JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT.

R.S.A No.07/2016.

Naseem Ahmed Khan, etc.	**Vs.**	**Syed Fahad Ali, etc.**
Appellants by:		**Syed Asad Ali Saeed, Advocate.**
Respondents No.1 & 2 by:		**Mr. Tariq Ameen, Advocate.**
Respondent No.3 by:		**Mr. Tariq Masud, Advocate.**
Date of Hearing		**25.10.2016.**

JUDGMENT.

MOHSIN AKHTAR KAYANI, J:- Through the instant appeal, the appellants have assailed the judgment and decree dated 25.01.2016, passed by learned Additional District Judge (West) Islamabad, whereby suit titled Syed Fahad Ali, etc Vs. Mst. Jamshed Jahan and others was decreed in appeal.

2. Brief facts leading to the filing of instant appeal are that Sarfraz ul Hassan Syed/respondent No.2 filed a suit in capacity of next friend/Guardian at Litum on behalf of respondent No.1(minor) titled as Syed Fahad Ali and another vs. Mst. Jamshed Jehan, etc, whereby respondent No.1 sought declaration against the respondents and claimed that he is lawful owner in possession of suit properties mentioned in the body of plaint on the basis of oral gift deed made by Mst. Musarat Sultana on 12.10.2006 in the presence of witnesses. The suit was contested by the respondents. Learned Trial Court framed the issues and after recording of evidence of the parties, the suit filed by respondent No.1 was dismissed vide judgment and decree dated 08.12.2015. The said judgment and decree was assailed through R.F.A by Syed Fahad Ali/respondent No.1 before learned Additional District Judge (West) Islamabad, who accepted the appeal, set aside judgment and decree of Trial Court vide judgment and decree dated 25.01.2016.

3. As per contents of the plaint, respondent No.1 Syed Fahad Ali claimed that his mother Mst. Musarat Sultana died on 28.05.2008, whereas he was adopted

by Mst. Musarat Sultana and Sarfraz ul Hassan soon after his birth as both were issueless.

4. Mst. Musarat Sultana was only daughter of her parents and her late father Muhammad Sultan was owner of the suit properties bearing House No.125, Street No.16, Sector G-10/I, Islamabad, land measuring 80 Kanals situated in Mouza Kharianwala, District Sheikhupura. Late Muhammad Sultan was also share holder in the properties of his late sister Mst.Murtazai Begum in capacity of real brother as Mst. Murtazai Begum was issueless and her husband had already been died. Mst. Murtazai Begum was owner of House No.1477, Street No.22, Mohallah Haripura, District Rawalpindi and the said land was inherited by Mst. Musarat Sultana. Mst. Musarat Sultana was also owner of land measuring 1 Kanal situated in Jhangi Syedan, Islamabad vide registered sale deed No.406, dated 02.02.1994. Respondent No.1 claimed that he is in possession of suit properties referred above and respondent No.3 Mst. Jamshed Jehan mother of Mst. Musarat Sultana being in capacity of share holder in the properties has already submitted his written statement in the suit conceding the stance of respondent No.1. Respondent No.1 in order to prove his case produced Sarfraz ul Hassan as P.W.1, Sabiha Begum as P.W.2 and Mst. Aziza Masroor as P.W.3 in order to prove oral gift declaration of Mst. Musarat Sultana in favour of respondent No.1. Respondent No.1 also produced documentary evidence, copy of allotment letter of House No.125, Sector G-10/1, Islamabad as Exh.P.1, copies of record of rights as Exh.P.2, copy of sale deed as Exh.P.3, certified copy of order dated 11.01.2005 of suit titled Mst. Mustafai Begum vs. Mst. Jamshed Jahan, etc as Exh.P.4, certified copy of suit titled Syed Fahad Ali vs. Mst. Jamshed Jahan, etc Exh.P.5, copy of death certificate of Musarat Sultana as Mark-A and copy of transfer order dated 21.03.1974 as Mark-B. The defendants produced their evidence through Mobin Ahmed Khan as D.W.1 and submitted documentary evidence Exh.D.1 to Exh.D.5 comprising of certified copies of judicial record of different cases.

5. Learned counsel for appellants contended that first appellate Court has set aside the judgment and decree of Trial Court contrary to the law and facts of the case; that learned first appellate Court has not discussed all issues of the suit nor

even given issue wise findings, which is contrary to law; that first appellate Court has completely ignored the documentary evidence produced by the present appellant, even issue No.2 with regard to jurisdiction of Court has not been discussed; that respondent No.1 while submitting his plaint contended that oral gift deed was pronounced in the presence of witnesses Syed Wajid Ali, Mansoor Ahmed and Sartaj Ali, whereby physical possession was also handed over to respondent No.1/plaintiff but during the course of evidence no such fact has ever been brought on record rather contrary evidence has been produced, therefore, when the appellate Court has not considered this fact of departure from pleadings and passed the judgment and decree in favour of respondent No.1, the same is to be considered in violation of statutory provisions of law, whereas it is mandatory upon the plaintiff to prove his case through cogent evidence on the basis of pleadings, whereas first appellate Court while accepting the evidence beyond the pleadings has committed serious error in law, which is core question before this Court in second appeal.

6. Conversely, learned counsel for respondents No.1 & 2 contended that first Appellate Court has rightly passed the judgment and decree, whereby suit of respondent No.1 was decreed as there is no rival contest of the suit; that only legal heirs available on record is respondent No.2 as well as Mst. Jamshed Jehan, who have conceded in favour of Syed Fahad Ali and acknowledged the oral gift on record, therefore, there is no further evidence required to prove case.

7. Arguments heard, record perused.

8. From the perusal of record, it has been observed that respondent No.1 filed suit for declaration regarding oral gift declaration dated 12.10.2006 in presence of witnesses pronounced by Mst. Sultana Musarat late in favour of respondent No.1, whereby respondent No.1 claimed that he is owner in possession of the suit properties mentioned in the body of the plaint. The suit was filed against the defendants Mst. Jamshed Jehan mother of late Mst. Musarat Sultana. Defendant Mst. Jamshed Jehan appeared before the Trial Court and got recorded her statement on 24.02.2012, whereby she conceded the prayer of respondent No.1 and stated that she has no objection if the suit of respondent No.1 is decreed as

she wants to transfer the house in the name of her grandson/respondent No.1. The statement was recorded by learned Civil Judge and Mst. Jamshed Jehan put her thumb impression and signature on the margin of order sheet. The suit was filed by respondent No.1 through his next friend respondent No.2, the adopted father and husband of Mst. Musarat Sultana, who has no adverse interest to that of minor. Subsequently the suit was amended on two different occasions and other legal heirs have been impleaded as defendant in the suit, in the instant are appeal appellants No.1 to 8, whereas respondent No.4 Mst. Mustafai Begum, Phuphi of late Mst. Musarat Sultana, who was living in India and appointed Syed Sartaj Ali has general attorney but later on both the parties are not aware of the whereabouts of the respondent and with consent of both the parties her name was deleted from array of the defendants vide order dated 22.04.2016, even the said Mst. Mustafai Begum was proceeded against ex-parte.

9. Mst. Musarat Sultana was married to respondent No.2 Sarfraz ul Hassan, who were issueless, therefore, they adopted Syed Fahad Ali as their son, however, Mst. Musarat Sultana died on 28.05.2008, whereby she was owner and having share in different properties listed below:-

(i) House No.125, Street No.16, Sector G-10/I, Islamabad.

(ii) Land measuring 80 Kanals situated in Mouza Kharianwala, District Sheikhupura.

(iii) House No.1477, Street No.22, Mohallah Haripura, District Rawalpindi.

(iv) Land measuring 1 Kanal situated in Jhangi Syedan, Islamabad.

10. Respondent No.1 has filed a suit for declaration to the effect that late Mst. Musarat Sultan on 12.10.2006 on eleventh birth day of respondent No.1 gifted of properties to respondent No.1 minor through oral gift deed in the presence of witnesses Mansoor Ahmed, Syed Wajid Ali and Sartaj Ali and also handed over physical possession to the extent of her share to the minor, however, same was acknowledged by respondent No.2 father of minor. The other living legal heir of Mst. Musarat Sultana is mother Mst. Jamshed Jehan, who appeared before the Court and got recorded her statement vide order dated 24.02.2012, whereby she has no objection on the decree prayed for and she has acknowledged the rights of

respondent No.1 to the extent of house referred in the body of the plaint. The other legal heir is Sarfrazul Hassan Syed/respondent No.2, who is representing respondent No.1 in capacity of next friend and acknowledged the claim of respondent No.1 during entire proceedings. The present appellants contested the said suit by filing their written statement on record in capacity of defendants No.3 to 10 mainly on the ground that oral gift has been pronounced in October, 2006 but late Muhammad Sultan never transferred the property in favour of respondent No.1 in her life time till the death i.e. 28.05.2010, hence, they claimed that entire story of oral gift is after thought. The present appellants have denied the oral gift story at the very inception of the proceedings rather contested the matter vigorously. From the perusal of record, it has been observed that learned Trial Court after hearing learned counsel for the parties framed following issues:-

ISSUES.

1. Whether the plaintiffs are entitled to the decree for declaration and permanent injunction as prayed for?OPP
2. Whether this court has territorial jurisdiction to adjudicate upon the suit in hand?OPD-3 to 10
3. Whether the plaintiffs have come to the court with sullied hands?OP-3 to 10
4. Whether suit of the plaintiffs is not maintainable under the law?OPD-3 to 10
5. Whether the plaintiffs are stopped by their words and conduct to file the instant suit?OPD-3 to 10
6. Whether the suit is false, frivolous and vexatious, hence, answering defendants are entitled to special costs U/S 35-A, CPC?OPD-3 to 10.
7. Relief.

11. From the above mentioned issues, it reveals that main issue is issue No.1, on which both the parties lead their evidence. Respondent No.1 has been represented through Sarfraz ul Hassan as P.W.1, who stated that at the time of filing of the suit respondent No.1 Fahad Ali was minor, whereas Mst. Musarat Sultana died on 28.05.2008. Respondent No.2 in capacity of P.W.1 further stated in his evidence that House No.125, Street No.126, Sector G-10/1, Islamabad belongs to my late wife, whereas he also claimed that he is share holder in the

said property and house in question was initially owned by his father in law Muhammad Sultan. He further stated that agricultural land measuring 80 Kanals situated in Sheikhupura and 1 Kanal land situated in Mouza Tornol as well as a plot situated in Rawalpindi were also owned by Mst. Musarat Sultana and on the 11th birth day event of respondent No.1 on 12.10.2006, when entire family relatives were present in the function, mother in law (defendant), his brother Sartaj Ali, his other family members and his sister and cousin Wajid Ali with his family were present and in their presence late Mst. Musarat Sultana stated that she has gifted her entire property to her son Fahad Ali, however, respondent No.1 was minor, therefore, the said gift deed has been acknowledged by P.W.1 in capacity of father. The entire possession of the property has also been received by P.W.1, hence, suit be decreed in favour of respondent No.1.

12. Respondents No.1 &2 have also produced Sabiha Begum and Aziza Begum as P.W.2 & P.W.3, sisters of respondent No.2 and aunts (Phuphi) of respondent No.1, who have got recorded their statements and acknowledged the entire transaction of oral gift deed on the 11th birth day event of respondent No.1. During the course of cross-examination by present appellants, P.W.1/respondent No.2 has acknowledged that he has not referred the share belonging to Mst. Musarat Sultana in the house situated in Sector G-10/1, Islamabad, land in Sheikhupura, share in house situated at Haripura, Rawalpindi as to what is share of Mst. Musarat Sultana in these properties. He further admitted that he has not endorsed the gift transaction in the revenue record of Sheikhupura nor he ever entered the possession of land situated in Sheikhupura. He further admitted that Mst. Musarat Sultana has never put any transfer of her property in the name of respondent No.1 and he further admitted that properties situated in Rawalpindi and Sheikhupura are out of the jurisdiction of this Court. He further admitted that no written document has been executed for the purpose of oral gift deed.

13. From the perusal of record, it is evident that respondents No.1 & 2 have submitted the allotment letter dated 24.05.1992/Exh.P.1, wherein house No.125, Sector G-10/1, Islamabad was transferred in the name of Mst. Jamshed Jehan, Mst. Musarat Sultana and Mst. Khatoon Begum. Respondents No.1 & 2 also

produced copy of record of rights of land measuring 80 Kanals situated in revenue estate Kharianwala District Sheikhupura as Exh.P.2 and registered sale deed No.406, dated 02.02.1994 registered before Sub-Registrar Islamabad measuring 4 Kanals situated in Mouza Jhangi Syedan in favour of Sarfrazul Hassan Syed and Mst. Musarat Sultana, whereby Mst. Musarat Sultana owned 1 Kanal land in the said registered sale deed.

14. Beside the above referred documents, respondents No.1 & 2 submitted certified copy of civil suit titled as Mustafai Begum vs. Syed Fahad Ali, etc/Exh.P.5, death certificate issued by Union Administrator Union Council No.34 of Rawalpindi in the name of Mst. Musarat Sultana/Mark-A, transfer letter issued by government of Punjab of Houser No.P1477 as Mark-B.

15. The present appellants only produced D.W.1, whereby Mobin Ahmed Khan appellant No.2 appeared as D.W.1 on behalf of other appellants, contested the suit vigorously and stated that Mst. Musarat Sultana d/o Sultan Ahmed was my close relative and he is (Yak Jadi) related to late Mst. Musarat Sultana through his predecessor. Further stated that the land situated in Mouza Kharianwala District Sheikhupura has been transferred in his name through mutation No.6667 and at the time of funeral of Mst. Musarat Sultana no one ever declared that she had transferred her suit properties on 12.10.2006 and the said claim is false and frivolous. Further stated that Mst. Musarat Sultana was issueless and she has share in other properties as Murtazai Begum is her Phuphi. Further stated that respondent No.2 has filed a criminal complaint U/s 22-A, Cr.P.C against mutation No.667, which has been dismissed by the Court. Further stated that a civil suit filed by Sartaj Ali, real father of Fahad Ali was dismissed and similarly another civil suit filed Murtazi Begum in Sheikhupura was also dismissed by Civil Court. Even the said suit was contested by Sartaj Ali, who was real father of respondent No.1.

16. From the perusal of entire evidence, there are two main legal points involved in the entire matter as to onus to prove the oral gift deed is upon the respondents No.1 & 2/plaintiffs, who are otherwise beneficiary of the entire

transaction. Respondents No.1 & 2 are bound to prove their case independently without weaknesses of the present appellants/defendants.

16. Respondents No.1 & 2 have categorically referred in para No.7 of the plaint, which is as follow:-

> "That on 12-10-2006 on the eleventh birthday of the plaintiff No.1 Mst. Mussrat Sultana gifted her all properties to the minor/plaintiff No.1 due to love and affection through oral gift in the presence of witnesses namely Syed Wajid Ali, Masroor Ahmed and Sirtaj Ali and the physical possession of the said properties was handed over to the plaintiff to the extent of her share and the same was accepted by the plaintiff No.1 through his father i.e. plaintiff No.2."

17. The above referred para of the plaint discloses names of the witnesses i.e Syed Wajid Ali, Masroor Ahmed and Sirtaj Ali, whereas respondents No.1 & 2 during the course of evidence have not produced these witnesses, which were disclosed in the plaint at the time of filing of instant suit, hence, the principle on the said proposition has been referred in Order VI Rule 2, CPC, whereby it is obligatory upon the parties to plead all material facts, on which the party pleadings relies for his claim or defence as the case may be. Hence, the specific stance taken by respondents No.1 & 2/plaintiffs in their plaint is the factum of oral gift declaration made on 12.10.2006 by Mst. Musarat Sultana in presence of witnesses regarding the properties on the eleventh birthday of respondent No.1.

18. From the perusal and comparison of plaintiffs evidence, it has been observed that the plea raised by plaintiffs/respondent No.1 & 2 in their plaint especially in Para No.7 of the plaint has not been proved in evidence rather not a single word has been uttered by P.W.1 in his examination in chief, hence, it can safely be assumed that the plaintiffs have failed to produce their affirmative evidence, which is basic requirement to prove the ingredients as referred by Apex Court in the judgments on the subject. It is settled law that he who alleges fact has to discharge onus and the plea not taken in the pleadings, party cannot be allowed to lead evidence about the plea and the said principle has also been applied Vice Versa if the plea taken in the pleadings is not proved, the entire case has been defeated. Reliance is placed upon **2006 CLC 546 Lahore(Ghulam Nabi through L. Rs. and others Vs. Tahir Abbas and others)**, wherein it was held that:-

> *"It is settled law, that no one should be allowed to plead the case beyond the scope of his pleadings. And even if any evidence has been led, which is outside the purview of the pleadings of a party should be ignored by the Court. The written statement of the appellants has been perused, but the plea now raised is conspicuously missing therein. It is for this reason, that no issue had been framed by the trial Court in this behalf."*

In **2007 CLC 462 (Trading Corporation of Pakistan (Pvt.) Limited Vs. Messrs Nidera Handelscompagnie B. B. Meent 94, P. O. Box 676, 3000 AR Rotterdam The Netherlands and another)**, it was held that:-

> "No party can be taken by surprise. The questions asked from the witness were without support of pleadings and cannot be considered. A party cannot lead evidence which is not supported by pleadings. In this respect, In the case of Binyameen and others v. Chaudhry Hakim and another 1996 SCMR 336 the Honourable Supreme Court has held as under:--
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> > "…It is a well settled principle of law that a party can prove a case which has been pleaded by it. In support of his contention, the learned counsel for the appellants referred to Government of Pakistan (now Punjab) through Collector, Bahawalpur v. Haji Muhammad PLD 1976 SC 469. It is also a well-settled principle that no evidence can be led or looked into in support of a plea which has not been taken in the pleadings. A party is required to plead facts necessary to seek relief claimed and he would be entitled to produce evidence to prove those pleas. Variation in pleading and proof is not permissible in law."

In **2009 CLC 1070 (Rafiq Dawood and 4 others Vs. Messrs Haji Suleman Gowa Wala & Sons Ltd. through Director and others)**, it was held that:-

> *"After the disclosure of the respective positions of the parties in their pleadings, no evidence which deviates from or is contrary to the pleadings is to be looked into. Rights and obligations of the respective parties are always to be determined keeping in view only such pleas that have been taken by them in their respective pleadings. The evidence that is adduced by the parties is also to be looked into only to the extent it supports or opposes the pleas that have been taken by the parties in their pleadings. Any piece of evidence which is beyond the scope of the pleadings cannot be considered while deciding a controversy. This is a well-established legal principle. A division bench of this Court in the case of Ehteshamuddin Qureshi v. Pakistan Steel Mills reported in 2004 MLD 36 held that a party cannot be allowed to lead evidence contrary to its pleadings, nor could a party be permitted to take a plea different than the plea which it has taken in its pleadings and any part of the evidence which is beyond the pleadings is ought to be overlooked as improvement of the nature being afterthought and impermissible in law."*

19. The above referred judgments clearly demonstrate that principle of departure is applicable in the instant matter in terms of Order VI Rule 2, CPC, whereby the parties could not be allowed to depart from their pleadings as at the

stage of evidence they can only be departed by way of amendment in terms of Order VI Rule 2, CPC. Hence, when the plaintiffs/respondents No.1 & 2 have specifically mentioned their witnesses in Para No.7 of the plaint, they are bound to produce these witnesses or at least summon them through Court or place some evidence on record as to why they have not been produced, in such circumstances, it can be assumed if these witnesses have been produced in evidence, might go against the plaintiff's claim and in consequence of such future act of these witnesses, respondents No.1 & 2 withheld evidence in violation of Article 129 (g) of Qanoon-e-Shahadat, 1984, hence, the presumption can be taken against respondents No.1 & 2.

20. In Islamic law any person of sound mind may dispose of his property by way of gift and writing is not essential to the validity of the gift. The ingredients of gift U/S 149 of Mohammadan Law are as follow:-

(i) Declaration of the gift by the doner
(ii) Acceptance of the gift expressed or implied by or on behalf of done.
(iii) Delivery of possession of the gift by the doner.

21. Beside the above referred ingredients, every transaction has to be proved through two witnesses in terms of Qanoon-e-Shahadat Order, 1984, therefore, person claiming title on the basis of such oral gift would have to prove the same by cogent and solid evidence, the person, who claims to be a witness of the said transaction have to explain the time, date or place of gift, even the circumstances as to why the gift was not reduced into writing, failing which the transaction cannot be proved. Reliance is placed upon **2004 CLC 33(Ghulam Zainib and another Vs. Said Rasool and & others),** wherein it was held that:-

> *"Ss. 122 & 123---Registration Act (XVI of 1908), Ss. 17 & 49---Islamic Law---Oral gift or through registered deed---Proof---Beneficiary of gift through registered deed has to prove, independent of such deed, transaction of gift as a fact---Persons in whose favour there was no document of any kind to support gift, would stand on a much weaker wicket as compared to those getting title out of registered gift."*

22. In view of above referred reasons, it has been observed that the onus to prove the transaction is upon respondent No.1/plaintiff, who is under obligation to

discharge onus, which has not been discharged in accordance with law. Similarly, the plea referred in Para No.7 of the plaint taken in terms of Order VI Rule 2, CPC has also not been adhered to rather the evidence has been withheld in terms of Article 129(g) of Qanoon-e-Shahadat Order, 1984, even otherwise section 123 of Transfer of Property Act, 1882 expressly provides that for the purpose of making gift of immovable property, the transfer must be effected by a registered instrument singed by or on behalf of the doner and attested by at least two witnesses, whereas the witnesses referred in the plaint have not been placed on record. Hence, the first question has been answered in negative.

23. The second important question is as to whether the instant appeal disclosed a question of law from the entire pleadings and evidence, in order to understand the term question of law referred in section 100, CPC. It is necessary to demonstrate on record that the impugned decision is being contrary to law and the said decision having failed to determine some material issue of law or substantial error or defect in the procedure has not been removed or answered and the entire decision effect merits of the case.

24. From the perusal of judgment of first Appellate Court, it has been observed that first Appellate Court conceded to this fact that Sartaj and Waleed Ali have been referred as witnesses of the gift but they have not been produced by respondents No.1 & 2 rather Sabiha Begum and Aziza Sarwar have been produced as P.W.2 & P.W.3, who are sisters of respondent No.2 Sarfarazul Hassan, in view of the said observation the first Appellate Court has considered that the requirement of the witnesses have been fulfilled, whereas the departure from the pleadings in terms of Order VI Rule 2, CPC, 1908 imposes procedural restriction upon the plaintiff or the defendant as the case may be to refer material facts in their pleadings and subsequent to pleadings, the evidence can only be lead, which has been referred in the pleadings and anything beyond the pleadings amounts to departure, which is not permissible under the law, hence, the said important aspect of the case has wrongly been considered in violation of settled principle, the said question is a material question of law to be answered in the instant appeal. In order to understand question of law reliance is placed upon

1965 SC 690 (Haji Abdullah Khan and others Vs. Nisar Muhammad Khan and others), wherein it was held that:-

> *"(d) Question of law__Meaning__Such question can be raised at any stage.*
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> *A pure question of law means a question which not only does not require any investigation into facts, but which could not have been met by a plea of fact if raised at the proper stage and ordinarily it will be a good argument as against a plea being a plea of law that it could have been met by an allegation of fact.*
>
> *The proposition is not open to contest that pure questions of law can be raised at any stage.*
>
> *Where in a case, on appeal, the High Court observed that to allow the question of law or of fact to be raised in appeal for the first time would clearly prejudice the other party and thus defeat the ends of justice:*
>
> *Held, that it is the duty of the Court itself to apply the law. A party is not bound to engage a counsel. Whatever law becomes applicable on the admitted or proved facts, law has to be given effect to whether or not it has been relied upon by a party"*

In **PLD 1966 SC 612 (Malik Muhammad Hayat Khan Vs. Subedar Yar Muhammad Khan)**, it was held that:-

> *"(b) Civil Procedure Code (V of 1908), S. 100__Queestion of law or fact, what is_Inference from construction of document__Surrounding circumstances__Colonisation of government Lands (Punjab) Act (V of 1912).*
>
> *The question of the proper legal effect of a document or of a proved fact is always a question of law but when an inference is to be drawn as to a question of fact then whether the inference is drawn from oral evidence or from documents it is always a question of fact.*
>
> *The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.*
>
> *Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have to be construed for the purposes of deciding the question."*

In **2000 SCMR 1871 (Messrs Irum Ghee Mills Limited Vs. Income Tax Appellate Tribunal and others)**, it was held that:-

> *"It has been held by the Court that when a finding of fact is based partly on evidence and partly on conjectures the question of law does arise. In support of this proposition, reliance has been placed on Oriental Investment Co. Ltd. v. Commissioner of Income-tax. Bombay (PLD 1958 Supreme Court (Ind.) 151), wherein the following test was provided to determine whether the question is one of fact or law:*
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> *(1) When the point for the determination is a pure question of law such as construction of a statue or document of title, the decision of the Tribunal is open to reference to the Court under section 66(1).*

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.

(3) A finding on a question of fact is open to attack under section 66(1) as erroneous in law if there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

What are the characteristics of the business of dealing in shares of that of an investor is a mixed question of fact and law. What is the legal effect of the facts found by the Tribunal and whether as a result the assessee can be termed a dealer or an investor is itself a question of law."

In **PLD 1960 Dacca 52 (Rangalal Sutradhar and others Vs. Satish Chandra Poddar),** it was held that:-

"(a) Civil Procedure Code (V of 1908), SS. 100 & 103__Failure of lower Courts to investigate and come to a finding on vital basic question of fact__Constitutes an error in law__Second Apeal competent.

There is no difference in principle between a failure to appreciate and determine the real question of fact to be tried, and failure to appreciate and determine a question of fact which vitally affects the issue. The failure of the Courts below to investigate and come to a finding on the vital basic question of fact constitute an error in law against which, by virtue of section 100 of the Civil Procedure Code, 1908, a second appeal will lie."

25. From the above referred precedents of Hon'ble Supreme Court as well as High Courts, following legal principles emerge that second appeal shall lie:-

(i) When the decision impugned is contrary to law.

(ii) Failure to determine some material issues of law.

(iii) Decision based upon undisputed facts, which has not been appreciated by the Courts below on the wrong principle of law.

(iv) Interpretation and legal effect of any document is also a question of law, which has not been appreciated by the Courts below.

(v) Failure to appreciate and determine a question of fact, which materially effects the principle issue of the case and as a result of said basic question of fact constitutes an error in law.

(vi) Decision based on erroneous reasoning and incorrect exposition of law.

(vii) Decision based upon evidence, which has not been pleaded by the parties in their pleadings and the Courts below have not given any reason for change of plea and evidence and wrongly appreciated the law.

(viii) Courts below have committed error or defect in the procedure, which is of substantial nature and the decision is based upon such defect.

(ix) Question of admissibility of evidence.

26. The above referred principles clearly define as to maintainability of Second Appeal whereas in present case the appellants have raised substantial question of law, which has not been appreciated by first Appellate Court, even the findings given by the first Appellate Court are contrary to the settled procedure and in violation of principles of Qanoon-e-Shahadat order, 1984. Learned first Appellate Court has based its findings on assumption, whereby those facts have been appreciated, which were not placed by respondents No.1 &2/plaintiffs in their pleadings rather they have changed their basic witnesses and such departure has not been discussed nor even appreciated in the impugned judgment, hence the same has been considered substantial question of law, therefore, the instant appeal has rightly been filed.

27. After the issue of maintainability of instant appeal, it has been observed from the record that respondents No.1 & 2/plaintiffs are under obligation to prove the oral declaration of gift as question of fact independently in terms of Qanoon-e-Shahadat Order, 1984, whereby it is necessary to produce two witnesses of the transaction, who have to express every fact in evidence in which one party signifies his willingness to do certain act of declaration of gift alongwith its details of the property, time, name of the witnesses, place of the declaration and terms of the declaration of gift including the details of possession and demarcation of the property in clear terms and the other party has to accept the offer in clear words, which is necessary requirement for the oral declaration of the gift whereas no such requirement has been proved. Reliance is placed upon **2010 SCMR 342 (Muhammad Ejaz and 2 others Vs. Mst.Khalida Awan and another),** wherein it was held that:-

> *"It is not the respondent's case that the gift of the suit property was made orally. The witnesses produced by her namely, Muhammad Tufail P.W.1(scribe) and the two marginal witnesses to the gift deed namely, Muhammad Zaman P.W.3 and Muhammad Nawaz P.W.4 also deposed in relation to the gift-deed. Moreover, they do not profess to be witnesses to any oral gift. Their testimony is also to the effect that the respondent/plaintiff was not present*

when the alleged gift-deed was reduced into writing by the scribe. In these circumstances, neither an oral gift nor a valid gift deed has been proved on record.

It has been observed by the High Court that under Muslim Law a gift may be made by a Muslim donor through a declaration to this effect, followed by acceptance by the done and delivery of possession. These are the requisite elements of a valid oral gift under Muslim Law and there can be no cavil with the general proposition stated by the High Court. In the present case, however, as noted above, ***there were no witnesses of the acceptance of the gift or delivery of possession****. The scribe Tufail (P.W.2) in clear terms, deposed that the respondent/plaintiff was not present at the time of the alleged gift. Statements to the same effect have been made by Muhammad Zaman P.W.3 and Muhammad Nawaz P.W.4, Zaman expressly deposed that only three persons namely Ahmad Bakhsh, Muhammad Nawaz P.W.4 and Zaman himself were present at the time when the gift-deed was made. Muhammad Nawaz P.W.4 testified that the respondent/plaintiff Mst.Khalida Awan was not present at the time. From the testimony of these witnesses, the only conclusion which can be drawn is that there is* ***no evidence of acceptance of the gift by the plaintiff even if the gift*** *deed Exh.P/1 was treated as a declaration of gift.*

Coming next to the ***question of delivery of possession****, the evidence once again does not support the respondent/plaintiff. She has acknowledged in her own statement that her brother, Muhammad Ejaz (petitioner No.1) has one room in the disputed house which is under his lock and key and he resided in the said room when he visits Shorkot Muhammad Zaman P.W.3 has made a similar statement while Muhammad Nawaz P.W.4 has stated that Muhammad Ejaz has retained two rooms in the disputed property. From these statements and in the absence of any explanation for this material circumstance, it is abundantly clear that possession of the disputed property was not delivered to the respondent/plaintiff by her father. On the contrary, the most logical inference to be drawn from this circumstance was that the portion of the disputed property (be it two rooms or one) was in the use and occupation of Ejaz Even during his father's lifetime and possession was never handed over to the respondent/plaintiff. Had it been otherwise, the plaintiff and her witnesses would have explained in their testimony, the events whereby Ejaz came into possession of such portion of the property after it had been gifted.*

As this point, I would like to advert to another important aspect of the case. The respondent/plaintiff has testified that her father Ahmad Bakhsh was an affluent and rich person having retired from the Police service as S.H.O. ***It, therefore, does not stand to reason that he would not have obtained registration of the gift deed, had he wished to convey the suit property to the plaintiff.*** *Interestingly, the scribe Muhammad Tufail (P.W.2) has stated in his testimony that the Sub-Registrar's office was only 25 yards from his place of work. This fact has also been noted by the learned appellate Court and the logical inference from the same has been drawn.*

(Emphasizing and underlining is mine)

28. Learned first Appellate Court while passing impugned judgment & decree has also relied upon the conceding statement of the mother (Jamshed Jahan) of the

deceased, who got recorded her statement vide order dated 24.02.2012 before the Trial Court in following words:-

بیان کیا کہ دعوی بحق مدعی ڈگری کیے جانے پر اعتراض نہ ہے۔ میں اپنی بیٹی کے مکان کو اپنے نواسے کے نام کرنا چاہتی ہوں۔

The said statement has been given due weightage although the statement has not been cross-examined by the appellants, even Mst. Jamshed Jahan was not identified nor even the said conceding statement qualifies the quality of evidence, through which one can prove oral gift declaration, even the said lady has not confirmed the oral declaration of gift made by late Mst. Musarat Sultana , hence the same in toto is inadmissible having no legal effect in favour of respondents No.1 & 2. Reliance is placed upon **PLD 2016 Lahore 587 (Sardara and Allah Ditta through Legal Heirs and others Vs. Mst. Bashir Begum and another)**, wherein it was held that:-

> *"Nothing was on record as to when, where and before whom declaration of gift was made by the donor which was accepted by the donee and possession was delivered in lieu thereof---Oral gift was permissible but same was required to be proved by production of persuasive and trustworthy evidence---Trial Court proceeded to decree the suit merely on the basis of conceding written statement as well as conceding statement of donor without taking precautionary measures whether all such proceedings were being conducted without any coercion or misrepresentation on the part of donor-lady---Consent decree being an agreement between the parties to the lis when brought under challenge was required to be proved by beneficiary through production of convincing and cogent evidence."*

29. In view of above referred judgments of the Apex Court as well of learned High Courts, I am of the considered view that the plea of oral gift has been raised by respondents No.1 &2/plaintiffs and the same has not been proved, although the onus and obligation to prove the said facts is the responsibility of a person, he who alleges the said facts. It has been proved from record that respondents No.1 &2/plaintiffs after the departure from the pleadings have gone beyond their plea, therefore, as a result of said departure civil suit fails whereas the Appellate Court has refused to acknowledged the said departure rather failed to appreciate the most important and crucial plea referred in Para No.7 of the plaint while considering the oral gift declaration as respondents No.1 &2/plaintiffs have changed the witnesses at their own.

30. Respondents No.1 & 2 have not proved the material facts, which were pleaded in their plaint rather substituted their testimony through other witnesses. Such substitution and departure is substantial question of law, which can be taken up at the level of second appeal, hence, this Court is of the view that first Appellate Court has wrongly considered the factum of oral declaration of gift without considering the pleadings of the plaintiffs, hence, committed material error on factual side, which resulted in wrong application of law, therefore, this appeal is allowed and the judgment & decree dated 25.01.2016 passed by Additional District Judge (West) Islamabad while giving findings on issue No.1 is set aside and the judgment and decree dated 08.12.2015 passed by learned Trial Court is upheld.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 14.11.2016.

JUDGE

APPROVED FOR REPORTING.

R.Anjam