

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Regular Fist Appeal No.03 of 1987

Mst. Ashram Bibi
Vs.
Musa Khan etc.

Appellant by: Hafiz Ali Asghar & Safeer Khadim,
Advocates.
Respondent/CDA by: Mr. Kashif Malik, Advocate.
Date of Decision: 11.03.2015.

AAMER FAROOQ, J.- This appeal is directed against judgment and decree dated 14.03.1987 whereby the suit filed by Musa Khan, predecessor-in-interest of respondents No.1 to 5, was decreed and it was declared that he is the owner of plot bearing No.770 measuring 166.6/9 Square Yard situated at Sector G-9/4, Islamabad (the property).

2. The facts, in brief, are that the predecessor of respondents No.1 to 5 namely Musa Khan filed a suit for declaration and injunction against the appellant with respect to the property on the basis that the property was purchased in the name of the appellant, however, the funds for it were provided by him and were deposited from England in a jointly operated account maintained with MCB Bank Limited, Islamabad. It was further alleged in the plaint that since the plaintiff was not in the Country, therefore, the property was purchased in the name of the appellant on the basis of *mala fide*. It was further submitted that on 12.03.1982 a notice was published in the daily 'Jang' wherein it was categorically provided that the property is owned by him. The suit was contested by the appellant and in the written statement legal as well as factual objections were taken. It was categorically denied that the property was purchased out of the money sent by Musa Khan from U.K. or that there was any misrepresentation or *mala fide*. The appellant in her defence specifically submitted that the possession of the property is with her and she has leased out the same and is receiving the rent. Out of the pleadings of the parties, learned Trial Court framed the following issues:

ISSUES.

1. Whether this court lacks jurisdiction to entertain the suit?
2. Whether the plaintiff has locus standi to bring the action ?OPD
3. Is the suit incompetent in its present form?
4. Is the suit is bad for non joinder and mis joinder of necessary parties? OPD
5. Is the suit incorrectly valued for the purpose of court fee and jurisdiction? OPD
6. Whether the plaintiff is the actual owner of the suit plot & defendant No.1 is a benamy?
7. Whether the plaintiff is entitled to the declaration & injunction prayed for on the grounds detailed in the plaint?
8. Relief.

3. In support of his claim Musa Khan adduced the following witnesses:

- i. Musa Khan PW-6
- ii. Gul Zaman PW-1
- iii. Sher Ahmed Khan PW-2
- iv. Ameer Afsar, Manager MCB Bank, PW-3
- v. Syed Muhammad Saqlain Naqvi, Manager MCB Bank, PW-3
- vi. Lal Khan PW-4
- vii. Muhammad Naeem PW-5
- viii. Muhammad Ramzan PW-6.

Mst. Ashrim Bibi appeared as DW-1.

4. The parties also led the documentary evidence i.e. copy of passport of Mst. Ashram Bibi Ex.P-1, copy of I.D. card of Mst. Ashram Bibi Ex.P-2, copy of application for transfer of allotment of plot Ex.P-3, copy of application for allotment of plot Ex.P-4, copy of bank draft Ex.P-3/A, receipt of MCB Bank regarding Bank draft Ex.P-5, copy of letter issued by Yusuf & Co. Mark-A, copy of application form of MCB Bank Mark-B. The documentary evidence led by Mst. Ashram Bibi was copy of completion certificate Ex.D-1, copy of letter for permission to occupy the building Ex.D-2, copy of family suit filed by defendant No.1 Ex.D-3, copy of decree of family suit in favour of Mst. Ashram Bibi Ex.D-4, copy of account opening form Mark-A, copy of application filed by Mst. Ashram Bibi Mark-B.

5. The Trial Court vide judgment and decree dated 04.03.1987 decreed the suit in favour of Musa Khan, hence the present appeal.

6. Learned counsel for the appellant *inter alia* submitted that in light of law laid down by the Hon'ble Supreme Court of Pakistan in case titled *Muhammad Sajjad Hussain v. Muhammad Anwar Hussain* cited as 1991 SCMR 703 in order to prove *benami* a party has to prove source of money from which the property was purchased, custody of title documents, possession of the property and motive in the *Benami* transaction. It was further contended that the plain reading of the plaint shows that the plaintiff

has not alleged the four ingredients of *Benami* and also has failed to prove the same. Respondents No.1 to 5 were ordered to be proceeded ex-parte vide order dated 22.09.2014.

7. Learned counsel for respondent No.7 namely Capital Development Authority (CDA) supported the version of the appellant and submitted that as per record the appellant purchased the property in her name.

8. It is an established principle of law that any person claiming *Benami* has to prove the four elements as in accordance with the decision of the Superior Courts of the Country which are as follows:

- i) Source of income.
- ii) From whose custody the original title deed and other documents came in evidence.
- iii) Who is in possession of suit property and
- iv) Motive for *Benami* transaction.

The Hon'ble Supreme Court of Pakistan in the case titled *Abdul Majeed v. Amir Muhammad* (2005 SCMR 577) approved the law laid down in the case titled *Muhammad Sajjad Hussain v. Muhammad Anwar Hussain* (1991 SCMR 703) *supra* and *Jane Margrete William versus Abdul Hamid Mian* (1994 CLC 1437) and highlighted the four considerations for deciding the question of *Benami* character of transaction. These considerations are as follows:

- (i) *It is the duty of the party who raises such plea to prove such plea by adducing cogent, legal, relevant and unimpeachable evidence of definitiveness. The Court is not required to decide this plea on the basis of suspicions, however, strong they may be.*
- (ii) *That Court is to examine as to who has supplied the funds for the purchase of property in dispute, it is proved that purchase money from some person other than the person in whose favour the sale is made, that circumstance, prima facie, would be strong evidence of the Benami nature of the transaction.*
- (iii) *The character of a transaction is to be ascertained by determining the intentions of the parties at the relevant time which are to be gathered from all the surrounding circumstances i.e. the relationship of parties, the motives underlying the transactions and any other subsequent conduct.*
- (iv) *The possession of the property and custody of title deed.*

9. The plaintiff in the suit did not allege all the four elements mentioned above and the emphasis was only to the effect that money for the purchase of the property was provided by him and that since he was in U.K. therefore, the

property was purchased by Mst. Ashram Bibi (the appellant) in her name through misrepresentation and *mala fide*. In so far as the question of custody of title documents and possession of the property was concerned, no submission was made in the plaint. Likewise, the evidence adduced by the plaintiff was to the effect that the money for the purchase of the property was provided by him and that Mst. Ashram Bibi had no independent source of income. In the case titled *Ghulam Murtaza v. Mst. Asia bibi and others* (PLJ 2010 SC 846) the Hon'ble Supreme Court of Pakistan observed that a transaction cannot be dubbed as *Benami* simply because one person happened to make payment for or on behalf of another. It was further observed that challenge to a transaction is not *bona fide* when husband and wife were amicably living, it was accepted valid but subsequently when relationship is strained title is claimed exclusively. Therefore, in the present case the plaintiff (predecessor-in-interest of respondents No.1 to 5) has failed to prove *Benami*.

10. In view of above, the instant appeal is allowed, the impugned judgment and decree dated 04.03.1987 is set aside and the suit filed by predecessor-in-interest of respondents No.1 to 5 is dismissed, with no order as to costs.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

M. Naveed

Blue slip
added.

Approved for reporting