

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.327 of 1966

[Raza Hussain and others v. Muhammad Khan & others]

- Plaintiffs** : **Raza Hussain and others, since deceased through Legal Heirs, represented by Mr. Khalid Daudpota, Advocate.**
- Defendant No.8** : **Malik Mir Hasan, since deceased through Legal Heirs, represented by Mr. Muhammad Ali Jan, Advocate.**
- Defendants No.9** : **Malik Mir Hazar Khan, since deceased through his Legal Heirs, represented by M/s. Mustafa Lakhani and Yaseen Azad Advocates.**
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Judicial Miscellaneous Application No. Nil of 2005

[Malik Mehboob and others v. Raza Hussain & others]

- Applicants** : **Malik Mehboob and others, through Mr. Muhammad Ali Jan, Advocate.**
- Respondents** : **Raza Hussain and others, through Mr. Khalid Daudpota, Advocate.**
- Dates of hearing** : **24.05.2017**
- Date of Decision** : **15.08.2017**

Case law cited by the Plaintiffs' counsel.

1. P L D 1997 Supreme Court page-84
[*Al-Jehad Trust and another v. Federation of Pakistan and others*]
2. 2003 C L C page-250
[*Raza Hussain v. Muhammad Khan and others*]
3. 1992 M L D page-490
[*Bibi Khudeja v. Pir Sarwaruddin Shah and others*]
4. 2017 M L D page-338 (Lahore)
[*Khalid Mahmood v. Mst. Naseem Akhtar and 9 others*]
5. 2017 Yearly Law Report (YLR) 355
[*Zamrud Khan v. Sabir Khan*]
6. 2015 Yearly Law Report (YLR) 1348
(*Mst. Naseem Fatima v. Capital Development Authority*)

Case law relied upon by Defendants' counsel.

1. P L D 1981 Lahore page-623
[*Mst. Saeeda Akhtar and others v. Lal Din and others*]

Other Precedents

1. 2017 Supreme Court Monthly Review 81
[*Ghulam Rasool v. Noor Muhammad*]
2. PLD 2003 Karachi 314
[*Ardeshir Cowasjee v. KBCA*]

- Law under discussion:**
- (1) Civil Procedure Code, 1908.
 - (2) Qanun-e-Shahadat Order, 1984 (the *Evidence Law*)
 - (3) Transfer of Property Act, 1882 (the *Property Law*)
 - (4) The West Pakistan Land Revenue Act, 1967 (*the Revenue Law*).

J U D G M E N T

Muhammad Faisal Kamal Alam, J: The present proceeding is basically a post remand one. Learned Division Bench by its decision dated 19.11.2001 was / is of the view that Respondents No.8 and 9 in High Court Appeal No.03 of 1974, who actually are present Defendants No.12 and 13 (Malik Mir Hassan and Malik Mir Hazar Khan), are entitled to contest the present suit on the basis of their plea of *bona fide* purchaser of the land in question, for value without notice. This Judgment of learned Division Bench has been reported in *2003 C L C page-2050 Karachi* as well, was subsequently challenged before the Hon'ble Supreme Court in CPLA No.37-K of 2002 by one of the Defendants-Muhammad Khan/Defendant No.1, but the Hon'ble Apex Court maintained the above decision.

2. By this common Judgment both; present *lis* and Judicial Miscellaneous No. Nil of 2005 will be decided.

3. Considering intricate question of facts and nature of dispute stretching over to past many decades, it is necessary to give a background of the case.

4. Present dispute is with regard to a part of land comprising 900 Acres (approximately) in various survey numbers, situated at Deh Hub, Karachi, which was owned by deceased Mst. Shahar Bano. Initially, the suit was filed by the predecessor-in-interest of present Plaintiff (late) Raza Hussain against the present Defendants No.1 to 11, seeking, *inter alia*, Specific Performance of various agreements claimed to have entered into between predecessor-in-interest of these Defendants, deceased Mst. Shahar Bano, Raes Gul Hassan and Dildar Hussain. The original plaint contains the following prayer clause(s):

- a) *Ordering the defendants to specifically perform the agreement dated 18.01.1964 and to do all acts necessary to be performed under the terms of the said agreement of sale and on failure to do so, the Nazir of this Hon'ble Court be ordered to do all things necessary for the specific performance of the said agreement;*
- b) *Ordering the defendants to put the plaintiff in full possession of plots No.12 to 28, admeasuring 287 acres and 5 ghuntas situated at Hab Naddi, Manghopir, in case this Hon'ble Court comes to the conclusion that the plaintiff is not in possession of the said plots and to do all acts necessary to be done for putting the plaintiff in possession of the said plots;*

OR ALTERNATIVELY

- a) *For Rs.57,830/- with interest at 6% p.a. from the date of this suit till realization;*
- b) *Costs of this suit; and,*
- c) *Any other relief which this Hon'ble Court may think fit and proper looking to the circumstances of this case.*

5. After being duly served, original Defendants, that is, those, who owned / co-owned the above land, contested the suit, particularly, Defendant No.3 (Yaqoob) and Defendant No.6 (Mst. Janat), who were admittedly brother and sister. For the sake of clarity, the original Defendants will be referred to as the “**said Defendants**”.

6. By the order dated 16.12.1968, present Defendants No.12 and 13 (for the sake of reference, these Defendants be referred to as the “Claimants”) were impleaded as Defendants No.12 and 13, as they also claimed to have purchased that portion of lands in question falling to the share of Defendants No.3 and 6 (Yaqoob and Mst. Janat).

7. The amendments were made in the pleadings and the amended prayer clause(s) of present suit runs as under_

(a) ordering the defendants 1 to 11 to specifically perform the agreement dated 18.1.1964 and to do all acts necessary to be performed under the terms of the said agreement of sale and on failure to do so, the Nazir of this Court be ordered to do all things necessary for the specific performance of the said agreement; and declaring the sale in respect of the property which is the subject-matter of the suit in favour of the defendants Nos.12 and 13 and null and void and not binding on the plaintiff;

(b) ordering the defendants to put the plaintiff in full possession of plots Nos.12 to 28 admeasuring 287 acres and 5 ghuntas situated at Hab Nadi Manghopir; in case this Hon’ble Court comes to the conclusion that the plaintiff is not in possession of the said plots and do all acts necessary to be done for putting the plaintiff in possession of the said plots;

OR Alternatively

a) for Rs.57,830.00 with interest at 6% from the date of the suit till realization;

b) costs of this suit, and;

c) any other relief which this Hon’ble Court may think fit and proper looking to the circumstances of the case.

8. From the pleadings of the parties, following issues were framed:

1. Whether Mst. Shahar Bano had entered into agreement of sale of land in suit with the plaintiff? If so, whether the said agreements were obtained by fraud or misrepresentation?

2. *Whether the defendants 12 and 13 are bonafide purchasers for value without notice? If so, its effect?*
3. *Whether the relief of specific performance cannot be granted?*
4. *Whether the plaintiff is entitled to damages, If so, how much?*
5. *To what relief, if any, is the plaintiff entitled?*

9. In the intervening period, Defendants No.7 to 10 were dropped from the array of Defendants, as they were not the direct descendants and legal heirs of Mst. Shahar Bano, including the said Dildar Hussain from whom the Plaintiff averred to have purchased a portion of the land in question.

10. Exhaustive evidence was led by the parties including newly added Defendants No.12 and 13 {Claimants} in support of their respective claims.

11. Learned Single Judge handed down the Judgment dated 19.02.1973, whereby prayer for Specific Performance was rejected, inter alia, as all the agreements entered into between the Plaintiff and the said Defendants were adversely affected by the Rule of Pardanasheen lady, as Plaintiff failed to discharge the burden of satisfying the Court that all those sale agreements were executed by deceased Shahar Bano with full knowledge and consent. Additionally, relief of specific performance was also refused to Plaintiff because requisite permission for transfer/sale from the concerned Deputy Commissioner was not obtained. However, a decree against Defendants No.1 to 6 and 11 to the extent of Rs.4000/- (rupees four thousand only) with interest of 6% per annum, to be calculated from 13.03.1962 till realization, was awarded. It is pertinent to mention here that while discussing Issue No.2 pertaining to Defendants No.12 and 13 (Claimants), that whether or not they were bonafide purchasers for value without notice, learned Judge was of the opinion that since main relief of Specific Performance was declined to the Plaintiffs, therefore, it was not necessary to give a finding on the Issue No.2 as well.

12. The above Judgment was challenged in High Court Appeal No.03 of 1974 and while Appeal was *sub judice*, a compromise application under Order XXIII, Rule 3 of C.P.C. being C.M.A.No.2777 of 1980, dated 10.08.1980 (available at page-551 of the main file) was jointly moved by the predecessor-in-interest of the present Plaintiffs, viz. late Raza Hussain and Defendants No.1, 2, 4, 5 and 6, excluding present Defendant No.3 (said Yaqoob) as well as the Claimants.

13. Learned Division Bench has passed an order dated 08.10.1980, whereby the matter was deferred to a date in office for hearing. That order was subsequently impugned before the Hon'ble Apex Court in CPLA No.108-K of 1999 and after hearing counsel representing different parties, Hon'ble Supreme Court converted the above Petition into Appeal, set aside the above referred order and remanded the case to the learned Division Bench of this Court for rehearing of the Appeal and decision in accordance with law, as well as observation of the Hon'ble Supreme Court, *inter alia*, that once a compromise application was filed before the learned Division Bench, it had to be disposed of accordingly.

14. On remand, aforesaid order was passed by the learned Division Bench, which was maintained by the Hon'ble Apex Court, hence present proceedings.

15. Looking at the age of the present *lis*, evidence file was reconstituted /re-constructed in accordance with Rules. I must record my appreciation for all the learned counsel representing the parties for their co-operation in this regard.

16. It is also relevant to discuss undisputed facts for reaching a conclusive finding about the rights and interest of the respective parties to the proceedings.

17. Plaintiffs' side is laying its claim over a portion of the land in survey Nos.12 to 28, Deh Hub, as mentioned in the compromise application dated 10.08.1980 filed in the aforereferred H.C.A. No.03 of 1974, followed by the **Compromise Decree of 19.11.2001**, whereas Defendants No.12 and 13 (said Claimants) derived their title from a registered instrument; Sale Deed dated 29.05.1968, which has been exhibited during the evidence as Exhibit No.24/21 (available at page-343 [new page 311] of the Evidence File). This Sale Deed has been entered into between Muhammad Yaqoob and Mst. Janat (Defendants No.3 and 6) as Vendors and predecessor-in-interest of present Defendants No.12 and 13, namely, Malik Mir Hassan Khan and Malik Mir Hazar Khan as vendors. The subject matter of the Sale Deed is agricultural land bearing Survey Nos.7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 to 27, admeasuring 299 Acres and 35 Ghuntas, situated in Deh Hub, Taluka Karachi, District Karachi. *Plaintiffs' claim* is on an area admeasuring 287 Acres and 5 Ghuntas, regarding which the above Compromise Decree dated 19th November 2001 has been passed and subsequently through Nazir of this Court, possession was handed over to the Plaintiffs; Nazir Report is of 25.10.2003 (at page-51) of the Exeuction No.02 of 2003. It is also noteworthy that claim of the Plaintiffs is also in respect of same survey numbers, except survey No.7. Plaintiffs and Defendants at all material times also had knowledge of this Sale Deed as evident from their respective pleadings as well as testimonies. Plaintiffs in their amended plaint had sought declaration that sale in respect of the subject property in favour of said Claimants should be declared as null and void, while further praying that the Plaintiffs' side should be put in possession of plots No.12 to 28, admeasuring 287 Acres and 5 Ghuntas, that is, suit land. The undisputed factual and legal position is also highlighted in the afore-mentioned remand order of learned Division Bench (dated 19.11.2001). Entitlement of Defendants No.3 and 6 [Yaqoob and

Jannat] have not been disputed by any of the parties, but, only the area of land they have inherited. As per plea of the said Defendants, the afore named Yaqoob and Jannat had jointly inherited 170 acres.

18. The second set of facts is that in the intervening period, Plaintiffs after obtaining compromise decree filed Execution Application No.02 of 2003, after more than a year from passing of the said Compromise Decree. Notices were issued, but it is pleaded by the present Claimants that no notice was issued to them. In this regard, on one of the dates, it was observed by this Court in the above Execution proceeding that counsel for Decree Holder to satisfy the Court that Defendants No.8 and 9 (present Claimants) who are contesting the suit will not be affected or have no interest in survey Nos.12 to 28. These survey numbers constitute a larger portion of the subject land in dispute.

19. That on 14.04.2003, the Execution Application was allowed. Thereafter, present Claimants preferred a proceeding under Section 12(2) of C.P.C. by filing a J. M. No. Nil of 2005 and impugned the above order dated 14.03.2003, *inter alia*, on the ground that Plaintiffs / Decree Holder by playing fraud upon the Court got the above order passed, though the said Compromise Decree was a non-executable one. Office has raised objections to the maintainability of the Judicial Miscellaneous. The said Judicial Miscellaneous proceeding has been contested by Plaintiffs by filing a detailed Counter affidavit. According to the Plaintiffs' counsel, it is the present Claimants who had obtained a *status quo* order on 07.03.2008, by misrepresenting the facts before this Court. It would be advantageous to reproduce herein under the relevant portion of the decree that was filed in above Execution proceeding_

“And whereas the above matter came up on this 19th day of November, 2001 for Re-hearing before a D.B. consisting of Mr. Justice Sabihuddin Ahmed and Mr. Justice S. Ali Aslam Jafri in presence of Mr. Faisal Khalid Daudpota Advocate for appellant and Mr. G. M.

Qureshi, advocate for respondents No.1(a), (c), 2 and 4, it is hereby ordered that appeal is accordingly allowed to this extent that the Compromise dated 08.10.1980 is binding as between the parties thereto, the terms of Compromise dated 8-10-1980 which reads as under: -

“TERMS AND CONDITIONS”

- (1) *“That the appellant shall be transferred, assigned ownership of plots Survey number 12 to 28 situated in Deh Hab, Tappo Manghopir, District Karachi. The expenses of transfer shall be borne by the appellant.*
- (2) *That the Respondents 1, 2, 4, 5 and 6 shall cooperate with the appellant in the transfer assignment and mutation of plot bearing Survey Nos. 12 to 28 in favour of appellant or his nominee.*
- (3) *Petitioners shall bear their own costs”.*

However, the respondents Nos.8 and 9 are entitled to contest the suit on the basis of their plea of being bonafide purchasers for value without notice and the suit is remanded to a learned Single Judge on the original side to decide the same on merits.” [Underlying for emphasis]

20. In order to decide controversy involved effectively and completely, it would be necessary to frame two additional Issues besides retaining the original Issue No.2. Consequently, following are the Issues:

1. *Whether the defendants 12 and 13 are bonafide purchasers for value without notice? If so, its effect?*
2. *Whether the compromise application dated 10.08.1980 is a valid one and can have the effect of nullifying the registered Sale Deed dated 29.05.1968?*
3. *To what relief, if any, the Claimants are entitled to?*

ISSUE NO.1:

21. Mr. Khalid Daudpota, learned counsel representing the Plaintiffs, has strenuously argued that the sale transaction in favour of the Claimants by Defendants No.3 and 6 is otherwise illegal as at that relevant time a restraining order was in the field and, therefore, subject land could not have been sold to the Claimants. He further argued while referring to record that

criminal cases were registered against the parties including the Claimants when the latter attempted to take over the physical possession of the subject land and faced resistance. In this regard, learned counsel has also referred to a Letter Patent Appeal (LPA) No.19 of 1969 preferred by the said Claimants against the injunction order, but the same was also dismissed by learned Division Bench of this Court. Stance of the Plaintiffs is that sale transaction between the Claimants and said Defendants No.3 and 6 is hit by Section 52 of the Transfer of the Property Act, 1882 and the Sale Deed [afore mentioned] is an illegal document; that Claimants cannot approbate and reprobate at the same time, by pursuing the present suit and subsequently filing the J.M. No. nil of 2005; that even otherwise, sale transaction between the Claimants and said Defendants No.3 and 6 is of no consequence as the said Defendant no.3 and Plaintiffs already entered into a Compromise by filing a Compromise Application (CMA No. 1081 of 1967) under Order XXIII, Rule 3 of CPC, which again has been brought on record through a pending CMA No. 11617 of 2016. Learned counsel representing the Plaintiffs have placed reliance on the reported decisions already mentioned in the opening part of this judgment.

22. No one appeared on behalf of the said Defendants in the present round of proceeding. M/s Muhammad Ali Jan, Mustafa Lakhani and Yaseen Azad (ASC) have argued on behalf of the Claimants and their present legal heirs. Arguments advanced by Mr. Muhammad Ali Jan, Advocate have been adopted by other two learned counsel, as there is no conflict of interest *inter se* these Claimants.

23. Main thrust of the arguments of Claimants is that the Compromise Decree which is based on the Compromise dated 10.8.1980 [supra] is a nullity in the eyes of law, as the land falling in the afore mentioned disputed survey numbers at that relevant time was not owned by those said

Defendants who entered into the said Compromise with Plaintiffs, but, the said lands were in fact owned by and in possession of said Defendants No. 3 and 6 [Yaqoob and Jannat] in terms of the Partition dated 15-5-1968 [Exhibit 9/1]. The point of law of *lis pendens* was also rebutted by Claimants' side by invoking the principle of bona fide purchaser without notice, as ownership of land in question was transferred to Claimants by a registered Sale Deed dated 29-5-1968 [Exhibit 24/21].

24. Number of witnesses were examined by all the Parties. A major portion of evidence relates to the sale transaction through various sale agreements said to have entered between Plaintiffs predecessor-in-interest Raza Hussain (late) and the said Defendants and their predecessor-in-interest (late) Shahar Bano in respect of their various lands in different survey numbers. However, the above sale transaction(s) between Plaintiffs and the said Defendants, **was already rejected by this Court vide Judgment dated 19-2-1973, though challenge in afore referred HCA No.3 of 1974, but while the said Appeal was *sub judice*, the Plaintiffs and the said Defendants excluding Defendant No.3 [Yaqoob] entered in the afore referred Compromise., followed by a Compromise Decree in dispute.** Thus, I need to discuss only the relevant portion of the evidence necessary for deciding the above Issues.

25. First the objection raised by learned counsel for Plaintiff about the Compromise signed between original Plaintiff (late Raza Hussain) and the said Defendant No.3 [Yaqoob] is to be addressed and answered, as it is directly related to the Issue at hand. In this regard, an Application C.M.A.No.11671/2016 is also filed and pending for decision, through which the purported Compromise dated 23.8.1967 is again brought on record, though the same was already filed many decades back by the Plaintiffs' side in the form of a compromise application being

C.M.A.No.1081 of 1967, under Order XXIII, Rule 3 of C.P.C. Undisputedly, this compromise was earlier rejected by this Court while passing Order dated 14.9.1967, which was never challenged subsequently, hence the said rejection order attained finality. Secondly, the afore referred Judgment in this suit and subsequent decision in HCA No. 3 of 1974 has further diluted the above Compromise, while giving an observation [as mentioned in the preceding paragraphs] about the status of Claimants based on registered Sale Deed [of 29.05.1968]. Thirdly, and admittedly, as also observed in the above earlier Judgment passed in this Suit that the said Defendants No. 3 and 6 have filed their separate written statement. It means that these two Defendants have taken an independent but different stance from the other Defendants about their sale transaction with Claimants. In addition to this, the said Defendant No.3 [Yaqoob] has specifically stated in his pleading / Written Statement as well as in his testimony about sale of his portion/share of land to the Claimants through the afore referred registered Sale Deed (Exhibit 24/21), hence, the plea of Plaintiffs' Advocate that said Defendant No.3 had already surrendered his right and interest as owner in the lands in question, is misconceived and meritless. Accordingly, CMA No. 11671 of 2016 is dismissed.

The next contention of Plaintiffs' side that afore referred Letter Patent Appeal (LPA) filed by present Claimants was dismissed and the sale transaction between them and Defendants No. 3 and 6 was/is thus illegal, in my considered view, hardly carries any weight, because in the said LPA, this Court neither gave any conclusive finding about the sale transaction between the above named Parties, nor on the factual aspect of the case, as according to the learned Division Bench, that would have been "*contrary to a fair trial of the disputes which were existing between the parties*". Secondly, at present, the possession of the lands in question is with Plaintiffs, therefore, the above contention has lost its significance.

26. P.W.-13-Plaintiff himself (Late Raza Hussain) in his cross-in-examination has acknowledged the fact about his knowledge regarding purchase of the subject land by the said Claimants and he himself produced the certified copy of the said Sale Deed as Exhibit 24/1. He has further admitted in his evidence that through the then Revenue Authorities; Deputy Commissioner and Mukhtiarkar, he was informed that a sale permission was given in respect of the subject land for its sale to the said Claimants. To a question, he has admitted that he did not send any notice to the Claimants for not entering into such type of sale transaction. In line 310 of his deposition, to a question, the said Plaintiff had replied that he was not party to the Partition Proceeding, which took place before the Deputy Commissioner, while denying that it was he (the Plaintiff) who drafted a compromise application between himself and Defendant No.3 (Muhammad Yaqoob).

27. A very significant question here would be that whether the subject lands mentioned in the said registered Sale Deed (**Exhibit 24/1**) were at the relevant time vested in the Vendors, that is, Defendants No.3 and 6 (Muhammad Yaqoob and Mst. Janat), when the same were sold out to the Claimants. In this regard, evidence of Muhammad Yaqoob (Defendant No.3), who was witness No.15, is of prime importance. In his examination-in-chief, he has given the facts that how he and his sister Mst. Janat (Defendant No.6) inherited the joint properties which were later partitioned by the then Revenue Authorities upon a joint application filed by other legal heirs, who are the said Defendants. He has further deposed that the Plaintiff (late Raza Hussain) took advantage of his position as a Lawyer of the paternal grandmother Mst. Shahar Bano, who actually was owner of a vast area of the land comprising around 900 Acres in various survey numbers in deh Hub. The said Defendant No.3 in his pleadings as

well as in his evidence has specifically stated and admitted that he and his sister sold their lands to Malik Mir Hazar Khan (Defendant No.13) for a total sale consideration of Rs.1,09,500/- (Rupees One Lac Nine Thousand and Five Hundred Only) and Sale Deed (ibid) in this regard was signed before the Registrar. About his earlier compromise application filed in Suit, which was admittedly not given effect to, the said Muhammad Yaqoob stated that its contents were not read over to him by Plaintiff (late Raza Hussain). The evidence of said Muhammad Yaqoob with regard to the Sale Deed remained consistent and unshaken. The evidence file shows that the same witness (Muhammad Yaqoob) also appeared as witness on behalf of other Defendants in another Suit No.224 of 1969, which deposition is available at page-205 of the evidence file as Exhibit No.9. In his evidence, the said Muhammad Yaqoob (Defendant No.3) has brought on record the official partition of the lands inherited by the said Defendants and Order for the Partition (dated 15.05.1968) is available at page-207 as Exhibit 9/1, wherein various lands in different survey numbers are shown to be partitioned in accordance with the entitlement of the said Defendants including said Defendants No.3 and 6. **According to this Official Partition these Defendants No.3 and 6 (Vendors) have inherited 299 Acres and 35 Ghuntas of land in Survey Nos.7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 to 27, which is the subject matter of the Sale Deed.** The other significant aspect of this Partition Order is that its opening paragraphs show rather confirm the deposition of said Defendant No.3 [Yaqoob] that in fact a joint application was moved before the Deputy Commissioner by the present said Defendants, who were the legal heirs of Mst. Shahar Bano. It is also an admitted position that no appeal was preferred against this partition order passed by the then Deputy Commissioner. This partition was not a private one as stated by the other Defendants but an official one in terms of Section 135 of the Revenue Law, encompassing all questions including that of

ownership/title of respective party/said Defendants. The above partition is a Partition Instrument in terms of Section 145 of the Revenue Law. It is also necessary to observe that even a private partition is recognized under Section 147. Although and rightly so, Plaintiffs' learned counsel argued that mutation entries in the record of right is not a title document, but, at the same time, the said entries are an evidence of the ownership of an individual, unless, disproved, Section 52 of the Revenue Law lends sanctity to such entries in record of rights. Undisputedly, the above **Partition Order/Instrument dated 15.05.1968 {Exhibit 9/1}** was never challenged by any of the parties hereto, nor, any proceeding/suit as contemplated by Section 53 of the said Revenue Law was filed by any of the parties. The record of above Partition was produced by the concerned clerk-Muhammad Ismail, PW-1 of Mukhtiarkar Office. Hence, in terms of Articles 90 to 92 of the Evidence Law, a presumption of genuineness is attached to such official acts and record, unless proven otherwise.

28. Witness No.10-Syed Muhammad Ajmal who is son of above named Yaqoob, in his deposition stated about his visit to the subject lands sold to Claimants and confirmed the possession of the latter (Claimants).

29. Another Defendants' witness-D.W.-5 (Raees Muhammad Khan), who was Defendant No.1, while denying any sale transaction in respect of the subject land with plaintiff in his cross-examination, has conceded to the fact that he and his other family members had received a sum of Rs.90,500/- from the Claimants in respect of the subject land. To a question, he only showed his ignorance about the registered Sale Deed, but did not deny its existence. He did not deny the question that in the aforementioned Partition, the said witness / Defendant No.1 (Raees Muhammad Khan) and other legal heirs / said Defendants were given their respective shares in Survey Nos. 29, 30, 31, 32, 33, 34, 36, 42, 46 and 50 *{the other*

survey numbers}. It simply means that other said Defendants got their share of properties/lands in other survey numbers and not those which are subject matter of the above said Sale Deed and the Compromise Decree in question. To another question, he has admitted the fact that in respect of afore mentioned 'other survey numbers', he entered into another Sale Agreement on 09.02.1970 with one Habib Ahmed. He further admitted that this Agreement was signed by him and other siblings but excluding Muhammad Yaqoob and his sister, that is, Defendants No.3 and 6. He has further admitted in his evidence that the said Muhammad Yaqoob (Defendant No.3) was in possession of lands belonging to him, but under a private partition.

The said witness-Defendant No.1 in his cross-examination recorded his conditional no objection to the sale of subject lands by Defendants No.3 and 6 (Muhammad Yaqoob and Mst. Jannat), as according to the said witness, there was a stay order of this Court.

30. One of the Claimants Malik Mir Hassan also entered the witness box. Said Witness specifically stated that he purchased the land in question from (afore mentioned) Defendant No.3 and 6 through the registered Sale Deed and after the official Partition. The said witness also deposed that he even gave a sum of Rs. 90,000/- to the said Defendant No.1 as a sale consideration to purchase his landed property also, but later the said Defendant No.1 backed out. The said Claimant witness has deposed that at the relevant time he was not aware of any injunction order. In his cross-examination the said Claimant witness who himself is a purchaser/vendee of the subject lands, could not be disproved nor his credibility was impeached. No apparent contradiction can be found in the depositions of the above-named Claimant and Defendant No.3 [Yaqoob],

rather they corroborate each other in respect of Partition Order and Sale Deed, which are the fact-in-issue relating to the present controversy.

31. The Witness No. 12-Malik Mustafa who is son and attorney of Malik Mir Hassan (the Claimant) in his testimony corroborated the evidence of Claimants about the sale transaction in respect of the subject lands between Defendants No.3, 6 and Claimants, inter alia, by categorically stating that he (the said Malik Mustafa, attorney) was present at the time of registration of the Sale Deed dated 29-5-1968 (*Exhibit 24/21*) and both the afore said Vendors/Defendants No. 3 and 6 were present. He further deposed that said Defendant No.3/Yaqoob handed over the possession of the lands mentioned in the above Sale Deed. It is important to observe that the Plaintiff and the said Defendants did not cross examine the said witness on above material aspect of his deposition.

32. If the above evidence is analyzed, it would lead to the conclusion that said Defendant No.1 himself is admitting the fact that he and his other brothers and sisters did not own those survey numbers, which were transferred to the said Defendants No.3 and 6 by virtue of the above Partition Order dated 15.05.1968 (Exhibit 9/1). From this, it can be further concluded that the survey numbers forming part of the subject Sale Deed were lawfully inherited by the said Vendors, viz. Defendants No.3 and 6 (Muhammad Yaqoob and Mst. Jannat) and when the subject Sale Deed was executed, these two Defendants had the ownership / marketable title of the lands in question, which were subsequently transferred / conveyed to the Claimants. In the Sale Deed itself the fact of Partition is mentioned. Further scrutiny of the Sale Deed record shows that before the concerned Sub-Registrar (T-Division IV, Karachi) both the said Defendants No.3 and 6 appeared and admitted to have received the full sale consideration of Rs.1,09,950 (Rupees One Lac Nine Thousand, Nine Hundred and Fifty

Only). A copy of the Sale Deed has also been placed on record by the Claimants in their aforereferred J. M. No. Nil of 2005 as one of the annexures with their rejoinder as well as in instant Suit with their Statement of 8-3-2016.

33. Main thrust of submissions from the Plaintiffs' side with regard to the conduct of the Claimants about taking over possession of the lands in question through force and illegal means, loses significance, firstly, because there is no convincing and conclusive evidence that the Claimants committed illegal acts for taking over possession of the subject land and secondly, undisputed present factual position is that the possession of the disputed land in question is with the Plaintiffs themselves, as mentioned above.

34. Adverting to the second limb of arguments advanced by learned counsel for the Plaintiffs about *lis pendens*. Section 52 of the Property Law (supra), contemplating the principle of *lis pendens*, has been explained and expounded by various judicial pronouncements and in this regard Plaintiffs' counsel has also cited reported decisions which are mentioned in the opening part of this Judgment. However, the question is that whether in the present facts of the case, the Rule of *lis pendens* will apply or that of bonafide purchaser for value without notice as envisaged in Section 41 of the Property Law (ibid), so also expounded by various judicial precedents including a recent reported decision given in Ghulam Rasool's case (*supra*) by the Hon'ble Supreme Court.

35. Examination and evaluation of voluminous record of present case and particularly undisputed facts and documentary evidence that has come on record, the conclusive position that emerges is as follows:

- i) The Judgment dated 19-2-1973 earlier passed in this matter (Suit) has rejected the claim of the Plaintiffs after taking into account

the entire evidence, but did not give any independent finding on the entitlement of the present Claimants. Considering the two documents, viz. Partition Order and the Sale Deed [supra], existence and authenticity whereof was never challenged, then under Article 126 of the Evidence Law, onus was on Plaintiffs and the said Defendants to prove their claim that said Defendants No.3 and 4 were not the owners of those lands, which were conveyed/transferred to Claimants through the above registered Sale Deed and hence the transaction was illegal; however, appraisal of evidence leads to the conclusion that the above parties; Plaintiffs and the said Defendants No. 1, 2, 4 and 5 have failed to discharge their burden of proof.

- ii) Compromise application filed in above mentioned High Court Appeal was only accepted to the extent of Plaintiffs and those Defendants, who were party to the said compromise, as admittedly mentioned in the decree itself, relevant portion whereof has already been reproduced in the preceding paragraphs.
- iii) The compromise application (C.M.A.No.2777 of 1980) is perused, available at page-551 of the main file, it is not signed by Defendant No.6 (Mst. Jannat). Secondly, even otherwise after selling her share in the lands in question to Claimants by a registered and undisputed Sale Deed dated 29.05.1968, **which is admittedly prior in time**, the said Defendant No.6 could not have, even otherwise, signed the above compromise application. Thirdly, applying the Rule of *Pardah nasheen* lady as expounded in the earlier Judgment in the present suit as well as other judicial precedents on the subject, I further hold that once the said Defendant No.6 has sold out her ownership rights and interest in the land in question to the Claimants, cannot and could not have signed the above compromise application with a conscious mind.
- iv) Above compromise application, which later became the decree is in respect of survey numbers 12 to 28, which survey numbers, excluding survey No.28, **already stood transferred in favour of Claimants through registered Sale Deed** executed by Defendants

No.3 and 6 (Muhammad Yaqoob and Jannat) as vendors. Secondly, the evidence, which is available on record proves the fact that under the official Partition Order (ibid), the survey numbers which form part of the said Sale Deed had fallen to the share of said Defendants No.3 and 6 and they being the lawful owners of the same have subsequently and validly conveyed their right and interest in the said lands comprising of said survey numbers to present Claimants.

36. The upshot of the above is that to the facts of the present case, the principle of bonafide purchaser for value without notice is applicable, as all the ingredients summarized by the Hon'ble Supreme Court in the above Ghulam Rasool case are available here. Thus, case law relied upon by the learned counsel for Plaintiffs, primarily relating to *lis pendens* are distinguishable and hence, do not lend any support to the case of Plaintiffs. Accordingly, the Issue No.1 is answered in Affirmative and in favour of Claimants, that is, the latter (Claimants) were/are the bonafide purchasers for value / consideration without notice coupled with all benefits flowing therefrom.

ISSUE NO.2:

37. It is an established principle that fraud vitiates most solemn proceeding. It is an undisputed position that neither any appeal was preferred against the Partition Order dated 15-5-1968 (Exhibit 9/1), nor the authenticity or validity of the same was challenged by any of the witnesses examined in the evidence proceeding. The survey numbers in question, which are subject matter of the afore-mentioned Compromise decree, in fact belonged to and owned by the said Defendants No.3 and 6 (Muhammad Yaqoob and Mst. Jannat). It is also a settled legal principle that the transferee cannot confer upon a transferor a better title than what he himself possess. The said Defendants had no lawful authority, right or

interest at the relevant time in the subject survey numbers 12 to 27 (at least), at Deh Hub, when they entered in a compromise with Plaintiffs, followed by the afore said Compromise decree. In this regard, observation made in the Remand Order of learned Division Bench, which was upheld by the Honourable Apex Court, is also of relevance and significance. It has been observed by learned Division Bench that the negative finding of learned Single Judge about rejecting the claim of Specific Performance of present Plaintiffs was upheld in Appeal. It was further observed and held that since required notices under the Registration Act was not registered with the concerned Sub-Registrar, therefore, plea of *lis pendens*, as argued by the learned counsel for the Plaintiffs is hardly of any significance, while holding that at best the transfer of lands in question in favour of Claimants can entail a penalty, if it is found that the same was made in utter violation of injunction order, but the sale in favour of Claimants cannot be declared void. It has been further observed by the learned Division Bench that title to the property vested in the Claimants would not be destroyed by a unilateral compromise made by the transferors after they stood divested of such title.

38. The above discussion convinces me to answer Issue No.2 as follows:

That compromise application dated 10.08.1980, followed by a compromise decree, which later became subject matter of Execution Proceeding No.02 of 2003 is / was a transaction void ab initio and the same neither nullifies the registered Sale Deed dated 29.05.1968 (Exhibit 24/21) entered into between Defendant No.3 and 6 (Vendors) and the present Claimants (Vendees) nor the said compromise can in any way dilute the effect or eclipse the findings handed down by the learned Single Judge in his earlier Judgment dated 19-12-1973 (in present suit).

39. At this juncture, it is necessary to clarify that if the parties to the compromise application had the valid and marketable title vested in them at

the relevant time, only then the subject lands in survey numbers 12 to 28 could have been transferred / conveyed to the Plaintiffs, even after adverse findings against the latter (Plaintiffs), but here the factual and legal position is altogether different.

ISSUE NO.3:

40. It was strenuously argued by learned counsel for the Plaintiffs that Claimants cannot maintain both proceedings simultaneously, that is, present Suit as well as J. M. Nil of 2005, under Section 12(2) of C.P.C. In rebuttal, Learned counsel representing the Claimants argued that Judicial Miscellaneous proceeding was filed as the Plaintiffs being Decree Holders and the said Defendants as Judgment Debtors have collusively obtained the order in Execution proceeding, while present Claimants were kept in dark. The order sheets of Execution proceedings are taken into account. Even the Assistant Registrar's diary shows that all the Judgment Debtors were not served as mentioned hereinabove. On 17.03.2003, this Court made certain observations regarding the claim of the present Claimants in respect of survey numbers 12 to 28. The matter was then adjourned to 24.03.2003, on which date, the matter was again adjourned and it was ordered that notice be repeated for 07.04.2003, as Judgment Debtors were not personally served. On 07.04.2003, Mr. Ghulam Murtaza Malik, counsel representing Judgment Debtors sought adjournment and the matter was adjourned by consent to 14.04.2003, on which date, the Execution was allowed by consent. The file of Execution proceeding surprisingly does not contain Vakalatnama on behalf of above named Mr. Ghulam Murtaza Malik, Advocate, who was representing Judgment Debtors. The publication of notice in the newspaper 'Pakistan' at Islamabad, cannot be held to be a good service, as legal heirs of Claimant No.8 reside at Rawalpindi and that of Respondent No.9 at Karachi. More so, whether the said Daily had a large

circulation is also not known. From the above, it is clear that present Claimants, who were impleaded as Judgment Debtors No.8 and 9 were not served with the notices of Execution proceeding as per Rules. Consequently, these Judgment Debtors / Claimants were kept in dark about the Execution proceeding, which finally culminated into handing over of possession of the subject lands to the Plaintiffs by the Nazir of this Court. File of aforesaid Execution proceeding also contains the objections filed by the Judgment Debtors No.5 and 6 (Mst. Zeenat and Mst. Jannat) and they have specifically stated through their counsel that they being illiterate villagers and *Pardah Nasheen* ladies had never authorized any one on their behalf to enter in a compromise with the Plaintiffs. However, these objections were filed much after the Execution proceeding was allowed.

41. The objection of the Plaintiffs' counsel about maintaining of two proceedings at a time has been completely answered by our learned Division Bench in the case of Cowasjee (*ibid*), wherein it is *held*, inter alia, that an aggrieved party can challenge the order either by way of appeal or under Section 12(2) of C.P.C. Another plea of Plaintiff about non-framing of Issue in the said J.M. No. nil of 2005 is also mis-conceived, as by now it is a settled principle that while deciding a case of the nature, framing of Issues is not mandatory. Secondly, since J.M No. nil of 2005 is also decided by this common judgment on the basis of the Issues framed in the Suit, thus, requirement is otherwise stands fulfilled.

42. The upshot of the above is that the J. M. No. Nil of 2005 was not an erroneous proceeding in these peculiar circumstances, and the office objection should have been overruled long time back. Nevertheless, this is a procedural matter and cannot obstruct dispensing substantial justice to the parties. Judicial Miscellaneous Application No. Nil of 2005 is accepted and order dated 14.04.2003 passed in above Execution Application No.02 of

2003, is set aside and benefits accrued there from are also held to be a nullity in the eyes of law having no legal effect whatsoever. Consequently, it is held that the possession of the survey numbers 12 to 28 at deh Hub, were wrongly handed over to the Plaintiffs by the Nazir of this Court. Accordingly, possession in respect of survey Nos.7, 12 to 27, measuring 299 Acres and 35 Ghuntas, at Deh Hub, is restored and should be handed over to the Nazir of this Court, who shall take appropriate measures to hand over the same to the Claimants who are now being represented through their legal heirs. Fee of Nazir for carrying out the above task will be rupees fifty thousand (tentatively) to be shared equally by Plaintiffs and the Claimants.

44. Parties to bear their respective costs.

JUDGE

Dated: 15.08.2017.

*Riaz Ahmed / P. S.**