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Bail...365-A PPC7 ATA...co-accused ...granted bail...furnish...bail bonds	<b>1366</b>
Bail...365-B/34...a question requiring...further enquiry...admitted to bail	<b>2318</b>
bail...377 PPC...12 of the Offences of Zina ...medico-legal report ...Forensic Science Laboratory do not spell out any definite opinion...further inquiry...be released on bail if	<b>2082</b>
bail...377/34 PPC...passive presence on the spot...stopped the main accused from committing the crime...be released on bail	<b>2124</b>
bail...3775 grams of "Charas"...doubt...attracting prohibitory clause...be released on bail	<b>2306</b>

bail...379/411 PPC...falls within the ambit of section 411 PPC...grant of bail in such like cases is a rule and refusal is an exception	<b>2159</b>
bail...382/354/411 PPC...mere heinousness of crime will not disentitle an accused to the ...bail...conviction...can repair ...mistaken relief of bail...be released on bail	<b>2134</b>
Bail...382/452/506... questions requiring further inquiry, accused was admitted to bail,	<b>1944</b>
bail...411 PPC...Jail for more than one year...None...charged with attract the prohibitory clause...rule and refusal is an exception	<b>2018</b>
bail...411 PPC...Whether...gang of dacoits...vegetables etc. recovered from the road side...further inquiry ...be released on bail	<b>1982</b>
bail...412 PPC...is recovery of incriminating material ...stolen property ...section 411 ...not attract the prohibitory clause...be released on bail	<b>2009</b>
bail...417,465,468,471 PPC...none of the offences ...attracts prohibitory clause...be released on bail	<b>2053</b>
bail...419/420/406 PPC...punishable with imprisonment or fine or with both...PLD 1993 Peshawar 104...be released on bail	<b>2123</b>
bail...419/420/467/468/471 PPC...none...attracts prohibitory clause ...civil suit ...is pending ...the grant of bail is a rule and refusal is an exception...be released on bail	<b>1975</b>
bail...419/420/468/371 PPC...none of the offences ...attracts prohibitory clause...to be released on bail	<b>2117</b>
bail...419/420/468/482/483/486 PPC...none of the offences ...prohibitory clause...be released on bail	<b>2000</b>
bail...420/465/467/468/471/197/198 PPC...requires further inquiry...be released on bail	<b>2039</b>
bail...420/468/471 PPC ...156(89) of Customs Act...vehicle...stolen and smuggled ...do not attract the prohibitory clause...be released on bail	<b>1960</b>

bail...457/380 PPC...Whether...could be termed as a stolen property ...no identification parade ...co-accused ...granted bail ...ultimate conviction...would repair the wrong...be released on bail	<b>2162</b>
bail...457/380/411 ...patched up ...no other evidence to connect ...confessional statement of a co-accused ...be released on bail	<b>2007</b>
bail...489 (B) PPC...within the ambit of section 489 (B) or 489 (C) of the PPC. is essentially one of further inquiry...furnishes bail bond	<b>2126</b>
bail...489-B of the PPC...covered by Section 489-B or 489-C ...requiring further inquiry...be released on bail	<b>2253</b>
bail...489-B PPC...trafficking in counterfeit notes...being found in possession ...covered by section 489-C ...does not attract the prohibitory clause...be released on bail	<b>1991</b>
bail...489-B-C PPC...besides possessing ...trafficking or using them as genuine...further inquiry...be released on bail	<b>2166</b>
bail...489-B-C PPC...besides possessing ...trafficking or using them as genuine...further inquiry...be released on bail	<b>2166</b>
bail...5/10 of the Offences of Zina ...have become husband and wife... marriage...solemnized through their parents ...reduced into writing ...FIR...is no better than a confession of an accused made to a Police Officer...it is owned by her at the time of framing the charge or ...under section 342 ...be released on bail	<b>2072</b>
bail...506/34/337-F(ii) PPC...none of the offences...prohibitory clause ...be released on bail	<b>1977</b>
bail...506/447/448/458/ 354/147/148/149 PPC...20 Offences Against Property ...do not disclose ...prohibitory clause... Whether...tress-pass ...lurking house tress-pass...further inquiry...do not attract the prohibitory clause...be released on bail	<b>1965</b>
Bail...57 Surrender of Illicit Arms Act...folding iron butts of kalashinkov...inhabitants of the locality have not been associated to witness...case becomes 2577arguable for the purpose of bail...Bail Granted	<b>2577</b>

bail...abdominal cancer...be released on bail	<b>1048</b>
bail...abductee...does not charge ...furnish bail bonds	<b>1329</b>
bail...Anti-Terrorism Act...case is not distinguishable ...who have been released ...be released on bail	<b>2269</b>
bail...Anti-Terrorism Act...case is not distinguishable ...who have been released on bail	<b>2300</b>
bail...be released on bail	<b>2102</b>
bail...cancellation of bail ...excessive delay of more than 18 hours ...informant himself ...an accused...cross firing ...whose shots hit the deceased ...further inquiry ...release of the petitioner on bail	<b>2084</b>
Bail...cancellation...302/324/1148/149 PPC...not like to interfere ...recall it...is no allegation against them as to the mis-use of concession ...pre-arrest bail has been confirmed...extended the concession of post arrest bail to	<b>1948</b>
Bail...cancellation...302/34 PPC...could not yet collect any evidence ...remained in Police custody ...nothing on the record...dismissed.	<b>2115</b>
Bail...cancellation...302/34 PPC...father of the deceased who is not an eye witness ...no other material ...not ...inclined to recall ...dismissed	<b>2031</b>
Bail...cancellation...injuries ...manner described by her in the first information report...further inquiry...nothing...mis-used this concession ...dismissed	<b>1971</b>
bail...CNCA...5 K.Gs. of chars...Railway Police is not competent ...PLD 2001 Peshawar 152)...is debatable...arguable for the purpose of bail ...quantum of the substance ...be released on bail	<b>2068</b>
bail...CNSA ...1200 grams of opium...doubt...attracting prohibitory clause...be released on bail	<b>2063</b>
bail...CNSA ...despite order ...challan within 15 days ...not been complied with...trial has not been concluded in the stipulated time...release...on bail	<b>2013</b>

bail...CNSA 2 kilograms of “Opium”, ...when the charge ...not be ...to grant bail...PLD 2003 SC 525)....(PLD 1972 SC 277)...maximum sentence ...but ...likely to be entailed ...be released on bail	<b>2208</b>
bail...CNSA read with articles ¾ of the Prohibition...search and seizure was made by an ASI...informed...trafficking and transportation ...in advance...be released on bail	<b>1986</b>
bail...CNSA...below the rank of S.I...requires further inquiry...be released on bail	<b>2005</b>
bail...CNSA... having suckling babies...PLD 2004 Peshawar 228...2002.P.Cr.L.J. 746)....be released on bail	<b>2014</b>
bail...CNSA...10 K.Gs. of chars ...cannot...without deeper appreciation of evidence...dismissed	<b>1997</b>
bail...CNSA...1100 grams of “Charas” ...doubt...attracting prohibitory clause...not...maximum sentence ...but the one which ...likely to be entailed ...be released on bail	<b>2273</b>
bail...CNSA...13 A.O...does not fall within the prohibitory clause...be released on bail	<b>2002</b>
bail...CNSA...14 KGs. of Chars ...involves deeper appreciation of evidence ...dismissing this petition...conclude ...two months	<b>1959</b>
bail...CNSA...1500 grams ...doubt...maximum sentence ...not...Statute but ...likely to be entailed ...PLD 1972 S.C. 277...law is not to be stretched in favour of prosecution...Jail...3 months ...be released on bail	<b>2023</b>
bail...CNSA...360 grams of chars...does not attract the prohibitory clause...be released on bail	<b>2043</b>
bail...CNSA...4 K.Gs. chars...doubt ...attracting prohibitory clause ...released on bail	<b>2045</b>
bail...CNSA...4 K.Gs...(PLD 2001 Peshawar 152)...doubt...can be awarded the maximum sentence provided by the statute...be released on bail	<b>2128</b>
bail...CNSA...5 K.Gs of chars...mere failure to mention the name...recovery memo...substance...attracting prohibitory clause...require further inquiry...be released on bail	<b>2054</b>

bail...CNSA...be released on bail...does not attract prohibitory clause...does not exceed one K.G.	<b>2088</b>
bail...CNSA...carrying the bag ...none naming him has been examined so far...be released on bail	<b>2037</b>
Bail...CNSA...Control of Narcotic Substances Act...5 kgs of charas ...released on bail, in circumstances	<b>2176</b>
bail...CNSA...doubt...maximum sentence ...Courts while sitting in judgments on a petition for bail are not supposed to keep in view the maximum sentence provided by the Statute but the one which is likely to be entailed by the facts and circumstances of the case...	<b>2029</b>
bail...CNSA...mere presence...in the vehicle ...I do not feel inclined to grant ...bail	<b>2022</b>
bail...CNSA...not be appropriate to release him on bail as even previously...released him ...involvement in yet another case of similar nature	<b>2020</b>
bail...CNSA...one K.G. of charas ...will not entail a punishment attracting prohibitory clause...be released on bail	<b>1995</b>
bail...CNSA...one K.G. of charas ...will not entail a punishment attracting prohibitory clause...be released on bail	<b>1995</b>
bail...CNSA...only evidence ...confessional statement...not so far corroborated ...further inquiry...be released on bail	<b>2056</b>
bail...CNSA...punishable with 7 years ...be released on bail	<b>2066</b>
bail...CNSA...substance...vehicle boarded by him ...cannot be considered without deeper appreciation of evidence...prima facie linked ...dismissed	<b>2035</b>
bail...CNSA...Though...marginally exceeds one K.G. ...juvenile...yet I do not ...release him on bail ...conclude his case within a period of 2 months failing ...shall be released on bail	<b>2136</b>
bail...CNSA...trial...four months failing...record reveals that he himself was instrumental in delaying ...once again I direct the trial Court to conclude his case	<b>2109</b>

bail...CNSA...Whether...in conscious possession of the substance ...not driving the car...further inquiry...be released on bail	<b>2164</b>
bail...co-accused ...on bail ...as a matter of law and equity likes are to be treated alike....be released on bail	<b>1988</b>
bail...confirmed the ad-interim pre-arrest bail...365 PPC...nothing ...mis-used ...dismissed.	<b>1946</b>
bail...Control of Narcotics Substances Act	<b>2200</b>
bail...Control of Narcotics Substances Act...250 kilograms of Charas ...	<b>2271</b>
bail...Control of Narcotics Substances Act...2980 grams of “Charas”...three FIRs to discredit ...not been convicted in anyone ...doubt...sentence attracting prohibitory clause ...be released on bail	<b>2202</b>
bail...Control of Narcotics Substances Act...3 / 4 of the ...None...can be appreciated without deeper appreciation of evidence...prima facie, connected...dismissed	<b>2245</b>
bail...Control of Narcotics Substances Act...500 grams “Charas”...be refused ...is not understandable...prohibitory clause...be released on bail	<b>2181</b>
bail...Control of Narcotics Substances Act...direction ...trial within four months was not complied ...don’t feel inclined to grant the bail to the petitioners	<b>2196</b>
bail...Control of Narcotics Substances Act...doubt the petitioner can be awarded a sentence attracting prohibitory clause for possessing ...quantity ...be released on bail	<b>2198</b>
bail...Control of Narcotics Substances Act...Doubt...attracting prohibitory clause...be released on bail	<b>2302</b>
bail...Control of Narcotics Substances Act...driver of ...no concern ...who were transporting the substance tried to decamp...recovered from the rear ...boarded by ...three persons...kilograms of “Charas” ...be released on bail	<b>2179</b>
bail...Control of Narcotics Substances Act...huge quantity of narcotics ...recovered from the rear of the car...further inquiry.....be released on bail	<b>2249</b>

bail...Control of Narcotics Substances Act...I doubt the petitioner can be awarded a sentence attracting the prohibitory clause...four months in jail would further tilt the scales of justice in favour of bail...be released on bail	<b>2185</b>
bail...Control of Narcotics Substances Act...kilograms of “Charas” and one liter of “liquor”...doubt ...attracting prohibitory clause ...be released on bail	<b>2206</b>
bail...Control of Narcotics Substances Act...petitioner cannot be awarded a sentence attracting the prohibitory clause, I do not see any reason ...be released on bail	<b>2183</b>
bail...Control of Narcotics Substances Act...possessing one kilogram of “Charas”...doubt...attracting the prohibitory clause...be released on bail	<b>2192</b>
bail...Control of Narcotics Substances Act...recovered from beneath one of the front seats ...requiring further inquiry...be released on bail	<b>2286</b>
bail...Control of Narcotics Substances Act...recovered from the vehicle ...None...can be appreciated without deeper appreciation of evidence...prima facie, connected ...dismissed	<b>2288</b>
bail...Control of Narcotics Substances Act...secret cavities of the car ...None...without deeper appreciation of evidence...prima facie...connected...dismissed	<b>2231</b>
bail...Control of Narcotics Substances Act...Though, the trial has not been concluded ...cannot be attributed either to the prosecution or the Court...manipulative tactics ...law and order ...cannot be lost sight...conclusion of the trial within ...(1 ½) month...dismissed	<b>2204</b>
bail...Control of Narcotics Substances Act...three kilograms of “Charas”...doubt ...attracting prohibitory clause ...be released on bail	<b>0</b>
bail...Control of Narcotics Substances Act...three kilograms of “Charas”...doubt...attracting prohibitory clause...be released on bail	<b>2277</b>
bail...Control of Narcotics Substances Act...two kilograms of “Charas”, ...doubt ...attracting the prohibitory clause...be released on bail	<b>2191</b>

bail...Control of Narcotics Substances Act...two kilograms of “Charas”...doubt ...attracting prohibitory clause ...be released on bail	<b>2239</b>
bail...declined bail ...ready to furnish the bonds ...direct the release of the petitioner on bail	<b>1179</b>
bail...declined bail...ready to furnish the bonds ...direct release ...on bail	<b>1154</b>
Bail...Fugitive...cannot be taken to an illogical and unworkable extreme and applied indiscriminately ...302/324/24...be released on bail	<b>1941</b>
bail...furnish bail bonds	<b>1156</b>
Bail...Illicit Arms Act...Bail...1991...doubts that petitioner is likely to be awarded an extreme penalty bail granted...be released on bail	<b>2579</b>
Bail...interim pre-arrest bail...¾ of the Explosive ...13 A.O./7 SIAA...two other ...similarly placed ...granted post-arrest bail ...no distinction ...Jail on technical ...even after his arrest... consistency...1986 SCMR 1380...dismissed	<b>2025</b>
bail...kidney and close to renal failure ...NAB ...bail if he furnishes bail bonds	<b>1571</b>
bail...marginally exceeds one K.G...be released on bail	<b>2155</b>
bail...NAB...accused similarly placed ...case cannot be distinguished...when...case for bail is made out, abscondence cannot be taken to unworkable extreme...furnishes bail bonds	<b>1352</b>
bail...Narcotics Substances Act...three kilograms of “Charas”... doubt ...sentence attracting prohibitory clause...be released on bail	<b>2298</b>
bail...no prospect of early hearing of his appeal...allowed...be released on bail	<b>1258</b>
bail...Not...sentence attracting prohibitory clause...be released on bail	<b>2047</b>
bail...Passport Act...Police Station FIA ...good number of forged passports ...recovered...none of the offences ...seven years ...be released on bail	<b>2049</b>

bail...prima facie linked with a crime attracting prohibitory clause...do not feel inclined ...for...bail	<b>1330</b>
bail...provisions of law the political authorities could detain...detention...as a vehicle to settle some civil dispute ...be released on bail	<b>1510</b>
bail...remained absconder...appeal for enhancement of sentence...appeal filed by the petitioner ...cannot be heard in near future owing to heavy backlog ...be released on bail	<b>1410</b>
bail...section 20 of the Offences Against Property ...in Jail for almost 20 months ...trial has not been concluded...fate cannot left hung for an indefinite period ...ultimate conviction...can repair the wrong caused by...bail...and no reparation ...an unjustified incarceration ...be released on bail	<b>1973</b>
bail...Sections 324, PPC / 3 / 4 of the Explosive Substances Act, 1908 ...7 of the Anti-Terrorism Act, 1997...none ...charged the petitioner nor the one charging ...be released on bail on ...to have given the firsthand account of the occurrence	<b>1338</b>
bail...served out half of his entire sentence ...prospect of early hearing of his appeal ...that too when his appeal cannot be heard in near future...be released on bail	<b>1259</b>
bail...served out the entire sentence ...appeal cannot be heard in near future...be released on bail	<b>1256</b>
bail...single injury as many as four persons ...nature of the injury ...distance ...case for further inquiry ...be released on bail	<b>1951</b>
bail...source never came to light...charged by the abductee...recovered from his house...arrested from the spot...if he furnishes bail bonds...dismiss the writ petition filed by Maqbali...trial within ...	<b>1327</b>
Bail...Ss.382/452/506...not named in the F.I.R. and description...did not tally ...weight and other details of ornaments...accused was admitted to bai	<b>1944</b>
Bail...Surrender of Illicit Arms Act...could not be held to be one falling...prohibitory clause...Bail was allowed	<b>1930</b>

bail...three kilograms of “Charas” and 2500 grams of “Opium”...trial ...despite direction ...has not been concluded ...jail for more than seven months ...be released on bail	<b>2247</b>
bail...three kilograms of “Charas”...doubt ...sentence attracting prohibitory clause...not supposed to keep in view the maximum sentence...but the one which is likely to be entailed...be released on bail	<b>2296</b>
bail...three kilograms of “Charas”...doubt...attracting prohibitory clause...be released on bail	<b>0</b>
bail...trial not concluded...despite direction ...trial has not been concluded...there remains any justification to keep her in jail...she has been in jail ...four months ...be released on bail	<b>2268</b>
compensation...default in payment of compensation/not be detained for more than six months...cannot be kept in jail for more than six months...be released forthwith	<b>1203</b>
complaint ...absence on the date fixed...absence...simplicitor would be sufficient to justify acquittal...dismissed	<b>620</b>
Complaint...dismissed the complaint...has not been decided after making a proper enquiry... set aside ...send the case	<b>1314</b>
Complaint...dismissed the complaint...has not been decided after making a proper enquiry... set aside ...send the case	<b>1314</b>
Complaint...to register a criminal case...complaint...adequate remedy...not of the type as would call for its investigation by the police...he can achieve his desired objective by filing a complaint	<b>802</b>
confession...whether...voluntarily made and legally recorded...15 minutes...should not be less than half an hour...no certificate ...result of inducement...stereo typed rubber stamp ...acquit	<b>644</b>
confiscation of vehicle...not given notice...order ...can't be maintained ...send the case back	<b>701</b>
detention...illegal custody...detenue is not with any of the respondents...wants ...for registration of case ...be investigated	<b>1622</b>

detention...release the detenues...detenues are not in the custody of the police ...insisted that the detenues are still with them...we cannot issue the writ ...at liberty to move against the officials...kidnapping the detenues in the court of competent jurisdiction	<b>1613</b>
forfeiting bond...penalty to the extent of Rs.80000...purely humanitarian ...patched up ...at bail stage ...reduce the penalty to ...Rs.15000	<b>698</b>
personal appearance...242 of the Cr.PC ...No hard and fast rules ...No rigid compliance ...primarily enacted ...dismissed in limine	<b>2225</b>
Quash...Customs Act...case is still in the phase of investigation...tend to prejudice the case ...(PLD 1971 SC 677...(1994 SCMR 2142) ...deprecated the interference ...in the phase of investigation...alternate adequate remedy ...249-A Cr.P.C...in limine	<b>1440</b>
Quash...learned Magistrate ...register a case ...324/34 PPC ...none of these provisions, in any case empower him to order registration of case...clearly without jurisdiction and lawful authority...quashed	<b>880</b>
Quash...malice and mala fide ...case has been forwarded to the Court of ...if so advised, move an ...under Section 265-K	<b>2294</b>
Quash...order/of this court...quash the order... confined only to the dismissal of Cr.Misc...and not the appeal	<b>2279</b>
Quash...respondent...requested...judicial magistrate to make spot inspection...respondent created obstruction on the public path ...allow this quashment petition	<b>2327</b>
sentence of accused awarded by the Judge Special Court Customs were consequently quashed	<b>2441</b>
Trial...trial within the statutory period...he cannot be left on tenterhooks for an indefinite period...Judge Accountability Court to conclude this case within 30...failing which ...be released on bail	<b>793</b>

<b>Constitution of Islamic Republic of Pakistan, 1973</b> Article 158...supply of natural gas for domestic, commercial and industrial units...province in which the Well-head of natural gas ...not at variance and now have developed a consensus	<b>1508</b>
constitutional petition was dismissed on account of non-prosecution as well as merits...Educational Institutions...duly recognized by the University Grant Commission...no discrimination can be made ...allow this C.M. ...allow this writ ...consider the petitioners for appointment in the first instance in preference over the new entrants	<b>797</b>
<b>Control of Narcotic Substances Act</b> 10 K.Gs. of chars...5 years R.I...delay in the dispatch of the parcel...delay...used to the detriment of the appellants...parcels containing the remaining substance ...5 years R.I. to 2 years R.I	<b>502</b>
10 Kg...sentenced them to six years R.I. each...driver...bag lying under the legs ...“Yes ”...private vehicle...no conscious knowledge ...does not appeal to common sense...A few discrepancies ...Defect...Chemical...not of much value ...quantum of sentence in ...harsh....six years each to three years	<b>713</b>
10 Kgs and 162 packets of chars which weighed 202 Kg...of 30 bore with 14 cartridges, 2 Kalashnikovs and a rifle of 222 bore with magazine loaded with 29 rounds ...imprisonment for life ...testimony remained un-shattered...consistent or confidence inspiring...connected with the crime beyond doubt...Attempt on the part of the appellants to flee after seeing the police officials also belies the plea that they had no conscious knowledge of the incriminating substance...rightly convicted ...fine...reduced from Rs.2 lac each to Rs.one Lac each	<b>1671</b>
1050 grams ...chars and 5 grams ...3 years R.I. ...magnitude of liability follows the magnitude of the crime...three years R.I. to one year	<b>526</b>

1050 grams of chars...imprisonment for one year ...Section 21 CNSA is directory and ...much less damaging...Chars Pukhta ...Chars Garda...recovery appears to be motivated...constable who being a co-villager and inimically disposed to the appellant...set aside ...acquit	<b>736</b>
1650 grams...10 years R.I...delay in dispatch of the parcel ...never been suggested at any stage during ...trial...103 Cr.P.C...people due to lack of civic sense ...do not run the risk ...10 years R.I. ...to 1 (one) year R.I...13 A.O. from Rs.2000/- to Rs.500	<b>494</b>
1680 K.Gs...truck...168 crates ...chars...quite consistent and confidence inspiring...no serious infirmity...sample for chemical examiner was taken only from one of them...life to 10 years RI ...quantum of punishment ... in proportion ...quantum ...substance proved	<b>473</b>
170 packets of Chars ...imprisonment for life with ...Chars Pukhta ...Gardah form	<b>731</b>
2 K.Gs. of chars ...two years R.I...beyond any shadow of doubt ...any ill will or hostility...female is a first offender... no previous conviction...2 years R.I. to one already undergone	<b>517</b>
2 K.Gs...chars...testimony of all the P.Ws. is consistent and unanimous...2 years ...Rs.5000...sufficient	<b>598</b>
205 grams of chars ...2 years R.I...undergone one month and 10 days imprisonment...be commensurate with the quantum ...2 years to the one already undergone	<b>519</b>
210 grams of chars...6 months...what type of seal ...omission ...very damaging ...delay in the despatch ...acquitted...set aside	<b>641</b>
25 Kg of chars...imprisonment for life ...“Whether the Assistant Chemical Examiner possessed the required qualifications ...after summoning and examining ...Examiner...again convicted ...Government Analyst within the terms of Section 35 of the CNSA...re-examination of the samples by a qualified Government Analyst ...set aside the convictions ...release on bail	<b>733</b>

250 grams of ‘charas’...one year R.I...vivid account ...no discrepancy ...nothing...was planted ...twenty-five days ...Rs.100	<b>707</b>
2500 grams of heroin...four years S.I...Rs.20000...plea of guilt ...look into the record...application of mind ...send the case	<b>680</b>
253 Kilograms of “Charas...08 Kilograms of “Opium” ...imprisonment for life ...2008 SCMR 991 ...samples...three...10 years R.I.	<b>656</b>
3 K.Gs.of chars... 8 years R.I ...8 years R.I. to 3 years R.I.	<b>528</b>
3 slabs...reduction in sentence ...samples...from three slabs...remaining...(PLD 2003 Peshawar 130)...to prove that the remaining substance...life with a fine of Rs. one million...10 years R.I. with a fine of Rs. one lac	<b>575</b>
3 years R.I...reduced to one year R.I.	<b>711</b>
30 Kg ...imprisonment for life...statement...before ...police...not admissible in ...Article 38...acquitted	<b>664</b>
4 K.Gs...5 years R.I...Farmanullah...statement of an accused made before Police being inadmissible...article 38 of the Order...Mst. Ishrat Begum ...un-shattered ...five years R.I. to one year and 10 months	<b>630</b>
4 Kg of chars...4 years R.I...Rs.20000...appellant is a female...already undergone	<b>670</b>
4030 grams of chars and 80 grams of heroin...one year R.I. with a fine of Rs.5000...having any grudge or animosity ...Minor discrepancies ...dismissed	<b>709</b>
5 K.Gs...5 years R.I. with a fine of Rs.30,000/- ...Farmanullah...Inadmissible...38 of the Order... Mst. Fayaz Begum ...un-shattered...five years R.I. to two years R.I	<b>636</b>
5 K.Gs...5 years R.I...Farmanullah... Inadmissible...article 38 of the Order...Mst. Nizahat Bibi...5 years R.I. to 2 years R.I...un-shattered.	<b>633</b>
5 kg of chars...four years R.I...five samples ...each packet contained many slabs...4 years to 2 years	<b>760</b>

519 Kg of chars...Motor Car ...imprisonment for life ...Rs.2 lac...imprisonment...in lieu of fine ...from two years to six month	<b>702</b>
540 K.Gs. of chars, 18 ½ K.Gs. of opium...14 years R.I...Rs. one lac ...presence in the vehicle...conscious...possession of ...acquit her	<b>602</b>
5980 grams ...10 years R.I...no significant discrepancy...	<b>515</b>
5980 grams... absence of any ill-will muchless enmity...reduce...10 years R.I. to 4 years R.I	<b>516</b>
6 Kg. of heroin...imprisonment for life ...witnesses are unanimous ...reduce the sentence to 10 years R.I	<b>678</b>
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7 Kg. of Chars ...sentenced...seven years R.I...material under the seat ...mystery...un-veiled ...could it be debited to ...either of them ...from the Bus...solid as well as powder form...rather dangerous to maintain ...set aside ...acquitted	<b>676</b>
7 kilograms of “Charas”...five years rigorous ...evidence as could link him with the box...set aside ...acquitted	<b>652</b>
8 K.Gs...30 bore ...one year R.I. ...P.Ws...contradicted each other...wild goose chase...charge...has not been proved ...acquitted	<b>589</b>
8 slabs ...3 years R.I...samples...three only...reduce the ...to the one already undergone	<b>729</b>
8500 grams ...five years ...Rs.Two lac...samples...one of the packets...other packet can not ...heroin...five years R.I. to two years R.I...Rs.Two lac to Rs.one lac	<b>720</b>

9 K.Gs...15 years R.I...parcel...sent...after a...delay of more than 24 days ...other infirmities ...sample...from one out of 58 slabs...substance proved to be chars is negligible in quantity...(2003 P.Cr.L.J. 680)...set aside ...acquit the appellant of the charge	<b>476</b>
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Bail...failure to conduct search in compliance with the provisions of S.21...Courts of law were bound to implement the statute...so long as it was a part of the statute, it had to be interpreted as it was	<b>1953</b>
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Control of Narcotic Substances Act...Charas weighing 2016 grams...shopping bag held by him...Finding of conviction...quantum of sentence had to be proportionate...reduced	<b>420</b>
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one K.G. of chars...neither...case property ...produced...exhibited...nor ...witness recovering ...examined...set aside the conviction	<b>600</b>

One Kg of Chars and 600 grams of heroin...two years R.I. each...it is a Taxi, mere passive sitting on the seat alongside the driver may not evince any criminality...acquitted	<b>757</b>
One Kg. of chars...3 months R.I., with... PWs consistently charged ...PWs had any ill-will or improper motive...dismissed.	<b>662</b>
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One KG...life ...One Million ...one K.G. of heroin...retaining sample ...re-examination of the heroin...case property was destroyed without any notice ...NLR 1995 SD 374...516-A Cr.P.C. the competent Court was under the obligation to secure...under its own supervision...Magistrate who was not competent to try the case...1996 P.Cr.L.J. 1446...the trial Court...2003 SCMR 45 ...set aside the conviction ...released from the Jail	<b>465</b>
Political Agent... could not be tried...section 46 of the CNSA...requires establishment of Special Courts ...Political Agent was not competent to try the petitioner...not competent to hear appeal or revision...be released on bail	<b>1164</b>
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<p>sections-21 and 22 of the Control of Narcotic Substances Act directory or mandatory...of neglect to comply with the provisions is not mentioned in the Statute, it shall be deemed to be directory is devoid of force in view of the paragraphs quoted above...A fleeting glance of this section would make it clearer still that every conceivable eventuality was all along in the mind of the legislature that is why even the Customs Officers were empowered to carry out the inquiry and investigation in the same manner as an authorized Officer under the Act, thus this too leaves no room for an officer below the rank of Sub-Inspector to figure anywhere in the scheme of this Act. It would, therefore, follow that the officers below the rank of S.I. are just non-entity for the purposes of this Act who can never be made entity by having recourse to the interpretative niceties...observations non est recedendum.. Where a thing was provided to be done in a particular manner, it had to be done in that manner and if not so done, the same would not be lawful....If the working of Muhammad Bashir, A.S.I. is affirmed there would be administrative chaos resulting in the judicial anarchy. This is the crux of the matter to make us pass the order of exoneration of Khalid Nawaz appellant...provisions of the Act are mandatory and observance thereof would be imperative to the validity of entry...release of the petitioner on bail</p>	<b>1914</b>
<p>sentenced to 8 years R.I ...peculiar circumstances of the case, the sentence was reduced from eight years to five years ...instead of...Supreme Court ...once again invoked the revisional ...section 439 Cr.P.C...this Court has become functus officio...dismissed</p>	<b>419</b>
<p>vehicle...confiscation ...set aside ...confiscation of the truck and send the case back</p>	<b>505</b>
<p>Vehicle...supported by the relevant documents ...there is no other rival claimant so far...allowed</p>	<b>2153</b>
<p><b>Co-Owners</b> being impleaded ...defendants...not...to interfere ...dismissed in-limine</p>	<b>908</b>

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<b>Copies</b> order bound to provide its copy...forthwith	<b>1128</b>
<b>Co-sharer</b> do not...suit for ...possession by a co- sharer against another can succeed unless the property is partitioned by metes and bounds	<b>287</b>
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<b>Cross Examination</b> cross examine the witnesses...we will not like to interfere ...decision...merits...the most cherished goal of law	<b>1001</b>
<b>Custody of the minors</b> factual controversy ...recourse to a competent forum	<b>800</b>
<b>Custom Act 1969</b> 156 (1)(8) (16), 157, 178. Special Judge Customs is not competent to try offences under Ss.156 (1)(8) (16), 157, 178 Customs Act as Special Court constituted under Control of Narcotic Substances Ordinance (1995) had exclusive jurisdiction	<b>2407</b>
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Refund or input adjustment of Sales Tax paid on packing material and chemical used in DTRE Scheme... Customs Rules, 2001	<b>2561</b>
Toyota Hiace ...Smuggled...auctioned during the pendency of the appeal...respondent has been deprived	<b>1818</b>
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<b>Damages</b> suit for damages...due to non-supply of electric connection...ill-will or malafide on the part of the officer working...WAPDA...required to be proved ...not proved no decree can be granted...omnibus allegation...dismissed	<b>83</b>
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detenue who being 12 years old...be released on bail ...to pass an appropriate	<b>1301</b>
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detenue/40 FCR apart...no objection ...released on bail ...bail bonds	<b>1272</b>
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detenue...not with any of the agencies...writ petition asked for cannot be issued.	<b>1302</b>
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detenues on bail/40 FCR...release the detenues on bail ...approach the competent forum for his release	<b>1209</b>
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detenues...have since been released...infructuous ...release...on receipt of Rs.45000/-. ...time honoured practice in the area.	<b>1229</b>
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district reporting officer...propose...did not propose any other person...be entered in the list of validly nominated candidates	<b>1045</b>
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<b>Family</b> Amount...taken away by respondent-wife ...never agitated ...this point cannot be agitated for the first time in a constitutional petition ...dismissed in limine	<b>795</b>
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dower ...dismissed in limine	<b>992</b>
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dower...golden ornaments ...no evidence...ornaments were taken back...dismissed in limine	<b>1430</b>
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separate house ...none to look after his father ...contracted second marriage...dismissed in limine	<b>1131</b>
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S.40...incarcerated...without any rhyme or reason and without there being any material on the record...Fundamental rights were available even to the residents of Tribal Areas...had jurisdiction...to grant relief to a person incarcerated illegally...be released on bail	<b>1114</b>
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<p><b>Loan</b> Company ran into a loss and was declared as a sick unit...Relief Committee ...Industrial Development Bank of Pakistan...Liquidation...wound up...put to auction ...not sufficient to discharge the liability...bank instituted a suit for recovery of Rs.5,16,54816.57 alongwith the penal interest...it was decreed ...we do not ...the impugned judgment is open to any exception...the appeal ...dismissed</p>	<b>1878</b>
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279/320/337-G/427...acquitted him...description of the facial features of the driver...nor any identification parade ...dismissed	<b>696</b>
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302 .324...Unsoundness of mind of accused... "Schizophrenia"...Provisions of S.465, Cr.P.C....Evaluation of mental state...by a Psychiatrist besides others was essential for just decision of the case...set aside conviction and sentence	<b>537</b>
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302(b)...Compromise...life...patched up...minors ...mutation...property and its value...one yearly average...acquitted	<b>755</b>

302(b)...F.I.R....as a 'dying declaration'...Only witness in the case, had also given a simple and straightforward narration...Ocular account...perfectly in accord with the medical evidence...Absence of enmity...ruled out...falsely implicate the accused...site-plan was not a substantive piece of evidence...Prolonged, noticeable and unexplained abscondence of ...Cause of altercation...shrouded in mystery	<b>457</b>
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302(b)-Appreciation of evidence...Injured witnesses were withheld...bullet was also dispatched to the Ballistic Expert twice with two different seals...Accused was acquitted	<b>2364</b>
302(b)compromise...imprisonment for life...acquitted	<b>746</b>
302, 324, 148 and 149-- Abscondance...Incident..highly...doubtful,	<b>2390</b>
302...109..acquitted...confession...exculpatory...charged none in ...the FIR ...dismissed in limine	<b>674</b>
302..Chance Witness...unless corroborated...Absconsion...as corroboration of the charge and not the evidence of the charge...motive for murder was inadequate and ocular version did not inspire confidence...acquittal of appellant...to imprisonment for life	<b>438</b>
302/307/353/34...life...absence of identification parade...confession...recorded without removing the impression caused by any inducement...but a cock and bull story...highly doubtful...set aside...acquitted of the charge	<b>412</b>
302/324/109...death...PWs...not ...cross-examined by anybody on behalf of the appellant...send the case back	<b>425</b>
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302/324/34...FIR ...delay...six hours ...distance...acquitted ...dismissed	<b>559</b>

302/324/404...25 years R.I...single entry wound...all the assailants fired...conflict...120 shots ...only two empties ...recovered...inherently un-reliable...improbable...set side...acquit	<b>509</b>
302/324/427/34...life on 2 counts...No effort was made to recover empties ...Exaggerated...to throw wide the net of implication to rope in...mere stamps of injuries on the person of a witness per-se will not guarantee the truth ...PLJ 1995 SC 1...(1981 SCMR 795...512 of the Cr. P.C ...Article 47...shifted to an unknown place in. Karachi...more of a formality than a search in real sense ...(PLD 1958 SC 392...convictions and sentences ...set aside and the appellants are acquitted	<b>780</b>
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302/449/436/148/149...life...patch-up...we do not think the fact that the offence is non-compoundable can create any hurdle in the way of acceptance of appeal...acquit	<b>1311</b>
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302...‘Lalkara’...acquittal...beside ‘Lalkara’ no overt act ...despite being armed with a lethal weapon did not give even a swing to it during the course of incident to indicate his intention initial presumption ...becomes double on the acquittal ...dismissed	<b>587</b>
302...Acquittal...suspicion...appears to be more of a cock and bull story ...dismissed in limine	<b>548</b>
302...acquitted...patched up ...verified to be correct...sentenced him to death	<b>668</b>
302...Appreciation of evidence...incompatible with the...innocence...no chain in the link should be missing	<b>530</b>
302...chance of mistaken identity or substitution would be absolutely nil...Minor discrepancies... which are apt to occur ...difference in power of retention and reproduction ...not bound to examine each and every witness mentioned in the FIR...suddenness of the occurrence ...altercation ...sentence of 10 years...for life	<b>626</b>
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302...confessional statement...grave and sudden provocation...inducement or promise...torture or undue influence...medical evidence...dismissed	<b>428</b>
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302...death... consistently deposed ...altercation...Chance of substitution is rare rather nil when ...exact words spoken ...	<b>432</b>
302...death...compromise ...acquitted	<b>666</b>
302...death...harsh ...preceded by an altercation...something bitter must have been uttered ...death into ...life	<b>437</b>
302...described but ...intensity of reaction ...convert...for life	<b>434</b>

302...life on 2 counts...2 years R.I...for causing injuries to the complainant...requisite intrinsic worth to prove ...cross-examination which perhaps in view of deteriorating standards of investigation is the only engine for bringing the truth into light...set aside ...acquitted	<b>613</b>
302...life...a few minor discrepancies...a few improvements ...being natural cannot adversely affect...gap of ...three years ...occurrence...substitution...remote...rightly convicted and sentenced	<b>771</b>
302...life...Compromise...confiscation of all immoveable property... patched up ...acquitted	<b>767</b>
302...life...compromise...no objection ...acquit	<b>750</b>
302...life...inferred that neither they were present on the spot nor they saw the incident...Dead body...riddled with bullets...crime of unremitting vengeance...Difference in dimension of at least two of the entry wounds...two persons with two different weapons...Kalashnikovs... Abscondence...corroborative and not evidence of the charge...innocent persons go into hiding...set aside...acquitted	<b>787</b>
302...life...Investigating Agency miserably failed ...no evidence is available...acquitted	<b>628</b>
302...life...ocular account ...P.Ws...not worth credence ...ocular account ...at variance with medical ...resident of another village...P.W...servant of ...father of the deceased ...witnesses bearing the stamps of injuries ...with-held ...failure...blood of human origin ...same group ...acquitted	<b>484</b>
302...Neither witness was produced nor any identification parade was...set aside the judgment and order...the appellant to be released	<b>2401</b>
302...patch up...set at liberty	<b>672</b>
302...presence of the P.Ws...complete dark...absence of ...light is just impossible...acquittal...dismissed in limine	<b>471</b>
302...PWs...not...cross-examined ...cruel and even callous to hear arguments on merits ...send the case ...back	<b>423</b>

302...R.I. for 25 years...except the armed presence of the appellant no role ...not give either a swing to the axe...or utter even a word...acquitted	<b>578</b>
302...type of weapons used...two persons...for an entry ...doing of one man...death was instantaneous ...acquitted co-accused...empties...subsequent induction ...positive report of ballistic expert ...set free ...set aside...perse cannot prove the guilt	<b>568</b>
302--proof of motive	<b>2386</b>
319/34...Acquitted...not examined the electric pole to find electric leakage...no postmortem was conducted ...(PLD 1958 SC 392)...Article 47...transferring statements ...proof that the witnesses were incapable ...dismissed.,	<b>2144</b>
324 ...3 years R.I...altercation over lunch...testimony... supported by the medical evidence...a sudden flare ...3 years to 2 years	<b>610</b>
324 ...3 years R.I...altercation over lunch...testimony... supported by the medical evidence...a sudden flare ...3 years to 2 years	<b>610</b>
324/337-F...one year R.I. and six months R.I. with 'Daman' to the tune of Rs.3000/- under section 337-F (v)six months R.I...Daman...nor the injuries ...proved...the injury is one ...assailants are three ...false implication of at least two...whether...fired from one or more than one weapon...acquit,	<b>491</b>
324/34/337Ai ii, Fii/452/427...Convicted and sentenced... charged falsely cannot be ruled out...acquitted,	<b>692</b>
324/353/342 ...seven years R.I...single piece of paper worth-the-name...to show ...proclaimed offender...every inmate of the house will have a right to resist his unwarranted entry or ingress even though he be a Police officer...will not be safe to maintain conviction ...investigation...members of the raiding party ...conviction and sentences ...set aside ...acquitted	<b>592</b>
324...3 years R.I... stands proved beyond doubt...sentence already awarded to ...is sufficient to meet the ends of justice...sentence has to be commensurate with the magnitude of the crime	<b>1740</b>

324...3 years R.I...not even a single empty...distance of 67 paces ...neither an exit ...nor...bullet is recovered ...conflicting motive...Doctor...never appeared ...secondary evidence ...more often than not is permitted only when ...injuries...doing of one person...as to whose fire hit...pinning of guilt on any one ...Absence of ...blood stained earth ...abscondence...cannot remedy the defects and infirmities ...corroborative and not vidence of the charge...acquitted,	<b>550</b>
324...5 years R.I...not by any means proved that it were they who fired the missiles...accessibility of the place of recovery to all and sundry...acquitted	<b>595</b>
324...5 years...set aside ...acquitted	<b>597</b>
324...8 years R.I...inquiry...Juvenile...many privileges ... many sentences ...cannot be awarded ...sent back ... set aside ...	<b>576</b>
324...firearm injury...imprisonment already undergone... intention to kill...does not appear ...dismissed.	<b>686</b>
324...firearm injury...imprisonment already undergone... intention to kill...does not appear ...dismissed.	<b>686</b>
324...one year S.I...nothing in their cross-examination as could suggest that the charge...false or motivated...substitution is a rare phenomenon...appeal...dismissed	<b>607</b>
337 F(V)/34...order of acquittal ...evidence...neither consistent nor confidence inspiring...injury ...who caused ...dismissed,	<b>618</b>
337-A (ii)/34 PPC/ 337/34...3 years R.I... 1.00 P.M. but the report was lodged at 8.15 P.M...The story of committing of carnal intercourse...afterthought...FSL... negative... not be safe to maintain their convictions and sentences...quality and quantity of evidence...moral turpitude is heinous... ...set aside ...acquitted ...dismissed,	<b>777</b>
337A(ii)/337F(v)/34...acquitted...fracture...but who out of the four caused it is any body's guess...kicks and fists ...be a doing of one man, all of them cannot be held responsible for that...as to whose blow resulted in injury...dismissed in limine	<b>639</b>

337-N ...five years R.I.each...nothing...that...appellant causing this injury is habitual, hardened, desperate and dangerous criminal, he could only be convicted in terms of Arsh and not in terms of imprisonment in view...imprisonment ...set aside ...the choice of weapons ...324 PPC ...sentence of one ...leave no doubt about the intention to kill,	<b>742</b>
365 A/109/148/149...Appreciation of evidence...Reasons justifying suspicion as to the complicity of accused in the crime wee not known...a wild goose chase...conviction and sentence...were set aside	<b>2366</b>
377 Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979), S.12 Appreciation of evidence Res gestae Occurrence was not witnessed by any of the prosecution witnesses...conviction and sentence...set aside	<b>2368</b>
377...10 years ...Rs.30000...a girl of 7/8 years...spontaneous and straightforward account of the occurrence...reduce...10 years R.I. to four years R.I.,	<b>722</b>
392/302(b)..5 years R.I...death on three counts ...incident is blind ...not been witnessed by any one...confessional statement of the appellant...on 27.4.2000 ...recoveries...at the instance of the appellant...why was he retained ...till 1.5.2000...re-arrest...more of a 'Darama' ...tortured and beaten by the Police...conviction and sentence...set aside ...appellant is acquitted,	<b>582</b>
409/34 PPC/FIA/Offences in Banks ...Acquitted...No responsibility can be fixed...procedure for transshipment was not strictly followed...whole affair doubtful ...many persons admittedly involved in the transaction ...presumption of innocence becomes double...dismissed in limine	<b>1731</b>
419 / 420...bottles bearing counterfeit...imprisonment till rising ...fine of Rs.2000/...neither machinery nor bottles nor chemicals...produced...in the Court...set aside ...acquit,	<b>561</b>

<p>420 PPC read with sections 5 (2) and 5 (c) of the Prevention of Corruption Act, 1947...accumulated assets well beyond his means...son...wife...father...mother...none of the assets shown in the account of the respondent belonged to him...Lucky Star won prize bonds...learned trial Court...being laboured and overstretched is not supported...wife of the respondent never opted to appear as DW in person...The indecent haste with which the proceeding in the Civil Court was concluded within three days...Amount through salary Rs.17,00,000/- ...Amount through Prize Bond...Rs.25, 00,000/-...found guilty of misconduct is convicted and sentenced to three years R.I. with a fine of Rs.50,00,000/- (Rs. Fifty lac) or in default to undergo six months S.I. under section 5 (2) of the Act. The properties...being disproportionate...confiscated,</p>	<p><b>2581</b></p>
<p>430...3 months S.I. each under section ...he himself is not a witness of the occurrence...nor in the site plan prepared at his instance...inordinate and unexplained delay of 20 days...set aside...fine ...refund.</p>	<p><b>1738</b></p>
<p>468/471 and 420...2 years R.I...vehicle ...recovered from the house of the acquitted co-accused...nothing incriminating ...Sessions Judge who acquitted the co-accused ...mere presence of the petitioner...capable of explanation on many other reasonable hypothesis...set aside ...set free</p>	<p><b>1737</b></p>
<p><b>Pakistan Standards and Quality Control Authority Act</b>          ...Interpretation of statutes...Powers of the Parliament to Legislate laws...Vires...Parliament in view of diverse socio-economic dynamics could legislate...was not ultra vires...While interpreting one must not act like a mechanic or a working mason having brick on brick without thought to the overall scheme--Approach or outlook should be akin to that of an architect who thought of the structure as a whole</p>	<p><b>1194</b></p>

<p><b>Parda Nashin Lady</b> to prove that the transaction was genuine and bonafide...understood by her ...independent advice ...burden of proving the bonafide ...always on the person who is a beneficiary</p>	317
<p><b>Partition</b> be divided into four shares, three brothers would get one share each, while the fourth share will go to three sisters, put to sale and the proceeds be distributed accordingly fee of the commissioner shall be Rs.5 lac...If any problem ...executing court ...this court...be resorted to</p>	81
<p><b>PATA-Riwaj</b> Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation...Dispute as to ownership of property...Case had not received judicial treatment at any level of relevant hierarchy functioning under Riwaj...Quid pro quo or a via media is desirable in politics which is a game of the possible---Administration of justice in a Court of law cannot succumb to such a phenomenon in any situation whatever regardless of the expediencies, whether administrative or otherwise...acted wholly without jurisdiction or taken any action beyond a sphere allotted thereto by law, such action amounts to a usurpation of power and as such is an act without jurisdiction and lawful authority...Condition for conferment of jurisdiction on Court or Tribunal is to decide rightly, but not wrongly---Where Tribunal goes wrong in law, same goes outside jurisdiction-- -Where law is not correctly or properly observed, same would be a fit case for interference in exercise of Constitutional jurisdiction</p>	856
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claimed / recovery of Rs. 50000/...A.S.I...essentially of a civil nature...overstepped his jurisdiction ...daring and glaring example of abuse of power...restore the buffaloes of ...within 3 days	<b>910</b>
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detenu...Grounds...abstract and omni bus...nothing ...being omni bus are abstract and hypothetical ...detenu cannot be justified...alternate efficacious remedy of representation...2001 P.Cr.L.J. Peshawar, 1373...PLD 1997 Peshawar 148...release of the detenu	<b>1041</b>
<b>Prohibition (Enforcement of Hadd) Order, 1979</b> 3/4...sale of Alcoholic drink...one year R.I...nexus with the bag and carton...acquitted	<b>684</b>

Art. 3/4 read with CNSA Section 9---Opium...Record did not show...Chemical Examiner...No reliance can thus, be placed on the report of Chemical Examiner...be released	<b>2414</b>
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Vehicle...Arts.3/4...Retention of the vehicle in police custody for an indefinite period could also serve no useful purpose...prima facie...to be the owner of the vehicle	<b>1927</b>
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Compensation...Property having a similar nature and character was acquired by authorities through private negotiation on the basis of mutation at the rate of Rs.5000 per marla...reduced the amount of compensation from Rs.8000 per marla to Rs.5000 per marla accordingly	
Compensation...rightly concluded that the market value of the property was not less than Rs.5000/-...proper appreciation of evidence	<b>71</b>
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Interest...Entitlement to get interest	<b>2348</b>
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<b>Statute</b> Discriminatory use of a provision of law...Statute cannot be struck down...discriminatory action...can be struck down...struck down the impugned order...to regularize the admission of petitioners	<b>828</b>
<b>Tax</b> advance income tax/slaes tax...CNG Filling Station ...cannot be held confiscatory or violative of the Constitutional provisions as, 1	<b>234</b>
excise duty...once a lesser amount ...could not have been increased...charged to give a push ...could not be extended for good ...stands dismissed	<b>47</b>
exemption/of the taxes...exemption...were extended to only those Industries which were not already in existence in the country on the day of its promulgation i.e. 19.1.1995...could not have been extended to him ...especially when such exemption is not extended by the SRO itself...without merit is dismissed with no order as to costs	<b>887</b>
Income Tax Ordinance ...CNG Station, assailed the vires of S.235 of the Income Tax Ordinance, 2001...were not ultra vires the Constitution---Petitions were dismissed for being without any substance	<b>2508</b>
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Income Tax Ordinance...return did not show closing stock...No illegality or jurisdictional error in order of remand by Income Tax Appellate Tribunal	<b>2568</b>

income tax ordinance...Whether...justified to include...the cash purchases from the purview of section 50(4)...legislative intent ...to evolve a mechanism to collect tax in advance at the source from a person ...expression supply ...comprehensive...to include ...both sale ...purchase....supply is just inconceivable without the activity of sale and purchase...amendment in an Act or Ordinance can not be retrospective...neither imposes a new nor adds to an already existing liability nor tends to take away a right already accrued...Assuming...an amendment...being declaratory in nature will have retrospective effect...dismissing appeals ...restore those of the Assessing Officer	<b>1763</b>
income tax...failed to file ...statement under section 139 and 142 ...Once...there is nothing in the Statute requiring an assessee to file statement...failure...not be an act to be visited with a penalty	<b>1883</b>
interest being a business income could not be subjected to tax ...interest earned... can't be termed as profits and gains derived by it ...interest earned on deposit being covered by Section 30 of the Ordinance is liable to be taxed	<b>1899</b>
professional tax...Cantonment...no canons of interpretation takes any such business, trade, calling or employment carried in the Cantonment area outside the scope of the Province or its Assembly...provincial Government ...cannot be restricted...Banks or Banking Companies cannot be termed as corporation in any sense of the word	<b>1390</b>
re-claim or deduct the input tax paid on caustic soda, bottle glasses and PMX glasses which are not the direct constituent and integral part of the taxable goods produced...when their supply with the premix aerated water has not been disputed in the forums below ...their supply also forms part of taxable activity...deduction even on PMX glasses cannot be denied	<b>1821</b>
Sales Tax Act...Levy of sales tax..."Supply"...on receipt of oil and packing material from another company, assessee processed and packed the same then it was liable to be taxed on account of conversion charges...was covered by expression 'supply' as...High Court declined	<b>1837</b>

Sales Tax Act...Stock in trade...Wires and cables...No input tax adjustment could be claimed on wires and cables,	<b>2542</b>
Sales tax, levy of...Assessee was a contractor, supplying cooked food stuff to be served in an industrial canteen...Person supplying cooked and prepared...food to an industrial canteen for business activity was not exempted	<b>1895</b>
sales tax...Appellate Tribunal could order the recovery of sale tax ...there was no mala fide...nature of penalty...additional tax	<b>1825</b>
seized goods as ...tax appellate tribunal...without ...payment of duty and taxes...seized goods...smuggled...controversy...essentially factual on all counts	<b>1831</b>
tax collected under the said provision is said to be final tax on income of CNG Stations...double taxation ...we do not feel inclined to declare any of the provisions as ultra-vires...what is not income under the Income Tax Act can be made income under the Finance Act or exemption granted by the Income Tax Act can be withdrawn by the Finance Act or its efficacy can be reduced...do not agree ...that any of the provisions ...is violative of the Constitutional provisions or in any way ultra vires...dismissed	<b>1469</b>
tax references...income from letting out of residential portion of the business premises ...any property ...shall be chargeable to income tax	<b>1886</b>
the interest earned on deposit being covered by Section 30 of the Ordinance is liable to be taxed.	<b>1909</b>
Tobacco/license fee...116 of the N.W.F.P. Local Government Ordinance, 2001...not ...mandatory...to seek prior approval before levying taxes, fee etc...mandatory...no taxes, fee etc...without previous publication of the tax proposal...presumption in favour of the legislative competence...(PLD 1997 Supreme Court 582)...always lean in favour of their legality ...dismissed	<b>813</b>

<p>wealth tax - Act 1963...assessments...securities refundable to students...liabilities...The term question of law is used in three distinct but related senses. It in the first place means a question which is authoritatively answered by the law itself. In the second sense it means a question as to what the law on a particular point is or what is the true and real meaning behind a provision of law which is ambiguous. In the third sense it means a question which relates to the applicability or otherwise a provision of law in view of the facts proved in a given case. This category of questions can also be called mixed questions of law and fact, since their answers one way or the other depend on the existence or otherwise of certain facts. For instance the question as to what is the period of limitation for a suit for recovery of possession by an owner after his dispossession is purely a question of law but whether the suit was instituted within the period provided by the first schedule of the Limitation Act would essentially be one of fact...Any other question which does not fall in any of the categories mentioned above, would be a question of fact. However...PLD 1958 Supreme Court (Ind.) 151) ... (PLD 1957 Supreme Court (Ind.) 188...wealth means the amount which is exclusive of debts...none of the formulations enumerated above, raises a question of law...would call for no interference</p>	<b>1843</b>
<p>Wealth Tax Act...mixed question of law and fact...Term 'question of law' is used in three distinct but related senses...Net wealth means the amount which is exclusive of debts...Refundable securities...none of the formulations raised a question of law, the appeal being misconceived, did not call for interference</p>	<b>2519</b>
<p><b>Terms and Conditions of Service</b>  “25%” quota...retired employees...would be adjusted...when any vacancy occurs,</p>	<b>1541</b>
<p>absorption...denied the absorption...terms and condition of service...can't issue the writ asked for...treat it as an appeal before the Federal Service Tribunal</p>	<b>1476</b>

adjust...order/appointing/being illegal and void ab initio...injustice of the worst form ...to adjust the petitioner against the vacancy of Laboratory Assistant	<b>1600</b>
advance increments...Once...Granted...could not be withdrawn subsequently...allow this petition ...to grant the advance increments,	<b>1227</b>
after..retirement... proceeding ...Service Tribunal Act... treat this petition ...representation ...ecision... one month	<b>1226</b>
agreement...cannot bind the department...to consider the petitioner in appoint/property/donated...when any vacancy occurs,	<b>1317</b>
Agreement...to ensure uninterrupted supply...that it was a dispute between two governments and it could only be decided by Supreme Court...only sought enforcement of mandate contained under Art. 158 of	<b>1595</b>
Alternate remedy...not being the rule of law but a rule of procedure can't limit or restrict the jurisdiction of this Court ...(PLD 1972 SC 279...(PLD 2008 SC 135)...terms and condition ...can't step-in...PLD 1995 SC 530...Government functionaries...pass orders of posting and transfer by behaving like pawns...the hands of Ministers, MNAs and MPAs...nothing to do ...Article 129 of the Constitution...treat it as a representation ...send it to the Chief Secretary...within a month	<b>1557</b>
appeal before the Departmental authority... shall not be arrested except ...accordance with law	<b>1237</b>
appeal before the Service Tribunal ...we cannot entertain this petition...Though Federal Service Tribunal returned...treat it as an appeal before the Federal Service Tribunal and send it thereto ...File...Federal Service tribunal as early	<b>1261</b>
appeal...Article 10A of the constitution... warning...in derogation of...University...appeal before the appellate authority...treat it as an appeal before the appellate authority	<b>1629</b>
appeals...filed appeals before the Departmental Authority...not like to intervene	<b>1439</b>

applications have been filed ...but none ...decided...direct the respondents...to dispose of...within a fortnight	<b>1246</b>
applications have been filed...departmental authorit	<b>1278</b>
applications...filed applications ...respondents...to dispose of the applications ...within a fortnight	<b>1404</b>
appoint /deceased employees children quota... petitioner be adjusted as committed,	<b>1584</b>
appoint/vacancies of PST...9 vacancies but four were concealed...could not refer to any document showing ...9 vacancies ...dismissed.,	<b>1304</b>
appoint...merit list... provisional merit list...omission on the part of person compiling the merit list...record was set straight...dismissed	<b>1531</b>
appointment...already filed an application...wouldn't like to step-in at this stage...to decide	<b>1493</b>
back benefits...lacked required length of service...acting charge basis...eligibility and not fitness...to be promoted ...treat this petition as an appeal before the Service Tribunal	<b>1291</b>
before...departmental authority ...can't intervene...already filed representations ...within a month	<b>1335</b>
can't intervene...already filed a representation ...within a month	<b>1442</b>
can't intervene...treat it as a representation ...for decision ...within a month	<b>1658</b>
can't issue the writ asked for...already filed a representation ...within a fortnight	<b>1283</b>
can't issue the writ asked for...already filed a representation...to decide...within a month	<b>1286</b>
can't issue the writ asked for...already filed representations ...within a week	<b>1282</b>
can't step-in...already filed a representation ...decide the representation	<b>1295</b>
can't step-in...already filed a representation ...decide...within 15 days	<b>1569</b>

can't step-in...already filed a representation ...decide...within a month	<b>1567</b>
can't step-in...already filed a representation ...to decide ...within a fortnight	<b>1242</b>
can't step-in...already filed a representation ...within a fortnight	<b>1210</b>
can't step-in...filed a representation	<b>1685</b>
can't step-in...filed a representation	<b>1555</b>
can't step-in...treat it as a representation	<b>1701</b>
can't step-in...treat it as a representation before the departmental authority	<b>1371</b>
can't step-in...treat this petition as an appeal before the Service Tribunal	<b>1293</b>
cancelling their appointment...order...without giving them any show cause notice...taken on the board or associated ...principle of natural justice ...send the case back ...for passing an appropriate order	<b>1609</b>
challenge to the vires of the notification...(1991 SCMR 1041)- can approach the Service Tribunal...Section 4 ...doesn't bar ...Tribunal to sit in judgment on the vires of rules ...terms and conditions of service...New rule or notification of ...is also an order ...can't strike a discordant note...treat it as an appeal before the Service Tribunal	<b>1454</b>
civil court..."no"...where a statute provides a forum...appointed...enquiry....Exonerated...repatriation to... Review Petitions ...Syndicate to the detriment of any person...Officer...Punished...application to the Syndicate for review ... resort must be had to that and not to civil court...plaint shall be deemed to have been returned,	<b>1529</b>
Civil Servants (Appointment, Promotion and Transfer) Rules, 1973...sought to correct his date of birth recorded at time of joining service in year 1965---Validity...applications made in years 1966 and 1982...not explained as to why he had slept over...case of estoppel by conduct	<b>2429</b>

continue till completion of the project...terms and conditions of service ...one month's notice...post held by the petitioner could not have been advertised ...petition is thus allowed	<b>1351</b>
contract...Locus Poenitentiae...contract...Section 21 of the General Clauses Act, 1897 provides that power to pass an order includes the power to amend vary or rescind it...cannot be exercised where the order passed is acted upon...allow these writ petitions, declare the act of the respondents as without jurisdiction and lawful authority and hold that the petitioners are entitled to retain the posts till the expiration of the stipulated period	<b>1055</b>
could not advance any convincing reason...set aside ...send the case back ...for decision afresh	<b>1401</b>
criteria for ...can be urged before the Service Tribunal...treat this writ petition as an appeal before the Service Tribunal	<b>1653</b>
delaying tactics...appointed as dispenser...adjusted against the posts of Health Technicians...adjust the petitioners against the vacancies of Dispensers	<b>1284</b>
disciplinary action...can't intervene...treat it as a representation before ...departmental authority	<b>1408</b>
duties on the posts...terms and conditions of service ...treat them as representations ...decision...within one month	<b>1581</b>
eligible...shall be considered for appointment...if found eligible	<b>1400</b>
experience of teaching...edifice...arguments...collapses	<b>1421</b>
filed a representation...we wouldn't like ...to decide ...within one month	<b>1626</b>
filed applications...haven't been decided ...to dispose of the applications ...within a fortnight	<b>1394</b>

<p>Finding of ...based on no evidence...It would not deserve any other fate but quashment, when it is based on misreading or non reading of evidence, erroneous assumptions of law and facts or no evidence...High Court has, and should have, jurisdiction to control the proceedings of inferior Courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right...the condition of the grant of jurisdiction is that it should decide the matter in accordance with the law...allow the writ petition alongwith C.M. No. set aside the entire proceeding including the impugned orders and reinstate the petitioner</p>	<p><b>1093</b></p>
<p>Finding of ...based on no evidence...It would not deserve any other fate but quashment, when it is based on misreading or non reading of evidence, erroneous assumptions of law and facts or no evidence...High Court has, and should have, jurisdiction to control the proceedings of inferior Courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right...the condition of the grant of jurisdiction is that it should decide the matter in accordance with the law...allow the writ petition alongwith C.M. No. set aside the entire proceeding including the impugned orders and reinstate the petitioner</p>	<p><b>1093</b></p>
<p>grant them BPS-21...we wouldn't like to step-in ...respondents to decide the appeals...within a month</p>	<p><b>1320</b></p>
<p>implement the judgment /of the service tribunal...has not been granted back benefits...absence of any express verdict holding him entitled to back benefits, he cannot ask for that...1991 S C M R 2087 ...in the subsequent enquiry...be entitled to back benefits</p>	<p><b>1249</b></p>
<p>implement the judgment/of the service tribunal</p>	<p><b>1711</b></p>
<p>implement the notification...Service Tribunal ...treat this...writ petition as an appeal</p>	<p><b>1233</b></p>
<p>implementation of the order /competent authority...approach the authority passing the order</p>	<p><b>1244</b></p>

Increments on acquiring higher qualification...Rule did not provide any such eventuality	<b>2481</b>
issuing their LPCs...terms and conditions of service ...Service Tribunal...can't intervene...already filed a representation ...within a month	<b>1507</b>
joint seniority list ...appointment of a Professor by promotion...they have to be considered for being promoted ...Professors...working paper ...within one month	<b>1487</b>
jurisdiction in service matters...returning the plaint ...(2010 SCMR 1484)...(PLD 1984 SC 70)...relation between ...master and servant...Recourse to this court cannot be had when services of the petitioner are not regulated by any Statute and no violation of such Statute has been made ...allow this petition....send the case back to the civil Judge	<b>1660</b>
leave ... being on long leave...no objection ...is allowed	<b>2223</b>
leave on full pay...once expressed satisfaction about the implementation of...cannot reopen the matter...treat this ...under Section 12(2) CPC ...to pay arrear of 360 days to	<b>1457</b>
lower college course...dismissed	<b>1591</b>
merit...appointment...petitioner ever applied for any post...dismissed.	<b>1639</b>
nominate...being intra departmental...pass an appropriate order ...within a fortnight	<b>1275</b>
non-domiciled teaching staff...terms and condition of service...Service Tribunal...wouldn't like to step-in...already filed representations...decide...within a fortnight	<b>1247</b>
notice...cannot give the relief asked for...treat them as grievance notices to the employers	<b>1617</b>
notification / being nullity...be challenged before the Service Tribunal...treat ...appeal before the Service Tribunal	<b>1376</b>
order / being void...terms and condition of service...filed a representation...to decide	<b>1254</b>
order / without jurisdiction...filed a representation...be disposed of ...two weeks	<b>1218</b>

order has been passed by the Senior Member Board of Revenue...get the order mentioned above implemented	<b>1434</b>
Paragraph-xiv of the said policy...an appeal to be ...treat it as an appeal before the Departmental authority i.e...decide ...within a fortnight	<b>1679</b>
pay package...unjustified when they are paid what was promised to them in the letter of appointment...dismissed	<b>1432</b>
pay their salaries from...pay their salaries... we wouldn't like to intervene ...treat it as representation ...one month	<b>1253</b>
payment of an allowance/terms and conditions of service...can't intervene...already approached the departmental authority ...to decide...within a month	<b>1538</b>
pension papers...the Service Tribunal...finalize the pension ...not later than one month	<b>1248</b>
pension When liabilities have been cleared...direct...finalize the matter within one month	<b>1664</b>
pension...her husband as he remained ...Additional Judge of High Court ...( PLD 2008 SC 522)...had not been confirmed..., is not open to any interference...dismissed	<b>1582</b>
Peshawar High Court...employees...at par with the...Service Tribunal Act...already filed a representation ...decide...within a fortnight	<b>1168</b>
post of tehsildar...already approached the competent authority...authority to pass an appropriate order ...within a month	<b>1321</b>
posting and transfer ..., can't step-in...treat it as an appeal	<b>1344</b>
posting and transfer ...can't step-in, atleast...already filed a representation	<b>1577</b>
posting and transfer ...can't step-in, atleast...already filed a representation ...decide...within one month	<b>1615</b>
posting and transfer ...can't step-in...already filed representations ...to decide ...within one month	<b>1631</b>
posting and transfer ...can't step-in...treat it as a representation	<b>1342</b>

posting and transfer ...can't step-in...treat it as a representation ...for decision ...within a month	<b>1709</b>
posting and transfer ...can't step-in...treat it as a representation ...within one month.	<b>1539</b>
posting and transfer ...can't step-in...treat it as a representations	<b>1669</b>
posting and transfer ...can't step-in...treat it as a representations...	<b>1667</b>
posting and transfer ...can't step-in...treat this petition as representation	<b>1251</b>
posting and transfer ...Service Tribunal...can't step-in...already filed a representation	<b>1522</b>
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## **Regular First Appeals**

## **Civil Revisions**

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75/2003

TAJ ALI KHAN---Appellant

Versus

Haji MUHAMMAD ALI ---Respondent

**JUDGMENT**

R.F.A No.12/2002  
(2003 Y L R 1130 Peshawar)

Decided don 27.01.2003

(a) Civil Procedure Code (V of 1908)---

**Ejaz Afzal Khan, J**----O. XXXVII, Rr.2, 3 & 4---Suit in summary jurisdiction upon negotiable instrument--Defendant's failure to apply for leave to appear and defend suit within prescribed time---Effect---Decreeing the suit by Court--Principles.

There is no doubt that proceedings under Order XXXVII, Rules 2 and 3, C.P.C. are summary in nature, and where defendant does not submit an application for leave to appear and defend within prescribed time, the allegations, in plaint shall be deemed to have been admitted and the suit so instituted shall be decreed. But at the same time, the Court seized of the matter is not relieved of its duty to see and ensure before decreeing the suit that the person proceeded against was not only served, but was also made to understand the nature of proceedings. It was preeminently conspicuous in this context that Legislature in its wisdom prescribed a form for plaint and a form for the summons to be served on defendant of such proceedings.

Stringent action should be taken against those, who default wilfully, but not against those, who are not at fault or whose default, if any, was because of failure of Process Serving Agency to serve the summons with the letter and spirit of law, because no

Peshawar High Court

person can be punished or penalized for the acts of commissions and omissions of others.

(b) Civil Procedure Code (V of 1908)---

----O. XXXII, Rr.2, 3 & 4---Suit upon promissory note---Trial Court decreed suit for defendant's failure to apply for leave to appear and defend suit within prescribed time---Defendant's plea for setting aside of decree was that he never knew about nature of proceedings, as no plaint was accompanied with notice served on him--Court initially fixed case for evidence, but later on reviewed its order and only after hearing the arguments dismissed application---Validity---Nothing was available on record to show that defendant knew the nature of proceedings or had been served in accordance with requirements of law---No canon of law or justice would justify such a stringent action against defendant in absence of such material---Order to decide application in absence of such material--Order to decide application after recording evidence was perfectly in accordance with safe administration of justice---Such order should not have been reviewed without sane, sound and sensible reasons---Nothing was gained by defendant by not appearing within stipulated time---High Court accepted appeal with costs of Rs.5,000, set aside impugned judgment and remanded case to Trial Court to decide application after recording evidence.

Naeem Iqbal v. Mst. Zarina 1996 SCMR 1530; Messrs Simnwa Polypropylene (Pvt.) Ltd. and others v. Messrs National Bank of Pakistan 2002 SCMR 476; Manzoor Ahmad v. Muhammad Iqbal 1994 SCMR 560; Messrs United Distributors Pakistan Limited v. Ahmad Zarie Services and another 1997 MLD 1835; M. Ashraf Parwaz v. Prof. Asghar Ali Naz 1995 SCMR 45 and Syed Sarwat Hussain Zaidi v. Abdul Hameed 1999 MLD 2182 ref.

(c) Administration of justice---

----No person could be punished or penalized for acts and omissions of others.

Gohar Zaman Kundi for Appellant.

Peshawar High Court

Minhajuddin Alvi for Respondent.  
Date of hearing: 27th January, 2003.

## **JUDGMENT**

The respondent instituted a suit under Order XXXVII, rule 2 of the C.P.C. for recovery of an amount to the tune of Rs.4,40,000 on the basis of a promissory note dated 4-3-2000 in the Court of learned District Judge, D.I. Khan. When the appellant failed to move an application for leave to defend within 10 days, the learned District Judge decreed the suit of the respondent, vide his judgment, dated 9-4-2001. As soon as the appellant came to know about the decree so passed against him, he moved an application for setting it aside on the ground mentioned therein. The learned District Judge after getting reply of the respondent, fixed it for evidence, vide his order, dated 21-6-2001 but afterwards on the application of the learned counsel for the respondent, he again fixed the case for arguments and after hearing the parties, dismissed it vide his order dated 16-9-2002. Hence this appeal.

2. The learned counsel appearing on behalf of the appellant contended that once the learned District Judge decided to record evidence on the application of the appellant, it was not proper to change his mind and review his order particularly when it was not questioned in a higher forum. The learned counsel for the appellant next contended that the appellant never knew the nature of the proceedings as no plaint was accompanied by the notice served on him, therefore, such stern and stringent action could not have been taken against him.

3. The learned counsel appearing on behalf of the respondent by placing reliance on the case of Naeem Iqbal v. Mst. Zarina 1996 SCMR 1530 contended that the proceedings under Order XXXVII, rules 2 and 3 of the C.P.C. are summary in nature and where the defendant does not obtain leave to appear and defend within the prescribed time, the allegations in the plaints shall be deemed to have been admitted and the plaintiff shall be entitled to a decree. The learned counsel to give added vigour to his arguments relied

Peshawar High Court

on the cases of Messrs Simnwa Polyproplene (Pvt.) Ltd. and others v. Messrs National Bank of Pakistan 2002 SCMR 476, Manzoor Ahmad v. Muhammad Iqbal 1994 SCMR 560, Messrs United Distributors Pakistan Limited v. Ahmad Zarie Services and another 1997 MLD 1835, M. Ashraf Parwaz v. Prof. Asghar Ali Naz 1995 SCMR 45 and the case of Syed Sarwat Hussain Zaidi v. Abdul Hameed 1999 MLD 2182 (Lah.).

4. I have gone through the record and carefully considered the submissions of the learned counsel for the parties.

5. There is no doubt that the proceedings under the above mentioned provisions of law are summary in nature and where the defendant does not submit at, application for leave to appear and defend within the prescribed time, the allegations in the plaint shall be deemed to have been admitted and the suit so instituted shall be, decreed. But at the same time, the Court seized of the matter is not relieved of its duty to see and ensure before decreeing the suit, that the person proceeded against was not only served but was also made to understand the nature of the proceedings. It was pre-eminently in this context that the Legislature in its wisdom prescribed a form for plaint and a form for the summons to be served on the defendant of such proceedings.

6. There is no material so far on the record to show that the appellant either knew the nature of the proceedings or was served in accordance with the requirements of law. In the absence of any such material no cannons of law or justice let aside those of natural justice, will justify such a stringent action against the defendant or warrant the disposal of the case in the manner resorted to by the learned District Judge. His order dated 21-6-2001 to decide the application after recording evidence thereon was perfectly in accordance with safe administration of justice, which should not have been reviewed or rescinded without any sane, sound and sensible reason. Stringent action should be taken against those, who default wilfully, but not against those, who are not at fault or whose default, if any, was because of the failure of Process Serving Agency to serve the summons in accordance with the letter

Peshawar High Court

and spirit of law, because no person can be punished or penalized for the acts of commissions and omissions of others.

7. It is also not understandable as to what could possibly be gained by the appellant by not appearing within the stipulated time, even if, it is assumed for the sake of arguments that he was served and apprised about the nature of the proceedings, when he of his own accord appeared in the Court 15 days later. The learned District Judge was required to attend to all these aspects of the case before passing such a harsh order.

8. Where it is not clear from the record that the appellant was served in accordance with the requirements of law and that he knew the nature of the proceedings lodged against him and the mechanism to defend which is always invariably disclosed in its summons, the judgments cited by the learned for the respondent, I am afraid will have no relevance to the instant case.

9. For the reasons discussed above, this appeal is allowed with a cost of Rs.5,000, the impugned judgment is set aside and the case is remanded to the learned District Judge for deciding the application of the appellant for setting aside the ex parte decree after recording evidence within a period of three months. The record of the case be sent to the learned District Judge. As this appeal has been allowed, the Civil Miscellaneous being infructuous are dismissed. The cost shall be paid by the appellant to the respondent before the trial Court.

S.A.K./711/P.

Appeal allowed.

Peshawar High Court

TOWN MUNICIPAL ADMINISTRATION, TOWN-1,  
PESHAWAR---Appellant

Versus

RIFAT HUSSAIN --- Respondent

## JUDGMENT

R.F.A. No.49/2002  
(2003 CLC 1370 Peshawar High Court)

Decided on 28.02.2003

Civil Procedure Code (V of 1908)

**Ejaz Afzal Khan, J** ----S. 80 & O.VIII, R.10---Limitation Act (IX of 1908). S.5---Time-barred appeal---Condonation of delay---Principle---Summonses, in the present case, were issued only in the name of Administrator of the Municipal Committee notwithstanding the fact that the Secretary, Local Government was also a party---Without service of the Secretary, Local Government, there was absolutely no justification to strike off defence or close his right to cross-examine the witnesses---Appeal; in the present case, though was time-barred and delay had not been explained in accordance with law, the Court could not shut its eyes and allow injustice to reign supreme---High Court, in circumstances, exercised its suo motu revisional jurisdiction to prevent the abuse of the process of the Court and consequent injustice---State, though could not be given different or preferential treatment in a row between citizens and the State, but at the same time it could not be allowed to be treated in a manner defying all the dictates of procedural law meant to protect its rights as litigant.

Sabahuddin Khattak for Appellant.

Abdul Sattar Khan for Respondent.

Date of hearing; 28th February, 2003.

Peshawar High Court

## **JUDGMENT**

This R.F.A. is directed against the judgment and decree dated 10-7-2001 of the learned Civil Judge Peshawar whereby he decreed the suit of the respondent for recovery of Rs.10,00,000 (Rs. Ten Lacs) as damages.

2. The learned counsel appearing on behalf of the appellants contended that the appeal in this case could not have been filed within time prescribed therefore as after the promulgation of N.-W.F.P. Local Government. Ordinance, 2001, the entire structure of the Local Government underwent a radical change therefore, the delay in filing the appeal is liable to be condoned and that the order striking off the defence on account of failure of the appellants to file written statements was also uncalled for as they were not served in accordance with the requirements of law. The learned counsel by referring to the order-sheets further submitted that the learned trial Judge was interested just in the disposal of the case with least concern to do justice between the parties, therefore, the impugned orders be set aside and the appellants be allowed to submit written statements and contest the case on merits.

3. The learned counsel appearing on behalf of .the respondent contended that the appellants knew all along about the impugned orders and that the delay of more than ten months has not been explained in accordance with the requirements of section 5 of the Limitation Act, therefore, in the circumstances of the case, the appeal of the appellants be dismissed as there is no justification in law or morality to give them an exceptional extraordinary or unusual treatment.

4. I have gone through the record and carefully considered the submissions of the learned counsel for the parties.

5. A perusal of the order-sheets would indicate that the learned trial Court right from the very inception- intended to proceed with an indecent haste in flagrant disregard of the provisions contained in the C.P.C. in general and section 80 in particular. Where the

Peshawar High Court

Secretary Government was a party, the learned trial Judge was required to allow nor less than 3 months for submitting its written statement, provided, of course, he was served in accordance with law. Similarly without complying with the provisions of section 80 of the C.P.C., he was not supposed to have struck off the defence of the appellants under Order VIII, rule 10 of the C.P.C. It is quite strange to note that summonses were issued only in the name of Administrator of the Municipal Committee notwithstanding the fact that the Secretary, Local Government was also a party. So long as the Secretary, Local Government was not served there was absolutely no justification whatever to strike off defence or close his right to cross-examine the witnesses. In this view of the matter, even though the appeal is barred by time and delay has not been explained in accordance with the requirements of law, the Courts of law cannot shut their eyes and allow injustice to reign Supreme. Leaving aside the appeal, this Court in view of the facts highlighted above shall be constrained to exercise its suo motu revisional power to prevent the abuse of the process of the Court and consequent injustice.

6. No doubt in a row between citizens and State, the latter cannot be given different or preferential treatment but at the same time it cannot be allowed to be treated in a manner defying all the dictates of procedural law meant to protect its rights as litigant.

7. For the reasons discussed above, all the orders passed to the detriment of the appellant are set aside with a cost of Rs.15,000 (Rs. fifteen thousand) to be paid by the appellants to the respondents in the trial Court and the case is sent back to the learned trial Judge for trial denovo in accordance with law. The parties are directed to appear before the concerned Court on 7-3-2003.

M.B.A./777/P  
Order accordingly.

Peshawar High Court

Director (S&ML) N-W.F.P --- Appellant/Petitioner (s)

Versus

Director LAC --- Respondent (s)

***JUDGMENT***

RFA. No. 84/2000  
(PLD 2004 Peshawar 44)

Date of hearing 01.12.2003

**EJAZ AFZAL KHAN, J.-** This R.F.A. is directed against the order dated 8.6.2002 of the learned Referee Judge Mardan whereby he dismissed the reference filed by the appellant on the ground that it was not filed by a competent person within the terms of section 50 (2) of the Land Acquisition Act.

2. The learned counsel appearing on behalf of the appellant by placing reliance on the case of Haji Muhammad Pervez and 3 others..vs..Engineer Azizullah Khan and 4 others (PLD 1999 Peshawar 53) and the case of Messers Ittehad Cement Industries..Vs..Govt. of Baluchistan through Secretary Industry Quetta and 4 others (1997 CLC 562) contended that in view of the judgment given by the Shariat Appellate Bench of the Hon'ble Supreme Court in Shariat Appeal No.7 of 1989, the right to make reference, file an appeal and cross-objection has been given to the Federal Government and the Acquiring Department, therefore, the reference was competent and it should not have been dismissed without adverting to the merits of the case.

3. As against that, the learned counsel appearing on behalf of the respondents firstly contended that this appeal being connected with C.R.No.610/2003 be heard therewith, moreso when, an order in this behalf has been made by his Lordship Mr.Justice Tallat Qayyum Qureshi on 28.10.2003. The learned counsel by placing reliance on the cases of Pakistan through Military Estate Officer, Kharian Cantt and another..vs..Abdul Hayee Khan through Legal Heirs and 5 others (PLD 1995 Supreme Court 418) and the case of Iftikhar Hussain Shah and others...Vs..Pakistan through Secretary, Ministry of Defence Rawapindi and others (1991 SCMR 2193) next contended that in view of the provisions contained in sections 18 and 50(2) of the Land Acquisition Act, right of reference or appeal being a creation of statute cannot be exercised by any person unless so conferred on him under the Statute.

Peshawar High Court

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The impugned order would reveal that reference filed by the appellant was dismissed mainly on the ground of its being incompetent without knowing that the law has since been amended and this right has been conferred on the Federal Government including the Acquiring Department as it was held by the Shariat Appellate Bench of the Hon'ble Supreme Court in Shariat Appeal No.7 of 1989, the relevant paragraph whereof is reproduced hereunder for the facility of reference which reads as under:-

“We order that the aforementioned sections of the Act shall be amended so as to provide for right of making reference, filing cross-objections and appeal to Federal Government or the concerned department of the Federal Government or of the Provincial Government as also the Company or the local authority for whose benefit the acquisition is made. In that context the proviso to section 50(2) of the Act shall be deleted.”

6. Another relevant paragraph of the aforesaid judgment may also be quoted with advantage which is reproduced as below:-

“The grounds which weighed with the Federal Shariat in making the recommendations are cogent and sound. The amendments in the aforesaid provisions of the Act would make the law more consistent and equitable. It is against all canons of principles and equity that the Provincial Government may have a right to refer the matter to the Court and file a cross-objections but the Federal Government and its department are not given such a right. It would amount to negation of justice and is repugnant to the injunctions of Islam. The wisdom behind such amendments would be to give all the parties a fair opportunity to prove regarding the reasonable amount of compensation to be awarded. A party who has to pay the money from its own funds should have been given a chance to adduce evidence for the purpose of determining the amount of compensation. The proposed amendments would advance remedy to an aggrieved party. It would be fair and just to give a right to make a reference file a cross-objection, lead evidence and file an appeal to those parties who have been denied such a right under section 18,22-A, 50 and 54 of the Land Acquisition Act.”

Peshawar High Court

7. When considered in this background, I have no hesitation to hold that the learned Referee Judge has not acted in accordance with the declared law of the land by dismissing the reference without advertng to the merits of the case. The judgments rendered in the case of Haji Muhammad Pervez and 3 others..Vs..Engineer Azizullah Khan and 4 others and Messers Ittehad Cement Industries Ltd.Vs. Government of Baluchistan through Secretary Industry Quetta and 4 others (supra) cited at the bar by the learned counsel for the respondents are therefore, not relevant to the instant case as those deal with the appeals filed before the aforesaid amendment. The argument that this appeal being connected with C.R.No.610 of 2003 be heard therewith as similar question has been involved therein is incorrect altogether, since no question of competency or otherwise of the reference has been agitated in that, therefore, this appeal as well as the Civil Revision mentioned above are to be disposed of independently.

8. As a sequel to what has been discussed above, this appeal is allowed, the impugned order is set aside and the case is sent back to the learned Referee Judge for decision afresh in accordance with law after giving an opportunity to produce evidence in support of their respective claims. The parties are directed to appear before the learned Referee Judge on 24.12.2003.

Dated:1.12.2003.

J U D G E

Peshawar High Court

Taj Muhammad --- Appellant/Petitioner (s)

Versus

Provincial Government --- Respondent (s)

### ***JUDGMENT***

RFA. No. 79/1998

Date of hearing 23.01.2004

**EJAZ AFZAL KHAN J.-** The appellants whose reference for enhancement and apportionment of compensation was dismissed by the learned Referee Judge vide his judgment and decree dated 20.3.1998, preferred the instant appeal.

2. It was argued by the learned counsel for the appellants that forefathers of the appellants were owners in the property comprised in village Shamilat-e-Deh acquired for the up-gradation of the Basic Health Unit and that the learned Referee Judge erred in dismissing the reference notwithstanding the fact that evidence on the record was sufficient to prove their claim for enhancement as well as apportionment.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that the appellants have not brought on the record sufficient evidence to prove their ownership, therefore, their claim for enhancement as well as apportionment was rightly rejected by the learned Referee Court.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Appellants' claim as to the ownership may have some ring of truth but as far as the available record goes, he could not bring any evidence thereon to substantiate their claim. In the absence of any evidence showing their ownership in the property comprised in Shamilat-e-Deh, I am afraid their claim could not have been accepted. Therefore, I do not find any infirmity legal or

Peshawar High Court

factual in the impugned judgment of the learned Referee Court which is thus maintained.

6. For the reasons discussed above, this appeal being without substance is dismissed. However, the appellants would be at liberty to assert their claim regarding the property through a separate suit. In the circumstances of the case, I would make no order as to costs.

Dated:23.1.2004.

J U D G E

Peshawar High Court

Pakistan WAPDA --- Appellant/Petitioner (s)

Versus

M/S FASCO Ltd --- Respondent (s)

***JUDGMENT***

RFA. No. 28/2000

Date of hearing 17.02.2004

**EJAZ AFZAL KHAN J.-** The respondent being a Private Limited Company incorporated under the relevant Ordinance was awarded a contract for the work named as (Furnish, Deliver and Stock pile Gravel, Mardan Scarp), vide agreement dated 28.2.1984. When the respondent almost completed his work, he was directed to stop further supply. When this incident also coincided with the imposition of liquidated damages and withholding of payment due, he instituted a suit in the Court of the learned Civil Judge Peshawar, which on completion of its proceedings was decreed, vide judgment dated 12.2.2000. Hence this appeal.

2. It was argued by the learned counsel for the appellants that the learned trial Court without considering the evidence on the record decreed the suit of the respondent, moreso when no evidence much less convincing was brought on the record to substantiate their averments made in the plaint. He next argued that deduction on account of shrinkage factor was rightly made as the measurement of the gravel supplied in terms of truck load was not in accordance with the requirements of agreement. While justifying imposition of liquidated damages on the respondent, the learned counsel argued that when the requisite supply was not made within the stipulated period by the respondent, he was rightly saddled therewith, The learned counsel next argued that the claim of the respondent to the tune of Rs, 2, 26, 74, 656/- on account of provision of washed material could not have been awarded by the Court below as no evidence was brought on the record to justify this amount.

Peshawar High Court

3. As against that, the learned counsel appearing on behalf of the respondent argued that though the stipulated supply was to be completed from 2.2.1984 to 12.10.1987 but the respondent, as is evident from the letter dated 8.9.1987 completed it before the target date notwithstanding that the appellants failed to provide smooth and compact surface therefor. The learned counsel next argued that when change in the mode of measurement from cross section to truck load emanated from a variation order made by a competent authority, deduction on account of shrinkage factor was just out of question. With regard to the claim made in respect of washed material, the learned counsel argued that when despite being specifically averred in para-18 of the plaint, it was not at all denied by the appellants in their written statement, no issue arose and, therefore, the question of leading evidence thereon would hardly arise. He next argued that when it is patent from the evidence on the record that the parties were aware of the points in issue and led evidence in this behalf, the objection that no issue was framed would be an unmeaning technicality unless of course prejudice is shown to have been caused to the appellant which is quite obviously missing in this case.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. As the claim of the respondent with regard to the washed material has not been duly reflected either in the issues framed by the learned trial Court or in the evidence led by the appellants in general and the respondent in particular, we will not like to maintain the impugned judgment particularly when this as well as other connected issues decided in favour of the respondent have not been dealt with in accordance with the provisions of Order-XX Rule 5 of the C.P.C.. Since a huge amount to the tune of crores is sought to be recovered from the appellants, a specific issue manifesting this controversy should have been framed. As the claim of the respondent was never accepted by the appellants and pre-eminently remained disputed through out before and during the litigation, some evidence, as could satisfy judicial conscience before the award of a decree of such an amount, should have been

Peshawar High Court

adduced. The claim should not have remained abstract or confined to an ipse dixit. It was a legal requirement to have brought it forth from behind the rampant of abstraction to the world of concrete reality. It was also the bounden duty of the Court to see and satisfy itself that the claim made by the respondent is based on substantive evidence, otherwise his decision would be more of a conjecture than a judgment required to be given by a Court of law.

6. Since mere allegation is not sufficient from which a conclusion can be drawn much less a judgment rendered, we do not feel persuaded, notwithstanding many convincing arguments of the learned counsel for the respondent to maintain the impugned judgment, moreso when the evidence as well as the judgment itself with regard to the material particulars of the case is deficient in content. In this view of the matter, we are of the firm and considered view that the remand of the case would be inevitable.

7. As a sequel to what has been discussed above, we allow this appeal, set aside the impugned judgment and send the case back to the learned trial Court for decision afresh in accordance with law after framing proper issues in presence of counsel of the parties. The parties would be at liberty to adduce further evidence to substantiate their respective claims. As it is an old case, it be decided within a period of 3 months. The parties are directed to appear in the Court concerned on 27.2.2004. In the circumstances of the case, we will not make any order as to costs.

Announced on:  
Dated 17.02.2004

J U D G E .

J U D G E

Peshawar High Court

Bacha Rehman --- Appellant/Petitioner (s)

Versus

Inayat Khan --- Respondent (s)

### ***JUDGMENT***

RFA. No. 103/2000

Date of hearing 18.06.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition which has wrongly been entered as RFA seek to impeach the validity of the judgment and decree dated 14.10.2000 of the learned Zila Qazi Dir whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 26.3.1999 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where the respondents failed to prove the document which was the sole basis of their claim, the learned appellate Court should not have relied thereon. He next argued that even report of the Commissioner could not have been considered as a piece of evidence unless a finding confirming or rejecting it before hearing the final case was made.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the document relied upon by the respondents being 30 years old was blessed with presumption of truth under Article 100 of Qanun-e-Shahadat, therefore, it was rightly relied upon. While converting the second argument of the learned counsel for the petitioners, the learned counsel submitted that where the learned Appellate Court based its finding by referring to the report, it clearly means that it was confirmed, therefore, failure to make any order confirming or rejecting it before the final hearing of the case, will not adversely affect its evidentiary value.

Peshawar High Court

4. A perusal of the impugned judgment reveals that the learned appellate Court summarily disposed of the lis before him without adverting to the evidence adduced by the parties. Since it being Ist Court of appeal and final Court of facts, was required to discuss each and every aspect of the evidence and it's; bearing on the fate of the case, I do not think, that the learned Court has handed down a finding in accordance with Order-XLI Order-31 of the C.P.C.

5. No doubt it was within power and competence of the learned Judge to appoint Commissioner for collecting evidence essentially local in nature and rely on such evidence but before doing so he was required to have acted in accordance with the provisions of C.P.C. He should have given his mind before hearing the main case whether the report submitted by the local Commissioner was confirmed or otherwise. If in any way such report enabled him to arrive at a just and right conclusion in the lis before him, he should have discussed it in the judgment and given reasons therefor.

6. When the judgment of the learned appellate Court is deficient in content and radiates the impression that it was not given after due appraisal and conscious consideration of the evidence on the record, I do not feel inclined to uphold it.

7. For the reasons discussed above, this petition is allowed, the impugned judgment and decree are set aside and the case is sent back to the learned appellate Court for decision afresh as hinted to above.

8. As it is an old case, it be disposed of within a period of six months. The parties are directed to appear in the Court of the learned Zila Qazi Dir on 6.7.2004.

Dated:18.6.2004.

J U D G E.

Peshawar High Court

Muhammad Shafiq --- Appellant/Petitioner (s)

Versus

Haji Muhammad Nazir --- Respondent (s)

### ***JUDGMENT***

RFA. No. 15/1999

Date of hearing 24.06.2004

**EJAZ AFZAL KHAN J.-** An Inter Cooler Jeep bearing registration No. LOQ-686, was purchased by appellant No.1 from the respondent for a sum of Rs.19,50,000/- on 26.5.1996. Out of the said amount Rs.7,00,000/- was paid on the same date and the remaining was promised to be paid on 26.9.1996. The aforesaid transaction was witnessed by a deed as well as receipt executed on the even date. When the payment was not made by appellant No.1 on the stipulated date, appellant No.2 stepped in by executing yet another deed undertaking therein to pay the amount on 30.12.1996 failing which, he would pay the double of it within two months after such date. When even he despite undertaking failed to pay the amount agreed upon, the respondent instituted a suit for recovery of Rs.25,00,000/- in the Court of Aa'la Illaqa Qazi which after recording evidence and hearing the parties was decreed, vide judgment dated 15.12.1998, hence this appeal.

2. It was argued by the learned counsel for the appellant that the amount outstanding against appellant No.1 was Rs.12,50,000/-, therefore, a decree for a sum of Rs.25,00,000/- was totally un-called for. He by referring to the statement of Bakht Munir who was examined as P.W.1, contended that where the witness admittedly undertook to pay the amount outstanding against appellant No.1, he too was a necessary party and no decree could be passed against the appellants as he by undertaking the payment stepped into their shoes, more so when it was accepted by the respondent, therefore, the judgment and decree of the learned trial Court being based on mis-reading and non-reading of evidence be set aside and the case be remanded to the learned trial

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Court for decision afresh after due consideration of the evidence on the record.

3. As against that, the learned counsel appearing on behalf of the respondent, argued that where appellant No.2 undertook to pay the double of the outstanding amount in case of his failure to pay the said amount on the stipulated date, the learned trial Court has rightly decreed the suit for the said sum when the transaction, documents witnessing it and the document undertaking to pay the double of the amount have been proved in accordance with law and there is nothing on the record to dispute their execution.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is not disputed that the vehicle was purchased by appellant No.1 for a sum of Rs.19,50,000/- and that a sum of Rs.7,00,000/- was paid and the remaining was promised to be paid on a date mentioned in the deed. It is also not disputed that when appellant No.1 failed to pay the amount on the stipulated date, appellant No.2 by executing another deed undertook to pay the said amount on a given date failing which, he would pay its double. It is also not disputed that Bakht Munir, a witness examined by the respondent also undertook the responsibility to pay it on receipt of a cheque for similar amount from appellant No.1, yet we will not like to stretch the controversy to illogical extremes in order to enlarge its scope and drag any other in the arena by shifting and multiplying the responsibility when admittedly the actual outstanding amount is Rs.12,50,000/-. We, therefore, hold that the respondent is entitled to get a decree for a sum of Rs.12,50,000/- only and not its double.

7. For the reasons discussed above, we by partially allowing this appeal, modify the impugned judgment and decree to the extent of Rs.12,50,000/- In the circumstances of the case, we will make no order as to costs. It may, however, be noted that

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the decree in favour of the respondent shall only be effective, if he affixes a Court fee of Rs.3000/- on his plaint.

Dated:24.6.2004.

J U D G E

J U D G E

Peshawar High Court

Gul Rehman --- Appellant/Petitioner (s)

Versus

Iqbal ud Din --- Respondent (s)

### ***JUDGMENT***

RFA. No. 16/2003

Date of hearing 15.10.2004

**EJAZ AFZAL KHAN J.-** The appellant through the instant appeal has questioned the order dated 23.11.2002 of the learned Aa'la Illaqa Qazi, whereby he dismissed his suit on his failure to deposit the pre-emption amount within 15 days.

2. It was argued by the learned counsel for the appellant that once an order was made for depositing 1/3<sup>rd</sup> of the probable value of the property sought to be pre-empted, the learned trial Court could not have passed another order, therefore, the failure to deposit the pre-emption amount within the stipulated time, will not call for dismissal of the suit.

3. As against that, the learned counsel appearing on behalf of the respondents argued that where an order for depositing 1/3<sup>rd</sup> of the sale consideration was passed in the absence of any documentary evidence, there was nothing in the law to restrain its substitution with another, if the amount originally mentioned in the plaint turns out to be incorrect. The learned counsel next contended that where the second order was passed with the consent of the plaintiff, he could not have turned round to say that this order being abinitio void, could not have been passed by the trial Court.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. No doubt that in the plaint the market value of the property was mentioned as six lacs and an order for depositing its 1/3<sup>rd</sup> was accordingly made but when later on its probable value turned out to be 13 lacs, another order for depositing its 1/3<sup>rd</sup>

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within 15 days was made with the consent of the appellant on 15.10.2002. When the said order was not impugned by the appellant in the higher forum nor it was ever stated that it was never passed with his consent, the only consequence to ensue upon his failure to deposit 1/3<sup>rd</sup> of the said amount within the stipulated time would be dismissal of his suit. When viewed in this perspective, I do not find any infirmity muchless legal in the impugned order as could justify interference therewith.

6. For the reasons discussed above, this appeal being without merit is dismissed.

Dated:15.10.2004

J U D G E

Peshawar High Court

Khair ur Rehman --- Appellant/Petitioner (s)

Versus

Abdul Kabir Khan --- Respondent (s)

### ***JUDGMENT***

RFA. No. 23./2004

Date of hearing 24.01.2005

**EJAZ AFZAL KHAN J.-** Khairur Rehman, appellant herein has questioned the order dated 13.11.2003 of the learned District Judge, whereby he returned the memorandum of appeal to the appellant for presentation in the High Court, as according to him, it was well beyond his pecuniary jurisdiction.

2. It was argued by the learned counsel for the appellant that where the value mentioned in the suit for the purpose of jurisdiction was three lacs, the learned District Judge was not competent to return the memorandum of appeal on the ground of pecuniary jurisdiction. If at all, the learned counsel urged in the alternative, the appeal before this Court was barred under the law for having been filed beyond the period of limitation, this time was liable to be condoned as the time consumed in the wrong forum was solely because of the act of the Court which cannot prejudice the cause of any one.

3. As against that, the learned D.A.G. representing respondents Nos.2 to 4 contended that where the value mentioned for the purpose of jurisdiction in the plaint does not exceed the pecuniary jurisdiction of the learned District Judge, the appeal could not have been returned on this score.

4. The learned counsel appearing on behalf of respondent No.1 argued that though the decree was passed for a sum of Rs.3,00,000/- (Rs. Three lacs) but if the amount of interest awarded by the trial Court is added thereto, the subject matter was exceeded the pecuniary jurisdiction of the learned District Judge,

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therefore, his order being free from any infirmity merits no interference.

5. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

6. The record reveals that the appeal in the Court of the learned District Judge was presented well within time. If it was well beyond the pecuniary jurisdiction of the learned District Judge, he could have returned it on the same day or at least on the date it was heard in motion as the very purpose of hearing of an appeal in motion is to see and ensure whether it was presented in the proper forum? Where the learned Judge sat and slept over the matter for months and months together and the day it transpired that it was beyond his pecuniary jurisdiction by then the period of limitation to file it in the High Court stood expired, any time so consumed could not have been construed to the detriment of the appellants as it being an act of the Court as per principle enshrined in the maxim "actus curiae neminem gravabit" cannot prejudice any.

7. Quite apart from this, where the value mentioned in the plaint for the purpose of jurisdiction governs its fate right from the very inception to the last, the learned trial Court could not have ordered the return of appeal on this score as held in the case of Gul Zaman..Vs..Muhammad Shafique ( PLD 1989 Peshawar 247)

8. For the reasons discussed above, this appeal is allowed, the impugned order is set aside and the cases is sent back to the learned District Judge for decision afresh. As it is an old case, it be disposed of as expeditiously as possible but not later than two months.

Dated:24.1.2005

J U D G E

Peshawar High Court

LAC --- Appellant/Petitioner (s)

Versus

Sabz Ali --- Respondent (s)

### ***JUDGMENT***

RFA. No. 55/2004

Date of hearing 31.01.2005

**EJAZ AFZAL KHAN J.-** This is a regular first appeal directed against the judgment dated 24.1.2004 of the learned Referee Judge, whereby he accepted the reference filed by the respondent and thus enhanced the compensation of the property from Rs.1,57,031/- to Rs. 2,55,173/-.

2. It was argued by the learned counsel for the appellants that where the superstructure of the tube-well was raised in 1983, the learned Judge could not have awarded its compensation on the basis of its assessment worked out by the S.D.O. Public Health according to the scheduled rates prevailing in 1993.

3. As against that, the learned counsel appearing on behalf of the respondent argued that where every passing day brings unthought-of increase in the prices, the S.D.O. Public Health has rightly assessed the value of the superstructure of the tube-well in accordance with the scheduled rates of 1993 and that the learned Referee Judge committed no error much less legal by founding his judgment thereon. He next urged that where the compensation was enhanced, the respondent was entitled to 6% simple interest as of right as it is a mandate of the Statute itself and that this Court while exercising powers under Rule 33 of Order XLI of the C.P.C. can award it even though cross-objections have not been filed in this behalf by the respondent. Relies on the case of Government of N.W.F.P. and others..Vs.. Mst. Jamshaid Bibi and another (PLD 1997 Peshawar 19) and the case of Province of

Peshawar High Court

Punjab through Collector..Vs..Eng: Jamil Ahmad Malik and others  
(2000 SCMR 870).

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Even if the superstructure was raised somewhere in 1983, its owner was required to be compensated according to its value existing on the date of its acquisition when every passing day brings manifold increase in the prices of construction, therefore, the learned Referee Judge has acted perfectly in accordance with law while awarding compensation worked out by the S.D.O. Public Health on the basis of the rates prevailing in 1993. Needless to say while assessing the compensation of the property acquired, the Courts of law are required to pay that price to the affectee owner which is asked by a willing seller and paid by a willing purchaser.

7. The argument of the learned counsel for the respondent that the respondent was entitled to get 6 % simple interest as of right as it is the mandate of the Statute and that this Court while exercising jurisdiction under Rule 33 of Order XLI of the CPC can award it even though cross-objections have not been filed is not without substance, when this omission is not justified by any cannons of law and is supported by the dictums referred to above.

8. For the reasons discussed above, this appeal is dismissed with the observation that the respondent shall be entitled to 6 % simple interest on the enhanced amount.

Dated:31.1.2005

J U D G E

Peshawar High Court

Usman Khan --- Appellant/Petitioner (s)

Versus

Hassan Dad --- Respondent (s)

***JUDGMENT***

RFA. No. 110/2003

Date of hearing 04.02.2005

**EJAZ AFZAL KHAN J.-** This appeal has been filed in this Court under the impression that it was well beyond the pecuniary jurisdiction of the learned District Judge.

2. As the value mentioned in the plaint for the purpose of jurisdiction is Rs.150/-, the Court of the learned District Judge is competent to entertain, hear and decide this appeal on merits.

3. Though this Court is not stripped of jurisdiction to entertain this appeal, yet it would be proper to remit it to the Court of the learned District Judge for decision on merits as its entertainment by this Court will deprive either of the parties of a right to file revision in this Court.

In view of what is stated above, this appeal is sent back to the learned District Judge Swabi for decision on merits. The parties are directed to appear in the Court of the learned Judge on 21.2.2005.

Dated:4.2.2005

J U D G E

Peshawar High Court

ABDULLAH JAN----Appellant

Versus

M. JAMIL SHAH----Respondent

## JUDGMENT

R.F.As. Nos. 54 and 55/1998  
(2006 C L C 1284 Peshawar)

Decided on 2nd May, 2006

Tort---

### **Muhammad Qaim Jan Khan and Ejaz Afzal Khan, JJ**

--Defamation-Suit for damages---Defamatory statement showing that plaintiff had grabbed a great deal of property belonging to widows and orphans, was published in newspapers---Since said statement was alleged to have been published at the instance of defendant, plaintiff instituted a suit for damages to tune of rupees six crors---Trial Court decreed the suit to the extent of rupees twenty lacs---Validity---Defendant had filed appeal against said judgment and plaintiff had also filed appeal for enhancement of amount---Defendant, though had disputed alleged defamatory statement which was published in the newspapers, but one of his witnesses, when examined in the court, admitted that whatever was published in the newspapers was the essence of what was stated by defendant and the people who gathered at his residence at the relevant time---Impugned finding of Trial Court, was not open to any exception, in circumstances, but it could not be sustained to the extent of amount of damages granted by Trial Court to the tune of Rs.20,00,000, when no convincing evidence had been adduced by plaintiff to prove his good reputation and impact of statement thereon---Plaintiff was required to prove that he was in fact belittled in the estimation of the people because of said statement--  
-When no such evidence had come forth, a token damages to the tune of Rs.20,000 (Twenty thousands) would be sufficient to meet the ends of justice.

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Ajit Singh v. Radha Kishen AIR 1931 Lah. 246; Province of Punjab through Collector Bahawalpur, District Bahawalpur and others v. Col. Abdul Majeed and others 1997 SCMR 1692 and Haji Rehmdil v. The Province of Balochistan and another 1999 SCMR 1060 ref.

Mian M. Yunis Shah for Appellant.

M. Alam and S. Yunis Jan for Respondent.

Date of hearing: 2nd May, 2006.

## **JUDGMENT**

**EJAZ AFZAL KHAN, J.**--- A defamatory statement showing that Mian Jamil Shah respondent No.1 herein has grabbed a great deal of property belonging to widows and orphans was published in Daily "Khubrain" dated 27-3-1995 Daily "Mashriq" of the same date and in the Daily "Khubrain" dated 29-3-1995. Since the statement was alleged to have been published at the instance of Abdullah Jan and Mian Moeenuddin, appellant and respondent No.2, herein, respectively, A respondent No.1 instituted a suit for damages, to the tune of Rs.6,00,00,000 (Rs. Six crores) in the Court of the learned Senior Civil Judge, Nowshera. When the learned trial Court after recording evidence decreed the suit of respondent No.1 to the extent of Rs.20,00,000 vide his judgment and decree dated 28-4-1998, the appellant filed R.F.A. No.54 while respondent No.1 filed R.F.A. No.55 of 1998 for enhancement of the amount. As both of them arise out of the same lis, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the appellant in R.F.A. No.54 of 1998 that where it has not been proved on the record as to who made the statement thus, published in the newspapers, the suit of the respondent was liable to be dismissed. He next submitted that, if at all, by any means, it is assumed that this statement was made by the appellant and respondents Nos.2 to 4, it

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being based on truth cannot call for an award of any amount of damages.

3. As against that, the learned counsel appearing on behalf of respondent No.1 submitted that where one of the witnesses examined by the appellant admitted in his cross-examination that whatever was published in the newspapers was the essence of what was stated by the appellant and the people who gathered at his residence at the relevant time, it was proved that it was published at the instance of the appellant, therefore, the suit of respondent No.1 was rightly decreed. While controverting the argument of the learned counsel for the appellant with regard to the truth of the statement, the learned counsel submitted that where the appellant did not specifically plead it in his written statement, it cannot be considered altogether. The learned counsel to support his contention placed reliance on the case of *Ajit Singh v. Radha Kishen* AIR 1931 Lah. 246. The learned counsel, then submitted that where the remaining defendants have not preferred any appeal against the impugned judgment, it shall be deemed to be final at least against them. In support of R.F.A. No.55 of 1998, the learned counsel submitted that where it is proved on the record that defamatory statement was published at the instance of the appellant and the other respondent with malice, the suit should have been decreed in the terms of prayer.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that the statement, mentioned above, was published in the newspapers recounted above. Though the appellant disputed this statement but one of his P.Ws. when examined in the Court, admitted that whatever was published in

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the newspapers was the essence of what was stated by the appellant and the people who gathered at his residence at the relevant time. Truth of the statement has neither been pleaded in the written statement nor proved through the evidence on the record, as such it remained unsubstantiated. The case of Ajjit Singh v. Radha Kishen (supra) may be quite germane to the situation. In this view B of the matter, we do not think, the, impugned finding is open to any exception. However, it cannot be sustained as to the amount of damages to the tune of Rs.20,00,000 when no convincing evidence has been adduced by the appellant to prove his good reputation and the impact of the statement thereon. He was required to prove that he was in fact belittled in the estimation of the people because of the said statement. When no such evidence has come forth, a token damages to the tune of Rs.20,000 (Rs. Twenty thousands) would be sufficient to meet the ends of justice, notwithstanding the fact that some of the defendants have not preferred appeal against the impugned judgment. This Court, in view of the provisions contained in Rule 33, Order XLI of the C.P.C. has the power to grant relief even to the non-appealing respondents, if their case is similar to that of the party filing appeal. The cases of Province of Punjab through Collector Bahawalpur, District Bahawalpur and others v. Col. Abdul Majeed and others 1997 SCMR 1692 and Haji Rehm dil v. The Province of Balochistan and another 1999 SCMR 1060, may well be referred in this behalf. We, therefore, modify the impugned judgment 'by reducing the amount of Rs.20,00,000 to Rs.20,000 only.

6. With the above modification, this appeal is disposed of As we have reduced the amount of damages in the connected appeal, the appeal filed by respondent No.1 has become infructuous and is, thus, dismissed.

H.B.T./96/P  
Order accordingly.

Peshawar High Court

GENERAL MANAGER ARMY WELFARE TRUST,  
PESHAWAR---Appellant

Versus

ZAHIR SHAH and others---Respondents

## JUDGMENT

R.F.A.Nos. 30, 98, 99, 100, 106 to 111  
and 122 to 124/2004

and F.A. No. 53/2002,  
(2007 M L D 1507 Peshawar)

Decided on 27th July, 2006

Land Acquisition Act (I of 1894)---

**Ejaz Afzal Khan and Jehanzaib Rahim, JJ**----Ss.4, 12, 18, 23 & 54---Acquisition of land---Determination of amount of compensation---Reference to referee court---Enhancement of compensation---Landowners being dissatisfied with the amount of compensation of acquired land as awarded by Collector, filed References under S.18 of Land Acquisition Act, 1894, which were allowed and amount of compensation was enhanced to Rs.8,000 per marla---Authorities filed appeal against enhancement, contending that referee court while deciding references, did not refer to evidence on record and handed down impugned finding in vacuum; notification under S.4 of Land Acquisition Act, 1894 was issued on 28-9-1991 and besides the one yearly average of the year preceding or succeeding said date, no convincing oral or documentary evidence had been brought on record to show that the-price of acquired property was or could be Rs.8000 per marla at the relevant time; Property having a similar nature and character was acquired by authorities through private negotiation on the basis of mutation at the rate of Rs.5000 per marla, same amount could also be fixed for acquired property---Validity---High Court, allowing appeals modified impugned judgments of referee court and reduced the amount of compensation from Rs.8000 per marla to Rs.5000 per marla accordingly---Landowners would be entitled

Peshawar High Court

to compulsory acquisition charges permitted under the law end interest at the rate of 6% per annum on enhanced amount.

Murad Khan through his widow and 13 others v. Land Acquisition Collector, Peshawar and another (1999 SCMR 1647) and Province of Sindh through Collector of District Dadu and others v. Ramzan and others (PLD 2004 Supreme Court 512) -and Messrs Dawood Yamha Ltd. v. Government of Baloshitan 3 others PLD 1986 Quetta 148 rel.

M. Sardar Khan for Applicant.

Abdul Bari Khan for Respondents.

Date of hearing: 27th July, 2006.

### **JUDGMENT**

**EJAZ AFZAL KHAN, J.**---A land measuring 545 kanals, 3-1/2 marlas situated in village Sheikh Muhammadi, was acquired for the construction of a Housing Colony for Welfare of Army Personnel, vide Award No.272-75/ADC, dated 25-7-1992. The landowners filed references under section 18 of the Land Acquisition Act to enhancement of compensation, as the one awarded by the Collector was too low, according to them. All the references filed by the respondents were allowed and consequently the compensation was enhanced to Rs.8,000 per Marla. Hence R.F.As. Nos. 30, 98, 99, 100, 106 to 111 and 122 to 124 of 2004 which are disposed of by this single judgment.

2. Mr. Zaffar Ali Shah, appellant, whose reference for enhancement of compensation was dismissed also filed R.F.A. No. 53 of 2002, which is also disposed of with the R.F.As. mentioned above as it also arises out of the same award.

Peshawar High Court

3. The learned counsel appearing on behalf of the appellants argued that the learned Referee Judge while deciding the references did not refer to the evidence on the record and handed down the impugned finding in a vacuum. Many strips of the land acquired, the learned counsel added, are not situated along side the road, therefore, they have to be treated differently from those which are situated along side it. The learned counsel next urged that where no reliable oral or documentary evidence was brought on the record as could show that the property having similar nature and character was ever sold at a price fixed by the learned Referee Judge, the enhancement so made has to be annulled.

4. The learned counsel appearing on behalf of the appellant in R.F.A. No. 53 of 2002 contended that when the strips of land belonging to the appellant are similar to those of the other owners, they were required to be treated alike, therefore, the compensation of his strips of land be also enhanced accordingly.

5. As against that, the learned counsel appearing on behalf of the respondents, in the first instance, raised a preliminary objection as to the maintainability of the R.F.As., by submitting that the Army Welfare Trust is a Company, therefore, no appeal could be competent unless the person filing it, is authorized by a resolution of its Board of Directors. The learned counsel while controverting the other arguments of the learned counsel for the appellants, submitted that where a property situated in the same vicinity having similar nature and character was acquired at the rate of Rs.5,000 per Marla, vide Mutations Nos. 7234 and 7235 attested on 18-10-1991, its value, by no stretch of imagination, could be less than Rs.10,000 per Marla and that the impugned enhancement being based on proper appraisal of evidence, is not open to any interference. One yearly or five yearly average, the learned

Peshawar High Court

counsel' submitted does not always afford an adequate basis for determining a fair compensation of the property compulsorily acquired, therefore, a price which a willing purchaser would pay to a willing seller cannot lost sight of. The learned counsel to support his contentious placed reliance on the case of Murad Khan through his widow and 13 others, v. Land Acquisition Collector, Peshawar and another (1999 SCMR 1647) and Province of Sindh through Collector' of District Dadu and others v. Ramzan and others (PLD 2004 Supreme Court 512).

6. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

7. Notification under section 4 of the Land Acquisition Act in the instant case was issued on 28-9-1991. Besides the one yearly averages of the year preceding or succeeding the said date no convincing oral or documentary evidence has been brought on the record to show that the price of the property was or could be Rs.8000 per Marla at the relevant time. A good number of witnesses were examined in the Court below but the main thrust of their evidence was that the strips of their property are situated along side the Sheikh Muhammadi Road or in the nearby vicinity and as such they can retch much higher price than the one spelt out by the one yearly averages as mentioned above. The only above-board evidence, we can call back upon is that of Mutations Nos. 7234 and 7235 which could furnish a basis for determining a price that a willing 'purchaser would pay to a willing seller. Though it was also used as a sheet anchor by the learned counsel for the respondents to call for enhancement of compensation awarded by the Collector but it could not, in any way, justify the enhancement 'to the extent it was enhanced by the learned Referee Judge. When confronted that a property having a similar nature and character was acquired by the appellants through private negotiation on the basis of the aforesaid mutations at the rate of Rs.5000 per Marla,

Peshawar High Court

the same amount could also be fixed for the property acquired in this case, Mr. M. Sardar Khan, learned counsel for the appellants, by finding himself in a blind alley could not advance any argument except the one that that property was acquired for having access to the property acquired, therefore, that could not be treated at par with the property acquired in this case. But this argument, in our view, is not strong enough to shield the appellants from being beaten with their own weapons. It does not lie in their mouth to raise even a whisper in this behalf, when they themselves have acquired a property of similar nature and character at such rate during the relevant year. Such sales have to be reckoned with and given preference over the one yearly averages. The cases of Murad Khan through his widow and 13 others v. Land Acquisition Collector, Peshawar and another and Province of Sindh through Collector of District Dadu and others v. Ramzan and others (Supra) may well be referred as authorities for the aforesaid conclusion. We, thus, hold that compensation of the property acquired in this case could, by no means, be either more or less than Rs.5000 per Marla. The property of the appellant in R.F.A. No.53 of 2002 is also to be treated with the same yardstick.

8. The argument that the Army Welfare Trust is a Company, therefore, no appeal- could be competent unless a person filing it 'is authorized by a resolution of its Board of Directors has no force altogether as the Army Welfare Trust may be a Company in terms of section 3(e) of the Land Acquisition Act but it is not a Company within the terms of section 2(7) of the Companies Ordinance, 1984. Even if it be so, which is not the case here, such objection cannot be given much weight firstly because he was impleaded as such by the respondents themselves and secondly because it was raised at belated stage. The case of Messrs Dawood Yamaha Ltd. v. Government of Balochistan and 3 others (PLD 1986 Quetta 148), may also be referred in this behalf.

Peshawar High Court

9. The short or long of the foregoing discussion is that we allow R.F.As. Nos. 30, 98, 99, 100, 106, 111 and 122 to 124 of 2004 and by modifying the impugned judgments reduce the amount of compensation from Rs. 8000 per Marla to Rs.5000 per Marla. As we have held above that the market value of the property acquired is, by no means, either more or less than Rs.5000 per Marla, we also allow R.F.A. No. 53 of 2002 and enhance the compensation of Rs.3000 to Rs.5000 per marla. The respondents in R.F.As. Nos. 30, 98,99, 100, 106 to 111 and 122 to 1.24 of 2004 and the appellant in R.F.A. No. 53 of 2002 shall also be entitled to compulsory acquisition charges permitted under the law and interest at the rate of 6% per annum on the enhanced amount. With the modification mentioned above, all these R.F.As. stand disposed of accordingly along with C.Ms. Benefits of this judgment shall also be extended to the non-appealing owners.

H.B.T./122/P  
Order accordingly.

Peshawar High Court

Daud Khan --- Appellant/Petitioner (s)

Versus

NHA --- Respondent (s)

### ***JUDGMENT***

RFA No. 34/2008

Date of hearing 12.03.2009

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to dispose of RFAs Nos. 34/2008, 42/2007 filed by the owners of the property ( hereinafter called as appellants) and RFA No.38/2008 filed by the National Highway Authority (hereinafter called as respondents) as they involve common questions of law and facts.

2. Learned counsel appearing on behalf of the appellants contended that when the property acquired is situated alongside the road and is capable of being used as a building site, its compensation at the rate of Rs.3000/- per Marla would by no means be commensurate with its nature and character and that it calls for further enhancement when the compensation of a property having similar nature and character was enhanced to the tune of Rs.9733.33 per Marla. The learned counsel next submitted that enhancement of compensation of the property is all the more desirable when according to the report of the commissioner, the market value of the property having similar nature and character was not less than Rs.1,50,000/- per Kanal at the relevant time.

3. As against that, learned counsel appearing on behalf of the respondents, not only opposed further enhancement but also opposed the enhancement made by the learned Referee Judge, by submitting that the amount fixed by the Collector in the Award was perfectly in accordance with the realities on the ground and the averages of the relevant years.

Peshawar High Court

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that a good deal of evidence has been produced by the appellants to justify the enhancement. The judgment dated 26-1-2001 of the Referee Court was also referred to whereby compensation of a property acquired for the same purpose was enhanced to the tune of Rs.9733.33 per Marla but it cannot be given much weight because this amount was determined according to one yearly average of the village where the property is situated but it is not the case here. Then comes the report of Commissioner. No doubt, according to the said report, the market value of the property in this case, at the relevant time comes out to Rs.150,000/- per Kanal but it appears to be based on guess work as no mutations or registered deeds have been cited in its support. Be all that as it may, even Rs.3000/- per Marla appears to be too low a price if we keep in view the nature, character, location and potential of the property in this case.

6. Rs.5000/- per Marla would be quite an adequate compensation of the property in this case if we strike a balance between the prices worked out by the averages and the report of the commissioner. We, therefore, allow the appeals filed by the appellants and enhance the compensation of the property to the tune of Rs.5000/- per Marla, while appeal filed by the respondents is dismissed. Needless to say that the appellants would be entitled to 25% as compulsory acquisition charges as the property has been acquired for a statutory body. In addition to above, the appellants shall be entitled to 6% simple interest from the date the property acquired was taken possession of.

CHIEF JUSTICE

J U D G E

Announced on  
3rd Dec. 2009

Peshawar High Court

GOVERNMENT OF N.-W.F.P.---Appellant

Versus

SHAHIN SHAH and others---Respondents

## JUDGMENT

R.F.A. No. 94 of 2007  
(2009 M L D 1418 Peshawar)

Decided on 24th June, 2009

Arbitration Act (X of 1940)---

### **Ejaz Afzal Khan and Shahji Rehman Khan, JJ** ----

Ss.17 & 39---Making award rule of the court---Scope---Appellant had challenged the judgment and decree whereby award was made rule of the court---Trial Court felt free to make award as rule of the court, in the case, the moment it found that the objection thereagainst had not been filed within the period of limitation---Court did not bother to cast even a. passing glance at the award before proceeding to make it rule of the court---Court seized of a proceeding for making award, as rule of the court, was not supposed to sit in judgment over it as a court of appeal---Court was also not required to make reappraisal of evidence recorded by the Arbitrator to discover any error or infirmity in the award, but it would not mean that it was to ditto or rubber stamp the award mechanically without much questioning about it---Legislature, did not envision the intervention of the court just for hack of it, it was rather purposive, meaningful and goal oriented---Jurisdiction of Court being supervisory was meant to check the excesses and over-doings in the conduct of Arbitrator in the arbitration proceedings---Role of court, was that of active dissenter rather than passive consentor---Trial Court, in the present case, considered itself just a plant meant for manufacturing the goods known as rule of the court on receipt of some raw material in the form of award---No part of its judgment reflected due or conscious application of mind---

Peshawar High Court

Judgment passed by the Trial Court, in circumstances, could not be maintained under any canons of law and propriety--- Court was required to look at the award with a pronounced leaning towards upholding rather than vitiating it, but when the Trial Court did not care even to touch it before making it rule of the court, remand of the case would be imperative---Impugned judgment and decree of the court below were set aside and the case was sent back to the Trial Court for decision afresh in accordance with law after hearing the parties.

Pakistan through General Manger, Pakistan Railways v. Messrs Q.M.R. Expert Consultants PLD 1990 SC 800; Messrs Millat Tractors Ltd. v. Messrs Millat Tractor House, A Partnership Firm, Registered under the Partnership Act Kutchery Road, Sargodha through Malik Muhammad Aslam, Managing Partner 1999 YLR Lah. 295; Messrs Abdullah Traders through Partner Mukhtar Ahmad v. Trading Corporation of Pakistan Ltd. through Chairman, Attorney, Principal Officer and 2 others 1999 CLC Kar. 2047; Mian Corporation through Managing Partner v. Messrs Lever Brothers of Pakistan Ltd. through General Sales Manager, Karachi PLD 2006 SC 169; Sezai Turkes Feyzi Akkays Construction Company v. Board of Trustees of Karachi Port Trust, Karachi 2007 CLC Kar. 879; Sheikh Mahboob Alam v. Sheikh Mumtaz Ahmad PLD 1956 (W.P.) Lah. 276; Ashfaq Ali Qureshi v. Municipal Corporation Multan and another 1984 SCMR 597 and Messrs Awan Industries Ltd. v. The Executive Engineer, Lined Channel Division and another 1992 SCMR 65 ref.

Zahid Yousaf Qureshi D.A.G. for Appellant.

Qazi Jawad Ihsanullah Qureshi for Respondent No.1, 2 and Nazir Ullah Qazi for Bank of Khyber.

Peshawar High Court

## JUDGMENT

**EJAZ AFZAL KHAN, J.**---Government of N.-W.F.P. through Secretary Irrigation Department, Peshawar and one another, appellants herein, have challenged the judgment and decree, dated 27-11-2006 of the learned Civil Judge-IX, Peshawar, whereby he made the award as rule of the Court.

2. Learned A.A-G. appearing on behalf of appellants contended that the Court was required to examine the award to see whether It was capable of being made as rule of the Court even though the appellants failed to file objections against its validity within the period provided by Article 158 of the Limitation Act. The duty of the Court, the learned A.A-G. submitted, does not come to an end, if the other party fails to raise any objection within the stipulated period of time. The Court, the learned counsel submitted, failed in its duty, when did not put the award to test in view of the criteria provided by the provisions contained In section 17 of the Arbitration Act. The learned counsel to support his contention placed reliance on the cases of Pakistan through General Manger, Pakistan-Railways v. Messrs Q.M.R. Expert Consultants (PLD 1990 Supreme Court 800), Messrs Millat Tractors Ltd. v. Messrs Millat Tractor House, A Partnership Firm, Registered under the Partnership Act Kutchery Road, Sargodha through Malik Muhammad Aslam, Managing Partner (1999 YLR Lahore 295) and Messrs Abdullah Traders, through Partner Mukhtar Ahmad v. Trading Corporation of Pakistan Ltd. through Chairman, Attorney, Principal Officer and 2 others (1999 CLC Kar. 2047).

3. As against that, the learned counsel appearing on behalf of the respondents contended that the Court seized of the proceeding for making the award as rule of the Court cannot sit in judgment over

Peshawar High Court

it as a Court of appeal. What it is required under the law to do, the learned counsel added, is to satisfy itself that the award does not run counter to the settled principles of law and the material available on the record. The Arbitrator, the learned counsel submitted, is the final adjudicating authority on the question of law and facts and it is not open to a party to challenge his decision if it is otherwise valid. The learned counsel next contended that it is one of the settled principles of the law of arbitration that an award deserves utmost respect and cannot be lawfully disturbed, even if on its reappraisal from a different angle a different view is possible. The learned counsel to support his contention placed reliance on the cases of Mian Corporation through Managing Partner v. Messrs Lever Brothers of Pakistan Ltd. through General Sales Manager, Karachi (PLD 2006 Supreme Court 169) and Sezai Turkes Feyzi Akkays Construction Company v. Board of Trustees of Karachi Port Trust, Karachi (2007 CLC Karachi 879). Learned counsel by referring to the case of Sheikh Mahboob Alam v. Sheikh Mumtaz Ahmad (PLD 1956 (W.P.) Lahore 276) contended that an objection which was not raised in the trial Court cannot be allowed to be raised in appeal. The learned counsel by concluding his arguments submitted that the Court is required to look at the award with pronounced leaning towards upholding rather than vitiating it. The learned counsel to buttress his argument placed reliance on the case of Ashfaq Ali Qureshi v. Municipal Corporation, Multan and another (1984 SCMR 597).

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is correct that objections raised by the appellants were left entirely out of account by the trial Court because they were filed after the expiration of 30 days. But this does not absolve the Court of its duty to examine the award to satisfy itself that it does not run counter to the settled principles of law and the material available

Peshawar High Court

on the record. The learned trial Court felt free to make award as rule of the Court, the moment it found that the objections thereagainst have not been filed within the period of limitation. It did not bother to cast even a passing glance at the award before proceeding to make it rule of the Court. There is no cavil with the proposition that the Court seized of a proceeding for making award, as rule of the Court is not supposed to sit in judgment over it as a Court of appeal. There is also no cavil with the proposition that the Court is also not required to make reappraisal of evidence recorded by the arbitrator to discover any error or infirmity in the award. But it does not mean that it is to ditto or rubber stamp the award mechanically without much questioning about it. The legislature in its wisdom, as far as, it can be gathered from the scheme of the Act, did not envision the intervention of the Court just for the hack of it. It was rather purposive, meaningful and goal oriented. It being supervisory is meant to check the excesses and over doings in the conduct of the arbitrator in the arbitration proceeding. The role of Court, if seen in the light of the relevant provisions of the Act and the case law that has grown over years in this behalf is that of active dissenter rather than passive consentor. But strange is the fact that the learned trial Court considered itself just a plant meant for manufacturing the goods known as rule of the Court on receipt of some raw material in the form of award. No part of its judgment reflects due or conscious application of mind. The judgment, thus, passed cannot be maintained under any canons of law and propriety. In the case of Messrs Awan Industries Ltd. v. The Executive Engineer, Lined Channel Division and another (1992 SCMR 65) the Hon'ble Supreme Court after reviewing a string of judgments held that the provision of section 17 of the Arbitration Act imposes a duty on Courts to see that there is no cause to remit award or any of the matters referred to arbitration for reconsideration or to set aside the order and that this can be done by the Court suo motu, apart from the application which a party could make for remission of the award or its reversal. In the cases of Pakistan through General Manger, Pakistan Railways v. Messrs Q.M.R. Expert Consultants and Messrs Millat Tractors Ltd. v. Messrs Millat Tractor House, A Partnership Firm, Registered under the Partnership Act Kutchery Road, Sargodha through Malik

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Muhammad Aslam, Managing Partner and Messrs Abdullah Traders through Partner Mukhtar Ahmad v. Trading Corporation of Pakistan Ltd. through Chairman, Attorney, Principal Officer and 2 others (supra) the same view was reaffirmed. The cases cited by the learned counsel for the respondents also advance and articulate the same point of view. Even the judgment rendered in the case of Mian Corporation through Managing Partner v. Messrs Lever Brothers of Pakistan Ltd. through General Sales Manager, Karachi (supra) requires the Court to satisfy itself that the award does not run counter to the settled principles of law and the material available on the record. The judgments rendered in the cases of Sezai Turkes Feyzi Akkays Construction Company v. Board of Trustees of Karachi Port Trust, Karachi, Sheikh Mahboob Alam v. Sheikh Mumtaz Ahmad and Ashfaq Ali Qureshi v. Municipal Corporation, Multan and another (supra) cited at the bar by the learned counsel for the respondents too do not project a different view. We agree with the learned counsel for the respondents that the Court is required to look at the award with a pronounced leaning towards upholding rather than vitiating it, but when the learned trial Court did not care even to touch it C before making it rule of the Court, remand of the case would be imperative.

6. For the reasons discussed above, this appeal is allowed, the impugned judgment and decree of the Court below are set aside and the case is sent back to the learned trial Court for decision afresh in accordance with law in the light of the discussion made above within one month after hearing the parties, even if it is to hear the case on day today basis. The parties are directed to appear in the Trial Court on 2-7-2009.

H.B.T./169/P

Case remanded.

Peshawar High Court

Saif Beverages --- Appellant/Petitioner (s)

Versus

Government of NWFP --- Respondent (s)

### ***JUDGMENT***

RFA No. 32/1999

Date of hearing 17.11.2009

**EJAZ AFZAL KHAN, C.J.-** Appellant herein has questioned the judgment and decree dated 7-1-1999 of the learned Civil Judge Peshawar whereby its suit was dismissed.

2. Learned counsel appearing on behalf of the appellant contended that once a lesser amount of excise duty was charged on the indigenous brand of aerated water, it could not have been increased and made at par with the international brands when a huge amount was invested by the appellant and that the increase in the excise duty being against the principle of promissory estoppel is liable to be struck down.

3. As against that learned counsel representing the respondents defended the impugned judgment by submitting that the less amount of excise duty was charged to give a push to the appellant in a market which was inundated with foreign brands but this could not be extended for good and it was, therefore, rightly withdrawn.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that the incentive was provided to the appellant to give him a push in the market reigned by foreign products of aerated water. The appellant availed that for many years and earned a lot notwithstanding there was a great disparity

Peshawar High Court

between the quality of the products of the appellant and those of the foreign brands, The said incentive was subsequently withdrawn in accordance with law and policy. Thus the incentive cannot be claimed as of right. The learned Civil Judge by appraising evidence on the record and appreciating the relevant law and notification issued in this behalf rightly dismissed the suit of the appellant. The impugned finding being free from any infirmity of legal or factual nature is unexceptional.

6. For the reasons discussed above, this appeal being without any merits, stands dismissed.

CHIEF JUSTICE

Announced on  
17<sup>th</sup> November, 2009

J U D G E

Peshawar High Court

Ali Asghar Khan --- Appellant/Petitioner (s)

Versus

LAC --- Respondent (s)

### ***JUDGMENT***

RFA No. 204/2005

Date of hearing 23.11.2009

**EJAZ AFZAL KHAN, C.J.-** Appellants herein have questioned the judgment dated 19-5-2005 of the learned Referee Judge whereby he declined to enhance the compensation of their property acquired for the construction of Islamabad Peshawar Motorway.

2. Learned counsel appearing on behalf of the appellants contended that where the compensation of property having similar nature, character, location and potential has been enhanced by this court vide judgment dated 22-12-2006 rendered in RFA No.175/2005 (Sangeen Shah and others Vs. Govt. through Collector and others), the property of the appellants cannot be treated with a different yardstick, the more so, when the judgment of this court has been upheld by the Honourable Supreme Court in the CPLA No.1148/2003, decided on 15.11.2005.

3. As against that learned counsel appearing on behalf of the respondents contended that if the judgment of this court is sought to be relied upon for the enhancement of the compensation of the property acquired, the judgment rendered in the case of Khana Gul Vs Collector Land Acquisition and others in RFA No.132/2005, cannot be lost sight of as the property forming subject matter of dispute in this case was also having similar nature, character, location and potential. The learned counsel next contended that where the appellants received the compensation awarded by the Collector without protest, they could not ask for more by filing a Reference. The learned counsel to support his

Peshawar High Court

argument mainly relied on the Proviso to Section 31(2) of the Land Acquisition Act.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. A perusal of the judgment dated 18-12-2006 of this court reveals that the same evidence which is sought to be relied upon in the case in hand was considered for enhancement of compensation. A comparison between the property acquired in this case and the one forming subject matter of dispute in the case cited above, shows that there is no difference between their nature, character, location and potential. When so, the property forming subject matter of dispute in this case, cannot be treated with a different yardstick.

6. The judgment rendered in the case of Khana Gul Vs Collector and others cannot in any way advance the case of the respondents when, the judgment rendered in the case of Sangeen Shah and others Vs. Govt. through Collector was not referred to before the Honourable Judge. The said judgment being sub-silentio would not have any value. I, therefore, do not see any reason much less tenable for not enhancing the compensation at par with the property forming subject matter of dispute in the case cited above

7. The argument that where the appellants received compensation without protest they could not file Reference for enhancement of compensation has not impressed me altogether because no date of receipt of the compensation has been mentioned in the Acquittance Roll to show whether the amount was received before or after filing the Reference. The case of **Zardad Khan and others Vs. Government of NWFP and others (1987 SCMR 1387)** may well be referred to in this behalf.

8. For the reasons discussed above, this appeal is allowed and the compensation awarded to the appellants by the Collector Land Acquisition is enhanced to Rs.6000/- per Marla in

Peshawar High Court

addition to 25% compulsory acquisition charges and 6% simple interest on the enhanced amount.

CHIEF JUSTICE

Announced on  
23rd Nov. 2009

Peshawar High Court

Iftikhar Ahmad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

### ***JUDGMENT***

RFA No. 130/2008

Date of hearing 24.11.2009

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos.130/2008 and 9/2009 as they arise out of the same judgment.

2. Main contention of the learned counsel for the appellants appearing in RFA 130/2008 was that once the court held in the issues No.2 & 3 that fair compensation of the property comes to Rs.1801/81 per Marla according to one yearly average, the concluding portion of the judgment should have been in conformity with that and that the concluding portion being in conflict with the discussion on the relevant issues, cannot be sustained.

3. The learned Deputy Attorney General appearing on behalf of the appellants in RFA 9/2009 defended the judgment but could not convincingly do so as the concluding portion was an outright departure from what was held in the discussion of the relevant issues.

4. In this view of the matter, we allow RFA No.130/2008 and enhance the compensation of the property from Rs.500/- to Rs.1801/81 per Marla while RFA No.9/2009 being without merit is dismissed. However, the appellants would be entitled to 25% compulsory acquisition charges as the property was acquired for statutory body. The award of 6% interest from the

Peshawar High Court

date of possession of the property acquired was taken of, shall remain intact.

Announced on  
24th Nov. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

M.E.O --- Appellant/Petitioner (s)

Versus

Khan Akbar --- Respondent (s)

### ***JUDGMENT***

RFA No. 56/2006

Date of hearing 24.11.2009

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos. 56, 57, 58, 59, 60 and 61 of 2006 and Cross Objections Nos.3 & 4 of 2006 wherein appellants have challenged the judgment dated 7-6-2005 of the learned Referee Judge, whereby he enhanced the compensation of the property acquired to the tune of Rs.1117.64 per Marla.

2. Learned counsel appearing on behalf of the appellants contended that the said enhancement is not supported by any evidence on the record and that it being un-justified, calls for its annulment.

3. Learned counsel appearing on behalf of the respondents contended that one yearly average of the property similarly situated and having similar nature and character was taken into account which being in consonance with the provision of Section 23 of the Land Acquisition Act, is not open to any interference.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that the learned Referee Judge while determining the compensation of the property relied upon one yearly average of the period in which the Notification under Section 4 of the Land Acquisition Act was issued. Though many

Peshawar High Court

other one yearly averages were also brought on the record but since the amount worked out therein was less, they were ignored. The enhancement thus made appears to be correct if seen in the light of the evidence on the record. The appeals thus being misconceived stand dismissed. However, the respondents would be entitled to 25% of the compulsory acquisition charges as the property has been acquired for the statutory body. They would also be entitled to 6% simple interest from the date the property was taken possession of.

CHIEF JUSTICE

J U D G E

Announced on  
24th Nov. 2009

Peshawar High Court

M.E.O --- Appellant/Petitioner (s)

Versus

Furqan Ali --- Respondent (s)

### ***JUDGMENT***

RFA No. 57/5006

Date of hearing 24.11.2009

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos. 57 and 58 of 2006 and filed by the M.E.O. (hereinafter called as appellants) and RFA Nos.156/2006 7 Cross Objections No.3 & 4 of 2006 filed by the owners (hereinafter called as respondents) as they involved the same legal and factual controversies.

2. The learned Deputy Attorney General appearing on behalf of the appellants submitted that the market value fixed in the Award was perfectly in accordance with the Revenue record and realities on the ground. Therefore, it merited no enhancement and that the enhancement being unjustified is liable to be set aside.

3. Learned counsel appearing on the behalf of the respondents contended that in some of the villages averages were available but where they were not available, averages of the adjoining villages were taken into account for determining the compensation of the property acquired which has resulted in injustice of the worst form as this treatment was not given to the land owners in all the cases. The learned counsel by elaborating their argument submitted that the average of village Manki Sharif for the year 1998-99 was considered for the purpose of determining the compensation of the property situated in Nowshera Khurd but it was never considered for determining the compensation of the property situated in Manki Sharif itself. The same was not the case, the learned counsel submitted, with the property acquired from Village Badrashi.

Peshawar High Court

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. We are at loss to understand that the latest average for the year 1998-99 of village Manki Sharif was considered for determining the compensation of the property acquired in the adjoining villages but it was not considered while determining the compensation of the property acquired in Village Manki Sharif itself. This disparity is also patent and palpable in respect of the property acquired in Village Spin Kanrai and Nowshera Khurd. This duality and double standard cannot be justified under any canon of law and propriety. This would also give rise to an impression that neither the Patwari Halqa was fair and faithful in producing evidence nor the court properly examined the evidence thus produced.

6. We, therefore, allow these appeals of the appellants as well as respondents and send the case back to the learned trial Court for decision a fresh after attending to the anomalies and disparities hinted out above.

CHIEF JUSTICE

J U D G E

Announced on  
24th Nov. 2009

Peshawar High Court

M.E.O --- Appellant/Petitioner (s)

Versus

Nasrullah --- Respondent (s)

### ***JUDGMENT***

RFA No. 79/2006

Date of hearing 24.11.2009

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos. Nos.79, 80, 81, 82, 83, 84, 85, 86, 87, 102, 103, 104,151, 210, 211, 212, 214, 215, 246, 247, 248, 245, 249, 250, 251, 252, 253, 254, 255 of 2006 and RFAs Nos.03, 04, ,07, 08, 09, 10, 31 , 183 & 184 of 2007 filed by the M.E.O. & others (hereinafter called as appellants) and RFAs Nos.210 & 228 of 2005, RFAs Nos.155, 156, 157, 167, 168, 169, 174, 176, 181, 196, 202, 203, 204, 205, 218, 236, 244, 283 and 291 of 2006 and Cross Objections Nos.02 & 06 of 2006 & 01,02 & 09 of 2007 filed by the owners (hereinafter called as respondents), as they involve the same legal and factual controversies.

2. The learned Deputy Attorney General appearing on behalf of the appellants submitted that the market value fixed in the Award was perfectly in accordance with the Revenue record and realities on the ground, therefore, it merited no enhancement and that the enhancement being unjustified is liable to be set aside.

3. Learned counsel appearing on the behalf of the respondents contended that in some of the villages averages were available but where they were not, averages of the adjoining villages were taken into account for determining the compensation of the property acquired, but it has resulted in grave injustice as many other owners in the other villages have not been given alike treatment. The learned counsel by elaborating their argument submitted that the average of village Manki Sharif for the year 1998-99 was considered for the purpose of determining the compensation of the property situated in Nowshera Khurd and

Peshawar High Court

Village Spin Kanrai but it was never considered for determining the compensation of the property acquired in Manki Sharif except in two or three cases. The property thus acquired, the learned counsel submitted, in all the villages be treated alike, when its nature, character and potential are alike.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. We are at a loss to understand that the latest average for the year 1998-99 of village Manki Sharif was considered for determining the compensation of the property acquired in the adjoining villages, as mentioned above, but it was not considered while determining the compensation of the property acquired in Village Manki Sharif, except in two or three cases. Another strange and surprising fact in the cases mentioned above is that one yearly average of village Manki Sharif for the year 1998-99 comes to Rs.6300/- in one, Rs.5000/- in another and Rs.4911 in yet another set of cases. This gives rise to an impression that neither the Patwari Halqa was fair and faithful in producing evidence nor the courts hearing the References were discreet and discursive in examining the evidence thus produced. How this difference, duality and double standards can be justified? None of the counsel representing the respondents or even the DAG could plausibly explain this phenomenon. Remand of the cases in the circumstances would, therefore, be inevitable.

6. For the reasons discussed above, We allow these appeals of the appellants as well as respondents and send the case back to the learned Referee Court for decision afresh after attending to the anomalies and disparities hinted to above. The learned Referee Judge would be at liberty to examine the Patwari or any other witness afresh.

Announced on  
24<sup>th</sup> Nov. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

LAC Islam Abad --- Appellant/Petitioner (s)

Versus

Muhammad Ghafoor --- Respondent (s)

### ***JUDGMENT***

RFA No. 48/2007

Date of hearing 30.03.2010

**EJAZ AFZAL KHAN, CJ.**- By this single judgment, we propose to decide Regular First Appeals No.48, 49, 50, 51, 52, 53, 54, 67, 68, 69, 70, 157, 158, 159, 160 & 66 of 2007 with Cross Objection No.10/2008, 173 of 2007 with Cross Objection No.09/2008, 36, 60, 91, 161 of 2007, wherein, the appellants have questioned the judgments of the Referee Judges, whereby, the compensation of the property acquired for the construction of road was enhanced to Rs.7,000/- per marla.

2. The learned counsel appearing on behalf of the appellants contended that the Award in another case was taken into account while determining the compensation of this property but that couldn't be considered relevant for the purposes of these cases because in that case, property was situated alongside the road and had more potential value as compared to one acquired in these cases, therefore, enhancement so made calls for annulment. They next contended that even the report of Commissioner was not worthy of reliance as the Commissioner while working out the value of the property acquired was influenced by value of the property, acquired by virtue of Award No.425 dated 30.11.1996. They further contended that when no evidence worth the name has been brought on the record to show that the price of the property acquired is by any means of Rs.7,000/- can't be justified by any cannon of law and property. The report of Commissioner, the learned counsel added, is too, of no value when that is based on surmises and conjectures and made no reference to any registered deed or mutation, witnessing the transaction of similar property.

Peshawar High Court

3. As against that, the learned counsel appearing on behalf of the respondents contended that where the property having similar nature, character and location like that of the property acquired @ Rs.9,200/- for the construction of PTCL exchange, the property acquired in these cases was to be treated in the same way. They by referring to the report of the Commissioner contended that where a Commissioner, after assessing the value of the property acquired and other similarly situated, opined that the value of the property acquired in these cases couldn't be less than Rs.7,000/- to Rs.10,000/- per marla, the learned Court was required to take stock of the said evidence.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. The record reveals that some of the property in the same village was acquired for the construction of road @ Rs.7,000/- per marla. It further reveals that the property acquired for the construction of PTCL exchange was acquired @ Rs.9,200/- per marla in the year, 1996, though, this property may not be similar in its nature, character when compared in the light of its location and other potential but at the same time, it can't be ignore that the price in the village remained static, even, thereafter the property acquired in these cases was acquired in the year, 2003, it is pertinent to note that seven years registered a remarkable upward swing in price. When so, we don't think the learned Referee Judges committed any error, much less, legal or factual by enhancing the compensation of the property to the tune of Rs.7,000/- per marla. It is, too, settled to reiterate that while determining the compensation of the property acquired, the Court is to see what willing to Salah is to get from willing purchaser. The judgments of the learned Referee Judges being based on proper appreciation of law and evidence, therefore, don't require any interference.

6. For the reasons discussed above, these appeals are dismissed while Regular First Appeals No.36, 60, 91 & 161 of 2007 for the same reasons are also dismissed.

Announced.  
30. 03. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Fazal Muhammad --- Appellant/Petitioner (s)

Versus

NHA --- Respondent (s)

### ***JUDGMENT***

RFA No. 197/2009

Date of hearing 02.04.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, I propose to decide RFA No.154/2009 filed by Fazal Muhammad and others (hereinafter called as appellants) and RFA No.197/2009 filed by the National Highway Authority (hereinafter called as respondents) as they raised almost alike questions vis-à-vis the nature, character, location and potential of the property and its value.

2. Learned counsel appearing on behalf of the appellants addressed the court at length to justify enhancement of compensation on the ground that if at all the average of the adjacent village was to be considered as basis for enhancement, the average of another adjacent village should have been considered which was on the higher side. But when questioned which is that adjacent village whose average is on the higher side, he could not substantiate it with reference to the evidence on the record. The evidence of commissioner could have clarified the matter but he could not be appointed as the respondents refused to deposit his fee. In such circumstances, it is not possible for this court to determine whether the value of the property of one adjacent village or another be made basis for determination of compensation in this case. The remand of the case would thus be inevitable. Though the learned counsel appearing on behalf of the respondents insisted on the dismissal of reference and annulment of the enhancement so made by the Referee Judge but he too could not give any satisfactory answer as to why in one adjacent village value of the property stayed upto Rs.4000/- per marla and shot up

Peshawar High Court

to Rs.7500/- per marla in another village, notwithstanding the nature of the property acquired in both the villages is almost alike. I thus allow these appeals, set aside the impugned judgment and send the case back to the learned District Judge Charsadda for decision afresh within one month after the issuance of commission whose fee shall be paid by the National Highway Authority. The parties are directed to appear in the court of learned District Judge Charsadda on 21-4-2010.

CHIEF JUSTICE

Announced on  
2nd April, 2010.

Peshawar High Court

LAC --- Appellant/Petitioner (s)

Versus

Jan Muhammad --- Respondent (s)

***JUDGMENT***

RFA No. 112/2007

Date of hearing 08.04.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos.138, 139, 140 & 141 & 142 of 2007 filed by the Land Acquisition Collector and another (hereinafter referred to as appellants) and Cross Objections Nos.1 & 8 of 2008 & RFA No.59/2007 (hereinafter referred to as respondents) wherein they have questioned the judgments of the Referee Judge, whereby he enhanced the compensation of the property acquired for the construction of road to the tune of Rs.7000/- per Marla.

2. The learned counsel appearing on behalf of the appellants contended that the Referee Judge while determining the compensation of the property acquired in these cases was mainly influenced by the Award No.425, dated 30-11-1996 but indeed the property acquired through this Award has no nexus with the property acquired in these cases, as the former being situated alongside the road is having much greater potential as compared to the latter, therefore, the enhancement so made calls for annulment. The report of the Commissioner, the learned counsel added, is also of no value in determining the compensation of the property acquired in these cases when it is based on surmises and conjectures, without making any reference to any mutation or registered deed witnessing the transaction of a similar property. The learned counsel by concluding his arguments submitted that when no evidence worth the name has been brought on the record to show that the value of the property acquired is by any means Rs.7000/- per Marla, enhancement of even Rs.100/- cannot be justified.

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3. As against that, the learned counsel appearing on behalf of the respondents contended that the property acquired for construction of road by virtue of Award No.425, dated 30-11-1996 is by no means different from the one acquired in these cases, therefore, it was rightly taken into account while determining the compensation of the property acquired in these cases. The learned counsel next contended that once it is not disputed that the property in these cases is capable of being used as a building site its specie would lose its value. The learned counsel by referring to Mutation No. 7616, attested on 25-9-1998, contended that when a property in the same village has been purchased at the rate of Rs.9200/- per Marla in the year 1996 for the construction of Telephone Exchange, the compensation of the property acquired in these cases deserves an enhancement to that extent at least if not more. The report of the Commissioner, the learned counsel added, would also call for enhancement of compensation of the property acquired when according to the said report a property having similar nature and character is sold at the rate of Rs.7000/- to Rs.10000/- per Marla.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that a great deal of property in the same village was acquired for the construction of road at the rate of Rs.7000/- per Marla, vide Award No.425 dated 30-11-1996. It further reveals that another property in the same village was purchased for the construction of Telephone Exchange at the rate of Rs.9200/- per Marla, vide Mutation No. 7616, attested on 25-9-1998. The report of the Commissioner also shows that the property having similar nature, character and location is sold at the rate of Rs.7000/- to Rs.10000/- per marla. When so we do not think the learned Referee Judges committed any error much less legal by enhancing the compensation of the property to the tune of Rs.7000/- per marla. This enhancement shall be all the more justified when it is not disputed that the property acquired in these cases is capable of being used as a building site. It is by now too settled to be re-iterated that the Court while determining the

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compensation of a property compulsorily acquired is to consider the price which a willing seller would demand from a willing purchaser. Even otherwise this enhancement is not open to any exception as the property in these cases was acquired much later in terms of time, when every passing day registered a marked increase in the prices of the property. Ever increasing inflation would be yet another factor for not interfering with the finding of the Referee Judge. The judgments of the learned Referee Judge being based on proper appreciation of law and evidence, are, therefore, not open to any exception.

6. For the reasons discussed above, the appeals filed by the Collector alongwith Cross Objections are dismissed, with no order as to costs.

CHIEF JUSTICE

J U D G E

Announced on  
8th April,2010

Peshawar High Court

Abdul Rab --- Appellant/Petitioner (s)

Versus

LAC --- Respondent (s)

### ***JUDGMENT***

RFA No. 20/2008

Date of hearing 12.04.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, I propose to decide RFA No. 2/2008 filed by the Land Acquisition Collector and two others (hereinafter called as appellants) and RFA No.20/2008 filed by the owners (hereinafter called as respondents) as they arise out of the same judgment and raised alike questions of law and facts.

2. The learned counsel appearing on behalf of the appellants contended that no evidence whatsoever was brought on the record to show that the market value of the property acquired was Rs.4000/- per Marla, therefore, the one awarded by the Collector through Award No.143, dated 25-10-2003 was not open to any exception.

3. As against that learned counsel appearing on the behalf of the respondents contended that when this court in a judgment dated 23-11-2009 delivered in RFA NO 204/2005 (Ali Asghar Khan and others Vs. LAC and others), enhanced the compensation of the property having nature, character, location and potential like those of the one acquired in this case, at the rate of Rs.6000/- per Marla, this property cannot be treated with different yardstick that too when the Village and the revenue state are the same.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

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5. The record reveals that no average either one yearly or five yearly was available to enable the Referee Court to determine the market value of the property acquired. The learned Referee Court in the circumstances appointed the Commissioner to ascertain the market value. The Commissioner, after inspecting the spot and examining the property and the value in its surrounding areas opined that its market value could not be less than Rs.4000/- per Marla. The learned Referee Court accordingly enhanced the compensation of the property to the tune of Rs.4000/- per Marla, by holding as under:-

**“In view of the stated facts and circumstances of the case, I am of the considered opinion that the report of commission regarding fixation and determination of compensation amount is based on proper reasoning and local investigation, which in the absence of contrary evidence is liable to be acted upon. The commissioner for the purpose of determining the market value has taken into account the potential value particularly on construction of Motor Way, price of similar land situated in the near by neighborhood and acquired for a same use. The court observes that naturally the value of the disputed land has increased in consequence of the land being put to a use as road. Moreover, its location and status has not been determined by the acquiring Department by spot inspection and local investigation. It has been taken on the basis of old revenue record, without spot inspection and latest position. One year’s average of sale is merely one of the modes for ascertaining market value and is not an absolute, last and final yard stick for assessment of compensation. In the instant case, status of acquired land at the time of notification, its potentialities, its likelihood of development and**

Peshawar High Court

**improvement for the owners are the necessary factors for grant of compensation but all these factors were totally ignored by the Collector.”**

6. A look at the above quoted paragraph would reveal that the learned Referee Judge after considering all the conceivable aspects of the case, rightly concluded that the market value of the property was not less than Rs.4000/- per Marla. The impugned finding being based on proper appreciation of evidence is not open to any exception. Both the appeals are dismissed with no order to costs.

CHIEF JUSTICE

Announced on  
12<sup>th</sup> April, 2010

Peshawar High Court

Saifoor --- Appellant/Petitioner (s)

Versus

LAC --- Respondent (s)

### ***JUDGMENT***

RFA No. 01/2008

Date of hearing 12.04.2010

**EJAZ AFZAL KHAN, C.J.**- By this single judgment, I propose to decide RFA No. 1/2008 filed by the Land Acquisition Collector and two others (hereinafter called as appellants) and RFA No.31/2008 filed by the owners (hereinafter called as respondents) as they arise out of the same judgment and raised alike questions of law and facts.

2. The learned counsel appearing on behalf of the appellants contended that no evidence whatsoever was brought on the record to show that the market value of the property acquired was Rs.5000/- per Marla, therefore, the one awarded by the Collector through Award No.144, dated 25-10-2003 was not open to any exception.

3. As against that learned counsel appearing on the behalf of the respondents contended that when this court in a judgment dated 23-11-2009 delivered in RFA NO 204/2005 (Ali Asghar Khan and others Vs. LAC and others), enhanced the compensation of the property having nature, character, location and potential like those of the one acquired in this case, at the rate of Rs.6000/- per Marla, this property cannot be treated with different yardstick that too when the Village and the revenue state are the same.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

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5. The record reveals that no average either one yearly or five yearly was available to enable the Referee Court to determine the market value of the property acquired. The learned Referee Court in the circumstances appointed the Commissioner to ascertain the market value. The Commissioner, after inspecting the spot and examining the property and the value in its surrounding areas opined that its market value could not be less than Rs.5000/- per Marla. The learned Referee Court accordingly enhanced the compensation of the property to the tune of Rs.5000/- per Marla, by holding as under :-

**“The facts on record show that the report of commission and the evidence on record support each other to the effect that the price was not fixed in good faith and honestly by keeping in view the situation, location, future and potential value of the land, particularly for its owners; the price of acquired land fixed by the respondents seems to be not genuine; the respondents have accepted one yearly value prepared on revenue record wherein nature/kind of the land is recorded other than the factual position. So mere old entry in revenue record about the nature of acquired land does not reflect the actual and physical position of it. In such like cases for determination of genuine price of the land, one has to take into consideration other relevant circumstances. Admittedly, the disputed land is located on Nowshera Charasadda road at a short distance from the commercial and residential property coupled with the fact that after construction of motor way through the disputed and neighboring land, the value and status of acquired land has naturally improved, the respondents have fixed very meager and less amount of compensation which seems to be**

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**fancy price and conspicuously below the prevailing market value.”**

6. A look at the above quoted paragraph would reveal that the learned Referee Judge after considering all the conceivable aspects of the case rightly concluded that the market value of the property was not less than Rs.5000/- per Marla. The impugned finding being based on proper appreciation of evidence is not open to any exception. Both the RFAs are thus dismissed with no order as to costs.

7. With reference to C.M.Nos. 465/2009 & 83/2010, suffice it to say that when the applicants can move the Executing Court in the light of judgment rendered in FAO No.90/2005, delivered on 31<sup>st</sup> March, 2010, their impleadment in these cases would not be of any consequence. Thus, both the C.M. applications are disposed of.

CHIEF JUSTICE

Announced on  
12th April. 2010

Peshawar High Court

Malik Sahib Gul --- Appellant/Petitioner (s)

Versus

LAC NHA --- Respondent (s)

### ***JUDGMENT***

RFA No. 137/2008

Date of hearing 13.04.2010

**EJAZ AFZAL KHAN, CJ.**- By this single judgment, we propose to decide Regular First Appeals No.137, 138, 139, 140, 141, 142, 143, 144 & 145 of 2008, filed by the owners (hereinafter called as “the appellants”) and Regular First Appeals No.160, 161, 162, 163, 164, 165, 166, 167 & 168 of 2008, filed by the National Highway Authority and another (hereinafter called as “the respondents) as they raise alike questions of law and facts.

2. The learned counsel appearing on behalf of the appellants contended that where sufficient evidence has been brought on the record to show that the market value of the property couldn't be less than Rs.1,50,000/-, per marla, the learned Referee Judge was required to enhance the compensation accordingly. Even the report of the Commissioner, the learned counsel added, proves that the market value of the property couldn't be less than Rs.1,50,000/- per marla. The learned counsel next contended that where the averages don't afford adequate basis for determining the market value of the property, the sale mutations attested in the nearby vicinity could be taken into account. The learned counsel further contended that neither Collector nor Referee Judge awarded any amount of compensation in respect of the property, which has been rendered useless because of acquisition of the property in the case in hand. This case, the counsel concluded, if considered in this prospective, the compensation of the property merits further enhancement. The learned counsel, in support of his contentions, placed reliance on the judgments of **Murad Khan though his widow & 13 others vs. Land Acquisition Collector, Peshawar (1999 SCMR 1647) and Province of Punjab through Collector,**

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**Bahawalpur & others vs. Sh. Hassan Ali & others (PLD 2009 SC 16).**

3. As against that, the learned counsel appearing on behalf of the respondents contended that where the appellant in RFA No.145, claimed Rs.80,000/- per marla and appellant in RFA No.144 claimed Rs.25,000/- per marla, in their references, they couldn't be awarded more than what was claimed by them. The learned counsel to support his contention placed reliance on the judgment of **Malik Nasim Ahmad Aheer & 4 others vs. WAPDA & 3 others (PLD 2004 SC 897).** The learned counsel, by referring to the report of the Commissioner, contended that where the Commissioner didn't refer to any mutation, registered deed or any other document witnessing transaction in the nearby vicinity, his report being based on guesswork would be devoid of any probative worth.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. A perusal of the impugned judgments would reveal that the learned Referee Judge while enhancing the compensation of the property mainly relied on the report of the Commissioner. A look at the report of the Commissioner would reveal that he based his opinion on guesswork. It therefore, doesn't serve the requirement of law. Nor such opinion can be relied upon while determining the compensation of a property compulsorily acquired. The Commissioner, of course, has commented upon the location of the property and observed in no uncertain terms that a market was constructed over the property, forming subject matter of dispute in RFA No.145, but what price would it fetch because of its location hasn't been discussed with reference to the mutations, registered deeds or sale transactions of similar property in the nearby vicinity. Though, a reference has been made to certain mutations in the statements of the witnesses but they can't be relied upon unless the nature, character, location and potential of that property sold through them are compared with those of property acquired in

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these cases. How the learned Referee Judge could award more than what was claimed by the owners themselves, in derogation of the express provisions of the Land Acquisition Act and the judgment rendered in the case of **Malik Nasim Ahmad Aheer & 4 others vs. WAPDA & 3 others (Supra)** is yet another question, which hasn't been answered as far as the record of these cases or even the impugned judgments are concerned. When so, remand of the case would be inevitable.

6. For the reasons discussed above, we allow these appeals, set aside the impugned judgments and send the cases back to the learned Referee Judge for decision afresh in accordance with law after appointing a seasoned revenue officer as Commissioner for ascertainment of the value of the property acquired. Both the parties are directed to appear before the Court on 19.05.2010.

Announced.  
13. 04. 2010

CHIEF JUSTICE

J U D G E

Chairman WAPDA --- Appellant/Petitioner (s)

Versus

Abdul Rauf --- Respondent (s)

### ***JUDGMENT***

RFA No. 241/2005

Date of hearing 10.05.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, I propose to dispose of RFA 241/2005 filed by WAPDA (hereinafter called as appellants) and RFA No.264/2005 filed by the legal heirs of Abdul Rauf (hereinafter called as respondents) as they both arise out of the same Award and even the judgment.

2. Learned counsel appearing on behalf of the appellants contended that when no evidence much less convincing has been brought on the record to show that the value of the property was more than what was awarded by the Collector, it was not required to be enhanced on the basis of one yearly average in which the Award was announced. The learned counsel next contended that when the Notification under Section 4 of the Land Acquisition Act was issued on 15-4-2986, the market value prevailing on such date could be awarded to the owners and not the one which was prevailing at the time when the award was announced. The learned counsel next contended that the learned Referee Judge by ignoring the provision of Section 23 of the Land Acquisition Act has acted against the law of the land.

3. As against that, the learned counsel appearing on behalf of the respondents contended that though according to one yearly average, value of the property comes to Rs.2094/- per marla but the fact is that the property of alike nature is not available even at the rate of Rs.5000/- to Rs.10000/- per Marla. The learned counsel by referring to the report of the Commission contended that where the commissioner after assessing the ground realities during the course of spot inspection suggested that the market value of the property could not be less than Rs.10000/- per marla,

Peshawar High Court

the learned Referee Judge was required to take stock of the said fact while assessing its compensation.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Though the commissioner was appointed in this case to ascertain the market value of the property and he accordingly submitted his report after spot inspection but there is absolutely nothing in his report or the statement recorded in the court to show as to what enabled him to arrive at the conclusion that the market value of the property could not be less than Rs.5000/- per marla. The report being based on personal assessment cannot be given much weight especially when it is not supported by any reliable oral and documentary evidence. Once it is excluded from consideration, what, this court, is left with, is one yearly average according to which the market value of the property comes to Rs.2094/- per marla. The learned Referee Judge considered it and rightly so while determining the compensation of the property acquired. Though this average relates to the year of Award and not of the Notification under Section 4 of the Land Acquisition Act but it appears to be correct when the gap between the date of issuance of Notification under Section 4 of the Land Acquisition Act and that of Award registered upward trend in the prices. The case of **N.W.F.P. through Collector, Abbottabad Land Acquisition and others Vs. Haji Ali Asghar Khan and others (1985 S C M R - 767)** may well be referred in this behalf. In this view of the matter, I do not think the compensation determined by the learned Referee Judge requires any modification on either side.

6. For the reasons discussed above, both the appeals are dismissed.

CHIEF JUSTICE

Announced on  
10<sup>th</sup> May, 2010

Peshawar High Court

Mian Muhammad Iqbal --- Appellant/Petitioner (s)

Versus

Mian Muhammad Akhtar --- Respondent (s)

### ***JUDGMENT***

RFA No. 44/2004

Date of hearing 13.05.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFA No.44/2004 and Cross Objection No.5/2004 as they arise out of the same judgment and raise alike questions.

2. During the course of arguments, we were informed that the parties have arrived at a settlement and it has been agreed upon that the entire property, forming the subject matter of these appeals, i.e.

Property No.1 : Shop at Saddar Road.

Property No.2 : Plot at Shahi Bagh Road, Peshawar.

Property No.3 : Shafi Market Hata No. 5-A, Peshawar Saddar, be divided into four shares, put to sale and the proceeds be distributed accordingly. Three shares would go to three brothers, while the fourth would go to three sisters. The counsel for the parties affirm the above stated position. Mian Muhammad Iqbal, appellant in RFA No.44/2004, also affirms the aforesaid position by adding that the subject matter of dispute may not be confined to 25 shops situated in the Shafi Market but the entire property, as detailed above.

3. In view of the above position, the decree granted by the lower court is modified to the extent that the properties mentioned above, be divided into four shares i.e. one share will go to Mian Muhammad Iqbal, second share to Mian Muhammad

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Afzaal, third share to Mian Muhammad Akhtar and fourth share to three daughters of Mian Muhammad Shafee. After sale of these properties, the sale proceeds shall be distributed on the aforesaid agreed formula. As this dispute has been lingering on since long, the lower court seized of the application for final decree is directed to decide the matter within a period of six months. However, to implement the judgement delivered in this case, with the consent of the parties, Malik Ghulam Mohyuddin, Advocate, is appointed as Commissioner to ensure implementation of this judgment with in a period of three months. The Commissioner shall ensure that the value of the property No.1 & 2 shall not be less than Rs.5 crore each and that of property No.3 shall not be less than 40 crore. After sale of the aforesaid properties, the sale proceeds shall be distributed in four equal shares in accordance with the formula hinted to above. The fee of the commissioner shall be Rs.5 lac, Rs.2 lac would be paid initially within a period of two months and the remaining amount of fee on conclusion of the task assigned to him. The amount of fee shall be payable by the stake holders in equal shares. The amount of rent which has been collected so far by the Receiver shall be divided into four shares as hinted to above and the receiver shall continue receiving the rent till finalization of the matter.

4. If any problem crops up in implementing the order of this court, first the executing court sized of the matter and then this court, may, if so advised, be resorted to. Both the appeal and the Cross objection are disposed of in the above terms.

CHIEF JUSTICE

Announced on  
13th May, 2010.

J U D G E

Peshawar High Court

Mian Muhammad Iqbal --- Appellant/Petitioner (s)

Versus

Mian Muhammad Akhtar --- Respondent (s)

### ***JUDGMENT***

RFA No. 44/2004

Date of hearing 13.05.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFA No.44/2004 and Cross Objection No.5/2004 as they arise out of the same judgment and raise alike questions.

2. During the course of arguments, we were informed that the parties have arrived at a settlement and it has been agreed upon that the entire property, forming the subject matter of in these appeals, i.e.

Property No.1 : Shop at Saddar Road.

Property No.2 : Plot at Shahi Bagh Road, Peshawar.

Property No.3 : Shafi Market Hata No. 5-A, Peshawar Saddar, be divided into four shares, three brothers would get one share each, while the fourth share will go to three sisters, put to sale and the proceeds be distributed accordingly. The counsel for the parties affirm the above stated position. Mian Muhammad Iqbal, appellant in RFA No.44/2004, also affirms the aforesaid position by adding that the subject matter of dispute may not be confined to 25 shops situated in the Shafi Market but the entire Ehata No.5.

3. In view of the above position, the decree granted by the lower court is modified to the extent that the properties mentioned above, be divided into four shares i.e. one share will go to Mian Muhammad Iqbal, second share to Mian Muhammad

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Afzaal, third share to Mian Muhammad Akhtar and fourth share to three daughters of Mian Muhammad Shafee. After sale of these properties, the sale proceeds shall be distributed on the aforesaid agreed formula. As this dispute has been lingering on since long, the lower court seized of the application for final decree is directed to decide the matter within a period of six months. However, to implement the judgement delivered in this case, with the consent of the parties, Malik Ghulam Mohyuddin, Advocate, is appointed as Commissioner to ensure implementation of this judgment with in a period of three months. The Commissioner shall ensure that the value of the property No.1 & 2 shall not be less than Rs.5 crore each and that of property No/.3 shall not be less than 40 crore. after sale of the aforesaid properties, the sale proceed shall be distributed in four equal shares in accordance with the formula hinted to above. The fee of the commissioner shall be Rs.5 lac, Rs.2 lac would be paid initially within a period of two months and the remaining amount of fee on conclusion of the task assigned to him. The amount of fee shall be payable by the stake holders in equal shares. The amount of rent which has been collected so far by the Receiver shall be divided into four shares as hinted to above and the receiver shall continue receiving the rent till finalization of the matter.

4. If any problem crops up in implementing the order of this court, first the executing court sized of the matter and then this court, may if so advised be resorted to. Both the appeal and the Cross objection are disposed of in the above terms.

CHIEF JUSTICE

Announced on  
13<sup>th</sup> May, 2010.

J U D G E

Peshawar High Court

Muhammadzai Flour Mills --- Appellant/Petitioner (s)

Versus

WAPDA --- Respondent (s)

***JUDGMENT***

RFA No. 44/2001

Date of hearing 26.05.2010

**EJAZ AFZAL KHAN, C.J.**- Muhammad Zai Flour Mills, a limited company, appellant herein, has questioned the judgment dated 10-2-2001 of the learned Civil Judge Charsadda, whereby he dismissed its suit for damages.

2. The learned counsel appearing on behalf of the appellant contended that where it has been proved on the record that delay in providing the electric connection was on account of malafide of the respondents, the losses thus suffered by the appellant were to be made up by the respondents and that the learned trial court by ignoring the clear cut evidence on record acted against law by dismissing the suit of the appellant.

3. As against that the learned counsel appearing on behalf of the respondents by referring to the evidence available on the record contended that if at all, any delay occurred in providing the commercial electric connection to the appellant, that was not because of the respondents but on account of deficiencies in the application and other requirements whose fulfillment was necessary for providing the electric connection. The suit of the appellant, the learned counsel added, with this quality and quantity of evidence could not have any other end except dismissal which being free from any legal or factual error merits no interference.

4. We have gone through the evidence of the case carefully and have also considered the submissions made by the learned counsel for the parties.

Peshawar High Court

5. The record reveals that the appellant applied for electric connection in 1986. He wanted immediate connection but it could not be provided because the line wherefrom it was to be provided was already over loaded. PW.1 while stating this fact also added that the appellant was told in clear and unequivocal terms that the electric connection could not be provided to him till the establishment of a Grid Station at Tangi. After its establishment, the SDO took up the case of the appellant afresh and sent it to the XEN for approval, vide letter dated 5-6-1989. The Demand Note after approval was sent to the appellant on 10-7-1989 but the appellant objected to the amount thus demanded. The estimate given in the earlier demand note was, however, reviewed and a fresh demand note was issued on 28-12-1989. Though the appellant deposited the amount through a cross cheque dated 1-1-1990 but this was not the end of his responsibility. He was required to do something more by providing the test report. On his failure to do so, he was reminded to do the needful by another letter dated 19-9-1990. When the formalities were fulfilled, the office order for providing electric connection was issued on 31-1-1991. The connection was thus provided on 2-2-1991. All this shows that the respondents acted with due diligence. At no point of time their response to the appellant appears to be negligent or malafide.

6. A Chartered Accountant was, no doubt, produced in the court to prove the losses sustained by the appellant due to non-supply of electric connection, but this is imaginary and thus insignificant when there is nothing on the record to show that these losses, even if real, occurred due to the negligent or malafide act of the respondents. Even if it is assumed that the delay in providing the electric connection occurred because of some ill-will or malafide on the part of the officer working in the Establishment of the WAPDA it was required to be proved on the record who was that officer of the Department and who acted with such mindset during the relevant years. When it is not proved no decree can be granted on the basis of an omnibus allegation. The more so when none of such officers has either been named or arrayed as defendant in the suit.

Peshawar High Court

6. For the reasons discussed above, this appeal being devoid of force stand dismissed.

Announced on  
26th May,2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Arbab Shafiullah --- Appellant/Petitioner (s)

Versus

Suriya Begum --- Respondent (s)

### ***JUDGMENT***

RFA No. 152/2010

Date of hearing 31.05.2010

**EJAZ AFZAL KHAN, C.J.-** The appellants have questioned the order dated 8-2-2010 of learned Additional District Judge-V, Peshawar, whereby he dismissed their Reference for not complying with the order of the court directing to deposit the amount for publication of notice in the Newspaper.

2. The learned counsel appearing on behalf of the appellants contended that where decision on merits is the most cherished goal of law and a party at fault can adequately be penalized with imposition of a reasonable cost, dismissal on such score would be too harsh in the circumstances of the case.

3. The learned counsel appearing on behalf of respondents No.94 to 96 opposed the prayer by submitting that when the appellants despite numerous chances given by the court below failed to deposit the amount of publication in the Newspaper, their Reference was rightly dismissed.

4. I have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. The record reveals that neither the appellants nor any other respondents except respondents No.94 to 96 were present in the court on the date the impugned order was passed. Though the appellants were given last chance for depositing the amount, nonetheless, dismissal of a Reference on such score appears to be

Peshawar High Court

harsh and even unjust that too when valuable rights of the parties are involved in the case. This was all the more harsh and unjust when the party at fault could be adequately penalized with imposition of cost. I thus allow this petition, set aside the impugned order on a cost of Rs.3000/- and send the case back to the learned trial Court for decision afresh. The cost shall be paid to respondents No.94 to 96 as only they were present on the date the impugned order was passed. The appellants are also directed to deposit the amount for publication of notice in the Newspaper within ten days from the date of receipt of the file by the trial Court. The parties are directed to appear before the trial Court on 19-6-2010.

CHIEF JUSTICE

Announced on  
31<sup>st</sup> May, 2010

Peshawar High Court

LAC --- Appellant/Petitioner (s)

Versus

Khan Wali --- Respondent (s)

### ***JUDGMENT***

RFA No. 178/2007

Date of hearing 01.06.2010

**EJAZ AFZAL KHAN, C.J.-** The Land Acquisition Collector has questioned the judgment dated 17-4-2007 of the learned Referee Judge whereby he awarded compensation to the respondents for 41 Kanal and 9 Marla.

2. The learned counsel appearing on behalf of the appellants contended that he has no objection to the award of the compensation to the respondents of 22 Kanal & 2 Marla, but has a very serious reservation to the award of compensation in respect of the area lying underneath the drain which has been in existence since time immemorial. He next contended that, if at all, the learned Referee Court wanted to award compensation of the area underlying the drain already in existence, it should have done so after getting it measured and that in the absence of any such evidence, the impugned judgment awarding the compensation for the area over and above the one acquired cannot be maintained.

3. As against that the learned counsel appearing on behalf of the respondents contended that the area was measured by meets and bounds by the patwary. The learned counsel by referring to the statement of the Patwary tried to clarify the position but the same Patwary in his cross-examination admitted that he himself did not measure the property. When so we do not think the court was competent to award compensation of the area, underlying the drain without getting it measured through the appointment of a Commissioner. Though, the Commissioner was also appointed in this case but his report, for one reason or the other, was not

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confirmed. We, therefore, do not feel persuaded to maintain the impugned judgment. This appeal is, thus, allowed, the impugned judgment of the Referee Judge is set aside and the case is sent back to the learned Referee Court to decide it afresh after getting the area measured by appointing a seasoned Revenue Officer as Commissioner. The parties are directed to appear before the Referee Court on 19-6-2010. As it is an old case, it be decided within a period of two months.

Announced on  
1<sup>st</sup> June , 2010.

CHIEF JUSTICE

J U D G E

Peshawar High Court

General Akbarullah Awan --- Appellant/Petitioner (s)

Versus

Mst. Naznin --- Respondent (s)

### ***JUDGMENT***

RFA No. 45/2009

Date of hearing 02.06.2010

**EJAZ AFZAL KHAN, C.J.-** Appellant herein has questioned the order dated 24-1-2009 of the learned Additional District Judge-I, Peshawar, whereby he dismissed his suit by invoking the provision of Rule-3 of Order-XVII of the CPC.

2. The learned counsel appearing on behalf of the appellant contended that when despite the issuance of non-bailable warrants of arrest, the official witnesses sought to be examined by the appellant did not turn up, the fault did not lie with the appellant but with the witnesses, therefore, the appellant could not be punished for that.

3. As against that, the learned counsel appearing on behalf of the respondent contended that when despite many chances, the appellant failed to produce the witnesses in the court, the court had no alternative but to invoke the application of Rule-3 of Order-XVII of the CPC that too when a notice was also given to the appellant under the said provision.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Since decision on merits is the most cherished goal of law and a party at fault can adequately be punished with the imposition of a reasonable cost, dismissal of suit shall be too harsh a measure in the circumstances of the case, notwithstanding the

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appellant cannot say with his chin up that he was condemned for none of his faults. We thus allow this appeal, set aside the impugned order at the cost of Rs.15000/- and send the case back to the learned trial court for decision in accordance with law. The cost shall be paid to the respondent. As it is an old case, it be decided as early as possible but not later than three months. The parties are directed to appear before the trial Court on 26<sup>th</sup> June,2010.

CHIEF JUSTICE

Announced on  
2nd June, 2010.

J U D G E

Peshawar High Court

Director Nuclear Institute --- Appellant/Petitioner (s)

Versus

Muhammad Sharif --- Respondent (s)

### ***JUDGMENT***

RFA No. 164/2009

Date of hearing 03.06.2010

**EJAZ AFZAL KHAN, CJ.**-By this single judgment, we propose to decide Regular First Appeals No.164, 165, 166, 167, 168, 169, 170, 171, 172, 173 of 2009, filed by Nuclear Institute for Foods & Agriculture “NIFA” etc., and Regular First Appeals No.175, 176, 177 & 178, filed by Pakistan Atomic Energy Commission etc., and Writ Petition No.2737 of 2009, filed by some of the owners, as common questions of law and facts are involved in them.

2. The learned counsel appearing on behalf of the appellants contended that where commissioner went on the spot and conducted the entire proceeding culminating in his report in the absence of the appellants, no value could be given thereto and that the judgment of the learned Referee Judge based on such report being nullity in the eye of law, can't be maintained.

3. As against that, the learned counsel appearing on behalf of the respondents-owners contended that where commissioner was appointed and date for spot inspection was fixed by the Referee Court in presence of the parties, it doesn't lie in the mouth of the appellants to say that no notice was served on them on the date, the commissioner inspected the spot.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

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5. The record reveals that the spot inspection was made by the commissioner in the absence of the appellants. He admitted unreservedly in his statement recorded in the Court that he didn't issue any notice to the parties in general and the appellants in particular. Though, the counsel for the parties have been mentioned in the order sheets to have been present at the time of appointment of commissioner and fixing the date of spot inspection, but the fact is that the appellants weren't present in the Court on the said date. Even if presence of the counsel is construed to be the presence of the parties on the date the Court fixed the date of spot inspection, it alone will not serve the purpose because it wasn't only the date but also the time of the spot inspection, which was required to be conveyed to the parties. This isn't end of the matter. It has also to be seen whether the report has been drawn on correct premises?. Though, certain mutations have been annexed with the report but the learned commissioner hasn't considered them in their proper prospective in as much as he hasn't highlighted as to how the nature, character, location and potential of the property sold through such mutations was at par with the nature, character, location and potential of the property acquired in these cases. What led him to infer that the market value of the property acquired is Rs.1,00,000/- per marla at the relevant time hasn't been addressed with reference to reliable facts and figures. The learned Referee Judge, too, without applying his mind and without considering this aspect of the report relied upon it and proceeded to determine the compensation of the property acquired on its basis. A judgment, thus, delivered can't be maintained. Remand of the cases in the circumstances would, therefore, be inevitable for just decision of the case.

6. For the reasons discussed above, we allow these appeals, set aside the impugned judgments and send the cases back to the learned District Judge for decision afresh in accordance with law after appointing a commissioner from amongst the seasoned Advocates of the bar, who has sufficient experience of conducting such cases, for ascertaining the value of the property acquired. The fee of the commissioner shall be paid by the appellants. Since these cases relate to the compulsory acquisition, they can't be kept

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pending for long and, thus, be decided as early as possible but not later than one month. Both the parties are directed to appear before the Court on 15.06.2010. The office is directed to send back the record as early as possible but not later one week.

7. With regard to the prayer made in the writ petition No.2737 of 2009, suffice it to say that this Court in FAO No.90 of 2005 decided on 31.03.2010 held that when the award merges into the judgment of the learned Referee Judge and the judgment of the Referee Court merges into the judgment of High Court, regardless altogether of the fact, an owner didn't file reference or appeal, he can legitimately benefit from such final judgment.

Announced.  
03. 06. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

LAC --- Appellant/Petitioner (s)

Versus

Tahmash Khan --- Respondent (s)

### ***JUDGMENT***

RFA No. 51/2009

Date of hearing 04.06.2010

**EJAZ AFZAL KHAN, C.J.-** Through the instant appeal, the Land Acquisition Collector and the National Highway Authority have challenged the judgment dated 18-7-2008 passed by the learned Referee Judge whereby he enhanced the compensation of the property acquired for the construction of the road to Rs.7000/- per Marla.

2. The learned counsel appearing on behalf of the appellants contended that the Referee Judge while determining the compensation of the property acquired in these cases was mainly influenced by the Award No.425, dated 30-11-1996 but indeed the property acquired through this Award has no nexus with the property acquired in these cases, as the former being situated alongside the road is having much greater potential as compared to the latter, therefore, the enhancement so made calls for annulment. The report of the Commissioner, the learned counsel added, is also of no value in determining the compensation of the property acquired in these cases when it is based on surmises and conjectures without making any reference to any mutation or registered deed witnessing the transaction of a similar property. The learned counsel by concluding his arguments submitted that when no evidence worth the name has been brought on the record to show that the value of the property acquired is by any means Rs.7000/- per Marla, enhancement of even Rs.100/- cannot be justified.

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3. As against that the learned counsel appearing on behalf of the respondents contended that the property acquired for construction of road by virtue of Award No.425, dated 30-11-1996 is by no means different from the one acquired in these cases, therefore, it was rightly taken into account while determining the compensation of the property acquired in these cases. The learned counsel next contended that once it is not disputed that property in these cases is capable of being used as a building site its specie would lose its value. The learned counsel by referring to Mutation No. 7616, attested on 25-9-1998, contended that when a property in the same village has been purchased at the rate of Rs.9200/- per Marla in the year 1996 for the construction of Telephone Exchange, the compensation of the property acquired in these cases deserves an enhancement to that extent at least if not more. The report of the Commissioner, the learned counsel added, would also call for enhancement of compensation of the property acquired when according to the said report a property having similar nature and character is sold at the rate of Rs.7000/- to Rs.10000/- per Marla.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that a great deal of property in the same village was acquired for the construction of road at the rate of Rs.7000/- per Marla, vide Award No.425 dated 30-11-1996. It further reveals that another property in the same village was purchased for the construction of Telephone Exchange at the rate of Rs.9200/- per Marla, vide Mutation No. 7616, attested on 25-9-1998. The report of the Commissioner also shows that the property having similar nature, character and location is sold at the rate of Rs.7000/- to Rs.10000/- per marla. When so we do not think the learned Referee Judges committed any error much less legal by enhancing the compensation of the property to the tune of Rs.7000/- per marla. This enhancement shall be all the more justified when it is not disputed that the property acquired in these cases is capable of being used as a building site. It is by now too

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settled to be re-iterated that the Court while determining the compensation of a property compulsorily acquired is to consider the price which a willing seller would demand from a willing purchaser. Even otherwise this enhancement is not open to any exception as the property in these cases was acquired much later in terms of time, when every passing day registered a marked increase in the prices of the property. Ever increasing inflation would be yet another factor for not interfering with the finding of the Referee Judge. The judgments of the learned Referee Judge being based on proper appreciation of law and evidence, are, therefore, not open to any exception.

7. For the reasons discussed above, the appeal is, thus, dismissed, with no order as to costs.

Announced on  
4th June,2010

CHIEF JUSTICE

Peshawar High Court

Muhammad Zahin --- Appellant/Petitioner (s)

Versus

NHA --- Respondent (s)

### ***JUDGMENT***

RFA No. 166/2010

Date of hearing 07.06.2010

**EJAZ AFZAL KHAN, .C.J.-** By this single judgment, I propose to decide RFA Nos.166, 167 & 168 of 2010 wherein the appellants have questioned the judgements dated 25-3-2010 of the learned Referee Judge whereby he dismissed the References filed by them.

2. The learned counsel appearing on behalf of the appellants contended that once the Reference was confined to the question of enhancement of compensation, the learned Referee Court could not, by travelling beyond it, enquire into the question of limitation and proceed to dismiss it on this score. The learned counsel next contended that the learned Referee Court also acted with indecent haste by dismissing the Reference on the ground that the appellants received the compensation without voicing their protest on its quantum notwithstanding such question being factual could be decided only after confronting the appellants with their signatures or thumb impressions.

3. As against that, the learned counsel appearing on behalf of the respondents contended that though the Reference was sent to the Court of the Referee Judge for determination of the compensation nevertheless it could decide whether it was within time or not in view of provision contained in Section 3 of the Limitation Act. The learned counsel next contended that where the Acquittance Roll clearly bore the signatures and thumb impressions of the appellants, the learned Referee Court did not commit any

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error by dismissing the Reference and that the impugned judgments being free from interference are not open to any interference

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. It has been settled in the case of “**Government of West Pakistan Vs. Arbab Haji Ahmad Ali Jan and others**” (**PLD 1981 Supreme Court - 516**) that once a Reference has been sent to the court on a particular question, it cannot go beyond that. Therefore, dismissal on the question of limitation being beyond the competence of the Referee Court cannot be maintained. Section 3 of the Limitation Act cannot be invoked when the Land Acquisition Act has its own scheme of limitation. Dismissal of Reference after seeing the alleged signatures and thumb impressions of the appellants on the Acquittance Roll also appears to be an outcome of indecent haste notwithstanding such questions being factual could be decided only after giving the appellants an opportunity to affirm or deny the said signatures or thumb impressions on the Acquittance Roll. I, therefore, do not feel inclined to maintain the impugned judgments.

6. For the reasons discussed above, I allow these appeals, set aside the impugned judgments and send the cases back to the learned Referee Court for decision afresh in accordance with law after recording evidence. The parties are directed to appear before the Referee court on 22-6-2010.

Announced on  
7th June, 2010.

CHIEF JUSTICE

Peshawar High Court

Mori Lasht Bala --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

### ***JUDGMENT***

RFA No. 229/2006

Date of hearing 09.06.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, We propose to decide RFA Nos. 207, 229 & 233 of 2006 as they arise out of the same subject matter and raise alike questions of law and facts.

2. Main thrust of the arguments of the learned counsel for the appellants was that where the property known as Mori Bala is different from the one known as Mori Lasht Bala, the judgment given pursuant to the previous litigation could not be made basis for rejecting the claim of the appellants, therefore the impugned judgment being against the evidence on the record cannot be maintained.

3. As against that the learned counsel appearing on behalf of the respondents contended that though the property known as Mori Bala and Mori Lasht Bala are different, nonetheless the judgment rendered in the previous litigation also covered it; that the learned Referee Court by extensively referring to the said judgment arrived at just conclusion and that the finding thus handed down being free from any infirmity much less legal is not open to any interference.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

Peshawar High Court

5. When we asked whether the property known as Mori Bala and Mori Lasht Bala are one and the same, the learned counsel for the respondents answered in “no”. Though, he added that the previous litigation covered the property known as Mori Lasht Bala as well, but he could not substantiate his stance with reference to the judgment. Even otherwise the Referee Court was required to decide whether the Mori Bala and Mori Lasht Bala are the same and if not whether the judgment handed down in the previous litigation also gave adjudication vis-à-vis the latter. When the judgment is silent on these points, it would be rather unjust to maintain it. We, therefore, allow these appeals, set aside the impugned judgment and send the case back to the learned Referee Court for decision afresh on the issues hinted to above after appointing a seasoned Revenue Officer as Commissioner. The parties are directed to appear before the Referee Court on 14-7-2010. As the matter has been lingering on since long, it be decided within a period of three months.

CHIEF JUSTICE

Announced on  
9<sup>th</sup> June, 2010

J U D G E

Peshawar High Court

Shabbir Muhammad --- Appellant/Petitioner (s)

Versus

Mukhtiar Muhammad --- Respondent (s)

### ***JUDGMENT***

RFA No. 151/2009

Date of hearing 14.06.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, I propose to dispose of RFA No.151/2009 filed by Shabbir Muhammad Khan (hereinafter called as appellant) and Cross Objection No.1 /2010 filed by Mukhtiar Muhammad (hereinafter called as respondent) as they arise out of the same dispute.

2. Learned counsel appearing on behalf of the appellant contended that when according to the Deed Ex.PW.3/1 only a sum of Rs.8 lac was advanced to the appellant, a suit for an amount greater than that could not have been instituted. The learned counsel next contended that where the amount mentioned in the cheques was not written by the appellant, no decree even for an sum of Rs.9 lac could be passed.

3. As against that, the learned counsel appearing on behalf of the respondent contended that when the appellant issued as many 5 cheques for a sum of Rs.11 lac and nothing has been brought on the record to prove payment of even a single penny, the learned trial court was required to grant a decree asked for without any subtraction, the more so, when cheques being an acknowledgement of debt are always invariably presumed to have been issued for a consideration.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

Peshawar High Court

5. Though a Deed was also executed between the parties showing that a sum of Rs.8 lac was advanced to the appellant for business but at the same time it is not disputed that as many as 5 cheques for a sum of Rs.11 lac were issued to the respondent. The appellant throughout denied having entered the amount in the cheques but when he did not dispute that the cheques issued related to his Account and the signatures thereon are his signatures, mere denial of entering the amount would not be of any significance. Since in view of the provision contained in Section 118 of the Negotiable Instruments, cheque is not only an acknowledgement of a debt but is presumed to have been given for a consideration unless proved otherwise, they are to be accepted on their face value. Appellant could not prove that he paid the amount sought to be paid through cheques except an amount to the tune of Rs.2 lac. The respondent also admitted that he has received an amount of Rs.2 lac but he construed it not as an amount paid towards the satisfaction of the principal amount but as a profit earned on the amount thus advanced. Whether the payment of Rs.2 lac could be construed towards satisfaction of the debt or as a profit of the amount so advanced, is the main question urged through the Cross Objection. The learned Additional District Judge while dealing with this question has termed it as payment towards the satisfaction of the principal amount because the respondent nowhere termed this amount as profit if seen in the light of his pleading. The treatment given to the aforesaid issue by the learned trial court appears to be correct and close to the admitted facts on the record. It, thus, merits no interference even on this score.

6. For the reasons discussed above, both the appeal as well as the Cross Objection being without any substance stand dismissed.

CHIEF JUSTICE

Announced on  
14th June, 2010

Peshawar High Court

Haji Inayat Khan --- Appellant/Petitioner (s)

Versus

Shamsur Rehman --- Respondent (s)

### ***JUDGMENT***

RFA No. 33/2003

Date of hearing 30.06.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos. 33, 34, 36, 61, 63 and 731 of 2003 wherein the appellant has questioned the judgments and decrees of the learned Senior Civil Judge, Dir at Timargara, on alike questions of law and facts.

2. The main contention of the learned counsel for the appellant was that where the signatures on the cheques and other documents have been denied by the appellant and for one reason or another, he was not confronted therewith, case cannot be said to have been proved against him, that too when a look at the signatures shows marked variation.

3. As against that, the learned counsel appearing on behalf of the respondent contended that though the signatures on the cheques have been denied but when Account No. and the Cheque Book relate to the appellant, denial simplicitor cannot extricate him from the consequences especially when such cheques are presumed to have been issued for consideration under Section 118 of the Negotiable Instruments Act.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. According to the averments made in the plaint and the evidence recorded in the court, signatures on the cheques and

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other documents are alleged to be those of the appellant. But where these signatures have been denied, it was rather essential and even imperative to get the opinion of the hand writing expert in this behalf. Though the cheques are presumed to have been issued for consideration yet some evidence was required to be brought on the record when according to the respondent, the consideration for cheques was transfer of vehicles. Not only that documentary evidence was also required to be brought on the record to show that he was in fact owner of the vehicles alleged to have been transferred to the appellant. When many things essential for just decision of the case have not been done, remand of the cases would be inevitable. We, therefore, allow these appeals, set aside the impugned judgments and decrees and send the cases back to the learned trial court for decision afresh after obtaining the opinion of the Hand Writing Expert vis-à-vis the disputed, admitted and specimen signatures of the appellant. The parties would be at liberty to examine additional evidence to meet the points hinted to above. The parties are directed to appear before the trial court on 12-7-2010. As these are old cases, these be heard on day to day basis and decided within a period of two months.

CHIEF JUSTICE

J U D G E

Announced on  
30th June 2010.

Peshawar High Court

Abdul Sattar --- Appellant/Petitioner (s)

Versus

Chairman WAPDA --- Respondent (s)

### ***JUDGMENT***

RFA No. 178/2003

Date of hearing 05.07.2010

**EJAZ AFZAL KHAN, .C.J.-** Property of the appellant was acquired for the construction of a drain. Notification under Section 4 of the Land Acquisition Act (hereinafter called as “Act”) was issued on 17-9-1996. After complying with other formalities, the Award was announced on 5-11-1999. The value of the property was fixed at the rate of Rs.393/- per Marla in the Award mentioned above. The appellant aggrieved of the said Award, filed a Reference under Section 18 of the Act. The learned Collector despatched the same to the Referee Judge who after recording the evidence dismissed it, vide judgment dated 30-9-2003. Hence, this appeal.

2. Learned counsel appearing on behalf of the appellant contended that when there was a gap of more than three years in between the issuance of a Notification under Section 4 of the Act and the announcement of the Award, the compensation of the property could not be determined according to the year of the former as every passing day registered an appreciable increase in the market value of the property. The market value, the learned counsel added which prevailed at the time of announcement of the Award, could have been taken into account and that the learned Referee Court by failing to consider this essential aspect of the case, acted against law of the land. The learned counsel next contended that when according to one yearly average of 1999, the market value has been shown as Rs.1172.6 per Marla. the learned Referee Judge was required to enhance the compensation at least to that extent if not beyond.

Peshawar High Court

3. As against that, the learned counsel appearing on behalf of the respondents contended that where there was no other evidence showing the market value of the property, one yearly average could only be taken into consideration and that the Collector by awarding Rs.393/- per Marla acted in accordance with the provision of Section 23 of the Act which being proper and adequate is not open to any interference.

4. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that there was a gap of three years in between the issuance of Notification under Section 4 of the Act and that of announcement of the Award. It further reveals that during said gap an appreciable increase was noticed in the market value of the property. The average from 2-11-1998 to 2-11-1999 shows that the property of this nature was sold at the rate of Rs.1172.6 per Marla. It thus cannot be lost sight of. The compensation of the property acquired in this case has to be enhanced accordingly. The case of **“N.W.F.P. through Collector Abbottabad Land Acquisition and others Vs Haji Ali Asghar Khan and others” ( 1985 S C M R – 767 )** may well be referred to in this behalf.

6. I thus allow this appeal and enhance the compensation from Rs.393/- per Marla to Rs.1172.6 per Marla. The appellants would be entitled to compulsory acquisition charges at the rate of 25% as the property has been acquired for the Company. He would also be entitled to 6% simple interest from the date the property was taken possession of.

Announced on  
5th July,2010.

CHIEF JUSTICE

Peshawar High Court

LAC --- Appellant/Petitioner (s)

Versus

Rawaid Khan --- Respondent (s)

***JUDGMENT***

RFA No. 15/2008

Date of hearing 19.07.2010

**EJAZ AFZAL KHAN, CJ.-** Appellants through the instant appeal have questioned the judgment dated 31.10.2007 of the learned Additional District Judge-I, Nowshera, whereby, he enhanced the compensation of the property acquired for Islamabad-Peshawar Motorway to the tune of Rs.30,000/- per marla.

2. The learned counsel appearing on behalf of the appellants contended that when many other appeals, arising out of the same award, after being allowed have been sent back to the learned Referee Judge on reversal of the impugned judgment, vide judgment dated 13.04.2010 of this Court in RFA No.137/2008, this appeal, too, requires alike treatment.

3. The learned counsel appearing on behalf of the respondents didn't dispute the aforesaid position. In this view of the matter, I allow this appeal, set aside the impugned judgment and send the case back to the learned Referee Judge for decision afresh alongwith other references in accordance with law. The office is directed to send the case record as early as possible but not later than three days.

Announced.  
19. 07. 2010

CHIEF JUSTICE

Peshawar High Court

Munawar Shah --- Appellant/Petitioner (s)

Versus

LAC Peshawar --- Respondent (s)

### ***JUDGMENT***

RFA No. 65/2002

Date of hearing 05.10.2010

**EJAZ AFZAL KHAN, CJ.**- A property measuring 21 kanals, 10 marlas, bearing Khasra Nos.1919, 1920, 1922 & 1989 alongwith other property, situated in village Sheikh Muhammadi, Tehsil & District Peshawar was acquired for the construction of a housing colony for the welfare of Army Personnel, though Award No.272-75/ADC dated 25.07.1992. A reference was filed by the appellants for the enhancement of compensation, but it was dismissed vide judgment dated 10.04.2002 by the learned Senior Civil Judge, Peshawar / Judge Land Acquisition. Hence this appeal.

2. The learned counsel appearing on behalf of the appellant contended that since the nature, character, location and future potential of the property forming subject matter of dispute in this case is similar to the one, which has been dealt with by this Court in RFA No.30/2004, titled G.M. Army Welfare Trust vs. Zahir Shah etc. decided on 27.07.2006, it, has to be treated similarly.

3. The learned counsel appearing on behalf of the respondents opposed it by contending that no convincing evidence has been brought on the record by the appellants to justify enhancement of the compensation. The compensation, the learned counsel added, awarded by the Collector and then up-held by the learned Referee Judge is not open to any interference, particularly, when no commission was issued to collect any evidence in support of such claim. The learned counsel in support of his contentions

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placed reliance on the judgment of **Government of Sindh & 2 others vs. Muhammad Usman & 2 others (1984 CLC 3406)**.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for both the parties.

5. While dealing with the property acquired through the same award having same nature, character, location and future potential, we, in RFA No.30/2004, held as under:-

“Notification under section 4 of the Land Acquisition Act in the instant case was issued on 28.09.1991. Besides the one yearly averages of the year preceding or succeeding the said date, no convincing oral or documentary evidence has been brought on the record to show that the price of the property was or could be Rs.8000/- per marla at the relevant time. A good number of witnesses were examined in the Court below but the main thrust of their evidence was that the strips of their property are situated along side the Sheikh Muhammadi Road or in the nearby vicinity and as such they can fetch much higher price than the one spelt out by the one yearly averages as mentioned above. The only above board evidence, we can fallback upon is that of mutations Nos.7234 and 7235 which could furnish a basis for determining a price that a willing purchaser would pay to a willing seller. Though it was also used as a sheet anchor by the learned counsel for the respondents to call for enhancement of compensation awarded by the Collector but it could not, in any way, justify the enhancement to the extent it was enhanced

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by the learned Referee Judge. When confronted that a property having a similar nature and character was acquired by the appellants through private negotiation on the basis of the aforesaid mutations at the rate of Rs.5000/- per marla, the same amount could also be fixed for the property acquired in this case, Mr. M. Sardar Khan, learned counsel for the appellants, by finding himself in a blind alley could not advance any argument except the one that that property was acquired for having access to the property acquired, therefore, that could not be treated at par with the property acquired in this case. But this argument, in our view, is not strong enough to shield the appellants from being beaten with their own weapons. It does not lie in their mouth to raise even a whisper in this behalf, when they themselves have acquired a property of similar nature and character at such rate during the relevant year. Such sales have to be reckoned with and given preference over the one yearly averages. The cases of **Murad Khan through his widow and 13 others vs. Land Acquisition Collector Peshawar and another and Province of Sindh through Collector of District Dadu and others vs. Ramzan and others (Supra)** may well be referred as authorities for the aforesaid conclusion. We, thus, hold that compensation of the property acquired in this case could, by no means, be either more or less than Rs.5000/- per marla. The property of the appellant in RFA No.53 of 2002 is also to be treated with the same yardstick.”

6. Since there is no difference between the nature, character, location and future potential of the property acquired in this case and the one forming subject matter of dispute in RFA No.30/2004, quoted above, we wouldn't like to treat the former in a different way. We, therefore, allow this appeal, enhance the compensation of the property to Rs.5,000/- per marla. Needless to say that the appellants would be entitled to 15% compulsory acquisition charges and simple interest @ 6% from the date of taking possession till the date of payment.

Announced.

05. 10. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Tehsil ur Rehman --- Appellant/Petitioner (s)

Versus

Wahid Noor --- Respondent (s)

### ***JUDGMENT***

RFA No. 205/2010

Date of hearing 11.10.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, I propose to decide RFA No. 205/2010 filed by Tehsil ur Rehman and others (hereinafter referred to as appellants) and RFA No. 370/2010 filed by Wahid Noor (hereinafter referred to as respondent) as they arise out of the same judgment.

2. Brief facts of the case are that a notice was published in the newspaper at the instance of appellant No.2 on the abetment of appellant No.1 wherein public by and large was warned to enter into any transaction with regard to her property or asking the hands of the daughters of the plaintiffs who were betrothed with her sons.

3. Respondent instituted a suit for damages on the basis of such notice published in the newspaper to the tune of Rs.two lac which was decreed to the extent of Rs.125000/-, vide judgment dated 26-4-2010. Hence this appeal (RFA No.205/2010) while respondent filed appeal (RFA No.370/2010) on the ground that when he succeeded to prove mental torture, his suit was liable to be decreed in toto.

4. Learned counsel appearing on behalf of the appellants contended that where notice was not served on the appellants in accordance with the requirements of Section 8 of the Defamation Ordinance, 2002, suit for damages filed by the respondent was liable to be dismissed, even if it is assumed that the

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time consumed in a wrong forum was liable to be condoned under Section 14 of the Limitation Act.

5. As against that the learned counsel appearing on behalf of the respondent contended that respondent firstly instituted a suit in the civil court for damages but when it transpired that under the latest dispensation of Defamation Ordinance, 2002 such suits are to be instituted in the District Court, he without any loss of time, did it accordingly. The learned counsel added that Section 14 of the Limitation Act cannot be applied in the case of the respondent when he never knew about the latest law while instituting a suit for damages. He by concluding his arguments contended that when notice was issued to the respondents after the decision of his appeal, the period of delay if any in giving notice is also liable to be condoned.

6. I have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that the respondent produced sufficient evidence to prove that the notice published in the Newspaper was defamatory as it not only tarnished his image and belittled him in the estimation of the people but also caused mental torture to him. Granted that the respondent succeeded in making out a case for damages on the score of damage to his reputation and mental torture. Granted that the time consumed by the respondent in the civil court is liable to be condoned under Section 14 of the Limitation Act when there is sufficient material on the record to show that he pursued his remedy in a wrong forum in good faith and with due diligence. But his failure to serve notice on the appellants within two months after the publication of the defamatory material came to his notice, is fatal to his suit. It can neither be condoned nor can be brought within the mischief of Section 14 of the Limitation Act. Since a notice within the stipulated time in terms of Section 8 of the Ordinance is sine qua non, the suit of the respondent in its absence cannot lie. I, therefore, allow RFA No.205/2010, set aside the decree and

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dismiss the suit filed by the respondent, whereas, RFA No.370/2010 is dismissed.

CHIEF JUSTICE

Announced on  
11th Oct., 2010

Peshawar High Court

Government of Pakistan --- Appellant/Petitioner (s)

Versus

Land Acquisition DOR Nowshera --- Respondent (s)

### ***JUDGMENT***

RFA No. 76/2005

Date of hearing 28.10.2010

**EJAZ AFZAL KHAN, C.J.-** By this single judgment, we propose to decide RFAs Nos. 76 & 83 of 2005 filed by the M.E.O. & others wherein they have questioned the judgment dated 9-10-2004 of the learned Referee Judge awarding payment of taxes, CVT and stamp duty.

2. The learned Deputy Attorney General appearing on behalf of the appellants contended that the stamp duty cannot be awarded against the appellants in respect of any acquisition as it stands exempted by virtue of Section 51 of the Land Acquisition Act. He went on to argue that the CVT too was not chargeable at the relevant time in view of the Notification, vide Circular No.05 of 1999 (Capital Value Tax), dated 6<sup>th</sup> July, 1999. Similarly, the District Council Fee, the learned DAG added, cannot be charged in advance so long as the appellants do not ask for the attestation of mutation in their favour.

3. Learned Additional Advocate General appearing on behalf of the respondents conceded that in view of Section 51 of the Land Acquisition Act, the Stamp duty cannot be charged. He also conceded that CVT cannot be charged in view of Notification, vide Circular No.05 of 1999 (Capital Value Tax), dated 6<sup>th</sup> July, 1999. However, he seriously opposed the contention of the learned DAG regarding the chargeability of the District Council fee.

Peshawar High Court

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. A perusal of the Notification, vide Circular No.05 of 1999 (Capital Value Tax), dated 6<sup>th</sup> July, 1999, reveals that the CVT could not be charged on the transfer of immovable property at the relevant time. The stamp duty too could not be charged in view of the provision contained in Section 51 of the Land Acquisition Act. However, the learned DAG could not refer to any document or notification as could show that the property acquired could be exempted from the District Council Fee which is leviable at the time of attestation of mutation. Even otherwise, it is in the interest of the department to do that and if now they do not, the same would be charged at the time when the mutations are attested. We thus allow these appeals, set aside the impugned judgments to the extent of payment of CVT and stamp duty while maintain them to the extent of District Council Fee. Both the appeals are thus disposed of.

CHIEF JUSTICE

J U D G E

Announced on  
28th Oct. 2010

Peshawar High Court

NHA --- Appellant/Petitioner (s)

Versus

Mst. Bibi Hawa --- Respondent (s)

***JUDGMENT***

RFA No. 38/2010

Date of hearing 03.11.2010

**EJAZ AFZAL KHAN, CJ.**- By this single judgment, we propose to decide Regular First Appeals No.38, 39, 40, 41, 42, 43, 44, 45, 46, 47 & 48 of 2010, filed by the National Highway Authority and another (hereinafter called as “the appellants”) and Regular First Appeals No.105, 106, 107, 108, 109, 110, 111, 112, 113, 114 & 115 of 2010, filed by the owners (hereinafter called as “the respondents) as common questions of law and facts are involved in them and are mainly directed against the same judgments.

2. Facts leading to the institution of these cases are that a land measuring 390 kanals and 5 marlas was acquired by National Highway Authority in Moza Jabba Daudzai, Tehsil & District Nowshera for the construction of Islamabad—Peshawar Motorway Project vide Award No.681 dated 08.08.2007. The Collector while determining the market value could not find any other basis except one yearly average. Though, according to one yearly average, the market value of the property of ‘Shah Nehri’ type was shown as Rs.36,904/- per marla while the market value of the property of ‘Sailaba’ type was shown as Rs.10,000/- per marla but for the reasons best known to him, he reduced it to half respectively. Discontent with the award, the owners filed references in the Court of the learned District Judge, Nowshera, who allowed them and consequently, enhanced the compensation to Rs.36,904/- per marla of ‘Shah Nehri’ type and Rs.10,000/- per marla of ‘Sailaba’ type vide judgment dated 17.10.2009. Hence, these appeals.

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3. The learned counsel appearing on behalf of the appellants contended that though the original notification under Section 4 of the Land Acquisition Act, was issued on 15.07.1997 but since the property of the respondents was included by virtue of a corrigendum issued on 19.10.2006, the crucial date for determining the market value would be 19.10.2006. The learned counsel next contended that though one yearly average in between 18.01.2000 and 17.01.2001 of 'Shah Nehri' and 'Sailaba' type of lands has been shown to have coincided with the date of issuance of corrigendum but it is wrong on the face of it because no such notification or corrigendum under Section 4 of the Land Acquisition Act was issued on such dates. The learned Referee Court, the learned counsel added, appears to have based its judgment on no evidence, therefore, remand of the case would be inevitable. The learned counsel next contended that the average on the crucial dates could have been taken into account but unfortunately that was not brought on the record either by the respondents or by the Court itself. The learned counsel went on to argue that when one yearly average appears to be fake on the face of it, the learned Referee Court could have proceeded to appoint a commission to work out the compensation of the property after its local inspection but when, that too, was not done, a judgment based on guesswork cannot be maintained.

4. As against that the learned counsel appearing on behalf of the respondents contended that though the corrigendum, whereby, their property was included, was issued on 19.10.2006 but when no other evidence was available to determine the market value of the property acquired even the Collector had no other option but to consider one yearly average of 'Shah Nehri' and 'Sailaba' type of lands sold in between 18.01.2000 and 17.01.2001, though, he reduced it to its half without any justification. If at all, the learned counsel added, this average was fake or false, it should have been questioned in the cross-examination of the witness producing it but where not even a whisper was raised against that, it cannot be looked at now with doubt and suspicion. The learned counsel by elaborating their arguments submitted that where the compensation of the property is to be determined keeping in view

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what willing a purchaser would pay to a willing seller, something more than mere average is to be looked out for determining adequate compensation of the property compulsorily acquired. The learned counsel placed reliance on the case of **Land Acquisition Collector & others vs. Mst. Iqbal Begum & others (PLD 2010 SC 719)**.

5. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

6. It is true that the crucial date for the purposes of determining the compensation of the property acquired is the date of issuance of notification under Section 4 of the Land Acquisition Act or the date of issuance of corrigendum, whereby, the property acquired was included. But where nothing has been brought on the record to show as to what was the market value of the property acquired in the preceding or succeeding year of the issuance of corrigendum, the one yearly average in between 18.01.2000 and 17.01.2001 could not be brushed aside. In case the average of the year mentioned above was fake or fabricated to bring about increase in the value, the witness producing it could have been cross-examined on these lines. Where the average so produced was not seriously questioned nor any other documentary evidence was brought on the record to prove it fake, it has to be considered and taken into account while determining the compensation. When what a willing purchaser would pay to a willing seller for a property which is similar to the property acquired in its nature, character, location and future potentiality cannot be lost sight of something more than mere average was to be looked out. But when nothing was found, this average was rightly considered and relied upon by the learned Referee Judge. It is important to note that even the Collector while determining the compensation of the property acquired considered the average mentioned above but what called for its reduction to its half is neither mentioned in the award nor has been highlighted by the learned counsel for the appellants. Some better or even best evidence could have been brought on the record to prove that one yearly average was either fake or

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exaggerated but again nothing was done in this behalf. The inference would, thus, be unavoidable that had it been brought on the record, it would have gone against the appellants. The appellants against this backdrop cannot benefit from their own omission. Nor can they assert that the market of the land acquired in the years preceding or succeeding the year of issuance of corrigendum was less than what was determined by the learned Referee Judge. The compensation of the land, thus, determined by the learned Referee Judge appears to be just and proper. Neither it calls for enhancement nor reduction. The case of **Land Acquisition Collector & others vs. Mst. Iqbal Begum & others (Supra)** may well be referred to in this behalf.

7. For the reasons discussed above, we, while maintaining judgments of the learned Referee Court, dismiss appeals filed by the appellants as well as by the respondents.

Announced.  
03. 11. 2010

CHIEF JUSTICE

J U D G E

Nawab Ali --- Appellant/Petitioner (s)

Versus

LAC --- Respondent (s)

### ***JUDGMENT***

RFA No. 11/2010

Date of hearing 23.12.2010

**EJAZ AFZAL KHAN, CJ.**- By this single judgment, we propose to decide Regular First Appeals No.11, 17, 19, 29, 49 of 2010 and 236 & 244 of 2009, filed by the owners (hereinafter called as “the appellants”) and Regular First Appeals No.84, 85, 86, 87, 88, 89 & 90 of 2010, filed by the Sarhad Development Authority etc (hereinafter called as “the respondents) as common questions of law and facts are involved in them and are mainly directed against the same judgments.

2. Facts leading to the institution of these appeals are that property, whose compensation is subject matter of dispute before us was acquired for the construction of Industrial Estate vide Award dated 16.05.2007 at the rate of Rs.27,866/20 per Kanal. Reference was filed by the appellants which, according to them, was partially allowed, as the compensation was not enhanced as desired.

3. The learned counsel appearing on behalf of the appellants as well as the respondents unanimously stated at the bar that the report of the Commissioner being based on surmises and conjectures cannot furnish adequate basis for determining the market value of the property and that the learned Referee Judge erred in relying upon it without testing its probative worth and that it would be in the interest of justice to remand the case for decision afresh after issuing a fresh commission.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

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5. The contentions of the learned counsel for both the parties appear to be correct as the report of the Commissioner is not supported by any cogent and convincing oral as well as documentary evidence. Even the evidence of the owners is not of a nature as could be considered of unquestionable worth for determining the market value of the property. We, thus, allow these appeals, set aside the impugned judgments and send back the cases to the learned Referee Judge for decision afresh after issuing a fresh Commission at the expense of the respondents. In the circumstances of the case, the appellants as well as the respondents shall be at liberty to adduce additional evidence in support of their claim.

Announced.  
23. 12. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Government of NWFP --- Appellant/Petitioner (s)

Versus

Muhammad Sharif --- Respondent (s)

***JUDGMENT***

RFA. No. 25/2003

Date of hearing \_\_\_\_\_

**EJAZ AFZAL KHAN J.-** This appeal is directed against the judgment and decree dated 8.6.2002, whereby the learned Civil Judge on the basis of an admission made by the appellants in their written statement partially decreed the claim of the respondent in view of the provisions contained in Rule 6 of Order XII of the C.P.C.

2. The learned Deputy Advocate General appearing on behalf of the appellants contended that no doubt a Court can decree a claim even partially on the basis of an admission made by the defendants but this adjudication should have covered the entire dispute relating to claim of the respondent in respect of white chalk and duster. By, he next urged, bifurcating the dispute into shreds and fragments, the learned trial Court has further complicated the matter in stead of bringing an end thereto.

3. As against that, the learned counsel appearing on behalf of the respondent, contended that the learned trial Court proceeded to decree that part of the claim of the respondent which was admitted by the appellants in their written statements, therefore, it being well within the parameters of his jurisdiction merits no interference. He next contended that the issue of damages, though arises out of the same dispute but it has not been adjudicated upon so far, therefore, any argument to question a matter not decided so far cannot be said to aggrieve the appellants by any stretch of imagination .

4. I have gone through the record and considered the submissions of the learned counsel for the parties.

Peshawar High Court

5. A perusal of the record in general and written statement in particular would indicate that the appellants never disputed the grant of decree to the tune of Rs.82,130.15/- in respect of white chalk and duster. When that being the case, I do not think, any exception can be taken to the decree of the learned trial Court particularly when nothing significant and substantial has been pointed out by the learned Deputy Advocate General during the course of his arguments as could show that either the admission was wrong or that the learned trial Court mis-understood its import or implication.

6. The argument that by bifurcating the dispute into shreds and fragments, the learned trial Court has further complicated the matter has not impressed me to the least particularly when the learned trial Court proceeded to decree only that part of the claim of the respondent which sprang mainly from the admission of the appellants.

7. For the reasons discussed above, this appeal being without substance is dismissed alongwith C.M.

J U D G E .

Mst. ROHEELA and others---Petitioners

versus

Syed MAZHAR ALI SHAH, and others---Respondents

## JUDGMENT

C.R Nos. 110/1997 & 508/1999  
(2001 CLC 1013 Peshawar)

Decided on 22.12.2000

(a) Transfer of Property Act-(IV of 1882)---

**Ejaz Afzal Khan, J** -----Ss. 122 & 123---Gift, validity of---Gift in respect of property made by husband in favour of his wife was objected to contending that even though the gift was made by husband to his wife, delivery of possession was to be proved and in absence of any such proof gift could not be held to be valid--Validity---Where the property had been gifted away by a husband to his wife, proof of delivery of possession to donee would not be necessary particularly when the control and management of the property was in the hands of the donor husband and possession with the donor after the gift would be deemed to be on behalf of the donee ---Rationale behind delivery of possession, was to ensure that property forming subject-matter of the gift had been 'transferred and that the donor had divested himself of that once for all---Donor by' getting the gift-deed registered and subsequently by getting the mutation attested on the basis of the registered deed, had left nothing unturned in divesting himself of the subject-matter of the gift---Gift would not become invalid for want of delivery of possession where donee was a ferriale because possession with the donor after gift would be deemed to be on behalf of the donee ---Change of possession would be complete if a recital was made in the gift-deed about the same;

Mst. Kaneez Bibi and another v. Sher Muhammad and 2 others PLD 1991 SC 466; Khuresheedul Islam v. Mrs. Qamar Jehan 1989 CU 1467; Mst. Waziran. v. Kalu etc. 1995 CLC 1532;

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K.S. Aghia Mir Ahmad Shah and others v. K.S. Agha Mir Yaqub Shah and others PLD 1957 (W.P.) Kar. 258; Shamshad Ali Shah and others v. Syed Hassan Shah and others PLD 1964 SC 143; Ashiq Hussain and another v. Ashiq Ali 1972 SCMR 50; Ghulam Hassan and others v. Sarfaraz Khan and others PLD 1956 SC (Pak.) 309 and Mst. Manzoor Mai v. Abdul Aziz 1992 CLC 235 ref.

(b) Specific Relief Act (I of 1877)---

---Ss. 42 & 54---Civil Procedure Code (V of 1908), S:115---Suit for declaration and injunction ---Revisional jurisdiction, exercise of---Appellate Court below in: reversing findings of Trial Court had not only misread the evidence on the record, but had also shown ignorance of latest dictums of superior Courts---Appellate Court below exercised jurisdiction not vested in it by setting aside and reversing well-reasoned judgment of Trial Court without any legal and factual justification---High Court, in exercise of its revisional jurisdiction, set aside judgment and decree of appellate Court and restored that of Trial Court which was based on proper appreciation of evidence and was perfectly in conformity with the latest pronouncement of superior Courts.

Sli. Wazir Muhammad assisted by Muhammad Jamil for Petitioners.

M. Sardar Khan assisted by Sami Ullah Jan for Respondents.

Dates of hearing: 8th and 18th December, 2000.

### **JUDGMENT**

The petitioners Mst. Raheela and others have assailed the judgment and decree, dated 3-3-1997 of the learned District Judge Peshawar whereby he accepted the appeal of the respondents Nos. 1 to 3 and thereby set aside the judgment and decree, dated 19-9-1995 of the learned Senior Civil Judge. Peshawar.

Peshawar High Court

2. Since Civil Revisions Nos.110, 135, 136 of 1997 and Civil Revision No.508 of 1999 arise out of the same judgments rendered in Civil Appeals Nos. 128/13 and 129/13 and originate from almost the same set of facts, I propose to dispose them through this single judgment.

3. The facts, stated in brief, are that Syed Muzaffar Shah since dead and now represented by respondents Nos. 1 to 3 instituted a suit against Najmal Fatima and others for declaration to the effect that the registered deed bearing No.2879 attested on 23-12-1946 whereby an area measuring 32 Kanals out of the property comprised in Khasra No.545 bearing Khata N0.567/472 measuring 62 Kanals, 9 Marlas was gifted by late Chan Badshah to his wife Mst. Najmal Fatima and subsequent mutations in favour of respondents, mentioned in the heading of the plaint are illegal, ineffective and void as against the rights of the plaintiff. Similarly Mst. Najmal Fatima since dead and now represented by her legal heirs, instituted a suit for possession through partition of land measuring 13 Kanals and 19-1/2 Marlas out of the suit Khasra with a prayer for prohibitory injunction restraining the defendants, respondents Nos. 1 to 3 herein from interfering with her rights.

4. Yet another suit was brought by Syed Mustafa Shah against the plaintiff Muzaffar Shah and others wherein he sought declaration that Mst. Najmal Fatima was owner of 24 Kanals out of Khasra No.545 and that the transfer by way of gift by her in favour of Abid Ali Shah through Mutation No.783 attested on 11-11-1975 and subsequent transfer of land by Syed Abid Ali Shah through Mutation No.741, dated 15-3-1977 is illegal, ineffective and void 'as against his rights with a consequential relief for perpetual injunction. All the aforesaid suits were consolidated and eventually disposed of through one consolidated judgment, dated 19-9-1995 whereby the suit of Mst. Najmal Fatima for possession through partition was decreed while the suit of Syed Muzaffar Shah was dismissed and similarly the suit brought by Mustafa Shah was also dismissed.

Peshawar High Court

5. Respondents Nos. 1 to 3 herein, on being aggrieved by the aforesaid judgment, preferred appeals in the Court of District Judge which were accepted by the Court vide judgments in Appeals Nos. 128/13 and 129/13, dated .3-3-1997. The petitioners herein on being aggrieved by the judgments .of the learned District Judge, invoked the revisional jurisdiction of this Court by filing the revision petitions as mentioned above.

6. The learned counsel for the petitioners contended that admittedly the suit property was ownership of Syed Chan Badshah who transferred the same to his wife by way of gift vide registered deed No.2879, dated 2312-,1946, that gift was complete as it fulfilled all the pre-requisites thereof and that a recital as to the delivery of possession in the deed keeping in view the relationship of husband and wife between the donor and the donee was sufficient to complete the gift. He further contended that subsequent mutation of gift in favour of Syed Abid Ali Shah leaves no manner of doubt that the donor gifted -the property in dispute to his wife and that he by all means divested himself of the corpus of the gift in favour of his wife. The learned counsel by impeaching the validity of the judgments of the learned District Judge submitted that delivery of possession in the strict sense of words is not required where the gift has been made by a husband to his wife, more so when possession of the property gifted with tenant. In this behalf he placed reliance on the case of Mst. Kaneez Bibi and another v. Sher Muhammad and 2 others PLD 1991 SC 466, Khuresheedul Islam v. Mrs. Qamar Jehan 1989 CLJ 1467 and Mst. Waziran. v. Kalu etc. 1995 CLC 1532.

7. On the other hand, the learned counsel for the respondents Messrs M.. Sardar Khan and Samiullah Jan, Advocates; contended that delivery of possession even though the gift has been made by a husband to his wife is to be proved and in the absence of any such proof gift cannot be held to be valid. To support his contention the learned counsel-placed reliance on the case of K.S. Agha Mir Ahmad Shah and others v. K.S. Agha Mir Yaqub Shah and others PLD 1957 (W.P.) Kar. 258, Shamshad Ali Shah and others v. Syed Hassan Shah and others PLD 1964 SC 143, Ashiq Hussain and

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another v. Ashiq Ali 1972 SCMR 50 and Ghulam Hassan and others v. Sarfaraz Khan and others PLD 1956 SC (Pak.) 309. The learned counsel by summing up his arguments submitted that in the absence of any evidence showing attornment in favour of wife delivery of possession cannot be presumed.

8. I have seriously considered the arguments addressed by the learned counsel for the parties and been through the case-law cited at the bar. A perusal of plaint, its tone and tenor in which the facts are averred and the evidence on the record would reveal that the execution of the gift-deed is not disputed. It was, indeed, its validity which was questioned for want of delivery of possession. Even the arguments addressed at the bar were confined only to the validity or otherwise of the gift for want of delivery of possession. The core of the matter, therefore, is whether delivery of possession was essential for the validity of the gift in this case? The answer to this question is an accentual no, because-the rationale behind delivery of possession, as far as I am capable to understand, is to ensure that property forming subject-matter of the gift has been transferred and that the donor has divested himself of that once for all.

9. When seen in this perspective it is clearer than crystal that the donor by getting the gift-deed registered and subsequently by getting the mutation attested on the basis of the registered deed left nothing unturned in divesting himself of the subject-matter of gift. Above all else a recital in the registered deed as to delivery of possession by the donor to the donee is per se sufficient to prove that the subject-matter of the gift was parted with and that the donor who happened to be the husband of the donee divested himself of that.

10. Another conclusive rather crucial evidence on the record to prove this factum is Mutation No. 703 attested on 11-11-1975 whereby Mst. Najmal Fatima transferred an area of 24 Kanals of land out of the property in dispute by way of gift to her nephew Syed Abid Ali Shah in the presence of her husband Chan Badshah as is evident from the mutation. Apart from this where the property

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gifted is not in actual possession of donor there delivery of possession becomes just a meaningless formality. Similarly, where a property has been gifted by a husband to his wife even there the proof of delivery of possession will not be necessary particularly when the control and management of the property is in the hands of the donor and possession with the donor after the gift shall be deemed to be on behalf of the donee.

11. In the case of Mst. Kaneez Bibi and another v. Sher Muhammad and 2 others (supra) it was held that gift does not become invalid for want of delivery of possession where the donee is a female for the reason that possession with the donor after the gift shall be deemed to be on behalf of the donee. The relevant paragraph is reproduced as under:---

"The plethora of case-law on the question of the delivery of possession in cases like the present one; when the husband is the donor for a wife living with him, when the father is the donor for a daughter and for a minor living with him or a father-in-law for a daughter-in-law and/or her husband living with him, was not at all noticed. It may be straightaway remarked that in such-like cases strict proof by the donee of transfer of physical possession, as in other type of cases, is not insisted upon: To cite only one example; the Privy Council three quarters of a century ago in the case of Ma Mai and another v. Kallandar Animal AIR 1927 Privy Council 22 had observed that in the case of gift of immovable property by such a close relation of the female as are mentioned above, once mutation of names has been proved the natural presumption arising from the relationship existing between the donor and the donee, the donor's subsequent acts with reference to the property would be deemed to have been done on behalf of the donee and not on his own behalf. The obvious consensus has to be followed and adopted in this case also; there is absolutely no reason for departure. "

12'. In the case of Khursheedul Islam v. Mrs. Qamar Jehan (supra) the same view was reiterated and reaffirmed with much greater accent and emphasis. Quite recently in the case of Mst. Waziran. v. Kalu etc. (Supra) his Lordship of this High Court has sealed the

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fate of any view to the contrary by holding that change of possession shall be complete if a recital is made in the deed about the same. The relevant paragraph reads as under:---

"The Privy Council has further gone to hold in the same ruling that if the gift is between husband and wife; the change of possession is complete if it is merely written in the deed and that in case of a gift of a father to daughter, simple bona fide intention to give, is sufficient to prove. Taken on the analogy, the case of a daughter should be taken at par with that of a wife. In *Mst. Manzoor Mai v. Abdul Aziz* 1992 CLC 235, the transfer of possession was not considered material in case of female was involved. In such case of gift to a sister, mere utterance regarding change of possession made before Patwari Halqa while making an entry in Daily Diary was considered to be a sufficient evidence regarding change of possession."

13. The judgments relied upon by the learned counsel for the respondents are distinguishable and have little perceptible relevance to the facts of the case in hand. The judgment rendered in the case of *K.S. Agha Mir Ahmad Shah and others v. K.S. Agha Mir Yaqub Shah and others* (supra) is of no value particularly when the view taken in the judgment is not in tune with the latest pronouncements of the apex Court. The judgment rendered in the case of *Shamshad Ali Shah and others v. Syed Hassan Shah and others* (supra). will not advance the case of the respondents as the facts and circumstances of that case are totally different from those of the instant lis before me.

14. The case of *Ashiq Hussain and another v. Ashiq Ali* (supra) has also no application to the case in hand as in that case the donor himself revoked the gift on the ground of want of delivery of possession. There is no such question at issue in this case as the gift by the donor in favour of the donee is not disputed either by donor himself or by the predecessor-in-interest of respondents Nos. 1 to 3. The case of *Ghulam Hassan v. Sarfaraz Khan* (supra) is also distinguishable because in that case the deed of gift was executed on 31-5-1946 but the donor, so-called made no attempt to have it

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registered till the 2nd August, 1946. He also made no report to the Revenue Authority about the gift but in this case the deed was executed, it was registered and on the basis of registered deed mutation was entered and attested at the instance of the donor which goes a long way to prove that the donor has relinquished his dominion over the property gifted and completely divested himself of that by actively witnessing its further transfer by the donee to her nephew Syed Abid Ali, Shah.

15. In the light of the facts and the case-law discussed and distinguished above, I have no hesitation to hold that the learned District Judge has not only misread the evidence on the record but has also shown a great deal of audacity by ignoring the latest dictums of the apex Court and High Courts of the country in general and this Court in particular. The learned District Judge, therefore, exercised a jurisdiction so vested in him by setting aside and reversing a well-reasoned judgment of the learned trial Court without any legal and factual justification, particularly when the judgment of the learned trial Court was based on proper appreciation of evidence and was perfectly in conformity with the latest pronouncements of the Supreme Court and High Courts of the country.

16. Consequently all the revision petitions, inasmuch as they seek tray restoration of the judgment of the learned trial Court are accepted. The judgments and decrees, dated 3-3-1997 of the learned District Judge are set aside and that of the trial Court, dated-19-9-1995 is restored. Keeping in view the facts and circumstances of the case, the parties are, however, left to bear their own costs.

H.B.T./234/P

Revision accepted.

Peshawar High Court

MUHAMMAD SUBHAN and others---Petitioners

Versus

MIR QADAM KHAN and others---Respondents

## JUDGMENT

C.R No.751/1994

Decided on 30.04.2001

2001 M L D 1716 Peshawar

(a) Transfer of Property Act (IV of 1882)---

**Ejaz Afzal Khan, J** ----S. 54---Sale---When effective---  
Contention that sale before attestation of mutation or registration of deed could not be deemed to have any existence, was repelled on the ground that sale as defined means transfer of ownership in exchange for price paid or promised or part paid or part promised and has nothing to do with the attestation of mutation or registration of deed.

(b) Transfer of Property Act (IV of 1882)---

----S. 54---North-West Frontier Province Pre-emption Act (X of 1987), Ss.2(d) . & 13---Pre-emption suit---Sale---Non-attestation of mutation or registration of deed---Effect---Expression "sale" means transfer of ownership of immovable property in exchange for valuable consideration and the same has no nexus with the attestation of mutation or registration of deed as the same, more often than not, can be oral and thus, effective from the date when it is entered into---Want of attestation of mutation or registration of deed does not prevent a sale from being a sale though later on- it may be formalised or documented through attestation of mutation or registration of deed which, in fact and effect, only confirms the already existing fact or a fait accompli, i.e. sale.

(c) North-West Frontier Province Pre-emption Act (X of 1987)---

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----S. 13---Pre-emption suit ---Tal-e-Muwathibat---Making of such Talb before attestation of mutation or registration of sale-deed---Scope---Failure to make Talb-e-Muwathibat on attaining knowledge of sale before attestation of mutation or registration of sale-deed was not in conformity with the provisions of S.13, North-West Frontier Province Pre-emption Act,' 1987---' was required to make immediate demand (Talb-e-Muwathibat) in the sitting or meeting in which he came to know about the fact of sale, regardless altogether of attestation of mutation or registration of deed.

(d) North-West Frontier Province Pre-emption Act (X of 1987)---

----S. 13---Pre-emption suit---Immediate demand (Talb-e-Muwathibat)---. Object and scope---Where despite receiving intelligence about sale through any source whatsoever, the pre-emptor keeps still and expresses no intention to pre-empt the sale, the assumption would be that his need to acquire the property through pre-emption has not sprung from his natural and spontaneous reaction but from an object other than the one underlying the spirit of pre-emption right---Immediate demand before demand through notice (Talb-i-Ishhad) and Court (Talb-e-Khasumat) has been made sine qua non for the enforcement of right of pre-emption.

(e) North-West Frontier Province Pre-emption Act (X of 1987)---

----S.13---Pre-emption suit---Failure to make immediate demand (Talb-e-, Muwathibat)---Pre-emptor on attaining knowledge of sale waited for 6/9 days for attestation of mutation and then the demand was made---Suit was dismissed by Trial Court and appeal before Lower Appellate Court also met the same fate---Validity---Immediate demand was a condition precedent for making demand through notice and Court---Where immediate demand was not made on attaining the knowledge of sale, both the Courts below had rightly dismissed the suit.

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Ram Saran Lal and others v. Mst. Domini Kuer and others AIR 1961 SC 1747 and Zafar Ali v. Zainul Abiddin and another 1992 SCMR 1886 distinguished.

(f) North-West Frontier Province Pre-emption Act (X of 1987)---

---S. 13---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Pre-emption suit--Witnesses of Talb-e-Muwathibat, failure to produce them in Trial Court--Effect---Where making of the demand was alleged to have been made in the presence of witnesses, examination of the said witnesses could not be dispensed with--- Failure to produce the witnesses of Talb-i-Muwathibat would give rise to adverse inference in terms of Art.129(g) of Qanun-e-Shahadat, 1984.

(g) Civil Procedure Code (V of 1908)---

----S. 115---Revision---Scope---Factual controversy---Concurrent findings of facts by the Courts below---Effect---Factual controversy could not be attended to by High Court in exercise of its revisional jurisdiction---In absence of any jurisdictional error or infirmity in the findings of the two Courts below, High Court declined to interfere therewith---Revision was dismissed in circumstances.

Abdul Aziz Kundi for Petitioners.

Raham Badshah Khattak for Respondents.

Date of hearing: 13th April, 2001.

## **JUDGMENT**

The petitioners herein have assailed the judgment and decree dated 17-10-1994 of the learned District Judge, Karak whereby he dismissed the appeal of the petitioners and thus, upheld the judgment and decree dated 30-6-1994 of the learned trial Court.

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2. The facts forming the background of this litigation are that the petitioners instituted a suit for the enforcement of right of pre-emption in the Court of learned Senior Civil Judge, Karak which was dismissed and appeal there against also met the same fate, hence this revision petition.

3. The learned counsel appearing on behalf of the petitioners contended that the findings of both the Courts below are based on misreading and non reading of evidence and that their conclusions are not supported by the evidence on the record. The learned counsel next contended that the law relating to enforcement of right of pre-emption has not remained stringent as it was before because in view of the latest pronouncements of the Supreme Court the rigors for the enforcement of right of pre-emption have been reduced and it is now interpreted quite liberally and absence of particulars as to date, time and place of making jumping demand and the name of the person informing about the sale cannot be taken to non-suit the pre-emptor. He by referring to section 31 of the N.-W.F.P. Pre-emption Act X of 1987, hereinafter called the Act, contended that knowledge about the sale before completion thereof will not necessitate the making of preliminary immediate demand as sale before the attestation of its mutation or registration of deed cannot be deemed to have any existence, therefore, failure to make immediate demand before either of them will not call for the dismissal of suit. He in this connection placed reliance on a judgment of the Supreme Court of India rendered in the case of Ram Saran Lal and others v. Mst. Domini Kuer and others AIR 1961 SC ,1747. The learned counsel by referring to the judgment of the Supreme Court in the case of Zarghoon Shah v. Muhammad Yaqoob Khan to Civil Appeal No.560 of 1995 contended that immediate demand need not be made in the presence of witnesses and failure to produce them for the proof of immediate demand will not be fatal to the case of pre-emptor.

4. On the other hand, the learned counsel for the respondents contended that failure to make immediate demand after knowing about the sale is fatal to the, case of a pre-emptor as by making it he is not to loose anything but his failure to make it would

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inevitably be met with consequences which are essentially damaging to his case. He in this connecting placed reliance on the case of Zafar Ali v. Zainul Abiddin and another 1992 SCMR 1886. The learned counsel for the respondents by summing up his arguments contended that the concurrent findings of fact cannot be interfered with in the absence of any jurisdictional error in the exercise of revisional jurisdiction of this Court, therefore, this revision petition is liable to be dismissed.

5. I have carefully considered the arguments of the learned counsel for the parties and perused the record. The argument of the learned counsel for the petitioners that sale before the attestation of mutation or registration of deed cannot be deemed to have any existence goes against the very definition of sale, which means, transfer of ownership in exchange for price paid, or promised or part paid or part promised. Even under the Act the expression sale means transfer of ownership of immovable property in exchange for valuable consideration and has thus, no nexus with the attestation of mutation or registration of deed as the same, more often than not, can be oral and thus effective from the date when it is entered into. Want of attestation of mutation or registration of deed will not prevent a sale from being a sale though later on it may be formalised or documented through the attestation of mutation or registration of deed which in fact and effect only confirms an already existing fact or a fait accompli.

6. The next argument of the learned counsel for the petitioners that knowledge about a sale before the attestation of mutation or registration of deed will not necessitate the making of immediate demand is not in conformity with the provision of section 13 of the Act hi is reproduced as below:

"13. **Demand of Pre-emption** The right of pre-emption of a person shall be extinguished unless such person makes demands of pre-emption in the following order, namely:--

(a) Talb-i-Muwathibat;

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- (b) Talb-i-Ishhad; and
- (c) Talb-e-Khusumat.

### **Explanations**

- (1) 'Talb-i-Muwathibat means immediate demand by a pre-emptor in the sitting or meeting (Majlis) in which he has come to know of the sale declaring his intention to exercise the right of pre-emption

**Note**-- Any words indicative of intention to exercise the right of Pre-emption are sufficient.

- (1) 'Talb-i-Ishhad' means demand by establishing evidence.
- (II) 'Talb-i-Khusumat' means demand by filing a suit.
- (2) When the fact of sale comes within the knowledge of a pre-emptor through any source, he shall make Talb-i-Muwathibat.
- (3) (Subject to his ability to do so, where) a Pre-emptor has made Talbe-muwathibat under subsection (2), he shall as soon thereafter as possible but not later than two weeks from the date of notice under section 32, or knowledge whichever may be earlier, make Talb-i-ishhad by sending a notice in writing attested by two truthful witnesses, under registration cover acknowledgment due to the vendee, confirming his intention to exercise the right of pre-emption:"

7. Even a casual glance at the above quoted provision would show that it requires a pre-emptor to make immediate demand in the sitting or meeting in which he comes to know about the fact of sale, regardless altogether of attestation its mutation or registration of deed. This omission, to say the least, is not accidental but deliberate and purposeful. Had the legislature intended to link or

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condition making of immediate demand or demand through notice with the knowledge of attestation of mutation or registration of deed, it would have clearly and expressly provided about that. But the very absence of the words attestation of mutation or registration of deed' in the' section would leave no manner of doubt that sale or knowledge about it has no nexus with the attestation of mutation or registration of deed. Therefore, the argument of the learned counsel for' the' petitioners would be void and vacuous both legally and logically. Apart from this; it has 'never been the case of the petitioners that they did not make immediate demand on knowing about the sale because it was not complete by then.

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8. A pre-emptor under the Act is required to make immediate demand as soon as he is apprised about a sale to indicate his natural and spontaneous re-action thereto before the dispersal of the gathering in which he hears about it. Where despite receiving intelligence about a sale through any source whatever he keeps still and expresses no intention to pre-empt it, the assumption would thus, be natural to arise that his need to acquire the property through pre-emption has not sprung from his natural and spontaneous re-action but from an object other than the one underlying the spirit of this right. It is in view of this important aspect that immediate demand before the demand through notice and Court has been made *sino qua non* for the enforcement of this right.

9. The record reveals that despite knowledge about the sale 6/7 days before the attestation of mutation the petitioners did not 'make the immediate demand which is a condition precedent for making demand through notice and Court, therefore, their failure would inevitably call for; the dismissal of their suit.

10. The last argument of the learned counsel for the petitioners that immediate demand need not be made in the presence of witnesses becomes relevant only when the knowledge of the petitioners about the sale 6/7 days before the attestation of mutation and their failure to make immediate demand at that time is ignored or left

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out of account, which, to my mind, in the light of the foregoing discussion, cannot be. Even if it be done, this argument cannot be brought to rescue of the petitioners because it is not their case that they came to know about the sale and ,that they made immediate demand when none was present Their case, instead, is ,that they came to know about the sale and made the immediate demand amidst the common gathering in which the mutation was attested. Once the making of immediate, demand was alleged to have been made in the presence of the witnesses then their examination cannot be dispensed with and failure to produce them for its proof would inescapably give rise to an adverse inference in terms of Article 129(g) of Qanun-e-Shahadat Order. For the aforesaid reasons the judgments relied upon by the learned counsel for the petitioners are distinguishable and, therefore, not relevant to the ease in hand. Besides this all the points agitated by the learned counsel for the petitioners do not travel beyond the sphere and scope of factual controversy which cannot be attended to by this Court in the exercise of its revisional jurisdiction. In the absence of any jurisdictional error or, infirmity in the findings of the two Courts below, I do not feel inclined to interfere therewith.

11. For the foregoing reasons, I see no merit in this revision petition I and thus, dismiss the game with no order as to costs.

Q.M.H./M A.K./304/P

Revision dismissed.

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BAIDULLAH JAN and 3 others---Petitioners

Versus

HAWAS KHAN and 11 others---Respondents

**JUDGMENT**

C.R No.40/2000

Decided on 7.12.2001

(P L D 2002 Peshawar 92)

(a) Constitution of Pakistan (1973)

**Ejaz Afzal Khan, J** ---- Arts. 203-D & 264---General Clauses Act (X of 1897), S.6---Expression "ceased to have effect" where a law has been declared repugnant to Injunctions of Islam mentioned in Art.203-D of the Constitution--Expression not synonymous to repealing enactment of a statute---Expression cannot be held synonymous with repeal as is envisioned by Art.264 of the Constitution and S.6 of the General Clauses Act, 1897; in the former eventuality even pending cases cannot be dealt with in accordance with the law which has been held repugnant to the Injunctions of "ilam and ceases to have effect after the date mentioned 'in the decision while in the later eventuality a proceeding pending in a Court or any such right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed are fully protected unless a different intention appears from repealing enactment.

(b) Limitation Act (IX of 1908)-----S. 28---Transfer of Property Act (IV of 1882), S.60---Redeeming of mortgage---Provisions of S.28- of the Limitation Act, 1908, declared repugnant to Injunctions of Islam---Suit not decreed before 31-8-1991, the cut-off date as given by Supreme Court in the case titled Maqbool Ahmad v. Government of Pakistan reported as 1991 SCMR 2063---Validity---If a suit instituted there under was decreed for the target date it was considered a transaction past and closed but if not then, the suit could not have been decreed

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thereafter---Suit, in the present case, was instituted on 22-7-1985 but it never culminated in a decree of the Court and by the time when it matured for being decreed, S.28 of the Limitation Act, 1908, did no more adorn the Statute of Limitation---Suit could not have been decreed in circumstances.

Maqbool Ahmad v. Government of Pakistan 1991 SCMR 2063 ref.

(c) Transfer of Property Act,,(IV of 1882)-----S. 55(d);.- Limitation Act (IX of 1908), S.20---Punjab Alienation of Land Act (XIII of 1900), Ss.6(1) & 7(1)(3)(4)(5)---Usufructuary mortgage, redeeming of---Plaintiff asserted that he was mortgagee of the suit property over sixty years, therefore, his title was perfected by prescription and title of the defendants stood extinguished after expiry of the period of sixty years--Both the Courts below had concurrently dismissed the suit ---Validity--Mortgage in question was usufructory mortgage' because possession of the property was with mortgagees who had been enjoying the usufructs of the property ever since its creation---Where a mortgagee was in possession of the mortgaged property and was in receipt of the usufructs, the receipt of such usufructs were to be treated as payment to the mortgagee for the purpose of limitation regardless altogether of the intention of the parties receiving such usufructs in view of the provisions contained in S.20 of the Limitation Act, 1908---High Court declined to interfere with the judgments and decrees passed by the Courts below.

Taj Din and 8 others v. Karim Bakhsh and 11 others 2000

SCMR 1463 distinguished.

Abdul Haq v. Ali Akbar 1998 CLC 129 and 1999 SCMR 2531 ref.

Dated: 30th November and 3rd December, 2001

Baidullah Jan one of the petitioners herein instituted a suit in the Court of learned Civil Judge for declaration to the effect that he

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alongwith pro forma-defendants being mortgagees of the property in dispute for over 60 years have perfected their title by prescription and that the title of the defendants, respondents herein stands extinguished after the expiration of the aforesaid period.

2. The suit was dismissed vide judgment and decree dated 6-2-1996 and appeal thereagainst also met the same fate vide judgment dated 13-12-1999, hence this petition.

2-A. The learned counsel for the petitioners contended that though the suit of the plaintiffs-petitioners could not have been decreed against the contesting respondent but the same was capable of being decreed against the respondents who were proceeded against ex pane by the trial Court vide order dated 13-3-1986 because the matter as against the said persons was a transaction passed and closed. The learned counsel to add vigor to his submissions placed reliance on the case of Taj Din and 8 others v. Karim Bakhsh and 11 others (2000 SCMR 1463).

3. On the other hand the learned counsel for the respondents contended that the suit of the plaintiff could not have been decreed after 13-8-1991 the day after which section 28 of the Limitation Act ceased to have effect. The learned counsel by referring to section 6(1) and 7(1)(3)(4)(5) of the Punjab Alienation of Lands Act, 1900, which was also extended to the N.-W.F.P. contended that mortgage created in favour of the petitioner being usufructory was self-redeeming in nature and the charge on the property stood satisfied by the enjoyment of the usufructs arising therefrom. by the mortgagee, therefore, the question of perfecting title by prescription does not arise. The learned counsel by referring to the case of Abdul Haq v. Ali Akbar 1998 CLC 129 and the judgment of the Hon'ble Supreme Court rendered in the same case on appeal 1999 SCMR 2531 contended that where a mortgagee is in possession of the mortgaged land and is also in receipt of usufructs, such receipt would be counted towards the payment of the mortgage money to him for the purpose of limitation regardless of the intention of the mortgagee while receiving the same.

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4. I have carefully considered the arguments of the learned counsel for the parties and perused the record and the judgments so produced by them.

5. The questions whether after the deletion of section 28 of the Limitation Act, a suit purported to have been instituted under section 60 of the Transfer of Property Act can be decreed and whether a law declared by the Supreme Court to be repugnant to the Injunctions of Islam and ceasing have effect after the date fixed in the decision can be held synonymous with the repeal of a law, require a detailed examination. Before I answer the questions it is worthwhile to reproduce the relevant provisions of the Constitution of the Islamic Republic of Pakistan, 1973 and General Clauses Act which read as under:--

"203-D.Powers 'urisdiction and functions of the Court.---(1)... ..

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,---

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provisions into conformity with the Injunctions of Islam; and

(b) such law or provision ,hall, to the extent to which it is held to be so repugnant cease to have effect on the day on which the decision of the Court takes effect "

264. Effect ryneal\_ of laws.----Where law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the Constitution---

(a) revive anything .not in force or existing at the time at which the repeal takes effect

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- (b) affect the previous operation of the law or anything duly done or suffered under the law;
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability,, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.

Section 6 of the General Clauses Act:

Effect of repeal.--Where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

- (a) revive anything not in force or existing at the time at which the `5,: repeal takes effect; or
  - (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
  - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
  - (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed -against any enactment so repealed; or
4. affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability enalty, forfeiture, or punishment as aforesaid; and any such investigation, legal

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proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

6. A perusal of the abovequoted provisions of the Constitution and the I General Clauses Act would reveal, that the expression "ceased to have effect" cannot be held synonymous with repeal as is envisioned by Article 264 of the Constitution and section 6 of the General Clauses Act. ' In the former eventuality even pending cases cannot be dealt with in accordance with the A law which has been so held repugnant to the Injunctions of Islam and ceases to have effect after the date mentioned in the decision while in the later eventuality a proceeding pending in a Court or any such right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed are fully protected unless a different intention appears from repealing enactment.

7. Section 28 of the Limitation Act was declared repugnant to the Injunctions of Islam by the Hon'ble Supreme Court in the case of Maqbool Ahmad v. Government of Pakistan (1991 SCMR 2063) and according thereto it ceased to have effect after 31-8-1991. If a suit instituted thereunder was decreed before the target date it was considered a transaction past and closed, but if not then it could not have been decreed thereafter. In the instant case though the suit was instituted on 22-7-1985 but it never culminated in a, decree of the Court and by the time when it matured for being decreed section 28 no more adorned the Statute, of Limitation thus it could not have been and cannot be decreed.

8. Besides this a look at the extracts from the periodical records would unmistakably indicate that. the mortgage in question was usufructory mortgage because possession of the property was with mortgagees who had been enjoying the usufructs of the property ever since its creation. Where a mortgagee is in ,possession of the mortgaged property and is in receipt of the usufructs, the receipt of such usufructs are to be treated as payment to the mortgagee for

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the purpose of limitation regardless altogether of the intention of the parties receiving such usufructs in view of the provisions contained in section 20 of the Limitation Act which merits reproduction and thus runs as under:--

"20.--(1) Where payment on account of a debt or of interest on a legacy is made, before the expiration of the prescribed period, by the person liable to pay the debt or legacy, or by his duly authorized agent, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

(2) Where mortgaged land is in the possession of the mortgagee; the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of subsection (1)."

9. A perusal of the abovequoted provision in general and its subsection (2) in particular would make it quite clear that when the mortgagee is in possession of the mortgaged property and receives the usufructs shall be deemed not only to be a payment of the mortgage money but its acknowledgment as well and thus a fresh period of limitation shall be computed from the time when such payment was made. This legal aspect of the case finds a lucid expression in the judgment rendered in the case of Abdul Haq v. Ali Akbar and 12 others (supra) relevant paragraph whereof reads as under:--

"When mortgagee is in possession of the mortgaged property and in receipt of the usufruct; such receipts are treated as payments to the mortgagee for purposes of limitation regardless of what the intention of the party receiving the produce may be or might have been. Subsection (2) of section 20 of the Limitation Act does not expressly refer to the intention of such party. Particular insertion of subsection (2) in section 20 and the specific words thereof make it

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altogether self-contained and even independent of the proviso preceding it concerning handwriting or signature of the person making acknowledgement. Simple possession of mortgagee and the receipt of rent or produce by him are sufficient ingredients to constitute absolute acknowledgement."

10. In appeal against the said judgment of the Hon'ble Judge of the Peshawar High Court their Lordships of the Supreme Court of Pakistan while upholding the same held as under:--

"On the parity of reasoning aforesaid, the learned Single Judge held the view that when the mortgagee is in possession of the mortgaged property and in receipt of the usufruct, such receipts are treated as payments to the mortgagee for the purpose of limitation regardless of what the intention of the party receiving the produce may be or might have been. Subsection (2) of section 20 of the Limitation Act, was held to have not 'expressly referred to the intention of such party'. Particular insertion of subsection (2) of section 20 -and the specific words thereof were construed to render it altogether self-contained and even independent of the proviso preceding it concerning handwriting or signature of the persons making acknowledgement. Therefore, the learned Single Judge concluded that simple possession of mortgagee and the receipt of rent or produce by him are sufficient ingredients to constitute absolute acknowledgement."

11. All the arguments the learned counsel for the petitioner, when considered in the light of the foregoing discussion, are stripped of force particularly when the mortgage in question is usufructuary in view of the definition made in the provisions of Punjab Alienation of Lands Act referred to above and section.58(d) of the Transfer of Property Act. The case of Taj Din and 8 others v. Karim Bakhsh and 11 others (supra) is, therefore, distinguishable and has no relevance to the case in hand.

Peshawar High Court

The result of the foregoing discussion is that this revision fails D which is accordingly dismissed with no order as to costs.

Q.M.H./371/P  
Revision dismissed.

HAYATULLAH JAN and others---Petitioners

Versus

JAN ALAM and others---Respondents

## JUDGMENT

C.R Nos. 10 and 23/2000  
2003 M L D 625 Peshawar

Decided on 22.03.2002

(a) Civil Procedure Code (V of 1908)-----

**Ejaz Afzal Khan, J** ----S.115---Revisional jurisdiction of High Court---Scope---High Court could not substitute its view in exercise of its revisional jurisdiction.

(b) North-West Frontier Province Pre-emption Act (X of 1987)-----

----Ss.6 & 13---Pre-emption suit---Making of Talbs---Pre-emptor, no doubt, could not be knocked down on the basis of technicalities, but noncompliance with requirement of S.13 of North-West Frontier- Province Pre-emption Act, 1987, was though a technicality but its non-observation would be fatal to pre-emption suit.

(c) North-West Frontier Province Pre-emption Act (X of 1987)---

----Ss.6 & 13---Qanun-e-Shahadat (10 of 1984), Arts. 74, 79 & 153--Pre-emption suit---Making of Talb-i-Ishhad, proof of---Notices with regard to Talb-i-Ishhad dispatched to vendees by pre-emptor contained in registered envelopes which were returned undelivered---Such documents being photostat copies of notices, were not proved according, to requirements of Arts.74, 79 & 153 of Qanun-e-Shahadat, 1984 as none of the witnesses testified to their correctness by affirming their signatures or thumb-impressions thereon and none of the witnesses had deposed that same were photographed from the original, plaintiff in

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circumstances, failed to fulfil requirement of Talb-i-Ishhad in accordance with provision of S.13 of North-West Frontier Province Pre-emption Act, 1987.

(d) Civil Procedure Code (V of 1908)-----

---S.115---Revisional jurisdiction, exercise of---In absence of any jurisdictional error, concurrent judgments of Courts below could not be, interfered with by High Court in exercise of its revisional jurisdiction.

Gohar Zaman Khan Kunali for Petitioner.

Mazhar Alam Khan Miankhel for Respondents.

Date of hearing: 12th March, 2002.

### **JUDGMENT**

Gulli Jan, predecessor-in-interest of the petitioner instituted a suit for pre-emption in the Court of learned Civil Judge, Lakki, which was dismissed vide his judgment and decree, dated 5-12-1994 and appeal there against was also dismissed by the learned District Judge, Lakki vide his judgment and decree dated 31-10-1996. On a revision filed by the petitioners the case was remanded to the learned District Judge, Lakki for decision afresh who after hearing the parties again dismissed the appeal of the petitioners vide his judgment and decree dated 26-10-1999 which have been impugned herein by both the parties through Civil Revisions Nos. 10 and 23 of 2000 which are disposed of through this single judgment.

2. The gist of the arguments of the earned counsel for the petitioners is that the preponderance of the evidence on the record shows that the plaintiff made Talb-i-Muwathibat on 20-8-1991 when he came to know about the sale; that the inference drawn by the learned District Judge that he came to know about the sale on 9-8-1991 is not deducible from the evidence on the record, therefore, the finding of the learned Appellate Court is based on

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misreading and non-reading of evidence and that since latest pronouncements of the Supreme Court have considerably reduced the rigours in the enforcement of the right of pre-emption a pre-emptor cannot be non-suited on the basis of technicalities.

3. On the contrary the learned counsel for the respondents contended that the predecessor-in-interest of the petitioners failed to make 'Talb-i-Muwathibat' on 9-8-1991 when he came to know about the sale; that even 'Talb-i-Ishhad' was not fulfilled in accordance with the requirements of section 13 of the Pre-emption Act, 1987 as registered envelopes returned undelivered contained photographs and that the finding of fact recorded by the Appellate Court, which is a final Court of fact cannot be upset merely because this Court on reappraisal of evidence comes to a different conclusion.

4. I have gone through the record and anxiously considered the arguments of the learned counsel for the parties:

5. The argument that the inference drawn by the learned District Judge that the plaintiff came to know about the sale on 9-8-1991 is not deducible from the record is not correct when seen in proper order and sequence of narration given by the P. W. Though on reappraisal of evidence another view as suggested by 'the learned counsel for the petitioners can also be taken, but, I am, afraid, this Court cannot substitute that in the exercise of the revisional jurisdiction.

6. There is no cavil with the argument of the learned counsel for the petitioner that in view of the latest pronouncements of the Honourable Supreme Court which have reduced rigours in the enforcement of right of pre-emption, a pre-emptor cannot be knocked down on the basis of technicalities but there is nothing in any of the aforesaid pronouncements indicating that compliance with the requirements of section 13 of the Pre-emption Act is a technicality and that its non-observance will not be fatal to his suit.

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7. The record further reveals that the notices dispatched to the vendees contained in the registered envelopes being photostat were not proved in accordance with the requirements of Articles 74, 79 and 153 of Qanun-e-Shahadat, Order 10 of 1984 as none of the witnesses testified to their correctness by affirming their signatures or thumb-impressions thereon and similarly none of the witnesses deposed that the same were photographed from the original.

8. Even otherwise there is nothing in the findings of the learned Appellate Court showing absence or excess of jurisdiction so as to call for interference therewith under section 115 of the C.P.C.

As a sequel to what is discussed above, Civil Revision No.10 being without merit is dismissed. Similarly as no jurisdictional error in the impugned judgments has been pointed out by the learned counsel for the respondents who was representing petitioners in Civil Revision No-23-of 2000, it is also dismissed, leaving the parties to bear their own costs.

H.B.T./703/P

Revisions dismissed.

MUHAMMAD SADDIQUE and others---Petitioners

Versus

AMEER ZADA KHAN and others---Respondents

**JUDGMENT**C.R No.315/2000  
(2003 Y L R 1355 Peshawar)

Decided on 3.02.2003

(a) Civil Procedure Code (V of 1908)---

**Ejaz Afzal Khan, J** ----O.XLI, R.31---Judgment and decree passed by Court---Validity---Petitioners had questioned judgment and decree passed by 'Zila Qazi' whereby he dismissed the appeal filed by petitioners and upheld judgment and decree passed by 'Illaqa Qazi'---Petitioners had alleged that issues had not been framed and lis was disposed of in a summary, hasty and off hand manner without independent application of mind---Judgment passed by 'Zila Qazi' had shown that he had only recorded the conclusion without reasons enabling him to arrive thereat---Judge who was seized of the matter, was required to state points of determination; decision thereon and reasons therefore to enable party on one hand and the next higher forum on the other to know how and why lis before him was decided in favour of one side and against the other---Such compliance should not be formal, but substantial and sufficient by all means and it should be evident from the judgment that Judge was conscious of the controversy involved and that the decision had been made on the basis of record with independent application of mind---Judicial order must be a speaking order manifesting by itself that Court had applied its mind to the resolution of the issues involved for their proper adjudication---Judgment of 'Zila Qazi' appeared to be perfunctory on the face of it and resolution of the issues involved with independent application of mind was absent---Said judgment could not give an impression to the party losing case that his case was decided fairly, justly and in accordance with law---Impugned

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judgment was set aside by High Court in exercise of its revisional jurisdiction and case was remanded to decide afresh in accordance with law after giving parties an opportunity of being heard.

(b) Administration of justice---

----Justice should not only be done, but should be manifestly seen to be done--Speaking order, rather than a cursory and a groundless order, was imperative indeed indispensable---Even Executive Authority, leaving aside the one exercising judicial power, while passing an order under the provisions of any enactment, was required to record reasons therefore.

(c) Civil Procedure Code (V of 1908)---

----S.115 & O.XLI, R.31---Revisional jurisdiction, exercise of---Contention that concurrent findings of fact arrived at by Courts below even though erroneous could not be interfered with in exercise of revisional jurisdiction of High Court, undoubtedly was valid and tenable contention, but in case Appellate Court which was first Court of appeal and final Court of fact had not given any finding at all, but had recorded conclusion without recording reasons, concurrent judgment of Courts below was set aside, in circumstances and case was remanded to decide afresh in accordance with law after giving parties an opportunity of being heard.

Gouranga Mohan Sikdar v. The Controller of Import and Export and 2 others PLD 1970 SC 158; Mollah Ejahar Ali v. Government of East Pakistan and others PLD 1970 SC 173; Abdul Qadir v. The Presiding Officer, Punjab Labour Court No.3, Lyallpur and 2 others PLD 1975 Lah. 44; Haji Sultan Ahmad through Legal Heirs v. Naeem Raza and 6 others 1996 SCMR 1729 and Mahabir Prasad v. State of U.P. AIR 1970 SC 1302 ref.

Sardar Khan for Appellant.

Qazi Muhammad Jamil for Respondents.

Date of hearing: 3rd February, 2003.

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## JUDGMENT

The petitioners through the instant petition have questioned the judgment and decree dated 5-4-2000 of the learned Zila Qazi Dir at Timargara whereby he dismissed the appeal filed by the petitioners and thus upheld the judgment and decree of the learned Illaqa Qazi dated 8-10-1999.

2. The learned counsel appearing on behalf of the petitioners by referring to the judgment of the learned Appellate Court contended that the issues have not been properly framed and that the learned Judge has disposed of the lis before him in summary, hasty and off hand manner without independent application of mind. The learned counsel by relying on the case of Gouranga Mohan Sikdar v. The Controller of Import and Export and 2 others (PLD 1970 SC 158), Mollah Ejahar Ali v. Government of East Pakistan and others (PLD 1970 SC 173) and the case of Abdul Qadir v. The Presiding Officer, Punjab Labour Court No.3, Lyallpur and 2 others (PLD 1975 Lah. 44) contended that the disposal of cases in a summary manner without giving reasons or resolving the points of controversy alone will constitute a ground for the remand of the case.

3. As against that, the learned counsel appearing on behalf of the respondent by controverting the arguments of the learned counsel for the petitioners contended that it is irony that precision in judgment is construed as deficiency of content and the worst of it is that it is characterized as hasty and off hand decision. The learned counsel by relying on the case of Haji Sultan Ahmad through Legal Heirs v. Naeem Raza and 6 others (1996 SCMR 1729) next contended that the concurrent findings of facts recorded by the Courts below cannot be interfered with by the High Court while exercising jurisdiction under section 115 of the C.P.C., even though erroneous unless such findings have been arrived at by misreading or non-reading of evidence or perverse appreciation thereof.

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4. I have gone through the record and carefully considered the submissions of the learned counsel for the parties.

5. A perusal of the evidence on the record would reveal that it was quite a lengthy case and a good number of witnesses had been examined by both the sides. The conclusion drawn by the learned Zila Qazi may have been based on proper appraisal of evidence but a perusal of his judgment shows that he perhaps thought to record only the conclusion without recording reasons enabling him to arrive thereat. The learned Judge seized of the matter was required under Order XLI, Rule 31 of the C.P.C. to state the points of determination; decision thereon and the reasons therefore to enable the party on one hand and the next higher forum on the other to know how and why the lis before him was decided in favour of one side or the other. This compliance should not be formal but substantial and sufficient by all means. It should be evident from the judgment that the Judge was conscious of the controversy involved and that the decision has been made on the basis of the record with independent application of mind. In the case of *Gouranga Mohan Sikdar v. The Controller of Import and Export and 2 others (supra)* it was held that the litigants who bring their dispute to the law Courts with incidental hardships and expenses do expect a patient and a judicious treatment of their cases and their determination by proper order. Similarly in the case of *Mollah Ejahar Ali v. Government of East Pakistan and others (ibid)* it was held that a judicial order must be a speaking order manifesting by itself that the Court has applied its mind to the resolution of the issues involved for their proper adjudication. The ultimate result may be reached by a laborious effort but if final order does not bear the imprint but on the contrary shows arbitrariness of thought and action and the feeling that justice has neither been done nor seems to have been done will be thus inescapable. Similar views were expressed in the case of *Abdul Qadir v. The Presiding Officer, Punjab Labour Court No.3, Lyallpur and 2 others (supra)*. In the case of *Mahabir Prasad v. The State of U.P. AIR 1970 SC 1302 at p.1304* almost similar view was expressed by the Supreme Court of India even with regard to the

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judgment of an authority exercising quasi-judicial power which may be reproduced as under:--

"Opportunity to a party interested in the dispute to present his case on question of law as well as fact, ascertainment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them, and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found, are attributes of even a quasi judicial determination. It must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him, it must appear that he has reached a conclusion which is according to law and just, and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Satisfactory decision of a disputed claim may be reached only if it be supported by most cogent reasons that appeal to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on the grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater for without recorded reasons, the Appellate Authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just."

6. Where the most coveted achievement nay the destination in the process of administration of justice is that justice should nor only be done but to be manifestly seen to be done, a speaking, rather than a cursory and a groundless, order is imperative indeed indispensable, more so when in view of section 24-A(2) of the General Clauses Act, 1897, even executive authority, leaving aside the one exercising judicial power, while passing an order under the

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provisions of any enactment, is required to record reasons therefore.

7. Since the judgment of the learned Zila Qazi appears to be perfunctory on the face of it and the resolution of the issues involved with independent application of mind is conspicuously absent, I do not think that it can give an impression to the party losing the case that his case was decided fairly, justly and in accordance with law.

8. As far as the second limb of the argument of the learned counsel for the petitioners is concerned, that seems to be without substance as the issues already framed by the trial Court are comprehensive enough to cover the entire gamut of controversy.

9. The argument addressed by the learned counsel for the respondent that the concurrent findings of facts arrived at by the Courts below even though erroneous cannot be interfered with in the exercise of revisional jurisdiction of this Court, is undoubtedly valid and a tenable argument but as discussed above, since the learned Appellate Court which being first Court of appeal and the final Court of fact has not given any finding at all, in my view the judgment referred to by the learned counsel has no application to the instant case.

10. For the reasons discussed above, I allow this petition, set aside the impugned judgment and remand the case to the learned Zila Qazi for decision afresh in accordance with law after giving the parties an opportunity of being heard. As it is an old case, let it be decided within one month. The parties are directed to appear in the Court of Zila Qazi on 10-2-2003.

H.B.T./739/P

Petition allowed.

Peshawar High Court

Muhammad Ghafoor --- Appellant/Petitioner (s)

Versus

Col: Ali Ghafoor --- Respondent (s)

### ***JUDGMENT***

CR. No. 242/2003

Date of hearing 19.02.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 25.2.2003 of the learned Addl Distt Judge Swabi whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 2.12.2000 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where private partition between the parties was admitted in that case the learned Courts below were required to decree the declaratory suit of the petitioners and that both the Courts below by ignoring the evidence on the record and admission made by respondent No.1 erred in law as well as fact by dismissing their suit.

3. As against that, the learned counsel appearing on behalf of the respondent, argued that an application for partition in respect of the suit property has been instituted by the respondents in the Revenue Court much before the institution of the present suit, therefore, it being incompetent was rightly dismissed by the Courts below particularly when even the question of title by virtue of private partition could well be urged and agitated there.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the impugned judgment would reveal that the learned Addl Distt Judge handed down the impugned

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finding without discussing evidence on the record and without recording reasons therefor. He was required to state the points of determination, decision thereon and reasons therefor as he was presiding over a first Court of appeal and final Court of fact. He has not altogether commented on the statement of the respondent wherein he admitted the factum of private partition. He was required to record reasons in case he concurred with the finding of the learned trial Court as to the nature of admission to enable this Court to know how and why the finding of the Court below was upheld.

6. The tenor of the judgment clearly shows that many things of crucial importance have not been considered in their proper perspective as is expected of a first Court of appeal, therefore, I do not feel inclined to uphold its finding which is too sketchy and deficient in content.

7. For the reasons discussed above, this petition is allowed, the impugned judgment and decree are set aside and the case is sent back to the learned Addl Distt Judge for decision afresh in accordance with law within a period of three months. The parties are directed to appear in the above mentioned Court on 28.2.2004.

Dated:19.2.2003.

J U D G E .

Peshawar High Court

Muhammad Saeed --- Appellant/Petitioner (s)

Versus

Mst. Akhtar Sultana --- Respondent (s)

### ***JUDGMENT***

CR. No. 261/2003

Date of hearing 09.09.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition seeks to impugn the judgment and decree dated 13.1.2003 of the learned District Judge Charsadda whereby she dismissed the appeal filed by the petitioners and thus upheld the judgment and decree dated 20.7.2002 of the learned trial Court.

2. The learned counsel appearing on behalf of the respondent contended that oral as well as documentary evidence on the record is not sufficient to establish the title of the respondent to the house in dispute, therefore, findings of both the Courts below being mis-conceived are liable to be set aside. The learned counsel next contended that entries made in the form P.T-I cannot be taken as proof of ownership particularly when the plaintiff respondent failed to establish the nexus of the other documents on the record with the house in dispute.

3. As against that,, the learned counsel appearing on behalf of the respondent by referring to the pedigree table of the respondent, form P.T-I, registered deed dated 7.9.1894, dower deed dated 24.4.1902 and the record of execution proceedings bearing No.43/11, instituted on 6.7.1939 and decided on 23.9.1939, contended that all these documents conclusively prove that the house in dispute was the ownership of the father of the respondent which was transferred to his wife and later on it devolved on her legal heirs. The learned counsel next contended that these documents also prove the fact that the status of the predecessor-in-interest of the petitioner was no better than that of a

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tenant, therefore, his possession for any length of time cannot make him owner.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the impugned judgment and relevant record would reveal that the learned District Judge before concurring with the finding of the trial Court has taken sufficient pain while appreciating the oral as well as documentary evidence on the record. The documents relied upon by the respondent clearly establish their nexus with the house in dispute, therefore, no exception could be taken to the findings of the Courts below. Even otherwise, the preponderance of documentary as well as oral evidence which alone is a criterion for deciding civil cases proves that the house in dispute was the ownership of the father of the respondent and that it was transferred to the name of his wife in lieu of her dower deed dated 24.4.1902 and on her demise it devolved on her legal heirs including the respondent.

6. The argument that the form P.T-I cannot be considered as a proof of title could have been otherwise tenable if there had been no other material on the record to support the contention of the respondent. But when it is considered in the light of other supporting documentary evidence on the record, I do not think, that entries made in the form can be left out of account.

7. Over and above this as the learned counsel for the petitioners could not pin point any factual, legal or jurisdictional error in the impugned finding, no case in my opinion is made out for interference therewith.

8. For the reasons discussed above, this petition being without merit is dismissed.

Dated:9.9.2003.

J U D G E.

Peshawar High Court

Liaqat Ali --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

### ***JUDGMENT***

CR. No. 382/2003

Date of hearing 09.09.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition has impugned the judgment and decree dated 27.3.2003 of the learned Zila Qazi Shangla Camp Swat whereby he dismissed the appeal filed by the petitioners and thus upheld the judgment and decree dated 11.6.2002 of the learned trial Court.

2. The learned counsel appearing on behalf of the petitioners by referring to the photo copy of the deed dated 3.1.1984 contended that the property which was gifted by the father of the petitioners to the respondents for the construction of School was 10½ marlas and as such they cannot assert their right over an area of 15 marlas by constructing a boundary wall thereon.

3. As against that, Mr.Bashir Muhammad A.D.E.O. on behalf of respondent No.3, contended that the area gifted by the father of the petitioners for the construction of School was 15 marlas which is fully born out by the revenue record and that both the Courts below by considering the entire material available on the record have rightly dismissed the suit of the plaintiffs.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners and the representative of the respondents.

5. A perusal of the evidence on the record would reveal that the area gifted by the father of the petitioners to the respondents for the construction of school was 15 marlas and not 10 -1/2 marlas. The extracts from the periodical record also

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buttress and bear out the aforesaid stand of the respondents. It is pertinent to note that the respondents have been in possession and peaceful enjoyment of the property in dispute ever-since the time, it was gifted by the father of the petitioners. During this period the petitioners nor any other legal heir of the donor took exception to the quantum of area, which too gives rise to the inference that the area gifted was 15 marlas and not 10 -1/2 marlas.

6. The argument addressed on the strength of photo copy of the deed dated 3.1.1984 that 10-1/2 marlas and not 15 marlas was gifted by the father of the petitioners to the respondents does not appear to be tenable on the face of it as the said deed has not been proved in accordance with the requirements of law either through primary or secondary evidence. The petitioners, therefore, cannot seek reversal of a concurrent finding of fact on the basis of a document which has not been proved in accordance with law.

7. As the learned counsel for the petitioners could not point out any error, absence, or excess of jurisdiction in any of the findings of the Courts below, I do not feel inclined to interfere therewith.

8. For the reasons discussed above, this petition being without substance is dismissed.

DATED:9.9.2003.

J U L D G E

Maghfoor Shah --- Appellant/Petitioner (s)

Versus

Wali Jan --- Respondent (s)

***JUDGMENT***

CR. No. 53/1998

Date of hearing 17.11.2003

**EJAZ AFZAL KHAN, J. –** The petitioner through the instant petition has questioned the judgment and decree dated 11.11.1997 of the learned Addl Distt Judge whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 6.3.1997 of the learned trial Court.

2. It was mainly argued by the learned counsel for the petitioner that absence of particulars as to the time, date and place of making talbs and the name of the person informing about the sale in the plaint perse will not non-suit the plaintiff, therefore, both the Courts below have erred by dismissing the suit of the petitioner on this score.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. As both the Courts below have concurrently held that the petitioner has not pleaded and proved talbs in accordance with the requirements of law , I will not like to interfere with the impugned judgment, even if, on re-appraisal of evidence a conclusion to the contrary is possible especially when no error, excess or absence of jurisdiction has been pointed out.

5. For the reasons discussed above, this petition being without merit is dismissed.

Dated:17.11.2003.

J U D G E

Peshawar High Court

Abdul Rasheed --- Appellant/Petitioner (s)

Versus

Nizamul Haq --- Respondent (s)

***JUDGMENT***

CR. No. 255/2001

Date of hearing 17.11.2003

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 17.2.2001 of the learned Zila Qazi whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 7.12.1991 of the learned Illaqa Qazi Samarbagh.

2. It was argued by the learned counsel for the petitioner that the learned Civil Judge in utter disregard to the order of examination as laid down by Qanun-e-Shahadat Order-X of 1984 after recording the statements of the defendants as C.Ws proceeded to decree the suit of the plaintiff even without examining him on oath. The learned counsel next contended that even the learned appellate Court did not give a legal treatment to the lis pending before him in the form of appeal as is required by Order XLI Rule 31 of the CPC.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the Court may examine the witnesses at any time to ascertain the genuineness or otherwise of the claim made by any of the parties and proceed to decree the suit without going through the rigours and rigmarole of the procedural law.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the statements of the C.Ws. reveal that the learned trial Court has followed rather , aberrant and unusual

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mode of recording the evidence. So much so he has proceeded to decree the suit without even examining the plaintiff on oath and giving the defendants an opportunity to cross-examine him notwithstanding the fact that onus lay on the plaintiff to prove his case. It is clearly a case of exercise of jurisdiction not so vested in the trial Court. Similarly the learned appellate Court has not followed the well recognized procedure while passing the impugned order as it appears to be more of a telegraphic message than a judgment required to be given by him under the law.

6. For the reasons discussed above, this petition is allowed, the impugned judgments and decrees are set aside and the case is sent back to the learned Aa'la Illaqa Qazi for proceeding in accordance with law. As it is an old matter, it be heard on day today basis and be concluded within one month. The record of this case be sent back to the learned Aa'la Illaqa Qazi as soon as possible but not later than a week. The parties are directed to appear before the learned Aa'la Illaqa Qazi on 20.12.2003.

Dated. 17.11.2003.

J U D G E .

Peshawar High Court

Mst. Shumaila --- Appellant/Petitioner (s)

Versus

Nadir Ali --- Respondent (s)

***JUDGMENT***

CR. No. 548/1997

Date of hearing 17.11.2003

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has impugned the judgment and decree dated 18.9.1997 of the learned Addl Distt Judge whereby he accepted the appeal filed by the respondents and thus set aside the judgment and decree dated 14.2.1996 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that the learned appellate Court confined its finding only to the thumb impression of the petitioner without discussing the evidence on the record and without taking stock of the law relating to the transaction entered into by Pardanashin lady.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the learned appellate Court after comparing the disputed thumb impression of the petitioner with the admitted one has rightly held that the impugned transaction was entered into at the instance of the petitioner.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the record reveals that the learned District Judge did not discuss the evidence of the parties while handing down the impugned finding. He only after comparing the thumb impression of the petitioner with the disputed one and without discussing the evidence held that the claim of the petitioner was false. This was not the end of his job. He was required to discuss the entire evidence to see whether the

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impugned transaction was in fact entered into by the petitioner whether she understood its nature; had had the benefit of independent advice while doing so and whether the respondents have discharged the burden of proving the genuineness and bona fide of the transaction.

6. When without attending to the above mentioned points, he reversed the judgment of the learned trial Court, I in the circumstances of the case, would be constrained to hold that he has not exercised the jurisdiction so vested in him in accordance with the law of the land, therefore, I allow this petition, set aside the impugned judgment and decree and send the case back to the learned Addl District Judge for decision afresh after hearing the parties. The parties are directed to appear before the learned Addl Distt Judge Lahor on 20.12.2003. As it is an old case, let it be disposed of within 3 months.

Dated:17.11.2003.

J U D G E.

Peshawar High Court

Haji Muhammad Iqbal --- Appellant/Petitioner (s)

Versus

Rahim Shah --- Respondent (s)

***JUDGMENT***

CR. No. 938/2003

Date of hearing 17.11.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 17.5.2003 of the learned Addl District Judge Peshawar whereby he dismissed the appeal filed by them and upheld the judgment and decree dated 28.2.2002 of the learned Civil Judge –II Peshawar.

2. It was mainly argued by the learned counsel for the petitioners that the house constructed by the petitioners was raised not in Khasra No.2068 but Khasra No.385 which is contiguous thereto and is their ownership to the exclusion of other ; that decree for recovery of possession against them on the plea of alleged encroachment is just un-thinkable without demarcation and that both the Courts below have erred in fact as well as law by decreeing the suit of the respondents.

3. As against that, the learned counsel appearing on behalf of the respondents by referring to the statement of Patwari Land Acquisition contended that where the property of the petitioners on the basis whereof they instituted the instant petition has been acquired in its entirety, the petitioners are left with no locus standi muchless a cause of action to impugn the findings of the Courts below.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is not disputed that the property comprised in Khasra No.385 has been acquired by the Government in its entirety

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. It is also not disputed that beside Khasra No.385 the petitioners owned no other property contiguous to the property in dispute. When so, I do not think, the petitioners have been left with any locus standi muchless a cause of action to question the impugned findings notwithstanding her persuasive arguments.

6. For the reasons discussed above, this petition being without force is dismissed alongwith C.Ms.

Dated:17.11.2003.

J U D G E

Sardar Zahid Ali --- Appellant/Petitioner (s)

Versus

Mst. Sabiha Naheed --- Respondent (s)

***JUDGMENT***

CR. No. 962/2003

Date of hearing 17.11.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 19.9.2003 of the learned Addl District Judge Peshawar whereby he dismissed the appeal filed by them and thus upheld the order dated 14.4.2003 of the learned trial Court.

2. The main argument of the learned counsel for the petitioners was that where the respondents without any legal or moral justification are collecting rent from the tenants of the petitioners, they should have been restrained from doing so and that both the Courts below by declining the injunction asked for have failed to exercise the jurisdiction so vested in them.

3. I have gone thorough the record carefully and considered the submissions of the learned counsel for the petitioners canvassed at the bar.

4. When confronted the learned counsel for the petitioners admitted that the tenants of the petitioners are still paying rent to them, when so, I do not think the petitioners have any cause of grievance and that the issuance of a restraining order as asked for will be of any consequence.

5. For the reasons discussed above, this petition being mis-conceived is dismissed in limine alongwith the C.M.

Dated:17.11.2003.

J U D G E

Peshawar High Court

Gul Daraz --- Appellant/Petitioner (s)

Versus

Noor Nawaz --- Respondent (s)

### ***JUDGMENT***

CR. No. 24/2002

Date of hearing 18.11.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 8.10.2002 of the learned Addl District Judge-I Kohat Camp Court Karak whereby he upheld the judgment and decree dated 16.6.1999 of the learned Civil Judge Karak.

2. It was mainly argued by the learned counsel for petitioners that both the Courts below while relying upon the report of the Commissioner have not considered it in its true perspective; that despite direction of the learned District Judge in the earlier round of litigation, the respondent has not impleaded all the co-owners of the property comprised in Khasra No.2900; that the plaintiff respondent has failed to prove his right of easement as by prescription or necessity; that the respondent became owner in the said Khasra number 3 years after the institution of the suit and as such cannot claim any right of easement in it on the basis of his ownership and that the learned appellate Court while passing the impugned order has not recorded reasons therefore in accordance with the provisions of Order-XLI Rule 31 of the CPC.

3. As against that, the learned counsel appearing on behalf of the respondent argued that the matter was patched up between the parties in the presence of the Commissioner who went on the spot to work out the encroachment ; that when both the parties agreed to abandon their encroachments vide written agreement dated 5.12.2003 the dispute was set at rest, therefore, the petitioners cannot turn round to make an out right departure

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there-from and that both the Courts below on proper appraisal of evidence have rightly decreed the suit of the respondent.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It cannot be disputed on the record that when the commissioner went on the spot in the presence of the elders of the locality, the matter was patched up between the parties and in consequence the area which was encroached by the petitioners was abandoned in favour of the respondent and the one encroached by the respondent was abandoned in favour of the petitioner. It too cannot be disputed that the report of the Commissioner which was submitted in the Court on the basis of the aforesaid settlement was confirmed notwithstanding the fact the petitioners went back on that. It was, therefore, rightly considered and relied upon by both the Courts below while decreeing the suit of the respondent.

6. The argument that the report of the commissioner was not considered in its proper perspective does not appear to be correct, though this report in the light of the interpretation placed thereon by the learned counsel for the petitioners gives a different ring and connotation but this alone will not be sufficient to dislodge the concurrent findings of facts recorded by the Courts below when they suffer from no mis-reading or non-reading of evidence or any other error as could be called legal or jurisdictional.

7. The argument that the respondent was not owner of the property comprised in khasra No.2900 in the year 1988 when the suit was instituted by him and as such he could not assert any right of ownership or even easement therein is devoid of force as he became owner of the property in the year 1991 and submitted his amended plaint in the year 1993, therefore, he could assert it after he was allowed to submit amended plaint.

8. The argument that the learned appellate Court while passing the impugned judgment has not recorded reasons therefor is also without force as the learned Court has clearly stated the

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points of determination, the decision thereon and the reason therefore.

9. The argument that the respondent despite direction of the Court has not impleaded the co-owners is also without foundation as he by impleading the public at large in view of the nature of the property which was allegedly a thorough-fare; has complied therewith in its substance.

10. When seen against this back-drop, I find no infirmity in the impugned judgment and decree; therefore, I have no hesitation to maintain it. The petition being without substance is dismissed.

Announced:  
18.11.2003.

J U D G E

Muhammad Akbar Khan --- Appellant/Petitioner (s)

Versus

Mst. Wahid Bibi --- Respondent (s)

***JUDGMENT***

CR. No. 912/2003

Date of hearing 24.11.2003

**EJAZ AFZAL KHAN, J.-** The petitioner through the instant petition has questioned the judgment and decree dated 4.6.2003 of the learned Azafi Zilla Qazi Timargara whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 30.9.2002 of the learned trial Judge.

2. It was mainly argued by the learned counsel for the petitioner that the actual date of the institution of the suit was 1.4.1970 and it was wrongly entered as 11.2.1977, therefore, both the Courts below erred by dismissing the suit of the petitioner on the ground of its being barred by the law of Limitation.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The learned counsel for the petitioner could not show any document or order-sheet of the learned trial Court showing that the suit was in fact instituted on 1.4.1970. The record rather reveals that it was instituted on 11.2.1977, therefore, both the Courts below have rightly dismissed the suit of the petitioner on the ground of its being barred by the law of Limitation, moreso when the petitioner himself in his statement recorded in the Court stated on oath that it was instituted in the year 1977.

5. Apart from this, as the impugned judgment does not suffer from any factual, legal and jurisdictional error, I do not feel inclined to interfere therewith in the exercise of revisional jurisdiction of this Court.

Peshawar High Court

6. For the reasons discussed above, this petition being without merit is dismissed in limine.

Dated:24.11.2003.

J U D G E .

Peshawar High Court

Mian Sher Bahadur --- Appellant/Petitioner (s)

Versus

Haji Fazal ur Rehman --- Respondent (s)

***JUDGMENT***

CR. No. 559/2003

Date of hearing 01.12.2003

**EJAZ AFZAL KHAN, J.-** It was mainly argued by the learned counsel for the petitioners that when a similar suit has been stayed by the Courts below till the decision of the declaratory suit bearing No.66/1 of 2001, the principle of consistency demands that this suit should also be given identical treatment.

2. The learned counsel appearing on behalf of the respondents has graciously agreed to the aforesaid proposition of law provided the petitioners give an undertaking that they will pay arrear to the plaintiffs after the aforesaid suit is decreed.

3. When the learned counsel for the petitioners was confronted with this situation, he too agreed with the proposal put forth by the learned counsel for the respondents.

4. In view of the above stated position, this suit is also directed to be stayed till the decision of the suit mentioned above with the condition highlighted above.

5. This Civil Revision is thus disposed of accordingly.

Dated:1.12.2003.

J U D G E

Peshawar High Court

Mst. Sultan Begum --- Appellant/Petitioner (s)

Versus

Mst. Sultan Begum --- Respondent (s)

### ***JUDGMENT***

CR. No. 141/1996

Date of hearing 08.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioner through the instant petition has questioned the judgment and decree dated 11.12.1995 of the learned Addl Distt Judge Peshawar whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 6.2.1995 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that where the house in dispute was transferred to the name of Mst.Amir Jan, a predecessor-in-interest of the petitioner, in lieu of her dower amount, her rights therein will remain intact notwithstanding its sale through auction pursuant to a money decree granted in favour of Tila Muhammad against her father-in-law Mirza Fazal Qadilr particularly when she lived therein till 1971 and after her demise it descended on and was occupied by her legal heirs including the plaintiff. Similarly it was next argued that sale of the suit house by the aforesaid Tila Muhammad in favour of respondent No.1 on the strength of registered deed dated 9.8.1950 will not affect her rights in any way and that both the Courts below have erred by dismissing the suit of the petitioner.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the house in dispute was purchased by Tila Muhammad by depositing the auction money pursuant to a decree so obtained by him against the father-in-law of Mst.Amir Jan, vide order dated 23.8.1938 and later on it was sold by him to respondent No.1 by the dint of the registered deed and that since neither the execution proceedings nor the registered deed despite knowledge has been challenged so far, no relief

Peshawar High Court

whatever can be given to the petitioner and that both the Courts below have rightly dismissed her suit.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is not disputed on the record that the suit house was attached pursuant to the decree passed in favour of one Tila Muhammad against Mirza Fazal Qadir, the father-in-law of Mst.Amir Jan. It is also not disputed that the said Tila Muhammad after depositing the auction money purchased the house in his own name. It is also not disputed that Tila Muhammad sold the house in dispute to the respondent vide a registered deed dated 9.8.1950. When so, I do think, that the auction of the house could in any way be held to be a secret affair particularly the judgment-debtor in that case was the father-in-law of Mst.Amir Jan. Sale through auction of the house was by all means a sufficient public notice to all and sundry including a lady who happened to be an owner of the house transferred in her name to the extent of  $\frac{1}{2}$  in lieu of her dower amount.

6. Subsequent sale of the suit house by the said purchaser through a registered deed would be yet another public notice to the owner that the house in dispute is no more her ownership, if at all it was so previously. It is unbelievable that the owner did not have a notice as to the change of her status as owner of the house when these two events in their respective stages of time were pre-eminently talks of the town.

7. The failure on the part of the petitioner to question the auction through execution proceedings under section 12 (2) of the C.P.C. and challenge registered deed whereby the suit house was transferred in favour of respondent No.1 by Tila Muhammad within time notwithstanding the fact that all these things were specifically averred in the written statement submitted by the respondents on 30.10.1983 would be another circumstance militating against the genuineness and validity of her claim.

Peshawar High Court

8. Quite apart from this, both the Courts below have concurrently construed the prolonged silence and even slumber of the petitioner and her predecessor-in-interest to their detriment, therefore, I will not like to interfere therewith even if on re-appraisal of evidence a view to the contrary is possible, moreso when it does not suffer from any jurisdictional error.

9. For the reasons discussed above, this petition being without substance is dismissed.

Dated:8.12.2003.

J U D G E.

Peshawar High Court

Haji Faqir --- Appellant/Petitioner (s)

Versus

Khaista Khan --- Respondent (s)

***JUDGMENT***

CR. No. 240/1997

Date of hearing 08.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioners through the instant petition has questioned the judgment and decree dated 20.5.1997 of the learned Zila Qazi Malakand whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 7.11.1996 of the learned Illaqa Qazi Batkhela.

2. This case was heard at length. During the course of arguments it transpired that the report of the Local Commissioner which has been made basis of the finding of the learned trial Court has neither been affirmed nor rejected by him in spite of the fact that the Local Commissioner in the wake of objections raised by both the parties was examined as C.W.

3. Once during the course of proceedings before the trial Court collection of evidence through local commissioner was held desirable by the parties as well as the Court and accordingly it was collected by the Commissioner, the fate of such evidence should have been decided one way or the other in the light of such objections, moreso when it was extensively referred to even by the appellate Court in the impugned judgment.

4. When seen in this background, I do not think, any authoritative pronouncement as to the rights of the parties could be given by any forum including this Court on the basis of such report.

Peshawar High Court

5. For the reasons discussed above, I have no option but to set aside the impugned judgment and decrees of both the Courts below and send the case back to the learned trial Court for decision afresh after deciding the fate of the report of the local commissioner.

6. As it is an old case of 1997, let it be decided within a period of 3 months. The parties are directed to appear before the learned Illaqa Qazi for 23.12.2003. Needless to say that the parties would be at liberty to adduce more evidence in support of their respective claims if and when it is deemed essential for the just decision of the case.

Dated:8.12.2003.

J U D G E.

Muhammad Aslam Khan --- Appellant/Petitioner (s)

Versus

Ayaz Khan --- Respondent (s)

***JUDGMENT***

CR. No. 759/2003

Date of hearing 08.12.2003

**EJAZ AFZAL KHAN, J.**-The petitioner through the instant petition has questioned the judgment and decree dated 28.6.2003 of the learned Addl Distt Judge II Nowshera whereby she dismissed the appeal filled by him and thus upheld of the judgment and decree dated 21.12.2002 of the learned trial Court.

2. The learned counsel appearing on behalf of the petitioners by referring to the extracts from the record of rights for the year 1996-97 and copy of Khasra Girdawari, contended that the learned appellate Court while handing down the impugned finding has not taken into account these documents of fundamental importance especially when they are blessed with the presumption of truth and regularity respectively. It was next contended that once a person has been recorded as Hisadar owner in possessory column, his individual ownership cannot be determined in view of the entries made in the proprietary column of one Khasra number without considering his over all entitlement in the whole revenue estate.

3. As against that, the learned counsel appearing on behalf of the respondents argued that if the finding of the learned appellate Court is correct the mere fact that one document or another even though blessed with the presumption of truth or regularity has not been considered will not justify its reversal, moreso when, the fact that every Court is over-worked and over-crowded now a days is too hard and austere to be disputed.

Peshawar High Court

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The impugned judgment reveals that the learned Addl District Judge has not discussed altogether the possession of the petitioner and its nature vis-à-vis the entries made in the periodical record and Khasra Girdawari notwithstanding the fact that they are blessed with the presumption of truth and regularity respectively, therefore, it cannot be held that the impugned findings were rendered on proper appraisal of evidence.

6. For the reasons discussed above, this petition is allowed, the impugned judgment and decree are set aside and the case is sent back to the learned Addl Distt: Judge for decision afresh after hearing the parties and by taking stock of the entire material available on the record. However, none of these observations will in any way influence the mind of the learned Judge.

7. As short point is involved in this case, it be decided within a period of three months. The parties are directed to appear before the learned Addl Distt Judge on 17.12.2003 .

Dated:8.12.2003

J U D G E.

Mehmood Saeed --- Appellant/Petitioner (s)

Versus

Sahibzada Fateh ur Rehman --- Respondent (s)

***JUDGMENT***

CR. No. 1046/2003

Date of hearing 08.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioner through the instant petition has questioned the order dated 24.9.2003 of the learned Addl Distt Judge whereby he dismissed the appeal filed by him and thus upheld the order dated 10.2.2003 of the learned Civil Judge.

2. The impugned order was assailed chiefly on the ground that where the defendant made an offer for resolution of his dispute on oath, both the Courts below should have been taken steps in this behalf to ensure the safe administration of justice.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. As under no cannons of law a person can be compelled to take oath notwithstanding the offer made by the other, I do not think, that the Courts below have committed any factual, legal or jurisdictional error so as to justify interference with the impugned findings.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:8.12.2003.

J U D G E.

Peshawar High Court

Muhammad Shereen --- Appellant/Petitioner (s)

Versus

Abdul Rehman --- Respondent (s)

***JUDGMENT***

CR. No. 932/2003

Date of hearing 12.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioner through the instant petition has questioned the judgment and decree dated 16.6.2003 of the Izafi Zila Qazi whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 6.1.2002 of the learned Illaqa Qazi.

2. The judgment of the learned appellate Court was assailed by the learned counsel for the petitioner principally on the ground that it is based on mis-reading and non-reading of evidence and as such it is clearly a case of failure of exercise of jurisdiction vested.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. According to the averments made in the plaint the petitioner purchased the property in dispute on the basis of certain documents but strangely enough not even a single document has been brought on the record to substantiate this fact. The oral evidence on the record either is not of a quality as could support the claim of the petitioner with regard to the ownership of the property in dispute. When that being the case, the impugned findings of the Courts below can be held to have been based on mis-reading and non-reading of evidence by any stretch of imagination. Needless to say that onus probandi always lies on the party which asserts the existence of a particular fact.

Peshawar High Court

5. Apart from this, when the impugned findings do not suffer from any factual, legal or jurisdictional error, I do not think, a case for interference therewith in the exercise of revisional jurisdiction of this Court is made out.

6. For the reasons discussed above, this petition being without substance is thus dismissed in limine.

Dated:12.12.2003.

J U D G E .

Haji Ashraf Zameer --- Appellant/Petitioner (s)

Versus

Syed Wali Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 345/1998

Date of hearing 12.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioner whose suit for the enforcement of right of pre-emption was dismissed on account of his failure to deposit 1/3<sup>rd</sup> of the pre-emption amount in accordance with the direction of the learned trial Court when failed to get any relief from the learned appellate Court has filed the instant petition.

2. The judgment of the learned appellate Court was assailed principally on the ground that when the pre-emption amount was not even tentatively determined by the learned trial Court, the petitioner could not have been directed to deposit its 1/3<sup>rd</sup> and that in the peculiar circumstances of the case the failure to deposit it will not ipso facto call for the dismissal of the suit.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the provisions of section 24 of the N.W.F.P. Pre-emption Act No.X of 1987 are mandatory; that the failure to deposit 1/3<sup>rd</sup> of the pre-emption amount in accordance with the direction of the Court will inevitably call for the dismissal of the suit and that both the Courts below by dismissing the suit of the petitioner have acted perfectly in accord with the provisions of the Act mentioned above.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is settled that the provisions of section 24 of the NWFP Pre-emption Act No.X of 1987 are mandatory as the failure

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to deposit 1/3<sup>rd</sup> of the pre-emption amount within the time fixed by the Court is accompanied by a penal consequence of dismissal of suit, therefore, no exception could be taken to the findings of the Courts below particularly when it cannot be disputed that 1/3<sup>rd</sup> of the pre-emption amount was not deposited within the stipulated time.

6. The argument that when the pre-emption amount was not even tentatively determined in the order of the Court in that case it was not proper for the Courts below to have dismissed the suit of the petitioner is also without any force and foundation that too when the petitioner did not deposit even 1/3<sup>rd</sup> of the pre-emption amount admitted by him to be the sale consideration of the property in spite of the fact that he himself sought an order for depositing it..

7. For the reasons discussed above, I see no substance in this petition which is accordingly dismissed.

Dated:12.12.2003.

J U D G E .

Marjan --- Appellant/Petitioner (s)

Versus

Abdul Rahim --- Respondent (s)

### ***JUDGMENT***

CR. No. 674/2003

Date of hearing 12.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioners through the instant petition has questioned the order dated 24.6.2003 of the learned Zila Qazi whereby he dismissed the appeal filed by them and thus upheld the order dated 28.10.2002 of the learned Alaqa Qazi.

2. It was manly argued by the learned counsel for the petitioners that since decision on merits after giving the parties opportunity of producing evidence is the most cherished goal of law, dismissal of suit on account of failure to produce evidence despite chances would be too harsh a treatment for the petitioners particularly when award of reasonable cost could be sufficient to meet the ends of justice over and above the fact that the provisions contained under Order XVII Rule 3 of the C.P.C. are not mandatory. The learned counsel to support his contention placed reliance on the case of Allied Bank of Pakistan Ltd..Vs..Abdur Rehman Khan and 2 others ( PLJ 1986 Peshawar 115).

3, As against that, the learned counsel appearing on behalf of the respondents by placing reliance on the cases of Fateh Sher..Vs..Muhammad Zubair (2003 SCMR 797), Ghulam Qadir alias Qadir Bakhsh..Vs..Haji Muhammad Suleman and 6 others (2002 CLC 1111), Muhammad Aslam Shah..Vs..Pak Electran Pvt. Ltd. (2002 CLC 1887) and Ghulam Haider..Vs..Mst.Rasoola and another (2001 MLD 1603) contended that once a discretion has been exercised by the Courts below while invoking the provisions of Order XVII Rule III of the C.P.C., no interference can be made therewith especially when it has not been disputed that the petitioners were given chances to adduce evidence.

Peshawar High Court

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Though it cannot be disputed on the record that the petitioners were given various chances for adducing evidence but this alone is not an act calling for the dismissal of suit that too, when the party at fault can be burdened with adequate cost. Needless to stress that the Courts of law now a days lean in favour of doing substantial justice without making fetish of technicalities and procedural law whose proper place is to provide stepping stones rather than the stumbling blocks in way of the administration of justice. Therefore, I will not like to maintain the impugned order as decision on merits is the most cherished goal of law.

6. For the reasons discussed above, this petition is allowed and the impugned orders are set aside at the cost of Rs.5000/-to be paid to the respondents.

7. As it is an old case, it be disposed of within a period of 3 months. The parties are directed to appear before the learned trial Court on 4.2.2003.

Dated:12.12.2003.

J U D G E.

Peshawar High Court

Khan Bahadur --- Appellant/Petitioner (s)

Versus

Darul Uloom Sarhad --- Respondent (s)

***JUDGMENT***

CR. No. 260/2001

Date of hearing 15.12.2003

**EJAZ AFZAL KHAN, J.-** As the parties have come to a settlement and have patched up the matter, the respondents have no objection to the acceptance of this petition in view of the terms spelt out by the lease deed. Photo copy whereof is placed on file.

2. In view of the above stated position, the impugned findings of the Courts below are set aside and the civil revision is disposed of accordingly.

Dated:15.12.2003.

J U D G E.

Peshawar High Court

Aziz Muhammad --- Appellant/Petitioner (s)

Versus

Noor Muhammad --- Respondent (s)

***JUDGMENT***

CR. No. 712/2003

Date of hearing 15.12.2003

**EJAZ AFZAL KHAN, J.-** During the course of arguments the main stress was laid by the learned counsel for the petitioner that it has been held in the impugned judgment, in no uncertain terms that in lieu of the property in dispute some property was given to the petitioner known as Abdur Rehman 'Pattai' and that in case he is allowed to institute a fresh suit in respect of the aforesaid property, the impugned judgment may not barricade his movement in this behalf.

2. The learned counsel appearing on behalf of the respondents has neither disputed this assertion nor it can be by any means.

3. In view of what has been discussed above, the petitioner would be free to seek his remedy in respect of the property which was given to him in lieu of the property in dispute.

4. With these observations, this Civil Revision is disposed of.

Dated:15.12.2003.

J U D G E .

Peshawar High Court

Muhammad Yaqoob --- Appellant/Petitioner (s)

Versus

Wazir Zada --- Respondent (s)

### ***JUDGMENT***

CR. No. 47/1995

Date of hearing 15.12.2003

**EJAZ AFZAL KHAN, J.-** Petitioner Wazirzada and others through Civil Revision No.47 of 1995 have questioned the judgment and decree dated 14.11.1994 of the learned Addl Distt Judge Swabi whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 10.2.1988 of the learned trial Court while Yaqoob, and others respondents herein have also filed Civil Revision 67 of 1995 whereby they have also assailed the impugned judgment inasmuch as it declined their prayer for arrears on the sole ground that the same can be claimed through an application before the Rent Controller.

2. Since both the petitions arise out of the same judgment, they are disposed of by this single judgment.

3. It was mainly argued by the learned counsel for the petitioners that the learned appellate Court while upsetting the findings of the learned trial Court has not at all attended to the question of title of the plaintiffs respondents notwithstanding the fact that it was a suit for recovery of arrears and possession on the basis of title especially when it was seriously disputed by the petitioners. He next argued that even the cognovit which is the sheet-anchor of the case of the respondents has not been proved in accordance with the requirements of law. The learned counsel also took serious exception to the finding of the learned appellate Court on the question of resjudicata.

Peshawar High Court

4. As against that, the learned counsel appearing on behalf of the respondents, defended the impugned judgment by arguing that the title of the respondents was never seriously disputed by the petitioners, therefore, the learned appellate Court was not supposed to hand down a finding in this behalf. He next argued that the principle of resjudicata cannot be attracted to the instant case as the earlier suit though between the same parties was not with regard to the same subject matter. While controverting the argument of the learned counsel for the petitioners as to the proof of cognovit, the learned counsel for the respondents contended that this document too was never seriously disputed as the witnesses producing it has not been cross-examined about its genuineness or otherwise.

5. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

6. Admittedly it was not a suit under section 9 of the Specific Relief Act where a person claiming possession is only required to prove his possession and dispossession otherwise than in due course of law within six months. It was rather a suit for possession under section 8 of the Specific Relief Act on the basis of title, therefore, the title of the house in dispute was the first and foremost requirement of law to be dealt with. The plaintiffs respondents when specifically averred that they purchased the equity of redemption from one Sarfaraz, the learned appellate Court was duty bound to discuss this important rather crucial aspect of the case and give finding thereon that too when he did not find himself in agreement with the finding of the learned trial Court on this issue. The learned Court could not have upset the findings of the learned trial Court without recording reasons therefor, therefore, it would be clearly a case of failure of exercise of jurisdiction vested.

7. As because of the above mentioned serious lapse, the impugned judgment cannot be maintained and the case has to be remanded back, I would not like to discuss the other arguments addressed at the bar by the learned counsel for the parties.

Peshawar High Court

8.. For the reasons discussed above, this Civil Revision is allowed, the impugned judgment and decree are set aside and the case is sent back to the learned District Judge for decision afresh after attending to the questions highlighted above.

9. Since the impugned judgment and decree have been set aside, the connected Civil Revision filed by the respondents is also disposed of accordingly. The parties are directed to appear in the Court of the learned Distt Judge on 12.1.2004.

10. As it is an old case, it be decided within a period of two months. However, in the circumstances of the case, I will make no order as to costs.

Dated:15.12.2003.

J U D G E.

Amin Khan --- Appellant/Petitioner (s)

Versus

Mir Wali Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 369/2003

Date of hearing 18.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioner through Civil Revision No.369/2001 and 372/2001 has questioned the judgment and decree dated 18.5.2001 of the learned Distt Judge Karak whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 15.10.1996 of the learned trial Court.

2. As both the Civil Revisions arise out of the same judgment, they are disposed of by this single judgment.

3. It was mainly argued by the learned counsel for the petitioner that the learned Distt Judge while sitting in judgment on appeal filed by the respondents did not deal with the entire spectrum of the controversy involved in this case, therefore, it being deficient in content and against the provisions of Order XLI Rule 31 of the C.P.C. is liable to be set aside.

4. As against that, the learned counsel appearing on behalf of the respondents, vehemently argued that the learned Distt Judge has recorded tenable reasons for all of the findings handed down by him, therefore, it merits no interference.

5. I have gone through the record and anxiously considered the submissions of the learned counsel for the parties.

6. A perusal of the evidence on the record would reveal that the learned Distt Judge based his findings by

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considering only one set of earlier litigation and has not attended to the later litigation and its effect on the instant litigation notwithstanding the fact that it had serious and far reaching bearing on the fate of the case one way or the other. When the entire oral as well as documentary evidence including the record of the previous litigations was not properly read by the learned Distt Judge while giving the impugned finding it would clearly be a case of failure of exercise of jurisdiction vested. Needless to say that the Courts of law are supposed to accept or discard the claim of one party or another through a speaking and reasoned judgment as is required by the provisions of Order XLI Rule 31 of the C.P.C. so that the party loosing the case may go with the impression that it was decided fairly, justly and in accordance with law and that justice was actually and manifestly done.

7. Having thus held that the learned Distt Judge has not decided the case in accordance with the requirements of law, I have no alternative but to allow these petitions, set aside the impugned judgments and send the case back to the learned Distt Judge for decision afresh in accordance with the law as mentioned above.

8. As it is an old case, let it be disposed of within a period of 3 months. The parties are directed to appear in the Court of the learned Distt Judge Karak on 20.1.2004.

Dated:18.12.2003.

J U D G E .

Peshawar High Court

Amin Khan --- Appellant/Petitioner (s)

Versus

Mir Wali Khan --- Respondent (s)

***JUDGMENT***

CR. No. 372/2001

Date of hearing 18.12.2003

**EJAZ AFZAL KHAN, J.-** For reasons recorded in my detailed judgment of today's date in the connected Civil Revision No.369 of 2001, this Civil Revision stands accepted.

Dated: 18.12.2003.

J U D G E.

Peshawar High Court

Muhammad Iqbal Khan --- Appellant/Petitioner (s)

Versus

Badar Munir --- Respondent (s)

### ***JUDGMENT***

CR. No. 982/2003

Date of hearing 19.12.2003

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 23.7.2003 of the learned Zilla Qazi whereby he upheld the judgment and decree dated 21.10.2002 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that the documents relied upon by the respondents have no nexus with the property in dispute, therefore, both the Courts below without appreciating them in their true perspective have erred in basing their findings thereon. It was next argued that had additional evidence sought to be produced by the petitioner been allowed, the fallacy of the documents relied upon by the respondents would have been unhusked and that the learned appellate Court by refusing the prayer of the petitioner for additional evidence has failed to exercise jurisdiction so vested in it.

3. I have gone through the record and anxiously considered the submissions of the learned counsel for the petitioner.

4. The learned counsel for the petitioner could not refer to any piece of evidence adduced by the petitioner which was either mis-read or not read by the learned appellate Court. The fact is that he could not prove on the record that the property in dispute has ever been his ancestral property; that it was inherited by him, his brothers and sisters that it fell to his lot through a private partition and that a portion thereof was also purchased by him from his uncle. Non-impleading of his other brothers and sisters would also negate the genuineness of his claim and even the ancestral character of the suit property. Similarly the fact that the respondents are occupying the suit property in their capacity as his

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tenants also remained un-substantiated, when no trustworthy documentary and oral evidence was adduced in this behalf.

5. When so, I do not think, the learned appellate Court has committed any factual, legal or jurisdictional error by dismissing the appeal filed by the petitioner, moreso when the claim of the respondents is supported by preponderance of documentary as well as oral evidence.

6. For the reasons discussed above, this petition being without force is dismissed in limine alongwith the C.M.

Dated:19.12.2003.

J U D G E .

Peshawar High Court

Abdullah --- Appellant/Petitioner (s)

Versus

Khyber Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 1053/2003

Date of hearing 19.12.2003

**EJAZ AFZAL KHAN J.-** The petitioner through Civil Revisions Nos.1053,1054,1055,1056 and 1057 of 2003 seeks to impugn the judgment and decree dated 15.10.2003 of the learned Distt Judge Nowshera whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 3.4.2003 of the learned trial Court.

2. As a common question of law and fact is involved in all these petitions, they are disposed of by this single judgment.

3. The findings of the Courts below were assailed principally on the ground that the contradictions in the statements of the P.Ws. as highlighted in the impugned judgment are not born out from the record and that both the Courts below have based their findings on mis-reading and non-reading of evidence.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

5. A perusal of the evidence on the record would reveal that each of the P.Ws. has given a different version as to the time and date of making talb-i-muwathibat as well as talb-i-ishhad. According to P.W.3 talb-i-muwathibat was made on 9.1.2001 and talb-i-ishhad was made on 16.1.2001 but according to P.W.5 talb-i-ishhad was made after convening three Jirgas which consumed almost 12/15 days after talb-i-muwathibat was made. The

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statement of P.W.4 is also not in line with the statements of the above mentioned P.Ws. Non-production of Shahzarin who according to the averments made in the plaint and evidence recorded in the Court informed the plaintiff about the sale would be yet another factor militating against the genuineness of the alleged talbs.

6. When seen in this context, I do not think, any of the findings of the Courts below is based on mis-reading or non-reading of evidence, therefore, no exception can be taken thereto in the exercise of revisional jurisdiction of this Court even if on re-appraisal of evidence a view to the contrary can also be taken.

7. For the reasons discussed above, these petitions being without substance are dismissed in limine.

Dated:19.12.2003.

J U D G E .

Abdullah --- Appellant/Petitioner (s)

Versus

Khyber Khan --- Respondent (s)

***JUDGMENT***

CR. No. 1054/2003

Date of hearing 19.12.2003

**EJAZ AFZAL KHAN J.-** For reasons recorded in my detailed judgment of today's date in the connected Civil Revision No.1053 of 2003, this civil revision stands dismissed in limine.

Dated:19.12.2003.

J U D G E.

Peshawar High Court

Khan Zada --- Appellant/Petitioner (s)

Versus

Rehmat Ali --- Respondent (s)

***JUDGMENT***

CR. No. 1070/2003

Date of hearing 19.12.2003

**EJAZ AFZAL KHAN, J.-** The petitioners through the instant petition has questioned the judgment and decree dated 4.10.2003 of the learned Izafi Zila Qazi Swat whereby he allowed the appeal filed by the respondents and on setting aside the judgment and decree dated 8.1.2002 sent the case back to the learned trial Court for decision afresh.

2. It was argued by the learned counsel for the petitioners that once an ex-parte decree was passed against the petitioners on 17.5.1987 and their application for setting aside the aforesaid ex-parte decree moved on 11.7.1987 was also dismissed on 23.12.1987, they could not have instituted a suit for declaration questioning the validity of such decree, therefore, their suit was rightly dismissed by the trial Court and that the learned appellate Court by accepting the appeal, setting aside the judgment and decree of the learned trial Court and sending the case back to the learned trial court for decision afresh has acted without jurisdiction.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. Be all that as it may. When it has been held by the learned appellate Court that the suit filed by the respondents could be treated as an application under section 12 (2) of the C.P.C. and decided as such on merits, I do not think, he has acted without

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jurisdiction. As a matter of fact, this was the right course which is by all means in tune with the principles of law, equity and natural justice because the Courts of law always invariably lean in favour of decision on merits after giving the parties a fair opportunity to substantiate their claim and vindicate their position.

5. Since there is no illegality or material irregularity in the impugned judgment, I do not feel inclined to interfere therewith.

6. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:19.12.2003.

J U D G E.

Yousaf Khan --- Appellant/Petitioner (s)

Versus

Dila Ram --- Respondent (s)

### ***JUDGMENT***

CR. No. 565/2003

Date of hearing 22.12.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 28.5.2003 of the learned Zilla Qazi Swat whereby he dismissed the appeal filed by them and thus upheld the order dated 17.5.2002 of the learned trial Court directing the petitioners to deposit the rent of the shop in dispute.

2. It was argued by the learned counsel for the petitioners that where the title of the plaintiff was disputed no cannons of law would justify the appointment of receiver, therefore, the orders of both the Courts below being against law are liable to be set aside. The learned counsel to support his contention placed reliance on the case of M.Attaur Rehman Alvi..Vs..Inamur Rehman (1974 SCMR 541).

3. As against that, the learned counsel appearing on behalf of the respondents argued that the plaintiff based her claim on a registered deed which is blessed with the presumption of truth as such the orders of both the Courts below being well reasoned and well founded merit no interference, that too when they also enjoy the virtue of being concurrent.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is not disputed on the record that ever since January, 2001 the rent of the shop is Rs.300/- per day. It is also not

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disputed that the plaintiff is the real mother of the petitioners. Similarly it is also not disputed that originally the property belonged to the prepositus of the parties.

6. Whether the suit property was ever gifted to the name of the plaintiff respondent through a registered deed or was orally gifted to petitioner No.1 is a question which can only be determined after recording evidence. But since the order of depositing the rent of the suit shop in the Court in spite of the warring claims of the parties has been passed by the Courts below for cogent reasons and it does not, on any count, harm the interest of any of them, I will not like to interfere therewith. However, in the circumstances of the case, I would hold that the petitioners instead of depositing rent from 17.5.2002 will deposit it from 28.5.2003 at the rate of Rs.300/- per day and will furnish a surety bond for the remaining amount to the satisfaction of the learned trial Court, ensuring that they would pay it to respondent No.1 in case her suit is decreed.

7. As it is a simple matter between mother and son, it be disposed of within a period of 3 months positively. With the modification hinted to above, this civil revision is disposed of.

Dated:22.12.2003.

J U D G E.

Peshawar High Court

NHA --- Appellant/Petitioner (s)

Versus

Sardar Ali Khan --- Respondent (s)

***JUDGMENT***

CR. No. 814/2003

Date of hearing 22.12.2003

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 19.5.2003 of the learned Addl 1 Distt Judge Peshawar whereby he allowed the appeal filed by the respondent and thus set aside the order dated 17.12.2002 of the learned trial Court.

2. It was mainly argued by the learned counsel for the petitioners that where the defects in the work done by the respondent-contractor were not rectified in accordance with the direction of the petitioners, it was not at all proper for the learned Addl Distt Judge to have ordered the release of the retention money as such he has over stepped his jurisdiction by allowing the appeal filed by the respondent.

3. As against that, the learned counsel appearing on behalf of the respondent argued that when the retention money has since been released by the concerned authority, this revision petition has become infructuous, therefore, it is liable to be dismissed.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. When as per statement of the learned counsel for the respondent the retention money has been released, I do not think any controversy has survived for resolution by this Court.

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6. or the reasons discussed above, this petition being without merit is dismissed .

Dated:22.12.2003.

J U D G E.

Peshawar High Court

Mir Jan Shah --- Appellant/Petitioner (s)

Versus

Abdul Qahar --- Respondent (s)

***JUDGMENT***

CR. No. 819/2003

Date of hearing 22.12.2003

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 17.7.2003 of the learned Distt Judge Karak whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 16.10.2002 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that where the petitioner has pleaded and proved making of talbs in accordance with the requirements of law, mere omission to mention their particulars as to date, time and place in the plaint will not ipso facto call for the dismissal of the suit.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The record reveals that the petitioner has neither pleaded in plaint nor proved in his evidence recorded in the Court the particulars as to date, time and place of making talbs and the person informing him about the sale, therefore, no exception whatever can be taken to the finding of the Courts below, moreso when they enjoy the virtue of being concurrent.

5. The failure of the petitioner as is evident from his statement to make talb-e-muwathibat at the time when he was informed about the sale on the shop of Hussan Badshah much before his departure to Patwarkhana where the mutation was

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attested will further strengthen the conclusion that it was not made in accordance with the requirements of law.

6. When seen in this backdrop, I do not think that the findings of the Courts below suffer from any factual, legal and jurisdictional error to justify interference therewith in the exercise of revisional jurisdiction of this Court .

7. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:22.12.2003.

J U D G E .

Peshawar High Court

Farooq Khan --- Appellant/Petitioner (s)

Versus

Haji Aqal Zareen --- Respondent (s)

### ***JUDGMENT***

CR. No. 113/2001

Date of hearing 19.01.2004

EJAZ AFZAL KHAN J.- The petitioners through the instant petition has assailed the order dated 4.10.2000 of the learned Izafi Zilla Qazi, Dir Bala whereby he dismissed the appeal filed by them and thus upheld the order dated 19.5.1999 of the learned Illaqa Qazi, Dir Bala.

2. It was argued by the learned counsel for the petitioners that where the witnesses sought to be produced by the petitioners through Court were not in attendance, the suit of the petitioners could not have been dismissed as the Court could not shift its responsibility on the shoulder of the party seeking to produce them. The learned counsel relies on the case of Mst. Bashir Bibi..Vs..Aminuddin and 9 others (1972 SCMR 534).

3. As against that, the learned counsel appearing on behalf of the respondents argued that when despite chance the petitioners could not produce the evidence, Courts below rightly struck off their defence under Order-XVII Rule 3 of the C.P.C. The learned counsel next contended that even on merits the petitioners have no case, therefore, the impugned judgment being free from any jurisdictional error merits no interference.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The impugned order reveals that the learned trial Court struck off the defence of the petitioners mainly on the ground that the latter despite his undertaking on the preceding date

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to produce witnesses could not do so but strangely enough the order of the preceding date does not give any such indication, therefore, the reasons justifying the impugned course appear to be incorrect on the face of it.

6. It was all the more uncalled for when the witnesses were sought to be produced through Court notwithstanding that the petitioners undertook to do the needful. Needless to say that it is the job of the Court to move its own coercive machinery to procure the attendance of the witnesses as no party can have the means to compel their attendance. The judgment cited at the bar covers the case on all force.

8. Even otherwise, since decision on merits after giving the parties a fair opportunity to produce evidence is the most cherished goal of law, I will not feel inclined to uphold the impugned orders, moreso when the reasons mentioned therein are patently incorrect.

9. For the reasons discussed above, this petition is allowed, the impugned orders of both the Courts below are set aside at the costs of Rs.3000/- to be paid to the respondents before the trial Court and the case is sent back to the learned Illaqa Qazi-I for decision afresh after recording evidence. The parties are directed to appear in the Court of Illaqa Qazi-I on 16.2.2004.

Dated:19.1.2004.

J U D G E.

Peshawar High Court

Government --- Appellant/Petitioner (s)

Versus

Village Flour Mill --- Respondent (s)

### ***JUDGMENT***

CR. No. 454/1996

Date of hearing 19.01.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 28.7.1996 of the learned Addl Distt Judge-I Mardan whereby he allowed the appeal filed by the respondent and thus set aside the judgment and decree dated 7.2.1996 of the learned Senior Civil Judge Mardan.

2. The learned counsel appearing on behalf of the petitioners contended that the finding of the learned appellate Court that the agreement culminating in decree in suit No.24/14 decided on 18.8.1992 was the result of undue influence, coercion and mis-representation etc. being based on no evidence is not sustainable. He next urged that it was not at all proper for the learned appellate Court to decide the case in hand without taking stock of the relevant record including Notification as to the policy of the supply of quota to the Flour Mills.

3. As against that, the learned counsel appearing on behalf of the respondent, argued that the consent decree in the earlier suit will not bar the respondent from instituting the instant suit as the conditions culminating in the consent decree were never adhered to by the petitioners. He next argued that when the petitioners are bound to supply quota to each Flour Mill from its nearest Provincial Reserve without charging any extra amount, they could not saddle the respondent with extra charges as it was clearly violative of the provisions of the Constitution ensuring

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equality before law, therefore, the impugned judgment being free from any legal or jurisdictional infirmity merits no interference.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. What was the policy of the Government at the relevant time as to the supply of quota to the flour mills; what was the evidence on the record which led the learned appellate Court to infer that the agreement arrived at in the earlier suit culminating in a consent decree was the result of undue influence, coercion and mis-representation etc. and that who violated the terms of the agreement if at all it was free from the taint of undue influence etc., are the questions which find no answers from the record.

6. As no case could be decided in a vacuum or on the basis of a presumptive evidence alone, the learned appellate Court could have insisted on the production of the additional evidence in this behalf. Similarly there was no harm in taking stock of the Notifications highlighting the policy of the Government regarding the supply of quota.

7. When the evidence on the record on all these aspects is deficient and no balanced judgment can be handed down in respect of the subject in question, I have no hesitation to allow this petition, set aside the impugned judgment and decree and send the case back to the learned District Judge Mardan for decision afresh in accordance with law after attending to all the queries adverted to above within a period of one month. The parties will be at liberty to adduce additional evidence to substantiate their respective claims. They are directed to appear in the Court of the learned Distt Judge Mardan on 30.1.2004.

Dated:19.1.2004:

J U D G E.

Peshawar High Court

Haji Anwar Khan --- Appellant/Petitioner (s)

Versus

Dr. Muhammad Afzal --- Respondent (s)

### ***JUDGMENT***

CR. No. 497/2000

Date of hearing 19.01.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 27.6.2000 of the learned Izafi Zilla Qazi Swat, 1 whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 26.2.2000 of the learned Illaqa Qazi Swat.

2. The learned counsel appearing on behalf of the petitioner by referring to a deed dated 11.7.1997 and an irrevocable power of attorney of even date argued that the conditional sale of the property stipulated therein is a sort of either simple mortgage or conditional sale and that the respondent could not become an owner and seek declaration to this effect on the basis of the deed and the power of attorney, thus he could either ask for its foreclosure in the former case or its sale for the realization of the money secured in the latter. He next argued that where possession of the disputed property has not been handed over to the respondent pursuant to the aforesaid deeds, they can neither be used as shield nor sword, moreso when they being compulsorily register able have not been registered, therefore, the finding of both the Courts below despite being concurrent are liable to be set aside. The learned counsel to support his arguments placed reliance on the cases of Habilbur Rehman and another..Vs..Mst.Wahdania and others (PLD 1984 S.C. 424), Himat Khan..Vs..Shamsur Rehman (1993 PSC 1299, Amirzada Khan and others..Vs..Ahmad Noor and others ( PLD 2003 S.C. 410) and the case of Ali Rehman..Vs..Fazal Mehmud and 8 others (2003 SMCR 327.

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3. As against that, the learned counsel appearing on behalf of the respondent argued that possession of the property in dispute was also transferred to the respondent pursuant to the aforesaid deeds, therefore, the respondent can use them as shield as well as sword, hence the findings of the Courts below being unexceptionable merit no interference. The learned counsel placed reliance on the case of Fazla..Vs.Mehr Din and 2 others (1997 SMCR 837).

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The evidence on the record reveals that the respondent admittedly received an amount to the tune of Rs.65000/- but it is, however, not clear whether this amount was received before or after the execution of the aforesaid deeds. When confronted the petitioner stated that this amount was paid after the execution of the deeds but when the respondent was asked concerning this , he was evasive and even equivocal in his reply. Though the receipt of the amount mentioned above before the execution of the deeds may not have any meaning but it will certainly have far reaching consequence if it is proved to have been received after the execution of the deeds and will thus besides providing a basis for seeking the intention behind the deeds will also tend to show that the respondent by accepting the amount chose to lay hand on the money alone instead of property. Therefore, remand of the case for the clarification of this aspect by recording additional evidence is indispensable for its just decision.

6. Since, I am going to remand this case, it will not be appropriate to discuss the merits of the case and the case law cited at the bar.

7. For the reasons discussed above, this petition is allowed, the impugned judgment and decree are set aside and the case is sent back to the learned Zilla Qazi Swat for decision afresh

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within one month after recording additional evidence as mentioned above. The parties are directed to appear in the Court on 9.2.2004.

Dated:19.1.2004.

J U D G E .

Peshawar High Court

Ahmad Noor --- Appellant/Petitioner (s)

Versus

Mst. Hawa Jana --- Respondent (s)

### ***JUDGMENT***

CR. No. 628/2000

Date of hearing 19.01.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 12.5.2000 of the learned Zila Qazi Malakand at Bat Khela whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 10.2.2000 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that the respondents in view of the provisions contained in Rule 5 (4) of the Provincially Administered Tribal, Areas (Nifaz-e-Nizam-e- Shariah) Rules, 1994 could only file an appeal or revision if they had objected to the opinion of the mediators. The learned counsel by referring to the opinion of the mediators next contended that where, how and who were heard and examined by them while arriving at their opinion is any body's guess, therefore, no sanctity could be attached to their verdict particularly when the objection of the petitioner against the opinion of the mediators was allowed and on the annulment of such opinion, the case was fixed for evidence.

3. As against that, the learned counsel appearing on behalf of the respondents by placing reliance on the case of Shah Mazahi and 6 others..Vs..Muhammad Afzal and 6 others rendered in Civil Petition No.142-P and 143-P of 1997 decided on 4.2.1998, argued that technicalities of the type and dimension highlighted by the petitioner cannot be given much weight, therefore, the impugned judgment and decree merit no interference.

Peshawar High Court

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Technicalities apart, the questions raised by the petitioner are not without force. What were the premises and who were the persons furnishing them which led the mediators to give their opinion is, of course, any body's guess. How the respondents could file an appeal against the order annulling the opinion of the mediators when they raised no objection thereto is a question which has not been convincingly replied by the learned counsel for the respondents. If at all the learned Zila Qazi wished to base his judgment on the opinion of the mediators, he was required to satisfy himself as to the basis of such opinion.

6. No doubt as argued by the learned counsel for the respondents on the strength of the judgment cited above that technicalities cannot be given much weight but where the manner resorted to by the mediators for arriving at their opinion does not conform even to the minimum judicial standards, I do not think it can be vested with any sanctity. It was, therefore, rightly annulled by the learned trial Court. When considered in this context, the judgment cited above will have no relevance to the instant case.

7. For the reasons discussed above, this petition is allowed, the impugned judgment and decree are set aside and the case is sent back to the Aa'la Illaqa Qazi for decision afresh in accordance with law within a period of two months, after giving the parties a fair opportunity to produce evidence. The parties are directed to appear in the Court of learned Aa'la Illalqa Qazi on 23.2.2004. The record of the case be sent to the learned Aa'la Illaqa Qazi as expeditiously as possible but not later than one week.

Dated:19.1.2004.

J U D G E.

Peshawar High Court

Haji Wahid Gul --- Appellant/Petitioner (s)

Versus

Jamshed Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 5/2004

Date of hearing 26.01.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 13.9.2003 of the learned Izafi Zilla Qazi whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 25.2.2003 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that the deed dated 7.7.1991 was to all intents and purposes a substitute for the deed dated 1.3.1985 whereby an area measuring 1 kanal and 16 marlas was sold to the petitioner, therefore, the decrease of the area to a half being un-expected and un-thought of could not be noticed at the time of its execution and that both the Courts below while deciding the instant case failed to appreciate this crucial aspect especially when the execution of the latter was also not disputed on the record. The learned counsel by placing reliance on the case of Executive Engineer C & W..Vs. Muhammad Nasim Khan (2002 CLC 427) argued that the learned appellate Court has not recorded reasons in accordance with the requirements of Order-XLI Rule -31 of the CPC., therefore, the impugned judgment is also liable to be set aside on this score . The learned counsel next contended that where a vendor had professedly transferred a property for consideration on a fraudulent or erroneous representation a vendee of such transfer has an indefeasible right to be compensated by such vendor out of his other property. The learned counsel relied on the case of Darwesh Ali..Vs..Munir Khan and others (2001 CLC 433).

Peshawar High Court

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. As the execution of subsequent deed always invariably supersedes the previous one, it would be tantamount to putting the cart before the horse by stressing that even previous holds the field notwithstanding that the subsequent was executed when the previous was lost.

5. The argument that decrease of area in the subsequent deed being un-expected and un-thought of could not be noticed by the petitioner is too imaginary to be true, that too, when it was consciously executed by the parties in the presence and hearing of the scribe and the marginal witness.

6. As both the Courts below after considering all these aspects of the case, have rightly dismissed the suit of the petitioner, I will not like to interfere with their finding when it suffers from no error, absence or excess of jurisdiction. The judgments cited by the learned counsel for the petitioner when considered in the light of the facts discussed above, appear to be distinguishable on all counts.

8. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:26.1.2004.

J U D G E.

Peshawar High Court

Qazi Saeed Akhtar --- Appellant/Petitioner (s)

Versus

Haji Muhammad Ashique --- Respondent (s)

### ***JUDGMENT***

CR. No. 64/2001

Date of hearing 26.01.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment dated 18.9.2000 of the learned Distt Judge-II Peshawar, whereby he allowed the appeal filed by the respondent, set aside the order dated 15.3.2000 of the learned trial Court rejecting the plicant under Order-VII Rule 11 of the C.P.C.

2. It was argued by the learned counsel for the petitioner that when the averments made in the plaint coupled with material annexed therewith clearly spelt out that the suit of the respondent being barred by the law of Limitation, is liable to be rejected under Order-VII Rule 11 of the C.P.C., there was hardly any justification to remand it for decision after recording evidence.

3. As against that, the learned counsel appearing on behalf of the respondent, argued that the questions agitated by the petitioner and those agitated by the respondent in the trial Court are of a nature which could not have been decided without recording evidence, therefore, the order of the learned appellate Court being free from any legal or jurisdictional error merits no interference.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

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5. As none of the questions agitated by the parties can be decided without a deep and detailed probe, the remand of the case for decision afresh after recording evidence does not by any means amount to error, absence or excess of jurisdiction, therefore, I do not feel persuaded to interfere with the impugned order. This petition is thus dismissed. The parties are directed to appear in the trial Court on 6.2.2004.

Dated:26.1.2004.

J U D G E .

Peshawar High Court

WAPDA --- Appellant/Petitioner (s)

Versus

Wajid Ali Shah --- Respondent (s)

### ***JUDGMENT***

CR. No. 18/2004

Date of hearing 26.01.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 4.10.2003 of the learned Izafi Zilla Qazi, whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 5..7.2001 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that the learned appellate Court without advertng to the merits of the case dismissed the appeal filed by the petitioners only on the ground of limitation and as such has not handed down a judgment in accordance with the requirements of Order XLI Rule-31 of the C.P.C. The learned counsel by referring to the definition of the consumer argued that it is wide enough to include even the person who is owner or occupant of a building, therefore, the interpretation placed thereon by the Courts below is not correct.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. The record reveals that the appeal was time barred, therefore, it was dismissed without advertng to the merits of the case as the petitioners have neither submitted an application for condonation of delay nor has it been explained in accordance with the requirement of section 5 of the Limitation Act.

Peshawar High Court

5. Even otherwise, the judgment of the learned trial Court being in conformity with the principles of law and equity suffers from no legal or factual infirmity was rightly upheld by the learned appellate Court, moreso when the arrears sought to be recovered from respondents No.1 to 4 relate to the period before they became owners of the premises. Since the petitioners can recover the arrears from the previous consumers, owners and occupants of the building in whose proprietary and occupational tenure the electricity was consumed, I do not think, the petitioners have any cause of grievance to assail the impugned judgment.

6. For the reasons discussed above, this petition being without force is dismissed in limine.

Dated:26.1.2004.

J U D G E

Din Muhammad --- Appellant/Petitioner (s)

Versus

Akhtar Gul --- Respondent (s)

***JUDGMENT***

CR. No. 287/2003

Date of hearing 30.01.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 27.2.2003 of the learned Distt Judge Hangu whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 20.10.2001 of the learned trial Court.

2. The learned counsel appearing on behalf of the petitioner argued that since the mutation on the basis whereof the petitioner claims superior right of pre-emption is a subject matter of another suit, therefore, the learned Courts below erred in holding that he is a co-sharer. The learned counsel next argued that mere omission to mention the name of the informer in the plaint is not a defect as could be sufficient to non-suit him, therefore, the finding of the Courts below even though concurrent is liable to be set aside.

3. As against that, the learned counsel appearing on behalf of the respondent by referring to the statement of Patwari argued that when it was unreservedly admitted by the patwari that the petitioner is not a co-sharer in the suit Katha and he was not re-examined with regard to this fact, the petitioner could not claim to have a superior right of pre-emption, therefore, he was rightly non-suited. The learned counsel next argued that as the petitioner never appeared in person in the Court to prove the making of requisite talbs, his suit could not have been decreed notwithstanding the statement of his attorney as he being a general attorney was never authorized to make a statement on his behalf in a pre-emptory suit.

Peshawar High Court

The learned counsel relied on the case of Nasib Khan..Vs..Inayat Jan and another (2003 C.L.C. 1336).

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. As it is admitted by the Patwari examined as P.W.1 in his cross-examination that the petitioner is no more a co-sharer in the property, I do not think, that the finding of the learned Courts below is in any way against law and facts, especially when the petitioner did not opt to re-examine him with regard to this fact.

6. A perusal of the general power of attorney executed by the petitioner in favour of his attorney would reveal that the latter was authorized to perform acts in respect of the property already owned by the petitioner. It by no stretch of imagination authorized the petitioner to make a statement on his behalf in a suit for pre-emption in respect of a property which has not yet become his ownership. Therefore, such statement cannot be taken as a substantive evidence for the proof of talbs. Needless to stress that a power of attorney is to be construed very strictly and no power can be said to have been attorned to its donee which is not spelt out from its plain words. The dictum laid down in the case of Nasib Khan..Vs..Inayat Jan and another (2003 C.L.C. 1336) would thus be quite relevant in this case.

7. As the finding of the Courts below besides being well reasoned and concurrent suffers from no error, absence or excess of jurisdiction, I do not feel inclined to interfere therewith.

8. For the reasons discussed above, this petition being without substance is dismissed.

Dated:30.1.2004.

J U D G E .

Peshawar High Court

LAC --- Appellant/Petitioner (s)

Versus

Muhammad Yousaf Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 610/2003  
(2004 CLC Peshawar 682)

Date of hearing 30.01.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 19.5.2003 of the learned Addl Distt Judge-I Mardan whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 13.7.2002 of the learned Civil Judge Mardan.

2. It was argued by the learned counsel for the petitioners that if a property acquired was taken possession of under section 6 read with section 17 of the Land Acquisition Act, award of simple interest at the rate of Rs.6% was mandatory if, however, it was awarded a controversy relating to it cannot be brought to a Civil Court as an aggrieved person has a right to ask therefor, by filing a reference under section 18 or 30 of the Act. The learned counsel to support his contention placed reliance on the cases of State of Madhya Phardesh ..Vs..Man Mohan Swaroop (AIR 1966 MP 270) and Lalsaheb Nabin Chandra Hani Deo and another..Vs..The State of Orissa (AIR 1975 Orissa 126).

3. As against that, the learned counsel appearing on behalf of the respondents argued that execution of a decree passed pursuant to a suit for recovery of interest permissible under section 34 of the Land Acquisition Act, was never interfered with by the Hon' ble Supreme Court in the case of Land Acquisition Collector Nowshera and others..Vs..Sarfraz Khan and others (PLD 2001 S.C. 514), therefore, its recovery through a civil suit cannot be held to be barred by law, moreso when, according to the proviso of the

Peshawar High Court

aforesaid provision, owners are entitled to it notwithstanding a waiver or an agreement to the contrary.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Be all that as it may, since in any case, it is an indefeasible right of the owners to get interest under section 34 of the Land Acquisition Act if the property acquired was taken possession of under section 6 read with section 17 thereof, no cannons of law will bar its recovery through a civil suit if denied as the proviso to the section itself, in no uncertain terms, envisages the entitlement of the owner thereto, notwithstanding any waiver or an agreement to the contrary. Therefore, I do not think, the award of such interest through a decree in a civil suit can be termed an illegality or jurisdictional error by any attribute so as to justify interference therewith.. However, award of compound interest is in no way in conformity with the said provision.

6. As a sequel to what is discussed above, I while maintaing the impugned judgment, would modify it to the extent of compound interest. The respondents would thus be entitled to simple interest at the rate of 6% from the date of taking possession to the date the compensation was deposited in the Court.

7. With the modification mentioned above, this petition is disposed of accordingly.

Dated:30.1.2004.

J U D G E.

Peshawar High Court

Abdul Manan --- Appellant/Petitioner (s)

Versus

Muhammad Akbar --- Respondent (s)

### ***JUDGMENT***

CR. No. 8/2000

Date of hearing 09.02.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has assailed the judgment and decree dated 13.12.1999 of the learned Izafi Zila Qazi, Swat, whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 16.2.1999 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that where no objection was raised in the written statement as to the absence of talbs neither an issue could be framed nor evidence could be led in this behalf, therefore, the suit could not have been dismissed on account of lack of evidence in this regard.

3. As against that, the learned counsel appearing on behalf of the respondents argued that even if it is assumed that the N.W.F.P. Pre-emption Act No. X of 1987, had no application to the area where the property in dispute is situate, none-the-less, the principles of Islamic Law of Pre-emption are applicable, therefore, the proof regarding talab-i-muwathibat and talb ishhad was sine-qua-non for the success of a suit for the enforcement of right of pre-emption and that its absence, as in this case, the plaintiff was rightly non-suited. The learned counsel to support his contention placed reliance on the case of Sardar Ali and others..Vs..Additional Secretary Home and TA Department and others (1996 SCMR 1480).

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

Peshawar High Court

5. A perusal of averments made in the plaint and evidence recorded in the Court will reveal that the petitioner has neither pleaded nor proved making of talbs altogether let alone their making in conformity with the requirements of law. When so, I have no hesitation to hold that he was rightly non-suited. Needless to say that it is a settled proposition of law that even in the absence of a notification extending the application of the N.W.F.P. Pre-emption Act to the tribal area, all cases of pre-emption arising therein are to be decided in the light of the principles of Islamic law of pre-emption which too require making of talbs rather indispensable for the enforcement of such right.

6. The argument that when no objection as to the absence of talbs was raised by the respondents in their written statement, neither issue could be framed nor evidence could be led thereon, therefore, suit of the petitioner could not have been dismissed on that count, will not in any way benefit the case of the petitioner as regardless altogether of any objection in the written statement as to the absence of talbs, it was his bounden duty to plead and prove them in accordance with the requirements of law, as no suit could be decreed in their absence.

7. Besides this, as the impugned judgment does not suffer from any factual, legal or jurisdictional error, I do not feel inclined to interfere therewith.

8. For the reasons discussed above, this petition is dismissed.

Dated: 9.2.2004.

J U D G E.

Peshawar High Court

Ghandal --- Appellant/Petitioner (s)

Versus

Zahir Shah --- Respondent (s)

***JUDGMENT***

CR. No. 91/2004

Date of hearing 09.02.2004

**EJAZ AFZAL KHAN J.-** Contends inter alia that both the Courts below are at variance with each other with regard to the issuance of temporary prohibitory injunction. Points raised need consideration. Admit. Notice and record for 8.3.2004.

Date 9.2.2004

J U D G E .

Peshawar High Court

Mst. Masooda Begum --- Appellant/Petitioner (s)

Versus

Abdul Hussain --- Respondent (s)

### ***JUDGMENT***

CR. No. 839/2003

Date of hearing 13.02.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 2.7.2003 of the learned Distt Judge Hangu whereby he accepted the appeal filed by the respondents, set aside the judgment and decree dated 28.5.1990 of the learned trial Court and sent the case back thereto for decision afresh.

2. It was argued by the learned counsel for the petitioners that the learned appellate Court proceeded on wrong assumption by holding that all the co-sharers in the property in dispute being necessary parties were not before the Court and that no evidence was available on the record to show the nature and extent of their ownership therein in spite of the fact that all were sued in the representative capacity and as such were before it and that the evidence on the record fully reflected the nature and extent of their ownership. The learned counsel next argued that the original entries will hold the field if and when not lawfully substituted. The learned counsel to support his contention placed reliance on the case of Misri through Legal Heirs and others..Vs.. Muhammad Sharif and others (1997 SCMR 338). The learned counsel next argued that where evidence of the parties to support their respective stance was sufficient to enable the Court to decide the points in controversy, there was absolutely no need for remitting the case back for decision afresh. The learned counsel referred to the case of Muhammad and 9 others.. Vs..Hashim Ali (PLD 2003 SupremeCourt 271) in this behalf.

Peshawar High Court

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. A perusal of the record reveals that many important factual issues have not been attended to either in the evidence or in the judgment of the learned trial Court. What was the extent of ownership of Haider Hussain in the property in dispute as recorded in proprietary as well as possessory column of the record of rights at the time of attestation of mutation No.179 and whether he could transfer the whole of it when he alone was not its owner to the exclusion of others are the questions which cannot be answered so readily without making a detailed inquiry about it.

5. No doubt the co-sharers in the property in dispute have been sued in their representative capacity but in the circumstances of the case and in view of the nature of the controversy involving their valuable rights, no proper adjudication can be possible without their conscious participation in the proceedings notwithstanding, the act of their being sued in representative capacity may not have any infirmity of form.

6. Another reason for not interfering with the impugned judgment is the pendency of the suit wherein mutation No.179 attested on 14.5.1910 which is the very basis of the title of the petitioners has been challenged as simultaneous proceeding in this and that case, as observed by the learned District Judge would be rather prudent and proper in the circumstances of the case.

7. Having thus viewed in this perspective, I am of the firm and considered view that remand of the case was inevitable for the just decision of the case and that the judgment remitting it back to the learned trial Court besides being based on cogent reasons, does not suffer from any error, absence or excess of jurisdiction so as to justify interference therewith in the exercise of revisional jurisdiction of this Court. The judgments cited at the bar because of their distinguishable facts and features will thus have no perceptible relevance to the case in hand.

Peshawar High Court

8. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith C.M.

Dated:13.2.2004.

J U D G E .

Peshawar High Court

Noor Saeed --- Appellant/Petitioner (s)

Versus

Abdul Manan --- Respondent (s)

***JUDGMENT***

CR. No. 1063/2003

Date of hearing 13.02.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 15.7.2003 of the learned Distt Judge Karak whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 4.4.2000 of the learned Civil Judge Banda Daud Shah.

2. It was argued by the learned counsel for the petitioner that when the donor was recipient of Zakat, he cannot be expected to gift the property in dispute to the respondent-vendee, therefore, the impugned transaction is one of sale rather than gift and that both the Courts below by ignoring this essential aspect of the case erred in dismissing the suit filed by the petitioner for enforcement of right of pre-emption.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. A perusal of the evidence on the record would reveal that the petitioner could not bring any evidence on the record to prove that the transaction in dispute was sale and not gift. Similarly he could not adduce any evidence to prove the passing of consideration. In the absence of any evidence muchless convincing, the entry made in the Register of Mutation cannot be allowed to be dis-lodged when it is blessed with the presumption of regularity and is supported by the statement of the donor.

Peshawar High Court

5. The argument that the petitioner being recipient of Zakat cannot be expected to gift the property may not be wholly without substance but in the absence of any evidence showing the passing of consideration, I will not like to substitute my own finding for that of the Courts below on the basis of a presumptive argument in the exercise of revisional jurisdiction of this Court, that too when it does not suffer from any factual, legal or jurisdictional error.

6. For the reasons discussed above, this petition being without merit is dismissed in limine.

Dated:13.2.2004.

J U D G E .

Peshawar High Court

Rehman Cotton Mills --- Appellant/Petitioner (s)

Versus

Sar Anjam Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 18/2001

Date of hearing 08.03.2004

**EJAZ AFZAL KHAN J.-** Respondent Sar Anjam Khan asked for specific performance of contract by instituting a suit in the Court of the learned Civil Judge Mardan and in the alternative asked for an amount to the tune of Rs.1,42,000/-. The learned trial Court after proceeding with the case declined the prayer for specific performance of contract but decreed the amount asked for in the alternative, vide his judgment dated 3.6.2000. Both the parties impugned the aforesaid judgment by filing separate appeals before the learned Addl District Judge Mardan at Takht Bhai but when the fate of the case remained much the same, vide his judgment dated 19.9.2000, the petitioner filed Civil Revision No.18/2001 while the respondent filed Civil Revision No.45/2001 which are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioner that there is no denying the fact that the petitioner agreed to sell 80 kanals of property, vide agreement dated 30.5.1981 but subsequently it was varied with the consent of the parties; and that this variation was not only accepted but acted upon by the respondent by receiving an amount of Rs.1,06,675/-, therefore, his suit was rightly dismissed by the Courts below. He next urged that the respondent was not entitled to any amount even in the alternative because as per agreement dated 16.6.1984 he was entitled to Rs.1,06,675/- which has already been paid to him, therefore, both the Courts below erred and atrociously so by passing a decree claimed in the alternative with interest at the rate of Rs.14% per annum.

Peshawar High Court

3. As against that, the learned counsel for the respondent argued that where the remaining property was available, the prayer for specific performance of contract could not have been declined by the Courts below and that the findings of both the Courts below are liable to be set aside. With regard to the receipt of Rs.1,06,675/-, the learned counsel argued that the respondent received only Rs.1,00,000/-, that too, under protest, therefore, this receipt cannot in any way be construed to his detriment.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. No doubt originally an area measuring 80 kanals out of the suit property was agreed to be transferred by the petitioner, vide agreement mentioned above but a careful analysis of the evidence on the record would transpire that it underwent variation. Though the deed dated 16.6.1984 witnessing the aforesaid variation has not been proved in accordance with the requirements of law, none-the-less, the admission made by the respondent in para-3 of his plaint that he received an amount of Rs.1,00,000/- proves the aforesaid fact., otherwise there could be no occasion for its receipt.

6. The argument that this amount was received under protest will not have any force altogether when nothing in black and white evincing it has been produced by the respondent. When this being the position, I do not think that the Courts below by declining specific performance of contract have committed any illegality so as to justify interference with the impugned judgments by this Court in the exercise of its revisional jurisdiction.

7. Now the question that crops up for decision of this Court is whether the respondent is entitled to get an amount of Rs.1,42,000/- as prayed for in the alternative. The answer to this question would be in the affirmative because this amount was to be paid by the petitioner to the respondent on all counts once the agreement was varied and some of the property, for one reason or

Peshawar High Court

the other, was left to be retained by the former. But the award of 14% interest per annum will not be in consonance with the settled provisions of law even though the respondent has been held entitled to recover the aforesaid amount. I, therefore, in the circumstances of the case, while dismissing both the petitions, modify the impugned judgment and decree by holding that the respondent would be entitled to simple interest at the rate notified by the National Bank of Pakistan, from the date of institution of the suit to the date of its payment, calculation whereof shall be made at the time of executing the decree. However, I will make no order as to costs.

Dated:8.3.2004.

J U D G E .

Peshawar High Court

Sar Anjam Khan --- Appellant/Petitioner (s)

Versus

Rehman Cotton Mills --- Respondent (s)

***JUDGMENT***

CR. No. 45/2001

Date of hearing 08.03.2004

**EJAZ AFZAL KHAN J.-** For reasons recorded in my detailed judgment of today's date in the connected Civil Revision No.18/2001, this petition stands disposed of.

Dated:8.3.2004.

J U D G E .

Peshawar High Court

Government --- Appellant/Petitioner (s)

Versus

Teghoon Shah --- Respondent (s)

### ***JUDGMENT***

CR. No. 925/2003

Date of hearing 12.03.2004

**EJAZ AFZAL KHAN J.-** The petitioners instituted a suit for declaration and perpetual injunction in the Court of the learned Illaqa Qazi Swat. When despite many chances, they failed to adduce evidence, it was dismissed in default on 20.9.2001. Their application for the restoration of suit was declined by the learned trial Court, vide order dated 20.12.2002 and when their appeal in the Court of the learned Izafi Zila Qazi was dismissed, vide order dated 3.1.2002, the petitioners invoked the revisional jurisdiction of this Court by filing the instant petition.

2. It was argued by the learned counsel for the petitioners that decision on merits is the most cherished goal of law, therefore, dismissal of suit involving a huge property of Government on a technical ground will not be in consonance with the well recognized provisions of law and justice.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that where despite many chances the petitioners failed to produce evidence, their suit was rightly dismissed for non-prosecution and that when application for its restoration was filed beyond the period of limitation, the Courts below had no other option but to dismiss it. The learned counsel next argued that even the revision petition filed by the petitioners is on no better footing and thus merits dismissal when it is filed with a delay of more than eight months without moving an application for condonation of delay. The learned counsel to support his contention placed reliance on the cases of the Province

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of Punjab through Collector, District Attock and 4 others..vs..Muhammad Nawaz ( CLC 1994 Lahore 666), Rafiq Ahmad..Vs.. Ghulam Rasool and others ( 1983 SCMR 17) and the case of Bashir Ahmad..Vs.. Government of the Punjab and others ( 1985 SCMR 333).

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that despite many chances the petitioners failed to produce evidence but this alone will not justify so stern an action when the party at fault can be burdened with reasonable cost. Similarly if an application for restoration of suit was not filed within the stipulated period, it could not be used as a weapon to deprive the Government of a huge property when, the fault if any, was committed by its officials that too when they, more often than not, are plied, purchased or even pressurized by the adversaries not to pursue the interest of the Government with due diligence. Since the property owned by the Government is also a public property and is thus used one way or the other for common weal and public welfare, it cannot and should not be allowed to be thrown down the drain because the persons Incharge of defending it are inefficient, irresponsible or un-scrupulous, therefore, I do not feel inclined to uphold the impugned orders.

6. The argument that where the application for restoration of suit was filed beyond the period of limitation prescribed therefor, it was rightly dismissed by the Courts below and, therefore, it cannot be interfered with when even the revision petition is hopelessly time barred and no application for condonation of delay has been accompanied thereby, has not impressed me to the least, firstly because this Court while exercising revisional jurisdiction can suo moto step in and interfere with any judgment, decree or order passed by the Courts below in the interest of justice even when no petition in terms of section 115 has been filed, therefore, the judgments cited at the bar by the learned counsel for the respondents will not be applicable to this case as they relate to filing of appeals.

Peshawar High Court

7. As decision on merits is the most cherished goal of law, no fetish of technicalities can be made to short circuit the matter without giving the parties a chance to vindicate their position and establish their claim.

8. For the reasons discussed above, I allow this petition, set aside the impugned orders at the costs of Rs.10,000/- to be paid by the petitioners to the respondents in the trial Court and send the case back to the learned Aa'la Illaqa Qazi Swat for decision afresh in accordance with law after giving an opportunity to both the parties to adduce evidence in support of their respective claims.

8. As it is an old case, it be decided within a period of six months. The parties are directed to appear in the Court of Aa'la Illaqa Qazi Swat on 5.4.2004.

Dated:12.3.2004.

J U D G E .

Afsar Ali Khan --- Appellant/Petitioner (s)

Versus

Muhammad Ayaz --- Respondent (s)

### ***JUDGMENT***

CR. No. 212/2004

Date of hearing 26.03.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition has questioned the judgment and decree dated 5.1.2004 of the learned Addl District Judge-I Mardan whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 25.6.2003 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that exchange perse will not non-suit the petitioners unless it is proved that it was for better management of the property, therefore, dismissal of the suit of the petitioners on this score is not in conformity with the provisions of N.W.F.P. Act X of 1987. The learned counsel next argued that omission to mention particulars as to the date, time and place of making talbs and the name of the person informing the pre-emptor about the sale of the property in the plaint will not be fatal as these are the particulars to be stated in evidence, therefore, the findings of the two Courts below on this score is not in line with dictums of the Hon'ble Supreme Court. The learned counsel to support his arguments placed reliance on the cases of Altaf Hussain..Vs..Abdul Majeed and another (2000 SCMR 314 and the case Haji Noor Muhammad..Vs..Abdul Ghani and 2 others (2000 SCMR 329).

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

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3. The record reveals that the petitioners failed to plead and prove the particulars as to the date, time and place of making talbs and the name of the person informing about the sale either in the plaint or in the evidence recorded in the Court. When so, the suit of the petitioners was rightly dismissed by the Courts below. The judgments in the case of Altaf Hussain..Vs..Abdul Majeed and another and Haji Noor Muhammad..Vs..Abdul Ghani and 2 others( supra) will not in any advance the case of the petitioners as they besides omitting to plead particulars as to the date, time and place etc. in the plaint also omitted to prove them in the evidence recorded in the Court.

4. The argument that exchange perse will not non-suit a pre-emptor unless it is proved to have been effected for better management of the property is no doubt correct, but reversal of the findings of the Courts below on this point alone will not be of any consequence when the petitioners have failed to plead and prove talbs in accordance with the requirements of law.

5. As no factual, legal or jurisdictional error has been pointed out in the findings, I do not feel inclined to interfere therewith especially when they are concurrent.

6. For reasons discussed above, this petition being without merit is dismissed in limine.

Dated:26.3.2004.

J U D G E .

Peshawar High Court

Cantonment Board --- Appellant/Petitioner (s)

Versus

Haji Muhammad Ali --- Respondent (s)

***JUDGMENT***

CR. No. 1003/2003

Date of hearing 26.03.2004

**EJAZ AFZAL KHAN J.-** The learned counsel for the petitioners states at the bar that he does not press this petition on merits if the respondents execute agreement in conformity with the terms of allotment and deposit the entire arrears outstanding against them within one month.

2. The learned counsel for the respondents undertakes on behalf of the respondents to execute the agreement and deposit all the arrears subject of course to adjustment at the time of final decision of the suit within one month.

3. In view of the above stated position, the respondents are directed to do the needful within one month by taking stock of the relevant record and receipts whereby they have deposited some amount failing which the order passed by the appellate Court will stand reversed. This petition is thus disposed of accordingly.

Dated:26.3.2004.

J U D G E .

Peshawar High Court

Poor Dil Khan --- Appellant/Petitioner (s)

Versus

Shamsher Ali Khan --- Respondent (s)

***JUDGMENT***

CR. No. 33/2004

Date of hearing 02.04.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition has questioned the order dated 3.12.2003 of the learned Addl District Judge, Swat, whereby he upheld the order dated 31.7.2003 of the learned trial Court rejecting the plaint under Order-VII Rule 11 of the C.P.C.

2. It was argued by the learned counsel for the petitioners that none of the averments made in the plaint is of a nature which could be discarded without recording evidence, therefore, both the Courts below have failed to exercise jurisdiction vested in short-circuiting the matter by invoking the application of Order-VII Rule 11 of the C.P.C.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the averments made in the plaint are prima facie unbelievable and that they do not raise triable issue, therefore, both the Courts below have rightly rejected the plaint under Order-VII Rule 11 of the C.P.C.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the plaint reveals that the petitioners specifically averred that they invited the village proprietary body to participate in the adventure of reclaiming the property under the river and in case they do not do it, the property so reclaimed would belong to the petitioners alone. Whether this statement is based on truth or otherwise is a question which cannot be decided without

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recording evidence, therefore, I do not think, the Courts below have acted in accordance with the soul and spirit of Order-VII Rule 11 of the C.P.C. by rejecting the plaint filed by the petitioners.

6. For the reasons discussed above. This petition is allowed, the impugned orders are set aside and the case is sent back to the learned trial Court for decision afresh in accordance with law after recording evidence.

Dated:2.4.2004.

J U D G E

Peshawar High Court

Safdar Khan --- Appellant/Petitioner (s)

Versus

Mir Zaman --- Respondent (s)

***JUDGMENT***

CR. No. 226/1997

Date of hearing 05.04.2004

EJAZ AFZAL KHAN J.- Petitioners in C.R.Nos. 226, 227 and 228 of 1997 seek to impugn the judgments and decrees of the learned Additional District Judge dated 15.6.1997, whereby he dismissed their appeal and thus upheld the judgments and decrees dated 7/2/1996 of the learned trial Court. As in all these petitions, a common question of law and fact is involved, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioners that once the mutations whereby the property in dispute was sold by the respondents to them were admitted in evidence without there being an objection by the other side, there was absolutely no need to examine the Revenue Officer, the Commissioner recording the statement of the Vendors and the marginal witnesses thereof, moreso when they were also admitted in a cognovit submitted by the attorney for the respondents. The learned counsel next contended that if by any means the evidence on the record was not sufficient to enable the learned Appellate Court to give a just decision in the case, it could well have allowed the examination of additional evidence instead of deciding it on the available record. The learned counsel to support his contention placed reliance on the case of Mst.Amina Begum and others... Vs...Mehr Ghulam Dastagir (PLD 1978 S C 220).

3. As against that, the learned counsel for the respondents argued that where the very sale was disputed, it was all the more desirable for the petitioners to have examined the

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Commissioner recording the statement of the Vendors, the marginal witnesses in whose presence such statement was recorded and the Revenue Officer attesting the mutations. When, he elaborated his arguments, none of them was examined, an adverse inference shall be drawn against them. He next argued that when even the application for additional evidence despite being moved was withdrawn, the adverse inference shall further stand strengthened in the circumstances of the case.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the impugned judgment reveals that the learned Addl Distt Judge has decided all the appeals before him in a summary and slipshod manner without discussing the evidence on the record and the cognovit submitted by the attorney of the respondents. No doubt the petitioners did not produce any evidence altogether to prove the sale consideration or even passing of consideration, none-the-less, he produced some which in his view was sufficient to prove his case. If in the judgment of the learned Addl District Judge the evidence was insufficient and examination of the Commissioner recording the statement of some of the vendors, marginal witnesses thereof and Revenue Officer attesting the mutation or the person conversant with their signatures etc. in case any one of them was dead, was essential for the just decision of the case, he could well have examined them as additional evidence but under no circumstances, he could proceed to decide the case notwithstanding insufficiency of evidence especially when he was required under the law to do justice and not to dispose of the lis before him whether justly or otherwise. It would thus be a case of failure of exercise of jurisdiction vested as the learned Addl Distt Judge has not exercised the power so vested in him by virtue of Order XLI Rule 27 of the C.P.C.

6. Having thus considered in this background, I have no alternative but to accept these revision petitions alongwith CMs for additional evidence set aside the impugned judgments and decrees of the Courts below and remand the cases to the learned trial

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Court for decision afresh after recording additional evidence as hinted to above. The parties are directed to appear in the Court of learned trial Judge on 23/4/2004 who shall decide the case as expeditiously as possible, but not later than three months, as the dispute between the parties pertains to the year 1993.

ANNOUNCED  
5.4.2004.

JUDGE

Peshawar High Court

Sardar Khan --- Appellant/Petitioner (s)

Versus

Muhammad Munir --- Respondent (s)

***JUDGMENT***

CR. No. 227/1997

Date of hearing 05.04.2004

**EJAZ AFZAL KHAN J.-** For reasons recorded in my detailed judgment of today's date in the connected Civil Revision No.226 of 1997, this Civil Revision stands allowed.

Dated:5.4.2004.

J U D G E

Peshawar High Court

Shah Zaman --- Appellant/Petitioner (s)

Versus

Jamroz Khan --- Respondent (s)

***JUDGMENT***

CR. No. 262/1997

Date of hearing 05.04.2004

**EJAZ AFZAL KHAN J.-** As the impugned judgments and decrees have been set aside in Civil Revision No.613 of 1999, this revision petition has become infructuous which is thus dismissed.

Dated:5.4.2004.

J U D G E

Peshawar High Court

Haji Alamzeb --- Appellant/Petitioner (s)

Versus

Member --- Respondent (s)

### ***JUDGMENT***

CR. No. 346/1998

Date of hearing 05.04.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 26.6.1997 of the learned Aa'zafi Zilla Qazi whereby he dismissed the appeal filed by him and thus upheld the order dated 24.4.1997 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that previously the Court seized of a pre-emption suit could not extend time beyond 30 days for deposit of 1/3<sup>rd</sup> of the Pre-emption amount but after amendment in section 24 of the N.W.F.P. Pre-emption Act, 1987, it has been made discretionary with the Court to fix any time for deposit of 1/3<sup>rd</sup> of pre-emption amount even beyond 30 days which clearly means that the Court has the power to extend it. He next argued that notwithstanding the failure of the petitioner to deposit the pre-emption amount before the date fixed, once the Court allowed the application of the petitioner for the deposit of the amount, vide order dated 24.4.1997, it could not have substituted it by an order of dismissal of suit on that score.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that the provision of section 24 of the Act is mandatory, therefore, both the Courts below have committed no irregularity by dismissing the suit of the petitioner on account of his failure to deposit the amount within the period fixed by the Court.

Peshawar High Court

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that the petitioner failed to deposit 1/3<sup>rd</sup> of the pre-emption amount before 24.4.1997 as directed by the Court, when so, I do not think, the Courts below had any other option but to dismiss the suit of the petitioner.

6. The argument that notwithstanding the failure of the petitioner to deposit the amount before the date fixed, once the Court allowed the application of the petitioner for the deposit of the amount, it could not have substituted it by dismissing the suit on that score, has no force altogether as the provision of section 24 of the Act is mandatory and failure to deposit the amount within the time fixed by the Court shall ipso facto call for the dismissal of the suit.

7. The argument that after amendment in section 24 of the Act, it is discretionary with the Court to fix any time for deposit of the amount even beyond 30 days is not doubt correct but it does not, however, mean that in case of failure of the pre-emptor to deposit it within the period fixed, it has the power to extend it, as despite the amendment the mandatory part of the provision has been left intact which provides for the dismissal of the suit if and when the plaintiff fails to deposit the amount within such period.

8. When seen in this context, I do not think, the Courts below have committed any jurisdictional error by dismissing the suit of the petitioner.

9. For the reasons discussed above, this petition being without merit is dismissed.

Dated:5.4.2004.

J U D G E.

Peshawar High Court

Jamroz Khan --- Appellant/Petitioner (s)

Versus

Shah Zaman --- Respondent (s)

### ***JUDGMENT***

CR. No. 613/1999

Date of hearing 05.04.2004

**EJAZ AFZAL KHAN J.-** Heard at length. During the course of arguments many things were pointed out which have not been taken note of by both the Courts below while handing down the impugned finding.

2. It appears that both the Courts below have decided this case without conscious application of mind and without recording finding in accordance with the provisions of Order-XX Rule-5 and Order-XLI Rule-31 of the C.P.C.

3. When confronted with this state of affairs, both the learned counsel agreed that the finding of both the Courts below be set aside and the case be sent back to the Senior Civil Judge Charsadda for decision afresh in accordance with law.

4. In view of what has been discussed above, this Civil Revision is allowed, the judgments and decrees of both the Courts below are set aside and the case is sent back to the learned Senior Civil Judge Charsadda for decision afresh in accordance with law.

5. Since various intricate questions relating to the revenue record are also involved in this case, the parties would be at liberty to adduce additional evidence.

6. The parties are directed to appear before the learned Senior Civil Judge Charsadda on 15.4.2004. The learned trial

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Judge is directed to dispose of this case himself without sending it to any other Court within a period of 3 months.

Dated:5.4.2004.

J U D G E

Peshawar High Court

Mst. Haji Begum --- Appellant/Petitioner (s)

Versus

Mst. Bibi Zaitoon --- Respondent (s)

### ***JUDGMENT***

CR. No. 49/2004

Date of hearing 09.04.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 4.12.2003 of the learned Addl Distt Judge Peshawar whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 22.7.2003 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where the deed which is sheet-anchor of the case of the respondents was not proved in accordance with the requirements of Article 79 of Qanun-e-Shahadat, both the Courts below erred by decreeing the claim of the respondents. The learned counsel to support his contention placed reliance on the cases of Syed Muhammad Sultan..Vs..Kabir-ud-din and others (1997 CLC 1580), Beutsche Dampschiffahrt-Gesellschaft and another..vs.. Central Ubsyrabce Co. Ktd, Karachi ( PLD 1975 Karachi 819), Mst.Zeenat Begum..Vs..Muhammad Hussain (1999 MLD 230) and Chilya Corrugated Board Mills Limited..vs..M.Ismail and another (1992 CLC 2524).

3. As against that the learned counsel appearing on behalf of the respondents argued that the deed was proved in accordance with the requirements of section 68 of the Evidence Act as scribe as well as attesting witness was produced who deposed as to the correctness of the deed; that the document because of its being 30 years old is blessed with the presumption of truth and that both the Courts below have rightly decreed the suit of the respondents by relying on the deed especially when it was supported by the D.Ws. examined by the petitioners.

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4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that the respondents examined sufficient documentary as well as oral evidence to prove that the house in dispute was transferred to her name in lieu of her dower amount. The evidence of D.Ws. 4 and 5 examined by the petitioners further added to the preponderance of evidence of the respondents when they un-equivocally supported her claim as to the ownership of the house in dispute by virtue of the deed mentioned above.

6. When that being the case, I do not think, the Courts below have committed any error of jurisdiction by handing down the impugned finding so as to justify interference therewith in the exercise of revisional jurisdiction of this Court, especially when it is concurred. The judgments cited at the bar, therefore, will have no application to the case in hand.

7. For the reasons discussed above, this petition being without substance is dismissed alongwith the C.M.

Dated:9.4.2004.

J U D G E

Peshawar High Court

Gulab --- Appellant/Petitioner (s)

Versus

Almina --- Respondent (s)

### ***JUDGMENT***

CR. No. 221/1997

Date of hearing 09.04.2004

**EJAZ AFZAL KHAN J.**- The petitioners through the instant petition have questioned the judgment and decree dated 23.4.1996 of the learned Addl Distt Judge Peshawar whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 14.3.1992 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that the property in dispute bearing Khasra No.458 measuring 392 kanals 5 marlas is Shamilat-i-deh and has been recorded as a burial ground to the extent 133 kanals in the original settlement of 1870, therefore, subsequent entries showing the entire Khasra number as burial ground being against law and fact will not have any effect on the rights of the petitioner. The learned counsel by referring to the case of Allah Dad..Vs..Muhammad Ali and others (PLD 1956 Lahore 245) argued that where a new entry was made illegally the old will hold the field. The learned counsel by referring to section 188 of the Mahomedan Law by D.F Mullah, argued that where it has not been proved that an area more than 133 kanals 7 marlas of the property in dispute has been used as a burial ground since the time immemorial, it cannot be held as such.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the entire property ever since 1929-30 has been recorded as a burial ground, therefore, the petitioners cannot assert their private ownership in respect thereof and that both the Courts below have committed no irregularity

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much less illegality by declaring it as such especially when the report of the Commissioner coupled with his statement recorded in the Court proves the aforesaid nature and character of the property.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is correct that during the settlement of 1870 an area measuring 133 kanals 7 marls was recorded as a burial ground, but a perusal of the extract from the records of rights for the year 1895/96 upto 1926/27 will reveal that the area under went a consistent increase. This did not stop there as in the records of rights for the year 1929-30, the entire area was recorded as a burial ground. Since this increase in the area was not sudden but gradual, no element of illegality, as contended by the learned counsel for the petitioners on the strength of the Allah Dad..Vs..Muhammad Ali and others (supra) can be found therein, moreso when it is justified by day today burials. If 50 years before it was spread over 133 kanals 7 marlas, it could be come double of that after 50 years and would thus go on unless, of course, it is proved that further burial was restricted by the village proprietary body or that no death occurred 50 years later or that the entire population of the area migrated to another place lock stock and barrel. Another factor which rather shakes and shatters the case of the petitioners is that the entries appearing in the record of rights for the year 1929-30 have been consistently repeated with negligible variation up till now.

6. Whether the entire area of the khasra number has in fact been converted into a burial ground would have of course been a relevant inquiry to be made but this too has already been met and obviated when the learned trial Court appointed Commissioner who after having inspected the entire property in the presence of the parties found it to be a burial ground as none of its nooks and corners is without grave as per his report.

7. Once the whole khasra number has been entered as a burial ground ever since 1929-30 and every inch of it is covered

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by graves I do not think, any of the contentions of the learned counsel for the petitioners, can change the grave ground realities on the basis of any technical argument divorced from substance. Even otherwise where a property is entered as a burial ground and has been used as such a creation of Wakf and dedication for the purpose can well be presumed. In the case of Muhammad Jan..Vs..Suleman and others (PLD 1968 Peshawar 181), his Lordship Mr.Justice Mian Shakirullah Jan, as he then was after taking stock of all the relevant case-law on the subject, held that where a property has been used as a graveyard its dedication as wakf shall be presumed in view of its long user as such.

8. Quite apart from this, when the learned counsel for the petitioners could not pin point any irregularity or illegality or any other jurisdictional error in the impugned finding, I do not feel inclined to interfere therewith in the exercise of revisional jurisdiction of this Court.

9. For the reasons discussed above, this petition being without substance is dismissed alongwith the C.M.

Dated:9.4.2004.

J U D G E

Peshawar High Court

Inzar Gul --- Appellant/Petitioner (s)

Versus

Karimullah --- Respondent (s)

### ***JUDGMENT***

CR. No. 219/2004

Date of hearing 16.04.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 19.12.2003 of the learned District Judge Mardan whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 28.7.2002 of the learned trial Court.

2. The learned counsel for the petitioner argued that particulars as to the time, date and place of making talbs and the name of the person informing about the sale are the particulars to be stated in evidence, therefore, he could not be non-suited if his plaint is found deficient in this regard. The learned counsel to support his contention placed reliance on the cases of Altaf Hussain..Vs..Abdul Majeed and another (2000 SCMR 314) and Noor Muhammad..Vs..Abdul Ghani and 2 others (2000 SCMR 319).

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. Assuming for the sake of arguments that the particulars as to time, date and place and the name of the person informing about the sale are the particulars to be stated in evidence, none-the-less the case of the petitioner for interference with the concurrent findings of the Courts below is not made out as the evidence on the record too is deficient in these particulars. When that being the case, I do not feel inclined to interfere with

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the impugned finding when it does not suffer from any error, absence or excess of jurisdiction.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:16.4.2004.

J U D G E .

Peshawar High Court

Niaz Muhammad --- Appellant/Petitioner (s)

Versus

Faqir Muhammad --- Respondent (s)

***JUDGMENT***

CR. No. 947/2003

Date of hearing 23.04.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 17.9.2003 of the learned Additional Distt Judge Lahor Swabi whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 19.2.2003 of the learned trial Court.

2. The learned counsel for the petitioners by referring to the report of the Commissioner argued that where demarcation was not conducted without establishing three permanent points, no reliance can be placed thereon. The learned counsel to support his contention placed reliance on a judgment of this Court rendered in the case of Syed Said Shah.Vs.Maqsood and others in Civil Revision No.655 of 2000 decided on 21.12.2001.

3. As against that, the learned counsel appearing on behalf of the respondents argued that when no such objection was raised at the time of demarcation of property or at the time when the report of the Commissioner was submitted in the Court, the petitioners cannot now turn round to question its legality on any technical ground.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The report of the Commissioner reveals that demarcation was conducted without establishing three permanent points. Though no such objection was raised by the petitioners at the time of demarcation or even after when the report was

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submitted in the Court, none-the-less, a person seeking recovery of possession on the allegation of encroachment must prove that it was worked out pursuant to a demarcation conducted in accordance with law. The case cited at the bar by the learned counsel for the petitioners fully covers the case in hand. A similar view was held by Lahore High Court in the case of Sheikh Allah Ditta. Vs. A.F. Ahmad & Co. and others (PLD 1954 Lah. 608).

6. Having thus considered in this backdrop, I do not feel inclined to maintain the impugned finding when admittedly demarcation was conducted without establishing three permanent points.

7. For the reasons discussed above, this petition is allowed, the impugned findings are set aside and the case is sent back to the learned Addl Distt Judge Lahor for decision afresh after appointing a seasoned Revenue Officer to conduct demarcation in accordance with law.

8. As the petitioners failed to raise objection at the relevant time, they are burdened with a costs of Rs.10,000/- to be paid to the respondents before the learned Addl Distt Judge.

9. As it is an old case, it be disposed of within a period of 2 months positively. The parties are directed to appear in the Court of the learned Addl Distt Judge Lahor on 20.5.2004.

Dated:23.4.2004.

J U D G E .

Peshawar High Court

Mansoor Zafar --- Appellant/Petitioner (s)

Versus

Shaukat Ali Baig --- Respondent (s)

***JUDGMENT***

CR. No. 651/2002

Date of hearing 26.04.2004

**EJAZ AFZAL KHAN J.-** The learned counsel for the parties agree that the evidence on the record is sufficient to enable the learned appellate Court to decide all including additional issues, therefore, the order remanding the case is without any justification.

2. In view of the statements of the learned counsel for the parties which conforms to grave ground realitiles available on the record, I have no option but to allow this petition, set aside the impugned judgment and send the case back to the learned Addl District Judge-II Nowshera for decision afresh on merits in accordance with law. The parties are directed to appear in the said Court on 24.2.2004.

Dated:26.4.2004.

J U D G E

Peshawar High Court

Abdul Subhan --- Appellant/Petitioner (s)

Versus

Chairman Board --- Respondent (s)

***JUDGMENT***

CR. No. 456/2004

Date of hearing 30.04.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition seeks to impugn the order dated 24.4.2004 of the learned Additional District Judge-II Kohat whereby he dismissed the appeal filed by him and thus upheld the order dated 15.4.2004 of the learned Civil Judge-II Kohat.

2. It was argued by the learned counsel for the petitioner that where an authentic document like a birth certificate showed that actual date of birth of the petitioner was 8.7.1945 and not 28.3.1944 as recorded in the Secondary School Certificate, he was having a prima facie good case and that both the Courts below by declining the prayer of the petitioner for temporary injunction have failed to exercise jurisdiction vested in them.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. As in view of Rule 12-A inserted in the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, the date of birth once recorded in the Service Book is final once for all and cannot be questioned in any Court of law, the petitioner cannot be said to have a prima facie good case. If at all, notwithstanding the above mentioned provision, the petitioner could question the correctness of his date of birth, he could do so only through an appeal before the Service Tribunal, not through a civil suit, as the matter pertains to the terms and conditions of service.

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5. Since there is nothing in the impugned order showing any error, absence or excess of jurisdiction to justify interference therein, I do not feel inclined to admit this petition for regular hearing.

6. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith the C.M.

Dated:30.4.2004.

J U D G E .

Muhammad Nisar --- Appellant/Petitioner (s)

Versus

Shah Wazir --- Respondent (s)

***JUDGMENT***

CR. No. 158/1999

Date of hearing 21.05.2004

**EJAZ AFZAL KHAN J.-** Both the learned counsel for the parties very fairly agreed that the learned appellate Court has handed down the impugned judgment without discussing the evidence of the parties which he was required to do so as a Ist Court of appeal and final Court of fact.

2. In view of the above stated position, I have no alternative but to allow this petition, set aside the impugned judgment and send the case back to the learned Zila Qazi Malakand at Batkhela for decision afresh in accordance with law.

3. As it is an old case, it be disposed of within a period of 3 months. The parties are directed to appear before the Court concerned on 16.6.2004.

4. The record of this case be sent to the learned appellate Court as soon as possible but not later than one week.

Dated:21.5.2004.

J U D G E

Peshawar High Court

Umar Rehman --- Appellant/Petitioner (s)

Versus

Behram Khan --- Respondent (s)

***JUDGMENT***

CR. No. 502/2004

Date of hearing 14.06.2004

**EJAZ AFZAL KHAN J.-** The matter has been patched up between the parties. Their statements in this behalf have been recorded. As the respondents have agreed to forsake their right in favour of the petitioner on receiving an amount to the tune of Rs.50,000/- and some property measuring 6" X 100", they have no objection if the revision petition filed by the petitioner is allowed and decrees in their favour are set aside.

2. In view of the stated position, the Civil Revision is allowed, the impugned judgments and decrees of both the Courts below are set aside and the suit of the respondents is dismissed with no order as to costs.

Dated: 14.6.2004.

J U D G E .

Peshawar High Court

Qasim Jan --- Appellant/Petitioner (s)

Versus

Saeed ur Rehman --- Respondent (s)

***JUDGMENT***

CR. No. 522/2004

Date of hearing 21.06.2004

**EJAZ AFZAL KHAN J.-** Petitioner Qasim Jan whose suit for pre-emptory decree and appeal there against were dismissed by the Courts below, vide judgments and decrees dated 18.9.2003 and 14.2.2004 respectively has sought the indulgence of this Court by filing the instant petition.

2. It was argued by the learned counsel for the petitioner where it was proved on the record that the suit property is lying in contiguity with the privately owned path of the petitioner, he could not have been non-suited particularly when there was no lacuna in the proof of requisite talbs.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The evidence on the record reveals that the path on the basis whereof the petitioner claims contiguity with the suit property is not only used by the people of the locality but a drain constructed at the Government expense also runs through that. When that being the case, I do not think, it can be termed as private ownership of the petitioner by any stretch of imagination on the basis whereof any right muchless pre-emptory can be exercised. The finding given by the trial Court being based on proper appraisal of evidence, therefore, merits no interference, moreso when they are concurrent.

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5. For the reasons discussed above, this petition being without merit is dismissed in limine.

Dated:21..6.2004.

J U D G E

Peshawar High Court

Faqeer Khan --- Appellant/Petitioner (s)

Versus

Entikhab Alam --- Respondent (s)

### ***JUDGMENT***

CR. No. 595/1997

Date of hearing 21.06.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 10.10.1997 of the learned Izafi Zila Qazi Malakand at Dargai whereby he allowed the appeal filed by the respondent and thus set aside the judgment and decree dated 30.11.1996 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that the learned appellate Court could not have up-set the finding of the learned trial Court by relying on a document allegedly executed by the petitioner which was not proved in accordance with the requirements of law that too when he was not confronted therewith. He next argued that even the inferences drawn by the learned appellate Court from the document are not warranted by its plain reading.

3. As against that, it was argued by the learned counsel for the respondent that the document was proved in accordance with the requirements of law whereby the property in dispute was gifted by the petitioner to the respondent, therefore, it was rightly relied upon.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that neither the document was proved in accordance with the requirements of law nor the petitioner was confronted therewith at the time when he was

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examined in the Court. It further reveals that the parties have not led sufficient evidence to prove their respective claim to the property in dispute as could enable any of the Courts below let alone this Court to arrive at just and proper conclusion. When that being the state of evidence, I do not think, that it could have been made a basis for a finding as could be called just and proper by any attribute.

6. In the circumstances of the case, I have no alternative but to allow this petition, set aside the impugned judgments and decrees of the learned trial as well as appellate Court and send the case back to the learned trial Court for decision afresh in accordance with law. The parties would be at liberty to produce even additional evidence to prove their respective claim. As it is an old case, it be disposed of within a period of six months. The parties are directed to appear before the learned trial Court on 8.7.2004.

Dated:21.6.2004.

J U D G E .

Peshawar High Court

Ghafoor Shah --- Appellant/Petitioner (s)

Versus

Khaista Gul --- Respondent (s)

***JUDGMENT***

CR. No. 1060/2004

Date of hearing 10.09.2004

**EJAZ AFZAL KHAN J.-** The petitioner whose suit and appeal were dismissed by the learned trial and appellate Courts vide judgments and decrees dated 17.7.2003 and 1.6.2004 respectively, has assailed them by filing the instant petition.

2. It was argued by the learned counsel for the petitioner that where the defendant could not substantiate any of his allegations regarding his title to the property in dispute in the evidence recorded in the Court, both the Courts below erred in non-suiting the petitioner.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The contention of the learned counsel, I am afraid is not in conformity with the well established principle of law enshrined in the maxim “*secundum allegata et probata*”, thus it amounts to putting the cart before the horse as it is not for the defendant but for the plaintiff to stand on his own legs and prove his title to the property claimed by him. Where he failed to substantiate his allegations as to the ownership of the property, he cannot benefit from the infirmities in the case set up by the defendant, moreso when his stance in the plaint does not agree with the one taken in the evidence recorded in the Court as according to the former it being the property of Juma Gul was entrusted to him for the up-keep of a mosque and according to the latter it was purchased by him from the said Juma Gul.

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5. Apart from this, there is no mis-reading or non-reading of evidence on the record and there is nothing in the impugned finding as could suggest that it is based on wrong assumption of law or fact, this Court will not substitute its own view for that of the Courts below in the exercise of revisional jurisdiction of this Court, even if on re-appraisal of evidence a view to the contrary is also possible.

6. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith C.M.

Dated:10.9.2004.

J U D G E

Peshawar High Court

Abdul Ghani --- Appellant/Petitioner (s)

Versus

Ayub Khan --- Respondent (s)

### ***JUDGMENT***

CR. No. 716/2004

Date of hearing 16.09.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 3.3.2004 of the learned Additional District Judge-II Kohat whereby he allowed the appeal filed by the respondent and by setting the judgment and decree dated 1.10.2003 of the learned Civil Judge-II Kohat, sent the case back to the learned trial Court for decision afresh after getting the property in dispute demarcated through a local Commissioner not below the rank of Tehsildar.

2. The learned counsel appearing on behalf of the petitioner argued that where the plaintiff respondent failed to establish on the record encroachment of the property sought to be recovered through a possessory suit, it was rightly dismissed by the learned trial Court and that the learned appellate Court was not supposed to come to his rescue by remanding the case and thereby providing him an opportunity to fill up the lacunas in the case when he himself did not make any effort in this behalf.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. It is not disputed on the record that demarcation of the property in dispute was conducted by Girdawar Circle as is evident from the report submitted by him. Though the respondent was required to prove the demarcation report by examining the Girdawar concerned but due any reason best known to him or his counsel, he could not do so. None-the-less, the learned trial Court

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was not relieved of its duty by dismissing the suit before it on this score as such a hurried disposal rather tends to prolong than to end the dispute between the parties. The learned trial Court, therefore, was required to examine the Girdawar either as C.W. or in case he was not satisfied with his report, he could have issued another commission to find out whether the property of the respondent was in fact encroached as alleged by him.

5. When viewed against this back-ground, I do not think, the learned appellate Court has committed any error much less jurisdictional by remanding the case to the trial Court for decision afresh as highlighted above. He, it may be added, being conscious of his powers as an appellate Court has rightly exercised the jurisdiction vested by doing so.

6. For the reasons discussed above, this petition being without merit is dismissed in limine alongwith the C.M. However, the learned Court is directed to conclude the trial of this Case within a period of 3 months positively.

Dated:16.9.2004.

J U D G E

Sikarndar Mir --- Appellant/Petitioner (s)

Versus

Head Mistress --- Respondent (s)

***JUDGMENT***

CR. No. 631/2000

Date of hearing 20.09.2004

**EJAZ AFZAL KHAN J.-** The petitioners whose suit for mense profit was dismissed by the learned trial Court, vide order dated 26.4.2000 on the sole ground of Order-II Rule 2 of the CPC., preferred an appeal in the Court of the learned District Judge and when that which too met the same fate in limine, vide order dated 21.6.2000, he filed the instant petition.

2. It was argued by the learned counsel for the petitioners that Order II Rule 2 of the CPC has no application to the suit in hand when the mense profit have been claimed in respect of a period subsequent to the decree passed in the previous suit.

3. As against that, the learned A.A.G. does not seriously dispute this proposition of law and rightly so because Order-II Rule 2 of the CPC bars the remedy in respect of a relief which is available at the time of the institution of the earlier suit, which is not the case here as the claim of mense profits relate to a period subsequent to the decree in the previous suit.

4. When that being the case, I have no alternative but to allow this petition set aside the impugned judgments and decrees and send the case back to the learned trial Court for decision afresh on merits after giving the parties an opportunity to defend the case. As it is an old case, it be decided within six months. The parties are directed to appear in the Court the learned Senior Civil Judge Peshawar on 5.10.2004.

Dated:20.9.2004.

J U D G E

Peshawar High Court

Fazal Khan --- Appellant/Petitioner (s)

Versus

Dil Afzal --- Respondent (s)

***JUDGMENT***

CR. No. 1170/2004

Date of hearing 18.10.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 13.5.2004 of the learned Additional District Judge, XII Peshawar, whereby he upheld the judgment and decree dated 23.7.2003 of the learned Civil Judge Peshawar.

2. It was argued by the learned counsel for the petitioner that though the respondent has purchased the property in dispute from one of the co-sharers, none-the-less, the petitioner also being a co-sharer therein shall be deemed to be interested in every inch of it, therefore, both the Courts below have erred in dismissing the suit of the petitioner for recovery of possession.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. It is rather patent from the record that the property in dispute being the ownership of Mst. Sarwara , a co-sharer therein was transferred to the respondent by virtue of mutation No.4560 attested on 9.2.1994. It is also patent from the record in general and the statement of Parwari Halqa in particular that the property being joint has not been partitioned by metes and bounds so far and so is the fact that the said lady being a co-sharer therein was competent to alienate 3-2/3 kanals to the respondent. In this view of the matter, I do not think, the suit for recovery of possession by a co-sharer against another can succeed unless the property is partitioned by metes and bounds.

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5. When viewed in this context, none of the findings of the learned courts below suffers from any infirmity muchless jurisdictional so as to justify interference therewith.

6. For the reasons discussed above, this petition being without merit is dismissed. However, the petitioner would be at liberty to seek his remedy in the competent Court of revenue hierarchy.

Dated:18.10.2004

J U D G E

Peshawar High Court

Muhammad Sohail --- Appellant/Petitioner (s)

Versus

Dr. Khalid Mufti --- Respondent (s)

### ***JUDGMENT***

CM. No. 74/2004

Date of hearing 27.10.2004

**EJAZ AFZAL KHAN J.-** The petitioners whose revision petition bearing No.183/2002 has been dismissed by this Court, vide judgment dated 22.1.2004 have asked for its suspension through the instant C.M. for a period of 20 days to enable them to obtain a stay order from the Hon'ble Supreme Court.

2. The learned counsel appearing on behalf of the petitioners argued that even after the announcement of judgment, the Court does not become functus officio and can thus in appropriate cases stay its own orders with a view to assure the applicant to pursue his remedy in the next higher forum. The learned counsel to support his argument referred to the cases of Rani Shankeramma..Vs..Ramchandra Reddy and another (AIR 1953 HYD 73), Sadiq Hussain Qureshi..Vs..Federation of Pakistan, Rawalpindi and 2 others (PLD 1979 Lahore 1) and Ukusana Singh and others..Vs.. Union of India (AIR 1957 Manpur 35).

3. We have perused the application, grounds mentioned therein and also the judgments so cited at the bar.

4. As nothing urgent, emergent and extra ordinary has been pointed out by the learned counsel for the petitioner either in petition or during the course of arguments to justify the grant of this extra ordinary relief, we do not feel persuaded to stay the operation of our own judgment particularly when a similar prayer for stay can well be made in the Court executing the decree. The

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judgments cited at the bar because of their distinguishable facts and features have no relevance to the case in hand.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:27.10.2004.

J U D G E .

J U D G E .

Peshawar High Court

Fateh Mirza --- Appellant/Petitioner (s)

Versus

Abdul Mateen --- Respondent (s)

### ***JUDGMENT***

CR. No. 672/2004

Date of hearing 08.11.2004

**EJAZ AFZAL KHAN J.-** The petitioner whose suit for the enforcement of right of pre-emption was dismissed, vide judgment and decree dated 28.5.2003 of the learned Illaqa Qazi and appeal there against in the Court of Izafi Zilla Qazi, also met the same fate, vide judgment and decree dated 29.4.2004, invoked the revisional jurisdiction of this Court through the instant Civil Revision.

2. The main contention of the learned counsel for the petitioner was that when the issue relating to the factum of talbs which was of fundamental importance in this case was not framed, it cannot be said to have been decided against him and that the finding of both the Courts below being based on mis-reading and non-reading of evidence is liable to be set aside.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. Be all that as it may, when the petitioner did not adduce any evidence to show that he is either a co-sharer in the property in dispute, or contiguous owner thereto or participator in amenities and appendages, I do not think, the finding of the learned Courts below, can be interfered with on any technical ground urged by the learned counsel for the petitioner that too when it does not suffer from any error muchless jurisdictional.

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5. For the reasons discussed above, this petition being without merit is dismissed in limine.

Dated:8.11.2004.

J U D G E

Peshawar High Court

Muhammad Wasif Alam --- Appellant/Petitioner (s)

Versus

Muhammad Nawaz --- Respondent (s)

***JUDGMENT***

CR. No. 514/1998

Date of hearing 22.11.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 27.4.1998 of the learned Addl District Judge Nowshera whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 2.12.1996 of the learned trial Judge.

2. It was argued by the learned counsel for the petitioners that where the respondents and other co-sharers had relinquished their rights in the property in dispute in favour of the petitioners, they could not have turned round to claim it through a civil suit. It was next argued that where the petitioner effected improvement in the property in dispute, they were entitled to its compensation in the wake of their ejection therefrom.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that where there is no evidence on the record to show that the respondents or the other co-sharers have ever relinquished their rights in the property, the learned Courts below have rightly turned down their claim. With regard to the improvement, it was urged by the learned counsel that when no evidence what ever was produced to prove its nature and character, this issue could not be raised for the first time in the revisional jurisdiction of this Court, moreso when both the Courts below have decided it in negative.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

Peshawar High Court

5. There is no evidence muchless convincing on the record to show that the respondents have ever relinquished their rights in the property in dispute in favour of the petitioners. There is also no evidence on the record except vague and self contradictory assertion to prove that the petitioners ever made any improvement over the property in dispute. When that being the case, I do not think, the findings of the Courts below could be held to have been based on mis-reading or non-reading of evidence or erroneous assumption of law and fact.

6. For the reasons discussed above, this petition being without substance is dismissed.

Dated:22.11.2004

J U D G E

Peshawar High Court

Najeeb Ullah --- Appellant/Petitioner (s)

Versus

Haji Sher Muhammad --- Respondent (s)

### ***JUDGMENT***

CR. No. 1284/2004

Date of hearing 26.11.2004

**EJAZ AFZAL KHAN J.-** The petitioner has assailed the order dated 4.10.2004 of the learned Addl District Judge-IX Peshawar whereby he allowed the appeal filed by the respondents and thus set aside the order dated 27..5.2004 of the learned Civil Judge Peshawar.

2. It was argued by the learned counsel for the petitioner that when the petitioner is in possession of a deed showing the sale of the property in his favour, all the ingredients justifying the grant of temporary injunction are in his favour and that the learned appellate Court by ignoring them acted against law of the land.

3. As against that the learned counsel appearing on behalf of the respondents, by taking serious exception to the form of the suit and expressing reservations even as to the genuineness of the deed contended that the very existence of a prima facie case is open to serious doubt, therefore, the order of the learned appellate Court being unexceptionable merits no interference.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Without discussing the merits of the case, I, in the circumstances of the case, direct the learned trial to conclude this case within a period of two months and restrain the respondents from alienating the property in dispute to any body in any manner

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till then. However, if the trial is not concluded within the time mentioned above due to an act or omission of the petitioner, the restraint so placed on the respondents will ipso facto cease to have effect. This petition is thus disposed of in the terms indicated above.

6. The parties are directed to appear in the Court of the learned trial Judge on 3.12.2004. The record of this case be sent to the learned trial Court as soon as possible but not later than 3 days.

Dated:26.11.2004

J U D G E

Peshawar High Court

Nazar Hussain --- Appellant/Petitioner (s)

Versus

Ehl-e-Sadat Qazmi --- Respondent (s)

### ***JUDGMENT***

CR. No. 366/2002

Date of hearing 29.11.2004

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 17.1.2002 of the learned Addl District Judge Peshawar whereby he set aside the order dated 23.9.2000 of the learned Senior Civil Judge Peshawar and sent the case back to him for decision afresh after affording an opportunity to respondent No.1 to adduce evidence in support of his claim including competency or otherwise of the suit.

2. The learned counsel appearing on behalf of the petitioners argued that the suit of respondent No.1 was prima facie barred by law as being resjudicata, therefore, the plaint was rightly rejected under Order VII Rule 11 of the C.P.C. He next argued that competency of the suit of respondent No.1 is also open to serious doubt when he has not served notice on respondent No.3 in terms of section 273 of the Cantonment Act, 1924.

3. As against that, the learned counsel appearing on behalf of respondent No.1 argued that since all the questions raised by the petitioners cannot be decided without recording evidence, the impugned order being free from any factual or legal infirmity merits no interference. With regard to incompetency of the suit for want of notice in terms of the provision mentioned above, the learned counsel submitted that it too be dealt with by the learned trial Court.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

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5. As none of the questions agitated by the learned counsel for the petitioners can be resolved without recording evidence, I will not like to interfere with the impugned order, especially when it does not suffer from error or infirmity of law and jurisdiction. With regard to the competency or otherwise of the suit under the above mentioned provisions of law, suffice it to say that it too can adequately be dealt with by the learned trial Court.

6. For the reasons discussed above, this petition being without substance is dismissed. As it is a lis relating to 1998, the learned trial Court is directed to dispose it of within a period of six months. The parties are directed to appear in the Court of the learned trial Court on 14.12.2004.

Dated:29.11.2004.

J U D G E

Peshawar High Court

Khuda Bakhsh --- Appellant/Petitioner (s)

Versus

Haidar Khan --- Respondent (s)

***JUDGMENT***

CR. No. 479/2004

Date of hearing 03.12.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 24.4.2004 of the learned District Judge Chitral whereby he appointed Commissioner to see existence or otherwise of graves over the property in dispute.

2. It was argued by the learned counsel for the petitioner that where there was no issue relating to graves, no commission could be issued and that by issuing commission, the learned appellate Court exercised jurisdiction not so vested in it.

3. As against that, the learned counsel appearing on behalf of the respondents argued, that existence or otherwise of graves is having bearing on the fate of the case, therefore, issuance of commission for its ascertainment was essential for the just decision of the case.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. As no irregularity muchless illegality has been pointed out in the impugned order, I do not feel inclined to interfere with the impugned order, moreso when adjudication on merits of the entire case is yet to be made.

Peshawar High Court

6. For the reasons discussed above, this petition being without merit is dismissed alongwith C.Ms.

Dated: 3.12.2004

J U D G E

Peshawar High Court

Anwar Daraz --- Appellant/Petitioner (s)

Versus

Khaista Rehman --- Respondent (s)

***JUDGMENT***

CR. No. 959/2004

Date of hearing 03.12.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 4.3.2004 of the learned Izafi Zila Qazi Wari whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 30.5.2003 of the learned Illaqa Qazi.

2. The learned counsel appearing on behalf of the petitioner argued that issue as to the market value of the property in dispute was of fundamental importance in this case and that the learned trial Court by failing to frame it has failed to exercise jurisdiction so vested. He next argued that both the Courts below ignored the fact that where a transaction was not witnessed by a mutation, registered deed or delivery of possession under the sale the period of limitation would run from the date, the sale fell to the knowledge of the pre-emptor.

3. I have gone through the record carefully and considered the sub missions of the learned counsel for the petitioner.

4. The argument that issue relating to market value was of fundamental importance would have been relevant had the suit been decreed but where the suit has been dismissed by the Courts below, I do not think, framing of this issue or failing to frame it will assume any importance.

5. The argument that where the sale has not been witnessed by a mutation, registered deed or delivery of possession

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under the sale, the period of limitation will run from the date, the sale fell to the knowledge of preemptor is also without substance as both the Courts below by attending to this aspect of the case, held that the execution of sale deed was accompanied by delivery of possession. When that being the case, I do not think, the finding of the learned Courts below is open to any exception especially when it does not suffer from error of fact or law.

6. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated: 3.12.2004

J U D G E

Peshawar High Court

Aslam Khan --- Appellant/Petitioner (s)

Versus

Faqir Muhammad --- Respondent (s)

### ***JUDGMENT***

CR. No. 1117/2003

Date of hearing 03.12.2004

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 4.12.2003 of the learned Addl District Judge Lahor whereby he dismissed his appeal and thus upheld the judgment and decree dated 31.5.2003 of the learned Civil Judge.

2. The main argument of the learned counsel for the petitioner was that where notice of 'talb-e-ishhad' was available on the record, it could well be read as a piece of evidence, even if not exhibited when all the witnesses stated in their evidence that it was scribed . The learned counsel to support his contention placed reliance on the case of Mst. Iqbal Begum..Vs..Muhammad Yousaf (PLD 2003 Lahore 255), Nathe Khan..Vs..Mst. Rahmat Bibi and others (PLD 1961 (W.P) Baghdad ul Jadid 96) and Muhammad Akbar Khan and 3 others..Vs..Said Khan (PLD 1978 SC (A J & K )6).

3. As against that, the learned counsel appearing on behalf of the respondent argued that when notice has been tendered in evidence, it cannot be read as such, moreso when, none of the witnesses has affirmed its attestation.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The evidence on the record reveals that neither the notice was exhibited nor any of the witnesses attesting it was

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confronted therewith for affirmation of its content or correctness of their signatures or thumb impressions thereon, therefore, it cannot be said that 'talb-e-ishhad' was proved in accordance with the requirements of section 13 of the N.W.F.P. Pre-emption Act, 1987.

6. The argument addressed on the strength of the judgment rendered in the cases of Mst. Iqbal Begum...Vs..Muhammad Yousaf, Nathe Khan..Vs..Mst. Rahmat Bibi and others and Mulhammad Akbar Khan and 3 others..Vs..Said Khan (supra) that a document if brought on the record can be looked into notwithstanding its non-exhibition is not tenable in the case in hand when the document being a notice of 'talb-e-ishhad' has not been proved by its attesting witnesses in accordance with the requirements of law..

7. Having thus considered against this backdrop, I do not think the finding of the learned Courts below is open to any exception especially when it does not suffer from any error of fact, law or jurisdiction.

8. For the reasons discussed above, this petition being without merit is dismissed.

Dated:3.12.2004

J U D G E

Qazi Habibul ul Haq --- Appellant/Petitioner (s)

Versus

Qazi Ehsan Khaliq --- Respondent (s)

***JUDGMENT***

CR. No. 339/2002

Date of hearing 24.01.2005

**EJAZ AFZAL KHAN J.** The petitioners through the instant petition have questioned the judgment and decree dated 11.4.2002 of the learned Izafi Zilla Qazi, Malakand, at Dargai, whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 16.11.1998 of the learned Aa'la Illaqa Qazi.

2. The learned counsel appearing on behalf of the petitioners after enumerating the joint landed properties of the parties contended that where admittedly all of them are joint, no exception could be taken to the properly known as 'Kandau Serai' especially when both of them inherited from a common ancestor, namely, Burhanuddin alias Khattakay Baba,.

3. As against that, the learned counsel appearing on behalf of the respondents argued that when the petitioners despite many chances in various rounds of litigation could not establish that the respondents also inherited from the same ancestor, their claim was rightly turned down, as no claim can be decreed on the basis of presumptions when as per admission of one of the petitioners many of the landed properties are exclusively owned by the respondents.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

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5. The record reveals that many of the landed properties owned by the parties are joint and enjoyed as such. How the property in dispute which is known as 'Kandau Serai' can be an exception to that is not understandable, moreso when it is not the case of the respondents that they either purchased it or inherited it from a person other than Muhammad Masoom alias Kalan Baba.

6. Another strange fact to note is that the respondents admit the pedigree table inasmuch as it shows that they are descendents of Muhammad Masoom alias Kalan Baba but they dispute it inasmuch as it shows Khattakay Baba to be their common ancestor, on the sole ground that they lack knowledge in this behalf. When admittedly they lack knowledge in this behalf, their view one way or the other cannot be given any sanctity. Therefore, it will not be just, right and reasonable to decide the fate of this case at least with this state of evidence. Remand of the case for recording additional evidence would thus be inevitable for the just decision of the case.

7. For the reasons discussed above, this petition is allowed, the impugned judgment and decree and those of the learned trial Court are set aside and the case is sent back to the learned trial Court for decision afresh. The parties would be at liberty to adduce additional evidence, to substantiate their claim. As it is an old case, it be disposed of within a period of six months. The parties are directed to appear in the Court of the learned trial Judge on 16.2.2005.

Dated: 24.1.2005

J U D G E

Peshawar High Court

Hidayat --- Appellant/Petitioner (s)

Versus

Muhammad Sher --- Respondent (s)

### ***JUDGMENT***

CR. No. 47/1998

Date of hearing 28.01.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 27.11.1997 of the learned Additional District Judge-IV Peshawar, whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 7.5.1995 of the learned Senior Civil Judge Peshawar.

2. It was argued by the learned counsel for the petitioners that where the petitioners have been in possession of the house in dispute ever since 1928 by virtue of an unregistered deed it could well be used as a shield under section 53-A of the Transfer Property Act and Proviso to section 50(1) of the Registration Act in any suit against them especially when it being a thirty years old document enjoys the presumption of due execution and that both the Courts below by ignoring this aspect of the case erred in decreeing the suit of the respondents. The learned to support his contention placed reliance on the case of Fazla..Vs..Mehr Din and 2 others (1997 SCMR 837). The learned counsel next contended that where the witnesses of the respondents had been contradicting each other as to the payment of rent of the house in dispute, their claim thereto cannot be said to have been established on the record. The learned counsel by referring to the case of Muhammad Afsar and 7 others..Vs.. Allalh Ditta and 13 others (1970 SCMR 118) contended that where a finding was based on non-consideration of material on the record, it can be interfered with notwithstanding it is concurrent. The learned counsel by referring to the case of Sher Baz Khan..Vs..Mir Adam

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Khan (PLD 2002 1), argued that where the original registered deed was not brought on the record, secondary evidence could not have been adduced unless permitted by the Court, that too, when plausible explanation is furnished about its loss. The learned counsel by concluding his arguments submitted that where many legal heirs of Malik Fateh Muhammad, the predecessor-in-interest, of the respondents were not impleaded, the suit of the respondents being bad for non-joinder of necessary party was liable to be dismissed.

3. As against that, the learned counsel appearing on behalf of the respondents argued that where the un-registered document was not set up as defence of title in the written statements and was belatedly introduced after almost a decade, it could not have been used as a shield, that too, when its nexus was not established with the house in dispute. The learned counsel next contended that when the respondents established their title to the house in dispute on the basis of a registered deed which was exhibited without any objection by the petitioners, their suit was rightly decreed.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that the respondents instituted a suit for recovery of the house in dispute through partition on the basis of a registered deed attested on 19.4.1945. A look on the boundaries given in the deed and the plaint would reveal that they corresponded to each other. It is, therefore, not difficult to decide that it is relating to the house in dispute and that the respondents have succeeded in proving that they are its owners.

6. No doubt the petitioners claimed title to the suit house on the basis of an un-registered deed mentioned above but it will do little to substantiate their claim in spite of its being thirty years old, firstly because it was neither annexed with nor referred to in the written statement and was produced for the first time after almost a decade; secondly because no boundaries have been

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mentioned therein as could establish its nexus with the house in dispute and thirdly because it has not been proved in accordance with the requirements of law.

7. It is true that the witnesses produced by the respondents made varying statement as to the payment of rent of house but it will not be of much significance when the petitioners could not prove that their possession of the house in dispute owed its origin to the deed mentioned above. It is also not the case of the petitioners that they dispossessed the respondents for more than twelve years before the institution of their suit that it was barred by the law of limitation. While the evidence produced by the respondents which also enjoys the virtue of being preponderant overwhelmingly proves the title of the respondents. I will not thus feel inclined to take a different view, even if, on reappraisal of evidence this Court arrives at a conclusion different from the one held by the Courts below unless of course it is based on misreading or non-reading of evidence which is not the case here as such the case of Muhammad Afsar and 7 others..Vs..Allah Ditta and 13 others (Supra) will not have any relevance to the instant case. It is rather covered by the case of Haji Muhammad Din..Vs..Malik Muhammad Abdullah (PLD 1994 S.C. 291) wherein the Hon'ble Supreme Court while dealing with a similar situation and considering a string of judgments in this behalf held as under:-

“4. It is well-settled law that a concurrent finding of fact by two Courts below cannot be disturbed by the High Court in second Civil Appeal much less in exercise of the revisional jurisdiction under section 115, C.P.C., unless the two Courts below while recording the finding of fact have either misread the evidence or have ignored any material piece of evidence on record or the finding of fact recorded by the two Courts below is perverse. The jurisdiction of the High Court to interfere with the concurrent finding of fact in revisional jurisdiction under section 115, C.P.C. is still narrower. The High Court in exercise of its

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jurisdiction under section 115, C.P.C. can only interfere with the orders of the subordinate Courts on the grounds, that the Court below has assumed jurisdiction which did not vest in it, or has failed to exercise the jurisdiction vested in it by law or that the Court below has acted with material irregularity effecting its jurisdiction in the case, (See Umar Dad Khan V. Tilla Muhammad Khan, PLD 1970 SC 288), Muhammad Bakhsh V. Muhammad Ali 1984 SCMR 504, Muhammad Zaman V. Zafar Ali Khan PLD 1986 SC 89 and Abdul Hameed V. Ghulam Muhammad 1987 SCMR 1005). Under this jurisdiction the High Court only corrects the jurisdictional errors of subordinate Courts. The fact that the High Court while reappraising the evidence on record reached a conclusion different from those arrived at by the two Courts below, could never be a ground justifying interference with a finding of fact much less a concurrent finding recorded by the two Courts below on the basis of evidence produced before them, in exercise of its revisional jurisdiction under section 115, C.P.C.”

8. The argument that some of the legal heirs of late Malik Fateh Muhammad have not been impleaded as party, even if true, will not bring the petitioners on a better pedestal when this point can well be urged by the legal heirs themselves in the competent forum.

9. The argument addressed on the strength of the judgment rendered in the case of Fazla..Vs..Mehr Din and 2 others (Supra), is undoubtedly based on a settled proposition of law but where the petitioners failed to establish the nexus of the deed with the house in dispute, I am afraid it will not help the petitioners, despite the fact that it being 30 years old enjoys the presumption of due execution under article 100 of Qanun-e-Shahadat.

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10. The argument that where the original deed was not brought on the record, secondary evidence could not have been produced unless permitted by the Court is also devoid of force when no objection was taken in the trial Court at the time of its production and exhibition in the evidence of Moharrir registration, therefore, the judgment rendered in the case of Sher Baz khan..Vs.. Mir Adam Khan (Supra) will not be relevant to the facts and circumstances of this case.

11. Mere discrepancies in the statements of the witnesses as to the payment or otherwise of rent of the house in dispute will not by any cannons of law make the petitioners owners of the house in dispute when they could not produce any convincing evidence to establish their title.

12. Above all else, when there is nothing in the impugned finding as could suggest that it is erroneous or based on wrong assumption of law and fact, I will not interfere therewith while exercising revisional jurisdiction of this Court under section 115 of the C.P.C..

13. For the reasons discussed above, this petition being without substance is dismissed.

Dated:28.1.2005

J U D G E

Haji Gheyasuddin --- Appellant/Petitioner (s)

Versus

Haji Muhammad Nawaz --- Respondent (s)

***JUDGMENT***

CR. No. 1517/2004

Date of hearing 14.02.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 5.10.2004 of the learned Additional District Judge-X Peshawar whereby he allowed the appeal filed by the respondents and thus set aside the order dated 6.5.2004 of the learned Senior Civil Judge Peshawar passing an order maintaining status quo.

2. It was argued by the learned counsel for the petitioner that though the property forming the subject matter of litigation in this case is in possession of the tenants of the petitioner, none-the-less, interference with their possession would amount to interference with his possession.

3. As against that, the learned counsel appearing on behalf of the respondents argued that when the property is admittedly in possession of the tenants, the very prayer of the petitioner for temporary injunction against interference with his possession shall be misconceived on the face of it. However, the respondents will not dispossess the tenants otherwise than in due course of law.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. When the respondents are not going to dispossess the tenants otherwise than in due course of law, I do not think, there is any serious dispute between the parties.

Peshawar High Court

6. For the reasons discussed above, this petition is disposed of with the observation that respondents will not dispossess the tenants otherwise than in due course of law.

Dated:14.2.2005

J U D G E

Peshawar High Court

Abdul Jameel --- Appellant/Petitioner (s)

Versus

Mst. Zeenat Bibi --- Respondent (s)

***JUDGMENT***

CR. No. 1535/2004

Date of hearing 14.02.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 21.6.2004 of the learned Additional District Judge-V Charsadda whereby he dismissed the appeal, wrongly termed as civil revision filed by the petitioners and thus upheld the judgment and decree dated 30.10.2003 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where a suit for recovery of possession under section 9 of the Specific Relief Act was decreed by a Civil Court, no proceedings under section 12(2) of the CPC. can be entertained in respect of such judgment or decree as it has least bearing on the title of the parties, therefore, the Courts below by accepting application of Mst. Zinat Bibi, respondent No.1 herein, under section 12 (2) of the CPC. and by setting aside the judgment dated 24.6.1999 of the Civil Judge, have exercised jurisdiction not so vested in them. It was next urged that where Khair Gul happened to be the husband of respondent No.1, it shall be presumed that she knew about the entire proceedings all along and as such her application being barred by the law of limitation was liable to be dismissed.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. The record reveals that a suit under section 9 of the Specific Relief Act was instituted by the petitioners against Khair Peshawar High Court

Gul and his 3 brothers. The latter resisted the suit by submitting their written statements wherein they specifically averred that the suit property is in possession of Mst. Zinat Bibi, respondent No.1 herein, in her capacity as owner and that they have no proprietary or possessory right therein. They also reiterated the same stance in the Court. When they stated that they have no interest either in the ownership or possession of the property and that respondent No.1 is in its possession as an owner, the plaint of the petitioners was to be rejected for non-disclosure of cause of action. It is not understandable as to how the suit could be decreed when the person having interest in the property possessory or proprietary was not impleaded as party. Therefore, the Courts below by accepting the application filed by respondent No.1 under section 12 (2) of the C.P.C. have rightly set aside the decree so passed against her.

5. The argument that where a suit for possession under section 9 of the Specific Relief Act has been decreed by a Civil Court, no proceeding under section 12 (2) of the CPC. can be entertained in respect of such judgment or decree is wholly without force, particularly when such judgment or decree has some repercussion to the detriment of a person recorded as owner or in possession.

6. The second argument of the learned counsel for the petitioners is also devoid of force, firstly because no inference about knowledge can be drawn on the basis of presumption, and secondly because respondent No.1 instituted the application as soon as she came to know that the petitioners have taken possession of the property pursuant to the decree mentioned above, therefore, it cannot be said that her application being barred by the law of Limitation was liable to be dismissed.

7. As the impugned judgments of the Courts below do not suffer from any infirmity much less jurisdictional, I will not feel inclined to interfere therewith.

Peshawar High Court

8. For the reasons discussed above, this petition being without substance is dismissed in limine

Dated:14.2.2005

J U D G E

Peshawar High Court

Iqbal Hussain --- Appellant/Petitioner (s)

Versus

Mst. Mah Roshan --- Respondent (s)

### ***JUDGMENT***

CR. No. 254/2005

Date of hearing 07.03.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 8.12.2004 of the learned Additional District Judge-IV Swabi, whereby he dismissed the appeal filed by the petitioners and thus upheld the judgment and decree dated 16.11.2001 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where it was admitted by the respondent that she thumb impressed a document purportedly a mortgage mutation, it was for her to prove it as such and that her failure to do so will reflect adversely on her plea and that both the Courts below by wrongly placing the burden of proving the bona fide and genuineness of the transaction on the petitioners, committed a serious error of law which has resulted in miscarriage of justice.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The respondent is an illiterate 'parda nashin' lady while late Faqir Hussain, the predecessor-in-interest of the petitioners, being her real brother stood in fiduciary relation to her. Though the stance of the petitioners is that the suit property was sold by the respondent to their predecessor-in-interest, in lieu of Rs. 20,000/-, vide mutation No.14166 dated 5.7.1989 but adduced no evidence to prove that the transaction was genuine and bonafide; that it was understood by her and that she had had an

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independent advice at the relevant time in this behalf. When that being the case, I do not think, the learned Courts below committed any error of law much less serious by decreeing the suit of the respondent.

5. The argument that where it was admitted by the respondent that she thumb impressed a document purportedly a mortgage mutation, it was for her to prove it as such, has no force at all, when it is a settled law that burden of proving the bonafide and genuineness of a transaction with an illiterate 'parda nashin' lady is always on the person who is a beneficiary and stood in fiduciary relation to her.

6. Having thus considered in this background, the impugned judgments being free from any error much less jurisdictional are not open to any exception.

7. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith the C.M.

Dated:7.3.2005

J U D G E

Amir Rawan --- Appellant/Petitioner (s)

Versus

Mozaray --- Respondent (s)

### ***JUDGMENT***

CR. No. 637/2002

Date of hearing 07.03.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition has questioned the judgment and decree dated 25.6.2002 of the learned Izafi Zila Qazi, Gulkada Swat, whereby he dismissed the appeal filed by them and thus upheld the judgment and decree dated 3.7.2001 of the learned Illaqa Qazi-IV Swat.

2. It was argued by the learned counsel for the petitioners that where respondent No.1 purchased a specific area out of the property in dispute from respondents Nos.4 and 5, he could not have sold more than what he himself had. It was next submitted that when many cases were decided in favour of the petitioners vis-à-vis the property in dispute under the hierarchy of PATA, the learned appellate Court was required to advert to them while deciding the case in hand, when they have bearing on the fate of this case. The learned counsel by referring to the deed whereby the property in dispute was purchased by respondent No.1 contended that if the boundaries of the property are seen in their proper perspective, the whole claim of the respondents stands belied as respondent No.1 owned no property other than the one acquired by him by virtue of the deed attested on 13.2.1982.

3. As against that, the learned counsel appearing on behalf of the respondents argued that respondent No.1 besides purchasing the property from respondents Nos.4 and 5 on the strength of deed dated 13.2.1982, also owned some property as an owner of 'Tal Painsa Khel', therefore, it is not correct to say that the claim of the respondents stands belied by the deed, moreso

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when, his status as an owner in 'Tal Painda Khel' is not disputed by the petitioners. With regard to the decisions given by the Courts under the hierarchy of PATA, the learned counsel for the respondents submitted that the very withdrawal of the execution proceedings will explain that they had no right whatever in the property in dispute.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Whether respondent No.1 owned some property as an owner in 'Tal Painda Khel' besides the one purchased by him from respondents Nos.4 and 5 and what is the effect of the litigation taking place in different forums of the hierarchy under PATA are the questions which though have bearing on the fate of this case have not been attended to by the learned appellate Court in spite of the fact that it being first Court of appeal and final Court of fact was required to have attended to them. Since no just decision could be made without attending to the questions mentioned above, I do not feel inclined to maintain the impugned judgment.

6. For the reasons discussed above, this petition is allowed, the impugned judgment is set aside and the case is sent back to the learned Zila Qazi Swat for decision afresh after attending to the questions adverted to above. He would, however, be at liberty to examine additional evidence, if feels it necessary for the just decision of the case.

7. The parties are directed to appear in the Court of the learned Zila Qazi on 18.3.2005. Since it is an old case, it be disposed of within a period of two months positively. The office is directed to send this case to the Court concerned as soon as possible but not later than one week.

Dated:7.3.2005

J U D G E

Peshawar High Court

Zoor Talab --- Appellant/Petitioner (s)

Versus

Mst. Gul Khandana --- Respondent (s)

***JUDGMENT***

CR. No. 513/2003

Date of hearing 01.04.2005

**EJAZ AFZAL KHAN J.-** The learned counsel for the petitioners states that in fact the learned appellate Court has confirmed the judgment of the learned trial Court in substance, therefore, the impugned order by no stretch of imagination offends his rights inasmuch as the petitioners are held entitled to that property which was purchased by them on the strength of deed dated 4.10.1974 which is Ex: DW 2/1 on the record, therefore, he does not press this petition.

2. Order accordingly.

Dated: 1.4.2005

J U D G E

Peshawar High Court

Mst. Paas Khas Bibi --- Appellant/Petitioner (s)

Versus

Mst. Badshah Haram --- Respondent (s)

### ***JUDGMENT***

CR. No. 793/2004

Date of hearing 01.04.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the judgment and decree dated 4.3.2004 of the learned Azafi Zila sdQazi-III Swat whereby he dismissed the petition filed by the petitioners and thus upheld the judgment and decree dated 26.8.2002 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where both the Courts below held in no uncertain terms that the respondents could not prove their ownership in respect of the property in dispute, they could not have dismissed the suit of the petitioners especially when the evidence on the record which also enjoys the virtue of preponderance, proves their ownership.

3. As against that, the learned counsel appearing on behalf of the respondents argued that where the petitioners specifically stated that they purchased the property in dispute on the strength of certain deeds, it was for them to prove them in accordance with the requirements of article 79 of Qanun-e-Shahadat and that their failure to do so will belie their claim as to the ownership of the property.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is not disputed on the record that the property in dispute has been in possession of the respondents since long and

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that they have also constructed a good number of houses thereon. The mere fact that the respondents could not prove their title to the suit property will not mean that the case set up by the petitioners stands proved as it were not the respondents but the petitioners who instituted a suit in this behalf. Therefore, in any case it was for the petitioners to prove that they are owners of the property in dispute and that possession of the respondents owes its origin to their permission. The worst of it is that they despite asserting that they purchased the property on the strength of certain deeds adduced no evidence worth-the-name to substantiate it. Even oral evidence on the record does not tend to establish their claim when the witnesses examined by them in the Court could not describe it with reference to its boundaries.

6. When this is the state of evidence adduced by the petitioners, I am afraid the finding of the Courts below cannot be held to have been based on mis-reading, non-reading of evidence or erroneous assumption of law and fact.

7. For the reasons discussed above, this petition being without substance is dismissed in limine.

**Dated:1.4.2005**

J U D G E

Peshawar High Court

Noor Muhammad --- Appellant/Petitioner (s)

Versus

Akbar Khan --- Respondent (s)

***JUDGMENT***

CR. No. 230/2001

Date of hearing 07.04.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 10.4.2001 of the learned Zila Qazi Chitral, whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 26.6.2000 of the learned Aala Illaqa Qazi at Drosh.

2. While arguing the case in the Bench headed by his Lordship Mr. Justice Shahjehan Khan, the learned counsel for the petitioner through C.M.No.129/2004 requested that if it is verified on the spot through a local commission that petitioner is in possession of 17  $\frac{1}{4}$  chakorum of land which has been established to be his ownership, he would be out of the Court but if not, he would have a case to argue.

3. This Court directed the learned Zila Qazi to do the needful which was accordingly done. When the report of the commission was submitted in the Court, it transpired that the petitioner was found in possession of 53 chakorum whereas he was claiming 17  $\frac{1}{4}$  chakorum.

4. When confronted with the report of the commission, the learned counsel for the petitioner without any hesitation owned the stance adopted by him at the time he requested for appointment of commission. Therefore, this civil revision alongwith C.Ms. is dismissed.

Dated:7.4.2005

J U D G E

Peshawar High Court

Akhtar Munir --- Appellant/Petitioner (s)

Versus

Saadullah --- Respondent (s)

### ***JUDGMENT***

CR. No. 364/2005

Date of hearing 07.04.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have question the judgment and decree dated 8.12.2004 of the learned Izafi Zila Qazi-II Buner, whereby he dismissed the appeal filed by the petitioners and thus upheld the judgment and decree dated 17.10.2003 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that where the petitioners have produced sufficient material on the record to prove that they are owners of the property comprised in khasra Nos.557 and 559, their suit was to be decreed and that both he Courts below by non-suiting the petitioners failed to exercise the jurisdiction so vested in them.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. A perusal of the extract from the record of rights would unmistakably indicate that the property besides being recorded as Shamilat-i-deh and ownership of 'Ahl-i-Islam' is also recorded as graveyards. When so it is trust to all intents and purposes and as such no person can claim its ownership. Quite apart from this, when the entries in the record of rights being blessed with the presumption of truth, have not been dislodged by any convincing evidence by the petitioners, I will not like to interfere with the impugned finding which besides being concurrent suffers from no error much less jurisdictional.

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5. For the reasons discussed above, this petition being without merit is dismissed in limine.

Dated:7.4.2005

J U D G E

Peshawar High Court

Mian Sifatullah --- Appellant/Petitioner (s)

Versus

Jamal Ullah --- Respondent (s)

***JUDGMENT***

CR. No. 351/2005

Date of hearing 08.04.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 18.8.2004 of the learned Additional District Judge-IV Nowshera whereby he dismissed the appeal filed by the petitioner and thus upheld the judgment and decree dated 6.3.2004 of the learned Civil Judge-V Nowshera.

2. It was argued by the learned counsel for the petitioner that the learned Civil Judge disposed of the matter before her as if she was seized of a criminal case and that the learned appellate Court by concurring with the aforesaid judgment has failed to exercise the jurisdiction so vested in it.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. A perusal of the evidence on the record would reveal that petitioner could not prove his claim in respect of the amount sought to be recovered through the suit in hand. When he stated that the matter was referred to a Jirga and it was decided by it that an amount to the tune of Rs.40,000/- is to be paid by the respondent to the petitioner and a deed in this behalf was also scribed, he was required to produce the members of Jirga as well as deed scribed in this behalf. When he did not produce any of the

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members of the Jirga and the deed executed in this behalf, I have no hesitation to agree with the Courts below that the claim of the petitioner was not proved in accordance with the requirements of law. In this view of the matter, the impugned finding being free from any infirmity much less jurisdictional merits no interference

6. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith the C.M.

Dated:8.4.2005

J U D G E

Peshawar High Court

Siraj ud Din --- Appellant/Petitioner (s)

Versus

Misaal Khan --- Respondent (s)

***JUDGMENT***

CR. No. 326/2005

Date of hearing 18.04.2005

**EJAZ AFZAL KHAN J.-** For reasons recorded in my detailed judgment of today's date in the connected Civil Revision No.118 of 2005, this Civil Revision stands allowed.

Dated: 18.4.2005

J U D G E

Peshawar High Court

Akram Khan --- Appellant/Petitioner (s)

Versus

Ashraf Khan --- Respondent (s)

***JUDGMENT***

CR. No. 456/2005

Date of hearing 18.04.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 3.3.2005 of the learned Additional District Judge Takht Bhai, whereby he dismissed the appeal filed by the petitioners and upheld the order dated 22.11.2004 of the learned trial Court.

2. It was argued by the learned counsel for the petitioners that when the respondents could have access to their house through a path other than the disputed one, the learned Courts below should not have issued a temporary injunction against the petitioners.

3. I have gone through the available record and considered the submissions of the learned counsel for the petitioners.

4. As both the parties are admittedly joint owners of the property in dispute, I will not like to interfere with the impugned order, moreso when, any comment one way or the other, may prejudice the case of either of them. Therefore, a direction for speedy disposal of the case rather than interference on merits would be more appropriate in the circumstances of the case.

5. For the reasons discussed above, this petition being without substance is dismissed alongwith the C.M. However, the

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learned trial Court is directed to conclude the case of the parties as soon as possible but not later than six months.

Dated:18.4.2005

J U D G E

Peshawar High Court

Muhammad Tazeem --- Appellant/Petitioner (s)

Versus

Ghazi Ahmad --- Respondent (s)

***JUDGMENT***

CR. No. 361/2005

Date of hearing 25.04.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 10.3.2005 of the learned Iazafi Zila Qazi Chitral, whereby he dismissed the appeal filed by the petitioners and thus upheld the order dated 11.8.2004 of the learned Illaqa Qazi Chitral.

2. It was argued by the learned counsel for the petitioners that ejection of the petitioners from the suit property could not be ordered in execution proceedings unless it is proved that they failed to make payment to the landlords in accordance with the terms of the decree dated 20.1.1962,

3. As against that, the learned counsel appearing on behalf of the respondents by referring to the judgment of this Court rendered in Civil Revision No.254 of 1993 decided on 30.11.1998 between the same parties, argued that all the questions urged by the petitioners through the instant petition have already been urged and adjudicated upon by this Court, therefore, they cannot be urged afresh. While controverting the argument of the learned counsel for the petitioners, the learned submitted that it has never been the case of the petitioners at any stage and in any round of litigation which went upto the Supreme Court that they made payment to the respondents in accordance with the terms of the decree mentioned above.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

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5. The record reveals that the petitioners were held liable to ejection, if they failed to pay 'Qalang' etc., vide order dated 20.1.1962 which was not only upheld upto the apex Court of the country but was also re-affirmed in another proceeding pursuant to a civil suit instituted by the respondents, which too, was maintained upto the apex Court. The learned appellate Court, as is evident from the impugned order, after considering the entire spectrum of the controversy involved in this case and taking stock of the judgments rendered by various forums including this and apex Court has passed a proper order. Therefore, the argument of the learned counsel for the petitioners that ejection of the petitioners could be ordered from the suit property in execution proceedings unless it is proved that they failed to make payment to the landlords in accordance with the terms of the decree dated 20.1.1962 is wholly without substance, the more so when it has never been the case of the petitioners at any forum or in any round of litigation, they being tenants under the respondents made payment to them in accordance with the terms of the decree mentioned above. In the earlier round of litigation this Court while deciding Civil Revision No.254 of 1993 observed as under:-

“ The trial Court framed 11 issues and the relevant would be issues No.2,3,4 and 10. The finding on issue No.2 refers to Regulation No.1 of 1971 read with PLD 1975 Pesh: 195 where finality to the judgments of Riwaj Courts has been attached and the order of the Governor of the year 1971 in which the Advocate General gave assurance to the Supreme Court was purely dealing with the administrative side of the matter with regard to the payment of Qalang and the contention of the learned counsel for the petitioners before this Court is ill-founded by saying that it has reopened the entire lis including the relationship of landlord and tenant and its fresh determination.

10. As for issue No.3, the finding given by the trial Court is based on documents duly exhibited, which mostly relate to the judgments of the different

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forums and are all in favour of the present respondent namely, Ghulam Jailani, hence no exception can be taken to the legality of such orders as the learned counsel has never challenged their legality, in fact they were challenged on merits by the present petitioners till final disposal by the Provincial Government where too he did not succeed.

Issue No.4 is as to the maintainability of the suit. It was not seriously challenged by the learned counsel for the petitioners. However, a declaration as against the functionaries of the State for the implementation/execution of a decree could be asked/sought from a civil Court.

Issue No.10 also co-related to issues NO.2 and 3 and as the plaintiff-respondent has successfully discharged his burden of proof by adducing oral as well as documentary evidence given effect by different courts in his favour.

11. The judgment of the learned District Judge also does not suffer from any illegality or irregularity as none could be pointed out.”

6. The Hon’ble Supreme Court while dealing this aspect of the case held as under:-

“2. The dispute in this litigation pertains to the days when custom was in vogue in District Chitral and this District was governed by its Ruler known as “Mehtar”. The record indicates that the dispute of ownership between the parties was decided by the then Wazir-i-Azam/A.P.A. Chitral on 2.1.1962; wherein predecessor of respondents No.1 to 6 was held to be the owner of the land in question while Muhammad Aziz, predecessor of the petitioners, was declared to be tenant under him. It is admitted fact that the matter was further agitated in appeal and revision, the forums provided under “Riwaj” and then a Writ Petition was also filed which was dismissed by the High Court on

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12.01.1981. The respondents then approached this Court in Civil Petition No.16-P/81, which was, however, not pressed and was disposed of as such on 30.11.1982. As the Order of the “Riwaj” Court was not being implemented, therefore, the respondents approached the Civil Court for its implementation. Their suit was decreed by the learned trial Judge on 4.7.1992, holding that the ownership of the plaintiffs stood determined by the verdicts of the Courts constituted under “Riwaj” and, therefore, the order of the Deputy Commissioner dated 13.2.1989, re-opening the controversy, was without lawful authority. The appellate Court agreed with this finding and the High Court also affirmed the decisions of the lower Courts.”

7. When considered in this background and in the light of the judgments quoted above, I do not think, the petitioners can urge and agitate a controversy in execution proceedings when it had already attained finality upto the apex Court of the country.

8. For the reasons discussed above, this petition being without substance is dismissed alongwith the C.M.

Dated:25.4.2005

J U D G E

Peshawar High Court

Syed Ziaullah --- Appellant/Petitioner (s)

Versus

Jamshed Khan --- Respondent (s)

***JUDGMENT***

CR. No. 1436/2004

Date of hearing 29.04.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 8.9.2004 of the learned Additional District Judge-III Swabi, whereby he allowed the appeal filed by the petitioner and set aside the judgment and decree dated 31.3.2003 of the learned Civil Judge.

2. The main thrust of the arguments of the learned counsel for the petitioner was that where the evidence on the record was sufficient to enable the appellate Court to pronounce a balanced judgment, it could not have remanded the case on any technical ground of impleading the necessary party when such party failed to get itself impleaded in the trial as well as revisional Court.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that where the very nature of the transaction as a sale is disputed, any verdict to the detriment of a person who has acquired a right in the property would amount to condemning him without giving him the option of hearing and that the impugned judgment being free from any infirmity merits no interference.

4. I have gone through the available record carefully and considered the submissions of the learned counsel for the parties.

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5. Once the very nature of the transaction as a sale is disputed, any declaration in the absence of a person who has, one way or the other, acquired a right in the property would amount to condemning him without giving him the option of hearing. Therefore, I do not think, the impugned order suffers from any infirmity much less jurisdictional so as to justify interference therewith in the exercise of revisional jurisdiction of this Court.

6. For the reasons discussed above, this petition is dismissed. Since this matter is lingering ever since 1999, the learned trial Court is directed to decide it as expeditiously as possible but not later than 3 months.

Dated:29.4.2005

J U D G E

Peshawar High Court

Faqir Khan --- Appellant/Petitioner (s)

Versus

Hakumat Khan --- Respondent (s)

***JUDGMENT***

CR. No. 158/2004

Date of hearing 03.05.2005

**EJAZ AFZAL KHAN J.-** For reasons recorded in our detailed judgment of today's date in the connected Writ Petition No.849 of 2004, this revision petition stands dismissed.

Dated:3.5.2005

J U D G E

J U D G E

Peshawar High Court

Hakumat Khan --- Appellant/Petitioner (s)

Versus

Faqir Khan --- Respondent (s)

***JUDGMENT***

CR. No. 306/2004

Date of hearing 03.05.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 22.12.2003 of the learned Additional District Judge-I Peshawar whereby he dismissed the cross-objections filed by the petitioner and thus upheld the judgment and decree dated 4.9.2002 of the learned trial Court.

2. It was argued by the learned counsel for the petitioner that where it was established from the record that the petitioner was one of the legal heirs of Daulat Khan, he was entitled to inherit the property mutated in the names of his remaining legal heirs by virtue of mutations Nos.1294 and 3030 attested on 15.3.1968.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that since the mutations were attested on the basis of a judgment of a Civil Court, the Courts below rightly declined to countenance the claim of the petitioner.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that the aforesaid mutations were attested on the basis of a judgment of a Civil Court and so long as that is intact, these mutations cannot be annulled, even to the extent of the share of the petitioner. Therefore, the view taken by the learned Courts below being unexceptionable is not open to any

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interference, that too, when it does not suffer from any error much less jurisdictional.

7. For the reasons discussed above, this petition being without substance is dismissed. However, the petitioner would be at liberty to move a competent forum in this behalf.

Dated:3.5.2005

J U D G E

J U D G E

Peshawar High Court

Ayaza Khan --- Appellant/Petitioner (s)

Versus

Muhammad Aslam Khan --- Respondent (s)

### ***JUDGMENT***

CR No. 1248/2004

Date of hearing 07.05.2005

**EJAZ AFZAL KHAN J.-** Assailed herein is the judgment and decree dated 22.7.2004 of the learned Additional District Judge-III Nowshera, whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 12.12.2002 of the learned Civil Judge Nowshera.

2. It was argued by the learned counsel for the petitioners that where the original deed was not produced in the Court, it could not have been considered by the learned Additional District Judge while sitting in judgment on appeal before him. The learned counsel next submitted that where the delivery of possession did not coincide with the execution of the deed so called or soon thereafter benefit of section 53-A of the Transfer of Property Act could not have been extended to the respondents. The learned counsel by referring to the case of **Amirzada and others- Vs- Ahmed Noor and others** (PLD 2003 S.C. 410) argued that an unregistered deed could only be used as a shield by the person who obtained possession of the property purchased by him in part performance of the Contract. With regard to the entry in the Khasra Girdawari and then in the periodical record, the learned counsel, submitted that where the respondents were already co-sharers in the suit property, such entry of possession cannot be construed as the one made under a sale or in part performance of the contract. The learned counsel next submitted that where vendor so called was not owning more than one kanal and one marla in the property in dispute, he could not have sold more than his entitlement.

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3. As against that, the learned counsel appearing on behalf of the respondents argued that no such objection was taken at the time when it was produced and exhibited and that an unregistered document can equally be used as a sword where the vendee seized possession of the property sold pursuant to a sale. He next submitted that the deed in question was executed at the instance of one Nawaz Khan, whose son has never appeared in the Court to dispute the sale in question notwithstanding he was the sole affectee thereof. While responding to the last argument of the learned counsel for the petitioners, the learned counsel submitted that the question whether the predecessor-in-interest of the petitioners could sell more than his entitlement has been fully dealt with by the learned Additional District Judge in the last part of the impugned judgment, therefore, the impugned judgment being free from any infirmity much less jurisdictional is not open to any interference.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Though the attorney on behalf of the petitioners appeared in the trial Court, yet the son of Nawaz Khan, the vendor, who is the main affectee of the sale in question has never appeared in the witness box to dispute on oath the sale in question. Quite apart from the fact that the testimony of the marginal witnesses who appeared in support of the deed remained unshaken despite searching cross-examination. Therefore, I have no doubt as to the genuineness of the document on the basis whereof the respondents purchased the property from the said Nawaz Khan. Finding with regard to possession of the property delivered to the respondent under the sale is also not open to any interference, when it is based on proper appraisal of oral as well as documentary evidence on the record. However, the apprehension of the petitioners may not be wholly without foundation inasmuch as they assert that the said Nawaz Khan, could not have sold more than one kanal and one marla of land out of the property in dispute but since this aspect has been fully attended to by the learned Additional District Judge in the last part of his judgment, it will not be proper to interfere

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therewith even on this score, especially when it does not suffer from any jurisdictional infirmity.

6. For the reasons disc used above, this petition being without merit is dismissed. However, the petitioners would be at liberty to raise any such objection at the time of partition.

Announced on:

J U D G E

Peshawar High Court

Saeedullah --- Appellant/Petitioner (s)

Versus

Sabz Ali --- Respondent (s)

***JUDGMENT***

CR. No. 234/1999

Date of hearing 09.05.2005

**EJAZ AFZAL KHAN J.-** The learned counsel for the parties by presenting compromise deed dated 5.9.2004, duly signed by the parties, which is Ex:C.W.1/1, stated that the matter has been patched up between the parties and the judgments and decrees of both the Courts below be modified in the light of the terms and conditions mentioned therein.

2. In view of the above stated position, this petition is allowed, the impugned judgments and decrees of the Courts below are modified in the light of the terms and conditions of the compromise deed mentioned above. This revision petition is thus disposed of accordingly.

Dated:9.5.2005

J U D G E

Peshawar High Court

Sabz Ali --- Appellant/Petitioner (s)

Versus

Ghazan --- Respondent (s)

***JUDGMENT***

CR. No. 299/1999

Date of hearing 09.05.2005

**EJAZ AFZAL KHAN J.-** The learned counsel for the parties by presenting compromise deed dated 5.9.2004, duly signed by the parties, which is Ex:C.W.1/1, ( the original seen and returned ) stated that the matter has been patched up between the parties and the judgments and decrees of both the Courts below be modified in the light of the terms and conditions mentioned therein.

2. In view of the above stated position, this petition is allowed, the impugned judgments and decrees of the Courts below are modified in the light of the terms and conditions of the compromise deed mentioned above. This revision petition is thus disposed of accordingly.

Dated:9.5.2005

J U D G E

Peshawar High Court

Shaukat Ali --- Appellant/Petitioner (s)

Versus

Pir Muhammad --- Respondent (s)

### ***JUDGMENT***

CR. No. 82/1996

Date of hearing 09.05.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have sought to impeach the judgment and decree dated 26.11.1995 of the learned Additional District Judge Swabi, whereby he dismissed the appeal filed by the petitioners and thus upheld the judgment and decree dated 7.7.1991 of the learned Civil Judge Swabi.

2. The crux of the arguments of the learned counsel for the petitioners was that where the petitioners purchased the property in dispute from an ostensible owner in good faith for consideration after taking reasonable care to ascertain that transferor had the power to transfer it, his rights are protected and that both the Courts below by acting in flagrant disregard of the provisions contained in section 41 of the Transfer of Property Act have decreed the suit of the respondents and that a Civil Court could not pass even a declaratory decree as to the entitlement of the respondents when it is subject to adjustment in a proceeding for partition before a Revenue Court.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the respondents have been recorded as owners of the property in dispute ever since, 1927 upto date, therefore, the plea that the petitioners purchased the property in dispute in good faith for consideration after satisfying the requirements of section 41 of the Act is not tenable altogether.

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4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the revenue record right from 1927 upto date shows that respondents have been recorded owners of their respective shares and that they did not part with any of them except those which are mentioned in the relevant mutations. Where the respondents have been recorded owners of their respective shares and there is absolutely nothing on the record to show that any entry in this behalf was lawfully substituted, the argument that the right of the petitioners being bona fide purchasers are protected under section 41 of the Act is not tenable altogether.

6. The argument that a Civil Court could not pass even a declaratory decree as to the entitlement of the respondents when it is subject to adjustment in a proceeding for partition before a Revenue Court, is no doubt correct but it does not, at any rate, preclude it from passing a declaratory decree when some of the owners have transferred more than their ostensible shares as recorded in the revenue record.

7. When considered in this background, I do not think, the impugned finding is suffering from any error of law and fact so as to justify interference therewith.

8. For the reasons discussed above, this revision petition being without substance is dismissed. However, the petitioners would be at liberty to seek adjustment of the share purchased by him against the transferor in other Khusra numbers at the time of partition.

Dated:9.5.2005

J U D G E

Peshawar High Court

Chaman Gul --- Appellant/Petitioner (s)

Versus

NHA --- Respondent (s)

***JUDGMENT***

CR. No. 534/2005

Date of hearing 13.05.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have impugned the order dated 27.1.2005 of the learned Additional District Judge-IV Charsadda, whereby he dismissed the appeal filed by the petitioners and thus upheld the order dated 18.6.2004 of the learned Civil Judge Charsadda rejecting the plaint.

2. It was argued by the learned counsel for the petitioners that where an agreement entered into between the parties as to the quantum of the compensation of the property acquired was sought to be enforced through the plaint instituted by the petitioners, it could not have been rejected under Rule 11 of Order VII of the C.P.C. It was next argued that if none of the Courts below was competent to entertain, hear and adjudicate the lis in hand, it could have returned it for being presented in the competent forum instead of rejecting it.

3. I have gone through the available record carefully and considered the sub missions of the learned counsel for the petitioners.

4. The argument that when an agreement arrived at between the parties as to the quantum of compensation was sought to be enforced through a civil suit, plaint could not have been rejected under Rule 11 of Order VII of the C.P.C. is totally without any foundation as the question as to the enhancement of compensation even on the basis of an agreement can only be

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determined by a referee Judge if and when a reference under section 18 of the Land Acquisition Act is made, therefore, I do not think, the Courts below have erred in refusing to entertain the suit of the petitioners.

5. The argument that if at all the learned Courts below have no jurisdiction to entertain, hear and adjudicate upon the lis before them, they should have ordered its return for being presented in the competent forum instead of rejecting it is, however, not without substance. I, therefore, while maintaining the impugned order modify it to the extent that rejection of plaint be read as its return for being presented in the competent forum.

6. For the reasons discussed above, this petition alongwith C.M. are thus disposed of.

Dated:13.5.2005

J U D G E

Peshawar High Court

Qasim Khan --- Appellant/Petitioner (s)

Versus

Sikandar Rehman --- Respondent (s)

### ***JUDGMENT***

CR. No. 641/2004

Date of hearing 17.05.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 25.5.2004 of the learned Additional District Judge-III Mardan, whereby he dismissed the appeal filed by them and thus upheld the order dated 6.11.2003 of the learned Civil Judge Mardan rejecting their petition for temporary injunction.

2. It was argued by the learned counsel for the petitioner that where a suit for partition between the parties is pending, the respondents be restrained from transferring it to any one as it is likely to complicate the matter and result in the multiplicity of suits. He next urged that where some of the respondents are in possession of more than their entitlement, it would be all the more just and adequate to restrain them from doing so.

3. As against that, the learned counsel appearing on behalf of the respondents argued that a private partition has been effected between the parties since long and each co-owner is in possession of his share there under, therefore, the petitioners are estopped by their own conduct either to question the private partition or rights of the co-owners to transfer it.

4. I have gone through the record carefully and considered the sub missions of the learned counsel for the parties.

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6. A perusal of the extracts from the record of rights would reveal that both the parties are co-sharers in the property in dispute. When they are co-sharers in the property in dispute, no fetter or restraint can be imposed on their rights to transfer their shares. The apprehended transfer besides substituting one set of co-sharers with another is not likely to cause any inconvenience or loss much less irreparable to the petitioners. The Courts below have thus committed no error much less jurisdictional to justify interference with the impugned orders.

7. The argument that when some of the respondents are in possession of more than their entitlement, it would be all the more just and adequate to restrain them from transferring it is also without any force as any transfer beyond their entitlement being void will not affect or impair the rights of the petitioners. The case of **Muhammad Muzaffar Khan..Vs..Muhammad Yousaf Khan (PLD 1959 Supreme Court (Pak) 9)** may well be referred.

8. The argument with regard to complication and multiplicity of suit is also without force as any transfer made during the pendency of a suit being hit by the principle of Pendente lite will have no effect altogether and as such the subsequent vendee is not required to be sued independently or impleaded as a party in the ongoing suit. However, I would not like to comment on the proposition that each co-sharer is in possession of his share by virtue of a private partition as it being disputed is yet to be inquired into and adjudicated upon.

9. For the reasons discussed above, this petition being without substance is dismissed alongwith the C.M.

Dated:17.5.2005

J U D G E

Peshawar High Court

Darwaish --- Appellant/Petitioner (s)

Versus

Abdul Haleem --- Respondent (s)

### ***JUDGMENT***

CR. No. 589/2005

Date of hearing 18.05.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 25.1.2005 of the learned Senior Civil Judge Mardan, whereby she dismissed the application of the petitioner for dismissal of reference as being barred by the law.

2. It was argued by the learned counsel appearing on behalf of the petitioner that where the respondents knew all along about the acquisition of the property and the proceeding in the Court of Referee Judge and the Court of appeal pursuant to a reference filed by the petitioner under section 18 of the Land Acquisition Act, they could not have turned round after the lapse of more than 10 years to ask for apportionment of compensation and that the learned Referee Judge by refusing to dismiss the reference has failed to exercise the jurisdiction so vested in her.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. Whether the respondents despite being aware of the entire proceeding remained silent and as such are estopped by their own conduct to file this reference is a question which cannot be determined without recording of evidence. Moreover, since no time of limitation for filing a reference under section 30 of the Land Acquisition Act is prescribed, it being prima facie maintainable, has rightly been entertained by the learned trial

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Court. Therefore, the impugned order being free from any infirmity is not open to any interference in the exercise of revisional jurisdiction of this Court.

5. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith C.M.

Dated:18.5.2005

J U D G E

Peshawar High Court

Akbar Hussain --- Appellant/Petitioner (s)

Versus

Altaf ur Rehman --- Respondent (s)

### ***JUDGMENT***

CR. No. 540/2005

Date of hearing 19.05.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 11.4.2004 of the learned District Judge Mardan, whereby he dismissed the appeal filed by the petitioner and thus upheld the judgment and decree dated 20.12.2004 of the learned Civil Judge Mardan.

2. It was argued by the learned counsel for the petitioner that where the petitioner has mentioned the particulars as to date, time and place of making talbs and the name of the person informing about the sale in his plaint, he could not have been non-suited simply because he did not mention them while being examined in the Court.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. It is by now settled that particulars as to date, time and place and the name of the persons informing about the sale are required to be mentioned in plaint as well as in the evidence but in any case, where such particulars are not mentioned in evidence altogether, no suit for pre-emption can be decreed. The cases of **Altaf Hussain..Vs...Abdul Hameed and another (2000 SCMR 1314) and Haji Noor Muhammad..Vs.. Abdul Ghani and 2 others (2000 SCMR 239)** may well be referred in this behalf.

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5. When seen in this context, I do not think, the impugned judgments are suffering from any infirmity much less jurisdictional so as to justify interference therewith.

6. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:19.5.2005

J U D G E

Peshawar High Court

Liaqat Ali --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

***JUDGMENT***

CR. No. 599/2005

Date of hearing 19.05.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the order dated 9.4.2005 of the learned Additional District Judge-IV Peshawar, whereby he dismissed the appeal filed by the petitioner and thus upheld the order dated 28.2.2005 of the learned Civil Judge Peshawar rejecting the application for prohibitory injunction.

2. It was argued by the learned counsel for the petitioner that the petitioner needs a month's time for vacating the premises as his children are studying in Schools notwithstanding his entitlement to retain it in view of paragraph-4 of SRO 749 (1)/2002 dated 30.10.2002.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. As the two Courts below have declined the injunction for valid reasons, I will not like to interfere with the impugned orders. However, in view of the circumstances highlighted by the learned counsel for the petitioner, he is allowed to retain it for one month.

5. With the observations made above, this petition is dismissed in limine alongwith the C.M.

Dated: 19.5.2005

J U D G E

Peshawar High Court

Habib ur Rehman --- Appellant/Petitioner (s)

Versus

Dilbar --- Respondent (s)

### ***JUDGMENT***

CR. No. 617/1999

Date of hearing 06.06.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 19.11.1999 of the learned Zila Qazi Timargara, whereby he allowed the appeal filed by the respondent and set aside the judgment and decree dated 23.6.1999 of the learned Illaqa Qazi Timargara at Camp Chakadara.

2. The main argument of the learned counsel for the petitioner was that if at all the crop of the respondent was damaged because of the shadow of the trees planted by the petitioner in his property, yet their removal was not the remedy in the circumstances of the case when the desired end could well be achieved by their trimming that too in the light of an opinion given by a person having expertise in the field of horticulture.

3. As against that, the learned counsel appearing on behalf of the respondent submitted that where a tree instead of benefiting human beings causes harm, its removal is only solution. However, he had no reservation if the issue relating to trimming or removal of trees is decided in the light of an opinion given by a person wielding mastery in the subject.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Whether removal of the trees or their proper trimming in the circumstances of the case was a proper remedy is a

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is a question which should have been attended to by the learned appellate Court in the light of an opinion given by an expert in this behalf. In the circumstances of the case, when this aspect has not been attended to altogether by the learned appellate Court in the impugned judgment, I will not like to maintain it because this being a technical subject was required to be decided in the light of an expert opinion rather than that of a lay man.

6. For the reasons discussed above, this petition is allowed, the impugned judgment and decree of the learned appellate Court are set aside and the case is sent back to the learned appellate Court for decision afresh in accordance with law. Before deciding the case, he should better obtain the opinion of an expert in this behalf as mentioned above. As it is an old matter, it be decided within a period of six months. The parties are directed to appear in the Court of the learned Zila Qazi Timargara on 5.7.2005.

Dated:6.6.2005

J U D G E

Peshawar High Court

Qazi Hamid ud Din --- Appellant/Petitioner (s)

Versus

Muhammad Zafar Azam --- Respondent (s)

***JUDGMENT***

CR. No. 749/2004

Date of hearing 08.06.2005

**EJAZ AFZAL KHAN J.-** Qazi Hamidullah Jan, petitioner in C.R. No.749 and Akhtar Ali, petitioner in C.R.No.1252 of 2004, have assailed the order dated 17.5.2004 of the learned Civil Judge-I Peshawar, whereby he declined the application of the petitioners for deleting their names from the panel of defendants. As common question of law and facts are involved in these petitions, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioners that where notices to the respondents for depositing arrears were issued by the petitioners in their official capacity, they could not have been sued in their personal capacity and that the order declining their deletion from the panel of defendants being without jurisdiction and lawful authority is liable to be set aside. The learned counsel next submitted that when in a similar case an application moved on similar grounds has been allowed by the learned trial Court, the petitioners could not have been dealt with differently with a different yardstick.

3. As against that, the learned counsel representing the respondents defended the impugned order by arguing that since the controversy in question can not be decided without recording evidence, the learned trial Court has rightly declined the application of the petitioners.

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4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The controversy whether the petitioners issued notices to the respondents for depositing arrears, in their official capacity or otherwise is a question which cannot be decided without recording evidence, therefore, we do not think, the learned trial Court has acted without jurisdiction and lawful authority while passing the impugned order.

6. The argument of the learned counsel for the petitioners that when in a similar case an application moved on similar grounds has been allowed by the learned trial Court, the petitioner could not have been dealt with differently with a different yardstick, has no force altogether, as a wrong order will not create a justification for passing another wrong order.

7. For the reasons discussed above, these petitions being without substance are dismissed.

Dated:8.6.2005

J U D G E

Haji Nihayat Khan --- Appellant/Petitioner (s)

Versus

Abdul Haji --- Respondent (s)

### ***JUDGMENT***

CR. No. 967/2004

Date of hearing 13.06.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 17.4.2004 of the learned District Judge/Zila Qazi Chitral, whereby he dismissed the appeal filed by the petitioner and thus upheld the judgment and decree dated 4.4.2003 of the learned Ilaqa Qazi Mastooj at Boni.

2. It was argued by the learned counsel for the petitioner that where the joint character of the property in dispute is admitted by the parties in their pleadings, then the burden lay on the respondents to prove that it was partitioned by metes and bounds and that a share was also given to the petitioner.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the plaintiff under the law is to succeed on the basis of his own evidence and cannot benefit from the infirmities in the case set up by the defendant, therefore, both the Courts below have rightly dismissed the suit of the petitioners especially when he failed to give the substance of proof to the averments he made in the plaint.

4. I have gone through the record carefully and considered the sub missions of the learned counsel for the parties.

5. Once the joint character of the property is admitted, how and when the property was partitioned and what was given to the petitioner pursuant thereto is a question which has bearing on

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the fate of this case and, therefore, no decision without attending to this aspect, can be termed as just. In this view of the matter, I have no alternative but to allow this petition, set aside the impugned judgment and decree and send the case back to the learned trial Court for decision afresh in accordance with law by attending to the question as adverted to above. The parties are directed to appear in the Court of the learned trial Judge on 30..6.2005. They would also be at liberty to adduce further evidence, if they so wish.

Dated:13.6.2005

J U D G E

Peshawar High Court

Shah Jehan --- Appellant/Petitioner (s)

Versus

Abid ur Rehman --- Respondent (s)

### ***JUDGMENT***

CR. No. 625/2005

Date of hearing 27.06.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has assailed the judgment and decree dated 16.3.2005 of the learned District Judge Charsadda, whereby she dismissed the appeal filed by the petitioner and thus declined to interfere with the judgment and decree dated 30.4.2004 of the learned Civil Judge.

2. The learned counsel appearing on behalf of the petitioner argued that where no public notice was given in term of section 32 of the N.W.F.P. Pre-emption Act, 1987, it cannot be presumed that the pre-emptor was aware of the registration of sale deed or attestation of mutation on the day, it was attested. The learned counsel to support his contention placed reliance on the case of **Walayat Khan..Vs.. Muhammad Sharif etc.(2004 CLJ 868)**. The learned counsel next urged that minor discrepancies in the statements of the P.Ws. will be inconsequential when evidence on the record is consistent on material particulars with regard to the making of 'talbs'.

3. The record reveals that the petitioner while making deposition in the Court did not mention at all that he made 'talb-i-muwathibat' when he came to know about the sale, therefore, the finding of the learned trial Court being based on proper appraisal of evidence is not open to any exception.

4. The argument addressed on the strength of the judgment rendered in the case **Walayat Khan..Vs.. Muhammad**

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**Sharif etc.(Supra)** will be just academic and will not advance the case of the petitioner when public notice of a sale deed or mutation, as the case may be, is directory and not mandatory. In the case of **Maulana Nurul Haq..Vs..Ibrahim Khalil (2000 SCMR 1305)** the Hon'ble Supreme Court while dealing with this aspect held as under:-

“The next point for determination relates to the date from which the period of limitation for a suit to enforce a right of pre-emption arising from a registered sale-deed is to be computed. The explicit and mandatory provisions of section 31 of the Act leave no room for doubt that in case of a sale effected through a registered sale deed the period of one hundred and twenty days shall be computed from the date from the date of registration of the sale deed. The contention that if the Registrar fails to issue public notice envisaged by the mandatory provisions of section 32 of the Act the period of limitation is to be computed from the date of knowledge by the pre-emptor is misconceived. Such a provision is neither contained in section 31 of the Act nor can be read into it in view of settled law that Court cannot supply ‘casus omissus’. A comparative study of sections 31 and 32 of the Act would make it manifest that the provisions with regard to issuance of public notice by the Registrar contained in section 32 had no nexus with the period of limitation prescribed by section 31 for filing a pre-emption suit in respect of sale transaction effected through a registered sale deed and is meant to provide an extra source of knowledge for making ‘talb-i-mowathibat’ and an alternate timeframe for making ‘Talbn-e-Ishhad’ in accordance with subsection (3) of section 13 of the Act”.

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5. While commenting on the nature of the provision, the Hon'ble Supreme Court in the same judgment held as under:-

“There is yet another aspect of the matter to which it is necessary to refer to section 32 of the Act appears to be mandatory, in view of the expression ‘shall’ used therein, but in fact is directory for want of a penal clause. No doubt there exists no faultless acid test or a universal rule for determining whether a provision of law is mandatory or directory and such determination by and large depends upon the intention of Legislature and the language in which the provision is couched but it is by now firmly settled that where the consequence of failure to comply with the provision is not mentioned the provision is directory and where the consequence is expressly mentioned the provision is mandatory. It was held in Niaz Muhammad Khan V. Mian Fazal Raqeeb (PLD 1974 SC 134) that as a general rule a statute is understood to be directory when it contains matters merely of direction, but it is mandatory when those directions are followed by an express provision that in default of following them the facts shall be null and void. In Major Shujat Ali v. Mst. Surrya Begum (PLD 1978 SC (AJ & K) 118) it was held that in the absence of a penalty for failure to follow the prescribed procedure the provisions are to be taken to be directory and not mandatory. The provisions of section 32 of the Act being directory cannot in any manner override or dilute the provisions of section 31 of the Act which are mandatory by all standards.”

6. When considered in the light of the foregoing discussion and the above quoted paragraph, I do not think, the impugned finding can be said to have been based on erroneous

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assumption of law and fact, therefore, I do not like to interfere therewith.

7. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:27.6.2005

J U D G E

Peshawar High Court

Government --- Appellant/Petitioner (s)

Versus

Shah Motors --- Respondent (s)

***JUDGMENT***

CR. No. 849/2004

Date of hearing 28.06.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has assailed the judgment and decree dated 10.3.2004 of the learned Additional District Judge-X Peshawar whereby he dismissed the appeal filed by the petitioner and thus declined to interfere with the judgment and decree dated 29.10.2003 of the learned Senior Civil Judge Peshawar.

2. The learned A.A.G. appearing on behalf of the petitioner argued that where many of the bills regarding repairs of vehicles stood paid, the learned Courts below could not have decreed the suit of the respondent by reading a part of the statement of P.W.No.4 in isolation and out of context.

3. As against that, the learned counsel appearing on behalf of the respondent argued that where the witness examined by the petitioner admitted in his cross-examination that the amount of bills for repair of vehicles, according to his calculation, is Rs.2, 50,000/-, his statement was rightly relied upon by the Courts below while decreeing the suit of the respondent and that the impugned finding being free from any mis-reading or non-reading of evidence is not open to any exception.

4. I have perused the record with the assistance of the learned counsel for the parties in the light of the submissions they made at the bar and have also evaluated them with a careful mind.

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5. A perusal of the impugned judgment would reveal that both the Courts below by relying on the admission of the witness produced by the petitioner decreed the suit. But it may be pointed out that it was not the end of the matter. As a matter of fact, the said witness also stated in his examination-in-chief that a bill to the tune of Rs.47, 800/- despite being paid has been claimed once again through the suit. Alright admission of P.W.4 made the job of the Courts below easier but it was required to be read as a whole and not in isolation and out of context. When according to the P.W., the amount mentioned above was already paid, it should have been deducted while passing the impugned decree. It would thus be a glaring instance of mis-reading of evidence. When the learned counsel for the respondent was confronted with this situation he except prevaricating in ambiguous terms could not give any satisfactory reply to justify this omission of the Courts below. Therefore, I have no hesitation to hold that the Courts below erred by not deducting the amount already paid as per admission of the P.W.

6. For the reasons discussed above, I by partially allowing this petition, hold that respondent would be entitled to recover only an amount to the tune of Rs.2,02,200/-.

Dated:28.6.2005

J U D G E

Peshawar High Court

Muhammad Ajmal Khan --- Appellant/Petitioner (s)

Versus

Maqsood Gul --- Respondent (s)

***JUDGMENT***

CR. No. 813/2005

Date of hearing 01.07.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 21.5.2005 of the Additional District Judge-II Nowshera, whereby he dismissed the application of the petitioners for amendment of plaint.

2. It was argued by the learned counsel for the petitioners that where certain acts of the respondents have been mentioned with particularity in the written statement constituting estoppel on the part of the respondents, there was absolutely no harm to permit amendment asked for.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioners.

4. Once it is admitted by the learned counsel for the petitioners that certain acts have been mentioned with particularity in the written statement submitted by the petitioners constituting estoppel on the part of the respondents, he need not seek their elaboration through amendment as averments already made therein can be considered by the appellate Court alongwith the evidence adduced by the parties on the record notwithstanding the impugned order. Quite apart from this, since revision is also a continuation of suit and even the impugned order can be questioned by the petitioner in a revision petition under section 105 of the C.P.C. if and when his appeal stands disposed of, I will not like to intervene at least at this stage.

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5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:1.7.2005

J U D G E

Peshawar High Court

Fazal Elahi --- Appellant/Petitioner (s)

Versus

Gulshan --- Respondent (s)

***JUDGMENT***

CR. No. 1054/2005

Date of hearing 12.08.2005

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition have questioned the order dated 19.7.2005 of the learned Azafi Zila Qazi, Swat, whereby he dismissed the appeal filed by the petitioners and thus upheld the order dated 29.6.2005 of the learned trial Court.

2. The main argument of the learned counsel for the petitioners was that where the respondents are trespassers out and out, they have no locus standi to raise any superstructure over the property in dispute, therefore, both the Courts below have failed to exercise jurisdiction vested in them by declining the prayer for prohibitory injunction.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. The record reveals that the superstructure raised by the respondents is nearing completion, therefore, it will not be proper to interfere with the impugned orders in the exercise of revisional jurisdiction of this Court, when they do not suffer from any jurisdictional error.

5. The argument that the respondents being trespassers out and out, have no locus standi to raise any superstructure, if proved true during the trial, may disentitle them from claiming

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improvement but it in no way furnishes a justification to interfere with the impugned orders.

6. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith C.M.

Dated:12.8.2005

J U D G E

Peshawar High Court

Sher Zameen Khan --- Appellant/Petitioner (s)

Versus

Abdul Wali Khan --- Respondent (s)

***JUDGMENT***

CR. No. 751/2005

Date of hearing 19.09.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 16.4.2005 of the Additional District Judge Buner, whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 13.6.2003 of the learned trial Court.

2. The main argument of the learned counsel for the petitioner was that where the evidence on the record proves that the father of the petitioner gifted the property in dispute to him and also delivered its possession, he could not be non-suited and that both the Courts below by failing to appreciate the evidence in its true perspective have failed to exercise jurisdiction so vested in them.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. The record reveals that the father of the petitioner survived almost 2 years after the execution of the alleged deed but nothing evincing its implementation was ever done by him. When asked as to why it was not implemented by the father of the petitioner in spite of the fact that he survived almost 2 years thereafter, the learned counsel for the petitioner submitted that he never wanted to divest himself of the property in his life time. The answer of the learned counsel would itself clinch the whole matter and take the petitioner out of Court, as no gift can be a gift in the

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real sense of the word so long as the donor does not divest himself of its subject matter. Quite apart from this, as both the Courts below have not only handed down the impugned finding after due appraisal of evidence but have also recorded convincing reasons in its support. Therefore, I do not feel inclined to interfere therewith, that too, when it is free from any error of fact, law or jurisdiction.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated: 19.9.2005

J U D G E

Peshawar High Court

Arshad Iqbal --- Appellant/Petitioner (s)

Versus

Rasool Khan --- Respondent (s)

***JUDGMENT***

CR. No. 854/2005

Date of hearing 19.09.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has questioned the judgment and decree dated 12.1.2005 of the learned District Judge Karak, whereby he dismissed the appeal filed by him and thus upheld the judgment and decree dated 28.2.2004 of the learned Civil Judge Karak.

2. It was argued by the learned counsel for the petitioner that where the dispute between the parties was settled through arbitrators and the petitioner was saddled with the liability of paying Rs.75000/- in addition to a fine of Rs.3000/- to the respondent, a decree for Rs.1, 30,000/- could not be granted in his favour, when he admitted the receipt of Rs.26000/- out of the agreed amount.

3. As against that, the respondent present in Court alongwith his counsel by admitting the above stated position, however, added that where the petitioner himself refused to accept the decision of the arbitrators, he was liable to pay the entire amount, therefore, both the Courts below have rightly decreed his suit.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. When it is not disputed that the matter was referred to the arbitrators and they saddled the petitioner with the liability of paying Rs.75, 000/- in addition to a fine of Rs.3000/-, the

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respondent could not have turned round to demand more. The more so when, he also received an amount of Rs.26000/- pursuant to the decision of the arbitrators. When so, the judgments and decrees of both the Courts below are modified and it is held that the petitioner would be liable to pay only an amount of Rs.49000/- in a addition to a fine of Rs.3000/- as decided by the arbitrators.

6. With the modification hinted to above, this civil revision is disposed of alongwith the C.M.

Dated: 19.9.2005

J U D G E

Peshawar High Court

Hamaish --- Appellant/Petitioner (s)

Versus

Habib Ullah --- Respondent (s)

***JUDGMENT***

CR. No. 135/1999

Date of hearing 28.09.2005

**EJAZ AFZAL KHAN J.-** Brief facts forming the background of this case are that the property bearing Khata No.1/1 to 1208 measuring 36113 kanals 12 marlas situated in village Kalo Tehsil and District Mardan was recorded as ownership of Hazrat Sheikh Mian Umar Sahib of Chamkani in the proprietary column and occupancy tenancy of Abubaker and Habibullah sons of Hazratullah in the possessory column of the record of rights. On 3.4.1950, the Provincial Government of N.W.F.P. took over and assumed its administration, control, management and maintenance under section 3 of the Charitable Institution Act 1949 (No.III of 1949). The petitioners who claimed to be the successors-in-interest of the occupancy tenants went on paying rent to the Auqaf Department. In the year, 1987 the then Chief Minister issued a directive requiring the Department to lease out the property in dispute to the sitting tenants at will on usual terms and conditions under the relevant rules. The petitioners besides assailing the aforesaid directive also assailed the Waqf nature of the property and the Notification issued under section 3 of the Act through a constitutional petition on the ground that they being occupancy tenants for more than two generations have become full owners by operation of law. The petition was dismissed by this Court, vide judgment dated 16.5.1989. The petitioners filed an appeal in the Supreme Court through the leave of the Court which was partly allowed in terms of compromise, vide judgment-dated 29.3.1992. The petitioners launched yet another round of litigation by instituting a suit in the Court of the learned Civil Judge Mardan for declaration and perpetual injunction claiming therein the

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ownership of the property and restraint against the respondents from interfering with their proprietary and possessory rights which was dismissed, vide judgment 10.3.1998. They preferred appeal in the Court of the learned District Judge Mardan which too met the same fate, vide judgment dated 13.2.1999, hence these petitions. As they arise out of the same case, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioners that where it is not disputed that the petitioners were occupancy tenants, their rights could not be extinguished except in accordance with the provisions of the N.W.F.P. Tenancy Act, 1950. The learned counsel by referring to the case of **Muhammad Yousaf-Vs-Hukumat-e-Pakistan** (PLD 1991 S.C. 707), and the Amending Act II of 1992 argued that the petitioners have the right to institute a suit for declaration that they are owners of the property in dispute, notwithstanding the judgment dated 29.3.1992 of the Supreme Court, that too, when the amending act was given effect from 23.3.1990. The learned counsel next contended that where appeal has not been decided on merits, remand of the case for decision afresh on merits, would be imperative for just decision of the case. The learned counsel to support his contention placed reliance on the cases of **Government through Secretary-Vs-Shamshair Ali and 18 others** (PLD 1978 Peshawar 34), **Haji Sk. Subhan-vs- Madhorao** (AIR 1962 Supreme Court 1230) and **Narsingh Kalu Kalota-Vs- Rao Nihalkaran Raoraja** (AIR 1962 Madhya Pradesh 318).

3. As against that, the learned counsel appearing on behalf of the respondents by referring to the judgment of this and that of the Supreme Court in the earlier round of litigation argued that when all these points have been set at rest, they cannot be reopened under the garb of the Amending Act which was not in existence at the time of passing either of the judgments of this or apex Court.

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4. I have gone through the record carefully and considered the submissions of the of the learned counsel for the parties.

5. Before I discuss the points canvassed at the bar by the learned counsel for the parties, let me see, what was urged in the earlier round of litigation and what finding was handed down by this Court. Para 4 of the judgment would be relevant which is reproduced as under:-

“ According to the record of rights for the year 1925-26, a copy of which has been placed on record by the respondents, it transpires that in the column of ownership the property in the dispute is shown as Ziarat Hazrat Sheikh Mian Umar Sahib of Chamkanni under the management of Fazli Hadi son of Said Mohammad Caste Akhonzada resident of Dir Sajjada Nashin and in the column of cultivation Abu Bakar and Habibullah sons of Hazratullah are shown occupancy tenants under section 5 of the Punjab Tenancy Act, 1887 and non-muslim Gundas is shown as lessee from the aforesaid occupancy tenants. A copy of Notification dated 3.4.1950 of the Government of N.W.F.P., has also been filed which shows that the Governor N.W.F.P., in exercise of the powers conferred upon him under section 3 of the Charitable Institutions Act, 1949, took over and assumed the administration, control, management and maintenance of the property in dispute.”

6. Para-5 of the judgment has also bearing on the fate of this case which runs as under:-

“ The position which now emerges is that the property in dispute was treated as a Waqf property and its management and control was taken over by the Government of N.W.F.P. on 3.4.1950. The aforesaid Charitable Institutions Act of 1950, under the

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provisions of section 3 of which the management and control of the property in dispute was taken over by the Government of N.W.F.P., provides in section 5 for a petition to the Administrator or any other officer authorized by the Provincial Government by any person in possession or claiming any interest in such property to ask for a declaration that the property in question was not a charitable institution. A right of appeal is also provided in clause (iv) of section 5 to the court of the Judicial Commissioner from any order made as aforesaid. The writ petition or the record attached therewith does not show whether the petitioners had submitted any application or any appeal under the provisions of section 5 after the assumption of administration etc of the property in dispute by the Provincial Government. This would naturally prove that the property in dispute was a Waqf property and its administration, control and management had been taken over by the Provincial Government. This action took place in the year 1950 and to challenge it by the writ petition in hand filed in the year 1987 would badly suffer from laches. It would also prove that the petitioners had also treated the property in dispute as Waqf property. The assumption of management, control and administration of the property in dispute by the Provincial Government under the provisions of the Charitable Institutions Act, 1949 was done in accordance with law and we do not find any illegality or wrong exercise of jurisdiction by the Provincial Government in this respect.”

7. With regard to the question that the petitioners had become owners by operation of law, this Court held as under:-

“ In so far as the question that the petitioners had become owner by operation of law is concerned, the learned counsel for the petitioners contended that they were occupancy tenants of the property in dispute and

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by the provisions of section 4-A of the Act they had become owners thereof without payment of any compensation. We are unable to accept this contention of the learned counsel. Although the petitioners are recorded occupancy tenants of the property in dispute and there is a provision in sub-section (1) of section 4-A of the Act, according to which occupancy tenants paying rent by division of the produce were declared to have become owners of the portion of the land in proportion to their share of the produce without payment of any compensation to the landlord but there is an exception to this section according to which it did not apply to land owned or administered by the Government both Central and Provincial. N.W.F.P. Act VI of 1952 added section 4-A to the Act and at that time the Provincial Government administered the property in dispute and so provisions contained in sub-section (1) thereof did not apply to it. Since the provisions of section 4-A of the Act did not apply to the property in dispute, the occupancy tenancy of the petitioners did not convert into full ownership. As such the petitioners cannot be held to have become owners of the suit land by operation of law although they had the status of occupancy tenants paying rent by division of produce.”

8. Whether the property in dispute was hit by the exception to section 4-A of the N.W.F.P. Tenancy Act, this Court held as under:-

“It was further contended by the learned counsel for the petitioners that the property in dispute was not administered by the Provincial Government as under sub-section (3) of the section 3 of the N.W.F.P. Waqf Properties Ordinance, 1979, the Chief Administrator Auqaf was a corporation and as such the exception to section 4-A of the Act did not apply to it. We cannot accept this contention of the learned counsel as well

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because when the administration, management and control of the property in dispute was taken over by the Provincial Government, at that time the Chief Administrator Auqaf was not a Corporation and such taken over property was administered by the Provincial Government and it was at that time exempt from the provisions of section 4-A of the Act.”

9. Now the question crops up whether the finding of this Court was reversed by the Hon’ble Supreme Court in the appeal sought through leave of the Court? Before I answer this question, it is worth while to refer to what was proposed by the petitioners and the respondents in the Supreme Court for the settlement of their dispute which is reproduced as below:-

“The parties have agreed as under:-

1. 1.That the rights of the parties are regulated by the Notification of 3/4/50, issued under section 3 of the Act VIII of 1949.
- 2.That the directions of the Chief Minister of N.W.F.P. of 29.3.87 be ignored.

“The appeal may be allowed in the terms above and the parties left to bear their own costs.

Sd/xxxxxxx.

Nur Ahmad Khan

A.O.R.

For the appellants.”

2. “The Chief Minister’s directions that the land should be given to tenants at will be ignored. The appellants be considered, if they take the land in their possession on lease in accordance with law. They shall be liable to ejectment if they do not abide by the terms settled or show a conduct unbecoming of a tenant for instance they are troublesome.”

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10. The Hon'ble Supreme Court after considering both the proposals held as under:-

“It is true that the draft submitted by the learned A.O.R. for the appellants is not shown to have been agreed to by the learned counsel for the respondents. However, when note of the learned counsel for the respondents reproduced above is read in the context and the facts and circumstances of the case as well as in the context of the draft agreement signed by the learned counsel for the appellants, in our view, there is not much dispute left between the parties. The respondents do rely on the notification of 1950. Not only this but the same having been accepted and acted upon for the last 40 years none of the parties can escape from its consequence, legal or otherwise. Both the parties have agreed that the directions of the Chief Minister dated 29.3.1987 should be ignored. That being so, the further clarification by the learned counsel for the respondents in his note does not present any un-surmountable difficulty in partly allowing this appeal in terms of both the drafts submitted by the counsel. They are fair. When read together they are workable. They shall be given the effect accordingly.

With the foregoing order of disposal, this appeal stands partly allowed. There shall be no order as to costs.”

11. A perusal of the above quoted paragraphs would reveal that the judgment of this Court was upheld on all the crucial points with the only modification that the rights of the parties shall be regulated by Notifications of 3/4/50 issued under section 3 of the Act, 1949 (Act No. VIII) and that the directive of the Chief Minister of N.W.F.P. dated 29.3.1987 shall be ignored and fresh

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terms will be settled with the appellants, now petitioners, before this Court.

12. The argument of the learned counsel for the petitioners that occupancy tenancy of the petitioners could not be extinguished except in accordance with the provisions of the Tenancy Act, will not have much force as there was nothing in the Statute on 29.3.1992 as could preclude the Hon'ble Supreme Court from passing the judgment dated 29.3.1992. The case of **Haji Sk. Subhan-vs- Madhorao (Supra)** will do little to advance the case of the petitioners as in that case the Act came into force before the decree was passed,; but here the judgment of the Hon'ble Supreme Court was passed before the Act came into force. The case of **Narsingh Kalu Kalota-Vs- Rao Nihalkaran Raoraja (Supra)** would too have little relevance to the case in hand as the validity of the decree in that case was questioned during the execution proceeding due to subsequent change in law. The case of **Government through Secretary-Vs- Shamsair Ali and 18 others (Supra)** because of its distinguishable feature too will have no relevance to the case in hand.

13. The upshot of the above discussion is that the impugned judgments being free from any error, excess or absence of jurisdiction, merit no interference. Therefore, these petitions are dismissed. The rights of the petitioners accruing under the judgment of the Supreme Court dated 29.3.1992 will, however, remain intact notwithstanding the litigation culminating in these petitions.

Announced on:  
28.9.2005

J U D G E

Peshawar High Court

Hamaish --- Appellant/Petitioner (s)

Versus

Habib Ullah --- Respondent (s)

### ***JUDGMENT***

CR. No. 135/1999

Date of hearing 28.09.2005

**EJAZ AFZAL KHAN J.-** Brief facts forming the background of this case are that the property bearing Khata No.1/1 to 1208 measuring 36113 kanals 12 marlas situated in village Kalo Tehsil and District Mardan was recorded as ownership of Hazrat Sheikh Mian Umar Sahib of Chamkani in the proprietary column and occupancy tenancy of Abubaker and Habibullah sons of Hazratullah in the possessory column of the record of rights. On 3.4.1950, the Provincial Government of N.W.F.P. took over and assumed its administration, control, management and maintenance under section 3 of the Charitable Institution Act 1949 (No.III of 1949). The petitioners who claimed to be the successors-in-interest of the occupancy tenants went on paying rent to the Auqaf Department. In the year, 1987 the then Chief Minister issued a directive requiring the Department to lease out the property in dispute to the sitting tenants at will on usual terms and conditions under the relevant rules. The petitioners besides assailing the aforesaid directive also assailed the Waqf nature of the property and the Notification issued under section 3 of the Act through a constitutional petition on the ground that they being occupancy tenants for more than two generations have become full owners by operation of law. The petition was dismissed by this Court, vide judgment dated 16.5.1989. The petitioners filed an appeal in the Supreme Court through the leave of the Court which was partly allowed in terms of compromise, vide judgment-dated 29.3.1992. The petitioners launched yet another round of litigation by instituting a suit in the Court of the learned Civil Judge Mardan for declaration and perpetual injunction claiming therein the

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ownership of the property and restraint against the respondents from interfering with their proprietary and possessory rights which was dismissed, vide judgment 10.3.1998. They preferred appeal in the Court of the learned District Judge Mardan which too met the same fate, vide judgment dated 13.2.1999, hence these petitions. As they arise out of the same case, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioners that where it is not disputed that the petitioners were occupancy tenants, their rights could not be extinguished except in accordance with the provisions of the N.W.F.P. Tenancy Act, 1950. The learned counsel by referring to the case of **Muhammad Yousaf-Vs-Hukumat-e-Pakistan** (PLD 1991 S.C. 707), and the Amending Act II of 1992 argued that the petitioners have the right to institute a suit for declaration that they are owners of the property in dispute, notwithstanding the judgment dated 29.3.1992 of the Supreme Court, that too, when the amending act was given effect from 23.3.1990. The learned counsel next contended that where appeal has not been decided on merits, remand of the case for decision afresh on merits, would be imperative for just decision of the case. The learned counsel to support his contention placed reliance on the cases of **Government through Secretary-Vs-Shamshair Ali and 18 others** (PLD 1978 Peshawar 34), **Haji Sk. Subhan-vs- Madhorao** (AIR 1962 Supreme Court 1230) and **Narsingh Kalu Kalota-Vs- Rao Nihalkaran Raoraja** (AIR 1962 Madhya Pradesh 318).

3. As against that, the learned counsel appearing on behalf of the respondents by referring to the judgment of this and that of the Supreme Court in the earlier round of litigation argued that when all these points have been set at rest, they cannot be reopened under the garb of the Amending Act which was not in existence at the time of passing either of the judgments of this or apex Court.

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4. I have gone through the record carefully and considered the submissions of the of the learned counsel for the parties.

5. Before I discuss the points canvassed at the bar by the learned counsel for the parties, let me see, what was urged in the earlier round of litigation and what finding was handed down by this Court. Para 4 of the judgment would be relevant which is reproduced as under:-

“ According to the record of rights for the year 1925-26, a copy of which has been placed on record by the respondents, it transpires that in the column of ownership the property in the dispute is shown as Ziarat Hazrat Sheikh Mian Umar Sahib of Chamkanni under the management of Fazli Hadi son of Said Mohammad Caste Akhonzada resident of Dir Sajjada Nashin and in the column of cultivation Abu Bakar and Habibullah sons of Hazratullah are shown occupancy tenants under section 5 of the Punjab Tenancy Act, 1887 and non-muslim Gundas is shown as lessee from the aforesaid occupancy tenants. A copy of Notification dated 3.4.1950 of the Government of N.W.F.P., has also been filed which shows that the Governor N.W.F.P., in exercise of the powers conferred upon him under section 3 of the Charitable Institutions Act, 1949, took over and assumed the administration, control, management and maintenance of the property in dispute.”

6. Para-5 of the judgment has also bearing on the fate of this case which runs as under:-

“ The position which now emerges is that the property in dispute was treated as a Waqf property and its management and control was taken over by the Government of N.W.F.P. on 3.4.1950. The aforesaid Charitable Institutions Act of 1950, under the

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provisions of section 3 of which the management and control of the property in dispute was taken over by the Government of N.W.F.P., provides in section 5 for a petition to the Administrator or any other officer authorized by the Provincial Government by any person in possession or claiming any interest in such property to ask for a declaration that the property in question was not a charitable institution. A right of appeal is also provided in clause (iv) of section 5 to the court of the Judicial Commissioner from any order made as aforesaid. The writ petition or the record attached therewith does not show whether the petitioners had submitted any application or any appeal under the provisions of section 5 after the assumption of administration etc of the property in dispute by the Provincial Government. This would naturally prove that the property in dispute was a Waqf property and its administration, control and management had been taken over by the Provincial Government. This action took place in the year 1950 and to challenge it by the writ petition in hand filed in the year 1987 would badly suffer from laches. It would also prove that the petitioners had also treated the property in dispute as Waqf property. The assumption of management, control and administration of the property in dispute by the Provincial Government under the provisions of the Charitable Institutions Act, 1949 was done in accordance with law and we do not find any illegality or wrong exercise of jurisdiction by the Provincial Government in this respect.”

7. With regard to the question that the petitioners had become owners by operation of law, this Court held as under:-

“ In so far as the question that the petitioners had become owner by operation of law is concerned, the learned counsel for the petitioners contended that they were occupancy tenants of the property in dispute and

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by the provisions of section 4-A of the Act they had become owners thereof without payment of any compensation. We are unable to accept this contention of the learned counsel. Although the petitioners are recorded occupancy tenants of the property in dispute and there is a provision in sub-section (1) of section 4-A of the Act, according to which occupancy tenants paying rent by division of the produce were declared to have become owners of the portion of the land in proportion to their share of the produce without payment of any compensation to the landlord but there is an exception to this section according to which it did not apply to land owned or administered by the Government both Central and Provincial. N.W.F.P. Act VI of 1952 added section 4-A to the Act and at that time the Provincial Government administered the property in dispute and so provisions contained in sub-section (1) thereof did not apply to it. Since the provisions of section 4-A of the Act did not apply to the property in dispute, the occupancy tenancy of the petitioners did not convert into full ownership. As such the petitioners cannot be held to have become owners of the suit land by operation of law although they had the status of occupancy tenants paying rent by division of produce.”

8. Whether the property in dispute was hit by the exception to section 4-A of the N.W.F.P. Tenancy Act, this Court held as under:-

“It was further contended by the learned counsel for the petitioners that the property in dispute was not administered by the Provincial Government as under sub-section (3) of the section 3 of the N.W.F.P. Waqf Properties Ordinance, 1979, the Chief Administrator Auqaf was a corporation and as such the exception to section 4-A of the Act did not apply to it. We cannot accept this contention of the learned counsel as well

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because when the administration, management and control of the property in dispute was taken over by the Provincial Government, at that time the Chief Administrator Auqaf was not a Corporation and such taken over property was administered by the Provincial Government and it was at that time exempt from the provisions of section 4-A of the Act.”

9. Now the question crops up whether the finding of this Court was reversed by the Hon’ble Supreme Court in the appeal sought through leave of the Court? Before I answer this question, it is worth while to refer to what was proposed by the petitioners and the respondents in the Supreme Court for the settlement of their dispute which is reproduced as below:-

“The parties have agreed as under:-

2. 1. That the rights of the parties are regulated by the Notification of 3/4/50, issued under section 3 of the Act VIII of 1949.
2. That the directions of the Chief Minister of N.W.F.P. of 29.3.87 be ignored.

“The appeal may be allowed in the terms above and the parties left to bear their own costs.

Sd/xxxxxxx.  
Nur Ahmad Khan A.O.R.  
For the appellants.”

2. “The Chief Minister’s directions that the land should be given to tenants at will be ignored. The appellants be considered, if they take the land in their possession on lease in accordance with law. They shall be liable to ejection if they do not abide by the terms settled or show a conduct unbecoming of a tenant for instance they are troublesome.”

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10. The Hon'ble Supreme Court after considering both the proposals held as under:-

“ It is true that the draft submitted by the learned A.O.R. for the appellants is not shown to have been agreed to by the learned counsel for the respondents. However, when note of the learned counsel for the respondents reproduced above is read in the context and the facts and circumstances of the case as well as in the context of the draft agreement signed by the learned counsel for the appellants, in our view, there is not much dispute left between the parties. The respondents do rely on the notification of 1950. Not only this but the same having been accepted and acted upon for the last 40 years none of the parties can escape from its consequence, legal or otherwise. Both the parties have agreed that the directions of the Chief Minister dated 29.3.1987 should be ignored. That being so, the further clarification by the learned counsel for the respondents in his note does not present any un-surmountable difficulty in partly allowing this appeal in terms of both the drafts submitted by the counsel. They are fair. When read together they are workable. They shall be given the effect accordingly.

With the foregoing order of disposal, this appeal stands partly allowed. There shall be no order as to costs.”

11. A perusal of the above quoted paragraphs would reveal that the judgment of this Court was upheld on all the crucial points with the only modification that the rights of the parties shall be regulated by Notifications of 3/4/50 issued under section 3 of the Act, 1949 (Act No. VIII) and that the directive of the Chief Minister of N.W.F.P. dated 29.3.1987 shall be ignored and fresh terms will be settled with the appellants, now petitioners, before this Court.

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12. The argument of the learned counsel for the petitioners that occupancy tenancy of the petitioners could not be extinguished except in accordance with the provisions of the Tenancy Act, will not have much force as there was nothing in the Statute on 29.3.1992 as could preclude the Hon'ble Supreme Court from passing the judgment dated 29.3.1992. The case of **Haji Sk. Subhan-vs- Madhorao (Supra)** will do little to advance the case of the petitioners as in that case the Act came into force before the decree was passed,; but here the judgment of the Hon'ble Supreme Court was passed before the Act came into force. The case of **Narsingh Kalu Kalota-Vs- Rao Nihalkaran Raoraja (Supra)** would too have little relevance to the case in hand as the validity of the decree in that case was questioned during the execution proceeding due to subsequent change in law nullifying such decree but here there is nothing in the Amending Act as could nullify the judgment dated 29.3.1992 of the Hon'ble Supreme Court. The case of **Government through Secretary-Vs- Shamshair Ali and 18 others (Supra)** because of its distinguishable feature too will have no relevance to the case in hand.

13. The upshot of the above discussion is that the impugned judgments being free from any error, excess or absence of jurisdiction, merit no interference. Therefore, these petitions are dismissed. The rights of the petitioners accruing under the judgment dated 29.3.1992 of the Hon'ble Supreme Court will, however, remain intact notwithstanding the litigation culminating in these petitions.

**Announced on:**  
**28.9.2005**

**J U D G E**

Peshawar High Court

Muhammad Iqbal --- Appellant/Petitioner (s)

Versus

Chief Administrator --- Respondent (s)

***JUDGMENT***

CR. No. 136/1999

Date of hearing 28.09.2005

**EJAZ AFZAL KHAN J.**- For reasons recorded in my detailed judgment of today's date in the connected Civil Revision No.135 of 1999, this revision petition stands disposed of.

Announced on:  
28.9.2005

J U D G E

Peshawar High Court

Muhammad Ashraf Abbasi --- Appellant/Petitioner (s)

Versus

Haji Taza Khan --- Respondent (s)

***JUDGMENT***

CR. No. 984/2004

Date of hearing 28.09.2005

**EJAZ AFZAL KHAN J.-** Muhammad Ashraf Abbasi, petitioner herein, has assailed the judgment and decree dated 22.6.2004 of the learned District Judge Kohat, whereby he dismissed the appeal filed by him and thus upheld the order dated 15.1.2004 of the learned Senior Civil Judge refusing to set aside the ex-parte decree dated 10.6.2002.

2. It was argued by the learned counsel for the petitioner that where the petitioner was not served in accordance with the requirements of law, no ex-parte decree could be passed against him and that the finding of the Courts below that he is just resorting to delaying tactics is not warranted by any evidence on the record, especially when he responded with reasonable alacrity the moment he came to know that an ex-parte decree has been passed against him.

3. As against that, the learned counsel appearing on behalf of the respondents argued that when the petitioner did not respond to any of the modes of service prescribed by the procedural law, ex-parte decree was rightly passed and subsequently when he failed to account for his absence despite service, his application for setting aside the ex-parte decree was rightly declined.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

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5. The record reveals that the petitioner was never served in accordance with the requirements of law, therefore, ex-parte proceeding or for that matter, the ex-parte decree against him was not called for. The moreso when the petitioner responded with reasonable alacrity by moving the forums below for setting aside the ex-parte decree and accounted for his failure to respond to the summon etc of the Court. Therefore, I do not think, an ex-parte decree for a sum of Rs.8,88,950/- could justifiably be passed or maintained, that too, when decision on merits rather than technicalities is the most coveted goal of law.

6. For the reasons discussed above, this petition is allowed, the impugned orders are set aside on payment of Rs.5000/- as cost and the case is sent back to the learned trial Court for decision afresh in accordance with law. The parties are directed to appear in the trial Court on 19.10.2005.

Dated:28.9.2005

J U D G E

Peshawar High Court

Maweem --- Appellant/Petitioner (s)

Versus

Haji Kashmalay --- Respondent (s)

### ***JUDGMENT***

CR. No. 68/2003

Date of hearing 29.09.2005

**EJAZ AFZAL KHAN J.-** Assailed herein is the judgment and decree dated 20.12.2002 of the learned Additional District Judge Dir Payan, whereby he dismissed the appeal filed by the petitioners and thus upheld the judgment and decree dated 26.2.2001 of the learned trial Court.

2. The main argument of the learned counsel for the petitioners was that where the deed dated 5.4.1960 which is the very basis of the title of the respondents was not believed by the Courts below, their suit could not be decreed on the basis of their oral evidence which besides being contradictory was incredible on many counts.

3. As against that, the learned counsel appearing on behalf of the respondents argued that though the document relied upon by the respondents was not believed but the preponderance of oral evidence produced by them was credible and confidence inspiring, therefore, the learned Courts below have rightly decreed their suit.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the impugned judgment would reveal that the learned appellate Court by taking partial and piecemeal view of the evidence on the record has not appreciated it in its true perspective. The fact that witnesses examined by the respondents

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were 70/80 years old and had no motive to give false evidence against the petitioners would not perse call for uncritical acceptance of their evidence. It, as a matter of fact, is its inherent, probative worth which determines its credibility or otherwise. The job of the learned appellate Court, which is the first Court of appeal and final Court of fact, did not end by highlighting the lapses in the evidence of the petitioners. He was required to give finding after appraising entire oral as well as documentary evidence on the record. Where finding of the learned appellate Court does not appear to have been based on proper appraisal of evidence, I have no alternative but to allow this petition, set aside the impugned judgment and decree and send the case back to the learned District Judge for decision afresh in accordance with law after hearing both the parties. The learned Judge may record additional evidence, if he thinks it is essential for the just decision of the case. The parties are directed to appear in the Court of the learned District Judge on 15.10.2005. As it is an old case, it be decided within a period of 3 months.

Dated:29.9.2005

J U D G E

Peshawar High Court

Abdul Haae --- Appellant/Petitioner (s)

Versus

Amir Haidar --- Respondent (s)

CR No. 1292/2004

Date of hearing: 29.9.2005

## JUDGMENT

**EJAZ AFZAL KHAN J.-** Petitioners in C.R.No. 1292 and 1293 of 2004 have assailed the judgments and decrees dated 24.4.2004 of the learned District Judge Swabi, whereby he dismissed their appeals and thus upheld the judgments and decrees dated 11.6.2001 of the learned Civil Judge.

2. It was argued by the learned counsel for the petitioners that where an area measuring 13 kanals 9 marlas of land was sold to the respondents out of Khasra No.2221, he could not be held owner in Khasra No.2196 notwithstanding that they were given possession out of the latter, therefore, both the Courts below erred in dismissing the suit of the petitioners for recovery of possession and decreeing the suit of the respondents for declaration.

3. As against that, the learned counsel appearing on behalf of the respondents argued that though an area as per entries in the mutation has been transferred out of Khasra No.2221 but possession to the respondents was given out of Khasra No.2196, therefore, the learned Courts below made no error while decreeing the suit of the respondents and dismissing that of the petitioners.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the record would reveal that an area measuring 13 kanals 9 marlas as per entries in the mutation was transferred to the respondents out of Khasra No.2221 but

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possession by the predecessor-in-interest of the petitioners pursuant to the aforesaid entries was given out of Khasra No.2196 as he was recorded in its 'hisdari' possession at that time. Since the property comprised in Khasra Nos.2221,2196 and many others is joint and has not been partitioned by metes and bounds, the respondents by purchasing it out of even one Khasra Number have stepped into the shoes of the predecessor-in-interest of the petitioners and have thus become co-owners with them. In this background, the suit of the petitioners for recovery of possession being misconceived was rightly dismissed, as one set of co-sharers cannot claim possession from another set of co-sharers without partition. Though the suit of the respondents for declaration inasmuch as they claimed exclusive ownership of the property comprised in Khasra No.2196 was also misconceived, yet it cannot be disputed that they by stepping into the shoes of their vendor, the predecessor-in-interest of the petitioners, have become co-owners in all the Khasra numbers jointly owned by them. Therefore, the judgments and decrees of both the Courts below are maintained with the only modification that petitioners and the respondents are co-owners in all the Khasra Numbers jointly owned by them and that none of them can be ejected there from unless partitioned by metes and bounds. With the modification hinted to above, these petitions are disposed.

Dated:29.9.2005

J U D G E

Peshawar High Court

Muhammad Nabi --- Appellant/Petitioner (s)

Versus

Nadar Khan --- Respondent (s)

***JUDGMENT***

CR. No. 970/2005a

Date of hearing 30.09.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has impugned the judgment dated 7.6.2005 of the learned District Judge Chitral whereby he dismissed the appeal filed by the petitioner and thus upheld the judgment dated 29.8.2003 of the learned Civil Judge.

2. The main argument of the learned counsel for the petitioner was that where the respondents themselves unreservedly admitted in their cross-examination that they are having no concern whatever with the property in dispute, the suit of the petitioner was to be decreed.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. Regardless altogether of what was stated by the defendants in their statement recorded in the Court, where the petitioner himself failed and miserably so in proving that he is owner of the property in dispute, his suit was rightly dismissed by the Courts below. Needless to say that failure on the part of the defendants to substantiate their stance will not in any way prove that he is owner of the property in dispute. Moreover, as the impugned judgments are free from any infirmity much less legal or jurisdictional, I do not feel inclined to interfere therewith. However, this judgment will not affect any other right if at all the

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petitioner has in respect of the property in dispute other than that of ownership.

Dated:30.9.2005

J U D G E

Peshawar High Court

Syed Khan --- Appellant/Petitioner (s)

Versus

Wazir Rehman --- Respondent (s)

***JUDGMENT***

CR. No. 984/2005

Date of hearing 30.09.2005

**EJAZ AFZAL KHAN J.-** The petitioner through the instant petition has impugned the judgment and decree dated 25.2.2005 of the learned Additional District Judge-II Buner, whereby he dismissed the appeal filed by the petitioner and thus upheld the judgment and decree dated 29.3.2004 of the learned Civil Judge Daggar.

2. The learned counsel appearing on behalf of the petitioner by referring to the finding of the learned trial Court on issue No.5 and 6 argued that where it has been held by the trial Court that the property in dispute has been sold, the learned appellate Court could not have reversed this finding notwithstanding the factum of sale was denied by the vendee as well as vendors and there was no mutation or registered deed in this behalf.

3. I have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. The record reveals that the vendee as well as vendors consistently denied the factum of sale in their averments made in the written statement and deposition made in the Court. The learned appellate Court after making proper appraisal of evidence for valid and viable reasons held that sale has not taken place and that the question of enforcement of right of pre-emption thus does not arise. When that being the case, I will not like to

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interfere with the impugned finding, that too, when it does not suffer from any error of fact, law or jurisdiction.

5. For the reasons discussed above, this petition being without substance is dismissed in limine. However, it will be open to the petitioner to bring a fresh suit for the enforcement of right of pre-emption if and when sale takes place.

Dated:30.9.2005

J U D G E

Peshawar High Court

MUHAMMAD SHER---Petitioner

Versus

NAWAR KHAN and others---Respondents

### **JUDGMENT**

C.R No. 536/2009  
(2010 Y L R 1865 Peshawar)

Decided on 22.02.2010

Specific Relief Act (I of 1877)---

**Ejaz Afzal Khan, C J** ----Ss. 8 & 42----Suit for possession and declaration---Suit had concurrently been decreed by the Trial Court and Appellate Court---Counsel for the plaintiff by describing the background of the case had explained the origin of the title of each of the parties and person claiming through them, but when he was asked to refer to evidence on record, he could not do that---Courts below, in circumstances, had not applied their minds while handing down the impugned judgment, which could not be maintained---Impugned judgments and decrees were set aside and case was sent back to the Trial Court for decision afresh after recording additional evidence.

Iftikhar Ali Qadir for Petitioner.

Fahim Wali for Respondents.

Date of hearing: 22nd February, 2010.

### **JUDGMENT**

**EJAZ AFZAL KHAN, C.J.**---Petitioner through the instant petition has questioned the judgment and decree dated 12-3-

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2009 of the learned Additional District Judge-V, Mardan, whereby, he dismissed his appeal and maintained the judgment and decree dated 15-1-2008 of the learned Civil Judge-VIII, Mardan.

2. The learned counsel appearing on behalf of the petitioner contended that the entire gamut of controversy was not considered either by the learned Trial Court or the learned Appellate Court while handing down the impugned judgments and that they being based on misreading and non-reading of evidence cannot be maintained.

3. The learned counsel appearing on behalf of the respondents by describing the background of the case nicely explained the origin of the title of each of the parties and the persons claiming through them but when he was asked to refer to evidence on the record, he couldn't do that because many of the relevant documents have been brought on the record, though, he had them in his possession. When this being the state of things, I don't think that the Courts below have applied their minds while handing down the impugned judgments. I, therefore, don't feel inclined to maintain them.

4. For the reasons discussed above, this revision petition is allowed and the impugned judgments and decrees are set aside and the case is sent back to the learned Trial Court for decision afresh after recording additional evidence. Both the parties are directed to appear there on 31-3-2010. Record of the case be sent there forthwith.

H.B.T.132/P

Case remanded.

Peshawar High Court

Secretary Forest --- Appellant/Petitioner (s)

Versus

Akbar Jan --- Respondent (s)

***JUDGMENT***

CR. No. 556/1997

Date of hearing \_\_\_\_\_

**EJAZ AFZAL KHAN J.-** The petitioners through the instant petition has questioned the judgment and decree dated 4.9.1997 of the learned Izafi Zila Qazi Swat, whereby he allowed the appeal filed by the respondents and thus set aside the judgment and decree dated 15.4.1997 of the learned trial Court.

2. It was argued by the learned D.A.G. appearing on behalf of the petitioners that the learned Appellate Court erred by placing burden of proof on the petitioners in spite of the fact that the respondents sought annulment of the entries made in the record of rights through a suit for declaration. The learned counsel next argued that burden of proof as to ownership of the person in possession can only be shifted to the defendants where such possession is proved to be lawful. The learned counsel to support his contentions placed reliance on the case of Mira Khan..Vs..Abdul Ghawas and others (PLD 1994 Peshawar 209). The learned D.A.G. by referring to the judgment delivered in the case of Government of N.W.F.P...Vs..Bakht Jamal in Civil Revision No.123 of 1997 decided on 18.12.2003, argued that where there was no material on the record to show how and why an area was declared a protected forest, this Court by allowing the petition, directed the Provincial Government to conduct an inquiry within the terms of section 29 of the Forest Act, 1927 (Act No.XVL of 1927) within a period of two months and remanded the case to the learned trial Court for decision afresh in the light of such report and other additional evidence, if any.

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3. As against that, the learned counsel appearing on behalf of the respondents argued that the property in dispute is the ownership of the respondents and can never be held to be a part and parcel of a protected forest, more so when, it is surrounded by culturable property as is shown in the revenue map produced by the Patwari. He next argued that the property in dispute has never been a forest as is evident from the report of the Commissioner. How, he concluded, a patch of 40 kanals amidst the culturable tracks of land can be a forest that too when not even a single tree was found there as per report mentioned above.

4. I have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. When and how a property can be declared as a protected forest and what is the statutory mechanism therefor. Before I answer these questions, it is worth while to refer to the relevant provision of the Act which is reproduced as under:-

29. (1) The (Provincial Government) may, by notification in the (Official Gazette), declare the provisions of this Chapter applicable to any forest-land or waste-land which is not included in a reserved forest, but which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled.

(2) The forest-land and waste-lands comprised in any such notification shall be called a "protected forest".

(3) No such notification shall be made unless the nature and extent of the rights of Government and of private persons in or over the forest-land or waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the

(Provincial Government) thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved:

Provided that, if, in the case of any forest-land or waste-land, the (Provincial Government) thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government the (Provincial Government) may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.”

6. A perusal of the above quoted provisions would reveal that no property shall be declared a protected forest unless an inquiry in this behalf has been made by the Provincial Government vis-à-vis the nature and extent of the rights of Government and private persons therein.

7. Whether an inquiry in terms of the aforesaid provisions of law before declaring the property in dispute as a protected forest or a part thereof has been made is not clear from the available record. Though according to the extracts from the record of rights prepared during the course of settlement it has been shown to be a protected forest but what is the origin of this entry is yet another query which too finds no answer from the record.

8. In the case of Government of N.W.F.P...Vs...Bakht Jamal (Supra) when nothing was shown from the record that an inquiry in terms of section 29 of the Act was made before notifying a property to be a protected forest or a part thereof, this Court remanded the case to the trial Court for decision afresh in the light of such report and other additional evidence, if any.

9. Since all these questions are to be attended to before a property is declared to be a protected forest by the Provincial

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Government or an individual ownership of one party or another by a Court of law and the case in hand is not in any way different from the one cited above, I, too, have no option but to allow this petition, set aside the impugned judgment and the judgment of the learned trial Court, direct the Provincial Government to hold a similar inquiry within a period of two months and remand this case to the learned trial Court for decision afresh after attending to the questions mentioned above and in the light of the inquiry report. The parties will also be at liberty to produce further evidence to prove their respective claims.

10. Since I have decided to remand this case, it will be futile to discuss the arguments addressed by the learned counsel for the parties on merits of the case. The parties are directed to appear in the Court of the learned Aala Illaqa Qazi concerned on 25.2.2004. As it is an old case, it be disposed of within a period of six months.

Announced on:

J U D G E.

Saleem Shah --- Appellant/Petitioner (s)

Versus

Faqeer Shah --- Respondent (s)

***JUDGMENT***

CR. No. 918/2003

Date of hearing \_\_\_\_\_

**EJAZ AFZAL KHAN, J.** The respondents-decree-holders filed an application for execution of decree which was stayed pursuant to the stay order passed by the High Court in a C.M. filed alongwith a civil revision . Though the revision was dismissed on 9.2.1991, none-the-less, the respondents filed an application for its restoration on 23.4.2001. The petitioners on being served raised objections as to the maintainability of the application which were accordingly allowed and the application for execution was dismissed vide order dated 23.9.2002. When the aforesaid order was set aside by the learned Addl Distt Judge on appeal filed by the respondent, the petitioner filed the instant petition under section 115 of the C.P.C.

2. It was mainly argued by the learned counsel for the petitioners that when the learned Court below in view of the stay order passed by the High Court stayed the execution proceedings with the observations that the parties may apply for its restoration subject to the final decision of the High Court, the application for restoration of the proceedings could be filed within 3 years and not beyond that ; that the application for having been filed after the period mentioned above is time barred, therefore, it was rightly dismissed and that the learned appellate Court by ignoring this aspect of the case has exercised jurisdiction not so vested in it by reversing the order of the learned Court below.

3. I have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

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4. It may be said at the very out-set that the learned counsel for the petitioners seems to have laboured under a mistaken concept of law as well as facts because the application for revival of execution proceedings was neither a fresh application in terms of Article 181 of the Limitation Act nor was it an application for restoration of a proceeding dismissed in default. In fact it was just an application to reactivate a lis which was pending in the wake of stay order passed by the High Court in a Civil Revision, therefore, it was rightly treated as pending. The learned Addl Distt Judge by appreciating this aspect in its proper perspective and by holding that it was more or less a sine die adjournment, has befittingly dealt with the case by allowing the appeal and setting aside the order of the learned trial Court.

5. Besides this as the impugned order suffers from no factual, legal or jurisdictional error, I do not feel inclined to interfere therewith in the exercise of revisional jurisdictional of this Court.

6. For the reasons discussed above, this petition being without substance is dismissed in limine alongwith C.M.

Announced on:

J U D G E

Peshawar High Court