

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.112 of 2016

Muhammad Nawaz

Versus

Shahida Perveen & others

Date of Hearing: 28.07.2017
Petitioner by: Mr. Muhammad Ishtiaq Ahmad Raja,
Advocate,
Respondents by: M/s Akseer Abbasi, and Rakhshanda
Azhar, Advocates for respondent No.1,
Mr. Bilal Anwar Sadat, Advocate for
respondent No.4.

MIANGUL HASSAN AURANGZEB J:- Through the instant Civil Revision Petition, the petitioner, Muhammad Nawaz, impugns the judgment and decree dated 08.12.2015, passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's appeal (Civil Appeal No.181/2015) against the consolidated judgment and decrees dated 06.07.2015, passed by the Court of the learned Civil Judge, Islamabad, was dismissed. Vide consolidated judgment and decrees dated 06.07.2015, passed by the learned Civil Court, the following three suits were decided:-

- (i) the suit for declaration, mandatory and permanent injunction, instituted on 10.10.2011, by Shahida Perveen/respondent No.1 against Muhammad Nawaz/petitioner was partially decreed;*
- (ii) the suit for declaration, possession of residential premises measuring 10 marlas, mandatory and perpetual injunction, instituted on 22.10.2011, by Muhammad Nawaz/petitioner against Shahida Perveen/respondent No.1 etc., was dismissed; and*
- (iii) the suit for declaration, separate possession through partition, permanent and mandatory injunction, and recovery of mense profit, instituted on 09.02.2011, instituted by Shahida Perveen/respondent No.1 against Qaseeda Begum/respondent No.2 etc., was dismissed.*

2. The facts essential for the disposal of this petition are that on 09.11.1981, the petitioner applied to the Capital Development Authority ("C.D.A.") for an allotment of a plot. Vide allotment letter dated 24.09.1985, the C.D.A. allotted plot No.21 measuring

2.695 acres, I-8-V, Murree Road, Islamabad ("the suit plot"), to (i) Muhammad Hanif, (ii) Muhammad Nawaz/petitioner, and (iii) Yaqoob Khan, a *lumbardar*. Muhammad Nawaz and Muhammad Hanif were brothers. Yaqoob Khan died on 04.04.2001. On 02.02.2005, Yaqoob Khan's 1/3rd share in the suit plot was transferred by the C.D.A. to his legal heirs. The ownership of 1/3rd share in the suit plot by the legal heirs of Yaqoob Khan is not in dispute. Muhammad Hanif died on 16.07.2009, and was survived by a widow (Qaseeda Begum/respondent No.2), a son (Sajid Mahmood/respondent No.3), and a daughter (Shahida Perveen/respondent No.1). The ownership of 1/3rd share in the suit plot by the petitioner is also not in dispute. What is disputed is the ownership of 1/3rd share in the suit plot by Muhammad Hanif.

3. The petitioner claims that his brother, Muhammad Hanif, was only a *benami* ostensible owner of the 1/3rd share, and that the petitioner is the real owner of the said share. The petitioner claims that when the suit plot was allotted, the petitioner was gainfully employed in the Kingdom of Saudi Arabia, and had executed a special power of attorney in Muhammad Hanif's favour authorizing him to do certain things with respect to the suit plot. The petitioner also claims to have paid all the expenses and ancillary dues regarding the suit plot.

4. On 10.10.2011, Shahida Perveen/respondent No.1 instituted a suit for declaration, mandatory and permanent injunction against her paternal uncle, Muhammad Nawaz/petitioner, before the Court of learned Civil Judge, Islamabad. In the said suit it was *inter-alia* pleaded that the suit plot was jointly owned by Muhammad Hanif and Yaqoob Khan; that respondent No.1's father died on 16.07.2009, whereafter respondent No.1 along with her mother and brother became owners of Muhammad Hanif's share in the suit plot; that respondent No.1 was in possession of her share in the suit plot; and that respondent No.1 instituted the said civil suit because the petitioner had started constructing a boundary wall around the suit plot. In the said suit, respondent No.1 prayed for a

declaration that on account of being a legal heir of Muhammad Hanif, she was entitled to use the suit property, and that the petitioner's acts were unlawful and ineffective on respondent No.1's rights. Respondent No.1 also prayed for a mandatory injunction directing the petitioner to remove the construction/boundary wall erected on the suit plot, and for a permanent injunction restraining the petitioner from interfering with respondent No.1's peaceful possession of the suit plot.

5. The petitioner contested the said suit by filing a written statement. In the said written statement, it was *inter-alia* pleaded that on 10.11.1981, the petitioner had applied to the C.D.A. for the allotment of a plot; that on the petitioner's said application, leasehold rights regarding the suit plot were granted by C.D.A.; that the petitioner's share in the suit plot was 2/3rd whereas Yaqoob Khan's share was 1/3rd; that Muhammad Hanif's name was included as 1/3rd owner of the suit plot as *benamidar* ostensible owner; that the petitioner was gainfully employed in Saudi Arabia for a period of 11 years, and had the resources to pay for the suit plot; that all expenses and dues regarding the suit plot were paid by the petitioner; that Muhammad Hanif had no source of income, and could not contribute any amount as consideration for the suit plot; that Muhammad Hanif, prior to his death, was willing to transfer his 1/3rd share in the suit plot to the petitioner; that the petitioner had raised construction on 10 *marlas* of the suit plot with his own funds; that since Muhammad Hanif did not have a house of his own, the petitioner let him and his family reside in the rooms constructed on the suit plot; and that Muhammad Hanif's legal heirs rejected the petitioner's request to transfer 1/3rd share in the suit plot to the petitioner.

6. Prior to the filing of the written statement in the suit instituted by respondent No.1, the petitioner, on 22.10.2011, had filed a suit for declaration, possession of residential premises measuring 10 *marlas*, mandatory and perpetual injunction against the legal heirs of Muhammad Hanif before the Court of the learned Civil Judge, Islamabad. The petitioner's pleadings in

the said suit are almost the same as his pleadings in the written statement in the suit instituted by respondent No.1. This suit was contested only by Shahida Perveen/respondent No.1. Respondents No.2 and 3 (i.e. the widow and son of Muhammad Hanif) had filed a conceding written statement in the said suit. The position taken by respondent No.1 was that the petitioner had no concern whatsoever with the suit plot, and that the suit plot had been allotted by C.D.A. to Muhammad Hanif and Yaqoob Khan in equal shares. She also pleaded that Muhammad Hanif had sufficient financial resources to pay for his share in the suit plot.

7. On 09.02.2012, respondent No.1 filed a suit against her mother and brother (i.e. respondents No. 2 and 3 respectively) for declaration, separate possession through partition, permanent and mandatory injunction, and recovery of mense profit. In the said suit, respondent No.1 had *inter-alia* prayed for the suit plot to be partitioned and separate possession of her share in the suit plot to be given her. She also prayed for a permanent injunction restraining respondents No.2 and 3 from selling, alienating or changing the nature of the suit plot. Subsequently, the petitioner/Muhammad Nawaz was impleaded as a defendant in the said suit. In the written statement filed by respondents No.2 and 3, they took the position that they had no concern whatsoever with the suit plot; and that 2/3rd share in the suit plot belonged to the petitioner, whereas the remaining 1/3rd share belonged to Yaqoob Khan. Furthermore, it was pleaded that Muhammad Hanif had paid nothing as consideration for the suit plot; that respondents No.2 and 3 were residing in the rooms constructed on the suit plot with the petitioner's permission; and that Muhammad Hanif was only a *benami*/ostensible owner of 1/3rd share in the suit plot.

8. On 10.06.2013, the learned Civil Court consolidated the above mentioned three civil suits. From the divergent pleadings of the contesting parties, the learned Civil Court framed the following consolidated issues:-

1. *Whether Mst. Shahida Perveen along with her mother and brother is in possession of suit property? OPP*
2. *Whether Muhammad Hanif was only benami owner of suit property? OPD*
3. *Whether Mst. Shahida Perveen has no cause of action to file the suit? OPD*
4. *Whether Mst. Shahida Perveen is entitled to the relief claimed for? OPP*
5. *Relief.*

9. Respondent No.1 entered the witness box as PW-1, whereas the petitioner gave evidence as DW-1. The petitioner and respondent No.1 also produced other witnesses in support of their respective cases. As mentioned above, vide the said judgment and decrees dated 06.07.2015, the learned Civil Court partially decreed the suit for declaration, mandatory and permanent injunction instituted by respondent No.1 (Shahida Perveen), and dismissed the suit for declaration, possession of residential premises measuring 10 marlas, mandatory and perpetual injunction instituted by the petitioner.

10. Vide judgment dated 08.12.2015, the petitioner's appeal (Civil Appeal No.181/2015) against the judgment and decrees dated 16.07.2015, passed by the learned Civil Court, was dismissed by the Court of the learned Additional District Judge, Islamabad. The said concurrent judgments of the learned Courts below have been impugned by the petitioner in the instant Civil Revision Petition.

11. The grounds taken by the petitioner in the Civil Revision Petition are that the impugned judgment and decrees are illegal, perverse and against the norms of justice; that the learned trial Court exercised its jurisdiction illegally and with material irregularity; that the learned Courts below did not give any weight to the conceding written statement filed by respondents No.2 and 3; that the impugned judgment and decrees are the result of misreading and non-reading of evidence; that the learned Courts below ignored the oral and documentary evidence produced by the petitioner; and that the petitioner had proved that Muhammad Hanif was only a *benami* owner of 1/3rd

share in the suit plot. The petitioner in his revision petition prayed for the suit instituted by the petitioner to be decreed, and for the suit instituted by respondent No.1 to be dismissed.

12. Learned counsel for the contesting parties made their submissions in reiteration of their pleadings before the learned Courts below. For the sake of brevity, these submissions need not be restated.

13. Additionally, learned counsel for the petitioner submitted that the suit plot was allotted to Yaqoob Khan and the petitioner as rehabilitation benefit by the C.D.A.; that 1/3rd share in the suit plot was 'transferred' by the petitioner in Muhammad Hanif's name; that since the petitioner was gainfully employed abroad, a power of attorney was executed by him in Muhammad Hanif's favour to do certain things with respect to the suit plot; that relationship based on mutual trust and love existed between the petitioner and his brother, Muhammad Hanif; that Muhammad Hanif in his lifetime had acknowledged that he had no share in the suit plot; that since Muhammad Hanif did not have a house of his own, a house was constructed by the petitioner on 10 marlas of the suit plot so that Muhammad Hanif and his family could live in it; that the title documents as well as receipt of payments to C.D.A. are in the petitioner's possession; that respondents No.2 and 3 also acknowledge that Muhammad Hanif did not have a share in the suit plot; that the motive for making Muhammad Hanif a *benami* owner of 1/3rd share in the suit plot was that the petitioner was abroad and he wanted his brother to do all that was necessary with respect to the suit plot. Learned counsel prayed for the concurrent judgments passed by the learned Courts below to be set aside and for the suit instituted by the petitioner to be decreed. Learned counsel for the petitioner placed reliance on the cases of Mazim-ud-Din Vs. Sheikh Zia-ul-Qamar (2016 SCMR 24), Mandi Hassan Vs. Muhammad Arif (PLD 2015 SC 137) and Muhammad Baksh Vs. Gul Muhammad (2012 YLR 1045), in support of his contention that concurrent findings of fact recorded by the trial Court and the appellate Court can be interfered with in the revisional jurisdiction of this Court where

there is misreading and non-reading of evidence. Additionally, learned counsel for the petitioner placed reliance on the following cases:-

- (i) In the case of Muhammad Sajjad Hussain Vs. Muhammad Anwar Hussain (1991 SCMR 703), it has been held that the criteria for determining whether a transaction is *benami* transaction or not, the factors to be taken into consideration are (i) source of consideration, (ii) from whose custody the original title deed and other documents came in evidence; (iii) who is in possession of the suit property, and (iv) motive for the *benami* transaction.
- (ii) In the case of Major (Retd.) Mazhar Mahmood Khan Vs. Khushal Khan Jadoon (1995 MLD 316), it has been *inter-alia* held that *benami* transaction is a custom of the country and is recognized as such. In such cases, a person purchases the property in the name of another but for his own benefit.

14. On the other hand, learned counsel for respondent No.1 submitted that the petitioner wanted to deprive respondent No.1 of her share in her father's inheritance; that respondent No.1's father was the owner of 1/3rd share in the suit plot; that the allotment letter and certificate of possession issued by the C.D.A. show that respondent No.1's father was 1/3rd owner of the suit plot; that the suit plot was allotted as rehabilitation benefit to the allottees; that the petitioner had not purchased the suit plot; that respondent No.1 was married and was living with her husband; that a portion of the suit plot was in respondents No.2 and 3's possession; that the conceding written statement of respondents No.2 and 3 cannot operate against the interests of respondent No.1; that respondent No.1's father was not a *benami* owner of 1/3rd share in the suit plot; that the essential ingredients for proving a transaction to be *benami* in nature were missing in this case; that the concurrent judgments of the learned Courts below did not suffer from any misreading or non-reading of evidence so as to warrant interference in the revisional jurisdiction of this Court. Learned counsel for respondent No.1 prayed for the revision petition to be dismissed.

15. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of this Civil Revision Petition have been set out in sufficient detail in paragraphs 2 to 10 above.

16. On 09.11.1981, the petitioner submitted an application (Mark D/A) to the Chairman, C.D.A. seeking an allotment of a plot as compensation for the acquisition of his land measuring 15 acres. It is an admitted position that the suit plot was allotted by the C.D.A. vide allotment letter dated 24.09.1985 (Ex.P-4/1), to (i) Muhammad Hanif (who was the petitioner's elder brother), (ii) Muhammad Nawaz/petitioner, and (iii) Yaqoob Khan (who was a *Lumberdar*). Paragraph 4 of the allotment letter provides that the allottees were required to execute a lease agreement with the C.D.A. Lease agreement dated 10.12.1986 was executed between the C.D.A. and the three allottees. Each page of the lease agreement dated 10.12.1986 bears one signature of Yaqoob Khan and two signatures of Muhammad Hanif. Muhammad Hanif's second signature is as the petitioner's special attorney. Vide letter dated 28.10.1985 (Mark-D/C) the Estate Management Directorate, C.D.A. requested the Deputy Director (Survey), Land Survey Division, C.D.A. to arrange delivery of possession of the suit plot to its allottees. This letter also shows that the allottees had deposited the required payment for the suit plot. The certificate of possession (Ex.P-4/2) issued by the C.D.A. on 13.05.1986, bears the signatures of Muhammad Hanif and Yaqoob Khan as allottees of the suit plot. None of the above referred documents indicate that 2/3rd share in the suit plot actually belonged to the petitioner or that 1/3rd share in the suit plot was transferred/allotted to Muhammad Hanif on the petitioner's request.

17. This case entails a dispute between a paternal uncle (Muhammad Nawaz/petitioner) and his niece (Shahida Parveen/respondent No.1). Respondent No.1 filed a suit for declaration etc., seeking her inheritance rights in 1/3rd share in the suit plot, whereas the petitioner filed a suit praying for *inter-*

alia a declaration that respondent No.1's late father, Muhammad Hanif, was an ostensible/*benami* owner of 1/3rd share in the suit plot, and that the petitioner was the real owner of the said 1/3rd share, in addition to another 1/3rd share in the suit plot. The petitioner's case was based on the assertion that the allotment of the suit plot by the C.D.A., to the extent of transferring leasehold rights in the name of Muhammad Hanif, was a *benami* transaction. In other words, the petitioner's case was that the allotment of the suit plot in the names of the petitioner and Yaqoob Khan was correct, but to the extent of Muhammad Hanif, it was a *benami* transaction, and that the real owner of Muhammad Hanif's share was the petitioner.

18. In Pakistan, *benami* transactions were a recognized species of legal transactions pertaining to immovable properties. The genesis of the concept of *benami* is that the consideration for a transfer of property must flow from one person and the transfer is made in the name of the other person, and the consideration flowing for the transfer was not intended to be a gift in favour of the person in whose name the transfer is made. In other words, *benami* transactions are purchases of property in the name of a person, who does not pay consideration for the property, but merely lends his name to become an ostensible owner, while the real title vests in another person, who actually pays for the property and becomes the beneficial owner. Such transactions are rife in Pakistan. In the case of Guru Narayan Vs. Sheolal Singh (AIR 1918 PC 140), the Right Hon'ble Syed Ameer Ali also made the following general observations on *benami* transactions:-

"The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people."

19. The word '*benami*' is a Persian compound word made up of two different words namely – "be" which means "without" and "name" which denotes "name". It, therefore, literally means

“without a name”, i.e., nameless or fictitious and as such a *benami* name is used to denote a transaction which is really done by a person without using his own name but in the name of another. The principle underlying *benami* transactions is embodied in Section 82 of the Trust Act 1882, which reads:-

“Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.”

20. It is well settled that the burden of proving that a particular sale is *benami* and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing evidence of a definite character which would either directly prove the fact of *benami* or establish circumstances unerringly raising an inference of that fact. In order to determine whether a transaction is *benami* or not the Courts are usually guided by the following factors:-

- “(1) the source from which the purchase money came;*
- (2) the nature and possession of the property, after the purchase;*
- (3) motive if any, for giving the transaction a benami complexion;*
- (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;*
- (5) the custody of the title-deeds after the transaction and*
- (6) the conduct of the parties concerned in dealing with the property after the sale.”*

21. A notion of wide prevalence is that *benami* transactions are regarded as reprehensible and improper. In the case of Punjab Province Vs. Daulat Singh (AIR 1942 Federal Court 38), it has been held *inter-alia* as follows:-

“A practice has long been common in this country for intending alienees of land to take the document of transfer in the names of their friends or relatives, sometimes with a view to defeat the claims by other members of their own family, and sometimes to escape restrictions imposed upon them by Government servants’ conduct rules.”

22. The Indian parliament realising the quantum of dishonesty involved in *benami* transactions prohibited the same in the year 1988. After coming into operation of the Benami Transactions (Prohibition) Act, 1988 (Act No.XLV of 1988), such transactions

are prohibited in India. In Pakistan, the Benami Transactions (Prohibition) Act, 2017 (Act No.V of 2017), has been enacted for the prohibition of holding property in *benami*, and to restrict the right to recover or transfer property held in *benami*, and to provide a mechanism and procedure for confiscation of property held in *benami*, and for matters connected herewith or incidental thereto. Section 3 (1) of the said Act provides that no person shall enter into any *benami* transaction. Section 3 (2) read with Section 51 provides that whoever enters into any *benami* transaction or holds any *benami* property on and after the date of the commencement of the said Act, shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to a fine which may extend to twenty-five per cent of the fair market value of the property. Under Section 4 read with Section 25 of the said Act, any property which is held to be *benami* by the Adjudicating Authority constituted under the said Act, the same can be confiscated, and after an order of confiscation has been made such property shall vest absolutely in the Federal Government. Under Section 5 of the said Act, a *benamidar* has been prohibited from retransferring *benami* property to the beneficial owner. The transactions taken out of the meaning of '*benami* transactions' are the ones when the property is held by:

“(a) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, agent or legal adviser, and any other person as may be notified by the Federal Government of this purpose; or

(b) any person being an individual in the name of his spouse or in the name of any child or in the name of his brother and sister or leniel ascendant or descendent and the individual appeal as joint owner in any document of such individual and the consideration for such property has been provided or paid out of known resources of income of the individual.”

23. Unlike the Indian statute (Benami Transactions (Prohibition) Act, 1988), the Benami Transactions (Prohibition) Act, 2017, has prospective effect. Section 56 of the Benami Transactions (Prohibition) Act, 2017, provides that the provisions

of the said Act shall apply notwithstanding anything to the contrary contained in any other law for the time being in force. Hence, the said Act overrides other laws including *Section 82 of the Trust Act 1882*.

24. Coming back to the facts of the case at hand, the vital question that needs to be answered is whether Muhammad Hanif was the real or an ostensible/*benami* owner of 1/3rd share in the suit plot. The petitioner, in his civil suit, has *inter-alia* pleaded that at the time of the allotment of the suit plot, the petitioner “*included as benami the name of his brother Muhammad Hanif to the extent of 1/3 share in the suit plot.*” Furthermore, the petitioner in his cross-examination deposed *inter-alia* as follows:-

25. Now, the petitioner claims to have ‘transferred’ 1/3rd share in the suit plot to his brother, Muhammad Hanif. Not a single document has been produced in evidence to show that 1/3rd share in the suit plot was ‘transferred’ to Muhammad Hanif at the petitioner’s instance. The petitioner did not bother to file an application for summoning the record from the C.D.A. in order to establish that 2/3rd share in the suit plot was to be allotted to the petitioner or that the petitioner had applied to the C.D.A. to allot or transfer 1/3rd share in the suit plot to Muhammad Hanif.

26. The petitioner in his suit had pleaded that respondents No.1 and 3 were greedy and were refusing to transfer Muhammad Hanif’s share in the suit plot to the petitioner. It was also pleaded that respondents No.1 and 3 were liable to be evicted from the suit plot. It appears that after the institution of the said suit, respondents No.2 and 3 were won over by the petitioner. The said respondents filed a conceding written statement in the petitioner’s suit admitting in totality the

petitioner's claim regarding Muhammad Hanif's ownership of 1/3rd share in the suit plot to be *benami* in nature. The position taken by respondents No.2 and 3 in their written statement cannot operate to the detriment of respondent No.1. In the cases of Farzand Ali Vs. Kuuda Bakhsh (PLD 2015 SC 187), Bashir Ahmad Vs. Abdul Latif (2005 YLR 2655), Bakhan Vs. Ahmad Yar (2006 YLR 831), Allah Rakha Vs. Nisar Khan (2007 CLC 154), and Riffat Sultana Vs. Nadir Khan (2016 YLR 110), it has been held that admission of one defendant is not binding on another defendant, who had contested the matter. In the case of Mrs. Riffat Sultana Vs. Nadir Hayat (2016 YLR 110), it has been held by the Hon'ble Lahore High Court, as follows:-

"It is settled principle of law that the pleadings in the shape of plaint or written statement cannot be treated as a piece of evidence unless the same are proved by the production of evidence and the adversaries are afforded opportunity to rebut the same through cross-examination of the witnesses and produce the evidence. The contention of the learned counsel for the plaintiff that whenever conceding written statement is filed by the defendant, the same provides a valid proof and no further evidence is required to prove the same might have some force in a case of single defendant, but herein respondent No.2 had filed conceding written statement against the version of her co-defendants in the suit and unless they were afforded opportunity of cross-examination to shatter the credibility of her version, the same could not be treated as a gospel truth."

27. Respondent No.1 (PW-1) in her examination-in-chief as well as cross-examination admitted that possession of the suit plot is with Muhammad Nawaz (petitioner), Qaseeda Begum (respondent No.2) and Muhammad Sajid Mahmood (respondent No.3). Respondent No.1 is married and lives with her husband. There is evidence available on the record that until she got married she lived in the house on the suit plot. The mere fact that she is presently not in possession of a portion of the suit plot would not operate to her disadvantage. It cannot be expected that her husband would move in with her and live in the house on the suit plot. It may also be mentioned that the petitioner in his suit had prayed for possession of the portion of the suit plot on which the house was constructed. In paragraph 7 of the suit, the petitioner had pleaded that respondents No.1 and 3 were in possession of the house on the suit plot. Hence, the essential

ingredient of a *benami* transaction i.e. possession of the *benami* property, has not been satisfied by the petitioner.

28. As regards possession of the allotment letter/title document regarding the suit plot, the petitioner in his suit did not plead that the allotment letter/title document is in his possession. During his evidence, the petitioner (DW-1) did not produce the original allotment letter or the lease agreement. The allotment letter (Exh.PW-4/1) was produced by PW-4, namely Malik Abid Farooq, an official in the C.D.A. Although, respondent No.1 (PW-1) and her husband, Arshad Mahmood (PW-3), in their cross-examination, deposed that the original allotment letter was not in their possession, and that the original documents with respect to the suit plot were with the petitioner, the fact remains that the petitioner did not produce the original allotment letter or the lease agreement during his evidence. Had the petitioner been in possession of these crucial documents there was nothing preventing him from producing them in his evidence. For all intents and purposes, the allotment letter and the lease agreement would be the title documents in this case. Since the petitioner did not produce the title documents with respect to the suit plot, he could not claim to be the real owner of 1/3rd share in the suit plot.

29. The petitioner in his suit had pleaded that *“all the expenses of allotment and dues of the suit plot were paid”* by the petitioner, yet when the petitioner entered the witness box as DW-1, he did not produce a single receipt. Copies of the receipts were produced before the learned trial Court after the petitioner’s evidence along with the statement of the learned counsel for the petitioner, Chaudhry Manzoor Ahmad Kamboh, Advocate. Had the petitioner produced these documents, respondent No.1 would have had an opportunity to cross-examine him. The documents included the special power of attorney dated 15.01.1986; transfer letter dated 02.02.2005 for the transfer of Yaqoob Khan’s share in the suit plot to his legal heirs; receipt dated 22.09.2004 for Rs.1,72,000/- from Muslim Commercial Bank; letter of possession dated 13.05.1986; and the petitioner’s

application to the Chairman, C.D.A. (Mark-D/A). The learned counsel for the petitioner also produced copies of pay orders for various amounts in favour of C.D.A. These documents were produced as Marks D/D to D/K. The production of some of these documents were objected to by the learned counsel for respondent No.1. The learned counsel for the petitioner has placed emphasis on the treasury deposit challan (Mark-D/G) for payment of Rs.7,700/- as the price of non-judicial stamps for the execution of the agreement with C.D.A. The said amount is stated to have been tendered by Yaqoob Khan and Muhammad Hanif in his capacity as the petitioner's general attorney. Now, copies of the documents produced as Marks D/D to D/K could not be relied upon by the petitioner as payments for the portion of the suit plot allotted to Muhammad Hanif. Even otherwise, in the case of State Life Insurance Corporation of Pakistan Vs. Javaid Iqbal (2011 SCMR 1013), it has been *inter-alia* held that a document not produced and proved in evidence but only marked could not be considered by Courts as legal evidence of a fact.

30. In the case at hand, the learned counsel for the petitioner could not come up with any explanation as to why the petitioner (DW-1), during his evidence, did not produce the documents which were produced by his counsel. These documents are copies of cheques and pay orders which the petitioner claims to have paid to the C.D.A. as allotment charges etc. All these documents predate the institution of the suit by the petitioner. The learned counsel for the petitioner also produced/exhibited the original power of attorney along with his statement. Why did the occasion for this arise? Why did the petitioner not produce the power of attorney during his evidence? All these factors make the petitioner's case of the allotment of 1/3rd share of the suit plot in Muhammad Hanif's name as *benami* most doubtful to say the least. The documents produced by the learned counsel for the petitioner along with his statement were neither copies of judicial record nor public documents.

31. In certain circumstances, the counsel for either party may produce documents which are certified copies of public or

judicial record. Documents cannot be produced by the counsel for a party in order to plug the loopholes or to address the deficiencies in the such party's evidence. In the case of BABAP Enterprises Vs. United Bank Limited (2011 CLC 1534), the Hon'ble Lahore High Court held that documents that could be exhibited or tendered in evidence by a witness, could not be exhibited in the statement of the counsel for a party. The statement of the counsel is not on oath and he is not cross-examined by the opposing party on the veracity and evidentiary value of the documents so tendered. In the case of Muhammad Ashraf Vs. Shah Noor Khan (1996 MLD 1819), it has been held *inter-alia* that documents which were required to be proved in accordance with the provisions of the *Qanoon-e-Shahadat* Order, 1984, could not be tendered in evidence through bare statement of the counsel for a party and got exhibited even if there was no objection from the other side. Similarly, in the case of Muhammad Ashraf Vs. Muhammad Tahir Ismail (2011 MLD 1848), it has been held as follows:-

“So far as the production of original documents are concerned, under Article 78 of Qanun-e-Shahadat Order, 1984 without the proof of signature and hand writing of person alleged to have signed or written documents cannot be taken in evidence. The production of these documents in the statement of learned counsel for the plaintiff was not permissible under the law.”
(Emphasis added)

32. In the case of Jamshed Ahmed Khan Dasti Vs. The State (2013 CLC 1501), the appellant was convicted by the Sessions Judge, Muzaffargarh, under Section 82 of Representation of the People Act, 1976, and sentenced to 3 years' imprisonment with a fine of Rs.5,000/-. The appellant had been accused of presenting a fake educational qualification at the time of contesting general elections held in the year 2008. One of the grounds on which the conviction was set aside by the Hon'ble Lahore High Court, was as follows:-

“(h) What happened in the trial of the present case was, that the learned counsel representing the complainant has in fact appeared in the witness-box and placed on record all the exhibited documents, but in spite of that he was formally not given the status of a witness the accused denying the

prosecution allegations levelled against him was not afforded any opportunity to cross-examine the said witness. If the statement of learned counsel for the complainant is not considered as a statement of witness, then this is a case of no evidence on behalf of the complainant. Even the documents, which were inducted in the record do not qualify to be of any worth for their inclusion in the evidence without some permissible mode. Some documents are shown to have been certified copies, but when probed as to which authority put a certificate on the said documents, it reveals that it was the complainant, who certified such documents. The complainant had no authority whatsoever under any law to certify the documents. Most of the documents are private documents. Neither their author nor signatory nor custodian were ever permitted to be called to appear in evidence to prove the existence of such documents."

33. Since the petitioner in his evidence did not come up with any convincing evidence that he had paid all the allotment charges etc., for the suit plot, he could not claim that 1/3rd share in the suit plot was actually owned by him and not Muhammad Hanif in whose favour the allotment of said share stood at all material times. Learned counsel for the petitioner submitted that since the suit plot was allotted as rehabilitation benefit, only allotment charges were paid, and no sale consideration was paid. This would make the petitioner's case even more doubtful since the petitioner in his cross-examination had deposed that the suit plot was not allotted as compensation by the C.D.A., and that he (the petitioner) had paid for the suit plot.

34. Registered Special Power of attorney dated 15.01.1986 (Ex.D.1), was executed by the petitioner in favour of Muhammad Hanif, authorizing the latter to *inter-alia* correspond with the C.D.A. and to execute any document, deed or paper required to be signed or executed by the C.D.A. with respect to the suit plot. Muhammad Hanif was also authorized to take possession of the suit plot and to construct a building thereon with the funds provided by the petitioner. A house has been constructed on 10 *marlas* of the suit plot. Respondents No.2 and 3 are residing in the said house. It is common for a sibling living abroad to give a power of attorney regarding his property in Pakistan to a sibling living in Pakistan. Admittedly, the petitioner had 1/3rd share in the suit plot. The mere fact that the said power of attorney was not

with respect to 1/3rd share in the suit plot, but the entire suit plot would not make the petitioner the owner of the entire suit plot. It is also an admitted position that 1/3rd share in the suit plot was owned by Yaqoob Khan, and after his demise by his legal heirs. The said power of attorney makes no mention of Yaqoob Khan's share in the suit plot. The said power of attorney cannot be construed as an arrangement between the petitioner and Muhammad Hanif as to the latter being a *benamidar* to the extent of 1/3rd share in the suit plot.

35. It may also be mentioned that the said power of attorney was not produced by the petitioner (DW-1) during his evidence. Had the petitioner produced this document during his evidence, respondent No.1 would have had the chance to cross-examine him. This document was also produced by the learned counsel for the petitioner along with his statement. The factum as to the execution of the power of attorney is pleaded by the petitioner in paragraph 3 of the suit. This assertion was specifically denied by respondent No.1 in her written statement. Therefore, the petitioner could not be relieved from the obligation of proving the execution of the said power of attorney in accordance with the provisions of the law, even though the same was registered. It is well settled that when the defendant denies the execution of a power of attorney, the burden shifts on to the plaintiff to prove the same in accordance with the provisions of Articles 17 and 79 of the *Qanoon-e-Shahadat* Order, 1984. Reference in this regard may be made to the law laid down in the cases of Mir Shah Nawaz Marri Vs. Sub-registrar, Quetta (2017 MLD 158), Mst. Salma Bibi Vs. Muhammad Aslam (2014 YLR 2481), Riaz-ul-Haq Sheikh Vs. Zulfiqar Hussain (2010 CLC 770), Sardar Muhammad Vs. Mst. Naheed Mehboob Alam (2005 YLR 2108), and Jan Muhammad Vs. Collector, District Jang (2004 CLC 1847). In the case at hand, the petitioner did not even produce the said power of attorney when his evidence was being recorded let alone producing the marginal witnesses or a representative from the office of the sub-registrar to prove its execution. Although presumption of correctness was attached to a registered document but when its

execution was denied then the sanctity of said document would depend upon the quantum and quality of evidence, which is lacking in this case.

36. In the written statement filed by C.D.A. in the suit for declaration etc., instituted by the petitioner, it has been pleaded that Muhammad Hanif was the co-allottee of the suit plot, and that his legal heirs had not applied for the transfer of his share in their names. Since Yaqoob Khan's share in the suit plot was transferred to his legal heirs after his demise, there is nothing preventing respondent No.1 from applying to the C.D.A. for transferring her *Sharai* share in the 1/3rd share in the suit plot, which was owned by her father, to her.

37. Taking into consideration the cumulative effect of all the facts and circumstances of the present case, the learned Courts below concurrently came to the conclusion that the petitioner failed to prove that the purchase of 1/3rd share in the suit plot in Muhammad Hanif's name was a *benami* transaction. I am in complete agreement with the findings arrived at by learned Courts below. It cannot be held that the findings of the courts below were perverse or in disregard of the material evidence on record. Resultantly, this civil revision petition is dismissed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

M.A. Raza

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