IN THE HIGH COURT OF SINDH AT KARACHI

R.A. NO.52/2005

Applicants	:	Mrs. Shamim Qadri and another, through Mr. Mushtaq A. Memon advocate.
Respondents	:	M/s. Noor Iron and Steel Industries Ltd. and another, Mr. Faisal Siddiqui alongwith Mr. Saad Fayyaz advocates for respondent No.1. Ms. Sofia Saeed Shah alongwith Mr. Ejaz Ali advocates for respondent No.2 (S.I.T.E)

Date of hearing 9th February, 4th & 18th March, 14th &, 27th April, 28th & 31st May, 2021.

Date of announcement 15th June, 2021.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Applicants have impugned judgment and decree dated 20.11.2004 passed by 4th Additional District Judge, Karachi West, in Civil Appeal No.137/2000 setting aside the judgment and decree dated 15.11.2000 passed by 1st Senior Civil Judge, Karachi West, in Suit No.94/1977 filed by respondent No.1, and decreed that suit.

2. Concisely relevant facts of the case are that Plaintiff/Respondent No.1 herein (Noor Iron and Steel Industries Limited) filed Suit No.94/1977 for Declaration and Injunctions contending that plaintiff through its promoter or the then proposed Director had acquired a piece of land measuring 5 acres which on actual measurement found to be 6 acres, from one Ibrahim Brohi s/o Khamiso Khan in the then Shershah Village in district of Karachi and plaintiff was put in physical possession; that an agreement dated 08.03.1968 was executed between said Ibrahim Brohi and plaintiff whereby confirming delivery of possession; that the plot

was regularized by defendant No.1/respondent No.2 (S.I.T.E) herein on 05.09.1968 after completing necessary formalities and payment of relevant charges; that agreement was executed between plaintiff/respondent No.1 and defendant No.1/respondent No.2 on 10.09.1968 for grant of long term lease of the said land to plaintiff and land was numbered as Plot No.D-182, a site plan was prepared by the Sindh Industrial and Trading Estate (S.I.T.E.) showing the number of the plot as D-182, that SITE thereafter also granted NOCs with regard to carrying out the construction on that plot; that Syed Saleh Shah, on account of his enmity with Muhammad Ibrahim or otherwise, filed malafide and incompetent ejectment case No.633/1968 against plaintiff before the Civil Judge/Controller Karachi which was dismissed; that said Saleh Shah in collusion with defendants No.2 and 3/applicants No.1 and 2 herein, forged some documents including deed of partnership of one Noor Muhammad with Muhammad Rafi Qadri alleging to be partners of a non-existing firm known as Noor Iron & Steel Industries and claiming to have acquired some piece of land from the Land Manger Shershah Estates in Class-V in Block-F in plan of Syed Umed Ali Shah from Shershah Village. It was further pleaded that in furtherance of their malafide collusion, defendants No.2 and 3 filed incompetent Suit NO.2256/1969 in the court of Civil Judge Karachi against said Noor Muhammad and Land Manager, Shershah Estate for dissolution of a fake partnership and declaration and injunction, describing the land as Plot measuring 30,000 square yards falling on 100 feet vide Road, Class-V in Bock-F in plan Syed Umed Ali Shah situated in Shershah Village, SITE, Karachi; that plaintiff was not party to that suit nor received any notice thereof, that plaintiff/respondent No.1 received a letter dated 14.12.1976 by defendant No.1/respondent No.2 whereby plaintiff was asked as to why agreement with them be not cancelled and the plot may not be transferred in the name of defendants No.2 and

3/applicants; it was learnt that the suit was exparte decreed on 29.05.1973; that they received another letter dated 04.01.1977 by SITE for joint meeting which was replied asking the SITE to provide copies documents to enable them to prepare defence but same were not provided; that by letter dated 17.01.1977 the plot was cancelled and they were advised to hand over its possession to defendants No.2 and 3/applicants. Plaintiff/respondent No.1 thus filed Suit No.94/1977 with following prayer:-

> (a) It be declared that plaintiff is still the lawful tenant/lessee of defendant No.1 in respect of industrial plot of land bearing Plot No.D/182, situated in Sind Industrial Trading Estate, off Mauripur Road, Karachi, and is in lawful possession thereof, and that the decision of defendant No.1 to recognize or treat defendants No.2 and 3 or any of them, as tenants of the said plot No.D/182, is illegal, inoperative, malafide collusive and it has been passed without lawful authority, and is an absolute nullity, and annexure G of the plaint and also the alleged letter dated 17.01.1977 are void, illegal, inoperative and unenforceable, and are incapable of implementation.
>
> (b) It be declared that the decree passed by XV Civil Judge Karachi in Suit No.2256 of 1960 (annexure EE of the plaint) is void and/or is not binding on the plaintiff, and on the basis thereof, the plaintiff cannot be deprived or dispossessed of the tenancy/lease/possession of the said plot No.D-182 (in SITE Karachi, and that the said decree cannot be executed/enforced as against he said plot of land and/or against the plaintiff.
>
> (c) Perpetual injunction restraining the defendants, their servant, agents, workmen and all persons claiming through or under them, or either of them, from disturbing or denying the tenancy/lease and possession of the plaintiff in respect of the said plot No.D-182, on the basis of or in pursuance/execution/implementation of annexure E and G of the plaint and/or of the alleged letter dated 17.01.1977 or otherwise.
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> (d) Mandatory injunction directing defendant No.1 to withdraw/annul/set aside/cancel annexure G of the plaint and/or the alleged letter dated 17.01.1977 and all and any other order, decision or proceedings taken by defendant No.1 through its board or otherwise, prejudicing or depriving the plaintiff of the tenancy/lease/possession of the said plot No.D-182.
>
> (e) Any other, better, further or alternate relief which this honourable court may deemed just and proper under the circumstances of the case be granted to the plaintiff.
>
> (f) The costs of the suit be awarded to the plaintiff."

3. Defendants No.2 and 3/present applicants in their written statement denied that plaintiff acquired the land from Muhammad Ibrahim or was put into possession or that said Muhammad Ibrahim was owner of the land or that agreement between said Ibrahim and plaintiff was executed, or that plaintiff remained in possession continuously, they pleaded that vide lease agreement dated 30.02.1960 Muhammad Rafi Qadri took the land measuring 30,000 square yards situated at Block F N.10 Shershah Village Estates and Shershah Colony (new numbered as Plot No.D/182 by defendant No.1/SITE) on 99 year lease from one Syed Saleh Shah landlord and owner of Shershah Village Estate and Shershah Colony, that later on Noor Muhammad Dada Bhai who had friendly terms with late Mian Muhammad Rafi Qadri represented to him that in the event of partnership between them he could install iron and steel industry over the plot and ultimately they agreed to form a partnership firm on equal basis and under the name and style "Noor Iron and Steel Industries" and that the contribution of said Noor Muhammad in the firm would be installation of the steel and iron industry at his expense, they executed a partnership deed, that it was agreed that deceased would transfer his leasehold rights in the plot to said firm to facilitate it to obtain necessary loans in its name and accordingly Mian Muhammad Rafi Qadri applied to said Syed Saleh Shah landlord and owner of Shershah Village Estates and Shershah Colony for mutation which was done and as such Mian Muhammad Rafi performed his part of deal; that possession of the land was delivered to said partnership firm as per letter dated 06.06.1963, Noor Muhammad Dada did not perform his part of deal and kept Mian Muhammad Rafi on false promises till his death leaving behind defendants No.2 and 3 as his legal heirs in said Noor Iron and Steel Industries in shape of disputed land; that civil suit

No.2256/1969 was filed against Noor Muhammad Dada and notices issued to his address being second floor, Zamindar Building, Campbell Street Karachi but returned un-served as he avoided service, notices were also issued on his residential address but could not be served and publication was made but Noor Muhammad Dada did not contest the suit and it was decreed as per judgment and decree dated 31.05.1973; that on pursuing defendant No.1 SITE issued notices to plaintiff asking to show cause why the land should not be mutated in favour of defendants No.2 and 3 on the basis of judgment and decree dated 31.05.1973 in Suit No.2256/1969. That the land having been devolved upon defendants No.2 and 3 and plaintiff had no concern to it and just by making fraudulent entries in the documents in their favour plaintiff could not get the title of the land; that plaintiff had no authority to seek alleged regularization of possession of the land or tenancy right thereof from SITE.

4. Trial court framed and answered the issues as under:-

S.NO.	ISSUES	FINDINGS
1	Whether the land in the above suit is in possession of the plaintiff since 1968, if so, its effect?	In affirmative
2	Whether the land in the above suit was the subject matter of the alleged partnership of Mian Mohammad Rafi Qadri with one Noor Mohammad Dada, if so, its effect?	In affirmative
3	Whether the decree passed by XV Civil Jude Karachi in Suit No.2256 of 1969 if binding on the plaintiff, and whether plaintiff can be dispossessed of the suit land, in execution of this decree?	In affirmative
4	Whether the alleged revocation or cancellation by defendant No.1 of the tenancy of the plaintiff in respect of the suit land is legal and valid, if so, its effect?	In affirmative
5	Whether Noor Mohammad Dada is a necessary party in the above suit?	In affirmative
6	Whether the suit has not been instituted by proper and authorized persons, if so, its effect?	In affirmative

7	To what relief, if any, the plaintiff is entitled to?	Suit of the plaintiffs stands dismissed.

5. Respective parties led their evidence (s). The learned trial court, having heard the parties, dismissed the suit of the respondent No.1/plaintiff. Such judgment and decree were challenged vide Civil Appeal No.137/2000 which was allowed by learned 4th Additional District Judge Karachi West; same are assailed through instant Civil Revision.

6. Heard learned counsel for applicants, respondent No.1 and respondent No.2 and perused the record.

7. Learned counsel applicants while reiterating same contentions as in revision application, contends that there is no lease in favour of Noor Iron and Steel Industries Limited, that in fact that is an agreement between Brohis and Noor Iron and Steel Industries Limited to be implemented by the SITE so SITE was competent to enforce or cancel the same hence SITE very rightly not acted on lease and cancelled the same after issuing show cause notice; that onus was upon the respondent No.1 (plaintiff) to prove as beneficiary; that applicants (defendants No.2 and 3) being *pardanasheen* ladies, hence were not bund to prove the case; that respondent No.1 (plaintiff) failed to produce in evidence the lease agreement and decree though filed with the plaint. It is further contended that suit against the firm was not maintainable as that was unregistered partnership hence promoter was joined as party; that applicants' suit with regard to mutation was decreed though respondent was not party but after acknowledgement they were competent to file appeal but they did not choose that remedy; that applicants' suit was for declaration and mutation only hence execution was not required to be filed; that agreement between Brohis and respondent No.1

(plaintiff) is not showing delivery of possession. He has referred paragraph No.10 of the plaint which is that :-

> "From the inspection made on behalf of the plaintiff of the record of the said suit No.2266/69 (after the receipt of letter dated 14.12.1976 as stated hereinafter) it is found that after publication of notice in the local newspaper, the said suit was decreed ex-parte, on 29.5.1973 and declaration as prayed was granted in respect of "Shershah Land". The plaintiff was not a party to this suit, nor it had received any notice thereof, nor it had any knowledge of the said decree."

Learned counsel for applicants has relied upon 2001 SCMR 1277, PLD 2016 SC 214, PLD 2003 Karachi 314 (relevant at 331), PLD 1982 Karachi 378 (relevant at 395) 2000 SCMR 1647, 2010 SCMR 1630, 2016 MLD 70, 2019 CLC 1925, 1972 SCMR 322, 2015 CLC 1196, PLD 1973 SC 160 (relevant at 191), 2007 SCMR 61 (relevant at 65), 1992 SCMR 2182 (2183), 2010 SCMR 1523 (1529), PLD 2010 SC 604 (607), PLD 1969 SC 65 (relevant at 68 and 69), 1984 SCMR 586 (588), PLD 1994 SC 245 (252), 2015 YLR 2306 (relevant at 2310 and 2312), PLD 1990 SC 642 (648) and PLD 2005 SC 658 (relevant at 662). Learned counsel for applicants has referred section 69 of the Partnership Act while contending that suit was maintainable against promoter of the firm, he has referred evidence of PW Qurban which shows that Noor Muhammad Dada was promoter.

8. In contra, learned counsel for respondent No.1 (plaintiff) contends that mutation on the decree was without judgment and same was not produced by the applicants (defendants); that SITE was not party in the suit; he has referred lease agreement dated 20.02.1960; that in partnership deed father's name of Noor Muhammad is mentioned whereas in suit filed by applicants they failed to mention his father's name; he has emphasized paragraph No.3 of the partnership deed of 1962; learned counsel for respondent has referred various documents pertaining to subject matter land as well as he has referred plaint and decree of suit No.225/1969; that decree

without consequential relief was not executable and SITE authorities were in-competent to act upon that decree directly; that regularization of plaintiff's agreement was effected in 1968; that Noor Muhammad Dada was not director of that limited company established in 1968. Learned counsel for respondent No.1 has referred sketches of suit land; also he has contended that details of land were not provided in the plaint; that the SITE in their meeting of BoD cancelled the lease of respondent No.1 (plaintiff) improperly at the instance of one Minister who wrote letter to the SITE. He has referred 2002 YLR 2553, PLD 1978 Lahore 1958, 2001 CLC 981, 2006 YLR 1799, 2010 SCMR 1523, 1987 MLD 580, 2015 CLD 1749, 2008 SCMR 905, PLD 1973 Karachi 686 and 2015 CLC 1042.

9. Learned counsel for respondent No.2/SITE has contended that as per record applicants possess legal character however the possession is with respondent No.1.

10. The instant revision petition is filed thereby challenging the judgment and decree of appellate Court whereby the judgment and decree of the learned trial Court were set-aside hence, *prima facie,* instant revision petition is against the conflicting judgment (s), therefore, scope of revisional jurisdiction of this Court would not be as *limited* as in the case (s) of *concurrent findings.*

11. The issue No.1, as was framed by trial Court, to the effect that:-

> Whether the land in the above suit is in possession of the plaintiff since 1968, if so, its effect?

was answered in ***affirmative*** and such findings were not challenged in appeal, as is evident from findings of the learned appellate Court i.e:-

> "Issue No.1 as decided by the learned trial court was with regard to the possession of the appellant on his plot since 1968 and the same was decided in favour of the appellant as such it is not assailed by the appellant in this appeal."

therefore, same needs no discussion as having been unchallenged.

12. The finding on issue No.2 were disagreed by the learned appellate Court. Before making any further discussion onto the reasoning of the disagreement, so made by the learned appellate Court, I find it necessary to say that what the learned appellate Court lost sight is the fact that the suit was filed by the respondent No.1 / plaintiff thereby making challenge (s) not only to *documents* but also to actions and claims of defendants, including the present applicants, therefore, the burden was upon them to prove its claims which includes their induction into the plot in question as well claimed *agreement* dated 10.9.1968 for which the PW-1 Qurban stated as:-

> "……. The plaintiff Company claim their entire rights in respect of the land, on the basis of agreement dated 10.9.1968 Annexure D-198"

Reliance is placed on the case law, reported as 2010 SCMR 1351 wherein it is held as:-

> "It is also settled principle of law that appellant is a beneficiary of the aforesaid document therefore it is the duty and obligation of the appellant to prove the documents as pointed out by the learned counsel in accordance with the provisions of Qanoon-e-Shahadat Order 1984. See 1979 SCMR 549)Akhter Ali V. University of the Punjab), 1992 SCMR 2439 (Haji Muhammad Khan etc v. Islamic Republic of Pakistan). It is well settled principle of law that initial burden to prove execution of document is on party which is relying on documents. Once this onus is discharged burden to prove factum of fraud or undue influence or genuineness of documents shifts to party which alleges fraud."

Such settled principle was never appreciated by the learned appellate Court which has given reasoning of disagreement on basis of hypothesis and no referral was made to failure of the respondent No.1 / plaintiff in proving its (plaintiff's) contentions and claims. It was never appreciated by the learned appellate Court that the respondent No.1 / plaintiff never proved the execution of the document upon which its (plaintiff's) whole case, per PW-1 Qurban, rests. On what the whole case was resting, the respondent no.1 / plaintiff was required to do a little more than mere production of such a

document. Here, a referral to cross examination of PW-Qurban is made which was referred by learned trial Court in its judgment which reads as:-

> "It is fact that I produce Ex.5/1 in the court during my examination in chief. I see Ex.5/1 and state that I am not aware as to who has signed as party of second part. It is correct to that Ex.5/1 is not the original documents and it is photocopy. *I cannot say as to where original documents of Ex.5/1 was or it*. I have produced Ex.D/138 in court when I was examined as PW 1. ***It is correct that Ex.D/198 i.e. the agreement dated 10.9.1968 is also a photocopy. I cannot say where the original of the agreement dated 10.09.1968. I am not signatory of Ex.D/198."***

Needless to reiterate the legally established principle of law that burden to prove such document was upon the respondent No.1 / plaintiff as it (plaintiff) was / is claiming benefit of such document and failure, needless to affirm, shall bring its legal consequence. The guidance is taken from the case of *Amjad Ikram v. Asiya Kausar* (2015 SCMR 1) wherein it is held as:-

> "It is an equally settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same. Reference in this behalf may be made from the judgments of this Court, reported as Akhter Ali v The University of the Punjab (1979 SCMR 549), Haji Muhammad Khan and another v Islamic Republic of Pakistan and 2 others (1992 SCMR 2439) and Khan Muhammad v Muhammad Din through LRs (2010 SCMR 1351)."

I would also add here that since it was never claimed by the respondent No.1/ plaintiff that original of such document was lost or missing nor the respondent no.1 / plaintiff ever enjoyed liberty that mere production of *photo-state copy* was legally sufficient for proof of such document. In the case of *Imam Din & 4 Ors v. Bashir Ahmed & Ors* (PLD 2005 SC 418) even the *certified* true copy was held to be not sufficient when existence of document is disputed and original is not produced. It was held as:-

> 'This is settled law that in absence of original document, its certified copy if not admissible evidence and notwithstanding the presumption of correctness being attached with certified copy of a document pertaining to the official record, if the validity or the existence of the document is disputed and original is not produced, its certified copy would not be admissible in evidence without proving the non-availability of the original."

In another case of <u>*Dawa Khan v. Muhammad Tayyab*</u> 2013 SCMR 1113, the legal principle was reaffirmed that it is not *mere* production / exhibiting a document but proof of execution thereof which, too, per commandment of law. It was held as :-

> "The contention of the learned counsel for the respondent that under Article 81 of the Order, if a document produced is admissible in evidence, the party relying upon it is not required to prove its contents, is without force and misconceived. Admissibility of a document in evidence, by itself, will not absolve the party from proving its contents in terms of Article 79 provided under the scheme of the Order'

The above legal position (s) were never appreciated nor discussed by the learned appellate Court while reversing the findings of the learned trial Court though *legally* the party, claiming relief, has to stand on its own legs to succeed and no benefit of any weaknesses in case of opposite party can be availed. Guidance is taken from the case of <u>*Sultan Muhammad v. Muhammad Qasim*</u> (2010 SCMR 1630) wherein it is held as:-

> "24. …. The above observations against respondent No.1 are in line with the well-recognized legal principle about the discharge of burden of proof that a party approaching the Court of law for grant of relief has to discharge its own burden and has to stand on its own legs to succeed, and no benefit of any weaknesses in the case of opposite party can be availed by him."

In the last, I find it in all fairness to add that decision must never be based on surmises but on established facts which, *too,* by following the settled principles of law of appreciation of evidences and administration of justice. Reference in this regard is made to the case of <u>*Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif*</u> (PLD 2017 SC 265) wherein it is held as:-

> "19. … Courts of law decide the cases on the basis of the facts admitted or established on the record. Surmises and speculations have no place in the administration of justice. Any departure from such course, however well-intentioned it may be, would be a precursor of doom and disaster for the society. It as such would not a solution to the problem nor would it be a step forward. It would indeed be a giani stride nay a long leap backward. The solution lies not in bypassing but in activating the institutions by having recourse to Article 190 of the Constitution. …."

13. Without prejudice to above legal position (s), now I would like to examine the reasoning of the learned appellate Court whereby the findings of the learned trial Court were reversed making the instant revision to be one against *'conflicting views'*. It would be conducive to reproduce the same for proper appraisal of conclusion, so arrived by learned appellate Court. The same reads as:-

> "The learned trial court has however made a lengthy discussion on issue No.2 and by quoting and referring to the evidence of different witnesses has come to the conclusion that the land in possession of the appellant was the subject matter of the earlier suit No.2256 of 1969. I have carefully gone through the discussion made by the learned trial court and have also perused the quoted portions of the evidence of the witness of the appellant namely Qurban s/o Qamaruddin. The learned trial court while deciding this issue and also referred to the evidence of respondent No.2 which also has been perused by me carefully.
>
> The entire discussion made by the learned trial court with reference to the evidence of the witness of appellant namely Qamaruddin tends to resolve that <u>either the said Noor Muhammad who was defendant in suit No.2256 of 1969 was in any manner associated with the affairs of the present appellant which is a private limited company or that the appellant company was in fact a subsequent change of status of the same defendant Noor Muhammad or that the present appellant company was a successor of the said Noor Muhammad</u>. <u>**The issue to be decided by the trial court was with regard to the plot of the appellant as to whether it was the same plot or not which was subject matter of the earlier suit No.2256 of 1969**</u> and this was not at all the issue before the trial court as to whether there was any statutory or factual relationship between the said Noor Muhammad and the present appellant. I would like to reproduce below some of the portions of evidence relied upon by the learned trial court in dealing with this issue in the words of the trial court:-
>
> > "...Here I would like to discuss evidence of plaintiff's witness Qurban son of Qamaruddin who is the promoter as well as Director of plaintiff's company he has deposed in his examination in chief as under:-
> >
> > "I am son of the promoter of the plaintiff company, other promoter were three brothers namely Noor Muhammad, Ghulam Mohammad and Mohammad Farooq, the said three brother had agreed with one Mohammad Ibrahim and his family in respect of the suit property. I produce photo state copy of agreement between three brothers and Mohammad Ibrahim (subject to prove) on the basis of ex.5/1 three brothers who were promoter of plaintiff's company applied to site defendant No.1, hereafter for transfer and regularization of the suit plot in their favour.

> We promptly apply incorporating of the plaintiff's company. I see Ex.D/114 which is photo state copy of the certificate."

Similarly in his cross examination on 6.5.1992 at page 4 he has deposed as under:-

> "That original Directors besides me were Mohammad Farooq Dada Bahi, Mr. Abdul Ghani Dada Bhai, he admitted that he had earlier deposed in his examination in chief that Noor Mohammad Dada Bahi was also one of the original Directors and Abdul Ghani Dada Bahi is father of Noor Mohammed Dada and Mohammad Farooq Bahi."

He further admitted in cross examination at page 5 as under:-

> "It is correct that of this position he had no personal knowledge of the dealing between plaintiff's company and SITE pertaining to the subject plot. I was not personally associated with the affairs of the plaintiff's company to its incorporation. I see Ex.D/94 and say that it bears the signature of Mohammad Farooq Dada Bahi, it is correct that in Ex.D/93 Noor Irion and Steel Industries is mentioned as firm. I see Ex.I/78 D/79 and D/81 and say that to address of Noor Iron and Steel Industries is shown as second floor Zamindar Building, Campbell Street."

The perusal of cross examination at page 6 further reveals that there are also certain admission on the part of the plaintiff's said material witness he has deposed as under:-

> "I am not quite shore from where this plot was acquired by the plaintiff's company but I recollect having seen an agreement where under one of the Dada bahi brothers had an agreement of purchased from one Mohammad Ibrahim Bhori. I am not in position to say as to whether if Mohammad Ibrahim Brohi has no title whatever to this plot. The first registered office of the plaintiff's company was in Zaminidar Building Campbell Street. I am not aware whether any summon or notice in suit No.2256/69 were served on Noor Mohammad Dada Bahi at the Zamindar building address."

I have also gone through further cross examination of this witness on 5.4.1997 conducted by learned counsel of defendant Nos.2 and 3 and have no hesitation to say that there are also some other material admission which goes in favour of the defendants and make the evidence of the plaintiff', inconsistence with main averments of the plaint.

> "It is correct to suggest that I am not signed to the plaint of this suit. It is correct to suggest that I have stated in my examination in chief that besides there three promoter of the plaintiff's company namely Noor Mohammad, Ghulam Mohammad and Mohammad Farooq. I see the signature of the plaintiff on the plaint, but I cannot say who has signed. I am a familiar with the signature of only Mohammad Farooq. I see the plaint and say that one Attaullah son of Mohammad Yameen have signed the plaint and I am not familiar with his signature."

He further has admitted in his cross examination as under:-

> "It is fact that I produce ex.5/1 in the court during my examination in chief. I see Ex.5/1 and state that I am not as to who has signed as party of second part. It is correct to that Ed.5/1 is not the original documents and it is photo

> copy. I cannot say as to where original documents of Ex.5/1 was or it. I have produced ex.D/138 in court when I was examined as PW 1. It is correct that Ex.D/198 i.e. the agreement dated 10.9.1968 is also a photo copy. I cannot say where the original of the agreement dated 10.9.68. I am not signatory of Ex.D/198."

It appears that the learned trial court tried to decide this issue by establishing that the present appellant company is in fact the same defendant or a legal or statutory successor of the said defendant namely Noor Muhammad in the earlier suit NO.2256 of 1969 and through this, it attempted to decide this issue against the appellant by arguing that since the appellant was the same person or a successor of the same person who was defendant in the earlier suit, **therefore, the plot which is subject matter of this suit was also the subject matter of that suit**. I am afraid if any person of a prudent mind can agree with such an argument. The learned trial court, if by any means had opted to act as an executing court yet, it was obligatory on it to decide this issue through straight and to the point evidence. The learned trial court has throughout the judgment, has disapproved the alleged purchase of the plot which is subject matter of this suit by the appellant from its seller namely Muhammad Ibrahim Brohi, but on the other hand the learned trial court has shown no hesitation in accepting the alleged sale of plot by one Saleh Shah to the predecessor of respondent NO.2 and 3. The trial court has also accepted the document of partnership relied upon by the respondents No.2 and 3 as a holy document and gospel truth. **It completely ignored the very assertion of the appellant that due to enmity between the Brohis and Syed Umed Ali Shah, the documents were prepared and forged by the respondents No.2 and 3 with the collusive assistance and cooperation of the said Syed Saleh Shah as a successor of Umed Ali Shah**. It is strange that the learned trial court did not notice a very important point that in the partnership agreement, the name of the other partner was shown as Noor Muhammad s/o Unascertainable. In case the respondents were in possession of the partnership deed/agreement at the time of filing of this suit then what was the reason that the parentage of the defendant partner Noor Muhammad was not shown in the plaint of the said suit? I have also gone through the partnership deed / agreement brought no record by the respondents No.2 and 3 and have again noted with wonder that the contents, language and style of clause No.18 of the partnership deed/agreement was not noticed to be far different form the remaining text of the agreement and the style and language used and incorporated with the same.

The entire agreement of partnership titled as partnership deed is written in third person language using the terms, parties, party of the first part and party of the second part but in clause 18, first person singular language has been used in the following words:-

> " …… who are his sole heists and during the period of minority of my daughter Baby Rukhsana Qadri, my wife Shamim Qadri shall look after the interest in business."

The use of words "my daughter" and again "my wife" are not in consistency with the style of the entire other text which is written in third person singular and third person plural vocabulary. The learned trial court again did not noticed and failed to give proper weight to the fact that although there was provided a clause as to who would be the successor of Muhammad Rafi Qadri in case of his death but there was not provided any clause as to what will happen in case of death of the other partner namely Noor Muhammad. The learned trial court again did not weigh the document properly so as to find that although the documents was named as Partnership Deed but it was not registered and even not signed before a Notary Public, instead it was only attested by an Oath Commissioner without there being an element of oath in the said document. In clause 3 of the same, it was provided that the land of Mian Muhammad Rafi was valued at Rs.45,000,00 and that the said amount shall be treated as an investment of and on behalf of the said Mian Muhammad Rafi being party of the first part, yet there was no description provided, in the entire above document as to what was the area of that land, what was its number, where it was situated. Even in the plaint filed by the respondents No.2 and 3 vide para 1 of the same, although area of the plot was shown as being 30,000.00 sq. yards but no number of the same was mentioned in the entire plaint, it location was shown to be in Block F of the plan of Syed Med Ali Shah situated in Shershah Estate Karachi. At the end of the plaint a schedule was provided whereby the said plot was shown as falling on 100x100 ft vide road, class V in Block F, in plan Syed Umed Ali Shah situated in Shershah village Site Karachi. Both the contesting parties i.e. the appellant on one hand and the respondents No2 and 3 on the other hand, have produced sketches of their respective plots. I have seen the sketch of the plot of the appellant which shows for composition of plot in almost double triangular shape having a 50 feet wide road on the north west side and a space reserved for nala at the South west side of the plot separating the same from a 176 wide road as central avenue. On the other hand the sketch of the plot produced by respondents No.2 and 3 shows the shape of the plot in almost in square shape having a 100 feet wide road at the north eastern side and another 100 feet wide road on the opposite side i.e. south west. Both these sketches do not match with each other in any aspect. This all is suffice to show that the respondents No.2 and 3 had not been able to prove beyond doubt and positively that the plot whose ownership was being claimed by them, **was the same plot which is in possession of the appellant and was numbered as D-182 and accordingly regularized in his favour as far back as in the year 1968.**

There is another important point to be noted which perhaps lost consideration by the learned trial court that through suit No.2256 of 1969 the respondents No.2 and 3 claimed to be in possession of the plot and made a specific prayer in prayer clause as sub-clause (ii) as under:-

> "(ii). Permanent injunction restraining the defendant from interfering with the rights, titles, interest and possession of the plaintiffs."

> This is surprising that if the plot claimed by the respondents No.2 and 3 was in their possession, what was the reason that they did not know about its being renumbered by the Site because on the date when the suit had been field, the plot in possession of the appellant had already been numbered as D-182 on 05.09.1968. This particular claim of the respondents No.2 and 3, being in possession of the plot, has been turned down by the learned trial court as while deciding issue No.1, it has given a finding that the plot No.D-182 is and has remained in possession of the appellant throughout the entire period. All the above circumstances referred by me above completely show that the respondents No2 and 3 had not been able to prove that the plot in possession of the appellant bearing No.D-182 was the same plot which was subject matter of suit No.2256 of 1969. As already discussed by the above, first of all it was not the function of the trial court to act as executing court because when a suit had been decreed in favour of the respondents No.2 and 3 against one Noor Muhammad with possession of the same claimed by the respondents No.2 and 3 as being with them, the only execution proceedings could lie for the purpose of acquitting the possession of the plot from the appellant and not through an attempt of bypassing the prescribed judicial procedure an acquitting and unjustified assistance of the administrative powers vested in the SITE. Even if such departure from the law be allowed for a moment to the learned trial court, yet the findings given by it on this issue are not based on proper appreciation of the evidence as such I again fall to share my views with the learned trial court on this issue as well."

For such reasoning, I am compelled to react that same are not in line with settled principles of law as well the material, brought on record. Mere difference in the *shape* alone, I would insist, shall not be of much *significance* unless and until by referral to all circumstances and material it is shown that it was not the same plot which was subject matter of earlier suit, filed against **Noor Muhammad.** The learned appellate Court seems to have not properly appreciated the evidence of PW-1 Qurban who made number of admission(s) thereby making it clear that ***Noor Muhammad*** (defendant in Suit No.2256 of 1969) had nexus with the present plaintiff / respondent No.1. The relevant admission (s) are referred hereunder:-

> "I am son of the promoter of the plaintiff company, other promoter were three brothers namely ***Noor Muhammad***, Ghulam Mohammad and Mohammad Farooq, the said three brother had agreed with one Mohammad Ibrahim and his family in respect of the suit property. I produce photo state copy of agreement between three brothers and Mohammad Ibrahim (subject to prove) on the basis of Eex.5/1 three brothers who were promoter of plaintiff's company applied to site

> defendant No.1, hereafter for transfer and regularization of the suit plot in their favour. We promptly apply incorporating of the plaintiff's company. I see Ex.D/114 which is photo state copy of the certificate."

The above admission, *prima facie,* establishes the role of ***Noor Muhammad*** even in instant status of the plaintiff / respondent no.1.

This witness also admitted in his cross examination as:-

> "I became director of the plaintiff company some time in 1968-69. ….**It is correct that I had earlier stated in my examination-in-chief that Noor Muhammad Dada Bhai was also one of the original Director;** it was due to inadvertence since Noor Muhammad Dada Bhai was a brother of Muhammad Farooq Dada Bhai**. ……….**Abdul Ghani Dada Bhai is father of Noor Muhammad Dada Bhai and Muhammad Farooq Dada Bhai."

Here, it is worth adding that this witness, so examined by the plaintiff / respondent no.1, requires to be given a little more weight because his (witness's) claim was that:-

> **"I knew Abdul Ghani Dada Bhai since my school days and I also had business association with him in as much as we were agents of Manzoor Glass and Ceramics agency."**

The witness further affirmed in his cross-examination that:-

> I knew Abdul Ghani Dada Bhai since my school days and I also had business association with him in as much as we were agents of Manzoor Glass and Ceramics agency**. I mean that Noor Muhammad was also associated in that agency business. Further states that now I am not quite sure about it but believe that it was so. The office of the said Agency (which bore the name of "Qamarudding and Dada Bhai Company") was located on the Second Floor of Zamindar Building on Campbell street. "**

This admission, *prima facie,* leaves nothing to doubt that **Noor Muhammad** was one of the associates in the business and was running his office at said address which, needless to add, was shown to be address of the defendant no.1 of Suit No. 2256 of 1969 as :-

> "1. Noor Muhammad s/o unascertainable, adult, muslim, carrying on business in the **second floor of Zamindar Building Campbell Street, Karachi**."

For this, it was admitted by said witness as:-

> …**It is correct that in Ex.D/94 Noor Iron & Steel Industries is mentioned as firm.** I see Ex.D/78, Ex.D/79 and Ex.D/81 and say that the **address of Noor Iron & Steel Industries is shown as "Second Floor, Zamindar Building, Campbell street Karachi"**

It is matter of record that said **Noor Muhammad,** despite his said admitted status as ***one of the promoters,*** did not come forward to challenge the document of *partnership* as well claim of the applicants / defendant Nos.1 and 2 hence presumption was *rightly* drawn against the respondent No.1 / plaintiff by the learned trial court while referring to *ex-parte* proceedings in said suit which included report of bailiff as well publication for effecting service upon ***Noor Muhammad,*** admittedly one of the promoters who, *undeniably,* was running his business with Farooq Dada Bhai in one and same office.

14. It is also worth adding that such witness, whose claim of knowing family of Abdul Ghani Dada Bhai from his early days, was unchallenged. He, even, did not *specifically* deny to a question, posed to him regarding status of respondent No.1 / plaintiff as ***firm*** rather he answered to such question as:-

> "I cannot say whether the plaintiff company was a partnership firm prior to its incorporation as a limited company because I was not associated with it at that time."

The said material witness, *prima facie,* did not dare to specifically deny the status of the plaintiff's family as *firm* which, otherwise, was admittedly acting as ***Agency*** but when confronted to record, he admitted such status of the respondent no.1 / plaintiff as:-

> "It is correct that of this position he had no personal knowledge of the dealing between plaintiff's company and SITE pertaining to the subject plot. I was not personally associated with the affairs of the plaintiff's company to its incorporation. I see Ex.D/94 and say that it bears the signature of Mohammad Farooq Dada Bahi, ***it is correct that in Ex.D/93 Noor Irion and Steel Industries is mentioned as firm***. I see Ex.I/78 D/79 and D/81 and say that to ***address of Noor Iron***

> ***and Steel Industries is shown as second floor Zamindar Building, Campbell Street."***

The above admission was rightly and properly appreciated by the learned trial Court in proof of nexus of **Noor Muhammad** with present respondent no.1 / plaintiff, particularly when another witness of the respondent no.1 / plaintiff namely **Attaullah** made an admission to the effect that:

> "… I have been shown Ex.116 and say that the registered office address of the plaintiff company was situated at **2nd floor of Zamindar Building Campbell street Karachi**.

The perusal of cross examination at page 6 further reveals that there are also certain admissions on the part of the plaintiff's said material witness. He has deposed as under:-

> "I am not quite shore (sure) from where this plot was acquired by the plaintiff's company but I recollect having seen an agreement where under one of the Dada bahi brothers had an agreement of purchased from one Mohammad Ibrahim Bhori. I am not in position to say as to whether if Mohammad Ibrahim Brohi has no title whatever to this plot. ***The first registered office of the plaintiff's company was in Zaminidar Building Campbell Street.*** I am not aware whether any summon or notice in suit No.2256/69 were served on Noor Mohammad Dada Bahi at the Zamindar building address."

It is also matter of record that there came no denial to the fact that ***Noor Muhammad*** remained alive when proceedings started between the parties *least* the plaintiff / respondent no.1 learnt about claim of the applicants / defendant nos.1 and 2 wherein the ***Noor Muhammad Iron & Steel Industries*** was claimed as a ***firm***, therefore, it was obligatory upon any of the associates or related person to make denial of such claim which, *undeniably,* was not done though the plaintiff / respondent no.1 was running its office (place of business) at same address which was shown in the suit, so filed by the applicants / defendant Nos.1 and 2. Here, it is material to add that the witness further admitted that:-

> …At the time when I appeared as a witness in the High Court all the three promoters namely **Noor Muhammad,** Ghulam Muhammad and Muhammad Farooq were alive.

Through said admission the witness not only admitted that ***Noor Muhammad*** was alive at relevant time but was also one of the ***promoters*** yet he (***Noor Muhammad)*** did not chose to come forward for denial of such claim of the applicants / respondents hence legal presumption was / is always to be drawn against respondent No.1 / plaintiff which, per said admissions, included **Noor Muhammad** as one of the promoters**.** Needful to add that the issue revolved round **Noor Muhammad** who, admittedly, was one of the promoters as well **real brother** of Muhammad Farooq Dada Bhai yet he was kept away from his appearance in Court which, *too,* without any legal reasoning and even was not made as party to the suit though through the suit the *decree,* against the ***Noor Muhammad*** was being challenged. Within meaning and objective of Article 129(g) of Qanun-e-Shahdat Order, 1984 it can safely be concluded that presumption, in such situation, was / is to be drawn that "***had this witness been examined he would not have supported the versions of the respondent No.1/plaintiff***".

15. I would also add that as surfaced from evidence of PW-1 Qurban, if the **Noor Muhammad** was one of the promoters of the respondent No.1/ plaintiff, and the family of ***Abdul Ghani*** was operating from the office, shown in the suit, yet they preferred to let a *decree* to be drawn against them by waiving their right to throw a challenge to such document, then they were / are *legally* estopped to make a challenge thereto. Guidance is taken from the case, reported as PLD 2015 SC 212 wherein it is held as:-

> Where a person was aggrieved of a fact, he had a right, rather a duty to object thereto to safeguard his right, and if such a person did not object, he shall be held to have waived his right to object and subsequently shall be estopped from raising such objection at a later

> stage—person….Such waiver or estoppel may arise from mere silence or in action or even inconsistent conduct of a person.

16. I would also add that *vitality* and importance of the PW-Qurban is *till-date* not challenged by the respondent No.1 / plaintiff rather he was produced to prove the contentions and claims of the respondent No.1 / plaintiff, therefore, the admission (s), made by such witness always need to be given due weight which made it quite clear that:-

a) ***Noor Muhammad*** was associated with his brother Muhammad Farooq and father Abdul Ghani;

b) they all were doing business through one and same office;

c) ***Noor Muhammad*** was one of the promoters;

d) ***Noor Muhammad*** himself never came forward to deny claim of the applicants / defendant Nos.1 and 2 despite his being alive when *litigation* started;

e) the address of defendant in suit of the applicants/defendant No.1 & 2 was *admittedly* the same as was of the plaintiff / respondent No.1 at relevant time;

f) the decree was drawn after holding the service upon **Noor Muhammad** as *good* in such proceedings wherein the business address of the said **Noor Muhammad** was *undeniably* the one, as was that of present respondent No.1 / plaintiff;

g) there existed a ***firm*** with which **Noor Muhammad** was associated.

These were rightly taken into consideration by the learned trial Court because, there can be no exception to principle that "***no one would like to make any admission against his own interest unless the same is true".*** I am guided in such view with the case of <u>*Muhammad Yaqoob through L.Rs v. Feroze Khan & Ors*</u> (2003 SCMR 41) wherein it is held as:-

> *"We are not persuaded to agree with Chaudhry Muhammad Tarique , learned Advocate Supreme Court that admission of Muhammad Yaqoob be treated as an innocent admission as it would be a* new phenomenon having no legal foundation at all as <u>**no one would like to make any admission against his own interest unless the same was true.**</u> In this regard reference can also be made to Article 31 of the Qanun-e-Shahadat Order, 1984 and thus the principle that ***no one would make any admission against his own interest has rightly been taken into consideration by the learned forums below."***

Further, I would not hesitate in saying that legal presumption of nexus / status of the ***Noor Muhammad*** was rightly presumed by the learned trial Court which, *even,* is permitted by Article 129 of the Qanun-e-Shahadat Order, 1984, particularly when the **Noor Muhammad** was neither made a party nor was produced as a witness to deny the claim of the applicants / defendant nos.1 and 2 which, *entirely,* rests with reference to Noor Muhammad and formation of ***Noor Iron & Steel Industries*** but privately.

17. Be that as it may, there is another glaring aspect which lost sight of consideration by the learned appellate Court. It is an undeniable position of the record that the respondent no.1 / plaintiff claim to have been in possession under Muhammad Ibrahim Brohi vide agreement dated 8th March 1968. The agreement, to make point clear, is reproduced hereunder:-

> Whereas party of the First part owns and possess the **entire area of Shershah village Trans Lyari**, Karachi and whereas a litigation is going on between the **Brohi community of Shershah** village **represented by Muhammad Ibrahim**, the leader of the community i.e Party of the First Part and **Sindh Industrial Trading Estate Limited,** and Umed Ali Shah and his legal representatives for a declaration of right and title regarding the land located in Shershah village and whereas the entire land of Shershah village is in possession of the Party of the First part and **no final decision has yet been given regarding the rights relating to the land of said village**, but in the meantime the Party of the Second Part wants to take on lease a plot of land measuring about **five acres** for which the Party of the Second Part **has applied for regularization to Sindh Industrial Trading Estates Limited for 99 years** and the Party of the First Part **is prepared to give possession of said plot of land to the Party of the Second Part** and ultimately to execute a lease deed for 99 years after decision of the Suit No.80 of 1950 pending in the High Court of West Pakistan, Karachi Bench and the Party of the Second Part is / are prepared to take possession of the said plot on the following terms and conditions:-

The above, *prima facie,* makes it clear that the plaintiff / respondent no.1, *even,* had applied for regularization of 5-00 acres land before such agreement for which it (respondent no.1 / plaintiff) was entering into such agreement and was to take possession. This could never be possible unless the version

of the applicants/ defendant Nos.1 and 2, made in their plaint as para-3, which is that:-

> "3. In pursuance of fraud and misrepresentation made by the defendant (**Noor Muhammad)** the deceased approached the Land Manager of the Shershah Estate for the transfer of the plot in the name of the firm in place of the deceased name which was accordingly done. The deceased therefore, did his part of the bargain."

It is also worth adding that witness, so examined from the side of the SITE, also affirmed such position while making statement that:-

> "After seen Ex.D/69 he stated that it is a partnership deed March 1962 which has duly been received by their department on 20.11.1976 and …."

I would also add that the learned appellate Court also failed in appreciating that respective parties claimed to have come into possession through different person (s) of ***different area (s).*** The document, produced by the respondent no.1 / plaintiff, in support of such claim, was never containing the ***shape*** but only boundaries, therefore, pressing *hard* on shape was misconceived, particularly in view of discussion, made above, as well following admission (s), made by the witnesses of the respondent No.1/plaintiff *itself* which are:-

> ***PW-Attaullah***
>
> ….It is correct that the suit plot was numbered by the SITE. It is correct that **prior to 1969 the suit plot was not numbered**. Again says that prior to 1968 it was numbered. I do not remember that when I moved application to SITE on 28th July 1968 Ex.D/100 whether I mentioned the plot No or not. **I see Ex.D/100 and say that it does not bear the number or the plot in suit.** I do not remember that the shape of the plot in suit was given by the SITE in 1968 after preparing site / master plan.

.

Therefore, putting much stress for not giving number of the plot in the suit, so filed by the applicants / defendant nos.1 & 2, was / is not justified, particularly when the suit included the description of the plot by showing it as:-

> "Declaration be made that that plot shown in the schedule belongs exclusively to the plaintiffs who are its owners with the direction to the Land Manager Shershah Estate to make the entries in favour of the plaintiffs as the owners of the land ***shown in the Schedule in place of the firm known as M/s Noor Iron & Steel Industries*** and to exclude the defendant from ownership;

Here, it is worth adding that PW-2 Abdul Aziz, also detailed in his evidence that:

> "…. In 1948 the entire area of the SITE was undeveloped. The development was started from 1948 onwards. The most of the area of the SITE was opened and un-built and it was unoccupied physically. In 1948 … who was the Development Officer in the government of Sindh **got prepared a layout plan of the entire SITE area** from the draftsman of the SITE including me. In that layout plan only those plots were shown and mentioned as were already allotted by the SITE to various persons. All other area excepting the plots mentioned above were shown as open. This layout plan and a map of the SITE area is one and of the same area. **The layout plan as prepared in 1948 was revised from time to time after 1948**. The revision was necessary because **the area of the site was being continuously developed as and when plots were carved out and demarcated and allotted**. From 1950 upto the time of my retirement the original layout plan prepared in 1948 was revised from time to time at least 25/30 times."

The above details, given by the PW-Abdul Aziz, also make it clear that revision continued because of carving out and demarcation of the open plots and since *admittedly* the respective parties claim that ***'entire area of Shershah village'*** was in possession of either Muhammad Ibrahim Brohi or Syed Saleh Shah then mere change (s) in shape (after proper demarcation by Authority) becomes *immaterial* but area to be possessed maters which tilts the claim of the applicants / defendant nos.1 and 2 who claimed to have come into possession of 6-00 acres while the respondent no.1 / plaintiff never claimed to have come into 6-00 acres but 5-00 acres.

Here, it is worth adding that PW Attaullah also stated in his evidence that:-

> "At the time of execution of Ex.5/1 Muhammad Ibrahim aforesaid had informed Noor Iron and Steel Industries that there was a dispute going on in respect of the Shershah village land which was the subject matter of suit No.80/1950 which was then pending in the High Court of Sindh. The dispute regarding the Shershah village land was between Muhammad Ibrahim and the Brohi community of Tessa Lyri Karachi on the one hand and Umed Shah and its legal representative on the other hand. These facts are duly reflected in

> Ex.51. Noor Iron and Steel industries had made payment to Muhammad Ibrahim in consideration of Ex.5/1. Muhammad Ibrahim had duly delivered the possession of plot No.D-182 SITE to Noor Iron and Steel Industries.
>
> ….Noor Iron and Steel Indust. had applied to the Def. No.1 as a matter of abundant caution because of **the dispute in regard to the Shershah village land which was the subject matter of Suit No.80/1950**.
>
> … Muhammad Ibrahim Brohi and his Community had an enmity with Umed Ali Shah **and Syed Saleh Shah** and other legal representative of Syed Umed Ali Shah because of the dispute over the land known as Sher Shah village**.** Syed Saleh Shah filed a false rent case NO.633/1968 against Muhammad Ibrahim Brohi in the Court of senior Civil Judge, at Karachi."

From above admissions, the status of the **Syed Saleh Shah** which, even, was challenged by Muhammad Ibrahim Brohi, was always clear but this was also not appreciated properly though it was, *prima facie,* adding to the plea of the applicants / defendant nos.1 and 2 that ***firm*** (partnership firm) had come into possession of such an area of **6-00** acres which the respondent no.1 / plaintiff never claimed rather their claim of possession was only to extent of **5-00 acres.** Needless to add that an area of **'1-00 acre'** is considerably big hence can't be taken as an *error* or *mistake* when the party, delivering possession, was claiming price and rent for each acre. Accumulative effects matters while drawing any conclusion because the Courts are not supposed to perpetuate what is unjust and unfair by exploring explanations therefor rather should explore ways and means for undoing what is unjust and unfair which always includes a *fraud.* Reference is made to case of *Muhammad Nawaz alias Nawaza & Ors v. Member Judicial Board of Revenue & Ors* 2014 SCMR 914. There was an admission of the PW-Attaullah that their act of approaching the S.I.T.E was as ***abandon caution*** only who, otherwise, were to act under the agreement with Muhammad Ibrahim Brohi, so is evident from relevant portion which reads as:-

> "….Noor Iron and Steel Indust. had applied to the Def. No.1 as a matter of abundant caution because of the dispute in regard to the Shershah village land which was the subject matter of Suit No.80/1950."

Thus, such act can't prevail over the condition whereby the respondent No.1/ plaintiff has rested its claim to *only* consequence of success in the said suit. This was also not properly appreciated.

18. The learned appellate Court also discussed the contents of the ***partnership deed*** which, otherwise, were never challenged by the respondent no.1 / plaintiff though the respondent No.1 / plaintiff, *prima facie,* included **Noor Muhammad** as one of the promoters *least* real brother to Muhammad Farooq Dada Bhai. It could have been the **Noor Muhammad** or anybody claiming under him to challenge the same, if he so chooses which, however, was never the claim of the respondent No.1/plaintiff. Further, the said document, on *decree* by a competent court, was not open for the learned appellate Court to make any discussion thereon. The grievance should have been to present respondent No.1 / plaintiff with such document and *decree* because the same was asking the SITE to remove entries in name of ***M/s Noor Iron & Steel Industries.*** The respondent no.1 / plaintiff, while filing the suit, did acknowledge complete notice of such proceedings but preferred to let the same remain unchallenged though the respondent No.1 / plaintiff had *legal* remedies which, being known, needs not be reiterated. Thus, I am of the clear view that the learned appellate Court was not justified to make comments on such document which, otherwise, was the subject matter of a past and closed transaction (independent suit).

19. These *floating* facts were also never appreciated by the learned appellate Court while reversing the well-reasoned findings of the learned trial Court in this regard. Accordingly, I am of the clear view that the

findings of the learned trial court regarding issue No.2 were proper and with reference to available material, therefore, the same are maintained while that of appellate Court are hereby reversed.

20. The learned appellate Court also disagreed with findings of learned trial Court on Issue No.3. The reasons for disagreement, if summed up, may be stated as:-

> "It transpires from the above discussion made by the learned trial court that while deciding issue No.3 it has mainly built up its findings on the reasons that the appellant having acquired knowledge of the decree passed in Suit NO.2256 of 1969 through the letter of respondent No.1, not challenge the same and made no effort to get the said judgment and decree as binding upon the appellant. To me, the above reasoning adopted by the trial court is far away from the pleadings, in fact the case of the appellant appears to be that the appellant does not admit the judgment and decree passed in suit No.2256 of 1969 as a judgment and decree passed against him and this is the reason that the appellant did not make any effort to get the said judgment and decree set aside in which the appellant was not a party and therefore it was not for him to prove that the judgment and decree in the said suit was not passed against the appellant but in fact ***it was the burden on the respondent No.2 and 3 to prove that the appellant was the defendant in the said suit or in any way successor of the defendant in the same."***

For such reasoning, it is pertinent to mention that same are not in line with settled principles of law as well the material, brought on record. The learned appellate Court seems to have not properly appreciated that the applicants / defendant Nos.1 and 2 *did* establish the fact that **Noor** Muhammad, who was defendant No.1, in their suit, was having nexus with present respondent No.1/plaintiff. Needless to add that such role and status of the **Noor Muhammad** did come on surface, while making discussion on issue No.2, which was never appreciated by the learned appellate Court *properly,* so erred.

21. Be that as it may, it is also worth to add here that whole cause and claim of the respondent no.1 / plaintiff was that it (plaintiff) has nothing to do with **Noor Muhammad** nor his (Noor Muhammad's) acts or omission

were binding upon it (plaintiff) hence they were to enjoy benefits of such exception. In such eventuality, the burden was upon the respondent no.1 / plaintiff which it (plaintiff) could have done easily either by suing him (Noor Muhammad) as one of the defendants in suit or *least* by examining him as witness, particularly when it (plaintiff) never claimed to be at any *'enmity'* or *'rivalry'* with **Noor Muhammad** rather, *as discussed in issue no.2,* it came to surface that **Noor Muhammad** remained associated with present respondent no.1 / plaintiff *even.* The legal consequences of non-examination were / are to be faced by the respondent No.1 / plaintiff who, *otherwise,* could have produced such material witness *easily* as he (Noor Muhammad) was not alive when litigation started but was never claimed to be having any adverse interest to that of present respondent No.1 / plaintiff hence withholding of such witness could be nothing but that had he been examined he would not have supported the *base* of the cause of present respondent No.1 / plaintiff. Guidance is taken from the case of *Farid Bakhsh v. Jind Wadda* 2015 SCMR 1044) wherein it is held as:-

> "The argument addressed on the strength of the judgment rendered in the case of *Dil Murad and others v Akbar Shah (supra)* has not moved us a bit when the appellant failing to call the other attesting witness failed to prove the deed in accordance with the requirements of law. **Such failure, in the absence of any plausible explanation, would also give rise to an adverse presumption against the appellant under Article 129(g) of the Order.** In the case of *Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs (PLD 2011 SC 241)* , this Court after defining the meaning of the word *'attesting'* in the light of Black's Law Dictionary and other classical books and case law held that a document shall not be considered, taken as proved or used in evidence, if not proved in accordance with the requirements of Article 79 of the Order."

This, however, was never properly appreciated by learned appellate Court.

22. The learned appellate Court further reasoned for disagreement on this issue as:-

"In the same issue the learned trial court has opined that it was enough for the respondent No.2 and 3 to obtain a decree of dissolution of partnership firm and there was no need to file any execution application or to initiate any execution proceedings against the appellant for obtaining possession of the plot of the appellant. **The learned trial court was of the view that since the tenancy in respect of the said plot was approved and admitted by the respondent No.1 as such the respondent No.1 was competent to dispossess the appellant from the plot in his possession and put the respondents No.2 and 3 in possession of the same, without any execution proceedings before any executing court as the SITE being a government functionary, was competent to do the same**. This reasoning again appears to be couched with complete departure from the facts of this case, the facts narrated in the earlier suit No.2256 of 1969 and assessment of the effect of the decree. Through the decree in suit NO.2256 of 1969, the respondent No.2 and 3 were declared to be owners of a plot of land which according to them, had been purchased by their late predecessor namely Mohammad Rafi Qadri from one Saleh Shah acting on behalf of Syed Ali Shah in the name of Noor Iron and Steel Industries. If the effect of the decree is seen in its proper structure, it actually goes against the respondent No.1 who claims to be owner of the entire estate vested in the Sindh Industrial Trading Estate. If that would have been the effect of the decree then the very ownership of the respondent No.1 over the plot which was allegedly purchased by the said Muhammad Rafi Qadri stands vanished. After obtaining a decree of their ownership of a certain plot of land, the respondents No.2 and 3 approached the respondent No.1 to accept them as their tenant by cancellation of agreement of lease with the appellant and causing their dispossession from plot NO.D-162. It appears that the learned trial court has mixed up an unauthorized possession, its sale and purchase by private parties, title over the property and regularization of the same. ***In almost all Katchi Abadies, where the land belongs to government, people use to sell and purchase "possession" of the plot on private basis which does not confer any title on them, yet the practice continues. Whenever such possessions are regularized, only the actual physical possessions are regularized without looking into question of proper or improper sale and purchase of the same***. In the year 1968, when appellant allegedly purchased the plot in their possession from Ibrahim Brohi, they applied for regularization of their possession by the respondent No.1. Since the appellant was in admitted actual physical possession of the plot at the time as such, without looking into the right of seller to sell the same and without looking into the validity of such purchase by the appellant, the respondent No.1 admitted the appellant as their tenant on the basis of their possession and possession alone. In such an eventuality, prior to applying for regularization in the shape of mutation, etc., **they had to first acquire the possession of the plot by way of filing appropriate execution proceedings which alone could provide a legal forum to the appellant to prove before the executing court that either they were the defendant in that suit nor they were predecessor-in-interest of any Noor Muhammad and that the property as described by the respondent No.2 and 3 in suit No.2256 of 1969, was not the same and much different from the property which is in actual physical possession of the appellant**. It appears that the learned trial court did not consider this aspect of the issue in its entire delicacy and in fact acted as an executing court and tried to determine all such issues and questions which could arise between the parties and could only be decided by an executing court under the provisions of Order 21 and section 47 of the CPC. Plain enough for the learned trial court was, to check the vires and legality of the

decision of the Board of Directors of the respondent NO.1 whereby they decided to terminate the tenancy of the appellant on the basis of the decree produced by respondents No.2 and 3 alongwith their application. The legitimacy of the decision could be adjudged by the learned trial court on stressing upon three basic questions viz:

(1) *Whether Board of Directors of the respondent No.1 should have decided under the applicable law prior to proceeding against the appellant, as to whether they were compelled or bound by the said decree in which they were not a party.*

(2) *Even if that be so, whether the property involved in the said suit and its decree was the same which was in possession of the appellant and*

(3) *Whether the appellants were the same persons/person against whom the earlier suit was filed and decree was passed.*

It is very strange that the learned trial court did not examine this aspect of the action taken by the Board of Directors of the respondent No.1 and there is no evidence on record to show that the Board of Directors of the respondent No.1, prior to ordering cancellation of the allotment, made any effort to obtain answers on the above three basic questions. It appears that the learned trial court shared its view with the Board of Directors of the respondent No.1 that due to non-appearance of the appellant in response to the letter issued by the respondent NO.1 informing him that an application for cancellation and mutation was made, it was the only decision left with the Board of Directors of the respondent No.1 to cancel the allotment of the appellant and mutate the plot in the name of the respondents No.2 and 3. ***On one hand, learned trial court observes that the respondent No.1 being a government functionary was competent to cause dispossession of the appellant from the plot in his possession without any execution proceedings against him but on the other hand the learned trial court did not notice that inspite of the non-appearance or otherwise of the appellant in reply to the notice issued to him, it was obligatory upon the respondent No.1 to decide the application of the respondents No.2 and 3 on its merit and at the strength of their own case***. The judgment produced by the respondents No.2 and 3 before the respondent No.1 had at least two material points which required consideration by the respondent No.1 before allowing their request for cancellation and possession and they were with regard to the name of defendant in that suit which was Noor Muhammad as against the allottee/tenant of respondent No.1 being M/s. Noor Iron and Steel Industries (Pvt) Limited and secondly the description of the plot claimed by the respondent No.2 and 3 as their property in that suit which was far different from the property in possession of the appellant. The main point to be considered in this case was that the appellant, while filing I suit was aggrieved of the order passed by the Board of Directors of the respondent No.1 ***and not of the decree which was produced by the respondents No.2 and 3 alongwith their application***. The learned trial court did not focus the appreciation of pleadings and evidence to this actual aspect of the case and instead tried to resolve the controversy which could be decided by the said earlier court of XV Civil Judge, Karachi in case the said suit would have been contested by the defendant and not decided by way of exparte judgment. So far as this grievance of the appellant is concerned, there was enough

material available before the trial court to come to the only conclusion that while accepting the request of the respondents No.2 and 3 and mutating the plot in possession of the appellant, the respondent No.1 has not acted with properly legality and in accordance with the principles of extending justice. In my view, since the passion of the plot was admittedly with the appellant since 1968 and even from prior to that as such the only proper legal course available for the respondents No.2 and 3 was to file execution proceedings against the present occupants i.e. the appellant against that all questions requiring determination for the purpose of satisfaction, discharged and execution of the decree could be resolved and adjudicated by the executing court. Secondly, I am not convinced as to how the respondent No.1 could treat the judgment and decree passed in suit No.2256 of 1969 as binding upon the. If the plot in possession of the appellant was the same plot which was claimed by the respondents No.2 and 3 then they were supposed to have the knowledge that the said plot stood vested in respondent No.1 and therefore for every reason and for all practical purposes, the respondents NO.2 and 32 were bound to implead and join the respondent No.1 as a party to that suit which remained pending at the file of that court for about 4 to 5 years and was not decided abruptly by way of an exparte judgment. The same respondents No.2 and 3 after obtaining the judgment and decree had approached the respondent No.1 for mutation but during pendency of the suit, they ever bothered to summon the respondent No.1 to join the proceedings which would ultimately result in joining of those proceedings by the present appellant and thus entire controversy would have been resolved. I fail to find any element of bonafide in the failure of the respondents No.2 and 3 to implead the respondent No.1 in their suit No.2256 of 1968. It is ordinary rule of the jurisprudence that a person not joined as a party to a legal proceeding is not bound with the result of those proceedings. The findings of the learned trial court on this very basic and important issue, is devoid of proper reasoning, as already observed by me above that the question as to whether the said decree was binding on the appellant as being the actual defendant in that suit or as successors of the defendant was a question to be determined by an executing court alone in the light of relevant provisions of Order 21 CPC and specially under the provisions of section 47 CPC and this question could not be lawfully determined and decided by the respondent No.1 or by the learned trial court. I would like to reproduce below the section 47 of the CPC:-

> 47 Questions to be determined by the Court executing decree. – (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not a by a separate suit.
>
> (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under the section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purpose of this section, be determined by the court.

> While applying the above section, it has been held that where a dispute arises between the parties to the suit respecting the title of the judgment debtor, it shall be exclusively determined by the court executing the decree. Likewise the question as to who are the legal representatives of a party to the suit is also to be resolved by the executing court. To me, it appears that while determining this question, the respondent No.1 has acted in excess of its authority and the learned trial court has travelled beyond its jurisdiction. ***All the relevant facts and circumstances brought on record, perused and thoroughly considered by me lead me to the irresistible conclusion that neither the appellant nor the respondent NO.1 were bound by the said decree in suit NO.2256 of 1969 in the absence of any proper determination of this question by any executing court competent to decide the same***. With this reason I am constrained to disagree with the findings given by the trial court on issue No.3

23. At the outset, I would say that since the applicants / defendant Nos.1 and 2 had claimed that possession of the land in question went with ***Noor Iron & Steel Industries*** in consequence to partnership agreement, therefore, they were quite justified for filing a suit for *Dissolution of partnership* as well declaration as:-

> i) That the firm and partnership known as Noor Iron and Steel Industries be dissolved;
>
> ii) Declaration be made that that plot shown in the schedule belongs exclusively to the plaintiffs who are its owners with the direction to the Land Manager Shershah Estate to make the entries in favour of the plaintiffs as the owners of the land shown in the Schedule in place of the firm known as **M/s Noor Iron & Steel Industries** and to exclude the defendant from ownership;

Such suit was competent which, *undeniably,* ended in an ***'ex-parte unchallenged decree'.*** It is needful to add that there can be no denial to the legally established principle of law that even an *exparte* decree has the same legal status as the recorded after due trial with the exception that modes and mechanism for setting such decree might be more. Reference is made to the case, reported as PLD 2014 SC 380. In another case, reported as 1992 SCMR 2117, it is affirmed that:

> "Adjudication of rights of parties in terms of *ex parte* decree and that of decree granted after contest would not be deemed to be distinct and different."

It is also worth to add here that the case of *Muhammad Aslam v. District Officer, Revenue* 2002 YLR 2553, relied upon by the learned counsel for the respondent no.1/plaintiff, says as:-

> "11. Demand of the decree-holder (petitioner) is that respondent No.2 (Tehsildar) a functionary of judgment-debtor No.1 (province of Punjab) be directed to implement the decree by attesting a Mutation in favour of the decree-holder and incorporating his ownership in the Revenue Record. **This could have been possible only if terms of the decree contained a mandatory injunction under section 55 of the Specific Relief Act to compel performance of the requisite act**.
>
> "13. A decree is to be executed in accordance with its terms and conditions without modification."

Here, it is worth to remind that the suit of the applicants / defendant nos.1 and 2 against the ***Noor Muhammad*** was never challenged to be *barred* by law and the relief (s), granted to the applicants / defendant nos.1 & 2 included a direction to the effect that:

> "the direction to the Land Manager Shershah Estate to make the entries in favour of the plaintiffs as the owners of the land shown in the Schedule in place of the firm known as **M/s Noor Iron & Steel Industries** and to exclude the defendant from ownership."

therefore, even per the case law, relied upon by learned counsel for the respondent no.1 / plaintiff, the *decree* satisfied the test, therefore, the S.I.T.E was required to honour the decree, regardless of its status as ***'ex-parte'.***

It is further matter of record that, it (SITE), however, served a show-cause notice to respondent No.1/plaintiff whereby providing a complete remedy to respondent No.1 / plaintiff to challenge such *decree* which, *admittedly,* was not resorted to by the respondent no.1 / plaintiff hence rendered itself to face the consequences of their own *fault.* This was not properly appreciated by learned appellate Court while demanding filing of execution application for implementation of the *decree* which the SITE *itself* agreed to honour. I would also add here that it is also matter of record that

despite claimed purchase from **Muhammad Ibrahim Brohi,** the respondent no.1 / plaintiff, acknowledged even in such document acknowledged competence of the S.I.T.E while including requirement of ***'regularization'*** as well subsequently pleaded ***lease deed*** or ***tenancy.*** Needless to add that even in such *lease / tenancy* the right of termination / cancellation rests with the S.I.T.E. A legal obligation upon owner / authority can't be defeated / denied by tenant / possessor merely while insisting his possession. Since, the status of the S.I.T.E was rightly found by the learned trial Court as:

> "..statutory body the defendant No.1 **has its own jurisdiction to deal with its properties with regard to allotment, recovery of dues, taken of possession, deliver of possession, dealing of lease to the respective tenants, the Board of Directors of the defendant No.1 is final authority."**

therefore, learned trial court was also right in concluding that S.I.T.E is competent to remove one from its properties. This was also not properly appreciated by the learned appellate Court.

24. As regard the observations, made by the learned appellate Court, with reference to ***Katchi-Abadi*** properties, it would suffice to say that matter (s) of ***Katchi-Abadi*** were / are always different hence referral thereof was / is not understandable. The S.I.T.E claims its *ownership* over its area and that of having chalked out plot (s) as well numbering thereof which was never dependent on *possession / occupation* alone. The PW-2 Abdul Aziz stated in his evidence as:-

> "…. In 1948 the entire area of the SITE was undeveloped. The development was started from 1948 onwards. The most of the area of the SITE was opened and unbuilt and it was unoccupied physically. In 1948 … who was the Development Officer in the government of Sindh got prepared a layout plan of the entire SITE area from the draftsman of the SITE including me. In that layout plan only those plots were shown and mentioned as were already allotted by the SITE to various persons. All other area excepting the plots mentioned above were shown as open. This layout plan and a map of the SITE area is one and of the same area. The layout plan as prepared in 1948 was revised from time to time after 1948. **The revision was necessary because the area of the site was being continuously developed as and when plots were carved out and demarcated and allotted.** From

> 1950 upto the time of my retirement the original layout plan prepared in 1948 was revised from time to time at least 25/30 times."

Prima facie, it was the S.I.T.E *itself* to chalk-out its plot (s) which was / is never dependent upon possession *alone* as was / is the practice in matters of ***Katchi-Abadi*** nor mere possession *alone* can prejudice the authority of the S.I.T.E in regulating or *otherwise* therefore, mere unauthorized possession *alone* was / is never sufficient to get title or interest. If any other view is approved, it shall allow a license for encroacher (s) to get legal title which, I am sorry, can't be stamped. This was never appreciated by the learned appellate Court while making such referral.

25. It would be germane to add here that the learned appellate Court was also not legally justified in drawing a ***'mechanism'*** for the BoDs of the S.I.T.E for taking an action because the domain *absolutely* lies with them, particularly no such requirement was / is shown to be backed by any ***rule*** or ***law***. There was made no explanation by the learned appellate Court to the findings of the learned trial Court to the effect that:

> "The SITE has been determined as a provincial government department and the character of the SITE has been discussed in a authority PLD 1975 Karachi page 178 and the said findings have been reaffirmed by the honourable Supreme Court in a case reported PLD 1985 SC PAGE 197 97. It further has been held that the resolution of the Board of Directors of the company can be suspended, altered and set aside by the Secretary Provincial Government of Sindh. This is vested all powers of ownership in respect of the land which has come in their ownership, the members of the Board of Directors are the government officials i.e. Commissioner of Karachi and Hyderabad besides other staff which has specifically been mentioned in Ex.D/50 Board of resolution dated 01.1977 and being the statutory body the defendant No.1 **has its own jurisdiction to deal with its properties with regard to allotment, recovery of dues, taken of possession, deliver of possession, dealing of lease to the respective tenants, the Board of Directors of the defendant No.1 is final authority** and it their jurisdiction the person aggrieved by opinion of the Board of Directors can appeal to the Secretary Government of Sindh which is final and admittedly Board of Directors of the defendant No.1 by its resolution passed on 10.1.1977 recognized the defendant No.2 and 3 as their tenant and thereafter recovering all the due upto date from defendant Nos.2 and 3 has not been challenged by the plaintiff although defendant No.1 by its letter dated 17.2.1979 Ex.D/31 has informed the plaintiff that they are not recognizing them as their tenants besides they further asked through their letter dated 2.2.1977 (Ex.D/47) to vacate the plot in question within one month.

> It further appears that before passing impugned order the Board of Directors of the defendant No.1 by their letter dated 14.12.1976 (Ex.D/55) called upon the plaintiffs that why the application of the defendant No.2 and 3 be not granted. The plaintiffs did not care to attend the meeting and finally by resolution dated 10.01.1977 Ex.D/50 ordered was passed by the Board of Directors thus in my humble view since the revocation or cancellation of the tenancy by the Board of Directors (who was competent authority) has not been challenge before the Secretary Government of Sindh as such it has attained its finality."

Further, I am also not convinced with the view of the learned appellate Court that where the authority does not dispute the *validity* of a decree then it is always necessary for the holder of decree to *first* file execution application because the cause for filing an ***'execution application'*** comes when the decree holder *first* gives cause of his approaching for execution which could be nothing but that enforcement / implementation of the ***'decree'*** was denied or resisted. Thus, if such view is stamped, it may prejudice the binding effect (s) of a valid decree which, otherwise, are binding upon the authorities. Reference is made to *Ali Ahmed and another v. Muhammad Fazal & another* 1972 SCMR 322 wherein it is held as:-

> "….A valid decree was passed in favour of respondent nO.1. He became the owner of the property on payment of the purchase price on the 26th October 1960, and became vested with right, interest and title in the land from that date. He was entitled to get the mutation effected on the basis of the decree. Simply, because it has barred by time, it has not lost its utility. In our opinion, the view of the High Court is correct that the Revenue authorities were under obligation to sanction mutation on the basis of the decree…"

As regard, difference of the shape of the plot from the one, claimed by the applicants / defendant nos.1 & 2, and that of respondent no.1 / plaintiff, the discussion have already been made while responding to the findings of learned appellate court on issue no.2. Not only this, but the *undeniable* status of ownership and right of the allotment couple with demarcating / chalking out the **plots** was / is with the S.I.T.E.

26. Lasting my discussion on this issue, it may also be added that the respondent No.1 / plaintiff entered into possession through the referred agreement with Muhammad Ibrahim Brohi which included the clause-4 as:-

> "(4) That in case the Party of the First Part fails in suit NO.80 of 1950 and their right is not declared to the said Suit for the said plot of lands the party of the Second Part shall be entitled to …. of all amounts paid to the Party of the First Part who will not claim execution of the registered Lease Deed, thereafter."

The above clause, *prima facie,* establishes that respondent No.1 / plaintiff from very beginning one blowing hot and cold in a single breath which, per settled law, is not permissible. Besides, here it is conducive to refer the observations, so made by the learned appellate Court while parting with its judgment, which are:-

> "First of them is an application filed by the intervener namely Mumtaz Hussain son Abdul Qadir Baig, under order I rule 10 CPC. The intervener in his application has submitted that there was a dispute over the ownership rights of Shershah Village between the Brohi Jamaat and the legal heirs of one Umed Ali Shah son of Shershah. The said rights remained in litigation under suit No.80 of 1950 which was re-numbered as Suit No.37 of 2003. He further stated that the subject matter of this appeal is part and parcel of the land which was subject matter of the above suit No.80 of 1950 new No.37 of 2003 and according to him, the parties to this appeal have also made reference to the above suit in this appeal as well as in their pleadings. According to the intervener, suit NO.37 of 2003 has been decreed in favour of the intervener and since the appellant herein had filed suit before the trial court alleging that the land in dispute was purchased by the appellant form the grandfather of the intervener as such he was a necessary and proper party to this appeal. In order to adjudicate upon and decide the controversies involved in the matter, the appellant filed his counter affidavit to the same against which the intervener filed his affidavit in rejoinder.
>
> When the above application was filed this appeal was pending for hearing/final arguments. In view of the lengthy record of this case, the appellant filed his written arguments to the main appeal on 15.06.2004. On 04.09.2004 respondent No.1 filed his written arguments and the respondent Nos.2 and 3 also field their written arguments on the same date i.e. 04.09.2004 while the application under order I rule 10 CPC

was field on 24.04.2004. Since the matter was old one as such repeated chances were given to the learned counsel for the intervener and others but nobody came forward to this application. On 16.10.2004 the matter was adjourned for arguments on 06.11.2004 with the direction to argue the application under order I rule 10 CPC in the meanwhile but again nobody came forward to argue this application. On 06.11.2004 another opportunity was provided to the parties in the interest of justice to argue the said application in the meanwhile as the matter was adjourned for today for judgment. This opportunity was also not availed by the parties as such while pronouncing judgment as above, I am disposing of this application on the basis of the matte available on record.

The intervener along with his application has field a copy of the judgment and decree passed in his other suit No.80 of 1950 new No.37 of 2003. The operative part of the decree reads as under:-

> "The civil suit is coming up for final hearing disposal on this 31st day of January 2004 before Miss. Rashida Siddiqui, 1st senior civil judge, Karachi (West) in presence of parties counsels, it is hereby ordered that the plaintiffs are entitled for the declaration of Sher Shah Village as their property to the extent of landing their possession so also (unascertainable portion of land) occupied by the defendant No.1 (SITE). Likewise, the plaintiffs are also entitled to receive compensation from the defendant No.1 for the area occupied by the defendant No.1 from the boundaries of Sher Shah Village at the rate as per prevailing at the time of acquisition of land by the defendant No.1 (SITE). Resultantly suit of the plaintiff is decreed in the above terms. The parties are left to bear their own costs."

In this appeal, through the suit filed before the trial court, the dispute with regard to tenancy rights of the appellant though regularization made by the respondent No.1 in his favour and with regard to the applications of the respondent No.2 and 3 whereby they wanted revocation of the agreement of lease in favour of the appellant and to be re-assigned the same to them. The possession is admittedly with the appellant who while claiming his plot having purchased from Ibrahim Brohi has simultaneously got regularization of the possession from the respondent No.1 meaning thereby that the appellant claims to hold the possession through the respondent No.1. the decree passed in the above suit No.80 of 1950 new No.37 of 2003 while declaration of ownership of Sher Shah Village in favour of the intervener and others, the land which was subject matter of the above suit in two categories viz. (1) land in possession of Umeed Ali and (2) Unascertainable portion of the land occupied by the SITE for the second part of the land, it has been that the plaintiff would be entitled to receive compensation from the defendant No.1 (SITE) for the area occupied by it from the of Sher Shah Village. **This means that through the above decree the intervener alongwith co-plaintiffs in that suit, is entitled to compensation for the plot of land which is subject matter of this suit from the respondent No.1 herein i.e. SITE** and

> therefore, there pertains to further controversy to be resolved between the intervener and any other party in this suit as the interests of the intervener and his other plaintiffs stands protected under the above decree and the same is in no way impaired through the resolution of the controversy in the instant appeal in any manner. I am therefore of the constrained view that for the purpose of deciding the present appeal or even the controversy involved in the original suit before the learned trial court presence of the intervener was and is not at all required either as a necessary or even a proper party. I therefore, while deciding this do not find any merits in the application of the intervener filed under order I rule 10 CPC and dismiss the same accordingly. This application has however fortified my findings given above. The respondent No.2 and 3 are admittedly not in possession of the suit property so that the respondents No.1 could lawfully regularize their possession. **Their alleged title acquired on the basis of an alleged purchase of their plot form a successor/representative of Umed Ali Shah, has also become a nullity in the light of the judgment and decree produced by the intervener whereby** it has been expressly as well as impliedly declared that Umed Ali shah was never authorized to sell any property of Shershah village. **This leaves the respondents No.2 and 3 with neither any title to the plot by them nor with its possession, which is additionally enough to hold that the appellant was entitled to the relief claimed by him in the suit filed before the learned trial court.**

If such view of the learned appellate Court is considered then it also cuts at the very root of the cause and claim of the present respondent no.1 / plaintiff against the S.I.T.E and leaves the respondent No.1 / plaintiff with no option but to seek its (plaintiff's) entitlement, if any, with reference to agreement with Muhammad Ibrahim Brohi or to claim compensation from him or his successors, as was *categorically,* included in the agreement.

27. Thus, it is quite evident that learned appellate Court not appreciated the facts and application of law, *properly* while answering the issue in question.

28. In view of above discussion, I am of the clear view that the findings of the learned appellate Court are not in accordance with the available material rather the findings of the learned trial Court were rather proper and reasoned one hence are up-held, accordingly.

29. The learned appellate Court also disagreed with the conclusion, so drawn by learned trial Court for Issue No.4, hence to examine the same to be legal or otherwise, it would be conducive to reproduce the same which reads as:-

> "While deciding Issue No.4, the learned trial court has again relied upon the same reasoning which was assigned to it while deciding issue No.2 as discussed by me above. It however further added that the SITE has been determined as provincial government department and the character of the SITE has been discussed in the authority established in PLD 1975 Karachi page 128 which was approved and reaffirmed by the honourable Supreme Court in a case reported in PLD 1985 SC page 97. The trial court discussed that and has further been held by those authorities that the resolution of the Board of Directors of the company can be suspended, altered and set aside by the Secretary of the Provincial government. The trial court thus was of the view that whatever were the circumstances, the appellant had challenge the resolution of the Board of Directors before the Secretary to the provincial government of Sindh as such the same had attained finality and therefore the very root of revocation of tis licence of allotment in favour of the appellant by the legal and valid. ***There is no dispute to such as by the learned trial court with regard to the estates of the SITE***; the question is that whether a civil court the action taken by the respondent No.1 or not. This in with the question of ouster of jurisdiction of civil courts. There is enormous case law on the pint that civil courts have all powers and jurisdiction to entertain all such proceedings in which the act of a government functionary is tainted with malafide, excess of act of authority colourful exercise of powers and departure from the principles of natural justice, in the instant case it was not the controversy as to whether the respondent NO.1 was vested with the powers to revoke the license granted by it or cancel any allotment but the question involved in the suit was as to whether the respondent No.1 acted lawfully and all norms of justice and jurisdiction in treating the decree passed in civil suit No.2256 of 1969 as binding on it. **Without having any dispute with the powers vested in respondent No.1 through its board of directors** the question was as to whether the action taken by the respondent No.1 on the application made by the respondents was legal and valid or not. An order passed with all bonafides challenged in a departmental appeal if the party aggrieved with that the authority passing the order has given and not malafide or collusive one, but in cases where the very element of bonafide is missing and the order of an authority, on the face of it appears to be passed with colourful exercise of powers and in excess of authority vested in it by the law then civil courts have the ultimate jurisdiction to entertain such proceedings. In view of my findings with reference to decision of issue No.3 by the learned trial court I am of the view that in the given set of circumstances, the civil court only had the powers to decide the validity of the action taken the appellant by the respondent No.1 and through my discussion above, I am of the firm opinion that in the circumstances the suit, the action taken against the appellant by the respondent No.1 by way of revocation of their licence, cancellation of allotment of their plot and mutation of the same in the name of respondents NO.2 and 3 was not legal and being an action taken in excess of authority and with colorful exercise of powers, was a nullity in the eye of law. I am

> therefore again no convinced with the findings arrived at by the learned trial court on issue No.4."

The above, *prima facie,* shows that the learned appellate Court *did* not dispute the authority and competence of the S.I.T.E in cancelling etc yet held the action, so taken by the competent authority, as not legal while holding it as colourful or *mala fide*. Here, it is conducive to say that even an illegal order, if passed with competence and jurisdiction, needs to be challenged before the proper forum and not before the *Civil Court,* regardless of *plenary* jurisdiction of Civil Court. Reference is made to the case of *Ashiq Hussain & Ors v. Province of Punjab* (2015 CLC 1196) wherein such principle is reaffirmed as:-

> "…. For determining the jurisdiction of civil court which otherwise have a plenary jurisdiction under section 9 of the C.P.C. The basic test is whether the action taken or order passed by the authorities is within the jurisdiction conferred upon them in the statute in which the provision of bar of jurisdiction is available. If the order has been passed with the jurisdiction having under the Statute then certainly the civil court has no jurisdiction to entertain a suit against the order which has been passed with jurisdiction and if the order is beyond jurisdiction or scope of the authority vested by the statute then certainly the civil court has jurisdiction to entertain a suit against such like order. "

30. Moreover, at this point, it would be conducive to refer relevant portion of the judgment, passed by honourable Apex Court, in case of *Akhtar Hassan Khan v. Federation of Pakistan* 2012 SCMR 455, while answering to a claimed ***'mala fide'*** as:-

> "25. ….. The allegations of mala fides and of the impugned exercise being collusive are questions of facts requiring factual inquiry. It is by now a well established principle of judicial review of administrative action that in absence of some un-rebutable material on record qua mala fides, the Court would not annul the order of Executive Authority which otherwise does not reflect any illegality or jurisdictional defect. In Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151), this Court was called upon to dilate upon the mala fides as a ground for exercise of power of judicial review of administrative action and the Court observed as follows:--
>
> "Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until the presumption is rebutted, the

> action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity , and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.
>
> "Mala fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say , in which the person taking the action does so out of personal motives either to hurt the person against whom the action taken or to benefit oneself."

The above makes it clear that *'mala fide'* on part of the authority must not only be alleged but should be detailed which the respondent No.1 / plaintiff had not. On the other hand, the pleading (plaint) of the respondent No.1 / plaintiff includes an admission of receipt of letter from S.I.T.E. thereby respondent No.1 / plaintiff was asked that as to why agreement with it (plaintiff) be not cancelled and plot be not transferred to applicants/ defendant Nos.1 and 2?. The witness of the respondent No.1 / plaintiff namely **Attaullah** *even* admitted in his cross-examination as:-

> "It is correct that the plot which has been cancelled by Site is D/182. Suit plot is admeasuring 30000 square yards (about 6 acres). It is a fact that we received a letter in Dec., 1976 from Site informing us that the defendant no.2 & 3 had already moved an application before the revenue Minister for effecting mutation of the plot No.D/182 in her name in terms of the said court order.
>
> .. It is correct that Site invited us to have a joint meeting by a letter dt. 4.1.77 but we did not attend the joint meeting because we insisted and requested that relevant document be supplied to us but site did not supply the same to us. It is correct that by that time the allotment of plot no.D/182 had not been cancelled by the Site."

31. I would add here that if the S.I.T.E would have passed the order without providing an opportunity to the respondent No.1 / plaintiff then the order could be termed as ***illegal*** or result of colourful exercise of powers or jurisdiction but where the person, likely to be prejudiced with proposed action, himself evades to respond the authority then it would not

be available for him to bypass the ordinary course of appeal, provided by law or rules. Reference is made to case of *Mir Muhammad Ali Rind v. Zahoor Ahmed & Ors* PLD 2008 SC 412 wherein consequence of non-service of show cause notice (not providing right of audience) was observed as ***'declaring order as illegal'.*** It was held in the case:-

> "5. There is no cavil to the legal position that an order adverse to the interest of a person cannot be passed without providing him an opportunity of hearing and departure to this rule may render the order illegal."

Prima facie, the S.I.T.E did make compliance of above legal requirement by serving the show-cause and whence its (SITE's) competence, *even,* was not denied by learned appellate Court for taking the action, then learned appellate Court was not required to dress up itself into dress of BoDs but was required to conclude that it was the appellate authority to reverse such findings of the BoDs. This, however, shows that action, challenged, was never taken without *first* putting the respondent no.1 / plaintiff onto notice of the claim of the applicants / defendant nos.1 and 2. Here, it is worth adding that negligence and failure of the respondent no.1 / plaintiff *itself* shall make it (plaintiff) to liable to face the consequences thereof. The findings of the learned trial court in respect of the issue no.4 were never disturbed with reference to any *legal* justification and reasoning which were:-

> "The SITE has been determined as a provincial government department and the character of the SITE has been discussed in a authority PLD 1975 Karachi page 178 and the said findings have been reaffirmed by the honourable Supreme Court in a case reported PLD 1985 SC PAGE 197 97. It further has been held that the resolution of the Board of Directors of the company can be suspended, altered and set aside by the Secretary Provincial Government of Sindh this is vested all powers of ownership in respect of the land which has come in their ownership, the members of the Board of Directors are the government officials i.e. Commissioner of Karachi and Hyderabad besides other staff which has specifically been mentioned in Ex.D/50 Board of resolution dated .1.1977 and being the statutory body the defendant No.1 has its own jurisdiction to deal with its properties with regard to allotment, recovery of dues, taken of possession, deliver of possession, dealing of lease to the respective tenants, the Board of Directors of the defendant No.1 is final authority and it their

> jurisdiction the person aggrieved by opinion of the Board of Directors can appeal to the Secretary Government of Sindh which is final and admittedly Board of Directors of the defendant No.1 by its resolution passed on 10.1.1977 recognized the defendant No.2 and 3 **as their tenant and thereafter recovering all the due upto date from defendant Nos.2 and 3 has not been challenged by the plaintiff although defendant No.1 by its letter dated 17.2.1979 Ex.D/31 has informed the plaintiff that they are not recognizing them as their tenants besides they further asked through their leter dated 2.2.1977 (Ex.D/47) to vacate the plot in question within one month**. It further appears that **before passing impugned order the Board of Directors of the defendant No.1 by their letter dated 14.12.1976 (Ex.D/55) called upon the plaintiffs that why the application of the defendant No.2 and 3 be not granted**. The plaintiffs did not care to attend the meeting and finally by resolution dated 10.01.1977 Ex.D/50 ordered was passed by the Board of Directors thus in my humble view since the revocation or cancellation of the tenancy by the Board of Directors (who was competent authority) has not been challenge before the Secretary Government of Sindh as such it has attained its finality. "

32. Thus, the *legal* requirement for establishing ***'mala fides'*** on part of the S.I.T.E, was never proved. In such eventuality where the competence of the S.I.T.E. in revoking / cancelling the license / lease was not disputed, *even,* per view of the learned appellate Court hence failure of the respondent no.1 / plaintiff in proving the ***'mala fides'*** was always sufficient to hold *otherwise.* This, however, was never properly appreciated by the learned appellate Court while answering the issue No.4.

33. The learned appellate Court also disagreed with the findings of the learned trial court over issue No.5 which reads as:-

> "On issue No.5, the learned trial court has been of the opinion that since the respondents No.2 and 3 through their written statement discussed that Noor Muhammad Dada was a partner of their successor in interest Mian Muhammad Rafi as such he was a necessary party to be joined in these proceedings in the absence of which the learned trial court treated the suit itself as incompetent for misjoinder of the parties. First of all, if Noor Muhammad Dada would have been a necessary party to this suit then it would be a case of non-joinder of the necessary party and not misjoinder of the necessary party as held by the learned trial court. Secondly, throughout the judgment the learned trial court has decided each and every issue without any and hesitation which is by itself sufficient indication of the fact that the controversy between the parties was able to be resolved and adjudicated even in the absence of Noor Muhammad Dada therefore it cannot be treated as a necessary party. **Had he been necessary party to this suit, the learned trial court would have found itself unable to determine the**

> **<u>controversy and adjudge the suit on merits.</u>** Even otherwise, if at all joining of Noor Muhammad Dada was treated essential, that could be done by even the respondents No.2 and 3 by making an application under order 1 rule 10 CPC. I am therefore unable to maintain the findings of the learned trial court on this issue that the said Noor Muhammad Dada was at all a necessary party to this suit or the suit must fail on account of his non joinder.

Since the suit was filed by the respondent No.1 / plaintiff which, *too,* after complete notice and knowledge of the suit of the applicants / defendant Nos.1 and 2, therefore, *discretion* completely rested with the respondent no.1/ plaintiff for making one as party or to drop him. There can be no *exception* to floating fact that the controversy, involved in the suit, was / is revolving round the **Noor Muhammad** and even the applicants / defendant Nos.1 and 2, claiming their right with reference to **Noor Muhammad** therefore, said **Noor Muhammad** was a necessary party, as was rightly viewed by the learned trial Court. I would also add that there came no challenge to framing of the instant issue from the side of the respondent No.1/ plaintiff which (issue) was / is always believed to be answered with its legal effects, hence the learned trial Court had rightly answered the issue. The consequence of non-joinder of necessary party was / is always to be faced by the plaintiff, as such discretion squarely rests with him, therefore, the effects of failure, shall always to be borne by the plaintiff. This legal position was never properly appreciated by the learned appellate Court while answering the instant issue. Accordingly, such findings, being not in accordance with law, are reversed.

34. As regard the findings of the learned appellate Court on *issue no.6* it appears that there was no dispute regarding requirement of Order 29 rule 1 CPC which, even, was reproduced by the learned appellate Court as:-

> "<u>Order 29 rule 1 CPC</u>:
> Subscription and verification of pleadings. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by **<u>any director or other principal officer of the corporation</u>** who is able to depose of the facts of the case."

Therefore, it was required to be established on record that the person, signing / verifying the pleadings, is either a Secretary or one of the Directors. The PW-1 Qurban never admitted the status of signatory of plaint as that of ***'one of the Directors'*** rather had stated as:-

> "It is correct to suggest that I am not signed to the plaint of this suit. It is correct to suggest that I have stated in my examination in chief that besides there three promoter of the plaintiff's company namely Noor Mohammad, Ghulam Mohammad and Mohammad Farooq. I see the signature of the plaintiff on the plaint, **but I cannot say who has signed**. I am a familiar with the signature of only Mohammad Farooq. I see the plaint and say that one Attaullah son of Mohammad Yameen have signed the plaint and I am not familiar with his signature."

The PW-1 never admitted the signatory of pleading (plaint) as one of the Directors of the respondent no.1 / plaintiff therefore, it was obligatory upon the respondent no.1 / plaintiff to produce record thereby establishing the status of signatory of pleading (plaint) to be one of its ***Directors.*** Without prejudice to this, what I find from perusal of the record is that there came no denial to claimed status of PW-Attaullah as one of the ***Directors*** therefore, it was not obligatory upon the respondent no.1 / plaintiff to prove what was not disputed. The position, being so, convinces me to up-hold the findings of the learned appellate Court for issue No.6.

35. In view of what has been discussed above, I am of the clear view that the judgment and decree, so recorded by the learned appellate Court, are not sustainable in law which, accordingly, are set-aside. In consequence thereof, the judgment and decree of learned trial court are hereby maintained resulting into dismissal of the suit of the respondent No.1/plaintiff. The parties are left to bear their own costs.

J U D G E

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