

**JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT**

E.F.A.No.02 of 2013

Syed Waqar-ul-Hassan Shah Burkari and others

Versus

Small Business Finance Corporation (now SME Bank Ltd.) and others

Date of Hearing: 16.09.2024.

Appellants by: Hafiz Muhammad Kashif Zaman, Advocate for the appellants along with appellant No.1 in person in E.F.A.No.02/2013.

Mr. Qausain Faisal Mufti, Advocate for appellant in R.F.A.No.204/2004.

Respondents by: Mr. Wasim Abid, Advocate for respondent No.1 in E.F.A.No.02/2013.

Mr. Muhammad Mehboob Alam, Advocate for respondents No.2 to 4 in E.F.A.No.02/2013 and for the petitioner in C.R.No.06/2005.

Raja Abdul Qayyum, Advocate for respondent No.1 in R.F.A.No.204/2004 and C.R.No.06/2005.

Mr. Amir Latif Gill, Advocate for CDA in C.R.No.06/2005.

Assisted by: Mr. Umar Farooq, Deputy Registrar and Barrister Khadija Naeem, Law Clerk.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide the following cases:-

- (i) Regular First Appeal No.204/2004 titled “Mian Muhammad Ajmal Vs. Syed Nazar Hussain etc.”
- (iii) Civil Revision No.06 of 2005 titled “Mian Muhammad Ajmal Vs. Syed Nazar Hussain etc.”
- (iii) Execution First Appeal No.02/2013 titled “Syed Waqar-ul-Hassan Shah Burkari etc. Vs. Small Business Corporation etc.”

2. This case has a chequered history spreading over more than twenty-five years. The essential facts culled out from the voluminous record are that on 01.12.1996, a finance facility of Rs.20,00,000/- had been availed by M/s Blossom Towels Industries (Pvt.) Ltd. (“Blossom”)

from Small Business Finance Corporation (“SBFC”) for a period of three years ending on 30.11.1999.

3. By virtue of the provisions of the Regional Development Finance Corporation and Small Business Finance Corporation (Amalgamation and Conversion) Ordinance, 2001, SBFC and Regional Development Finance Corporation were amalgamated into SME Bank Limited, which was incorporated into a public limited company. In this judgment “SBFC” shall be referred to as “SME Bank.”

4. Mian Muhammad Ajmal (“Ajmal”) was the Chief Executive Officer of Blossom. He and his wife, Yasmin Begum, had executed documents creating a mortgage over Unit No.1, Plot No.1-Z, F-10 Markaz, Islamabad (“mortgaged property”) in favour of SME Bank. Default in the repayment obligations caused SME Bank to institute a suit for recovery of Rs.30,31,040/- against Blossom, Ajmal and his wife on 13.05.2000 before the learned Banking Court, Rawalpindi. Vide judgment and decree dated 12.07.2001, the learned Banking Court dismissed the application for leave to defend filed by Blossom etc. and consequently the said suit was decreed to the extent of Rs.28,05,179/- with actual costs and mark-up at the rate of 15% from the date of the institution of the suit till realization of the decretal amount. Blossom etc. preferred R.F.A.No.161/2001 against the said decree before this Court. On 13.08.2001, SME Bank had filed a petition for the execution of the said order and decree. In these proceedings, an order for the auction of the mortgaged property had been passed. The application filed before this Court in R.F.A.No.161/2001 by Blossom etc. for staying the auction proceedings was dismissed vide order dated 18.02.2002 and the said order was upheld by the Hon'ble Supreme Court vide order dated 09.05.2002 passed in Civil Petition No.618/2002. Vide order dated 16.04.2008, R.F.A.No.161/2001 was disposed of after the learned counsel for the appellants in the said appeal sought the withdrawal thereof. He had also made the statement to the effect that the decree had been satisfied.

5. On 23.08.1999, an agreement to sell had been executed between Ajmal and Syed Nazar Hussain Shah ("Nazar") whereby the former agreed to sell to the latter Unit No.1 consisting of two shops with their basement, two other shops on the ground floor, one office on the first floor and one flat on the second floor in the building known as 'Seasun Complex' located on Plot No.1-Z Markaz F-10, Islamabad ("suit property"). The sale consideration was agreed to be Rs.47,00,000/- out of which Rs.10,00,000/- was paid as earnest money and additionally Rs.5,00,000/- was paid in cash and Rs.5,00,000/- through traveller cheques issued by Habib Bank Limited ("HBL"). In this way, Rs.20,00,000/- was admittedly paid to Ajmal when the agreement was executed whereas, the remaining sale consideration was agreed to be paid by 24.10.1999. Clause (b) of the agreement obligated Ajmal to clear all debts owed to Allied Bank Limited ("ABL") within a period of fifteen days of the execution of the agreement. It may be mentioned that the only difference between the suit property and the mortgaged property is that the suit property does not include the roof top of Unit No.1, Plot No.1-Z, F-10 Markaz, Islamabad.

6. On 18.10.1999, a supplementary agreement was executed between Ajmal and Nazar. In this agreement, Ajmal acknowledged that he had obtained a loan from ABL and in lieu thereof the suit property had been pledged. The supplementary agreement also refers to Ajmal's assurance in the agreement to sell dated 23.08.1999 that all debts would be paid and the suit property would be redeemed. Since Ajmal was unable to repay the loan to ABL, Nazar agreed to pay Rs.6,00,000/- which Ajmal had to pay to ABL.

7. On 22.11.1999, a second supplementary agreement was executed between Ajmal and Nazar under the terms whereof the deadline for the finalization of the transaction was extended to 24.11.1999. The recitals to this agreement show that Nazar had paid Rs.6,00,000/- more to Ajmal on the date of the execution of the said agreement. This agreement also shows that Ajmal had delivered possession of the first and the second floors (office No.1 and residential flat) to Nazar.

8. On 24.01.2000, a third supplementary agreement was executed between Ajmal and Nazar under the terms whereof the deadline for the finalization of the transaction was extended to 06.03.2000.

9. On 27.01.2000, Ajmal executed an irrevocable general power of attorney authorizing Nazar's son Syed Abrar-ul-Hassan Bukhari to transfer the suit property either to Nazar or anyone else. In this power of attorney, Ajmal acknowledged that on 23.08.1999 Rs.10,00,000/- had been paid as earnest money; Rs.6,00,000/- was paid on 18.10.1999; and Rs.1,20,000/- on 27.10.1999. On the date of the execution of the said power of attorney, Rs.26,80,000/- (Rs.25,80,000/- through bank draft No.DJA-359219-602-3 dated 27.01.2000 drawn on HBL and Rs.1,00,000/- in cash) was paid by Nazar to Ajmal and this fact is also duly acknowledged in the said power of attorney. In this way, a total amount of Rs.44,00,000/- was paid by Nazar to Ajmal and Rs.3,00,000/- remained to be paid. In this power of attorney, Ajmal had also acknowledged the fact that possession of the suit property had been handed over to Nazar and that in the event of Ajmal's demise, his legal heirs would be bound to transfer the suit property to Nazar and in case of Nazar's demise to his legal heirs.

10. What was not mentioned in the agreement to sell dated 23.08.1999 and/or any of the supplementary agreements was the fact that Ajmal had also obtained a loan from SME Bank. On 03.12.2001, Nazar had filed a suit for specific performance of the agreements dated 18.10.1999, 22.11.1999 and 24.01.2000 before the Court of the learned Civil Judge, Islamabad. The outcome of these proceedings and the proceedings ancillary thereto shall be discussed at a subsequent stage in this judgment.

11. As mentioned above, for the execution of the decree dated 12.07.2001, SME Bank had on 13.08.2001 filed an execution petition before the learned Banking Court. In the execution proceedings, an order for the auction of the mortgaged property was passed and an auctioneer was appointed. According to Nazar, this was the stage at

which he came to know about the loan obtained by Ajmal from SME Bank and the said decree dated 12.07.2001.

12. On coming to know about the said judgment and decree dated 12.07.2001, Nazar filed an application under Section 12(2) of the Code of Civil Procedure, 1908 ("CPC") for the recall of the same. The position taken by Nazar in the said application was that he was a *bonafide* purchaser of the suit property not having any notice as to mortgage over the said property created in favour of SME Bank.

13. The said application was dismissed by the learned Banking Court vide order dated 09.09.2002. It was held that Ajmal and his wife had executed documents creating a mortgage over the mortgaged property in favour of SME Bank so that the finance facility could be availed by Blossom. Furthermore, it was held that the mortgage in favour of SME Bank had been created in the year 1996 which was prior in time to the execution of the agreement to sell between Ajmal and Nazar; and that Nazar had no *locus standi* to seek the setting aside of the judgment and decree dated 12.07.2001 or to have the auction proceedings stayed.

14. Writ petition No.2797/2002 filed by Nazar against the said order dated 09.09.2002 was dismissed in *limine* by the Hon'ble Lahore High Court, Rawalpindi Bench vide order dated 23.09.2002. This order was assailed by Nazar before the Hon'ble Supreme Court in civil petition No.1624/2002.

15. Now, pursuant to the order for the auction of the mortgaged property passed by the learned Banking Court, auction was conducted on 28.09.2002 in which SME Bank offered to purchase the mortgaged property for an amount equivalent to the decretal amount. As per the Court auctioneer's report dated 30.09.2002, the mortgaged property was sold in auction to SME Bank for an amount of Rs.28,05,179/. On the date of the auction, an application was filed by Nazar to adjourn the matter so as to await the outcome of civil petition No.1624/2002 pending before the Hon'ble Supreme Court. Nazar had also filed an application before the learned executing Court expressing his readiness to deposit Rs.20,00,000/- in the Court.

However, the auction went ahead but the sale in favour of SME Bank was not confirmed at any stage.

16. In the proceedings before the Hon'ble Supreme Court, the position taken by Nazar was that he was ready to pay the entire amount that was outstanding against Ajmal to SME Bank, and that in this regard, he had filed an application before the learned Banking Court. Nazar requested the Hon'ble Supreme Court to direct the learned Banking Court to decide the said application expeditiously. Vide order dated 02.10.2002, the Hon'ble Supreme Court allowed Nazar's request to withdraw civil petition No.1624/2002 and directed the learned Banking Court to decide Nazar's said application as early as possible.

17. In fact it was on 25.10.2002 that Nazar filed an application before the learned Banking Court expressing his readiness to deposit Rs.28,05,179/- with the caveat that the said amount should be considered as having been deposited as trust and liable to be refunded in the event of the setting aside of the judgment and decree dated 12.07.2001.

18. After the said order dated 02.10.2002 was passed by the Hon'ble Supreme Court, the learned Banking Court vide order dated 25.10.2002 directed Nazar to deposit the decretal amount, i.e. Rs.28,05,179/- by 05.12.2002. It was also ordered that if the said amount is not deposited by the said deadline, Nazar's objections to the auction would be deemed to have been dismissed.

19. On 02.12.2002, Nazar is said to have deposited a pay order for Rs.28,05,180/- drawn on HBL in the learned executing Court. The said amount of Rs.28,05,180/- was not immediately available to SME Bank for withdrawal since Ajmal, while depositing the pay order for the said amount, had submitted an application with the prayer that the said amount be kept in the Court as trust till the adjudication of Nazar's objection petition on merits.

20. Since Ajmal did not pay the decretal amount, the learned Banking Court on 30.10.2002 had issued warrants for his arrest and in execution of such warrants, Ajmal had been arrested on

10.11.2002 and sent to judicial lockup on 11.11.2002. Ajmal continued to remain in prison until 07.10.2003 when he was produced before the learned Banking Court for the recording of his statement.

21. On 07.10.2003, Ajmal was in police custody when he was produced before the learned Banking Court. After his handcuffs were removed, he recorded his statement on oath that a settlement had been arrived at between the parties. Furthermore, it was stated that the amount which the State Bank of Pakistan ("SBP") would determine as payable under the decree dated 12.07.2001, would be paid by Nazar, and the said decree would be considered as having been passed against Nazar. It was also stated that the entire sale consideration for the suit property had been received by Ajmal; that Ajmal would make a statement before the Court in which the suit for specific performance instituted by Nazar is pending to the effect that he would have no objection if the suit is decreed; that the amount of Rs.28,05,179/- which Nazar had deposited in the Court would be paid to the decree holder / SME Bank; that if the SBP determines the amount payable under the said decree dated 12.07.2001 to be less than Rs.28,05,179/-, the differential would be returned to Nazar; that the mortgaged property would be redeemed in favour of Nazar upon the suit for specific performance being decreed and upon the payment of the entire decretal amount in accordance with the determination to be made by the SBP; and that Nazar would not pursue the criminal case registered by him against Ajmal before the FIA. The said statement was recorded in the presence of the counsel for Nazar and the decree holder / SME Bank.

22. On 08.10.2003, Ajmal appeared before the learned Civil Court where the suit for specific performance instituted by Nazar was pending and recorded his statement on oath to the effect that he had no objection if the said suit was decreed in terms of the settlement recorded before the learned Banking Court. Learned counsel for SME Bank, which was defendant No.4 in the said suit, also recorded a statement to the effect that a settlement had been arrived at between the parties before the learned Banking Court; that payment was being

made in terms of the said settlement; that once the entire payment is made, the mortgage would be redeemed; and that SME Bank should be deleted from the array of the defendants.

23. On the basis of the statements recorded by Ajmal and the learned counsel for SME Bank, the learned civil Court, on 21.10.2003, decreed the suit for specific performance instituted by Nazar in the following terms:-

[CDA] is directed to substitute the name of plaintiff, Nazar Hussain Shah S/o Syed Nijabat Ali Shah Bukhari as co-allottee / co-sharer in place of Mian Muhammad Ajmal, in its record with regard to Plot No. 1-Z, F-10 Markaz, Islamabad, subject to the payment of all dues according to the rules & regulations of the CDA. No order as to costs. The file be consigned to the record room for completion. [Nazar Hussain Shah] would step into the shoes of [Mian Muhammad Ajmal] so far the liability on suit property [is] concerned."

24. Ajmal did not file an appeal against the said judgment and decree dated 21.10.2003. However, on 17.12.2003 Ajmal filed an application under Section 12(2) C.P.C against the said decree. This application was dismissed by the learned Civil Court vide order dated 27.10.2004, which was further assailed by Ajmal in appeal (R.F.A.No.03/2004) before the Hon'ble Lahore High Court. On 22.12.2004, Ajmal withdrew the said appeal and thereafter filed a revision petition (C.R.No.06/2005) against the said order dated 27.10.2004.

25. On 26.01.2006, Nazar had filed a petition for the execution of the said judgment and decree dated 21.10.2003. On 15.12.2006, Ajmal filed an application under Section 47 CPC objecting to the execution. In the said application, it was pleaded *inter alia* that the decree could not be executed since the roof rights were not supposed to have been handed over to Nazar under the terms of the agreements between Ajmal and Nazar or the settlement agreement; that Nazar had not abided by his commitment to withdraw the criminal case pending before the Special Judge Central, Rawalpindi that he got registered against Ajmal; that Ajmal had filed R.F.A.No.204/2004; that the execution proceedings could not proceed without the impleadment of SME Bank; and that Nazar's two

sons who had been serving in the District Judiciary of Punjab had been dismissed by the Hon'ble Lahore High Court due to their involvement in the case between Nazar and Ajmal. The said application was contested by Nazar by filing a written reply.

26. Vide order dated 07.07.2009, Ajmal's said application under Section 47 CPC was dismissed by the learned executing Court. This order was further assailed in an appeal by Ajmal before the Court of the learned Additional District Judge, Islamabad. Vide order dated 06.10.2010, the said appeal was also dismissed. C.R.No.1192/2010 was preferred against the said order dated 25.11.2010 before the Hon'ble Lahore High Court. After the establishment of this Court, the said civil revision petition was transferred to this Court, which allowed the said civil revision petition vide order dated 22.03.2012 by setting-aside the judgments of the learned Courts below and remanding the matter to the learned executing Court for a decision afresh. The said order dated 22.03.2012 was assailed by the legal heirs of Nazar before the Hon'ble Supreme Court in C.P.No.505/2012. Vide order dated 18.12.2014, the said petition was allowed by the Hon'ble Supreme Court, which took the view that the material on the record was sufficient for the High Court to decide the revision petition instead of remanding the matter to the learned executing Court. The Hon'ble Supreme Court set-aside the said order dated 22.03.2012 and sent the matter back to this Court for a decision afresh on the revision petition.

27. The post-remand proceedings culminated in the order dated 17.06.2015 whereby this Court dismissed C.R.No.1192/2010. The said order dated 17.06.2015 was further challenged by Ajmal before the Hon'ble Supreme Court in C.P.No.1750/2015, which was dismissed vide order dated 05.10.2015. It is pertinent to reproduce herein below the said order dated 05.10.2015:-

"This case was argued at length for about forty-five minutes. When the learned ASC for the petitioner realized that he cannot get anything out of the orders passed by the Court executing the decree and other fora functioning in the hierarchy, he straightaway stated that he would not press it and pursue his remedy under Section 152 CPC before the Court which passed the decree.

2. In this view of the matter, the petition is dismissed as not pressed."

28. On the basis of a settlement arrived at between the parties and recorded by the learned Banking Court on 07.10.2003, SME Bank, on 15.10.2003 withdrew Rs.28,05,180/- from the Banking Court. SME Bank takes the position that on the payment of such amount, the judgment and decree dated 12.07.2001 is not satisfied. SME Bank explains this in its written arguments by asserting that out of Rs.28,05,180/- deposited in the Court, an amount of Rs.14,76,231/- was adjusted towards mark-up and Rs.13,28,948/- towards the principal amount leaving Rs.14,76,231/- to be paid by the judgment debtors. It also asserts that the present outstanding balance including mark-up at the rate of 15% on Rs.14,76,231/- stands at Rs.42,81,410/-.

29. Apparently, an application had been submitted to the SBP by Nazar for a review of the amount that was payable under the decree dated 12.07.2001. Vide letter dated 20.08.2004, the SBP informed Ajmal that the SBP Committee for Resolution of Cases had decided that the said application could not be entertained. Once this information was placed before the learned Banking Court, order dated 04.09.2004 was passed directing Nazar to deposit Rs.7,20,161/- as the outstanding amount under the decree dated 12.07.2001 by 05.10.2004. Admittedly, Nazar did not comply with this order and took the position before the learned Banking Court that he had filed an application for review of the decision taken by the SBP.

30. Nazar had indeed filed another application before the SBP for reconsideration of the matter. SME Bank, through its letter dated 17.05.2005, after making reference to SBP's letter dated 31.03.2005 addressed to Nazar, offered a settlement plan with the following relief:-

*"75% of charged mark up
or
50% of total outstanding in your loan account
(whichever is less from among the above two)
The remaining settlement amount paid within one year of the formal approval of the settlement plan."*

31. SME Bank's said letter dated 17.05.2005 caused Nazar to file an application before the learned Banking Court praying for an order to SME Bank to refund (i) Rs.2,32,179/- under "75% of charged mark-up" or (ii) Rs.6,58,848/- under "50% of the total outstanding in loan account." This calculation was done by Nazar by treating the decretal amount of Rs.2,805,179/- to be the same in the year 2005. The said application was contested by SME Bank by filing a written reply in which it was pleaded *inter alia* that the time-bound relief offered to the judgment debtor had expired.

32. Vide order dated 17.09.2005, the learned Banking Court dismissed Nazar's said application. In the said order, it was mentioned that one of the terms of the Ramzan Loan Relief Package under which the offer was made to the judgment debtor was that no refund could be claimed by the judgment debtor. Furthermore, it was held that the benefit of the relief would be applicable to the amount not as of the date of the decree (i.e. 12.07.2001) but the date of the announcement of the said Package on which date the amount payable by the judgment debtor had swelled to Rs.15,06,983/-, and that the benefit of the relief would be on this amount.

33. Against the said order dated 17.09.2005, Nazar preferred an appeal (FAO No.160/2005) before the Hon'ble Lahore High Court. Vide order dated 18.06.2008, the said appeal was dismissed for non-prosecution. The application for the restoration of the said appeal was also dismissed for non-prosecution on 02.07.2009. The time-barred application for the restoration of the restoration application was dismissed by this Court vide order dated 05.04.2012. Nazar's legal heirs assailed the said order dated 05.04.2012 before the Hon'ble Supreme Court in C.P.No.856/2012, which was dismissed as withdrawn on 11.01.2013.

34. It may be mentioned that Nazar passed away on 22.07.2009 whereafter his legal heirs were impleaded as parties in the cases before different fora.

35. In its order dated 10.12.2012, the learned Banking Court recorded the submission of the learned counsel for SME Bank that

the decretal amount of Rs.28,05,179/- had been paid whereas an amount of Rs.33,26,728/- was outstanding in respect of costs of funds calculated from the date of the institution of SME Bank's suit till 31.01.2012. The learned Banking Court also recorded the contention of the learned counsel of Ajmal that he was ready to pay the outstanding liability to SME Bank provided possession of the mortgaged property is taken back from Nazar and given to Ajmal through an order of the Court. Learned counsel for Nazar however took the position that in view of the statements of the parties recorded by the learned Banking Court on 07.10.2003 he was ready to pay Rs.7,00,000/- to SME Bank in compliance with the order dated 04.09.2004 passed by the learned Banking Court. Since the offer made on behalf of Nazar was not accepted by SME Bank, the learned Banking Court directed Nazar to pay Rs.33,26,728/- as costs of funds payable up to 31.01.2012. It is in these terms that the learned Banking Court disposed of the objection petition filed by Nazar. The said order dated 10.12.2012 has been assailed by Nazar's legal heirs in E.F.A.No.02/2013.

36. In support of the grounds taken in E.F.A.No.02/2013, learned counsel for Nazar's legal heirs submitted that with the purchase of the mortgaged property by SME Bank in the auction, the decretal amount of Rs.28,05,179/- stood adjusted on 28.09.2002; that on gaining knowledge of the decree dated 12.07.2001 in favour of SME Bank, Nazar rushed to the Hon'ble Supreme Court and thereafter deposited the decretal amount in the Banking Court on 02.12.2002 for onward payment to SME Bank; that it was SME Bank that negligently delayed the withdrawal of the decretal amount until 12.01.2005; that after receipt of the decretal amount, the learned Banking Court could not have proceeded further in the execution proceedings; that the amount claimed by SME Bank in addition to the decretal amount was unfair; that at best SME Bank could have claimed mark-up on the decretal amount from the date of the institution of the suit (i.e. 13.05.2000) till the date of the payment of the decretal amount in the Court (i.e. 02.12.2002); that Nazar had accepted the responsibility to

pay the decretal amount through the statement recorded before the learned Banking Court on 07.10.2003; that thereafter on 04.09.2004, the learned Banking Court directed Nazar to deposit Rs.700,000/- in the Court; that the review petition filed by Nazar against the said order dated 04.09.2004 was dismissed by the learned Banking Court vide order dated 17.09.2005; that the learned Banking Court vide order dated 17.09.2005 held that on the basis of the incentive package, 50% of Rs.15,06,983/- was payable by Nazar in satisfaction of the decree; that Nazar's appeal against the said order was dismissed up to the Hon'ble Supreme Court; that on the basis of the incentive package, Nazar was entitled to a refund; that Nazar had never accepted his liability to pay Rs.700,000/- after the deposit of decretal amount in the Court; that the position taken by SME Bank that a sum of Rs.33,26,728/- was outstanding till 31.01.2012 was baseless; that at best, the learned Banking Court ought to have on the basis of its order dated 04.09.2004, required Nazar to pay Rs.700,000/- in satisfaction of the decree; and that the learned Banking Court had dismissed the objections taken by Nazar against the baseless demand made by SME Bank in a perfunctory manner. Learned counsel for Nazar's legal heirs prayed for the impugned order dated 10.12.2012 to be set-aside.

37. On the other hand, learned counsel for SME Bank submitted that the suit for recovery instituted by SME Bank was decreed on 12.07.2001 for an amount of Rs.28,05,179/- along with mark-up at the rate of 15% from the date of the institution of the suit till the realization of the decretal amount; that furthermore, the Banking Court had also granted actual costs as per decree sheet; that the decretal amount was to be recovered through the execution of the decree by sale of the mortgaged property; that the said decree was passed under the provisions of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997; that the Financial Institutions (Recovery of Finance) Ordinance, 2001 had not been promulgated when the said decree was passed; that since the said decree dated 12.07.2001 had not been challenged in an appeal, it

attained finality; that SME Bank had sought the satisfaction of the decree by way of auction of the mortgaged property; that SME Bank participated in the auction conducted on 28.09.2002 and offered to purchase the mortgaged property for an amount equivalent to the decrelal amount; that after the auction, Nazar filed objections before the learned executing Court, wherein it was pleaded that Ajmal had sold the suit property, which was a part of the mortgaged property, to Nazar through agreement to sell dated 23.08.1999; that since the mortgage had been created in favour of SME Bank in the year 1996, which is prior in time to the agreement to sell, the objections filed by Nazar were dismissed by the Banking Court; that the order of the Banking Court was assailed up to the Hon'ble Supreme Court where Nazar made the statement to the effect that the entire outstanding amount would be paid by him; that on 02.12.2002, an amount of Rs.28,05,180/- was deposited by Nazar in the Banking Court but SME Bank was not permitted to withdraw the same; that SME Bank made an offer for a settlement to Nazar under which an amount of Rs.35,00,000/- was to be paid in lieu of the decrelal amount which at the time of the offer stood at approximately Rs.42,00,000/-; that on 15.10.2003, SME Bank withdrew Rs.28,05,180/- from the Banking Court on the basis of a settlement arrived at between the parties; that the said settlement was duly recorded by the learned Banking Court in its order dated 07.10.2003; that the liability under the decree on the date of the settlement came to Rs.42,81,410/-; that in the settlement, the parties agreed that the amount deposited by Nazar in the Court would be paid to SME Bank and the remainder amount of Rs.700,000/- would be subject to the outcome of the representation submitted to SBP; that vide order dated 04.09.2004, the Banking Court directed Nazar to deposit Rs.700,000/-; that on 31.03.2005, the SBP rejected the representation; that thereafter, SME Bank vide letter dated 17.05.2005 made a revised settlement offer to Nazar which he did not accept; that the revised settlement offer was only valid up to 30.06.2005; that Nazar challenged the order dated 04.09.2004 in a review application which was dismissed vide order dated 17.09.2005

passed by the learned Banking Court; that FAO No.160/2005 against the said order dated 17.09.2005 was dismissed for non-prosecution by this Court, and the order of this Court was upheld by the Hon'ble Supreme Court on 11.01.2013; that in this way, Nazar's request for refund on the basis of the revised settlement offer had been rejected up to the Hon'ble Supreme Court of Pakistan; that Nazar and / or his legal heirs instead of complying with the terms of the settlement delayed payment on one pretext or the other; that on 10.12.2012, the total amount outstanding was Rs.33,26,728/-; and that vide impugned order dated 10.12.2012, the learned Banking Court directed Nazar's legal heirs to make payment of the outstanding amount in terms of the settlement.

38. Furthermore, it was submitted that the grounds taken by Nazar's legal heirs in E.F.A.No.02/2013 have been decided earlier up to the Hon'ble Supreme Court in different rounds of litigation; that the instant appeal is nothing but an attempt to reopen matters that have already been decided; that the payment of Rs.28,05,180/- to SME Bank on 15.10.2003 did not satisfy the decree; that after the said payment was made to SME Bank, the latter adjusted Rs.14,76,231/- towards mark-up and the remaining amount of Rs.13,28,948/- towards the principal amount; that as a consequence, an amount of Rs.14,76,231/- was still outstanding under the decree and the same was subject to mark-up at the rate of 15%; that Nazar had agreed to step into the shoes of Ajmal, who was the judgment debtor; that Nazar's legal heirs are bound by the terms of the settlement dated 07.10.2003 which was never assailed by Nazar; that before the Hon'ble Supreme Court, Nazar had made a statement to the effect that he was ready to pay the entire amount outstanding against Ajmal; and that the liability assumed by Nazar which was recorded in the settlement dated 07.10.2003 pursuant to the order dated 02.10.2002 passed by the Hon'ble Supreme Court in CP No.1624/2002 is binding on Nazar's legal heirs. Learned counsel for SME Bank prayed for E.F.A.No.02/2013 to be dismissed.

39. Learned counsel for Ajmal submitted that since Nazar has stepped into the shoes of Ajmal as the judgment debtor, he has to pay the entire amount payable to SME Bank under the decree dated 12.07.2001; that the fact Nazar is a person of notorious character can be gathered from the contents of the complaint filed by Advocate Tariq Asad before the NAB; that Ajmal wanted to resign from the service of Pak PWD but instead of accepting his resignation, he was dismissed from service in the year 2001 without giving him an opportunity of being heard; that the agreement to sell dated 23.08.1999 was in fact a *benami* transaction under which the real purchaser was Nazar's son, Syed Waqar-ul-Hassan Bukhari, who signed the said agreement as the general attorney of his father; that the actual sale consideration was Rs.90,00,000/- and not Rs.47,00,000/-; that at the time of the execution of the said agreement to sell, only Rs.39,00,000/- had been paid to Ajmal; that under the said agreement to sell, the roof top rights of the suit property were never sold; that the suit property had been mortgaged with SME Bank; that Nazar's son application under Section 12(2) CPC against the said decree dated 12.07.2001 was dismissed by the learned Banking Court and the order of the learned Banking Court was upheld by the Hon'ble Lahore High Court vide order dated 23.09.2002; that Nazar had assailed the said order dated 23.09.2002 before the Hon'ble Supreme Court where he made a statement to the effect that he was ready to pay the entire amount that was payable by Ajmal to SME Bank under the said decree dated 12.07.2001; that Nazar's sons misused their authority by lodging FIR No.25/2002 against Ajmal which resulted in Ajmal's arrest; that subsequently the case was transferred to NAB which eventually closed the case against Ajmal pursuant to the order dated 09.11.2016 passed by the Hon'ble Lahore High Court in writ petition No.696/2015; and that Ajmal's complaint against Nazar's sons, who were Judicial Officers in the District Judiciary of Punjab, resulted in the initiation of disciplinary proceedings against them and ultimately vide notification dated 26.09.2006 they were dismissed from service.

40. Furthermore, it was submitted that the amount determined by the learned Banking Court as payable through order dated 17.09.2005 was challenged unsuccessfully by Nazar in appeal (F.A.O.No.160/2005) before the Hon'ble Lahore High Court; that under the judgment and decree dated 12.07.2001, Nazar was liable to pay not just Rs.28,05,179/- but also actual costs and mark up at the rate of 15% from the date of the institution of the suit; that with the deposit of Rs.28,05,179/- by Nazar in the Court on 02.12.2002, the said decree is not satisfied; that SME Bank committed no illegality by apportioning sum of the said amount for the adjustment of interest and the remaining for the adjustment of the principal amount; that the judgment debtor under the said decree dated 12.07.2001 was Blossom which did not authorize Ajmal to make a statement to the effect that the decretal amount be paid by Nazar; that the statement made by Ajmal on 07.10.2003 when he was in custody is of no legal or evidentiary value; that Nazar and/or his legal heirs did not fulfill their commitment of withdrawing the criminal cases against Ajmal; that Ajmal never intended to sell the roof top rights of the suit property to Nazar; that the CDA has accorded permission for the construction of another storey on the roof of the suit property; that since Nazar and/or his legal heirs have taken possession of the roof top of the suit property, they have taken over property in excess of what they agreed to purchase through the agreement to sell dated 23.08.1999; that Nazar has unnecessarily lingered on the dispute with SME Bank; that the settlement between the parties recorded by the learned Banking Court vide order dated 07.10.2003 ought to be set at naught and the matter be remanded to the learned trial Court for a decision on Ajmal's application under Section 12(2) CPC; and that the suit for declaration and cancellation of the agreements filed by Ajmal could not have been dismissed on the ground of *res judicata* as the earlier suit filed by Nazar was for specific performance and not for declaration. Learned counsel for Ajmal prayed for the appeal (R.F.A.No.204/2004) and the revision petition (C.R.No.06/2005) to be allowed.

41. We have heard the arguments of the learned counsel for Nazar's legal heirs as well as SME Bank with great interest and keenness. The facts leading to the filing of the instant petition and appeals have been set out in sufficient detail in paragraphs 2 to 35 above and need not be recapitulated.

Execution First Appeal No.02/2013 titled "Syed Waqar-ul-Hassan Shah Bukhari etc. Vs. Small Business Corporation etc.":-

42. SME BANK, on 13.05.2000, filed a suit for recovery of Rs.30,31,040/- against Blossom, Ajmal and his wife before the learned Banking Court. Vide judgment and decree dated 12.07.2001, the said suit was decreed to the extent of "*Rs.28,05,179/- with actual costs as per decree sheet and mark-up at the rate of 15% from the date of the institution of the suit till the realization of the whole decretal amount.*" This is explicitly mentioned in the judgment and decree dated 12.07.2001 passed by the learned Banking Court. It was also held that the decretal amount shall be recovered through execution of the decree by the sale of *inter alia* the mortgaged property.

43. Ajmal had entered into an agreement to sell dated 23.08.1999 with Nazar without informing him about the finance agreement dated 01.12.1996 with SME Bank and the mortgage on the suit property. When Nazar gained knowledge of the said judgment and decree, he filed objections to the execution proceedings that had been filed by SME Bank for the enforcement of the decree dated 12.07.2001. The challenge to the said judgment and decree by Nazar through an application under Section 12(2) CPC was dismissed up to the Hon'ble Supreme Court.

44. As mentioned above, Nazar had stated before the Hon'ble Supreme Court on 02.10.2002 that he was ready to pay SME Bank the entire amount outstanding against Ajmal under the said decree dated 12.07.2001. He had also filed an application with such a request before the learned Banking Court. After the said order dated 02.10.2002 was passed by the Hon'ble Supreme Court, the learned Banking Court vide order dated 25.10.2002 directed Nazar to deposit

the decretal amount, i.e. Rs.28,05,179/- by 05.12.2002. It was also ordered that if the said amount is not deposited by the said deadline, Nazar's objections to the auction would be deemed to have been dismissed. Although on 02.12.2002, Nazar deposited a pay order for Rs.28,05,180/- drawn on HBL in the learned Banking Court, but this amount could not be withdrawn by SME Bank due to the conditions on which such deposit was made by Nazar.

45. It was after the settlement in the form of Ajmal's statement dated 07.10.2003 was recorded by the learned Banking Court that SME Bank was able to withdraw the amount deposited by Nazar. One of the terms of the settlement was that SME Bank could withdraw the amount deposited by Nazar in the Court. Thereafter, on 15.10.2003, SME Bank withdrew Rs.28,05,180/- from the Court. SME Bank apportioned the said amount by adjusting Rs.14,76,231/- towards mark-up / interest and Rs.13,28,948/- towards the principal amount leaving a principal amount of Rs.14,76,231/- to be paid by the judgment debtor. Mark-up at the rate of 15% continued to accrue on the said outstanding amount.

46. This apportionment by SME Bank did not suffer from any illegality. I say so because the normal rule in the case of a debt due with interest is that any payment made by a debtor in the first instance is to be applied towards satisfaction of interest and thereafter to the principal. Reference in this regard may be made to the law laid down in the cases of Meghraj Vs. Bayabai (AIR 1970 SC 161) and Meka Venkatadri Vs. Raja Parthasarathy (AIR 1922 PC 233). Additionally, in the case of Najam Koreshi Vs. Chase Manhattan Bank (2015 SCMR 1461), the decree passed by the Court did not fix the manner in which payments were to be apportioned under the three heads of liability, i.e. (i) the principal sum adjudged, (ii) the accrued interest thereon, and (iii) costs of the suit, applying the principle of appropriation of payments laid down in the case of Meka Venkatadri Vs. Raja Parthasarathy (supra). The Hon'ble Supreme Court held that the initial payment made by the judgment debtor was first to be adjusted against the accrued interest amount and thereafter the

costs of the suit. Any amount leftover after the said adjustment was to be utilized towards the adjustment of the principal sum adjudged. If the principal sum is not fully adjusted, such amount accrues interest at the rate applied by the order of the Court. Any further payment made by the judgment debtor is also to be applied under the same principle by adjusting the accrued interest first and the principal sum thereafter.

47. When E.F.A.No.02/2013 was filed, this Court, vide ad-interim order dated 12.03.2013, directed *status quo* to be maintained subject to the deposit of half the decretal amount. On 25.04.2013, Nazar's legal heirs deposited Rs.16,63,500/- with the learned Banking Court which permitted SME Bank to withdraw the said amount. When the said payment was made, mark-up amounting to Rs.19,70,497/- and principal amount of Rs.14,76,231/- was payable. The said amount of Rs.16,63,500/- paid by Nazar's legal heirs was adjusted towards the outstanding mark-up and after such adjustment, Rs.3,06,997/- was payable as mark-up, whereas the principal amount remained Rs.14,76,231/-. As per the accounts furnished by SME Bank, the outstanding liability of the judgment debtor as on 06.12.2023 was Rs.44,72,683/- (i.e. Rs.29,96,452/- as interest payable, whereas the principal amount remains Rs.14,76,231/-). This amount would have further swollen by today.

48. Had the deposit of Rs. Rs.28,05,180/- made by Nazar on 02.12.2002 before the learned Banking Court been unconditional, SME Bank would have been in a position to withdraw the same and at best Nazar would have been liable for the mark-up up to 02.12.2002 only. Since the said deposit made by Nazar was with the caveat that the said amount should be considered as having been deposited as trust and liable to be refunded in the event of the setting aside of the judgment and decree dated 21.10.2003, and since the payment of the said amount was made to SME Bank on 15.10.2003 on the basis of the terms of the settlement recorded by the learned Banking Court on 07.10.2003, SME Bank was well within its rights to have demanded intertest of the said amount up to 09.10.2003.

49. Nazar had another opportunity to have cleared his liability by availing the offer made by SME Bank under the Ramzan Loan Relief Package within the deadline. The learned Banking Court vide order dated 17.09.2005 had clearly mentioned that the benefit under the Ramzan Loan Relief Package which was offered by SME Bank to the judgment debtor vide letter dated 17.05.2005 would be applicable to the outstanding amount which as on 17.09.2005 was Rs.15,06,983/-.

Nazar instead of availing this benefit under the said order of the learned Banking Court decided to unsuccessfully challenge it in the High Court. During all this period, the mark-up, etc. continued to accrue on the principal decretal amount.

Civil Revision No.06 of 2005 titled "Mian Muhammad Ajmal Vs. Syed Nazar Hussain etc.: -

50. On 17.12.2003, Ajmal filed an application under Section 12(2) CPC against the decree dated 21.10.2003. In this application, it was pleaded *inter alia* that the roof top of the said property was not the subject matter of the agreement to sell dated 23.08.1999 and that the same was in unlawful possession of Nazar; and that Nazar's son who is serving as a Judge in the District Judiciary of Punjab has had a false criminal case registered against Ajmal in the FIA, and that he had used his influence in getting Ajmal's statement recorded under coercion.

51. Nazar contested the said application by filing a written reply. Vide order dated 27.10.2004, the said application was dismissed by the learned Civil Court. Against the said order, Ajmal on 23.11.2004, preferred R.F.A.No.203/2004 before the Hon'ble Lahore High Court. Vide order dated 22.12.2004, the Hon'ble Lahore High Court allowed the request made by Ajmal's counsel not to press the appeal in order to avail an alternative remedy. In other words, the request made on Ajmal's behalf to withdraw the said appeal was allowed so that he could avail an alternative remedy. For reasons best known to Ajmal or his counsel no request was made for the appeal to be converted into a revision petition.

52. On 07.01.2005, Ajmal filed C.R.No.06/2005 before the Hon'ble Lahore High Court against the order dated 27.10.2004 whereby his application under Section 12(2) CPC against the order and decree dated 21.10.2003 had been dismissed.

53. For filing a revision petition limitation period of ninety days has been prescribed in the second proviso to Section 115(1) CPC which was inserted in the CPC through Act No.VI of 1992 enacted on 30.05.1992. C.R.No.06/2005 was not accompanied by an application for condonation of delay under Section 5 of the Limitation Act, 1908. Even otherwise, Section 5 does not apply on its own force to special or local laws but has to be made applicable to such laws through legislation. This is implicit in the employment of the words, "*[a]ny appeal or application ... to which this section may be made applicable by or under any enactment*" in Section 5 of the Limitation Act, 1908. In the case of Mahmud Alam Vs. Mehdi Hussain (PLD 1970 Lahore 6), the Hon'ble Mr. Justice Muhammad Afzal Zullah (as he then was) had the occasion to hold that "*[t]he words "by or under any enactment" indicate that Section 5 of the Limitation Act is not of general application to all the enactment, but can be made applicable by the provisions of an enactment.*" It is an admitted position that the legislature has not made Section 5 of the Limitation Act, 1908 specifically applicable to revision petitions filed under Section 115 CPC. Therefore, it is my view that had Ajmal's revision petition been accompanied with an application for condonation of delay under Section 5 of the Limitation Act, 1908, it would not have been maintainable as the limitation period of 90 days for filing a revision petition is provided in the 2nd proviso to Section 115(1) CPC, and not by the provisions of the Limitation Act, 1908.

54. Since the limitation period of 90 days for filing a revision petition under Section 115 CPC, which has been held to be a special law, I am of the view that the applicability of the Section 5 of the Limitation Act, 1908 stands excluded by Section 29(2) of the said Act, which reads thus:-

- "(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law*
- (a) The provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and*
- (b) The remaining provisions of this Act shall not apply."*

55. Since Section 115 CPC has been held to be a special law, the application of Section 5 of the Limitation Act, 1908 has also been excluded by Section 29(2)(b) of the said Act. Consequently, C.R.No.06/2005 is liable to be dismissed as grossly time-barred. In holding so, reliance is placed on the following case law:-

- (i) In the case of Government of Balochistan Vs. Abdul Rashid Langove (2007 SCMR 518), the Hon'ble Supreme Court upheld the judgment passed by the Hon'ble Balochistan High Court holding that a revision petition filed under Section 115 CPC beyond the period of limitation was liable to be dismissed as time barred as the provision of Section 5 of the Limitation Act, 1908 was not applicable and therefore the delay could not be condoned.
- (ii) In the case of Allah Dino Vs. Muhammad Shah (2001 SCMR 286), it was held as follows:-

"6. ... There is no cavil with the argument that if the Statute governing the proceedings does not prescribe period of limitation, the proceedings instituted thereunder shall be controlled by the Limitation Act as a whole. But where the law under which proceedings have been launched prescribes itself a period of limitation like under section 115, C.P.C. then benefit of section 5 of the Limitation Act cannot be availed unless it has been made applicable as per section 29(2) of the Limitation Act, as held in the cases (i) The Canara Bank Ltd. v. The Warden Insurance Co. Ltd. (AIR 1935 Bombay 35), (ii) Abdul Ghaffar and others v. Mst. Mumtaz (PLD 1982 SC 572), (iii) Ali Muhammad and another v. Fuai Hussain and others (1983 SCMR 1239), (iv) Collector of Customs (Appraisement) v. Messrs Saleem Adaya, Karachi (PLD 1999 Karachi 76) and (v) Haji Muhammad Ashraf v. The State and 3 others (1999 MLD 330)."

- (iii) In the case of Muhammad Zafar Vs. Nazir Ahmed (2005 MLD 1034), the Hon'ble Lahore High Court held as follows:-

"Time barred revision petition was liable to dismissal on multiple grounds, as on the one hand there was no explanation for inordinate delay because order dated 18-6-1996 dismissing application under section 12(2), C.P.C. was passed in the lifetime of predecessor of the petitioner Nadir, whereas on the other hand the revision petition was to be filed within a period of ninety days under section 115, C.P.C. This period of limitation having, been provided by a special statute, section 5 of the Limitation Act, 1908, was not applicable in view of its provisions under section 29(2) in view of the law laid down in the cases of Allah Dino anti another v. Muhammad Shah and others (2001 SCMR 286) and Punjab C Road Transport Corporation through District Manager, PRTC, D.G. Khan and another v. Muhammad Iqbal Lodhi, and another (2003 CLC 1539)."

Law to the said effect has also been laid down in the cases of Muhammad Amir Vs. Muhammad Sarfraz (2019 CLD 523), Muhammad Khalid Naeem Vs. Habib Bank Limited (2018 CLD 1027), Raja Karamat Ullah Vs. Sardar Muhammad Aslam Sukhera (1999 SCMR 1892), Noor Muhammad Vs. Assistant Commissioner, Vehari (1986 SCMR 292) and Abdul Aziz Vs. Additional Settlement Commissioner (1984 SCMR 1562).

Regular First Appeal No.204/2004 titled "Mian Muhammad Ajmal Vs. Syed Nazar Hussain etc.":-

56. On 27.04.2004, Ajmal filed a suit for declaration and cancellation of the agreements dated 23.08.1999, 18.10.1999, 22.11.1999 and 24.01.2000 as well as the general power of attorney dated 27.01.2000. This suit was filed against Nazar and his sons, etc. before the Court of the learned Civil Judge, Islamabad. In the said suit, it was pleaded *inter alia* that Nazar, in violation of the terms and conditions of the agreement to sell dated 23.08.1999, took possession of the roof top of Unit No.1, Seasun Plaza, Islamabad and despite Ajmal's repeated requests, did not restore possession of the same. It was also pleaded that Nazar's son, who was serving in the District Judiciary of Punjab, was instrumental in registering a false criminal case against Ajmal in the FIA.

57. On 23.09.2004, Nazar filed an application under Order VII, Rule 11 CPC praying for the rejection of the plaint in the said suit. The said application was contested by Ajmal by filing a written reply on 30.09.2004. Vide order dated 27.10.2004, the said application was allowed and the plaint in the suit filed by Ajmal was rejected. In the said order, it was mentioned that the suit for specific performance of the agreement dated 23.08.1999 filed by Nazar against Ajmal was decreed on 21.10.2003 on the basis of Ajmal's own statement. Furthermore, it was held that since the earlier suit for specific performance (which was with respect to the same property and between the same parties) had already been decreed, the subsequent suit filed by Ajmal was hit by the principle of *res judicata* enshrined in Section 11 CPC. The said order and decree dated 27.10.2004 has been assailed by Ajmal in R.F.A.No.204/2004.

58. At the time when the said suit was filed, Ajmal's application under Section 12(2) CPC challenging the order and decree dated 21.10.2003 had not been decided. The pleadings in the suit for declaration filed by Ajmal on 27.04.2004 are more or less the same as the grounds taken by Ajmal in his application under Section 12(2) CPC for setting aside the decree dated 21.10.2003. It may be recalled that through the said decree dated 21.10.2003, Nazar's suit for the specific performance of the agreement to sell dated 23.08.1999 was decreed on the basis of the statement recorded by Ajmal, who was the defendant in the said suit. It is an admitted position that at no material stage did Ajmal file an appeal against the said decree dated 21.10.2003. His application under Section 12(2) CPC to challenge the said order and decree was dismissed by the learned civil Court vide order dated 27.10.2004. This order was assailed in R.F.A.No.203/2004 which was dismissed as withdrawn vide order dated 22.12.2004. After the withdrawal of the said R.F.A., Ajmal filed C.R.No.06/2005 to challenge the said order dated 27.10.2004. C.R.No.06/2005 has been dismissed by us as time barred. In these circumstances, since the decree dated 21.10.2003 has attained finality for all intents and purposes, we do not find any illegality in the

order and decree dated 27.10.2004 whereby the learned civil Court rejected the plaint in Ajmal's suit for declaration and cancellation of *inter alia* the agreement to sell dated 23.08.1999.

59. If the learned civil Court would have proceeded with Ajmal's suit for declaration, etc., it would in effect amounted to allowing Ajmal to collaterally challenge the decree dated 21.10.2003 which is not permissible under the law. The suit for declaration, etc. filed by Nazar was clearly a device to dislodge the finality and binding nature of the decree dated 21.10.2003, and the learned Civil Court was correct in thwarting this nefarious design by Ajmal. Through the suit for declaration etc., Ajmal is attempting to re-open a matter that already stands decided through decree dated 21.10.2003. In fact, through the said suit, Ajmal was seeking the cancellation of the agreements that stand specifically enforced through the said decree dated 21.10.2003. Since the said decree dated 21.10.2003 was based on the statement made before the Court by Ajmal who was the contesting defendant in the suit for specific performance filed by Nazar, the decree was in the nature of a compromise decree and as such was not only binding upon the parties as a contract between the parties but also operated as *res judicata* between the parties thereto with regard to matters which constituted the main foundation of the agreement of compromise. The principle of *res judicata* in the aforementioned fact situation, in our opinion, has rightly been applied by the learned Civil Court.

60. Active concealment of material facts by a person having knowledge or belief of such facts may constitute fraud. In the present case, Ajmal was duty bound to have made disclosure about the finance facility obtained from SME Bank and the mortgage over the suit property. On the contrary there was a positive recital in the agreement to sell dated 23.08.1999 that the suit property was free from encumbrances and acting on this representation Nazar entered into the said agreement and paid Ajmal Rs.44,00,000/- . The concealment of the said encumbrance on the suit property enabled Ajmal to surreptitiously secure the execution of the agreement to sell

with Nazar. Since Ajmal suppressed or concealed the fact that the suit property was already mortgaged with SME Bank, it is safe to hold that Ajmal had deceived Nazar. Had he made such disclosure prior to the execution of the agreement to sell dated 23.08.1999, the twenty-five years of acrimonious litigation would have been averted. Since Nazar had stepped into the shoes of SME Bank, he would be invested with ownership rights over the property which was mortgaged with SME Bank i.e., the suit property including the roof top of Unit No.1.

61. In view of the above, R.F.A.No.204/2004 and C.R.No.06/2005 are dismissed with costs throughout. Additionally, Ajmal shall pay costs amounting to Rs.10,00,000/- into the Government treasury under Section 35(1)(iii) inserted in CPC through the Costs of Litigation Act, 2017. E.F.A.No.02/2013 is also dismissed with costs payable to SME Bank.

(SAMAN RAFAT IMTIAZ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 26.09.2024.

(CHIEF JUSTICE)

(JUDGE)

APPROVED FOR REPORTING