

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No.286 of 2003

[Syed Waqar Haider Zaidi vs. Mst. Alam Ara Begum and others]

Suit No.492 of 2008

[Abdul Samad Khan and others vs. Mst. Alam Ara Begum and others]

Date of hearings : 14.10.2020 and 05.11.2020.

Suit No.286 of 2003

Plaintiff : Syed Waqar Haider Zaidi, through
Mr. Khawaja Shams-ul-Islam, Advocate along
with Mr. Shahzad Mehmood and Mr. Imran
Taj, Advocates.

Defendants/Legal
heirs No.1, 3, 4
and 5 : Mst. Alam Ara Begum widow of
Dr. Abdul Moneim Khan (since deceased)
through her legal heirs No.1, 3, 4 and 5, namely,
(1) Abdul Samad Khan, (3) Abdul Rab Khan,
(4) Mrs. Ayesha Jawed and
(5) Mrs. Fatima Ansar, through Mr. M.M. Aqil
Awan, Advocate along with Mr. Muhammad
Arshad Khan Tanoli and Mr. Danish Rasheed
Khan, Advocates.

Defendant/Legal
heir No.2 : Abdul Ahad Khan.....(Nemo)

Suit No.492 of 2008

Plaintiffs : (1) Abdul Samad Khan, (2) Abdul Rab Khan
and (3) Mst. Fatima Ansar, through Mr. M.M.
Aqil Awan, Advocate along with
Mr. Muhammad Arshad Khan Tanoli and
Mr. Danish Rasheed Khan, Advocates.

Defendant No.1,
1-a and 2 : Mst. Alam Ara Begum widow of Dr. Abdul
Moneim Khan (since deceased) (Defendant
No.1) through her legal heirs; Mrs. Ayesha

Jawed (Defendant No.1-a) and Abdul Ahad Khan (Defendant No.2).....(Nemo)

Defendant No.3 : City District Government Karachi.....(Nemo).

Defendant No.4 : Syed Waqar Haider Zaidi, through Mr. Khawaja Shams-ul-Islam, Advocate along with Mr. Shahzad Mehmood and Mr. Imran Taj, Advocates.

Case law cited by M/s. Khawja Shams-ul-Islam, Shahzad Mehmood and ImranTaj, Advocates.

Case law relied upon by M/s. M.M. Aqil Awan, Muhammad Arshad Khan Tanoli and Danish Rasheed Khan, Advocates.

1. 1990 SCMR page-387
[Ahmed Din vs. Ghulam Muhammad]
Ahmed Din case.
2. 2016 SCMR page-910
[Agha Syed Mushtaque Ali Shah vs. Mst. Bibi Gul Jan and others]
3. 1987 SCMR page-115
[Muhammad Arshad vs. Muhammad Islam and others]
4. 2005 SCMR page-1408
[Sinaullah and others vs. Muhammad Rafique and others]
Sinaullah case.
5. 2007 SCMR page-1808
[Abdul Hameed vs. Mst. Aisha Bibi and another]
Abdul Hameed case.
6. 2015 SCMR page-1044
[Farid Bakhsh vs. Jind Wadda and others]
Farid case.
7. 2004 SCMR page-1102
[Sadar Din vs. Mst. Khatoon and others]
Sardar Din case.
8. 2005 SCMR page-1217
[Muhammad Zubair and others vs. Muhammad Sharif]
9. 1996 SCMR page-1239
[Mst. Gul Nisa and 4 others vs. Muhammad Arif and 12 others]

10. PLD 1990 Supreme Court 1
[*Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi*]
Ghulam Ali case.
11. PLD 1993 Supreme Court (AJ&K) 24
[*Bostan and 5 others vs. Mst. Sattar Bibi and 11 others*]
12. 2015 SCMR page-869
[*Mahmood Shah vs. Syed Khalid Hussain Shah and others*]
13. 2004 SCMR page-1502
[*Rehman vs. Yara through L.Rs. and others*]
14. 1995 SCMR page-284
[*Wali and 10 others vs. Akbar and 5 others*]

- Other Precedents:**
- (1) PLD 2015 Sindh page-472
[*Syed Waqar Haider Zaidi vs. Mst. Alam Ara Begum through Legal Heirs and others*]
 - (2) AIR 1967 SC page-1395.
[*Kuppuswamy Chettiar vs. A.S.P.A. Arumugam Chettiar and others*]-
Arumugam case.
 - (3) 2008 SCMR page-1639
[*Nazir Ahmad and another vs. M. Muzaffar Hussain*]-***Nazir case.***
 - (4) 2013 SCMR page-1600
[*Abbas Ali vs. Liaqat Ali and another*]-
Abbas Ali case.

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

JUDGMENT

Muhammad Faisal Kamal Alam, J: Due to commonality, the title suits are decided through this Judgment. Suit No. 286 of 2003 is filed by Syed Waqar Haider Zaidi, for Specific Performance, seeking following relief_

“It is, therefore, respectfully prayed that this Honourable Court may graciously be pleased to pass judgment and decree in favour of the plaintiff and against the defendant as follows: -

- I. Judgment and Decree for specific performance of agreement of sale dated 20.11.2002 and 07.01.2003 in respect of House bearing plot No.B-173, Block-2, admeasuring 409.75 square yards situated at Gulshan-e-Iqal, KDA Scheme No.24, Karachi with double storeyed building standing thereon together with all necessary fittings and fixtures fitted and provided therein along with two running telephones be passed in favour of the plaintiff and against the defendant with the direction to the defendant to execute Sale Deed and to get the same register with the concerned Sub-Registrar, Karachi on receiving balance sale consideration of Rs.60,00,000/- (Rupees Sixty Lacs only) from the plaintiff and on failure the Nazir or any other officer of this Hon'ble Court may be authorized to execute the sale deed on behalf of the defendant and in favour of the plaintiff to get the sale deed registered and to receive remaining sale consideration of Rs.60,00,000/- (Rupees Sixty Lacs only) from the plaintiff.*
- II. Judgment and Decree be passed in favour of the plaintiff for physical, vacant possession of the House bearing No.B-173, Block-2, admeasuring 409.75 square yards situated at Gulshan-e-Iqbal, KDA, Scheme No.24, Karachi together with double storeyed construction.*
- III. Mandatory injunction be passed directing the defendant, her successors, agents, servants, legal heirs attorneys, employees, or any person or persons for or under and/or on behalf of the Defendant including (without limitation) to claim the suit Bungalow No.B-173, Block-2, admeasuring 409.75*

square yards situated at Gulshan-e-Iqbal, KDA Scheme No.24, Karachi.

IV. Cancel any other sale agreement or any Sale / Conveyance Deed executed between the defendant with any other person or persons, group of persons, company, corporation before or after 20.11.2002 in view of clauses 5, 7 and 8 of the Binding / Concluding Contract / Agreement dated 20.11.2002 read with agreement dated 07.01.2003 and declare that the same has no legal effect and consequences.

V. Permanent injunction restraining the defendant, her successors, agents, servants, legal heirs, attorneys, employees, or any person or persons for or under and / or on behalf of the defendant from parting, renting or creating any third party interest in respect of the suit property or demolishing, altering and raising any construction thereon.

WITHOUT PREJUDICED TO THE FOREGOING AND / OR IN THE ALTERNATIVE.

VI. A decree in the sum of Rs.45,00,000/- (Rupees Forty Five lacs only) be passed towards refund of Rs.1500,000/- (Rupees fifteen lacs only) plus damages of Rs.25,00,000/- (Rupees twenty five lacs only) against the defendant and in favour of the plaintiff with interest thereon at the rate of 21% per annum aggregated sum from the date of filing of the suit of the plaintiff against the defendant till its realization.

VII. Consequential relief as this Hon'ble Court may deem fit and proper may also be granted.

VIII. Any other relief(s) which this Hon'ble Court may deem fit and proper under the circumstances of the case may be passed.

IX. Cost of the Suit.”

2. The subsequent Suit No.492 of 2008 (original Civil Suit No.367 of 2003) has been originally filed by some of present legal heirs against Defendant No.1 (Mst. Alam Ara Begum), Abdul Ahad Khan and the then official Defendant No.3. The plaint contains the following Prayer Clause_

“It is, therefore, respectfully prayed that this Hon’ble Court may be pleased to pass Judgment and decree in favour of the Plaintiff as under: -

- 1. Declare that all properties and assets left by deceased Dr. Abdul Moneem Khan particularly property bearing No.B-173, Block-2, Gulshan-e-Iqbal, Karachi shall be inherited by all his surviving legal heirs and no one can dispose of the assets of deceased without the permission and consent of other legal heirs.*
- 2. Declare that mutation order No.KDA/L&E/Gul/CC/354 dated 10.10.1994 in respect of property bearing No.B-173, Block-2, Gulshan-e-Iqbal Karachi is unlawful arbitrarily and has no force in the eye of law.*
- 3. Direct the Defendant No.3 to cancel mutation order No.KDA/L&E/Gul/CC/354 dated 10.10.1994 and issue mutation order in respect of the property bearing No.173, Block-2, Gulshan-e-Iqbal in favour of all the legal heirs of the deceased owner as per para1 of the plaint.*
- 4. Restrain the Defendant No.3 not to transfer the property bearing No.B-173, Block-2, Gulshan-e-Iqbal, Karachi to anybody else without the consent of all legal heirs of the deceased owner.*
- 5. Restrain the Defendants No.1 and 2, their, representatives, employees, attorneys, servants and assignees, not to dispose of or create any third party interest in the property bearing No.B-173, Block-2, Gulshan-e-Iqbal, Karachi, without the consent and permission of the Plaintiffs.*
- 6. Cost of the suit.*

7. Any other relief(s) which this Hon'ble Court may deem fit and proper under the circumstances of the case may also be awarded to the Plaintiff."

3. Upon service of summons Written Statements in both suits have been filed by the parties, including Defendant No.3, the then City District Government Karachi and at present Karachi Development Authority (KDA).

4. The subject matter of Suit No.286 of 2003 (*the First Suit*) is the Agreement to Sell dated 20.11.2002 (*Article X-1*) and Agreement to Sell dated 07.01.2003 (*Article X-5*), said to have been entered between Plaintiff of First Suit and Defendant No.1 (*Mst. Alam Ara Begum*) for sale of House No.B-173, Block-2, admeasuring 409.75 square yards situated at Gulshan-e-Iqbal, KDA Scheme No.24, Karachi-*the Suit Property*; whereas, some of the children of said Defendant No.1, namely, Abdul Samad Khan, Abdul Rab Khan and Mst. Fatima Ansar, filed Suit No.492 of 2008, to be referred as **Second Suit**, wherein, primarily they have challenged the Mutation Order dated 10.10.1994 in respect of Suit Property, whereby, it was transferred in the sole name of said Defendant No.1-Mst. Alam Ara Begum (*the mother of Plaintiffs of Second Suit*). By the order of 02.03.2009 both suits were consolidated and First Suit was treated as leading suit.

5. Following consolidated Issues were framed by the Court vide order dated 09.12.2013_

"1. Whether Suit No.492 of 2008 is within time from the admitted date of mutation order dated 10.10.1994? If so, its effect?

2. Whether the defendant No.1 was the absolute owner of the suit property at the time of execution of sale agreements with the plaintiff? If so, what would be its effect?

3. *Whether the defendant No.1 in para 11 of her written statement in Suit No.286 of 2003 has admitted execution of the sale agreement in question which written statement was also accepted by the defendant No.2 Abdul Ahad Khan, hence the suit is liable to be decreed as prayed?*
4. *Whether the plaintiff is entitled for judgment and decree for specific performance of the sale agreement dated 20.11.2002 and 07.01.2003 entered into between the plaintiff and defendant No.1 Mst. Alam Ara Begum in respect of double storey house constructed on plot No.B-173, Block-2, admeasuring 409.75 sq. yards situated in Gulshan-e-Iqbal, KDA Scheme No.42, Karachi, together with consequential relief for delivery of possession? If so, what would be its effect?*
5. *Whether the so-called legal heirs of late Dr. Abdul Moneim Khan i.e. plaintiffs in Suit No.492 of 2008 had waived off and relinquished their rights and title in the suit property as they failed to raise any objection to the transfer / mutation of the suit property dated 10.10.1994 in faovur of their mother Mst. Alam Ara Begum? If so, whether the so-called legal heirs are under a legal estoppel at this stage from raising any objection to the transaction as well as sale agreements executed between the plaintiff and Mst. Alam Ara Begum?*
6. *Whether the property bearing No.B-173, Block-2, Gulshan-e-Iqbal, Karachi, is inherited by all the surviving legal heirs of deceased Dr. Abdul Muneem Khan?*
7. *Whether the mutation order No.KDA/L&E/Gul/CC/354 dated 10.10.1994 in respect of the suit property is unlawful and liable to be cancelled?*
8. *Whether the plaintiff is entitled for the relief claimed?*
9. *What should the decree be?"*

6. Plaintiff and Defendants have led the evidence.

7. In order to avoid any confusion about description of parties, the Plaintiff (*Syed Waqar Haider Zaidi*) of First Suit will be referred to as the 'Claimant' and Plaintiff of **Second Suit** [will be referred to as the 'Objectors'], who are opposing sale transaction between the said Claimant and their mother, viz. Defendant No.1 (*Mst. Alam Ara Begum*)-the 'Seller'.

8. On behalf of Claimant, Syed Waqar Haider Zaidi, examined himself as PW-1 and Syed Shabih Haider Zaidi as PW-2, who is also one of the marginal witnesses in the said Second Agreement to Sell. On behalf of Objectors, only Abdul Samad Khan (Plaintiff No.1 of Second Suit) testified as DW-1. During pendency of both *Lis, above* Defendant No.1 [Seller] has passed away and her legal heirs including the Objectors were impleaded as Defendants.

9. Mr. Khawaja Shams-ul-Islam, Advocate along with Mr. Shahzad Mehmood and Mr. Imran Taj, Advocates, for Claimant, who is also subsequently impleaded as Defendant No.4 in the Second Suit, has argued that the sale transaction in respect of the Suit Property is legal as Defendant No.1, mother of Objectors, being sole owner of the Suit Property by virtue of registered instrument-Relinquishment Deed, produced in evidence as **Exhibit-5/7**, which was never challenged by Objectors or any of children of Defendant No.1, competently executed the above two Sale Agreements and acknowledged receipt. He has referred to the Written Statement of Seller/Defendant No.1 of First Suit in which she has admitted the sale transaction between Claimant and Seller by admitting both Agreements, particularly Paragraph-3 of the plaint of Claimant, which mentions the sale price as well. It is argued that Objectors (*Plaintiff of Second Suit*) have filed a time barred claim (Second Suit) merely to prolong the matter and compel the Claimant to pay a higher price of the Suit Property. Contends that the Written Statement of Seller since has not disputed the claim of Claimant,

therefore, latter filed an application under Order XII Rule 6 of CPC (CMA No.7021 of 2003), seeking a Judgment on admission, but the same was dismissed, hence, High Court Appeal No.37 of 2013 was also preferred, which was later reported in PLD Sindh page-472 [*Syed Waqar Haider Zaidi vs. Mst. Alam Ara Begum through Legal Heirs and others*]; it was dismissed with an observation that since admission made by Seller in her Written Statement filed by her in Second Suit, hence, on the basis of that Claimant was not entitled to a decree for specific performance [of subject Sale Agreements].

10. On the other hand, Mr. M.M. Aqil Awan, Advocate along with Mr. Muhammad Arshad Khan Tanoli and Mr. Danish Rasheed Khan, Advocates, for Defendant No.1 (Objectors) have opposed the arguments of Claimant. Contended that undisputedly the Suit Property was owned by the **deceased husband** of Seller and father (*Dr. Abdul Moneim Khan*) of Objectors, who died on 06.08.1988. After his death, the Suit Property was devolved upon all legal heirs, including Objectors being his children. It is argued that by virtue of above referred Relinquishment Deed, Seller did not become exclusive owner of Suit Property, primarily because basic ingredient of consideration for giving effect to such a registered instrument (Relinquishment Deed-Exhibit-5/7) should be mentioned, but which is absent in the present case. Further argued that both Sale Agreements were not proved in accordance with the Evidence Law, particularly, Articles 17 and 79; as both attested witnesses were not examined, which is a mandatory requirement. Argued that Objectors in their Second Suit did not seek cancellation of the above Relinquishment Deed (Exhibit-5/7) because it is a void document for which no cancellation is required. With regard to limitation period, it is argued that when challenge to the ownership / title of Objectors was posed, they took step and filed the Second Suit and same is

within time and not a time barred claim as alleged by Advocate for Claimant.

11. Heard arguments and record perused.

12. Findings on the issues are as follows:

ISSUE NO.1	Negative
ISSUE NO.2	Affirmative
ISSUE NO.3	Affirmative
ISSUE NO.4	Affirmative
ISSUE NO.5	Affirmative
ISSUE NO.6	Negative.
ISSUE NO.7	Negative
ISSUES NO.8 & 9	Suit No.286 of 2003 is decreed to the extent of Prayer Clause-I, II, IV and V and Suit No.492 of 2008 is dismissed.

REASONS

ISSUES NO.1, 5 AND 7.

13. Since these Issues are interlinked, hence, they have to be decided by a common finding. In Second Suit, Written Statement on behalf of Defendant No.3 (CDGK) and now Karachi Development Authority (KDA) though was filed but no evidence was led as no official witness was examined. In the Written Statement, the official Defendants have confirmed the ownership of Dr. Abdul Moneim Khan, Predecessor-in-interest of Seller and Objectors and subsequent transfer in favour of Seller through Mutation Order of 10.10.1994 (Exhibit-5/8) on the basis of above Relinquishment Deed (Exhibit-5/7).

14. Issues No.1, 5 and 7 are pivotal. In pursuance of the Relinquishment Deed dated 24.10.1992 (Exhibit-5/7) (*ibid*), mutation was done by official Defendants in favour of Seller (Mst. Alam Ara Begum) and Mutation Order dated 10.10.1994 is produced in the evidence as **Exhibit-5/8**, whereas, the

same was challenged by Objectors in the Second Suit initially filed on 8-2-2003 in the Court of learned Senior Civil Judge [IV, Karachi East] and was registered as Suit No. 376 of 2003, but later was transferred to this Court and was **renumbered** as Suit No. 492 of 2008.

Claimant's Advocate contends that under Article 91 of the Limitation Law, within three years, a cancellation of document can be sought but in the present case, the said Mutation Order, which is well within the knowledge of Objectors, was sought to be cancelled after almost nine years. Contended that both Mutation Orders and the Relinquishment Deed are undisputed documents and hence they may be given full legal effect. Legal Team of Objectors have stated that since no consideration is mentioned in the Relinquishment Deed, therefore, it is of no consequence and hence the Mutation Order is of no legal effect. *Secondly*, it is not a time barred claim because the Objectors who were in possession of the Suit Property, when faced challenge about their ownership, due to Sale Agreements between their mother / Seller and Claimant, they filed the Second Suit, which was filed after one month from the date of second Sale Agreement dated 07.01.2003. It is also argued that the Suit Property belongs to all the legal heirs of above named deceased, including their mother, the present Seller. Since Suit Property cannot be physically partitioned, therefore, even Claimant cannot ask for partial specific performance of the two Sale Agreements.

15. Case law in support of the arguments for Objectors are already mentioned in the opening part of this Judgment, crux of which is that all legal heirs become co-owners in the property left by their propositus immediately after his demise, without intervention of any of the functionaries including Revenue Department; since possession of one co-heir would be deemed on behalf of possession of all, therefore, any new entry in the record of rights would

give them a fresh cause of action and no length of time would culminate/extinguish their proprietary and possessory rights. Right of succession would not be defeated by the law of limitation or principle of *res judicata* as no law or judgment can override the law of Sharia, which is superior law. Relinquishment by sister in favour of brothers was annulled by the Hon'ble Supreme Court in the case of Ghulam Ali (*supra*) and it was held that, *inter alia*, it is against public policy; an agreement of relinquishment which was without any consideration is of no consequence, because no positive evidence could be led.

16. Registered Relinquishment Deed dated 24.10.1992 (Exhibit-5/7) is not disputed, but only Transfer / Mutation Order dated 10.10.1994 (Exhibit-5/8) issued in pursuance of said Relinquishment Deed and by virtue of which the above named Seller became the sole owner of the Suit Property (purportedly). From a careful examination of first document-Exhibit-5/7, it appears that stance of legal team of Objector appears to be correct, that no consideration is mentioned therein by any of the children of seller including the three objectors, for relinquishing their respective title, rights and claim in the Suit Property in favour of their mother / Seller. But it is not end of everything, as this aspect needs a deeper appreciation.

17. The second suit has not questioned the execution of Relinquishment Deed but has only sought relief of declaration that the assets left by above named deceased are inherited by all the surviving legal heirs and the above referred Mutation Order dated 10.10.1994 (Exhibit-5/8) for the Suit Property should be declared as unlawful and official Defendants be directed to cancel the same. The above deceased was succeeded by Seller and her five children; three of them are Plaintiffs in the Second Suit, that is, Objectors and two are Defendants along with the Seller herself. Although the Plaintiff No.1-Abdul Samad Khan has signed the plaint for himself and

on behalf of Plaintiffs No.2 and 3, namely, the brother-Abdul Rab Khan and sister Mrs. Fatima Ansar but no Power of Attorney has been produced in the evidence to confirm this fact that the other two siblings had / have given any authority to said Abdul Samad Khan to challenge the above Mutation Order (Exhibit-5/8) on behalf of other family members / siblings. It means only Abdul Samad Khan (Objector No.1) has challenged the Mutation Order and the sale of the Suit Property and no one else.

18. Clause-1 of this document/registered instrument states that the children including the Objectors had voluntarily and mutually agreed that the Suit Property be transferred in the name of Seller, who was in physical possession of the Suit Property. Second Clause mentions that the first party-children of Seller including Objectors had (have) no objection if the property is transferred to Seller. Clause-3 is quite specific about surrendering, relinquishment and abatement of all the rights, titles and claims of respective children including Objectors in respect of the Suit Property in favour of their mother (the said Seller) and it is stated that the Seller has become the absolute owner of the Suit Property.

19. Evidence is evaluated. Plaintiff and his witness in their evidence and particularly in cross-examination have reiterated that they have purchased the Suit Property from Seller/Defendant No.1 through the two Sale Agreements (Articles X-1 and X-5) and there was no dispute of the price. To a question, the Plaintiff in his cross-examination has stated that the above named lady was the owner of Suit Property on the basis of documents seen by the said Plaintiff. PW-1/Plaintiff has produced the Written Statement filed by Seller/Defendant No.1 as Exhibit-5/10 and Statement dated 10.04.2003 filed by Defendant No.2 (of First Suit) to the plaint of Second Suit filed by Objectors. In her Written Statement, the Seller has specifically stated that with the consent of all the legal heirs of

her deceased husband she became the exclusive owner of the Suit Property and she has every right to deal with the same. She has acknowledged the sale consideration of Rs.7.5 Million under the Sale Agreement with the present Claimant. She has further stated that the sale transaction in question was negotiated with the consent of all legal heirs but Objectors later backed out. The statement filed by Defendant No.2-Abdul Ahad Khan, that is, real brother of Objector-Abdul Samad Khan, as Exhibit-5/11, states that the said Defendant No.2 (Abdul Ahad Khan) adopted the Written Statement filed by her mother (the Seller). Whereas PW-2 (Syed Shabih Haider Zaidi), in his cross-examination has specifically denied the suggestion that Seller is not the owner of Suit Property. To a question, he has stated that she (Seller) being the owner was not required to take consent from others for selling the property. The above Abdul Ahad Khan and PW-2 are the attesting witnesses in the subsequent Sale Agreement dated 07.01.2003 (Article-X/5), whereas, Abdul Ahad Khan is also an attesting witness of first Sale Agreement dated 20.11.2002.

20. The sole Objector-Abdul Samad Khan-DW-1, in his cross-examination has admitted that all the brothers and sisters vide Relinquishment Deed dated 24.10.1992 relinquished their shares and rights in the Suit Property in favour of Seller [their mother]. The said witness has admitted the Sale Agreements and receipts-Articles X/1, X/2 and X/5. He has even accepted above Exhibit-5/10, that is, Written Statement filed by the Seller [his mother]. He acknowledged that his brother-Abdul Ahad Khan, the signatory of Exhibit 5/11 [*ibid*] resides with him-the Objector, in the same Suit Property. To a specific question, he has admitted that by virtue of Relinquishment Deed- Exhibit-5/7 and afore referred Mutation Order {Exhibit-5/8}, Seller was the absolute owner and can deal with the property. Although he voluntarily stated that he [Objector] did not receive any share from the Suit Property and relinquishment was made because

mother was the eldest in the family, but in view of his admission, the above voluntary statement loses its significance.

Similarly, admission of PW-1, that all the legal heirs of above named Deceased “*had not transferred their right of inheritance through a registered document in favour of defendant*” [the said Seller] and PW-1 further reply in which he did not dispute the suggestion that the Seller was not authorised to sell the Suit Property {upon which much emphasis is laid by Legal Team of the Objectors}, is also of no consequence, because, the above admission and reply of PW-1 is contrary to the contents of the registered Document-the Relinquishment Deed, which is an undisputed Document hitherto and bears a character of a public document and presumption of genuineness is attached to it in terms of Articles 85, 90 and 92 of the Evidence Law; thus, above portion of testimony of PW-1 is to be discarded, in view of provisions of Chapter VI of the Evidence Law [relating to exclusion of oral by documentary evidence] and particularly, Articles 102, 103 and 104, besides the admission made by Objector (DW-1).

21. In view of the above discussion and particularly evidence, the case law cited by learned Advocates for Defendants is distinguishable. In the present case admittedly children including Objectors executed the above Relinquishment Deed in favour of their mother, thus, a well-known Judgment of Ghulam Ali (*ibid*) reported in PLD 1990 Supreme Court page-1 and the rule laid therein does not apply to the facts of present case, because in the cited decision, relinquishment done by the sole female legal heir in the family in favour of her brothers, was annulled on the basis of public policy and morality as it amounts to depriving a female legal heir of her due rights and share in the inheritance; *secondly*, the respondent sister (of the reported Decision) herself challenged the relinquishment, *inter alia*, because even her name was omitted from the pedigree table. With this brief background the above Decision of Apex Court was handed down.

Conversely, here the relinquishment is made in favour of mother [Defendant No.1], **one of the female legal heirs in the family, which Relinquishment Deed [exhibit 5/7] has till date not been challenged by any of her children,** the executants of the said Relinquishment Deed, **including** the main Objector (Abdul Samad Khan). More so, one of the brothers-Abdul Ahad Khan had supported the stance of her mother / seller in the suit filed by the Objectors. Just because one of the contesting Objectors (Abdul Samad Khan) was / is residing in the Suit Property, does not improve his case, because being real son of the Seller and part of joint family system, the said Objector was/is residing therein with the said Seller along with Abdul Ahad Khan {as admitted in his cross examination}, who actually opposed the stance of the above named Objector.

22. The physical possession and exclusive ownership of Seller has also been acknowledged by all the legal heirs including the Objectors in the above Relinquishment Deed (Exhibit-5/7). This document fulfills the requirement of Section-17 of Registration Act, 1908, whereby, such transfer of interest in favour of a person can only be done through a registered instrument, regarding which **neither any fraud, misrepresentation, undue influence or coercion is pleaded.** This Document [exhibit 5/7] has its own intrinsic legal value. The Mutation Order dated 10.10.1994 (Exhibit-5/8) under challenge, was issued by the competent authority in pursuance of Relinquishment Deed. If the stance of Objector No.1 is accepted then sanctity of registered instrument and official documents would be seriously compromised. This will encourage persons to commit breach of promise and their obligations. A registered instrument of the nature (Relinquishment Deed) in such peculiar circumstances [as discussed here] can also be construed either as a family arrangement / agreement or a gift. **Secondly**, this aspect was considered by the learned

Supreme Court of India in the case of Arumugam (*ibid*); wherein a registered release deed for an immoveable property though without consideration, was held to be a valid document equated with that of a gift.

23. The reported decision of Sadar Din (*ibid*) is altogether on a different set of facts, where the relinquishment document itself was disputed by the legal heirs regarding which it was stated by the surviving brother that the deceased had relinquished his share in a house. Since no evidence was led, therefore, Hon'ble Apex Court came to the conclusion that relinquishment was without any consideration because 'no evidence could be led by the defendant', to show that another property-a shop was also jointly owned by two brothers, hence, the relinquishment document was held to be a nullity in the eyes of law in terms of Section 25 of the Contract Law.

24. The reported decisions as relied upon by learned Advocates for Objectors, particularly, expounding principle, that law of limitation does not apply in inheritance matters and a legal heir cannot be deprived of his lawful share in the inheritance, and that for every adverse mutation entry, a lawful owner, who is in possession of premises / property, is not required to initiate legal proceeding, unless there is a real threat to his ownership and possession, is not applicable in the present case. All the legal heirs including Objectors particularly above named contesting Objector No.1, themselves executed the Relinquishment Deed on 24.10.1992 and the Suit Property was duly mutated / transferred in the name of Seller (mother) vide a Mutation Order of 10.10.1994 (Exhibit-5/8), therefore, all these developments were not only in the knowledge of Objectors but they themselves fully participated in the entire transaction, therefore, the question here is not that Objectors were deprived of their right in inheritance of their father, because the same has already been relinquished/released in favour of their mother (Seller) by virtue of the

above Relinquishment Deed, which was executed by all the legal heirs including the Objectors by a conscious decision. The relevant issue here is that why the Objectors and particularly Objector No.1 (Plaintiff No.1) of the Second Suit did not challenge the mutation entry / order for nine years. The answer to this question is replied by the said Objector No.1 in his cross-examination; when he stated that he filed suit (Second Suit) so that his mother (Seller) “may not sell the property”. To another question, he replied that he stopped the Seller from executing the Sale Deed. It means that when the sale transaction was on the verge of completion, the said Objector No.1 **only** created hurdles and no one else from the legal heirs (his siblings).

In view of this testimony even if declaration is sought in terms of Article 120 of the Limitation Law (prescribed time is six years), with regard to the above Mutation Order, then still the claim of Objectors in Second Suit is time barred by almost three years. The admission of Objectors in his testimony, that motive of the Second Suit was to forestall the subject sale transaction, cannot be held to be a *bona fide* motive in view of the foregoing discussion and particularly with regard to the Relinquishment Deed and exclusive ownership of Seller. The reported Decision of *Agha* [*ibid*, 2016 SCMR 910] is relevant here, wherein, Hon’ble Supreme Court upheld the Orders of Courts, rejecting the plaint of the appellant [of the cited Decision], who has challenged the mutation entry of agriculture property in favour of his sister/respondent. It is held, that when no error, mistake, fraud or misrepresentation is pointed out, rather, such mutation was done with the active participation of appellant, then the same cannot be cancelled, inter alia, by adding into or deleted from what is mentioned in a document. Consequently, suit of appellant was held to be time barred and few of the Reported Decisions relied upon here *in the*

present Lis by Legal Team of the Objectors, were distinguished by the Apex Court.

Consequently, Issue No.1 is answered in Negative, that is, Suit No.492 of 2008 instituted by Objectors is a time barred proceeding and is adversely affected by Sections 91 and 120 of Limitation Law and is liable to be dismissed. **Issue No.5 is answered in Affirmative** that all the legal heirs of Dr. Abdul Muneim Khan have waived off / relinquished their rights in the Suit Property in favour of their mother, that is, above named Seller (Mst. Alam Ara Begum). **Issue No.7 is answered in Negative** and against the Objectors. Mutation Order dated 10.10.1994 (Exhibit-5/8) is a legal document, which was issued in pursuance of the registered instrument, viz. Relinquishment Deed (Exhibit-5/7) and thus cannot be cancelled.

ISSUES NO.2, 3 AND 6.

25. In view of the above discussion, **Issue No.2 is answered in Affirmative**. The Written Statement of Seller is available in record and in paragraph-11 she has admitted the corresponding paragraph-12 of the plaint, wherein factum of execution of Sale Agreement is mentioned. However, Defendant No.1/Seller has also stated that due to Objections of legal heirs, she is unable to perform the contract. Similarly, supportive statement of Defendant No.2 is already discussed in the foregoing paragraphs. Therefore, **Issue No.3 is also answered in Affirmative**.

After the findings on the Relinquishment Deed (Exhibit-5/7), it is held that the surviving legal heirs have relinquished their respective rights and interest in the Suit Property in favour of their mother / Seller, therefore, she was the sole owner of the same. Hence, **Issue No.6 is answered in Negative**.

ISSUE NO.4.

26. Legal team for Objectors have vehemently argued that since photocopies of both Sale Agreements were produced in the evidence, therefore, they lack evidential value, besides the fact that both Agreements were not proved in accordance with the Evidence Law, particularly Articles 17 and 79 thereof. They have cited the cases of Abdul Hameed and Farid (*ibid*); 2007 SCMR page-1808 and 2015 SCRM page-1044, respectively, to substantiate their arguments. Learned Advocate for Claimant has referred to his notices available in the evidence file under Article 77 of the Evidence Law for production of original documents. He has further referred to the order of 10.03.2011 passed in the High Court Appeal No.101 of 2009 also produced in evidence, wherein the learned Advocate for respondents No.1, 2, 4 to 6, that is, the present private parties in both suits, stated that present private Defendants submitted documents in the Office of Defendant-KDA, for mutating the Suit Property in the name of their mother, that is, the present Seller.

Photocopies of both Agreements to Sell have been produced in the evidence along with receipts and public notices together with Legal Notice as Articles X/1 to X/6, respectively, whereas in his cross-examination, the Objector has admitted, not only the factum of sale, but also the aforesaid documents including Agreements to Sell and receipts.

The Hon'ble Supreme Court in both the cited decisions, has very clearly expressed its view that Article-79 for proving an Agreement is mandatory. Agreement is to be proved by calling two attesting witnesses and the testimony of a scribe cannot be equated with that of one of the attesting witnesses. If either or both witnesses are not called for proving the documents then an adverse presumption would be raised in terms of Article

129 (g) of the Evidence Law, against a party, which is beneficiary under the said document. Common feature in both the cited decisions [on behalf of Objectors] is, that sale agreements were disputed and allegations of fraud were leveled against plaintiffs [of the above cited decisions]. However, in the present case, the undisputed factual position that has emerged after conclusion of evidence is altogether different. Not only the Seller in her Written Statement has admitted the entire sale transaction along with subject Agreements to Sell but the sole Objector in his cross-examination also acknowledged the same. The Claimant has also produced one of the marginal witnesses, the above named PW-2, who has corroborated the testimony of Claimant to the extent of entire sale transaction and if the entire evidence is seen, the Claimant and his witness could not be contradicted in cross-examination, therefore, to the facts of present case, decisions handed down by Hon'ble Supreme Court in the cases of **Nazir** and **Abbas Ali (supra)**; 2008 SCMR page-1639 and 2013 SCMR page-1600, respectively, are relevant. In the latter reported decision, the Hon'ble Apex Court has held that when an agreement itself is not disputed and admitted in written statement, then provision of Article-81 of the Evidence Law will be applicable. Article 30 of the Evidence Law has been explained by the Honourable Supreme Court in the following words_

“8. It means that the execution of agreement is admitted not disputed and it is well settled proposition of law that the admitted facts need not to be proved. The admission has been defined in Article 30 of the Qanun-e-Shahadat Order, 1984 which reads as under:--

“30. Admission denied. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.””

27. Conclusion of the above discussion is, that since subject Sale Agreements and the Receipt, all are admitted documents, therefore,

non-production of the originals and the two attesting witnesses is not fatal and in this regard the plea of Objectors is devoid of any force; the Documents are proven **also** through the secondary evidence. Similarly, both cited Judgments, handed down in *Ahmed Din* and *Sinaullah cases (ibid)*, are not applicable to the facts of present case; as in the **first case**, the specific performance failed because the property had co-owners and all did not agree to sell the property and in the **second case**, partial specific performance of a contract was not granted, and it was held that the same can only be given in such cases where a property is capable of division. Since it is already determined in the present case that the Defendant No.1 was the sole owner and the entire sale transaction in respect of the Suit Property was valid, therefore, the relief of specific performance can be granted to Claimant. Consequently, **Issue No.4 is answered in Affirmative** and against the Objectors.

ISSUES NO.8 AND 9.

28. In view of the above, Suit No.286 of 2003 filed by Claimant is decreed to the extent of Prayer of Specific Performance and in terms of Prayer Clause-I, II, IV and V and consequently Second Suit No.492 of 2008 instituted by Objectors is hereby dismissed. Objectors and other legal heirs of Seller are entitled to the balance sale consideration, which will be distributed amongst themselves in accordance with their respective shares in the inheritance. Since balance sale consideration is deposited with the learned Nazir of this Court, upon proper application the amount along with accruals will be released to the Objectors and legal heirs [private Defendants] of both suits, [it is clarified that since Claimant is also one of the Defendants in Second Suit, thus, he is excluded from getting any payment] and similarly the initial payment of Rs.15,00,000/- (rupees fifteen hundred thousand only) deposited by the Objectors will also be released to

the private Defendants [legal heirs] and Objectors along with accruals (if any).

29 Parties are left to bear their own costs.

JUDGE

Dated 21.12.2020.
M.Javid.P.A.