

IN THE HIGH COURT OF SINDH AT KARACHI

REVISION APPLICATION No.20/2017

Applicants : Asghar Ali, since deceased through legal heirs. and others.

Respondents : Mst. Batul Bai, since deceased through legal heirs, and others.

SECOND APPEAL NO.29/2017

Appellants : Mst. Batul Bai, since deceased through legal heirs,

Respondents : Mst. Kulsoom Bai, since deceased through legal heirs, and others.

Date of hearing : 22.09.2020.

Date of announcement: 03.12.2020.

Appearance:

Mr. Mushtaq A. Memon alongwith Mr. Asif Ahmed advocates for applicant in revision application.

Mr. Abdul Qadir Mirza advocate for respondents No.5 (a) to (g), 6 to 9 in second appeal.

Saifuddin appellant No.1 in person and attorney of appellant No.2 in second appeal and respondent No.1(a) in person and attorney for respondent No.1(b) in revision application.

Arif Hussain respondent No.1(ii)(a) in second appeal and respondent No.2(ii) in revision application.

J U D G M E N T

SALAHUDDIN PANHWAR, J. By the dint of this common judgment I intend to dispose of captioned revision application and second appeal.

2. Applicant in R.A. being aggrieved with judgment dated 2nd October, 2013 passed by Xth Senior Civil Jude, Karachi South in Suit

No.2421/1996 (Old No.36/1973) filed for declaration, partition, accounts and injunction, as well as consolidated judgment dated 9th November, 2016 passed by learned District Judge Karachi South in Civil Appeals No.247, 248 and 251 of 2013 whereby appeal was dismissed, preferred captioned Revision Application. Likewise, appellant in Second Appeal, being partly aggrieved with judgment and decree dated 09.11.2016 and 16.11.2016 respectively, in Civil Appeal No.248/2013 dismissing his appeal, as well being aggrieved with judgment and preliminary decree dated 02.10.2013 and 03.10.2013 respectively in Suit No.2421/1996, filed captioned Second Appeal for modification of order.

3. Reference to the parties and brief facts of the case are being made according to the revision application having been filed earlier in time than the second appeal; these facts are that plaintiff Mst. Batul Bai (respondent No.1 herein) filed Civil Suit No.36/1973 (New No.2421/1996) against defendants Mst. Kulsum Bai, Rubab Bai, Asma Bai, Shafia Bai and *Asghar Ali (whose legal heirs filed R.A.)* for declaration, mandatory injunction, accounts and partition contending that Ghulam Hussain s/o Essajee, father of plaintiff and defendants died on or about 31.5.1935 in the earthquake of Quetta leaving behind surviving heirs and number of properties in Sindh and Quetta together with running business, bank accounts, jewelry, cash, shares, agricultural lands etc. Initially family was looked after by relatives and finally on account of assets and flourishing business they were able to maintain themselves; that as the only male member of the family defendant No.5/applicant No.1 looked over the entire ancestral properties referred above and continued to run the business of the firm M/s. Essajee and Sons which were founded by grandfather flourished at a very large scale during the life time of grandfather himself and as such properties were acquired from the income of this business and added to the ancestral property of the

family; at the time of earthquake one of the brothers of the parties had also died, defendant No.5 Asghar Ali (since deceased through legal heirs in R.A.) was a student aged about 18 years and except for the mother and the elder sister, plaintiff/respondent No.1 as well as defendants were all minors, as such she did not have full particulars of the properties and assets; that defendant No.4 Mst. Safia Bai/respondent No.5 (since deceased through legal heirs) had married and settled in Jamnagar India since 1942 where she has her own independent business and assets, she still resides in India and in such circumstances is an alien; that mother of the parties also had her personal properties wherein once again the parties have inherited their shares; that after a great deal of efforts, plaintiff/respondent No.1 had been able to obtain information in respect of following properties being part of the assets left by the deceased father of the parties; defendant No.5 Asghar Ali had the complete information and control of the entire assets also the ancestral business and though called upon to disclose the same but with malafidely and dishonestly refused to give such details, however, following assets become known to the plaintiff/respondent.No.1:-

- A. Agricultural lands, at Deh Tayab and Wazirabad Sukkur.
- B. Plots in Dawoodi Bohra Housing Society, Karachi.
- C. Office of M/s. Essajee and Sons, Marriot Road, Karachi.
Plot of land with structures bearing Khasra Nos.1557, 4865, 1612,
- D. 1383,1384,1375, 1387, 1586, 1692 at Quetta and Agricultural lands near Ebrahim Zai Karaj Quetta.
Running business under the name and style of M/s Essajee and
- E. Sons having office at Marriot Road, Karachi, show rooms and offices on M.A. Jinnah Road, Quetta, with Branches in other places.
Insurance Money received by the defendant No.5 and the mother
- F. of the parties as life insurance of the father and brother who died in the Earthquake and also for the loss of goods and business assets.
- G. Compensation paid by the then Government of India for the danger, losses and loss of lives in the earthquake of 1935/36.
- H. Joint business and its assets at Sukkur, under the name and style of A. Ghulam Hussain and Co., together with land and goodwill.
- I. Additional compensation and financial assistance paid by the then

Government of India, for the purpose of Rehabilitation, reconstruction etc.

- J. Cash in hand, shares, gold bullion, ornaments, jewellery and precious stones including diamonds, which were stored in the especially-constructed underground vault and the strong room constructed underground and which remained undamaged.
- K. Accounts in the various banks in the personal name and also in the name of the firm.

4. It was further pleaded that defendant No.5/applicant being the only surviving male member of the family conducted the family business and looked after the movable and immovable properties of the family for himself as well as on behalf of the other heirs and the mother of the parties who died on or about 16.12.1960 leaving behind her own personal properties and assets of father of the parties and the plaintiff/respondent No.1 and rest of the parties, entitled to inheritance according to Muslim Law applicable to Dawoodi Bohras, to which the parties belong; that defendants (applicant No.1 and defendants No.2 to 5) in collusion with each other and in order to deprive the plaintiff/respondent No.1 of her share appear to have arrived at some understanding amongst themselves, especially between defendant No.2/respondent No.3 and defendant No.5/applicant No.1 on account of marriage of daughter of defendant No.5 with son of defendant No.2 and on occasions, defendant No.5/applicant No.1 who is in charge of the business, has obtained signatures of plaintiff/respondent No.1 on blank papers with the plea that the same were required for the various departments and in the transaction of the business of the family and during the lifetime of the mother, they always assured of an amicable settlement and also of the payment of due share of plaintiff/ respondent No.1 but after death of the mother, they kept her on empty promises; that on numerous occasions plaintiff/ respondent No.1 called upon all the defendants to disclose the assets and particulars of the properties of the family but they avoided to do

so. resultantly, plaintiff/respondent No.1 was constrained to serve defendant No.5/applicant No.1 with legal notice dated 09.11.1971 and in response thereof a meeting was arranged at the house of Tayab Ali which was attended among others by Abdul Hadi, Tayab Ali meeji Harianawala, Saleh Bhoy the husband of plaintiff, and defendant No.5 wherein defendant No.5/applicant No.1 had agreed to sell the entire assets including agricultural lands and running business of the family together with all subsequently acquired properties and business at an agreed price but inspite of subsequent legal notice dated 03.5.1972 on behalf of Saleh Bhoy and legal notice dated 02.6.1972, he did not honor the commitment; that in his reply dated 18.5.1972 defendant No.5/applicant No.1 claimed an alleged agreement dated 12.10.1961 under which it is asserted that plaintiff and defendants No.1 to 4 all had agreed to forego the accounts, partition and share in the family properties in consideration of being satisfied with a property of Rs.25,000/- from the list alleged to have been furnished, whereas plaintiff/respondent No.1 has no knowledge of such an agreement if any which is collusive, forged and fraudulent, and is not binding on her; that as per Muslim Law, she is entitled to 1/7 share in the family assets, business, accretions, additions, profits thereof and to the family jewels, savings, cash accounts, bank account, gold bullion, in the form of guineas, insurance life policy, fire and earthquake policies for movable and immovable properties, bank account, compensation received from the then government of India etc., which have and continue to constitute the present assets, according to her a sizeable amount has been fraudulently transferred by defendant No.5/applicant No.1 in name of his children, wife and other relatives, money has been deposited in various banks within and outside the country and the valuables like jewellery diamonds, precious stones and gold bullion/guineas are in the different vaults; that all the legal heirs (defendants/applicant No.1

and respondents No.2 to 5) are in collusion and in one case fraudulently defendant No.5/applicant No.1 appears to have made settlement wherein face value is different from the actual amount involved hence plaintiff/respondent No.1 prayed :-

- I. That the defendants specially defendant No.5 (*applicant No.1 herein*) be directed to render full and true accounts of all income and profits, advantages and benefits derived and received from the movable and immovable properties left behind by the parents of the parties;
- II. Judgment and Decree of the amount found due to the plaintiff as 1/7 share on rendition of accounts, be passed against the defendants, recoverable from defendant No.5, in favour of the plaintiff (*respondent No.1 herein*);
- III. Defendant No.5 be required to disclose true and full details of the properties, movable and immovable, including life insurance, claims, against the insurance company, duly satisfied, compensation for losses, received from insurance Co. and Government agencies, cash balances, bank accounts, shares, jewellery, gold bullion, precious stones, including diamonds etc, received by defendant No.5 since the Earthquake in Quetta of 1935/36 with details of bank accounts and safe deposit lockers maintained in his name or the name or names of his family members;
- IV. Partition of the 1/7 share of the plaintiff in all the properties;
- V. Costs of the suit and such expenses as may be required in the implementation of the necessary requirements arising during the course of proceedings;
- VI. Any other further relief/relieves, which this court may deem fit and proper under the circumstances of the case.

5. Defendants had filed their separate written statements in the civil suit. Defendant No.1 Kulsum bai (respondent No.2 through legal heirs herein) stated that mother of the parties namely Fatima Bai had also survived the earthquake and Asghar Ali defendant No.5 being the only male member of the family under the guidance and control of their mother took charge of the whole estate of deceased Ghulam Hussain, including cash, gold, jewelry and running business of Essajee & Sons together with all its assets, goodwill

and outstanding, bank accounts and bank accounts of deceased for and on behalf of all legal heirs and conducted business, looked after and managed all properties, received insurance claims in respect of Ghulam Hussain and in respect of wife of Fida Hussain who had also died in earthquake and defendant No.5 also received compensation paid by government; he was incharge of all the aforesaid movable and immovable properties for and behalf of all parties and managed the same under direction of their mother for their benefit; that defendant No.5 had no property of his own and no money of his own at the time of earthquake and all the money that he has held since then was belonging to the estate and earned from its income, investment business etc and all properties that defendant No.5 has since purchased in his name actually are the properties of all the parties; that all the parties have their respective shares therein and during the life of the mother it was always considered that all the properties inherited and acquired after the demise of Ghulam Hussain were joint properties and on the death of the mother in the year 1960 her share in all the aforesaid properties was also inherited by the parties but remained in charge of defendant No.5 who was taking advantage of the fact that defendant No.1 was a pardanasheen lady knowing nothing of the worldly affairs and whose husband was completely under his influence, got Sale Deed executed by defendant No.5 on 30.05.1962 in respect of all her share in the estate of late Ghulam Hussain Essajee and Fatima Bai and all the income derived therefrom for a partly sum of rupees 25,000/- without disclosing the true extent of the whole property, their market value, the income derived therefrom, which he has avoided to reveal and she being an ignorant lady was unable to comprehend the true nature of the transaction which was never explained to her; that from the instant *lis* she for the first time learnt that how her own brother had deceived her and made to execute a document for a price which is totally unconscionable

hence claims that the same may be cancelled and she may be awarded her share in the aforesaid estates together with account of the income thereof relating to her share and decree for the partition, possession of her separate share and the amount found due; that defendant No.5/applicant falsely alleged that agricultural lands in Deh Tayab and Wazirabad, Sukkur and Brewery Road, Quetta and plot of land with structure bearing Khasra No.1692 Quetta and plot in Dawoodabad Housing Society Karachi were his personal property and as such did not form part of the estate of deceased parents; that agricultural lands in Deh Tavab, Wazirabad and Balali Road Quetta are ancestral properties and could not by any stretch of imagination become his personal properties, even all the other aforesaid properties were acquired by him out of the income of the aforesaid estates and belonged to all parties in their respective shares. Lastly, she claimed a decree against defendant No.5/applicant in the same terms as prayed by the plaintiff/respondent No.1.

6. Defendant No.2 Rubab Bai (respondent No.3 herein through legal heirs) in her written statement had stated that the mother of the parties namely Fatima Bai had also survived the earthquake and defendant No.5/applicant being the only male member of the family under the guidance and control of their mother took charge of the whole estate of deceased Ghulam Hussain including cash, gold, jewelry and running business of Essajee & Sons together with all its assets, goodwill and outstanding, bank accounts and bank accounts of the deceased for and on behalf of all the legal heirs and defendant No.5/applicant had conducted the business, looked after and managed all the properties urban, rural and agricultural, received insurance claim in respect of the life of Ghulam Hussain, the father of the parties and in respect of the life of Fida Ali the

brothers of parties who had also died in the earthquake and defendant No.5/applicant had also received the compensation paid by the Government for issues resulting from earthquake and the defendant No.5/applicant was in charge of all the aforesaid movable and immovable property for and on behalf of all the parties hereto and managed the same under the direction of their mother for their benefits; that defendant No.5 had no property of his own and no means of his own at the time of the earthquake and all the assets that he has held since then all the properties belonging to the estate and earned from its income, investment, business and sale of shops and all the properties that defendant No.5 has purchased in his name actually are the properties of all the parties hereto and all the parties have their respective share therein the answering defendant/respondent No.3 was also a minor and unaware of the family properties and still is unaware about most of them. It is stated that the mother of the parties managed the joint properties of the family through defendant No.5 and after her death in 1960, who managed all the joint family properties independently as he was the only male family member and after the death of the mother in 1960 her properties and her share in the joint family properties, devolved on the parties in the suit; that she is a pardanashin lady and defendant No.5 who was the sole administrator of properties and business, several times during these days got her signatures and other sisters and the he is as yet unaware of the imports and contents of the said documents and any document got executed by defendant No.5 from her in respect of the ancestral properties by fraud may be treated as null and void and not binding upon her and her share in the aforesaid properties together with an account of the income relating to her share and a decree for partition, possession of her separate share and the amount found due and that she is unaware of any collusion between other defendants; that if defendant No.5 had obtained her signatures on any

document which goes against the interest of the parties including her then it is done by fraud and without understanding and such document is null and void and not binding; that only defendant No.5 who knew about the assets and particulars of the properties in which all the legal heirs would have a share and she was quite ignorant of the same; that if her signatures are found on any of the document as alleged by plaintiff then they must have been obtained without disclosing the contents and effects of the said document; she denied that she has ever been a party in any collusive act as alleged in plaint, she prayed for passing a decree in her favour regarding her share in the properties; she pleaded that she is ready and willing to pay any court fee if required under the law and further prayed for cancelation of any document produced by defendant No.5 during the proceedings of the suit.

7. Defendant No.3 Asma Bai/respondent No.4 was debarred from filing written statement in the suit. Defendant No.4 Shafia Bai (respondent No.5 through legal heirs herein) denied that deceased left behind any running business or any properties in Sindh or any shares, bank account, jewelry or cash; she denied that they were looked after by their relatives; she stated that they were initially looked after by their mother and thereafter by defendant No.5/applicant being the only male heir; she denied that deceased Ghulam Hussain had left any asset and flourishing business out of which they were maintained; she stated that owing to the severity of the earthquake entire business premises of the firm of Essajee and Sons was destroyed and nothing was left except the bar earth; there was no bank account or any continued business of that firm; that after the earthquake Quetta was almost destroyed; at that time her mother, a sister and defendant NO.5 were adult, rest were minors; that plaintiff and defendant Nos.1 to 3

(respondents No.2 to 4) did not have information about what was left after the death of their father.

8. Defendant No.5 Asghar Ali (applicant through legal heirs in R.A.) denied that their father left behind any property in Sindh, any running business, bank account, jewelry or cash etc, as alleged; he only left behind some landed property; it is denied that they were looked after by the relatives; in fact they all were looked after by their mother for some time and then by defendant No.5; suggestion that they were able to maintain themselves on account of the assets and flourishing business of the deceased is entirely incorrect; he denied that he carried on the business of the firm; it was stated that the business of defendant No.5 was his own and had no connection with his father's business which had absolutely no trace left after the earthquake and defendant No.5 started new business with entirely his own resources although the name of the firm was same; it was stated that although some landed properties were acquired by his father, he heavily indebted to various people so far as his business was concerned and the mother of the parties looked after the entire family except answering defendant in the initial stages with the insurance claim that she received on the death of the deceased, during this period, defendant No.5 was able to establish his business to some extent and the family came back to Quetta and lived with him, thereafter he looked after all the family members and also arranged for their marriage; he denied that he was called upon to disclose the assets of the deceased; plaintiff as well as other defendants had full knowledge of all the assets left by the deceased, plaintiff did not have to make great deal of efforts to find out particulars of the properties given by her in the plaint and the particulars are obviously based on the particulars as given in the agreement between the parties dated 12.10.1961, of which

plaintiff is pretends to be completely unaware, so much so that in her pleadings plaintiff has mentioned the properties with same serial number as mentioned in the agreement, The replies to the individual items is that:-

- i. Agricultural lands at Deh Tayab and Wazirabad and the plots in Dawoodi Bohra Housing Society, Karachi, are the self acquired property of the Defendant No.5.
- ii. There is no office of Essajee & Sons at Marriot Road, Karachi or other place as mentioned. Beside of Messrs Essajee & Sons mentioned at serial E has no connection with the family business of the deceased. Except for the land at Quetta over which the shop building was constructed by Defendant No.5 after the earthquake the entire business, though carried on by answering defendant under the same name is his own separate and self-acquired business started with his own funds and efforts. Plaintiff has no conceivable share in it. There was total destruction of the shop in the fire after the earthquake and there was nothing left except the land.
- iii. With respect of the various plots of lands mentioned at serial D, except for the plot of land bearing Khasra No.1692 and agricultural lands near Ebrahim Zai Karaj, Quetta, rest of the plots are admitted to be ancestral properties;
- iv. As regards the insurance money it is denied that answering defendant received any insurance money. It is absurd to suggest that this Defendant who was himself a minor at the time would be given the insurance money particularly when the mother and the eldest sister, defendant No.1 were alive. In fact, the entire insurance money was received by the mother who obtained Succession Certificate while she was in Jamnagar alongwith Defendant's sisters after earthquake.
- v. No compensation as alleged was at all paid. What the then Government did was to allot a plot of land admeasuring 50 feet by 25 feet over which the Defendant constructed a tin shade and stated business.
- vi. There was no so-called additional compensation as alleged.
- vii. The various items mentioned at serial J are entirely imaginary and without any basis. Deceased did not leave behind any cash in hand, shares, gold bullion, ornaments, jewelry, precious stones as alleged.
- viii. It is also denied that the deceased left any money in the accounts in any bank either in his personal name or in the name of the firm. All the papers of the deceased were destroyed and answering defendant is totally unaware of any such account. If any such funds were left or traceable the plaintiff's mother and elder sister would certainly have realized the same by virtue of the Succession Certificate obtained by them.

9. It was contended that plaintiff had colluded with defendant No.1 in her attempt to deprive defendant No.5 of his lawfully acquired property and these allegations have been made with ulterior object of getting out of the commitments voluntarily made by plaintiff; that by agreement dated 12.10.1961 entered into between answering defendant and plaintiff and other defendants, amicable partition was affected between the parties but plaintiff later on went back on her commitment: that the matters could not be amicably settled because of the unreasonable attitude of plaintiff; that plaintiff was in full possession of all particulars of ancestral property but had already agreed to accept the amicable partition as per the said agreement, although a meeting was held as alleged in paragraph No.18 of plaintiff but it is denied that answering defendant agreed to the terms as stated therein. It was stated that the suit has been grossly undervalued and proper court fee has not been paid and plaintiff has failed to give proper valuation of her claimed share of the immovable property. Likewise legal heirs of defendant No.5/applicants No.1(a) to 1(g), 2 to 5 adopted the contents of written statement filed by defendant No.5.

10. Out of the pleadings of the parties, following issues were framed:-

1. Is the firm of Essajee & Sons founded by the grandfather of the parties and has the same remained under the control and supervision of the deceased Defendant No.5 Asghar Ali for and on behalf of the Plaintiff and other Defendants. If so its effect?
2. What were the assets left by the father of the Plaintiff and Defendant and to what share each is entitled?
3. Are the properties mutated in the name of Defendant No.5 Mr. Asghar Ali and his family members purchased from the earnings and income of the ancestral and joint business? If so its effect?

4. Has the mother of the plaintiff and Defendant left separate properties owned by her to be inherited by plaintiff and defendants? What are that shares of the plaintiff and defendant according to personal and customary law?
5. What are the amounts of life insurance of the father and brother of the plaintiff and defendants who died in earthquake in 1935 and what was the compensation granted by the then Government and who received the same?
6. To what share is the Plaintiff and Defendants entitled in the assets of the firm M/s Ghulam Hussain & Co. founded by the late father of the Plaintiff and Defendants?
7. Was there an underground vault containing cash, shares, gold bullion, ornaments, precious stones and which remained unaffected by earthquake and were taken over and kept by the defendant? If so what were the contents of the vault and what extent are the Plaintiff and Defendant entitled to?
8. Whether there have been accounts in the banks in the name of the firm prior and after the earthquake which have been utilized for himself by the Defendant No.5? if so what was the amount and to what share each is entitled?
9. Have there been negotiation and meetings amongst the parties and has the Defendant No.5 admitted the claim of the Plaintiff and Defendant No.1 to 4 in all the assets. If so its effect?
10. To what relief is the Plaintiff entitle to?
11. Whether the suit is maintainable in law?
12. Whether the Plaintiff is estopped from preferring the present suit?
13. Whether the Plaintiff's title extinguished by adverse possession of Defendant No.5?
14. Whether the alleged Agreement dated 12.10.1961 entered into between the parties is a forged document and is not binding upon the Plaintiff and other Defendants?
15. Whether Defendant No.1 & 2 is a purdahnashin lady and are the deeds executed by her not binding on her?
16. Whether agriculture lands in Deh Tayab, Wazirabad in Sukkur, on Babli road, Quetta and plots of land with constructions thereon bearing Khasra No.1692 in Quetta

and Plots Dawoodabad Housing Society, Karachi were Defendant No.5 personal property?

17. To what relief if any is Defendant No.1 & 2?
18. Whether the suit is time barred?
19. 19 & 20. Whether the Defendant No.4 has settled her total claim outside the court with the legal representation of Defendant No.5 and has no subsisting right, title or interest in estate of the deceased and has no locus stand to contest this suit?
20. Whether the Defendant. No.4 is an alien enemy? If so on her share being ascertained would vest •n the custodian of enemy property as alleged?

The trial court answered the above issues as under:-

“Issue No.1	Affirmative
Issue No.2, 6, 8 & 16	Accordingly
Issues No.3	Affirmative
Issue No.4	Negative
Issues No.5	Negative
Issue No.7	Negative
Issues No.9	Negative
Issue No.11 & 18	Accordingly
Issue No.12 & 13	Accordingly
Issue No.14	Accordingly
Issue No.15 & 17	Accordingly
Issue No.19 to 21	Accordingly
Issue No.10	The suit is hereby decreed accordingly.”

11. The appellate court framed and answered the points of determination as follows :-

1. Whether the trial Court has no territorial or pecuniary jurisdiction?
2. Whether the suit is not maintainable by law?
3. Whether the deceased Ghulam Hussain left the assets as claimed by the respondent No.1 / plaintiff as mentioned in Para-9 of the plaint and what share she has over the properties of the deceased being his daughter/one of legal heirs?

4. Whether agricultural lands in Deh Tayab, Wazirabad in Sukkur, transferred in name of appellants/legal heirs of late Asghar Ali. were the personal properly defendant No.5 (late Asghar Ali)?
5. Whether the legal heirs of the deceased Ghulam Hussain had received their share in terms of money through family settlement by virtue of Agreement dated 12.10.1961 (Ex.D/2/7), as claimed by the defendant No.5 (Asghar Ali)?
6. Whether the appellants/defendant are entitled for the relief(s) as claimed in Civil Appeal No.247/2013?
7. Whether the appellant/plaintiff is entitled for the relief(s) as claimed in Civil Appeal No.248/2013?
8. Whether the appellant/defendant No.1 is entitled for the relief(s) as claimed in Civil Appeal No.251/2013?
9. What should the judgment be?

FINDINGS

POINT NO.1As under
POINT NO.2As under
POINT NO.3As under
POINT NO.4As under
POINT NO.5As under
POINT NO.6As under
POINT NO.7As under
POINT NO.8As under
POINT NO.9As under

12. I have heard Mr. Mushtaq A. Memon learned counsel for applicants in revision application and Mr. Abdul Qadir Mirza advocate for respondents No.5 (a) to (g), 6 to 9 in second appeal as well Saifuddin appellant No.1 in person/attorney of appellant No.2 in second appeal and respondent No.1(a) in person and for respondent No.1(b) in revision application and Arif Hussain respondent No.1(ii)(a) in second appeal and respondent No.2(ii) in revision application. I have also perused the record.

13. Mr. Mushtaq A. Memon has contended that both the impugned judgments are erroneous on the law as well as facts; having been passed without due application of judicial mind; that the learned trial Court should have given its findings on each issue but acted contrarily by forming misconceived conclusions; that the two courts below failed to decide the

issue of maintainability of suit as per law hence failed to apply its judicial mind; that the learned trial Court has failed to appreciate that the only reference was made to a "running business" through document exhibit Ex.P-7 which refers to various immovable properties, distributed by the ancestors of the parties hereto on the basis of a compromise arrived in the year 1939; that the learned trial Court failed to incorporate the settlement admittedly arrived at between the parties in the year 1961, later on validated in the year 1962 and as a result thereof certain payments were made by father of applicants to respondents and all rights and entitlements were surrendered by the respondents in his favour; as well respondent No.1 through her pleadings admitted to having signed a document in favour of applicants' father and has subsequently insisted through her evidence produced by her alleged Attorney that the same was never implemented, but the courts below failed to appreciate that for all the purposes, the settlement stands enforced in favour of the applicants and caused a waiver against respondent No.1 estopping her from claiming to the contrary; that respondent No.1 was a minor of about 7 to 8 years of age at the time of demise of her father therefore the claims made by her are based on presumption, but the learned trial Court as well as appellate court have failed to consider that the properties listed in the settlement as "Schedule A" were admittedly destroyed in the earthquake of 1935 and subsequent structures erected on the properties and earnings acquired therefrom must only vest with the father of the parties; that both courts below grossly erred in passing the impugned judgments and decrees having failed to appreciate the agreements of settlement between the parties and committed gross illegality on law hence the impugned judgments and decrees are liable to be set aside. He has relied upon PLD 2001 SC 443, PLD 2003 SC 315, 2008 SCMR 1457, 2016 SCMR 986, 1981 CLC 503, PLD 1950 Sindh 131, PLD 1978 SC 242, 2001 SCMR 19, 1980 CLC 2056, 1990 CLC 1116, 1973 SCMR 495, 1981 SCMR 71, PLD 2002 SC 208, 1999 SCMR 1700, 2013 CLC 164 and 1996 SCMR 1767.

14. Mr. Abdul Qadir Mirza adopted the arguments as advanced by Mr. Memon.

15. Saifuddin, appellant No.1 in person/attorney of appellant No.2 in second appeal and respondent No.1(a) in person and for respondent No.1(b) in revision application has strongly refuted the contentions of learned counsel for applicants and argued that learned trial Court has erred in not granting full relief as prayed for and only restricted its findings to the extent of accounts of the income and profit of the properties from the date of filing of the suit and not from the date of death of his parents; that respondent No.1/plaintiff through evidence at trial court proved that there were various banks accounts in the personal name of her father and also in the name of the firms as well lockers in different banks within and outside the country, as such said moveable properties were liable to be included in the findings of issue No.2; that learned trial Court did not discuss the last property involved in issue No.16 viz. plots in Dawoodabad Housing Society, Karachi. In this regard, hence learned trial Court erroneously observed that respondent No.1/plaintiff has not produced proof to show that such property is also the inherited one whereas it was for the applicants/defendant No.5 to establish that it was his personal property which he failed to do; that DW Abdul Hussain in his cross-examination on 14.02.2012 admitted that at the time of death of Mr. Ghulam Hussain, his father Asghar Ali/defendant No.5 had no personal assets; further admitted that deceased appellant No.1/defendant No.5 at the time of earthquake was a student of the age of about 18 years, unmarried, had no properties of his own; that these admissions establish the fact that applicant/defendant No.5 at the time of earthquake had no assets whatsoever all the assets properties moneys generated and held in his name afterwards belong to all the legal heirs; that findings of the learned trial Court on issue No.3 are correct, but it

overlooked to include the details and description of the properties on which respondent No.1 had led evidence mentioned at page 18 of his affidavit in evidence; that trial court wrongly recorded its findings on issues No.4, 5 7 and ignored the evidence led by respondent No.1 available on record; that learned trial Court also erred in answering issue No.9 in negative and failed to appreciate the claim of respondent No.1 in paragraph Nos.22, 23 and 24 of affidavit in evidence which went un-rebutted and unchallenged; that learned trial Court also erred while giving wrong finding on issues No.15 and 17 which is a result of non-reading and misreading of material evidence on record; that the findings of trial Court given on issues No.19 and 20 show that learned trial Court failed to appreciate the evidence led by respondent No.1 particularly paragraph Nos.20 and 21 of his affidavit in evidence and also exhibited documents at Exhibits P/30, P/39, P/40 to P/44 and such piece of evidence gone un-rebutted and unchallenged, on the other respondent No.5/defendant No.4 Mst. Safia Bai did not lead her evidence, as such, contents of her written statement could not be utilized as a substitute of evidence as per law; he prayed for modification of both judgments and decrees passed by the courts below and for appointment of receiver with whole powers to administer the properties with possession, manage and maintain accounts of income and look after the properties during pendency of the appeal in respect of the properties regarding which the trial court and appellate court have passed judgments and decree and such receiver should recover his fees from the income and sale proceeds of those properties; he has prayed for dismissal of Revision Application. He has relied upon 1991 CLC 185 Karachi, PLD 1973 SC 295, PLD 2005 Lahore 578, NLR 1990 SCJ 207, 1994 MLD 1955, 2011 YLR 2725, 2005 SCMR 1859 and PLD 1964 (W.P.) Karachi 149.

16. Arif Hussain respondent No.1(ii)(a) in second appeal and respondent No.2(ii) in revision application has made his submissions that during the life time of the said Ghulam. Hussain the father of the defendant No. 1 to 5 and of the Plaintiff, there was a suit No. 173/ 1933 pending against him and his brother Moosajee, filed by Mst Hussaina bai, their sister in the court of Judicial Commissioner of Sind for partition. After the demise of the Plaintiff father Ghulam Hussain in the year 1935, the legal heirs of Ghulam Hussain including the Plaintiff and the defendants No.1 to 5 and Mst Fatema Bai widow of Ghulam Hussain were substituted as the defendants No1(a) to (g) in the said suit No. 17 3 / 1933 being the legal heirs of Ghulam Hussain. According to the Final Partition decree of the year 1939 (Exhibit P/ 7), which is of the value of Rs.19,00,000~00, the legal heirs of Ghulam Hussain who are plaintiff and defendants No. 1 to 5, and mother Mst Fatema bai, they had become the absolute owners in the Estate of Ghulam Hussain to the extent of their share and their share comes in lakhs of rupees in 1939, according to the final partition decree passed in suit No.173/ 1933. He has further argued that respondent No.1 partly aggrieved and dissatisfied with the judgment and preliminary decree of the trial Court had preferred Civil appeal before the District Judge Karachi South bearing No 251/2013 praying in the civil appeal for the modification of the judgment and preliminary decree of the trial Court, that civil appeal was dismissed; that the finding recorded by the learned trial court on issue No. 15 "Whether defendant No. 1 & 2 is a purdahnashin lady and are the deeds executed by her not binding on her?" and issue No.17 "To what relief it any is defendant No. 1 & 2?" are against the evidence available on record because the Respondent No.2/defendant No.1 has successfully led evidence and proved in his evidence regarding the fraud. The defendants No.1 & 2 are the real sisters of the applicant / plaintiff and all the sisters including Respondent No.2 are purdahnashin ladies and

they all are illiterate. The Respondent No. 2 / defendant No.1 has stated in her Written statement that she is being a Purdahnashin lady. The defendant No. 1 (a) & 2; (b) had led evidence and it has come in the evidence of defence witness D / 1, and appellant/ Plaintiff attorney's evidence that the Respondent No. 1/ defendants No.1 &5 the appellant/ plaintiff, they all are purdah-Nashin ladies. Appellant/ Plaintiff attorney's evidence at para No.10 of his affidavit in evidence says that the Plaintiff is a Purdhanashin lady, knowing nothing of the worldly affairs, on this evidence, no question has been asked in cross examination by the counsel of the defendant No. 6 to 9 and 5 (a) to (g) and it deemed to have been accepted; that appellant/Plaintiff in main plaint and in the amended plaint, filed on 23.12.1972 and 23.5.1977 in the then High Court in suit stated before the commissioner that she is ignorant of the English language in which it is written; that contents of the plaint and amended plaint were first truly and audibly read over to the appellant/ Plaintiff in Urdu language by the commissioner and she understood the same and made her signature before the commissioner, this fact of illiteracy of the appellant/ Plaintiff Written in the Plaint and amended Plaint is not denied by the defendants in their written statements; that on CMA No.827/1977, appellant/Plaintiff application U/O 40 rule 1 read with section 151 CPC filed in this suit in paragraph No.3 of the application, it was stated that the Plaintiff is handicapped as is a Purdah-Nashin lady; that defendant No.5, in his counter affidavit dated 27.4.1977 filed in reply to the Plaintiff's application U/o 40 rule 1 R/W section 151 CPC in the suit did not deny this fact that the Plaintiff is handicapped as she is, being a Purdah-Nashin lady. The D.W Abdul Hussain or other defendants, has not led any evidence on this issue in his evidence that all aunties are not Purdah-Nashin ladies and illiterate ladies, nor produce any documentary evidence. It is further contended that if for the sake of arguments it is presumed that deed

of conveyance (Ex.D/2/ 13) dated 30.03.1962 is binding on respondent No.2/ defendant No.1, then even otherwise this conveyance deed is executed in respect of and to the extent of the properties mentioned in it; said deed of conveyance does not relate to the other properties of the estate and properties of issue No.1, 2, 3 and 16 which properties were declared as the ancestral properties in the decree, therefore even if conveyance deed is prove in favor of respondent No.6 then even otherwise respondent No. 2 / defendant No. 1 is entitled according to law for her share in the remaining properties of the judgment excluding the properties mentioned in deed of conveyance dated 30.03.1962; that said deed of conveyance is challenge by the respondent No.2 in his evidence at paragraphs No.7 and 8 of his evidence and no cross examination was made by the legal heirs of defendant No.5 regarding this evidence; that respondent No.2 also cross examined defence witness Abdul Hussain on behalf of defendants No. 5(b), (c) and (d), that witness stated that "It is correct that that the Ex D-2/7 is dated 12th October 1961. The Ex D-2/12 is dated 21st January 1962. It is correct that the Ex D-2/13 was executed on 30th March 1962. It is incorrect that nothing is mentioned in Ex D-2/13 about the documents Ex D-2/7 and D-2/12. I see at Ex D- 2/13 and say that nothing is mentioned in it about the document Ex D-2/7 and Ex D-2/12. In cross examination the witness is making contradictory statements. It is correct that nothing is mentioned in Ex D-2/12 about the document at Ex D-2 / 7. It is correct that the schedule mentioned in Ex D-2/12 is without the signature of anyone. It is not in my knowledge from which place the stamp paper of Ex D-2/ 12 was purchased. It is correct that the pages No. 1 and 2 of exhibit D-2//12 is without the signature of any one. It is correct that all the contents were mentioned on page No.1 and 2 of exhibit D-2/ 12 and only the signatures are mentioned on page No.3 of the exhibit D-2/ 12. It is correct that according to schedule A of Ex D-2 /12 the

all properties mentioned in it belongs to Mr. Ghulam Hussain Essaji. It is incorrect that the properties mentioned in schedule B of exhibit D-2/12 are also belongs to Mr. Ghulam Hussain Essaji. The properties mentioned in schedule B of Ex D-2/12 are belonged to my father/ Asghar Ali (defendant No.5). It is correct that I have not filed any document to show that the properties mentioned in schedule B of Ex D-2 / 12 are belong to my father Asghar Ali. It is correct that I have not filed any receipt to show that in compliance of Ex D-2/7 and D-2/ 12 has been made as per clause 4 of such documents; further that defendant No. 1 and 2 are Purdanashin illiterate ladies none of them have got any independent advice at the time of alleged execution of the said document. He has contended that the trial court wrongly observed in issue No.15 that said alleged agreement at Ex.D/2/12 has not been specifically challenged by the defendants No.1 and 2 in their written statements as well as affidavit-in-evidence. It is pertinent to mention that the copies of Ex.D/2/12 and other exhibits of respondent No.5 have not been produced and exhibited till the evidence and cross examination of respondent No.2/defendant No.1 were completed; the finding recorded by the learned trial court on issue No.15 are against the evidence available on record because the respondent No.2/defendant No.1 has successfully led evidence and proved in his evidence regarding the fraud, that in the instant case neither execution of alleged document has been admitted by defendant No.1 and 2 nor by defendant No.5's legal heirs brought any evidence that alleged agreements and conveyance deed are valid documents in the absence of proof of execution, in fact these documents are void are of no consequence; that learned trial court has rightly decided issue No.3 in affirmative, finding recorded by the learned lower court on issue No. 3 is correct but learned trial court has overlook to include the details and mention the name and description of properties on which respondent

No.2/defendant No.1 led evidence on this issue. He has relied upon 1994 MLD 1955 and NLR 1990 SCJ 207 and prayed for modification of judgments and decrees as requested by respondent No.1(a) and 1(b) in revision application.

17. At the outset, it may *safely* be said that scope of both *Second appeal* and *Civil Revision* is limited one and interference by this Court is permissible *only* if there exists *exceptional* circumstances which do not include '*possibility of another interpretation*'. In the recent case of *Shahbaz Gul v. Muhammad Younas Khan* (2020 SCMR 867) it is held as:-

"6.Furthermore, where two different interpretations were possible of the evidence brought on record, as is the matter in the instant case, then appraisal of facts of lower courts should not have been overturned by the learned High Court in its revisional jurisdiction under section 115, C.P.C. Between two possible interpretations, the one adopted by the learned Trial and Appellate Courts should have been maintained, keeping in mind the limited scope of revisional jurisdiction."

18. Before attending to other question (s), raised by the counsel for the applicant (s), I would take up the question regarding competence and jurisdiction of the trial court. Here, it is worth adding that no Court, including this Court, has competence to go in against of the view / decision of Honourable Apex Court as the same is binding. Reference, if any, may well be made to case of *Mirza Shaukat Baig v. Shahid Jamil* (PLD 2005 SC 530) wherein such position is affirmed as:-

"30.that the judgments of this Court being apex Court are binding upon the learned High Court in the view of the provisions as enumerated in Article 189 of the Constitution of Islamic Republic of Pakistan which, *inter alia*, provides that **any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or initiate a principle of law shall be binding on all other Courts in Pakistan** and the learned Lahore High Court is no exception to it. ..."

In instant matter the question of *jurisdiction* did raise which even went upto Honourable Apex Court and was answered in *affirmation* hence the same was never available to be raised even at such stage. However, the record reflects that this question was raised *even* before learned Appellate Court and was *properly* attended. This will reflect from referral to operative part of the judgment of appellate Court which reads as:-

"24. The instant Suit was originally instituted in the Honourable High Court of Sindh & Baluchistan at Karachi in the year 1973. On creation of separate provincial High Courts for Sindh & Baluchistan in the year 1980, this suit was tried by the Hon'ble Sindh High Court at Karachi. On 26.10.1996, the matter was transferred to District Court due to enhancement of pecuniary jurisdiction of District Courts Karachi and assigned to the trial Court for adjudication where the matter was proceeded and finally adjudicated by impugned Judgment / Decree. On scanning of the record, it reveals that in the instant case, the plea of the jurisdiction had been discussed and determined upto the level of the Hon'ble Supreme Court of Pakistan. In CP @ 823-K/2011, it has been held that:-

"We have heard Mr. Muhammad Amin Lakhani, learned ASC, the petitioner and respondent Saif Ud Din and Arif Hussain, who...are residents of Karachi.

In this eventuality, even if for the argument sake, submissions made by the learned ASC for the petitioners are accepted, still there was no occasion for return of plaint for its presentation before any other Court, except the one where legally such proceedings are pending for a period of over 38 years. The record available before us is sufficient to show that the petitioner herein and many other respondents in league with him are trying their best to delay the proceedings in the suit to frustrate the claim of the plaintiff i.e respondent no.1 herein.

To amplify the correct legal position, here a reference to the provisions of sections 16 & 17, CPC, relating to place of suing, will also be useful. **Section 16, CPC provides that subject to pecuniary or other limitations prescribed by any law, a suit relating to the immovable property or its partition etc is to be instituted before the Court within whose local limits property is situated.** Further, section 17 deals with the situation where the immovable property subject matter of litigation is situated within the jurisdiction of different Courts. It lays down that where in a suit relief is claimed in respect of immovable property or compensation for wrong thereto in respect of immovable property situation within the jurisdiction of different Court, the suit can be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated, provided the Court exercising jurisdiction to competent to entertain claim to this effect. Thus, from the plaint (plaint) reading of these two sections from CPC, it is clear that filing of application under Order VII, Rule-10 CPC relating to the pending suit before the Court of Senior Civil Judge was

tainted with malafide, otherwise such request for return of plaint was wholly devoid of merits and liable to be rejected as such.

25. Nothing has been discovered / brought on record to launch contrary view regarding the verdict of the Hon'ble Supreme Court of Pakistan on the point of the jurisdiction, discussed supra. Obviously, the instant suit was instituted in proper Court having jurisdiction. The Section 17 of CPC confers the jurisdiction to the court where the immovable property of the subject matter is situated within the jurisdiction of different Courts. The valuation of the Suit was also considered to be same as it was fixed at the time of institution of the Suit and subsequently enhancement of market value of the property may not deter / oust the jurisdiction of the Court. It has been already discussed above that the trial Court had received the matter by way of transfer, in such circumstances the contention of the learned advocate has no substance & force. The point is answered accordingly."

19. There has been placed nothing on record as to how the view on said question was / is erroneous or that there exists an exception to what the honourable Apex Court has already observed regarding jurisdiction and competence of the trial Court. Worth adding here that the honourable Apex Court while answering the question *did* refer the Section 16 of the Code therefore it would not be proper that Honourable Apex Court, despite referral to particular section, was not aware of legality thereof. Without prejudice to this, it is worth adding that suit is valued at time of its *presentation* hence subsequent rise or fall in value (s) of subject matter (s) would not be material, as has rightly been viewed by the learned Appellate Court. Thus, I am of the clear view that this plea is not having any legal substance therein, particularly for undoing the *lawful* trial which started in year *1973*.

20. While reverting to merits of the case, I would insist that there can be no denial to a known fact that people in this region normally avoid to give the daughters / sisters i.e women folk, their due shares in the inheritance of their predecessors which is totally against the *Sharia* and the law of inheritance prevailing in the country. Needless to add that *deprived*

women-folk, normally, become prey of our system where the party, at advantage of situation, keep things rolling for years together, as in the instant case, the plaintiff/ respondent no.1 regardless of her undisputed status as one of the daughters of deceased, remained away from her rights of inheritance *least* to extent of *undisputed* properties which compelled the honourable Apex Court to observe in referred order as:-

“except the one where legally such proceedings are pending for a period of over 38 years. The record available before us is sufficient to show that the petitioner herein and many other respondents in league with him are trying their best to delay the proceedings in the suit to frustrate the claim of the plaintiff i.e respondent no.1 herein”

21. Therefore, I am compelled to insist that the matters wherein the ladies dare to come forward for their rights of inheritance must be decided *speedily* and *first* effort of the Courts should be (after examination of pleadings of respective parties) to separate *disputed properties* from undisputed one because the *‘adjudication must only be for disputes only’* and *undisputed things should be allowed to take their course even if the same are from one and same tree.* Parting disputed from undisputed shall *surely* ensure enforcement of right of inheritance at *early* state which, otherwise, shall remain dragging with *disputed* properties/claims.

22. I would further add that since it is undeniable position that for such rights the women-folk has to *first* approach the lowest forum i.e *Civil Court (s)* where things *normally* remain pending for years together for affirmation of what, *otherwise,* is already enunciated by honourable Apex Court with binding effect even upon this Court. Therefore, the Courts of *instant* jurisdiction must appreciate and appraise following legal position to one, denying female’s right of inheritance that:-

- a) limitation does not run in matter of inheritance;

- b) succession opens the moment one dies thereby giving the *legal heirs* the status of co-owner (s) even without such mutation in record of rights;
- c) possession of co-sharers is deemed to be possession of even those co-sharers who, otherwise, are out of possession;

Said legal position stands affirmed from the case of Mahmood Shah v Syed Khalid Hussain Shah (2015 SCMR 689) wherein it is held as:-

“7. The first argument questioning the judgments of the for a below as well as High Court is that the suit being hopelessly time barred is liable to be dismissed. This argument would have been viable otherwise but not in a case where co-heirs become co-owners in the property left by their propositus on his demise. Their succession to the property of their propositus becomes a *fait accompli* immediately after his demise. It , thus, does not need the intervention of any of the functionaries of the Revenue Department and remains as such irrespective of what Patwari, Girdawar and Revenue Officer enter in the mutation sanctioned in this behalf. Since possession of one co-heir or any number of them would be deemed to be on behalf of even those who are out of it, preparation of every new record of rights, in their case, would confer on them a fresh cause of action. No length of time, therefore, would culminate in the extinguishment of their proprietary or possessory rights.”

23. It is worth adding that plea of claimant (lady), being out of possession, is also taken so as to technically knock her out, as taken in the instant suit, but the same *legally* is also of no legal consequence. Reference is made to case of Shabla and others v. Ms. Jahan Afroz Khilat & Others (2020 SCMR 352) wherein it is held as :-

“4. ...
...

...; flux of time can neither validate the transaction nor wash away the repugnance thereof. Argument that much water has flown under the bridge is entirely beside; the mark. Limitation never run against fraud, more so in the matters involving inheritance rights of a female, a view consistently taken by this Court in cases reported as _____

...
...

Non-maintainability of the suit on the plea of respondent’s being out of possession is an argument that two carries no weight; respondent being a co-sharer in the estate is deemed to be in possession of each inch thereof till the land is partitioned according the respective shares.

Here, I would also insist that another *common* plea for denying such right is that one's predecessor died without claiming / receiving his share hence his successors are entitled to claim inheritance, which, *plea* is also misconceived hence same *alone* should not be a reason for keeping things hanging because a right of an heir to claim inheritance does not dissipate with his death rather transfers to his successors. Reference is made to the case of Faqir Ahmed Khan (deceased) through L.Rs v. Riaz Ahmed & Ors (2020 SCMR 346) wherein such principle is affirmed as:-

“5. Insofar as the argument that Romaan Sheda and Zakia did not claim her share from his brother Faqir Ahmed under the Muslim Personal Law, suffice it to state that a right of an heir to claim inheritance does not dissipate with his death as upon his death, it passes on to his heirs and so on and so forth. So when a Muslim has not received in his lifetime his share in the property to which he was entitled under Muslim Personal Law then the same right stands transferred to his heirs. In other words, no death can prevent a rightful heir to claim his share in the inheritance of his predecessor to which predecessor was entitled under the provisions of Muslim Personal Law. Merely for the reason one's predecessor had died without claiming or receiving his share in the property that was inheritable by him under the Muslim Personal Law would be of no legal consequence. This right upon his death gets transferred to his heirs and so on and so forth. ...”

24. Worth adding that a *legally* established principle of law does not require the new *litigants* to undergo the same agony which were undertaken by *earlier* litigants upto honourable Apex Court for enunciation of such *binding principles* of law, therefore, the Court (s) should not only appreciate and appraise such legal positions but must take measures to decide such *controversy* by making *preliminary issues* by appreciating the *pleadings* as well settled and established principles of law so as to help a legally entitled woman for her right in inheritance, particularly where her status as that of one of the *heirs* is not disputed.

25. Keeping in view above principles, I will *first* add that following facts were never disputed:-

- a) both parties claim under '*Ghulam Hussain*';
- b) *Ghulam Hussain* also had business in name and style of a *firm/company*;
- c) *Ghulam Hussain* did left number of properties;
- d) it was defendant no.5/applicant *himself* who (per his own document of family settlement) while acknowledging status of other sisters (except plaintiff/ respondent no.1) gave them their share (s);

yet the plaintiff/ respondent no.1 regardless of her undisputed status as one of the *daughters* of deceased, remained away from her rights of inheritance *least* to extent of such *undisputed* properties, which, could have been avoided if the Courts could have parted *disputed* properties from *undisputed* properties. I don't want to make any further comment (s) onto such *irony* but would prefer to examine the merits of the case. The applicant/ defendant no.5 was always *legally* obliged to give *least* that share to plaintiff / respondent no.1 from which he claimed to have given to other sisters. Here, a referral to his pleading (written statement), being relevant in this regard, is made hereunder:-

"19. With reference to paragraph 14, it is stated that not only during the lifetime of the mother but all along this defendant has been willing to give due share of the ancestral property to the plaintiff as well as other defendants. In fact, by an Agreement dated 12.10.1961 entered into between this defendant and the plaintiff and other defendants except plaintiff amicable partition was effected between the parties but the plaintiff later on went back on her commitments."

Prima facie, a failure to part undisputed things from *disputed* one kept *undisputed* things dragged *too* for such long period which could have *easily* been avoided by a *tactful* move of the Courts at *initial* stage, *even*, because advancement of cause of justice needs to be preferred over *technicalities*. Reference may be made to the case, reported as PLD 2015 SC 15 wherein it is held as:-

“For ding substantial justice in the true sense in a hardship case, technicality of law and rule shall not operate as an absolute bar in the way of the court because giving preference to the technicality of law would defeat substantial justice.”

26. In the instant, the applicant / defendant no.5 *himself* produced an agreement between him and his other sisters, excluding plaintiff / respondent no.1 (Ex.D/2/12) wherein admitting the property, shown as schedule-A (plot of land with structure thereon bearing S.Nos. 1557, 4865, 1612, 1383, 1384, 1375, 1387, 1586 and 1692 at Quetta and Agricultural lands near Ebrahim Zai Karaj Quetta) to be left by deceased Ghulam Hussain, therefore, the moment the plaintiff / respondent No.1 had filed the suit the applicant / defendant No.5 was obliged to have given such *right* but he (applicant / defendant No.5), without any claim (in his written statement) of having paid her share in any other shape or manner, pleaded *estoppel* against plaintiff / respondent in his pleading (written statement) under title '*preliminary objections* as:-

“2. The plaintiff having already agreed to take a specified sum of money in lieu of her share in the ancestral properties in question at an agreed valuation, she is estopped from preferring the present suit as there has already been a private amicable partition.”

27. A right in inheritance can't be denied on any count including that of *estoppel* because opening of succession turns all legal heirs as co-owners. A co-owner could *legally* dispose of his / her rights in the manner, as provided by the law and law *alone*.

28. Further, it was / is also a matter of record that the respondent no.1 / plaintiff has not been the party to such document nor it was proved that she had agreed to such settlement, however, what is undisputed is that '*she was never paid / given her share out of such undisputed property*'. Needless to add that findings on such count, *too*, is concurrent by the two courts below. Therefore, I am of the clear view that claim to such an *extent*,

being undisputed, needs to be enforced by giving due share to the plaintiff / respondent no.1 from said property which, too, without any resistance and objection by the applicants/ defendant no.5 and his successors.

29. Now, I would discuss the claim of the plaintiff / respondent No.1, made in para-9 of her plaint which was denied / disputed by the applicant / defendant no.5 while asserting in his written statement as:-

- i) Agricultural lands at Deh Tayab and Wazirabad and the plots in Dawoodi Bohra Housing Society, Karachi, **mentioned at serials A and B** are the self acquired property of the Defendant.
- ii) There is no office of Essajee & Sons at Marriot Road, Karachi or other place as mentioned at serials C and E. **Business of Messrs Essajee & Sons mentioned at serial E has no connection with the family business of the deceased.** Except for the land at Quetta over which the shop building was constructed by Defendant after the earthquake the entire business, though carried on by answering defendant under the same name is his own separate and self-acquired business started with his own funds and efforts. Plaintiff has no conceivable share in it. There was total destruction of the shop in the fire after the earthquake and there was nothing left except the land.
- iii) With respect of the various plots of lands mentioned at serial D, **except for the plot of land bearing Khasra No.1692 and agricultural lands near Ebrahim Zai Karaj, Quetta,** rest of the plots are admitted to be ancestral properties;
- iv) As regards the insurance money mentioned at serial F it is denied that answering defendant received any insurance money. It is absurd to suggest that this Defendant who was himself a minor at the time would be given the insurance money particularly when the mother and the eldest sister, defendant No.1 were alive. In fact, the entire insurance money was received by the mother who obtained Succession Certificate while she was in Jamnagar alongwith Defendant's sisters after earthquake.
- v) No compensation as alleged at serial No.G of the said paragraph 9 was at all paid. **What the then Government did was to allot a plot of land admeasuring 50 feet by 25 feet over which the Defendant constructed a tin shade and started business.**
- vi) There was no so-called additional compensation as alleged or at all as mentioned at serial No.I of the said paragraph.
- vii) The various items mentioned at serial J are entirely imaginary and without any basis. Deceased did not leave behind any cash in hand, shares, gold bullion, ornaments, jewelry, precious stones as alleged.

- viii) It is also denied that the deceased left any money in the accounts in any bank either in his personal name or in the name of the firm. All the papers of the deceased were destroyed and answering defendant is totally unaware of any such account. **If any such funds were left or traceable the plaintiff's mother and elder sister would certainly have realized the same by virtue of the Succession Certificate obtained by them.**

From above, it can *safely* be deduced that the applicant / defendant no.5 never denied the existence of said properties except that of :-

- a) Office of Essajee & sons at Marriot road, Karachi or other places;
- b) Plot of land bearing Khasra NO.1692 and agricultural lands near Ebrahim Zai Karej, Quetta;
- c) compensation; additional compensation, items including cash, gold, jewelry, stones etc;
- d) money in bank-account;

and for existing properties he (applicant/defendant no.5) had claimed to be self-acquired hence burden was upon him to prove the status of same as *self-acquired*.

30. Before going any further, it would be advantageous that agricultural land bearing Khasra.No.1692 is mentioned in schedule-A of agreement dated 18-01-1962 (Exh.D/2/12) which, per document, was property of deceased Ghulam Hussain therefore, the applicant/defendant no.5 was never authorized to contradict the contents of the document which he, not only relied, but had been a party to such document. Reference is made to case of Elahi Bakhsh v. Muhammad Iqbal (2014 SCMR 1217) wherein it is held as:-

“The question that arises for the adjudication of this Court is whether an oral statement of a party to an instrument which varies or tends to vary its terms could be admitted into evidence? **The answer to this question is a plumb no because Article 103 of Qanun-e-Shahadat Order 10 of 1984 excludes oral statement as between the parties to any such instrument or their representatives.** The rationale behind this Article is that inferior evidence is excluded in the presence of superior evidence that an agreement finding expression in writing is an outcome of deliberate and well thought out settlement; that a party acknowledging a fact in writing is precluded to dispute it and that an agreement reduced into writing is immune from mischief,

failure and lapse of memory. It, therefore, follows that oral statements of P.Ws 1 and P.Ws 2 which tend to vary the terms of the deed mentioned above are inadmissible in evidence. No conclusion could be drawn much less a judgment rendered on the basis of these statements. If these statements are excluded, we are left with bare words of the respondent. Bare words, we afraid, cannot dislodge the presumption of truth attached to a registered deed. Any finding based on such statements is no finding in the eye of law.

The record further shows that both the learned lower Courts have *separately* dealt with each *claimed / disputed* properties. The findings with regard to *undisputed* properties (already discussed), being not disputed, needs not be discussed again.

31. Now, I would discuss the claim of the plaintiff / respondent no.1 which was denied / disputed by the applicant / defendant no.5. Again before diving deep into merits of the case, I feel it appropriate to refer *specific* paragraphs (despite repetition thereof) from the written statement of the applicant / defendant No.5 which read as:-

“7. With reference to paragraph 2, it is admitted that the plaintiff and the defendants survived the earthquake but it is denied that they were looked after by the relatives. **In fact they all were looked after by the mother for sometimes** and then by defendant no.5. The suggestion that they were able to maintain themselves on account of the assets and flourishing business of the deceased is entirely incorrect and denied.”

8. The allegations contained in paragraph 3 of the plaint are incorrect and misleading in that there being no bank account or assets there was no question of this defendant taking over the same. It is also incorrect to say that this defendant carried on the business of the firm of Messrs Essajee and Sons. The business of this defendant was his own and had no connection with his father's business which had absolutely no trace left after the earthquake. **This defendant started new business with entirely his own resources although the name of the firm was same.**”

14(iv) As regard the insurance money mentioned at serial F it is denied that this defendant received any insurance money. It is absurd to suggest that this defendant who was himself a minor at the time would be given the insurance money particularly when the mother and the eldest sister, defendant no.1 were alive. **In fact, the entire insurance money was received by the mother who obtained succession Certificate**

while she was in Jamnagar alongwith defendant's sisters after earthquake.

"19. With reference to paragraph 14, it is stated that not only during the lifetime of the mother but all along this defendant has been willing to give due share of the ancestral property to the plaintiff as well as other defendants. In fact, by an Agreement dated 12.10.1961 entered into between this defendant and the plaintiff and other defendants except plaintiff amicable partition was effected between the parties but the plaintiff later on went back on her commitments."

32. It is needless to add that *legally* none of the parties is allowed to build his / her case beyond the pleadings. Reference may be made to the case of Muhammad Iqbal v. Mehboob Alam (2015 SCMR 21) wherein it is held as:-

"It is a settled principle of law that a fact admitted needs no proof, especially when such admission has been made in the written statement (*see PLD 1975 SC 242*), and **it is also settled that no litigant can be allowed to build and prove his case beyond the scope of his pleadings.** ..

33. Worth adding that by making such assertions in the pleading (written statement) the applicant / defendant no.5 *first* claimed that deceased father had left nothing but in the same breath claimed that:-

- i) he was minor at such time and it was his mother who was managing / looking after all affairs;
- ii) claimed to have acquired all other properties (mentioned in the para-9 of plaint) with his own sources *independently*;

Both assertion (s), *prima facie*, were contrary to each other particularly when the applicant / defendant no.5 in para-19 of his written statement claimed as:-

"19. With reference to paragraph 14, it is stated that not only during the lifetime of the mother but all along this defendant has been willing to give due share of the ancestral property to the plaintiff as well as other defendants. In fact, by an Agreement dated 12.10.1961 entered into between this defendant and the plaintiff and

other defendants except plaintiff amicable partition was effected between the parties but the plaintiff later on went back on her commitments."

34. Be that as it may, the applicant / defendant no.5 had claimed starting of business with *same name* but with his own sources which is not worth believing by a '*minor*' whose father, per him, left him nothing. However, the burden was upon him to prove that:-

- a) he *himself* arranged sufficient funds to continue business of a known and established firm;
- b) father's business had absolutely no trace left after the earthquake;

but nothing was produced to prove said two plea (s) rather it was admitted by the applicant / defendant no.7 in his cross-examination as:-

"It is correct that the defendant no.5/Asghar Ali had obtained only the inherited property of Mr. Ghulam Hussain Essaji. It is correct that at the time of death of Mr. Ghulam Hussain my father Asghar Ali had not his personal assets.

35. On the other hand, final partition decree of suit No.173/1933 (Exh.P/7) was produced by plaintiff / respondent no.1 which is not denied by applicant / defendant no.5. The findings of learned trial court with regard to such document, being relevant, are referred hereunder:-

"...It is pertinent to mention here that after perusal such Ex.P/7 it appears that it is mentioned in it for having the shop and running the business at Bruce road Quetta which shows the running of the business at Quetta in the name of shop of Essajee & Sons. It is pertinent to mention here that admittedly the said Mr. Ghulam Hussain son of Essajee was the father of plaintiff and defendants No.1 to 4 who was died on 31.05.1935 in the earthquake of Quetta and he left behind his legal heirs namely.....It is pertinent to mention here that during cross-examination the defendant No.7 who is also the attorney of Defendants No.5(b) (c) & (d) and is the son of defendant No.5 has admitted that the Defendant No.5/Asghar Ali had obtained only the inherited property of Mr. Ghulam Hussain Essajee and at the time of the death of the father of parties / Mr. Ghulam Hussain the Defendant No.5/Asghar Ali had not any his personal assets. It is pertinent to mention here that the said Defendant No.7 who is also the attorney of No.5(b) (c) & (d) has admitted during his cross examination that the Ex.D-2/2 is dated

05.05.1935 and is mentioned in it that Essajee & Sons established in 1879."

The status of documents, brought on record as Ex.P/7 as well Ex.P/2 & P/2-a, have not been challenged hence were rightly believed by two court (s) below. These *even* found validation from proceedings of Suit No.173/1993, filed by Mst. Hosainabai against her brothers namely *Ghulam Hussain & Moosa Ji* for partition of ancestral properties (Ex.P/4) wherein the present parties were joined and later compromise decree was recorded (Ex.P/7). There has not been any *specific* denial nor anything in disproof of such document (s) was brought on record, therefore, both the learned lower courts have rightly given due weight to such documents while referring to these documents.

36. As regard agricultural land situated in Deh Tayyab, Wazeerabad, Sukkur, which the applicant / defendant no.5 had claimed as self-acquired. The burden was, *accordingly*, upon applicant / defendant no.5 to prove so but nothing was brought rather roots establish that it was property of deceased Ghulam Hussain. A direct referral to relevant portion of judgment of appellate Court regarding this property, being relevant, is made hereunder:-

"...however, he did not dispute the genuineness & relevancy of the above referred documents. On perusal of the documentary evidence discussed supra, it transpires that the above mentioned agricultural land was acquired by the late Ghulam Hussain (father of the plaintiff and defendants) through his agent Seth Pokardas, Hindu by virtue of registered Deed dated 17.9.1937 in satisfaction of the decrees of competent Court passed in Case NO.178 & 179 of 1931-32, in favour of late Ghulam Hussain. This Deed was executed by the J.V. Bedikar Sukna Yaraj, C.S. Manager Bahadur Engineer Assistant in Sindh on behalf of the State, such mutation was affected in the name of the deceased Ghulam Hussain in the Revenue Record of the Rights. After partition of Indo-Pak, the above said property was declared as a Evacuee property and later on it was restored **in the name of the deceased Ghulam Hussain in compliance of the Judgment / Decree passed by the Hon'ble High Court.** The document viz. Ex/P11 reads that the above said agricultural land was mutated in the name of Asghar Ali (appellant / defendant no.5) on 1760 in the record of the Rights by the Mukhtiarkar Sukkur, on the basis of oral statement of the two witnesses namely Abdul Hayee son of Haji Ghulam Qadir

and Suleman S/o. Tayyab while accepting Asghar Ali (defendant No.5) as a sole legal heir of the deceased Ghulam Hussain, who subsequently transferred the land in favour of his sons namely Abdul Hussain, Fida Ali & Aftab Ali. Admittedly, the deceased Ghulam Hussain was having several surviving legal heirs at the time of his death. The transfer of the agricultural land in favour of one legal heir Asghar Ali (appellant / defendant no.5) was illegal, unjust and result of the fraud and wrong practices....

37. I am unable to find any other conclusion, as *rightly* drawn by learned appellate Court while affirming the view of trial court. I am also unable to appreciate, how, the plaintiff / respondent can be kept out from her share in said property which, *undeniably*, first went in *absolute* name of *Ghulam Hussain* which, *too*, in compliance of Judgment / Decree of High Court. Needless to add that a *fraud* or *multiplicity* thereof shall never be sufficient to defeat a legitimate and lawful right rather all such transactions, once noticed, shall be available for correction. Reference may well be made to the case of Moulana ATTA-UR-REHMAN V. Al-Hajj Sardar Umer Farooq & others (PLD 2008 SC 663) wherein it is observed as:-

“It is well settled that when the basic order is without lawful authority and *void ab initio*, then the entire superstructure raised thereon falls to the ground automatically as held in Yousuf Ali v. Muhammad Aslam Zia PLD 1958 SC 104.”

38. When *prima facie* it stands proved on record that mutation in name of the applicant / defendant no.5 was nothing but a fraud hence subsequent transfer in name of his successors would also be of no consequence else it would amount giving premium to one of his own fraud, which, per law is not permissible. Reference is made to the case of Muhammad Nawaz v. Sakina Bibi (2020 SCMR 1021) wherein said principle is affirmed as:-

“13. .. **It is settled principle of jurisprudence that no person can be allowed to take the benefit of his own fraud.** Further permitting Muhammad Idrees to inherit his entire share would amount to giving him a premium for his fraud considering that he has

admittedly sold and received valuable consideration for land measuring 6 *kanals* 9 *marlas*."

Accordingly, the said property be deemed to be as *undisputed* property available for inheritance amongst the sharers, including the plaintiff / respondent.

39. As regard to plot in Dawood Bohra Housing Society, Karachi also result of fair appraisal of record because for claiming *inheritance* it is always necessary to establish that claimed property was left by deceased. Record produced shows *original* allotment to Ismail G. Muhammad Ali in year 1948 and then it was transferred to Asghar Ali (defendant no.5) in year 1954, therefore, it was rightly viewed by learned lower Court (s) that such property can't be said to be one of the properties, left by deceased Ghulam Hussain. Here, it is worth adding that in para-9 of the plaint, the plaintiff / respondent no.1 had claimed this plot as part of *assets inheritable by parties* but *prima facie* failed to prove so, therefore, findings of two courts below to such extent are not open to any exception.

40. As regard the disputed property i.e office of M/s Essajee & Sons, Mariot Road, Karachi (shown at serial # C in para-9 of plaint), the applicant/ defendant no.5 had denied existence of any such office hence the burden was upon the plaintiff / respondent no.1 to prove existence thereof as well control of the applicant/ defendant No.5 after death of father. For this, plaintiff / respondent No.1 did produce certain documents in shape of conveyance deed, executed in year 1962 as well letters, sent on such address before year 1940. All these have been referred by plaintiff / respondent no.1 to establish existence of *running business* under control of applicant / defendant no.5 but same only carry '**address**' which, in no way, could be a substitute of proof for proving running *business*. It was not a dispute of

address but existence or non-existence of *specifically* claimed *place of business* therefore, the plaintiff / respondent no.1 was required to bring substantial proof in this regard which she failed. Thus, learned appellate Court committed no *illegality* while holding so. It is also worth adding that plaintiff / respondent never proved that such office was *functioning* at time of filing of the suit when it was shown and claimed as *part of assets inheritable*. The failure of the plaintiff / respondent in this regard was properly adjudicated by both the Courts below.

41. As regard the findings of two court (s) below with regard to disputed properties i.e insurance money & compensation (mentioned at serial F,G& I in para-9 of plaint) as well for cash, shares, gold bullion, ornaments, jewelry, precious stones, stored in the underground vault and accounts in various banks in personal name as well in name of firm (mentioned at serial # J & K of para-9 of plaint), the perusal of the record shows that since applicant/ defendant no.5 had denied to have received the same, therefore, plaintiff / respondent no.1 was required to prove the same through substantial material but nothing was brought on record except mere words which, *legally*, can't take place of proof.

Be that as it may, it is not a disputed fact that at time of death of Ghulam Hussain the applicant / defendant no.5 was also minor so affairs of family were *first* dealt by their mother (widow of Ghulam Hussain), therefore, plea of applicant / defendant for such properties is rather logical and believable which, per his written statement, as follows:-

"It is also denied that the deceased left any money in the accounts in any bank either in his personal name or in the name of the firm. All the papers of the deceased were destroyed and answering defendant is totally unaware of any such account. **If any such funds were left or traceable the plaintiff's mother and elder sister would certainly have realized the same by virtue of the Succession Certificate obtained by them.**"

Therefore, failure of the plaintiff / respondent no.1 was rightly given due weight by two courts below while responding to such *claim* because the mother of the parties, even per the plaintiff / respondent, *first* dealt with affairs of family, therefore, applicant / defendant no.5 was not rightly held to submit account of what he (applicant/defendant no.5) was never proved to *safely* have been entrusted with.

42. As regard another plea of respondent / plaintiff that she was entitled for account from death of father and not from date of filing of the suit, as declared by two Courts below, I am not inclined to agree with the same. This is for reason that mother of the parties died in 1960 who, remained as incharge of the *family*, as well appreciating the reasons, offered by learned trial court for Issue no.10 which are:

“In the light of discussion in issue No.1 to 9, 11,12,13,14 & it appears that admittedly at the time of death of the father of parties only the surviving male member of the family was Defendant No.5 who was aged about 18 years old and after the death of his father he carried out the business of his father and also look after the properties left by him with his intelligence, skill and hard work and also gain profit and income from the asserts of his father, which shows that if he did not make any effort to carry out the business of his father and to look after the said properties, would not be in existence today. It is pertinent to mention here that admittedly at the time of the death of their father the plaintiff was only aged about 7/8 years old and the marriages of Plaintiff and Defendants No.1 to 4 were also solemnized after the death of their father meaning thereby that the defendant No.5 spent money on their livelihood and also borne their marital expenses. Moreover, according to the record during the lifetime of their mother no dispute was arose between the parties of this suit and the all sisters including Plaintiff remained silent to claim their share for about 25 years from the death of their father till death of their mother.”

Further, it is also matter of record that till filing of the suit there had not been any dispute between parties i.e plaintiff and defendant no.5, therefore, margin of benefit couple with earlier actions of applicant / defendant no.5 for welfare / betterment of plaintiff as well business needs to be given due weight while attending such plea.

43. Before attending the plea of the respondents / defendant nos.1 & 2, it would be appropriate to say that such *dispute* was / is with reference to a *settlement document* which was claimed / pressed as *relinquishment deed* by applicant / defendant no.5 so as to oust other sisters from their right of inheritance. Before making any further it would be advantageous to refer recent view of honourable Apex Court with regard to *relinquishment deed* in the case of Mirza Abid Baig v. Zahis Sabir (deceased) through L.Rs & others (2020 SCMR 601) as:-

“8. We have heard the learned counsel and with their assistance examined the documents on record. This case is yet another sad example of a brother denying and resisting the claim of his sisters to their legal entitlement to inheritance. Mirza Sultan Baig died on 22nd March 1975 and when he died his properties came to vest in his legal heirs and should have been distributed among them in accordance with *shariah* but this was not done compelling two of his daughters to file a suit to get what was due to them. Mirza Abid Baig stooped to denying that his sisters were the legal heirs of Mirza Sultan Baig. He also, without any proof, claimed this sister was not the legal owner of the said house and shop, insinuating but without stating, let alone establishing, that he was their real owner and this his father was the *Benami* (ostensible) owner. The learned Civil Judge, Lahore decreed the suit in respect of only two of the properties, that is the said house and shop, but this too was not acceptable to Mirza Abid Baig who continued to throw one unnecessary challenge after another to prevent his sisters from getting their inheritance and regrettably succeeded by such tactics as Zahida Sabir passed away and it is now forty-five years since she and then her children have remained deprived of inheritance. Such conduct of the appellant contravened the law and also the dictates of Almighty Allah; *shariah* expounds that legal heirs immediately on the death of their predecessor become owners of the estate left behind as per their predetermined shares.”

“11. We cannot be unmindful of the fact that often times male members of a family deprive their female relatives of their legal entitlement to inheritance and in doing so *shariah* and law is violated. **Vulnerable women are also sometimes compelled to relinquish their entitlement to inheritance in favour of their male relation.** This Court in the case of *Ghulam Ali* (PLD 1990 SC-1) had observed that ‘relinquishment’ by female members of the family was contrary to public policy and contrary to *shariah*. It would be useful to reproduce the following portion from the decision of this Court:

“Here in the light of the forgoing discussion on the Islamic point of view, the so-called “relinquishment” by a female of her inheritance as has taken place in this case, is undoubtedly opposed to “public policy” as understood in the Islamic sense with reference to Islamic jurisprudence. In addition it may be mentioned that Islam visualized many modes of circulation of wealth of certain types under certain strict conditions. And

when commenting on one of the many methods of achieving this object, almost all commentators on Islamic System agree with variance of degree only, that the strict enforcement of laws of inheritance is an important accepted method in Islam for achieving circulation of wealth. This being so, it is an additional object of public policy. In other words the disputed relinquishment of right of inheritance, relied upon from the petitioner's side, even if proved against respondent, has to be found against public policy the very act of agreement and contract constituting the relinquishment, was void”

“12. Therefore, there is no reason to allow this appeal which is dismissed with costs throughout. The cost shall be paid to the respondent Nos.1(a) to 1(d). Since the said respondents and before them their mother stood deprived of inheritance for forty-five years, we expect that if the matter goes to the Executing Court it will ensure that the matter is promptly concluded without entertaining frivolous objections from the appellant to further procrastinate the misery of the said respondents.”

44. *Prima facie*, the relinquishment *deed*, even if proved, has been declared as against the public policy, therefore, *plea* of relinquishment of all rights of inheritance by a *woman* would not be of much weight so as to deprive her of her *divine* right in inheritance in other properties.

45. No *relinquishment* can be said as *voluntary* and legal unless the person, executing such *deed* knows of her right and claim. How it can be believed that person, never knowing value of her rights, can *voluntarily* relinquish the same or that same was / is not result of *wrong* persuasion by person, getting such deed executed. This has been the reason that in the case of *Shabla and others* supra it has been held as:-

“4. Given the preponderance of conferment, such a right, rooted into Personal Law, has to be jealously guided, therefore, a heavy onus is cast upon the claimant to demonstrate that a female legatee had parted with her entitlement by choice and for consideration, consciously, without duress or uncalled for persuasions, by those placed qua her in advantageous positions.”

46. The terms '*consciously*' and '*without uncalled for persuasions*' shall always be decisive while deciding such like *pleas* when a **woman** claims to have been deceived for her *full right in inheritance* because of concealment

of true value (inheritable assets). I would appreciate the *legal* position that '*consideration is always subject to choice (agreeing) of two parties*' but the '*consideration*' even, if agreed, would not be valid to terminate *independent* rights in *independent* properties wherein a woman became sharer on opening of the succession. Accordingly, I would, respectfully, conclude that in such like matter (s), the *relinquishment deed*, even if proved to be have been acted upon by both parties, could at the most attain the status of a '*satisfied agreement*' but for such *properties* only.

47. To see whether the courts below have attended such dispute / issue within such four-lines, referral to relevant portion of judgment of trial Court, being relevant, is made hereunder:-

“During cross-examination the said legal heir of Defendant No.1 stated **at the time of obtaining the signature of his mother in the year 1961-1962 his father was present in Karachi who managed the business of his uncle / defendant No.5.**The said admission of defendant No.1's side shows that at the time of execution of alleged agreement dated 18.01.1962 at Ex.D/2/12 which was allegedly executed between Defendant No.5 and Defendants No.1,3 & 4, the Defendant No.1 was married and **her husband was working with Defendant No.5 and the said alleged Agreement at Ex.D/2/12 has not been specifically challenged by the defendant Nos.1 & 2 in their written statement as well affidavit-in-evidence.** Whereas, the Defendant No.4 has admitted in her written statement that she has received her share in the said inherited properties to the Defendant No.5 and then it was sold out by her to the Defendant No.5 through her husband Mr. Tahir Ali son of Ali Bhai and also registered a Conveyance Deed at Ex.D/2/8 in favour of Defendant No.5 dated 01.05.1962.

On the contrary, the Defendant No.3 remained failed to come in court and also remained failed to file anything in rebuttal and also not challenged the alleged Agreement at Ex.D/2/12 and the Deed of conveyance at Ex.D/2/14. **It is pertinent to mention here that on the basis of alleged Agreement at Ex.D/2/12 the deeds as Deed of Conveyance at Ex.D/2/8, Deed of Disclaimer at Ex.D/2/9, Deed of Conveyance at Ex.D/2/13, Deed of Conveyance at Ex.D/2/14, Deed of Sale at Ex.D/2/15, were executed between Defendants No.1,3,4 and 5.** It is pertinent to mention here that if it is presumed that the Defendant No.5 took the advantage for being the Defendant No.1 & 2 as *parda nasheen* ladies, illiterate knowing nothing so why they have not challenged such documentsIt is also pertinent to mention here that the Defendants No.1 to 4 have also received their shares in the inherited properties of their father as per Ex.D/2/8.... And also registered such documents.... in favour of Defendant No.5 after taking their shares in the said inherited properties of their father in shape of cash....”

48. From above, it is quite obvious and clear that only a '*certain property (schedule-A)*' was known *least* made the respondents / defendants (sisters) as inheritable properties and further acts and omissions of these women (sisters) can only be believed to such an *extent* only while applicability of rest of the agreement (Ex.D/2/12) for independent rights (not *specifically* mentioned as *inheritable assets*) can't be allowed, being not only against '*public policy*' but is also against true meaning of a '*legal agreement*'. The referral to husband of respondent / defendant no.1 with applicant / defendant no.5 can't be a *legal* excuse to make such document applicable for independent properties which were never brought to light hence it can never be believed that such person (husband of defendant no.1) could have advised the defendant no.1 about true value of her rights. The defendant no.3, however, knowing all claims and entitlement, did not press her such rights hence her stand shall, for all purposes and intents in inheritance of her father, would be taken as '*satisfied*'.

49. In consequence to what has been discussed above, I am of the clear view that findings of both the lower courts on this aspect are not in line with settled legal position hence needs to be modified as that respondents/ defendant nos.1 & 2 would be entitled for their rights of inheritance in independent properties, excepting schedule-A, as the respondent / plaintiff has been found entitled to.

50. In consequence to what has been discussed above, I am of the clear view that both the revision petition as well appeal merit no consideration hence are dismissed as such. Judgments and decree (s) of two Courts below are hereby maintained but with modification, as discussed above. However, while parting, I find myself compelled to add that

plaintiff/respondent as well respondent/defendant Nos.1 & 2 stood deprived of true inheritance for more than five decades, therefore, I expect that the Executing Court will ensure that the matter is promptly concluded, and *preferably* proceedings shall be separated for *undisputed* properties.

J U D G E

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