JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.455/D/2010
Hafiz Muhammad Saeed
Versus
Mst. Gulzar Begum and another

Date of Hearing: 04.03.2019 & 09.05.2019
Petitioner by: Syed Asghar Hussain Sabzwari and Sheikh Khizar-ur-Rasheed, Advocates
Respondents by: Ch. Imran Hassan Ali, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide civil revision petitions No.455-D/2010 and 456-D/2010, since they entail common questions of law and fact.

2. During the pendency of the said petitions, Mst. Gulzar Begum who was respondent No.1 in the said petitions, passed away. An application for impleadment of her legal heirs as respondents was filed on 27.10.2014. Notices were issued to her legal heirs through publication in the newspapers "Daily Dawn" and "Daily Jang" of 05.05.2016 whereafter, vide order dated 17.05.2016, her legal heirs other than her son Mansif Majeed were proceeded against *ex-parte*. In this judgment, Mst. Gulzar Begum (deceased) shall be referred to as "respondent No.1".

3. Hafiz Muhammad Saeed, the petitioner in the said petitions, impugns the consolidated judgment and decree dated 11.03.2010, passed by the Court of the learned Additional District Judge, Islamabad, whereby (i) civil appeal No.139/2009 filed by respondent No.1 (Mst. Gulzar Begum) and respondent No.2 (Munsif Majeed) against the consolidated judgment and decree dated 05.07.2001, passed by the Court of the learned Civil Judge, Islamabad, was allowed and the suit for declaration and permanent injunction filed by respondent No.1, was decreed, and the suit for possession and *mesne* profits filed by the petitioner against respondents No.1 and 2, was dismissed, and (ii) cross objections No.138/2009 filed by the petitioner against the said consolidated judgment and decree passed by the learned Civil Court, were dismissed.

4. Vide the said consolidated judgment and decree dated 05.07.2001, the learned Civil Court had dismissed respondent No.1's suit for declaration and permanent injunction, and decreed the petitioner's suit for possession and recovery of *mesne* profits. The petitioner and respondent No.1 were married.

5. The facts essential for the disposal of these petitions are that on 07.09.1995, respondent No.1 filed a suit against the petitioner praying for a declaration to the effect that she is the owner-in-possession of House No.1049, Street No.109, Sector G-9/4, Islamabad ("the suit house"), having purchased the same for valuable consideration from one Shaukat Iqbal through his attorney, Muhammad Imtiaz. Respondent No.1 had asserted that the suit house had been transferred in her favour in the records of the Capital Development Authority ("C.D.A.") vide transfer letter No.CDA/EM/G-9/4/1049/71 dated May, 1985, and that its subsequent transfer to the petitioner was illegal, void *ab-initio* and ineffective upon her proprietary and possessory rights over the suit house. Furthermore, respondent No.1 had also sought the relief of permanent injunction restraining the petitioner from interfering in respondent No.1's possession over the suit house.

6. Respondent No.1's case, in her civil suit, was that she was the owner-in-possession of the suit house; that in the year 1986, the petitioner advised respondent No.1 to submit an application for exemption from payment of property tax with respect to the suit house on the ground that the same was in self-occupation; that for the said purpose, the petitioner made respondent No.1 sign a few papers; that respondent No.1 being a *pardanashin* illiterate lady and having blind faith in the petitioner, signed the papers; that disputes and differences arose between the petitioner and respondent No.1, because the former wanted to contract a second marriage and for this purpose, he wanted respondent No.1's permission; that on respondent No.1's refusal to grant the petitioner permission for a second marriage, he threatened to divorce her and oust her from the suit house; that the petitioner had also disclosed that the suit house had been transferred in his name;

and that since the petitioner refused to transfer the suit house back in respondent No.1's name, she filed the said suit against him.

7. On 22.12.1996, the petitioner filed a suit for possession and recovery of *mesne* profits against respondents No.1 and 2. In the said suit, the position taken by the petitioner was that the suit house had been purchased by the petitioner with his own funds; that respondent No.1 was merely an ostensible owner of the suit house; that in recognition of the fact that the petitioner was the real owner of the suit house, respondent No.1, on 07.09.1986, transferred the suit house to the petitioner; that since respondent No.1 was the mother of the petitioner's children, she was allowed to live in the suit house; that respondents No.1 and 2 were merely in permissive occupation of the suit house; that after respondent No.1 instituted a suit against the petitioner, he revoked the permission given to respondents No.1 and 2 to live in the suit house; that respondents No.1 and 2 were liable to vacate the suit house and handover its vacant possession to the petitioner; and that the petitioner was also entitled to be compensated for being denied possession of the suit house.

8. The above-mentioned suits were consolidated. The learned Civil Court, on 03.06.1997, framed the following issues:-

> ***"1. Whether the plaintiff Mst. Gulzar Begum is owner in possession of suit house? OPP***
> ***2. Whether the transfer in favour of defendant is without consideration, forged, illegal and ineffective? OPP***
> ***3. Whether the suit is not maintainable in its present form? OPD***
> ***4. Whether the plaintiff has not come to the court with clean hands? OPD***
> ***5. Whether the suit is time barred? OPD***
> ***6. Whether the plaintiff is estopped by her words and conduct to file the present suit? OPD***
> ***7. Whether the suit is false, frivolous and vexatious, if so, its effect? OPD***
> ***8. Whether the plaintiff Mst. Gulzar Begum was benami owner of the suit property? OPD***
> ***9. Whether Hafiz Muhammad Saeed is entitled to recover mesne profit at the rate of Rs.5,000/- p.m., if so, for what period? OPD***
> ***9-A. Whether the plaintiff Hafiz Muhammad Saeed is entitled to the possession of the suit property?***
> ***9-B. Whether suit titled Muhammad Saeed has been correctly valued for the purpose of court fee and jurisdiction?***
> ***9-C. Whether the suit titled Saeed versus Gulzar Begum is false, frivolous and vexatious and the defendant is entitled to special costs u/s 35-A CPC? OPD***

10. Relief."

9. Respondent No.1 gave evidence as PW-1 whereas Abdul Majeed gave evidence as PW-2. The petitioner gave evidence as DW-4; the Assistant Management Officer of C.D.A. as DW-1; Haji Abdul Rauf as DW-2; and Muhammad Imtiaz as DW-3. After the recording of evidence, the learned Civil Court, vide consolidated judgment and decree dated 05.07.2001 decreed the suit instituted by the petitioner and dismissed the one instituted by respondent No.1. However, the petitioner's prayer for the recovery of *mesne* profits was turned down.

10. Against the said judgment and decree, respondent No.1 preferred an appeal, whereas the petitioner filed cross objections. Vide consolidated judgment and decree dated 11.03.2010, the learned Appellate Court allowed respondent No.1's appeal and consequently decreed her suit for declaration and permanent injunction. Furthermore, the petitioner's suit was dismissed. The said judgment and decree has been assailed by the petitioner in the civil revision petitions under disposal.

11. Syed Asghar Hussain Sabzwari and Sheikh Khizar-ur-Rasheed, Advocates, learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petitions, made submissions in reiteration of the pleadings in the petitioner's civil suit. Furthermore, it was submitted that the suit house was purchased by the petitioner but since the petitioner had to proceed abroad, it was transferred in respondent No.1's name on 13.05.1985; that subsequently, on 07.09.1986, the suit house was transferred on respondent No.1's insistence in favour of the petitioner; that after the relations between the petitioner and respondent No.1 turned sour, the former divorced the latter on 08.12.1994; that the version put forth by respondent No.1 that she was not divorced by the petitioner or that the petitioner wanted to marry again was not correct; that the petitioner was the real owner of the suit house, whereas respondent No.1 was simply a *benamidar* prior to the transfer of the suit house to the petitioner; that respondent No.1 did not have the means to purchase the suit house; that on 07.09.1986, the suit house was transferred by

respondent No.1 on her own accord in the petitioner's name; and that the learned Appellate Court violated the requirements of Order LXI, Rule 31 of the Code of Civil Procedure, 1908 ("C.P.C.") by not setting out points of determination in giving a decision thereon.

12. Learned counsel for the petitioner further submitted that payment for the suit house was made from the joint account held by the petitioner and respondent No.1; that the learned Appellate Court erred by not appreciating that respondent No.1 had deposed, in her cross-examination, that she had not deposited any amount in the said joint account; that respondent No.1 did not bring any evidence on the record to show that she had an independent source of income; that the petitioner had been working abroad and had sufficient resources for the purchase of the suit house; that the mere fact that respondent No.1 had a joint bank account with the petitioner does not mean that respondent No.1 had contributed in the payment of sale consideration for the suit house; that the petitioner had not been cross-examined about the cash payment of Rs.1,30,000/- and Rs.20,000/- made by him for the purchase of the suit house; that respondent No.1 was unable to establish that the transfer of the suit house by respondent No.1 in favour of the petitioner on 07.09.1986 was fraudulent; and that the judgment and decree passed by the learned Civil Court is well reasoned and therefore liable to be restored whereas the judgment and decree passed by the learned Appellate Court is liable to be set-aside. Learned counsel for the petitioner prayed for the civil revision petitions to be allowed and for the impugned judgment and decree passed by the learned Appellate Court to be set-aside. In making their submissions, learned counsel for the petitioner placed reliance on the judgments in the cases of Muhammad Zaman Vs. Sheikh Abdul Hamid (2002 CLC 1209), Muhammad Bakhsh and 4 others Vs. Province of Punjab through District Collector, Multan (now Lodhran) and 2 others (1994 SCMR 1836), Brig. (R) Sher Afghan Vs. Mst. Sheeren Tahira and 6 others (2010 SCMR 786) and Mst. Naziran Begum through Legal Heirs Vs. Mst. Khurshid Begum through Legal Heirs (1999 SCMR 1171).

13. On the other hand, Ch. Imran Hassan, Advocate, learned counsel for respondent No.2, also made submissions in reiteration of the pleadings in respondent No.1's civil suit. He further submitted that the petitioner had not been able to satisfy the essential ingredients for showing that the transaction for the purchase of the suit house in respondent No.1's name was a *benami* transaction; that at all material times, respondent No.1 has remained in possession of the suit house; that had respondent No.1 not been in possession of the suit house, the petitioner would not have filed a suit for possession against respondent No.1; that the petitioner did not discharge the onus that the entire sale consideration for the suit house was paid by him; that respondent No.1 had deposed that the suit house was purchased with the remittances sent by her son, Asif Hameed; that in the sale agreement dated 13.05.1985 (Exh.P/2), it is clearly mentioned that the sale consideration was paid by respondent No.1; that Articles 102 and 103 of the *Qanun-e-Shahadat* Order, 1984 provide that no oral evidence is admissible to contradict a disposition of property reduced to the form of writing; and that the original transfer letter issued by the C.D.A. is in possession of respondent No.1.

14. Furthermore, learned counsel submitted that respondent No.1 was a *pardanashin* illiterate lady; that the application (Exh.D/1) for the transfer of the suit house in the petitioner's favour was in English; that the petitioner, being the beneficiary of the transaction, had not discharged the onus of proving that respondent No.1 had understood the nature of the transaction; that there were discrepancies as to dates on the transfer application; that the certificate of identification does not show the name of any witness who had identified respondent No.1; that although the transfer application shows that respondent No.1 had received the entire amount from the petitioner, it is not the petitioner's case that he had purchased the suit house from respondent No.1; that the alleged transaction between the petitioner and respondent No.1 was not a sale since no sale consideration was paid by the petitioner to respondent No.1; that the alleged transaction was not even a gift since there was no declaration of a gift and transfer of possession

in the petitioner's favour; that possession of the suit house remained with respondent No.1 until her death and after her death with her son Munsif Majeed; that even if it is assumed that respondent No.1 got knowledge of the suit house having been transferred in the petitioner's favour four to five years earlier, the suit filed by respondent No.1 on 07.09.1995 was within the limitation period provided by law; that respondent No.1's deposition, which she was trapped into giving, cannot be used against her; that the mere fact that the learned Appellate Court used flowery language in the judgment does not mean that it is not in accordance with the law and facts of the case. Learned counsel for respondent No.2 prayed for the revision petitions to be dismissed. In making his submissions, learned counsel placed reliance on the cases of Yaqoob etc Vs. Nazir Ahmed Khan etc (PLD 2008 Lahore 233), Sarbaland etc Vs. Ghulam Fatima etc (1996 MLD 948), Mst. Izzat Vs. Allah Ditta (1981 PLD 165 SC), Khushi Muhammad Vs. Mst. Zainab Bibi (1981 SCMR 814), Mst. Fazal Begum Vs. Municipal Corporation Lahore (1983 CLC 1643), Umar Din Vs. Muhammad Anwar (2003 YLR 67), Ghulam Murtaza Vs. Mst. Asia Bibi (PLD 2010 SC 569), Muhammad Nawaz Minhas Vs. Mst. Surriya Sabir Minhas (2009 SCMR 124), Ch. Ghulam Rasool Vs. Mst. Nusrat Rasool (PLD 2008 SC 146), Muhammad Arif Vs. Haji Waheed ul Haq (2017 YLR 224), Muhammad Afzal Vs. Muhammad Zaman (PLD 2012 Lahore 125), Shehnaz Bibi Vs. Muhammad Ikhlaq Khan (PLJ 1996 Lahore 1472), Abdur Rehman Vs. Mst. Majeedan Bibi (2017 SCMR 1110), Phul Peer Shah Vs. Hafeez Fatima (2016 SCMR 1225), Ghulam Farid Vs. Sher Rehman (2016 SCMR 862), Muhammad Nazir Vs. Khurshid Begum (2005 SCMR 941) and Khanas Khan Vs. Sabir Hussain Shah (2004 SCMR 1259).

15. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance.

16. The facts leading to the filing of the instant petitions have been set out in sufficient detail in paragraphs No.5 to 10 above, and need not be recapitulated.

17. The suit house was originally owned by one Shaukat Iqbal. On 13.05.1985, an agreement to sell/*iqrarnama* (Exh.P/2) was executed between Shaukat Iqbal's attorney, Muhammad Imtiaz (DW-3) and respondent No.1, whereby the former agreed to sell the suit house to the latter for a total sale consideration of Rs.4,58,000/. In the said agreement, the receipt of the entire sale consideration from respondent No.1 has been acknowledged.

18. On 21.08.1986, an application for the transfer of the suit house in favour of the petitioner is said to have been submitted by respondent No.1 to the C.D.A. Although the transfer letter is not on the record, it is an admitted position that the suit house was transferred in the petitioner's favour in the C.D.A.'s records on 07.09.1986. There is a deposition to this effect in DW-3's examination-in-chief. It is also an admitted position that ever since the purchase of the suit house on 13.05.1985, it has remained in respondent No.1's possession. After respondent No.1's demise, her son, Munsif Majeed/respondent No.2, has been in possession of the suit house.

19. The question whether the transaction for the purchase of the suit house by respondent No.1 from Shaukat Iqbal, through his attorney Muhammad Imtiaz, was a *benami* transaction, in my view, would gain significance only in the event this Court holds that the transfer of the suit house in favour of the petitioner was unlawful.

20. The foundation set up by respondent No.1, in her suit for declaration etc., for challenging the transfer of the suit house in the petitioner's favour, was as follows:-

> ***"2. That the defendant in the year 1986 very cleverly advised plaintiff to submit an application for exemption from payment of property tax being self occupation and in continuation of that pretext required to sign few papers from the plaintiff which the plaintiff being an un-educated and illiterate Asian woman having blind faith on her husband innocently signed the same because such an artifice deception based on foolish mischief and forgery had never been expected on the part of the defendant at that time, which had occasioned with the plaintiff as such the alleged transfer of the suit house in the name of the defendant which remained concealed till disclosed recently, is illegal and based on artifice deception and forgery, hence void, abinitio, and ineffective on the rights and interests of the plaintiff and is liable to be annulled under the prevailing circumstances."***

21. Respondent No.1 appeared as PW-1, and in her examination-in-chief, she deposed *inter-alia* that she had neither appeared before any department nor had she affixed her thumb impression or put her signature on any document and that the suit house had been fraudulently transferred from respondent No.1's name in favour of the petitioner.

22. Sarfraz Ali, the Assistant Management Officer, C.D.A., appeared as DW-1 and admitted that the application form (Exh.D/1) had been submitted for the transfer of the suit house in favour of the petitioner. The said application form bears respondent No.1's signatures at two places. DW-1 also admitted that Exh.D/2 bears six specimen signatures of respondent No.1, which was a part of C.D.A.'s record. These signatures were attested by one Javed Qadeer Qureshi, Assistant Director, National Training Bureau, Manpower Division, Government of Pakistan. No objection was taken on behalf of respondent No.1 when the said documents were exhibited. Respondent No.1's plea that she had not appeared before any department and had not signed any document is not plausible in view of the fact that at no material stage, did she file an application for her signatures on Exh.D/1 and Exh.D/2, to be forensically examined by a handwriting expert.

23. Respondent No.1 had challenged the transfer of the suit house in the petitioner's favour primarily by taking the plea in her suit that she was a *pardanashin* illiterate lady and did not appreciate the nature of the transaction which she had been made to execute through fraud and deception at the hands of her husband, i.e., the petitioner. Although respondent No.1, in her suit for declaration etc., pleaded that she was an *"uneducated and illiterate Asian woman"* but while giving evidence as DW-1, she did not depose that she was a *pardanashin* illiterate lady. Respondent No.1's bare pleading to the said effect unsupported by any ocular testimony cannot form the basis for shifting the burden on the petitioner to prove the transaction as to the transfer of the suit house in his favour was not fraudulent. Since respondent No.1 had not deposed that she was a *pardanashin* illiterate lady, the

petitioner did not feel the need to put her any question regarding this matter in the cross-examination.

24. The learned Appellate Court in paragraph 14 of the impugned judgment has erred by holding that *"being a Muslim, [respondent No.1] is supposed to be a pardanashin lady and the onus would be on [the petitioner] to give strongest and most satisfactory proof that she understood the transaction".* This finding is a clear consequence of misreading and non-reading of evidence. Had the learned Appellate Court gone through respondent No.1's testimony, it would have been noticed that she had not even deposed that she was an illiterate *pardanashin* lady. Even if every Muslim lady is presumed to be a *pardanashin* lady, in the absence of evidence to the effect that respondent No.1 was an illiterate lady not capable of understanding the transaction that she had entered into for the transfer of the suit property in the petitioner's favour, the principles governing the transactions entered into by *pardanashin* illiterate ladies will hardly be attracted in the instant case. In the case of Mst. Sadia Andaleeb Vs. Mst. Farzana Zia etc (PLJ 2019 Islamabad 22), I had the occasion to hold as follows:-

> ***"27. ... In Pakistan, pardanashin illiterate ladies are given special protection due to the social conditions. They are presumed to have an imperfect knowledge of the world, as on account of their parda they are practically excluded from social intercourse and communion with the outside world. Where a transaction is entered into with an illiterate pardanashin lady, the burden of proof always rests upon the person who seeks to sustain the transaction to establish that the document in question was executed by her after clearly understanding the nature of the transaction. This burden can be discharged not only by proving that the document was read over and explained to her and that she understood it but also by proving that she was given independent advice as to the nature of the transaction.***
>
> ***28. It is also well settled that the protection given by the rule relating to pardanashin ladies cannot be the exclusive privilege of the class commonly known as pardanashin. The real reason behind the rule is lack of understanding and appreciation that an illiterate woman without independent advice has when entering into a transaction. Where ignorance, capability and illiteracy of a woman are not proved, protection under the rule will not be available, whether or not the lady is pardanashin."***
>
> **(Emphasis added)**
>
> **In holding so, reliance was placed on the following case law:-**

(i) In the case of Irshad Hussain Vs. Ijaz Hussain (PLD 1994 SC 326), it has been held as follows:-

> ***"Whether a lady is a pardanashin is a question of fact. The burden of proof that any document purported to have been executed by a pardanashin lady affecting her right in an immovable property was substantially understood by the lady and was her voluntary, intelligent, free and conscious act, is upon the person chiming any right under such deed. This rule has been extended to illiterate ignorant lady whether she is pardanashin or not. This rule of wisdom and caution thrown round the pardanashin, illiterate and ignorant women is to protect them from exploitation, duress, fraud and misrepresentation. From all the judgments cited and discussed in the referred judgments it is clear that the cases involved pardanashin or illiterate and ignorant ladies. But where the lady involved is an educated lady not observing parda capable of understanding transactions and has executed the deed on full and proper understanding of its implications, the principle governing pardanashin, ignorant and illiterate women will hardly be attracted."***
> **(Emphasis added)**

(ii) In the case of Muhammad Tufail Vs. Muhammad Aslam Khan (1999 YLR 934), the petitioners/plaintiffs had challenged a part of a sale transaction on the ground that they were *pardanashin* ladies to whom the contents of the registered sale deed had not been read over and explained. Furthermore, it was asserted that additional land had been included in the sale deed on the basis of fraud. In the said case, the petitioners/plaintiffs had admitted the execution of the sale deed. The Hon'ble Lahore High Court upheld the concurrent judgments of the Courts below, whereby the petitioners/plaintiffs had been non-suited. It was held that *"fraud is not only to be alleged specifically in the pleadings but also to be proved by convincing evidence beyond any shadow of doubt."* Furthermore, it was held that *"the mere allegation that the petitioners/plaintiffs did not read the contents of the documents before signing does not mean that fraud had been practiced upon them."* Additionally, it was held that since it was not proved on the record that the petitioners/plaintiffs were illiterate and simpletons, the presumption would be that they were aware of the contents of the sale deed and had put their signatures being well conversant with the same.

(iii) In the case of National Bank of Pakistan Vs. Mst. Hajra Bai (PLD 1985 Karachi 431), it was held as follows:-

> ***"In fact the protective cloak is available to pardanashin lady more because of lack of understanding and appreciation on her part than for merely observing parda. It is quite possible that a woman belonging to a pardanashin class may possess sufficient intelligence to understand the contents of the document to which she is party despite the restraints of parda. Conversely there can be an illiterate woman totally devoid of understanding but not observing parda. Therefore the criterion cannot be the social status in the parda class but the ability to comprehend the contents of the document in question. The emphasis is on factual understanding of the document with reference to the individual concerned and not upon presumptive disability incidental to mere status."***

(iv) In the case of Aisha Bai Vs. Usman Muhammad (PLD 1967 Karachi 733), it has been held that a literate woman entering into a contract having full business aptitude as well as capable of looking after her own interest was not entitled to any special consideration.

25. In her suit for declaration etc., respondent No.1 had attributed *"artifice deception", "mischief and forgery"* and *"concealment"* to the petitioner. The particulars of the alleged deception, etc., on the part of the petitioner as per respondent No.1's pleadings in the suit were that the petitioner had advised respondent No.1 to submit an application for exemption from payment of property tax due to the suit house being in self occupation and in continuation of that pretext required her to sign a few papers which she innocently did on account of having blind faith in her husband. Respondent No.1 in her evidence made no such deposition. Respondent No.1, in her entire evidence (examination-in-chief as well as in cross-examination), did not give any particulars of the fraud or deception committed by the petitioner. There is just one simple statement as to fraud in the tail end of respondent No.1's examination-in-chief that the suit house was transferred thorough fraud (دہوکہ دہی) by the petitioner. This testimony of respondent No.1 was not sufficient for the learned Appellate Court to have held that she had been deceived into signing the transfer application form for the transfer of the suit house to the petitioner.

26. It is well settled that the burden of proving fraud lies on the party alleging it. Fraud and forgery must be proved by producing unimpeachable, impartial and confidence-inspiring evidence. Mere allegations in the pleadings cannot partake proof required under the law. Courts have to be very careful in coming to a finding of fraud and should satisfy themselves that the finding is based on reliable evidence. Reference in this regard may be made to the judgments in the cases of Ahsan Ali Vs. District Judge (PLD 1969 SC 167), Shamir Vs. Faiz Elahi (1993 SCMR 145) and Nasira Khatoon Vs. Mst. Aisha Bai (2003 SCMR 1050). In the case of Noor Jehan Vs. Bostan (1976 SCMR 486), it has been held that fraud has to be asserted with clarity and has to be proved as a fact. In the case of Punjab National Bank Limited Vs. Dr. A.B. Arora (AIR 1933 Lahore 1024), it has been held that if a person charges another with fraud or misrepresentation, it is incumbent upon him to substantiate his allegations by making a statement on oath and by giving the other party an opportunity to cross-examine him.

27. Although respondent No.1 had given some particulars of the fraud allegedly committed by the petitioner in her pleadings (i.e., para 2 of the suit), it is well settled that pleadings of the parties are not evidence, and facts alleged in the pleadings must be proved through evidence adduced by or on behalf of the party who had claimed the existence of such facts. Mere averments and pleadings are of no value and cannot not be relied upon unless proved through cogent evidence. The principle conveyed by the maxim *secundum allegata et probata* is that the plaintiff could succeed only by what he had alleged and proved. Article 117 of the *Qanun-e-Shahadat* Order, 1984 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

28. Issue No.2 framed by the learned Civil Court was *"whether the transfer in favour of the defendant is without consideration, forged, illegal and ineffective".* The onus of proving this issue was placed on respondent No.1. All that respondent No.1 in her examination-in-chief said about the fraud having been played on her was to the following effect:-

مجھےمدعاعلیہ کی شادی کے بعد پتہ چلا کہ مکان اس نے اپنے نام کروالیا ہے مدعاعلیہ نےدھوکہ دہی سے ایسا کیا ہے۔ میں کسی محکمہ میں پیش ہوی اور نہ ہی میں نے دستخط یا نشان انگوٹھانہ لگایا تھا۔

29. After having gone through the evidence produced by respondent No.1, in particular the above referred deposition, I have formed the view that she was not able to discharge the burden of proving that the petitioner had committed fraud or forgery or had deceived her by having the suit house transferred in his favour.

30. Although respondent No.1, in her suit for declaration, etc., pleaded that she had signed papers at the petitioner's instance, however, while giving evidence as DW-1, respondent No.1 had deposed that she had not signed any document. In this way, respondent No.1 took a contradictory and mutually exclusive stance.

31. Exh.D/1 is respondent No.1's application for the transfer of the suit house to the petitioner and Exh.D/2 bears respondent No.1's six specimen signatures. These documents were a part of C.D.A.'s record. In her cross-examination, respondent No.1 specifically denied the making of her specimen signatures and making any signature in the C.D.A.'s offices. If respondent No.1's stance in her cross-examination that she had not signed any document is to be believed, it does not appeal to reason as to why she did not apply to the learned Trial Court to have her alleged signatures on Exh.D/1 and Exh.D/2 forensically examined by a handwriting expert. There is no denying the fact that it is respondent No.1 who had made the allegation of forgery against the petitioner. In the case of "Mst. Kausar Haseen Vs. Mst Anees Begum" (1988 MLD 522), it has been held *inter-alia* that the burden to prove that the signature of a person on a document was forged would be upon the person who asserts such forgery. Additionally, in the case of "Bashir Ahmad Vs. Muhammad Bakhsh" (PLD 2016 Lahore 130), it has held as follows:-

> ***"Be that as it may, whenever the evidence legally required to be provided to prove execution of a document has been produced, it is for the other party denying the execution of a document to produce handwriting expert in proof of his denial of execution. Failure to ask the court to refer the matter to the handwriting***

expert would raise inference against the party (see <u>Meraj Din and another v. Kh. Mahboob Elahi and 4 others</u> 1992 CLC 2457)".

32. Respondent No.1, in her suit, had sought the relief of declaration which is undoubtedly an equitable remedy. In paragraph 5 of her suit, respondent No.1 had pleaded that the cause of action had accrued to her since *"the impugned transfer"* and a week before the petitioner's refusal to annul the transfer letter in his favour. Respondent No.1, in her cross-examination, deposed that thirteen to fourteen years prior to giving her evidence, she came to know that the suit house had been transferred to the petitioner. Learned counsel for respondent No.1 submitted that respondent No.1 was trapped into making this statement. Even if respondent No.1's said deposition is ignored, she at another stage of her cross-examination had deposed that she had received knowledge of the transfer in the petitioner's favour four to five years after the transfer. Since the suit house was transferred on 07.09.1986. the period of four to five years after the transfer would come to 1990-91. Although the suit for declaration filed by respondent No.1, on 07.09.1995, was not barred by limitation, no explanation was provided for respondent No.1 to have remained silent for a period of almost four years after gaining knowledge as to the transfer of the suit house to the petitioner. In this period, she had made no effort to file an application before the C.D.A. for the transfer of the suit house in her favour or a complaint to the effect that there had been a fraudulent transfer of the suit house in the petitioner's favour. Respondent No.1's testimony is also silent on the question whether she had asked the petitioner to re-transfer the suit house in her favour. All this make the equities tilt against respondent No.1. The learned Appellate Court ought to have taken into account respondent No.1's said conduct before decreeing her suit for declaration.

33. Although the learned Trial Court had decided issue No.2 in the petitioner's favour, the judgment of the learned Appellate Court is silent on the question whether the findings of the learned Civil Court on the said issue were erroneous or not. The learned Appellate Court appears to have delved more into the question whether or not

the transaction of sale by Shaukat Iqbal in favour of respondent No.1 was a *benami* transaction. I have proceeded to decide the dispute regarding the validity of the transfer of the suit house from respondent No.1 to the petitioner by assuming that prior to the said transfer, respondent No.1 was the lawful owner of the suit house. Perusal of the judgment passed by the learned Civil Court shows that the sole ground on which the sale transaction between Shaukat Iqbal and respondent No.1 was declared to be *benami* in nature was that respondent No.1 had not been able to prove that she had paid the entire sale consideration for the suit house. This finding is in clear derogation of the law laid down by the Hon'ble Supreme Court in the case of "Ghulam Murtaza Vs. Mst. Asia Bibi" (PLD 2010 SC 569), wherein it has been held as follows:-

> ***"7. At this juncture, we may clarify that the motive part in the benami transactions 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. We come across innumerable transactions where a father purchases property with his own sources for his minor son or daughter keeping in mind that the property shall vest in the minor. Such transaction subsequently cannot be challenged by father as benami simply because the amount was paid by him. There are people who, with positive application of mind, purchase properties in the name of others with intention that the title shall vest in that other.***
>
> ***8. As said earlier, there are certain transactions in peculiar circumstances of those peculiar cases where, for reason of certain emergencies or contingencies, the properties are purchased in the name of some other person without the intention that the title shall so vest permanently. If such motive is available and also is reasonable and plausible, a transaction can be held as benami, otherwise not. A property purchased with ones own sources in the name of some close relative like wife, son or daughter cannot be dubbed as benami when purchased with full intention of conferring title to the purchaser shown. If this principle is denied and that of benami attracted simply because the sources of consideration could not be proved in favour of the named vendee, it would shatter the most honest and bona fide transactions thereby bringing no end to litigation."***

34. Since in the agreement to sell/*iqrarnama* executed between Shaukat Iqbal through his attorney and respondent No.1, it has been explicitly stated that the vendor had received the entire sale consideration from respondent No.1, the oral evidence adduced by the petitioner to the contrary would have no significance in view of

the principles enshrined in Articles 102 and 103 of the *Qanun-e-Shahadat* Order, 1984.

35. Transactions for the transfer of properties in the records of the C.D.A., in accordance with the procedure prescribed for such transfer between family members, have to be given their due sanctity. Any family member who is a party to such a transfer, or any of his legal heirs or persons claiming under him/her, question such a transaction on the ground of fraud or forgery or deception, must come up with cogent and unimpeachable evidence in order to be successful in his/her endeavor.

36. To summarize it all, respondent No.1, in her evidence, did not give any particulars of the fraud allegedly played on her by her husband for the transfer of the suit property from her name. She did not even depose in her evidence that she was a *pardanashin* illiterate lady not capable of understanding the contents of her application form for the transfer of the suit house. She was also unable to prove that her signatures on the application form (Exh.D/1) or her specimen signatures (Exh.D/2) were forgeries. After the said documents were tendered in evidence, respondent No.1 made no effort to have her signatures on the said documents forensically examined in order to prove that they were forged. In such circumstances, I am of the view that the judgment and decree passed by the learned Appellate Court to the extent of granting the prayer in respondent No.1's suit that the transfer of the suit house in the petitioner's favour is *"illegal, void and based on foolish mischief, and forgery and ineffective on the proprietary and possessory rights of the plaintiff"* is not sustainable.

37. Since respondent No.1 had not been able to impeach the transaction as to the transfer of the suit house from her name to that of the petitioner on the ground of fraud, forgery or under the principles governing transactions executed by *pardanashin* illiterate ladies, it is safe to hold that ownership in the suit house lawfully vests in the petitioner. In such circumstances, the petitioner was well within his rights to have instituted a suit for possession against respondent No.1 and his own son. The learned Civil Court had decreed the petitioner's suit for possession but had

denied him the *mesne* profits claimed by him. I find the said judgment to be unexceptional.

38. In view of the above, the revision petition challenging the appellate judgment and decree dated 11.03.2010, whereby respondent No.1's suit for declaration was decreed, is partly allowed and the said judgment and decree to the extent of granting respondent No.1's prayer that the transfer of the suit house in favour of the petitioner was unlawful etc., is set-aside; and the appellate judgment and decree to the extent of holding that the suit house was purchased by respondent No.1 from Shaukat Iqbal is sustained. The appellate judgment and decree dated 11.03.2010 to the extent of dismissing the petitioner's suit for possession etc, is set-aside and consequently, the judgment and decree dated 05.07.2001, passed by the learned Civil Court to the extent of allowing the petitioner's suit for possession etc, is restored.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING