

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 665 of 2003

[Umar Islam Khan and others Vs. Abdul Basit and others]

Dates of hearing	:	13.02.2018, 14.02.2018 and <u>16.02.2018</u>
Date of decision	:	<u>23.02.2018</u>
Plaintiffs	:	Umar Islam Khan and others; through Mr. Malik Altaf Javed, Advocate.
Defendant No.1	:	Abdul Basit; through M/s. Yousuf Moulvi and Rafia Murtaza, Advocates.
Defendant No.2	:	Pakistan Defence Officers; through Mr. Asif Rasheed, Advocate.
Defendant No.3	:	Sub-Registrar, T, Division (<i>Nemo for Defendant No.3</i>)

Case law cited by the Plaintiffs' counsel

1. 1989 MLD page-3530 [Lahore]
(*Ghulam Siddique Vs. Jameela*).
2. PLD 1975 Supreme Court page-311
(*Ahmad Khan Vs. Rasul Shah and others*).
[Ahmed Khan case]
3. 2015 CLC page-594 [Lahore]
(*Mst. Akbar Jan through L.Rs. and others Vs. Mst. Kalsoom Bibi and 6 others*).
4. 2008 SCMR page-1031
(*Muhammad Ali through L.Rs. and another Vs. Manzoor Ahmad*) **[Muhammad Ali case]**
5. PLD 1964 Supreme Court page-329
(*Muhammad Akbar Shah Vs. Muhammad Yousuf Shah and others*). **[Akbar Shah case]**
6. 2015 SCMR page-1.
(*Amjad Ikram Vs. Asiya Kausar and 2 others*)
[Amjad case]
7. PLD 2010 Karachi page-148
(*Nazimuddin Ahmed Vs. Ainuddin Ahmed and 2 others*)

8. PLD 1975 Supreme Court page-624
(*Mst. Hamida Begum Vs. Mst. Murad Begum and others*)
[Hamida Begum case]
9. 2016 CLC page-1293 [Islamabad]
(*Abdul Latif Vs. Biwi Jan alias Bibi Jan and another*)
[Abdul Latif case]
10. 2010 SCMR page-1042
(*Mehr Manzoor Hussain and others Vs. Muhammad Nawaz and another*)**[Manzoor Hussain case]**
11. 2010 SCMR page-978
(*Abdul Rehman and others Vs. Ghulam Muhammad through L.Rs. and others*)**[Abdul Rehman case]**
12. PLD 2003 Supreme Court page-849
(*Sher Baz Khan and others Vs. Mst. Malkani Sahibzadi Tiwana and others*) **[Sher Baz Khan case]**
13. PLD 2015 Supreme Court page-212
(*Dr. Muhammad Javaid Shafi Vs. Syed Rashid Arshad and others*)

Case law relied upon by counsel for Defendant No.1

1996 SCMR page-137
(*Sughran Bibi Vs. Mst. Aziz Begum and 4 others*)
[Sughran Bibi case]

Other Precedent:

2017 SCMR page-81
(*Ghulam Rasool and others Vs. Noor Muhammad and others*)
[Ghulam Rasool case]

- Law under discussion:**
- (1). The Code of Civil Procedure, 1908
[CPC]
 - (2). Limitation Act, 1908.
[Limitation Law]
 - (3). Qanoon-e-Shahadat Order, 1984.
[Evidence Law]
 - (3). Specific Relief Act, 1877. **[SRA]**
 - (4). Contract Act, 1872.

JUDGMENT

Muhammad Faisal Kamal Alam, J: Through the present proceeding, the Plaintiffs are claiming to be the owners of a Plot No.77,

at main Khayaban-e-Ghazi, Phase-VI, Defence Housing Authority [DHA], admeasuring 2000 Square Yards (*the Suit Plot*) have challenged the subsequent transfer in favour of Defendant No.1. The Plaintiff contains the following prayer clause: -

“a). It is, therefore, humbly prayed that this Hon’ble Court may be pleased to pass Judgment and Decree, in favour of the Plaintiffs and against the Defendants, in terms and of following further prayers.

b). That this Hon’ble Court declare null and void the whole procedure of transfer in favour of Defendant No.1, regarding the suit property as the procedure is fraudulent.

c). Declare and cancel all the documents which are fake and forge, used in favour of Defendant No.1, for the transfer of suit property, with the help of Defendant No.2.

d). To declare that the Plaintiffs are lawful owner (legal heirs) of the suit property under the reference, by virtue of law of inheritance.

e). Direct the Defendants No.2 and 3, execute the registered deed/sub-lease in favour of the Plaintiffs of the suit property.

f). To declare that the atrocities committed by the Defendants individually and collectively are illegal and the Plaintiff has right to claims, Rs.50,00,000/- (Rupees Fifty Lacs) from the Defendants individually and collectively.

g). Cost of the Suit.

h). Any other relief(s) this Hon’ble Court may considered deem fit and proper in the circumstances of the Suit.”

2. On service of notice, the claim of Plaintiffs was contested by Defendants No.1-Abdul Basit and 2-Defence Housing Authority [DHA], through their respective Written Statement(s).

3. From the pleadings of the parties, following issues were framed on 04.05.2010_

- “1. Whether claim made in the suit is barred by time?***
- 2. Whether Muhammad Ibrahim Sheedat is duly constituted attorney of Defendant No.1?***
- 3. Whether Plaintiffs No.2 and 3 have executed Power of Attorney in favour of Plaintiff No.1?***
- 4. Whether Plaintiff No.1 is duly constituted attorney of Plaintiffs No.2 to 4?***
- 5. Whether Plaintiffs were entitled to their share of inheritance in the suit property on the death of their father Squadron Leader Muhammad Islam Khan?***
- 6. Whether the functionaries of Defendant No.1 committed fraud in depriving the Plaintiffs of their lawful share in the suit property which they inherited from their father and mother?***
- 7. Whether documents of transfer in favour of Defendant No.1 are liable to be cancelled?***
- 8. Whether the Plaintiffs are entitled to the award of damages, if yes, to what extent?***
- 9. What should the decree be?”***

4. Plaintiffs and Defendant No.1 led the evidence but Defendant No.2 only filed a Statement in response to the Notice dated 26.10.2010 under Order XII, Rule 8 of CPC, served by the Plaintiffs. This

Statement was filed before the learned Commissioner (*appointed for recording the evidence*) on 29.07.2010, which is available at Page-22 of the Evidence File, where under, relevant documents pertaining to the suit plot, besides the Bye-laws of Defendant No2 of the relevant period, have been filed.

5. Findings on the Issues are as follows:

FINDINGS

ISSUE NO.1.	In Affirmative.
ISSUE NO.2.	In Affirmative.
ISSUE NO.3.	As under.
ISSUE NO.4.	As under.
ISSUE NO.5.	In Affirmative.
ISSUE NO.6.	As under.
ISSUE NO.7.	In Affirmative.
ISSUE NO.8.	In Negative.
ISSUE NO.9.	Suit decreed.

REASONS

ISSUE NO.1.

6. The ownership of deceased father of Plaintiffs in respect of suit plot has not been disputed by any one. Admittedly, the deceased father was a Squadron Leader in Pakistan Air Force and died on 17.01.1971 due to illness as mentioned in the official death certificate produced in the evidence as Exhibit **P/2**, by the Plaintiffs. Undisputedly, the suit plot stands in the name of deceased father when the transaction in question took place. Similarly, heirship of Plaintiffs has also not been questioned by Defendants.

7. The transaction which the Plaintiffs is impugning is the transfer of the suit Plot in favour of Defendant No.1 (*Abdul Basit*), that dates back to 31.05.1976, through the impugned Transfer Order of the above date having reference No.DS/A/AM-2516, original whereof was produced under the above referred Statement of DHA Official and is available at page-267 of the Evidence File, as well as by Defendant No.1 during his evidence and exhibited as **D/11**. Mr. Yousuf Moulvi, the learned counsel representing the Defendant No.1 submits that the present proceeding is hopelessly time barred as the transaction of year **1976** has been challenged through the present *lis* in the year **2003** when the plaint was presented on **03.06.2003**. This long period of **27** years, as per the learned counsel for Defendant No.1, cannot be condoned.

8. On the other hand, Mr. Malik Altaf Javed, the learned counsel representing the Plaintiffs has placed reliance on Section 18 of the Limitation Law, to develop his arguments that when the fraudulent act came into the knowledge of present Plaintiffs, they initiated present action. The Plaintiffs' counsel referred to the correspondence of 10.07.2000, a Letter of Defendant No.2 addressed to Plaintiffs in response to their earlier correspondence, wherein, the Plaintiffs were informed that the suit plot and their other two plots have been transferred as per procedure; it has been acknowledged in the Written Statement of Defendant-Defence Housing Authority that this correspondence of 10.07.2000 was written in response to different letters of different dates, addressed by Plaintiffs to Defendant-DHA. This letter is exhibited (*in the evidence*) as Exhibit **P/9**, available at Page-**59** of the evidence file.

9. The present suit seeks, *inter alia*, declaration and cancellation of different documents on the basis of which the transaction in respect of

the suit plot took place. In the pleadings of Plaintiffs as well as in the Affidavit-in-Evidence of Plaintiff No.1, who led the evidence, it is stated that Plaintiffs were minors at the time of the death of their father (*Muhammad Islam Khan*), who owned the suit plot. In paragraph-8 of the Affidavit-in-evidence, the factum of acquiring the knowledge has been mentioned through a correspondence of Pakistan Air-Force in respect of some other properties, which as per Plaintiff's claim, persuaded the Plaintiff No.1 to visit the Office of the Defendant No.2 to inquire about other estate left by the deceased father, resulting in exchange of correspondences as mentioned above. It is also not a disputed fact that through the letters dated 14.02.2000, 20.06.2000, 06.07.2000 and 21.10.2000 (Exhibits-5, 6, 7 and 8 respectively), the Plaintiffs called upon the Defendant No.2 (*DHA*) to hold an inquiry into the transaction in question. From the perusal of record produced by Defendant No.2 (*DHA*) and the deposition of Defendant No.1, it becomes clear that neither any agreement was signed for the subject transaction nor any sale price (sale consideration) was paid. That the documents filed by Defendant No.2, under the afore referred Statement, contains, *inter alia*, Affidavit of deceased mother (*Mst. Shamim Akhtar*) and Plaintiffs No.2 and 3 (viz. *Nayar Islam* and *Qamar Islam*) and the Loan Certificate, that the suit plot is not under any charge or mortgage as well as transfer order dated 06.05.1976 (at Page-265 of the Evidence File), showing the names of above named persons being the legal heirs of deceased (Squadron Leader) Muhammad Islam Khan. But these documents do not contain the names of other two sons / legal heirs, present Plaintiffs No.1 and 4. Though in the referred Affidavit, which is undated, the Plaintiffs No.2 and 3 are mentioned as '*adult*', but the testimony of witnesses and the documentary evidence available in the record suggest otherwise; particularly Exhibit-P/3, which is an official

document from Pakistan Air-Force, dated 18.10.1971, wherein, all five legal heirs have been mentioned, that is, present four Plaintiffs and their above named deceased mother. The date of birth of each Plaintiff is also mentioned, which shows that Plaintiffs No.2 and 3 at the time of transaction in dispute were minors. The age of Plaintiff No.2 (Nayar Islam) was around 17 years and that of Plaintiff No.3 (Qamar Islam) was around 15 years. The authenticity of above document-Exhibit-P/3 has not been questioned (challenged) by Defendants. This document primarily relates to the pensionary benefits and children allowance, which was extended to the Plaintiffs and their mother by Pakistan Air Force.

In this view of the matter, the dicta of *Manzoor Hussain* and *Abdul Rehman* cases (*supra*) relied upon by the Plaintiffs' side is applicable to the facts of present case. In these two reported decisions, the sale transaction even based on registered documents were set-aside after giving a negative finding on the point of limitation, which was held to be commenced after the date of knowledge. It was held in the case of *Manzoor Hussain*, by making a reference to earlier decision of Hon'ble Supreme Court, that a transaction entered into by a minor is a void transaction in terms of Section 11 of the Contract Act, 1872. Secondly, one of the Issues to be decided in this Suit relates to the inheritance, regarding which the Limitation Law is not applicable.

I am inclined to answer this **Issue No.1 in Affirmative and in favour of Plaintiffs**. In addition to the above discussion, in my considered view, the present suit is not barred by limitation as it has been filed on 03.06.2003, within three (03) years from the date of acquiring knowledge of the transaction in question, which was acquired through the correspondence of 10.07.2000 (*afore-referred*). Since Plaintiffs have also sought a relief of declaration for which under

Article 120 of the Limitation Law, the period of limitation is six (06) years, hence, the present action is not a time barred one.

ISSUE NO.2

10. **This Issue is answered in Affirmative**, in view of the fact that though the said Written Statement on behalf of Defendant No.1 was filed by his father, but the Defendant No.1 himself led the evidence, while endorsing the contents of General Power of Attorney (Exhibit-D/1) given in favour of his father.

ISSUES NO.3 AND 4.

11. The Special Power of Attorney by Plaintiffs No.2, 3 and 4 in favour of Plaintiff No.1 is at Page-19 of the Evidence File and has been exhibited as **P/1**. The Plaintiffs No.2 and 3 have filed their separate Affidavits-in-Evidence, *inter alia*, stating in paragraph-3 the fact that the said Special Power of Attorney-Exhibit-**P/1** has been duly signed in favour of Plaintiff No.1, but these two Plaintiffs were not cross-examined. Even though the contents of their respective Affidavits-in-Evidence (of Plaintiffs No.2 and 3) cannot be taken into the account as a corroborative piece of evidence for answering the triable issues, but these Affidavits-in-Evidence can be considered only to the extent to verify that the Special Power of Attorney (Exhibit-**P/1**) in favour of Plaintiff No.1 is not bogus. No adverse presumption can be drawn against the Special Power of Attorney-Exhibit **P/1**, when a specific suggestion has been denied in the cross-examination by PW-1 that the said Special Power of Attorney is a forged one. In my view, even otherwise these two Issues relating to Exhibit-**P/1** are hardly of any significance, as no conflict of interest is apparent between the Plaintiffs *inter se*, notwithstanding the fact that the Plaintiff No.1 has only signed

the Plaintiff and the Plaintiff No.4 has neither signed the pleadings nor filed his Affidavit-in-Evidence. More so, in view of the above discussion, the Plaintiff No.1, admittedly, being one of the legal heirs of his deceased father (*Squadron Leader Muhammad Islam Khan*) can institute the present proceeding in his own right as well. **Issues No.3 and 4 are answered accordingly** that the Plaintiff No.1 is duly constituted attorney of Plaintiffs No. 2 to 4 and even in the absence of any such authority, can file a proceeding of the nature, which is to be decided on its own merits.

ISSUES NO.5, 6 AND 7

12. The heirship of Plaintiffs has already been discussed under Issue No.1. Mr. Yousuf Moulvi, the learned counsel representing Defendant No.1 has referred to earlier Affidavit of erstwhile owner (*Captain Tahir Mehmood*), which has been produced with the Affidavit-in-Evidence of Plaintiffs, as exhibit-13, to fortify his basic stance that the suit plot was earlier transferred in the name of deceased father of Plaintiffs in the same manner as has been transferred in the name of Defendant No.1. Similar type of Affidavit was executed by the mother of Plaintiffs along with Plaintiffs No.2 and 3, which is filed by Defendant No.2 under the afore referred Statement; at page-259 of the evidence file. He further argued in response to a query of this Court with regard to non-payment of sale consideration, that at the relevant time by virtue of Bye-law No.15, the properties were transferred on the basis of such type of Affidavits. A copy of Bye-laws is also available on record under the afore-referred Statement of Defendant No.2 (*DHA*). Learned counsel for Defendant No.1 further argued that the evidence of Plaintiffs' witness has glaring contradictions and hence, his credibility was impeached during the evidence and thus his testimony cannot be believed. He has

read the cross-examination of Plaintiffs' witness (*Plaintiff No.1*) that when latter was confronted with his own document-Exhibit-P/5 (an Application to the DHA) the said witness acknowledged that his Statement in the Exhibit-P/5 about commercial plot is incorrect.

Basically, Exhibit-P/5 is the correspondence, which was addressed by present Plaintiff No.1 to the Administrator of Defendant-DHA for holding an inquiry in respect of the suit plot. In this correspondence, there is a reference to another commercial plot also, which was claimed to have been sold out by the mother of Plaintiff No.1, but in this very correspondence, the Plaintiff No.1 has clearly taken a similar stance about the suit plot, which is mentioned in the present suit and thus even if there is some contradiction in the evidence of PW-1, as argued by the counsel for Defendant No.1, the said contradiction is neither material nor related to the issues involved in the present case.

The Defendant No.1 has invoked the principle of *bona fide* purchaser for value without notice as envisaged in Sections 27(b) of **SRA** and 41 of the Property Law, *inter alia*, on the ground that it is an undisputed fact that Plaintiffs and Defendant No.1 did not know each other before the impugned sale transaction and thus Defendant No.1 after examining the record of Defendant No.2, in which only widow and her above named two sons were shown as owners, entered into the transaction in question. Learned counsel for Defendant No.1 contended that latter neither is at fault nor he (Defendant No.1) was in collusion with the Officials of Defendant No.2 in respect of the subject transaction. Further defence is raised by the legal team of Defendant No.1, that claim of Plaintiffs is adversely affected by the Article 129, Illustration (g) of the Evidence Law, which is expounded by various judicial pronouncements. He referred to the cross-examination of PW-1

and particularly to that portion, where a suggestion was denied by PW-1, that Plaintiffs No.2 and 3 were not produced in cross-examination, so to save them from embarrassment. It is contended that the claim of Plaintiffs could have been on a much stronger footing, had the Plaintiffs No.2 and 3 after filing their Affidavit-in-Evidence would have appeared for their cross-examination and since they abstained to appear, therefore, this act should go against the Plaintiffs with an adverse inference.

After a thoughtful consideration, the arguments from the side of Defendant No.1 are not plausible. The case of *Sughran Bibi* cited by Defendant side is distinguishable, because in the reported case, the first agreement for the sale of property was not disputed, however, the Appellant (of the reported case) was relying upon a subsequent agreement, under which, she paid a further amount to a male member of respondents. The said person never stepped in the witness box to deny execution of the subsequent document. In this context, an adverse inference was drawn against respondents, who could have produced their side of witness against a sale transaction. In the present case, the very basis of sale transaction has seriously been questioned and admittedly neither sale agreement exists nor any sale consideration paid.

13. Material document is the Transfer Order of 31.05.1976, produced by Defendants as Exhibit-D/11, by virtue of which, the suit plot got transferred in favour of Defendant No.1. Ex facie, this Transfer Order is self-contradictory, as in the first portion it mentions the suit plot, which, admittedly, is a residential one and standing in the name of above mentioned deceased and subsequently transferred in favour of Defendant No.1, but the transfer fee was calculated on the basis of a 'commercial shop'. The other document, on which the Defendant No.1

is basing his claim, is the Loan Affidavit-Exhibit-**D/12**. In this document, the above named widow and two of the Plaintiffs (No.2 and 3), namely, Nayar Islam and Qamar Islam had given undertaking that the said Plot is free from any charge or loan. The Defendant No.1 has also produced two public notices in respect of the transaction in question as Exhibits-**D/13** and **D/14**, but, surprisingly both these public notices which were published on behalf of Defendant No.2 were misleading, as it did not mention the names of Plaintiffs No.1 and 4 as legal heirs of late Muhammad Islam Khan.

14. The set of documents produced by Defendant No.2 (DHA) under their afore referred Statement preceded the impugned transfer order (Exhibit **D/11**);

- (i) an application dated 30.05.1976, that is, a day before the impugned transfer order, has been addressed to the Secretary of Defendant No.2 by the present Plaintiffs No.2 and 3 and their mother (*Mst. Shamim Akhtar*) for transfer of the suit plot in favour of Defendant No.1 whose residential address is mentioned as 164-A, Street No.8, Sindhi Muslim Housing Society Karachi and;
- (ii) an affidavit has been sworn by the aforesaid Plaintiffs and their mother, *inter alia*, relinquishing their respective shares in favour of Defendant No.1 and a declaration that the name of Defendant No.1 should be entered in the record of Military Estate Office and Defendant No.2 (DHA) as the lessee of the suit plot;
- (iii) An undertaking of the widow (*Shamim Akhtar*) and Plaintiffs No.2 and 3 that they are the legal heirs of deceased-Muhammad Islam Khan and no prior lease has been executed in respect of the suit plot,

but surprisingly only signature of Shamim Akhtar is appearing on this Undertaking, which is undated.

15. Learned counsel for Defendant No.1 also based his reliance on the Article 100 of the Evidence Law to advance his case that since the documents produced by Defendant-DHA in respect of the subject transaction is more than 30 years old, their presumption of genuineness do exists and no adverse inference can be drawn about the afore-referred documents on the basis of which the Defendant No.1 is a lawful transferee / owner / purchaser of the suit plot for value without notice.

To controvert the above plea, learned counsel representing the Plaintiffs has referred to the copies of NIC (National Identity Card), Certificate of Domicile, Passport and Form of Application of Defendant No.1 for becoming Associate Member of the Defendant No.2-(DHA), which have been produced by the Defendant No.1 as Exhibits-**D/2** to **D/10**, respectively; and pointed out that in all these official documents, the residential address of Defendant No.1 has been mentioned as ‘G-28-1, 4th Gizri Land Defence Society, Karachi’, but in the impugned Transfer Order (Exhibit-**D/11**) the address is mentioned as ‘164-A, Street No.8, Sindhi Muslim Society, Karachi’, which is basically the address of one of the proposers (*Muhammad Anwar*) of Defendant No.1 as mentioned in the afore-referred Form of Application for Associate Membership. Further contended that Plaintiffs have been deprived of their shares in the inheritance due to the fraudulent transaction in question, as being the legal heirs of afore mentioned deceased-owner of the suit plot, the same should have been devolved upon the Plaintiffs. It has been further argued that even the afore mentioned documents forming basis of the impugned transfer since does not bear/mention the

names of other two Plaintiffs, viz. the present Plaintiffs No.1 and 4, therefore, on this ground alone, the entire transaction is not legal.

16. Under Section 17 of the Registration Act, a relinquishment / surrender of rights and interests in respect of immovable properties can be done only through a registered instrument and not through a simple affidavit. Thus, ex facie the above Affidavit at serial No.(ii) has no sanctity in the eyes of law.

The other glaring factor going against the Defendants is that Defendant No.1 in his cross-examination has admitted that neither any sale agreement in respect of the impugned transaction exists nor any terms and conditions. Defendant No.1 has not even claimed that he has paid any amount towards sale consideration. In this perspective, the rule laid down in the reported decisions and particularly of Hon'ble Apex Court handed down in *Amjad case (ibid)*, as relied upon by the learned counsel for the Plaintiffs are relevant to the facts of present case, that onus is now on the Defendant No.1 to prove that the impugned sale transaction is not a result of a fraud.

Since, the deceased father of the Plaintiffs was an officer of the Pakistan Armed Forces, it is not believable that Defendant No.2 (DHA) did not have his requisite details, as under the Bye-law No.7 such persons have been mentioned at serial No.(i). Secondly, it is a matter of record that in Defendant No.2-DHA, plots were originally allotted to the persons of the Armed Forces. Byelaw No.15(4) cannot be invoked, as argued by the Defendants' side, for validating this type of transaction, which is violative of the provisions of the Property Law concerning the sale of an Immovable Property and Contract Law, particularly Section 11, which deals with the disability of a minor to enter such type of contract. Thirdly, the earlier Affidavit through which

the suit plot was transferred in the name of deceased father of Plaintiffs is different from the purported Affidavit given by the two of the Plaintiffs and their mother. The earlier Affidavit was admittedly by the original allottee of the suit plot, namely, Captain Tahir Mehmood, who has referred the deceased father of Plaintiffs as his friend. The other distinguishing factor between the aforesaid earlier Affidavit and the present impugned Affidavit is that in the earlier Affidavit both persons belonged to the Armed Forces, *whereas*, the present parties to the impugned transaction, viz. Plaintiffs and Defendant No.1 are strangers to each other, as admitted by the Defendant No.1 himself in the evidence.

17. In the foregoing paragraphs, it has already been determined that Plaintiffs No.2 and 3 were minors, when the transaction/transfer in question through the impugned transfer order (Exhibit-D/11) was done. It means that even if these two Plaintiffs did sign the afore referred documents (for the argument's sake), they being minors could not have entered into a sale transaction of this nature. Such type of transaction has been declared as void ab initio by the Hon'ble Supreme Court in the case of **Muhammad Ali** (*supra*). The same view has been expressed by the Hon'ble Apex Court in the case of **Sher Baz Khan** (*ibid*) in which sale of a landed property was challenged, *inter alia*, on the ground that the disputed transaction had taken place when the respondent (*of the reported case*) was a minor, though the disputed sale was made by the father of the said respondent. The sale was struck down by the Hon'ble Supreme Court on three grounds; firstly, the beneficiaries / appellants could not prove the sale transaction with consideration; secondly, the sale transaction was made during the age of minority of respondent, thus was void, even though the same was made through her natural

guardian (*father*); and, thirdly, the questionable sale (*of the reported case*), was not made to benefit the respondent, when she was a minor. In the present case things are not different than the above reported decisions; rather worse; as admittedly neither any sale agreement exists nor sale consideration. Thus, the present transaction in question has been rightly and successfully challenged by the Plaintiffs; latter being legal heirs of (late) Muhammad Islam Khan are entitled to their respective share of inheritance in the suit property. The plea of Article 100 of the Evidence Law, as put forth by the learned counsel for Defendant No.1, is misconceived in nature, as the presumption of genuineness is not absolute and is rebuttable, which has been successfully done in the present case by Plaintiffs. On the other hand, Defendant No.1 has failed to discharge his onus about genuineness of the transaction in question in his favour. Similarly, defence of *bona fide* purchaser for value without notice, also fails, in view of the above discussion and expounded in a recent judgment handed down by the Hon'ble Apex Court in the *Ghulam Rasool case (ibid)*.

The plea of *bona fide* purchaser was repelled by the Hon'ble Supreme Court, primarily, because some of the legal heirs/brothers' names were not mentioned in the official record. The Hon'ble Supreme Court has laid down the essential ingredients for applicability of Section 41 of the Property Law. Relevant portion of the decision is reproduced herein under_

“The essential ingredients of this section are, (a) that the transferor was the ostensible owner; (b) that the transfer was made by consent express or implied of the real owner; (c) that the transfer was made for consideration; and (d) that the transferee while acting in good faith had taken reasonable care before entering into such transaction. These four imperative/essential

*ingredients must co-exist in order for a person to take the benefit of the equitable principle, however, merely on account of some error committed by the revenue staff in the revenue record unintentional or deliberate or motivated which excludes the name of the lawful owner of the property therefrom and the property, shown to be in the name of some other person who is not the owner of the whole or a part thereof by itself shall not deprive and denude the true and actual owner from the title of the property and this by no means can be construed that the transfer, to the person claiming protection of the rule of equity *ibid* by a person who actually is not the owner is being made by consent express or implied of the real owner.”*

Adverting to the present case; the impugned transaction/transfer in favour of Defendant No.1 is to be struck down on three grounds; (i) admittedly, no sale price was paid by Defendant No.1 to Plaintiffs, (ii) following the decision of *Sher Baz Khan*, even the mother could not have entered into such type of transaction, if at all it is even assumed that deceased mother of Plaintiffs did sign the Affidavit, though no convincing evidence has been led by Defendant No.1 with regard to this fact, and (iii) under Section 11 of the Contract Act, Plaintiffs No.2 and 3, being minors at that relevant time, could not have entered into sale transaction with Defendant No.1, again, even if it is assumed that these Plaintiffs had signed the above documents under challenge; as held by the Hon'ble Supreme Court in number of decisions some of which are referred hereinabove, that such type of transaction/transfer is *void ab initio*. Thus, the present transaction in question in respect of the suit plot in favour of Defendant No.1 is void *ab initio* with no legal effect. Hence, **Issue No.5 is answered in Affirmative and in favour of Plaintiffs.** From the evidence that has come on record and the

Official Documents produced by Defendant No.2 (DHA) vide a Statement (afore-referred), it is quite apparent that the impugned transaction in respect of the suit plot in favour of Defendant No.1 could not have been taken place, except through active collusion of officials of Defendant No.2. **Hence, Issue No.6 is answered accordingly.**

Undisputedly and luckily, the suit plot has not been transferred in the name of some other third party nor any construction is raised thereupon, but it is lying in the same state as it was before. In view of the above, **Issue No.7 has to be answered in Affirmative by holding that** the impugned Transfer Order (Exhibit-D/11) in favour of Defendant No.1 is liable to be delivered up by the Defendants to this Court for cancellation.

ISSUE NO.8.

18. Plaintiffs have not led the evidence for awarding the damages of rupees five million. Specific details about suffering of losses have not been proved, instead, in his cross-examination the Plaintiffs' sole witness has admitted that he did not give "full particular of the damages claimed...". Thus, **Issue No.8 is answered in Negative, that Plaintiffs are not entitled for damages.**

ISSUE NO.9:

19. The suit is decreed with costs to the extent of prayer clauses **(b), (c), (d) and (e).**

Dated: _____

M.Javid.PA

JUDGE