

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.35/2016
Mst. Saadia Andaleeb
Versus
Mst. Farzana Zia and 5 others

Date of Hearing: 12.06.2018
Petitioner by: Mr. Sajid Abbas Khan, Advocate
Respondents by: Mr. Muhammad Shoaib Sheikh, Advocate
for respondents No.1 to 3; and Ms. Sitwat
Jehangir, Advocate for respondent No.5.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Mst. Saadia Andaleeb, impugns the judgment and decree dated 21.01.2016, passed by the Court of the learned Additional District Judge (West), Islamabad, whereby the petitioner's appeal against the judgment and decree dated 27.07.2015, passed by the Court of learned Civil Judge, Islamabad, was dismissed. Vide the said judgment and decree dated 27.07.2015, the learned civil Court decreed the suit for declaration, separate possession through partition and permanent injunction, instituted by respondent No.1 (Mst. Farzana Zia) and her sister, Mst. Fakhra Zia, against their brother, respondent No.4 (Ihtisham-ul-Haq) and the petitioner who is respondent No.4's wife.

FACTUAL BACKGROUND:

2. The controversy in this case is primarily regarding ownership of House No.386, Street No.64, Sector I-8/3, Islamabad, measuring 355.55 square yards ("the suit house"), which had been purchased by Mr. Zia-ul-Haque Zia, who died on 03.12.2007. He was survived by the following legal heirs:-

- (i) Widow (Mst. Khadija Begum), who died on 10.04.2012
- (ii) Son (Ihtisham-ul-Haq/ respondent No.4)
- (iii) Daughter (Farzana Zia/respondent No.1) and
- (iv) Daughter (Fakhra Zia), who died on 15.01.2015, and was survived by her husband/respondent No.2 ("Hafiz Nazir Ahmed") and her daughter/respondent No.3 ("Aqsa Nazir").

3. For the sake of brevity, Saadia Andaleeb/petitioner shall be referred to as “Saadia”; Ihtisham-ul-Haq/respondent No.4 shall be referred to as “Ihtisham”; Farzana Zia/respondent No.1 shall be referred to as “Farzana”; Fakhra Zia shall be referred to as “Fakhra”; and Farzana and Fakhra shall be collectively referred to as “the plaintiffs”.

4. On 24.06.2013, Farzana instituted the said suit before the Court of learned Civil Judge, Islamabad. The prayer made in the said suit, is reproduced herein below:-

"In these circumstances, it is, therefore, respectfully prayed that a decree for declaration to the effect that Release Deed No.2894, dated 30.05.2009, may be declared null and void ab initio and ineffective upon the rights and interest of the plaintiff as obtained through fraud and misrepresentation and without consideration may please be passed in favour of plaintiff and against the defendants.

It is further prayed that a decree for separate possession through partition of the suit house No.386, Street No.64, Sector I-8/3, Islamabad to the extent of 1/4 share of the plaintiff be passed in favour of plaintiff and against the defendants.

It is also prayed that the defendants be restrained from transferring or alienating the suit property in favour of any other person till the partition of the suit property.

Any other relief which this Hon'ble Court deems just and proper be also awarded to the plaintiff."

5. In essence, Farzana's case in the said civil suit was that when her father Mr. Zia-ul-Haque Zia died, all his legal heirs became co-owners of the suit house; that in order to have the suit house transferred in the co-owners' names, Ihtisham took his mother and sisters to the District Courts at Islamabad and obtained their signatures and thumb impressions on a stamp paper; that since Ihtisham's mother and sisters reposed faith and confidence in him, they put their signatures and thumb impressions on the stamp paper; that Farzana was *"unaware of the business of the courts and legal languages and was unaware of the legal proceedings required for the transfer of the inherited property"*; that subsequently, on 10.04.2012, Mst. Khadija Begum passed away; that on 10.06.2013, Ihtisham asked Farzana to vacate the suit house which caused her to seek legal advice; that after seeking legal advice, she came to know that on the basis of

release deed No.2894, dated 30.05.2009, the suit house had been transferred on 18.06.2013 in Ihtisham's favour; that Ihtisham had fraudulently obtained his sisters' and mother's signatures and thumb impressions on the said release deed; that the said release deed had not been executed by Farzana with her free will; that Ihtisham had misrepresented that the signatures and thumb impressions on the stamp paper were required for the transfer of the suit house in favour of Mr. Zia-ul-Haque Zia's legal heirs; that Farzana had been deprived of her 1/4th share in the suit house; and that Farzana had not appeared before the Capital Development Authority and the Federal Government Employees Housing Foundation ("F.G.E.H.F.") for the transfer of the suit house.

6. When the said suit was instituted, Farzana's sister, namely, Fakhra, was impleaded as one of the defendants. On 23.09.2013, Fakhra filed an application praying for her transposition as plaintiff No.2 in the said suit. Fakhra asserted that she had also been cheated and defrauded by her brother and that her stance was similar to that of her sister, Farzana. The learned civil Court, vide order dated 23.09.2013, allowed the said application and Fakhra was transposed as plaintiff No.2 in the said suit.

7. On 04.10.2013, Ihtisham filed his written statement, wherein he refuted the allegations of fraud and misrepresentation made against him by his sisters. Ihtisham pleaded that Farzana was a well educated lady and her qualification was B.A. and B(Ed); that she was teaching in the Federal Government High Secondary School, Rawat, since the past 14 years; that Farzana was well aware of the laws of inheritance and the procedure of the Courts; that she was neither illiterate nor a '*pardahnashin*' lady; that Farzana had also authored and published books including *Bazm-e-Janaa*, *Khawab Zinda Hain* and *Zia Ilm'O'Paiker'O'Wafa*; that Farzana had willingly gone to the District Courts and appeared before the Joint Sub-Registrar for the registration of the release deed; that the said release deed was duly executed, witnessed and registered in accordance with the law. Ihtisham took the

position that he had already transferred the suit house in favour of his wife, Saadia.

8. On 21.10.2013, Saadia filed an application under Order 1, Rule 10 C.P.C. for her impleadment as a party in the said suit. She asserted that she was a *bonafide* transferee of the suit house. The learned civil Court, vide order dated 08.01.2014, allowed Saadia's application and she was impleaded as a defendant in the said suit. On 24.02.2014, she filed her written statement, wherein it was pleaded, *inter-alia*, that she being a *bonafide* transferee had become the lawful owner of the suit house. She also prayed for the dismissal of the suit with special costs. Out of the divergent pleadings of the parties, the learned civil Court, on 22.09.2014, framed the following issues:-

- "1. *Whether the plaintiff is entitled for a decree for declaration to the effect that Release Deed No.2894 dated 30.05.2009 be declared null and void ab-initio and ineffective upon the rights and interest of the plaintiff as obtained through fraud and misrepresentation and without consideration? OPP*
2. *Whether the plaintiff is entitled for a decree for separate possession through partition of the suit house, to the extent of 1/4 share of the plaintiff in favour of the plaintiff and against the defendants? OPP*
3. *Whether the plaintiff has no cause of action or locus standi to file the instant suit? OPD*
4. *Whether the suit of the plaintiff is false, frivolous and vexatious? OPD*
5. *Whether the suit of the plaintiff is barred by law? OPD*
6. *Relief."*

9. Farzana gave evidence as PW-1, whereas Fakhra as PW-2. The said witnesses were subjected to rigorous cross-examination. Mr. Zaheer Ahmed, Assistant Record Keeper, Federal Government Employees Housing Foundation ("F.G.E.H.F.") appeared as PW-3 and produced the allotment letter of the suit house as Exh.P/3; application form for the transfer of the suit house submitted by Ihtisham as Exh.P/4; release deed as Ex.P/5; proclamation regarding transfer as Exh.P/7; transfer letter dated 08.06.2011 in the name of Ihtisham, as Exh.P/9; and application for the issuance of N.O.C. as Exh.P/10, etc.

10. Ihtisham appeared as DW-1 and produced a succession certificate as Mark D/A. Saadia Andaleeb gave evidence as DW-2,

whereas the marginal witnesses of the release deed, namely, Mr. Ahmed Nadeem Qaiser and Muhammad Ehsan, gave evidence as DW-3 and DW-4, respectively.

11. On 15.01.2015, Fakhra passed away. After Fakhra's demise her legal heirs, namely Hafiz Nazir Ahmad/respondent No.2 and Aqsa Nazir/respondent No.3 were impleaded as co-plaintiffs in the suit.

12. On 27.07.2015, the learned civil Court passed a preliminary decree regarding the suit house. Hafiz Ali Asghar, Advocate, was appointed as the local Commission with the direction to suggest different modes of partitioning the suit house. It was also ordered that if the suit house was not capable of being partitioned, the Local Commission was to submit a report regarding the determination of its market value. It was also held that the release deed dated 30.05.2009 and the subsequent transfer of the suit house was *void ab initio* and ineffective on the rights of the plaintiffs in the suit, and liable to be cancelled.

13. The said judgment and decree dated 27.07.2015 was challenged by Ihtisham in appeal No.79/2015. This appeal was filed beyond the limitation period provided by law. Vide judgment dated 27.10.2015, the said appeal was dismissed as time barred. Ihtisham did not assail the said judgment any further.

14. The said judgment and decree dated 27.07.2015 was also challenged in appeal No.116/2015 by Saadia before the Court of the learned Additional District Judge, Islamabad. Vide judgment and decree dated 21.01.2016, the learned appellate Court dismissed the said appeal. The concurrent judgments and decrees passed by the learned Courts below have been impugned by the petitioner in the instant civil revision petition.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:

15. Mr. Sajid Abbas Khan, learned counsel for the petitioner/Saadia, after narrating the facts leading to the filing of the instant civil revision petition, made submissions in reiteration of the written statements filed by Ihtisham and Saadia. Furthermore, it was submitted that the release deed dated

30.05.2009 was executed by Ihtisham's sisters and mother of their own accord and free will and without any compulsion or coercion on Ihtisham's part; that through the said release deed, Ihtisham's sisters and mother had relinquished their ownership rights in the suit house in Ihtisham's favour; that the said release deed was witnessed by two attesting witnesses and had been registered in accordance with the law; that during Mst. Khadija Begum's lifetime, the validity of the said release deed had not been questioned; that in their suit, the plaintiffs admit the execution of the said release deed but assert that their signatures and thumb impressions thereon were obtained through fraud and misrepresentation; that no particulars of fraud and misrepresentation had been given in the suit; that the plaintiffs claim to be *pardahnashin* ladies and were not aware of the legal languages but it is an admitted position that both the plaintiffs were educated ladies and were, therefore, well aware of the contents of the release deed; that since Farzana had also authored books, she could not assert that she was unaware of the contents of the release deed; and that the plaintiffs in the suit were unable to prove that the release deed was executed on the basis of fraud and misrepresentation. Learned counsel for the petitioner/Saadia prayed for the revision petition to be allowed and for the concurrent judgments and decrees passed by the learned Courts below to be set-aside. In making his submissions, learned counsel for the petitioner placed reliance on the cases of Mian Allah Ditta through L.Rs. Vs. Mst. Sakina Bibi (2013 SCMR 868), Nabi Bakhsh Vs. Fazal Hussain (2008 SCMR 1454), Habib Khan and others Vs. Mst. Bakhtmina and others (2004 SCMR 1668), Amir Haider Vs. Shabbir Ahmad through Legal Heirs and others (2000 SCMR 859), Muhammad Akhtar Vs. Mst. Manna and others (2001 SCMR 1700), Syed Zulifqar Hussain Naqvi Vs. Syed Gulzar Hussain Shah (2005 YLR 2817 Lahore) and Noor Muhammad Vs. Jamal Din and others (2000 CLC 305 Lahore).

CONTENTIONS OF THE LEARNED COUNSEL FOR THE RESPONDENTS NO.1 to 3:

16. On the other hand, learned counsel for respondents No.1 to 3 submitted that the concurrent judgments and decrees passed by the learned Courts below do not suffer from any misreading or non-reading of evidence so as to warrant interference in the revisional jurisdiction of this Court. He made submissions in reiteration of the pleadings in the suit. He further submitted that Ihtisham, being the beneficiary of the release deed, had not proved its execution in accordance with the law; that Ihtisham was in a position to dominate the will of his mother and sisters; that although the plaintiffs were well educated ladies, they observed *pardah* and were not proficient in legal matters; that Ihtisham had given his mother and sisters the impression that they were executing documents for the devolution of Mr. Zia-ul-Haque Zia's ownership rights in the suit house amongst his legal heirs; that Ihtisham had caused his mother and sisters to execute the release deed through fraud and misrepresentation; that Fakhra who was a disabled person had not signed the release deed in the presence of the Sub-Registrar; that Ihtisham had deprived the plaintiffs of their inherited shares in the suit house; and that Ihtisham's appeal against the judgment and decree passed by the learned civil Court had been dismissed by the learned appellate Court as time-barred. Learned counsel for the said respondents prayed for the revision petition to be dismissed. In making his submissions, learned counsel for respondents No.1 to 3 placed reliance on the cases of Muhammad Ahmad Chatta Vs. Iftikhar Ahmad Cheema (2016 SCMR 763), Jehanzeb Vs. Muhammad Israr (PLJ 2014 Peshawar 92), Mrs. Nasreen Awan VS. M. Sadiq (K.L.R. 1990 Civil Cases 520), Shouket Ali Vs. Muhammad Anwar (NLR 2004 Civil 515), Sahib Noor and others Vs. Feroz Khan (1992 MLD 2563 Peshwar), Munir Hussain and others Vs. Raja Mushtaq Ahmad (PLD 2006 Lahore 48), Ghulam Bheek and others Vs. Mst. Salamat Bibi and others (2001 CLC 1078 Lah), Taisei Corporation Vs. A.M Construction Company (PLD 2012 Lah 455), Abdul Hameed through L.Rs. and others Vs. Shamasuddin and others

(PLD 2008 SC 140), Muhammad Ashraf Vs. Muhammad Tahir Ismail and others (2011 MLD 1848 Lah), Kalsoom Akhtar Vs. Fazal Noor and others (2000 MLD 1653 Lah), Mst. Farzana Khatoon Vs. Mst. Bushra and others (PLD 1994 Karachi 92), Mst. Rasheeda Bibi and others Vs. Mukhtar Ahmad and others (2008 SCMR 1384), Ghulam Ali and others Vs. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1), Baja through L.Rs. and others Vs. MSt. Bakhan and others (2015 SCMR 1704), Muhammad Nazir Vs. Khurshid Begum (2005 SCMR 941), Muhammad Boota Vs. Mst. Rashidan Bibi and others (2008 SCMR 343), Syed Shabbir Hussain Shah Vs. Asghar Hussain Shah and others (2007 SCMR 1884), Fateh Khan (deceased) through L.Rs. Vs. Surriya Begum (2006 SCMR 930), Mst. Khurshid Bibi and others Vs. Ramzan and others (2005 CLC 1714 Lah), Khair Din Vs. Mst. Salaman and others (PLD 2002 SC 677), Haji Khuda Bukhsh and others Vs. Deputy Registrar, Cooperative Societies, Punjab, Lahore and others (PLD 2007 Lah 341), Syed Muhammad Baqir Shah Vs. Farida Sajid (2013 CLC 52 Lah), Muhammad Idrees and others Vs. Muhammad Pervaiz and others (2010 SCMR 5), Muhammad Tufail and others Vs. Akbar Ali and others (2004 SCMR 1370), Abu Bakar and others Vs. Mst Khayber Jan (2014 YLR 178 Peshwar), Ayub Khan Vs. Mst. Makhnoon (2010 CLC 870 Peshwar), Ch. Muhammad Boota Vs. Mst. Bano Begum (2003 CLC 485 Lah) and Muzaffar Khan Vs. Additional District Judge and others (2014 CLC Lah 318).

17. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant civil revision petition have been set out in sufficient details in paragraphs 2 to 14 above and need not be recapitulated.

18. The pivotal question that needs to be determined is whether Mst. Khadija Begum, Farzana and Fakhra, had relinquished their respective shares in the suit house in favour of Ihtisham through a registered release deed dated 30.05.2009. The pleadings in the civil suit show that the plaintiffs therein had impeached the said release deed on the following grounds:-

- "(1) that plaintiffs' signatures and thumb impressions on the release deed were obtained by Ihtisham through fraud and misrepresentation;
- (2) that the plaintiffs were under the impression that they were signing documents for the transfer of the suit house in the names of their father's legal heirs;
- (3) that the plaintiffs had signed the documents on the basis of confidence reposed by them in Ihtisham; and
- (4) that the plaintiffs were "*house ladies*" and did not know the "*business of the Courts, and legal languages and were unaware of the legal proceedings required for the transfer of the inherited property.*"

19. The release deed dated 30.05.2009 was produced in evidence as Ex.P/5 by PW-3 who was the Assistant Record Keeper of F.G.E.H.F. The said release deed was a registered document and bears registration No.2894. The certificate on the reverse of the said release deed shows that it was registered by the Joint Sub-Registrar, Islamabad, on 30.05.2009.

20. In order to prove the execution of the said release deed, Ihtisham-ul-Haq produced his two marginal witnesses, namely, Mr. Ahmed Nadeem Qaiser and Muhammad Ehsan as DW-3 and DW-4, respectively. These witnesses, in their examination-in-chief, deposed that they had signed the release deed as marginal witnesses. In his cross-examination, DW-3 deposed that he was asked by Ihtisham-ul-Haq and his mother to sign the release deed as a witness; that Fakhra did not sign the release deed in his presence but before his arrival; and that he and the other marginal witness signed the release deed after its executants had signed the same. Similarly, DW-4, in his cross-examination, also deposed that he was asked by Ihtisham's mother to become a marginal witness. There is nothing in the cross-examination of DW-3 and DW-4 which would show that they had not signed the release deed as its marginal witnesses.

21. True, marginal witnesses of a document are produced not merely to identify the signatures of the executants but also to prove that the executants had put their signatures on the document within their view. In the case at hand, DW-3 deposed that the release deed had been signed by Fakhra before his arrival, but this, in my view, is not sufficient to hold that the

execution of the release deed has not been proved. I say this because neither Fakhra nor Farzana denied their signatures on the release deed. Since the executants of the release deed had admitted their signatures thereon, there was no need to prove the execution of the said document in terms of Article 79 of the *Qanoon-e-Shahadat* Order, 1984. A document which requires attestation can be admitted in evidence after the examination of the attester, only if the execution is specifically denied. Law as we all know postulates that an admitted document need not be proved. Article 81 of the *Qanoon-e-Shahadat* Order, 1984 provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. In the case of Dr. Ijaz Ahmad Vs. Mst. Nasreen Akhtar (2005 SCMR 1259), it has been held that where the executant had not denied his signatures on the sale deed, there was no need to put the same to the executant. In the case of Mst. Zainab Khatoon Vs. Amir Abdullah Khan (PLD 2004 Lahore 330), the Hon'ble Lahore High Court, after making reference to Article 81 (*ibid*) held that where the execution of a document is admitted and not denied, admission thereof is sufficient proof of its execution and that such a document need not be proved in terms of Article 79 of the *Qanoon-e-Shahadat* Order, 1984. Law to the said effect has also been laid down in the cases of Mehmood Ahmad Vs. Malik Abdul Ghafoor (PLD 2011 Lahore 522), Iqbal Ahmad Sabri Vs. Fayyaz Ahmad (2007 CLC 1089) and Bashir Ahmed Vs. Akbar Ali (2005 MLD 2830).

22. Given the fact that the plaintiffs did not deny signing and putting their thumb impressions on the release deed and given that the marginal witnesses of the said release deed in their evidence did not deny signing the said deed as marginal witnesses, it is my view that the execution of the said release deed, which is a registered document, stands proved. In the case of Mirza Muhammad Sharif Vs. Mst. Nawab Bibi (1993 SCMR 462), it has been held that a "*registered document has sanctity attached to it and stronger evidence is required to cast aspersion*

on its genuineness". Law to the said effect has also been laid down in the cases of Muhammad Idrees Vs. Muhammad Pervaiz (2010 SCMR 5), Chaudhry Manzoor Ahmed Vs. Faisal Manzoor (2016 YLR 671), Asif Vs. Mst. Sangeeta (2013 CLC 1597), Syed Imdad Hussin Shah Vs. Syed Makhdoom Hussain Raza (2010 CLC 722), Mrs. Khalida Azhar Vs. Rustam Ali Bakhshi (2007 CLC 339) and Muhammad Aslam Vs. Rehmat Ali (2000 MLD 1459).

23. Now, as regards the question as to proof of transaction, the release deed in question has features akin to a gift. The operative portion of the release deed is reproduced herein below:-

"AND WHEREAS in consideration of love and affection which the releasers have for the transferee wish(s) to renounce their right, interest, claim etc. in the above said plot/property in favour of Mr.Ihtisham-ul-Haque.

NOW, this deed witness that the releasers hereby transfer/renounce their rights, interest, or claim in the above said plot/property, in favour of said Mr.Ihtisham-ul-Haque son of Zia-ul-Haque Zia Late and hereafter releasers right interest or claim will cease and extinguish in the above mentioned plot/building."

24. The three executants of the release deed relinquished their shares in the suit house in Ihtisham's favour without any monetary consideration. They divested themselves of all proprietary interest in the suit house. In effect, the three executants of the release deed gifted their shares in the suit house in Ihtisham's favour. As mentioned above, the plaintiffs do not deny their signatures and thumb impressions on the said release deed, but in effect, assert that they did not know what they were signing and putting their thumb impressions on. Therefore, they dispute the transaction under the release deed.

25. Since Ihtisham was the beneficiary of the said release deed, it was his obligation to prove the contents of the same and the transaction under the said deed. In the cases of Amjad Ikram Vs. Mst. Asiya Kauser (2015 SCMR 1), Rab Nawaz Vs. Ghulam Rasool (2014 SCMR 1181), Noor Muhammad Vs. Azmat-e-Bibi (2012 SCMR 1373), Khan Muhammad Vs. Muhammad Din (2010 SCMR 1351) and Aurangzeb Vs. Muhammad Jaffar (2007 SCMR 236), it has been held *inter-alia* that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same in

accordance with the *Qanoon-e-Shahadat* Order, 1984. Such a transaction, be it a gift or a release, has to be proved by convincing evidence satisfying the conscience of the Court that the document in question was executed by the donor in favour of the donee/beneficiary.

26. The essential ingredients of a valid gift are (i) declaration of the gift, (ii) acceptance of the gift, and (iii) delivery of possession to the donee. In the instant case, the satisfaction of the first condition has been disputed by the plaintiffs. Where there is no declaration of a gift, the question of its acceptance will not arise. It is not disputed that Ihtisham continued to remain in possession of the suit house after the execution of the release deed. Ihtisham appeared as DW-1 and deposed that the plaintiffs were well educated ladies and were aware of the contents of the release deed. Therefore, the pivotal question that needs to be determined is whether the plaintiffs were aware of the contents of the release deed and voluntarily signed the same mindful of the consequences.

27. In paragraphs 5 and 6 of the plaint, it is pleaded *inter-alia* that the plaintiffs are *pardanashin* ladies and do not know the business of the Courts and are unaware of the proceedings required for the transfer of a property to legal heirs. In Pakistan, *pardahnashin* illiterate ladies are given special protection due to the social conditions. They are presumed to have an imperfect knowledge of the world, as on account of their *pardah* they are practically excluded from social intercourse and communion with the outside world. Where a transaction is entered into with an illiterate *pardanashin* lady, the burden of proof always rests upon the person who seeks to sustain the transaction to establish that the document in question was executed by her after clearly understanding the nature of the transaction. This burden can be discharged not only by proving that the document was read over and explained to her and that she understood it but also by proving that she was given independent advice as to the nature of the transaction.

28. It is also well settled that the protection given by the rule relating to *pardanashin* ladies cannot be the exclusive privilege of the class commonly known as *pardanashin*. The real reason behind the rule is lack of understanding and appreciation that an illiterate woman without independent advice has when entering into a transaction. Where ignorance, capability and illiteracy of a woman are not proved, protection under the rule will not be available, whether or not the lady is *pardanashin*.

29. In the case at hand, Farzana gave evidence as PW-1 and in her cross-examination, she admitted that she had two graduate degrees; that she had been teaching in Rawat Model School since 2002; that she has an interest in poetry and has also authored books in Urdu called "*Khwaab Zinda Hain*" and "*Bazme-e-Khana*"; and that on the advice of her father's friends she wrote her father's biography called "*Zia Ilm'O'Paikar'O'Wafa*". As regards Fakhra, she gave evidence as PW-2. In her cross-examination, Fakhra deposed that she was a graduate and remained a teacher between 1994 and 1999. In these circumstances, there is nothing which could engender suspicion in my mind about the *bona fide* nature of the transaction.

30. The registered release deed was impeached and sought to be cancelled on the ground of fraud and misrepresentation. The plaintiffs may well have been observing *pardah* but they were not rustic villagers or illiterates or naïve. This is not a case of a *pardanashin* lady or illiterate rural folk so as to tilt or shift onus to prove the aforesaid facts upon defendants. Here the plaintiffs were well-educated ladies holding graduate degrees and having taught in schools. Their contention that they did not know or understand what they were signing is not believable given their educational qualifications. It is difficult to accept that these ladies who were sufficiently intelligent could have fallen victims to the nefarious devices, if any, of their brother. The conclusion is inescapable that the plaintiffs executed the release deed after understanding or being capable of understanding the same. Therefore, the protection given to *pardanashin* illiterate ladies

could not be made available to them. In holding so, I derive guidance from the law laid down in the following cases:-

- (i) In the case of Irshad Hussain Vs. Ijaz Hussain (PLD 1994 SC 326), it has been held as follows:-

“Whether a lady is a Pardanashin is a question of fact. The burden of proof that any document purported to have been executed by a Pardanashin lady affecting her right in an immovable property was substantially understood by the lady and was her voluntary, intelligent, free and conscious act, is upon the person chiming any right under such deed. This rule has been extended to illiterate ignorant lady whether she is Pardanashin or not. This rule of wisdom and caution thrown round the Pardanashin, illiterate and ignorant women is to protect them from exploitation, duress, fraud and misrepresentation. From all the judgments cited and discussed in the referred judgments it is clear that the cases involved Pardanashin or illiterate and ignorant ladies. But where the lady involved is an educated lady not observing Parda capable of understanding transactions and has executed the deed on full and proper understanding of its implications, the principle governing Pardanashin, ignorant and illiterate women will hardly be attracted.”

(Emphasis added)

- (ii) In the case of Muhammad Tufail Vs. Muhammad Aslam Khan (1999 YLR 934), the petitioners/plaintiffs had challenged a part of a sale transaction on the ground that they were *pardanashin* ladies to whom the contents of the registered sale deed had not been read over and explained. Furthermore, it was asserted that additional land had been included in the sale deed on the basis of fraud. In the said case, the petitioners/plaintiffs had admitted the execution of the sale deed. The Hon'ble Lahore High Court upheld the concurrent judgments of the Courts below, whereby the petitioners/plaintiffs had been non-suited. It was held that *“fraud is not only to be alleged specifically in the pleadings but also to be proved by convincing evidence beyond any shadow of doubt.”* Furthermore, it was held that *“the mere allegation that the petitioners/plaintiffs did not read the contents of the documents before signing does not mean that fraud had been practiced upon them.”* Additionally, it was held that since it was not proved on the record that the petitioners/plaintiffs were illiterate and simpletons, the

presumption would be that they were aware of the contents of the sale deed and had put their signatures being well conversant with the same.

- (iii) In the case of National Bank of Pakistan Vs. Mst. Hajra Bai (PLD 1985 Karachi 431), it was held as follows:-

“In fact the protective cloak is available to Pardanashin lady more because of lack of understanding and appreciation on her part than for merely observing Parda. It is quite possible that a woman belonging to a Pardanashin class may possess sufficient intelligence to understand the contents of the document to which she is party despite the restraints of Parda. Conversely there can be an illiterate woman totally devoid of understanding but not observing Parda. Therefore the criterion cannot be the social status in the Parda class but the ability to comprehend the contents of the document in question. The emphasis is on factual understanding of the document with reference to the individual concerned and not upon presumptive disability incidental to mere status.”

- (iv) In the case of Aisha Bai Vs. Usman Muhammad (PLD 1967 Karachi 733), it has been held that a literate woman entering into a contract having full business aptitude as well as capable of looking after her own interest was not entitled to any special consideration

31. One other important feature of this case is that since the plaintiffs were well educated ladies, they should be deemed to have understood the challenged release deed before signing it. The plea of *non est factum* (Latin for “this is not my deed”) is therefore, not available to them. The fair assumption is that they read release deed, understood it and signed it. In the case of Martin Cashin Vs. Peter J. Cashin (AIR 1938 PC 103), it was held as follows:-

“In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it.”

32. In the plaint, the plaintiffs took a position which cannot be reconciled with the stance taken by them in their evidence. As mentioned above, in the plaint, the plaintiffs pleaded that they

were unaware of “*legal languages*”, whereas in their evidence, the plaintiffs (PW-1 and PW-2) deposed that since there were papers lying on the text of the document that they signed they were unaware of its contents. Not understanding the document that the plaintiffs signed and not having read the same are two different and inconsistent positions. These inconsistent pleas would disentitle the plaintiffs from the discretionary relief of declaration and injunction. It is well settled that a party cannot be permitted to assume inconsistent positions in the Court to the detriment of the opponent.

33. Zia-ul-Haque Zia’s estate was not restricted to the suit house. He owned other properties including land in Jhangi Syedan; land in Revenue Estate Noon; a plot in G-15; and a bank account. Farzana (PW-1), in her cross-examination, admitted that Ihtisham sold the plot in G-15 and with its proceeds Ihtisham, Saadia, Farzana, Fakhra, Mst. Khadija Begum, Farzana’s husband and his mother went for Hajj. She also admitted that her mother and Ihtisham had relinquished their inherited shares in the land in Jhangi Syedan in Fakhra’s favour. She also deposed that from the sale proceeds of the land in Revenue Estate Noon, Ihtisham had given her Rs.47,000/- and from their father’s bank account Ihtisham had given her Rs.1,00,000/-. Fakhra, in her cross-examination, deposed that she was given Rs.1,00,000/- out of her father’s bank account and Rs.47,000/- from the sale proceeds of the land in Revenue Estate Noon. Fakhra also admitted that her mother and brother had transferred their shares in the land in Jhangi Syedan in her favour. Fakhra along with Ihtisham had appeared before the Revenue Officer for the transfer of the said land. Fakhra also deposed that when her daughter was born, Ihtisham had given her Rs.2,75,000/-. All these factors indicate that Ihtisham was not a crafty brother out to usurp his sisters’ inherited share in the suit house. Both the plaintiffs were married when the release deed was executed. Therefore, they could not have been dependent on or dominated or unduly influenced by their brother, namely, Ihtisham, to transfer their shares in the suit house to him. Farzana was 32 and Fakhra was 35 years of age

when the release deed was executed. They were not gullible young girls so as to have been unduly influenced by their brother.

34. Now, the learned civil Court held that Ihtisham taking advantage of his “dominant position” prepared the release deed and obtained his mother’s and sisters’ signatures and thumb impressions on the same. It was also held that the execution of the release deed and its registration was carried out in a “doubtful manner”. It was not the plaintiffs’ case in the suit that they signed the release deed due to undue influence, coercion or duress on Ihtisham’s part. Their case was that Ihtisham played fraud on them by misrepresenting that the document on which their signatures were required was necessary for the suit property to devolve on Zia-ul-Haque Zia’s legal heirs. If this was Ihtisham’s intention, he would not have been successful in his design only if the plaintiffs had read the document which they signed and put their thumb impressions on. The two sisters also deposed that they could not read the document, because there were papers lying on it. Fakhra, in her cross-examination, deposed that she did not ask any one to lift the papers off the stamp paper. Now, the plaintiffs signed the release deed at four different places. Just above their signatures, the words “*plot/property in favour of Mr. Ihtisham-ul-Haque*” are clearly written. Just below the signatures of the executants on the second page of the release deed, the words “*TRANSFeree / Mr. Ihtisham-ul-Haque*” are written. This is not the case where the releasers signed blank papers. Most of the signatures overlap the writing. Farzana, in her cross-examination, deposed that she was not pressurized into signing the release deed. Given all these facts, I am of the view that this is not a case of fraud or misrepresentation but, at best, a case of carelessness and recklessness on the part of the plaintiffs. Therefore, the learned Courts below erred by cancelling the release deed on the ground that due to Ihtisham’s dominant position, he took advantage of his sisters.

35. In a case where a litigant intends to overlook and bypass a registered document under which certain rights become vested and under which third party (i.e., the petitioner in the instant case)

has acquired indefeasible rights then the challenging party should be in a position to give such particulars about such undue influence which should form the basis of his/her complaint. In the case at hand, the primary ground on which the plea of undue influence is founded is based on the relationship between the plaintiffs and Ihtisham. It is axiomatic that mere proof of relationship, however near, is not sufficient for a Court to assume that one was in a position to dominate the will of the other.

36. The learned civil Court observed that it was not logical for the plaintiffs to have transferred their shares in the suit house to Ihtisham when they were married and had children of their own. The learned civil Court erred by not appreciating that this was a family where relinquishments of shares in property in favour of siblings had taken place. For instance, the evidence on the record shows that entire amount in the bank account at Habib Bank Limited, Jhangi Syedan, was given by Ihtisham to Fakhra; with the proceeds of sale of a plot in G-15, Ihtisham took his mother, sisters etc., for Hajj; Ihtisham contributed towards Fakhra's marriage and gave her Rs.2,75,000/- when her daughter was born; Ihtisham relinquished his share in the plot in Jhangi Syedan in Farzana's favour; Farzana's father had already transferred a house in Kallar Syedan in her favour. When all these circumstances are taken into account, the execution of the release deed in Ihtisham's favour does not seem illogical.

37. The signatures on the said instrument were not disputed by the plaintiffs though they tried to explain that the same were obtained by giving them an impression that they were signing a document necessary for the devolution of the ownership rights in the suit house in favour of Zia-ul-Haque Zia's legal heirs. This explanation had to be proved by the plaintiffs but, in my view, they failed. But nothing has been elicited from the evidence of either PW-1 or PW-2 to infer that the release deed was obtained through fraud or misrepresentation. As the plaintiff in their evidence admitted that they had not even read the document they signed, it would not lie in their mouths to allege fraud or misrepresentation against their brother.

38. The release deed was executed on 30.05.2009, whereas the suit was instituted by Farzana on 24.06.2013, i.e., four years after the execution of the release deed. In the suit it was pleaded that on 18.06.2013, Farzana came to know about the said release deed from the office of F.G.E.H.F. Since the said release deed is a registered document, it is my view that the plaintiffs would be presumed to have had knowledge of the release deed right from the day when it was executed and registered. In the cases of Abdul Majeed Vs. Amjad Farooq (2008 YLR 61) and Khadim Hussain Vs. Rasheed Ahmad (2008 MLD 81), it has been held that registration of a document is notice to the public.

39. Prior to the institution of the suit, Ihtisham had transferred ownership of the suit house to his wife, Saadia. The mere fact that Ihtisham's appeal was dismissed on the ground of limitation and not on merits, would not *ipso facto* deprive Saadia of her right to assail the said judgment and decree dated 27.07.2015 in an appeal. Saadia's case in her appeal would be no better or worse than Ihtisham's would have been. She could and did agitate all the grounds that would have been available to Ihtisham in her appeal and the appellate Court decided the appeal on merits.

40. Learned counsel for respondents No.1 to 3 vehemently argued that this Court could not interfere with the concurrent findings of the learned civil Court and the learned appellate Court. Now, if concurrent findings of fact could, under no circumstances, be disturbed by this Court, this would make the provisions of Section 115 C.P.C. redundant. It is well-settled that if material evidence is not considered by the lower Courts, the High Court, in exercise of its revisional jurisdiction, can interfere in concurrent findings. An authority of recent vintage is the case of Nizamuddin Vs. Sheikh Zia-ul-Qamar (2016 SCMR 24), wherein it has been held as follows:-

"It is settled law that ordinarily the revisional court would not interfere in the concurrent findings of fact recorded by the first two courts of fact but where there is misreading and non-reading of evidence on the record which is conspicuous, the revisional court shall interfere and can upset the concurrent findings, as well as where there is an error in the exercise of jurisdiction by the courts below and/or where the courts have acted in the

exercise of its jurisdiction illegally or with material irregularity.”

41. No exception could be taken to the exercise of revisional powers for the setting-aside of concurrent findings of the Courts below if the same were based on non-reading or misreading of evidence on the record. In the case of Habib Khan Vs. Mst. Bakhtmina (2004 SCMR 1668), it has been held that concurrent findings could not be termed as “sacrosanct” and could be reversed by the High Court in revisional jurisdiction, if the same were based on insufficient evidence, misreading of evidence, non-consideration of material piece of evidence, erroneous assumption of facts and patent error of law.

42. In the case at hand, the learned Courts below concurrently erred by not appreciating that the plaintiffs were well educated ladies; that they were not young vulnerable girls but in their 30s; that they were both married and, therefore, not financially or otherwise, dependent on their brother, Ihtisham; that the protection that the law gives to *pardanashin* illiterate ladies could not be extended to the plaintiffs; that, at best, the plaintiffs had been reckless or negligent in executing the release deed which cannot be a valid ground for its cancellation; that the plaintiffs had only themselves to blame for not reading the documents which they signed and affixed their thumb impressions on; that the plaintiffs' stance that they did not come to know about the release deed dated 30.05.2009 until June, 2013, is not believable, because the same was a registered document and operated as notice to the public; that Ihtisham had given the plaintiffs their due shares in his father's other properties; that Ihtisham had also relinquished his own share in the land in Jhangi Syedan in Fakhra's favour; that Farzana had deposed that she had not been pressurized into signing the release deed; that the plaintiffs had not pleaded in the plaint that Ihtisham had abused his dominant position by making his sisters execute the release deed in his favour; that Ihtisham had produced the two marginal witnesses of the release deed who deposed that they had signed the release deed as witnesses; and that the plaintiffs did not deny that the said marginal witnesses had signed the release deed. The errors

in the observations and conclusions reached by the learned Courts below are thus writ large.

43. For the reasons stated above, I am of the considered view that the impugned judgments and decrees cannot stand. The same are accordingly set-aside. The revision petition is allowed and the suit is accordingly hereby dismissed. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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