

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

RFA No.172/2015
Javaid Arshad
versus
Tahir Mehmood & 2 others

Appellant by: Mr. Muhammad Ilyas Sheikh, Advocate.
Respondents by: Mr. Muhammad Aslam Chishti, Advocate
for Respondents No.1 and 3.
Date of Hearing: 04.03.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant RFA, Javaid Arshad (appellant) has assailed the judgment and decree dated 11.05.2015, passed by Civil Judge 1st Class (West), Islamabad, whereby the suit filed by the appellant for declaration, cancellation of documents and permanent injunction has been dismissed.

2. Brief facts narrated by the appellant in appeal are that in the year 1990, when he planned to purchase a house in Islamabad, his younger brother namely Tahir Mehmood (respondent No.1) requested him to arrange his emigration abroad as he was jobless and dependent upon the appellant, whereafter the appellant in order to accommodate Respondent No.1 incorporated his name as joint owner and benamidar of the appellant in House No.105, Street No.88, Sector I-10, Islamabad (*suit house*), which was purchased from one Ghazanfar Ali by the appellant without anything being paid by Respondent No.1. The appellant filed a suit on 23.09.2011 with the prayer to declare him as the sole owner of suit house and transfer of the suit house in the name of Respondent No.1 as a benami transaction and such transfer be cancelled. The suit was contested by respondent No.1 by way of filing his written statement and took the stance that the story narrated by appellant is false and fabricated as the suit house was purchased out of remittances made by their elder brother namely Khalid Waheed, who died in

USA in the year 1989 and a huge sum of insurance claim on account of his death as well as life saving and pension commutation of his father had been utilized to purchase the suit house. Respondent No.1 has also denied the factum of incorporating his name on the advice of some overseas employment promoter for emigrating Respondent No.1 abroad as he got his passport issued on 21.06.2006 and went to UK thereafter and as such, he is not a benami owner, rather is a genuine bona fide co-sharer of the suit house as at present he is occupying a portion of the suit house along with his family and mother. The learned trial Court on the basis of evidence recorded by the parties has dismissed the suit of the appellant vide impugned judgment and decree dated 11.05.2015, hence, the instant regular first appeal.

3. Learned counsel for appellant contended that the learned Trial Court has not appreciated the evidence in its true perspective, especially when all four ingredients of benami transaction were justified by the appellant on record; that the findings given by the learned Trial Court are based upon misreading and non-reading of evidence, even the document Exh.P1 was produced by the appellant and respondent No.1 has acknowledged that entire consideration was paid by the appellant, but he could not prove that remittances of Khalid Waheed were transferred and utilized for the purchase of suit house.

4. Conversely, learned counsel for respondents No.1 and 3 contended that the learned Trial Court has rightly appreciated the evidence as agreement to sell Exh.D1 has been produced by respondent No.1 in the evidence and he is in possession of one portion of the suit house and as such, minimum requirements of benami transaction have not been proved by the appellant and the suit has rightly been dismissed by the learned trial Court.

5. Arguments heard, record perused.

6. Perusal of record reveals that the learned Trial Court while adjudicating upon the counter versions and claims of the parties has framed the following nine (09) issues vide order dated 24.09.2014.

1. *Whether the suit of plaintiff is barred by time, therefore, same is liable to be dismissed? OPD 1 &3*
2. *Whether the suit of plaintiff is bad for misjoinder and non joinder of necessary parties? OPD 1 &3*
3. *Whether the plaintiff has no cause of action to file the instant suit, hence his suit is liable to be dismissed? OPD 1 &3*
4. *Whether the suit of plaintiff is false, frivolous and vexatious moreover, plaintiff has concealed the material facts from this Court and is filed to harass the defendant No.3, therefore, his suit is liable to be dismissed? OPD 1 &3*
5. *Whether the suit house was purchased from the remittance of Khalid Waheed the elder brother of plaintiff, defendant No.1 & 3? OPD 1 &3*
6. *Whether the defendant No.1 & 3 are co-sharer in the possession of suit house? OPD 1 &3*
7. *Whether the suit house was purchased by the plaintiff in the name of defendant No.1 on the advice of some overseas employment promoter for sending the defendant No.1 to abroad? OPP*
8. *Whether the plaintiff is entitled for the decree for declaration, cancellation and permanent injunction as prayed for? OPP*
9. *Relief.*

7. The proposition in hand is based upon the claim of benami transaction of the appellant as he has taken the stance that he has purchased the suit house from one Ghazanfar Ali, but at the time of transfer of same, he incorporated the name of respondent No.1 only to help him out for emigration purposes.

8. However, before going into evidence, it is necessary to go through the minimum requirements of benami transaction, whereby word "*benami*" means "*without a name, nameless, or fictitious*" and as such, it is used to denote a transaction which is really done by a person without using his own name, rather the same is done in the name of another. Reliance is placed upon PLD 2017 Islamabad 375 (Muhammad Nawaz vs. Shahida Perveen) and 2019 CLC 770 Lahore (Ghulam Haider vs. Ghulam Qadir). Similarly, this Court has also gone through cases on the subject matter reported as 2005 SCMR 577 (Abdul Majeed,

etc. vs. Amir Muhammad), 1991 SCMR 703 (Muhammad Sajjad Hussain v. Muhammad Anwar Hussain), 2009 CLC 324 Karachi (Chuttal Khan Chachar vs. Mst. Shahida Rani), PLD 2012 Lahore 141 (Mst. Sharifan Bibi v. Abdul Majeed Rauf) and 2008 CLC 887 Lahore (Ghulam Qadir vs. Muhammad Younas),

wherein the following guiding factors have been outlined for the Court to determine as to whether a transaction is a benami one or otherwise.

- (i) *source from which purchase money came;*
- (ii) *nature and possession of property, after purchase;*
- (iii) *motive, if any, for giving transaction a benami complexion;*
- (iv) *position of parties and relationship, if any, between claimant and alleged benamidar;*
- (v) *custody of title deeds after transaction; and*
- (vi) *conduct of parties concerned in dealing with property after sale.*

9. In order to prove the case of benami transaction on the basis of above mentioned ingredients, the appellant appeared as PW-1 and contended that when his father retired in the year 1969, he started his banking career in the year 1970 and took the responsibility of his entire family and at that time respondent No.1 was not even admitted in Class 1. In the year 1994, when the appellant came to Pakistan after visit from USA, respondent No.1 asked him to arrange his emigration and on the advice of an overseas employment promoter a property has to be purchased in the name of respondent No.1 to arrange his immigration abroad. The appellant further stated that he out of his personal bank account savings purchased the suit house in January, 1990 from one Ghazanfar Ali against the sale consideration of Rs.1,000,000/-, which has nothing to do with respondent No.1, who had already left Pakistan for England and he has no share in the suit house. The appellant has produced allotment letter Exh.P1, dated 25.01.1990, property tax receipts Exh.P2 to P5, electricity bill Exh.P6, sui gas bill Exh.P7, telephone bills Exh.P8 and Exh.P9, bank appreciation letter Exh.P10 and site map of suit house Exh.P11. However, during the course of cross examination, PW-1 Javaid Arshad/appellant acknowledged that Khalid Waheed

was settled in USA, where he died, and he is not aware as to when Respondent No.1 had left the country, but he acknowledged about his financial status in the following manner:

"جنوری 1970 میں میری تنخواہ 350 روپے تھی۔ سال 1990 میں میری تنخواہ 20/22 ہزار تھی۔ میں نے پنشن کا دستاویز پیش کیا ہے۔ گھر کی ادائیگی بے آرڈر کے ذریعے بذریعہ بینک کی تھی۔ بینک کی ریکارڈ کی کاپی پیش نہ کی ہے۔ از خود کہا بینک بند ہو گیا ہے۔"

10. The above referred stance, if considered in the light of cross-examination of respondent No.3 i.e. the other brother of appellant, following facts have been reiterated.

"یہ بات درست ہے کہ میں سال 2000 میں ریٹائرڈ ہوا تھا۔ یہ بات مجھے علم نہ ہے کہ خالد کی remittance آئی تھی۔ میں کوئی ثبوت اس بارے میں پیش نہ کر سکتا ہوں کہ رقم کہاں سے آئی تھی۔ مکان کی خریداری کی از خود کہا کہ وہ بینک بند ہو چکا ہے۔ خالد نے ایک یاد دہانہ رقم بھیجی تھی جو کہ میں نے والدہ کی welfare کیلئے خرچ کر دی تھی۔"

11. While considering the above position, the initial burden to prove that the transaction in question is of a benami character is upon the appellant and he has to discharge this burden as he is claiming himself to be the real owner of suit house and declaring respondent No.1 as ostensible owner and a benamidar for him. Reliance is placed upon 1991 SCMR 703 (Muhammad Sajjad Hussain vs. Muhammad Anwar Hussain).

12. Similarly, the appellant has placed on record transfer letter Exh.P1 and is also in possession of the suit house, except a portion of it, which is presently occupied by respondent No.1 and this factum has also been acknowledged by the appellant. The third ingredient to prove the benami transaction is the motive part and as per version of the appellant he has transferred the property in the name of respondent No.1 with the motive that:

"سال 1994 میں میں امریکہ سے واپس آیا ورنٹ ویزے پر گیا تھا۔ تب سے مدعا علیہ نمبر 1 نے کہا کہ مجھے باہر بھجوا دیا جائے۔ میں نے پروموت سے بات کی اس نے کہا کہ اگر اس کے نام کوئی پرانی ہو جائے تو پھر مدعا علیہ نمبر 1 کو باہر بھجوانا آسان ہے۔ جس پر میں نے مکان متدعوہ کی خریداری کے بارے میں پلان کیا اور جنوری 1990 میں میں نے غضنفر علی سے گھر متدعوہ خرید کیا تقریباً 10 لاکھ کا خرید تھا۔ اور میں نے مدعا علیہ نمبر 1 کا نام بطور نے نام داخل کر دیا تھا۔"

13. The above referred motive part could only be justified by production of such promoter, who was not produced by the appellant before the learned Trial Court and even otherwise, the suit house was purchased from Ghazanfar Ali, who confirmed this fact through agreement Exh.D5 and receipt Exh.D6, whereas it is admitted by appellant himself in his own evidence that:

"یہ بات درست ہے کہ مکان سند عویہ سال 1990 میں خریدا گیا اور طاہر محمود سال 2006 میں باہر گیا۔ از خود کہا کہ سال 1984 سے اس کو باہر بھیجنے کی کوشش کرتا رہا ہوں۔"

14. The above referred evidence clearly establishes that the motive part as alleged by the appellant is not substantiated as Respondent No.1 was settled in UK in the year 2006 i.e. after 16 years of purchase of the suit house and whether the property in question has been made basis for immigration of Respondent No.1 as per the stance of the appellant, which is not visible from the record, even there is no documentary evidence to suggest that respondent No.1 had been given immigration of UK on the strength of ownership/entitled record of the suit house, therefore, the motive part is not established.

15. The learned Trial Court has also framed the issue regarding remittances made by Khalid Waheed (deceased brother of the parties) in the purchase of suit house vide Issue No.5 and this aspect has already been admitted by appellant that some of the amount had been transmitted by Khalid Waheed, but he had spent the same on the welfare of their mother. On the other hand, the respondent side has produced Exh.D7, which is an international money order, dated 30.09.1988, amounting to US \$20,000.00, issued by Bank of America Corporation on the instruction of Khalid Waheed (deceased brother) in the name of the appellant. Similarly, another document (a stub) of Bank of America amounting to Rs.50,000/-, dated 08.01.1984, in the name of appellant has also been placed on record as Exh.D8. Both these documents have not been refuted by the appellant in any manner, rather the said documents spell out that a huge sum of money

was transferred by Khalid Waheed in the name of appellant, whose monthly salary at the time of purchase of suit house was about Rs.20,000/- or Rs.22,000/-, which renders the situation that a property worth of Rs.1,000,000/- cannot be managed by such meager salary, rather it could safely be considered that it was the remittances made by Khalid Waheed (deceased brother) from America through banking transaction.

16. In view of above position, we have gone through the findings of the learned Trial Court qua Issues No.7 and 8 and there is nothing on record to justify that the appellant could arrange such a huge sum of money at his own to pay the sale consideration of Rs.1,000,000/- to the said Ghazanfar Ali i.e. ex-owner of suit house, therefore, findings on Issues No. 7 and 8 have rightly been passed by the learned Trial Court against the appellant, who has failed to discharge his onus to prove his own sources, especially when he is not able to place any banking instrument, bank statement or the ex-owner of suit house i.e. Ghazanfar Ali to justify that the sale consideration was paid by him.

17. The last important element is the timeframe for filing of suit, which was filed in the year 2011, while the property was purchased in the year 1990, which clearly establishes that the suit was filed after 21 years of the transfer of property in the name of respondent No.1, although the agreement to sell was executed on 31.12.1989, therefore, the limitation for the purpose of such kind of suit has to be considered in terms of Article 91 of the Limitation Act, 1908, which provides limitation of three (03) years for filing of such kind of suit and as such, similar question was dealt with by the Sindh High Court in case reported as 2009 CLC 324 Karachi (Chuttal Khan Chachar vs. Mst. Shahida Rani), even otherwise, it has been argued by the appellant that Article 120 of the Limitation Act, 1908 will apply in this case, whereby the time from which period begins to run is "when the

right to sue accrues". For the purpose of clarity, Articles 91 and 120 of the Limitation Act, 1908 are reproduced hereunder:

Article	Description of suit	Period of limitation	Time from which period begins to run
91	To cancel or set aside an instrument not otherwise provided for.	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
120	Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.

18. Perusal of the above referred provisions establishes that since the appellant is seeking cancellation of instrument of transfer in favour of respondent No.1, his case is covered under Article 91 of the Limitation Act, 1908 and the time from which period begins to run clearly places an obligation upon the appellant to seek a remedy of cancellation when the said instrument came to his knowledge and as such, the Exh.P1 transfer of the suit house was in the knowledge of the appellant but the suit was filed beyond the period of limitation as it is not dependent upon the cause of action or refusal. Although, the appellant has relied upon 1995 SCMR 284 (Wali vs. Akbar) with the contention that fresh cause of action would arise from the date of last denial by respondent No.1 in the year 2011, but the said judgment is not applicable to the case of appellant as the instrument, which requires settlement of right and cancellation of which has been sought by appellant, is covered under Article 91 of the Limitation Act, 1908. Even otherwise, this question of limitation has rightly been adjudicated by the learned Trial Court while deciding Issue No. 1, therefore, nothing is left in favour of appellant, who has failed to prove the motive part, the sources/sale consideration of the suit house and is not having exclusive possession of the suit house, hence, all requirements of benami transaction as set out in the cases mentioned supra are missing.

19. At last, if the appellant's version be considered as true, even then he has to prove the concept of agreement between the two brothers for return of the property as claimed by the appellant with this commitment that when he will immigrate to foreign country the purpose will be achieved and such arrangement has been discussed by the apex Court in case reported as PLD 2010 SC 569 (Ghulam Murtaza vs. Asia Bibi) and PLD 2008 SC 146 (Ch. Ghulam Rasood vs. Mst. Nusrat Rasool), whereby such kind of contract and promises are to be proved, failing which such arrangement could not be considered valid, even otherwise, the appellant has failed to discharge his basic onus to prove the transaction of transfer of suit house in the name of respondent No.1 being *benamidar* in terms of Articles 117 and 120 of the Qanun-e-Shahadat Order, 1984, which interpret that the burden of proof, if not discharged in a proper manner, the suit fails, like the case in hand.

20. The last argument advanced by the appellant is based upon the cross examination of respondent No.3 i.e. the other brother of the parties, whereby it has been referred on record in the cross examination that:

"یہ صحیح ہے کہ مکان متدعوہ میں نے طاہر محمود کہ باہر بھجوانے کے لیے طاہر کے نام لگوا یا تھا۔"

This aspect is only brought on record with the help of respondent No.3, who himself has not appeared in the Court to establish and help out the appellant, therefore, such suggestion and admission in the evidence of appellant by indirect method has no bearing as it was not the question put by respondent No.1.

21. Besides the above referred contention, learned counsel for appellant has also drawn attention of this Court towards filing of application for submission of additional documents i.e. the cheque books and counter files of the cheques, which was not allowed by the learned Trial Court, but surprisingly the said application was filed in the Court on 29.11.2014 and same was contested by respondent No.1 and the learned Trial Court while considering all these

contentions of the appellant dismissed the said application vide order dated 10.12.2014 mainly on the ground that Order XIII Rule 2 CPC places an embargo upon the party to produce any documentary evidence, which was in possession or power of the party, which should have been but has not been produced in accordance with requirement of Order XIII Rule 1 CPC, however such document could be received at a subsequent stage of proceedings, unless good cause is shown to the satisfaction of the Court for non-production thereof. We have gone through the said application and considered its effects at this appellate stage, which is without any reasonable cause to believe that the private record of appellant, which was in his possession, was not produced due to any restriction or difficulty or non-availability, therefore, such belated plea is not acceptable and the learned Trial Court has rightly rejected the same. Even otherwise, if the cheque book and counter files of the cheques are considered at this stage by way of additional evidence, even then it will not help out the appellant as he has otherwise failed to prove other important elements and ingredients of benami transaction in his favour.

22. In view of above discussion, the instant regular first appeal is misconceived and the same is hereby **DISMISSED**.

(LUBNA SALEEM PERVEZ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 17th March, 2020.

JUDGE

JUDGE

Khalid Z.