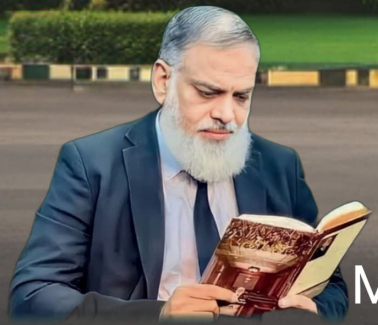
CONTOURS of JUSTICE

Composition, Interpretation & Explanation of
Landmark Judgments of Civil Cases
By Honourable Mr. Justice Shahid Bilal Hassan



Sahibzada
Mian Ashraf Asmi Advocate

ASMI
PUBLICATIONS

The Hon'ble Mr. Justice Shahid Bilal Hassan

Born to a noble family in 1965 at Lahore. Hon'ble Mr. Justice Shahid Bilal Hassan received his early education in Chiniot, District Chiniot, Punjab, Pakistan and thereafter migrated to Uganda, East Africa with his family and completed his secondary education there. During his subsequent sojourn in the heart of Africa, he frequented his visits to Kenya, Tanzania, Egypt and Saudi Arabia abroad and to Lahore in Pakistan till 1982, continuing his

studies and accomplishing his academic benchmarks by completing his degrees in graduation from University of the Punjab in 1985, post graduation in English as his major subject from Government College University in 1988, and LLB from Punjab law College, Lahore affiliated with University of the Punjab in 1993. His lordship had been endowed with versatile potentials that led him to the sports arena as well, excelling in the game of rowing by being in the Lahore Champions' team during his under-graduation tenure.

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

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

His lordship is happily married and bestowed with three offspring.

Preface.

It is with great pleasure and honor that I present this remarkable compilation of landmark judgments in civil cases authored by the distinguished jurist, Mr. Justice Shahid Bilal Hassan, of the Lahore High Court, Lahore. This comprehensive anthology, meticulously compiled by the esteemed Ashraf Asmi, Advocate, provides a valuable repository of legal wisdom and insight derived from the judicious pronouncements of one of the leading jurists of our time.

The realm of civil law is dynamic and ever-evolving, requiring legal practitioners to stay abreast of the latest jurisprudential developments. In this context, the present compilation serves as an invaluable resource for lawyers, judges, academicians, and all those keen on understanding the intricacies of civil law. Mr. Justice Shahid Bilal Hassan's judgments, marked by erudition and analytical precision, encapsulate the essence of legal reasoning, thereby providing a beacon for those navigating the complex terrain of civil litigation.

Ashraf Asmi, Advocate, has undertaken the commendable task of distilling the crux of each judgment, presenting readers with a succinct yet comprehensive analysis of the legal principles and issues discussed therein. This book not only serves as a tribute to the juristic acumen of Mr. Justice Shahid Bilal Hassan but also as an indispensable guide for legal professionals seeking a deeper understanding of the nuances of civil law.

The compilation is structured systematically, with each chapter dedicated to a specific judgment, allowing readers to delve into the intricacies of individual cases. The inclusion of the key issues addressed in each judgment enhances the practical utility of this compilation, transforming it into a ready reference for legal research and practice. Furthermore, the meticulous organization of the content facilitates a nuanced exploration of the evolving legal landscape as shaped by Mr. Justice Shahid Bilal Hassan's pronouncements.

The book not only captures the legal brilliance of Mr. Justice Shahid Bilal Hassan but also provides readers with a panoramic view of the jurisprudential trends that have shaped civil law in our jurisdiction. As we navigate an era marked by legal complexities and evolving societal dynamics, the insights offered by this compilation are indispensable for anyone seeking to comprehend the judicial thought process underpinning civil jurisprudence.

In conclusion, I extend my heartfelt appreciation to Ashraf Asmi, Advocate, for his dedication and diligence in bringing forth this invaluable compilation. This book stands as a testament to the enduring impact of Mr. Justice Shahid Bilal Hassan's contributions to the field of civil law, and it is my sincere hope that it will serve as

a source of inspiration and knowledge for generations of legal practitioners to come.

In the realm of legal scholarship, the significance of precedent-setting decisions cannot be overstated. These decisions, often encapsulating the crux of complex legal issues, serve as pillars upon which the edifice of jurisprudence stands. Ashraf Asmi Advocate, a seasoned legal professional, has meticulously compiled a comprehensive book titled "Landmark Judgements in Civil Cases," showcasing the profound contributions of MR. Justice Shahid Bilal Hassan from the Lahore High Court Lahore.

Overview of the Book:

Ashraf Asmi Advocate's book is a seminal work that delves into the jurisprudential landscape shaped by the erudite judgments of MR. Justice Shahid Bilal Hassan. The compilation focuses exclusively on civil cases, providing readers with an in-depth exploration of the legal intricacies involved in each decision. Through a meticulous selection process, Ashraf Asmi has curated a collection that not only highlights the prowess of the esteemed justice but also serves as an invaluable resource for legal practitioners, scholars, and enthusiasts seeking profound insights into civil law.

Structured Analysis:

The book adopts a structured approach, with each chapter dedicated to a specific judgment authored by MR. Justice Shahid Bilal Hassan. Ashraf Asmi takes readers on a journey through these landmark decisions, unraveling the crux of each case and shedding light on the pivotal legal issues addressed. The narrative is not only accessible to legal professionals but also to those with a keen interest in understanding the evolution of civil law jurisprudence in the Lahore High Court.

In-depth Examination of Judgments:

Ashraf Asmi's compilation goes beyond a mere recitation of judgments; it provides an in-depth examination of the legal reasoning, principles, and precedents cited by MR. Justice Shahid Bilal Hassan in each case. This approach allows readers to grasp the nuances of the decisions, fostering a profound understanding of the legal doctrines that underpin them. The author's insightful commentary adds an extra layer of comprehension, making the book an indispensable guide for both practitioners and academics.

Practical Utility:

The practical utility of the book extends to legal professionals engaged in civil practice, providing them with a valuable reference tool to navigate and argue

cases effectively. Moreover, law students and researchers will find the compilation to be a treasure trove of knowledge, offering a unique perspective on the evolution of civil law in Pakistan.

Conclusion:

"Landmark Judgements in Civil Cases" by Ashraf Asmi Advocate stands as a testament to the rich tapestry of legal wisdom woven by MR. Justice Shahid Bilal Hassan. The book not only pays homage to the jurist's intellectual contributions but also serves as a beacon for those navigating the intricate terrain of civil law. Ashraf Asmi's compilation is poised to become an authoritative resource, contributing significantly to the legal scholarship landscape in Pakistan.

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Lahore High Court
Afzaal Ahmad Buttar & another v. Muhammad Yousaf Civil Revision No.520 of 2022
Mr. Justice Shahid Bilal Hassan

Crux of the Judgement:

An agreement to sell by the guardian of the minor with regards to minor's.

Facts of Case:

The respondent/mother/guardian of minor entered into agreement to sell pertaining to property of minor with the petitioner. After receiving sale consideration, she refused to act upon the agreement. The suit for specific performance of agreement to sell filed by petitioner was dismissed ex-parte on the ground that mother of minor has not obtained permission from court to sell property of minor.

Issues In Case:

What is legal status of an agreement to sell executed by the guardian of the minor with regards to property, owned by the minor, without taking prior-permission from the competent court?

Analysis of Issues of Case:

As per section 29 of the Guardian and Wards Act, 1890, before entering into any transaction with the petitioners, the guardian of the minor had to obtain permission of the Court concerned. The alleged agreement to sell was entered into by mother/guardian of the minor without seeking prior permission of the Court concerned, therefore, the same is void *ab initio*.

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.520 of 2022
Afzaal Ahmad Buttar & another V**ersus** Muhammad Yousaf

Sr. No. of order/ proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties of counsel, where necessary

11.01.2022 Mr. Khalid Pervaiz Warraich, Advocate for the petitioners

Tersely, the petitioners instituted a suit for specific performance against the respondent/minor (Muhammad Yousaf) through his real mother Azra Tehsin, on the basis of an agreement to sell dated 05.12.2003, with respect to the suit property measuring 49-Kanals 09-Marlas falling in Khewat No.388, situated in Mauza Ferozwala, detailed in paragraph No.1 of the plaint. It was maintained by the petitioners that suit property was owned by respondent/minor; that mother of the respondent namely Mst. Azra Tehsin was appointed guardian by Guardian Court at Gujranwala vide order dated 24.05.2003; that mother/guardian of the respondent entered into an agreement to sell dated 05.12.2003 germane to the suit property for a consideration of Rs.20,00,000/-, out of which Rs.15,00,000/- were paid in presence of the marginal witnesses and possession of the suit property was delivered to the petitioners; that as per terms, the mother/guardian of the minor/respondent within 15-days of issuance of guardian certificate was bound to execute registered sale deed in favour of the petitioners after receiving the remaining sale consideration Rs.500,000/- but later on she procrastinated and ultimately refused; hence, the suit. The respondent/defendant was proceeded against ex parte on 26.03.2007 after observing all legal and codal formalities for procuring attendance.

Ex parte evidence of the petitioners, oral as well as documentary, was recorded and thereafter the learned trial Court vide impugned judgment and decree dated 28.02.2018 dismissed suit of the petitioners for specific performance, however, entitled the petitioners to recover Rs.15,00,000/- from the respondent/defendant. The petitioners being aggrieved of the same preferred an appeal but remained unsuccessful vide impugned judgment and decree dated 01.11.2021; hence, the instant revision petition under section 115 of the Code of Civil Procedure, 1908.

2. Heard.

3. There is no denial to the fact that the suit property is owned by minor and the same remained situation at the time of alleged agreement to sell (Ex.P1) dated 05.12.2003, which was entered into between the petitioners and the mother of the minor who was admittedly appointed as guardian of the minor on 24.05.2003 and guardianship certificate (Ex.P3) was issued in her favour on 17.07.2003. However, before entering into any such transaction with the petitioners, the mother of the minor did not obtain any permission of the Court concerned, because she was not allowed to alienate, transfer, gift or mortgage the property owned by the minor, rather an impediment was put on such right of the guardian towards the property of the minor as is evident from the guardianship certificate (Ex.P3). When the position was as such the mother of the minor was not competent to enter into any agreement to sell with regards to the disputed property, owned by the minor, because section 29 of the Guardian and Wards Act, 1890 puts a clog in the manner:-

> '***29. Limitation of powers of guardian of property appointed or declared by the Court***. *Where a person other than a Collector or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be*

guardian of the property of a ward, he shall not, without the previous permission of the Court.

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the 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 minor.'

Thus, as stated above, the alleged agreement to sell (Ex.P1) was entered into by mother of the minor without seeking prior permission of the Court concerned, therefore, the same is void ab initio, which does not create any legal rights or liabilities in favour of the petitioners/vendees and the same cannot be enforced against the minor/respondent. In such scenario, this Court observes that the alleged agreement to sell (Ex.P1) executed by mother of the minor in favour of the present petitioners is void and the petitioners cannot seek its performance with the aid of the Court by filing civil suit. In *Muhammad Ali through L.Rs. and another v. Manzoor Ahmed* **(2008 SCMR 1031)**, the Apex Court of the country, while referring the ratio, rendered in case of Chairman, District Screening Committee, Lahore, has held:-

'In the case of the Chairman, District Screening Committee, Lahore v. Sharif Ahmad Hashmi PLD 1976 SC 258 it was laid down that an agreement by person under a legal disability e.g. a minor was void ab inito and was incapable of rectification or confirmation. Law forbids such a transaction even if the minors were to ratify after attaining the age of majority. Therefore, the suit of the respondent against the petitioners for specific performance of the alleged agreement of transfer of 5 Killas of land could not be decreed. Needless to observe

that Sultan, the petitioner No.2, was not even a party to the alleged agreement. The impugned judgment is not sustainable at law.'

4. In view of the above, it can safely be observed that the learned Courts below while construing law on the subject and appreciating evidence on record have reached to a just conclusion and have rightly non-suited the petitioners; therefore, the concurrent findings recorded on facts, when do not suffer from any misreading and non-reading of evidence, howsoever erroneous, cannot be interfered with in exercise of revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908. Reliance is placed on *Mst. Zaitoon Begum v. Nazar Hussain and another* (**2014 SCMR 1469**), *CANTONMENT BOARD through Executive Officer, Cantt. Board Rawalpindi v. IKHLAQ AHMED and others* **(2014 SCMR 161)** and *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* **(2017 SCMR 679)**.

5. In view of the above, the learned Courts below have rightly exercised vested jurisdiction and have not committed any illegality and irregularity while passing the impugned judgments and decrees, warranting interference by this Court in exercise of revisional jurisdiction. Resultantly, while placing reliance on the judgments *supra*, the civil revision in hand, having no force and substance, stands dismissed, ***in limine***.

(Shahid Bilal Hassan)
Judge

M A. Hassan

Approved for reporting.

Judge

Lahore High Court
Noor Zaman v. Mst. Gullan (deceased) through L.Rs.
Civil Revision No.70819 of 2021
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
It is necessary to issue notice pervi upon transfer of case under administrative order.

Facts of Case:
The suit of petitioner was transferred under administrative order. The learned transferee court closed petitioner's right to lead evidence as well as dismissed his suit for want of evidence without issuance of notice pervi.

Issues In Case:
Whether it is necessary to issue notice pervi upon transfer of case under administrative order?

Analysis of Issues of Case:
Para 6, Chapter XIII, Volume I of High Court Rules and Orders dealing with transfer of a case by administrative order requires the Presiding Officer of the Court from which it has been transferred to inform the parties regarding the transfer & of the date on which they would appear before the transferee Court and the District Judge passing the order of transfer is required to see that the records are sent to the Court concerned & parties informed of the date fixed with the least possible delay. Moreover, in the event of transfer of a case by judicial order, the transferee court is required to fix a date on which the parties should attend the Court.

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.70819 of 2021

Noor Zaman Versus Mst. Gullan (deceased) through L.Rs.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary

12.01.2022 Mr. Muhammad Akmal Khan, Advocate for the petitioner
Mr. Muzaffar Abbas Khan Ghadhi, Advocate for the respondents

Succinctly, the petitioner instituted a suit for specific performance of contract with permanent injunction against the deceased respondent Mst. Gullan, who entered appearance and submitted her written statement. She also filed a separate suit for declaration with consequential relief, which was contested by the present petitioner. Both the suits were consolidated and consolidated issues were framed. However, on 15.02.2021, the learned trial Court closed the right of the petitioner to lead evidence and dismissed his suit for want of evidence on the said date. The petitioner being aggrieved of the same preferred an appeal but remained unsuccessful vide impugned judgment and decree dated 04.03.2021; hence, the instant revision petition.

2. Heard.

3. It is an established and admitted fact on record that when under administrative order the case was transferred from one Court to the other Court, no notice *parvee* was issued by the transferee Court to the parties or their counsel, as is evident from the order dated 05.01.2021, which is reproduced as under:-

O R D E R
05.01.2021
Present: Advocates are observing strike today.

Received through transfer. Be Registered.

Today, instant case was fixed for evidence of plaintiff. Evidence of plaintiff is not available. Due to strike, suit is adjourned, absolute last opportunity is granted to the plaintiff to produce complete evidence.

Adjourned till 15.02.2021 for evidence of plaintiff.

Announced:
05.01.2021 *Muhammad Adeel Asghar Mian*
Civil Judge Class-II, Sillanwali

Instead of passing such an order, giving absolute last opportunity, the learned trial Court ought to have issued the notices *parvee* to the parties, because the case was transferred under administrative order and not under section 24-A(2) of the Code of Civil Procedure, 1908 where the parties are directed to appear before the learned transferee Court and if party fails to appear then penal order can be passed against such party; however, here the case is not as such, rather otherwise, as highlighted above. Para 6, Chapter XIII, Volume I of High Court Rules and Orders provides:-

> *"6. When a case is transferred by administrative order from one Court to another, the Presiding Officer of the Court from which it has been transferred shall be responsible for informing the parties regarding the transfer, and of the date on which they should appear before the Court to which case has been transferred. The District Judge passing the order of transfer shall see that the records are sent to the Court concerned and parties informed of the date fixed with the least possible delay. When a case is transferred by judicial order the Court passing the order should fix a date on which the parties should attend the Court to which the case is transferred.'*

However, in the present case, none of the requirements enunciated in the above para 6 of the Chapter XIII, Volume I of the High Court Rules and Orders has been adhered to because nothing is on record to suggest that the Court from which the

case was transferred ever informed the parties to appear before the transferee Court on such and such date, rather it has manifested from the record that the case was transferred under administrative order without fixing a date to appear before the transferee Court and no information in this regard was imparted to the parties; thus, it was required by the learned transferee Court to issue notice *parvee* to the parties and their counsel, fixing a date to appear before it but no such exercise has been done. In such scenario, what to speak of passing a penal order without putting the petitioner on caution as has been held by the Apex Court of the country in a judgment reported as *Moon Enterprises CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another* **(2020 SCMR 300)**; thus, the said precedent being on different facts is not attracted in the instant case and the ratio of the same has wrongly been appreciated by the learned subordinate Courts.

This Court while dilating upon a case of almost identical facts, wherein the defendant was proceeded against ex parte by the Court where the suit was pending and was transferred to some other Court under administrative order and without issuing notice to him he was proceeded against ex parte, reported as *Azizullah Khan and 4 others v. Arshad Hussain and 2 others* **(PLD 1975 Lahore 879)** has held:-

> *'According to section 24-A(2), C.P.C. and the relevant rule of High Court Rules and Orders, as referred to above, if the order of the learned District Judge transferring the case had been passed in the presence of the absentee defendants or they had been intimated in accordance with that order, then in case of their absence before the transferee Court they could be lawfully proceeded against ex parte. If the absentee defendant can join the proceedings at the subsequent stage even after ex parte order has been passed against him, as also held in Messrs Landhi Industrial Trading Estages Ltd., Karachi v. Government of West Pakistan through Excise & Taxation Officer 1970*

SCMR 251, then how it can be presumed that in the absence of any intimation duly furnished to him with regard to transfer of the case from one Court to another he can be proceeded against ex parte simply on the basis of ex parte order already passed against him. His right to join future proceedings implies that after the transfer of the case from the Court where such proceedings are pending if the same have not been transferred in his presence or without intimation to him, then he cannot be proceeded against ex parte unless duly served upon with regard to transfer of the case to the successor Court. In this view of the matter the contention of the learned counsel for the respondents, that since there is no clear provision in the amended law to issue notice to the parties after the case has been received on transfer, therefore, said notice cannot be issued, has no substance. As laid down in 1970 SCMR 251, the rules of procedure as laid down in the Code are principally intended for advancing justice and not for retarding it on bare technicalities.'

4. Pursuant to the above discussion it can safely be held that the impugned order, dismissing the suit for want of evidence, it is harsh in nature, especially when after transfer of the case from one Court to the other Court, the petitioner was not informed, so as to enable him to produce his evidence and even he was not warned to face the consequences in case of his failure to produce complete set of evidence; thus, the impugned order, judgment and decrees cannot be allowed to hold field further, because it is requirement of law that cases should be decided on merits and technicalities should be avoided. Moreover, this Court while exercising revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908, has ample power to correct the illegality and irregularity committed by the learned Courts below.

5. The crux of the discussion above is that the revision petition in hand is allowed, impugned order, judgment

and decrees are set aside and case is remanded to the learned trial Court which will be deemed to be pending at the stage when the impugned order dated 15.02.2021 was passed with a direction to afford two clear opportunities to the petitioner for production of his complete set of evidence. The parties are directed to appear before the learned trial Court on 31.01.2022, positively.

(SHAHID BILAL HASSAN)
Judge

M.A.Hassan

Approved for reporting.

Judge

Lahore High Court
Zahoor Ahmed v. Zafar Abbas and another.
Civil Revision No. 232332 of 2018
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
Factual controversy cannot be decided summarily without framing issues and recording evidence, especially when the application filed has been adorned with affidavits of the witnesses.

Facts of Case:
The petitioner through this revision petition assailed the order of appellate court, whereby, his application under was rejected.

Issues In Case:
Whether factual controversy can be decided summarily without framing issues and recording evidence, especially when the application filed has been adorned with affidavits of the witnesses?

Analysis of Issues of Case:
It is the requirement of law that each and every party should be provided with open field to prove his stance by leading evidence, obviously, by adhering to the procedural law i.e. Qanun-e-Shahadat, 1984 and Code of Civil Procedure, 1908, in civil nature cases, because it is desired by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 that for determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process. Besides, the doctrine of promissory estoppel also plays a significant role, as after alleged out of Court settlement, the parties cannot go aside and if any suchthing happened in between the parties and the respondents have stepped back, the petitioner can only prove the same by leading evidence.

Form No: HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No. 232332 of 2018
Zahoor Ahmed …Versus… Zafar Abbas and another

Sr. No. of order/ proceeding	Date of order/ Proceeding	Order with signatures of Judge, and that of Parties or counsel, where necessary

31.01.2022 Ms. Kiran Bashir, Advocate for the petitioner
Sheikh Usman Karim Ud Din, Advocate for the respondents

Succinctly, the petitioner/plaintiff instituted a suit for specific performance of agreement to sell dated 21.09.2013 with permanent injunction against the respondents/defendants. On 13.11.2014, the suit of the petitioner/plaintiff was dismissed as withdrawn on the basis of statement recorded by the petitioner. Later on, the petitioner filed an application under section 12(2) alongwith an application under Order XXXIX, Rules 1 and 2, Code of Civil Procedure, 1908 seeking setting aside of withdrawal order dated 13.11.2014 and restoration of the suit for deciding the same on merits. The respondents contested the said applications. The learned trial Court vide impugned order dated 06.12.2017 dismissed the said application under section 12(2), CPC. The petitioner being aggrieved preferred an appeal but the same was also dismissed on 19.05.2018; hence, the instant revision petition.

2. Heard.

3. First of all it is observed that the order dated 06.12.2017, passed by the learned trial Court, dismissing the application under section 12(2), CPC was revisable but an appeal was preferred by the present petitioner. The learned appellate Court was vested with jurisdiction to convert the appeal into revision petition but this fact has escaped the

attention of the learned appellate Court and without adverting to the said legal point, the learned appellate Court decided the appeal; therefore, the said appeal is treated as revision petition and the instant revision petition is converted into constitutional petition under Article 199, Constitution of Islamic Republic of Pakistan, 1973. Office shall number it in the relevant register as Constitutional Petition.

4. Now, I advert to the merits of the case, perusal of the statement recorded on 13.11.2014 by the present petitioner being plaintiff divulges that certain compromise was effected inter se the parties and in pursuance of the same, the petitioner withdrew the suit. However, allegedly, later on, the respondents stepped back of the said alleged compromise which constrained the petitioner to file application under section 12(2), Code of Civil Procedure, 1908 with specific allegations of fraud. In support of his stance, the petitioner appended affidavits of the witnesses namely Maher Ghulam Hussain Patwari Halqa, Ajmal Khan son of Inayat Hussain and Aslam Khan son of Shahbaz, in order to show that before withdrawal of suit the parties entered into compromise with regards to the disputed property and Maher Ghulam Hussain Patwari settled the dispute inter se the parties in presence of the witnesses, named above. The respondents demanded withdrawal of suit till 27.11.2014 and agreed to abide by the agreement to sell dated 21.09.2013. However, when the petitioner withdrew his suit as per compromise, the respondents stepped back of the said compromise. Such factual controversy cannot be decided summarily without framing issues and recording evidence, especially when the application filed by the petitioner for setting aside the order dated 13.11.2014 has been adorned with affidavits of the witnesses. It is the requirement of law that each and every party should be provided with open field to prove his stance by leading evidence, obviously, by adhering to the

procedural law i.e. Qanun-e-Shahadat, 1984 and Code of Civil Procedure, 1908, in civil nature cases, because it is desired by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 that *for determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process*. Besides, in this case, the doctrine of promissory estoppel also plays a significant role, as after alleged out of Court settlement, the parties cannot go aside and if anything such happened in between the parties and the respondents have stepped back, the petitioner can only prove the same by leading evidence. The doctrine of promissory estoppel was discussed in the judgment reported as *Pakistan through Ministry of Finance Economic Affairs and another v. Fecto Belarus Tractors Limited* **(PLD 2002 Supreme Court 208)**, as under:-

> *'23. It will be necessary to touch the true concept of the realm of doctrine of promissory estoppel. Before proceeding further this doctrine has been variously called 'promissory estoppel' 'requisite estoppel', 'quasi estoppel' and 'new estoppel'. It is a principle evolved by equity to avoid injustice and though commonly named 'promissory estoppel', it is neither in the realm of contract nor in the estoppel. The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled*

> *to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. The doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the Courts for doing justice and there is no reasons why it should be given only a limited application by way of defence. There is no reasons in logic or principle why promissory estoppel should also not be available as a cause of action.'*

The said doctrine was further reiterated by the Apex Court of the country in judgment reported as *Azra Riffat Rana v. Secretary, Ministry of Housing and Works, Islamabad and others* **(PLD 2008 Supreme Court 476)**.

5. In this view of the matter, when the petitioner is knocked out of the arena on the basis of technicality, how will he be able to establish that some promise was made by the respondents in presence of the witnesses knowingly and showed their intentions that they would act upon the same if the petitioner withdrew the suit and when he performed his part of such promise, the respondents took somersault, in this way they (respondents) allegedly defrauded the petitioner by making him believe that they would act upon their part of promise. In such scenario, the learned Courts below while passing the impugned order and judgment have failed to exercise vested jurisdiction as per mandate of law, keeping in view the peculiar facts and circumstances of the case in hand, the impugned order and judgment are not upto the dexterity.

6. The crux of the above discussion is that the constitutional petition in hand succeeds, which is allowed accordingly and the case is remanded to the learned trial Court with a direction to decide the application under section 12(2) of the Code of Civil Procedure, 1908 after framing issues and recording evidence afresh on merits, which shall be deemed to be pending before it. The adversaries are directed to appear before the learned trial Court on 10.03.2022.

(Shahid Bilal Hassan)
Judge

M.A.Hassan

Approved for reporting.

Judge

Lahore High Court
M/s Premium Developers v. Muhammad Tariq
Civil Revision No.74574 of 2019
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) The agreement inter se the parties is a bilateral agreement.

ii) Without calculation of the already sold units and received amount the actual sale price cannot be determined. Trial Court while passing the order should be sure whether the ordered amount is the balance amount or not.

Facts of Case:

Through this civil revision, petitioner called in question the order of learned trial court with the contention that the impugned order was passed in favor of the respondent while respondent has not fulfilled his part of bilateral agreement and even the arrangements made subsequently between the parties.

Issues In Case:

i) What is bilateral agreement?

ii) How the court should determine the actual sale price and balance amount?

Analysis of Issues of Case:

i) The agreement inter se the parties is a bilateral agreement and in a bilateral agreement, participating parties promise each other that they will perform or refrain from performing an act. This type of contract is also known as a two-sides contract.

ii) The agreement to sell as a whole is to be considered and read; without calculation of the already sold units and received amount the actual sale price cannot be determined and the petitioner cannot be directed to deposit the entire agreed sale price as the agreement in question is bilateral in nature, binding the parties to perform their parts step by step. Moreover, the trial Court while passing the order should be sure whether the ordered amount is the balance amount or not.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.74574 of 2019
M/s Premium Developers Versus Muhammad Tariq

JUDGMENT

Petitioner (s): Mr. Shazib Masud & Mirza Nasar Ahmad, Advocates

Respondent (s): Mian Muhammad Hussain Chotiya & Mr. Adnan Naseer Chohan, Advocates

Date of hearing: 01.02.2022

SHAHID BILAL HASSAN-J: Tersely, the respondent was the exclusive owner in possession of a duly approved housing scheme from the TMA, Ferozwala under the name and style of M/s Lahore Garden & New Lahore Phase-I, Housing Scheme, Situated in Mauza Chahar and Rana Bhatti, opposite Government Primary School, Kot Noor Shah, Shahdara, Sharaqpur Road, Tehsil Ferozwala, District Sheikhupura with total land measuring 1100 Kanals approximately inclusive of developed, underdeveloped land alongwith immovable assets of all sort of public utilities with standing construction. Allegedly, the respondent agreed to sell the said property to the petitioner in February, 2018 in presence of the witnesses against a total consideration of Rs.940,000,000/- and in acknowledgment of the said bargain the respondent received Rs.1,000,000/- as earnest money from the petitioner through cheque No.18854127, drawn on Meezan Bank, Zahoor Elahi Road, Lahore and a formal agreement of sale was reduced into writing on 01.03.2018 to the effect that the respondent was already dealing in sale of plots of the suit property in the market, therefore, the above said agreed sale consideration of the suit property would include an approximate amount of

Rs.405,300,000/- as remaining sale consideration of the already sold residential and commercial units of the property by the respondent, subject to its finalization upon providing of sale records of the suit property, was due against their respective purchasers for their respective purchase of different portions of the residential and commercial units and recovery of the same would be the liability and responsibility of the respondent, hence, after its final determination would be excluded from the agreed sale consideration of Rs.940,000,000/-, where-after the said remaining amount would be the actual sale consideration for the purpose of agreement to sell in question; that as per agreed terms, the petitioner was bound to pay 1/4th amount as earnest money being first installment of the sale consideration of the total agreed sale consideration after deduction of actual recovery of respondent due against its already sold residential and commercial units of the suit property upon providing of sale records and that of the actual measurement of the remaining available immovable assets of the suit property; similarly upon finalization of the said calculation, the remaining amount of sale consideration would be paid in twelve months wherein initial six months would be the grace period where-after, monthly installments be made by the petitioner to the respondent but at any cost, the full and final payment of the bargain would be made positively on or before March, 2019; that it was agreed between the parties that whenever any agreed payment of the sale consideration is made by the petitioner/ plaintiff, the respondent at his instance in acknowledgment of receipt of the said part of sale consideration would be liable to execute the transfer deed of the immovable assets of the suit property in favour of the petitioner or any of his assignee or nominee upon providing *Fard Bai* to the extent of received amount at his cost and expense; that in furtherance of their bargain, the respondent also provided his CNIC, copies of

approval letters of the Scheme alongwith NOCs of various authorities, revenue record and that of copies of his agreement for the purchase of 32 acres of undeveloped land as being part of the agreement as proof of his ownership of the suit property and the petitioner got published this fact of purchase of suit property in the daily newspaper for his sole satisfaction. However, allegedly the respondent did not provide the records of his already sold units of the suit property and amount of actual recovery on lame excuses besides providing of *Fard Bai* of the land to the extent of 1/4th earnest money of the bargain. The respondent was approached time and again for the said purpose but all in vain, rather it came to the knowledge of the petitioner that the respondent malafidely negotiated further sale of the suit property with some other person against an enhanced price, so the respondent was contacted with a request to honour his commitment but he refused to accede to the request of the petitioner; therefore, the petitioner instituted suit for possession through specific performance of agreement with mandatory and permanent injunction.

After filing of the suit, the parties arrived at an interim compromise arrangement and filed the same before the Court through application under Order XXIII, Rule 3, Code of Civil Procedure, 1908. Allegedly, the petitioner complied with the terms of the said compromise and paid the initial amount fixed under the said arrangement to the respondent but the respondent failed to comply with clauses 1(d), (e) and (f) of the application despite an order of the Court dated 08.06.2018. Again, the parties entered into a negotiation and on 09.10.2018, the respondent made a statement before the Court that he had received another amount of Rs.90,000,000/- and the respondent also agreed to transfer another area of 30 acres after receipt of the said amount. However, despite passage of more than one year, the respondent failed to do the needful, so the petitioner

moved an application for enforcement of the said order against the respondent. On 16.11.2019, after arguments on the said application, the learned trial Court ordered the petitioner to pay an amount of Rs.619,486,272/- which was agreed between the parties as sale consideration within a period of one month. Being aggrieved of the said order, the petitioner has filed the instant revision petition.

2. Learned counsel for the petitioner has argued that the impugned order is against law and facts of the case; that the agreement to sell is not a simple agreement to sell of immovable property, rather it places mutual obligations on the parties, thus, the ratio of judgment reported as 2017 SCMR 2022 has wrongly been appreciated and applied in the case in hand; that the respondent has not fulfilled his part of agreement and even the arrangements made subsequently between the parties but even then the learned trial Court passed the impugned order; that the respondent has not handed over the documents showing his ownership over the disputed property as agreed by the parties; thus, the impugned order is not sustainable in the eye of law and liable to be set aside by allowing the revision petition in hand.

3. On the contrary, learned counsel for the respondent while supporting the impugned order, has argued that the petitioner has not fulfilled his part of agreement as well as arrangements made in the shape of compromise subsequently; therefore, the learned trial Court has rightly passed the impugned order giving an opportunity to the petitioner to show his bona fide and willingness to purchase the property in dispute.

4. Heard.

5. Terms and conditions No.1 to 8 of the alleged agreement to sell are essential for determination of the fact that the same falls in what type of the agreement/contract, which are reproduced as under:-

> *1. That the total sale consideration for the sale and purchase of the scheme alongwith standing construction and other attached lying articles,*

movables & immovable of all sort, detailed in the annexed schedule-I subject to the actual measurement of the immovable land inclusive of raised construction thereupon, residential & commercial, against agreed rates being detailed in the annexed schedule-I, is agreed at Rs.940,000,000/-.

2. *That the above said agreed sale consideration of the Scheme does include an approximate amount of Rs.405,300,000/- as remaining sale consideration/installments of the already sold residential & commercial units of the Scheme by the Seller (subject to finalization upon providence of sales record of the Scheme) due against their respective purchasers for the purchase of different portions of residential or commercial units of the Scheme, recovery of which will be the sole liability and responsibility of the Seller, therefore, the said amount after final determination will be excluded from the agreed sale consideration of Rs.940,000,000/-. Hence, after its execution, the total payable sale consideration of the bargain will be the actual sale consideration of this agreement of sale.*

3. *That as the above deducted amount is being made from the entire sold Scheme, therefore, upon execution of this agreement of sale, the proprietary rights of the sold units of the Scheme shall be transferred to the Purchaser, who will be responsible to transfer the ownership of the said sold units in favour of their respective buyers after receipt of outstanding dues from them subject to the final planning of development work by the purchaser. The Purchaser shall be liable to transfer/register the units in the names of respective buyers upon the request of Seller. If the respective buyer fails to make payment to Seller and Seller cancels the unit for the respective*

buyer, Seller shall be responsible to pay any amount due to respective buyer, and such cancelled unit shall be added in the land sold to Purchaser for rate per marla agreed in this agreement.

4. *That the target date of the completion of the bargain is agreed upon 12 months from the date of signing of this agreement of sale i.e. March 1st, 2019 with specific agreed mode of payment. Any records of income tax and sales tax upto 01 March 2018 shall be handed over to the Purchaser within three (3) months from the date of payment of 25% as first installment.*

5. *That under the greed terms of the payment of the sale consideration , the purchaser shall pay a sum of 25% of the total agreed sale consideration after deduction of actual recovery of the Seller as being remaining sale amount of his already sold residential & commercial units of the Scheme upon providence of sales record and that of the actual measurement of the remaining available immovable assets of the Scheme as earnest money as being first installment of the sale consideration whereas upon finalization of the above calculation, the remaining amount of sale consideration will be paid in twelve months wherein initial six months will be the grace period whereafter monthly payments be made by the purchaser to the Seller but the final payment of the bargain be made positively on or before 01 March 2019. It is clarified that remaining sale price of 75% shall be paid in six equal installments starting from six months after the date of agreement with last payment till 01 March 2019.*

6. *That it has been agreed between the parties that prior to the receipt of payment of last installment of the remaining sale consideration, the Seller will be responsible to provide at his cost and expense*

not only the fresh Fard Bai(s) of the entire/remaining sold land of the Scheme for the completion of transfer of the proprietary rights of ownership of any of the remaining sold land of the scheme, but will also provide the transfer letters of the movable assets of the articles for the transfer of their ownership in the name of the purchaser at his cost and expense.

7. *That further it has been agreed upon between the parties that whenever any agreed payment of the sale consideration has been made by the purchaser, the Seller at his instance in acknowledge of the receipt of said part of the sale consideration, will be liable to execute the transfer deed of the immovable assets of the scheme to the proportionate of the received amount of part of sale consideration in favour of purchaser or any of his assignee or nominee upon providence of Fard Bai to the extent of the received amount.*

8. *That as per agreed terms of the bargain, at the time of signing of this agreement, the seller acknowledges the receipt of already paid amount of token earnest money of Rs.1,000,000/- through cheque No.3-18854127 dated 10 February 2018, in the presence of witnesses whereas the remaining amount of 1st installment of 25% of the agreed sale consideration will be paid by the Purchaser to the Seller after finalization of actual recovery of the Seller as being remaining sale amount of the already sold residential & commercial units of the Scheme upon providence of sales record alongwith and that of actual measurement of the remaining available immovable assets of the Scheme. The possession of the scheme shall be considered handed over after the payment of 1st installment of 25% of the actual calculated sale price for smooth business operations of the purchaser.'* (*underline for emphasis*)

The above terms and conditions as well as others go to divulge that the agreement inter se the parties is a bilateral agreement and in a bilateral agreement, participating parties promise each other that they will perform or refrain from performing an act. It is clear from the above terms and conditions especially condition No.8 that the remaining amount of 1st installment of 25% of the agreed sale consideration will be paid by the Purchaser to the Seller after finalization of actual recovery of the Seller as being remaining sale amount of the already sold residential & commercial units of the Scheme upon providence of sales record alongwith and that of actual measurement of the remaining available immovable assets of the Scheme; however, there is nothing on record to suggest that the respondent fulfilled his part of the agreement in this regard by providing detail of already sold units, residential and commercial, by providing sale records as well as actual measurement of the remaining available immovable assets of the scheme. This Court while dealing with such a matter in *Ijaz Ahmad Chaudhry v. Learned Civil Judge and others* **(2020 CLC 291-Lahore)**, which has been presented and relied upon by both the sides, has already held:-

> *'6. Here, in this case, the perusal of Property Sale Agreement/Settlement Agreement goes to evince that it is bilateral agreement/contract/ settlement agreement and in a bilateral contract, participating parties promise each other that they will perform or refrain from performing an act. This type of contract is also known as a two-sides contract, as stated above; thus, when the petitioner has already performed his first part of agreement, it is the respondents who have to perform their part as agreed between them and the petitioner and when they refused to perform their part of agreement/settlement agreement, this thing prompted the petitioner to approach the Court so as to force them to perform their part. Thus, in this eventuality, the petitioner cannot be forced to deposit the whole sale consideration, especially when the agreement is bilateral as well as under*

certain terms and conditions and both the parties have to perform their parts step by step. As such, the case law relied upon by the learned trial Court reported as Hamood Mehmood v. Mst. Shabana Ishaque and others ***(2017 SCMR 2022)*** *does not attract and is not applicable to the facts of the case in hand being on different premises.'*

6. In the present case, in agreement to sell in question, it has not been agreed that the entire sale consideration will be paid in lump-sum rather it has been agreed that the respondent will be liable to transfer deed of the immovable assets of the scheme to the proportionate of the received amount of part of sale consideration in favour of purchaser or any of his assignee or nominee upon providence of *Fard Bai* to the extent of the received amount. Meaning thereby it is a commercial type bilateral agreement in between the parties. The agreement to sell as a whole is to be considered and read; however, the learned trial Court has failed to dilate upon the said issue by construing law on the subject in a judicious manner and without appreciating the ratio of judgment reported as *Hamood Mehmood v. Mst. Shabana Ishaque and others* ***(2017 SCMR 2022)*** has passed the impugned order regarding deposit of the remaining sale consideration, because in the said case the vendee/plaintiff despite decree had failed to deposit the balance sale price and even the same is a leave refusing order and cannot be held to be an enunciation of law by the Apex Court of country, having binding effect as per Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, because in number of judgments the Hon'ble Supreme Court has held that an order granting and/or refusing leave is not a judgment which decides a question of law and therefore, it should not be followed necessarily and imperatively as has been held in *Muhammad Asif Awan v. Dawood Khan and others* **(2021 SCMR 1270)**.

7. Pursuant to the above, without calculation of the already sold units and received amount there-against the actual sale price cannot be determined and the petitioner cannot be directed to deposit the entire agreed sale price as the agreement

in question is bilateral in nature, binding the parties to perform their parts step by step. Moreover, the learned trial Court while passing the impugned order dated 16.11.2019 was not sure whether the ordered amount is the balance amount or not as is evident from the last paragraph, which reads:-

> *'Before parting the order, it would be pertinent to mention that the amount herein above has been calculated while making an assessment in the peculiar circumstances and shall be adjustable at the time of final adjudication.'*

8. In view of the above, the impugned order being not sustainable in the eye of law cannot be allowed to hold field; the same is, resultantly, set aside by accepting the revision petition in hand. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Announced in open Court on 11.03.2022.

Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Sheikh Muhammad Tariq v. M/s Premium Developers
Civil Revision No.49091 of 2021
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

A Court is not precluded from getting its order executed when any 'executable order' is passed.

Facts of Case:

Through this revision petition, the petitioner assailed the order of executing court, whereby, the petitioner was directed to get transfer the land in response to amount received.

Issues In Case:

Whether a Court is precluded from getting its order executed when any 'executable order' is passed?

Analysis of Issues of Case:

No doubt, a Court is not precluded from getting its order executed when any 'executable order' is passed while adhering to the provisions of section 36 of the Code of Civil Procedure, 1908, which provides that the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

J U D G M E N T

Petitioner (s): Mian Muhammad Hussain Chotiya & Mr. Adnan Naseer Chohan, Advocates

Respondent (s): Mr. Shazib Masud & Mirza Nasar Ahmad, Advocates

Date of hearing: ***01.02.2022***

SHAHID BILAL HASSAN-J: Tersely, the petitioner was the exclusive owner in possession of a duly approved housing scheme from the TMA, Ferozwala under the name and style of Lahore Garden Housing Scheme, situated at Jaranwala Road, Tehsil Ferozwala, District Sheikhupura who entered into an agreement to sell in respect of his some developed and undeveloped land of the above said scheme with the respondent on 01.03.2018 for a consideration of Rs.94 crore; that according to the terms and conditions of the above said agreement the respondent was bound to pay 1/4th amount of total consideration amount and remaining amount was to be paid in 6 equal installments till performance date i.e. 01.03.2019. However, the respondent instituted a suit for possession through specific performance of agreement to sell. On 27.03.2018, the learned trial Court ordered the respondent to deposit the remaining amount of consideration in the Court but the respondent failed to honour the direction and did not deposit the amount in the Court. On 08.06.2018, the respondent/plaintiff filed an application under Order XXIII, Rule 3, Code of Civil Procedure, 1908 apprising the Court that both the parties had arrived at a compromise out of Court and prayed that the suit may be decided in terms of compromise and on the same day learned counsel for the respondent got recorded his statement before the Court for vacation of stay to the extent of 15 acres 12 marlas land belonging to the petitioner, which was vacated and the respondent paid 5% amount Rs.37,920,330/- of the total sale consideration under clause (b) of the compromise for the purpose mentioned in clause (d) to satisfy the claim of creditors of the petitioner, who had already filed litigation against him

(petitioner) as well as against the sold scheme; thus, allegedly the said amount was not price of 15 acres 12 marlas land. On 09.0.2018, the respondent paid amount to the extent of Rs.90,000,000/- to the petitioner under clause (e) of the compromise which was part payment of 1/4th earnest money as the respondent was bound to pay 1/4th amount of the total sale consideration within 50 days but after making this part payment, the respondent started to linger on the matter and did not reach even at the figure of 1/4th earnest money that is why the compromise could not be finalized and this amount was also not the sale price of 30 acres of land but it was part payment of 1/4th earnest money; moreover, purportedly this 30 acres land was not part of the agreement and was not transferable in the name of the respondent. On 09.10.2018, allegedly the stay order was vacated on the statement of the learned counsel for the respondent because the 30 acres land was not part of the compromise. It has been submitted that the respondent did not comply with the compromise as he did not pay the remaining amount under terms of compromise.

The petitioner instituted a suit for cancellation of documents on 03.05.2019 wherein status quo order was passed on 14.05.2019.

After failure of compromise, the learned trial Court passed detailed order on 16.11.2019 directing the respondent for deposit of the remaining amount of Rs.619,486,272/ out of the Rs.758,406,602/- deducting already paid amount Rs.128,920,330/- after determination of actual sale consideration subject to adjustment at the time of final adjudication of the case. However, the respondent instead of complying with the said order, challenged the same by filing C.R.No.74574 of 2019 before his Court and got suspended operation of the above said order on 09.12.2019 which is still intact and revision petition is pending before this Court. However, the respondent, in the meanwhile, filed an execution petition on the basis of orders dated 08.06.2018 and 09.10.2018 for transferring 30 acres of land and the learned Executing Court vide impugned order dated 26.07.2021 directed the present petitioner to get transferred land measuring 30 acres in

response to the received amount of Rs.9-crores vide pay order No.0208-4533054 dated 20.08.20218, on 09.10.2018. Being aggrieved of the said order, the petitioner has filed the instant revision petition.

2. Heard.

3. Order dated 09.10.2018, execution of which has been sought by the respondent reads:-

> *'Today the case is fixed for submission of written statement on behalf of the defendant. However, at the very outset learned counsel for the defendant has stated at bar that compromise has been effected inter-se the parties to the extent of whole property. However, presently an amount of Rs.9,00,00,000/- has been received by the defendant vid pay order No.0208-4533054 dated 20.08.2018, hence, if the stay order may be vacated to the extent of 30-acres land they shall have no objection. Learned counsel for the plaintiff has frankly conceded the contention on behalf of the defendant. Both the learned counsel for the parties have acknowledged the earlier recorded statement vide order dated 08.06.2018 in furtherance of compromise deed Mark-C. Signatures of learned counsel for the parties as well as signature of defendant are obtained on the margin of order sheet as token of correctness. In furtherance thereof the stay order to the extent of 30-acres land is hereby vacated. As per request to come up for making an efforts for remaining compromise and for submission of written statement on behalf of the defendant for 15.11.2018.'*

Now, the alleged compromise, mutually reached at, between the parties is necessary to be considered, which has been submitted before the learned trial Court in the form of application under Order XXIII, Rule 3 read with section 151 CPC for recording of compromise, which reads:-

> *'a) That at the time of execution of questioned*

agreement of sale, the approximate agreed available land under sale transaction was 1100 Kanals which has now been roughly calculated as 1284 Kanals (subject to final measurement), due to which the agreed sale consideration amount of the sale transaction after deduction of approximate arrears of Rs.405,300,000/- of the already sold units of the scheme (subject to finalization upon providence of actual sales record) has now comes to Rs.75,84,066,02 instead of Rs.54,00,000,00/-.

b) That it has been agreed between the parties that the defendant is ready to handover the possession of the entire sold scheme of their agreement of sale to the plaintiff subject to payment of an amount of 5% of the total sale consideration which as per new roughly calculation of the land of the scheme comes to Rs.3,79,20,330/- , receipt of which the defendant hereby acknowledges in presence of this Hon'ble Court through P.O.No.4213840 dated 05.06.18.

c) That it has further been agreed between the parties that upon receipt of above 5% of the actual sale consideration by the defendant, the defendant besides handing over possession of entire assets of the scheme to the plaintiff, will also transfer his ownership of his already sold units in the scheme to the extent of 15 Acre in favour of the plaintiff.

d) That as the defendant is receiving the above amount of 5% from the plaintiff to satisfy the claims of his creditors who had already filed litigation against him as well as against the sold scheme, therefore, it has been agreed upon that both the parties will jointly make efforts to satisfy all the said claims and pending litigation within 50 days from the date of receipt of above amount of 5% by the defendant out of total sale consideration.

e) That upon satisfaction of all the claims and pending litigation in respect of the sold scheme subject to finalization upon providence of actual sales record of the scheme and that of providence of actual measurement of the land of the scheme within the above agreed period of 50 days, the plaintiff will be liable to pay the agreed ¼ of the actual sale consideration to the defendant who upon receipt of said earnest amount will be liable to get transfer his ownership to the extent of received earnest amount in the sold scheme in favour of the plaintiff whereafter the rest of the agreement

of sale will be proceeded as per its agreed terms till satisfaction of the same.

d) That in case despite lapse of above agreed period 50 days, the parties fail to satisfy the pending claims or that of the said any pending litigation due to any reasons, then in such eventuality the said liability ,with the consent of the defendant, will be satisfied by the plaintiff and any such payment made by him will be adjusted towards the remaining sale consideration of the scheme and thereafter the rest of the agreement to sale will be proceeded as per its agreed terms till satisfaction of the same. Besides the above, any other pending litigation, if any, will now be the liability of the plaintiff who will manage the same of its own at the cost and expense (inclusive of professional fee of lawyer, court fees and other litigation expenses) of the defendant and in case of non-payment of the same by the defendant, any payment if be made there under by the plaintiff for the satisfaction said litigation, will again be adjusted towards the remaining sale consideration of the scheme.

g) That again in case of any dispute in the matter with regard to the above settlement, the same in terms of the original agreed terms of the agreement of sale, be referred to the committee of arbitrators for amicable resolution thereof.'

4. Perusal of the above said order dated 09.10.2018 divulges that the same was passed only for vacation of stay order to the extent of 30-Acres land and not more than this; there is no mention in the said order that the said 30-Acres land will be transferred in the name of the respondent/plaintiff in pursuance of amount of Rs.90,000,000/- in terms of compromise Mark-C and even, upon bare perusal, the compromise Mark-C does not find mentioned the above said fact, rather in clause (e) of the said compromise Mark-C, it has been agreed that upon satisfaction of all the claims and pending litigation in respect of the sold scheme subject to finalization upon providence of actual sales record of the scheme and that of providence of actual measurement of the land of the scheme within the above agreed period of 50 days, the plaintiff will be liable to pay the agreed 1/4 of the actual sale consideration to the defendant who upon receipt of the said earnest amount will

be liable to transfer his ownership to the extent of received earnest amount in the sold scheme in favour of the plaintiff whereafter the rest of the agreement of sale will be proceeded as per its agreed terms till satisfaction of the same. If we calculate the agreed sale price after deduction of Rs.405,300,000/- of the already sold units of the scheme (subject to finalization upon providence of actual sales record) the same comes to Rs.758,406,602/-, so as per term (e) of the compromise Mark-C, the respondent/plaintiff was bound to pay 1/4 of the agreed amount, whereas the respondent/plaintiff has paid Rs.90,000,000/-, which in no way is 1/4 of the agreed amount. Moreover, the orders sought to be executed by filing execution petition before the learned trial Court as per section 36 of the Code of Civil Procedure, 1908, are not executable, because no such order, as stated above, has been passed by the learned trial Court, rather the said orders are only to the extent of vacation of the stay order with regards to certain patches of land.

5. No doubt, a Court is not precluded from getting its order executed when any 'executable order' is passed while adhering to the provisions of section 36 of the Code of Civil Procedure, 1908, which provides that the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders; however, here in this case no such order is in field. Beside others, certain instances of executable orders in terms of section 36 of the Code, 1908 are given below:-

1. Ad-interim order regarding status quo.
2. An order disposing of suit in terms of compromise.
3. Undertaking given by a party in Court of law.
4. Order of Service Tribunal.
5. Order with regards to temporary and mandatory injunction.
6. Order for delivery of joint possession
7. A payment order under section 186, Companies Act.

8. Order passed by a tribunal.
9. Order for restitution of possession ante in some cases.

Moreover, in a judgment reported as *Bakhtawar etc. v. Amin etc.* **(1980 SCMR 89)**, the Apex Court of the country while defining 'order' with reference to section 2(14) of the Code of Civil Procedure, 1908 has invariably held that:-

> *'9. At this place reference may be made to section 2(14) of the C.P.C. which defines an 'order' and states that 'order' means the formal expression of any decision of a civil Court which is not a decree". As a general rule an order by a Court of law is founded on objective consideration and as such is a judicial order which contains discussion of the question in issue and the reasons which prevailed with the Court to pass it.'*

6. However, as stated above, in the orders, sought to be executed by filing an independent execution petition, which otherwise was not necessary, because the Court, if considers that the order passed by it is executable, it can get the same enforced/ executed at his own without formal filing of an execution petition as per provisions enunciated in the Code of Civil Procedure, 1908 in this regard, no such dilation was made and the said orders are not founded on objective consideration, rather the same are nothing but have been passed germane to vacation of stay, as has been referred in start of observations of the instant judgment. Even the order dated 08.06.2018 has also been passed with regards to vacation of stay to the extent of 15-Acres 12-Marlas land.

7. Keeping in view the above discussion, it is observed that the learned Executing Court ought to have firstly decided the question of maintainability of the execution petition and then to have proceeded to pass any further order, which

exercise has been avoided by it. Thus, the learned executing Court has committed material illegality and irregularity as well as has failed to exercise vested jurisdiction as per mandate of law on the subject. As such, the impugned order dated 26.07.2021 cannot be allowed to hold field, which is hereby set aside by allowing the revision petition in hand.

8. Before parting with this judgment, as this Court has held that the orders sought to be executed by filing execution petition are not executable, the execution petition filed by the respondent being not maintainable stands dismissed as well. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Announced in open Court on 11.03.2022.

Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Mst. Badami and others v. Mst. Budhee and others
R.S.A. No.141 of 1987
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) An adverse presumption arises against a witness that had he appeared in the witness box, he would not have supported the stance of the appellants.

ii) The deposition of witness cannot be considered and appreciated who disassociated the proceedings and did not face the cross examination.

iii) A presumption is attached to certified copies of foreign judicial records if certified in prescribed manner.

Facts of Case:
The appellant filed suit for possession which was dismissed and first appeal was also dismissed. The appellant preferred RSA and this court remanded the matter to first appellate court for recording of additional and rebuttal evidence then to decide the matter. The respondent approached the Hon'ble Supreme Court where this court was directed to decide the RSA in light of judgment of Supreme Court. This court set aside judgments of learned courts below. The respondents challenged the judgment & decree of this court before Supreme Court and case was remanded again to this court with observations. This court remitted the matter to learned senior civil judge for purpose of recoding of evidence by keeping appeal pending here. After recording of rebuttal evidence, the learned senior civil judge transmitted the proceedings to this court.

Issues In Case:
i) Whether adverse presumption arises against party for-non production of important witness?

ii) Whether the deposition of witness can be considered and appreciated if he disassociated the proceedings and did not face the cross examination?

iii) Whether a presumption is attached to certified copies of foreign judicial records?

Analysis of Issues of Case:

i) The pedigree tables were got issued from the concerned authorities in India in the year 1985 as the same was in Indian language, so it was got translated by the said Abdul Rehman; meaning thereby the said person namely Abdul Rehman was an important witness so as to substantiate the stance of the appellants but he was not produced in the witness box, for the reasons best known to them, so adverse presumption arises against the appellant in view of Article 129(g) of the Qanun-e-Shahadat, 1984 that had he appeared in the witness box, he would not have supported the stance of the appellants.

ii) The deposition of a witness cannot be considered and appreciated who disassociated the proceedings and did not face the cross examination…

iii) Article 96, Qanun-eShahadat, 1984 deals with presumption as to certified copies of foreign judicial records. It states that the Court may presumed that any document purporting to be a certified copy of any judicial record of any country not forming part of Pakistan is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Federal Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

J U D G M E N T

Date of hearing: ***22.02.2022***

Appellant (s): M/s Chaudhry Iqbal Ahmad Khan, Zeeshan Munawar and Jamil Asif, Advocates

Respondent (s): M/s Muhammad Atif Amin, Chaudhry Rizwan Sarwar and Ayaz Munawar, Advocates

SHAHID BILAL HASSAN-J: Succinctly, on 27.11.1979, the present appellants instituted a suit for possession against the respondents with the assertion that suit land, mentioned in Para No.1 of the plaint, was transferred to one Malooka son of Dalmeer, who died issueless in the year 1969. Inheritance mutation No.469 was attested on 29.06.1971 in favour of his widow namely Mst. Budhi/respondent No.1; the said mutation was stated to be illegal as the appellants and respondents No.2 & 3 were stated to be collaterals of the said Malooka and entitled to the residue after settling the share of the said widow. A pedigree table was drawn in Para No.2 of the plaint. The mutation was stated to have been taken up and decided in the absence and without notice to the said collaterals; hence, a declaratory decree with possession was sought for.

2. The suit was only contested by the respondent No.1 who admitted that Malooka was the last male owner of the suit land and that he died issueless in the year 1969; however, it was pleaded that the respondent No.1 being the widow was the only legal heir and as such was entitled to the entire estate. It was denied that the appellants and other respondents were the collaterals of the said Malooka; moreover, the pedigree table was denied.

The divergence in pleadings of the parties was summed up into issues as follows:-

1. *Whether the present suit is not maintainable in its present form? OPD*
2. *Whether the suit is not competent? OPD*
3. *Whether Civil Court had no jurisdiction to try this suit? OPD*
4. *Whether the suit is not properly valued. If so, its effect? OPD*

5. *Whether plaintiffs are estopped to file the suit? OPD*
6. *Whether Mutation No.469 dated 29.06.1971 sanctioned by AC-II Lahore is void, inoperative, illegal. If so, to what effect? OPD*
7. *Whether suit is within limitation? OPP*
8. *Relief.*

Evidence of the parties was recorded and on conclusion, the learned trial Court vide judgment and decree dated 18.02.1983 dismissed suit of the appellants. The first appeal preferred by the appellants was dismissed on 05.12.1985. It is pertinent to note here that during pendency of the appeal before the first appellate Court, the appellants filed an application seeking permission to produce additional evidence but the same was dismissed for the reasons rendered in the said judgment. The appellants being aggrieved preferred R.S.A. in question and on 06.07.2001 this Court set aside the judgment and decree dated 05.12.1985 *ibid* and ordered to remand the case to the first appellate Court with direction:-

> *'Learned first appellate court shall then proceed to take the document accompanying the application for evidence subject to any objection to be raised by the respondent-party and thereafter provide an opportunity to the respondent party to lead evidence in rebuttal and then to decide the matter taking the entire evidence on record in consideration.'*

3. The respondents being dissatisfied filed C.P.No.2435-L/01 before the Hon'ble Supreme Court of Pakistan, which was converted into an appeal and allowed on 23.11.2001 and R.S.A. was directed to be decided by this Court in the light of the said judgment dated 23.11.2001. On 12.02.2007, this Court again heard the appeal and allowed the same while announcing the judgment on 01.03.2007 whereby set aside the impugned judgments and decrees passed by the learned Courts below, consequent whereof the suit filed by the appellants was decreed as prayed for.

4. The respondents feeling aggrieved of the said judgment and decree agitated the matter before the Apex Court

of the country through Civil Appeal No.1071 of 2007, which was accepted on 27.02.2014 and case was remanded again to this Court with the following observation:-

> *'2. After hearing the learned counsel for the appellants and the respondents we noted that the High Court had examined and given effect to the pedigree-table without the same being formally introduced in evidence through a witness. The learned counsel for the parties agreed to the remand of the case to the High Court so that the said document may be duly exhibited in evidence through a witness, with an opportunity to the appellants to cross examine the witness. The learned counsel for the respondents, however, submitted that since the respondents have been deprived of their share in property for the last 40 years the appeal be decided by the High Court expeditiously.*
>
> *3. Thus the appeal is allowed. The impugned judgment and decree are set aside and Regular Second Appeal No.141 of 1987shall be deemed to be pending; the same be decided by the High Court within a period of three months in the light of above direction.'*

5. After remand, on 09.09.2015, in view of the provisions of Order XLI Rule 28 CPC, the matter was remitted to the learned Senior Civil Judge, Lahore by keeping this appeal pending here for a sole purpose to provide the parties an opportunity to bring on record the said document in accordance with the law through a witness if still it is required and to cross-examine the said witness by the other side. It was further observed that if the party, who had earlier brought on record such document, does not want to enter into such exercise, the statement of some competent person to that effect be recorded. This exercise was ordered to be completed within sixty days from the appearance of the parties before the learned Senior Civil Judge, Lahore, who (the parties) were directed to appear before the said court on 21.09.2015. In pursuance thereof, the

learned Senior Civil Judge, Lahore recorded additional evidence led by the appellants and forwarded the proceedings to this Court on 21.04.2016. On 19.02.2018, learned counsel for the respondents/defendants submitted that his clients have a right to lead rebuttal evidence against the additional evidence, which has already been recorded. Thus, in view of the said submission, this Court ordered:-

> *'In view of the above development, the office will refer the relevant record immediately to the learned Senior Civil Judge (Judicial), Lahore, who will record rebuttal evidence of the respondents/defendants on 14.03.2018 and if on account of any unavoidable circumstance, the evidence could not be completed/recorded, then the case would be adjourned to 21.03.2018 when no further opportunity would be provided to them. It is, however, clarified that if the learned Presiding Officer is found to be on leave on the said dates, in that eventuality, such proceedings will be completed on the very next day of his availability. The parties are directed to appear before the learned Senior Civil Judge (Judicial), Lahore on 14.03.2018, who after completion of proceedings will remit the file to this Court before the next date of hearing. Adjourned to 04.04.2018.'*

After recording evidence in rebuttal i.e. evidence of D.W.6, the learned Senior Civil Judge (Judicial), Lahore transmitted the proceedings, which have been made part of the file.

6. Heard.

7. It is stance of the appellants that inheritance mutation No.469 attested on 29.06.1971 in favour of widow of Malooka namely Mst. Budhi/respondent No.1 is illegal as the appellants and respondents No.2 & 3 are collaterals of the said Malooka and are entitled to the residue after settling the share of the said widow; however at trial stage and before the learned appellate Court they could not substantiate their stance by leading cogent and confidence inspiring evidence because the

pedigree table produced by them was not establishing their relationship to the propositus making them residuary.

However, after remand by the Apex Court, the pedigree tables sought to be produced as additional evidence was brought on record as Ex.P8, Ex.P9 and Ex.P10 through statements of witnesses P.W.1 and P.W.2 in the shape of affidavits (Ex.P7 and Ex.P11) and P.W.2 was cross examined whereas the P.W.1 namely Muhammad Rafique did not appear before the Court concerned for facing the cross examination after recording his examination in chief on 12.03.2016. In rebuttal, the statement of D.W.6 was recorded by the respondents. It has emerged on record, during cross examination on P.W.2, recorded after remand from the Apex Court of the country, that the pedigree tables were got issued from the concerned authorities in India in the year 1985 through brother of Muhammad Rafique namely Abdul Rehman and as the same was in Indian language, so it was got translated by the said Abdul Rehman; meaning thereby the said person namely Abdul Rehman was an important witness so as to substantiate the stance of the appellants but he was not produced in the witness box, for the reasons best known to them, so adverse presumption arises against the appellant in view of Article 129(g) of the Qanun-e-Shahadat, 1984 that had he appeared in the witness box, he would not have supported the stance of the appellants. Even, the appellant did not produce the passport or any other documentary evidence of said Abdul Rehman to show and prove that he travelled from Pakistan to Indian from such and such date in the year 1985 despite the fact that allegedly he travelled twice to India: firstly for obtaining pedigree tables and secondly for getting the same translated. Moreover, P.W.2 namely Fazal Din is not party to the lis rather one Fajroo has been arrayed and no exertion has been made by the said Fazal Din that if his alias was Fajroo, he should have got the same corrected/incorporated in the plaint as such.

The deposition of P.W.1 cannot be considered and appreciated because he disassociated the proceedings and did not face the cross examination. Furthermore, the pedigree tables adduced by the appellants are different from one another,

because pedigree table in plaint shows Malooka as single son of Dalmeer, the pedigree table attached with the suit discloses Jasmal as brother of Malooka besides Budhi as widow and the pedigree table allegedly obtained from India through Abdul Rehman, brother of Muhammad Rafique, shows four sons of Dalmeer namely Malooka, Jasmal, Mazari and Ameer; thus, the same cannot be relied upon, because it casts aspersions about their authenticity especially when Abdul Rehman, who purportedly went to India for obtaining pedigree table and its translation was not produced in the witness box and even P.W.1 appeared before the trial Court deposed that he has no knowledge of facts and circumstances of this case and statement of P.W.2 before the learned trial Court also remained the same.

8. In addition to the above, Article 96, Qanun-e-Shahadat, 1984 deals with presumption as to certified copies of foreign judicial records, which reads:-

> *'**Presumption as to certified copies of foreign judicial record.**-(1) The Court may presumed that any document purporting to be a certified copy of any judicial record of any country not forming part of Pakistan is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Federal Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.*
>
> *(2) An officer who, with respect to any territory or place not forming part of Pakistan, is a Political Agent therefore, as defined in section 3, Clause (40, of the General Clauses Act, 1897 (X of 1897), shall for the purposes of clause (1), be deemed to be a representative of the Federal Government in or for the country comprising that territory or place.'*

However, in the present case, the documents Ex.P8 and Ex.P9 are not of judicial record and even the same do not bear any certificate as required under Article 89(5) of the Qanun-e-

Shahadat, 1984, which provides:-

'(5) public document of any other class in a foreign country, -- by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.'

In this view of the matter, the documents brought on record as Ex.P8 and Ex.P9 cannot be said to have been duly obtained in accordance with law and cannot be relied upon for decision of a matter with regards to inheritance. In judgment reported as *Haji Sultan Ahmad through Leal Heirs v. Naeem Raza and 6 others* **(1996 SCMR 1729)**, the Apex Court of the country held:-

'5. From the above discussed legal position, it is quite obvious that the concurrent finding recorded by the Courts below cannot be interfered with by the High Court while exercising jurisdiction under section 100, C.P.C. how so erroneous that finding may be, unless such finding has been arrived at by the Courts below either by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence.'

Moreover, in judgment reported as *Ahmad and others v. Allah Diwaya and others* **(1998 SCMR 386)**, it has categorically been held that:-

'2. In support of the above petition Mr. Shaukat Ali Mehr, learned Advocate Supreme Court for the petitioners, has contended that the Court below have relied upon pedigree-table, Exh.P10 and Exh.D4, without examining any witness in support thereof to explain the same. To reinforce the above

submission he has relied upon the case of Muhammad Hussain and others v. Muhammad Khan (1989 SCMR 1026) and the case of Muhammad Naeem and others v. Ghulam Muhammad and others ***(19945 SCMR 559)****, in which been held that the contents of a pedigree-table are to be proved and mere exhibition of the same as a document is not sufficient.'*

Further reliance in this regard is placed on *Mst. Mangti v. Mst. Noori and others* **(1995 CLC 210-Lahore)**.

9. Pursuant to the above, when the appellants have failed to establish their relationship with Malooka, it has rightly been concluded by the learned Courts below that they have no locus standi. The question of making up deficiency of court fee, while construing law on the subject, has also rightly been adjudicated upon.

10. The crux of the discussion above is that the appeal in hand, being meritless, fails and the same is hereby dismissed with no order as to the costs.

(***Shahid Bilal Hassan***)
Judge

Announced in open Court on 21.03.2022.

Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Mst. Sahib Khatoon alias Saban v. Muhammad Ramzan (deceased) through L.Rs.
Civil Revision No.1167 of 2013
Mr. Justice Shahid Bilal Hassan
https://sys.lhc.gov.pk/appjudgments/2022LHC2726.pdf

Crux of Judgement:

i) The principle of acquiescence is attracted when a party allows another party to remain in possession of the suit property.

ii) When a party fails to implead revenue officials as party then alleged connivance of revenue officials cannot be proved.

Facts of Case:

The suit of the petitioner was decreed by the trial court and the said decree was set aside by the appellate court while framing additional issues, the case was remanded to the learned trial Court for decision afresh after recording evidence of the parties on additional issues and giving independent findings on reframed issues. After remand, the petitioner did not produce additional evidence whereas the respondent(s) produced additional oral as well as documentary evidence. The learned trial Court again decreed the suit and the learned appellate Court while accepting the appeal, set aside the judgment and decree of the trial court which resulted in filing of the instant revision petition.

Issues In Case:

i) When the principle of acquiescence is attracted?

ii)What are legal consequences when a party fails to implead revenue officials as party?

Analysis of Issues of Case:

i) When a party allows another party to remain in possession of the suit property thereby allowing him to deal with it as exclusive owner and to develop it at his own expense over a period of time while having the knowledge then the principle of acquiescence is attracted.

ii) It is necessary for a party to implead revenue officials as party in the suit if it has been alleged that fraud has been committed with their connivance. In case, a party fails to implead and bring evidence with regards to alleged connivance of revenue officials, it fails to prove its case.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.1167 of 2013
Mst. Sahib Khatoon alias Saban
Versus
Muhammad Ramzan (deceased) through L.Rs.

J U D G M E N T

Date of hearing: ***29.03.2022***

Petitioner (s): Rana Muhammad Hayat, Advocate

Respondent (s): Nemo

SHAHID BILAL HASSAN-J**:** Perusal of order sheet reflects that in the instant revision petition pre-admission notice was ordered to be issued to the respondents on 02.05.2013. The respondents were represented by Mr. Muhammad Ishfaq Mughal, Advocate who submitted his power of attorney under Diary No.1018 dated 30.05.2013; however, despite fixation of case on 13.02.2015, 11.04.2017, 14.06.2021, 30.06.2021, 09.11.2021 and 19.01.2022 as well as today, none has entered appearance on behalf of the respondents, which shows their lack of interest in pursuing their case; thus, the instant revision petition is going to be decided after hearing learned counsel for the petitioner and going through the record.

2. Brief facts, giving rise to the instant revision petition, are as such that the petitioner instituted a suit for

declaration and permanent injunction challenging the vires of registered sale deed No.300-1 dated 03.04.1986 germane to land measuring 36-Kanals 9-Marlas situated at Mauza Chanda, Tehsil Shaiwal District Sargodha, by maintaining that the said sale deed was executed on the basis of fraud and the same is fictitious, having no effect upon the rights of the petitioner. It was further asserted that respondent(s)/defendant(s) Muhammad Ramzan (deceased) in connivance with the officials of Sub-Registrar got executed and registered the said document; that in fact the respondent(s)/defendant(s) was tenant and was paying share of produce; that when the defendant(s) started selling the trees, the petitioner tried to stop him and in response he disclosed the factum of alleged registered sale deed and mutation by stating that the petitioner has no concern whatsoever with the suit property; hence, the suit.

The suit was contested by the respondent(s)/defendant(s) while submitting written statement and raised factual as well as legal objections.

Out of divergent pleadings of the parties, the learned trial Court framed as many as (9) issues including “Relief”. Both the parties adduced their evidence in pro and contra. The learned trial Court vide judgment and decree dated 12.01.2007 decreed the suit. An appeal was preferred which was accepted vide judgment dated 04.09.2008, the said decree was set aside and while framing additional issues, the case was remanded to the learned trial Court for decision afresh after recording evidence

of the parties on additional issues and giving independent findings on issues No.3 to 8. After remand, the petitioner/ plaintiff did not produce additional evidence whereas the respondent(s)/defendant(s) produced D.W.3, D.W.4 and D.W.5 as well as submitted documentary evidence Ex.D2 to Ex.D10 and Mark-A. The learned trial Court, on conclusion, after hearing arguments decreed the suit in favour of the petitioner vide judgment and decree dated 27.09.2011. The respondent(s)/ defendant(s) being aggrieved preferred an appeal and the learned appellate Court vide impugned judgment and decree dated 02.02.2013 accepted the appeal, set aside the above said judgment and decree and consequently dismissed suit of the petitioner/plaintiff, which has resulted in filing of the instant revision petition.

3. Heard.

4. It is an admitted fact that the suit for cancellation in the form of declaration of the disputed registered sale deed was instituted on 07.07.2001, which is after a lapse of almost 21 years; therefore, the same is not within the prescribed period of limitation of three years as required by Article 91 of the Limitation Act, 1908 or even 6 years as prescribed under Article 120 of the Act *ibid*. No explanation whatsoever has been provided by the petitioner for the delay in filing the suit before the trial court despite not being in possession of the suit property. Furthermore, the petitioner despite being not in possession of the disputed property has failed to claim relief of

possession in her plaint, which is fatal for her cause as has been held in judgment reported as *Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others* **(PLD 2014 Supreme Court 167)** by Apex Court of the country that:-

> *"It appears that in a suit which involves some element of inheritance the Courts are generally quick to declare that the law of limitation would not be attracted. It is not in all cases of inheritance that the question of limitation becomes irrelevant. Even in Ghulam Ali"s case the Court recognized that there could be exceptional circumstances wherein even in a suit based on inheritance the issue of limitation may become relevant. This Court recently in some cases had invoked the principle of time limitation and acquiescence of the plaintiff in suits of inheritance. In "Mst. Phaphan through L.Rs. v. Muhammad Bakhsh and others" **(2005 SCMR 1278)** a suit for declaration and possession was filed in 1983 by the plaintiff/petitioner claiming to be the owner of inherited property. The suit was held to be barred by time wherein mutations of the year 1959 and 1967 were challenged in the year 1983 when the plea of the defendants was that the plaintiffs had alienated the property of her own free-will. The plaintiff"s plea of being Pardanasheen lady and reliance on the case of Ghulam Ali was not accepted as the plaintiff was found to have remained in deep slumber for 24 years despite the fact that the physical possession of the land was passed on to the defendant. Recently in the case of "Lal Khan through Legal Heirs v. Muhammad Yousaf through Legal Heirs" **(PLD 2011 SC 657)** this Court had set aside concurrent findings of*

three Courts and dismissed the suit filed on 13-5-1970, where the plaintiff had challenged inheritance mutation of 13-2-1947; the Court held it to be barred by time".

Even earlier, in judgment reported as *Atta Muhammad v. Maula Bakhsh and others* **(2007 SCMR 1446)** it has invariably been held:-

"The law of limitation provides an element of certainty in the conduct of human affairs. Statutes of limitation and prescription are, thus, statutes of peace and repose. In order to avoid difficulty and errors that necessarily result from lapse of time, the presumption of coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so, within that period; otherwise his rights if any, will be forfeited as a penalty for his neglect. In other words the law of limitation is a law which is designed to impose quietus on legal dissensions and conflicts. It requires that persons must come to Court and take recourse to legal remedies with due diligence. There have been cases where even in a claim for inheritance law of limitation was applied."

The act of the petitioner of allowing the respondent(s) to remain in possession of the suit property attracts the principle of acquiescence on her part in the respondent(s) title to the suit property thereby allowing him to deal with it as exclusive owner and for developing it at his own expense over a period of time while within the knowledge of the plaintiff, because she

could not bring on record anything showing that the share of produce used to be paid to her by the respondent(s).

5. Another aspect in this case is that petitioner in her plaint stated that the disputed registered sale deed was got attested by the respondent(s) in his favour in connivance with revenue officials, however, no revenue officials were impleaded or arrayed as defendants by the petitioner in the suit. In a case reported as *Sikandar Hayat and another v. Sughran Bibi and 6 others* **(2020 SCMR 214)** it has been held by the Apex Court of the country that:-

> *"We are clear in our mind that when it is pleaded in a suit that with the connivance of the revenue officials any mutation was got attested and the same is challenged through a civil suit, the Province of the Punjab as well as revenue officials against whom such connivance for attestation of the mutation is alleged, are a necessary party in such suit. The reason is that when anyone alleges connivance of the said officials of Revenue Department with the Defendants of the Suit for getting a mutation attested, without participation of the said party, no valid adjudication can be carried out against the said party and no finding can be recorded against them in their absence."*

The principle of regularity available under Article 129(e) of the Qanun-e-Shahadat Order, 1984 is attached to the registered sale deed in question as the same was executed and attested by officials in performance of their regular duty. Though, the same is rebuttable but the plaintiff has absolutely failed to rebut the

presumption attached to it. In the case in hand the petitioner has not only failed to implead revenue officials as party to the suit but has also failed to bring evidence with regards to alleged connivance of revenue officials in respect of registered sale deed. Therefore, there was nothing before the Court in the shape of evidence or documents to overlook the act of not impleading the revenue officials.

In addition to the above, the petitioner has not denied her thumb impression on the disputed sale deed and even did not move any application seeking comparison of the same with the admitted one. She has only relied upon her solitary statement and no independent witness has been produced in this regard. Moreover, mere assertion of fraud and misrepresentation is not sufficient but the same has to be proved by the person who asserts as such. Order VI, Rule 4 of the Code of Civil Procedure, 1908 postulates that,

> *„in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items necessary) shall be stated in the pleadings."*

But in the present case, the petitioner could not substantiate the stance taken up by her and could not chain the links of alleged fraud played against her. As against this, the respondent(s) by producing the marginal witnesses and identifier as D.W.2 to

D.W.5 has successfully fulfilled the requirement of Article 17 and 79 of the Qanun-e-Shahadat, 1984.

6. Apart from the above, it has also been admitted by the petitioner that she earlier instituted a suit on the same subject matter, which was dismissed for non-prosecution, copy of which was produced by the respondent(s) as Ex.D2; thus, in such scenario, the present suit was barred under Order II, Rule 2 and Order IX, Rule 9(1), Code of Civil Procedure, 1908, which enunciates:-

> *"**9. Decree against plaintiff by default bars fresh suit**.—(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."*

7. In view of the above, it can safely be held that the trial court has blatantly failed to adjudicate upon the matter in hand in consonance with law on the subject. On the other hand the approach of the learned appellate court is upto the dexterity and as per law of the land and ratio of the judgments rendered by the Apex Court as well as High Courts.

8. Pursuant to the above, the findings recorded by the learned appellate court are based on proper appreciation of

evidence as well as law on the subject and do not call for any interference. No illegality and irregularity has been found to have been committed by the learned appellate Court warranting interference by this Court in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908. Even otherwise, it is a settled principle, by now, that in case of inconsistency between the findings of the learned Trial Court and the learned Appellate Court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held in judgments reported as *Amjad Ikram v. Mst. Asiya Kausar and 2 others* **(2015 SCMR 1)**, *Madan Gopal and 4 others v. Maran Bepari and 3 others* **(PLD 1969 SC 617)** and *Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others* **(2013 SCMR 1300)**.

9. Compendium of the discussion above is that the revision petition in hand comes to naught and hence, the same is hereby dismissed with no order as to the costs.

(Shahid Bilal Hassan)
Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Nazar Abbas. v. Addl. District Judge, etc.
W.P. No. 21779 of 2017
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) In case of similar issues in different suits, the said suits will be consolidated and will be decided conjointly on the basis of consolidated trial.

ii) After availing the right to produce affirmative as well as rebuttal evidence in both the suits, a party cannot reopen the case in the garb that rebuttal evidence in the connected was not recorded.

Facts of Case:
Through the instant constitutional petition, the petitioner assailed the order passed by the learned Revisional Court, whereby, it declared that the right of rebuttal evidence of respondent No.2 in connected suit is still open.

Issues In Case:
i) Whether in case of similar issues in different suits, the said suits will be consolidated and will be decided conjointly on the basis of consolidated trial?

ii) Whether after availing the right to produce affirmative as well as rebuttal evidence in both the suits, a party can reopen the case in the garb that rebuttal evidence in the connected was not recorded?

Analysis of Issues of Case:
i) Rule 6-A, Order II has been inserted in Code of Civil Procedure, 1908, which relates to the consolidation of suits. Bare perusal of the above provision of law enunciates that in case of similar issues in different suits, the said suits will be consolidated and will be decided conjointly on the basis of consolidated trial.

ii) After availing the right to produce affirmative as well as rebuttal evidence in both the suits, a party cannot reopen the

case in the garb that rebuttal evidence in the connected was not recorded.

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.21779 of 2017.

Nazar Abbas. …Vs… Addl. District Judge, etc.

JUDGMENT

Date of Hearing: **03.03.2022.**

For Petitioner: **Rana Muhammad Naeem Khan, Advocate.**

For Respondent(s): **Mr. Shahid Mehmood Khan Khilji, Advocate for respondent No.2.**

SHAHID BILAL HASSAN-J; Tersely, the petitioner instituted a suit for declaration challenging the vires of mutation No.3234 dated 09.09.2010 against the respondent No.2; whereas the respondent No.2 instituted a suit for specific performance of agreement with regard to land measuring 13 Marlas in disputed Khata No.2874. Both the rival parties contested each other's suit. On application of the respondent No.2, both the suits were consolidated vide order dated 27.04.2015 and consolidated issues were framed. Both the parties adduced their evidence in support of their respective contentions and closed their evidence, whereas the respondent No.2 also closed her evidence in rebuttal. Later on, on 20.10.2016, the respondent No.2 produced three witnesses but an objection on behalf of petitioner side was raised, so the learned Trial Court vide order dated 10.01.2017 refused to record evidence of the proposed witnesses produced by the respondent No.2, who feeling aggrieved of the said order, filed revision petition and the learned Revisional Court vide impugned order dated 30.03.2017 accepted the revision petition, set aside the order dated 10.01.2017 and declared that the right of rebuttal evidence of Ghulam Fatima respondent No.2 in second suit is still open. Hence, the instant constitutional petition, calling into question the legality of impugned order dated

30.03.2017, passed by the learned Revisional Court, has been filed by the petitioner.

2. Heard.

3. Considering the arguments and going through the record, it is observed that on 27.04.2015 while deciding application for consolidation of both the suits ibid, the learned Trial Court in a categorical way ordered that:

> *"In this state of affairs, the controversy between the parties regarding subject matter is the same and the parties are also same, therefore, to avoid from conflicting judgment and for convenience of the parties, the instant application is accepted and the above said suit is hereby consolidated with the instant suit the proceedings will be conducted in the instant suit."*

It is worth mentioning here that Rule 6-A, Order II has been inserted in Code of Civil Procedure, 1908, which relates to the consolidation of suits and the same provides:

> *"**6-A. Consolidation of suits.-** Where two or more suits or proceedings of the same nature requiring determination of similar issues between the same parties are pending in relation to the same subject matter, the Court may if considers it expedient for avoiding multiplicity of litigation or conflict in judgments, direct the consolidation of such suits or proceedings as one trial, whereupon all such suits or proceedings shall be decided on the basis of the consolidated trial"*

Bare perusal of the above provision of law enunciates that in case of similar issues in different suits, the said suits will be consolidated and will be decided conjointly on the basis of consolidated trial. In the present case after considering facts of both these suits instituted by the rival parties i.e. respondent No.2 and the present petitioner, the learned Trial Court consolidated the suits and the respondent No.2 was treated as plaintiff, whereas the present petitioner was designated as defendant. Respondent No.2 produced her affirmative evidence in support of her contentions and after evidence of the present petitioner, the respondent No.2 on 13.07.2015 after

submitting cancellation report with regard to F.I.R. No.36 of 2014 as Ex.P-4 closed her evidence in rebuttal, meaning thereby, the respondent No.2 availed of her right to produce affirmative as well as rebuttal evidence in both the suits and she cannot reopen the case in the garb that rebuttal evidence in the connected suit instituted by the present petitioner was not recorded. In case of *JHANDA through Legal Heir v. MUHAMMAD YOUNAS* reported as **(PLD 1994 Lahore 100)**, it was held by this Court that:

> "*Plaintiff has unreservedly closed his affirmative evidence and hence, he could not have been permitted to record the statement in affirmative after the close of defense evidence to that extent his testimony carried little weight*."

However, in the present case as observed above, the respondent No.2 has produced her affirmative as well as rebuttal evidence, therefore, the learned Revisional Court while travelling beyond vested jurisdiction has wrongly adjudicated upon the matter in hand. The impugned order suffers from legal infirmity, thus the same cannot be allowed to hold field further.

4. The epitome of the discussion above is that the constitutional petition in hand succeeds and the same is **allowed**, consequence whereof the impugned order dated 30.03.2017 passed by the learned Addl. District Judge concerned is set aside and order dated 10.01.2017 passed by the learned Trial Court stands restored. No order as to the costs.

(Shahid Bilal Hassan)
Judge

*M. Usman**

Approved for reporting.

JUDGE

Lahore High Court
Mst. Nighat Waheed and others v. Mr. Arif Latif.
R.S.A. No. 33740 of 2019
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) The basic ingredients for a valid gift are: offer, acceptance, and delivery of possession. These ingredients are necessary to be pleaded in the plaint and duly proved.

ii) The beneficiary is under obligation to prove with unimpeachable evidence that at what time, date, and place transaction of a gift occurred.

Facts of Case:
Through this instant regular second appeal, the appellants have challenged the judgment and decree whereby the appellate court dismissed the appeal consequently the suit instituted by the respondent/ plaintiff for declaration and possession stood decreed.

Issues In Case:
i) What are the basic ingredients for a valid gift and whether these ingredients are necessary to be pleaded in plaint?

ii) Whether the beneficiary is under obligation to prove the valid execution of the gift when a transaction has been challenged?

Analysis of Issues of Case:
i) The basic ingredients for a valid gift are: offer, acceptance, and delivery of possession. It is mandatory to make the description in plaint regarding the making of offer and acceptance of the same as well as names of witnesses, in whose presence such transaction took place. These ingredients are necessary to be pleaded in the plaint and duly proved but if the same are not pleaded in the plaint then these cannot be proved in evidence as a party cannot lead any evidence beyond its pleadings.

ii) When the validity and correctness of a gift transaction

are challenged, it becomes mandatory and essential for the beneficiary to prove the valid execution of the gift. He has to prove with unimpeachable evidence that at what time, date, and place transaction of a gift occurred.

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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

R.S.A. No.33740 of 2019
Mst. Nighat Waheed and others **Versus** Mr. Arif Latif

J U D G M E N T

Date of hearing: ***04.02.2022***

Appellant(s) by: M/s Khalid Ishaque, Usman Nassir Awan, Rahil Riaz, Wajahat Ali, Danyal Akbar, Nouman Ihsan and Faizan Ahmad, Advocates

Respondent(s) by: M/s Aurangzeb Daha and Muhammad Ashfaq Jutt, Advocates

SHAHID BILAL HASSAN-J**:** Brief facts, giving rise to the instant regular second appeal are as such that the respondent instituted a suit for declaration and possession against the present appellants as well as against his father Mr.

C.M. Latif (defendant No.1) by maintaining that Mr. C.M. Latif was owner of bungalow No.SE-35-R-6, measuring 23-Kanals 14-Marlas and 45 Sq.Ft. known as 2-Kashmir Road, Lahore; that out of the said property the defendant No.1 transferred to the respondent/plaintiff a plot measuring 8-Kanlas and 12-Sq.ft. bearing Khasra No.1023(min) through a transaction of oral gift dated 15.07.1963; that subsequently the said oral gift was confirmed through deed of acknowledgment dated 10.03.1966. He prayed for passing a

declaratory decree in his favour in this regard. The suit was contested by the present appellants/ defendants while submitting written statement whereby defendant No.1 categorically denied the alleged fact of gift of the suit property in favour of the respondent/plaintiff. However, defendant No.1 died on 10.03.2004 during the pendency of the suit before the stage of recording of evidence.

After framing of necessary issues out of the divergent pleadings of the parties, the learned trial Court recorded evidence of the parties and vide impugned judgment and decree dated 18.09.2012 decreed the suit in favour of the respondent/ plaintiff. The present appellants being dissatisfied with the same preferred an appeal, whereas the respondent filed cross objections against the judgment passed by the learned trial Court to the extent of findings under issue No.5-I. The learned appellate Court vide impugned consolidated judgment and decree dated 14.05.2019 dismissed the appeal preferred by the present appellants and accepted the cross objections filed by the respondent. Hence, the instant regular second appeal.

2. Heard.

3. The basic ingredients for a valid gift are: offer, acceptance and delivery of possession. See *Bilal Hussain Shah and another v. Dilawar Shah* **(PLD 2018 Supreme Court 698)** and *Khalid Hussain and others v. Nazir Ahmad and others* **(2021 SCMR 1986)**. In the present case paragraph No.2 of the plaint deals with the alleged gift made by the defendant No.1 in favour of the respondent/plaintiff, which reads:-

> *'2. That the defendant No.1 out of the said property gifted away to the plaintiff a plot*

> *measuring 8 kanals 12 sq. ft. bearing Khasra No.1023(min) vide an oral gift dated 15-7-1963. The possession of the same was also delivered to the plaintiff there and then after the gifting of the same to the plaintiff. The property thus gifted to the plaintiff may herein be called as the property in dispute.'*

Bare reading of the above paragraph divulges that no description of making of offer and acceptance of the same by the respondent/plaintiff as well as names of witnesses, in whose presence such transaction took place are missing, which are necessary to be pleaded and proved, because a party cannot lead any evidence beyond its pleadings. Reliance is placed on judgments reported *Zulfiqar and others v. Shahdat Khan* **(PLD 2007 SC 582)**, *Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others* **(2014 SCMR 914)**, *Combined Investment (Pvt.) Limited v. Wali Bhai and others* **(PLD 2016 SC 730)** and *Saddaruddin (since deceased) through LRs. V. Sultan Khan (since deceased) through LRs and others* **(2021 SCMR 642)**, wherein it has been held that:-

> *'…….. the parties are required to lead evidence in consonance with their pleadings and that no evidence can be laid or looked into in support of a plea which has not been taken in the pleadings. A party, therefore, is required to plead facts necessary to seek relief claimed and to prove it through evidence of an unimpeachable character.'*

Therefore, the names of witnesses deposed during evidence would be considered beyond pleadings; even otherwise, the said witnesses namely Ishaque and Molvi Umar Din have not been produced in the witness box and it has been deposed that both

of them have expired but no proof in the shape of their death certificates has been brought on record by the respondent. Even if they had appeared in the witness box, non-pleading of their names in the plaint would have come in their way and would have caused impediment in recording their depositions as P.Ws.

4. So far as the execution of Ex.P1 i.e. acknowledgment deed is concerned, the witnesses of the same were also Ishaque and Molvi Umar Din, so when they have not been produced in the witness box alongwith the revenue officer, who allegedly recorded statement of defendant No.1/C.M. Latif, a serious dent with regards to authenticity of the document Ex.P1 has been caused, because when a person pleads a specific plea, he would have to prove the same by producing cogent, plausible and confidence inspiring evidence, which is lacking in the present case. Furthermore, submission of contesting written statement on behalf of the deceased defendant No.1/C.M.Latif alongwith the present appellants negating the making of alleged oral gift as well as execution of acknowledgment deed Ex.P1 put a heavy burden upon the respondent to prove the same by producing strong and unimpeachable evidence but he miserably failed to do so as has been observed above. In addition to this, the alleged oral gift was with regards to 8-Kanals 12-Sq.Ft. of the land but the Ex.P1 finds mentioned only 8-Kanals. Moreover, the possession of the disputed property was also not with the respondent. When the requirements of Article 17 and 79 of the Qanun-e-Shahadat Order, 1984 have not been fulfilled with regards to the document Ex.P1 and prior to this germane to

transaction of oral gift, it cannot be said that the respondent has successfully proved his case.

5. It is observed that when the validity and correctness of a gift transaction is challenged, it becomes mandatory and essential for the beneficiary to prove the valid execution of the same, but when the evidence produced by the parties is gone through, it appears that the respondent has failed to prove the making of valid oral gift and subsequent acknowledgment deed Ex.P1, rather it has surfaced that fraud has been committed, as the respondent has failed to bring on record any reliable evidence. Even, evidence led to show and prove how, when and where offer was made and the same was accepted, where-after possession was delivered, was not trustworthy and confidence inspiring and even the respondent could not mention the names of witnesses in the plaint, as has been highlighted above, which was essential and necessary to be pleaded and proved; reliance is placed on *Mst. Kulsoom Bibi and another v. Muhammad Arif and others* **(2005 SCMR 135)**, *Peer Bakhsh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417)**, *Mst. Mughlani Bibi and others v. Muhammad Mansha and others* **(2012 CLC 1651-Lahore)** and *Allah Wassaya v. Mst. Halima Mai and 12 others* **2016 MLD 1535-Lahore (Multan Bench)**.

6. The matter in hand pertains to inheritable property because admittedly the property in question was owned by C.M. Latif, father of the parties and the respondent was under heavy burden to prove valid execution of oral gift and subsequent acknowledgement deed (Ex.P1) because he cannot

take benefits from the shortcomings in the evidence of appellants rather he has to stand on his own legs. In a judgment reported as *Mushtaq Ul Aarifin and others v. Mumtaz Muhammad and others* **(2022 SCMR 55)**, the Apex Court of the country has invariably held that:-

> *'As far as the contention of learned counsel for the respondents-plaintiffs that the appellants-defendants have not succeeded in proving their claim is concerned, it is a well settled principle of law that the plaintiffs cannot get benefit from the weaknesses of the defendants alone, rather they have to prove their case on their own strength. The initial burden of proof was upon the respondents-plaintiffs which they did not discharge, but the learned High Court has burdened the appellants-defendants for proving their stance which is not a correct approach.'*

Moreover, in judgment reported as *Mst. Parveen (deceased) through LRs. V. Muhammad Pervaiz and others* **(2022 SCMR 64)**, the Hon'ble Supreme Court of Pakistan has invariably held that:

> *'---------- On the death of a Muslim his/her property devolves upon his/her legal heirs. However, if any heir seeks to exclude the other legal heirs, as in the instant case by relying on a purported gift the beneficiary of such gift must prove it.'*

The same view was also affirmed in *Mst. Hayat Bibi and others v. Alamzeb and others* **(2022 SCMR 13)**.

7. Pursuant to the discussion above it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the

Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to set aside concurrent findings as has been held in *Sultan Muhammad and another v. Muhammad Qasim and others* **(2010 SCMR 1630)** and *Ghulam Muhammad and 3 others v. Ghulam Ali* **(2004 SCMR 1001)**.

8. The crux of the discussion is that the appeal in hand is allowed, impugned judgments and decrees are set aside, consequent whereof the suit instituted by the respondent/ plaintiff for declaration and possession stands dismissed. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Announced in open Court on 21.04.2022.

Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Ghafoori Bibi v. Bashir Ahmed (deceased) through L.Rs. and others
Civil Revision No.3559 of 2012
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) When sanctity of a gift is challenged or called into question, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction.

ii) The efflux of time does not extinguish the right of inheritance.

iii) Limitation does not run against a void transaction.

Facts of Case: Through this revision petition, the petitioner has challenged the vires, legality and sanctity of the impugned judgments and decrees passed by the learned Courts below.

Issues In Case:
i) When sanctity of a gift is challenged or called into question, whether the beneficiary has only to prove the valid execution of gift deed or mutation?

ii) Whether efflux of time extinguishes the right of inheritance?

iii) Whether limitation runs against a void transaction?

Analysis of Issues of Case:
i) When sanctity of a gift is challenged or called into question, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction.

ii) The efflux of time does not extinguish the right of inheritance.

iii) Limitation does not run against a void transaction.

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.3559 of 2012

Ghafoori Bibi

VERSUS

Bashir Ahmed (deceased) through L.Rs. and others

JUDGMENT

Date of Hearing: 12.05.2022

Petitioner(s): Malik Yousaf Farooq, Advocate

Respondent(s): M/s Muhammad Naveed and Muhammad Shahid Rafique Mayo, Advocates for respondents No.2 & 3

Mr. Muhammad Siddique Chaudhry, Advocate for respondents No. 5 & 7

SHAHID BILAL HASSAN-J: Succinctly, the petitioner, Mst. Ghafoori Bibi, instituted a suit for declaration to the effect that she was daughter of one Bhoop Khan, who was owner in possession of land measuring 135-Kanals 15-Marlas falling in Khata No.127 Khatuni No.369 Khasra Nos.310, 332, 333, 334, 335, 390, 391, 392, 394, 295, 401, 411, 418, 419, 423, 424, 911, 933 and 404, situated at Mauza Babliana Autar, Tehsil & District Kasur; that father of the petitioner Bhoop Khan died on 20.07.1986 by will of God and respondents No.1 to 3 purportedly by mala fide acts transferred the disputed property in their names through registered gift deed No.369 dated 03.08.1986, which is liable to cancelled.

The suit was contested by the respondents while submitting written statement wherein they controverted the averments of the plaint and raised different legal as well as factual objections.

The divergence in pleadings of the parties was summed up into following issues by the learned trial Court:-

1. *Whether the plaintiffs have filed the previous suit regarding the same lis pending before this Court, if so, its effect on the maintainability of the present suit? OPP*
2. *Whether the present suit is time barred? OPD*
3. *Whether the suit is not maintainable in the present form? OPD*
4. *Whether the plaintiffs have no cause of action to file the present suit? OPD*
5. *Whether the defendants are entitled for the special costs? OPD*
6. *Whether the proper court fee has been affixed in the plaint, if so, what will be proper court fee in this case? OPP*
7. *Whether the registered Hiba Nama dated 03.08.1986 is based on the fraud and misrepresentation hence void and ineffective upon the rights of the plaintiffs? OPP*
8. *If the issue No.7 is decided in affirmative whether the plaintiff is entitled for the decree of the suit as prayed for? OPP*
9. *Relief.*

Both the parties adduced their oral as well as documentary evidence in support of their respective contentions. On conclusion of trial, the learned trial Court, vide impugned judgment and decree dated 18.01.2011, dismissed suit of the petitioner/plaintiff. The petitioner being aggrieved of the said judgment and decree preferred an appeal but remained unsuccessful vide impugned judgment and decree dated 24.10.2012, which has culminated in filing of the revision petition in hand challenging the vires, legality and sanctity of the impugned judgments and decrees passed by the learned Courts below, respectively.

2. Learned counsel for the petitioner has stressed upon that the father of the petitioner/plaintiff died on 20.07.1986 while the impugned registered gift deed No.369 was registered on 03.08.1986, approximately after 13 days of demise of the donor/father of the petitioner, while the mutation was sanctioned in 19.02.1987, after seven months of death of the father of petitioner; that no question of limitation arises in cases of fraud, thus, the suit was within time after gaining knowledge of fraud at the hands of the respondents No.1 to 3 by the petitioner; that the impugned judgments and decrees are against law and facts of the case, rather the same are based on misreading and non-reading of evidence on record; that the learned Courts below have failed to apply independent judicious mind and have knocked out the petitioner on technical

grounds; that the impugned judgments and decrees have been passed in a summary manner arbitrarily; that material illegalities and irregularities have been committed; that the impugned judgments and decrees are based on surmises and conjectures; hence, the same are not sustainable in the eye of law; that this Court has ample power to undo the concurrent judgments and decrees when the same are found perverse and arbitrary as well as result of misreading and non-reading of evidence on record, in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908. Therefore, the revision petition in hand may be accepted and by setting aside the impugned judgments and decrees, suit of the petitioner may be decreed as prayed for. Relies on *Islam-Ud-Din through L.Rs. and others v. Mst. Noor Jahan through L.Rs. and others* **(2016 SCMR 986)**, *Mst. Gohar Khanum and others v. Mst. Jamila Jan and others* **(2014 SCMR 801)**, *Mian Ghayassuddin and others v. Mst. Hidayatun Nisa and others* **(2011 SCMR 803)**, *Barkat Ali through Legal Heirs and others v. Muhammad Ismail through Legal Heirs and others* **(2002 SCMR 1938)** and *Isfiaan Haider v. Muhammad Hussain and 2 others* **(2017 CLC 352-Lahore)**.

3. Naysaying the above submissions, learned counsels representing the respondent No.2 & 3 has supported the impugned judgments and decrees and has prayed for dismissal of the revision petition in hand, whereas learned

counsel for the respondents No.5 and 7 has submitted that the respondents No.5 and 7 have no objection on acceptance of revision petition in hand.

4. Heard.

5. Ingredients for a valid gift are: offer, acceptance and delivery of possession. When sanctity of a gift is challenged or called into question, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction. Reliance is placed on judgment reported as *Peer Baksh through LRs and others v. Mst. Khanzadi and others* (**2016 SCMR 1417**). However, in the present case, perusal of the alleged registered gift deed, brought on record as Ex.P3 and Ex.D1, goes to divulge that the same does not find mentioned the factum of original transaction that as to when the offer was made by the donor, which was accepted by the donees and thereafter possession was delivered to the donees. Even the same does not disclose the names of witnesses in whose presence such transaction took place and the place where such incident occurred. Moreover, the said pivotal document does not disclose as why the donor had excluded his other legal heirs i.e. the daughters and wife and for what reason he had gifted out the disputed property to his sons i.e. respondents No.1 to 3. All this shows that the respondents No.1 to 3 have failed to discharge the heavy burden of proving the valid gift in their favour. In a judgment reported as *Faqir Ali*

and others v. Sakina Bibi and others **(PLD 2022 Supreme Court 85)**, the Apex Court of the country has held:-

> *„8. Although stricto sensu, it is not necessary for a donor to furnish reasons for making a gift yet no gift in the ordinary course of human conduct can be made without reason or justification be it natural love and affection for one or more of his children who may have taken care of the donee in his old age and thus furnished a valid basis and justification for the donor to reward such effort on the part of the donee by way of making a gift in his/her favour. In the case of Barkat Ali v. Muhammad Ismail (2002 SCMR 1938) this Court has already taken notice of the fact that in the wake of frivolous gifts generally made to deprive female members of the family from benefit of inheritance available to them under Sharia as well as the law, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to a legal heir who otherwise stands to inherit from the estate of a deceased predecessor or relative and that the course of inheritance is not bypassed or artificially blocked. In the present case, no reason is available on the basis of which the alleged gift appears to have been made. The only reason furnished by Faqir Ali, DW.8 and Munir Ali, DW.10 in their statements before the trial court was that their father Muhammad Ali had transferred the suit land to gain divine favour of God by pleasing Him and the exact words used were "Allah Waasty". It is therefore, clear and obvious to us that natural love and affection was not the consideration of the gift*

and instead as alleged by the aforenoted two witnesses the intention behind the transaction was to please God, the Almighty. Even if that claim is accepted as true, it is ex facie hard to understand how depriving his real daughters of their rightful share in the inheritance/estate of the donor could be interpreted as an act which would please God, the Almighty Who had specifically ordained that the daughters are entitled to a specified share by way of inheritance in the estate of their father on his demise. It therefore appears that the gifts were only a device to deprive the daughters from inheritance and the gift mutations were sanctioned to bypass the law of inheritance and to disinherit the daughters. In this background, the High Court in our opinion was correct in coming to the conclusion that the gift was based on a fraudulent intent. It is settled law that fraud vitiates even the most solemn transactions and any transaction that is based upon fraud is void and notwithstanding the bar of limitation. Courts would not act as helpless by stands and allow a fraud to perpetuate."

In the said judgment, it has further been held:-

„10. We also find that a transaction which is based on an oral gift has two parts, namely the fact of the oral gift which has to be independently established by proving through cogent and reliable evidence the three necessary ingredients of a valid gift as noted above. However, that is not enough. The second ingredient i.e. mutation on the basis of an oral gift has to be independently established by adopting the procedure provided in the Land

Revenue Act and the rules framed thereunder as well as the evidentiary aspects of the same in terms of the Qanun-e-Shahadat Order, 1984."

6. In the present case, admittedly the donor namely Bhoop Khan was an old aged person i.e. about 90 years of age and even his date of death is considered as has been disclosed and relied upon by the respondents No.1 to 3 i.e. 10.10.1986, the execution of disputed gift deed Ex.P3/Ex.D1 on 29.07.1986 cannot be said to have been executed with free consent and without any duress or influence, especially when it has come on record that he (Bhoop Khan) was suffering from some disease and no evidence has been brought by the respondents No.1 to 3 showing that the donor Bhoop Khan was a healthy man and was enjoying good mental condition at the time of execution of alleged registered gift deed Ex.P3/Ex.D1. No evidence has been brought on record depicting that the alleged gift deed was read over to Bhoop Khan, the donor and made him understand the consequences of the same, especially when he (Bhoop Khan) was living at the mercy of the respondents No.1 to 3. Moreover, no documentary proof with regards to death of marginal witnesses of the registered gift deed Ex.P3/Ex.D1 has been brought on record. Muhammad Waheed D.W.2 is only witness of registration proceedings and no transaction of alleged oral transaction of gift was made in his presence, thus, his evidence has no value with regards to original transaction of gift. In judgment reported as *Muhammad Boota through L.Rs v. Mst. Bano Begum and others* **(2005 SCMR 1885)**, it has been held:-

„---------- The petitioner in fact wants to deprive his real sister from the legacy of their parents on

the basis of alleged gift deed executed in his favour by Mst. Saira Bibi, their real mother, who by no stretch of imagination could deprive her real daughter from the share due without any justifiable reasons which are badly lacking in this case which otherwise does not appeal to logic and reason. The gift deed was admittedly executed by an ailing and 80/85 years old woman who had suffer an attack of paralysis and lost her memory, (attention is invited to the statement of Mst. Anwar Bibi) and therefore, it should have been substantiated by worthy of credence evidence which could not be done. The petitioner could not show as to when the offer made by the donor and when it was accepted."

7. Nothing has been brought on record to show that at the time of alleged execution of gift deed Ex.P3/Ex.D1, some independent advice was available to the donor Bhoop Khan, which was necessary keeping in view his old age, especially when through the said document the real daughters and wife were going to be excluded to get their shares. In judgment reported as *Mian Ghayassuddin and others v. Mst. Hidayatun Nisa and others* **(2011 SCMR 803)**, the Apex Court of the country held:-

„The onus was heavily placed on the shoulders of petitioners to have proved that the transaction of gift was effected without exercising undue influence over the donor or that she had independent advice at the relevant time and that she had effected the transaction with her free will and consent."

The said ratio was further reiterated in judgment reported as *Rab Nawaz and others v. Ghulam Rasul* **(2014 SCMR 1181)**.

In judgment reported as *Peer Baksh through LRs and others v.*

Mst. Khanzadi and others **(2016 SCMR 1417)** it was held:-

> *„The petitioner was under an obligation to establish the ingredients of the gift claimed by him under the impugned mutations. However, no particulars whatsoever of the time, date, place and witnesses of the declaration of the gift made by Ghulam Muhammad deceased in favour of the petitioner have been provided in his pleadings nor any evidence could be produced by him in this behalf. This is fatal to the petitioner"s plea. Admittedly Ghulam Muhammad deceased was a patient of paralysis and was above 85 years of age when the disputed gift mutations were recorded on his statement in 1974. He is justifiably claimed to be in frail physical condition at the time."*

8. So far as the argument that the petitioner was party in an earlier suit instituted by Mst. Sajida and others and was well in knowledge about execution of registered gift deed in favour of the respondents No.1 to 3 as she alongwith other defendants in that suit submitted joint written statement and admitted the valid execution of registered gift deed in favour respondents No.1 to 3, therefore, she is estopped to institute the suit; in this regard, it is observed that the petitioner has unequivocally denied the submission of written statement and joining of proceedings in that suit or appointing a counsel for representing her in the said suit; therefore, when the position was as such, it was bounden duty of the respondents to prove the said fact by producing the learned counsel who represented the petitioner in earlier suit so as to prove that she herself engaged him as her counsel and on her instructions written statement was submitted but in this regard they have failed.

Even, the stance taken up by the petitioner that Mst. Sajida Bibi, etc. withdrew the suit when their shares were satisfied by making payment to them and this factum remained un-rebutted as no evidence otherwise has been brought on record by the respondents No.1 to 3. Thus, it can safely be held that the limitation would run from the date of knowledge, which has been pleaded as 15 days prior to institution of suit, hence the suit is well within time, even the efflux of time does not extinguish the right of inheritance and limitation does not run against a void transaction. See *Peer Baksh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417)**.

9. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in *Sultan Muhammad and another v. Muhammad Qasim and others* **(2010 SCMR 1630)** and *Ghulam Muhammad and 3 others v. Ghulam Ali* **(2004 SCMR 1001)**.

10. In view of the above, while placing reliance on the judgments supra as well as judgments reported as *Islam-Ud-Din through L.Rs. and others v. Mst. Noor Jahan through L.Rs. and others* **(2016 SCMR 986)**, *Mst. Khalida Azhar v. Viqar Rustam Bakhsh and others* **(2018 SCMR 30)**, *Muhammad Nawaz and others v. Sakina Bibi and others* **(2020 SCMR 1021)** and *Farhan Aslam and others v. Mst. Nuzba Shaheen and another* **(2021 SCMR 179)**, the revision petition in hand is allowed,

impugned judgments and decrees are set aside, consequent whereof the suit of the petitioner is decreed as prayed for. No order as to the costs.

SHAHID BILAL HASSAN
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Tufail Muhammad v. Nazar Hussain and others. Civil Revision No.1035 of 2008
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) Yes, it is necessary for the plaintiff to plead and prove the time, date and place of alleged transaction of oral agreement between the parties.

ii))Yes, plaintiff is bound to plead the names of witnesses in whose presence oral agreement was struck in between the parties.

iii) Article 113 of the Limitation Act, 1908 provides three years limitation from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused.

Facts of Case:

The petitioner has filed instant civil revision feeling aggrieved with the decisions of concurrent findings of courts below in which the learned trial Court dismissed suit of the petitioner for possession and decreed suit of the respondent No.1 for specific performance on the basis of oral agreement to sell and further the said decree was assailed in appeal by the petitioner but the same was also dismissed by the learned appellate court.

Issues In Case:

i) Whether it is necessary for the plaintiff to plead and prove the time, date and place of alleged transaction of oral agreement between the parties?

ii) Whether plaintiff is bound to plead the names of witnesses in whose presence oral agreement was struck in between parties?

iii) What is the period of limitation for the performance of a contract when the date of performance of contract is fixed and when no such date is fixed?

Analysis of Issues of Case:

i) When a case is instituted on the basis of oral agreement, minute detail of each and every event has to be pleaded and proved. It is a settled principle of law that a party has to first

plead facts and pleas in pleadings and then to prove the same through evidence. A party cannot be allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of "secundum allegata et probata", that a fact has to be alleged by a party before it is allowed to be proved.

ii) When the petitioner has not pleaded the names of the witnesses in whose presence the alleged oral transaction took place, the witnesses produced by him in evidence would not be helpful to the petitioner"s case because their evidence would be nothing but an improvement, as any evidence led by a party beyond the pleadings is liable to be ignored.

iii) The alleged oral agreement to sell was reached at in the year 1975 and the suit was instituted in the year 2002, which is badly barred by limitation, because Article 113 of the Limitation Act, 1908 provides three years limitation from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused.

Form No. HCJD/-121

ORDER SHEET
IN THE LAHORE HIGH COURT,
LAHORE JUDICIAL DEPARTMENT

Civil Revision No.1035 of
2008

Tufail Muhammad
Versus
Nazar Hussain and others

Sr. No. of order/ proceedings	Date of Order/ proceedings	Order with signature of Judge and that of parties or counsel, where necessary

11.05.2022 M/s Shaigan Ijaz Chadhar and Irfan Khokhar, Advocates for the petitioner
Respondents No.2 to 4 ex parte on 22.04.2009
Respondents No.5 & 6 ex parte on 17.11.2021

Tersely the respondent instituted a suit for specific performance on the basis of an oral agreement and cancellation of mutation No.643 dated 09.05.1993 against the petitioner and

respondents No.2 to 6 by maintaining that he purchased the land measuring 08-Marlas from Faqir Muhammad, etc. through an oral agreement for a consideration of Rs.5600/- in 1975, so the subsequent mutation dated 09.05.1993 in favour of the petitioner was liable to be cancelled and a decree for specific performance may be passed in his favour. The present petitioner resisted the suit and also instituted a separate suit for possession of the disputed Ihata on the ground that Faqir Muhammad and others sold out the disputed Ihata to him vide mutation No.643 dated 09.05.1993 and he (petitioner) rented out the same to the respondent No.1 on monthly rent of Rs.500/-. Both the suits were consolidated and out of the divergent pleadings of the parties, the learned trial Court framed consolidated issues. Evidence of the parties, in pro and contra, was recorded. The learned trial Court vide impugned judgment and decree dated 21.02.2007 dismissed suit of the petitioner for possession and decreed suit of the respondent No.1 for specific performance. The said decree was assailed in appeal by the petitioner but the same was dismissed vide impugned judgment and decree dated 17.06.2008; hence, the instant civil revision.

2. Heard.

3. In respect of oral agreement, the parameters have been settled by the Hon'ble Supreme Court in an esteemed judgment reported as *Muhammad Nawaz through L.Rs. v. Haji Muhammad BaranKhan through L.Rs. and others* **(2013 SCMR 1300)** that:-

> *'…….. We also hold that although it is not the requirement of law that an*

agreement or contact of sale of immovable property should only be in writing, however, in a case where party comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the party to prove that there was consensus ad idem between both the parties for a concluded oral agreement. An oral agreement by which the parties intended to be bound is valid and enforceable, however, it requires for it prove clearest and most satisfactory evidence.'

The said esteemed judgment was followed by this Court in *Karamdad v. Manzoor Ahmad and 2 others* **(2015 CLC 157-Lahore)** and it was further observed that:-

'6. The perusal of plaint reveals that respondent/plaintiff did not disclose the name of witnesses before whom the alleged oral sale was struck between the parties. Even no period has been mentioned by the respondent/plaintiff in his plaint for completion of oral agreement to sell. No doubt, an oral agreement to sell is permissible in law, but it has to be proved through credible and un-impeachable evidence.'

4. Now, when the facts of the instant case are considered on the touchstone of the two judgments *ibid* it appears that the petitioner has failed to prove the alleged oral agreement to sell because he failed to plead and prove the time, date and place of alleged transaction of oral agreement inter se the petitioner and the respondents No.2 to 6 and even he did not plead the names of witnesses in whose presence such bargain of oral agreement was struck in between him and the respondents

No.2 to 6. When a case is instituted on the basis of oral agreement, minute detail of each and every event has to be pleaded and proved, which is lacking in this case. It is a settled principle of law that a party has to first plead facts and pleas in pleadings and then to prove the same through evidence. A party cannot be allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of "secundum allegata et probata", that a fact has to be alleged by a party before it is allowed to be proved is fully attracted in this case, which has full backing of provisions of Order VI, Rule 2 and Order VIII, Rule 2, Code of Civil Procedure, 1908. When the petitioner has not pleaded the names of the witnesses in whose presence the alleged oral transaction took place, the witnesses produced by him in evidence would not be helpful to the petitioner's case because their evidence would be nothing but an improvement, as any evidence led by a party beyond the pleadings is liable to be ignored. Reliance is placed on judgments reported as *Muhammad Wali Khan and another v. Gul Sarwar and another* **(PLD 2010 SC 965)** and *Haider Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another* **(2012 SCMR 254)**. Moreover, no receipt with regards to payment of the sale consideration has been brought on record and mere an assertion has been put that entire sale consideration was paid, which does not appeal to prudent mind. Furthermore, description of the property in question has not been narrated properly in the plaint, which otherwise ought to have been inserted in a vivid and categorical manner especially in case of an oral agreement.

In addition to the above, the alleged oral agreement to sell was reached at between the respondent No.1 and the respondents No.2 to 6 as back as in the year 1975 and the suit

was instituted in the year 2002, which is badly barred by limitation, because Article 113 of the Limitation Act, 1908 provides three years limitation from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused.

5. As against this, the petitioner has a mutation in his favour which has been entered, sanctioned and incorporated in the revenue record after due process, thus, he is entitled to the decree for possession because he is lawful owner of the disputed property.

6. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in *Sultan Muhammad and another v. Muhammad Qasim and others* **(2010 SCMR 1630)** and *Ghulam Muhammad and 3 others v. Ghulam Ali* **(2004 SCMR 1001)**.

7. For the foregoing reasons, material illegality and irregularity has been committed and the learned Courts below have failed to exercise vested jurisdiction in an apt and judicious manner; therefore, while placing reliance on the judgments *supra* the civil revision in hand is allowed, impugned judgments and decrees are set aside, consequent

whereof suit of the petitioner for recovery of possession is decreed whereas the suit for specific performance on the basis of an oral agreement instituted by the respondent No.1 stands dismissed. No order as to the costs.

SHAHID BILAL HASSAN
Judge

*Announced in open Court on*_____.

Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Ahmad and another v. Manzoor Ahmad
Civil Revision No.1611 of 2015
Mr. Justice Shahid Bilal Hassan
https://sys.lhc.gov.pk/appjudgments/2022LHC4369.pdf

Crux of Judgement:
i) Declaratory decree can only be passed to the effect of a pre-existing right which is being denied by some person.

ii) When necessary, ingredients of oral agreement are not pleaded, such agreement is void and consequently it cannot be specifically enforced. iii) Party cannot be allowed to prove his case beyond the scope of pleadings.

Facts of Case:
The suit for declaration along with specific performance of contract filed by respondent against the petitioners was decree by trial and appellate courts; hence, the instant revision petition has been filed.

Issues In Case:
i) What is the pre-requisite for seeking declaratory decree?

ii) What is legal position of agreement when necessary ingredients of oral agreement are not pleaded, and whether the same is enforceable? iii) Whether a party is allowed to lead evidence beyond its pleadings?

Analysis of Issues of Case:
i) Bare reading of section 42 of Specific Relief Act makes it vivid that declaratory decree can only be passed to the effect of a pre-existing right which is being denied by some person.

ii) When the particulars of the land and of the alleged oral agreement are not detailed in the plaint, which otherwise ought to have been pleaded and proved and when the position is as such the subject agreement is void for uncertainty in terms of section 29 of the Contract Act, 1872 and consequently it cannot be specifically enforced as enunciated in section 21(c) of the Specific Relief Act, 1877.

iii) it is a settled and cardinal principle of law that no one can be allowed to prove his case beyond the scope of pleadings as enunciated by the August Court of country..(…) that none of the parties to a judicial proceeding can be allowed to adduce evidence in support of a contention not pleaded by it and the decision of a case cannot rest on such evidence.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.1611 of 2015
Ahmad and another Versus Manzoor Ahmad

J U D G M E N T

Date of hearing: ***31.05.2022***

Petitioner(s): Mr. Usman Lateef, Advocate

Respondent(s): Hafiz Mushtaq Ahmad Naeemi, Advocate

SHAHID BILAL HASSAN-J: Tersely, the respondent instituted a suit for declaration alongwith specific performance of contract and perpetual injunction against the petitioners by maintaining that respondent and petitioners are relatives and belong to same caste; that allegedly in the year 1970, the respondent purchased land measuring 01-kanal bearing Khasra No.2326/2-0 against consideration of Rs.6,000/- from the petitioner No.1 and the respondent constructed rooms and got installed electricity meter; that since then the respondent has been in possession of the disputed land. He further asserted that the petitioner No.2 filed a false and frivolous application in connivance with petitioner No.1 against the son of respondent namely Imran before the General Assistant Revenue, Hafizabad with the allegations that the son of the respondent

has illegally

possessed over the land of the petitioners, upon which the Revenue Department submitted the report on 22.06.2011 that the son of the respondent had not illegally possessed over the land of the petitioners and respondent had purchased the land in the year 1970 and since then he had been in possession of the disputed land but due to mutual trust the respondent did not incorporate his name in the revenue record by sanctioning the mutation in his favour; that the disputed land has become valuable and the petitioner No.1 has alienated the same to the petitioner No.2 through mutation No.696 dated 06.09.2005 and the said mutation to the extent of disputed land is against law and facts, void and inoperative upon the rights of the respondent. The respondent prayed for cancellation of the said mutation with further prayer that the petitioners may be directed to execute the sale deed in favour of the respondent in pursuance of alleged oral agreement and a decree for perpetual injunction be also passed in favour of the respondent.

The petitioners by filing written statement contested the suit and controverted the averments of the plaint. The divergence in pleadings of the parties was summed up into issues and evidence of the parties was recorded. On conclusion, the learned trial Court vide impugned judgment and decree dated 06.03.2015 decreed the suit in favour of the respondent. The petitioners being aggrieved preferred an appeal but the same was dismissed vide impugned

judgment and decree dated 15.05.2015; hence, the instant revision petition has been filed.

2. Heard.

3. Section 42 of the Specific Relief Act, 1877 postulates that:-

> *'Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit seek for any further relief:*
>
> ***Bar to such declaration**. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.'*

Bare reading of above said section makes it vivid that declaratory decree can only be passed to the effect of a pre-existing right which is being denied by some person. In the present case, admittedly the respondent based his claim on an oral agreement allegedly reached at between the respondent and present petitioner No.1 as back as in the year 1970 but perusal of the plaint shows that particulars of the land and of the alleged oral agreement are not detailed in the plaint, which otherwise ought to have been pleaded and proved and when the position is as such the subject agreement is void for uncertainty in terms of section 29 of the

Contract Act, 1872 and consequently it cannot be specifically enforced as enunciated in section 21(c) of the Specific Relief Act, 1877. Therefore, when the respondent has yet to establish his right on the basis of alleged oral agreement, how can he claim a declaratory decree, because the petitioners have not denied his pre-existing right, which is pre-requisite for seeking a declaratory decree. In *Muhammad Riaz and others v. Mst. Badshah Begum and others* **(2021 SCMR 605)**, the Apex Court of the country has invariably held:-

> *'6. The plaintiffs in the instant case relied upon an oral agreement. However, the plaintiffs did not set out the particulars of such oral agreement as per either of the prescribed forms (above) or as nearly as may be thereto and also did not describe the land which was the subject matter of the agreement. Therefore, the agreement would be void for uncertainty in terms of section 29 of the Contract Act, and consequently, it could not be specifically enforced as stipulated by section 21(c) of the Specific Relief Act.'*

4. In view of the above, when the respondent has not pleaded the particulars of alleged oral agreement and even the names of the witnesses in whose presence such agreement was reached at, the evidence produced by him would be considered beyond the pleadings and it is a settled and cardinal principle of law that no one can be allowed to prove his case beyond the scope

of pleadings as enunciated by the August Court of country in a case reported as *Muhammad Wali Khan and another v. Gul Sarwar Khan and another* **(PLD 2010 Supreme Court 965)**. In another case reported as *Mubarak Ali and others v. Khushi Muhammad and others* **(PLD 2011 Supreme Court 155)**, it has been held that no one can be allowed to plead and seek relief from the Courts on a plea not founded and embedded in his pleadings. Another judgment reported as *Combined Investment (Pvt.) Ltd. V. Wali Bhai and others* **(PLD 2016 Supreme Court 730)**, can also be referred, which pronounces that none of the parties to a judicial proceeding can be allowed to adduce evidence in support of a contention not pleaded by it and the decision of a case cannot rest on such evidence.

5. In addition to the above, the respondent has not led any evidence showing that he was put in possession of the suit pursuant to the alleged oral agreement between him and the petitioner No.1. Not a single word has been uttered about the payment of the consideration amount by the P.Ws. produced by the respondent. Ownership of the petitioners over the disputed property has been proved through unimpeachable and cogent evidence rather the same is an admitted fact.

6. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the matter

in hand by appreciating law on the subject in a judicious manner; therefore, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in *Sultan Muhammad and another v. Muhammad Qasim and others* **(2010 SCMR 1630)** and *Ghulam Muhammad and 3 others v. Ghulam Ali* **(2004 SCMR 1001)**.

7. For the foregoing reasons and discussion while placing reliance on the judgments supra as well as judgments reported as *Muhammad Nawaz (deceased) through LRs. v. Haji Muhammad Baran Khan (deceased) through L.Rs. and others* **(2013 PSC 1683)** and *Ali Muhammad v. Muhammad Hassan and others* **(2021 CLC 1111-Lahore)**, the revision petition in hand is allowed, impugned judgments and decrees passed by the learned Courts below are set aside and in consequence thereof the suit, instituted by the respondent/plaintiff is dismissed. No order as to the costs.

SHAHID BILAL HASSAN
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Amjad Saeed & another v. Muhammad Saeed and 2 others
Civil Revision No.2175 of 2012
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land.

ii) The conditions that easement right is certain and have been enjoyed peaceably, openly, without interruption for twenty years or sixty years if claim is against the government, must be fulfilled before claiming a right of easement by prescription.

Facts of Case:

Through this civil revision, the petitioners challenged the concurrent judgments and decrees passed by learned Civil Court / Trial Court and learned first Appellate Court, whereby, their civil suit for declaration with permanent and mandatory injunction claiming their easement right of usage of passage has been dismissed.

Issues In Case:

i) What is an easement right and what are its essential ingredients?

ii) What pre-requisite conditions must be fulfilled before claiming a right of easement by prescription?

Analysis of Issues of Case:

i) An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to present something being done, in orupon, or in respect of, certain other land not his own. The essential qualities of an easement generally are: (1) it is incorporeal; (2) it is imposed on corporeal property and not on the owner of it; (3) it confers no right of share in the profits from such property; (4) it is imposed for the benefit of corporeal property; (5) it involves two distinct tenements, the one which enjoys the easement, that is, to which the easement belongs or to which it is attached, called the „dominant tenement“ or
„dominant estate“ and the other on which the easement rests or is imposed, called „the servient tenement“ or „servient estate“.

ii) The following conditions must be fulfilled for the acquisition of a right of easement by prescription: (i) the right claimed must not be uncertain. (ii) The right claimed must have been enjoyed. (iii) It must have been enjoyed (a) peaceably, (b) openly, (c) as of

right, (d) as an easement, (e) without interruption, (f) for twenty years or sixty years, if the right is claimed against Government. Out of the last six sub-conditions, (b) and (c) are not necessary in the case of easement of light and air or support. With this exception, all the conditions and sub-conditions must be fulfilled before the right of easement is acquired.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.2175 of
2012 Amjad Saeed & another
Versus
Muhammad Saeed and 2 others

JUDGMENT

Date of hearing: ***24.05.2022***

Petitioner(s) by: Mr. Azmat Ullah Chaudhry, Advocate

Respondent(s) by: M/s Salman Mansoor & Ahmed Raza Chattha, Advocates

SHAHID BILAL HASSAN-J**:** Facts, in precision, are as such that the petitioners instituted a suit for declaration with permanent and mandatory injunction claiming their easement right of usage of passage passing through Square No.6, Killas No.1 and 10, allegedly to be in their use for the last 30/35 years, whereas the respondents No.1 and 2 have restrained them from using the said passage, for which they (respondents No.1 and 2) have no right to do so. The suit was resisted by the respondents No.1 and 2, who while submitting written statement have controverted the averments of the plaint. The divergence in pleadings of the parties was summed up into issues and evidence of the parties was recorded. On conclusion of trial, the learned trial Court vide impugned judgment and decree dated 25.02.2011 dismissed suit of the petitioners, who being

aggrieved of the same preferred an appeal there-against but it was dismissed vide impugned judgment and decree dated 30.03.2012 by the learned appellate Court; hence, the instant revision petition.

2. Heard.

3. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to present something being done, in or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the rights exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land, on which the liability is imposed, is called the servient heritage, and the owner or occupier thereof the servient owner.

The essential qualities of an easement generally are:

(1) it is incorporeal;
(2) it is imposed on corporeal property and not on the owner of it;
(3) it confers no right of share in the profits from such property;
(4) it is imposed for the benefit of corporeal property;

(5) it involves two distinct tenements, the one which enjoys the easement, that is, to which the easement belongs or to which it is attached, called the ‘dominant tenement’ or ‘dominant estate’ and the other on which the easement rests or is imposed, called ‘the servient tenement’ or ‘servient estate’.

Moreover, the following conditions must be fulfilled for the acquisition of a right of easement by prescription:

(i) The right claimed must not be uncertain.
(ii) The right claimed must have been enjoyed.
(iii) It must have been enjoyed (a) peaceably, (b) openly, (c) as of right, (d) as an easement, (e) without interruption, (f) for twenty years or sixty years, if the right is claimed against Government.

Out of the last six sub-conditions, (b) and (c) are not necessary in the case of easement of light and air or support. With this exception, all the conditions and sub-conditions must be fulfilled before the right of easement is acquired.

In the present case, the petitioners, however, have failed to established by leading cogent, trustworthy and confidence inspiring evidence that they have been using the disputed path continuously and have been enjoying the right of easement over the same for the last 30/35 years rather it has surfaced on record that the respondents/defendants demolished the said passage around 25.03.2006, meaning thereby the alleged use of passage by the petitioners/plaintiffs is near about 16 years, so the petitioners cannot claim the accrual of right of easement in their favour, because it is the pre-requisite of law, as hinted above, that the right (passage in the present case) has to be enjoyed by a person continuously and without any interruption for a period of 20 years, there-after he can claim such right of easement. Right of way through easement does not mature if the right of way is not used for a period of twenty years as has been held by this Court in judgment reported as *Haji Abdul*

Sattar v. Haji Muhammad Bakhsh through Legal Heirs **(2017 YLR Note 9)**. Further reliance can safely be placed on *Abdul Khaliq alias Mithoo v. Moulvi Sher Jan and others* **(2007 SCMR 901)**.

4. Apart from the above, the P.W.4-Ajmal Tahzeeb in the beginning of his deposition has deposed that there is a passage to his land from Muridke Sheikhupura road bearing square No.3, Killa Nos. 10.11. 20 and 21 beside the disputed passage. When the position is as such that the petitioners have an alternate way and they could not establish their continuous usage of passage for a period of 20 years, they have rightly been non-suited by the learned Courts below concurrently. In *Hafiz Riaz Ahmad and others v. Khurshed Ahmad and others* **(2013 MLD 947-Lahore)**, it has been held:-

> *'9. Under the easement Act (V of 1882), to prove a right of easement by prescription mere user for innumerable years does not confer prescriptive right of easement. Under section 15 of the Easement Act (V of 1882) this right must be peaceably openly enjoined by any person claiming title thereto, as an easement and as of right without interruption for 20 years. In case in hand, it is evident that defendants remained in possession of land owned by the plaintiff-respondent No.1 as Mustajar/contractor, including the land in dispute. Even otherwise the Constitution of Islamic Republic of Pakistan gives a right to hold and enjoy the property to a person. These rights are sacrosanct which have to be protected as fundamental rights. No person including the neighbour could be allow to diminish the rights in order to enjoy use of his property, as 'rights to assert the property have been protected under Articles 23 and 24 of the Constitution. If any*

person claims any right of easement, he is bound under the law to prove without any discrepancy his right in accordance with law. In case in hand, the petitioners-defendants miserably failed to prove their right of easement by prescription as well as the proof of right of easement as necessity. In case of necessity it is the duty of the plaintiff that he must prove that if this right of easement claimed by a claimant is not given to him his property will be ruined for which he is claiming right of easement. In case in hand, it is admitted on the record that there is also another road available which lead to the property of petitioners-defendants, therefore, this right of necessity is also not available to the petitioners.' (underline for emphasis)

There appears no misreading and non-reading of evidence on record on the part of the learned Courts below alleged to have been committed while passing the impugned judgments and decrees, rather the evidence brought on record by the parties has minutely been scanned and flicked through.

5. In view of the above, the learned Courts below have rightly non-suited the petitioners, concurrently and as such concurrent findings on facts cannot be disturbed when the same do not suffer from misreading and non-reading of evidence, howsoever, erroneous in exercise of revisional jurisdiction; reliance is placed on *Mst. Zaitoon Begum v. Nazar Hussain and another* (**2014 SCMR 1469**), *CANTONMENT BOARD through Executive Officer, Cantt. Board Rawalpindi v. IKHLAQ AHMED and others* (**2014 SCMR 161**), *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* (**2017 SCMR 679**), *Muhammad Sarwar and others v. Hashmal Khan and others*

(PLD 2022 Supreme Court 13) and *Mst. Zarsheda v. Nobat Khan* **(PLD 2022 Supreme Court 21)** wherein it has been held:-

> *'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent findings of three courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage.'*

6. Pursuant to the above, when there appears no illegality and irregularity as well as wrong exercise of jurisdiction, the revision petition in hand being without any force and substance, stands dismissed. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Mr. Raza Ibrahim, etc. v. Mr. Nasir Ibrahim, etc.
Civil Revision No.80780 of 2021
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) Rejoinder/replication is a supplement of plaint and is also supposed to clarify such ambiguities which are left in the plaint or are pointed out by the defendant(s) in his written statement.

ii) A party cannot lead evidence beyond its pleadings.

Facts of Case:
In order to cater the additional contentions of the respondents/defendants taken in the amended written statement, the petitioners filed an application under Order VIII, Rule 9, Code of Civil Procedure, 1908 seeking leave for filing a rejoinder. The learned trial Court vide impugned order dismissed the said application; which has culminated in filing of the revision petition in hand.

Issues In Case:
i) Whether rejoinder/replication is a supplement of plaint and is also supposed to clarify such ambiguities which are left in the plaint or are pointed out by the defendant(s) in his written statement?

ii) Whether a party can lead evidence beyond its pleadings?

Analysis of Issues of Case:
i) It is a settled principle of law that rejoinder/ replication is a supplement of plaint and is also supposed to clarify such ambiguities which are left in the plaint or are pointed out by the defendant(s) in his written statement and that altogether new case cannot be allowed to be presented in the rejoinder/replication as there will be no opportunity for the defendant(s) to controvert such a new case, set up in the rejoinder/replication.

ii) It is also a settled principle of law that a party cannot lead evidence beyond its pleadings and if anything is brought on record beyond the pleadings, the same will not be considered and even the averments made in the pleadings do not constitute evidence.

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
LAHORE JUDICIAL DEPARTMENT

Civil Revision No.80780 of 2021

Mr. Raza Ibrahim, etc. Versus Mr. Nasir Ibrahim, etc.

J U D G M E N T

Date of Hearing: 14.06.2022

Petitioner(s): Mian Sami Ud Din, Advocate

Respondent(s): Mr. Zahid Nawaz Cheema, Advocate

SHAHID BILAL HASSAN-J: Succinctly, the petitioners instituted a suit for specific performance and rendition of accounts against the respondents. On 11.12.2017, the petitioners filed an application under Order VI, Rule 17, Code of Civil Procedure, 1908 for amendment in plaint to the extent of adding an alternate prayer seeking damages for the non- performance of contract by the respondent No.1. The respondents filed its reply and the said application was allowed on 22.01.2019. The petitioners submitted amended plaint and the respondents filed amended written statement. Purportedly, the respondents/defendants pleaded certain additional facts and contentions in their amended written statement, which were not addressed in the petitioners' plaint, such as: (a). the frail

condition of Mian Ibrahim as alleged in para 5(iii) of On Merits; (b). specific allegation of fraud and forgery in paras 5(iv) to 5(x) of On Merits that petitioner No.1 transferred the shares of petitioners No.2 in his and his wife's name by practicing fraud and forgery; (c). allegation in para 5(xii) of On Merits that petitioner No.1 is engaged in immoral activities. In order to cater the said additional contentions, the petitioners filed an application under Order VIII, Rule 9, Code of Civil Procedure, 1908 seeking leave for filing a rejoinder. The respondents filed its reply. The learned trial Court vide impugned order dated 29.09.2021 dismissed the said application; which has culminated in filing of the revision petition in hand.

2. Heard.

3. It is a settled principle of law that rejoinder/ replication is a supplement of plaint and is also supposed to clarify such ambiguities which are left in the plaint or are pointed out by the defendant(s) in his written statement and that altogether new case cannot be allowed to be presented in the rejoinder/replication as there will be no opportunity for the defendant(s) to controvert such a new case, set up in the rejoinder/replication. Moreover, it is also a settled principle of law that a party cannot lead evidence beyond its pleadings and if anything is brought on record beyond the pleadings, the same will not be considered and even the averments made in the pleadings do not constitute evidence as has been held in

Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others **(2014 SCMR 914)**. Moreover, Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 demands that fair and reasonable opportunity be given to every party to put and defend his stance and case. The perusal of the plaint and written statement including the amended pleadings of the parties, divulges that the facts and contention raised in the written statement/amended written statement, submitted by the respondents, have not been pleaded by the petitioners and the same need clarity on their behalf, because, as observed above, the rejoinder and replication is a supplement of plaint and is supposed to clarify the ambiguities, a new case cannot be set up. Therefore, the learned trial Court ought to have granted leave to the petitioners in exercise of powers conferred upon it under Rule 9 of Order VIII, Code of Civil Procedure, 1908 so as to clarify the ambiguities and plead their stance in respect of additional facts and contentions of the respondents, asserted in their written statement/amended written statement.

4. In view of the above, the learned trial Court has failed to exercise vested jurisdiction while passing the impugned order, which has resulted in miscarriage of justice; therefore, the impugned order cannot be allowed to sustain and hold field further. Resultantly, the revision petition in hand is allowed, impugned order dated 29.09.2021 is set aside,

consequent whereof the application filed by the petitioners under Order VIII, Rule 9, Code of Civil Procedure, 1908 is accepted and they are allowed to submit rejoinder/replication. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Mst. Shahnaz Shafiq and 2 others v. Mst. Gulnar Khalid and 4 others
Civil Revision No.19610 of 2021
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) On admission of gift by donor the Court, on moving an application under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908, in exercise of discretion, vested upon it, may pass a judgment or order, as it thinks fit.

ii) Only forum competent to declare a person as "mentally disordered person" is one available under Mental Health Ordinance, 2001 and the same has overriding effect and no other Court could determine or for that matter grant any declaration.

Facts of Case:

Respondent No.1 instituted a suit for declaration against the present petitioners and remaining respondents No.2 to 5 in the present revision petition. The petitioners also instituted a suit for declaration with permanent injunction against the respondents whereby the petitioner No.1 sought cancellation of gift deed. The respondent No.2 also filed a separate suit in this regard. The instant revision petition as well as connected C.Rs. called into question the validity and vires of impugned orders rejecting the plaints of suits instituted by the present petitioners and respondent No.2 and decreeing the suit of the respondent No.1.

Issues In Case:

i) Whether court may pass judgment on admission of gift by donor?

ii) Whether civil court can declare a person as "mentally disordered person"?

Analysis of Issues of Case:

i) On admission of gift by donor through statement recorded in a categorical, unambiguous and in a vivid way, the Court, on moving an application underOrder XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908, in exercise of discretion, vested upon it, may pass a judgment or order, as it thinks fit.

In case law reported as **Arshad Ehsan v. Sheikh Ahsan Ghani and 2 others (PLJ 2007 Lahore 144)**, this Court has held: - „There is no cavil to the proposition that the only forum competent to declare a person as "mentally disordered person" is one available under Mental Health Ordinance, 2001 and the same has overriding effect and no other Court could determine or for that matter grant any declaration…"

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.19610 of 2021

Mst. Shahnaz Shafiq and 2 others
VERSUS
Mst. Gulnar Khalid and 4 others

J U D G M E N T

Date of Hearing: 20.05.2022

Petitioner(s): Mr. Zafar Abbas Khan, Advocate as well as in connected C.R.No.24020 of 2021

Respondent(s): Mr. Qasim Hassan Buttar, Advocate for respondent No.1/plaintiff and in C.R.No.10730 of 2021

Mr. Zawar Ahmad Sheikh, Advocate for respondent No.2/petitioner in connected C.R.No.10730 of 2021 & C.R.No.12562/2021

Sahabzada Muzaffar Ali, Advocate for Lahore Development Authority

SHAHID BILAL HASSAN-J: This single judgment will dispose of the captioned revision petition as well as connected C.R.No.24020 of 2021, C.R.No.10730 of 2021 and C.R.No.12562 of 2021, as in all, common question of law and facts are involved as well as one and the same judgments and decrees have been called into question.

2. Facts, in precision, are as such that respondent No.1 instituted a suit for declaration against the present petitioners and remaining respondents No.2 to 5 in the present

revision petition. The petitioners also instituted a suit for declaration with permanent injunction against the respondents whereby the petitioner No.1 sought cancellation of gift deed bearing document No.1878, Book No.1, Volume No.2099 dated 02.04.2013 (*on the basis of which the respondent No.1 instituted her suit*), alleging therein that the same was obtained through fraud and misrepresentation by the respondent No.1 and others. The respondent No.2 also filed a separate suit in this regard. Rival parties contested each other's suit. On 05.11.2014, donor/father of the parties namely Shafique A. Siddiqui appeared before the learned trial Court and recorded his detailed and comprehensive statement wherein he categorically, unambiguously and unequivocally stated that he has executed gift deed of the suit property in favour of his daughter Gulnar Khalid, respondent No.1, with his free will and without any coercion and undue influence as well as in his complete senses. After recording of the said statement, the respondent Gulnar Khalid made an application under Order XII, Rule 6, Code of Civil Procedure, 1908 for passing a judgment and decree in her favour but the learned trial Court dismissed the said application, who filed revision petition, which was allowed and the learned trial Court was directed to decide the contention of the respondent Gulnar Khalid in the light of the statement of her father/donor Shafique A. Siddiqui. On the other hand, the present respondent No.2 namely Rubina Amjad filed a writ

petition bearing No.131333 of 2018 before this Court, which was dismissed. Therefore, in the light of the direction of the learned revisional Court and this Court, the learned trial Court decided the application under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908 and decreed the suit for declaration instituted by the respondent No.1 titled "Gulnar Khalid v. Shahnaz Shafique, etc.", whereas the plaints of suits instituted by the present petitioners Shahnaz Shafique, etc. and Mst. Rubina Amjad, were rejected under Order VII, Rule 11, Code of Civil Procedure, 1908 vide impugned orders/judgment and decrees dated 10.03.2020. Hence, the captioned revision petition as well as connected C.Rs. (detailed above) calling into question the validity and vires of impugned orders rejecting the plaints of suits instituted by the present petitioners and respondent No.2/Mst. Rubina Amjad and decreeing the suit of the respondent No.1/Mst. Gulnar Khalid.

2. Heard.

3. Rule 6 of Order XII, Code of Civil Procedure, 1908 provides:-

> *„6.* ***Judgment on admissions****. Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may*

upon such application make such order, or give such judgment, as the Court may think just."

Rule 1 of Order XV, Code of Civil Procedure, 1908 enunciates:-

*„**Parties not at issue**. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment."*

In the present case there is no denial to the factum that the disputed house was owned by Shafique A. Siddiqui (deceased), father of the parties, who gifted out the same to respondent No.1 namely Gulnar Khalid, through gift deed bearing document No.1878, Book No.1, Volume No.2099 dated 02.04.2013 and when the respondent No.1 instituted a suit for declaration, obviously, on refusal of her entitlement, on the basis of said document, the said Shafique A. Siddiqui, the donor, appeared before the learned trial Court on 05.11.2014 and in a categorical, unambiguous and in a vivid way recorded his detailed statement on oath in favour of respondent No.1 and the learned Courts below have reproduced the said statement of the deceased Shafique A. Siddiqui in the impugned judgments in verbatim. When, the position remained as such, the learned trial Court, on moving an application under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908, in exercise of discretion, vested upon it, may pass a judgment or order, as it thinks fit, as has been referred above, but the learned

trial Court declined the request of the respondent No.1 on 26.11.2016, who challenged the order by filing revision petition, which was accepted on 11.12.2017 and the matter was remanded to the learned trial Court with a direction to decide the request under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908 and W.P.No.131333 of 2018, filed by Mst. Robina Amjad against the said revisional order was dismissed by this Court with the observation that:-

> *„The father of the petitioner in his statement categorically stated that he gifted the suit property to his daughter while putting his signature and thumb impression on the order sheet. The presumption of truth is attached to the order sheet."*

4. It is not case, here, that Shafique A. Siddiqui appeared before the learned trial Court only once before the learned trial Court rather after recording his categorical detailed statement on 05.11.2014, he again appeared on 09.04.2016 in presence of learned counsel for the parties and the learned trial Court, on the said date, cross questioned him in order to ascertain mental condition and soundness of his mind and observed in the order that:-

> *„So, defendant No.5 was cross-examined by the court and he spoke about his name, parentage, correct address and profession as Electrical Engineering and still MD at ICC private, Limited. The mental condition of defendant No.5 has been*

found correct. He is a man of sound mind, hale and hearty up to the mark. Counsel for the defendant No.4 is hereby directed to clear position of Mst. Rubina Amjad on the next date of hearing."

The said observation recorded by the learned trial Court had not been challenged before any forum at the relevant time and even the petitioner(s) did not move any application before the competent forum under Mental Health Ordinance, 2001 seeking declaration of unsoundness or soundness of Shafique A. Siddiqui, because oral stance has no value, especially when the said person while appearing before the learned trial Court twice on different dates with a gap of almost two years i.e. firstly on 05.11.2014 and secondly on 09.04.2016, did not seem to be of unsound mind. Reliance is placed on *Arshad Ehsan v. Sheikh Ahsan Ghani and 2 others* **(PLJ 2007 Lahore 144)**, wherein this Court has held:-

„6. There is no cavil to the proposition that the only forum competent to declare a person as "mentally disordered person" is one available under Mental Health Ordinance, 2001 and the same has overriding effect and no other Court could determine or for that matter grant any declaration, hence, the suit filed by the petitioners to this extent was barred by law."

5. In addition to the above, it is worth mentioning here that in his statement dated 05.11.2014, Shafique A. Siddiqui in a categorical manner stated that he is affectionate

and kind father towards his children and he has already transferred valuable properties in the names of his sons and daughters and has gifted out the disputed house in lieu of services of his widowed daughter Gulnar Khalid (plaintiff). This part of the statement of the deceased Shafique A. Siddiqui has not been denied by the present petitioners or other respondents.

6. So far as the objection that the registered gift deed was written on a non-stamp paper and adhesive stamps were pasted is concerned, after admission on the part of the deceased Shafique A. Siddiqui by appearing before the learned trial Court, the said objection loses its significance. In judgment reported as *G.R. Syed v. Muhammad Afzal* **(2007 SCMR 433)**, the Apex Court of the country while upholding the judgment rendered by a Division Bench of this Court reported as (**PLD 2007 Lahore 93)** has held:-

> *„7. It is a settled proposition of law that under Order XII, rule 6 of C.P.C. the Court is empowered to pass a judgment on the basis of admission of facts by the addressee made by the parties to their pleadings, at any stage of the proceedings. The learned High Court to adjudge the controversy between the parties placed reliance upon the judgment of this Court in case of Amir Bibi v. Muhammad Khushid and others 2003 SCMR 1261, and applying the rules laid down therein concluded that as the admission of the*

petitioner was specific, clear, unambiguous, categorical and definite, therefore, the trial Court had rightly granted decree under Order XII, rule 6 of C.P.C. As such under the circumstances, reiterating the principle laid down in the reported judgment we are of the opinion that the impugned judgment admits of no interference."

7. In view of the above discussion, it can safely be held that the learned Courts below have proceeded with the case as per mandate of law and have not committed any material illegality and irregularity while passing the impugned orders, judgments and decrees warranting interference by this Court in exercise of supervisory revisional jurisdiction under section 115, Code of Civil Procedure, 1908, rather after passing a decree in favour of the respondent No.1, in her suit for declaration on the basis of registered gift deed, after categorical admission by Shafique A. Siddique (deceased), the suits instituted by the petitioners in the present revision petition and connected petitions, lacks locus standi and cause of action, so the plaints in the said suits have rightly been rejected by invoking powers under Order VII, Rule 11, Code of Civil Procedure, 1908. The findings recorded by the learned Courts below, being well reasoned and up to the dexterity as well as proper and judicious appreciation of law on the subject, are upheld and maintained

8. For the foregoing reasons and while placing reliance on the judgments (*supra*), the revision petition in hand as well as connected C.R.No.24020 of 2021, C.R.No.10730 of 2021 and C.R.No.12562 of 2021, having come to naught and devoid of any force stand dismissed. No order as to the costs.

SHAHID BILAL HASSAN
Judge

Announced in open Court on_____.

Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Asif Naeem v. Mst. Balqees Fatima and others
Civil Revision No.60443 of 2022
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
No appeal can be filed against the consent decree; except in exceptional circumstances.

Facts of Case: Respondents instituted a suit for declaration which was decreed by the trial court upon recording of conceding statements of the petitioner. Feeling aggrieved of the same, the petitioner preferred an appeal but it was dismissed; hence, the instant revision petition.

Issues In Case:
Whether an appeal can be filed against the consent decree?

Analysis of Issues of Case:
No appeal lies in consent decree; however, there are following exceptions where consent decree is appealable:- ⍰ An appeal by a person who was not a party to the compromise; ⍰ Where it is alleged that decree is not a decree passed with the consent of parties; ⍰ Where the consent decree is alleged to be invalid as for instance where court did not have jurisdiction over the subject matter; ⍰ Where there is a dispute regarding the nature of compromise; ⍰ Where the decree travels beyond the agreement; ⍰ Where the consent is given under mistake of fact or obtained by practicing fraud upon the court; ⍰ Where there was no compromise at all; ⍰ Where the strict requirements of O.XXIII, Rule 3, Code of Civil Procedure, 1908 are not satisfied.

Form No. HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT,
LAHORE JUDICIAL
DEPARTMENT
Civil Revision No.60443 of 2022
Asif Naeem Versus Mst. Balqees Fatima and others

Sr. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
	04.10.2022	Mr. Muhammad Ahsan Hussain, Advocate for the petitioner

Precisely, the respondents instituted a suit for declaration maintaining therein that predecessor in interest of the parties namely Muhammad Ismail was owner of the land measuring 197-Kanals 11-Marlas, situated in Mauza Lakoo, Tehsil & District Khushab, who passed away on 24.09.2016; that the petitioner/defendant No.1 in order to deprive them of their inheritance got attested a gift mutation No.4004 dated 31.07.2015 in his favour in collusion with the revenue officials; that their father neither made any offer of gift nor the same was accepted by the petitioner/defendant No.1. Moreover, father of the parties did not appear before any revenue officer for the sanction of mutation; therefore, the mutation in question is illegal and being ineffective upon their rights is liable to be cancelled. The suit was contested by the petitioner who controverted the averments of the plaint. The defendant No.2 was proceeded against ex parte. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the plaintiffs was recorded. On 24.07.2019, plaintiff No.3 namely Rehana Ishfaq appeared before the learned trial Court and recorded her statement regarding withdrawal of the suit to her extent, so the suit to her extent was dismissed as withdrawn. However, on 02.06.2021, the present petitioner appeared before the learned trial court and recorded his statement on oath that respondents/defendants No.1 and 2 are his real sisters,

therefore, he has no objection if the suit is decreed upto their extent. The learned trial Court vide impugned order and decree dated 15.12.2021 decreed the suit to their extent by observing that Revenue Officer is authorized to sanction mutation in favour of the plaintiffs to the extent of their respective shares from inheritance of Muhammad Ismail after cancellation of impugned mutation No.4004 and to pass a mutation of inheritance relating to inheritance of Muhammad Ismail deceased. Feeling aggrieved of the same, the petitioner preferred an appeal but it was dismissed vide impugned judgment and decree dated 04.07.2022; hence, the instant revision petition.

2. Heard.

3. Admittedly, the impugned order, judgment and decrees have been passed when the petitioner conceded the claim of the respondents No.1 and 2; meaning thereby the same is consent decree, where-against no appeal lies; however, there are following exceptions where consent decree is appealable:-

- *An appeal by a person who was not a party to the compromise;*
- *Where it is alleged that decree is not a decree passed with the consent of parties;*
- *Where the consent decree is alleged to be invalid as for instance where court did not have jurisdiction over the subject matter;*
- *Where there is a dispute regarding the nature of compromise;*
- *Where the decree travels beyond the agreement;*
- *Where the consent is given under mistake of*

fact or obtained by practicing fraud upon the court;

- *Where there was no compromise at all;*
- *Where the strict requirements of O.XXIII, Rule 3, Code of Civil Procedure, 1908 are not satisfied.*

However, in the present case, no such plea has been agitated rather the present petitioner before the learned appellate Court contended that the petitioner is ready to transfer some land in favour of the respondents/plaintiffs while the whole corpus of land according to gift mutation does not exist on the spot. Therefore, the learned trial Court as well as learned appellate Court have rightly adjudicated upon the matter in hand and have not committed any illegality or irregularity warranting interference by this Court in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908. Resultantly, the revision petition in hand having no force and substance stands dismissed ***in limine***.

(***Shahid Bilal Hassan***)
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Basharat Ali, etc v. Muhammad Arif, etc. Writ Petition No.22235 of 2020
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
A party is always bound by the statement of his counsel unless there is anything contrary in the power of attorney places restriction on the authority.

Facts of Case: The respondents instituted suit for malicious prosecution which was dismissed as withdrawn on the statement of their counsel. The respondents filed an application for restoration of suit which was dismissed by the trial court. The respondents filed a revision petition which was partially allowed hence, the instant constitutional petition filed by the petitioners.

Issues In Case: Whether a party is bound by the statement of his counsel recorded in his suit?

Analysis of Issues of Case: A party is always bound by the statement of his counsel unless there is anything contrary in the power of attorney places restriction on the authority, delegated upon the counsel, to compromise or abandon the claim on behalf of his client(s).

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
LAHORE JUDICIAL DEPARTMENT

Writ Petition No.22235 of 2020
Basharat Ali, etc. Versus Muhammad Arif, etc.

JUDGMENT

Date of hearing: ***04.10.2022***

Petitioner (s): Mr. Muhammad Mehmood Chaudhry, Advocate

Respondent (s): M/s Mubeen Arif & Ihsan Ullah Ranjha, Advocates

SHAHID BILAL HASSAN-J: Facts, in concision, are as such that respondents instituted a suit for malicious prosecution against the petitioners on 27.07.2017. During pendency of the

suit, learned counsel for the respondents namely Ch. Hasnain Sadiq Sahi, Advocate appeared before the learned trial Court alongwith one of the plaintiffs Muhammad Akram and recorded his statement, by virtue of which the suit was withdrawn on 09.01.2019 and the impugned order dated 10.01.2019 was passed. After 30 days of the said withdrawal of the suit, an application was filed by the respondents for restoration of the suit. The learned trial Court after hearing both the parties dismissed the said application vide order dated 04.03.2019, against which they filed a revision petition which was partially allowed vide impugned order dated 26.02.2020; hence, the instant constitutional petition.

2. Heard.

3. Engagement of counsel namely Hasnain Sadiq Sahi, Advocate and conducting of proceedings by him on behalf of the respondents, under Order III, Rule 1, Code of Civil Procedure, 1908, is admitted one. The respondents have appointed the said learned Advocate as their counsel for conducting of suit on their behalf and signed the power of attorney, which authorizes the said learned Advocate to conduct the suit on their behalf including recording of any kind of statement. Record reveals that the statement was recorded on 09.01.2019 on the application of the learned counsel and one of the plaintiffs/respondents namely Muhammad Akram and after recording statement, the case was ordered to be produced on the date already fixed i.e. 10.01.2019, when order with regards to withdrawal of the suit was passed. By singing Wakalatnama all the powers including withdrawal of suit or to take any step and conduct proceedings have been delegated upon the counsel. In

Fateh Khan v. Manzoor and 5 others **(PLD 1993 Lahore 76)**, this Court held:-

> *'It is inconceivable that elements of fraud and misrepresentation may anywise be involved in the exercise of lawful authority conferred on a counsel by means of Wakalatnama. This appointment is made as per the contemplation of Rule 1 of Order III, C.P.C. and is essentially an authority conferred on an agent, exercisable under the ordinary rules governing the relationship of Principal and Agent, in quite a subtle and refined form, exercisable in the field determined by the terms of Wakalatnama itself. Effectiveness of such delegated authorisation and the use thereof stand provided for by section 2 of the Powers of Attorney Act (VII of 1882) as also in Chapter X of the Contract Act (IX of 1872). Authority to withdraw or compromise a, litigation has been held to also be inherent in the engagement of a counsel.'*

Further reliance is placed on Noor Muhammad and others v. Muhammad Siddique and others **(1994 SCMR 1248)** wherein the Apex Court of country has invariably held that:-

> *'It will be seen that the terms of Vakalatnama amply demonstrate that the counsel was empowered to take any step and conduct proceedings in the suit as considered proper by him, and that the same were acceptable to the respondents, who put their signatures on the Deed in token of their approval.'*

A party is always bound by the statement of his counsel unless there is anything contrary in the power of attorney places restriction on the authority, delegated upon the counsel, to compromise or abandon the claim on behalf of his client(s). Reliance is placed on *Hassan Akhtar and others v. Azhar*

Hameed and others **(PLD 2010 Supreme Court 657)** and *Afzal and others v. Abdul Ghani* **(2005 SCMR 946)**. In Hassan Akhtar case *ibid*, the Hon'ble Supreme Court has held:-

> *'13. It is by now well-settled that an Advocate has authority to make statement on behalf of his client, which is binding upon the client, unless there is any thing contrary in the Vakalatnama putting restriction on the authority of the Advocate to compromise or abandon claim on behalf of the client. The Advocate's power in the conduct of a suit allows him to abandon the issue, which in his discretion, advisable in the general interest of his client.'*

4. For the foregoing discussion, the learned revisional Court has wrongly construed law on the subject and has failed to exercise vested jurisdiction as per mandate of law and this Court in exercise of constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is not denuded of correcting the wrong committed by the learned Court below. As such, the impugned order dated 26.02.2020 passed by the learned Addl. District Judge, Wazirabad being illegal is set aside by allowing the constitutional petition in hand and consequent whereof the order dated 04.03.2019 passed by the learned trial Court is restored. No order as to the costs.

(***Shahid Bilal Hassan***)
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Harmooz Khan and others v. Abdul Azeem Khan and others.
Civil Revision No. 115692 of 2017
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

Section 17 of the Undesirable Cooperative Society Act, 1993 does not bar the jurisdiction of civil Court to try the suit where a specific plea of fraud and forgery has been pleaded.

Facts of Case:

Through the instant civil revision, the petitioners have challenged the concurrent findings of court courts below whereby a suit for declaration filed by them was dismissed being barred under section 12, 13 and 17 of the Undesirable Cooperative Society Act, 1993.

Issues In Case:

Whether section 17 of the Undesirable Cooperative Society Act, 1993 bars the jurisdiction of civil Court to try the suit?

Analysis of Issues of Case:

As per Section 9 of the Code of Civil Procedure, 1908, The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In such scenario, the alleged bar contained in section 17 of the Act, 1993ibid cannot take away the plenary jurisdiction enjoined upon the civil Court under section 9, C.P.C. in a situation where the aggrieved person finds himself remediless, particularly, when a dispute requires detailed evidence in order to resolve a factual controversy, as in the present case, because a specific plea of fraud and forgery has been pleaded.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.115692 of 2017

Harmooz Khan and others

Versus

Abdul Azeem Khan and others

J U D G M E N T

Date of hearing: 27.09.2022

Petitioner(s) by: Syed Moazzam Ali Shah, Advocate

Respondent(s) by: Mr. Jawad Tariq Naseem, Advocate for respondent No.13

***SHAHID BILAL HASSAN-J*:** Facts, in precision, are as such that the petitioners instituted a suit for declaration maintaining that their father Mallu Khan was owner of the land measuring 1017-Kanals 06-Marlas falling in Khewat No.33 situated at Malkhoke as per Misl-e-Haqiat Consolidation 1963-64 District Lahore; that the land measuring 553 Kanals was allegedly shown to be transferred in favour of respondent No.1 and 2 vide mutation No.259 dated 05.11.1965; that land measuring 250-Kanals was allegedly shown to be transferred in favour of respondent No.1 and 2 vide sale deed No.15965, thereafter mutation No.261 dated 04.11.1964 was incorporated in the revenue record; that total land measuring 803-kanals 14-Marlas was, purportedly, illegally and fraudulently transferred in favour of the respondents No.1 and 2, however, the petitioners are allegedly still enjoying the possession of the suit property; that the respondent No.2 made many alleged illegal transactions and finally the property was transferred in favour of the respondent No.13 illegally and unlawfully.

The respondent No.13 appeared in the suit and orally prayed for rejection of the plaint by taking a stance that the suit of the petitioner(s) is barred under section 12, 13 and 17 of the Undesirable Cooperative Society Act, 1993. The learned trial Court vide impugned order dated 04.07.2017 rejected the plaint. The petitioners being aggrieved of the same preferred an appeal but it was dismissed *in limine* vide impugned judgment and

decree dated 20.09.2017; hence, the instant revision petition.

2. Heard.

3. Section 9 of the Code of Civil Procedure, 1908 reads:-

> ***'9. Courts to try all Civil Suits unless barred.*** *– The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'*

In the present case, the respondent No.13 asserted before the learned Courts below as well as before this Court that section 17 of the Undesirable Cooperative Society Act, 1993 bars the jurisdiction of civil Court to try the suit. For ready reference the same is reproduced as under:-

> *'Save as otherwise provided in this Act, no court shall have jurisdiction in respect of any matter, which a co-operatives board and the co-operative judge are empowered by or under this Act to determine and no injunction or process or order shall be granted by any court or authority in respect of any action taken or to be taken in exercise of any power conferred by or under this Act.'*

However, when the contents of the plaint are gone through it appears that the petitioners have alleged fraud and forgery, mainly committed by the respondents No.1 and 2 and action of the respondent No.13 has been challenged, rather it has been pleaded that the land measuring 553 Kanals was allegedly shown to be transferred in favour of respondent No.1 and 2 vide mutation No.259 dated 05.11.1965 and the patch of land

measuring 250-Kanals was allegedly shown to be transferred in favour of respondent No.1 and 2 vide sale deed No.15965, thereafter mutation No.261 dated 04.11.1964 was incorporated in the revenue record, which was illegally and fraudulently transferred in favour of the respondents No.1 and 2 as contended by the petitioners and the petitioners are purportedly still enjoying the possession of the suit property. It was further pleaded that the respondent No.2 made many alleged illegal transactions and finally the property was transferred in favour of the respondent No.13 illegally and unlawfully. In such scenario, the alleged bar contained in section 9 of the Act, 1993 *ibid* cannot take away the plenary jurisdiction enjoined upon the civil Court under section 9, C.P.C. in a situation where the aggrieved person finds himself remediless, particularly, when a dispute requires detailed evidence in order to resolve a factual controversy, as in the present case, because a specific plea of fraud and forgery has been pleaded. In the present case, at the cost of repetition, the main grievance of the petitioners is against the respondents No.1 and 2 and not against the respondent No.13, therefore, the barring section of the Act, 1993 does not debar the suit of the petitioners. In *M/s Sui Northern Gas Pipelines Limited (SNGPL) v. M/s. Noor CNG Filling Station* **(PLJ 2022 SC 288)**, the Apex Court of the country has invariably held that:-

> *'10. The question of implied bar has been raised in this Court for the first time and nothing was pleaded in the Trial Court, Appellate Court and the High Court. Under Section 9 of C.P.C., the Civil Courts have the jurisdiction to try all suits of a civil nature excepting suits of which their*

cognizance is either expressly or impliedly barred. The congregated in a routine, save as the conditions laid down are fulfilled. The presumption of lack of jurisdiction may not be gathered until the specific law enacted by the legislation debars Court from exercising its jurisdiction with specific remedy within the hierarchy which may attain the finality of order or the controversy involved.'

4. Pursuant to the above discussion, it is observed that in the matter in hand, the civil Court has jurisdiction to entertain the suit. The learned Courts below have failed to rightly construe law on the subject and have to appreciate the law on a true perspective. Therefore, the impugned orders and decrees cannot be allowed to hold field further. Resultantly, by allowing the revision petition in hand, the impugned orders and decrees are set aside and case is remanded to the learned trial Court to decide the same afresh after obtaining written statement(s), framing of issues and recording evidence of the parties, on merits, in accordance with law. No order as to the costs.

5. The adversaries are directed to appear before the learned trial Court on 20.10.2022, positively.

(Shahid Bilal Hassan)
Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court
Niamat Bibi, etc. v. Muhammad Rafique, etc.
Civil Revision No.1148 of 2013
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
When two persons enter into any agreement pertaining to financial or future obligations, the instrument should be attested by two men or one man and two women, so that one may remind the other.

Facts of Case:
The respondents/plaintiffs instituted a suit for specific performance of an agreement to sell and learned trial Court decreed the suit in favour of the respondents/plaintiffs. The petitioners being dissatisfied preferred an appeal against the same but the learned appellate Court dismissed the appeal; hence, the instant revision petition.

Issues In Case:
How many witnesses are required to prove the execution of an agreement pertaining to financial or future obligations?

Analysis of Issues of Case: Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 provides that in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly;‘ meaning thereby when two persons enter into any agreement pertaining to financial or future obligations, the instrument should be attested by two men or one man and two women, so that one may remind the other. Article 79 of the Qanun-e-Shahadat Order, 1984 enumerates the procedure of proof of execution of document required by law to be attested.

Form No.HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT,
LAHORE JUDICIAL DEPARTMENT

Civil Revision No.1148 of 2013

Sr. No. of order/ proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties of counsel, where necessary

29.09.2022 Mian Muhammad Hussain Chotya & Mr. Muhammad Adnan Naseer Chohan, Advocates for the petitioners
Mr. Salim Khan Chechi & Mr. Abdul Majeed-I, Advocates for the respondents

Precisely, the respondents/plaintiffs instituted a suit for specific performance of an agreement to sell dated 10.11.1987 in respect of plot situated in Khasra No.759/242, previous Khewat No.15 and present Khewat No.21, Khatuni No.43, as per register Record of Rights for the year 2000-2001, Mauza Saidrah Khurd, District Sialkot, contending therein that predecessor in interest of the petitioners namely Noor Muhammad entered into an agreement to sell with the respondents in respect of the suit land and received Rs.10,000/- as earnest money and promised to execute the sale deed after three months after receiving the remaining sale consideration Rs.30,000/- and he made an endorsement in presence of the witnesses at the back side of the agreement to sell in question. It was further asserted that the predecessor in interest of the petitioners handed over the peaceful possession of the plot to the respondents and through the said endorsement Noor Muhammad agreed to execute the sale deed after redemption of the suit land. After death of Noor Muhammad the respondents came to know that the land in question has been redeemed from the Bank but his legal heirs refused to transfer the suit land.

The suit was contested by the present petitioners/ defendants by way of filing written statement wherein they controverted the averments of plaint and prayed for dismissal of the suit. The divergence in pleadings of the parties was summed up into issues and evidence of the parties in pro and contra was recorded. On conclusion of trial, the learned trial Court vide impugned judgment and decree dated 16.02.2010 decreed the suit in favour of the respondents/plaintiffs. The petitioners being dissatisfied preferred an appeal against the same but the learned appellate Court vide impugned judgment and decree dated 06.12.2012 dismissed the appeal; hence, the instant revision petition.

2. Heard.

3. Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 provides that *in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly;'* meaning thereby when two persons enter into any agreement pertaining to financial or future obligations, the instrument should be attested by two men or one man and two women, so that one may remind the other.

Article 79 of the Qanun-e-Shahadat Order, 1984 enumerates the procedure of proof of execution of document required by law to be attested; for ready reference the said provision of law is reproduced here:-

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

In the present case, the respondents/plaintiffs claim decree for specific performance of agreement to sell (Ex.P1) with regards to the property in dispute allegedly entered into by predecessor in interest of the petitioners namely Noor Muhammad with them, but the respondents/plaintiffs, in order to prove the execution of the alleged agreement to sell (Ex.P1), have failed to produce marginal witnesses of the same and only produced Muhammad Akram (P.W.3) and Muhammad Sarwar (P.W.4), who are witnesses of alleged statement made overleaf on 25.01.1988 and not of alleged agreement to sell dated 10.11.1987, besides other witnesses, meaning thereby the original agreement to sell dated 10.11.1987 has not been proved as per requirements of law as enunciated under Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 and in this regard, this Court seeks guideline from the celebrated judgment reported as *Hafiz Tassaduq Hussain Vs. Muhammad Din through Legal Heirs and others* (**PLD 2011 Supreme Court 241**) and Mst. Rasheeda Begum and others v. Muhammad Yousaf and others (2002 SCMR 1089).

In addition to the above, admittedly, the respondents did not agitate the matter before any forum or issued any legal notice to the predecessor in interest of the petitioners for

performance of his part of alleged agreement in his life time despite the fact that he remained alive for a considerable period of five years after execution of alleged agreement to sell (Ex.P1), which casts doubt about the veracity and authenticity of the same. It is also notable that the respondents pleaded that the petitioners have got redeemed the suit property and intended to sale out the same but while appearing in the witness box P.W.9- Muhammad Rafique, one of the plaintiffs during cross examination deposed that he did not know as to when the property was redeemed and further stated that when suit was instituted the property was still mortgaged with the Bank but the plaintiffs did not implead the concerned Bank in the array of the defendants. All these facts lead this Court to the conclusion that the document i.e. agreement to sell Ex.P1 has been maneuvered only to deprive the petitioners of their valuable rights.

4. Pursuant to the above, the learned Courts below have misread and non-read evidence of the parties and have committed material illegalities and irregularities. Both the Courts have failed to exercise vested jurisdiction as per mandate of law, which has resulted in miscarriage of justice as the respondents were seeking relief under Specific Relief Act and overwhelming as well as unimpeachable evidence was required to prove their stance, wherein they failed because they did not produce the marginal witnesses of the alleged original agreement to sell and even did not produce any evidence as to when, at what place and in whose presence the bargain with regards to sale of the disputed property took place, which culminated into execution of alleged agreement to sell. When

the position is as such, the discretionary relief of specific performance cannot be extended to the respondents/plaintiffs.

5. In view of the above, the revision petition in hand is accepted, impugned judgments and decrees dated 16.02.2010 and 06.12.2012, respectively, are set aside, consequent whereof, suit of the respondents/plaintiffs for specific performance stands dismissed. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Approved for reporting.

Judge

M A. Hassan

Lahore High Court, Lahore
Mst. Bharai Bibi And Others v. Muhammad Arif And Another Civil Revision No.10872 Of 2021
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) The beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction.

ii) The efflux of time does not extinguish the right of inheritance and limitation does not run against a void transaction based on fraud.

Facts of Case:
The suit for declaration along with permanent injunction was decreed. However, the appeal was accepted resulting in dismissal of suit, hence, the instant revision petition.

Issues In Case:
i) What evidence is required to be produced for discharging burden to prove sanctity of an oral gift by beneficiary thereof, which gift is challenged or called into question especially on the basis of fraud and misrepresentation?

ii) Does the efflux of time extinguishes the right of inheritance and does limitation run against a void transaction based on fraud?

Analysis of Issues of Case:
i) A transaction which is based on an oral gift has two parts, namely the fact of the oral gift which has to be independently established by proving through cogent and reliable evidence the three necessary ingredients of a valid gift i.e., offer, acceptance and delivery of possession. It is to be proved that when, where and in whose presence oral gift was made. Further, no gift in the ordinary course of human conduct can be made without reason or justification which is also to be proved. In addition, particulars whatsoever of the time, date, place and witnesses of the declaration of the gift made by donor have to be provided in pleadings or any evidence can be produced in this behalf. The mutation on the basis of an oral gift has to be independently established by adopting the procedure provided in the Land Revenue Act and the rules framed thereunder as well as the evidentiary aspects of the same in terms of the Qanun-e-Shahadat Order, 1984, including production of marginal witnesses of the disputed mutations, *Patwari Halqa* and Revenue Officer who attested the mutations. Moreover, appearance of the donor before the revenue officer for the purpose of getting the disputed

mutations sanctioned has to be proved as well. To add, the onus was heavily placed on the shoulders of beneficiary to prove that the transaction of gift was effected without exercising undue influence over the donor or that donor had independent advice at the relevant time and that donor had effected the transaction with free will and consent.

ii) Fraud vitiates the most solemn transaction; therefore, the limitation would run from the date of knowledge.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.10872 of 2021

Mst. Bharai Bibi and others

VERSUS

Muhammad Arif and another

JUDGMENT

Date of Hearing: 11.10.2022

Petitioner(s): Mian Muhammad Athar, Advocate

Respondent(s): Rai Muhammad Zubair, Advocate for the respondent No.1

Nemo for respondent No.2

SHAHID BILAL HASSAN-J: Facts in concision are as such that the petitioners instituted a suit for declaration alongwith permanent injunction against the respondents to the effect that they are owners of the property measuring 29-Kanals 19-Marlas comprising Khewat No.3 & 4 vide inheritance mutation No.44 and Rapt No.17 dated 11.09.1996, situated at Mauza Sayed Mohal, Tehsil Kamalia; that they are in possession through

„Chakotadar" and alleged oral gift mutation No.45 vide

Rapt No.2 dated 30.09.1996 on behalf of petitioners in favour of their mother Mst. Sattan Bibi and subsequently the alleged oral gift mutation No.46 dated 16.10.1996 on behalf of Mst. Sattan Bibi in favour of the respondents are against law and facts based on fraud, conspiracy, forged, result of collusion and ineffective upon the rights of the petitioners/plaintiffs, therefore, the same are liable to be cancelled.

The suit was contested by the respondent No.1 while submitting written statement wherein he controverted the averments of the plaint and raised different legal as well as factual objections, whereas respondent No.2 submitted conceding written statement in favour of the petitioners/ plaintiffs.

The divergence in pleadings of the parties was summed up into issues by the learned trial Court. Both the parties adduced their oral as well as documentary evidence in support of their respective contentions. On conclusion of trial, the learned trial Court, vide judgment and decree dated 03.05.2018 decreed the suit in favour of the petitioners/plaintiffs. The respondent No.1 being aggrieved of the said judgment and decree preferred an appeal and the learned appellate Court vide impugned judgment and decree dated 11.12.2020 accepted the appeal, set aside the judgment and decree date 03.05.2018 and dismissed suit of the petitioners; hence, the instant revision petition.

2. Learned counsel for the petitioners has argued that the impugned judgment and decree is against law and facts of

the case; that no question of limitation arises in cases of fraud, thus, the suit was within time after gaining knowledge of fraud at the hands of the respondents by the petitioners; that the impugned judgment and decree is based on misreading and non-reading of evidence on record; that the learned appellate Court has failed to apply independent judicious mind and has knocked out the petitioners on technical grounds; that the impugned judgment and decree has been passed in a summary manner arbitrarily; that material illegalities and irregularities have been committed; that the impugned judgment and decree is based on surmises and conjectures; hence, the same is not sustainable in the eye of law. Therefore, the revision petition in hand may be accepted and by setting aside the impugned judgment and decree, suit of the petitioners may be decreed by restoring the judgment and decree dated 03.05.2018 passed by the learned trial Court.

3. Naysaying the above submissions, learned counsel representing the respondent No.1 has supported the impugned judgment and decree and has prayed for dismissal of the revision petition in hand. Respondent No.2 has already been served personally but no one is present on his behalf, therefore, he is proceeded against ex parte.

4. Heard.

5. Ingredients for a valid gift are: offer, acceptance and delivery of possession. When sanctity of a gift is challenged or called into question especially on the basis of fraud and misrepresentation, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the

original transaction. Reliance is placed on judgment reported as *Peer Baksh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417)**. However, in the present case, the respondent No.1 has failed to lead evidence showing that as to when the offer was made by the donors i.e. the present petitioners to their mother Mst. Sattan Bibi, which was accepted by the donee and thereafter possession was delivered to the donee i.e. Mst. Sattan Bibi where-after the mutation No.45 was entered and attested in favour of Mst. Sattan Bibi. Even the names of witnesses in whose presence such transaction took place and the place where such incident occurred has not been pleaded and proved by the respondent No.1. Moreover, the respondent No.1 has also not been able to lead evidence showing that as to when, where and in whose presence Mst. Sattan made offer of gifting the suit property to the respondents, which was accepted by them and thereafter she transferred the possession to the respondents and mutation No.46 was entered and executed in their favour. Only solitary statement of the respondent No.1 is on record and no other witness i.e. marginal witnesses of the disputed mutations, Patwari Halqa and Revenue Officer who attested the mutations have been produced by the respondent No.1. All these facts lead me to conclude, especially after submission of conceding written statement by the respondent No.2, that the transaction of alleged gift mutations No.45 and 46 have been maneuvered by the respondent No.1 only to deprive the petitioners of their valuable rights in inherited property. All this show that the respondent No.1 has failed to discharge the heavy burden of proving the valid gift in favour of the respondents. In a

judgment reported as *Faqir Ali and others v. Sakina Bibi and others* **(PLD 2022 Supreme Court 85)**, the Apex Court of the country has held:-

> *„8. Although stricto sensu, it is not necessary for a donor to furnish reasons for making a gift yet no gift in the ordinary course of human conduct can be made without reason or justification be it natural love and affection for one or more of his children who may have taken care of the donee in his old age and thus furnished a valid basis and justification for the donor to reward such effort on the part of the donee by way of making a gift in his/her favour. In the case of Barkat Ali v. Muhammad Ismail (2002 SCMR 1938) this Court has already taken notice of the fact that in the wake of frivolous gifts generally made to deprive female members of the family from benefit of inheritance available to them under Sharia as well as the law, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to a legal heir who otherwise stands to inherit from the estate of a deceased predecessor or relative and that the course of inheritance is not bypassed or artificially blocked. In the present case, no reason is available on the basis of which the alleged gift appears to have been made. The only reason furnished by Faqir Ali, DW.8 and Munir Ali, DW.10 in their statements before the trial court was that their father Muhammad Ali had transferred the suit land to gain divine favour of God by pleasing Him and the exact words used were "Allah Waasty". It is therefore, clear and obvious to us that natural love and affection was not the consideration of the gift and instead as alleged by the aforenoted two witnesses the intention behind the transaction was to please God, the Almighty. Even if that claim is*

accepted as true, it is ex facie hard to understand how depriving his real daughters of their rightful share in the inheritance/estate of the donor could be interpreted as an act which would please God, the Almighty Who had specifically ordained that the daughters are entitled to a specified share by way of inheritance in the estate of their father on his demise. It therefore appears that the gifts were only a device to deprive the daughters from inheritance and the gift mutations were sanctioned to bypass the law of inheritance and to disinherit the daughters. In this background, the High Court in our opinion was correct in coming to the conclusion that the gift was based on a fraudulent intent. It is settled law that fraud vitiates even the most solemn transactions and any transaction that is based upon fraud is void and notwithstanding the bar of limitation. Courts would not act as helpless by stands and allow a fraud to perpetuate."

In the said judgment, it has further been held:-

„10. We also find that a transaction which is based on an oral gift has two parts, namely the fact of the oral gift which has to be independently established by proving through cogent and reliable evidence the three necessary ingredients of a valid gift as noted above. However, that is not enough. The second ingredient i.e. mutation on the basis of an oral gift has to be independently established by adopting the procedure provided in the Land Revenue Act and the rules framed thereunder as well as the evidentiary aspects of the same in terms of the Qanun-e-Shahadat Order, 1984."

In judgment reported as *Muhammad Boota through L.Rs v. Mst. Bano Begum and others* **(2005 SCMR 1885)**, it has been held:-

> *„---------- The petitioner in fact wants to deprive his real sister from the legacy of their parents on the basis of alleged gift deed executed in his favour by Mst. Saira Bibi, their real mother, who by no stretch of imagination could deprive her real daughter from the share due without any justifiable reasons which are badly lacking in this case which otherwise does not appeal to logic and reason. The gift deed was admittedly executed by an ailing and 80/85 years old woman who had suffer an attack of paralysis and lost her memory, (attention is invited to the statement of Mst. Anwar Bibi) and therefore, it should have been substantiated by worthy of credence evidence which could not be done. The petitioner could not show as to when the offer made by the donor and when it was accepted."*

6. Nothing has been brought on record to show that at the time of execution of alleged gift mutation No.45 why the petitioners excluded their near and dear ones. Appearance of the petitioners and even Mst. Sattan Bibi before the revenue officer for the purpose of getting the disputed mutations sanctioned has not been proved because except solitary statement of the D.W.1 no other evidence in this regard is available on record. In judgment reported as *Mian Ghayassuddin and others v. Mst. Hidayatun Nisa and others* **(2011 SCMR 803)**, the Apex Court of the country held:-

> *„The onus was heavily placed on the shoulders of petitioners to have proved that the transaction of gift was effected without exercising undue influence over the donor or that she had independent advice at the relevant time and that she had effected the transaction with her free will*

and consent."

The said ratio was further reiterated in judgment reported as *Rab Nawaz and others v. Ghulam Rasul* **(2014 SCMR 1181)**. In judgment reported as *Peer Baksh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417)** it was held:-

> *„The petitioner was under an obligation to establish the ingredients of the gift claimed by him under the impugned mutations. However, no particulars whatsoever of the time, date, place and witnesses of the declaration of the gift made by Ghulam Muhammad deceased in favour of the petitioner have been provided in his pleadings nor any evidence could be produced by him in this behalf. This is fatal to the petitioner"s plea. Admittedly Ghulam Muhammad deceased was a patient of paralysis and was above 85 years of age when the disputed gift mutations were recorded on his statement in 1974. He is justifiably claimed to be in frail physical condition at the time."*

7. Fraud vitiates the most solemn transaction; therefore, in this particular case, it can safely be held that the limitation would run from the date of knowledge; therefore, the suit is well within time, even the efflux of time does not extinguish the right of inheritance and limitation does not run against a void transaction. Reliance is placed on *Peer Baksh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417).**

8. Pursuant to the above discussion it is observed that the learned appellate Court has failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the learned appellate Court has misread evidence of the parties and when the position is as such, this Court is vested with authority

to undo the same in exercise of supervisory jurisdiction under section 115, Code of Civil Procedure, 1908.

9. In view of the above, while placing reliance on the judgments supra as well as judgments reported as *Islam-Ud-Din*

through L.Rs. and others v. Mst. Noor Jahan through L.Rs. and others **(2016 SCMR 986)**, *Mst. Khalida Azhar v. Viqar Rustam Bakhsh and others* **(2018 SCMR 30)**, *Muhammad Nawaz and others v. Sakina Bibi and others* **(2020 SCMR 1021)** and *Farhan Aslam and others v. Mst. Nuzba Shaheen and another* **(2021 SCMR 179**), the revision petition in hand is allowed, impugned judgment and decree dated 11.12.2020 passed by the learned appellate Court is set aside, consequent whereof the suit of the petitioners is decreed by restoring the judgment and decree dated 03.05.2018 passed by the learned trial Court. No order as to the costs.

SHAHID BILAL HASSAN
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court, Lahore
Muhammad Yaqoob, etc. v. Raheela Yousaf, etc.
Civil Revision No.18764 of 2022
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
Transferee Court is required to issue notice parvee to the parties and their counsel, fixing a date to appear before it if the case is transferred under administrative order of District Judge.

Facts of Case:
Instant revision petition is brought by petitioners being aggrieved of judgment & decree dated 14.12.2020 passed by learned trial court to the effect of dismissing their suit for want of evidence under Order XVII, Rule 3, Code of Civil Procedure, 1908, and judgment & decree dated 14.01.2022 passed by the learned Appellate Court dismissing their consequently filed appeal in limine.

Issues In Case:
Whether, instead to passing order giving absolute last opportunity for evidence, transferee court is required to issue notice parvee to the parties or their counsel fixing a date to appear before it after transfer of case under administrative order of District Judge if the case is transferred under administrative order of District Judge?

Analysis of Issues of Case:
If the case is transferred under section 24-A (2) of the Code of Civil Procedure, 1908, the parties are directed to appear before the learned transferee Court and if party fails to appear then penal order can be passed against such party. However, if case is transferred with administrative order of District Judge, then Para 6 of the Chapter XIII, Volume I of the High Court Rules and Orders require that the Court from which the case is transferred should inform the parties fixing a date to appear before the transferee Court.

JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.18764 of 2022
Muhammad Yaqoob, etc.
Versus
Raheela Yousaf, etc.

J U D G M E N T

Date of hearing: ***11.10.2022***

Petitioner (s): Mian Zaffar Iqbal Kalanauri, Advocate

Respondent (s): Mr. Basharat Ali Gill, Additional Advocate General Punjab for respondents No.2 & 3

Respondents No.1 & 4 ex parte

SHAHID BILAL HASSAN-J: Succinctly, the petitioners instituted a suit for declaration with permanent and mandatory injunction against the respondents, which was duly contested by them. Out of the divergent pleadings of the parties, the learned trial Court framed issues and fixed the suit for evidence of the petitioners/plaintiffs but they failed to adduce their evidence; therefore, the learned trial Court vide impugned judgment and decree dated 14.12.2020 dismissed suit of the petitioners for want of evidence under Order XVII, Rule 3, Code of Civil Procedure, 1908. The petitioners being aggrieved preferred an appeal but it was dismissed in limine vide impugned judgment and decree dated 14.01.2022 by the learned Addl. District Judge, Gujranwala; hence, the instant revision petition.

2. Heard.

3. It is an established and admitted fact on record that when under administrative order the case was transferred from one Court to the other Court, no notice *parvee* was issued by the transferee Court to the parties or their counsel, as is evident from the order dated 05.11.2020, which divulges that the case was received through transfer under administrative order passed by the learned District Judge, Gujranwala and the Advocates were observing strike and the learned trial Court adjourned the case by giving absolute last opportunity for evidence of the plaintiffs. It is observed that instead of passing such an order, giving absolute last opportunity, the learned trial Court ought to have issued notices *parvee* to the parties, because the case was transferred under administrative order and not under section 24-A(2) of the Code of Civil Procedure, 1908 where the parties are directed to appear before the learned transferee Court and if party fails to appear then penal order can be passed against such party; however, here the case is not as such, rather otherwise, as highlighted above. Para 6, Chapter XIII, Volume I of High Court Rules and Orders provides:-

> *"6. When a case is transferred by administrative order from one Court to another, the Presiding Officer of the Court from which it has been transferred shall be responsible for informing the parties regarding the transfer, and of the date on which they should appear before the Court to which case has been transferred. The District*

> *Judge passing the order of transfer shall see that the records are sent to the Court concerned and parties informed of the date fixed with the least possible delay. When a case is transferred by judicial order the Court passing the order should fix a date on which the parties should attend the Court to which the case is transferred.'*

However, in the present case, none of the requirements enunciated in the above para 6 of the Chapter XIII, Volume I of the High Court Rules and Orders has been adhered to because nothing is on record to suggest that the Court from which the case was transferred ever informed the parties to appear before the transferee Court on such and such date, rather it has manifested from the record that the case was transferred under administrative order without fixing a date to appear before the transferee Court and no information in this regard was imparted to the parties; thus, it was required by the learned transferee Court to issue notice *parvee* to the parties and their counsel, fixing a date to appear before it. In such scenario, what to speak of passing of a penal order without putting the petitioners on caution as has been held by the Apex Court of the country in a judgment reported as *Moon Enterprises CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another* (**2020 SCMR 300**); thus, the said precedent being on different facts is not attracted

in the instant case and the ratio of the same has wrongly been appreciated by the learned subordinate Courts.

This Court while dilating upon a case of almost identical facts, wherein the defendant was proceeded against ex parte by the Court where the suit was pending and was transferred to some other Court under administrative order and without issuing notice to him he was proceeded against ex parte, reported as *Azizullah Khan and 4 others v. Arshad Hussain and 2 others* **(PLD 1975 Lahore 879)** has held:-

> *'According to section 24-A(2), C.P.C. and the relevant rule of High Court Rules and Orders, as referred to above, if the order of the learned District Judge transferring the case had been passed in the presence of the absentee defendants or they had been intimated in accordance with that order, then in case of their absence before the transferee Court they could be lawfully proceeded against ex parte. If the absentee defendant can join the proceedings at the subsequent stage even after ex parte order has been passed against him, as also held in Messrs Landhi Industrial Trading Estages Ltd., Karachi v. Government of West Pakistan through Excise & Taxation Officer 1970 SCMR 251, then how it can be presumed that in the absence of any intimation duly furnished to him with regard to transfer of the case from one Court to another he can be proceeded against ex parte simply on the basis of ex parte order already passed against him. His right to join future*

proceedings implies that after the transfer of the case from the Court where such proceedings are pending if the same have not been transferred in his presence or without intimation to him, then he cannot be proceeded against ex parte unless duly served upon with regard to transfer of the case to the successor Court. In this view of the matter the contention of the learned counsel for the respondents, that since there is no clear provision in the amended law to issue notice to the parties after the case has been received on transfer, therefore, said notice cannot be issued, has no substance. As laid down in 1970 SCMR 251, the rules of procedure as laid down in the Code are principally intended for advancing justice and not for retarding it on bare technicalities.'

4. Pursuant to the above discussion it can safely be held that the impugned order/judgment and decree, dismissing the suit for want of evidence, is harsh in nature, especially when after transfer of the case from one Court to the other Court, the petitioners were not informed, so as to enable them to produce their evidence and even they were not warned to face the consequences in case of their failure to produce complete set of evidence; thus, the impugned order, judgments and decrees cannot be allowed to hold field further, because it is requirement of law that cases should be decided on merits and technicalities should not be allowed to hinder the administration of justice. Moreover, this Court while exercising revisional

jurisdiction under section 115 of the Code of Civil Procedure, 1908, has ample power to correct the illegality and irregularity committed by the learned Courts below.

5. The crux of the discussion above is that the revision petition in hand is allowed, impugned order 14.12.2020, judgments and decrees passed by the learned Courts below are set aside and case is remanded to the learned trial Court which will be deemed to be pending at the stage when the impugned order dated 14.12.2020 was passed with a direction to afford two clear opportunities to the petitioners for production of their complete set of evidence. The parties are directed to appear before the learned trial Court on 27.10.2022, positively. No order as to the costs.

(SHAHID BILAL HASSAN)
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Mahmooda Bibi v. Muhammad Khurshid Alem & others.
Civil Revision No.1426 of 2015
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) When validity of gift is challenged, the burden lies on beneficiary who has to prove not only the valid execution of gift deed or mutation but also the original proceedings of gift.

ii) It is not necessary for a donor to furnish reasons for making a gift because it is always made due to natural love and affection

iii) Yes, in case of oral gift it is necessary to prove oral gift and mutation (entered thereupon) independently.

Facts of Case:

Initially, a suit for declaration with consequential relief was instituted by the present petitioner challenging the vires and validity of disputed gift mutation. The trial Court vide impugned judgment and decree dismissed the suit. The petitioner being aggrieved of the said judgment and decree preferred an appeal but the same was also dismissed vide impugned judgment and decree by the learned appellate Court; hence, the instant revision petition.

Issues In Case:

i) When validity of gift is challenged then on whom burden to prove lies?

ii) Whether donor has to furnish reasons while making the gift?

iii) Whether in case of oral gift it is necessary to prove oral gift and mutation (entered thereupon) independently?

Analysis of Issues of Case:

i) Ingredients for a valid gift are: offer, acceptance and delivery of possession. When sanctity of a gift deed or mutation is challenged or called into question, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original proceedings of gift.

ii) It is not necessary for a donor to furnish reasons for making a gift yet no gift in the ordinary course of human conduct can be made without reason or justification be it natural love and affection for one or more of his children who may have taken care of the donee in his old age and thus furnished a valid basis and justification for the donor to reward such effort on the part of the donee by way of making a gift in his/her favour.

iii) Transaction which is based on an oral gift has two parts, namely the fact of the oral gift which has to be independently established by proving through cogent and reliable evidence the three necessary

ingredients of a valid gift as noted above. However, that is not enough. The second ingredient i.e. mutation on the basis of an oral gift has to be independently established by adopting the procedure provided in the Land Revenue Act and the rules framed there under as well as the evidentiary aspects of the same in terms of the Qanun-e-Shahadat Order,
1984." .

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.1426 of 2015

Mahmooda Bibi **Versus** Muhammad Khurshid Alem & others

JUDGMENT

Date of Hearing: 13.10.2022

Petitioner(s): Hafiz Muhammad Yusuf, Advocate

Respondent(s): Nemo

SHAHID BILAL HASSAN-J: Initially, a suit for declaration with consequential relief was instituted by the present petitioner alongwith her sisters namely Shamim Akhtar and Razia Bibi against their three brothers i.e. respondents No.1 to 3 challenging the vires and validity of disputed gift mutation No.1315 dated 31.10.2002 allegedly sanctioned in favour of respondents No.1 to 3. However, later on, Mst. Razia Bibi withdrew suit to her extent on 29.10.2011, who was transposed as defendant No.4 in the suit. Subsequently, Mst. Shamim Akhtar, after making her statement on oath in the Court and supporting stance of the present petitioner, also withdrew suit to her extent on 24.02.2014 but she was not transposed as defendant and continued as plaintiff. The respondents No.1 to 3 contested the suit by filing written statement, who controverted the averments of plaint and prayed for dismissal of the suit. The defendant

No.4/respondent No.4 Mst. Razia Bibi filed separate written statement in support of version of the respondents No.1 to 3. The divergence in pleadings of the parties was summed up into nine issues including "Relief" on 25.11.2013. Both the parties adduced their oral as well as documentary evidence. The learned trial Court vide impugned judgment and decree dated 31.03.2014 dismissed the suit. The petitioner being aggrieved of the said judgment and decree preferred an appeal but the same was also dismissed vide impugned judgment and decree dated 20.04.2015 by the learned appellate Court; hence, the instant revision petition.

2. Heard.

3. Ingredients for a valid gift are: offer, acceptance and delivery of possession. When sanctity of a gift deed or mutation is challenged or called into question, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original proceedings of gift. Reliance is placed on judgment reported as *Peer Baksh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417)**. However, in the present case, perusal of the plaint shows that the respondents have failed to plead the time, date, place and names of witnesses in whose presence their mother Mst. Sardaran Bibi made offer of making gift in their favour, which was accepted by them, whereafter possession was delivered to them after execution of mutation in dispute (Ex.P1). Even the plaint does not disclose the names of witnesses in whose presence such transaction took place. Moreover, the said pivotal

document (Ex.P1) does not disclose as why the donor had excluded his other legal heirs i.e. the daughters and for what reason he had gifted out the disputed property to his sons i.e. respondents No.1 to 3. All this shows that the respondents No.1 to 3 have failed to discharge the heavy burden of proving the valid gift in their favour. In a judgment reported as *Faqir Ali and others v. Sakina Bibi and others* **(PLD 2022 Supreme Court 85)**, the Apex Court of the country has held:-

> *„8. Although stricto sensu, it is not necessary for a donor to furnish reasons for making a gift yet no gift in the ordinary course of human conduct can be made without reason or justification be it natural love and affection for one or more of his children who may have taken care of the donee in his old age and thus furnished a valid basis and justification for the donor to reward such effort on the part of the donee by way of making a gift in his/her favour. In the case of Barkat Ali v. Muhammad Ismail (2002 SCMR 1938) this Court has already taken notice of the fact that in the wake of frivolous gifts generally made to deprive female members of the family from benefit of inheritance available to them under Sharia as well as the law, the Courts are not divested of the powers to scrutinize the reasons and justification for a gift so that no injustice is done to a legal heir who otherwise stands to inherit from the estate of a deceased predecessor or relative and that the course of inheritance is not bypassed or artificially blocked. In the present case, no reason is available on the basis of which the alleged gift appears to*

have been made. The only reason furnished by Faqir Ali, DW.8 and Munir Ali, DW.10 in their statements before the trial court was that their father Muhammad Ali had transferred the suit land to gain divine favour of God by pleasing Him and the exact words used were "Allah Waasty". It is therefore, clear and obvious to us that natural love and affection was not the consideration of the gift and instead as alleged by the aforenoted two witnesses the intention behind the transaction was to please God, the Almighty. Even if that claim is accepted as true, it is ex facie hard to understand how depriving his real daughters of their rightful share in the inheritance/estate of the donor could be interpreted as an act which would please God, the Almighty Who had specifically ordained that the daughters are entitled to a specified share by way of inheritance in the estate of their father on his demise. It therefore appears that the gifts were only a device to deprive the daughters from inheritance and the gift mutations were sanctioned to bypass the law of inheritance and to disinherit the daughters. In this background, the High Court in our opinion was correct in coming to the conclusion that the gift was based on a fraudulent intent. It is settled law that fraud vitiates even the most solemn transactions and any transaction that is based upon fraud is void and notwithstanding the bar of limitation. Courts would not act as helpless by stands and allow a fraud to perpetuate."

In the said judgment, it has further been held:-

„10. We also find that a transaction which is based on an oral gift has two parts, namely the fact of the oral gift which has to be independently established by proving through cogent and reliable evidence the three necessary ingredients of a valid gift as noted above. However, that is not enough. The second ingredient i.e. mutation on the basis of an oral gift has to be independently established by adopting the procedure provided in the Land Revenue Act and the rules framed thereunder as well as the evidentiary aspects of the same in terms of the Qanun-e-Shahadat Order, 1984."

4. In the present case, admittedly the donor namely Mst. Sardar Bibi was an old aged person i.e. 75/80 years of age and was living with the respondents No.1 to 3, so the execution of gift mutation under duress and fear as well as compulsion cannot be ruled out and it cannot be said to have been executed with free consent especially when before executing any such transaction in favour of the respondents No.1 to 3, her sons, she was not allowed to take her daughters in confidence or consult them. No evidence has been brought on record depicting that the alleged gift mutation was read over to Mst. Sardar Bibi, the donor and made her understand the consequences of the same, especially when she was living at the mercy of the respondents No.1 to 3. D.W.3 namely Sabir Hussain, Patwari Halqa, who entered the disputed mutation, during cross examination deposed that he did not know Mst. Sardaran Bibi personally and he did not enter her CNIC number in his register; that Mst. Sardaran Bibi was identified by five persons came with her.

None of the P.Ws. including P.W.7 Ghulam Sarwar, one of the plaintiffs/respondents deposed that why the disputed property was gifted to the respondents No.1 to 3 by Mst. Sardaran Bibi, whereas in plaint, the plaintiffs/respondents No.1 to 3 pleaded that the same was gifted in lieu of services and out of affection. In judgment reported as *Muhammad Boota through L.Rs v. Mst. Bano Begum and others* **(2005 SCMR 1885)**, it has been held:-

> *,,---------- The petitioner in fact wants to deprive his real sister from the legacy of their parents on the basis of alleged gift deed executed in his favour by Mst. Saira Bibi, their real mother, who by no stretch of imagination could deprive her real daughter from the share due without any justifiable reasons which are badly lacking in this case which otherwise does not appeal to logic and reason. The gift deed was admittedly executed by an ailing and 80/85 years old woman who had suffer an attack of paralysis and lost her memory, (attention is invited to the statement of Mst. Anwar Bibi) and therefore, it should have been substantiated by worthy of credence evidence which could not be done. The petitioner could not show as to when the offer made by the donor and when it was accepted."*

5. Nothing has been brought on record to show that at the time of alleged execution of gift mutation Ex.P1, some independent advice was available to the donor Mst. Sardaran Bibi, which was necessary keeping in view her old age, especially when through the said document the real daughters were going to be excluded to get their shares. In judgment

reported as *Mian Ghayassuddin and others v. Mst. Hidayatun Nisa and others* **(2011 SCMR 803)**, the Apex Court of the country held:-

> *„The onus was heavily placed on the shoulders of petitioners to have proved that the transaction of gift was effected without exercising undue influence over the donor or that she had independent advice at the relevant time and that she had effected the transaction with her free will and consent."*

The said ratio was further reiterated in judgment reported as *Rab Nawaz and others v. Ghulam Rasul* **(2014 SCMR 1181)**. In judgment reported as *Peer Baksh through LRs and others v. Mst. Khanzadi and others* **(2016 SCMR 1417)** it was held:-

> *„The petitioner was under an obligation to establish the ingredients of the gift claimed by him under the impugned mutations. However, no particulars whatsoever of the time, date, place and witnesses of the declaration of the gift made by Ghulam Muhammad deceased in favour of the petitioner have been provided in his pleadings nor any evidence could be produced by him in this behalf. This is fatal to the petitioner"s plea. Admittedly Ghulam Muhammad deceased was a patient of paralysis and was above 85 years of age when the disputed gift mutations were recorded on his statement in 1974. He is justifiably claimed to be in frail physical condition at the time."*

6. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the

matter in hand by appreciating law on the subject; thus, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in *Sultan Muhammad and another v. Muhammad Qasim and others* **(2010 SCMR 1630)** and *Ghulam Muhammad and 3 others v. Ghulam Ali* **(2004 SCMR 1001)**.

7. In view of the above, while placing reliance on the judgments supra as well as judgments reported as *Islam-Ud-Din through L.Rs. and others v. Mst. Noor Jahan through L.Rs. and others* **(2016 SCMR 986)**, *Mst. Khalida Azhar v. Viqar Rustam Bakhsh and others* **(2018 SCMR 30)**, *Muhammad Nawaz and others v. Sakina Bibi and others* **(2020 SCMR 1021)** and *Farhan Aslam and others v. Mst. Nuzba Shaheen and another* **(2021 SCMR 179**), the revision petition in hand is allowed, impugned judgments and decrees are set aside, consequent whereof the suit of the petitioner is decreed, gift mutation No.1315 dated 31.10.2002 is cancelled and the revenue officer(s) is directed to pass inheritance mutation in respect of disputed property in favour of legal heirs of Mst. Sardaran Bibi according to their shares. No order as to the costs.

SHAHID BILAL HASSAN
Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Dr. Hassan Shahryar v. Sana Waqar and 2 others.
Civil Revision No. 13538 of 2020
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) The Union Council in Pakistan would have no jurisdiction in matters of divorce when the spouses are residing in a foreign country rather the officers of Pakistan Mission abroad are authorized to discharge the functions of Chairman under the aforesaid Ordinance.

ii) When an act is performed without any jurisdiction the civil Court being a Court of plenary jurisdiction has authority and competence to look into the matter and proceed with the same in accordance with law as well as pass an appropriate order in this regard.

Facts of Case:

Learned Civil Court by accepting the application of the petitioner under Order VII, Rule 11 CPC rejected the plaint of the respondent but the learned Appellate Court accepted the appeal and set aside the judgment of learned Trial Court and remanded the matter for deciding the same afresh after framing issues and recording evidence. Petitioner through this civil revision challenged the judgment of learned Appellate Court.

Issues In Case:

i) Whether the Union Council in Pakistan would have the jurisdiction in matters of divorce when the spouses are residing in a foreign country?

ii) Whether the Civil Court can issue an injunction to, or stay any proceedings pending before a Chairman or an Arbitration Council?

Analysis of Issues of Case:

i) In view of the Sections 2(b) and 7 of the Muslim Family Laws Ordinance, 1961 and Rule 3(b) of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961, the Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce and in this case the respondent No.1 was residing in the USA as has been admitted by the petitioner. When the position is as such, as observed above, as per Notification S.R.O.No. 1086(K)61 dated 09.11.1961, officers of Pakistan Mission abroad are authorized to discharge the functions of Chairman under the aforesaid Ordinance.

ii) So far the argument that the Family Court cannot issue an injunction to, or stay any proceedings pending before a Chairman or an Arbitration Council under section 22 of the Family Courts Act, 1964; in this regard it is observed that when an act is performed without any jurisdiction, as discussed above, the civil Court being a Court of plenary jurisdiction has authority and competence to look into the matter and proceed with the

same in accordance with law as well as pass an appropriate order in this regard. Even if the Chairman/respondent No.2, for the sake of arguments, is considered to have jurisdiction, the trial Court, though its jurisdiction is barred, can look into the matter as has been held in Messrs Mardan Ways SNG Station v. General Manager SNGPL and others (2022 SCMR 584).

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.13538 of 2020

Dr. Hassan Shahryar
…Versus…
Sana Waqar and 2 others

JUDGMENT

Date of Hearing: **27.09.2022**

Petitioner(s) for: M/s Mustafa Ramday, Saad Sibghat-Ullah, Mahnoor Ahmed, Asfand Mir and Abdul Moiz Khan , Advocate

Respondent(s) for: M/s Muhammad Ahmad Qayyum (ASC), Shamil Arif and Zahir Abbas, Advocates for respondent No.1

SHAHID BILAL HASSAN-J: Facts, in concision, are as such that the petitioner married with respondent No.1 as per Islamic rites and rituals on 15.05.2006 at Lahore (Pakistan) and Nikahanama was registered with Union Council No.129, Neelam Block, Allama Iqbal Town, Lahore; that from this wedlock three children were born. The petitioner and respondent No.1 went to reside in the United States after their marriage. Allegedly, in the year 2015, the respondent No.1 instituted a suit for dissolution of marriage before the Common Pleas of Center Country, Pennsylvania Civil Action Law for dissolving marriage and physical custody of the children and also applied for maintenance allowance; that the petitioner tried his best

efforts to salvage the relationship and continue the marriage for the sake of the children. The petitioner purportedly tried his best to reconcile with the respondent No.1 but she was adamant therefore, the petitioner gave his consent to the Courts in Pennsylvania to dissolve the marriage; that the proceedings in the United States are still pending and have not been finally adjudicated upon and the petitioner has been, regularly, paying maintenance of his children. The petitioner shifted to Lahore and initiated divorce proceedings against the respondent No.1 under the provisions of the West Pakistan Muslims Family Laws Ordinance, 1961 and the rules framed thereunder by pronouncing divorce upon the respondent No.1 which was reduced into writing by way of deed of divorce dated 05.01.2017 and notices were also issued through the Union Council concerned in this regard; that the respondent No.1 was also put to notice of the divorce by way of Email dated 10.01.2017 in which the deed of divorce was contained as an attachment; that subsequently, a second deed of divorce dated 10.02.2017 was put into writing and notices were also issued to the respondent No.1 through the concerned Union Council and the same was further intimated to respondent No.1 through Email dated 14.03.2017 in which the deed of divorce was contained as an attachment; that in pursuance of the said notice, father of the respondent No.1 appeared in the Arbitration proceedings before the respondent No.2, in which he challenged the jurisdiction of the proceedings pending before the respondent No.2.

Simultaneously, the father of respondent No.1 instituted a suit in his own name before the learned Civil Court at Lahore on 15.07.2017 seeking a declaration to the effect that the proceedings pending before the respondent No.2 may be declared null and void; that the said suit was contested by the present petitioner, consequently, the interim injunction dated 18.07.2017 was vacated vide order dated 18.09.2017 and the matter was fixed for arguments on the maintainability of the suit. However, while concealing pendency of earlier suit, the suit under discussion was filed on 20.09.2017 by the respondent No.1 through her father as an attorney seeking the same relief as claimed in the earlier suit and the earlier suit was withdrawn on 21.09.2017 with permission to file afresh. The petitioner while submitting written statement controverted the averments of plaint and also filed an application under Order VII, Rule 11, Code of Civil Procedure, 1908 for rejection of plaint of the suit of respondent No.1 contending that the civil Court has no jurisdiction in the matter as only the Arbitration Council of a Union Council has jurisdiction and an injunction cannot be issued to stay proceedings before it; that the suit is not maintainable. The respondent No.1 filed her written reply. The learned trial Court vide order dated 09.05.2019 accepted the said application and rejected the plaint of the suit, instituted by the respondent No.1 through her father. The

respondent No.1 impugned the said order by filing an appeal on 03.06.2019. The petitioner also filed an appeal against the said order specifically against two observations made therein i.e. the learned trial Court had observed that the petitioner and respondent No.1 were nationals of USA while they were only residents and not nationals and that since respondent No.1 had appeared in the proceedings before respondent No.2 through her father acting as her attorney, there was no need to issue fresh notices through the Pakistan Mission in the United States.

The learned appellate Court vide impugned consolidated judgment dated 01.02.2020 accepted the appeal of the respondent No.1, order and decree dated 09.05.2019 passed by the learned trial Court was set aside and the matter was sent to the learned trial Court for deciding the same afresh after framing issues and recording evidence; however, appeal of the petitioner was dismissed. The learned appellate Court held that a previous case had been filed by the respondent No.1 in the United States of America (USA) and the petitioner had given his consent to the issuance of final decree in the matter; that the respondent No.2 was not empowered to issue certificate of Talaq in violation of law as it did not have the jurisdiction to proceed in the matter since respondent No.1 was residing in USA; that the petitioner was estopped from initiating proceedings before the respondent

No.2 after having submitted to the proceedings before the Common Pleas of Central Country, Pennsylvania Civil Action Law and that the Civil Court is competent to decide the legality of divorce proceedings initiated in Pakistan. Therefore, being aggrieved of the judgment dated 01.02.2020, the petitioner has filed the instant revision petition.

2. Mr. Mustafa Ramday (ASC), the learned counsel for the petitioner while opening the arguments has submitted that after acquiring a "permanent residency card" which is more commonly referred to as a „Green Card", the card holder(s), the petitioner and respondent No.1 in this case, attained the status of US residents and not US citizens or US nationals; that Green Card is deemed to have been abandoned once the card holder travels outside of the USA and does not return back for more than six months; that the petitioner returned to Pakistan on 29.12.2016 and has not travelled back to the USA; therefore, the green card which is due to expire on 18.12.2022 has already become infructuous; that in case the petitioner intends to revive it, he will have to initiate the process for re-entry in the USA, which is known as an application Form I-131 and the petitioner has made no such application before the US Embassy; that the respondent No.1 attained Naturalization Status in the USA on 12.07.2019, prior to which she was merely a green card holder, which was issued to her on the basis of her marriage with the petitioner,

however, she continues to remain a Pakistani National unless she categorically revokes the same by making an application to the Pakistan Embassy in the concerned country abroad for renunciation of her Pakistani Citizenship. He submits that in actual the petitioner and the respondent No.1 are Pakistani National and are governed by the provisions of Muslim Family Laws Ordinance, 1961; that right to dissolve marriage is a sacred and inalienable right granted to the husband and neither such a right can be taken away nor can the exercise of such a right be invalidated merely on the basis of some alleged procedural deficiencies or irregularities/technicalities, as such, the petitioner has divorced the respondent No.1/Mst. Sana Waqar and *talaq* has become effective after expiry of 90 days from pronouncement of the same on 05.01.2017 i.e. on 05.04.2017, however, the learned appellate Court has committed material illegality in overlooking this fact while passing the impugned judgment dated 01.02.2020; that the learned appellate Court while passing the impugned judgment in para No.17 has given finding on the merits of the case, therefore, the learned appellate Court has travelled beyond the scope of the matter before it and has exercised jurisdiction in an illegal manner; that the learned appellate Court has erred in law while applying the principle of estoppel to the facts and circumstances of the case in hand; that perusal of Nikahnama entered into by and between the parties reveals that the

petitioner did not delegate his powers of divorce to the respondent No.1, therefore, when the right of divorce was not available to the respondent No.1, the proceedings initiated before the Courts in the USA are in nature of Khula proceedings, whereas the proceedings initiated by the petitioner before the respondent No.2 were in the nature of *talaq* and even if both the proceedings work towards the same goal i.e. dissolution of marriage, they are different proceedings which can be initiated simultaneously; that the impugned judgment suffers from major inconsistencies which tantamount to patent irregularity when the learned appellate Court did not interfere in the finding of the learned trial Court that respondent No.1 was to be served notice in the divorce proceedings through the Pakistan Mission in the USA, while in the same breath holds that the petitioner was barred from invoking divorce proceedings in Pakistan; that the contents of SRO No.1086 (K) 161 dated 08.11.1961 are applicable to situations where the husband pronouncing the *talaq* as well as the wife are both residing abroad, despite being citizens of Pakistan, however, in the present case, the petitioner (husband) is residing in Pakistan while the wife (respondent No.1) is residing in USA, therefore, the case falls squarely within the ambit of (i) of Proviso to sub-rule (b) of Rule 3 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 and matter falls within the domain of

respondent No.2, thus, the proceedings in the form of suit for declaration are clearly barred by law and liable to be rejected under Order VII, Rule 11, Code of Civil Procedure, 1908, even otherwise, the said SRO has been declared ultra vires by the Islamabad High Court in judgment reported as **2021 CLC 1947** and any judgment wherein question of law is decided would be a judgment in rem and thus binding with regard to the said question of law as has been held in **1997 CLC** 121**, 2000 CLC 661** and **2006 CLC 1555**; that section 22 of the Family Court Act, 1964 bars issuing of injunction by the Family Court to or stay any proceedings pending before, a Chairman or an Arbitration Council; that the function of respondent No.2 is not to decide any issue or adjudicate upon the rights of the parties but is merely limited to bringing about reconciliation between the parties and in the event of failure the divorce ipso facto becomes effective upon laps of 90 days of receipt of notice under section 7 of the Muslim Family Law Ordinance, 1961, hence, no vested right has accrued to the respondent No.1 and no right of respondent No.1 has been denied for which a declaration is sought for; that even the Hon‟ble Federal Shariat Court in PLD 2000 FSC 1 has held the provisions of section 7(3) and (5) to be repugnant to the injunctions of Islam and *talaq* takes effects from the date of pronouncement of *talaq* by the husband and not from the day of delivery of notice to the Chairman, Union Council; that the

impugned judgment has been passed in a whimsical manner and the same being devoid of any cogent reasoning is liable to be set aside. Therefore, the impugned judgment dated 01.02.2020 may be set aside by allowing the revision petition in hand and plaint of the suit filed by the respondent No.1 may be rejected by restoring the order and decree dated 09.05.2019 and a declaration to the effect may also be issued that the Talaq pronounced by the petitioner upon the respondent No.1 on 05.01.2017 took effect upon the expiry of 90 days i.e. on 05.04.2017. Relies on *Allah Dad v. Mukhtar and another* **(1992 SCMR 1273)**, *Mst. Shahida Shaheen and another v. The State and another* **(1994 SCMR 2098)**, *Allah Rakha and others v. Federation of Pakistan and others* **(PLD 2000 Federation Shariat Court 1)**, *Farah Khan v. Tahir Hamid Khan and another* **(1998 MLD 85)**, *Muhammad Talat Iqbal Khan through General Attorney v. Tanvir Batool through Wasim Iqbal and 2 others* **(2005 CLC 481-Lahore)**, *Sanya Saud v. Khawaja Saud Masud and others* **(2013 CLC 108-Islamabad)**, *Mst. Lala Rukh Bukhari v. Syed Waqar Ul Hassan Shah Bokhari and others* **(2018 YLR 273-Lahore)**, *Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited* **(PLD 2012 Supreme Court 247)**, *Mst. Khurshid Bibi v. Baboo Muhammad Amin* **(PLD 1967 Supreme Court 97)**, *Ahmad Nadeem v. Assia Bibi and another* **(PLD 1993 Lahore 249)**, *Mst. Khurshid Mai v. The*

Additional District Judge, Multan and 2 others **(1994 MLD 1255)**, *Muhammad Yaqoob v. Mst. Sardaran Bibi and others* **(PLD 2020 Supreme Court 338)**, *Muhammad Akram Nadeem v. Chairman, Arbitration Council/ADLG, Islamabad and 2 others* **(2021 CLC 1947-Islamabad)**, *A.M. Kamal through Legal Heirs and others v. Lahore Improvement Trust* **(1997 CLC 121-Lahore)**, *Messrs Sandal Dye Stuff Industries Ltd. v. Federation of Pakistan through Secretary Finance, Pakistan Secretariat, Islamabad and 5 others* **(2000 CLC 661-Lahore)** and *Shafqat Ullah and 2 others v. Land Acquisition Collector (D.C.), Haripur and 2 others* **(2006 CLC 1555-Peshawar).**

3. On the contrary, Mr. Muhammad Ahmed Qayyum (ASC), the learned counsel for the respondent No.1 while responding to the above said submissions has avowed that the petitioner submitted to the jurisdiction of the Court in the USA and categorically consented to divorce through that Court only, stating in his affidavit that he will not be divorced until decree is issued by that Court, therefore, he is, now, estopped bypassing his undertaking/sworn affidavit and the procedure and forum that he submitted to through affidavit and specific undertaking on oath; that even if the petitioner would invoke the jurisdiction under Pakistani Law (though the same is denied by the respondent No.1), he has invoked the same before the wrong Chairman under the Muslim Family

Law Ordinance, 1961, as the spouse is residing abroad, so under the Muslim Family Laws Ordinance, 1961 the proceedings shall be conducted before the appointed officer in the Pakistan Mission abroad and the Local Chairman of the Union Council has no authority to take up the proceedings, because it has been clearly mentioned in SRO No.1086(K)61 dated 09.11.1961 that respective officers of the Pakistan Mission abroad shall be deemed as the Chairman under section 2(b) constituting the Arbitration Council under the Muslim Family Laws Ordinance, 1961; that it is trite law that when law provides for a particular mechanism for an act, then that act should be done in that manner as provided or not at all; that the petitioner is abusing the process of Court in Pakistan; that he has not appeared himself before the Court and reportedly he is not even in Pakistan, and has remarried without the permission of his wife and is carrying on proceedings through his father who ostensibly has no authorization and C.M.No.4/2021 clearly establishes this fact; that during arguments it was not denied that the petitioner has illegally remarried without permission from the respondent No.1 and only the counsel evasively stated that the second marriage was not on record; that principle of *comity* of courts holds a court having legally assumed jurisdiction should be allowed to continue and pass a final judgment; that the bar of section 22 of the Family Courts Act is available to the

Chairman as defined under law, which in the present case is not the Chairman Union Council rather is the officer designated in the US High Commission; that the petitioner has renewed his NICOP on 02.06.2018 (set to be expired on 02.06.2028 address: 6496 Terrace Court, Harrisburg, Pennsylvania USA as has been referred in C.M.No.1 of 2021 at page No.5; that even if the Chairman Union Council was prima facie couched with jurisdiction (which is vehemently denied), the view of the Hon‟ble Supreme Court of Pakistan as enunciated in *Messrs Mardan Ways SNG Station v. General Manager SNGPL and others* **(2020 SCMR 584)** is that the trial Court even if its jurisdiction is barred can look into the matters to see if any portion of the same fell outside its jurisdiction, therefore, the suit at present stage is maintainable; that so far as the argument of striking down of SRO by the Islamabad High Court is concerned, nothing turns on the fact that Islamabad High Court has struck down the SRO, as the same still survives outside the Capital Territory and in fact this Court has continually followed the SRO and this Court will follow its own line of precedents enforcing the SRO, until the same is brought under challenge before this Court and the same is struck down in Punjab. In this regard reliance has been placed on *Hassan Shahjehan v. FPSC through Chairman and others* **(PLD 2017 Lahore 665)**; that the petitioner has consistently claimed to be resident of

Pakistan whereby he is clearly to be classified as an overseas Pakistani in light of his NICOP, even during arguments it has been conceded by the petitioner‟s side that even if his residence lapses he can get the same restored. Submits that the petitioner‟s side is misreading the Muslim Family Laws Ordinance, 1961 because the said Rules would apply in instances where a mechanism is not available under the powers of the Act, because Rules cannot override the powers exercised under the Act, even otherwise the said rules are not applicable to international mattes, rather on the face of it, it were applicable inside the then united Pakistan between East and West Pakistan; adds that Federal Notification overrides provincial rules in case of conflict. Lastly, prays that the revision petition in hand may be dismissed. Besides above referred judgment, further relies on *Mst. Asma Bibi v. Chairman Reconciliation Committee and others* **(PLD 2020 Lahore 679)**, *Mian Irfan Latif through Special Attorney v. Nazim/Chairman Union Council No.100 and another* **(2009 YLR 1141-Lahore)**, *Mst. Sana Asim Hafeez v. Administrator/Chairman, Arbitration and Conciliation Court* **(2016 MLD 1061-Lahore)**, *Syeda Wajiha Haris v. Chairman, Union Council No.7, Lahore* **(2010 MLD 989-Lahore)**, *Saba Riaz v. Nazim/Chairman Arbitration Council, Gulberg, Lahore and another* **(PLJ 2003 Lahore 1240)** and *Ms. Sadaf*

Munir Khan v. Chairman, Reconciliation Committee and 2 others **(PLD 2019 Lahore 285)**.

4. Heard.

5. The only point in issue is the assumption of jurisdiction by the respondent No.2/Chairman, Union Council No.129, Neelam Block, Allama Iqbal Town, Lahore, on the divorce notice issued by the present petitioner in presence of already initiated and consented proceedings before Common Pleas of Center Country, Pennsylvania Civil Action Law (USA) in this regard. The respondent No.1 in order to get (the proceedings before the respondent No.2) declared null and void instituted a suit for declaration with permanent injunction against the present petitioner, wherein the petitioner filed an application under Order VII, Rule 11, Code of Civil Procedure, 1908, which was accepted on 09.05.2019 and plaint of the suit was rejected, prompted the respondent No.1 to file an appeal and the learned appellate Court accepted the appeal, set aside the order and decree dated 09.05.2019 and remanded the case to the learned trial Court for decision afresh after framing of issues and recording of evidence on merits. In this regard, it is observed that Sections 2(b) and 7 of the Muslim Family Laws Ordinance, 1961 and Rule 3(b) of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 are necessary, in order to resolve the controversy in hand, which are to be reproduced infra:-

„Section 2(b):- "Chairman" means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or by any officer authorized in that behalf by any such Government to discharge the functions of Chairman under this Ordinance."

„7. "Talaq". (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save a provided in subsection (5) a Talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the

period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

In order to resolve the matter in hand, the respondent No.1 is permanently residing in the USA and petitioner is also there as is evident from his Green Card, copy of which has been placed on record through C.M.No.1-C of 2021, even at the time of alleged *Talaq* he was not available in Lahore; meaning thereby as per S.R.O.No.1086(K)61 dated 09.11.1961 the jurisdiction for taking up the matter was with the designated officer in the Pakistan Consulate/Mission in USA. The said S.R.O. reads:-

„In exercise of the powers conferred by clause (b) of section 2 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Central Government is pleased to authorize the Director General (Administration) Ministry of External Affairs to appoint officers of Pakistan Mission abroad to discharge the functions of Chairman under the aforesaid Ordinance."

Rule 3(b) of the Rules provides:-

„Rule 3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (d) of section 2 shall be as follows, namely:-

(a) ----------

(b) in the case of notice of talaq under subsection (1) of section 7, it shall be the Union Council of the Union or Town where the wife in relation to whom talaq

has been pronounced was residing, at the time of the pronouncement of talaq:

Provided that if at the time of pronouncement of talaq such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be –

(i) in case such wife was at any time residing with the person pronouncing the Talaq in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person; and

(ii) in any other case, the Union Council of the Union or Town where the person pronouncing the talaq is permanently residing in West Pakistan;"

In view of the above said provisions of law, the Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce and in this case the respondent No.1 was residing in the USA as has been admitted by the petitioner. Reliance is placed on *Mt. Sharifan v. Abdul Khaliq and another* **(1983 CLC 1296)** and *Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others* **(PLD 2019 Lahore 285)**. When the position is as such, as observed above, as per Notification S.R.O.No. 1086(K)61 dated 09.11.1961, *officers of Pakistan Mission abroad are*

authorized to discharge the functions of Chairman under the aforesaid Ordinance. Meaning thereby the Chairman, Union Council 129-Neelam Block, Allama Iqbal Town, Lahore had no authority to exercise that authority which he has exercised. This Court in judgment reported as *Mian Irfan Latif through Special Attorney v. Nazim/Chairman Union Council No.100 and another* **(2009 YLR 1141-Lahore)**, has held:-

> *„Since both the parties are permanent resident of U.K. and as such as per Notification No. SRO No. 1086(K)/61 the function of Chairman Arbitration Council under the Muslim Family Laws Ordinance, 1961 are to be performed by an appointed offer of the Pakistan Mission abroad."*

The same view was reaffirmed and reiterated in judgments reported as *Mst. Sana Asim Hafeez v. Adminstrator/ Chairman, Arbitration and Conciliation Court* **(2016 MLD 1061-Lahore)**, *Syeda Wajiha Haris v. Chairman, Union Council No.7, Lahore* **(2010 MLD 989-Lahore)** and *Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others* **(PLD 2019 Lahore 285)**.

In addition to the above, the petitioner did not disclose the factum of initiation of proceedings before the Common Pleas of Center Country, Pennsylvania Civil Action Law (USA) and consent given by him while approaching the Arbitration Council, Union Council No.129, Neelam Block, Allama Iqbal Town, Lahore, meaning thereby he did not

approach the Council with clean hands. Though the consent of parties does not confer vested jurisdiction upon any Court of law but as the proceedings were in progress the petitioner must have disclosed this factum.

6. So far the argument that the Family Court cannot issue an injunction to, or stay any proceedings pending before a Chairman or an Arbitration Council under section 22 of the Family Courts Act, 1964; in this regard it is observed that when an act is performed without any jurisdiction, as discussed above, the civil Court being a Court of plenary jurisdiction has authority and competence to look into the matter and proceed with the same in accordance with law as well as pass an appropriate order in this regard. Even if the Chairman/respondent No.2, for the sake of arguments, is considered to have jurisdiction, the trial Court, though its jurisdiction is barred, can look into the matter as has been held in *Messrs Mardan Ways SNG Station v. General Manager SNGPL and others* **(2022 SCMR 584)**. The relevant para is reproduced as under:-

> *„7. With regard to bar of jurisdiction contained in any statute we are clear in our mind and it is concurrently declared by this court that if in any statute there is a bar of plenary jurisdiction of civil court, the bar will be applicable if the authority acts in accordance with the said statute and its acts, orders do not violate the jurisdiction conferred upon that*

authority under the said statute then the bar of jurisdiction contained in the said statute applies and if the authority acts or passes any order in violation of the jurisdiction vested in it under the said statute and transgresses jurisdiction or the order or action if scrutinized keeping in view the jurisdiction available under the said statute and the orders or action is found without jurisdiction then certainly the bar contained in the said statute on the plenary jurisdiction of civil court is not applicable and the suit would be competent."

In this view of the matter, it is observed that the learned trial appellate Court has rightly appreciated law on the subject and observed that the learned trial Court has jurisdiction to look into the matter being a Court of plenary jurisdiction.

7. So far as the argument that the S.R.O. ibid has been struck down by the learned Islamabad High Court is concerned, it is observed that the said S.R.O. is fully in vogue in Punjab as no verdict as such has been passed by this Court, because a relief cannot go beyond the provincial boundary and affect any other province or Area or its people, as has already been held by this Court in a judgment reported as *Hassan Shahjehan v. FPSC through Chairman and others* **(PLD 2017 Lahore 665)** that:-

,,As a corollary, the relief granted or the writ issued by the High Court also remains within the territorial jurisdiction of this Court and can only benefit or affect a person within the territorial jurisdiction of the Court. The relief cannot go

beyond the Provincial boundary and affect any other Province or Area or its people. So for example, if a federal law or federal notification is struck down by Lahore High Court, it is struck down for the Province of Punjab or in other words the federal law or the federal notification is no more applicable to the Province of Punjab but otherwise remains valid for all the other Provinces or Area. Unless of course the Federation or the federal authority complying with the judgment of the Lahore High Court, make necessary amends or withdraw the law or the notification."

8. In view of the above, it is concluded as such that:-

- *The proceedings initiated by the respondent No.1 before the Common Pleas of Center Country, Pennsylvania Civil Action Law (USA), though consented by the present petitioner, are not maintainable, because the Competent Authority, as provided under law and SRO No.1086(K)61 dated 09.11.1961 is respective officer of the Pakistan Mission abroad, in this case (USA) who shall be deemed as the Chairman under section 2(b) constituting the Arbitration Council under the Muslim Family Laws Ordinance, 1961.*
- *The proceedings before the Chairman, Union Council No.129, Neelam Block,*

Allama Iqbal Town, Lahore are without any jurisdiction.

- *The civil Court can look into the matter, even though jurisdiction is barred under law/statute, being a Court of plenary jurisdiction.*

9. So far as the case law relied upon by the learned counsel for the petitioner is concerned, with utmost respect, it is observed that the same has no relevance to the peculiar facts and circumstances of the case in hand, because in this case pure issue of jurisdiction was involved and not the merits of the case, as such the same is not helpful to the petitioner‟s cause.

10. The compendium of the discussion above is that the revision petition in hand comes to naught and hence, the same is dismissed. No order as to the costs.

(Shahid Bilal Hassan)
Judge

Announced in open Court on_____.

Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Shehzad Akhtar v. Muhammad Saleem Shad Qureshi, etc.
R.F.A. No.39735 of 2020
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:
i) When recovery of certain amount of benefit or interest along with paid amount is claimed, then the court of ordinary jurisdiction i.e. Civil Court has to be approached.

ii) "Promissory Note" and "Bond" are different documents and against both different remedies are available under law.

Facts of Case:
A suit under Order XXXVII Rule 2 C.P.C., for recovery was decreed to the extent of principal amount. The appeal against decree was accepted and matter was remanded for fresh decision. The said suit was decreed to the extent of principal amount along with profit and the compensation was also granted, hence, the instant regular first appeal.

Issues In Case:
i) Which court has to be approached when recovery of certain amount of benefit or interest along with paid amount is claimed?

ii) Whether "Promissory Note" and "Bond" are same having similar remedies available under law?

Analysis of Issues of Case:
i) A suit with regards to negotiable instruments, without claim of any other amount is to be instituted under the Rule 2 of Order XXXVII, Code of Civil Procedure, 1908 and if part payment is made, the transaction with regards to investment is carried out and instead of paid amount, certain amount of benefit or interest is also claimed, such suit is not covered by above provision of law.

ii) The definition of Negotiable Instruments given in section 4 of the Negotiable Instruments Act makes it vivid that it does not require attestation by any witness as it is a promise by its maker for the payment of amount received under Negotiable Instruments Act and in case the said document i.e. Promissory Note requires certain attestation, it becomes a "Bond", which has been defined in section 2(5) of the Stamp Act, 1899, as an instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed as the case may be and this instrument is attested by a witness.

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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT R.F.A. No.39735

of 2020.

Shehzad Akhtar.
…Vs…
Muhammad Saleem Shad Qureshi, etc

JUDGMENT

Date of Hearing: **07.10.2022.**

Appellant(s) for: **Ch. Muhammad Zubair Rafiq Warraich, Advocate.**

Respondent(s) for: **Muhammad Saleem Shad Qureshi, respondent No.1 in person.**

SHAHID BILAL HASSAN-J: Succinctly, the respondents instituted a suit under Order XXXVII Rule 2 C.P.C. for recovery of Rs.3,84,00,000/- against the present appellant. It was averred that the respondents are husband and wife, whereas the appellant is brother in law of respondent No.1. The present appellant was running business and was in need of loan, so he approached the respondents and they provided him an amount of Rs.1,50,00,000/-. In response, the present appellant executed two pro-notes, one in the sum of Rs.1,00,00,000/- on 01.11.2011 with an undertaking to pay profit at the rate of 4% per month to the respondents while the second in the sum of Rs.50,00,000/- and profit rate was settled at the rate of Rs.5% per month. However, the present appellant failed to make payment of profit to the

respondents on the pretext that business was not rendering good profit. The present appellant remained making assurance to make payment but failed and consequently the relations between the parties became strained. The appellant with the intervention of the family members, issued 15 cheques in favour of respondent No.1 and to the extent of profit, it was undertaken that same would be paid after realization of actual amount but when the said cheques were presented before the concerned bank for encashment, the same were dishonored, which constrained the respondent No.1 to lodge FIRs against the present appellant. The respondents made efforts for realization of the said amount but remained unsuccessful, which culminated in filing of the suit.

2. The present appellant on 28.02.2015 filed an application for leave to appear and defend the suit but the same was dismissed by the learned Trial Court and suit of the respondents was decreed to the extent of Rs.1,50,00,000/- (one crore and fifty lacs rupees) vide order dated 08.10.2015, where against the present appellant filed R.F.A. No.1598 of 2015 before this Court and this Court vide judgment and decree dated 12.09.2017 while accepting the appeal, set aside the order of learned Trial Court dated 08.10.2015 and remanded the matter to the learned District Judge, Lahore, with the observation that the suit titled "Mohammad Saleem Shad Qureshi and another v. Shehzad Akhtar" would be deemed to be pending and the learned trial Court after requisitioning the record from the concerned

quarters would proceed to frame issues and grant ample opportunities to both the sides to produce their respective evidence and then decide the suit on merits. In compliance of the same, the learned Trail Court framed eight issues including the "relief". Thereafter, on application of the present appellant under Order XIV Rule 5 C.P.C. for amendment in issue No.5 and framing of additional issue, the learned Trial Court amended issue No.5 and framed additional issue No.5-A. Both the parties adduced their oral as well as documentary evidence. On conclusion of trial, the learned Trial Court after hearing respondent No.1 in person and learned counsel for the present appellant vide impugned judgment and decree dated 13.06.2020 decreed the suit of respondents to the extent of principal amount i.e. Rs.1,50,00,000/- and also held the respondents entitled to recover Rs.7.5 million as compensation from the appellant. The respondents are also held entitled to recover 6% profit at the principal amount from the present appellant w.e.f. 13.06.2020 till its actual recovery. Hence, the instant regular first appeal.

3. Learned counsel for the appellant has argued that the impugned judgment and decree is against law and facts of the case; that the suit as instituted on the basis of two alleged promissory notes Ex.P2 and Ex.P3 was not maintainable and competent in the eye of law for the reason that the alleged execution of two distinct documents on two different dates gave arise to two separate alleged causes of action and both the alleged

claims cannot be claimed by filing a single joint suit which is liable to be dismissed as the same is also barred under Order II, Rule 2(1) and 3(1) CPC; that under section 7 of the Court Fee Act, 1870 read with section 2 Rule 3(1), 6 and Order VII, Rule 11(C), Code of Civil Procedure, 1908, joinder of two distinct and separate causes of action based on two distinct subjects, court fee already paid on plaint payable on one relief is based on one cause of action, therefore, the plaint on this score is liable to be rejected; that promissory notes have insufficiently been stamped, therefore, the same are inadmissible in evidence and suit on this score merits its dismissal; that the contents of the alleged promissory notes reveals that the same are not negotiable instruments and are not covered under Negotiable Instruments Act because the alleged loan has been shown to be returnable with certain amount of profit; that the plaintiffs miserably failed to prove the payment of alleged loan amount on two occasions by producing oral as well as documentary evidence; that the plaintiff No.1 while appearing as P.W.1 on his own behalf and on behalf of plaintiff No.2 in the capacity of attorney has categorically waived of the claim of profit, allegedly settled, but on the contrary the learned trial Court has proceeded to grant profit @6/% from the date of judgment and also 7.5 million as compensation, meaning thereby the learned trial Court has transgressed its jurisdiction and has acted with pure illegality in granting such reliefs which have not been claimed by the plaintiffs; that the impugned judgment and decree suffers from misreading and non-reading of evidence on record; that the learned trial Court has failed to apply correct law on the point of

maintainability of the suit; that the question of nature of the document as to whether Ex.P2 and Ex.P3 fall within the ambit of either "promissory note" or "Bond" has not been decided properly by the learned trial Court; that after specific denial of his signatures over the disputed promissory notes and receipts, the learned trial Court ought to have referred the matter to the handwriting expert under Article 59 and 78 of the Qanun-e-Shahadat Order, 1984 but the same was not done and even the learned trial Court did not compare the same with admitted one; that execution of Ex.D5 is admitted one and as such not required to be proved as per Article 79 of the Qanun-e-Shahadat Order, 1984 and the same is sufficient to rebut the whole claim of the respondents/plaintiffs; that there are material contradictions in depositions of the P.Ws. and even dishonest improvements have been made but the same have been ignored; that the evidence beyond pleadings has been led which could not have been considered as the same is inadmissible; that the scribe of the documents Ex.P2 and Ex.P3 has not been produced, so the scribing of the same has not been proved but even then the impugned judgment and decree has been passed; that the impugned judgment and decree suffers from legal infirmities of misreading, non-reading, miscalculation and misappreciation of oral as well as documentary evidence and the learned trial Court has misinterpreted the provisions of law on the subject; hence, the same is not sustainable in the eye of law and liable to be set aside by allowing the appeal in hand.

4. On the contrary, respondent No.1/plaintiff No.1

while controverting the above said submissions has supported the impugned judgment and decree and has prayed for dismissal of the appeal in hand.

5. Heard.

6. Rule 2 of Order XXXVII, Code of Civil Procedure, 1908, under which a summary suit is instituted, provides:-

> *„Institution of summary suits upon bills of exchange, etc.—(1) All suits upon bills of exchange, hundies or promissory notes, may, in case the plaintiff desires or proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No.4 in Appendix B or in such other form as may be from time to time prescribed.*
>
> *(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree—*
>
> *(a)* ----------
>
> *(b)* ----------
>
> *(c)* ----------
>
> *(3)* ----------
>
> *Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be*

ascertained in the ordinary way."

The bare reading of the above provision of law makes it vivid that all suits upon bills of exchange, hundies or promissory notes, may, in case the plaintiff desires or proceed, be instituted by presenting a plaint in the form prescribed; meaning thereby the suit with regards to negotiable instruments, without claim of any other amount are to be instituted under the above said Order XXXVII, Code of Civil Procedure, 1908 and if part payment is made and if the transaction with regards to investment is carried out and instead of paid amount, certain amount of benefit or interest is claimed, such suit is not covered by above provision of law, rather Court of ordinary jurisdiction has to be approached. Here, paragraph No.1 of the plaint is necessary to be reproduced, in order to, understand the above observation, which reads:-

> *„1. That the plaintiffs are husband and wife while the defendant is the real brother of plaintiff No.2, therefore, on the basis of close relationship there was a mutual trust amongst the parties to the suit. The defendant was running business and needed loan. He approached the plaintiffs for the said purpose and they provided him an amount of Rs.1,50,00,000/- (one crore and fifty lacs). The defendant executed two pronotes one in the sum of Rs.1,00,00,000/- (Rs.One crore) was executed by the defendant on 01.11.2011 with an undertaking to pay profit at the rate 4% per month to the plaintiffs while another in the sum of Rs.50,00,000/- (Rs.Fifty lacs) was executed by the defendant; wherein the rate of profit was settled at 5% per month. Copies of pronotes duly signed by the defendant and attested by the witnesses are appended herewith as Annex-A & B."*

Perusal of the promissory notes exhibited on record as Ex.P2 and

Ex.P3 divulges that the same have been signed by the marginal witnesses. In this respect, it is observed that "Promissory Note" and "Bond" are different documents and against both different remedy is available under law. Section 4 of the Negotiable Instruments Act defines promissory note as under:-

> *„Promissory Note.—A "Promissory Note" is an instrument in writing (note being a blank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay (on demand or at a fixed or determinable future time) a certain sum of money only to or to the order of, a certain person, or the bearer of the instrument."*

The above definition of Negotiable Instruments Act makes it vivid that it does not require attestation by any witness as it is a promise by its maker for the payment of amount received under Negotiable Instruments Act and in case the said document i.e. Promissory Note requires certain attestation, it becomes a "Bond", which has been defined in section 2(5) of the Stamp Act, 1899, which reads:-

> „(5) Bond: "*Bond" includes.—*
>
> *(a) Any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed as the case may be;*
>
> *(b) Any instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another; and*
>
> *(c) Any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."*

Moreover, the plaint further reveals that the respondents have not only claimed the alleged amount mentioned in the disputed cheques but also the profit worth Rs.2,34,00,000/- calculated over principal amount, which has been denied by the appellant.

7. Pursuant to the above, after assessing the record and going through the pleadings of the parties, especially the plaint, this Court has reached to a conclusion that the matter in hand is not covered by Order XXXVII, Code of Civil Procedure, 1908, rather Court of ordinary jurisdiction i.e. Civil Court has to be approached in the matter in hand, therefore, this Court does not find it appropriate to give further observations on merits of the case, may it prejudice case of either side.

8. For the foregoing reasons, the appeal in hand is allowed, impugned judgment and decree is set aside and plaint is returned under Order VII, Rule 10, Code of Civil Procedure, 1908 for its presentation before a Court of competent jurisdiction, which will proceed with the matter and decide the same on merits in accordance with law. No order as to the costs.

(Shahid Bilal Hassan)
Judge

*Announced in open Court on*_____.

Judge

Approved for reporting.

Judge

Lahore High Court
Premier Insurance Limited v. M/s Ihsan Yousaf Textile Private Ltd. etc.
R.F.A. No.1064 of 2011
Mr. Justice Shahid Bilal Hassan, Mr. Justice Muhammad Raza Qureshi

Crux of Judgement:
i) Judgment rendered by an Insurance Tribunal which has not been constituted as per mandate of law, is not sustainable in the eye of law.

ii) It is the duty of the trial court to decide the objection qua admissibility or inadmissibility of evidence then and there and not to defer the same till the end of the trial.

Facts of Case:
Respondent No.1 filed an application under section 75, 76 and 122 of the Insurance Ordinance, 2000 for the recovery against the appellant before the Insurance Tribunal. On conclusion of trial, the learned Judge, Insurance Tribunal accepted the application filed by the respondent No.1 and held him entitled to Insurance Claim/Policy Proceed alongwith liquidated damages. Hence, the instant appeal has been preferred.

Issues In Case:
i) What will be the value of verdict of Insurance Tribunal which has not been constituted as per law?

ii) Whether court is bound to decide the objection of party qua admissibility or inadmissibility of evidence then and there?

Analysis of Issues of Case:
i) sub-section (2) of section 121, ibid, provides that, „The Tribunal shall consist of a Chairperson who shall be serving or retired Judge of the High Court and not less than two members being persons of ability and integrity who have such knowledge or experience of life insurance, non-life insurance, actuarial science, finance, economics, law, accountancy, administration or other discipline as would, in the opinion of the Federal Government, enable them to discharge the duties and functions of members of the Tribunal.‟ and sub-section (3) ibid demands that, „To constitute a sitting of a Tribunal the presence of the Chairperson and at least one other member shall be necessary.‟ By using word “shall” the legislators have made it mandatory and any deviation therefrom would make the verdict of such Tribunal illegal and not sustainable in the eye of law.

ii) The learned Tribunal did not ponder upon and decide the point of admissibility of the said report at the relevant time, which otherwise ought to have been decided then and there instead of deferring the same till the end of trial and even at the time of passing the impugned judgment, the objection raised by the respondent No.1 was not decided.

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JUDGMENT SHEET

IN THE LAHORE HIGH COURT,
LAHORE JUDICIAL DEPARTMENT

R.F.A. No.1064 of 2011

Premier Insurance Limited
Versus
M/s Ihsan Yousaf Textile Private Ltd.
etc.

J U D G M E N T

Date of hearing: ***04.10.2022***

Appellant(s): M/s Syed Ali Zafar (ASC), Talib Hussain, Jahanzeb Sukhera, Mehak Zafar and Ali Hur Jamal, Advocates.

Respondent(s): M/s Waqar A. Sheikh, Tassawar Sohail, Humair Afzal, Faisal G. Meeran, Syed Ali Zakir, Mian Ijaz Latif & Ms. Hina Bandealy, Advocates for the respondent No.1

M/s Mushtaq Ahmad Khan (ASC) and Zahid Mehmood Arain, Advocates for respondent No.3/HBL

SHAHID BILAL HASSAN-J: Succinctly, the respondent No.1 filed an application under section 75, 76 and 122 of the Insurance Ordinance, 2000 for the recovery of Rs.326,293,052/- against the appellant before the Insurance Tribunal, Lahore contending therein that the respondent No.1 is a Private Limited Company duly incorporated under the Companies Ordinance, 1984; that the respondent No.1 is a "Policies Holder" as defined in section 2(xiv) of the

Ordinance and the present appellant is a registered Insurer as enshrined in section 2(xxxi) of the Ordinance. It is alleged that the appellant has committed default and is not fulfilling its obligations with regards to the insurance supported by the statement of Insurance Claim Denial; that the respondent No.1 had been using the insurance facility of the appellant since 1992-93; that the respondent No.1 paid a total amount of Rs.13,000,000/- approximately as premium to the appellant/Insurance Company; that on 5th October, 2006 when fire broke out in the dyeing unit of the respondent No.1 and the machinery, building and stock of cloth lying therein was destroyed by fire, the respondent No.1 suffered huge loss of millions of rupees; that the incident of fire was immediately reported to the Fire Brigade Station and Town Municipal Administration, Faisalabad, who extinguished the fire; that the incident was also abruptly reported to the police on 05.10.2006, who incorporated the same against Rapt No.32 dated 13.10.2006. Allegedly, thereafter, the respondent No.1 lodged insurance claim with the present appellant on 10.10.2006; that as a result of fire incident, purportedly the machinery installed at the dyeing unit of the respondent No.1 including the machinery which was owned by the respondent No.1 as well as obtained on lease from Askari Leasing was damaged. It was further averred that after the fire incident, the survey team of the appellant visited the dyeing unit firstly on 16.10.2006 and secondly on 17.10.2006 and they demanded certain documents through letter dated 27.12.2006 which was duly replied by the

respondent No.1 vide letter dated 28.12.2006, thereby provided all the relevant/necessary documents but despite that the present appellant unnecessarily delayed the matter and did not pay the insurance claim to the respondent No.1. It was further maintained that the respondent No.1 intimated the appellant about the loss occurred to the respondent No.1 due to stoppage of work but the appellant did not fulfill their obligation of making payment of insurance claim; that the appellant was intimated through letter dated 02.12.2006 that due to delay in claim the entire process of export shipment has stopped, which has caused heavy operational losses to the respondent No.1 amounting to Rs.5 to 10 million per month; hence, the respondent No.1 made the following prayer:-

(i)	Insurance Claim	Rs.148,513,052/-
(ii)	Operational Losses	Rs.10.00 million p/m till date
(iii)	Loss suffered due to cancellation of agreements with C.I.CARCECO S.A. Textiles= US $ 515,000	
(iv)	Loss suffered due to cancellation of agreements with G.O. Traders=US $448,000	
	Total:	Rs.326,293,052/-

Therefore, it was prayed that the application of the respondent No.1/applicant may be accepted against the present appellant.

The appellant hotly contested the application by filing its written reply and raised certain preliminary and legal objections as well as resisted the same on facts and prayed for dismissal of the said application.

The divergence in pleadings of the parties was summed up into following issues-

1. *Whether the claim of applicant is not maintainable in its present form? OPR*

2. *Whether the petition is bad for misjoinder and non-joinder of necessary parties and the HBL have any nexus with the plant and machinery lying in the dyeing unit and got damaged in the fire broke out on 05.10.2006? OP Parties*

3. *Whether the claim of applicant is in violation of Section 75 of Insurance Ordinance, 2000 and Sections 51/52 of Contract Act, 1872? OPR*

4. *Whether the applicant has not fulfilled his part of the agreement with the respondent enabling him to file the claim? OPR*

5. *Whether survey report is biased, prejudiced and based on mala fide? OPA*

6. *Whether the applicant has no cause of action? OPR*

7. *Whether the respondent is not duly authorized to contest the application? OPA*

8. *Whether the fire occurrence took place in the premises of Ikram Fabrics (Pvt.) Ltd. and the machinery, building alongwith stocks burnt in fire was also in the name of Ikram Fabrics (Pvt.) Ltd.? OPR*

9. *Whether the assets of Ahsan Yousaf (Pvt.) Ltd. were transferred in the name of Ikram Fabrics which was not insured by the respondent and as such the respondent was justified in repudiating the whole claim? OPR*

10. *Whether extent of damage to machinery, building and stocks lying therein was destructed by fire which was neither accidental nor natural, rather the applicant deliberately set on fire the insured building, machinery and stocks? OPR*

11. Whether the applicant is entitled to the decree alongwith liquidated damages as prayed for? OPA

12. Relief.

Both the parties adduced oral as well as documentary evidence in support of their respective stances. On conclusion of trial, the learned Judge, Insurance Tribunal vide impugned judgment dated 11.11.2011 accepted the application filed by the respondent No.1 and held him entitled to Insurance Claim/Policy Proceed amounting to Rs.148,513,052/- alongwith liquidated damages from 10.10.2006 at the prevailing rate till its realization. Hence, the instant appeal has been preferred.

2. Syed Ali Zafar (ASC), the learned counsel for the appellant has argued that the impugned judgment is illegal and bad in the eyes of law; that the same is result of misreading and non-reading of evidence on record; that in actual no fire incident occurred in the premises, subject matter of the policies, rather it was a jumping fire incident in the premises owned by Ikram Fabrics (Pvt.) Limited; that despite demands of surveyors, the respondent No.1 failed to provide necessary documents, so non-provision of all information and documents disentitles the respondent No.1 to grant of any claim being in violation to section 51 and 52 of the Contract Act, 1872 and Policies Conditions No.1, 4, 8, 11 and 13; that evidence of the appellant especially report of surveyors Ex.P7 has not been

considered by the learned Insurance Tribunal while passing the impugned judgment; that the learned Insurance Tribunal has misinterpreted and misread the Policies Ex.A2 and Ex.A3 germane to keeping of any hazardous inside the insured building; that the impugned judgment is against law and facts, the same suffers from inherent defects; that the said is illegal, arbitrary and unjust as no consideration has been paid to the averments of the appellant; that the impugned judgment has been passed in a slip-shod manner without appreciating the proved facts on record; that the learned Insurance Tribunal has failed to consider that the application was not maintainable as the claim was not filed by the respondents No.2 & 3 who had a charge/lien on the insured properties/assets and even they had not assigned any right to the respondent No.1 for filing such claim, therefore, the same is not sustainable on this score; that a party has to stand on its own legs and cannot take benefit of the shortfalls or shortcomings in the opposite party but this basic principle has been defiled by the learned Insurance Tribunal; that the entire proceedings are Coram non judice because Insurance Tribunal was not properly constituted as in such matters which involve insurance claims particularly whether fire was deliberate or accidental, require interpretation of insurance law which therefore provides that there must be insurance experts in the Insurance Tribunal; however, in this case learned Tribunal was based on Single Judge who did not

have requisite expertise in the matter; that a huge amount has been awarded while passing the impugned judgment, that too, without any cogent and trustworthy evidence; that under condition No.18 of the Policies the matter has to be referred to arbitrator in case of any differences as to the amount of any loss or damage, so the learned Insurance Tribunal has wrongly assessed the quantum of alleged loss; that learned Insurance Tribunal has failed to appreciate that the machines, their value, quantity and conditions etc. were nowhere proved or established but even then the respondent No.1 was awarded such a huge amount while passing the impugned judgment; that the impugned judgment has been passed on the foundation of pick and choose methodology, which is not warranted under law, because at one hand the report of surveyors has been rejected but on the other some parts of the same have been relied upon; that the learned Insurance Tribunal has wrongly decided that the Habib Bank Limited and PICIC Commercial Bank Limited had no nexus with the dispute; that the evidence of A.W.1 has wrongly been accepted by the learned Insurance Tribunal because the same was beyond the claim forms as in evidence he deposed that fire was caused by a short circuit in the electric box but in claim form the reason was narrated as unknown; that the impugned judgment is based on surmises and conjectures; therefore, the same is not sustainable in the eye of law and liable to be set aside by allowing the appeal in hand.

3. Mr. Waqar A. Sheikh (ASC), Advocate while representing the respondent No.1 has controverted the above said submissions and further argued that in terms of section 112(3)(c) of the Insurance Ordinance, 2000 read with Rule 22(2) of the Insurance Rules, 2002, the survey report has to be prepared and signed by natural persons. However, the joint survey report under reference carried no name of the alleged surveyors, which is conspicuous from its absence and the same cannot be termed as a survey report in terms of the foregoing mandatory provisions of law and hence, it is inadmissible in evidence and non-mentioning of name of the surveyors under the report is admitted by R.W.3 during cross examination; that Rule 22(4) of the Insurance Rules, 2002, demands that the report shall be finalized as early as possible but within the period of ninety days, however, in the present case, the fire incident took place on 05.10.2006 while the survey report was prepared on 10.08.2007, after considerable lapse of the mandatory period, especially when the technical expert hired by the surveyors i.e. Electro-Tech Engineers (Electrical, Mechanical, Air Conditioning Engineers & Contractors) on whose findings the surveyors have relied upon, gave its technical report on 24.11.2006; that the respondent No.1 provided required documents to the surveyors in time; that rule 22(2) of the Rules, 2002 is mandatory provision of law, consequence of non-compliance whereof are provided in section 118 of the Insurance Ordinance, 2000; that the alleged survey report blatantly violates the mandatory requirements of law/rules and the same can neither be termed as a survey report

nor is admissible in evidence, hence, it has rightly been discarded by the learned Insurance Tribunal; that under section 118 of the Insurance Ordinance, 2000 statutory presumption of truth has been attached to the claim raised under the insurance policy by the legislature and consequences in the form of payment of liquidated damages have also been provided in case where the claim is not satisfied within the stipulated time; that the survey report has been presented in evidence under objection by R.W.3 as neither the alleged surveyor for the Insurance Survey Company nor any other surveyor or expert hired by the surveyors has been produced in support of the survey report; that the survey report is biased, prejudiced and lacking in material; that the respondent No.1 by producing cogent, unimpeachable, trustworthy and confidence inspiring evidence, oral as well as documentary, has proved and established his claim. Lastly, prays for dismissal of the appeal in hand. Relies on *Postal Life Insurance (PLI) and others v. Muhammad Ishaque Butt* **(2022 CLD 309-Lahore)**, *Lasania Oil Mills v. Silver Star Insurance Company Limited and others* **(2021 CLD 659-Lahore)**, *Mst. Riffat Asghar v. State Life Insurance Corporation of Pakistan and others* **(2010 CLD 1123-Lahore)** and *Ghulam Raza Sajid v. State Life Insurance Corporation of Pakistan and another* **(2010 CLD 792-Lahore)**.

4. Heard.

5. Section 121 of the Insurance Ordinance, 2000 deals with constitution of the Tribunal and it would be advantageous to reproduce the same here, which reads:-

*'**121. Constitution of the Tribunal.** ---*

(1) The Federal Government shall constitute a Tribunal or Tribunals in consultation with the Commission and shall in respect of each Tribunal so constituted specify the territorial limits within which, or the class or classes of cases in respect of which each such Tribunal shall exercise jurisdiction under this Ordinance:

Provided that the Federal Government may by notification in the official Gazette confer all or any of the powers of the Tribunal on any District or Additional District and Sessions Judge of an area where for any reason it may not be expedient to constitute a separate Tribunal, and in doing so the Federal Government shall also specify the composition and pecuniary and territorial limits of such a Tribunal.

(2) The Tribunal shall consist of a Chairperson who shall be serving or retired Judge of the High Court and not less than two members being persons of ability and integrity who have such knowledge or experience of life insurance, non-life insurance, actuarial science, finance, economics, law, accountancy, administration or other discipline as would, in the opinion of the Federal Government, enable them to discharge the duties and functions of members of the Tribunal.

(3) To constitute a sitting of a Tribunal the presence of the Chairperson and at least one other member shall be necessary.

(4) A Tribunal shall not merely by reason of a change in its composition, or the absence of any member from any sitting, be bound to recall and rehear any witness who has given evidence, and

may act on the evidence already recorded by or produced before it.

(5) A Tribunal may hold its sitting at such places within its territorial jurisdiction as the Chairperson may decide from time to time.

(6) No act or proceeding of a Tribunal shall be invalid by reason only of the existence of a vacancy in, or defect in the constitution of the Tribunal.' (Emphasis supplied)

When the above provision of law is, accumulatively, gone through and interpreted, we observe that the Tribunal, in the peculiar facts and circumstances of the case in hand, has not been constituted as per mandate of law because sub-section (2) of section 121, *ibid*, provides that, *'The Tribunal shall consist of a Chairperson who shall be serving or retired Judge of the High Court and not less than two members being persons of ability and integrity who have such knowledge or experience of life insurance, non-life insurance, actuarial science, finance, economics, law, accountancy, administration or other discipline as would, in the opinion of the Federal Government, enable them to discharge the duties and functions of members of the Tribunal.'* and sub-section (3) *ibid* demands that, *'To constitute a sitting of a Tribunal the presence of the Chairperson and at least one other member shall be necessary.'*

By using word "**shall**" the legislators have made it mandatory and any deviation therefrom would make the verdict of such Tribunal illegal and not sustainable in the eye of law. However, in the present case, the Tribunal was consisting of only one Judge (Addl. District & Sessions Judge) and no member having

experience of life insurance, non-life insurance, actuarial science, finance, economics, accountancy, administration or other discipline has been included as provided under sub-section (2) of section 121 *ibid*; meaning thereby the impugned judgment has been rendered by Tribunal, not constituted as per mandate of law and hence, the same is not sustainable in the eye of law.

6. In addition to the above, section 111 of the Insurance Ordinance, 2000 provides that who will be permitted to act as Insurance Surveyors, which reads:-

> *'**111. Persons permitted to act as insurance surveyors.** – (1) Subject to sub-section (2), it shall be unlawful for any person to act for remuneration as a surveyor, loss adjuster, or loss assessor (by whatever titled called) unless such person is:*
>
> *(a) an adjuster of aviation or maritime losses; or*
>
> *(b) a person licensed as a surveyor under this Ordinance.*
>
> *(2) Nothing in this section shall prevent –*
>
> *(a) the performance in the course of his employment by an employee of an insurer of activities of the nature of insurance surveying for that insure; or*
>
> *(b) the expression in the course of his general professional practice of an expert opinion on the nature, cause or quantum of an insurance loss by an advocate, solicitor, accountant, actuary or other professional person engaged in a profession other than surveying.'*

Section 112 of the Ordinance, 2000 provides:-

> *'**112. Licensing of insurance surveyors.** – (1) The Commission may, on application by a person,*

grant of that person a licence, having a term of not more than twelve months, to act as a surveyor where the Commission is satisfied that person is qualified under this section to be granted such a licence.

(2) A licence granted under the preceding sub-section (or renewed under this sub-section) may be renewed for a term of not more than twelve months on application made by the holder of the licence prior to expiry of the licence, where the Commission is satisfied that such person is qualified under this section to be granted such a licence.

(3) No person shall be entitled to apply for or to hold a licence as a surveyor under this Ordinance unless the following conditions are fulfilled at the date of the application and at all times during which the licence is held:

(a) the person is a company with a prescribed minimum share capital;

(b) the person carries professional indemnity insurance at such level as may be prescribed;

(c) reports issued in respect of surveys conducted by the person are signed by natural persons, registered under section 113 as authored surveying officer;

(d) reports issued in respect of surveys conducted by the person contained such information and comply with such conditions as may be prescribed;

(e) the person is a member of such approved professional association as may be prescribed; and

(f) the person complies with such other conditions as may be prescribed:

Provided ----------

Provided ----------

Provided ----------

Provided ----------
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(4) ----------
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(5) ----------
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(6) ----------
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(7) ----------
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Rules 22 of the Insurance Rules, 2022 deals with surveys and reports of insurance surveyors, which enunciates:-

> *'**22. Surveys and reports of insurance surveyors.** – (1) Pursuant to clause (d) of sub-section (3) of section 112 the report of an insurance surveyor shall be subject to the conditions as laid down in sub-rule (2).*
>
> *(2) Every report given by an insurance surveyor shall be signed by a natural person who is, at the date of the report, registered as an authorized surveying officer for the class of insurance surveyors to which the loss being surveyed relates, and shall include the following, namely: ---*
>
> *(a) A description of the property or interest which constitutes the subject-matter of the survey report, sufficient to identify the property or interest;*
>
> *(b) the terms of reference given to the insurance surveyor by the person engaging him;*
>
> *(c) any instructions given to the insurance surveyor by the person engaging him, as to facts to be assumed or other assumptions to be made by the insurance surveyor;*
>
> *(d) a description of the procedures carried out by the insurance surveyor in the conduct of the survey;*
>
> *(e) the opinion of the insurance surveyor*

on the matters contained in the term of reference; and

(f) a declaration that neither the insurance surveyor, nor any director, employee, associate or partner of the insurance surveyor, nor any related party of any of those persons, has any interest directly or indirectly by way of insurance, ownership, agency commission, repairs, disposal of salvage, or in any other way whatsoever, other than as an insurance surveyor in the property or interest which constitute the subject-matter of the survey report.

(3) Every survey conducted by, and report given by, an insurance surveyor shall comply with the relevant professional standards of any professional body of which the insurance surveyor is a member.

(4) Every survey conducted by, and report given by, an insurance surveyor shall be conducted and given with due diligence and skill, and in good faith and the report shall be finalized as early as possible but within the period of thirty days, after receipt of all related information/documents.

(5) If the Commission has reason to believe that a survey performed has not been performed with due diligence or skill, or in good faith, or that it otherwise does not comply with the conditions of this rule, such that the report does not present a fair opinion on the matters contained in the terms of reference, the Commission may direct that the insurer arrange for an additional survey of the subject matter of the survey report to be performed by one or more licensed insurance surveyors who shall be approved by the Commission.

(6)An additional survey under sub-rule (5)

> *shall be performed at the expense of the insurer and a copy of the report on the additional survey shall be provided to the Federal Government.' (Emphasis supplied)*

In the present case, the respondent No.1 allowed the bringing of report Ex.R7 on record „*under objection*". The learned Tribunal did not ponder upon and decide the point of admissibility of the said report at the relevant time, which otherwise ought to have been decided then and there instead of deferring the same till the end of trial and even at the time of passing the impugned judgment, the objection raised by the respondent No.1 was not decided. In a judgment reported as *Hayatullah v. The State* **(2018 SCMR 2092)**, the Apex Court of the country has pondered upon this legal issue and has invariably held:-

> *'We have also observed that although sometime objection was raised by either party regarding the inadmissibility of such piece of evidence but the court while admitting the evidence at that time reserves the question of law as to its admissibility till the end of the trial and while delivering the judgment no such question of admissibility is usually decided. It is the duty of the trial court to decide the objection then and there and not to defer the same till the end of the trial.'*

Though the said judgment pertains to a criminal case, but the legal point decided by the Apex Court, which has probative value and the ratio of the same can be applied in civil side, too. Moreover, when the respondent No.1 and the learned Tribunal were not satisfied with the survey report Ex.R7, the Tribunal

must have adhered to proceedings provided under Sub-rule (5) of Rule 22, Insurance Rules, 2002, as has been referred above but no such proceedings have been carried out which otherwise must have been done in order to reach a just decision of the case especially when the appellant/ Insurance Company has been denying the fire incident, allegedly occurred in „Ehsan Yousaf Textile Private Limited/respondent No.1 and claims that such incident took place in „Ikram Fabrics", which is not insurer with the appellant/ Insurance Company.

Section 122 of the Insurance Ordinance, 2000, provides that in all matters with respect to which procedure has not been provided for in the Ordinance, the Tribunal shall follow the procedure laid down in the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1898, as the case may be. For ready reference, the said provision is reproduced as under:-

> *'122. Powers of Tribunal.--- (A) Tribunal shall:*
>
> *(a) in the exercise of its civil jurisdiction, have in respect of claim filed by a policy-holder against an insurance company in respect of, or arising out of a policy if insurance, all the powers vested in a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);*
>
> *(b) in the exercise of its criminal jurisdiction, try the offences punishable under this Ordinance and shall, for this purpose, have the same powers as are vested in the Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898);*
>
> *(c) exercise and perform such other powers and functions as are, or may be, conferred upon,*

or assigned to it, by or under this Ordinance; and

(d) in all mattes with respect to which procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908) or the Code of Criminal Procedure, 1898 (Act V of 1898) as the case may be.

(2) ----------

(3) ----------

Provided that ----------.'

Moreover, the learned Tribunal without bifurcating, assessing and giving details of damages as to machinery, building, articles, etc., caused to the respondent No.1, proceeded to pass the impugned judgment dated 11.11.2011, giving an accumulative policy proceed/claim, which otherwise ought to have been referred to the Arbitrator because condition No.18 of the Policies stipulates that the matter as to the quantum of the alleged loss has to be referred to the Arbitrator, which factum has also been ignored by the learned Tribunal, while accepting the application filed by the respondent No.1. For ready reference the condition No.18 is reproduced infra:-

'If any difference arises as to the amount of any loss or damage such different shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference or, if they cannot agree upon a single arbitrator----------.'

7. For the foregoing reasons, the appeal in hand is

allowed, impugned judgment dated 11.11.2011 is set aside and matter is remanded to the Insurance Tribunal with the observation that Tribunal should be constituted as per mandate of law, where-after the proceedings should be carried out by adhering to the above said provisions of law keeping in view the above observations and case be decided afresh on merits in accordance with law. No order as to the costs.

(***Muhammad Raza Qureshi***) (***Shahid Bilal Hassan***)
Judge *Judge*

*Announced in open Court on*_____.

(**Muhammad Raza Qureshi**) (**Shahid Bilal Hassan**)
Judge *Judge*

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Chanan alias Channu and others v. Hassan Raza and others Civil Revision No. 3471 of 2016
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) Under the administrative suit, the Court assumes the jurisdiction of an administrator, realizes the assets, discharges the debts and legacies, takes an account of the income of the property and distributes the assets amongst those entitled to it.

ii) The issues which are not framed as per pleadings cannot resolve the controversy between the parties and entire further process will be meaningless, which will be wastage of time, energy and would further delay the final decision of the suit.

Facts of Case:

The petitioners through this civil revision challenged the judgment of learned Appellate Court whereby the appeal of the respondents was accepted and the judgment of the learned Trial Court was set aside and the suit of the petitioners for administration of property was dismissed.

Issues In Case:

i) What is the scope of an Administrative suit?

ii) Whether the issues which are not framed as per pleadings can resolve the controversy between the parties?

Analysis of Issues of Case:

i) Under the administrative suit, the Court assumes the jurisdiction of an administrator, realizes the assets, discharges the debts and legacies, takes an account of the income of the property and distributes the assets amongst those entitled to it. … In „administrative suit" only the admitted legal heirs of a deceased are to be impleaded and if right of a stranger who is not sharer are involved, the „administrative suit" is not competent and such rights are to be determined through separate proceedings provided under law.

ii) Evidence is led after framing of issues. The stage of framing of issues is very important in trial of civil suit because at that stage the real controversy between the parties is summarized in the shape of issues and narrowing down the area of conflict and determination where the parties differ and then parties are required to lead evidence on said issues. The importance of framing correct issues can be seen from the fact that parties are required to prove issues and not pleadings as provided by Order XVIII, Rule 2, CPC. The Court is bound to give decision on each issue framed as required by Order XX, Rule 5, CPC. Therefore, the

Courts while framing issues should pay special attention to Order XIV of CPC and give in depth consideration to the pleadings etc. for the simple reason that if proper issues are not framed, then entire further process will be meaningless, which will be wastage of time, energy and would further delay the final decision of the suit.

Stereo. HCJDA 38

JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Civil Revision No.3471 of 2016

Chanan alias Channu and others
…Vs…
Hassan Raza and others

JUDGMENT

Date of Hearing: **27.09.2022**

Petitioner(s) for: Syed Kaleem Ahmad Khurshid, Advocate

Respondent(s) for: M/s Sheikh Naveed Shehryar & Uneza Siddiqui, Advocates for respondents No.1, 2 & 11

M/s Mian Kashif Abbas and Zahir Abbas, Advocates for respondents No.3 to 9

M/s Malik Naveed Akram and Usman Azam Gondal, Advocates for respondents No.11, 12 & 13

Mr. Basharat Ali Gill, Additional Advocate General Punjab for respondent No.14

SHAHID BILAL HASSAN-J: Succinctly, the present petitioners instituted a suit for administration of property of Talib Hussain alias Fateh Sher son of Umer Bukhsh, Thaheem by caste, resident of Fateh Pur by maintaining that he (Talib Hussain alias Fateh Sher) was sunni Muslim who died on 30.04.1997 leaving behind one Jindwadi (wife) and Nasira Hussain (daughter); that Mst. Nasira Hussain was his daughter from Mst.

Taj Bibi because deceased Talib Hussain alias Fateh Sher had married Jindwadi and Taj Bibi; that late Talib Hussain alias Fateh Sher was owner of property in village Hassue Baleel, Fateh Pur Peerati, Tibba Gehli and urban property situated in Jhang Saddar; that defendant Nasira Hussain is in possession of the property and has been misappropriating the benefits; that gold ornaments weighing 20 tolas of deceased Talib Hussain alias Fateh Sher are also in possession of the said Nasira Hussain while other urban immovable property has also been inherited by the present petitioners/plaintiffs; therefore, the suit for administration of property of Talib Hussain and also for cancellation of mutation No.1917, 1920, 2574 and 2577 has been instituted.

The suit was contested by the defendants No.1 to 3 and 6 while submitting written statement wherein they controverted the averments of the plaint and further submitted that Talib Hussain alias Fateh Sher deceased was Asna Ashri Shia while allegedly deceased plaintiff Mst. Jindwadi was issueless wife of the deceased Talib Hussain alias Fateh Sher, therefore, she has been disinherited under Shia Law of inheritance; that animals owned by deceased were gifted by him (Talib Hussain) to defendant No.1 in the year 1995. It was also alleged that proceedings for the arbitration were also pending in the Civil Court, Jhang. A separate written statement was filed by defendant No.4 namely Sardaran Bibi and she prayed for her share having no objection if

the suit is decreed. The defendants No.5, 7 and 8 also submitted their separate written statements.

The divergence in pleadings of the parties was summed up into issues on 22.01.1999 and evidence of the parties in pro and contra, oral as well as documentary, was recorded by the learned trial Court. On conclusion of trial, the suit of the deceased plaintiff Mst. Jindwadi was preliminary decreed vide judgment and decree dated 20.02.2016. The legal heirs of Nasira Hussain, being aggrieved preferred an appeal, which was accepted vide impugned judgment and decree dated 29.06.2016 and by setting aside the preliminary decreed dated 20.02.2016 *ibid*, dismissed suit of the petitioner(s); hence, the instant revision petition challenging the vires and legality of the impugned judgment and decree passed by the learned appellate Court.

2. Heard.

3. With respect to an administration suit no specific provision exists, however, the power to entertain an administration suit is given by section 9 of the Code of Civil Procedure, 1908 to the Civil Court, being a Court of plenary jurisdiction and competence of such suit is recognized in Order XX, Rule 13 of the Code of Civil Procedure, 1908. Both the above provisions of law are reproduced as under:-

> *„9. Courts to try all Civil Suits unless barred. – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil*

nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation. – A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

Rule 13 of Order XX reads:-

„13. Decree in administration suit. – (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code."

The above observation finds support from judgment of a Division Bench of this Court reported as *Mahbub Alam v. Razia Begum and others* **(PLD 1949 Lahore 263)**, wherein it was held that:-

> *„---------- I have already pointed out that the forms given in Schedule I are not exhaustive, and to that argument I may add that since Order XX, rule 12(1) empowers the Court when passing a preliminary decree, to order such accounts and inquiries to be taken and made and to give "such other directions as it thinks fit", the Court would be at liberty to pass a decree in accordance with the circumstances of each case.*
>
> *It seems to me, if I may say so with great respect, that it would be incorrect to rely too much on Order XX, rule 12 or the forms of plaints and decrees prescribed in the Frist Schedule of the Code of Civil Procedure for ascertaining the objects of an administration suit. Order XX, it will be noticed bears the title "Judgment and decree" and is devotee to the form in which judgments should be delivered and decree passed in particular cases. The forms, it has already been noticed, are not exhaustive, and rule 13 itself enables the Court to give any directions that it thinks fit. "Administration" means management and disposal of an estate, whether it be that of a deceased person or of any other person. The power to entertain an administration suit is given not by Order XX, rule 13, but by section 9 of the Code, which provides that the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil*

nature expecting suits of which their cognizance is either expressly or impliedly barred", and if a suit for the administration of an estate is not barred expressly or impliedly by any provision of law, it must be entertained. It would appear that an administration suit need not necessarily relate to the estate of a deceased person. This conclusion may be drawn from the language of sub-rule (1) of rule 13 of Order XX, which speaks of a suit "for an account of any property and for its due administration under the decree of the Court" without any reference to a deceased person, and the force of this language is brought out specifically in sub-rule (2) which makes a special provision for the "administration by the Court of the property of any deceased person"."

Having observed above, now moving to the pleadings of the present case, it comes on surface that in the case under discussion both the parties have taken a different stance with regards to Religious School of thought, followed by the deceased Talib Hussain alias Fateh Sher, because the present petitioners claim that deceased Talib Hussain alias Fateh Sher was a Sunni Muslim whereas the defendants claim him to be Asna Ashri Shia; therefore, without deciding the said controversy, which goes to the root of the case, no determinative findings and decree can be passed, because under the administrative suit, the Court assumes the jurisdiction of an administrator, realizes the assets, discharge the debts and legacies, takes an account of the income of the property and distribute the assets amongst those entitled to it. It

has been held in *Shakeel Aijaz v. Mst. Shakeela Naseem and 8 others* **(2015 MLD 1360)** that:-

> *„The scope of Administrative suit and limitation (s) to grant relief(s) in such like suit in absence of any specific provision of law, make me of the view that it would always be material to examine the relief (s) sought and effect of such relief (s) against the parties (persons). At this stage, it would be conclusive to refer case law reported as PLD 2011 Karachi 281 wherein guideline to gauge the maintainability of the „Administrative suit" has been detailed as:-*
>
> *13. We would therefore (subject to the test formulated in para.11 above) sum up the foregoing analysis in the form of the following propositions:*
>
> *(a) when the question is whether a property forms part of the estate of deceased, and a determination of this question involves a person who is a stranger to the estate, then question should be determined by means of separate proceedings;*
>
> *(b) proposition (a) is subject to the qualification that if the question is also whether the stranger is a sharer in the estate, then the matter comes within the scope of administration;*
>
> *(c) when a determination of the aforesaid question involves a person who is a sharer in the estate then question comes within the scope of the administration suit, and this is so regardless of*

whether the sharer claims through or under the deceased (e.g. by way of a gift or sale from the latter) or in his own right;

(d) it is immaterial whether or not the property in question stood in the name of the deceased at the time of his death, and it is likewise immaterial whether any alienation was by way of a registered instrument or otherwise.

15. Hence, patently above criteria is in conformity to the fact that determination of maintainability shall be subject to the relief(s) and effect thereof. If the relief(s) sought effects upon a stranger it shall be beyond the scope of Administrative Suit and a separate suit shall be competent. To maintain a suit within capacity of „administrative suit" against stranger it is necessary to show that „such stranger is a sharer". Thus, needful to say that although the scope of the „administrative suit" was widened even to probe into title(s) but such was made subject to the condition that it would revolve round the „sharer" only. This was with an object to avoid multiplicity of the lis but confining the scope to extent of „sharer" was sufficient to establish that nature and character of the „administrative suit" is different from that of an ordinary civil suit (governed by Specific Relief Act). In an „administrative suit" the final decree is to follow the result of an inquiry within meaning of Order XX, Rule 13, C.P.C. while in an ordinary suit

the determination of rights and status is dependent upon a full fledged „trial".'

4. It is concluded that in 'administrative suit' only the admitted legal heirs of a deceased are to be impleaded and if right of a stranger who is not sharer are involved, the 'administrative suit' is not competent and such rights are to be determined through separate proceedings provided under law.

In judgment reported as *Syed Mehdi Hussain Shah v. Mst. Shadoo Bibi and others* **(PLD 1962 Supreme Court 291)**, the Apex Court of the country while discussing the scope 'administrative suit' has invariably held that:-

„In absence of any specific provision in the procedural law the question as to the matters to be determined and the parties to be impleaded in a suit depends on the relief that is to be granted in that suit. With respect to an administration suit no such specific provision exists though the competence of such a suit is recognized in Order XX of the Civil Procedure Code and in the forms of plaints and decrees contained in Appendices to that Code. In a suit for administration the relief to be granted is that the estate of the deceased is to be administered under the decree of Court. This means that the Court will assume the functions of an administrator, it will realize the assets, will discharge the debts and legacies, will take an account of the income of the property and will distribute the assets amongst those entitled to it. That this is the relief to be granted appears also from form 41 in Appendix A, Schedule I

to the Civil Procedure Code wherein is stated the form of the decree which is to be granted in such suit. It is clear that for distributing the estate of the deceased among those entitled to it the Court has to find out who the persons entitled are and therefore it will be proper to join in the suit all those persons who claim to be so entitled. According to Order I, rule 10, of the Civil Procedure Code any persons whose presence is "necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit" may be added as a party to the suit."

In the said judgment, it has further been held:-

„While an administration suit is not a remedy for getting possession from those who claim the property in their possession in their own right and adversely to the deceased there does not appear to be any valid objection to their dispossession if they claim only as heirs or under a will from the deceased and their claim is negative. The question as to whether a person is entitled to a share in the property of the deceased is a fit subject to decision in an administration suit and in fact learned counsel for the appellant does not contend to the contrary, his plea being that a defendant in an administration suit can raise a question as to whether the plaintiff or another defendant is entitled to a share but that the plaintiff cannot raise such a plea as to a defendant. We see no good reason for this distinction."

5. While appreciating the ratio of the ***Mehdi Hussain Shah's*** case it can safely be held that, as observed above, before passing a determinative decree, rights of the parties are to be determined, especially when different stances as to Religious School of Thought of the deceased Talib Hussain alis Fateh Sher have been taken and in this view question of maintainability of the suit has to be considered and decided at first instance before proceeding further in the case.

6. In addition to the above, the pleadings of the parties have been gone through, the petitioners have also challenged the gift mutation No.2574 dated 05.12.1996 germane to property situated in Fateh Pur Peri, Tehsil Shorkot, District Jhang in favour of deceased Nasira Hussain and subsequent gift mutation No.2577 dated 30.12.1996 by Nasira Hussain (deceased) to defendants No.1 & 2 as well as gift mutation No.1917 dated 05.12.1996 regarding property in Mauza Tibba Gehli in favour Nasira Hussain (deceased) and subsequent mutation No.1920 dated 30.12.1996 in favour of defendants No.1 and 2, which have been controverted by the defendants, however, the learned trial Court did not frame any issue on this point and even no issue has emerged on record that which school of religious thought was followed by deceased Talib Hussain alias Fateh Sher and only following issues were framed:-

1. *Whether the plaintiff is entitled to get the decree as prayed for in the plaint? OPP*

2. *Whether the plaintiff has no cause of action or locus standi to file the suit? OPD*
3. *Whether the plaintiff is estopped by his words and conduct to bring the instant suit? OPD*
4. *Whether the suit of the plaintiff is frivolous and vexatious and the defendants are entitled to get special costs under section 35-A? OPD*
5. *Relief.*

The above issues are not according to the pleadings of the parties. It seems that the learned trial Court was not acquainted with the real myth of framing of issues, because the parties have to lead evidence keeping in mind the burden of proof placed upon their shoulders while formulating issues. The issues framed by the learned trial Court do not cover the real controversy, meaning thereby the provisions of Order XIV, Rule 1 of the Code of Civil Procedure, 1908 have been defiled. Evidence is led after framing of issues. The stage of framing of issues is very important in trial of civil suit because at that stage the real controversy between the parties is summarized in the shape of issues and narrowing down the area of conflict and determination where the parties differ and then parties are required to lead evidence on said issues. The importance of framing correct issues can be seen from the fact that parties are required to prove issues and not pleadings as provided by Order XVIII, Rule 2, CPC. The Court is bound to give decision on each issue framed as required by Order XX, Rule 5, CPC. Therefore, the Courts while framing issues should

pay special attention to Order XIV of CPC and give in depth consideration to the pleadings etc. for the simple reason that if proper issues are not framed, then entire further process will be meaningless, which will be wastage of time, energy and would further delay the final decision of the suit. In the present case, as observed supra, the learned Trial Court did not ponder upon the pleadings of the parties while framing issues and could not sum up the real controversy into issues; thus, further proceedings are of no use. In this regard reliance is placed on *Muhammad Yousaf and others v. Haji Murad Muhammad and others* **(PLD 2003 Supreme Court 184)** wherein it has been held:-

> *„The provisions as contained in Order XIV, Rule 5, C.P.C. were not kept in view and ignored completely by the learned trial Court while framing the issues as a result whereof controversy regarding removal of household articles could not be set as naught. There is no cavil to the proposition which was settled decades ago and still hold field "that where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main questions of fact, necessary to be decided, and the parties may have been prevented from adducing evidence, or fresh issue may be directed to try the principal question of fact". (Olagappa v. Arbuthnot (1875) 14 BLR 115-142, 14/268, 316. "The duty of raising issues rests under the Code of Civil Procedure on the Court and it would be unsafe to presume from the failure of the Court to raise the necessary issues an attention of*

the defendant to admit the fact, which the plaintiff was bound to prove." (Ganou v. Shri Devsidhes War, 1902 AIR 26 Bom. 360-361)."

Further reliance in this regard is placed on *Mst. Rasheeda Bibi & others v. Mukhtar Ahmad & others* **(PLJ 2010 SC 530)**, wherein it has been held that:-

„It is the duty of the Court to frame issues correctly primarily on pleadings of the parties, because the issues framed by the Court correctly reflect the controversies arising from the pleadings of the parties and the Court thus can render an effective judgment on the disputed facts and the party also know on what fact the evidence should be led.--------

----

----------, that framing of a particular issue was not pressed by party affected is no ground for condoning failure to frame necessary issue and the mandate of Order XIV, Rule 1 CPC reveals that it is incumbent upon the Court to frame issues in the light of the controversies raised in the pleadings and after examination of the parties, if necessary. Issues of law and facts are to be illustrated clearly, to enable the parties to understand the points at issue to support their respective claims by recording evidence on all material points. It is the settled principle of law that "action or inaction" on the part of the Court cannot prejudice a party to litigation and the failure of Courts below to determine material issue amounted to exercise of jurisdiction illegally or with material irregularity."

The learned appellate Court has totally ignored this aspect of the case and without pondering upon the illegality and material irregularity committed by the learned trial Court, proceeded to pass the impugned judgment and decree.

7. For the foregoing reasons, the impugned judgment and decree dated 29.06.2016 handed down by the learned appellate Court and judgment and decree dated 20.02.2016 passed by the learned trial Court, are set aside and case is remanded to the learned trial Court with a direction to frame issues, keeping in view the above said observations by considering the pleadings of parties, especially with regards to maintainability of the suit, which will be decided at first instance, and thereafter decide the case afresh on merits in accordance with law. The adversaries are directed to appear before the learned District Judge, Jhang on 14.11.2022, who will further entrust the case to the learned trial Court.

(Shahid Bilal Hassan)
Judge

*Announced in open Court on*_____.

Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Mian Javed Akhtar and another v. Rana Muhammad Ismail and others
R.S.A. No.37 of 2017
Mr. Justice Shahid Bilal Hassan
https://sys.lhc.gov.pk/appjudgments/2022LHC8374.pdf

Crux of Judgement:
Where a suit was instituted and decided without impleading an aggrieved person as party then such an aggrieved person can alternatively avail the remedies as provided under section 12(2) CPC or section 100 CPC.

Facts of Case:
A civil suit of respondent no.1 regarding declaration and possession with perpetual injunction was decreed by trial court. The appellant filed appeal against the said judgment and decree on the ground that he was not made party to the suit however the said appeal was dismissed. Consequently, the appellant filed regular second appeal.

Issues In Case:
Where a suit was instituted and decided without impleading an aggrieved person as party then whether such an aggrieved person can alternatively avail the remedies as provided under section 12(2) CPC or section 100 CPC?

Analysis of Issues of Case: …it is observed that the appellants had remedies: to file application under section 12(2), Code of Civil Procedure, 1908 or to assail the judgment and decree by preferring an appeal. The appellants, having been adversely affected, opted to challenge the decree by filing an appeal, which was maintainable…the impugned judgments and decrees being contrary to law are open to examination in exercise of jurisdiction under section 100 of the Code of Civil Procedure, 1908; therefore, the same cannot be allowed to hold field further, because it is trite law that one should not be condemned unheard and every litigant should be provided with fair opportunity to present and defend his/her case.

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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

R.S.A. No.37 of 2017
Mian Javed Akhtar and another
Versus
Rana Muhammad Ismail and others

J U D G M E N T

Date of hearing: ***25.11.2022***

Appellant(s) by: Mr. Mahmood Ahmad Bhatti, Advocate

Respondent(s) by: Malik Nasim Akhtar Awan, Advocate

***SHAHID BILAL HASSAN-J*:** Brief facts, giving rise to the instant appeal are as such that respondent No.1 instituted a suit for declaration and possession with perpetual injunction contending therein that he was owner in possession of the land measuring 12-Kanals 14-Marlas and 06-Sarsahi, situated at village Channu Mome, Tehsil & District Sialkot; that he appointed the late Chaudhry Zulfiqar Ahmad as his general attorney; however, he cancelled his power of attorney replacing him with Muhammad Akram, the respondent No.6; that his attorneys committed fraud and carried out deception upon him, who in collusion with the revenue authorities transferred the aforesaid land to Gulzar Butt, the respondent No.2 through a sale mutation No.836 attested on 26.05.2004; hence, the appellant sought annulment of the said

mutation and prayed for possession of the suit land. The suit of the respondent No.1 was decreed vide judgment and decree dated 06.03.2013. The respondent No.2 being aggrieved preferred an appeal. The appellants were not arrayed as the defendants and respondents: both in suit and the appeal, despite the fact that the suit land stood mutated in favour of the appellants vide sale mutation No.952 attested on 10.12.2005 whereas the suit was instituted on 17.12.2005. When the appellants came to know about passing of the aforesaid decree dated 06.03.2013, they being directly affected preferred an appeal and alongwith the appeal they also filed a miscellaneous application seeking leave to file an appeal as a matter of abundant caution. The learned appellate Court admitted the appeal of the appellants to regular hearing vide order dated 27.09.2013. However, vide impugned consolidated judgment and decree dated 18.10.2016, the learned appellate Court held the appeal of the appellants incompetent and dismissed the same; hence, the instant regular second appeal challenging the vires of impugned judgments and decrees passed by the learned Courts below.

2. Heard.

3. It is an admitted position on record that the present appellants became owner of the disputed property vide sale mutation No.952 attested on 10.12.2005, whereas the suit was

instituted, obviously, without impleading them as party and challenging the said mutation in their favour, by the respondent No.1 on 17.12.2005 and even during pendency of the suit, the respondent No.1/plaintiff did not bother to implead them in the array of defendants by moving an application under Order I, Rule 10, Code of Civil Procedure, 1908 and decree dated 06.03.2013 was passed. The appeal preferred by the present appellants before the first learned appellate Court was dismissed by observing that:-

> *'As far as appeal filed by the appellants is concerned perusal of record reveals that they never appeared before learned trial court in proceedings of trial of the suit and they even did not make any effort to become a party to the suit or to challenge the impugned judgment and decree upon the basis of fraud and collusiveness in due course of law. It is un-denied principle of law that a person who is not the party to the proceedings cannot assail the vires and result of the same in appeal. Therefore, this court is of the firm view that appeal filed by appellants is not maintainable.'*

However, in this respect, it is observed that the appellants had remedies: to file application under section 12(2), Code of Civil Procedure, 1908 or to assail the judgment and decree by preferring an appeal. The appellants, having been adversely affected, opted to challenge the decree by filing an appeal, which was maintainable. In this regard reliance is placed on *H.M. Saya &*

Co., Karachi v. Wazir Ali Industries Ltd., Karachi and another **(PLD 1969 Supreme Court 65)** and *Sahib Dad v. Province of Punjab and others* **(2009 SCMR 385)**. The said principle was followed by learned Division Bench of Islamabad High Court in a judgment reported as *Jamila Pirzada and 3 others v. Col. (R) Mansoor Akbar and 2 others* **(2011 CLC 1619-Islamabad)** and it was held that:-

> *'12. It is observed that as a general principle none can appeal from a decree unless he is a party, but a person, who is not a party to the trial proceedings in a civil suit can file an appeal if he/she is adversely affected by the order and the Appellate Court considers it necessary in the interest of justice, because in such cases right of appeal is a safety wall against the perpetuation of injustice as well as against useless appeals.'*

4. Pursuant to the above, the impugned judgments and decrees being contrary to law are open to examination in exercise of jurisdiction under section 100 of the Code of Civil Procedure, 1908; therefore, the same cannot be allowed to hold field further, because it is trite law that one should not be condemned unheard and every litigant should be provided with fair opportunity to present and defend his/her case. Any further observations on merits of the case cannot be rendered, may it prejudice case of

either side; therefore, this Court holds its hands from making any further dilation.

5. In view of the above, the appeal preferred by the appellants is accepted, consequent whereof the impugned judgments and decrees passed by the learned Courts below are set aside and case is remanded to the learned trial Court with a direction to implead the present appellants in the array of the defendants by obtaining amended plaint from the plaintiff and after submission of written statements by them (the present appellants) proceed with the case, which will be deemed to be pending, and decide the same afresh in accordance with law. The adversaries are directed to appear before the learned trial Court on 24.01.2023, positively.

SHAHID BILAL HASSAN
Judge

Announced in open Court on_____.

Judge

Approved for reporting.

Judge

M.A.Hassan

Lahore High Court
Mst. Liaqat Sultana and others v. Mst. Mumtaz Tahawar and others
Civil Revision No.64976 of 2020
Mr. Justice Shahid Bilal Hassan

Crux of Judgement:

i) Ingredients for a valid gift are: offer, acceptance and delivery of possession.

ii) Onus to prove original transaction also lies on the beneficiary when sanctity of
a gift is challenged especially on the basis of fraud and misrepresentation.

iii) At least two truthful witnesses are required to prove execution of a document.

iv) The concurrent findings on facts cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence.

Facts of Case:

The respondent No.1 to 4 and respondent No.7 to 10 instituted suits for declaration and partition and also sought revocation of succession certificate which were consolidated and decreed. The respondents preferred nine appeals and learned appellate Court modified the judgment and decree passed by the learned trial Court. Feeling aggrieved, the instant revision petition as well as connected
civil revisions have been filed by the petitioners.

Issues In Case:

i) What are ingredients of a valid gift?

ii) Whether onus to prove original transaction also lies on the beneficiary when sanctity of a gift is challenged especially on the basis of fraud and misrepresentation?

iii) How many witnesses are required to prove execution of a document?

iv) Whether concurrent findings on facts can be disturbed when the same do not suffer from any misreading and non-reading of evidence?

Analysis of Issues of Case:

i) It is observed that ingredients for a valid gift are: offer, acceptance and delivery of possession.

ii) When sanctity of a gift is challenged or called into question especially on the basis of fraud and misrepresentation, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction.

iii) Whereas law requires that in order to prove valid execution of a document, at least two truthful witnesses are to be produced, as has been

enunciated under Article 79 of the Qanun-e-Shahadat Order, 1984. The concurrent findings on facts cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908.

Stereo. HCJDA 38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.64976 of 2020

Mst. Liaqat Sultana and others
Versus
Mst. Mumtaz Tahawar and others

J U D G M E N T

Date of Hearing: 26.10.2022

Petitioner(s): M/s Sheikh Naveed Shehryar, Sh. Usman Karim-Ud-Din and Humaira Bashir Chaudhry, Advocates

M/s Tahir Nasrullah Warraich, Rizwan Khalid and Zahir Abbas, Advocates for petitioners in C.R.No.64972 of 2020

Mr. Muhammad Azam Chughtai, Advocate for petitioner in C.R.No.9062 of 2021

Mr. Muhammad Naveed Khan, Advocate for petitioner in C.R.No.4430 of 2021

Respondent(s): M/s Farooq Amjad Meer, Zulfiqar Ali Khan and Mian Ijaz Latif, Advocates for respondents No.1 to 3 in C.R.No.64976 of 2020

Mr. Muhammad Naveed Khan, Advocate for respondent No.5 in C.R.No.64972 and 64976 of 2020

M/s Rana Zia Abdul Rehman, M. Shakeel Gondal, Rana Fahad Zia, Rana Muhammad Usman and Rana Shahzad, Advocates for respondents No.7 & 8 in C.R.No.64976

Ms. Farzana Abbas, Advocate for LDA in C.R.No.64972 of 2020

SHAHID BILAL HASSAN-J: This single judgment will decide the captioned revision petition as well as connected C.Rs. bearing Nos.64972 of 2020, 9062 of 2021 and 4430 of 2021, as one and the same judgments and decrees have been called into question in all the revision petitions.

2. Succinctly, the present respondents No.1 to 4 instituted a suit for declaration and partition on 05.07.1997. The present respondents No.7 to 10 also instituted another suit for declaration and partition on 13.05.1998 with regards to the suit property. In both the suits, the respondents/plaintiffs have sought declaratory decree with partition of the suit property: movable and immovable of late Tahawar Ali Khan and also sought revocation of succession certificate dated 12.12.1997 regarding movable property of the said Tahawar Ali Khan. The petitioners in all revision petitions contested the suits and prayed for dismissal of the same. Both the suits and application for revocation of succession certificate were consolidated by the learned trial Court and out of divergent pleadings of the parties consolidated issues were framed. Both the parties led their oral as well as documentary evidence in pro and contra. On conclusion of trial, the learned Trial Court vide impugned judgment and decree dated 19.06.2007 decreed the suits as such:-

> *'In view of the facts discussed above, suit of the plaintiffs as well as defendants No.9 to 12 are*

hereby decreed in their favour to the effect that all of the gift deeds allegedly executed by Tahawar Ali Khan deceased in favour of Karman Tahawar, Sohail Nasir and Jamal Nasir, Sultan Tahawar and Aalam Tahawar are false and baseless documents as the same have been fabricated by them by way of fraud, forgery and misrepresentation with the active assistance of Shaiq Siddiquee Advocate, who acted as local commissioner without proof or any justification for his appointment as such. Therefore, all of the aforementioned documents are hereby cancelled. Moreover the registered gift deed in favour of Azam Tahawar too has been proved to be false and baseless as the aforesaid Azam Tahawar has failed to prove its execution in accordance with law. However, no evidence has been produced to prove that the document was prepared by way of forgery or fraud; and the aforesaid Azam Tahawar cannot be made criminally liable for fabricating a false gift deed merely on the ground of his failure to prove the document because proof of involvement in fabricating a document is one thing while failure to prove the execution of a document is another. Therefore, criminal proceedings against the defendants No.2 to 5 and 7 and the aforesaid Shqiq Siddiqui Advocate may be initiated under relevant provisions of Pakistan Penal Code as it has become evident that all of them got false and fabricated gift deed executed by way of fraud and forgery and used the document to get monetary gains as well as to deprive the plaintiffs and defendants No.9 to 12 of their due share in the

suit-property. Therefore, all of the gift deeds in favour of defendants No.2 to 7 are hereby cancelled and they will have no legal effect upon the rights of the plaintiffs and defendants No.9 to 12.

However, the plaintiffs' claim on the basis of legal status of Mst. Akbari Khanum as one of the Directors of International Publishers is not tenable in view of the evidence on the record, therefore, the part of the plaintiffs' suit relating to their claim regarding ownership of a share of the suit-land as one of the Directors is hereby dismissed.

While deciding issue No.9 it was proved that the succession certificate issued on 12.12.1997 was based on fraud and misrepresentation, therefore, the application filed by defendants No.9 to 12 for revocation of the aforementioned succession certificate under section 383 of Succession Act 1925 is hereby accepted and the impugned succession certificate is hereby revoked and the defendants No.9 to 12 are entitled to get the share of the movable assets bequeathed by the deceased. Therefore, both Sohail Nasir and Jamal Nasir defendants No.3 and 4 are hereby required to deposit the remaining sum of the amount drawn by them from the account of Tahawar Ali Khan at Grindlays Bank and the amount drawn from the court which was deposited by Sohail Shafique as arrears of rent, after deducting their share as one of the heirs of Tahawar Ali Khan. Since all of the gift deeds in favour of defendants No.2 to 7 are hereby declared as null and void and in-operative upon the rights of the plaintiffs as well as

defendants No.9 to 12, and in the course of determination of issue No.10 it was proved that Late Tahawar Ali Khan was owner of movable as well as immovable property which included the residential portion of the suit-property comprised in plot No.129-E.1 Gulberg III Lahore, commercial portion of the suit-property known as Tahawar Plaza comprised in plot No.129-B/E.1 Gulberg III Lahore, an amount of Rs.85,715/- deposited by the deceased in his account No.1161638556 at Grind Lays Bank Gulberg Lahore, a sum of Rs.300,000/- deposited by Sohail Shafique as arrears of rent during the proceedings of ejectment petition titled Tahawar Ali Khan Versus Sohail Shafique, the royalty of books Biographical Encyclopedia of Pakistan and Man eaters of Sunder bens, therefore, the plaintiffs as well as the defendants No.9 to 12 are entitled to get their share in the movable as well as immovable assets left by the deceased according to law of inheritance.

Since the suit-property of the buildings comprised in plots No.129/E.1 (residential portion) and plot No.129-B/E.1 (commercial portion-Tahawar Plaza), therefore, a preliminary decree of the partition is hereby issued in favour of the parties holding them entitled to the ownership as well as possession of their share of the suit-property as prescribed by law of inheritance.

The record shows that the defendants have produced Ex./P.W.8/D.1 and Ex./P.W.8/D.2 which is copy of an agreement to sell executed by Tahawar Ali Khan in favour of Mian Ahmad Irfan

and a registered sale deed in favour of Raziq International through its Chief Executive namely Mr. Nadeem Khan. Both of the documents shall have no legal effect upon the rights of the parties as discussed while deciding issue No.10. However, Mian Ahmad Irfan will have an option of filing a suit for specific performance of an agreement to sell, while Nadeem Khan Chief Executive of Raziq International is hereby directed to get his right declared by filing a suit for declaration on the basis of the alleged sale deed. Moreover, the money deposited by Tradex Private Limited as rent shall be distributed among the parties according to their lawful shares while the amount deposited by Mian Ahmad Irfan or Tradex are hereby entitled to get the amount deposited by him in pursuance of the alleged agreement to sell, refunded, in accordance with law. While all of transfers of different portion of the suit property made after filing of the main suit titeld Mst. Mumtaz Tahawar etc. Versus Liaqat Sultan etc. on 05.07.1997 shall be considered as null and void and in-operative upon the rights of the plaintiffs as well as defendants No.9 to 12 by virtue of the doctrine of li-pendence as envisaged in Section 52 of Transfer of Property Act.

Therefore Mr. Sajjad Aslam Virrak Advocate, Butar Law Chambers, 105-Al-falah Building, The Mall, Lahore is hereby appointed as local commissioner. He is hereby directed to conduct a local inspection of both residential as well as commercial part of the suit-property and to prepare a detailed report regarding his proposals

as to the partition of both of the portions of the suit-property. The report must include the site-plans enumerating the separate schemes of partition of both residential as well as commercial areas. His fees is hereby fixed as Rs.48,000/- which shall be paid by all the parties at the rate of Rs.3000/- each. The record shows that the plaintiffs as well as defendants No.9 to 12 were kept deprived of their due share of the suit-property by the malicious acts of defendants No.1 to 8 and the latter had been receiving rent of different portions of the suit-property, even in excess to the area mentioned in the aforementioned forged gift deeds. The record shows that the aforesaid defendants were directed to deposit the rents of different portions of the suit-property received by them individually, in the court and in this regard specific directions were issued by the Civil as well as District Courts but no such order was complied with. Moreover, the court appointed Receiver for the said purpose on 10.10.2000 but the Receiver prayed for the revocation of his appointment vide his statement dated 17.04.2001 and once again the matter was ignored. Therefore, the aforesaid Sajjad Aslam Virrak Butar Law Chambers 105 Al-falah Building, The Mall, Lahore shall also act as a receiver of commercial part of the suit-property under Order 40 of CPC and whole of the building of the Tahawar Plaza is hereby committed to the possession, control as well as management of the Receiver. Learned Receiver shall be entitled to collect rentals of different portions of Tahawar

Plaza by 5th of each month and shall be bound to deposit the same in the Court alongwith Statement of accounts by 10th of every month and all of the shareholders shall be entitled to draw their share of the monthly rent of the suit-property in accordance with law and the Receiver shall be entitled to the monthly remuneration which shall be equal to 2 per cent of the amount of rent recovered each month. Robkar be issued to the local commissioner requiring him to do the needful. Receiver shall exercise the same powers and perform the same functions as may be performed or exercised by a landlord appointed for collection of rent under the Punjab Urban Rent Restriction Ordinance. The arrangement shall remain till the issuance of final decree of partition of the suit property……..'

3. Being aggrieved of the said judgment and decree, the defendants/petitioners and other defendants preferred nine(9) appeals. The learned appellate Court vide impugned consolidated judgment and decree dated 16.09.2020 modified the judgment and decree passed by the learned trial Court to the extent that sale deed in favour of Raaziq International (Pvt.) Limited through its Chief Executive Mr. Muhammad Nadeem Khan cannot be cancelled without impleading him as party to the suit, therefore, judgment of learned trial Court to this extent was set aside. One appeal titled "Liaquat Sultana etc. v. Mst. Mumtaz Tahawar, etc.", two appeals titled "Kamran Tahawar,

etc. v. Akbari Khanum, etc.", two appeals tiled "International Publishers etc. v. Kamran Tahawar, etc." were dismissed whereas appeals titled "M/S Raaziq International etc. v. Naushaba Akhtar, etc." and "Raaziq International etc. v. Mumtaz Tahawar, etc." were accepted.

4. Feeling aggrieved by the said judgments and decrees, the revision petition in hand as well as connected C.Rs. Nos.64972 of 2020, 9062 of 2021 and 4430 of 2021 have been filed by the petitioners.

5. Heard.

6. Status of the defendants No.9 to 12 being legal heirs of the late Tahawar Ali Khan is an undisputed right now because the same has been established from the orders of this Court dated 02.03.2001, available on the record as Ex.D10, which divulges that all the parties have admitted and accepted the status of the said defendants No.9 to 12 as legal heirs of late Tahawar Ali Khan in C.R.No.261 of 2001; therefore, keeping in view the said factum as well as other evidence in the shape of admission of the P.W.8 and D.W.1, the learned Courts below have judiciously and rightly adjudicated upon the matter on this issue, so the findings on this score are upheld and maintained.

7. So far as the second question that Mst. Akbari Khanum was one of the Director of International Publishers is concerned, it is observed that when evidence of the parties has been pondered upon, it has surfaced that Tahawar Ali Khan

(late), during his life time, used the letter head pad of the said company for the purpose of correspondence with various department and he used to run the same solely. No documentary proof has been brought on record depicting or showing that any portion of the suit property was in the name of the said company i.e. International Publishers and Mst. Akbari Khanum with Maqsood Ali Khan were Directors whereas the late Tahawar Ali Khan was Managing Director, because the documents Ex.P3/3 and Ex.P.W.8/D-1 do not support the said stance, rather it has emerged that the said documents were executed by late Tahawar Ali Khan in his personal capacity and not as a Managing Director of the said company. Moreover, no rules of business or any resolution, appointing the said Akbari Khanum and Maqsood Ali Khan as Directors has been brought on record. In this regard, the learned Courts below have rightly appreciated the document Ex.D12, certified copy of order dated 23.12.2000 passed by the learned Addl. District Judge, Lahore during proceedings of an appeal, wherein one of the alleged Director appeared and recorded his statement that he had no concern and interest with the suit property, so his name was deleted as one of the promoter of the International Publishers by the said Court. Apart from this, not an iota of evidence has been brought on record showing that said Akbari Khanum and Maqood Ali Khan ever made any investment in the said alleged Company and nothing has been brought to show that the said

persons ever performed their duties as Directors of the said alleged company. In this view of the matter, the learned Courts below have rightly reached to a conclusion that the said company was only in papers and was used as a reference during correspondence with the third parties and no portion of the disputed property i.e. Tahawar Plaza was in the name of the said Company/International Publishers (Pvt.) Limited. In this view of the matter, the findings recorded by the learned Courts below after evaluating evidence of the parties in a minute manner on this issue are upheld and maintained.

8. The question with regards to gifting of some portions of the disputed property i.e. Tahawar Plaza is concerned, it is observed that ingredients for a valid gift are: offer, acceptance and delivery of possession. When sanctity of a gift is challenged or called into question especially on the basis of fraud and misrepresentation, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction. Reliance is placed on judgment reported as *Peer Baksh through LRs and others v. Mst. Khanzadi and others* (**2016 SCMR 1417**). The gift deeds Ex.D2 dated 18.01.1997 and Ex.D3 dated 17.09.1996, allegedly executed in favour of Kamran Tahawar and Sohail Nasir, though are registered documents and presumption of correctness are attached to them, but it is a settled principle of law, as observed above, that when sanctity of such a document is challenged, the

beneficiary has not only to prove the said document but also the original transaction. However, in the present case, it is observed that the beneficiaries i.e. Karman Tahawar, Sohail Nasir, Jamal Nasir, Sultan Tahawar and Aalam Tahawar have not only miserably failed to prove the original transaction of gift but also the subsequent transaction of registered gift deeds because late Tahawar Ali Khan admittedly died on 06.01.1997 (Ex.D.W.8/4, whereas alleged gift deed in favour of Kamran Tahawar was executed on 13.01.1997 through Muhammad Shaiq Siddiqui Advocate as local commission and the said document has signatures and thumb impressions of late Tahawar Ali Khan, which cannot be said anything but a fraud and misrepresentation because when a person has died on 06.01.1997, how he can make his signatures and put his thumb impressions on 13.01.1997. Ex.D3 is the alleged gift deed in favour of Sohail Nasir but he also could not prove the original transaction as well as the execution of registered gift deed by producing the marginal witnesses and the revenue officer. Same remained the position with documents Ex.D19 and Ex.D27 to Ex.D29, gift deeds in favour of Jamal Nasir, Sultan Tahawar, Azam Tahawar and Aalam Tahawar. Only one marginal witness namely Khursheed Alam with regards to gift deed in favour of Azam Tahawar and Haroon Shafique marginal witness germane to gift deed in favour of Aalam Tahawar besides Muhammad Shaiq Siddiqui, Advocate, local

commission have been produced, whereas law requires that in order to prove valid execution of a document, at least two truthful witnesses are to be produced, as has been enunciated under Article 79 of the Qanun-e-Shahadat Order, 1984. Even, Azam Tahawar, alleged donee of Ex.D16 did not enter into the witness box so as to corroborate his stance and also did not produce the local commission in whose presence the document was executed and the marginal witnesses signed it. The alleged marginal witness of Ex.D16 namely Khursheed Alam D.W.5 deposed that the alleged gift deed was not written down in his presence. Same remained the situation with Ex.D17 and Ex.D18, gift deeds in favour of Jamal Nasir and Sultan Tahawar, because M. Shaiq Siddiqui Advocate not only purchased the stamp papers for execution of gift deeds but also was an identifier and one of the marginal witness of the said documents. The other marginal witness was clerk of the said M. Shaiq Siddiqui Advocate, meaning thereby the documents have been executed with active collusion of the said M. Shaiq Siddiqui Advocate in order to deprive of other legal heirs of Tahawar Ali Khan (late), for some worldly gains. In this view of the matter, the learned Courts below after evaluating and discussing evidence of the parties, oral as well as documentary, in a minute manner have reached to a just conclusion that the gift deeds in favour of Kamran Tahawar, Sohail Nasir, Jamal Nasir, Sultan Tahawar, Azam Tahawar and Alam Tahawar were

based on fraud and have rightly been declared as illegal, forged and fabricated documents. The findings on this point, being upto the dexterity, are also upheld and maintained

9. Question with regards to alienation of a portion of his property measuring 2456'11'' Sq.feet of the commercial building for a consideration of Rs.800,000/- in favour of Raaziq International (Pvt.) Limited through its Chief Executive Mr. Muhammad Nadeem Khan in the year 1994 by late Tahawar Ali Khan vide Ex.D.W.8/D-2, has rightly been adjudicated upon by the learned appellate Court vide impugned judgment and decree dated 16.09.2020, because when the said Raaziq International (Pvt.) Limited through its Chief Executive Mr. Muhammad Nadeem Khan has not been impleaded as party to the suit and has not been provided with an opportunity to defend himself, no adverse order can be passed against him, as it would amount to condemn him unheard, which is not requirement of law, rather free and fair opportunity of defending and presenting one's case has to be provided.

10. Matter germane to revocation of succession certificate issued on 12.12.1997, keeping in view the factum that defendants No.9 to 12 are also legal heirs of late Tahawar Ali Khan, has also rightly been adjudged by the learned Courts below, because the said succession certificate was obtained by concealing true facts from the Court, seized of the matter. In this view of the matter, no illegality and irregularity has been

committed by the learned Courts below while passing the impugned judgments and decrees.

11. In addition to the above, the concurrent findings on facts cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908; reliance is placed on *Mst. Zaitoon Begum v. Nazar Hussain and another* (**2014 SCMR 1469**), *CANTONMENT BOARD through Executive Officer, Cantt. Board Rawalpindi v. IKHLAQ AHMED and others* (**2014 SCMR 161**), *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* (**2017 SCMR 679**), *Muhammad Sarwar and others v. Hashmal Khan and others* (**PLD 2022 Supreme Court 13**) and *Mst. Zarsheda v. Nobat Khan* (**PLD 2022 Supreme Court 21**) wherein it has been held:-

> *'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent*

findings of three courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage.'

12. Pursuant to the above, when there appears no illegality and irregularity as well as wrong exercise of jurisdiction, the revision petition in hand as well as connected C.Rs. bearing Nos. 64972 of 2020, 9062 of 2021 and 4430 of 2021 being without any force and substance, are dismissed. No order as to the costs.

(***Shahid Bilal Hassan***)
Judge

Approved for reporting.

Judge

M.A.Hassan

Connoisseur's Introduction.

Sahibzada Mian Muhammad Ashraf Asmi, an advocate of the High Court, hails from the ancestral city of Lahore. His father, the esteemed Mian Omar Draz, was a teacher. Mian Muhammad Ashraf Asmi spent his childhood at Sargodha under the guidance of his maternal uncle, Hakeem Enayat Qadri Noshahi. He completed his matriculation from Government Comprehensive High School Sargodha and pursued his intermediate & Graduation at Government College of Commerce Sargodha. He was also student of Government College Sargodha.

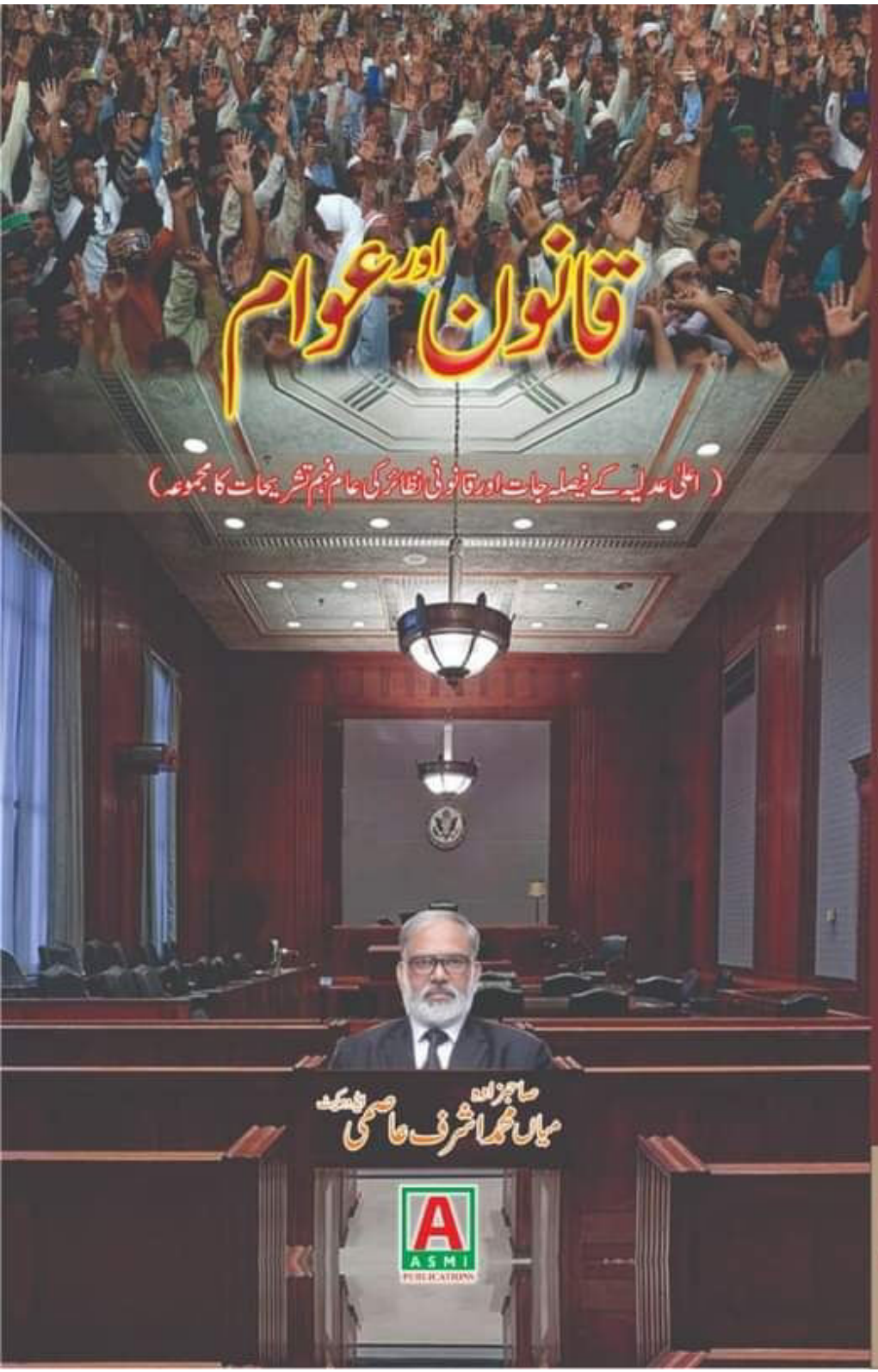
He holds master's degrees in Economics, Business Administration, and Education. He obtained his LLB and LLM degrees from Punjab University and also holds a postgraduate diploma in Islamic Law & Information Technology. For 35 years, he has been associated with the study and teaching of law. He is affiliated with the student organization Anjmin-e-Talaba Islam, known for its commitment to the love of Prophet Muhammad (PBUH).

Belonging to the illustrious Sufi family of Hafiz Mian Muhammad Isma'il, also known as Hafiz Mian Wada Sahib, from Burshehri Pak Wahan, he has roots in Lahore for centuries. His grandfather, Hafiz Mian Muhammad Isma'il, and great grandfather, Hafiz Mian Muhammad Ibrahim, served in the police department in British India. His family has resided in Lahore for generations, and the mosque on the left side of Bhatti Gate in Lahore is named after his great-grandfather, Hafiz Mian Ibrahim, who had it constructed.

Advocate Asmi contributes columns on social and legal issues to various national and international newspapers. He serves as the Senior Vice President of the World Columnist Club, a globally recognized organization of columnists. Actively engaged in human rights advocacy, he is the Chairman of the Human Rights Committee at Lahore High Court Bar and the founder Chairman of the Committee for the Protection of the Honor of Prophet Muhammad (PBUH) at Lahore Bar Association. He is also member of TXdLA of America since 1998.

He is also a representative of the Qadriyah Noshahiyya, being the authorized successor of Hakeem Mian Muhammad Enayat Khan Qadri Noshahi in the Silsila of Qadriyah Noshahiyya. Advocate Asmi has received literary awards from Lahore High Court Bar, Human Rights Award from Lahore Bar Association, and awards from the World Columnist Club. He has been honored with the Shahnaz Mazamil Award by Adab Sara International.

Apart from this book, he has authored numerous books on various subjects. Advocate Muhammad Ashraf Asmi, through his digital channels - Asmi Advocate, Qanoon Aur Awaam, and Cgent Legal Solutions, has recorded over seven thousand lectures. With systematic regularity, he records decisions of the higher judiciary in an easy-to-understand Urdu language, benefiting thousands of law-related individuals and the general public.



قانون اور عوام

صاحبزادہ میاں محمد اشرف عاصمی ایڈووکیٹ

صاحبزادہ میاں محمد اشرف عاصمی ایڈووکیٹ کا آبائی شہر لاہور ہے۔ان کے والد محترم صاحبزادہ میاں عمر دراز رحمۃ اللہ استاد تھے۔صاحبزادہ میاں محمد اشرف عاصمی ایڈووکیٹ نے اپنا بچپن ماموں جان حضرت حکیم میاں محمد عنایت خاں قادری نوشاہی کے زیر سایہ گزارہ۔گورنمنٹ کالج آف کامرس سرگودھا سے بی کام کیا۔معاشیات بزنس ایڈمنسٹریشن ،ایجوکیشن میں ماسٹرز کیے۔پنجاب یونیورسٹی سے ایل ایل بی کیا اور ایل ایل یم کریمنالوجی کی ڈگری کے حامل ہیں۔اسلامک لاء میں پوسٹ گریجویٹ ڈپلومہ بھی کیا ہے۔تین دہائیوں سے قانون کی درس وتدریس سے وابستہ ہیں۔عشق رسول ﷺ کی سرخیل تنظیم انجمن طلباء اسلام سے تعلق رہا ہے۔برصغیر پاک وہند کے عظیم صوفی بزرگ حضرت حافظ میاں محمد اسماعیل رحمۃ اللہ المعروف میاں وڈا صاحب رحمۃ اللہ لاہوری کے خانوادے سے تعلق ہے۔صاحبزادہ میاں محمد اشرف عاصمی ایڈووکیٹ کے دادا حافظ میاں محمد اسماعیل رحمۃ اللہ اور پردادا حافظ میاں محمد ابراہیم متحدہ ہندوستان میں محکمہ پولیس میں بطور افسر خدمات سرانجام دیتے رہے ہیں۔ان کا خاندان صدیوں سے لاہور میں رہائش پذیر ہے۔لاہور میں بھاٹی دروازے کے بائیں جانب مسجد ابراہیم ان کے پردادا کے نام سے منسوب ہے جو انھوں نے تعمیر کروائی تھی۔صاحبزادہ میاں محمد اشرف عاصمی ایڈووکیٹ مختلف قومی اور بین الاقوامی اخبارات میں سماجی اور قانونی موضوعات پر کالم لکھتے ہیں۔کالم نگاروں کی عالمگیر تنظیم ورلڈ کالمسٹ کلب کے سنیئر نائب صدر ہیں۔انسانی حقوق کے حوالے سے انتہائی فعال کردار ادا کر رہے ہیں۔ہیومن رائٹس کمیٹی لاہور ہائیکورٹ بار کے چیئرمین ہیں۔تاجدار ختم نبوت کمیٹی اور تحفظ ناموس رسالت ﷺ کمیٹی لاہور ہائی کورٹ بار ایسوسی ایشن کے بانی چیئرمین ہیں۔صاحبزادہ میاں محمد اشرف عاصمی ایڈووکیٹ سلسلہ قادریہ نوشاہیہ میں حکیم میاں محمد عنایت خاں قادری نوشاہی آف زاویہ نوشاہی سرگودھا کے خلیفہ مجاز ہیں۔اس کے علاوہ آپ کی متعدد تصانیف منظر عام پر آچکی ہیں۔

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