JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.76 of 2019
Amanat Ullah Khan
Versus
Waseem Iqbal and others

Dates of Hearing:	13.05.2024 and 21.05.2024.
Appellant by:	M/s Qaiser Imam, Muhammad Daniyal Lali, Ali Raza Rao and Riaz Gondal, Advocates.
Respondents by:	Nemo for respondent No.1. Syed Mastan Ali Zaidi, Advocate for respondent No.2(2-a to 2-e). M/s Shoeba Akhtar and Shaneela Razzaq, Advocates for respondent No.3 / CDA.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal the appellant, Amanat Ullah Khan, impugns the judgment and decree dated 14.03.2019 passed by the Court of the learned Civil Judge, Islamabad, whereby the suit for declaration, cancellation of transfer letter, etc. filed by him was dismissed.

2. Through the said suit filed on 11.09.2004, the appellant had sought a declaration to the effect that he is the owner of Plot No.1, Street No.47, Sector F-8/1, Islamabad (**"the suit property"**). Furthermore, the appellant sought the cancellation of (i) letter dated 18.06.1977 (Exh.P6), whereby the Capital Development Authority (**"CDA"**) transferred half share in the suit property from his name to respondent No.1, Waseem Iqbal, and (ii) letter dated 07.05.1987 (Exh.D8), whereby the CDA transferred the suit property in favour of Javed Akhtar, who was the predecessor of respondents No.2-a to 2-e.

3. The record shows that on 16.12.1976 Afzal Hussain, who at that time was the owner of the suit property, submitted an application (Exh.P3) to the CDA for its transfer to the appellant and respondent No.1 in equal shares. The appellant was born on 21.10.1968 and therefore when the said application was submitted, he was eight years of age. The said application was also required

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to be signed by the transferees. It bears the signatures of respondent No.1. For the appellant, the said application was admittedly signed by his father, Ghulam Rasool. The said application makes mention of the fact that the appellant was a minor and that his name was written on the application by his father in his own hand. Vide letter dated 24.01.1977 (Exh.P4), the suit property was transferred in the names of the appellant and respondent No.1.

4. On 08.06.1977 (Exh.P5) the appellant, through this father, is said to have applied to the CDA for the transfer of half share in the suit property to respondent No.1. This application also makes mention of the fact that the appellant's name was written by his father in his own hand. Vide letter dated 18.06.1977, (Exh.P6), the half share in the suit property was also transferred to respondent No.1. In this way, respondent No.1 became the owner of the entire suit property. On 26.03.1987, respondent No.1 submitted an application (Exh.P7) to the CDA for the transfer of the suit property to Javed Akhtar and vide letter dated 07.05.1987 (Exh.P8), the suit property was transferred to the latter.

5. It was not until 26.02.2004 that the appellant addressed a letter (Exh.D9) to the Member (Administration), CDA stating that the suit property was jointly transferred to the appellant and respondent No.1; that being a minor at that time, the appellant's father, Ghulam Rasool, got the whole case processed; that respondent No.1, being a family friend, was allowed to use / look after the appellant's portion of the suit property; that the appellant had come to know that respondent No.1, on the basis of fake signatures, had got the appellant's share transferred in his own name and had further sold the suit property; and that the suit property could not be transferred without obtaining a guardianship certificate from the Court of competent jurisdiction. The appellant requested the Member (Administration), CDA to conduct an inquiry in the matter and restore the suit property in his name. Vide letter dated 17.07.2004 (Exh.D10), the CDA informed the appellant that

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the suit property had been transferred in 1977 to respondent No.1 and that the appellant had remained silent for a period of twenty-six years; that the suit property had been transferred further; and that the appellant's application did not merit consideration.

6. On 11.09.2004, the appellant filed the suit for *inter alia* the cancellation of the said transfer letters dated 24.01.1977 (Exh.P4) and 18.06.1977 (Exh.P6). The said suit was contested by Javed Akhtar by filing a written statement. The CDA had also filed a written statement whereas respondent No.1 was proceeded against *ex-parte*. From the divergent pleadings of the contesting parties, the learned Civil Court framed the following issues:-

> ***"1. Whether the defendant No.1 in connivance with defendant No.3 through fraud got transferred the share of the plaintiff from the suit property when he was a minor, therefore, plaintiff is entitled to the decree for declaration, cancellation of transfer letters, recovery of possession, partition of suit property and permanent injunction, as prayed for? OPP***
> ***2. Whether the plaintiff has no cause of action or locus standi to file the instant suit? OPD***
> ***3. Whether the defendant No.2 is a bonafide purchaser of suit property, hence his right and interest are protected under the law? OPD2***
> ***4. Whether the instant suit is hopelessly time barred? OPD***
> ***5. Whether the present suit has been filed just to blackmail the defendant No.2? OPD***
> ***6. Whether this Court lacks jurisdiction to adjudicate upon the matter? OPD2***
> ***7. Relief."***

7. Testimony on the appellant's behalf was recorded by his special attorney, Riaz Khan (PW-1). The Record Keeper from the CDA appeared as CW-1 and produced documents from the official record of the CDA. These documents are Exh.P3 to Exh.P9. Javed Akhtar gave evidence as DW-1 and produced *inter alia* a copy of the transfer letter dated 07.05.1987 as Exh.D8. He also produced the revised completion certificate dated 09.02.2009 as Exh.D2 with respect to the building constructed on the suit property. The Administration Officer from the Estate Management Directorate of the CDA appeared as DW-3 and submitted documents listed in paragraph 5 of the impugned judgment.

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8. The trial culminated in the judgment and decree dated 14.03.2019, whereby the appellant's suit was dismissed. The said judgment and decree has been assailed by the appellant in the instant appeal.

9. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that on 24.01.1977 the suit property was *"purchased jointly and equally"* by his father and respondent No.1; that on 18.06.1977 respondent No.1 maneuvered the transfer of the appellant's share in the suit property in his own name; that the said transfer was the result of collusion between respondent No.1 and the employees of the CDA; that the appellant was a minor at that time and no guardianship certificate had been obtained from the Court of competent jurisdiction; that again due to the *"evil designs"* of respondent No.1 and the employees of the CDA, the suit property was alienated in favour of Javed Akhtar on 07.05.1987; that the transfer of half share in the suit property in favour of respondent No.1 on 18.06.1977 and the transfer of the entire suit property in favour of Javed Akhtar on 07.05.1987 are based on fraud; that it was not until 26.02.2004 that the appellant came to know that the suit property had been fraudulently transferred; that in the instant case, the limitation period for filing the suit would start from the date of the appellant's knowledge as to the fraud and not the date when he gained majority; that the application dated 08.06.1977 is stated to have been signed and filed by the appellant and not his father in the capacity of a guardian; that since the appellant was only eight years of age at that time, he had no legal capacity to enter into a sale transaction; that the appellant, being a minor at that time, could not be burdened with liability under a void transaction; that by virtue of Section 11 of the Contract Act, 1972 a minor is not competent to enter into a contract; and that the learned Civil Court erred by dismissing the appellant's suit. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned judgment and decree 14.03.2019 to be set-aside. Learned counsel

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for the appellant submitted a well-prepared brief of case-law, reference to which shall be made at a subsequent stage in the judgment.

10. On the other hand, learned counsel for respondents No.2-a to 2-e submitted that the manner in which the transfer of the suit property from Afzal Hussain to the appellant and respondent No.1 took place is admitted; that the application dated 16.12.1976 for the transfer of the suit property in the names of the appellant and respondent No.1 bears three signatures of the appellant and respondent No.1 each; that it is obvious that the appellant, being a minor at that time, did not have the means to purchase half share in the suit property but it was his father who did so; that application dated 08.06.1977 for the transfer of half share in the suit property in the name of respondent No.1 bears the appellant's name in exactly the same form as in the application dated 16.12.1976; that the appellant is taking a contradictory position by asserting that the purchase of half share in the suit property in January, 1977 is valid but the transfer of the said share in June, 1977 is invalid on the ground that he was a minor; that respondent No.1 had constructed a house on the plot after it was entirely transferred to him through transfer letter dated 18.06.1977; that respondent No.1 sold the suit property to Javed Akhtar and in this regard, a transfer letter was issued in favour of Javed Akhtar on 07.05.1987; that for the appellant's silence from 1987 (when Javed Akhtar purchased the suit property) to 2004 (when the appellant filed the suit), there is no plausible explanation; that the appellant's father was neither made a party in the suit nor produced as a witness by the appellant; that the appellant's father died on 12.07.2010, i.e. more than six years after the institution of the suit; that it was essential for the appellant to have produced his father since it was his stance in the suit that half share in the suit property had been purchased by his father from Afzal Hussain; that even the appellant did not appear himself as a witness but produced his special attorney, Riaz Khan; that the transfer letter dated 18.06.1977 is a thirty year old

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document to which a presumption of correctness is attached; and that Javed Akhtar and his successors had been subjected to the acrimony of litigation since the past twenty years and therefore the instant appeal merits dismissal with costs.

11. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 3 to 8 above and need not be recapitulated.

12. The appellant's birth certificate (Exh.P2) shows that he was born on 21.10.1968. In the suit, the appellant pleads that the suit property was *"purchased jointly and equally"* by his father, Ghulam Rasool, and respondent No.1. Prior to this, the suit property was owned by Afzal Hussain. He had submitted application dated 16.12.1976 (Exh.P3) to the CDA for the transfer of the suit property to the appellant and respondent No.1. The said application also contains a declaration of the transferees. The signatures of respondent No.1 on the said declaration are not disputed. Interestingly, the fact that the appellant's father had signed the said declaration on behalf of his son is also not disputed. It is on the basis of the said application dated 16.12.1976 (Exh.P3) that the suit property was transferred vide the CDA's letter dated 24.01.1977 (Exh.P4) to the appellant and respondent No.1.

13. What is disputed by the appellant is the entry of his name as an applicant in the application dated 08.06.1977 (Exh.P5) submitted to the CDA for the transfer of half share in the suit property to respondent No.1. This application bears the appellant's handwritten name in Urdu stated to have been written by his father, Ghulam Rasool. For the purposes of clarity, the writing of the appellant's name as the applicant on the said application is as follows:-

"امانت اللہ ولد غلام رسول بقلم خود"

This translates into: Amanat Ullah son of Ghulam Rasool (in my own hand)

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14. This is exactly the manner in which the appellant's name as a declarant / transferee is written in the application dated 16.12.1976 (Exh.P3) submitted to the CDA for the transfer of the suit property from Afzal Hussain to the appellant and respondent No.1. As mentioned above, the appellant does not dispute the writing of his name as a declarant / transferee in the application dated 16.12.1976 (Exh.P3) and explains this in paragraph 1 of the suit by pleading that his father and respondent No.1 had jointly purchased the suit property. This obviously implies that the writing of his name in the said application was by his father.

15. Now, the appellant takes the position that the writing of his name in the application dated 08.06.1977 (Exh.P5) is not by him or his father. In his suit, the appellant has made allegations of fraud, connivance and evil designs, etc. The CDA, in its written statement, has pleaded *inter alia* that *"Ghulam Rasool being the father and natural guardian of the plaintiff has sold the said ½ share vide transfer application form No.9271 dated 08.06.1977."* This written statement was filed on 13.11.2004. At that time, the appellant's father was alive and did not pass away until 12.07.2010. After the said position was taken by the CDA in its written statement, it was most essential for the appellant to have produced his father as a witness to contradict what was pleaded by the CDA in its written statement. For this omission, no explanation has been presented by the appellant. It would be natural to assume that Ghulam Rasool was a truthful person and would have not contradicted the said pleading in the CDA's written statement. Additionally, it was for Ghulam Rasool to have stated that he had not signed the application dated 08.06.1977 (Exh.P5) for the transfer of half share in the suit property to respondent No.1 or that the said application was a fabricated document. The appellant's father's testimony would have also thrown light on the controversy as to whether he was in actual or constructive possession of any portion of the suit property or derived any benefit therefrom for a period of twenty-six

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years between the date when the suit property stood transferred to respondent No.1 and the date of the institution of the suit.

16. Article 129 of the Qanun-e-Shahadat Order, 1984 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard had to the common course of natural events, human conduct and public and private business, in their relation to the facts of a particular case. Illustration (g) to the said Article provides that the Court may presume that evidence which could be and is not produced would, if produced be favourable to the person who withholds it. This rule of presumption is based on the principle that no one shall be allowed to take advantage of his own wrong. The rule contains a well known Latin maxim *"omnia praesumuntur contra spoliation"* (all things are presumed against the wrongdoer). Where a person withholds evidence, every presumption to his disadvantage, consistent with the facts admitted or proved, has to be adopted.

17. The appellant's conduct of not producing his father as a witness is to be attributed to consciousness that his father's evidence, if produced, would operate against him. It does not appeal to reason that Ghulam Rasool, who purchased half share in the suit property in his son's name, did not take any issue for a period of twenty-six years with respondent No.1 who is alleged not just to have had the appellant's share in the suit property transferred to himself but ten years after doing so transferred it to a third party. An explanation in this regard could have been given by Ghulam Rasool but for the appellant's decision not to produce him as a witness. Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first-hand account of the matters in controversy and throw light on them and who can rebut all allegations of the other side, it is legitimate to draw adverse inference against the party who did not produce such principal witness.

18. The appellant has tried to project the impression that the transaction which resulted in the transfer of half share in the suit

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property to respondent No.1 through transfer letter dated 18.06.1977 (Exh.P6) could not have been executed by him as at that time he was just eight years old and permission from the Guardian Court had not been obtained for such transfer. Learned counsel for the appellant has relied on the law laid down in the judgments reported as Ghulam Nabi Vs. Faisal Naveed (2003 SCMR 1794), wherein it was held that a legal guardian was required to obtain permission of the Guardian Court under Section 29 of the Guardians and Wards Act, 1890 before alienating the minor's property, and that the transfer of a minor's property without the permission of the Guardian Court was voidable under Section 30 of the said Act; Abdul Ghani Vs. Yasmeen Khan (2011 SCMR 837), wherein it was held that no rights and liabilities could be attached to or arise out of a void contract, and that a minor could not be burdened with liability of a void contract; Sultan Vs. Muhammad Hussain (2006 MLD 659), wherein it was held that a transaction for the sale of an immovable property on behalf of minors was void even if it was made by a legal and natural guardian except where the dispossession of such property was for the need of the minors; Muhammad Umar Khan Vs. Aziz Begum (2001 MLD 448), wherein it was held that parents of a minor who had not gotten themselves appointed as a guardian of the minor by the Guardian Court could not sell the minor's land especially when the alienation had not been made out of necessity or for the exclusive benefit of the minor; Aamir Masood Vs. Khurshid Begum (2001 MLD 159), wherein it was held that the mere fact that the vendor was a minor at the time of the sale would render the sale document void and no plea of estoppel or *bonafide* purchase or even rectification upon attaining majority by the minor would be available to the vendee to defend the document; Muhammad Adil Vs. Muhammad Amir (2023 SCMR 1032), wherein it was held that in the absence of any evidence to indicate that the adult co-sharer was ever made the guardian of the minor co-sharer, the minor's share could not be sold by a de-facto guardian; Muhammad Haneef Vs. Abdul Samad

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(PLD 2009 SC 751), wherein it was held that a person who had purchased the suit land from a lady, who had exchanged the same with her minor daughter, could not be given protection of Section 41 of the Transfer of Property Act, 1882 as he cannot be said to have taken reasonable care or acted in good faith by failing to find out whether or not the mother had the power to transfer the suit land on the strength of an exchange mutation; Manzoor Hussain Vs. Muhammad Nawaz (2010 SCMR 1042), wherein it was held that where a sale agreement was executed by a minor during his minority, then such transaction being void *ab-initio* could be challenged within a reasonable period when the minor on becoming a major acquires knowledge of such transaction; and Allah Bukhsh Vs. Bakhtawar (2018 CLC 1070), wherein it was held that a plaintiff, being a minor at the time of the relinquishment of her right of inheritance, could not enter into such transaction and since such a transaction was void against which limitation does not run, it could be challenged at any time.

19. The appellant's stance in impeaching the transfer of half share in the suit property through transfer letter dated 18.06.1977 has been oscillating like a pendulum. In his suit, the appellant pleads that the transfer of half share in the suit property in favour of respondent No.1 through transfer letter dated 18.06.1977 was due to fraud, collusion and evil designs. In total contrast to this, the appellant asserts that when the transfer of half share in the suit property in favour of respondent No.1 took place, permission from the Guardian Court under Section 29 of the Guardians and Wards Act, 1890 had not been obtained. It would obviously his father who would have had to obtain such permission. The appellant's failure to implead his father as a defendant in the suit is fatal to his stance that his father could not have sold the appellant's half share in the suit property without obtaining permission from the Guardian Court. Even otherwise, the argument of the learned counsel for the appellant that the appellant's father ought to have obtained permission from the Guardian Court for selling / transferring his

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minor son's share in the suit property has no foundation in the form of pleadings in the suit. In fact the appellant's case in his suit is that the fraud had been perpetrated in the transfer of the said share from his name on 18.06.1977.

20. PW-1, in his cross-examination, admitted that Mark-A (which is the application dated 16.12.1976 submitted to the CDA by Afzal Hussian for the transfer of the suit property in favour of the appellant and respondent No.1) bears the correct signatures of the appellant's father, Ghulam Rasool. PW-1, however, deposed that Ghulam Rasool's signatures on Mark-B (which is application dated 08.06.1977 submitted by the appellant's father on his behalf for the transfer of the appellant's half share in the suit property in favour of respondent No.1) are forged. This testimony is not worth the paper it is written on. I say this because PW-1 was not Ghulam Rasool's special attorney but that of the appellant. It was for Ghulam Rasool to have been brought as a witness to testify that his signatures on the application dated 08.06.1977 are forged and not for his son and / or his attorney.

21. The Record Keeper of the CDA (CW-1) was summoned by the learned Civil Court on the request of the appellant. CW-1 had deposed that as per the record maintained by the CDA, the suit property was transferred through letter dated 24.01.1977 (Exh.P4) in favour of the appellant and respondent No.1, and that since the appellant was a minor at that time his father had appeared before the CDA for the purposes of the transfer. Furthermore, CW-1 deposed that on 08.06.1977 (Exh.P5), the appellant's half share in the suit property was transferred in favour of respondent No.1 and that time as well the appellant's father had appeared before the CDA for the purposes of the transfer. Once this testimony came on record, it was for the appellant to have applied for the verification of the genuineness of his father's signatures on the application dated 08.06.1977 (Exh.P5) submitted to the CDA or to have come up with cogent evidence to establish that his father had never appeared before the CDA for the purpose of the transfer of the

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appellant's half share in the suit property. None of this was done by the appellant.

22. The learned Civil Court had held that the suit for declaration instituted by the appellant was hopelessly time barred as the appellant had gained majority on 20.10.1986 and it was held that it was from that date that the limitation would start to run. The appellant's stance is that limitation would not start to run from the date of majority but from the date when the appellant gained knowledge of the fraudulent transaction as to the transfer of his half share in the suit property to respondent No.1. In paragraph 5 of the suit, he pleads that regarding the said transfer dated 18.06.1977, he gained knowledge on 26.02.2004. He claims to be well aware of the half share in the suit property having been purchased by his father and transferred in his name on 24.01.1977 but pleads ignorance as to the transfer of the said share in favour of respondent No.1 on 18.06.1977 until 26.02.2004. The appellant cannot on the one hand claim lack of knowledge as to the said transaction and on the other keep his father well away from the proceedings in the suit. The learned Civil Court is correct in observing that the appellant did not produce any evidence to prove as to how he gained knowledge on 26.02.2004 as to the transfer of half share in the suit property in favour of respondent No.1.

23. I have also not been given any reason to fault the finding of the learned Civil Court that half share in the suit property was in fact purchased by the appellant's father since the appellant being an eight-year-old minor had no means to purchase such property. The learned Civil Court has correctly termed the appellant's father as the ostensible owner of such share.

24. Since the appellant has not been able to impeach the transaction for the transfer of half share in the suit property in favour of respondent No.1 through transfer letter dated 08.06.1977 (Exh.P5), respondent No.1 having become the owner of the entire suit property on the basis of such property was well within his

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rights to have transferred the same to Javed Akhtar on 07.05.1987 (Exh.P8).

25. In view of my findings aforementioned, I am of the opinion that there is no merit in this appeal, which is accordingly dismissed with costs throughout.

26. Vide order dated 13.05.2024, this Court had required the contesting parties to file their affidavit of costs. In compliance with the said order, respondent No.2-e, Muhammad Junaid Akhtar son of Javed Akhtar, has filed an affidavit deposing that the costs incurred in defending the appellant's suit and the instant appeal were Rs.5,15,000/-. This affidavit has not been objected to by the appellant and I have no reason to doubt the correctness of its contents. Therefore, the appellant shall pay the said costs to respondents No.2-a to 2-e within one month. In addition to this, for subjecting Javed Akhtar and his legal heirs to the acrimony of litigation over a period of two decades, the appellant shall also pay costs amounting to Rs.10,00,000/- to respondents No.2-a to 2-e under Section 35(1)(iii) of Code of Civil Procedure, 1908 as amended by the Costs of Litigation Act, 2017.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPERN COURT ON 21.06.2024.

(JUDGE)

APPROVED FOR REPORTING

Ahtesham

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