

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

R.F.A.No.09/2017

Kamil Rehman and others

**Versus**

Haji Rehman Bangash and another

**Date of Hearing:** 21.10.2019  
**Appellants by:** M/s Tahir Mahmood Abbasi and Muhammad Arbab Alam Abbasi, Advocates  
**Respondents by:** M/s Abdur Rashid Awan, and Zahid Ayub Rathore, Advocates.

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**MIANGUL HASSAN AURANGZEB, J:-** Through this judgment, we propose to decide regular first appeals No.08/2017, 09/2017 and 14/2017 since they entail common questions of law and fact.

2. Through regular first appeal No.08/2017, the appellants, Kamil Rehman Khan, etc., who are legal heirs of Haji Zarwar Khan (“Zarwar Khan”), impugn the consolidated judgment and decree dated 19.12.2016 passed by the Court of the learned Civil Judge, Islamabad, whereby suit for declaration and permanent injunction (“Suit No.90/2006”) instituted on 30.11.1998 by Zarwar Khan against Rehman Bangash was dismissed. In the said suit, Zarwar Khan had prayed for a declaration to the effect that he is the actual and lawful owner in possession of House No.24, Street No.2, E-7, Islamabad (“the suit house”) whereas Rehman Bangash was a *benamidar* having no concern with the suit house.

3. Through regular first appeal No.09/2017, the appellants, Kamil Rehman Khan etc., impugn the said judgment and decree dated 19.12.2016 passed by the learned Civil Court, whereby suit for possession through ejectment, recovery of compensation damages and permanent injunction (“Suit No.1012/2013”) instituted on 21.03.1998 by Rehman Bangash against Zarwar Khan was decreed holding that the former was entitled to (i) possession of the suit house, and (ii) rent at the rate of Rs.1,20,000/- per month from January 1998 till the handing over of possession of the suit house.

4. Through regular first appeal No.14/2017, the appellant, Rehman Bangash, has impugned the said judgment and decree dated

19.12.2016 passed by the learned Civil Court only to the extent whereby his claim for damages was turned down and compensation to the tune of Rs.1,20,000/- per month was awarded in his favour. He has prayed for an enhancement of the compensation to Rs.10,00,000/- per month.

5. Rehman Bangash (hereinafter referred to as “respondent No.1”) was Zarwar Khan’s nephew (*bhatija*) as well as son-in-law. Vide letter dated 10.04.1984 (Exh.P/1) issued by the Estate Management Directorate of the Capital Development Authority (“C.D.A.”) ownership in the suit house was transferred to respondent No.1. The position taken by respondent No.1 in Suit No.1012/2013 instituted by him was that he being the lawful owner of the suit house was entitled to gain possession of the suit house from Zarwar Khan and also recover rent/compensation from him. The position taken by Zarwar Khan, in his Suit No.90/2006, was that he was the real owner of the suit house whereas respondent No.1 was an ostensible/*benami* owner.

6. During the pendency of the said suits, Zarwar Khan passed away whereafter his legal heirs were impleaded as parties. The appellants, save one, in regular first appeals No.08/2017 and 09/2017 are the legal heirs of Zarwar Khan. Mst. Waqif Jan, who is Zarwar Khan’s daughter and married to respondent No.1, has not assailed the said consolidated judgment and decree dated 19.12.2016. In the said appeals, she has been impleaded as respondent No.2. The legal heirs of Zarwar Khan except Mst. Waqif Jan shall hereinafter be referred to as “the appellants”.

7. After the said suits were consolidated, the learned Civil Court vide order dated 16.02.2001 framed the following consolidated issues:-

- "1. *Whether the plaintiff of suit titled "Haji Rehman Bangash Versus Haji Zarwar Khan" at Sr.No.1 has no cause of action? OPD*
2. *Whether the suit at Sr.No.1 is false and frivolous and is not maintainable? OPD*
3. *Whether the plaintiff of suit at Sr.No.1 has not come to the court with clean hands? OPD*
4. *Whether the defendants of suit at Sr.No.1 are entitled to special costs U/S 35-A of CPC? OPD*
5. *Whether the plaintiff of suit at Sr. No.1 is entitled to the decree for possession and recovery of damages Rs.50,00,000/- (five million)*

*for illegal use of the property and compensation and permanent injunction, as prayed for? OPP*

6. *Whether the plaintiff of suit titled Haji Zarwar Khan Vs. Haji Rehman Bangash etc at Sr.No.2 has no cause of action? OPP*
7. *Whether the suit at Sr.No.2 is false, and frivolous and is not maintainable? OPP*
8. *Whether the suit at Sr.No.2 is barred under Provision of Specific Relief Act? OPP*
9. *Whether the plaintiff of suit at Sr.No.2 is entitled to the decree for declaration and permanent injunction as prayed for? OPD*
10. *Relief."*

On 10.01.2002, additional issues were framed which are as follows:-

*9-A Whether the defendant No.1 (Haji Zarwar Khan) is in possession of suit property as real owner, not as tenant and plaintiff is just an ostensible owner? OPD*

*2-B Whether existing building of suit property was constructed by defendant No.1 (Haji Zarwar Khan) by his own sources as owner in possession of suit property? OPD*

8. After the framing of issues, both the parties were directed to adduce their respective evidence. Respondent No.2 appeared as PW-7. He also produced Zafar Ullah Khan (PW-1), Amjad Ali (PW-2), Sohail Ghias Khan (PW-3), Taimous, record keeper, Allied Bank Limited, F-7/2 Branch, Islamabad (PW-4), Muhammad Asam Khan (PW-5), Ishtiaq Ahmed (PW-6) and Muhammad Ali (PW-8). On the other hand, Kamil Rehman Bangash appeared in the witness box as DW-1. He also got examined Ahmed Iqbal (DW-2). Vide consolidated judgment and decree dated 19.12.2016, Suit No.1012/2013 instituted by respondent No.1 was decreed whereas Suit No.90/2006 instituted by Zarwar Khan was dismissed. Respondent No.1 was awarded compensation at the rate of Rs.1,20,000/- per month from January 1998 till possession of the suit house was handed over to him.

#### **CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS:-**

9. Learned counsel for the appellants submitted that the learned Civil Court erred by applying the provisions of the *Qanun-e-Shahadat* Order, 1984 ("the 1984 Order") to documents executed prior to the said law coming into force; that the 1984 Order came into force on 26.10.1984 whereas the documents in question were executed on 04.06.1984 and 15.01.1984; and that the impugned judgment and

decree was passed on the basis of documents which were inadmissible in the evidence.

10. Learned counsel for the appellants further submitted that the funds for the purchase of the suit house were provided by Zarwar Khan; that in compliance with the order dated 21.01.2000 passed by the learned Civil Court, Zarwar Khan had produced a copy of bank draft No.527576, dated 15.01.1984, for an amount of Rs.10,00,000/- drawn on Allied Bank Limited; that respondent No.1 had produced a copy of the said bank draft after the same had been produced by Zarwar Khan; that the learned Civil Court erroneously placed an exhibit number on a copy of the said bank draft; that the services of a Contractor (Bashir Ahmad) had been engaged by Zarwar Khan for the construction of a house on the plot purchased from Mst. Tahira Zaheer; that Zarwar Khan had entered into an agreement (Exh.D/4) with M/s Saeed Associates Consulting Architect for the design of the suit house; that respondent No.1 was only about 24 years of age in the year 1984 when the suit house was purchased; that respondent No.1 had deposed that he had done his F.A. from the Government College, Hangu in the year 1980-81, and that in January 1982, he was taken to Qatar when his age was 20 to 22 years; that respondent No.1 did not have financial means to purchase the suit house; that respondent No.1 also deposed that he had no evidence to prove that he had transferred funds from Qatar to Pakistan, and that in those days, funds used to be transferred by him through *hundi* to his father and brother; that in fact in those days respondent No.1 was financially dependent on his paternal uncle, Zarwar Khan, who was also living in Qatar; that ever since 1987 when the construction of the suit house was completed, the possession, constructive and otherwise had remained with Zarwar Khan and/or his sons; that between 1989 and 1996, the suit house was given on rent to various tenants through agreements executed by the appellants; that respondent No.1 had never remained in possession of the suit house; that in the year 1998, possession of the suit house was handed over by the tenant to Zarwar Khan; that since Zarwar Khan's family was not in Pakistan in year 1984, the suit house was purchased by him in

respondent No.1's name; that it had never been Zarwar Khan's intention to give the suit house to respondent No.1; that all the requisite documents with respect to the sale transaction and the construction of the suit house were in Zarwar Khan's possession; that respondent No.1 has come up with different conflicting positions regarding the possession of the allotment letter/title documents regarding the suit house; that even though the utility bills were in the name of respondent No.1, they were paid by the appellants who are in possession of the relevant receipts; that the impugned judgment passed by the learned Civil Court is based on circumstantial evidence without taking into consideration the relationship between the contesting parties and the surrounding circumstances; that Zarwar Khan had also purchased properties in the name of his brother, Haji Noorwar Khan, who was respondent No.1's father; that respondent No.1's father had executed an *iqrarnama* in which he had admitted that Hotel Doha Palace in Peshawar had been purchased by Zarwar Khan in the name of respondent No.1's father; and that since a relationship of trust existed between Zarwar Khan and his nephew-cum-son-in-law/respondent No.1, the former had purchased the suit property in the latter's name. Learned counsel for the appellants prayed for the appeal to be allowed and for the consolidated judgment and decree dated 19.12.2016, passed by the learned Civil Court, to be set-aside. In making his submissions, learned counsel for the appellants placed reliance on the judgments in the cases of Ghulam Murtaza Vs. Mst. Asia Bibi (PLD 2010 SC 569), Naushad Shamsuddin Fancy Vs. New Jubilee Insurance Company Limited (2007 CLC 1448), Abdul Majeed Vs. Amir Muhammad (2005 SCMR 577), Malik Muhammad Zubair Vs. Malik Muhammad Anwar (PLD 2004 Lahore 515), Muhammad Yaseen Siddiqui Vs. Tahseen Jawaid Siddiqui (2003 MLD 319), Muhammad Zaman Vs. Sheikh Abdul Hamid (2002 CLC 1209) and Asal Muhammad Vs. The State (PLD 1994 Peshawar 214).

#### **CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.1:-**

11. On the other hand, learned counsel for respondent No.1 submitted that the documents produced by Zafarullah Khan, Upper

Division Clerk, C.D.A. (PW-1) clearly show that the sale consideration for the suit house had been paid by respondent No.1; that respondent No.1 had sufficient earnings in Qatar with which the suit house was purchased; that the bank draft through which the sale consideration had been paid to Mst. Tahira Zaheer had been produced as Exh.P/17 by respondent No.1/PW-7; that Sohail Ghias Khan appeared as PW-3 and deposed *inter alia* that the architect fee had been paid by respondent No.1; that Muhammad Ali who was the son of the construction contractor appeared as PW-8 and identified his father's signature on the books of expenses incurred on the construction of the suit house; that the utility meters in the suit house were in respondent No.1's name; that after the completion of the suit house in 1987, respondent No.1 along with his family resided in the said house for a period of nine years; that in 1995, respondent No.1 went abroad and his family shifted to live with Zarwar Khan; that Zarwar Khan had given the suit house on rent with respondent No.1's consent and upon the latter's return from abroad the rent was paid to him; that Zarwar Khan had given the suit house on rent to Mr. Paul Medhurst, Security Officer, UNMOGIP without respondent No.1's consent; that respondent No.1 had issued a legal notice to Mr. Medhurst requiring the latter to vacate the suit house; that the said tenant handed over possession of the suit house to Zarwar Khan in 1998; that ever since 1998, Zarwar Khan and/or his sons are in unlawful possession of the suit house; that Zarwar Khan, in his suit for declaration etc. has not pleaded the motive for entering into a *benami* transaction regarding the suit house; that possession of the allotment letter had been with respondent No.1 but the same was taken by Zarwar Khan; that none of the ingredients for declaring the transaction for the purchase of the suit house in respondent No.1's name to be a *benami* transaction have been satisfied in the case at hand; that Zarwar Khan and/or his sons were bound to pay compensation to respondent No.1 for the period that they remained in possession of the suit house; and that the learned Civil Court had correctly held respondent No.1 entitled to compensation and unpaid rent but the amount of compensation ought to be enhanced by this

Court. Learned counsel for respondent No.1 prayed for appeals No.08/2017 and 09/2017 to be dismissed and for appeal No.14/2017 to be allowed.

12. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

13. As mentioned above, Zarwar Khan's stance was that he was the real owner of the suit property whereas respondent No.1 was only an ostensible/*benami* owner. 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. In the cases of Muhammad Sajjad Hussain Vs. Muhammad Anwar Hussain (1991 SCMR 703) and Muhammad Siddiqui Vs. T.J. Ibrahim & Company (2001 SCMR 1443), it was held that "*the initial burden of proof is on the party who alleges that an ostensible owner is a Benamidar*". 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."*

**The source from which the money for the purchase of the suit house came:-**

14. Vide agreement to sell dated 20.12.1983 (Exh.D/3) executed between Mst. Tahira Zaheer and respondent No.1, the former agreed to sell the suit house to the latter for a total sale consideration of Rs.10,75,000/-, out of which Rs.75,000/- was paid as earnest money whereas the remaining Rs.10,00,000/- was to be paid by 15.01.1984.

15. Vide bank draft No.527576, dated 15.01.1984, for an amount of Rs.10,00,000/- drawn on Allied Bank Limited, the remaining sale

consideration was paid to Mst. Tahira Zaheer. In suit No.60/2009, Zarwar Khan had pleaded *inter alia* that the remaining sale consideration had been paid by him through the said bank draft. Since a copy of the said bank draft had not been filed along with the said suit, respondent No.1 filed an application for the production of the said bank draft. Vide order dated 21.01.2000, the learned Civil Court directed Zarwar Khan to file a copy of the said bank draft in the Court. It appears that on 01.03.2000, Zarwar Khan produced a copy of the said bank draft in the Court.

16. Thereafter, on 06.04.2000, respondent No.1 filed a written statement wherein it was pleaded that respondent No.1 had paid the remaining sale consideration through the said bank draft No.527576 dated 15.01.1984.

17. In the cases of Shalimar Limited Vs. Raisuddin Siddiqui (1979 CLC 338), Ismail Dada Adam Soomar Vs. Shorat Bano (PLD 1960 Karachi 852) and Mst. Shohrat Bano Vs. Ismail Dada Adam Soomar (1968 SCMR 574), it was held *inter alia* that “*the most important criteria for determining the benami nature of the transaction is the source of the purchase money*”. Zarwar Khan died before getting an opportunity to record his evidence. His son, Kamil Rehman, appeared as DW-1 and deposed *inter alia* that his father had purchased the suit house from Mst. Tahira Zaheer on 20.12.1983 for an amount of Rs.10,75,000/-. He produced the agreement to sell dated 20.12.1983 as Exh.D/3. Furthermore, he deposed that the sale consideration for the suit house had been paid by his father through a bank draft issued by Allied Bank Limited, F-7/2 Branch, Islamabad. He produced a copy of the said bank draft as Mark-D/1.

18. Respondent No.1 appeared as PW-7 and deposed *inter alia* that he had purchased the suit house from Mst. Tahira Zaheer in the year 1983 for an amount of Rs.10,75,000/-, out of which Rs.75,000/- was paid in cash whereas the remaining Rs.10,00,000/- was paid on 15.01.1984 through bank draft No.527576 from his current account No.744 with Allied Bank Limited. Respondent No.1 produced a copy of the said bank draft as Exh.P/17 during his evidence, under objection of the learned counsel for the appellants.



19. Ahmed Iqbal, Manager Operations, Allied Bank Limited, F-7/2 Branch, Islamabad appeared as DW-2 and deposed *inter alia* that since the regulations of the State Bank of Pakistan require banks to maintain records for the previous five years, his bank does not have the record pertaining to the year 1984.

20. There is nothing on the record to show that bank draft No.527576 for an amount of Rs.10,00,000/- had been prepared from the funds in the bank account of either respondent No.1 or Zarwar Khan. Other than the production of a copy of the said bank draft by respondent No.1 as Exh.P/17, and by DW-1/Kamil Rehman as Mark-D/1, there is no other corroborative documentary evidence to show that the said bank draft was made at the instance and from the funds of either respondent No.1 or Zarwar Khan. There is also no receipt of the sale consideration on the record.

21. Zafarullah Khan, Upper Division Clerk, Estate Management Directorate, C.D.A. appeared as PW-1 and deposed *inter alia* that the suit house was transferred on 10.04.1984 to respondent No.1. He produced a copy of the transfer letter as Exh.P/1. He also deposed that respondent No.1 had deposited the transfer fee with respect to the suit house. He produced the application for the transfer of the suit house as Exh.P/2. PW-1 was not cross-examined. Vide order dated 12.02.2015, the right to cross-examine PW-1 was closed by the learned Civil Court.

22. Vide transfer letter dated 10.04.1984 (Exh.P/1) addressed by the Estate Management Directorate, C.D.A. to Mst. Tahira Zaheer and copied to respondent No.1, the suit house was transferred to respondent No.1. The said transfer letter makes reference to Mst. Tahira Zaheer's transfer application which was produced by PW-1 as Exh.P/2. The content of the said transfer application is a clear acknowledgment by Mst. Tahira Zaheer that the sale consideration for the suit house was paid to her by respondent No.1. For the purposes of clarity, this acknowledgment on her behalf in Exh.P/2 is reproduced herein below:-

*"I was allotted by CDA plot No.24, Street No.E-7, Sector E-7, Islamabad measuring 1153.33 square yards vide allotment order No.CDA/EM-24/E-*

*7/75/8445, dated 26.03.1982, I have now decided to transfer the said plot to Haji Rehman Bangash son of Haji Noor War Khan aged about 23 years, resident of V+PO Dohba Teh Hungu Kohat from whom I have received the entire amount paid by me to the CDA on account of price premium of the plot and who has agreed to abide by all the terms and conditions of allotment and to pay the transfer fee as prescribed by CDA and other dues payable by me in respect of the said plot.”*

**(Emphasis added)**

23. Since PW-1 was not cross-examined and no objection was taken on behalf of any of Zarwar Khan's legal heirs when Exh.P/1 and Exh.P/2 were produced by PW-1, the contents of Exh.P/2 (which is a public document) are ample proof that the sale consideration for the suit house was paid to Mst. Tahira Zaheer by respondent No.1. There is no other document executed contemporaneously with Exh.P/2 to show that the sale consideration was in fact paid by Zarwar Khan so as to contradict the contents of Exh.P/2.

24. The contesting parties did not produce Mst. Tahira Zaheer, who would have been in the best position to state as to from whom she had received the sale consideration. It may be mentioned that respondent No.1 had, on 13.05.2002, filed an application before the learned Civil Court under Order XXVI C.P.C. for the appointment of a local commission to record Mst. Tahira Zaheer's evidence. The said application was dismissed as withdrawn on 15.01.2003. Years later, on 14.03.2015, respondent No.1 filed an application for the appointment of a local commission to record the evidence of Mst. Tahira Zaheer's husband, Mr. Zaheer Ahmed Qureshi. Vide order dated 30.03.2015, the learned Civil Court dismissed the said application on the ground that respondent No.1 had earlier withdrawn his application for the appointment of the local commission for the recording of Mst. Tahira Zaheer's evidence. Respondent No.1 did not assail the said order dated 30.03.2015.

25. Since the burden was on Zarwar Khan and/or his legal heirs to prove that the said transaction was *benami* in nature, a safe mode to discharge this burden was for them to have called Mst. Tahira Zaheer as a witness so that she could testify that she had in fact entered into the transaction with Zarwar Khan and that it was from him that she had received the sale consideration. This, Zarwar Khan and/or his legal heirs, did not do. They did not even produce the witnesses to

the agreement to sell dated 20.12.1983. Due to this omission, the acknowledgment in Mst. Tahira Zaheer's above-mentioned transfer application (Exh.P/2) as to the receipt of the sale consideration from respondent No.1 remained un-rebutted. In the case of Abdul Ghani Vs. Muhammad Shafi (1991 CLC 1706), one of the reasons why a suit filed by the respondent asserting to be the beneficial owner of a property did not succeed was because the vendor had not been produced to give evidence in support of the respondent's stance.

26. In view of the above, it cannot be held that the plaintiffs/appellants in the suit for declaration etc. (Suit No.90/2006) had discharged their onus of proving that the sale consideration for the suit house had been paid by them and not by respondent No.1.

27. It is not disputed that a house was constructed on the plot sold by Mst. Tahira Zaheer. Kamil Rehman (DW-1), in his examination-in-chief, deposed that on 04.06.1984, an agreement for the construction of a house on the suit property was executed between Zarwar Khan and one Bashir Ahmad. Kamil Rehman produced the construction agreement dated 04.06.1984 (Exh.D/1) executed between Zarwar Khan and Bashir Ahmad (Contractor). Muhammad Ali (PW-8), who was Bashir Ahmad's son, had identified his father's signatures on the said construction agreement. The said agreement was witnessed by Salar Abdul Ghani and a second witness whose name cannot be deciphered from his signature. The stamp paper on which the said agreement (Exh.D/1) was executed and was issued on 04.06.1984 for an agreement between Bashir Ahmad and respondent No.1. Kamil Rehman/DW-1, in his cross-examination, deposed that one of the witnesses namely Salar Abdul Ghani had passed away. He chose not to produce the second witness in order to prove the execution of the said agreement. Therefore, it can safely be held that the execution of the said agreement was not proved in accordance with Section 68 of the Evidence Act, 1872. It ought to be borne in mind that the *Qanun-e-Shahadat* Order, 1984, Article 79 whereof requires such a document to be proved by producing two attesting witnesses had come into force on 26.10.1984, i.e. after the alleged execution of the said construction agreement.

28. The architect of the suit house was M/s Saeed Associates Consulting Architects. Kamil Rehman (DW-1) produced Exh.D/4 which is an agreement executed between Zarwar Khan and the said firm for drawing up the design for the suit house. The said agreement was signed by Chaudhary Muhammad Saeed, Chief Architect on behalf of the said firm. Chaudhry Muhammad Saeed did not appear as a witness on account of having gone abroad. Sohail Ghias Khan, who was Auto Operator in said firm, appeared as PW-3 and produced the design map of the suit house as Mark-A and the receipt for the payment of architect's fee as Mark-B. PW-3 deposed that the architect's fee had been paid by respondent No.1 and in this regard, a receipt for Rs.10,000/- was produced as Mark-B.

29. Respondent No.1 (PW-7) had deposed that he had provided the funds for the construction by transferring them through *hundi* from Qatar. In support of this stance, respondent No.1 produced his diaries as Exh.P7/1-50. The said diaries show entries of various payments made to Bashir Ahmad whose signatures also appear on the entries. Bashir Ahmad's son, Muhammad Ali (PW-8), had also identified his father's signatures on the said entries.

30. Respondent No.1, in his examination-in-chief, produced note books (Exh.P/7 and P/8) containing the expenses incurred by him on the construction of the suit house. Although the construction contractor had died and therefore could not be produced as a witness, his son Muhammad Ali appeared as PW-8 and identified his father's signatures on the note books as Exh.P/1 to 50.

31. PW-3's testimony that the architect's fee had been paid by respondent No.1 and identification by PW-8 of his father's signature on the note books produced by respondent No.1 lead credence to respondent No.1's position that he had paid for the construction of the suit house.

**The nature and possession of the property after the purchase:-**

32. It is an admitted position that presently possession of the suit house is with Zarwar Khan's sons. Kamil Rehman/DW-1, in his cross-examination, deposed that since 1998 he is in possession of the suit house. Respondent No.1 had also deposed that Zarwar Khan had

taken possession of the suit house in January 1998. In view of these depositions, respondent No.1 has not been in possession of the suit house since the past twenty years.

33. Certificate of possession dated 16.04.1984 (Exh.D/11) issued by the C.D.A. shows that possession of the suit property had been handed over to respondent No.1. The notice of completion dated 15.01.1987 (Exh.D/12) had been issued by respondent No.1 to the C.D.A. These documents are evidence of the fact that after the purchase of the plot from Mst. Tahira Zaheer and the construction of a house thereon, its possession had been with respondent No.1. It may, however, be mentioned that these documents were not produced by respondent No.1/PW-7 but by the learned counsel for respondent No.1. It now needs to be determined how respondent No.1 lost possession of the suit house to Zarwar Khan and/or the appellants.

34. Zarwar Khan, in his suit for declaration etc. (Suit No.90/2006), pleaded that possession of the suit house was handed over to him by the C.D.A. and that the certificate of possession No.1351, dated 16.04.1984, was in his possession. Furthermore in paragraphs 10 to 13 of the said suit, it was pleaded that the suit house had been leased out on 01.03.1989 to the Military Liaison Officer of the United Arab Emirates for a monthly rent of Rs.30,000/-; that on 14.04.1994, the suit house was rented out to Mrs. Margaret Kyenkya from UNICEF for a period of three years; and that on 22.05.1996, the suit house had been rented out to Mr. Paul Medhurst, Security Officer, UNMOGIP.

35. Respondent No.1, in his written statement, pleaded *inter alia* that after the completion of the construction of the suit house, he had been residing in the same along with his family, and after he went abroad, his wife and children continued to live there until they shifted to live with Zarwar Khan. Respondent No.1, in his written statement, admitted that the suit house was rented out by Zarwar Khan with his consent and upon his return from abroad, Zarwar Khan had handed over the rent to respondent No.1. In view of the said admission, the execution of the lease agreements executed by Zarwar Khan with the tenants between 1989 and 1996 (Exh.D/5 to Exh.D/9) does not need to

be proved. Furthermore, it was pleaded by respondent No.1 that legal notice dated 10.09.1997 (Mark-C) was sent on his behalf to the tenant intimating to the latter that the house in his occupation is without consent of respondent No.1. Perusal of the said notice shows that thereby respondent No.1 required the tenant, Mr. Medhurst, to pay rent to him and not anybody else. In paragraph 6 of the suit for possession etc., respondent No.1 pleaded *inter alia* that on the expiry of the lease, possession of the suit property had been handed over by the said tenant to Zarwar Khan. In respondent No.1's examination-in-chief, Zarwar Khan is said to have trespassed and taken possession of the same after the tenant vacated the suit house. Moreover, legal notice dated 04.03.1995 (Mark-B) is said to have been served on Zarwar Khan calling upon him to hand over possession of the suit house to respondent No.1. On 21.03.1998, respondent No.1 filed a suit for possession against Zarwar Khan and his sons.

36. Kamil Rehman (DW-1) deposed *inter alia* that the suit house was rented out by this father to different tenants through lease agreements produced as Exh.D/5 to Exh.D/9. The period during which the rent agreements were executed was from 1989 to 1996. The lease agreement dated 22.05.1996 (Exh.D/9) was executed between Kamil Rehman and Mr. Paul Medhurst, Security Officer, UNMOGIP.

37. Respondent No.1 appeared as PW-7 and deposed in his cross-examination that he had lived in the suit house for a period of nine years, and that after he proceeded to Qatar in the year 1995, his wife and children moved to live with Zarwar Khan. Respondent No.1 did not depose as to whom he handed over possession of the suit house after he proceeded abroad and his wife and children moved out of the suit house. Respondent No.1, in his written statement to Zarwar Khan's suit, did not clearly deny the fact that the said house had been given on rent from 1989 to 1996. Respondent No.1 deposed that he came to know in the year 1996 that Zarwar Khan had rented out the suit house to a foreigner for an amount of Rs.70,000/-.

38. Now, since the construction of the suit house was admittedly completed in 1987, the nine-year period during which respondent No.1 claims to have lived in the suit house would end in 1996.

Respondent No.1's testimony belies his own pleadings. Respondent No.1's admission in his written statement that between 1989 and 1996, the suit house was rented out with his consent and that he had also been paid the rent is a negation of his testimony that he lived in the suit house for nine years and went abroad in the year 1995 after which his wife and children moved to live with Zarwar Khan. On the one hand, respondent No.1 deposes that the possession of the suit house fell in the hands of Zarwar Khan in the year 1995 when respondent No.1 went abroad and on the other hand, he pleads that for the period between 1989 to 1996, the suit house was given on rent by Zarwar Khan with respondent No.1's consent and that the latter had received the rent for the said period. This material contradiction renders respondent No.1's testimony on this question unbelievable. Yet another contradiction in respondent No.1's case is that in his cross-examination, he deposed that prior to the suit house having been given on rent to Mr. Paul Medhurst, respondent No.1's wife and children lived in the suit house.

39. It is when a litigant tries to build his case on a false premise that such contradictions in his testimony develop. Is this Court to believe respondent No.1 when he says that he lived in the suit house for nine years after its completion in 1987 or that between 1989 and 1996, the suit house was rented out by Zarwar Khan with his consent? These positions taken by respondent No.1 are contradictory and mutually exclusive. Be that as it may, the long and short of this is that respondent No.1 has not been able to prove that he was in possession of the suit house at all material times after 1987 when the construction of the suit house was completed.

**Motive if any, for giving the transaction a *benami* complexion:-**

40. The motive on the part of the person who claims to have advanced the sale consideration plays an important role in determining the nature of the transaction. No motive for having purchased the suit house in respondent No.1's name was pleaded by Zarwar Khan in the suit declaration, etc. filed by him as well as the written statement to the suit filed by respondent No.1. Zarwar Khan's son, Kamil Rehman, appeared as DW-1 and in his examination-in-

chief, deposed *inter alia* that although the motive for purchasing the suit property in respondent No.1's name has not been pleaded in the suit, the said property was purchased in respondent No.1's name because Zarwar Khan's wife and children were abroad. Furthermore, it was deposed that no document was executed to show that the purchase of the suit house in respondent No.1's name was a *benami* transaction. "*Mutual confidence, faith warm and cordial relationship*" between Zarwar Khan and respondent No.1 could hardly constitute motive to sustain a plea of *benami* transaction.

41. Since the suit instituted by Zarwar Khan contains no pleading as to a plausible or a valid reason/motive for the purchase of the suit house in respondent No.1's name, the reason advanced by DW-1 in his evidence for the purchase of the suit house in respondent No.1's name is not worthy of any consideration. It is an admitted position that Zarwar Khan was in Pakistan when the suit house was purchased. If indeed Zarwar Khan had purchased the suit property, it does not appeal to reason as to why another person would be shown as the owner of the suit property. All this leads us to form the view that an essential prerequisite for declaring a transaction for the purchase of property to be *benami* in nature is lacking in the case at hand. It is essential for the motive for the *benami* transaction to borne out from the record. Reference in this regard may be made to the following case law:-

- (i) In the case of Ghulam Murtaza Vs. Asia Bibi (PLD 2010 SC569), it has been held as follows:-

*"7. At this juncture, we may clarify that the motive part in the benami transaction is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other."*

Furthermore, in the said case, it was held that if "*motive is available and also is reasonable and plausible, a transaction can be held as Benami, otherwise not*".

- (ii) In the case of Abdul Majeed Vs. Abdul Rasheed (PLD 2016 Lahore 383), the Hon'ble Lahore High Court held *inter alia* that "*the absence of motive always goes against a party asserting*



*title over a property as its real owner against a party alleged to be an ostensible/benami owner”.*

(iii) In the case of Ansar Hussain Vs. Muhammad Karim (2006 CLC 732), the Hon'ble Lahore High Court held *inter alia* that “*the main ingredients about the Benamiship are the motive and the source of money*”.

(iv) In the case of Muhammad Riaz Mirza Vs. Muhammad Yousaf Mirza (2005 YLR 2213), it was held as follows:-

*“26. In addition to the above, it is clear from the record that no motive for a Benami transaction has been brought out on record by Muhammad Yousaf Mirza. It is by now well-settled that the existence of a motive for creating a Benami title is relevant for the purpose of determining whether title vested in a person is merely Benami. The absence of any motive also goes against Muhammad Yousaf Mirza.”*

(v) In the case of Muhammad Rafique Vs. Khalida Shehzadi (2003 CLC 559), it was held as follows:-

*“In matters where law requires a party to prove its motive for doing an act, failure to establish motive defeats the claim made by such party. Dispute regarding Benami transaction, motive for alienation in favour of Benamidar must be proved by the person claiming to be the real owner.*

(vi) In the case of Muhammad Zaman Vs. Abdul Hamid (2002 CLC 1209), the Hon'ble Lahore High Court held as follows:-

*“In matters in which law requires a party to prove its motive for doing an act failure to establish motive would defeat the claim made by the party. In disputes relating to Benami transactions, motive for alienation in favour of a Benamidar must be proved by the person claiming to be the real owner”.*

**The position of the parties and the relationship, if any, between the claimant and the alleged benamidar:-**

42. Respondent No.1 was Zarwar Khan's nephew as well as son-in-law. Respondent No.1 was in his early twenties when the suit house was purchased. After the suit house was purchased, he did not purchase any other immovable property in Islamabad. The mere fact that respondent No.1 was young when the suit house was purchased would not *ipso facto* lead to the conclusion that he was only an ostensible owner and that Zarwar Khan was the real owner. There is no evidence as to the existence of circumstances showing that Zarwar Khan could not purchase the suit house in his own name and

was compelled to purchase the same in respondent No.1's name. If it is assumed for the sake of argument that Zarwar Khan was the real owner of the suit house, it does not appeal to reason as to why he did not transfer the suit house in his own name between 1984 (when the suit house was purchased from Mst. Tahira Zaheer) and 1998 (when respondent No.1 instituted the suit for possession of the suit house). There is nothing on the record to show that there was any impediment or hurdle before Zarwar Khan in transferring the suit property in his own name. Additionally, there is nothing on the record to suggest that there was an agreement or understanding between respondent No.1 and Zarwar Khan that the latter was to be the real owner of the suit house. Zarwar Khan had several years after the purchase of the suit house to have executed such an understanding with respondent No.1. The absence of such an express understanding would go to respondent No.1's benefit. Reference in his regard may be made to the following case law:-

(i) In the case of Ghulam Rasool Vs. Nusrat Rasool (PLD 2008 SC 146), it was held as follows:-

*"[T]wo essential elements must exist to establish the benami status of the transaction. The first element is that there must be an agreement express or implied between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the person who has to make payment of the consideration and second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party".*

(ii) In the case of Bilqees Begum Vs. Registrar of Properties (PLD 2006 Karachi 617), it was held as follows:-

*"A transaction can be recognized and declared as benami only if there is clear agreement or express understanding in that respect between the person who claims to be purchaser as owner and the person in whose favour the property was purchased. That agreement should be clear to the extent that the property was in fact owned by the person having paid the price thereof and not by the person in whose name it has been purchased".*

Law to the said effect has also been laid down in the case of Muhammad Arif Vs. Waheed-ul-Haq (2017 YLR 224).

43. Respondent No.1, during his evidence, had produced an affidavit (Exh.PW1/X-1) sworn by his father, Haji Noorwar Khan. In the said affidavit, it was deposed *inter alia* that a four-storey building in

Peshawar called “*Doha Palace*” was beneficially owned by Zarwar Khan whereas the deponent/Haji Noorwar Khan was only its ostensible/*benami* owner. No plausible explanation was advanced by the learned counsel for respondent No.1 for having produced the said document. If the intention behind producing the said document was that it was a practice between Haji Zarwar Khan and his brother, Haji Noorwar Khan, or his children to enter into *benami* transaction, this would be fatal to respondent No.1’s case. Be that as it may, if the affidavit sworn by respondent No.1’s father is true, it would show that it was a practice by Zarwar Khan to purchase properties in the names of his relatives.

**The custody of the title-deeds after the transaction:-**

44. Since the suit house is located in the developed sector of Islamabad, the transfer/allotment letter issued by the C.D.A. in favour of its owner would be considered as the title document. Zarwar Khan, in his suit for declaration etc., did not specifically plead that he is in possession of such a transfer/allotment letter. He, however, did plead that the original owner of the suit house, namely Mst. Tahira Zaheer, had handed him over the original documents pertaining to the suit house. What is of importance in a suit praying for a declaration that the transaction for the purchase of property is *benami* in nature is for the plaintiff not just to plead that he is in possession of the title document but also to produce the same in his evidence.

45. The title document with respect to the suit house is letter No.CDA/EM/E-7/24/75, dated 10.04.1984, whereby the allotment of the suit house was transferred from Mst. Tahira Zaheer to respondent No.1. This document was produced by Zarwar Khan’s learned counsel as Exh.D-18, at the stage of the recording of his statement. No explanation was put forth by the learned counsel for the appellants as to why Kamil Rehman/DW-1 did not produce the said transfer letter. Although in the case of Muhammad Nawaz Vs. Shahida Perveen (PLD 2017 Islamabad 375), this Court had held that the documents cannot be produced by counsel for the parties in order to plug the loopholes or to address the deficiencies in such parties’ evidence, but in the case at hand respondent No.1 admitted

that the possession of the original transfer letter was with Zarwar Khan. What respondent No.1 disputes is the legality and propriety of the appellant's possession of the allotment/transfer letter.

46. When the transfer/allotment letter was produced before the learned Civil Court by the appellant's counsel, an objection was taken by learned counsel for respondent No.1 that the said document had been stolen from respondent No.1 and in this regard, *Rapt* No.8, dated 14.11.1997 (Mark-A/1) was registered at Police Station, Margalla, Islamabad. The contents of the said report show that respondent No.1 had taken the position that he had brought the original documents to the lower Courts/*Kachehri* where he had lost them. Respondent No.1 had also applied to the C.D.A. for the issuance of a duplicate allotment letter. The said application was accompanied by respondent No.1's affidavit in which he deposed that the original documents pertaining to the suit house had been misplaced somewhere.

47. Respondent No.1/PW-7's examination-in-chief is not consistent with the objection taken by his learned counsel when the appellants' counsel produced the transfer/allotment letter. Respondent No.1, in his examination-in-chief, deposed that the original documents were present in the suit house and since respondent No.1 had proceeded abroad, they came into Zarwar Khan's possession. It was also deposed that despite repeated reminders, Zarwar Khan had not given these original documents to respondent No.1. Respondent No.1, in his cross-examination, also deposed that in the year 1995 when Zarwar Khan took possession of the suit house, he also snatched (چھین لی) the file pertaining to the suit house, and that respondent No.1 in this regard lodged a criminal complaint (Mark-PW-7/A1). Respondent No.1 clarified that although a criminal complaint had been filed regarding the allotment/transfer letter having been lost but after coming to know that the same was in Zarwar Khan's possession, he did not pursue the criminal complaint and verbally requested Zarwar Khan to return the said document. However, on 13.11.2016, respondent No.1 filed an application before the D.S.P., Islamabad praying for legal action to be taken against

Zarwar Khan's sons for having stolen the documents pertaining to the suit house. In the case of S. Iqbal Ahmad Vs. Jawaaid Iqbal (2011 CLC 29), the title documents of the property in question in the said case were held to be with the plaintiff since the defendant had lodged an F.I.R., wherein it was alleged that the title documents had been taken away by the plaintiff.

48. Respondent No.1's stance, in his examination-in-chief, is not even consistent with his stance in his cross-examination inasmuch as on the one hand he takes the position that when he went abroad in 1995, the allotment/transfer letter came in Zarwar Khan's possession and on the other hand, he asserts that Zarwar Khan had snatched the allotment/transfer letter from him. In the case of Abdus Samad Khan Vs. Abdullah (1989 CLC 1563), the party/defendant alleged to be an ostensible/*benami* owner of the property in question had given contradictory evidence with respect to the possession of the title documents pertaining to such property. He had deposed in his cross-examination that he could not produce the documents pertaining to the house in dispute because he had misplaced them. He had also accused the plaintiff of having stolen the documents. This contradiction in the defendant's evidence was one of the reasons for decreeing the suit instituted by the plaintiff claiming to be the real owner of the property in question.

49. It may be noted that respondent No.1, in his written statement to Zarwar Khan's suit for declaration, etc. (Suit No.90/2006) had pleaded *inter alia* that since after he returned to Pakistan, he was unable to locate the papers relating to the suit house, he published an advertisement in the newspaper and lodged a report in the concerned police station. It may also be noted that respondent No.1, in his suit for possession, had not pleaded that he had lost the transfer/allotment letter or that it was stolen from him or that Zarwar Khan had snatched it from him or that he had lodged a criminal complaint. Since respondent No.1's testimony that Zarwar Khan snatched or had stolen the allotment/transfer letter from him is in derogation of respondent No.1's pleadings, such testimony is not worthy of any consideration. The Superior Courts have time and

again indicated that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It is also settled law that parties are bound by the pleadings. Pleadings are treated as a foundation of a case especially in civil matters and a fact having not been pleaded cannot be allowed to be taken or agitated at a subsequent stage. The maxim "*secundum allegata et probata*" (according to what is alleged and proved) can be aptly pressed into service here.

50. A conjoint study of (i) respondent No.1's evidence, (ii) respondent No.1's pleadings, (iii) objection taken on behalf of respondent No.1 (when the allotment/transfer letter (Exh.D-18) was produced by the appellants' learned counsel), and (iv) respondent No.1's application to the C.D.A. for the issuance of a duplicate allotment letter, shows that respondent No.1's stance regarding how he lost possession of the allotment/transfer letter is contradictory. These contradictions render respondent No.1's stance unreliable before a Court exercising equitable jurisdiction. Since in the proceedings before the learned Trial Court the original allotment letter (Exh.D-18) did not come from respondent No.1's possession, and since respondent No.1's stance as to how he lost possession of the allotment letter is contradictory and unconvincing, it would be safe to hold that possession of the title document/transfer letter had remained with the appellants. The discharge of the onus by the appellants that the title document was in Zarwar Khan's possession is not, by itself, sufficient to declare transaction for the purchase of the suit house as *benami*.

51. The agreement to sell dated 20.12.1983 (Exh.D/3) is the first in the series of documents with respect to the transaction for the purchase of the suit house. Although the parties to this agreement are Mst. Tahira Zaheer and respondent No.1, but this document was produced by Kamil Rehman/DW-1 in his examination-in-chief. The objection taken by the learned counsel for respondent No.1 to the production of the said document was that it had not been executed with Zarwar Khan. Indeed, Zarwar Khan was not a party to the said

agreement but it was tendered in evidence by his son, i.e. Kamil Rehman/DW-1. There is no testimony or explanation by respondent No.1 as to how he had lost possession of the said document. Although Exh.D/3 is not a title document regarding the suit house, but it is a document of crucial importance in a suit for declaration where title to a property is asserted by a real owner against an ostensible owner, and where the real owner's possession of the title document is alleged by the ostensible owner to be unlawful and improper.

**The conduct of the parties concerned in dealing with the property after the sale:-**

52. As mentioned above, respondent No.1 is Zarwar Khan's nephew as well as his son-in-law. Differences and disputes between Zarwar Khan and respondent No.1 arose when the suit for possession was filed by the latter on 21.03.1998. It was after the filing of the said suit that Zarwar Khan, on 30.11.1998, filed a suit for declaration and permanent injunction against respondent No.1.

53. Learned counsel for respondent No.1 admitted that between 1989 and 1996, the suit house used to be given on rent by Zarwar Khan and/or his sons with respondent No.1's consent. Respondent No.1 also asserts that after he returned from abroad the rent was paid to him. He, however, takes the position that in the year 1996, the suit house was given to Mr. Paul Medhurst without his consent. It was not until 1998 that respondent No.1 filed the suit for possession. Respondent No.1 contradicted himself by deposing that he along with his family lived in the suit house until 1995 whereafter he went abroad and his family moved in with Zarwar Khan. Although there are far too many contradictions between respondent No.1's pleadings and evidence but the weaknesses in his case would not have the consequence of decreeing Zarwar Khan's suit for declaration to the effect that the latter was the beneficial owner of the suit property. In the case of Muhammad Sajjad Hussain Vs. Muhammad Anwar Hussain (1991 SCMR 703), it was held *inter alia* that the initial burden of proof is on the party who alleges that an ostensible owner is a *benamidar* for him. It was also held that the weaknesses in the defence evidence would not relieve a plaintiff from discharging the burden of proof on him.

54. The above discussion leads us to the conclusion that the appellants were able to establish that they were in possession of the suit house as well as the title documents pertaining to the suit house. However, they were unable to prove that Zarwar Khan had provided the funds for the purchase of the suit house, and motive for entering into a *benami* transaction.

55. As regards the quantum of compensation held by the learned Civil Court to be payable to respondent No.1 between 1998 and until he gets possession of the suit house, learned counsel for respondent No.1 was unable to convince us that such compensation was in any manner inadequate. Consequently, all the appeals are dismissed with no order as to costs.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2019

(CHIEF JUSTICE)

(JUDGE)

**APPROVED FOR REPORTING**

Qamar Khan\*

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