

IN THE HIGH COURT OF SINDH, KARACHI

Present

Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Zulfiqar Ahmad Khan

HCA No.67 of 2007

Muhammad Hussain Qureshi Appellant
Versus
Mrs. Mumtaz Muzakir and others Respondents

HCA No.73 of 2007

Tariq Qureshi and another Appellants
Versus
Mrs. Afroz Shah and others Respondents

CMA No. 219 of 2017 and CMA No. 731 of 2017

Dates of hearing : 17.12.2018

Date of order : 14.03.2019

M/s. Muhammad Vawda and Shariq Razzaq, Advocates for Appellants

M/s. Khalid Javed Khan and Uzair Qadir Shoro, Advocates for Auction Purchaser

Syed Mureed Ali Shah, Advocate for Respondents Nos.2, 3 & 8

Mr. Asim Mansoor Qureshi, Advocate for Respondents Nos.4 to 9

Mr. Ahmed Pirzada, Advocate

Mr. Mushtaq A. Memon, Advocate for Respondents Nos.5 & 7

Mr. Asadullah Shaikh, Advocate for Respondent No.9

Mr. Kashif Paracha, DAG alongwith Mr. Shajjar Abbas, Deputy Military Estate Officer, Karachi

ORDER

Zulfiqar Ahmad Khan, J:- This order will dispose of CMA No. 219 of 2017

moved under Section 12(2) C.P.C. read with Order XXXIX Rule 1 & 2, read with

sections 94 and 151 C.P.C. ("CMA 219") where a prayer is made to set aside

orders dated 21.12.2016 and 28.12.2016 passed in the High Court Appeal No.67

of 2017 ("HCA 67"), as well as, a prayer is made that sale of the plot of land

bearing No. 84, N-I Lines, admeasuring 0.91 acres (approximately 4400 Sq.yds)

Aziz Bhatti Shaheed Road, Saddar, Karachi ("the said property"); and CMA No.

731 of 2017 moved by Deputy Attorney General on behalf of MEO where prayer is made to set aside or recall the order dated 28.12.2016.

2. Through HCA 67 appellant Muhammad Hussain Qureshi son of late A. M. Qureshi impugned judgment dated 12.3.2007 and decree dated 20.3.2007 passed by the learned Single Judge of this Court in terms of which Civil Suit No.756 of 1998 (Mst. Afroz Shah and others vs. Tariq Qureshi and others) pertaining to declaration, cancellation, partition and administration of estate left by A.M. Qureshi who died on 22.06.1989 as Sunni Muslim. Late A.M.Qureshi had two wives namely Mst. Kulsoom Bibi and Mst. Hafeezun-Nisa. The said suit was moved by the children of A.M.Qureshi from Mst. Kulsoom Bibi, where their step brother and sisters (from Mst. Hafeezun-Nisa) were arrayed as defendants and the dispute related to the said property on which originally a school was running under the name of Mari Calaco School, which was nationalized controlled and managed by Secretary, Education Department, Government of Sindh, consequent thereupon A.M.Qureshi filed Rent Case No.14 of 1978, where ejectment was allowed against Government of Sindh, which order was assailed in Appeal No. 8 of 1983. Upon the said appeal having been dismissed, Government of Sindh preferred Constitutional Petition No.S-23 of 1985, which was allowed vide order dated 09.09.1985. The said order was assailed before the Hon'ble Supreme Court of Pakistan, which remanded the case, whereupon a fresh ejectment order was passed, on which Government of Sindh preferred a further appeal, which was dismissed, whereupon Constitution Petition No. 192-K of 1997 was moved, which was also dismissed by the Apex Court vide order dated 09.02.1998. Controversy between the rival parties started when the plaintiffs obtained a certified copy of the order passed by the Hon'ble Supreme Court of Pakistan on 09.02.1998 showing late A.M. Qureshi being represented through his legal heirs comprising the defendant children from Mst. Hafeezun-Nisa, while the plaintiffs' side of the family was not pleaded as Mr. Qureshi's legal heirs.

3. On 25.05.1998 a news item was published in the Daily Jang reporting demolishing of Mari Calco School (quite a prestigious school of its time), which shocked the plaintiffs as they were also claiming to be legal heirs of deceased Qureshi having interest in the said property. Plaintiffs claimed that the defendants presented a forged declaration and confirmation of oral gift dated 20.05.1975 which enabled the defendants to have their names mutated in the record of MEO (Karachi) in respect of the said property. They alleged that the said declaration and confirmation of oral gift had forged signature of late A.M. Qureshi. It was contended that late Mr. Qureshi died in June 1989 whilst the mutation was (fraudulently) effected in the year 1991 on the basis of an unregistered document. It was specifically pleaded that late A.M. Qureshi till his death remained owner of the said property and he contested all matters up to the Apex Court, and he never gifted the said property to the defendants in exclusion of the plaintiffs who being legal heirs and co-owners were entitled to appropriate share in the said property in accordance with Muhammadan law. The said suit was defended by the rival family members, who in their written statement admitted that late A.M. Qureshi expired on 26.6.1989, as well as, that plaintiffs No.1, 2 and 3 were his legal heirs, however, disputed parentage of the Plaintiff No.4 (the appellant in HCA 67). It was denied that the subject property was part of estate of the deceased, rather it was pleaded that on 22.05.1973 Mr. Qureshi had gifted the said property to the defendants and inter alia wrote a letter to Deputy Collectorate (East) Division informing the latter about the said gift and called upon the said officer to delete his name from the record and mutate the property in the name of the donees (defendants). Defendants No.1 to 6 however stated that since the original gift deed was misplaced therefore another gift deed was executed on 01.5.1975 in favour of the donees. The Defendant also relied upon a wide range the communication between defendants No.1 to 6 and Government of Sindh, Education Department pertaining to the said School suggesting that plaintiffs had full knowledge of the gift deed and have mischievously asserted their claim as to the co-ownership of

the property. It was admitted that possession of the said property as an outcome of the ejectment proceedings was only delivered on 23.05.1998, whereupon old structure was bulldozed. Defendants No. 7 and 8 adopted the arguments of the other defendants and maintained that the property was gifted by their father A.M. Qureshi to defendants No.1 to 6 in pursuance of the gift deed dated 26.5.1973, and supported the contention of the other set of defendants that the original gift deed was misplaced.

4. Upon pleadings of the parties, the trial court framed the following issues:

- 1) Whether the suit is time barred?
- 2) Whether the plaintiffs have no cause of action for this suit?
- 3) Whether the property in dispute was gifted to defendant No.1 to 6 by their father?
- 4) Whether the plaintiffs are entitled to their shares in the suit property by inheritance?
- 5) Whether the document of declaration of gift in favour of defendants is a forged document and hence liable to cancellation?
- 6) Whether the property can be partitioned by meets and bounds?
- 7) Reliefs?

5. Through detailed judgment dated 12.03.2007 spreading over 25 pages, the learned Single Judge reached to the following conclusion:-

“Upshot of the above discussion is that disputed property has devolved upon all the legal heirs of A.M. Qureshi excluding Plaintiff No. 4, they being co-sharer are entitled to have their share in accordance of Muhammad Law, consequently document purported to be declaration and confirmation of oral gift being forged is nullity in law, consequently same is hereby cancelled, entries in the record of Military Estate Circle Cantonment Karachi in the name of defendant No.1 to 6 stands cancelled with no order as to cost.”

6. Being aggrieved by the said outcome, Plaintiff No.4 Muhammad Hussain Qureshi (“MHQ”) whose claim was squarely denied by the learned Single Judge impugned the said outcome in HCA 67. It is also pertinent to distinguish that defendants No.1 to 6 namely Tariq Qureshi, Akbar Qureshi, Iqbal Qureshi, Nasir Qureshi, Altaf Qureshi and Seema Qureshi also challenged the said outcome by filing HCA No. 73 of 2007 (“HCA 73”) against all (four) children of Late A.M. Qureshi through his wife Mst. Kulsoom Bibi (i.e. the Plaintiffs in Suit

No. 756/1998) including MHQ whereas HCA 67 only challenged the judgment and decree to the extent that share denied to Plaintiff No.4 (MHQ) be admitted and judgment and decree be set aside to that extent; whereas, in HCA No. 73 children of Late Qureshi from Mst. Hafeezun-Nisa prayed that the decree and judgment to be set aside in *toto* i.e. the claim of three (remaining) children of late A.M. Qureshi through his wife Kulsoom Bibi be dismissed (keeping in mind that Court had already dismissed the claim of the fourth child MHQ). Both the appeals were connected on 23.05.2007 and interim orders to the extent that no third party interests to be created in the subject property were passed. Both the appeals continued pending for the longish period.

7. As the matter lingered on for a considerable length of time, all the relevant parties (with the exception of MHQ) through CMA No. 1278/15 in HCA 73 moved a compromise application under Order XXIII Rule 3 read with Section 151 of CPC stating that the parties (of the application) had amicably settled their disputes outside the Court and have agreed to compromise the litigation subject to the terms and conditions laid down therein. Since MHQ did not sign the said compromise application, outcome of the said compromise was to remain subject to the final decision of HCA 67 moved by MHQ. Pertinent terms and conditions of the said compromise application are reproduced hereunder:-

“v. That Muhammad Hussain Qureshi preferred HCA No. 67 of 2007 before the Hon’ble High Court of Sindh at Karachi against Judgment dated 12.03.2007 and Decree dated 20.03.2007 passed in civil Suit No. 756/1998 2007 before the Hon’ble High Court of Sindh at Karachi, which is still pending adjudication and a stay order is operative in respect of property bearing Plot No. 84 N.I. Lines, Saddar Karachi. The parties to this compromise application agree that they shall use all efforts to dispute the claim of Muhammad Hussain Qureshi in HCA 67 of 2007 before the Hon’ble High Court of Sindh at Karachi and this compromise shall be subject to final decision of HCA No. 67 of 2007 and/or any legal impediment created by any proceedings launched by Muhammad Hussain Qureshi.

vi. That since the litigation has consumed almost two decades as such the Respondents No.1, 2 & 3 by way of settlement accept the gift in favour of the Appellants and Respondent No.5 to 8 thereby the gift to the extent of property bearing Plot No.84, N.I. Lines, Saddar, Karachi, may be declared as valid thereby Judgment and Decree impugned through the captioned Appeal may be set aside to that extent only.

vii. That the Appellants No.1 & 2 and Respondents No.5 to 8 from the net sale proceeds after deduction of tax and other government charges, if any, of property bearing Plot No.84, N.I. Lines, Saddar, Karachi shall pay 20% to Respondents No.1 & 2 in the manner that (a) Appellants No.1 & 2 and Respondents No.5 to 8 from their share shall pay equally 16.40% to

Respondents No.1 & 2 and (b) the remaining 3.6% shall be paid by the Appellants No.1 & 2 and Respondents No.5, 6 & 8 respectively, within *Twelve Months* from the date of the final decision in HCA No.67 of 2007 or any appeal thereafter. The approximate prevailing market value of the said plot shall be determined by 3 evaluators each, to be appointed in a manner that one is appointed by the Nazir of this Hon'ble Court and one each by the Respondent No.1 & 2 (as one component) and Appellants and Respondents No.5 to 8, (as the other component). Provided that in the event of difference in evaluation, the average of all three evaluations shall be taken as the approximate prevailing market value of the property, whereas, presuming the value of the property is Rupees One Thousand Million, and basing the distribution on the presumed value, the Respondent No.3 shall be paid a sum of Rs.2,00,00,000/- (Two Crore) in the following manner:

- a) Respondents No.1 & 2 from their share shall pay a sum of Rs.1,40,00,000/- (Fourteen Million) to Respondent No.3.
- b) Respondent No.6 from his share shall pay a sum of Rs.20,00,000/- (Two Million) to Respondent No.3.
- c) Respondent No.8 from his share shall pay a sum of Rs.40,00,000/- (Four Million) to Respondent No.3.

viii. Time shall be essence of the contract as per clause vii above and the property bearing Plot No.84, N.I. Lines, Saddar, Karachi will be sold in the open market and either party shall be at liberty to purchase the property himself or to bring forth a buyer willing to purchase the same at the approximate prevailing market value determined as per clause vii above.

ix. That if the Appellants and Respondent No.5 to 8 fail to pay the amount as mentioned above in para (vii) to Respondents No.1 & 2 within *Twelve Months*, subject to clause viii above, then property bearing Plot No.84, N.I. Lines, Saddar, Karachi shall be attached by the Nazir of this Court and thereafter, Nazir shall sell said plot and shall pay 20% of the netsale consideration (as in clause vii) of said plot to Respondents No.1 & 2, without any notice or execution process and shall pay remaining 80% equally amongst Appellants and Respondents No. 5 to 8.

x. That the Appellants and Respondents No.1, 2, 3 & 5 to 8 and each one of them shall cooperate in disputing the claim of Mr. Muhammad Hussain Qureshi being the subject matter of HCA No.67 of 2007 before this Court.

xi. That the Respondents No.9 & 10 have already admitted in their Written Statement before the Trial Court regarding the execution of declaration of oral gift dated 20.05.1975, however, Respondent No.10 is the witness of the said gift.

xii. That the Appellants and Respondents No.5 to 8 hereby agree and confirm that upon passing of the relevant Orders in the titled appeal/ compromise application by this Hon'ble Court the Appellants and Respondents No.5 to 8 shall handover original documents of property bearing Plot No.84, N.I. Lines, Saddar, Karachi as surety (currently in custody of Appellants and Respondents No.5 to 8) to the Nazir of this Hon'ble Court within seven days, who shall keep the same in safe custody. In the event the property is sold by private agreement, the documents shall be handed over to the purchaser on the joint request of the parties hereto. In the event the property is sold by the Nazir, the document shall be delivered to the purchaser directly to the purchaser on the confirmation of sale by the Court. In case Appellants and Respondents No.5 to 8 fail to provide aforesaid documents to Nazir, the Nazir will be entitled to collect/get aforesaid documents from the concerned department/ authority etc. without any notice or execution process.

xiii. That it is declared and clarified that the Appellants and Respondents No.5 to 8 shall pay 20% of the netsale consideration of property bearing Plot No.84, N.I Lines, Saddar, Karachi as per clause vii above, to Respondents No.1 & 2 and the Respondents No.1 to 3 shall not claim any other payment form the Appellants & Respondents No.5 to 8.

xiv. That it is hereby jointly and severally declared, clarified and understood by the Appellants and Respondents No.1, 2, 3 & 5 to 8 that any breach or violation of any clauses of this agreement, mentioned hereinabove by any one of them, inclusive of their respective legal heirs, successors in interests etc. shall be taken to be unauthorized, illegal, void and nullity, having no legal significance.

xv. That the terms and conditions of this application, as agreed upon between the Appellants and Respondents No.1, 2, 3 & 5 to 8 shall be binding upon them and shall also be enforceable through the Court of Law of competent jurisdiction.

8. Counsel for Respondent No.4 MHQ was present on 06.05.2015 when the said compromise application was taken up by the Court and he objected to the instant move of selling the said property through the intended compromise. On 02.07.2015 in the presence of counsel for Respondent No. 4 (MHQ), Mr. Zahid Marghoob, Advocate, the following order was passed:

- “1. Granted.
2. Mr. Mureed Ali Shah, advocate for respondents, except Respondent No.4, submits that all the parties, except respondent No.4, are agreeable to disposal of this High Court Appeal in terms of the compromise application. He submits that so far dispute regarding share of respondent No.4 is concerned, his share may be directed to be kept with the Nazir of this Court till decision of HCA No. 67 of 2007, and remaining amount may be distributed amongst the legal heirs of late A.M. Qureshi as per the compromise application. Copy of the listed application has been handed over to Counsel for respondent No.4 in Court today who requests for time to seek instructions. However, he submits that his application regarding DNA test of the parties may be decided first.
3. Notice to other side for a date soon after Summer Vacation.”

9. On 12.8.2015 in the presence of counsel for Respondent No.4 (MHQ), following order was passed:

“These are two connected High Court Appeals. At the present time we are concerned only with CMA No.1278/2015 filed in HCA No.73/2007 whereby a compromise is sought to be recorded between the parties in this litigation except one party, who is the respondent No.4 in HCA No.73/2007, and is the appellant in connected HCA No. 67/2007. With reference to aforementioned CMA an order was made on 02.07.2015. Today before us learned counsel for the respondent No.4 has raised his objections to the recording of a compromise as per the CMA, and has also urged for an order on an application pending in his HCA No.67/2007.

We have been briefly assisted by the learned counsel in attendance today on the CMA. Entirely without prejudice to the case of the respective parties, both in terms of the two appeals on the merits and also with reference to CMA No.1278/2015, we are of the view that no prejudice shall be caused to any of the parties (including in particular to respondent No.4) if a preliminary exercise, along the lines as contemplated by the compromise application, is allowed to be carried out. Therefore, we direct with reference to para (vii) of the compromise application that let the three evaluators as therein referred to be appointed in respect of the subject property, in terms as therein contemplated, and let those evaluators make their evaluations and place the same before the Nazir. For this limited purpose only, let the parties, either themselves or through counsel, appear before the Nazir on 22.08.2015 at 11.00 a.m. The Nazir may make such orders and give such directions as are necessary or expedient to give effect to the order being made today so that the

exercise hereby directed is completed within four weeks from the date on which the parties are to appear before the Nazir. The Nazir is directed that the absence of any of the parties shall not hold up the exercise. We again emphasize that this is a procedural exercise only and is entirely without prejudice to the case of respective parties as noted above. For the time being let the expenses in respect of this exercise be shared equally between the two "components" as are referred to para (vii) of the aforementioned compromise application but final decision as regards the expenses shall be as directed by the Court. Should one or the other of the "components" fail or delay depositing the due share of the expenses, such share may be paid by the other "components", subject to subsequent adjustment.

Once the exercise has been carried out let the Nazir prepare a reference for consideration by the Court, and let these High Court Appeals be listed thereafter, for a consideration of the reference, as also CMA No.1278/2015 and also the objections that are being taken to this CMA by the respondent No.4."

10. In compliance of the said order of 12.08.2015, Nazir submitted his report dated 27.10.2015 dilating outcome of the valuation exercise conducted in respect of the subject property. Matter was again taken up on 02.12.2015 in the presence of counsel for Respondent No.4 in HCA No. 73 of 2007 and Appellant in HCA No. 67 of 2007 (MHQ). The said counsel on that date sought time to go through the Nazir report, also relevant to observe is that Court offered last opportunity to the said counsel to seek instructions from his client (MHQ) with regard to the Nazir report, making it clear that the matter will be proceeded on the basis of record as available and with the assistance of the learned counsel in attendance on the next date of hearing.

11. Order passed on 25.08.2016 is also of relevance, which is reproduced as under:-

"Let this matter come up on 06.09.2016. We have had the assistance of learned counsel for some of the parties, who are before us in this and connected appeal and we are confident that as submitted by learned counsel before the Court, a statement for consideration of the Court will be drawn up, which will cover all of points, which were made before us and adequately preserve and protect the interest of respective parties, especially the Appellant in High Court Appeal No.67 of 2007 insofar as the merits of this Appeal are concerned."

12. Thereafter the matter came up on 06.09.2016, when the following order was passed:-

"With reference to order of previous date learned Counsel for Respondents No.1 and 2 has prepared a statement. Let learned

Counsel supply copy of this statement to learned Counsel for Appellant who was also before us on the previous date. Today other learned Counsel have also joined the proceedings, on behalf of various other parties in this and/or connected HCA No.73/2007. Copy of this statement may also be supplied to other learned Counsel. We are informed that in HCA No.73/2007 learned counsel for Respondent No.3 has filed some CMA. Also in HCA No.73/2007 learned Counsel for Respondent No.9 seeks to file counter affidavit. However, since these parties have not put in appearance before the Court for the last several dates, as of today we will first take up the matter that was under consideration by the Court on the previous date and in terms of which statement, as mentioned above, has today been filed. It is only thereafter that notice will be, if the Court so deems appropriate, directed to be issued on freshly filed CMA and/or permission granted to Respondent No.9 to file counter affidavit

Today learned Counsel who have now joined the proceedings on behalf of their respective parties have been brought up to speed with regard to what had happened on the previous date and the context in which the statement has been filed. All the learned Counsel will be heard in full with regard thereto and matter to come up accordingly. To come up on 27.9.2016.

Learned Counsel for Mr. Muhammad Hussain, Appellant in HCA No.67/2007 [MHQ], also files a statement duly signed by learned Counsel as also by the Appellant who is today present in Court with reference to order of previous date. Copy may be supplied to all the learned Counsel who are present today. This statement also to be taken up in terms as noted above on the next date."

13. Order dated 08.12.2016 is also of relevance, which is reproduced as under:-

"With reference to order of previous date, certain objections have been taken by some of the parties, which are taken on record. Copies supplied to the other parties, who may go through the same. To come-up on 21.12.2016 at 11.00 a.m., on which date (although it is only a tentative observation) if no cogent, valid or substantial objection which satisfies the Court both in terms of the letter of the law and in equity that the proposed sale/transaction should not go through, then the Court may pass such order, which it deems appropriate.

Learned counsel appearing for the Appellant No.1 in HCA No.73/2007 states, on instruction, that the consent of this Appellant to the proposed sale/transaction may be recorded since learned counsel states that he would be on general adjournment from 17.12.2016 onwards. So noted and recorded."

14. The instant Section 12(2) CPC application numbered as CMA 219 of 2017 was moved on 16.01.2017, which was taken up for orders on the same date, where by way of interim orders Nazir was directed to not to finalize the transfer of property in favour of the bidder. On 19.01.2017, Mr.Ahmed Pirzada, Advocate appeared on behalf of auction purchaser, who claimed copy of the instant application. On 28.02.2017, Mr. Mushtaq Memon, Advocate showed

appearance on behalf of the Respondent Nos.5, 6 and 7 and some other respondents in HCA No. 73 of 2007, where Mr. Anas Makdhoom, Advocate wanted to file Vakalatnama for auction purchaser in both the appeals. He was directed to file the same in the office and the matter was adjourned to 22.02.2017.

15. CMA 219 as stated earlier has been moved by two individuals (so far alien to the instant controversy) being Muhammad Faisal son of Muhammad Bashir and Shoukat Ali son of Muhammad Siddique. Mr. Mohamed Vowda, learned counsel of these Applicant stated that through the compromise application made in HCA No. 73 of 2007 being CMA No.1278 of 2015 in April 2015, it was agreed by the Respondent Nos.1 to 3 that the oral gift in favour of Respondent Nos. 5 to 8 was to be taken as valid, and the subject property was agreed to be sold by the Respondent No.5 to 8 to a potential buyer. Per counsel, it was agreed that these Respondent would pay certain agreed amounts from the sale of the said property to the Respondent Nos.1 to 3, whereas the Respondent Nos. 9 and 10 clearly stated that they have no claim or interest in the subject property. Per counsel his clients approached the Respondent Nos.5 to 8 regarding purchasing a portion of the subject property. Per counsel, these respondents in view of the compromise application were independently selling their share of 16.667% each to the Applicant for a consideration of Rs. 62.5 million for each share.

16. Learned counsel states that his clients were assured that by these Respondents (5 to 8) that they also own share of Respondent Nos. 1 to 3 in addition to their own shares in terms of the compromise. Counsel further states that although a Pay Order was given to the Respondent No. 4 (MHQ) by the Applicants, but MHQ returned the same and informed the Applicants that he did not want to sell his share to the Applicants. Per counsel, although no formal agreement was signed by Respondent No. 4, the potential transaction with the Applicant was acknowledged by him in application bearing CMA No.1804 of 2016 filed in HCA No. 73 of 2007 at page 591 of HCA No. 67 of 2007. Per counsel, the

Applicant entered into various agreements with Respondents 5 to 8, wherein respective initial payments are admitted to have been received.

- a. Agreement dated 24.5.2016 with Respondent No.5 (page 663).
- b. Agreement dated 23.5.2016 with Respondent No.6 (page 623).
- c. Agreement dated 23.5.2016 with Respondent No.7 (page 697).
- d. Agreement dated 09.5.2016 with Respondent No.8 (page 727).

17. Per counsel, in terms of the compromise, the Respondent Nos.5 to 8 were required to pay 20% of the sale proceeds to the Respondent Nos. 1 to 3, which was orally agreed between the Applicant and Respondent Nos. 5 to 8 that in addition to the above agreed amount an additional amount equal to 20% of the total amount will be paid by the Applicant directly to the Respondent Nos.1 to 3. He stated that the Applicants are ready and willing to abide by this oral arrangement too. Per counsel, Respondent Nos. 5 to 8 assured the Applicant that both the HCAs would be disposed of soon in view of the earlier compromise application filed in HCA No.73 of 2007, therefore, under Clause-5 of the abovementioned four agreements, the balance sale consideration was due from the Applicant within 3 to 6 months. However, under Clause-6 of these agreements the respondents were required to resolve their disputes in relation to both the HCAs within the time period set out in the clause-5, thus it was apparent (to his clients) that the balance sale consideration was only due from them upon resolution of disputes subject matter of both the HCAs to the extent of the shares sought to be purchased by the Applicant.

18. Learned counsel next states that the Applicants were ready and willing to pay balance sale consideration in accordance with the agreement to sale, but the Respondents were unable to resolve their dispute within the stipulated time, therefore, the Applicants entered into further agreements with Respondent No.5, 6 and 7.

- a. Agreement dated 30.11.2016 with Respondent No.5 (page 779).
- b. Agreement dated 30.11.2016 with Respondent No.6 (page 474).
- c. Agreement dated 30.11.2016 with Respondent No.7 (page 827).

19. Learned counsel further stated that the Respondent No.8 did not execute a further agreement with the Applicants and kept requesting the Applicants for time. The Respondent No.5 to 7 informed the Applicants that the Respondent No.8 would sign the additional agreement and on his behalf, collected pay orders in the sums of Rs.13,000,000/-. These pay orders are still in the possession of the Respondents No.5 to No.7 but the Applicants have put a stop on those payments in view of the fraud committed by the Respondents as elucidated herein below. In the meantime, and in accordance with the agreements dated 30.11.2016, the Respondent No.5 to 7 executed and registered a General Power of Attorney dated 29.11.2016 in favour of the Applicant No.1.

20. Learned counsel further stated that on or about 21.12.2016, the Applicants were informed that the subject property was being sold by the respondents to an entity called R&H Enterprises under the aegis of order passed by this Hon'ble Court in H.C.A No.67 and 73. It is also submitted that the Applicant No.1's father, who is also a property developer, made a bid for the purchase of the said property under a misconception that the deal between the Applicants and the Respondents No.5 to 8 had been cancelled, but when the Applicant No.1 informed his father that the deal was very much still in place and that a registered power of attorney was also executed in favour of the Applicant No.1, the Applicant No.1's father withdrew his bid 3 days later. The Applicants then made inquiries and per counsel, were shocked and surprised to learn that the Respondents had, through fraud and misrepresentation, orchestrated sale of the subject property through the Nazir of this Court and had deliberately and malafidely concealed from this Court that the Respondents No.5 to 8, with the nod of the Respondents No.1 to 3, had already entered into agreements with the Applicants and concealed the fact that the Respondents No.5 to 8 have already received more than 40% of sale considerations from the Applicants.

21. Learned counsel further stated that out of the total sale consideration amount of Rs.250,000,000/-, the Applicants have paid a total of Rs.104,000,000/-

to the Respondents No.5 to No.8 for purchasing 49.48% of the subject property (i.e. 2202 square yards out of 4404 square yards). The Applicants are ready and willing to pay the balance sale consideration of Rs.146,000,000/- to the Respondents No.5 to No.8 as well as additional amount of Rs.50,000,000/- to the Respondents No.1 to No.3 being 20% of the total sale consideration amount paid to the Respondents No.5 to No.8 as per their oral arrangement. Therefore, the balance payable by the Applicants is only Rs.196,000,000/-.

22. Learned counsel further contended that it is respectfully and most humbly submitted that the Respondents have deliberately and malafidely misrepresented before this Hon'ble Court in H.C.A 67 and 73 and have through fraud, caused the orders dated 21.12.2016 and 28.12.2016 be passed in these HCAs through which the bid on behalf of R&H Enterprises has been approved and consequently, the sale of the subject property has been approved in favour of R&H Enterprises. That the respondents have deliberately and malafidely committed fraud and misrepresented before this Hon'ble Court by concealing seven agreements executed between the Applicants and the Respondents No.5 to No.8 and by concealing the fact that they have received over 40% of the sale consideration from the Applicants in relation to the subject property. Therefore, the orders dated 21.12.2016 and 28.12.2016 passed in these HCAs are based on misrepresentation and fraud.

23. Learned counsel further informed that the execution of all documents have been admitted by the parties in their Counter Affidavits

- a. The Respondent No.5 has admitted in his CA [p.955]. para 6 at page 971.
- b. The Respondent No.6 has admitted in his CA [p.1001]. para 6 at page 1017.
- c. The Respondent No.7 has admitted in his CA [p.1029]. para 6 at page 1045.
- d. The Respondent No.8 has admitted in his CA [p.1093]. para xiv at page 1099.

24. He therefore, requested that the sale of the subject property vide orders dated 21.12.2016 and 28.12.2016 be declared null and void by setting aside these two orders. In support of arguments, the learned counsel relied on the following cases:

1. PLD 2010 Karachi 400

2. 2006 CLC 833
3. PLD 2017 SC AJ&K 1
4. 2005 CLD 1162
5. SBLR 2016 Sindh 1555
6. 2004 SCMR 843
7. 2013 CLD 1002

25. Learned counsel for Respondent Nos.5, 6 & 7 in HCA No.67 of 2007 after giving same background submitted that since May 2007 interim orders have been operating in both the appeals and on account of long pendency respondents in HCA No.73 of 2007 filed CMA No.1278 of 2015 in the form of a compromise proposing sale of the subject property to some potential buyers after having it evaluated in order to have sale proceeds distributed amongst the respondents, on which, orders on 02.07.2015 were passed that after retaining the presumptive share of the Appellant of HCA No.67 of 2007 (MHQ) with the Nazir till decision of said HCA, the amount realized from sale of the property be distributed amongst respondents in respective proportion as mentioned in the compromise. Later Nazir submitted his report on 27.10.2015 suggesting the highest price was assessed to the tune of Rs.880.8 Million. Where after on 27.11.2016, Respondent Nos.4 to 8 (including his clients) filed application bearing CMA No.1804 of 2016 in HCA No.73 of 2007 proposing modifications in the compromise agreement requesting bifurcation of their respective shares in the subject property. Per counsel, in para 5 of the said application it has been expressly stated that the Respondent No.5 to 8 desired to sell their respective share in the subject property, for which an offer was received by them from the perspective purchaser, whereupon four agreements for sale of the respective shares of Respondent Nos.5, 6, 7 & 8 were executed only in May 2016 for sale of their respective shares at the rate of Rs.62.5 Million each. Per counsel, it was also agreed in the sale agreement that Respondent Nos.5, 6 & 7 would appear before the Hon'ble High Court to resolve the matter. Per counsel, only Respondent Nos.5 to 8 received part payment from the purchasers. Per counsel, not only the said agreements, rather Respondent Nos.5, 6 & 7 executed general power of attorneys authorizing Applicant No.1 to act on their behalf, even to the

extent of appointing advocates in respect of both the HCAs, as well as, in Suit No.756 of 1998 in order to get appropriate decision in respect of the subject property from the Hon'ble High Court to the extent of respective shares after clearance of litigation pending. Per counsel, the second set of agreements was signed by the Respondent Nos.5, 6 and 7 on 30.11.2016 in respect of each seller's respective share of 16.66%, as calculated from the compromise agreement. Per counsel, the Auction Purchaser M/s. R & H Enterprises submitted an offer to buy the subject property for Rs.1 Billion, whereupon on 08.12.2016, Court held that appropriate orders will be passed on the next date, if no cogent, valid or substantial objections were raised against the proposed sale. Learned counsel stated that on 21.12.2016, Muhammad Bashir, father of the Applicant No.1 submitted a counter offer to purchase the subject property in the sum of Rs.1.002 Billion supported by four cheques favouring Nazir of this Court for a total advance sum of Rs.10 Million. Per counsel, two cheques were infact submitted from the account of the Applicant No.2 Shoukat Ali itself. Learned counsel later stated that on 21.12.2016 a consent order was passed, allowing bids to be submitted with the Nazir of this Court, whereupon on 26.12.2016, Nazir submitted his report stating that on 24.12.2016 Muhammad Bashir, father of the Applicant No.1 had withdrawn his offer in writing, whereas, a further improved offer in the sum of Rs.1.0251 Billion was submitted by the earlier auction purchaser R & H Enterprises. Learned counsel then drew Court's attention to order dated 28.12.2016, when the offer of M/s. R & H Enterprises was accepted with certain observation in order to implement the orders as well as interim orders in both the appeals dated 09.05.2007 and 23.05.2007 were recalled with further observation that no objection whatsoever would be acceptable now. At this juncture, learned counsel stated that on 16.01.2017 the instant application under Section 12(2) CPC was filed in this Court alleging fraud and misrepresentation committed by the Respondent Nos.5 to 8. Learned counsel stated that these Applicants had full knowledge of the pending litigation to the extent that father of Applicant No.1 even made an offer to buy the

property, thus the allegation that Respondent Nos. 5 to 8 have concealed their respective sale agreements with the Applicants as well as having received a sum of Rs.29.25 Million from each of the Respondent Nos.5, 6 & 7 beside receipt of Rs.16.250 Million by the Respondent No.8 are devoid of truth. He prayed for the dismissal of the instant CMA and to have the sale matured through Court. He further stated that the Applicants have already instituted Civil Suit No.93 of 2017 against the respondents for performance of contract, which suit is defended by the present respondents.

26. Learned counsel for Respondent No.8 stated that the Applicants were in full knowledge of both the appeals, wherein the Hon'ble Court had suspended the judgment and decree passed in Suit No.756 of 1998. He stated that the Applicants executed the agreement to sell on 09.05.2016 with Respondent No.8 to purchase the said property on "*as is where is basis*" subject to the legal opinion with the following terms and conditions:-

"Whereas the party of the First Part has agreed to sell and the party of the Second Part have **agreed to purchase the respective share** of the party of the First Part in the above noted plot No.84, N.I, Lines, total measuring 0.91 Acres, Aziz Bhatti Shaheed Road, Saddar, Karachi on following terms and conditions: -

1. That the party of the first part being the absolute co-owner and co-sharer in the said plot of land and has agreed **to sale his respective share** therein for a total lump sum sale consideration of Rs.6,25,00,000/- (Rupees Six Crores and Twenty Five Lacs Only).

6. That during the above noted period the party of the First Part / Co-owner to appear before the Hon'ble High Court of Sindh, Karachi in pending High Court Appeals and other related matters before the Nazir of the Court and to acquire the necessary permission for selling and disposing his respective share in the said plot of land.

7. That both the parties are hereby agreed that to cooperate each other in future regarding any hurdle arises relating to the said plot of land and to swear affidavits.

...leaving a net balance amount of Rs.4,62,50,000/- **towards sale of my respective share being the co-owner** in plot No.84, N.I, Lines, total measuring 0.91 Acres, Aziz Bhatti Shaheed Road, Saddar, Karachi."
[Emphasis supplied]

27. Learned counsel stated that after seeking the legal opinion, the Respondent No.8 served a notice dated 13.10.2018 for the cancellation of MOU and the said Respondent neither executed any additional agreement nor any

power of attorney in favour of the Applicants, who with *malafide* intentions published a public notice in the daily Jang on 16.12.2016 alleging that the Respondent No.8 has executed irrevocable general power of attorney in their favour. He stated that the offer from M/s. R & H Enterprises was the highest received in respect of the subject property over and above the offer made by Mr. Muhammad Bashir, father of Applicant No.1, who appeared in person and filed a counter offer on 21.12.2016 along with two cheques to Applicant No.2, when this Court was pleased to pass a consent order that no objections whatsoever in any shape would be acceptable at any later stage. He concluded by stating that the instant application under Section 12(2) CPC is not maintainable as no fraud has been committed upon the Hon'ble High Court neither any misrepresentation of law or fact has been made. He clarified that the order dated 12.08.2015 provided for *modus operandi* for the disposal of the subject property, of which, the Applicants have complete knowledge and the Applicants clearly are neither aggrieved person, nor can claim *locus standi* to challenge the impugned orders, which were passed lawfully and in consonance with equity. He stated that the application is not maintainable, particularly, when the Applicants have sought alternate remedy by simultaneously filing Civil Suit No.93 of 2017 seeking specific performance etc. on the same cause of action as alleged in the instant application. Attacking the very maintainability of the agreement which the Applicants have entered with respondents, the learned counsel submitted that the Agreements allegedly signed by the Applicants are void as per the law laid down under Section 20, 24 and 29 of the Contract Act, 1872, agreement for sale are void on the sole grounds that shares of the property being sold were undetermined and the property was not partitioned, hence there was great uncertainty as to what portion of the property the Applicants have chosen to buy. Further, under Section 24, these Agreements are void as the considerations and objects were unlawful, as interim orders were specifically operating restraining anyone from creating third party interest in the said property. As to Section 20, the learned counsel stated that the Agreements

are void as there were grave factual mistakes pertaining to the rights of the Respondent No.8 in the subject property. Learned counsel placed reliance on PLD 2010 SC 913 to substantiate his point that since the property was undivided, therefore, no sale could be made. He next placed reliance on 2006 CLC 1018 to show that since the Applicants have not disclosed the dates on which they came to know about the alleged fraud or misrepresentation, this failure is fatal. He requested that the instant application be dismissed.

28. Heard the counsel and perused the material on record. In the controversy at hand, we have chosen to address the following points and have attempted to give our findings there on as per the following:-

(a) Whether the applicants had knowledge about the pending litigation in between the parties regarding the said property?

The relationship between the applicant and the Respondent Nos.5 to 8 commenced when these parties signed their first set of agreement as per the following:

- a. Agreement dated 24.5.2016 with Respondent No.5 (page 663).
- b. Agreement dated 23.5.2016 with Respondent No.6 (page 623).
- c. Agreement dated 23.5.2016 with Respondent No.7 (page 697).
- d. Agreement dated 09.5.2016 with Respondent No.8 (page 727).

Clause 6 of these identical agreements provided as under:-

“That during the above noted period the party of the First Part/co-owner is subject to appear before the Honorable High Court of Sind, Karachi in HCA Nos. 73/2007 and 67/2007 and to resolve the same and other related matters before the Nazir of the Court”

Second set of agreements dated 30.11.2016 between the applicant and the Respondent Nos. 5 to 7 have twice mention of the litigation pending in respect of the said property and required the parties to appear before the High Court as well as before the Nazir of this Court.

The General Power of Attorney (page 889) also makes specific mention of Suit No. 756/1998 as well as that of both the HCAs. By virtue of paragraphs 4 and 5 of the said GPA, the Applicant No.1 was expressly authorized to represent and appear for Respondents No.5 to 7, in both the HCAs. The Respondents

No.5 to 8 themselves apprised this Court about the intended sale of their share in the said property by filing application under Section 151 CPC (CMA No.1804/2016) on 27.04.2016, long before the impugned orders were passed in December 2016.

Thus, apart from information about intended sale by the Respondents No.5 to 8 brought to the knowledge of the Court, the Applicants had themselves been authorized to participate in the present proceedings and to take all steps necessary for the disposal of the said property under order of the Hon'ble Court. By virtue of definition and interpretation contained in Section 3 of the Transfer of Property Act, 1882, a person is said to have notice of a fact when he actually knows that fact or when, but for willful abstention from an inquiry or search, which he ought to have made, or gross negligence, he would have known it. The Applicants, in our view thus cannot plead lack of knowledge or notice about the proceedings pending in this Court.

(b) Whether there has been any concealment of facts or proceedings, either from the Court or the Applicants?

As stated above, the Applicants had information about the pendency of both the HCAs as reflected in both sets of Agreements and the GPA. It is worth noting that the application for Compromise (CMA No.1278/2015) was filed almost one year prior to the negotiations for purchase by the Applicants in April 2016 and on 27.04.2016, application under Section 151 CPC was filed on behalf of the Respondents No.5 to 8 and others praying for direction to the Nazir to determine and identify specific portion of land with reference to respective share of every co-owner of the said property. In the affidavits, separately sworn by the Respondents No.5 to 8, it is expressly stated in paragraph-5, that they intended to sell their respective shares in the said property for which a prospective purchaser had offered good and lucrative price. As a result of consensus that the said property is indivisible, all the subsequent orders were passed by this Court in order to expedite sale of the property at the highest market price and ascertainment of respective shares of all the parties for disbursement of the sale consideration to them except that of MHQ whose share was left to be retained by the Nazir for disbursement after decision of HCA 67. Under Section 38 of

Transfer of Property Act, 1882 the transferee is obliged to apply reasonable care. The Applicants, being the proposed transferees of interest and having expressly been put on notice about pendency of litigation were expected to have fully apprised themselves of proceedings in these appeals. The move for the disposal of the said property through Compromise is presumed to be known to the Applicants, therefore, the Applicants cannot legally seek annulment of the orders dated 21.12.2016 and 28.12.2016 on the ground of fraud or misrepresentation by filing an application under Section 12(2) CPC. Reliance is placed on Division Bench judgment in Dadabhoy Cement Industries Limited reported as 2002 CLC 166 (page 181) which judgment was upheld by the Hon'ble Supreme Court of Pakistan and reported as PLD 2002 SC 500. Same principle is stated in the judgments reported as 2000 YLR 212 relevant page 214 and 2000 SCMR 230 relevant page 233. It is seen that the allegation of fraud has been made by the Applicants without specifying any details thereof. The key requirement to prove fraud, as held in the above referred Division Bench judgment of 2002 CLC 166, is an intention to deceive or to induce a person by misrepresentation to enter into a contract knowing the same being false. In our humble view, the Respondents No.5 to 8 are not seen to have made any such statement.

(c) Whether by virtue of doctrine of *lis pendens*, the Applicants could evade the affect or assail the orders dated 21.12.2016 and/or 28.12.2016?

As deduced from the foregoing, the Applicants entered into both sets of Agreements and obtained GPA with knowledge of the pending litigations. The second set of agreements with Respondents No.5, 6 & 7 as well as the GPA even authorized the Applicants to participate in proceedings before this Court to represent the Respondents No.5, 6 & 7. The provision of *lis pendens*, in terms of Section 52 of the Transfer of Property Act, 1882 are attracted to the present case. It is an established position that where a party wishes to take advantage by entering into a transaction at a reduced price due to pendency of litigation, it may also has to be prepared to suffer the consequence of outcome of the litigation. The elementary requirements for applicability of Section 52 of Transfer of

Property Act, 1882 viz. (i) proceedings relating to specific immovable property and (ii) the transaction in question having taken place at a time when litigation is pending, are explicit in the present matter. Hardship of an individual case could hardly be a factor to overcome the rule of *lis pendens*. As held in the judgment reported in PLD 2011 SC page 905 (relevant page 915), the argument of bonafide purchaser with reference to Section 41 of Transfer of Property Act, 1882 or Section 27(b) of the Specific Relief Act, 1877 remains subservient to Section 52 of Transfer of Property Act, 1882 which is an exception to the above stated equitable concept. Purchase or acquisition of property during pendency of litigation is usually held by courts as a gamble in which the purchaser bargains for a risk of loss.

(d) Weather the Applicants had waived their rights, if any, through acquiescence?

As seen from the foregoing, the Applicants having knowledge of the proceedings chose to participate in the bidding process through the father of the Applicant No. 1 who initially submitted his bids with the Nazir of the Court and later withdrew the same. The various proceedings for evaluation of the subject property including the orders dated 25.08.2016, 06.09.2016, 08.12.2016 and 21.12.2016 (which are all subsequent to the sale agreements of May 2016) had never been challenged or objected by the Applicants. The order dated 21.12.2016 shows that Muhammad Bashir, father of Applicant No.1 submitted counter bid due to which the matter was deferred allowing submission of bids in sealed envelope with the Nazir within three days alongwith pay order of 10% of the bid amount. The bid dated 21.12.2016, submitted by Muhammad Bashir, is available at page 435. Significantly, alongwith the said bid, Muhammad Bashir had submitted four cheques out of which two cheques for Rs.2,500,000 each, in the name of Nazir, are issued by and from the account of Applicant No.2. Shoukat Ali. Subsequently on 24.12.2016, the father of Applicant No.1 withdrew his bid upon finding that M/s. R&H Enterprises had submitted higher bid in the sum of Rs.1,025,100,000.00. The explanation offered by the applicants in paragraph 17 of the affidavit in support of application under Section 12(2) CPC, ex-facie appears to be an afterthought. The letter of withdrawal of bid (page 455) does not

even mention that the bid was withdrawn on gaining knowledge about the alleged transaction between the applicants and Respondents No.5 to 8. The instant application under Section 12(2) CPC does not even mention as to how did the father of applicant No.1 learned about proceedings pertaining to sale of the said property and submission of bid by M/s. R&H Enterprises, particularly, when no notice for sale of the subject property for invitation of bids had ever been issued. The only source of knowledge for submission of bid by Muhammad Bashir during hearing on 21.12.2016 appears to be the Applicants who had, thus, indirectly participated in the bidding process but could not match the bid submitted by M/s. R&H Enterprises. Having thus, acquiesced into the process of bidding, the Applicants in our humble view cannot turnaround and seek recall of order dated 28.12.2016.

(e) Whether the Agreements create any right in Applicant' favour in the instant litigation in the presence of their pending suit for specific performance in respect of the case property?

The Applicants have admittedly asserted their claim portraying that some vested legal right has accrued in their favour through both sets of the Agreements. The claim of the Applicants is clearly based only on Agreements which, of themselves in our humble view in the present form do not create any interest in or charge over the said property as mandated by Section 54 of the Transfer of Property Act, 1882 as a contract for sale of immovable property is merely an agreement that sale of such property would take place at a future date on terms settled between the parties. The Applicants, admittedly, have filed Suit No.93 of 2017 for specific performance which is pending under the original civil jurisdiction of this Court. In our humble view the Applicants are not suited for any further relief and the instant Section 12(2) CPC application particularly when the said application purports to deal with the entire property admeasuring 4404 square yards, whereas the sale agreement with respondents No.5 to 7 are only in respect of 49.98 percent (1999.2 square yards) of that property. Thus a legal vacuum will be created in case the instant application is allowed with regards to remaining 50.02 percent portion of the

said property, for the purchase of which the Applicants have not made any agreement with the Respondents.

(f) Whether the Agreements in their present form are capable of enforcement?

The first set of Agreements executed in May 2016 clearly do not specify the specific share (or portion) of the property which was contemplated to be purchased by the Applicants notwithstanding that the Applicants knew that Respondents No.5 to 8 were only part-sharers alongwith other legal representatives of late A.M.Qureshi but it was only through the second set of Agreements of November 2016 where a mention of the share of each of respondents 5 to 7 has been mentioned as 16.66%. It is on record that late A.M. Qureshi was survived by four daughters and seven (or may be eight) sons. In such event, the share of every daughter would come to 5.00% whereas the share of every son would come to 10.00%. Such shares would stand revised depending MHQ is excluded from the inheritance or otherwise. Thus, at this point of time, none of the Respondents No.5, 6 and 7 could claim co-ownership of the said property beyond 10.00% share. Apart from the above elementary mistake of facts, it was not known as to which geographical portion of the property would fall as share of the Respondents No.5 to 7. Indeed, the subject property cannot be sub-divided except in accordance with the terms of Grant and the Cantonment Land Policy and any particular portion of the subject property cannot be claimed by any particular legal representatives unless the said property is partitioned. The registered GPA executed by Respondents No.5, 6 & 7, in our humble view also suffers from the same deficiency. In such circumstances Section 29 of the Contract Act, 1872 comes into play which provides that an agreement, terms of which are uncertain, is void. Reliance for this principle is placed on the judgment reported in PLD 1973 Lahore 77 relevant page 80 and 1994 CLC 1200 relevant page 1202. An uncertain contract, even otherwise, cannot be enforced by virtue of Section 21(c) of the Specific Relief Act, 1877. This view is also fortified from the judgments in support of this preposition reported as 1982 SCMR 1169 relevant page at 1170, 1987 SCMR 624 relevant page at 629 and 2003 YLR 3174 relevant page 3176. The Applicants' claim may

also be hit as being a contract which is unconscionable. Admittedly the Nazir had submitted report on 27.10.2015 to the effect that the subject property could fetch Rs.88,08,80,000/- and the auction purchaser M/s. R&H Enterprises whose bid has been accepted by the Court had offered Rs.1,02,51,00,000/. Therefore, to exercise discretionary power in favour of Applicants by this Court in these circumstances shall be unconscionable, as well as courts have always refused to enforce clandestine transactions or the deal in violation of restraining orders passed by the Courts. Such principle is affirmed by judgment reported as 2013 SCMR 602 relevant page at 603. It may be pointed out that interim orders of injunction were passed by this Court on 09.05.2007 and 23.05.2007 in the present appeals and no third party interest could have been created in the property by any party. One more factor to be noticed is that the record pertaining to the said property had not been mutated in favour of the legal representatives of late A.M. Qureshi as yet:

(g) Is Section 12(2) CPC applicable in the instant case?

The Applicants have alleged that they have been defrauded by the Respondents No.5 to 7 (and may be 8 too) by giving consent for sale of the subject property in the Court without disclosing the sale of their share in favour of the applicants. While observing that the compromise application (CMA No.1278/2015) containing consent for sale was filed more than an year prior to the first set of agreements, the proposed transaction for sale, entered by the said respondents was disclosed to this Court through application bearing CMA No.1804 of 2016, the Applicants themselves could have appeared in Court as attorney of Respondents No.5 to 7 and could have opposed the disposal of the said property by this Court. For maintaining an application under Section 12(2) CPC, it is an essential requirement to allege and show that fraud has been committed upon Court in obtaining the order/judgment. Reliance is placed on judgments reported in 2002 YLR 1984 relevant page at 1986 and 2016 YLR 2355 relevant page at 2358. On behalf of the Applicants, reference was made to the case of Muhammad Aslam 2004 SCMR 843 wherein attorney of father of the respondents had appeared and given consent for decree in favour of his own children who

were petitioners. Thus, consent was apparently given collusively and decree was obtained through undue haste. Moreover, unlike the present case, the application under Section 12(2) CPC was filed in the reported case by party to the case. The Applicants are not party to these appeals. The said judgment of Hon'ble Supreme Court, therefore, is distinguishable.

(h) Whether institution of Suit No.93/2017 for specific performance, by the Applicants, postulates adequate relief to the Applicants, hence, shouldn't the parallel proceedings be avoided?

The Applicants have admittedly filed independent suit for specific performance against all the respondents. While the merits of the suit, including existence of an enforceable and valid contract, will have to be decided in such proceedings, the Respondents No.1 to 4 and 9 to 11 apart from Respondents No.5 to 8, have been impleaded as defendants in the said suit, probably, for the relief of partition of the subject property. Indeed, partition can only be sought by an existing co-owner of immovable property. The Applicants, for the present, cannot claim the status of co-owner on the basis of agreements for sale simplicitor. However in our humble view, while maintaining Suit No.93 of 2017, the consideration of the instant application under section 12(2) CPC would amount to per parallel proceedings which ought to be avoided in the interest of justice.

(i) Whether the principle of finality of litigation would be applicable in the instant case?

Admittedly the parties (excluding the Applicants) have been trying to settle their disputes and have seemingly left no stone unturned to have the property sold and its share divided amongst the legal heirs in accordance with law, to the extent that assistance of this court was sought to keep the share of MHQ with the Nazir, and to have the remaining share divided as per the compromise agreement. Admittedly the principle of "finality of litigation" cannot be pressed to the extent of an absurdity that it becomes an engine of fraud in the hands of dishonest litigants, however Courts of law are meant for imparting justice between the parties and to endure that litigation reaches to a just finality. When everything was seemingly in place and all the parties had

chosen to have the property sold through the Nazir of this court and highest bids were also made, the Applicants though indirectly participated in the said bids, chose to throw a spanner by filing the instant Section 12(2) application, which on the aforementioned grounds lacks merit. If the applicants feel that have been cheated by the respondent Nos. 5 to 7 (or 8) they had alternate remedy which they have already availed by filing Suit No.93 of 2017 for specific performance. Their current move to stall the sale proceedings for the entire property (for a portion of which they claim to have sale agreements from selected legal heirs) clearly attacks the principle of finality of litigation.

29. To conclude, for the numerous reasons detailed in the foregoing, the instant application (CMA No.219 of 2017) moved under Section 12(2) CPC is dismissed.

30. Now coming to CMA 731 of 2017 moved by MEO where prayer is made to set aside or recall the order dated 28.12.2016, the DAG in the hearing of 17.12.2018 at the time of filing of Statement as signed by the MEO, Karachi who was also present in the Court, Court was informed that applicable policy in respect of old grants and leases has been revised through policy dated 05.06.2018, and the case will be considered on its merits. Accordingly they chose to not to press their CMA, which is dismissed as not pressed.

Judge

Judge