Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No. 56505/2022

Farrukh Shahzad Versus Maqbool Hussain Awan.

JUDGMENT

Date of hearing: 04.04.2024.

Petitioners by: Mr. Ali Masood Hayat, Advocate.

Respondents by: Ch. Abdul Majeed, Advocate for the respondent in this petition assisted by Ch. Ahsan-ul-Haq and Ch. Zahid Majeed, Advocates.

Nemo for respondents No.2 to 5 in Civil Revisions No.58046/2022, & 58055/2022 (proceeded against *ex-parte vide* order dated 01.04.2024).

Shujaat Ali Khan, J: - Through this single judgment, I intend to decide Civil Revision No. 56505/2022 **("this petition")** as well as Civil Revision Petitions No. 58038/2022, 58046/2022 and 58055/2022 **("connected Civil Revisions")** having commonality of law and facts.

2. Tersely, the factual background of this petition is that Maqbool Hussain Awan (hereinafter to be referred as **respondent No.1**) filed

suit against the petitioner-defendant (Farrukh Shehzad Malik) seeking declaration to the effect that he was owner-in-possession of the properties mentioned in the heading of the plaint whereas Mutations No.2476, 2489, 2894 and 2858 were got attested in favour of the petitioner-defendant as *Benamidar*. It was also prayed that petitioner-defendant be restrained to further alienate the suit properties and to interfere in his possession. Initially, the suit filed by respondent No.1 was decreed by the learned Civil Judge Class-II, Faisalabad *vide ex-parte* judgment and decree, dated 02.04.2016, however, on the application of the petitioner-defendant the *ex-parte* judgment and decree was set aside *vide* order, dated 17.09.2018 and the petitioner-defendant was allowed to join the proceedings of the suit. After recording evidence of the parties and hearing their respective arguments, the learned Civil Judge, 1st Class, Faisalabad (**learned Trial Court)** dismissed the suit through judgment and decree dated 12.12.2020 against which respondent No.1 filed appeal in terms of section 96 CPC. Alongwith the said appeal, respondent No.1 also filed an application seeking permission to bring on record certain documents in the shape of additional evidence. The learned Additional District Judge, Faisalabad (**the learned Appellate Court**) *vide* judgment, dated 08.09.2022, not only accepted the application of respondent No.1 for placing on record certain documents but also

allowed the appeal and while reversing the findings of the learned Trial Court decreed the suit of respondent No.1.

3. The facts, as gleaned out from Civil Revision No.58038/2022 (one of the connected Civil Revision Petitions), are that respondent No.1 filed suit against the petitioner-defendant (Amir Ishaq Malik) seeking declaration to the effect that he was owner-in-possession of the properties mentioned in the heading of the plaint whereas Mutations No.2888, 2893, 2900, 2940, 2477 and 2991 were got attested in favour of the petitioner-defendant as *Benamidar*. It was also prayed that petitioner-defendant be restrained to further alienate the suit properties and to interfere in his possession. Initially, the suit filed by respondent No.1 was decreed by the learned Civil Judge, Faisalabad *vide ex-parte* judgment and decree, dated 02.04.2016, however, the *ex-parte* judgment and decree was set aside *vide* order, dated 17.09.2018 and the petitioner-defendant was allowed to join the proceedings of the suit. After recording evidence of the parties and hearing their respective contentions, the learned Trial Court dismissed the suit through judgment and decree, dated 12.12.2020, against which respondent No.1 filed appeal under section 96 CPC. Alongwith the said appeal, respondent No.1 also filed an application seeking permission to bring on record certain documents in the shape of additional evidence. The learned Appellate Court *vide* judgment,

dated 08.09.2022 not only accepted the application of respondent No.1 for placing on record certain documents but also allowed the appeal and while reversing the findings of the learned Trial Court decreed the suit of respondent No.1.

4. Insofar as factual edifice of connected Civil Revision No.58046/2022 is concerned, respondent No.1 filed suit against the petitioner-defendant (Zain Malik) seeking declaration to the effect that he was owner-in-possession of the properties mentioned in the heading of the plaint whereas Mutations No.2488, 2859, 2892, 2947, 2973, 2989, 2985, and 2977 were got attested in favour of the petitioner-defendant as *Benamidar*. It was also prayed that petitioner-defendant be permanently restrained to further alienate the suit properties and to interfere in his possession. Initially, the suit filed by respondent No.1 was decreed by the learned Civil Judge, Faisalabad *vide ex-parte* judgment and decree, dated 02.04.2016. Respondent No.1, in the first instance, got transferred the suit land in his name in execution of *ex-parte* judgment and decree and subsequently transferred the same in the name of respondents No.2 to 5, as a result they were impleaded as party in the proceedings. Later on, the *ex-parte* judgment and decree was set aside by the learned Civil Judge *vide* order, dated 17.09.2018 and the petitioner-defendant was allowed to join the proceedings of the suit. After recording evidence of the

parties and hearing their respective pleas, the learned Trial Court dismissed the suit through judgment and decree, dated 12.12.2020, against which respondent No.1 filed appeal under section 96 CPC. Alongwith the said appeal, respondent No.1 also filed an application seeking permission to bring on record certain documents in the shape of additional evidence. The learned Appellate Court *vide* judgment & decree, dated 08.09.2022, not only accepted the application of respondent No.1 for placing on record certain documents as additional evidence but also allowed the appeal and while reversing the findings of the trial court decreed the suit of respondent No.1.

5. Now coming to factual narration of connected Civil Revision No.58055/2022, I have noted that respondent No.1 filed suit against the petitioner-defendant (Salman Ahmed Khan) seeking declaration to the effect that he was owner-in-possession of the properties mentioned in the heading of the plaint whereas Mutations No.2884, 2970, 2482 and 2493 were got attested in favour of the petitioner-defendant as *Benamidar*. It was also prayed that petitioner-defendant be permanently restrained to further alienate the suit properties and to interfere in his possession. Initially, the suit filed by respondent No.1 was decreed by the learned Civil Judge, Faisalabad *vide ex-parte* judgment and decree, dated 02.04.2016. Respondent No.1, firstly got transferred the suit land in his name in execution of *ex-parte* judgment

and decree and subsequently transferred the same in the name of respondents No.2 to 5, as a result they were impleaded as party in the proceedings. Later on, the *ex-parte* judgment and decree was set aside by the learned Civil Judge *vide* order, dated 17.09.2018 and the petitioner-defendant was allowed to join the proceedings of the suit. After recording evidence of the parties and hearing their respective contentions, the learned Trial Court dismissed the suit through judgment and decree, dated 12.12.2020, against which respondent No.1 filed appeal. Alongwith the said appeal, respondent No.1 also filed an application seeking permission to bring on record certain documents in the shape of additional evidence. The learned Appellate Court *vide* judgment & decree, dated 08.09.2022, not only accepted the application of respondent No.1 for placing on record certain documents but also allowed the appeal and while reversing the findings of the trial court decreed the suit of respondent No.1.

6. The submissions made by the learned counsel for the petitioners-defendants at the bar and those contained in the paper-book, submitted by him during arguments, can be summed up in the words that that the plaints of the suits filed by respondent No.1 were deficient in respect of necessary details which fact escaped notice of learned Appellate Court hence, its decisions are not sustainable**;** that applications filed by respondent No.1 under Order XLI rule 27 CPC

could not be allowed as no party can be permitted to make up deficiencies in its case, under the garb of additional evidence, at the appellate stage; that well-reasoned judgment of the learned Trial Court was reversed by the learned Appellate Court in a casual manner; that when the documents were neither exhibited before the learned Appellate Court, as per law, nor the petitioners-defendants were allowed to impeach the authenticity of the said documents, same could not be read in evidence while deciding the appeals filed by respondent No.1**;** that suits of respondent No.1 could not be decreed in presence of equivocal statement of PW-1 that he did not know the petitioners-defendants; that the motive for *benami* transactions, given by respondent No.1 in his plaints, was the tax-evasion, which being an offence, could not be treated as valid one; that documents tendered during statement of the counsel cannot be read while deciding *lis* between the parties; that the learned Appellate Court failed to appreciate that necessary ingredients of a *benami* transaction were missing in the suits filed by respondent No.1, thus, his appeals could not be allowed; that when the agreements, express or implied, between petitioners-defendants and respondent No.1 regarding *benami* transaction were not proved, the suits of the latter could not be decreed; that the learned Appellate Court failed to appreciate that the evidence led by petitioners-defendants was sufficient to believe that

they were the real owners and that the petitioners-defendants are going to initiate criminal proceedings against respondent No.1. To fortify his contentions, learned counsel has relied upon the cases reported as *Muhammad Yousaf and others v. Muhammad Ishaq Rana (deceased) through LRs and others* **(2023 SCMR 572),** *Muhammad Mumtaz Shah (deceased) through LRs. and others v. Ghulam Hussain Shah (deceased) through LRs. and others* **(2023 SCMR 1155),** *Mst. Akhtar Sultana v. Major Retd. Muzaffar Khan Malik through his legal heirs and others* **(PLD 2021 SC 715),** *Muhammad Siddique v. Gul Nawaz and others* **(2021 SCMR 1480),** *Rana Abdul Aleem Khan v. Idara National Industrial Co-Operative Finance Corporation Defunct through Chairman Punjab Cooperative Board for Liquidation, Lahore and another* **(2016 SCMR 2067),** *Niaz Rasool through Muhammad Bilal v. Mst. PARVEEN IKRAM and others* **(2013 SCMR 397),** *Ghulam Murtaza v. Mst. Asia Bibi and others* **(PLD 2010 SC 569),** *Syed Muhammad Hassan Shah and others v. Mst. Binat-e-Fatima and another* **(PLD 2008 SC 564),** *Muhammad Feroze and others v. Muhammad Jamaat Ali* **(2006 SCMR 1304),** *Shtamand and others v. Zahir Shah and others* **(2005 SCMR 348),** *Muhammad Yousaf v. Mst. Maqsooda Anjum and others* **(2004 SCMR 1049),** *Rehmatullah v. Fazal Baqi and another* **(1998 SCMR 670),** *Muhammad Amir v. Khan Bahadur and another* **(PLD**

1996 SC 267), *Muhammad Sajjad Hussain v. Muhammad Anwar Hussain* **(1991 SCMR 703),** *Nazir Ahmad and 3 others v. Mushtaq Ahmad and another* **(1988 SCMR 1653),** *MAD AJAB and others v. Awal Badshah* **(1984 SCMR 440),** *Abdur Rehman and others v. Abdul Qadir and others* **(PLJ 1999 SC (AJ&K) 1),** *Izat Ali v. Muhammad Ashfaq and others* **(2022 CLC 2090),** *Mst. SHAHEENA BIBI v. SHAUKAT ALI and others* **(2020 MLD 1279),** *Ghulam Haider v. Ghulam Qadir* **(2019 CLC 770),** *Abdul Majeed through Legal Heirs v. Abdul Rasheed and others* **(PLD 2016 Lahore 383),** *Abdul Haq v. Mst. Mughalani and 10 others* **(PLJ 1999 Lahore 1071),** *Muhammad Younus and 2 others v. Abdul Ghaffar and others* **(1998 MLD 1622)** and *Rahim Bakhsh and another v. Civil Judge, Lodhran and 3 others* **(1985 CLC 387),** *Nedumkandathil Koyakutty v. Kunhali and others* **(AIR (33) 1946 Madras 203),** *Parawa Sangappa and others v. Rayangouda Chandramappa* **(AIR 1939 Bombay 401),** *K.M. Srinivasam Pillai v. Y.P.R.L.Alagappa Chettiar and another* **(AIR 1938 Madras 372),** *Shadi Ram v. Mst. Atri and another* **(AIR 1936 Lahore 933)** and *Surendrakumar Chaudhury and others v. Gangachandra Chaudhury and others* **(AIR 1934 Calcutta 627).**

7. On the other hand, learned counsel appearing on behalf of respondent No.1, while defending the impugned judgments and decrees passed by the learned Appellate Court, argues that since not

only consideration amount was paid by his client but also agreements to sell were executed in his favour, the learned Appellate Court has committed no illegality while declaring the petitioners-defendants as *benamidars*; that presence of son of respondent No.1, at the time of attestation of subject mutations, speaks loud about the fact that petitioners-defendants were just *benamidars*; that non-participation of the petitioners-defendants in the alienation proceedings at any stage stands proof of the fact that they were not the real owners rather they were just *benamidars;* that possession of respondent No.1 over the suit properties renders it crystal clear that he is the real owner; that non-participation of the petitioners-defendants during alienation proceedings and their non-appearance in person, during proceedings before the courts, affirms that they were alien to the sale transactions; that when the findings of the learned Trial Court were based upon suppositions, no illegality has been committed by the learned Appellate Court while reversing the same; that though question of limitation was not raised by the petitioners-defendants but the learned Trial Court unnecessarily framed *Issue* on the said point; that as public documents were brought on record by respondent No.1, in the shape of additional evidence, no illegality was committed by the learned Appellate Court while allowing applications for additional evidence; that non-judicial approach on the part of the learned Trial

Court is evinced from the fact that it relied upon *Khasra Girdawaris* for the year 2020 to believe that petitioners-defendants were in possession of the suit properties despite knowing the fact that the same having been prepared during pendency of the suits were inconsequential upon the rights of the parties and that when the petitioners-defendants failed to rebut the claim of respondent No.1 that major chunk of consideration amount was paid by him through his bank account, he was rightly declared to be the real owner by learned Appellate Court.

8. Since respondents No.2 to 5 in Civil Revision Nos.58046 & 58055 of 2022 did not enter appearance despite their service through substituted means by way of proclamation in *Daily Jang Lahore*, dated 13.03.2024, they were proceeded against *ex-parte* through orders, dated 01.04.2024, passed in the said petitions.

9. I have heard learned counsel for the parties at considerable length and have also gone through the documents, annexed with these petitions, as well as the case-law, cited at the bar.

10. It is admitted position that respondent No.1 alongwith his appeals filed applications under Order XLI rule 27 CPC seeking permission to place on record certain documents in the shape of additional evidence. For convenience of reference, one of the said

applications, filed by respondent No.1 in his appeal, subject matter of this petition, is reproduced herein below:-

IN THE COURT OF DISTRICT JUDGE, FAISALABAD

Maqbool Hussain Versus Farrukh Shahzad Malik

PETITION UNDER ORDER 41 RULE 27 OF CPC FOR PLACING ON RECORD THE FOLLOWING DOCUMENT AND EXHIBITION THERETO.

1. *Copy of plaint titled "Maqbool Hussain Vs. Muhammad Address" pending in the Court of Civil Jude, Kausar (sic);*
2. *Copy of written statement in suit titled "Maqbool Hussain Vs. Muhammad Address" pending in the Court of Civil Judge Kausar;*
3. *Copy of agreement dated 30.05.2014*
4. *Copy of Fard jamabandi pertaining Moza Kalar Kahar Tehsil Kalar Kahar District Chakwal.*
5. *Sale Deed pertaining to house No.P-32 Rawalpindi.*
6. *Sale Deed No.4552 dated 30.07.2001;*
7. ~~*Sale Deed No.3557 dated 26.05.2008;*~~
8. *Copy of fard jamabandi pertaining to property situated Chak No.166-P Sadiqabad.*
9. *Copy of plaint titled "Maqbool Hussain Vs. Ejaz Mehood" along with decree.*
10. *Copy of plaint titled "Sohail Maqbool Awan Vs. M/s Renaissance Developers Pvt. Ltd.*

Respectfully Sheweth,

1. *That above titled appeal is being filed in this Honourable Court in which no date of hearing has been fixed so far*
2. *That the contents of the appeal may kindly be read as necessary part of this petition.*
3. *That petitioner has prima facie a good arguable case.*
4. *That Trial Court while deciding the fate of case made observation that the petitioner failed to place on record the document regarding their source and funds though the petitioner placed sufficient documents in Trial Court, however, in order meet the observations of Trial Court, the petitioner intends to produce on record the above said document, further, the file is also requiring*

production of document on record.

5. *That affidavit is attached herewith.*

Prayer

In the light of submission made above it is therefore respectfully prayed that by accepting this petition, petitioner be allowed to place and exhibits the documents mentioned in headnote of this petition on record for decision of case on merit.

Petitioner

Maqbool Hussain

Through Counsel:

Chaudhry Abdul Majeed
Advocate Supreme Court of Pakistan
52, Tamiz-ud-Din Law Chambers,
District Courts Faisalabad
Mob. 0300-8655064

Verification:

Verified on oath at Faisalabad on 03.02.2021 that all the contents of this petition are true and correct to the best of my knowledge.

Petitioner

A cursory glance over the above quoted application, in particular Para No.4 thereof, shows that the reason for production of additional evidence was mentioned as "meet with the observation of the civil court". There is no cavil with the fact that additional evidence can be allowed to be led even during proceedings before the Apex Court of the country but the conditions precedent for exercise of such power are that the party concerned should establish that reasons for non-production of such evidence, before the court of first instance, were beyond its control and that the same is inevitable for just decision of the *lis* between the parties. A bird's eye-view of the afore-quoted application brings it to limelight that neither a single word as to the

reasons for non-production of said documents, during proceedings before learned Trial Court, has been uttered nor their relevance for just decision of the case has been narrated rather it has been averred that the subject application was filed to meet with the observation of the learned Trial Court which cannot be considered as valid ground allowing production of additional evidence. The Apex Court of the country in the case of *Shamshad Bibi & others v. Riasat Ali & others* **(PLD 2023 SC 643),** while deprecating tendency to permit production of additional evidence in routine, to fill in lacunas in the case of a party, has *inter-alia* held as under:-

> *"4. The questions that have arisen for our consideration are; whether the High Court, while exercising its revisional powers under section 115 of the C.P.C., was justified in accepting the application under Order XLI, Rule 27 of the C.P.C. and remanding the matter for recording of additional evidence; whether the High Court, in the absence of jurisdiction having been exercised illegally or without material irregularity by the subordinate courts, was justified to allow the revision petition and remand the matter to the trial Court. The powers vested in the High Court under section 115 of the C.P.C. are to be exercised in accordance with the parameters described in clauses (a) to (c) ibid. The revisional powers are meant for correcting errors made by the subordinate courts in the exercise of their jurisdiction. Ordinarily, erroneous decisions of fact are not revisable, except in cases where the decision is based on no evidence or inadmissible evidence and is so perverse that grave injustice would result therefrom. Rule 27 of Order XLI, C.P.C. empowers the appellate Court to allow additional evidence to be adduced, whether oral or documentary, after the recording of reasons. This power is circumscribed by three eventualities described in clauses (a) to (c) i.e. if*

the court, from whose decree the appeal has been preferred, has refused to admit evidence which ought to have been admitted; the appellate court, on being satisfied that the additional evidence was available but could not be produced before the trial court for reasons beyond the control of the party seeking its production; or the appellate court itself requires any such evidence so as to enable it to pronounce a judgment. Rule 28 of Order XLI describes the procedure for taking additional evidence and provides that the appellate Court may either take such evidence or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the appellate court. Rule 29 of Order XLI further provides that where additional evidence is directed or allowed to be taken, the appellate court shall specify the points to which evidence is to be confined and record in its proceedings the points so specified……

5. The power under Order XLI, Rule 27 of the C.P.C. is not intended to be exercised to fill up lacunas, or to make up any deficiency in the case, nor to provide an opportunity to the party to raise a new plea. The power essentially has to be exercised cautiously and sparingly and not to facilitate an indolent litigant. The court, before exercising its jurisdiction of allowing the recording of additional evidence, must be satisfied that the document sought to be adduced in evidence is not of the nature that could be easily fabricated, tampered or manufactured.

*6. *****The application was, however, filed before the High Court which was exercising revision powers. The grounds mentioned in the application, filed under Order XLI, Rule 27 of the C.P.C., did not disclose any exceptional circumstance to justify the recording of additional evidence. The grounds were flimsy and appeared to be an attempt to embark upon a fishing or roving inquiry. Moreover, it was not denied that the evidence sought to be recorded as additional evidence at the revision stage was available when the trial was pending but no attempt was made to produce it then. The remanding of the matter and setting aside of the concurrent findings by two competent courts was not in*

> *consonance with the legislative intent unambiguously manifest from principles highlighted above."*

If fate of the order passed by learned Appellate Court permitting respondent No.1 to lead additional evidence, at appellate stage, is seen in the light of afore-referred judgment of the Apex Court of the country it stands established that it violated the settled norms on the subject despite the fact that those have binding force upon it in terms of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973.

11. It is pertinent to mention over here that despite addressing the Court at certain length, learned counsel representing respondent No.1 has not been able to convince this Court as to why respondent No.1 did not produce the documents, subject matter of the application for additional evidence, before the learned Trial Court despite the fact that in all the cases he was given two chances to produce evidence *viz*. firstly during recording of *ex-parte* evidence and secondly, at the time of recording of evidence of both sides after setting aside of *ex-parte* judgments & decrees. The law favours the vigilant and not the indolent as held by the Hon'ble Supreme Court in the cases reported as *State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others* (**2012 SCMR 280**) and *Rehmat Din vs. Mirza Nasir Abbas* **(2007 SCMR 1560).**

12. It is very ironical to note that while allowing applications of respondent No.1, for additional evidence, instead of giving an opportunity to the petitioners-defendants to impeach the authenticity of subject documents, learned Appellate Court proceeded to take the same on record on the day when the main appeal was finally decided which fact also speaks volumes about lack of legal acumen on the part of learned Appellate Court. Had the applications of respondent No.1, for production of additional evidence, been decided through independent orders, the petitioners-defendants would have an opportunity to challenge the same before the higher forum in appropriate proceedings. Moreover, it is well-settled by now that when an application for additional evidence is allowed either the learned Appellate Court can record such evidence by itself or can refer the matter to learned Trial Court for said purpose in terms of Order XLI rule 28 CPC but in the instant matter neither learned Appellate Court recorded the evidence as per guidelines given by Hon'ble Supreme Court of Pakistan through its various pronouncements nor referred the matter to learned Trial Court for the purpose rather took the documents on record without summoning the person(s), who were custodian of such documents in ordinary course. *Prima-facie*, purpose behind such approach seems to deprive the petitioners-defendants to impeach the character and credibility of said documents. The Apex

Court of the country, in the case of *Muhammad Siddique (Supra*), while dilating upon the procedure in cases where an application for additional evidence is allowed by learned Appellate Court, has *inter-alia* held as under: -

> *"7. *****In case the application is allowed then the appellate court may record the additional evidence itself or direct the trial court to record such evidence and to remit the same to the appellate court……"*

If the conduct of the learned Appellate Court taking documents on record as additional evidence, without allowing the petitioners to impeach the authenticity thereof, is considered in the light of afore-referred decision of the Hon'ble Supreme Court of Pakistan, there leaves no doubt that it totally violated the settled principles on the subject, thus, the same cannot be approved of rather deserves to be deprecated.

13. This Court fully agrees with the plea of learned counsel for respondent No.1 that the learned Appellate Court had the jurisdiction to permit additional evidence but at the same time it cannot be ignored that while exercising such jurisdiction it should see as to whether there are justiciable reasons for exercise of such powers or not. While dealing with a matter in exercise of its revisional jurisdiction, vested under section 115 CPC, this Court has to see as to whether any jurisdictional defect is there in the decision of the courts below or not.

Insofar as the cases in hand are concerned, it is observed that it is classical example of exercise of jurisdiction by the learned Appellate Court with material illegality inasmuch as it failed to note that conditions precedent for permitting production of additional evidence were missing in these matters.

14. Since the findings of the courts below are at variance, I proceed to decide these petitions while appreciating the evidence of the parties in the light of the guidelines given by Hon'ble Supreme Court of Pakistan in the case reported as *Mst. Zara Gulzar v. Muhammad Farooq and another* (**2022 SCMR 1625**).

15. Now reverting to the decisions of learned Appellate Court relating to main appeals, filed by respondent No.1, I am of the view that in a suit challenging a transaction on the basis of *benami*, plaintiff(s) is bound to prove his source of purchase money; possession of the party over the suit land; position of the parties as well as their *inter-se* relationship; the circumstances, pecuniary or otherwise, of the alleged transferee; the motive for the transaction; the custody and production of the title deed and the previous and subsequent conduct of the parties. Now I proceed to examine these matters on the basis of above parameters.

16. Firstly, taking up the source of purchase money of respondent No.1, at the relevant time, I have observed that in his pleadings, he claimed himself to be financially well-off person but said stance stands belied from the statement of his real son (PW-1) who during cross-examination admitted that in the year 2005, when the subject mutations were attested in favour of the petitioners-defendants, annual income of his father (respondent No.1) was Rs.20,00,000/- to Rs.25,00,000/- whereas his (respondent No.1) monthly expenditures at that time were Rs.3,00,000/- to Rs.4,00,000/-. If financial position of respondent No.1 is seen in the light of statement of PW-1, it stands clarified that he was not in a position to save such a huge amount to manage funds for purchase of the land, subject matter of these cases, as even if his monthly expenditures are considered as Rs.3,00,000/-, in the relevant year, the same comes to Rs.36,00,000/- per annum which were more than his annual income. The factum of monthly expenditures of respondent No.1, ranging between Rs.2,00,000/- to Rs.3,00,000/-, in the year 2005, was also admitted by him while appearing as PW-4. Further, PW-1 also showed his inability to clarify the name of the Bank from where his father (respondent No.1) withdrew the amount to pay the same to the land owners of the suit properties. Further, his (PW-1) admission that he did not know the petitioners-defendants shows that he had no concern with the purchase

of land in favour of the petitioners-defendants as *benamidars* rather he appeared as representative of vendees-petitioners-defendants.

17. It is also imperative to note that though respondent No.1 produced plethora of evidence but did not bother to bring on record any document to show that he managed funds from his own sources to pay the same to the land owners in lieu of agreements to sell executed in his favour, thus, his oral assertion in that regard cannot be considered as gospel truth.

18. Though it is case of respondent No.1 that as his son (PW-1) was attesting witness of subject mutations it was to be considered that the land was purchased by him (respondent No.1) but the admission of PW-1 that he was not aware even about the numbers of the mutations attested in favour of the petitioners-defendants renders it crystal clear that the land was not purchased in the name of respondent No.1 rather the same was purchased by the petitioners-defendants.

19. The stance of respondent No.1, throughout the proceedings, has been that his son (PW-1) appeared as his representative at the time of attestation of mutations but PW-1, during cross-examination, instead of clarifying that he appeared on behalf of his father (PW-4), while replying to a suggestion that in what capacity he appeared at the time of attestation of mutations, contented with the following words: -

"*** انتقالات پر مشتری نمائندہ میں ہی تھا۔"

If the afore-quoted portion from the statement of PW-1 is considered, while putting it in juxtaposition to the claim of the petitioners-defendants that they are the real owners of the suit properties, it becomes abundantly clear that since petitioners-defendants were vendees according to the subject mutations, he (PW-1) appeared on their behalf and not on behalf of his father (respondent No.1).

20. A cursory glance over the plaints of the suits, filed by respondent No.1, shows that he took specific plea that he purchased the land, subject matter of the suits out of which the present petitions have emanated, exclusively from his own sources but during cross-examination, he (PW-4) admitted that an amount of Rs.12/13 crores was transferred by one Major (R) Ijaz in his account. When the said admission on the part of respondent No.1 (PW-4) is considered in the light of the findings of the learned Trial Court contained in Para No.29 of its judgment, dated 12.12.2020, it stands clarified that an amount of Rs.13,68,10,000/- was transferred in the account of respondent No.1 bearing No. 0404001469507, maintained at Prime Commercial Bank, Faisalabad, by Major (R) Ijaz from his account No.1015173, Prime Commercial Bank, Rawalpindi. In this regard,

reference can be made to the following portion from the cross-examination of respondent No.1 (PW-4):

> "***درست ہے کہ میجر اعجاز بڑا Businessman تھے۔ یہ ملک ریاض کے لئے property کا کام کرتا ہے۔ درست ہے کہ میجر اعجاز کے اکائونٹ سے رقم میرے اکائونٹ میں ٹرانسفر ہوئی۔"

Though, respondent No.1 (PW-4) tried to establish that the afore-referred amount was not for the purchase of land, subject matter of these petitions, rather the same was outstanding against Major (R) Ijaz but respondent No.1 did not bother to produce any oral or documentary evidence in that regard. In this situation, the plea of respondent No.1 that the amount received from Major (R) Ijaz was already due against him is not worth consideration.

21. It is very interesting to note that according to own evidence of respondent No.1, in particular agreement to sell and receipts (Exh.P/12 & Exh.P/13), Farrukh Shahzad Malik (petitioner in this petition) directly paid Rs.54,00,000/-, to one of the vendors, namely, Ghulam Ahmad as consideration amount, thus, the claim of respondent No.1 that he paid the entire amount of consideration against purchase of suit properties to the exclusion of anyone else, falls to the ground.

22. While dealing with the point of possession over the suit properties, learned Appellate Court has observed that suit land was in

possession of respondent No.1. Firstly, the said observation stands negated from the contents of the *Jamabandis* (Exh.P/21 to Exh.P/25) according to which the properties purchased by the petitioners-defendants were in their possession. Secondly, according to the copies of *Khasra Gardawaris* for the year 2020 (Exh.D/22 to Exh.D/25) the petitioners-defendants were in possession of their respective shares, thus, findings of learned Appellate Court being contrary to the record cannot be allowed to hold the field even for a moment.

Considering from another angle, if the possession of a party is not supported by any legal document, the same cannot be considered as lawful. As far as these matters are concerned, at the cost of repetition, it is observed that after attestation of mutations in favour of the petitioners-defendants, the agreements to sell, executed in favour of respondent No.1, became irrelevant, thus, his claim relating to possession was not supported by a valid document, thus, said fact does not lend any help to him. Reliance in this regard is placed on the cases reported as *Muhammad Aslam v. Muhammad Ismail and others* (**1999 SCMR 1331**) and *Saleem Ran and 23 others v. IInd Additional Sessions Judge, Malir, Karachi and 5 others* (**2020 YLR 634**).

23. It is pertinent to mention over here that throughout the proceedings respondent No.1 has been agitating that since their

purchase he had been in possession of the suit properties as real owner whereas the petitioners-defendants were just *benamidars* but said plea of respondent No.1 stands contradicted from the closing lines of cross-examination of Shahid Anjum (PW.2). The said witness, while replying to a suggestion relating to possession over the suit properties, in his cross-examination, *inter-alia* stated as under: -

"***جائیداد کا اب قبضہ کس کے پاس ہے مجھے معلوم نہ ہے۔"

In the wake of above statement of PW-2, learned Appellate Court was not justified to reverse the findings of learned Trial Court and decree the suit of respondent No.1, while treating respondent No.1 in possession of the suit properties.

24. Inconsistent attitude of respondent No.1 is also discernible from the fact that on the one hand he stated that with a view to save himself from tax complications, he got transferred the suit properties in the names of the petitioners-defendants as *benamidars* but on the other he adopted the plea that he did so just to avoid the exercise of pre-emption right by co-owner(s). The latter assertion of respondent No.1 stands belied from the fact that the petitioners-defendants, not being owners of any piece of land in the villages where the suit properties were situated, their position was not better than that of respondent No.1 to counter the claim of pre-emption as best possible defence in

such event is that the vendee is already owner in the same village and the pre-emptor has no preferential right of pre-emption as compared to him. In this context following portion from cross-examination of respondent No.1 (PW-4) can be quoted with convenience:-

"*** درست ہے کہ مدعا علیہم اس کھیوٹ میں اس جائیداد سے قبل کسی جائیداد کے مالک نہ تھے۔"

Likewise, the alleged motive to avoid tax complications does not appeal to a man of prudent mind inasmuch as tax evasion, being an offence under the relevant law, cannot be considered as valid motive. Moreover, when respondent No.1 was not a taxpayer, at the time of attestation of subject mutations, he being out of tax net, his apprehension in respect of tax complications had no basis rather it seems to be a self-invented ground taken by him just to maintain the suits filed by him.

25. The material contradictions amongst the pleadings and the statements of PWs regarding motive, as set out by respondent No.1, are evinced from following portions from their cross-examinations:-

"یہ کہ مدعی نے رقبہ درج عرضی دعویٰ کے علاوہ دیگر رقبہ اسی گائوں میں خرید کیا۔ تاہم ٹیکس کی قانونی پیچیدگیوں سے بچنے کی خاطر انتقال نمبری 2894 مورخہ 02.05.2005، 2758 سال 2005، 2476 مورخہ 07.06.2005، 2489 مورخہ 30.06.2005 بحق مدعا علیہ تصدیق کروائے۔ مزید شفع سے بچنے کے لئے جزوی انتقالات ہائے کروائے۔ (ضمن 8 عرضی دعویٰ)"

"*** غلط ہے کہ شفع سے بچنے کے لئے یہ انتقالات بے نامی کرائے۔" (PW-1)

"*** درست ہے کہ میں نے لکھا کہ ٹیکس کی پیچیدگیوں سے بچنے کے لئے یہ جائیداد اپنے نام نہ لگوئی۔
" (PW-4)

In the presence of such material contradictions it was not open for learned Appellate Court to hold that respondent No.1 proved the motive for the alleged *benami* transaction.

26. During the course of arguments, learned counsel for the petitioners-defendants put much emphasis on the fact that since the plaints of the suits, filed by respondent No.1, were not drawn in line with the guidelines provided in the case of *Muhammad Yousaf and others* (Supra), same were liable to be rejected. To appreciate the contention raised by learned counsel for the petitioners-defendants, I have gone through the plaints of the suits wherein respondent No.1 neither clarified with exactitude that as to what were the reasons for transfer of properties in the name of the petitioners-defendants as *benamidars* nor he disclosed his relationship with them let alone the assertion of business relation which too was not disclosed. The Apex Court of the country in the case of *Muhammad Yousaf and others* (Supra) while laying down guidelines for success in a suit challenging a transaction in favour of a party on the basis of *benamidar* has *inter-alia* held as under: -

> *"7. Be it noted that in cases of alleged benami transaction, there may be a ground for suspicion,*

> *nevertheless, the Court's decision must not be based on suspicion or conjecture, but on legal grounds. We, therefore, wish to say that it is one of the essential elements of a fair trial that the law must be applied to any transaction in the light of its ordinary course of human conduct. Keeping this in mind when we analyze the benami transaction, we find that there are three persons involved in it - the seller, the real owner, and the ostensible owner or benamidar, and, in the ordinary course of human conduct, it encompasses two different contracts, one is the contract, express or implied, between the ostensible owner and the purchaser (real owner) and it specifically mentions two things. First, the real owner expresses his desire or compulsion (also called motive) and obtains permission from the ostensible owner (Benamidar) to purchase the property in his name after paying the consideration amount to the seller, and second, it talks about the consent of the ostensible owner (Benamidar) that whenever the real owner demands, he will be bound to transfer the property to him. The other is a contract between the ostensible owner (Benamidar) and the seller of the property. It is important to note here that both the above contracts, though differ from each other in their legal character and incidents, complement each other to establish benami transaction, and thus, in cases of such transaction, the plaintiff must first state them, in detail, in his plaint, and then prove them by legal testimony, and failure to do so is fatal. Mindful of this legal position, we have perused the pleadings and the evidence brought on record and find that they fall short of the material facts mentioned above. This omission cannot be condoned and that alone is sufficient to reject the claim of the appellants."*

When the plaints of the suits, filed by respondent No.1, are seen in the light of the guidelines provided in the afore-quoted judgment of the Hon'ble Supreme Court of Pakistan, it becomes abundantly clear that neither he disclosed the contract (express or implied) between him and

the petitioners-defendants to get the properties transferred in their name as *benamidars* nor he has referred to any permission by the petitioners-defendants allowing him to transfer the properties in their name as *benamidars* especially when the petitioners-defendants were equally amenable to tax complications in the event of transfer of land in their names as *benamidars* as claimed by respondent No.1 and nobody allows another person to undertake any transaction in his name inviting action by the relevant authorities. Thus, the standards set by Hon'ble Supreme Court of Pakistan in the referred judgment remained unfulfilled.

27. The custody and production of the title documents of property, subject matter of a suit filed on the basis of *benami* transaction, has important bearing on the outcome of the *lis* between the parties. Insofar as the cases in hand are concerned, the copies of the mutations, subject matter of these petitions, were brought on record by the petitioners-defendants to prove that they were the real owners. On the other hand, respondent No.1, instead of producing title documents to show that those were in his possession, contented with production of agreements to sell in evidence and pleaded that since not only agreements to sell were executed in his favour but also his son joined the proceedings relating to attestation of mutations in favour of the petitioners-defendants, they were only *benamidars*. Firstly, taking up

execution of agreements to sell in favour of respondent No.1, I am of the view that while replying to a suggestion as to the names of the persons, who executed agreements to sell in his favour, respondent No.1 stated as under: -

مجھے اس وقت یاد نہ ہے کہ میرا معاہدہ کن کن افراد سے ہوا تھا۔

In presence of admission regarding lack of such important fact, mere execution of agreements to sell in favouor of respondent No.1 could not be used to believe him as real owner. Moreover, just execution of an agreement to sell, in favour of a party, cannot be considered as a title document. Reliance in this regard is placed on *Rao Abdul Rehman (deceased) v. Muhammad Afzal (deceased)* (**2023 SCMR 815**) and *Falak Sher v. Province of Punjab* (**2017 SCMR 1882**). In the former case the Hon'ble Supreme Court of Pakistan, while dealing with the status of agreement to sell *vis-à-vis* title of ownership, has *inter-alia* held as under:-

> *"6.*****On the basis of a sale agreement, no legal character or right can be established to prove the title of the property unless the title is transferred pursuant to such agreement to sell, but in case of denial or refusal by the vendor to specifically perform the agreement despite the readiness and willingness of the vendee, a suit for specific performance may be instituted in the court ……"*

If the fate of production of agreements to sell by respondent No.1, to fulfill the condition of production of title documents, is seen in the light of afore-referred judgments of the Hon'ble Supreme Court of

Pakistan, there leaves no ambiguity that respondent No.1 failed to discharge his duty towards production of title documents. Moreover, if the petitioners-defendants were just *benamidars*, there was nobody barring them to get incorporated in column No.12 of the mutations that the same were based on the agreements to sell executed in favour of respondent No.1 but in absence of such important note in the relevant column of the subject mutations, it cannot be believed, at the whims of respondent No.1, that the same were attested on the basis of agreements to sell executed in his favour.

28. Insofar as reliance of respondent No.1 upon attestation of subject mutations in presence of his son (PW-1), is concerned, suffice it to note that in the wake of unequivocal admission on the part of PW-1 that he did not know the petitioners-defendants, said fact can hardly be used to believe that the petitioners-defendants were just *benamidars*. Moreover, mere presence of a person at the time of attestation of a mutation is not sufficient to believe that he or any of his blood relations is the purchaser of the land and the person in whose favour the mutation is being attested is just a *benamidar*. According to section 42 of the Land Revenue Act, 1967, a mutation should be based on some transaction and the same should be attested in presence of witnesses and upon identification of the vendor by the *Lamberdar, Patidar* or co-owner in a village. As far as these matters

are concerned, the most relevant persons to clarify as to whether the petitioners-defendants were just *benamidars* or not were the vendors but respondent No.1 did not bother to produce them in evidence to unveil the truth. It is well entrenched by now that when a party withholds best available evidence inference goes against it. Reliance in this regard is placed on the judgment of Hon'ble Supreme Court of Pakistan in the matter of *Muhammad Boota through L.Rs. v. Mst. Bano Begum and others* (**2005 SCMR 1885**).

29. It is cardinal principle of civil jurisprudence that when a party alleges a particular fact it is bound to prove the same and when respondent No.1 pleaded that he paid the entire amount of consideration against purchase of suit properties, subject matter of the suits, he was bound to prove the said fact but when he failed to prove the same he could not be given premium of any deficiency in the case of the petitioners-defendants as he was bound to establish through evidence of impeachable character that he was the real owner whereas the petitioners-defendants were just *benamidars*.

30. While scanning the judgment passed by learned Appellate Court, I have observed that it formed adverse opinion against the petitioners-defendants for the reason that Major (R) Ijaz was not produced in evidence by them to prove that he was acting on their

behalf and transferred an amount of more than Rs.13 crores in the bank account of respondent No.1 which was utilized by him for purchase of the suit properties. At the same time, learned Appellate Court omitted to note that when respondent No.1 alleged that the aforesaid amount was received by him from Major (R) Ijaz, out of his outstanding amount, as to how his suits could be decreed without establishing said fact by producing Major (R) Ijaz or other relevant person(s). In the given circumstances, the omission to produce Major (R) Ijaz is more fatal for respondent No.1 as compared to the petitioners-defendants inasmuch as respondent No.1, who challenged the status of the petitioners-defendants as owners, was bound to prove that they were just *benamidars*.

31. At the cost of repetition, it is observed that the Apex Court of the country in the case of *Muhammad Yousaf & others* (supra) has settled that without establishing the relationship between the real owner and alleged *benamidar*, suit to declare a person as *benamidar* cannot be decreed. Insofar as the cases in hand are concerned, though respondent No.1 claimed that he had business relations with the petitioners-defendants but his said stance was contradicted by his own son (PW-1), who, during cross-examination, stated in clear cut words that he did not know the petitioners-defendants. Further, when the nature and scope of alleged business relation of respondent No.1 with

the petitioners-defendants was not clarified mere oral assertion of respondent No.1 could not be used against the petitioners-defendants.

32. Further, conduct of the parties plays pivotal role in a suit challenging *benami* transaction. As far as the cases in hand are concerned, respondent No.1 miserably failed to establish any previous direct relationship between the parties justifying transfer of the suit properties by him in the names of the petitioners-defendants. Reference in this regard is made to the following portion from the cross-examination of respondent No.1 (PW-4):

***درست ہے کہ میری فرخ شہزاد کے ساتھ کسی قسم کی partnership نہ رہی ہے۔

From the above quoted portion from the cross-examination of respondent No.1 (PW-4), it stands established that he failed to prove his relationship with the petitioners-defendants justifying transfer of the suit properties in their names as *benamidars*. When such important limb was missing, learned Appellate Court was not justified to set aside the well-reasoned judgment & decree passed by the learned Trial Court.

33. Though, respondent No.1 averred in the plaints of his suits that the petitioners-defendants admitted themselves to be *benamidars* but

said assertion stands nullified from the following portion from cross-examination of PW-1: -

"*****مجھے معلوم نہ ہے کہ مدعا علیہم نے بے نامی دار ہونا کن کن کے سامنے تسلیم کیا۔"

The above quoted portion from the statement of PW-1 is sufficient to disbelieve the assertion of respondent No.1 that the petitioners-defendants admitted that they were just *benamidars*. Moreover, when respondent No.1 failed to establish that the petitioners-defendants permitted him to get transferred the suit properties in their names, learned Appellate Court committed grave illegality while reversing the findings of learned Trial Court.

34. A perusal of the impugned judgments and decrees shows that learned Appellate Court has held that since point of limitation was not raised by the petitioners-defendants, no *Issue* could be framed by learned Trial Court. In this regard, I do not find myself in agreement with the learned Appellate Court for the reason that as per section 3 of the Limitation Act, 1908, at the time of entertaining any matter it is duty of the Court to see as to whether proceedings have been filed within the prescribed period of limitation or not, notwithstanding the fact as to whether the said point has been raised by the opposite side or not. In this regard, I stand guided by a very illuminated judgment of the Hon'ble Supreme Court of Pakistan reported as *Chief Engineer,*

Gujranwala Electric Power Company (GEPCO) Gujranwala v. Khalid Mehmood (**2023 SCMR 291**) wherein the issue, under discussion, has been clinched in the following manner:-

> *"12.***** The Court is obliged to independently advert to the question of limitation and determine the same and to take cognizance of delay without limitation having been set up as a defence by any party……. The Court under Section 3 of the Limitation Act is obligated independently rather as a primary duty to advert the question of limitation and make a decision, whether this question is raised by other party or not."*

If the observation of learned Appellate Court, under discussion, is seen in the light of above-quoted judgment of the Hon'ble Supreme Court of Pakistan it becomes more than clear that no illegality was committed by learned Trial Court while framing *Issue qua* limitation.

35. It is pertinent to mention over here that according to Article 120 of the Limitation Act, 1908, maximum period to challenge any transaction in a declaratory suit is six years whereas in these matters though the subject mutations were attested in the year 2005 but respondent No.1 filed suits in the year 2013 meaning thereby that the same were barred by law of limitation. With a view to wriggle out of dilemma of limitation, respondent No.1 tried to plead that he could not file suits within the prescribed period of limitation due to pendency of suit for pre-emption. Firstly, pendency of suit for pre-emption was not a bar to challenge the subject transactions on the basis of *benamidar* and secondly when respondent No.1 filed the

subject suits, during pendency of matter relating to pre-emption before the Hon'ble Supreme Court of Pakistan, his said assertion becomes irrelevant. In this backdrop, the suits filed by respondent No.1 were liable to be dismissed on that score alone.

36. There is no cavil with the proposition that when sufficient cause is shown, delay in filing of any proceedings before a court of law can be condoned but when such cause is missing, the courts should not feel shy to dismiss the proceedings on that score alone. Reliance in this regard can be placed on the case reported as *Chief Executive Officer NPGCL, GENCO-III, TPS Muzaffargarh v. Khalid Umar Tariq Imran and others* (**2024 SCMR 518**) wherein the issue under discussion has been replied in the following words: -

> *"14. Even otherwise, the public interest requires that there should be an end to litigation. The law of limitation provides an element of certainty in the conduct of human affairs. The law of limitation is a law that is designed to impose quietus on legal dissensions and conflicts. It requires that persons must come to Court and take recourse to legal remedies with due diligence. Therefore, the limitation cannot be regarded as a mere technicality. With the expiration of the limitation period, valuable rights accrue to the other party, as observed in numerous judgments by this Court. However, reference may be made to the cases of Ghulam Rasool and others v. Ahmad Yar and others (2006 SCMR 1458); Collector Sales Tax (East), Karachi v. Customs, Excise and Sales Tax Appellate Tribunal, Karachi and another (2008 SCMR 435) and Messrs SKB-KNK Joint Venture Contractors through Regional Director v. Water and Power Development Authority and others (2022 SCMR 1615)."*

As far as petitions in hand are concerned, respondent No.1 took plea that as the matter was pending before the Civil Court in suit for possession through pre-emption, he could not file the suits within time. Reference in this regard is made to the following from the statement of respondent No.1 (PW-4):-

"*****انتقالات 2005 میں ہوئے اور یہ دعوی بے نامی 2013 میں دائر کیا۔ آٹھ سال میں نے دعوی اس لئے دائر نہ کیا کہ شفع کے دعوے دائر ہو گئے تھے۔۔۔۔۔۔۔۔۔"

The aforesaid stance of respondent No.1 was contradicted by his son who, while appearing as PW-1, in his cross-examination, stated as under: -

"*****انتقالات 2005 میں ہوئے اور کیس 2013 میں دائر کئے اس وجہ سے کہ مدعا علیہم خود ہی ان کے پاس آجائیں گے۔"

The above material contradictions amongst the statements of PWs, on the point of limitation, also go against respondent No.1 and findings of learned Appellate Court on the said point being erroneous in nature cannot sustain.

37. It is of common knowledge that land developers manage purchase of land for their prospective projects through their agents/ land providers. Respondent No.1, while appearing in the witness box as PW-4, admitted that he used to transfer properties in favour of other persons after purchasing from the land owners. He further

admitted that Major (R) Ijaz had been acting as front man on behalf of Malik Riaz, a renowned developer of the country who happens to be close relative of the petitioners-defendants. Reliance in this regard is placed on the following portion from his statement as PW-4:-

> "***** میں ملک ریاض بحریہ ٹائون والے کو جانتا ہوں۔ درست ہے کہ میں عامر اسحاق، زین ملک اور سلمان احمد کو بھی جانتا ہوں۔ یہ ملک ریاض کے داماد ہیں۔ میرے ان کے ساتھ business relation تھے۔ درست ہے کہ میجر اعجاز بڑا Businessman ہے۔ یہ ملک ریاض کے لئے propertyکاکام کرتا ہے۔۔۔۔"

The afore-quoted portion from the statement of respondent No.1 (PW-4) lends support to plea of the petitioners-defendants that respondent No.1 used to act as an agent on their behalf and after purchase of land ultimately used to transfer the same in their names and other developers of housing schemes for execution of their respective projects.

38. While addressing the Court, learned counsel representing respondent No.1 put much emphasis on the fact that as son of respondent No.1 had been contesting the suit for pre-emption, as attorney, it was to be believed that respondent No.1 was the real owner of the suit land. In this regard, it is clarified that mere pursuing a *lis* as attorney *per-se* does not declare a person as owner, thus, said fact can hardly be used to believe respondent No.1 as owner of the suit properties.

39. It is very interesting to note that during entire pleadings, respondent No.1 claimed that he being unknown to Major (R) Ijaz Mahmood, it was not believable that he acted on behalf of the petitioners-defendants. The said contention of respondent No.1 stands contradicted from the contents of suit for declaration, mandatory and permanent injunction filed by him against said Major (R) Ijaz, while portraying him as Managing Director, Renaissance Developers (Pvt.) Ltd., Khan Chambers, 60-Canning Road, Saddar, Rawalpindi Cantt. Further, PW-1, son of respondent No.1, in his cross-examination, admitted that Major (R) Ijaz was known to him.

40. There is no cudgel that in a *benami* transaction, real owner(s) can challenge the title of *benamidar* while seeking declaration that he is real owner of the property but the same is subject to fulfillment of the conditions repeatedly highlighted by the superior courts in plethora of judgments which in my humble opinion are missing in these matters, thus, the findings of learned Appellate Court are not tenable.

41. It is indisputable that most of the documentary evidence, before the learned Trial Court, was produced through the statement of the counsel for respondent No.1. Hon'ble Supreme Court of Pakistan, in the case of *Manzoor Hussain (deceased) through L.Rs v. Misri Khan*

(**PLD 2020 SC 749**), while devising guidelines for production of documentary evidence and deprecating production thereof through the statement of the counsel, has *inter-alia* laid law to the following effect:-

> *"4. Before parting with this case we would like to comment on a related matter. Copies of the acknowledgement receipt (exhibit P4), aks shajarah kishtwar (exhibit P2), registered post receipt (exhibit P3), mutation (exhibit P5) and jamabandi for the year 2000-2001 (exhibit P6) were produced and exhibited by the pre-emptor's counsel, but without him testifying.* ***We have noted that copies of documents, having no concern with counsel, are often tendered in evidence through a simple statement of counsel but without administering an oath to him and without him testifying, especially in the province of Punjab.*** *Ordinarily, documents are produced through a witness who testifies on oath and who may be cross-examined by the other side. However, there are exceptions with regard to facts which need not be proved; these are those which the Court will take judicial notice of under Article 111 of the Qanun-e-Shahadat Order, 1984 and are mentioned in Article 112, and facts which are admitted (Article 113, Qanun-e-Shahadat Order, 1984)." (emphasis provided)*

If the fate of the judgments rendered by learned Appellate Court is adjudged in the light of the guidelines provided by the Apex Court of the country in the afore-quoted judgment it becomes conspicuously clear that most of the documents relied upon by learned Appellate Court, having been produced during the statement of counsel for respondent No.1 instead of the relevant witnesses, same could not be read in evidence while accepting the appeals filed by him.

42. Insofar as intention of the petitioners-defendants to lodge criminal proceedings against respondent No.1 is concerned, suffice it to note that the same having no nexus with the *lis* before the Court, cannot be discussed in these proceedings rather it is upto them to put the criminal machinery into motion.

43. Learned counsel representing respondent No.1 repeatedly argued that since his client has been possessing and managing the properties in question, he was real owner whereas petitioners-defendants were just *benamidars*. There is no cavil with the fact that subsequent conduct of parties in a suit based on *benami* transaction is very relevant. Insofar as the cases under discussion are concerned, the following portions from the cross-examination of PW-1 are very relevant.

> ”*** مجھے معلوم نہ ہے کہ کس معاہدہ میں کتنی رقم تھی۔“
>
> ”*** مجھے انتقالات کے نمبر زیادہ نہ ہیں۔“
>
> ”*** انتقال نمبر 2844 میں خریدار کون تھا مجھے یاد نہ ہے۔ انتقال نمبر 2758 اور 2976 میں خریدار کون ہیں مجھے یاد نہ ہیں۔ میرے والد صاحب کو معلوم ہے مجھے معلوم نہ ہے۔ کہ مدعا علیہم نے بے نامی دار ہونا کن کن کے سامنے تسلیم کیا۔“

Similarly, respondent No.1, while appearing as PW-4, in reply to a suggestion regarding the identification of the properties, subject matter of the suits, *inter-alia* stated as under:-

> ”***** مجھے اس وقت یاد نہ ہے کہ میرا معاہدہ کن کن افراد سے ہوا تھا۔

مجھے انتقالات متدعویہ کے نمبر زیادنہ ہیں۔

*****مجھے یادنہ ہے کہ پہلا انتقال متدعویہ کتنی رقم کے عوض درج اور تصدیق ہوا۔ اسی طرح باقی انتقالات میں رقم بیع کا علم نہ ہے۔

***اس وقت مجھے اس پٹواری، قانونگو اور تحصیلدار کے نام یادنہ ہیں۔ جنہوں نے یہ انتقالات درج اور تصدیق کیے۔

*****پہلے انتقال متدعویہ پر بائع نے دستخط کیے یا انگوٹھے لگوائے مجھے یاد نہ ہے۔ دوسرے اور تیسرے انتقالات میں بھی یادنہ ہے کہ انگوٹھے لگائے یا دستخط کیے۔

*****مجھے یادنہ ہے کہ پہلے انتقال 2844 کا خریدار کون تھا اس طرح دوسرے 2758 اور تیسرے 2476 میں خریدار کون تھا معلوم نہ ہے۔"

In the wake of afore-quoted stances of PW-1 & PW-4 it cannot be believed that respondent No.1 was real owner and had been dealing with the properties as owner and petitioners-defendants were just *benamidars*. It is very difficult to believe that a person, who claims himself to be owner of a property, is not aware about its exact identification despite the fact that he claims that he has been dealing with it since the year 2005.

44. As a necessary corollary to the above discussion, I have no hesitation to hold that learned Appellate Court not only misread the evidence of the parties but also misapplied the law on the subject. Further, it exercised the jurisdiction relating to production of additional evidence in a perfunctory manner. Consequently, all these petitions are **accepted**, as a result, the judgments & decrees of learned Appellate Court are set aside. Consequently, the appeals as well as the applications filed by respondent No.1, seeking permission to lead

additional evidence, would stand dismissed and judgments & decrees passed by learned Trial Court shall hold the field. No order as to costs.

Judge

Announced in Open Court today i.e._30.04.2024_____

Approved for Reporting.

Judge

G.R.