

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
(JUDICIAL DEPARTMENT)

C.R. No.335/2019

Ghulam Ahmed Chaudhry through legal heirs

versus

Akbar Hussain (deceased) through legal heirs & 2 others

Petitioners by: Mr. Muhammad Ishtiaq Ahmad Raja, Advocate.

Respondents by: Mr. Ghulam Shabbir Akbar, Advocate for
CDA/Respondent No.3
Dr. Ulfat Shah, Attorney for Respondents No.1 & 2
Sajid Mehmood Cheema, Inspector Legal.
Muhammad Athar Khan, Inspector/S.H.O., P.S.
Kohsar, Islamabad.
Muhammad Nawaz, S.I., P.S. Kohsar, Islamabad.

Date of Hearing: 05.03.2020

MOHSIN AKHTAR KAYANI, J: Through the captioned civil revision petition, Ghulam Ahmed/petitioner through his legal heirs namely Muhammad Yousaf Kamal, Muhammad Idrees Chaudhary, Muhammad Ishaque, Mushtaq Ahmed and Ishtiaq Ahmed have called in question judgment and decree dated 29.07.2019, passed by learned Additional District Judge (West), Islamabad, whereby the suit filed by Akbar Hussain (deceased)/respondent for cancellation of documents, possession and recovery has been decreed in their favour by setting aside judgment and decree dated 14.12.2002, passed by learned Senior Civil Judge, Islamabad, whereby suit of the plaintiff/respondents was dismissed.

2. Learned counsel for petitioners contended that the suit was hopelessly barred by time but the first Appellate Court has not appreciated the law on this point and passed the impugned judgment; that the respondents with malafide intention had not provided accurate particulars of Tassaduq Hussain in order to avoid service upon him; that the first Appellate Court has picked and chosen relevant facts of the case and relied upon the same while passing the impugned judgment, which is suffering from mis-reading and non-reading of evidence; that plaintiff/respondent No.1 has failed to produce on record any title documents

with respect to the suit house but even then the first Appellate Court has not appreciated this aspect of the case and passed the impugned judgment in arbitrary manner; that it is totally false to say that Tassaduq Hussain is a non-existent person as the sale consideration was paid through bank transactions and was deposited in the account of Tassaduq Hussain maintained at United Bank Limited; that the law on the subject of bonafide purchaser and evidence produced by the petitioners is altogether ignored by the first Appellate Court and rendered the impugned judgment on presumption, therefore, the same may be set-aside and judgment and decree dated 14.12.2002, passed by learned Senior Civil Judge, Islamabad, whereby suit of the plaintiff/respondents was dismissed, may be restored.

3. Conversely, Dr. Ulfat Shah, Attorney for Respondents No.1 & 2 opposed the filing of instant civil revision petition and contended that petitioner/defendant has failed to bring on record satisfactory evidence; that the core issues i.e. Issues No.4 and 6-A have not been properly adjudicated upon by the learned trial Court and dismissed the suit filed by the plaintiff/respondents; that there is over-whelming evidence available on record to establish that purported transfer of suit house in favour of Tassaduq Hussain (imaginary person) by the plaintiff/respondent followed by its transfer from Tassaduq Hussain in favour of petitioner/defendant was fraudulent and without the consent express or implied of the plaintiff/respondents, but the learned trial Court has not appreciated such evidence, but the first Appellate Court pursuant to due appreciation of law on subject and evidence available on record has rightly decreed the suit of the plaintiff/respondents vide the impugned judgment, which is liable to be maintained.

4. Arguments heard, record perused.

5. Perusal of record reveals that the plaintiff, predecessor-in-interest of respondents, filed a suit for cancellation of documents, possession and recovery

on 20.01.1979 with the contention that A.H. Shah being the original owner of House No.13, Street No.32, Sector F-6/1, Islamabad (*suit house*) had transferred the same in his name on 02.11.1972 after receiving sale consideration. The plaintiff/respondent further referred in his plaint that he after taking over possession of the suit house got approved the site plan from CDA and constructed the house in the year 1973. The house was leased out to Second Secretary of the Federal Republic of Yugoslavia on 16.05.1973 at the monthly rent of Rs.1,800/- and the lease remained continued till 1976. Later on, the suit house was leased out to Embassy of Iraq against monthly rent of Rs.2,000/- through plaintiff's nephew namely Muhammad Banaras and the rent was kept on depositing in the plaintiff's bank account maintained at Muslim Commercial Bank. In September, 1978, the plaintiff's nephew on his return from Libya to Pakistan learnt that the suit house is in possession of petitioner/defendant, who claimed himself to be the owner of the suit house on account of its purchase from one Tassaduq Hussain, who posed himself to be the son of plaintiff/respondent, though the plaintiff/respondent has actually one son namely Muhammad Lahrasab. Accordingly, the plaintiff/respondent No.1 filed a suit for cancellation of the transfer deed from his name to Tasadduq Hussain and subsequently in the name of petitioner/defendant for being based on fraud and misrepresentation as he had never transferred his property in the name of Tasadduq Hussain and as such, he never came back to Pakistan as he was in UK. The petitioner/defendant contested the suit by filing his written statement with the plea that Tassaduq Hussain had transferred the suit house in his name in the office of CDA, who for being a necessary party has not been arrayed as defendant in the suit (fake Tassaduq Hussain was impleaded as party in the suit on the order of the Hon'ble High Court). The petitioner/defendant has also taken the plea that construction of the suit house was not completed and he completed the same after getting permission from the CDA, whereafter the plaintiff/respondent was issued

completion certificate on 04.02.1979 by the CDA. He has also taken the plea that the suit house was leased out by Muhammad Banaras to Embassy of Iraq at the rate of Rs.2,000/- per month. Petitioner/defendant has also taken the stance that he has taken over the possession of suit house from Embassy of Iraq after refund of amount of Rs.14,000/- on account of seven months' rent and occupied the suit house in June, 1977. He has taken a specific stance that ID Card of Tassaduq Hussain was issued under the National Registration Act, who had filed an application in the office of CDA for transfer of suit house, which was attested by notary public and countersigned by Magistrate after verification that he is the son of respondent/plaintiff. The CDA also filed their written statement and while answering Para-5 of the plaint they have taken the specific stance that they received Transfer Application No.9057, dated 01.02.1977, duly signed by respondent/plaintiff with the request for transfer of allotment of Plot No.13, Street No.32, Sector F-6 (Shalimar), Islamabad from his name in the name of his son Tassaduq Hussain. The allotment was accordingly transferred in the name of Tassaduq Hussain on 02.04.1977 and subsequently, Transfer Application No.9565, dated 25.04.1977, requesting for transfer of allotment of said plot in the name of petitioner/defendant was received, whereafter allotment was transferred in the name of petitioner/defendant on 13.05.1977 as all required formalities were completed by the allottee. However, while answering Para-7 of the plaint, the CDA in their written statement has taken the specific stance that after they tallied the signatures of plaintiff/respondent available on his Transfer Application No.9057, dated 01.02.1977, with the signatures available with the authorities' record, the subsequent transfer application was admitted and suit house was transferred in the name of petitioner/defendant. The suit has been contested and issues were framed in April, 1982, which are as under:

1. *Is the suit incompetent in its present form?*
2. *Is the suit time barred?*

3. *Whether the suit is barred under Section 49 (E) of the CDA Ordinance read with Specific Relief Act?*
4. *Whether the suit property had been transferred by the plaintiff to his son Tasadiq Hussain?*
5. *If the above issue is not proved, whether the plaintiff is entitled to the he decree for cancellation of documents pertaining to the suit property on the grounds detailed in the plaint?*
6. *Whether the plaintiff is entitled to the mesne profit, if so at what rate and since when?*
7. *Relief.*

6. The learned trial Court after recording of complete evidence of the parties dismissed the suit filed by plaintiff/respondent vide judgment and decree dated 14.12.2002, which constrained the plaintiff/respondent in filing RFA before the learned District Judge through his legal heirs namely Muhammad Lahrasab and Mst. Rahim Jan, which was contested by the present petitioner/defendant, however the said appeal was accepted and the suit of respondent/plaintiff was decreed vide impugned judgment and decree dated 29.07.2019 declaring the suit house to be fraudulently transferred in the name of Tassaduq Hussain followed by its transfer in favour of petitioner/defendant.

7. The entire case mainly rests upon Issues No.4 and 6-A, which are key issues and have been decided by both the Courts below through their diverse findings. The plaintiff/respondent in this case has produced two witnesses namely PW-1 Muhammad Sadiq and PW-2 Sardar Muhammad Aziz, both are resident of Sihali Umar Khan, Tehsil Kallar Sayaddan, District Rawalpindi i.e. the same area where plaintiff/respondent was residing. Both the said witnesses confirmed that the plaintiff/respondent has only one son by the name of Muhammad Lahrasab and he is the owner of the suit house, who had left for England in the year 1973, even PW-2 Sardar Muhammad Aziz denied any person by the name of Muhammad Latif being husband of plaintiff's niece.

8. The plaintiff/respondent i.e. Akbar Hussain had appeared as PW-3 and recorded his stance that he had purchased the suit house from A.H. Shah, approved its site plan and constructed the suit house, which was later on leased

out to Embassy of Yugoslavia, whereafter he left the country and documents of title of suit house remained with the CDA. Later on, he had leased out the suit house through his nephew namely Muhammad Banaras to the Embassy of Iraq against monthly rent of Rs.2,000/- and as such, the suit house was transferred in the name of petitioner/defendant by the CDA and he never transferred the suit house in the name of his son or any other relative as he was in England at the relevant time. During the course of cross-examination, PW-3 Akbar Hussain/plaintiff had acknowledged that he had received the rent till 1977 and he had written a letter to Iraq Embassy, but no response was given by them. He came back to Pakistan in August, 1978 from England when his nephew Muhammad Banaras told him that suit house has been transferred from his name. He also recorded his stance that he had registered a complaint to the police against petitioner/defendant, but of no avail, which compelled him in filing an application to Marshal Law authorities, whereafter he was informed that the issue relates to civil dispute. He also denied the suggestion that Tassaduq Hussain was his son, rather he voluntarily stated that he has only one son by the name of Muhammad Lahrasab.

9. Plaintiff/respondent had also produced PW-4 Naseer-ud-Din/Registration Clerk, who had verified the record of NIC No.101-54-532837 along with the record, which is in the name of Latif Muhammad son of Noor Muhammad, resident of House No.822, Gali No.27, Saidpur Gate, Rawalpindi and his date of birth was recorded as 1979, and not 1954. He also confirmed that the ID Card No.216-50-129133 is not available in their record and the parentage of Muhammad Lahrasab has not been entered in their record. During the course of cross-examination, PW-4 Naseer-ud-Din acknowledged that correct date of birth of Muhammad Lahrasab has not been incorporated in the record and ID No.101-54-532837 is of Islamabad Capital Territory. The counsel of plaintiff/respondent has produced the Record of Rights pertaining to period of

1955-56 as Exh.P2 together with the Pedigree Table as Exh.P3 and closed the evidence.

10. On the other hand, the petitioners' predecessor-in-interest Ghulam Ahmed/defendant had produced eight witnesses in his defence, whereby he had produced DW-1 Muhammad Ghaffar/Record Keeper of Pakistan Times, who has produced record dated 28.04.1977 as Exh.D1 i.e. the advertisement in which the suit house has been referred for the purpose of public notice as Exh.P2.

11. Raja Abdul Rahim, Advocate appeared as DW-2, who verified his signatures on transfer application form as he attested the form being Oath Commissioner. He has produced the original record/photocopy as Exh.D3, which has further been attested by the Magistrate. During the course of cross-examination, DW-2 Raja Abdul Rahim acknowledged that he verified Tassaduq Hussain son of Akbar Hussain as he was in possession of ID Card and CDA transfer letter in his favour. He also confirmed that he knew Yousaf Kamal (legal heir of petitioner/defendant), but he was not present at that time.

12. DW-3 Mansoor Kamran/Record Keeper of DHO, Rawalpindi appeared in the Court and stated that he has produced the Register of Births of Kallar Sayedan in which there is no entry of birth from 1950 to 1952 by the name of Tassaduq Hussain son of Akbar Hussain.

13. Ghazanfar Zia/Secretary RTA, Lahore appeared as DW-4, who stated that he was Magistrate Section-30 on 25.04.1997, and he had verified the transfer letter Exh.D3 which was countersigned by Raja Abdul Rahim, Advocate/Oath Commissioner, upon which he had verified his signatures together with stamp/seal. During the course of cross-examination, DW-4 Ghazanfar Zia acknowledged that the executant had not appeared before him and he just countersigned the documents.

14. Petitioner/defendant's legal heir namely Muhammad Yousaf Kamal appeared as DW-3 and stated that he came to know about sale of suit house from

the advertisement of Pakistan Times, published in April, whereupon he contacted Tassaduq Hussain/seller, who had shown his allotment letter, due verification from CDA record as well as his ID card, who claimed to have purchased the suit house against sale consideration of Rs.300,000/-, whereas the sale was confirmed to be purchased against sale consideration of Rs.275,000/-. The transfer application was attested by notary public followed by the Magistrate. He further stated that they had got published the advertisement in Pakistan Times before the purchase of suit house on the ground that if any person had any objection on transfer of suit house, he could have objected to the same. After transfer of suit house, they got possession of the suit house from Counselor of Iraq Embassy in June, 1977 after paying back an amount of Rs.14,000/-, which was received as advance rent. He further stated that after taking over the suit house, the house was repaired and its completion certificate was issued along with Convenience Deed in the year 1978. He further stated that in the year 1978, they received a letter from MCB, Civic Center Branch, Islamabad and they replied that the suit house has been transferred in their names from the name of Akbar Hussain (respondent/plaintiff) and they themselves are residing in the suit house. At the time of sale, the entire record of suit house was given by Tassaduq Hussain to them. DW-3 Muhammad Yousaf Kamal further acknowledged that he has not verified the credentials of Tassaduq Hussain and he believed that Tassaduq Hussain was the owner of the suit house and real son of Akbar Hussain (respondent/plaintiff) on the basis of ID Card, which was issued in the year 1977. He also stated that the amount of sale consideration was paid by his father, out of which some of the amount was paid through cheque while rest of it was on cash basis. For the purpose of verification, his father has not attended the notary public in person.

15. Raja Qanat Ali/Director Estate Management, CDA appeared as DW-6 and while producing the record of Plot No.13, Street No.32, Sector F-6/1, Islamabad, stated that:

"یہ جائیداد (پلاٹ کی صورت میں) عزیز الحسن کو ٹرانسفر کیا یہ بذریعہ درخواست ٹرانسفر CDA ٹرانسفر ہوا تھا اسکے بعد مدعی اکبر حسین نے اپنے بیٹے تصدق حسین بذریعہ درخواست ٹرانسفر 1/2/77 کو جائیداد ہذا منتقل کر دی تصدق مذکورہ نے مدعا علیہ غلام احمد کے نام یہ جائیداد بذریعہ درخواست ٹرانسفر کر دی اس پلاٹ پر تعمیر شدہ مکان کا completion سرٹیفیکیٹ مدعا علیہ غلام احمد کے نام 4/2/79 کو جاری ہوا مدعا علیہ کے حق میں CDA نے رجسٹری server مورخہ 19/2/79 کو ہونی ہے مدعا علیہ غلام احمد کے حق میں CDA نے ایک اقرار نامہ مورخہ 3/10/77 کو رجسٹر کیا تھا مدعا علیہ کے نام جائیداد امتدعو یہ کی ٹرانسفر کیلئے جو درخواست تصدق حسین نے دی تھی وہ حسب ضابطہ تصدیق شدہ تھی اور RM اسلام آباد اور نوٹری پبلک کی تصدیق شدہ تھی ہم نے جملہ کوائف verify کر لیے اور دیگر formalities کو دیکھ لی تھیں ہمارے ریکارڈ کے مطابق کوئی جعل سازی یا فراڈ اس بارے میں نہ ہوا میں نے بحثیت Estate آفیسر جملہ کاروائی ٹرانسفر پر دستخط کیے تھے رجسٹر convenience ٹیڈ ExD4 ہے اقرار نامہ رجسٹرڈ بحق مدعا علیہ ExD5 ہے ٹرانسفر لیٹر بحق مدعی ExD6 ٹرانسفر لیٹر بحق تصدق حسین ExD7 ٹرانسفر لیٹر بحق مدعا علیہ ExD8 اور completion سرٹیفیکیٹ ExD9 درخواست ٹرانسفر لیٹر بحق مدعا علیہ ExD10 ہے۔"

16. DW-6 Raja Qanat Ali has been called without mentioning the name in the list of witnesses nor any application was filed for summoning of the said witness, an objection was also raised by the plaintiff/respondent, however the said objection has not been decided by both the Courts below, therefore, it requires separate adjudication. Keeping in view this aspect, it is settled law that objections should have been decided before pronouncement of final judgment, however while considering this aspect in the revisional jurisdiction, the objection was rightly raised, however while considering the merits of the case, the evidence of DW-6 Raja Qanat Ali is the key evidence required in such type of cases. The record reflects that DW-6 Raja Qanat Ali before the Court at the behest of petitioners/defendant without even summoning through the court of law, this aspect clearly establishes the connivance of petitioner's predecessor Ghulam Ahmad Ch. with the CDA officials, hence the testimony recorded by DW-6 Raja Qanat Ali would be considered with caution and care. DW-6 Raja Qanat Ali intends to protect certain factors including his negligence, misconduct in performance of his official duty in favour of petitioner/defendant as he had not

verified the credentials of Tasadqu Hussain (impersonated person) who claims to be son of plaintiff/respondent Akbar Hussain, which has been revealed in his cross examination. However, during the course of cross-examination, DW-6 Raja Qanat Ali has acknowledged the following important facts.

- یہ درست ہے کہ جب مکان ٹرانسفر ہوا تو مدعی کو اس پتہ پر کوئی چٹھی تحریر نہ کی۔
- تصدق حسین سے فیس اس وجہ سے نہ وصول کی گئی کہ وہ اکبر حسین کا بیٹا تھا ٹرانسفر کے سلسلے میں اکبر اور تصدق حسین دونوں کے فارم وصول کیے گئے تھے جو گزٹیفڈ افسران سے تصدیق شدہ تھے تصدق حسین سے برتھ سرٹیفیکیٹ، سند ٹیکہ یا سکول سرٹیفیکیٹ حاصل نہ کیا گیا ہے چونکہ اسکی ضرورت نہ تھی۔
- اکبر حسین کے اس ٹرانسفر فارم پر دستخط ہیں جو اس نے لڑکے کے نام ٹرانسفر کرنے وقت کیے تھے وہ دستخط تصدیق شدہ ہیں اصل پولیس کے پاس ہے۔
- مدعی کا کوئی بیان قلمبند نہ ہوا مدعی کو جو محکمہ نے چٹھی تحریر کی تھی اسکا جواب کوئی موصول نہ ہوا رجسٹرڈ لیٹر کے ساتھ اکنالجمنٹ ڈیونہ تھی۔
- تصدق حسین نے جو منتقلی بحق مدعا علیہ کی ہے اسپر مدعی کے دستخط کی ضرورت نہ ہے۔

17. The petitioners' predecessor-in-interest i.e. Ghulam Ahmed Ch./defendant appeared as DW-8, who stated that he had purchased the suit house in the year 1977 from one Tassaduq Hussain against sale consideration of Rs.275,000/-. DW-8 Ghulam Ahmed Ch./defendant/petitioner had recorded his version in the following manner:

- مکان کا سودا پونے 3 لاکھ روپے میں ہو گیا میں نے مکان کا اشتہار دیا کہ میں مکان خرید رہا ہوں اگر کسی کو اعتراض ہو تو وہ کر سکتا ہے سودے کی تحریر ہوئی تصدق حسین معاہدہ بنا کر لایا بیانہ وصول کیا گیا جو معاہدہ بیع نہ ہے بلکہ بیانہ ہے نمونہ دے کر Simpond کیا کہ اس پر penalty کا پابند ہوگا۔
- ٹرانسفر کی درخواست تصدق حسین نے کر آیا تھا اس پر ایک وکیل کے دستخط تھے راجہ عبد الرحیم ایڈووکیٹ کا تصدیق شدہ تھا اور مجسٹریٹ کا بھی تصدیق شدہ تھا۔ اس پر شناختی کارڈ نمبر بھی درج ہے CDA نے میرے نام منتقل کر دیا قیمت ڈرافٹ کے ذریعے دی تھی قبضہ مکان جنوری 1977 میں حاصل کر لیا تھا کرایہ داروں سے یہ معاہدہ طے ہوا کہ ان کا پیشگی کرایہ انہیں واپس کر کے قبضہ حاصل کر لیا۔
- 1978 اکتوبر میں پولیس والے آئے انہوں نے ریکارڈ دیکھا اور تسلی کی اور واپس چلے گئے سال 1979 میں وہ دعویٰ ہذا دائر کر دیا بغیر نوٹس کے مکان میں نے بہت تسلی سے خرید کیا تھا۔

18. During the course of cross-examination, DW-8 Ghulam Ahmed Ch./defendant/petitioner had acknowledged the following facts:

- میں نے تصدق حسین کو تلاش کرنے کی کوشش کی تھی مگر وہ ملا ہی نہیں کوئی کہتا ہے کہ بیرون ملک ہے اور کوئی کراچی میں ہے میں نے اس کا سکول سرٹیفیکیٹ یا پیدائش سرٹیفیکیٹ حاصل نہ کیا تھا اور نہ ہی تصدق حسین ہیں نے یہ سرٹیفیکیٹ حاصل کرنے کی کوشش کی میں سہالی عمر خان کبھی تصدق حسین کے پاس نہ گیا۔

- معاہدہ بیع بات چیت کے ایک ماہ بعد لکھا ہوگا تاریخ یاد نہ ہے وہ راولپنڈی سے تحریر کر کے لایا تھا دستخط میرے گھر ہونے تھے اس وقت اس کا -/2000 روپے ماہوار کرایہ تھا اس وقت ایک اور آدمی جو تصدق حسین ساتھ لایا تھا وہ موجود تھا اس کے دستخط ہوئے تھے مگر اس کا نام معلوم نہ ہے ایک میرا پسر یوسف کمال گواہ تھا میں نے اکٹھے ہی دستخط کیے تھے۔
- میں نے -/255000 روپے بذریعہ کراس چیک بذریعہ UBL ادا کیا تھا ازخود کہا کہ اسکی فوٹو نقل پیش کر سکتا ہوں UBL کے ExP12 covering letter جو کراس چیک Deposit slip کی فوٹو کاپی ہے۔

19. The above referred evidence has been considered by this Court with the able assistance of learned counsel for the parties, however it is necessary to establish the burden of proof in terms of Article 117 of the Qanun-e-Shahadat Order, 1984 at the first instance, whereas the matter in issue referred before this Court discloses that there are two sets of proposition raised by the respective parties i.e. *the question of fraud as raised by the plaintiff/respondent and the question of bona fide purchase as raised by the petitioner/defendant.*

20. Article 117 of the Qanun-e-Shahadat Order, 1984 lays down the principle to settle such kind of dispute and this Court is bound to follow the spirit of law, whereby “whoever desires any Court to give a judgment as to any legal right or liability dependent upon the existence of facts which he asserts, must prove that such facts exists.” If we consider this principle of law in this proposition, then Issues No.4 and 6-A relate to:

- (a) whether the suit house had been transferred by the plaintiff/respondent to his son Tassaduq Hussain.
- (b) whether the impugned sale in favour of petitioner/defendant is protected for being bona fide purchaser with sale consideration and without notice.

The above referred questions are the key issues to be dealt with in order to resolve the controversy.

21. I have considered the evidence of petitioner/defendant, who is under obligation to justify that he had purchased the suit house against sale consideration of Rs.275,000/- on the basis of some agreement executed with

Tassaduq Hussain (imaginary person), however no such document has been exhibited on record, rather the defendant/petitioner has produced his own son DW-5 Muhammad Yousaf Kamal being signatory of the agreement, though when a question has been asked from petitioner/defendant regarding the second attesting witness, he replied that the said person had come along with Tassaduq Hussain and he is not aware of his name. In this situation, the principal onus to prove the sale was not discharged, even otherwise, it is incumbent upon the petitioner to justify the requirement of sale at the first instance.

22. The sale in terms of Section 54 of the Transfer of Property Act, 1882 requires four specific ingredients i.e.

- (a) agreement,
- (b) parties to the sale transaction,
- (c) sale consideration (fixed or paid) and
- (d) subject matter of the sale transaction.

All these ingredients have also been highlighted and appreciated by the superior Court in case reported as 2015 CLC 994 Lahore (Fakhar-ud-Din vs. Muhammad Iqbal). Similarly, the most essential element for sale of immovable property is payment of sale price of the property as held by the apex Court in case reported as 2019 SCMR 524 (Sheikh Akhtar Aziz vs. Mst. Shabnam Begum). If any of the ingredients referred above is missing, the sale in such circumstances is not proved as held in case reported as 2012 SCMR 1522 (Atta Muhammad vs. Muhammad Afzal).

23. In the light of above principle of law, I have considered the evidence of DW-8 Ghulam Ahmed Ch./petitioner/defendant, who stated before the Court that he had paid the amount of Rs.275,000/- to the seller Tassaduq Hussain for which he had produced certificate dated 21.04.1983, issued by UBL, referred as Exh.D12, which is as under:

Ref: AFS/D-2

Dated: 21-4-1983

TO WHOM IT MAY CONCERN

This is to certify that Cheque bearing No.669627 dated 29-4-1977 for Rs.255,000.00 (Rupees Two hundred fifty five thousand only) favouring Mr. Tasadaq Hussain s/o Mr. Akbar Hussain, was paid in transfer dated 29-4-77 from CD A/c No.813 in the name of M/s Ghulam Ahmed Chaudhry & M. Yousaf Kamal.

24. The wording in above referred certificate clearly reflects that cheque was issued in the name of Tassaduq Hussain, however it is not proved that the amount claimed by petitioner/defendant had been transferred to Tassaduq Hussain or otherwise as no proof in this regard has been placed on record. Similarly, a copy of agreement has also been placed on record by the petitioner/defendant, which discloses the signatures of parties/witnesses, but surprisingly the NIC number of Tassaduq Hussain has not been clearly mentioned, even the name of Tassaduq Hussain son of Akbar Hussain, Caste Dhoond (ڈھونڈ) has been referred, which is different from the caste of respondent or Akbar Hussain (deceased), who are Chib Rajpoot (چب راجپوت) by caste.

25. While considering the above position, the burden of proof of a particular fact in terms of Article 119 of the Qanun-e-Shahadat Order, 1984 is upon the person who wishes to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. However, in this case the petitioner/defendant has taken the specific stance that while executing agreement to sell he had paid the sale consideration to Tassaduq Hussain in presence of two witnesses, but surprisingly he has produced Exh.D12, which is a certificate of the bank to the extent of issuance of cheque, not as a pay order or a proof of payment through which it could be justified that certain amount has been transacted in the account of Tassaduq Hussain. In such situation, when the burden of proof lies upon petitioner/defendant, but the same has not been discharged, rather he has merely placed copy of agreement on record, which has been signed by two witnesses, one of whom is his own son and has been produced before the Court while the other attesting witness has not been

produced nor even known, the law in this regard has clearly been settled by the apex Court where one attesting witness has not been produced, Article 79 of the Qanun-e-Shahadat Order, 1984 has been violated and such document could not be considered as proved. Reliance is placed upon 2002 MLD 1002 (Muhammad Sharif vs. Mst. Sardaran Bibi), 2015 SCMR 808 (Mst. Nusrat Bibi vs. Nazir Akhtar) and 2016 SCMR 986 (Islam-ud-Din vs. Mst. Noor Jahan).

26. Another important question which requires adjudication is the existence of Tassaduq Hussain (fake person) and his presence has to be proved by the beneficiary i.e. petitioner/defendant, but in this case, the said fake person has never been produced before the Court despite the fact that Tassaduq Hussain had transferred the suit house in the name of Ghulam Ahmad Ch. (predecessor-in-interest of petitioner/defendant), the transfer was admitted by the CDA in their record. It is settled law that when a party relies upon documentary transaction being attested by two witnesses, such two witnesses must appear before the Court and testify about the documentary evidence in case of any dispute to prove the transaction. Reliance is placed upon 2017 CLC 1533 Lahore (Muhammad Abbas vs. Muhammad Ismail) and 2011 SCMR 621 (Sultan Ahmad vs. Muhammad Yousaf). However, when question has been put to petitioner/defendant i.e. beneficiary of the suit house regarding the whereabouts of Tassaduq Hussain, he had replied in the following manner:

"میں نے تصدق حسین کو تلاش کرنے کی کوشش کی تھی مگر وہ ملا ہی نہیں کوئی کہتا ہے کہ بیرون ملک ہے اور کوئی کراچی میں ہے میں نے اس کا سکول سرٹیفیکیٹ یا پیدائش سرٹیفیکیٹ حاصل نہ کیا تھا اور نہ ہی تصدق حسین ہیں نے یہ سرٹیفیکیٹ حاصل کرنے کی کوشش کی میں سہالی عمر خان کبھی تصدق حسین کے پاس نہ گیا۔"

27. The above mentioned stance to the query clearly spells out that petitioner/defendant has not fulfilled the requirement of law as he is under legal obligation to produce Tassaduq Hussain in all manner, even though he is party in all proceedings before both the Courts below and even before this Court, but he remained ex-parte in all proceedings as his whereabouts have not been traced by the petitioner/defendant despite the fact that the petitioner/defendant being

beneficiary of suit house himself raised the plea that he had purchased the suit house from Tassaduq Hussain son of Akbar Hussain (plaintiff).

28. I have considered the proposition from diverse angles and come to an irresistible conclusion that initial onus of proof is upon the beneficiary and when the beneficiary proves his case and discharges his onus, then the burden of proof shifts upon the person who is alleging a fraud. Reliance is placed upon 2010 SCMR 1351 (Khan Muhammad vs. Muhammad Din). Similar view has also been taken in 2007 SCMR 236 (Aurangzeb through LRs vs. Muhammad Jaffar), 2010 SCMR 1358 (Muhammad Saeed vs. Mst. Sharaf Elahi), 2010 SCMR 1370 (Khaliqdad Khan vs. Mst. Zeenat Khatoon), 2015 SCMR 1 (Amjad Ikram vs. Mst. Asiya Kausar), 2016 SCMR 1225 (Phul Peer Shah vs. Hafeez Fatima) and 2016 SCMR 862 (Ghulam Farid vs. Sher Rehman), but in this case beneficiary of the transaction i.e. petitioner has failed to prove the case.

29. The evidence of DW-6 Raja Qanat Ali/Director Estate Management, CDA has not been justified on record by the beneficiary/petitioner without mentioning his name in the list of witnesses, even no permission was available on record from where it could be assumed that any application was filed for summoning of the said witness, therefore, the objection raised by the plaintiff/respondent side on the testimony of DW-6 Raja Qanat Ali is legally justified and same stands valid in terms of law. However, DW-6 Raja Qanat Ali being custodian of CDA has produced the record of the suit plot, but surprisingly he could not prove the case in favour of petitioner/defendant as he has not verified the credentials of Tassaduq Hussain in any manner nor any letter was issued in the name of plaintiff/respondent that his property has been transferred in the name of his so-called son (Tassaduq Hussain), and he just stated in his cross-examination that since Transfer Application was attested by a Gazetted officer, which itself does not absolve CDA from their basic responsibility of verification of person or allottee, even he plainly accepted Tassaduq Hussain without any proof. Although, it is requirement of law under

Transfer of Property Manual CDA that the transferee must appear before the Estate Officer to record his intention to transfer the property, even if such transfer is being made in the name(s) of his family member(s).

30. There is another important factor which plays a key role in the entire proposition i.e. non-availability of original record of transfer of suit property, which was transferred to the Investigating Officer of a criminal case FIR No.147, dated 29.10.1978, under Sections 420, 468, 471 PPC, P.S. Kohsar, Islamabad. However, DW-6 Raja Qanat Ali could not be absolved from his lawful duty for recovery of said record and he is the key person to recover the record from the Investigating Officer in all circumstances, especially when he recorded his testimony before the learned trial Court on 20.05.1984, even then he is not in possession of those documents, rather kept silent for non-obtaining the original record from the concerned Investigating Officer. This ignorance on the part of DW-6 Raja Qanat Ali, Director Estate Management, CDA clearly establishes that he had played a vital role in the entire fraud as he had not performed his lawful duty despite knowing this fact that the original record is an important record through which one can prove the transfer of the property from the name of plaintiff/respondent to one imaginary person i.e. Tassaduq Hussain followed by its transfer in favour of petitioner/defendant. Even otherwise, during the proceedings of the instant civil revision petition, this Court, vide order dated 24.12.2019, requisitioned the record from the Director Estate Management-I, CDA to observe the requirements of transfer under the law, however on 27.12.2019, the complete record of the suit house was placed before this Court but the same is silent qua the original transfer application filed on behalf of Akbar Hussain (plaintiff) in favour of Tassaduq Hussain followed by filing of transfer application by Tassaduq Hussain in the name of Ghulam Ahmed Ch. (defendant). The Director Estate Management-I, CDA, when confronted about missing of the record, he contended that original record was taken over by

S.H.O., P.S. Kohsar, Islamabad through recovery memo (undated) in case FIR No.147, dated 29.10.1978, under Sections 420, 468, 471 PPC, P.S. Kohsar, Islamabad, therefore, after verifying this fact, direction was passed to the Superintendent of Police (Investigation), Islamabad, DSP (Legal) and S.H.O., P.S. Kohsar, Islamabad to appear before this Court and explain their position regarding pendency of said criminal case.

31. On 30.12.2019, the DSP (Legal) and S.H.O. P.S. Kohsar, Islamabad put appearance before this Court and contended that entire original record is with the DSP (legal), Rawalpindi therefore, direction was issued to the DSP (Legal), Rawalpindi, dated 30.12.2019, for submission of police record. On 09.01.2020, the DSP (legal), Rawalpindi i.e. Shazia Fazle along with Ghulam Qambar/S.I. (Legal) Branch put appearance and contended that they have not recovered the said record as yet and they will submit the report on the next date of hearing. On 28.01.2020, the DSP (Legal) Rawalpindi has submitted a written report regarding record of case FIR No.147/1978, which reveals that despite her best effort she could not trace out the record, except 21 case diaries of different dates of said case. The report further reveals that original record is still lying with P.S. Kohsar, Islamabad, therefore, direction was issued to the SSP Police for initiation of inquiry as the then Investigating Officer was not alive and the record is still missing, hence, in this situation, it is the obligation of the beneficiary to justify the mode and manner of transfer through evidence of secondary mode after seeking permission from the Court as the primary evidence is missing, but no such effort has been made by the petitioner/defendant in this case, hence adverse inference should be drawn against him.

32. I have attended to the findings of the first Appellate Court in the impugned judgment, whereby the first Appellate Court has compared the signatures of plaintiff/respondent available on Transfer Application, dated 01.07.1977, through which the suit house was transferred in the name of

Tassaduq Hussain i.e. his alleged son and the first Appellate Court while considering the signatures with naked eyes has referred the following opinion:

“The signatures of Akbar Hussain if compared with naked eyes do not match with his admitted signatures on his passport rather these are altogether different.”

33. In terms of Article 78 of the Qanun-e-Shahadat Order, 1984, the signatures and handwriting of person alleged to have signed or written the document could be proved in the following manner:

- a) By admission;
- b) By the person in whose presence the document was reduced to writing;
- c) By person who saw deceased writing;
- d) By the person acquainted with the signatures of deceased;
- e) By comparison of Court of disputed signatures with admitted signatures; and,
- f) By the handwriting expert.

Therefore, the first Appellate Court has every authority to compare the signatures in such like proposition, especially when the original record was missing and has not been produced intentionally by the CDA or by the beneficiary and when no effort was made by the defendant side to produce such technical evidence, therefore, the Court has power to compare the signatures at its own, even at the apex Court level. Reliance is placed upon PLD 2003 SC 389 (Saeed Ahmad vs. The State), PLD 1994 SC 162 (Sahib Khan vs. Muhammad Pannah), 2014 CLD 63 Lahore (Muhammad Boota vs. Basharat Ali), 2004 SCMR 361 (Rehmat Ali Ismailia vs. Khalid Mehmood) and 2016 SCMR 2163 (Abdul Rasheed vs. Syed Fazal Ali Shah), wherein it has been held that the Court enjoys the preliminary powers to compare the signatures with the admitted signatures and as such, the respondent/plaintiff has produced the original passport before the first Appellate Court as well as before this Court for the purpose of comparison and this Court also considered the original passport of late

plaintiff/respondent containing his signatures, which clearly prove that the signatures available on record are different as observed from the naked eyes and the first Appellate Court has rightly formulated the said opinion qua difference of signatures of Akbar Hussain/deceased.

34. It is evident from the record that the plaintiff/respondent was not in Pakistan on 01.02.1977 when his property (suit house) was transferred in the name of Tassaduq Hussain. Similarly, another important aspect discussed by the first Appellate Court in Para-14 of the impugned judgment also raises a presumption adverse to the claim of petitioner/defendant, which is as under:

".....the property was advertised in "Pakistan Times" for sale on 20-04-1977 against the consideration of Rs.300,000/-. It is also evident that the advertisement was published by the defendant No.1 on 24-04-1977 stating that if there was no objection to the purchase of the property it should be brought forward by 30-04-1977. But on 25-04-1977 without waiting for the cut date the defendant No.1 got transferred the property in his own name in haste despite stating in the advertisement that he would entertain objection till 30-04-1977."

35. The above referred reasons persuaded this Court to believe that the plaintiff/respondent in his lifetime had acted in a bonafide manner to dispel the fraud at the first instance when he came to know that fraud was played with him by the petitioner/defendant in the office of CDA, which constrained him to file a suit within the period of three (03) years as required under Article 91 of the Limitation Act, 1908 and he initiated the legal action which is the key factor to refute and deny the process in a proper manner, therefore, at this stage, while relying upon PLD 2015 SC 212 (Dr. Muhammad Javaid Shafi vs. Syed Rashid Arshad), wherein it has been held as under:

"5. On the question of limitation, the learned High Court has concluded that according to the case of the respondent, he came to know of the sale deed in the year 1978 and as the suit was filed on 4-6-1987, the same is within time. Obviously the suit has been treated by the Court to be the one for possession and Article 142 of the Limitation Act, 1908 has been resorted to, besides some benefit of section 14 of the Act is seemingly also given to the respondent. But the learned court unfortunately has failed to consider and appreciate the foundational facts of the case as put forth by the respondent in the plaint and those

emerging on the record, i.e. as from the pleadings of the parties, and the evidence produced by them; the reasoning assigned by the two courts on this point has been ignored; it has also eluded the attention of the learned High Court that basically the suit filed by the respondent was for cancellation of the documents on the allegations of fraud, forgery and misrepresentation, which (suit) shall squarely fall within the purview of section 39 of the Specific Relief Act and per Article 91 of the Act, the prescribed period of limitation shall be three years."

It can safely be held that the suit filed by the respondent/plaintiff Akbar Hussain is well within time period defined in Limitation Act, 1908.

36. Similarly, in another judgment reported as 2010 SCMR 978 (Abdul Rehman vs. Ghulam Muhammad), the shifting of onus has been highlighted and it is the primary duty of petitioner/defendant to prove that the suit house was transferred in his name from Tassaduq Hussain, which was earlier allotted in the name of plaintiff/respondent (Akbar Hussain/deceased), hence, non-production of Tassaduq Hussain is fatal to the plea and bonafide claim of petitioner/defendant (Ghulam Ahmad Ch./deceased), who failed to prove the ingredients of sale together with the payment of sale consideration and valid delivery of possession in all respects.

37. Keeping in view the above position, it is also settled law that in case of reverse findings, the findings given by the Appellate Court have to be relied upon. Reliance is placed upon 2015 SCMR 1 (Amjad Ikram vs. Mst. Asiya Kausar), 2013 SCMR 1300 (Muhammad Nawaz v. Haji Muhammad Baran Khan) and 2015 SCMR 1044 (Farid Bakhsh v. Jind Wadda).

38. I have considered the entire case from diverse angle while exercising the powers of revisional jurisdiction under Section 115 CPC, which were primarily intended for correcting the errors made by the subordinate Court in exercise of its jurisdiction. Ordinarily the erroneous decision of fact was not revisable except in cases where the decision was based on no evidence or inadmissible evidence or order sought to be revised was so perverse that grave miscarriage of justice

was likely to be resulted there-from, however there is no such case that the first Appellate Court has exercised its jurisdiction in a wrong manner. Reliance is placed upon 2010 SCMR 817 (Moulvi Muhammad Azeem vs. Alhaj Mehmood Khan Bangish) and 2010 SCMR 5 (Muhammad Idrees vs. Muhammad Pervaiz). However, in this case the findings on facts and law appreciated by the learned Trial Court are based upon no evidence, rather based on inadmissible evidence, which have rightly been settled by the learned first Appellate Court as the findings of the learned Trial Court caused a grave miscarriage of justice.

39. This Court has applied the principle of reappraisal of evidence and observed that no interference with the findings of the first Appellate Court is required as the petitioners have failed to prove or establish that the first Appellate Court has grossly misread or non-read the material evidence or the findings are perverse or causing serious miscarriage of justice.

40. This Court while exercising the powers of revision in terms of Section 115 CPC is in consonance with the findings of the first Appellate Court referred in the impugned judgment as no exception or strong reason has been placed on record by the petitioner/defendant side for interference in the same and there is no cavil to the proposition that fraud had been played by the petitioner/defendant Ghulam Ahmad Ch. in connivance with CDA officials by using the name of an imaginary person i.e. Tassaduq Hussain. The claim of petitioner/defendant being a bonafide purchaser has not been proved on record, even the sale is not justified, the transfer of suit property in favour of petitioner is also not proved on record, therefore, the instant civil revision petition is misconceived and the same is hereby DISMISSED. However, Chairman, CDA is directed to initiate inquiry against DW-6 Raja Qanat Ali, the then Director Estate Management, CDA, and shall proceed against him accordingly, under the law.

The Inspector General of Police, Islamabad is also directed to initiate an inquiry as to why the case file of FIR No.147, dated 29.10.1978, under Sections 420, 468, 471 PPC, P.S. Kohsar, Islamabad has not yet been traced, even there is no clue as to the final outcome of the said criminal case, which shows the foul play on the part of police officials, who have not verified the status of the aforesaid criminal case during the course of their inspection, which remains pending as of today.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 16.04.2020.

JUDGE

APPROVED FOR REPORTING

Khalid Z.

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