

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 328 of 2001

Present:

Mr. Justice Khadim Hussain Tunio

Date of hearing: 11.01.2017

Date of Announcement: 27.02.2017

Plaintiff: Usman Yaseen through
Mr. Muhammad Irfan, Advocate.

Defendants: (1) DHA through Mr. Nazar
Hussain Dhoon Advocate

(5) Mst. Yaseen Tahir through Ms.
Shamsha.

J U D G M E N T

KHADIM HUSSAIN TUNIO J: The plaintiff has filed this suit for declaration, cancellation, possession, damages and permanent injunctions and prayed for following reliefs:

- 1. "To declare that the plaintiff is the lawful owner of the suit property bearing No. 157, 28th Street, Phase VI, Defence Housing Authority, Karachi, admeasuring 1000 Sq. Yards.*
- 2. To declare that the act of Defendant No.1, transferring the suit property in the name Of Defendant No.3, on the basis of forged and fictitious affidavit bearing No. 40749 dated 3rd March 1997 duly supported forged and fictitious*

NICs of the defendants No. 2 & 3, as illegal, unlawful and without any legal force.

3. To pass the judgment and decree against the defendant No. 1, to hand over the vacant peaceful physical possession of the suit property to the plaintiff along with damages of Rs. 5 Million (Rupees Five Million), as compensation/damages for having illegally, unlawfully and without complying the legal formalities, transferred the suit property in the name of defendant No.3. And also, against the defendants No. 2 & 3, for Rupees 5 million each for playing fraud and forgery with the plaintiff, who is a highly respectable professional person.

4. To pass judgment and decree against the defendants No.4 & 5, and in favor of the plaintiff for Rs. 2.5 Million each for having involved in the purchase in the suit property by forged and fraudulent transfers.

5. To pass the judgment and decree against the defendant No. 6, and in favor of the plaintiff for Rs. 5 Million as compensation for having committed fraud and forgery by issuing forged NICs bearing Nos. 517-93-148851 & 44,9-88-397134 to the defendants No. 2 & 3, on the bases of which all the defendants jointly, more particularly defendants No. 1, 2, 3 & 6 committed fraud and forgery.

6. To declare that the subsequent sale/purchase/transfer of the suit property from the defendant No.2 to defendant No. 5 is illegal, unlawful and without any lawful authority and the same declared null and void.

7. Cost of the suit.

8. Any other relief/reliefs which this Hon'ble Court deems fit and proper, in the circumstances of this case."

2. Briefly facts of the instant suit as stated in the plaint are that the plaintiff is a highly skilled professional, having done his graduation in Civil Engineering Technology from NED Engineering University, Karachi and thereafter he did his Masters in Civil Engineering from the University of California Berkley, USA. The plaintiff is registered with the Pakistan Engineering Council as well as State Board of Professionals Registrations, State of California USA. He is lawful owner of a plot, bearing No. 157, 28th Street, Phase VI, Defence Housing Authority, Karachi, admeasuring 1000 Sq. Yards, herein after referred to as suit property, having purchased the same from one Mst. Tayyaba Fuzail W/O fuzail Ahmed, R/O Bunglow No. 26 - B Block - P, North Nazimabad, Karachi, who was duly registered in category "B" of the defendant No. 1, vide registration No. AM-13505, after completing all the legal formalities as required by laws and the rules/by laws of the defendant No. 1. It is also pertinent to mention that all the requisite fees/charges of the defendant No.1 were paid by the plaintiff. After completing all the formalities the defendant No. 1, vide their letter No. DHA/Y/AM-16887 dated 29th January 1988, informed the plaintiff that in response to the plaintiff's application dated, 14.01.1988 for registration in category "B" he has been duly registered with the Defendant No.1, under category "B", vide registration No. AM-16887, after approval by the Executive board meeting No1/88, held on 23.01.1988. Accordingly, the Transfer Order was issued by the defendant No.1, in favor of the plaintiff. The purchase of the suit property by the plaintiff was facilitated through the defendant No. 7 & 8, in whose knowledge it was that the plaintiff is permanently residing in USA and visits Pakistan very occasionally and that every minute detail was known to them and such a fraud and forgery could not be possible without their connivance and involvement.

3. The plaintiff, being a Pakistani by birth, of and on travelled to Pakistan to meet his relatives and friends, and on 29.12.1986 got married to one Mst. Anila Hashmi D/O Tanveer Hussain Hashmi, having permanent residence at Lahore. This marriage took place at Lahore. The wife of the plaintiff accompanying him to USA, where the plaintiff was permanently residing and subsequently the wife also obtained the citizenship of the United States of America. The plaintiff, whenever visiting Pakistan, used to visit the suit property in order to check the same and also to ascertain the market conditions concerning the value of the property, as well as, the possibility of constructing his own house in his native land, more particularly being a father of a minor daughter. On his visit to Pakistan in August 2000, when the plaintiff visited the suit property, to his utter shock and disbelief there stood a complete bungalow (double story) with a name plate of one Muhammad Tahir, the husband of defendant No. 5 and also a notice that the suit property is FOR SALE and the suit property was locked. The plaintiff, on the next day, dispatched a letter dated 12.08.2000 to defendant No.1 informing them about the illegal and unlawful house constructed upon the property.

4. Later onwards, the plaintiff immediately after submitting his application with the defendant No.1 also met Major (Retd.) Sipra, who after going through the file of the plaintiff told him that the plaintiff in the year 1997 was declared dead by the defendant No. 3, who claimed to be the son of plaintiff and defendant No.2 who claimed to be the widow and mother of the defendant No.3 had given no objection to the defendant No.1 in favour of the defendant No.2 for transferring the suit property. The plaintiff

submitted an application to SHO Darakshan Police Station, District South, Karachi, with regards to the fraud and forgery committed by the defendant No. 1, 2& 8 and had particularly mentioned defendants No. 7& 8, as strong suspects as they had the access, as well as knowledge of all the documents, as well as the facts. The plaintiff again visited the suit property in the daytime and inquired from the watchman about Muhammad Tahir, husband of defendant No.5. The watchman informed that the illegal and unlawful house is for sale and the person to be contacted was Mr. Humayun. The plaintiff then called Mr. Humayun, who in turn informed the plaintiff that the suit property, along with the illegally and unlawfully constructed bungalow is owned by the defendant No. 5. On the request of the plaintiff, the brother of the defendant No. 5. Namely, Humayun arranged a meeting with his sister in order to verify the papers / file. Consequently a meeting was arranged at the suit property wherein the brother in law of the plaintiff, namely, Iqbal Fazal Butt, accompanied the plaintiff to the suit property, where the husband of the defendant No.5, namely, Mohammad Tahir, his brother in law, namely, Humayun, were already present. The plaintiff showed the original files / papers and informed them that they have defective file. The representatives of the defendant No. 5, namely, Mohammad Tahir and Humayun, her husband and brother, respectively after the meeting promised to contact the plaintiff, but to date neither the defendant No. 5, nor his representatives have contacted the plaintiff, much contrary to the promise made.

5. In other words, the mala-fide intentions and ulterior motives on the part of the defendant No. 5, is also evident. Had the hands of the defendant No. 5, would have co-operated with

the plaintiff, who by this time had started running from pillar to post to save his life long earnings for his family members. It is needless to mention here, how money is earned in a foreign land, where virtually corruption does not exist and where there is nothing known as easy money. Every penny and every cent is earned through hard labor and nothing else. If cases like this persist, overseas Pakistanis will refrain from investing in their homeland, if there is no safety of their investments. The defendant No.1, vide there letter No. DHA / M / A-7106 / Cord dated 25th November 2000, asked the defendant No. 6, to verify the genuineness of the National Identity Card of the plaintiff. The defendant No. 6, in turn, vide letter No. Regn. 107 / 3 / 00 Kar (East) T dated 13.02.2000, which in fact should have been 13.02.2001. Nonetheless the letter of the defendant No. 6 has been written in response to the letter of the defendant No. 1.

6. One fails to understand, and even otherwise it is a matter of common sense, logically speaking the defendant No. 1 should have verified credentials of the defendant No. 2 & 3, who claim to be the wife and son of the plaintiff. Their credentials were never verified for the reasons best known to the defendant No.1 and why the verification of the NIC of the plaintiff was required by the defendant No. 1, is beyond the imagination and reasonableness, but again the defendant No. 1, is manned with a battery of cream retired Army personnel, and they know better right and wrong. The plaintiff apart from moving an application with defendant No.1, also moved an application with the Chief Executive of the Islamic Republic of Pakistan, and the Commander V Corp, Karachi, apprising them of the fraudulent transfer of the suit property and praying therein that justice be done to the plaintiff and initiate criminal proceedings against the

persons/functionaries involved in this criminal act, but surprisingly to date no action has been initiated against the culprits. The suit property was transferred in the name of the defendant No. 3, on a no objection of the defendant No. 2, by the defendant No. 1, without obtaining any letter of Succession/Administration, and measurably on a bogus affidavit of the defendant No. 2, the suit property was transferred in the name of defendant No. 3.

7. The plaintiff after running from pillar to post managed a letter issued by the defendant No. 1, which is dated 10th March 2001, informing the plaintiff that the suit property was first transferred to the name of defendant No. 3, who claimed to be the son of the plaintiff. The defendant No. 2, claimed to be the widow of the plaintiff and the defendant No. 1, without demanding the letter of Administration / Succession from the defendants No. 2 & 3, measurably and barely transferred the suit property on the basis of an affidavit of the defendant No. 2, giving no objection in favor of defendant No. 3. This act of defendant No. 1, is illegal, unlawful, unjustified and against the practice of law which requires obtaining a letter of Succession/Administration which is to be obtained by the legal heirs of the deceased in case of transfer of moveable/immovable transfer of property is involved.

8. In the instant matter, the connivance and involvement of the defendant No. 1, can be well judged from the fact that the defendant No.1, did not even bother to ask a nikah-nama or a divorced letter from the defendant No. 2, as the defendant No.2, in her affidavit bearing No. 40749 dated 3rd March 1997 has stated

that she is now married with one Muhammad Anwar Baig and prior to this man she was married to plaintiff. The National Identity Card of the defendants No. 2 & 3 have been issued by defendant No. 6, thereby committing by fraud or forgery, hand in hand with defendant No. 1, so much so, no verification was demanded or carried out by the defendant No. 1, with regard to the NICs of defendant No. 2 & 3. The plaintiff, from the letter of the defendant No. 1, dated 10th March 2001 that the defendant No. 2 & 3 after active connivance of the defendant No. 1 by playing fraud and forgery, illegally and unlawfully sold the suit property to the defendant No. 5, the present occupant, who has illegally and unlawfully constructed a double storied bungalow.

9. The plaintiff has executed a Special Power of Attorney in favor of his brother in law, namely, Jawed Tanveer Hashmi S/O Tanveer Hussain Hashmi R/O 222-C, Jauhar Town, Phase I, Lahore, holding NIC, bearing No. 267-54-391932 for the purpose of this suit/suit property only. The cause of action accrued to the plaintiff, therefore, he has filed present suit against the defendants.

10. After service of the summons, the defendant No. 1, 5, 7 & 8 filed their written statements separately and denied the case of the plaintiff in *toto*. They submitted that the defendants had not committed any fraud or forgery in respect of the suit property. The suit property was transferred in favor of the plaintiff on the basis of proper documents as well as by adhering to the procedure in vogue for transfer of property to legal heirs after demise of the owner. They have also submitted that the transfer of suit property from the name of plaintiff to the legal heirs as well

as subsequent transfer has taken place in accordance with procedure in vogue with the defendant authority. They have further submitted that the plaintiff did not acquire the ownership of the property in dispute at any time. They have further submitted that the plaintiff kept the property for open transfer in terms of rules, regulations and practice of the DHA. Also, that the defendant No. 5 is residing in the disputed property with her husband and children since its construction. The defendant further submitted that the transfer of the suit property in favor of the defendants No. 5 has been acquired lawfully for valuable consideration and in good-faith. The suit against the defendants No. 2 to 4 and 7 was ordered to be proceeded ex-parte vide order dated 09.08.2004, 30.08.2004, and 25.10.2004 respectively.

11. The following issues were framed by the court on 19.09.2005.

ISSUES

1. *Whether the plaintiff is the lawful owner of the suit property?*
2. *Whether the transfer of suit property by defendant No.1 in favor of the defendant No.2 & 3 was authorized and lawfully made?*
3. *Whether the defendants No. 2 & 3 in connivance with defendant No.1acquired the transfer of the suit property in their favor by fraudulent means and committed forgery, if so, its effect?*

4. *Whether the sale transaction as between defendant Nos. 2 and 3 and defendant No. 5 being based on fraud is liable to be cancelled?*
5. *Whether the defendant No.5 had obtained a registered sub lease lawfully of the said plot in Form-A from defendant No.1, if so, its effect?*
6. *Whether the defendant No. 5 had constructed a double stories bungalow prior of the filing of this suit on the said plot at her own cost in accordance with the plan duly approved by the competent Authority, if so, its effect?*
7. *Whether the plaintiff is entitled to claim damages from defendants, if so, what amount?*
8. *What should the decree be?*

12. Plaintiff filed his affidavit in evidence. He produced his affidavit in evidence, passport No. 15357806 (first page only), transfer order dated 03.02.1998, photocopy of application for registration as member of DHA dated 24.01.1988, photostate copy of payment receipt No. 264855 dated 22.01.1988, number 264595 dated 18.01.198, photocopies of pay-order No. 158711 dated 16.01.1988 and P.O No. 158710 dated 16.01.1988, drawn on B.C.C.I., photocopy of transfer affidavit, sworn on 16.01.1988 undertaking of Mrs. Tayaba Fuzail W/O Fazail Ahmed (photocopy), photocopy of transfer order dated November-1987 duly cancelled (original in possession of DHA), photocopy of

receipt for associate member dated 16.01.1988, photocopy of agreement to sell dated 18.01.1988 executed in between Mrs. Tayaba Fuzail and Osman Yasin, receipt of payment of Rs.4,00,000/1 (Rs. Four Lacs only), and nikah-nama of Mr. Osman Yasin , photocopy of application to the administrator by Osman Yasin dated August, 12, 2000, photocopy of application to SHO Drakhashan P.S dated 14.02.2001(all original seen and returned) at Ex. 5 and 5/1to 5/16 respectively. The plaintiff was cross-examined by the learned counsel for the defendant No.1 and defendant No. 5 respectively. Thereafter, his side was closed.

13. On the other hand, Defendant No. 1, DHA, filed affidavit in evidence of administrative officer Major (Retd.) Shamim Ahmed Malik. He produced his affidavit in evidence, application submitted by Farooq Osman dated nill for transfer of plot in the name of legal heirs, in affidavit of Farooq Osman, Death certificate of Osman Yasin, Letter / Application dated nill received on 04.02.1997 moved by Farooq Osman for issuance of certified true copy of transfer order, photocopy of affidavit for loss of transfer order, photocopy of NIC of Farooq Osman bearing No. AX212679, photocopy of cuttings of Jasarat newspaper dated 01.02.1997, daily The News dated 1st February 1997, photocopy of letter dated 20 February 1997 bearing file No. DHA / G/A Coord, photocopy of letter dated 07.03.1997 issued by DHA to Farooq Osman along with an affidavit, photocopy of NIC No. BK960837 of Mst. Tahira Anwar, photocopy of transfer order dated 03.02.1988, photocopy of transfer order dated 09.04.1997, photocopy of transfer order dated 24.04.1997, photocopy of pro-forma, photocopy of statement of account, photocopies of NIC AB38476 & NIC AX212679 of Siddique Sharif and Farroque Usman, photocopy of mutation application by Farroque Usman, photocopy of transfer order dated 09.04.1997, Photocopy of

transfer affidavit, photocopy of undertaking dated nill, photocopy of transfer order dated 5.5.1997), photocopy of proforma of minutes sheets, photocopy of statement of account, photocopies of NIC of Siddique Sharif and Mst. Yasmin Begum, photocopy of transfer letter in favor of Mst. Yasmin Tahir, photocopy of transfer order dated 22.4.1997, photocopy of affidavit of Siddique Sharif and photocopy of undertaking of Siddique Sharif (all original seen and returned) at Ex.D-6/1 and Ex.D-6/31 respectively. Defendant No.5 filed affidavit in evidence of her attorney and husband namely Muhammad Tahir. He produced his affidavit in evidence, photocopy of general power of attorney, photocopy of sale agreement dated 25/-/1997, photocopy of receipt nill of Rs. 10 Lac (Rupees ten Lac), photocopy of transfer affidavit submitted by Siddique Sharif, photocopy of application for mutation/transfer made of Siddique Shari, photocopy of Loan affidavit of Siddique Sharif, photocopy of transfer order dated 05/May/1997, photocopy of handing/taking over certificate No. 7106, photocopy of Form A sub-lease in favor of Mst. Yasmin Tahir, photocopy of application for issuance of site plan, photocopy of site plan, photocopy of approval letter dated 02.10.1997, photocopy of regularization dated 22.8.2000(all original seen and returned) at Ex.D-6/A/1 to D-5/A/14 respectively. They were cross examined by the Learned Counsel for the plaintiff. Thereafter, their side was closed.

14. I have heard the learned counsel for the plaintiff, defendant No.1 and defendant No.5. Perused the material available on record carefully with their assistance.

15. Learned counsel for the plaintiff has argued that the plaintiff has proved his case by adducing oral as well as documentary evidence; that the plaintiff has been cross-examined

by the Defendants counsel but his evidence has not been shattered by the defence; that the plaintiff produced documentary evidence and oral evidence and proved that he is lawful owner of the suit property; that the Defendants have got transferred the suit property fraudulently by preparing forged and fabricated documents; that the Defendants caused damages to the plaintiff, committed cheating by preparing forged documents and transferred the suit property in their favour; that the Defendants failed to prove that the suit property was transferred in their favour in lawful manner.

16. Learned counsel for the Defendant No.1 argued that the plaintiff has not approached the court with clean hands; that the time is not essence of contract; that the suit is bad for necessary party; that the principle of aged person that the plaintiff has made admission in his evidence. He has cited handbook relating to Rules of DHA, *Ch. Muhammad Shafi vs. ShahmimKhanum*(2007 SCMR 838-842), *Muhammad Hussain and others vs. Dr. ZahoorAlam*(2010 SCMR 286-299), *Mst. Maqbool Begum Etc. vs. Gullan and others* (PLD 1982 SC 46-48), *Lahore Cantt Cooperative Housing Society Ltd. Through Secretary vs. Muhammad Anwar and 11 others* (2007 CLC 160-162), *Ali Muhammad and 2 others vs. Gulfam and another* (PLD 1983 Karachi 99-111) and *Muhammad Bashir vs. Muhammad Shafi*(NLR 1984 A.C 211-214).

17. Learned counsel for the Defendant No.5 has argued that the Defendant No.1 has transferred the suit property in lawful manner in favour of the Defendant No.5; that the Plaintiff has not made any allegation of fraud, concealment of facts or misrepresentation against the Defendant No.5 in the plaint and evidence; that the plaintiff has not alleged any specific allegation

of fraud; that nothing has been brought on record regarding visits made by the plaintiff from time to time to the suit property; that the plaintiff has not approached the Defendant No.1 nor made any payment since 1988 to 2000; that the plaintiff has not disclosed the date of his arrival in Pakistan; that the plaintiff has made many allegations against Defendant No.1 but could not substantiate the same; that the plaintiff has not challenged authenticity or the genuineness of the Death Certificate issued by the KMC; that the Defendant No.5 is bonafide purchaser of the suit property and same is covered by the provision of Section 41 of Transfer of Property Act. The Defendant No.5 has constructed the house within four years during said period plaintiff never contracted with the Defendant No.1 or Defendant No.5. He has cited case law reported in *Kanwal Nain and 3 others vs. Fateh Khan and others (PLD 1983 SC 53)*, *More Khan and others vs. Imam Bux and others (PLD 1959 (W.P) Karachi 767)*, *Mst. Asia Latif vs. Tariq Muhammad Khan and 8 others (2007 YLR 1636)*, *IjazBaig and 16 others vs. IrshadBaig and 2 others (2003 CLC 1805)*, *Muhammad Mashooq and another vs. Rehmat Ali alias Ishaq and 14 others (2007 CLC 1679)*, *Talib Hussain vs. Babu Muhammad Shafi and 12 others (PLD 1987 Lahore 04)* and *Attaur-Rehman and another vs. Abdul Wahab and 13 others (2007 MLD 1605)*.

18. I have given due consideration to the contentions raised by the learned counsel for the respective parties and carefully considered the material available on record with their assistance. My findings on the above issues with reasons are as under:-

FINDINGS

Issue No.1.	Affirmative
Issue No.2.	Negative

Issue No.3.	Affirmative
Issue No.4.	Affirmative
Issue No.5.	Negative
Issue No.6.	Accordingly
Issue No.7.	Accordingly
Issue No.8	Suit Decreed with no order as to costs.

ISSUE NO.2

'Whether the transfer of suit property by defendant No.1 in favor of the defendant No.2 & 3 was authorized and lawfully made?'

19. The burden to prove this *issue* squarely falls upon the defendants because it (transfer in favour of defendant nos.2 and 3) has *prima facie* resulted in instant cause.

Before examine the merits of the instant case in search of an *answer* to above issue, the *peculiar* facts of instant case ask me to *first* say that it was / is *always* the authority (defendant no.1) to examine *competence* and *validity* of any move for change of transfer therefore, whenever a question arises with regard to *validity* of a transfer, the *initial* burden shall always remain upon *authority* and *beneficiary* to establish that it was *valid* and *lawful*. The custodian of record of the *rights* should always establish / prove to have acted *bonafide*, *fairly* and *judiciously* so that this (exercise of procedure) be not made as a *tool* to defraud or deprive one of his legitimate and lawful right or property. A sense of assurance of proper thrashing / scanning of every single attempt for change of *title* or *right* , as per dictates of law, shall *surely* discourage fraudulent or

fictitious application (s). Worth to add that even in *absence* of relevant rules, the authority shall not stand absolved from establishing good faith, honestly and to have acted within the precincts of the power before insisting *validity* of an action. Reference may be made to the case of Pir Imran Sajid(2015 SCMR 1257) wherein it is held as:

“It is now well laid down that the object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mindbut objective can be achieved by following the rules of justness, fairness, and openness in consonance with the command of the Constitution enshrined in different Articles including Article 4 and 25. The obligation to act fairly on the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of the justice.

Since, exercise of *discretion* is always subject to a *move* which results in benefiting one therefore, the beneficiary is always under an obligation to establish *bonafide*. Reference in this regard can well be made to the case of AmjadIkram2015 SCMR 1 wherein it is held as:

‘It is an equally settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same. Reference in this behalf may be made from the judgments of this Court, reported as....’

20. Now, I would revert to merits of the case. The defendant (s) have claimed change of title in name of the defendant nos.2 and 3 in consequence to opening of succession (death of plaintiff) and it is claimed that after the death of Plaintiff the Defendants No. 2 and 3 approached the Defendant No.1 by

submitting application for transfer of the suit property in their favour being widow and son of the plaintiff. They have reiterated same contentions as pleaded in the written statement and in their affidavits in evidence. They have produced application for transfer of plot in the name of legal heirs Ex.D-6/2, Affidavit of legal heir i.e. Farooq Osman at Ex. D-6/3, Death Certificate at Ex.D-6/4. Such clear stand *purely* rests on *two* counts i.e death of plaintiff (admitted owner) and status of defendant nos.2 and 3 to be *legal heirs* of plaintiff (admitted owner). There can be no *denial* to legal position that it was never the competence of the defendant no.1 to have determined both the said *counts* as same require proper *inquiry* by competent *forum / person*. Thus, it was always obligatory duty of the defendant no.1 to have satisfied *itself* on said *two* count (s) which , regretful to say, was never adhered to. This shall stand evident from the fact that application for issuance of certified true copy at Ex.D-6/5 transpires that the CNIC Number and the name of the person who identified the legal heirs have not been shown in said documents. The marks of identification of the alleged widow and son of the plaintiff are also not shown in the said documents; they have not been identified by any competent Authority/person. The said suit property has been transferred by the Defendant No.1 in absence of any Letter of Administration, issued by competent Court of law, as required under Section 278 of the Succession Act or a decree with regard to status of the defendant nos.2 and 3 as *only* surviving legal heirs hence legally entitled to inherit the same. The byelaws alleged to have been deposed by DW- Major (Rtd) Shamim Ahmed Malik and his admission that they have transferred the suit property without directing the Defendants No. 2 and 3 for producing the Letter of Administration. DW also said that the Annexure A/2 (Death Certificate of Plaintiff) was not

verified. He did not know who used to issue Heirship Certificates during those periods. He also deposed that as per record there was no original or photocopy of NIC of plaintiff Osman Yasin on the file. He also deposed after verifying the Ex.D-6/3 that the name of Mst. Tahira Begum has not been mentioned who was alleged to have been ex-wife of the Plaintiff. He has also deposed that it is not clear from the record that it was verified that Mst. Tahira was/is wife of plaintiff when Farooq informed that title documents of the property in question were lost. He has also deposed that they did not ask for any police report but they have issued the documents as per their procedure. They also did not ask for production of Succession Certificate from Farooq Osman. Though, it was attempted by saying that in the year 1997 there was no requirement of production of/asking to produce Succession Certificate as per their byelaws. Not only this but DW has admitted the suggestion put forth by the learned counsel for the plaintiff that it is correct that the transfer has not been effected as per Article 34 of the Book which *however* cannot legally absolve an authority to act *fairly, honestly* and with application of a *prudent mind* particularly when this witness could not state the provision of law, which was applicable at that time and had justified vesting jurisdiction in *defendant no.1* in doing what it (defendant no.1) legally was never competent i.e to determine said *two* counts. Here, I would insist that whenever custodian of a Record of Rights is going to entertain an application for change of title with reference to death of *owner* it shall always satisfy itself with regard to said *two* count (s) i.e :

- i) *death of recorded owner; and*
- ii) *status of legal heir (s), seeking transfer of title in their names /favour*

and if mechanism / procedure does not provide a *satisfactory* answer then procedure, having binding effects, shall be asked to be adopted i.e a verified declaration to effect of '**death**' and '**verified status of legal heirs**' which *too* by competent forum / quarter *preferably* a '**decree to such effects**'.

21. Without prejudice to above, I would attend to other aspect of the issue i.e '**death of plaintiff**'. I am conscious that the plaintiff, being alive, was not seriously objected by the defendants else there would have been such '**issue**' which means that such claim of the plaintiff was not *disputed*. There is no better piece of evidence other than the plaintiff's word, who is alive in this world and deposing that he never died and said piece of evidence cannot be rebutted by sufficient oral as well as documentary evidence. Even otherwise, *prima facie* the burden would always remain upon the *asserters* to prove death of a person as has been explained by Article 123 and 124 of the Qanun-e-Shahadat Order. There is *prima facie* failure on part of the defendant no.1 in exercising the jurisdiction vested in it (defendant no.1) to justify satisfaction of said two *counts* whereby plaintiff stood deprived of his guaranteed protection of '**property rights**'. Further, the defendant nos.2 and 3 also have not chosen to come forward to shoulder their *title* as legal, valid and lawful. Surprisingly, the Defendants No. 1 to 5 have not examined the Defendants No.2 and 3 in support of their case or anybody else to substantiate the very *root* / foundation of their title i.e death of plaintiff and entitlement of the defendant nos.2 and 3. The Defendant No.5 has taken a very weak plea in his written statement as well as in evidence that the suit property was lying open, abandoned and even no boundary wall was got constructed by the plaintiff and he never visited the same at any time. It should suffice for such *plea* that even if one leaves its *property* open yet it is no ground to

occupy the same because the laws of the land guarantee protection to *property right* and does not necessarily require one to build a boundary wall before insisting guaranteed protection. Since, it stood *prima facie* established that plaintiff is *alive* hence transfer in name of the defendant nos.2 and 3 with reference to claimed death of plaintiff was / is illegal hence any superstructure raised on such *foundation* , in law, cannot stand. It has been held in case of *Yousuf Ali vs. Mohammad Aslam Zia (PLD 1958 SC (Pak) 104)*, it has been held that:

‘if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded.’

It has been held in case of *Executive District Officer (Education), Rawalpindi vs. Mohammad Younas (2007 SCMR 1835)*, that:

“It is a settled law that when the basic order is without lawful authority then the superstructure shall have to fall on the ground automatically as law laid down by this Court in Yousuf’s Ali case(PLD 1958 SC 104).

In another case of *Muhammad Idris and others vs. Federation of Pakistan through Secretary Ministry of Finance and others (PLD 2011 SC 213)* , the honourable Supreme Court held that:

“since, admittedly, the amendment made in section 11(3)(d) of the Act of 1974 by the Finance Act, 2007 was unconstitutional and illegal, the appointment of Respondent No.3 made under an unconstitutional and illegal legislation would not remain unaffected as the foundation on which its superstructure rested stood removed.”

Further, in the case of *Province of Punjab through District officer (Revenue) District Collector Kasur vs. Border Area Committee*

through Chairman and others (PLD 2011 SC 550), the Honourable Supreme Court has held as under:-

“This factual sequence is borne out from record and the same could not be controverted by any party to this case before us. From the facts narrated above it is quite clear that allotment of the relevant parcel of land by the Border Area Committee in favour of the respondent on 10-5-1971 was in clear violation of the prohibition ordered in that regard by the Provincial Government and, thus, not only the said allotment was totally without jurisdiction but the entire superstructure built upon the same was also without any lawful foundation.”

In another case reported as *Rehmatullah and others vs. Saleh Khan and others (2007 SCMR 729)*, the Honourable Supreme Court has observed as under:-

“It is settled law that when the basic order is without lawful authority then all the superstructure shall fall on the ground automatically as law laid down by this Court in Yousuf Ali’s case (PLD 1958 SC 104) and Crescent Sugar Mills case (PLD 1982 Lahore 01).”

In another case reported as *Muhammad Tariq Khan vs. Khawaja Muhammad Jawad Asami and others (2007 SCMR 818)*, the Honourable Supreme Court has held as under:-

“It is settled law that when the basic order is without lawful authority then the superstructure shall have to fall on the ground automatically as law laid down by this Court in Yousuf Ali’s case (PLD 1958 SC 104).”

22. In the light of above position and circumstances, I am of the opinion that the Issue No.2 that the act of the Defendant No.1 for transfer of suit property in favour of the Defendants No.2 and 3 on the Misc. Application for transfer of suit property as well as transfer of the same in favour of the Defendants No. 4 and 5 being

purchased property is illegal and unlawful. Thus issue No.2 is answered as **Negative**.

ISSUE NO.1

'Whether the plaintiff is the lawful owner of the suit property?'

23. Since, it has never been a matter of dispute that plaintiff was the lawful owner of the suit property which *however* substituted with transfer of ownership in names of the defendant nos.1 and 2 with reference to claimed death of the plaintiff. The Defendants even have admitted that the Plaintiff was lawful owner of the suit property but after his death the same was transferred in the name of his alleged widow and son from whom the Defendant No.5 purchased the same, but none of the Defendants have denied the ownership of the plaintiff or adduced any sufficient evidence on this issue in rebuttal of the evidence adduced by the plaintiff. Since, the foregoing issue has been answered as '**negative**' the ultimate effect thereof would be nothing but restoration of title and status of the plaintiff as '**lawful owner**'. Accordingly, this issue is decided as **Affirmative**.

ISSUE NO.3

"Whether the defendants No. 2 & 3 in connivance with defendant No.1 acquired the transfer of the suit property in their favor by fraudulent means and committed forgery, if so, its effect?"

24. Since it has been held under Issue No.2 that the transfer of suit property in favour of the Defendants No. 2 & 3 from the name of the plaintiff is illegal, void and without lawful authority, therefore, answer to this issue could be nothing but '**affirmation**'.

However, I would add here that where one was not entitled for a thing *directly* yet gets it *indirectly* then same shall be nothing but an outcome of '*fraudulent means*'. Needless to say that where it is established that one has obtained a *thing* illegally then requirement of law would be nothing but to bring things to its *earlier* (legal) stage at *least* for which point of *limitation* and *multiplicity* shall not operate as a bar to make things '**corrected**'. Reference in this regard can well be made to the case of Mehran Khan PLD 2016 Lahore 617 wherein it is held :

“ On the strength of fact finding report and judicial verdict the respondent no.6 was quite justified in recalling the impugned mutations. The contention of learned counsel for the petitioners while relying upon the judgments reported as Hakim Muhammad Buta and another v. Habib Ahmed and others' PLD 1985 SC 153), 'United Bank Limited and others v. Noor-un-Nisa and others' (2015 SCMR 380), Dildar Ahmed and others v. Member (Judicial-III) BOR, Punjab, Lahore (2013 SCMR 906) and Muhammad Amir and others v. Mst. Beevi and others (2007 SCMR 614) that the revenue hierarchy after a considerable delay was not within its jurisdiction to review the mutations, is misconceived. **In fact, a duty is cast upon revenue hierarchy to ensure that his record is free from the elements of fraud and whenever such element of fraud is unfolded to him or brought to his notice in any manner whatsoever at any time, he should rectify the same. The question of limitation is wholly irrelevant in such like matter.** When it is proved at two different forums that respondent no.1 was not a mentally fit person and his property was got transferred by practicing fraud and this is the element which vitiates all

solemn acts and any instrument / mutation / judgment or decree obtained through fraud is nullity in the eye of law and has to fall down whenever it is challenged. Safe reliance can be placed upon the judgments reported as Muhammad Younus Khan and 12 others v. Government of N.W.F.P through Secretary, Forest and agriculture, Peshawar and others 1993 SCMR 618 and Mst. ZulaikhanBibi through L.Rs and others v. mst. Roshan Jan and tohers2011 SCMR 986

In another case of Peer Baksh through LRs & Ors 2016 SCMR 1417 it is held as:

*'5. It is settled law that limitation does not run against a void transaction nor efflux of time extinguishes the right of inheritance. **Equally a mutation is not a proof of title and a beneficiary thereunder must prove the original transaction.** Reference is made to the cases of Muhammad Iqbal v. Mukhtar Ahmed (2008 SCMR 855), Hakim Khan v. Nazeer Ahmed Lughmani(1992 SCMR 1832. These requirements of law have not been met by the petitioner.*

The issue No.3 is accordingly answered in '**affirmation**' and effects of such *answer* , as discussed above.

ISSUE NO.4

"Whether the sale transaction as between defendant Nos. 2 and 3 and defendant No. 5 being based on fraud is liable to be cancelled?"

25. In view of the findings recorded under foregoing issues as well as oral and documentary evidence adduced by the plaintiff, the Defendants have miserably failed rebut the same through tangible and confidence inspiring oral as well as documentary evidence. Though they have produced some documents but the CNIC number, marks of identifications or proper identification by competent Authority of the person of the Defendants No.2 and 3 and without asking for producing the Letter of Administration, the transfer as well as sale of the suit property in favour of the Defendants No. 4 and 5 is illegal and void. The Hon'ble Apex court has been pleased to hold that when the foundation is weak then the super-structure constructed upon it must fail.

26. Since the basic transfer of the suit property from the name of the plaintiff in favour of the Defendants No. 2 and 3 is depending on the alleged death of plaintiff who is very much present in court in these proceedings with a number of documentary evidence such as copy of passport, NIC etc, hence the very foundation of defence has been shattered as such all the subsequent events are illegal, unlawful and without lawful authority as such liable to be set aside and declared so. Therefore, the issue is answered as **Affirmative**.

ISSUE NO.5

"Whether the defendant No.5 had obtained a registered sub lease lawfully of the said plot in Form-A from defendant No.1, if so, its effect?"

27. Since it has been already observed while recording findings on Issues No. 1 to 4, therefore, I am of the view that the defendant No.5 had not obtained a registered sub lease deed and Form-A

from the Defendant No.1 in lawful manner as the title in name of the defendant nos.2 and 3 was never complete and perfect rather, as already discussed, was fraudulent one, hence they were never competent to *lawfully* transfer the rights. It is also a matter of record that suit property was transferred unlawfully in favour of the Defendants No. 2 to 4; was transferred without observing all the legal formalities and the same was transferred on the basis of simple application in favour of the persons without proper verification, identification of persons as well as documents produced and relied upon by them. It also needs not be mentioned here that **'no rights and liabilities could be attached to or arise out of a void contract'** nor in law a **superstructure could be built on 'no foundation'**. Reliance can well be made to the case of *Abdul Ghani v. Yasmeen Khan* 2011 SCMR 837 wherein it is held as:

'It may not be out of place to mention that 'no rights and liabilities could be attached to or arise out of a void contract. Minor could not be burdened with liability of a void contract, thus Court''

28. Further, it would not need to be reiterated that before insisting the provision of Section 41 of the Transfer of Property Act one shall have to establish that he acted vigilantly and in *good faith* and burden to prove this lies upon the beneficiary as shall stand evident from referral to Section 41 of the Act *itself* which reads as:

'Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for

consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it; provided that the transferee, after taking reasonable care to ascertain that *the transferor had power to make the transfer, has acted in good faith.*

29. To substantiate *good faith*, the beneficiary shall have to establish that he had probed from point-A to point-Z and entire chain of Vendor must be probed into to see that there was no missing link in chain nor same was clouded by suspicious doubtful circumstances. In the instant matter the defendant no.5 has not established to have acted in *good faith* and had probed into legality of the title of the defendant nos.2 and 3 from point-A to point-Z because, as already pointed out and discussed under the foregoing issues that DW Major (Rtd) Shamim Ahmed Khan has admitted that the suit property was transferred in favour of the Defendants No.2 and 3 without verifying the Death Certificate, Affidavits and Application for transfer of suit property and newspaper clipping produce at Ex.D-6/8 and Ex.D-6/9. Even the Defendants have failed to produce the author of the Death Certificate in order to prove its genuineness.

It has been held in the case reported as *Khan Mohammad Yousuf Khan Khattak vs. S.M. Ayoub and 2 others (PLD 1973 SC 160)*, which reads as under:-

“Even documents are brought on record and exhibited without objection, they remain on the record as “exhibits” and faithful copies of the contents of the original but they cannot be treated as evidence of the original having been signed and written by the persons who purport to have been written or signed them, unless the writing or the signature of that person is proved in terms of the mandatory provisions of section 67 of the Evidence Act.”

It has been observed by the Honourable Supreme Court in case of *Muhammad Ashraf Khan Tareen and others Vs. The State and another, reported in (1996-SCMR-1747)*, that:-

“The newspapers cuttings have not been properly proved in the required by law of evidence. Particularly in a criminal case such cuttings cannot be used either in favour of the prosecution or in favour of the defence, unless author of the same is examined in Court as a witness. The case of Ghulam Muhammad Vs. The State (1985-SCMR-1442), cited on behalf of the appellant has no force”.

From above, it appears that since title in names of the defendant nos.2 and 3 was *prima facie* illegal and there was no proper probe, conducted by the defendant no.5, hence the defendant no.5 *legally* cannot take refuge of Section 41 of the Act. Therefore, Issue No. 5 is answered as **Negative**.

ISSUE NO.6

30. So far this issue is concerned, it is not denied from either party that Bungalow was constructed by the Defendant No.5 prior to filing of the suit, as the plaintiff himself averred in his pleadings and affidavit in evidence that at the time of his visit of Pakistan, he visited the suit property and found double storied complete bungalow on 12.08.2000 and a notice that property is for sale and same was locked, but it would be observed that the Defendant No.5 has not got transferred the suit property in her favour through lawful manner therefore, she was not competent to raise construction on the property owned by someone else. Though she has produced documents i.e Application for issuance of Site Plan at Ex. D-5/A/11, Site Plan at Ex.D-5/A/12, Approval Letter dated 02.10.1997 at Ex.D-5/A/13, but she has not examined

the author of the said documents in support of her case. Therefore, the same are not admissible in evidence, though exhibited in evidence without objection. I am fortified in my view with the principle laid down in the case reported as *Khan Muhammad Yusuf Khan Khattak vs. S.M.Ayoub and 2 others (PLD 1973 SC 160)*, wherein the Honourable Supreme Court has held that even documents are brought on record and exhibited without objection, they remain on the record as “exhibits” and faithful copies of the contents of the original but they cannot be treated as evidence of the original having been signed and written by the persons who purport to have been written or signed them, unless the writing or the signature of that person is proved in terms of the mandatory provisions of section 67 of the Evidence Act. Therefore, the issue is answered accordingly. However, while parting the defendant no.5 may resort to remedy available with reference to Section 51 of the Transfer of Property Act subject to establishing required ingredients but *legally* cannot retain an *ill gotten* thing under a title which has no foundation and defendant no.5, per settled principle of law, has to sail and sink with the one under whom he is claiming.

ISSUE NO.7

31. To prove this issue, Plaintiff has claimed general damages sustained by him due to act/actions of the Defendants and Defendants have not rebutted the evidence of the plaintiff on this issue while adducing the authenticated evidence. The plaintiff appeared in the case was cross-examined by the Defendants, but his evidence on material aspects more particularly pertaining to damages was not

questioned/challenged and as such this omission to cross-examine the witness on material point would lend support to the case of plaintiff. It is a cardinal principle of evidence that omission to cross-examine a witness on a material part of his evidence gives rise to inference that truth of his statement has been accepted. Such un-challenged statement of witness should be given full credit and usually accepted as true unless disproved by reliable, cogent and clear evidence. However, it is material to add here that since the plaintiff has not specifically established / proved that defendant no.5 had been in league or collusion with the defendant nos.1, 2 and 3 or that fraudulent transaction in names of defendant nos.2 and 3 was result of any of nexus, knowledge or deliberation on part of the defendant no.5. In absence thereof, it would not be legally justified to penalize the defendant no.5 for acts (fraud) of others or a *negligence* of defendant no.5 in probing into title of the defendant nos.2 and 3 should result in burdening her (defendant no.5) with damages. Accordingly Issue No.7 is answered in **Affirmative** but to extent of defendant nos.1 to 3 *only*.

ISSUE NO.8

32. In view of the above position, discussion as well as case law cited above, the suit of the plaintiff is decreed with no order as to costs except second part of prayer clause-3.

JUDGE

Dated: 27thFebruary 2017

