12(2) cannot be availed where it is alleged that the decree was obtained on the basis of perjured evidence. The philosophy behind this rule would be that all questions concerning credibility of the evidence produced in the case relate to that file and must be decided therein; otherwise there would be no finality to the litigation. To me application under section 12(2) would also not be maintainable merely on the ground that the claim was false or that lis was incompetent. It is also recognized principle that a decree cannot be challenged on merits, especially when the applicant was aware of the facts forming the application, but did or did not assert those in the Court before whom the proceedings were finalized and subsequently by means of application under section 12(2), he is precluded from challenging the decree under this provision.

There is hell of difference in deciding a fact with wrong exercise of jurisdiction and for want of jurisdiction. The findings based on wrong exercise of jurisdiction could only be agitated under section 115 or 96 of Civil Procedure Code, 1908 as the case may be. In case of Rehmat Ali v. Additional District Judge (1988 SCJ 761) (sic), the august Supreme Court while dealing with the expression "without lawful and of no legal effect" held that the distinction has to be made in the judgment, which stood vitiated on account of "jurisdictional defect" and a judgment, which is tainted with irregular and improper exercise of jurisdiction and for correcting latter kind of deficiencies, the remedy available under law would be other than to have resorted to section 12(2) by invoking ground of want of jurisdiction, rather only the findings for the Court/Tribunal having absolute, no jurisdiction could be brought before the same forum by means of application under section 12(2) of the Code ibid. Here in this case, if the argument of Mr. Hamid Khan is considered to be correct that a consigner was not entitled to claim the amount as well as liquidated damages, was a fact, but was decided by the Court having jurisdiction to answer it on either side, hence for any illegality or material irregularity the jurisdiction vested to Court under the afore-noted provision could not be invoked. Mr. Hamid Khan when was confronted to the situation that had the Appeal preferred by his client been allowed, then what would be the fate of subsequent application, he was not in a position to wriggle out of it, which left no room to conclude that it was ploy and instrument to reopen the Pandora's box. The scope of provision ibid was restricted and the applicant was only obliged to prove that fraud or misrepresentation had been committed by the adversary in connection with the proceedings, but the contents of his application as disclosed supra, are silent in this regard. In fact, petitioner in a way wanted to reopen the matter, which had

been finally disposed of, as such it failed to prove his case being covered by the mischief of section 12(2) of the Code, ibid.

4. Adverting to the second point of difference of opinion, admittedly prior to filing of application under section 12(2) of the Code, the Appeal had already been preferred and after having remained unsuccessful, the other provided remedy could not be pressed. Although the petitioner at least had three concurrent remedies, i.e. appeal, review as well as application under section 12(2) to assail the judgment of the learned Tribunal and one does not exclude the other, but it was open to him to choose either of the three and the moment one out of those (appeal) was availed, the doors of the Court to receive/entertain the second application under section 12(2) were closed to decide both the remedies simultaneously or one after the other. If duplication is allowed, then there would be no end of litigation, which may also cause conflicting judgments and would be sheer abuse of process of law. The apex Court while dealing with a similar proposition in a reported case Mrs. Amina Bibi v. Nasrullah (2000 SCMR 296) had discussed the remedies and panorama available to the litigant for his redressal against ex parte decree and para 7 thereof being relevant is given below:-

> 'Where a suit has been decreed ex parte, various remedies are available to an aggrieved person for redress of his grievance. Firstly, an application under Order IX, Rule 13, C.P.C.; secondly, an appeal from the ex parte decree under section 96(2), C.P.C.; a petition for review under section 114 read with Order XLVII and a civil suit on the ground of fraud and want of jurisdiction. The latter remedy is now substituted by section 12(2), C.P.C. Here, the petitioner has exhausted her remedies by filing an application under Order IX, Rule 13, C.P.C. and, therefore, on the same ground she cannot be permitted to re-agitate the same issue by means of a fresh petition under section 12(2), C.P.C.'

Thus the petitioner had no lawful excuse or justification to re-agitate the settled controversy again by resorting to another different remedy.

5. The apex Court recently rendered a comprehensive judgment and his lordship Mushir Alam, speaking for it in the case reported as Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others (PLD 2018 SC 828) discussed the doctrine of election in depth and finally held that once the litigant opted to avail one out of the provided remedies, then it generally could not be permitted to initiate the other one. The relevant part of his lordship's conclusion being applicable to the facts of the case in hand is reproduced hereunder:-

> …The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one

out of host of available concurrent or co-existent 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 proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized 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 as 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. Though there is no bar to concurrently invoke more than one remedy at the same time against an ex parte order/judgment. However, once election or choice from amongst two or more available remedy is made an exhausted, judgment debtor cannot ordinarily be permitted subsequently to venture into other concurrently or coexisting available remedies.

With more certainty it was further concluded that:-

Giving choice to elect remedy from amongst several coexistent and or concurrent remedies does not frustrate or deny right of a person to choose any remedy, which best suits under the given circumstances but to prevent recourse to multiple or successive redressal of a singular wrong or impugned action before the competent forum/court of original and or appellate jurisdiction, such rule of prudence has been evolved by courts of law to curb multiplicity of proceedings. As long as a party does not avail of the remedy before a Court of competent jurisdiction all such remedies remain open to be invoked. Once the election is made then the party generally, cannot be allowed to hop cover and shop for one after another coexistent remedies. In an illustrative case this court in the case of Mst. Fehmida Begum v. Muhammad Khalid and others (1992 SCMR 1908) encapsulated the doctrine of election as follows:-

> "However, it is one thing to concede a power to the statutory forum to recall an order obtained from it by fraud, but another to hold that such power of adjudication or jurisdiction or jurisdiction is exclusive so as to hold that a suit filed in a civil Court of general jurisdiction is barred. I am therefore in agreement with my brother that a stranger to the proceedings, in a case of this nature has two remedies open to him. He can either go to the special forum with an application to recall or review the order, or file a separate suit. Once he acts to invoke either of the remedies, he will, on the general principles to avoid a conflict of decisions, ultimately before the higher appellate forums, be deemed to have given up and forfeited his right to the other remedy, unless as held in Mir Salah-ud-Din v. Qazi Zaheer-ud-Din PLD 1988 SC 221, the order passed by the hierarchy of forums under the Sindh Rented Premises Ordinance, leaves scope for approaching the Civil Court."

In view of the principle so set, the petitioner at the most could select one of the remedies provided by the Statute, but it was not his choice to avail/press one after the other.

6. The other salient feature of the case would be where special law provides its own mechanism and procedure to challenge certain actions under its scheme, recourse to general law for challenging such actions is not approved by the apex Court. See Major (Retd.) Pervez Iqbal v. Muhammad Akram Almas and others (2017 SCMR 831) wherein it is concluded that all the available grounds could have been raised before the forum and hierarchy provided in special law and not in collateral proceedings under section 12(2) of the Code, 1908.

7. The judgments relied upon by Mr. Hamid Khan, learned counsel for the petitioner are entirely distinguishable from the facts and circumstances of the instant case, wherein the Superior Courts have discussed the meanings of fraud, misrepresentation, rule of merger, suo motu powers of the Courts to deal with application under section 12(2), but none of the judgments cited above have come across to cope with situation that even after availing one of the provided remedies upto the level of Honourable Supreme Court, the same party could maintain application under section 12(2) for re-agitating the same grievances as a fresh cause of action.

8. For what has been discussed above, I am of the considered opinion that application under section 12(2) of the Code, 1908 was not maintainable and I agree with the opinion and observations of my learned brother Ch. Muhammad Iqbal, J., which now being view of majority would have decisive effect and the **judgment will follow such opinion.**

ZC/J-5/L
Revision dismissed.

2020 C L D 1022
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
PAKISTAN TELECOMMUNICATION COMPANY LIMITED through Senior Executive Vice-President---Appellant
Versus
Shaikh MUSHTAQ ALI ADVOCATE---Respondent

F.A.O. No. 168 of 2013, heard on 8th June, 2020.

Punjab Consumers Protection Act (II of 2005)---

----Ss. 27, 25 & 33--- Jurisdiction of Consumer Court--- Filing of claims--- Appellant Company impugned order of Consumer Court whereby complainant's complaint against appellant, a (Telecom Company), for not conducting "lucky prize draw" for various prizes as advertised by appellant, was allowed--- Contention of appellant, inter alia, was that Consumer Court had no jurisdiction in the matter---Validity---Complainant had applied for a telephone connection pursuant to advertisement made by appellant, which was duly installed and practically no loss was caused to complainant---Grievance that offer of awarding certain prizes announced in said advertisement was not fulfilled was incompetent and did not attract jurisdiction of Consumer Court---Impugned order was set aside---Appeal was allowed, in circumstances.

Muhammad Akram v. Ehsan Raqib and another Criminal Petitions Nos. 408, 409 and 429 of 2016 rel.

Muhammad Ashraf Mirza, Atif Mohtashim Khan and Rana Muhammad Ashraf Khan for Appellant.

Nemo for Respondent.

Date of hearing: 8th June, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This appeal is directed against the order dated 19.02.2013 passed by the learned Consumer Court, Lahore whereby the appellant-Company was directed to fix a date for the Lucky Prize Draw of Rs.10,00,000/- as well as 1000 Cordless phone sets duly advertised in National Newspapers for providing opportunity to all the concerned including the respondent to participate in the said Draw proceedings to be conducted within two months, otherwise the appellant would be liable to pay fine of Rs.5,000/- for every successive day till holding of draw in a transparent way.

2. It is emphasized by learned counsel for the appellant that no loss or damage was caused to the respondent, who had simply applied for a telephone connection, which was duly installed without any extra charges and there being

no complaint of any faulty or defective services, the jurisdiction of the learned Consumer Court was barred, whereas the respondent at the most could move the PTA, which has the exclusive jurisdiction to deal with the matters/disputes arising out between the appellant-company with its clients, but the learned Consumer Court while omitting to consider the said aspect passed the impugned order in a slipshod manner, which being illegal, against the facts and without jurisdiction is liable to be set aside.

3. None has turned up on behalf of the respondent-complainant despite repeated calls, whereas his name being counsel as well as other detail of the case is duly reflected in the cause list, hence he is proceeded against ex parte.

4. I have heard the learned counsel for the appellant and perused the record with his able assistance.

5. The pivotal question to be firstly resolved by this court is that whether the Consumer Court possessed jurisdiction to take cognizance in the matter in hand. As per its preamble, the Punjab Consumer Protection Act, 2005 has been promulgated to provide for protection and promotion of the rights and interests of the consumers and the complaint before the learned Consumer Court is filed under section 25 thereof, which reads as follows:-

> "25. Filing of Claims.---A claim for damages arising out of contravention of any provisions of this Act shall be filed before a Consumer Court set up under this Act."

However, procedure to be followed by the Consumer Court has been provided in section 30 of Act ibid, whereas powers vested to said Court are defined in given below next provision to the following effect:-

> "31. Order of Consumer Court.---If, after the proceedings conducted under this Act, the Consumer Court is satisfied that the products complained against suffer from any of the defects specified in the claim or that any or all of the allegations contained in the claim about the services provided are true, it shall issue an order to the defendant directing him to take one or more of the following actions, namely:-

(a) to remove defect from the products in question;

(b) to replace the products with new products of similar description which shall be free from any defect;

(c) to return to the claimant the price or, as the case may be, the charges paid by the claimant;

(d) to do such other things as may be necessary for adequate and proper compliance with the requirements of this Act;

(e) to pay reasonable compensation to the consumer for any loss suffered by him due to the negligence of the defendant;

(f) to award damages where appropriate;

(g) to award actual costs including lawyers' fees incurred on the legal proceedings;

(h) to recall the product from trade or commerce;

(i) to confiscate or destroy the defective product;

(j) to remedy the defect in such period as may be deemed fit; or

(k) to cease to provide the defective or faulty service until it achieves the required standard."

A perusal of the above provisions shows that in order to invoke the jurisdiction by the Consumer Court, it must have satisfied that the products complained against suffered from any of the defects specified in the claim or that any or all of the allegations contained in the claim about the services provided are true, then it could issue direction in the above said manner. However, from the bare reading of the complaint filed by the respondent before the said Court, it is found that pursuant to some advertisement made by the appellant-company in the newspaper, the respondent had applied for telephone connection, which was duly installed and practically no loss was caused to him, whose simple grievance is that the offer of awarding certain prizes announced in the said advertisement was not fulfilled. This Court concurs with learned counsel for the appellant that the complaint made by the respondent to the Consumer Court was incompetent, which wrongly assumed the jurisdiction in the matter in hand and at the most the respondent could lodge/set up his claim before the PTA. The identical question stood already clinched by the apex Court in Crl. P. 408/2016, Crl. P. No. 409 of 2016 and Crl. P. 429 of 2016 titled Muhammad Akram v. Ehsan Raqib and another to the following effect:-

> "During the course of hearing of this petition a consensus developed between the parties that the complaint filed before the Regular Consumer Court is without jurisdiction because under the Pakistan Telecommunication (Re-Organization) Act, 1996, particularly section 58, the consumer is required to file such a complaint before PTA because of the non-obstante clause, which has been given overriding effect over all other laws, therefore, the petitioner shall file a complaint under the provisions of Telecom Consumers Protection Regulations, 2009 before the PTA against the respondent in the manner prescribed therein, while the regular forum under the Protection of Consumer Act has no jurisdiction and this legal aspect conveniently escaped the notice of the High Court and in the impugned judgment unnecessarily academic

discussions were made which were not required in the circumstances of the case, hence the impugned judgment is set aside. The counsel of the parties and the petitioner may file a complaint as stated above under the Special Law, if so wished. Petition disposed of. The complaint pending before the trial court is also disposed of but that will not preclude the petitioner to file a fresh complaint under the special law as stated above before the PTA and also followed by this Court in order dated 11.07.2018 passed in W.P. No.219920 of 2018, which is squarely applicable to the facts and circumstances involved herein."

6. For the foregoing discussion, this appeal is allowed, the impugned order passed by the learned District Consumer Court, Lahore is set aside and the complaint filed by the respondent will be returned to him for its presentation before the competent forum.

KMZ/P-10/L
Appeal allowed.

2020 C L C 1687
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Haji MUHAMMAD AMEER----Petitioner
Versus
SALEEM NAWAZ and 2 others----Respondents

W.P. No.7381 of 2016, heard on 5th June, 2020.

Specific Relief Act (I of 1877)---

----S.12---Civil Procedure Code (V of 1908), O.IX, R.6---Qanun-e-Shahadat (10 of 1984), Arts. 58, 117, 120 & 129 illustration (e)---Presumption of correctness---Extent---Absence of defendant---Proof---Onus to prove---Trial Court, in suit for specific performance of agreement to sell, proceeded ex-parte against defendant for his non-appearance but Lower Appellate Court in exercise of revisional jurisdiction set aside the order--- Validity--- Non-examination of process server who two times tried to effect service upon defendant was a factor to disbelieve service of process upon defendant--- Presumption of correctness was attached to judicial proceedings but whenever those were called in question then it was sine qua non for the beneficiary to prove the same as per mandate of Art.58 of Qanun-e-Shahadat, 1984---To bring case under illustration (e) to Art. 129 of Qanun-e-Shahadat, 1984, solitary statement of plaintiff was insufficient---Counsel who purportedly filed power of attorney as well as written statement on behalf of defendant, could be the best evidence to shatter / belie allegations raised by defendant but the same was withheld without any justification---Opinion of expert was one of the modes of producing evidence and if the report was properly proved, the same could be used as corroborative piece of evidence---By not resorting to such exercise, plaintiff himself incurred a presumption against him---Order passed by Lower Appellate Court caused no prejudice to plaintiff, if he had a genuine case who had been given a fair chance to prove his case on merit---High Court under constitutional jurisdiction declined to interfere in the order passed by Lower Appellate Court, as the same was neither coram non judice nor ultra vires, rather the same was made in exercise of lawful authority on the basis of available evidence---Constitutional petition was dismissed in circumstances.

Muhammad Qayyum and 2 others v. Muhammad Azeem through legal heirs and another PLD 1995 SC 381 rel.

Sh. Naveed Shahryar, Ms. Humaira Bashir Chaudhry and Muhammad Shafiq Ahmad for Appellant.

Malik Muhammad Imran Joyia and Rana Muhammad Ashraf Khan for Respondent No.1.

Date of hearing: 5th June, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The factual history of the petition in hand is that Saleem Nawaz respondent was owner of 80-Kanals 10-Marlas of the suit property against whom Haji Muhammad Ameer present petitioner instituted suit for specific performance of contract before the learned Civil Court on 09.2.2004, pleading therein that it had been purchased against consideration of Rs.2,10,000/- out of which. Rs.1,98,800/- were paid, whereas neither the remaining consideration received nor the vendor transferred the subject area in compliance of said contract. The lower Court after registration of the suit, initially issued process through ordinary means and lastly via substituted modes by publication in some newspaper for service of the defendant. As a consequence thereof, Malik Muneer Tahir, Advocate filed Power-of-Attorney as well as contesting written statement on behalf of defendant/vendor. The said Advocate also pursued the case for some period, but thereafter went out of the scene without leaving any reason, which act forced the learned Trial Court to initiate ex parte proceedings besides to pass decree dated 08.12.2007 of same character. Having notice thereof, respondent-defendant made application for its setting aside, which though after trial was declined, however, vide impugned order dated 08.2.2016 granted, hence, this Constitutional Petition.

2. Arguments heard and record perused.

3. Through his application for setting aside of the ex parte proceedings as well as decree, it was clear stance of the defendant/respondent that neither process was served upon him, nor he appointed any counsel to represent him. He further asserted there that plaintiff/petitioner through active connivance managed filing of forged and fictitious power of attorney, which was never signed by him. In response the petitioner vide his written reply specifically asserted that on 30.03.2004, the defendant personally appeared before the Civil Court and appointed above named counsel, who was not only earlier known, rather had personal relations with the respondent. It was further narrated that to avoid comparison, the signatures over written statement were made in Urdu. This left no room to observe that on behalf of contesting parties, the negation of series of acts and its assertion were specifically pleaded. The defendant in order to shake the credibility of the proceedings stepped in the witness-box as AW1 and once again repeated all the allegations on oath as detailed above. Although he was diligently subjected to cross-examination, but stood credible, as such succeeded to shift the onus to the beneficiary/plaintiff to prove his positive assertion. Even otherwise as per Roman Law ei incumbit probation qui dicit non qui negat, the burden of proving a fact rest on the party, who substantially assets the affirmative of the issue and not upon the party, who denies. Anyhow, to prove his assertion, the petitioner (RW1) though stated that defendant personally appeared in trial proceedings, but his deposition to that effect was not supported

by any entry made by the judicial officer or the official on the suit file. Moreover, the petitioner in his cross-examination failed to disclose the date/occasion when the respondent appeared before the learned Civil Court during trial proceedings. As such, the beneficiary miserably failed to prove his specific asserted plea to that effect. Whereas, RW1 omitted to say anything about the alleged previous and close relationship between respondent as well as his alleged counsel, Mr. Muneer Tahir, Advocate. It was pertinent that during test of cross-examination, the petitioner (RW1) candid to admit that process for procuring service of the respondent was not issued at the address given in the plaint. During the course of deliberation, Messrs Sh. Naveed Shehryar, Humaira Bashir and Muhammad Shafiq Ahmad, Advocates for the petitioner were invited to show any documentary material to satisfy that at the address detailed in the plaint requisite summons/notices were ever issued, but they emphasized that at the known address these were sent/dispatched. Had there been any other address in the knowledge of the petitioner, then its non-disclosure in the plaint and non-issuance of process at the given address were the plausible reasons to discredit the entire mode followed for the service of the defendant. Moreover, non-examination of the Process Server, who twicely tried to effect service upon defendant, was another factor to disbelieve the entire exercise. No doubt, under Article 129 illustration (e) of the Qanun-e-Shahadat Order, 1984, presumption of correctness is attached to judicial proceedings, but whenever those are called in question, then it is sine qua non for the beneficiary to prove the same as per mandate of Article 58 of the said Order. To bring the case under the above referred illustration, the solitary statement of the petitioner was insufficient. Another star witness Mr. Muneer Tahir, Advocate, who purportedly filed power of attorney as well as written statement on behalf of the defendant could be the best evidence to shatter/belie the allegations raised by the defendant, but withheld without any justification. Learned counsel for the petitioner on being confronted to such lapse remained handicapped to justify non-examination of best available evidence. The said omission has compelled the Court to draw hostile inference that had he been brought it in the witness-box, he might have deposed against the petitioner.

4. There could be one more resort available to the petitioner to prove the honest representation of the defendant through alleged counsel, by making prayer or comparison of the disputed signatures available on wakalatnama and the written statement with the sample of Urdu handwriting of the defendant. In this scientific period, the Expert while analyzing flow, pressure, characteristic and angle of the digit easily could render its report in negative or otherwise. Although the evidence of the Expert is not conclusive proof, but as held by the august Supreme Court in judgment reported as "Muhammad Qayyum and 2 others v. Muhammad Azeem through legal heirs and another" (PLD 1995 SC 381), the opinion of Expert is one of the modes of producing evidence and if the said report is properly proved, the same can be used as corroborative piece of

evidence. By not resorting to this exercise, the plaintiff himself incurred a presumption against him.

5. In such given circumstances, the learned Revisional Court was perfect in setting aside the ex parte proceedings as well as the decree, which in fact caused no prejudice to the present petitioner rather if he has a genuine case, then has fair chance to prove it on merit. The impugned order is neither coram non judice nor ultra vires, rather made in exercise of lawful authority on the basis of available evidence, hence deserve no interference. The petition in hand being meritless is dismissed.

MH/M-103/L
Petition dismissed.

2020 M L D 1773
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. GHAFOORAN BIBI---Appellant
Versus
MUHAMMAD AMIN NASIR and others---Respondents

F.A.O. No.685 of 2014, heard on 4th June, 2020.

Civil Procedure Code (V of 1908)---

----O.XLI, Rr. 23 & 24---Remand of case---Sufficient evidence--- Suit was decreed by Trial Court in favour of plaintiff but Lower Appellate Court remanded the matter to Trial Court for comparison of disputed thumb impressions---Validity---Unnecessary remand resulted in undue delay in cases and was an addition to agony of litigant besides over burdening Court dockets as well as wastage of its precious time---Constitutional imperative demanded inexpensive and speedy justice, that was why practice of frequent remand orders were time and again reprimanded by superior Courts---High Court observed that there was no occasion for Lower Appellate Court for remand of original suit, as the same was violative to the law on the subject and against the mandate of law settled by Supreme Court---High Court set aside remand order and remanded the matter to Lower Appellate Court to decide appeals against judgment and decree passed by Trial Court---High Court directed that if it was inconsequential to go for comparison of disputed thumb impressions, then Lower Appellate Court would do such exercise at its own level--- Appeal was allowed accordingly.

Robeena Shaheen v. Muhammad Munir Ahmad PLD 2013 Lah. 106, Arshad Ameen v. Messrs Swiss Bakery and others 1993 SCMR 216 and Mst. Shahida Zareen v. Iqrar Ahmed Siddiqui 2010 SCMR 1119 rel.
Muhammad Muzammil Qureshi, Atif Mohtashim Khan and Zubair Ahmed Virk in three connected appeal respectively for Appellants.
Nemo. for Respondents.
Date of hearing: 4th June, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This as well as connected FAOs Nos. 28 and 115 of 2015 have arisen out of consolidated remand order passed by the learned lower Appellate Court in the rival lis instituted by the parties against each other and there being common questions of fact/law involved, hence appropriate to decide all the appeals jointly, however, for reference, source will be instant file.

2. Inessential detail apart, on 27.12.2007, the present appellant instituted suit for possession as well as cancellation of mutation No.4467 dated 25.05.2000

claiming it to be result of fraud, impersonation and misrepresentation against Muhammad Amin, respondent No.1, which was not only contested by the latter, rather he also brought independent rival suit for permanent injunction to maintain his alleged possession over the subject property, whereas Muhammad Azam, respondent No.2 and nine others filed cross suit for specific performance of contract as well against the appellant, pleading that the latter sold out subject property to their late father. It is pertinent that during the pendency of the lis, the respondents made application for comparison of purported thumb-impressions of the appellant available on the disputed mutation and agreement to sell, subject of their suits, which was declined by the learned Trial Court on 15.05.2014 and finally after joint trial, the suit of appellant decreed and those of respondents dismissed through consolidated judgment dated 11.06.2014. Being dejected, three appeals were preferred by the respondents and during its pendency they again requested for comparison of thumb-impressions of the appellant through a fresh application before the learned lower Appellate Court, who without touching merits of the case while observing that the said exercise of comparison was essential for the just decision of the lis remanded it to the learned Court of first instance for decision afresh after making such drill work through impugned single order dated 28.11.2014, which is subject of appeals in hand.

3. These appeals are lingering on for the last many years and despite issuance of process repeatedly, the respondents did not bother to make their representation either in person or through counsel, who were finally summoned by publication of citation in the newspaper for 07.04.2020, which was duly published, but as per record none turned up on their behalf till today, who are proceeded against ex parte.

4. Heard and record scanned.

5. To me, the remand was not a proper solution as the whole evidence of the parties was already available on the file and it was not adviseable to throw them in another round of litigation just for the exercise, which could even be carried out by the learned Appellate Court, if essential. Under the law Regular First Appeal is continuation of original lis where the whole case is reopened and as per mandate of section 107 of the Code, 1908, the powers of the Appellate Court are akin with that of the Trial Court, as such the former endavours to read the entire evidence in the light of submissions made by the parties and then try to reach the truth of the matter. The jurisdiction to remand the case by the learned Appellate Court is provided under Order XLI, Rule 23 of the Code ibid, which reads as under:-

> "Remand of case by Appellate Court.-Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case; and may further direct what issue or

issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under the original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

Whereas the following rule 24, reproduced hereinbelow:-

"24. Where evidence on record sufficient, Appellate Court may determine case finally. --Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

(sic) is, in fact, alternative to the remand and makes obligatory for the Appellate Court to decide the lis even while resettling issues, if not framed properly, on the basis of evidence, so available on record.

However, the next rule 25 given below:-

"Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.---Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor."

provides mechanism for the Appellate Court to collect further evidence, if needed through remittance of suit record to the Trial Court, which after compliance shall return the same to the former and in the meanwhile, the file of appeal shall remain within his custody. The analogy behind the said provision would be that unnecessary remand results in undue delay in cases and addition to the agony of the litigant besides over burdening the Court dockets as well as wastage of its precious time, whereas constitutional imperative demands inexpensive and speedy justice, that is why practice of frequent remand orders has time and again reprimanded by the superior Courts. See Robeena Shaheen v. Muhammad Munir Ahmad (PLD 2013 Lahore 106), Arshad Ameen v. Messrs Swiss Bakery and others (1993 SCMR 216) and Mst. Shahida Zareen v. Iqrar Ahmed Siddiqui (2010 SCMR 1119). In this case, there was no occasion for the learned Appellate Curt for the remand of original suits, hence being violative to

the law on the subject and against the mande of the above referred judgments of the Superior Courts cannot be supported.

6. The upshot of the above discussion is that all these appeals are allowed, the impugned consolidated remand order dated 28.11.2014 is set aside, as a result whereof the Appeals preferrered by the respondents will deem to be pending before the learned Appellate Court below, who will redecide those as well as application for comparison preferred/made on their behalf in accordance with law after initiation of process to the other side as well. It is made clear that if learned Appellate Court below feels it inconsequential to go for the comparison of disputed thumb-impressions for the just and fair conclusion of the lis, then the said exercise should be carried out at his own level. The appellants will appear before the learned District Judge, Sheikhupura on 29-6-2020, who may hear the cases himself or entrust the same to any Court of competent jurisdiction for further proceedings.

MH/G-10/L
Case remanded.

PLJ 2020 Lahore (Note) 129
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
NOOR KHAN, etc.--Petitioners
Versus
AKRAM HUSSAIN SHAH etc.—Respondents

W.P. No. 7502 of 2007, heard on 16.9.2014.

Constitution of Pakistan, 1973--

----Art. 199--Civil Procedure Code, (V of 1908), O.XIII R. 2--Suit for declaration--Application for producing of documents during pendency of suit--Accepted--Civil revision--Allowed--Good cause--Discretion of Court--Failing to exercising of jurisdiction--Jurisdictional defect--Parameters of jurisdiction--Challenge to--Admittedly, petitioners/plaintiffs produced oral as well as documentary evidence and when case was fixed for arguments then application was made at his instance to produce documents--Said documents mentioned in his application are required to be produced so that Court could arrive at a just and fair decision--It is to be noted that express "good cause" has been used in Order XIII, Rule 2 of Code of Civil Procedure, 1908 and not term "sufficient cause" as referred to by lower revisional Court--Expression "good cause" is wider expression than "sufficient cause" and has to be construed liberally--Court may in its discretion admit documents at subsequent stage of proceedings to dispense with justice with sole objective that function of Court was to do substantial justice and decide rights on merits rather than technicalities--That Court is of views that trial Court while allowing application made by petitioners acted within parameters of its jurisdiction and lower revisional Court while setting aside said order passed by learned trial Court failed to exorcise its jurisdiction vested in it and as such impugned judgment passed by learned Addl. District Judge suffers from jurisdictional defect calling for interference by this Court--Petition was accepted. [Para 6 & 7] A, B, C & D

1987 SCMR 744, 1999 MLD 3018, 1992 SCMR 1778 and 1993 MLD 2295 *ref.*

Mr. Imran Muhammad Sarwar, Advocate for Petitioners.

Mr. Muhammad Mumtaz Afridi, Advocate for Respondent No. 1.

Date of hearing: 16.9.2014.

JUDGMENT

Through filing the instant Constitutional petition by the petitioners, the illegality of judgment dated 08.6.2007 recorded by the learned Addl. District Judge has been called in question, whereby, the civil revision filed by the respondents against the order dated 30.4.2007 was accepted by the learned trial Court and the application to adduce additional evidence filed by the petitioners/plaintiffs was dismissed.

2. The facts germane for the disposal of the instant petition are that the petitioners being plaintiffs preferred a suit for declaration along with consequential relief before the learned trial Court against the respondents/defendants and during the pendency of said suit, the petitioners/plaintiffs filed an application for allowing them to submit and produce certain documents for proper adjudication of the case. The said application was accepted by the learned trial Court vide order dated 30.4.2007 while invoking the provisions of Order XIII, Rule 2 CPC. The respondents/defendants assailed the said order by filing the revision petition before the learned lower revisional Court which was allowed and order dated 30.4.2007 passed by the learned trial Court was set aside and application for production of documentary evidence was also dismissed. Being aggrieved, the petitioners/plaintiffs have assailed the impugned judgment dated 08.6.2007 by filing the instant petition.

3. Learned counsel for the petitioners has argued that the impugned order is against the spirit of mandate provided under Order XIII, Rule 2 of CPC; that the proposed documents required to be produced in documentary evidence are fully mentioned in the plaint and inadvertently the same could not be got exhibited at the time of production of documentary evidence; that some of the proposed documents were part of public record and the learned trial Court rightly allowed the petitioners to produce the said documents but the learned lower appellate Court on erroneous premises of law dismissed the said application; that production of documents before the Court of first instance should liberally be allowed for the adjudication of cases on merits and that the learned lower revisional Court failed to exercise its jurisdiction in accordance with law. He has lastly prayed for acceptance of the instant writ petition.

4. Conversely," learned counsel for the respondents has supported the impugned judgment.

5. Arguments heard and record perused.

6. The present petitioners filed a suit for declaration along with consequential relief before the learned trial Court against the respondents which was contested by the respondents/defendants. However, it is not disputed by the respondents/defendants that the proposed documents which are required to be produced in additional documentary evidence are mentioned in the contents of the plaint filed by the petitioners/plaintiffs. Admittedly, the petitioners/plaintiffs produced oral as well as documentary evidence and when the case was fixed for arguments then the application was made at his instance to produce the documents. The said documents mentioned in his application are required to be produced so that the Court could arrive at a just and fair decision. It is also not disputed that the said documents could not be produced at the relevant stage as envisaged by Order XIII rule 1 of CPC. Rule 2 of the said order suggests that no documentary evidence in the possession or power of any party shall be received at any subsequent stage of proceedings unless good cause is shown to the satisfaction of the Court for non-production of the same. It is to be noted that express "good cause" has been used in Order XIII, Rule 2 of the Code of Civil Procedure, 1908 and not the term "sufficient cause" as referred to by the learned lower revisional Court. The expression "good cause" is wider expression than "sufficient cause" and has to be construed liberally. It is also a settled principle of law that a party cannot be allowed to fill up the lacunas and gaps; which have been left by him during the course of recording of evidence. Nevertheless the party can be permitted to produce document at the level of Court of first instance. Though there is no good cause within the meaning of Rule 2 of Order XIII of the Code of Civil Procedure, 1908 as mentioned in the application filed by the petitioners/plaintiffs in this regard but the perusal of plaint reveals that the above referred documents are very well mentioned in the plaint. The learned counsel appearing on behalf of respondents could not deny the fact that such documents find mention in the plaint. However, he contended that the documents which are required to be produced in evidence are of private nature and the presentation thereof in the evidence will amount to its strict proof. No doubt, the contention of learned counsel for the respondents has some substance, but the fate of proof of the documents will be adjudicated upon by the learned trial Court at the time of final adjudication of the lis. The genuineness of the documents could also be disputed at the relevant time when the petitioners/ plaintiffs will present the same in their evidence. As it is held in various judgments that Order XIII, Rule 2 CPC should be construed liberally to serve the ends of justice and said provision was general provision applicable to the plaintiff as well as the defendant and benefit of this provision should be made available to them both liberally. Court may in its

discretion admit documents at subsequent stage of proceedings to dispense with justice with the sole objective that the function of the Court was to do substantial justice and decide the rights on merits rather than technicalities. The said view has been fortified by the judgments reported as *"Iqbal Ahmad and others v. Khurshid Ahmad and others* (1987 SCMR 744), *"Messers Liyas Mortine and Associates (Pvt.) Ltd. v. Muhammad Amin Lakhani and others* (1999 MLD 3018) *"Zar Wali Shah v. Yousaf ali shah and others* (1992 SCMR 1778) and *"Muhammad Nawaz v. The Additional District Judge, Jhang and 4 others* (1993 MLD 2295).

7. Pursuant to above discussion, this Court is of the views that the learned trial Court while allowing the application made by the petitioners acted within the parameters of its jurisdiction and the learned lower revisional Court while setting aside the said order passed by the learned trial Court failed to exorcise its jurisdiction vested in it and as such the impugned judgment passed by the learned Addl. District Judge suffers from jurisdictional defect calling for interference by this Court.

8. Epitome of the above discussion is that while setting aside the impugned judgment the instant writ petition is hereby accepted and the petitioners/plaintiffs are permitted to produce the documents sought to be produced, reference of which has been made in the application.

(Y.A.) Petition accepted.

PLJ 2020 Lahore (Note) 141
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
ADAM KHAN--Petitioner
Versus
MOHAMMAD SADDIQ KHAN(deceased) through L.Rs.—Respondents

C.R. No. 3031 of 2014, heard on 9.3.2015.

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

----S. 9--Suit for possession--Decreed--Appeal--Accepted--Case was remanded--Suit was again decreed--Appeal--Dismissed--Ejectment petition was also filed--Decreed--Execution petition--Possession was handed over--Forcibly dispossession--Presumption of truth--Challenge to--Stance of plaintiff that subsequently present petitioner had again dispossessed him forcibly has also been proved by producing PW4 to PW-3--In rebuttal petitioner himself appeared as DW.1 as a sole witness and produced certain documents but remained fail to deny stance of plaintiff--Documentary evidence produced by respondent/plaintiff attained strong presumption of truth and both courts below lafter considering same have rightly passed impugned judgments and decrees on valid reasons--Both courts below have rightly knocked out petitioner on valid reasons through impugned judgments and decrees, which are not found to be tainted with any misreading or non-reading of evidence as well as any perversity and infirmity or jurisdictional defect to warrant interference by this Court in exercise of revisional jurisdiction, scope whereof is restricted and narrower, which is only meant for correcting errors of law, if are found to be committed by subordinate courts in discharge of their judicial functions--Revision petition was dismissed. [Para 4 & 5] A & B

Mr. Umair Khan Niazi, Advocate for Petitioner.
Mr. Muhammad Mumtaz Faridi, Advocate for Respondents.
Date of hearing: 9.3.2015.

JUDGMENT

By filing the instant civil revision the petitioner has challenged the judgment and decree dated 23.6.2011, whereby, suit for possession filed by respondents/plaintiffs was decreed by the learned trial Court as well as the judgment and decree dated 24.6.2014 delivered by the learned lower appellate Court by virtue of which the appeal filed by petitioner has been dismissed.

2. Precisely, the facts of the case are that Muhammad Sadiq Khan, plaintiff, who subsequently died and now represented by Respondents No. 1 to IV, filed a suit for possession against the petitioner with respect to the disputed property fully mentioned in the body of the plaint with the assertion that the disputed property was under the possession of present petitioner/defendant, who was cultivating the same being tenant and on account of default of the petitioner to pay the share of the produce, the suit filed by plaintiff for recovery of share was decreed by the revenue hierarchy on 11.11.2002, which was also followed by a decree for ejectment passed

by the same forum vide judgment and decree dated 15.12.2004 in favour of the plaintiff and in lieu of execution petition, the possession of the disputed property was handed over to the plaintiff on 26.2.2005. However, the petitioner/defendant again took possession of the suit land forcibly, hence, the above referred suit was filed by the plaintiff. The said suit was contested by the petitioner/defendant. However, the learned trial Court after full-fledged trial decreed the same vide judgment and decree dated 09.2.2010. The petitioner being aggrieved filed an appeal before the learned lower appellate Court (although the appeal was not provided as per law). The learned lower appellate Court vide judgment and decree dated 30.3.2011 accepted the appeal with direction to the learned trial Court that the suit should, be decided afresh after allowing the parties to adduce additional evidence. In post remand proceedings, the learned trial court again decreed the suit filed by Respondent No. 1/plaintiff vide judgment and decree dated 23.6.2011, which was maintained by the learned lower appellate Court when the appeal filed by the petitioner/defendant was dismissed vide judgment and decree dated 24.6.2014. Being dissatisfied, the instant civil revision has been filed by the petitioner/defendant.

3. Arguments heard and record perused.

4. The plaintiff has proved his case by placing on record the documentary evidence. According to the copy of Register Haqdaran Zameen for the year, 2004-05 (Exh.P1), the respondent/plaintiff was undoubtedly owner of the disputed property. The ejectment suit filed by Respondent No. 1/plaintiff before the revenue hierarchy was decreed vide judgment dated 15.12.2004 (Exh.P2). The said judgment had already attained finality and in pursuance thereof the possession of the disputed property was also handed over to Respondent No. 1/plaintiff. The perusal of reports of Warrant Dakhal (Exh.P3 and Exh.P4) proves the fact that the possession of the disputed property had been handed over to Respondent No. 1/plaintiff on 16.2.2005. The stance of the plaintiff that subsequently the present petitioner had again dispossessed him forcibly on 8.4.2005 has also been proved by producing PW4 to PW-3. In rebuttal the petitioner himself appeared as DW.1 as a sole witness and produced certain documents but remained fail to deny the stance of the plaintiff. The documentary evidence produced by respondent/plaintiff attained strong presumption of truth and both the courts below lafter considering the same have rightly passed the impugned judgments and decrees on the valid reasons.

5. In view of the above discussion, I am fully convinced that both the learned Courts below have rightly knocked out the petitioner on valid reasons through the impugned judgments and decrees, which are not found to be tainted with any misreading or non-reading of evidence as well as any perversity and infirmity or jurisdictional defect to warrant interference by this Court in the exercise of revisional jurisdiction, the scope whereof is restricted and narrower, which is only meant for correcting errors of law, if are found to be committed by the subordinate Courts in the discharge of their judicial functions. The instant civil revision devoid of any force is dismissed.

(Y.A.) Revision petition dismissed.

2020 Y L R 2344
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD ILYAS---Petitioner
Versus
MUMTAZ BEGUM and others---Respondents

Civil Revision No. 25529 of 2020, decided on 11th June, 2020.

Specific Relief Act (I of 1877)---

----S.8---Suit for possession of immovable property--- Admission---Withdrawal of---Effect---Suit land was inherited in favour of plaintiffs being widow and minor son of deceased---Defendant having possession of suit property being nephew of deceased filed earlier suit for declaration on the basis of gift against public-at-large which was ex parte decreed---Plaintiffs moved application for setting aside of said ex parte decree which was accepted with the consent of defendant wherein he admitted relationship of plaintiffs as widow and son of the allottee---Defendant thereafter withdrew the said suit and filed another suit against the plaintiffs on the basis of gift wherein he also admitted the plaintiffs as widow and son of the deceased---Said suit filed on behalf of defendant was dismissed and thereafter plaintiffs moved an ejectment petition against the defendant wherein he admitted the relationship of plaintiffs with the deceased---Plaintiffs could not prove relationship of landlord and tenant and eviction petition was dismissed and thereafter present suit was filed wherein defendant had denied the relationship of plaintiffs with the deceased---Suit filed on behalf of plaintiffs was decreed concurrently---Validity---Defendant had admitted the relationship of plaintiffs as widow and son of the allottee in the earlier litigations---Admission once made could not be withdrawn at any subsequent stage---Defendant was estopped to develop different stance other than the one already confirmed before the Court of law---Defendant had made allegations of illicit relationship of plaintiffs with the deceased allottee malafidely just for a defence to prolong his unauthorized possession---Defendant had lost his case on the basis of gift and he was bound to part with his possession forthwith---Real owners of suit property had been entangled in baseless litigation one after the other which practice was to be condemned---Defendant had defied the modesty of an old age widow and undermined the personality of her son while claiming him illegitimate child---Plaintiffs had right to independently proceed under the law against the defendant in that regard---Courts should be courageous to impose heavy costs against the defendant for his ill designs---Defendant had managed forged gift and asserted baseless allegations and prolonged his illegal possession over the suit property---Revision was dismissed with costs of Rupees 200,000/---Executing Court was directed to satisfy the decree as well as cost imposed herein within sixty days---Revision was dismissed in limine, in circumstances.

Ch. Abdul Majeed-III, Ch. Zahid Majeed and Rana Muhammad Ashraf Khan for Petitioner.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undisputedly, vide PTD (Exh. P-2), the suit house was finally transferred by the Settlement Department to Ghulam Muhammad, ascendant of respondents, who departed on 05.09.1989 and as a consequence thereof, the subject house was inherited by respondents being widow and minor son of the deceased. It was admitted position that petitioner, who was nephew of transferee along with the latter was also occupying the disputed house. The petitioner after the death of his uncle to maintain his possession instituted civil suit (Exh. P4) on 21.11.1992 (without impleading respondents) only against public-at-large while claiming that subject house stood already transferred to him by his uncle/ allotee through unregistered memo of gift dated 18.06.1989 and finally procured ex parte decree. Having its notice, the respondents/plaintiffs to whom the house had already been transferred being legal heirs of original transferee tabled application (Exh. P7) under section 12(2) of the Code, 1908 before the same Court for setting aside of ex parte decree dated 15.12.1992 (Exh.P-6). The petitioner without denying the relationship of respondents or their ownership, straightaway raised no objection for the setting aside of that decree, resultantly vide order dated 23.10.1993 (Exh. P-8) it was reserved and original suit though restored, yet on the next date of hearing that was simply withdrawn by the petitioner. After complete silence of seven years, the petitioner woke up to institute second suit (Exh. P-9) on the same lines as pleaded in earlier one, but this time only against the respondents while specifically admitting them widow and son of the original allotee. Anyhow, this suit was also withdrawn vide order (Exh.P-10) and soon thereafter the petitioner opened third round of litigation against respondents through another suit (Exh.P-11) relying upon that very memo of gift while admitting their relationship with his late uncle and ownership of the respondents. This time after full-fledged trial spreading over about nine years, the petitioner failed to prove the genuineness of his said hub document and the alleged transaction of gift referred therein. As a result thereof that suit dismissed vide judgment dated 28.01.2010 (Exh. P-12) which though challenged through R.F.A. and R.S.A., but maintained all the way up to this Court vide judgments dated 15.03.2012 and 06.03.2015 (Exh. P-13 and 31). As per available history/record, the petitioner did not assail said unanimous judgments of the three Courts any further, therefore, stood final. After having culminated repeated rounds of litigation in their favour the respondents initially approached the learned Rent Tribunal through ejectment petition to recover possession of the suit house, but failed to establish purported relationship of tenant and landlord. It would be pertinent to add here that once again the lineal tie of the respondents with Ghulam Muhammad as well as their ownership was not disputed or denied by the petitioner in any manner. Anyhow, thereafter the respondents on the basis of

their ownership through revenue entry (Exh. P-3) brought suit under section 8 of the Specific Relief Act, 1877 for recovery of possession as well as mesne profit. The petitioner this time again through his initial written statement admitted the relationship and ownership of the respondents, however during trial proceedings, he becoming impious through his amended written statement, diverted to earlier stance introduced by him in the series of litigation spreading over decades, first time asserted that neither Ghulam Muhammad contracted marriage with respondent No.1 nor respondent No.2 was out of said wedlock. The petitioner being (DW-2) further went ahead in stating that respondent No.1 had illicit relations with one Muhammad Siddique and respondent No.2 being result thereof was illegitimate. The respondents/plaintiffs by bringing on record copy of nikahnama, (Exh. P-29) of Ghulam Muhammad with respondent No.1 and copies of earlier pleadings made on behalf of present petitioner successfully nullified his newly concocted allegation so made. The learned Trial Court vide its judgment dated 18.07.2018 while relying upon said unrebutted documentary evidence endorsed the respondents to be exclusive owners being legal heirs of late Ghulam Muhammad and passed decree in their favour for recovery of possession, however the other relief to the effect of mesne profit declined. Being dejected, both the parties approached the District Court, who dismissed appeal of the petitioner, whereas that of the respondents allowed through consolidated judgment dated 04.03.2020 to decree the suit of the latter as a whole. The greed of the petitioner did not end there, who to further prolong his unlawful possession without any fear has approached this Court through petition in hand.

2. During the course of arguments, learned counsel for the petitioner were faced with the above referred judicial record and asked that in every round of litigation the relationship of the respondents with original transferee and devolving of the suit house in their favour via inheritance was never denied, rather admitted in clear terms, who after going through each and every document tendered on behalf of respondents conceded the trend of his client to that effect. Moreover, although through his amended pleadings while raising serious allegation, the petitioner attempted to deny relationship of respondents with Ghulam Muhammad, but before District as well as this Court in memo of parties, the petitioner himself reflected them as widow and son of his late uncle. It is well settled principle that admission once made can never be withdrawn at any subsequent stage. The petitioner in latest round of litigation was estopped to develop different stance other than the one already confirmed before the Court of law. The allegation of illicit relationship was levelled malafidely just to graft a defence to stand on and prolong his unauthorized possession by the petitioner, who otherwise had lost his basic case based on memo of gift and legally/morally bound to part with its possession forthwith, but while entangling the real owners in baseless litigation one after the other deprived them to derive fruit of their belonging for decades, which practice should be condemned, otherwise, the Courts will be more burdened day by day with frivolous litigation under the heap whereof the real issues are also prolonged. It is noted that the amended

written defence and statement of the petitioner during trial clearly defied the modesty of an old age widow, which also undermined the personality of her son, while calling him illegitimate child and for it they have each and every right to independently proceed under the law against the petitioner. The Courts are not idle or silent spectator, rather bound to return amanat to the righteous as per ordain of Holy Quran. No doubt the learned Appellate Court through the impugned judgment rightly dismissed the appeal of the petitioner and allowed that of respondents, but it should also be courageous to impose heavy costs against the petitioner for his ill designs. The petitioner under his greed, firstly by managing a forged memo of gift and then while asserting baseless allegation prolonged his unlawful possession over the suit property and dragged the widow and his orphan child in frivolous litigation, while wasting the precious time of the Courts as well, who has no case at merit, hence Civil Revision in hand is dismissed in limine with costs of two lac rupees.

3. Before parting with this order, the history of the case and especially the conduct of the petitioner has compelled this Court to require the learned Executing Court to satisfy the impugned decree passed by learned Appellate Court as well as cost imposed herein within next sixty day's even by taking all the punitive actions provided under the law while conducting proceedings on day-to-day basis, if need be under intimation to this Court through Deputy Registrar (Judicial), who will also submit final conclusion of the execution petition before me in Chamber. Copy of this order be transmitted forthwith to the Court concerned through the learned District Judge, Faisalabad for strict compliance.

ZC/M-105/L

Revision dismissed.

PLJ 2020 Lahore 374

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

AHTISHAM ELAHI etc --Petitioners

Versus

INSRAM ELAHI etc.--Respondents

C.R. No. 12040 of 2020, decided on 27.02.2020.

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

----S. 115--Suit for separation of share--Consent preliminary decreed--Joint property--Revision petition--Allowed--Direction to restoration of gifted property--Realization was started--Objection petition--Dismissed--Challenge to--Court is equally competent to enforce any order like a decree, therefore, objection petition of petitioners was rightly declined--Advocate for petitioners though tried best to his level, but failed to point out any material irregularity or illegality to be committed by Courts below while passing impugned orders--Had order qua restoration of possession with regard to gifted part of property been challenged in time, position would be otherwise, but having stood final, Court was bound to realize same and petitioners suffered for their own act--Revision petition was dismissed.

[P. 375] A & B

Raja Tassawar Iqbal, Advocate for Petitioners.

Date of hearing: 27.2.2020.

ORDER

The litigation was boiled out among the members of the family when Respondent No. 1 instituted suit for separation of his share in the joint property through partition against petitioners, which finally was preliminary decreed, consequently local commission was appointed to suggest mode of partition, but his first two reports were discarded and while deciding objections of plaintiff/respondent on third report, *vide* order dated 24.01.2019, the Court declaring that subject matter was not partitionable ordered for internal auction. The petitioners/ defendants being offended challenged it before learned Revisional Court, who while observing that some other parts of property, which had been independently gifted out to the parties to the lis were also joined by the local commission, as such while allowing the revision petition of the petitioners on 28.05.2019, the third report was annulled as well, however they were directed to handover possession of the gifted property to the respondent/plaintiff, whereas parties to the *lis* were given choice to purchase the subject matter through internal auction. It admittedly was not challenged, before any higher forum.

Pursuant thereto process for its realization started, which was resisted by the petitioners, but objection petition was dismissed *vide* order dated 21.10.2019 and further maintained by learned lower Revisional Court through impugned order dated 01.02.2020, hence this civil revision.

2. Heard.

3. It is an admitted fact that a consent preliminary decree was awarded with regard to joint property and the learned District Court *vide* order dated 28.05.2019 directed the learned Civil Court to restore possession of the gifted property to respondent/plaintiff, which was not assailed any further before the higher forum, whereas a time barred application for its review made before the same Court was not only declined rather today the latter's order has also been maintained by this Court, as such order dated 28.05.2019 attained finality in all respect and u/S. 36 of the Code, 1908 the Court is equally competent to enforce any order like a decree, therefore, the objection petition of the petitioners was rightly declined.

4. Raja Tassawar Iqbal Advocate for the petitioners though tried best to his level, but failed to point out any material irregularity or illegality to be committed by the Courts below while passing the impugned orders. Had the order qua restoration of possession with regard to gifted part of property been challenged in time, the position would be otherwise, but having stood final, the Court was bound to realize the same and the petitioners suffered for their own act. This petition being meritless is **dismissed** in *limine*.

(Y.A.) Revision petition dismissed.

PLJ 2020 Lahore (Note) 90
[Multan Bench, Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
ABDUL MOMIN(deceased) through LRs. and others--Appellants
Versus
BEGUM QAMAR ISPHAHANI (deceased) through LRs. and others--Respondents
R.S.A. No. 9 of 2010, decided on 11.5.2017.

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

----S. 100--Specific Relief Act, 1877 (I of 1877), S. 12--Suit for specific performance--Decreed--Appeal--Dismissed--Appeal before Supreme Court--Allowed--Case was remanded--Filling of application for substitution of written statement--Allowed--Civil revision--Dismissed--Execution of sale agreement was totally denied in amended written statement--Concurrent findings--Suit was dismissed--Agreement to sell--Token amount was paid--Possession was changed in favour of appellants--Reverting to evidence available on suit file, it is a hard fact that one of appellants--Abdul Momin appeared as PW3; who explicitly stated in his cross-examination as under:

سودا زبانی تھا اقرار نامہ تحریر نہ کروایا تھا

While deposing so, he diverged and turned off from stance which he averred in his plaint wherein it was pleaded in clear words that a written contract was executed among parties--It is well established principle that a party cannot be allowed to lead evidence beyond scope of his pleadings and if any evidence so recorded has to be simply ignored, when this flip-flop was confronted to counsel for appellants had not any copacetic reply rather asserted that appellants succeeded to prove their agreement, might it had be oral--It is well established now that concurrent findings remaned by Court below cannot be disturbed by this Court while exercising jurisdiction under Section 100, of CPC, 1908, how erroneous that findings may be, unless such findings have been arrived at by them either by misreading of evidence, by ignoring a material piece of evidence on record or through perverse appreciation of evidence, whereas it is ambivalent that impugned judgments arc neither contrary to law nor usage having force of law--Counsel for appellants could not succeed to show, firstly; that there has been a substantial error or defect in procedure and secondly; that such significant error could have resulted in an erroneous or defective decision of case.--Appeal was dismissed. [Para 8 & 11] A, B & C

M/s. Ch. Sagheer Ahmad and *Syed Muhammad Ali Gillani*, Advocates for Appellants.

Mr. Muhammad Masood Bilal, Advocate for Respondents.

Date of hearing: 11.05.2017.

JUDGMENT

This regular second appeal arises out of a suit for specific performance of agreement for sale instituted by appellants against the respondents which has been concurrently dismissed by Courts below through the impugned judgments and decrees dated 23.05.2007 and 11.01.2010.

2. In brevity the facts of the case emerging from the record are that subject property measuring 400 Kanals fully detailed in plaint was owned by Respondent No. 1 without any dispute, she allegedly appointed one Syed Muhammad Zamin as her General Attorney, who while exercising his such authority agreed to sell the property of his principal against a consideration of Rs. 235,000/-through an agreement of sale dated 10.06.1980. The token amount of Rs. 50,000/-was also paid to the attorney against receipt and the possession changed in favour of the appellants on the same day, whereafter certain amount in parts was also received by said agent and when the contract was not honoured the suit for its performance was instituted on 24.04.1982. Initially on behalf of Respondent No. 1 her alleged afore-referred attorney submitted written statement on 20.01.1983. No doubt, settlement of transaction and execution of agreement was admitted but the suit was resisted with the defence that the husband of the vendor was seriously ill and for his treatment the vendor was in dire need of amount, which was not paid within the agreed period and time fixed for completion of agreement was its essence, as such it was breached and the agreement automatically stood cancelled. During the pendency of said suit the subject property was alienated in favour of Respondents No. 2 to 9, they were also impleaded in the group of defendants, who too defended the suit with the position that they were bona fide purchasers for value without any notice of the impugned agreement and could not be deprived of the land. A protracted trial was conducted and in earlier round of litigation the suit was decreed by the learned Trial Court whose verdict was unsuccessfully assailed by Respondents No. 2 to 9 and their R.F.A. was dismissed but they succeeded to set aside the said concurrent judgments when their appeal was allowed by the august Supreme Court of Pakistan and on 26.03.2003 the suit was remanded to the Court of first instance for its decision afresh while rendering certain observations.

3. In post remand proceedings vendor/Respondent No. 1 made an application for substitution of written statement allegedly filed by her attorney on 20.01.1983. The said crucial application was allowed, which was unsuccessfully assailed by the appellants through civil revision, but declined on 26.06.2004 and pursuant thereto amended written statement was filed wherein transaction of sale and execution of agreement was totally denied. The learned Trial Court as per mandate and spirit of

the remand order passed by the apex Court re-modified the issues, collected further evidence in pros and cons and while appreciating entire evidence on file both the Courts below concurrently dismissed the suit through judgments referred in para-1 ante.

4. In their inaugural argument M/s. Syed Muhammad Ali Gillani and Ch. Sagheer Ahmad, Advocates, learned counsel for the appellants emphasized with great vehemence that in post remand proceedings the learned Trial Court was obliged to conduct the trial as per mandate and observation of the apex Court which remanded the suit to it, but he while allowing the application of Respondent No. l for substitution of her written statement erred in law, who even, otherwise could not withdrew her admission which she made in her earlier written statement, whereas subsequent written statement wherein the vendor denied the transaction was mere an afterthought and based on *mala fide*. They further submitted that neither the vendor/Respondent No. 1 nor her attorney Syed Muhammad Zamin appeared in the witness-box to negate the contract settled among its parties; that the appellants through qualitative and quantitative evidence proved the contract, but the Courts below without appreciating it in its true perspective rendered the impugned judgments, which being tainted with material irregularity and illegality are not sustainable. At the end, they prayed for acceptance of the instant appeal.

5. Conversely, Mr. Muhammad Masood Bilal, Advocate, learned counsel for respondents highlighted that as per contents of the plaint, there was a written agreement executed by alleged attorney of Respondent No. l in favour of appellants and against a receipt, token sale consideration was paid by them, but when one of the appellants being PW3 appeared in the witness-box. he deviated from his said version and deposed that the transaction was orally settled. He further added that after the execution of alleged sale agreement, Appellant No. 1 instituted a civil suit against Respondents No. 2 to 9 as well as other appellants wherein he did not refer the agreement to sell, rather while claiming himself to be in possession of the subject property being tenant prayed for a decree of permanent injunction and both the Courts below while capturing said backdrops of the case were perfect to non-suit the appellants.

6. There might be some force in the opening argument of learned counsel for the appellants that if the apex Court had remanded the suit on a particular issue then the learned trial Court could not proceed to try the case upon other issues, whereas perusal of remand order dated 26.03.2003 reveals that the suit was remanded with the conclusion as follows:

9. The suit was decreed on the basis of pleadings of the parties without attending the above important aspects of the case and going into the controversial questions of facts required to be proved and decided on the basis of evidence. We have noticed that neither the specific issues were framed on these important mixed questions of law and facts nor the parties produced the evidence essential for decision of these questions and without proper decision of the same, there could be no effective adjudication of the dispute between the parties. We, therefore, deem it proper to send the case back to the trial Court to enable the parties to produce further evidence on all issue including the additional issues to be framed by the trial Court on the above questions. Consequently, we set aside the impugned judgment and remand the case to the trial Court for decision afresh in the light of the observations made in the preceding paragraphs. Since this is an old case, therefore, the trial Court should make efforts to dispose it of within six months. The appeal stands allowed in the above terms.

7. To me as per sequitur referred hereinabove the entire case was left open to be decided by the learned Trial Court and the remand order was not made for specific consideration, therefore, the learned Trial Court was perfect to entertain the application for substitution of written statement. Withal, it is taken by surprise that the said application was not only allowed by the learned Trial Court despite its contest but the said order was maintained by its superior Court when civil revision of the appellants was dismissed on 26.06.2004. It is perfect that under Section 105 of the Code of Civil Procedure, 1908, either interlocutor order or non-appealable order can be attacked in regular first appeal against final decree provided there is an error, defect or irregularity in such an order and it effected the decision of the case, but situation changes when such an order is impugned by means of civil revision which stand decided and settled under the order of Revisional Court, then it cannot be allowed to be re-agitated in appeal ultimately filed against decree. Reliance can be placed upon the judgment reported as *Baqa Muhammad vs. Muhammad Nawaz and others* (PLD 1985 Lahore 476) and *Lal Khan and others vs. Khizar Hayat and others* (1994 SCMR 351).

8. Reverting to the evidence available on the suit file, it is a hard fact that one of the appellants. Abdul Momin appeared as PW3; who explicitly stated in his cross-examination as under:

سودا زبانی تھا اقرار نامہ تحریر نہ کروایا تھا

While deposing so, he diverged and turned off from the stance which he averred in his plaint wherein it was pleaded in clear words that a written contract was executed

among the parties. Despite making said statement in 2006, the plaint has not been amended till today. It is well established principle that a party cannot be allowed to lead evidence beyond the scope of his pleadings and if any evidence so recorded has to be simply ignored, when this flip-flop was confronted to the learned counsel for the appellants they had not any copacetic reply rather asserted that the appellants succeeded to prove their agreement, might it had be oral. This Court is fully cognizant of the fact that an oral agreement to sell of immovable property is equally enforceable as per law as a written agreement can be. The oral agreement is not only required to be proved through high standard evidence, but prior to it, the essential details with regard to time, date, venue and names of the witnesses should also be mentioned in the pleadings by the beneficiary to show that when, where and before whom the oral transaction on what terms and conditions was struck and the analogy behind the same is that no evidence can be led beyond the scope of pleadings. As per Section 54 of the Transfer of Property Act, 1882. "Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promised, whereas the contract for the sale of immovable property is defined as that sale of such property shall take place in terms settled among the parties, but does not by itself create any interest in or charge on such property, therefore, the beneficiary has been bound down by the apex Court through judgments reported as *Binyameen and 3 others vs. Ch. Hakim and another* (1996 SCMR 336), *Nazir Ahmed and another vs. Yousaf* (PLD 2011 SC 161) and *Muhammad Nawaz through L.Rs. vs. Haji Muhammad Baran Khan* (2013 SCMR 1300) to give the said detail in his plain.

9. Whereas, in the case in hand, neither venue nor the names of witnesses were mentioned in the plaint so that it can be proved that when and before whom the transaction was effected. The onus of proof of transaction orally or in documentary form was on the appellants and their deviation has really made their stance dubious and unconvinced.

10. It is also admitted-by PW3 in his cross-examination that prior to the institution of suit in hand, he filed a suit for permanent injunction with regard to the subject property against his brothers/Appellants No. 2 & 3 as well as Respondent No. 3. The copy of the same was tendered in evidence by respondents as Exh.D6, which reveals that said suit was instituted on 11.01.1982, whereas their agreement was allegedly settled on 10.06.1980 meaning thereby that Exh.D6 was filed 1¾ year after the said contract, but in Exh. D6 neither the appellants referred their agreement nor any sale was alleged therein, rather they claimed a decree for permanent injunction on the basis of their tenancy. Had there been an agreement with respect to the disputed property either the suit for specific performance was instituted on 11.01.1982 when Exh.D6 was instituted or the appellants might have

pleaded their sale therein, but non-disclosure of the agreement in a suit filed subsequent to their alleged sale again made it doubtful.

11. It is well established now that concurrent findings remaned by Court below cannot be disturbed by this Court while exercising jurisdiction under Section 100, of the Code of Civil Procedure, 1908, how erroneous that findings may be, unless such findings have been arrived at by them either by misreading of evidence, by ignoring a material piece of evidence on record or through perverse appreciation of evidence, whereas it is ambivalent that the impugned judgments are neither contrary to law nor the usage having the force of law. The learned counsel for the appellants could not succeed to show, firstly; that there has been a substantial error or defect in procedure and secondly; that such significant error could have resulted in an erroneous or defective decision of the case. This appeal has no merit and force, which is dismissed.

(**Y.A.) Appeal dismissed.**

PLJ 2020 Lahore (Note) 103
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
SHABBIR HUSSAIN--Petitioner
Versus
SURAYIA BEGUM and 9 others--Respondents
C.R. No. 22 of 2012, heard on 20.6.2016.

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

----S. 115--Specific Relief Act, (I of 1877), S. 42--Suit for declaration--Dismissed--Appeal--Allowed--Execution of general power of attorney for management of property and perusing of cases--Transfer of property without permission of principals--Challenge to--It is a wrong presumption that every agent on Recount of description of general power of attorney means and includes power to alienate/dispose of property of principal to his fiduciary relations--In order to achieve that object, it must contain a clear separate clause devoted to said object--Courts have to be vigilant regarding interpretation of clauses of power of attorney, particularly, when allegation by principal is of fraud or misrepresentation--Neither petitioner/Defendant No. 1-beneficiary put his appearance before learned trial Court to contest suit nor any effort was made by him before learned lower appellate Court for setting aside of order passed by learned trial Court, whereby he was proceeded against ex parte--I have no hesitation to hold that in absence of any rebuttal of stance introduced by Respondents No. 1 to 6/plaintiffs, learned Additional District Judge was quite justified in decreeing suit of Respondents No. 1 to 6/plaintiffs through impugned judgments and decrees--Counsel for petitioner/Defendant No. 1 is unable to point out any misreading and non-reading of material available on record or material illegality and irregularity committed by Court below while passing impugned judgment and decree to warrant interference by this Court in exercise of revisional jurisdiction, scope whereof being narrower is restricted only to extent of orders, which arc found to have been passed by subordinate judiciary in illegal manner or without jurisdiction--Revision petition dismissed.

[Para 5, 6, 7, 8 & 9] A, B, C, D & E

PLD 1985 SC 341, 2005 SCMR 1368 and 2004 CLC 1747 *ref.*

Mr. Shahid Mehmood Minhas, Advocate for Petitioner.

Ms. Yasrab Gulzar, Advocate for Respondents No. 1 to 6.

Date of hearing 20.6.2016.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Admitidly, *Mst.* Surayia Begum, Razia Bibi, Nazir Begum and Nasim Bibi were real sisters, whereas Sharifan Begum was wife of their real brother. Aforementioned ladies except Nasim Bibi were owners of the property to the extent of 21 Kanals 3 Marias in the joint holding. *Mst.* Surayia Begum and successors of Razia Bibi being

plaintiffs instituted a suit for declaration while claming that Surayia Begum, Nazir Begum and Sharifan Begum executed general power of attorney dated 14.2.1998 (Exh.P1) in favour of Nasim Bibi only for management of their properly and to pursue the cases pending in the Court of Tehsildar, but no authority to transfer the suit property was delegated to her. It was also pleaded in the plaint that Razia Bibi neither executed the said deed nor delegated any power rather she was impersonated; that Nasim Begum while practicing fraud got incorporated power to transfer the properly owned by the principals and thereafter she transferred it to her real son Shabbir Hussain petitioner/Defendant No.1, through oral sale Mutation No. 914 dated 31.1.2005 (Exh. P. 2) without seeking any prior permission from her principals. To defend the said suit, none amongst the defendants appeared before the learned trial Court, who were ultimately proceeded against *ex-parte vide* order dated 12.6.2010. Despite availability of *ex-parte* evidence, the suit was dismissed by the learned trial Court through *ex-parte* judgment and decree dated 26.2.2011. However, in appeal the learned Additional District Judge, Ferozewala set aside the same and decreed the suit through the impugned judgment and decree dated 19.10.2011. Being despondent, the instant civil revision has been filed by the petitioner/Defendant No. 1/beneficiary.

2. It is contended by the learned counsel for the petitioner/Defendant No. 1 that the impugned judgment and decree passed by the learned counsel lower appellate Court is based on surmises and conjectures; that the learned lower appellate Court failed to apply independent judicious mind and passed the impugned judgment and decree without considering the facts available on record and prayed for its setting aside.

3. Conversely, the learned counsel for Respondents No. 1 to 6/plaintiffs has supported the impugned judgment and decree and prayed for dismissal of the instant civil revision.

4. Arguments heard arid record perused.

5. The argument of learned counsel for petitioner/Defendant No. 1 that the principals through the execution of registered power of attorney authorized their gent to transfer the disputed property and for acting on their behalf being agent the attorney was not required to seek prior permission to transfer the disputed property to her kith and kin is not correct. It is a wrong presumption that every agent on account of description of general power of attorney means and includes the power to alienate/dispose of property of the principal to his fiduciary relations. In order to achieve that object, it must contain a clear separate clause devoted to the said object. The principal as well as attorney must have paid particular attention to such a clause regarding alienation of the property to the kith and kin with a view to avoid any uncertainty or vagueness. Implied authority to alienate properly would not be readily deducible from words spoken or written which do not clearly convey the principal's knowledge, intention and consent about the same. The Courts have to be

vigilant regarding interpretation of the clauses of the power of attorney, particularly, when the allegation by the principal is of fraud or misrepresentation.

6. The pictorial view of general power of attorney, (Exh.P1) divulges that all of its executants were illiterate folk ladies and at the time of its execution, no independent advice was available to them and for the sake of argument, if execution of general power of attorney is admitted to be correct, even then the agent was not authorized to transfer the properly of her principals to her son/petitioner/Defendant No. 1 without specific consent or prior permission of the principals, failing which they rightly repudiated and questioned the transaction through their suit. The conclusion arrived at by the learned Additional District Judge lends ample support from the law laid down by the apex Court in the judgments reported as *Fida Muhammad vs. Pir Muhammad Khan (Deceased) Through Legal Heirs and others* (PLD 1985 SC 341), *Jamil Akhtar and others vs. Las Baba and others* (PLD 2003 SC 494), *Mst. Bandi vs. Province of Punjab and others* (2005 SCMR 1368), and *Khushi Muhammad and 2 others vs. Jannat Bibi* (2004 CLC 1747).

7. Moreover, neither the petitioner/Defendant No. 1-beneficiary put his appearance before the learned trial Court to contest the suit nor any effort was made by him before the learned lower appellate Court for setting aside of the order passed by the learned trial Court, whereby he was proceeded against ex parte. No doubt, he made a request before the learned lower appellate Court that matter might be remanded to the learned trial Court for enabling him to adduce his evidence, but without seeking setting aside of *ex-parte* proceedings/ order and in the absence of brining on record his defence through submission of written statement, the petitioner/Defendant No. 1 could not be permitted to introduce his defence against the stance taken by the Respondents No. 1 to 6/plaintiffs. He also did not make any application before the learned lower appellate for cross-examining the witnesses produced by the Respondents No. 1 to 6/plaintiffs to shatter their testimony. A glance over the plaint as well as memo. of appeal filed before the courts below by Respondents No. 1 to 6/plaintiffs and memo. of parties of the instant civil revision reveals that address of the petitioner/Defendant No. 1 is similar in the said lis, The petitioner/Defendant No. 1 had nothing on his part to contest the suit instituted by Respondents No. 1 to 6/plaintiffs and *mala fide* on his part is apparent on the face of the record that his mother being the alleged general attorney transferred the property of her principals to him and a transaction by an agent in favour of his/her real son without prior permission of his/her principal cannot be validated.

8. The next argument of learned counsel for the petitioner/ Defendant No. 1 that the vires of general power of attorney dated 14.02.1998 and mutation dated 31.1.2005 were assailed by the Respondents No. 1 to 6/plaintiffs through the institution of their suit before the learned trial Court on 31.3.2010 and on the face of it the same was barred by time, but the learned lower appellate Court, failed to take notice of said legal aspect of the case is without any substance. As regards filing a suit for declaration, Article 120 of the Limitation Act, 1908 has provided limitation of six years only from the date of right to sue which would accrue to the plaintiff

when his right was denied by the adversary. There can be no right to sue until an accrual of right is asserted in the plaint and its infringement or its clear unequivocal threat to infringe that right by the defendant against whom the suit is instituted is also pleaded. The Respondents No. 1 to 6/plaintiffs have prayed for declaring the mutation in dispute as illegal which has been entered in the revenue record of right. The entries in the revenue record afforded fresh cause of action to the plaintiffs and adverse entries in the revenue record even if allowed to remain unchallenged does not necessarily extinguish the right of the party against whom such entry had been made. Every new entry in the record of right gives fresh cause of action to the plaintiffs. This view has been affirmed by the apex Court in the judgment reported *Wali and 10 others vs. Akbar and 5 others* (1995 SCMR 284) wherein it is held that any new entry in the revenue record on the basis of the document, which did not constitute a title then it gives rise to a now cause of action. As such the suit cannot be declared to be barred by time. In such facts and circumstances, I have no hesitation to hold that in the absence of any rebuttal of the stance introduced by Respondents No. 1 to 6/plaintiffs, the learned Additional District Judge was quite justified in decreeing the suit of the Respondents No. 1 to 6/plaintiffs through the impugned judgments and decrees.

9. The learned counsel for the petitioner/Defendant No. 1 is unable to point out any misreading and non-reading of the material available on record or material illegality and irregularity committed by the Court below while passing the impugned judgment and decree to warrant interference by this Court in the exercise of revisional jurisdiction, the scope whereof being narrower is restricted only to the extent of orders, which are found to have been passed by the subordinate judiciary in illegal manner or without jurisdiction. Resultantly, the instant civil revision is **dismissed.**

(Y.A.) Revision petition dismissed.

PLJ 2020 Lahore (Note) 109

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUHAMMAD BASHIR etc.--Petitioners

Versus

MUHAMMAD NASRULLAH--Respondent

C.R. No. 3308 of 2016, decided on 9.5.2018.

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

----S. 12--Suit for specific performance--Dismissed--Appeal--Dismissed--Sale agreement--Burden of proof--Withholding of evidence--Concurrent findings--Direct evidence was led with regard to Exh.P1 as well as transaction reflected therein, onus shifted upon petitioners, but surprisingly only Muhammad Bashir, Petitioner No. 1 being DW1 appeared and no other supporting witness was examined--Latter conceded during cross-examination that possession of disputed property changed hands from day of its sale, but admittedly, till today no effort was made on behalf of petitioners for eviction of respondent--In such situation, Muhammad Hussain was best person to be examined, but he was withheld and adverse inference was to be drawn against petitioners under Article 129 illustration (g) of Qanun-e-Shahadat Order, 1984--In written statement as well as deposition made by Petitioner No. 1, burden of proof was shifted upon him to establish that he had thumb marked it being marginal witness, but no supporting and convincing evidence was adduced--Petitioner No. 1 neither had made any complaint against Deed Writer/Stamp Vendor nor initiated any proceedings against him for engineering a fake document, hence petitioners failed to prove their defence--Concurrent findings of facts recorded by two Courts below being based on well appreciation of evidence available on suit file are not open to any exception by this Court in exercise rcvisional jurisdiction ,when learned counsel for petitioners also failed to point out any misreading and non-reading of evidence as well as any irregularity or illegality committed by Courts below--Revision petition dismissed. [Para 1 & 2] A, B, C & D

Mr. Muhammad Sohail Bhatti, Advocate for Petitioners.

M/s. Kashif Aslam, Shahid Mehmood, Minhas and Rai Qaiser Abbas, Advocates for Respondent.

Date of hearing: 9.5.2018.

JUDGMENT

Muhammad Bashir, Petitioner No. 1 and his brother Muhammad Hussain, predecessor of rest of the petitioners were owners of 16 Kanals land. On 22.07.2004, Muhammad Nasrullah, respondent approached the learned Civil Court with a suit for specific performance of agreement to sell dated 20.3.2003 (Exh.P1) contending therein that both the brothers had agreed to sell the land against a consideration of Rs. 220,000/- and after receiving Rs. 215,000/- before the witnesses, Exh.P1 was executed, whereas on making payment of remaining

consideration of Rs. 5,000/- the vendors were bound to transfer the suit land, but when it was not acted upon, he approached the Court of first instance seeking a decree for specific performance of his agreement, which was resisted by the vendors/petitioners by filing an unsigned confusing written statement. On one side, it was admitted by them that agreement with regard to some other land was settled, but on the other hand, it was also averred that agreement (Exh.P1) was struck between plaintiff and Muhammad Hussain, whereas Muhammad Bashir, Petitioner No. 1 put his thumb impression being its attesting witness. The respondent/plaintiff examined both the marginal witnesses being PW-2 & PW-3 to prove that sale was effected among the parties, out of total sale consideration, Rs. 215,000/-were paid and pursuant thereto the vendee also stepped in the witness-box and reiterated his version in line with contents of the plaint. The moment, direct evidence was led with regard to Exh.P1 as well as transaction reflected therein, the onus shifted upon the petitioners, but surprisingly only Muhammad Bashir, Petitioner No. 1 being DW-1 appeared and no other supporting witness was examined. The latter conceded during cross-examination that the possession of the disputed property changed hands from the day of its sale, but admittedly, till today no effort was made on behalf of the petitioners for eviction of respondent. It was the main defence of DW-1 that agreement to sell was settled between the vendee-respondent and Muhammad Hussain, whereas he only thumb marked it being its marginal witness. In such situation, Muhammad Hussain was the best person to be examined, but he was withheld and adverse inference was to be drawn against the petitioners under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984. Moreover, having admitted his thumb impression on the agreement, in the written statement as well as deposition made by Petitioner No. 1, the burden of proof was shifted upon him to establish that he had thumb marked it being marginal witness, but no supporting and convincing evidence was adduced. The Petitioner No. 1 neither had made any complaint against the Deed Writer/Stamp Vendor nor initiated any prorceedings against him for engineering a fake document, hence petitioners failed to prove their defence.

2. The concurrent findings of facts recorded by the two Courts below being based on well appreciation of evidence available on suit file are not open to any exception by this Court in the exercise revisional jurisdiction ,when learned counsel for petitioners also failed to point out any misreading and non-reading of evidence as well as any irregularity or illegality committed by the Courts below. The instant Civil Revision having no force and merit is ***dismissed.***

(Y.A.) Revision petition dismissed.

2020 C L C 1779
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
REHAN MAHMOOD and others----Petitioners
Versus
CHAIRMAN, EVACUEE TRUST PROPERTY BOARD and others----Respondents

Writ Petition No.28472 of 2020, decided on 30th June, 2020.

Constitution of Pakistan---

----Arts. 189 & 199---Civil Procedure Code (V of 1908), S.11---Constitutional petition---Res-judicata, principle of---Petitioner assailed the matter which had already been finalized up to the Supreme Court---Validity---No scope was available to reopen pandora's box buried for all times by the last Court of the State, whose verdict was not merely culmination of litigation rather in terms of Art. 189 of the Constitution that pronouncement was binding on all Courts of Pakistan--- Doctrine of res-judicata did not merely prevent future judgment from contradicting earlier ones but also prevented litigants from multiplying litigations--- Such type of false / baseless litigation needed to be nipped / buried at its inception, otherwise real controversies among people requiring prompt attention were likely to be prolonged under its heap--- High Court declined to interfere in the matter and imposed cost upon petitioners---Constitutional Petition was dismissed in circumstances.

Khurshid Ahmad and others v. Rana Mumtaz Ahmad and others 2016 SCMR 679; Sh. Muhammad Rafique Goreja and others v. Islamic Republic of Pakistan and others 2006 SCMR 1317; Muhammad Ajmal Khan v. Lt. Col. Muhammad Shafaat and 4 others PLD 1976 Lah. 396; Abdul Majid and others v. Abdul Ghafoor Khan and others PLD 1982 SC 146 and Asif Jah Siddiqi v. Government of Sindh and others PLD 1983 SC 46 ref.

Talaat Farooq Sheikh and Muhammad Shafique Ahmad for Petitioners.

Syed Muhammad Aslam Rizvi, Assistant Attorney General for Respondents Nos.1 and 3 to 6 on Court's call.

Arshad Jahangir Jhoja, Additional Advocate-General for Respondents No.2 on Court's call.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.----Inessential detail apart, subject area measuring 187 kanals 01 marla having not been left by any migrant was not available for allotment to refugee(s) against his/their verified claim, whereas this land was part and parcel of Evacuee Trust Board, but Ghani, ascendant of the present petitioners managed its transfer on Register RL-II, which was kept under the carpet and finally brought into light after more than three decades, when the alleged transferee made application before the District Collector for its incorporation in the revenue record. The said authority referred the matter to the Assistant Commissioner for making a probe to scrutinize the genuineness or otherwise of the purported allotment, who after due inquiry found it to be forged and further authenticated that disputed area being vested to the Evacuee Trust Property Board stood duly leased out to different persons in series and continuity. The District Collector having been appraised the said facts, dismissed application of Ghani through order of 30th March, 1991. The allottee being dejected approached the Chairman, Evacuee Trust Property Board through reference under sections 8 and 10 of the Evacuee Trust Properties (Management and Disposal) Act XIII of 1975 for validation of his alleged transfer, which was declined through detailed order of 3rd January, 1995. Although revision petition was made by Ghani before the Revisory Authority, but soon thereafter withdrawn and he instituted civil suit for confirmation of his title on the basis of afore-referred allotment allegedly made on Register RL-II, which though concurrently decreed all the way up to this Court through judgments of 23rd January, 1996, 16th March 1998 and 27th June, 2006 respectively, yet having been assailed by the Evacuee Trust Property Board, were reversed and suit of petitioners dismissed on 13th January, 2016 by the august Supreme Court of Pakistan through judgment reported as 'Khurshid Ahmad and others v. Rana Mumtaz Ahmad and others' (2016 SCMR 679). It would be pertinent to mention that in the meantime Abdul Rashid, Faqir Muhammad, Khurshid Ahmed and Ghulam Mustafa instituted suit No.186-1/1995 for specific performance of contract against Ghani (the alleged allottee) and procured somewhat consent decree on 25th January, 1996 qua part of subject land, which was satisfied in favour of said decree-holders vide attestation of sale deed No.3006 of 7th May, 1996. These proceedings were also quashed by the apex Court through aforesaid reported judgment, which was further affirmed when review petitions were dismissed as well on 17th January, 2018, as such verdict of the august Supreme Court declaring that it was Evacuee Trust Property since late 30s and that Ghani as well as subsequent decree-holders lacked locus standi much less a cause of action to lay their hands on its ownership in any form before any forum though attained finality, yet thereafter; firstly, on behalf of subsequent transferees (decree-holders), Writ Petition No.4616 of 2019 was preferred, but declined. Then those bootless writ petitioners approached the hon'ble Division Bench of this Court via I.C.A.

No.47445/2019, which too was dismissed with heavy costs vide order of 4th September, 1999. At least, after the said fruitless fresh cycle of litigation, there left nothing to be reopened, but now in second attempt, the legal heirs of Ghani initially made another unsuccessful reference before respondent No.1, which met with the result of dismissal on 11th June, 2020 and presently they dared to approach this Court through petition in hand with the following prayer:-

> 'It is, therefore, most respectfully prayed that the instant petition may kindly be accepted, record of the case be called for, notices be issued to respondents and the impugned order dated 11.06.2020 passed by the Chairman, Evacuee Trust Property Board may kindly be set aside and be declared that the property was rightly transferred in the name of Ghani in his favour of its claim and the Chairman has no authority to interfere the matter and he has accepted the findings on this issue in the interest of justice and equity.
>
> It is further prayed that the operation of impugned order dated 11.06.2020 passed by the Chairman Evacuee Trust Property Board may kindly be stayed till the final decision of the titled petition in the interest of justice and equity.
>
> Any other relief, which this Honourable Court deemed appropriate in the peculiar facts and circumstances may also very kindly be granted to the petition to secure the ends of justice and fair play.'

2. During the course of deliberation, Mr. Tallat Farooq Shaikh, learned counsel for the petitioners on being faced to the history narrated above was left with no words to deny the same or justify the initiation of present litigation and when the matter in first round stood already finalized by the apex Court through reported judgment (supra) to the following effect:-

> 'A look at the extracts from the record of rights for the years 1938-1939 and onward would reveal that this property has been entered as Gaoshala Society Bar. These entries have been repeated till 1960-61. After 1960-61 the Auqaf Department took the control and management of this property and had been managing this property through lease to different persons as is evident from the entries made in the periodical records of 1964-1965, 1968-1969, 1980-1981, 1984-1985 and 1988-1989. Respondent No.1 claims to be the allottee of this property through RL-II mentioned above but at no stage of time any entry of its allotment to the respondent figured in any of the periodical records ever since 1946-1947. The respondent alleged that this property was confirmed in his name but the entries in RL-II do not conform to his claim. He moved a petition under sections 8 and 10 of the Evacuee Trust Property (Management and Disposal) Act No.XIII of 1975 in the Court of

> Chairman Evacuee Trust Board, Govt. of Pakistan but he could not substantiate his claim that the property in dispute was evacuee and that he was its lawful allottee. Even entries in naqsha taqseem do not support the contention that the property in dispute has ever been allotted to the respondent. The evidence led in this behalf overwhelmingly proves that the property is Evacuee Trust Property ever since late 30s. The surprising part of the litigation is that the respondent himself invoked the jurisdiction of the Evacuee Trust Board for its verdict about the nature of the property but when the verdict given by the Board turned against him, he turned the table on the Board and proceeded to question its verdict through a revision petition. Somehow he withdrew it and instituted a civil suit questioning the verdict of the Chairman Evacuee Trust Board notwithstanding such verdict being amenable to the revisional jurisdiction of the Federal Government in the hierarchy established under the Act and then Constitutional jurisdiction of the High Court, could not have been challenged in the Civil Court especially when its jurisdiction was barred by Section 14 of the Evacuee Trust Properties (Management and Disposal) Act, 1975.

besides further solicited with the declaration below:-

> 'When preponderance of documentary as well as oral evidence on the record and verdict of the Chairman Evacuee Trust Board prove that the property in dispute is an evacuee trust property, the appellants and respondents in Civil Appeal No.1540 of 2006 are left with no locus standi much less a cause of action to lay their hand on its ownership in any form and in any forum.
>
> As a sequel to what has been discussed above, appeal filed by the Evacuee Trust Board is allowed, the impugned judgments are set aside while the suit pending in Civil Court in respect of property in question together with the application under section 12(2), C.P.C. is dismissed. Needless to say that where the basic order in favour of respondent No.1 has been declared void ab initio, entire superstructure raised thereon would automatically collapse.'

there left no scope for the alleged decree-holders as well as descendants of Ghani (bogus allottee) to reopen the pandora's box buried for all times by the last Court of the State, whose verdict is not merely culmination of litigation rather in terms of Article 189 of the Constitution, 1973, the said pronouncement is the law declared by it, as such binding on all the Courts in Pakistan. The judgment reported as 'Sh. Muhammad Rafique Goreja and others v. Islamic Republic of Pakistan and others' (2006 SCMR 1317) is almost on all fours applicable, which further resolved that decision of the Supreme Court could not be treated as mere obiter dictum and even if taken to be so, due to the high place, which the said Court held in its hierarchy, enjoyed a highly respected

position as precedent, as such respondent No.1 or even this Court cannot give findings contrary to what had already been held by the apex Court while deciding appeals and review petitions. Any contrary decision will be against the judicial dignity, which is unwarranted. See 'Muhammad Ajmal Khan v. Lt. Col. Muhammad Shafaat and 4 others' (PLD 1976 Lahore 396), 'Abdul Majid and others v. Abdul Ghafoor Khan and others' (PLD 1982 Supreme Court 146) and 'Asif Jah Siddiqi v. Government of Sindh and others' (PLD 1983 Supreme Court 46).

3. The dictum of the august Supreme Court declaring that jurisdiction of the Civil Court, for the purposes of deciding the question, whether an evacuee property is attached to charitable, religious or educational trust or institution, is expressly barred and that it could only be dealt with by the Court exercising jurisdiction under section 8 of the Act ibid is, in fact, judgment in rem to that effect. However, the remaining part of the judgment of the apex Court in its nature was personam to the sense that property in dispute was not part of compensation pool to be transferred to Ghani or any else claimant, rather Evacuee Trust Area having been declared so by the Court of plenary jurisdiction in view of the provision contained in section 21 of the Act, Ghani or subsequent transferees could not claim any nexus with it, as such all the parties to the dispute along with their successors are bound by said findings on the issues raised between them besides questions of fact and law necessary to the decision of such issues. It is the policy of the Courts to stand by the ratio decidendi, that is, the rule of law and not to disturb a settled point. This policy of the Courts is conveniently termed as doctrine of rule of stare decisis. The rationale behind this policy is the need to promote certainty, stability and predictability of the law. As the clear decision of the apex Court was accepted by Ghani, hence, the petitioners having stepped into his shoes were estopped to initiate fresh round of litigation.

4. This petition, otherwise, is hit by doctrine of res judicata as well. The said principle gives respect and finality to the judicial decisions already pronounced, which is aimed that no one shall be vexed twice for the same cause, as such meant to bar/preclude re-litigation of a claim between the same parties or the successors. Of course, the doctrine of res judicata does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying litigations. The re-examination of adjudicated disputes, otherwise, will not be in any society's interest, therefore, repeated efforts to reopen the past and closed chapter being unjustified are not tolerable as if such tendency is permitted to continue, then there would be no end of litigation. The shelves of the Courts of law are already crowded with the backlog and such type of false/baseless litigation needs to be nipped/buried at its inception, otherwise the real controversies among the people requiring prompt attention are likely to be prolonged under its heap. Thus, this Constitutional Petition is dismissed in limine with costs of rupee two lac. The office will also send a copy of this order

to the concerned District Collector for the recovery of imposed costs as land revenue arrears through due process of law, who will submit compliance report within forty five days to this Court through Deputy Registrar (Judicial) and the latter will place the same before me in Chamber.

MH/R-13/L

Petition dismissed.

2020 C L C 1813
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD ATIF IQBAL and others----Petitioners
Versus
ZEESHAN ALI and others----Respondents

Writ Petition No.13884 of 2020, decided on 2nd July, 2020.

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

----S. 144---Suit for recovery of possession---Application for restitution---Scope---Petitioners assailed order passed by courts below whereby they were directed to restore the possession of suit property to the respondents---Validity---Petitioners, in satisfaction of ex parte judgment and decree, had taken over possession of the property from respondents but subsequently the said decree was set aside by High Court---Court was bound to perform its statutory duty to cause restitution, as such the concurrent orders of the lower fora putting the parties at the place prior to ex parte decree were perfectly passed---Constitutional petition was dismissed with costs.

S.N. Banerji and another v. Kuchwar Lime and Stone Co., Ltd. (in Liquidation) and another AIR 1941 PC 128 ref.

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

---- S. 144 --- Application for restitution---Actus curiae neminem gravabit---Scope---Doctrine of restitution is based upon cardinal maxim "Actus curiae neminem gravabit" (an act of the Court shall prejudice no man)---Maxim: contemplates a case where property was received through order of the Court, which was later on reversed or varied; in such situation, it becomes wrongful possession hence, imperative upon the beneficiary of said erroneous order/decree to make restitution to the other party what he had lost, otherwise Court is armed with the powers to place the applicant in the position in which he would have been, if the order had not been made, else it would be inequitable and unjust---Concept of restitution is as old as the law itself---Section 144, C.P.C., provides procedure, whereas the power to order restitution is inherent in Court and is sparingly exercised whenever justice demands---Expression 'the act of the Court' does not mean merely the act of primary Court or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court, which entertains jurisdiction over the matter, upto the highest Court which finally disposes of the case---Court reversing the order/ decree need not specifically direct restitution of the property, rather such right arises automatically, which is enforceable before the Trial Court---Even any subsequent event cannot defeat the right of restitution, rather it is to be enforced against the person, who was benefited under such order / decree as well as his

transferee or assignee, even if such person was not a party to the proceedings in which such order or decree was reversed.

K. Anantharam Singh and another v. Marwadi Thara Chand and others AIR 1936 Madras 634; S.A Latif v. J.B. Dubash and 5 others PLD 1970 Kar. 220; Zia Ullah v. Muhammad Hussain Afzal and 3 others 2003 CLC 1321 and Parvaiz and 4 others v. Muhammad Ramzan and 5 others 2009 CLC 513 ref.

(c) Maxim---

----Actus curiae neminem gravabit---Scope---Expression 'the act of the Court' does not merely mean the act of primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court, which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case.

K. Anantharam Singh and another v. Marwadi Thara Chand and others AIR 1936 Madras 634; S.A Latif v. J.B. Dubash and 5 others PLD 1970 Kar. 220; Zia Ullah v. Muhammad Hussain Afzal and 3 others 2003 CLC 1321 and Parvaiz and 4 others v. Muhammad Ramzan and 5 others 2009 CLC 513 ref.

Ch. Abdul Majeed, Zahid Majeed and M. Shafique Ahmad for Petitioners.

Muhammad Shahid Tasawar Rao for Respondents.

Date of hearing: 2nd July, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Precise facts of the case were that although the contesting parties to the lis are exclusive owners of their property falling in adjacent khasras, yet it does not form part of any joint holding. The present petitioners while relying upon demarcation report conducted by the revenue field staff, instituted suit for possession through removal of construction against their neighbourers/respondents, which on contest was finally dismissed by the learned Trial Court on 30th July, 2013, however in appeal vide ex parte judgment of 29th June, 2015 suit stand decreed, pursuant thereto the possession of the disputed premises was taken over by the petitioners/plaintiffs through execution process of the Court. It is again admitted fact that having assailed, ex parte decree of the learned Appellate Court was thereafter set aside by this Court through order of 24th April, 2018 and the appeal of the petitioners was remanded back for its decision afresh, which thereafter dismissed vide judgment of 7th July, 2018. Admittedly respondents/defendants after the setting aside of ex parte decree, approached the Court of first instance for restitution through application under section 144 of the Code, 1908. Although it was contested, but learned lower fora through unanimous orders of 19th October, 2019 and 14th February, 2020 respectively

granted the same, directing the petitioners-plaintiffs to restore the possession to the respondents/defendants, hence this constitutional petition.

2. Arguments heard, record perused.

3. Before adverting to merits of the case, it would be expedient to reproduce the provision of section 144 of the Code, 1909:-

> "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.
>
> No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)."

There is no cavil to say that doctrine of restitution is based upon cardinal maxim "Actus curiae neminem gravabit" (an act of the Court shall prejudice no man). It contemplates a case where property had been received through order of the Court, which latterly was reversed or varied. In such situation, it becomes wrongful possession, hence imperative upon the beneficiary of said erroneous order/decree to make restitution to the other party for what he had lost, otherwise Court is armed with the powers to place the scourger/applicant in the position in which he would have been, if the order had not been made, else it would be inequitable and un-just with the latter. The concept of restitution is as old as the law itself. The provision ibid provides procedure, whereas the power to order restitution is inherent in Court and sparingly exercised whenever justice demands. It cannot be taken as a case of restoration of possession, but of restitution of possession because order of dispossession is reversed. It is made clear that when the expression 'the act of the Court' is used, it does not merely the act of primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court, which entertains jurisdiction over the matter upto the highest Court and finally disposes of the case. It would be expedient to clarify that it is not necessary that the Court reversing the order/ decree should specifically direct restitution of the property, rather such right arises automatically, which is enforceable before the Trial Court. Even any subsequent event cannot defeat the right of restitution, rather to be enforced against the person, who was benefited under such order/decree as well as his transferee or assignee, even if such person had not been party to the proceedings

in which such order or decree reversed. See K. Anantharam Singh and another v. Marwadi Thara Chand and others (AIR 1936 Madras 634). S.A Latif v. J.B. Dubash and 5 others (PLD 1970 Karachi 220). Zia Ullah v. Muhammad Hussain Afzal and 3 others (2003 CLC 1321). Parvaiz and 4 others v. Muhammad Ramzan and 5 others (2009 CLC 513).

4. Coming to the history of the case in hand, the available record affirmed, which otherwise conceded by learned counsel for the petitioners as well, that in satisfaction of ex parte judgment and decree dated 29.06.2015, the possession of the subject property was taken over from the respondents/defendants, but subsequently set aside by this Court on 24.04.2018. In such situation, it became sine qua non for the Court to perform its statutory duty to cause restitution, as such the concurrent orders of the learned lower fora putting the parties at the place prior to ex parte decree were perfectly passed. The argument of learned counsel for the petitioners that the latter are the actual owners of the subject property, who were duly inducted in possession through process of law and as per ratio of judgment reported as S.N. Banerji and another v. Kuchwar Lime and Stone Co., Ltd. (in Liquidation) and another (AIR 1941 PC 128), the respondents are not entitled for restitution, is misconceived. The study of the pleadings of the parties left no room that title of their respective adjoining khasras is not disputed. The fall out among them is whether they are in occupation within their boundaries or there is some overlapping/encroachment, for which through another even day order passed in tagged C.R. No. 2323 of 2018, the suit of the present petitioners with consensus of the other side has already been remanded to the Court of first instance to resolve the real dispute after appointment of local Commission as per procedure provided under Orders of Lahore High Court Vol.I, Ch.I, M(i). As such till this time it cannot be held that respondents were trespassers or the petitioners are real owners, therefore the latter are not immune from the implication of section 144 ibid. Indeed, the respondents were evicted as a result of pernicious as well as erroneous act of the Court, which having already been declared non-existent through order of the higher Court, the right of restitution arose automatically.

4. The leaned Counsel for the petitioners failed to make out case of interference, whereas the impugned concurrent orders are found to be perfect as per law on the subject and having been passed in exercise of lawful authority are approved by dismissing this petition. The costs of this petition will be paid by the petitioners throughout.

SA/M-117/L

Petition dismissed.

PLJ 2020 Lahore 573
[Multan Bench, Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
NOOR AHMAD and 6 others--Appellants
Versus
ANWAAR MOHYUDDIN and others—Respondents

R.S.A. No. 25 of 1991, heard on 26.6.2019.

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

----S. 100--Specific Relief Act, (I of 1877), S. 42--Suit for declaration--Decreed--Appeal---Allowed--Challenge to--Registered sale-deed--Documentary proof--Possession of property--No ambiguity in transfer of land--Original transfer--Validity--Respondents No. 1 to 9 rested on sale deed (Exh.P1) whereby they had not only purchased share of Allah Bakhsh, ascendant of Respondents No. 10 to 14, but his mother and brother, also alienated their shares to them--Surprisingly despite fact that descendants of Allah Bakhsh as well as their transferees Asghar Ali and appellants to whom property was finally alienated, filed independent written statements, but none out of them either denied execution of Exh.P1 or challenged its legality, as such having been admitted by their own conduct and act, there left nothing for plaintiffs to prove their deal as well as construction of Exh.P1 any further--Exh.P1 was a registered instrument aged more than thirty years, which having not been questioned by executants or afterwards by their descendants as well as subsequent transferees attained strong presumption of correctness and has to be given preference over oral statements recorded on behalf of defendants--It is also proved on record that for implementation of Exh.P1 in revenue record, mutation No. 157 (Exh.P3) was promptly entered on 23.07.1954 by concerned Revenue Officer, but subsequently it was rejected on sole ground that land referred therein stood acquired by Thai development Authority--Cancellation of Exh.P3 did not mean that alienation made in favour of plaintiffs also stood terminated--There is no cavil that mutation per se is not deed of title, as such its cancellation was not enough to annul ownership of rightful owners structured on a valid title document--Above all, according to para 7.32 of Land Record Manual, which are statutory instructions having force of law and binding upon revenue authorities, it is imperative upon registrar and sub-registrar to send monthly reports to revenue official/officer, particulars of all registered deeds with regard to transfer of agricultural land for entries in their mutation register for making an appropriate order for change in revenue record in accordance therewith and any omission by beneficiary to report registered

deed to patwari/revenue officer was not such an act to invalidate his original instrument until and unless his basic document is cancelled by Court of ultimate jurisdiction--Plaintiffs by bringing on record copies of khasra girdawaris also proved that after sale through Exh.P1, possession of property referred therein was delivered to them, as such sale in their favour was not only perfect and matured for all intents and purposes, rather it is intact till today--As per contents of Exh.P1 chunk of land situated in Mouza Ladhana that had been purchased by plaintiffs, whereas legacy of Allah Bakhsh on his death was opened in favour of his successors-in-interest *vide* inheritance mutation No. 353 (Exh.P2) and its pictorial view affirmed that land faling in khewat No. 1 of mouza Ladhana was mutated to them--Adjustment order (Exh.P4) also clarified that; this particular land was adjusted, hence there left no ambiguity that land of Allah Bakhsh, originally transferred to plaintiffs, had been subsequently acquired and adjusted against suit property--Had fit not been so, then appellants as well as co-defendants must have brought on record, some documentary proof that property actually purchased by plaintiffs was either still occupied/owned by them or transferred to someone else--Moreover, there was no need to dispute attestation of Exh.P1 as did by Allah Wasaya (DW1) in his deposition, whereas it has been consistently held that mere adverse entries in revenue record do not create or extinguish title of property--Counsel for appellants despite his best was not able to bring case within mischief of Section 100 of Code, 1908--Decree impugned herein is well reasoned and based on material available on suit file, which otherwise has to be given preference over judgment of his subordinate, hence is maintained--Appeal was dismissed. [Pp.

576, 577, 578 & 579] A, B, C & D

1968 SCMR 573, 1968 SCMR 842.

Mr. Muhammad Faisal Bashir Chaudhary Advocate for Appellants.

Mr. Kanwar Muhammad Younas, Advocate for Respondents.

Date of hearing: 26.6.2019.

JUDGMENT

This Regular Second Appeal was preferred against judgment and decree dated 03.06.1991 of Additional District Judge, Layyah, whereby appeal filed on behalf of Respondents No. 1 to 9 plaintiffs was allowed, judgment of the learned trial Court of 13.6.1989 was set aside and their suit was decreed as prayed for.

2. Precisely, facts of the case were that initially the plaintiffs instituted suit for declaring them to be owners of the subject land having been purchased from Allah Bukhsh, the ascendant of Proforma respondents/Defendants No. 10 to 14, *vide* registered sale-deed dated 29.06.1954 (Exh. P-1) as well as for the cancellation of inheritance Mutation No. 353 dated 01.07.1981 attested in favour of the latters, sale-deed dated 17.08.1981, whereby they further transferred it in favour of proforma-Respondent No. 15 and sale-deed dated 10.01.1982 executed on latter's behalf in favour of appellants, besides order dated 06.10.1981 passed by EACO whereby the suit land was adjusted as a right of return in favour of descendants of Allah Bukhsh/Respondents No. 10 to 14 and the order dated 29.05.1984 of the Additional Commissioner (Revenue) Dera Ghazi Khan by Virtue of which appeal of the plaintiffs was dismissed were also called in question, however, the suit was subsequently amended and a decree for restoration of possession was also claimed.

Obviously the suit was contested by the descendants of Allah Bukhsh, Asghar Ali and the appellants to support the inheritance mutation as well as instruments of sale whereby suit land was subsequently transferred to them.

After receiving and appreciating the evidence so led by the contesting parties initially the suit was dismissed by the Court of first instance, however, finally it was decreed by his appellate Court *vide* impugned judgment as referred in Para 1 ante.

Mr. Muhammad Faisal Bashir, learned counsel for the appellants emphasized with great vehemence that suit was instituted after decades, which was badly time barred and the learned trial Court was perfect in dismissing it on the said score; that the plaintiffs earlier approached the revenue hierarchy and after their failure before said forum, the suit was not maintainable, but learned appellate Court without determining whether civil Court had the jurisdiction to entertain and decide the suit erroneously decreed it; that property purchased by the plaintiffs-respondents through sale deed from Allah Bukhsh was not similar to the area for which declaration was sought for and that the impugned decree being tainted with misreading and non-reading of evidence could not be sustained, whereas the comprehensive judgment rendered by the learned trial Court should be restored. In support of his contentions, he has placed reliance upon the judgments reported as *Khaleel and 2 others vs. Karamat Ali through LRs and another* (2016 CLC 714), *Muhammad Moosa alias Niaz Ali Moosa vs. Province of Punjab and others* (2017 Law Notes 358), *Barkat Ali versus Muhammad Nawaz* (PLD 2004 SC 489) and *Allah Ditta versus Amina Bibi* (2011 SCMR 1483) and prayed for acceptance of appeal, setting aside of the impugned decree and restoration of the judgment of the learned trial Court.

In contra, it was accentuated by learned counsel for contesting respondents that Allah Bakhsh predecessor-in-interest of proforma respondents along with two others was owner of land in dispute besides some other area, who jointly transferred its title to the plaintiffs *vide* sale deed (Exh.P-1) and vires thereof had never been challenged by him despite that he survived for years; that even the present appellants and the descendants of Allah Bakhsh had also not disputed the said instrument either by filing independent suit or through the defence raised in the present litigation, as such the undisputed registered instrument having been executed and attested more than thirty years and much prior to promulgation of Qanun-e-Shahadat Order, 1984 attained strong presumption of correctness, therefore, the learned appellate Court was perfect in relying upon the same; that although the land referred in afore-noted sale deed (Exh. P1) was different to the suit land, but by bringing on record copy of adjustment order and revenue record, it was proved without any doubt that the land referred in Exh.P-1 had been acquired by Thal Development Authority on 04.04.1951, which was adjusted against the suit land.

3. Arguments heard. Record perused.

4. In fact, the case of the plaintiffs-Respondents No. 1 to 9 rested on sale deed (Exh.P1) whereby they had not only purchased the share of Allah Bakhsh, ascendant of Respondents No. 10 to 14, but his mother, *Mst.* Zohran and brother, Khuda Bakhsh also alienated their shares to them. Surprisingly despite the fact that descendants of Allah Bakhsh as well as their transferees Asghar Ali and the appellants to whom the property was finally alienated, filed independent written statements, but none out of them either denied the execution of Exh.P1 or challenged its legality, as such having been admitted by their own conduct and act, there left nothing for the plaintiffs to prove their deal as well as construction of Exh.P1 any further. The emphasis of Mr. Muhammad Faisal Bashir Chaudhry, Advocate for the appellants that Allah Wasaya (DW1) in his statement-in-chief explicitly claimed it to be forged and collusive, as such it was sine qua non for the beneficiaries of Exh.P1 not only to prove its genuineness rather the transaction couched therein, was fallacious. As per principle of *secundum allegata et probata*, any evidence led to prove a fact, which was omitted to be first explained in the pleadings is liable to be ignored. This principle has also been enunciated by Order VI Rule 2 as well as Order VIII Rule 2 of the Code, 1908 and further affirmed by the apex Court in the judgment reported as *Pakistan vs. Abdul Ghani* (PLD 1964 SC 68), *Muhammad Wali Khan and another vs. Gul Sarwar Khan and another* (PLD 2010 SC 965) and *Haider Ali Bhimji vs. Vith Additional District Judge, Karachi (South) and another* (2012 SCMR 254). So, this lacuna was fatal for the appellants

as well as their co-defendants. Moreover, Exh.P1 was a registered instrument aged more than thirty years, which having not been questioned by the executants or afterwards by their descendants as well as subsequent transferees attained strong presumption of correctness and has to be given preference over the oral statements recorded on behalf of defendants. It is also proved on record that for the implementation of Exh.P1 dated 29.06.1954 in revenue record, Mutation No. 157 (Exh.P3) was promptly entered on 23.07.1954 by the concerned Revenue Officer, but subsequently it was rejected on the sole ground that land referred therein stood acquired by Thal Development Authority. The cancellation of Exh.P3 did not mean that alienation made in favour of the plaintiffs also stood terminated. There is no cavil that mutation per se is not deed of title, as such its cancellation was not enough to annul the ownership of the rightful owners structured on a valid title document. Above all, according to para 7.32 of the Land Record Manual, which are statutory instructions having force of law and binding upon the revenue authorities, it is imperative upon registrar and sub-registrar to send monthly reports to the revenue official/officer, particulars of all registered deeds with regard to transfer of agricultural land for entries in their mutation register for making an appropriate order for change in the revenue record in accordance therewith and any omission by beneficiary to report registered deed to the patwari/revenue officer was not such an act to invalidate his original instrument until and unless his basic document is cancelled by the Court of ultimate jurisdiction. The plaintiffs by bringing on record copies of khasra girdawaris also proved that after the sale through Exh.P1, possession of the property referred therein was delivered to them, as such the sale in their favour was not only perfect and matured for all intents and purposes, rather it is intact till today.

5. There is no doubt that land referred in Exh.P1 was entirely different than that for which decree for possession was prayed. The learned appellate Court through impugned judgment digged out the relevant record to elucidate the truth and to crosscheck the same this Court with the able assistance of learned counsel for the parties has also gone through the original suit record. As per contents of Exh.P1 chunk of land situated in Mouza Ladhana Thal had been purchased by the plaintiffs, whereas legacy of Allah Bakhsh on his death was opened in favour of his successors-in-interest *vide* inheritance Mutation No. 353 (Exh.P2) and its pictorial view affirmed that land falling in khewat No. 1 of mouza Ladhana was mutated to them. The adjustment order (Exh.P4) also clarified that this particular land was adjusted, hence there left no ambiguity that land of Allah Bakhsh, originally transferred to the plaintiffs, had been subsequently acquired and adjusted against the suit property. Had it not been so, then the appellants as well as co-defendants must

have brought on record, some documentary proof that the property actually purchased by plaintiffs was either still occupied/owned by them or transferred to someone else. Moreover, there was no need to dispute the attestation of Exh.P1 as did by Allah Wasaya (DW1) in his deposition, whereas it has been consistently held that mere adverse entries in the revenue record do not create or extinguish title of the property. In this regard, reference may be made to the precedent of the apex Court reported in cases *Mian Ghulam Ahmad vs. Muhammad Sarwar and others* (1968 SCMR 573), *Lal and others vs. Mian Dad and another* (1968 SCMR 842) and *Muhammad Lehrasab Khan vs. Mst. Aqeel-un-Nisa, etc*. NLR 2001 Civ.65). On the other hand case-law referred by learned counsel for the appellants and relied by learned trial Court being distinguishable is not applicable.

6. The argument of learned counsel for the appellants that suit having been instituted after much delay of the attestation of Exh.P1 was badly time barred, is not well founded. The cause of action to its beneficiaries firstly accrued when their land was acquired and subsequently adjusted to the defendants, but despite their approach to the concerned hierarchy the relief was denied on lame excuses. The ascendant of defendants Nos. 1 to 5 had already transferred his title, hence nothing more was left to be inherited by the latters for its transfer to Asghar Ali Respondent No. 15 or the appellants. The entire superstructure raised in their favour without any title or legal backing Could not be perpetuated and every fresh entry in the revenue record based on inheritance mutation of Allah Bakhsh or subsequent sale deeds accrued fresh cause of action to the plaintiffs to institute suit in hand, which was well within time. See *Wali and 10 others vs. Akbar and 5 others* (1995 SCMR 284).

7. So far as argument of learned counsel for the appellants that civil Court had no jurisdiction to try the suit is concerned, suffice it to say that in this regard Issue No. 2 was framed by the learned civil Court but having not pressed the same was answered and its said

findings were never assailed before the learned appellate Court by means of separate appeal or cross objection, hence at this stage it cannot be agitated afresh.

8. Learned counsel for appellants despite his best was not able to bring the case within the mischief of Section 100 of the Code, 1908. The decree impugned herein is well reasoned and based on material available on suit file, which otherwise has to be given preference over the judgment of his subordinate, hence is maintained and instant appeal being devoid of merit and force stands dismissed with no order as to costs.

(M.M.R.) Appeal dismissed.

PLJ 2020 Lahore (Note) 179

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

SARDAR KHAN, etc--Petitioners

Versus

GOVERNMENT OF PUNJAB, through District Officer (Revenue) and others--Respondents

C.R. No. 694 of 2014, heard on 22.1.2018.

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

----S. 115--Specific Relief Act, 1877 (I of 1877), S. 2--Suit for specific performance--Dismissed--Appeal--Dismissed--Sale-deed--Consolidation proceedings--Acquisition of land by petitioner excess of title--Concurrent findings--Scope of interference--Occupation of property--Petitioners failed to bring on record title; documents *i.e*. sale deed as well as mutations to prove that they were owners of property measuring 77-Kanals 04-Marlas, whereas respondents by examining Patwari (DW1) as well as; Local Commission (DW2) succeeded to prove that petitioners were not recorded owners of property as averred by them in plaint as per revenue entries and that petitioners were in occupation of property more than their entitlement--Consolidation hierarchy after examining revenue record rendered its concurrent findings against present petitioners and their counsel failed to point out any material irregularity or illegality in order dated rendered by M.B.R which was called in question by them through their suit--Counsel for petitioners is not in a position to persuade this Court to intrude concurrent findings of Consolidation hierarchy as well as those of two Courts below and this Court is of considered view that they decided matter against petitioners after well appreciation of material available before them--Counsel for petitioners has also failed to point out any illegality or jurisdictional defect on part of two Courts below while passing impugned judgments, which are also found not to be tainted with misreading or non-reading of any material part of record--Scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by subordinate Courts in discharge of their judicial functions--Revision petition was dismissed.

[Para 5 & 6] A, B, C, D & E

2007 SCMR 236 and 2011 SCMR 762 *ref.*

Mian Asif Mumtaz, Advocate for Petitioners.

Mr. Mohammad Arif Yaqoob Khan, AAG for Respondents No. 1 to 4.

Mr. Usman Sher Gondal, Advocate for private-Respondents No. 5 and 6.

Date of hearing: 22.1.2018

JUDGMENT

By filing instant Civil Revision, the petitioners have assailed judgments and decrees dated 14.11.2012 and 11.2.2014 rendered by learned two Courts below, whereby their suit was concurrently dismissed.

2. In brevity, the facts of the case are that on 4.8.2007 petitioners approached learned Civil Court through a declaratory suit for confirmation of their title to the extent of land measuring 77-Kanals and 04-Marlas while basing their title on sale deed dated 18.10.1955, mutations No. 346 and 348 dated 28.07.1992 and further assailed the reports of Revenue/Consolidation hierarchy as well as order dated 28.05.2007 passed by the Member Board of Revenue, whereby area measuring 05-Kanals 12-Marlas was excluded from their title during consolidation proceedings. The suit was resisted by respondents with the stance that only 69-Kanals land was acquired by petitioners, but they encroached more land measuring 05-Kanals 12-Marlas in excess of their title and the Consolidation hierarchy was impeccable in restoring the possession of said land to its right holders. To prove their version, petitioners examined only Sardar Khan, one of the plaintiffs, as PW-1, who antipodal to his Version pleaded in the plaint, in the opening line of his statement-in-chief stated that the plaintiffs were owners of land measuring 74-Kanals 9-Marlas, whereas no other ocular corroborative evidence was examined. However, he brought on file copy of Mutation No. 190 (Ex:Pl), copy of order of Executive District Officer (Revenue) dated 01.09.2005 (Ex:P2), copy; of Mutation No. 104 dated 08.09.2005 (Ex:P3), copies of Record of Right (Ex:P4 to Ex:P7) and in rebuttal he again brought on file copy of Register Haqdaran Zamin (Ex:P8), but the title documents referred in plaint *i.e*. sale deed dated 18.10.1958, mutations No. 346 and 348 dated 28.7.1992 were not tendered, whereas on behalf of respondents/ defendants besides Patwari (DW-1), Local Commission (DW-2) and one of the defendants (DW-3), documentary evidence ranging from Ex:D1 to Ex:D8 was examined. It is pertinent to note here that before the learned Trial Court petitioners had also filed an application under Order VI rule 17 read with Section 151 of the Code of Civil Procedure, 1908 for amendment of their paint. The Court of first instance after thrashing oral as well as documentary evidence of parties available on file dismissed the suit on 14.11.2012, which was assailed by means of appeal, but learned Addl. District Judge concurred the judgment of his subordinate Court while dismissing the appeal through impugned judgment. Being aggrieved, this Civil Revision was filed in 2014 with specific ground (D) that aforenoted application for amendment of plaint was filed, which was not attended to by the learned Civil Courts rather the suit was finally dismissed and the same ground was pressed before this Court at the time of first hearing of this Civil Revision, whereupon pre-admission notice was issued to respondents on 04.03.2014.

3. Today, learned counsel for the petitioners again pressed the same ground, whereas learned counsel for respondents submitted attested copy of case diary maintained by learned Trial Court to nullify the said ground and perusal thereof reveals that no doubt on 12.02.2010 petitioners had made an application for

amendment of plaint, which was not only allowed by learned Civil Court on the very next date of hearing *i.e.* 23.02.2010 subject to imposition of costs of Rs. 300/-, rather on 22.03.2010 the amended plaint was also filed, hence ground (D) pressed by learned counsel for petitioners before this Court was not available to him, who while making misstatement on said premises got entertained this Civil Revision on first day of its hearing.

4. The learned counsel for petitioners on having been confronted with aforesaid situation after going through the attested copies of interlocutory orders presented by learned counsel for respondents today felt handicapped to deny the same, however he emphasized that neither Civil Revision was drafted nor at preliminary stage it was argued by him, rather he superseded earlier counsel, who made and pressed the said ground is not tenable because the present petitioner even till today did not make any application to obliterate it.

5. Adverting to the facts of case, as observed supra, petitioners failed to bring on record title documents *i.e.* sale deed as well as mutations to prove that they were owners of property measuring 77-Kanals 04-Marlas, whereas respondents by examining Patwari (DW1) as well as Local Commission (DW2) succeeded to prove that petitioners were not recorded owners of property as averred by them in the plaint as per revenue entries and that petitioners were in occupation of property more than their entitlement. Statements of both the DWs were thrashed in detail properly by both the learned Courts below to render concurrent findings of fact. Moreover, the jurisdiction of Civil Court as regards matters of consolidation was barred under Section 26 of the Punjab Consolidation of Holdings Ordinance, 1960. The Consolidation hierarchy after examining the revenue record rendered its concurrent findings against present petitioners and their learned counsel failed to point out any material irregularity or illegality in the order dated 28.05.2007 (Ex:D8) rendered by Member Board of Revenue, which was called in question by them through their suit.

6. Learned Counsel for petitioners is not in a position to persuade this Court to intrude the concurrent findings of Consolidation hierarchy as well as those of learned two Courts below and this Court is of considered view that they decided the matter against petitioners after well appreciation of material available before them. The learned Counsel for the petitioners has also failed to point out any illegality or jurisdictional defect on the part of learned two Courts below while passing the impugned judgments, which are also found not to be tainted with misreading or non-reading of any material part of the record. The concurrent findings of the fact on face of record have been eminently arrived at by both the learned Courts below. The scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by the subordinate Courts in the discharge of their judicial functions. Safe reliance can be placed on the judgments passed by the august Supreme Court of Pakistan reported as *"Aurangzeb through LRs. and*

others vs. Muhammad Jaffar and another" (2007 SCMR 236) and *"Bashir Ahmed vs. Ghulam Rasool"* (2011 SCMR 762).

7. Sequel of the above discussion is that the instant Civil Revision, being devoid of any merit and force is dismissed with costs of Rs. 25000/-.

(Y.A.) Revision petition dismissed.

PLJ 2020 Lahore (Note) 191
[Multan Bench, Multan]
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
GHULAM YASEEN and 12 others--Petitioners
Versus
MOHAMMAD AALAM and 8 others—Respondents

C.R. No. 1241 of 2016, decided on 09.10.2018.

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

----Ss. 115 & 12(2)--Specific Relief Act, 1877, S. 42--Suit for declaration--Dismissed--Appeal--Allowed--Rights and interest of immovable property--Element of fraud--Challenge to-- Lapse on part of petitioners for not examining any of witnesses to prove element of fraud was a Strong factor for declining their application--Counsel for petitioners also failed to justify said lacuna on their part--Moreover, as observed supra suit was instituted and during its pendency petitioners Purchased property through aforenoted mutation which is squarely hit by rule of *lis pendens*-- Counsel for petitioners has failed to point out any illegality, perversity or jurisdictional defect in impugned order calling for any interference by this Court in exercise of revisional jurisdiction--Resultantly, instant Civil Revision being devoid of any force is dismissed.
[Para 3 & 4] A & C

Transfer of property Act, 1882 (IV of 1882)--

----S. 52--Rights & interest of parties--Immovable property--Ambit and import of aforesaid provision is to protect and safeguard parties to suit as well as their rights and interest qua immovable property involved therein against any alienation made by either of parties of that property during pendency of litigation in favour of a third person and transferee of property shall acquire title of property subject to final decision of litigation, hence, third party who acquires any interest or right in property under litigation, even for value or through an exchange of value, without notice of pendency of suit shall be bound by result of suit stricto sensu in all respects as his transferor would be bound--It is well established by now that subsequent transferee, therefore, does not acquire any independent legal title and he has to swim and sink with his transferor-- Petition was dismissed. [Para 3] B

Malik Ahmad Shahzad, Advocate for Petitioners.

Mr. Muhammad Faisal Bashir Chaudhry, Advocate for Respondents.

Mr. Tahir Mehmood, Advocate for Applicant in C.M.No. 79 of 2018 and 80 of 2018.

Date of hearing: 9.10.2018.

ORDER

The precise history of the case was that Abdul Ghafoor Respondent No. 9 instituted a declaratory suit on 27.12.2003 against Amir Hassan, predecessor-in-intcrest of Respondents No. 1 to 7 to call in question the vires of Mutation No. 415. Although it was dismissed after conducting full fladged trial on 17.07.2010, however, the plaintiff succeeded in appeal when it was allowed on 06.03.2012, which was not assailed any further by its judgment debtor Amir Hassan, however, the latter sold out the subject land *vide* oral sale Mutation No. 3251 dated 06.05.2008 to the present petitioners, who on its basis filed an application under Section 12(2) of the Code, 1908 to call in question the aforenoted decree rendered by the learned District Court. In due course of trial of said application none appeared on behalf of petitioners to prove the allegation of alleged fraud rather they closed their evidence by tendering some documents. It is settled by now that the pleadings of the parties could not be considered substitute of evidence and while concluding' so, the application was declined, hence this Civil Revision.

2. Heard and record perused.

3. The lapse on the part of the petitioners for not examining any of the witnesses to prove element of fraud was a strong factor for declining their application. Learned counsel for petitioners also failed to justify the said lacuna on their part. Moreover, as observed supra the suit was instituted in December, 2003 and during its pendency the petitioners purchased the property through aforenoted mutation dated 06.05.2008, which is squarely hit by rule of *lis pendens*. Undoubtedly, the predecessor of the petitioners was a transferee *pendente* lit, hence proposition relates to Section52 of the Act,1882, which reads as under:

> **52. Transfer of property pending suit relating thereto.--**During the pendency in any Court having authority in Pakistan, or established beyond the limits of Pakistan by the Federal Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and Specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> **Explanation.--**For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent

> jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction of discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

The ambit and import of the aforesaid provision is to protect and safeguard the parties to the suit as well as their rights and interest qua the immovable property involved therein against any alienation made by either of the parties of that property during the pendency of the litigation in favour of a third person and the transferee of the property shall acquire the title of the property subject to the final decision of the litigation, hence, the third party who acquires any interest or right in the property under litigation, even for value or through an exchange of value, without notice of the pendency of the suit shall be bound by the result of suit stricto sensu in all respects as his transferor would be bound. It is well established by now that subsequent transferee, therefore, does not acquire any independent legal title and he has to swim and sink with his transferor. The proposition in hand has already been clinched by the apex Court in its esteemed judgments cited as *Muhammad Ashraf Butt and others vs. Muhammad Asif Bhatti and others* (PLD 2011 Supreme Court 905) and *Mst. Tabassum Shaheen vs. Mst. Uznta Rahat and others* (2012 SCMR 983). Relevant portion of the former judgment, for ready reference, is reproduced as under:

> *Principle of lis pendens unambiguously prescribes that the rights of the party to the suit, who ultimately succeeds in the matter are not affected in any manner whatsoever on account of the alienation, and the, transfer of the property shall acquire the title to the property subject to the final outcome of the lis. In view of the rule/doctrine of lis pendens, a transferee of the suit properly, even if a bona fide purchaser, without notice of the pendency of suit, shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound. Transferee therefore, does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all intents and purposes and has to swim and sink with his predecessor-in-interest.*

This view has further been supplemented by the same Court in a recent case reported as *Aasia Jabeen and 3 others vs. Liaqat Ali and others* (2016 SCMR 1773). In such a situation, the Court below was quite justified to knock out the petitioners on valid reasons through the impugned order.

4. Learned counsel for the petitioners has failed to point out any illegality, perversity or jurisdictional defect in the impugned order calling for any interference by this Court in the exercise of revisional jurisdiction. Resultantly, instant Civil Revision being devoid of any force is dismissed.

5. Since the main case has been dismissed on merit, C.Ms. Nos. 79 and 80 of 2018 seeking impleadment of the applicants as party therein as well as for the grant of injunction have become redundant, which stand disposed of accordingly.

(M.M.R.) Petition was dismissed.

PLJ 2020 Lahore (Note) 192
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J**
LAHORE DEVELOPMENT AUTHORITY--Petitioner
Versus
ADDITIONAL DISTRICT JUDGE, etc.—Respondents

W.P. No. 26831 of 2015, heard on 8.2.2018.

Specific Relief Act, 1877 (I of 1877)—

----S. 12--Constitution of Pakistan, 1973, Art. 199--Suit for specific performance--Decreed--Execution proceedings--Objection petition--Quashment of execution proceedings in writ petition--Withdrawal of writ petition for filling of fresh objection petition--Instant Writ Petition stands disposed of in terms that in light of judgment delivered by this Court--Petitioner may file fresh Objection Petition before Executing Court and any such remedy on having been availed will be dealt with on its own merit without being influenced by impugned orders in accordance with law--Petition was disposed of. P. 2]

A

Mian Tahir Maqsood, Advocate for Petitioner.

M/s. Ihsan Ahmad Bhindhar and Ahmad Sheraz, Advocates for Respondent No. 3.

Date of hearing: 8.2.2018.

JUDGMENT

In concision, the facts of the case are that Ghulam Mujtaba, Respondent No. 3 instituted a suit for specific performance of agreement to sell with regard to suit plot, which was decreed. Pursuant thereto, decree holder filed Execution Petition before learned Executing Court, which was resisted by Lahore Development Authority/petitioner through a vague Objection Petition and the same was declined by both learned Courts below *vide* orders, impugned herein. According to learned counsel for petitioner, in the meanwhile *vide* judgment dated 01.06.2015 passed by this Court in Writ Petition No. 11292/2003 preferred by Chiniot Co-Operative Housing Society Limited, and the acquisition proceedings qua property involved

in aforenoted Writ Petition as well as suit plot were quashed and in such a situation, he opts to withdraw instant Constitutional Petition to file fresh comprehensive Objection Petition in the light of afore-reffered judgment of this Court.

2. Consequently, the instant Writ Petition stands disposed of in the terms that in the light of judgment dated 01.06.2015 delivered by this Court in Writ Petition No. 11292/2003, the petitioner may file fresh Objection Petition before the learned Executing Court and any such remedy on having been availed will be dealt with on its own merit without being influenced by impugned orders in accordance with law.

(Y.A.) Petition Disposed of.

PLJ 2020 Lahore (Note) 196

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

MOHAMMAD SIDDIQUE (deceased) through L.Rs, etc--Petitioners

Versus

SHAH MOHAMMAD, etc.--Respondents

C.R. No. 1776 of 2015, heard on 6.12.2018.

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

----S. 115--Specific Relief Act, (I of 1877), S. 12--Suit for specific performance--Dismissed--Appeal--Allowed--Oral sale agreement--Inheritance mutation--Refusal for attestation of inheritance mutation--Beneficiary of oral transaction--Failing to prove transaction--Obligation of plaintiff--Rule of *lis pendens*--No doubt in mind that alleged vendee failed to give essential detail with regard to time, date, venue and names of witnesses before whom offer of sale was extended by purported vendors, rather only specific date and names of witnesses were referred when it was accepted--It is well established by now that in case where a right in immoveable property is asserted basing on an oral transaction, it becomes sine qua non for its beneficiary to specifically give essential detail (as discussed earlier) in his pleadings--Anyhow, Respondent No. 1/plaintiff was beneficiary of alleged oral transaction and heavy onus was upon him to have proved same through tangible evidence--It was surprising that he himself did not opt to come into witness box, rather on his behalf, his son, Zafar Hussain (PW1) being his General Attorney appeared--As observed supra, it was plaintiff to whom offer was extended when no one was available with him, so this fact could only be proved by him, but he deliberately withheld himself to face test of cross-examination, which is a sole art to dredge up truth--non-appearance of plaintiff has compelled Court to draw an adverse inference against him under Article 129 illustration (g) of Qanun-e-Shahadat Order, 1984, that had he been examined, he might have failed to prove purported transaction--Argument of counsel for respondents that till that time inheritance mutation was not attested, therefore, execution of sale deed was not possible, but he failed to satisfy that in such situation either part payment was made or at least a contract was executed--ADJ erred in law to decree suit in favour of Respondent No. 1 for some weaknesses or lacunas on part of defendants, whereas plaintiff was under obligation to have proved his case on his own footing--Appellate Court committed material illegality to arrive at approach while misconstruing. [Para 4 & 5] A, B, C, D & E

2013 SCMR 1300, PLD 1959 Pesh. 81, 2007 CLC 819 and 2013 SCMR 397 *ref.*

M/s. Usman Sher Gondal and *Javed Anwar Janjua*, Advocate for Petitioner.

M/s. Ch. Amjad Hussain and *Khalid Mehmood*, Advocates for Respondents.

Date of hearing: 6.12.2018.

JUDGMENT

The defining feature of the case were that Khan Mohammad was exclusive owner of land measuring 19-Kanals 01-Marla, who departed in 1991 and subsequently inheritance was opened in favour of his three sons, namely Mohammad Siddique, Petitioner No. 1, Mohammad Aslam, Respondent No. 2, Mohammad Ali and two daughters *Mst.* Rasoolan Bibi, Petitioner No. 6 and *Mst.* Irshad Bibi. Shah Mohammad, Respondent No. 1 on 23.05.2009 approached the learned Civil Court through a suit for specific performance of oral agreement to sell with the assertion that Mohammad Aslam and Mohammad Siddique out of successors-in-interest of Khan Mohammad in February, 1995 offered him to purchase the land, which thereafter was accepted on 18.02.1995 in presence of Zafar Iqbal and Fazal Karim with the assurance of Mohammad Aslam and Mohammad Siddique that *Mst.* Rasoolan Bibi, *Mst.* Irshad Bibi, their sisters and Mohammad Ali, brother would also be bound by the transaction of sale offered by them and as a consequence thereof, entire consideration Rs. 60,000/-was paid and possession of land also changed hand, whereas it was promised that after attestation of inheritance mutation the property would be transferred, but later on they refused, compelling Respondent No. 1 to approach the Court for enforcement of his oral sale. The defendants/petitioners through their pleadings denied the sale as well as receipt of any consideration and ultimately suit was dismissed by learned. Civil Court on 24.12.2014, however, it could not hold the field when appeal of Respondent No. 1 was allowed and suit was decreed *vide* impugned judgment and decree dated 26.05.2015, hence this Civil Revision.

2. It was argued by learned counsel for petitioners that neither any transaction of sale was settled nor its price was received and Respondent No. 1 just to usurp the property of infirm petitioners concocted a false story to prolong possession of the maternal uncle. It was next emphasized with great vehemence that Respondent No. 1 /plaintiff failed to plead the specific venue, date and names of witnesses to unveil that when, where and before whom the alleged offer of sale was extended by Mohammad Aslam and Mohammad Siddique and in absence thereof, a decree for specific performance of oral contract could not be awarded. It was also added that learned Trial Court after appreciating evidence available on suit file was perfect to dismiss the suit, whereas learned lower Appellate Court failed to comprehend available material as well as points of law, which being result of misreading and non-reading of evidence as well as misapplication of law on the subject cannot be sustained.

3. In contra, learned counsel for Respondent No. 1 supported the impugned judgment and decree.

4. The minute perusal of plaint left no doubt in mind that alleged vendee failed to give essential detail with regard to time, date, venue and names of witnesses before whom the offer of sale was extended by the purported vendors, rather only specific

date and names of witnesses were referred when it was accepted and it would be advantageous to reproduce para 3 of the plaint in verbatim as under:

5. It is well established by now that in case where a right in the immoveable property is asserted basing on an oral transaction, it becomes sine qua non for its beneficiary to specifically give essential detail (as discussed earlier) in his pleadings. See *"Muhammad Nawaz through L.Rs vs. Haji Muhammad Baran Khan through L.Rs and others"* (2013 SCMR 1300). Anyhow, Respondent No. 1/plaintiff was the beneficiary of alleged oral transaction and heavy onus was upon him to have proved the same through tangible evidence. It was surprising that he himself did not opt to come into witness box, rather on his behalf, his son, Zafar Hussain (PW1) being his General Attorney appeared. As observed supra, it was the plaintiff to whom the offer was extended when no one was available with him, so this fact could only be proved by him, but he deliberately withheld himself to face the test of cross-examination, which is a sole art to dredge up the truth. The non-appearance of plaintiff has compelled the Court to draw an adverse inference against him under Article 129 illustration (g) of Qanun-e-Shahadat Order, 1984, that had he been examined, he might have failed to prove the purported transaction. This view has already been fortified by the superior Courts in judgments reported as *Haji Abdullah Khan and others vs. Nisar Muhammad Khan and others* (PLD 1959 Peshawar 81), *Humauun Naseer Cheema and 3 others vs. Muhammad Saeed Akhtar and others* (2007 CLC 819), *Fateh Muhammad through L.Rs. and others vs. Fida Hussain Shah through L.Rs.* (2007 CLC 1885) and *Niaz Rasool through Muhammad Bilal vs. Mst. Parveen flzram and others* (2013 SCMR 397) and the relevant para of *Haji Abdullah Khan's* case is reproduced as follows:

> "So far as the other defendant-appellants are concerned, none of them appeared in the witness-box except Mir Afzal Khan. It is a settled law that it is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his behalf, and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. By non-appearance, therefore, the defendant/ appellants except Mir Afzal Khan failed to discharge the onus or shift the onus on to the plaintiffs."

Anyhow, the Attorney (PW1), who was the alleged participant of the gathering where offer of sale was accepted for the first time disclosed in his testimony that on 15.02.1995 Mohammad Aslam and Mohammad Siddique along with their brothers and sisters appeared in their house to make an offer of sale, but it being militant to the principle of *"Secundum allegata et probata"* that the fact has to be first alleged by a party in the pleadings before it is allowed to be proved, cannot be considered. This principle has full command of provisions of Order VI Rule 2 and Order VIII of Rule 2 of the Code, 1908. As such, this part of statement being beyond the contents of the plaint is liable to be ignored. Reliance can be placed upon the dicta laid down in the case law reported as *Muhammad Wali Khan & another vs. Gul Sarwar Khan & another* (PLD 2010 SC 965) and *Haider Ali Bhimji*

vs. VIth Additional District Judge, Karachi (South) & another (2012 SCMR 254), wherein it was held that in absence of specific pleadings, the . Court could not allow a party to grope around and draw remote inference in his favour from his vague expressions. In his support only Fazal Karim although was examined, but he did not disclose any date when the transaction was settled or consideration was paid. Admittedly, Mohammad Aslam and Mohammad Siddique, who allegedly settled the bargain with regard to property of their other brothers and sisters had no authority on their behalf. Respondent No. 1 not only failed to prove his transaction and even if his stance is presumed to be correct, then the alleged transaction being without delegated power was void to the extent of rest of the sharers. Had it been a genuine sale and entire consideration was paid, what was the fun that the vendors did not press for the attestation of sale deed/mutation. The argument of learned counsel for the respondents that till that time the inheritance mutation was not attested, therefore, the execution of sale deed was not possible, but he failed to satisfy that in such situation either part payment was made or at least a contract was executed. The argument raised by learned counsel for Respondent No. 1 that out of alleged vendors, legal heirs of Mohammad Ali have already alienated their shares to Respondent No. 1, which was an acknowledgment that transaction cited in the plaint had been settled is fallacious. The alleged subsequent transaction was settled during the pendency of suit in hand, which was hit by rule of lis pendens and any act favourable to respondent on behalf of any defendant could not be made basis to damage the case of his co-defendants. Moreover, it was an independent sale against consideration of Rs. 6 lac with regard to part of subject land measuring 04-Kanals 15-Marlas, which definitely damaged the case of Respondent No. 1. Had there been a sale of 1995, then legal heirs of Mohammad Ali in acknowledgment thereof were bound to attest the sale deed, whereas independent sale against too much high price was a solid proof that no earlier sale was affected. Learned Additional District Judge erred in law to decree the suit in favour of Respondent No. 1 for some weaknesses or lacunas on the part of defendants, whereas plaintiff was under obligation to have proved his case on his own footing. The learned Appellate Court committed material illegality to arrive at approach while misconstruing evidence on the record, hence this Civil Revision succeeds, impugned judgment and decree of learned Additional District Judge is hereby set aside and that of learned Trial Court is restored with cost throughout.

(Y.A.) Revision petition allowed.

PLJ 2020 Lahore 600
***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**
SUFI MUHAMMAD ASHIQ--Petitioner
Versus
MUHAMMAD SHAFIQ—Respondent

C.R. No. 1485 of 2009, decided on 17.4.2019.

Civil Procedure Code, 1908 (V of 1908)—

----S. 115--Specific Relief Act, 1877, S. 42--Declaratory suit--Dismissed--Appeal--Dismissed--Concurrent findings--Challenge to--Ostensible owner--Ingredients of--Benami transaction--Question of--Whether a particular transaction is *benami* or not--Determination--Onus to prove--Ingredients of motive for creation of *benami* transaction--Actual owner--Although, petitioner brought on record agreement to prove that house was purchased by him from Asghar Ali against a consideration but neither any of its witnesses nor vendor was examined to prove contents of contract as well as fact that amount referred therein was paid by petitioner--Moreover, sale price mentioned in Sale Deed (Ex:P2) was not matching with figure referred in contact (Ex:P1), as such this disparity was enough to disbelieve Ex:P1, especially when no explanation to this effect was narrated or explained in plaint as well as deposition by petitioner, hence he failed to prove first ingredient petitioner did not bring an iota of evidence to prove his possession over subject house, rather he before this Court being fair enough admitted that it was occupied by his son, so next ingredient also went against suitor--Ingredient of motive for creation of *benami* transaction was essential and relevant factor for purpose of determining, whether title vesting was merely a *benami* and absence of motive always goes against party claiming to be actual owner, thus heavy onus was on shoulders of petitioner to prove that he had purchased it, but for certain reasons ostensibly got it transferred to his son--It was neither case of petitioner that he was taxpayer, who ostensibly got transferred house in his son's name to evade taxes nor it was his stance that he had black money and to save himself from inquiries, *benami* transaction was effected in favour of respondent, even he failed to allege that his son was required to show himself to be owner of some immovable property for his benefit and disputed transaction was effected in his name and in absence thereof, impugned transaction could not be declared a sham one--For sake of argument, if stance of petitioner that for love and affection, house was purchased in name of his son, is taken as correct, even then it could not be dubbed as *benami*--Once having purchased when relations among father and son were amicable, former

cannot turn around to claim him actual owner after relations became hostile and they fell apart--Counsel for petitioner has failed to point out any misreading and non-reading of material evidence available on record to render impugned judgments and decrees passed by two Courts below to be illegal, unlawful and without jurisdiction for calling interference by this Court in exercise of revisional jurisdiction--Petition was dismissed. [Pp. 602 & 603] A, B, C & D

Syed Ahmad Hussain Shah Naqvi, Advocate for Petitioner.
M/s. Muhammad Amin Ashraf Khan and *Tahir Mehmood Mughal*, Advocates for Respondent.

Date of hearing: 17.4.2019.

JUDGMENT

The father/petitioner instituted declaratory suit against his son/respondent to claim that Sale Deed of 27th July, 1999 was ostensibly attested in favour of the latter, whereas former was actual owner of the subject house, which was defended with the stance that house was purchased by the defendant through his own funds. The final result of the trial was that suit was dismissed and so was the fate of Appeal, hence this Civil Revision to call in question the legality of unanimous decrees of the learned Courts below.

2. The question whether a particular transaction is *benami* or not, is largely one of the facts and for its determination, no absolute formula or test has been laid down, but while seeking guidance from the dicta laid down in judgment reported as *"Muhammad Sajjad vs. Muhamamd Anwar"* (1991 SCMR 703), the following elements are to be proved by a quester.

i. Source of consideration;

ii. From whose custody original title deed came;

iii. Who is in possession of the property; and

iv. Motive of *benami*

These essential elements must co-exist for proving *benami* transaction between the ostensible owner and actual purchaser, who bought it through his own funds in the name of ostensible owner for certain reasons/motive to gain ultimate benefits.

The basic onus was upon the petitioner to prove the aforenoted ingredients. Although, the petitioner brought on record agreement (Ex:P1) dated 26 March, 1999 to prove that the house was purchased by him from Asghar Ali against a consideration of Rs. 4,10,000/-, but neither any of its witnesses nor the vendor was examined to prove the contents of the contract as well as the fact that amount referred therein was paid by the petitioner. Moreover, the sale price mentioned in Sale Deed (Ex:P2) was not matching with the figure referred in the contact (Ex:P1), as such this disparity was enough to disbelieve Ex:P1, especially when no explanation to this effect was narrated or explained in the plaint as well as deposition by the petitioner, hence he failed to prove the first ingredient. The petitioner did not bring an iota of evidence to prove his possession over the subject house, rather he before this Court being fair enough admitted that it was occupied by his son, so the next ingredient also went against the suitor. The real setback of the case of the latter was that he omitted to plead and prove the motive why the subject house was ostensibly purchased in the name of respondent, rather only mentioned therein that for love and affection it was done so. The ingredient of motive for creation of *benami* transaction was essential and relevant factor for the purpose of determining, whether title vesting was merely a *benami* and absence of motive always goes against the party claiming to be actual owner, thus heavy onus was on the shoulders of petitioner to prove that he had purchased it, but for certain reasons ostensibly got it transferred to his son. It was neither the case of petitioner that he was taxpayer, who ostensibly got transferred the house in his son's name to evade the taxes nor it was his stance that he had black money and to save himself from the inquiries, *benami* transaction was effected in favour of respondent, even he failed to allege that his son was required to show himself to be owner of some immovable property for his benefit and the disputed transaction was effected in his

name and in absence thereof, the impugned transaction could not be declared a sham one.

3. For the sake of argument, if stance of the petitioner that for love and affection, the house was purchased in the name of his son, is taken as correct, even then it could not be dubbed as *benami*. Once having purchased when relations among father and son were amicable, the former cannot turn around to claim him actual owner after relations became hostile and they fell apart.

4. The learned counsel for the petitioner has failed to point out any misreading and non-reading of the material evidence available on the record to render the impugned judgments and decrees passed by the two Courts below to be illegal, unlawful and without jurisdiction for calling interference by this Court in the exercise of revisional jurisdiction. Consequently, the instant revision petition being devoid of any merit is hereby dismissed.

(M.M.R.) **Petition Dismissed.**

2020 C L C 2001
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
MANZOOR HUSSAIN and others----Petitioners
Versus
Mst. FAZLOON BIBI and others----Respondents

C.R. No.636 of 2020, decided on 16th July, 2020.

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

----O.VI, R.17 & O. VIII, Rr. 3, 4 & 5---Suit for declaration---Gift deed---Evasive denial---Effect---Appeal---Petition for amendment of written statement---Suit was decreed against which appeal was filed wherein defendants moved application for amendment of written statement which was dismissed---Validity---Court while deciding application for amendment of pleadings was to keep in view the interest of justice and allow the case to run on correct lines for decision of real controversy---Amendment in the pleadings could be allowed at any stage of proceedings for determining the real question of controversy between the parties---Proposed amendment in the pleadings should not alter the nature of the same---Alleged amendment should not be tainted with dishonest purpose and to build a new case or prejudice the case of adversary---Defendants in their written statement had not controverted the allegations levelled by the plaintiffs with substance rather evasively denied---If any allegation had not been denied specifically then it would be considered to be admitted---Plaintiffs had led affirmative evidence to shift the onus to the beneficiary of impugned gift deed---Defendants had produced only one witness to prove alleged gift deed in their favour---Defendants through proposed amendment intended to reopen the case by leading evidence afresh---Intention of defendants behind proposed amendment was to cover the lacunas left by them during trial, which could not be permitted---Defendants had produced meager, weak and poor evidence and vested right in favour of plaintiff had accrued---Permission to amend written statement would definitely cause prejudice to the plaintiffs, in circumstances---Revision was dismissed in limine.

Munir Ahmad and 7 others v. Additonal District Judge, Kasur PLD 2001 Lah. 149; Ahmed Jamil Ansari v. Messrs Al-Hoqani Securities and Investment Corporation (Pvt.) Limited 2008 CLC 946; Hafiz Muhammad Jaffar v. Muhammad Ameer and 6 others 2011 CLC 1556; Mst. Ghulam Bibi and others v. Sarsa Khan and others PLD 1985 SC 345; Ahsan Kausar and others v. Ahmad Zaman Khan 1986 SCMR 1799; Pehlwan and others v. Ali Ahmad 2005 SCMR 1044; Muhammad Shafi and others v. Abdul Hameed and others 2008 SCMR 654 and Haji Sultan Abdul Majeed (Decd) through Mehboob Sultan and Habib

Sultan and others v. Mst. Shamim Akhtar (Decd) through Mah Jabeen and others 2018 SCMR 82 ref.

Daulat Ali through Legal Heris and 2 others v. Ahmad through Legal Heirs and 2 others PLD 2000 SC 792; Bashir Ahmed and 3 others v. Muhammade Aslam and 6 others 2003 SCMR 1864; G.R. Syed v. Muhammad Afzal 2007 SCMR 433; Mir Akbar v. Sher Bahadur and others 2006 SCMR 315; Abaid Ullah Malik v. Additional District Judge, Mianwali PLD 2013 SC 239; Sulaiman v. Tan Hui Ya AIR 1930 Rangoon 140; Ijaz Mahmood and others v. Manzoor Hussain and others 1988 SCMR 34; Mir Akbar v. Sher Bahadur and others 2006 SCMR 315; Abaid Ullah Malik v. Additional District Judge, Mianwali and others PLD 2013 SC 239 and Ghulam Yasin and others v. Ajab Gul 2013 SCMR 23 rel.

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

----O.VI, R. 17---Amendment in the pleadings could be allowed at any stage of proceedings.

Malik Bashir Ahmed Baryal for Petitioners.

ORDER

CH. MUHAMMAD MASOOD JAHANGIR, J.---Inessential detail apart, Yar Muhammad was the exclusive owner of the subject area, who had two sons-petitioners and even number of daughters-respondents. The entire suit land was transferred to only sons-petitioners just to disinherit the daughters-respondents via registered instrument No.803 on 12.03.1988 followed by mutation No.411 dated 11.04.1988. Having its notice, the latters though instituted suit for declaration, yet aiming cancellation of afore-referred document pleading to be forged, fictitious, collusive based upon fraud and misrepresentation. The petitioners-beneficiaries although contested the suit through their written statement, but neither the allegations were denied with strength nor essential details of the alleged original transaction as well as the construction of basic registered document were provided therein. Any how the following issues were framed:-

1. Whether the plaintiff is entitled for the decree of declaration along with consequential relief of permanent injunction as prayed for? OPP
2. Whether the plaintiffs are entitled for possession of the disputed property? OPP
3. Whether the registry Tamleek No.803 of dated 12.03.1988 and subsequent mutation No.411 dated 11.04.1988 from predecessor in interest of plaintiffs intending attention of land to defendants has been entered after meeting with all its legal requirements?OPD
4. Whether the suit of the plaintiffs is not maintainable in its present form due to non-joinder of the necessary parties?OPD
5. Whether plaintiff has no cause of action to institute the suit, same is liable to be dismissed with special cost?OPD
6. Relief.

and after examination of evidence so made available by respective parties, the suit finally decreed on 01.02.2019. The appeal promptly filed and when it was riped for adjudication, the petitioners tabled application under Order VI rule 17 of the Code, 1908 for amendment of the written statement to explain the reasoning why the transaction of Tamleek was effected by the donor as well as to introduce the ingredients of transaction reflected therein besides how the registered document was constructed, but it was not acceded to and to call in question the impugned order of 11.06.2020 to that effect, this civil revision was preferred.

2. Malik Bashir Ahmed Baryal, Advocate learned counsel for the petitioners submitted that amendment in pleadings can be made at any point of time and even at belated stage of proceedings, which cannot be refused on the score of delay. He further emphasized with great vehemence that law favours adjudication of cases on merit and a lis can be improved through amendment, that the proposed amendment is neither aimed to bring any change in the

defence already set forth nor going to alter its complexion. In support of his submissions, learned counsel for the petitioners relied upon judgments reported Munir Ahmad and 7 others v. Additonal District Judge, Kasur (PLD 2001 Lahore 149), Ahmed Jamil Ansari v. Messrs Al-Hoqani Securities and Investment Corporation (Pvt.) Limited (2008 CLC 946), Hafiz Muhammad Jaffar v. Muhammad Ameer and 6 others (2011 CLC 1556) Mst. Ghulam Bibi and others v. Sarsa Khan and others (PLD 1985 SC 345), Ahsan Kausar and others v. Ahmad Zaman Khan (1986 SCMR 1799), Pehlwan and others v. Ali Ahmad (2005 SCMR 1044), Muhammad Shafi and others v. Abdul Hameed and others (2008 SCMR 654) and Haji Sultan Abdul Majeed (Decd) through Mehboob Sultan and Habib Sultan and others v. Mst. Shamim Akhtar (Decd) through Mah Jabeen and others (2018 SCMR 82).

3. Arguments considered, record consulted.

4. I am fully in agreement with leaned counsel for the petitioners to the effect that while deciding application for amendment of pleadings, Court has to keep in view the interest of justice and allow the case to run on correct lines for decision of real controversy. It is again settled principle of law that amendment can be allowed while ignoring delay whatsoever, even at any stage of proceedings, however, keeping in view the beneficial rule, that proposed amendment is expedient for the purpose of determining the real questions in controversy between the parties, it should not alter the nature of pleadings. Similarly, at the same time it must be kept in mind that the amendment sought must not be tainted with dishonest purposes and should not be intended to build a new case or prejudice the case of adversary, particularly to deprive the latter of a benefit already accrued to him. Indeed, the conduct and the intention of the seeker behind the amendment is one of the relevant factor for allowing or refusing the request.

5. In the present case, the petitioners/defendants through their initial written statement, did not controvert the allegations levelled by the plaintiffs with

substance, rather evasively denied. The rule 3 of Order VIII of the Code, 1908 that defendant must deal specifically with each allegation of fact which he does not admit the truth, whereas following rule 4 is an amplification to the former. The rule 5, prescribes the effect of non-compliance with the provisions of rules 3 & 4 ante, which clarifies that if allegation is not denied specifically, it will consider to be admitted and the effect is that plaintiff need not to prove such facts, because the august Supreme Court, while interpreting the under discussion provisions over and over held that evassive denial is an admission. See Daulat Ali through Legal Heris and 2 others v. Ahmad through Legal Heirs and 2 others (PLD 2000 SC 792), Bashir Ahmed and 3 others v. Muhammade Aslam and 6 others (2003 SCMR 1864), G.R. Syed v. Muhammad Afzal (2007 SCMR 433). At the cost of repetition, despite that after submission of basic plaint, the trial proceeded for about another three years and having not defending substantially, the suit decreed against the petitioners/defendants. Thereafter before the appellate Court, when lis came up for final culmination, the request for amendment tabled. Indeed, motive behind this effort was to withdraw the said admissions. Whereas, as per ratio of the judgments of the apex Court in cases styled as Mir Akbar v. Sher Bahadur and others (2006 SCMR 315) and Abaid Ullah Malik v. Additional District Judge, Mianwali (PLD 2013 SC 239), party is precluded to withdraw any admission.

6. It is matter of record that the learned Trial Court had already settled comprehensive issue, which perfectly covered the dimensions of the litigation and the plaintiffs led the affirmative evidence to shift the onus to the beneficiary of the impugned gift deed, as such certainly it was sine qua non for them to establish due construction thereof by examining its signatories i.e. attesting witnesses, identifier of the donor, stamp vendor, deed writer and sub-registrar, but surprisingly solely one of the petitioners (DW 1) appeared in the witness-box, whereas none else summoned or produced to second him. Through the proposed amendment, in fact no new ground of attack is introduced, but it is just

aimed to reopen the case by leading evidence afresh, which despite availability was withheld earlier, otherwise simple grant of permission to amend the written statement would not serve purpose of the petitioners. The intention behind the amendment was to cover the lacunas left by the petitioners during trial, which obviously cannot be permitted. The petitioners having examined meagre, weak and poor evidence, definitely accrued vested right in favour of the plaintiffs and in such situation permission to amend the written statement will definitely cause prejudice to the latter. For these reasonings, which find support from the judgments reported as Sulaiman v. Tan Hui Ya (AIR 1930 Rangoon 140), Ijaz Mahmood and others v. Manzoor Hussain and others (1988 SCMR 34), Mir Akbar v. Sher Bahadur and others (2006 SCMR 315), Abaid Ullah Malik v. Additional District Judge, Mianwali and others (PLD 2013 SC 239) and Ghulam Yasin and others v. Ajab Gul (2013 SCMR 23), the impugned order of the learned Court below deserves no interference. This Court has gone through the case-law cited by learned counsel for the petitioners while addressing at bar, but found those to be inapplicable having different situation and facts.

7. Therefore, in the light of above, this petition being meritless and without any substance is dismissed in limine.

ZC/M-118/L Revision dismissed.

2021 C L C 25
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. TAMEEZAN and others----Petitioners
Versus
MUHAMMAD SHARIF----Respondent

C.R. No.722 of 2017, heard on 29th September, 2020.

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

----O.IX, R.13, O.V, Rr.19 & 20---Constitution of Pakistan, Art.10-A---Ex-parte decree, setting aside of---Merits of original lis to be considered---Failure to examine serving officer---Effect---Petitioners assailed the dismissal of their application for setting aside ex-parte proceedings as well as decree, which was dismissed on the sole ground of li mitation---Validity---High Court observed that nothing was brought on file to adjudge that the defendants were avoiding service and without recording of the statement of process server to that effect, their substituted service through issuance of proclamation was not warranted---Question of limitation in institution of suit and locus standi of plaintiff being legal propositions were required to be considered by the Trial Court but without taking any pains, ex-parte decreed the suit merely being influenced by the fact that there was no rebuttal to the stance of the plaintiff---Even otherwise, while dealing with application for setting aside ex-parte decree, merits of the original lis could be considered---Summary rejection of the application was against the principles of natural justice as well as the concept of fair trial guaranteed by Art. 10-A of the Constitution---Revision petition was allowed, impugned orders were set aside and the Trial Court was directed to re-decide the application for setting aside ex-parte proceedings and decree.

Hassan Din and another v. Jalal Din and 2 others 1992 CLC 33 and Muhammad Idrees v. Muhammad Kashif 2008 MLD 1448 ref.

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

----O.IX, R.13---Ex-parte decree, setting aside of---Merits of original lis to be considered---Scope---Court while dealing with the application for setting aside ex-parte decree can consider merits of the original lis.

Sharjeel Ejaz, M. Shafique Ahmad and Rana M. Ashraf for Petitioners.

Nemo. for Respondent.

Date of hearing: 29th September, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Inessential detail apart, respondent/plaintiff on the basis of mere receipt dated 28.02.1971 scribed on plain paper instituted suit for its specific performance against the petitioners before the learned Trial Court about thirty seven years thereafter on 19.03.2008. The assertion of the respondent was that his father had purchased it from the predecessor of the petitioners and after making sale consideration the possession changed hands. It was matter of record that petitioners/defendants were not served through ordinary modes, consequently process published via substituted service. For non-appearance, defendants/petitioners were proceeded against ex parte on 24.06.2008, followed by ex parte decree of 07.02.2009. Having its notice, when proceedings for its satisfaction were under way, the petitioners though for some advice tried to resist the ex parte decree before learned Executing Court, but having failed there, they tabled application for setting aside of ex parte proceedings as well as decree. This effort fell to ground on sole score of limitation, thus this civil revision was made.

2. This matter repeatedly called and each time, Mr. Sharjeel Ejaz and associate Advs. for petitioners appeared, but none turned up on behalf of respondent in spite of that name of his learned counsel is duly reflected in the cause list, who is thus proceeded against ex parte.

3. Arguments on behalf of petitioners heard, record perused.

4. On factual side, it emerged that on the basis of receipt merely scribed on plain paper, the petitioners were sued after about four decades of its alleged execution. Although, process issued, but nothing was brought on file to adjudge that defendants were avoiding service and without recording statement of Process Server to this effect, their substituted service through issuance of proclamation was definitely not warranted. The Courts are obliged to return Amanats to original claimants and there is no assumption that a litigant can be

trapped through technicalities. Neither the property was purchased by respondent/plaintiff himself nor his ascendants from petitioners/defendants, rather as per contents of plaint the forefathers of the parties had entered into alleged contract. The question of limitation in institution of suit after such a delay besides locus standi of the successor in this regard being legal proposition was necessarily to be considered, but the learned Trial Court without taking any pain ex parte decreed the suit merely being influenced that there was no rebuttal to the stance of the respondent.

5. It is well established by now that even while dealing with application for setting aside of decree, merits of the original lis can be considered. It was not a simple case, rather many questions appearing on factual as well as legal aspects required to be resolved by the Court and without adverting thereto or probe ex parte decree was passed, the vires whereof can be looked into even if the same was assailed after some delay caused due to bona fide agitation before some other forum. Once disputed question of law and fact agitated in such like application, the Trial Court was bound to equip the parties with opportunity to lead evidence in pro and contra. The summary rejection of application was against the principle of natural justice as well as concept of fair trial guaranteed by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. See "Hassan Din and another v. Jalal Din and 2 others" (1992 CLC 33) and "Muhammad Idrees v. Muhammad Kashif" (2008 MLD 1448).

6. For the reasons recorded hereinabove, this petition having merit is allowed, orders impugned herein are set aside and as a result thereof, application tabled under afore-noted provision of law for setting aside of ex parte proceedings and decrees dated 24.06.2008 and 07.02.2009 respectively will deem to be pending before learned Civil Court, who will re-decide it after settlement of issues as well as evaluation of evidence to be led by respective parties. The petitioners are directed to appear before learned Civil Judge-I, Pattoki on 19.10.2020, who after

procuring service of respondent/plaintiff will proceed further in accordance with law.

SA/T-12/L

Petition allowed.

PLJ 2021 Lahore 179
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
GHULAM HUSSAIN, etc.--Petitioners
Versus
MUHAMMAD HUSSAIN, etc.--Respondents.

W.P. No. 38630 of 2015, heard on 28.10.2020.

Constitution of Pakistan, 1973--

----Art. 199--Specific Relief Act, 1877, S. 54--Suit for permanent injunction--Ex-parte decreed--Appeal--Slight modification--Application for contempt proceeding for recovery of possession--Dismissed which further congealed by ADJ--Concurrent findings--Question of--Whether after pronouncement of decree, decree holder was dispossessed from that khasra or not--Determination--Joint owners--No trust worthy evidence--Validity--Respondents produced on record copy of Register Haqdaran Zameen for year 1982-83 (Exh. R.5), which found mention that in particular khasra, Muhammad Hussain, judgment-debtor being sharer was in its exclusive possession, so it stood established without any doubt that even prior to decree, judgment-debtor was ploughing disputed area--Moreover, document brought on file by both parties further confirmed that they were joint owners--Onus probandi was on petitioners' shoulder to prove same without any shadow of doubt, but Ghulam Hussain (PW1) in his statement-in-chief could only deposed that in March, 2002, he was evicted from land--As per contents of contempt application, occurrence was witnessed by Hayat and Muhammad Akram, but out of them, only latter (PW2) appeared, who also failed to give specific time, date, month or year of incident alleged to have been happened within his view, whereas second one was withheld--Moreover, no trustworthy evidence brought on suit file to shatter veracity of copies of Jamabandies tendered on behalf of respondents--As such, Courts below were quite justified to refuse claim of petitioner--Next drastic angle of case was that judgment debtor/Respondent No. 1 till this time has passed away, as such to his extent, contempt application has become infructuous, whereas rest of

respondents were not party to original suit/decree, hence no punitive action against them is warranted--Although Mr. Allah Bakhsh Gondal, Advocate for petitioners took maximum time, but could not persuade that either evidence available on this file was misinterpreted in its true perspective or impugned orders were result of some jurisdictional defect, *coram non judice or ultra vires* to call for interference by this Court, hence are approved and instant Constitutional Petition being bereft of any merit is dismissed.

[Pp. 181 & 182] A, B, C & D

1999 MLD 2297 & PLD 2009 SC 380 *ref.*

Mr. Allah Bakhsh Gondal, Advocate for Petitioners.

Mr. Zia Ullah Khan Niazi, Advocate for Respondent No. 1.

Mr. Ihsan Ahmad Bhindar, Advocate for Respondents 4 and 5.

Date of hearing: 28.10.2020.

JUDGMENT

Indeed, Muhammad Fareed, the ascendant of the petitioners, long ago instituted suit for permanent injunction only against Muhammad Hussain, Respondent No. 1 (now deceased). Muhammad Fareed through his suit claimed his exclusive ownership *qua* different *khasras* including area falling in Square No. 325, *Killa* No. 24 praying for decree to restrain Muhammad Hussain from his illegal eviction. The sole defendant did not appear on the scene, consequently Muhammad Fareed was finally equipped with ex parte decreed on 11.02.1998, however there was some omission in referring *Khasras* number, who for its insertion himself appealed and another decree dated 11.09.2001 was awarded to him by the learned Appellate Court with slight modification, which stood final having not been agitated further by anyone. Thereafter, on 24.04.2002 Muhammad Fareed, decree holder filed application for initiation of contempt proceedings against the judgment-debtor as well as Respondents No. 2 to 5 while asserting that standing crops as well as about

forty trees over area falling in square number 325 *Killa* No. 24 were put to fire and its possession was taken over unauthorizedly. The ultimate prayer of the petitioner was for recovery of possession of the said property along with some damages, which resisted mainly on the score that no order of the Court was ever violated. The learned Civil Court settled issues, invited the parties to lead their respective evidence and while evaluating the same finally dismissed the application on 26.10.2007, which was further congealed by learned Addl. District Judge on 29.01.2008, hence this constitutional petition to assail the said concurrent findings.

2. Arguments heard and record scanned.

3. The sole question to be resolved is whether after the pronouncement of decree dated 11.02.1998 or 21.09.2001, the decree holder was dispossessed from the aforenoted khasra or not. The respondents produced on record copy of Register Haqdaran Zameen for the year 1982-83 (Exh. R.5), which found mention that in particular khasra, Muhammad Hussain, the judgment-debtor being sharer was in its exclusive possession, so it stood established without any doubt that even prior to decree, the judgment-debtor was ploughing the disputed area. Moreover, the document brought on file by both the parties further confirmed that they were joint owners.

4. The next drawback of the case was that petitioner while approaching the learned Civil Court through contempt application did not demonstrate specific time and date of the alleged occurrence for their illegal eviction by the rivalry from the property under their alleged plough. The onus probandi was on petitioners' shoulder to prove the same without any shadow of doubt, but Ghulam Hussain (PW1) in his statement-in-chief could only deposed that in March, 2002, he was evicted from the land. As per contents of contempt application, the occurrence was witnessed by Hayat and Muhammad Akram, but out of them, only the latter (PW2) appeared, who also failed to give specific time, date, month or year of the incident alleged to have been happened within his view, whereas the second one was withheld. Moreover, no trustworthy evidence brought on suit file to shatter the veracity of

copies of Jamabandies tendered on behalf of the respondents. As such, the Courts below were quite justified to refuse claim of the petitioner.

5. The next drastic angle of the case was that the judgment debtor/Respondent No. 1 till this time has passed away, as such to his extent, the contempt application has become infructuous, whereas rest of the respondents were not party to the original suit/decree, hence no punitive action against them is warranted. See *Mubarak Ali vs. Feroze Din and 2 others* (1999 MLD 2297) and *Syed Naghman Haider Zaidi and another vs. Zahid Mehmood and others* (FLD 2009 SC 380).

6. Although Mr. Allah Bakhsh Gondal, Advocate for the petitioners took maximum time, but could not persuade that either the evidence available on this file was misinterpreted in its true perspective or the impugned orders were result of some jurisdictional defect, *coram non judice or ultra vires* to call for interference by this Court, hence are approved and instant Constitutional Petition being bereft of any merit is dismissed.

(M.M.R.) Petition dismissed.

PLJ 2021 Lahore (Note) 20

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

ABDUL REHMAN and 9 others--Petitioners

Versus

DISTRICT OFFICER (REVENUE) SHEIKHUPURA and 5 others--Respondents.

W.P. No. 10541 of 2007, heard on 14.11.2018.

Constitution of Pakistan, 1973--

----Art. 199--Allotment of land--Sale of land--Cancellation of original allotment--Direction for implementation of orders--Allottee right of audience--Violation of principle of *audi alteram partem*--Natural justice--Quashment of orders--Direction to conduct of through enquiry--Law Officer who attended case on behalf of official respondents submitted that Mushtaq Ahmed, Senior Clerk was posted as Settlement Clerk in office of then District (Revenue)/Respondent No. 2 and relevant record of this as well as other cases was misplaced by him whereupon criminal proceedings and departmental action had already been initiated, so without availability of record any comment upon correctness or otherwise of instant case cannot be given, however he further admitted that record of allotment of Respondent No. 5 was also not available--Counsel for Respondent No. 5/subsequent allottee after having been confronted to aforenoted situation, although' argued case to some extent, but ultimately prayed that matter may be referred to Notified Officer to conduct a thorough enquiry--Counsel for petitioners without wasting any time has accepted offer of learned counsel for contesting respondent, whereas learned Law Officer also did not object to this settlement--Orders dated 15.01.2004, 22.01.2004 and 29.01.2004 of Respondents No. 2 are quashed declaring those to be without lawful authority and matter is forwarded to Senior Member, Board of Revenue, Punjab, Lahore for entrustment of file to Notified Officer of concerned area for its disposal after a thorough inquiry in terms enumerated above--Petition allowed.

[Para 3, 4 & 5] A, B, C & D

Ch. Iqbal Ahmed Khan, Advocate for Petitioners.

M/s.Sh. Sajid Mehmood, Muhammad Asghar Naeem, Kh. Farooq Dildar an d Shahzada Jahandar Durrani, Advocates for Respondent No. 5.

Mr. M. Osama Hanif, Advocate for Settlement Department.

Date of hearing: 14.11.2018.

JUDGMENT

Compendium facts of the case were that 706 Kanals 15 Marlas of land was allotted at Khata No. 2 of RL-II in village Kund Reham Shah Tehsil Nankana Sahib by the Rehabiliation Authorities to Abdul Ghafoor s/o Bhoorey Khan a Claimant/Displaced Person from India,which was sold out by the allottee to one Muhammad Hussain through mutations No. 9 & 10 of 09.01.1970 on whose demise it was transferred to Naseem Begum etc. his successors-in-interest through inheritance mutation No. 7 dated 11.01.1988 and thereafter vide mutation Nos.1 of 1990, 87 of 1999, 185 of 2001 as well as some others it was purchased by present petitioners, the possession also changed hands in their favour and the land without interruption is still under their plough. The allotment as well as mutations referred hereinabove were duly incorporated in the Revenue Record. The controversy boiled out when District Officer (Revenue), Sheikhupura vide order dated 15.01.2004 on the basis of order dated 04.11.1971 purported to have been passed by Additional Settlement Commissioner (Land) cancelled the original allotment of Abdul Ghafoor as well as subsequent mutations, who also allotted the land to Muhammad Siddique Respondent No. 5 on 22.01.2004 and issued a Robkar on 29.01.2004 directing the Tehsildar for implementation of aforenoted orders compelling the petitioners to approach this Court through petition in hand.

2. Ch. Iqbal Ahmed Khan, Advocate, learned counsel appearing on behalf of petitioners inaugurally emphasized that despite the fact that Respondent No. 2 was well aware that the property had been transferred to the present petitioners without issuance of notice and providing them as well as the original allottee right of audience, in violation of principle of *audi alteram partem* passed the impugned orders, which being militant to the principle of natural justice were liable to be set aside. He further added that after more than 33 years the original allotment and subsequent transfers were shattered on the basis of non-existent order dated 04.11.1971 and that Respondent No. 2 neither had powers to pass the impugned

orders nor he was Notified Officer under the Repeal Act to allot the property to Respondent No. 5, who ultimately prayed for setting aside of impugned orders.

3. The learned Law Officer who attended the case on behalf of official respondents submitted that Mushtaq Ahmed, Senior Clerk was posted as Settlement Clerk in the office of the then District Officer (Revenue)/Respondent No. 2 and the relevant record of this as well as other cases was misplaced by him whereupon criminal proceedings and departmental action had already been initiated, so without availability of the record any comment upon the correctness or otherwise of the instant case cannot be given, however he further admitted that the record of allotment of Respondent No. 5 was also not available. M/s. Sh. Sajid Mehmood, Muhammad Ashgar Naeem, Kh. Farooq Dildar and Shahzada Jahandar Durrani, Advocates, learned (counsel for the Respondent No. 5/subsequent allottee after having been confronted to the aforenoted situation, although' argued the case to some extent, but ultimately prayed that matter may be referred to Notified Officer to conduct a thorough enquiry in the terms given below:

1. Whether the property was allotted to original allottee Abdul Ghafoor against his verified claim?
2. Whether the allottee had appeared before the Additional Settlement Commissioner to concede that his allotment was bogus and on 04.11.1971 a valid order for the cancellation of his allotment was passed as per law?
3. What would be the effect of sale of disputed land by original allottee to Muhammad Hussain vide mutations No. 9 & 10 of 1970 which had already been attested prior to purported order dated 04.11.1971 of the Additional Settlement Commissioner?
4. If ultimately land becomes available, who among the parties will be entitled for its allotment and by whom under the Repeal Laws?

4. The learned counsel for the petitioners without wasting any time has accepted the offer of the learned counsel for contesting respondent, whereas learned Law Officer also did not object to this settlement.

5. Resultantly, this Writ Petition is allowed, orders dated 15.01.2004, 22.01.2004 and 29.01.2004 of Respondents No. 2 are quashed declaring those to be without lawful authority and matter is forwarded to Senior Member, Board of Revenue, Punjab, Lahore for entrustment of file to the Notified Officer of the concerned area for its disposal after a thorough inquiry in the terms enumerated above. The parties are directed to appear before the former on 26.11.2018 for the needful.

(Y.A.) Petition allowed.

PLJ 2021 Lahore (Note) 23

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUHAMMAD RAZZAQ--Petitioner

Versus

MUHAMMAD SALEEM etc.--Respondents

W.P. No. 29936 of 2014, heard on 10.11.2016.

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

----S. 54--Civil Procedure Code, (V of 1908), O.XXI R. 32--Constitution of Pakistan, 1973, Art. 199--Suit for permanent injunction--Disposed of--Direction to respond to abide by statement of his counsel--Application for delivery of possession after ejectment--Dismissed findings--Concurrent--Challenge to--During course of arguments on having been confronted with situation that suit of petitioner was disposed of on statement of learned counsel for Respondent No. 1/defendant, which was never decreed by learned Civil Court and how provisions of Order XXI rule 32 governing with decree passed in a regular suit could be invoked in favour of petitioner, learned counsel for petitioner has himself handicapped to respond satisfactorily and in such a situation, I am satisfied that both Courts below are quite justified to dismiss application filed by petitioner through impugned orders--Counsel for petitioner is unable to point out any irregularity or illegality committed by learned Lower Courts while passing impugned orders, which are neither *coram non judice nor ultra vires*--Petition dismissed.

[Para 2 & 3] A & B

Mr. Ghulam Hussain Awan, Advocate for Petitioner.

Mr. Shah Nawaz Khan Niazi, Advocate for Respondent No. 1.

Date of hearing: 10.11.2016.

JUDGMENT

In concision, the facts of the case are that petitioner instituted suit for permanent injunction while claiming his possession being exclusive owner of the suit property and prayed that Respondent No. 1/defendant be restrained permanently from taking its possession illegally and forcibly. The said suit was resisted by Respondent No. 1/defendant through written statement with the assertion that he had no concern with the suit land, but he was owner in possession of the different property. At one stage of the proceedings, learned counsel for Respondent No. 1/defendant also got recorded statement that Respondent No. 1 was in possession of his owned property falling in Khasra No. 20 and would not take possession of the suit property having no concern with it. The suit was spontaneously disposed of *vide* order dated 24.07.2007 by the learned Trial Court with the direction that respondent/defendant would abide by the statement of his counsel. Thereafter an application under Order XXI Rule 32 of the Code of Civil Procedure, 1908 was tabled by the petitioner on 05.09.2007 wherein he prayed that possession of the suit property be delivered to

him after ejectment of the Respondent No. 1/defendant, but same did not succeed having been concurrently dismissed by both the Courts below *vide* impugned orders dated 19.12.2012 and 27.09.2014 respectively, which are subject matter of the instant Constitutional petition.

2. During the course of arguments on having been confronted with the situation that suit of the petitioner was disposed of on the statement of learned counsel for Respondent No. 1/defendant, which was never decreed by the learned Civil Court and how the provisions of Order XXI, Rule 32 governing with the decree passed in a regular suit could be invoked in favour of petitioner, learned counsel for the petitioner has found himself handicapped to respond satisfactorily and in such a situation, I am satisfied that both the Courts below are quite justified to dismiss the application filed by the petitioner through the impugned orders.

3. The learned counsel for petitioner is unable to point out any irregularity or illegality committed by learned Lower Courts while passing the impugned orders, which are neither *coram non judice nor ultra vires* and the instant writ petition having to substance is ***dismissed.***

(Y.A.) Petition dismissed.

2021 C L C 584
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
WALAYAT (deceased) through L.Rs. and others----Petitioners
Versus
SHAHADAT through LRs and others----Respondents

Civil Revision No.220 of 2005, heard on 21st October, 2020.

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

----S.54---Specific Relief Act (I of 1877), S.42--- Suit for declaration---"Sale" how made---Contract of sale---Failure to prove payment of consideration---Scope---Plaintiff approached Civil Court through declaratory suit aiming cancellation of registered sale deed as well as its implementing mutation asserting that the suit area was mortgaged to defendants for a term of five years but they managed registration of sale deed within just ten days of the attestation of mortgage mutation and that he was an illiterate and advanced age seriously ill person---Validity---Illiteracy, advanced age and serious illness of the plaintiff was not disputed---Burden to prove the contents of document, in addition to proof of execution and ingredients of the transaction couched therein, was on the defendants, being beneficiaries---In order to prove that a transaction was sale, the passing of price or its promise had to be contemplated and in absence thereof, mere registration of document to that effect did not operate to pass title to the beneficiary---Marginal witnesses of the sale deed and Deed Writer admitted that the consideration was not paid before them---High Court observed that in the absence of proof that sale consideration was received by the vendor, there was no sale in the eyes of law---Revision petition was dismissed, in circumstances

Shahid Nasim and 2 others v. Syeda Imtiaz Khatoon PLD 1997 Lah. 243 and Hakim Ali v. Sakhi Muhammad and 16 others 1996 SCMR 354 distinguished.

Gopal Das v. Siri Thakir Gee and others AIR 1943 P.C. 83; Siraj Din v. Jamila and another PLD 1997 Lah. 633; Fakhar-ud-Din through L.Rs. v. Muhammad Iqbal and others 2015 CLC 994; Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others 2006 SCMR 1144; Khan Muhammad v. Muhammad Din through L.Rs. 2010 SCMR 1351; Amjad Ikram v. Mst. Asiya Kausar and 2 others 2015 SCMR 1 and Muhammad Shafi and others v. Allah Dad Khan PLD 1986 SC 519 ref.

Muhammad Sher and 2 others v. Muhammad Azim and another PLD 1977 Lah. 729 rel.

(b) Evidence Act (I of 1872) [since repealed]---

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

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

----S.54---"Sale" defined---Sale how made---Contract of sale---Scope---In absence of proof that sale consideration was received by the vendor, there was no sale in the eyes of law.

Muhammad Shafi and others v. Allah Dad Khan PLD 1986 SC 519 ref.

(d) Limitation---

----Any deal (transaction) based on fraud would be void and notwithstanding the bar of limitation, the matter can be considered on merit so as to discourage fraud besides to be perpetuated.

Irfan Alam for Petitioner.

Khalid Ikram Khatana and Sohail Zafar Sipra for Respondent No.1.

Date of hearing: 21st October, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Shorn of unnecessary detail, Shahadat plaintiff/respondent No.1 on 10.09.1996 approached the learned Civil Court through declaratory suit aiming cancellation of registered sale deed dated 18.12.1972 (Exh.P5) as well as its implementing mutation No.439 dated 18.02.1973 asserting that suit area was mortgaged to Walayat and Noor Akbar, the predecessors-in-interest of the petitioners vide mutation N.434 dated 08.12.1972 (Exh.P1) for a term of five years since khareef 1973 till rabi 1978 and after its expiry, the possession was returned, but subsequently apprised that Walayat and Noor. Akbar, ascendants of the petitioners managed execution/attestation of sale deed No.698 dated 18.12.1972 within just ten days of the attestation of mortgage mutation dated 08.12.1972; that plaintiff was an illiterate and advanced age seriously ill person, who neither settled any sale nor consideration was paid and even he did not appear before the Registering Officer for its registration, thus being forged and fictitious, the sale deed as well as its incorporating mutation was liable to be cancelled. The defendants/ beneficiaries along with co-defendants although contested the suit by filing joint written statement, yet it was admitted on their part that Shahadat, plaintiff was an illiterate person and that the property was initially mortgaged to them,

however, asserted that the sale deed as well as subsequent Mutation No.853 dated 07.06.1991 was perfectly attested/sanctioned. It was matter of record that in the written statement, it was not demonstrated that against what value the property was purchased. The written defence was lacking as well to explore when, where and before whom the transaction settled and consideration paid. The serious allegations of the plaintiff qua execution/ registration of instrument (narrated hereinabove) were again not specifically denied in the written statement. The learned Civil Court having faced conflicting pleadings made by respective parties materialized the following issues:-

1. Whether the plaintiff is owner in possession of the suit land fully described in the plaint and such impugned sale deed dated 18.12.1972 and mutation No.439 dated 18.2.1973 and Mutation No.853 dated 7.6.1991 were void, illegal upon the right of the plaintiff which is liable to be dismissed? OPP

2. Relief

and invited them to lead evidence in pros & cons. As a result thereof, the moment plaintiff (PW1) as well as supporting witness (PW2), deposed in line with the contents of plaint that the suit property was only mortgaged for a specified term, whereas neither sale was effected nor the plaintiff recorded statement for the attestation of sale deed and he was deprived of his property due to his illiteracy, onus shifted to the petitioners/beneficiaries. On the part of the latters to discharge it, the Patwari (DW1), Deed Writer (DW2), one of the beneficiaries (DW3), the marginal witnesses of the impugned sale deed (DW4 & 5) were produced. As a result of evaluation of evidence of the parties, the learned Civil Court dismissed the suit vide judgment dated 18.10.2001, but it did not sustain, when learned Appellate Court on 05.01.2005 accepted the appeal of the respondent/plaintiff and decreed his suit, hence civil revision in hand on behalf of the descendant of the beneficiaries.

3(sic). Mr. Irfan Alam, Advocate on behalf of the petitioners inaugurally nnphasized with great vehemence that basic onus to prove that the sale deed was collusive, forged and fictitious rested upon the plaintiff, but he failed to lead trustworthy evidence. He further submitted that quantitative and qualitative evidence was produced on behalf of the petitioners/beneficiaries to establish that there was a fair deal, consideration paid and the vendor with his free consent appeared before the Scribe/Registering Officer for the construction as well as attestation of impugned document, but it was not scrutinized in its true perspective by the Appellate Court. The main emphasis of learned counsel for

the petitioners while relying upon cases reported as Shahid Nasim and 2 others v. Syeda Imtiaz Khatoon (PLD 1997 Lahore 243) and Hakim Ali v. Sakhi Muhammad and 16 others (1996 SCMR 354) was that the disputed sale instrument was duly registered and under section 60 of the Registration Act, 1908, presumption of correctness and due sanctity was attached thereto, whereas the strongest evidence was required to cast aspersion on its genuineness, but in absence thereof, Court below erred in law to cancel the sale deed. The learned counsel for the petitioners in the fag end of his arguments contended that sale deed was attested prior to promulgation of Qanun-e-Shahadat Order, 1984, which being registered document needed not to be proved as per yardstick/scheme introduced through the Order ibid, and that intention of the vendor for the execution of instrument was more important than the passing of sale price, but this aspect was ignored while passing the impugned decree, as such is not sustainable.

4. In defence, M/s. Khalid Ikram Khatana and Sohail Zafar Sipra, Advocates for respondent No.1/plaintiff submitted that disputed documents were challenged while raising serious allegations and in such situation, the onus shifted towards the beneficiary to prove its due execution as well as transaction detailed therein, who badly failed to adduce sufficient evidence in this behalf. It was also argued that neither in their pleadings, the petitioners provided essential detail with regard to original transaction nor through the evidence examined on their behalf they succeeded to establish the alleged sale. Next emphasis of respondent No.1's learned counsel was that Stamp Vendor and Sub-Registrar being the independent persons, at the most, could belie the allegations raised by the plaintiff, but despite availability, they were deliberately withheld, as such Appellate Court below rightly inferred adverse presumption against the petitioners/beneficiaries.

5. Attended the submissions and file also gone through with the able assistance of learned counsel for the parties.

6. As regards the last two grounds of arguments sounded by Mr. Irfan. Alam, Advocate for petitioners, there was much substance that impugned instrument was attested prior to enforcement of Order ibid, which needed not to be proved as per scheme provided therein, but when they of their own produced the evidence, then it has to be analyzed on the standard set by the superior Courts. There is no second thought that ordinarily a document is not proved itself unless admitted by its executant, otherwise, when there is specific denial and controverted while raising serious allegations, it becomes sine qua non for the

beneficiary to prove the same as per section 102 of the Evidence Act, 1872. Thus, the burden to prove the contents of the document, in addition to proof of execution and ingredients of the transaction couched therein, was on the beneficiaries, who should have led primary/secondary circumstantial internal evidence to dig out the truth/genuineness thereof. In the case in hand, illiteracy, advanced age and serious illness of the plaintiff were not disputed elements among the parties. Moreover, there was also a consensus between them that on 08.12.1972 through mutation (Exh.P1) the suit property had been mortgaged for five years, then the settlement of its sale through attestation of instrument in this regard within next ten days definitely created some suspicion, which could only be defused through production of trustworthy evidence. There is no cavil that such like document attaches presumption of truth, however, it is not rule of thumb, but each case is to be dealt with as per its peculiar facts and its veracity depends upon quantum/quality of evidence to be made available by the respective parties. Reliance to this extent can be placed upon cases reproduced as Gopal Das v. Siri Thakir Gee and others (AIR 1943 P.C. 83), Muhammad Sher and 2 others v. Muhammad Azim and another (PLD 1977 Lahore 729), Siraj Din v. Jamila and another (PLD 1997 Lahore 633), Fakhar-ud-Din through L.Rs. v. Muhammad Iqbal and others (2015 CLC 994), Abdul Ghafoor and others v. Mukhtar Ahmad Khan and others (2006 SCMR 1144), Khan Muhammad v. Muhammad Din through L.Rs. (2010 SCMR 1351) and Amjad Ikram v. Mst. Asiya Kausar and 2 others (2015 SCMR 1). In Muhammad Sher's case (supra), wherein registered sale deed of 1957 was disputed, in para No.8 it was concluded as under:-

> "There is no doubt that the certificate of registration shows the execution of the document but no such presumption can be drawn therefrom that such and such person has really executed the same. In the given circumstances of the case it will be open to the parties to prove that the document in question was not really executed by the person shown to have executed the same according to the certificate of registration. It is exactly what the learned Judges in AIR 1929 Lahore have held. The certificate of registration is only to show the execution of the document, and presumption beyond that cannot be drawn therefrom. This view gains strength from Gopal Das and others v. Sri Thakurji and others AIR 1943 PC 83 holding that where the Registrar's endorsements made under section 60 of the Registration Act showed that in 1881 a person claiming to be parahotam Das and to have become son of Harish Chandra by adoption made by his widow presented the receipt for registration and

admitted its execution and was identified by two persons one of them was scribe of the document and was known to the Registrar, what remained to be shown was that the person admitting execution before the Registrar was Parshotam Das and no imposter. According to their Lordship of the Privy Council the question as to whether executant was Parshotam Das or any imposter was one of fact. However, the only presumption which could be drawn from the certificate of endorsement was that registration proceedings were regular and honestly carried out. It is clear that if in the given circumstances of a case genuineness or bona fide with regard to the execution of a document are in doubt then inquiry can be held in this behalf and no presumption to the effect that such and such document has actually been executed by a genuine person in all circumstances, can be drawn."

7. Having found support to the effect that in case of disputed registered document, it is also sine qua non for the beneficiary to prove the sale, it would be better to first approach to its definition, provided in Section 54 of the Transfer of Property Act, 1882, which says "sale" is transfer of ownership of immovable property in exchange for a price paid or promised or partly paid or partly promised, hence in order to prove that a transaction is sale, the passing of price or its promise might be contemplated. In absence thereof, mere registration of document to that effect does not operate to pass title to the beneficiary against such transaction. The pivotal issue in this case was 'whether Shahadat sold out the property to petitioners and the latter though examined both of the marginal witnesses (DW4 and 5) to prove questioned sale deed, but out of them, the former in his statement-in-chief did not depose that either the original deal was settled in his presence or at the time of payment of consideration, he was available, whereas in his cross-examination he explicitly said that consideration was not paid before him. Although subsequently he tried to improve that it was made before him, but in next breath he again denied to recall that when it was paid. He further showed lack of knowledge that who was the other witness of the said fact. The position in statement-in-chief of the next attesting witness (DW5) of the impugned sale deed was again the same, who in his cross-examination in all fairness admitted that consideration was not paid before him. It was again drastic that Walayat (DW3), one of the beneficiaries, admitted the position that both of the marginal witnesses were not of the revenue estate where parties resided or area in dispute situated. It was astonishing that said defendant though stated that consideration was paid before the Sub-Registrar, but while admitting in his cross-examination that he was not present at that occasion, there

left only statement of Deed Writer (DW2), who also did not depose that either the consideration was paid before him or the vendor accepted its receipt in his presence at the time of execution of sale deed. It is matter of record that the other beneficiary Noor Akbar, who was an Advocate, Stamp Vendor and the Sub-Registrar were also not examined, as such meager, weak and shaky evidence was brought on record, out of whom no one is found to have stated that sale consideration was paid/made good in his presence or he witnessed the original transaction. Moreover, the defendant (DW3) in last lines of his cross-examination also denied to administer special oath on the Holy Quran in support of his stance. Thus, in absence of proof that sale consideration was received by the vendor, there was no sale in the eye of law. See Muhammad Shafi and others v. Allah Dad Khan (PLD 1986 SC 519). Hence, learned lower Appellate Court was perfect in returning positive findings on Issues Nos.1 and 2.

8. Reverting to main emphasis and case-law cited by Mr. Irfan Alam, Advocate for the petitioners that more important was intention of the vendor to pass on title of his property than to establish that transaction couched in document was proved or not. Suffice it to say that each case has to be dealt with as per its own facts on the rule of preponderance of evidence. In the file in hand, no specific intention was either pleaded or even pressed, rather from the inception of this litigation, vivid stance of the plaintiff was that basically the property in dispute was mortgaged for five years and there was no intention for its sale, but forged as well as fictitious instrument introduced within next ten days, thus the petitioners were under obligation to prove it. The view formed by the apex Court in Hakim Ali's case (supra) went through, wherein the sale deed executed on behalf of one Jagga Khan was challenged after his death by the collaterals, which was perpetuated while observing that vendor/Jagga Khan in his life had already endorsed and acknowledged the instrument during course of some earlier judicial proceedings initiated in this behalf. Likewise, in other referred case of Shahid Nasim (supra), the payment of consideration through Bank was proved. Hence, the said case law runs on different footing, which being inapplicable cannot be given due weight.

9. When established that there was no sale and the sale deed was managed qua property of an illiterate/seriously ill person by practicing fraud, which vitiates even the most solemn transaction, as any deal based on fraud would be void and notwithstanding the bar of limitation, the matter can be considered on merit so as to discourage fraud besides to be perpetuated.

10. In view of what has been discussed above, the learned Appellate Court while giving findings of fact against the petitioners after proper appreciation of evidence and applying correct law on the subject committed nothing wrong, whereas the learned counsel for the petitioners took maximum time to find out that either any misreading/non-reading of evidence was made or the impugned judgment tainted with jurisdictional defect, but he failed, hence this civil revision being devoid of my merit and force is dismissed. No order as to costs.

SA/W5/L Petition dismissed.

2021 Y L R 669
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
AMJAD ALI---Appellant
Versus
MUNIR AHMAD and others---Respondents

R.S.A. No. 213 of 2011, decided on 14th October, 2020.

Specific Relief Act (I of 1877)---

----Ss. 12 & 27(b)---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 120---Suit for specific performance of agreement to sell---Bona fide purchaser for valuable consideration without knowledge of prior agreement---Onus to prove---Plaintiff/ appellant asserted that defendant/vendor after executing agreement to sell in his favour transferred suit land in favour of defendant/subsequent vendee---Plea raised by defendant/subsequent vendee was that he was bona fide purchaser for valuable consideration---Trial Court decreed suit in favour of plaintiff/ appellant but Lower Appellate Court reversed the findings and dismissed the suit---Validity--- Plaintiff/appellant claimed that his prior sale via agreement to sell was in knowledge of defendant/ subsequent vendee, whereas the latter pleaded his complete ignorance---Defendant / vendor asserted that defendant/subsequent vendee was fully aware of earlier sale and purchased suit land at his own risk---Onus shifted to defendant/subsequent vendee pleading bona fide purchase---Earlier transaction settled by defendant/vendor with plaintiff/appellant was proved to be in complete knowledge of defendant/ subsequent vendee, who failed to prove passing of consideration to defendant/ vendor---In absence of making of any due inquiry, findings of Lower Appellate Court on issues relating to payment of consideration amount and bona fide purchase were tainted with misreading and non-reading of evidence---High Court set aside judgment and decree passed by Lower Appellate Court and restored that of Trial Court---Second appeal was allowed, in circumstances.

Dhanna Lal v. Shambhu AIR 1917 Nagpur 123; Veeramalai Vanniar (died) and others v. Thadikara Vanniar and others AIR 1968 Madras 383 and Sakhi Jan and others v. Shah Nawaz and another 2020 SCMR 832 ref.

Mahmood Ahmed Bhatti and M. Zaeem Bhatti for Appellant.

Ch. Muhammad Ashraf Goraya and Ch. Zulqarnain Baryar for Respondent No.1.

Ch. Muhammad Aslam Arain and Mahar Sohail Zafar Sipra, Advocates for L.Rs. of Respondent No.2(a to e).

Date of hearing: 23rd September, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---In this case, the decree awarded to the appellant in his suit for specific performance of contract by the learned Trial Court was reversed in appeal made by subsequent vendee/ respondent No.1 and the former being dejected preferred this second appeal.

2. In terseness, the facts of the case in hand are that suit area vested to Iqbal Bibi/respondent No.2, who initially agreed to sell it to the appellant and after receipt of token amount, the agreement dated 07.01.2008 (Exh.P1) was executed, whereas the remaining consideration was to be paid till 01.03.2008 followed by attestation of sale deed/mutation to pass on title to the vendee/appellant, but much prior to it, the lady vendor transferred the suit land to respondent No. 1 vide oral sale Mutation No.457 of 23.01.2008 (Exh.P2). This demeanor impelled the appellant to institute suit for specific performance of agreement to sell (Exh.P1), besides seeking cancellation of mutation (Exh.P2). In response, though the vendor defended the suit merely controverting the fixation of sale price, yet in all fairness admitted the settlement of transaction as well as construction of Exh.P1. She in her written statement further demonstrated that respondent No.1 had persuaded her for sale of area in his favour against some additional amount while guaranteeing that he would convince the appellant to withdraw/ relinquish his sale. Whereas the subsequent vendee/respondent No.1 while claiming him to be bona fide purchaser and showing his complete ignorance qua earlier contract of sale (Exh.P1) also contested the suit.

3. The learned Trial Court facing with divergent pleadings of the contestants, captured disputed area of fact and law while settling the issues as follows:-

1. Whether the plaintiff and defendants Nos.3 to 5 entered into an agreement to sell dated 07.01.2008 with the defendant No.1 regarding suit land and paid Rs.3,10,000/- as earnest money and defendant No.1 promised to execute the sale deed in their favour till 01.03.2008 after receiving the remaining amount? OPP

2. If issue No.1 is proved in affirmative, whether the plaintiff and defendants Nos. 3 to 5 are entitled to the decree as prayed for?OPP

3. Whether Mutation No.457 dated 23.01.2008 in favour of defendant No.2 regarding suit land by defendant No.1 is illegal, against facts and law, collusive, based on fraud, hence void and inoperative upon the rights of the plaintiff and defendants Nos.3 to 5?OPP

4. Whether the plaintiff and defendants Nos. 3 to 5 have no locus standi and cause of action against the defendant No.2? OPD-2

5. Whether defendant No.2 is bona fide purchaser with consideration without notice of suit land vide mutation No.457 dated 23.01.2008?OPD-2

6. Whether the plaintiff and defendants Nos.3 to 5 have not come to the court with clean hands?OPD-2

7. Whether the plaintiff and defendants Nos.3 to 5 have filed this suit to harass the defendant No.2 and suit is false and baseless, hence, liable to be dismissed with special costs under section 35-A of C.P.C.? OPD-2

8. Relief.

The onus probandi of crucial issues Nos.1 and 2 was on the appellant/ plaintiff, who to discharge it examined Stamp Vendor (PW1), Deed Writer (PW2), one of the marginal witnesses (PW4) and himself appeared as PW3. It is significant that other attesting signatory of Exh.P1 was Khadim Hussain son of vendor, who being attorney of the latter appeared as DW1 and candidly admitted the construction of Exh.P1, transaction reflected therein, besides that Exh.P1 was signed by him being its marginal witness. On his end, respondent No.1/subsequent vendee examined DWs-3 and 4, the attesting witnesses of his mutation and himself appeared as DW2. The two Courts below appreciated the available evidence/ material with different approach, resulting into divergent decisions as disclosed in para-1 ante, hence this appeal.

4. Messrs Mahmood Ahmed Bhatti and M. Zaeem Bhatti, Advocates, on behalf of appellant/plaintiff inaugurally submitted that despite the fact that case of his client was covered by the presumption ordained by Article 81 of the Qanun-e-Shahadat Order, 1984, but even then the execution of Exh.P1 and the original transaction detailed therein were duly proved. Further contended that transaction of the plaintiff settled earlier was an admitted fact and the moment it conceded on behalf of the vendor, the subsequent sale made in favour of respondent No.1 became inessential. They also added that disclosure on the part of the vendor through her pleadings and statement that the subsequent vendee was very much aware of the prior sale was enough to infer that second transaction was collusive and result of conspiracy. Messrs Bhatti, then argued that even earlier sale and execution of Exh.P1 was not disputed by the subsequent vendee/ respondent No.1, as such findings of issues Nos.1 and 2 were perfectly returned in affirmative by learned Civil Court, but learned Appellate Court on some extraneous and supervenient reasons reversed the same, which being tainted with misreading and non-reading of evidence are liable to be set aside. The learned counsel for the appellant also emphasized with great vehemence that his client through trustworthy evidence proved on record that respondent No.1 was well aware of the first transaction, but the latter failed to discharge the onus so shifted to prove his bona fide purchase. The narrative of the arguments of learned counsel for the appellant was acceptance of appeal,

setting aside of the judgment of the learned District Judge and restoration of decree awarded by the learned Trial Court.

On their turn, Messrs Ch. Muhammad Ashraf Goraya and Ch. Zulqarnain Baryar, Advocates for subsequent vendee/ respondent No.1 contended with great vehemence that sale struck through Exh.P1 was not in the knowledge of his client, who after due diligence purchased suit land at the market price and not only possession changed hands, but its ownership also transferred via sanction of mutation (Exh.P2), that case of respondent No.1 was fully proved as per requirement ordained by section 27-B of the Specific Relief Act, 1877. It was added as well that execution of sale agreement (Exh.P1) was controversial/ disputed, as such its contents were to be proved as per yardstick set through Article 79 of the Order ibid, but having failed to examine second marginal witness of Exh.P1, it cannot be taken as evidence, what to assume that a decree can be equipped to its beneficiary. The learned counsel for respondent No.1 while inviting attention toward statement of plaintiff (PW3) submitted that when plaintiff admitted that at the time of his deal, only he, the vendor and her son were available, the learned Appellate Court was correct to infer that respondent No.1 was not aware of earlier transaction. It was further argued by Mr. Goraya and Baryar that earlier sale was not followed by change of possession, hence there was no chance to apprehend that subsequent vendee was in its direct knowledge, that cogent, inspiring and trustworthy affirmative evidence was brought on record to prove the bona fide purchase, therefore, impugned findings on issues Nos.3 and 5 were perfectly recorded, that under section 27-B of the Act ibid negative was to be proved by the subsequent vendee and once he stated on oath that he was not aware of any earlier deal/ transaction, that would be sufficient to discharge the onus rested on his shoulders and in such event the same shifted to the plaintiff to prove positively that subsequent vendee had its knowledge. In the fag end of their submissions, learned counsel for respondent No.1 contended that the vires of mutation No.457 (Exh.P2) were specifically challenged while asserting it to be result of fraud, collusiveness etc and in such situation, the impleadment of Revenue Official/ Officer was essential, but they were not arrayed, therefore, a decree for cancellation of Exh.P2 could not be passed. Their ultimate request was for upholding of impugned judgment via dismissal of this appeal.

Ch. Muhammad Aslam Arain and Mahar Sohail Zafar Sipra, Advocates for the descendants of vendor/respondent No.2 adopted the arguments of learned counsel for respondent No.1.

5. Heard, record consulted.

6. It is well established by now that resolution of civil nature dispute is dependent upon existence of various facts, which are not self-evident and a party to the suit expecting decision in its favour from the Court, has to discharge the onus probandi rested upon it by leading affirmative primary evidence. The

relevant provisions in this regard are Articles 117 to 120 of the Order ibid. The case of the appellant hinges upon agreement to sell (Exh.P1), which is a document of financial liability and future obligation. The parameters for construction of such document are referred in Article 17 of the Order ibid, whereas in order to prove such like document, the beneficiary as per Article 79 has to call at least two attesting witnesses and if not, the document has to be excluded from consideration. However, Article 81 is an exception to the general rule contained in Article 79. The bare reading of Article 81 manifests that examination of attesting witnesses will not be necessary for the purpose of proving the execution of the document required by law to be attested, if the executant admits its execution. In the case in hand, as observed earlier, the vendor, Iqbal Bibi respondent No.2 explicitly admitted the execution of Exh.P1, thus no other proof of its execution was required. See Dhanna Lal v.. Shambhu (AIR 1917 Nagpur 123), wherein it was concluded that when execution admitted and due attestation not denied the question of attestation did not arise or that if arise, the maxim "Omnia praesumuntur rite esse acta" comes in unless there is evidence that the attestation was not according to law. In the given situation, though there was no need to examine the signatories of Exh.P1, even then Scribe (PW1), Stamp Vendor (PW2) and Abdul Majeed (PW4), one of the marginal witnesses were put before the learned Trial Court, besides the appellant/ plaintiff (PW3) also stated on oath in lines with contents of plaint as well as agreement to sell. It was again matter of record that other attesting witness Khadim Hussain was the son of the vendor/ respondent No. 2, who while appearing as DW1, neither denied the execution of Exh.P1 nor disputed affixation of his signatures in said capacity, as such despite admission of its execution, though there was no requirement, but even then each and every signatory thereof appeared in trial proceedings to prove the construction of basic document and the transaction referred therein. The appellant, thus, successfully discharged onus of issues Nos.1 and 2.

7. Adverting to the next phase, that despite having proved the prior transaction, a decree for specific performance could be granted against respondent No.1 and the initial onus of issue No.5 so struck to this effect was upon the subsequent vendee/respondent No.1. Before appreciating evidence of the parties, the Court felt it appropriate to consider the pleadings, so as to understand their basic stances. At the cost of repetition (just to recollect memory), the Exh.P1 between appellant and respondent No.2 executed on 07.01.2008, whereas cutoff date for its materialization was 01.03.2008, but prior to it, on 23.01.2008 (within two weeks of the execution of Exh.P1), the property in dispute was mutated to respondent No.1 vide mutation No.457, forcing the appellant to institute suit on 06.02.2008, much earlier to date for accomplishment of sale as per terms and conditions of Exh.P1. The appellant/ plaintiff in paragraph-4 of the plaint specifically pleaded that:-

In response, the vendor/respondent No.2/ defendant No.1 replied the said fact, while pleading as under:-

Whereas, the subsequent vendee/ respondent No. 1 / defendant No.2 answered paragraph No.4 of the plaint while averring as follows:-

A minute scrutiny of the written statement of subsequent vendee/ respondent No.1 exposed that he did not assert that possession of the suit area was already with him or it delivered to him at the time of sanction of mutation. Anyhow, having consulted the above quoted pleadings of the respective parties, wherein appellant/ plaintiff was claiming that his prior sale via agreement to sell (Exh.P1) was in the knowledge of subsequent vendee/respondent No.1, whereas the latter was pleading his complete ignorance, the stance of vendor/respondent No.2 was significant, who asserted that respondent No.1 being fully aware of earlier sale (Exh.P1) had purchased the suit land at his own risk. The onus, indeed, shifted to respondent No.1 pleading bona fide purchase to have proved the three features given below:-

1) that he acquired the property for due consideration and thus is a transferee for value, meaning thereby that his purchase is for the price paid to the vendor and not otherwise.

2) there was no dishonesty of purpose or tainted intention to enter into the transaction which shall settle that he acted in good faith or with bona fide;

3) he had no knowledge or the notice of the original sale agreement between the plaintiff and the vendor at the time of his transaction with the latter.

In the light of history of the case in hand discussed so far, the ingredient No.3 (supra) was of worth to be proved by the subsequent vendee/respondent No.1, especially when he in his written defence neither asserted that the vendor/ respondent No.2 played fraud with him, or that she misrepresented or even in connivance with plaintiff/ appellant had managed antedated agreement to frustrate his sale. Whereas it was forcefully pleaded by the plaintiff/ appellant that mutation inter se vendor and subsequent vendee was a colluded/ dishonest engineering and that it was inoperative upon his rights.

In the given situation, Khadim Hussain, son of the vendor Iqbal Bibi, who on one hand signed Exh.P1 being its marginal witness and on the other side put his signatures on the mutation (Exh.P2) being identifier/ attesting witness became the most important person/witness to elucidate the true facts especially when his role in such capacity was even not disputed by any of the contestants. He being attorney of his mother/vendor appeared in the witness-box as DW1. Though in his statement-in-chief he suppressed the facts (narrated in the written statement)

that earlier sale with plaintiff/ appellant was open to the respondent No.1, however during test of cross-examination, he was forced to concede that:-

It was significant that the respondent No.1 cross-examined the DW1 after such exercise had already been conducted on behalf of the plaintiff. DW1 stood credible to the effect that earlier sale was communicated to the subsequent vendee. Moreover, the latter (DW2) whose statement was recorded after some days of the statement of DW1 again did not utter that a fabricated or antedated agreement to sell managed to frustrate his sale, rather during cross-examination by deposing that:-

he impliedly acknowledged the authentic-city of prior sale struck through Exh.P1. There is no cavil that no person can convey a better title than what he has, except where the statute provides exception to the rule like section 27(b). Once it is established that the vendor settled the agreement to sell, he thereafter could not convey the same to anybody else, as after the first sale, he was no more a free owner. Any subsequent alienation would remain subject to the rights created under the prior agreement of sale. See Veeramalai Vanniar (died) and others v. Thadikara Vanniar and others (AIR 1968 Madras 383).

8. As far as, the other feature that respondent No.1 acquired the property for due consideration is concerned, the same was shattered by his own witness, Khalid Kamboh (DW3) while deposing in his cross-examination to the following effect:-

The attorney of the vendor (DW1) during his cross-examination conducted by learned counsel for respondent No.1 stated that:-

Moreover, it was explicitly admitted by the witnesses of respondent No.1 that mutation was not attested in the public gathering, rather the proceedings carried out in the office of the Tehsildar and consideration was paid before the latter then and there. The attestation of mutation in the office was not only violative to the provisions of law, rather its contents also do not support that alleged sale amount was paid before the attesting officer. To prove said fact, Tehsildar was the best person, who was withheld, forcing the Court to infer adverse presumption under Article 129 illustration (g) of the Order ibid that had he been examined, he might have not supported that consideration was paid in his presence. So, the subsequent vendee failed as well to establish that his purported purchase was for the price paid to the vendor and not otherwise. The emphasis of learned counsel for respondent No.1 that the moment vendor admitted receipt of the sale consideration, there was no need to prove said fact, suffice it to say, that if the case is to be decided on her admission, then her admission that respondent No.1 was well aware of prior sale, would be enough to non-suit him being the subsequent vendee.

9. The respondent No.1 with regard to fact thatg he made an honest probe qua free status of land from any encumbrance neither specifically pleaded nor an iota of evidence examined.

10. As regards the last objection of learned counsel for respondent No.1, while relying upon judgment of the honourable apex Court reported as Sakhi Jan and others v. Shah Nawaz and another (2020 SCMR 832) that plaintiff despite challenging the vires of mutation (Exh.P2) did not implead the revenue official/ officer in the group of defendants thus suit was liable to be dismissed on said alone score, suffice it to say that each case is to be decided on its peculiar facts, whereas as per Order I, rule 9 a lis cannot be dismissed for nonjoinder or mis joinder of parties. Moreover, in the cited case, serious allegations on the part of revenue official/officer were taken therein to the effect that they played an active role in entering/ sanction of fraudulent mutation, whereas situation in the case in hand is altogether different. Here, no specific allegation with regard to working of said incumbents is raised, rather merely asserted that the vendor and respondent No.1 colluded to frustrate the prior sale. In such panorama, there was no legal defect in not impleading the revenue official/ officer, thus objection is not sustainable.

11. Having proved that earlier transaction settled by respondent No.2 with the appellant/plaintiff was in the complete knowledge of the respondent No.1, who also failed to prove passing of consideration to the vendor/respondent No. 2 and in absence that any due inquiry was made, the findings on issues Nos.1 to 3 and 5 of the learned Appellate Court below being tainted with misreading and non-reading of evidence are reversed, thus this appeal succeeds, impugned judgment and decree rendered by the learned Appellate Court is set aside and that of the learned Trial Court whereby suit of the appellant/ plaintiff decreed is restored. No order as to costs.

MH/A-68/L

Appeal allowed.

PLJ 2021 Lahore 292

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

SAFDAR HUSSAIN--Petitioner

Versus

MUHAMMAD AFZAL and another—Respondents

C.R. No. 4603 of 2015, heard on 15.1.2021.

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

----S. 9--Suit for possession through pre-emption--Dismissed--Sale of property--Performance of talabs--Constitution of majlis for pronouncement of talbs--Muwathibat--Right of pre-emption--Concurrent findings--Evidence of pre-emptor was minutely thrashout by Courts--Negative findings--Challenge to--It was *sine qua non* for petitioner/pre-emptor to establish constitution of *majlis* as well as pronouncement of , *talb-i-muwathibat*--Participant of *majlis* (PW5) did not disclose time of performance of first demand in his statement-in-chief--Law is now clear that very right of pre-emption is not activated unless *talab-e-munwathibat* is performed, it should not be dubbed as a mere technicality, but at times it acquires such dimension that it becomes more important than superior right because it essentially is a *sine qua non* of right of pre-emption--Courts below minutely thrashed evidence of pre-emptor while capturing salient variations and major contradictions in statements of witnesses and perfectly rendered negative findings on pivotal issue *qua talbs*--Petitioner had failed to convince that impugned decrees were tainted with misreading or non-reading of evidence, thus no case of interference is made out--Petition dismissed. [Pp. 293 & 294] A, B, C, D & E

2007 SCMR 1 *ref.*

Mr. Ali Hussain Mohsin, Advocate for Petitioner.

Mr. Athar Ali Bhindar, Advocate for Respondents.

Date of hearing: 15.1.2021.

JUDGMENT

The concurrent judgments of the two Courts below, whereby suit for possession through pre-emption as well as appeal of the petitioner unanimously dismissed, are the subject of petition in hand.

2. Arguments heard and record perused.

3. In fact, the transaction reflected in sale-deed dated 24.02.2010 was pirated by the petitioner through suit asserting his superior right and performance of requisite *talbs. Ex-fade,* in para-3 of the plaint of his suit, it was the stance of the petitioner that on 17.06.2010 at 6.00 P.M., he in his *haveli* was sitting with his brother, Farrukh Humayun when Muhammad Khalid (PW6) appeared there and on his information about the sale, the first demand was fulfilled. It was *sine qua*

non for the petitioner/pre-emptor to establish constitution of *majlis* as well as pronouncement of the *talb-i-muwathibat* as pleaded in said para of the plaint. Although he being PW.4 narrated the same stance that he along with his brother was sitting in his *haveli* at 6.00 P.M. when Muhammad Khalid appeared there and communicated the sale but his brother/participant of the *majlis* (PW5) did not disclose the time of performance of first demand in his statement-in-chief. No doubt, he tried to cover this aspect in his cross-examination, but Muhammad Khalid, the informer (PW6) did not disclose the presence of Farrukh Humayun in the *majlis* through his statement-in-chief. The performance of *talb-e-mmvathibat* is not a mere technicality viz-a-viz the superior right of pre-emption. The law is now clear that the very right of the pre-emption is not activated unless *talb-e-munwathibat* is performed. It should not be dubbed as a mere technicality, but at times it acquires such dimension that it becomes more important than the superior right because it essentially is a sine qua non of the right of the pre-emption as has been held in a case reported as *Fazal Din through L.Rs. vs. Muhammad Inayat through L.Rs* (2007 SCMR 1). The learned Courts below minutely thrashed the evidence of the pre-emptor while capturing salient variations and major contradictions in the statements of PWs and perfectly rendered negative findings on pivotal issue *qua talbs*.

4. Mr. Ali Hussain Mohsin, Advocate for the petitioner although argued the case to the best of his ability, but was not able to persuade that either the learned lower fora committed material irregularity/patent illegality or that its unanimous findings were suffering from jurisdictional defect. He also failed to convince that the impugned decrees were tainted with misreading or non-reading of evidence, thus no case of interference is made out. This Civil Revision being devoid of any merit and force is hereby dismissed. No order as to costs

(Y.A.) Petition dismissed.

PLJ 2021 Lahore 304

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

Mst. **SHARIFAN NASEEM etc.--Petitioners**

Versus

NASIR MEHMOOD etc.--Respondents

C.R. No. 378 of 2003, decided on 26.10.2020.

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

----S. 115--Specific Relief Act, (I of 1877), Ss. 43 & 39--Suit for declaration and cancellation entries in revenue record--Dismissed--Unregistered memo. of gift--Non-producing of signatories--Legal requirement--Presumption of truthness--Examination of weak and meager evidence--Deprivation of legal heirs--Challenge to--DW1, who in no capacity was signatory of Exh.D1 also failed to demonstrate time and date about happening of original transaction--Weak and meager evidence was examined, which was not enough to deprive legal heirs to claim their shari shares in suit property--Document was not a registered document, but merely scribed on plain paper and it was not essential for Court to attach presumption of execution to a document more than 30 years old in all cases without considering other related facts of case to draw such inference--On account of appreciation of evidence available on suit file, presumption under discussion as to validity and execution , of Exh.D1 would not apply--Property was under clog or there was any restraining order for its alienation, then why it was not permanently transferred by donor through execution of registered gift deed--Moreover, execution of present memo of gift on a plain paper was sufficient to doubt its authenticity--It is very easy to manage such like document and in such situation, a high quality evidence is always required to rely thereupon, which is lacking here--It was again a drawback that after execution of Exh. donor survived for more than two decades but neither it was brought in light in his life nor an effort was made for its registration--There is no doubt that record of Excise & Taxation Department, whatever it may be and utility bills could not be made basis to constitute title-- It is a gift, which tantamount to disinheriting majority of legal heirs--In such circumstance when, through a gift, deprivation of some or either of legal heir is involved, heavy onus to prove original transaction as well as reasons for doing so strongly rested upon beneficiary of such gift--Petitioners badly failed to persuade that either impugned judgment was result of material irregularity/ patent illegality or tainted with misreading and non-reading of evidence or jurisdictional defect on part of Appellate Court to call for interference by High Court--Scope of interference in revisional jurisdiction by High Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by subordinate Court in discharge of its judicial functions--Petition dismissed.

[Pp. 307, 308 & 309] A, B, C, D, E & F

2020 CLC 1048, 2020 YLR 1466, 2017 SCMR 1934, 1992 CLC 873, 2018 CLC 866, 2007 SCMR 181 and 2018 SCMR 141 *ref.*

M/s. Sher Baz Ali & Farhan Ali Khan, Advocates for Petitioners.

M/s. Amir Farooq, Ch. Riasat Ali & Sahibzada Nasir Mehmood Ch. Advocates for Respondents No. 1 to 6.

Mr. Ihsan Ahmad Bhindar, Advocate for Respondents No. 10 and 11 for Respondents.

Date of hearing: 26.10.2020.

JUDGMENT

Undeniably the suit shop was titled by Chanan Din, the forefather of the present parties, who departed in 1988 and thereafter his son Khushi Muhammad Akhtar also passed away in 1995. Muhammad Sharif, ascendant of Respondents No. 1 to 6, son of Chanan Din and real brother of Khushi Muhammad Akhtar when tried for the attestation of inheritance mutation qua shop in dispute, it was apprised by the petitioners that it stood already gifted out by Chanan Din through unregistered memo. of gift (Exh.D1) way back in 1965 to Khushi Muhammad (ascendant of petitioners), compelling Muhammad Sharif to institute the suit to claim his Shari share in the suit property besides for cancellation of Exh.D1 asserting it to be forged, fictitious and collusive. The said plaintiff also prayed for the cancellation of entries in favour of Khushi Muhammad solely recorded in record of Excise and Taxation Department. The suit was contested by the petitioners being successors-in-interest of beneficiary. Thus issues were materialized and although learned Trial Court while appreciating evidence of the parties dismissed the suit *vide* judgment dated 24.10.2001, however, it could not sustain having been set aside by learned lower Appellate Court while accepting appeal of Respondents Nos. 1 to 6 (the descendants of original plaintiff), hence this petition.

2. Arguments heard and record scanned.

3. The case of petitioners/beneficiaries hinges upon unregistered memo. of gift alleging to have been executed to acknowledge oral gift. This Court with the able assistance of learned counsel for the parties has minutely gone through the said document and found it inadequate to demonstrate the happening of original transaction. The said dearth in order to explore time, date, venue and names of the witnesses was again found in the written statement submitted on behalf of the petitioners. No doubt, Exh.D1 was constructed prior to promulgation of the Qanun-e-Shahadat Order, 1984, but even then it being a private document was to be proved by producing its signatories. Whereas, available record suggests that none out of its three attesting witnesses examined. The contention of learned counsel for the petitioners that out of them two had already died and the third one due to his serious illness was not produced, if is taken as true, even then to meet with the legal requirement, the copies of their death entries as well as some record to prove the

factum of illness might be brought on suit file, besides to examine some persons familiar with their signatures in secondary evidence, which is completely lacking herein, thus for such count, the document (Exh.D1) was liable to be taken out of evidence. No doubt the Scribe (DW3) was summoned, who though tried to prove the construction of Exh.D1, but could not be treated at par with marginal witness, thus his deposition was not enough to prove contents of said document. Moreover, he was also not the witness of original transaction. It is well established that such like documents are not per se admissible in evidence, rather are required to be proved as per scheme of law. The emphasis that Exh.D1 was taken in evidence without any objection, which being document of more than thirty years old was not required to be proved as per threshold of the law is not well founded. The exhibition of document in evidence is one aspect, whereas the other is to prove its due execution and most important is to establish the ingredients of transaction referred therein. The Scribe (DW3) did not state that declaration of gift was pronounced or accepted before him. The DW1, who in no capacity was signatory of Exh.D1 also failed to demonstrate time and date about happening of original transaction. He even omitted to said that alleged offer was made or accepted by the donee in his presence. As such, weak and meager evidence was examined, which was not enough to deprive the legal heirs to claim their shari shares in the suit property.

4. The submission of learned counsel for respondents that Ehx.P1 having age more than 30 years attained presumption of its correctness within the meaning of Article 100 of the Qanun-e-Shahadat Order, 1984 and the conclusion drawn by the Civil Court to this effect was unexceptionable, is not well founded. The Exh.D1 was not a registered document, but merely scribed on plain paper and it was not essential for the Court to attach presumption of execution to a document more than 30 years old in all the cases without considering the other related facts of the case to draw such inference. On account of appreciation of evidence available on suit file, the presumption under discussion as to validity and execution of Exh.D1 would not apply. See *Sabz Ali Khan & 7 others vs. Mst. Bibi Naik Zada and another* (2020 CLC 1048), *Liaqat Ali and 6 others vs. Muhmnmnd Akhtnr and 63 others* (2020 YLR 1446) and *Nazir Ahmed deceased through LRs vs. Karim Bakhsh (Late) through LRs* (2017 SCMR 1934).

5. There is nothing on record, that property in dispute was under clog or there was any restraining order for its alienation, then why it was not permanently transferred by the donor through execution of registered gift deed. Moreover, the execution of present memo. of gift on a plain paper was sufficient to doubt its authenticity. It is very easy to manage such like document and in such situation, a high quality evidence is always required to rely thereupon, which is lacking here. It was again a drawback that after the execution of Exh.D1, the donor survived for more than two decades but neither it was brought in light in his life nor an effort was made for its registration. There is no doubt that record of Excise and Taxation Department, whatever it may be and the utility bills could not be made basis to constitute title. See *Muhammad Zaman vs. Muhammad Jamil and 4 others* (1992 CLC

873), *Muhammad Ismail vs. Maqbool Ahmed and 8 others* (2001 CLC 252), *Muhammad Shafi vs. Syed Chan Pir Shah and 4 others* (2018 CLC 866) and *Muzaffar Khan vs. Sanchi Khan and another* (2007 SCMR 181). The donor was even not produced before the said Department to make a statement for the endorsement of Exh.D1.

6. Thus mere execution of Exh.D1, which was even unregistered, definitely created no right, interest or title in the immoveable property until and unless attested in terms of Section 54 of the Registration Act, 1908 and in absence thereof the title of the property in question could not have been conferred upon predecessor of petitioners. See *Allah Diwaya vs. Ghulam Fatima, represented by Ahmad Sher and others* (PLD 2008 SC 73).

7. In the instant case, it is a gift, which tantamount to disinheriting the majority of legal heirs. In such circumstance when, through a gift, deprivation of some or either of legal heir is involved, the heavy onus to prove original transaction as well as reasons for doing so strongly rested upon the beneficiary of such gift. The apex Court has already nullified such like transaction in various judgments reported as *Muhammad Ashraf vs. Bahadur Khan and others* (1989 SCMR 1390), *Barkat Ali through legal heirs and others vs. Muhammad Ismail through legal heirs and others* (2002 SCMR 1938), *Ghulam Haider vs. Ghulam Rasool and others* (2003 SCMR 1829) and *Muhammad Ajmal and others vs. The State and another* (2018 SCMR 141).

8. When established that there was no gift and its deed (Ex:D-1) was unregistered and procured by practicing fraud, which vitiates even the most solemn transaction, as any deal based on fraud would be void and notwithstanding the bar of limitation, the matter can be considered on merit so as to discourage fraud besides to be perpetuated, as such findings of the learned Appellate Court below on Issue No. 1 are affirmed as well.

9. The learned counsel for the petitioners badly failed to persuade that either the impugned judgment was result of material irregularity/patent illegality or tainted with misreading and non-reading of evidence or jurisdictional defect on the part of the learned Appellate Court to call for interference by this Court. The scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by the subordinate Court in the discharge of its judicial functions. Hence, instant revision petition being devoid of any merit and force is dismissed. No order as to costs.

(Y.A.) Petition dismissed.

PLJ 2021 Lahore (Note) 48
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
AMEER MUHAMMAD BOOTA KHAN--Petitioner
Versus
GHULAM YASEEN, etc.—Respondents

C.R. No. 38062 of 2017, heard on 6.3.2019.

Punjab Pre-emption Act, 1991 (I of 1991)--

----S. 13--Civil Procedure Code, (V of 1908), S. 115--Pre-emption suit--Dismissed--Consolidated judgments--Sale of suit property--Attestation of mutation--Preferential pre-emptive right--Challenge to--Petitioner failed to bring on record tangible evidence to prove that he was owner or enjoying any of superior right, whereas all documents available on his part were; insufficient to prove that at first stage pre-emptor was also sharer in joint holding--Furthermore, there is nothing in black and white on record to prove that some other property of pre-emptor was adjacent to subject land having common passage and source of irrigation--It was imperative for him to bring on record copy of Aks Shajrah besides examination of its maker as well as copy of Warabani to prove that he was shafi jaar and shafi khaleet for some other land , but withholding of such evidence has forced High Court to draw adverse inference against her under; Art. 129 illustration (g) of Q.S.O., 1984, as such, findings of Court below are maintained--No doubt, with regard to subject land as well as transferred to petitioner through decree copy of Aks Shajrah was exhibited, but it was useless to him--Since petitioner failed to prove his preferential pre-emptive right, Court did not feel it necessary to dilate upon other issues, which will be sheer wastage of time--Petitioner was unable to point out any material illegality, irregularity, infirmity and perversity that judgment of lower appellate Court is tainted with any misreading non-reading of evidence--Petition was dismissed. [Para 3 & 4] A & B

M/s.Muhammad Mushtaq Ahmad Dhoon and

Mrs. Naila Mushtaq Ahmad Dhoon, Advocates for Petitioner.

Date of hearing: 6.3.2019.

JUDGMENT

Briefly put, cousins of present petitioner sold out the subject property to respondents/defendant by attestation of mutation on 10.09.2011, which was pirated by the petitioner through institution of suit for pre-emption alleging therein his superior right being Shafi Shereek, Shafi Khaleet and Shafi Jaar and that the transaction came into his knowledge on 14.10.2011 at 10.00 a.m through Muhammad Zahid Khan, when he along with his son Muhammad Ijaz Iqbal Khan was available in his house and fulfilled the first demand then and there, whereas second one was performed on 14.10.2011 by dispatching notices through registered Post. After receiving evidence in pros and cons, the learned Trial Court decided Issue No. 1 with regard to superior right of the petitioner in the affirmative, but on the basis of findings recorded against Issue No. 2 qua performance of requisite demands, the ‘ suit was dismissed. Being offended, petitioner preferred appeal, whereas vendees approached the learned District Court through cross objections for the reversal of decision recorded against Issue No. 1. Ultimately, latter one was granted, whereas former was dismissed *vide* consolidated judgment of 15.4.2015. The petitioner has filed the instant Civil Revision for setting aside of the impugned judgments and that his suit be decreed as prayed for.

2. Learned counsel for the petitioner is in agreement on the legal phrase that in order to succeed in a suit for pre-emption, the pre-emptor is obliged to prove that he had superior right of pre-emption qua the vendee(s) at three stages; firstly on the day of sale, secondly, when the suit is to be instituted and lastly on the date when it is finally culminated. In this regard, reference may be made to the judgments reported as *“Baldeo Misir vs. Ramlaaan Shukul”* (AIR
1924 Alahabad 82), *“Rai Tulley Khan vs. Ahmed Hassan Khan and others”* (1981

SCMR 1075), *"Muhammad Khan and others vs. Muzaffar"* (PLD 1983 SC 181) and *"Hasil and another vs. Karam Hussain Shah and others"* (1995 SCMR 1385). Needless to add that well-founded rule laid down by the apex Court has also been recognized by the legislature while introducing Section 17 in the Punjab Pre-emption Act, 1991.

3. In the instant case, co-ownership of the petitioner was originated through judgment and decree dated 15.10.2011 granted in his favour in another suit for pre-emption, which was duly implemented in the Revenue Record vide Mutation No. 4749 of 18th April, 2015 (Ex:P12), whereas the subject land had already been alienated in favour of vendees on 10.09.2011 through Mutation No. 4275 (Ex.P13), as such, on the crucial day of impugned sale, the petitioner failed to bring on record tangible evidence to prove that he was owner or enjoying any of the superior right, whereas all the documents available on his part were insufficient to prove that at the first stage referred hereinabove, the pre-emptor was also sharer in the joint holding. Furthermore, there is nothing in black and white on the record to prove that some other property of pre-emptor was adjacent to the subject land having common passage and source of irrigation. In this regard, it was imperative for him to bring on record copy of Aks Shajrah besides examination of its maker as well as the copy of Warabani to prove that he was Shafi Jaar and Shafi Khaleet for some other land , but withholding of such evidence has forced this Court to draw adverse inference against her under Article 129 illustration (g) of Qanun-e-Shahadat Order, 1984, as such, the findings of the Court below on Issue No. 1 are maintained. No doubt, with regard to subject land as well as transferred to petitioner through decree the copy of Aks Shajrah was exhibited, but for the reasons recorded above it was useless to him. Since the petitioner failed to prove his preferential pre-emptive right, I do not feel it necessary to dilate upon other issues, which will be sheer wastage of time.

4. Learned counsel for the petitioner is unable to point out any material illegality, irregularity, infirmity and perversity that the judgment of learned lower Appellate Court is tainted with any misreading non-reading of evidence, hence the Civil

Revision in hand stand dismissed while maintaining the dismissal of the suit of petitioner by the learned Courts below. No order as to costs.

(Y.A.) Revision petition dismissed.

2021 C L C 612
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD ASHRAF through LRs----Petitioner
Versus
Mst. NAJMA BEGUM alias NAJMA SULTANA and others----Respondents
Civil Revision No.2191 of 2012, heard on 14th January, 2021.

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

----Ss.9 & 42---Suit for declaration and partition of immoveable property---Preliminary decree, grant of---Defendant impugned grant of preliminary decree in favour of plaintiffs, inter alia, on ground that Trial Court did not consider that suit for partial partition of property was not maintainable and did not take into account amounts invested by defendant in property---Validity---Preliminary decree was only meant for determination of shares of respective parties in common property whereas remaining questions could be agitated and culminated at time of final conclusion of such suit---Trial Court did not commit any error in ignoring stance of defendant regarding costs incurred in renovation of property as suit was still pending and any evidence in such regard could be decided by Trial Court keeping in mind continuous use of such property by defendant alone---Revision was dismissed, in circumstances.

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

----S.115---Revision---Issue / plea, if not claimed or pressed before courts below, where trial and appeal proceeded, then such issue could not be raised at stage of revision under S.115, C.P.C.

Atta Hussain Khan v. Muhammad Siddique Khan and others, 1979 SCMR 630 and Kaura and others v. Allah Ditta and others 2000 CLC 1018 rel.

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

----O.XX, R.18---Punjab Land Revenue Act (XVII of 1967), S.172(2)---Specific Relief Act (I of 1877), Ss.42 & 9---Suit for declaration and partition with respect to agricultural property---Exclusion of jurisdiction of Civil Courts in matters within the jurisdiction of Revenue Officers---Scope---Property, if same was agricultural in nature, then remedy for partition thereof lay solely with Revenue Hierarchy, and Civil Court lacked jurisdiction in such matter.

Muqadar and others v. Mst. Roshan and others 2008 CLC 43; Qamar Sultan and others v. Mst. Bibi Sufaidan and others 2012 SCMR 695 and Muhammad Ayaz and others v. Malik Zareef Khan and others PLD 2016 Pesh. 8 rel.

Malik Noor Muhammad Awan, Anwaar Hussain Janjua and Moshin Hanif for Petitioners.

Rana Nasrullah Khan and Zubair Ahmad Virak for Respondents Nos.1 to 4.

Ihsan Ahmad Bhindar for Respondent No.6.

Date of hearing: 14th January, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----In fact, late Inayat Ullah, predecessor-in-interest of the parties had contracted two marriages and three daughters/plaintiffs were born from one wife, whereas out of other wedlock, son Muhammad Asharf, present petitioner was born. Undisputedly, Inayat Ullah, ascendant was owner of subject properties, who died on 13.01.1981. The step sisters of petitioner in 1997 instituted suit for separation of their respective shares in the suit properties left by their father through partition. Their step brother/petitioner contested the same asserting that it was orally gifted to him by Inayat Ullah (father of the parties), who subsequently also executed document of acknowledgement dated 18.12.1980 and that he had invested huge amount for construction/renovation of subject properties. It is a hard fact that the document (Ex:D1) scribed on a plain paper executed for acknowledgement of oral gift was the basic foundation of defence of petitioner, which having entailed future obligation could only be proved as per yardstick laid down in Article 79 of the Qanoon-e-Shahadat Order, 1984, but despite availability, required number of witnesses for its proof were not produced on behalf of petitioner/beneficiary, whereas, on the other hand, by tendering copy of record of rights (Ex:P6), respondents/ plaintiffs fully established their shares in the joint properties. Thus, preliminary decree was granted in their favour by the learned Trial Court on 07.03.2011, which was further maintained by the learned Appellate Court below through judgment dated 07.06.2012 and since then, petition in hand is pending.

2. Today, Malik Noor Muhammad Awan, learned counsel for petitioner being candid admitted that his client could not prove the alleged transaction of oral gift as well as document (Ex:D1) scribed in this regard, however, he emphasized that firstly improvements made by his client were not considered by the learned two Courts below and secondly Inayat Ullah had also left another property, but despite admission of said fact by respondents/plaintiffs, the same was not considered, whereas law is clear on the point that suit for partial partition is not maintainable.

3. On the other hand, Rana Nasrullah Khan, Advocate of rival party/respondents argued that once it is admitted that there was no gift in favour of present petitioner, then preliminary decree, whereby only shares of parties were to be determined was perfectly passed. He further submitted that plea with regard to improvements/expenditures, if any, is yet to be determined at the time of passing of final decree. He emphasized as well that third property is of

agricultural nature and learned Civil Court lacked jurisdiction to partition the same, rather such remedy could be availed before the Revenue Hierarchy, therefore, for said reasons neither any objection qua non-maintainability of suit with regard to partial partition was raised before the learned two Courts below nor such issue was pressed, thus no objection in this behalf could be raised for the first time before this Court.

4. Arguments heard. Record perused.

5. Once it is admitted on behalf of learned counsel for petitioner that alleged gift pleaded by his client was not proved, the Courts below committed nothing wrong to determine the shares of the parties through the impugned preliminary decree, which in this behalf now could not be disputed. There is no cavil that preliminary decree is only meant for determination of shares of the respective parties in common property, whereas remaining questions could be raised/agitated and culminated at the time of final conclusion of such suit. Thus, till this time, no material irregularity or illegality was committed by the learned Courts below in ignoring the other stance of petitioner that he had incurred heavy amounts for construction/renovation of properties. If there would be any evidence in this regard, then learned Trial Court before whom suit is still pending will decide the same on its basis besides keeping in mind continuous use of properties by the present petitioner alone.

6. As far as argument of Malik Noor Muhammad Awan, ASC that suit for partial partition was not maintainable is concerned, suffice it to say that this specific objection was never raised through written statement or even pressed before the learned Courts below despite that the lis remained pending there for almost one and half decades. It is well settled principle of law that if a party does not claim some specific issue, then the plea, if any, stands abandoned. In this regard reference may be made to the case of "Atta Hussain Khan v. Muhammad Siddique Khan and others, (1979 SCMR 630). The proposition is established that, if an issue is not pressed before the learned Courts below where trial and appeal proceeded, then the objection to that effect cannot be raised at revisional stage. See "Kaura and others v. Allah Ditta and others" (2000 CLC 1018). Moreover, to the effect of under discussion objection the petitioner (DW1) neither deposed a single word nor brought any document to the extent of any other joint property. In addition thereto, it is admitted fact that remaining property not included in the suit in hand is of agricultural nature and for partition thereof, the remedy solely lies with the Revenue Hierarchy, whereas learned Civil Court lacks jurisdiction in this behalf. Reliance can be placed upon the judgments reported as "Muqadar and others v. Mst. Roshan and others" (2008 CLC 43), "Qamar Sultan and others v. Mst. Bibi Sufaidan and others" (2012 SCMR 695) and "Muhammad Ayaz and others v. Malik Zareef Khan and others" (PLD 2016 Peshawar 8).

7. For the foregoing reasons, learned Courts below were perfect in passing the unanimous preliminary decree, which calls for no interference by this Court and civil revision in hand having no merit is dismissed with costs throughout.

KMZ/M-18/L **Revision dismissed.**

2021 C L C 684
[Lahore]
Before Ch. Muhammad Masood Jehangir, J
Capt. UMER NAVEED PIRZADA----Petitioner
Versus
Rana ABDUR RAHEEM and 3 others----Respondents

Writ Petition No.62948 of 2020, decided on 3rd December, 2020.

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

----S.12(2) & O.IX, R.13---Specific Relief Act (I of 1877), S. 12---Agreement to sell---Defendant gone abroad---Setting aside ex parte decree---Incorrect address of defendant mentioning of---Scope---Plaintiff filed suit for specific performance against defendant and his alleged attorney, who were never served---After publication of notice in the newspaper, an advocate submitted unsigned memo of appearance, marked his presence on behalf of defendant but subsequently disappeared resulting into ex parte proceedings against him and the decree in absentia of defendant qua his property was passed---Defendant on his return to Pakistan tabled application for its setting aside asserting that said person was not his agent; that agency in between them had never been constituted; that his correct/current address was not mentioned in the plaint and that he had not directed any counsel to represent him---Trial Court and Appellate Court allowed the application under S.12(2), C.P.C., read with O.IX, R.13, C.P.C.---Validity---Copy of CNIC and passport of defendant provided enough proof that his address mentioned in the plaint was absolutely diverse and different to that mentioned in the public record issued much prior to filing of the suit---Such an evidence was enough to shift the onus towards the plaintiff, beneficiary of the ex parte decree, to rebut the same---Not a single process was issued on the address of defendant given in said documents which under the law bore presumption of regularity and correctness---Appearance of an advocate on behalf of defendant was concerned, firstly, there was no backing of law that an advocate could represent a litigant by submitting such memo; secondly, it was never signed by defendant, thus, he could not be bound by it; thirdly, said advocate was the best person to be summoned to confirm that defendant being in knowledge of the suit proceedings had directed him to appear on his behalf, which was not done---Revision petition was dismissed with costs, in circumstances.

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

----Art.150---Question by party to his own witness---Scope---Sine qua non for the beneficiary to examine the concerned person to prove construction of the document and the moment he makes an adverse statement, request for declaring him hostile can be made to illustrate/dig out truth through art of cross examination---Requirement of law cannot be excused.

(c) Legal Practitioners and Bar Councils Act (XXXV of 1973)---

----S.22---Rights of advocates to practice---Scope---Memo of appearance is not an authorization under the law to represent a litigant, which at the most can be treated as an intimation that the advocate who has filed it would furnish proper power of attorney on the coming date of hearing.

(d) Administration of justice---

----Courts to dispense with justice while performing within the parameters of the law and law alone.

(e) Decree---

----Decree against dead person is nullity in the eyes of law.

Jahangir A. Jhojha and Iftikhar Ahmed Chohan for Petitioners.

ORDER

CH. MUHAMMAD MASOOD JEHANGIR, J.----The concurrent orders dated 20.11.2012 and 07.03.2019 of the two Courts below are the subject of petition in hand, whereby while allowing application under section 12(2) read with Order IX, Rule 13 of the Code, 1908 decree dated 21.01.2007 passed in suit for specific performance instituted by the petitioner was set aside.

2. The facts of the case are already enumerated in the order, however, to better understand, precisely, respondent No.1 being Overseas Pakistani had been residing in USA for the last more than three decades and the suit area vested to him through inheritance. He was in abroad, when an unregistered power of attorney was maneuvered in favour of one Rana Abdul Ghafoor, who allegedly sold out land to present petitioner vide agreement to sell dated 17.07.2000. The latter on its basis filed the suit for specific performance against respondent No.1 & others before Civil Court, Lahore. As a matter of fact and record, respondent

No.1 or his alleged attorney Rana Abdul Ghafoor (who died before institution of suit, but even then added in the suit as defendant No.4) were never served. Although process through ordinary modes issued, yet learned Civil Judge without recording statement of process server to satisfy that respondent No.1 had deliberately avoided to receive the same, ordered for effecting his service through citation in the newspaper. After its publication, one Ijaz Ahmad Khan, Advocate while submitting unsigned Memo. of Appearance, marked his presence on behalf of respondent No.1, who subsequently disappeared resulting into ex parte proceedings against him and the decree in absentia of respondent No.1 qua his valuable property passed. The latter when returned to Pakistan for a short period, the said proceedings and decree faced to him, who tabled application for its setting aside asserting that Rana Abdul Ghafoor was not his agent, that agency in between them had never constituted, that on the basis of forged, fictitious and unregistered power of attorney, the questioned agreement to sell was managed, that in the suit correct/current address of respondent No.1 was not mentioned, that neither his service was effected nor he ever directed any Advocate to represent him in the suit filed by petitioner and that ex parte decree dated 21.01.2007 was earned by use of fraud and misrepresentation.

Obviously, being beneficiary, the stance of respondent No.1 was forcefully defended by the petitioner through written reply with specific stance that respondent No.1 for the last more than ten years had already permanently shifted to Pakistan, who required Ijaz Ahmad Khan, Advocate to represent him in the suit and its proceedings were in his complete knowledge.

The learned Civil Court having such pleadings, formulated issues and out of those, Issue No.1 being important for ready reference is given below:-

> Whether the impugned judgment and decree dated 21.01.2007 has been obtained through fraud and misrepresentation as the service of the petitioner has not been effected in accordance with law and the address of the petitioner has wrongly been mentioned. Hence the same is liable to be set aside: OPA

After receiving evidence in pros and cons, the Courts below unanimously set aside the ex parte proceedings and the decree through orders referred in para 1 ante, which being injurious to the petitioner, compelled him to prefer petition in hand.

3. M/s. Jahangir A. Jhojha, ASC assisted by Iftikhar Ahmed Chohan, Advocate took their maximum time to argue the case and record consulted as well with their able assistance.

4. Undeniably, the basic onus probandi of the above-noted issue was upon respondent No.1. To discharge it, on his behalf special attorney, Muhammad Boota (AW1) appeared and stated in line of the facts detailed in application for setting aside of decree. He also tendered copy of CNIC and Passport of the respondent No.1, which provided enough proof that his address mentioned in the plaint was absolutely diverse/different to that mentioned in the public record issued/prepared much prior to filing of suit. The said evidence was enough to shift the onus towards petitioner/beneficiary of the ex parte decree to rebut the same. He himself did not appear, rather on his behalf his attorney (RW1) mainly stated that respondent No.1 was in complete knowledge of the proceedings of the suit and that he authorized an Advocate to represent him. The said witness (RW1), however, was not found to be credible to stick firmly that address of respondent No.1 mentioned in plaint was correct one or that mentioned in CNIC as well as Passport was incorrect/false.

Admittedly not a single process was issued on the address of respondent No.1 given in said documents, which under the law bear presumption of regularity and correctness. Moreover, the process server or any private person of the vicinity was not summoned to explore that respondent No.1 had been residing at the abode, which was mentioned in the plaint. The emphasis of Mr. Jhojha that after submitting Memo. of Appearance on behalf of petitioner by his authorized counsel, there left nothing to prove that his service was not effected is not well founded for the counts; firstly, there is no backing of law that an Advocate can represent a litigant by submitting such memo; secondly, it was never signed by respondent No.1, thus he could not be bound by it; and thirdly Mr. Ijaz Ahmed Khan, Advocate was the best person to be summoned to confirm that respondent No.1 being in knowledge of the suit proceedings had directed him to appear on his behalf. His deliberate withholding by the beneficiary of the decree was sufficient for the Courts to draw hostile inference under Article 129 illustration (g) of the Qanun-e-Shahadat Order, 1984, that had he been examined, he might have gone adverse to the stance of the petitioner. Mere bringing on record copies of some other Memos of Appearance of said Advocate to say that he was regularly representing respondent No.1 in some other cases was not enough to protect the ex parte proceedings and decree passed in the case in hand. The production of document and proof of its contents

are two different subjects and, indeed, latter aspect is the crucial to be proved. When Mr. Jhojha was asked why the Advocate, who filed the Memo. was not summoned, he submitted that he was the counsel of the adversary and his examination might have become risky was fallacious. It is well established by now that sine qua non for the beneficiary to examine the concerned person to prove the construction of document and the moment he made an adverse statement, request for declaring him hostile could be made to illustrate/dig out truth through art of cross-examination. For any risk, the requirement of law cannot be excused. Assuming, without conceding, that Memo. of Appearance was genuinely executed by respondent No.1, even then it was not an authorization under the law to represent a litigant, which at the most could be treated as an intimation that the Advocate/Agent, who filed it would furnish proper power of attorney on the coming date of hearing. In absence thereof, imperative for the Court to at least issue notice pervi to the litigant on whose behalf it purportedly submitted. The foremost duty of the Courts is to dispense with justice while performing within the parameters of the law and law alone. For their any omission or act alien to law, the case of either side cannot be prejudiced.

5. The Court is conscious that nowadays, the properties of the absentees, especially overseas Pakistanis are at the mercy of looters, grabbers or snatchers, therefore, the such like cases are to be dealt with extra care. The case in hand could be an example of those wherein, the alleged agreement to sell might have not been executed by the titleholder nor by his agent having registered power of attorney. The respondent No.1 was sued while giving a fake address. Moreover, the institution of suit against purported agent of respondent No.1 Rana Abdul Ghafoor, who had already passed away, was not proceedable until and unless his LRS were impleaded. It is well established by now that decree against dead person is, otherwise nullity in the eye of law. These all questions are yet to be decided and the suit of the petitioner is only revived through the impugned orders. If there is a genuine case, the petitioner should not be worry. Nothing serious prejudice is caused to him, who can still prove his agreement to sell through proper trial while providing chance to the alleged vendor as well.

6. Mr. Jahangir A. Jhojha, who is a keen professional, although put his best, but failed to persuade that either the impugned orders are coram non judice/ultra vires or suffering from jurisdictional defect. The Courts below after appreciating each and every aspect of the case and considering available evidence as per its pith and substance passed exhaustive impugned orders, which being perfect and

having been passed in exercise of lawful authority are confirmed by dismissing this petition in limine subject to cost of Rs.50,000/-to be deposited in the welfare account of the Lahore High Court Bar Association Dispensary.

SA/U10/L Petition dismissed.

2021 C L C 757
[Lahore]
Before Ch. Muhammad Masood Jehangir, J
Mst. NABILA TAJ and another----Petitioners
Versus
MURAD and 4 others----Respondents

Civil Revision No.2628 of 2009, heard on 1st December, 2020.

Civil Procedure Code (V of 1908)---

----O.IX, R.13 & S.24-A---High Court (Lahore) Rules and Orders, Vol.I, Chap. XIII, Para. 6---Setting aside ex parte proceedings---Record to be sent immediately to the Court to which case is transferred---Scope---Petitioners/defendants assailed the concurrent dismissal of their application under O.IX, R.13, C.P.C.---Held; it was not only usual but mandatory to issue notice to the parties to impart them information that the case had been transferred from one court to another and in the absence of such notice, the defaulting party could well plead lack of knowledge that in which court he had to appear---Case diary maintained by the Trial Court reflected that the defendants were diligently pursuing the case for nearly two years, who only on one occasion had failed to appear, but the Trial Court in haste proceeded against them ex parte without realizing that the defendants throughout had been assiduously following the suit proceedings, thus might have adjourned the case---In doing so, nothing terrible would have happened because valuable rights of the parties were involved---Law favoured adjudication of case on merits as far as possible---Revision petition was allowed, in circumstances and the application for setting aside ex parte proceedings was accepted.

Nemat Ali and others v. Mst. Bakhtawar and others 1995 MLD 484 rel.

Ch. Muhammad Aslam for Petitioner.

A.D.Bhatti for Respondents Nos.1 and 2.

Anwaar Hussain Janjua for respondent No.4.

Arshad Jahangir Jhoja, Addl. Advocate for Respondents Nos.3 and 5

Date of hearing: 1st December, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.-----Although the complete facts of the case in hand are detailed in impugned concurrent orders, however, to streamline in short, on 24.04.2001, respondents Nos.1 and 2 instituted

declaratory suit against the lady defendants/petitioners along with others to challenge oral exchange mutation No.207 dated 19.06.1993 as well as subsequent orders passed by Member, BoR and Deputy Commissioner concerned, which was hotly contested by the petitioners, the beneficiaries of impugned mutation and orders referred hereinabove. Consequent upon divergent pleadings of the parties, issues were settled on 16.06.2004 and the plaintiffs were invited to examine evidence, but on two occasions, it was not produced. Subsequently the Judicial Officer seized of the lis was transferred without any substitute, therefore, under section 24-A of the Code, 1908, the learned District Judge, T.T. Singh transferred the suit to some other Court on administrative side. Again on different occasions the evidence of the plaintiffs was not available, however, the matter was fixed for 30.11.2005 when none appeared on behalf of the petitioners and consequently they were proceeded against ex parte, but before the following date of hearing i.e. 25.01.2006, the Judicial Officer once again transferred without any substitute. The learned District Judge another time on 21.06.2006 transferred the suit on administrative side in absentia of petitioners to Mr. Qamar-uz-Zaman, Civil Judge without fixing any specific date. The Transferee Court after receipt of file although under the law issued notice pervi to procure attendance of petitioners/defendants, but could not be served. The Court all of a sudden halted the said exercise in between and on being apprised that petitioners/lady-defendants had already been proceeded against ex parte, directed the plaintiffs to adduce their evidence, which was led, thus suit ex parte decreed on 23.01.2008. The petitioners being offended within next thirty days tabled application under Order IX, Rule 13 of the Code, 1908 for its setting aside, but having been dismissed by both the Courts below, this Civil Revision was preferred.

2. Arguments heard and record perused.

3. While keeping in mind the fact and history of the case narrated in para-1 ante, the sole moot point would be, whether upon transfer of lis on administrative side under section 24-A of the Code ibid, the parties were required to be informed through some notices and definitely in terms of para.6, Chapter XIII, Volume I, High Court Rules and Orders, which is reproduced hereunder:-

> "6. Records to be sent immediately to the Court to which case is transferred.----When a case is transferred by administrative order from one Court to another, the Presiding Officer of the Court from which it has been transferred shall be responsible for informing the parties regarding the transfer, and of the date on which they should appear before the Court to which the case has been transferred. The District Judge passing the order of transfer shall see that the records are sent to the Court concerned and parties informed of the date fixed with the least possible delay. When a case is transferred by judicial order the Court

passing the order should fix a date on which the parties should attend the Court to which the case is transferred."

the answer is in affirmative. Thus, it was not only usual, but mandatory to issue notice to the parties to impart them information that the case had been transferred from one Court to another and in absence of such notice, the defaulting party could well plead lack of knowledge that in which Court he had to appear.

4. The emphasis of learned counsel for the respondents that petitioners/defendants had already been proceeded against ex parte, therefore, it was not necessary to issue them fresh notices by the Transferee Court, has already been negated by this Court in the judgment reported as Nemat Ali and others v. Mst. Bakhtawar and others (1995 MLD 484), wherein it was concluded as under:-

> "Further, the suit was twice transferred administratively on 12.05.1982 and 18.11.1982 to different Courts without an intimation to the petitioners. It was imperative to issue notices to the parties informing them that the case had been transferred from one Court to another. An absence of such a notice, a party could well plead that he did not know in what Court had to appear. The fact that a notice was required for the act of transfer of a suit under an administrative order was supported by cases reported in AIR 1918 Patna 341, AIR 1923 Lahore 444, PLD 1950 Lahore 82, PLD 1962 (W.P.) Lahore 1041, PLD 1975 Lahore 879, PLD 1985 Lahore 326. Last decision was given by me. Even an order for ex parte proceedings against a particular defendant did not deprive him of a right to receive notice on transfer of the suit by an administrative order."

Thus, the impugned orders in the light of afore-noted para of the High Court Rules and Orders as well as judgment of this Court referred hereinabove are not sustainable.

5. The case diary maintained by the learned Trial Court was reflective of the fact that the petitioners/lady-defendants diligently pursued the case for years and years, who only on one occasion failed to appear, but the learned Trial Court in haste proceeded them against ex parte without realizing that the said ladies throughout had been assiduously following the suit proceedings, thus might have adjourned the case. In doing so, nothing terrible would have happened because valuable rights of the parties are involved herein and so far as possible law favours adjudication of cases on merit. From whatever angle the situation is tested, the impugned orders are not liable to be protected. Therefore, this Civil Revision is allowed, orders impugned herein are set aside and as a result thereof, the application for setting aside of ex parte proceedings as well as decree dated 30.11.2005 and 23.01.2008 respectively is accepted while reviving the suit of respondents Nos.1 and 2 / plaintiffs before the learned Civil Court with direction

to decide the same within next five months positively even by conducting proceedings on day to day basis, if need be. The parties will appear before the learned District Judge, T.T. Singh on 14.12.2020 for entrustment of suit file to some Court of competent jurisdiction for further proceedings.

S.A./N-33/L

Revision allowed.

2021 M L D 608
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Syed IFTIKHAR HUSSAIN SHAH----Appellant
Versus
MUHAMMAD SHARIF----Respondent

R.S.A. No.98 of 2011, heard on 21st December, 2020.

(a) Punjab Land Revenue Act (XVII of 1967)---

----S.42--- Mutation--- Scope--- Mutation per se is not deed of title and party relying upon its entries is always bound to prove transaction reflected therein.

Gangabai and others v. Fakirgowda Somaypagowda Desai and others AIR 1930 PC 93; Durga Prasad and another v. Ghanshiam Das and others AIR (35) 1948 PC 210; Muhammad and others v. Sardul PLD 1965 Lah. 472; Hakim Khan v. Nazeer Ahmad Lughmani and 10 others 1992 SCMR 1832; M. Malik v. Mst. Razia PLD 1988 Lah. 45; Ali Muhammad and others v. Chief Settlement and Rehabilitation Commissioner and others 1984 SCMR 94 and Islam-ud-Din through L.Rs and others v. Mst. Noor Jahan through L.Rs. and others 2016 SCMR 986 rel.

(b) Punjab Land Revenue Act (XVII of 1967)---

----S.42---Qanun-e-Shahadat (10 of 1984), Art.79---Suit for cancellation of mutation and declaration---Second appeal--- Financial liability---Proof--- Single witness, production of--- Plaintiff/petitioner assailed mutation of sale in favour of defendant/respondent on the plea of fraud--- Suit was decreed by Trial Court in favour of plaintiff/petitioner but Lower Appellate Court reversed the findings and dismissed the suit--- Validity--- Mutations in question containing sale transactions were documents pertaining to financial liability and were required to be proved as per yardstick laid down in Art.79 of Qanun-e-Shahadat, 1984--- Examination of only one marginal witness by beneficiary was not enough to meet with legal requirement--- Mutations in question were not liable to be taken as evidence as neither their attestation was established nor sale transaction embodied therein was proved, when other marginal witness while appearing on behalf of plaintiff/petitioner created serious doubts in the veracity of disputed mutations--- Plaintiff/petitioner proved that alleged transaction never happened and mutations in question were manoeuvred through collusiveness--- High Court set aside judgment and decree passed by Lower Appellate Court as the same was tainted with misreading/non-reading of evidence and was suffering from jurisdictional defect--- Second appeal was allowed in circumstances.

Zulfiqar and others v. Shahdat Khan PLD 2007 SC 582; Tooti Gul and 2 others v. Irfanuddin 1996 SCMR 1386; Muhammad Shafi and others v. Allah Dad Khan PLD 1986 SC 519; Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar and another PLD 1975 SC 678; Ch. Akbar Ali v. Secretary, Ministry of Defence, Rawalpindi and another 1991 SCMR 2114; Mst. Arshan Bi through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others 2003 SCMR 318; Altaf Hussain alias Mushtaq Ahmed v. Muhammad Din and others 2010 CLC 1646; Sardara and Allah Ditta through legal heirs and others v.

Mst. Bashir Begum and another PLD 2016 Lah. 587 and Muhammad Riaz and others v. Qaim Ali and others PLD 2019 Lah. 97 ref.

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

----S.52---Lis pendens, principle of--- Scope--- Any action / development caused during pendency of trial proceedings is hit by rule of lis pendens and has to fall on ground in case the affected party ultimately succeeds.

Ch. Akbar Ali Tahir and Azhar Siddiqui for Appellants.

Arshad Nazir Mirza for Respondent.

Date of hearing: 21st December, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Undisputedly, in Khewat No.156, the appellant was co-sharer to the extent of 65 Kanals 18-1/2 Marlas falling in Kattey Phakni, Ghauspur Gujran, Tehsil Dipalpur as per Record of Rights pertaining to years 1992-93 (Exh.P1). One Muhammad Ameen was the concerned patwari of this revenue estate, whereas Muhammad Sharif, respondent was his father-in-law. Out of that very share of the appellant more than 40 Kanals was transferred to Muhammad Sharif vide disputed mutations Nos.1738, 1786, 1794, 1815 and 2006 (Exh.D1 to Exh.D5) during equidistant period of 15.11.1995 and 30.06.1998. These mutations were entered and sanctioned when Muhammad Amin, was officiating as patwari halqa of the concerned revenue estate. Having its notice, the appellant on 25.11.2000 instituted declaratory suit along with consequential relief aiming cancellation of Exh.D1 to Exh.D5 asserting that neither any transaction of sale settled nor consideration received, rather Muhammad Amin patwari while playing active role deprived the appellant of his land while mutating the same in favour of his father-in-law. The respondent/ beneficiary obviously contested the suit through his written statement while pleading that on five distinct occasions, the suit area had been purchased by him after making payment before the witnesses. The learned Civil/Trial Court having faced controversial pleadings materialized different issues, out of which, Issues Nos.1 and 5A being pivotal for brevity sake are reproduced hereunder:-

1. Whether the sale mutation No.1738 dated 15.11.1995, sale mutation No.1815 dated 14.10.96, mutation No.1794 dated 30.6.1996 and mutation No.1786 dated 30.5.1995 are against facts, law, based on fraud, void, without consideration and ineffective qua the rights of the plaintiff? OPP

5-A Whether the defendant purchased the suit property through alleged mutations bonafidely and with free consent? OPD

The parties to prove their respective stances produced evidence in pros and cons. The appellant/plaintiff examined as many as four witnesses and tendered documents ranging from Exh.P1 to Exh. P10. In contra, the respondent/beneficiary also

adduced voluminous evidence in the shape of DW1 to DW10 and documents including Exh.D1 to Exh.D13. As a result of appreciation thereof, the subject mutations were cancelled by the learned Trial Court, while decreeing the suit of the appellant vide judgment of 02.07.2010, but the learned lower Appellate Court after analyzing the available material with different angle set aside the said decree and dismissed the suit through impugned judgment of 10.03.2011. Thus, this second appeal was preferred.

2. At the very outset, the learned counsel for the appellant submitted that his client moved C.M.No.1-C of 2017 for the examination of additional evidence, but opted not to press it, thus dismissed accordingly.

3. M/s Ch. Akbar Ali Tahir and Azhar Siddique, learned counsel for the appellant then on main case emphasized that disputed mutations of sale were not sanctioned by Revenue Officer as per legal requirement. They further submitted that it was duty and obligation of the defendant/beneficiary not only to prove that the mutations were genuinely sanctioned besides to establish that transaction reflected therein was honestly/truly settled. It was further argued that proceedings qua attestation of mutations were not proved by examining both the marginal witnesses of each mutation and that sufficient evidence was not produced by beneficiary to establish that original deal of sale had been effected and appellant/vendor received consideration. It was also contended that the mutation itself could not create right in favour of defendant until and unless it stood proved that sale ever offered, accepted and consideration paid. M/s. Tahir and Azhar further accentuated with great vehemence that sine qua non for the respondent/beneficiary to produce both the marginal witnesses of each disputed mutation, but he not only failed, rather one out of those was produced by appellant/plaintiff, who specifically deposed that neither sale effected nor the disputed mutations were genuinely sanctioned, therefore, beneficiary miserably remained unsuccessful to fulfil the legal requirement, but the learned lower Appellate Court without considering the said aspects erred in law to reverse the decree passed by the learned Trial Court.

In contra, Mr. Arshad Nazir Mirza, Advocate/learned counsel for the respondent/beneficiary supported the impugned judgment while submitting that it was not a single transaction that fraud could be played, rather within the span spreading over two years, on five occasions, his client had purchased suit property from the appellant/plaintiff after making consideration. He further maintained that Muhammad Aslam, one of the marginal witnesses of the disputed mutations as well as the Revenue Officers, who sanctioned subject mutations in different eras, appeared in the witness-box to prove that not only transaction of sale settled, but mutations were also attested in due process of law. Mr. Mirza, further contended that contradictory versions were introduced by the plaintiff at different stages of the case, therefore, onus was never shifted towards the defendant/beneficiary and that in absence of solid evidence on the side of plaintiff, the learned lower Appellate Court

rightly returned its findings on vital issues. It was argued as well that plaintiff did not plead or expose any allegation in his averments/evidence that Revenue Officers played any negative role in sanctioning the disputed mutation, thus their act could not be annulled. It was next argued that presumption of regularity and truth is attached to the proceedings of mutations initiated/culminated by the government officials in the discharge of their obligation, which could only be rebutted through reliable evidence and in absence thereof, the learned Appellate Court below was perfect in dismissing the suit.

4. Arguments heard and record perused.

5. Before adverting to the salient features of the case, it is to be added that the mutation proceedings are initiated primarily for fiscal purposes to collect the land revenue and is only meant for maintaining the record. It is again not disputed that the revenue official/officer enters and attests the mutation during summary proceedings, which by no stretch of imagination can be considered a judicial proceedings wherein right/title qua immoveable property is determined. Although these proceedings made under section 42 of the Land Revenue Act, 1967 are admissible under Article 49 of the Qanun-e-Shahadat Order, 1984 and some presumption is also attached thereto, but it is always rebuttable. It is also well established by now that mutation per se is not deed of title and the party relying upon its entries is always bound to prove the transaction reflected therein. In holding so, I am fortified by the law laid down in Gangabai and others v. Fakirgowda Somaypagowda Desai and others (AIR 1930 PC 93), Durga Prasad and another v. Ghanshiam Das and others (AIR (35) 1948 PC 210), Muhammad and others v. Sardul (PLD 1965 Lahore 472), and Hakim Khan v. Nazeer Ahmad Lughmani and 10 others (1992 SCMR 1832). Whereas this Court defined the 'sale' in the judgment reported as M. Malik v. Mst. Razia (PLD 1988 Lahore 45) as under:-

"Sale means transfer of ownership in exchange for a price paid or promised or part paid and part promised where sale was made orally and reported Patwari by parties thereto who had admitted payment of the consideration and delivery of possession on the basis whereof mutation was entered. Sale would be effected and completed on that day and not when mutation in respect thereof was sanctioned."

The august Supreme Court further defined the paramount ingredients of the sale in Ali Muhammad and others v. Chief Settlement and Rehabilitation Commissioner and others (1984 SCMR 94) in the following terms:-

"Sale is defined as being a transfer of ownership for sale price is an absolute transfer of rights in property sold and no rights are left in transferor. Essential elements of

sale are (i) the parties; (ii) subject matter; (iii) transfer or conveyance and (iv) price or consideration."

Whereas, according to section 54 of the Transfer of Property Act, 1882, it is to be established on record that the sale price has been passed on to the vendor and in default thereof, sale is not completed.

6. While keeping in mind aforesaid features, when case of the parties consulted, the appellant/plaintiff in paras 3 and 4 of the plaint narrated the detail of the alleged malpractices, misrepresentation and fraud played upon him to usurp his land. The respondent/defendant denied the said allegations while asserting that genuine transaction of sale was effected and after making payment of the consideration, the disputed mutations were properly attested. The subject mutations were tendered as Exh.D1 to Exh.D5, reappraisal whereof confirmed that out of these, Exh.D1, Exh.D2 and Exh.D4, were sanctioned on the attestation of Muhammad Azam (PW2) and Muhammad Aslam (DW3), whereas Exh.D3 was attested on the verification of Muhammad Azam and Muhammad Yahya (PW2 and PW3 respectively). However, the last mutation (Exh.D5) was attested by Muhammad Aslam (DW3) and Lal Din (DW4). As per available record, Muhammad Azam and Muhammad Yahya, out of afore-referred witnesses were produced by the appellant/plaintiff, who explicitly worded that transactions of sale were never struck and that they did not put their signatures over any mutation to acknowledge the transaction reflected therein. Although they were subjected to cross-examination, but withstood their credibility, thus their evidence was enough to slip the onus to the defendant/beneficiary. The latter to discharge/rebut it though examined DW3 and DW4, the attesting witnesses of mutations Exh.D1 to Exh.D5 besides the Revenue Officers (DW6, DW8, DW9 and DW10), but none of them expressed in their statement-in-chief that offer of sale was extended, accepted and price paid before him. They all, indeed, just tried to prove the attestation of impugned mutations. As a matter of law, subject mutations containing sale transactions were documents pertaining to financial liability, thus required to be proved as per yardstick laid down in Article 79 of the Qanun-e-Shahadat Order, 1984. The examination of only one marginal witness, by the beneficiary was not enough to meet with the legal requirement. As such, the impugned mutations (Exh.D1 to Exh.D5) were not liable to be taken as evidence, what to talk that its attestation was established or the sale transaction embodied therein proved, especially, when the other marginal witness while appearing on behalf of the plaintiff created serious doubts in the veracity of disputed mutations. See Islam-ud-Din through L.Rs and others v. Mst. Noor Jahan through L.Rs. and others (2016 SCMR 986), wherein it was held that:-

"The attesting witnesses of all the three mutations are Muhammad Rashid son of Maula and Akbar Jan son of Mehr Jan, however, only one witness (Muhammad Rashid) was produced and no any reason was given for the non-production of Akbar Jan. Article 79 of the Qanun-e-Shahadat Order, 1984 stipulates that a document

"shall not be used in evidence until two attesting witnesses at least had been called for the purpose of proving its execution".

7. Mr. Arshad Nazir Mirza, Advocate for the respondent submitted that apart from mutations, the vendor himself reported the transaction to the patwari, who recorded it in Register Roznamcha Waqiati and it was also signed by the vendor as well as marginal witnesses, therefore, mutations duly supported by unchallenged reports recorded in Daily Diary could not be annulled. Suffice it to say that no doubt rapats Roznamcha Waqiati (Exh.D6 to Exh.D9) were brought on record, but through the statement of counsel, the contents whereof were neither proved by summoning its maker nor custodian of the record. Moreover, these entries were also not confronted to the plaintiff/alleged vendor (PW1), when he appeared in the witness-box. There is no hesitation to hold that rapat Roznamcha Waqiati is not per se admissible, whereas exhibition of document as well as proof of contents are two different aspects and the latter to me is more relevant and important, which to the extent of Exh.D6 to Exh.D9 was lacking here. Moreover, in judgment reported as Zulfiqar and others v. Shahdat Khan (PLD 2007 SC 582) the apex Court while dealing with a rapat Roznamcha Waqiati recorded on behalf of vendor had already held it to be against intention of relevant provision of law. The pertinent conclusion detailed therein is as under:-

"Although Roznamcha Waqiati is required to be maintained under the West Pakistan Land Revenue Rules, 1968 and entry made during the course of performance of official duty is admissible yet if the report contains the statement of a private individual, it is required to be proved to establish its correctness. It may also be noted here that under section 42 of the West Pakistan Land Revenue Act, 1967 it is the person acquiring a right in the land who has to make such a report to the Patwari Halqa. However, in the case in hand the report was made by the vendor and, therefore, within the scope of section 42, it is even doubtful whether such a report, at the instance of vendor (a person alienating his right) could be said to have been recorded by the Patwari in the discharge of his official duty."

In addition thereto Roznamcha itself is not a document to confer title in view of bar contained in section 49 of the Registration Act, 1908, but the respondent/beneficiary was required not only to lead solid evidence that the appellant had sold out the suit land to him and also received its price as a whole or in part. This view finds support from the judgment of the august Supreme Court reported as Tooti Gul and 2 others v. Irfanuddin (1996 SCMR 1386).

8. The next emphasis of Mr. Mirza that the Revenue Officers (DW6 to DW10) in their depositions explicitly deposed that vendor admitted before them that he had already received the sale proceed, thus their statements duly supported by the entry recorded during sanction of mutations was enough to prove that sale price was received by the vendor/plaintiff, was again not well founded. The august Supreme

Court even in a case wherein registered sale instrument was under question held that mere an admission as to receipt of sale consideration before Attesting Officer could not be taken as conclusive proof. See Muhammad Shafi and others v. Allah Dad Khan (PLD 1986 SC 519).

9. The other argument of learned counsel for respondent that during test of cross-examination, the plaintiff (PW1) admitted his signatures over the impugned mutations, which was enough to believe that he voluntarily appeared before the Revenue Officer to acknowledge the transaction reflected therein. Suffice it to add that PW1 though admitted his signatures over there, but while clarifying that those were procured by Patwari for some other defined purpose, therefore, his said admission was not a proof of settlement of alleged transaction or solemn sanction of the subject mutations. In the case in hand, the basic attack of the plaintiff was upon said Patwari that he by practicing fraud maneuvered disputed mutations, therefore, mere admission of putting signatures could not be given due weight. Admittedly Muhammad Amin Patwari halqa was son-in-law of the beneficiary/defendant. Had there been a genuine sale, vendee/ respondent might have insisted for the execution of sale deed to eliminate the role of his close relative, who might be the ultimate beneficiary being husband of the daughter of the vendee. If for certain reasons the registration of instrument was not possible, then the respondent might have prepared some supporting documents like agreement to sell or receipt besides making sale price through cheque or some other such source, but the said course was not resorted, compelling the Court to draw adverse inference against respondent.

10. As far as, the submission of learned counsel for the respondent that suit for simple declaration without seeking relief of possession was not maintainable is concerned, suffice it to add that in his statement, the plaintiff (PW1) explicitly worded that during pendency of suit, the possession was forcefully snatched. Moreover, the respondent/defendant (DW2) during his cross-examination conceded that possession was taken over during trial proceedings, therefore, the suit might not be defective in its form at the time of institution. It is well established principle by now that any action/development caused during pendency of trial proceedings being hit by rule of lis pendens has to fall on the ground in case the affected party ultimately succeeds. Furthermore, through the impugned mutations, the respondent stepped in the suit property as a co-sharer, whereas rest of partake still rested with the appellant/plaintiff. There is no cavil to affirm that every sharer is deemed to be owner in possession of every inch of the joint holding, thus analysis of the raised issue with this angle again provided shield to the appellant/plaintiff to maintain his suit for simple declaration. Above all, while dealing with relevant provision/Order VII, Rule 7 of the Code, 1908 reproduced here:-

7. Relief to be specifically stated---Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court

may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

the superior Courts in cases reported as Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar and another (PLD 1975 SC 678), Ch. Akbar Ali v. Secretary, Ministry of Defence, Rawalpindi and another (1991 SCMR 2114), Mst. Arshan Bi through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others (2003 SCMR 318), Altaf Hussain alias Mushtaq Ahmed v. Muhammad Din and others(2010 CLC 1646), Sardara and Allah Ditta through legal heirs and others v. Mst. Bashir Begum and another (PLD 2016 Lahore 587) and Muhammad Riaz and others v. Qaim Ali and others (PLD 2019 Lahore 97), have already held that for mere technicalities a suit cannot be defeated due to its bad form. It was further observed that a Court in aid of justice vests with unfettered powers to provide, mould and grant adequate relief even if not claimed through the contents of the plaint. The superior Courts through their cited judgments while dealing with identical situation granted relief of possession, even not sought by the plaintiff. In the case in hand when it is strongly proved that alleged transactions never happened and impugned mutations were maneuvered through collusiveness, therefore the subject mutations cannot be perpetuated/protected for such error, if any.

11. For the reasons discussed hereinabove, this Court has come to the conclusion that the learned Appellate Court below misconstrued the available evidence and law on the subject, which being tainted with misreading/non-reading of evidence and suffering from jurisdictional defect fully calls for interference by applying the exceptions provided under section 100 of the Code, 1908. Thus, this appeal is allowed, judgment impugned herein is set aside and that of learned Trial Court by virtue of which suit of the appellant was decreed, is not only restored, rather the latter is additionally equipped with decree for possession, subject to affixation of Court fees of Rs.15,000/-on the plaint as well as memo of this appeal within two months positively, otherwise his suit and instant appeal will deem to be dismissed. No order as to costs.

MH/ I-4/ L Appeal allowed.

2021 C L D 479
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
STATE LIFE INSURANCE CORPORATION and others---Appellants
Versus
Mst. Syeda MUZHARA FATIMA---Respondent

Regular First Appeal No. 3953 of 2020, heard on 27th January, 2021.

(a) Insurance Ordinance (XXXIX of 2000)---

----Ss. 79, 118 & 124---Life insurance---Payment of liquidated damages on late settlement of claims---Remedies for non-disclosure or misrepresentation---Repudiation of claim---Onus on Insurance Company---Scope---Appellant Insurance Company impugned order of Insurance Tribunal whereby claim of respondent claimant for payment of life insurance amount along with liquidated damages by virtue of insurance policy of deceased husband was allowed---Contention of Insurance Company inter alia was that the insured had provided such information on proposal form which amounted to fraud and misrepresentation, and therefore claim had been rightly repudiated by Insurance Company---Validity---To seek benefit of S. 79 of Insurance Ordinance, 2000, onus probandi rested upon Insurance Company to prove either that the insured failed to comply with duty of disclosure or made fraudulent misrepresentation before contract was finalized, however no such evidence was presented by Insurance Company---Claimant had provided unrebutted evidence that deceased had been examined by approved specialist of Insurance company and was found to be fit and healthy, and only then insurance contract was finalized---High Court observed that repudiation of claim of claimant was therefore illegal and thus impugned order could not be interfered with---Appeal was dismissed, in circumstances.

(b) Insurance Ordinance (XXXIX of 2000)---

----S. 118---Limitation Act (IX of 1908), Art. 86(a) of Part IV of First Sched.---Computation of period of limitation for filing of claim/application before Insurance Tribunal under S. 118 of the Insurance Ordinance 2000---Scope---Whenever a demand for disbursement of insurance claim was denied, a fresh cause of action accrued to claimant to approach Insurance Tribunal within three years of such denial---Act of an insurance company which was illegal, without jurisdiction, unfounded and based on mala fide had no pedestal to be perpetuated even behind shield of limitation.

Messrs Pakistan Agro Forestry Corporation Ltd. v. T.C. PAF Pakistan (Pvt.) Ltd. and others PLD 2003 Kar. 284 rel.

Ibrar Ahmad for Appellants.

Liaqat Ali Butt, Azhar Siddique, Anwaar Hussain Janjua and Humera Bashir for Respondent.

Date of hearing: 27th January, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This appeal has arisen out of judgment of the learned Trial Court, whereby prayer for recovery of death claim along with interest was awarded to the respondent.

2. Inessential detail apart, the appellants (insurer) after having medically probed that the respondent's husband Syed Iqbal Hussain Rizvi (insured) just aged 46 years was a fit person, issued him life insurance policy on 29th July, 1998, who unfortunately died on 01st September, 1999, thus his widow/respondent preferred claim before insurer about three months thereafter, but repudiated on 18th September, 2000 while concluding that the proposal form was based on fraud and misrepresentation. It was matter of fact and record that the widow/respondent struggled hard to have the secured claim by approaching Wafaqi Mohtasib, President of Pakistan, Insurance Tribunal and finally concerned learned District Court by filing suit in hand on 05th April, 2014. The same was contested by insurer. The Court below while facing with divergent pleadings of the respective parties materialized certain issues. Out of those issues Nos.3 and 5, being important are reproduced below:-

"3. Whether benefit under sections 14 and 19 of Limitation Act, 1908 cannot be extended to the plaintiff on the given circumstances of the case? OPD

5. Whether the plaintiff is entitled to recover the policy proceeds under the life insurance policy along with interest under section 47-B of Insurance Act, 1938 (since repealed). If so to what extent? OPP"

After due trial, the last remedy (suit) bore the fruit having been decreed on 12th October, 2019, which being impugned herein is the subject of appeal in hand.

3. Heard, record perused.

4. There was no second thought except that the policy was a bilateral contract executed among insurer and insured under strict compliance of special law. The insurer to reprobate its said act/contract per section 79 of the Insurance Ordinance, 2000 (Ordinance) has a limited authority, which can be exercised where either the insured avoided its obligation in exposing the required particulars or he acted with fraud or misrepresentation to deceit the insurer before finalization of the contract. The next provision further confines that this option can be availed by the insurer within two years of the effectiveness of the policy. In the case in hand, admittedly policy executed on 29th July, 1998, thus the insurer at the most within two years (till 28th July, 2000) could repudiate the same, but despite that claim was submitted on 22nd November, 1999, it allegedly declined on 18th September, 2000, (Mark-D), when the provided period stood already elapsed. Thus clear that the insurer without any justification repudiated the claim beyond prescribed limitation.

Anyway, to seek benefit of section 79, the onus probandi rested upon the insurer to prove that either the insured failed to comply with duty of disclosure or made a fraudulent misrepresentation before the contract was finalized, but it despite availing countless chances could not examine/tender any evidence, hence such right was taken away. There left unrebutted evidence of the respondent, which fully established that insured having been medically examined by the approved Specialist of the appellants was found fit and only then the contract was materialized. The insured breathed his last naturally in quite prime age of 47 due to heart failure, which cannot be claimed to have been managed/planned in suspicious manner just to obtain the policy amount of meager quantum. Thereafter, act of repudiation beyond the specified limitation was not only illegal, rather deficient to any justification/evidence, thus could not be perpetuated. Therefore, findings returned by learned Court below on issue No.5 being unexceptionable Sr based upon unrefuted evidence are affirmed.

5. Mr. Ibrar Ahmed, worthy counsel for the insurer being aware of the fact that his client has a weak case on merit, mainly focused his emphasis to persuade that suit was barred by time and liable to be dismissed on said score. To this effect, he emphasized with great vehemence that under Article 86(a) of the Limitation Act, 1908, the period provided for filing of suit was just three years from the date of death of the insured, but it having been instituted after 141/2 years, on the face of it, was barred by time, is not well founded. There is no denial that after the demise of insured, his widow even within her iddat period tendered the claim before the insurer. Had it been awarded at that moment, then there was no fun to approach the

Authority/Tribunal or the Court. Indeed, it is act of repudiation, which caused accrual of limitation to the claimant, otherwise, the Insurance Companies can defeat object of the provision ibid by retaining claim for more than three years. Here as well, just some days prior to expiry of three years after the death of insured, the claim was declined. The judicial system is aimed to promote justice and when it is proved on record that the repudiation was not justified on law as well as merit, then to me in such like situation the principle of recurring cause of action fully applies, thus whenever a demand for disbursement of claim is denied, fresh cause of action accrues to the claimant to approach the Court within three years of last denial, because an illegal, without jurisdiction, unfounded and based on mala fide act has no pedestal to be perpetuated even behind the shield of limitation.

6. There is no other opinion that office of Wafaqi Mohtsib was not an entity to entertain claim of the respondent, but having felt annoyed with appellants' totally unethical attitude, the respondent being member of aggrieved family after unfortunate sudden demise of the bread winner approached the said forum for speedy remedy to agitate the rightful demand, which having been granted on 27th September, 2001 was further assailed by the insurer in that hierarchy. Thereafter, the said matter was taken up by this Court through different writ petitions including one (W.P. No.21517/2002) on behalf of the respondent and vide order dated 20th December, 2002, the representation filed by appellants was remanded to the Secretary of Law, Justice and Human Rights Division, Islamabad for decision afresh. In the meanwhile respondent again approached the insurer, who vide letter dated 10th September, 2003 (Exh.P4) regretted to take any action on the ground that the matter (on behalf of the insurer) was still sub judice before the apex Court of Pakistan, which was decided on 28th September, 2005 and the case (W.P. No.21517 of 2002) remanded to this Court, however, it was withdrawn on 25th. July, 2006. In such facts and circumstances, the respondent deserved condonation of delay in bona fide approach to the wrong forum(s).

7. There is yet another aspect that any correspondence on behalf of insurer either explaining reasons to repudiate the claim or showing indulgence to probe the matter any further is, indeed, an acknowledgment falling within the meaning of Explanation-I to section 19 of the Act ibid. The aforesaid letter (Exh.P-4) provided new cause of action and on 20th July, 2006 within three years of its communication, the respondent approached the Insurance Tribunal duly constituted in this behalf via appropriate remedy, which was accepted vide judgment dated 25.10.2011, but this Court on 15th February, 2013 in R.F.A. directed that the application be returned to

the respondent for its presentation before the Court of competent jurisdiction. In fact, the same proceedings under the orders of this Court were reopened before the learned District Court. Now comes another moot point, whether the respondent was bound to present the earlier application returned by the then Insurance Tribunal or she could institute new one after formation of regular suit. This proposition has already been resolved by the High Court of Sindh in 'Messrs Pakistan Agro Forestry Corporation Ltd. v. T.C. PAF Pakistan (Pvt.) Ltd. and others' (PLD 2003 Karachi 284) while observing to the following effect:-

"The first contention of Mr. Samiuddin Sami is that the plaintiff did not comply with the provisions of Order VII, Rule 10, C.P.C. but filed as fresh plaint which is liable to rejection. In support of his contention, he relied on the case of Mst. Hawabai v. Abdul Shakoor and others PLD 1970 Kar. 367. Mr. Mansoorul Arifin, learned counsel for the plaintiff, stated that the present suit, filed with the same prayer but with different valuation is maintainable as it is a new suit with different valuation based on the claim of the defendant No.1. The finding of the learned Single Judge in the case of Hawa Bai (supra) was reversed in appeal by a Division Bench of this Court in the case reported as Hawabai v. Abdul Shakoor PLD 1981 Kar. 277 and the same was upheld by the Hon'ble Supreme Court in the case Abdul Shakoor and others v. Mst. Hawabi and others 1982 SCMR 867. Following conclusion was reached by the Division Bench of this Court.

In view of the above discussion, we have reached the conclusion that after a plaint is returned to plaintiff by Court under Order VII, Rule 10, C.P.C. he may adopt any of the following courses:-

I. He may challenge the order returning the plaint for presentation to the proper Court by filing an appeal against such order, or

II. he may present the same plaint after its return to him to a Court having jurisdiction in the matter, or

III. he may amend the plaint by giving up a part of the relief or by reducing the valuation, so as to make it cognizable by the Court, which returned the plaint and then present the same to the same Court or amend the plaint and present it before a Court having jurisdiction in the matter, or

IV. he may file a fresh suit in the Court having jurisdiction in the matter.

Therefore, in view of the law laid down by a Division Bench of this Court in the case of Hawa Bai (supra) and upheld by the Hon'ble Supreme Court in the case of Abdul Shakoor 1982 SCMR 867, I hold that the objection has no force."

Therefore, institution of new suit was perfect as per law already settled and learned lower Court was justified in answering issue No.3 against the insurer.

8. The family of the insured was forced to initiate litigation for totally unjustified act of repudiation of the insurer, which took more than two decades to decide lis in hand uptil this forum and for the foregoing discussion, this appeal having no merit stands dismissed with costs of Rs.2,00,000/- to be additionally paid to the respondent:,

KMZ/S-10/L Appeal dismissed.

PLJ 2021 Lahore 352

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

Malik **EHSAN ULLAH etc.--Petitioners**

Versus

PROVINCE OF THE PUNJAB etc.--Respondents

C.R. No. 3527 of 2016, heard on 26.3.2019.

Res judicata--

----Doctrine of constructive--Subsequent suit--Applicability--Whereas doctrine of constructive res judicata on other hand, bars trial in a subsequent suit of matters not alleged by either of parties in former suit, but which might and ought to have been alleged, as such in case in hand this principle was squarely applicable. [P. 355] A

PLD 1982 SC 146 *ref.*

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

----O.II R. 2--Subsequent suit regarding any fresh relief--Limitation--Once limitation started running in 1994 when earlier suit was instituted, then it could not be stopped latter on and on score of limitation second suit instituted after twenty one years was badly barred by time--It was a hard fact that till 1½ month prior to institution of ensuing suit, earlier suit of petitioners was still *sub judice* before august Supreme Court, who at that moment could amend their pleadings, but they waited for its decision, which on having been decided against them, they managed second one in a contemptuous manner with aim to reopen past and closed chapter and such a tendency cannot be tolerated any further because it would amount to promote endless litigation. [P. 356] B & C

Ch. Zulfiqar Ali, Advocate for Petitioners.

M/s. Ijaz Hussain Gorcha, Abdul Sattar Chughati, Syed Akhtar Hussain Shirazi, Advocates for Respondents No. 2 to 19.

Mr. Muhammad Aamer Javed Bhatti, Advocate for Respondent No. 65.

Mr. Shadab Hassan Jafri, Addl. A.G. for Respondent No. 1.

Date of hearing: 26.3.2019.

JUDGMENT

Shorn of unnecessary detail, admittedly earlier two suits filed by the contesting parties ended against present petitioners upto the level of the apex Court, which vide order dated 19.11.2015 passed in C.P. No. 2337 of 2015 resolved the issue with regard to estate left by predecessor of the parties. Scope of Section 2-A of the Muslim Personal (Shariat) Application Act, 1948 was also discussed by the honourable Supreme Court of Pakistan in last paragraph of its said order, which was never assailed by means of Review Petition before the same Court, rather within 1½ month thereafter on 30.12.2015, the second suit in hand was instituted by the present petitioners to reopen the controversy already culminated as referred above.

The respondents promptly filed an application for rejection of the plaint that suit was hit by Section 11 as well as Order II Rule 2 of the Code, 1908. The learned Trial Court being sanguine to the stance of the respondents/ defendants rejected the plaint. Despite being assailed before the learned District Court by means of Appeal, it was maintained and to call in question their unanimous orders, this Civil Revision was preferred.

2. Ch. Zulfiqar Ali, Advocate, learned counsel for the petitioners while relying upon the case law cited as *Shahzad and another vs. IVth Additional District Judge, Karach (East) and 5 others* (PLD 2016 Sindh 26), *Muhammad Saleem, Ullah and others vs. Additional District Judge, Gujranwala and others* (PLD 2005 SC 511) and *Q.B.E. Insurance (International) Ltd vs. Jaffar Flour and Oil Mills Ltd. and others* (2008 SCMR 1037) emphasized that question of fact especially with regard to inheritance can only be resolved after framing of issues, but both the Courts below without application of their judicious mind erred in law to non-suit the petitioners on technicality. It was further argued that neither the law of limitation was involved nor it was a case of applicability of Order II Rule 2 of the Code, 1908, whereas new cause of action was subsequently accrued to the petitioners, but both the Courts below without going through the contents of the plaint passed the impugned orders in a haste, which being nullity in the eye of law are not sustainable.

In response, M/s. Ijaz Hussain Gorcha, Abdul Sattar Chughtai, Syed Akhtar Hussain Shirazi and Muhammad Aamer Javed Bhatti, Advocates, learned counsel for private respondents and Mr. Shadab Hassan Jafri, Addl. A.G. on behalf of Respondent No. 1 being in agreement submitted that the suit was not only hit by above provisions of law, rather it was a contemptuous act and supported the impugned verdicts while adding further that concurrent findings cannot be disturbed in the exercise of jurisdiction vested u/S. 115 of the Code *ibid.*

3. Heard and record perused.

4. Undeniably, a round of litigation was earlier played among the present parties with regard to land involved in the suit in hand. In previous suit the following were the issues:-

1- کیا غازی مورث مدعیان ڈگری عدالت دیوانی مورخہ 16.5.46 کی رو سے مالک قابض اراضی متدعویہ تھا۔ اور اس طور پر مدعیان وارثان باز گشت غازی متوفی ڈگری سرکایہ پانے کے حقدار ہیں؟ بذمہ مدعیان۔
2- کیا انتقالات وراثت مسماۃ غلام فاطمہ متوفیہ غلط اور خلاف قانون و واقعات ہیں؟ بذمہ فریقین
3- مسمی نواز عرف نازو و مسماۃ غلام فاطمہ متوفیان کس فرقے سے تعلق رکھتے ہیں؟ بذمہ فریقین
4- کیا مدعیان کو کوئی بنائے دعویٰ حاصل نہ ہے؟ بذمہ علیہم
5- کیا فارم دعویٰ غلط ہے؟ بذمہ مدعا علیہم
6- کیا مدعیان قول و فعل خود سے مانع دعویٰ دائری ہیں؟ بذمہ مدعا علیہم 5، 6 تاج
7- کیا دعویٰ مدعیان زائد المیعاد ہے؟ بذمہ مدعا علیہم 1، 2 تا 4

8- کیا دعویٰ مدعیان بوجہ شمولیت غیر ضروری فریق و عدم شمولیت ضروری فریق ناقص ہے؟ بذمہ مدعا علیہ نمبر 1-
9- کیا مدعا علیہم ہر جانہ خاص پانے کے حقدار ہیں؟ کس قدر؟ بذمہ مدعا علیہم 1، 5، 6، تا 6 ج-
10- کیا دعویٰ مدعا علیہ نمبر 1 بعنوان مہرمائی بنام غازی نا قابل پزیرائی ہے؟ بذمہ مدعیان-
11- داد رسی-

which were finally decided upto the level of august Supreme Court In the recent suit, again inheritance mutation No. 1173 dated 15.05.1975 of *Mst.* Ghulam Fatima had been challenged, which question directly had already been culminated while rendering findings on Issue No. 2, referred hereinabove, as such the matter in issue once decided cannot be tried for the second time. It is a fit case that the matter directly and substantially in issue is the same, hence the petitioners were precluded from again raising the grouse, which had earlier been finalized. The doctrine of res judicata bars the subsequent litigation if following five conditions are fulfilled:

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III), or constructively (Explanation IV), in the former suit

(2) The former suit must have been a suit between the same parties or between parties under whom they or any one of them claim (Explanation IV).

(3) The parties as afore-said must have litigated under the same title in the former suit.

(4) The Court which decided the former suit must have been a Court competent to try the subsequent suit in which such issue is subsequently raised (Explanation II).

(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit (Explanation V).

whereas doctrine of constructive res judicata on the other hand, bars the trial in a subsequent suit of matters not alleged by either of the parties in the former suit, but which might and ought to have been alleged, as such in the case in hand this principle was squarely applicable. This doctrine had engaged the attention of the apex Court in a case cited as *Abdul Majid and others vs. Abdul Ghafoor Khan and others* (PLD 1982 SC 146) and the relevant portion thereof for ready reference is reproduced as under:

> There is no force in any of the arguments raised by the learned counsel. He admits that the petitioners fled the suit after the final decision by the High Court, to remove its effect, so as to get their claim sanctioned from the Rehabilitation Authorities. It is, therefore, not correct to say that the High Court decision would bar the fresh enquiry before the Rehabilitation

Authorities only. Whatever the forum whether of special or general jurisdiction it will operate as a bar on the re-opening of the case, except of course to the extent the law permits by way of review/appeal. As was held by this Court in the case of Muhammad Chiragh-ud-Din relied upon by the learned Courts below, even if the provision of Section 11, C.P.C. do not apply in terms, in such like cases, the general principles of res judicata would apply. Therefore, there is no force in the second argument of the learned counsel either. In this connection learned counsel also tried to argue that the principle of constructive res judicata would not apply in cases where

Section 11, C.P.C. does not apply, in terms. There is no reason to exclude a particular kind of res judicata when considering these questions, neither on the basis of any law nor on any other general principle.

5. Moreover, without conceding, if the argument of Mr. Zulfiqar that some new relief was claimed in subsequent suit is taken to be correct, even then mandate of Order II rule 2 of the Code, 1908 precluded the petitioners to file subsequent suit regarding any fresh relief, which was relinquished in earlier one. Besides, the other setback was that once limitation started running in 1994 when earlier suit was instituted, then it could not be stopped latter on and on the score of limitation the second suit instituted after twenty one years was badly barred by time.

It was a hard fact that till 1½ month prior to institution of ensuing suit, the earlier suit of the petitioners was still *sub judice* before the august Supreme Court, who at that moment could amend their pleadings, but they waited for its decision, which on having been decided against them, they managed the second one in a contemptuous manner with the aim to reopen the past and closed chapter and such a tendency cannot be tolerated any further because it would amount to promote endless litigation. The case law cited by learned counsel for the petitioners being run on different footing is not applicable to the facts of the case in hand. Resultantly this Civil Revision being devoid of any merit and force is dismissed with costs of Rs. 50,000/- (Rupees fifty thousand only).

(R.A.S.)

PLJ 2021 Lahore 413

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

ZAFAR ABBAS and 4 others--Petitioners

Versus

MEMBER BOARD OF REVENUE PUNJAB and others--Respondents

W.P. No. 57337 of 2020, decided on 9.11.2020.

Constitution of Pakistan, 1973--

----Art. 199--Land Revenue Act, (XVII of 1967), S. 135--Application for separation of shares--Allowed--Appeal allowed--Matter was remanded--Appeal was dismissed after post remand proceedings--Revision petition--Dismissed--Filing of ROR--Dismissed--Exercising of jurisdiction--Concurrent orders--Challenge to--Revenue hierarchy while passing impugned concurrent orders focused compactness of wandas and potential/worth/location of block awarded to sharers--This Court while exercising jurisdiction under Article 199 of Constitution of Islamic Republic of Pakistan, 1973 cannot go deep into factual controversy requiring evidence, whereas on its face value neither impugned orders are *coram non judice* nor *ultra vires* rather were passed while keeping in mind afore-noted parameters in dividing property to right holders as per their shares--Thus no case of interference with impugned orders is made out--Petition dismissed. [Pp. 414 & 415] A

Ch. Iqbal Ahmad Khan, Advocate for Petitioners.

Mr. Arshad Jahangir Jhoja, Addl. Advocate General for Respondents on Court's call.

Date of hearing: 9.11.2020.

ORDER

The petition in hand calls in question vires of the concurrent orders passed by the revenue hierarchy right from the Court of first instance up to the apex forum, whereby application made by Respondent No. 2 under Section 135 of the Land Revenue Act, 1967 for the partition of joint holding was accorded. The record suggests which otherwise is also not denied by the learned counsel for the petitioners that long ago Respondent No. 2 had tabled afore-noted application for separation of his share out of the area falling in joint khewat and allowed on 05.07.2014, but without extending any right of audience to the petitioners, therefore, the matter remanded by the District Collector to the AC-I. The latter again accorded it in presence of present petitioners *vide* order dated 18.06.2015, which sustained through dismissal of appeal, revision petition as well as ROR by the District Collector, Additional Commissioner (Revenue), and learned Member, Board of Revenue on 17.02.2020, 18.03.2020 & 22.10.2020 respectively.

2. The learned counsel for the petitioners despite taking maximum time failed to convince that either Respondent No. 2 was not sharer or he was awarded more land than his entitlement. The revenue hierarchy while passing the impugned concurrent

orders focused the compactness of wandas and the potential/worth/location of the block awarded to the sharers. This Court while exercising jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 cannot go deep into factual controversy requiring the evidence, whereas on its face value neither impugned orders are *coram non judice* nor *ultra vires* rather were passed while keeping in mind the afore-noted parameters in dividing the property to the right holders as per their shares. Thus no case of interference with the impugned orders is made out, therefore, this petition being meritless is dismissed *in limine*.

(Y.A.) Petition dismissed.

PLJ 2021 Lahore 438 (DB)

Present: **CH. MUHAMMAD MASOOD JAHANGIR AND SHAMS MEHMOOD MIRZA, JJ.**

KAMAL DIN, etc.--Petitioners

Versus

CHAIRMAN, FEDERAL LAND, COMMISSION, ISLAMABAD etc.--Respondents

W.P. No. 5958 of 2010, decided on 2.11.2020.

Constitution of Pakistan, 1973--

----Art. 199--Minor declaration--Gift-deed--Gift transaction was declared void--Appeal--Allowed--Gift transaction was declared valid--Suo moto revisional powers--Previous orders regarding validation of gift transaction were set a side--Writ petition--Dismissed--Appeal dismissed--Non-applicability of provisions of land reforms regulations--Challenge to--Conclusion of apex Court having stood final became past and closed chapter--Declarant was accommodated to surrender land according to his revised choice, so tendered, thus excess land equivalent to 9162 PIUs was resumed in favour of Land Commission, therefore he or his successor cannot agitate his any right or interest in property in dispute--Chairman Federal Land Commission without considering said aspects of case erred in law to set aside said orders while reopening pandora box, which stood already culminated up to apex Court of State--Counsel for writ petitioner of Writ Petition No. 7695/2010 that view of Chairman was perfect as per impact of 'Qazalbash Waqfs case (PLD 1990 SC 99)--It was settled thereby that said decision would not effect pending cases, which shall be decided under provisions of Land Reforms Regulation, 1972, hence was not applicable in case in hand--Petitions allowed. [Pp. 441 & 442] A & B

1974 SCMR 409 *ref.*

Rana Muhammad Akhtar Khan, Advocate for Petitioners.

Mr. Tahreem Iqbal Butt, AAG for Respondents No. 3 & 4 and Petitioner (in Writ Petition No. 24410 of 2013).

Malik Noor Muhammad Awan, Advocate for Respondent No. 6.

Mr. Iqbal Ahmad Khan, Advocate for Respondent No. 7 and Petitioners (in Writ Petition No. 7695 of 2010).

Date of hearing: 2.11.2020.

JUDGMENT

Ch. Muhammad Masood Jahangir, J.--For delivering this judgment, reference to the pleaded facts would be that Muhammad Abdullah son of Muhammad Hussain (predecessor of Respondents No. 5 & 6) was declarant under The Land Reforms Regulation, 1972 and being minor declaration on his end was filed by his father

while disclosing in form LR-I that area of 2722-kanals 16-marlas was gifted out in favour of his sisters Nusrat Begum, Nuzhat Begum and Nasira Begum through Mutation No. 99 on 18th October, 1971, but Land Commissioner declared it void on 16th June, 1972. No doubt, thereafter it was reviewed by the same authority on 13th December, 1973 and declared the gift transaction to be invalid on the ground that it could not be said that the declarant's father while making transaction as guardian of his minor son Muhammad Abdullah had acted in the interest of the latter by gifting away such a large area. However, in appeal Additional Chief Land Commissioner *vide* his order of 21st July, 1973 declared_the_gift transaction as valid, but the learned Member Federal Land Commission while exercising its suo moto revisional powers on 24th November, 1976 seaside afore-noted orders of his subordinate while holding that Mutation No. 99 in terms of para No. 7(1)(B) of the Regulation ibid was void. Although this order was assailed by the declarant, his three daughters (beneficiaries of said mutation) as well as their father before this Court by means of Constitutional Petition No. 351 of 1977, but without any success having been dismissed *in limine* on 29th March, 1977, which further sustained before the apex Court when their appeal No. 260/1977 dismissed on 29th October, 1991.

It was a hard fact that during the pendency of said appeal before the apex Court, Muhammad Abdullah declarant submitted choice before the Deputy Land Commissioner, Sahiwal while surrendering 1656-kanals 02-marlas equivalent to 9162 PIUs falling in different khasras of the joint holding. Consequently the said land was resumed as per desire and will of the declarant for its transfer to the sitting tenants. Although sisters/beneficiaries of Mutation No. 99 challenged it through appeal, but dismissed by the learned Land Commissioner, Multan on 23rd May, 1990. Thereafter on a move through application by the declarant for implementation of order dated 23rd May, 1990, the Deputy Land Commissioner on 08th July, 1991 directed that after resumption of 9162 PIUs as per choice of the declarant, fresh calculation of PIUs be carried out and khata of the resumed land be also separated from the khata of the declarant. No doubt, revision petitions of the declarant as well as his sisters before Chief Land Commissioner succeeded and while setting aside afore-noted orders, the matter was remanded to the Deputy Land Commissioner, Pakpattan for fresh decision after extending right of audience to the parties, who in compliance of the same on 27th January, 1997 resumed the excess land in favour of Land Commission according to the choice of the declarant under para No. 11(I) of the Regulation ibid while observing that Mutation No. 99 stood already declared void up to the apex Court and required submission of proposal for allotment of resumed land to the eligible tenants.

The appeal and then RORs were dismissed by the Land Commissioner, Multan and Chief Land Commissioner, Punjab *vide* orders of 12th July 2000 & 29th June, 2009 respectively. However, Revision Petition of the successors of the declarant and beneficiaries of Mutation No. 99 were allowed by the Chairman Federal Land Commission through order of 16th February, 2010, by merely concluding as under:

'Under the circumstances, Federal Land Commission has no option but to accept the Revision Petition and set aside the order dated 27.01.1999, passed by the learned Deputy Land Commissioner Pakpattan, the order dated 12.07.2000 passed by the learned Land Commissioner Multan/Pakpattan and the order dated 29.06.2009 passed by the learned Chief Land Commissioner Punjab. It is also made clear that all the orders, decisions made during the status qua order issued by the Apex Court of Pakistan also declared null and void.'

Being aggrieved, this petition on behalf of the tenants and connected Writ Petition No. 24410/2013 by the State, whereas Writ Petition No. 7695/2010 was made by the sisters of the declarant (beneficiaries of Mutation No. 99). As the subject matter is identical and all these three petitions have been preferred against common impugned order, thus we propose to decide the same jointly through single judgment, however source of reference would be petition in hand.

2. Heard. Record scanned with the able assistance of learned counsel as well as learned Law Officer on behalf of the respective parties.

3. In the case in hand, the gift under consideration was made prior to 20th December, 1971, as such Clause (b) of Paragraph 7 (1) of the Regulation ibid is relevant, which recognized the validity of transaction relating to land struck before the said date provided the Land Commission constituted under the Regulation was satisfied with regard to its *bona fide*. However, proviso to this clause treated the gift made by the declarant on a different footing inasmuch as it precluded the Land Commission from holding any transfer of land or creation of right or interest or encumbrance by way of gift to be bona fide. Although such restriction on the power of Land Commission was relaxed regarding a gift made to an heir or, in certain circumstances to a widowed or unmarried sister, however, 'Explanation I' explained the word 'heir' to mean the donor's wife or wives, sons, daughters, father, mother and sons and daughters of a deceased son or daughter. Whereas, the gift made to an unmarried or widowed sister was to be governed by sub-clause (ii) of the second proviso to paragraph 7 (1) (b), which provided that a gift could be treated as valid only if the 'widowed' or 'unmarried' sister of the donor had not received her due share of
inheritance of ancestral land. The flow of the said provision irresistibly suggested that it referred to the agnatic rule that prevailed under the custom whereby the sisters were deprived of their personal law share in the ancestral land left by the common ancestor, which was applicable only in those cases where the inheritance had already opened prior to the making of the gift conquest upon the death of the common ancestor, there has been an unfair distribution of the ancestral land. Having faced identical proposition, the Hon'ble Supreme Court in the judgment reported as *'Syed Muhammad Ahmad Shah & Co. versus Additional Chief Land Commissioner, Punjab, Lahore'* (1974 SCMR 409) has already declared a gift in favour of unmarried minor sister as void.In this case when matter in earlier cycle went before the apex Court on the same lines, the transaction of gift having already

been declared void was maintained. Thus, the conclusion of the apex Court having stood final became past and closed chapter. Moreover, the declarant was accommodated to surrender land according to his revised choice, so tendered, thus excess land equivalent to 9162 PIUs was resumed in favour of the Land Commission, therefore he or his successor cannot agitate his any right or interest in the property in dispute. The Chairman Federal Land Commission without considering said aspects of the case erred in law to set aside the said orders while in box, which stood already culminated up to the apex court of the state. The emphasis of Mr. Iqbal Ahmad

Khan, Advocate/learned counsel for the writ petitioner of Writ Petition No. 7695/2010 that view of the learned Chairman was perfect as per impact of 'Qazalbash Waqfs case (PLD 1990 SC 99). Suffice it to say that it was settled thereby that the said decision would not effect the pending cases, which shall be decided under the provisions of Land Reforms Regulation, 1972, hence was not applicable in the case in hand.

5. Consequently, Constitutional Petition in hand and that of the State bearing Writ Petition No. 24410/2013 have substance, which are allowed, order impugned herein is set aside, whereas Writ Petition No. 7695/2010 filed by the beneficiaries of gift transaction is **dismissed.**

(Y.A.)

PLJ 2021 Lahore 451
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
NAZAR MUHAMMAD (deceased) through L.Rs, etc.--Petitioners
Versus
M.B.R., etc.—Respondents

W.P. No. 1314 of 2016, decided on 23.9.2020.

Constitution of Pakistan, 1973--

----Art. 199--Confirmation of consolidation scheme--Writ petition--Matter was remanded--Consolidation scheme was reconfirmed by collector consolidation--Appeal--Allowed--Filing of ROR--Dismissed--Ex-parte order--Norms of justice--Right of audience--Direction to--Decision was made without considering wroth, potential and compactness of land/block of wandas modified by Addl. Commissioner--No positive effort was made by any of consolidation authority including BoR to decide *lis* as per norms of justice despite that earlier this Court remanded matter--A miserable file containing jumble of papers including reports regarding classification of land, *aks shajras* showing location of site and report/proposals for carving of *wandas* maintained, but nothing was considered either by Addl. Commissioner or Member, rendering their impugned orders unjust and to make such factual drill work, definitely this Court is not proper forum--Anomaly noted above when faced to Advocate for beneficiaries of impugned orders, though he tried his best to persuade that nothing wrong was found therein, but in reality he failed to show plausible reasoning to maintain those verdicts--It is not expected from a Court/Tribunal/ Authority while performing judicial affairs to pass an order in novel or unprecedented manner, rather is bound to take pain and put labour in consulting record, repelling or capitulating grounds urged or argued by parties or their respective authorized agent/counsel, but sorry to say that no such effort made by two authorities below--Court is left with no other choice except to remand this matter to Board of Revenue with direction to re-decide it exhaustively after consulting original

record/file and extending right of audience to all concerned--Petition allowed. [Pp. 453 & 454] A, B, C & D

PLD 1992 SC 333, 1995 SCMR 51, 1995 SCMR 1385 1997 SCMR 410 *ref.*

Ch. Iqbal Ahmed Khan, Advocate for Petitioners.

Mr. Arshad Jahangir Jhoja, Addl. Advocate General for Respondent No. 1.

Mian Noor Hassan Kamyana, Advocate for Respondents No. 2 to 15.

Date of hearing: 23.9.2020.

ORDER

The dispute inter se the private parties pertains to consolidation of holdings of village Kamman, tehsil Renala Khurd, district Okara, which is lingering on since 1977 when for the first time the Scheme was confirmed by the Consolidation Officer, however, last time on 12.12.1988, this Court while deciding W.P. No. 5240/1986 remanded the matter with specific direction. Thereafter, though the Scheme was reconfirmed by the Collector (Consolidation) on 29.04.1993, which being agitated by private respondents through appeal was modified by Addl. Commissioner (Consolidation), yet the said appeal was again remanded by the Member, BoR. The Addl. Commissioner, this time, *vide* ex parte order dated 30.01.2014 allowed appeal of aforenoted respondents, compelling the petitioners to file RoR No. 967/2014 before the learned Member, BoR while asserting grounds **"a to m".** The learned Member dismissed it while concurring ex-parte order of his subordinate *vide* order dated 19.05.2015 in the following manner:

> *This Court carefully considered the arguments advanced by counsels for the parties and went through record of the case available in the file along with the impugned orders. On examination of the record, it has been revealed that the controversy involved in this case hinges around the confirmation of consolidation scheme. The web of consolidation is woven*

by hectic efforts and taking pains. However, during the consolidation operation, land of the respondents was scattered into pieces which is not the spirit of law on the subject. The perusal of record indicates that no deficiency whatsoever has taken place in the entitlement of parties as it is not claimed by them. The petitioners failed to produce any convincing documentary evidence to substantiate that in what manners their rights have been prejudiced. Therefore, the order assailed through the instant revision petition dated 30.01.2014 is quite legal and lawful which calls for no interference by this Court. Thus, the revision petition is dismissed in limine being devoid of force and merit."

2. Having a glance over it, there left no doubt in mind that the decision was made without considering the wroth, potential and compactness of the land/block of the wandas modified by Addl. Commissioner. There is no doubt that BoR is controlling authority and it being the highest forum on revenue/colony/consolidation side in the provinces has been conferred vast powers respecting every order passed by the subordinates working under its command, thus bound to decide the lis in exhaustive manner especially in the cases where jurisdiction of the plenary Court is specifically barred. In the case in hand, no positive effort was made by any of the consolidation authority including the BoR to decide the *lis* as per norms of justice despite that earlier this Court remanded the matter. A miserable file containing jumble of papers including reports regarding classification of land, *aks shajras* showing location of site and report/proposals for the carving of *wandas* maintained, but nothing was considered either by the Addl. Commissioner or learned Member, rendering their impugned orders unjust and to make such factual drill work, definitely this Court is not proper forum.

3. The anomaly noted above when faced to Mian Noor Hasasan Kamyana, Advocate for the beneficiaries of the impugned orders, though he tried his best to persuade that nothing wrong was found therein, but in reality he failed to show the plausible reasoning to maintain those verdicts. It is not expected from a

Court/Tribunal/ Authority while performing judicial affairs to pass an order in novel or unprecedented manner, rather is bound to take pain and put labour in consulting the record, repelling or capitulating the grounds urged or argued by the parties or their respective authorized agent/counsel, but sorry to say that no such effort made by the two authorities below.

4. This Court is left with no other choice except to remand this matter to Board of Revenue with direction to re-decide it exhaustively after consulting original record/file and extending right of audience to all the concerned, obviously while keeping in mind the import as well as object of consolidation laws duly enlightened by the apex Court in judgments reported as *Shamir Khan vs. Member, (Cons.) Board of Revenue and 8 others* (PLD 1992 SC 333), *Muhammad Bashir and 2 others vs. Mst. Roshi and 12 others* (1995 SCMR 51), *Hasil and another vs. Karam Hussain Shah and others* (1995 SCMR 1385) and *Khan Muhammad and others vs. Member (Consolidation) Board of Revenue, Punjab and others* (1997 SCMR 410). The parties to appear before Senior Member, Board of Revenue on 12.10.2020 for further proceedings. Disposed of.

(Y.A.) Petition allowed.

PLJ 2021 Lahore 456

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

Ch. **MUHAMMAD RIZWAN--Appellant**

Versus

MUHAMMAD YOUNAS, etc.--Respondents

F.A.O. No. 595 of 2013, heard on 18.3.2015.

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

----S. 12--Civil Procedure Code, (V of 1908), S. 96, O.XXXI Rr. 1, 2--Suit for specific performance--Application for grant of temporary injunction--Dismissed--Agreements to sell--Defecto guardian--Agreement to sell on behalf of minors--Creation of rights or title--Balance of inconvenience--Rule of lis pendense--Challenge to--It is settled principle of law that a defecto guardian has no authority to enter into an agreement to sell on behalf of minors--It is settled principle of law that mere execution of an agreement to sell neither creates right or title in immoveable property--Appellant has no batter case than respondents, who are title holder of disputed property and for grant of temporary injunction, applicant, has not only to establish that he has a prima facie case, but he has also to show that balance of inconvenience is on his side and that he will suffer irreparable loss unless he is protected during pendency of suit while issuing Injunctive order in his favour--Rule of *lis pendens* is available to appellant, if disputed property is further alienated by respondents/defendants--In presence of said principle appellant cannot be equipped with relief of temporary injunction and trial Court after assessing required three ingredients has rightly declined grant of stay order--There is much force in contention of counsel for appellant that findings of trial Court to extent that alleged agreement executed by Respondent No. 1 to 4 did not bear characteristic of agreement is not plausible--Counsel for respondent has also conceded said fact--Anyhow findings of trial Court as well as of this Court are of tentative nature and will not influence trial Court at final decision of suit, which will be made independently on basis of evidence likely to be produced by parties during trial--Petition dismissed. [Pp. 458, 459, 461 & 462] A, B, C, D & E

2000 SCMR 961, PLD 1994 SC 674 and 2008 SCMR 352 *ref.*

Mr. Muhammad Baleeg-uz-Zaman Ch., Advocate for Appellant.

Mr. Zabiullah Nagra, Advocate for Respondents No. 1 to 4.

Mr. Muhammad Ramzan Ch., Advocate for Respondents No. 5 to 10.

Mr. Muhammad Rafique Ch., Advocate for Applicants (in C.M. No. 1 & 2-C of 2015).

Date of hearing: 18.3.2015.

ORDER

The facts germane for the disposal of instant appeal are that Ch. Muhammad Rizwan present appellant being plaintiff brought a suit for specific performance of two agreements to sell dated 16.10.2011 with the assertion that Respondent No. 1 to 4 being owners of property measuring 27-Kanal and 18-marlas, whereas, Respondents No. 5 to 1.0 being owners of 8-Kanal of disputed property fully mentioned in the today of the plaint had agreed to sell the same to him and after receiving a sum of Rs. 10,00,000/- they executed two different above referred sale agreements. It was further settled that plaintiff/appellant would pay Rs. 32,00,000/- to the Respondents No. 1 to 4 and Rs. 8,00,000/- to Respondent No. 5 to 10 till 15.11.2011. According to the appellant, he was ever ready to pay the balance amount, but the respondents refused to receive the balance amount and get transferred the suit property in favour of the plaintiff/ appellant, who was constrained to file the suit in hand. Along with the said suit appellant/plaintiff also filed an application for grant of temporary injunction with the prayer that respondents be permanently restrained from selling, alienating, transferring or encumbering the land in dispute and from changing its nature and character in any manner whatsoever till the final disposal of the titled suit. The said suit as well as application was resisted by the respondents/defendants by filing written statement and written reply. The learned trial Court *vide* impugned order dated 12.11.2013 dismissed the said application for grant of injunctive order. Being aggrieved the instant appeal has been filed.

2. During the pendency of this appeal CM No. 1-C/2015 for impleading Parveen as respondent under order I rule 10 CPC was filed, but on reconsideration learned counsel for the applicant has opted not to press the same as the applicant has already filed similar application before the trial Court. As such, CM No. 1-C/2015 is dismissed accordingly whereas CM No. 2-C/2015 has become redundant.

3. Learned counsel for the appellant has argued that respondents received the earnest money, but they did not produce the Fard Malqiat and get demarcated the land, therefore, remaining amount could not be paid to the respondents and the appellant is ever ready to perform his part, if the respondents fulfill the condition mentioned in the agreement; that the learned trial Court without considering the said contention of the petitioner dismissed the application filed by the petitioner; that three essential ingredients necessary for the grant of interim order under Order XXXIX Rule 1 & 2 of CPC also tilt in favour of appellant, but learned trial Court without considering the said pre-requisites passed the impugned order; that the execution of the disputed agreements as well as payment of earnest money was

admitted by the respondents and the appellant has prima face arguable case, but this fact has also not been considered by the learned trial Court. He has lastly prayed for the acceptance of the instant appeal, setting aside of the impugned order and that application for grant of temporary injunction filed by the appellant before the learned trial Court be accepted.

3. Conversely, learned counsel for the respondents have supported the impugned order.

4. Arguments heard. Record perused.

5. It is an admitted fact that appellant filed a suit for specific performance of agreement to sell on the basis of two agreements to sell, one was allegedly executed by Respondents No. 1 to 4, whereas the other was claimed to have been executed oh behalf of Respondents No. 5 to 10 by Rahila Bibi Respondent No. 5 on her behalf as well as her miner sons and daughters Respondents No. 7 to 10. No doubt, Rahila Bibi being mother is the defecto guardian of her minor children, but it is settled principle of law that a defecto guardian has no authority to enter into an agreement to sell on behalf of minors. This Court has already thrashed this point in the judgment dated 28.4.2014 passed in RSA No. 221/2010 to the following effect:

> "The appellant/plaintiff himself admitted in the plaint that at the time of execution of the disputed agreement to sell, defendants No. 2 to 4 and 6 were minors and Defendant No. 1, the mother of the said minor defendants was not their appointed guardian at the time of execution thereof.

7. The agreement to sell is defined in Black'S Law Dictionary, Fifth Edition which reads as under:

> "**Agreement of sale; agreement to sell.--**An agreement of sale may imply not merely an obligation to sell, but any obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. Treat v. While, 181 U.S. 264, 21 S.Ct. 611, 45 L.Ed. 853. It is a contract to be performed in future, and, if fulfilled, results in a sale; it is preliminary to sale and is not the sale."

The said definition has further been elaborated by the august Supreme Court of Pakistan in a case reported as *"Hafiz Tassadiq Hussdin vs. Muhammad Din through Legal Heirs and others* (PLD 2011 Supreme Court 241) and relevant para-5 is reproduced hereunder for ready reference:

> "The noted meaning is also fortified by the provisions of Section 54 of the Transfer of Property Act, 1882 which definies the sale of immovable property, prescribes the mode and mechanism how it is made; and by virtue of its clear language distinguish it from a contract/agreement of sale, when it is ordained that: "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties". Furthermore, in the above context, a clear distinction and contract is drawn in the same provision, wherein it is provided that a contract for sale itself shall neither create any interest in or a charge on such property, Thus, the former transaction (if not a conditional sale) is the conclusive transfer of an absolute title and ownership of the property unto the vendee in presentee, while the later is meant for accomplishing the object of sale in futurity and for all intents and purposes it pertains to the future obligations of the parties thereto, resultantly there is no room for doubt that a sale agreement/agreement to sell is duly covered and is hereby so declared to fall within the pale of said Article.

8. It is an admitted fact that the disputed property had been agreed to sell by Defendant No. 1, *i.e*. mother of the other defendants, who were less than 18 years of age and could not validly enter into sale contract on their behalf, which was void *ab initio* having been contracted incapacity of vendors, thus, had no legal existence. No rights or liabilities would arise in favour of vendee from such void transaction, which could neither be enforced nor set up as a valid defence plea to claim thereunder a right or title. Invalidity of such transaction arose from a legal incapacity, which was, thus, incurable. Such sale was void and not voidable. Sale of minors's property by their mother as a defecto guardian was not sale in the eyes of law. Such sale would be invalid, unless the guardian obtained permission from the Court of law to sell but the said property after her appointment as a guardian. The Court is not even bound to grant leave to dispose of property of minors to an appointed guardian unless and until it is expressly proved to before benefit or welfare of minor. Section 29 of the Guardians and Wards Act, 1980 reads as under:

> **29. Limitation of Powers of guardian of property appointed or declared by the Court.** Where a person other than a Collector, or other than a guardian appointed by will or other instrument, has . been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court:

(a) mortgage, or charge or transfer by sale, gift, exchange or otherwise any part of the Immovable property of his ward; or

(b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

After perusal of the aforesaid provisions, there is left no doubt that the agreement to sell (Exh.Pl) alleged to have been executed by Defendant No. 1 in favour of the appellant on behalf of the minor children without prior permission of the Court is void and the appellant could not seek performance of such agreement with the aid of Court by filing Civil suit, In arriving at this view, I am also fortified by the dictum laid down by the august Supreme Court of Pakistan in the judgment reported as "2000 SCMR 961, PLD 1994 SC 674 and 2008 SCMR 352.

9. In the present case, it is even admitted by the learned counsel for the appellant/plaintiff during the course of arguments that Defendant No. 1 was not an appointed guardian of the minor defendants from the competent. Court of law. As such the said defendants cannot be burdened with liability of void contract and the learned lower appellate Court has validly refused relief to the vendee from his contracting minor party."

Learned counsel for the appellant, during the course of arguments has conceded that one of the alleged agreement is defective to this extent. The appellant/plaintiff by filing a single suit regarding above referred two agreements has also damaged his case on account of mis-joinder of causes of action. It is settled principle of law that mere execution of an agreement to sell neither creates right or title in the immoveable property. The appellant has yet to prove the valid execution of the disputed agreements by producing cogent and convincing evidence. At present stage, the appellant has no batter case than the respondents, who are title holders of the disputed property and for grant of temporary injunction, the applicant, has not only to establish that he has a prima facie case, but he has also to show that the balance of inconvenience is on his side and that he will suffer irreparable loss unless he is protected during the pendency of the suit while issuing Injunctive order in his favour. If the appellant is not equipped with temporary injunction then at the most he could suffer a loss in terms of coins and such a loss cannot be termed as irreparable loss. The appellant has only prayed in his application for grant of temporary injunction to the extent that respondents/defendants be restrained from alienating the disputed property. Rule of *lis pendens* is available to the appellant, if the disputed property is further alienated by the respondents/defendants. In the

presence of said principle the appellant cannot be equipped with the relief of temporary injunction and the learned trial Court after assessing the required three ingredients has rightly declined the grant of stay order. However, there is much force in the contention of the learned counsel for the appellant that the findings of the learned trial Court to the extent that the alleged agreement executed by Respondent No. 1 to 4 did not bear the characteristic of agreement is not plausible. The learned counsel for the respondent has also conceded the said fact. Anyhow the findings of the learned trial Court as well as of this Court are of tentative nature and will not influence the learned trial Court at the final decision of the suit, which will be made independently on the basis of the evidence likely to be produced by the parties during the trial.

6. Sequel to the above discussion, the instant appeal being devoid of any merit and force is dismissed.

(Y.A.) Petition dismissed.

PLJ 2021 Lahore (Note) 56

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

BAHRIA TOWN (PVT) LTD. through Law Officer Bahria Town--Petitioner

Versus

WAQAS AHMAD GONDAL--Respondent

R.S.A. No. 26834 of 2017, heard on 28.11.2018.

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

----S. 100--Regular second appeal--Suit for declaration--Development charges--Cancellation of allotment of plot--Ulterior motive--Installments were paid beyond given date--Validity--Although notices under objection were received in statement of sole DW, but neither its maker nor any document like Booking Receipt, Acknowledgement Due Card or any official of Post Office was examined to prove that it was dispatched or served upon addressee--Over and above on behalf of appellant, nothing in black and white was tendered in evidence to prove that for making one or more installment(s) beyond given date it could be made basis for cancellation of allotment of plot or that it was ever cancelled--Appellant miserably failed to prove its case as pleaded in written statement; whereas trustworthy evidence of plaintiff was rightly believed--Additional District Judge was perfect to calculate that only amount of Rs. 1,41,690/- towards development charges was due to allottee--Allotment was cancelled with ulterior motive and instant Appeal has been filed just to further drag respondent, who was an allottee of Scheme of appellant and such tendency with customers cannot be assimilated. [Para 3] A

Mr. Aamir Sadiq Butt, Avocate for Appellant.

M/s. Muhammad Amir Javaid, Ch. Shakeel Gondal and *Nawab-ur-Rehman Mian*, Advocates for Respondent.

Date of hearing: 28.11.2018.

JUDGMENT

For a housing phase of Low Cost Orchard, the appellant allotted subject plot to respondent/plaintiff requiring him to pay its price and development charges in installments. After making the entire payment, the possession of the plot was not handed over, compelling the respondent/allottee to approach the learned Civil Court through a declaratory suit, which was contested that installments were to be deposited till 28.11.2015, but default was committed, resultantly the allotment was cancelled. To narrow down the conflict, issues were settled and after collecting as well as appreciating evidence of the parties, although suit was decreed, but directing the plaintiff to deposit certain amount. Both the parties being not satisfied approached the learned Appellate Court through Appeal as well as Cross Objections and ultimately, the Appeal of the present appellant was dismissed, whereas Cross Objections of the rival party/ plaintiff were partly allowed *vide* common judgment dated 13.03.2017, hence this Second Appeal.

2. Arguments heard, record scanned.

3. A careful study of the pleadings was reflective of the fact that only a short dispute to the extent that had the installments been paid within scheduled/time and if not, what was its effect as per terms and conditions of the allotment. Admittedly as per schedule referred in Exh.D-4, some of the installments were paid beyond the given date, but it was a hard fact that those were not only received without any objection, rather the entire payment was made much prior to target date as disclosed in written statement. The appellant is bound by the words uttered in the written statement, which was also silent to the effect that any prior notice before initiation of purported action of cancellation was issued or served upon the plaintiff. Although notices under objection were received in statement of sole DW, but neither its maker nor any document like Booking Receipt, Acknowledgement Due Card or any official of the Post Office was examined to prove that it was dispatched or served upon the addressee. Over and above on behalf of appellant, nothing in black and white was tendered in evidence to prove that for making one or more installment(s) beyond the given date it could be made basis for cancellation of allotment of the plot or that it was ever cancelled. The appellant miserably failed to prove its case as pleaded in the written statement; whereas trustworthy evidence of the plaintiff was rightly believed. The learned Additional District Judge was perfect to calculate that only amount of Rs. 1,41,690/- towards development charges was due to the allottee. The allotment was cancelled with ulterior motive and instant Appeal has been filed just to further drag the respondent, who was an allottee of the Scheme of the appellant and such tendency with the customers cannot be assimilated. Learned counsel for the appellant is unable to point out any illegality or perversity in the impugned judgment, which being result of correct appreciation of material available on suit file is approved and instant Regular Second Appeal being devoid of any merit is dismissed with costs of Rs. 20,000/-.

(Y.A.) Appeal dismissed.

2021 C L C 873
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Qari FAIZ RASOOL----Petitioner
Versus
CHIEF ADMINISTRATOR AUQAF through Secretary and others----Respondents

Writ Petition No.26062 of 2016, heard on 27th January, 2021.

Punjab Waqaf Properties Ordinance (IV of 1979)---

----Ss.7, 10, 21&23---Civil Procedure Code (V of 1908), O.VII, R.11---Bar of jurisdiction---Rejection of plaint---Petitioners/plaintiffs were aggrieved of notification under S.7 of Punjab Waqaf Properties Ordinance, 1979, whereby mosque and shops were taken over by Auqaf Department---Lower Appellate Court rejected the suit under O.VII, R.11, C.P.C.---Validity---Petitioners/plaintiffs lacked cause of action as well as locus standi to maintain their suit before Trial Court, whose jurisdiction was barred to make any indulgence---Suit amounted to pre-empting an action under Punjab Waqaf Properties Ordinance, 1979 and circumventing the law so as to defeat its purpose--- Remedy was provided in Punjab Waqaf Properties Ordinance, 1979 through a petition before District Court---Legislature by promulgation of Ss. 21 & 23 of Punjab Waqaf Properties Ordinance, 1979, excluded jurisdiction of Civil Court in respect of proceedings and intended action---When law desired a thing to be done in a defined way then it was to be performed in that manner alone---When jurisdiction of Civil Court was ousted then no further inquiry was needed, plaint was rightly rejected at its inception---Revision was dismissed, in circumstances.

Chief Administrator Auqaf and another v. Haji Muhammad Sharif and another 1999 SCMR 2795 rel.

Muzaffar Aziz Khan for Petitioner.

Aurangzaib Ch. for Respondents Nos.1 to 3.

Ihsan Ahmed Bhindar for Respondent No.4.

Date of hearing: 27th January, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Inessential detail apart, Chief Administrator Auqaf, Punjab initially issued Notification of 14th May, 1979 under section 7 of The Waqaf Properties Ordinance, 1979, which was further amended through another Notification of 20th May, 1980, whereby mosque and Khanqah Sidiq Ali Shah alias Sirki Shah along with five shops bearing khasra No.9873 were taken over as well. The present petitioner accompanied by proforma respondents Nos.7 to 12 on 13.02.2002 to dispute the said Notifications instituted declaratory suit asserting that the subject shops were not part of khasra No. 9873, rather those fell within the boundaries of adjoining khasra No.9874, therefore, respondents/defendants be permanently restrained from dispossessing them. The Auqaf Department/respondents Nos.1 to 3 made two applications; one under section 10 for staying proceedings of the suit and the other under Order VII, Rule 11 of the Code, 1908 for rejection of the plaint, whereas the petitioner/plaintiffs also tabled petitions for de-sealing of shops and demarcation of boundaries of khasras Nos.9873 and 9874. The learned Civil Court on 22.01.2015 dismissed applications of respondents and those of petitioner/plaintiffs granted. Being aggrieved, the respondents approached learned Revisional Court, which through impugned order dated 04.08.2016 rejected the plaint, thus this petition was made.

2. Arguments heard. Record perused.

3. I have considered the plaint minutely and the prayer clause being relevant is given below:-

'In view of the above submissions, it is most respectfully prayed that the Notification No.SOP-3 (93)/Aquaf/62 dated 20.05.1980 regarding the five shops in dispute may be declared as null and void illegal and inoperative upon the possessary rights of the plaintiffs over the suit property which is situated in khasra No.9874 and not in khasra No.9873. It is further prayed that the defendants be permanently restrained from illegally and forcibly dispossessing the plaintiffs from the suit property including the five shops and the Madrassah Anwar-ul-Quran. Costs of the suit may also be awarded.

Any other relief which this Honourable Court deems necessary and fit may also be granted.'

The perusal thereof left no doubt that vires of Notification dated 20.05.1980 issued under section 7 of the Ordinance were vividly challenged through suit in hand. Moreover, the further act of the respondents initiated in pursuance of Notification was assailed as well through para No.7 of the plaint, which being relevant is reproduced as under:-

'That the Notification No.SOP-3 (93)/Auqaf/62 dated 20.05.1980 is illegal and the act of the defendants of interference of the possession of the plaintiff is also unlawful and without any justification.'

The provisions of the Ordinance are very much clear, whereby not only protection is provided to the action of the Department, rather suit and other legal proceedings except filing of petition under section 11 before the District Court are specifically barred. To this effect, sections 21 and 23 of the Ordinance are reiterated here:-

'21 Bar of jurisdiction. Save as expressly provided in this Ordinance, no Civil or Revenue Court or any other authority, shall have jurisdiction:

a) to question the legality of anything done under this Ordinance by or at the instance of the Chief Administrator; or

b) in respect of any matter which the Chief Administrator is empowered by or under this Ordinance to determine or settle: or

c) to grant an injunction or other order in relation to any proceedings before the Chief Administrator under this Ordinance or anything done or intended to be done by or at the instance of the Chief Administrator under this Ordinance.'

'23 Protection of action taken under this Ordinance.-No suit, prosecution or other legal proceedings shall be instituted against any person for anything which is in good faith done or intended to be done under this Ordinance or the rules made thereunder.'

These provisions left no room that jurisdiction of the Civil Court is specifically barred to deal with a suit wherein legality of anything done or intended to be done in good faith under the command of Ordinance ibid is questioned.

4. The case in hand was heard yesterday as well, when Mr. Muzaffar Aziz Khan, learned counsel for the petitioner finally sought postponement of case till today so that he could produce title document that property of the petitioner/plaintiffs fell in khasra No.9874, but today when he presented original gift deed dated 08.10.1990 (the copy whereof is retained on file) it is found that petitioner was owner in disputed khasra No.9873, which is the subject of Notification under suit. On the other hand, by bringing on record copy of Field Book, it stood strongly proved by respondents No.1 to 3 that khasra No.9874 never vested to any private person, rather it belonged to Provincial Government as well, thus the stance that subject shops fell within the boundaries of said khasra is not plausible. In addition thereto, copy of report dated 18.09.2011 furnished by Tehsildar, Model Town, Lahore is another supportive document to conclude that subject property fell within the

boundaries of khasra No.9873. It stood fully proved that the plaintiffs lacked cause of action as well as locus standi to maintain their suit before the learned Civil Court, whose jurisdiction even otherwise was clearly barred to make any indulgence. In fact the suit amounts to pre-empting an action under the Ordinance, 1979 and circumventing the law so as to defeat its purpose. The Ordinance itself provides remedy through a petition before the District Court, otherwise the legislature by promulgation of afore cited two provisions excluded the jurisdiction of Civil Court in respect of the proceedings and intended action. It is foremost principle of law that when law desires a thing to be done in a defined way then it is to be performed in that manner alone. Once it is established that jurisdiction of the Civil Court is ousted then no further inquiry is needed, rather plaint is liable to be rejected at its inception. See 'Chief Administrator Auqaf and another v. Haji Muhammad Sharif and another' (1999 SCMR 2795). Therefore, the learned Revisional Court while exercising its lawful authority passed well-reasoned order.

5. The learned counsel for the respective parties at fag end of their arguments admitted that some others had already questioned vires of impugned Notification by making petition under section 11 to the concerned District Court, thus opportunity is still available to the petitioner to join the said proceedings by making application under Order I, Rule 10 of the Code ibid, if he has any genuine cause.

6. For the foregoing reasons detailed in paras Nos.3 and 4 ante, this petition has no merit, therefore, is dismissed accordingly. No order as to costs.

MH/F-4/L Revision dismissed.

2021 M L D 833
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
IFTIKHAR AHMAD CHAUDHARY----Petitioner
Versus
MANZOOR AHMAD (DECEASED) through LRs and others----Respondents

Civil Revision No.1536 of 2012, heard on 25th January, 2021.

Specific Relief Act (I of 1877)---

----S.12---Limitation Act (IX of 1908), S.5---Civil Procedure Code (V of 1908), S.35-A---Suit for specific performance of agreement---Condonation of delay---Re-filing of revision---Special costs, imposition of---Principles---Respondent/plaintiff filed suit for specific performance of agreement and during trial Forensic Science Laboratory reported confirming genuineness of signatures of petitioner/defendant on the agreement---Trial Court as well as Lower Appellate Court dismissed suit and appeal concurrently---Incomplete revision was filed against concurrent decrees well in time and to remove objection raised by office of High Court the file was received back but refiled after almost seven years---Validity---Petitioner/defendant filed application under S.5 of Limitation Act, 1908, but without specifically explaining delay of each day in re-filing of revision application---Concurrent findings of lower fora were based on reasoning as per available evidence---High Court in exercise of revisional jurisdiction declined to interfere in concurrent findings of facts---Petitioner/defendant had no merit or evidence at his end but he with ulterior motive continued the litigation, which caused consumption of precious time of Court therefore, special cost was imposed on petitioner/defendant---Revision was dismissed, in circumstances.

Muhammad Umer v. Muhammad Qasim and another 1991 SCMR 1232; Mst. Imtiaz Begum v. Mst. Sultan Jan and others 2008 SCMR 1259; Messrs Rashid & Company v. Punjab Province and another 1995 CLC 1914; Ch. Zulfiqar Ali v. Mian Akhtar Islam and Mian Bashir Ahmed PLD 1967 SC 418; Baqa Muhammad v. Muhammad Nawaz and others PLD 1985 Lah. 476; Lal Khan and others v. Khizar Hayat and others 1994 SCMR 351; Union Insurance Company of Pakistan Ltd. v. Hafiz Muhammad Sadique PLD 1978 SC 279 and Muhammad Ashiq v. Niaz Ahmed PLD 2004 Lah. 95 ref.

Syed Muhammad Kaleem Ahmad Khurshid for Petitioner.

Muhammad Zubair Rafique Warraich and Anwar Ahmad Janjua for Respondents Nos.1-A (i to iii) and 1-J.

Ihsan Ahmed Bhindar for Respondent No.1-B.

Date of hearing: 25th January, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----The petitioner and respondent (since deceased and represented through LRs) were brothers inter se. The former was permanently residing in America, whereas the latter along with his family was living in Pakistan. The respondent had an area 54 Kanals 18 Marlas against his name. The petitioner offered his brother and the family to settle them in America subject to transfer of said area to him. The respondent while relying upon his words vide registered instrument dated 05.12.1984 fulfilled his desire, but petitioner could not manage their immigration, thus the respondent demanded for return of his property. In respond the petitioner on 02.01.1992 collegially executed agreement dated 02.01.1992 (Exh.P1) for alienation of four acres (suit property) in his favour, however, subsequently no instrument to honour the same was executed, compelling the respondent to file suit for its specific performance. The petitioner through his written statement specifically disputed the execution as well as genuineness thereof. During trial, the respondent/plaintiff examined the marginal witnesses (PW1 and PW2), stamp vendor (PW3) as well as scribe (PW4) and himself appeared as PW.5 to prove the due execution of Exh.P1. This quantitative and qualitative evidence was enough to shift the onus toward the executant/petitioner/defendant, but in spite of availing number of chances and consuming years neither he himself appeared in the witness-box nor produced a single witness, forcing the learned Civil Court to take off his such right by invoking penal consequences of Order XVII, Rule 3 of the Code, 1908 on 18.10.2003. It was hard fact that as a last hope during suit proceedings, the petitioner/defendant made application for comparison of his alleged disputed signatures available on the agreement (Exh.P1). As per his hope, the relevant documents were referred to Forensic Science Laboratory, but a hostile report was received from the Expert. The said movement of the petitioner itself further established the genuineness of his signatures, thus after failure on scientific side as well, there left nothing in the defence grafted by the petitioner. Having solid, consistent & un-rebutted evidence on file, the learned Trial Court was left with no other option except to decree the suit vide judgment dated 27.10.2003. For said history there existed no merit in appeal, which was dismissed as well on 13.04.2005, hence, instant petition.

2. Syed Muhammad Kaleem Ahmad Khurshid, ASC on behalf of petitioner argued that an application under Order XVIII of Code ibid was made by his client before the learned Civil Court for recording his statement, but it was not decided, as such, per case law reported as Muhammad Umer v. Muhammad Qasim and another (1991 SCMR 1232) and Mst. Imtiaz Begum v. Mst. Sultan Jan and others (2008 SCMR 1259) suit requires to be remanded is not well founded. No doubt said application,

in original, is available on suit file, but neither there is any mention in interlocutory orders that it was ever filed nor it bore seal as well as signature of the then learned Judicial Officer seized of the lis. It was matter of record as well that neither during trial proceedings, it was either pressed or the indulgence of the said Court invited nor in the RFA preferred against the final decree any specific ground was raised before the learned District Court, thus at this stage no new ground could be agitated. The above cited judgments being distinguished on particular facts cannot be applied in this case. Even otherwise each case, as per settled theory, has to be dealt with independently.

3. Syed Kaleem, while referring another case law reported as Messrs Rashid & Company v. Punjab Province and another (1995 CLC 1914) emphasized that Exh.P1 having been scribed on undervalued stamp paper was required to be impounded, which formality though performed by referring the matter to the Collector concerned, yet its real value was not ascertained, therefore, Exh.P1 could not be read in evidence, whereas the Courts below erred in law while relying upon the same is also fallacious. The interlocutory order dated 08.02.1996, whereby learned Trial Court impounded Exh.P1, was not only challenged by filing Civil Revision, rather through Writ Petition before the learned District as well as this Court respectively, but without any success to that effect. It is well established up till now that once an interim order is assailed through available proper remedy and affirmed, then it cannot be thrashed subsequently even in RFA. See Ch. Zulfiqar Ali v. Mian Akhtar Islam and Mian Bashir Ahmed (PLD 1967 SC 418), Baqa Muhammad v. Muhammad Nawaz and others (PLD 1985 Lahore 476) and Lal Khan and others v. Khizar Hayat and others (1994 SCMR 351). Now its reopening was neither warranted nor permissible. Even then, obvious object of section 35 of Stamp Act, 1899 is not to abrogate the document, rather this provision is aimed to have a check on evasion of revenue. There is no cavil that document even under-value or without impounding once admitted in evidence, neither could be de-exhibited nor ignored or discarded for said lapse. This proposition has already been clinched by this as well as apex Court in the case law reported as Union Insurance Company of Pakistan Ltd. v. Hafiz Muhammad Sadique (PLD 1978 SC 279) and Muhammad Ashiq v. Niaz Ahmed (PLD 2004 Lahore 95). The rational of these judgments is that if a document was admitted in evidence, howsoever erroneously, its admissibility cannot be disputed at any subsequent stage.

4. It is matter of record that although incomplete civil revision against concurrent decrees was initially filed well within time on 15.06.2005 against Diary No.1008 and to remove objection (s) raised by the office of this Court the file was received back on 05.07.2005, but surprisingly it was re-filed after almost seven years on 02.05.2012 against Diary No.43601. No doubt at this juncture C.M.No.2-C of 2012 under section 5 of the Limitation Act, 1908 was also appended, but without specifically explaining delay of each and every day in this behalf. The emphasis of learned counsel for petitioner that his client was living abroad and never intimated

about removal of office objection(s) is not plausible, because the Civil Revision was originally preferred by the petitioner through his Special Attorney as vivid from the power of attorney executed in favour of his learned counsel, therefore, the pretend regarding absence of civil revisioner was no more available.

5. An additional drastic aspect of the case of the petitioner would be that the impugned decrees passed in suit of respondent were brought before the learned Executing Court for its satisfaction, which in due process of law stood already satisfied through attestation of sale deed No.9406 dated 15.12.2005 and sanction of mutation No.2020 dated 27.09.2006. It is again not denied that learned Executing Court after realization of the decrees has also consigned the file of execution petition to the record room and despite of the fact that all these referred documents were brought on record by respondent through C.M.No.1-C of 2020 on 30.06.2020, but till today these proceedings were not assailed, which is enough to assume that petitioner has waived his grouse, thus principle of acquiescence in all four corner is applicable.

6. Mr. Kaleem Khurshid, Advocate for the petitioner having nothing at his end to argue the matter on merits of the case just tried to raise technical ground, which either had already been culminated before the learned Courts below or not agitated at proper time there. The concurrent findings of the learned lower fora being based on reasoning as per available evidence and subject on the law require no interference by this Court while exercising revisional jurisdiction, the scope whereof is limited. The petitioner having no merit or evidence at his end with ulterior motive continued this litigation, which caused consumption of precious time of the Courts as well, therefore, this petition is dismissed with cost of Rs.100,000/- (Rupees one lac only).

MH/I-5/L Revision dismissed.

2021 Y L R 1116
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD IJAZ and 2 others---Petitioners
Versus
AMANAT ALI---Respondent

Civil Revision No. 1035 of 2011, heard on 12th November, 2020.

Punjab Pre-emption Act (IX of 1991)---

----S.13---Suit for possession through pre-emption right---Concurrent findings of facts by two Courts below---Talb-i-Muwathibat (prompt demand)---Proof---Confirmation of sale--- Plaintiff/ respondent claimed his superior right of pre-emption on the plea that he was Shafi Shareek (co-sharer)---Trial Court and Lower Appellate Court concurrently decided suit and appeal in favour of plaintiff / respondent---Contention of defendant / petitioner was that there was delay in making Talb-i-Muwathibat---Validity---Sine qua non for pre-emptor of each case was to pronounce Talb-i-Muwathibat immediately upon receiving information of sale irrespective of the fact that conditions laid down for completion of transaction in question were fulfilled---Such was an inflexible nature of the demand of Talb and did not permit pre-emptor to cause any delay to perform it even if he was not certain that sale had been completed in all respects---Pre-emptor was bound to perform Talb-i-Muwathibat spontaneously regardless of the credibility of information---Sale under pre-emption was already known to plaintiff/ respondent or at least apprised to him on 22-1-2007 through proceedings before revenue authorities---Pronouncement of first demand was delayed for clear nine days while introducing story regarding its performance on 31-1-2007, which was mere concoction---Judgments and decrees passed by two Courts below were example of wrong exercise of jurisdiction and were tainted with misreading and non-reading of evidence besides patent violation of law floating on its surface---High Court in exercise of revisional jurisdiction could not shut its eyes and was always under obligation to rectify the error by interference in such like illegal findings---High Court set aside concurrent findings of two Courts below and suit was dismissed---Revision was allowed, in circumstances.

Muhammad Nazeef Khan v. Gulbat Khan 2012 SCMR 235; Mst. Rooh Afza v. Aurangzeh and others 2015 SCMR 92; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001; Mushtari Khan v. Jehangir Khan 2006 SCMR 1238; Muhammad Nawaz alias Nawaza v. Member Judicial BoR and others 2014 SCMR 914 and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 rel.

Mian Mushtaq Mehdi Akhtar, Sardar Muhammad Asim Javed and Rana M. Ashraf Khan for Petitioners.

Humera Bashir Chaudhry, Sh. Naveed Shahryar, Muhammad Shafique Ahmad and Zubera Bashir Ch. for Respondent.

Date of hearing: 12th November, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The file entails the facts that 52 Kanals 03 Marlas area vested to Noor Muhammad, the real uncle of the respondent/pre-emptor. The former vide mutation No.119 dated 22.01.2007 sold it to present petitioners/vendees in equal shares. The respondent/pre-emptor pirated the said transaction through suit for possession asserting his superior pre-emptive right being Shafi Shareek and due performance of requisite demands. The petitioners/vendees mainly contested the suit on score of talbs, avowing that prior to settlement of transaction under pre-emption, a dispute regarding consolidation of certain land including suit area was in progress before Member, BoR and during its proceedings on 22.01.2007, the petitioners/vendees (after maturing of sale vide mutation No.119) tabled application for their impleadment, copy whereof immediately delivered to the respondent/pre-emptor, thus by that time the transaction of sale under pre-emption came into latter's knowledge, who at the most then and there could pronounce talb-i-muwathibat, if so intended to pre-empt the same, but having been deferred till 31.01.2007, it could not declare to be performed as per law hence suit was liable to be dismissed.

The learned Trial Court facing with divergent pleadings of the parties. materialized issues and while evaluating available evidence decreed the suit. The petitioners/vendees though preferred appeal, but without success being dismissed followed by this civil revision to throw challenge upon concurrent decrees dated 01.07.2009 and 19.03.2011.

2. It is submitted by Messrs Mian Mushtaq Mehdi Akhtar, Sardar Muhammad Asim Javed and Rana M. Ashraf Khan, Advocates, learned counsel for petitioners/vendees that pre-emptor being real nephew of the vendor was his family member and fully aware of sale under pre-emption from the day of its inception. It was next contended that sale matured vide subject mutation was specifically brought into notice of the pre-emptor on 22.01.2007 during court proceedings by

submitting application (Exh.D2), but talb-i-muwathibat was not pronounced promptly and due to said lapse pre-emption decree could not be awarded. It was further submitted that copies of judicial record bear presumption of correctness and despite having not been rebutted, the learned Courts below while completely ignoring these important documents erred in law to decide the issue qua talbs in favour of respondent/pre-emptor, which findings being tainted with misreading/non-reading of evidence as well as suffering from jurisdictional defect cannot be sustained.

In contra, Messrs Humera Bashir Chaudhry, Sh. Naveed Shahryar, M. Shafique Ahmad and Zubera Bashir Ch., Advocates, learned counsel for respondent/pre-emptor argued that neither copy of the mutation was delivered to the pre-emptor nor an inference could be drawn that contents of application for impleadment were read over to the latter so as to allege that on 22.01.2007 the pre-empted sale transaction came into his knowledge; and that qualitative and quantitative evidence was produced to prove the superior right of pre-emption as well as due performance of requisite talbs by the plaintiff and both the Courts below perfectly passed the impugned decrees, which cannot be interfered with while invoking revisional jurisdiction.

3. Arguments considered and available record consulted.

4. Although the petitioners disputed the superior right of the pre-emptor in the written statement, but the latter successfully proved it by bringing on record relevant revenue entries, whereas the petitioners could not rebut those as per their defence so asserted.

There left the contest with regard to fulfilment of requisite demands. The basic onus probandi qua relevant issue in this regard was upon respondent/pre-emptor. Let us have a glance at the contents of plaint and written statement submitted on behalf of the parties to determine the pivotal question. As per para-4 of the plaint, the respondent/pre-emptor took the stance that sale was kept secret, which for the first time came into his knowledge on 31.01.2007 through Shaukat Ali (PW5) in presence of Ehsan Ali (PW4) and in said majlis the declaration of first demand was pronounced. The petitioners/ vendees reprobated the said fact while specifically averring in parallel part of their written statement that on 22.01.2007, application under Order I, Rule 10 of the Code, 1908 was submitted by them before the learned Member, BoR in RoR No.1608-2005, wherein specifically the sale effected through

mutation No.119 was made known to the respondent/pre-emptor, but talb-i-muwathibat was not pronounced promptly, thus its delay for certain days was fatal. The respondent/pre-emptor (PW3), firstly had a chance to rebut said reply of para No.4 through his statement-in-chief, but he totally remained mum to that effect. Even, in his cross-examination, he did not specifically deny the pendency of the lis before BoR, who initially showed his ignorance qua said proceedings, but at subsequent stage admitted that in said lis he as well as his father was being represented by Muhammad Khan Ranjha, Advocate. Anyhow, the petitioners/vendees to prove their stance tendered certified copy of RoR (Exh.D1), which depicted that it was preferred by two brothers Sardara and Muhammad sons of Mirza against father of the pre-emptor as well as Noor Muhammad/vendor. By exhibiting copy of inheritance mutation (Exh.D7), it stood established that father of pre-emptor died during pendency of RoR and thereafter said lis was pursued by the pre-emptor along with other LRs. The copy of application under Order I, Rule 10 of Code ibid (Exh.D2) submitted on 22.01.2007 before the learned Member contained petitioners' stance that they by purchasing the entire holdings of Noor Muhammad through mutation No.119 had stepped into his shoes and sought for their impleadment in the said lis. The next document was copy of interlocutory order dated 22.01.2007 (Exh.D3) passed by learned Member seized of RoR, which being very relevant, in verbatim, is reproduced hereunder:-

The moment, these documents were brought on record, the vendees succeeded to prove that at least on 22.01.2007 the sale under pre- emption was disclosed during open Court proceedings. The delivery of copy of application and its endorsement in interlocutory order was a clear notice to the pre-emptor, thus onus once again shifted towards him to rebut it, but surprisingly neither he nor his counsel, to whom copy of Exh.D2 was handed over, appeared in the witness-box despite that they had the right to adduce evidence in rebuttal. The under discussion documents being part of judicial proceedings attained presumption of regularity and correctness under Article 129(e) of the Qanun-e-Shahadat Order, 1984, which went unrebutted and un-objected. The non-examination of rebuttal evidence compelled the Court to draw hostile inference that had they appeared might have admitted that sale was made known to them on 22.01.2007 by delivering copy of (Exh.D2). Therefore, the defence of the petitioners/ vendees unequivocally proved that at least on 22.01.2007, the pre-emptor was apprised of sale under pre-emption reflected in mutation No.119 and performance of talb-e-muwathibat at subsequent stage on 31.01.2007 was not legally justified. The Courts below were not within its

discretion to ignore the very relevant and important documents duly tendered in evidence by the vendees even without any objection on the part of the pre-emptor.

5. As discussed earlier, the respondent/pre-emptor succeeded to prove his preferential pre-emptive right being Shafi Shareek, which alone was not enough to equip him with the decree prayed for, rather he was under obligation to cross the barrier that prior to institution of suit, both the requisite demands were duly performed. Through catena of judgments, the apex Court already held time and again that the delay in performance of talb-e-muwathibat is always fatal for the pre-emptor, who is obliged to pronounce it the moment transaction came to his knowledge, which, in fact, is called jumping demand. The promptness is the beauty and importance of that very talb. Thus, sine qua non for the pre-emptor of each case to pronounce talb-i-muwathibat immediately upon receiving information of sale irrespective of the fact that conditions laid down for completion of said transaction have been fulfilled. This is because the inflexible nature of the demand of said talb does not permit the pre-emptor to cause any delay to perform it even if he is not certain that sale has been completed in all respects. The law settled by the august Supreme Court so far, binds the pre-emptor to perform talb-i-muwathibat spontaneously regardless of the credibility of the information. See Muhammad Nazeef Khan v. Gulbat Khan (2012 SCMR 235) and Mst. Rooh Afza v. Aurangzeh and others (2015 SCMR 92), but in this case it stood fully proved that sale under pre-emption was already known to the pre-emptor or at least apprised to him on 22.01.2007 through Exhs. D1 to 3, but the pronouncement of first demand was delayed for clear nine days while introducing the story regarding its performance on 31.01.2007, which was mere concoction. Therefore, on the said sole score, the suit of the respondent/pre-emptor bounds to fail.

6. The emphasis of learned counsel for the respondent/pre-emptor that the concurrent findings of the Courts below cannot be disturbed by this Court while exercising revisional jurisdiction provided under section 115 of Code ibid is not tenable as both the judgments and decrees having been found to be result of misreading/non-reading of evidence as well as non-adherence to the law laid down in this behalf by the superior Courts are not sustainable in the eye of law. It is correct that normally this Court does not interfere in the concurrent findings of fact recorded by the Courts below, but here the impugned decrees being classic example of wrong exercise of jurisdiction and clearly tainted with misreading and non-reading of evidence besides patent violation of the law floating on its surface cannot be sustained. On being faced with such situation, 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 Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001) Mushtari Khan v. Jehangir Khan (2006 SCMR 1238), Muhammad Nawaz alias Nawaza v. Member Judicial BoR and others (2014 SCMR 914) and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others (2016 SCMR 24).

7. For the reasons recorded hereinabove, this civil revision is allowed, impugned decrees passed by the learned lower fora are hereby set aside and the suit of respondent/pre-emptor is dismissed leaving the parties to bear their own costs.

MH/M-182/L Revision allowed.

2021 Y L R 1206
[Lahore (Multan Bench)]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD ZAFAR IQBAL---Petitioner
Versus
SADOZAI KHAN and 2 others---Respondents

Civil Revision No. 24-D of 2011, heard on 16th March, 2020.

(a) Punjab Pre-emption Act (IX of 1991)---

----Ss. 13 & 24---Suit for possession through pre-emption---Plaintiff deposited sale price of the property one day beyond statutory period---Failure to plead Acknowledgment-due card for dispatch of notice of Talb---Effect---Petitioner challenged the concurrent dismissal of suit---Suit was dismissed on two counts; firstly, that zar-e-soem was deposited one day beyond the time required by first proviso of S.24 of the Punjab Pre-emption Act, 1991; secondly, the performance of requisite demands was not duly proved---Validity---Starting and ending day of thirty days could not be excluded for making good 1/3rd of the sale price, as such the Trial Court had justifiably concluded that its deposit was one day beyond the statutory period---Study of plaint though reflected that notices were dispatched, yet it nowhere disclosed to have been made through registered post accompanied by Acknowledgement Due Card---Impugned judgments were perfectly rendered by the Courts below---Revision petition was dismissed, in circumstances.

Nabi Ahmed and others v. Muhammad Arshad and others 2008 SCMR 1685 not foll.

Muhammad Tufail v. Mst. Akhtari Begum PLD 2019 Lah. 153; Hasnain Nawaz Khan v. Ghulam Akbar and another PLD 2013 SC 489; Malik Tariq Mehmood and others v. Ghulam Ahmed and others PLD 2017 SC 674; Muhammad Jahangir v. Muhammad Abbas and 2 others 2004 CLC 538; Raja v. Tanvir Riaz and others 2006 CLC 1455; Wali Muhammad through L. Rs. and others v. Ghulam Nabi 2018 MLD 1044 and Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604 ref.

Awal Noor v. District Judge, Karak and 8 others 1992 SCMR 746; Hafiz Muhammad Ramzan v. Muhammad Bakhsh PLD 2012 SC 764 and Basharat Ali Khan v. Muhammad Akbar 2017 SCMR 309 rel.

(b) Punjab Pre-emption Act (IX of 1991)---

----S. 24---Plaintiff to deposit sale price of the property---Scope---Section 24, Punjab Pre-emption Act, 1991, unambiguously and unequivocally confirms that it is mandatory in nature and made obligatory for the Court seized of the suit to require the pre-emptor to deposit zar-e-soem within maximum thirty days of institution of the suit, otherwise, he has to face consequences of its dismissal as required by sub-section (2) ibid.

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

----S.148---Enlargement of time---Scope---Where the time is fixed by the Statute, the Court has no power to extend the same from its outer limit, even while assuming jurisdiction under S.148, C.P.C.

(d) Administration of justice---

----Maxim "A communi observantia non est recedendum: When a thing is to be done in particular manner, it must be done in that very way and not otherwise.

Atta Muhammad Qureshi v. The Settlement Commissioner, Lahore Division, Lahore and 2 others PLD 1971 SC 61 and Raja Hamayun Sarfraz Khan and others v. Noor Muhammad 2007 SCMR 307 ref.

Ch. Ghulam Mohy-ud-Din and Zubair Ahmad Virk for Petitioner.

Mehr Abdul Ghafoor Araien, Atif Mohtshim Khan and M. Shafiq Ahmad for Respondents.

Date of hearing: 16th March, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This Civil Revision has arisen out of the concurrent judgments passed by learned lower fora, whereby suit for possession through pre-emption instituted on behalf of petitioner was dismissed.

2. The admitted facts presented before this Court are that transaction of sale qua 16 kanals reflected in mutation No.2627 dated 17.01.2006 effected in favour of respondents/defendants was pirated by the petitioner through pre-emption suit instituted on 16.05.2006 for the enforcement of superior rights while claiming due performance of requisite talbs. It is pertinent that the suit was not only registered on the aforementioned day of institution, rather the learned Trial Court required the

petitioner/pre-emptor to deposit zar-e-soem, which admittedly made good on 15.06.2006. After receipt and appreciation of evidence, finally learned Civil Court vide judgment dated 04.02.2010 dismissed the suit on two counts; firstly, that zar-e-soem was deposited one day beyond time required by first proviso of section 24 of the Punjab Pre-emption Act, 1991; secondly the performance of requisite demands was not duly proved. Although the petitioner went in appeal, but failed on 16.10.2010, hence this civil revision.

3. Arguments heard and record scanned.

4. During the course of arguments, although Ch. Ghulam Mohy-ud-Din, learned counsel for the petitioner admitted the factual position that suit was filed on 16.05.2016, whereas zar-e-soem deposited on 31st day of the filing of suit, yet he while citing judgment reported as Nabi Ahmed and others v. Muhammad Arshad and others (2008 SCMR 1685) emphasized with great vehemence that required 30 days' time was to be reckoned after the day of institution of suit. In contra, Mehr Abdul Ghafoor Araien, Advocate on behalf of the respondents/ vendees relying upon cases of Muhammad Tufail v. Mst. Akhtari Begum (PLD 2019 Lahore 153), Hasnain Nawaz Khan v. Ghulam Akbar and another (PLD 2013 SC 489) and Malik Tariq Mehmood and others v. Ghulam Ahmed and others (PLD 2017 SC 674) argued that statutory period for depositing zar-e-soem was within thirty days of the filing of pre-emption suit and its day of filing cannot be excluded. Assuredly, time for depositing zar-e-soem has been fixed under section 24 of the Punjab Pre-emption Act, 1991, which reads as follows:-

24. Plaintiff to deposit sale price of the property.---(1) In every suit for pre-emption, the Court shall require the plaintiff to deposit in such Court one-third of the sale price of the property in cash within such period as the Court may fix:

Provided that such period shall not extend beyond thirty days of the filing of the suit:

Provided that if no sale price is mentioned in the sale deed or in the mutation, or the price so mentioned appears to be inflated, the Court shall require deposit of one-third of the probable value of the property.

(2) Where the plaintiff fails to make a deposit under sub-section (1) within the period fixed by the Court, or withdraws the sum so deposited by him, his suit shall be dismissed.

(3) Every sum deposited under subsection (1) shall be available for the discharge of costs.

(4) The probable value fixed under subsection (1) shall not affect the final determination of the price payable by the pre-emptor.

The bare perusal thereof unambiguously and unequivocally confirms that it is mandatory in nature and made obligatory for the Court seized of the suit to require the pre-emptor to deposit zar-e-soem within maximum thirty days of institution of the suit, otherwise, he has to face the consequences of its dismissal as required by subsection (2) ibid. There is no doubt to conclude that where the time is fixed by the Statute, the Court has no power to extend the same from its outer limit, even while assuming jurisdiction under section 148 of the Code, 1908. In Hasnain Nawaz Khan's case (supra), it has already been held by the august Supreme Court that deposit within thirty days is the clear command of law, therefore, irrespective of any omission or lapse on the part of Court in passing specific/formal order in this regard, the pre-emptor has to comply with the requirement of law as there is no excuse for ignorance of law. The said situation is covered by the maxim "a communi observantia non est recedendum" that when a thing is to be done in particular manner, it must be done in that very way and not otherwise. See Atta Muhammad Qureshi v. The Settlement Commissioner, Lahore Division, Lahore and 2 others (PLD 1971 SC 61) and Raja Hamayun Sarfraz Khan and others v. Noor Muhammad (2007 SCMR 307). Reverting to facts of the case, undoubtedly the 30th day from filing of the suit finished on 14.06.2006, which being not a holiday, it was sine qua non for the pre-emptor/petitioner to deposit zar-e-soem uptil that particular day. The starting and ending day of thirty days could not be excluded for making good 1/3rd of the sale price, as such the learned Trial Court justifiably concluded that its deposit on 15.06.2006 was one day beyond the statutory period. No doubt, in Nabi Ahmed's case (supra), the esteemed three members' Bench of the apex Court observed that the words "or, "from" or "after" were interchangeable and held that while applying provisions of the West Pakistan General Clauses Act, 1956 thirty days' time was to be reckoned after the day of institution of the suit, whereas in earlier as well as subsequent citations titling Awal Noor v. District Judge, Karak and 8 others (1992 SCMR 746) and Hafiz Muhammad Ramzan v. Muhammad Bakhsh (PLD 2012 SC 764), the Bench led by parallel number of honourable Judges of the same Court concluded that the Punjab Pre-emption Act, 1991 being special law has not only provided fixed time limit, rather the manner of its computation, as such the provisions of General Clauses Act, being ordinary law

could not be applied. This principle was again repeated in Hasnain Nawaz as well as Malik Tariq's cases (supra) by the apex Court and this Court in judgments reported as Muhammad Jahangir v. Muhammad Abbas and 2 others (2004 CLC 538) and Raja v. Tanvir Riaz and others (2006 CLC 1455), therefore, the view of learned Trial Court in dismissing the suit for said reason was perfect being supplemented by law so far settled by the superior Courts.

5. Moving towards other damaging factors regarding failure of pre-emption suit, the study of plaint though reflected that notices talb-e-ishhad were dispatched, yet nowhere disclosed to have been made through registered post accompanied by Acknowledgement Due Card. Moreover, neither the pre-emptor nor any of the signatories of alleged notices stated in their examination-in-chief that those were sent by adopting process required by the law. It was matter of record that the postman (PW 1) also did not disclose in his statement-in-chief that the registered mail containing notices was covered by said rider. No doubt, the A.D. Cards were brought on record as Exh.P12 to 14, but through statement of counsel recorded for admission of rebuttal evidence, which was not enough to fulfil the mandate of law. Almost identical situation stood already clinched by the august Supreme Court through celebrated judgment reported as Basharat Ali Khan v. Muhammad Akbar (2017 SCMR 309) and omission in the plaint 'to plead that notice sent through registered post along with A.D.' was declared fatal for the pre-emptor, which too followed by this Court in Wali Muhammad through L. Rs. and others v. Ghulam Nabi (2018 MLD 1044). In addition thereto, the onus probandi qua due performance of talbs was upon petitioner/pre-emptor and A.D. Cards were to be brought on record through affirmative evidence when the postman examined, but instead of following the said mode, those were tendered via statement of counsel at the stage of rebuttal evidence, which rightly was not taken into consideration. See Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others (PLD 1973 SC 160) and Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others (PLD 2010 SC 604). As such, the petitioner/pre-emptor deserved failure on said count as well.

6. For the reasons discussed above, this Court feels satisfied that impugned judgments were perfectly rendered by the Courts below as per available evidence and law on the subject, whereas scope of interference therewith in revisional jurisdiction is restricted/narrower, which cannot be invoked until proved that the decrees under challenge were tainted with misreading as well as non-reading of evidence or the learned lower fora committed material irregularity or jurisdictional

defect, but definitely is not the case here, hence this petition being devoid of merit is dismissed. No order as to costs.

SA/M-159/L Petition dismissed.

PLJ 2021 Lahore 523

***Present*: CH. MUHAMMAD MASOOD JAHANGIR, J.**

***Syeda* TAHIRA BEGUM, etc.--Petitioners**

Versus

***Malik* KHALID PERVAIZ, etc.—Respondents**

W.P. No. 40998 of 2017, decided on 25.2.2021.

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

----S. 12--Civil Procedure Code, (V of 1908), S. 12(2) & O.I, R. 8--Constitution of Pakistan, 1973, Art. 199--Suit for specific performance--Application for impleadment in group of defendants--Allowed--E*x-parte* decreed--Application for setting aside ex-parte decree--Dismissed--Revision petition--Concurrent findings--Stance of petitioners--Presumption of correctness--Challenge to--Stance of petitioners that they did not file application for their impleadment was not appealable to a prudent man--There was no fun for Respondent No. 1 to initiate any such move so that his case could be contested by an additional party--It is absolute rule that judicial proceedings bear strong presumption of correctness and cannot be taken away easily for mere bald assertion--Had it been fake, collusive move to be added in suit planted on behalf of Respondent No. 1 petitioners/might have initiated some proceedings against latter or at least against counsel, who represented them, but admittedly such remedy was never availed at any forum--Real drastic aspect of petitioners' case was that they had purchased subject property during pendency of ongoing suit inter se Respondents No. 1 & 2--Third party, who acquires any interest or right in property under litigation, even for value or through an exchange of value or without notice of pendency of lis shall be bound by its result stricto sensu in all respects alike his transferor--It is well established by now that subsequent transferee, therefore, does not acquire any independent legal title, but he has to swim and sink with his transferor--Normally only application u/S. 12(2), which calls for factual inquiry, in appropriate cases, should follow regular trial, but it cannot be applied as a universal principle--Where an application, if on face of it, is found to be frivolous/vexatious or in facts & circumstances of case and Court reaches opinion that filing thereof was with ulterior motive or *mala fide*, then rival party/beneficiary must not be compelled to face another round of litigation, otherwise there will be no end of litigation--Lower fora was quite justified to knock out petitioners on valid reasons--Petitioners' counsel though argued case to best of his ability while availing maximum time, but failed to persuade that either verdicts under attack are *coram non judice/ultra vires* or suffering from jurisdictional defect to call for interference--Petition dismissed. [Pp. 525, 526, 527 & 527] A, B, C, D, E & F

2015 SCMR 1081, PLD 2016 SC 1773, 2006 SCMR 1530, 2020 CLC Note 19, 2008 YLR 119, 2009 SCMR 40.

Rao Tariq Mehmood, Advocate for Petitioners.

Mr. Muhammad Mehmood Ch. & *Azhar Siddique* Advocates for Respondent No. 1

Date of Hearing: 25.2.2021.

JUDGMENT

The unanimous orders dated 07.04.2017 & 23.05.2017 of the two Courts below are the subject of petition in hand, whereby not only application under Section 12(2) of the Code, 1908 for setting aside of decree dated 08.10.2009 of the present petitioners, but also their Revision Petition dismissed.

2. Arguments heard and record scanned with the able assistance of worthy counsel for the parties.

3. The available record suggests that Jewan Abbas, Respondent No. 2 was exclusive owner of the subject area. He on 24.05.2001 was sued by Malik Khalid Pervaiz, Respondent No. 1 through suit for specific performance of contract dated 23.05.2001 asserting that the former had, settled transaction of sale with him, therefore prayed for grant of decree for is enforcement. During its proceedings an application u/o. I rule 8 of the Code ibid on behalf of present petitioners was filed for their impleadment in the group of defendants pleading that they had purchased the suit area *vide* oral sale mutations No. 210 & 230 dated 09.01.2006 as well as 30.06.2006 respectively, therefore, they were added, however, on their part, the suit was not diligently pursued, rather they were proceeded against *ex-parte* and ultimately the suit of Respondent No. 1 decreed on 07.10.2009. The petitioners soon thereafter on 10.11.2009 preferred application u/s. 12(2) before the same Court for setting aside of *ex-parte* decree, which on behalf of Respondent No. 2 or any other contestant(s) was never assailed. In their said application, the stance of the petitioners was that they had never applied for their impleadment in the suit for specific performance of contract, rather on their behalf, forged/fictitious application as well as written statement while practicing impersonation was managed by the plaintiff/ Respondent No. 1 on the suit file, so as to defeat their (petitioners) sale matured in their favour through attestation of afore-noted mutations. The stance of the petitioners was refuted by the decree holder/ Respondent No. 1 *vide* his reply, pleading that the formers by engaging a counsel submitted application for their impleadment, which was allowed and thereafter they joined the trial proceedings through submission of contesting written statement, that due to their non-appearance, they were proceeded against *ex-parte* and after issuance of decree, the

application u/S. 12(2) was filed with false & concocted stance. Having considered the pleadings, the Courts below passed adverse unanimous order duly disclosed, in para 1 ante, therefore, this petition by the bootless petitioners.

3. Arguments heard, record consulted.

4. The stance of the petitioners that they did not file the application for their impleadment was not appealable to a prudent man. There was no fun for Respondent No. 1 to initiate any such move so that his case could be contested by an additional party. It is absolute rule that judicial proceedings bear strong presumption of correctness and cannot be taken away easily for mere bald assertion. Had it been fake, collusive move to be added in the suit planted on behalf of Respondent No. 1 the petitioners/might have initiated some proceedings against the latter or at least against counsel, who represented them, but admittedly such remedy was never availed at any forum.

5. The real drastic aspect of the petitioners' case was that they had purchased the subject property during the pendency of the ongoing suit inter se Respondents No. 1 & 2, so the proposition in hand to that effect, is covered by section 52 of the Transfer of Property Act, 1882, which reads as under:

> ***52. Transfer of property pending suit relating thereto.--****During the pendency in any Court having authority in Pakistan, or established beyond the limits of Pakistan by the Federal Government, of any Suit or proceeding which is not collusive and in which any right to immovable property is directly and Specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*
>
> ***Explanation.--****For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction of discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution there of by any law for the time being in force.*

The ambit & import of the aforesaid provision is to protect/safeguard the parties to the litigation as well as their rights and interest *qua* the immovable property

involved therein against any alienation made by either of the parties during its pendency in favour of a third person, who shall acquire title of the said property subject to the final decision of the litigation. In such circumstances, the third party, who acquires any interest or right in the property under litigation, even for value or through an exchange of value or without notice of the pendency of the lis shall be bound by its result stricto sensu in all respects alike his transferor. It is well established by now that subsequent transferee, therefore, does not acquire any independent legal title, but he has to swim and sink with his transferor. The theory involved herein has already been clinched by the apex Court in its esteemed judgments cited as *Industrial Development Bank of Pakistan through Deputy Chief Manager vs. Saadi Asmatullah and others* (1999 SCMR 2874), *Muhammad Ashraf Butt and others vs. Muhammad Asif Bhatti and others* (PLD 2011 S.C 905), *Mst. Tabassum Shaheen vs. Mst. Uzma Rahat and others* (2012 SCMR_983) & *Syed Hussain Naqvi and others vs. Mst. Begum Zakara Chatha through LRs and others* (2015 SCMR 1081). Relevant portion of the second last judgment, for ready reference, is reproduced as under:

> *"Principle of lis pendens unambiguously prescribes that the rights of the party to the suit, who ultimately succeeds in the matter are not affected in 'any manner whatsoever on account of the alienation, and the transfer of the property shall acquire the title to the property subject to the final outcome of the lis. In view of the rule/doctrine of lis pendens, a transferee of the suit property, even if a bona fide purchaser, without notice of the pendency of suit, shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound. Transferee therefore, does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all intents and purposes and has to swim and sink with his predecessor-in-interest."*

This view has further been approved by the same Court in a recent case reported as *Aasia Jabeen and 3 others vs. Liaqat Ali and others* (PLD 2016 SC1773).

6. The emphasis of Mr. Rao, learned counsel for the petitioners while relying upon judgments reported as *Lahore Development Authority through Director General vs. Arif Manzoor Oureshi and others* (2006 SCMR 1530) & *Hazoor Muhammad vs. Raqia Begum (deceased) through LRs* (2020 CLC Note 19) that assertion so raised by his clients involved factual controversy revolving around elements of fraud, collusiveness or impersonation could only be decided through settlement of issues and requiring evidence of the parties, but the learned Courts below committed material irregularity/patent illegality in defeating them summarily, therefore,

impugned orders are liable to be reversed, is not well-founded. Normally only application u/S. 12(2), which calls for factual inquiry, in appropriate cases, should follow regular trial, but it cannot be applied as a universal principle. Where an application, if on the face of it, is found to be frivolous/vexatious or in the facts & circumstances of the case and the Court reaches the opinion that filing thereof was with ulterior motive or mala fide, then the rival party/beneficiary must not be compelled to face another round of litigation, otherwise there will be no end of litigation. This Court while dealing with similar question in judgment reported as *Mst. Shahida Hakim through General Attorney vs. Tanveer Ahmad Khan through General Attorney and others* (2008 YLR 119) has already held in the following manner:

6. So far as the grievance about non-framing of issues and non-availability of opportunity to produce evidence is concerned, suffice it to observe that there is no ride of absolute nature that in all applications under section 12(2) of the Code of Civil Procedure, 1908 the Court must necessarily frame issues and record evidence. In *Mrs. Amina Bibi through General Attorney v. Nasrullah and others* (2000 SCMR 296) it was observed that while dealing with the allegations, under Section 12(2) C.P.C. it is not incumbent upon the Court that it must, in all circumstances, frame issues, record evidence and follow the procedure prescribed for decision of the suit as held in *Amiran v. Muhammad Ramzan* (1999 SCMR 1334). In the instant case, we have gone through the application under section 12(2), C.P.C., moved by the petitioner and the material available on record. In view of the facts and circumstances of the case and the judicial orders passed up to this Court during the protracted litigation, the application filed by the petitioner u/S. 12(2), C.P.C, was, liable to be dismissed without formulating issues and recording evidence of parties". Similar was the view taken in *Mst. Nasira Khatoon and another v. Mst. Aisha Bibi and 12 others* (2003 SCMR 1050).

Also see *Mst, Shaban Irfan vs. Muhammad Sham Khan and others* (2009 SCMR 40), *Mst. Nasira Khatoon and another vs. Mst. Aisha Bai and 12 others* (2003 SCMR 1050) & *Messrs Dadabhoy Cement Industries Ltd. and 6 others vs. National Development Finance Corporation, Karachi* (FLD 2002 SC 500).

7. In such facts and circumstances, the learned lower fora was quite justified to knock out the petitioners on the valid reasons. The case-law cited by learned counsel for the petitioners being run on distinguishable' features is not applicable here, moreover, it is now well settled that each matter has to be decided keeping in view its peculiar facts and circumstances.

8. The petitioners' learned counsel though argued the case to the best of his ability while availing maximum time, but failed to persuade that either verdicts under attack are *coram non judice/ultra vires* or suffering from jurisdictional defect to call for interference, hence this petition having no substance is **dismissed** with no order as to costs

(Y.A.) Petition dismissed.

PLJ 2021 Lahore (Note) 69

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

KHUDA BAKHSH deceased through L.Rs--Petitioners

Versus

MUHAMMAD SHAFI, etc.--Respondents

C.R. No. 644 of 2010, decided on 12.1.2016.

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

----S. 115--Specific Relief Act, (I of 1877), S. 42--Suit for declaration--Dismissed--Appeal--Dismissed--Inheritance mutation--Concealment of facts--Entitlement for inheritance shares--Non-producing of corroborating witness--Limitation--Scope of--Challenge to--Sole statement of Nazir Ahmad, one of petitioners was got recorded as PW1--No other corroborating witness brought into witness box by petitioners--petitioners produced copy of Register Muhajreen (Ex:P1), which being full of cuttings is not a reliable document, rather highly doubtful and same cannot be relied upon--Original disputed Mutation No. 68 was sanctioned in year 1984 in favour of Shukar Din, his family members and respondents/defendants, which was never assailed by Shukar Din in his life time and instant suit filed by three sons of Shukar Din with elapse of almost 21 years was badly barred by time--Courts below after analyzing salient features of case and appreciating material available on record while assigning eminent reasons have perfectly non-suited petitioners through impugned judgments and decrees--Scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by subordinate Courts in discharge of their judicial functions--Revision petition dismissed.

[Para 4, 5 & 6] A, B, C & D

2007 SCMR 236 and 2011 SCMR 762 *ref.*

Mr. Mohammad Sharif Chauhan, Advocate for Petitioners.

Mr. Shah Nawaz Khan Niazi, Advocate for Respondents.

Date of hearing: 12.1.2016

ORDER

By fling the instant civil revision, the petitioners have challenged the judgments and decrees dated 1.6.2006 and 17.11.2009 passed by the two Courts below, by virtue of which, the suit for declaration as well as appeal filed by the petitioners was dismissed.

2. Arguments heard. Record perused.

3. The main grouse of the petitioners as borne out from the contents of the plaint filed by them is that the suit property was allotted to the family of Shukar Din, their predecessor consisting upon six members, that the respondents got attested

Mutation No. 68 on 28.2.1984 while concealing the said facts and Respondents No. 1 and 2 were only entitled to get their shares form the legacy of their parents to the extent of 7 kanals 6 marlas, while Respondent No. 3/defendant was entitled to get 11 kanals 17 marlas; that subsequently inheritance Mutations No. 130 and 150 were also invalidly sanctioned on the basis of fictitious mutation.

4. To prove their stance, sole statement of Nazir Ahmad, one of the petitioners was got recorded as PW1. No other corroborating witness was brought into the witness box by the petitioners. The petitioners produced copy of Register Muhajreen (Ex:P1), which being full of cuttings is not a reliable document, rather highly doubtful and the same cannot be relied upon. On the other hand, a copy of Register of allotment is also available on page 23 of the file, perusal of which reveals that the family of Shukar Din consisting of six members was allotted land at Sr. No. 344 and Bashir Ahmad son of Shukar Din was independently allotted land at Sr. No. 345, while Mohammad Shafi, brother of Bashir Ahmad was also allotted independent property at Sr. No. 346. The said document has fully negated the stance of the petitioners that the disputed property was solely allotted to the family of Shukar Din. The original disputed Mutation No. 68 was sanctioned in the year 1984 in favour of Shukar Din, his family members and the respondents/defendants, which was never assailed by Shukar Din in his life time and the instant suit filed on 11.6.2005 by the three sons of Shukar Din with the elapse of almost 21 years was badly barred by time.

5. Both the learned Courts below after analyzing the salient features of the case and appreciating the material available on the record while assigning eminent reasons have perfectly non-suited the petitioners through the impugned judgments and decrees.

6. The learned counsel for the petitioner has failed to point out any illegality or jurisdictional defect in the impugned judgments and decrees or that these are reflective of any misreading and non-reading of evidence available on the file. The concurrent findings of fact on face of record have been eminently arrived at by both the learned Courts below. The scope of interference in revisional jurisdiction by this Court is restricted and narrower, which is only meant for correcting errors of facts and law, if are found to have been committed by the subordinate Courts in the discharge of their judicial functions. Safe reliance can be placed on the judgments passed by the august Supreme Court of Pakistan reported as *"Aurangzeb through L.Rs. and others vs. Muhammad Jaffar and another"* (2007 SCMR 236) and *"Bashir Ahmed vs. Ghulam Rasool"* (2011 SCMR 762).

7. Sequel of the above discussion is that the instant revision petition being devoid of any merit and force is dismissed.

(Y.A.) Petition dismissed.

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Before Ch. Muhammad Masood Jahangir, J
HALEEMA SHUJA---Petitioner
Versus
Mst. Syeda MEHMOODA BEGUM (Deceased) through L.R. and others---Respondents

Writ Petition No. 42235 of 2020, heard on 19th May, 2021.

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

----S. 39---Civil Procedure Code (V of 1908), S. 12(2)---Suit for cancellation of inheritance mutation---Bar to further suit---Framing of issues---Recording of evidence---Scope---Original owner of suit property (respondent) filed suit for cancellation of inheritance mutation claiming therein that she was shown to be dead by practicing mis-representation---Civil Court decreed the suit---Respondent subsequently transferred the suit property to the beneficiaries---Petitioner filed application under S.12(2), C.P.C. contending therein that she had purchased the suit property from legal heirs of the respondent---Bank, in whose favour the petitioner had mortgaged the suit property, also filed application under S.12(2), C.P.C.---Petitioner s application was concurrently dismissed by the courts below---Validity---One party claimed that the respondent passed away in the year 1985 or prior thereto and thereby the inheritance mutation along with various registered instruments were not only attested, rather money decree by Banking Court was passed as well, whereas in contra, the other/rival party asserted that the respondent after getting the consent decree from the Civil Court in her favour and transferring the suit property to beneficiaries as well, subsequently departed in the year 2003---Real controversy inter se both set of the parties could not be resolved until and unless the date of death of respondent was determined through proper/due trial---Issue of limitation in the lis was a mixed question of law and fact which could not be determined without conducting the trial---Constitutional petition was allowed, impugned order was set aside and the trial court was directed to decide the application filed by petitioner and the Bank jointly.

Syed Imran Raza Zaidi, Superintending Engineer, Public Health Engineering Circle-I, Gujranwala v. Government of the Punjab through Service, General Administration and Information Department, Punjab Secretariat, Lahore and 2 others 1996 SCMR 645; Lahore Development Authority through Director-General v. Arif Manzoor Qureshi and others 2006 SCMR 1530; Shazia Munawar v. Punjab Public Service Commission through Secretary, Lahore PLD 2010 Lah. 160; Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905; Haji Abdul Sattar and others v. Farooq Inayat and others 2013 SCMR 1493; Muhammad Altaf v. District Judge and 3 others 2016 YLR 1191; Hazoor Muhammad v. Raqia Begum (deceased) through L.Rs. 2020 CLC Note 19;

Muhammad Akram Malik v. Dr. Ghulam Rabbani and others PLD 2006 SC 773; Mrs. Anis Haider and others v. S. Amir Haider and others 2008 SCMR 236 and Lahore Development Authority v. Arif Manzoor Qureshi and others 2006 SCMR 1530 ref.

Majid Ali Naqvi v. Additional District Judge and Ex-officio Settlement and Rehabilitation Commissioner, Tharparkar and another 1970 SCMR 375; Muhammad Sharif v. Chief Administrator, Auqaf and others 1975 SCMR 104; Allah Wasaya and 5 others v. Irshad Ahmad and 4 others 1992 SCMR 2184; Amiran Bibi and others v. Muhammad Ramzan and others 1999 SCMR 1334; Abdullah v. Shaukat 2001 SCMR 60; Dr. A. Basit, Advocate v. Deputy Registrar (Judicial) and others PLD 2001 SC 1028; Tariq Mahmood v. District Returning Officer, District Faisalabad and 3 others 2001 SCMR 1991; Din Muhammad and another v. Subedar Muhammad Zaman 2001 SCMR 1992; Faizum alias Toor v. Nader Khan and others 2006 SCMR 1931; Mst. Shabana Irfan v. Muhammad Shafi Khan and others 2009 SCMR 40; Lahore Development Authority v. Firdous Steel Mills (Pvt.) Ltd. 2010 SCMR 1097; Ghulam Rasool and others v. Akbar Ali and others 2011 SCMR 794; Raja Muhammad Arshad v. Raja Rabnawaz 2015 SCMR 615 and Nasrullah Khan and another v. Mst. Khairunnisa and others 2020 SCMR 2101 distinguished.

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

----S. 12(2)---Practice of fraud---Bar to further suit---Framing of issues---Recording of evidence---Scope---Whenever a controversial question of fact, especially practice of fraud is raised, the proper course for the court will be to frame issues on such question and decide the lis on its merits in the light of evidence to be made available before it.

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

----S. 12(2)---Forgery, misrepresentation or fraud---Bar to further suit---Framing of issues---Recording of evidence---Scope---Where element of forgery, misrepresentation or fraud is involved, the said issue cannot be decided summarily, rather it being mixed question of law and fact can only be adjudicated upon after settling issues and appreciating the evidence to be led by the parties in pros and cons.

Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others 2000 SCMR 346 ref.

(d) Limitation---

----Where an order/judgment was challenged through different appeals or petitions and if anyone out of those was brought within time, while the others were preferred beyond specified period, then all those matters ought to be decided on merit especially when an order in one appeal or petition would apply to the other connected lis/matters, even if brought after the provided limitation.

Mehreen Zaibun Nisa v. Land Commissioner, Multan and others PLD 1975 SC 397; Shazia Munawar v. Punjab Public Service Commission through Secretary, Lahore

PLD 2010 Lah. 160; Muhammad Ashraf and others v. U.B.L. and others 2019 SCMR 1004 and FBR through Chairman, Islamabad and others v. Messrs Wazir Ali and Company and others 2020 SCMR 959 ref.

(e) Constitution of Pakistan---

----Arts. 199 & 4---Civil Procedure Code (V of 1908), S. 115---Right of individuals to be dealt in accordance with law---Scope---Every citizen under Art.4 of the Constitution has an inalienable right to enjoy the equal protection of law and to be treated in accordance therewith, thus, if a Revisional Court has passed an order, which does not qualify the test of Art.4 and suffers from patent error of fact, such as non-reading as well as misreading of the material on record or has committed a grave illegality in applying the correct law, such as the error of misapplication and non-adherence of correct law, thus being an illegality of sheer nature, can always be rectified by the High Court while exercising its constitutional jurisdiction under Art. 199, as no bar/limitation in this behalf on the exercise of constitutional jurisdiction either emanates from the plain reading of the Article or can be read into it.

Haris Azmat, Maryam Hayat and Jawad Ashraf for Petitioner.
Syed Muhammad Kaleem Ahmad Khurshid, Fazal Ilahi Akbar and Ihsan Ullah for Respondents Nos. 4 and 5.
Moiz Tariq for Respondent No.6.
Malik Nadeem-ud-Din, Ahmad Yar and Dawod Ahmad Asif for Respondent No.8.
Date of hearing: 19th May, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The condensed facts to better understand litigation in hand are that valuable suit bungalow originally vested to Mst. Syeda Mehmooda Begum/respondent No.1, who was reported to be dead and thereupon through inheritance mutation No.6556 dated 21.05.1985 the said property was devolved upon respondents Nos.2 and 3. The latters thereafter transferred it to respondent No.8 via sale deed dated 05.04.1989, which was then purchased by present petitioner through registered instrument dated 27.05.1989 and lastly mortgaged by the latter with Allied Bank Limited/respondent No.6 via registered document dated 12.10.1993. The petitioner failed to repay the loan consideration, compelling respondent No.6 to file recovery suit against the former as well as her other family members before the learned Banking Court, which was ex parte decreed on 08.02.2002. In execution proceedings, three objection petitions; one on behalf of petitioner, the other with the name of Syeda Mehmooda Begum/ respondent No.1 and the third on the part of respondents Nos.3 and 4 were tabled before the Banking Court. The crux of last two petitions was that Syeda Mehmooda Begum original allottee/owner had never died, rather by practicing

misrepresentation, she was shown to be dead so as to maneuver inheritance mutation dated 21.05.1985, thus being result of fraud stood already cancelled via judgment of 30.06.2003 by the learned Civil Court while decreeing civil suit allegedly instituted on behalf of Syeda Mehmooda Begum/respondent No.1, who subsequently further transferred suit bungalow to respondents Nos.3 and 4 as well. It was a hard fact that afterwards on being apprised before Executing/Banking Court that Syeda Mehmooda Begum/respondent No.1 had died on 05.12.2003, her application without decision to logical end was simply disposed of, however, the other made by respondents Nos.3 and 4 (alleged transfrrees on the part of respondent No.1) proceeded and though accepted by the learned Banking Court on 24.02.2010, but the horible Division Bench of this Court through judgment dated 24.03.2015 while allowing E.F.A. No.394/2010 dismissed the same, which is now subject of Civil Petition No.833/2015, pending before the august Supreme Court.

2. The other page of the litigation was that during the era of pendency of EFA No.394 before this Court, the present petitioner and respondent No.6 tabled two independent applications under section 12(2) of the Code, 1908 for setting aside of decree dated 30.06.2003 passed in favour of late respondent No.1. Despite that both of these applications were pending determination before the similar Judicial Officer, but he vide order dated 31.10.2019 opted to summarily dismiss the one made on behalf of petitioner and that too solely on the score of limitation, whereas the other tabled by respondent No.6 is still sub judice there. The order dated 31.10.2019 for dismissal of application under section 12(2) of the present petitioner was sustained before the learned Additional District Judge, when her Civil Revision failed as well vide order dated 18.08.2020, thus this petition on the part of present petitioner.

3. It is matter of record that while passing the impugned orders, the learned Courts below also passed some remarks touching upon merits of the application filed under section 12(2) of respondent No.6, who being aggrieved preferred connected Writ Petition No.41571/2020 as well. Both these files have arisen out of the common impugned orders qua alike subject matter, therefore, for all intents and purposes, it is appropriate to decide the same jointly through this single judgment, however for reference, source will be file in hand.

4. Mr. Haris Azmat, ASC worthy counsel for the writ petitioner while relying upon various judgments of the superior Courts reported as Syed Imran Raza Zaidi, Superintending Engineer, Public Health Engineering Circle-I, Gujranwala v. Government of the Punjab through Service, General Administration and Information Department, Punjab Secretariat, Lahore and 2 others (1996 SCMR 645), Lahore Development Authority through Director-General v. Arif Manzoor Qureshi and others (2006 SCMR 1530), Shazia Munawar v. Punjab Public Service Commission through Secretary, Lahore (PLD 2010 Lahore 160), Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905), Haji Abdul Sattar and others v. Farooq Inayat and others (2013 SCMR 1493),

Muhammad Altaf v. District Judge and 3 others (2016 YLR 1191) and Hazoor Muhammad v. Raqia Begum (deceased) through L.Rs. (2020 CLC Note 19) has argued that law favours adjudication of lis on merit, but the learned Civil Court without fetching or consulting the original suit file wherein subject decree was passed pronounced its impugned order in haste, which being against the cannons of justice is not sustainable. Mr. Haris further emphasized with great vehemence that without determination of the basic controversy whether Mst. Syeda Mehmooda Begum/respondent No.l died in 1985 viz prior to attestation of inheritance mutation No.6556 or thereafter on 05.12.2003 i.e. after passing of subject decree dated 30.06.2003, erred in law while summarily dismissing application under section 12(2); that, indeed, real as well as serious factual controversy revolved around elements of forgery, misrepresentation and fraud, which could only be resolved after settling of issues and requiring evidence in pros and cons of the respective parties. The learned counsel for the petitioner further contended that against the same impugned decree, there were two identical applications, one by his client and other on behalf of respondent No.6, therefore, under the law and per propriety, the Judicial Officer seized thereof was bound to culminate both of those jointly, but while deciding solely that of the former and keeping the other pending, no better result was achieved, because fate of the subject decree is still under question before the same forum. Mr. Haris further maintained that Hon'ble Division Bench of this Court vide order dated 24.03.2015 passed in E.F.A. No.394/2010 has already disbelieved the version of respondents Nos.1 to 3, but herein the subordinate Courts passed the impugned orders while ignoring the reasoning returned thereunder. At the fag end of his arguments, learned counsel for the petitioner maintained that point of limitation in such like cases is also a mixed question of law and fact, which could only be decided after due trial, and that when other petition under section 12(2) has not still been decided on the score of limitation, the Courts below were not within its jurisdiction to knock out the petitioner on said point, therefore, impugned orders being coram non judice, ultra vires and suffering from jurisdictional defect are liable to be set aside.

Mr. Moiz Tariq, ASC, worthy counsel for respondent No.6 (the petitioner of connected Writ Petition) has adopted the above noted arguments with the addition that when application under section 12(2) of his client was still pending without its culmination, there was no justification for passing any observations to affect ultimate fate thereof.

On the same lines, Malik Nadeem-ud-Din, ASC appearing on behalf of respondent No.8 has not only endorsed the grounds advocated by his aforenoted two brothers, rather asserted as well that learned Civil Court lacked jurisdiction to entertain or decree the purported suit of respondent No.1.

5. In response, Syed Muhammad Kaleem Ahmad Khurshid, ASC, worthy counsel for the contesting respondents Nos.4 and 5 while relying upon case law cited as

Majid Ali Naqvi v. Additional District Judge and Ex-officio Settlement and Rehabilitation Commissioner, Tharparkar and another (1970 SCMR 375), Muhammad Sharif v. Chief Administrator, Auqaf and others (1975 SCMR 104), Allah Wasaya and 5 others v. Irshad Ahmad and 4 others (1992 SCMR 2184) Amiran Bibi and others v. Muhammad Ramzan and others (1999 SCMR 1334), Abdullah v. Shaukat (2001 SCMR 60), Dr. A. Basit, Advocate v. Deputy Registrar (Judicial) and others (PLD 2001 SC 1028), Tariq Mahmood v. District Returning Officer, District Faisalabad and 3 others (2001 SCMR 1991), Din Muhammad and another v. Subedar Muhammad Zaman (2001 SCMR 1992), Faizum alias Toor v. Nader Khan and others (2006 SCMR 1931), Mst. Shabana Irfan v. Muhammad Shafi Khan and others (2009 SCMR 40), Lahore Development Authority v. Firdous Steel Mills (Pvt.) Ltd. (2010 SCMR 1097), Ghulam Rasool and others v. Akbar Ali and others, (2011 SCMR 794), Raja Muhammad Arshad v. Raja Rabnawaz (2015 SCMR 615) and Nasrullah Khan and another v. Mst. Khairunnisa and others (2020 SCMR 2101) has supported the impugned orders. He further argued that application under section 12(2) was filed by the petitioner after about 10 years of the pronouncement of the subject decree, which on its face value was time-barred; that petitioner at least learnt about the subject decree before the Banking Court, where during the proceedings for its realization in favour of respondent No.6, late Mst. Syeda Mehmooda Begum preferred objection petition, thus even from that point of time, the application for its setting aside was tabled beyond provided time; that question of limitation is not mere technicality, rather sine qua non for the Courts seized of the lis to itself apply the same in appropriate cases, therefore, both the Courts below perfectly rejected badly time barred application. The learned counsel for respondents Nos.4 and 5 further pleaded that authentic record was available on the file to ascertain that respondent No.1 died after grant of consent decree dated 30.06.2003, thus the inheritance mutation dated 21.05.1985 was definitely product of fraud and the entire superstructure raised thereupon was rightly bulldozed. In the end it was emphasized with great vehemence on the part of Mr. Kaleem that concurrent findings recorded by the Courts below cannot be upset while exercising jurisdiction provided under Article 199 of the Constitution of 1973.

6. Arguments heard. Record perused.

7. As per available record, one party (petitioner, respondents Nos.6 and 8) is claiming that respondent No.1 passed away in 1985 or prior thereto and thereby the inheritance mutation along with various registered instruments were not only attested, rather money decree by the Banking Court passed as well, whereas in contra, the other/rival party (respondents Nos.4 and 5) is asserting that respondent No.1 after getting the consent decree from the Civil Court in her favour and transferring the suit bungalow to them as well, subsequently departed in 2003. In such situation, the real controversy inter se both sets of the parties could not be resolved until and unless the date of death of respondent No.1 was determined through proper/ due trial, but unfortunately the said recourse had not been adopted

so far. The argument of Mr. Kaleem, ASC, worthy counsel for respondents Nos.4 and 5 that judicial proceeding conducted by the Civil Court while passing the decree in favour of respondent No.1 attained presumption of truth might have some force, if its veracity/ genuineness was not attacked by filing application(s) under section 12(2). It is yet to be ascertained whether petitioner was duly served or she appeared during said proceedings. So far nothing was brought on record to suggest that petitioner after having knowledge with regard to impugned decree kept quiet and any such stance, if existed, is still unproved. This Court has minutely gone through the grounds (i) to (viii) agitated in application under section 12(2), which definitely require due trial for its adjudication while affording opportunity to the petitioner to prove the same by leading evidence to that effect, whereas respondents Nos.4 and 5/beneficiaries will also have a right to rebut the same by producing relevant witnesses-documents. However, the learned Civil Court without conducting said drill work precipitously defeated the petitioner in spite of that mere lack of proof or its weakness in circumstances of the case does not furnish any justification for coming to conclusion that there was no cause of action and while taking action for rejection of lis, the Court cannot take into consideration pleas raised by the opponent in his defence as at that stage, the same are only contentions in the proceedings unsupported by any evidence on record. There is no second opinion that whenever a controversial question of fact, especially practice of fraud is raised, the proper course for the Court will be to frame issues on such question and decide the lis on its merits in the light of evidence to be made available before it. The contents of applications under section 12(2) filed by petitioner also prima facie disclose cause of action against respondents Nos.4 and 5, which could not be rejected without recording of evidence. See Muhammad Akram Malik v. Dr. Ghulam Rabbani and others (PLD 2006 SC 773), Mrs. Anis Haider and others v. S. Amir Haider and others (2008 SCMR 236) and Lahore Development Authority v. Arif Manzoor Qureshi and others (2006 SCMR 1530). It is hard fact that so far, in due course of proceedings, stance of respondents Nos.4 and 5 to some extent has already been discredited by Hon'ble Division Bench of this Court vide judgment dated 24.03.2015 passed in E.F.A. No.394 of 2010. For ready reference, the relevant extracts out of para 6 of said verdict are reproduced hereunder:-

***The record shows that separate consenting written statements were filed by Mst. Tanveer Bokhari, Zohra Fakhar Bokhari and Mst. Halima shuja. Though the counsel of all the three defendants in the suit was same, whose name is Noor Muhammad Advocate. A consent decree was passed on the basis of consenting written statements as well as making statements by Mst. Tanveer Bokhari and Zohra Bokhari appearing before the court on 17.06.2003 and 18.06.2003. No statement of Mst. Halima Shuja was recorded and the suit was decreed through a short order dated 30.06.2003 having only four lines on the basis of alleged conceding written statements and statements of defendants. It is on the record that through the suit basically the inheritance mutation was challenged and no subsequent sale deeds, transfers or mortgage deeds were specifically challenged in the suit. Neither the

appellant/Bank nor Pasban Co-operative Housing Society were made party to the suit. Though the learned counsel for the the appellant has argued the matter with regard to fraudulent passing of decree in favour of said Mst. Syeda Mehmooda Begum which has been challenged by respondent No.4 whose application under section 12(2) of the C.P.C. is pending and appellant's writ petition is also pending wherein subject matter of the lis is application under section 12(2) of C.P.C. filed by the appellant/Bank, therefore, we refrain ourselves from commenting upon the validity of passing of judgment and decree, as the same is subject matter of applications filed by the appellant as well as respondent No.4, which are pending adjudication. We presume that a decree has been passed in favour of Mst. Syeda Mehmooda Begum the original owner on 08.02.2002 with the consents of parties, where admittedly the mortgage in favour of appellant was not challenged and further the transfer in favour of Pasban Co-operative Housing Society was not challenged neither Pasban Co-operative Housing was made party nor the appellant/Bank, in that eventuality, whether that decree is binding upon the appellant and Pasban Co-operative Housing Society.***"

"***Another question is very important that a simple declaration was sought knowingly that property has been transferred thrice through registered sale deeds etc and has been mortgaged with the appellant/Bank without challenging those transfers, the decree got executed through the court whereby the orders were procured from the court for cancellation of sale deeds etc are also showing fraud on the part of respondent No.1 Mst. Samar Abid. Another factor has been shown that Colonel Saif-ud-Din Qureshi is father and attorney of Mst. Samar Abid, the objector and the alleged death certificate produced in the objection proceedings shows that said Colonel Saif-ud-Din Qureshi received the body of Mst. Syeda Mehmooda Begum from Hospital. This document has been produced by the objector herself to show the date of death which speaks against her also."

Undoubtedly, the said conclusion rendered by the superior forum until and unless holds field was binding upon the subordinate Courts and needed to be honoured while passing the impugned orders. No doubt, the apex Court vide order dated 19.05.2017 has granted leave to respondents Nos.4 and 5 in their C.P. No.833 of 2015, but the core issue to be resolved among others, as discussed hereinabove, is qua determination of tenure/date of death of respondent No.1. It is admitted position as well that via subsequent order dated 29.04.2020, the apex Court has already required the learned Trial Court first to decide fate of the application under section 12(2) made by respondent No.6. Thus when the last Court is also in agreement that basic issue, initially should be decided by the Court of first instance, then remittance of matter in hand to the said forum as well will not cause any harm/prejudice to either of the parties because the veracity or otherwise of the subject decree is yet to be inquired/probed at that level.

8. So far as question of limitation is concerned, in such like cases where element of forgery, misrepresentation or fraud is involved, the said issue cannot be decided summarily, rather it being mixed question of law and fact can only be adjudicated upon after settling issues and appreciating the evidence to be led by the parties in pros and cons. So far per cited part of the judgment passed in EFA, the factum of death of respondent No.1 in 2003 (after the sanction of inheritance mutation) has prima facie been found doubtful and the same itself is sufficient to take the case in hand out of the purview of provided period of limitation. See 'Abdul Rahim and another v. Mrs. Jannatay Bibi and 13 others' (2000 SCMR 346). Till this time, it is the stance of petitioner that documents presented by respondents Nos.4 and 5 qua death of respondent No.1 in 2003 were false, which to some extent was further authenticated by horible Division Bench while allowing EFA against respondents Nos.4 and 5 and such matter is now sub judice before the apex Court. In the given circumstances, indeed, an inquiry was necessary and in absence thereof the real crux of the controversy that when respondent No.1 died would remain in mystery. Thus, this Court is of the view that issue of limitation in the lis in hand involves mixed question of law and fact, which cannot be determined without conducting due trial.

In addition thereto, it is well established by now that where an order/judgment was challenged through different appeals or petitions and if any one out of those was brought within time, while the others were preferred beyond specified period, then all those matters ought to be decided on merit especially when an order in one appeal or petition would apply to the connected/is/matters, even if brought after provided limitation. See Mehreen Zaibun Nisa v. Land Commissioner, Multan and others (PLD 1975 SC 397), Shazia Munawar v. Punjab Public Service Commission through Secretary, Lahore (PLD 2010 Lahore 160), Muhammad Ashraf and others v. U.B.L. and others (2019 SCMR 1004) and FBR through Chairman, Islamabad and others v. Messrs Wazir Ali and Company and others (2020 SCMR 959). The relevant portion of second last judgment is reproduced hereunder:-

Out of the three instant Civil Petitions before us, one Civil Petition bearing No.3032-L of 2016 is barred by limitation and accompanied by an application for condonation of delay i.e. Civil Misc. Application No. 3057 of 2016, while the other two Civil Petitions bearing Nos. 2701-L and 2994-L of 2016 are within time. It is settled law that where an order or judgment is challenged through separate proceedings be it appeals or petitions, some of which are within time, while the others have been filed beyond the period of limitation, all such appeals or petitions ought to be decided on merit especially when an orders in one appeal or petition (within time) would apply to the other appeal or petition, which may be barred by limitation. Consequently, it is appropriate to decide all three Civil Petitions on merits.'

Similarly, in FBR's case (supra) it was held as under:--

'***when a common question of law is decided in one case, another case involving the same point that is time barred is liable to be heard on merits. Consequently, following the said princi-ple, we condone the delay and insofar as the merits are con-cerned, for reasons to be recorded later, we allow this appeal.'

9. Lastly, attending to the plea propounded by the learned counsel for respondents Nos.4 and 5 that the constitutional jurisdiction could not be exercised by this Court for interference in the revisional order of the Addl. District and Sessions Judge. Suffice it to say that on account of the provisions of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, it is an inalienable right of every citizen to enjoy the equal protection of law and to be treated in accordance therewith, thus, if a Revisional Court has passed an order, which does not qualify the test of Article 4 ibid and suffer from a patent error of fact, such as non-reading as well as misreading of the material on the record or has committed a grave illegality in applying the correct law, such as the error of misapplication and non-adherence of correct law, thus being an illegality of a sheer nature can always be rectified by this Court while exercising its constitutional jurisdiction under Article 199, as no bar/limitation in this behalf on the exercise of constitutional jurisdiction either emanates from the plain reading of the Article or can be read into it.

The case law referred to above, cited by learned counsel for respondents Nos.4 and 5, has minutely been gone through, but having been found to be based on distinguishable features with regard to facts and circumstances of instant case is of no help to them.

10. As patent wrong is found in the orders rendered by both the Courts below, which went to the roots of the case and the petition filed by petitioner could not be decided summarily or separately, therefore without commenting upon the other merits of the case, lest it should prejudice case of either side, the Constitutional Petition in hand is allowed and the impugned orders of the Courts below are hereby set aside. Consequently, applications under section 12(2) filed by petitioner along with that of respondent No.6 will deem to be pending before Civil Court, which after settling issues and recording of evidence be decided jointly within next six months positively. In view of such development, the other tagged writ petition filed behalf of respondent No.6 has borne fruit as well, which stands deposed of accordingly. The parties will appear before learned Civil Court on 14.06.2021 for further proceedings.

SA/H-9/L Case remanded.

2021 C L C 1215
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
INAM ELAHI and 2 others----Petitioners
Versus
Mst. SAEEDA BEGUM (DECEASED) through LRs and others----Respondents

C.R. No.2931 of 2000, heard on 11th November, 2020.

(a) Islamic Law---

----Inheritance---Inheritance of immoveable property---Principles---Inheritance mutation was not essential to determine right of succession, rather under law of Shariah, on death of a Muslim, his / her estate automatically devolved upon legal heirs as per their shahrai shares and the law of Shariah / Islamic Law being supreme was not subordinate to any law, policy, rules or judicial pronouncements---Succession of a deceased Muslim was a matter which was concerned about law of Shariah and could not be defeated by any silence on part of party whose interest was involved.

Lal and another v. Muhammad Ibrahim 1993 SCMR 710; Khair Din v. Mst. Salaman and others PLD 2002 SC 677 and Muhammad Saleem Ullah and others v. Additional District Judge, Gujranwala and others PLD 2005 SC 511 rel.

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

----S.12(2)----Challenge to a decree / order / judgment on ground of fraud or misrepresentation---Mutation in respect of immoveable property based on fraud / misrepresentation, validity of---Subsequent sale / exchange of such property---Scope---No benefit could be derived by person acquiring title of immoveable property by practicing fraud, misrepresentation and concealment---Fraud, if established on record, was sufficient to vitiate most solemn proceedings and a court of law shall in no eventuality endorse or perpetuate same---Subsequent sale deed / exchange deed attained some presumption of correctness but same having been founded on superstructure of a fraudulent mutation whereby legal heirs were deprived of shahrai shares could not be maintained and lost its efficacy when such foundation slipped away ---- Fraudulent transaction had no basis / pedestal to stand and whenever such primary alienation was declared null and void, then whole entity built thereupon was bound to collapse.

Baja through L.Rs. and others v. Mst. Bakhan and others 2015 SCMR 1704 rel.

Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others PLD 2015 SC 212 and Mst. Sehat Bibi v. Bahar Khan and others 2018 CLC 299 distinguished.

(c) Punjab Land Revenue Act (XVII of 1967)---

----S.42---Nature of mutation in respect of immoveable property---Scope---Mutation conferred no right or title in an immoveable property but at best was an arrangement made on fiscal side for ensuring realization of land revenue and securing correctness of record for such purpose.

(d) Islamic Law---

----Inheritance---Inheritance of immoveable property---Law of limitation, applicability of---Right of Inheritance could not be defeated by law of limitation.

Khair Din v. Mst. Salaman and others PLD 2002 SC 677 and Mst. Gohar Khanum and others v. Mst. Jamila Jan and others 2014 SCMR 801 rel.

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

----S.115---Revisional jurisdiction of High Court---Concurrent findings of fact---Nature of jurisdiction conferred by S.115, C.P.C---Scope of interference against concurrent findings by courts below, in revision, was narrow and required court to examine whether lower fora failed to exercise jurisdiction so vested or they acted in excess of same illegally or with material regularity based on misreading of evidence brought on record by parties----Power under S.115, C.P.C. was an exceptional and necessary power intended to secure effective exercise of its superintendence as well as visitorial powers of correction unhindered by technicalities , which could not be invoked against conclusion of law or fact based on correct appraisal of evidence on record.

Ashtar Ausaf Ali for Petitioner.

Hamid Ali Mirza and Anwaar Hussain Janjua for Respondent No.1.

Sh. Naveed Shahryar, Sohail Zafar Sipra, Humera Bashir Chaudhry and Sh. Muhammad Ali Naveed for Respondent No.13(b).

Arshad Janahgir Jhojha, Addl. A.G. for Respondent No.14.

Date of hearing: 11th November, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----The file entails the fact that undisputedly 35 Kanals 02 Marlas area vested to Qazi Abdul Wahid, who passed away in 1967 and it solely devolved upon his son Habib Ullah vide inheritance Mutation No.574 dated 07.01.1978 (Exh.P8). The latter through his authorized agent further transferred 24 Kanals as well as 11 Kanals, 02 Marlas out of aforenoted area via Sale Deed and Exchange Deed (Exhs.P2 and 3 respectively) on 15.04.1979 to the present petitioners. The remaining land was also alienated by Habib Ullah to some others, thus he became landless. Be that as it may, around eleven years after the registration of Exhs.P2 and 3, Saeeda Begum and Siddiqa Begum (two sisters) on 07.01.1990 claiming themselves to be daughters of Qazi Abdul Wahid instituted two independent suits asserting that they had been purposely deprived of their shari shares out of the estate left by their late father, who be declared owners in possession of their inheritance right to the extent of 08 Kanals, 17 Marlas each through cancellation of inheritance mutation No.574 of 07.01.1978. The further prayer of the plaintiffs was that subsequent Sale Deed as well as Exchange Deed executed in favour of petitioners and others be also declared inoperative upon their rights. As both the suits stringed with common facts, thus conjunctively tried through settlement of consolidated issues and after evaluating the evidence made available on file were decreed by the learned Trial Court vide single judgment dated 03.02.1999. The petitioners although preferred two independent appeals, but without any success, having been dismissed on 06.03.2000. This as well as connected C.R.No.2932-2000 were arisen out of said common judgments of the learned lower fora, hence appropriate to decide the same jointly through this single judgment. However, for reference, source point will be file in hand.

3. Mr. Ashtar Ausaf Ali, Advocate, learned counsel for the civil revisioners mainly emphasized that the transaction in favour of his clients matured through registered instruments and presumption of regularity as well as correctness was attached thereto; that to rebut it, high quality evidence was required, which was not adduced; that initial onus was upon the plaintiffs to prove their case, who failed to discharge it and in absence of any trustworthy evidence, the Courts below erred in law to cancel the registered Sale Deed and Exchange Instrument. He further contended that the transaction through registered document was notice to public at large and could only be assailed within three years in terms of Article 91 of the Limitation Act, 1908, whereas suit was filed much beyond thereafter, hence sine qua non for the Courts below to consider the question of limitation even if it was not pressed, but omitted to decide it appropriately. He further emphasized that the real culprit of the plaintiffs was their brother and the Courts, at the most, could compensate them through passing of recovery decree proportionate to the value of their shares against the brother. Mr. Ashtar Ausaf Ali in support of his arguments has placed reliance upon judgments reported as Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad

and others (PLD 2015 SC 212) and Mst. Sehat Bibi v. Bahar Khan and others (2018 CLC 299).

In response, M/s. Hamid Ali Mirza, Sh. Naveed Shahryar, Anwaar Hussain Janjua, Sohail Zafar Sipra, Humera Bashir Chaudhry & Sh. Muhammad Ali Naveed, Advocates for the contesting respondents /daughters submitted that their clients/ plaintiffs were deprived of their inheritance right duly recognized by Shariah, which could not be defeated by applying law of limitation. They further argued that stance of the plaintiffs being daughters of Qazi Abdul Wahid was conclusively proved, thus the disputed inheritance mutation was managed through fraud, which could not be perpetuated, even if assailed after a century. They further submitted that evidence of the plaintiffs remained unrebutted as right of the petitioners after closure by the learned Trial Court was never revived despite being assailed upto the last forum of august Supreme Court, therefore, the Courts below perfectly cancelled the inheritance mutation while awarding right of inheritance to the plaintiffs according to their legitimate shares; that the Sale Deed and Exchange Deed executed in favour of petitioners being superstructure of the fraudulent inheritance mutation have to fall down; that the plaintiffs could not be compensated against consideration, who were joint owners in the legacy left by their deceased father, but deprived thereof by practicing fraud, thus revival of their share was the only solution and rightly done so by the Courts below and that concurrent findings of fact cannot be disturbed by this Court while exercising revisional jurisdiction.

4. Arguments heard and record perused.

5. The relationship of the plaintiffs although disputed by the petitioners through their written statement, but it is well settled that mere pleadings cannot be taken as evidence until and unless its maker appears in the witness-box to corroborate the same on oath. In this case, as disclosed by learned counsel for respondents, on 25.01.1995 the right of evidence of the petitioners/defendants was taken away by the learned Court of first instance, which was further maintained all the way upto the apex Court through orders dated 12.02.1996, 13.03.1996 and 25.02.1996 while dismissing Civil Revisions, Writ Petitions and CPLAs respectively. Moreover, to prove their relationship, the plaintiffs brought on record undisputed and unchallenged copy of Sale Deed (Exh.P7), whereby the residential unit left by their late father was jointly sold out by them along with Haib Ullah/brother, which persuasively established their such relationship. There is no cavil that sanction of inheritance mutation is not essential to determine the right of succession, rather under the law of Shariah, on death of a Muslim, his estate automatically devolves among his heirs as per their shari shares. The law of Shariah being supreme, indeed, is not subordinate to any other law, policy, rules as well as judgment pronounced by Court of law. It is, therefore, clear that on the death of said propositus, in accordance with Shariah, the plaintiffs became joint owners of half of his legacy and only remaining part was to be devolved upon their brother Habib Ullah. The inheritance mutation in dispute could only be attested as per shari shares of all the legal heirs, but it was sanctioned solely in favour of son while depriving the daughters and such mutation would not ipso facto create title of the entire estate in

his favour alone, who played foul in maneuvering its further transfer to the petitioners and others. Undoubtedly, no benefit can be derived by a person acquiring title by practicing fraud, misrepresentation and concealment. It is again settled proposition of law that fraud, if established on record, is sufficient to vitiate most solemn proceedings and Court of law shall, in no eventuality endorse and perpetuate the same. See Lal and another v. Muhammad Ibrahim (1993 SCMR 710) and Khair Din v. Mst. Salaman and others (PLD 2002 SC 677).

6. The argument of learned counsel for the petitioners that plaintiffs were fully aware of attestation of impugned inheritance mutation as well as subsequent transactions, thus being estopped by their such silence/conduct, the suit bound to fail, is not well-founded. The succession of a deceased Muslim is a matter, which concerns about law of Sharia and cannot be defeated by any silence. This view finds support from the judgment of apex Court reported as Muhammad Saleem Ullah and others v. Additional District Judge, Gujranwala and others (PLD 2005 SC 511).

7. The next contention of Mr. Ashtar, that suit being barred by law of limitation was liable to be dismissed, is fallacious. The moment father of the plaintiffs departed, they along with their brother automatically became co-sharers in the legacy left by him. The law is well established by now that even exclusive occupation of one co-heir is considered to be constructive possession of the joint property on behalf of all the heirs and simply because the inheritance mutation was fraudulently sanctioned twelve years prior to filing of suit could not be attached due sanctity. The mutation confers no right or title in the immovable property, but at best is arrangement made on the fiscal side for ensuring realization of land revenue and securing the correctness of revenue record for that very purpose. It is well established by now that right of inheritance cannot be defeated by law of limitation. In alike proposition where brothers deprived sisters of their due shares, the apex Court decreed latter's suits while ignoring law of limitation. See Khair Din v. Mst. Salaman and others (PLD 2002 SC 677) and Mst. Gohar Khanum and others v. Mst. Jamila Jan and others (2014 SCMR 801).

8. No doubt, that subsequent Sale Deed and Exchange Deed being registered one attained some presumption of correctness, but having been found superstructure of a fraudulent mutation, whereby the legal heirs were deprived of their shari shares, cannot be maintained and lost its efficacy when its foundation slipped away. The law has been expounded on the subject by the august Supreme Court in the recent judgment reported as Baja through L.Rs. and others v. Mst. Bakhan and others (2015 SCMR 1704). For ready reference, the relevant text is referred as under:-

Since the appellants have failed to prove the validity of the gift allegedly made by respondent No.1 in favour of respondents No.2 to 4, we are inclined to hold that the consequent entry in the revenue record had been managed fraudulently and thus it is void. It is a settled principle of law that any superstructure built on the basis of a

fraudulent transaction must collapse on failure of such transaction. Therefore, the contention of the appellants that they are bona fide purchasers of the joint holding, including the 9-Kanals, 1-marla and owned by respondent No.1, hence, protected under section 41 of the Transfer of Property Act, 1882, does not carry any weight.

In the wake of above discussion, it goes without saying that a fraudulent transaction has no basis/pedestal to stand and whenever such primary alienation is declared null and void, then the whole series as an entity built thereupon is bound to collapse.

9. The case law cited by learned counsel for the petitioners has been considered minutely, which runs on different footing as in Dr. Muhammad Javaid Shafi's case (supra), no question of inheritance was involved, whereas in the other case of Mst. Sehat Bibi (supra), the lady herself omitted to add the subsequent vendees at the time of institution of suit and her request for their impleadment made at later stage was also turned down by the Courts, as such no effective decree could be passed against them being hit by the principle of natural justice as well as maxim audi alteram partem. However, in the case in hand, the petitioners/subsequent transferees were added in the lis from inception of litigation, who by filing written defence specifically pleaded their bona fide purchase/exchange, but could not lead an iota of evidence to prove that the suit area was transferred to them in good faith while taking due care to ascertain that their transferor solely competent to deal therewith, thus no benefit of relevant section 41 of the Transfer of Property Act, 1882 was available to the petitioners. As such, both the Courts below committed nothing wrong in decreeing the suit against them as well.

10. The Courts below while evaluating the unrebutted evidence applying correct law perfectly passed the impugned decrees. The scope of interference against concurrent findings in revision is narrow and requires this Court to examine whether learned lower fora failed to exercise jurisdiction so vested or they acted in excess of the same illegally or with material irregularity besides to misread the evidence brought on record by the parties. The provision of section 115 of Code, 1908 empowering this Court revisional jurisdiction also confers an exceptional and necessary power intended to secure effective exercise of its superintendence as well as visitorial powers of correction unhindered by technicalities, which cannot be invoked against conclusion of law or fact based on the correct appraisal of evidence available on record. The learned counsel for the petitioners is unable to point out any misreading or non-reading of evidence as well as material irregularity or patent illegality and jurisdictional error on the part of Courts below while passing the concurrent decrees. Thus nothing wrong is found to be interfered with and both civil revisions having no merit and substance are dismissed with cost throughout.

KMZ/I-20/L Revision dismissed.

2021 C L C 1269
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Mst. NASIM BEGUM and others----Petitioners
Versus
MUHAMMAD NAWAZ and others----Respondents

Civil Revision No.13 of 2004, heard on 20th October, 2020.

(a) Islamic Law---

----Sect---Presumption---Majority of Muslims in South Asia is Sunni by sect, therefore, primary presumption about a person tilts that he is follower of Sunni faith---Such presumption is rebuttable.

Mulla's Muhammadan Law; Mst. Ghulam Ayesha alias Ilyas Begum and another v. Sardar Sher Khan (deceased) represented by LRs and others PLJ 2006 SC 1476; Muhammad Bashir and others v. Mst. Latifa Bibi through LRs' 2010 SCMR 1915 and Mst. Chanani Begum (deceased) through LRs v. Mst. Qamar Sultan 2020 SCMR 254 rel.

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

----Art.72---Document, proof of---No objection---Effect---Document having been produced and tendered without objection cannot be challenged subsequently, rather its admission in evidence also dispenses with requirement of its formal proof.

Jai Bhagwan v. Gutto and others AIR 1934 Oudh 167; Mst. Anwari Jan v. Baldua and another AIR 1936 Allah. 218; Gopal Das v. Shri Thakurji AIR 1943 PC 83 and Abdullah and others v. Abdul Karim and others PLD 1968 SC 140 rel.

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

-----Ss.30-A(2) & 31-A(1)(a)---Colony land--- Law of succession---Applicability---Sect, proof of---Plaintiffs / petitioners sought tenancy rights of land allotted under Mule Breeding Scheme on the plea that their predecessor-in-interest was from Shia sect---Both the Courts below concurrently declared predecessor-in-interest of plaintiffs / petitioners as Shia but Lower Appellate Court declined tenancy rights---Validity---Documentary evidence was to exclude oral one---Plaintiffs / petitioners brought on record some receipts to substantiate that predecessor-in-interest of plaintiffs / petitioners was Ahl-e-Tasheeh and was in habit of depositing donation to Imam Bargah such was not the conclusive proof---Plaintiffs / petitioners also produced death entries and statements of witnesses examined on behalf of parties

whereby it was concluded that funeral prayer of their predecessor-in-interest was also offered as per Shia sect---Such were sufficient proofs that plaintiffs / petitioners successfully rebutted presumption so attached and by not questioning death entries, which were part of public document had attained presumption of correctness, stood admitted by respondents / defendants---Predecessor-in-interest of plaintiffs / petitioners, in her lifetime, also instituted suit claiming that her husband was Shia by faith and to that effect although she did not succeed yet at least to her extent, inference was there that she was follower of Shia sect---High Court in exercise of revisional jurisdiction confirmed concurrent findings of lower fora on issue regarding predecessor-in-interest of plaintiffs / petitioners was disciple of Shia---Nothing was contained in S.30-A(2) of Colonization of Government Lands (Punjab) Act, 1912, to alter law of succession applicable to any female tenant in respect of Personal Rights in land acquired by her---Lower Appellate Court failed to take into notice distinction between Ss.30-A & 31-A(1)(a) of Colonization of Government Lands (Punjab) Act, 1912---High Court set aside such findings of Lower Appellate Court and decreed the suit in favour of plaintiffs/petitioners--- Revision was allowed accordingly.

Abdullah and others v. Abdul Karim and others PLD 1968 SC 140 and Nizam Din and others v. Amir and others 1989 SCMR 1958 rel.

Arshad Malik Awan and Saima Hanif for Petitioners.

Raja Khurram Shehzad, Mian Asif Hayat and Nadia Iffat for Respondents Nos.1 to 5 and (in Civil Revisions No.131 of 2004).

Ihsan Ahmad Bhindar and Akhtar Masood Khan for Respondents Nos.9 to 13.

Malik Shakeel Ahmed Khan for Respondent No.14.

Akhtar Masood Khan and Rai Muhammad Panah Bhatti for Petitioners (in Civil Revisions Nos.1742 and 1743 of 2004).

Date of hearing: 20th October, 2020.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Vide this single judgment, this Court proposes to decide instant file as well as connected Civil Revisions Nos. 131, 1742 and 1743 of 2004 arising out of common judgments of learned lower fora involving identical questions of fact/law, however, for reference, the source point will be instant file.

2. The facts have already been detailed in the impugned judgment of the learned District Judge, however, to streamline those, briefly, there were two properties; the one measuring 213 Kanals, 10 Marlas falling in the revenue estate known as Daiwal (presently District Khushab) and the second area measuring 430 kanals 15 marlas in Chak No.29/GB, Tehsil and District Sargodha. The first property was ancestral, which lastly and exclusively devolved upon Ali Muhammad forefather of the parties, whereas the second one being State land also allotted to him under Mule Breeding Scheme. He passed away about century ago and ownership of the ancestral property solely devolved upon his son Sahib Khan, who also inherited tenancy rights of the State land. It was admitted fact that Mst. Ghulam Zainab was sole daughter of Sahib Khan out of his wedlock with Mst. Sardaran. The owner/allottee Sahib Khan died on 19.01.1934, which caused genesis of litigation. The widow, Mst. Sardaran as well as daughter Mst. Ghulam Zainab jointly instituted suit qua ancestral property of District Khushab against collateral of Sahib Khan asserting that the latter was follower of Shia sect and they being widow as well as daughter were solely entitled to inherit his whole estate. This suit after full-fledged trial lastly dismissed on 14.10.1965 (Exh.D-5) and with regard to that property stood final among its contestants.

3. As far as, the second property is concerned, admittedly it was not only re-allotted to Mst. Sardaran, widow of Sahib Khan, rather its proprietary rights conferred solely upon her as well, thus she became its exclusive owner in January, 1961 through attestation of conveyance deed (Exh.P-16). Mst. Sardaran subsequently passed away on 22.10.1978 (Exh.P-15) and survived by sole daughter Mst. Ghulam Zainab, (predecessor-in-interest of the present civil revisioners), who in her lifetime, instituted declaratory Suit No.1076 of 1978 on 28.11.1978 and claimed devolution of the entire estate being sole legal heir while asserting that her parents; Sahib Khan and Mst. Sardaran were followers of Shia sect. Out of the defendants, Sardara, who was not only the first cousin of Sahib Khan, but also the husband of his sister defended the suit; pleading that parents of Mst. Ghulam Zainab, plaintiff were Sunni by faith, whose proper and should be devolved in accordance therewith.

4. As a matter of record, after the death of Sardara, his son Ghulam Haider (predecessor of respondents Nos. 1 to 5) instituted rival suit against Mst. Ghulam Zainab on same lines and pleas of his father Sardara already agitated by him in the written statement. Whereas, third suit was filed by Ghulam Habib (ascendant of respondents Nos.9 to 13), real brother of Mst. Sardaran wife of Sahib Khan, seeking declaration to the effect that she was Sunni, as such claimed co-ownership along with his niece/plaintiff. Admittedly, at one stage, this suit was withdrawn, however subsequently respondents Nos.9 to 13 instituted fresh one.

Having faced with divergent pleadings of three suits, ultimately, the Trial Court materialized issues as under:-

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

2. Whether the suit is barred by the principle of res-judicata? OPD.

3. Whether Sahib Khan deceased was Shia, if so, its eject? OPP.

4. Whether Mst. Sahib Khatoon was alive at the time of death of Sahib Khan deceased? OPD-2.

5. Whether Sahib Khatoon was sister of Sahib Than deceased? OPD-2.

6. Whether Ghulam Haider defendant No.2 is son of Mst. Sahib Khan? OPD-2.

6-A. Whether the property has been incorrectly described in the plaint, if so, what is the correct description? OPD.

6-B. Whether the plaintiff is entitled to special costs? OPP.

6-C. Whether the suit has been incorrectly valued for the purposes of court fee and jurisdiction? OPP.

6-D. What is the effect of decree dated 14.10.2965? OPD-1 and 2.

6-E. Whether Mst. Sardaran deceased was Shia, if so its effect? OPP.

After evaluating the evidence so led by the respective parties in pros and cons, the suit of Mst. Ghulam Zainab (predecessor of petitioners) decreed and that of Ghulam Haider as well as Ghulam Habib dismissed through independent judgments of 24.09.1984, but all the three suits remanded by the learned District Judge on 24.03.1985 to the learned Civil Court for fresh decision after consolidation. In post remand proceedings, although decision was again rendered partially in favour of Mst. Ghulam Zainab, but for technical reason it did not sustain and the learned Additional District Judge once again remanded the lis vide judgment dated 10.10.1987. In next round, the learned Civil Court through judgment dated 12.03.2001 returned its findings only on issue No.6-E in favour of Mst. Ghulam Zainab, whereas rest of the issues were not answered, compelling learned Appellate Court below to remit back the suit for another time on 27.03.2002, but this time, it having been checked by this Court through Civil Revisions Nos.1243 and 1261 of 2002 on 18.12.2003, the appeals were sent back to the learned District Judge to himself decide the same on the basis of evidence already available on lis file. In compliance thereof, the learned Appellate Court allowed the appeal of Muhammad Nawaz etc. (respondents Nos.1 to 5), whereas two appeals of Noor Hussain and others (respondents Nos.9 to 13) were dismissed. Through the same decision, the

cross-objections of Mst. Ghulam Zainab/original plaintiff were also rejected while deciding issue No.6-E in terms that Mst. Sardaran was Shia by faith and her inheritance would open as per Shia law of inheritance. This part of the said impugned judgment has been challenged by respondents Nos.9 to 13 vide connected Civil Revisions Nos.1742 and 1743 of 2004.

Through second part of the impugned judgment, the learned District Judge concluded that suit land was not wholly titled by Mst. Sardaran, but she was limited owner and reverted it to legal representatives of last male owner (Sahib Khan). These findings being offended to the petitioners (the descendants of original plaintiff Mst. Ghulam Zainab) have been challenged through petition in hand. The next Civil Revision No.131 of 2004 has been filed by respondents Nos.1 to 5 to seek inheritance being successors-in-interest of Mst. Fazlan and Sahib Khan. This shows that none of the parties was satisfied with the impugned decision and although it was easy to remand these matters for such count when some out of them were also willing thereto, but this Court keeping in view agony of litigation being faced by the parties for the last four decades opted to decide these petitions on merit.

5. Arguments heard.

6. As discussed in detail, there are two aspects of the litigation;

the first, whether Mst. Sardaran was Shia or Sunni by faith and second, whether suit property exclusively vested to her or being limited owner it was to be reverted to the last deceased male owner. In answer to first query although each time in every cycle before the learned Courts below, it was repeatedly concluded that Mst. Sardaran was Shia by sect, but since it is a matter of inheritance, the Court felt it appropriate to reconsider the entire record with the able assistance of learned counsel for the parties.

7. It is open and shut that there is not any hard and fast rule/principle of universal application to test the faith of any person, who had already passed away. To determine this intricated issue, the Court has to probe the surrounding circumstances, the life style of the departed soul, the faith of his/her nearer. The opinion of the contestants, who are in fight to get the legacy of the deceased in one way or the other, definitely is not enough to conclusively determine the sect of a person, which, of course, was his personal belief. In such circumstances, it is always difficult to determine either one was Shia or Sunni. There is no cavil that as per section 28 of Mulla's Muhammadan Law, in this part of the world, majority of the Muslims is Sunni by sect, therefore, primary presumption qua a person tilts that he is follower of Sunni faith, but it definitely is rebuttable presumption. See 'Mst. Ghulam Ayesha alias Ilyas Begum and another v. Sardar Sher Khan (deceased)

represented by LRs and others' (PLJ 2006 SC 1476), 'Muhammad Bashir and others v. Mst. Latifa Bibi through LRs' (2010 SCMR 1915) and 'Mst. Chanani Begum (deceased) through LRs v. Mst. Qamar Sultan' (2020 SCMR 254). In the latter judgment, para No.7 to this effect being relevant is reproduced hereunder:-

'As to submission of Mr. Paracha ASC regarding initial presumption of once faith as being 'sunni', no doubt that in Indo Pak Sub continent majority of Muslims are Sunni by faith, therefore, there is initial presumption that the parties to the proceedings are Sunni however, such initial presumption is rebuttable and for this reason this Court in the case of Muhammad Bashir (supra) held that no principle of universal application is available to determine the faith of a person which should be determined keeping in view the surrounding circumstances, the way of life, the parental faith and faith of other kith and kin. Consequently once the faith of person is challenged the question of the initial presumption loses its sanctity and is to inferred from the facts creating presumption or the surrounding circumstances one way or the other.'

In support of her stance on behalf of Mst. Ghulam Zainab, the original plaintiff, nine witnesses (PWs 1 to 9) were produced, who consistently stated that Mst. Sardaran was the follower of Shia sect and some receipts were also brought on record to prove that in performance of her such affairs, she was regularly paying subscription/donation to the Imam Bargah. They also tendered in documentary evidence copies of Death Entries (Exh.P-14) of Ghulam Habib, (the rival contestant of the plaintiff) and Exh.P15 that of late Mst. Sardaran to prove that they were disciple of Shia sect. In contra, to substantiate Sunni sect of the deceased lady, only oral evidence was produced. Although, the copies of Death Entries of Sahib Khatoon, Mst. Fazlan and Ghulam Haider (Exhs.D-2 to 4) were also exhibited, but with regard to sect of said deceased nothing was mentioned therein, as such not enough to rebut the entries of Death Certificates tendered on behalf of the plaintiff, wherein the deceased were specifically mentioned as followers of Shia faith. A close scrutiny of Exhs.P-14 and 15 revealed that those were promptly recorded at the move of Chowkidar of the village. Out of these documents, the Death Certificate (Exh.P-15) relating to Mst. Sardaran, whose legacy disputed, was of much importance, which was never challenged prior to institution of suits or through contents thereof, even when it was brought on record and that being part of public record within the meaning of section 74 of the Evidence Act, 1872 (Article 85 of the Qanun-e-Shahadat Order, 1984), was admissible in evidence. See Jai Bhagwan v. Gutto and others (AIR 1934 Oudh 167) and Mst. Anwari Jan v. Baldua and another (AIR 1936 Allahabad 218). It was again a hard fact that at the time of exhibition of this important document, no objection was raised by the adversary. It is well established by now that a document having been produced and tendered without objection cannot be challenged subsequently, rather its admission in evidence also dispensed with the requirement of its formal proof. It was observed by the Privy Council in Gopal Das v. Shri Thakurji (AIR 1943 PC 83) that:-

"where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial."

These observations were further followed in Abdullah and others v. Abdul Karim and others (PLD 1968 SC 140). The veracity of Exh.P-15 also cannot be doubted because it was duly recorded within four days of the departure of Mst. Sardaran on the report made by Raja Chowkidar, who was an independent person and his action being impartial cannot be simply ruled out. The sufficient documentary proof was brought on record by Mst. Ghulam Zainab, whereas nothing in rebuttal adduced. It is well established law that documentary evidence excludes the oral one. No doubt some receipts were also brought on record to substantiate that Mst. Sardaran being Ahl-e-Tasheeh" was in the habit of depositing donation to the Imam Bargah, but did not feel it to be conclusive proof. However, the aforenoted copies of death entries and the statements of witnesses examined on behalf of both the parties, whereby it was concluded that funeral prayer of Mst. Sardaran was also offered as per Shia sect, were sufficient proof that civil revisioners of this petition successfully rebutted presumption so attached and by not questioning the death entries, which being part of public documents attained presumption of correctness, stood admitted by the petitioners of other civil revisions. The additional aspect would be that in her life, Mst. Sardaran also instituted suit claiming that her husband Sahib Khan was Shia by faith and to this effect although she did not succeed, but at least to her extent, inference was there that she was follower of the said sect. Consequently, the concurrent findings of lower fora on issue No.6-E for declaring that Mst. Sardaran was disciple of Shia, are hereby confirmed.

8. As far as, the second question, whether Mst. Sardaran was exclusive owner of area devolved upon her being limited owner is concerned, although there was no specific issue, yet the learned District Judge through the impugned judgment declared her to be limited owner and in this regard, tagged Civil Revision No.131 of 2004 is also in field, as such record consulted in depth. The learned District Judge without referring any evidence might have presumed it in the light of arguments of the learned counsel for the parties. As per Conveyance Deed (Exh.P-16), the title was conferred upon Mst. Sardaran, who having paid the price secured PRs and became its absolute owner. See Ibrahim v. Mst. Rajji and others (PLD 1956 (W.P.) Lahore 609). The learned District Judge, thus, failed to appreciate that thereafter it was not a case of devolution to the female from a last male holder under sub-para (a) of subsection (1) of Section 31-A of the Colonization of Government Lands (Punjab) Act, 1912 nor the possession covered by sub-clause (b) thereof, rather her case was covered by subsection (2) of section 30-A of the said Act, which is reproduced as under:-

(2) Nothing herein contained shall be construed to alter the law of succession applicable to any female tenant, in respect of proprietary rights in land acquired by her, if the tenancy in such land was acquired by or accrued to her in circumstances other than those specified in subsection (1).

The bare perusal impacts that nothing contained in the said section shall be construed to alter the law of succession applicable to any female tenant, in respect of PRs in land acquired by her. See Nizam Din and others v. Amir and others (1989 SCMR 1958). Thus, learned District Judge failed to take into notice the distinction between section 30-A and the provisions reproduced hereinabove, as such his findings to this effect being not sustainable are reversed.

9. For the above reasons, all the connected Civil Revisions are dismissed, whereas the one in hand is allowed, impugned judgment is partly set aside and suit decreed while holding that Mst. Sardaran mother of Mst. Ghulam Zainab (the original plaintiff) was follower of Shia sect and the latter was entitled to inherit the entire land exclusively vested/devolved to her mother. No order as to costs.,

MH/N-34/L Order accordingly.

PLJ 2021 Lahore 870
[Rawalpindi Bench Rawalpindi]

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

Raja **MUHAMMAD YOUSAF (deceased) through LRs.--Petitioners**

Versus

MUHAMMAD ASHRAF, etc.--Respondents

C.R. No. 31-D of 2013, heard on 28.6.2021.

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

----S. 42--Sale agreement--Possession was delivered--Ostensible allottee--Benami transaction--Concurrent findings--Plaintiff was not close relative of transfree--Non-producing of documentary evidence by plaintiff regarding sale consideration--Omission of plaintiff to prove motive--Non-establishment of ingredient motive for extensible sale--Challenge to--Neither suit was filed in lifetime of (original transferee) nor any of his descendants was added in suit--Plaintiff was, not a close relative of transferee, rather he was his remote distant kinder--Plaintiff did not adduce any documentary evidence to demonstrate that sale consideration was paid by him, whose version that he used to transmit amount from Kuwait also could not be established from record as he did not bring on record any proof in this behalf--Witnesses examined by plaintiff also failed to speak respecting this most important feature of benami transaction, as such plaintiff failed to prove payment of sale consideration--Better course for respondents was to summon any of persons before whom sale consideration paid, but it was not examined--Plaintiff omitted to plead and prove motive that why subject plot was ostensibly purchased in name of transfree rather only mentioned therein that for love & affection it was done so--Counsel for petitioners has failed to point out any misreading or non-reading of material evidence available on record to render impugned judgments and decrees passed by two Courts below to be illegal, unlawful and without jurisdiction for calling interference by High Court in exercise of revisional jurisdiction--Revision petition dismissed. [Pp. 872, 873, 875] A, B, C, D & E

PLD 2010 SC 569, 1986 SCMR 1591 and PLD 2008 SC 146 *ref.*

Mr. Sana Ullah Zahid Advocate for Petitioners.

Mr. Muhammad Shoaib Abbasi, Advocate for Respondents.

Date of hearing: 28.6.2021.

JUDGMENT

The judgments dated 16.10.2010 & 01.10.2012 are the subject of Civil Revision in hand, whereby declaratory suit instituted by predecessor-in-interest of present petitioners claiming him to be exclusive owner of entire building superstructure of plot No. B/131, Satellite Town, Rawalpindi, was concurrently dismissed by the two Courts below.

2. The condensed facts of the case are that the subject plot had been transferred to one Muhammad Yousaf by the Housing & Planning Department, who (transferee) via registered sale agreement dated 11.06.1964 (Exh.P22) agreed to sell out the same to his nephew Muhammad Ashraf/Respondent No. 1 while endorsing that double-storey building plan had already been sanctioned in his favour, whereas ground floor was constructed with the finance of Rs. 21,000/- provided by the vendee and possession thereof delivered to him as well. Thereafter, on 06.01.1973, Raja Muhammad Yousaf, original plaintiff (*decensed now represented by petitioners*) instituted declaratory suit asserting that Muhammad Yousaf being ostensible allottee was mere *benamidar*, whereas funds were provided by the former to purchase the said plot from the concerned Department; that construction was raised thereupon through his resources; that he was in its occupation since inception of the allotment, and that for love & affection and to accord respect, the said plot was ostensibly got allotted to Muhammad Yousaf, whereas indeed the plaintiff was its actual owner. The suit was contested by Respondent No. 1 and finally *vide* unanimous judgments cited in preceding para, it as well as appeal dismissed by the two Courts below, thus this petition.

3. Arguments heard and record scanned.

4. Without going into deeper/detail facts of the case, the question whether a particular transaction is benami or not, is largely one of the facts and for its determination, no absolute formula or test has been laid down, but while seeking guidance from the dicta laid down in judgment reported as *Muhammad Sajjad vs. Muhammad Anwar* (1991 SCMR 703), the following elements are to be proved by a quester:

i. Source of consideration.

ii. From whose custody original title deed came.

iii. Who is in possession of the property, and

iv. Motive of benami.

These essential elements must co-exist for proving a benami transaction between the ostensible owner and actual purchaser, who purchased it through his own funds in the name of ostensible owner for certain reasons/motive to gain ultimate benefits.

5. Undeniably neither the suit was filed in the lifetime of Muhammad Yousaf (original transferee) nor any of his descendants was added in the suit in any capacity. It was also borne out from the record that plaintiff was not a close relative of the transferee, rather he was his remote distant kinder. It was again admitted fact that at the time of transfer of subject plot to late Muhammad Yousaf, the father, brothers & sisters of the plaintiff being alive were also available. In such situation, the plea of the plaintiff did not appeal to prudent mind that he ostensibly purchased the subject property in the name of a person, who was not closely related to him. Anyways, heavy onus to prove the benami transaction was upon the plaintiff, who

neither could establish that he got the subject plot allotted in the name of Muhammad Yousaf (deceased) nor could prove that building was constructed by him. No doubt, letters allegedly written by original transferee to plaintiff were brought on record, but neither it was disclosed therein that those pertained to the subject house nor such private documents could be given preference over registered agreement (Exh.P22), the veracity/genuineness whereof was never challenged by any one including the plaintiff. Moreover, none from the post office was examined to establish that in fact said letters were dispatched by the original transferee & received to the plaintiff, but those were brought on file even after the death of the alleged sender and no effort was ever made to have compared its writing with the admitted one of the deceased from the Expert.

6. It is drastic aspect that the plaintiff did not adduce any documentary evidence to demonstrate that sale consideration was paid by him, whose version that he used to transmit amount from Kuwait also could not be established from the record as he did not bring on record any proof in this behalf. The witnesses examined by the plaintiff also failed to speak respecting this most important feature of benami transaction, as such the plaintiff failed to prove the payment of sale consideration. Indeed, better course for the respondents was to summon any of the persons before whom the sale consideration paid, but it was not examined. The withholding of best evidence definitely created hostile inference against the plaintiff/petitioners. As far as argument of learned counsel for the petitioners that Muhammad Yousaf had no independent source to purchase the suit house, whereas plaintiff provided the funds is not well founded for the counts; firstly that it was nowhere proved that the latter paid the sale price and secondly that mere proof that it was made by him in such like cases is not enough.

7. The next damaging aspect of the case was that original title document was also not produced by plaintiff, rather it was made available on record by Respondent No. 1, as such plaintiff failed to establish second ingredient too in his favour.

Moreover, admittedly both of the parties are jointly residing in the subject property, thus the plaintiff/petitioners failed to meet with the third ingredient of the *benami* transaction (*detailed hereinabove*) to claim their exclusive possession therein.

8. Another setback of the case was that the plaintiff omitted to plead and prove the motive that why the subject plot was ostensibly purchased in the name of Muhammad Yousaf, rather only mentioned therein that for love & affection it was done so. The ingredient of motive for creation of *benami* transaction is essential and relevant factor for the purpose of determining, whether title vesting is merely a *benami* and absence of motive always goes against the party claiming to be actual owner, thus heavy onus was on the shoulders of the petitioners to prove that actually their father had purchased it, but for certain reasons ostensibly got it transferred to someone else. It was neither the case of the plaintiff/petitioners that he was a taxpayer and the name of Muhammad Yousaf was added in the transfer papers, so

that taxes could be evaded, nor it was their stance that plaintiff had black money and to save himself from the inquiries, *benami* transaction was effected in favour of original transferee. Even he failed to allege that Muhammad Yousaf was required to show himself to be owner of some immovable property for his benefit, thus the alleged transfer was effected in his name and in absence thereof, the purported transaction could not be declared as sham one. For the sake of arguments, if stance of the plaintiff that for love & affection, the suit property was purchased in the name of the said person is taken as correct, even then it could not be dubbed as *benami*. Once having purchased the suit property when there was benevolence as well as benignancy towards the transferee, thereafter plaintiff could not turn around to claim himself actual owner after liaisons became hostile and they fell apart. This view finds support from judgment of the apex Court reported as *Ghulam Murtaza vs. Mst. Asia Bibi and others* (PLD 2010 SC 569). The relevant paras 7 & 8 being all four corners applicable are reproduced here:

7. At this juncture, we may clarify that the motive part in the benami transactions is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other. We come across innumerable transactions where a father purchases property with his own sources for his minor son or daughter keeping in mind that the property shall best in the minor. Such transaction subsequently cannot be challenged by father as benami simply because the amount was paid by him. There are people who with positive application of mind, purchase properties in the name of others with intention that the title shall vest in that other.

8. As said earlier, there are certain transactions in peculiar circumstances of those peculiar cases where, for reason of certain emergencies or contingencies, the properties are purchased in the name of some other person without they intention that the title shall so vest permanently. If such motive is available and also is reasonable and plausible, a transaction can be held as benami, otherwise not. A property purchased with ones own sources in the name of some close relative like wife, son or daughter cannot be dubbed as benami when purchased with full intention of conferring title to the purchaser shown. If this principle is denied and that of benami attracted simply because the sources of consideration could not be proved in favour of the named vendee, it would shatter the most honest and bona fide transaction thereby bringing no end to litigation.

In addition thereto, any transaction effected for love & affection can, at the most, be taken as gift and for the said motive/reason, it cannot be termed as *benami*. See *Ahamd Sultan Khan vs. Mst. Sanin Kausar and another* (1986 SCMR 1591). In said case the father purchased the property for his minor daughter at his own sake and when subsequently the transaction was claimed to be benami, the apex Court declared as under:

> ****We agree with the learned Judge of the High Court that there was nothing wrong or unusual for a father, in a society to which the parties*

*belong, purchasing a plot of land for building a house for a minor daughter in her name. The question of Benami transaction or the purchase having been made by Umar Khan for his own sake, therefore, did not arise. Reliance of the learned counsel on Iman v. Saifur Rehman 1982 PSC 1474 is of no avail to the petitioner because that case is distinguishable from the present case.****

For the reasons discussed hereinabove and law already laid down by the apex Court on the subject in hand, the ingredient 'motive' for ostensible sale in favour of Muhammad Yousaf was not established as well. The apex Court while dealing with a case involving *benami* transaction through authoritative judgment titled as *Ch. Ghulam Rasool vs. Mrs. Nusrat Rasool and 4 others* (PLD 2008 SC 146) besides proving of the essential elements discussed hereinabove also introduced an additional rule that sine qua non for claimant of benami transaction to establish that there was some mutual understanding between him and ostensible owner and as a result thereof, sham transaction was germinated. For better understanding, the relevant extract of the cited judgment (supra) is reproduced here:

****This may be seen that two essential elements must exist to establish the benami status of the transaction. The first element is that there must be an agreement express or implied between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the persons who has to make payment of the consideration and second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party. In the present case, the evidence brought on record would not directly or indirectly suggest the existence of any of the above elements to prove the benami character of the transaction of sale.****

This aspect is also lacking in the case in hand, therefore, plaintiff failed to cross the barrier set down by the august Supreme Court, whose decisions in terms of Article 189 of the Constitution are binding on each & every organ of the State including the subordinate Courts.

9. As far as argument of learned counsel for the petitioners that indeed the plaintiff while living abroad provided funds to Muhammad Yousaf for purchase of the subject property in the name of the former, but the latter cheated him in getting transferred the same in his favour is concerned, suffice it to say that the said emphasis is not valid for the counts; firstly that it was beyond the story narrated in the plaint, thus could not be considered, and secondly that if for the sake of arguments such stance is taken as correct, then the plaintiff/petitioners had the sole remedy to bring suit for cancellation of alleged transfer maneuvered by late Muhammad Yousaf through cheating, whereas suit in hand was not maintainable.

10. The learned counsel for the petitioners has failed to point out any misreading or non-reading of the material evidence available on the record to render the impugned judgments and decrees passed by the two Courts below to be illegal, unlawful and

without jurisdiction for calling interference by this Court in the exercise of revisional jurisdiction. Consequently, the instant Revision Petition being devoid of any merit is hereby dismissed.

(Y.A.) Petition dismissed.

2021 P L C (C.S.) 1435
[Lahore High Court]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD JAHAN ZAIB KHAN
Versus
MUHAMMAD RAFIQUE KHAN and 2 others

Writ Petition No.56759 of 2020, heard on 18th February, 2021.

Specific Relief Act (I of 1877)---

----S.12---Specific performance of agreement to sell---Balance consideration amount, non-deposit of---Principle---Petitioner-plaintiff sought specific performance of agreement to sell executed by respondent-defendant who had onward sold the property to a third person---Lower Appellate Court directed petitioner-plaintiff to deposit balance consideration amount in Court---Validity---No justification existed to bound down petitioner-plaintiff to deposit a massive sale amount, who purportedly had already paid healthy amount but was out of picture to receive any benefit---Petitioner-plaintiff was yet to prove not only his own case but also to rebut stance of his vendor, besides to shatter claim of third party---Deposit of balance amount was not in aid of justice to either promote case of plaintiff nor even beneficial to other party who till the time was disputing settlement of sale and vendee could not be forced in such behalf---High Court set aside the order passed by Lower Appellate Court directing petitioner-plaintiff to deposit remaining balance consideration---Constitutional petition was allowed, in circumstances.

Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd. and another 2020 SCMR 171 distinguished.

Maksud Ali and others v. Eskandar Ali PLD 1964 SC 381 ref.

Ch. Zahid Majeed, Nasir Mahmud and Daud Ahmad Asif for Petitioner.

Ch. Ishtiaq Ahmad Khan and Anwaar Hussain Janjua for Respondent No.1.

Date of hearing: 18th February, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---In concision, facts of the case are that present petitioner brought suit for specific performance of agreement to sell dated 06.02.2018 along with possession as well as permanent injunction against respondent No.1/defendant asserting that subject area vested to latter, who settled

bargain against consideration of Rs.3,20,00,000/- and after receipt of Rs.80,00,000/- , aforesaid agreement to sell executed. The suit was also accompanied by independent application for grant of temporary injunction, which was declined on 03.11.2018. The application under Order I, Rule 10 of the Code, 1908 tabled by the petitioner for impleadment of subsequent ostensible vendee dismissed as well and simultaneously keeping in view the dicta laid down in 'Messrs Kuwait National Real Estate Company (Pvt.) Ltd. and others v. Messrs Educational Excellence Ltd. and another' (2020 SCMR 171) he was further directed to deposit balance sale consideration in the Court vide order dated 06.10.2020. Being offended, the petitioner preferred Civil Revision before the learned District Court, which partly allowed and request for adding subsequent vendee as defendant granted, but the demand to make good the balance amount maintained by twofold order dated 31.10.2020, thus to that effect instant Constitutional Petition has been moved.

2. Arguments heard. Record perused.

3. The case of the petitioner qua immovable area is hinging upon agreement to sell, the execution whereof specifically denied by respondent No.1, who not only further alienated the said property, rather possession also delivered to the third party. No doubt, in 'Messrs Kuwait National Real Estate Company (Pvt.) Ltd's case (supra), it has been observed that party seeking specific performance of agreement to sell is required to deposit balance sale consideration in the Court so as to prove readiness and willingness at its part, but this Court having minutely gone through cited esteemed judgment humbly focused that the Hon'ble Supreme Court held so because subject matter involving that lis was not the immovable property, whereas vendor therein straightaway admitted the transaction as well as execution of sale agreement, besides to propose that if remaining sale price would be paid, then suit might be decreed. After having such fair attitude on the part of vendor, the apex Court required the vendee to make good the balance sale consideration. Thus, the rule so laid down might be for the cases where execution of contract was admitted and in its due compliance the vendor consented to transfer subject property as well. The said canon cannot be applied where the transaction as well as execution of document entailing terms/conditions of alleged deal is questioned from its inception. In the current case subject property is immovable one, possession of which never delivered to the plaintiff and the vendor also specifically asserted sale agreement to be fabricated, deceptive and concocted one, besides has already created third party's charge by transferring title and possession of subject area to him. The alleged agreement to sell is bilateral document and its genuineness or otherwise as well as ascertainment who is at fault to perform his part besides to search readiness and willingness of either party is, indeed, a fact, which could only be determined after collecting evidence. The three honorable Judges of the august Supreme Court while deciding a lis qua specific performance of contract in case reported as Maksud Ali and others v. Eskandar Ali (PLD 1964 SC 381) held that though invariable for the vendee to expressly plead his readiness and willingness in

the plaint, but omission thereto would not be enough to non-suit him. The apex Court, indeed, focused in said judgment that sine qua non for the vendee to prove his readiness from the date of contract to that of hearing. The relevant part of this judgment being advantageous is reproduced as under:-

"So far as the question of making any express averment to the pleading of such readiness and willingness is concerned, we are of the view that although there can be doubt that this is the invariable practice of pleading, and if we may say so. A desirable practice, designed to give a clear and express notice to the opponent of the case sought to be made out, it cannot be said that this is a rule of law which would render the structure of the suit itself defective or that without it a proper cause of action would not appear on the plaint. We are, therefore, unable to accept the contention of the learned counsel that the present suit was bound to fail in the absence of such an averment.

Now so far as the question of what exactly the plaintiff must still prove; namely, as to whether he must prove his readiness from the date of the contract to the date of hearing, is concerned; we express no final opinion, for, full arguments have not been advanced before us on this aspect of the question, as on the evidence in this case it has been held by all Courts below that even such readiness and willingness had in fact been established."

Having gone through the said esteemed verdict, the wisdom of the apex Court was that willingness and readiness is a pure question of fact and without requiring evidence, the same could not be resolved.

4. Adverting to 'Messrs Kuwait National Real Estate's case (supra), the law laid down therein, in stricto sensu is not applicable to each suit of alike form, rather the same can be followed in cases, where with all four corners is applied as per its statistics. Even otherwise, it is well settled that each case has to be decided on its peculiar facts, therefore, with utmost respect, the law introduced in the cited judgment cannot be applied as 'universal rule' for certain reasons like-

(i) If a forger brings a suit for specific performance of contract alleging that entire consideration stood already paid, then it may proceed because no such direction can be passed;

(ii) In a genuine case, where balance consideration was required to be paid within next twelve months or so, but the vendor with ulterior motive soon after execution of the sale agreement further transferred title as well as possession of the subject property to someone else or the terms and conditions are violated at his end, compelling the vendee to institute suit prior to cutoff date (which might have to come much after approaching the Court), then in that eventuality requiring the

promisee/plaintiff to deposit rest of the amount forthwith, which he has still to arrange/manage after certain period, being beyond the scope of their contract, would be unjustified; and

(iii) Section 12 of the Specific Relief Act, 1877 provides that specific performance of the contract might be enforced in the discretion of the Court, whereas Explanation thereof clearly states that unless and unless the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and its section 19 lays down that any person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for, such performance. More importantly, under section 22, jurisdiction to decree specific performance is discretionary and the Court is not bound to decree or grant such relief merely because it is lawful to do so.

Thus in peculiar features of case in hand, there would be no justification to bound down the plaintiff to deposit a massive sale amount, who purportedly had already paid healthy amount, but still is out of picture to receive any benefit. The petitioner not only still to prove his case, but also to rebut stance of his vendor, besides to shatter the claim of the third party. For these reasons, deposit of the balance amount, in fact, will not be in aid of justice to either promote the case of the plaintiff or even beneficial to the other party, who till this time is disputing the settlement of sale, thus there will be no fun to force the vendee in this behalf.

4. As a corollary of the above discussion, the impugned orders of the learned lower fora to the extent of requiring the petitioner to deposit remaining consideration being unwarranted are set aside and this petition stands allowed accordingly. However, keeping in mind the involvement of massive consideration and exigency of the parties, learned Civil Court is directed to finally culminate trial proceedings within next six months positively, even by conducting proceedings on day to day basis, if need be.

MH/M-50/L Petition allowed.

2022 Y L R 209
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
Dr. NISAR AHMED CHAUDHARY through Special Attorney---Petitioner
Versus
GOVERNMENT OF PUNJAB through Secretary Colonies, Lahore and 12 others---Respondents

Writ Petition No. 65143 of 2019, heard on 24th March, 2021.

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

----S.10---Lease of Government Land---Purchase of State land---Resumption of leased land--- Scope--- Petitioner challenged the vires of order passed by Member Colonies, Board of Revenue Punjab whereby his request for restoration of allotment/conveyance deed was declined---Validity---Petitioner had started his demand for purchase of just 5 kanals of State land in his own Chak, which afterwards increased to 31 kanals and lastly to 57 kanals in another revenue estate--- Most valuable chunk of land facing the Highway was thrown away to him just for peanuts---Petitioner had sought lease of the land but the Secretary Finance, who had no business with the private project, proposed permanent transfer of the State land so that a blue-eyed could be accommodated over and above his own request--- Execution of conveyance deed for agricultural purposes was another violation towards the alleged specific sale for construction of a purported Hospital--- Petitioner who had voluntarily undertook twice to complete the project i.e. construction of a hospital within extended time of his own choice had failed to install even a brick---Constitutional petition was dismissed, in circumstances.

(b) Administration of justice---

----Conduct of the litigant before court of law is very relevant to award or refuse the relief claimed for.

Waqar A. Shaikh and Syed Faisal G. Miran for Petitioner.

Arshad Jahangir Jhojha, Addl. A.G. and Saqib Haroon, A.A.G. for Official Respondents Nos. 1 to 8 and 11.

Tahir Mahmood Mughal for Respondent No.9.

Sherbaz Ali, Legal Adviser for PESSI/Respondent No.12.

Zubair Ahmad Virk for Respondent No.10.

Nadeem Ahmad Sheikh for Applicants (in C.M. No.8 of 2020).

Date of hearing: 24th March, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---This Constitutional Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 has been filed to challenge vires of order dated 05.08.2019, whereby learned Member (Colonies) BoR/ respondent No.2 declined the request of the petitioner for restoration of allotment/ conveyance deed.

9 As per original allotment file (which during course of deliberations was retained to go through history of the case), the petitioner is a dual nationality holder, who basically hails from Chak No.46/NB, Sargodha and mostly resides in America. He initially approached the Revenue/Colony authorities for the purchase of State land measuring 05 kanals 10 marlas situated in his Chak, to construct a charitable Hospital however, prior to its culmination the ban on the sale of State land was imposed, whereupon said move though was dropped, yet another desire tabled to purchase land measuring 31-1/4 kanals, bearing square No.38 Killas Nos.23 and 24, Square No.41 Killas Nos.3 and 4 falling within the boundary of Chak No.50/NB for the same purpose, which move was underway, when the petitioner made another request for the grant of long term lease of disputed State land measuring 57-1/2 Kanals comprising Square No.38, Killas Nos. 23 to 25, Square No.41 Killas Nos.3-B, 4 to 7 situated in 50/NB, Tehsil Sargodha. Undisputedly, this chunk of area is abutting Sargodha, Lahore Highway. The then Deputy Commissioner vide Memo No.1546/CA/UCC dated 01.01.1990 while making favourable recommendation forwarded it to the Commissioner and paras 3 and 4 thereof being relevant are reproduced hereunder:--

3. Previously, the proposal for sale of state land comprising Sq. No.38 Killa Nos.23 and 24, Sq. No.41 Killa Nos.3 and 4, measuring 31-1/2 Kanals situated in Chak No.50/NB by private treaty in favour of the applicant for the construction of a private hospital was sent vide this office Memo No.145-C/CA/ UCC dated 26.01.1988. The proposal was supported and forwarded to the Board of Revenue vide your office Memo No. K-1-14-84(2)/4403-4/ CA dated 08.03.1988. Since this land has now been applied for by Dr. Nisar A. Chaudhary for long lease for the construction of hospital, the previous proposal may be considered as withdrawn.

4. In view of the fact that Dr. Nisar intends to establish an Hospital/Drug Rehabilitation Centre for the general benefit of poor people, it is recommended that the lease of the state land measuring 57-1/2 Kanals (as detailed above) situated in

Chak No.50/NB may be granted to him on long term basis at the annual rent of Rs.300/- per acre."

Within next two days on 03.01.1990, the then learned Member (Colonies) forwarded summary to the Chief Minister to the following effect:-

Briefly the position is that Dr. Nisar Ahmad had applied in 1987 for the sale of 31 Kanals 05 madas of state land comprising killa Nos.23, 24/38 and 3-B, 4, 5, 6 and 7/41 in Chak No.50/N.B for construction of a hospital and drug rehabilitation centre. The Commissioner recommended the sale at Rs.1,50,000/- per acre plus 10% surcharge for sale through private treaty. However the case could not be processed further because of the ban imposed by the Chief Minister on such sales. The Commissioner has again sent a reference (Annexure 'A') in which 57 Kanals 10 Marlas of state land comprising killa Nos.23-25 square Nos.38 and 3-B, 4 to 7 square No.41 situated in Chak No.50/N.B, Tehsil and District Sargodha. But this time he has recommended that 57 Kanals 10 Marlas of state land which was lying vacant and Banjar Qadeem may be allowed to be leased out to Dr. Nisar Ahmad for construction of hospital/drug rehabilitation centre etc. at Rs.300/- per acre. Dr. Nisar Ahmad has requested for long lease of land and intends to establish a hospital for the general benefit of the poor people. The land is located on Sargodha-Talibwala road and is reported to be Banjar Qadeem (Sem Thur). Since the land is being required for good cause we may agree to its lease for 30 years renewable by another equal period subject to satisfaction of the District Collector about proper utilization of the land etc on the usual colony conditions plus the following:--

(i) The lessee will undertake to provide a minimum of 33% bends/wards in each section of the hospital (e.g. Drug Rehabilitation, general surgery, medicines etc.) for free treatment of the poor people.

(ii) Hospital should be managed by a proper committee in which a local representative of the Health Department and District Collector would be included on ex-officio basis.

(iii) Market rent will be assessed in accordance with the procedure laid down."

The Chief Minister's Secretariat transmitted it to the Finance Secretary, Punjab, who at his own, felt it appropriate that land should be sold out instead of leasing out for a long term. The same was not only endorsed by the Finance Minister, rather promptly approved on the part of the Chief Minister on 11.02.1990. Consequently, Colony Secretary issued Memo dated 17.02.1990, wherein specific clause 'b' qua completion of proposed Hospital within specified time was particularly inserted to the following effect:-

"The construction should be completed within 2 years from the date of issue of these orders failing which the land shall be liable to be resumed."

The District Collector within next couple of days on 26.02.1990 attested the Conveyance Deed to award the land to the petitioner. It was a hard fact that construction was not started within the period provided through Memo dated 17.02.1990. The petitioner in 1994 directly made application before Chief Minister asserting that he had no sources to run the Hospital and prayed for the withdrawal of clause 'b', which promptly was accorded through issuance of letter dated 02.01.1994, even without fetching any report or consulting the Colony Department/BoR. As a result thereof, clause 'b' qua construction period was waived off by the Secretary (Colonies) vide letter dated 09.01.1994. The BoR, who in the Province was custodian of the State land kept mum, however, thanks to a public pro bono, who via W.P. No.16310/1995 brought such malpractices before this Court, which unfortunately was not decided on its merit, rather the moment on 07.12.2000, petitioner undertook to complete the Hospital within next three years, it was simply disposed of. The petitioner did not honour his assurance made before the apex Court of the Province, compelling the same pro bono to blow the whistle another time by filing Contempt Application (Crl. Original No.151-W/2004) before this Court. The same once again was not culminated on its merits, rather while disposing it of on 22.12.2006 present petitioner get extra six months to complete the project. The relevant part of said order is reproduced here:-

"Reply filed by the respondent has been examined. He has undertaken in very clear terms that he will abide by the undertaking given by him in court and has explained delay in commencing completion of the project of the proposed hospital. He has further undertaken that he will take all efforts to comply with the said undertaking is disposed of with the direction to the respondent to take all steps to commence and complete the construction of the said hospital as already undertaken by him before this Court. Needful to be done within six months from today. In case of any delay, explanation to be filed in this Court"

Now the scenario/regime might have changed or some man of character was posted in the BoR, that Province of the Punjab for the first time brought said proceedings before august Supreme Court via Cr. P.No.282-L/2007 where through interlocutory order dated 07.09.2007 not only the petitioner was put under show cause notice, but the State was also let free to cancel the transaction. The relevant part of said interim order for ready reference is reproduced as below:--

"The explanation tendered being reasonable, condoning the delay, petition is entertained for hearing putting Dr. Nisar A. Chaudhry, respondent No.1 under notice to show cause why the procured sale of the spelt out state land at a through away price exclusively for setting up of a hospital/drug rehabilitation centre within a period of two years construction whereof till date has not even commenced despite

indulging into entangled litigation for 17-1/2 years putting off the construction through devious means for unjust entrichment at the cost of the exchequer in violation of the sole object for which the same was bestowed, including procurement of extension through criminal original proceedings without impleading the petitioners as a party, which too stands exhausted.

Notice be issued for the first week of the next roster. Meanwhile further proceedings before the Lahore High Court in Writ Petition No. 2198/2007 for the acclaimed demarcation apparently designed to cover up the delay are injuncted with a right to the petitioners to take such actions as may deem appropriate in accordance with law, and, in the event the same lead to cancellation of the transaction, the land should be sold through public auction with a right to the respondent to participate therein."

Being aggrieved of show cause notice, the petitioner filed I.C.A. No.6 of 2007 before the apex Court, which along with Cr. P. No.282-L/2007 was finally disposed of on 05.01.2016, while concluding as under:--

"We have been informed by the learned Assistant Advocate General, Punjab appearing for the State that the State land sold to the appellant on 17.02.1990 has already been resumed vide order dated 26.09.2007 passed by the Member (Colonies), Board of Revenue, Punjab, in view of this development the order passed by this Court on 03.10.2007 in Criminal Petition No.282-L of 2007 is hereby recalled and the notice issued to the appellant to show cause as to why he may not be punished for contempt of this Court on account of attempting to interfere with the administration of justice is hereby withdrawn. In view of recalling of the impugned order passed by this Court on 03.10.2007 the present Intra Court Appeal filed against the said order has lost its relevance. This Intra Court Appeal is, therefore, disposed of as having become infructuous.

Criminal Miscellaneous Applica-tion No.07 of 2016 in Criminal Petition No.282-L of 2007.

2. This miscellaneous application is allowed and the documents appended with the same are permitted to be brought on the record of the main petition. Disposed of

Criminal Petition No.282-L of 2007.

3. As the land in issue has already been resumed by the Board of Revenue, Punjab on 26.09.2007, therefore, the learned counsel for the petitioners does not press this petition. This petition is, thus, disposed of as having not been pressed. It goes without saying that if respondent No.1 has assailed the above mentioned resumption of the relevant land or intends to assail the same before any Court or forum then any challenge made or to be made by him to such resumption shall be decided on its

own merits without in any manner being influenced by anything observed or done by this Court in the present proceedings."

3. No doubt in the meantime, as already observed by the august Supreme Court in its order dated 07.09.2007, just as an afterthought to groom the afore-noted cases pending before august Supreme Court, the petitioner preferred Writ Petition No.2198/2007 before this Court with the following prayer:--

"It is, therefore, most respectfully prayed that the writ petition be accepted and respondent No. 7 be directed to finalize the demarcation proceedings so that the petitioner may proceed to complete construction as undertaken by him before this Hon'ble Court.

however, when apprised that in compliance of above noted interim order of the apex Court, the allotment/conveyance stood already cancelled/rescinded, the petitioner ultimately withdrew the said petition on 21.01.2008. He in series preferred three Writ Petitions to assail cancellation of his allotment. This Court in earlier two petitions, remanded the matter to the learned Member (Colonies) BoR for decision afresh, who each time maintained his earlier verdict and on third occasion, when the incumbent Authority once again endorsed its earlier decision passed against the petitioner as disclosed in para 1 ante, the latter another time has filed petition in hand.

4. It would be pertinent that after the resumption of subject land, it was awarded to the Punjab Employees Social Security Department-respondents Nos.12 and 13 for the construction of Hospital. The Government of Punjab has also released 5 billion rupees for the said project, which is under construction at site and this action has also been impugned through petition in hand.

5. Arguments heard and available record scanned minutely.

6. The petitioner does not seem to be a common individual, whose influence is vivid from the proceedings initiated by the Deputy Commissioner, Commissioner, under Secretary Colony, the Finance Secretary as well as the then Chief Minister. The petitioner started his demand for purchase of just 5-1/2 Kanals in his own Chak, which afterwards increased to 31-1/2 Kanals and lastly to 57-1/2 Kanals in another Revenue Estate. The most valuable chunk of land facing to Highway was thrown away to him just for peanuts. It might be a classical case, where the demand was made by the seeker for lease of land, but without letting him to amend his desire or even taking into confidence the relevant Authority/BoR, the Secretary Finance, who had none of the business with the private project, proposed for permanent transfer of the State land so that a blue-eyed could be accommodated over and above to his own request. Our society is civilized one and governed by law and law alone. There

must be a system of check and balance. None is above the law, whereas all public powers being trust are to be exercised/ performed within limits of relevant enactments/statutes. The Chief Executive/ Chief Minister has not been assigned any role in the relevant laws to allot/lease or sell out State land at his own whims. Moreover, the execution of Conveyance Deed for agricultural purposes was another violation towards the alleged specific sale for construction of purported Hospital. It might be so to cause loss to the public exchequer. Anyhow, it was fortune of the petitioner that in first Writ Petition made against him on behalf of a public pro bono, the same was not culminated on merit for its logical end. The petitioner played a trick there while giving undertaking to complete the Hospital within next three years. No doubt, the Writ Petition was disposed of, but to me, the clause 'b' was revived a while extending another three years from the day when petitioner tendered assurance. It was either pity on his part or he was so confident that the Courts of law would not take any action against him, therefore, he dared to ignore his own assurance while not starting the construction in the period extended by the Court. Pursuant to contempt petition, he once again was awarded another six months' period at his second commitment, even then he failed to install a single brick. Everything could be ignored, but a free promise/undertaking of his own choice could not be left unnoticed, otherwise, not only belief of the public will be shaken from the judicial system, rather the respect and command of the Court would seriously be attenuated. It is well established rule that conduct of the litigant before Court of law is very relevant to award or refuse the relief claimed for. It was petitioner; who voluntarily undertook twicely to complete the project within extended time of his choice. This assurance attached sanctity and thereby principle of estoppel not only came into play, rather clause 'b' stood restored with allied penal consequences entailed therein, as such the sale ispo facto was no more when the extended period expired.

7. The emphasis of Mr. Waqar A. Sheikh, learned counsel for the petitioner that area was encroached upon by some unknown persons or it was not demarcated, therefore, the construction work of building could not be started, seems to be mere an afterthought. At relevant time, when period was specified in clause 'b' it was never complained, which at the most should be uttered, when he tendered his first undertaking. He even did not explore said pretext, when second time he was awarded more period per his additional undertaking. Thereafter, any such ground was not liable to be considered. As far as assertion of learned counsel for the petitioner that his client being very well off is eager to serve the general public is concerned, suffice it to say that decades have passed since the purchase of State area, but no positive steps initiated to achieve the desired goal. He while seeking waiver of clause 'b' himself asserted just within four years of the issuance of Conveyance Deed that he had no resource to run the Hospital, which clarified his own intention. Even if it is taken to be correct that petitioner has good financial status, he may start his private project over his owned which definitely will be a

more pious deed. Moreover, clause (f) of para 2 in the aforesaid Memorandum dated 17.02.1990, which reads as under:--

(f) The Hospital authority shall provide 33% of beds in action/ wards for free treatment of the poor."

obviously discloses that the hospital was not to be used for cent percent charity, but only 33% of its resources were to be utilized on the poor patients, whereas rest of 67% income was to be derived by the petitioner/ owner. In contra the Project, which is under construction on behalf of respondents Nos. 1, 2 and 13 is meant for treatment of general public free of costs, wherein the additional clause also exists allowing any person of the civil society to make donation for the said noble cause and if the petitioner is still willing for charity, may add funds in the underway assignment for his ultimate reward.

8. As a matter of fact, the instant lis was partly heard five days earlier, when to check his bona fide, the petitioner was; asked verbally to deposit amount intended to be invested on the project till today, but he made C.M. No. 2 of 2021 for extension of time, which otherwise shows his paramount desire to cause further delay in the construction work of the Hospital, therefore, it is declined.

9. Another C.M. No.8/2020 was filed for impleadment through Mr. Nadeem Ahmad Sheikh, Advocate, who has opted not to press the same on merit any further, which stands disposed of accordingly.

10. For the history/reasoning narrated in paras. 2 to 8, the writ petition in hand has absolutely no merit, which is dismissed with the addition that amount already deposited by the petitioner be also forfeited for its deposit to public exchequer, so that such like malpractices may be avoided in coming days.

SA/N-12/L Petition dismissed.

PLJ 2022 Lahore 70
[Multan Bench, Multan]
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
Mst. **MANZOOR ELAHI--Petitioner**
Versus
ADDITIONAL DISTRICT JUDGE, MAILSI, etc.--Respondents
W.P. No. 10915 of 2021, decided on 14.7.2021.

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

----S. 13--Execution petition--Surety of judgment debtor--Respondents approached learned Family Court for recovery of maintenance allowance which was ultimately decreed and attained status of finality--Formers approached learned Executing Court for execution of said decree, but in spite of adopting due course of proceedings, respondent failed to realize decree, who was arrested and put behind civil prison--Petitioner appeared on scene for rescue of her son (judgment debtor) and voluntarily submitted surety bond--Judgment-debtor failed to satisfy decree and learned Executing Court was compelled to attach immoveable property of petitioner/surety--Surety under law has no right to restrain an action against her, rather having stood guarantor, she had been substituted for her principal--Crux of contract of guarantee is that it binds surety--Executing Court was quite justified to adopt measures against petitioner/surety--Petition dismissed.

[Pp. 70, 71, 72 & 73] A, B, C & D

1989 CLC 2441; 2006 CLD 687; PLD 2014 Lahore 429; 2005 SCMR 72; PLD 1953 Lahore 22; 2000 CLC 85; 2000 CLC 451 *ref.*

Mr. Muhammad Qadir Asif Toor, Advocate for Petitioner.

Date of hearing: 14.7.2021.

ORDER

Shorn of unnecessary details apart, Fazal Hassan Respondent No. 5 (the real son of present petitioner) wedded *Mst.* Kausar Perveen, Respondent No. 3 and out of their wedlock, Shabana Zartaj, Respondent No. 4/minor girl was born. The Respondents No. 3 & 4 approached learned Family Court for recovery of maintenance allowance etc. against Respondent No. 5, which was ultimately decreed on 10.06.2012 and attained status of finality. The formers approached the learned Executing Court for the execution of said decree, but in spite of adopting due course of proceedings, Respondent No. 5/ judgment-debtor failed to realize the decree, who was arrested and put behind the civil prison. Thereafter, the petitioner appeared on the scene for the rescue of her son (judgment-debtor) and voluntarily submitted surety bond on 14.09.2017 while giving assurance to the following effect:

منکہ منظور الہی زوجہ احمد بخش ذات بھٹی سکنہ میلسی ضلع وہاڑی کی ہوں۔ بقائمی ہوش و حواس خمسہ بلا جبر اکراہ اقرار کرت ہے کہ ایک دعویٰ بعنوان کوثر پروین وغیرہ بنام فضل حسن جو کہ فضل حسن کے خلاف ڈگری ہوا ہے۔ اور مدعا علیہ زیر حراست ہے۔ جس میں مبلغ -/20000 روپے زر ڈگری میں سے ادا کر رہی ہوں اور بقیہ زر ڈگری ادا کرنے کی پابند رہے گی۔ ضمانت نامہ بعنوان کوثر پروین وغیرہ بنام فضل حسن بحق سرکار تحریر کر دیا ہے تاکہ سند رہے اور بوقت ضرورت کام آو۔۔

In consequence of the above situation, Respondent No. 5 was conditionally released, but subsequently the petitioner tabled two applications; one for withdrawal of her surety and the other for stoppage of warrant of attachment of her property avowing therein that she being advance aged and heart patient lady wanted to sell out the property for her treatment, which were dismissed on 10.05.2019. Thereafter she filed application for production of new surety, which was not only dismissed on 10.11.2020, but also directed by the learned Executing Court to produce judgment-debtor within three days for satisfaction of the decree, but despite specific directions, none appeared even on behalf of the surety, thus proceedings against her were initiated on 13.11.2020. Being dejected, the petitioner preferred appeal before the learned Appellate Court below, which dismissed on 09.06.2021, thus petition in hand.

2. Arguments heard and record scanned.

3. It is an admitted fact that Respondent No. 5/judgment-debtor being defaulter was arrested, but thereafter released on furnishing of surety bond by the petitioner with afore-noted undertaking and recording her statement to the following effect:

بیان کیا کہ ضمانت نامہ سن و سمجھ لیا ہے ضمنانت ضمانت نامہ درست و صحیح ہیں۔ ضمنات ضمانت نامہ کی مکمل پابندی کروں گا اگر کوئی کوتاہی کروں گا تو عدالت حضور کو اختیار حاصل ہو گا کہ وہ میری جائیداد قرق/نیلام کرکے ضمانت وصول کر سکتی ہے۔

thus indeed bound down herself thereby to satisfy the upcoming decree. Again the judgment-debtor failed to satisfy the decree and learned Executing Court was compelled to attach the immoveable property of the petitioner/surety. It was a matter of fact and record that neither she ever assailed her statement nor denied the same, which left no panorama for her to wriggle out of it. Thus prior to discharging her liability, the petitioner could not dictate terms to the creditors to pursue their remedy against the principal in the first instance. The surety under the law has no right to restrain an action against her, rather having stood guarantor, she had been substituted for her principal and afterwards it was the choice of the decree holder(s) to proceed any of them severally or both of them jointly. The crux of the contract of guarantee is that it binds the surety in a co-extensive manner, whereas on the fulfillment of condition, the principal was released from the jail without execution

of the decree and now it was tried to be avoided for the afore-noted objection(s). The petitioner at her own accord had stepped into the shoes of the judgment debtor, as such she was equally responsible for the realization of his liability. Reliance is placed on the judgments reported as *Mirza Anwar Ahmad vs. Habib Bank Ltd., Faisalabad end others* (1989 CLC 2441), *Messrs State Engineering Corporation Ltd. vs. National Development Finance Corporation and others* (2006 CLD 687), *Muhammad Bashir through Legal Heir vs. Zarina Bibi and others* (PLD 2014 Lahore 429), *Rafique Hazquel Masih vs. Bank Alfalah Ltd. and other* (2005 SCMR 72). In the case of *M/s. State Engineering* (supra) it was held as under:

"Section 128 is applicable in the given circumstances. The liability of the guarantor/surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract as envisaged in Section 128 of the Contract Act, 1872. They are jointly and severally liable to pay the outstanding amount to the creditor. A guarantor cannot shirk from the liabilities incurred by him through the execution of documents."

Almost similar view was adopted in *Rafique's case (supra)* and for ready reference its relevant extract is reproduced hereunder:

> The liability of the surety under Section 128 of the Contract Act is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract…….In absence of any specific stipulation in the contract, a guarantor cannot take up the plea that the Bank should enforce the liability against the principal debtor before proceedings against the guarantor. The reason being that the Bank grants loan only on the guarantee and in absence of letter/contract of guarantee the Bank may not have sanctioned the loan.

Besides, Section 145 of the Code, 1908 is more than clear on this point.

4. The next grouse of the petitioner that she was not party to the original lis, as such decree was not executable against her, has also been dealt with by this Court in cases reported as *Khan Muhammad Ishaq Khan vs. The Azad Sharma Transport Co. Ltd. and others* (PLD 1953 Lahore 22), *Mrs. Muhammad Shafi through Agent vs. Sultan Ahmed* (2000 CLC 85) and *Habib Bank Limited vs. Malik Atta Muhammad and 4 others* (2000 CLC 451). In latter case it was held as under:

> *"As far the objection that the petitioner Bank being surety was not a party to the original suit or appeal, therefore, the execution of the decree passed against Agent Domez Borie could not be taken out against them, suffice it to refer to Section 145, C.P.C. whereby it is provided that even though a surety is not arrayed as a party to the suit or appeal, the decree against the judgment debtor can also be executed against the surety and rightly so because it is well accepted that the liability of the surety is co-extensive with the judgment debtor and continues till such time that the decree is either satisfied by the judgment debtor or by the surety. The provision of*

Section 145, C.P.C. eminently makes it clear that such surety shall, for the purpose of appeal, be deemed to be a party within the meaning of Section 47, C.P.C. The expression "deemed to be" manifestly refers to the my whereby a thing is presumed to be in existence while in fact it is riot in existence. A surety need not be made a party to the proceedings until execution is sought against him. If any authority is needed, reference may be made to Khan Muhammad Ishaq Khan v. The Azad Sharma Transport Co. Ltd. and others PLD 1953 Lah. 22, Cholappa Gattina Sanna and another v. Rachandra Anna Pai AIR 1920 Bom. 331 and Parkash Chand Mahajan v. Madan Theatres, Ltd. AIR 1936 Lah. 463."

Hence, learned Executing Court was quite justified to adopt measures against the petitioner/surety.

5. Mr. Muhammad Qadir Asif Toor, Advocate for the petitioner although argued the case to the test of his ability, but failed to persuade that either the impugned unanimous orders are *coram non-judice* or *ultra vires*, rather were passed by learned lower fora while exercising its lawful authority, hence are approved and instant Constitutional Petition having no merit is **dismissed** *in limine*.

(K.Q.B.)
Petition dismissed.

2022 Y L R 390
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
GHAZANFAR ALI and others---Petitioners
Versus
Malik MUHAMMAD ANSAR---Respondent

Civil Revision No. 1330 of 2015, heard on 7th June, 2021.

(a) Punjab Pre-emption Act (IX of 1991)---

----Ss. 6 & 7---Superior/preferential right of pre-emption---Partially sharing boundaries of adjoining land---Plaintiff pre-empted the sale on ground of being Shafi Khalit and Shafi Jar---Validity---Where sharing of boundaries of both the lands: viz. owned by pre-emptor and under pre-emption, was partial or deficient, it was not enough to meet with the requirement of both the properties being 'contiguous' to each other---Pre-emptor possessed meager share in three khasras adjoining to pre-emptive property--- Such pre-emptor alone could not pre-empt sale of suit property for himself, however, suit of pre-emptor could succeed if all other co-sharers had also joined him in claiming preferential right of pre-emption---Revision petition allowed accordingly.

Allah Ditta v. Ali Muhammad PLD 2016 SC 73; Iftikharuddin v. Jamshed K. A. Karker and 11 others PLD 1995 Kar. 608 and Iftikhar Mehmood v. Abdul Latif and others 2009 CLC 462 ref.

(b) Punjab Pre-emption Act (IX of 1991)---

----S. 6---Superior/preferential right of pre-emption---Co-sharers in un-abutted property---Equal right of co-sharers---Shafi Khalit and Shafi Jar---Scope---Vendees having become sharers in rest of three un-abutted khasras might safely defeat the right of pre-emption in pre-emptive property.

Mst. Gul Rangeena v. Khushal Khan 1999 CLC 831; Muhammad Iqbal v. Muhammad Gul 2010 CLC 1035 and Muhammad Ayub v. Hazrat Mansha 2006 MLD 1001 ref.

(c) Punjab Pre-emption Act (IX of 1991)---

----S. 6---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 18---Pre-emption---Onus probandi---Shafi Khalit and Shafi Jar---Multiple heads vesting right of pre-emption---Burden solely on pre-emptor---Onus probandi was upon the pre-emptor to prove

that he, besides being owner of adjoining area, was a participator in amenities and appendages of the sold land.

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

----S. 115--- Revision--- Unanimous judgments of two courts below---Reversal of---Scope---High Court normally hesitate to invoke its jurisdiction to disturb concurrent judgments of the two Courts below, however, where Courts below committed misreading/non-reading of available evidence in unanimously rendering their concurrent findings or those suffered from jurisdictional defect or misapplication of law, then Court could not shut its eyes, rather visitorial/ revisional jurisdiction was vested to it to check or even reverse such findings.

Nasir Abbas v. Manzoor Haider Shah PLD 1989 SC 568; Muhammad Nawaz alias Nawaza v. Member Judicial BoR and others 2014 SCMR 914 and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 ref.

Malik Arshad Awan, Mohsan Hanif Ch., Ihsan Ullah and Dr. Saima Hanif Mughal for Petitioners.

Irfan Salamat Ali Bajwa for Respondent.

Date of hearing: 7th June, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The judgments dated 10.04.2013 and 08.04.2015 are subject of petition in hand, whereby suit for possession through pre-emption instituted by the respondent/pre-emptor was concurrently decreed by the learned lower fora.

2. The condensed facts leading to file instant Civil Revision were that area measuring 07 kanals 13 marlas falling in khewat No.10 (fully detailed in the plaint) titled by Humayun Iqbal and his two brothers against sale price of Rs.15,00,000/- was sold out to the present petitioners vide Mutation No.781 dated 20.02.2007. The said transaction was pirated by the respondent through afore-noted suit asserting that the sale, which despite being kept secret was known to him on 22.02.2007 at about 07:00 p.m. through Tariq Ahmad, when he along with Muhammad Ishaq was present in his house and promptly pronounced Talb-i-muwathibat. It was further pleaded that after obtaining copy of sale mutation No.781, five independent notices of Talb-i-ishhad through registered post A/D were dispatched to the petitioners/vendees, but due to failure of Postman were received back un-served. To the extent of preferential right of pre-emption, it was asserted on behalf of respondent/pre-emptor that pre-empted land was abutting to his owned area, besides

right of way as well as flow of water over the property sold was shared in the appendages of said land, thus being qualified as Shafi Khalit and Shafi Jar the decree for pre-emption was claimed.

3. In contra, the petitioners/vendees denied due performance of Talbs by the respondent/pre-emptor as well as his better right of pre-emption. Facing with the contest, the learned Trial Court framed as many as eight issues and after receiving evidence in pros and cons finally decreed suit of the pre-emptor and appeal filed on behalf of the vendees dismissed, thus the latters preferred this petition for setting aside of the unanimous verdicts duly reflected in para 1 ante.

4. Mr. Arshad Malik Awan, ASC, worthy counsel for the vendees- petitioners argued that according to pleadings in Para No.7 of the plaint the pre-emptor himself was not satisfied that postman performed his responsibility provided under the law, therefore he was to be defeated per his own admission as averred in referred para, but Courts below without adverting to said vital aspect erred in law to decide issue qua fulfillment of talb-i-ishhad in affirmative. Mr. Malik further emphasized that there were more than dozen of the co-owners in the Khewat wherein pre-emptor was also co-sharer, thus suit for pre-emption solely filed on behalf of the latter without joining rest of the sharers was not maintainable, that pre-emptor was not a full and complete owner of the alleged neighbouring land, thus he does not qualify as Shafi Jar to be equipped with decree prayed for. The worthy counsel while relying upon judgment reported as Iftikhar Mehmood v. Abdul Latif and others (2009 CLC 462) argued that better pre-emption right was not available to the plaintiff, thus by accepting petition in hand, suit be dismissed.

5. Mr. Irfan Salamat Ali Bajwa, worthy counsel for the pre-emptor responded that per law on the subject the second talb was perfectly performed, that concurrent findings of fact returned by two Courts below with regard to performance of demands being un-exceptionable cannot be interfered with while exercising revisional jurisdiction. He further emphasized that a co-sharer in the adjoining land is equally competent to claim his superior right of pre-emption, that mere abutting of any of the Khasras vested to pre-emptor with sold land is enough to qualify being Shafi Jar. To strengthen his assertion to that effect, learned counsel for respondent has relied upon case law reported as Muhammad Yusaf v. Sikandar (PLD 1970 Peshawar 160) and Said Karim Shah v. Taj Muhammad (PLD 1974 SC 383). He lastly prayed for dismissal of Civil Revision in hand.

6. Arguments heard, record scanned.

7. Per pleadings and submissions advanced by worthy counsel for the parties, the issue with regard to superior right of pre-emption needs preeminent consideration. Undoubtedly, according to existing law on the subject, there are three classes of persons, who are entitled to assert/claim right of pre-emption, which are as follows:-

1) Shafi Sharik who is a co-sharer in the property.
2) Shafi Khalit a participator in amenities and appendages.
3) Shafi Jar owner of adjoining immovable properties.

In the instant case, the plaintiff is pre-empting the sale of suit property being Shafi Khalit as well as Shafi Jar, which fact is also apparent from the contents of plaint.

Admittedly, per copy of record of rights 2003-2004, Exh. P21 (available at pages 102 to 104), the pre-emptor owned share viz 55/1451 equal to 02 kanals 15 marlas in khewat No.5 having 19 different khasras total measuring 72 kanals 11 marlas. Whereas according to copy of jamanbandi for the same era, Exh. D1 (available at page 109), complete strength of Khewat No.10 is 23 Kanals 01 Marla falling in six Khasras and the vendors were jointly owners of 3/9 share equal to 07 kanals 13 marlas in said khewat, who transferred their said share to the petitioners/vendees vide oral sale Mutation No.781 dated 20.02.2007, Exh. P24 (available at page 107). It was respondent/pre-emptor, who being sharer of khewat No.5 (consisting of nineteen khasras) exercised his right of pre-emption against sale of land falling in khewat No.10 (consisting of six khasras), while asserting his superior right of pre-emption, therefore onus probandi was upon him to prove that he besides to be owner of adjoining area was a participator in amenities and appendages of the sold land. The pre-emptor in order to prove him being Shafi Khalit and Shafi Jar examined oral as well as documentary evidence, especially the copies of revenue record. The Courts below axled its concurrent decisions on Aks Shajra, Exh. P22 (available at page 105). Its perusal revealed that neither area of khewat No.5 (comprising nineteen khasras) is forming a compact block nor khewat No.10 (having six khasras) is in assembled shape, rather khasras of both the khewats are scattered here and there, whereas admittedly out of nineteen khasras of khewat No.5 (shared by pre-emptor) only its three khasras i.e. 523, 528 and 531 are found to be contiguous to just three khasras viz Nos.513, 522 and 532 of the sold/pre-empted land, however rest of three khasras under pre-emption are certainly not abutting or adjoining to the boundaries of remaining sixteen khasras of khewat No.5. In such situation, the pre-emptor, on the basis of contiguity to the extent of only those three khasras could, at the most, claim to have a superior right of pre-emption, but obviously should have failed for the counts; firstly that decree for partial pre-emption is not warranted and most importantly that the vendees having become sharers in rest of three un-abutted khasras are safely defeating the right of pre-emption in the subject property. This proposition to some effect has already been clinched by the superior Court in case reported as Mst. Gul Rangeena v. Khushal Khan (1999 CLC 831). Its relevant para No.7 to better understand is reproduced here below:-

7. Aks Shajra Kishtwar and the copy of disputed mutation placed on record would certainly suggest that two Khasras have been sold in the disputed sale out of which one is Khasra No.324. Aks Shajra Kistwar would certainly reveal that the pre-emptor is not contiguous to Khasra No.324 and hence his right of pre-emption based only on contiguity is not extended to Khasra No.324. No decree of pre-emption can be passed qua Khasra No.324 and hence by purchase of this Khasra the lady vendee has become a co-sharer in the Khata and thus, happens to have a much superior right of pre-emption to that of the pre-emptor. When numerous Khasras are purchased by a vendee and to some Khasras the contiguity is not proved and such Khasras cannot be pre-empted, the vendee becomes a co-sharer in the Khata due to that Khasra and gets armed with a superior right of pre-emption and can very well

defend a suit for pre-emption. On this score as well the pre-emptor was bound to be non-suited.

Thereafter same Court re-affirmed the said view in judgment styled as Muhammad Iqbal v. Muhammad Gul (2010 CLC 1035). Its demonstrable findings are as under:-

After having gone through the record, it transpired that the transaction of sale was effected in four Khasra numbers measuring 50 Kanals 13 Marlas out of which 2 Kanals 10 Marlas was purchased by the vendee/respondent. The petitioner had contiguity only with Khasra No.470 on the basis of Khasra No.476 whereas he had no contiguity with the rest of the three Khasra numbers nor the impugned Khasra numbers formed a compact block. So, apparently the petitioner seems to have a superior right of pre-emption on the basis of contiguity to the extent of one Khasra number. But on the other hand, the vendee-respondent can safely defeat the right of pre-emption by becoming co-sharer in the disputed property on the strength of the remaining three Khasra numbers. He being a co-sharer has a preferential right of pre-emption as compared to plaintiff/petitioner who happens to be the contiguous owner of the suit property. Reliance in this regard can safely be placed on Mst. Gul Rangeena v. Khushal Khan 1999 CLC 831.

On the same pattern, his lordship Jawad S. Khawaja, when he was gracing this Court per his wisdom defined contiguity via judgment titled as Muhammad Ayub v. Hazrat Mansha (2006 MLD 1001) while concluding as under:--

"The entire concept of contiguity in matters of pre-emption is based upon the premise that the owner of land sharing a common boundary with land, which is subject-matter of a pre-emption suit, should have a right superior to that of a purchaser who does not own land having a common boundary with the suit-land. In the present case it is quite evident that the suit land has no common boundary with the land owned by the respondent/plaintiff in square No.88. The mere fact that killa No.25 in square No.88 has one corner touching the corner of killa No.1 in square No.102, which is part of the suit land, does not result in any shared boundaries between the two and as such, cannot be treated as being contiguous. It, therefore, follows that the ownership of the respondent/plaintiff in killa No.25 of Square No.88 does not vest in him a superior right of pre-emption in respect of the suit land."

This view has recently been concurred by the august Supreme Court in case styled as 'Allah Ditta v. Ali Muhammad' (PLD 2016 Supreme Court 73). The above referred decisions made it clear that where sharing of boundaries of both the lands viz owned by pre-emptor and under pre-emption is partial or deficient it is not enough to meet with the requirement of both the properties being 'contiguous' to each other in terms of explanation to Section 6 of the Punjab Pre-emption Act, 1991. At the cost of repetition, but just to recall that in the lis in hand neither the land vested to pre-emptor nor the other, which was sold are forming compact block, therefore the case law referred by worthy counsel for the pre-emptor being distinguishable cannot be applied to the facts of this case.

8. The additional drawback of the case of the respondent/pre-emptor would be that he was not full owner of the adjoining three khasras, rather he possessed meager

share therein, who alone could not pre-empt sale of suit property for himself and the suit might have succeeded, if all other co-sharers had also joined him in claiming preferential right of pre-emption. This view finds support from judgments reported as 'Iftikharuddin v. Jamshed K. A. Karker and 11 others' (PLD 1995 Karachi 608) and 'Iftikhar Mehmood v. Abdul Latif and others' (2009 CLC 462).

9. The pre-emptor has not examined an iota of evidence to establish that he was Shafi Khalit, thus to this extent qualification could not be proved at all. The findings of two Courts below on issue No.1 with regard to superior right of pre-emption though are unanimous, yet being result of misreading and non-reading of evidence, besides against the law on the subject cannot be approved, which are reversed while answering it in negative.

10. Since the respondent/pre-emptor failed to prove his better pre-emptive right, the rest of discussion to return findings on remaining issues will be mere academic, thus Court does not feel appropriate to attend those, which otherwise will be sheer wastage of time as well.

11. As far as emphasis of learned counsel for the respondent that concurrent judgments of the two Courts below cannot be disturbed while exercising revisional jurisdiction is concerned, suffice it to say that normally this Court hesitate to invoke its said jurisdiction, but only in those cases where the unanimous findings of fact are based upon true appreciation of available evidence as well as free from misapplication of law. However, where Courts below committed misreading/non-reading of evidence in rendering their concurrent findings or those suffered from jurisdictional defect, then this Court cannot shut its eyes, rather visitorial/ revisional jurisdiction is vested to it to check or even reverse such findings. See Nasir Abbas v. Manzoor Haider Shah (PLD 1989 SC 568), Muhammad Nawaz alias Nawaza v. Member Judicial BoR and others (2014 SCMR 914) and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others (2016 SCMR 24).

12. Consequent to afore discussion based upon appreciation of available material, this Court does find that learned fora below had not only misread the evidence on suit file, but also escaped notice of the law on subject while holding the respondent to be Shafi Jar, therefore this Petition merits acceptance, which accordingly is allowed, the impugned decrees are hereby set aside and the suit instituted by respondent is dismissed. The parties to bear their own costs.

ZH/G-21/L Petition allowed.

PLJ 2022 Lahore 118

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

Mst. **NOOR ELAHI--Petitioner**

Versus

MUHAMMAD ABBAS etc.--Respondents

C.R. No. 203 of 2008, heard on 11.2.2021.

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

----Art. 49--Land Revenue Act, (XVII of 1967), S. 42--Title *qua* immovable property--Mutation--Scope of-- It is well established by now that mutation per se is not deed of title and party relying upon its entries is always bound to prove transaction reflected therein.

[P. 120] A

Ref. AIR 1930 PC 93; AIR (35) 1948 PC 210; PLD 1965 Lahore 472; 1992 SCMR 1832 PLD 1988 Lahore 45.

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

----Art. 49--Mutation containing sale transaction--Financial liability--Marginal witness--Examination of Tehsildar out of its signatories by beneficiary was not enough to meet with legal requirement--Impugned mutation was not liable to be taken as evidence, its attestation was established or sale transaction embodied therein proved, especially, when marginal witness while appearing on behalf of plaintiff created serious doubts in veracity of disputed mutation. [P. 122] B

Ref. 2016 SCMR 986.

Witness--

----Attestation of mutation--Allegation of lady--Not personally known--Thus allegation of lady that she was impersonated could not be rebutted. [P. 122] C

Thumb-Impression--

----Expert opinion--Doubtful report--Opinion of an Expert is always a weak, type of evidence and is not that of conclusive nature--It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence--Expert's testimony recorded in case in hand cannot be treated as substitute of available direct evidence. It is settled practice of Courts not to base findings merely on expert's opinion.

[P. 124] D

Ref. 2004 SCMR 1859, 2006 SCMR 193.

Land Revenue Act, 1967 (XVII of 1967)--

----S. 42--Limitation Act, (IX of 1908), Art. 120--Suit was filed after 11 years of sanction of mutation--Beneficiaries failed to prove--A document which was procured by playing fraud, can be challenged at any stage of time--Plaintiff prayed for declaring mutation in dispute as illegal, which was implemented in

relevant record of right--Every new entry in revenue record gives fresh cause of action to plaintiff and adverse entries therein even if are allowed to remain unchallenged does not necessarily extinguish right of party against whom such entry are renewed [P. 126] E

1995 SCMR 284.

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

----S. 115--Civil revision--Jurisdictional defect--Appellate Court below misconstrued available evidence and law on subject, which being tainted with misreading/ non-reading of evidence as well as suffering from jurisdictional defect fully calls for interference by applying exceptions provided u/S. 115 of Code, 1908. [P. 127] G

Limitation Act, 1908 (IX of 1908)--

----S. 120--Limitation for filing of suit--Filing a suit for declaration, Article 120 of Limitation Act, 1908 provides limitation of six years from date of right to sue. [P. 126] F

Miss Gulzar Butt, Advocate for Petitioner.

Mr. Sajjid Ali, Advocate for Respondents.

Date of hearing: 11.2.2021.

JUDGMENT

Undisputedly, the subject area was titled by the present petitioner, who claiming her to be a folk/illiterate lady, on 26.04.1992 brought declaratory suit against respondents, asserting that the said, land was only leased out, but while impersonating her, the respondents managed its transfer in their favour *vide* oral sale Mutation No. 192 dated 25.04.1981, whereas neither she offered its sale nor received any consideration, therefore, it being forged, fictitious as well as collusive was inoperative upon her rights and liable to be cancelled. The respondents/defendants (who inter se were brothers) obviously contested the suit through their written statement while pleading that suit area had been purchased by them, that the vendor/plaintiff in the company of her husband as well as attesting witnesses had appeared before Revenue Officer, who after recording the statement of the plaintiff and affixing her thumb-impressions over the Pert, sanctioned the subject mutation.

The parties to prove their respective stances produced evidence in pros & cons. As a result of appreciation thereof, the learned Trial Court decreed suit in hand and cancelled the mutation in dispute through judgment dated 17.06.2004, but the learned Appellate Court after analyzing the material with different angle dismissed the suit while reversing decree of the subordinate Court *vide* impugned judgment of 01.11.2007. Thus, the instant civil revision on behalf of the petitioner/plaintiff.

2. Arguments heard and record consulted.

3. Before adverting to the salient features of the case, it is to be added that mutation proceedings are initiated primarily for fiscal purposes to collect the land revenue and is only meant for maintaining the record. It is again not disputed that the revenue official/officer enters and attests the mutation during summary proceedings, which by no stretch of imagination can be considered judicial proceedings wherein right title *qua* immoveable property is determined. Although these proceedings made under Section 42 of the Land Revenue Act, 1967 are admissible under Article 49 of the Qanun-e-Shahadat Order, 1984 and some presumption is also attached thereto, but it is always rebuttable. It is well established by now that mutation per se is not deed of title and the party relying upon its entries is always bound to prove the transaction reflected therein. In holding so, I am fortified by the law laid down in *Gangabai and others vs. Fakirgowda Somaypagowda Desaiand others* (A.I.R.1930 PC 93), *Durga Prasad and another vs. Ghanshiam Das and others* (A.I.R. (35) 1948 PC 210), *Muhammad and others vs. Sardul* (PLD 1965 Lahore 472), and *Hakim Khan vs. Nazeer Ahmad Lughmani and 10 others*.(1992 SCMR 1832). Whereas this Court in the judgment titled *M. Malik vs. Mst. Razia* (PLD 1988 Lahore 45) defined the 'sale' as under:

> *"Sale means transfer of ownership in exchange for a price paid or promised or part paid and part promised where sale was made orally and reported Patwari by parties thereto who had admitted payment of the consideration and delivery of possession on the basis whereof mutation was entered. Sale would be effected and completed on that day and not when mutation in respect thereof was sanctioned."*

The august Supreme Court further elaborated the paramount ingredients of sale in *Ali Muhammad and others vs. Chief Settlement and Rehabilitation Commissioner and others* (1984 SCMR 94) to the following effect:

> *"Sale is defined as being a transfer of ownership for sale -price is an absolute transfer of rights in property sold and no rights are left in transferor. Essential elements of sale are (i) the parties; (ii) subject matter; (iii) transfer or conveyance and (iv) price or consideration."*

Whereas, according to Section 54 of the Transfer of Property Act, 1882, it is to be established on record that the sale price has been passed on to the vendor and in default thereof, sale is not completed.

4. While keeping in mind aforesaid features, when case of the parties consulted, the petitioner/plaintiff in paras 3 to 6 of the plaint narrated detail of the alleged malpractices, misrepresentation and fraud played upon her to usurp suit land. The respondents/defendants denied the said allegations while asserting that genuine transaction of sale was effected and after making payment of the consideration, the disputed mutation was properly attested. The said mutation was sanctioned on the attestation of Shafi Muhammad (PW2) & late Khan Bahadur Lumberdar, the father of PW3, whereas it was attested on the verification of Muhammad Ashiq (PW4), the husband of the plaintiff. As per available record, out of them two signatories (PW2

& 4) as well son (DW3) of third because the latter had already passed away was produced by the plaintiff. Out of those, PW1 explicitly worded that the plaintiff had never sold out suit area and consideration was also not paid to her, that she did not appear before the Tehsildar in his presence, and that she did not thumb-mark the sale mutation before him. He further stated that only for procuring some loan, his own thumb-impression was procured by the Patiuari. The next witness Riasat Ali (PW3) deposed on oath that his father Khan Bahadur though was Lumberdar, but he was illiterate person, who prior to his death told him that Patwari had managed his thumb-impression while cheating him, whereas plaintiff according to his knowledge never sold out subject land. On the same lines Muhammad Ashiq (PW4), who admittedly is husband of the plaintiff stated under oath that his wife had neither sold out the suit land nor she turned up before the Tehsildar and that he as well never appeared before the said officer or signed the subject mutation.

In response, the beneficiary though examined the Patzvari (DW5), but he was not the one, who either entered the mutation under dispute or attested in his presence. Although, the concerned Tehsildar (DW4) endorsed the genuine sanction of the disputed mutation, but admitted that consideration was not paid before him, whereas it was only acknowledged by the plaintiff/vendor that she had already received it. As a matter of law, subject mutation containing sale transaction was document pertaining to financial liability, thus required to be strictly proved. The examination of Tehsildar out of its signatories by the beneficiary was not enough to meet with the legal requirement. As such, the impugned mutation was not liable to be taken as evidence, what to talk that its attestation was established or the sale transaction embodied therein proved, especially, when the marginal witness while appearing on behalf of the plaintiff created serious doubts in the veracity of disputed mutation. See *Islam-ud-Din through LRs and others vs. Mst. Noor Jahan through LRs. and others* (2016 SCMR 986), wherein it was held that:

> *"The attesting witnesses of .all the three mutations are Muhammad Rashid son of Maula and Akbar Jan son of Mehr Jan, however, only one witness (Muhammad Rashid) was produced and no any reason was given for the non-production of Akbar Jan. Article 79 of the Qanun-e-Shahadat Order, 1984 stipulates that a document "shall not be used in evidence until two attesting witnesses at least had been called for the purpose of proving its execution".*

Apart therefrom, the Revenue Officer (DW4) during the cross-examination conceded that the plaintiff was not personally known to him, as such he could not say with certainty that she along with the witnesses actually appeared before him for attestation of mutation or not, thus the allegation of the lady that she was impersonated could not be rebutted. Even otherwise, father of respondents/ beneficiaries while appearing as DW2 during the cross-examination stated that the plaintiff/lady at that moment was about 15/16 years old and she (in 1981) was paid consideration of currency notes valuing rupees 500/1000, whereas learned counsel for the plaintiff on the strength of "Pakistani rupee - Wikipedia, the free

encyclopedia" pointed out that notes of rupees 500 were introduced in 1986 followed by denomination of 1000 rupees in the next year. This position was strengthened when printed material to this extent was provided by the learned counsel for the petitioners, which is also retained on the file. The learned counsel for the beneficiaries after going through the same fell in great difficulty to respond the same satisfactorily and this situation provided much corroboration to the stance of the petitioner. In absence of proof that consideration was made good, the sale definitely could not be established.

5. Mr. Sajid Ali, Advocate for the respondents submitted that apart from mutation, the vendor herself reported the transaction to the Patwari, who recorded the same in the Register Roznamcha Waqiati, therefore, mutation duly supported by the report recorded in the Daily Diary could not be annulled. Suffice it to say that no doubt rapat Roznamcha Waqiati (Exh.D5) was brought on record, but without recording statement of its maker. There is no hesitation to hold that rapat Roznamcha Waqiati is not per se admissible, whereas exhibition of document as well as proof of its contents are two different aspects and the latter to me is more relevant and important, which to the extent of Exh.D5 was lacking here. Moreover in judgment reported as *Zulfiqar and others vs. Shahdat Khan* (PLD 2007 SC 582) the apex Court while dealing with a rapat Roznamcha Waqiati recorded on behalf of vendor has already held it to be against intention of relevant provision of law. The pertinent conclusion being relevant is reproduced as under:

> *"Although Roznamcha Waqiati is required to be maintained under the West Pakistan Land Revenue Rules, 1968 and entry made during the course of performance of official duty is admissible yet if the report contains the statement of a private individual, it is required to be proved to establish its correctness. It may also be noted here that under Section 42 of The West Pakistan Land Revenue Act, 1967 it is the person acquiring a right in the land who has to make such a report to the Patwari Halqa. However, in the case in hand the report way made by the vendor and, therefore, within the scope of Section 42, it is even doubtful whether such a report, at the instance of vendor (a person alienating his right) could be said to have been recorded by the Pahvari in the discharge of his official duty."*

In addition thereto, *Roznamcha* itself is not a document to confer title in view of bar contained in Section 49 of the Registration Act, 1908, 'but the respondents being beneficiaries were required not only to lead solid evidence that the petitioner had sold out the suit land to him and also received its price as a whole or in part. This view finds support from the judgment of the august Supreme Court reported as *Tooti Gul and 2 others vs. Irfanuddin* (1996 SCMR 1386). Moreover, these entries were also not confronted to the plaintiff/alleged vendor (PW1), when she appeared in the witness box.

6. The next emphasis of Mr. Sajid Ali that the Revenue Officer (DW4) in his depositions explicitly deposed that vendor admitted before him that she had already

received sale proceed, thus her statement duly supported by the entry recorded during sanction of mutation was enough to prove that consideration was received by the vendor/plaintiff, was again not well founded. The august Supreme Court even in a case wherein registered sale instrument was under question held that mere an admission as to receipt of sale price before Attesting Officer could not be taken as conclusive proof. See *Muhammad Shafi and other vs. Allah Dad Khan* (PLD1986 SC 519).

7. The other argument of learned counsel for respondents that the disputed mutation was referred to Finger Expert Bureau to compare alleged thumb-impression of the plaintiff, who (DW6) reported it to be identical with the admitted one, therefore, the stance of the plaintiff was falsified is not well founded. Although, Expert opined the similarity, but he also endorsed that by putting another thumb-impression over the already existed thumb mark available on the subject mutation, it was tried to be impaired, thus made the report doubtful. Even otherwise, the opinion of an Expert is always a work, type of evidence and is not that of conclusive nature. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence. In view of this infirmity, the Expert's testimony recorded in the case in hand cannot be treated as substitute of available direct evidence. It is settled practice of Courts not to base findings merely on expert's opinion. In this regard, reference can be made to a case reported as *Syed Muhammad Umer Shah vs. Bashir Ahmed* (2004 SCMR 1859) wherein it was held as under:

> *"After scanning the entire evidence on record and after going through the concurrent findings, we are of the firm view that the only opinion of a Handwriting Expert, otherwise a weak piece of evidence, should not be allowed to prevail against strong circumstances and strong evidence giving inference, altogether, to the contrary. When once the petitioner had failed to prove his case on the basis of the very evidence produced by him, he cannot be given the benefit of the only favouarble opinion by the Expert, being otherwise a weak piece of evidence."*

This view was again affirmed by the same Court in case *Mst. Saadat Sultan and others vs. Muhammad Zahur Khan and others* (2006 SCMR 193) in the following words:

> *We have carefully examined the contentions as adduced on behalf of petitioners in the light of relevant provisions of law and record of the case. We have scanned the entire evidence and perused the judgments of learned trial and Appellate Courts as well as the judgment impugned. Let we make it clear at the outset that the opinion of Handwriting Expert is a very weak type of evidence and is not that of a conclusive nature. It is well-established by now that expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence cannot be given preference where confidence inspiring and worthy of credence evidence is available. In this regard we are fortified by the dictum as laid down in*

Yaqoob Shah v. The State PLD 1976 SC 53. There is no doubt that the opinion of Handwriting Expert is relevant but it does not amount to conclusive proof as pressed time and again by the learned Advocate Supreme Court on behalf of petitioner and can be rebutted by overwhelming independent evidence. In this regard reference can be made to Abdul Majeed v. State PLD 1976 Kar. 762. It is always risky to base the findings of genuineness of writing on Expert's opinion. In this behalf we are fortified by the dictum as laid down in case of Ali Nawaz Gardezi v. Muhammad Yousuf PLD 1963 SC51,"

8. As far as, submission of learned counsel for the respondents that suit for simple declaration without seeking relief of possession was not maintainable is concerned, suffice it to add that per para 4 of the plaint, the plaintiff explained that the suit land was under lease, which while exercising fraud was mutated, therefore, simple suit for declaration is maintainable. After its final culmination in her favour, she might have opportunity to initiate proceedings to recover the possession. The learned Appellate Court ignored the said part of the plaint while rendering its findings on the issue settled in this behalf. Above all, the superior Courts while dealing with relevant provision/ Order VII, Rule 7 of the Code, 1908 reproduced here:

> ***7. Relief to be specifically stated--****Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.*

in series of cases cited as *Manager, Jammu and Kashmir, State Property in Pakistan vs. Khuda Yar and another* (PLD 1975 SC 678), *Ch. Akbar Ali vs. Secretary, Ministry of Defence. Rawalpindi and another*(1991 SCMR 2114), *Mst. Arshan Bi through Mst. Fatima Bi and others vs. Maula Bakhsh through Mst. Ghulam Safoor and others*(2003 SCMR 318), *Altaf Hussain alias Mushtaq Ahmed vs. Muhammad Din and otters* (2010 CLC 1646), *Sardara and Allah Ditta through legal heirs and others vs. Mst. Bashir Begum and another* (PLD 2016 Lahore 587) and *Muhammad Riaz and others vs. Qaim Ali and others* (PLD 2019 Lahore 97) have already observed that for mere technicalities a suit cannot be defeated due to its bad form. It was further observed that a Court in aid of justice vests with unfettered powers to provide, mould and grant adequate relief even if not claimed through the contents of the plaint. As such the suit was competent in all respect and plaintiff could not be non-suited for such drawback, if any.

9. The next contention of learned counsel for respondents that the suit was filed after 11 years of the sanction of subject mutation, therefore, the same was liable to be dismissed on the score of limitation is without any substance. As discussed above, beneficiaries failed to prove the transaction of sale as well as valid attestation of impugned mutation. A document which was procured by playing fraud, can be

challenged at any stage of time. As regards filing a suit for declaration, Article 120 of the Limitation Act, 1908 provides limitation of six years from the date of right to sue. The plaintiff prayed for declaring the mutation in dispute as illegal, which was implemented in the relevant record of right. The every new entry in the revenue record gives fresh cause of action to the plaintiff and adverse entries therein even if are allowed to remain unchallenged does not necessarily extinguish the right of the party against whom such entry are renewed. This view has been affirmed by the apex Court in the judgment reported as *Wali and 10 others vs. Akbar and 5 others* (1995 SCMR 284), wherein it is held that any new entry in the revenue record on the basis of the forged document gave rise to a new cause of action. Moreover, any transaction/document, which is result of fraud neither can be perpetuated nor protected on the ground of period of limitation and whenever such transaction is assailed, the Court of law has to refuse to give effect to it. Reliance can be placed upon recent judgment reported as *"Ghulam Farid and another vs. Sher Rehman*

through L.Rs" (2016 SCMR 862). As such suit was very much within time and Issue No. 7 is answered against the respondents/defendants.

10. For the reasons discussed hereinabove, this Court has come to the conclusion that the learned Appellate Court below misconstrued available evidence and law on subject, which being tainted with misreading/ non-reading of evidence as well as suffering from jurisdictional defect fully calls for interference by applying the exceptions provided under Section 115 of the Code, 1908. Thus, this civil revision is allowed, judgment impugned herein is set aside and that of learned Trial Court by virtue of which suit of the petitioner decreed, is restored. No order as to costs.

(R.A.) Civil Revision allowed.

PLJ 2022 Lahore 159
[Multan Bench, Multan]
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
SUI NORTHERN GAS PIPELINE LIMITED, etc.--Petitioners
Versus
MUHAMMAD SHAFI--Respondent

C.R. No. 772 of 2019, decided on 1.12.2021.

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

----S. 12(2)--Specific Relief Act, 1877 (I of 1877), S. 42--Constitution of Pakistan, 1973, Art. 10-A--Suit for declaration was ex-parte decreed--Non effectness of personal service of petitioner--Evidence of process server was not recorded--Publication of citation in newspaper--Application for setting aside of ex-parte decree was rejected--Right of fair trial--Application entailing factual controversy could only be decided after settlement of issues and requiring parties to lead their evidence, but petitioners were knocked out merely through mechanical order mainly on strength that wrong provision of law was quoted over application for setting aside of ex parte proceedings and decree--Counsel for respondent despite going through entire record found himself in difficulty to wriggle out queries raised by his counter part, Article 10-A of Constitution with guarantees right of fair trial as well as due process to every litigant--Petition allowed. [P. 160] A & B

Malik Zafar Mehboob Langrial, Advocate for Petitioners.

Ch. Pervaiz Akhtar Gujjar, Advocate for Respondent.

Date of hearing: 1.12.2021.

ORDER

In a declaratory suit instituted by respondent, although petitioners/defendants were put under notice, yet personal service could not be effected and after publication of citation in newspaper finally they were proceeded against ex pnrte on 19.03.2016 followed by decree of similar character dated 23.01.2017, who then preferred application for its setting aside on 20.01.2018, but summarily dismissed via impugned order dated 19.03.2019, thus this petition.

2. Today, Malik Zafar Mehboob Langrial, Advocate learned counsel for petitioners vehemently, argued that law favours adjudication of cases on merit; that no personal service was effected upon petitioners/defendants, but in haste even .without recording statement of Process Server, process of service through substituted mode was followed, which was not warranted and that copy of said citation was even not dispatched to petitioners. In such situation, application entailing factual controversy could only be decided after settlement of issues and requiring parties to lead their evidence, but petitioners were knocked out merely

through mechanical order mainly on the strength that wrong provision of law was quoted over application for setting aside of ex parte proceedings and decree.

3. In response, learned counsel for respondent/plaintiff despite going through entire record found himself in difficulty to wriggle out queries raised by his counter part, thus while keeping in mind Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, which guarantees right of fair trial as well as due process to every litigant, hence this petition is **allowed** subject to cost of Rs. 10,000/- payable by the petitioners to respondent, order impugned herein is set aside and learned Trial Court will re-decide application made for setting aside of ex-parte proceedings and decree without being influenced that under what provision of law same was tabled or require them to amend the same. The parties are directed to appear there on 13.12.2021 for further proceedings.

(Y.A.) Petition allowed.

2022 C L C 563
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ALTAF HUSSAIN and others----Petitioners
Versus
Mst. SABAN and others----Respondents

R.S.A. No.264 of 2010, heard on 25th May, 2021.

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

----O.VII, R.1---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 120---Pleadings---Proof---Onus to prove---Plaintiff, in order to succeed, has to stand on his own legs---Imperative for plaintiff to prove his case independently and without merely getting any support or flaws/lapses, if any, of his adversary.

Amir Ullah Khan and another v. Muhammad Akram 2004 YLR 709 and Fazal Khan v. Mukaram Khan and others 2007 CLC 894 rel.

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

----S.3 Arts.113 & 120---Specific Relief Act (I of 1877), Ss. 42 & 54---Limitation, determination of---Jurisdiction of Court---Respondent-plaintiff filed suit for declaration and injunction in which he claimed to be owner in possession of suit land on the basis of an agreement to sell---Suit filed by respondent-plaintiff was dismissed by Trial Court but Lower Appellate Court decreed the same in his favour---Validity---Lower Appellate Court failed to consider that on the basis of some agreement, suit for declaration was not maintainable---To seek decree for its specific performance, period of only three years per Art.113 of Limitation Act, 1908, was available to institute the suit---Agreement in question was settled on 22-3-1995 and suit for specific performance on its strength could be filed till 21-3-1998, whereas while stretching it to accord decree for declaration Court was bound to satisfy that suit per Art. 120 of Limitation Act, 1908, was instituted within six years--- Suit was filed on 22-04-2002 after more than seven years and Lower Appellate Court did not attend such aspect--- As per mandate of S. 3 of Limitation Act, 1908, Lower Appellate Court was under obligation to scrutinize the plaint, application and appeal on the point of limitation regardless of the fact that the point of limitation was agitated by either party or not--- High Court set aside judgment and decree passed by Lower Appellate Court and restored that of Trial Court---Second appeal was allowed, in circumstances.

Haji Abdullah Khan and others v. Nisar Muhammad Khan and others PLD 1959 Pesh. 81; Niaz Rasool through Muhammad Bilal v. Mst. Perveen Ikram and others

2013 SCMR 397; Naveed Akram v. Muhammad Anwar 2019 SCMR 1095; Imperial Bank of Canada v. Mary Victoria Begley AIR 1936 PC 193; "Muhammad Zakaria v. Bashier Ahmad 2001 CLC 595 and Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others PLD 2013 SC 641 ref.

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

----S.3---Limitation---Object, purpose and scope--- Limitation is not merely a technicality, rather Limitation Act, 1908 furnishes certainty and regularity to human affairs, matters and dealings--- Law helps vigilant and not the indolent--- Delay of each and everyday has to be explained satisfactorily, otherwise delay cannot and should not be condoned.

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

Akhtar Masood Khan Awais and Khan Talib Hussain Baloch for Appellant.

Nemo. for Respondents.

Date of hearing: 25th May, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----The instant second appeal was filed against the judgment dated 03.04.2010, whereby learned Appellate Court below while allowing first appeal of the respondents/plaintiffs, reversed decision of the learned Trial Court and decreed their declaratory suit based upon alleged exchange contract dated 22.03.1995 (Ex:P1).

2. The condensed facts of the case were that Sher Muhammad (ascendants of respondents Nos.1 to 4) as well as Muhammad Afzal and Muhammad Ismail (respondents Nos.5 and 6), three real brothers, were joint owners in equal shares of 651/2Kanas situated in Mauza Deenar. On the same pattern, Muhammad Latif (ascendant of appellants Nos.1 to 5), Muhammad Rafique, appellant Nos.6 and Muhammad Sharif (predecessor-in-interest of appellants Nos.7 to 10) were also brothers inter se, who too were titleholders in equal shares of 651/2Kanals in same Mauza. The respondents/plaintiffs on 22.04.2002 instituted suit against the

appellants for declaring them exclusive owners of land vested to the latters/defendants as they had purportedly exchanged it vide agreement dated 22.03.1995 (Exh.P1). The appellants/defendants seriously contested the suit with two-fold defence; firstly that alleged exchange transaction had never been settled among the parties, rather forged, fictitious and fraudulent document was maneuvered to usurp their valuable land, and secondly that two out of three defendants were neither available nor party to Exh.PI, thus it to the extent of their rights was ineffective. Facing with the hot contest, issues were materialized, evidence in pros and cons received and though suit was dismissed by the learned Civil Court on 24.01.2007, yet decreed by the learned Appellate Court below through impugned judgment duly reflected in preceding para, thus this second appeal was preferred by the appellants seeking restoration of judgment of the learned Trial Court.

3. Consequent upon issuance of process through various modes, respondents were duly served, out of whom only respondent No.2 appointed Syed Qaiser Gillani, Advocate for his representation, who submitted his power of attorney, but for the last so many dates of hearing none of them is appearing. This matter is lingering on for more than a decade and per its age now falls within category of the oldest cases, whereas the respondents seem not to be interested in its disposal on merit, who are proceeded against ex parte.

4. Arguments of learned counsel for appellants heard and record scanned.

5. Undoubtedly, there were three co-owners each from both sides to whom land vested in equal shares. Although, respondents/plaintiffs claimed their ownership qua land owned by three defendants/appellants while relying upon agreement of exchange dated 22.03.1995 (Exh:P1), but admittedly out of the latters, it alone was allegedly thumb marked by Muhammad Latif and that too while exposing him exclusive owner of entire property, whereas per available copies of record of rights, he being just a co-owner was owner only to the extent of his 1/3rd share. Thus per face value of Exh:P1, its execution by one of the co-sharers while showing him owner of total area was in opposite. Moreover, Muhammad Latif, the sole alleged signatory specifically not only denied the execution of Exh.P1, rather he claimed signatures available over there to be fake. In the given situation, sine qua non for the beneficiary/plaintiffs to have either alleged that sole signatory was authorized on the part of other co-owners to settle the exchange or execute Exh.P1 or the latters ever ratified the action initiated on behalf of Muhammad Latif. It was surprising that on both of the said counts, not only the basic/hub document (Exh.P1), whereupon entire case of the plaintiffs rested, rather the plaint was totally silent. Thus this document in no way could be used to confer title upon the plaintiffs to the extent of remaining 2/3rd share of suit land, which was neither owned by Muhammad Latif nor he had expressed authority to act in this behalf. More surprising that even plaint itself was mute to justify that in what capacity Muhammad Latif solely executed the

contract, rather according to its para No.1, all the three defendants/appellants settled the exchange. This pleaded fact otherwise was negated by the marginal witnesses of Exh.P1, viz Muhammad Afzal (PW2) and Muhammad Khalil (PW3) while explicitly conceding during their cross-examination (at pages 54 and 56) that Muhammad Sharif and Muhammad Rafique (rest of two defendants) neither singed Exh.P1 nor they were available at the scene, therefore their evidence being contrary to the contents of the plaint was of no value. The Exh.P1 being a document of future liability per scheme of law was required to be attested by at least two male witnesses. No doubt it was so, but one out of them (Muhammad Afzal PW2) was beneficiary of Exh.P1 as well. It is well established rule that a party cannot be a witness of its own document, thus it was not to be taken in evidence, what to talk that it could be made basis to confer title upon its beneficiary.

6. The other drastic angle of the case of respondents/plaintiffs was that only Sher Muhammad, one of the plaintiffs while posing him to be exclusive owner of the land (which was allegedly given to the appellants/defendants in lieu of said exchange) solely signed Exh:Pl, therefore firstly it was of no help to rest of the two plaintiffs and secondly that he did not appear in the witness-box to make statement on oath, whose non-appearance without any probable cause not only compelled the Court to draw hostile inference under Article 129 illustration (g), rather by not appearing in the witness box, he assuredly damaged the case. See "Haji Abdullah Khan and others v. Nisar Muhammad Khan and others" (PLD 1959 Peshawar 81). The relevant para thereof at page 100 is reproduced as follows:-

"So far as the other defendant-appellants are concerned, none of them appeared in the witness-box except Mir Afzal Khan. It is a settled law that it is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. By non-appearance, therefore, the defendant- appellants except Mir Afzal Khan failed to discharge the onus or shift the onus on to the plaintiffs."

This view has been recurred by the apex Court in cases reported as Niaz Rasool through Muhammad Bilal v. Mst. Perveen Ikram and others (2013 SCMR 397) and Naveed Akram v. Muhammad Anwar (2019 SCMR 1095).

7. The learned Appellate Court below despite being bound to consider the statement of DW1 as a whole per its pith and substance tried to accord benefit to the plaintiffs for some alleged weaknesses while picking particular glimpses therefrom, whereas it is well established principle that in order to succeed, the plaintiff(s) has/have to stand on his/their own legs, thus imperative for him/ them to prove his/their case independently and without merely getting any support for the flaws/lapses, if any, of his/their adversary. See Amir Ullah Khan and another v. Muhammad Akram (2004 YLR 709) and Fazal Khan v. Mukaram Khan and others (2007 CLC 894). The

learned Addl. District Judge (Malik Ali Raza Awan) as he then was, to form its respective findings had also wrongly interpreted "ratification" as provided in section 196 of the Contract Act, 1872. In the file in hand, DW1 during cross-examination simply worded that they had permitted Muhammad Latif, their brother (alleged signatory of Exh.P1) to administer the suit land, whereas he as well as other co-plaintiff via their written statement as well as statement-in-chief expressly averred that Muhammad Latif was never authorized to settle the exchange or execute a document in this behalf. Sorry to say that learned Addl. District Judge just to graft his unfounded reasoning not only twisted the available evidence, rather misapplied the provision ibid. "Administer" just means to manage or supervise the matter/ task so assigned. It does not qualify the authorization qua disposal of the property. Ratification as referred in provision ibid is that where acts are done by one person on behalf of another, but without his knowledge or authority, the latter may act to approve or confirm it. If ratification is made, then same effect will flow as if those acts have been performed under some authority. It is again well settled that acts done by a person in his own name and in his separate legal capacity are not capable to subsequent ratification by another person. See "Imperial Bank of Canada v. Mary Victoria Begley " (AIR 1936 PC 193), "Muhammad Zakaria v. Bashier Ahmad" (2001 CLC 595) and "Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others" (PLD 2013 SC 641). In such like situation, the ratification would be applicable that after the execution of Exh.P1 the other defendants had subsequently authorized Muhammad Latif to settle transaction of exchange on their behalf. In absence thereof, the term "ratification" was not applicable in the case in hand, which purposely was applied just to pass the decree in favour of respondents, who otherwise, never pleaded the said fact/situation.

8. The Court below also failed to consider that on the basis of some agreement, suit for declaration was not maintainable, whereas to seek decree for its specific performance, period of only three years per Article 113 of the Limitation Act, 1908 was available to institute the suit. Admittedly, the alleged agreement (Exh.P1) was settled on 22.03.1995, thus the suit for specific performance on its strength could be filed till 21.03.1998, whereas while stretching it to accord decree for declaration the Court was bound to satisfy that suit per Article 120 of the Act ibid was instituted within six years, but despite that suit was filed on 22.04.2002 after more than seven years, the learned Addl. District Judge did not attend to said aspect. As per mandate of Section 3 of the Act ibid, the Court is under obligation to scrutinize the plaint, the application and the appeal on the point of limitation regardless of the fact that the said point has been agitated by either party or not. The relevant provision of law for clarity and reference, is reproduced hereunder:-

"Section 3 Dismissal of suit, etc, instituted, etc, after period of limitation. Subject to the provisions contained in Sections 4 to 25 (inclusive), every suit instituted, appeal preferred and application made after the period of limitation prescribed therefore by

the First Schedule shall be dismissed, although limitation has not been set up as a defence."

Moreover, it is an established principle by now that law of limitation is not merely a technicality, rather said statute furnishes certainty and regularity to the human affairs, matters and dealings. It is also well settled that law helps the vigilant and not the indolent. Furthermore, delay of each and every day has to be explained satisfactorily, otherwise the delay cannot and should not be condoned. On said settled canons of law, this Court is fortified by case law cited as "Messrs Dawood Cotton Mills Ltd. v. Sindh Labour Appellate Tribunal and others" (2006 SCMR 630), "Atta Muhammad v. Maula Bakhsh and others" (2007 SCMR 1446), "Muhammad Hussain and others v. Dr. Zahoor Alam" (2010 SCMR 286), "Muhammad Islam v. Inspector General of Police, Islamabad and others" (2011 SCMR 8) and "State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others" (2012 SCMR 280). In such facts and circumstances, the learned Court below was not justified to decree the time barred suit.

9. For the foregoing reasons, it is a fit case to attract exceptions provided under section 100 of the Code, 1908, consequently, this appeal is allowed, judgment and decree impugned herein is set aside and that of the learned Civil Court, whereby suit was dismissal is restored, with costs throughout.

MH/A-53/L Appeal allowed.

PLJ 2022 Lahore 341

Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**

MUHAMMAD RAFI--Petitioner

Versus

Mst. **JAMILA BEGUM and 9 others--Respondents**

C.R. No. 1747 of 2015, heard on 5.3.2021.

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

----Ss. 42 & 9--Civil Procedure Code, (V of 1908), S. 115--Suits for declaration and possession--Consolidated judgment--Suit filed by plaintiff was decreed and suit filed by defendant was dismissed--Dismissal of appeals--Benamidar--Joint and equal title--Presumption of correctness--Motive for ostensible sale was not established--Exercising of wrong jurisdiction--Partial transaction--Challenge to--Sale-deed (Exh.P3) was original document, which vested joint & equal title to both brothers (plaintiff & petitioner)--This was a registered instrument, which prior to institution of suit had already attained age much over to 30 years, for both said counts attained strong presumption of correctness *qua* its attestation--Suit plot had been exclusively purchased by plaintiff, neither any express nor implied evidence was brought on suit file--Plaintiff omitted to plead and prove motive why subject plot was ostensibly purchased in name of petitioner, rather only mentioned therein that for love & affection it was done so-- Plaintiff failed to allege that his brother was required to show himself to be owner of some immovable property for his benefit and disputed transaction was effected in his name, in absence thereof, impugned partial transaction could not be declared a sham one--Ingredient 'motive' for ostensible sale in favour of petitioner was not established as well--Normally High Court does not interfere in concurrent findings of fact recorded by Courts below, but here impugned decrees being classic example of wrong exercise of jurisdiction & clearly suffering from material irregularity/patent illegality besides gross violation of law floating on its surface cannot be sustained--High Court cannot shut its eyes and is always under obligation to rectify error by interference in such like illegal findings--Revision petition allowed.

[Pp. 344, 346, 347, 348, 350 & 351] A, B, C, D, E & F

2004 SCMR 1001, 2006 SCMR 1238, 2014 SCMR 914 & 2016 SCMR 24 *ref.*

Mr. Muhammad Ahmad, Advocate for Petitioner.

Malik Muhammad Shafique Rajpoot, Advocate for Respondents No. 1 to 8 & 10.

M/s. Nasir Mahmud and Tahir Mahmood Mughal, Advocates for Respondent No. 9.

Date of hearing: 5.3.2021.

JUDGMENT

Precisely, Muhammad Rafi, petitioner and late Muhammad Shafi (plaintiff) ascendant of Respondents No. 1 to 5, were brothers inter se, to whom suit plot measuring 14Marlas transferred by one Malik Din through sale-deed dated 16.12.1964 (Exh.P3). Much thereafter, on 31.01.2007, Muhammad Shafi/plaintiff instituted declaratory suit asserting that in 1964, when suit property was transferred, the petitioner/defendant was minor; that, indeed, the former from his own funds had purchased subject plot after paying entire sale price, whereas just for love and affection, name of minor brother/petitioner being benamidar was reflected in subject instrument. The latter not only contested the suit, rather he also filed an independent suit for declaration and possession etc. According to the pleadings submitted on behalf of petitioner/defendant, his stance was that suit property had been purchased in equal shares by their late father through his own resources for both of the sons (plaintiff and petitioner). It was further defence of the petitioner that subsequently, the plaintiff/respondents by selling out some area out of his 07marlas to one Muhammad Shabbir as well as to the petitioner *vide* Sale Deed and Relinquishment Deed respectively had not only become landless, rather already transferred share more than his entitlement. The ultimate posture of the petitioner was that he had become proprietor of 10marlas 02 Square Feet, thus possession of said area be awarded/restored to him.

2. The learned Trial Court captured disputed area of pleadings of the parties by materializing nine issues, however, subsequently Issue No. 1-A added as well and Issues No. 1, 1-A, 2, 3, 6 & 7, being pivotal for brevity sake, are reproduced here:-

1. Whether the plaintiff is entitled to a decree for declaration and permanent injunction as prayed for? OPP.

1-A. Whether the plaintiff is exclusive and sole owner of the suit property mentioned in the sale-deed No. 13633 dated 16.12.1964 and defendant is only benamidar? OPP

2. Whether the entries in the name of defendant in the Revenue Record and Excise and Taxation Record are based upon fraud, illegal and inoperative upon the rights of the plaintiffs? OPP

3. Whether the suit is time barred? OPD.

6. Whether the defendants Haji Muhammad Rafi etc. are entitled to a decree for declaration, possession cancellation of sale-deed along with permanent injunction as prayed for? OPD.

7. Whether the sale-deed No. 2194 dated 29.03.2001 is illegal, void and liable to be cancelled? OPD.

The learned Civil Court tried both the suits conjunctively and ultimately after receiving/appreciating evidence of the respective parties, decreed the suit of Muhammad Shafi, plaintiff (predecessor of Respondents No. 1 to 5), whereas dismissed that of petitioner/ defendant through consolidated judgment and decrees dated 30.11.2013. Although two independent appeals were preferred by the latter, but without any success having been dismissed on 27.04.2015, therefore, this as well as connected C.R.No. 1749-2015. Since both these Civil Revisions inter se the parties have arisen out of common verdicts and decrees involving identical questions of fact/law, therefore, for all intents and purposes, it would be better to decide the same vide this single judgment. However for reference, source will be file in hand.

3. Arguments heard, record perused.

4. At the very outset, it is noticed that by filing CM No. 1/C of 2018, the plaintiff/respondents prayed for production of additional evidence detailed in Para No. 7 thereof. No doubt in appropriate cases permission can be granted to produce the same, if found to be essential by the Court in arriving at just conclusion of the lis before it. Admittedly, the proposed documents were already in possession and knowledge of the plaintiff/respondents, who never produced the same in the evidence at the relevant time for the reasons best known. Moreover, mere placing of such documents on the record will not serve any useful purpose until and unless those are duly proved under the scheme of law. See *Muhammad Yusuf Khan Khattak vs. S.M.Ayub and 2 others* (PLD 1973 SC 160). Even otherwise, it is well settled principle up till now that permission to bring additional evidence cannot be accorded just to fill in the lacunas left by a party in its evidence. Reliance can be placed on the judgments reported as *Muhammad Yousaf vs. Mst. Maqsooda Anjum and others* (2004 SCMR 1049), *Muhammad Siddique vs. Muhammad Sharif and others* (2005 SCMR1231) and *Rana Abdul Aleem Khan vs. Idara National Industrial Co-operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another* (2016 SCMR 2067). Resultantly, instant application having no substance is dismissed.

5. Adverting to merits of the main lis, sale-deed No. 13633 dated 16.12.1964 (Exh.P3) was the original document, which vested joint and equal title to both the brothers (plaintiff and petitioner). This was a registered instrument, which prior to institution of suit on 13.01.2007 had already attained the age much over to 30 years, therefore for both the said counts attained strong presumption of correctness *qua* its

attestation. Reliance can be placed upon *Rasool Bukhsh and another vs. Muhammad Ramzan* (2007 SCMR 85), *Khan Muhammad vs. Khursheed* (2010 CLC 970) and *Muhammad Siddique (deceased) through LRs and others vs. Mst. Noor Bibi (deceased) through LRs and others* (2020 SCMR 483). It is to be kept in mind that suit *qua* benami dispute is not the one wherein genuineness or veracity of the document is involved, rather in such like cases, the execution of the instrument is an admitted fact and the seeker intends just rectification of the document so as to eliminate/exclude the name of the benamidar. The question whether a particular transaction is benami or not, is largely one of the facts and for its determination, no absolute formula or test has been laid down, but while seeking guidance from dicta laid down in judgment reported as *Muhammad Sajjad vs. Muhamamd Anwar* (1991 SCMR 703), the following elements are to be affirmatively proved by the quester:-

i. Source of consideration;

ii. From whose custody original title deed came;

iii. Who is in possession of the property; and

iv. Motive of benami.

These essential elements must co-exist for proving benami transaction between ostensible owner and actual purchaser, who bought it through his own funds in the name of ostensible owner for certain reasons/motive to gain ultimate benefits.

6. As per prevailing situation emerging from pleadings of the parties under Article 117 of the Qanun-e-Shahadat Order, 1984, onus to prove the said claim was on the plaintiff, who asserted it positively. Admittedly, before recording evidence of the parties, Muhammad Shafi, (plaintiff)/alleged actual owner had already died, who was succeeded by Respondents No. 1 to 5. Out of them, Muhammad Taqi (PW1) in his statement neither exposed the essential detail in respect of time, date and names of witnesses, so as to prove when and before whom the consideration was paid, nor did he disclose the resources for generation of the funds. He simply stated in his examination-in-chief that suit property had been purchased by his father after making entire sale consideration, whereas nothing was invested by petitioner/defendant because he was minor. It was further worded by PW1 that subsequently some area out of suit property was alienated to one Muhammad Bashir and another 03 marlas was also transferred to petitioner/defendant for additional love and affection. He though stated that remaining part of the property was transferred by his father to the younger sons through sale-deeds and those were attested by the petitioner/defendant being marginal witness, yet this part of deposition was beyond the pleadings of the plaintiff. Muhammad Taqi (PW1),

however, during test of cross-examination could not withstand the credibility. Some important glimpses out of his cross-examination are given below:

یہ درست ہے کہ جب متد عو یہ زمین کی ادائیگی ہوئی تو اس وقت میں موجود نہ تھا ۔ میرے والد صاحب نے کہا کہ رقم میں نے ادا کی تھی ۔ سال 1964 میں میری عمر 4 چار سال تھی ۔ یہ درست ہے کہ میرے دادا پر چون کی دکان کرتے تھے ۔

Meaning thereby that he being infant at the time of execution of sale-deed, was not in any position to utter that when original sale settled, how much consideration paid or what was the resource of his late father to beget the sale price. While answering another question, PW-1 admitted as well that his grandfather (real father of the plaintiff and petitioner) was running a shop. The said witness while further uttering as under:

جب میرے دادا جان پر چون کی دکان کر تے تھے تو اس وقت میرے والد پڑھتے تھے ۔ مجھے یاد نہ ہے کہ میرے دادا جان نے کس سال تک پرچون کی دکان کی۔

indeed, to some extent admitted the stance of his uncle/petitioner that father of original parties (grandfather of PW1) was an earning hand, whereas his father (plaintiff) was still student. The PW1 also deposed in following terms:

یہ درست ہے کہ ہمارے پاس OK نوار فیکٹری کی بابت کوئی بنک Statement یا سرٹیفیکیٹ کسی ادارے کی طرف سے فی الوقت موجود نہ ہے ۔ میں کل بھی یہ دستاویزات پیش نہ کر سکتا ہوں ۔

and thereby factually belied his own version, which for the first time was introduced by him in his statement-in-chief that his father had been running some factory and out of its income subject property was purchased. The PW1 in further cross-examination while conceding as follows:

یہ درست ہے کہ میرے والد نے 3 تین مرلہ تقریبا کا دستبر داری نامہ محمد رفیع کے نام کر وایا تھا۔

explicitly admitted as well that subsequent to sale-deed (Exh.P3), another area of 03marlas was alienated to petitioner/defendant. If initially out of fourteen, disputed seven marlas had ostensibly been transferred to petitioner/defendant in 1964 via subject sale-deed, then without demanding it back, the alienation of further 03marlas 02square feet through Relinquishment Deed No. 10037 dated 22.09.2010 (Exh.P5) was an additional acknowledgement of the earlier transfer.

7. Although in further collaboration, Jaleel Hassan Madni (PW2), Shahid (PW3) & Muhammad Ashraf (PW4) were produced, but PW2 in his early lines of the cross-examination admitted that:

یہ درست ہے کہ جب پراپرٹی متد عویہ کار قبہ خرید کیا گیا میں اس وقت موجود نہ تھا ۔

Whereas Shahid (PW3) also endorsed PW2, while acknowledging that:

درست ہے کہ پلاٹ متدعویہ کی رقم کی ادائیگی کے وقت میں موجود نہ تھا ۔

On the same pattern, PW4 conceded as well that:-

یہ درست ہے کہ جب پراپرٹی متدعو یہ خریدی گئی میں اس وقت موجود نہ تھا ۔

No other witness was examined. Thus, clear that all the four witnesses (PW1 to PW4) by admitting their absence at crucial point when sale price paid, lost their relevancy and importance, if any. Therefore, to the effect that suit plot had been exclusively purchased by plaintiff, neither any express nor implied evidence was brought on suit file. Indeed, better course for the beneficiary/plaintiff was either to summon the original vendor or the marginal witnesses of sale-deed (Exh.P3), so that through this direct evidence, the basic stance could be proved. The withholding of best evidence definitely created hostile inference against the plaintiff/respondents. The emphasis of worthy counsel for the latter that in the meantime the vendor and attesting witnesses might have died, if taken to be correct, then it was not enough to exonerate the plaintiff from his failure to produce the secondary evidence. The strict compliance of scheme of law in proving the fact was to be followed, but no heed was paid. It was plaintiff, who did not institute the suit promptly or till the existence of direct evidence and filing of suit after its elimination might be an afterthought, which in no way could advance benefit to the plaintiff, rather this aspect was drastic at his end. The available evidence was not only meager, infirm and weak, rather insufficient to prove the first ingredient.

8. Another setback of the case was that the plaintiff omitted to plead and prove the motive why the subject plot was ostensibly purchased in the name of petitioner, rather only mentioned therein that for love and affection it was done so. The ingredient of motive for creation of benami transaction is essential and relevant factor for the purpose of determining, whether title vesting is merely a benami and absence of motive always goes against the party claiming to be actual owner, thus heavy onus was on the shoulders of the plaintiff to prove that actually he had purchased it, but for certain reasons ostensibly got it transferred to his brother. It was neither the case of plaintiff that he was a taxpayer and the name of petitioner was added in the Exh.P3, so that taxes could be evaded, nor it was his stance that he had black money and to save himself from the inquiries, benami transaction was

effected in favour of petitioner/defendant. Even he failed to allege that his brother was required to show himself to be owner of some immovable property for his benefit and the disputed transaction was effected in his name, thus in absence thereof, the impugned partial transaction could not be declared a sham one. As far as arguments of learned counsel for the plaintiff/respondents that per contents of subject sale-deed (Exh.P3) the consideration was exclusively paid by the plaintiff, therefore, the strict onus was upon the petitioner to establish that the same was generated by the father, is not well founded. Mere proof that sale price was paid by the plaintiff in such like cases is not enough and for the sake of arguments, if stance of the plaintiff that for love and affection, the half of the property was purchased in the name of his brother, is taken as correct, even then it could not be dubbed as benami. Once having purchased the suit property when there was benevolence as well as benignancy towards minor brother, thereafter plaintiff could not turn around to claim himself actual owner after liaisons became hostile and they fell apart. This view finds support from judgment of the apex Court reported as *Ghulam Murtaza vs. Mst. Asia Bibi and others* (PLD 2010 SC 569). The relevant paras 7 & 8 of latter one being all four corners applicable are reproduced here:

> 7. At this juncture, we may clarify that the motive part in the benami transactions is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other. We come across innumerable transactions where a father purchases property with his own sources for his minor son or daughter keeping in mind that the property shall best in the minor. Such transaction subsequently cannot be challenged by father as benami simply because the amount was paid by him. There are people who with positive application of mind, purchase properties in the name of others with intention that the title shall vest in that other.
>
> 8. As said earlier, there are certain transactions in peculiar circumstances of those peculiar cases where, for reason of certain emergencies or contingencies, the properties are purchased in the name of some other person without they intention that the title shall so vest permanently. If such motive is available and also is reasonable and plausible, a transaction can be held as benami, otherwise not. A property purchased with ones own sources in the name of some close relative like wife, son or daughter cannot be dubbed as benami when purchased with full intention of conferring title to the purchaser shown. If this principle is denied and that of benami attracted simply because the sources of consideration could not be proved in favour

> of the named vendee, it would shatter the most honest and bona fide transaction thereby bringing no end to litigation.

In addition thereto, any transaction effected for love and affection can, at the most, be termed as gift and for the said motive/reason, it cannot be termed as benami. See Ahmad *Sultan Khan vs. Mst. Sanin Kausar and another* (1986 SCMR 1591). In said case the father purchased the property for his minor daughter at his own sake and when subsequently the transaction was claimed to be benami, the apex Court declared as under:

> ***We agree with the learned Judge of the High Court that there was nothing wrong or unusual for a father, in a society to which the parties belong, purchasing a plot of land for building a house for a minor daughter in her name. The question of Benami transaction or the purchase having been made by Umar Khan for his own sake, therefore, did not arise. Reliance of the learned counsel on Iman v. Saifur Rehman 1982 PSC 1474 is of no avail to the petitioner because that case is distinguishable from the present case.

For the reasons discussed hereinabove and law already laid down by the apex Court on the subject in hand, the ingredient 'motive' for ostensible sale in favour of the petitioner was not established as well.

9. The apex Court while dealing with a case involving benami transaction through authoritative judgment titled as *Ch. Ghulam Rasool vs. Mrs. Nusrat Rasool and 4 others* (PLD 2008 SC 146) besides proving of the essential elements discussed hereinabove also introduced an additional rule that sine *qua* non for claimant of benami transaction to establish that there was some mutual understanding between him and ostensible owner and as a result thereof, sham transaction was germinated. For better understanding, the relevant extract of the cited judgment (supra) is reproduced here:

> "***This may be seen that two essential elements must exist to establish the benami status of the transaction. The first element is that there must be an agreement express or implied between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the persons who has to make payment of the consideration and second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party. In the present case, the evidence brought on record would not

directly or indirectly suggest the existence of any of the above elements to prove the benami character of the transaction of sale.***"

This aspect is also lacking in the case in hand, therefore, plaintiff failed to cross the barrier set down by the august Supreme Court, whose decisions in terms of Article 189 of the Constitution are binding on each and every organ of the State including the subordinate Courts, but in the case in hand, the learned lower fora while passing the impugned decrees not only omitted to take notice thereof, rather the available evidence was misconstrued and misinterpreted to return its findings on factual issues, which being tainted with misreading and non-reading cannot be sustained, therefore, are set aside.

10. The contention of learned counsel for the plaintiff/respondents that petitioner while putting his signatures as one of the marginal witnesses over a subsequent sale-deed (Exh.P7) whereby plaintiff transferred some part of the disputed property to his son, in fact acknowledged that he had no nexus with the subject matter in hand was not persuasive. The execution of this document or affixing signature over there was specifically denied by the petitioner in his statement. The plaintiff while examining the second attesting witness or the Petition Writer of Exh.P7 could defuse the denial of the petitioner, but again the best evidence was withheld to attract adverse inference under Article 129 illustration (g) of the Qanune-e-Shahadat Order, 1984 that had they been produced, might have supported the stance of the petitioner. Moreover, the plaintiff could tender request for referring the Exh.P7 to the Handwriting Expert/Finger Print Bureau, so that genuineness of the alleged signatures of petitioner over there could be ascertained, but no such attempt initiated. Although the report of the Finger Print Bureau is not conclusive evidence, yet as held by the Supreme Court in *Hamid Qayyum and two others vs. Muhammad Azeem through legal heirs and another* (PLD 1995 SC 381), the opinion of an Expert is one of the modes of producing evidence, which after being properly proved, can be used as corroborative piece of evidence. By not resorting to this exercise at any stage so far, the petitioner himself incurred a hostile presumption that if any such effort was made, the report would have been given against him.

11. It is again admitted position that suit was instituted after more than forty years of the attestation of sale-deed, whereas per Article 120 of the Limitation Act, 1908 maximum six years are provided to seek a right. Since inception of the litigation, it was the stance of the petitioner that he engineered the subject sale-deed (Exh.P3), therefore, when it was known to him since its birth, why he took forty three years to file the suit. No plausible ground either introduced in the plaint or explored through available evidence. As such, suit on the face of it was badly barred by time. It is

well settled by now that law helps the vigilant and not the indolent, whereas after expiry of the prescribed limitation, a vested right is always accrued in favour of the rivalry. See *Muhammad Nawaz and 3 others vs. Mst. Saina Bibi and 3 others* (1974 SCMR 223), *Central Board of Revenue, Islamabad through Collector of Customs, Sialkot Dry Port, Samberial District Sialkot and others vs. Messrs Raja Industries (Pvt.) Ltd. through General Manager and 3 others* (1998 SCMR 307) and *Atta Muhammad vs. Maula Bakhsh and others* (2007 SCMR 1446). It cannot be denied that compliance of statutory period within which a right has to be exercised or enforced is mandatory and Courts cannot ignore any lapse in this behalf, even if no such objection is raised by the adversary. The decisions of the Courts below on Issue No. 3 are erroneous and against the norms of justice as well as law, therefore the same are reversed as well.

12. The emphasis of learned counsel for the respondents that the concurrent findings of the Courts below cannot be disturbed by this Court while exercising revisional jurisdiction provided under Section 115 of Code, 1908 is not tenable. The impugned judgments and decrees having been found to be result of misreading/non-reading of evidence as well as non-adherence to the law laid down in this behalf by the superior Courts are not sustainable. It is correct that normally this Court does not interfere in the concurrent findings of fact recorded by the Courts below, but here the impugned decrees being classic example of wrong exercise of jurisdiction and clearly suffering from material irregularity/patent illegality besides gross violation of the law floating on its surface cannot be sustained. On being faced with such situation, 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 *Ghulam Muhammad and 3 others vs. Ghulam Ali* (2004 SCMR 1001) *Mushtari Khan vs. Jehangir Khan* (2006 SCMR 1238), *Muhammad Nawaz@Nawaza vs. Member Judicial BoR & others* (2014 SCMR 914) and *Nazim-ud-Din and others vs. Sheikh Zia-ul-Qamar and others* (2016 SCMR 24).

13. For the reasons recorded hereinabove, these Civil Revisions are allowed, impugned decrees passed by the learned lower fora are hereby reversed, resultantly the suit of the plaintiff/respondents is dismissed and the rival one instituted on behalf of petitioner is decreed as prayed for. No order as to costs.

(Y.A.) Petition allowed.

PLJ 2022 Lahore 364
[Multan Bench, Multan]
Present: **CH. MUHAMMAD MASOOD JAHANGIR, J.**
TARIQ MASOOD KHAN--Petitioner
versus
DISTRICT JUDGE, KHANEWAL and 4 others--Respondents
W.P. No. 3378 of 2013, heard on 26.10.2021.

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

----O.XVII R. 3--Constitution of Pakistan, 1973, Art. 199--Right of producing of remaining evidence of petitioner was struck off--Non-submission of list of witnesses--Lethargic attitude--Interlocutory order--Challenge to--When admittedly till this time list of witnesses was never submitted, how petitioner could be allowed to summon him--The better course for petitioner was to make application for submission of list of witnesses but he never opted for same, for his indolent/lethargic attitude right of remaining evidence was rightly closed about nine years ago--Petition dismissed. [P. 365] A

Mr. Muhammad Afzal Chandio, Advocate for Petitioner.

Mr. Iqbal Hussain Jafri, Advocate for Respondent No. 3.

Date of hearing: 26.10.2021.

JUDGMENT

The sale settled in favour of respondents was pirated by petitioner through filing of suit for possession via pre-emption before the learned Civil Court on 01.03.2005, which having been contested, issues were on 14.11.2005, but admittedly so far list of witnesses was never submitted. No doubt, partial evidence was recorded, but despite seeking several adjournments, the petitioner could not lead the remaining evidence compelling learned Trail Court to struck off his such right on 28.09.20212 and further approved by the learned Revisional Court below *vide* order dated 27.02.2013, thus this petition was here.

2. Arguments heard, record perused.

3. The case diary maintained by the learned Civil Court confirmed that after the settlement of issues almost seven years were consumed by the petitioner to record his evidence. No doubt, on 04.10.2010, the petitioner examined three witnesses, but thereafter the remaining evidence was never brought before the Court despite issuance of warning and even imposition of cost. So far as the emphasis of learned counsel for petitioner that one more chance may be provided to his client is concerned, suffice it to say that per his statement dated 04.05.2010 he only reserved his right to produce postman in affirmative evidence, whereas rest of the oral evidence was closed. In such situation when admittedly till this time the list of witnesses was never submitted, how the petitioner could be allowed to summon him. The better course for the petitioner was to make application for submission of

list of witnesses but he never opted for the same, therefore for his indolent/lethargic attitude the right of remaining evidence was rightly closed about nine years ago. The said interlocutor order duly congealed by Revisional Court below cannot be interfered with while invoking jurisdiction under Article 199 of the Constitution, 1973. Thus this petition is **dismissed.**

(Y.A.) Petition dismissed.

2022 M L D 1378
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
ABDUL RAZAQ and others---Petitioners
Versus
IFTIKHAR HUSSAIN and others---Respondents

Civil Revisions Nos.1814 and 1815 of 2009, decided on 13th March, 2019.

Specific Relief Act (I of 1877)---

----S.12---Suit for specific performance---Non-payment of balance sale consideration---Effect---Respondents filed suit for specific performance of agreement to sell against vendors alleging therein that they had settled the sale with them---Petitioners, within couple of months, filed a suit of similar nature contending therein that the vendors had agreed to sell the land to them---Suits were clubbed with each other---Trial Court granted money decree to the respondents whereas the petitioners were equipped with conditional decree for specific performance of their contract directing them to pay the outstanding amount within one month---Although a receipt was presented before the Appellate Court to claim that outside the Court, the decretal amount had already been paid but the Appellate Court did not agree that the condition was genuinely fulfilled---Appellate Court dismissed the suit filed by petitioners, allowed the appeal of respondents and decreed their suit for specific performance with the condition of payment of balance sale consideration---Validity---Payment by petitioners outside the Court to a person (an alleged attorney of the vendors) who was not duly competent in this behalf could not be made basis to hold that condition was fulfilled as per mandate of the decree---Operation of decree of the petitioners was never suspended---Once the suit of petitioners stood dismissed, they got out of the picture leaving no pedestal for them to resist the suit of respondents---Suit of respondents could only have been resisted by vendors---Revision petitions were dismissed.

Usama Ahmad for Petitioners.

Abdul Wahid Chaudhry for Respondents.

Date of hearing: 13th March, 2019.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----The three sons of Muhammad Banaras Khan, namely, Iftikhar Hussain, Pervaiz Akhtar and Muhammad Afaaq were the exclusive owners of the subject land, whose father was their duly

appointed Attorney through Agency Deed dated 18.02.1987. Nisar Ahmed and Zia Ullah, respondents Nos.5 and 6 respectively, approached the learned Civil Court on 07.06.1993 through a suit for specific performance of agreement to sell dated 04.08.1992 (Exh.P1) alleging therein that Muhammad Banaras had settled the sale with them. Within couple of months, present petitioners also filed a suit of similar nature contending therein that the same Agent had already agreed to sell the land to them vide agreement dated 17.05.1992 (Exh.D1). Both the suits were clubbed with each other. The vendors submitted their written statement through their father/Attorney and conceded the execution of Exh.D1, whereas that of Exh.P1 was denied, however, subsequently, one of the vendors, Pervaiz Akhtar/respondent No.2 appeared before the learned Civil Court on 15,02.1995 and being Attorney on behalf of rest of the vendors antipodal to the written statement conceded that vide agreement (Exh.P1) the sale had been settled with respondents Nos.5 and 6, who in the same breath denied that no contract was finalized with the petitioners while claiming it to be forged and fictitious one. The ultimate result of conjunctive trial was that on 25.01.2005, a money decree to the tune of Rs.756,000/- was granted to respondents Nos.5 and 6 (the beneficiaries of Exh.P1), whereas the petitioners were equipped with conditional decree for specific performance of their contract (Exh.D1) directing them to pay the outstanding amount of Rs.900,000/-within one month up till 25.02.2005. Being dejected, two civil appeals were preferred by respondents Nos.5 and 6, who subsequently were also allowed to amend their appeal by inserting a fresh ground therein that the petitioners having failed to fulfil the condition, their suit would deem to be dismissed. Although a receipt dated 12.02.2005 was presented before the learned District Court seized of the appeals to claim that outside of the Court, the decretal amount had already been paid to Muhammad Javed, Special Attorney of the vendors but the learned Appellate Court did not agree that the condition was genuinely fulfilled and while relying upon admission made on behalf of vendors before the learned Trial Court in favour of respondents Nos.5 and 6, not only their appeal was allowed, but their suit for specific performance of agreement (Exh.P1) was also decreed with the further conclusion that in default to fulfil condition regarding payment of balance sale consideration, the rival suit of the petitioners stood dismissed vide judgment and decrees of 28th August, 2009, impugned in this Petition as well as connected C.R.No.1815 of 2009. As both the lis have arisen out of a joint trial as well as consolidated judgment and common questions of facts and law are involved, therefore, for all intents and purposes, I am going to decide the same jointly through this single judgment.

2. Arguments heard and record perused.

3. The execution of Exh.D1 and Exh.P1 inter se the petitioners and respondents Nos.5 and 6 were disputed from the very inception of the litigation, whereas the vendors at initial stage through their pleadings admitted the execution of Exh.D1, but denied that of Exh.P1, however, at a subsequent stage, the stance was altogether

changed by them claiming that Exh.P1 was genuinely executed, whereas Exh.D1 was declared to be forged and fictitious and in such scenario, respondents Nos.5 and 6 were awarded a money decree, whereas the petitioners were granted a conditional decree for specific performance of Exh.D1 subject to payment of certain amount within specified time with the further clarification that in case of default of payment of amount, their suit would be dismissed. Now to understand the unbelief granted to the parties as well as import of condition, it would be advantageous to reproduce the said clause here:-

"In the light of my above discussion of issues Nos.1 and 2, the suit titled Abdul Razzaq and others v. Iftikhar Hussain and others is decreed subject to payment of Rs.9,00,000/-within one month up till 25.2.2005, otherwise, the suit of the Plaintiffs (Abdul Razzaq etc.) shall stand dismissed and the depositing of remaining consideration of Rs.9,00,000/ Abdul Razzaq and Tahir Javed shall be entitled to get executed sale deed in their favour according to law. While the other suit Nisar Ahmed and others v. Iftikhar Hussain and others is decreed in the way that they (Nisar Ahmed and Zia Ullah) are entitled to recover Rs.7,56,000 /- (including the amount deposited in the court) from the defendants Nos.1 to 4 (Iftikhar Hussain, Perveriz Akhter, Muhammad Aafaq and Muhammad Banaras)."

Admittedly, the petitioners never ever approached the Court either to deposit the said amount or with a prayer to summon the vendors so that outstanding consideration could be paid to them, rather they managed a receipt to show that on 12.02.2005 the balance amount had been paid to Muhammad Javed, the alleged Attorney of the vendors. Admittedly, Muhammad Javed was not the agent, who executed any of the contracts. Although during trial his statement by DW3 was recorded, but even then he did not expose his such status, whereas the alleged Power of Attorney brought on record was scribed much prior to it. Important to note that in his deposition, DW3 explicitly admitted his relationship with the petitioners, as such the possibility of maneuvering of Agency Deed in his favour could not be ruled out. Moreover, the most vital part of his statement was that he stated that Banaras Khan, the admitted General Attorney of the vendors was not known to him, but most surprisingly, Banaras Khan was the person, who allegedly appointed him his Special Attorney on 17.02.1994, whereas the statement of DW3 was recorded much thereafter on 26.02.2000. As such execution of Agency Deed in favour of Muhammad Javed was highly doubted and perfectly disbelieved by the learned Appellate Court. Withal the copy of said Agency Deed is available on file wherein no such authority was assigned to the said Agent by his Principal that he was competent to receive the balance sale consideration on his behalf, as such any act on behalf of the petitioners and that too outside of the Court with a person, who was not duly competent in this behalf could not be made basis to hold that condition was fulfilled as per mandate of decree.

4. The argument of learned counsel for the petitioners that appeals preferred by respondents Nos.5 and 6 were already admitted for regular hearing wherein injunction was also granted, as such the Courts below were obliged to extend the target date for fulfilling the condition is self-contradictory and destructive to his earlier stance that balance amount had already been paid to the vendors through their Attorney. The perusal of record reveals that although appeals of the respondents Nos.5 and 6 were admitted for regular hearing on 08.02.2005 much prior to the target date, but the operation of the decree of the petitioners was never suspended and only status quo was ordered to be maintained, as such there was no hindrance for the petitioners to fulfil the condition. Moreover, the injunctive order was not a bar in any situation, however, without conceding, if it is admitted correct that for some injunctive order the petitioners were not in a position to make deposit of the balance amount then it was also applicable to them outside of the Court and payment as per receipt would have also not been made. In the given circumstances, the suit of the petitioners stood dismissed for non-compliance of the condition imposed by the learned Trial Court, as such there being left no decree in their favour, they became out of the picture leaving no pedestal for them to resist the suit of respondents Nos.5 and 6, whereas the vendors had already conceded their contract while making statement on 15.02.1995 before the learned Trial Court and the suit of respondents Nos.5 and 6 could only be resisted by said vendors, but the petitioners definitely lacked any locus standi to any further contest the contract of their rivals when they have already lost their case.

5. The learned counsel for the petitioners was not able to persuade that impugned judgment was either perverse, infirm or the learned Additional District Judge committed material irregularity or illegality or wrongly exercised its revisional jurisdiction, thus these Civil Revisions having no merit and force are dismissed with no orders as to cost.

SA/A-78/L Petitions dismissed.

2022 Y L R 1660
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
JAMIL AKHTAR KHAN and another---Petitioners
Versus
MUHAMMAD SALEEM SADIQ and others---Respondents

Writ Petition No. 66426 of 2020, heard on 10th March, 2021.

Civil Procedure Code (V of 1908)---

----O. III, R. 4---Appointment of pleader---Scope---Respondent filed suit for specific performance of agreements to sell against several defendants---Several defendants including petitioners engaged a counsel who duly filed his power of attorney---Suit was fixed for submission of written statement before Trial Court when one of the defendants (brother of petitioners) recorded statement apprising that he had engaged a new counsel and that the previously engaged counsel would not be his attorney---Previous counsel despite being superseded not only submitted joint conceding written statement on behalf of several defendants, except one, rather simultaneously made statement for acceptance of application for grant of temporary injunction---Trial Court adjourned the case for submission of written statement by the brother of petitioners---Petitioners tabled an application for cancellation of conceding written statement made by their counsel but the application was concurrently dismissed---Validity---Petitioners along with their brother had also engaged the new counsel---Haste in submitting written statement on the part of previous counsel spoke volumes on his conduct towards the proceedings of the suit---High Court observed that previous counsel should have at least omitted/ deleted the name of petitioners' brother, who had already withdrawn his power of attorney---Such conduct of the previous counsel lent support to the stance of petitioners that he, by using their signatures made available to him, had filed the written statement without their instructions--- Prompt filing of application qua discarding of the written statement on behalf of the petitioners was again a supporting factor and could not be summarily declined---Impugned orders were set aside and the Constitutional petition was allowed, in circumstances.

Rao Abid Mushtaq for Petitioners.

Mirza Aziz-ur-Rehman for Respondent No.1.

Muhammad Akram Khan and Kiran Akram Khan for Respondent No.4 through LRs.

Nasir Mahmud for Respondent No.8(b).

Anwaar Hussain Janjua and Daowd Ahmad Asif for respondent No.8(c&d).

Rao Abbas Adeel for Respondents Nos.17 to 19.

Date of hearing: 10th March, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---As per available record, Muhammad Saleem Sadiq, respondent No. 1 instituted suit for specific performance of agreements to sell dated 20.09.2012 and 31.12.2012 against 15 defendants including the petitioners/ defendants Nos.3 and 4. On behalf of most of the defendants including the petitioners and their brothers, Ch. Aslam Javaid, Advocate filed his power of attorney. The suit was fixed on 16.02.2015 to submit written statement before the learned Trial Court, when Khalil Akhtar Khan, defendant No.1 (now deceased represented by his legal heirs) real brother of present petitioners recorded statement apprising that he had appointed Rao Kashif Iqrar, Advocate as new counsel to represent him in further proceedings and previously engaged, Ch. Aslam Javaid, Advocate, would be no more attorney on his part. It was matter of record that new counsel submitted joint wakalatnama on behalf of defendant No.1 as well as present petitioners/defendants Nos.3 and 4 in the Court, but despite having notice that he stood superseded, Ch. Aslam Javaid, Advocate not only submitted joint conceding written statement on behalf defendants Nos.1 to 6 and 8 to 15, rather he simultaneously made statement for the acceptance of application filed by respondent No.1/plaintiff for grant of temporary injunction. However, the learned Trial Court without making any decision on the said application further adjourned the case to 26.02.2015 for submission of written statement on behalf of defendant No.1. On the said date, the present petitioners tabled application for cancellation of conceding written statement made at their end by their counsel, who had already been superseded, but the learned Trial Court while observing that there was no new power of attorney of any other counsel submitted on behalf of the petitioners, dismissed the said application on 14.02.2017, which further sustained by the learned Additional District Judge while dismissing Civil Revision of the petitioners through order dated 03.08.2019, therefore, this petition was preferred.

2. Arguments heard.

3. Having consulted record, especially the proceedings recorded on 16.02.2015, it is observed that on said day not only defendant No.1 apprised the learned Civil Court for the appointment of new counsel, but also tendered his request for withdrawal of appointment of earlier counsel, Ch. Aslam Javaid by submitting fresh power of attorney of new counsel, namely, Rao Kashif Iqrar, Advocate, which was jointly executed by defendant No.1 as well the petitioners/defendants Nos.3 and 4 and the said fact was duly recorded in the proceedings of the said date as under:-

This happened in first phase of the proceedings of the day and in second part of the proceedings initiated on the same day, Ch. Aslam Javaid, Advocate, whose power of attorney stood already specifically withdrawn by defendant No.1 and also superseded by the petitioners not only submitted conceding written statement on their behalf as well as other defendants, rather he also recorded statement qua acceptance of application for grant of temporary injunction. The haste on the part of Ch. Aslam Javaid, Advocate in filing joint written statement despite that his authority to the extent of defendant No.1 had specifically been withdrawn and petitioners superseded him as well by engaging new counsel, speaks volume on his conduct towards proceedings of the suit. At least he should have omitted/deleted name of defendant No.1, who already withdrew his power of attorney, but filing of joint written statement including him as well leans support to the stance of present petitioners that by using their signatures made available to the said advocate, he filed the written statement without their instructions. The prompt filing of application qua discarding of the written statement on behalf of present petitioners is again a supporting factor and could not be summarily declined.

4. As a corollary of the above discussion, the impugned orders are patently bad for misreading/non-reading of the aforesaid material fact, which are set aside by allowing this writ petition. Since main suit could not be straightaway decided on the basis of alleged conceding written statement, which even to the extent of defendant No.1 had not only been discarded, rather on his behalf contesting written statement also submitted and regular trial is necessarily to follow. In such panorama, it is felt appropriate for the ends of justice that petitioners will submit another written statement before the learned Trial Court, who after receiving it will frame an additional issue qua genuineness, veracity or competency of earlier conceding written statement, so as to decide its fate and what would be its effect, will also be

resolved at the time of final adjudication of the lis after requiring evidence of the parties in pros and cons.

SA/J-5/L Petition allowed.

2022 Y L R 1752
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
MUHAMMAD RAFI---Petitioner
Versus
Mst. JAMILA BEGUM and others---Respondents

Civil Revision No. 1747 of 2015, heard on 5th March, 2021.

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

----O.XLI, R. 27---Additional evidence, production of---Principle---Permission to bring additional evidence cannot be accorded just to fill in lacunas left by a party in its evidence.

Muhammad Yusuf Khan Khattak v. S. M. Ayub and 2 others PLD 1973 SC 160; Muhammad Yousaf v. Mst. Maqsooda Anjum and others 2004 SCMR 1049; Muhammad Siddique v. Muhammad Sharif and others 2005 SCMR 1231 and Rana Abdul Aleem Khan v. Idara National Industrial Co-operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another 2016 SCMR 2067 rel.

(b) Benami transaction---

----Scope---Suit regarding Benami dispute is not the one wherein genuineness or veracity of document is involved---Execution of instrument in such cases, is an admitted fact and seeker intends just rectification of document so as to eliminate/exclude name of Benamidar.

Rasool Bukhsh and another v. Muhammad Ramzan 2007 SCMR 85; Khan Muhammad v. Khursheed 2010 CLC 970; Muhammad Siddique (deceased) through LRs and others v. Mst. Noor Bibi (deceased) through LRs and others 2020 SCMR 483 and Muhammad Sajjad v. Muhamamd Anwar 1991 SCMR 703 rel.

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

----Art. 120---Civil Procedure Code (V of 1908), S.115---Suit for declaration and injunction---Limitation--- Benami transaction--- Concurrent findings of facts by two Courts below---Respondent-plaintiff claimed to be owner of suit property while petitioner-defendant was shown just Benamidar in year 1964 at the time when property was purchased---Trial Court and Lower Appellate Court concurrently decreed suit and appeal in favour of respondent-plaintiff---Plea raised by respondent-plaintiff was that concurrent findings of Courts below could not be

disturbed by High Court while exercising revisional jurisdiction provided under S.115, C.P.C.---Validity---Suit was instituted after more than forty years of attestation of sale deed---Maximum period of six years had been provided under Art. 120 of Limitation Act, 1908, to seek a right---Since inception of litigation it was stance of petitioner-plaintiff that he engineered subject sale deed---When it had been known to petitioner-plaintiff since birth of document, then he took forty three years to file the suit and there was no plausible ground either introduced in plaint or explored through available evidence---Suit was barred by time and law was to help the vigilant and not the indolent---Judgments and decrees passed by two Courts below were result of misreading / non-reading of evidence as well as non-adherence to law laid down by superior Courts---High Court in exercise of revisional jurisdiction set aside concurrent findings of two Courts below and dismissed the suit filed by respondent-plaintiff--- Revision was allowed, in circumstances.

Ghulam Murtaza v. Mst. Asia Bibi and others PLD 2010 SC 569; Ahmad Sultan Khan v. Mst. Sanin Kausar and another 1986 SCMR 1591; Ch. Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others PLD 2008 SC 146; Hamid Qayyum and 2 others v. Muhammad Azeem through legal heirs and another PLD 1995 SC 381; Muhammad Nawaz and 3 others v. Mst. Saina Bibi and 3 others 1974 SCMR 223; Central Board of Revenue, Islamabad through Collector of Customs, Sialkot Dry Port, Samberial District Sialkot and others v. Messrs Raja Industries (Pvt.) Ltd. through General Manager and 3 others 1998 SCMR 307; Atta Muhammad v. Maula Bakhsh and others 2007 SCMR 1446; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001; Mushtari Khan v. Jehangir Khan 2006 SCMR 1238; Muhammad Nawaz alias Nawaza v. Member Judicial BoR and others 2014 SCMR 914 and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 rel.

Muhammad Ahmad for Petitioner.

Malik Muhammad Shafique Rajpoot for Respondents Nos. 1 to 8 and 10.

Nasir Mahmud and Tahir Mahmood Mughal for Respondent No.9.

Date of hearing: 5th March, 2021.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---Precisely, Muhammad Rafi, petitioner and late Muhammad Shafi (plaintiff) ascendant of respondents Nos.1 to 5, were brothers inter se, to whom suit plot measuring 14 Marlas transferred by one Malik Din through sale deed dated 16.12.1964 (Exh.P3). Much thereafter, on 31.01.2007, Muhammad Shafi/plaintiff instituted declaratory suit asserting that in 1964, when suit property was transferred, the petitioner/defendant was minor; that,

indeed, the former from his own funds had purchased subject plot after paying entire sale price, whereas just for love and affection, name of minor brother/ petitioner being benamidar was reflected in subject instrument. The latter not only contested the suit, rather he also filed an independent suit for declaration and possession etc. According to the pleadings submitted on behalf of petitioner/ defendant, his stance was that suit property had been purchased in equal shares by their late father through his own resources for both of the sons (plaintiff and petitioner). It was further defence of the petitioner that subsequently, the plaintiff/respondents by selling out some area out of his 07 marlas to one Muhammad Shabbir as well as to the petitioner vide Sale Deed and Relinquishment Deed respectively had not only become landless, rather already transferred share more than his entitlement. The ultimate posture of the petitioner was that he had become proprietor of 10 marlas 02 Square Feet, thus possession of said area be awarded/restored to him.

2. The learned Trial Court captured disputed area of pleadings of the parties by materializing nine issues, however, subsequently issue No.1-A added as well and issues Nos. 1, 1-A, 2, 3, 6 and 7, being pivotal for brevity sake, are reproduced here:--

1. Whether the plaintiff is entitled to a decree for declaration and permanent injunction as prayed for? OPP.

1-A. Whether the plaintiff is exclusive and sole owner of the suit property mentioned in the sale deed No.13633 dated 16.12.1964 and defendant is only benamidar? OPP

2. Whether the entries in the name of defendant in the Revenue Record and Excise and Taxation Record are based upon fraud, illegal and inoperative upon the rights of the plaintiffs? OPP

3. Whether the suit is time barred? OPD.

6. Whether the defendants Haji Muhammad Rafi etc. are entitled to a decree for declaration, possession cancellation of sale deed along with permanent injunction as prayed for? OPD.

7. Whether the sale deed No.2194 dated 29.03.2001 is illegal, void and liable to be cancelled? OPD.

The learned Civil Court tried both the suits conjunctively and ultimately after receiving/appreciating evidence of the respective parties, decreed the suit of Muhammad Shafi, plaintiff (predecessor of respondents Nos. 1 to 5), whereas

dismissed that of petitioner/defendant through consolidated judgment and decrees dated 30.11.2013. Although two independent appeals were preferred by the latter, but without any success having been dismissed on 27.04.2015, therefore, this as well as connected C.R.No.1749-2015. Since both these Civil Revisions inter se the parties have arisen out of common verdicts and decrees involving identical questions of fact/law, therefore, for all intents and purposes, it would be better to decide the same vide this single judgment. However for reference, source will be file in hand.

3. Arguments heard, record perused.

4. At the very outset, it is noticed that by filing C.M. No.1/C of 2018, the plaintiff/respondents prayed for production of additional evidence detailed in para No.7 thereof. No doubt in appropriate cases permission can be granted to produce the same, if found to be essential by the Court in arriving at just conclusion of the lis before it. Admittedly, the proposed documents were already in possession and knowledge of the plaintiff/respondents, who never produced the same in the evidence at the relevant time for the reasons best known. Moreover, mere placing of such documents on the record will not serve any useful purpose until and unless those are duly proved under the scheme of law. See Muhammad Yusuf Khan Khattak v. S.M. Ayub and 2 others (PLD 1973 SC 160). Even otherwise, it is well settled principle up till now that permission to bring additional evidence cannot be accorded just to fill in the lacunas left by a party in its evidence. Reliance can be placed on the judgments reported as Muhammad Yousaf v. Mst. Maqsooda Anjum and others (2004 SCMR 1049), Muhammad Siddique v. Muhammad Sharif and others (2005 SCMR 1231) and Rana Abdul Aleem Khan v. Idara National Industrial Co-operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another (2016 SCMR 2067). Resultantly, instant application having no substance is dismissed.

5. Adverting to merits of the main lis, sale deed No. 13633 dated 16.12.1964 (Exh.P3) was the original document, which vested joint and equal title to both the brothers (plaintiff and petitioner). This was a registered instrument, which prior to institution of suit on 13.01.2007 had already attained the age much over to 30 years, therefore for both the said counts attained strong presumption of correctness qua its attestation. Reliance can be placed upon Rasool Bukhsh and another v. Muhammad Ramzan (2007 SCMR 85), Khan Muhammad v. Khursheed (2010 CLC 970) and Muhammad Siddique (deceased) through LRs and others v. Mst. Noor Bibi (deceased) through LRs and others (2020 SCMR 483). It is to be kept in mind that suit qua benami dispute is not the one wherein genuineness or veracity of the document is involved, rather in such like cases, the execution of the instrument is an admitted fact and the seeker intends just rectification of the document so as to eliminate/exclude the name of the benamidar. The question whether a particular transaction is benami or not, is largely one of the facts and for its determination, no

absolute formula or test has been laid down, but while seeking guidance from dicta laid down in judgment reported as Muhammad Sajjad v. Muhamamd Anwar (1991 SCMR 703), the following elements are to be affirmatively proved by the quester:--

i. Source of consideration;

ii. From whose custody original title deed came;

iii. Who is in possession of the property; and

iv. Motive of benami.

These essential elements must co-exist for proving benami transaction between ostensible owner and actual purchaser, who bought it through his own funds in the name of ostensible owner for certain reasons/motive to gain ultimate benefits.

6. As per prevailing situation emerging from pleadings of the parties under Article 117 of the Qanun-e-Shahadat Order, 1984, onus to prove the said claim was on the plaintiff, who asserted it positively. Admittedly, before recording evidence of the parties, Muhammad Shafi, (plaintiff)/alleged actual owner had already died, who was succeeded by respondents Nos. 1 to 5. Out of them, Muhammad Taqi (PW1) in his statement neither exposed the essential detail in respect of time, date and names of witnesses, so as to prove when and before whom the consideration was paid, nor did he disclose the resources for generation of the funds. He simply stated in his examination-in-chief that suit property had been purchased by his father after making entire sale consideration, whereas nothing was invested by petitioner/ defendant because he was minor. It was further worded by PW1 that subsequently some area out of suit property was alienated to one Muhammad Bashir and another 03 marlas was also transferred to petitioner/defendant for additional love and affection. He though stated that remaining part of the property was transferred by his father to the younger sons through sale deeds and those were attested by the petitioner/defendant being marginal witness, yet this part of deposition was beyond the pleadings of the plaintiff. Muhammad Taqi (PW1), however, during test of cross-examination could not withstand the credibility. Some important glimpses out of his cross-examination are given below:-Meaning thereby that he being infant at the time of execution of sale deed, was not in any position to utter that when original sale settled, how much consideration paid or what was the resource of his late father to beget the sale price. While answering another question, PW1 admitted as well that his grandfather (real father of the plaintiff & petitioner) was running a shop. The said witness while further uttering as under:-

indeed, to some extent admitted the stance of his uncle/petitioner that father of original parties (grandfather of PW1) was an earning hand, whereas his father (plaintiff) was still student. The PW1 also deposed in following terms:-

and thereby factually belied his own version, which for the first time was introduced by him in his statement-in-chief that his father had been running some factory and out of its income subject property was purchased. The PW1 in further cross-examination while conceding as follows:-

explicitly admitted as well that subsequent to sale deed (Exh.P3), another area of 03 marlas was alienated to petitioner/ defendant. If initially out of fourteen, disputed seven marlas had ostensibly been transferred to petitioner/defendant in 1964 via subject sale deed, then without demanding it back, the alienation of further 03 marlas 02 square feet through Relinquishment Deed No.10037 dated 22.09.2010 (Exh.P5) was an additional acknowledgement of the earlier transfer.

7. Although in further collaboration, Jaleel Hassan Madni (PW2), Shahid (PW3) and Muhammad Ashraf (PW4) were produced, but PW2 in his early lines of the cross-examination admitted that:--

Whereas Shahid (PW3) also endorsed PW2, while acknowledging that:-

On the same pattern, PW4 conceded as well that:-

No other witness was examined. Thus, clear that all the four witnesses (PW1 to PW4) by admitting their absence at crucial point when sale price paid, lost their relevancy and importance, if any. Therefore, to the effect that suit plot had been exclusively purchased by plaintiff, neither any express nor implied evidence was brought on suit file. Indeed, better course for the beneficiary/plaintiff was either to summon the original vendor or the marginal witnesses of sale deed (Exh.P3), so that through this direct evidence, the basic stance could be proved. The withholding of best evidence definitely created hostile inference against the plaintiff/respondents. The emphasis of worthy counsel for the latter that in the meantime the vendor and attesting witnesses might have died, if taken to be correct, then it was not enough to exonerate the plaintiff from his failure to produce the secondary evidence. The strict compliance of scheme of law in proving the fact was to be followed, but no heed was paid. It was plaintiff, who did not institute the suit promptly or till the existence of direct evidence and filing of suit after its elimination might be an afterthought, which in no way could advance benefit to the plaintiff, rather this aspect was drastic at his end. The available evidence was not only meager, infirm and weak, rather insufficient to prove the first ingredient.

8. Another setback of the case was that the plaintiff omitted to plead and prove the motive why the subject plot was ostensibly purchased in the name of petitioner, rather only mentioned therein that for love and affection it was done so. The ingredient of motive for creation of benami transaction is essential and relevant factor for the purpose of determining, whether title vesting is merely a benami and absence of motive always goes against the party claiming to be actual owner, thus heavy onus was on the shoulders of the plaintiff to prove that actually he had purchased it, but for certain reasons ostensibly got it transferred to his brother. It was neither the case of plaintiff that he was a taxpayer and the name of petitioner was added in the Exh. P3, so that taxes could be evaded, nor it was his stance that he had black money and to save himself from the inquiries, benami transaction was effected in favour of petitioner/defendant. Even he failed to allege that his brother was required to show himself to be owner of some immovable property for his benefit and the disputed transaction was effected in his name, thus in absence thereof, the impugned partial transaction could not be declared a sham one. As far as arguments of learned counsel for the plaintiff/ respondents that per contents of subject sale deed (Exh.P3) the consideration was exclusively paid by the plaintiff, therefore, the strict onus was upon the petitioner to establish that the same was generated by the father, is not well founded. Mere proof that sale price was paid by the plaintiff in such like cases is not enough and for the sake of arguments, if stance of the plaintiff that for love and affection, the half of the property was purchased in the name of his brother, is taken as correct, even then it could not be dubbed as benami. Once having purchased the suit property when there was benevolence as well as benignancy towards minor brother, thereafter plaintiff could not turn around to claim himself actual owner after liaisons became hostile and they fell apart. This view finds support from judgment of the apex Court reported as Ghulam Murtaza v. Mst. Asia Bibi and others (PLD 2010 SC 569). The relevant paras 7 and 8 of latter one being all four corners applicable are reproduced here:-

7. At this juncture, we may clarify that the motive part in the benami transactions is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other. We come across innumerable transactions where a father purchases property with his own sources for his minor son or daughter keeping in mind that the property shall best in the minor. Such transaction subsequently cannot be challenged by father as benami simply because the amount was paid by him. There are people who with positive application of mind, purchase properties in the name of others with intention that the title shall vest in that other.

8. As said earlier, there are certain transactions in peculiar circumstances of those peculiar cases where, for reason of certain emergencies or contingencies, the properties are purchased in the name of some other person without they intention that the title shall so vest permanently. If such motive is available and also is reasonable and plausible, a transaction can be held as benami, otherwise not. A

property purchased with ones own sources in the name of some close relative like wife, son or daughter cannot be dubbed as benami when purchased with full intention of conferring title to the purchaser shown. If this principle is denied and that of benami attracted simply because the sources of consideration could not be proved in favour of the named vendee, it would shatter the most honest and bona fide transaction thereby bringing no end to litigation.

In addition thereto, any transaction effected for love and affection can, at the most, be termed as gift and for the said motive/reason, it cannot be termed as benami. See Ahmad Sultan Khan v. Mst. Sanin Kausar and another (1986 SCMR 1591). In said case the father purchased the property for his minor daughter at his own sake and when subsequently the transaction was claimed to be benami, the apex Court declared as under:--

***We agree with the learned Judge of the High Court that there was nothing wrong or unusual for a father, in a society to which the parties belong, purchasing a plot of land for building a house for a minor daughter in her name. The question of Benami transaction or the purchase having been made by Umar Khan for his own sake, therefore, did not arise. Reliance of the learned counsel on Iman v. Saifur Rehman 1982 PSC 1474 is of no avail to the petitioner because that case is distinguishable from the present case.

For the reasons discussed hereinabove and law already laid down by the apex Court on the subject in hand, the ingredient motive for ostensible sale in favour of the petitioner was not established as well.

9. The apex Court while dealing with a case involving benami transaction through authoritative judgment titled as Ch. Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others (PLD 2008 SC 146) besides proving of the essential elements discussed hereinabove also introduced an additional rule that sine qua non for claimant of benami transaction to establish that there was some mutual understanding between him and ostensible owner and as a result thereof, sham transaction was germinated. For better understanding, the relevant extract of the cited judgment (supra) is reproduced here:-

***This may be seen that two essential elements must exist to establish the benami status of the transaction. The first element is that there must be an agreement express or implied between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the persons who has to make payment of the consideration and second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party. In the present case, the evidence brought on record

would not directly or indirectly suggest the existence of any of the above elements to prove the benami character of the transaction of sale.***

This aspect is also lacking in the case in hand, therefore, plaintiff failed to cross the barrier set down by the august Supreme Court, whose decisions in terms of Article 189 of the Constitution are binding on each and every organ of the State including the subordinate Courts, but in the case in hand, the learned lower fora while passing the impugned decrees not only omitted to take notice thereof, rather the available evidence was misconstrued and misinterpreted to return its findings on factual issues, which being tainted with misreading and non-reading cannot be sustained, therefore, are set aside.

10. The contention of learned counsel for the plaintiff/respondents that petitioner while putting his signatures as one of the marginal witnesses over a subsequent sale deed (Exh.P7) whereby plaintiff transferred some part of the disputed property to his son, in fact acknowledged that he had no nexus with the subject matter in hand was not persuasive. The execution of this document or affixing signature over there was specifically denied by the petitioner in his statement. The plaintiff while examining the second attesting witness or the Petition Writer of Exh.P7 could defuse the denial of the petitioner, but again the best evidence was withheld to attract adverse inference under Article 129 illustration (g) of the Qanune-e-Shahadat Order, 1984 that had they been produced, might have supported the stance of the petitioner. Moreover, the plaintiff could tender request for referring the Exh.P7 to the Handwriting Expert/ Finger Print Bureau, so that genuineness of the alleged signatures of petitioner over there could be ascertained, but no such attempt initiated. Although the report of the Finger Print Bureau is not conclusive evidence, yet as held by the Supreme Court in Hamid Qayyum and 2 others v. Muhammad Azeem through legal heirs and another (PLD 1995 SC 381), the opinion of an Expert is one of the modes of producing evidence, which after being properly proved, can be used as corroborative piece of evidence. By not resorting to this exercise at any stage so far, the petitioner himself incurred a hostile presumption that if any such effort was made, the report would have been given against him.

11. It is again admitted position that suit was instituted after more than forty years of the attestation of sale deed, whereas per Article 120 of the Limitation Act, 1908 maximum six years are provided to seek a right. Since inception of the litigation, it was the stance of the petitioner that he engineered the subject sale deed (Exh.P3), therefore, when it was known to him since its birth, why he took forty three years to file the suit. No plausible ground either introduced in the plaint or explored through available evidence. As such, suit on the face of it was badly barred by time. It is well settled by now that law helps the vigilant and not the indolent, whereas after expiry of the prescribed limitation, a vested right is always accrued in favour of the rivalry. See Muhammad Nawaz and 3 others v. Mst. Saina Bibi and 3 others (1974 SCMR 223), Central Board of Revenue, Islamabad through Collector of Customs,

Sialkot Dry Port, Samberial District Sialkot and others v. Messrs Raja Industries (Pvt.) Ltd. through General Manager and 3 others (1998 SCMR 307) and Atta Muhammad v. Maula Bakhsh and others (2007 SCMR 1446). It cannot be denied that compliance of statutory period within which a right has to be exercised or enforced is mandatory and Courts cannot ignore any lapse in this behalf, even if no such objection is raised by the adversary. The decisions of the Courts below on issue No.3 are erroneous and against the norms of justice as well as law, therefore the same are reversed as well.

12. The emphasis of learned counsel for the respondents that the concurrent findings of the Courts below cannot be disturbed by this Court while exercising revisional jurisdiction provided under section 115 of Code, 1908 is not tenable. The impugned judgments and decrees having been found to be result of misreading/non-reading of evidence as well as non-adherence to the law laid down in this behalf by the superior Courts are not sustainable. It is correct that normally this Court does not interfere in the concurrent findings of fact recorded by the Courts below, but here the impugned decrees being classic example of wrong exercise of jurisdiction and clearly suffering from material irregularity/ patent illegality besides gross violation of the law floating on its surface cannot be sustained. On being faced with such situation, 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 Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001) Mushtari Khan v. Jehangir Khan (2006 SCMR 1238), Muhammad Nawaz alias Nawaza v. Member Judicial BoR and others (2014 SCMR 914) and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others (2016 SCMR 24).

13. For the reasons recorded hereinabove, these Civil Revisions are allowed, impugned decrees passed by the learned lower fora are hereby reversed, resultantly the suit of the plaintiff/ respondents is dismissed and the rival one instituted on behalf of petitioner is decreed as prayed for. No order as to costs.

MH/M-81/L Order accordingly.

2022 C L D 1026
[Lahore]
Before Ch. Muhammad Masood Jahangir, J
STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Chairman/Zonal Head/Attorney and others---Appellants
Versus
Mst. RAZIA BEGUM through Legal Heirs/Representative---Respondent

Regular First Appeal No. 26584 of 2021, heard on 22nd February, 2022.

Insurance Ordinance (XXXIX of 2000)---

----S. 79---Insurance claim, recovery of---Scope---Insurer company assailed judgment and decree passed by Trial Court in favour of respondent/plaintiff allowing her insurance claim of her deceased husband---Validity---Policy was a bilateral contract executed among insurer and insured under strict compliance of special law---Insurer was to reprobate its act/contract per S. 79 of Insurance Ordinance, 2000, which had a limited authority and could be exercised where either insured avoided its obligation in exposing required particulars or acted with fraud or misrepresentation to deceit the insurer before finalization of the contract---Such option could be availed by insurer within two years of effectiveness of policy---Policy in question was executed on 1-10-1999, and insurer at the most within next two years i.e. till 30-9-2001, could repudiate the same---Despite that claim was submitted on 20-01-2001, it was declined on 27-12-2002, beyond provided period, when the insurer had already lacked authority to such effect---High Court imposed cost on appellant/insurer company, as family of insured was forced to initiate litigation for totally unjustified act of repudiation of the insurer and the same took more than two decades to decide the matter up till High Court---Appeal was dismissed, in circumstances.

State Life Insurance Corporation of Pakistan v. Atta ur Rehman 2021 SCMR 1347 and Messrs Pakistan Agro Forestry Corporation Ltd. v. T.C. Paf Pakistan (Pvt.) Ltd and others PLD 2003 Kar. 284 ref.

Ibrar Ahmad for Appellants.

Liaqat Ali Butt, Usman Ali Butt and Muazzam Ali Butt for Respondent.

Date of hearing: 22nd February, 2022.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.---The judgment dated 24.03.2021 of the learned Trial Court, whereby prayer for recovery of death claim along with interest was awarded to the respondent is subject of this Appeal.

2. Briefly, the appellants (insurer) after conducting medical examination of the respondent's husband, Rana Liaqat Ali (insured) that he was a fit person, issued him life insurance policy on 1st October, 1999, who afterwards died on 20.12.2000. The widow/respondent promptly preferred claim before insurer, but was repudiated on the ground of concealment of facts. The record stands for that the widow/respondent approached available Forums to get the relief and lastly per decision of the Hon'ble Supreme Court, the learned Trial Court below stood final to hear such matters, thus suit in hand was instituted on 11.04.2014, which was contested by insurer. The Court below while facing with divergent pleadings of the respective parties materialized certain issues. Out of those issues Nos.1, 2 and 2A; being important are reproduced below:-

"1. Whether the plaintiff is entitled to recover the policy proceed amount Rs.10,00,000/- under policy No.5075568326-1 along with interest under section 47-B of Insurance Act, 1938? OPP

2. Whether the suit is time barred in terms of section 3 and Article 80(a) of Limitation Act, 1908? OPD.

2-A Whether plaintiff is entitled to get the benefit under section 14 read with section 19 of Limitation Act, 1908."

The parties led evidence in pros and cons and after its appreciation the suit was decreed vide judgment cited in preceding para to the following effect:-

'As a consequence of the above discussion the claim of the present plaintiff is hereby decreed/allowed as prayed for with costs along with interest at the rate of 5% higher than the prevailing bank rate from the date of death of the insured till realization of the claim. Decree sheet be prepared.'

This caused the insurer to prefer cited Appeal.

3. Heard, record perused.

4. There was no second thought except that the policy was a bilateral contract executed among insurer and insured under strict compliance of Special Law. The insurer to reprobate its said act/contract per section 79 of the Insurance Ordinance,

2000 has a limited authority, which can be exercised where either the insured avoided its obligation in exposing the required particulars or he acted with fraud or non-representation to deceit the insurer before finalization of the contract. The next provision further confines that this option can be availed by the insurer within two years of the effectiveness of the policy. In the case in hand, admittedly policy executed on 01.10.1999, thus the insurer at the most, within next two years (till 30.09.2001) could repudiate the same, but despite that claim was submitted on 20.01.2001, it allegedly declined beyond provided period on 27.12.2002 (Mark-D), when the insurer had already lacked authority to that effect.

5. Admittedly, before finalization of the policy, the insured had been medically examined via Mark B on 08.09.1999 by the Medical Specialist notably hired by insurer, who per investigation conducted via concerned Laboratory, according to his experience and expertise found him to be fit/healthy person. Nonetheless, the son of late insured (PW1) made statement on oath in line with contents of the plaint, who despite being subjected to cross-examination withstood his credibility, thus onus shifted towards insurer. Although, the latter produced Muhammad Yaqoob, Deputy Manager (retired) of the State Life as DW1, yet he was not a concerned incumbent, because he himself admitted that policy was not executed by him, who further conceded that:-

Although DW1 deposed that insured had been suffering from diabetes and hepatitis, but during the cross-examination damaged case of the insurer by conceding as under:-

Similarly, DW-2 also conceded during cross-examination that he did not meet any Doctor or obtain some medical record and certificate. The glimpse of statement in verbatim is reproduced here:-

'It is correct that I did not personally conduct inquiry of this death claim. It is correct that I did not took part for book of this policy, neither repudiation. I did not meet any doctor and also not obtain any medical record and certificate.'

From the same, it can easily be inferred that the insurer failed to discharge the onus shifted to him especially to the effect that the insured made concealment while obtaining policy of insurance. The insurer, indeed, took a defence, wherein he himself stood defaulter. This defence so introduced by the insurer has already been dealt with by the apex Court in 'State Life Insurance Corporation of Pakistan v. Atta ur Rehman' (2021 SCMR 1347) to the following effect:-

'****If therefore the medical examiner chosen by the insurer is negligent or the SOPs established for the examination (again, by the insurer) are so lax as to fail to result in a properly thorough examination, the burden of that fault lies on the

insurer. In such a situation the insured cannot be held to account for any non-disclosure such as would enable the insurer to escape liability on the policy unless there is fraud or a fraudulent misrepresentation. In the actual facts of the present case, had the coronary condition of the insured prior to 2002 been so bad as learned counsel sought to make out before us it would certainly have been discovered by the appellant's own medical examiner. That he did not do so, and gave a report that essentially totally, belied the stance subsequently taken by the appellant in its attempt to avoid the contract effectively puts paid to that stance. It cannot, in our view, be accepted and was rightly rejected by the Tribunal and the High Court.'

The insured breathed his last naturally at the age of 50 years, which could not assume to have been managed/planned in suspicious manner just to obtain the policy amount of meager quantum and subsequently act of repudiation beyond the specified limitation was not only illegal, rather deficient to any justification/evidence. Therefore, findings returned by learned Court below on issue No.1 being unexceptionable and based upon unrefuted evidence are affirmed.

6. Mr. Ibrar Ahmed, worthy counsel for the insurer has emphasized with great vehemence that under Article 86(a) of the Limitation Act, 1908, the period provided for filing of suit was just three years from the date of death of the insured, but it having been instituted after 13 years and 04 months, on the face of it, was barred by time, is not well founded. There is no denial that insured died on 20.12.2000, yet his widow (even within her iddat period) submitted the claim within a month, viz on 20.01.2001 before the insurer. Had it been awarded at that moment, then there was no fun to approach the Authority/Tribunal or the Court. Indeed, it is act of repudiation, which caused accrual of limitation to the claimant, otherwise, the Insurance Companies can defeat object of the provision ibid by retaining claim for more than three years. Here as well, just some days prior to expiry of three years after the death of insured, the claim was declined. The judicial system is aimed to promote justice and when it is proved on record that the repudiation was not justified on law as well as merit, then to me in such like situation the principle of recurring cause of action fully applies, thus whenever a demand for disbursement of claim is denied, fresh cause of action accrues to the claimant to approach the Court within three years of last denial, because an illegal, without jurisdiction, unfounded and based on mala fide act has no pedestal to be perpetuated even behind the shield of limitation.

7. There is yet another aspect that any correspondence on behalf of insurer either explaining reasons to repudiate the claim or showing indulgence to probe the matter any further is, indeed, an acknowledgment falling within the meaning of Explanation-I to section 19 of the Act ibid. The insurer after series of litigation finally declined to adjust the claim vide letter dated 28.12.2005 (Mark F), which provided new cause of action and on 20th July, 2006 within seven months of its communication, respondent approached the Insurance Tribunal duly constituted in

this behalf via appropriate remedy, which was accepted vide judgment dated 25.09.2012, but this Court on 26.03.2013 in R.F.A. No.827/2012 directed that the application be returned to respondent for its presentation before the Court of competent jurisdiction. In fact, the same proceedings under the orders of this Court were reopened before learned District Court. Now comes another moot point, whether the respondent was bound to present the earlier application returned by the then Insurance Tribunal or she could institute new one after formation of regular suit. This proposition has already been resolved by the High Court of Sindh in 'Messrs Pakistan Agro Forestry Corporation Ltd. v. T.C. Paf Pakistan (Pvt.) Ltd and others' (PLD 2003 Karachi 284) while observing to the following effect:-

"The first contention of Mr. Samiuddin Sami is that the plaintiff did not comply with the provisions of Order VII, Rule 10, C.P.C. but filed as fresh plaint which is liable to rejection. In support of his contention, he relied on the case of Mst. Hawabai v. Abdul Shakoor and others PLD 1970 Kar. 367. Mr. Mansoorul Arifin, learned counsel for the plaintiff, stated that the present suit, filed with the same prayer but with different valuation is maintainable as it is a new suit with different valuation based on the claim of the defendant No.1. The finding of the learned Single Judge in the case of Hawa Bai (supra) was reversed in appeal by a Division Bench of this Court in the case reported as Hawabai v. Abdul Shakoor PLD 1981 Kar. 277 and the same was upheld by the Hon'ble Supreme Court in the case Abdul Shakoor and others v. Mst. Hawabi and others 1982 SCMR 867. Following conclusion was reached by the Division Bench of this Court.

In view of the above discussion, we have reached the conclusion that after a plaint is returned to plaintiff by Court under Order VII, Rule 10, C.P.C. he may adopt any of the following courses:-

I. He may challenge the order returning the plaint for presentation to the proper Court by filing an appeal against such order, or

II. he may present the same plaint after its return to him to a Court having jurisdiction in the matter, or

III. he may amend the plaint by giving up a part of the relief or by reducing the valuation, so as to make it cognizable by the Court, which returned the plaint and then present the same to the same Court or amend the plaint and present it before a Court having jurisdiction in the matter, or

IV. he may file a fresh suit in the Court having jurisdiction the matter.

Therefore, in view of the law laid down by a Division Bench of this Court in the case of Hawa Bai (supra) and upheld by the Hon'ble Supreme Court in the case of Abdul Shakoor 1982 SCMR 867, I hold that the objection has no force."

Therefore, institution of new suit on 11.04.2014 was perfect per law already settled and learned lower Court was justified in answering issues Nos.2 and 2-A against the insurer.

8. The family of the insured was forced to initiate litigation for totally unjustified act of repudiation of the insurer, which took more than two decades to decide lis in hand uptil this forum and for the foregoing discussion, this Appeal having no merit stands dismissed with costs of Rs.4,00,000/- to be additionally paid to the respondent(s).

MH/S-38/L Appeal dismissed.

2022 M L D 1734
[Lahore (Rawalpindi Bench)]
Before Ch. Muhammad Masood Jahangir, J
QAMMAR ABBAS---Petitioner
Versus
MUMTAZ AHMED MINHAS and others---Respondents

Civil Revision No.597-D of 2014, decided on 24th May, 2022.

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

----Arts.17 & 79---Agreement to sell----Proof---Petitioner/plaintiff instituted suit for specific performance of contract against respondents before Trial Court while plaintiff/ petitioner asserted that first respondent/defendant had sold out subject property to petitioner/plaintiff but instead of performing part of contract first respondent alienated suit property to second respondent----Suit was contested by respondents with the pleas that neither alleged sale was ever offered nor consideration was received----Suit was decreed by Trial Court---Appellate Court reversed the said verdict and dismissed the suit of petitioner---Held, that agreement to sell could not be treated as deed of title ,which in case of denial, being document of financial obligation and future liability was required to be proved in terms of Art.79 of Qanun-e-Shahadat, 1984----As per contents of written statement, respondents explicitly disputed very origin of alleged agreement to sell while raising serious allegations in the sense that it was forged, fabricated and fictitious document and maneuvered by practicing fraud, thus heavy onus rested upon beneficiary/petitioner to establish its genuineness---Alleged sale agreement revealed that persons 'G' & 'S' had witnessed it, but surprisingly only 'G' was examined, whereas 'S' despite availability was withheld, thus per compulsory requirement of Art. 79 of Qanun-e-Shahadat, 1984, document remained unproved---Requirements under Art. 79 of Qanun-e-Shahadat, 1984 were mandatory and without strict compliance thereof any such document (entailing future obligation or financial liability) could not be used as evidence----Testimony of scribe of document could not be used to consider it as statement of marginal witness and when deed writer neither signed agreement to sell as attesting witness nor alleged transaction finalized before him, therefore writer's evidence lacked any importance----Sole marginal witness 'G' was not only real brother of petitioner/plaintiff, rather he did not utter a single word that either purported deal was settled or token amount was paid in his presence---No more supporting witness appeared on behalf of petitioner/plaintiff, thus the available evidence was meager, insufficient and inconsistent---Requisite document was tendered in evidence but was not proved per stern compliance of law, thus, plaintiff had to suffer---Civil Revision was dismissed, in circumstances.

Mst. Rasheeda Begum and others v. Muhammad Yousaf and others 2002 SCMR 1089; Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others

PLD 2011 SC 241; Farid Bakhsh v. Jind Wadda and others 2015 SCMR 1044; Amjad Ikram v. Mst. Asiya Kausar and 2 others 2015 SCMR 1; Muhammad Yasin through L.Rs and others v. Muhammad Latif and others 2016 CLC 553 and Mst. Azra Gulzar v. Muhammad Farooq and another 2018 CLC 1056 rel.

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

---Arts.72 & 79-Execution of document---Proof of content of a document---Scope---Execution of document would not only mean mere signing or putting thumb impressions, but must be proved that same was so made in presence of witness before whom the document was written, read over and understood by the executants; it would also not only be limited to merely signing a name or affixing thumb impression upon blank sheet of paper so as to prove the document to have been executed by the executants, whose identification should be proved by reliable authentic evidence as well---Execution means series of acts, which would complete the same and mere signing or putting thumb mark would not amount to prove due construction of the document---Unproved document was not admissible in evidence unless strict proof thereof was waived---Exhibition of a document as well as its proof were two different aspects and the latter one was more significant---Civil Revision was dismissed.

Abdul Hameed v. Mst. Aisha Bibi and another 2007 SCMR 1808 rel.

Muhammad Taqqi Hasnain and Muhammad Tariq for Petitioner.

Barrister Osama Amin Qazi for Respondents.

Date of hearing: 24th May, 2014.

JUDGMENT

CH. MUHAMMAD MASOOD JAHANGIR, J.----Verily, Mumtaz Ahmad Minhas, respondent No.1 was exclusive owner of the subject property, who transferred it to Amir Abbas Minhas, respondent No.2 vide sale deed dated 24.06.2005. Thereafter, on 06.07.2005 the petitioner/plaintiff instituted suit for specific performance of contract dated 18.05.2005 (Exh.P1), against respondents before learned Civil Court, Chakwal while asserting that respondent No.1 had sold out subject property to him after receiving advance consideration before the witnesses, but instead of performing his part of contract, respondent No.1 to frustrate Exh.P1 alienated suit property to respondent No.2, thus prayed for grant of decree for specific performance and cancellation of sale deed executed in favour of respondent No.2. In response, suit was contested by the respondents with the plea that neither alleged sale was ever offered nor consideration received; that

petitioner/plaintiff had succeeded to obtain signature of respondent No.1 over blank stamp paper so that electric connection could be installed over the suit house and that said blank stamp paper was used to manipulate sale contract, which being forged, fictitious and result of fraud was inoperative upon rights of the respondents. Facing with divergent pleadings, the parties were put to face trial, who examined evidence in pros and cons and as a result of its appreciation, though suit was decreed by learned Trial Court via judgment dated 25.04.2011, yet learned Appellate Court below through impugned decision of 27.03.2014 reversed the said verdict of its subordinate and dismissed the suit. It caused the petitioner to approach this Court via cited petition, which since 2014 is here.

2. Messrs Muhammad Taqqi Hasnain and Muhammad Tariq, Advocates for the petitioner as well as Barrister Osama Amin Qazi, Advocate for the respondents argued the case and available record consulted with their able assistance.

3. There is no cavil that agreement to sell cannot be treated as deed of title, which in case of denial, being document of financial obligation and future liability is required to be proved in terms of Article 79 of Qanun-e-Shahadat Order, 1984. Per contents of written statement, respondents explicitly disputed the very origin of Exh.P1 while raising serious allegations in the sense that it was forged, fabricated and fictitious document, besides that maneuvered by practicing fraud, thus heavy onus rested upon beneficiary/petitioner to establish its genuineness. The perusal of sale agreement (copy whereof is available at page 73) revealed that Ghulam Sajjad and Sajjad Haider had witnessed it, but surprisingly only former (PW3) was examined, whereas latter despite availability was withheld, thus per compulsory requirement of relevant provision, the document remained unproved. In 'Mst. Rasheeda Begum and others v. Muhammad Yousaf and others' (2002 SCMR 1089), 'Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others' (PLD 2011 SC 241) and 'Farid Bakhsh v. Jind Wadda and others' (2015 SCMR 1044), while defining Article 79 in depth, the apex Court finally observed that its requirement is mandatory and without strict compliance thereof any such document (entailing future obligation or financial liability) cannot be used as evidence. For ready reference, para No.8 of Hafiz Tassaduq Hussain's case (supra) being applicable with all four corners to the case in hand is given below:-

"The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression 'shall not be used as evidence' until the requisite number of attesting witness have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting

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

This aspect with some more clarity that nothing short of two attesting witnesses can even be imagined for proving sale contract, besides that testimony of scribe cannot be used to consider it as statement of marginal witness has also been substantiated by the same Court in Farid Bakhsh's case (supra) by concluding that:-

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

4. In addition to said drastic aspect, per available evidence despite that the Deed Writer (DW1) made his statement without having his relevant Register before him, yet explicitly conceded that:-

In such situation when he neither signed Exh.P1 as attesting witness nor alleged transaction finalized before him, therefore in line of afore reproduced decision of the apex Court, his evidence lacked any importance. The next draw back was that sole marginal witness, Ghulam Sajjad (PW3) was not only real brother of the petitioner/plaintiff, rather he did not utter a single word that either purported deal was settled or token amount was paid in his presence. No more supporting witness appeared on behalf of the petitioner, thus the available evidence was meagre, insufficient and inconsistent besides that not up to the demand of law, thus was rightly disbelieved by the Court below.

5. The submission of learned counsel for the petitioner/plaintiff that respondent/defendant No.1 admitted his signatures over sale contract (Exh.P1), thus in such situation his client was not under obligation to formally prove the said document is misconceived. As observed supra to this extent stance of respondent/defendant No.1 was that blank stamp paper was got signed by the petitioner/plaintiff for installation of power connection, but subsequently it was fabricated as sale agreement through forgery. It is well settled by now that execution of document would not only mean mere signing or putting thumb impression, but must be proved that same was so made in presence of witnesses before whom the document was written, read over and understood by the executant. It would also not only be limited to merely signing a name or affixing thumb impression upon a blank sheet of paper so as to prove the document to have been executed by the executant, whose identification should be proved by reliable and authentic evidence as well. The execution means series of acts, which would complete the same and mere signing or putting thumb mark would not amount to prove due construction of the document. There is no cavil that an unproved document is not admissible in evidence unless strict proof thereof is waived. Reliance to this effect is placed on 'Abdul Hameed v. Mst. Aisha Bibi and another' (2007 SCMR 1808), wherein it was observed as under:-

"After hearing the learned counsel for the parties and perused the record with their assistance, we find that sole question requiring determination would be whether the admission of vendor of his thumb-impression on the agreement to sell was sufficient to prove its execution and contents, the answer is in the negative as the document purporting to create a right in the property must be proved to have been actually executed by the person who allegedly executed such document."

The apex Court further held that:-

"In view thereof, the admission of Din Muhammad of his thumb-impression on the agreement in question, would not ipso facto prove its contents to raise the presumption of it being a genuine document to have the legal force."

It is to be kept in mind that exhibition of document as well as its proof are two different aspects and obviously the latter one is more significant. In the case in hand, although the requisite document was tendered in evidence, but was not proved per stern compliance of law, thus he had to suffer.

6. For the foregoing reasons, it can safely be concluded that learned Appellate Court below has elaborately discussed all factual and legal aspects of the matter in recording valid, cogent as well as convincing reasons to culminate the same, whereas learned counsel for the petitioner failed to persuade to take a view different from the one taken by learned Additional District Judge, whose verdict per decisions of the Superior Courts passed in cases reported as "Amjad Ikram v. Mst. Asiya Kausar and 2 others" (2015 SCMR 1), "Muhammad Yasin through L.Rs and others v. Muhammad Latif and others" (2016 CLC 553) and "Mst. Azra Gulzar v. Muhammad Farooq and another" (2018 CLC 1056) deserved preference over that of Civil Court. Thus, instant case does not fall within any of the exceptions to invoke revisional jurisdiction provided under section 115, C.P.C. This petition having no merit is dismissed with no order as to cost.

MHS/Q-9/L Revision dismissed.