JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.84 of 2016
Muhammad Hanif Qureshi
Versus
Muhammad Ayub and another

Date of Hearing:	02.12.2019
Appellant by:	M/s Muhammad Ilyas Sheikh, Talha Ilyas Sheikh and Muhammad Javeid Iqbal Malik, Advocates
Respondents by:	Barrister Umer Aslam Khan and Tariq Mehmood Mirza, Advocates for respondent No.1.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellant, Muhammad Hanif Qureshi, impugns the judgment and decree dated 02.03.2016 passed by the Court of the learned Civil Judge, Islamabad, whereby suit for declaration, cancellation, recovery, permanent and mandatory injunction instituted by him against respondent No.1 (Muhammad Ayub) and respondent No.2 (Capital Development Authority) **("C.D.A.")** was dismissed.

2. Learned counsel for the appellant submitted that on 14.02.2007, an exchange agreement was executed between the appellant and Muhammad Saleem Bhatti **("Mr. Bhatti")** under which the appellant gave his property (i.e. House No.58 measuring 1,866 square yards, 6th Avenue, Main Embassy Road, G-6/3, Islamabad) to Mr. Bhatti in exchange for two properties, including the **suit property** (i.e. Plot No.28 measuring 777.78 square yards, Sector G-10 Markaz, Islamabad); that the difference in the value of the exchanged properties was Rs.3,50,00,000/- out of which Rs.15,00,000/- plus Rs.1,35,00,000/- was paid by the appellant to Mr. Bhatti through cheques and the remaining Rs.2,00,00,000/- was payable at the time of the transfer of the properties; that respondent No.1 was one of the two attesting witnesses of the said agreement; that through fraud played by the respondents, the suit property was transferred in the joint names of the appellant and respondent No.1; that the appellant did not know about the transfer in the joint names of the appellant and respondent No.1 until a few days before the institution of the suit; that respondent No.1

ignored the appellant's repeated demands for the transfer of the half share in the suit property in favour of the appellant; that although the appellant resides in France and is an educated person, he was unaware of the contents of the *"declaration of transferee"* (Exh.D/1); that the appellant had reposed faith and trust in respondent No.1, who was unlawfully claiming 50% share in the suit property; that respondent No.1 had also played fraud on the appellant by giving his address for correspondence to the C.D.A.; that the transfer letter dated 11.08.2007 (Exh.P/1) was sent on respondent No.1's address, and not to the appellant; that respondent No.1 had not produced the marginal witnesses of the agreement dated 12.03.2007 in order to prove its execution; that respondent No.1 had not paid any sale consideration for the suit property; and that the appellant had been suffering due to the fraud played on him by respondent No.1 as well as the C.D.A. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned judgment and decree to be set-aside.

3. On the other hand, learned counsel for respondent No.1 submitted that the appellant and respondent No.1 were business partners and had jointly invested in the Real Estate Business; that respondent No.1 purchased half share in the suit property; that possession of the suit property is with respondent No.1; that House No.58, G-6/3, Islamabad was not given in exchange but was sold to Mr. Bhatti through a registered sale deed for cash consideration; that the appellant and respondent No.1 were co-purchasers of the suit property; that the appellant had submitted an application for the suit property to be transferred jointly to the appellant and respondent No.1; that Mr. Bhatti, the original owner of the suit property, in his application (Exh.D.2/1) had applied to the C.D.A. for the transfer of the suit property in the joint names of the appellant and respondent No.1; that even though the suit property was transferred in the joint names of the appellant and respondent No.1, vide transfer letter dated 11.08.2007 (Exh.P/1), the appellant had filed the suit on 08.02.2012, i.e. more than four years after the issuance of the transfer letter; that the appellant had also executed an affidavit/undertaking along with respondent No.1 to indemnify the C.D.A. against any losses or damages that may be occasioned due to the transfer of the suit property jointly in their

names; that the appellant had instituted the suit only to obtain an undue benefit from respondent No.1; and that the impugned judgment and decree does not suffer from any legal infirmity so as to warrant interference by this Court. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

4. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

5. The suit property was originally owned by Mr. Bhatti. On 27.03.2007, he submitted an application (Exh.D.2/1) before the C.D.A. for the transfer of the suit property in favour of the appellant and respondent No.1. The appellant and respondent No.1 had also submitted a declaration (Exh.D/1) to the C.D.A. admitting the contents of Mr. Bhatti's application for the transfer of the suit property. They had also submitted bank draft dated 12.03.2007 for an amount of Rs.7,58,550/- in favour of the C.D.A. for the transfer of the suit property. The appellant and respondent No.1 jointly swore an affidavit undertaking to indemnify the C.D.A. against all losses and damages that may be occasioned by the transfer of the suit property in favour of the appellant and respondent No.1. It is not disputed that the appellant appeared before the C.D.A. along with respondent No.1 for the transfer of the suit property. Vide transfer letter dated 11.08.2007, the suit property was transferred jointly to the appellant and respondent No.1.

6. The appellant claims to be unaware of the transfer of the suit property in the joint names of the appellant and respondent No.1 until a few days before the institution of the suit. This is explicitly pleaded in paragraph 16 of the suit. In the suit, the appellant did not plead as to how he came to know about the transfer of the suit property in the joint names of the appellant and respondent No.1, and why he had remained unaware of the said transfer for years after the same had been made.

7. The appellant is seeking to undo the transfer of the 50% share in the suit property in favour of respondent No.1 by alleging *"professional breach of trust"* and *"fraud".* The appellant has given no particulars of fraud in the suit. It has only vaguely been pleaded that respondent No.1 had mentioned his own residential address as that of the appellant in

the records of the C.D.A. during the transfer process. Although the transfer letter (Exh.P/1) has been addressed to Mr. Bhatti, it has also been copied to the appellant and respondent No.1 showing their address to be House No.440, Street No.7, G-10/2, Islamabad. This is the same very address which was given by the appellant and respondent No.1 as their address in the *"declaration of transferee"* (Exh.D/1) as well as the affidavit/undertaking (Exh.D/2) sworn by the appellant and respondent No.1. In this view of the matter, the appellant cannot complain about the transfer letter being sent to an address that the appellant had himself provided in the above mentioned documents, i.e. Exh.D/1 and Exh.D/2. Additionally, this was the same very address which had been provided by Mr. Bhatti in his application form (Exh.D.2/1) as the appellant and respondent No.1's address. The appellant being an educated person cannot claim to be unaware about the contents of the said documents. No plausible explanation was presented by the learned counsel for the appellant as to why the appellant waited for more than four years before instituting the suit for *inter alia* the cancellation of the transfer letter dated 11.08.2007.

8. Since the appellant asserts that the suit property was only purchased by him from Mr. Bhatti and that respondent No.1 had not paid any sale consideration for the suit property, the person whose testimony would have been most crucial in determining whether the suit property was purchased jointly by the appellant and respondent No.1 or singly by the appellant would have been Mr. Bhatti. If there was any truth to the appellant's assertion that the suit property had only been purchased by him, he would have lost no time in producing Mr. Bhatti as a witness so that he could give testimony in consonance with the appellant's case. This, the appellant did not do. The appellant's failure to produce Mr. Bhatti would give rise to a presumption under Article 129(g) of the *Qanoon-e-Shahadat* Order, 1984 that the evidence which could be but was not produced, would, if produced, be unfavourable to the person withholding it.

9. The documentary evidence especially the *"declaration of transferee"* (Exh.D/1) and the affidavit/undertaking (Exh.D.2) are of crucial importance since these documents bearing the appellant's signatures show that the suit property was to be jointly transferred in

the names of the appellant and respondent No.1 as the purchasers of the suit property. The appellant appeared as PW.1 and admitted his signatures on the said documents. He, being an educated person, cannot claim to be ignorant as to the contents of these documents.

10. The transfer letter dated 11.08.2007 (Exh.P/1) can be equated with a title document. Since it is an official document, a presumption of correctness is attached to it. Heavy burden rested on the appellant to prove that the said document was obtained through fraud. As mentioned above, the fraud alleged to have been committed by respondent No.1 is not pleaded with particularity. The transfer letter when read with (i) the application for the transfer of allotment of the suit property (Exh.D.2/1) submitted by Mr. Bhatti, (ii) the *"declaration of transferee"* (Exh.D.1) and (iii) the affidavit/undertaking (Exh.D.2/2) submitted jointly by the appellant and respondent No.1 leads us to hold that the process leading to the issuance of the transfer letter dated 11.08.2007 (Exh.P/1) in favour of the appellant and respondent No.1 did not suffer from any illegality. Transfers of immovable properties made before the C.D.A. have to be given due sanctity and cannot be interfered with unless clear fraud is proved by the party impeaching such a transfer.

11. The contention of the learned counsel for the appellant that the transfer of the suit property should have been made only in his favour since the exchange agreement dated 14.02.2007 was executed only between the appellant and Mr. Bhatti is not sufficient to interfere with the impugned judgment and decree since the appellant failed to produce Mr. Bhatti or the second attesting witness (Muhammad Ansar S/o Muhammad Asghar) of the said agreement in order to prove that it was executed in accordance with the law.

12. Since we have been given no reason to interfere with the impugned judgment and decree dated 02.03.2016, the instant appeal is accordingly dismissed with no order as to costs.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

Qamar Khan **APPROVED FOR REPORTING**