Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No. 111 of 2005

Present
Mr. Justice Nadeem Akhtar
Mr. Justice Sadiq Hussain Bhatti

Appellant	:	Muhammad Sabir Awan through his legal heirs, through Mr. Munir A. Malik and Chaudhry Atif Rafiq advocates.
Respondent No.1	:	Pakistan Defence Officers' Housing Authority through Mr. Nazar Hussain Dhoon advocate.
Respondent No.2	:	Mohammad Jamal Ghazali called absent.
Respondent No.3	:	Raees Ahmed (since deceased) through his legal heirs through Mr. H. A. Rahmani advocate.
Dates of hearing	:	03.09.2014, 09.09.2014, 11.09.2014, 15.09.2014 and 15.09.2015.

J U D G M E N T

NADEEM AKHTAR, J. – Through this appeal, the appellant has impugned the judgment delivered by a learned Single Judge of this Court on 19.03.2005 and the decree drawn in pursuance thereof on 12.04.2005 in the respondent No.3's Suit No.926/1987, whereby the said Suit was decreed in terms of prayers (a) and (b) by cancelling the transfer of Plot No.3, Khayaban-e-Badar, Phase VI, Defence Housing Authority, Karachi, measuring 1,983 sq. yds. (**'the suit property'**), in favour of the appellant, by restoring its transfer in favour of respondent No.3, and by permanently restraining the defendants in Suit from further transferring / alienating / encumbering the suit property to anyone else except respondent No.3. During pendency of this appeal, CMA No.1948/2005 was filed by the appellant under Order XLI Rule 27 CPC seeking permission to produce the documents described therein as additional evidence before the regular hearing of this appeal. With the consent of the learned counsel for the parties, the said application and the main appeal were heard together.

2. The facts giving rise to the filing of this appeal are that respondent No.3 Raees Ahmed filed Suit No.926/1987 at the original side of this Court against the appellant and respondents 1 and 2 for cancellation of transfer documents in respect of the suit property and injunction, and alternatively for damages. It was the case of respondent No.3 / plaintiff that he purchased the suit property from

one Shahnaz Begum and applied to respondent No.1 Pakistan Defence Officers' Housing Authority (**'DHA'**) for its transfer and mutation in his name. Upon submission of relevant documents and requisite transfer fee for this purpose with DHA, an acknowledgement receipt dated 04.05.1987 was issued by DHA whereby he was asked to collect the transfer order in his favour by 04.06.1987. Due to his serious ailment and bypass surgery as averred by him in the plaint, he could not collect the original transfer order and presumed that the same would be dispatched to him at his address by registered post as mentioned on the receipt issued by DHA. A letter dated 17.07.1987 addressed to him, respondent No.2 and the appellant, was received by him regarding transfer of the suit property in favour of the appellant and asking him to visit the DHA's office along with his identity card. On 28.07.1987, he visited the office of DHA when he came to know that respondent No.2 had played fraud upon him and DHA by forging his signatures and receiving the original transfer order from DHA. He also came to know that other documents with his forged signatures were also prepared by respondent No.2 and by using such forged documents, the suit property was sold and transferred in favour of the appellant. In view of the above, he immediately lodged a written complaint with DHA on the same day. In order to settle the matter, respondent No.2 came to visit him and during such meeting, respondent No.2 handed over a pay order for Rs.500,000/- to him for keeping the same in trust for getting the matter settled as soon as possible as respondent No.2 confessed to have committed a mistake and did not want to be prosecuted for committing fraud, to which no undertaking was given by respondent No.3. However, the pay order was kept by him in trust for respondent No.2. On 03.08.1987, respondents 2 and 3 and the appellant were invited by DHA for settlement, but no result was forthcoming. On 18.08.1987, a legal notice was sent by him calling upon DHA to retransfer the suit property in his name, and such demand was reiterated by him by another notice dated 16.09.1987. It was alleged in his plaint by respondent No.3 that the transfer of the suit property in favour of the appellant was illegal and was based on forged documents, and there was collusion between the appellant, DHA and respondent No.2, as the transfer was effected by DHA without properly verifying the documents.

3. In the above background, following relief was sought by respondent No.3 in his Suit No.926/1987 :

> "*a) Cancellation of Transfer of the Plot bearing No.3, Khayaban-e-Badar, Phase VI, measuring 1983 square yards in favour of Defendant No.3 and Direct defendant No.1 to transfer the same in favour of the Plaintiff;*

b) Permanent injunction restraining the Defendants from further transferring / alienating / encumbering the Suit plot to anyone else but to the Plaintiff ;

c) IN THE ALTERNATIVE, if for any reason the above prayers at (a) and (b) cannot be granted then a Decree be passed for the sum of Rs.40 Lacs against the Defendants jointly and/or severally with interest at the usual rate i.e. 15% per annum with effect from 4th of June, 1987, the date on which the transfer was undertaken to be executed by Defendant No.1 in favour of the Plaintiff

d) Costs of the Suit.

*e) Any other relief which the Honourable Court may deem fit and proper under the circumstances of the case.***"**

4. In its written statement, it was admitted by DHA that a receipt for delivery of transfer order was issued by DHA in favour of respondent No.3. It was averred that respondent No.3 had authorized respondent No.2 to collect the transfer order on his behalf ; he sold the suit property and documents of transfer duly executed by him were submitted with DHA for mutation / transfer ; such documents were accepted by DHA as the covering / mutation letter was duly attested by an authorized officer of the armed forces ; after proper processing of the transfer documents executed by respondent No.3 in favour of the appellant, transfer order was issued in favour of the appellant ; and, the transfer was effected by DHA with full diligence and as per their rules and regulations. The allegations of collusion and negligence leveled by respondent No.3 in his plaint were denied by DHA.

5. Respondent No.2 also filed his written statement, wherein in paragraph 8 he stated that the appellant approached him and arranged to get the transfer documents of the suit property prepared ; the appellant presented one person by claiming that he was Raees Ahmed (respondent No.3), who wanted to transfer the suit property to the appellant ; and, he prepared the papers and submitted the same with DHA for which a sum of Rs.1,500/- was paid to him towards his services. In the same paragraph, it was admitted by respondent No.2 that the person introduced to him by the appellant as Raees Ahmed was not actually Raees Ahmed. In paragraph 10, it was stated by respondent No.2 that on coming to know that the person presented by the appellant as Raees Ahmed was not in fact Raees Ahmed (respondent No.3), he approached respondent No.3 and promised to get the market price for the suit property ; he paid a sum of Rs.1,050,000/- to respondent No.3 as security deposit ; and, thereafter, respondent No.3 started threatening him that he wanted the suit property. In paragraph 14, it was reiterated by respondent No.2 that the appellant approached him and produced one person by claiming that they had concluded a deal with regards to the suit property ; he was asked only to submit

the papers with DHA ; and, on becoming aware of the facts, he approached the appellant and respondent No.3 for settlement in order to avoid litigation. In paragraph 15, respondent No.2 claimed that it was agreed that the appellant would transfer the Suit property to respondent No.3 on being paid back the amount of Rs.1,300,000/- ; and, he and respondent No.3 arranged to pay back the amount to the appellant, but the appellant flatly refused to transfer the suit property to respondent No.3. The allegation of fraud leveled against him by respondent No.3 was denied by respondent No.2.

6. In his written statement, the appellant denied the assertions and allegations made by respondent No.3. In paragraph 5, he claimed that on 03.06.1987, respondent No.3 through his duly authorized agent / respondent No.2 sold the suit property to him in consideration of Rs.1,350,000/- which was the prevailing market price ; at the time of agreement, an amount of Rs.10,000/- was paid by him as token money and the balance was payable within 15 days ; respondent No.2 held all the documents duly executed by respondent No.3 and duly verified by Brig. S. A. R. Durrani ; as desired by respondent No.2, he had two pay orders prepared of Rs.500,000/- each on 07.06.1987 and brought Rs.350,000/- in cash at the time of presentation of the documents at the office of DHA ; as DHA did not accept the documents for want of the official seal of the attesting officer, the same were returned by DHA to respondent No.2 for proper verification ; the documents were finally accepted by DHA in presence of the appellant after verification by Col. Ikram Ali Khan ; and, he then deposited the transfer fee of Rs.19,800/- with DHA on 08.06.1987 and paid the balance sale consideration on 11.06.1987 to respondent No.3 through respondent No.2, whereafter the suit property was transferred in his name on 22.07.1987 by DHA. In paragraph 6, it was stated by the appellant that the assertions were made by respondent No.3 due to subsequent differences between him and respondent No.2 over their business dealings which did not affect the transaction in his favour. In paragraph 9, by denying that respondent No.3 was entitled to the retransfer of the suit property in his name, it was pleaded by the appellant that respondent No.3 was entitled to recovery of the balance amount from his own agent / respondent No.2 who had betrayed his trust. The allegations of fraud were denied by the appellant.

7. In view of the pleadings of the parties, following issues were settled by the learned trial Court :

> **"***1. Whether the plaintiff authorized the defendant No.2 to collect from office of defendant No.1 the Transfer Order in respect of the suit plot ?*
>
> *2. Whether the defendant No.2 practiced fraud on the plaintiff and the defendant No.1 by forging signature of the plaintiff and receiving transfer paper in respect of the suit plot from the defendant No.1 ?*

3. Whether the documents in respect of transfer of the suit plot in favour of the defendant No.3 are forged and fraudulent ?

4. Whether the defendant No.2 confessed commission of fraud and paid Rs.5 lacs to the plaintiff by way of trust for getting the matter settled ?

5. Whether the transfer of the suit plot in favour of the defendant No.3 is fraudulent and liable to be cancelled ?

6. What should the decree be ? **"**

8. Respondent No.3 / plaintiff examined himself and produced several documents in support of his claim. No evidence was led by DHA. After filing his written statement, respondent No.2 did not contest the proceedings nor did he appear in the witness box. In support of his case, the appellant examined himself and produced only a counter affidavit dated 07.02.1988 filed by him in the Suit. After hearing the learned counsel for the parties, the learned Single Judge decided Issue Nos.1, 2 and 3 against the defendant / appellant, and Issue Nos.4 and 5 in favour of the plaintiff / respondent No.3. As a result of his findings, the Suit of respondent No.3 was decreed by the learned Single Judge through the impugned judgment and decree in terms of prayers (a) and (b) by holding that the transfer made by DHA in favour of the appellant was unauthorized, and the transfer of the suit property in favour of respondent No.3 be restored cancelling Exhibit PW-1/4, that is, the transfer of the suit property in favour of the appellant.

9. Mr. Munir A. Malik, learned counsel for the appellant, contended that specific allegation of fraud by respondents 2 and 3 and collusion between them was pleaded by the appellant in his written statement, but no issue to this effect was framed by the learned trial Court ; though no application was filed by the appellant for amendment of issues or for framing an additional issue, yet it was the duty of the trial Court to frame such issue ; under Order XLI Rule 25 CPC where a relevant issue is not framed by the trial Court, the appellate Court may frame such issue and remand the matter to the trial Court. In support of these submissions, he relied upon *Alam Khan and 3 others V/S Pir Ghulam Nabi Shah & Company*, ***1992 SCMR 2375***, *Roazi Khan and others V/S Nasir and others*, ***1997 SCMR 1849*** and *Mansab Ali V/S Nawab and others*, ***1994 CLC 2208***.

10. He submitted that signatures of the plaintiff / respondent No.3 on relevant documents were compared visually by the learned Single Judge, which is not permissible in law ; the disputed signatures could only be proved either by circumstantial evidence or by an expert ; and, the learned trial Court should

have made an inquiry as to whether or not the signatures of respondent No.3 stood proved by circumstantial evidence. According to him the following facts were on record which ought to have been accepted by the learned trial Court as circumstantial evidence. As per Exhibit PW-1/1, respondent No.3 was required to collect the transfer documents in his favour on 04.06.1987, but he did not explain as to why he did not go to the DHA's office on or after the said date. It was claimed by respondent No.3 that he could not collect the transfer documents due to his ailment as he had a bypass surgery in December 1985. This stance taken by him was belied by his own admission that he went to the DHA's office on 04.05.1987 to submit the documents. It was admitted by respondent No.3 in his cross-examination that respondent No.2 was his agent at the time of mutation of the suit property in DHA and respondent No.2 was present with him when Exhibit PW-1/1 was issued. Respondent No.2 had witnessed License 'A' of another property in the name of respondent No.3, which was a public document. The learned counsel submitted that the above circumstantial evidence was not appreciated by the learned Single Judge which was sufficient to show that there was no fraud or collusion on the part of the appellant, but in fact respondents 2 and 3 had committed fraud in collusion with one another. In support of his above submissions, he relied upon *Qamrul Hasan and another V/S United Bank Ltd. and another*, ***1990 MLD 276***, *Karali Prasad Dutta and another V/S A. I. Ry. Co.*, ***AIR 1928 Calcutta 498***, *Govardhan Das V/S Ahmadi Begum*, ***AIR 1953 Hyderabad 181*** and *General Manager, HBFC and others V/S Ali Rehman and others*, ***1995 CLC 531***.

11. Mr. Munir A. Malik pointed out that CMA No.1948/2005 has been filed in this appeal by the appellant for production of four documents as additional evidence in order to prove that Brig. (Rtd.) S.A.R. Durrani had attested the signatures of respondent No.3 on the relevant documents, and respondent No.2 had prior business dealings with respondent No.3. He submitted that the appellant is entitled to produce additional evidence under Order XLI Rules 27 and 28 CPC even at the appellate stage in order to prove the issues involved in the Suit through circumstantial evidence, and while hearing this appeal, this Court should exercise its discretion in his favour so that the issues are decided effectually and completely. He further submitted that the bar for filling up any lacuna is contrary to the Islamic law, Pakistan jurisprudence and administration of justice, and the same being a mere technicality should not hinder the administration of justice. In support of the above submissions, he relied upon *Zar Ali Shah and 9 others V/S Yousuf Ali Shah and 9 others*, ***1992 SCMR 1778***, *Ghulam Zohra and 8 others V/S Nazar Hussain through legal heirs*, ***2007 SCMR 1117*** and *Syed Muhammad Hassan Shah and others V/S Mst. Binat-e-Fatima and another*, ***PLD 2008 S.C. 564***.

12. It was also argued by the learned counsel that the letter of authority executed by respondent No.3 in favour of respondent No.2 was wrongly discarded by the learned Single Judge on the ground that the same did not meet the requirements of registration under Section 17 of the Registration Act, 1908. He submitted that registered power of attorney was not mandatory in this case, as there is no law which provides that a registered power of attorney is mandatory to sell an immovable property. In support of this submission, he relied upon Sections 32 and 33 of the Registration Act, 1908, and *Riazul Ambia V/S Ibrahim and others*, ***PLD 1961 S.C. 43*** and *American Life Insurance Co. V/S Abdullah and others*, ***PLD 1968 Karachi 765***.

13. Mr. Munir A. Malik further submitted that if the learned Single Judge had concluded that the suit property was wrongly transferred, then DHA, being a public functionary, should have been penalized for transferring the suit property in the appellant's name rather than penalizing the appellant who is the bonafide purchaser ; however, DHA has been left unaccountable ; the proper course would have been to grant a decree for damages to respondent No.3 against DHA because the appellant had paid the entire agreed sale consideration to him ; equitable relief of cancellation of transfer of the suit property in favour of the appellant ought not be granted to respondent No.3 as he could have been easily compensated ; respondent No.3 was not entitled to equitable relief also on the ground that he was negligent inasmuch as he failed to collect the transfer order in his name within the stipulated period ; there was collusion between respondents 2 and 3, who committed fraud with the appellant ; admittedly an amount of Rs.500,000/- was received by respondent No.3 from respondent No.2, which fact alone was sufficient to belie his claim ; originally the Suit was filed by respondent No.3 by claiming alternate relief of damages to the tune of Rs.20,00,000/- which claim was increased by him to Rs.40,00,000/- by amending the plaint ; respondent No.3 had not come to the Court with clean hands ; and, respondent No.3 was not entitled to any discretionary relief in view of the well-settled principle of natural justice that a person who seeks equity must do equity. In the end, Mr. Malik prayed that the impugned judgment and decree, being contrary to the evidence and the law, be set aside.

14. At the very outset, Mr. H. A. Rahmani, learned counsel for respondent No.3 / plaintiff, submitted that there was no agreement between the appellant and respondent No.3 in respect of sale of the suit property as alleged by the appellant or otherwise. He argued with vehemence that the case of the appellant in his written statement was that he purchased the suit property through the duly authorized agent of respondent No.3, but there was complete failure on his part to establish that the suit property was sold to him by respondent No.3 through any such agent ; no power of attorney or letter of

authority by respondent No.3 in favour of his alleged agent was produced by the appellant ; existence or proof of any sale transaction between the appellant and the respondent No.3's alleged agent was never established ; and, the burden to prove all the above was on the appellant, but he miserably failed to discharge the same. Learned counsel specifically pointed out that the appellant had admitted in his examination-in-chief that there was an agreement for sale of the suit property which was entered into by his brother with the assistance of broker Shahid Aleem who was in Karachi. He emphasized that the alleged sale remained unproven according to law and also for lack of proper, relevant and admissible evidence ; firstly, on the basis of the Rule of Best Evidence as the claim of the alleged sale and transfer was not proved through direct and relevant evidence of the appellant's brother and broker Shahid Aleem ; and, secondly, in view of the firm denial by respondent No.3 about the alleged sale, the appellant was required to produce corroborative evidence in which he had failed. He relied upon *Gul Begum V/S Muhammad Riaz and another*, ***2006 MLD 480***, in support of this submission.

15. The learned counsel submitted that the evidence led by respondent No.3 to the effect that due to his ailment he could not visit the DHA's office on 04.06.1987 to collect the transfer order in his name and he was expecting the same to be delivered to him by DHA through post, was not challenged in his cross-examination nor was any material brought on record in rebuttal thereof. It was urged that in any event the suit property could not be transferred and respondent No.3 could not be deprived therefrom on the ground that he did not visit the DHA's office or did not collect the transfer order on the given date. It was contended that respondent No.3 was never negligent as he was persistently pursuing his complaint with DHA and filed the Suit within two months of the illegal transfer. He submitted that respondent No.3 produced all relevant documents in original in support of his case, and his entire evidence remained un-rebutted and unshaken as there was no contradiction or inconsistency therein. He further submitted that personal appearance of the vendor at the time of transfer was necessary under Regulation Nos.27(g) and 27(h) of the 'Hand Book for Guidance to Members' issued by DHA ; the documents bearing the alleged signatures of respondent No.3 showed that they were attested at Quetta despite the admitted fact that all the parties to the alleged sale were at Karachi at the relevant time ; and, the alleged attestation at Quetta was deliberately and fraudulently managed by the appellant in order to avoid personal appearance of respondent No.3 before DHA at the time of transfer.

16. Regarding the disputed signatures of respondent No.3 on documents transferring the suit property in the name of the appellant and the contents

thereof, Mr. Rahmani submitted that under Article 72 of Qanun-e-Shahadat Order, 1984, ('Qanun-e-Shahadat'), contents of the documents should be proved by primary or secondary evidence ; Article 78 thereof requires proof of the signature as well as the writing of the author of the document ; and, in case of denial of execution of the document, it can only be proved through the various modes as provided in Qanun-e-Shahadat, and not otherwise. He further submitted that the Superior Courts have consistently held that the execution as well as contents of a document have to be proved by its beneficiary in case its execution is denied by its author, and Articles 78 and 79 of Qanun-e-Shahadat are the only modes through which the disputed document could be proved. It was urged that the appellant failed in proving any of the documents bearing the alleged signatures of respondent No.3 as he did not examine the attesting witnesses, and he also failed to examine the oath commissioner of the disputed affidavit ; and further, the appellant did not adopt any other course or mode provided under Qanun-e-Shahadat to prove the contents of the disputed documents as well as the alleged signatures of respondent No.3 thereon. It was further urged that in view of the above failure on the part of the appellant, the documents relied upon by him remained unproven and as such the same were rightly not considered by the learned Single Judge. In support of his above submissions, learned counsel relied upon *Khan Muhammad Yousuf Khan Khattak V/S S.M. Ayub and 2 others*, ***PLD 1973 SC 160***, *AAS Muhammad and others V/S Chahat Khan and others*, ***2004 SCMR 770***, *Anwar Ahmed V/S Mst. Nafisa Bano through legal heirs*, ***2005 SCMR 152***, *Syed Shabbir Hussain Shah and others V/S Asghar Hussain Shah and others*, ***2007 SCMR 1884*** and *Messrs Foremost Trading Company V/S Messrs Calendonian Insurance Company Limited and 2 others*, ***PLD 1988 Karachi 131***.

17. In response to the submissions made by the learned counsel for the appellant with regard to consideration or acceptance of circumstantial evidence, Mr. Rahmani submitted that circumstantial evidence is not the substitute of Articles 72, 78 and 79 ibid nor can circumstantial evidence override the requirements of the said Articles ; circumstantial evidence is based on inference and presumption ; and, if the correctness or truth of the contents of the document and the signatures thereon are not proved through direct evidence in terms of Article 72 and 78 ibid, then the truth or otherwise of the document cannot be presumed under circumstantial evidence.

18. Responding to the contention of the learned counsel for the appellant regarding the findings of the learned Single Judge that in the absence of a registered instrument as required under Section 17 of the Registration Act, 1908, the appellant was unable to prove that respondent No.2 acted as the authorized agent of respondent No.3 were contrary to law, the learned counsel

submitted that the question of registered document was/is immaterial as the appellant never produced any such document ; and, the legality, genuineness or authenticity of a document and the effect of its registration or non-registration can be looked into only when such document is produced before the Court.

19. Replying to the submission of the learned counsel for the appellant that respondent No.3 was not entitled to the discretionary relief as he had claimed damages in his Suit, Mr. Rahmani argued that there is no law that bars a plaintiff from seeking alternate remedy by way of damages. He submitted that on the contrary, main relief could not be denied to respondent No.3 simply because he had claimed damages by way of alternate relief, which even otherwise was permissible under Section 19 of the Specific Relief Act, 1877. He relied upon *Barkatullah through Legal Heirs & 12 others V/S Wali Muhammad through Legal Heirs & 3 others*, ***1994 SCMR 1737***, in support of this submission. As to the pay order of Rs.500,000/- handed over in trust to respondent No.3 by respondent No.2, he contended that such fact was disclosed by respondent No.3 himself in his plaint and examination-in-chief which shows his bonafides. He submitted that the said pay order was not given to respondent No.3 in consideration of the suit property, but was given to him in consideration of the assurance that the suit property will be retransferred in his name. He argued that the evidence of respondent No.3 in this behalf remained un-rebutted as during his lengthy cross-examination no suggestion was made to him by the appellant that the said pay order was not kept in trust by respondent No.3 or that the same was received by him towards sale consideration. He further argued that in view of the un-rebutted evidence of respondent No.3 on this point, it could not be assumed that there was collusion between respondents 2 and 3 ; and, in any event, acceptance of pay order by respondent No.3 did not affect his case as the appellant was required to prove his own case in which he had failed.

20. Regarding the issues settled by the learned trial Court, Mr. Rahmani submitted that the only relevant issue was/is whether or not the suit property was legally and validly transferred in favour of the appellant, to which the plaint of respondent No.3 was a complete denial. He further submitted that as far as the so-called allegations by the appellant in his written statement regarding fraud and collusion by and between respondents 2 and 3 were concerned, the same were not supported by any specific averments and only vague and casual reference was made in this behalf ; and as such, in the absence of necessary ingredients to this effect in the pleadings, no issue was required to be framed, nor can any such plea be entertained in this appeal. He added that even if it is assumed that there was collusion between respondents 2 and 3, the same had not improved the case of the appellant as he was required to prove his case on

its own merits. It was urged that it was not the case of the appellant that because of the alleged fraud or collusion he was prevented from summoning the attesting and other material witnesses and/or from producing the relevant documents. It was further urged that in view of the above, the documents sought to be produced by the appellant through CMA No.1948/2005 are irrelevant and have no bearing on the issues involved in the Suit.

21. Mr. Rahmani also argued that even otherwise CMA No.1948/2005 filed in this appeal by the appellant for production of additional evidence is not maintainable as denial of additional evidence is a rule and grant thereof is an exception which is evident from the very language of Rule 27 of Order XLI CPC, especially the opening sentence thereof. He submitted that under Rule 27(b) of Order XLI, discretion lies with the Court to see whether there is any deficiency in the evidence or not. He asserted that the application is not bonafide as the affidavit dated 29.10.2005 of Brig. (Rtd.) S. A. R. Durrani filed therewith on the face of it is false inasmuch as he has stated in his said affidavit that the documents bearing the disputed signatures of respondent No.3 were attested by him when he was in Karachi, but under his purported signatures / attestation on the said documents, he had mentioned an address of Quetta as his address at the time of the alleged attestation. It was urged that discretion should not be exercised by the Court in favour of a person who has filed false documents to mislead the Court. He pointed out that the documents sought to be produced by the appellant as additional evidence pertain to the year 1987 and the entire evidence in Suit was recorded subsequently. He submitted that the appellant was required to disclose convincing, cogent, reasonable and valid explanation and grounds for not producing such documents before the trial Court at the relevant time, in which he has miserably failed. It was urged by the learned counsel that there is no law that a document should be allowed to be produced subsequently merely on the ground that it is a public document, and the case-law relied upon by the learned counsel for the appellant on this point is not applicable to this case.

22. Concluding his arguments, Mr. H. A. Rahmani denied that equity was not in favour of respondent No.3, or that equitable or discretionary relief should not have been granted to him by the learned Single Judge. He submitted that equity was all along in his favour as he was illegally and fraudulently deprived of his valuable property by the appellant, he came to the Court with clean hands, and he did not file or produce any bogus or forged document nor did he make any false statement before the Court. He further submitted that on the other hand the entire case of the appellant was/is based on false statements and fabricated and forged documents, and now the appellant is trying to further mislead the

Court by introducing new documents which are either irrelevant or forged. He prayed for the dismissal of CMA No.1948/2005 and this appeal.

23. Mr. Nazar Hussain Dhoon, learned counsel for DHA, adopted the arguments advanced by Mr. H. A. Rahmani. Additionally, he contended that the process of verification of transfer documents had taken place in the office of DHA as per rules in a bonafide manner ; the appellant has to blame himself as he failed to exercise proper caution at the time of purchasing the suit property from respondent No.3 ; the appellant also failed in proving the documents of transfer through documentary or ocular evidence the onus whereof was solely on him ; the alleged sale consideration was admittedly not paid by him to respondent No.3 ; there was no fault on the part of DHA as upon submission of documents for transfer, DHA was bound to transfer the suit property in favour of the appellant, but submission of true and genuine documents was the responsibility of the appellant at the time of transfer and also in evidence before the learned trial Court ; he failed in proving through documentary or ocular evidence the genuineness or validity of such documents ; and, it is well-settled that when genuineness of the document is challenged, onus shifts to the beneficiary thereof as laid down in *Khan Muhammad V/S Muhammad Din through LRs*, ***2010 SCMR 1351***.

24. Exercising his right of rebuttal, Mr. Munir A. Malik, learned counsel for the appellant, submitted that the principle referred to by Mr. H. A. Rahmani that when attesting witnesses were not produced by the appellant, circumstantial evidence relied upon by him was irrelevant, was applicable only where the document required attestation by law. He relied upon Article 83 of Qanun-e-Shahadat in support of this submission. It was reiterated by him that there is no law which provides that a registered power of attorney is mandatory to sell an immovable property. He submitted that legal notice was issued by respondent No.3 after encashment of the pay order of Rs.500,000/- given to him by respondent No.2, which amount has not been returned by him till date, and in such circumstances, the presumption in law would be that he had accepted the said amount from the appellant as sale consideration.

25. We have heard the learned counsel for the appellant, respondent No.3 and DHA at length, and with their able assistance, have also carefully examined the material available on record, the case-law cited at the Bar and the impugned judgment and decree. Respondent No.2 was duly served as per the bailiff's report dated 27.05.2005, but he did not appear on any date of hearing.

26. In *Muhammad Azam V/S Muhammad Abdullah through legal heirs*, ***2009 SCMR 326***, the Hon'ble Supreme Court was pleased to hold that an application

for additional evidence should be decided by the Court before final adjudication of the case. We shall, therefore, first take up CMA No.1948/2005 filed by the appellant for production of additional evidence in this appeal. In order to decide this application, we have examined the law and the principles laid down on this point / subject by the Hon'ble Supreme Courts of Pakistan and Azad Jummu and Kashmir, some of which are discussed here in brief :

A. In *Mad Ajab and others V/S Awal Badshah*, ***1984 SCMR 440***, by referring to the case of *Parshotim Thakur and others V/S Lal Mohar Thakur & others*, ***AIR 1931 Privy Council 143***, it was held by the Larger Bench of the Hon'ble Supreme Court of Pakistan that the provisions of law with regard to additional evidence are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch-up the weak parts of his case and fill up omissions in the Court of appeal ; and, such power ought to be exercised very sparingly, and one requirement at least of any such evidence to be adduced should be that it should have a direct and important bearing on the main issue in the case.

B. In *Muhammad Siddique V/S Abdul Khaliq and 28 others*, ***PLD 2000 SC (AJ&K) 20***, it was held that parties to an appeal are not entitled to adduce any evidence, but the same can be allowed if the Court from whose decree an appeal is preferred had refused to admit the evidence which ought to have been admitted or the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause which is an exception to the principle that the appellate Court cannot record fresh evidence ; under Rule 27 of Order XLI CPC, additional evidence cannot be recorded unless provisions of the said Rule are attracted ; the power to allow additional evidence is discretionary in nature, but the same is circumscribed by the limitation specified in the said Rule as evidence under Rule 27(b) of Order XLI is required by the appellate Court itself and not by a party to the appeal ; it may be allowed only when a party was unable to produce evidence through no fault of its own or where evidence was imperfectly taken by the lower Court ; a party that had an opportunity but elected not to produce evidence cannot be allowed to give evidence that could not have been given in the Court below ; and, the appellate Court can allow additional evidence only if it itself so feels that the judgment cannot be pronounced in the absence thereof.

C. In *Taj Din V/S Jumma and 6 others*, ***PLD 1978 SC (AJ&K) 131***, it was held by the Hon'ble Full Bench that provisions of Rule 27 of Order XLI CPC impose strict conditions so as to prevent a litigant from being

negligent in producing the evidence at the time of the trial ; a litigant seeking permission to adduce additional evidence at the stage of appeal has to establish that evidence available apart from being of an unimpeachable character is so material that its absence might result in miscarriage of justice and that in spite of reasonable care and due diligence it could not be produced at the time the question was being tried or it has come into existence after completion of the trial ; therefore, where a party who had been negligent in producing evidence at the time the issue was being tried and a lacuna had been left and it is not shown as to how the absence of the proposed evidence would result into failure of justice, a prayer for additional evidence in such circumstances obviously would not be granted.

D. In *Nazir Hussain V/S Muhammad Alam Khan and 3 others*, ***2000 YLR 2629 [SC (AJ&K)]***, it was held that provisions contained in Rule 27 of Order XLI CPC would reveal that the appellate Court must be very cautious while allowing additional document ; and, a party which seeks to bring additional evidence on record must convince the Court with proof that such party could not lead the evidence at proper stage due to some substantial cause.

E. In *Abdul Hameed and 14 others V/S Abdul Qayyum and 16 others*, ***1998 SCMR 671***, application for production of additional evidence was dismissed by the lower appellate Court which order was maintained in revision by the learned High Court. It was held by the Hon'ble Supreme Court that the learned High Court was justified in refusing to allow production of additional evidence at the appellate stage specially when no reasonable ground was shown for not producing the same during the trial of the Suit ; and, though the parties were conscious of the questions involved in the Suit, yet they did produce the evidence.

F. In *Nazir Ahmed and 3 others V/S Mushtaq Ahmed and another*, ***1988 SCMR 1653***, leave was refused as no explanation was offered for why the evidence which was sought to be produced in the High Court for the first time was not tendered before the trial Court.

G. In *Mst. Jewan Bibi and 2 others V/S Inayat Masih*, ***1996 SCMR 1430***, it was held that discretion of Court should not be exercised in favour of a person who had remained indolent for years together in the matter of producing oral or documentary evidence before trial Court, and such person should suffer the consequences of his failure.

H. In *Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs) V/S Messrs Ghulam Nabi Corporation Ltd., Lahore*, ***PLD 1971 SC 550***, it was held by Hon'ble Full Bench of the Supreme Court that discretion under Order XLI Rule 27 CPC should not be exercised in respect of such documents which could be fabricated or manufactured.

I. In *Ejaz Muhammad Khan and others V/S Mst. Sahib Bibi through Shahzad Khan and others*, ***1996 SCMR 598***, Suit was filed in 1986 and was decided in the year 1991. Application for additional evidence was made in the year 1993 after two years of the decision by the trial court and the filing of appeal. Total duration of period of inaction on the part of the petitioners from 1986 to 1993 was about 7 years. They could not explain why any step to produce evidence in question was not taken for so many years. It was held that no doubt Order XLI Rule 27 CPC empowers the appellate Court to receive additional evidence in appropriate cases, but in view of lack of vigilance on the part of the petitioners which lasted for years together, it was not a fit case for exercise of powers by the appellate Court in their favour under Rule 27 ibid ; and, possibility of fabrication of the documents sought to be produced by the petitioners as additional evidence or the making of any alteration or interpolation therein during the aforesaid period of seven years, could also not be ruled out completely.

27. Perusal of Rule 27(1) of Order XLI CPC shows that the scope thereof is limited as it contemplates very few circumstances or conditions in which the appellate Court may allow a party to the appeal to produce additional oral or documentary evidence. It may be noted that except for Rule 27(1) ibid, there is no other provision for this purpose in the entire Civil Procedure Code, 1908. Such circumstances / conditions are, (a) where the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (b) where the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or (c) for any other substantial cause. Admittedly, the case of the appellant does not fall under Rule 27(1)(a) as he neither attempted to produce the documents in question before the learned trial Court nor did the learned trial Court refuse to admit the same in evidence. That leaves only Rule 27(1)(b). Thus, the questions that have to be resolved are, whether or not this Court while hearing this appeal requires any additional document to be produced or any witness to be examined to enable it to pronounce judgment ; are the evidence and material available on record sufficient to pronounce judgment ; and, is there any other substantial cause for allowing the appellant to produce additional evidence in this appeal.

28. Keeping in view the language used in Rule 27 ibid, it may be observed that the first appellate Court could take additional evidence only if after examining the evidence produced by the parties it comes to the conclusion that the same was inherently defective or insufficient, and unless additional evidence was allowed, judgment cannot be pronounced ; and, only such additional evidence can be permitted to be brought on record at the appellate stage which is required by the appellate Court itself for final or conclusive adjudication in the matter, or for any other substantial cause. It follows that additional evidence can be allowed in appeal when on examining the record, as it stands, an inherent lacuna, defect or deficiency is not only apparent, but is also felt by the appellate Court. The sole criterion as to whether additional evidence should be allowed or not depends upon the question whether or not the appellate Court requires the evidence **"***to enable it to pronounce judgment or for any other substantial cause***"**, as to which the appellate Court is the sole judge as the need for additional evidence must be felt by the appellate Court itself. In such an event, the appellate Court may allow additional evidence either on an application by any of the parties or even *suo motu*. Thus, it can be safely concluded that the expression **"***to enable it to pronounce judgment***"** means to enable the appellate Court to pronounce a satisfactory and complete judgment ; it certainly does not mean that additional evidence should be admitted in appeal in order to enable the appellate Court to pronounce judgment in favour of a particular party. We are of the view that the provisions of Rule 27 ibid can be legitimately invoked by allowing additional evidence only in cases where it is impossible for the appellate Court to pronounce judgment on the basis of the evidence available on record. The views expressed by us in the last two paragraphs are fortified by the authorities discussed above.

29. Coming back to the appellant's CMA No.1948/2005 for production of additional evidence, it has to be examined whether or not he was justified in not producing the documents in question when his case was being tried by the learned trial Court. He has prayed that he may be allowed to produce two documents ; namely, (i) affidavit of Brig. (Rtd.) S. A. R. Durrani, and (ii) sub-lease in Form 'A' executed by DHA in favour of respondent No.3 in respect of property No.50/II, 25th Street, Phase V, DHA, Karachi ; and, DHA be directed to produce (i) transfer affidavit from Mst. Shahnaz Begum in favour of respondent No.3 in respect of plot No.3, Khayaban-e-Badar, Phase VI, DHA, Karachi, and (ii) covering letter submitted to DHA on behalf of respondent No.3 enclosing transfer documents for transfer of property No.50/II, 25th Street, Phase V, DHA, Karachi, in favour of respondent No.3.

30. Regarding the first document, that is the affidavit of Brig. (Rtd.) S. A. R. Durrani, the appellant has stated in the affidavit filed by him in support of his above application that the signatures of respondent No.3 on Exhibits PW-1/4 and PW-1/8 were verified by the said Brig. (Rtd.) S. A. R. Durrani, whose whereabouts were not known to him previously ; after filing of this appeal, one of his close friends made some enquires from the army authorities and found that Brig. (Rtd.) S. A. R. Durrani had served as Governor of Balochistan during the period from July 1993 to May 1994 ; after locating Brig. (Rtd.) S. A. R. Durrani, his friend Tariq Rasheed narrated to him the facts of this case and inquired from him if he recalled that respondent No.3 had personally come to him for verification of his signatures on the above Exhibits ; and to this, Brig. (Rtd.) S. A. R. Durrani replied in the affirmative and had sworn the above affidavit. It may be noted that the appellant himself had stated in paragraph 5 of his written statement that the documents verified by Brig. (Rtd.) S. A. R. Durrani were rejected by DHA, and the documents which were finally accepted by DHA were verified by Col. Ikram Ali Khan. In view of this admitted position that the impugned transfer of the suit property in favour of the appellant was not effected on the basis of the documents allegedly verified by Brig. (Rtd.) S. A. R. Durrani, we are of the view that the above affidavit of Brig. (Rtd.) S. A. R. Durrani, which the appellant seeks to produce now as additional evidence, is irrelevant.

31. In addition to the above, it is pertinent to mention here that the examination-in-chief of respondent No.3 was recorded in the Suit on 13.11.1993 and he was cross-examined by the appellant's counsel on 20.01.1996, and the appellant examined himself on 17.09.1998 and he was cross-examined on the same day. Admittedly, Brig. (Rtd.) S. A. R. Durrani served as Governor of Balochistan during the period from July 1993 to May 1994, that is much prior to the cross-examination of respondent No.3 and the appellant's evidence. There is no explanation whatsoever by the appellant that if the affidavit or evidence of Brig. (Rtd.) S. A. R. Durrani was so material and important for his case, what had prevented him from locating Brig. (Rtd.) S. A. R. Durrani when evidence was being recorded in the Suit, or whether any attempt in this behalf was made by him or not at the relevant time. Moreover, if Brig. (Rtd.) S. A. R. Durrani could be traced in the year 2005 after filing of this appeal, why could he not be traced at the time of evidence, especially when, being the former Governor and a well-known personality, he could have been easily traced. It would certainly have been much easier for the appellant to locate him in the years 1996 and 1998 than in the year 2005.

32. Exhibits PW-1/4 and PW-1/8 bearing the disputed signatures of respondent No.3 and the alleged verification thereof by Brig. (Rtd.) S. A. R.

Durrani, are admittedly dated 05.06.1987. Brig. (Rtd.) S. A. R. Durrani has stated in his affidavit, which the appellant wants to produce now, that **"***I do distinctly recall that Raees Ahmed had personally appeared before me when I was in Karachi requesting me to attest these documents***"**. This affidavit was admittedly sworn by Brig. (Rtd.) S. A. R. Durrani on 29.10.2005 after filing of this appeal, that is after more than 18 years of the alleged verification of the respondent No.3's signatures on the above Exhibits. He has not explained what was so special about respondent No.3 that he recalled his personal appearance even after more than 18 years, especially when respondent No.3 was a civilian and not even a member of the armed forces. The appellant has also not explained this aspect, which creates serious doubt about the truthfulness of the contents of the said affidavit. In addition to the above, no satisfactory explanation has been given on behalf of the appellant as to why Exhibits PW-1/4 and PW-1/8 were shown to have been verified at Quetta or why an address of Quetta was mentioned thereon under the name of Brig. (Rtd.) S. A. R. Durrani when the said Exhibits were verified at Karachi according to the appellant and Brig. (Rtd.) S. A. R. Durrani. In view of the foregoing, we are afraid the principles laid down by the Hon'ble Supreme Court in the cases of *Khan Iftikhar Hussain Mamdot* and *Ejaz Muhammad Khan* (supra) will be attracted here, wherein it was held that since the party could not explain why any step to produce evidence in question was not taken for so many years and also in view of lack of vigilance on its part which lasted for years together, it was not a fit case for exercise of powers by the appellate Court in its favour under Order XLI Rule 27 CPC ; discretion under Rule 27 ibid should not be exercised in respect of such documents which could be fabricated or manufactured ; and, possibility of fabrication of the documents sought to be produced as additional evidence or the making of any alteration or interpolation therein during such long period, could also not be ruled out completely.

33. The second document which the appellant seeks to produce is the sub-lease in Form 'A' executed by DHA in favour of respondent No.3 in respect of property No.50/II, 25th Street, Phase V, DHA, Karachi, which is not the subject matter of this Suit. He has alleged collusion between respondents 2 and 3 by stating that respondent No.2 had acted as agent of respondent No.3 in other property deals and had witnessed the above sub-lease. This sub-lease was executed on 25.04.1987 and was registered on 02.05.1987, that is much prior to the cross-examination of respondent No.3 in the year 1996 and the appellant's evidence in the year 1998. It is pertinent to note here that the appellant had suggested to respondent No.3 in his cross-examination that respondent No.2 had acted on behalf of respondent No.3 as his broker in other transactions, which was denied by respondent No.3. Despite this suggestion, the appellant did not confront respondent No.3 with any document to prove the

contrary ; and now at this belated stage no explanation whatsoever has been offered by the appellant as to what had prevented him from tracing and producing the above document when evidence was being recorded in the Suit, or whether any attempt in this behalf was made by him or not at the relevant time ; and, if the same could be traced in the year 2005 after filing of this appeal, why it could not be traced at the time of evidence. Likewise, the appellant has also not explained as to what had prevented him from requesting the learned trial Court for production of the two documents that he now wishes to be summoned from DHA, especially when he had put specific questions in this context to respondent No.3 in his cross-examination regarding submission of documents at the time of transfer of the suit property from Mst. Shehnaz Begum to respondent No.3.

34. We have seen that respondent No.3 was cross-examined at length by the appellant and he also had the full opportunity to lead his own evidence in support of his defense / case by producing witnesses and relevant documents, but he elected not to confront respondent No.3 with any relevant document or to produce such evidence. Not only this, he has also failed before us in justifying his said failure. Thus the principles laid down by the Hon'ble Supreme Courts of Pakistan and Azad Jummu and Kashmir in the cases of *Abdul Hameed*, *Nazir Ahmed*, *Mst. Jewan Bibi*, *Muhammad Siddique*, *Taj Din*, *Nazir Hussain*, and *Ejaz Muhammad Khan* (supra) shall apply to the instant case with full force ; namely, a party which seeks to bring additional evidence on record must convince the Court with proof that such party could not lead the evidence at proper stage due to some substantial cause ; when no reasonable ground is shown for not producing the evidence during the trial of the Suit though the parties were conscious of the questions involved in the Suit, such evidence cannot be allowed ; when no explanation is offered why the evidence sought to be produced in the High Court for the first time was not tendered before the trial Court, evidence cannot be allowed ; a party that had the opportunity but elected not to produce evidence cannot be allowed to give evidence ; discretion of Court should not be exercised in favour of a person who had remained indolent for years together in the matter of producing oral or documentary evidence before trial Court, and such person should suffer the consequences of his failure ; additional evidence may be allowed only when a party was unable to produce evidence through no fault of its own or where evidence was imperfectly taken by the lower Court ; and, a litigant seeking permission to adduce additional evidence at the stage of appeal has to establish that evidence available apart from being of an unimpeachable character is so material that its absence might result in miscarriage of justice and that in spite of reasonable care and due diligence it could not be produced at the time the question was being tried or it has come into existence after completion of the trial.

35. With profound respect to the learned counsel for the appellant, we are unable to agree with him that production of additional evidence by the appellant at this stage cannot be declined on the ground that he cannot be allowed to fill up any lacunas in his case, and such bar, being a mere technicality, is contrary to the Islamic law, Pakistan jurisprudence and administration of justice, and the same should not hinder the administration of justice. We might have considered this argument had the appellant been vigilant and diligent in tracing and producing the relevant evidence at the time when the evidence was being recorded, or had he disclosed valid, cogent, reasonable or justifiable grounds in the listed application that in spite of all reasonable care and due diligence he could not or was unable to produce the said evidence or was prevented from doing so at the time of evidence, or he had attempted to produce such evidence before the learned trial Court which was refused by the learned trial Court, or the evidence was imperfectly taken by the learned trial Court. In the absence of the above, we are afraid the discretion for allowing additional evidence at this stage cannot be exercised in favour of the appellant. It is certainly not the purpose of Order XLI Rule 27 CPC or the intention of the lawmakers to allow a party to produce additional evidence at the appellate stage even if he had remained negligent in producing the same evidence at the time when he had the legal right and full opportunity to do so. In view of the above, the cases relied upon by the learned counsel for the appellant on the point of the bar in filling up lacunas, are of no help to him. On the contrary, the authorities ; namely, *Mad Ajab* and *Taj Din* (supra) shall be applicable on this point, wherein the Hon'ble Larger Bench of the Supreme Court of Pakistan and the Hon'ble Full Bench of the Supreme Court of Azad Jummu and Kashmir were pleased to hold *inter alia* that the provisions of law with regard to additional evidence are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch-up the weak parts of his case and fill up omissions in the Court of appeal ; such power ought to be exercised very sparingly ; and, where a party who had been negligent in producing evidence at the time the issue was being tried and a lacuna had been left, a prayer for additional evidence in such circumstances would obviously not be granted.

36. Thus, it is well-settled that additional evidence cannot be recorded to supplement the evidence of the parties or to make up the weaknesses of one's case. In other words, the provisions of Rule 27 ibid cannot be invoked to cover up any lacuna left by any party to the Suit or to help improve the case of any of the parties. It is also well-settled that in civil law a negligent party has to suffer for its omissions and negligence as because of such omissions and negligence on his part, a valuable right accrues in favour of the opposite party which cannot be taken away lightly. We have no hesitation in holding that since the power of

the appellate Court to allow additional evidence in appeal under Rule 27 ibid is purely discretionary in nature, a party to the appeal cannot seek production of additional oral or documentary evidence as a matter of right. In the instant case, the parties had led the evidence in support of their respective cases. The documents that are now sought to be produced admittedly pertain to the period when the alleged transaction is said to have been entered upon between the parties and the documents in question were in existence much before the evidence was recorded. Thus, none of the documents that are now sought to be produced by way of additional evidence can be permitted to be produced as the same would amount to filling in the lacuna, if any, left in the appellant's case. As observed above, the appellant has not stated any cause by which he was prevented from producing the evidence in question before the trial Court. The evidence could have been produced by him at the trial if he had been diligent. Since he was not diligent, and the purported disability to produce additional evidence before the trial Court was for the causes due to his negligence, it could not constitute a substantial cause within the meaning of Rule 27 ibid. It is apparent from the record that sufficient evidence was available before the learned Single Judge to decide the cause one way or the other effectively and insofar as the appeal before this Court is concerned, it could also be disposed of effectively and completely on the basis of the available evidence and there is no requirement or necessity of any additional evidence or document to enable this Court to pronounce judgment in this appeal. In view of the above, CMA No.1948/2005 filed by the appellant is liable to be dismissed.

37. We now propose to take up and decide the main appeal. According to the appellant, respondent No.2 acted as the authorized representative and agent of respondent No.3 only on the basis of an authority letter, and admittedly no power of attorney for this purpose was executed or registered by respondent No.3 in favour of respondent No.2. It was argued by the learned counsel for the appellant that the said authority letter was wrongly discarded by the learned Single Judge on the ground that the same did not meet the requirements of registration under Section 17 of the Registration Act, 1908. According to him, registered power of attorney was not mandatory in this case, as there is no law under which a registered power of attorney is mandatory to sell an immovable property, and in support of this submission, he relied upon Sections 32 and 33 of the Registration Act, 1908, and the cases of *Riaz-ul-Ambia* and *American Life Insurance Co.* (supra). The case of *American Life Insurance Co.* is of no help to the appellant as the finding therein that the power of attorney by other mortgagors in favour of the executant of the mortgage deed did not require registration, was due to the fact that the executant himself was one of the

mortgagors. Even otherwise, the cited case being a Single Bench decision of this Court is not binding on us. As far as the case of *Riaz-ul-Ambia* (supra) is concerned, we are afraid instead of supporting the appellant the same goes against him as it was held therein by the Hon'ble Larger Bench of the Supreme Court that only such documents are not compulsorily registerable which do not create any interest in immovable property. This clearly means that all such documents whereby any type of interest is created in an immovable property, must be registered. In this context, we would like to refer to the case of *Siraj Din and others V/S Ghulam Nabi and others*, ***PLD 2003 SC 159***, wherein the entire case was based upon the authenticity of an alleged general power of attorney which was not produced in evidence before the trial Court. It was held by the Hon'ble Full Bench of the Supreme Court that as the alleged general power of attorney was non-existent, the question of its validity did not arise at all ; under Section 17(b) of the Registration Act, any document that purports to create right, title or interest in immovable property requires compulsory registration ; if the power of attorney was in existence, the same should have been compulsory registered as per law and its mere attestation by the Notary Public was not sufficient to meet the requirement of the law ; and, the very foundation of the case was baseless and merited to fall down and thus rightly held so by all the Courts below. We would also like to refer to *Allah Diwaya V/S Ghulam Fatima*, ***PLD 2008 SC 73***, wherein it was held by the Hon'ble Supreme Court that the gift deed in question was compulsorily registerable under Section 17 of the Registration Act and without getting it registered, the title of the property in question could not have been conferred upon. Similarly, it was held by a learned Division Bench of this Court in *Ali Raza V/S Muhammad Shoaib*, ***2014 CLC 1343***, that under Section 17 ibid no right, title or interest in an immovable property of the value of more than one hundred Rupees could be created without a registered document. With profound respect to the learned counsel for the appellant, we are of the opinion that the findings of the learned Single Judge on this point are correct in view of the above authorities.

38. As the entire case of the appellant was admittedly based upon an authority letter in favour of respondent No.2, which was not produced by him in his evidence, and also as admittedly no registered power of attorney in favour of respondent No.2 was produced in evidence before the learned trial Court, we, in view of the authoritative pronouncement by the Hon'ble Larger Bench of the Supreme Court in *Siraj Din* (supra), have no hesitation in holding that this appeal is liable to be dismissed on this very ground. However, since several

other grounds were urged before us on behalf of the appellant, we deem it necessary to discuss the same and to give our findings thereon.

39. It was the case of the appellant that respondent No.2 acted as the agent and authorized representative of respondent No.3 on the basis of an authority letter allegedly executed in his favour by respondent No.3. After going through the evidence of the appellant, we have noticed that the said authority letter was not produced by him in his evidence, although it was admitted by him in his cross-examination that the original authority letter was with him. The original of the said authority letter was produced by DHA as Exhibit PW-1/3 during the examination-in-chief of respondent No.3 along with the originals of the transfer documents bearing the disputed signatures of respondent No.3, which fact is confirmed by the endorsements made by the office on the reverse of the said documents available in the evidence file. It was urged on behalf of the appellant that non-production of the original authority letter by the appellant did not affect his case in view of the order passed in the Suit on 18.02.2004, whereby the authority letter was taken on record and was ordered to be treated as part of the evidence subject to all just exceptions. In our humble opinion, this argument cannot be accepted. It is our firm view that when the burden to prove a document, and particularly the execution thereof when the writing or signature thereon is denied by the alleged author / executant, is on the party relying on it, such burden cannot be discharged except in accordance with the provisions of Qanoon-e-Shahadat, and even the Court has no power to dispense with such responsibility of the party. Vide order dated 18.02.2004, the purported authority letter was merely taken on record as part of the evidence, and that too subject to all just exceptions. Therefore, the appellant was still required to prove the execution and contents thereof under the provisions of Qanoon-e-Shahadat, especially in view of the specific and persistent denial by respondent No.3 regarding its execution and genuineness. Since the alleged authority letter was never produced by the appellant and admittedly there was power of attorney by respondent No.3, the appellant had completely failed in proving that respondent No.2 was the authorized representative or agent of respondent No.3, or that the former had any authority to sell the suit property belonging to the latter.

40. We have examined the purported authority letter on its own strength, which does not bear any date. For ready reference and convenience, the same is reproduced below :

> **"***The Administrative Officer,*
> *Defence Housing Authority,*
> *Karachi.*
>
> *Sub: AUTHORITY LETTER*

Dear Sir,

I, the undersigned, do hereby authorize Mr. Mohammad Jamal Ghazali, holder of N.I.C. No.518-62-308784, whose specimen signatures are given below, to submit the Transfer Documents to your office for me and on my behalf.

Thanking you,

Specimen Signature of
Mr. Mohammad Jamal Ghazali
Sd/-
_____

Your'sFaithfully,

sd/-
Rais Ahmed
S/O
*Mohammad Ayub.***"**

(Note : There are some handwritten endorsements at the foot of this authority letter, showing that it was again signed by defendant No.2 / Mohammad Jamal Ghazali on 11.06.1987, and under his signature, it was written by broker Shahid Aleem that he knew defendant No.2.)

It is significant to note that by virtue of the above document, no authority or power whatsoever was given to respondent No.2 to sell the suit property on behalf of respondent No.3 or to enter into an agreement for such purpose with any third party ; and, defendant No.2 was purportedly authorized only to submit the transfer documents to the DHA's office on behalf of respondent No.3. Moreover, it is nowhere mentioned in the above document that the transfer documents were to be submitted in favour of the appellant. Therefore, if the appellant's assertion regarding this authority letter is accepted, even then the alleged sale of the suit property in his favour was not proved.

41. We have seen that the case set up by the appellant in his written statement was that the suit property was purchased by him from respondent No.3 through respondent No.2, who was a broker and was the agent and authorized representative of respondent No.3. In his examination-in-chief, the appellant had admitted that there was an agreement of sale in respect of the suit property which was entered into by him through his brother with the assistance of broker Shahid Aleem, and the title deeds were also examined by his brother. In such circumstances, the appellant ought to have produced a power of attorney or at least a letter of authority, executed by him in favour of his brother authorizing him to enter into the agreement on his behalf. But surprisingly no such document was produced by him. Therefore, the authority to enter into the alleged sale was lacking in this case from both the sides, that is, from the appellant / alleged purchaser in favour of his brother and from

respondent No.3 / alleged seller in favour of his alleged authorized agent / respondent No.2.

42. It was stated by the appellant in his examination-in-chief that the total sale consideration was agreed at Rs.1,350,000/- ; his brother asked him on telephone to bring two pay orders of Rs.500,000/- each, one in the respondent No.2's name and the other in the name of **"***some woman***"** ; the balance amount of Rs.350,000/- was taken in cash to broker Shahid Aleem which was to be given to respondent No.2 ; the appellant, respondent No.2 and one person from broker Shahid Aleem went to the DHA's office to submit documents for transferring the suit property in favour of the appellant ; and, after removal of the DHA's objection, attestation of the said documents and submitting the same with DHA, the pay orders and cash were given to respondent No.2. The burden to prove all the above assertions lay squarely upon the appellant, but he did not produce either the sale agreement or his brother or the broker Shahid Aleem, who would have been material witnesses and best evidence to support his claim. Moreover, no explanation was given by the appellant in his evidence for not producing the above mentioned material and best evidence, resulting into the presumption that such material and best evidence was withheld by him. It is surprising to note that even in the application filed by the appellant in this appeal for producing additional evidence, he did not make any attempt to produce the sale agreement or his brother or the broker Shahid Aleem. In these circumstances, reliance on *Gul Begum* (supra) by Mr. Rehmani appears to be correct, wherein it was held by Hon'ble Mr. Justice Jawwad S. Khawaja (as his lordship then was) that where best evidence was not produced by a party, the Court should draw adverse inference that if such evidence had been produced, it would have gone against the defaulting party.

43. In addition to his above failure, the appellant made some very important admissions in his cross-examination, such as, the sale agreement was not produced by him ; he had no contact with respondent No.3 ; everything was done by his brother ; he came in the picture only when the transfer documents were filed with DHA ; none of the documents were signed before him by respondent No.3 and only defendant No.2 and broker Shahid Aleem signed before him ; broker Shahid Aleem lives in Karachi ; he had the pay order prepared in the name of a lady on the instructions of defendant No.2 ; and, he was not aware whether such instructions were given to defendant No.2 by respondent No.3 or not.

44. It was an admitted position that the appellant never met respondent No.3 nor did he enter into any agreement with him for sale of the suit property. As per his own deposition, he had a meeting with respondent No.3 only after filing of the Suit. In his written statement, the appellant had claimed that the suit property was purchased by him through the duly authorized agent of respondent No.3, and in his examination-in-chief, he had admitted that the agreement was entered into by his brother and even the title deeds were examined by his brother. It was further admitted by the appellant in his examination-in-chief that when he went to the DHA's office to collect the transfer letter, he was asked to produce the seller of the property (respondent No.3), and he was not aware whether the seller (respondent No.3) was produced before DHA or not. In view of the above admitted position, it is our considered view that there was no privity of contract between the appellant and respondent No.3.

45. As per the appellant's own pleadings and evidence, Rs.500,000/- was paid by him to respondent No.2 and Rs.500,000/- to **"***some woman***"**, and the balance amount of Rs.350,000/- was paid in cash to broker Shahid Aleem for payment to defendant No.2. Therefore, it is an admitted position that no portion of the alleged sale consideration was paid by him to respondent No.3. Regarding the amount of Rs.500,000/- received by respondent No.3 from respondent No.2, it was argued on behalf of the appellant that payment of sale consideration by him to respondent No.3 stood proven. It is important to note that even this amount of Rs.500,000/- was admittedly not paid by the appellant directly to respondent No.3. Respondent No.3 had specifically denied that this amount was received by him from the appellant towards sale consideration, and he had insisted that the same was received by him in trust for settlement of the dispute. The burden to prove that the said amount was paid by respondent No.2 on behalf of the appellant as sale consideration to respondent No.3, was on the appellant. Record shows that no suggestion was made by the appellant to respondent No.3 in his cross-examination that the said amount was received by him towards sale consideration or the same was not received by him in trust. Thus, the appellant had failed in discharging this burden also. Not only this, all assertions made by respondent No.3 in this behalf remained unchallenged and un-rebutted. In the absence of proof of payment of the alleged sale consideration by the appellant to respondent No.3, the appellant had failed in proving the alleged sale of the suit property in his favour. We are of the view that even if there was any agreement between the appellant and respondent

No.3, which could not be proved by the appellant, the same was void for lack of consideration.

46. It was also urged on behalf of the appellant that the disputed signatures of respondent No.3 on the disputed documents could only be proved either by circumstantial evidence or by an expert, therefore, the learned Single Judge erred in comparing his signatures visually, since it is not permissible in law. As discussed above, the onus to prove the respondent No.3's signatures on the disputed documents through direct and relevant evidence was squarely upon the appellant, in which he had miserably failed. Therefore, there was no occasion for proving the same by circumstantial evidence or by an expert. We have observed that the learned Single Judge has given detailed findings about the disputed signatures after carefully and minutely comparing the same with the admitted signatures of respondent No.3. The question of whether or not the learned Single Judge could legally do so, is answered in *Anwar Ahmad V/S Mst. Nafisa Bano through Legal Heirs*, ***2005 SCMR 152***. In the cited authority, the appellant / tenant filed a Suit for specific performance by alleging that the demised premises had been sold to him by the landlady. The receipt for payment of sale consideration filed and relied upon by him had overwriting and seemed to be a manipulated document. The said receipt was disbelieved by the learned Single Judge of this Court after noticing discrepancy therein showing traces of writing with ink on the original document having been removed by chemical action and typing out the substance on the receipt leaving the signatures of the landlady intact. Resultantly the Suit was dismissed, and the judgment and decree were maintained in appeal by the learned Division Bench of this Court. The appeal filed by the tenant / plaintiff before the Hon'ble Supreme Court was dismissed with the majority view, by holding that nothing was wrong on the part of the learned Single Judge and no exception could be taken to the opinion formed by him after thoroughly examining the disputed document. It was further held that even without calling the tenant / plaintiff to explain the discrepancy, the Court was competent to look into the document and to comment upon its true nature or otherwise, as such power was inherent in every Court, much more the High Court. It was also held that evidence of a handwriting expert is always considered to be a weak type of evidence ; in presence of overwhelming oral, documentary and circumstantial evidence, it would be futile to examine the expert ; and, even if such an expert is examined, it would not outweigh the available evidence.

47. It was argued on behalf of the appellant that a specific issue ought to have been framed by the learned trial Court in view of the allegations of fraud and collusion made by the appellant against respondents 2 and 3. Perusal of the written statement of the appellant shows that instead of specific allegations

with full particulars of the fraud allegedly committed by respondents 2 and 3, a vague and evasive statement was given by him. In this context, we may refer to *Messrs Dadabhoy Cement Industries Limited and others V/S Messrs National Development Finance Corporation*, ***2002 CLC 166***, wherein it was held by a learned Division Bench of this Court that where a party levels allegation of fraud, it must specify and mention the details of the fraud and further that the same was required to be proven beyond reasonable doubt and not on the basis of surmises, conjectures and suspicion. This decision of the learned Division Bench was upheld by the Hon'ble Supreme Court in *Messrs Dadabhoy Cement Industries Limited and 6 others V/S Messrs National Development Finance Corporation, Karachi*, ***PLD 2002 SC 500***. As full and specific particulars of the alleged fraud were not before the learned trial Court, there was no question of framing an issue in this behalf.

48. After examining all the aspects of the case, it is our considered view that the appellant had miserably failed before the learned trial Court in discharging his burden to prove that respondent No.2 was the authorized representative or agent of respondent No.3, or respondent No.3 had authorized respondent No.2 to sell the suit property on his behalf to the appellant ; or there was any privity of contract between the appellant and respondent No.3 or an agreement between them for sale of the suit property ; or any portion of the alleged sale consideration was paid by the appellant to respondent No.3. Such failure on the part of the appellant was fatal to his case. Moreover, respondent No.2 never came into the witness box to rebut the allegations made against him by respondent No.3, therefore, all the allegations made against him by respondent No.3 in his plaint and evidence that he was not his agent and had no authority to sell the suit property, remained unchallenged and un-rebutted.

49. In view of the above discussion, we are convinced that the impugned judgment and decree are balanced and equitable by all standards, they are based on correct appreciation of evidence and full and proper application of mind, and the appellant has not been able to show any infirmity or illegality therein. Thus, the same do not require any interference by us. This appeal and CMA No.1948 of 2005 are, therefore, dismissed with no order as to costs.

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