# General Training Program 2023-24

For

Additional District & Sessions Judges

and

Civil Judges – cum – Magistrates

## Reading Material

Punjab Judicial Academy
15-FANE ROAD, LAHORE

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# Civil Cases

## P L D 1987 Lahore 387

Before Amjad Khan, J

MUHAMMAD SULEMAN Appellant

versus

ABDUL RASHID and 13 others Respondents

Regular Second Appeal No. 10 of 1987/BWP with Civil Miscellaneous No. 151 of 1987/B.W.P., decided on 7th March, 1987.

**(a) Judgment**

Judgment containing errors of description and typographical mistakes Such errors and mistakes though not material for the purpose of the case but they do point to the need for the Judge being more careful in recording his judgments with greater attention.

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

0.1, Rr. 9 & 10 Necessary party Definition Person bringing action, appeal or proceeding is duty bound to implead all necessary parties to it and his omission to do so would be fatal defect which if not remedied with the permission of the Court within period prescribed by law would result in its dismissal.

A necessary party to an action, appeal or other proceeding was defined as the one whose presence on the record is enjoined by law or in whose absence no effective decision can at all be given. It is the duty of the person brining the action, appeal or proceeding to implead all necessary parties to it and his omission to do so is a fatal defect which if not remedied with the permission of the Court within the period prescribed by law results in its dismissal.

Thakar Hari Ram v. Central Government through Secretary, Commerce Department Delhi A I R 1941 Lah. 120; Gul Muhammad and another v. Mir Zaman and another P L D 1954 Lah. 406 and National Bank of Pakistan v. Syed Muzammal Hussain P L D 1965 (W.P.) Kar. 633 ref.

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

0. XLI, R. 20 Decree made in favour of several persons against several defendants without making any distinction whatsoever Appeal could not

proceed if all the plaintiffs and defendants were not impleaded in the case as appellants or as respondents Failure to so implead would render appeal incompetent and would be dismissed on that ground alone, the judgment of the Trial Court would stand intact Litigant may not to his pleasure, leave out of his appeal a necessary party as arrayed in the suit and then rejoin him subsequently to his convenience Even if the father and son may have a community of interests in the venture, still he had to be joined in the appeal either as his co appellant or as a respondent but could not be simply left out.

Gul Muhammad and another v. Mir Zeman and another P L D 1954 Lah. 406; National Bank of Pakistan v. Syed Muzammal Hussain P L D 1965 (W.P.) Kar. 633 and Musmar and another v. Khairullah Khan and others P L D 1954 Pesh. 52 ref.

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

O.XLI, R. 20 Where an appeal against a respondent had become time barred, he ceased to be "a person who was interested in the result of the appeal" within meaning of 0 . XLI , R . 20, C . P. C . and his name could not be subsequently added as a respondent under O . XLI , R . 20, C . P . C . Court was not competent to allow appellant to implead a person for the first time after the limitation for the appeal had expired Appellate Court, therefore, cannot hear appeal when necessary parties were not before it Where a necessary party was left out in an appeal, appeal could not be proceeded with and became liable to be dismissed as imperfectly constituted.

Rameshwar Des v. Official Receiver, Delhi and others A I R 1938 Lah. 325; Hayat and others v. Mutalli and others A I R 1938 Lah. 35; Taja Singh v. Katar Kaur A I R 1937 Lah. 180; Shangara Singh and others v. Imam Din and others AIR 1940 Lah. 314 and Shah Muhammad and others v. Muhammad Bakhsh P L D 1972 S C 321 ref.

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

0. XLI, R. 4 Provision of O.XLI, R. 4, C.P.C. is merely an enabling provision which confers a privilege on one of the plaintiffs or defendants to prefer an appeal from a decree which proceeds on any ground common to all the plaintiffs or all the defendants Any person who is necessary party to the appeal cannot be excluded and appeal in case of exclusion of necessary party would not be properly constituted Provision of O.XLI, R.4, C.P.C. cannot be applied where the non appealing plaintiff or defendant, as the case may be, has not been impleaded at

all No memorandum of appeal, whether in a Letters Patent Appeal or in any other appeal can be considered to be complete unless it mentions the names of all the parties against whom relief is sought Appeal, therefore, cannot be proceeded with if necessary parties to the appeal are not impleaded.

Nanak and others v. Ahmad Ali and another A I R 1946 Lah. 399; Khaira v. Saleam Raj I L R 1 Lah. 21 and Chajju Ram and others v.Singh Ram and others A I R 1925 Lah. 392 (1) ref.

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

O.XLI, Rr. 4, 20 & 33 Impleading of a party to an appeal after expiry of limitation for filing appeal is not possible Neither provision of 0. XLI, R . 4, C .P. C . is open to be pressed into service in such a situation nor can provision of O.XLI, R. 20, C.P.C. be invoked in this context Unauthorised inclusion of name at second appeal stage has to be simply disregarded, that being a new party and no new party can be added in an appeal In the absence of necessary party to appeal, provisions of O.XLI, R. 33, C.P.C. cannot be used for reversing the decree passed and upheld below in favour of respondents which had become unassailable as regards them Power can hereunder "be exercised in favour of all or any of the respondents or parties" but not in favour of a non party as second appeal is liable to be simply dismissed on this short ground.

Sh. Inayat Ali for Appellant.

**ORDER**

A sale of 95 Kanals 16 Marlas of agricultural land situated in village Tatter Chachar, Tehsil Khanpur, District Rahimyar Khan made by one Inayat Hussain through Mutation No. 1054, dated 12 1 1973 in favour of Abdul Qadir was subjected to two pre emption suits filed respectively by Hayat Muhammad, also described at places as Muhammad Hayat, who is represented by the legal heirs Muhammad Shafi etc., respondents Nos. 8 to 13 herein, and Abdul Ghafoor (represented by his legal heirs Abdul Rashid etc., respondents Nos. 1 to 7 herein). Both the suits were resisted by the vendee Abdul Qadir by denying the rights of the plaintiffs and by also relying upon a consent decree, dated 22 12 1973 passed in favour of his father Muhammad Suleman (the petitioner herein) which gave effect to his assertion that in fact he had purchased the land through his son Abdul Qadir but he had unscrupulously got the mutation sanctioned in his own name. Muhammad Suleman was also consequently joined as a defendant in both the suits which were consolidated for trial and proceedings were held in the suit

of Hayat Muhammad. Necessary issues were settled and parties led their evidence in result whereof, by the judgment, dated 8 2 1986, trial Court dismissed the suit of Hayat Muhammad with the finding that he had not been able to prove his claim of being an owner of the estate but decreed the suit of Abdul Ghafoor.

2. Two appeals were there against filed in the District Court at Rahimyar Khan respectively by the defeated pre emptors Muhammad Shafi etc. (the legal heirs of Hayat Muhammad) and the defendant Muhammad Suleman who, however, did not implead Abdul Qadir as a party in his appeal, on either side. Both the appea sI were heard together by a learned Additional District Judge (Mahar Muhammad Siddique Garwah) and were dismissed by his judgment, dated 18 1 1987 by affirming the findings of the trial Court on all the issues and upholding its decrees upon merits, without noticing the defect with regard to omission of Abdul Qadir from the array of parties. There appears to be a typographical mistake made in the judgment of the learned Additional District Judge with regard to the date of sanction of mutation of sale which he has mentioned as 16 1 1975 instead of 12 1 1973. He has also fallen into errors of description with regard to the consent decree secured by Muhammad Suleman which has been L stated by him to have been obtained "against his own father Abdul Qadir vendee" and, again in para. 12, he has mentioned Abdul Qadir to be the father. Actually, Muhammad Suleman is the father and the name of the son is Abdul Qadir. These errors are not material for the purposes of this case because they have not affected its decision on merits but they do point to the need for the learned Judge being more careful in recording his judgments with greater attention.

3. Muhammad Suleman has now come up to this Court in this Second Appeal filed by him against the successful pre emptors impleaded as respondents Nos. 1 to 7 and the rival pre emptors as respondents Nos. 8 to 13. Even Abdul Qadir has been joined in this appeal as respondent No. 14 despite the fact that, as mentioned already, he had not been joined in the appeal filed by Muhammad Suleman in the District Court.

In Thakar Hari Ram v. Central Government through Secretary Commerce Department, Delhi A I R 1941 Lah. 120, a necessary party to an action, appeal or other proceeding was defined as the one whose presence on the record is enjoined by law or in whose absence no effective decision can at all be given. It was also laid down therein:

"It is the duty of the person bringing the action, appeal or proceeding to implead all necessary parties to it and his omission to do so is a fatal defect which if not

remedied with the permission of the Court within the period prescribed by law results in its dismissal."

The above definition of a necessary party was approved in Gul Muhammad and another v. Mir Zaman and another P L D 1954 Lah. 406. To the same effect is also National Bank of Pakistan v. Syed Muzammal Hussain P L D 1965 (W.P.) Kar. 633.

Abdul Qadir being a co judgment debtor under the trial Court's decree passed without making any distinction, he was a necessary party required to be joined in the appeal below. No doubt he is a son of the appellant and even if the father and son may have a community of interests in the venture to dislodge the claim of the pre emptors, still he had to be joined in the appeal of Muhammad Suleman either as his co appellant or as a respondent but could not be simply left out. In Musmar and another v. Khairullah Khan and others P L D 1954 Pesh. 52, it has been held:

"Where a decree has been made in favour of several persons' against several defendants without making any distinction whatsoever, the appeal cannot proceed if all the plaintiffs and the defendants are not impleaded in the case as appellants or as respondents."

and it was concluded that since, for the failure to so implead all the parties, the appeal below was rendered incompetent and should have been dismissed on that ground alone, the judgment of the trial Court would stand intact.

It cannot be accepted that a litigant may, to his pleasure, leave out of his appeal a necessary party as arrayed in the suit and then rejoin him subsequently to his convenience.

4. Since the trial Court had passed one joint and indivisible decree against both the defendants, in favour of the heirs of the deceased pre emptor Abdul Ghafoor, on 8 2 1986 and the imperfect appeal there against was filed by the appellant on 12 3 1986 by leaving) out Abdul Qadir, therefore, the trial Court's decree had become final and indefeasible as regards him and his being joined improperly in this Second Appeal instituted on 14 2 1987, after more than one year of the trial Court's decree, cannot be of any avail because appellate Court's power to implead parties to an appeal under Order XLI, rule 20 of the C . P. C . was examined in Rameshwar Das v . Official Receiver,, Delhi and another, Debtors and others A I R 1938 Lah. 325 and it was held:

"Where an appeal against a respondent has become barred by time, he ceases to be "a person who is interested in the result of the appeal" within the meaning of Order XLI, rule 20 and his name cannot be subsequently added as a respondent under Order XLI, rule 20."

To the same effect is also Hayat and others v. Mutalli and others AIR 1938 Lah. 35 which was followed alongwith the case of Taja Singh v. Katar Kaur A I R 1937 Lah. 180 by another learned Judge of this Court in Shangara Singh and others v . Imam Din and others A I R 1940 Lah. 314 to conclude that:

"Court is not competent to allow the appellant to implead a person for the first time after the limitation for the appeal has expired."

Obviously enough, if a prayer may have been made in the lower appellate Court for joining Abdul Qadir in the appeal, it could not have succeeded, then, how may it be that the appellant may on his own choose to join Abdul Qadir in this Second Appeal? An act which is not capable of being done even with the leave of the Court, rather, for which even a Court does not have the power to grant permission, cannot be accomplished by a litigant just by himself by simply omitting to ask for its permission. The name of Abdul Qadir has, therefore, to be treated as non existent for the purposes of this appeal. It is firmly settled that where a necessary party is left out in an appeal there it cannot be proceeded with and becomes liable to be dismissed as being imperfectly constituted. While considering the question of array of parties in an appeal, their Lordships of the Supreme Court have, in a different context, observed in Shah Muhammad and others v. Muhammad Bakhsh P L D 1972 S C 321 as under:

"It will be totally wrong to hold that an appellate Court can proceed to hear an appeal, even if the necessary parties are not before it."

and, in the same judgment, while examining the scope of the provision made in rule 4 of Order XLI of the C.P.C., it has been held:

"The provision of Order XLI, rule 4 of the C.P.C. is merely an enabling provision which confers a privilege on one of the plaintiffs or defendants to prefer an appeal from a decree which proceeds on any ground common to all the plaintiffs or to all the defendants. It nowhere lays down that any person, who is a necessary party to the appeal, can be excluded ands :still the appeal will be properly constituted."

and therein also stands approved a Full Bench Judgment of this Court reported as Nanak, deceased, represented by Umra and others v. Ahmad Ali and another A I R 1946 Lah. 399 which had held that this provision cannot be applied where the non appealing plaintiff or defendant, as the case may be, has not been impleaded in the appeal at all. In the case of Rameshwar Das (ibid) it is also held:

"No memorandum of appeal, whether in a Letters Patent Appeal or in any other appeal can be considered to be complete unless it mentions the names of all the parties against whom relief is sought."

Following the rule laid down in an earlier judgment reported as Khaira v. Saleam Raj I L R (1920) 1 Lah. 21, a Division Bench of this Court held in Chajju Ram and others v. Singh Ram and others A I R 1925 Lah. 392 1 that an appeal cannot be proceeded with if necessary parties to the appeal are not impleaded.

As has been seen above, the omission to so implead Abdul Qadir had to inevitably result in rejection of the appeal below and, for practical purposes, it does not make the least difference that it was in fact heard to be only dismissed on merits, in complete oblivision of the defect resulting from the omission of his name. It stands amply brought out in the above cited judgments that the impleadment of a party to an appeal after the expiry of the limitation for filing the appeal is just not possible. Neither Rule 4 of Order XLI of the C . P. C . , is open to be pressed into service in such a situation nor can Rule 20 thereof be invoked in this context. Hence, the unauthorised inclusion of the name of Abdul Qadir in this second appeal has to be simply disregarded because for the purposes of this appeal he is a new party and no new party can be added in an appeal. In they absence of Abdul Qadir, even the provisions of Rule 33 of Order XLI of the C.P.C. cannot be used for reversing the decree passed and upheld below in favour of respondents Nos. 1 to 7 which has become unassailable as regards him. The power can thereunder "be exercised in favour of all or any of the respondents or parties" but not in favour of a non party so that this second appeal is liable to be simply dismissed on this short ground.

5. Inconsistent decrees cannot be brought about to co exist in one and the same case and since the result of ultimate success of this appeal cannot be that whereas the trial Court's decree remains in the field against Abdul Qadir, it may be set aside against Muhammad Suleman, therefore, no useful purpose can be served in proceeding with such an appeal which had, accordingly, to be held not liable to be proceeded with and is, hence, dismissed in limine.

M.B.A./M 213/L Appeal dismissed.

**1988 C L C 1688**

[Lahore]

Before Fazl i Mahmood, J

A ZI Z Petitioner

versus

MUMTAZ BIBI Respondent

Writ Petition No.4316 of 1986, decided on 24th January, 1988.

**(a) Judgment**

Judgment based on insufficient evidence and one based on total want of evidence Distinction Judgment without evidence, would be void or voidable as the case may be, while insufficiency of evidence was a relevant term.

**(b) Dissolution of Muslim Marriages Act (VIII of 1939)**

S. 2 (viii) Dissolution of marriage on ground of cruelty Question of sufficiency of evidence Wife examined two witnesses in support of her version and she herself also appeared and supported her case Evidence on factual plane did not show that evidence on record was insufficient for decision' of issue of cruelty against husband Plea rejected.

**(c) Muslim Family Laws Ordinance (VIII of 1961)**

S. 8 Dissolution of marriage on ground of Khula' Plea of petitioner that terms of Khula' had not been examined or laid down by Trial Court repelled Non payment of stipulated consideration for Khula' would not invalidate dissolution of marriage by Khula' Once Family Court came to conclusion that parties could not remain within limits of `God dissolution of marriage by Khula' must take place Inquiry into terms on which such dissolution would take place could not affect conclusion but only created civil liabilities with regard to benefits to be returned by wife to the husband and did not affect the dissolution of marriage itself.

**(d) Muhammadan Law**

Divorce Khula' Non payment of stipulated consideration for Khula' Effect Non-payment of stipulated consideration for Khula', held, would not invalidate dissolution of marriage by Khula' Once Family Court had come to conclusion

that parties could not remain within limits of God, dissolution of marriage by Khula' must take place Inquiry into terms on which such dissolution would take place could not affect conclusion but only created civil liabilities with regard to benefits to be returned by wife to the husband and did not, affect marriage itself.

**(e) Constitution of Pakistan (1973)**

Art. 199 Constitutional jurisdiction, exercise of Order of Court below not suffering from vitiative factual or legal infirmity, held, could not be interfered with by High Court in exercise of constitutional jurisdiction.

Khizar Abbas Khan for Petitioner.

Muhammad Iqbal Sargana for Respondent.

Date of hearing: 24th January, 1988.

**JUDGMENT**

This writ petition is directed against the judgment of a Judge, Family Court, dated 15 7 1986 whereby while answering other issues on merits against the wife except of cruelty and Khula', he granted a decree for dissolution of marriage.

2. The learned counsel's first contention before this Court is that the judgment is based on insufficient evidence. On this point I must observe that there is difference between insufficiency of evidence and total want of evidence. The judgment without evidence is void or voidable as the case may be. Insufficiency of evidence is a relative, term. There were two witnesses examined in support of version of the defendant wife and she herself also appeared and supported her' case. That evidence has been perused and it cannot on factual plane be said that it was insufficient for the decision of the issues against the petitioner. This ground, therefore, fails.

3. The second objection raised by the learned counsel is that the, terms of Khula' have not been examined or laid down. This objection is answered by the decision of the Supreme Court in the case of Dr. Akhlaq Ahmed v . Mst. Kishwar Sultana and others (P L J 1983 SC 252), wherein the following proposition has been laid down:

"As regards the third submission of the learned counsel for the petitioner that dissolution of marriage by Khula' cannot stand whilst an inquiry on facts with regard to the terms on which it is to be granted is yet to take place, it appears

plausible but is not quite sound. It was held in the case of Moonshee Buzul ul Raheem v . Luteefutoon Nisa (3 Moore's Ind Appl. 379) that non payment of stipulated consideration for Khula' does not invalidate the dissolution of marriage by Khula'. Once the Family Court came to the conclusion that the parties cannot remain within the limits of God and the dissolution of marriage by Khula' must take place, the inquiry into the terms on which such dissolution shall take place does not affect the conclusion but only creates civil liabilities with regard to the benefits to be returned by the wife to the husband and does not affect the dissolution itself.."

4. In view of what has been stated above, I do not think there is any scope for this Court to interfere in its Constitutional jurisdiction with the impugned order which does suffer from a vitiative factual or legal infirmity. This petition, therefore, fails and is hereby dismissed. There will be no order as to costs.

H.B.T./A 316/L Petition dismissed

**P L D 1989 Supreme Court (AJ&K) 32**

Present: Raja Muhammad Khurshid Khan, C. J. and Sardar Said Muhammad Khan, J

INAM UR RAHIM SHAH, ASSISTANT ENTOMOLOGIST AGRICULTURE DEPARTMENT, MUZAFFARABAD Appellant

Versus

THE STATE Respondent

Criminal Appeal No. 1 of 1988, decided on 16thJanuary, 1989.

(On appeal from the judgment of the High Court dated 8 2 1987 in Criminal Appeal No. 3 of 1985).

**(a) Expunction of remarks -----**

High Court judgment Inherent powers of Supreme Court to expunge portions of judgment of High Court Freedom and independence of Courts Expression of opinion by Courts Considerations. [Supreme Court].

No doubt the Supreme Court has inherent powers to expunge the portions of the judgment of the High Court, which the Court thinks are not called for. The power is unbounded by law which expressly gives to the Courts: especially Supreme Court, authority to make such orders as may be necessary to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. However, the jurisdiction being one of an extraordinary character is to be exercised with care and caution and only in exceptional cases. The reason is that it is of utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the superior Courts. Besides, it is always desirable that a judgment once delivered should remain in the shape in which it was originally published, nevertheless at times there may be good reasons to exercise inherent

powers to delete passages which are not based on evidence or which are irrelevant to any point in issue and which have unnecessarily been included in a judgment.

It is the duty of Supreme Court, in order to prevent the abuse of the process of the Court and to secure ends of justice, to delete passages commenting adversely upon a person when he was not a party to the proceedings and has had no fair opportunity of being heard and also to delete such passages when they are based upon no evidence. In the absence of any one of the above situations, expunction of any remark is neither permissible nor advisable. It is noticed always that in weighing evidence and in arriving at conclusion on a question of fact, lower Courts have often to make remarks on the character of a witness, which is always permissible, and in such a case no valid grievance can be made.

The proper freedom and independence of Judges and Magistrates are to be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. But at the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fairplay and restraint. Sweeping generalisations in a judgment should be avoided as they defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before the Courts of law in cases to be decided by them, it is relevant to consider

(a) whether the party whose conduct is in question is before the Court or had an opportunity of explaining or defending himself;

(b) whether there is evidence on record bearing on that conduct justifying the remarks; and

(c) whether it is necessary for the decision of the case, as an integral part thereof, to bring on record certain observations bearing on the conduct of a person.

Judicial pronouncements are to be judicious in nature, and should not normally depart from moderation and reserve.

Panchanan Banerji v. Upendra Nath Bhattacharji AIR 1927 All. 193; K.S. Mahomed Hussain v. Emperor AIR 1929 Sind 243 and Tajumal Naraindas v. Emperor AIR 1933 Sind 91 ref.

**(b) Administration of justice**

Proper freedom and independence of Courts to be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by the Supreme Court.

**(c) Judgment**

Sweeping generalisations in a judgment should be avoided as they defeat the very purpose for which they are made.

**(d) Judgment**

Judicial pronouncements are to be judicious in nature, and should not normally depart from moderation and reserve.

**(e) Expunction of remarks ------**

High Court judgment  Inherent powers of Supreme Court to expunge remarks from the High Court judgment  Passages which are based on evidence though may damage the character of a person, unless such an observation is irrelevant to any point in issue, cannot be expunged Passages irrelevant and not forming integral part of the judgment can of course be expunged.

**(f) Expunction of remarks -----**

Observations warranted by record and fair outcome of prosecution witness and appellant himself  Not expunged.

Sardar Rafique Mahmood Khan, Advocate for Appellant.

Manzoor Hussain Gillani, Advocate General for the State.

**JUDGMENT**

**RAJA MUHAMMAD KHURSHID KHAN, C.J.** This appeal, by leave, is addressed against the judgment of the High Court, dated 8 2 1987, whereby acquitting one Muhammad Ayub Qureshi of the charges levelled against him under section 5(2) of the At Corruption Act, read with section 409, Penal Code, an observation to which the appellant now seeks exception was made against him.

2. Brief facts leading to the above grievance are

It appears that the appellant was serving as Assistant Entomologist in the Agriculture Department of the Azad Jammu and Kashmir Government. During the period some misappropriation in the Department was made. At the time of misappropriation the pant, in addition to his duty, was also working as Drawing and Disbursing Officer. In this capacity, the appellant made a F.I.R. on 21stSeptember, 1980, against Muhammad Ayub Qureshi, Accountant of the Department. It was alleged in the report that Muhammad Ayub has prepared some fictitious pay bills and thus managed to obtain over payment and misappropriated the amount. After investigation, Muhammad Ayub was put to trial in the Court of Special Judge Anti --Corruption, Muzaffarabad, under section 5(2) of the Ant Corruption Act read with section 409 of the Penal Code. After the trial, he was convicted and sentenced to two years' rigorous imprisonment with a fine of Rs. 10,000. On appeal to the High Court his conviction and sentence were set aside vide order, dated 8 2 1987.

While passing the judgment in the aforesaid case, the learned Chief Justice of the High Court made an observation to which the appellant now seeks exception. The observation is to the effect "This suggests that the Drawing and Disbursing Officer was responsible for the whole mishap but intelligently enough, he chose to become a witness of the incident by implicating the appellant". The appellant, who was Drawing and Disbursing Officer at the Time of misappropriation, now wants expunction of these remarks.

3. It has been argued by Sardar Rafique Mahmood, the learned counsel for the appellant, that remarks referred to above are uncalled for and

violative of the principle of 'sudi alteram partem', i.e., nobody should be condemned unheard. Thus, the learned counsel has argued that the above observation is uncalled for in the circumstances of the case, especially so when it was the appellant who had moved the Investigation Agency to take action against Muhammad Ayub Qureshi, Accountant of the Department.

4. As against this the learned Advocate General has argued that these remarks are based on the statements of the appellant and one Mir Abdul Aziz, P.W., and, therefore, it would not be proper to expunge them in exercise of the inherent jurisdiction of this Court. It was further contended that the remarks are drawn in a reasonable way from the circumstances and evidence; and so they do not call for expunction.

5. We have given our dispassionate thought to the arguments advanced at the Bar. Let us first determine the extent of the authority of the. Supreme Court to exercise its inherent powers to expunge remarks. No doubt the Supreme Court has inherent powers to expunge the portions of the judgment of the High Court, which the Court thinks are not called for. We also believe that the power is unbounded by law which expressly gives to the Courts: especially Supreme Court, authority to make such orders as may be necessary to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. However, the jurisdiction being one of an extraordinary character is to be exercised with care and caution and only in exceptional cases. The reason is that it is of utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the superior Courts. Besides, it is always desirable that a judgment once delivered should remain in the shape in which it was originally published, nevertheless at times there may be good reasons to exercise inherent powers to delete passages which are not based on evidence or which are irrelevant to any point in issue and which have unnecessarily been included in a judgment. This view prevailed in Panchanan Banerji v. Upendra Nath Bhattacharji AIR 1927 All. 193, K.S. Mahomed Hussain v. Emperor A I R 1929 Sind 243 and Tajumal Naraindas v. Emperor A I R 1933 Sind 91.

6. It, thus, follows that it is the duty of this Court, in order to prevent the abuse of the process of the Court and to secure ends of justice, to delete

passages commenting adversely upon a person when he was not a party to the proceedings and has had no fair opportunity of being heard and also to delete such passages when they are based upon no evidence. In the absence of any one of the above situations, expunction of any remark is neither permissible nor advisable. It is noticed always that in weighing evidence and in arriving at conclusion on a question of fact, lower Courts have often to make remarks on the character of a witness, which is always permissible, and in such a case no valid grievance can be made.

7. It may be observed that there is a cardinal principle in the administration of justice that the proper freedom and independence of, Judges and Magistrates are to be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. But at the same time it is equally necessary that in expressing their opinions, Judges and Magistrates must be guided by considerations of justice, fair play and restraint. Sweeping generalisations in a judgment should be avoided as they defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before the Courts of law in cases to be decided by them, it is relevant to consider

(a) whether the party whose conduct is in question is before the Court or had an opportunity of explaining or defending himself;

(b) whether there is evidence on record bearing on that conduct justifying the remarks; and

(c) whether it is necessary for the decision of the case, as an integral part thereof, to bring on record certain observations bearing with conduct of a person.

It is also a settled law that judicial pronouncements are to be judicious) in nature, and should not normally depart from moderation :Ind reserve.

8. This now brings us to the controversial observation. To appreciate the controversial issue, it would be proper to reproduce the relevant portion of

the para in extenso in which the above observation has been made by the learned Judge. The tiara runs as under:

> "In present case, the Drawing and Disbursing Officer, Inam ur Rahim Shah appears to be careless and negligent of his duty or suffering from lack of aptitude or acumen in the job. This is so, as he never cared to have satisfied himself with the accuracy and correctness of the pay tills at the time of their signing and at occasions he signed blank pay bill forms as is the case of Exh. D.1. In answer to a question in crossexamination, he admitted that Exh. D.1 was a blank pay bill form and it was signed by him. It was equally conceded that the pay bills were not verified or checked by him at the time of signing. Mir Abdul Aziz, Assistant Accounts Officer, Accountant General's Office, P.W.1, narrated the details as to how the incident of the alleged offence transpired. It was testified by this witness that it was the responsibility of the Drawing and Disbursing Officer to certify that the pay bill was properly prepared, was entered in the cash book and the pay was disbursed accordingly. If any excess amount was received or found, it was equally to be entered in the cashbook and deposited into treasury under rules. He further stated that on discovery of the misappropriation, he called the Drawing and Disbursing Officer (Inam ur Rahim Shah) and asked him to deposit the amount received in excess. As he wanted to inform the police, the Drawing and Disbursing officer told him that the amount would be deposited by him within a day or two but in the meantime, he himself informed the police. This suggests that the Drawing and Disbursing Officer was responsible for the whole mishap but intelligently enough, he chose to become a witness of the incident by implicating the appellant.

9. Let us now see as to whether the case is visited by any circumstances calling upon us to exercise our inherent powers in respect of the observation complained of.

In the case before us, the reading of the above-impugned para would show that there is no sweeping or general observation against the appellant. The

objectionable para only conveys the sense that in the circumstances the appellant, who was Drawing and Disbursing Officer, may be responsible for the whole mishap. The examination of the para as a whole shows that the observation is based on the evidence of Mir Abdul Aziz and the appellant himself. The appellant, in his statement, admits that he signed the blank pay bill forms. In the context, he also admitted that Exh. D.1 was a blank pay bill form and it was signed by him. It was also conceded by him that pay bills were not verified or objected by him at the time of signing. In context of the appellant Mir Abdul Aziz, Assistant Accounts Officer, P.W.1, in evidence throws the entire responsibility on the appellant. He states that the appellant was to satisfy himself that the pay bills were properly prepared, entered in the cashbook and disbursed. He also says that on discovery of the misappropriation, the Drawing and Disbursing Officer undertook to deposit the amount received in excess.

10. The combined reading of the statement of the appellant and that of Mir Abdul Aziz would show that the observation to the effect that the circumstances suggested that the Drawing and Disbursing Officer was responsible for the whole mishap but intelligently enough he chose to become a witness of the incident by implicating Muhammad Ayub Qureshi (appellant in that appeal) is not unwarranted. The observation is the fair comment arising out of the statements of the appellant and Mir Abdul Aziz and calls for no interference. Somewhat identical law was enunciated in Emperor v. Ch. Muhammad Hassan AIR 1943 Lah. 298, Emperor v. Khawaja Nazir Ahmed AIR 1945 PC 18, Lala Jairam Das v. Emperor AIR 1945 PC 94, The State of Bombay v. Nilkanth Shripad Bhave AIR 1954 Bom. 65, State v. Chhotey Lal 1955 All. L.J. 240, Balit Kumar v. S.S. Bose AIR 1957 All. 398, In re, Pechimuthu Pandithan Ramaswami Pandithan AIR 1958 Mad. 305 and Sardar Lal Singh Kang v. The State AIR 1959 Punjab 211.

11. As said earlier, the inherent powers should not and cannot be used to delete the passages, which are based on evidence though they may damage the character of a person unless, of course, such an observation is irrelevant to any point in issue. Since the observation is the outcome of the evidence and is relevant to the point in issue, we do not feel advisable to delete the same.

12. The upshot of the above discussion is that the only passage or passages are to be deleted if they are irrelevant and do not form an integral part of the judgment and not otherwise. In the instant case we find that there is evidence on the record that the appellant grossly failed to discharge his duties efficiently and the remark is the fair outcome of his and that of Mir Abdul Aziz's statements. Thus, we decline to expunge the above remarks. The observation is warranted by the record, which can amply be read in support of the observation.

13. For the above stated reasons we hold that the High Court has not abused the powers in making the observation and there is, therefore, no justification to delete the aforesaid passage commenting upon the conduct of the appellant.

For the above stated reasons the appeal fails and we dismiss the same hereby.

M. B.A./246/S.C.A.

Appeal dismissed.

**1996 S C M R 218**

[Supreme Court of Pakistan]

Present: Ajmal Mian, Fazal Ilahi Khan and Mir Hazar Khan Khoso, JJ

MUHAMMAD SOHAIL and 2 others Appellants
versus
GOVERNMENT OF N. W.F.P. and others Respondents

Civil Appeals Nos. 74 to 76 of 1994, decided on 31st October, 1995.

(On appeal from the judgment dated 31 7 1993 of the N. W.F.P Service Tribunal, Peshawar, passed in Appeals Nos. 70/1993, 73/1993 and 74/1993 respectively):

**(a) North West Frontier Province Engineering Service (Building and Roads Department, Irrigation Department and Punjab Health Engineering Department) Rules, 1973**

Qanun e Shahadat (10 of 1984), Arts. 55 & 56 Constitution of Pakistan (1973), Art. 212 (3) Contorversy arose as to interpretation of N: W.F.P Engineering Service (Building and Roads Department, Irrigation Department and Public Health Engineering Department) Rules, 1973 and on the question whether the Engineers working in C & W Department and in the Central Design Office belonged to one cadre, or two cadres One of the employees of the said departments filed appeal before Service Tribunal wherein he arrayed the Government of N. W.F.P. as the respondent without impleading any person working in the department and contended that Design Office was not an independent 'or different cadre Service Tribunal accepted contention of said employee and petition for leave to appeal against order of the Service Tribunal filed by Government of N. W.F.P. was dismissed by the Supreme Court Pursuant to judgment/order of the Service Tribunal which had thus attained finality, a consolidated seniority list of the Engineers working in C & W Department and Central Design Office was notified Petitioners challenged the said seniority list by filing departmental appeals and then approached the Service Tribunal in appeals which were dismissed Leave to appeal to Supreme Court was granted to petitioners in the case to consider the question as to whether petitioners who were not parties before the Service Tribunal in appeal filed by an employee of the Department against the Government of N. W.F.P. in a similar matter and then before the Supreme Court, wherein they were again not arrayed as parties, were not bound by the judgments delivered by Service Tribunal and Supreme Court;

whether the said judgments were judgments in rein or judgments in personam and whether material facts bearing on the point in issue were not brought to the notice of the Court and whether two separate cadres were maintained, one main cadre and the other sub cadre, of the Central Design Office, with different nomenclature and the incumbents thereof were not transferable inter se and having separate seniority list and its effect.

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

Arts. 55 & 56 Interpretation, scope and application of Arts. 55 &, 56, Qanun e Shahadat,1984.

A perusal of Articles 55 and 56 of the Qanun e Shahadat, 1984 indicates that a final judgment, order or decree of a competent Court passed in the exercise of probate or matrimonial or admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character or to be entitled to any specific thing not as against any specified person but absolutely, is relevant when the existence of such legal character or the title of any such person to any such thing is relevant.

It also provides that the judgment, order or decree referred to in para.l of Article 55 is conclusive proof in the matters provided in the subsequent portion of the said Article. '

Under Article 56 it has been laid down that judgments, orders or decrees other than those mentioned in Article 55 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state. In other words, if a final judgment, order or decree is passed by a competent Court in the exercise of four categories of jurisdictions mentioned in para.l of Article 55 and if it relates to the matters as to the character referred to therein in the subsequent portion of the said Article, it is conclusive proof but any other final judgment, order or decree which is passed by a competent Court in exercise of jurisdiction other than the above four types of jurisdictions, namely, probate, matrimonial, admiralty or insolvency, the same will be relevant but will not be conclusive proof of that which it states in view of Article 56 of the Qanun e -Shahadat.

**(c) Judgment**

Judgment in rein" and "judgment in persoam" Distinction.

Pir Bakhsh represented by his Legal Heirs and others v. The Chairman, Allotment Committee and others PLD 1987 SC 145 quoted.

Black's Law Dictionary, Sixth Edn. ref.

**(d) Ratio decidendi**

**---Principles** of---Scope.

Pir Bakhsh through his Legal Heirs and others v. The Chairman, Allotment Committee and others PLD 1987 SC 145 quoted.

**(e) Stare decisis**

Principle of Scope.

Pir Bakhsh through his Legal Heirs and others v. The Chairman, Allotment Committee and others PLD 1987 SC 145 quoted.

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

Art. 55 Scope and application of Art. 55, Qanun e Shahadat, 1984 Article 55 restricts the application of the principles of judgment in rein to the judgments, orders or decrees rendered in the exercise of jurisdiction pertaining to four types of jurisdictions,. namely probate, matrimonial, admiralty and insolvency, in respect of the legal character of the matters referred to therein Court, in the absence of any well established principle of jurisprudence, cannot enlarge the scope of Art. 55 so as to include a final judgment, order or decree pasted by. a Court or Tribunal in the exercise of any other jurisdiction than any of the four types of jurisdictions referred to in Art. 55.

Article 55 of the Qanun e Shahadat, 1984 though incorporates the principles of a judgment in rein but does not use the term "judgment in rein". The judgments in rein are exception to the rule of law that no man should be bound by the decision of a Court unless he or those under whom he claims were parties to the proceedings in which it was given.

It seems that Article 55 of the Qanun e Shahadat, 1984 re9tricts the application of the principle of judgment in rein to the judgments, orders or decrees rendered in the exercise of jurisdiction pertaining to four types of jurisdictions, namely, probate, matrimonial, admiralty and insolvency, in respect of legal character of the matters referred to therein.

In the absence of any well established principle of jurisprudence. Court cannot enlarge the scope of Article 55 of the Qanun e Shahadat as to include a final judgment, order or decree passed by a Court or Tribunal in the exercise of any other jurisdiction than any of the four types of jurisdictions referred to in the Article.

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

Arts. 55 & 56 Application of Arts. 55 & 56 of the Qanun e Shahadat, 1984 Controversy arose as to interpretation of Service Rules and with regard to the cadre of civil servants in the department M, one of the employees of the said department filed appeal before Service Tribunal wherein he arrayed only Provincial Government as respondent without impleading any other person working in the department Pursuant to judgment/order of the Service Tribunal which attained finality on dismissal of the petition for leave to appeal to Supreme Court, department notified a consolidated list of seniority Other persons working in the department, challenged the said seniority list by filing departmental appeal and then approached the Service Tribunal in appeals which were dismissed Held, judgments rendered by Service Tribunal in the appeal filed by M, which was upheld by the Supreme Court by refusing leave to appeal, was not a judgment of the nature covered by the types of jurisdiction enumerated in Art. 55 of Qanun e Shahadat, 1984 but fell in the category of judgments referred to in Art. 56 of Qanun e Shahadat, 1984 for it was relevant for the controversy in issue but was not conclusive proof against the other persons of the department as to what it stated Service Tribunal could have taken the same view which it had taken earlier if no distinction could have been pointed out by the appellants in subsequent case but the said appellants could not have been non suited on the ground that the earlier judgment constituted judgment in rein as to bind subsequent appellants to whom the cause of action accrued after the circulation of seniority list.

**(h) Constitution of Pakistan (1973)**

Art. 189 Law declared by Supreme Court is though binding on all the Courts in Pakistan but simpliciter this fact will not attract the application of the principle of judgment in rein.

K.MA. Samdani, Advocate Supreme Court and Ejaz Muhammad Khan, Advocate on Record for Appellants.

Saifur Rehman Kiyani, Advocate General, N. W.F.P. for Respondents Nos. l to 3 (in all Appeals).

Muhammad Nawaz Abbasi, Advocate Supreme Court for Respondent No.4.

Mian Hisamuddin, Advocate Supreme Court for Respondent No.5.

Date of hearing: 31st October, 1995.

**JUDGMENT**

**AJMAL MIAN, J:** By this common judgment we intend to dispose of the above three appeals which have been filed with the leave of this Court against a common Judgment dated 31 7 1993 passed by the N. W.F.P. Service Tribunal, Peshawar, hereinafter referred to as the Tribunal, in Appeals Nos. 70 of 1993 and 71 to 75 of 1993, dismissing. the same for the following reasons:

> "The learned counsel for the respondents has contended that the judgment of the Tribunal as well as that of Supreme Court is judgment in rein and not judgment in personam. Therefore, the Tribunal cannot re open the issue of the interpretation of the rules already interpreted by the Hon'ble Supreme Court. Therefore, the present appeal cannot be maintained in the light of the earlier judgment of this Tribunal as well as of the Supreme Court, the Tribunal agrees with the contention of the learned counsel for the respondents and is of the view that without entering into the merits of the contention of the learned counsel for the appellant, the Tribunal holds that the earlier judgment of this Tribunal which has been merged into the judgment of the Supreme Court is the judgment in rem and not the judgment in personam and, therefore, the Tribunal cannot go into the merits of the appeal again on the same issue. In the light of the above discussion, the Tribunal holds that the appeal is misconceived and is accordingly dismissed." .

2. The brief facts are that in the year 1973 the Government of N. W.F.P. framed N. W.F.P. Engineering Service (Buil4ing and Roads Department, Irrigation Department and Public Health Engineering Department) Rules, 1973, hereinafter referred to as the Rules. It is the case of the appellants that certain parts of the Rules were substituted in 1979 by new Rules. It appears that a controversy arose, whether the Engineers working in C & W Department and in the Central Design Office belonged to one cadre or two cadres. Inter alia an

appeal was filed by one Mubarik Ali, in which he arrayed the Government of N: W.F.P. as the respondent without impleading any person working. in the above Department and contended that the Design Office was not an independent or different cadre. The above contention was accepted by the Tribunal through the judgment dated 7 9 1991. Petition for Leave to Appeal filed by N. W.F.P. Government was declined by this Court through an order dated 31 3 1992. It appears that pursuant to above judgment/order, a consolidated seniority list of the Engineers working in C & W Department and the Central*Design Office was notified on 29 11 1992, in which private respondents Nos. 4 and 5 were placed over the present three appellants. The appellants contested the aforesaid seniority list by filing departmental appeals and then approached the Tribunal through the aforementioned appeals, which were dismissed for the reasons recorded in the above quoted portion of the judgment under appeal. Thereupon, the appellants filed petitions for leave to appeal which were granted to consider the following questions:

> (i) Whether the petitioners were not parties to the appeal filed before the Service Tribunal by one Mubarik Ali against the Government of N: W.F.P. in similar matter and were also not arrayed as parties in the A Petition for Leave to Appeal No. 225 P/Ol before this Court and thus were not bound by the judgments delivered therein.
>
> (ii) Whether the judgments referred to above were judgments in rem or judgments in personam and whether material facts bearing on the point in issue were not brought to the notice of the Court.
>
> (iii) Whether two separate cadres were maintained, one main cadre and the other sub cadre, of the Central Design Office, with different nomenclature and the incumbent thereof not transferable inter se and having separate seniority list and its effect"

3. In support of the above appeals Mr. K.MA. Samdani, learned A.S.C. for the appellants, has vehemently contended that the Tribunal had non suited the appellants on the wrong assumption that the judgment rendered by it earlier in the appeal filed by aforesaid Mubarik Ali and upheld by this Court was a judgment in rem and not a judgment in personam and, therefore, is binding against the world. To reinforce the above submission he has invited our attention to Article 55 of the Qanoon e Shahadat Order, hereinafter referred to as the Order, and pointed out that a final Judgment, order or decree of a competent Court in the exercise of four types of jurisdiction, namely, probate, matrimonial, admirality and insolvency are conclusive proof as to the legal character referred

to therein and that as the jurisdiction of the Service Tribunal is not covered by any of the above four heads, the judgment rendered by the Service Tribunal cannot be treated as judgment in rem. He has referred to the case of Miss E. Scott v. M/s Residence Ltd. (AIR 1956 Calcutta 606) and the case of Secretary of State v. Syed Ahmad Badsha Sahib Bahadur (AIR 1921 Madras 248), which are on the interpretation of section 41 of the Evidence Act, 1872, which corresponded to Article 55 of the Order.

On the other hand Mr. Saifur Rehman Kiyani, learned Advocate General N: W.F.P. and Mr. Muhammad Nawaz Abbasi, learned A.S.C. for respondents Nos 1 to 4 have vehemently urged that since the earlier judgment of the Tribunal was as to the interpretation of the Rules and as the NfW.F.P. Government was a party to the aforesaid earlier proceedings initiated by Mubarik Ali, the same was judgment in rem. According to them it was not necessary to implead the appellants or any other employee of the department in the above earlier proceedings.

It was also urged by them that under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973, hereinafter referred to as the Constitution, any. decision of the Supreme Court shall to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan and, therefore, the Tribunal was bound to follow its earlier judgment in the appeal filed by Mubarik Ali, which judgment stood merged in the order of the Supreme Court refusing leave.

4. At this stage we may refer to Articles 55 and 56 of the Order, which read as under:

> "55. Relevancy of certain judgments in probate, etc.. jurisdiction. A final judgment, order or decree of a competent Court in the exercise of probate matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing,. not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof

> that any legal character which it confers accrued, at the time when such judgment, order or., decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time which such judgment, order or decree declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time 4bm which such judgment, order or decree declares that it had been or should be his property.

56. Relevancy and effect of judgment orders or decrees other than those mentioned in Article 55. Judgments, orders or decrees other than those mentioned in Article 55 are relevant if they relate to matters of a public nature relevancy the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state."

A perusal of above Articles indicates that a final judgment, order or decree of a competent Court passed in the exercise of

(i) . Probate; or

(ii) matrimonial; or .

(iii) admirality; or

(iv) Insolvency jurisdiction;

which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character or to be entitled to any specific thing not as against any specified person but absolutely is relevant to the extent of such legal character or the title of any such person to any such thing is relevant it may further be observed that it also provides that the judgment, order or decree referred to in para. 1 thereof is conclusive proof in the matters, provided in the subsequent portion of the aforesaid Article reproduced hereinabove.

It may also be pointed out that under Article 56 it has been laid down that judgments, orders or decrees other than those mentioned in Article 55 are relevant if they relate to matters of a public nature relevant to the enquiry but such judgments, orders or decrees are not conclusive proof of that which they ' 8 state. In other words, if a final judgment, order or decree is passed by a

competent Court in the exercise of four categories of jurisdiction mentioned in para. 1 of Article 55 and if it relates to the matters as to the character referred to therein in the subsequent portions of the above Article, it is conclusive 'proof but any other final judgment, order or decree which is passed by a competent Court in exercise of jurisdiction other than the above four types of jurisdiction, namely, probate, matrimonial, admiralty or, insolvency, the same will be relevant but will not be conclusive "'proof .of that which it states in view of Article 56 of the Order.

5. We may now refer to the above two reports referred to by Mr. K.M.A. Samdani.

In the case of Miss E. Scott (Supra), a Division Bench of the Calcutta High Court, while construing sections 14(4), 2($), Schedule A, rule 4 of the West Bengal Premises Rent Control Act, held that the standard rent determined in case of a sub tenant not a judgment in rein as to bind the other tenants. The relevant observations read as follows:

> "The judgment of the Rent Controller fixing rent for any particular tenancy does not fall within the class set out in section 41, Evidence Act. It is dangerous for Courts to extend the definition of `judgments en rein' to any judgment which do not fall within the well recognised class or judgments in rein, or which the legislature, in express words or by necessary implication, makes binding against all the world. I can find no .provision in the West Bengal Rent Control Act which even remotely, suggests any intention of the Legislature that judgments fixing a standard rent on the application of any particular individual should be binding against `all the world'. The provision in section 30 of the Act that before exercising any other powers of the Act, the Rent Controller shall cause a copy of a notice of his intention to do so to be affixed in a conspicuous place at his office and, shall duly consider any application from any person having interest in the premises does not, in my opinion, indicate any such intention."
>
> Whereas in the case of Secretary of State v. Syed Ahmad Badsha Sahib Bahadur (supra), a Full Bench of the Madras High Court, while examining sections 41 and 42 of the Evidence Act, pointed out that the above sections draw a distinction between judgments in rein and judgments in personam and a judgment which does not ,fall within section 41 can only be evidenced but cannot be used for the purpose of preventing the other party from proving facts which he set up. It has been further held in the above report that "It is not open to the Courts to import considerations as to convenience in dealing with matters which have been codified and dealt

with by Evidence Act however, attractive the theory may be and however much one would like to have the principle embodied by the legislature in the codes".

6. Mr. K.MA. Samdani has also referred to the definitions of the terms "judgment in personam" and "judgment in rein" given in Black's Law Dictionary, Sixth Edition, which read as follows:

"Judgment in personam or inter partes. A judgment against a particular person, as distinguished from a judgment against a thing or a right or status. See also Judgment (Personal judgment).

"Judgment in rein. An adjudication pronounced upon the status of some particular thing or subject matter, by a tribunal having competent Authority. Booth v. Copley, 283 Ky. 23, 140 S.W.Ed 662, 666. It is founded on the proceedings instituted against or on some thing or subject matter whose status or condition is to be determined. Eureka Building & Loan Ass'n v. Shultz, 139 Kan. 435, 32 P.2d 477. 480; or one brought to enforce a right in the thing itself, Federal Land Bank of Omaha v. Jefferson, 229 Iowa 1054; 295 N.W. 855, 857. It operates directly upon the property. Guild v. Wallis, 1M Or. 69, 40 P. 2d 737, 742. It is a solemn declaration of the status of some person or thing. Jones v. Teat, Tex Civ. App., 57S. W.2d 617, 620. It is binding upon all persons in so far as their interests in the property are concerned. See also Judgment quasi in rein'."

7. It will not be out of context to refer to a judgment of this Court in the case of Pir Bakhsh Represented by his Legal Heirs and others v. The Chairman, Allotment Committee and others (PLD 1987 SC 145), pointed out by Mr. S. Inayat Hussain, learned A.O.R. for respondent No.4, and which has direct bearing on the controversy. In the above case Muhammad Haleem, CJ. has very elaborately dilated upon the principle of stare decisis, principle of ratio decidendi and the distinction between a judgment in personam and a judgment in rein. It will be instructive to reproduce the relevant extracts from the above report, which read as under:

"Upon a consideration of what has been stated above, the formulation on behalf of the appellants cannot be accepted as it stands. In a controversy raising a dispute inter partes, the thing adjudged is conclusive as between the parties both on questions of act and law, but as to what the Court decides generally is the ratio decidendi or rule of law for which it is the authority. It is this ratio decidendi which is applicable to subsequent cases

presenting the same problem between third parties not involved in the original case nor will either of the original parties be bound in a subsequent dispute with a third party. It will be misnomer to say that this rule of law acts in rein, that is, as against the whole word as conceptually. the applicability of the rule of law is either founded on the doctrine of precedent as under the English law or rule of stare decisis, and none of the doctrines in its application is inflexible for what has been recalled elsewhere in the judgment. Therefore, the judgment cannot act in rein as is sought to be argued." .."The High Court in dislodging the appellants held that the, judgment of the Supreme Court was not a judgment in rein, but in personam. The terms `in rein' and `in personam' are of Roman Law used in connection with actio, that is, actio in rein and actio in personam to denote the nature of actions, and with the disappearance of the Roman forms of procedure, each of the two terms `in rein' and `in personam' got tagged with the word judgments to denote `the end products of actions in rein and actions in personam. Thus, according to the civil law an action in which a claim of ownership was made against all other persons was as action in rein and the, judgment pronounced in such action was a judgment in rein and binding upon all persons whom the Court was competent to bind, but if the claim was made against a particular person or persons, it was an action in personam and the decree was a decree in personam and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them.

Monir in his `Principles and Digest of the Law of Evidence' at page 563, gives the import of these terms as under:

`The point adjudicated upon in a judgment in rein is always as to the status of the res and is conclusive against the world as to that status, whereas in a judgment in personam the point, whatever it may be, which is adjudicated upon, it not being as to the status of the res, is conclusive only between parties or privies. A decision in rein not merely declares the status of the person or thing, but ipso facto renders it such as it is declared; thus, a decree of divorce not only annuls the marriage, but renders the, wrife feme sole: adjudication in bankruptcy not only declares; but constitutes the debtor a bankrupt; a sentence in a prize Court not merely declares the vessel prize, but vests it in the captor.' `

Section 41 of the Evidence Act does not use the term `judgment in rein', but it incorporates the law on the subject of judgments in rein, and makes

them relevant not only against strangers but also conclusive of certain matters such as whether a person was entitled to a legal j character or to any specific thing not as against any specified person but absolutely.

Judgments in rein are an exception to the rule of law that no man should be bound by the decision of a Court of Justice unless he or those under whom he claims were parties to the proceedings in which it was given. This rule of law is referable to the maxims of Roman Law namely, 'Res inter also. judicata nufun inter alias prejudicium facit', or 'Res inter alias acta alteri nocere non debet'. Such exception of the judgment in rein in the Roman Law was the foundation of the exception in English Law. Section 41 of the Evidence Act is the foundation for the exception of judgment in rein in our corpus juris. The reason why a judgment should not be used to the prejudice of a stranger is that he is denied the fundamental right to make a defence, or to examine or cross examine witnesses or to appeal from a judgment which aggrieves him. This is the requirement of most manifest justice and good sense."

8. It may be observed that Black's. Law Dictionary gives simple definition of the above two items by providing that `judgment in personam or inter partes' is a judgment against a particular person as distinguished from a judgment against a thing or a right or status, whereas the term `judgment in rein' has been defined as an adjudication pronounced upon the status of some particular things or subject matter by a Tribunal having competent Authority. Such a judgment is binding upon all persons in so far as their interests in the property are concerned.

9. It may further be observed that in the first extract from the above judgment in the case of Pir Bakhsh (Supra), Muhammad Haleem, CJ. Has succinctly pointed out that in a controversy raising a dispute inter partes the things adjudged is conclusive as between the parties both on questions of facts and law and the reasoning on the question, of law is the ratio decidendi or rule of law. It has been further pointed out that it will be misnomer to say that ,the above rule of law acts in rein i.e. as against the whole world.

A perusal of the second extract from the aforesaid judgment indicate that the concept of judgment in personam and judgment in rein was originated under the Roman Law in connection with actio i.e. actio in rein and actio in personam to denote the nature of actions and that the disappearance of E Roman forms of procedure, each of the two terms "in rein" and "in personam" got tagged with the judgments to denote the end products of actions in rein and actions in personam.

Whereas Monir in his book "Principles and Digest of the Law of Evidence" has distinguished the above two types of judgments by sting that the point adjudicated upon in a judgment "in rein" is always as to E the status of the res and is conclusive against the world as to the status, whereas in a judgment "in personam" the point whatsoever it may be which is adjudicated upon, it not being, as to the status of the res is conclusive only between the parties or privies.

It is also evident from, the above passage that section 41 of the Evidence Act (now Article 55 of the Order though incorporates the principles of a judgment in rein but does not use the above term "judgment in rein". The judgments in rein are exception to the rule of law that no man should be bound by the decision of a Court unless he or those under whom he claims were parties to the proceedings in which it was given.

10. It seems that Article 55 of the Order restricts the application of the principle of judgment in rein to the judgments, orders or decrees rendered in the exercise of jurisdiction pertaining to four types of jurisdictions, namely, probate, matrimonial, admiralty and insolvency, in respect of the legal character of the matters referred to therein, whereas the definition of the above term given in Black's Law Dictionary and the above commentary by Monir in his above book have not restricted the application of the above principles of judgments in rein to the judgments, orders or decrees rendered in the exercise of above four types of jurisdiction referred to in Article 55 of the Order. We are inclined to hold that in the absence of any well established principle of Jurisprudence, we cannot enlarge the scope of above Article 55 of the Order as to include a final judgment, order or decree passed by a Court or Tribunal in the exercise of any other jurisdiction than any of the four types of jurisdiction referred to in the above Article: We are of the view that the judgment rendered by the Tribunal in the appeal filed by Mubarik Ali and which was upheld by this Court by refusing leave to appeal is not a judgment of the nature covered by the above four types of jurisdictions referred to in Article 55 of the Order but it falls in the categories of judgments referred to in Article 56 of the Order. In other words, it is relevant for the controversy in issue but is not conclusive proof against the appellants as to what it states.

11. We are not impressed by the arguments of the learned Advocate- General N. W.F.P. and Mr. Muhammad Nawaz Abbasi that since the earlier judgment of the Tribunal was as to the interpretation of the Rules and as the N. W.F.P. Government was a party to the aforesaid earlier proceedings initiated by Mubarik Ali, the same was judgment in rein. N. W. F. P. Government though was a party

to the earlier appeal filed by said Mubarik Ali but it cannot be urged that it represented the interest of the appellants, nor Article 189 of the Constitution has any relevance to the controversy in issue, namely, whether the earlier judgment rendered by the Tribunal and upheld by this Court constituted a judgment in rein or a judgment in personam. There is no doubt that the law declared by this Court is binding on all the Courts in Pakistan but simplicitor this fact will not attract the application of the principle of judgment in rem. It was open to the Tribunal in the present case to have 1 taken the same view which it had taken earlier if no distinction could have been pointed out by the appellants, but the appellants could not have been non suited on the ground that the earlier judgment constituted judgment in rem as to bind the appellants to whom the cause of action accrued after the circulation of above seniority list on 29 11 1992.

12. We have not touched upon question No.3 on which leave was granted as we intend to remand the case to the Tribunal.

13. The upshot of the above discussion is that the above appeals are allowed, the cases are remanded to the Tribunal with the direction to hear the same in the light of observations contained hereinabove. However, there will be no order as to costs.

M.B.A./M 3167/S Appeals allowed.

**1998 C L C 1684**

[Quetta]

Before Iftikhar Muhammad Chaudhry and Raja Fayyaz Ahmad, JJ

EJAZ ALI SIDDIQUE and another Appellants
versus
Rana IRSHAD AHMED and another Respondents

Civil Miscellaneous Application No.25 and Civil Revision No.251 of 1997, decided on 30th April, 1998.

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

Ss.30 & 33 Objection application by appellant Respondents filed reply to objection application under Ss.30 & 33 of the Arbitration Act, 1940 wherein it was pleaded that the objection application filed by appellant was time barred, therefore, liable to be dismissed Appellant had participated and admitted the decision of Arbitrator and also joined in Dawa i Khair in this behalf and never raised objection at the relevant time Appellant having submitted himself to the jurisdiction of Arbitrator, thus, on principle of waiver and estoppel, was estopped from challenging award or judgment of Arbitrator Objection application of appellant, therefore, was not maintainable.

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

S.39(i)(vi) Civil Procedure Code (V of 1908), S.115 Setting aside the award Validity of the decree Procedure For the purpose of setting aside the award, appeal would be competent under S.39(i)(vi) of the Arbitration Act, 1940 and for the purpose of examining the validity of a decree, as no specific provision has been incorporated, therefore, revision would be the only remedy available to the judgment debtor.

PLD 1986 Quetta 321 and Amood Kumar Varma v. Hari Parsad Barman and others AIR 1958 All. 720 ref.

**(c) Judgment**

Object Proper judgment Judgment is to give impression that the same has been delivered after applying judicial mind and with full devotion Duty of Presiding Officer of the Court.

Presiding Officer of the Court has to write a proper judgment, which may give impression that it has been delivered after applying judicial mind and with full devotion, because object of delivering the judgment is not only to dispose of the matter, but a duty is cast upon the Presiding Officer to do justice between the parties, and if such factors lack in the judgment, it reflects on the ability as well as conduct of the Presiding Officer.

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

Ss.33 & 32 Interpretation and scope of Ss.33 & 32 of the Arbitration Act, 1940 Objection to award Process.

Section 33 of the Arbitration Act, 1940 does not contemplate that a separate objection must be filed challenging the Arbitration Award, as according to its plain reading, any party to an Arbitration agreement or any person claiming under him, desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, shall apply to the Court and the Court shall decide the question on affidavits. As far as the process of applying to the Court is concerned, that can be availed by submitting an independent application, after filing of the award, by the person, who is aggrieved from its existence or validity, or such objection can be raised by filing reply to the application under section 14 of the Arbitration Act by a person, requesting the Court that the Award may be made as 'Rule of the Court'.

Where after the filing of an award in Court one of the parties to the arbitration, being misled by the order of the Court posting the suit for objections, files objections instead of an application to set aside the award, and the objections not only are in substance an application to set aside the award, but almost so in form, the mistake made by the party is nothing more than an irregularity which is not such as to entitle the Court to overlook his objections and to pass a decree in terms of the award.

The provisions of sections 33 and 32 of the Arbitration Act, 1940 clearly permit a party to an Arbitration Agreement to challenge the existence of such an agreement by filing an application under section 33 of the Act. Section 32 bars

a suit to obtain such a relief. The fact that he denied to have signed the contract, will not disentitle him to challenge it under section 33 as the words 'any party to an arbitration agreement' in that section include a party who is alleged to be party to an agreement, but who challenges the existence thereof.

A challenge to the validity of award, inter alia, on the ground of challenge to the validity of reference is not only covered by section 33, but can also be made in an application to set aside the award as being otherwise invalid.

A person who is party to an arbitration agreement or award, can challenge its existence or validity either by filing an independent application or in the reply submitted to the application filed by other side, seeking indulgence of the Court to make the Award as 'Rule of the Court'. As far as section 33 is concerned, it has not provided special procedure for challenging the arbitration agreement or award and if same have been challenged in the reply, by way of raising objection and the Court has disposed of the same, after framing the issues and recording evidence, it would be deemed that objections raised in the reply of application or making the award as 'Rule of the Court' has been considered to be independent objections on behalf of the objector.

1985 CLC .1170; PLD 1994 Kar. 127 and PLD 1996 SC 797 distinguished.

Gadiraju Bangarayya and another v. Gottemukkula Ramabhadriraju AIR 1947 Mad. 315; Badri Narayan Agarwala v. Messrs Pak Jute Balers Ltd. PLD 1970 SC 43 and Province of Punjab through the Secretary to Government of Punjab, Communication and Works Department, Lahore and 2 others v. Nadeem & Company, Lahore PLD 1976 Lah. 1273 ref.

**(e) Partnership Act (IX of 1932)**

S.19(2) Submission of dispute relating to the business to arbitration ?Authority of partner Scope.

Section 19(2) of the Partnership Act, 1932 casts a duty upon the partner of a firm to submit to a dispute relating to the business of the firm to arbitration and in absence of any usage or custom of trade to the contrary, the implied authority of partner does not empower him to do so.

**(f) Partnership Act (IX of 1932)**

S.45(1) Dissolution of partnership Public notice about dissolution of firm If public notice is not given in respect of dissolution, the retiring partners remain liable to discharge the liability.

**(g) Partnership Act (IX of 1932) -**

Ss.19(2) & ' 32(2) Dissolution of firm Persons who took over the partnership business had a dispute with the taken over firm New owners of the firm could not settle such dispute with any of the retiring partners in his personal capacity.

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

S.33 Civil Procedure Code (V of 1908), S.11 & O.II, R.2 Arbitration proceedings Res judicata, principle of Application Claim in respect of which reference sought, forming principle of previous claim of which award was given, reference would be barred by principle of constructive res judicata ?Provisions of 0.11, R.2, C.P.C. though do not in terms apply, to proceedings under Arbitration Act, 1940, but in appropriate cases, such provision can be applied.

AIR 1978 Cal. 228 ref.

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

Ss.33 & 32 Objection to award Failure to join necessary party Effect ?Application for objecting the award was bad if necessary party was not joined.

Messrs Ahmad Bakhsh Abdul Rashid v. Muhammad Aslam & Brothers and another PLD 1954 Lah. 620 ref.

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

S.30 Setting aside award Arbitrator misconducted himself and, thus, had rendered the award invalid by not assigning the reasons after recording evidence.

Brooke Bond (Pakistan) Ltd. v. Conciliator appointed by Government of Sindh and 6 others PLD 1977 SC 237; Messrs Shafi Corporation Ltd. v. Government of Pakistan through Director General of Defence Purchase, Ministry of Defence, Karachi PLD 1994 Kar. 127; Province of Balochistan and another v. Malik Haji Gul Hassan PLD 1982 Quetta 52; Associated Constructors Ltd. v. Karachi Municipal Corporation 1982 CLC 1984 and Qamardin Ahmad & Co. v. Pakistan and others 1984 CLC 952 ref.

PLD 1971 Lah. 30; 1982 CLC 1984 and 1984 CLC 952 distinguished.

Basharatullah and Ehsanul Haque for Appellants.

S.A. Zahoor and Khushnood Ahmed for Respondents

Date of hearing: 14th April, 1998.

**JUDGMENT**

**IFTIKHAR MUHAMMAD CHAUDHRY, J.** Brasstacks of this case are, that on 9th October, 1969, a Partnership Deed was executed between appellant Ejaz Ali Siddiqui, his father and two brothers Shaukat Ali and Irshad Ahmad, as well as Agha Ahmad Shah, Mr. Abdul Wahid and Mir Karam Khan, in pursuance whereof, latter surrendered their rights and shares in old concern of Messrs National Mining Corporation, Quetta, in favour of appellant Ejaz Ali Siddiqui, his father and two brothers, named above. As far as Agha Ahmad Shah is concerned, he was partner in the old concern, therefore, he was allowed to continue to hold his previous share. The name and style of partnership was designated to be National Mining Corporation. In 1977 78, Rana Irshad Ahmad Khan and Chaudhry Muhammad Iqbal (respondents) obtained mine from National Mining Corporation for raising coal on royalty basis at the rate of Rs.35 per ton. It is the case of respondents that they developed the mine and installed machinery for the purpose of extracting coal. It so happened that in the year, 1991, appellant Ejaz Ali Siddiqui alongwith other sharers sold the rights of Mine to Mir Changez Ahmad Kurd and Mir Kamran Ahmad Kurd sons of Mir Abdul Wahid Kurd. On attaining the partnership rights, differences arose between the respondents and the new owners, as they were not permitting them to raise the coal. As such, to settle the dispute, the parties entered into an Arbitration, in pursuance whereof, as per Arbitration Agreement, dated 29th June, 1991, the new owners of the Corporation namely Mir Changez Ahmad Kurd appointed Haji Khan Bahadur and Muhammad Murad Kurd as Arbitrators to determine the price of machinery, cost of labour and other expenditures. Whereas respondents appointed on their behalf, Haji Abdul Raziq and Haji Khuda Bakhsh as Arbitrators for decision with the owners, in respect of the mining machinery, underground and surface. These Arbitrators vide Award, dated 14th July, 1991, held the respondents entitled to receive rupees twenty-eight lacs and directed the new owners of the Corporation to make payment of this amount, immediately to them. It is an admitted fact that this Arbitration Award was not made as 'Rule of the Court', as in this behalf, no such request was made. Subsequent thereto, on 12th November, 1991, another Arbitration Agreement was executed between respondents and appellant Ejaz Ali

Siddiqui, wherein he was designated to be Party No.2, being the Managing Director of National Mining Corporation, Narwar. Later on, statedly behind the back of appellant, sole Arbitrator pronounced the Award on 24th December, 1991. In the concluding para., it was mentioned that the respondents are in total entitled to the sum of Rs.28,00,000 plus Rs.21,60,000 equal to Rs.49,60,000, to which appellant is bound to pay them, after eight months, from the date of finally compiling the Award. As such, immediately after the pronouncement of Award, no application was submitted before the competent Court of civil jurisdiction, for making the Award as 'Rule of the Court'. However, on 24th November, 1992, an application under the Arbitration Act, 1940 for making the Award, dated 24 12 1991, as 'Rule of the Court' was submitted by respondents. It is noteworthy that in the application, nothing was stated in respect of earlier Arbitration Award, which took place between the respondents and the new owners of National Mining Corporation. Appellant petitioner contested the application and pointed out therein, inter alia, that on 11th July, 1991. Mir Kamran Ahmad Kurd and Mir Changez Ahmad Kurd, purchased share of 75 per cent. of the remaining partners in the sum of rupees fifty four lacs and this amount vas to be paid by them to the partners, within eighty days and on account of change of ownership, the respondents opted, not to work with the new owners and demanded that they should be paid, for the machinery installed by them and for the works done in the mine. Accordingly to solve the dispute, matter was referred to four Arbitrators, details whereof, have already been given above, who gave Award, declaring that respondents are entitled for rupees twenty eight lacs in lieu of machinery and other expenditures, incurred by them in the Mine. As at that time, respondents also owe an amount of rupees twenty-four lacs to appellant petitioner, therefore, on payment of four lacs in cash, the amount of rupees twenty eight lacs was adjusted. But despite final settlement between the respondents and the Firm and for the fact that appellant had no concern with the firm, the respondents kept on pressing their demands for more money and subsequently under the conspiracy and with the collusion of Arbitrator, it was arranged that he would intervene and call upon the appellant to enter into an Agreement of Arbitration with the respondents, with clear understanding that the question of arbitration already decided shall be upheld, ratified and legalized. Consequently the appellant was compelled, coerced and persuaded through mis representation and deception to enter into Arbitration Agreement. Accordingly the appellant on 23rd December, 1991, appeared before the Arbitrator and found out the mala fides of the respondents and the Arbitrator. Except certain discussion between the parties and the Arbitrator, no further proceedings were taken by the Arbitrator. Inasmuch as no witness was examined, because the appellant explained to Arbitrator that he no longer represents the Firm and is

not in a position to re open the issue, already settled between the parties through Arbitration. With the result, the proceedings were adjourned sine die. After this hearing, the Arbitrator never took up the matter nor recorded statement of any witness in his presence nor he was afforded opportunity to place his case and to produce evidence before the Arbitrator. However, on 23rd December, 1991, appellant on having smelled the mala fide intentions of the respondents and the Arbitrator, informed the other partners, who on the next day i.e., 24th December, 1991, notified to the Arbitrator that he should not take any proceedings in the matter, without their consent. As such, when the Arbitrator came to know about the stand of appellant, he did not take any proceedings in the matter. In the meanwhile in order to cause unnecessary harassment to appellant and his brother, one of the respondent namely Rana Irshad Ahmad disappeared, while the other filed a wrong and malicious report with the police about his abduction and tried to involve the appellant and his brother as culprits. The respondent Rana Irshad Ahmad remained underground for four months. With the result, appellant and his brother were summoned by the police on many occasions and kept them sitting in the police station for many hours, merely to cause harassment and compelled them to accept unreasonable demands of respondents. This exercise continued for about four long months and during this period, behind the back of appellant, on 24th December, 1991, purportedly Arbitrator pronounced his Award, without informing the appellant and it appears that with the connivance of respondents, the Arbitration Award was written somewhere in September, 1992,? but by anti dating the same, it was shown to have been written on 24th December, 1991. After explaining the above background of the case, the appellant filed following objections under sections 30. and 33 of the Arbitration Act:

"(A) That as per paras. 1, 2 and 3 of the application, applicants' case is that differences forming subject matter of Arbitration Agreement related to applicants' claim arising out of development made and machinery installed in coal mines of the Firm (National Mining Corporation). As such, the Arbitration Agreement and Award are not enforceable and are invalid for following reasons:

(i) On their own showing respondent had ceased to be partner in Firm (National Mining Corporation) following sale by him of his shares thereto; '

(ii) Admittedly, independently of the Firm, there were not differences between applicants and objector respondent so as to be subject? matter of an Arbitration Agreement or of Arbitration proceedings;

(iii) As ex partner, respondent had no express authority to refer any dispute relating to business of the Firm to arbitration;

(iv) Even under law, implied authority of a partner does not empower him to submit a dispute relating to the business of the Firm to arbitration. In this behalf attention is invited to section 19 of the Partnership Act, 1932:

19. Implied authority of partner as agent of the firm. (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The Authority of a partner to bind the firm conferred by this section is called his 'implied authority'.

(2) In absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to

(a) submit a dispute relating to the business of the firm to arbitration,

(b) to (h)----------

(B) That in the circumstances, the agreement in question is not covered by definition of Arbitration Agreement as contemplated by section 2(a) of Arbitration Act, 1940. It is not with respect to present or future differences.

(C) That neither the Award was made nor announced in presence of respondent nor for that matter any notice thereof was given to respondent. Therefore, filing of award is barred by time as contemplated by Article 178 of the Limitation Act, 1908.

(D) That the dispute in question was between the applicants on the one side and National Mining Corporation (a partnership firm) on the other therefore, the application against the answering respondent is not maintainable.

(E) That the National Mining Corporation is a Firm having 5 partners, therefore, the application is bad for misjoinder and non joinder of parties.

(F) That award is also illegal, unjust and arbitrary and no reasons have been given in the award as required under section 26 A of the Arbitration Act, 1940.

(G) That in fact at the time of the execution of Arbitration Agreement, dated 12 11 1991, the Mine belonged solely to Kamran Ahmad son of Ahmad Shah and Mir Changez Ahmad son of Abdul Wahid Kurd and before that the dispute

between the applicants on the one side and the Firm on the other had already been decided by 4 Arbitrators on 14 7 1991, holding that applicants are entitled to payment of Rs.28 lacs in lieu of their interest in the Mine (Machinery and development work done it) the Mine), therefore, there was no dispute between the applicants and the respondents to be decided by the arbitrator on 12 11 1991 in connection with the Mine, hence the Arbitration Agreement is void and is of no legal consequence.

(H) That Arbitration Agreement is a result of coercion, undue influence and fraud.

(J) That even otherwise the Arbitrator has not conducted himself and the proceedings in accordance with law which amounts to misconduct and misconducting the proceedings.

(K) That the arbitrator has awarded Rs.28 lacs as the price of machinery plus Rs.21,60,000 as 2/5th of the price of mine and has failed to take into consideration that the applicants have already received Rs.28 lacs as price of the machinery. On this ground alone the award is liable to be set aside.

(L) That after the decision by the Arbitrators on 14 7 1991, there was no dispute left between the parties to be referred for arbitration.

(M) That the award is not based on any evidence.

(N) That the award is patently bad, because as already explained above, amount of Rs.28 lacs has been paid to the applicants. Suppression of this payment by the applicants and inclusion of the same in the award by the Arbitrator renders the award as void, illegal and arbitrary.

(P) That without prejudice to above objections, application is premature."

Both the respondents filed reply to objection application under sections 30 and 33 of the Arbitration Act, wherein it was pleaded, that the Objection Application filed by appellant is time barred, therefore, liable to be dismissed. The appellant participated and admitted the decision of Arbitrator and also joined in ' Dowai Khair' in this behalf and never raised objection at the relevant time and now by the principle of Waiver estoppel, he is estopped from challenging the Award. The appellant submitted himself to the jurisdiction of Arbitrator, therefore, now he cannot challenge the Award or the jurisdiction of Arbitrator. The application is not maintainable under the law, in view of the provisions contained in Arbitration Act. On merits, it was admitted by them, to the extent that Mir Kamran Ahmad

Kurd and Mir Changez Ahmad Kurd, purchased the shares of remaining partners i.e., 75% for a sum of rupees fifty-four lacs. It was also admitted that four Arbitrators were appointed, but they were only appointed in order to estimate the price of mine and not expenses of development of mine and second arbitration agreement was executed between the appellant and respondent about the compensation of development of mine, which includes the development of tunnels, construction of power house, labour colony Roads etc. For the purpose of arbitration agreement, dated 14 7 1991, a list of machinery was also prepared further all these proceedings of arbitration, dated 14 7 1991, were conducted in their absence and behind their back. Respondents also explained that after the Arbitration Award, dated 14th July, 1991, neither Mir Changez Kurd nor appellant Ejaz Ali Siddiqui, paid any amount to them and it has been wrongly stated by appellants that rupees twenty-four lacs were outstanding against respondents and after payment of rupees four lacs in cash, the amount of rupees twenty eight lacs was adjusted. In fact the appellant has not paid a single penny to respondents. It was further stated that factual position is that respondents have no concern with the Firm or other partners and they have entered into Arbitration Agreement, with appellant. They had spent all they had and whatever they earned from this business, therefore, appellant is responsible for the amount of machinery and development and he sold his share to his partners. It was further emphasised that rupees twenty eight lacs were never paid to them. Allegations of appellant that he was coerced, compelled or persuaded through misrepresentation or deception to enter into Arbitration, were repudiated, as according to them, appellant entered into Arbitration Agreement, dated 12th November, 1991, to settle the dispute through Arbitrator. It was further stated that Arbitrator called some other Mine owners on 23rd December, 1991 and after taking their verbal statement in presence of appellant, asked the appellant, who admitted his liability to pay Rs.49,60,000 to respondents. On his admission, the Arbitrator and other persons present there, made ' Dowai Khair'. The appellant had full opportunity to place his case before the Arbitrator. He has again wrongly stated that Arbitrator wrongly included rupees twenty eight lacs which he has already paid to respondents. He had never paid them rupees twenty eight lacs. The reply to objections raised by appellant under sections 30 and 33 of the Arbitration Act, were answered as under:

"**LEGAL OBJECTIONS:**

(A) That the objection application filed by the respondent is time barred, therefore, liable to be set aside.

(B) Respondent participated and admitted the decision of arbitrator as well as participated in Dowai Khair in this behalf and never raised any objection at the relevant time, now by the principle of waiver, estoppel he is estopped from challenging the award.

(C) The respondent submitted himself to the jurisdiction of Arbitrator, now he cannot challenge the award or the jurisdiction of Arbitrator.

(D) The application is not maintainable under law in view of the provisions contained in the Arbitration Act.

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14. The applicant submitted his reply to objection raised under sections 30 and 33 of the Arbitration Act as under:

(A) That the respondent was partner as well as Managing Director of National Mining Corporation and all transactions were made between applicants and respondent and for all purposes respondent deal in all matters, further, respondent received the amount for machinery installed by applicant and development of mines made by applicants from his other partners, therefore, solely he is responsible for the amount due in his personal capacity.

(i) Contents are not admitted. That the respondent had sold his share to other partners which include the price of machinery installed by applicants and price of development of mines made by applicant, therefore, he is responsible for payment. Further, he admitted his liability before the arbitrator, now he cannot change his position to avoid his liability. According to award he is personally liable to pay Rs.49,60,000.

(ii) Contents are not admitted. There was a dispute between the parties and to settle the same an agreement for arbitration was executed. The award is very clear in this behalf.

(iii) That the respondent is liable to pay in his personal capacity as stated in reply to clauses (i), (ii).

(iv) Contents are not admitted detailed reply has been given in the reply to application, however, it is not out of place that respondent was Managing Director of the firm and not an Agent, and he was liable for the amount in his personal capacity as he received the amount in respect of development as well as machinery.

(B) That the contents are not admitted. Factually there was a dispute between applicants and respondents which was resolved by the Arbitrator.

(C) That the contents are not admitted. The award was announced in presence of respondent who admitted the same and promised to pay the same within stipulated time. According to the terms of the award the respondent has to pay Rs.49,60,000 to the applicants within eight months and if respondent failed to pay the said amount within time then the applicant will at liberty to file the award in Court and get it/make it rule of Court in accordance with law and get recover the amount. The award was made on .24 12 1991 and eight months expired on 24 8 1992. Thereafter, applicants approached the arbitrator who after his satisfaction permitted the applicants to file the application for making the award rule of Court. The applicants submitted application on 22 10 1992 for making the award rule of Court. Therefore, the application is within time.

(D) That the contents of ground (C) are not admitted. The respondent was Managing Director of National Mining Corporation thereafter, on 11 7 1991 the respondent received Rs.54 lacs from other shareholders which include the price of machinery installed by the applicant as well as developments made by the applicants, therefore, when arbitration agreement 12 11 1991 was executed he was not partner of the National Mining Corporation and thereafter, when he participated in the arbitration proceeding he was not partner or Managing Director of National Mining Corporation and he is responsible for all the liabilities in his personal capacity. Further, according to award he has to pay Rs.49,60,000 in his personal capacity. Therefore, in view of above facts National Mining Corporation have no concern with the present award.

(E) That the contents of ground (E) are not admitted as explained in answer to ground D the respondent is liable to pay the said amount in his personal capacity. Therefore, there is no need to join any other person in the present proceedings nor award set any liability on any other person except on respondent.

(F) That the contents of ground (F) are not admitted by reason of admission of respondent he is estopped from raising such objections.

(G) Contents of ground (G) are not admitted as stated and respondent? wrongly stated that there is no dispute between the applicants and respondents. A detailed reply has been given above.

(H) The contents of ground (H) are not admitted if the Arbitration Agreement was result of coercion, undue influence and fraud why he did not take legal action against the same and on the contrary participated in the arbitration proceedings.

(J) That the contents of ground (J) are not admitted a detailed reply has already been given above.

(K) That the contents of ground (K) are not admitted. The respondents have not paid to the applicants 28 lacs as price of machinery as alleged.

(L)? Contents of ground (L) are not admitted. That there was a dispute between the parties, therefore, they entered into agreement for arbitration.

(M) That the award is in accordance with the law. The arbitrator took oral evidence and also inspected documents and discussed all the matters and after admitting the liability by respondent he gave the award.

(N) That respondent has not mentioned in ground (P) on what grounds objection, application is premature, therefore, the same cannot be replied. "

Learned Trial Court, out of the pleadings of parties, framed following issues for determination:

"**ISSUES:**

(1) Whether the objection application filed by the respondent is time? barred?

(2) Whether the respondent is estopped from challenging the award?

(3) Whether the respondent cannot challenge the award or the jurisdiction of Arbitration?

(4) Whether the objections filed by the respondent are not maintainable under the provision of the Arbitration Act? ??????

(5) Whether the dispute in question was between the applicants and the respondent Ijaz Ali Siddiqui or the same was between the applicant and the Firm National Mining Corporation?

(6) Whether there was any arbitration proceedings and award between the applicants and the respondent National Mining Corporation decided by the 4 Arbitrators namely Haji Khan Bahadur, Muhammad Murad, Haji Khuda Bux and Haji Abdul Razik decided on 14 7 1991?

(7)? Whether the applicants have received the amount of Rs.28 lacs awarded by the 4 Arbitrators on 14 7 1991?

(8) That after the decision of the Arbitrators on 14 7 1991, whether there was any dispute existing between the applicants and the respondent?

(9) That after selling his share whether the respondent had any authority to refer any dispute between the applicants and the Firm to the Arbitration in his capacity as ex partner?

(10) Whether the Arbitration agreement and the award filed by the applicants in Court is enforceable?

(11) Whether any notice of the award was given by the Arbitrator to the respondent, if not, to what effect?

(12) Whether the application is bad for misjoinder and non joinder of parties?

(13) Whether the Arbitrator has misconducted himself and the proceedings?

(14) Whether the award is legal and valid when the same is not supported by any reasons or evidence?

(15) Whether the award can be converted into decree to be passed against the respondent what should the order be?

(16) Whether any award on 24 12 1991, was given or the award was antidated given in September, 1992?"

Respondents led evidence of P. Ws. Muhammad Hussain, Haji Malik Muhammad Mirwani, Muhammad Ikhlaq, and Khalid Javed, Petition Writer, who produced Arbitration Agreement (Exh.A/1), dated 12 11 1991 and extract from the Register (Exh.A/2). On the other hand, appellant got examined R.Ws. Mir Changez Ahmad Kurd, Khadim Hussain, Haji Abdul Raziq, who produced earlier Arbitration Agreements, dated 29 6 1991 as R/2 and R/3 and the Arbitration Award as Exh.R/1, Muhammad Murad, Sardar Saadat, Abdul Rehman, Haji Khuda Bakhsh, Masood Ahmad, Atta Muhammad, Head Constable, Police Station, Gawalmandi, who produce F.I.R. as Exh.R/2 A, and Shaukat Ali, brother of appellant. The appellant Ejaz Ali Siddiqui, also got recorded his own statement. Thereafter, respondent Rana Irshad Ahmad also got recorded statement in rebuttal. He produced Exh.A/5, letter of Authorization executed by Mir Shah Nawaz Kurd, Sole Arbitrator in favour of respondent Rana Irshad

Ahmad as well as Arbitration Agreement alongwith affidavit of one Muhammad Khalil son of Jaffar Khan. Respondent Chaudhry Muhammad Iqbal did not make statement before the Court, however, he filed an affidavit, stating therein that the claim of Rana Irshad Ahmad is baseless and they have already received rupees twenty lacs from appellant Ejaz Ali Siddiqui, in pursuance of earlier Arbitration Award, dated 14th July, 1991 and presently nothing is outstanding against the appellant. It may be noted that on his application under Order 1, Rule 10, C.P.C., his name was deleted from the list of applicants, vide order, dated 16th June, 1997.

The learned Trial Court (Additional District Judge I, Quetta) vide impugned judgment, dated 30th July, 1997, made the Award, dated 24th December, 1991, as 'Rule of the Court'. As such, instant Civil Miscellaneous Appeal No.25 of 1997 has been filed, wherein request has been made that the Award may kindly be set aside, as the Arbitrator has misconducted himself. Simultaneously Civil Revision No.251 of 1997, has been filed, wherein prayer has been made that the decree awarding Rs.49,60,000 against the petitioner and in favour of respondents be set aside and their claim in such behalf be rejected, with order as to the payment of costs throughout. In the revision, respondents filed Civil Miscellaneous No. 170 of 1997, stating therein that there is no provision for filing revision under the Arbitration Act, and the same has been filed under section 115, C.P.C., therefore, it may be dismissed, in the interest of justice with special cost. Notice of this application was given to appellant petitioner who filed reply, wherein it was explained that Civil Miscellaneous Appeal has been filed under section 39 of the Arbitration Act, scope of which, is to seek setting aside of Award, while the Civil Revision has been filed against the decree passed in favour of respondent, therefore, the objection is not well-?conceived.

Since both the matters arise out of same judgment and decree, therefore, we intend to dispose of them, jointly by this judgment.

Messrs Basharatullah and Ehsanul Haque, Advocates appeared on behalf of appellant petitioner, wheres for respondent No. 1, Mr. Khushnood Ahmad, Advocate appeared and respondent No.2 was represented by Syed Ayaz Zahoor, Advocate, who filed a statement in writing to the effect that the claim of respondent No.2, has already been satisfied, therefore, he does not want to contest the proceedings.

It would be appropriate to first of all, deal with the objection of Mr. Khushnood Ahmad, Advocate, concerning, non maintainability of revision petition. Learned counsel contended that Revision under section 115(1), C.P.C., is only competent,

if no appeal lies thereto. According to him, under section 39 of the Arbitration Act, only appeal was competent, which has been rightly filed, therefore, the revision may be dismissed. In support of his contention, he made reference to 1994 SCMR 1893.

On the other hand, Mr. Basharatullah, learned counsel for appellant, stated that as within the scope of section 39(1) and (vi) of the Arbitration Act, appeal is only competent for setting aside of an Award, therefore, for challenging the decree, passed on basis of Award, appeal would not be competent and a revision will be maintainable. He relied on PLD 1986 Quetta 321.

We have examined the scope of section 17 read with section 39(i) and (vi) of the Arbitration Act. Both these provisions of low, came for consideration in the reported judgment, relied upon by learned counsel for appellant, wherein it was held that 'when appellant challenges only order of rejection of application to set aside the Award, the same is appealable under section 39(i)(vi) of the Arbitration Act, and with regard to decree passed on basis of Award, appeal is not maintainable against the decree in view of clear provisions of section 17 of the Act, therefore, the revisional/supervisory jurisdiction of this Court for considering illegality, misexercise or illegal exercise of jurisdiction material irregularity in the proceedings or judgment or glaring violation of law, be exercised. In this behalf, reliance was placed on an earlier judgment, in the case of Amood Kumar Varma v. Hari Parsad Barman and others AIR 1958 All. 720. We have also examined the judgment cited by Mr. Khushnood Ahmad, Advocate, but in our opinion, it has not advanced his case, as far as question of maintainability of revision is concerned, therefore, it is held that for the purpose of setting aside the Award, appeal would be competent under section 39(i)(vi) of the Arbitration Act, and for the purpose of examining the validity of a decree, as no specific provision has been incorporated, therefore, revision would be the only remedy available to the judgment debtor. As such, Civil Miscellaneous No. 170 of 1997, filed by respondent's counsel, is hereby rejected.

Before proceeding on merits of the case, it is important to note that the Trial Court, while disposing of the matter did not adhere to settled principles of writing a judgment and had passed the same in a slipshod method, without discussing the evidence available on record. Inasmuch as, in respect of the issues, which pertain to misconduct by the Arbitrator, she had mentioned that same were not pressed. Whereas learned counsel for appellant, stated at bar that in view of the objections raised by appellant in reply to application submitted by respondents, they have repeatedly alleged misconduct by Arbitrator and to establish the same,

evidence was also led, therefore, how it was possible for them, to destroy their whole case by not pressing such objection. We have also noticed that some of the issues have been treated to be inter linked with each other by Trial Court, but on perusal of the issues as well as the evidence available on record, it has been found that those issues are absolutely not inter?connected, but the Additional District Judge I, Quetta (Mrs. Tahira Baloch) has attempted to dispose of the matter in a haphazard manner, by ignoring all the principles of law and procedure. We expect from a Judge of her standing to write a proper judgment, which may give impression that it has been delivered after applying judicial mind and with full devotion, because object of delivering the judgment, is not only to dispose of the matter, but it casts a duty upon the Presiding Officer to do justice between the parties, and if such factor lacks in the judgment, it reflects on the ability as well as conduct of the Presiding Officer. We, however, enquired from learned counsel for parties, that if they agree, case can be remanded to some other Judge for passing of an appropriate order, but they requested that matter may be disposed of, at this stage finally, as the parties had already suffered a lot, therefore, in view of their such request, we have decided to dispose of the matter in appeal finally.

Mr. Basharatullah, learned counsel contended that the objections raised by appellant in reply of application, have not been dealt with, while disposing of Issues 4 to 10, 12 and 13. We enquired from him, when appellant had not separately filed objections on the Arbitration Award, dated 24 12 1991, or on the arbitration agreement within the scope of section 33 of. the Arbitration Act, whether the objections incorporated in the reply of application, filed by respondents to make the Award as 'Rule of the Court' can be deemed to be valid objections by appellant? On this, learned counsel Mr. Basharatullah, relied on the judgments reported in PLD 1970 SC 43, PLD 1976 Lahore 1273 and AIR 1997 Mad. 315. Whereas Mr. Khushnood Ahmad, learned counsel stated that if no objections were separately filed or were filed beyond period of limitation, those cannot be considered in law, as it has been held in 1985 CLC 1170, PLD 1994 Karachi 127 and PLD 1996 SC 797.

It may be noted that section 33 of the Arbitration Act, does not contemplate that a separate objection must be filed challenging the Arbitration Award, as according to its plain reading, any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an Arbitration Agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits. As far as the process of applying to the Court is concerned, that can be availed by

submitting an independent application, after filing of the Award by the person, who is aggrieved from its existence or validity or such objection can be raised by filing reply of the application under section 14 of the Arbitration Act by a person, requesting the Court that the Award may be made as 'Rule of the Court'. As in the instant case, appellant when filed reply of application, he separately raised objections, which have been reproduced hereinabove, therefore, the respondents were also conscious in respect of the said objections, as such, they also submitted rejoinder to his reply for the purpose of answering the objections raised by appellant for setting aside the Award. In this behalf it is to be seen that in the case of Gadiraju Bangarayya and another v. Gottemukkula Ramabhadriraju (AIR 1947 Mad. 315), it was held that 'where after the filing of an award in Court one of the parties to the arbitration, being misled by the order of the Court posting the suit for objections, files objections instead of an application to set aside the award, and the objections not only are in substance an application to set aside the award, but almost so in form, the mistake made by the party is nothing more than an irregularity which is not such as to entitle the Court to overlook his objections and to pass a decree in terms of the award'. In the case of Badri Narayan Agarwala v. Messrs Pak Jute Balers Ltd. PLD 1970 SC 43, it was held that 'the provisions of sections 33 and 32 of the Arbitration Act, 1940 clearly permit a party to an Arbitration Agreement to challenge the existence of such an agreement by filing an application under section 33 of the Act. Section 32 bars a suit to obtain such a relief. The fact that denied to have signed the contract will not disentitle him to challenge it under section 33 as the words 'any party to an arbitration agreement' in that section include a party who is alleged to be party to an agreement, but who challenges the existence thereof'. In the case of Province of Punjab through the Secretary to Government of Punjab, Communication and Works Department, Lahore and 2 others v. Nadeem & Company, Lahore PLD 1976 Lah. 1273, it was held that ' a challenge to the validity of Award, inter alia, on the ground of challenge to the validity of reference is not only covered by section 33, but can also be made in an application to set aside the award as being otherwise invalid.

As far as the Judgments relied upon by Mr. Khushnood Ahmad, Advocate are concerned, they deal with the limitation of filing objections beyond period prescribed under Article 158 of the Limitation Act, but this question would not require determination, because the trial Court while disposing of Issue No.l, whether the objection application filed by respondents is time barred? Concluded that in the present matter, Article 158 of the Limitation Act, is not applicable, thus, the Issue No.l, is resolved in affirmative. No cross objection against these findings have been filed nor it has been otherwise challenged independently.

Thus, for these reasons we are inclined to hold that a person who, is party to an arbitration agreement or award, can challenge its existence or validity either by filing an independent application or in the reply submitted to the application filed by other side, seeking indulgence of the Court to make the Award as 'Rule of the Court'. As far as section 33 is concerned, it has not provided special procedure for challenging the arbitration agreement or award and if same have been challenged in the reply, by way of raising objection and the Court has disposed of the same, after framing the issues and recording evidence, it would be deemed that objections raised in the reply of application or making the Award as 'Rule of the Court' has been considered to be independent objections on behalf of the objector, therefore, the objection of learned counsel has no substance. Thus, affirmative findings of the Trial Court on Issue No.4 are reversed and this issue is decided in negative, in view of the discussion made hereinabove.

Now it would be seen, whether appellant is estopped from challenging the Award or jurisdiction of the Arbitrator in view of Issues Nos.2 and 3. First of all, it is to be borne in mind that admittedly composition of National Mining Corporation was changed, in pursuance whereof, Mir Changez Kurd and Kamran Ahmad Kurd became its owners. At the cost of repetition, it is once again noted that in pursuance of dispute between the new owners, respondents Rana Irshad Ahmad and Chaudhry Muhammad Iqbal, agreed to settle the dispute with them through Arbitrators, whereby both the parties appointed two arbitrators each and obtained an Award, dated 14th July, 1991. As far as this Award is concerned, it has not been disputed by Mr. Khushnood Ahmad, Advocate. After the pronouncement of this Award the remedy available to respondents was to seek its implementation either by it to make the same as 'Rule of the Court' or by following any other legal recourse. These observations are made without prejudice to the claim of any of the party. Surprisingly the respondents did not enforce this Arbitration Award for the reasons, known to them, but on 12th November, 1991, they entered into another arbitration agreement with appellant, who styled himself in the Award as Managing Director of National Mining Corporation Narwar, although after disposing of the total shares by appellant alongwith other shares of other partners, he was no more the Managing Director or the person, who can have any sort of interest in the Corporation. Now the proposition for consideration would be that as to whether the appellant was empowered to enter into second Arbitration Agreement or not? In this behalf, Mr. Bashratullah, learned counsel contended that respondents themselves were conscious of the fact that after selling the shares, appellant had no legal entitlement to settle the dispute with them. Therefore, with this background in their mind, they admitted in para. 2 of application filed by them for making the

Award, dated 24 12 1991, as 'Rule of the Court' that in 1991, appellant sold his share to his partner in the said Company, due to which differences arose between appellant and respondents. Learned counsel stated that such situation attract to section 19(2) read with sections 32(2) and 45 of the Partnership Act and on applying these sections, it can be held that appellant had no legal competence to enter into Arbitration Award, therefore, as now an adverse Award has been given against him, thus, he has challenged the same.

Mr. Khushnood Ahmad, learned counsel contended that appellant at his will entered into Arbitration Award and since the decision has been given against him, therefore, he cannot question the validity of same on the ground that after dissolution of partnership firm, he was not legally competent to enter into arbitration with the respondent No.l. According to him, actually appellant had committed fraud, because by involving the respondent No.l, in the second arbitration proceedings he had supported to Changez Ahmad Kurd and Kamran Ahmad Kurd, who were bound to pay rupees twenty eight lacs vide First Award, dated 14th July, 1991, therefore, in this manner, he cannot take the benefit of his own fraud and under the circumstances, is estopped to challenge the Arbitration proceedings as well as the Award, dated 24 12 1991. In this behalf, he placed reliance on PLD 1977 SC 644, PLD 1981 SC 282 and 1984 CLC 1729.

It may be seen that section 19(2) of the Partnership Act, cast a duty upon the partner of a firm to submit to a dispute relating to the business of the firm to arbitration and in absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to do so. Firstly it is to be seen that after the dissolution of the firm, appellant had no implied or express authority to submit to the Arbitrator to settle the dispute, relating to a partnership firm, shares of which have already been sold by him, not of his own but the shares of his other partners as well. In support of relevant Issues 2 and 3, no documents were brought on record by the respondents to argue, that he was authorized to enter into arbitration with respondents in respect of old disputes of the Corporation. As far as subsection (2) of section 32 of the Partnership Act is concerned, it speaks that a retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partner of the reconstituted firm and such agreement may be implied by a course of dealing between such third party and reconstituted firth after he had knowledge of the retirement'. It is not the case of respondents that they were not aware about the fact that appellant alongwith other partners had already retired and they themselves had recognized his retirement by entering into Arbitration with new

owners of the firm i.e., Mir Changez Ahmad Kurd and Mir Kamran Ahmad Kurd on 29th June, 1991, whereby the respondents and new partners appointed two arbitrators each, to settle their dispute in respect of machinery, other expenditures and the labour, as it can be seen from the perusal of Arbitration Agreement. Thus, having acquired the knowledge about the dissolution of firm and consenting to settle the dispute with the new partners of the firm, the respondents by their conduct had established that as far as the appellant is concerned, he was not the person, who can resolve the dispute with them. As regards section 45(1) of the Partnership Act, it speaks that notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution. The proviso attached thereto, is not relevant for our purpose. A plain reading of the words employed in this provision, indicates that if the public notice is not given in respect of dissolution, the retiring partners remain liable to discharge the liability. But in the instant case, as it has been pointed out' hereinabove, the public notice to all concerned was very much there, as the respondents opted with their free will and consent to enter into Arbitration with the new partners/owners of the firm. At this stage, it is also noteworthy that during cross examination on the statement of respondent No. 1, the appellant had suggested to him, that the Arbitration Agreement, dated 12 11 1991, is the result of his/their highhandedness. To prove this aspect of the case, reference can be made to F.I.R., which has been produced by R.W. Atta Muhammad, Head Constable of Gawalmandi Police Station, contents of which have not been challenged. The F.I.R., contains the allegations that respondent has been kidnapped and suspicion has been shown for committing of the offence, on appellant and his brother. It is stated that this device was adopted by respondents to pressurize the appellant to extract more money from him. Mr.Ehsanul Haq, learned counsel stated that in pursuance of this F.I.R., the police authorities had been summoning the appellant and his brother to police station and for a considerable period, they remained under pressure, but surprisingly after 3/4 months from the date of registration of F.I.R., all of a sudden, the respondent himself appeared and stated that he was kidnapped by some unknown persons. According to the learned counsel, this document is also important from another angle i.e., respondent No.2 Chaudhry Muhammad Iqbal admitted while recording F.I.R. that dispute with regard to payment of amount was settled, as they had already received rupees twenty eight lacs. If the contents of F.I.R. are considered with the background of the case, as discussed hereinabove, one can conveniently conclude that the respondents had been pressurizing the applicant by adopting different devices, so that he may concede

to their illegal demand. In such view of the matter, the Judgments cited by learned counsel for respondent No. 1, on the point that appellant after having entered into Arbitration Agreement is estopped from challenging the same are not applicable, because the facts noted therein are distinguishable from the peculiar circumstances of the instant case. As such, we are inclined to reverse the findings recorded by Trial Court on Issues Nos.2 and 3. Accordingly the same are decided in negative, for the reasons, stated above.

Mr. Basharatullah, learned counsel next contended that as the appellant was no more the partner of National Mining Corporation, therefore, if at all there was a dispute that was between the respondents and the Mining Corporation and not individually with the appellant. We enquired from Mr. Khushnood Ahmad, Advocate, that whether he can show us any document to establish that after the earlier arbitration, between the new partners and the respondents, Award in respect whereof was given on 14 7 1991, the appellant was still liable to satisfy the claim of respondents? Learned counsel stated that as throughout the period during which respondents had been working as Raising Contractors in the National Mining Corporation, it was the appellant who was dealing with them, therefore, he in the capacity of Managing Director was bound to enter into arbitration in his legal capacity with them. We are afraid to contribute to the contention put forth by learned counsel to be correct for the reasons that no documentary or oral evidence has been brought on record to show that appellant was responsible in his personal capacity to discharge the liability on behalf of other partners of the Mining Corporation. In such view of the matter, we are inclined to hold that after selling the shares in the partnership firm; by the appellant to new partners namely Changez Ahmad Kurd and Kamran Ahmad Kurd, the respondents had dispute with the Mining Corporation and not with the appellant in his personal capacity, particularly in view of sections 19(2) and 32(2) of the Partnership Act, after retiring from the firm, they were not liable to settle the dispute with appellant. Learned Trial Court while disposing of this issue had wrongly placed reliance on Exh.A/1 i.e., Arbitration Agreement, dated 12 11 1991, because this document is under objection and admittedly it was executed between the parties after the dissolution of first partnership between the parties, as such, the findings of trial Court on Issue No.4, are reversed holding that the respondents had no dispute in personal capacity with the appellant and if at all there was a dispute, that was between them and the National Mining Corporation through its partners, who have stepped into the shoes of appellant and other partners, who have already been retired.

As far as Issue No.6, is concerned, it relates to the fact as to whether any arbitration proceedings and award between the applicants and respondent ?National Mining Corporation conducted and decided by four Arbitrators namely Haji Bahadar Khan, Muhammad Murad, Haji Abdul Raziq and Haji Khuda Bakhsh on 14th July, 1991, is concerned, has also been wrongly decided in negative by the trial Court, because the two arbitrators namely Abdul Raziq and Khuda Bakhsh appeared on behalf of appellant and they proved the contents of arbitration agreement, dated 29th June, 1996 and the Arbitration Award, dated 14 7 1991 (Exh.R/1). Even during hearing Mr. Khushnood Ahmad, Advocate admitted that earlier there had been arbitration proceedings between the parties, but according to him that was for specific purpose. As far as such aspect of the case is concerned, it would be dealt with later on. It is necessary here to make mention of the fact that in the Arbitration Award, dated 24 12 1991, which is under challenge, figure of rupees twenty eight lacs find mention, being the cost of the machinery etc., which was already awarded to respondents vide earlier Arbitration Award; dated 14th July, 1991. In this behalf, one of the respondent namely Chaudhry Muhammad Iqbal had also admitted this fact in F.I.R., Exh.R/2, but the trial Court without referring to these pieces of evidence had wrongly decided the issue in negative. Thus, for the reasons mentioned hereinabove findings on Issue No.6 are reversed and this issue is decided in affirmative.

Mr. Basharatullah, learned counsel next contended that Issues Nos.7 and 8 have also been illegally decided by the Trial Court, without making reference to the evidence available on record, that no payment was received by respondents in pursuance of earlier Arbitration Award, dated 14th July, 1991. In this behalf, he made reference to the evidence of witnesses produced by appellant.

Mr. Khushnood Ahmad, learned counsel, contended that in fact the amount of rupees twenty eight lacs has not been paid to respondents either by appellant or new partners/owners of the firm.

Because the burden of proving both these issues was on the appellant, therefore, it would be appropriate to make reference of the evidence, led by him. First of all statement of Mir Changez Ahmad Kurd may be referred. He gave the details of the partnership business which he has purchased from appellant and other partners. Then he deposed that he insisted upon the respondents to carry out the work, but they declined to do so and thereafter, Arbitrators were appointed between him and the respondents. The Arbitrators gave an Award in favour of respondents, holding them entitled to receive rupees twenty eight lacs. According

to him this amount was not received by them, as according to their stand, they would take this amount from appellant, because they also owe an amount of rupees twenty five lacs to him. Therefore, after deducting that amount, balance was given to them, by the appellant. During cross examination, the adjustment of rupees twenty eight lacs as described by the witness in his examination in chief, was not challenged effectively. R.W.2 Khadim Hussain, used to work as Manager from 1985 to 1986. He deposed that on 10th July, 1997, Rana Irshad Ahmad, left the charge of mine at his own will and handed over the same to Changez Ahmad Kurd. Thereafter, he created a dispute with regard to payment of amount, which has been spent on the mine, as such two arbitrators from each side were appointed. They gave award declaring respondents entitled for the amount of rupees twenty eight lacs. According to him, they did not receive this amount from Changez Ahmad Kurd, as they owe an amount of Rs.23/24 lacs to appellant. According to him from 1st August, 1991, he started working with Mir Changez Ahmad Kurd. During this period he had been working with Rana Irshad. In the meanwhile some amount was paid by appellant to Rana Irshad Ahmad, through him. He stated that correct figure is not remembered to him, but it was 1 and 1/2 or 2 lacs, which the appellant paid to respondent No. 1 . In cross examination concerning payment of rupees twenty-eight lacs he stated that this amount ought to have been paid by Changez Kurd to respondents, Besides this, no other question was put to him, with regard to the payment of amount. R.W.3 Haji Abdul Raziq, who was one of the Arbitrators appointed by respondents, stated that Arbitrators concluded that a sum of rupees twenty eight lacs is to be paid to respondents by Changez Ahmad Kurd. According to him this was also settled that Ejaz Ali Siddiqui has to pay this amount to the respondents after deducting the amount which they owe to him. In this behalf in cross examination, no specific objection was raised. Same is the statement of R.W. Khuda Bakhsh, who was the second arbitrator on behalf of respondents. He also supported to Haji Abdul Raziq. Similar type of evidence was given by R.W. Muhammad Murad. Appellant Ejaz Ali Siddiqui and witness Shaukat Ali Siddiqui in their own statements have also maintained that this amount was paid on behalf of Changez Ahmad Kurd to respondents, after deducting the amount, which respondents owe to him. At this stage, reference to the F.I.R. (Exh.R/2) produced by R.W. Ali Muhammad can also be made, wherein respondent No.2, admitted that amount of rupees twenty eight lacs has already been received by him. In this very context affidavit of respondent No.2, filed before the Trial Court affirming that their claim has been settled and subsequent request made by him through an application that his name may be deleted from the proceedings, coupled with the fact that even during hearing of this appeal, Syed Ayaz Zahoor, learned counsel stated in writing on his behalf that his claim has already been

satisfied, is sufficient proof of the fact that said amount has been paid to them. We may mention here that affirmative findings of the Trial Court on these issues are also not sustainable, because she has not discussed the evidence, however, only for the purpose of disposal of instant proceedings, it can conveniently be held that if at all it presumed that the amount of rupees twenty eight lacs was not paid by Changez Ahmad Kurd to respondents, then for that matter, they should have filed suit against him and how they can hold the appellant responsible for the same. Even this amount cannot be added in the last Arbitration Award, dated 24 12 1991, therefore, the findings of the Trial Court are reversed and for the above discussion, the issues are decided accordingly.

As far as Issue No.9 is concerned, that requires no discussion in view of the findings given at Issue No.4.

Mr. Basharatullah, learned counsel, contended that Issue No.10 i.e., whether the Arbitration Agreement and the Award filed by the applicants in Court is enforceable? has also been disposed of wrongly by the trial Court. According to him, once the matter was settled between the new owners and the respondents vide Arbitration Award, dated 14 7 1991, the arbitration agreement and the Award, dated 12 I1 1991 and 24 12 1991, respectively were not enforceable in view of the provisions of section 11 and Order II, Rule 2, C.P.C., because when the earlier arbitration reference, dated 29 6 1991 was executed the respondents if, had any other sort of claim, they should have incorporated the same therein. According to him, on this point he has two fold stand. Firstly the earlier Arbitration Agreement and award has covered the total dispute as it reflects from the contents of reference, Marks 1 and 2 as well as Exh.R/1, and secondly if respondents can legally prove that arbitration proceedings had not covered the dispute, but for want of such conditions to be in existence, they were estopped under the law to initiate second proceedings of arbitration by way of executing Arbitration Agreement, dated 12 11 1991, in pursuance whereof sole arbitrator Mir Shah Nawaz Kurd gave the arbitration award, dated 24 12 1991. In this behalf learned counsel made reference to AIR 1978 Calcutta 228.

Mr. Khushnood Ahmad, learned counsel stated that admittedly there were arbitration proceedings between the new owners/partners of the firm and the respondents, but that was for limited purpose, as such, with regard to recovery of charges of the development of the mine, the respondents entered into second arbitration agreement with the appellant, who being the Managing Director of the Corporation was solely responsible, to settle the dispute with them.

In view of the admission made by the respondent's counsel in respect of the earlier arbitration it would be necessary to observe, that in both the References, executed by Mir Changez Ahmad Kurd and Mir Kamran Ahmad Kurd, whereby they appointed to Haji Abdul Raziq and Khuda Bakhsh, as their arbitrators and the second reference, wherein respondents appointed to Haji Khan Bahadur and Muhammad Murad as their Arbitrators, suggest to hold that earlier arbitration was in respect of the price of machinery, other expenditures and labour as well as mining machinery, underground and surface and the three arbitrators namely Muhammad Murad, Abdul Raziq and Haji Khuda Bakhsh, categorically deposed by appearing as witness on behalf of appellant, that in previous arbitration proceedings, total dispute has been settled. At this juncture reference to the arbitration agreement, dated 12 11 1991, (Exh.A/1) can be made. In this agreement as well, there was no specific reference of the nature of dispute except mentioning that there is a dispute between the parties in respect of National Mining Corporation, Narwar, therefore, they appointed to Mir Shah Nawaz Kurd, as their sole Arbitrator. Thus, from the contents of this document, the contention of counsel for respondent No.l, gets no support that the second arbitration proceedings, were drawn in respect of the dispute of development made on the mine. It is also important to note that in the Arbitration Award, dated 24 12 1991, figure of rupees twenty eight lacs has also been shown, which is due against appellant, although in the previous Award, dated 14th July, 1991, this amount was found due against Mir Changez Ahmad and Mir Kamran Ahmad Kurd, therefore, we are inclined to hold that the earlier arbitration proceedings have covered the whole dispute, as such, the second arbitration agreement, dated 12 11 1991, was not enforceable, in view of the Judgment relied by learned counsel (AIR 1978 Calcutta 228), wherein it was held that claim in respect of which reference sought, forming principle of previous claim of which award was given, reference is barred by principle of constructive res judicata'. It was also held that though Order II, Rule 2 does not in terms apply to proceedings under the Arbitration Act, there is no reason why the principles thereof, should not be applied to arbitration proceedings in appropriate cases. Thus, it is held that arbitration agreement, dated 12 11 1991, was not enforceable. This issue has been dealt with Issue No.11, by the Trial Court, which relates to the fact; whether any notice of the Award was given by the Arbitrator to the respondent, if not, to what effect? In this behalf it is to be mentioned that as per the statement of Sardar Saadat Ali, Arbitrator informed him that he is not in a position to give the Arbitration Award, therefore, he advised him on 23rd December, 1991, not to give the decision but on the next day, allegedly Award was announced by the sole Arbitrator i.e., 24th December, 1991. Admittedly at the time of announcement, no notice was given to appellant and he fixed the time of eight

months for its enforcement. Therefore, in such view of the matter, affirmative findings recorded by Trial Court on both these issues are not sustainable, as such, it is held that the Arbitration Award was not enforceable nor after its completion, any notice was given to appellant by the Arbitrator.

Mr. Basharatullah, learned counsel then argued that Issues Nos.12 and 13 have been disposed of in a slipshod manner by the Trial Court. As far as Issue No. 12, is concerned, it is in respect of non joinder jf parties. Suffice it to observe that respondents had themselves admitted the status of Mir Changez Ahmad Kurd and Mir Karnran Ahmad Kurd, as new owners/partners of National Mining Corporation, as they entered into arbitration agreement with them. Therefore, if they had any dispute in respect of the Mine, as per the contents of the Arbitration Agreement (Exh.A/1), dated 12th November, 1991, it was incumbent upon the respondents to have joined the new owners as party. Similarly if they were of the opinion that the retiring partners were necessary party, they should have joined all of them in the arbitration proceedings, as well as before the Court, because if at all it is presumed that one of the retiring partner i.e., Ejaz Ali Siddiqui has validly entered into arbitration proceedings with the respondents, as far as the remaining partners, who have already retired, would not be bound with his acts and deeds. Same would be the position of new owners/partners. As such, it is held that the application is bad for non joinder of parties. In forming this opinion we are supported by the judgment, delivered in the case of Messrs Ahmad Bakhsh, Abdul Rashid v. Muhammad Aslam & Brothers and another (PLD 1954 Lah. 620).

As far as Issues Nos. 13 and 14 are concerned, have been framed to resolve; whether the Arbitrator has misconducted himself and whether Award is legal and valid, when the same is not supported by any reasons or evidence?

Mr. Basharatullah, learned counsel, contended that as far as the expression 'misconduct' is concerned, it has not been defined in the Arbitration Act, itself, but according to him, the Hon'ble Supreme Court in the case of Brooke Bond (Pakistan) Ltd. v. Conciliator appointed by Government of Sindh and 6 others (PLD 1977 SC 237) has defined the expression 'misconduct'. He also made reference to Messrs Shafi Corporation Ltd. v. Government of Pakistan through Director General of Defence Purchase, Ministry of Defence, Karachi (PLD 1994 Kar. 127). On the strength of these two authorities, he argued that section 26 A of the. Arbitration Act, cast a duty upon the Arbitrator to state in the Award, the reasons for the Award in sufficient detail to enable the Court to consider any question of law, arising out of the Award. Whereas its subsection (2) says that

where the Award does not state the reasons in sufficient detail, the Court shall remit the Award to the Arbitrator or Umpire and fix the time within which the Arbitrator or Umpire shall submit the Award together with the reasons in sufficient detail. Its subsection (3) further lays down that an Award remitted under subsection (2) shall become void on the failure of Arbitrator or Umpire to submit it in accordance with the directions of the Court. According to him, without prejudice to his different pleas, raised hereinabove, the sole Arbitrator violated the mandatory provision of law. Inasmuch as no evidence was recorded nor any opportunity was given to appellant, to defend himself and arbitrarily the arbitration award was pronounced.

On the other hand, Mr. Khushnood Ahmad, learned counsel stated that the Arbitrator act as an Administrative Tribunal and is not required to give detailed reasons of his decision, as are normally expected from the judicial officer and if from reading the contents of the Award, one can spell out that the Arbitrator had applied his mind, keeping in view the facts and circumstances of the case, it would be sufficient to hold the award to be valid. He relied on PLD 1971 Lahore 30, PLD 1982 Quetta 52, 1982 CLC 1984 and 1984 CLC 952.

Admittedly the Arbitrator had not recorded evidence of the parties at the time of deliberations, nor he assigned reasons in giving the award in favour of respondents. It is not understandable that on basis of what material, it has been concluded that the respondents are entitled for rupees twenty eight lacs plus Rs.21,60,000 which are due against appellant. Mr. Khushriood Ahmad, learned counsel could not point out from the statements of respondents as well as the witnesses appeared on their behalf that of ever any evidence was recorded or heard in presence of appellant. It appears that merely on basis of guesswork, the Arbitration Award was compiled. At this juncture, it is also noteworthy that it is the allegation of appellant against the Arbitrator, that he had adjourned the hearing on 23rd December, 1991 and thereafter, matter remained pending before him and actually after about eight months the Award was compiled and delivered, in order to make it enforceable from 24th December, 1991, a period of eight months for its implementation was fixed and on the actual date, which should be somewhere in the month of July, 1992, the authority letter was executed by him without dates in favour of respondents i.e. Exh.A/5. Thus, according to learned counsel the award has been given in clear violation of section 26 A of the Arbitration Act. He further stated that in such like situation it would be deemed that the Arbitrator on bypassing the mandatory provisions has misconducted himself. We have considered this aspect of the case and also examined the Authorities quoted by learned counsel. First of all, in this context,

reference can be made to the judgment of Hon'ble Supreme Court, delivered in the case of Brooke Bond. The Hon'ble Supreme Court, while taking into consideration the implication of section 30 of the Arbitration Act, defined the expression 'Misconduct' and ' misconducted' the proceedings. Relevant para. therefrom is reproduced hereinbelow:

"The term 'misconduct' used in connection with arbitration does not necessarily imply anything in the nature of fraud or moral turpitude. In the judicial sense the misconduct of an Arbitrator means his failure to perform his essential duty, resulting in substantial miscarriage of justice between the parties. According to Atkin, J., in Williams v. Willis, p.45, the words ' misconducted the proceedings' mean such a mishandling of arbitration as is likely to cause some substantial miscarriage of justice. In the American Jurisprudence, Vo1.3 on pages 964 5 it is observed that awards which are valid on their faces may be set aside in equity for misconduct on the part of the arbitrators, and the extrinsic evidence is admissible to prove such misconduct. Conduct inconsistent with the duties imposed upon those selected as the arbitrators, either at the hearing, or in reaching their conclusions will frequently constitute misconduct as will impeach an award."

Similarly the learned Division Bench in Karachi High Court in the case of Shafi Corporation defined the expression 'misconduct' as follows:

"...The expression 'misconduct' appearing in clause (a) of section 30 of the Act is not defined in the Act. It is used in technical sense and with reference to arbitration proceedings it points out towards irregularity. Normally, it does not refer to moral turpitude of anything to it. It is now settled proposition of law that an award of the arbitrator is binding upon the parties and same cannot be set aside, unless it suffers from any error of law apparent on the face of record, or is in violation of principles of natural justice, which is not the case here. As regards counterclaim, it is noted that counterclaim is on better footing than additional work. "

As far as the judgment cited by respondent's counsel, reported in PLD 1971 Lah. 30, is concerned it is not applicable because it deals with a criminal matter under the West Pakistan (Industrial Disputes) Ordinance IV of 1968. However, in the case of Province of Balochistan and another v. Malik Haji Gul Hassan (PLD 1982 Quetta 52) it was held that 'misconduct of proceedings, mis-?adoption of such procedure in arbitration proceedings is either not warranted by facts of case or oppose to principles of justice and implies breach of duty and non observance of common rules of justice'. Similar judgment in the case of Associated

Constructors Ltd. v. Karachi Municipal Corporation (1982 CLC 1984), would also, therefore, not be applicable to the proposition in hand. Whereas in case of Qamardin Ahmad & Co. v. Pakistan and others (1984 CLC 952), it was held that 'evidence whether material or not improperly taken or admitted renders award to be bad'.

Thus, for the foregoing reasons and keeping in view the principles of law, discussed in the above judgments, particularly by Hon'ble Supreme Court in the case of Pakistan Brooke Bond Ltd. we are inclined to hold that in this case, sole Arbitrator misconducted himself and had rendered the Award invalid by not assigning the reasons, after recording evidence. As such, the findings of Trial Court on these issues to the effect that same have not been pressed by learned counsel, are not sustainable, because these were the two material issues and it is not known as to how the Presiding Officer has concluded that the issues were not pressed. Consequently both the issues are decided in affirmative.

Mr. Basharatullah, learned counsel stated that because the Arbitrator, has misconducted himself and the Award is not supported by any reasons or evidence, therefore, decree cannot be passed upon it. Since we have already resolved Issues Nos. 13 and 14 in affirmative, therefore, Issue No. 15, which pertains to the conversion of Award into decree, is decided against the respondents, in view of the findings of Issues Nos. 13 and 14, that the Award being invalid/nullity in the eye of law, cannot be converted into decree.

As far as disposal of Issue No. 16 is concerned, it does not call for separate determination, because we have already held that the Award is nullity in the eye of law.

No other point was argued by the parties' counsel.

Thus, for the above discussion Civil Miscellaneous Appeal No.25 of 1997 and Civil Revision No.251 of 1997 are accepted. Consequently Award; dated 24th December, 1997 and the Arbitration Agreement, dated 12th November, 1991 are declared to be illegal and of no legal consequences. Resultantly, impugned judgment/decree, dated 30th July, 1997 passed by Additional District Judge I, Quetta is set aside with cost against respondent No. l throughout.

Office is directed to prepare Decree Sheet.

M.B.A./708/Q?????????????????????????????????????????????????????????????
?? Order accord

**2001 C L C 136**

**[Lahore]**

**Before Ch. Ijaz Ahmad, J**

ANJUMAN TAJRAN, OUTSIDE DELHI GATE,
LAHORE and 15 others---Appellants
versus
CHIEF ADMINISTRATOR OF AUQAF,
PUNJAB AWAN-E-AUQAF and another---Respondents

First Appeal from Order No. 173 of 2000, heard on 7th July, 2000.

**(a) Punjab Waqf Properties Ordinance (IV of 1979)---**

----Ss. 11 & 12---Civil Procedure Code (V of 1908), O.XX, R.5---Appeal-- Notification of Waqf property---Petition under S.11 of Waqf Properties Ordinance, 1979, filed by the appellant was dismissed by Trial Court without discussing the evidence on record---Validity---Where judgment of the Trial Court was given without discussing the evidence on record, such judgment was not in accordance with the mandatory provisions of O.XX, R.5 of C.P.C.---Judgment was set aside and the case was remanded for decision afresh after hearing the parties and in accordance with the provisions of O.XX, R.5, C.P.C.---High Court declined to give findings on the issues between the parties so that parties might not be deprived of remedy of appeal before High Court---Appeal was allowed accordingly.

**(b) Judgment------**

---- Judgment is the result of accumulative effect on the mind of the Court that finds expression in its final opinion---Court is obliged to consider the evidence present on record, judge its value .in the light of legal principles applicable thereto and then pronounce its final opinion.

**(c) Punjab Waqf Properties Ordinance (IV of 1979)---**

--S. 11---Civil Procedure Code (V of 1908), Preamble---Petition under S.11 of Punjab Waqf Properties Ordinance, 1979---Applicability of provisions of Civil Procedure Code, 1908---Provisions of C.P.C. are applicable to such proceedings.

Abdul Latif Dar for Appellants.

Nasim Ahmed Khan and Asad Ali Shah Gilani for Respondents.

Date of hearing: 7th July, 2000.

**JUDGMENT**

The brief facts giving rise to this appeal are that appellants filed petition under section 11 of the Punjab Waqf Properties Ordinance, 1979 before learned Additional District Judge, Lahore. The respondents filed written statement controverted the allegations levelled in the petition. Out of the pleadings of the parties, the following issues framed:-----.

(1) Whether the petition is within time? O.P.P.

(2) Whether the petition is not maintainable? O.P.R.

(3) Whether the petition is bad for misjoinder of parties? O.P.R.

(4) Whether the property in question was purchased and constructed by the petitioner and is not a Waqf property? O.P.P.

(5) Relief.

The petition was dismissed by the learned Additional District Judge vide impugned judgment and decree, dated 1-5-2000.

2. The appellant's counsel submits that learned Additional District Judge was not justified to dismiss the petition of appellant as time-barred, therefore, findings of the trial Court on Issue No. 1 is not sustainable in the eyes of law; that the learned Additional District Judge without discussing the evidence on record summarily decided Issues Nos.2 and 4 against appellant; that notification, dated 21-8-1997 relied by the learned Additional District Judge was not placed on record properly in accordance with the provisions of Civil Procedure Code.

3. Respondents' counsel submits that learned Additional District Judge decided the case in accordance with evidence, after proper appreciation of evidence; that it is not necessary to discuss the evidence on record by the trial Court in its judgment.

4. I have given my anxious consideration to the contentions of learned counsel for the parties and perused the record. It is admitted fact that the learned Additional District Judge dismissed the petition of appellant without discussing

the evidence on record, therefore, impugned judgment is not in accordance with the mandatory provisions of Order 20, Rule 5, C.P.C. The learned Additional District Judge did not discuss the evidence on record at all and did not decide the same in accordance with mandatory provisions of C.P.C. It is better and appropriate to reproduce the operative part of the impugned judgment of trial Court to resolve the controversy between the parties;-----

"In the instant case, notification was published on 21-1-1977 whereas the present application was 12-12-1991 and was barred by time. Under Issue No-2 it is held that the petition is not maintainable in its present form. In view of findings on Issues Nos. l and 4 so far as Issue No.3 is concerned it is not proved for want of evidence by the respondent. Resultantly the petition fails and is dismissed with costs."

The aforesaid operative part of the impugned judgment reveals that the Court below has not applied his conscious mind to the relevant evidence and has not given sound and cogent reasons in support of the conclusion arrived at by him. It is well-settled .principle of law that Court is oblige to consider the evidence present on record, judged its value in the light of legal principle applicable thereto and then pronounced its final opinion. It is the result of accumulative effect on the mind of the Court that finds expression in its final opinion. In the present case the learned trial Court did not discuss and considered evidence at all meaning thereby the judgment is result of surmises and conjunctures. The provisions of C.P.C. are applicable while deciding the petition under section 11 of the Punjab Waqf Properties Ordinance, 1979.

In view of what has been discussed above, the impugned judgment and decree, dated 1-5-2000 is set aside and case is remanded back to the trial Court to decide it afresh after hearing the parties and decide the petition in accordance with Order 20, Rule 5, C.P.C. I myself do not want to give findings on aforesaid issues so that either party shall not be deprived one remedy of appeal before this Court. Parties are directed to appear before the learned Additional District Judge, Lahore, on 24-7-2000. Since it has become an old petition, the learned Additional District Judge is expected to dispose of petition expeditiously. There is no order as to costs.

Q.M.H/M.A.K/A-98/L Case remanded.

**2001 Y L R 764**
**[Karachi]**

**Before Syed Zawwar Hussain Jafferi, J**

SULEMAN and others---Applicants
versus
DADOO and others---Respondents

Civil Revision No.25 of 1993, decided on 28th May, 2001.

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

----O. XX, R.S & O.XLI, R.31 --- Judgment Of Lower Appellate Court--Failure to give findings on each issue framed by Trial Court---Effect---While deciding the suit, the Trial Court had framed 13 issues---Trial Court had extended reasons on each issue and dismissed the suit being barred by limitation---Lower Appellate Court, while deciding appeal only framed three issues separately, allowed the appeal and set aside the judgment and decree of the Trial Court--Validity---Where in the circumstances, the Lower Appellate Court had framed three issues separately, the Appellate Court had disregarded mandatory provision of O.XX, R.5, C. P. C. and had acted in exercise of its jurisdiction with material irregularity-- Judgment and decree of the Appellate Court was set aside and the case was remanded to the Appellate Court.

Ali Muhammad v. Muhammad Hayat and others 1982 SCMR 816; Muhammad Hayat and others v. Ali Muhammad and others 1982 CLC 2380 anti Akhtar Ali Khan and another v. Settlement Commissioner, Peshawar and 4 others 1989 SCMR 506 rel.

Syed Ghulam Mustafa Shah and 2 others v. Syed Muhammad Hussain Shah and others PLD 1993 Kar. 369; Mst. Sardar Bibi v. Muhammad Baksh and others PLD 1954 Lah.480; Moolchand and 9 others v. Muhammad Yousuf (Udhamdas) and others PLD 1994 SC 462 (Plasitium L, & F); Messrs Gharibwal Cement Ltd., Lahore v. Messrs Universal Traders, Gakhar Mandi; PLD 1977 Lah. 481; Muhammad Azam Khan and others v. Rehmat Ali and others PLD 1993 Lah. 836; Haji Khan Baz Khan and 8 others v. Abdul Rahim and 5 others PLD 1993 Pesh. 36; Messrs Asad Brothers v. lbadat Yar Khan PLD 1993 Kar. 140 and

Mst. Ghulam Sakina and 6 'others v. Karim Bakhsh and 7 others PLD 1970 Lah. 412 distinguished.

**(b) Judgment---**

---- Essentials of a good judgment--Scope-- Good judgment must be self-evident and self-explanatory, in other words it must contain reasons that justify conclusions arrived at and the reasons should be such that disinterested reader finds them convincing or at least reasonable.

Abdul Fattah Malik for Applicants.

G.M. Abbasi for Respondents.

Date of hearing: 25th May, 2001.

**JUDGMENT**

The present Civil Revision Application has been preferred by the applicants against the impugned judgment and decree passed by the learned District Judge, Naushero Feroze, dated 29-11-1992 and 6-12-1992 respectively, thereby allowing the Civil Appeal No. 112 of 1986 and set aside the judgment and decree for dismissal of the Suit No.43 of 1983 passed by the learned Civil Judge Naushero Feroze, dated 31-5 1986 and 7-6-1986 respectively.

The precise facts, as stated in the revision application, inter alia, are as under:-

That the respondents above named filed Suit No.43 of 1983 before the Civil Judge, Naushero Feroze, seeking the following reliefs:--

(a) That this Hon'ble Court may be pleased to declare that the plaintiffs are the owners of the suit land.

(b) That this Hon'ble Court may be pleased to issue permanent injunction against the defendants restraining them not to dispossess the plaintiffs from the suit land.

(c) That the Hon'ble Court may be pleased to appoint Commissioner for taking accounts of produce from Rabi Crop 1982 till the execution of the decree.

(d) That the costs of the suit be borne by the defendants.

(e) That any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case. "

After filing the said civil suit the petitioners resisted and pleaded non - maintainability of the suit through their written statement and denied the reliefs sought by the respondents and it was contended by the petitioners that they are owners of the property in question and deceased Nabi Bux was the owner and in exclusive possession of the suit land in his lifetime and after his death the petitioners above named being widow and son; the only legal heir and successors, came into his shoes and in the record of rights their names were mutated and it was also pleaded that during his lifetime, the deceased was full owner and enjoying the produce of the land in question and his name was also mutated in the record of rights as the sole owner and so also after his death, the said property was mutated in the names of the petitioners accordingly and it was also pleaded that the suit was barred by limitation.

On the basis of pleadings, the trial Court framed the following issues:--

"(1) Whether Jaro is the owner of the suit land?

(2) Whether the deceased Jaro son of Jung and deceased Nabi Bux son of Allah Dino purchased Serial No.351 from Hassan alias Hussain son of Umar through registered sale-deed on the consideration of Rs.600 in equal share on 10-5-1929 and same shares were mutated in the Revenue Record?

(3) Whether Jaro died and he left the plaintiffs and Juro as his legal heirs?

(4) Whether Foti-Khata Badal was effected in the years 1949 and after the death of Juro and the share of deceased Juro was mutated in the Revenue Record of rights in the name of plaintiffs?

(5) Whether Foti-Khata Badal was effected after death of Jaro and mutation was effected in Revenue Record?

(6) Whether Jurio was, in joint possession as co-owner and co-sharer in the suit land and after him the plaintiffs are in joint possession and they are enjoying the produce?

(7) Whether defendants have fraudulently mutated the record of rights in their names including the share of plaintiffs in the suit land?

(8) Whether suit is insufficient stamp?

(9) Whether the suit is bad for non -joinder of necessary party?

(10) Whether suit is time-barred?

(11) Whether the Court has got no jurisdiction?

(12) Whether defendants have acquired ownership by remaining in exclusive possession for more than 12 years.

(13) What should the decree be?"

The parties were directed to lead evidence and accordingly both the parties led their evidence and the learned trial Judge after hearing both the parties gave the findings and answered the Issues Nos. 1, 2, 3, 9, 10 and 12 in affirmative and Issues Nos. 4, 5, 6, 7, 8 and 11 were not pressed and in view of Issue No. 13 the suit was dismissed with no order as to costs.

After the dismissal of the suit the respondents preferred Civil Appeal No. 112 of 1986, which was heard by the learned District Judge Naushero Feroze and in pursuance of the hearing the appellate Court has framed the following points:--

"(1) Whether the judgment and decree passed by trial Court is illegal, without appreciation of evidence and passed without application of mind?

(2) Whether the judgment and decree of lower Court is illegal to be set aside?

(3) What should the decree be?"

The learned appellate Court answered the Points Nos. 1 . and 2 in the affirmative and in respect of the findings on point No.3 the appeal was allowed and the judgment and decree of the trial Court was set aide, therefore, the present revision application has been filed by the petitioners.

It is contended by the learned counsel for the petitioners that during the trial proceedings the trial Court has framed 13 issues and decided the case by discussing all the issues on merits whereas the appellate Court has only considered/framed 3 issues in appeal and other issues have not been touched on merits, therefore, the judgment and decree of the appellate Court may be set aside and the case be remanded to the appellate Court for fresh decision on each of issues framed by the trial Court. It is further contended by the learned counsel for the petitioners that the appellate Court has committed error as per Order 20,

Rule 5, C.P.C. as the Court has to discuss each issues in its decision. The Order 20, Rule 5, C.P.C. is reproduced as under:---

"Rule 5 of Order 20. C.P.C.

Court to state its decision on each issue.----In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

The learned counsel for the petitioners has cited the cases of Ali Muhammad v. Muhammad Hayat and others, reported in 1982 SCMR 816 and Muhammad Hayat and others v. Ali Muhammad and others, reported in 1982 CLC 2380.

The learned counsel for the petitioners has further contended that the appellate Court has ignored to consider the Issue No.9, as there was clear admission on the part of the respondents that their one sister Mst. Fateh Khatoon was alive and she was necessary party but she was not joined as party in the case by the respondents as such the suit was bad in law and not maintainable for non-joinder of necessary party. The learned counsel has cited the case of Akhtar Ali Khan and another v. Settlement Commissioner Peshawar and 4 others, reported in 1989 SCMR 506.

The learned counsel further states that the appellate Court has ignored to consider the entry made in the Revenue Record in favour of the petitioners. The learned counsel for the petitioners has prayed that the case may be remanded to the appellate Court for fresh decision by discussing all the issues.

Mr. G.M. Abbasi, learned counsel for the respondents, has supported the impugned judgment and decree of the learned appellate Court and states that there is conflicting findings and the findings extended by the appellate Court appear to be reasonable and the present revision application be dismissed. In support of his contention, learned counsel for the respondents, has relied upon the following authorities:--

(1) Syed Ghulam Mustafa Shah and 2 others v. Syed Muhammad Hussain Shah and others. (PLD 1993 Kar.369),

(2) Mst. Sardar Bibi v. Muhammad Bakhsh and others (PLD 1954 Lahore 480),

(3) Moolchand and 9 others v. Muhammad Yousuf (Udhamdas) and others , (PLD 1994 SC 462) (Plasitium L & F),

(4) PLD 1977 Lahore 481 (Messrs Gharibwal Cement Ltd., Lahore v. Messrs Universal Traders, Gakhar Mandi),

(5) PLD 1993 Lahore 836 (Muhammad Azam Khan and others v. Rehmat Ali and others),

(6) PLD 1993 Peshawar 36 (Haji Khan Baz Khan and 8 others v. Abdul Rahim and 5 orders),

(7) PLD 1993 Kar. 140 (Messrs Asad Brothers v. Ibadat Yar Khan) and

(8) PLD 970 Lahore 412 (Mst. Ghulam Sakina and 6 others v. Karim Bakhsh and 7 others).

I have gone through the evidence part and the judgment and decree of the trial Court and also examined the judgment and decree of the appellate Court.

The trial Court while deciding the suit had framed 13 issues and on each issue the trial Court had extended reasons while dismissing the suit and the suit was dismissed as it was barred by limitation, but while deciding the appeal the learned District Judge Naushero Feroze only framed 3 issues separately and, therefore, the appellate Court had disregarded mandatory provision of Order 20, Rule 5, C.P.C. and has acted in exercise of his jurisdiction with material irregularity and the case cited by the learned counsel for the petitioners (1982 SCMR 816) is relevant in the present circumstances of the case. The operative part of the said dictum laid down by the apex Court is reproduced as under:--

"Attention in this connection was drawn to the provisions of Order XX, rule 5 of the C. P. C. which provide that 'in suits in which issues have been framed, the Court shall state its findings or decision, with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit and it was observed that the trial Judge was bound to give reasons for his decision on each separate issue and the disposal of the Issues Nos. 1 to 5 by simply observing that all these issues have no substantive force in view of findings given under issue No.6 was not a proper decision in accordance with law. He, therefore, accepted the revision petition, set aside the impugned judgment and decrees of the trial Court and that of the learned Additional District Judge and remanded the case to the trial Court for re-writing the judgment after hearing the parties with the direction that the trial Court should decide the case within two months. This petition for leave to appeal is directed against the aforesaid judgment of the High Court.

We do not agree. The learned trial Court had disregarded the mandatory provisions of Order XX, rule 5, C.P.C., and, therefore, had acted in exercise of his jurisdiction with material irregularity. The High Court in exercise of its revisional jurisdiction was competent to make such order as in the case as it thought fit."

In view of the requirement of Order 20, Rule 5, C.P.C. it is very much clear that in the instant case the learned appellate Court has not given reasons for its decision on each separate issue framed by the trial Court and therefore, the observation of the appellate Court has no force in view of the rule laid down by the law and from the perusal of judgment and decree it extends an impression that the learned District Judge had only observed formality inasmuch as he has only touched the 3 issues framed by him and has not fully applied his mind and it is well-settled principle of law that the characteristic of a good judgment is that it must be self-evident and self-explanatory, in order of word it must contain reasons that justify conclusions arrived at and these reasons should be such that a disinterested reader can find them convincing at least reasonable.

The grounds urged by the learned counsel for the respondents and case law relied by the learned counsel for the respondents have no relevance at this stage when the appellate Court had disregarded the mandatory provisions of Order 20, Rule 5, C. P. C.

For the foregoing reasons, this Revision Application is accepted arid the impugned judgment and decree of the appellate Court is set aside and the case is remanded to the learned District Judge Naushero Feroze for hearing the parties and decide the case in accordance with law. The learned appellate Court is directed to rewrite the judgment after due hearing the concerned parties. The parties are directed to appear before the learned District Judge, Naushero Feroze on 16-6-2001 and no fresh notice will be issued by the appellate Court.

Q. M. H. /M. A. K./S-117/K Revision allowed.

**P L D 2002 Supreme Court 84**

**Present: Iftikhar Muhammad Chaudhry and Hamid Ali Mirza, JJ**

HYDERABAD DEVELOPMENT AUTHORITY through M.D., Civic Centre, Hyderabad ---Appellant

versus

ABDUL MAJEED and others---Respondents

Civil Appeals Nos, 557 to 572 of 2000, decided on 25th September, .2001.

(On appeal from the judgment/order dated 4-11-2000 passed by High Court of Sindh, Karachi in Appeals Nos. 12 to 19 and 31 of 1990).

**(a) Land Acquisition Act (I of 1894)---**

----S. 23---Constitution of Pakistan (1973), Art.185(3)---Compensation---Enhancement---Lands were acquired by Government and the compensation fixed by the Authorities was enhanced by the High Court---Contention of the petitioner was that the enhancement was without legal justification---Leave to appeal was granted by Supreme Court to consider the contention of the petitioner.

**(b) Judgement---**

----Judicial pronouncement Oudgment) by Judicial Officer---Necessary ingredients---Judicial pronouncement should be based on the evidence/material available on record and reasons must be an outcome of the evidence available and on the basis of such reasons conclusion should be drawn---Where the order/pronouncement lacks such ingredients it cannot be termed to be a judicial verdict (judgment) in stricto senso and such pronouncement at the best can be termed to be an administrative order incapable to settle controversy judicially between the parties.

**(c) Land Acquisition Act (I of 1894)---**

----Ss. 4(1) & 23---Acquisition of land---Fixation of market value---Crucial date---Crucial date for determination of market value of the acquired land would be on which a notification under S.4(1) of the Land Acquisition Act, 1894 was issued.

Land Acquisition Collector v. Ch.Muhammad Ali 1979 CLC 523 ref.

**(d) Land Acquisition Act (I of 1894)---**

----Ss. 4(1) & 23---Acquisition of land---Fixation of market value--?Determination---Sale average of the preceding years is to be taken into consideration for the purpose of grant of compensation---Transactions which have taken place subsequent to the issuance of notification under S.4(1) of the Land Acquisition Act, 1894, are not considered proper to achieve the object.

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

----Arts. 75 & 76---Document---Proof of---Tendering of photo copy of document---Failure to lead primary or secondary evidence to prove the document---Document was taken on the record subject to its admissibility because the witness tendered its photocopy---Later on no steps were taken by the party to prove the contents of that document by leading primary or secondary evidence in terms of Arts.75 & 76 of the Qanun-e-Shahadat, 1984---Validity---Such document could not be taken into consideration--?Merely by tendering a document in evidence, the same had no evidentiary value unless its contents were proved according to law.

**(f) Land Acquisition Act (I of 1894)---**

----S. 18---Acquisition of land---Reference to Court---Enhancement of compensation---Onus to prove---Being dissatisfied by the award fixed by the Authorities reference on behalf of the land owners was filed in the Court--?Land owners did not produce any documentary evidence in support of their claim---Trial Court dismissed the reference---High Court on the basis of only oral evidence enhanced the compensation---Validity---Party interested for enhancement of the compensation owed a duty to discharge the burden by producing convincing evidence for hearing of reference under S.18 of the Land Acquisition Act, 1894---Potential value of the property could not be determined on the basis of mere oral assertion on behalf of the land owners--?Land owners had failed to discharge the burden of proving the market value as well as potentials of the property---High Court therefore was not justified in enhancing the compensation--Order passed by the High Court was set aside and that of the Trial Court was restored.

**(g) Land Acquisition Act (I of 1894)---**

----S. 54---Supreme Court Rules, 1980, O. XII, R.2 & O.XIII, R.1--?Constitution of Pakistan (1973), Art. 185(3)---Appeal against decree of High Court---Limitation---Petition under Art. 185(3) of the Constitution--?Maintainability---Direct appeal lies to Supreme Court under S.54 of the Land Acquisition Act, 1894 against decree of High Court for which time of 30 days has been prescribed under OXII, R.2 of Supreme Court Rules, 1980--?Where no such appeal has been filed, a petition for leave to appeal is competent under Art. 185(3) of the Constitution, if the same is filed within 60 days as per O.XIII, R.1 of Supreme Court Rules, 1980---Appeal in land acquisition cases, against the order of the High Court should have been filed but instead of filing appeal if a petition for leave to appeal has been preferred then Supreme Court is competent to convert the same into appeal and also condone the delay in the interest of justice.

NLR 1999 Rev. 90 distinguished.

Sardar Abdur Rauf Khan and others v. The Land Acquisition Collector/Deputy Commissioner, Abbottabad and others 1991 SCMR 2164 ref.

**(h) Land Acquisition Act (I of 1894)---**

----S. 54---Constitution of Pakistan (1973), Art.185 --- Limitation Act (IX of 1908), S.5---Appeal---Condonation of delay---Delay of 8 days---Illegal order---Effect---Where the order passed by High Court could not be upheld which on the face of it was not sustainable in the eye of law, delay of 8 days in filing the appeal was condoned in the interest of justice---Merely for technical reason appellant could not be non-suited.

Chairman, N.-W.F.P. Fnrest Development Corporation and others v. Khurshid Anwar Khan and others 1992 SCMR 1202 ref.

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

----S. 5---Condonation of delay---Principles---Where on merits the respondent had no case, then :imitation would not be a hurdle in the way of appellant for getting justice---Supreme Court observed that the Court should not be reluctant in condoning the delay depending upon facts of the case under consideration.

Kishan Chand Barwani, Advocate Supreme Court and Akhlaq Ahmed Siddiqui. Advocate-on-Record for Appellants (in all Appeals).

M. M. Aqil Awan, Advocate Supreme Court and Faizan-ul-Haq, Advocate-on-Record (absent) for Respondents (in C.As. Nos. 557 to 568 of 2000).

M.M. Aqil Awan, Advocate Supreme Court and Raja Abdul Ghafoor, Advocate-on-Record for Respondents (in C.As. Nos.569 to 572 of 2000).

Date of heairng: 25th September, 2001.

**JUDGMENT**

**IFTIKHAR MUHAMMAD CHAUDHRY, J.**--In above-noted appeals leave was granted by this Court on 26-4-2000 to examine contentions noted therein. The Order is reproduced hereinbelow:--

"162. Acres of lands were acquired by the Government for the sewerages purposes. The Land Acquisition Officer had fixed the A value at the rate of Rs.10,000 (Rs. ten thousand) per acre, which in? appeal by the High Court was enhanced to Rs.400,000 (Rs.Fourl Lacs) per acre. The learned counsel contends that the enhancement is without legal justification. The contention raised, requires consideration. Leave is granted to examine the above contentions in the Petitions Nos.45 to 60-K/2000."

2. Facts giving rise to instant appeals are that vide Notification dated 29th September, 1981 published in the Sindh Government Gazette dated 15th October, 1981, the Land Acquisition Officer/Collector acquired land, owned by the respondents for the sewerage treatment plant in Deh Mirzan Pur, Taluka and District Hyderabad. Subsequent thereto the Land Acquisition Officer, vide award dated 7th July, 1986 fixed the compensation of the acquired land (a Rs.10,000 per acre plus 15 % compulsory charges. The respondents through their attorneys requested the Land Acquisition Officer for making reference to District Court for enhancement of compensation from Rs.10,000 to Rs.400,000 per acre plus 15 % compulsory charges plus 6% interest from the date of possession .till the date of payment of compensation. As the application was filed under section 18 (b) of the, Land Acquisition Act, 1894 (hereinafter referred to as "the Act") therefore, reference was made to the District Judge, who after recording the evidence from both the sides dismissed the reference on 31st August, 1989. As such respondents preferred appeals before High Court of Sindh. The appeals so filed by the respondents were accepted by means of consolidated impugned order dated 4th November, 1999, whereby compensation was enhanced from Rs.10,000 to Rs.4,00,000 as such instant proceedings have been instituted.

3. Learned counsel contended on behalf of appellant that impugned judgment is not sustainable in law because learned Single Judge, in chambers of High Court of Sindh, accepted the appeals filed by respondent without discussing the evidence and advancing reasons for acceptance of the same, therefore, instant appeals are liable to be accepted on this score alone.

4. When confronted with above position, learned counsel for respondents attempted to support the judgment by making reference to its various parts. However, he failed to pinpoint that portion of the judgment in which, after discussing evidence reasons were advanced to conclude that the respondents/land owners are entitled for compensation at the rate of Rs.4,00,000 per acre instead of Rs.10,000 under section 23 (1) of the Act.

5. We have painfully noted lacuna pointed out in the judgment by the learned counsel for the appellant. However, we believe that such omission has occurred inadvertently because perusal of the judgment reveals that besides noting arguments advanced by both the sides, the evidence has also been reproduced precisely, as such there was no impediment for the learned Judge in discussing the evidence to formulate reasons for the purpose of drawing conclusion on basis of which appeals were allowed. It would be advantageous to note that judicial pronouncement (judgment) by a Judicial Officer should be based on the evidence/material available on record and reasons must be outcome of the evidence available on record and on the basis of such reasons conclusion should be drawn and if the order lacks of these ingredients it cannot be termed to be a judicial verdict (judgment) in stricto senso and at the best such pronouncement can be termed to be an administrative order incapable to settle controversy judicially between the parties. Confronted with such situation we were inclined to remand the case by setting aside judgment to the High Court but keeping in view protracted delay which has already taken place in the matter because parties are in litigation from 24th September, 1981, therefore, with consent of the parties' counsel we decided to dispose of the appeals on merits to save parties from another round of litigation and also to do substantial justice between them.

6. Learned counsel for appellants contended that before the Additional District Judge (Referee Judge) respondents based their case for enhancement of compensation on sale deeds dated 31st January, 1981 (Exh.P/31) and 1-12-1985 as well as the award dated 3rd July 1986 pronounced by the Collector in another case. However, the documents produced in evidence were not admissible in law as their photo copies have been tendered during statement of one of the Attorneys of the respondents namely Mushtaq Ahmad. Learned

Additional District Judge has discarded the sale deed dated 31-1-1981 relied upon by the respondents for the reasons mentioned in the order. As far as second sale deed dated 1-12-1985 and the award pronounced by the Collector in another case of land acquisition for acquiring land for WAPDA was not acceptable because it was also not proved according to law. Moreover the property mentioned therein is situated in different location of Deh Mirzan Pur. According to him as far as oral evidence produced by respondents is concerned that is not acceptable to determine the market value of the land in dispute as well as to determine the potentials of the acquired land because mere assertions in the oral evidence with regard to the market value and the potentials of the property will not be accepted unless such oral statement is supported by some other oral as well as documentary evidence.

7. Learned counsel for the respondents raised preliminary objections regarding maintainability of the appeals as well as locus standi of appellant to invoke jurisdiction of this Court under Article 185(3) of the Constitution of Islamic Republic of Pakistan. Objections so raised by him shall be dealt with separately. However, on merits he stated that respondents have brought on record three documents reference of which has been made by the counsel for appellant in his arguments. According to him as per documentary evidence the average price of acquired land per acre comes to Rs.4,00,000 therefore, the High Court has rightly enhanced the compensation vide impugned judgment. He further argued that the respondents have adduced convincing oral evidence to prove potential and market value of the property and as statements of the witnesses got recorded by them in this behalf have gone unchallenged, therefore, respondents are entitled for grant of enhanced compensation at the rate of Rs.4,00,000 per acre.

8. It may be noted at the very outset that for determination of market value of the acquired land the crucial date would be on which a notification C under section 4(1) of the Act has been issued. Reference in this behalf may be made to the case of Land Acquisition Collector v. Ch. Muhammad Ali (1979 CLC 523). It is equally important to note that consistent practice for determining such value is that the sale average of the preceding years is to be taken into consideration for the purpose of grant of compensation. As far as the transactions which have taken place subsequent to the issuance of D Notification under section 4 (1) of the Act are concerned same are not considered proper to achieve the object. In the instant case Notification under section 4 (1) of the Act was issued on 29th September, 1981, therefore, -the sale deed dated 1-12-1985 and. the award of the Collector pronounced in some other case wherein the land was acquired for

the benefit of WAPDA dated 3rd July, 1986 are kept out of consideration outrightly.

9. As far as sale deed dated 31st January, 1981 Exh.P-31 is concerned, learned Additional District Judge has discarded it. Besides adopting the reasons for not accepting this document in evidence, we further add that as per the statement of Mushtaq Ahmed, this conveyance was taken on record subject to its admissibility because the witness tendered its photocopy. Inasmuch as later on no steps were taken by the respondents to prove the contents of this document by leading primary or secondary evidence in terms of Articles 75 and 76 of Qanun-e-Shahadat Order, 1984. Therefore, this document also cannot be taken into consideration. It is also to be-noted that merely be tendering a document in evidence it gets no evidentiary value unless its contents are proved according to law. The burden of proof was' upon the respondents to establish that the compensation of the land which has been awarded by the Collector is inadequate, therefore, it should have been enhanced adequately. As far as Collector or Land Acquisition Officer is concerned, he does not exercise judicial powers but only is appointed to conduct an inquiry and formulate his opinion on the basis of the same. However, during hearing of Reference under section 18 of the Act, judicial proceedings are conducted, therefore, party interested for enhancement of the compensation owes a duty to discharge the burden by producing convincing evidence. Since the sale deed dated 31-1-1981 Exh.P-31 is not admissible in evidence, therefore, we draw inference that this piece of evidence has not advanced the case of the respondents in any manner.

10. Now adverting towards oral evidence led by respondents, it is to be noted that the witnesses produced by them have made assertion that the market value of the property is Rs.400,000 and their such assertion is based on sale deed dated 31-1-1981 and once this document is kept out of consideration, this portion of statement becomes unbelievable. As far as other assertions made in this behalf are concerned with regard to potential value, no supporting evidence was brought on record by them. In this regard, a close scrutiny of the statement of one of the witnesses Mushtaq Ahmed would indicate that perhaps the acquired land was not cultivable because no Dhal (Revenue) was being paid by its owner. No evidence has been brought on record from independent source that the land has been cultivated or developed by its owner for the purpose of Housing Scheme etc. Therefore, on basis of mere oral assertion on behalf of respondent, the potential value of the property cannot be determined. As such we are of the opinion that as the respondents have failed to discharge the burden o proving the market value as well as potentials of the property, therefore, for such reasons

we are persuaded to draw a conclusion that learned Single Judge, in Chambers of High Court was not justified in enhancing the compensation from Rs.10,000 to Rs.4,00,000 per acre.

11. Learned counsel for respondents objected on the maintainability of the appeals on the ground that under section 54 of the Act, direct appeal is competent before this Court and according to Order XII of Supreme Court Rules, 1980 time prescribed for appeal is 30 days but appellant filed petition for leave to appeal beyond period of 30 days and if the petitions are treated as appeals then they are barred by 8 days and for condonation of such delay no application has been filed. Reliance in this behalf was placed by him on a judgment of this Court reported in NLR 1999 Rev. 90.

12. Learned counsel for the appellant contended that this Court while granting leave to appeal has already converted the petitions into appeals without making any observation in respect of determination of question of limitation at the time of final hearing of the appeals, therefore, it may be presumed that if there was any delay in filing of appeals that has been condoned. He further stated that the judgment relied upon by respondents' counsel is distinguishable because to that case petitions for leave to appeal were dismissed at the preliminary hearing whereas in the instant case leave to appeal was granted by this Court without making any observation in respect of limitation.

13. We have no doubt in our mind that against decree of the High Court a direct appeal shall lie to the Supreme Court under section 54 of the Act for I which time of 30 days has been prescribed under Order XII, Rule 2 of Supreme Court Rules, 1980 and if appeal has not been filed then a petition for leave to appeal is competent under Article 185(3) of the Constitution of f Islamic Republic of Pakistan if filed within 60 days as per Order XIII, Rule 1 of Supreme Court Rules, 1980. Normally in land acquisition cases against the order of the High Court appeal should have been filed but instead of filing appeal if a petition has been preferred then Court is competent to convert it into an appeal and also condone the delay if appeal is found barred, by time in the interest of justice as it has been held in the case of Sardar Abdur Rauf Khan and others v. The Land Acquisition Collector/Deputy Commissioner, Abbottabad and others 1991 SCMR 2164. Relevant para. therefrom is reproduced hereinbelow:--

"8. We are inclined to hold that if a party loses his right to file a direct appeal. because of the limitation, he may invoke clause (3) of Article 185 of the Constitution for a petition for leave to appeal, which the Court may either grant

or decline either on the ground that the party should have availed bf a direct appeal or for the reason that the petition for leave to appeal has no merits. "

The view taken in the above judgment has again been reconfirmed in the case of Chairman., N.-W.F.P. Forest Development Corporation and others v. Khurshid Anwu Khan wnd others 1992 SCMR 1202. It is to be noted that in the judgement, which the learned counsel has relied, these two judgments were not cited at the bar during arguments. There is yet another distinction in the case relied upon by learned counsel namely that in that case petition for leave to appeal was dismissed at a preliminary stage because leave to appeal was refused whereas in these cases leave has already been granted, therefore, keeping in view the merits of the case which have been discussed hereinabove we are of the opinion that if there is delay of 8 days in filing the appeal that is to be condoned in the interest of justice because merely for such technical reason appellant cannot be non-suited and the impugned order dated 4th November, 1999 passed by the High Court cannot be upheld which on face of it is not sustainable in the eye of law a .s it has been pointed out hereinabove while discussing merits of the case. Therefore, while condoning the delay it is held that the appeals were duly instituted. Even otherwise if on merits the respondents have no case then limitation would not be a hurdle in the way of appellant for getting justice and in such-like situation the Courts should not feel reluctant in condoning the delay depending upon facts of the case under-consideration.

14. Learned counsel for the respondents also objected on the maintainability of the appeal on behalf of the appellant in view of the provisions of section 54 of the Act but when it was pointed out to him that respondents filed Reference against the appellant and they contested the same, therefore, if an adverse order has been passed against them then they can file the appeal, he could not answer satisfactorily and stated that he would not press this point.

Thus for the foregoing reasons appeals are allowed, as a consequence whereof impugned order dated 4th November, 1999 is set aside and order of Additional District Judge, dated 31st August, 1989 is restored. Parties are left to bear their own costs.

Q.M.H./M.A.K./H-46/S?????????????????????????????????????????????????
???????????????????? Appeal allowed.

**2002 C L C 825**

**[Karachi]**

**Before Muhammad Afzal Soomro, J**

QAMARUDDIN---Applicant
versus
PROVINCE OF SINDH through Secretary, Land Utilization, Board of Revenue, Hyderabad through Deputy Commissioner Ghotki and 4 others---- Respondents

Civil Revision No.45 of 1996, decided on 7th September, 2001.

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

----O. XX, R.5 & O.XLI, R.31---Judgment---Contents of judgment-- Failure to give decision on each issue---Trial Court while deciding the suit had framed six issues but did not extend reasons separately on all issues and decreed the suit---While deciding appeal the Appellate Court had also not decided the appeal issue-wise---Validity---Both the Courts below had disregarded mandatory provision of O.XX, R.5, C.P.C. & O.XLI, R.31, C.P.C. respectively---Where in the judgment, the Appellate Court had not stated points for determination, decisions thereon and the reasons for its findings, the same was not a "judgment" according to law--- Trial Court and Appellate Court having acted in exercise of its jurisdiction with material irregularity, such judgment and decree was set aside and the case was remanded to the Appellate Court for decision afresh.

Ali Muhammad v. Muhammad Hayat and others 1982 SCMR 816; Muhammad Hayat and others v. Ali Muhammad and others 1982 CLC 2380; Muhammad Hafeez v. Jalaluddin and others 1981 SCMR 1171; Khawaja Muhammad Akbar v. Khawaja Fateh Muhammad 1993 MLD 76; Bashir Ahmed v. Ghulam Hyder 1991 MLD 360; Mian Muhammad Latif v. Province of West Pakistan PLD 1970 SC 180 and Anwar Hussain v. Deputy Settlement Commissioner, Larkana 1983 CLC 851 ref.

**(b) Judgment---**

---- Good judgment---Characteristics---Good judgment must be self- evident and self-explanatory---In other words it must contain reasons which should justify

conclusions arrived at and the reasons should be such that a disinterested reader can find same convincing or at least reasonable.

Abdul Fatah Malik and Abdul Sattar Soomro for Applicant.

Abdul Ghafoor Mirani and Mumtaz Ali Siddiqui for the State.

Date of hearing: 20th August, 2001.

**JUDGMENT**

Through this civil revision the applicant has challenged the judgment and decree, dated 7-4-1996 passed by the learned Additional District Judge, Ghotki in Civil Appeal No.22 of 1993, rejecting the appeal filed by the applicant against the judgment, dated 26-5-1993 and decree, dated 29-5-1993 passed by the Senior Civil Judge, Ghotki in Suit No.239 of 1978.

The precise facts, inter alia, as stated in the revision application, are that an agricultural land admeasuring 8 acres from U.A. No.219 of Deh Changlani, Taluka Ghotki, District Ghotki was granted to respondent No.5 Ali Sher by the Deputy Colonization Officer, Guddu Barrage, left Bank Ghotki, on 19-10-1973. It was alleged by respondent No.5 that during the same Katchery many other persons were granted land from same U.A. No.219 on Harap tenure. The applicant had also applied for grant of disputed piece of land measuring 8 acres during the same Katchary on the basis of P.K.M. right but his application was turned down on the ground that he did not raise objection to the grant in favour of respondent No.5 and further he did not have preferential right over the grant of suit-land in comparison to respondent No.5/plaintiff. The applicant challenged the said order of grant in Appeal No.S.R.O. A.4305 of 1973-74 before the Additional Commissioner, Sakkur Division, Sukkur (respondent No.3) who cancelled the grant vide his order, dated 1-2-1978 and granted the disputed land in favour of the applicant on the ground that the applicant's father namely Ilyas and thereafter his brother had P.K.M. right over the disputed piece of land and the same land is in cultivating possession of the applicant and further held in his order that the respondent No.5/plaintiff has no right for the grant of disputed land. Against the order of Additional Commissioner, Sukkur Division, Sukkur. Respondent No.5 Ali Sher filed an appeal before respondent No.2 (Member Board of Revenue, Sindh, Hyderabad) who maintained the order, dated 1-2-1978 passed by the Additional Commissioner, Sukkur and dismissed the appeal on merits. Respondent No.5 thereafter filed a Civil Suit being Suit No.239 of 1978 in the Court of Senior Civil Judge, Ghotki seeking the following reliefs:--

(a) That this Honourable Court will be pleased to declare that the orders passed by defendants Nos.3 and 4 are fn violation of the mandatory provision of Land Grant Policy framed by Government of Sindh vide Notification No.KBI/1/30/72/79/7784, dated 20/21-11-1972 and, therefore, illegal and not maintainable in law.

(b) That this Honourable Court may be pleased to declare that the plaintiff is landless Hari of Deh Changlani and, therefore, rightly granted the suit-land by the Deputy Colonization Officer, Guddu Barrage, Ghotki and the order of grant in favour of plaintiff was not liable to be disturbed.

(c) That this Honourable Court may be pleased o declare that the orders passed by the defendants Nos.2 an 3 are mala fide capricious, arbitrary and unlawful and, therefore, unenforceable against the plaintiff.

(d) That permanent injunction be issued against defendants Nos.2, 3 and 4 restraining them from interfering with the title and possession of the plaintiff or from complementing or executing the impugned orders passed by defendants Nos.2 and 3 directly or indirectly in any manner whatsoever.

(3) Costs of the suit be borne by the defendants Nos.2 to.

(f) Any other relief which this Honourable Court deems fit and proper in the circumstances of the case spay also be awarded

Defendants Nos. l to 3 did not contest the suit and as such were declare ex parte, while defendant No.4, applicant herein submitted his written-statement and contested the suit and raised legal objections about maintainability as well as jurisdiction of the Court of Senior Civil Judge. On the pleadings of the parties six issues were framed, as under:--

(1) Whether the suit is no maintainable under the law?

(2) Whether the Court has no jurisdiction to entertain the suit"

(3) Whether the plaintiff is entitled to the grant of suit-land in performance to defendant No.4?

(4) Whether the orders passed by defendants Nos.2 and 3 are illegal, ultra vires and void, ab initio?

(5) Whether the plaintiff has cause of action to file this suit.

(6) What Mould the decree be?

Both the parties led their evidence and ultimately the suit was decreed by the learned Senior Civil Judge, Ghotki vide judgment, dated 26-5-1993 and decree, dated 29-5-1993. The applicant/defendant No.4, therefore. preferred an appeal in the Court of learned District Judge, Sukkur but due to creation of Ghotki District the appeal was transferred to the Court of Additional District Judge, Ghotki who dismissed the said appeal vide his judgment, dated 4-7-1996 without giving findings on each and every issue separately. Thereof, the present civil revision application has been filed by the applicant.

I have herd the arguments of Mr. Abdul Fatah Malik, learned counsel appearing on behalf of applicant, Mr. Mumtaz Ali Siddiqui, Advocate and Mr. Sher Muhammad Shar, learned Assistant Advocate- General, Sindh appearing on behalf of respondents Nos. l to 4 and Mr. Abdul Ghafoor Mirani, learned counsel appearing on behalf of legal heir; of respondent No.5, Ali Sher.

It has been contended by the learned counsel for the applicant that the judgments and decrees passed by the Senior Civil Judge, Ghotki and the learned Additional District Judge, Ghotki, respectively, are in excess of their jurisdiction and as such are ultra vires, null and void. The learned Senior Civil Judge. Ghotki has erroneously held that the order, dated 14-4-1977 passed by Additional Commissioner. Sukkur to Case No.S.R.O.A-4331 of 1973-74 is binding on defendant No.5/applicant. In fact the applicant had filed his Appeal No.S.R.O.4305 of 1973-74 against illegal order of the D.C.O. and it was already pending and filed prior to said Appeal No.S.R.O.A-4331 of 1973-74 in which the applicant was not made party. It has further been contended by the learned counsel for the applicant that the learned Senior Civil Judge has failed to consider that the Case No.S.R.O.A-4305 of 1973-74 filed by. the applicant against respondents before the Additional Commissioner, Sukkur was prior to Case No.S.R.O.A-4331 of 1973-74 filed: It has also been contended by the learned counsel for the applicant that the learned two Courts below have failed to consider that the plaintiff/ respondent No.5 had suppressed the facts before the Additional Commissioner and Member, Board of Revenue about the institution of appeal which was filed earlier by the applicant against in respect of same disputed land before the Additional Commissioner, Sukkur even at the time of hearing of his appeal as it was heard and decided on 14-4-1977 by the Additional Commissioner, Sukkur in absence of applicant who was not party to the case as such the order, dated 14-4-1977 was neither within the knowledge of the applicant nor binding upon him. It is also contended that the learned

Senior Civil Judge has wrongly -held in his judgment that the plaintiff/respondent No.5 is in cultivating possession of suit-land though this fact is determined by the Revenue Appellate Court viz. Additional Commissioner, Sukkur and Member, Board of Revenue, Hyderabad in their orders/judgments that the applicant and his father late Ilyas are in cultivating possession of disputed land and further recognized the P.K.M. rights of the applicant over the same disputed land after scrutinizing the Revenue Record in presence of both the parties. It is further contended that the learned trial Court has no jurisdiction to set aside the findings of the facts given by the respondents Nos.2 and 3 in favour of the applicant. He was not competent to sit over the judgment/orders of the Revenue Courts as an Appellate Authority over the findings of the facts given by them. The learned Senior Civil Judge has wrongly held that the orders passed by respondents Nos.2 and 3 are illegal. In fact the respondent No .3 is the highest Appellate Revenue Court and respondent No.2 is the Appellate Authority hence both Courts have legally and rightly exercised their jurisdiction and powers vested in them. The learned counsel has further contended that the learned Senior Civil Judge. Ghotki as well as the learned Additional District Judge, Ghotki have decided all the issues together without giving findings on each and every issue, separately, enunciated under Order XX, rule 5, C.P.C. The Order XX, rule 5, C. P. C. is reproduced as under:--

"Rule 5 of Order XX, C.P.C. Courts to state its decision on each issue.--- In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor upon each separate issue, unless the finding upon anyone or more of the issues is sufficient for the decision of the suit. "

It has also been contended by the learned counsel for the applicant that during the pendency of Civil Appeal No.22 of 1993 applicant made an application under Order XIII, rule 2 read with section 151, C.P.C. and produced the original certificate, dated 10-9-1995 issued by the Assistant Colonization Officer, Guddu Barrage, Ghotki regarding the payment of entire instalments made by the applicant with regard for disputed land. The applicant had also produced the true copies of Form "A" issued in favour of applicant showing full instalments paid to the Government. The learned Additional District Judge, Ghotki failed to decide the said important documents produced by the applicant. Lastly, the learned counsel has submitted that an application was filed before the learned Additional District Judge, Ghotki for recording additional evidence which has also been left undecided by him. The learned counsel has relied upon the cases of Ali Muhammad v. Muhammad Hayat and others 1982 SCMR 816 and Muhammad Hayat and others v. Ali Muhammad and others 1982 CLC 2380. In

this background the learned counsel for the applicant has prayed that the case be remanded back to the learned Additional District Judge, Ghotki to decide the appeal afresh taking into consideration the points raised by him.

The learned counsel appearing on behalf of respondents Nos. l to 4 has conceded to the above position and state no objection if the case is remanded back to be decided afresh

The learned counsel appearing on behalf of legal heirs of respondent No.5 has opposed to the remand of the case to the Appellate Court to be decided afresh The learned counsel has contended that only trial Judge has to decide the case. Issue wise and the Order XX, rule 5, C.P.C. only governs the suit by the trial Court not the appeal by the Appellate Court, the decision of trial Court while deciding the issue separately or conjointly. He submits that it has also been held in the same rule that unless the finding upon anyone or more of the issues sufficient for the decision of the suit. So far the decision of appeal is concerned which is governed by Order 41, rule 31, C.P.C. it does not show the framing of issues by the Appellate Court. The learned counsel has relied upon the cases of Muhammad Hafeez v, Jalaluddin and others 1981 SCMR 1171; Khawaja Muhammad Akbar v. Khawaja Fateh Muhammad 1993 MLD 76, Bashir Ahmed v. Ghulam Hyder 1991 MLD 360, Mian Muhammad Latif v. Province of West Pakistan PLD 1970 SC 180 and Anwar Hussain v. Deputy Settlement Commissioner, Larkana 1983 CLC 851.

I have gone through the evidence and the judgments and decrees passed by the learned two Courts below.

The trial Court while deciding the suit had framed six issues but has not extended reasons separately on all issues and decreed the suit. While deciding the appeal by the learned District Judge, Ghotki has also not decided the appeal issue-wise and, therefore, the two Courts below A had disregarded mandatory provision of Order XX, rule 5, C.P.C. and Order 41, rule 31, C.P.C. have acted in exercise of their jurisdiction with material irregularity and the case cited by the learned counsel for the applicant 1982 SCMR $16 is relevant in the present circumstances of the case. The operative part off the said dictum laid down by the apex Court is reproduced below:--

"Attention in this connection was drawn to the provisions of Order XX, rule 5 of C.P.C. which provide that 'in suits in which issues have been framed, the Court shall state its findings or decision, with the reasons therefore, upon each separate issue, unless the finding upon anyone or more of the issues is sufficient

for the decision of the suit and it was observed that the trial Judge was bound to give reasons for his decision on each separate issue and the disposal of the Issues Nos. I to 5 by simply observing that all these issues have no substantive force in view of findings given under Issue No.6 was not a proper decision in accordance with law. He, therefore, accepted the revision petition, set aside the impugned judgment and decrees of the trial Court and that of the learned Additional District Judge and remanded the cases to the trial Court for re-writing the judgment after hearing the parties with the direction that the trial Court should decide the face within two months. This petition for leave to appeal directed against the aforesaid judgment of the High Court.

We do not agree. The learned trial Court had disregarded the mandatory provisions of Order XX, rule 5, C.P.C. and, therefore, had acted in exercise of his jurisdiction with material irregularity. The High Court in exercise of its revisional jurisdiction was competent to make such order as in the case as it thought fit. "

In view of the requirements of Order XX, rule 5; C.P.C., it is very much clear that in the instant case the learned Appellate Court has not given reasons for its decision on each separate issues framed by the trial Court, and therefore, the observation of the Appellate Court has no force in view of the rule laid down by the law and from the perusal of judgments and decrees it extends an impression that the learned two Courts below had only observed formality inasmuch as they have not fully applied their mind and it is well-settled principle of law that the characteristic of a good judgment is that it must be self -evident and self-explanatory, in other words it must contain reasons that justify conclusions arrived at and these reasons should be such that a disinterested reader can find them convincing or at least reasonable.

The grounds urged by the learned counsel for the respondent No.5 and the case-law retied by him have no relevance at this stage when the Appellate Court as well as learned Senior Civil Judge had disregarded the mandatory provisions of Order XX, rule 5, C.P.C. Apart from this, the learned Appellate Court has failed to exercise jurisdiction in not complying with Order 41, rule 31, C.P.C. as in the impugned judgment it has not been stated points for determination, decision thereon, the reasons for findings. Hence it is not a judgment according to, law.

For the foregoing reasons, this revision application is accepted and the impugned judgment and decree passed by the Appellate Court is set aside and the case is remanded to the learned Additional District Judge, Ghotki for hearing the parties afresh and decide the case in accordance with law within a period of 2 months from the date of receipt of this order The learned Appellate Court is directed to

re write the judgment after due hearing the concerned parties. The parties are directed to appear before the learned Additional District Judge, Ghotki on 29-9-2001 and no fresh notice will be issued by the Appellate Court.

Q.M.H./M.A.K./Q-26/K

**Revision allowed.**

**2003 C L C 1377**

**[Lahore]**

**Before Mian Hamid Farooq, J**

GHULAM MUHAMMAD ---Petitioner
Versus
Syed FARRUKH ANWAR---Respondent

Civil Revision Petition No.593/D of 1991, heard on 18th April, 2003.

**(a) Adverse possession---**

---- Defendant taking plea of allotment as well as of adverse possession regarding title of the property---Both pleas being contradictory and irreconcilable to each other, suit was liable to be decreed on this short ground.

**(b) Adverse possession---**

---- Pleas of ownership and adverse possession could not stand together, a person who asserts ownership over a certain property by purchase, would not be legally justified at the same time to say that his occupation of the property was hostile or adverse against the real owner.

Mira Khan v. Ghulam Farooq and others 1988 SCMR 1765; Ghulam Qadir v. Ahmad Yar and others PLD 1990 SC 1049 and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245 ref.

**(c) Judgment---**

---- Judgment which was neither contrary to the evidence nor in violation of the principle of administration of justice, should ordinarily be preferred.

Mir Muhammad, alias Miral v. Ghulam Muhammad PLD 1996 Kar. 202 and Ilamuddin through Legal Heirs v. Syed Sarfraz Hussain through Legal Heirs and 5 others 1999 CLC 312 ref.

Mirza Israr Beg for Petitioner.

Respondent: Ex parte.

Date of hearing: 18th April, 2003.

**JUDGMENT**

Ghulam Muhammad, the original petitioner/defendant, and the predecessor-in-interest of the present petitioners, through the institution of the present revision petition, has called in question judgment and decree dated 29-1-1991 whereby the learned Additional District Judge accepted respondent's appeal, decreed the suit and reversed the judgment and decree dated 11-1-1989, passed by the learned Civil Judge, through which he dismissed the suit for possession, filed by Syed Farrukh Anwar as successor-in-interest of Syed Anwar Ali Shah.

2. Briefly stated the facts leading to the filing of the present petition are that Syed Farrukh Anwar, the predecessor-in-interest of the present respondents, claiming to be the successor-in-interest of Syed Anwar Ali Shah; on 12-5-1984, filed a suit, against Ghulam Muhammad, for possession of a portion of house, described in the plaint, asserting to be the owner of the said house by virtue of transfer order, issued by Rehabilitation Department. It was the case of the plaintiff that the defendant is in possession of the portion of house as a "licensee" and as he failed to restore the possession, thus necessitating the filing of the suit for possession. Ghulam Muhammad contested the suit by way of filing the written statement, inter alia, pleading that he is owner in possession of the house as an "allottee" through a permit dated 3-11-1956 and that alternatively, he has become owner through "adverse possession."

Out of the divergent pleadings of the parties, the learned trial Court framed as many as six issues, recorded the evidence of the parties and proceeded to dismiss the suit, vide judgment and decree dated 11-1-1989. Feeling aggrieved, the plaintiff, Syed Farrukh Anwar, assailed the said decree before the learned appellate, forum and the learned Additional District Judge accepted his appeal, decreed the suit in his favour by reversing the judgment and decree of the learned trial Court, vide judgment and decree, dated 29-1-1991, hence the present petition.

3. After the death of the learned counsel for the respondents, namely Khan Younas Khan, Advocate, notices were issued to the respondents for today. Despite their service, respondents have not entered appearance, thus, they are proceeded ex parte.

4. Learned counsel for the petitioner, while supporting the judgment of the learned trial Court, has submitted that the learned lower Appellate Court has committed legal errors while rendering the impugned judgment and reversing

the well-reasoned judgment of the learned trial Court hence, according to the learned counsel, the impugned judgment is not sustainable in law.

5. Upon the examination of the available record, find that Ghulam Muhammad in his written statement has pleaded that he is in possession of the disputed house for the last thirty years, which house has been allotted to him vide permit dated 3-11-1956. It has also been stated that in the alternative he has become the owner of the said house on account of "adverse possession". For ready reference the said portion of the written statement is reproduced below:--

It flows from the above, that the original defendant took contradictory pleas, which are not reconcilable, thus, the suit was liable to be decreed on this short ground, moreso when the plaintiff was able to prove his ownership qua the house in question. The witnesses produced by the plaintiff have stated that the disputed property/house was owned by Syed Ali Anwar Shah, the predecessor-in-interest of Farrukh Anwar, who was transferred this house by the Settlement Department. The learned Additional District Judge, after minutely perusing the record of the case, came to the conclusion that the ownership of Anwar Ali Shah qua the house and the transfer of house in his name by the Settlement Department stands fully proved by order dated 25-11-1964 (Exh.P.3), allotment order dated 3-11-1956 and the subsequent order dated 1-6-1967, passed by the Deputy Settlement Commissioner, which transfer is further fortified by order dated 3-10-1964. The defendant could not produce any evidence to rebut the said documentary evidence and, thus, to 'my mind, the learned Additional District Judge has rightly held that Syed Anwar Ali Shah was the owner of the house in question.

6. Now coming back to the contradictory pleas raised by the defendant in his written statement, I find that the learned trial Court did not give any finding on the said crucial aspect of the case, while the learned Additional District Judge has slightly touched the matter. The consistent view of the Honourable Supreme Court of Pakistan is that the pleas of ownership and adverse possession cannot stand together and that a person who asserts ownership over a certain property by purchase would not be legally justified at the same time to say that his occupation of the property was hostile or adverse as against the real owner. If any case is needed, judgments reported as Mira Khan v. Ghulam Farooq and others 1988 SCMR 1765, Ghulam Qadir v. Ahmad Yar and others PLD 1990 SC 1049 and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245 can be referred.

In view of the afore-noted law declared, I am constrained to hold that the contradictory pleas, taken by the defendant in the written statement, are not reconcilable and the plaintiff had been able to prove his ownership qua the house in question, therefore, the learned Additional District Judge has rightly decreed the suit by reversing the findings of the learned trial Court.

7. I have examined the impugned judgment and find that the learned Additional District Judge has embarked upon the issues involved in the case, appreciated the oral as well as documentary evidence on record in its true perspective and has reached to the proper conclusions, which, to my mind, are not open to exception. The findings, rendered by the learned Additional District Judge are not only in accordance with the record of the case but also in consonance with the law on the subject. On the other hand, judgment and decree rendered by the learned Civil Judge is not only contrary to the record of the case but also violative of the law on the subject. To my mind, the judgment of the learned trial Court, as compared to the learned lower Appellate Court's judgment, is not sustainable in law and suffers from grave legal infirmities, which have been rectified by the learned Appellate Court by reversing the findings of the learned trial Court and substituting its own findings, which are supported by reasons and backed by law.

8. Although the learned counsel for the petitioner has contended that the impugned judgment suffers from misreading and non-reading of evidence, yet when asked to explain as to which portion of the evidence has been misread or non-read by the learned lower Appellate Court, the learned counsel, despite his best efforts, could not, point out any such misreading and non-reading on the part of the learned lower Appellate Court.

9. In my view as the impugned judgment is neither contrary to the evidence nor in violation of the principle of Administration of Justice, thus, the judgment of the learned Appellate Court should ordinarily be preferred. If any case is needed, judgments reported as Mir Muhammad alias Miral v. Ghulam Muhammad PLD 1996 Kar. 202 and Ilamuddin through Legal Heirs v. Syed Sarfraz Hussain through Legal Heirs and 5 others 1999 CLC 312 can be referred.

10. Upshot of the above discussion is that the present revision petition is devoid of any merits, thus, the same is dismissed with no order as to costs.

S.M.B./G-270/L Revision dismissed.

**2003 C L D 239**

**[Supreme Court of Pakistan]**

**Present: Jawed Iqbal, Sardar Muhammad Raza Khan and Falak Sher, JJ**

Messrs UNION BANK LIMITED---Petitioner
Versus
Messrs SILVER OIL MILLS LIMITED and others---Respondents

Civil Petition for Leave to Appeal No-1271 of 2002, decided on 18th September, 2002.

(On appeal from the order dated 24-4-2002 passed by Lahore High Court in R.F.A. 19 of 2002).

**(a) Judgment---**

---Interim order cannot be equated with a judgment--necessary conditions for a judgment enumerated.

Following are the necessary conditions for a judgment:

(a) It should terminate proceedings in Court.

(b) It should determine the rights and liabilities of the parties.

(c) The determination of the rights and liabilities as envisaged in (b) above should be on merits and should further be final and conclusive so as to cover the entire range of substantive rights and liabilities which formed the subject-matter of real controversy in the suit proceedings which initially gave rise to the dispute.

AIR 1963 Andh. Pra. 9; AIR 1961 All. 245; 1960 All WR (High Court) 5; ILR 2 All. 917; AIR 1953 Sau. 166; AIR 1958 All. 800; AIR 1957 All. 116 and AIR 1951 Pat. 25 ref.

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

----S.22(2)---Constitution of Pakistan (1973), Art.185(3)-- Admission of appeal for regular hearing ---Petition for leave to appeal---Maintainability---Interlocutory order---Appeal under S.22 of Financial

Institutions (Recovery of Finances) Ordinance, 2001, was not yet decided when the petitioner Bank filed the petition---Plea raised by the Bank was that execution of decree was stayed and appeal was admitted to regular hearing without giving any cogent reason-- Validity---Appeal preferred on behalf of the borrower was pending adjudication and determination of the rights and liabilities were yet to be made and thus all the contentions as mentioned in the petition for leave to appeal could be agitated before the High Court where the matter was pending---No verdict on the question of maintainability of appeal having been given by High Court, the petition for leave to appeal had been filed at premature stage-- Entertainment of petition for leave to appeal against interim order and hearing of case piecemeal was not desirable-- Although the contentions as agitated on behalf of the petitioner-Bank were convincing and needed serious consideration yet at such stage Supreme Court was not to make any interference as the appeal of the borrowers was still pending adjudication on the merits in High Court and question of maintainability whereof was yet to be decided Leave to appeal was refused.

Said Khan v. Aya Khan 1979 SCMR 577; Zafarullah Khan v. Abdul Rehman 1971 SCMR 702; Amir Khan Fateh Khan 1978 SCMR 334; Rafique Saigol v. Bank of Credit and Commerce PLD 1996 SC 749; Fine Textile Mills Ltd. v. Haji Umer PLD 1963 SC 163; Abdul Karim Jaffarrni v. United Bank Ltd. PLD 1981 SC 106; Abdul Rauf Ghauri v. Mst. Kishwar Sultana 1995 SCMR 925; Karim v. Ziker Abdullah 1973 SCMR 100; Abdul Majeed v. UBL 1984 SCMR 1435 and Ark Industrial Management Ltd. v. Habib Bank Ltd. PLD 1991 SC 976 ref.

S. Iqbal Haider, Advocate Supreme Court, Muhammad Afzal Siddiqui and Ejaz Muhammad Khan, Advocate-on-Record for Petitioners.

Ch. Mushtaq Ahmad Khan, Advocate Supreme Court and M.S. Khattak, Advocate-on-Record for Respondents.

Date of hearing: 10th September, 2002.

**ORDER**

**JAVED IQBAL, J.**---This petition for leave to appeal is directed against the order, dated 24-4-2002 passed by learned Division Bench of the Lahore High Court (Rawalpindi Bench) whereby the appeal preferred on behalf of respondents has been admitted for regular hearing by reversing the order, dated 3-1-2002 passed by learned Single Judge in Chambers and the conditions of furnishing cash

security or bank guarantee has been suspended with the direction that surety bonds be submitted within a period of two weeks.

2. The relevant facts in brief are that Messrs Union Bank Limited (petitioner) advanced financial facilities to the respondents in between 1994 to 2000 and upon their failure to discharge the financial liabilities in terms of the agreement executed between the parties a suit for recovery of Rs.85,246,891 with accruing mark-up and costs under the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act. No. XV of 1997 has been filed. The application for leave to appear and defend the case has been accepted by the learned Single Judge in Chambers vide order, dated 3-1-2002 subject to their furnishing cash security or banking guarantee in the sum of Rs.71,039,076 to the satisfaction of his Court within a period of one month failing which the suit shall be deemed to be decreed for the total claim of Rs.45,246,891 with costs. Being Aggrieved the respondents preferred Regular First Appeal bearing No. 19 of 2002 which has been admitted for regular hearing by the learned Division Bench vide order impugned whereby the direction for furnishing cash security has been suspended and substituted with that of furnishing of surety bonds of the amount claimed within a period of two weeks, hence this petition.

3. It is mainly argued by Mr. S. Iqbal Haider, learned Advocate Supreme Court on behalf of petitioner that the provisions as contained in section 22(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 have been misinterpreted and misconstrued which resulted in serious miscarriage of justice. It is contended that no stay of execution of money decree can be granted without affording proper opportunity of hearing to the decree- holder which has not been done resulting in serious prejudice and injunctive order has been confirmed without having gone through the entire record of the case. It is also argued that appeal has been admitted to regular hearing without giving any cogent reasoning with the direction that interim relief granted shall remain intact. It is urged with vehemence that the order, dated 3-1-2002 passed by learned Single Bench whereby leave to defend the suit was disposed of is merely an interlocutory order and thus is not appealable because the main suit is pending adjudication. It is next contended that the interim order, dated 3-1-2002 cannot be equated with that of a decree and, therefore, it cannot be assailed by way of appeal in view of the relevant provisions as contained in Ordinance XLVI of 2001 which imposes specific bar on filing an appeal from an interlocutory order. It is also contended that under section 22(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, execution of money decree cannot be stayed without hearing the decree-holder and without requiring the

judgment-debtor to deposit the decretal amount and costs. It is further argued that under section 22(6) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 no appeal, review or revision against the order accepting or rejecting an application for leave to defend the suit can be filed and the impugned order has been passed in violation thereof. It is contended time and again that appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance. 2001 could only be filed against final judgment, decree, sentence or final order which aspect of the matter has been ignored by the learned Division Bench.

4. Ch. Mushtaq Ahmed Khan, learned Advocate Supreme Court appeared on behalf of respondents and vehemently opposed this petition and challenged its maintainability on the ground that impugned order is an interim order simpliciter which cannot be assailed before this Court as appeal is yet to be decided by the learned High Court and all the contentions agitated before this Court can be raised before the High Court. It is further submitted that the order, dated 3-1-2002 passed by learned Single Judge in Chamber directing to furnish cash security or bank guarantee has been passed in violation of the provisions as contained in section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and is not sustainable.

5. We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of law and record of the case. We have also gone through the order, dated 3-1-2002 passed by learned Single Judge in Chamber and order, dated 24-4-2002 passed by learned Division Bench of Lahore High Court, Lahore. The impugned order, dated 24-4-2002 is reproduced herein-below for ready reference:--

"After hearing the learned counsel for the parties, we are of the view that there are certain legal questions pertaining to law and facts which require examination, therefore, we admit the instant appeal for regular hearing.

(2) Syed Iqbal Haider, Advocate appearing on behalf of the respondents accepted notices on their behalf, therefore, formal notices need not be issued to them.

(3) However, the objection raised by the leaned counsel for the respondents regarding maintainability of the appeal shall be taken up at the stage of final arguments of appeal.

(4) The interim relief already granted shall continue.

6. A perusal of the said order would reveal that appeal leas been admitted for regular hearing in view of certain legal questions concerning law and facts but the objection regarding maintainability of appeal made by Mr. S. Iqbal Haider, learned Advocate Supreme Court on behalf of petitioner before High Court is yet to be decided. It further transpires from the scrutiny of impugned order that it is an interim order which cannot be equated with that of a judgment which must fulfil the following three conditions:--

(a) It should terminate proceedings in the High Court.

(b) It should determine the rights and liabilities of the parties.

(c) The determination of the rights and liabilities as envisaged in (b) above should be on merits and should further be final and conclusive so as to cover the entire range of substantive rights and liabilities which formed the subject-matter of real controversy in the suit proceedings which initially gave rise to the dispute.

(AIR 1963 AP 9, AIR 1961 All. 245, 1960 All WR (High Court) 5, ILR (1960) 2 All. 917, AIR 1953 Sau. 166, AIR 1958 All. 800, AIR 1957 All. 116 and AIR 1951 Pat. 25).

7. The appeal preferred on behalf of respondent is pending adjudication and determination of the rights and liabilities is yet to be made and thus all the contentions as mentioned hereinabove could very conveniently be agitated before the Division Bench where the matter is pending at the moment. In our considered opinion this petition has been filed at premature stage as no verdict on the question of maintainability of appeal has been given. It is well-entrenched legal position that entertainment to petition against interim order and hearing of case piecemeal, is not considered desirable. In this regard we are fortified by the dictum as laid down in cases titled Said Khan v. Aya Khan (1979 SCMR 577), Zafarullah Khan v. Abdul Rehman (1971 SCMR 702), Amir Khan v. Fateh Khan (1978 SCMR 334). The question as to whether leave to appear and defend should have been granted by imposing a condition as has been done by the learned Single Judge by means of order, dated 3-1-2002 can be dilated upon and decided by the learned High Court in the light of principles as enunciated by this Court in the following cases and the objects and reasons for the promulgation of relevant financial enactment:---

(Rafique Saigol v. Bank of Credit and Commerce (PLD 1996 SC 749); Fine Textile Mills Ltd. v. Haji Umer (PLD 1963 SC 163); Abdul Karim Jaffarni v. United Bank

Ltd. (PLD 1981 SC 106); Abdul Rauf Ghauri v. Mst. Kishwar Sultana (1995 SCMR 925); Karim v. Ziker Abdullah (1973 SCMR 100); Abdul Majeed v. UBL (1984 SCMR 1435) and Ark Industrial Management Ltd. v: Habib Bank Ltd. (PLD 1991 SC 976).

8. In our considered opinion the contentions, as agitated on behalf of the petitioner are convincing and need serious consideration but at this stage we are not persuaded to make any interference as the appeal of respondents is still pending adjudication on the merits in the High Court and question of maintainability whereof is yet to be decided.

9. In such view of the matter the petition is dismissed. However, it shall open to the petitioner to agitate all the said contentions before the learned High Court at the time of arguments. The learned High Court is also directed that the appeal shall be disposed of preferably within a period of six weeks in view of the overall object envisaged by the Legislature for the expeditious dispensation of justice in suchlike cases.

Q.M.H./M.A.K./U-23/SC Petition dismissed.

**2003 C L D 88**

**[Lahore]**

**Before Mian Hamid Farooq and Parvez Ahmad, JJ**

Mirza NASEEM AHMAD and 4 others---Appellants
Versus
Dr. SADIQA SHARIF and 12 others---Respondents

E. F.A. No.30 of 1995, heard on 11th July, 2002.

**(a) Banking Companies (Recovery of Loans) Ordinance (XIX of 1979)---**

----Ss. 8 & 12---Civil Procedure Code (V of 1908), O.XXI, Rr.58 & 95---Execution of decree---Auction of property-- Objection petition---Identification of auctioned property-- Appellants' objection was that property in their possession was not covered by sale certificate issued in favour of auction-purchaser---Banking Court directed appellants to appear personally and produce proof of ownership of property, but on their failure to do so, objection petition was dismissed---Validity---Real question before Banking Court was regarding identification of property, which had been auctioned and purchased by auction-purchaser ---Auction- purchaser was entitled to ownership rights and possession of that property, which had been auctioned and purchased by her, but under the garb of auction, properties belonging to others could not be given to her---Banking Court ought to have provided an adequate and sufficient opportunity to appellants for establishing their claim as made out in objection petition---Such was all the more necessary, when rights, title and interest of objectors had to be decided by Executing Court only and in this regard no separate suit could be filed under law---Banking Court had not cared to investigate the claims of appellants in accordance with law, but had non-suited them on erroneous grounds---Objection petition should have been decided after framing issues and recording evidence of parties, whereby it could have been easily determined as to whether property statedly owned by appellants and allegedly possessed by their tenants was subject-matter of auction or not---Perfunctory manner in which the matter had been dealt with by Banking Court was violative of law and even against the principles of natural justice---Tenor of impugned order amply manifested non -application of judicial mind and no reasons had been assigned by Banking Court while dismissing objection petition---High Court accepted appeal, set aside impugned order and

remanded the case to Banking Court with direction to decide same afresh after hearing the parties, framing the issues and recording the evidence.

**(b) Administration of justice---**

---- Courts should be careful in deciding the causes as they always involved valuable rights of parties.

**(c) Judgment---**

---- Speaking order---Judicial order must be a speaking order manifesting by itself that Court had applied its judicial mind to issues/points involved---When reasons would not be forthcoming, then Appellate Court would be deprived of the view of subordinate Court---Impugned judgment, if devoid of reasons and not a speaking order, would not be sustainable in law---Passing of perfunctory order in causes involving valuable rights of parties not approved.

Adamjee Jute Mills Ltd. v. The Province of East Pakistan and others PLD 1959 SC (Pak.) 272; Gouranga Mohan Sikdar v. The Controller, Import and Export and 2 others PLD 1970 SC 158; Mollah Ejahar Ali v. Government of East Pakistan and others PLD 1970 Se 173 and Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and others 1984 SCMR 1014 ref.

Abid Hassan Minto for Appellants.

Respondents Nos. 2, 8 to 13 and Legal Representatives Nos.5 and 6: Ex parte.

Nemo for the Remaining Respondents.

Date of hearing: 11th July, 2002.

**JUDGMENT**

**MIAN HAMID FAROOQ, J.**---Present appeal, filed by Mirza Naseem Ahmad and others, appellants/objectors, under section 12 of the Banking Companies (Recovery of Loans) Ordinance, 1979, proceeds against order dated 2-2-1995, whereby the learned Judge Banking Court dismissed the objection petitions, filed by the appellants and others, and ordered for the issuance of warrants of possession.

2. Brief facts leading to the filing of the present appeal, as discernible from the available record, are that pursuant to the passing of decree for the recovery of Rs.9,80,510 with costs, against one Fazal Din, predecessor-in-interest of

respondents Nos. 3 to 13, favouring the Grindlays Bank, respondent No.2, by the then learned Special Judge Banking, vide judgment and decree dated 13-11-1982, the decree-holder-bank filed an execution petition for the realization of a sum of Rs.10,21,760.01. During the execution proceedings, statedly, Property No.S-19-R 33-A(ii), Mall Mension, The Mall, Shahrah-e-Quaid-e-Azam, Lahore (hereinafter called the disputed property) was auctioned by the learned Court Auctioneer, under the orders of the learned Banking Court; the bid of respondent No.1 of Rs.20 lacs was accepted; she was declared the highest bidder of the property in dispute; she had, reportedly, deposited the auction amount, and the auction was confirmed on 30-1-1984, by the learned Executing Court. Consequent to the above, on 14-2-1984, respondent No. 1 filed an application under Order XXI, rule 95, C.P.C. with the prayer that the sale certificate regarding the property bearing No.S-19-R-33-A-ii, Mall Mension, the Mall, Shahrah-e-Quaid-e-Azam, Lahore, may be issued and thereupon the learned Banking Court issued the sale certificate in terms of the prayer made in the aforenoted application, on 19-3-1984. Faced with the aforenoted circumstances, initially the alleged tenants of the appellants, namely, Jawaid Ahmad Corporation and B.R. Herman Mohta and subsequently the appellants, on 26-3-1984, filed objection petitions, which were contested by respondent No.1, however, .ultimately the learned Banking Court directed the appellants to appear personally and also to produce the proof of ownership of the disputed property but finding that the objectors have neither appeared personally nor produced the documents regarding ownership, he proceeded to dismiss the objection petitions vide order dated 2-2-1995, which was, statedly passed in the absence of the learned counsel of the objectors. Later on, a review application was filed by the appellants, but since injunction was refused, thus, the review application was not further processed and the appellants have now impugned the order dated 2-2-1995, through the filing of the present appeal.

3. Respondents Nos.2, 8 to 13 and legal representatives of respondents No.5 and 6 were proceeded ex parte vide order dated 5-5-1999. On 15-5-2002, this Court ordered for the issuance of fresh notice to respondent No.1 and despite the fact that she was served, none has entered appearance on her behalf, either on 9-7-2002, or today, thus, having no alternative we are constrained to proceed ex parte against respondent No.1, too.

4. Learned counsel for the appellants has contended that the real controversy involved in the objection petitions, before the learned Banking Court, was as to whether the total property bearing No.S-19-R-33-A or its portion was auctioned and purchased by respondent No. 1 and the title of the appellants qua the

property claimed by them was not in issue before the Banking Court, therefore, the objection petitions could not have been dismissed on the ground that the appellants did not appear and failed to produce the titled documents qua the property claimed by them. He has further contended that the learned Banking Court was under an obligation to decide the objection petitions after recording the evidence.

5. Undoubtedly the appellants and other persons filed objection petitions before the learned Banking Court thereby praying that the Court sale and consequent sale certificate issued in favour of Dr. Sadiqa Sharif do not cover Property No.S-19-R-33-A-ii housing M/s. Javaid Corporation on the ground floor and Messrs B.R. Herman & Mohatta in the upper floor, which was contested by respondent No.1. To our mind the real question involved before the learned Banking Court was regarding the identification of the property, which was auctioned under the orders of the Banking Court and purchased by respondent No. 1. The learned Banking Court ought to have provided an adequate and sufficient opportunity to the appellants for establishing their claim and to substantiate their case, as made out in the objection petitions. It was all the more necessary, when the rights, title and interest of the objectors have to be decided by the Executing Court only and in this regard, under the law, no separate suit lies to establish such a right, title or interest. In this case, we find that the learned Banking Court has not cared to investigate the claims of the appellants in accordance with law, adopted a short cut method in deciding their objection petitions and thus they have been non-suited on erroneous grounds. If the learned Banking Court had provided an opportunity to both the parties to establish their respective claims and resorted to the record of the case, it could have easily determined the extent of property, which was auctioned by the learned Banking Court. We cannot appreciate the mode and novel fashion, through which the learned Banking Court has decided the objection petitions. There is no cavil to the proposition that the Courts should be careful in deciding the causes, as they always involve the valuable rights of the parties. Obviously respondent No.1 was entitled to the ownership rights and possession of the property, which was auctioned and purchased by her but that does not mean that under the garb of auction, the properties belonging to others could be given to the auction-purchaser and these facts could have easily been determined by the learned Banking Court after the examination of the available record and recording the evidence of the parties. We are of the view that in this case the objection petitions should have been decided after Framing the issues and recording the evidence of the parties, through which it could have easily been determined as to whether the property, statedly, owned by the appellants and

allegedly possessed by their tenants was the subject-matter of the auction or not. The perfunctory manner in which the matter has been dealt with by the learned Executing Court, through the impugned order, is violative of the provisions of law and even against the principles of natural justice, as we feel that by dismissing their objection petitions, the appellants have been condemned unheard.

6. There is yet another aspect of the case, which cannot be ignored. After the examination of the impugned order we find that the same is sketchy, slip-shod and devoid of reasons. The said order is not at all a speaking order and cannot be called a "judicial order" within the parameters set up by law. The tenor of the order amply manifests non-application of judicial mind and no reasons have been assigned by the learned Judge in coming to the conclusions, while dismissing the objection petitions. Even it has been enjoined upon an executive Authority, as per section 24(A) of General Clauses Act, 1897 (inserted by General Clauses (Amendment Act, 1997, Act No. XI of 1997) to give reasons for making the order.

7. Hon'ble Supreme Court of Pakistan has time and again disapproved the passing of such perfunctory orders in the causes involving valuable rights of the parties. It is settled law that the judicial order must be a speaking order manifesting by itself that the Court has applied its judicial mind to the issues and the points of controversy involved in the causes. Furthermore, when the reasons would not be forthcoming, obviously the Appellate Court would be deprived of the views of the subordinate Court. In any way the impugned order, which is not a speaking order and devoid of reasons is not sustainable in law being in contravention of law declared by the Hon'ble Supreme Court of Pakistan in various cases like Adamjee Jute Mills Ltd. v. The Province of East Pakistan and others (PLD 1959 SC (Pak.) 272), Gouranga Mohan Sikdar v. The Controller Import and Export and' 2 others (PLD 1970 SC 158), Mollah Ejahar Ali v. Government of East Pakistan and others (PLD 1970 SC 173) and Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and others (1984 SCMR 1014).

8. In the light of above, we have examined the impugned order and find that the same is not sustainable in law, thus, we have no alternative except to set aside the same and remand the case to the learned Banking Court for its decision afresh.

9. In the above perspective, the present appeal stands accepted and the impugned order dated 2-2995, passed by the learned Banking Court is hereby set aside with no order as to costs. The result would be that the objection

petitions, filed by the appellants and their alleged tenants, shall be deemed to be pending before the learned Banking Court, who is directed to decide the same, afresh, after hearing the parties, framing the issues and recording the evidence, of course, in accordance with law. Office is directed to. immediately transmit the total record of the case to the learned Administrative Judge Banking Court, who may decide the case himself or entrust the same to another learned Judge according to its own administrative arrangements.

S.A.K./N-207/L Case remanded.

**2003 C L D 105**

**[Lahore]**

**Before Maulvi Anwarul Haq and Mian Hamid Farooq, JJ**

AL-HADAYAT TEXTILE through Proprietor and 2 others---Appellants
Versus
SONERI BANK LIMITED---Respondent

Regular First Appeal No.500 of 2001, heard on 4th July, 2001.

**(a) Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act (XV of 1997)---**

----Ss. 10, 15 & 21---General Clauses Act (X of 1897), S.24-A (as added by General Clauses (Amendment) Act (XI of 1997))---Decree for recovery of loan amount passed by Banking Court without adhering to questions raised in application for leave to defend the suit---Validity---Banking Court after narrating contentions of parties had not adverted to same and had decided leave application, in complete oblivion of its contents and contentions noted down by Court---Impugned judgment was sketchy, slip-shod and devoid of reasons and was not at all a speaking judgment and could not be called a judicial judgment within the parameters set up by law---Banking Court had not assigned any reason in coming to the conclusion as to how Bank was entitled to a decree---Appellants conceded their liability to the extent of Rs.4 millions, while regarding further amount as claimed by Bank, they sought leave to defend on the ground that they had not executed documents relied upon by Bank and had also objected to validity thereof---Plea of over charging of mark-up was found to be plausible---High Court accepted appeal with observations that interim decree for recovery of Rs.4 millions would stand in favour of Bank, while regarding remaining amount, appellants were granted leave to defend the suit in the light of said observations---Case was remanded to Trial Court for further proceedings.

**(b) Judgment---**

----Concept---Speaking order- --Judicial order must be a speaking order manifesting by itself that Court had applied its judicial mind to issues/points involved---When reasons would not be forthcoming, then Appellate Court would be deprived of the view of subordinate Court---Impugned judgment, if devoid of

reasons and not a speaking order, would not be sustainable in law---Passing of perfunctory order not approved.

Adamjee Jute Mills Ltd. v. The Province of East Pakistan and others PLD 1959 SC (Pak.) 272; Gouranga Mohan Sikdar v. The Controller, Import and Export and 2 others PLD 1970 SC 158; Mollah Ejahar Ali v. Government of East Pakistan and others PLD 1970 SC 173 and Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and others 1984 SCMR 1014 ref.

Sajid Mehmood Sheikh for Appellants:

Ishrat Mehmood Sheikh for Respondent.

Date of hearing: 4th July, 2001.

**JUDGMENT**

**MIAN HAMID FAROOQ, J**.---Present appeal, filed under section 21 of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, is directed against the judgment and decree dated 15-2-2001, passed by the learned Judge Banking Court II, Faisalabad, whereby he passed a decree amounting to Rs.68,59,822.44 with future mark-up at the stipulated rate on the outstanding principal amount of Rs.57,23,397.15 from the date of filing of the suit till the full and final realization of the decretal amount in favour of the respondent-bank and against the appellants.

2. Brief facts culminating to the filing of the present appeal are that the respondent-bank filed a suit for the recovery of Rs.9.02 millions against the appellants before the learned Judge Banking Court II, Faisalabad, wherein appellant No.1 was arrayed as the principal-debtor, whereas the rest of the defendants were joined as mortgagors/guarantors. Pursuant to the service of the summons as contemplated under section 9(3) of Act XV of 1997, the appellants filed an application seeking leave to defend the suit, thereby raising numerous legal and factual questions. The learned Judge Banking Court after hearing the arguments on the said leave application decreed the suit, as mentioned above, vide judgment and decree dated 15-2-2001, hence the present appeal.

3. Learned counsel submits that although numerous legal and factual controversies were raised before the learned Judge through the filing of application for leave to defend the suit, yet none of them have been adhered to by the learned Judge while deciding the said application. It is further argued that the impugned judgment is devoid of reasons and lack of all characteristics of a

"judgment" as contemplated under Order XX, rule 5, C.P.C. On the other hand, the learned counsel for the respondent has submitted that the decree has been passed in accordance with law and the learned Judge Banking Court even did not grant .the respondent-bank the mark-up for the cushion period and liquidated damages.

4. We have perused the impugned judgment. The argument of the learned counsel is well founded. The learned Judge while deciding the leave application and adjudicating valuable rights of the parties has, in fact failed to attend to the controversies between the parties, as raised in the leave application and replied to by the respondent-bank. The learned Judge after narrating the contentions of the parties did not even advert to the same and has, in fact, decided the leave application in complete oblivion of the contents of the same and contentions itself noted down by the learned Judge. As a matter of fact the learned Court failed to give any findings on any of the issue points raised by the parties. We have noticed that the impugned judgment passed by the learned Judge Banking Court is sketchy, slip-shod and devoid of reasons. The said judgment is not at all a speaking judgment and cannot be called a judicial judgment within the parameters set up by law. No point of controversy has been determined and the tenor of the impugned judgment amply manifest non- application of judicial mind. No reasons have been assigned by the learned Judge Banking Court in coming to the conclusion that how the bank is entitled for a decree for such a colossal amount. Even it has been enjoined upon an executive authority, as per section 24(A) of the General Clauses Act, 1897, inserted by General Clauses (Amendment) Act, 1997 (XI of 1997) to give reasons for making the order.

5. Hon'ble Supreme Court of Pakistan has time and again disapproved the passing of such perfunctory judgment. It is settled law that judicial order must be a speaking order manifesting by itself that the Court has applied its judicial mind to the issues and points of controversy involved in the causes. Furthermore, when the reasons would not be forthcoming, obviously the Appellate Court would be deprived of the views of the subordinate Court. In any case, the impugned judgment, which is not a speaking judgment and devoid of reasons, is not sustainable in law being in contravention of law declared by the Supreme Court of Pakistan in various cases, like Adamjee Jute Mills Ltd. v. The Province of East Pakistan and others (PLD 1959 SC (Pak.) 272), Gouranga Mohan Sikdar v. The Controller, Import and Export and 2 others (PLD 1970 SC 158), Mollah Ejahar Ali v. Government of East Pakistan and others (PLD 1970 SC 173) and Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and others (1984 SCMR 1014).

6. The learned counsel for the appellants concedes the liability of his clients to the extent of Rs.4 millions. Regarding the remaining amount being claimed by the respondent-Bank, he seeks leave to defend on the grounds stated in the application. We find that there is a denial of execution of several documents relied upon by the respondent-Bank as also the validity thereof has been objected to by the appellant. However, in view of the admission of the principal liability on behalf of the appellant the said ground would no longer be available to the appellant. We, however, do find the plea as to the over-charging of mark up as also of the capitalization of the debit account to be plausible.

7. In view of the above discussion we allow this R.F.A. inasmuch as now the interim decree for recovery of Rs.4 millions shall stand passed in favour of the respondent Bank and against the defendant/appellant which shall be executable in accordance with the terms of the agreement between the parties. Regarding the remaining amount we grant leave to the appellant to defend the suit to the said extent and in the light of observations made above. The case is accordingly remanded back to the learned trial/executing Court for further proceedings. No orders as to costs.

S.A.K./A-566/L Case remanded.

**P L D 2004 SUPREME COURT 219**

**Present: Mian Muhammad Ajmal, Sardar Muhammad Raza Khan and Karamat Nazir Bhandari, JJ**

Hafiz ABDUL WAHEED---Appellant
Versus
Mrs. ASMA JEHANGIR and another---Respondents

Criminal Appeal No.98 of 1997 and Civil Appeal No.563 of 1997, decided on 19th December, 2003.

On appeal from the judgment dated 10-3-1997 and 24-9-1996 of the Lahore High Court, Lahore passed in Criminal Miscellaneous No. 425/H of 1996 and Writ Petition No. 16561 of 1996).

**(a) Islamic Law---**

---- Marriage---Leave to appeal was granted by the Supreme Court to examine as to whether consent of "Wali" was essential to the validity of marriage of sui juris Muslim girl---Constitution of Pakistan (1973), Art. 185(3).

**(b) Constitution of Pakistan (1973)---**

----Art. 203-GG ---Decision of Federal Shariat Court is required to be followed by a High Court and by all Courts subordinate to a High Court.

**(c) Constitution of Pakistan (1973)---**

----Chap. 3-A---Federal Shariat Court---Various jurisdictions of the Court specified.

The Federal Shariat Court is itself the creation of Chapter 3-A. Article 203D confers, what may be described as original jurisdiction on the Federal Shariat Court. Under this jurisdiction, the Federal Shariat Court, on its own motion or on the petition of any citizen of Pakistan or Federal Government or a Provincial Government, can examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.). Article 203DD empowers the Court to call for and examine the record of any case decided by any criminal Court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness; legality or propriety of any finding, sentence

or order recorded or passed by any such criminal Court. Sub-Article (3) of Article 203DD lays' down that "the Court shall have such other jurisdiction as may be conferred on it by or under any law". It may be noted here, that right of appeal was provided to the Federal Shariat Court by adding second proviso to section 20(1) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter to be referred to as "the Ordinance"), in the year 1980.

Article 203GG says that any decision of the Federal Shariat Court in. the exercise of its jurisdiction under this Chapter will be binding on the High Court. Chapter 3-A not only establishes Federal Shariat Court but also specifies various jurisdictions of the Court. It is difficult to accept the contention that merely because the appeal against the judgment of the Federal Shariat Court has been provided by second proviso to section 20(1) of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, the criminal appellate jurisdiction cannot be said to be the creation of Chapter 3-A of the Constitution. Constitution is the fundamental law and all laws derive their validity from the same. While exercising the appellate jurisdiction, conferred by the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 under the enabling provision of Article 203DD (3), the Federal Shariat Court in fact is exercising jurisdiction conferred by sub-Article (3) of Article 203DD, a part of Chapter 3A.

The Court will lean in favour of harmonious interpretation of the statutes/various provisions and would certainly avoid an interpretation which has the potential of conflicting judgments or pitching one Constitutional Court against another Constitutional Court.

**(d) Constitution of Pakistan (1973)---**

----Art. 203-DD(3)---Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979), S.20(1)---Right of appeal provided to the Federal Shariat Court under S.20(1), second proviso to the Offence of Zina (Enforcement of Hudood) Ordinance, 1979---Nature---While exercising the appellate jurisdiction, conferred by the Ordinance under the enabling provision of Art. 203-DD(3), the Federal Shariat Court in fact exercises jurisdiction conferred by Art. 203-DD(3), a part of Chap. 3A of the Constitution.

**(e) Interpretation of statutes---**

----Court will lean in favour of harmonious interpretation of the statutes/various provisions and would certainly avoid an interpretation which has the potential of conflicting judgments or pitching one Constitutional Court against another. Constitutional Court.

**(f) Constitution of Pakistan (1973)---**

----Art. 203GG---Expressions "judgment" and "decision" ---Meaning-- "Judgment" and "decision" as used in Art. 203-GG of the Constitution will include the judgment, order or the sentence if any passed by the Federal Shariat Court and all these will remain binding on the High Court and Courts subordinate to the High Court.

Various expressions like judgments, decision, order or sentence have not been, defined in Chapter 3-A nor in the Constitution. These expressions have, therefore, been used in their dictionary meaning. Particularly the expression "decision" in Article 203GG seems to have been used in z generic sense which may include the judgment i.e. reasons, an order say of confiscation of property, and/or an order of payment of compensation or sentence like that of imprisonment or fine. This view has again the merit of avoiding the potential mischief whereby the High Court ban start scrutiny of the judgments, or orders or sentences imposed by the Federal Shariat Court. Such an ugly situation has to be avoided.

The two words "decision" and "judgment" are almost similar in meaning in the context of the present controversy. The expression "decision" in Article 203GG will include the judgment, order or the sentence if any passed by the Federal Shariat Court and all these will remain binding on the. High Court and Courts subordinate to the High Court.

Black's Law Dictionary, 4th Edn., 1968 ref.

**(g) Words and phrases---**

------ Decision" and "judgment" ---Meaning.

Black's Law Dictionary, 4th Edn., 1968 quoted.

**(h) Constitution of Pakistan (1973)---**

----Arts. 203-F & 203-GG ---Question of jurisdiction of Federal Shariat Court---Constitution provides appeal against the judgment of Federal Shariat Court to the Appellate Bench of the Supreme Court and the question of jurisdiction could have been urged and adjudications sought' initially from the Federal Shariat Court and thereafter in appeal from the Shariat Appellate Bench of the Supreme Court---If such course was never followed the result would be that the judgments in question would attain finality---Federal Shariat Court being a Constitutional Court, it was undesirable and inappropriate, if note illegal that another Constitutional Court (like High Court) should hold the judgments as without jurisdiction---Principles.

The Federal Shariat Court is a Constitutional Court and it is at least undesirable and inappropriate, if not illegal that another Constitutional Court (like High Court) should hold the judgments as without jurisdiction. Even in normal course the point of jurisdiction has to be urged before the same Court and an adjudication obtained. The Constitution provides appeal to the Shariat Appellate Bench of the Supreme Court and the question of jurisdiction could have been urged and adjudication sought 'initially from the Federal Shariat Court and thereafter in appeal from the Shariat Appellate Bench. If this course was never followed the result would be that the judgments in question have attained finality.

It is inappropriate and undesirable that one Constitutional Court should avoid the judgments of another Constitutional Court, in collateral proceedings. The proper course, is to raise the question in accordance with law before the Federal Shariat Court and obtain its adjudication.

**(i) Constitution of Pakistan (1973)---**

----Art. 203-E(9)---Review by the Federal Shariat Court---Federal Shariat Court has the power of review under Art.203-E(9) of the Constitution.

**(j) Constitution of Pakistan (1973)---**

-----Art.203-B(c)---Expression "Muslim Personal Law" has been used in Art.203-B(c) of the Constitution in the sense of statutory law applicable to the Muslims only as compared to other religions communities inhabiting Pakistan---" Muslim Personal Law" cannot be examined by the Federal Shariat Court as Muslim Personal Law as used in Art.203-B(c) means statutory law of

Muslims and it is personal law of a particular sect---If such two conditions are not present, the matter can be examined by the Federal Shariat Court---Where the matter before the Federal Shariat Court was as to whether the consent of "Wali" was necessary in case of marriage of a sui juris Muslim girl, the first of the conditions of ouster of jurisdiction of Federal Shariat Court being not present in the matter, declaration of the Federal Shariat Court in the matter was clearly within the exclusive power and jurisdiction of the Federal Shariat Court and was binding on the High Court.

The expression "Muslim Personal Law" has been used in the sense of statutory law applicable to the Muslims only as compared to other religious communities inhabiting in Pakistan.

Muslim Personal Law cannot be examined by the Federal Shariat Court and Muslim Personal Law in Article 203B(c) means (i) statutory law of Muslims and (ii) it is personal law of a particular sect. If these two conditions are not present, the matter can be examined by the Federal Shariat Court.

In the present case, it is not the case of the appellant that any codified or statutory law provides that the consent of `Wali' is necessary or not necessary in the case of marriage of sui juris Muslim girl. The 1st of the conditions of ouster is not present. Therefore, such a declaration is clearly within the exclusive power and jurisdiction of the Federal Shariat Court. The contention that the judgments, in question being void were not binding on the High Court was repelled.

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

----S. 5 & Sched.---Constitution of Pakistan (1973), Art. 199---Question of validity of a marriage falling within the exclusive domain of the Family Court established under the West Pakistan Family Courts Act; 1964, High Court could and ought to have avoided the needless controversy on the subject.

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

----S.491---Habeas corpus petition---Inappropriate and undesirable, if not illegal for the High Court to have determined the validity of marriage on the touchstone of Injunctions of Islam, in proceedings under S.491, Cr.P.C.

**(m) Administration of justice---**

----Judge of the High Court assuming to himself the adjudication of a question already being considered by the Full Bench of the same Court-- Normal and appropriate course was to either wait for the decision of the Full Bench or to have clubbed the cases with the cases under consideration of the Full Bench which was not done in spite of repeated requests for the said course by the counsel---Effect---Out of the way and abnormal course adopted by the Judge of the High Court had raised misgivings which could have been avoided in the larger -.interest of fairness and impartiality of the judiciary.

**(n) Constitution of Pakistan (1973)---**

----Art.185---Appeal to Supreme Court---Subject of the appeal falling to be determined by the Federal Shariat Court, Supreme Court declined to examine the argument in detail.

**(o) Constitution of Pakistan (1973)---**

----Art. 185---Appeal to Supreme Court---No desirable exercise to collaterally impeach the judgments of a Constitutional Court which had in any case attained finality.

**(p) Islamic Law---**

----Marriage---Validity--Consent of "Wali" is `not required and a sui juris Muslim female can enter into valid Nikah/marriage of her own free will---Marriage is not invalid on account of the alleged absence of consent of Wali---Muhammad Imtiaz and another v. The State PLD 1981 FSC 308; Arif Hussian and another v. The State PLD 1982 FSC 42; Muhammad Ramzan v. The Slate PLD 1984 FSC 93; Muhammad Yaqoob and another v. The State and 3 others 1985 PCr.LJ 1064; Mauj Ali v. Syed Safdar Hussain Shah and another 1970 SCMR 437, held, binding on the High Court and Courts subordinate to the High Court.

Muhammad Imtiaz and another v. The State PLD 1981 FSC 308; Arif Hussian and another v. The State PLD 1982 FSC 42; Muhammad Ramzan v. The State PLD 1984 FSC 93; Muhammad Yaqoob and another v. The State and 3 others 1985 PCr.LJ 1064; Mauj Ali v. Syed Safdar Hussain Shah and another 1970 SCMR 437; Zahur Textile Mills Ltd. v. Federation of Pakistan and others PLD 1999 SC 880; Hakim Khan and 3 others v. Government of Pakistan through Secretary Interior and others PLD 1992 SC 595; Ghulam Muhammad alias Gaman v. The State PLD 1981 FSC 120; Black's Law Dictionary, Revised 4th

Edn., 1968; Dr. Mahmood-ur-Rahman Faisal v. Government of Pakistan through Secretary, Ministry of Justice, Law Parliamentary Affairs, Islamabad PLD ,1994 SC 607 and Federation of Pakistan v. Mst. Farishta PLD 1981 SC 120 ref.

Syed Riazul Hassan Gillani, Advocate Supreme Court, Muhammad Akram Sheikh, Senior Advocate Supreme Court and Tanvir Ahmad, Advocate-on-Record (absent) (in Criminal Appeal No.98 of 1997).

Syed Iqbal Haider, Senior Advocate Supreme Court with Ch. Akhtar Ali, Advocate-on-Record for Respondent No.1 (in Criminal Appeal No.98 of 1997).

Syed Hamid Ali Shah, Advocate Supreme Court with Mehr Khan Malik, Advocate-on-Record for Respondent No.2 (in Criminal Appeal No.98.of 1997).

Makhdoom Ali Khan, Attorney-General for Pakistan assisted by Khurram Hashmi (on Court's Notice) (in Criminal Appeal No.98 of 1997).

Ms. Asma Jehangir, Advocate Supreme Court and Naeemul Hassan Shirazi, Advocate Supreme Court with Ch. Akhter Ali, Advocate-on-Record for Appellant (in Civil Appeal No.563 of 1997).

Respondent No. 2 in person for Respondent No.4 (in Civil Appeal No.563 of 1997).

Mst. Shahbina Zafar (in person) (in Civil Appeal No.563 of 1997).

M. Shabbar Raza Rizvi, A.-G. for the State (in Civil Appeal No.563 of 1997).

Makhdoom Ali Khan, Attorney-General for Pakistan assisted by Khurram Hashmi (on Court's Notice) (in Civil Appeal No.563 of 1997).

Date of hearing: 1st December, 2003.

**JUDGMENT**

**KARAMAT NAZIR BHANDARI, J.**---This judgment will dispose of Criminal Appeal No.98 of 1997 titled: Hafiz Abdul Waheed v. Mrs. Asma Jehangir and another and Civil Appeal No.563 of 1997 titled: Muhammad Iqbal v. S.H.O., Batala Colony, Faisalabad and others, as these involve common questions of law. The basic question is reflected in the leave granting order dated 3rd of April, 1997 and is whether consent of `Wali' is essential to the validity of marriage of a sui juris Muslim girl. The question arises out of these facts.

2. Muhammad Iqbal appellant in Civil Appeal No.563 of 1997, on 26-2-1996 married Mst. Shabina Zafar, a sui juris Muslim girl. Father of Mst. Shabina Zafar namely, Zafar Iqbal (respondent No.3) apparently did not approve of this marriage and lodged F.I.R. No.256 of 1996 on 29-6-1996 at Police Station Batala Colony, District Faisalabad under section 10(2) of Zina (Enforcement of Hadood) Ordinance, VII of 1979 on the allegation that Muhammad Iqbal appellant seduced his daughter Mst. Shabina Zafar and was having illicit sexual connection with her. On 7-7-1996 Mst. Shabina Zafar is claimed to have appeared before a Magistrate and made a statement under section 164, Cr.P.C., wherein she stated to be of 19 years of age and asserted that she had lawfully married Iqbal. Her affidavit td the same effect is also at pages 118-119 of the paper book.

3. On 10-7-1996 Mst. Shabina Zafar filed Writ Petition No. 11995 of 1996 in the Lahore High Court seeking quashment of the F.I.R. on the ground that she having married Iqbal of her free-will, no offence was made out. Muhammad Iqbal appellant also filed Writ Petition No.16561 of 1996 on 12-9-1996 in the same Court and prayed for quashment of the F.I.R. on almost identical grounds. Both these petitions were heard together by a learned Single Bench and dismissed on 24-9-1996, with a direction to the police to challan the accused persons. The learned Judge held that as `Wali', of the girl did not consent to the marriage, the same was invalid.

4. Criminal Appeal No.98 of 1997 is filed by Hafiz Abdul Waheed father of Mst. Saima Waheed, a sui juris Muslim girl. She was a graduate from the Government Lahore College for Women, Lahore. She contracted marriage with respondent No.2 of her own free-will on 26-2-1996 and apparently without the consultation/approval of the appellant. The appellant claims that it was a surreptitious marriage and when he learnt of the same on 9-3-1996 he approached the family of respondent No.2 and in the meetings that followed, respondent No.2, it is claimed, surrendered his rights under the "Nikah Nama" and freed Mst. Saima Waheed from the marital bond. The appellant asserts that the situation remained the same for a month when, on 9-4-1996 respondent No.2 alongwith his sister induced Mst. Saima Waheed to leave the house of the appellant and she lodged herself in the institution known as "Dastak", run and managed by respondent No. 1, an Advocate of this Court and also an active human rights worker. It is claimed that a collusive Habeas Corpus Petition No.393/H of 1996 was filed by respondent No .2 claiming release of his wife from respondent No. 1. This petition was dismissed by a learned Single Judge of the Lahore High Court on 16-4-1996 on the ground that petition was clearly mala

fide and aimed to circumvent the law relating to the family matters. The order of dismissal was challenged in this Court through Criminal Petition for Leave to Appeal No. 180/L of 1996 and as the two Hon. Judges hearing the petition differed in their opinion, the petition was referred to Hon. Chief Justice to constitute a new Bench. On the allegation that respondent No.1 was wrongfully confining her daughter, Mst. Saima Waheed, the petitioner also filed a Habeas Corpus Petition No.425/H of 1996. While proceedings in this petition were pending some "more petitions, Writ 'Petition No.6468 of 1996 and Criminal Miscellaneous No.435/H of 1996 were instituted concerning the liberty of the alleged detenue. The Hon'ble Chief Justice constituted a Full Bench of three Judges to hear these cases and some other connected matters. Vide judgment dated 10-3-1997, the Full Bench by a majority of two to one held the marriage valid, even without the consent of `Wali'. However, learned Judges individually proceeded to record their own views and the manner in which the marriages should be contracted. Thus aggrieved the appellant approached this Court and was granted leave to appeal on 3-4-1997.

5. The impugned judgment of a learned Single Bench of the High Court in Civil Appeal No.563/97, in addition to grounds which will be noticed hereafter has also been subjected to criticism or the ground that the Full Bench of three Honourable Judges of the same Court being seized of the question involved, learned Judge ought to have referred the same for hearing by the Full Bench and should not have himself hastily proceeded to pronounce hips opinion on the question involved. It has also been urged that learned Judge acted illegally and improperly in ignoring the pronouncements of the Federal Shariat Court on the subject which were brought to his notice during hearing but have been designedly not noticed.

5-A. In the impugned judgment in Criminal Appeal No.98 of 1997, one learned Member of the Full Bench (Malik Muhammad Qayyum, J. as he then was) held that the judgments of the Federal Shariat Court being in the field were binding on the High Court. We, therefore, directed the learned counsel appearing for the parties as well as learned Attorney -General for Pakistan to address the Court on this question of law which seemed preliminary and jurisdictional in nature. If this Court concludes that the pronouncements of the Federal Shariat Court are in the field and, the same are binding on the High Court the controversy on merits can be avoided.

6. In Muhammad Imtiaz and another v. The State (PLD 1981 FSC 308), Arif Hussain and Azra Perveen v. The State (PLD 1982 FSC 42), Muhammad Ramzan

v. The State (PLD 1984 FSC 93) and Muhammad Yaqoob and another v. The State and 3 others (1985 PCr.LJ 1064), the Federal Shariat Court has been consistently taking the view that a sui juris Muslim girl can contract marriage of her own accord and the consent of her Wali or other relations is not requisite to the validity of marriage. Earlier in Mauj Ali v. Syed Safdar Hussain Shah and another (1970 SCMR 437), this Court had held that a Muslim girl attaining puberty is competent to marry of her own free-will and on this ground her custody was declined to her father and the order of the High Court permitting her to go and live with the husband was, maintained. In PLD 1982 FSC 42 and PLD 1984 FSC 93 the Federal Shariat Court has even held that subject to other facts' of a given case, an admission by a couple that they were married, would constitute sufficient proof of marriage.

7. In support of his contention that notwithstanding the judgments of the Federal Shariat Court, the High Court was competent to itself decide the same question, Mr. Gillani contends that these judgments are not binding on the High Court. In this connection, he has supported the view taken by one of the learned Judges of the Full Bench (Ihsan-ul-Haq Chaudhry, J. as he then was). Before us he has asserted that these judgments are not binding on the High Court as--

(i) the judgments have been delivered in appellate criminal jurisdiction of the Court and relied upon statement of law is not a "decision" within the meaning of Article 203GG of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter to be referred to as "the Constitution");

(ii) that the judgments are beyond the jurisdiction of the Federal Shariat Court as the matter pertained to the Muslim Personal Law upon which the Court could not make any pronouncement. In this connection, he relied upon definition of the expression "Law" as contained in Article 203B (c) of the Constitution; and

(iii) Judgments in question having been delivered in exercise of criminal appellate jurisdiction, cannot be said to have been 'delivered under Chapter 3A and as such are outside the purview of Article 203GG.

8. Syed Iqbal Haider, learned Advocate Supreme Court for respondent No.1 has argued to the contrary and has maintained that the judgments of the Federal Shariat Court are binding on the High Court as also the Courts subordinate to the High Court whether given in revisional appellate or original jurisdiction. He has cited cases holding that consent of 'Wali' is nowhere provided as a pre-condition to the validity of marriage. Towards the end of his submission, he

also prayed that scandalous and frivolous remarks contained in pleadings against respondent No. 1 in the petition in this Court as well as in the petition in the High Court be ordered to be expunged as the same are baseless and not necessary to the decision of the case. Syed Hamid Ali Shah, learned Advocate Supreme Court for respondent No.2 in Criminal Appeal No.98 of 1997 has submitted that Mst. Saima and Arshad Ahmed are validly married, they are living abroad for the time being and have already been blessed with two children a son and a daughter. He has submitted that the Courts are extremely reluctant to illegitimise children. He has cited Zahur Textile Mills Ltd. v. Federation of Pakistan and others (PLD 1999 SC 880) to submit that the judgments pf the Federal Shariat Court are binding on the High Court. He has also cited Hakim Khan and 3 others v. Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595), to rebut the argument of Mr. Gillani that the High Court and this Court in exercise of their general and Constitutional jurisdiction can hold a law or practice to be contrary to Injunctions of Islam. In the submission of Mr. Shah no law can be declared un-Islamic on the touchstone of Article 2A of the Constitution.

9. Learned Attorney-General appearing; on Court notice has maintained that the judgments of the Federal Shariat Court on the question of requirement of consent of Wali have been validly given, have attained finality and are binding on the High Court. He has argued that at least two Members of the Full Bench have travelled beyond the realm of law and have entered the domain of desirability or morality of the controversy. He has emphatically urged that the Judges of the superior Courts should avoid such an exercise. He has contested the distinction created by Mr. Gillani as to the use of word "decision" in Article 203GG. He has urged that the word "decision" is comprehensive enough to include judgment, order and even sentence. He has criticized the approach of the High Court to the entire controversy by pointing out that the High Court was dealing with a petition of habeas corpus and in such a petition the High Court can only determine the legality of detention or confinement and if it came to the conclusion that the same was illegal, it could direct release of the detenue. Under this jurisdiction the High Court should not have proceeded to determine complicated questions touching validity or otherwise of the marriage. He supports Mr. Shah's argument that once Mst. Saima Waheed appeared in the Court and stated that she was living in 'Dastak' with her free-will, the habeas corpus petition should have been dismissed. Learned Attorney-General has cited Ghulam Muhammad alias Gaman v. The State (PLD 1981 FSC 120) to submit that the expression "Muslim Personal Law" in Article 203B (c) of the Constitution means codified or enacted law exclusively applicable to Muslim Citizen of

Pakistan as distinguished from other religious communities. According to him, consent of 'Wali' is nowhere provided in any codified law and therefore, the Court could validly examine the proposition as to whether it is a requirement of Injunctions of Islam that 'Wali' must consent to the marriage otherwise it will be invalid.

10. As noted earlier, there are number of judgments of the Federal Shariat Court specifically holding that an adult sui juris Muslim girl can contract a valid 'Nikah' on her own and consent of Wali/guardian/relations is not needed. The repeated pronouncements of Federal Shariat Court are required to be followed by the High Court, and by all Courts subordinate to a High Court by virtue of Article 203GG added in the Constitution, in the year 1982. For convenience of reference the said Article is reproduced below:--

> "203GG. Subject do Articles 203D and 203F, any decision of the Court in the exercise of its jurisdiction under, this Chapter shall be binding on a High Court and on all Courts subordinate to a High Court."

11. Mr. Riazul Hassan Gillani, learned Advocate Supreme Court has made valiant attempt to get out of the rigour of this Article. He has supported the view of Justice Ihsan-ul-Haq Chaudhry (as he then was) and has urged that we should uphold the same. His argument is that in order to be binding on the High Court, it has to be a "decision" and it has to be "in the exercise of its jurisdiction under this Chapter". He has explained that the judgments in Muhammad Imtiaz and another v. The State (PLD 1981 FSC 308), Arif Hussain and Azra Perveen v. The State (PLD 1982 FSC 42), Muhammad Ramzan v. The State (PLD 1984 FSC 93) and Muhammad Yaqoob and another v. The State and 3 others (1985 PCr.LJ 1064) were either delivered in exercise of the revisional jurisdiction conferred by Article 203DD of the Constitution or in appellate jurisdiction conferred by-amendment in the Zina (Enforcement of Hudood) Ordinance, 1979. According to him, these judgments cannot be said to have been delivered by the Federal Shariat Court in exercise of its jurisdiction under Chapter 3-A of the Constitution".

12. The argument is fallacious. The Federal Shariat Court is itself the creation of Chapter 3-A. Article 203D confers, what may be described as original jurisdiction on the Federal Shariat Court. Under this jurisdiction, the Federal Shariat Court, on its own motion or on the petition of any citizen of Pakistan or Federal Government or a Provincial Government, can examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy

Prophet (p.b.u.h.). Article 203DD empowers the Court to call for and examine the record of any case decided by any criminal Court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by any such criminal Court. Sub-Article (3) of Article 203DD lays down that "the Court shall have such other jurisdiction as may be conferred on it by or under any law". It, may be; noted here, that right of appeal was provided to the Federal Shariat Court by adding second proviso to section 20(1) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter to be referred to as "the Ordinance"), in the year 1980.

13. Article 203GG says that any decision of the Federal Shariat Court in the exercise of its jurisdiction under this Chapter will be binding on the High Court. We have seen that this Chapter 3-A not only establishes Federal Shariat Court but also specifies various jurisdictions of the Court. It is difficult to accept the contention that merely because the appeal against the judgment of the Federal Shariat Court has been provided by second proviso to section 20(1) of the Ordinance, the criminal appellate jurisdiction cannot be said to be the creation of Chapter 3-A of the Constitution. Constitution is the fundamental law and all laws derive their validity from the same. While exercising the appellate jurisdiction, conferred by the Ordinance under the enabling provision of Article 203DD (3), the Federal Shariat Court in fact is exercising jurisdiction conferred by sub-Article (3) of Article 203DD, a part of Chapter 3-A.

14. It is well-settled that the Court will lean in favour of harmonious interpretation of the statutes/various provisions and would certainly avoid an interpretation which has the potential of conflicting judgments or pitching one Constitutional Court against another. Constitutional Court If Mr. Gillani's argument is accepted, technically the High Court can declare the judgments of Federal Shariat Court as without lawful authority in exercise of its writ jurisdiction under Article 199 of the Constitution Such 5 situation could not have even been contemplated by law-maker. It certainly is a most undesirable situation and has to be avoided by appropriate interpretation. Further take the case of conflicting judgments, as in the present case. Which of the views that of the learned Single Judges or that of the Federal Shariat Court be held binding on Courts, authorities, tribunals and which should be followed by them? If option was left with them, the result would be utter confusion. For this reason as well, the submission of Mr. Gillani merits to be rejected.

15. Mr. Gillani's next submission is that the judgments of the Federal Shairat Court on the question of consent of 'Wali' are not "decision" within the meaning of Article 203GG. He has explained that in the various Articles of Chapter 3-A different expressions like judgment, sentence, order or decision have been used. According to him, these are distinct expressions connoting something different from each other and as Article 203GG only makes a "decision" binding, the High Court has correctly not followed these judgments.

16. This argument has again to be rejected. Various expressions like judgments, decision, order or sentence have not been defined in Chapter 3-A nor in the Constitution. These expressions have, therefore, been used in their dictionary meaning. Particularly the expression "decision" in Article 203GG seems to have been used in a generic sense which would include and which may include the judgment i.e. reasons, an order say of confiscation of property, and/or an order of payment of compensation or sentence like that of imprisonment or fine. This view has again the merit of avoiding the potential mischief whereby the High Court can start scrutiny of the judgments, or orders or sentences imposed by the Federal Shariat Court. At the cost of repetition it may be stated that such an ugly situation has to be avoided.

17. The meaning of expression "decision" and "judgment" as given in "Black's Law Dictionary, Revised Fourth Edition, 1968" confirms the above conclusions. The words "decision" and "judgment" have been explained:--

> "**Decision**". "A popupar rather than technical or legal word, a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.
>
> A judgment or decree pronounced by a Court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it.
>
> A judgment given by a competent tribunal.
>
> The findings of fact and conclusions of law which must be in writing and filed with the clerk."
>
> "**Judgment**". "A sense of knowledge sufficient to comprehend nature of transaction.

An opinion or estimate. The conclusion in a syllogism having for its major and minor premises issues raised by the pleadings and the proofs thereon.

The formation of an opinion or notion concerning something by exercising the mind upon it.

> The official and authentic decision of a Court of justice (underlining by me) upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. "

18. It is clear from the above that the two words "decision" and "judgment" are almost similar in meaning in the context of the present controversy. The expression "decision" in Article 203GG will include F the judgment, order or the sentence if any passed by the Federal Shariat Court and all these will remain binding on the High Court and Courts subordinate to the High Court.

19. Mr. Gillani has also questioned the applicability and binding nature of the above judgments of the Federal Shariat Court on the ground that the Court had decided something which pertained to Muslim Personal Law, which has been kept out of scrutiny of the Court by Article 203B (c) of the Constitution which defines law. In this connection, he has relied on Dr. Mahmood-ur-Rahman Faisal v. Government of Pakistan through Secretary, Ministry of Justice, Law Parliamentary Affairs, Islamabad (PLD 1994 SC 607).

20. The difficulty in accepting this argument of Mr. Gillani is that the judgments were delivered by the Federal Shariat Court between 1981 and 1985. Clearly these have attained finality. The Federal Shariat Court is a Constitutional Court and it is at least undesirable and inappropriate, if not illegal that another Constitutional Court (like High Court) should hold the judgments as without jurisdiction. Even in normal course the point of jurisdiction has to be urged before the same Court and an adjudication obtained. The Constitution provides appeal to the Shariat Appellate Bench of this Court and the question of jurisdiction could have been urged and adjudication sought initially from the Federal Shariat Court and thereafter in appeal from the Shariat Appellate Bench. As noted this course was never followed with the result that the judgments in question have attained finality. During the course of hearing, it was suggested to Mr. Gillani that if parties were so keen the Federal Shariaf Court may be asked to review their judgments. Mr. Gillani replied that the Federal Shariat Court has not been conferred the power of review. This response is factually incorrect. Under Article 203E (9) added through Presidential Order No.5 of 1981, the Federal Shariat Court has the power of review.

21. Notwithstanding the above, since the point of jurisdiction has been keenly raised and contested it is considered appropriate to adjudicate the same In Federation of Pakistan v. Mst. Farishta (PLD 1981 SC 120) the expression "Muslim Personal Law" as used in Article 203B (c) came under consideration of this Court. In this case, Mst. Farishta by filing an application before the Shariat Bench of the High Court of Peshawar claimed a-declaration that section 4 of the Muslim Family Laws Ordinance No. VIII of 1961, providing for the right of inheritance to the' children of predeceased child of propositus be held as opposed to the Injunctions of Islam. The Shariat Bench of the High Court accepted the petition and granted the declaration. On an appeal by Federation of Pakistan, this Court held that the expression "Muslim Personal Law" has been used in the sense of statutory law applicable to the Muslims only as compared to other religious communities inhabiting Pakistan. This Court held that the Shariat Bench was not entitled to scrutinize section 4 of the Muslim Family Laws Ordinance, 1961. The appeal was allowed and the declaration set aside. This judgment was considered by Shariat Appellate Bench of this Court in the case reported as PLD 1994 SC 607 in Dr. Mehmood-ur-Rehman Faisal's case. In this case, Federal Shariat Court had rejected the petition seeking declaration of invalidity of certain provisions of Zakat and Ushr Ordinance, 1980. The Shariat Appellate Bench of this Court re-considered the statement of law made in Mst. Farishta's case arid held:--

> "As we have reached the conclusion of that only by reasons of being a codified or statute law and applicable exclusively to the Muslim population of the country, a law would not fall in the category of `Muslim Personal Law' unless it is also shown to be the personal law of a particular sect of Muslims, based on the interpretation of Holy Qur'an and Sunnah by that sect.". (Underlining by me).

On this premise the Hon'ble Appellate Bench held that Zakat and Ushr Ordinance, 1980 was not outside the scope of scrutiny of Federal Shariat Court under Article 203D of the Constitution. It will be seen that the statement of law as contained in Mst. Farishta's case has not at all been recalled in the case of Dr. Mehmood-ur-Rehman Faisal. On the contrary this Court added one more condition to be present before ouster can exist. In other words, according to this Court Muslim Personal Law cannot be examined by the Federal Shariat Court and Muslim Personal Law in Article 203B (c) means (i) statutory law of Muslims and (ii) it is personal law of a particular sect. If these two conditions are not present, the matter can be examined by the Federal Shariat Court.

22. In the case before us, it is not the case of the appellant that any codified or statutory law provides that the consent of `Wali' is necessary or not necessary in the case of marriage of sui juris Muslim girl. The 1st of the conditions of ouster is not present. Therefore, such a declaration is clearly within the exclusive power and jurisdiction of the Federal Shariat Court. The argument of Mr. Gillani that the judgments in question being void are not binding on the High Court is repelled. It may be repeated that we would not have examined this argument but for the keenness and vehemence with which Mr. Gillani raised it. For purposes of this appeal it is, enough for us to hold that it is inappropriate and undesirable that one Constitutional Court should avoid the judgments of another Constitutional Court, in collateral proceedings. The proper course, it is repeated is to raise the question in accordance with law before the Federal Shariat Court and obtain its adjudication.

23. There is force in the submission of the learned Attorney-General that the High Court has needlessly blown up the issue. The sole controversy before the High Court in Criminal Appeal No.98 of 1997 was whether Mst. Saima Waheed daughter of the appellant was being wrongfully confined in the place known as `Dastak', run by respondent No. 1. On record, an application filed by Mst. Saima Waheed to the effect that she was living in 'Dastak' of her free-will is available, She also appeared before learned Judge (Justice Malik Muhammad Qayyum, as he then was) on 18-4-1996 where again she asserted that she was living in 'Dastak' and would like to go there. Learned Judge, however, declined to accede to this request on the ground that another learned Judge (Justice Ihsan-ul-Haq Chaudhry, as he then was) had in another habeas corpus petition directed her recovery from 'Dastak' and her lodging in Dar-ul-Aman. Justice Malik Muhammad Qayyum notwithstanding her protest and apprehension of serious danger to her life, directed that order of Justice Ihsan-ui-Haq Chaudhry be complied with. He, however, directed Senior Superintendent of Police, Lahore to personally ensure safety of the detenue while in `Dar-ul-Aman'. The learned Judges of the High Court, with due deference, could have and ought to have avoided the needless controversy as regards the validity of the marriage which subject in any case falls within the exclusive domain of Family Court established under the West Pakistan Family Courts (Act XXXV), 1964.

24. The proceedings in the High Court originated from the petition of the appellant under section 491 of the Code of Criminal Procedure, 1898, praying:

> "For the recovery and release of Mst. Saima Whaeed, the detenue from illegal detention/custody of the respondents."

In the facts and circumstances of the case particularly in view of the stance of the alleged detenue that she was voluntarily putting up at 'Dastak', the High Court clearly transgressed its jurisdiction and by formulating the question of validity of marriage and then answering the same, assumed to itself the exclusive jurisdiction of the Family Court in such matter. The point need not be laboured further and may be concluded by observing that it was inappropriate and undesirable, if not illegal for the High Court to have determined the fate of the couple by adjudicating the validity of marriage on the touchstone of Injunctions, of Islam, in proceedings under section 491, Cr.P.C.

25. In Civil Appeal No.563 of 1997, the learned Judge deciding the Constitutional petitions seeking quashment of F.I.R has not only ignored the above legal objections but, with due deference to the learned Judge, assumed to himself the adjudication of a question already being considered by the Full Bench of the same Court. The Full Bench concluded hearing, spread over weeks, on 23-10-1996 and delivered judgment on 10-3-1997. The learned Judge decided the writ petitions on 24-9-1996. The normal and appropriate course was to either wait for the decision of the Full Bench or to have clubbed these cases with the cases under consideration of the Full Bench. The assertion of Ms. Aasma Jehangir, learned Advocate Supreme Court who was counsel of the couple before the learned Single Bench that she requested repeatedly sending the cases to Full Bench has not been contested. The Full Bench cases were otherwise being widely publicized in the media. The out or the way and abnormal course adopted by learned Single Judge has raised misgivings which could have been avoided in the larger interest of fairness and impartiality of the judiciary.

26. Mr. Gillani towards fag-end of his submissions also impeached the validity of the statement of law recorded by the Federal Shariat Court in Muhammad Imtiaz's case (supra). He wanted to show that the Court has placed reliance on references which are non-existent. Since I am holding that the subject falls to be determined by the Federal Shariat Court, the argument need not be examined in detail. The argument m any case ignores that there are at least three other judgments of the same Court, presided by different Honourable Judges of eminence including Alim Judges reputed for their command over the Islamic principles. Mr. Gillani offered no comment on these judgments. Additionally, it is an extremely undesirable exercise to collaterally impeach the judgments of a Constitutional Court which have in any case attained finality.

27. As regards the request of Mr. Iqbal Haider, learned Advocate Supreme Court for expungement of assertions made against the person of respondent No. 1,

suffice it to observe that there is no material on record to hold their validity, one way or the other. We will therefore, leave respondent. No. 1 to vindicate her position by resorting to appropriate proceedings, in accordance with law, and if so advised.

28. Mst. Shabina Zafar appeared before us in person and denied her marriage with Muhammad Iqbal appellant in Civil Appeal No.563 of 1997. This is contrary to her stance in the High Court. In view of the order proposed to be passed, we decline to determine this question of fact.

29. For what has been stated above, it is hereby held/declared/ordered:--

(i) that as per judgments of the Federal Shariat Court, noted in para. 6 of this judgment, consent of `Wali' is not required and a sui juris Muslim female can enter into valid `Nikah'/marriage of her own free-will.

(ii) Statement of law contained in the judgments of the Federal Shariat Court, noted in para.6 of this judgment is binding on the High Court and Courts subordinate to the High Court.

(iii) Criminal Appeal No.98 of 1997 is dismissed with the declaration that marriage in question in this appeal is not invalid on the ground of absence of consent of appellant-Wali.

(iv) Civil Appeal No.563 of 1997 is allowed, impugned judgment of the learned 'Single Bench of the Lahore High Court dated 24-9-1996 is set aside. It is declared that the marriage in question in Writ Petition No.16561 of 1996 and Writ Petition No.11995 of, 1996 is not illegal on account of the alleged absence of consent of `Wali'. However, it will be open to the parties to seek adjudication as to existence and validity of marriage from the competent Court, in accordance with law. Writ Petitions Nos.11995 of 1996 and 165&7 of 1996 stand disposed of, accordingly.

(v) Parties be left to bear their own costs.

M.B.A./A-460/S Order accordingly.

**2021 S C M R 1890**
**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial and Sayyed Mazahar Ali Akbar Naqvi, JJ**

RAB NAWAZ KHAN---Appellant
Versus
JAVED KHAN SWATI---Respondent

Civil Appeal No. 889 of 2014, decided on 12th November, 2020.

(On appeal from the judgment/order dated 06.12.2013 of the High Court of Peshawar Abbottabad Bench passed in R.F.A. No. 72 of 2006)

**Negotiable Instruments Act (XXVI of 1881)---**

---- Ss. 6, 22 & 118---Civil Procedure Code (V of 1908), O. XXXVII---Summary suit--- Cheque, issuance of---Whether cheque was issued by respondent for consideration or merely as an acknowledgment/receipt for investment made by him---Held, that it was a well-established principle that a cheque was intended to be for immediate payment---In ordinary circumstances cheques were exchanged between the parties for the purpose of immediate payment---Cheque was not even entitled to days of grace, as in the case of promissory notes and bills of exchange---Presumption that every negotiable instrument was made/drawn for consideration was however rebuttable---Burden to rebut said presumption laid upon the party arguing that the negotiable instrument had not been made/drawn for consideration---Such presumption was not rebutted by a bare denial of the passing of the consideration----To disprove the presumption the defendant (person who had issued the cheque/negotiable instrument) had to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist---In the present case the respondent (who had issued the cheque) provided a bare denial as his defence, and produced no independent evidence to support his plea that cheque was issued by him merely as a receipt---Furthermore no protest was lodged by the respondent when the appellant presented the cheque for encashment to a bank, which returned the cheque with the remark 'refer to drawer'---Respondent re-validated the cheque but it was again declined by the bank with the same remark---If respondent's plea that cheque was issued merely as a receipt was accepted, then question was as to what was the purpose behind revalidating the cheque---Only reasonable

explanation for this was that cheque was issued and revalidated by the respondent so that appellant could recover his amount owed to him by the respondent---Appeal was allowed and summary suit filed by appellant for recovery of his amount was decreed.

Haji Karim v. Zikar Abdullah 1973 SCMR 100; Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal [1999] 1 SCR 704 and Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim 1999 SCMR 2832 ref.

Ch. Akhtar Ali, Advocate-on-Record for Appellant and Appellant in person.

Riaz Hanif Rahi, Advocate Supreme Court, Syed Rifqat Hussain Shah, Advocate-on-Record, Asif Ali, Advocate Supreme Court and Qari Rasheed, Advocate Supreme Court for Respondent.

Dates of hearing: 9th and 12th November, 2020.

**ORDER**

**UMAR ATA BANDIAL, J**.---The only point of controversy arising in the present matter is whether the cheque bearing No. FE-055763, dated 31.12.1992 was issued by the respondent to the appellant for consideration or merely as an acknowledgment/receipt for the investment made by the latter in certain forests, namely, Khachloga, 'Tanger and Khandia.

2.Brief facts of the case are that the appellant advanced a sum of Rs. 1,540,000 to the respondent out of which Rs. 920,000 was invested in the aforementioned forests. The balance amount of Rs. 620,000 was given to the respondent as a loan. On 31.12.1992, to return this amount the respondent gave the appellant a cheque for Rs. 620,000. However, on presentment of the said cheque on 21.02.1993 to the National Bank of Pakistan, Mansehra Branch, the same was returned to the appellant with the remark 'refer to drawer.' Thereafter, the appellant contacted the respondent for payment. As a result, on 27.07.1996 the respondent revalidated the original cheque but this was also declined by the Bank on 05.08.1996 with the same remark. Consequently, the appellant filed a suit before the learned District Judge under Order XXXVII, C.P.C. which was dismissed vide order dated 16.09.1999 on the ground that the cheque was a non-negotiable instrument and so the suit should be filed before the appropriate Civil Court. Feeling aggrieved by

this the appellant filed an FAO before the Peshawar High Court which by order dated 22.01.2002 remanded the matter back to the District Judge for determination after holding that the cheque was a negotiable instrument.

3. Pursuant to this direction, the learned Additional District Judge on 23.06.2006 dismissed the suit of the appellant with the observation that the balance amount of Rs. 620,000 could be realised by the latter in two separate suits pending between him and the respondent for rendition of accounts. This decision was upheld by the learned High Court by its order dated 06.12.2013. It is this judgment which is challenged before us.

4. Today learned counsel for the respondent has submitted that the cheque issued to the appellant was not meant for encashment. Instead it was merely an acknowledgement of the investment made by the appellant in the forests.

5. We have heard the arguments of both the parties and have also perused the record. As already stated above, the only dispute in the present case is about the purpose of the cheque issued by the respondent to the appellant. Learned counsel for the respondent has argued that the cheque was only a receipt and was never meant to be encashed. However, such a contention of learned counsel is misplaced for the simple reason that it is by now a well-established principle that a cheque is intended to be for immediate payment. Evidence for this can be gathered from section 6 of the Negotiable Instruments Act, 1881 ("the Act") which defines the term 'cheque':

> "6. "Cheque.". A "cheque" is a bill of exchange drawn on a specified banker and not expressed payable otherwise than on demand."
>
> (emphasis supplied)

6. Indeed, a cheque is not even entitled two days of grace, as arc promissory notes and bills of exchange. Reliance in this regard is placed on section 22 of the Act:

> 22. "Maturity" ----------
>
> Days of grace--- Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable."

(emphasis supplied)

These two provisions prove that in ordinary circumstances cheques arc exchanged between parties for the purpose of immediate payment. Any different interpretation would render redundant the objective behind making cheques payable on demand and not entitled to the three day period of grace (unlike other negotiable instruments) .

7. Support for this view can also be found in section 118 of the Act which sets out certain presumptions applicable to negotiable instruments. For ease of reference, this provision is produced below:

> "118. "Presumptions as to negotiable instruments". Until the contrary is proved, the following presumptions shall be made,
>
> (a) that every negotiable instrument was made or drawn of consideration, and that every such instrument, when it has been accepted, endorsed negotiated or transferred, was accepted, endorsed negotiated or transferred for consideration;"
>
> (emphasis supplied)

**Although the presumption stated above, that every negotiable instruments is made/drawn for consideration, is rebuttable, it is trite law that the burden to rebut this presumption lies upon the party arguing that the negotiable instrument has not been made/drawn for consideration.** Reference is made to the case of Haji Karim v. Zikar Abdullah (1973 SCMR 100 at page 101). However, this raises the question: how can this presumption be rebutted? The answer has been provided by the Indian Supreme Court in the case of Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal ([1999] 1 SCR 704).

> "13. ...The defendant can prove the nonexistence of consideration by raising a probable defence... The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relics... The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable

that a prudent man would. under thc circumstances of the case shall act upon thc plea that it did not exist."

(emphasis supplied)

8. **It may be noticed from the above cited passage that the bare denial of a party that a negotiable instrument has been made/drawn for consideration does not rebut the presumption in section 118(a) of the Act. Nevertheless, in the present case, this is precisely the respondent's defence; a bare denial. In fact, he has produced no independent evidence which supports his plea that the cheque was issued merely as a receipt.** In coming to this conclusion, we are guided by a judgment of this Court which was decided on near identical facts: Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim (1999 SCMR 2832). In that case, the respondent had received cheques from the petitioners. However, on presentment to the bank these were returned with the remark 'refer to drawer.' Thereafter, the respondent repeatedly asked the petitioners to return the requisite amount with no success. As a result, he filed a suit under Order XXXVII of the C.P.C. The petitioners raised the plea (amongst other defences) that the cheques were not meant to be honoured/encashed. However, this contention of the petitioners was dismissed by the Court in the following manner:

"13: ... on inquiry during arguments, learned counsel for petitioners was not able to furnish any plausible reasons why 'despite presentment of cheques which had been undisputedly issued by the petitioners, no protest was lodged for displaying their stand and alleged intention of not honouring encashing the same. We are aware that unless anything contrary is duly established, presumption of validity flows in favour of Negotiable Instruments [e]specially when its execution is not disputed."

(emphasis supplied)

9. **Quite similarly in the present case no protest was lodged by the respondent when the appellant on 21.02.1993 presented the cheque for encashment to the National Bank of Pakistan, Mansehra Branch. In fact, the respondent revalidated the cheque on 27.07.1996. If we accept the respondent's contention that the cheque was issued merely as a receipt, what then was the purpose behind revalidating the cheque. In our considered view, the only reasonable explanation is that the cheque was issued and revalidated by the respondent so that the appellant could**

**recover the balance amount of Rs. 620,000 owed to him by the respondent.**

10. Be that as it may, we notice that this material aspect of the case has escaped the consideration of both the learned Additional District Judge and the learned High Court. As a result, the impugned judgments passed by them have arrived at an incorrect conclusion. Consequently, these are set aside. This appeal is therefore allowed.

MWA/R-9/SC Appeal allowed.

**2022 C L C 890**
**[Lahore]**

**Before Rasaal Hassan Syed, J**

Mst. KAMALAN BIBI----Petitioner
Versus
PROVINCE OF PUNJAB through District Officer and 9 others----Respondents

Civil Revision No.2682 of 2011, decided on 15th October, 2021.

**(a) Gift---**

----Oral gift---Inheritance---Suit for declaration filed by petitioner alongwith her sister challenging alleged oral gift on the grounds of fraud/collusion and being inoperative on their right of inheritance---Suit was concurrently dismissed---Contention that predecessor-in-interest of parties was survived by two daughters and two sons; that petitioner and her sister were owners of 1/3rd share in estate of their deceased father; that they were being paid share from the produce by respondents/defendants who stopped doing so a year before filing the suit and claimed the transfer of property in their name; that their deceased father had never made any gift nor transferred any part of his property in his lifetime, nor had appeared before revenue officials nor ever thumb-marked or signed the revenue papers pertaining to alleged mutation of gift; that mandatory ingredients of gift were never fulfilled, no offer/acceptance was ever made, nor was the possession ever transferred under oral gift; that particulars of the witnesses in whose presence the oral gift was alleged to have been made were not mentioned; venue of alleged oral gift and period before the alleged attestation of mutation was not mentioned---Validity---Neither patwari who allegedly entered the mutation in the roznamcha waqiati was produced nor copy of roznamcha waqiati itself was adduced---Revenue officer who allegedly attested the mutations was not produced in evidence---Mutations did not bear thumb-impression/signatures of deceased/alleged donor---Essential particulars of witnesses of oral gift were missing in written statement and in the statements of defendant's witnesses---Stance that witnesses were not alive was taken only in cross-examination although it had been suggested to the contrary---Respondents had to produce death certificates of the witnesses to prove their death or to produce some male member of the family of those witnesses in evidence to confirm the stance of alleged death---Best evidence in said respect was withheld---No explanation as to absence of person who was shown to have identified the alleged donor

in one mutation---Considering the effect of absence of date, time, place and the names of the witnesses in whose presence the oral gift was allegedly made in the written statement as also in the evidence, it was observed that the beneficiary on whom the onus to prove the oral gift rested would be deemed to have utterly/miserably failed to prove the same in the manner prescribed by law---Mutations were attested in a casual manner and Revenue Officers did not attempt to find out the extraordinary reasons for depriving the daughters from inheritance or awarding special favour to the sons to the exclusion of the daughters---Daughters were not even summoned to find out as to whether any such transaction of gift was being made in reality by their father and also to their knowledge---Revenue officer had not indicated any special reason from the donor to deprive his daughters from their share of inheritance---Court below assumed that mere attestation of mutations would suffice to assume the declaration and acceptance of gift and transfer of possession---Mutations were not document of title---Where the transaction itself was in issue, beneficiary was legally obligated to discharge the onus by alleging/proving through credible evidence the prerequisites of a valid oral gift---Khasra girdawari for relevant year was not produced to support the plea of transfer of possession and non-production thereof was fatal to the stance of respondents---Revenue record transpired that fraud had been committed and the suit was instituted immediately thereafter---Pleadings and statement of witness revealed that said fact was affirmed which could not be dislodged in cross-examination---Revision petition was accepted and petitioner's suit was decreed as prayed for with costs throughout.

Naveed Akram and others v. Muhammad Anwar 2019 SCMR 1095; Muhammad Sarwar v. Mumtaz Bibi and others2020 SCMR 276; Atta Muhammad and others v. Mst. Munir Sultan (deceased) through her LRs and others 2021 SCMR 73; Islam-ud-Din through L.Rs and others v. Mst. Noor Jahan through L.Rs and others 2016 SCMR 986; Mrs. Khalida Azhar v. Viqar Rustam Bakhshi and others 2018 SCMR 30 rel.

**(b) Gift---**

----Oral gift---Proof---If oral gift was claimed, it was imperative for the beneficiary to allege foundational ingredients of the gift including time, date and place of the alleged gift in the pleadings and prove the same---Necessary to disclose the names of witnesses in whose presence the alleged declaration and acceptance of oral gift was announced---In the absence of such disclosure

no evidence could be led and even if any evidence came on record the same was liable to be ignored.

Saddaruddin through LRs. v. Sultan Khan through LRs and others 2021 SCMR 642; Sheikh Ishtiaq Ahmad and others v. Muhammad Usman Ali Sheikh and another 2021 SCMR 1277; Binyameen and 3 others v. Chaudhry Hakim and another 1996 SCMR 336 and Sardar Muhammad Naseem Khan v. Returning Officer, PP-12 and others 2015 SCMR 1698 rel.

**(c) Constitution of Pakistan---**

----Art.24---Gift---Disinheritence---Protection of women---Where the exclusion of legal heirs was claimed by way of gift, there should be evidence to justify the disinheritance of other legal heirs from the gift.

Mst. Kulsoom Bibi and another v. Muhammad Arif and others 2005 SCMR 135; Ghulam Haider v. Ghulam Rasool and others 2003 SCMR 1829 and Barkat Ali through legal heirs and others v. Muhammad Ismail through legal heirs and others 2002 SCMR 1938 rel.

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

----Arts. 80 & 129(g)---Where witness was not found or had died, the factum of such death must be specifically proved---If no effort was made to prove death of witness, strong inference contra the party would obviously be stimulated.

**(e) Constitution of Pakistan---**

----Arts.24, 25 & 34---Islamic Law---Inheritance---Discrimination against women---When vulnerable women were compelled to relinquish their inheritance in favour of their male relations such relinquishment offended public policy and was contrary to shariah.

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

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

----S.3---Inheritance---Islamic Law---Scope---On opening of succession, the property automatically devolve upon the legal heirs---Efflux of time would not extinguish the right of inheritance and limitation in such matters start from the date when right of any co-sharer/inheritor was denied by someone.

Mst. Suban v. Allah Ditta and others 2007 SCMR 635 rel.

**(g) Constitution of Pakistan---**

----Arts.24, 25 & 34---In the absence of legal and valid deed/document of relinquishment for transfer of property on the part of sisters, the possession of the co-owners/brothers could only be construed as possession on behalf of all the co-owners including the sisters.

Mst. Gohar Khanum and others v.Mst. Jamila Jan and others 2014 SCMR 801; Mahmood Shah v. Syed Khalid Hussain Shah and others 2015 SCMR 869; Mst. Namdara and 3 others v. Mst. Sahibzada and 2 others 1998 SCMR 996 and Fareed and others v. Muhammad Tufail and another 2018 SCMR 139 rel.

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

----O.XLI, Rr.4 & 33---Where there were multiple plaintiffs/defendants and decree appealed from proceeded on any ground common to all the plaintiffs/defendants, any one of them could appeal from the whole decree and, thereupon, the appellate court could reverse or vary the decree in favour of all the plaintiffs or defendants.

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

----S.115---Concurrent findings/judgements---Scope---Court could interfere when the concurrent findings of fact recorded were based on insufficient/inadmissible evidence; misreading/non-consideration of material evidence; erroneous assumptions of fact; patent errors of law; or reveal arbitrary exercise of power; abuse of jurisdiction; or where the view taken was demonstrably unreasonable which was not in consonance with material evidence.

Abdul Sattar v. Mst. Anar Bibi and others PLD 2007 SC 609 and Mst. Naziran Begum through Legal Heirs v. Mst. Khurshid Begum through Legal Heirs 1999 SCMR 1171 rel.

A.G. Tariq Ch. and Javed-ur-Rehman Rana for Petitioner.

Waqar Saeed Khan, Asst. Advocate General Punjab for Respondent No.1.

Shahid Azeem for Respondents Nos.2 to 9.

Date of hearing: 24th September, 2021.

**JUDGMENT**

**RASAAL HASAN SYED, J**.----This civil revision is directed against judgments and decree of the courts below whereby suit for declaration with consequential relief instituted by the petitioner was dismissed and the appeal thereagainst did not succeed.

2. Mst. Kamalan Bibi, petitioner herein, along with her sister Mst. Lalo Bibi instituted a suit for declaration to challenge mutation No. 528 dated 14.3.1984 and No. 539 dated 28.3.1984 in respect of alleged oral gift in favour of Gul Sher and Muhammad Sher, respondent No.2 and predecessor-in-interest of respondents Nos. 3 to 9, respectively, on grounds of fraud and collusion and being inoperative on their right of inheritance to the extent of 1/3rd share in the property. The suit was resisted, written statements were filed by respondents Nos. 2 to 9 wherein the assertions of petitioner were denied. Issues were framed and evidence recorded; whereafter the suit was dismissed by learned Civil Judge, Bhakkar vide judgment and decree dated 08.3.2010. The petitioner preferred appeal thereagainst which ended in dismissal vide judgment dated 25.5.2011 of learned Addl. District Judge, Bhakkar. In the instant petition, the judgments and decrees of two courts below are now under challenge.

3. Heard. Record perused.

4. Scrutiny of record available with the petition reveals that Muhammad Nawaz son of Alam deceased, was the predecessor-in-interest of the parties, who was survived by two daughters and two sons, namely, Mst. Kamalan Bibi, Mst. Lalo Bibi, Gulsher and Muhammad Sher alias Kareeta. In their suit, the petitioner and her sister Mst. Lalo Bibi claimed that they were owners of 1/3rd share in the estate of their deceased father; after his demise they were being paid share from the produce by the respondents who stopped doing so a year before the filing of the suit and claimed that the property stood transferred in their name. On inspection of revenue record it transpired that the respondents had fraudulently procured two mutations of alleged oral gift in their favour notwithstanding the fact that their deceased father Muhammad Nawaz had never made any gift nor transferred any part of his property in his lifetime; nor had he ever appeared before the revenue officials or ever thumb-marked or signed the revenue papers pertaining to the alleged mutations of gift and that the entire story of gift was mere fiction. In paragraph "5" of the plaint it

was specifically pleaded that late Muhammad Nawaz son of Alam, the predecessor-in-interest of the parties never made any gift in favour of respondent No.2/Gul Sher and late Kareeta (now represented by respondents Nos. 3 to 9) and that the deceased never appeared before the revenue officers nor recorded any statement and that the entire proceedings were fictitiously and collusively managed with mala fide and in cahoots with the revenue staff as also the alleged witnesses of the mutations. In paragraph "6" of the plaint it was alleged that mandatory ingredients of gift were never fulfilled, no offer or acceptance was ever made; nor was the possession ever transferred under any oral gift and that the plea of gift was a mere concoction. Perusal of the corresponding paragraphs "5" and "6" of the written statement, filed by respondents Nos.2 to 9 jointly, shows that the specific assertions of petitioner in corresponding paragraphs of the plaint were evasively responded as "incorrect" and that it was asserted that the mutations of oral gift were correctly attested. Necessary particulars i.e., time, date, place and the particulars of the witnesses in whose presence the oral gift was alleged to be made, were not mentioned nor was it specifically claimed that any declaration and acceptance of oral gift was ever made. So much so that the venue of alleged oral gift and the period before the alleged attestation of mutation was not mentioned.

5. In the evidence, petitioner produced Mst. Lalo Bibi as P.W.1 who specifically deposed that no gift was ever made by their father Muhammad Nawaz in favour of his sons and that after his demise, the respondents had been giving them share in the produce and that two years prior to her statement this was stopped and that upon inspection of revenue record, it came to their knowledge that the respondents had fraudulently got transferred the land in their favour. It was further deposed that before his demise, their father was unable to walk, and he was not mentally sound. P.W.2 Sarfraz, the husband of the petitioner, also entered appearance in the witness-box and deposed that the deceased was suffering from paralysis, his age was 80 years and that the respondents had committed fraud who procured the mutations of gift by producing some fictitious person and that the mutations were fraudulently got attested. Gul Sher respondent appeared as D.W.1 and in his statement, he deposed that the land was transferred in favour of Gul Sher and Muhammad Sher alias Kareeta and that they were in possession of the property and that the mutation was attested by Naseer Ahmad Khan and that the petitioners never claimed any share of batai. Perusal of the statements-in-chief of D.W.s, clearly show that D.W.1, the beneficiary of alleged gift did not mention time, date, date, month, or year of the alleged oral gift nor did he

depose as to the venue of the alleged gift. He did not even deem it necessary to depose on oath as to whether any declaration and acceptance of oral gift was ever made and, if so, in whose presence and on what occasion this happened before the attestation of mutations. On being asked, he expressed his ignorance as to the area of land which was mutated in his favour. He claimed that both the mutations were attested one after the other; but he was unable to depose about the area that was part of second alleged gift. In the cross-examination it was stated that the mutation was attested by Qasim and Naseer Ahmad who had died and denied the suggestion that the witnesses were alive and admitted that both the witnesses had children. Muhammad Ramzan appeared as D.W.2 who deposed that the land was transferred in favour of Gul Sher and Kareeta sons of Muhammad Nawaz and that the daughters were not given their share. During cross-examination he deposed that the mutations were attested with a difference of 15 to 16 days and that they bore his thumb-impression. He admitted that the children of Qasim and Naseer Ahmad were alive. It is manifest from the statement that even this witness also did not depose as to the time, day, date, year or venue of the alleged oral gift nor he claimed that any oral gift was made before the mutations in his presence.

6. **In cases where oral gift is claimed it is imperative for the beneficiary to allege foundational ingredients of the gift including time, date and place of the alleged gift in the pleadings and, thereafter, to prove the same. It is also necessary to disclose the names of witnesses in whose presence the alleged declaration and acceptance of oral gift was enacted. In the absence of such disclosure no evidence could be led and even if any evidence comes on record the same is liable to be ignored. Reference can be made to "Saddaruddin (since deceased) through LRs. v. Sultan Khan(since deceased) through LRs and others" (2021 SCMR 642), "Sheikh Ishtiaq Ahmad and others v. Muhammad Usman Ali Sheikh and another" (2021 SCMR 1277), "Binyameen and 3 others v. Chaudhry Hakim and another" (1996 SCMR 336) and "Sardar Muhammad Naseem Khan v. Returning Officer, PP-12 and others" (2015 SCMR 1698).**

7. **Apart from the foundational omissions in the written statement and evidence as noted supra, the other aspect of the matter is that neither the patwari who allegedly entered the mutation in the roznamcha waqiati was produced nor copy of roznamcha waqiati itself was adduced. Even the revenue officer who allegedly attested the mutations was also not produced in evidence. The mutations did not bear thumb-impression or**

**the signatures of late Muhammad Nawaz the alleged donor. It was essential requirement of law that the respondents should have given full particulars of oral gift in the written statement along with the names of the persons who were allegedly present at the time of making of oral gift and also mention the names of the persons who were present at the time of attestation of mutations of oral gift or who had allegedly identified the owner. These essential particulars were obviously missing in the written statement as also in the statements of D.W.1 and D.W.2. The revenue officer and the patwari were also not produced as witnesses. Samandar Khan, Qasim, Naseer Ahmad, the alleged witnesses to the mutations were not produced. The respondents did not claim in the pleadings or in statements-in-chief that the witnesses to the mutations, namely, Naseer Ahmad and Qasim had died. It was only in cross-examination that stance was taken that they were not alive although it had been suggested to the contrary. It was necessary for the respondents to produce the death certificate of the witnesses to prove their death or to produce some male member of the family of these witnesses in evidence to confirm the stance of alleged death; but best evidence in this respect was withheld. There was no explanation even about absence of Samandar Khan who was shown to have identified the alleged donor in one mutation. Article 80 of Qanun-e-Shahadat Order, 1984, mandates that if any witness is not found or has died, the factum of such death must be specifically proved. No effort was made to prove death of either of the three witnesses which obviously stimulated strong inference contra the respondents.**

8. In "Muhammad Nawaz and others v. Sakina Bibi and others" (2020 SCMR 1021) it was observed to effect that where the defendants in a suit neither mentioned the date, time, place or names of the witnesses in whose presence the oral gift was made in the pleadings nor produced evidence before the trial court, they could not be allowed to improve their case as set up in the written statement, in their evidence on the principle of secundum allegata et probata i.e. a fact must be alleged by a party before it is allowed to be proved. Considering the effect of absence of date, time, place and the names of the witnesses in whose presence the oral gift was allegedly made, in the written statement as also in the evidence, it was observed that the beneficiary on whom the onus to prove the oral gift rested, shall be deemed to have utterly and miserably failed to prove the same in the manner prescribed by law. Reference can be made to "Naveed Akram and others v. Muhammad Anwar" (2019 SCMR 1095). In "Muhammad Sarwar v. Mumtaz Bibi and others" (2020 SCMR 276) also it was observed to the effect that the beneficiary of the gift

was required to specify the date, time and place as to the foundational elements of offer and acceptance of such gift that disinherited the sisters.

9. In "Atta Muhammad and others v. Mst. Munir Sultan (deceased) through her LRs and others" (2021 SCMR 73) it was observed to the effect that the revenue authorities must also be extra vigilant when purported gifts are made to deprive daughters and widows from what would have constituted their share in the inheritance of an estate. The concerned officers must fully satisfy themselves as to the identity of the purported donor/transferee and strict compliance must be ensured with the applicable laws. Cases in point are "Islam-ud-Din through L.Rs and others v. Mst. Noor Jahan through L.Rs and others" (2016 SCMR 986) and "Mrs. Khalida Azhar v. Viqar Rustam Bakhshi and others" (2018 SCMR 30) wherein it was ruled to the effect that purported gifts and other instruments used to deprive female family members including daughter and widows are contrary to law and public policy. In "Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi" (PLD 1990 SC 1) it was observed to the effect that often male members of the family deprive entitled female relations of their inheritance and, in doing so, law was violated and that when vulnerable women were at times compelled to relinquish their inheritance in favour of their male relations such relinquishment offended public policy and was contrary to shariah.

10. **Perusal of the record of the instant case shows that no such efforts were made to ensure identification of the persons who had appeared before the revenue officer at the time of attestation of disputed mutations. Rather the mutations were attested in a casual manner without being conscious of the mandatory obligations of the revenue officers. The revenue officers did not attempt to find out the extraordinary reasons for depriving the daughters from inheritance or awarding special favour to the sons to the exclusion of the daughters. So much so that the daughters were not even summoned to find out as to whether any such transaction of gift was being made in reality by their father and also to their knowledge. Even perusal of the order of revenue officer does not indicate any special reason from the donor to deprive his daughters from their share of inheritance. It has been consistently ruled that where the exclusion of legal heirs is claimed by way of gift, there should be evidence to justify the disinheritance of other legal heirs from the gift. Reference in this respect can be made to the rule in "Mst. Kulsoom Bibi and another v. Muhammad Arif and others" (2005 SCMR 135), "Ghulam Haider v. Ghulam Rasool and others" (2003 SCMR 1829)**

**and "Barkat Ali through legal heirs and others v. Muhammad Ismail through legal heirs and others" (2002 SCMR 1938).**

11. **In the instant case neither in the pleadings nor in the evidence, the respondents, who were under heavy onus to not only establish the actual oral gift by propositus in their favour. No special reasons were, however, asserted or proved for such discrimination against the daughters or causing their disinheritance. Curiously the learned courts below did not consider the matter in this legal perspective at all and in oblivion of the consistent rule on the subject, proceeded to assume that the mere attestation of mutations shall suffice to assume the declaration and acceptance of gift and transfer of possession; little appreciating that the mutations were not document of title and that where the transaction itself was in issue, the beneficiary was legally obligated to discharge the onus by alleging and proving through credible evidence, the prerequisites of a valid oral gift; which in this case was conspicuously missing. Even the khasra girdawari for the year 1984 - 85 was not produced to support the plea of transfer of possession and non-production thereof was obviously fatal to the stance of respondents as to the alleged transfer of possession under any alleged oral gift.**

12. As to the objection of limitation, the view taken by the courts below is based on erroneous understanding of law. The dispute in this case related to the right of inheritance of sisters (daughters of the deceased) which the brothers, respondents, were illegally attempting to usurp. In suchlike cases the consistent view is that on the opening of succession, the property automatically devolves upon the legal heirs and that efflux of time does not extinguish the right of inheritance and that the limitation in such matters, starts from the date when right of any co-sharer/inheritor is denied by someone. Reference can be made in this respect to "Mst. Suban v. Allah Ditta and others" (2007 SCMR 635) where it was observed to the effect that it was well-established that as soon as owner of a property dies succession to the property opens which gets automatically and immediately vested in the heirs and that such vesting is not dependent upon any intervention or any act on the part of state and that limitation against co-inheritors would start running not from the time of the death of their predecessor-in-interest nor even from the date of mutation, if there be any, but from the date when the right of any such person was denied. In the instant case the plea raised by petitioner was that the respondents had been paying the share of produce till a year before the institution of the suit and that on stoppage of such supply, the revenue

record was inspected, from which it transpired that fraud had been committed and that the suit was instituted immediately thereafter. Not only in the pleadings but also in the statement of P.W.1 this fact was affirmed which could not be dislodged in cross-examination. This being so, the objection to the limitation was illusory and not well-founded.

13. Another aspect of the issue was that consistent rule is that in the absence of legal and valid deed/document of relinquishment for transfer of property on the part of sisters, the possession of the co-owners/brothers could only be construed as possession on behalf of all the co-owners including the sisters. In "Mst. Gohar Khanum and others v. Mst. Jamila Jan and others" (2014 SCMR 801) it was observed to the effect that male relative claimant of relinquishment having failed to show any document or deed of relinquishment, sale, transfer or gift that could establish that the female relative had relinquished her interest in the disputed property or had actually conveyed or transferred the same in favour of claimant constituted absence of affirmative act on the part of lady and that in such cases it could not be said that property came to vest entirely in the male relative. In "Mahmood Shah v. Syed Khalid Hussain Shah and others" (2015 SCMR 869) it was observed to the effect that the co-heirs become co-owners in the property simultaneous with the moment of their predecessor's death and such succession does not need the intervention of any functionaries of revenue department and that possession of one of the co-heirs or number of them shall be deemed to be on behalf of even those who were out of possession. In "Mst. Namdara and 3 others v. Mst. Sahibzada and 2 others" (1998 SCMR 996) it was ruled to the effect that co-sharers hold the property for and on behalf of all the co-owners and any adverse entry in the revenue record for mere non-partition in the profits of the property shall not amount to ouster of a co-sharer and that brothers cannot legally claim adverse possession against sisters and, even lesser, their ouster. In "Fareed and others v. Muhammad Tufail and another" (2018 SCMR 139) it was observed to the effect that if the plea of oral gift could not be proved then mere claim of possession by donee was insufficient to maintain the claim of valid gift. The objection as to limitation being untenable is rejected as such.

14. One of the objections taken on behalf of the respondents was that the suit was initially filed by Mst. Kamalan Bibi and Mst. Lalo Bibi and that co-plaintiff Mst. Lalo Bibi did not prefer an appeal or file revision and, therefore, the right of petitioner to maintain the revision petition on the strength of evidence already produced, could not sustain. This objection is devoid of force.

Order XLI, Rule 4, C.P.C. envisaged that where there are multiple plaintiffs or defendants and decree appealed from proceeded on any ground common to all the plaintiffs or defendants, any one of the plaintiffs or defendants, as the case may be, could appeal from the whole decree and, thereupon, the appellate court could reverse or vary the decree in favour of all the plaintiffs or defendants. Order XLI, Rule 33, C.P.C also invests the court with the authority to make any order or pass any decree that ought to have been passed or made and to pass or make such further order or decree as the case may require and such authority could be exercised notwithstanding that the appeal was as to only part of the decree and may be exercised in favour of all or any of the parties, including respondents, though such respondents may not have preferred an appeal or file cross-objections. On the touchstone of the principle, the first appellate court and also this Court, could competently reverse the entire decree at the instance of one of the plaintiffs. In the instant case, in the revision petition that has been filed by one of the co-plaintiffs, the Court is not denuded of its jurisdiction to set aside the impugned decree raising common questions and founded on common grounds in respect of the petitioner herein and co-plaintiff in the suit. The objection raised is, therefore, held to be sans substance.

15. At the fag end of the case an objection was also raised that concurrent findings of fact could not be disturbed in revisional jurisdiction. This assumption is not well-founded. In "Asmatullah v. Amanat Ullah through Legal Representatives" (PLD 2008 SC 155) it was ruled to the effect that while exercising jurisdiction conferred by section 115, C.P.C. the Court could interfere when the concurrent findings of fact recorded, are based on insufficient or inadmissible evidence, misreading or non-consideration of material evidence, erroneous assumptions of fact or patent errors of law or reveal arbitrary exercise of power or abuse of jurisdiction or where the view taken is demonstrably unreasonable which is not in consonance with material evidence. Similar view was taken in "Abdul Sattar v. Mst. Anar Bibi and others" (PLD 2007 SC 609). In "Mst. Naziran Begum through Legal Heirs v. Mst. Khurshid Begum through Legal Heirs" (1999 SCMR 1171) it was observed to the effect that the findings on a question of fact arrived at by the first appellate court that are not based on evidence or are result of conjectures or fallacious appraisal of material evidence on record, are not immune from scrutiny by this Court pursuant to exercise of its powers under sections 100 or 115, C.P.C. In the present case as observed supra neither in the pleadings nor by the evidence produced, the constitutive ingredients of oral gift were established, and no admissible or credible evidence was adduced to either

support the plea of gift itself or to prove its actual transaction. The findings of the courts below are based on fallacious factual assumptions and misapplication of law. The view adopted also suffered from inconsistency with law declared by the superior courts on pivotal aspects on anvil. In the obtaining conditions the concurrently recorded findings could neither be considered sacrosanct nor immune to interference. The objection, therefore, raised being legally untenable, is repelled.

16. For the reasons hereinabove, this revision petition is accepted. Resultantly the judgments of the courts below are set aside, and the suit of the petitioner is decreed as prayed for with costs throughout.

ZH/K-25/L Petition accepted.

**2022 S C M R 933**
**[Supreme Court of Pakistan]**

**Present: Sajjad Ali Shah and Muhammad Ali Mazhar, JJ**

KHUDADAD---Appellant

Versus

Syed GHAZANFAR ALI SHAH alias S. INAAM HUSSAIN and others---Respondents

Civil Appeals Nos. 39-K to 40-K of 2021, decided on 7th April, 2022.

(Against the judgment dated 30.09.2019 passed by the High Court of Sindh in R.As. Nos. 134 and 135 of 2013)

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

----S. 54---Agreement to sell immoveable property---Proof---Record reflected that no independent witness was examined by the appellant/alleged vendee---One of the witnesses was brother of appellant whereas the other was stamp vendor, who deposed that agreement was written by his son---However, it was clear that the alleged agreement to sell did not bear the signatures of the stamp vendor or the person who had written the agreement to sell---Agreement to sell did not bear the CNIC numbers of attesting witnesses---Further there is no endorsement of the Assistant Mukhtiarkar, who was alleged to have attested the said agreement to sell for which the parties appeared before him and put their signatures in his presence---Appellant also failed to examine Assistant Mukhtiarkar and marginal witness as well as the person in whose presence Faisla (arbitration) was held between the parties to prove the veracity of the letters produced by the appellant in support of his case---Appellant tried to prove the payment of sale consideration which he made allegedly through cheques for which he only produced some counter foils which could not be treated as evidence of payment---Neither the appellant produced any Bank statement to prove encashment of said cheques, nor called any person from Bank to verify such payments, if any, made against the alleged cheques---Suit for specific performance of agreement to sell filed by appellant was rightly dismissed---Appeal was dismissed.

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

----First Sched., Art. 113---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of agreement to sell immoveable property, filing of---Limitation period for filing such suit explained.

The starting point of limitation under Article 113 of Limitation Act, 1908 for institution of legal proceedings enunciates two limbs and scenarios. In the first segment, the right to sue accrues within three years if the date is specifically fixed for performance in the agreement itself whereas in its next fragment, the suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor. Obviously, the first part refers to the exactitudes of its application when time is of the essence of the contract, which means an exact timeline was fixed for the performance arising out of contract/agreement, hence in this particular situation, the limitation period or starting point of limitation will be reckoned from that date and not from date of refusal, however, if no specific date was fixed for performance of agreement and time was not of the essence, then the right to sue will accrue from the date of knowledge about refusal by the executant.

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

----S. 44---Transfer by one co-owner---Co-sharer entering into an agreement to sell the entire immoveable property without consent of other co-sharers---Effect---Co-sharer cannot bind other co-sharers of the property and if a co-sharer enters into any deal or agreement for the entire land without the consent and authority of other co-sharers, then any such agreement would be illegal to the extent of the shares of the rest of the co-sharers.

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

----S. 3---Limitation---Court, duty of---Court is obligated independently rather as a primary duty to advert to the question of limitation and make a decision on it, whether such question is raised by a party or not.

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

----S. 107---Appellate Court, powers of---Scope---Appeal is continuation of proceedings wherein entire proceedings are again opened for consideration by the Appellate Court---Powers of Appellate Court mentioned under section 107,

C.P.C. are co-extensive with the powers and obligations conferred upon the Courts of original jurisdiction in respect of suits.

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

----Art. 84---Comparison of signature, writing or seal with others admitted or proved---Powers of the Court under Article 84 of the Qanun-e-Shahadat, 1984 to conduct a comparison of signatures or handwriting on documents stated.

Though it is undesirable that a Presiding Officer of the Court should take upon himself the task of comparing signature in order to find out whether the signature/writing in the disputed document resembled that of the admitted signature/writing but Article 84 of the Qanun-e-Shahadat Order, 1984 does empower the Court to compare the disputed signature/writing with the admitted or proved writing.

Ghulam Rasool and others v. Sardar-ul-Hassan and another 1997 SCMR 976; Mst. Ummatul Waheed and others v. Mst. Nasira Kausar and others 1985 SCMR 214 and Messrs Waqas Enterprises and others v. Allied Bank of Pakistan and others 1999 SCMR 85 ref.

Article 84 of the Qanun-e-Shahadat, 1984 is an enabling stipulation entrusting the Court to reassure itself as to the proof of handwriting or signature. The Court has all the essential powers to conduct an exercise of comparing the handwriting or signature to get to a proper conclusion as to the genuineness of handwriting or signature to effectively resolve the bone of contention between the parties. The real analysis is to ruminate the general character of the inscriptions/signatures for comparison and not to scrutinize the configuration of each individual letter. It is an unadorned duty of the Court to compare the writings in order to reach a precise conclusion but this should be done with extreme care and caution. From the dissimilarity and discrepancy of two signatures, Court may legitimately draw inference that one of the signatures is not genuine and when the Court is satisfied that the signature is forged and feigned then nothing prevents the Court from pronouncing decision against the said document.

Ghulam Rasool v. Sardar-ul-Hassan 1997 SCMR 976; Messrs Waqas Enterprises v. Allied Bank of Pakistan and 2 others 1999 SCMR 85 and Rehmat Ali Ismailia v. Khalid Mehmood 2004 SCMR 361 ref.

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

----Art. 79---Attestation of a document---Scope---Attesting witnesses---Fundamental and elemental condition of valid attestation of a document is that two or more witnesses signed the instrument and each of them has signed the instrument in presence of the executants---Said stringent condition mentioned in Article 79 of the Qanun-e-Shahadat, 1984 is uncompromising---So long as the attesting witnesses are alive, capable of giving evidence and subject to the process of Court, no document can be used in evidence without the evidence of such attesting witnesses---Provisions of Article 79 are mandatory and non-compliance therewith will render the document inadmissible in evidence---If execution of a document is specifically denied, the best course is to call the attesting witnesses to prove the execution---When the evidence brought forward by a party to prove the execution of a document is contradictory or paradoxical to the claim lodged in the suit, or is inadmissible, such evidence would have no legal sanctity or weightage.

Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241 ref.

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

----S. 115---Revisional powers of the High Court---Scope---High Court has a narrow and limited jurisdiction to interfere in the concurrent rulings arrived at by the courts below while exercising power under section 115, C.P.C.---Said power has been entrusted and consigned to the High Court in order to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities---Such power cannot be invoked against conclusion of law or fact which does not in any way affect the jurisdiction of the court but it is confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law---Interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in revisional jurisdiction, therefore, the scope of appellate and revisional jurisdiction must not be mixed up---Interference in the revisional jurisdiction can be made only in the cases in which the order passed or a judgment rendered by a subordinate Court is found to be 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.

Syed Shahenshah Hussain, Advocate Supreme Court and Mazhar Ali B. Chohan, Advocate-on-Record for Appellant.

Ghulam Mustafa Lakhani, Advocate Supreme Court and Ghulam Rasool Mangi, Advocate-on-Record for Respondent No. 1.

Ex-Parte Respondents Nos. 2 - 9.

Date of hearing: 15th February, 2022.

**JUDGMENT**

**MUHAMMAD ALI MAZHAR, J**.---These Civil Appeals by leave of the Court are directed against a common judgment dated 30.6.2019 passed by learned High Court of Sindh, in Revision Applications Nos. 134 to 135 of 2013, whereby both the Revision Applications were dismissed.

2. The short-lived facts of the case are as under:-

> The land in question was owned by Syed Gul Hasan Shah who died in 1998, thereafter, the land devolved on his legal heirs i.e. respondents Nos. 1 to 6. The appellant alleged that he was lessee of the land since 1996 for a period of five years on oral terms. After expiry of lease, the respondents No.1 agreed to sell the land to the appellant vide agreement to sell dated 27.2.2001 in consideration of Rs.50,69,750/-, out of which a sum of Rs.41,95,000/- was paid through cheques and some amount by cash till 15.3.2002. Despite willingness of the appellant to pay the balance sale consideration, the respondents Nos.1 to 6 were not coming forward to execute the sale deed, hence the appellant filed F.C. Suit No.12 of 2008 for specific performance of contract. The respondent Nos.1 to 6 also filed a F.C. Suit No.42 of 2008 against the appellant in the same court for possession, ejectment and mesne profits. The learned trial Court vide consolidated Judgment dated 29.11.2019, dismissed the Suit of the appellant whereas the suit filed by the respondents Nos. 1 to 6 was decreed. Being aggrieved, the appellant filed Civil Appeals Nos.5 and 6 of 2013 which were also dismissed by the Appellate Court vide consolidated Judgment dated 19.09.2013.

3. Leave to appeal was granted vide order dated 08.07.2021 in the following terms:

> "Learned ASC for the petitioner submits that while holding that the petitioner has not been able to prove the execution of the subject agreement, evidence of Muhammad Umar, who appeared before the Trial Court and categorically deposed that he also witnessed the execution of

the document and the document was signed in the presence of attesting witness has been ignored. He further submits that the evidence of Muhammad Umar along with evidence of one of the attesting witnesses was good enough to prove the document, however, such aspect of the case was not considered by the Trial Court as well as the Appellate Court, while rendering their judgments.

2. The point requires consideration. Leave is granted inter alia to consider the same..."

4 The learned counsel for the appellant argued that the appellant in his evidence proved his possession in the capacity of a lessee and also produced sale agreement and "Faisla" dated 4.5.2003 along with land revenue receipts and some other documents to justify his lawful occupation which aspect was not considered by the courts below. The suit for possession and mesne profit was filed by the respondents to frustrate the claim of specific performance of the agreement to sell. He further pleaded that pursuant to agreement, possession was handed over but nothing was addressed by the learned counsel on the point of limitation despite the position that the Trial Court and the Appellate Court both concurrently held that the suit for specific performance filed by the appellant was time barred. He further argued that the witness, Khaliq Dino, appeared in evidence who was one of the attesting witnesses to the sale agreement. It was further contended that the appellant also produced a copy of "Faisla of Taj Muhammad Shah" wherein respondent No. 2 agreed to refund the amount of sale consideration to the appellant and since he failed to pay the already received amount within the cutoff date as mentioned in the Faisla, therefore, the respondents Nos.1 and 2 both orally agreed again to sell out the land in question to the appellant independent of the agreement to sell. It was further averred that on 24.10.2010, an order was passed by the Trial Court for sending sale agreement dated 27.2.2001, receipts, Faisla and other documents to a handwriting expert to verify the signatures of respondents Nos.1 and 2, but the said Order was not complied with by the Trial Court.

5. The learned counsel for the respondents argued that neither the appellant was lessee nor in occupation of land in question. It was further contended that after the death of Syed Gul Hassan Shah, there was no implied authority by the legal heirs to sell the land. The respondent No.1 neither issued receipts of any payment, nor agreed to sell the land to the appellant. The learned counsel further argued that the appellant never paid any amount

through postdated cheques nor any private Faisla (decision) agreed between the parties before Syed Taj Muhammad Shah or Syed Iqbal Hussain Shah on 04.05.2003 and all such documents are forged and fabricated. He further argued that neither the respondent No.2 signed or agreed to return any amount pursuant to the alleged private Faisla, nor the respondent No.1 ever signed any agreement to sell thus, on the face of it, his signature on alleged agreement to sell is forged. It was further averred that the respondent No.1 and respondent No.2 are co-sharers to the extent of 25 paisa share each and the remaining 50 paisa share belongs to respondents Nos.3 to 6, therefore the respondent No.1 was not lawfully entitled to sell the entire land as the land in issue is a joint property of the respondents which has not been partitioned.

6. Heard the arguments. **According to the sale agreement dated 27.1.2001 (Ex.69/J), the suit land was sold out to the appellant by the respondent/defendant No.1 for self, and on behalf of the respondents/defendants Nos.2 to 6 and the agreed date for execution and registration of sale deed was 15.3.2002. The appellant in his evidence deposed that he paid Rs.2,00,000/-, Rs.6,00,000/- and Rs.21,75,000/- to respondent/defendant No.1 and Rs.20,20,000/- to the respondent/ defendant No.2 through some cheques dated 24.03.2001 and 08.06.2001. He also produced some land revenue receipts, electricity bills, private Faisla dated 14.02.1998 and 4.5.2003, Sale agreement (Ex.69/J) and photocopy of legal notice dated 10.05.2006. In order to support his case, the appellant also examined Abdul Khalique, Muhammad Umar Abro and Zaheer Ahmed Abro. Whereas the respondent No.1 deposed that the appellant was appointed as Munshi to look after the suit land who had forcibly occupied the land and usurped the crops. He also deposed that the Sale Agreement and Faisla both are forged and fabricated documents and did not bear his signature. He also denied to have received any sale consideration. The respondent No.2 also denied his signature on the alleged Faisla dated 4.5.2003. The record reflects that no independent witness was examined by the appellant. PW Khalique Dino was brother of appellant whereas the PW Muhammad Umar was stamp vendor, who deposed that agreement was written by his son PW Zaheer Ahmed Abro. However, it is clear that Ex.69/J does not bear the signature of PW Zaheer Ahmed Abro as well as signature of Muhammad Umer Abro, being author of agreement to sell but he only identified the parties. The agreement to sell does not bear the CNIC numbers of attesting witnesses. Further there is no endorsement of the Assistant Mukhtiarkar, who is alleged to have attested the said agreement to sell on 27.02.2001 for which the parties**

**appeared before him and put their signatures in his presence. The appellant also failed to examine Assistant Mukhtiarkar and marginal witness Hashim Behrani, as well as Syed Taj Muhammad Shah in whose presence Faisla was held between the parties and Syed Sajjad Shah to prove the veracity of the letters produced by the appellant in support of his case. The appellant tried to prove the payment of sale consideration which he made allegedly through cheques for which he only produced some counter foils which could not be treated as evidence of payment. Neither he produced any bank statement to prove encashment of said cheques, nor called any person from bank to verify such payments, if any, made against the alleged cheques.**

7. One more important aspect that cannot be lost sight of is that the alleged agreement to sell was executed on 27.2.2001 in which a specific date was fixed for execution and registration of sale deed i.e. 15.3.2002 and the suit for specific performance was filed in the year 2008 whereas the suit should have been filed within three years from 15.3.2002. According to Article 113 of the Limitation Act 1908, a suit for specific performance may be filed within three years. For the ease of convenience, Article 113 of the Limitation Act is reproduced as under:-

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| 113. For specific performance of a contract. | [Three years] | The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. |

8. The starting point of limitation under Article 113 of Limitation of Act, 1908 for institution of legal proceedings enunciates two limbs and scenarios. In the first segment, the right to sue accrues within three years if the date is specifically fixed for performance in the agreement itself whereas in its next fragment, the suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor. Obviously, the first part refers to the exactitudes of its application when time is of the essence of the contract, which means an exact timeline was fixed for the performance arising out of contract/agreement, hence in this particular situation, the limitation period

or starting point of limitation will be reckoned from that date and not from date of refusal, however, if no specific date was fixed for performance of agreement and time was not of the essence, then the right to sue will accrue from the date of knowledge about refusal by the executant. The learned counsel made much emphasis that a legal notice was tendered to the vendor on 10.05.2006 and, in the reply, the respondent No.1 denied the execution hence the starting point of limitation will commence from the date of refusal which argument is not based on a correct exposition of the law. It was further articulated by him that, in the part performance of alleged agreement, the possession was handed over hence the suit could not be treated as time barred, but again this argument is also misconceived. The plea of part performance could not be established by the appellant in the Trial Court that the possession was handed over in terms of alleged agreement to sell. Throughout the proceedings, the respondents put forward a clear defence that the agreement to sell was forged and neither any part payment was received nor the possession was handed over pursuant to alleged sale agreement. The respondents had also instituted their own civil suit against the appellant for restitution of possession of the land in question which was forcibly occupied by the appellant and also prayed for mesne profit from October 2007 till the ejectment of appellant. It is a well settled exposition of law that each case is to be decided on its own facts. It is also a ground reality that the respondent No.1 was not the sole owner of the land, but the respondents Nos.2 to 6 are also co-owners. The appellant in his suit for specific performance prayed for directions against the respondents Nos.1 to 6 to execute the sale deed in his favour. Nothing produced on record to show that the respondent No.1 was authorized to sign any agreement without the consent or authority of other co-owners for selling the entire land or even his own share in the un-partitioned land which is in joint ownership of respondents Nos. 1 to 6, hence the alleged agreement was prima facie beyond the mandate and spirit of section 44 of the Transfer of Property Act 1882. A co-sharer cannot bind other co-sharers of the property and if a co-sharer enters into any deal or agreement for the entire land without the consent and authority of other co-sharers, then any such agreement would be illegal to the extent of the shares of the rest of the co-sharers. Adverting to the aforesaid situation, the unsubstantiated plea of part performance of contract by means of alleged possession of land also does not apply, nor is it helpful to the appellant's case which otherwise cannot vitiate the law of Limitation or the period provided therein in order to enroute legal proceedings including the claim for specific performance of contract, nor does it extend the period of limitation for an unlimited period being unregulated or unhindered.

9. The objective and astuteness of the law of Limitation is not to confer a right, but it ordains and perpetrates an impediment after a certain period to a suit to enforce an existing right. In fact this law has been premeditated to dissuade the claims which have become stale by efflux of time. The litmus test therefore always is whether the party has vigilantly set the law in motion for the redress. The Court under section 3 of the Limitation Act is obligated independently rather as a primary duty to advert the question of limitation and make a decision, whether this question is raised by other party or not. The bar of limitation in an adversarial lawsuit brings forth valuable rights in favour of the other party. In the instant case, a specific issue on the question limitation was framed by the Trial Court and a similar question was also included in the Appellate Court's judgment as one of the crucial points for determination and not only the learned Trial Court but the Appellate Court both have concurrently held that the suit filed by the appellant was time barred and both the judgments were also affirmed by the learned High Court.

10. Despite holding the suit of the appellant as time barred by the courts below, he made much emphasis that the Trial Court had passed an order that after recording evidence of parties, the documents will be sent to hand writing expert for his opinion but that order was not complied with and non-compliance of the said order vitiates the entire proceedings. We have scanned the record and also gone through the impugned judgments which put on view that the Trial Court in exercise of powers conferred under Article 84 of Qanun-e-Shahadat Order, 1984 compared the signatures appearing on Ex.69/J and found certain dissimilarities. The Appellate Court in order to reach a just and proper conclusion, also compared the documents allegedly signed by the respondents Nos.1 and 2 with the signatures appended by them on the written statement, amended written statement, counter affidavit and Vakalatnama and found them to be different. The Trial Court, while exercising powers under Article 84 of Qanun-e-Shahadat Order, 1984 (Section 73 of the Evidence Act 1872), may compare the disputed signature of any person to the suit with his admitted signature on the documents available on record. The learned Trial Court found differences and dissimilarities between the disputed signature and admitted signatures. The learned Appellate Court also compared the disputed signature with that of admitted signature and found variations and incongruities between the disputed signature and admitted signature. Article 84 of Qanun-e-Shahadat Order, 1984 divulges and articulates wide-ranging and all-embracing powers to the Court to compare or match the disputed handwriting with admitted writings. Section 107, C.P.C. provides the power of Appellate Court which includes the power to determine

a case finally; to remand the case; to frame issues and refer them for trial; to take additional evidence or to require such evidence to be taken and under subsection (2), subject as aforesaid, the Appellate Court has same powers to perform as nearly the same duties as are conferred and imposed by C.P.C. on courts of original jurisdiction in respect of suits instituted therein. An Appeal is continuation of proceedings wherein entire proceedings are again left open for consideration by the Appellate Court and these powers are co-extensive with the powers and obligations conferred upon the original jurisdiction in respect of suits. So the Appellate Court was competent to undertake the exercise of comparison of signature without any reluctance if such comparison was indispensable or crucial to appreciate the other evidence available on record on the question of writings. It is the foremost obligation of the Court to make a decision as to whether the disputed signature and the admitted signature were signed by one and the same person and form its opinion. However, if the court comprehends that exercise of comparison of signature on the disputed document by the Court itself is too complicated, difficult or impossible and requires some skilled assessment, then obviously, the Court may have recourse to the opinion of a handwriting expert.

11. **Article 84 of the Qanun-e-Shahadat Order, 1984 is an enabling stipulation entrusting the Court to reassure itself as to the proof of handwriting or signature. The Court has all the essential powers to conduct an exercise of comparing the handwriting or signature to get hold of a proper conclusion as to the genuineness of handwriting or signature to effectively resolve the bone of contention between the parties. The real analysis is to ruminate the general character of the inscriptions/signatures for comparison and not to scrutinize the configuration of each individual letter. It is an unadorned duty of the Court to compare the writings in order to reach at precise conclusion but this should be done with extreme care and caution and from dissimilarity and discrepancy of two signatures, Court may legitimately draw inference that one of these signatures is not genuine and when the Court is satisfied that the signature is forged and feigned then nothing prevents the Court from pronouncing decisions against the said documents. In the case of Ghulam Rasool v. Sardar-ul-Hassan (1997 SCMR 976), the petitioner contended that the Trial Court was not justified recording its finding on the question of signature by comparing the signature in dispute with the admitted signature as it was required to refer the matter to the handwriting experts which contention was found untenable by this Court and it was held that it is within the power of Court to compare the**

**disputed signature with the admitted signature and to form its view though it is advisable to refer the matter to the handwriting expert. However, the fact that the same was not referred would not render the order/judgment legally infirm as to warrant interference. While in the case of Messrs Waqas Enterprises v. Allied Bank of Pakistan and 2 others (1999 SCMR 85), the Court held that it is settled principle that in certain eventualities the Court enjoins plenary powers to itself to compare the signature along with other relevant material to effectively resolve the main controversy. The learned counsel for the appellant referred to the case of Rehmat Ali Ismailia v. Khalid Mehmood (2004 SCMR 361), in which, while recording the contention of the counsel for the petitioner that the Court was not competent to compare the signature of the petitioner on the agreement of sale under Article 84 of Qanun-e-Shahadat, the Court held that the above provisions do empower the Courts to make the comparison of the words or figures so written over a disputed document to that of admitted writing/ signature and the Court could exercise its judgments on resemblance of admitted writing on record. It is true that it is undesirable that a Presiding Officer of the Court should take upon himself the task of comparing signature in order to find out whether the signature/writing in the disputed document resembled that of the admitted signature/writing but the said provision does empower the Court to compare the disputed signature/writing with the admitted or proved writing. Reference may be made to (i) Ghulam Rasool and others v. Sardar-ul-Hassan and another 1997 SCMR 976; (ii) Mst. Ummatul Waheed and others v. Mst. Nasira Kausar and others 1985 SCMR 214 and (iii) Messrs Waqas Enterprises and others v. Allied Bank of Pakistan and others 1999 SCMR 85.**

12. **Article 79 of the Qanun-e-Shahadat Order 1984, (Section 68 of the Evidence Act, 1872) is germane to the proof of execution of document required by law to be attested which cannot be used as evidence until "two attesting witnesses" at least are 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 fact this Article is reproduction of Section 68 of the Evidence Act, 1872 with the difference that, under it only one attesting witnesses was required to prove the document rather than two. The evidence recorded in the Trial Court reflects that the appellant produced his brother PW Khaliq Dino as attesting witness of the agreement to sell but another attesting witness Hashim son of Allah Warrayo Behrani was not produced nor any**

**justification or reason of not calling him was assigned. The PW Muhammad Umar, the vendor, only identified the parties whereas the Ex.69/J does not bear the signature of PW Zaheer Ahmed Abro. The omission or oversight of not calling both the attesting witnesses is detrimental and adversative to the admissibility of the document. The attestation and execution both have distinct characteristics. The execution of document attributes signing in presence of attesting witnesses including all requisite formalities which may be necessary to render the document valid. While the fundamental and elemental condition of valid attestation is that two or more witnesses signed the instrument and each of them has signed the instruments in presence of the executants. This stringent condition mentioned in Article 79 is uncompromising. So long as the attesting witnesses are alive, capable of giving evidence and subject to the process of Court, no document can be used in evidence without the evidence of such attesting witnesses. The provision of this Article is mandatory and non-compliance will render the document inadmissible in evidence. If execution of a document is specifically denied, the best course is to call the attesting witnesses to prove the execution. When the evidence brought forward by a party to prove the execution of a document is contradictory or paradoxical to the claim lodged in the suit, or is inadmissible, such evidence would have no legal sanctity or weightage. In the case of Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others (PLD 2011 SC 241), the Court held in paragraph 8 that the command of the Article 79 of the Qanun-e-Shahadat Order, 1984 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequences of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court,**

**no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. It was further held that the scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfill and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute. In the case of Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639), the Court held that: "Attesting witness was the one who had not only seen the document being executed by the executant but also signed same as a witness. Person who wrote or was 'scribe' of a document was as good a witness as anybody else, if he had signed the document as a witness (Emphasis supplied) No legal inherent incompetency existed in the writer of a document to be an attesting witness to it". Whereas in the case of N. Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 507), it was held that: "Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest." In Badri Prasad and another v. Abdul Karim and others (1913 (19) IC 451), it was held: "The evidence of the scribe of a mortgage deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed."**

13. The Trial Court and Appellate Court rightly held that the appellant failed to prove the agreement to sell and Faisla in terms of Article 79 of Qanun-e-Shahadat Order 1984. The High Court has a narrow and limited jurisdiction to interfere in the concurrent rulings arrived at by the courts below while exercising power under section 115, C.P.C. These powers have been entrusted and consigned to the High Court in order to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities which cannot be invoked against conclusion of law or fact which do not in any way affect the jurisdiction of the court but confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law, but interference for the mere fact that the appraisal of evidence may suggest

another view of the matter is not possible in revisional jurisdiction, therefore, the scope of the appellate and revisional jurisdiction must not be mixed up or bewildered. The interference in the revisional jurisdiction can be made only in the cases in which the order passed or a judgment rendered by a subordinate Court is found to be 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.

14. The concurrent findings of three courts below are neither based on any misreading or non-reading of evidence nor suffering from any illegality or material irregularity affecting the merits of the case. As a result of above discussion, both the Civil Appeals are dismissed with no order as to cost.

MWA/K-8/SC Appeals dismissed.

**2022 S C M R 1068**
**[Supreme Court of Pakistan]**

**Present: Maqbool Baqar, Munib Akhtar and Qazi Muhammad Amin Ahmed, JJ**

HAQ NAWAZ and others---Appellants

Versus

BANARAS and others---Respondents

Civil Appeal No. 221 of 2018, decided on 15th September, 2021.

(Against the judgment dated 28.11.2017 of the Lahore High Court, Multan Bench passed in R.S.A. No. 8 of 1998)

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

----S. 215---Power of Attorney---Purported agent transferring property to his own sons without consent of principal---Illiterate village and pardanasheen lady deprived of her immoveable property---Father of plaintiffs, acting as an attorney for an old illiterate village lady, transferred her land (suit land) to the plaintiffs through a purported oral sale mutation---Legality---Purported vendor was an old illiterate village dweller, with ill health; she was not able to even move on her own, and had been carried to the Registrar's office for the execution of the power of attorney by someone---Plaintiffs' father i.e. the purported attorney, while deposing before the Trial Court, also has not denied the suggestion that she was a pardanashin lady; it was not even pleaded that she received any independent advice and/or that contents of the power of attorney were read over and explained to her before she executed it---Stance of the lady throughout had been that she appointed the plaintiffs' father, who was her tenant in occupation, as her attorney, merely to manage the affairs of her land and for nothing more, and therefore, given the status of the lady, it was imperative for the plaintiffs to have demonstrated and proved that at the time of the execution of the power of attorney, she was fully conscious of the fact that the document also contained power to sell and that the entire document was read out and explained to her fully and truly, and further that she executed it under an independent advice---Plaintiffs also had to prove that the lady was fully aware and conscious of the consequences and implications of executing the said document---However neither did they prove, nor even pleaded any of it, therefore, it could not be held that plaintiffs' father was in fact authorized by the lady to sell the suit land---Attorney could not lawfully make transfer of a property under agency in his own name, or for his benefit,

or in favour of his associates, without explicit consent of the principal, and in the event he did so, the principal, under the mandate of section 215 of the Contract Act, 1872 had a right to repudiate such transaction---In any case the power of attorney, whatever its worth was admittedly revoked by the lady through revocation deed dated 05-9-1974, thus on 14.10.1974, the date on which plaintiffs' father purportedly transferred the suit land, he no more remained attorney of the lady, and stood denuded of whatever power he purportedly enjoyed thereunder---Transfer of the suit land by plaintiffs' father was without authority and was of no legal effect, thus, the same was rightly annulled by the revenue authorities---Appeal was dismissed.

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

----S. 12---Suit for specific performance---Agreement to sell immoveable property---Proof---Purported vendee failed to mention the date and venue of the purported transaction---Two witnesses in whose presence the sale consideration was paid to the purported vendor, contradicted each other on material details---Neither the relevant roznamcha rapt, nor the purported sale mutation, made mention of any written agreement---Stamp paper did not bear the name of the purported vendee and was purchased in the name of someone else---Neither the said purchaser was produced nor was the vendor of the stamp paper examined---Relevant register of the stamp vendor was also never summoned, and more crucially the witnesses examined in respect of the said agreement did not mention the date thereof---Suit for specific performance of agreement to sell was dismissed---Appeal was dismissed, in circumstances.

Moulvi Anwar-ul-Haq, Advocate Supreme Court for Appellants.

Ex parte for Respondent Nos. 1 - 7.

Anwar Mobin Ansari, Advocate Supreme Court for Respondents Nos.8 - 10.

Date of hearing: 15th September, 2021.

**ORDER**

**MAQBOOL BAQAR, J**.---Assailed through the above appeal was the judgment of the Lahore High Court, whereby the respondents Nos.8 to 10's regular second appeal against the concurrent Judgments of the fora below was allowed.

2. The dispute mainly was with regard to the sale of the land owned by Mst. Channan Jan, the predecessor in interest of respondents Nos.1 to 7. The impugned sale was affected by Ghulam Rasool, the predecessor in interest of appellants Nos.1 and 2, who on 14.10.1974, as attorney of Mst. Channan Jan, transferred the land in favour of his sons, the appellants Nos.1 and 2, through oral sale mutation No. 61.

3. The mutation, upon being challenged by Mst. Channan Jan, was cancelled by the concerned Assistant Commissioner/Collector on 30.4.1975. The appeal filed by the appellants Nos.1 and 2 against the said cancellation was dismissed by the concerned Additional Commissioner on 25.10.1975. However instead of pursuing the matter before the revenue hierarchy any further, the appellants Nos.1 and 2 on 30.10.1975 filed a suit, seeking to be declared owners of the suit land on the basis of the aforesaid oral sale mutation, though the same, as noted above, had already been cancelled. The said appellants however in the alternative sought a decree for specific performance of an agreement to sell dated 02.9.1974. They claimed that in transferring the suit land in their favour, Ghulam Rasool, who was their father, and a tenant of Mst. Channan Jan, in respect of the suit land, acted under and in terms of a General Power of Attorney executed and registered by Mst. Channan Jan in his favour on 17.2.1973. According to said appellants, Ghulam Rasool had on 02.9.1974 entered into an agreement to sell the suit land with Mst. Channa Jan for a sale consideration of Rs.40,000/-.

4. It is an admitted fact that Mst. Channan Jan was an old illiterate village dweller, with ill health. The lady was not able to even move on her own, and had been carried to the Registrar's office for the execution of the power of attorney by someone. Ghulam Rasool, the purported attorney, while deposing before the trial Court, also has not denied the suggestion that she was a parda nashin lady. It was not even pleaded that she received any independent advice and/or that contents of the power of attorney were read over and explained to her before she executed it.

5. Mst. Channan Jan's stance throughout has been that she appointed Ghulam Rasool, who was her tenant in occupation, as her attorney, merely to manage the affairs of her land and for nothing more, and therefore, given the status of the lady, it was imperative for the appellants Nos.1 and 2 to have demonstrated and proved that at the time of the execution of the power of attorney, she was fully conscious of the fact that the document also contained power to sell and that the entire document was read out and explained to her

fully and truly, and further that she executed it under an independent advice. They had also to prove that the lady was fully aware and conscious of the consequences and implications of executing the said document. However neither did they prove, nor even pleaded any of it. It therefore cannot be held that Ghulam Rasool, was in fact authorized by Mst. Channan Jan to sell the suit land. The impugned sale/transfer was thus liable to be set-aside on this ground alone. In any view of the matter, since admittedly, the power of attorney did not specifically authorized Ghulam Rasool, to convey the property to his sons, or for that matter to any of his near ones, nor has he been able to prove that, he was otherwise so authorized. The impugned sale mutation was liable to be cancelled as rightly done by the revenue hierarchy. Since long it is well established that an attorney cannot lawfully make transfer of a property under agency in his own name, or for his benefit, or in favour of his associates, without explicit consent of the principal, and in the event he does so, the principal, under the mandate of section 215 of the Contract Act, has a right to repudiate such transaction. Mst. Channan Jan having disowned the subject transaction, the same was rightly annulled as noted above.

6. In any case the power of attorney, of whatever worth it was having admittedly been revoked by Mst. Channan Jan through revocation deed dated 05.9.1974, and thus on 14.10.1974, the date on which Ghulam Rasool purportedly transferred the suit land, he no more remained attorney of the lady, and stood denuded of whatever power he purportedly enjoyed thereunder. The transfer of the suit land by Ghulam Rasool was without authority and was of no legal effect.

7. **Although as noted above, the appellants Nos.1 and 2's case as initially presented before the trial Court, through their plaint dated 30.10.1975, simply was that their father, being attorney of Mst. Channan Jan, on 02.9.1974, entered into an agreement to sell the suit land with them and thereafter transferred the lands in their favour through mutation No.61 attested on 14.10.1974. There was absolutely no mention of any sale agreement between their father Ghulam Rasool and the lady. The plaint was thereafter amended twice firstly on 04.3.1981 and then on 21.2.1985, however still there was no mention of any sale between the lady and Ghulam Rasool. It was only through third amended plaint filed on 03.1.1987, that the said appellants introduced a new story claiming that Mst. Channan Jan had in fact orally agreed to sell the land to Ghulam Rasool for an amount of Rs.40,000/- and it was upon payment of the said sale consideration amount that she executed the general**

**power of attorney dated 17.2.1973 in favour of Ghulam Rasool, to enable him to pay the outstanding dues in respect of the suit land so that proprietary rights therein may be conferred on her, and the land may then be transferred accordingly. The story as can be seen from the forgoing was so introduced, by the appellants Nos.1 and 2 to enable them to plead that since the power of attorney was coupled with interest the same could not have been lawfully revoked. However in the first place the appellants Nos.1 and 2 could not have been allowed to set up and plead a case different from what they initially narrated and pleaded, secondly, this subsequent plea even otherwise did not inspire confidence, it was merely a vague assertion, bereft of necessary details. The said appellants did not even mentioned as to when, where and in whose presence the land was orally sold to Ghulam Rasool as claimed by them. The alleged purchase by Ghulam Rasool and the claim that the power of attorney was executed for consideration also does not find support even from the written statement filed by Ghulam Rasool in the case. Ghulam Rasool has through his written statement which he filed on 03.2.1976 simply conceded the claim of the appellants Nos.1 and 2 as set out in their original plaint dated 30.10.1975, which plaint, as noted earlier, made no mention of any sale in favour of Ghulam Rasool or of any payment by him to Mst. Channan Jan as a consideration therefor. Ghulam Rasool in his evidence recorded at an earlier stage of the trial as PW-4, simply deposed that Mst. Channan Jan had appointed him as her attorney, and as such he sold the suit land to the appellants Nos.1 and 2. However subsequently, after the above amendment in the plaint, when Ghulam Rasool was examined as PW-7, he claimed to have purchased the property himself and having himself paid the agreed sale consideration of Rs.40,000/- to Mst, Channan Jan in presence of witnesses Allah Wasaya (PW-5) and Allah Dawaya (PW-6), as well as of the son and daughter of Mst. Channan Jan, namely, Banaras and Khadija, the respondents Nos.1 and 5 respectively, but he still failed to mention the date and venue of the purported transaction. Although the said two witnesses who were cousin brothers of Ghulam Rasool, were examined by the appellants Nos.1 and 2, however their evidence failed to lend any credence to the appellants' stance, as they contradicted each other in material details.**

8. The appellants Nos.1 and 2 have thus miserably failed to establish that the suit land was sold by Mst. Channan Jan to Ghulam Rasool and/or that the power of attorney was executed in consideration of the price of land paid by Ghulam Rasool and/or that the same was otherwise coupled with interest.

The power of attorney also does not say so. No strings were therefore attached to the power of attorney that preventing Mst. Channan Jan from revoking it before Ghulam Rasool acted thereunder, which she did, before the purported oral sale mutation in favour of the appellants Nos.1 and 2 was recorded. The said mutation was therefore wholly without authority, illegal and ineffective and therefore was rightly cancelled.

9. **As regards the agreement to sell dated 02.9.1974, it may be noted, that despite the fact that Mst. Channan Jan had denied entering into any agreement with/or selling her suit land to Ghulam Rasool, and further that neither the relevant roznamcha rapt, nor the purported sale mutation, makes mention of any written agreement. However, and despite the fact that the stamp paper does not bear the name of Ghulam Rasool, and was rather purchased in the name of someone else. Neither the purchaser was produced nor was the vendor of the stamp paper examined, or was the relevant register of the stamp vendor summoned, and more crucially the witnesses examined in respect of the said agreement did not mention the date thereof. The above gives credence to the respondents' stance that the agreement was manipulated subsequently in order to defeat the consequences of the cancellation of power of attorney and is therefore of no avail to the appellants.**

10. So far as the contention of the appellants that sale of the suit property in favour of respondents Nos.8 to 10 is hit by doctrine of lis pendens, as envisaged by the provision of section 52 of the Transfer of Property Act, 1882 which provides that a suit land cannot be transferred by any party to the suit, so as to effect the rights of the other party thereto, under any decree or the order which may be made in the suit. As noted above, the said restriction is subject to the outcome of the suit, thus the fate of such sale/transfer depends upon the outcome of the suit. Whereas in the present case, since purported sale in favour of the appellants Nos.1 and 2 has been held to be illegal and without authority, they have no locus standi to object to the sale of the land in favour of respondents Nos.8 to 10. The appeal is dismissed.

MWA/H-5/SC Appeal dismissed.

**2022 S C M R 1054**
**[Supreme Court of Pakistan]**

**Present: Sajjad Ali Shah, Sayyed Mazahar Ali Akbar Naqvi and Muhammad Ali Mazhar, JJ**

NASIR ALI---Petitioner

Versus

MUHAMMAD ASGHAR---Respondent

Civil Petition No. 3958 of 2019, decided on 2nd February, 2022.

(Against the judgment dated 25.09.2019 Lahore High Court, Lahore, in Civil Revision No.140 of 2016)

**(a) Punjab Land Revenue Act (XVII of 1967)---**

----S. 42---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Dispute over authenticity of a mutation document---Impugned document of mutation mentioned the name, signature and Identity Card (ID) numbers of the respondent as vendor and the petitioner as vendee---Signature and ID card number of marginal witness as well as the identifying Lambardar were also mentioned therein, while the Naib Tehsildar attested the mutation---In evidence Lambardar who identified the parties before the Revenue Officer recorded his statement---Patwari produced the record and also confirmed the factum of entry of relevant Rapt Number by the then Patwari---Revenue Officer also confirmed and verified the physical appearance of the parties before him including the identification of parities by the Lambardar and appearance of Pattidar; he also testified that the respondent/plaintiff admitted before him the sale transaction, receipt of sale consideration and alienation in favour of petitioner/defendant---Testimony of respondent/plaintiff was based on falsehood and deceptiveness---On one hand he deposed that at the relevant time when the impugned mutation was recorded or attested he was bed ridden due to a leg fracture, hence his personal appearance before the Officers of Revenue Authority was not possible for signing the document, while on the same date another mutation was recorded duly signed by him which was never challenged by him and he failed to dispute said mutation recorded on the same date without any plea of hospitalization or being bed ridden on account of leg fracture---No proof of his indisposition was produced on record along with medical record or otherwise---According to respondent/ plaintiff, Revenue Officers defrauded him but he failed to mention as to what legal action was taken by him against the said Revenue Officers---At the time of

institution of suit, he claimed to be in possession but he failed to prove his possession while the petitioner/defendant discharged his burden of proof---Section 42 of Specific Relief Act, 1877 expressly permitted the plaintiff to ask for further relief but in the present case neither relief of possession was claimed nor the cancellation of mutation document as a consequential relief---Hence, mere suit for declaration without claiming the consequential relief of possession and cancellation of mutation entry was otherwise not maintainable---Petitioner/defendant had established the transaction, its execution as well as the genuineness of impugned mutation.

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

----Art. 117---Burden of proof---Scope---"Onus probandi", meaning of---If no evidence is produced by the party on whom the burden is cast, then such issue must be found against him.

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

----S. 42--- Qanun-e-Shahadat (10 of 1984), Art. 117---Deceitful transaction---Burden of proof on plaintiff---Burden of proof for a deceitful transaction rests normally on the person who impeaches it---In a suit for declaration alleging that the sale was fictitious, the onus is on the plaintiff to prove the same---Where the evidence of plaintiff is self-contradictory and not confidence inspiring then he must fail and where the case is doubtful, the decision must be given in favour of defendant rather than the plaintiff.

**(d) Administration of justice---**

----Plaintiff must succeed on the strength of his own case rather than the weakness of the defendant.

**(e) Evidence---**

----Witness, credibility of--- Quality of evidence--- Credibility and trustworthiness of a witness mandates to be tested with reference to the quality of his evidence which must be free from suspicion or distrust and must impress the court as natural, truthful and convincing.

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

----S. 42---Dispute over authenticity of a mutation document---Suit for declaration---Consequential relief---Scope---Mere declaration of title cannot be sought without asking for possession as a consequential relief---Consequential relief means a substantial remedy in accordance with the decree of declaration, if prayed for---Consequential relief denotes the relief which is an essential outcome to the declaratory relief prayed for---Plaintiff is not permitted to seek a mere declaration without consequential relief when it is necessary for the full and complete enjoyment of the property---Object of this condition is to avoid the multiplicity of suits and litigation.

Secretary to Government (West Pakistan) now N.W.F.P. Department of Agriculture and Forests, Peshawar and 4 others v. Kazi Abdul Kafil PLD 1978 SC 242; Ali Muhammad and another v. Muhammad Bashir and another 2012 SCMR 930 and Dr. Faqir Muhammad v. Maj. Amir Muhammad and others 1982 SCMR 1178 ref.

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

----O. II, R.2---Omission to sue for one of several reliefs---Effect---Law does not permit a second suit if a right to the plaintiff is available at the time of filing of the suit---Second suit in such like situation is otherwise barred under Rule 2 of Order II, C.P.C.

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

----S. 115---Revisional jurisdiction of the High Court---Scope---Scope of revisional jurisdiction is limited to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or if the conclusion drawn therein is perverse or conflicting to the law---High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising powers under section 115, C.P.C.

Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Atiq-ur-Rehman v. Muhammad Amin PLD 2006 SC 309 and Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630 ref.

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

----S. 115---Revisional jurisdiction of the High Court---Scope---Scope of appellate and revisional jurisdiction must not be confused since there is a difference between the misreading, non-reading and mis-appreciation of the evidence---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.

**(j) Punjab Land Revenue Act (XVII of 1967)---**

----S. 42---Mutation---Scope and Burden of proof---Any person who is acquiring title through mutation, the burden of proof of proving transaction embodied in the mutation is upon him---Mutation itself does not confer or extinguish any right or title and the persons deriving title thereunder have to prove that the transferor did part with the ownership of the property, the subject of mutation in favour of the transferee and that the mutation was duly entered and attested---If the mutation on the basis of which right in the property is claimed, is disputed, the onus of proving the correctness of mutation and genuineness of the transaction contained therein would be on the party claiming right on the basis of such mutation.

Hakim Khan v. Nazeer Ahmed Lughmani and 10 others 1992 SCMR 1832 and Niaz Ali and 16 others v. Muhammad Din through Legal Heirs and 13 others PLD 1993 Lah. 33 ref.

Mian Muhammad Hussain Chotya, Advocate Supreme Court for Petitioner.

Mian Muhammad Hanif, Advocate Supreme Court for Respondent.

Date of hearing: 2nd February, 2022.

**JUDGMENT**

**MUHAMMAD ALI MAZHAR, J**.---This Civil Petition for leave to appeal is directed against the judgment dated 25.09.2019, passed by the learned Lahore High Court in Civil Revision No. 140/2016, whereby the Civil Revision was allowed and the concurrent findings recorded by the Trial Court and Appellate Court in their respective judgments and decrees were set aside.

2. The summation and recapitulation of the case is as under:-

"The respondent filed a suit for declaration and alleged that he is owner in possession of land measuring 19-Marlas, in Khewat No.29 of Mouza Imli Moti, Tehsil Depalpur, District Okara. Basically, he had challenged the oral Sale Mutation No. 1222 dated 31.05.1994 recorded in favour of petitioner and the suit was instituted on 18.04.2002 after 07 years 10 months. The petitioner claimed to have been in possession and also installed therein a saw machine with electricity connections etc. Out of divergent pleadings of the parties, issues were settled and finally vide judgment and decree dated 26.07.2012, the suit filed by the respondent was dismissed which was assailed in an appeal before the learned Additional District Judge, Depalpur, District Okara, which was also dismissed vide judgment and decree dated 25.11.2015. Both the impugned judgments and decrees were challenged by the respondent in Civil Revision before the Lahore High Court which was allowed vide impugned judgment.

3. The learned counsel for the petitioner argued that the impugned judgment of the learned High Court is based on misreading and non-reading of evidence recorded in the Trial Court and without any cogent reason or justification, the learned High Court upset the concurrent findings recorded by two courts below. It was further argued that the transfer of land through mutation under section 42 of the Land Revenue Act, 1967 is a valid method of transfer of land. It was next contended that the suit was time barred, which important aspect was also ignored by the learned High Court. He further argued that the respondent personally appeared before the competent authority at the time of recording mutation of land in question in favour of the petitioner and ample evidence was available on record to confirm the presence of the respondent at the time of mutation.

4. The learned counsel for the respondent argued that after denial of the transaction of sale, recording of Rapat Roznamcha and attestation of impugned mutation, the onus of proving the same was shifted on to the petitioner. It was further contended that the Rapat Roznamcha No.336 dated 21.04.1994 was illegally incorporated and the Mutation No.1222 dated 31.05.1994, which mentions the presence of vendor/respondent, the vendee/petitioner and Muhammad Jahangir P.W.2, was a result of misapplication of law. The respondent during pendency of suit moved an application for amendment of the plaint which was partly allowed but the amendment for seeking possession of land was declined by the Trial Court. It was further argued that P.W.2, Muhammad Jahangir, fully supported the

version of the respondent. It was further averred that mutation was recorded in violation of section 42 of the Land Revenue Act, and mere availability of signatures of the parties, identifier and witnesses on the reverse side of the mutation cannot be made basis for sanction of the mutation. It was further contended that the original Mutation No. 1222 dated 31.05.1994 was not produced before the Trial Court but only attested photo copies were produced at the time of recording of evidence. The learned counsel fully supported the impugned judgment and concluded that the respondent neither appeared before the Tehsildar nor recorded his statement as he was admitted in the hospital due to an accident whereby his leg was fractured.

5. Heard the arguments. **The meticulous scrutiny of the evidence led by the parties in the Trial Court unequivocally demonstrates, inter alia, that the impugned document of Mutation No. 1222 recorded on 31.05.1994 was exhibited as Ex-P3 which translucent the name of respondent, Muhammad Asghar and his signature as well as his Identity Card number as vendor, whereas the name, signature and Identity Card number of Nasir Ali (petitioner) is also mentioned as vendee. The signature and ID card number of Muhammad Jahangir is mentioned as marginal witness. Khurshid Ahmad, Lambardar, identified the parties whose signature with ID card number are also mentioned while Niaz Ahmad, Naib Tehsildar, Depalpur attested this mutation. In the evidence Lambardar, Khurshid Ahmad, who identified the parties before the Revenue Officer recorded his statement. The Patwari produced the record and also confirmed the factum of entry of Rapt No.336 dated 21.4.1994 by the then Patwari. The Revenue Officer, Niaz Ahmad also confirmed and verified the physical appearance of the parties before him including the identification of parities by Khurshid Ahmad, Lambardar and appearance of Muhammad Jahangir, Pattidar. He also testified that the respondent admitted before him the sale transaction, receipt of sale consideration and alienation in favour of petitioner (Nasir Ali). The respondent denied the impugned mutation and termed it as a fake and forged document on the plea that when impugned mutation was attested, he met with an accident and due to fracture in his leg, he was admitted in hospital and for this reason it was impossible for him to appear and endorse his signature on any document ratifying the mutation but throughout the evidence he was miserably failed to lead any evidence, nor was he able to produce any medical record to prove this assertion. Another Mutation Document No. 1220 was also attested on 31.5.1994 (same day) which was exhibited as Ex-D8 in the evidence of the lis to**

**expose that the respondent, on the same day, alienated other property in favour of Munawar Ahmad son of Noor Ahmad but neither was this mutation challenged, nor did the respondent take the plea that he was admitted in the hospital or bed ridden due to leg fracture rendering it impossible for him to appear physically for that mutation too. The Ex-D8 displays that the same Revenue Officer attested this mutation while Khurshid Ahmad, DW-2, Lambardar, identified the parties and Muhammad Jahangir was alluded to as marginal witness in this mutation as well. A forthright and candid manifestation of the evidence including the documentary evidence stridently articulates that the petitioner/ defendant had established the transaction, its execution as well as the genuineness of impugned mutation.**

**6. According to the Article 117 of the Qanun-e-Shahadat Order, 1984, if any person desires a court to give judgment as to any legal right or liability, depending on the existence of facts which he asserts, he must prove that those facts exist and burden of proof lies on him. The terminology and turn of phrase "burden of proof" entails the burden of substantiating a case. The meaning of "onus probandi" is that if no evidence is produced by the party on whom the burden is cast, then such issue must be found against him. The burden of proof for the deceitful transaction rests normally on the person who impeaches it. In a suit for declaration alleging that the sale was fictitious, the onus is on the plaintiff to prove the same. Where the evidence of plaintiff was self-contradictory and not confidence inspiring then he must fail and where the case is doubtful, the decision must be given in favour of defendant rather than the plaintiff. It is a well settled exposition of law that the plaintiff must succeed on the strength of his own case rather than the weakness of the defendant. The lawsuits are determined on preponderance or weighing the scale of probabilities in which Court has to see which party has succeeded to prove his case and discharged the onus of proof which can be scrutinized as a whole together with the contradictions, discrepancies or dearth of proof. It is the burdensome duty of the Court to detach the truth from the falsehood and endeavor should be made in terms of the well-known metaphor, "separate the grain from the chaff" which connotes and obligates the Court to scrutinize and evaluate the evidence recorded in the lis judiciously and cautiously in order to stand apart the falsehood from the truth and judge the quality and not the quantity of evidence.**

**7. The evidence led by the parties in the Trial Court makes it copiously and profusely translucent and cloudless that the respondent as plaintiff had failed to prove his case. His testimony was based on falsehood and deceptiveness. On one hand he deposed that at the relevant time when the impugned mutation was recorded or attested he was bed ridden due to leg fracture, hence his personal appearance before the Officers of Revenue Authority was not possible for signing the document, while on the same date another Mutation was recorded duly signed by him which was never challenged by him and he failed to dispute said mutation recorded on the same date without any plea of hospitalization or being bed ridden on account of leg fracture. No proof of his indisposition was produced on record along with medical record or otherwise. The Revenue Officers deposed that respondent personally appeared and signed the document before them and also admitted to have received the sale consideration. No application was filed in the Trial Court for sending the document for the opinion of handwriting expert if he took the stand that he did not sign the relevant documents. According to him, Revenue Officers defrauded him but the plaintiff/respondent failed to mention as to what legal action was taken by him against the said Revenue Officers. At the time of institution of suit, he claimed to be in possession but he failed to prove his possession while the petitioner/ defendant discharged his burden of proof. Later on the respondent allegedly applied for the relief of possession also in the same suit but his application was dismissed as informed by the learned counsel for the respondent but nothing has been placed on record whether any legal proceedings were instituted to challenge the order of dismissal of application allegedly passed by the Trial Court under Order VI, Rule 17, C.P.C. nor was any such order produced. The credibility and trustworthiness of the witness mandates to be tested with reference to the quality of his evidence which must be free from suspicion or distrust and must impress the court as natural, truthful and so convincing. "Falsus in uno, falsus in omnibus" is a Latin term which means "false in one thing, false in everything" which is a legal principle in common law that a witness who testifies falsely about one matter is not at all credible to testify about any other matter. This doctrine simply encompasses and footholds the weightage of evidence which the court may acknowledge in a given set of circumstances or situation and is more or less or as good as a rule of caution or permissible inference which is essentially reliant on the Court to decide, however the Court cannot plainly rely on this**

**doctrine to get rid of its arduous duty of analyzing the evidence en masse thoroughly so as to separate the falsehood from the truth.**

8. **Under the provisions of section 42 of the Specific Relief Act a person entitled to any legal character or to any right to property can institute a suit for declaratory relief in respect of his title to such legal character or right to property. The expression, legal character has been understood to be synonymous with the expression status. A suit for mere declaration is not permissible except in the circumstances mentioned in section 42 of the Specific Relief Act. The proviso attached to this Section clarifies that no Court shall make any declaration where the plaintiff, being able to seek further relief than mere declaration of title, omits to do so. Whereas under section 39 of the Specific Relief Act, any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, could cause him serious injury, may sue to have it adjudged void or voidable and the Court may, in its discretion, so adjudge it to be delivered up and cancelled. In the case in hand, the plaint reflects that the plaintiff/ respondent brought the lawsuit only for declaration and at the same time alleged that he is in possession of the property in question, while in the written statement the petitioner categorically stated that he purchased the property against consideration, mutation was also effected in his favour and he is enjoying the possession. As indicated in the plaint, the respondent was allegedly in possession, which raises the question why application was moved for adding a relief of possession. Nothing was alleged regarding how he went out of possession and if it was done, whether any remedy available under the law was availed including filing of complaint under the Illegal Dispossession Act. The possession of the petitioner was proved in the Trial Court and there was nothing on record to show that during pendency of the suit the petitioner secured the possession of the suit property. Section 42 of Specific Relief Act expressly permits the plaintiff to ask for further relief but neither relief of possession was claimed nor the cancellation of mutation document as a consequential relief. Hence, mere suit for declaration without claiming the consequential relief of possession and cancellation of mutation entry was otherwise not maintainable. A consequential relief means a substantial remedy in accordance with the decree of declaration, if prayed for. Mere declaration of title cannot be sought without asking for possession as consequential relief, but in this case relief for cancellation of mutation entry was also very significant which the plaintiff omitted**

**to apply for. The claim of mere declaration as to alleged title does not suffice. Consequential relief denotes the relief which is an essential outcome to the declaratory relief prayed for. The plaintiff is not permitted to seek a mere declaration without consequential relief when it is necessary to the full and complete enjoyment of the property. The object of this condition is to avoid the multiplicity of suits and litigation. In the case of Secretary to Government (West Pakistan) now N.W.F.P. Department of Agriculture and Forests, Peshawar and 4 others v. Kazi Abdul Kafil (PLD 1978 SC 242), this Court held that it is a common knowledge that a suit for the grant of a declaratory decree is filed under section 42 of the Specific Relief Act, 1877. However, one of the mandatory requirements of the said section is that if in a suit filed thereunder the plaintiff ought to have prayed for the grant of consequential relief but had failed to do so, then the suit filed by him would be incompetent. In the matter of Ali Muhammad and another v. Muhammad Bashir and another (2012 SCMR 930), this court held that the appellants have not sought cancellation of registered instruments in terms of Section 39 of the Specific Relief Act in the suit nor direction of their ejectment in suits have been sought. When confronted with this situation, the learned counsel for the appellants could not offer any plausible explanation except that he contended that the appellants had the right to file a separate suit for possession. Even this argument is without substance. The law does not permit a second suit if a right to the plaintiff is available at the time of filing of the suit. A second suit in such like situation is otherwise barred under Rule 2, Order II, C.P.C. In the case of Dr. Faqir Muhammad v. Maj. Amir Muhammad and others (1982 SCMR 1178), this Court held that under section 42 of the Specific Relief Act the petitioner was required to ask for all other reliefs, which were opened to him. The relevant prayer for consequential relief in the present case, as rightly pointed out by the learned High Court Judge, would have been for specific performance of the agreement. But the petitioner had not asked for it. Whereas in the case of Khalid Hussain and others v. Nazir Ahmad and others (2021 SCMR 1986), this Court considered the crucial feature determining which remedy the aggrieved person is to adopt. In case of a voidable document, for instance, where the document is admitted to have been executed by the executant, but is challenged for his consent having been obtained by coercion, fraud, misrepresentation or undue influence, then the person aggrieved only has the remedy of instituting a suit for cancellation of that document under section 39 of**

**the Act of 1877 and a suit for declaration regarding the said document under section 42 is not maintainable.**

9. It is well settled exposition of law that section 115, C.P.C empowers and mete out the High Court to satisfy and reassure itself that the order of the subordinate court is within its jurisdiction; the case is one in which the Court ought to exercise jurisdiction and in exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision. If the High Court is satisfied that aforesaid principles have not been unheeded or disregarded by the courts below, it has no power to interfere in the conclusion of the subordinate court upon questions of fact or law. The scope of revisional jurisdiction is limited to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or if the conclusion drawn therein is perverse or conflicting to the law. Furthermore, the High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 115, C.P.C. In the case of Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), this Court held that the provisions of section 115, C.P.C under which a High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities. In the case of Atiq-ur-Rehman v. Muhammad Amin (PLD 2006 SC 309), this Court held that the scope of revisional jurisdiction is confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law, but the interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in revisional jurisdiction. 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 affecting the merits of the case are not open to question at the revisional stage.

10. The learned counsel for the respondent relied on the case of Muhammad Akram and another v.Altaf Ahmad (PLD 2003 SC 688), in which this Court held that once a mutation is challenged, the party that relies on such mutation(s) is bound to revert to the original transaction and to prove such original transaction which resulted into the entry or attestation of such mutation(s) in dispute. The burden squarely lay on him to prove the transaction because the existence thereof has throughout been alleged by him in affirmative. He was bound to fail in the event of the non-proof of transaction. He also referred to the case of Rehmatullah and others v. Saleh Khan and others (2007 SCMR 729), in which this Court held that it is settled law that entries vin the mutation registers are by themselves not conclusive evidence of the facts which they purport to record. It is settled law that any person who is acquiring title through mutation, the burden of proof of proving transaction embodied in the mutation is upon him. It is also settled law that mutations by themselves do not create title and the persons deriving title thereunder have to prove that the transferor did part with the ownership of the property, the subject of mutation in favour of the transferee and that the mutation was duly entered and attested as law laid down by this Court in the case of Hakim Khan v. Nazeer Ahmed Lughmani and 10 others (1992 SCMR 1832) and Niaz Ali and 16 others v. Muhammad Din through Legal Heirs and 13 others (PLD 1993 Lahore 33). It is settled law that an attested mutation may carry a rebuttable presumption. See Karam Shah v. Mst. Ghulam Fatima and 3 others (1988 CLC 1812) and Ghulam Muhammad v. Mukhtar Ahmad and others (1992 MLD 1335). Mutation is to be proved through evidence of title. Whereas this Court in the case of Arshad Khan v. Mst. Resham Jan and others (2005 SCMR 1859) held that there is no cavil to the proposition that the presumption of truth is attached with the Revenue Record but this presumption is always rebuttable. This is settled law that the mutation itself does not confer or extinguish any right or title and if the mutation on the basis of which right in the property is claimed, is disputed, the onus of proving the correctness of mutation and genuineness of the transaction contained therein would be on the party claiming right on the basis of such mutation. While in the case of Muhammad Bakhsh v. Zia Ullah and others (1983 SCM 988), it was held that the entries of the revenue record like the Jamabandi do not provide the foundation of title in property but are mere items of evidence to prove title Wali Muhammad v. Muhammad Bux (AIR 1930 PC 91). They have

a presumption of correctness which is rebuttable. The moment during scrutiny one reaches the transaction on the basis of which a change in the revenue record has been brought about then it is not the record but the transaction itself, not the secondary source but the primary one, which becomes the foundation of all claims and rights. It is clear that in the two cases before us, the justification for the entries in the revenue record showing the plaintiffs as co-sharers or owners was an oral transaction of purchase given effect to by a mutation in contravention of Section 54 of the Transfer of Property Act. Such a transaction must satisfy the legal requirements and it is only when its conformity to law is established that title to property is created, legal rights and liabilities come into existence.

11. In our considerate view, the judicial precedents relied on by the learned counsel for the respondent are based on well settled expositions of law but the case in hand is distinguishable mainly for the reason that the petitioner/ defendant in the Trial Court fully proved the execution of mutation documents by the respondent in his favour including the factum of possession without any shadow of doubt. The Revenue Officers also appeared as witnesses and they fully supported the case of the petitioner in the Trial Court and testified that the respondent personally appeared and signed the relevant documents before them without any demur. After scanning and browsing the evidence comprehensible on record, we reached to an irresistible conclusion that the interference made by the High Court in exercise of powers conferred under section 115, C.P.C. in the concurrent findings recorded by the Trial Court and Appellate Court was unjustified and unwarranted. Neither the Courts below have ignored material evidence or acted without evidence or drawn wrong inferences or conclusions from proved facts by applying the law erroneously, nor do the findings recorded amount to a dearth of evidence or suffering from any jurisdictional error or perversity.

12. In the wake of above discussion, this Civil Petition is converted into Civil Appeal and allowed, the impugned judgment of the learned High Court is set aside and judgments and decrees passed by the learned Trial Court and Appellate Court are restored.

MWA/N-9/SC Appeal allowed.

# Criminal Cases

**P L D 1957 Supreme Court (Ind.) 297**

**Present : Bhagwati, Sinha and Kapur, JJ**

NISAR ALI-Appellant
Versus
THE STATE OF UTTAR PRADESH-Respondent

Criminal Appeal No. 150 of 1956, decided on 14th February 1957.

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

**-----**S. 154-First Information Report made by co-accused-Can neither be used as evidence against him at his own trial not to corroborate or contra dict other witnesses-Evidence Act (1 of 1872), Ss. 157 & 145.

A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 157, Evidence Act, or to contra dict it under section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, not to corroborate or contradict other witnesses.

**(b) Criminal trial------**

**----**Duty of prosecution-Evidence Act (I of 1872), Ss. 101-104-Criminal Procedure Code (V of 1898), Ss. 252 & 286.

It is the cardinal principle of criminal jurisprudence that innocence of an accused person is presumed till otherwise proved. It is the duty of the prosecution to prove the prisoner's guilt subject to any statutory exception.

Woolmington v. The Director of Public Prosecutions 1935 App. Cas. 462 rel.

**(c) Evidence Act (I of 1872)-------**

**-----**Maxim : Falsus in uno falsus in omnibus-Merely a rule of caution-Criminal Procedure Code (V of 1898), S. 367.

The maxim : "falsus in uno falsus in ominbus" has not received general acceptance ; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases the testimony

may be disregarded and not that it must be dis regarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circum stances but it is not what may be called "a mandatory rule of evidence".

Daulat Ram Prem, Senior Advocate (P. G. Agarwal, advocate with him) for Appellant.

Gayan Chand Mathur and C. P. Lal, Advocates for Respondent.

**JUDGMENT**

**KAPUR, J.-------**The appellant along with one Qudrat Ullah was tried for the murder of one Sabir. The latter was tried under section 302 read with section 114, Penal Code, for abet ment, and the former under section 302, Penal Code, Both the accused were acquitted by the learned Sessions Judge of Pareilly. But the State took an appeal to the Allahabad High Court against the appellant only and the judgment of acquittal in his case was reversed and he was convicted under section 302, Penal Code and sentenced to `transportation for life. Against the judgment of the High Court the appellant has brought this appeal by Special Leave.

The facts which have given rise to the appeal are that Sabir was murdered on 11th May 1951 at about 6-30 p.m. The first information report was made by Qudrat Ullah the other accused at 6-45 p.m. the same day, i.e., within about 15 minutes of the occurrence. The prosecution case was that there was an exchange of abuses between the deceased and the appellant near the shop of the first informant, Qudrat Ullah. The cause of the quarrel was that on the evening of the occurrence while Qudrat Ullah was sitting on his shop and the deceased was sitting just below the shop, the appellant came out of his house and on seeing him, the deceased asked him as to why he was in such a "dishevelled condition", which annoyed the appellant and gave rise to an exchange of abuses. On hearing this noise, the prosecution witnesses arrived at the spot and saw the appellant and the deceased grappling with each other. The appellant is stated to have asked Qudrat Ullah to hand over a knife to him which Qudrat Ullah did; this knife is `Exh. II', with which the appellant stabbed the deceased and then fled away. As a result of the injuries the deceased fell down in front of Qudrat Ullah's shop; some witnesses have stated that he fell on the wooden plank in front of the shop. Qudrat Ullah picked up the knife which had been dropped by the appellant, put the deceased in a rickshaw and took him to the hospital from where he went to the police station and made the first information report. An

objec tion has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 157, Evidence Act, or to contradict it under section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corrobo rate or contradict other witnesses. In this case, therefore, it is not evidence.

The Sub-Inspector went to the spot, started investigation and arrested the appellant the same evening at his house The post-mortem examination of the deceased showed injuries on the person of the deceased and, according to the doctor, death was due to shock and haemorrhage on account of the punctured wound in the chest, causing injuries to the lungs and these injuries could be caused with a sharp edged weapon.

The appellant and the deceased both belong to a sect of Jogis. Evidence discloses that the deceased and the appellant were quite friendly with each other, and so were the deceased and Qudrat Ullah, who is a butcher and had a shop which is a part of his house. Adjacent to the shop is the house of the appellant. Eye witnesses of the occurrence were Yad Ali, P. W. 1. Banne, P. W. 2 and Muhammad Ahmad, P. W. 3. Having been told by the sister of the deceased as to the occurrence, Ashraf, P. W. 4 came to the spot later and found the deceased lying unconscious. Shakir. P. W. 5, younger brother of the deceased, on arriving near the shop of Qudrat Ullah heard the appellant and the deceased exchanging abuses, but was not a witness of the assault as just at that time he had gone, at the request of Qudrat Ullah, to fill his Chillums for the Hooka and when he came back he found the deceased lying unconscious and the appellant running away towards his house.

The evidence of Yad Ali, P. W. 1, is that he heard an exchange of abuses between the deceased and the appellant and when he moved about 4 or 5 paces he saw them grappling with each other. The appellant had the deceased "in his grip" he asked Qudrat Ullah to hand over a knife to him which the latter did and with it the appellant stabbed the deceased and then went away to his house. The statement of Banne is similar and so is the statement of Muhammad Ahmad, P. W. 3. This evidence was not accepted by the learned Sessions Judge and he acquitted both the accused. The State took an appeal only against the appellant which was allowed by the High Court. It held:

> "We may concede that the eye-witnesses have falsely implicated Qudrat Ullah by deposing that he handed over his knife to the respondent on his

> demand. There was no enmity between him and Sabir and he had no motive to get him killed by the respondent. It does not at all appear probable that after abetting the murder of Sabir he at once took him on a rickshaw to the hospital and from there went at once to the police station and lodged a report against the respondent. This conduct of Qudrat Ullah is so incon sistent with the part said to have been played by him in the occurrence that we have little hesitation in rejecting the evidence about the part played by him."

The High Court, however, accepted the testimony of the eye-witnesses as against the appellant's guilt and observed.

> "We are satisfied that the prosecution has fully establish ed the case against the respondent. There is not the slightest doubt about his guilt. The presumption of inno cence has been fully rebutted by the prosecution. The case against him does not become doubtful merely because the learned Sessions Judge said that there was a doubt about his guilt".

The learned Judges also came to the conclusion that the view taken by the learned trial Judge was one "which no reasonable person could have taken. It was a wholly erroneous view of the evidence which has resulted in gross miscarriage of justice inasmuch as a murderer escapes punishment". In the circum stances of the case and considering that there was some provocation, the High Court sentenced the appellant to `trans portation for life.

There is a passage in the judgment of the High Court which appears to us to be disconsolate and indicative of a wrong approach in deciding the guilt of an accused person. Although the learned Judges recognised the principle that the onus was not on the accused, yet one of the observations is such that it comes perilously near to putting the burden on the accused if it does not actually do so. The High Court has said:

> "The respondent himself did not have the courage to say, that he did not find them at the spot. If he were innocent, he must have come out of his house immediately on hearing the noise and must have known who was present there and who was not."

This passage is so destructive of the cardinal principle or criminal jurisprudence as to the presumed innocence of an accused person till otherwise proved that it has become neces sary to reiterate the rule stated by eminent authorities " ..... that it is the duty of the prosecution to prove the prisoner's guilt . . . . . subject

to any statutory exception". Woolmington v. The Director of Public Prosecutions (1935 App. Cas. 462).

It was next contended that the witnesses had falsely impli cated Qudrat Ullah and because of that the Court should have rejected the testimony of these witnesses as against the appellant also. The well-known maxim falsus in uno falsus in omnibus was relied upon by the appellant. The argument raised was that because the witnesses who bad also deposed against Qudrat Ullah by saying that he had handed over the knife to the appellant had not been believed by the Courts below as against him, the High Court should not have accepted the evidence of these witnesses to convict the appellant. This maxim has not received general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. C All that it amounts to is that in such cases the testimony may be disregarded and not that it must be disregarded. One American author has stated:

> " . . . . . the maxim is in itself worthless ; first in point of validity . . . . . and secondly, in point of utility because it merely tells the jury what they may do in any event, not what they must do or must not do, and there fore, it is a superfluous form of words. It is also in practice pernicious ..... .

(Wigmore-on Evidence, Vol. III. para. 1008).

The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circum- D stances but it is not what may be called "a mandatory rule of evidence."

Counsel for the appellant drew our attention to a passage from an unreported judgment of the Privy Council, Chaubaria Singh v. Bhuneshwari Prasad Pal.

"The defendants' own evidence and that of several of his witnesses is of no use to him. He cannot contend that any Court of law can place reliance on the oath of people who have admittedly given false evidence upon the other branches of the case."

This passage is a very slender foundation, if at all, for conferring on the doctrine the status of anything higher than a rule of caution and the Privy Council cannot be said to have given their weighty approval to any such controversial rule which has been termed as "worthless", "absolutely false as a maxim of life" and "in practice pernicious" in works of undoubted authority on the law of evidence. Wigmore on Evidence, Vol. III, para. 1008.

The High Court was not unmindful of what the witnesses stated as to Qudrat Ullah's part in the commission of the offence and having taken into consideration, it said:

> "While the learned Sessions Judge was right in acquitting Qudrat Ullah, be was completely wrong in acquitting the respondent of whose guilt there was not the slightest doubt. The direct evidence made out a clear case against him and there was no sound reason for disregarding it".

After discussing the evidence of the witnesses and the discrepancies pointed out by the appellant the High Court held "there is not the slightest doubt about his guilt".

It was because of the above two contentions raised by counsel for the appellant and because it was a case of reversal of a judgment of acquittal that we allowed counsel to go into the evidence which he analysed and drew our attention to its salient features and to the discrepancies in the statements of witnesses and the improbabilities of the case ; but we are satisfied that the learned Judges were justified in coming to the conclusion they did and the view of the trial Judge was rightly displaced. Upon a review of the evidence of the prosecution witnesses we have come to the conclusion that the appellant was rightly convicted.

The appeal is, therefore, dismissed and the judgment of the High Court is affirmed.

K. B. A. Appeal dismissed.

**P L D 1957 Supreme Court (Pak.) 297**

**Before M. Shahabuddin A. R. Cornelius, Muhammad Sharif,**

**and Amiruddin Ahmad, JJ**

MUHAMMAD AKHTAR-Appellant
Versus
THE STATE-Respondent

Criminal Appeal No. 46 of 1957, decided on 24th October 1957.

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore, dated the 14th of February 1957, in Criminal Revision No. 552 of 1956).

**(a) Judgment**---------Criminal case-Appellate Court's judgment mere reproduction of trial Court's judgment it, considerable portions-Judgment of appellate Court improper and of doubtful validity-Criminal Procedure Code (V of 1898), Ss. 367 and 424.

Where the Sessions Judge's judgment in appeal was for the most part a verbatim copy of considerable portions of the trial Court's judgment and the contribution made by the Sessions Judge to the ascertainment of facts upon appreciation of the evidence appeared to be negligible:

Held, that a judgment of this kind delivered by an appellate Court could not be regarded as proper and was of doubtful validity. It did not represent an honest discharge of its duty by the appellate Court.

**(b) Evidence**-------Criminal case-Evidence of eye-witnesses disbelieved against three of four accused and part characterised as "exaggerated"-Fourth accused cannot be convicted without any confirmatory circumstance.

The prosecution evidence in a case under sections 323 and 324, P. P. C. composed of the statements of eye-witnesses was disbelieved against three of the four accused persons and the High Court had not relied upon it to reach a finding as to whether one of the accused or the injured person was the aggressor. The High Court had also disbelieved another incident in the occurrence and described it as "exaggerated", two of the accused, in the High Court's opinion, having been included "to rope" in as many members of the family of the accused as possible.

Held, that the conviction of the fourth accused, in tine absence of any confirmatory circumstances, could not be upheld on the evidence of the same witnesses whose versions were found to be false or unreliable in regard to substantial ques tions.

Held, further, that in a case under sections 323 and 324, P. P. C. the principle enunciated in Muhammad and Sher v. Crown P L D 1954 F C 84, which was a murder case was none the less directly applicable.

Muhammad and Sher v. Crown P L D 195., F C 84 and Bhalu v. Crown P L D 1955 F C 432 ref.

Nasim Hassan Shah Advocate Supreme Court, in structed by virasat Hussain Naqvi, Attorney, for Appellant.

S. A. Mahmud Advocate, Supreme Court, instructed by Ijaz Ali, Attorney for Respondent.

Date of hearing: 24th October 1957.

**JUDGMENT**

**CORNELIUS, J.--------**This case clearly falls within the principle laid down by the Federal Court of Pakistan in two recent cases. The earlier case that of Muhammad and Sher (PLD1954FC84) from which it will be sufficient to quote the following short extract:-

> "Where for an offence of murder, the evidence of the prosecution witnesses is wholly rejected as unreliable so far as most of the accused are concerned, it is not safe to rely upon the evidence of the same witnesses, for the purpose of convicting the remaining accused in the case for that offence in the absence of confirmatory circum stances."

The convictions in the present case are for offences of simple hurt punishable under sections 323 and 324, P. P. C. but they principle enunciated above is none the less directly applicable on that account. The allegations in this case too were of a joint assault by three persons, viz. Muhammad Anwar and his sons Muhammad Akhtar and Muhammad Asghar, upon an enemy Chiragh Din, in the course of which-

(1) Chiragh Din had a tooth knocked out as the result of a slap delivered by Muhammad Anwar;

(2) Chiragh Din was then seized by Muhammad Anwar and his son Muhammad Akhtar and dragged from the spot towards their own house;

(3) in the assault and dragging Muhammad Asghar also assisted;

(4) in the course of the dragging, Muhammad Akhtar gave blows with a knife to Chiragh bin on his thigh ; and

(5) Chiragh Din was rescued before he could be dragged into the house of his assailants.

The trial Court convicted all three accused persons, whose appeal to the Sessions Court was rejected.

We note here, with regret, and wish to draw the attention of the High Court to the fact that the Sessions Judge's judg ment is for the most part a verbatim copy of considerable portions of the trial Court's judgment. In our typed foolscap record, the Sessions Judge's judgment covers 9 pages. Of this matter except for 9 lines at the commencement and 18 lines at the end, the remaining 7 pages are copied, word by word, from the trial Court's judgment. In this copy, there are reproduced several paragraphs commencing with such words as the followings:

"The learned counsel for the defence has laid considerable stress on the fact that etc., etc.,

"it is again contended by the learned counsel for the defence that etc., etc."

The arguments referred to were presented before the trial Court and it surprises us to find them being represen ted as having been placed before the Sessions Court, in the very words used by the trial Court. The con tribution made by the Sessions Judge to ascertainment of facts upon appreciation of the evidence appears to be negligible. A judgment of this kind delivered by an appellate Court cannot be regarded as proper and is of doubtful validity. It does not represent an honest discharge of its duty a by the appellate Court.

The case next came before a learned Single Judge of the High Court sitting in revision, who acquitted Muhammad Anwar and Muhammad Asghar, but confirmed the convictions ,and sentences of the present appellant Muhammad Akhtar upon the following basis of reasoning. The learned Judge found that the eye-witnesses besides being partisan were discrepant in their accounts of the occurrence, and had moreover left two matters unexplained, viz., (1) that no tooth of Chiragh Din had in fact been knocked out at the spot and (2) that

Muhammad Anwar had received injuries at or about the sams time when Chiragh Din was injured. He went on however to say---

"The picture, I can gather from the facts of this case, appears to be that an altercation and a fight took place between Chiragh Din P. W. and Muhammad Anwar accused in the course of which they gave each other first blows. Muhammad Akhtar joined in the fight later on and gave a blow with a knife to Chiragh Din P. W. The story that the accused dragged Chiragh Din to the threshold of their house appears to be exaggerated, because the occurrence took place during day time and in presence of so many residents of the mohalla who were none too friendly towards the accused. The name of Muhammad Afzal, another son of Muhammad Anwar accused, was also included in the list of Chiragh Din's assailants, but the trial Magistrate discharged him because there was no satisfactory evidence that he had joined in the fight. In my view the same applies to the case of Muhammad Asghar accused and his name was included to rope in as many members of Muhammad Anwar's family as possible.

The defence version that Chiragh Din and some of his companions tried to attack Muhammad Anwar by forcing entry into their house appears to be equally exaggerated although two witnesses were examined to support it.

Muhammad Anwar had himself suffered six injuries during the course of the occurrence and it cannot be safely determined whether he or Chiragh Din P. W. was the aggressor. So far as Muhammad Asghar is concerned, as mentioned above, he does not appear to have participated in the fight resulting in any injury to Chiragh Din P. W. On this view of the facts of this case, I allow the petition of Muhammad Anwar and Muhammad Asghar accused and acquit them. The petition of Muhammad Akhtar who had already been dealt with very leniently in the matter of sentence is, however, dismissed."

It is clear that the prosecution evidence composed of the statements of eye-witnesses was disbelieved against three of the four accused persons (including Muhammad Afzal who was discharged by the trial Court.) The learned Judge could not rely upon it to reach a finding as to whether, in the initial fight which he had found to have taken place, Chiragh Din or Muhammad Anwar was the aggressor. He disbelieved the story of the dragging of Chiragh Din, which he described as an "exaggeration". He thought both Muhammad Afzal and Muhammad Asghar had been falsely accused in order "to rope in as many members of Muhammad Anwar's family as possible." Yet, on the evidence of the same witnesses whose versions were found to be false or unreliable in regard to these substantial questions, the learned Judge found it possible to maintain the

convictions of Muhammad Akhtar not only for R the knife injuries but also for the other hurt falling under section 323, P. P. C. There is here a clear departure from the principle enunciated in the case of Muhammad and. Sher cited above, for no confirmatory circumstance has been sown to exist which could serve to corroborate the prosecution case against Muhammad Akhtar. In a case of this kind, it is essential for the safe dispensation of justice that one or more confirmatory circumstances should exist, in order to satisfy the Court of the guilt of one or a few persons out of a large number, against whom evidence has been given which has been found to be generally defective, by reason of partisanship or otherwise.

The second precedent case is that of Bhalu (P L D 1955 F C 432), where six persons had been brought to trial on charges of rioting, hurt and attempted murder. It was there observed as follows:--

> "We think that the learned Judge having disbelieved the evidence of- the prosecution witnesses on the main facts of the incident, could not have acted upon the theory of a sudden fight which was not supported by any evidence. The fact that the prosecution case was false and exaggerated in material particulars did not necessarily lead to the in ference that there must have been a sudden fight between the parties, because on the rejection of the prosecution version, the hypothesis of self-defence still remained a possi bility. In these circumstances we feel that on the findings arrived at by the learned Judge as to the credibility of the prosecution witnesses, the proper conviction". to be made was one of acquittal and not of conviction .

In the present case as well, there is a theory accepted which, taken with the doubt as to whether, in the first instance, Chiragh Din or Muhammad Anwar was the aggressor might have given rise to a plea of self-defence in favour of Muhammad Akhtar. It is however unnecessary to press that analogy further.

It is sufficiently clear that on the findings reached in the High Court, the safe dispensation of justice required that as to Muhammad Akhtar's convictions, they should not be confirmed, while those of his co-accused were being set aside, unless there was a confirmatory circumstance of some kind to corroborate true prosecution evidence as against him. There being no such circumstance, the convictions cannot be main tained, and we hereby allow the appeal of Muhammad Akhtar and direct that he be acquitted.

A.H. Appeal allowed.

**P L D 1958 Supreme Court (Pak.) 169**

**Present: M. Shahabuddin A. C. J., A. R. Cornelius, Muhammad Sharif and Amiruddin Ahmad, JJ**

ABDUL HAYEE KHAN-Appellant
Versus
(1) THE STATE and (2) Ch. GHULAM JILANI-Respondents

Criminal Appeal No. 32 of 1957, decided on 18th February 1958.

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore, dated the 18th November 1954, in Criminal Original No. 20 of 1954).

**(a) Criminal Procedure Code (Y of 1898),** S. 497-Magistrate's power to grant bail-Not restricted except as appears from Section itself-High Court order leaving question of bail to be decided by trial Magistrate "after some evidence is recorded"-Order does not rule out new grounds for bail arising in course of proceedings Delaying tactics of complainant in matter of producing evidence Magistrate admitting accused to bail-Whether guilty of contempt of High Court.

Held, that a Magistrate derived his power of granting bail from section 497 of the Criminal P. C., and no restraints upon that power can be recognized except such as appear in the section itself.

In a case under section 436, P. P. C., the High Court, on the accused' s application for bail, made an order leaving the question of bail "to be decided by the trial Magistrate after some evidence is recorded".

The Prosecuting Agency, however, having first pressed the charge under section 436 (non-bailable), had later, apparently altered its view, when it was conceded that the case was a fit one for bail. Consequently the only obstacle in the way of grant of bail by the trial Magistrate was thought to lie in the wording of the order made by the High Court.

Held, that, that order could not be interpreted as if it was the source of power in the Magistrate in regard to the grant of bail.

The order was not intended to lay down that the grant of bail by the Magistrate should be subject to the condition that he should have recorded some evidence. The complainant certainly understood the order in this sense, and for a

considerable time, attempted to frustrate the power of the trial Magistrate to grant bail by not allowing evidence to be recorded. In these circum stances, the duty of the Court clearly was to take such steps as were necessary to ensure that the complainant should not succeed in his tactics and, in releasing the accused on bail, the Magistrate acted in accordance with that duty.

The High Court order did not rule out grounds that might a :_- : i the course of the proceedings.

In the circumstances of the case, bail could have been granted the Magistrate, provided he was satisfied that there was no reasonable ground for thinking that the offence lay under section 436, P. P. C., and for this purpose it was not a necessary condition that any evidence should have been recorded in the case.

Consequently there was no such "flagrant disregard" of the order of the High Court as had been made the foundation of the conviction for contempt.

**(b)Judgment-Of High Court-**Interpretation by subordinate Courts-Competence-Extent-Different interpretations-Whether Sessions Judge's interpretation binding on Magistrate-Duty of Magistrate to differ with an expression of respect for view of Sessions Judge.

Held, that the view that the Sessions Judge's interpretation of a High Court order is binding on- a Magistrate as a Court of inferior jurisdiction, is one which it is not possible to sustain. A judg ment of a High Court is indeed binding upon all subordinate Courts, but when its meaning is not entirely clear, in the circum stances of a particular case, it is open to the subordinate Courts to attempt to interpret the words employed, and to give effect to that interpretation which seems to them to be the most reasonable. In such an exercise there is no distinction of superiority or infe riority of Courts, and each Court subordinate to the High Court must be regarded as having equal competence in the IV 1-ticulir respect.

Where the High Court order, on a bail application, left "the question of bail to be decided by the trial Magistrate after some evidence is recorded", and the Sessions Judge declared that tic High Court order meant that the trial Magistrate should not grant bail without recording evidence, but the trial Magistrate, thinking that the order did not rule out grounds that might arise in course of proceedings, released the accused on bail before recording any evidence

Held, that the Magistrate's was a more accurate view of the order and that the interpretation put on it by the Sessions Judge was incorrect.

Held further, that the Magistrate would have been \N ell advised to have added an expression of respect for the views of the Sessions Judge, from which he was differing. The obligation to do so is not a legal one, but is not to be regarded as any the less real, for that reason. It rests on a long tradition of judicial courtesy, and in the case of an inferior Court, the duty emphasised by the fact of subordination. A default in the important respect invites disapproval, and even correction, ill '11 appropriate case.

**(c) Contempt-**Proceedings against subordinate Courts fu, something having appearance of indiscipline-Not desirable.

The contempt supposed to have been committed by a sub ordinate Court in flagrant disregard of an order of the High Court belongs to a very special class, confined as it is to presiding officer of the Court: a contempt falling in this class would ordinarily be by itself sufficient to justify the removal of the Judge or Magis trate at fault. The offence must be of a grave character, involving

the commission of injustice or oppression or some irregularity of a serious character to justify imposition of the drastic procedure and penalties of a contempt proceeding. There have been cases where a subordinate Judge has apparently acted in contravention of an order of a superior Court, but upon an erroneous construc tion of an obscure instrument and in such cases the superior Court has refrained from taking action in contempt. Where what is found is something having the appearance of indiscipline, the powers of superintendence vested in the High Court are quite sufficient to enable restoration of a proper state of affairs, without recourse to the severe process of contempt.

Blackstone's Commentaries (1876) Vol. IV at p. 295 ; Halsbury's Laws of England 3rd Ed. Vol. VIII at p. 19 and Mungean v. Wheatley (1851) 16 Exch. 88 ref.

Manzur Qadir, Senior Advocate, Supreme Court Karam Elahi Chauhan, Advocate Supreme Court with him instructed by M. A. Rahman, Attorney for Appellant.

S. A. Mahmud, Advocate Supreme Court for Respondent.

Date of hearing : 18th February 1958.

**JUDGMENT**

**CORNELIUS, J.**-The appellant in this case is one Khan Abdul Hayee Khan and the order against which he has appealed is one made by a learned Judge of the West Pakistan High Court imposing upon him a fine of Rs. 100 and costs in the sum of Rs. 50 for a judicial act performed by him in the capacity of section 30 Magistrate at Lyallpur which had been held to amount to contempt of the High Court.

Briefly, the facts are as follows. A case of, arson was reported at the Kotwali in Lyallpur on the 22nd June 1954, at 9-30 p.m. The date and hour of the occurrence are given as the 21st June 1954 at 1 p.m. The distance to the thana is negligible. The report was made by one Ghulam Jilani, a merchant of Lyallpur and was to the effect that during his absence from Lyal1pur on the previous day, a person named Qasam Beg, also a merchant of Lyallpur, had entered the compound of his house and had thrown some incendiary substance into his garage, thus setting fire to his car. This he had done out of resentment at having been refused the loan of the car some days before. The crime was not witnessed by any person, but Qasam Beg had been seen coming out of the compound by the complainant's servant Mangoo and his neighbour Abdur Rahman. Damage to the extent of Rs. 2,500 had been done to the car. The charge was laid under section 436, P. P. C., for which it is necessary that there should have been an intention to cause destruction of a building, and the maximum punishment specified is transportation for life. Arson involving property other than buildings is punishable under section 435, P. P. C., with a maximum of 7 years' imprison ment.

Qasam Beg was arrested and on the 1st July 1954, the Additional District Magistrate of Lyallpur granted him bail by means of the following short order:

"Arguments heard. No damage to house caused. Previous enmity mentioned in the F. I. R. Only car damaged. May be bailed out in the sum of Rs. 2,000 with one surety of the like amount".

This order was set aside and the bail was cancelled by the Sessions Judge on the 15th July 1954 by means of an order which reads as under :-

> "I disagree with the reasoning given by the learned A. D. M. in releasing the respondent on bail. The car which was set on fire and was damaged, was lying inside the garage and, there fore, it cannot be said that he had no intention to cause damage to the garage, in which the car was lying. I

accordingly accept the petition and set aside the order of the learned A. D. M. and ca4pel the bail under section 498, Criminal P. C. granted to the respondent. He should be taken into custody."

The reference to section 498, Criminal P. C., requires some explanation. The offence charged being under section 436, P. P. C. the Additional District Magistrate had no jurisdiction to grant bail if there appeared reasonable grounds for believing that the accused was guilty of that offence. But clearly he considered that the offence should be limited by the damage caused, which was only to the car, and in that case, he would have jurisdiction to grant bail under section 497, Criminal P. C., and not under section 498 as stated in the order of the Sessions Judge. The Sessions Judge appears to have thought that the possibility of damage being caused to the garage brought the offence under section 436, P. P. C. On that basis a proper order might have been that the order granting bail made by the Additional District Magistrate was void, being without jurisdiction. Yet to bring the accusation under section 436, P. P. C.; it was not enough to find that "it cannot be said that he had no intention to cause damage to the garage". And there was of course the other question whether there were reasonable grounds for believing that Qasam Beg was the person who set fire to the car. It may conveniently be mentioned here that the eventual result of the case was the discharge of the accused under section 253, Criminal P. C., on the ground that the trial Court found it difficult to believe the pro secution story, based on the evidence of Mangoo and Abdur Rahman and was impressed moreover by certain evidence that on the day in question Qasam Beg was not in Lyallpur. The Magistrate took into account also the long delay in the making of the initial report. After the discharge of the accused no further steps appear to have been taken either by the Prosecuting Agency or by the complainant to continue the case against Qasam Beg.

Against the order of the Sessions Judge dated the 15th July 1954, an application was moved in the High Court at Lahore which was dismissed on the 23rd July 1954, by means of the following short order :-

".I would leave the question of bail to be decided by the trial Magistrate after some evidence is recorded. Dismissed,"

In the meantime, on 7th August 1954, the case had been entrusted to the appellant Khan Abdul Hayee Khan for trial the order directed that the accused should present himself before the transferee Court on that very day, that two witnesses Abdur Rahman and Ghulam Jilani who were present should be directed to appear in that Court-on the same day. Pursuant to this order Qasam

Beg was produced in Police custody before Khan Abdul Hayee Khan. Abdur Rahman was not present. When the Magistrate started to record the evidence of the other witness, namely, Ghulam Jilani, counsel for the defence objected the ground that his case would be prejudiced by evidence being pro duced piece-meal. The Court accepted the objection and adjourned the case to the 1st September 1954, directing that non-bailable warrants should issue for Abdur Rahman and that Ghulam Jilani be bound over to appear. On the same day Qasam Beg applied for bail, pleading that the case was being delayed through willful non-appearance of prosecution witnesses and that the Id-ul-Azha was approaching. It was stated also that the case was false and was based on business jealousy. The Magistrate adjourned the case to the 9th August 1954 for the purpose of certain enquiries. That day was declared a holiday and when the case came up on the following day, a fresh application was made by Qasam Beg stating that the witnesses had previously absented themselves wilfully after due service, that the case was totally false, that the applicant was a respectable business-man and the day being Id day he should be released to celebrate the festival with his family. On the last mentioned ground, the Magistrate granted interim bail till the 11th August and on the following day after hearing the parties, he confirmed the bail. In this order, he mentioned the delay in lodging the initial report, the existence of previous enmity and the intimacy of the eye-witnesses in the case with the complainant. At the same time, he declared that while he was not in a position fully to appreciate the stand taken by the defence, yet there was a new ground for considering the grant of bail namely that all the principal witnesses had been duly served for the 7th August 1954 and they had made default in appearance which had resulted in the case being adjourned to a longer date. Accordingly, he directed that the accused should continue to remain at large under the bail order made on the previous day.

It appears that the order made in the High Court was not before Khan Abdul Hayee Khan when he made his order on the 11th August 1954. The Public Prosecutor moved the Sessions Judge. or cancellation of the bail who accepted the application on the 13th August 1954 by means of an order in which he said:-

"A bail application was presented before the Honourable the Chief Justice and he also dismissed the application. He, how ever, remarked that he would leave the question of bail to be decided upon by the trial Magistrate after some evidence is recorded. The learned trial Magistrate to whom the case had been transferred by the Additional District Magistrate, Lyallpur, released Qasam Beg on bail without recording any evidence at all."

In my opinion he acted contrary to the orders of Honourable the Chief Justice. I accordingly cancel the bail granted to Qasam, Beg and order that he should be taken into custody forth with. Qasam Beg was next produced in custody before Khan Abdul Hayee Khan on the 1st September 1954. This was the date which had been fixed on the 7th August 1954 for examination of the prosecution witnesses. The complainant immediately placed before the Court a prayer that his own statement should not be recorded as he had made an application to the Additional District Magistrate for transfer of his case to some other Court. His other witnesses were not present. Khan Abdul Hayee Khan acceded to the request that Ghulam Jilani's statement should not be recorded on that date. In a written order, he noted that the complainant had declared that he had no intention to move the High Court under section 526, Criminal P. C., for transfer of the case. He noted also that there had been negligence on the part of the pro secution agency in serving the witnesses for the prosecution. A prayer for bail was again made on behalf of Qasam beg by his counsel, on the ground that the complainant was deliberatlt avoiding giving evidence himself and was taking no pains to bring his witnesses to Court. In the words of Khan Abdul Hayee Khan's order, "The learned counsel submits that when the complainant himself wishes postponement of the trial and; the witness are not forthcoming, his client should not be made to suffer an uncalled for confinement in the judicial lock-up and he should he admitted to bail." Counsel appearing for the State conceded that the case on its merits was a fit one for the grant of bail, but that the order of the High Court dated the 23rd July 1954, required that sonic evidence should be recorded before the grant of bail could be considered. The defence counsel replied that since it was at the wish of the complainant that evidence was not being reorded on that day, there was good ground for the exercise of power it, favour of the accused.

Khan Abdul Hayee Khan accepted the contention of the defence, and proceeded to observe as follows :-

"The evidence could have been, but for the unwillingness on the part of the complainant, recorded today . . . . . I am of the view, that the order of Hon'ble the Chief Justice d0: s not rule out new grounds that could have arisen in the course of trial of this case, because its strict interpretation would tanta mount even to disallow the bail when the accused be at the point of death. It is quite inconsonance with the spirit of that order to say that when some evidence could have been , recorded and is not so recorded as alluded above, it is as good as some evidence was in fact recorded. The facts of the case as are contained in

the zimnis, which I had studied earlier, would also justly warrant for the bail of the accused in this case."

Accordingly, Khan Abdul Hayee Khan once again directed the release of Qasam Beg on bail. On the 7th September 1954, Ghulam Jilani complainant applied to the Sessions Judge to cancel Qasam Beg' s bail. It is noteworthy that on this occasion, the application for cancellation was not made by the Prosecuting Agency. By his order dated the 13th September 1954, the Sessions Judge cancelled the bail granted by Khan Abdul Hayee Khan. After stating certain preliminary facts, the Sessions Judge observed that under section 526 (8), Criminal P. C. the trial Court was bound to adjourn the case when the complainant had declared his intention of applying for it to be transferred from that Court, and from that stage onwards, the Court was functus officio. He remarked also on the fact that there was no mention of this transfer application in Khan Abdul Hayee' s order of the 1st September 1954, by which he granted bail. As to these observations it is in our view necessary to point out that the application for transfer was not made under section 526, Criminal P. C. Moreover, it is plain from the order sheet, where the matter of the transfer application is fully dealt with, that Khan Abdul Hayee Khan had made no attempt to conceal the fact of that applica tion. His order granting bail was complete in itself and contained all the necessary facts.

In cancelling the bail of Qasam Beg the Sessions Judge observed as follows: -

" The learned trial Magistrate, in my opinion, by releasing the respondent Qasam Beg, on bail without recording any evidence has again acted contrary to the orders of the High Court. I am really pained to notice that a senior judicial officer like the said Magistrate has flouted the orders of the highest Court in the Province, which in my opinion is a very sad reflection indeed."

It was not, however, the Sessions Judge who moved for proceedings in contempt against Khan Abdul Hayee Khan. The application for this purpose was made by Ghulam Jilani. After hearing the counsel for the applicant as well as Khan Abdul Hayee Khan, the learned Judge in the High Court came to the following conclusions. He observed that the Public Pro secutor had drawn the attention of the Magistrates " to the order of the High Court which required the recording of some evidence before determining the question of releasing the accused on bail." He went on to say that the Magistrate was aware that the Sessions Judge had declared in his order of the 13th August 1954, that " releasing the accused on bail without recording evidence was contrary to the order of the High Court".

Observing that the Magistrate had ignored "the orders of the Sessions Judge" the learned Judge in, the High Court recorded his opinion as under: -

" There was thus flagrant disregard of the order of the High Court and of the interpretation of that order by the learned Sessions Judge, which, as a Court of inferior juris diction, was binding on the respondent. After the judgment of the learned Sessions Judge, it was not open to the respondent to put any other interpretation on the order of the High Court. His subsequent actions can, therefore, only be interpreted as being mala fide."

The point for determination in this appeal is whether these views are valid, in the light of all the facts and circumstances of the case. We consider it desirable to say at the that the expression "mala fide" can only have been used very special sense. Nothing in the nature of bad faith or on the part of the Magistrate appears or can be deduced anything contained in the record. From the very commence of the case, doubts were entertained regarding the maintainability of the accusation, not only in regard to the requirements of section 436, P. P. C. but also as to whether the witnesses cited could be worthy of belief, to which may have been added the circumstance that the initial report was lodged after wholly unreasonable delay. The Prosecuting Agency, having twice pressed the charge under section 436, had apparently altered its view by the 1st September 1954, when it was conceded before the Magistrate that the case was a fit one for bail. It is unnecessary to emphasise that where a Court grants bail in a case which the Prosecuting Agency itself admits to be a fit case for bail, it would need very strong evidence indeed to hold that the action of the Court in these circumstances was taken in bad faith, or that it involved judicial dishonesty of any kind.

Viewing the case as a whole, from its commencement with a much delayed initial report up to its conclusion in a discharge order which was left unchallenged, it clearly emerges that the only obstacle in the way of the grant of bail by the trial Magistrate was thought to lie in the wording of the order made in the High Court on the 23rd July 1954. That order which merely said that the question of bail was left to be decided by trial Magistrate after some evidence was recorded, has been interpreted by the Sessions Judge and in the High Court, as if it was the source of power in the Magistrate in regard to the grant of bail. That view is plainly fallacious, for the Magistrate derived his power of granting bail from section 497. of the Criminal P. C. and no restraints upon that power can be recognized except such as appear in the section itself. The present was clearly a case in which bail could have been granted by the Magistrate, provided he was

satisfied that there was no reasonable ground for thinking that the offence D lay under section 436, P. P. C. and for this purpose it was not a necessary condition that any evidence should have beets recorded in the case.

Moreover, it is clear from the wording of the High Court order dated the 23rd July 1954 that it was not intended to lay down that the grant of bail by the Magistrate should be subject to the condition that he should have recorded some evidence. The complainant certainly understood the order in this sense, and for a considerable time, attempted to frustrate e the power of the trial Magistrate to grant bail by not allowing evidence to be recorded. In these circumstances, the duty of the Court clearly was to take such steps as were necessary to ensure that the complainant should not succeed in his tactics. After the most careful consideration of the circumstances, we are left with the clear impression that in making repeated orders granting bail to Qasam Beg, Khan Abdul Hayee Khan acted in accordance with the duty indicated above. He did so moreover at some personal risk in view of the interpretation placed upon the High Court order by the Sessions Judge.

It is necessary also for us to observe that the view that the Sessions Judge's interpretation of the High Court order was binding on Khan Abdul Hayee Khan as a Court of inferior jurisdiction, is one which, speaking with due respect, we find JUit impossible to sustain. A judgment of a High Court is in indeed binding upon all subordinate Courts, but when its meaning is not entirell clear, in the circumstances of a particular case, it is open to the subordinate Courts to attempt to interpret the -words employed. and to give effect to that interpretation which seems to there to be the most reasonable. In such an exercise there is no distinction of superiority or inferiority of Courts, and each Court subordinate to the High Court must be regarded` as having equal competence in the particular respect except m the case where the interpretation is made the basis of a lawful direction to a subordinate Court. In this case, the Sessions Judge appears to have been content to declare that the High Court order meant that the trial Magistrate should not grant bail without recording evidence. In our view Khan Abdul Hayee Khan before whom the question arose whether there was sufficient justification for keeping Qasam Beg in custody for the purpose of determining the truth of the accusation against him, took a more accurate view of the High Court order in saying that it did not rule out grounds that might c arise in the course of the proceedings. As we have observed above, the High Court order was not intended to lay a yin fetters upon the power of the Magistrate to grant bail m the case, and fertile that the words "after some evidence is recorded" cannot be interact: as .a specific condition, applying to the exercise of that power Therefore,

not only do we feel that in a case of this nature there is no requirement in law that the interpretation placed upon a legal document by- a Sessions Judge is binding upon Courts of inferior jurisdiction, but we consider also that in the present case the interpretation placed upon the order in question by the Sessions Judge was incorrect.

On the other hand the appellant's interpretation of the order was one upon which he could properly act in the due discharge of judicial functions in Good faith. Consequently, we find no such "flagrant disregard" of the order of the High Court as has been made the foundation of the conviction for contempt in the present case.

We may usefully conclude this judgment with a few general observations. The contempt here alleged belongs to a very special class, confined to Judges and presiding officers of the inferior Courts. In Blackstone's Commentaries (1876) Vol. IV at p. 295 such contempt s are described in the following terms :-

" Those committed by inferior Judges and Magistrates; by acting unjustly, oppressively, or irregularly, id administering those portions of justice which are intrusted to their distri bution; or **by disobeying writs issuing out of the High** Court, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, ***certiorari,*** error, ***supersedeas,*** and the ***like.*** For as the High Court, and especially ` the Queen's Bench Division thereof, has a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordi nate Judges are contempt of that superintending authority whose duty it is to keep them within the bounds of justice."

In Halsbury's Laws of England (Third edition Volume. VIII page 19) the following description of this class of contempt appears :-

" Judges of inferior Courts are punishable by attachment for acting unjustly, oppressively or irregularly, in the execution of their duty, or for disobeying writs issued by the High Court requiring. them to proceed or not to proceed in matters before them, but a great part of this jurisdiction is virtually superseded by statutes giving the power to remove a Judge of an inferior Court for inability or misbehaviour."

The impression is clearly conveyed by the last quotation that a contempt falling in this class would ordinarily be by itself sufficient to justify the removal of the Judge or Magistrate at fault. The offence must be of a grave character, ;evolving the commission of injustice, or oppression or some irregularity of a serious

character to justify imposition of the drastic procedure and penalties of a contempt proceeding. There have been cases where a subordinate Judge has apparently acted in con travention of an order of a superior Court, but upon an erroneous construction of an obscure instrument and in such cases the superior Court has refrained from taking action in contempt. Mungean v. Wheatley, (1851) 16 Exch. 88) where what is found is something having the appearance of indiscipline, the - powers of' superin tendence vested in the High Court are quite sufficient to enable restoration of a proper state of affairs, without recourse to the severe process of contempt. In the present case, the Magistrate; would have been well advised to have added an expression of respect for the views of the Sessions Judge, from which he was differing. The obligation to do so is not a legal one, but is not to be regarded as any the less real, for that reason. It rests on a long tradition of judicial courtesy, and in the case of an inferior Court, the duty is emphasised by the fact of subordination. A default in this important respect invites disapproval, and even correction, in an appropriate case. But it is clearly not appropriate to use the process of contempt to enforce the requirements of judicial courtesy.

For the reasons given above we allow this appeal and ,ct aside the order of the High Court. The appellant will ha% c his costs against the second respondent Ghulam Jilani.

A. H. Appeal allowed.

**P L D 1960 (W. P.) Lahore 684**

**Before S. A. Haq, J**

Sheikh MUHAMMAD AMIN-Petitioner
Versus
THE SUPERINTENDENT OF POLICE, JHANG ----Respondent

Criminal Revision No. 186 of 1960, decided on 11th May 1960.

**(a) Criminal Procedure Code (V of 1898)----**S. 253 (2) Omission to examine all prosecution witnesses-No ground by itself to set aside order of discharge-Revisional Court to see whether order cannot be sustained on material brought on record or whether order is "perverse or foolish"-Also whether setting aside order will be in interest of justice keeping in view gravity of offence anti time elapsed since commission of offence-Criminal Procedure Code (V of 1898), S. 439.

When an order of discharge passed under subsection (2) of section 253 is to be set aside, it is not enough to say that the Magistrate had not examined all the prosecution witnesses. The Court which is asked to set aside such an order of discharge must examine whether the finding of the Magistrate that the charge is groundless cannot be sustained on the material, already brought on the record and also whether the finding is perverse or foolish. Another consideration is whether it will be in the interests of justice to set aside an order of discharge, keeping in view the gravity of the offence, and the time which had elapsed since commission of the offence.

The, accused was prosecuted under section 29, Telegraphs Act (XIII of 1885) for sending an allegedly false telegram. The accused admittedly had been involved in litigation with his relatives who appeared to have turned enemies, and the telegram was sent -to authorities to seek protection of the police. On the basis of the material brought on the record it could not be said that accused's apprehensions were baseless, the telegram could not be termed false or which the petitioner had reason to believe to be false. The alleged offence, moreover, had taken place nearly two years before the case came up to the High Court in revision.

The High Court declined to set aside the order of discharge.

**(b) Judgment---**Irrelevant remarks-Against witnesses or third persons-Highly deprecated.

M.B. Khizar Tamimi for Petitioner.

Zaheer Abbas for Respondent.

Date of hearing: 11th May 1960.

**JUDGMENT**

This is a revision petition directed against an order dated the 11th of February 1960 passed by the learned District Magistrate of Jhang, directing further inquiry into a criminal case started against the petitioner under section 29 of the Telegraphs Act. The petitioner was placed on trial before Mr. Shaukat Ali Khan, Magistrate of the 1st Class at Jhang, but was discharged under the provisions of subsection (2) of section 253 of the Criminal Procedure Code. The prosecution went up in revision to the learned District Magistrate who passed the impugned order, holding that a large number of prosecution witnesses had not been examined by the trial Magistrate and, therefore, it is a fit case where further inquiry should be held.

2. The revisional order of the learned District Magistrate is challenged before me mainly on the following grounds :- ,

(a) That the trial Magistrate was fully competent to discharge the accused-petitioner under the provisions of subsection (2) of section 253 of the Criminal Procedure Code at any stage of the trial if he a to the conclusion that the charge was ground less,

(b) That in any case all the material witnesses had already 'been examined and no useful purpose" would have been served by prolonging the trial

(c) That the learned District Magistrate has not recorded any finding that the order of discharge was perverse or foolish.

3. It is clear that subsection (2) of section 253 of the Criminal Procedure Code-does empower a Magistrate to discharge an accused person at any stage of the case, for reasons to be recorded by the Magistrate, if he considers the charge to be groundless. It seems to me, therefore that when an order of discharge passed under subsection (2) of section 253 is to be, set aside, it is not, enough to say that the Magistrate had not examined all the prosecution witnesses. The

Court which is asked to set aside such an order of discharge must examine whether the finding of the Magistrate that the charge is groundless cannot be sustained on the material already brought on the record and also, whether the finding is perverse, or foolish. Another important consideration which, think should be borne in mind is whether it will be in the interests as justice to set aside such an order of discharge, keeping in view the gravity of the offence, and the time which might have elapsed since the alleged commission of the offence. In the present case the telegram in question, which is the subject-matter of the trial, is dated the 21st of June 1958. In other words, the offence was committed nearly two years ago. It would appear, there face, that for the order of discharge to be set aside in this case, there must lie strong reasons to show that the order of discharge is unjustified on the record and is perverse or foolish, leading to a manifest failure of justice. This does not appear to me to be the case here. The telegram itself, when analyzed, only means this that the petitioner apprehended danger to his life from certain persons named in the telegram, and that he implored the police authorities to depute a D. S. P. to take immediate action. He also referred to the delay which was taking place in investigating the case regarding the kidnapping of his minor grandson Shahzada. In the concluding portion of the telegram an allegation was made that the persons named therein had been guilty of committing heinous offences in the past as well and that they were friendly with certain police and civil officers. Now, the evidence recorded by the trial Magistrate has made it clear that there is a long history of litigation and enmity between the petitioner before me and the persons named by him in the telegram as his enemies from whom he apprehended danger to his life. On the basis of the material brought on the record it cannot be said that the apprehensions were. baseless. It may be that there is no evidence to show as to what -connection the persons. named in the telegram had with the un-named police or civil officers, but that by itself is not the important part of the telegram. The important part is that the petitioner was apprehensive from the persons named by him and he sought protection of the authorities. it is clear to me, therefore, that the telegram- is not one which can be termed to be false or which the petitioner had reasons to believe to be false. The intention behind the telegram was not pure mischief, but it was an earnest-desire to expedite the investigation of the case regarding the kidnapping of his grandson and also to seek protection of the authorities. That being the case, I think the learned Magistrate was right in coming to the conclusion that the charge against the petitioner was, groundless. It Was not necessary for, him to examine all the prosecution witnesses cited the calendar of witnesses. I consider, therefore, that the order of discharge passed by the learned Magistrate cannot be termed to be un justice on the record or to be perverse and foolish. There was, therefore no

justification to interfere with ibis order simply for tile reason that all the prosecution witnesses had not been examined.

4. I have already observed that nearly two years have already elapsed, since the ending telegram was sent, and I cannot see how ends of-justice would be served by prolonging the agony of a man who is admittedly involved in litigation with relatives who have turned enemies. For all these reasons I would set aside the order of the learned District Magistrate and accept the present petition.

5. Before I close I would, however, like to observe that the learned trial Magistrate seems to me to have indulged in certain irrelevant observations about the conduct of various witnesses and other persons who were not directly arraigned before him. Any tendency on the part of, a judicial officer to indulge in such observations is highly to be deprecated. A copy of these remarks shall be communicated to the trial Magistrate, Mr. Shaukat Ali Khan, for future, guidance.

A. H. Petition accepted.

**1970 S C M R 877**

**Present : Hamoodur Rahman, C. J. and Salahuddin Ahmed, J**

MATIAR RAHMAN-Petitioner
versus
THE STATE-Respondent

Petition for Special Leave to Appeal No. 17-D of 1970, decided on 22nd June 1970.

(On appeal from the judgment and order of the High Court of East Pakistan, Dacca, dated the 10th February 1970, in Criminal Revision No. 128 of 1970).

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

----S. 367-Judgment Appellate Court although not recapitulating evidence of prosecution witnesses yet recording its finding by saying that P. Ws. 1, 2 and 3 have proved that the stolen animal belonged to owner complainant Such statement, held, sufficient to show that appellate Court did not accept defence story that animal belonged to accused-Penal Code (XLV of 1860), S. 411.

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

-----S. 435-Revision Concurrent findings of Courts below based on abundant evidence-' Court, held, rightly refused to interfere with.

Khondker Mahbubuddin Ahmad, Advocate Supreme Court instructed by Ab'dur Bab II, Advocate-on-Record for Petitioner.

Nemo for the State.

Date of hearing : 22nd June 1970.

**JUDGMENT**

**HAMOODUR RAHMAN, C. J**.-The petitioner was convicted under section 411 of the Penal Code for being in possession of a stolen heifer, for which he could not render any satisfactory explanation. He was caught moving with the heifer at about 2-00 a.m. at night. His companions escaped but the petitioner was caught on the spot with the heifer by the police patrol party. It is said that he could not

offer any satisfactory explanation for the possession of the heifer. He was arrested and taken to the police station.

At about 9-00 a.m. the following morning one, Bahadur Ali Pramanik, came to the police station to lodge an F. .I. R. with regard to the theft of his heifer but at the police station he saw his heifer and recognized it. He then lodged his first information report.

The petitioner was sent up for trial. At the trial he set up the defence that the heifer belonged to him. He stated that he had taken it to the market for sale the previous day but as it could not be disposed of he was bringing it home when he was caught by the patrol party. In support of his claim he examined also two witnesses. The trial Court disbelieved the defence witnesses and accepted the prosecution case that the heifer belonged to Bahadur Ali Pramanik and that it was stolen from his cow-shed on the night of the 19th/20th of Jaistha 1374 B. S. The evidence of the defence witnesses was found. to be so discrepant that the trial Court had actually recorded in its judgment that "they came tutored" and were "speaking lies." Apart from this, the Court also was of the view that the defence story was belied by the following circumstances :----

(1) The petitioner could not produce any certificate of owner ship from the Chairman of the Union Council, although in those days it was, on the admission of one of the defence witnesses himself, customary for people wishing to sell cattle to obtain a certificate of ownership from the Chairman of the local Union Council.

(2) The unearthly hour of the night at which tire petitioner was caught with the calf.

(3) The heifer had been identified at the police station by its owner, Bahadur Ali Pramanik (P. W. 1), whose evidence had been corroborated with regard to the ownership of the heifer.

The petitioner was accordingly convicted. His conviction was upheld by the Sessions Judge of Pabna on appeal and the High Court rejected his petition in revision. The petitioner now seeks special leave to appeal.

The only point urged in support of this petition is that the High Court failed to notice that the lower appellate Court had misdirected itself on the question of the ownership of the heifer by not coming to an independent finding of its own on this point after examination of the evidence.

It is true that the lower appellate Court has not recapitulated the evidence of the prosecution witnesses and then said that on this evidence the ownership of the heifer had been established by the prosecution, but in effect it has recorded its finding by saying that P. Ws. 1, 2 and 3 have proved that the heifer in question belonged to Bahadur Ali Pramanik, P. W. 1. This is sufficient to show that the appellate Court also was not accepting the defence story and was agreeing with the trial Court with regard to its finding as to the ownership of the heifer.

We see no substance in this contention which is, in any event, a question purely relating to the appreciation of evidence. The High Court was quite right in saying that in revision it saw reason to interfere with the concurrent findings of the Courts e below which were based on abundant evidence. This petition is, accordingly, dismissed.

Petition dismissed.

**1979 S C M R 79**

**Present : Karam Elahee Chauhan and Nasim Hasan Shah, JJ**

MUHAMMAD NAWAZ-Petitioner
Versus
THE STATE-Respondent

Criminal Petition for Special Leave to Appeal No. 59-R of 1978, decided on 21st October 1978.

(On appeal from the judgment and order of the Lahore High Court, Lahore, dated 24th July 1978, in Cr. R. No. 549/1978).

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

---S.367(2)-Judgment-Contents of-Petitioner charged for only an offence under S. 411, P. P. C.-Magistrate when convicting him obviously convicted him for offence charged-Technical plea of judg ment having not particularly specified offence under P. P. C. leading to conviction of accused, held, of no help to accused in any manner.

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

-----S.342 - Accused's examination - Recovery of ornaments from petitioner not disputed-Petitioner not claiming ornaments as his own Proper F. I. R. lodged about theft of ornaments much prior to arrest of petitioner-Plea that petitioner having not been asked whether he retained ornaments with knowledge, or having reason to believe same being stolen property, whole trial vitiated, held, without force especially when no prejudice shown caused to accused petitioner-Penal Code w . (XLV of 1860), S. 411.

**(c) Constitution of Pakistan (1973)-**

----Art. 185 (3)-Special leave to appeal-No violation of any funda mental principle of law in matter of appreciation of evidence in criminal cases or regarding guilt of petitioner pointed out so as to warrant interference by Supreme Court, petition for special leave to appeal dismissed.-[Evidence] .

Zafar Mahmood, Senior Advocate Supreme Court and Ch. Akhtar Ali, Advocate- on-Record for Petitioner.

Nemo for the State.

Date of hearing : 21st October 1978.

**ORDER**

**KARAM ELAHEE CHAUHAN, J.**-The petitioner was involved in a case under section 411, P. P. C. for having been found in possession of stolen goods namely four golden bangles, one ear-ring and three finger rings which belonged to Abdul Rashid owner of Pakistan Jewellery House, bazar Sarafa, Rawalpindi and were stolen from his shop on 10-1-1974 at 11 or 12 clock a.m. An F. I. R. was lodged about that theft and was recorded at the instance of Abdul Rahid aforesaid at police Station "C" Division, Rawalpindi City, at 2-45 p.m. It appears that the petitioner was apprehended at about 6-00 p.m. by P. W. 6 Raja Pir Muhammad while the petitioner was going in a taxi. As the movements of the petitioner appeared to be suspicious therefore his person was searched and the articles aforesaid were recovered from him. During the trial a charge under section 411, P. P. C. was framed against the petitioner and after recording the necessary evidence the learned Magistrate found the petitioner guilty and by order dated 27-2-1975 convicted and sentenced him to undergo two year's rigorous imprisonment. The petitioner filed an appeal but without any success as the same was dismissed by the learned Additional Sessions Judge on 12-7-1978. The petitioner filed a revision being Criminal Revision No. 549/78 but that too was dismissed by a learned Single Judge of the Lahore High Court on 24-7-1978. The petitioner has come up to a petition for special leave to appeal to this Court.

2. Learned counsel for the petitioner argued that the judgment of the learned Magistrate did not particularly specify the offence of the P. P. C. under which the petitioner had been convicted. It was submitted that this constituted a violation of the provisions of section 367(2) of the Cr. P. C. which according to him dealt with the subject as to what a judgment should contain. It was argued that the result of the aforesaid violation was that in the eye of law there was no valid conviction order against the petitioner. The contention has no merit. The only offence for which the petitioner had been charged was under section 411, P. P. C. and when the learned Magistrate found him guilty, obviously it was the offence fore which the petitioner had been charged, and the technical plea raised in the; circumstances cannot help him in any manner.

3. The next point argued was that during the examination of the petitioner under section 342, Cr. P. C. it was not asked from him whether he was retaining the ornaments with knowledge or having reason to believe that they were stolen property. It was submitted that failure to put this specific aspect of the matter to the petitioner vitiated the whole trial. The contention has no force. It is to be pointed out that the recovery of the ornaments from the petitioner has not been disputed before us. Similarly the petitioner did not claim the ornaments and in the circumstances the evidence of the complainant was accepted by the courts below that the ornaments belonged to him. There was a proper F. I. R. lodged at 2-45 p.m. about the theft of these ornaments much prior to the arrest of the petitioner. In this context a plea of the kind which has been advanced has no substance especially when it has not been shown as to whether and how it has caused any prejudice to the petitioner. All the three Courts below have appreciated the evidence and have found that, on merits the case has been duly established against the petitioner. Learned counsel has not pointed out violation of any fundamental principle of law in the matter of appreciation of evidence in criminal cases or regarding his guilt, so as to warrant interference by this Court. The petition has no merit and is dismissed.

Petition dismissed.

**1988 P Cr. L J 2376**

**[Quetta]**

**Before Munawar Ahmed Mirza, J**

ALI MUHAMMAD and 6 others--Accused/Petitioners
versus
THE STATE and another--Respondents

Criminal Revision No. 30 of 1988, decided on 21st August, 1988.

**(a) Criminal Law (Special Provisions) Amendment Ordinance (III of 1988)--**

---S. 1(2)--General Clauses Act (X of 1897), Ss.3(12) & 5(3)--Principle regarding time for commencement of enactment--Jurisdiction of executive Authority--Ordinance promulgated or. 23-6-1988 would be deemed to have been enforced on expiration of day preceding its commencement which would mean from zero hours of 23rd June, 1988- Executive Authority having been substituted to judicial forum by Ordinance on its promulgation, order passed by Additional Commissioner in criminal appeal whereby accused were remanded to custody, was without jurisdiction.

Prahalad Jena and others v. State A I R 1950 Orissa 157 and Khalid M. Ishaque Ex-Advocate-General, Lahore v. The Hon'ble Chief Justice and the Judges of the High Court of West Pakistan, Lahore PLD 1966 SC 628 ref.

**(b) Criminal Law (Special Provisions) Amendment Ordinance (III of 1988)--**

---S. 1(2)--Effect of Ordinance on pending cases--Procedural law has retrospective effect--Ordinance, which had come into force at once and aimed at substituting Executive Authority to judicial forum as regards appellate and revisional jurisdiction in criminal matters, would also apply to pending appeals and revisions which by operation of law would automatically stand transferred to corresponding forums prescribed by law.

Adnan v. Sher Afzal P L D 1969 SC 187 and Yasmin Nighat v. National Bank of 'Pakistan P L D 1988 SC 391 ref.

**(c) Judgment--**

---Natural justice, principles of--Violation of--Perusal of judgment passed by Executive Authority in criminal appeal indicated that petitioners were not provided opportunity of hearing as required by law--Judgment, held, was repugnant to principles of natural justice. [Natural justice, principles of].

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

---S. 439--Revisional jurisdiction, exercise of--Where principles of natural justice were violated by not providing opportunity of hearing to party as required by law, such glaring defects, held, could not normally be rectified in exercise of revisional jurisdiction.--[Natural justice principles of].

Nazeer Ahmed for Petitioners.

Mir Muhammad Nawaz Marri, A . A .-G. for the State.

Miss Shabnam Allah Din for Respondent No.2.

**ORDER**

This Petition is directed against order dated 23-6-1988, passed by learned Additional Commissioner, Sibi Division.

2. Relevant facts leading to this petition are, that on the night between 18-11-1987 and 19-11-1987 accused Muhammad Umer, came to Sadar Police Station Sibi and lodged F.I.R. No.118/1987 stating that he saw his wife Mst. Bakhtawar with her paramour Muhammad Yaqoob, lying together, therefore, killed both of them as 'Siahkar'. Concerned police conducted the investigation and prepared interim challan No.1/1988 on 1-1-1988 under section 302 P.P.C. against accused Muhammad Umer only; whereas final challan was submitted before Deputy Commissioner Sibi on 20-3-1988. It may be seen that on 15-12-1987 (about 28 days after the incident) Moosa Khan son of Essa filed a complaint before Deputy Commissioner Sibi alleging that petitioners alongwith accused Muhammad Umer had conspired to kill Muhammad Yakoob. However later unjustifiably, the: also killed Mst. Bakhtawar for giving the incident colour of Siahkari. He thus implicated all the petitioners alongwith accused Muhammad Umer for the commission of said offence. Learned Deputy Commissioner initially forwarded the complaint to Naib-Tehsildar for inquiry, and on receiving his report directed issuance of bailable warrants of petitioners vide order dated 3-3-1988 whereby question of their guilt or innocence in the matter was also referred

to the Tribunal already constituted in respect of accused Muhammad Umer. Respondent Moosa feeling aggrieved from issuance of mere bailable warrants of petitioners, preferred an appeal before Additional Commissioner, Sibi Division seeking their remand to custody. It may be seen that said appeal was ultimately accepted by learned Additional Commissioner Sibi vide order dated 23-6-1988 whereby petitioners were remanded to custody. Present petition was filed on 20-7-1988 challenging the same.

3. Mr. Nazir Ahmad learned counsel for petitioners mainly raised jurisdictional objection regarding validity of impugned judgment contending that Baluchistan Criminal Law (Special Provisions) Amendment Ordinance III of 1988 (hereinafter referred as "amending Ordinance") was promulgated on 23-6-1988, therefore, Additional Commissioner was not competent to proceed in the matter, as same would be deemed to have been enforced from zero hours of the day. Besides, it was contended that "Amending Ordinance" being procedural law will apply retrospectively even on pending cases.

Whereas Miss Shabnam Allah Din learned counsel for private respondent vehemently canvassed that petitioners had approached Member Board of Revenue subsequent to 23-6-1988 and had also obtained interim bail in respect of petitioners Nos.6 and 7, therefore institution of present petition in this Court is not maintainable. Learned counsel alternately argued that even if learned Additional Commissioner Sibi had no jurisdiction on 23-6-1988, this Court can examine merits and rectify defect, of impugned judgment in the exercise of revisional jurisdiction.

4. Mir Muhammad Nawaz Marri, learned A.A.-G. however candidly conceded that learned Additional Commissioner had no jurisdiction to pass the impugned order on 23-6-1988, on account of Amending Ordinance. It may be seen that principle regarding time for commencement of enactments on the analogy of section 5(3), General Clauses Act has been elaborately discussed in following judgments:-

(i) Prahalad Jena and others v. State (A I R 1950 Orissa 157).

"Therefore, if a Central Act came into force, say at 11 a.m. on 26th January then by virtue of section 5(3) read with section 3(12), General Clauses Act that Act should be deemed to have come into force from the mid-night of the 25th/26th January. The order of the President under Article 373 should, therefore, be deemed to have come into force from the mid-night of 25th/26th January, even though it might have been actually signed by the President only after 10-50 a.m. on 26th. The Constitution also came into force from the mid-night of 25th-26th

January because the provisions of the General Clauses Act, S.5(3) were made applicable to the interpretation of the Constitution by Article 367(1). The result, therefore, is that both the Constitution and the order came into force for legal purposes from the mid-night of 25th-26th January and in considering the validity or otherwise of the relevant provisions of the Orissa Act. The short interval of time between the mid-night of 25th-26th January and the exact time of the signing of the order by the President becomes immaterial."

(ii) Khalid M. Ishaque Ex-Advocate-General, Lahore v. The Hon'ble Chief Justice and the Judges of the High Court of West Pakistan, Lahore (P L D 1966 SC 628).

"A proper answer to the difficulty brought out in the questions from the Bench probably lay, not in any reference to the facts as to the moment of signing of the different orders or the moment of notification, but on a legal foundation, developed by analogy to section 5(3) of the General Clauses Act, 1897, which provides that unless the contrary be expressed, a Central Act shall be construed as 'coming into operation immediately on the expiration of the day preceding its commencement'. Thus, if the commencement be declared to take effect on a particular day, say the 6th January, 1964 the Act would be deemed to come into force immediately after the stroke of mid-night of the 5th January, 1964. Equally if the Act were expressed to come into effect on the granting of assent thereto, then if that assent was given on the 6th January, 1964, the operation of the order would still commence from mid-night on the 5th January, 1964. The analogy lies in this namely, that an order made under section 1(2) of the Criminal Law Amendment Act, 1908, applying that law, to a place where it previously had not applied, is substantially an act of legislation, which would takes effect from the earliest moment of the day on which the order is made, in the same way as an .Act of a legislative authority takes effect from the earlier moment of the day which is the day of its commencement."

Respectfully following, observations in above-quoted judgments have no hesitation to conclude that Criminal Law (Special Provisions) (Amendment) Ordinance 1988 shall be deemed to have been enforced on the expiration of day preceding its commencement which would mean from zero hours of 23rd June, 1988. Thus, impugned order is obviously without jurisdiction.

Next question which arises for consideration would be whether on promulgation of "Amending Ordinance" III of 1988 cases pending before Commissioner as Appellate Authority and Member Board of Revenue as Revisional authority shall stand transferred to the Court of concerned Sessions Judge and this Court respectively. Evidently amending Ordinance has come into force at once and

aims at substituting executive authority to judicial forum as regards Appellate and Revisional jurisdiction in criminal matters, where provisions of Ordinance II of 1968 apply. It is well settled that procedural law had retrospective effect accordingly, amending Ordinance shall also apply to pending Appeals and Revisions, which thus by operation of law would automatically stand transferred to corresponding forum prescribed by law. If any authority in this behalf is needed reference can be made to the observations in following decided cases:-

(i) Adnan v. Sher Afzal P L D 1969 SC 187

(ii) Yasmin Nighat v. National Bank of Pakistan P L D 1988 SC 391

The situation in the present case is similar and as there is no contrary indication in Ordinance II of 1983 we are of the opinion, therefore, that in the present case too the amending Ordinance (II of 1983) would affect the pending proceedings and all the suits would have to be tried by the Special Court.

It may be added that an examination of the provisions of Ordinance XIX of 1979 in juxtaposition with those of Ordinance II of 1983 shows that the legislature by enacting section 6(4) of Ordinance XIX of 1979 intended to oust the jurisdiction of all other Courts in the matter of banking loans and to confer exclusive jurisdiction on Special Courts in respect of the matters which were made triable by the said Courts under the terms of the said Ordinance and all such proceedings pending in any Court immediately before the commencing day of Ordinance XIX of 1979 stood transferred to the Special Court concerned. Under the provisions of the said Ordinance XIX of 1979 [under section 6(2)(a)] the jurisdiction of the Special Court was expressly excluded in relation to cases involving a sum of Rs. one lac or less. But by Ordinance II of 1983, the definition of the Special Court having been amended and subsection (2)(a) of section 6 of Ordinance XIX of 1979 having been omitted, the Special Court established under section 5(1) of the Ordinance became vested with the jurisdiction to try those cases which were specially excluded from its jurisdiction under section 6(2)(a) of Ordinance XIX of 1979. As a result of this extension, the Special Court was conferred the sole jurisdiction in such matters (the jurisdiction of all other Courts having been ousted in respect of such cases). The intendment of the law-maker which appears from the changes made by him, is that he intended that even such cases which under section 6(4) of the Ordinance were to be tried by the Civil Courts earlier were also to become triable by the Special Courts. Thus intention is also dicipherable from the circumstance that with the omission of clause (a) of subsection (a) of section 6 of Ordinance XIX of 1979 the forum of the Civil Courts for the trial of such cases ceased altogether. Hence it will not be

reasonable to infer that the suits pending in the civil Courts can continue to be tried by them, when their jurisdiction in respect of these cases has been completely taken away."

5. Learned counsel for private respondent however endeavoured to argue that defects relating to merits if any, may be considered by this Court. Bare perusal of impugned judgment clearly indicates, the petitioners were not provided opportunity of hearing as required by law. In the circumstances impugned judgment is evidently repugnant to principles of natural justice. This factual position is not controverted by learned counsel for respondent or learned A . A .-G. Obviously glaring defects discussed above cannot normally be rectified in the exercise of revisional jurisdiction under law.

6. Resultantly petition is accepted, order dated 23-6-1988 is set aside, appeal filed by respondent Moosa shall be deemed to be pending before learned Sessions Judge Sibi who should dispose of the same expeditiously, as far as possible within two weeks on its own merits according to law. Since impugned judgment is found to be without jurisdiction, therefore, parties are to be relegated to previous position. Thus petitioners be released, pending disposal of appeal subject to their furnishing fresh sureties in the sum of Rs.20,000 (Rupees twenty thousand) each to the satisfaction of learned Sessions Judge, Sibi. It is clarified that observations in this order shall neither affect merits of the case nor prejudice any party.

The petition is disposed of in the above terms.

H. B. T./312/Q Petition accepted/Order accordingly.

**2000 P Cr. L J 733**
**[Peshawar]**

**Before Talat Qayum Qureshi, J**

NAWAB KHAN---Petitioner
versus
THE STATE---Respondent

Criminal Revision No. 1 of 2000, decided on 11th February, 2000.

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

----Ss. 369, 439 & 514---Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979), S.17(3)---Forfeiture of bail bond-- Revision---Review---Scope---Accused for whom petitioners stood sureties, having failed to appear in Court after release on bail, Trial Court ordered forfeiture of bail bonds and directed sureties to deposit amount of surety bonds---Revision filed against judgment of Trial Court having been dismissed by High Court, sureties had sought review of judgment of High Court passed in revision---Provisions of S.369, Cr.P.C. had provided that no Court, after it had signed the judgment, could alter or review same except to correct clerical error---High Court, after deciding revision petition; in absence of any statutory provision, had become functus officio and could not entertain a fresh prayer for same relief unless and until previous order of final disposal, had been set aside---Revision petition having been dismissed by High Court after hearing parties, judgment passed in such revision was final which could not be reviewed, especially when case for review had not been made out.

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

----S. 369---"Judgment"---Connotation---Word "judgment" as used in S.369, Cr.P.C. includes decisions and orders passed by Criminal Court on the merits of a case.

Muhammad Samiullah Khan and another v. The State PLD 1961 (W.P.) Lah. 227 and Maulana Muhammad Azam Tariq v. Khurshid Ali and another 1996 PCr.LJ 119 ref.

**(c) Words and phrases---**

"Judgment "---Connotation,

Syed Altaf Hussain Shah for Petitioner,

Qazi Muhammad Gharanfar for AWL A.-G, for the State:

Date of hearing: 7th February, 2000.

**JUDGMENT**

Nawab Khan, the petitioner, stood surety for Amir Hamza Ali Shah accused charged in case F.I.R. No.1416, dated 9-12-1993, Police Station Saddar, Haripur, under section 17(3), Haraba, Hudood Ordinance, 1979. The said accused applied for his release on bail. The learned Sessions Judge, Haripur accepted his application vide order, dated 25-6-1997 and directed that the accused be released on bail provided he furnishes bail bond in the sum of Rs.50,000 with two sureties in the like amount. After release on bail, the accused failed to attend the Court when summoned, as a result of which the learned trial Court summoned the sureties and ordered that the bonds be forfeited to State and both the sureties were directed to deposit amount of Rs.25,000 each on or before 2-7-1997. The petitioner filed Revision Petition No.35 of 1999 in this Court which was dismissed in limine on 21-1-2000. The petitioner now wants to review of the said order, dated 21-1-2000 through petition in hand.

2. Syed Altaf Hussain Shah, Advocate, the learned counsel represented the petitioner mainly argued that one Assaar Khan had preferred revision petition in this Court which was accepted vide order, dated 30-6-1999 and another Bench of this Court comprising Honourable Mr. Justice Qazi Muhammad Farooq Pasha, J. had reduced the penalty of co-surety from Rs.25,000 to Rs.10,000. Moreover, no period for filing revision petition has been prescribed in the statute, therefore, the order, dated 21-1-2000 be reviewed and the amount of bail bondalty be reduced to Rs.10,000.

3. Qazi Muhammad Ghazanfar the learned A.A.-G. argued that section 369, Cr.P.C. places a bar to review the order passed by Criminal Court. He, however, did not contest the application. .

4. I have heard the learned counsel for the parties and perused the record.

5. The plain reading of section 369, Cr.P.C. shows that no Court when it has signed the, judgment shall alter or review the same except to correct a clerical error. After deciding the revision petition, this Court in absence of as statutory provision has become functus officio and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside. The judgment is, therefore, final so far as this Court is concerned.

6. The argument of the learned counsel that order, dated 21-1-2000 cannot be called a "judgment" because the main revision petition was dismissed in limine. This argument of the learned counsel has no force; firstly, that notice was given to the State for 21-1-2000 and the learned Assistant Advocate-General represented the State and contested the revision petition; secondly, the revision petition was dismissed after hearing .the learned counsel for the parties; thirdly, the word "judgment" includes decisions and orders passed. Reliance is placed on Muhammad Samiullah Khan and another v. The State PLD 1961 (W.P.) Lah. 227 wherein it was held:--

> "The expression ' judgment' as used in section 369 of the Criminal Procedure Code, 1898 obviously includes decisions and orders passed in criminal matters on the merits of the case. If, therefore, a party has agitated a matter by means of an application under section 561-A of the Code and the application is dismissed by High Court after considering the merits of the case then second application by the same party in respect of the same matter cannot be entertained under section 439 of the Code notwithstanding the. difference of 8 language employed in the two sections."

Likewise in Maulana Muhammad Azam Tariq v. Khurshid Ali and another 1996 PCr.LJ 119 it was held:--

> "The expression 'judgment' as used in section 369 of the Cr.P.C. obviously includes decisions and orders passed by criminal Courts on the merits of the case and the High Court has no jurisdiction to amend its judgment by deleting passages from it."

The learned counsel for the petitioner has not been able to make out a case for review. I, therefore, do not find myself pursuaded to review order, dated 21-1-2000. Consequently, the review petition in hand is dismissed.

H.B.T./44/P Review petition dismissed.

**2005 C L D 398**

**[Lahore]**

**Before Muhammad Sayeed Akhtar and Mian Hamid Farooq, JJ**

AGRICULTURAL DEVELOPMENT BANK OF PAKISTAN through Manager---Appellant

Versus

MUHAMMAD MUNIR LODHI and 16 others---Respondents

R.F.A. No.557 of 2002, decided on 21st October, 2003.

**(a) Financial Institutions (Recovery of Finances) Ordinance, (XLVI of 2001)---**

----Ss. 9 & 17---General Clauses Act (X of 1897), S.24-A-- Suit for recovery of loan amount---Partial ex parte decree for Rs.98,260 as against suit amount of Rs.3,10,507-- Validity---Neither record showed nor Banking Court had mentioned or referred to any document in impugned judgment that on basis of which document Rs.98,260 had been found to be die from defendant---Impugned judgment did not show that how amount of Rs.98,260 had been worked out, and why sum of Rs.2,12,241 had been deducted from suit amount nor statement of accounts had been referred to---Impugned judgment was silent as to why Bank was not entitled to recover total suit amount-- Impugned judgment was sketchy, slip-shod and devoid of reasons, which could not be called a 'judicial order"---Even an executive authority was bound to give reasons for making order as per S.24-A of General Clauses Act, 1897-- Passing of such perfunctory order was deprecated---High Court accepted appeal, set aside impugned judgment/decree, resultantly suit would be deemed to be pending before Banking Court for its decision afresh in accordance with law.

**(b) Judgment---**

----Sketchy and slip-shod judgment---Validity---Judgment, which was sketchy, slip-shod and devoid of reasons would not at all be a speaking judgment and could not be called a judicial order" within parameters set up by law---Passing of perfunctory order was disapproved---Such judgment would not be sustainable in law, thus, would be liable to be set aside.

Mian Nasir Mehmood for Appellant.

Nemo for Respondents.

**ORDER**

The appellant-Bank, through the filing of the present appeal, has partly called in question judgment and decree dated 18-2-2002, whereby the learned Judge Banking Court passed an ex parte decree for the recovery of Rs.98,260 along with costs of funds and costs of suit, as against suit amount of Rs.3,10,507 against the respondents.

2. The facts relevant for the decision of the present appeal are that the appellant-Bank/plaintiff, on 21-3-1993, filed a suit for recovery of Rs.3,10,507, which was initially decreed ex parte, however, later on the ex parte decree was set aside. During the pendency of the suit some of the defendants died and their legal representatives were impleaded. No application for the grant of leave to defend was filed on behalf of any of the respondents. The learned Banking Court after proceeding ex parte against the respondents, passed a decree for the recovery of Rs.98,260 along with costs of funds and costs of the suit, against all the respondents, as against the suit amount of Rs.3,10,507, vide judgment and decree dated 18-2-2002, hence the present appeal.

3. Despite service of the respondents for today, none has entered appearance to oppose this appeal, hence they are proceeded ex parte.

4. The learned counsel for the appellant has contended that the appellant-Bank filed a suit for recovery of Rs.3,10,507 against the respondents, but the learnt Banking Court, while illegally declining to award the decree of total suit amount, has passed a partial decree Rs.98,260 without any legal justification, thus, according to the learned counsel the impugned judgment and decree need modification, so as to include a further sum Rs.2,12,241.

5. Upon the examination of the available record and perusal of the impugned judgment, we find that the contention of the learned counsel has some substance. It is not discernible from the available record, that on the basis of which documents, the learned Banking Court concluded that only a sum of Rs.98,260 is outstanding against the respondents. The learned Banking Court did not even mention or refer to any of the documents in the impugned judgment, upon which it has been held that --- "an ex parte decree on the basis of documents present on record, is granted to the extent of Rs.98,260 along with costs at the rate of Rs.8.17%" ---. Impugned judgment does not show that how the amount of Rs.98,260 was worked out and why the sum of Rs.2,12,241 was

deducted from the suit amount, inasmuch as the statement of accounts has not been referred to. There are no findings on the crucial issue that why the appellant was not entitled to recover the total suit amount of Rs.3,10,507. If the learned Banking Court was of the view that said amount has incorrectly been added in the suit amount or the statement of accounts is not reliable, then, at least there should have been some reasons and finding for deducting the said amount from the suit amount. We see that there is a complete black out in this regard in the judgment. The learned Banking Court in complete oblivion of the facts of the case and law on the subject, has erroneously held that on the basis of documents, an ex parte decree for Rs.98,260 is granted.

6. There is another aspect of the case. The impugned judgment, passed by the learned Banking Court, is sketchy, slip-shod and devoid of reasons. The said judgment is not at all a speaking judgment and cannot be called a "judicial order" within the parameter set up by law. The tenor of the impugned judgment amply manifests non-application of judicial mind, inasmuch as no reasons have been assigned by the learned Judge Banking Court, while coming to the abrupt conclusion that an ex parte decree on the basis of documents, present on record, is granted to the extent of Rs.98,260. Even it has been enjoined upon an executive authority, as per section 24(A) of General Clauses Act, 1897 (Inserted by General Clauses (Amendment Act, 1997, Act No-XI of 1897) to give reasons for making the order. The Honourable Supreme Court of Pakistan has time and again disapproved the passing of such perfunctory order. In nutshell, the impugned judgment, which is not a speaking order and devoid of reasons, is not sustainable in law thus we have no hesitation in setting aside the same.

7. Upshot of the above discussion is that the present appeal is allowed and the impugned judgment and decree dated 18-2-2002 is set aside with no order as to costs. Result would be that the suit titled A.D.B.P. v. Muhammad Munir Lodhi and others shall deem to be pending before the learned Judge Banking Court No.1, Faisalabad, who shall decide the same afresh in accordance with law.

S.A.K./A-1016/L Appeal accepted.

**P L D 2005 Supreme Court 181**

**[Shariat Appellate Jurisdiction]**

**Present: Abdul Hameed Dogar, Chairman, Muhammad Nawaz Abbasi, Mian Shakirullah Jan, Dr. Allama Khalid Mahmood and Dr. Rashid Ahmed Jullundhari, Members**

Syed NADEEM SHAH and others---Appellants
Versus
THE STATE and another---Respondents

Criminal Miscellaneous Application No.54(S) of 2004 and Criminal Shariat Appeal Nos. 10(S) and 11(S) of 2003, decided on 5th October, 2004.

(On appeal from the judgment dated 24-4-2002 of the Federal Shariat Court passed in Criminal Appeal No.49-K of 2001).

Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979)---

----Ss. 11 & 16---Penal Code (XLV of 1860), S.366---Re-appraisal of evidence---Inconsistent version of prosecution---Abduction---Proof-- Accused were convicted by Trial Court for abduction as described under S.366, P.P.C. and sentenced them to ten years imprisonment---Federal Shariat Court, in appeal, found the accused guilty under S.11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and maintained the sentence awarded by Trial Court---Plea raised by the accused was that the version of prosecution was not consistent and had given different stories of the incident---Further plea raised by the accused was that as per medical evidence, neither any mark of violence was found on the body of abductee, nor she was subjected to the act of rape and her hymen was found intact---Validity---Prosecution had been changing its stance from the very beginning---Complainant had not taken one plea but had been changing version as per his desire---No offence as contemplated under S. 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, was made out as the prosecution had failed to bring on record the evidence that abductee was abducted or induced to compel for marriage against her will or she was forced or seduced to illicit intercourse or that there was even likelihood of her being forced or seduced to illicit intercourse---Even no case under S.366, P.P.C. was made out-- Conviction and sentence under S.11 of the Ordinance were not sustainable in law---Judgment passed by Federal Shariat Court was set aside and accused

were acquitted from the charge under S.11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979---Appeal was allowed.

Muhammad Ilyas Siddiqui, Advocate Supreme Court and M.A. Zaidi, Advocate-on-Record for Appellants (in Criminal Shariat Appeal No.10(S) of 2003).

Kazi Khalid Ali, Addl. A.-G. Sindh for the State (in Criminal Shariat Appeal No.10(S) of 2003).

Date of hearing: 5th October, 2004.

**JUDGMENT**

**ABDUL HAMEED DOGAR (CHAIRMAN).**---At the very out set Mr. Muhammad Ilyas Siddiqui, learned counsel for appellants and Kazi Khalid Ali, Addl. A.-G. Sindh stated that instead of hearing Criminal Miscellaneous Application No.54(S)/2004, Criminal Shairat Appeals Nos. 10(S) and 11(S) of 2003 may be heard as both of them are prepared to argue the same. The said request is allowed.

2. This appeal with leave of the Court is directed against the judgment dated 24-4-2002 of learned Federal Shariat Court, whereby Shariat Appeal No.49-K of 2001 filed by appellants Syed Nadeem Shah, Syed Zahid Shah and Abdul Haq was dismissed.

3. Briefly stated, the relevant facts are that on 19-7-1998, complainant Ali Muhammad lodged F.I.R. No.95 of 1997 at Police Station B-Section, District Sukkur, against appellants under sections 11/16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as `the Ordinance') alleging therein that his daughter Mst. Razia aged about 13 years, used to study in 7th Class. Five months prior, she had informed him that appellant Syed Nadeem Shah had been teasing her while going to and coming back from school. The matter was brought into the notice of Sajjad Ali Shah, the elder brother of appellants; but in vain, as such, the complainant being a noble mechanic, abandoned her education. According to him, on 5-7-1998, at about 2-30 p.m. while he was returning from town after purchasing household articles and was about to reach the house, he saw appellants Nadeem Shah, Zahid Shah and Abdul Haq with pistol who put an handkerchief on her, mouth and took her to the house of appellant Zahid Shah. Ali Muhammad complainant and his wife P.W. Mst. Sabranbano raised hue and cry which attracted Ghulam Muhammad Mirani and Muhammad Alam Abbasi and then all of them went to the house of

appellant Zahid Shah and knocked the door of his house and asked him to return the abductee. After lot of resistance and on gathering of neighbourers, appellant Zahid Shah opened the door and allowed to search his house. They, however, recovered the, victim lying in semi conscious condition front a locked room situated in the mid of stairs. She was brought to the house and from where was sent for medical check-up. Appellants entreated him in the name of Almighty Allah not to lodge F.I.R. as they had committed mistake and would compensate him, but later on, resiled, as such, the above case was registered.

4. After completion of investigation, appellants were sent up to face trial before the Court of learned Additional Sessions Judge (Hudood), Sukkur, who on conclusion of the trial found them guilty of the offence of abduction/kidnapping abductee Mst. Razia as described under section 366, P.P.C. and also about her being wrongfully confined and were sentenced to suffer ten years' R.I. each with fine of Rs.10,000 each, in default whereof to suffer further R.I. for one year. However, they were allowed benefit of section 382-B, Cr.P.C.

5. In appeal, the learned Federal Shariat Court found appellants guilty under section 11 of the Ordinance and maintained the sentence of ten years R.I. and that of fine awarded to them by the trial Court.

6. We have heard Mr. Muhammad Ilyas Siddiqui, learned Advocate Supreme Court for appellants Syed Nadeem. Shah and Syed Zahid Shah and Kazi Khalid Ali, Additional A.-G., Sindh for the State and have gone through the record and proceedings of the case in minute particulars.

7. Learned counsel for appellants vehemently contended that the impugned judgment is not sustainable in law as the same is based on wrong assumption of facts and law. According to him there is an admitted delay of 14 days in the lodging of the F.I.R. about which no plausible explanation of any sort has been furnished. He next contended that the complainant had been changing his stance with regard to the case of the prosecution and raised three different pleas at different levels: firstly, that an entry dated 5-7-1998 was made in the daily roznamcha of police station wherein it was disclosed that on the above date, complainant Ali Muhammad had left the house on his usual work in the morning and when returned at 7.00 p.m., his wife Mst. Sabranbano told him that their daughter Mst. Razia had gone outside with some work at 12-30 noon and on return, she told that appellant Syed Nadeem Shah, Syed Zahid Shah and two unknown persons had committed Zina with her; secondly, that in the Constitution Petition No.S-894 of 1998 filed by complainant Ali Muhammad before the High Court of Sindh, Bench at Sukkur for registration of F.I.R, it

reveals that on 1-7-1998 at about 2.00 p.m. his daughter purchased the ice and while returning back when reached near the door of the house, appellants Syed Nadeem Shah, Syed Zahid Shah and Abdul Haq came there from her backside and put an handkerchief on her mouth and dragged her at the show of pistol. This all was witnessed by her younger daughter who immediately informed the inmates of the house about the incident. At that time, he was not present in the house but came after two hours of the incident and thirdly, the version as disclosed in the F.I.R speaks of the incident in different manner whereby the complainant had said that on the day of incident at about 2.30 p.m. when he was returning to his home from town after purchasing household articles, he saw appellants dragging her daughter and beating her and thereafter, they took her to the house of appellant Syed Zahid Shah. According to him, abductee Mst. Razia in her statement before the Court has not stated that she was recovered from the house of Syed Zahid Shah. He submitted that as per medical evidence furnished by Dr. Saima Qureshi, Medical Officer, neither any mark of violence was found on the body of the victim nor she was subjected to the act of rape and her hymen was found intact. He lastly submitted that ingredients of section 11 of the Ordinance are not attracted in this case as the prosecution has miserably failed to bring on record the requisite evidence on that aspect. Even from the testimony of abductee, no offence of abduction as required under section 11 of the Ordinance is made out, as such, appellants deserve acquittal.

8. On the other side, Kazi Khalid Ali, Additional A.-G., Sindh on behalf of the State, controverted the above contentions of -the learned counsel for the appellants and contended that the learned Federal Shariat Court has fully dealt with all the legal as well as factual aspects of the case.

9. From the record, it transpires that the prosecution has been changing its stance from the very beginning. From the above narrated facts-and the contentions it is abundantly clear that complainant Ali Muhammad has not taken one plea but has been changing version as per his desire.

10. In order to reappraise the evidence, it would be appropriate to have a glance at the evidence adduced by complainant Ali Muhammad P.W.1, abductee Mst. Razia P.W.6; Mst. Sabranbano P.W.4 and lady doctor Saima Qureshi (P.W.7).

11. Complainant has supported the contents of F.I.R in toto whereas his wife Mst. Sabranbano stated that it was at about 2/3 p.m. she along with her both daughters were available in the house. Her husband had gone to bazaar to purchase some household articles. All the three appellant knocked the door of their house and her daughter Razia opened the door and all the three appellants

entered in the house. Appellant Abdul Hack was armed with Pistol pointed the same towards them and issued threats not to make any noise otherwise they would kill them. Appellant Zahid Shah kept handkerchief on the mouth of her daughter Razia and appellants dragged her with them from the house. In the meantime her husband returned to whom she disclosed the incident. Whereafter, they along with neighbourers proceeded to the house of appellant Zahid Shah and knocked at his door. After much resistance the door was opened and on search, their daughter Mst. Razia was found lying unconscious in a room situated near stairs and her neck was tied with her Dopata. They took back their daughter and in the meanwhile police also arrived there and on seeing the police, appellants escaped from the spot. Police took them along with abductee at Police Station and sent her for medical examination.

12. Mst. Razia in her statement has started that on the fateful day at about 2-30 p.m. while she was present along with her mother and minor brother and sisters in the house, the door of their house was knocked, whereupon her mother asked her to open the same. As soon as she opened the door, appellants Syed Nadeem Shah, Syed Zahid Shah alias Haji Shah and Abdul Haq entered into the house. Appellant Abdul Haq pointed pistol towards her mother, whereas appellant Syed Zahid Shah caused blow on her head and she fell down. Appellant Abdul Haq put handkerchief on her mouth and thereafter she did not know as to where they had taken and when she regained senses she found herself in the hospital. The medical evidence furnished by lady doctor Samia Qureshi that on examination the abductee was' found virgin and her hymen was intact negates the initial ocular version of complainant Ali Muhammad incorporated in daily Roznamcha whereby as per victim's own statement she was sexually assaulted by appellants Syed Nadeem Shah and Syed Zahid Shah.

13. For better appreciation, section 11 of the Ordinance is reproduced as under:

> "Section 11. **Kidnapping, abducting, or inducing women to compel for marriage etc**.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any other method of compulsion, induces and woman to go from any place will,

intent that she may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another, person shall also be punishable as aforesaid."

14. From the above discussion of the evidence we are of the considered opinion that no offence as contemplated under section 11 of the Ordinance is made out as the prosecution has miserably failed to bring on record the evidence that abductee Mst. Razia was abducted or induced to compel .for marriage against her will or she was forced of induced to illicit intercourse or that there was even likelihood of her being force or seduced to illicit intercourse. Even no case under section 360, P.P.C is made out. Thus the conviction and sentence under section 11 of the Ordinance are not sustainable in law.

15. For the foregoing reasons, both the appeals are allowed, impugned judgment dated 24-4-2002 passed by the learned Federal Shariat Court, is set aside and appellants, namely Syed Nadeem Shah, Syed Zahid Shah and Abdul Haq are acquitted from the charge under section 11 of the Ordinance. They are in custody. They shall be released forthwith if not required in any other case.

M.H/N-29/S Appeal allowed.

**2022 S C M R 1931**
**[Supreme Court of Pakistan]**

**Present: Ijaz ul Ahsan, Yahya Afridi and Sayyed Mazahar Ali Akbar Naqvi, JJ**

SHAMSHER AHMAD and another---Petitioners
Versus
The STATE and others---Respondents

Jail Petition No. 154 of 2016 and Criminal Petition No. 1084-L of 2016, decided on 1st August, 2022.

(Against the judgment dated 23.12.2015 passed by the Lahore High Court, Lahore passed in Criminal Appeal No. 810/2011 and Murder Reference No. 209/2011)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the accused or adverse to the prosecution could be produced on record---Ocular account furnished by the prosecution was reliable, straightforward and confidence inspiring---Medical evidence available on the record corroborated the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased was concerned---Counsel for the accused could not point out any reason as to why the complainant would falsely involve the accused in the present case and let off the real culprit, who had committed murder of his real son---Substitution in such like cases was a rare phenomenon---So far as the delay of about 2 hours 45 minutes in lodging the FIR was concerned, the complainant in his cross-examination had reasonably explained such delay---Parties were known to each other and no question of mistaken identity arose---Even otherwise, the prosecution witnesses of ocular account had clearly mentioned that a tube-light was glowing at the main gate in front of which the occurrence took place---Source of light was also established from the rough site plan as well as scaled site plan, which was essential part of the prosecution case---After the occurrence, the accused also remained absconder for about six months, which was also a corroboratory piece of evidence against him---Sufficient evidence was available to sustain the conviction of the accused---Petition for leave to appeal was dismissed and leave was refused.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd---Ocular and medical evidence---Preference---Where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd---Prosecution witnesses related to the deceased---Mere relationship of the prosecution. witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill-will is established on the record to falsely implicate the accused in the case.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Minor discrepancies in prosecution case---While appreciating the evidence, the court must not attach undue importance to minor discrepancies---Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored--- Accused cannot claim premium of such minor discrepancies---If importance is given to such insignificant inconsistencies then there would hardly be any conviction.

Allah Bakhsh v. Ahmad Din 1971 SCMR 462 ref.

**(e) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd---Reappraisal of evidence--- Sentence, reduction in---Death sentence reduced to life imprisonment---Motive not established---Recovery of weapon inconsequential---High Court had rightly disbelieved the motive by holding that there was no positive proof that the deceased was, instrumental in rejection of matrimonial proposal sent by the accused---So far as the recovery of weapon of offence was concerned, admittedly no empty was recovered from the place of occurrence, which could be sent to Forensic Science Laboratory for analysis, therefore, the recovery was inconsequential---High Court had rightly taken a lenient view and converted the sentence of death into imprisonment for life---No further leniency could be shown to the accused---Petition for leave to appeal was dismissed and leave was refused.

Malik Matee Ullah, Advocate Supreme Court for Petitioners (in J.P. 154 of 2016) (via video link, Lahore)

Saiful Malook, Advocate Supreme Court for Petitioners (in Cr. P. 108-L of 2016)

Mirza Abid Majeed, D.P.G. for the State.

Date of hearing: 1st August, 2022.

**JUDGMENT**

**SAYYED MAZAHAR ALI AKBAR NAQVI, J.---**Petitioner Shamsher Ahmed was tried by the learned Sessions Judge, Mianwali pursuant to a case registered vide FIR No. 185 dated 03.06.2009 under section 302, P.P.C. at Police Station Kundian, District Mianwali for committing murder of Ishtiaq Ahmed, son of the complainant. The learned Trial Court vide its judgment dated 28.04.2011 convicted petitioner Shamsher Ahmed under section 302(b), P.P.C. and sentenced him to death. He was also directed to pay compensation amounting to Rs.200,000/- to the legal heirs of the deceased or in default whereof to further suffer six months' SI. In appeal the learned High Court while maintaining the conviction of the petitioner/convict under section 302(b), P.P.C., altered the sentence of death into imprisonment for life. The amount of compensation and the sentence in default whereof was maintained. Benefit of section 382-B, Cr.P.C. was also extended to the petitioner/convict. Being aggrieved by the impugned judgment, the petitioner/convict filed Jail Petition No. 154/2016 whereas the complainant has filed Criminal Petition No. 108-L/2016 before this Court seeking enhancement of the sentence of the petitioner/convict.

2. The prosecution story as given in the judgment of the learned Trial Court reads as under:-

> "2. The brief facts of the case are that Manzoor Ahmed complainant (PW-6) got registered FIR (Ex.PE) alleging that he is resident of Doaba and serving as a teacher in Elementary School, Jaal Shumali, his sister Mst. Wazir Khatoon widow of Malik Gul Sher is residing in Mohallah Seelwan, Kundian along with her children and is a patient of paralysis. Yesterday at Degar vela he along with Ishtiaq Ahmed his son aged 18 years and Riaz Ahmed son of Allah Ditta went to inquire about her health, after having dinner he along with Riaz Ahmed, Ishtiaq Ahmed his son and Sami Ullah son of his sister came on Jernaili Road for easy load and did the needful after having tea at the hotel and then returned back at about 10.15 p.m. when they reached in front of house of Malik Gul Sher

deceased, then Shamsher Ahmed accused armed with double barrel .12 bore gun came from the front street and raised a lalkara at Ishtiaq Ahmed his son to be prepared as he has come to teach him a lesson being an impediment in his marriage from the house of Gul Sher and fired a shot with his .12 bore double barrel gun hitting his son Ishtiaq Ahmed on the chest who fell down after receiving the injury; that the occurrence was seen by Riaz Ahmed and Sami Ullah in the tube light installed on the main gate along with the complainant. The motive for the occurrence is that Shamsher Ahmed accused wanted to tie the knot with the daughter of his sister but his sister had refused to accede to his request to which the accused Shamsher Ahmed had a grouse that the deceased was hurdle in his way to be married from the house of Gul Sher, therefore, due to this reason he has committed Qatl-i-amd of Ishtiaq Ahmed, his son with .12 bore double barrel gun. The accused ran away while brandishing the gun towards east, they did not went near due to fear and took Ishtiaq Ahmed in injured condition to hospital who succumbed to the injuries after reaching in the hospital."

3. After completion of the investigation, report under section 173, Cr.P.C. was submitted before the Trial Court. The prosecution in order to prove its case produced 11 witnesses. In his statement recorded under section 342, Cr.P.C, the petitioner/convict pleaded his innocence and refuted all the allegations levelled against him. However, he did not make his statement on oath under section 340(2), Cr.P.C. in disproof of allegations levelled against him. He also did not produce any evidence in his defence.

4. Learned counsel for the petitioner/convict contended that there is a delay of about three hours in lodging the FIR whereas the inter se distance between the place of occurrence and the police station was 1 and 1/2 kilometers. Contends that it was a night time occurrence and it was not possible for the prosecution witnesses to identify the accused. Contends there are glaring contradictions and dishonest improvements in the statements of the eye-witnesses, which have escaped the notice of the learned courts below. Contends that the prosecution witnesses are interested and related, therefore, their evidence has lost its sanctity and the conviction cannot be based upon it. Contends that the prosecution case is based on whims and surmises and it has to prove its case without any shadow of doubt but it has miserably failed to do so. Contends that the prosecution has not been able to prove motive as alleged, which causes serious dent in the prosecution case. Contends that the recovery of weapon of offence in absence of recovery of empty is

inconsequential. Contends that the postmortem was conducted after eight hours of the occurrence for which no reason is given. Lastly contends that the reasons given by the learned High Court to sustain conviction of the petitioner are speculative and artificial in nature, therefore, the impugned judgment has to be set at naught.

5. On the other hand, learned Law Officer assisted by learned counsel for the complainant submitted that the learned High Court has converted the sentence of death of the petitioner on the grounds, which are not tenable in law. Contend that to sustain conviction of an accused on a capital charge, un-rebutted ocular evidence alone is sufficient. Lastly contend that the ocular account is supported by the medical evidence, therefore, the petitioner/convict does not deserve any leniency by this Court. Learned counsel for the complainant vehemently argued that the sentence of the petitioner/convict may be enhanced.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on the record with their able assistance.

**The ocular account in this case has been furnished by Manzoor Ahmed, complainant (PW-6) and Samiullah (PW-7). These prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the petitioner/convict or adverse to the prosecution could be produced on record. Both these PWs remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances happened in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. The medical evidence available on the record corroborates the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased is concerned. So far as the argument of learned counsel for the petitioner that the medical evidence contradicts the ocular version is concerned, we may observe that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence. It is settled that casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons. During occurrence when live shots are being fired, witnesses in a momentary glance make only tentative assessment of points where such fire shots appeared to have landed and it becomes highly improbable to mention their location with exactitude.**

**However, learned counsel could not point out as to how the medical evidence contradicts the ocular evidence. As far as the question that the complainant was father of the deceased, therefore, his testimony cannot be believed to sustain conviction of the petitioner/convict is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case. Samiullah (PW-7) was son of Mst. Wazir Khatoon, sister of the complainant and resident of the same area where the occurrence took place whereas the complainant has reasonably explained his presence at the place of occurrence. According to him, he went to his paralyzed sister's house to inquire about her health. Learned counsel for the petitioner/convict could not point out any reason as to why the complainant has falsely involved the petitioner/convict in the present case and let off the real culprit, who has committed murder of his real son. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprit who murdered his son and falsely involve the petitioner without any rhyme and reason. During the course of proceedings, the learned counsel contended that there are material discrepancies and contradictions in the statements of the eye-witnesses but on our specific query he could not point out any major contradiction, which could shatter the case of the prosecution. While appreciating the evidence, the court must not attach undue importance to minor discrepancies and such minor discrepancies which do not shake the salient features of the prosecution case should be ignored. The accused cannot claim premium of such minor discrepancies. If importance be given to such insignificant inconsistencies then there would hardly be any conviction. Reliance is placed on Allah Bakhsh v. Ahmad Din (1971 SCMR 462). So far as the delay of about 2 hours 45 minutes in lodging the FIR is concerned, the complainant in his cross-examination has reasonably explained the delay by furnishing the details about the consuming of time as it took 15/20 minutes at the spot, about 30 minutes in reaching the hospital, he remained in hospital for about one hour and then reached the police station in another 35-40 minutes where he had to wait for the SHO for more than an hour. Learned counsel for the petitioner/convict had argued that as it was a night time occurrence, therefore, it was not possible for the prosecution witnesses to identify the accused. However, this argument of the learned counsel is misconceived as the petitioner is paternal cousin of Samiullah (PW-7),**

**therefore, the parties were known to each other and no question of mistaken identify arises. Even otherwise, the prosecution witnesses of ocular account had clearly mentioned that a tube-light was glowing at the main gate of Mst. Wazir Khatoon, sister of the complainant, in front of which the occurrence took place. Although it has been argued that the tube-light, which has been shown as source of the light was not taken into possession and as such it hampers the prosecution case. However, this aspect of the argument has no legal foundation. Firstly, it depends upon the ownership of the article, which ultimately provided the source for identification, and secondly, it is for the Investigating Officer either he deems it essential or otherwise. Even if this aspect of the argument is evaluated broadly, it is suffice to state that this principle is not absolute because it depends upon (i) source, (ii) question of ownership, (iii) public or private, and (iv) essential to show the source. When all these matters are taken into consideration, it is established that it was a tube-light and as such the same cannot be made part of case property merely on the ground that the assailant was identified from the source, which has been shown. This source of light is also established from the rough site plan as well as scaled site plan, which is essential part of the prosecution case. The delay of about eight hours in conducting postmortem examination is also not beneficial to the petitioner/convict. The occurrence took place at 10.15 p.m. whereas the FIR was lodged at 1.00 a.m. (mid night) and it was after the registration of FIR that the state machinery came into action and after usual proceedings the postmortem examination was conducted at 6.15 a.m. in the morning i.e. after five hours of registration of FIR. After the occurrence, the petitioner also remained absconder for about six months, which is also a corroboratory piece of evidence against him. The learned High Court has rightly disbelieved the motive by holding that there is no positive proof that the deceased was instrumental in rejection of matrimonial proposal sent by the petitioner. So far as the recovery of weapon of offence i.e. .12 bore rifle is concerned, admittedly no empty was recovered from the place of occurrence, which could be sent to Forensic Science Laboratory for analysis, therefore, the recovery is inconsequential. In these circumstances, there is sufficient evidence available to sustain the conviction of the petitioner/convict. So far as the quantum of punishment is concerned, keeping in view the fact that recovery is inconsequential and motive has not been proved, the learned High Court has rightly taken a lenient view and converted the sentence of death into imprisonment for life.** No further leniency can be shown to the petitioner.

The impugned judgment is well reasoned, proceeds on correct principles of law on the subject and does not call for interference by this Court.

7. For what has been discussed above, we do not find any merit in these petitions, which are dismissed and leave to appeal is refused. The above are the detailed reasons of our short order of even date.

MWA/S-27/SC Petitions dismissed.

**2022 S C M R 1882**

**[Supreme Court of Pakistan]**

**Present: Ijaz ul Ahsan, Munib Akhtar and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**SAJID MEHMOOD---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 398 of 2020, decided on 31st May, 2022.

(Against the judgment dated 01.02.2018 passed by the Lahore High Court, Rawalpindi Bench in Criminal Appeal No. 281/2015, Criminal Revision No. 130/2015 and Murder Reference No. 36/2015)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the accused or adverse to the prosecution could be produced on record---Ocular account furnished by the prosecution was reliable, straightforward and confidence inspiring---Both prosecution witnesses were inmates of the house, in front of which occurrence took place, therefore, their presence was natural and the same was fully established from the record---Medical evidence available on the record corroborated the ocular account so far as the nature, time and impact of the injury on the person of the deceased was concerned---Counsel for the accused could not point out any plausible reason as to why the complainant would falsely involve the accused in the present case and let off the real culprit, who had committed murder of his real brother---Substitution in such like cases was a rare phenomenon---According to the report of the Forensic Science Labo-ratory, the crime empty was found fired from the pistol recovered from the accused---Conviction of accused under section 302(b), P.P.C. was maintained---Appeal was dismissed.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Medical evidence and ocular account---Preference---Where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence---Casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons---During an incident when live

shots are being fired, witnesses in a momentary glance make only tentative assessment of points where such fire shots appear to land and it becomes highly improbable to mention their location with exactitude.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd---Prosecution witnesses related to the deceased---Mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Minor discrepancies in prosecution case---While appreciating the evidence, the court must not attach undue importance to minor discrepancies---Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored---Accused cannot claim premium of such minor discrepancies---If importance is given to such insignificant inconsistencies then there would hardly be any conviction.

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

----Ss. 161, 265-F(2), 265-F(7) & 540---Witness mentioned in FIR but whose statement is not recorded under section 161, Cr.P.C.---Whether such witness could be examined under section 256-F or section 540, Cr.P.C. and his evidence relied upon---Held, that perusal of section 265-F, Cr.P.C. shows that nowhere in the said section it is mentioned that only those witnesses could be examined whose statements under section 161, Cr.P.C. have been recorded---Under section 265-F, Cr.P.C. the Trial Court is not bound to record the statements of only those witnesses who have been listed in the calendar of witnesses---Furthermore there is no bar that a witness, whose statement under section 161, Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to be examined under section 540, Cr.P.C.---When a witness is examined in Court, whose statement has not been recorded at the time of investigation under section 161, Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if it is found that prejudice has been caused to the accused then the evidence of such witness may or may not be acted upon.

To arrive at a just conclusion, the courts can call any person likely to be acquainted with the facts of the case after ascertaining it from the Public

Prosecutor or the complainant, subject to general provisions that summoning of any such witness does not cause delay or defeat the ends of justice. Section 265-F(2) of Cr.P.C empowers the Courts to summon a person, after having been ascertained from the Public Prosecutor or the complainant, who is likely to be acquainted with the facts of the case, to be able to give evidence for the prosecution. Section 265-F(7), Cr.P.C grants even to the accused a right to apply for summoning any witness and production of documents. The very purpose of section 265-F, Cr.P.C is to ensure the concept of a fair trial and to achieve this purpose equal opportunity has been given to both the accused and the prosecution for summoning the evidence. It is nowhere mentioned in this section that only those witnesses could be examined whose statements under section 161, Cr.P.C. have been recorded. Under this provision of law i.e. section 265-F, Cr.P.C the Trial Court is not bound to record the statements of only those witnesses who have been listed in the calendar of witnesses.

On the other hand, section 540, Cr.P.C. empowers the Trial Court to summon a material witness even if his name did not appear in the column of witnesses, provided his evidence is deemed essential for the just and proper decision of the case. Section 540 is divisible in two parts. In the first part, discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence had already been recorded. On the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to be essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of the society. The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. Fundamental thing to be seen is whether the Court considers this evidence necessary in the facts and circumstances of the particular case before it. If this results in only "filling of lacuna" that is purely a subsidiary factor and cannot be taken into consideration. There is no bar that a witness, whose statement under section 161, Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to be examined under section 540, Cr.P.C. When a witness is examined in Court, whose statement has not been recorded at the time of investigation under section 161, Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if it is found that

prejudice has been caused to the accused then the evidence of such witness may or may not be acted upon.

**(f) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Witness, evidence of---Scope---Believing or disbelieving a witness, depends upon intrinsic value of the statement made by him---No universal principle that in every case, interested witnesses should be disbelieved or disinterested witnesses be believed; it all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on scene of crime and that he is making a true statement---What is relevant is what statement has been given and it is not the person but the statement of that person which is to be seen and adjudged.

Abid Ali v. The State 2011 SCMR 208 ref.

**(g) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Testimony of single witness---Conviction---Scope---Conviction in a murder case can be based on the testimony of a single witness, if court is satisfied that he is reliable---Quality of evidence matters and not its quantity.

Niaz-ud-Din v. The State 2011 SCMR 725; Asim v. The State 2005 SCMR 417; Lal Khan v. The State 2006 SCMR 1846 and Muhammad Sadiq v. The State 2022 SCMR 690 ref.

**(h) Medical jurisprudence---**

----Concept of 'rigor mortis' and factors affecting the same explained.

The phrase rigor mortis is latin with rigor meaning stiffness and mortis meaning death. Rigor mortis is a temporary condition. Depending on body temperature and other conditions, rigor mortis lasts proximately for 72 hours. The phenomenon is caused by the skeletal muscles partially contracting. The muscles are unable to relax, so the joints become fixed in place. Factors that affect rigor mortis include (i) temperature/weather, (ii) physical exertion, (iii) age, (iv) body fat, (v) any illness the person had at the time of death, (vi) sun exposure, (vii) gender, (viii) body structure, (ix) genetics, (x) tribe and (xi) inhabitation.

**(i) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in---Death sentence reduced to life imprisonment---High Court while taking into consideration the fact that the motive part of the prosecution story was not proved; there was no blood feud between the parties; what actually preceded just before the occurrence remained shrouded in mystery; accused only fired single shot and co-accused of the accused had been acquitted by the Trial Court, had rightly taken a lenient view and converted the sentence of death into imprisonment for life---No further leniency could be shown to the accused in the matter of his sentence---Appeal was dismissed.

Muhammad Ahsan Bhoon, Advocate Supreme Court, Syed Ali Imran, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellant.

Ahmed Raza Gillani, Additional P.G. for the State.

Date of hearing: 31st May, 2022.

**JUDGMENT**

**SAYYED MAZAHAR ALI AKBAR NAQVI, J.---**Appellant Sajid Mehmood along with three co-accused was tried by the learned Sessions Judge, Jhelum in terms of the case registered vide FIR No. 13 dated 16.01.2014 under sections 302/34, P.P.C. at Police Station Civil Line, District Jhelum, for committing murder of Azeem Ahmed, brother of the complainant. The learned Trial Court vide its judgment dated 23.06.2015 while acquitting the co-accused, convicted appellant Sajid Mehmood under section 302(b), P.P.C. and sentenced him to death. He was also directed to pay compensation amounting to Rs.500,000/- to the legal heirs of the deceased. In case of non-payment of the compensation, the same was ordered to be recovered as arrears of land revenue and the appellant was to suffer SI for six months. In appeal the learned High Court while maintaining the conviction of the appellant under section 302(b), P.P.C., altered the sentence of death into imprisonment for life. The amount of compensation and the mode of recovery thereof was maintained. Benefit of section 382-B, Cr.P.C. was also extended to the appellant. Being aggrieved by the impugned judgment, the appellant filed Jail Petition No. 160/2018 wherein leave was granted by this Court on 02.06.2020 and the present appeal has arisen out of the same.

2. The prosecution story as given in the impugned judgment reads as under:-

"2. The brief facts of the case as unfolded in the FIR, recorded on the statement of Jameel Hussain, complainant (PW-10) are that on 16.01.2014, he (complainant) along with his father Karamat Hussain, PW and his brother Zameer Ahmad was present outside the gate of his house for participating in Milad Sharif in the mosque, when at about 8.30 p.m. Azeem Ahmed, deceased (brother of complainant) came there on his white coloured cultus car bearing registration No. LW/9991 from city side. Azeem Ahmad (deceased) parked his car in front of his house and as soon as he alighted from his car, accused persons namely Sajid Mehmood alias Saja, Aurangzeb alias Ranga, Abdul Samad all armed with the pistol 30 bore respectively also arrived thereon white colour car being driven by Shahid alias Sando, the accused Aurangzeb alias Rangha raised a lalkara and consequently Sajid Mehmood alias Saja made a straight fire shot of his pistol targeting left thigh of Azeem Ahmad. On receipt of this pistol's fire Azeem Ahmad fell down on the ground and succumbed to his injuries on the spot and accused persons on their car vanished from the place of occurrence. The occurrence was witnessed by complainant, Zameer Hussain (PW-1) and Karamat Hussain (since given up).

The motive behind the occurrence was that on the previous night of the occurrence, the accused persons had got set on fire the Haveli of the complainant party and falsely involved Junaid and others in the occurrence; the respectable of the locality had patched up that matter between the complainant party and Junaid and others; due to this grudge, the accused committed the murder of complainant's brother. Hence, the crime report."

3. After completion of the investigation, report under section 173, Cr.P.C. was submitted before the Trial Court. The prosecution in order to prove its case produced 13 witnesses. In his statement recorded under section 342, Cr.P.C. the appellant pleaded his innocence and refuted all the allegations levelled against him. However, he did not make his statement on oath under section 340(2), Cr.P.C. in disproof of allegations levelled against him. He also did not produce any evidence in his defence.

4. Learned counsel for the appellant contended that it was an un-witnessed occurrence and the whole prosecution case is concocted one. Contends that even there are glaring contradictions and dishonest improvements in the statements of the eye-witnesses, which have escaped the

notice of the learned courts below. Contends that the complainant was brother of the deceased, therefore, his testimony cannot be believed to sustain the conviction of the appellant. Contends that there is conflict between medical and ocular account. Contends that the postmortem examination was conducted after two hours of the occurrence and in such a short span of time, the rigor mortis could not develop as such contradicted time of occurrence. Contends that according to prosecution witnesses, the dead body of the deceased was brought to the hospital in car whereas according to Dr. Saeed Anwar (PW-7), the dead body was brought by Rescue 1122, which speaks volumes on the conduct of the prosecution witnesses. Contends that although Zameer Hussain (PW-11) was mentioned as witness in the FIR but the Police did not record his statement under section 161, Cr.P.C., therefore, the said witness could not be examined to corroborate the solitary evidence of other eye-witness i.e. the complainant.

5. On the other hand, learned Law Officer has defended the impugned judgment by contending that the judgment of the learned High Court is well reasoned, based on correct principles of law and has examined the evidence in its true perspective, therefore, the same does not call for any interference by this Court.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on the record with their able assistance.

**The ocular account in this case has been furnished by Ch. Jameel Hussain, complainant (PW-10) and Zameer Hussain (PW-11). These prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the appellant or adverse to the prosecution could be produced on record. Both these PWs remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances happened in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. The medical evidence available on the record corroborates the ocular account so far as the nature, time and impact of the injury on the person of the deceased is concerned. So far as the argument of learned counsel for the appellant that the medical evidence contradicts the ocular version is concerned, we may observe that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence. It is settled that casual discrepancies and conflicts**

**appearing in medical evidence and the ocular version are quite possible for variety of reasons. During turmoil when live shots are being fired, witnesses in a momentary glance make only tentative assessment of points where such fire shots appeared to have landed and it becomes highly improbable to mention their location with exactitude. As far as the question that the complainant was brother of the deceased, therefore, his testimony cannot be believed to sustain conviction of the appellant is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case. Both these PWs were inmates of the house, in front of which occurrence took place, therefore, their presence was natural and the same is fully established from the record. Learned counsel for the appellant could not point out any reason as to why the complainant has falsely involved the appellant in the present case and let off the real culprit, who has committed murder of his real brother. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprit who murdered his brother and falsely involve the appellant without any rhyme and reason. During the course of proceedings, the learned counsel contended that there are material discrepancies and contradictions in the statements of the eye-witnesses but on our specific query he could not point out any major contradiction, which could shatter the case of the prosecution. While appreciating the evidence, the court must not attach undue importance to minor discrepancies and such minor discrepancies which do not shake the salient features of the prosecution case should be ignored. The accused cannot claim premium of such minor discrepancies. If importance be given to such insignificant inconsistencies then there would hardly be any conviction.**

7. **It was one of the arguments of learned counsel for the appellant that although Zameer Hussain (PW-11) was mentioned as witness in the FIR but his statement under section 161, Cr.P.C. was not recorded, therefore, his testimony cannot be relied upon to sustain conviction of the appellant. However, we do not tend to agree with the learned counsel. To arrive at a just conclusion, the courts can call any person likely to be acquainted with the facts of the case after ascertaining it from the Public Prosecutor or the complainant, subject to general provisions that summoning of any such witness does not cause delay or defeat the ends**

**of justice. Section 265-F(2) of the Code of Criminal Procedure empowers the Courts to summon a person, after having been ascertained from the Public Prosecutor or the complainant, who is likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution. Section 265-F(7) grants even to the accused a right to apply for summoning any witness and production of documents. The very purpose of section 265-F is to ensure the concept of a fair trial and to achieve this purpose equal opportunity has been given to both the accused and the prosecution for summoning the evidence. There is nowhere mentioned in this Section that only those witnesses could be examined whose statements under section 161, Cr.P.C. have been recorded. Under this provision of law i.e. section 265-F the Trial Court is not bound to record the statements of only those witnesses who have been listed in the calendar of witnesses. On the other hand, section 540, Cr.P.C. empowers the Trial Court to summon a material witness even if his name did not appear in the column of witnesses provided his evidence is deemed essential for the just and proper decision of the case. In the present case, although the statement of Zameer Hussain (PW-11) under section 161, Cr.P.C. could not be recorded by the Police yet the fact remains that he was named as an eye-witness in the very FIR and was fully acquainted with the facts and circumstances of the case.** It would be advantageous to reproduce section 540, Cr.P.C., which is as follows:-

> "540. Power to summon material witness, or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case".

8. This section is divisible in two parts. In the first part, discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence had already been recorded. On the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also

justice from the point of view of the society. The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. Fundamental thing to be seen is whether the Court considers this evidence necessary in the facts and circumstances of the particular case before it. If this results in only "filling of lacuna" that is purely a subsidiary factor and cannot be taken into consideration. There is no bar that a witness, whose statement under section 161, Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to examine under section 540, Cr.P.C. When a witness examined in Court, whose statement has not been recorded at the time of investigation under section 161, Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if it is found that prejudice has been caused to the accused then the evidence of such witness may or may not be acted upon. Therefore, the argument of the learned counsel for the appellant is misconceived.

9. In Abid Ali v. The State (2011 SCMR 208), this Court has held that to believe or disbelieve a witness, all depends upon intrinsic value of the statement made by him. There cannot be universal principle that in every case, interested witnesses should be disbelieved or disinterested witnesses be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on scene of crime and that he is making true statement. Person who is reported otherwise to be very honest, aboveboard and very respectable in society, if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement. As a rule of criminal jurisprudence, prosecution evidence is not tested on the basis of quantity but quality of evidence. It is not that who is giving evidence and making statement. What is relevant is what statement has been given and it is not the person but the statement of that person which is to be seen and adjudged. In Niaz-ud-Din v. The State (2011 SCMR 725), it was held that conviction in a murder case can be based on the testimony of a single witness, if court is satisfied that he is reliable and it is the quality of evidence and not the quantity which matters. The same was the view of this Court in Asim v. The State (2005 SCMR 417), Lal Khan v. The State (2006 SCMR 1846) and Muhammad Sadiq v. The State (2022 SCMR 690). In this view of the matter, even if the testimony of Zameer Hussain is discarded, the evidence of complainant is sufficient to sustain conviction of the appellant.

10. **So far as recovery of crime weapon is concerned, after his arrest on 26.01.2014, the appellant got recovered .30 bore pistol and the same was sent to Forensic Science Laboratory on 04.02.2012. The one crime empty had already been sent to office of Forensic Science Laboratory on 27.01.2012. According to the report, the empty was found fired from the pistol got recovered from the appellant. Although, the Police sent the crime empty after ten days of the occurrence to the FSL and the same should have been sent without unnecessary delay after being collected from the spot but this laziness would not render the recovery inconsequential. It was argued by the learned counsel that according to prosecution witnesses, the dead body of the deceased was brought to the hospital in car whereas according to Dr. Saeed Anwar (PW7), the dead body was brought by Rescue 1122. However, this could not help the appellant simply for the reason that the document, which shows that the deceased was taken to hospital by Rescue 1122, is inadmissible in evidence as neither the author of the said document nor anyone on his behalf appeared before the Trial Court to verify the same. The said document, which is available at page 196 of the paper book, was also not brought on the judicial record. Even otherwise, the learned Trial Court has very rightly dealt with this issue and observed that during cross-examination, the doctor tried to give concession to the accused persons and stated that the dead body was brought by Rescue 1122 but in his reexamination he admitted that in documents there was no mention that the dead body was brought by Rescue 1122. The learned High Court has disbelieved the motive part of the prosecution story by observing that the complainant is neither the eye-witness of the incident of burning of haveli nor was present in the meeting where compromise was effected. According to him, his brother Shakeel had informed him but the said Shakeel was not examined during the trial in order to prove the motive part of the prosecution story. We find no reason to differ with this finding of the learned High Court. It was argued by the learned counsel that the postmortem examination was conducted after two hours of the occurrence and at that time rigor mortis had fully developed, which according to him, shows that the deceased had died long ago before the given time of incident. The phrase rigor mortis is latin with rigor meaning stiffness and mortis meaning death. Rigor mortis is a temporary condition. Depending on body temperature and other conditions, rigor mortis lasts approximately for 72 hours. The phenomenon is caused by the skeletal muscles partially contracting. The muscles are unable to relax, so the joints become fixed in place. Factors that affect rigor mortis**

**include (i) temperature/weather, (ii) physical exertion, (iii) age, (iv) body fat, (v) any illness the person had at the time of death, (vi) sun exposure, (vii) gender, (viii) body structure, (ix) genetics, (x) tribe and (xi) inhabitation. Admittedly, the occurrence took place in the night of January and development of rigor mortis in the cold days is not surprising. So far as the quantum of punishment is concerned, the learned High Court while taking into consideration the fact that the motive part of the prosecution story is not proved; there was no blood feud between the parties; what actually preceded just before the occurrence remained shrouded in mystery; appellant only fired single shot and co-accused of the appellant have been acquitted by the learned Trial Court, has rightly taken a lenient view and converted the sentence of death into imprisonment for life. No further leniency can be shown to the appellant. The impugned judgment is well reasoned, proceeds on correct principles of law on the subject and does not call for interference by this Court.**

11. For what has been discussed above, we do not find any merit in this appeal, which is dismissed. The above are the detailed reasons of our short order of even date.

MWA/S-28/SC Appeal dismissed.

**2022 S C M R 1608**
**[Supreme Court of Pakistan]**

**Present: Gulzar Ahmed, Qazi Faez Isa and Mazhar Alam Khan Miankhel, JJ**

MUHAMMAD SHOBAN---Appellant
Versus
The STATE---Respondent

Criminal Appeal No. 122-L of 2012, decided on 18th October, 2018.*

(On appeal from the judgment dated 9.6.2010 passed by the Lahore High Court, Lahore Multan Bench, Multan in Criminal A. No. 130 of 2005 and M.R. No. 213 of 2005)

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 337-F(iii)---Qatl-i-amd---Reappraisal of evidence---Sentence, reduction in---Death sentence reduced to life imprisonment---Motive not established---In the present case, the motive alleged by the prosecution was of illicit relations of the accused with the sister-in-law of the deceased and the alleged words of reprimand by the deceased to the accused and his co-accused in the evening preceding the day of occurrence---Burden to prove the motive part of the occurrence was upon the prosecution but record of the case revealed that the same was alleged in the FIR but was not been proved---Merely alleging a motive would not be sufficient to accept and rely upon the same---Prosecution had failed to prove the motive alleged in the FIR, benefit of which for the purpose of quantum of sentence would have to go to the accused---Accused in the given circumstances, could not be awarded major penalty of death---Conviction of accused under section 302(b), P.P.C., was maintained, however sentence of death awarded to him was converted into life imprisonment---Appeal was partly allowed.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Quantum of sentence--- Motive not established---Effect---Absence of motive or absence of proof of the same would be a sufficient mitigating circumstance to determine the quantum of sentence.

Mst. Nazia Anwar v. The State 2018 SCMR 911; Nadeem Ramzan v. The State 2018 SCMR 149; Haq Nawaz v. The State 2018 SCMR 21; Ghulam

Muhammad v. State 2017 SCMR 2048; Saif Ullah v. State 2017 SCMR 2041 and Waris Ali v. The State 2017 SCMR 1572 ref.

Zulfiqar Ahmed Bhutta, Advocate Supreme Court and Ahmed Nawaz Chaudhry, Advocate-on-Record (Absent) for Appellant.

Ahmed Raza Gillani, Additional Prosecutor General Punjab for the State.

Date of hearing: 18th October, 2018.

**JUDGMENT**

**MAZHAR ALAM KHAN MIANKHEL, J.---**The appellant namely Muhammad Shoban son of Niaz Ahmed Caste Rajput resident of Chak No.15-C/TDA, Tehsil Karor, District Layyah along with Shafaqat Ali alias Mithu and Muhammad Iqbal was booked in case FIR No.310 dated 1.10.2004 registered under sections 302, 324, 34, P.P.C. at Police Station, Fatehpur, Tehsil Karor, District Layyah on the report of Ghularn Abbas/complainant (PW-8) son of Khursheed. On the day of occurrence at 8.00 a.m. when the complainant along with his brother Muhammad Ilyas (deceased) was going to Addah Chak No.217/TDA, the appellant Muhammad Shoban, armed with pistol, Shafaqat Ali alias Mithu, also armed with pistol, and Muhammad Iqbal empty handed intercepted them near a vacant plot of Mst. Mehr Jehan Sial. Shafaqat Ali alias Mithu raised an alarm of alert that they will teach lesson to them for admonishing them in the evening a day before the occurrence, whereupon the appellant Muhammad Shoban fired two shots on the person of Muhammad Ilyas (deceased) which hit him on the front of his chest and near left elbow joint. He fell down after receiving said bullet injuries. Shafaqat Ali co-accused then tried to fire upon the complainant but he caught hold of him. The appellant then fired at the complainant on the direction of Muhammad Iqbal co-accused which hit him on the left leg whereas the second fire was missed and instead of hitting the complainant one Zahid Umar a passerby was hit. On hearing the fire shots, their father Khursheed Ahmed and Muhammad Ramzan (PW-9) along with others were attracted and on seeing them the accused decamped from the spot. Motive for the offence was that a day before the occurrence Muhammad Ilyas (deceased) had reprimanded the appellant and Shafaqat Ali alias Mithu as to why they were wandering around his house. It was also alleged in the FIR that the appellant had illicit relations with Mst. Nasreen Bibi sister-in-law (Saali) of Muhammad Ilyas (deceased).

2. The appellant after registration of the case faced trial in the Court of Additional Sessions Judge, Karor, District Layyah who after a regular trial convicted the appellant under sections 302(b), P.P.C. and sentenced him to death with compensation under section 544-A, Cr.P.C. of Rs.1,00,000/- (one lac) to be paid to the legal heirs of the deceased and in default of payment of the same the appellant to further undergo S.I. for six months. The appellant was further convicted under section 337-F(iii), P.P.C., and was sentenced for two years R.I. with payment of Rs.25,000/- as Daman to each of the injured person in default of which the appellant was ordered to be kept in jail till the payment is made.

3. The above conviction and sentences of the appellant were confirmed by the High Court while dismissing his appeal vide impugned judgment dated 9.6.2010, hence the present appeal with leave of the court dated 23.5.2012.

We have heard the learned counsel for the appellant and Mr. Ahmad Raza Gillani, learned Additional Prosecutor General, Punjab, Lahore.

4. Learned counsel for the appellant firstly tried to make out a case for acquittal of the appellant on merits but when confronted with leave granting order wherein learned counsel for the appellant at the very out set had asked for reduction of sentence from death to imprisonment for life instead of pressing his petition on merits, the learned counsel for the appellant had no words to say much less its rebuttal. **Perusal of the ocular account furnished by the eye-witnesses would also confirm the culpability of the appellant for the commission of the offence for which he has been charged. The medical evidence is also in full support of ocular account besides the corroborative piece of evidence in the shape of recovery of four empties and pistol and a positive report of Forensic Science Laboratory (FSL) in this regard. The appellant even has not denied his presence at the spot at the time of occurrence and took a plea of defence by firing at the deceased after snatching a pistol from him but that plea of self-defence was not established on the record and was rightly held by the trial court to be an afterthought. By keeping in view the above, we can understand that the appellant at the time of grant of leave to file appeal had in his mind the above referred material so far that matter he straight away opted to ask for reduction of his sentence.**

**Yes! The only aspect of the case which goes in favour of the appellant is the motive part of the case. The motive alleged by the prosecution is of illicit relations of the appellant with the sister-in-law**

**(Saali) of the deceased and the alleged words of reprimand by the deceased to the appellant and Shafaqat Ali alias Mithu his co-accused in the evening of a day before the occurrence. The burden to prove the motive part of the occurrence was upon the prosecution but record of the case would reveal that the same though alleged in the FIR but has not been proved. So mere alleging a motive would not be sufficient to accept and rely upon the same. The law of the land in this regard is much settled by now that absence of motive or absence of proof of the same would be a sufficient mitigating circumstance to determine the quantum of sentence.** We can lay hands on some of the latest judgments of this court for a matter of reference i.e. Mst. Nazia Anwar v. The State (2018 SCMR 911), Nadeem Ramzan v. The State (2018 SCMR 149), Haq Nawaz v. The State (2018 SCMR 21), Ghulam Muhammad v. State (2017 SCMR 2048), Saif Ullah v. State (2017 SCMR 2041), Waris Ali v. The State (2017 SCMR 1572). So keeping in view the above discussion, we are of the considered view that the prosecution has utterly failed to prove the motive so alleged in the FIR, benefit of which for the purpose of quantum of sentence in this case will have to go to the appellant and the appellant in the given circumstances, cannot be awarded major penalty of death.

5. This appeal, in the circumstances, by maintaining the conviction of the appellant under section 302(b), P.P.C., is partly allowed and sentence of death is converted into life imprisonment. Benefit of section 382(B), Cr.P.C. is also extended to the appellant. Remaining sentences of payment of Daman, compensation etc. are also maintained.

6. The above are the reasons for our short order of even date which reads as under:-

> "We have heard the learned counsel for the appellant. For reasons to be recorded later, this Criminal Appeal is partly allowed in terms that conviction of the appellant is maintained, however, his sentence of death is converted into life imprisonment with benefit of section 332-B, Cr.P.C. The remaining sentences of fine etc. shall remain intact."

MWA/M-48/SC Sentence reduced.

**2023 S C M R 117**
**[Supreme Court of Pakistan]**

**Present: Sayyed Mazahar Ali Akbar Naqvi and Shahid Waheed, JJ**

QASIM SHAHZAD and another---Petitioners
Versus
The STATE and others---Respondents

Criminal Petitions Nos. 241-L and 385-L of 2018, decided on 25th November, 2022.

(On appeal against the judgment dated 30.01.2018 passed by the Lahore High Court, Lahore in Criminal Appeal No. 101 of 2012 and Criminal Revision No. 167 of 2012)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Occurrence took place at 02.45 p.m. whereas the matter was reported to the police at 04:10 p.m. on the same day while the inter se distance between the place of occurrence and the police station was 4½ kilometers---Such aspect of the case clearly reflected that the matter was reported to police without any inordinate delay---Occurrence took place in broad daylight and the parties were known to each other therefore, there was no chance of misidentification---Both the prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the accused or adverse to the prosecution could be produced on record---Said witnesses remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances, therefore, it can safely be concluded that the ocular account furnished by the prosecution witnesses was reliable, straightforward and confidence inspiring---Said witnesses had reasonably explained their presence at the place of occurrence---Medical evidence available on the record corroborated the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased was concerned---Conviction and sentence awarded to the accused was maintained---Petition for leave to appeal was dismissed and leave was refused.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Conviction---Testimony of single witness---Conviction in a murder case can be based on the testimony of a single witness, if court is satisfied that he is reliable and it is the quality of evidence and not

the quantity which matters---Prosecution evidence is not tested on the basis of quantity but quality of evidence; it is not important that who is giving evidence and making statement; what is relevant is what statement has been given, and it is not the person but the statement of that person which is to be seen and adjudged.

Niaz-ud-Din v. The State 2011 SCMR 725; Asim v. The State 2005 SCMR 417; Lal Khan v. The State 2006 SCMR 1846 and Muhammad Sadiq v. The State 2022 SCMR 690 ref.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Ocular evidence---Medical evidence--- Preference--- Where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Witnesses of the ocular account related to the deceased---Mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses.

**(e) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Minor discrepancies--- As long as the material aspects of the evidence have a ring of truth, courts should ignore minor discrepancies in the evidence---Test is whether the evidence of a witness inspires confidence---If an omission or discrepancy goes to the root of the matter, the defence can take advantage of the same---While appreciating the evidence of a witness, the approach must be whether the evidence read as a whole appears to have a ring of truth---Minor discrepancies on trivial matters not affecting the material considerations of the prosecution case ought not to prompt the courts to reject evidence in its entirety --- Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored.

**(f) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Recovery of weapon of offence disbelieved and inconsequential---Sentence of imprisonment justified---Both the courts below had rightly disbelieved the recovery of weapon of offence i.e. churri by holding that no independent witness was associated during the recovery proceedings, and the blood stained churri was not sent to the office of Forensic Science Laboratory---Keeping in view the fact that recovery was disbelieved and inconsequential, the courts below had rightly awarded penalty of imprisonment for life to the accused---No further leniency could be shown to the accused---Petition for leave to appeal was dismissed and leave was refused.

Malik Saleem Iqbal Awan, Advocate Supreme Court for Petitioners (in Criminal Petition No. 241-L of 2018).

Nemo for Petitioners (in Criminal Petition No. 385-L of 2018).

Khurram Khan, Additional P.G. for the State.

Date of hearing: 25th November, 2022.

**JUDGMENT**

**CRIMINAL PETITION NO. 241-L OF 2018**

SAYYED MAZAHAR ALI AKBAR NAQVI, J.---Petitioner along with three co-accused was tried by the learned Sessions Judge, Khushab pursuant to a case registered vide FIR No. 64 dated 18.06.2010 under sections 302/34, P.P.C. at Police Station Naushera, District Khushab far committing murder of Aamer Riaz, nephew of the complainant. The learned Trial Court vide its judgment dated 13.01.2012 while acquitting two co-accused, convicted the petitioner under section 302(b), P.P.C. and sentenced him to imprisonment for life. He was also directed to pay compensation amounting to Rs.300,000/- to the legal heirs of the deceased or in default whereof to further undergo SI for six months. The co-accused Muhammad Nawaz was convicted under section 337-F(ii), P.P.C. and was sentenced to two years' RI. He was also directed to pay daman amounting to Rs.10,000/- to the injured. Benefit of section 382-B, Cr.P.C. was also extended to the petitioner and the co-accused. In appeal the learned High Court maintained the conviction and sentence of the petitioner under section 302(b), P.P.C. The amount of compensation and the sentence in default whereof was also maintained. However, the learned

High Court acquitted co-accused Muhammad Nawaz. Being aggrieved by the impugned judgment, the petitioner filed Criminal Petition No. 241-L/2018 whereas the complainant has filed Criminal Petition No. 385-L/2018 against the acquittal of the co-accused Muhammad Nawaz and seeking enhancement of the sentence awarded to the petitioner.

2. The prosecution story as given in the impugned judgment reads as under:-

> "2. Briefly, the facts of the case as per FIR lodged by Muhammad Ijaz/complainant (PW-8) are that he served as security guard in National Bank, Jouharabad and he was resident of Shakkar Kot; on the fateful day i.e. 18.06.2010 at 2.00 p.m., he after leaving from bank reached at Mouza Sarhal to see cricket match, where a tournament was going on. The complainant, Aamir Riaz his nephew, Faisal Ijaz his son and one Muhammad Asif, residents of village Shakar Kot, were already present in the village to watch the match. Before starting match the complainant party went to Jamia Masjid Sarhal to perform Juma prayer and after saying Juma prayer at about 2.45 p.m. when they reached at the gate of the Mosuqe, Aamir Riaz his nephew after wearing his shoes had gone few paces ahead of them; Faisal Ijaz and Muhammad Asif, after wearing their shoes also reached at the gate of Mosque. Suddenly they saw the accused persons namely Qasim Shahzad armed with churri; Haroon Shahzad armed with knife, lmran and Muhammad Nawaz empty handed, while raising lalkara came near Aamir Riaz; Imran accused said to Aamir Riaz that he would not live alive and caught hold of Aamir Riaz from behind and Qasim Shahzad inflicted churri blow to Aamir Raiz at left side of his abdomen; second blow of knife caused by Haroon Shahzad landed in front of his chest; Muhammad Nawaz gave a brick blow to Aamir, which caused injury in the inner side of both toes of his feet. The complainant along with Faisal Ijaz and Muhammad Asif witnessed the occurrence and in order to rescue Aamir Riaz they rushed towards accused but on seeing them the accused fled away from the scene of occurrence towards village Abadi. After receiving injuries Aamir Raiz fell on the ground; they took him to the Civil Hospital, Noushera on a private vehicle, where Aamir Riaz succumbed to the injuries.
>
> 3. Muhammad Ijaz/complainant also disclosed in the FIR that one day prior to occurrence i.e. on 17.06.2010 there was a cricket match in the village Sarhal between the team of Aamir Riaz and Qasim Shahzad in

which some hot words were exchanged between both the teams, thus, for the same reason the accused with consultation and planning has committed the murder of Aamir Riaz."

3. After completion of investigation, report under section 173, Cr.P.C. was submitted before the Trial Court. In order to prove its case the prosecution produced as many as eleven witnesses. In his statement recorded under section 342, Cr.P.C, the petitioner pleaded his innocence and refuted all the allegations levelled against him. However, he neither appeared in his own defence under section 340(2), Cr.P.C. nor produced any evidence in his defence.

4. Learned counsel for the petitioner/convict contended that there are glaring contradictions and dishonest improvements in the statements of the eye-witnesses, which have escaped the notice of the learned courts below. Contends that the prosecution case is based upon whims and surmises and it has to prove its case without any shadow of doubt but it has miserably failed to do so. Contends that the learned Trial Court had disbelieved the testimony of Muhammad Ejaz, complainant (PW-8), as such, the conviction of the petitioner based on the solitary statement of Faisal Ejaz (PW-9) is not sustainable in the eyes of law. Contends that the medical evidence contradicts the ocular account. Contends that the prosecution has not been able to prove motive as alleged, which causes serious dent in the prosecution case. Contends that the recovery of weapon of offence in absence of report of FSL is inconsequential. Lastly contends that the reasons given by the learned High Court to sustain conviction of the petitioner are speculative and artificial in nature, therefore, the impugned judgment may be set at naught.

5. On the other hand, learned Law Officer contended that to sustain conviction of an accused on a capital charge, un-rebutted ocular evidence alone is sufficient. Contends that the ocular account is supported by the medical evidence, therefore, the petitioner does not deserve any leniency by this Court.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on the record with their able assistance.

**Admittedly, the occurrence has taken place at 02.45 p.m. whereas the matter was reported to the police at 04:10 p.m. on the same day while the inter se distance between the place of occurrence and the Police Station was 4-1/2 kilometer. This aspect of the case clearly**

**reflects that the matter was reported to Police without any inordinate delay. As the occurrence has taken place in the broad daylight and the parties were known to each other, therefore, there is no chance of misidentification. The ocular account in this case had been furnished by Muhammad Ejaz, complainant (PW-8) and Faisal Ejaz (PW-9). Although, the learned Trial Court disbelieved the testimony of complainant Muhammad Ejaz (PW-8) but this would be of no help to the petitioner. As a rule of criminal jurisprudence, prosecution evidence is not tested on the basis of quantity but quality of evidence. It is not that who is giving evidence and making statement. What is relevant is what statement has been given and it is not the person but the statement of that person which is to be seen and adjudged. In Niaz-ud-Din v. The State (2011 SCMR 725), it was held that conviction in a murder case can be based on the testimony of a single witness, if court is satisfied that he is reliable and it is the quality of evidence and not the quantity which matters. The same was the view of this Court in Asim v. The State (2005 SCMR 417), Lal Khan v. The State (2006 SCMR 1846) and Muhammad Sadiq v. The State (2022 SCMR 690). In this view of the matter, even if the testimony of Muhammad Ejaz is discarded, the evidence of Faisal Ejaz (PW-9) is sufficient to sustain conviction of the petitioner. However, the learned High Court has believed the testimony of the complainant and in doing so has given valid reasons in paragraph 12 of the impugned judgment. On this aspect of the case, learned counsel for the petitioner could not convince us to come to a different view than what has been arrived at by the learned High Court. Both the prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the petitioner or adverse to the prosecution could be produced on record. They remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances happened in this case, therefore, it can safely be concluded that the ocular account furnished by these prosecution witnesses is reliable, straightforward and confidence inspiring. These PWs have reasonably explained their presence at the place of occurrence. The medical evidence available on the record corroborates the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased is concerned. Even otherwise, it is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence. As far as the question that the witnesses of the ocular account are related to the deceased, therefore, their testimonies cannot be believed to sustain conviction of the**

**petitioner/convict is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses. Learned counsel for the petitioner could not point out any reason as to why the complainant has falsely involved the petitioner in the present case and let off the real culprit. During the course of proceedings, the learned counsel contended that there are material discrepancies and contradictions in the statements of the eye-witnesses but on our specific query he could not point out any major contradiction, which could shatter the case of the prosecution. It is a well settled proposition of law that as long as the material aspects of the evidence have a ring of truth, courts should ignore minor discrepancies in the evidence. The test is whether the evidence of a witness inspires confidence. If an omission or discrepancy goes to the root of the matter, the defence can take advantage of the same. While appreciating the evidence of a witness, the approach must be whether the evidence read as a whole appears to have a ring of truth. Minor discrepancies on trivial matters not affecting the material considerations of the prosecution case ought not to prompt the courts to reject evidence in its entirety. Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored. Learned counsel had argued that in-fact the complainant party was aggressor and had come at the Masjid to take revenge of the quarrel, which had taken place in the cricket match. However, on our specific query, he could not show us any evidence in support of his argument. Even otherwise, this stance of the learned counsel proves the motive part of the prosecution story, according to which, hot words between the petitioner and the deceased during the cricket match became the reason of the present occurrence. So far as the recovery of weapon of offence i.e. churri is concerned, both the learned courts below have rightly disbelieved the same by holding that (i) no independent witness was associated during the recovery proceedings, and (ii) the blood stained churri was not sent to the office of Forensic Science Laboratory. Keeping in view the fact that recovery is disbelieved and inconsequential, the learned courts below have rightly awarded penalty of imprisonment for life to the petitioner. No further leniency can be shown to the petitioner.**

7. For what has been discussed above, we do not find any merit in this petition, which is dismissed and leave to appeal is refused.

Criminal Petition No. 385-L of 2018

8. No one has entered appearance on behalf of the petitioner/ complainant to prosecute this matter. However, we have gone through the merits of the case and found that the learned High Court while maintaining the penalty of imprisonment for life awarded to the petitioner/convict Qasim Shahzad and while acquitting co-accused Muhammad Nawaz has given cogent reasons, which are neither arbitrary nor perverse or fanciful. The learned High Court has passed a well reasoned judgment, which is based upon the weightage of the evidence led and the same is unexceptionable. Even otherwise, this petition is barred by 35 days for which no plausible explanation has been given in Criminal Miscellaneous Application No. 135-L of 2018. Consequently, this petition having no merit and being time-barred is dismissed and leave to appeal is refused.

MWA/Q-4/SC Petitions dismissed.

**2023 S C M R 190**
**[Supreme Court of Pakistan]**

**Present: Ijaz ul Ahsan, Munib Akhtar and Sayyed Mazahar Ali Akbar Naqvi, JJ**

MUHAMMAD BASHIR and another---Petitioners
Versus
The STATE and others---Respondents

Jail Petition No. 557 of 2016 and Criminal Petitions Nos. 1391-L and 1392-L of 2016, decided on 31st October, 2022.

(Against the judgment dated 03.10.2016 passed by the Lahore High Court, Lahore in Criminal Appeal No. 1638 of 2013, Criminal Appeal No. 1724 of 2013 and Murder Reference No. 400 of 2013)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Matter was reported to police without any inordinate delay---Occurrence took place at 05.00 a.m. in the morning whereas the matter was reported to the police at 09:15 a.m. on the same day while the inter se distance between the place of occurrence and the Police Station was six miles---As the occurrence had taken place in broad daylight and it was not denied anywhere that the parties were not known to each other, therefore, there was no chance of misidentification---Ocular account was furnished by the complainant and a witness---Both of them were subjected to lengthy cross-examination by the defence but nothing favourable to the accused or adverse to the prosecution could be produced on record---Both said witnesses remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances that happened in the case---Ocular account furnished by the prosecution was reliable, straight-forward and confidence inspiring---Both said witnesses had reasonably explained their presence at the place of occurrence by stating that they were watering the fields and saw the accused make a fire shot with his pistol, which hit the deceased---Medical evidence available on the record corroborated the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased was concerned---Accused could not point out any reason as to why the complainant would falsely involved the accused in a case involving murder of his brother and let off the real culprit---Even if evidence relating to motive and recovery of weapon was discarded, there was sufficient evidence available to sustain the conviction of the accused

under section 302(b), P.P.C.---Jail petition was dismissed, leave was refused and conviction of accused was maintained.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Discrepancy between ocular account and medical evidence---Where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence---Casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons---During an occurrence when live shots are being fired, witnesses in a momentary glance make only tentative assessment of the distance between the deceased and the assailant and the points where such fire shots appeared to have landed and it becomes highly improbable to mention the distance correctly and the location of the fire shots with exactitude.

(c) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Witnesses of ocular account related to the deceased---Mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Minor discrepancies and contradictions in statements of eye-witnesses---As long as the material aspects of the evidence have a ring of truth, courts should ignore minor discrepancies in the evidence---Test is whether the evidence of a witness inspires confidence---If an omission or discrepancy goes to the root of the matter, the defence can take advantage of the same---While appreciating the evidence of a witness, the approach must be whether the evidence read as a whole appears to have a ring of truth---Minor discrepancies on trivial matters not affecting the material considerations of the prosecution case ought not to prompt the courts to reject evidence in its entirety---Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored.

**(e) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in--- Motive not proved--- Recovery of weapon inconsequential---Specific motive had been attributed towards the accused that he wanted to marry niece of deceased and on refusal he took the deceased's life--- High Court had rightly disbelieved the motive by holding that name and parentage of niece of deceased whose hand had allegedly been demanded by the accused was not introduced in the investigation as well as before the Trial Court---No evidence could also be placed on record to prove the motive---So far as the recovery of weapon of offence i.e. .30 bore pistol was concerned, the same was inconsequential in presence of negative report of Forensic Science Agency---Keeping in view the fact that recovery was inconsequential and motive had not been proved, the High Court had rightly taken a lenient view and converted the sentence of death into imprisonment for life---No further leniency could be shown to the accused---Jail petition was dismissed and leave was refused.

**(f) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Petition for leave to appeal challenging acquittal of accused---Reappraisal of evidence---Name of the accused was not mentioned in the crime report, and his name was brought in through a private complaint, which was lodged after a lapse of three months wherein his name was mentioned for the first time---Statement of one of the witnesses of the ocular account recorded under section 161, Cr.P.C. also did not disclose the name of the accused---Alleged confessional statement on the part of all the accused was of no avail as the same was made jointly, which had no legal sanctity---Even otherwise, the same was inadmissible in evidence---High Court while adjudicating the matter and taking into consideration all the material placed on the record gave a finding of acquittal in favour of accused, which seemed to be well reasoned and the same did not invite any interference on judicial premises---Petition for leave to appeal was dismissed and leave was refused.

Muhammad Yar Khan Daha, Advocate Supreme Court for Petitioner (in J.P. No. 557 of 2016).

Malik Matee Ullah, Advocate Supreme Court for the Complainant and Petitioners (in Criminal Petitions 1391-L and 1392-L of 2016) (via video link from Lahore).

Ahmed Raza Gillani, Additional P.G. for the State.

Date of hearing: 31st October, 2022.

**JUDGMENT**

**SAYYED MAZAHAR ALI AKBAR NAQVI, J**.---Petitioner Muhammad Bashir along with two co-accused was tried by the learned Additional Sessions Judge, Arifwala in a private complaint under sections 302/34, P.P.C. for committing murder of Muhammad Amin, brother of the complainant. The same was instituted being dissatisfied with the investigation conducted by the Police in case FIR No. 487 dated 23.09.2010 registered under sections 302/34, P.P.C. at Police Station Saddar Arifwala, District Pakpattan Sherif. The learned Trial Court vide its judgment dated 23.11.2013 convicted the petitioner and co-accused Saeed Ahmed under section 302(b), P.P.C. and while sentencing the petitioner to death, awarded punishment of imprisonment for life to co-accused Saeed. They were also directed to pay compensation amounting to Rs.200,000/- each or in default whereof to further undergo SI for six months'. However, the learned Trial Court acquitted co-accused Abdul Hameed. In appeal the learned High Court while maintaining the conviction of the petitioner/convict under section 302(b), P.P.C., altered the sentence of death into imprisonment for life. The amount of compensation and the sentence in default whereof was maintained. Benefit of section 382-B, Cr.P.C. was also extended to the petitioner/convict. However, the learned High Court acquitted co-accused Saeed Ahmed. Being aggrieved by the impugned judgment, the petitioner/convict filed Jail Petition No. 557/2016 whereas the complainant has filed Criminal Petitions Nos. 1391-L and 1392-L/2016 before this Court against acquittal of co-accused Saeed Ahmed and for enhancement of the sentence of the petitioner/convict from imprisonment for life to death.

2. The prosecution story as given in the judgment of the learned Trial Court reads as under:-

> "2. Unnecessary detailed apart, brief facts, as unfurled from the private complaint are that on 23.9.2010 at about 5 a.m., Muhammad Amin (deceased) proceeded on motorcycle to Chak No. 87/EB in order to meet one Hassan Bhatti; when he reached near the land of one Ghulam Rasool accused persons Muhammad Basheer, Saeed Ahmed and Abdul Hameed, all armed with pistols .30 bore came there. On hue and cry of Muhammad Esa complainant, Manzoor Ahmed and Muhammad Sharif

PWs, who were watering the field near the place of occurrence attracted at the spot and saw the occurrence. Abdul Hameed accused raised lalkara that they would teach a lesson to Muhammad Amin for not giving 'Rishta' of his niece to Muhammad Basheer. Muhammad Basheer fired with his pistol .30 bore, which hit on the right side of head above the right ear of Muhammad Amin. Saeed Ahmed accused fired with his pistol .30 bore which hit below the right ear on the head of Muhammad Amin, who after receiving the fire shot fell down and succumbed to the injuries at the spot. The accused persons fled away from the spot along with their respective weapons.

Alleged motive behind the occurrence was that about six months prior to the occurrence, Muhammad Bashir accused for himself demanded Rishta of niece of Muhammad Amin deceased; Muhammad Amin refused that Rishta to Muhammad Bashir who felt insult and due to that grievance he along with his co-accused persons committed the murder of Muhammad Amin.

3. The conviction of the petitioner was recorded in a private complaint. The complainant produced cursory evidence whereafter the formal charge was framed against the petitioner and co-accused on 10.05.2011 under sections 302/34, P.P.C. to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced four PWs and thirteen CWs. In his statement recorded under section 342, Cr.P.C, the petitioner pleaded his innocence and refuted all the allegations levelled against him. He did not make his statement on oath under section 340(2), Cr.P.C. in disproof of allegations levelled against him. However, he produced some documentary evidence in his defence.

4. Learned counsel for the petitioner/convict contended that there are glaring contradictions and dishonest improvements in the statements of the eye-witnesses, which have escaped the notice of the learned courts below. Contends that the prosecution case is based on whims and surmises and it has to prove its case without any shadow of doubt but it has miserably failed to do so. Contends that during investigation, the Investigating Officer Ali Sher (CW-12) had found the petitioner not involved in the case and had declared him innocent. Contends that the medical evidence contradicts the ocular account. Contends that the prosecution has not been able to prove motive as alleged, which causes serious dent in the prosecution case. Contends that the recovery of weapon of offence in presence of a negative FSL report is

inconsequential. Contends that on the same set of evidence, the learned High Court has acquitted co-accused Saeed Ahmed, who was ascribed the similar role but the petitioner has been convicted without there being any justification. Lastly contends that the reasons given by the learned High Court to sustain conviction of the petitioner are speculative and artificial in nature, therefore, the impugned judgment may be set at naught.

5. On the other hand, learned Law Officer assisted by learned counsel for the complainant submitted that to sustain conviction of an accused on a capital charge, un-rebutted ocular evidence alone is sufficient. Contends that the ocular account is supported by the medical evidence, therefore, the petitioner/convict does not deserve any leniency by this Court, rather his sentence of imprisonment for life may be enhanced to death. So far as the acquittal of co-accused Saeed Ahmed is concerned, learned counsel for the complainant argued that the learned High Court erred in law while extending benefit of doubt although the same was not available keeping in view the solid, sound and cogent evidence adduced by the prosecution.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on the record with their able assistance.

**Undeniably, this occurrence has taken place at 05.00 a.m. in the morning whereas the matter was reported to the police at 09:15 a.m. on the same day while the inter se distance between the place of occurrence and the Police Station is six miles. This aspect of the case clearly reflects that the matter was reported to Police without any inordinate delay. As the occurrence has taken place in the broad daylight and it is not denied anywhere that the parties were not known to each other, therefore, there is no chance of misidentification. The ocular account in this case has been furnished by Muhammad Essa, complainant (PW-1) and Manzoor Ahmed (PW-2). These prosecution witnesses were subjected to lengthy cross-examination by the defence but nothing favourable to the petitioner/convict or adverse to the prosecution could be produced on record. Both these PWs remained consistent on each and every material point inasmuch as they made deposition exactly according to the circumstances happened in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. Both these witnesses have reasonably explained their presence at the place of occurrence by stating that they were watering the fields at the distance of one kanal**

**and saw that Bashir Ahmed petitioner made fire shot with his pistol, which hit on the right side of head of the deceased. The medical evidence available on the record corroborates the ocular account so far as the nature, time, locale and impact of the injury on the person of the deceased is concerned. Learned counsel for the petitioner had argued that in site plan the distance between the deceased and the petitioner has been mentioned as five feet but there was blackening around the wound which suggests that the fire was made from a distance of less than three feet and the same contradicts the ocular version. However, this argument is of no help to the petitioner because there are various factors which affect blackening e.g. surface of target i.e. wet or dry and the body structure of the victim and the quality of gun powder. Probably, the accused would have extended his arm to shot fire at the deceased. The normal length of the arm of an average man is more than two feet. With this if we add the length of the weapon i.e. .30 bore pistol, the distance between the accused and the deceased remains less than three feet. The deceased was not a static object and he could have changed his position at the time of occurrence. Even otherwise, it is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence. Casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons. During occurrence when live shots are being fired, witnesses in a momentary glance make only tentative assessment of the distance between the deceased and the assailant and the points where such fire shots appeared to have landed and it becomes highly improbable to mention the distance correctly and the location of the fire shots with exactitude. As far as the question that the witnesses of the ocular account are related to the deceased, therefore, their testimonies cannot be believed to sustain conviction of the petitioner/convict is concerned, it is by now a well established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses. Learned counsel for the petitioner/convict could not point out any reason as to why the complainant has falsely involved the petitioner/convict in the present case and let off the real culprit. Such reasoning does not appeal to reason. Substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real culprit who murdered his brother and falsely involve the petitioner without any rhyme or reason. During the course of proceedings, the learned counsel contended that there are material discrepancies and**

**contradictions in the statements of the eye-witnesses but on our specific query he could not point out any major contradiction, which could shatter the case of the prosecution. It is a well settled proposition of law that as long as the material aspects of the evidence have a ring of truth, courts should ignore minor discrepancies in the evidence. The test is whether the evidence of a witness inspires confidence. If an omission or discrepancy goes to the root of the matter, the defence can take advantage of the same. While appreciating the evidence of a witness, the approach must be whether the evidence read as a whole appears to have a ring of truth. Minor discrepancies on trivial matters not affecting the material considerations of the prosecution case ought not to prompt the courts to reject evidence in its entirety. Such minor discrepancies which do not shake the salient features of the prosecution case should be ignored.** It was argued by learned counsel for the petitioner that during initial investigation, the Investigating Officer, who appeared as CW-12 had found the petitioner not involved in the crime. However, this argument is also of no avail to the petitioner simply for the reason that Ali Sher (CW-12) was an ASI and under the law, he was not authorized to investigate the murder case falling within the ambit of section 302, P.P.C. Even otherwise, the statement of the said ASI shows that his finding was based on hearsay evidence and the same was not concurred by the subsequent Investigating Officer, who took the charge later on i.e. Qazi Abdul Basit, Inspector/SHO (CW-13). The said Qazi Abdul Basit, SHO categorically stated that he investigated the case under the supervision of SP, Regional Investigation Branch and found the petitioner involved in the case. His finding was verified by Regional Investigation Branch. The learned High Court has rightly disbelieved the motive by holding that a specific motive had been attributed towards the petitioner that he wanted the hand of niece of Muhammad Amin and on refusal he took his life. However, name and parentage of niece of Muhammad Amin deceased whose hand had allegedly been demanded by the petitioner has not been introduced in the investigation as well as before the trial court. No evidence could also be placed on record to prove the motive. So far as the recovery of weapon of offence i.e. .30 bore pistol is concerned, the same is inconsequential in presence of negative report of Punjab Forensic Science Agency. However, even if motive and recovery is discarded, there is sufficient evidence available to sustain the conviction of the petitioner/convict. So far as the quantum of punishment is concerned, keeping in view the fact that recovery is inconsequential and motive has not been proved, the learned High Court has rightly taken a lenient view and converted the sentence of death into imprisonment for life. No further leniency can be shown to the petitioner.

7. While adjudicating Criminal Petitions Nos. 1391-L and 1392-L of 2016 relating to the finding of High Court whereby co-accused of the petitioner namely Saeed Ahmed was acquitted of the charge while extending benefit of doubt, it is suffice to point out that the name of the said Saeed Ahmed was not mentioned in the crime report. However, his name was brought in through a private complaint, which was lodged after lapse of three months wherein his name was mentioned for the first time. The statement of the prosecution witness namely Manzoor Ahmed recorded on 23.09.2010 under section 161, Cr.P.C. also does not disclose the name of the said co-accused. The learned High Court while adjudicating the matter and taking into consideration all the material placed on the record gave a finding of acquittal in favour of Saeed Ahmed, which seems to us to be well reasoned and the same does not invite any interference on judicial premises. The crux of the argument that there was a confessional statement on the part of all the co-accused is of no avail as the same was made jointly, which has no legal sanctity. Even otherwise, the same is inadmissible in evidence, hence, the order of acquittal is justified based upon sound judicial reasoning. As far as the question of enhancement of sentence awarded to petitioner Muhammad Bashir is concerned, the learned High Court has already taken note of it and passed an appropriate order while converting the sentence of death into imprisonment for life, which seems to be meeting all requirements of principles enunciated by this Court for the safe administration of criminal justice.

8. For what has been discussed above, we do not find any merit in these petitions, which are dismissed and leave to appeal is refused.

MWA/M-75/SC Petitions dismissed.


**Punjab Judicial Academy**

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