IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE MAQBOOL BAQAR

CIVIL APPEAL NO.1137 OF 2008
(Against the judgment dated 25.4.2006 of the Lahore High Court, Lahore passed in LPA No.169 of 1968)

M/s Beach Luxury Hotels, Karachi

…Appellant(s)

VERSUS

M/s Anas Muneer Ltd. etc.

…Respondent(s)

For the appellant(s): Mr. Khalid Anwar, Sr. ASC
Mr. M. S. Khattak, AOR

For respondent No.1: Mr. Najam-ul-Hassan Kazmi, Sr. ASC

Date of hearing: 19.11.2015

…

JUDGMENT

MIAN SAQIB NISAR, J.- This is an appeal filed against the judgment delivered by a division bench of the Lahore High Court in ICA 169 of 1968 in terms whereof the judgment delivered by a learned single judge of the High Court was set aside and the case was decided in favour of the present Respondent. CPLA No.665 of 2006 was filed against the said judgment. The Respondent appeared before this court and unsuccessfully opposed the grant of leave to appeal, inter alia, on the ground that an appeal lay as of right in the present case and hence leave to appeal should not be granted. It was, however, contended on behalf of the Appellant that the value at which the disputed property was transferred showed the transfer price as being Rs.44,790.0 which is below Rs.50,000 and on the basis thereof his objection was over ruled. A review petition has been filed against the said order. However, it is not necessary to re-examine the question as to whether the transfer price was below

Rs.50,000 or not since this court has already granted a moratorium in relation to such petitions.

2. On the merits, the main objection raised on behalf of the Respondent before us was that the order of the Chief Settlement Commissioner in terms whereof the matter was re-opened disregarded the fact that prior thereto Ordinance No.II of 1962 had come into force with effect from 13.1.1962 and in terms thereof the provision of sub-section (2) and (4) of Section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1958 stood omitted. It was accordingly argued that the Settlement Department did not have the jurisdiction to re-open the case.

3. The essential facts of the case may now be considered. The property known as Nedous Hotel was transferred by means of a public auction. The auction notice states that the evacuee property known as Nedous Hotel would be sold on 21.08.1961. The auction was to be conducted by the Additional Settlement Commissioner, Lahore and presided over by the Settlement Commissioner (in dispute). The highest bid was tendered by Mr. Avari (hereinafter referred to as the Appellant) in the sum of Rs.1,21,00,000/- and in consequence thereof a Permanent Transfer Certificate was duly issued to him in which the area of the property was specified as being 96 kanals, one marla and 12 sq. feet. The boundaries were also specified as being on the north , PIA plot, WPIDC plot, Transport House and CSC Office and in the south Upper Mall, on the east Al-Hamra Arts Council and on the west WAPDA House. The Appellant's bid of Rs.1,21,00,000 had earlier been accepted by the Chief Settlement Commissioner on 7.9.1961. Although the permanent transfer certificate was issued on 6.10.1964 much prior thereto on 9.1.1962 the Appellant submitted a written application. By means of this letter it was submitted that at the time the possession of Nedous Hotel was given to him it was brought to the notice of the officer delivering possession that an area measuring approximately 530 sq. yards, or about 1½ kanals, belonging to Nedous Hotel and

lying between the Mall and the northwestern wing of the Hotel, had been enclosed by a wall and it was occupied by a service station. It was stated that at that time an assurance was given that the said area occupied by the service station would be recovered and possession handed over to him. It was further stated that the matter was also brought to the notice of the Settlement Commissioner to whom the letter was addressed and he repeated the same assurance. It was requested therefore that the appropriate action should be taken. Reliance was placed by the Appellant on a further letter as well dated 11th April which was addressed to the Chief Secretary, Government of the West Pakistan. This complained that his earlier letter had not evinced any response either from the Chief Settlement Commissioner or any other functionaries. The request was repeated that the said land should be handed over to him so that the total area of 96 kanals one marla and 12 sq. feet would be handed over to him. The Hotel was opened on 12th February 1962 as a going concern. Since the Government wanted the Hotel to start functioning urgently because of the shortage of accommodation the request was therefore made that the Chief Settlement Commissioner should hand over the area in question after an actual measurement and by removing the encroachment by M/s. Shahnawaz Limited, the occupant (i.e. Anas Muneer Limited, the Respondent) as soon as possible.

4. By means of a letter dated 29.1.1962 which was sent by the Settlement Commissioner to the Additional Settlement Commissioner the matter was re-opened. This letter is important and is reproduced below:

"**OFFICE OF THE**
CHIEF SETTLEMENT & REHABILITATION COMMISSIONER
PAKISTAN

11-Egorton Road,
Lahore

No. 106-F&M-Reh/62 Dated 29.1.1962

From
Settlement Commissioner (Industries)
Lahore.

To

Addl: Settlement Commissioner,
Lahore.

Sub:- Disposal of the big mansions & hotels
Property Nos. S-19-R-85 known as Nedous Hotel,
Upper Mall, Lahore.

Two units bearing Nos. S-10-R-85A (Khasra No. 1048) and S-19-R-85A (2) Khasra No. 1047 have been transferred to M/S Shahnawaz Serving station Ltd. The Mall, Lahore against one NS from. Only one unit could be transferred to then. The Unit No. S-19-R-85A(2) Khasra No. 1047 is a part of the Nedous Hotel which has since been auctioned. The transfer of this unit in favour of M/S Shahnawaz Ltd. is illegal and calls for immediate cancellation.

2. The Chief Settlement Commissioner, Pakistan has order that you may please re-examine the case and pass necessary or after hearing the parties under intimation to this office.

3. The relevant file of the Deputy Settlement Commissioner Lahore of this case containing pages 1 to 45 also sent herewith.

DEPUTY SETTLEMENT COMMISSIONER (1)
for, Settlement Commissioner (Industries)
Lahore.

No. 106-F-F&M-Reh/62 Dated _____1962

5. The foundation of the above letter is the clear cut legal position as set out in the Act in terms of which only one property could be transferred to a non-evacuee. The question, therefore, was whether the Respondent had obtained more than one property. If so, the transfer would be illegal and would lead to cancellation.

6. At this stage it would be appropriate to examine the title of the Respondent. The record indicates that the Respondent obtained a Provisional Transfer Order dated 8.1.1960. Apparently no permanent transfer order was ever issued to him. The Provisional Transfer Order issued by the Deputy Settlement Commissioner describes in the Schedule thereto the properties being transferred, as being not one but two properties. The said Schedule states that property No.S.E 19-R-85A and 85A(2), The Mall Lahore was being transferred. Subsequently the Respondent got the property numbers changed by the Deputy Settlement Commissioner to read as SE.19.R.85/A and SE.19.R.85/A(ii) instead.

7. The record indicates that not merely were these two different properties but in fact even the owners were different. Prior to getting to the said properties allotted it appears that the Respondent was occupying the same in his capacity as a tenant. In this connection, it is necessary to refer to a letter dated 13.11.1956 (i.e. much before the transfer of ownership to the Respondent) which was issued by the Settlement Department to the Respondent which is important and relevant. The said letter is reproduced hereinbelow:

No. DRC/ACS/RA/5961
Dated 13.11.1956

From

M.S. Zaman Esq. M.A. (Alig)
Deputy Rehabilitation Commissioner,
(Rent and Repairs) Lahore.

To

The Shahnawaz Servicing Station Ltd.
1, Charing Cross, The Mall,
Lahore.

Sub: Recovery of Rent of property No. SE-19-R/85 A, Lahore.

1. Reference your letter dated 6-11-1958 on the subject noted above.

2. There are two different properties i.e. SE-19-R-85(A) and SE-19-R-85 (E) belonging to two different owners named, K.S. Sathi and R.B.L. Jodhe Mal respectively. The rent of the properties has also been fixed separately @ Rs. 10/- p.m. and Rs. 83/5/- P.M. Gross. You are therefore requested to please pay the rent of the aforesaid properties separately.

3. All the amounts paid by you have been shown on the reverse of the rent bills which are enclosed herewith.

Sd. M.S. Zaman
Deputy Rehabilitation Commissioner,
(Rent and Repairs) Lahore.
Encl: Two
Rent Bills.

No. DRC/ACS/RA _____ Dated Nov 1956

Copy to:

The Rehabilitation Officer,
Civil Lines, Lahore, for information.

Deputy Rehabilitation Commissioner,
(Rent and Repairs) Lahore.

The letter speaks for itself and leaves no doubt in the matter that these were two different properties belonging to two different owners and in relation to which rent was being separately paid to the Settlement Department by the Respondent. However, to proceed with the narration of events thereafter the matter was taken up by the Additional Settlement Commissioner who passed a detailed order dated 9.11.1965.

8. The properties which were transferred to the Respondent consist of a petrol pump located on Khasra No.1048 and measuring 13 Marlas. The other property consists of a service station measuring 1½ kanals located on Khasra No.1047 and it is the case of Appellant that this was an integral part of Nedous Hotel which is located on the said Khasra. The Additional Settlement Commissioner directed that necessary enquiries should be made with the assistance with Mr. Agha Ali Hussain, Land Acquisition and Control Officer, in relation to the questions involved of title and possession. He reported that the Appellant had been handed over possession in full except the segment in the possession of Shahnawaz Service Station i.e. on Khasra 1047. On behalf of the Appellant it was contended before him that, being an integral part of Khasra No.1047. the Respondent was not entitled to claim the said plot of 1½ kanal and, in any event, there was no question of his being entitled to two properties on the basis of one Application Form alone.

9. In reply various defences were raised by the Respondent. According to him the land bore one number while the construction thereon bore another number. In relation to the ownership question the Respondent produced copies of the tax assessments by the Municipal Corporation which showed property bearing No.85/A(i) to be owned by one Mr. Sobti which was assessed at Rs.108 and the other property namely, 85/A(ii) was owned by M/s. R.B. Ram Saran Dass and R.B. Jodha Mall Kuthalia which was assessed at Rs.720. It appears to us that this argument does not advance the cause of the Respondent in any manner whatsoever but on the

contrary demolishes it completely. Insofar as the entitlement of the Appellant is concerned, he contended that the Settlement Patwari had submitted a report dated 5.6.1963 according to which the Appellant was in possession of 96 kanals 17 marlas and hence was not entitled to any further land. We will examine this report, which is important, closely in a later part of this judgment.

10. The Additional Settlement Commissioner after hearing both parties came to the conclusion that there had been a multiple transfer of the same property in favour of both Shahnawaz Service Limited (the Respondent) as well as Mr. D.B. Avari (the Appellant). He however, wanted to satisfy himself further as to Mr. Avari's entitlement and directed that a fresh examination of the same should be carried out by a team of five expert officials. He incorporated their findings in his order and we will further consider this at a later stage in this judgement. It will suffice to observe at this time that the report was in Mr. Avari's favour.

He then discussed the reliance by the Respondent on the earlier report of the Settlement Patwari and held that an examination of the said Patwari's report did not render any assistance to the Respondent since the report was vague. In the circumstances the matter was decided in favour of the Appellant and the transfer in favour of the Respondent was cancelled.

11. Against this order an appeal was filed before the Settlement Commissioner which was dismissed by means of an order dated 25.3.1968. This also concluded that possession of Nedous Hotel which was delivered indicated that the small area in the possession of the Respondent should also have been handed over at the same time to him. He concluded that the area in dispute was an integral part of Nedous Hotel and also that, in any event, the Respondent was not entitled to two properties by any stretch of the imagination.

12. After the Respondent had lost in both forums before the Settlement Department he approached the Lahore High Court by means of Writ Petition No.423-

R-68. The case came up before a learned Single Judge who passed an order dated 22.5.1968 in terms of which the Settlement Commissioner was directed to produce the complete file of the allotment and disposal of the properties which he then proceeded to examine personally. On a perusal of the record he concluded that Property No.85-A(i) was owned by Mr. Sobti while the portion designated 85-A(ii) was owned by Mr. Jodha Mall and that the property owned by Mr. Sobti had an area of 12 marlas whereas the property owned by Mr. Jodha Mall was a separate property with an area of 1½ kanals.

13. It is material to note that it was conceded before him by the Respondent that the petrol pump was located on the property bearing No.85-A(i) while the Service Station (i.e. the disputed plot) was situated on 85-A(ii) and that the latter was enclosed by a separate boundary wall. He then examined the record further and came to the conclusion that the Respondent, on his own showing, was not entitled to the property in question for an additional reason as well. This was that it was admitted that originally on the plot there was no pacca construction and the katcha construction had disintegrated and it was he who had subsequently constructed the pacca room. He concluded therefore that insofar as the property in dispute, which was owned by Mr. Jodha Mall was concerned, it could not be classified as a “shop” in terms of section 2(12) of the Displaced Persons (Compensation and Rehabilitation) Act 1958 and hence could not be transferred thereunder to the Respondent. It was merely an evacuee plot of land. The petition was accordingly dismissed since the Respondent had failed to establish his entitlement to the plot in question.

14. The question of more than one shop or property being transferred to a person is covered by the Schedule to the Displaced Persons (Compensation and Rehabilitation) Act, 1958. If reference is made to para 9 of the said Schedule it will be seen that it provides as under:

> 9. A shop in possession of a non-claimant displaced person and which the non-claimant desires to retain, shall be transferred to him on payment of the prevailing market value :
>
> Provided that not more than one shop shall be transferred to any one non-claimant under this paragraph :
>
> Provided further that if there is more than one applicant for the transfer of the same shop, the shop shall be transferred to the non-claimant who obtained prior possession.

It is therefore clear that in no circumstances whatsoever could the Respondent have had more than one property transferred to him.

15. We now turn to the judgment of the learned division bench of the High Court which has been impugned before us. By means of this the Respondent's appeal was accepted and the matter was decided in his favour. Before the learned division bench a new legal point was urged for the first time. Reliance was placed on Ordinance II of 1962 which was issued on 13th of January, 1962 and in terms of which by means of section 5 thereof, sub-section (2) and (4) of Section 20 were omitted. Section 20, as unamended is reproduced hereinbelow:

> 20. Revision.-(1) The Central Government at any time may call for the record of any case or proceeding under this Act in which the Chief Settlement Commissioner or a Settlement Commissioner or an Additional Settlement Commissioner or a Deputy Settlement Commissioner or an Assistant Settlement Commissioner has passed an order for the purpose of satisfying itself as to the correctness, legality and propriety of such order, and may pass such order in relatin thereto as it thinks fit.
>
> (2) The Chief Settlement Commissioner at any time may, and shall on being directed by the Central Government, call for the record of any case or proceeding under this Act in which a Settlement Commissioner or an Additional Settlement Commissioner or a Deputy Settlement Commissioner or an Assistant Settlement Commissioner has passed an order, for the purpose of satisfying himself as to the correctness, legality or propriety of such order, and may pass such order in relation thereto as he thinks fit.
>
> (3) A Settlement Commissioner specially empowered in this behalf by the Chief Settlement Commissioner may at any time call for the record of any case or proceeding under this Act in which an Additional Settlement Commissioner or a Deputy Settlement Commissioner or an Assistant Settlement Commissioner under his jurisdiction has passed an order, for

> the purpose of satisfying himself as to the correctness, legality or propriety of such order, and may pass such order in relation thereto as the thinks fit.
>
> (4) An Additional Settlement Commissioner specially empowered in this behalf by the Chief Settlement Commissioner may at any time call for the record of any case or proceeding under this Act in which a Deputy Settlement Commissioner or an Assistant Settlement Commissioner under his jurisdiction has passed an order, for the purpose of satisfying himself as to the correctness, legality or propriety of such order, and may pass such order in relation thereto as he think fit.
>
> (5) No order under this section shall be passed revising or modifying any order affecting any person without giving such person a reasonable opportunity of being heard.

In these circumstances it was submitted that the power to reopen the question of title had been taken away and hence the Settlement Department had no legal authority to interfere in the matter.

16. There is, however, an additional amendment which also took place. This was by means of Ordinance XIII of 1962 dated 17th of March, 1962. This amendment was effected with retrospective effect from 13th of January, 1962. Section 2 of the Ordinance provides that the following new section shall be inserted, and shall be deemed to have been always so inserted, as Section 7:

> "7. Savings. For the removal of doubts it is herby declared that omission by this Ordinance of sub-sections (2) and (4) of Section 20 and sub-sections (1), (1A) and 2) of Section 21 of the said Act shall not affect any case or proceedings the record of which called for under sub-section (2) of Section 20 of the said Act, or any review proceeding under sub-section (1) of Section 21 thereof, which was pending immediately before the commencement of this Ordinance:
>
> Provided that no revision or review under any of the provisions omitted by this Ordinance shall lie against any order made in any such case or proceedings."

17. It will be recollected that, as narrated hereinabove, on 9th January, 1962 the Appellant had sought to have the matter re-opened. This was before the critical date

namely 13th January, 1962. But this fact is not sufficient to enable the Appellant to take advantage of the amendment. The further question which arises is at what point of time did the Settlement authorities actually take cognizance of the matter and decide to re-open the same. In relation to this the record is silent. All that we have on the record is a letter dated 29.1.1962 sent to the Additional Settlement Commissioner in terms of which it is stated that the Chief Settlement Commissioner has ordered that he should re-examine the case and pass the necessary orders after hearing the parties under intimation to this office. Thus it is manifest that the Chief Settlement Commissioner had passed an order prior to the said date. This order was obviously passed at some point of time between 9th January, 1962 and 29th January, 1962. However, this earlier order is not part the of record before us. In these circumstances, since it was the duty of the Respondent, which was seeking to rely on this for the first time, and that too at a belated stage, who should have made an endeavour to have the entire record brought before the court. Since he failed to do there is no factual foundation on which we can proceed to decide the point in the Respondent's favour. Accordingly this finding of the learned division bench falls to the ground.

18. It is necessary to point out, however, that over and above the above aspect of the matter, there is an additional fact of the utmost importance. As pointed out earlier the Respondent only had a Provisional Transfer Order in his favour. This Provisional Order contains the following clause (vi) which is pertinent and is reproduced below:

> "(vi) The President shall be entitled to resume the whole or any part of the said property if the Central Government or any officer authorized by the Central Government in this behalf is at any time satisfied and records a decision in writing to that effect that the transfer of the said property or any other compensation in any form whatsoever under the aforesaid Act has been obtained by fraud, false representation or concealment of any material

> fact on the part of the transferee or his predecessor-in-interest."

It can be seen that this is an independent power conferred on the Settlement Authorities, quite apart from the statutory power of revision. The Respondent only had a provisional title and that also was subject to the above mentioned condition. It necessarily follows that in case the Settlement Department found that he had made any false representation, or concealment of a material fact, or fraud, it would be entitled to resume the property.

19. Further support to the above is provided by a plethora of case law including numerous judgments of this court which state that in case of fraud or misrepresentation an inherent power vests in the Settlement Authorities to recall the impugned order. Indeed the learned division bench had itself recognized the existence of this power and specifically held that even independently of the power of revision this was an inherent power of the Settlement Department. The relevant passage of the judgment of the learned division bench is reproduced below:

> "The only ground and basis of reopening of the matter has been where the transfer had been procured and was result of fraud and misrepresentation. That is the import of the *Chief Settlement Commissioner, Lahore vs. Raja Muhammad Fazal Khan and others* (PLD 1975 SC 331). In the instant case however there is not even any allegation or fraud or misrepresentation addressed to the Appellant (i.e. the Respondent herein) in seeking the transfer of the property not to say of any material."

20. We confess that we have read the above finding with great surprise. In fact, right from the beginning the *only* contention before the Settlement Authorities was the misrepresentation, or fraud, on the basis of which the Respondent had claimed two properties instead of one. There was no other matter before the court. The learned division bench has correctly stated the applicable principle of law but

thereafter has committed an error which is manifest on the face of the record. In these circumstances this finding can also not be upheld.

21. At this point of time it is necessary to deal with one additional point which has been raised before us on behalf of the Respondent. We noticed that the Respondent's counsel it difficult to justify the judgment of the learned division bench on the merits. Indeed, insofar as the judgment of the learned single bench of the High Court is concerned, he did not advance any proposition whatsoever to impugn its validity. He, however, adopted another stance, namely, to call in question the title of the Appellant. The main thrust of his submission was that the Appellant was only entitled to an area of 80 kanals and not 96 kanals, one marla 12 sq. feet. This contention was based by him on a map which is on the record as well as two additional documents filed by him. While we are going to examine his submission in some depth in what follows it is however necessary to clarify one point right at the inception.

22. The only question before the Settlement Authorities related to the title of the Respondent to the plot bearing No.85/A(ii) ad-measuring 1½ kanals. He claimed that he was entitled both to this plot (originally owned by Mr. Jodha Mal which is located on Khasra No.1047) as well as the smaller plot bearing No.85/A(i) originally owned by Mr. Sobti admeasuring about 12 kanals which is located on Khasra No.1048. In case this point is decided against him the matter comes to an end insofar as he is concerned. He has no locus standi to challenge the title or entitlement of Mr. D.B. Avari. Since we have already come to the conclusion that he has manifestly failed to establish his title in relation thereto his interest in the matter comes to a definitive end. He cannot be heard to challenge the title of Mr. D.B. Avari, which stems from an independent order passed by the Settlement Authorities in his favour, and which has never been challenged by anyone upto now despite the lapse of half a century.

Having said that, since the matter is before us, we turn to examine the submissions which have been made on his behalf on the merits.

23. We may note, at the inception, that the heart of the problem in cases such as this stems from the fact that no title deeds are available. This is not uncommon in cases of evacuee property. The owners had fled, presumably carrying with them their documents of title or else they were misplaced. We have to therefore proceed on the basis of whatever material there is available on the record. The map which has been referred to above shows the area as being 9.92 acres (approximately equal to 80 kanals). *It, however, also mentions the Khasra No. as being 1047 which is shown to be 96 kanals, 1 marla and 12 sq. feet.* Thus the map gives two figures, 9.92 acres and 96 kanals, 1 marla and 12. Sq. feet. The Respondent's counsel's contention however is that there are 600 sq. yards in a 1 kanal and if we convert 9.92 acres the result is 80 kanals and hence the Appellant is only entitled to this amount and not 96.1.12 sq. feet. There is more than one error in this contention. The first question is how many sqare yards are there in one kanal. The answer is that it depends on the location of the land. In agricultural areas there are not 600 but 605 sq. yards in one kanal but in Lahore a different practice is followed and there are 500 sq. yards in 1 kanal. There was no dispute on the point, in the entire proceedings before the Settlement Authorities, that apart from the 1 ½ kanals of Khasra No.1047, the rest of the area was the entitlement of Mr. Avari and if the 1 ½ kanals are added the total area of Khasra 1047 comes to 96 kanals, 1 marla, 12 sq. feet and not 80 kanals. If we convert 9.92 acres into sq. yards we get the figure of 48,012 sq. yards and if we divide this by 500 we get 96.0256 kanals or 96 kanals, 1 marla 12 sq. feet which is precisely the basis on which the Settlement Authorities have proceeded in the case, without any objection from the Respondent or anyone else upto now. Thus the entire argument is based on a misconception and, as we will observe in a later part of this judgement, the Settlement Patwari's report, on which the Respondent had placed

prime reliance before the Additional Settlement Commissioner and which he has relied on before us as an additional document comes to exactly the same conclusion. It is only if we proceed on the basis of 1 kanal equals 605 sq. yards (which is inapplicable) that we get a figure of not 80 kanals, but a little over 79 kanals. The argument therefore has to be rejected.

24. Two other documents have been filed by the Respondent and we will now consider them. The first is a copy of the Lahore Municipal Corporation Provisional Assessment List which reveals that Nedous Hotel has been given the number SE 19 R-87 for purposes of identification (i.e. in relation to imposition of municipal tax) which has been assessed at Rs.34,193/-. It describes the area of the site as being 80 kanals. The second is a copy of the Settlement patwari's report on which principal reliance was placed by the Respondent before the Settlement Department and was once again relied upon before us.

25. As is obvious from the above the Provisional Assessment List on which reliance has been placed relates to tax assessment. For this purpose the Municipality maintains its records of property. In fact, there are a number of additional documents also which are relevant in this context. By way of illustration we may refer to the Lahore Municipal Corporation assessment for the year 1946 in relation to the property bearing SE-19-R-85 A(i). This is the property owned by Mr. K.S. Sobti as stated in the document. This is the property on which the petrol pump is located which measures approximately 12 marlas. The annual value for purpose of tax payment has been assessed at Rs.108. This is the property which covers Khasra No.1048. Similarly, we also have the Lahore Municipal Corporation assessment for the same year in relation to the adjoining property, namely SE-19-R-85 A(ii) on Khasra No.1047. This is the property which admeasures approximately 1 ½ kanals. The name of the owner is disclosed in the assessment form as being R.B.L. Sarain Das for the owner Jodha Mall Kuthiala. This property has been assessed at Rs.720

for tax purposes. This is of course the property which had been illegally allocated to the Respondent and which allotment was subsequently cancelled by the Settlement Department. The occupier of this property, it is interesting to note, is shown as Mr. Sobti. We also have the Lahore Municipal Corporation Preliminary Assessment List for the year 1946, which shows the owner to be Mr. Jodha Mall with as many as five different names given by way of occupiers presumably from time to time. The names of the occupiers are reproduced below:

1. M/S Azam & Sons 2 Halls 2 Small rooms 1 gallery 1 bath.
2. J.C. Shamdia Locked
3. Post office 3 R + IV Ib1
4. Mr. Rafiullah 4R 1K IV 1F (Haroons)
5. Ch. Murtaza Sahib 5R 1K 1B 1F

26. It is interesting to note from the above that at one time even the Post Office was there. The Final Assessment List for the year shows the following names as occupiers:

1. Remington & Co.
2. J.C. Bendhier
3. Post Office

27. Thus although Mr. Jodha Mal remained the owner throughout the occupiers of some of the land kept changing from time to time. Taking all these documents together we can now get a reasonably good idea as to how the confusion may have arisen. The primary interest of the Lahore Municipal Corporation was to carry out an assessment for purposes of levying municipal tax. It was never to determine the question of title, which it was not entitled to do. In the absence of the title deeds for this purpose we have to go to the Revenue records. As is obvious from the above, Mr. Jodha Mal used to allow various individuals/entities to occupy part of the Nedous Hotel lands which were not for the time being required by the Hotel.

28. What emerges from a perusal of the documents is that the number given *for purposes of identification of the property* (as stated therein) is that number which has been given by the Lahore Municipal Corporation and this number has been given for purposes of tax assessment. As we have already commented, the title deeds however are missing since it was evacuee property. The question therefore arises what exactly was the title of the property owner and what area did it extend to. It is understandable that when a hotel is being assessed for tax purposes the Municipality would simply proceed on the number given by it and also focus essentially on the hotel building which is really the important building for purposes of tax assessment. Now it seems that Mr. Jodha Mall was in the habit of renting out parts of his property to various people or entities or at least to allow them to occupy it temporarily. The area owned by him which was on Khasra No.1047 was 96 kanals, one marla and 12 sq. feet. Out of this area he had, for example, given Mr. Sobti, 1 ½ kanals to be used for purposes of a service station. Similarly he had apparently allowed other persons also to utilize parts of the property. Thus it is possible that these parts of the land could easily and conveniently have been disregarded by the Municipality for purposes of tax assessment. The Municipal Tax record is not really the critically important document in order to establish title. For that we have to look to the Revenue records which fortunately are available with us. There is on the record available a copy of the Revenue records for the pre-partition period. The record relating to the year 1946 is decisive in the matter. *This shows an entry in urdu for what is described as* (نــدوکا) *Hotel (i.e. Nedous Hotel) and the area shown is not 80 kanals but 96 kanals, one marla and 12 sq. feet.* Since this goes back to the pre-1947 period, when there was no question of any evacuee property, this was the single strongest piece of evidence in relation to the title and ownership. It is important to note that this indicates not only the ownership of Mr. Jodha Mall but also that this entire area had been assigned and used for purposes of the hotel and hotel alone.

Thus it can logically be inferred that the area of the hotel was 96 kanals, one marlas and 12 sq. ft. which corroborates our earlier conclusion. This is the reason why the official map gives the area as 9.92 acres and also specifies 96 kanals, 1 marla, 12 sq. feet which exactly correspond to each other on the basis that one kanal equals 500 sq. yards.

29. The above record is further supported by the documentary evidence which is on the record. It needs to be borne in mind that since Nedous hotel was a well known hotel occupying a large area of land the Settlement Department exercised great care for and in relation to the auction. The auction notice states not merely that the auction would be conducted by the Additional Settlement Commissioner, Lahore, but the Settlement Commissioner himself would preside over the proceedings. Pursuant to the auction having taken place in which Mr. Avari was the highest bidder, (and it is important to note that no allegations have been made for and in relation to the manner in which the auction was conducted) initially a Provisional Transfer Order was issued in his favour on 29.1.1962. This Provisional Transfer Order contains the identical clause (vi) which is to be found in the title deed of the Respondent and states that if it is found that any fraud, misrepresentation or concealment has taken place the Government would be entitled to resume the property. However, no such fraud was either alleged by anyone or found by the Settlement Department to have taken place. Thus what is important to note, is that when the final transfer order was issued namely, the Permanent Transfer Certificate, which shows specifically the area of the property as being 96 kanals, one marla and 12 sq. feet on 6.10.1964, clause (vi), which had already served its purpose, was omitted in the normal course by the Government. This was a final title deed and accordingly conferred a permanent title on him in the normal course of events. It obviously could not grant a qualified or conditional title. That would be against the clear policy of the law relating to immovable property.

30. Not merely do the above facts speak for themselves, but there is in addition an extremely important circumstance which is further corroborative of the view expressed in the above. When the matter was re-opened the Additional Settlement Commissioner re-examined all the facts pertaining not merely to the title of the Respondent but also of Mr. Avari from the very inception and passed a very lengthy and detailed order which sets out at length the arguments advanced on behalf of the Respondents for purposes of examination thereof. He recorded the fact that the property auctioned in favour of Mr. Avari spread over Khasra No.1047 which was transferred to him on payment of the sum of Rs.1,21,00,000 and the title was duly confirmed by the issuance of the Permanent Transfer Certificate. He described the boundaries of the plot which are consistent with the fact that it extends to the whole of Khasra No.1047. It had already been noted by the Settlement Department by means of Office Memorandum dated 13.6.1962 that Mr. D.B. Avari had been handed over possession of the entire area sold to him except for the small segment which was in the possession of the Respondent. Mr. Avari's contention as advanced by his counsel, was that he had admittedly not been handed over possession of this small portion measuring 1½ kanals which was admittedly located on Khasra No.1047 which belonged to Mr. Jodha Mall. Accordingly his contention was that, being an integral part of the big mansion, the Respondent had no legal right or title thereto.

31. However, since the Respondent was adamant in insisting that he was entitled to the 1 ½ kanal plot the Additional Settlement Commissioner had to decide the issue whether or not a multiple transfer of the same property had taken place i.e. to Mr. Avari, as being the successful auction purchaser of Nedous Hotel spread over Khasra No.1047 on the one hand, and the Respondent on the other hand, who was in physical possession of 1½ kanals of that very khasra number. He accordingly called for the entire record and re-examined the same. The following passage from his order speaks for itself: "By going into the facts of the case as presented by both the learned

counsels and those available on the record of the case I am of the view that there has been a multiple transfer of the same property in favour of Mr. D.B. Avari auction purchaser on the one hand and M/s. Shahnawaz Service Limited transferee under Settlement Scheme No.1 on the other. *This point is established from a reference to the plan of the premises known as Park Luxury Hotel* wherein the segment at present in occupation of Shahnawaz Service Station Limited is shown included the premises so exhibited on the plan were disposed of to Mr. D.B. Avari through auction since finalized by way of issue of a Permanent Transfer Certificate. Auction of the property has without doubt been as that of a big mansion. The arguments by the learned counsel for Mr. D.B. Avari in this behalf that no part of the property since treated as big mansion was transferrable to third person unless of course as decided by the CS and RC do carry weight." Thus, it is clear, that the Settlement authorities examined the official plan of the premises on the basis of which the auction was held before concluding the matter in favour of Mr. Avari.

32. The Additional Settlement Commissioner, in view of the importance of the case, did not however, decide the matter merely on the above basis. He decided to set up a team of five dealing persons as is revealed by another extract from the said order which is reproduced below:

> "*As far as the point whether or not the said segment which is now in suit did form part of the premises sold in favour of Mr. D.B. Avari, the plan as referred to above, has also been examined vis a viz the position obtaining at site*. This examination as stated earlier, necessitated by a request by Mr. D.B. Avari for delivery of possession of the premises transferred to them was made through the technical assistance of the Land Acquisition and Control Officer, a Naib Tehsildar, a Revenue Patwari, and a Revenue Qaungo s\aided further by the Settlement Patwari. *As per his report dated 27.5.1963 actual measurement of the total area of Khasra No. 1047 in relation to the plan thereof which plan in turn was the subject matter of auction, was carried out at site and as a result of which an area of 1 Kanal and 2 marlas of Khasra No. 1047 was found in occupation of M/S Shahnawaz Service station Ltd."* [Emphasis added]

33. In our opinion these findings are conclusive in establishing what had actually happened. However, there is additional material available as well which further strengthens our conclusion.

34. When the case went up in appeal before the Settlement Commissioner the above findings were upheld. What is interesting to note is that the Respondent counsel's contention was that Mr. Avari was entitled to 96 kanals, 1 marla and 12 sq. feet and that he already had possession of the same as a perusal of the following passage of the order of Settlement Commissioner reveals:

> *"The counsel for the petitioner (i.e. the present Respondent) further asserted that a total area of 96 kanals, one marla and 12 sq. feet were promised to Respondent by sale and that according to the documents produced before the Additional Settlement Commissioner, it was proved beyond doubt that Respondent enjoyed full possession of 96 kanals, one marlas and 12 sq. feet."*

This then was the Respondent's case. He cannot now be allowed to radically alter it.

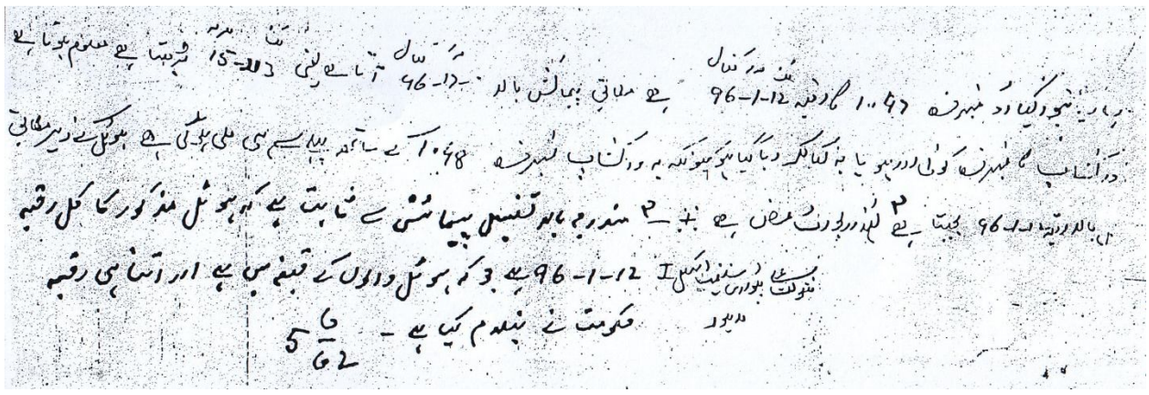
35. After considering the arguments advanced on behalf of both parties the Settlement Commissioner decided that the critical point was the entitlement of the Respondent – whether he had obtained one property or two, and since it had been established that there was no doubt about the fact that his legal entitlement only extended to one property hence the following finding was given: "It has been rightly held by the lower court that the Appellant is the transferee of two properties and that the portion of property No.SE-19-R-87 purchased by the Respondent in open auction had also been transferred to the Appellant by the Deputy Settlement Commissioner in an illegal manner. The appeal has no force and is dismissed herewith."

36. Thus it can be seen that the Respondent signally failed in order to establish his entitlement and the case was decided against him accordingly. This was in fact the major question before us. Thereafter the Respondent sought to challenge the concurrent findings of fact before a learned single judge of the Lahore High Court.

This has already been discussed by us at some length, and as noted above, the Respondent failed on an additional point as well that under the law in no circumstances whatsoever was he entitled to a transfer since he had claimed the transfer as a "shop" whereas in fact on the basis of his own admission it was clear it was an open plot of land. The finding of the Settlement Department on the facts was reiterated by the learned single judge.

37. We now turn to the final document in the case which we have not examined so far. As stated earlier, the Respondent has filed before us a copy of the Settlement Patwari's report which he had relied on earlier unsuccessfully before the Additional Settlement Commissioner. This is an extremely document which conclusively demolishes his case. In the earlier part of this report he suggests that Mr. Avari has already been given possession of 96 kanals, 17 marls and then proceeds to give his assessment of the matter. The relevant passage (in urdu) is reproduced below alongwith an English translation:

(X-7)



It has been found from the new record that the area of Khasra No 1047 is 96-1-12 and as per the above measurement it is 96-17 (96 Kanals 17 marlas) i.e. 15-213 is in excess. Workshop's khasra may be different because this workshop is connected with Khasra 1048 since earlier. Area covered by the Hotel is left at 96-1-12. *Therefore, it is submitted that from the above measurement it is proved that the total area of the Hotel is left at 96-1-12 which is in possession of the Hotel and it is this area which was auctioned by the Government. (Dated 5-6-1962*).

Shaukat Ali Patwari
Lahore.

38. Bearing in mind all the above facts and circumstances certain points are clear beyond any doubt: Firstly, insofar as the legal entitlement of the Respondent is concerned, this is primarily a question of law and there can be little doubt about the fact that he had illegally obtained two plots of land instead of one and hence the Settlement Department was entitled to cancel one of the two plots while the leaving the other in his possession and ownership. In fact, since there was only one order of the Deputy Settlement Commissioner which transferred both to the Respondent at one and the same time it was possible for the department even to have cancelled both at the same time but, we think, viewing everything in the proper perspective, that the department acted fairly and equitably in leaving title of one plot to him and restricting the cancellation to the other plot. Secondly, the question of Mr. Avari's entitlement really did not arise *per se*. The main thrust of the argument of the Respondent was in all prior stages upto the hearing of this appeal, that Mr. Avari already had the full 96 kanals, one marla and 12 sq. feet and hence was not entitled to the additional 1½ kanals which was in his occupation. This question of Mr. Avari's entitlement being limited to 80 kanals were never raised by him either before the Settlement Department or before the learned single judge and nor is it borne out by a consideration of all the facts and circumstances.

39. We have already commented on the fact that the Respondent has no locus standi to independently challenge the entitlement of Mr. Avari. We have, on our own, examined all the record in order to arrive at the conclusion which has been set out in the above. It may, however, be added that in any case it would be really extraordinary if a title which has been unchallenged and is supported by a Permanent Transfer Certificate issued more than half a century ago should now be allowed to be re-opened for the first time and that too in appeal on the allegations made by a person who has committed fraud. This is really something which we do not think would be proper or appropriate. The policy of the settlement law, has been to not to allow

questions of title, involving fatal disputes to be re-opened ever since the 1960s. This is the reason that revisional powers were taken away. In the present case the Settlement Department has also not challenged the title at any stage.

In the circumstances the appeal is allowed.

JUDGE

JUDGE

JUDGE

Announced in open Court
on **16.12.2015** at **Islamabad**
Not Approved For Reporting
Waqas Naseer/*