

P L D 2019 Islamabad 544
Before Athar Minallah, C J
MUHAMMAD LAHRASIB---Petitioner
Versus

GHULAM AHMED CHAUDHRY through Legal Heirs and others--
Respondents

C.R. No.429 of 2015, decided on 13th May, 2019.

(a) Limitation Act (IX of 1908)---

---Preamble & S. 3---Limitation---Connotation---Fraud---Principle---Law of limitation is crucial for ensuring certainty as a matter of public policy so that there is an end to litigation and a litigant does not abuse process by pursuing matter for an infinite period of time---Law of limitation is to be strictly construed and that it cannot be interpreted as a mere technicality---Nature of said law is prescriptive and preventive and cannot be used to perpetuate a gain which has its origins in fraud because then it would vitiate most solemn transaction---Transaction based on fraud and forgery cannot be shielded or be given protection on touchstone of limitation. **(b) Constitution of Pakistan---**

---Art. 10-A---Due process of law---Principle---Under Art.10-A of the Constitution, observance of due process has become a guaranteed Fundamental Right---Any order in violation of principles of Art.10-A is not sustainable in law because such order is void and of no legal effect.

(c) Discretion---

---Discretion of court---Scope---Extent---Law does not recognize absolute and unfettered discretion and discretionary powers ought to be exercised in accordance with well-established principles---In exercise of discretionary powers a court is not empowered to act arbitrarily or in a mechanical manner, rather it is circumscribed by law, recognized norms of justice, fair play, equity, logic, rationality and reasonableness.

Khushi Muhammad through L.Rs. and others v. Mst. Fazal Bibi and others PLD 2016 SC 872; Khalid Humayun v. The NAB through D.G. Quetta and others PLD 2017 SC 194; Commisisoner Inland Revenue, Karachi v. Pakistan Beverages Limited Karachi 2018 PTD 1559 and Manager, Jammu and Kashmir State Property in Pakistan v. Khuda Yar and another PLD 1975 SC 678 rel.

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

---Ss. 8 & 39---Limitation Act (IX of 1908), S. 5 & Art. 168---Civil Procedure Code (V of 1908), O. IX, R. 8 & O. XLI, Rr. 9 & 17---Constitution of Pakistan, Art. 10-A---Appeal, restoration of---Limitation---Principles---Overseas Pakistani---Rights---Plaintiff was overseas Pakistani who sought cancellation of sale deed on plea of fraud and forgery and recovery of suit property from respondents---Suit was dismissed by appellate court and appeal filed by plaintiff was dismissed due to non-prosecution in year 2009---Plaintiff sought restoration of his appeal in year 2012 but same was

dismissed being barred by limitation--- Validity---As a class, 'overseas Pakistanis' were generally vulnerable and exposed to becoming victims of fraud and deceit---Plaintiff reposed trust and confidence in professional counsel engaged by him after exercising due care and caution and in event of latter's negligence, there was no effective accountability---'Overseas Pakistanis' were exposed to harm like other classes such as widows, infirm, elderly litigants, etc.---Appeal was a valuable right and its dismissal in a mechanical manner for want of prosecution was contrary to settled principles for exercising discretion vested under the statute---Article 10-A, Constitution, guaranteed Fundamental Right of due process, and was to be considered by court before dismissing appeal for want of prosecution---Unlike dismissal of suit under O. IX, R. 8, C.P.C. dismissal of appeal under O.XLI, R.17(1), C.P.C. required application of mind and pursuant thereto exercise of discretion in accordance with settled principles of law which must be reflected in the order---Order of dismissal of suit was passed in a mechanical manner without taking all relevant matters into consideration---High Court declared order in question to be void and without lawful authority as it was not an order sustainable in law---High Court in exercise of revisional jurisdiction set aside orders in question and remanded case to Lower Appellate Court for decision afresh--- Revision was allowed accordingly.

Hafiz Ahmed and others v. Civil Judge, Lahore and others PLD 2012 SC 400; Muhammad Ramzan and another v. Ghulam Safia and others 2010 YLR 2236; Ghulam Rasool and others v. Ahmed Yar and others 2006 SCMR 1458; Market Committee through Administrator/ Secretary v. Hajji Abdul Karim and 3 others PLD 2014 Sindh 624; Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others PLD 2015 SC 212; Atta Muhammad v. Maula Bakhsh and others 2007 SCMR 1446; Lahore Development Authority v. Mst. Sharifan Bibi and another PLD 2010 SC 705; Dur Muhammad and others v. Abdul Sattar PLD 2003 SC 828; Fazli Hakeem and another v. Secretary State and Frontier Regions Division Islamabad and others 2015 SCMR 795; Province of Sindh and others v. Ghulam Fareed and others 2015 PLC (C.S.) 151; State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others 2012 PLC (C.S.) 218; Haji Abdul Sattar and others v. Farooq Inayat and others 2013 SCMR 1493; Mst. Zulaikhan Bibi through LRs. and others v. Mst. Roshan Jan and others 2011 SCMR 986; Muhammad Younus Khan v. Government of N.-W.F.P. 1993 SCMR 618; Rehmatullah and others v. Saleh Khan and others 2007 SCMR 729; Muhammad Zafarullah through L.Rs. and others v. Muhammad Arif through Lrs. and others 2007 SCMR 589; The Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others PLD 1975 SC 331; Lal Din and another v. Muhammad Ibrahim 1993 SCMR 710; Government of Sindh through the Chief Secretary and others v. Khalil Ahmed and others 1994 SCMR 782; Bashir Ahmad v. Muhammad Sharif and 4 others PLD 2001 SC 228; Abdul Majeed and another v. Ghulam Haider and others 2001 SCMR 1254; Mst. Rehana Begum v. Mst. Shagufta 1995 SCMR 323; Shams ul Akbar Sadiq and another v. Project Manager SKD and others 2012 SCMR 1243; Khushi Muhammad through L.Rs. and others v. Mst. Fazal Bibi and others PLD 2016 SC 872; Khalid Humayun v. The NAB through D.G. Quetta and others PLD 2017 SC 194; Commisisoner Inland Revenue, Karachi v. Pakistan Beverages Limited Karachi 2018 PTD 1559; Manager, Jammu and Kashmir State Property in Pakistan v. Khuda Yar and

another PLD 1975 SC 678 and Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another 2012 SCMR 1235 ref.

Dr. Babar Awan and Tajjamul Hussain for Petitioner.

Muhammad Ishtiq Ahmed Raja for Respondents.

Date of hearing: 4th February, 2019.

JUDGMENT

ATHAR MINALLAH, C J.--Through this petition the petitioner, namely, Muhammad Lahrasib (hereinafter referred to as the "Petitioner") has assailed the order, dated 14-12-2013, passed by the learned Addl. District Judge, Islamabad (West), whereby a petition for the re admission of the appeal was dismissed.

2. The facts, in brief, are that the Petitioner's father, namely Akbar Hussain, son of Fateh Khan (hereinafter referred to as the "Predecessor-in-Interest"), purchased plot No. 31, street No. 32, sector F-6/1, Islamabad (hereinafter referred to as the "Property") and which was transferred in his name by the Capital Development Authority (hereinafter referred to as the "Authority") vide letter, dated 22.11.1972. The Predecessor-in-Interest constructed a house and left for the United Kingdom. The Predecessor-in-Interest, an 'Overseas Pakistani', had settled in the United Kingdom and the Property was looked after by one of his nephews, namely, Muhammad Banaras. The latter had rented out the Property and had also received rent in advance. The nephew also went abroad in connection with his employment and on his return in 1977 he discovered that the Property was in possession of Ghulam Ahmed Chaudhry (hereinafter referred to as the "Predecessor-in-Interest of the respondents"). The Predecessor-in-Interest, who was in the United Kingdom, was informed and he came to Pakistan and made inquiries from the Authority. The Authority informed him that, pursuant to an application submitted by him, the Property was transferred in the name of Tassaduq Hussain vide letter dated 02-04-1977. In the documents the latter was shown as the son of the Predecessor-in-Interest. The said Tassaduq Hussain transferred the Property in the name of the Predecessor-in-Interest of the respondents vide letter dated 13-05-1977 i.e. after about a month of the transfer in his name. It appears from the record that the Predecessor-in-Interest had not visited Pakistan when the Property was transferred in the name of Tassadaq Hussain and later the Predecessor-in-Interest of the respondents. The Predecessor-in-Interest filed a written complaint at the Police Station, Kohsar and pursuant thereto a criminal case was registered. Simultaneously, a suit was also filed on 20-01-1979, seeking cancellation of documents, possession of the Property and recovery of money. It was explicitly asserted in the plaint that the transfer in the name of Tasadaq Hussain was based on fraud because he was neither his son nor was an application filed with the Authority. The suit was contested by the Predecessor-in-Interest of the respondents by filing a written statement. The learned trial Court framed seven issues out of the divergent pleadings. After the recording of evidence and affording an opportunity of hearing to the parties, the learned trial Court, vide judgment and decree, dated 28-07-1987, dismissed the suit of the Predecessor-in-Interest on the sole ground that the defendant was a bona fide purchaser. The former preferred Regular First Appeal No. 27/1987, which was allowed by the learned Lahore High Court, Rawalpindi Bench vide

judgment, dated 07-06-2001, and resultantly the impugned judgment and decree was set aside and the matter was remanded to the learned trial Court for deciding the suit afresh, after impleading Tassaduq Hussain as one of the defendants. The amended plaint was accordingly filed by the Predecessor-in-Interest. The judgment of the learned Lahore High Court, dated 07-06-2001, was assailed before the august Supreme Court by the Predecessor-in-Interest of the respondents through C.P.L.A. No. 2391/2001. It is pertinent to note that during the pendency of the proceedings the Predecessor-in-Interest passed away and, therefore, his legal heirs i.e. Ms. Raheem Jan and Muhammad Lahrasib, his wife and son, respectively, were impleaded in the suit. The apex Court, vide judgment dated 18-04-2002, upheld the judgment of the learned Lahore High Court and disposed of the petition by directing the learned trial Court to dispose of the suit within a period of four months. The suit of the Predecessor-in-Interest was again dismissed by the learned trial Court vide judgment, dated 14-12-2002. It is important to note that Tassaduq Hussain, son of 'unknown', who was stated to be a resident of village 'Sehali Umer Khan', was impleaded as one of the defendants. The latter could not be traced nor could the Predecessor-in-Interest of the respondents or the Authority produce him before the Court. Even the police officials, who were investigating the case pursuant to the complaint, could not find a clue about the existence of Tassadaq Hussain. The Petitioner and his mother preferred an appeal before the learned Lahore High Court by filing Regular First Appeal No.167/2003, which was later transferred to the learned District Judge, Islamabad. The petitioner, namely Mohammad Lahrasib and his mother were also 'Overseas Pakistanis' and settled in the United Kingdom. They had exercised utmost care and caution by engaging the professional services of a senior counsel enrolled as an advocate of the Supreme Court to pursue the litigation on their behalf. The appeal was, however, dismissed for want of prosecution vide order, dated 08-06-2009. The petitioner, namely Muhammad Lahrasib, travelled to Islamabad in 2012 and on making inquiries he was astonished to know that the appeal was dismissed for non-prosecution in 2009. The latter had not received any notice nor was he informed by his counsel that the appeal had been dismissed for want of prosecution. A petition under Order XLI, Rule 19 of the Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C.") along with an application under section 5 of the Limitation Act 1908 (hereinafter referred to as the "Act of 1908") was filed for restoration of the appeal and condoning the delay. The said petition was dismissed by the learned Additional District Judge, Islamabad vide the impugned order, dated 14-12-2013. The Petitioner is, therefore, seeking the setting aside of the said impugned order, dated 14-12-2013, through the instant petition.

3. The learned Counsel for the petitioner has contended that; the Predecessor-in-Interest had purchased the Property and thereafter had been living in the United Kingdom; he was informed that the Predecessor-in-Interest of the respondents was in illegal possession; the Predecessor-in-Interest was a victim of fraud because the Petitioner was his only son; the Predecessor-in-Interest had never visited the offices of the Authority for transfer of the Property; on coming to know of the fraud, committed by a person named Tassaduq Hussain in connivance with the officials of the Authority and the Predecessor-in-Interest of the respondents, a suit was promptly instituted; a written application was also filed for registering a criminal case; the Predecessor-in-Interest and the Petitioner, being expatriate overseas Pakistanis, are

settled in the United Kingdom; they had reposed trust and confidence in a professional counsel who was engaged by them to pursue the litigation; the person who had posed as son of the Predecessor-in-Interest had committed fraud and since he had used a fake NIC he never appeared nor could be traced; the respondents/defendants could not produce the said impersonator either; the evidence brought on record also established that Tassaduq Hussain had used a fake NIC at the time of the fraudulent transfer of the Property; the defendants/respondents could not prove that the said Tassaduq Hussain was real and the son of the Predecessor-in-Interest; the Predecessor-in-Interest was a victim of fraud and, therefore, the latter could not have been non-suited on the basis of limitation; the learned appellate Court has mis-interpreted the provisions of Article 168 of the Act of 1908; vested rights cannot be defeated in a perfunctory manner.

4. The learned Counsel for the respondents, on the other hand, has argued that; the instant petition is barred by time; the petition was filed on 14-12-2013 and the office had raised objections; the civil revision was subsequently re filed on 03-12-2014; the attested copies were received on 31-03- 2014, while the petition was filed on 03-12-2014 i.e. after a lapse of 247 days; after filing an application seeking condonation of delay the petition was numbered; section 5 of the Act of 1908 is not attracted in case of a petition filed under section 115 of the C.P.C.; reliance has been placed on the case titled "Hafiz Ahmed and others v. Civil Judge, Lahore and others " [PLD 2012 SC 400]; the appeal was dismissed on 08- 06-2009 and the petition for restoration was filed on 19-05- 2012; the limitation period under Article 168 of the Act of 1908 is thirty days and thus it was barred because of having been filed after 1076 days; reliance has been placed on the case titled "Muhammad Ramzan and another v. Ghulam Safia and others" [2010 YLR 2236]; the appeal was also barred by time; the ground taken in the application for condonation of delay was to the effect that the Counsel had not provided information and such ground is not tenable in law; reliance has been placed on the case titled "Ghulam Rasool and others v. Ahmed Yar and others" [2006 SCMR 1458]; limitation is not a mere technicality but amounts to accrual of a valuable right to the opposite party and the same cannot be taken away in the absence of strong and convincing reasons; reliance has been placed on the case titled "Market Committee through Administrator/Secretary v. Hajji Abdul Karim and 3 others" [PLD 2014 Sindh 624].

5. The learned Counsel have been heard and the record perused with their able assistance.

6. The facts and circumstances of this case are peculiar. It also highlights the hardship of the parties to this protracted litigation, particularly an 'Overseas Pakistani' who, despite taking utmost care in engaging a professional counsel, had to face and endure the ordeal which had commenced almost three decades ago. In this case the Property purchased by the Predecessor-in-Interest was transferred by the Authority in the name of one Tassadaq Hussain, who claimed to be the son of the former, and in less than five weeks it was again transferred in the name of the Predecessor-in-Interest of the respondents. As soon as the Predecessor-in-Interest came to know about the transfer, he appears to have taken all the precautionary measures which a prudent and vigilant person would have taken. He filed a criminal complaint alleging fraud and

simultaneously instituted a suit. It appears from the record that the police officials had conducted investigations but could not find the person named Tassadaq Hussain, who had presented himself before the Authority as son of the Predecessor-in-Interest. The former was impleaded as one of the defendants but he remained a mystery. The Authority and the Predecessor-in Interest of the respondents also failed in establishing his existence despite the fact that the onus to prove issue number 4 was on them. The Predecessor-in-Interest passed away after pursuing the proceedings relating to the suit for almost two decades. His legal heirs, his widow and the only surviving son, namely Mohammad Lehrasib, stepped into his shoes and reposed trust and confidence in a senior professional counsel for pursuing the litigation on their behalf. The learned trial Court had recorded evidence and twice the suit was dismissed on the sole ground that the Predecessor-in-Interest of the respondents was held to be a bona fide purchaser. The appeal preferred by the petitioner was dismissed for want of prosecution because the learned counsel, who was engaged after exercising due care and caution, did not pursue the appeal because he had taken oath as member of the Cabinet. Moreover, it happens to be a reality that there is no effective accountability for the negligence of a counsel, though the law provides that the litigant who has been wronged may either file a complaint or sue for damages. An "Overseas Pakistani", having no one to pursue his or her litigation in Pakistan, has no other option except for relying on the counsel who is engaged after exercising due care. It is ironic that a large number of litigation is pending in the courts wherein "Overseas Pakistanis" have alleged to have been deprived of their properties through fraud and deceit. An "Overseas Pakistani" is indeed vulnerable and exposed to fraud and remains at the mercy of those in whom he or she has reposed trust and confidence. Likewise, the Predecessor-in-Interest of the respondent, despite his advanced age, also had to go through the rigors and expense of a long drawn legal battle. Should not courts, while dismissing an appeal, exercise extraordinary care when dealing with cases relating to vulnerable classes such as widows, orphans, infirm and old aged litigants, "Overseas Pakistanis" etc who solely rely on the professional conduct of their counsels? This is more relevant in the event of dismissing an appeal for want of prosecution, as has happened in the instant case. Is it not the duty of the Court to exercise care and precaution before dismissing an appeal for want of prosecution? Does the fundamental right guaranteed under Article 10 A of the Constitution of the Islamic Republic of Pakistan, 1973, inserted through the eighteenth amendment, cast a duty on the Court to put the litigant or the latter's authorized counsel to notice before dismissing the appeal on the ground of want of prosecution? In the instant case, the appeal was preferred against a judgment and decree handed down after the recording of evidence and, therefore, the appellate Court could have considered, after an application of the mind, whether in the facts and circumstances notice should have been served. It also needs to be examined whether the discretion vested in an appellate court to dismiss an appeal under sub-rule (1) of rule 17 of Order XLI of C.P.C. is absolute and unfettered, thus open to be exercised mechanically. In the instant case the appeal was dismissed for want of prosecution and the petition for re-admission/restoration and the application for condoning the delay were dismissed because, in the opinion of the learned trial Court, they were not filed within the period prescribed under Article 168 of the Act of 1908. In order to answer the questions raised in the instant petition it

would be beneficial to examine the precedent law regarding limitation and factors related therewith.

7. Article 168 of the Act of 1908 prescribes the limitation in case of dismissal of appeal for want of prosecution. The learned appellate court, in the case in hand, had dismissed the petition for re-admission of the appeal without deciding the application seeking delay and on the sole ground that the limitation under Article 168 runs from the date of dismissal of the appeal rather than knowledge. What is the nature and object of the law of limitation? The august Supreme Court in the case titled "Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others" [PLD 2015 SC 212] has dealt with in detail the purpose, object and significance of the law of limitation. It has been observed that conceptually the law of limitation is founded upon public policy and State interest. The observance of limitation has been declared as vital for an orderly and organized society and the people at large. If no time constraints and limits are prescribed for pursuing a cause of action and for seeking reliefs/remedies relating thereto and a litigant is allowed to sue for the redressal of his/her grievance for an infinite and unlimited period of time then it would inevitably affect the discipline and structure of the judicial process and processes of the State. It has been held that the law of limitation must be strictly construed and applied in its letter and spirit and that it must not be interpreted as being merely a technicality and that too of a procedural nature. While referring to section 3 of the Act of 1908 it has been held that it is obligatory upon the Courts to dismiss a case/lis if it is found to be barred by the time prescribed under the law. The law of limitation has been declared as prescriptive and preventive in nature, meant to serve as a major deterrence against disorder in the society. The earlier judgment rendered in the case titled "Atta Muhammad v. Maula Bakhsh and others" [2007 SCMR 1446] was reaffirmed wherein the apex Court has held and observed that public interest requires that there should be an end to litigation and that the law of limitation provides an element of certainty in the conduct of human affairs. The august Supreme Court has further held as follows:

"Granted, that law of limitation ensures order in the society but it cannot be used as a bulwark to perpetuate a gain having its origin in fraud which not only vitiates the most solemn transaction but the very fabric of the society. Entry of order invariably necessitates the ouster of fraud. Shielding a transaction based on fraud and forgery would be more chaotic and disorderly than undoing it. It is essentially in this context that this Court in the cases of "Abdul Majeed and 6 others v. Muhammad Subhan and 2 others", "Muhammad Akbar Shah v. Muhammad Yusuf Shah and others", "Mst. Hameeda Begum v. Mst. Murad Begum" and "Abdul Rehman and others v. Ghulam Muhammad through L.Rs and others" (supra) held that limitation cannot shield a transaction having no effect and existence on account of fraud and forgery. The respondent thus cannot be non-suited on account of his failure to institute a suit for declaration or for cancellation of documents within the time provided by the statute. I, therefore, don't think a case for interference with the impugned judgment is made out.'

8. In the case titled "Lahore Development Authority v. Mst. Sharifan Bibi and another" [PLD 2010 SC 705] the august Supreme Court has observed and held that the

law of limitation could not be considered merely a formality and it is required to be observed strictly, being mandatory in nature. It has been further held that the purpose of the law of limitation is to help the vigilant and not the indolent and that a helping hand might not be extended to a litigant who goes into deep slumber and who is forgetful of his or her rights.

9. The apex Court in the case titled "Dur Muhammad and others v. Abdul Sattar" [PLD 2003 SC 828] has observed that it is a settled position that limitation in an adversarial system of justice does create a right in favour of one out of the two parties, therefore, it is an onerous duty of the Courts to construe relevant provisions of law on the subject strictly and to refrain from recording factual findings on the question of limitation loosely.

10. In the case titled "Fazli Hakeem and another v. Secretary State and Frontier Regions Division Islamabad and others" [2015 SCMR 795] the august Supreme Court has eloquently held as follows:

"Even otherwise, the Courts of law are not supposed to perpetuate what is unjust and unfair by exploring explanation for an act which is prima facie against law and thus void. They should rather explore ways and means for undoing what is unfair and unjust. Even the question of limitation, if at all, created any impediment in the fair adjudication of the case, has to be looked from such angle of vision. When considered in this background.'

11. In the case titled "Province of Sindh and others v. Ghulam Fareed and others" [2015 PLC (C.S) 151] the august Supreme Court concluded that the orders impugned before it were void and without lawful authority and, therefore, bar of limitation was neither attracted nor would a period of limitation run against such orders.

12. It has been observed and held in the case titled "State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others" [2012 PLC (C.S) 218] that if it is found by the court that the case is hit by the doctrine of laches/limitation then although the right would remain intact, it would not remain enforceable i.e. the grievance would no more be open to be redressed because a right would have accrued in favour of the opposite party.

13. The question of limitation is a mixed question of law and facts and in this regard reliance is placed on the case titled "Haji Abdul Sattar and others v. Farooq Inayat and others" [2013 SCMR 1493]. The august Supreme Court in the case titled "Mst. Zulaikhan Bibi through LRs and others v. Mst. Roshan Jan and others" [2011 SCMR 986] affirmed the law enunciated in the earlier judgment rendered in the case titled "Muhammad Younas Khan v. Government of N.-W.F.P" [1993 SCMR 618] affirming the settled principle of law that fraud vitiates all proceedings. In the latter judgment, the august Supreme Court has observed and held that there is no cavil to the proposition that all instruments, deeds, judgments or decrees obtained through fraud are a nullity in the eye of law and can be questioned at any time, so much so that such documents can be ignored altogether by any Court of law.

14. In the case titled "Rehmatullah and others v. Saleh Khan and others" [2007 SCMR 729] the august Supreme Court has held that limitation would not run against

a void order and that fraud vitiates even solemn orders. Reliance is also placed on the cases titled "Muhammad Zafarullah through L.Rs. and others v. Muhammad Arif through L.Rs. and others" [2007 SCMR 589] and "The Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others" [PLD 1975 SC 331].

15. In the case titled "Lal Din and another v. Muhammad Ibrahim" [1993 SCMR 710] the august Supreme Court has reiterated that fraud vitiates the most solemn proceedings and that no party should be allowed to take advantage of his/her fraud. Likewise, in the case titled "Muhammad Younas Khan and 12 others v. Government of N.W.F.P. through Secretary, Forest and Agriculture, Peshawar and others" [1993 SCMR 618] the august Supreme Court has emphasized that any act, instrument or deed which is based on fraud is a nullity in the eye of the law and can be questioned at any time.

16. In the case titled "Government of Sindh through the Chief Secretary and others v. Khalil Ahmed and others" [1994 SCMR 782] the august Supreme Court has held that the bar of limitation would not be attracted in the case of transfer of a property through deceit and without the knowledge of the owner.

17. In the case titled "Bashir Ahmad v. Muhammad Sharif and 4 others" [PLD 2001 SC 228] the august Supreme Court has held that mistaken advice of a counsel would not be a sufficient cause for condonation of delay and that the only remedy for a client due to gross negligence of his counsel was to sue for damages for the loss suffered on account of the negligent act.

18. In the case titled "Abdul Majeed and another v. Ghulam Haider and others" [2001 SCMR 1254] the apex Court has observed and held that ill advice given by a lawyer could not be treated as a valid ground for extension of time of limitation and that where the litigant and the counsel had acted with due care and caution and their conduct did not appear to be negligent then institution of an appeal in a wrong forum could constitute a sufficient cause within the meaning of section 5 of the Act of 1908.

19. The august Supreme Court in the case titled "Mst. Rehana Begum v. Mst. Shagufta" [1995 SCMR 323] reiterated the principle and law that a party who seeks condonation of delay in respect of limitation period is bound to show that the lis was prosecuted diligently and that there was no lapse or negligence on his/her part or on the part of the agent and that negligence on the part of a counsel did not furnish a ground for condonation. However, in the facts and circumstances of the case, since the litigant was a widow, therefore, the delay was condoned because of her vulnerability to pursue the litigation.

20. Lastly, reference may be made to the law enunciated in the case titled "Shams Ul Akbar Sadiq and another v. Project Manager SKD and others" [2012 SCMR 1243] which related to dismissal of a regular first appeal for want of prosecution and its re-admission because, after the transfer from another High Court, notice had not been served either on the appellant or the latter's counsel. The august Supreme Court, in the facts and circumstances of the case held that, since the requirements of due process had not been complied with, therefore, the dismissal order was not sustainable and that, though the case fell within the ambit of Article 168 of the Act of 1908, yet it was

found to be a fit case for condoning the delay since the dismissal order was void and of no legal effect.

21. The upshot of the above discussion is that the law of limitation is crucial for ensuring certainty as a matter of public policy so that there is an end to litigation and a litigant does not abuse the process by pursuing the matter for an infinite period of time. There is judicial consensus that the law of limitation is to be strictly construed and that it cannot be interpreted as a mere technicality. Its nature is prescriptive and preventive. Nonetheless, it cannot be used to perpetuate a gain which has its origins in fraud because then it would vitiate the most solemn transaction. It is also a principle founded on public policy that a transaction based on fraud and forgery cannot be shielded or be given protection on the touchstone of limitation. The law of limitation favours the vigilant and not the indolent. While dealing with the question of limitation it is the duty of the court not to lose sight of the principle that an act which is unjust, unfair, against law and thus void cannot be allowed to be perpetuated and ways and means ought to be explored for its undoing. Orders that are void and without lawful authority do not attract the period of limitation. The law of limitation is generally not attracted when transfer of property is based on deceit and has taken effect without the knowledge of its actual owner. After the insertion of Article 10-A in the Constitution, observance of due process has become a guaranteed fundamental right and thus an order in violation of its principles is not sustainable in law because it is void and of no legal effect and such an order, even within the ambit of Article 168 of the Act of 1908, is a fit case for condoning the delay.

22. In the case in hand the appeal was dismissed for want of prosecution under sub-rule 1 of rule 17 of Order XLI of the C.P.C. The distinction between sub-rules 1 and 2 is that the legislature has used the expression 'shall' in the latter and 'may' in the former. It, therefore, vests a discretion in the court and like any other discretion it has to be exercised in accordance with the settled principles. The law does not recognize absolute and unfettered discretion. Discretionary powers ought to be exercised in accordance with well established principles. In exercise of discretionary powers a court is not empowered to act arbitrarily or in a mechanical manner, rather it is circumscribed by the law, recognized norms of justice, fair play, equity, logic, rationality and reasonableness. Reliance is placed on "Khushi Muhammad through L.Rs. and others v. Mst. Fazal Bibi and others" [PLD 2016 SC 872], "Khalid Humayun v. The NAB through D.G. Quetta and others" [PLD 2017 SC 194] and "Commissioner Inland Revenue, Karachi v. Pakistan Beverages Limited, Karachi" [2018 PTD 1559]. The august Supreme Court in the case titled "Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar and another" [PLD 1975 SC 678] has held that discretion vested in a court under rule 17(1) of Order XLI cannot be exercised in a mechanical or perfunctory manner. There has to be an application of mind and it ought to be manifested in the order of dismissal. Depending on the circumstances in each case, observing the requirements of due process may also be necessary before the dismissal of an appeal under rule 17(1) of Order XLI of C.P.C.

23. I will finally advert to the facts of this case so that they can be examined on the touch stone of the principles and law highlighted above. The late Predecessor-in-Interest was an "Overseas Pakistani" and so is his son i.e the petitioner. They had

engaged the professional services of a senior counsel enrolled as an advocate of the Supreme Court after exercising due care and caution. The latter was sworn in as a member of the Cabinet and was holding the portfolio of Minister of Law when the appeal was dismissed for non-prosecution. This was public knowledge. The Predecessor-in-Interest or the petitioner had not authorized any other person to pursue the proceedings before the appellate court. It is an undisputed fact that in a large number of litigations "Overseas Pakistanis" allege having been deprived of their properties through deceit and fraud. As a class the "Overseas Pakistanis" are generally vulnerable and exposed to becoming victims of fraud and deceit. They repose trust and confidence in professional counsel engaged by them after exercising due care and caution and, in the event of the latter's negligence, there is no effective accountability. The "Overseas Pakistanis", therefore, are vulnerable and exposed to harm like other classes such as widows, the infirm, elderly litigants etc. An appeal is a valuable right and, therefore, its dismissal in a mechanical manner for want of prosecution would definitely be contrary to the settled principles of exercising discretion vested under the statute. After the insertion of Article 10-A in the Constitution, guaranteeing the fundamental right of due process, it has become one of the factors to be considered by a court before dismissing an appeal for want of prosecution. All these relevant factors were required to have been taken into consideration by the learned trial court before passing the impugned order, dated 08-06-2009. The learned Court obviously could not have been oblivious regarding these factors, particularly that the petitioner and the Predecessor-in-Interest were "Overseas Pakistanis" and living abroad while the professional counsel engaged by them had been sworn in as member of the Cabinet. It was the duty of the learned appellate court to have perused the record and, after application of the mind, formed an opinion whether in the facts and circumstances of the case, observance of principles of natural justice and due process were warranted before dismissing an appeal for want of prosecution. The discretion vested under rule 17(1) of Order XLI of C.P.C. necessarily has to be exercised by taking all relevant matters into consideration, particularly ascertaining whether the appellant or the latter's counsel should be put to notice. Keeping in view the vulnerability of the "Overseas Pakistanis" and the probability of becoming a victim of negligence of the authorized professional counsels, as a rule of prudence it would generally be required to put them to notice unless, in the facts and circumstances of a particular case, the learned court forms a different opinion. Nonetheless, all these factors have to be considered by the learned appellate court, failing which the order for dismissal of an appeal, being mechanical in nature, would be void and without lawful authority. Unlike dismissal of a suit under rule 8 of Order IX, dismissal of an appeal under rule 17(1) of Order XLI requires application of mind and, pursuant thereto, exercise of discretion in accordance with the settled principles of law, which must be reflected from the order.

24. In view of the above discussion, a plain reading of the order, dated 08-06-2009, unambiguously shows that it was passed in a mechanical manner without taking all the relevant matters into consideration. It was, therefore, not an order sustainable in law and thus void and without lawful authority. Consequently, on the touchstone of the law enunciated by the apex Court in the case of "Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another" [2012 SCMR 1235], it was a fit case for condoning

the delay and resultantly the impugned order, dated 14-12-2013, was also illegal, void and without lawful authority. In the facts and circumstances of the instant case, observance of the principles of due process was warranted. The learned counsel for the respondent has raised an objection regarding maintainability of the instant petition on the basis of limitation. There is no cavil to the proposition that this Court is vested with suo motu powers and jurisdiction under section 115 of the C.P.C., which are not constrained or fettered by limitation. This Court, in exercise of the said powers has, therefore, assumed jurisdiction.

25. For the above reasons, in exercise of the powers conferred under section 115 of the C.P.C., orders dated 08-06- 2009 and 14.12.2013 are hereby set aside. The appeal preferred by the petitioner will be treated as pending and the learned appellate Court is expected to afford an opportunity of hearing to the parties and decide the appeal at the earliest, preferably within ninety days from the date of receiving a certified copy of this judgment.

MH/71/Isl.

Case remanded.