IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

2nd Appeal No. S-64 of 2024

Before:
Dr. Syed Fiaz ul Hasan Shah.

Appellant: Purshutam son of Naraindas
through Mr. Ajay Kumar Advocate Junior partner of
Mr. Sunder Das Advocate.

Respondents:
1. Sht. Seeta W/o Essar Das,
2. Teekam son of Essar Das,
through Mr. Ali Nasir Baloch advocate
3. Sub-Registrar Umerkot,
4. Mukhtiarkar (R) and City Survey Officer Umerkot,
5. Province of Sindh through Chief Secretary,
Government of Sindh Karachi
Through Mr. Ayaz Ali Rajpar,
Additional Advocate General.

Date of hearing: 20-03-2025.

Date of Judgment: 13-05-2025.

J U D G M E N T

Dr. Syed Fiaz ul Hasan Shah, J: **Introduction—**The Appellant has challenged Judgment dated 27-05-2021 and decree dated 28-05-2021 passed by the learned District Judge, Umerkot in Civil Appeal No.01/ 2021 wherein the said Appellate Court has affirmed the Judgment dated 08-12-2020 and Decree dated 12-12-2020 passed by the learned 1st Senior Civil Judge, Umerkot in suits i.e. F.C. Suit No.04/2010 and F.C. Suit No. 181/ 2018. The Trial Court after recording evidence and hearing the parties has dismissed the suit which was filed by the Appellant while the counter suit which was filed

by the Respondent No.1 was decreed to the extent of restoration of possession in respect of suit property /plots with mesne profit and permanent injunction. The Appellate Court has also maintained the Judgment of Trial Court for dismissal of suit which was filed by the Respondent No.1 for Recovery of Rs.40,00,000/= against the Appellant.

2. The facts give rising to this Second Appeal are that the Appellant filed suit for declaration, cancellation of sale deed and permanent injunction against Respondents on the grounds that he is a qualified Doctor having been established practice at Umerkot and he is the owner and in possession of the property having constructed double story building situated at Ward-A Umerkot bearing Plot C.S No. 51/2, measuring 902.70 Sq. yards and according to the Appellant it has been established by the Appellant from his self-supported funds. He further stated that he is running his clinic in the above said building since last many years and while area of 51/3 is 385 Sq. yards plots number 51/2 and 51/3 are suit plots.

3. The Appellant further averred that the Respondent/ defendant No.1 Sh. Miti Seeta Bai is his relative while the Respondent/ defendant No.2 Teekam Das is the son of Respondent/ defendant No.1 and in the year 2006, the Appellant was in need of money, therefore, he approached the Respondent/ defendant No.1 for grant of loan amount Rs.1, 00,000/- and the said Respondent No.1 had agreed to give loan on the condition that the Appellant shall execute a sale deed without possession as a collateral security to the satisfaction of the Respondent No.1.

4. Subsequently, the Appellant had executed Sale Deed which is duly registered in respect of the open plots in respect of CS No. 51/2

admeasuring 525 Sq. feet and from CS No. 51/3 a portion of 375 Sq. feet on 30.11.2006 against the loan of Rs.100,000/-. He further stated that the sale deed was registered in favor of the Respondent/ defendant No.1 on mutual understanding that the Respondent No.1 shall re-convey the sale deed after receiving of loan Rs. 100,000/- and therefore, the Appellant executed the sale deed in respect of the portion of CS No. 51/2 and CS No. 51/3 admeasuring 525 Sq. feet and 375 Sq. feet respectively showing the area as open plots.

5. The Appellant further averred that in fact the area shown in the said Sale Deed is not open at all and it is constructed one and there is a complete building on the entire area of CS No.51/2 and 51/3 comprising 05 rooms on ground floor so also on first floor by spending huge amount constructed by him for his own use as he is qualified doctor and is exclusive owner of the suit property and respondent/ defendant No.1 has no right or interest in the above property and she has not spent a single pie, nor she spent any amount of money in the construction of medical Centre. The Medical Centre in the name and style of **"ROOP MEDICAL CENTRE"** had already been constructed by the Appellant long back than the execution of the **Ostensible Sale Deed** dated 30.11.2006. The value of the area of 900 sq. feet under dispute is too high in the market in 2006 and the Appellant requested the Respondent/defendant No.1 in the months of October and November, 2008 to take back the amount of loan of Rs.100,000/- (one lac) and to re-convey the sale deed as per promises and the respondent/ defendant No.1 always kept him on promises and hopes and ultimately the respondent/ defendant No.2 came from Karachi and in collusion with respondent/ defendant No.1 he started making false applications against the appellant in January, 2009 stating that his

mother i.e. respondent/ defendant No.1 has share in the medical Centre leveling false and concocted allegations against the appellant. The appellant approached the respondent/ defendant No.1 showing the conduct of the respondent/ defendant No.2, on which she stated that she would ask the respondent/ defendant No.2 not to come in the way of respondent/ defendant No.1 and appellant and that he resides in Karachi and due to certain matrimonial disputes between the appellant and respondents/ defendants No.1 and 2 the respondent/ defendant No.1 at the instance of respondent/ defendant No.2 has become dishonest and on or about 12-03-2009 refused to re-convey the sale deed after accepting the loan amount of Rs.100,000/- (One Lac) and the respondent/ defendant No.1 has joined hands with respondent/ defendant No.2 and they are negotiating to sell the portions of area of the building under suit to some strangers on the lease of so called sale deed and it is also learnt that the respondent/ defendant No.2 approached the respondents/ defendant No.3 and 4 for clearance certificates but they could not get and the appellant/ plaintiff again approached the respondent/ defendant No.1 for re-convey but she refused to re-sell the portion of the area under suit. Appellant further averred that the respondent/ defendant No.2 had brought some strangers for sale of the area on which the appellant/ plaintiff approached them and asked them that the entire property is exclusively owned by him and he is in possession, occupation and use of the same in his own rights, on which the respondent/ defendant No.2 went away threatening dire consequences, therefore, the appellant/ plaintiff has filed F.C suit No. 24/2009 against the respondent/ defendant on 16.03.2009 in the Court of learned 2nd Senior Civil Judge, Umerkot and said suit was

withdrawn with permission to file fresh suit and the instrument (sale deed) executed by the appellant is ostensible for collateral security of Rs. 100,000/= obtained as loan, hence the sale deed is void. The appellant/ plaintiff reasonably apprehends serious injury by sale deed if left outstanding and the appellant/ plaintiff is ready to refund the money amount and the respondent/ defendant No.1 is the nearest relative and the sale deed executed by the appellant/ plaintiff is the collateral security for Rs.100,000/= and the sale deed is without possession hence she cannot claim as bonafide purchaser of suit property, however she is entitled to receive back payment made to the appellant/ plaintiff and the appellant/ plaintiff has his own legal character and has a right in the property in suit and the respondents/ defendants No.1 and 2 cannot deny the rights and the title of the appellant/ plaintiff over the property under the law and the respondent/ defendant No.1 is bound to re-convey the sale deed after accepting the amount of Rs. 100,000/-; hence he filed suit with the following prayers:

a) Declare that the sale deed No. 361 of 2006 executed by the plaintiff in favour of defendant No.1 is ostensible sale deed for the purpose of collateral security of Rs. 100,000/- obtained as loan by plaintiff from defendant No.1.

b) Declare that the plaintiff is the exclusive owner in possession of area shown in the sale deed No. 361 of 2006 viz 525 sq. feet out of CS No. 51/2 and 375 sq. feet out of CS No.51/3 and also he is owner of the entire CS No. 51/3 and 51/3 with entire area of 902-7 sq. yards and 385 sq. yards as such the sale deed is void.

c) The sale deed No. 361 of 2006 executed by the plaintiff in favour of defendant No.1 may be adjudged as void, be delivered up and canceled with the orders to the plaintiff to refund the amount of Rs. 100,000/- to the defendant No.1.

d) Grant permanent injunction against the defendants No.1 and 2 restraining and prohibiting them from dispossessing, alienating in any manner by way of mortgaging, selling or creating third party risk by themselves, their agents, servants or through any means what so ever without due course of law.

e) Cost of the suit be borne by defendants.

f) Any other relief as may deem fit and proper under the circumstances of the case.

6. Upon having service of summons, the Respondents/ defendants No.1 & 2 filed their joint written statement on 23.10.2010, whereby partly admitted and partly denied the contents of plaint of leading suit. It had emphatically denied that the Appellant/ plaintiff is in possession of the double story building constructed upon C.S No. 51/2 and 51/3 Ward-A Umerkot town in the capacity as its owner and that the building is constructed from his own funds. It has further submitted that the Appellant/ plaintiff has given wrong description of suit plots and as a matter of fact, the appellant/ plaintiff is not owner of City Survey plots and the claims regarding his alleged remarkable reputation is denied for want to knowledge. However, the act of dishonesty of the appellant/ plaintiff indicates otherwise and the appellant/ plaintiff is their near relative as the real sister of appellant/ plaintiff namely Sht. Chandrwati is wife of respondent/ defendant No.2 and they denied that the execution of sale deed bearing No. 361 of 30.11.2006, with MF- Roll No. 45 dated 11.12.2006 by the appellant/ plaintiff in favour

of respondent/ defendant No.1 is nominal and without possession for collateral security to the satisfaction of the respondent/ defendant No.1 and it is also wrong to say that for the execution of the sale deed the appellant/ plaintiff of leading suit has taken loan of Rs.100,000/= with understanding that the respondent/ defendant No.1 shall re-covey the sale after refund of Rs.100,000/-.

7. They further submitted that the appellant/ plaintiff was in acute need of finance in the year 1997-98 and he was running his private clinic at rented premises in a small construction at Umerkot town and he wanted to have proper big building/ accommodation at Umerkot, therefore, he being real brother of the wife of respondent/ defendant No.2 had come to the respondent/ defendant No.1 in year 1997-98, with proposal that respondent/ defendant No.1 may kindly provide capital finance for purchase of plot bearing No.51/1 area 1000 Sq. feet from one Fakir Muhammad Hashim Halepoto, as a Benami transaction in the name of appellant/ plaintiff and the respondent/ defendant No.1 after consultation with the respondent/ defendant No.2 provided entire sale consideration amount of City Survey No. 51/1 through respondent/ defendant No.2 to the appellant/ plaintiff for its purchase and there was understanding between the appellant/ plaintiff and respondents/ defendants No.1 & 2 that entire finance/ capital shall be provided by the respondent/ defendant No.1 through respondent/ defendant No.2 for construction of medical Centre in Faqir Market Umerkot and the appellant/ plaintiff shall be a benami khatedar/ title-holder and he shall be active working partner till the completion of MBBS education of Dileep Kumar son of respondent/ defendant No.2 and then the Medical Center will be operated jointly and net profit/ income of Medical Center will be distributed equally between the

appellant/ plaintiff and respondent/ defendant No.2, and this entire agreement and proposals were oral because of close relationship between the appellant/ plaintiff and respondents/ defendants No.1 & 2 and the respondent/ defendant No.1 had paid entire amount for purchase of plots C.S No. 51/1, 51/2, 51/3 and so also she paid amount for construction of Medical center along with its entire medical equipment through respondent/ defendant No.2 who had noted down/ written in his personal old diary/ copy and initially name of Medical Center was **"UMERKOT MEDICAL CENTER"** and it was so happened in the year 2006, the appellant/ plaintiff turned dishonest and did not pay regular and proper share of income to the respondent/ defendant No.1, therefore the respondent/ defendant No.1 asked the appellant/ plaintiff to transfer the title of properties in their favour and the appellant/ plaintiff agreed and in first round he executed sale deed bearing No. 361 of 2006, with M.F Roll No. 45 dated 11.12.2006 in favour of respondent/ defendant No.1 as its absolute lawful owner of the plot and the construction upon it was already raised from the funds of respondent/ defendant No.1 therefore, construction is not mentioned in the registered deed. In fact, after execution of this sale deed there was a huge amount of more than Rs. 45,00,000/- of respondent/ defendant No.2 remained outstanding against the appellant/ plaintiff for that he promised to return within short period of six months and in case of his failure he shall execute the sale deed of remaining portion of Medical Center constructed upon C.S No. 51/1 area 1000 sq. feet, but the appellant/ plaintiff paid only one installment through cheque and then failed to satisfy the remaining amount till this date and became defaulter and his earlier installment stood forfeited as per settled terms of oral understandings and it is clearly mentioned

in the printed column of terms that the appellant/ plaintiff cannot ask for re-convey/ transfer of the title in his favour at para No.2 of terms.

8. They further denied that the Appellant constructed building upon these plots from his own funds and that he is exclusive owner of suit property and Respondent No.1 has no right or interest in this property and it is also denied that the Respondent No.1 has not spend any amount in construction of medical center and the style and name as Roop Medical Center is newly introduced. They also denied that the sale deed dated 30.11.2006 is ostensible sale deed and that the appellant/ plaintiff requested the respondent/ defendant No.1 in the months of October and November 2008, to take back the amount of loan Rs.100,000/- and re-convey the sale deed and that the Respondents/ defendants No.1 & 2 in collusion with each other made false applications against appellant/ plaintiff in January, 2009.

9. They further claimed that since the Respondent/ defendant No.1 is in exclusive lawful owner of the property by virtue of registered Sale deed dated 30.11.2006 and she had never promised to re-convey the same to Appellant at any time at any cost hence entire allegations are false and cooked up by the appellant/plaintiff and the question of refusal or otherwise, does not arise at all. They further denied that the appellant/ plaintiff is in occupation and possession of medical center as its exclusive owner and that the respondent/ defendant No.2 had brought strangers for sale of suit property and issued any threat to the appellant/ plaintiff. They further submitted that the appellant/ plaintiff suppressed true facts as he had filed F.C suit No.10 of 2008 in the Court of learned Civil Judge & J.M-I, Umerkot earlier then filed F.C Suit No. 24 of 2009, the contents in plaint of above suits are contradictory and different.

10. They further stated that Appellant has no any legal character or right in the suit; he has no cause of action against the Respondents/ defendants No.1 & 2 and his suit is liable to be dismissed with costs. They also took legal pleas and filed amended written statement on 13.02.2020 in which they have stated that amendment sought in para No. 01 of the plaint in respect of subject matter at this belated stage is not valid because declaratory suit could be filed within stipulated period, hence at this stage the suit for declaration is time barred and such amendment has no weight in the eyes of law and in continuation of previous written statement filed by the respondents/ defendants No.1 and 2 to the contents of Para No. 16 of the plaint and its sub paras a, b & c (prayer clause), the amendment sought in para No. 16 and its sub paras of the plaint in respect of declaration, cancellation and declaring the Registered sale Deed No. 361 to be void at this belated stage is not valid because suit for cancellation could be filed within 03 years, hence at this stage the suit for cancellation is time barred and such amendment has no weight in the eyes of law as prayer is added after lapse of 09/10 years since filing of the present suit.

11. The official Respondents/defendants No.3 to 7 being formal party and government officials have not filed written statement were proceeded ex parte vide order dated 14.10.2014.

12. Conversely, the facts of the **F.C.Suit No.181/2018** filed by Respondent/defendant No.1 for possession, recovery of Rs.40,00,000/=, mesne profits and permanent against the Appellant are that she is lawful owner of plots bearing CS No. 51/2 area 525 sq.ft and CS No.51/3 admeasuring about 375 sq.ft total area 900 sq.ft and the entire construction thereupon, situated in Ward-A old Fakir

Market at Akhara Temple road, Umerkot town, Taluka and District Umerkot which is suit property and there is triple story constructed building from the funds of Respondent No.1 upon entire suit property including the remaining area of old Umerkot Medical Center presently known as Roop Medical Centre constructed upon CS No. 51/1 near Akhara Temple Fakir Market Umerkot Town. The Respondent No.1 claimed that she has become exclusive lawful owner of the suit property through registered sale deed RD No. 361 dated 30.11.2006 with MF Roll No. 45 dated 11.12.2006 executed by the Appellant in favour of Respondent No.1 along with delivery of possession.

13. It is further stated that in the year 1997-98, the Appellant was in acute need of funds for his medical Centre in Umerkot, therefore he contacted the Respondent No.1 through Tikam Das son of Respondent No.1 and demanded amount on some oral terms and conditions which were settled between them amicably and the Respondent No.1 started to pay amount as required by the Appellant through Tikam Das and such payments were being acknowledged by Respondent No.2 Tikam Das in his diary, therefore total outstanding amount of more than Rs.60,00,000/- against the Appellant which has already paid by the Respondent No.1 through his son Tikam Das for initial purchase of plots bearing C.S 51/1 (area 1000 sq.ft) C.S No. 51/2 (area 525 sq.ft) and C.S No.51/3 (area 385 sq.ft) as Benami transaction in the name of Appellant and for the purpose the entire construction of triple story building upon all these three city survey numbers 51/1, 51/2, and 51/3, and also for the heavy Medical machines and equipment. As per Respondent No.1 this entire amount was paid by her through his son Tikam Das to the Appellant. It was oral agreement between the Appellant and Respondent No.1 through

Tikam Das that the property/ Umerkot Medical Centre will belong to Respondent No.1 in the name of Appellant/ defendant and the Appellant/ defendant will give 50% profit of Medical Center to the Respondent No.1 through Tikam Das. Per Respondent No.1&2, the Appellant after completion of Umerkot Medical Center started its business since 01.09.2001 and for about five years period the Appellant/ defendant kept the respondent No.1 on hopes that there will be good profit share of 50% in favour of Respondent No.1 but he failed to pay the profit to the Respondent No.1 as per commitment and only meager amount of Rs.5,14,819/ as profit paid by the appellant to the Respondent No.1 through Tikam Das such calculations were made by the appellant/ defendant and Tikam Das son of respondent No.1 on simple papers till the year 2006, and thereafter Respondent No.1 through her son Tikam Das asked the Appellant for payment of due profit of business earned at Umerkot Medical Center for onward period, to which the Appellant agreed to sell the suit property through registered Sale deed R.D. No. 361 dated 30.11.2006 with MF- Roll No. 45 dated 11.12.2006 with possession thereafter the Appellant through oral agreement with Tikam Das son of respondent No.1 continued his business of Roop Medical Center upon suit property with promise to pay share of profit much more than the market rate monthly rent/ lease amount at least Rs.1,00,000/- per month, this way mutually agreed hence the appellant remained in possession of suit property with the permission of respondent No.1 and the appellant also promised to refund the remaining amount of Rs.45,00,000/- to the respondent No.1 within short period of six months and in case of his failure to repay/ return the amount to respondent No.1 then the appellant will execute the sale deed of remaining portion of medical

center constructed upon C.S No.51/1 area 1000 sq.ft and the appellant/ defendant only paid one installment of Rs.500,000/- through cheque dated 09.01.2008 of current account No.4527-7 of National Bank of Pakistan Umerkot branch in favour of BUILDICON CONSTRUCTION COMPANY (Ameet Kumar) son of Tikam Das, but thereafter he failed to pay the remaining amount Rs.40,00,000/- in the year 2008, this amount of Rs.40,00,000/- is also subject matter of this suit.

14. It is further alleged that in the year 2008, the Respondent No.1 through her son demanded amount from Appellant, therefore the Appellant become annoyed and filed T.C Suit No. 10/2008 titled as "Dr. Pirshotam Das VS Sht. Seta and Tikam Das for Settlement of accounts and permanent injunction" with totally false and concocted story and with malafide intention. On usual service the Respondent No.1 and her son through advocate filed written statement wherein the entire facts were mentioned, therefore the appellant after going through facts of written statement chosen to remain absent and the suit was dismissed vide order dated 07.10.2008 by learned Civil Judge/ Judicial Magistrate-I Umerkot and thereafter the appellant/ kept the respondent No.1 on hopes for refund of outstanding amount Rs.40,00,000/- and vacant possession of suit property within short period but again he changed his mind and filed F.C Suit No. 24/2009 titled as Dr. Parshotam Versus Teekam and others in the Court of 1st Senior Civil Judge Umerkot for Pre-emption and Permanent Injunction with totally false and concocted changed story. After service the respondent No.1 and her son filed written statement wherein again the elaborate facts were mentioned, therefore the appellant after going

through facts of written statement had withdrawn his suit and the suit was dismissed as withdrawn vide order dated 22.10.2009.

15. It is further alleged by the Respondent No.1&2 that the Appellant is real brother of wife of Respondent No.2 Tikam Das son of Respondent No.1, therefore again the Appellant played fake game with the Respondent No.1 by keeping her on hopes to refund the amount and handover vacant possession of suit property within short time, but again the appellant filed F.C Suit No. 04/2010 titled as Purshutam Vs Sht. Seeta and others in the Court of 1st Senior Civil Judge, Umerkot. After usual service respondent No.1 Sht. Seeta and her son Tikam Das filed written statement and contesting the matter on merit and during pendency of suit again and again the appellant entered into private negotiations/ compromise talks by making assurance to return amount Rs.40,00,000/- and possession of suit property to the respondent No.1 through her son Tikam Das through respectable persons of locality and community, therefore the matter remained pending/ undecided for a long period but lastly on the requests/ applications of Tikam Das the suit/ matter started its further proceedings but again the appellant kept the respondent No.1 on hopes for private settlement, therefore the respondent No.1 could not avail legal remedies and lastly the respondent No.1 came at Umerkot along with her son Tikam Das in the last week of October 2018 and asked the appellant to settle the matter, to which the appellant flatly refused to return the amount Rs. 40,00,000/- and possession of suit property along with Mense Profits and also issued threats that he will handover possession of suit property to strangers and create third party interest in remaining area in favour of strangers to defeat the

legal right of respondent No.1, hence she filed suit with the following prayers:

(a) Direct the defendant to handover/ deliver the vacant peaceful possession of the suit property to the plaintiff, and in case of his failure to deliver possession, the Hon'able Court may get the same job done through its Nazir by ejecting the defendant or any one or more of his men/agents claiming through him found in possession, from suit property by adopting all modes of execution.

(b) To direct the defendant to return/ refund the amount of Rs. 40,00,000/-along with bank interest/ markup to the plaintiff forthwith, the value of interest/ markup shall continue since filing of this suit till final payment made to the plaintiff.

(c) To direct the defendant to pay Mesne profits amount at the rate of Rs. 1,00,000/ per month along with 10% increase per year to the plaintiff since last three years from filing of this suit till final delivery of peaceful vacant possession of suit property in favour of plaintiff or at any other rate as may be determined by the Honourable Court.

(d) Grant permanent injunction against the defendant restraining and prohibiting him from handing over possession of suit property to strangers and from creating third party interest in remaining area of Room Medical Center in favour of stranger to defeat the legal right of plaintiff, by himself or through his agents/ men, persons, or agency in any manner whatsoever directly or indirectly.

(e) The cost of the suit be borne by the defendants.

(f) Grant any other relief of the plaintiff deemed to be fit and property under the facts and circumstance of the matter.

16. After service the appellant filed written statement, which contained the facts as mentioned in plaint of leading FC Suit No.04/2010 filed by him for declaration, cancellation of sale deed and permanent injunction.

17. From the pleadings of both the parties, trial court has framed following consolidated issues:

CONSOLIDATED ISSUES

I. Whether the leading suit No. 04/2010 of plaintiff is not maintainable under the law.?
II. Whether the leading suit of the plaintiff is hopelessly time barred?
III. Whether the leading suit of the plaintiff is barred by section 39, 42 and 56 of Specific Relief Act?
IV. Whether the leading suit of the plaintiff is also barred by various provisions of CPC, suit valuation Act and Court fees Act?
V. Whether the leading suit of plaintiff suffers from misjoinder of parties?
VI. Whether the leading suit of plaintiff is undervalued?
VII. Whether the plaintiff of leading suit has no cause of action to file the suit against the defendants?
VIII. Whether the leading suit of plaintiff have no locus standi to file the instant suit?
IX. Whether the previous two suits No. 10/2008 for settlement of account and permanent injunction and another suit No. 24/2009 for pre-emption and permanent injunction filed by plaintiff of leading suit against private defendants of leading suit, the contents and stories in both the plaints of previous suits are totally contradictory and different from present leading suit (third suit of plaintiff), what its effect?
X. Whether the plaintiff of leading suit is lawful owner of suit plots bearing city survey No. 51/2 and 51/3 situated in Ward-A Umerkot town and double story building constructed there on at the time of filling the suit?

XI. Whether the plaintiff of leading suit being owner executed ostensible sale deed bearing No. 361 dated: 30.11.2006, M.F Roll No. 45 dated: 11.12.2006 in favour of defendant No.1 of leading suit/ plaintiff of connected suit for the purpose of collateral security of Rs. 1,00,000/= obtained as loan in respect of 900 sq. feet from suit plots?

XII. Whether the defendant No.1 of leading suit/ plaintiff of connected suit has paid entire amount for purchase of plots 51/1, 51/2, 51/3 and so also she paid amount for construction of Umerkot Medical Centre along with its entire medical equipment through defendant No.2 of leading suit?

XIII. Whether both the suit plots are exclusive property of defendant No.1?

XIV. Whether the defendant No.1 of leading suit/ plaintiff of connected suit is lawful & legal owner of the suit property under sale deed dated 30.11.2006 and she never promised to re-convey the sale to plaintiff of leading suit at any time at any costs?

XV. Whether the private defendants of leading suit have no right, title or legal character to claim the suit property?

XVI. Whether the plaintiff of leading suit is care taker of disputed suit property and partner in business with defendant No.1 or defendant No. 2 of leading suit?

XVII. Whether the alleged amount of Rs. 40,00,000/- (Forty Lacs) is outstanding against the plaintiff of leading suit from the year 2008 and plaintiff of leading suit is entitled to pay the same of defendant to leading suit/ plaintiff of connected suit along with bank interest/ markup since filling of this suit till final payment?

XVIII. Whether the defendant No.1 of leading suit/ plaintiff of connected suit is entitled for the possession of suit property being owner?

XIX. Whether the plaintiff of leading suit/ defendant of connected suit is legally bound to pay mense profits amount at the rate of Rs. 1,00,000/= (One Lac) per

month along with 10% increase per year to the defendant No.1 of leading suit/ plaintiff of connected suit since last three years from filling of connected suit till final delivery of peaceful vacant possession of the suit property.?

XX. Whether the defendant No.1 of leading suit / plaintiff of connected suit is entitled for any relief as claimed/ prayed?

XXI. What should the decree be?

18. Thereafter on the application of learned counsel for the Appellant filed an application in F.C. Suit No.04/2010 under Order XIV Rule 5 read with Section 151 CPC for framing of additional issues which were framed by the trial Court vide order dated 02.11.2019 as under:

ADDITIONAL ISSUES

I. Whether connected FC Suit No.181/2018 in highly time barred?

II. Whether connected FC Suit No.181/2019 is barred under section 60 of Partnership Act?

III. Whether without delivery of possession sale deed No.361 of 2006 in respect of suit plot have legal value and such sale deed create, right, title in favour of plaintiff of connected suit/defendant No.1 of leading suit namely Sht. Seeta?

IV. Whether plaintiff of connected FC Suit No.181 of 2018 has paid Rs. 60,00,000/- to defendant to initial purchase of suit plot in shape of Benami transaction?

V. Whether plaintiff of connected FC Suit No.181 of 2018 namely Sht. Seeta have sound source of income to purchase the suit plots in name of defendant of connected FC Suit No.181 of 2018 namely Parshotam?

VI. Whether private diary of Teekam Das is a valid proof for payment of Rs. 60,00,000/- to defendant of connected FC Suit No. 181 of 2018 namely Parshotam?

VII. Whether plaintiff of connected FC Suit No. 181 of 2018 namely Sht. Seeta was in active partnership with defendant at the rate of 50% share of profit?

VIII. Whether suit properties purchased by plaintiff of connected suit/defendant No.1 of leading suit namely Sht. Seeta in name of defendant/plaintiff of leading suit namely Parshotam in Form of Benami?

19. In order to prove leading suit, the Appellant/ plaintiff of leading suit Parshotam has examined official witnesses Abbas Ali, Junior Clerk, Sub-Registrar office Umerkot at Ex-83, who produced authority letter, entry relating to registered sale deed bearing No.687 dated 30.11.1999, entry relating to sale deed No.769 of 1999 dated 27.12.1999, entry relating to sale deed No.361 dated 30.1.2006, entry relating to sale deed No.397 dated 10.08.1998, entry relating to sale deed No.687 dated 30.1.1999, entry relating to sale deed No.361 dated 30.11.2006 and entry relating to sale deed No.397 dated 10.08.1998 at Ex-83-A to Ex.83-I. Muhammad Ismail, City Surveyor Umerkot at Ex-88, who produced city survey record relating to plots alongwith cancelled entry of city survey No.51/1, at Ex-88-A-I and 88-A-2, he has also produced city survey card in respect of property No.51/2 in three cards at Ex-88-B-1 to 88-B-3 and four city survey cards with cancelled entry and existing entry in respect of property No.51/3 at Ex-88-C-1 to C-4; Ali Bux, Assistant office of B.O.R Monitoring Unit Hyderabad at Ex-89, who produced authority letter, attested photograph copies of registered sale deed bearing No.397 of 1998 MF Roll No.402 dated 20.08.1998, registered sale deed bearing No.687 of 1999 MF Roll No.600 dated 13.12.1999 at Ex-89-A to 89-C;

Khalil Memon, Microfilming Officer Mirpurkhas at Ex-100, who produced attested copy of registered sale deed bearing S.No.372 and registration No.361 dated 30.11.2006 MF Roll No.45 dated 11.12.2006 alongwith attached documents at Ex-100-A; Appellant/ plaintiff of leading FC Suit No.04/2010 Dr. Parshotam examined himself at Ex-137, who produced original Power of Attorney at Ex. 137/A, original sale deed registration No. 397/98 Book I dated: 10.08.1998 at Ex. 137/B, certified true copy of statement of withdrawal and grant of permission in F.C Suit No. 24/2009 for filling fresh suit at Ex. 137/C, four original receipts regarding purchase of bricks, Reti Bajri, etc, and Mehran iron store Umerkot at Ex. 137/D to 137/D-3, original bills etc of Sun Shine Medical Corporation regarding purchased of X-Ray Machine etc. 137/E- 137/E-3, original delivery challan (3pages) issued by Tejjani brother in respect of purchase of Laboratory items at Ex. 137/F to 137/F-2, original service contract & repot by Merk Micro lab (5 leaves) at Ex. 137/G to 137/G-4, four original cash memos by Jaffri Medical Corporation regarding purchase of Hospital equipment at Ex. 137/H to 137/H-3, original solvent certificate issued by Mukhtiarkar (L.R) Umerkot on 24.05.2002 at Ex. 137/I, two original paid up demand notes issued by WAPDA at Ex. 137/J to 137/J-1, nine original electricity bills in respect of medical Centre at Ex. 137/K to 137/K-8., eight original telephone bills in respect of medical Centre at Ex. 137/L to 137/L-7, two original income tax returns and one original Tax determination order at Ex. 137/M to 137/M-2. Appellant/ plaintiff also examined his witnesses namely Bhagwandas at Ex-140, Deedar Ali Khan at Ex-141, Muhammad Ismail Rahimoon at Ex-142 and then his counsel has closed his evidence side vide statement dated 14.12.2019 at Ex-191.

20. In rebuttal, the Respondents/ defendants No.1 and 2 examined official witness Ramesh Kumar clerk of Civil Judge & J.M-I Umerkot at Ex. 193, he has produced official letter dated 18.12.2019 of this Court for production of official/ judicial record of T.C Suit No. 10/2008 (Re Dr. Parshotam VS Sht. Seeta and others), copy of plaint of T.C suit No.10 of 2008 filed by Dr. Pashotam Das against Sht. Seeta and Teekam Das and also produced copy of order/order-sheet dated 07.10.2010 dismissing the suit in non-prosecution at Ex.193/A to Ex. 193/D; Muhammad Ibrahim clerk of 1st Senior Civil Judge, Umerkot, who produced copy of plaint of F.C suit No. 24 of 2009 filed by Dr. Parshotm against Teekam Das, Sht. Seeta and others, written statement of respondent/ defendant No.1 Sht. Seeta and adopted by respondent defendant No.2, written statement of defendant No.3 Sub-Registrar and order dated 23.10.2009 for withdrawal of F.C Suit No. 24/2009 at Ex. 194-A to 194-D; Vijay Singh City Surveyor Umerkot at Ex. 201, who produced official record original Extract Form/ Rule Card regarding city survey plot No. 51/2 Ward-A area 525 sq feet entry dated 25.07.2001 vide RD No. 361, dated 30.11.2006 in the name of Seeta W/o Issar Das Khatri, original extract form/ rule card regarding city survey plot No. 51/3 Ward-A area 375 Sq. feet entry dated 15.01.2007 vide RD No. 361 dated 30.11.2006 in the name of Seeta W/o Issar Das Khatri at Ex. 201/A to Ex. 201/B (six leaves of official record). Thereafter respondent/ defendant No.2 Teekam Das examined himself and being attorney of respondent/ defendant No.1 at Ex. 207, who produced original Special power of attorney executed by respondent/ defendant No.1 in his name in F.C suit No. 04/2010, original Special power of attorney executed by respondent No.1 in his name in F.C suit No. 181/2018, certified true copy of order on

application under order 23 Rule 1 & 2 CPC dated 22.10.2009 passed in F.C suit No.24/2009 of Pre-emption and Permanent Injunction, certified true copy of Extract Form Ward-A of City Survey plots No. 51/2 and 51/3 in the name Seeta W/o Essar Das, original receipts and detail of expenditure and income of Umerkot Medical Centre (05 leaves), one Monogram of Umerkot Medical Centre, certified true copy of plaint of T.C suit No.10 of 2008 filed by appellant/ plaintiff Dr. Parshotam for Settlement of Account and Permanent Injunction against respondent No.1 / defendant Sht. Seeta and another and order dated 07.10.2008, original Diary detail of payment to the appellant/ plaintiff mentioned on 03 pages at Ex.207/A to 207/I-3. He also examined his private witness/son of Teekam Das namely Raj Kumar at Ex. 208 and thereafter learned counsel of Respondents/ defendants No.1 & 2 closed evidence side by filing statement dated 20.02.2020 at Ex. 209.

21. A sale deed in respect of suit plots bearing No. 51/2 area 902-7 Sq. yards and 51/3 area 385 Sq. yards, registered No. 361 of 2006 dated 30.11.2006, MF-Roll No. 45 dated 11.12.2006 in favour of Respondent/ defendant No.1 of Sht. Seeta executed by appellant/ plaintiff Parshotam Khatri was also produced and his counsel did not file any objections on statement dated 14.03.2020.

22. After hearing counsel for both parties, the trial Court dismissed the suit which was filed by the Appellant, bearing F.C suit No. 04 of 2010 while F.C suit No.181/2018 filed by Respondent No.1 was decreed to the extent of possession of suit plots/property, Mesne Profit and Permanent Injunction while her suit was dismissed for the recovery of Rs.40,00,000/- (Rupees Forty Lacs only) from Appellant / plaintiff.

23. The Appellant filed Suit No.04/ 2010 before the court of learned 1st Senior Civil Judge, Umerkot, for declaration, cancellation of registered sale deed and permanent injunction against the respondents / defendants No.1 and 2. This Suit has been dismissed by the trial court and it has been maintained by the Appellate Court. Before involving and scrutiny of the facts of the case in pursuit to delving out the substantive question of law essentially required for the purposes of jurisdiction set forth under section 100 of the Civil Procedure Code, 1908, I have noticed that prior to filing of present Suit No.4/2010, the Appellant/ plaintiff has filed suit No. 10/2006 for settlement of accounts and permanent injunction against same parties. Furthermore, another suit No.24/ 2009 was also filed by the Appellant for pre-emption and permanent injunction against the same parties and for the same subject-matter.

24. The earlier Suit No.10/2008 was dismissed for non-prosecution vide Order dated 07-10-2008 passed by the learned Civil Judge-I, Umerkot while the second Suit No.24/ 2009 was withdrawn with permission to file fresh suit vide Order dated 22-10-2009.

25. The Appellant in his previous Suit No.10/2008 at Para No.6 and 7 of plaint has stated as under:

> **"That the plaintiff borrowed an amount of Rs. 600,000/- without interest and any written agreement, the same was paid through defendant No.2 for an unspecified period and after some time the defendant No.1 asked the plaintiff for return of borrowed amount.**
>
> **"That the plaintiff sold above mentioned plot to the defendant No.1 in the sum of Rs.100,000/= by executing registered sale deed and cash Rs.500,000/= through**

cheque whereby the entire amount was repaid to the defendants".

26. The Appellant at para No.4 of plaint in subsequent Suit No.24/ 2009 has stated that:

"*the plaintiff being near relative to the defendant No.2 sold the plot on the pretext that he will get back as and when the plaintiff wish (sic) to purchase the same back from defendant No.2*".

27. The Appellant has pleaded in his present Suit No.4/2010 at para No.3 of the present plaint that:

"….in the year 2006 the plaintiff was in need of money; hence he approached the defendant No.1 for loan of Rs.100,000/-. The defendant No.1 agreed to extend the loan to the plaintiff with the condition that the plaintiff shall execute sale deed without possession for collateral security to the satisfaction of defendant No.1, the plaintiff therefore executed such sale deed duly registered nominally in respect of the portion of the constructed plot by showing it as open plots in respect of C.S No.51/2 admeasuring 525 sq. feet and from CS No.51/3 a portion of 375 sq. feet on 30-11-2006 after taking loan of Rs.100,000/- in the name of defendant No.1 with the understanding that the defendant No.1 shall re-convey the sale after refund of Rs.100,000/- Photo copy of the same is submitted herewith."

28. **Departure from Pleadings—**the Appellant in his present suit has voluntarily pleaded at paragraph-3 that he was desperately needed money, therefore, he had obtained Rs.1,00,000/- loan and as a collateral security he had executed sale deed of the property in question. On the other hand, the Appellant in the previous suit

No.10/2008 has specifically pleaded that he has borrowed Rs.6,00,000/- in respect of suit property which was dismissed for non-prosecution on 07-10-2008. In the aftermath of dismissal on 07-10-2008, and after considerable delay of 02 years, the Appellant has filed present Suit No.4/2010 and took departures from pleadings of previous two suits. In earlier suits, the Appellant has claimed that he had obtained Rs.6,00,000/- loans while in the present suit, the Appellant has pleaded that he has obtained Rs.1,00,000/- as loan and executed Sale Deed of the property in question for collateral purposes. Another departure from the pleadings appears that the Appellant, in previous pleadings, has stated that it was agreed that the Appellant can get back the property in question if he wishes so while in the present pleadings the Appellant has taken clear departure that the Respondent shall have to re-convey the said property.

29. The relevant portions of inconsistent pleadings and clear departures have been re-produced at paragraph-25,26 & 27. ***Order VI Rule 7 CPC*** restricts departure from pleadings or previous pleadings and the testimony or evidence produced in-contravention of a party's own pleadings is inadmissible evidence and law does not authorize to consider in handing down a Judgment in favor of such party. It is settled law that the mutually destructive pleas cannot be raised or more precisely it is not allowed to consider by Court of law. Reliance can be placed on the case ***"Haji Sultan Abdul Majeed (Decd) through Mehboob Sultan and Habib Sultan and others v. Mst. Shamim Akhtar (Decd) through Mah Jabeen and others (2018 SCMR 82)*** wherein it has invariably been held:

> "When a plea in the alternative can naturally arise and can co-exist with the main plea, which was not taken in the

plaint at the time of filing of the suit then such a plea can be introduced by seeking amendment in the pleadings. To hold this view, we are fortified by the judgment of this Court passed in the case of Nazir Hussain Rizvi v. Zahoor Ahmad (PLD 2005 SC 787) wherein it was held as under: -

“6. There is no cavil with the proposition that the proposed amendment can neither change the complexion of the suit nor introduce a new cause of action. “No amendment will be allowed where its effect would be to convert the character of the suit.” (Shahswar v. Najmaul Hassan 1981 SCMR 730, Khudeja v. Jahangir Khan 1971 SCMR 395, Atlantic Steamer‟s Supply Co. v. m.v. Titisee PLD 1993 SC 88 and more so the fundamental character of the suit including the subjectmatter and cause of action cannot be allowed to be substituted. “(Ghulam Bibi v. Sarsa Khan PLD 1985 SC 345, Ghulab v. Fazal Illahi PLD 1955 Lah. 26). It is, however, to be kept in view that subject to certain exceptions “even alternative and inconsistent pleas may be allowed to be raised by way of amendment.” (Ghulam Ali v. Pakistan PLD 1960 Kar. 581, Alauddin v. Central Exchange Bank Limited (PLD 1960 Lah. 446) “or a new ground of claim can be introduced because merely introduction of fresh matter cannot alter the nature of the suit and leave ought not be refused in such cases.” (Muhammad Essa v. Hasseena Begum 1989 SCMR 476). A line of distinction is to be drawn between „an alternative case‟ and „an inconsistent case‟ which are neither synonymous nor interchangeable. A similar proposition was examined in case Budho v. Ghulam Shah (PLD 1963 SC 553) wherein it, was held that no two facts can be said to be inconsistent if both could have happened and the test of inconsistency is that a plain which contains both cannot be verified as true but a party can put forward more than one source of his right or defence in which case he is pleading in the alternative. The judicial consensus seems to be that an alternative or inconsistent plea can be raised but

contradictory and mutually destructive pleas cannot be taken."

30. In ***"Muhammad Yaqoob vs. Mst. Sardaran Bibi and others" (PLD 2020 SC 338)*** held that:

"It is settled law that a party is not allowed to improve its case beyond what was originally setup in the pleadings".

31. ***"Muhammad Iqbal vs. Mehboob Alam", (2015 SCMR 21)***, the relevant extract is as under:

"It is also settled law that no litigant can be allowed to build and prove his case beyond the scope of his pleadings".

32. In ***"Moiz Abbas vs. Mrs. Latifa and others" (2019 SCMR 74)*** held that:

"These improvements are clearly beyond the pleadings and constitute and attempt to improve the case of the respondents as a afterthought. Such course of action is not permitted by law. Suits involving sales based on oral agreements are more susceptible to improvements made by parties in the evidence and pleadings in order to succeed. Even otherwise, it is settled law that no amount of evidence can be considered on a plea of fact which was not raised in the pleadings by the parties".

33. In ***"Sardar Muhammad Naseem Khan vs. Returning Officer, PP-12 and others" (2015 SMCR 1698)*** held that:

"The importance of the pleadings and its legal value and significance can be evaluated and gauged from the fact that it is primarily on the basis thereupon that the issues are framed; though the pleadings by themselves are not the evidence of the case, the parties to a litigation have to lead the evidence strictly in line and in consonance thereof to

prove their respective pleas. In other words, a party is bound by the averments made in its pleadings and is also precluded from leading evidence except precisely in terms thereof. A party cannot travel beyond the scope of its pleadings. It may be pertinent to mention here, that even if some evidence has been led by a party, which is beyond the scope of its pleadings, the Court shall exclude and ignore such evidence from consideration".

34. In ***"Abrar Ahmed and another vs. Irshad Ahmed" (PLD 2014 SC 331)***, observed that:

> "And in such a situation, they under the law are precluded to assail the validity of the gift on that account, because no one can be allowed to set out a new case beyond the scope of his pleadings".

35. In ***"Jan Muhammad and others vs. Mst. Sakina Bibi and others", (PLD 2017 SC 158)***, held that:

> "This Court has the discretion to grant leave at the time of hearing an appeal in which leave has been granted on a different point(s) and to consider such point of law, including for instance the question of inherent jurisdiction, undoubtedly being a pure question of law; even if not earlier taken up in any proceedings including those before the Supreme Court. This could very well apply to the point of limitation too where such plea was not dependent upon any factual determination. However, those cases which require a factual foundation and adjudication for the purposes of settling a legal issue cannot be said to be pure questions of law and the same cannot be allowed to be raised before this Court for the first time"

Burden of proof lies on the person who challenge the validity of a document. (2010 SCMR 1351).

36. Relinquishment of claims—the Appellant had not claimed in his earlier two suits that about ostensible Sale Deed or that he is factual owner or that the property in question is a portion of another property which he has owned as altered in the his subsequent suit. The Appellant had filed previous Suit No. 24/2009 on 16.03.2009 and Suit No.10/2008 filed on 04.06.2008 (dismissed for non-prosecution on 07.10.2008), the Appellant prayed in Suit No.24/2009 as under:

a. To direct the defendant No. 2 to execute the Registered sale deed in favour of plaintiff, after accepting the sale consideration amount of Rs.100000/-, and on her failure, the Nazir of the court may be directed to execute the same on behalf of the defendant No. 2 after receiving the sale consideration.

b. To grant permanent injunction against the defendants No. 1 and 2 restraining and prohibiting them from selling, transferring, alienating, mortgaging the suit plot or creating third party interest or dispossessing the plaintiff from suit plot. The official defendants No. 3 and 4 may also be directed not to execute the registered sale deed or issuing clearance certificate in favour of any other person other than plaintiff by themselves, or through their subordinates, whosoever in any manner whatsoever.

In the present suit No.4/2010, the Appellant prayed as follow:

a. Declare that the sale deed No. 361 of 2006 executed by the plaintiff in favour of defendant No.1 is ostensible sale deed for the purpose of collateral

security of Rs. 100,000/- obtained as loan by plaintiff from defendant No.1.

b. Declare that the plaintiff is the exclusive owner in possession of area shown in the sale deed No. 361 of 2006 viz 525 sq. feet out of CS No. 51/2 and 375 sq. feet out of CS No.51/3 and also he is owner of the entire CS No. 51/3 and 51/3 with entire area of 902-7 sq. yards and 385 sq. yards as such the sale deed is void.

c. The sale deed No. 361 of 2006 executed by the plaintiff in favour of defendant No.1 may be adjudged as void, be delivered up and canceled with the orders to the plaintiff to refund the amount of Rs. 100,000/- to the defendant No.1.

d. Grant permanent injunction against the defendants No.1 and 2 restraining and prohibiting them from dispossessing, alienating in any manner by way of mortgaging, selling or creating third party risk by themselves, their agents, servants or through any means what so ever without due course of law.

e. Cost of the suit be borne by defendants.

f. Any other relief as may deem fit and proper under the circumstances of the case.

37. The Civil Procedure Code, 1908, Order II Rule 2 does not permit alteration. For the convenience, the same is re-produced hereunder:

“2. Suit to include the whole claim—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) **Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished**.

(3) Omission to sue for one of several reliefs.—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action"

38. On comparative examination and analysis of the prayer clauses of both the suits of the Appellant, it is confirmed that the cause of action, parties and subject-matter are the same. The previous suits were dismissed one for non-prosecution and the second suit was withdrawn with permission to file afresh. However, the subsequent suit (under consideration in appeal) has filed with several altered prayer clauses. For instances, in the present suit, the Appellant has prayed for Declaration as Ostensible Owner (which was not claimed in the previous two suits), or that the suit property is a portion or part of another property which is exclusively owned by the Appellant as alleged. Hence the Appeal is hit by Order II Rule 2 CPC also.

39. The third aspect or the anomaly with the claim of the Appellant and legal embargo for the present appeal is about the relinquishment of the appellants to seek cancellation of registered instruments executed by the Appellant in favor of the Respondent No.1 voluntarily and the failure of the Appellant to seek cancellation of such sale deed in

compliance of Section 39 of the Specific Relief Act, 1877. The law does not permit a second suit if a right to the plaintiff is available at the time of filing of the suit. Reliance can be placed on the case ***“Dr. Faqir Muhammad v. Maj. Amir Muhammad etc”, (1982 SCMR 1178)***

40. The first suit of Appellant seeking direction to the Respondent No.1 to executed sale deed was dismissed for non-prosecution, the second suit was filed for pre-emption and Accounts and again the Appellant has relinquished to incorporate and add up all his claims. Hence in view of previous two suits, the filing of third suit with altered prayed whatever be the perspective, have admittedly not mentioned in the first two suits as such the present suit is barred. The Hon'ble Supreme Court of Pakistan in the case of ***"Abdul Hakim and 02 others vs. Saadullah Khan and 02 others" (PLD 1970 SC 63)*** has held that:

> "The expression "cause of action" in Order II, rule 2, C.P.C. means the cause of action for which a suit is brought. In order that the cause of action for the two suits may be the same, it is necessary not only that the facts which would entitle the plaintiff to the right, claimed must be the same but also that the infringement of his right at the hands of the defendants complained against in the two suits, must have arisen in substance out of the same transaction. In considering the application of this bar, regard is to be had to the allegations in the two suits without reference to the defence that may be set up by the defendants. As laid down by their Lordships of the Privy Council in Muhammad Khalil Khan and others v. Mahbub Ali Mian and others (PLD 1948 PC 131) "the bar under Order II, rule 2 refers entirely to the grounds set out in the plaint as the cause of action or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour". A rough test although not a conclusive one is to see whether

the same evidence will sustain both suits, which would be the case if both the suits are founded on continuous and inseparable incidents in the same transaction. The question, however, is to be examined in substance and not merely on from as the cause of action in the two suits may be found to be the same, in spite of the facts alleged not being exactly identical in the two cases. It is not open to the plaintiff to split up the parts really constituting the same cause of action and file different suits in respect of them. In other words, a plaintiff must ask for all his reliefs which flow from the grievances caused to him by the infringement of his rights by the defendant in the course of the same transaction, but he cannot and is under no obligation to add .to his grievances which did not occur in that transaction."

41. Another interesting aspect of the case is the admission of the Appellant himself about the payment of installment against Roop Medical Centre. Therefore, it has not come on record that it was for security or repayment of loan as alleged by the Appellant, secondly, the Appellant has admitted that he has pleaded in previous suit that the Respondent No.1 has approached me to purchase the suit property and thirdly, the Appellant has admitted in his evidence that he has signed the Sale Deed after proper reading and understanding. The relevant portion of the evidence of the Appellant Dr. Parshotam as P.W-I is re-produced as under:

"It is correct to suggest that I issued cheque of Rs. 5,00,000/- dated 09.01.2008 in the name of Ameet Kumar s/o Teekam Das/son of defendant No. 2 of leading suit. <u>It is correct suggest that in the bottom of cheque of Rs. 5,00,000/- dated 09.01.2008 with my own hand writing it is mentioned that said payment was as installment towards Roop Medical Centre.</u> It is correct to suggest that previously I have filed F.C suit No. 24/2009 for pre-emption against defendant No.1 of

leading which was later on withdrawn on 22.10.2009. It is correct to suggest that the plots numbers of present F.C suit No. 04/2010 and in my previous F.C suit No. 24/2009 are same. <u>It is correct that in my previous F.C suit No. 24/2009 of pre-emption in the para No. 8 of plaint knowing such facts that plaintiff/me approached the defendants No.1 & 2 to purchase the suit plot</u> and thereafter again I offered the money to defendants No. 1 & 2 / present defendant No. 1 & 2 of leading suit but they refused. It is correct to suggest that I have also previously filed T.C suit No. 10/2010 against the present defendant No.1 & 2 for settlement of account and permanent injunction in the Court of Civil Judge & Judicial Magistrate in respect of same plots of present suit viz. 51/2 & 51/3. I see para No. 6 & 7 of plaint of previous T.C suit No.10/2008 in which I have mentioned being plaintiff that the plaintiff/me borrowed an amount of Rs. 6 Lac without interest and any written agreement, the same was paid through defendant No.2 Teekam Das for an unspecified period and after some time the defendant No.1/Sht. Seeta asked the plaintiff/me for returned of borrowed amount and in para No. 7 I have mentioned that the plaintiff/me sold above mentioned plot to the defendant No.1/ Sht. Seeta in the sum of Rs.1 lac by execution registered sale deed and cash Rs.5 lac through cheque whereby the entire amount was repaid to the defendants. Vol: says that the pleadings of my F.C. Suit No.10/2008 was written by my previous counsel without my concerned. I see Ex. 100/A i.e. sale deed bearing No. 361 dated 30.11.2006 in which not condition is mentioned in respect of loan and security for alleged plots. I see clause No.3 of sale deed/Ex. 100/A in which it is mentioned that at the time of execution regular sale deed the possession of said plot was handed over to Mst. Seeta Bai/purchaser. It is correct to suggest that Ex. 100/A/sale deed bears my signature and thumb

impression. <u>It is correct to suggest that after read over the contents Ex. 100/A/sale deed I read the same and signed"</u>.

42. The learned Appellate Court has elaborately dealt with the plea that it has been executed against collateral security of Rs.1,00,000/-, no such condition was put by the Appellant at the time of registration of sale deed nor Sub Registrar has endorsed such plea at the time of admission of execution and registration of deed. Even out of two witnesses of sale deed, Mr. Saluram was not produced before the court and learned Appellate Court has formed its opinion under Article 129 of Qanoon-e-Shahadat Order, 1984 that adverse inference can be drawn due to absence of marginal witness Saluram that if he was produced he would not support the Appellant/plaintiff. The second marginal witness namely Bhagwandas appeared and chosen to depose that he is not witness of event. The relevant portion of his evidence is reproduced as under:

> **"It was disclosed by plaintiff Dr. Parshotam that he paid Rs.1 lac as security amount against said plots. At that time I was working as dispenser at the clinic of Dr. Parshotam/ plaintiff of leading suit."**

43. Therefore, the Appellant has failed to prove his claims that execution of sale deed was temporarily conveyed as a collateral security and pleadings of his previous two suits are in direct clash with the pleading of the present suit and evidence adduced by the Appellant.

44. On the other hand, the documentary evidence regarding sale deed supports the version of the respondents' side. It is settled law that documentary evidence shall prevail upon the oral evidence. Documentary evidence is a registered document and it has

presumption of truth attached under Article 91 of Qanoon-e-Shahadat Order, 1984 and it cannot preceded under Article 79 of the Qanoon-e-Shahadat Order, 1984 when one marginal witness was not appeared and evidence of other marginal witness is hearsay and he has not stated that he is witness of event. Admittedly, the sale deed bearing registration No. 361 dated 30-11-2006 (Ex.100-A) was registered on 30-11-2006 and present suit was filed on 21-01-2010. Notably, in the previous two suits filed by the Appellant he has not sought any declaration or cancellation against sale deed in question and present suit was filed without seeking cancelation of registered instrument as such appellant ‘s suit is also failed at this point of inconsequential relief.

45. In terms of Article 117 of Qanoon-e-Shahadat Order, 1984 onus of prove lies upon the Appellant. For the sake of convenience same is reproduced as under:

> **117. Burden of proof:**
> (1) Whoever desires any Court to give judgment as to any legal right or liability dependent On the existence of facts which he asserts, must prove that those facts exist.
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

46. The Appellant firstly failed to discharge the initial burden of proof or in other words legal burden as the Appellant has taken departure from his previous pleadings and then the Appellant has incorporated new pleadings on same cause of action (without addition of new cause of action) or permission of Court and thereby meeting with the barrier of doctrine of relinquishment or abandon of claim. The

testimony of Appellant is not unequivocally confirming the pleadings. The evidentiary burden in the present Appeal is also not supportive to the Appellant as the Sale Deed has admittedly been read over to the Appellant and the Appellant has acknowledged that in body of sale deeds or the contents thereof does not disclose any reference of collateral security or temporarily or conditional or time limit conveyance of rights or even it is not provided that whenever the Appellant-plaintiff would claim, the Respondent shall bound to re-convey or re-transfer the said property in favor of the Appellant. The Appellant has miserably failed to discharge burden of proof on both expressions of it, legal burden of proof through confirmation of his pleadings during process of evidence and adducing uncontroverted and trustworthy confident evidence to have attachment of presumptions in his favor and to adopt prevention of adverse inference from the material record against the Appellant.

47. The former cast unescapable duty upon the Appellant whilst the later may vary and can be shifted upon the Respondents' party provided the Appellant –plaintiff may discharge initial burden of proof or fact or fact of fact or relevant facts and in this way it does not essentially require direct evidence but also include corroborative or circumstantial evidence or even include presumption of facts or law. Reliance can be placed on the case ***"Raja Khurram Ali Khan and 2 others versus Tayyaba Bibi and another", (PLD 2020 SC 146).***

48. Undoubtedly, the Appellate Court has jurisdiction under section 96 of the Code of Civil Procedure, 1908 to reverse or affirm the findings of the trial Court and appeal under said provision of law being first appeal is a valuable statutory right of the parties and unless restricted by law, the whole case on question of law or question of fact is open

for re-hearing and re-appraisal of evidence and record or even framing of additional issues, if so warranted and the provisions aspire that the judgment must consider and discuss strenuous judicial mind, judicial norms and material record. It gives rising of findings back by reasons and judicial precedents on all issues of lis after careful examination of testimonies, evidence adduced or documents produced by the parties through analysis on settled judicial principles. It is the right created by the statute and it cannot be termed as conferment of power or delegation of statute or mutual consent of the parties.

49. In stark contrast, a right of Second Appeal is not a right created by a statute or inherent right or built right of statute. Understandingly, it a substantive statutory right and apply and utilize within defined sphere of law encircled around substantive questions of law or error of law with restricted condition upon a High Court to not interfere with findings of fact or re-appraise the facts or finding of facts of Appellate Court no matter how erroneous they are on facts. Reliance can be placed on ***"Zafar Iqbal and others Versus Naseer Ahmed and others", (2022 SCMR 2006).*** The relevant portion is re-produced:

> "8. At the very outset, we observe that the High Court hearing a second appeal, in the present case, has re-read and re appraised the evidence of the parties in the way a first appellate court does, without realizing the distinction between the scope of the first appeal and the second appeal. Under section 100 of the Code of Civil Procedure, 1908 ("C.P.C."), a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by C.P.C. or by

any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. The scope of second appeal is thus restricted and limited to these grounds, as section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already chocked with high pendency of cases. 9. No doubt, the expression "law" used in the phrase "the decision being contrary to law" in the ground (a) mentioned in section 100 of the C.P.C. is not confined to "statutory law" only, but also includes the "principles of law" enunciated by the constitutional courts, which have the binding force of law under Articles 189 and 201 of the Constitution of the Islamic Republic of Pakistan 1973. And, it is an elementary principle of law that a court is to make a decision on an issue of fact on the basis of legally relevant and admissible evidence available on record of the case, which principle is also incorporated in the statutory law, that is, the first proviso to Article 161 of the Qanun-e-Shahadat Order 1984. The said proviso states in unequivocal terms that a judgment must be based upon facts declared by the Qanun-e- Shahadat Order to be relevant and duly proved. 10. The decision of a court is, therefore, considered "contrary to law" when it is made by ignoring the relevant and duly proved facts, or by considering the irrelevant or not duly proved facts. The expressions "relevant evidence" and "admissible evidence" are often used interchangeably, in legal parlance, with "relevant facts" and "duly proved facts" respectively, and a decision is said to be "contrary to law" and is open to examination by the High Courts in second appeal when: (i) it is based no evidence, or (ii) it is

based on irrelevant or inadmissible evidence, or (iii) it is based on non-reading or misreading of the relevant and admissible evidence. A decision on an issue of fact that is based on correct reading of relevant and admissible evidence cannot be termed to be "contrary to law"; therefore, it is immune from scrutiny in second appeal. A High Court cannot, in such case, enter into the exercise of re-reading and re-appraisal of evidence, in second appeal, and reverse the findings of facts of the first appellate court, much less the concurrent findings of facts reached by the trial court as well as the first appellate court. It has, in second appeal, no jurisdiction to go into the question relating to weightage to be attached to the statements of witnesses, or believing or disbelieving their testimony, or reversing the findings of the courts below just because the other view can also be formed on the basis of evidence available on record of the case."

50. In view of above discussions and reasons, it is obvious that the Impugned Judgments and Decrees of the Courts below are neither contrary to law nor contrary to any usage having the force of law. The concurrent Impugned Judgments and Decrees also reflect that the Courts below had not omitted to decide any material issue on law or usage having the force of law. On the contrary, the case of Appellant is barred under various provisions as discussed hereinabove. The Instant Appeals even fail to cross the minimum standards set up by Section 100 of the CPC. Reliance in this regard is placed upon ***"Bahar Shah and others versus Manzoor Ahmad" (2022 SCMR 284), "Zafar Iqbal and others versus Naseer Ahmed and others" (2022 SCMR 2006) and "Syed Rafiul Qadre Naqvi versus Syeda Safia Sultana and others" (2009 SCMR 254).***

51. In Zafar Iqbal's (supra) case, the Hon'ble Supreme Court and again define the applicability and scope of Section 100 of the Code of Civil Procedure, 1908 that:-

> "Appeal under section 100 of the Code of Civil Procedure, 1908 ("C.P.C."), a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by C.P.C. or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. The scope of second appeal is thus restricted and limited to these grounds, as section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Court deal with and decide second appeals as if those were first appeals: they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already chocked with high pendency of cases."

52. The law relating to adverse inferences and presumption of law and fact attract against the Appellant. The Appellant's failure to call evidence about the collateral secu3rity by way of oral or documentary contract or lacking the reference in the contents of such registered sale meant that it could not complain if the court drew from the facts which had been disclosed "all reasonable inferences as to what are the facts that the Appellant has chosen to depart from pleadings of earlier two suits and institution of third suit with altered prayer attracting doctrine of abandon of claims in previous two suits, failure

to discharge the burden in legal obligations or evidentiary value concern the silence or absence of a witness to demonstrate through oral testimony or lack to fulfillment of mandatory requirement of Article 79 of the Qanun-e-Shahadat Order, 1984.

53. The Honorable Supreme Court in case ***"Muzzafar Iqbal v. Riffat Parveen", (Civil Appeal No.307 of 2017)*** highlighted the concept of second appeal and scope of section 100 CPC which is delineated hereunder:

> "The High Court under the sphere of Section 100, C.P.C., can take cognizance of a substantial question of law rather than triggering interference on a pure question of fact. The Court should also formulate the question of law to meet the requirements of Order XLI, Rule 31, C.P.C. The right of appeal accentuates two fold and three-fold checks and balances to prevent injustice, and ensures that justice has been done with a noticeable differentiation between the two appellate jurisdictions; one is conferred by Section 96, C.P.C., in which the Appellate Court may embark upon the questions of fact, while in the second appeal provided under Section 100, **the High Court cannot interfere with the findings of fact recorded by the first Appellate Court, rather the jurisdiction is relatively delineated to the questions of law which is sine qua non for exercising the jurisdiction under Section 100, C.P.C.**, but in this case, the learned High Court only adverted to a non-issue in a hyper-technical manner without realizing that the amount was already deposited in view of the directions contained in the appellate judgment and instead of considering the actual grounds of appeal raised by the contesting respondents which may have a colossal weightiness and significance for challenging the appellate judgment, the High Court only embarked upon the controversy which had little value and no consequence at a much belated stage of proceedings; in fact, no such

> ground was even raised in the memo of second appeal filed under Section 100, C.P.C., by the appellant."
>
> Emphasized added.

54. For the above reasons, the Appellant has not shown that the judge of Appellate Court erred in either of the ways asserted in the grounds upon which Second appeal was admitted for hearing. For completeness, I should say that, if the Appellant had succeeded, I would have agreed with the Respondent that still cancellation of registered instrument was not asked for in previous two suits is again a barred of suit which has not discussed by two courts below.

55. The appeal is dismissed.

Judge

IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS
2nd Appeal No. S-64 of 2024

Applicant: Purshutam son of Naraindas
through Mr. Ajay Kumar Advocate Junior partner of
Mr. Sunder Das Advocate.

Respondents:
1. Sht. Seeta W/o Essar Das,
2. Teekam son of Essar Das,
through Mr. Ali Nasir Baloch advocate
3. Sub-Registrar Umerkot,
4. Mukhtiarkar (R) and City Survey Officer Umerkot,
5. Province of Sindh through Chief Secretary,
Government of Sindh Karachi
Through Mr. Ayaz Ali Rajpar,
Additional Advocate General.

20.03.2025

ORDER ON APPLCIATON u/s 12(2) CPC After final hearing, the learned counsel for the Appellant has filed application under section 12(2) C.P.C., to re-call order dated 07-10-2022 and 17-03-2025 whereby Respondent No.2 being surviving legal heirs have been substituted in place of respondent No.1 vide order dated 07-10-2022 and vide order dated 17-03-2025 application of the appellant to bring on record grand-daughters and grand-sons of deceased respondent No.1 has been dismissed through an speaking order while placing reliance on the dictum laid down in case law i.e. P.L.D 2016 Sindh 97. The Appellant had only remedy to file an appeal before the Apex Court against said Orders dated 07-10-2022 and 17-03-2025, if he is aggrieved with the said Order whereby the Respondent No.2 has been substituted the Respondent No.1 after her death. However, the

Appellant cannot invoke provision of section 12(2) C.P.C which has a limited scope and without first qualifying with the requirement of the essential ingredients of said provision. It lays strict conditions that when an order or judgment or decree has obtained through fraud or mis-representation or under coercion but none of the ingredient is attributed in the case of Appellant as Order was passed in the presence of Appellant and only remedy was to approach the apex Court by way of Appeal and not to re-agitate on frivolous ground. In view of above, the application filed by the appellant does not attract any ingredients i.e. “fraud”, “misrepresentation” or “coercion” as such the application is misconceived. order was passed in presence of appellant as per Hindu Personal Law, therefore, application under section 12(2) C.P.C is dismissed.

Judge

Adnan Ashraf Nizamani