JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.199/2015
Mst. Tahira Noor and others
Versus
Shahid Humayun and others

Date of Hearing: 27.06.2019
Appellants by: Mr. Shaukat Rauf, Advocate
Respondents by: Ms. Shahina Shahab-ud-Din, Advocate for respondents No.1 and 2,
Mr. Rizwan Shabbir Kayani, Advocate for respondent No.3.

MIANGUL HASSAN AURANGZEB, J:- Through the instant Regular First Appeal, the appellants impugn the judgment and preliminary decree dated 29.10.2015 passed by the Court of the learned Civil Judge, Islamabad, whereby the suit for declaration, partition, and mandatory and permanent injunction, instituted by the plaintiffs/respondents No.1 and 2 (Shahid Humayun and Mst. Noor-ul-Ain Khusro) was decreed. In the said suit, respondents No.1 and 2 had sought, *inter-alia,* a declaration to the effect that appellant No.2 (Shoaib Noor) was the ostensible/*benami* owner of House No.18, Street No.13, Sector F-8/3, Islamabad ("the suit property"), and that Noor Muhammad (deceased), who was the predecessor of appellants No.1 to 4 and respondents No.1 and 2, was the real owner of the suit property.

2. The facts essential for the disposal of the instant appeal are that Noor Muhammad was first married to Zahida Begum. They had one son, Shahid Humayun (plaintiff No.1/respondent No.1) and one daughter, Mst. Noor-ul-Ain Khusro (plaintiff No.2/respondent No.2). Noor Muhammad divorced Zahida Begum and married Mst. Tahira Noor (defendant No.1/appellant No.1). Noor Muhammad's second marriage blessed him with two sons, namely, Shoaib Noor (defendant No.2/appellant No.2) and Dr. Saqib Noor (defendant No.3/appellant No.3) and one daughter, namely, Mst. Wajiha (defendant No.4/appellant No.4). After Noor Muhammad divorced Zahida Begum, the latter shifted with her son and daughter (i.e. respondents No.1 and 2) to Karachi.

3. On 31.03.1975, S.M.A. Bukhari, who was the original owner of the suit property, filed an application (Ex.P/1) before respondent No.3/Capital Development Authority ("C.D.A.") for the transfer of the said property to appellant No.2. Vide letter dated 15.08.1975 (Ex.D/1), the suit property was transferred in the C.D.A. records to to appellant No.2. In the certificate of possession (Ex.D/2) issued by the C.D.A., it was certified that possession of the suit property had been handed over to appellant No.2 on 23.04.1979. In the year 1976, the C.D.A.'s Directorate of Architecture approved the building plan for construction on the suit property. Ex.P/6 to Ex.P/9, Ex.P/11, Ex.P/15, and Ex.P/17, are the correspondence between the C.D.A. and appellant No.2 regarding extensions in the period during which the construction on the suit property was to take place and the levy of surcharge due to the delay in the construction. C.D.A.'s letter dated 06.11.1983 (Ex.P/9) addressed to appellant No.2 shows that construction on the suit property had been completed.

4. It is not disputed that Noor Muhammad was employed in the Pakistan Public Works Department ("Pak. PWD") as an Executive Engineer. He retired from service in the year 1995 and died on 24.06.2010.

5. On 05.05.2012, respondents No.1 and 2 filed a suit against their step mother, half brothers and half sister before the Court of the learned Civil Judge, Islamabad, praying for *inter-alia* a declaration to the effect that the real owner of the suit property was Noor Muhammad, whereas appellant No.2 was its ostensible/*benami* owner. Respondents No.1 and 2 claimed their proportionate share in the suit property.

6. The appellants contested the said suit by filing a written statement. The position taken by the appellants in the said written statement was that Noor Muhammad's second wife, i.e. appellant No.1, had purchased the suit property with her own resources in appellant No.2's name. The appellants asserted that appellant No.2 was the absolute owner in possession of the suit property ever since 1975.

7. The C.D.A. had also filed a written statement wherein it was pleaded that the suit property *"was transferred in the joint name[s] of*

Noor Muhammad Malik and Muhammad Shoaib Noor but transfer letter could not be issued due to short[age] of documents".

8. From the divergent pleadings of the contesting parties, the learned Civil Court, vide order dated 05.03.2013, framed the following issues:-

"1. Whether the suit house was purchased by late Noor Muhammad on the basis of benami transaction in 1975? OPP
2. Whether the suit property is liable to be partitioned on the basis of inheritance as prayed for? OPP
3. Whether the suit is not maintainable in the light of preliminary legal objections raised by defendants? OPD
4. Whether the suit property was purchased by Mst. Tahira Noor in the name of Shoaib Noor from her own sources in 1975? OPD
5. Whether the Defendant No.2 is absolute owner in possession of suit house since 1975? OPD
6. Relief."

9. Respondent No.1 gave evidence as PW-1 and respondent No.2 as PW-2. Mahmood Akhtar appeared as PW-3, Aftab Ahmed as PW-4 and Adil Hussain, Assistant, Estate Management Directorate, C.D.A. as PW-5. Appellant No.2 gave evidence as DW-1 and Tariq Mahmood as DW-2.

10. On 29.10.2015, the learned Civil Court passed a judgment and a preliminary decree. It was declared that respondents No.1 and 2, being the legal heirs of Noor Muhammad, were entitled to their share in the suit property. Rana Attiq-ur-Rehman was appointed as Local Commission and directed to submit a report as to whether or not the suit property was partitioned, mode of partition and its present market value. The said judgment and decree has been assailed by the appellants in the instant appeal.

11. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that the suit property was transferred in appellant No.2's name in the year 1975, whereas Noor Muhammad passed away in the year 2010; that the suit instituted by respondents No.1 and 2 was grossly time barred inasmuch as it was filed with a delay of 37 years; that during his life time, Noor Muhammad made no effort to transfer the suit property in his own name; that the funds for the purchase of the suit property were provided by appellant No.1 and not Noor Muhammad; that the transfer application (Ex.P/1) shows that appellant No.2 was represented by his mother, appellant No.1; that the lease agreement

dated 04.06.1982 (Ex.P/10) shows that appellant No.2 was the owner of the suit property; that the said lease agreement was witnessed by Noor Muhammad; that at all material times, possession of the suit property (constructive or otherwise) has remained with appellant No.1, who is appellant No.2's mother; that the title documents with respect to the suit property have always been in appellant No.1's possession; that the essential ingredients for declaring a transaction to be *benami* have not been satisfied in the case at hand; and that the burden to prove that a transaction is *benami* is always on the party who asserts the transaction to be so.

12. Learned counsel for the appellants further submitted that after the marriage between Noor Muhammad and respondents No.1 and 2's mother ended in the year 1958, there was no love and affection between respondents No.1 and 2 and their estranged father; that PW-1/respondent No.1, in his evidence, deposed *inter-alia* that in the last ten years of Noor Muhammad's life, he had met the latter only on two occasions; that PW-2/respondent No.2 also deposed that she had met her father, Noor Muhammad, about two years before his death; that respondents No.1 to 4 never denied the fact that the suit property had always been in appellant No.2's name; that the learned Civil Court erred by not appreciating that C.D.A. had issued a transfer letter in appellant No.2's favour; that there is nothing on the record to show that Noor Muhammad had applied for his name to be included as a co-owner of the suit property; that the application submitted by appellant No.2 in the C.D.A. for the inclusion of Noor Muhammad's name as a co-owner of the suit property had not been allowed by the C.D.A. at any stage; that the learned trial Court erred by not giving due evidentiary value to Ex.D/4, which is a receipt issued by the original owner of the suit property in favour of appellant No.2 through his mother; that Tariq Mahmood, who was one of the marginal witnesses of the said receipt, had appeared as DW-2 and had deposed that the said receipt bore his signature; that even if it was assumed that payment for the suit property was made by Noor Muhammad, the other ingredients for showing that the transaction was *benami* were lacking; that the communication made by Noor Muhammad with the C.D.A. was always for and on behalf of appellant No.2; that there was

no need for appellant No.1 to appear as a witness since she had executed a special power of attorney (Ex.D/3) in favour appellant No.2 authorizing the latter to give evidence on her behalf; and that learned trial Court violated the requirements of Order XX, Rule 18 C.P.C., by not mentioning in the preliminary decree the shares of each party in the suit property. Learned counsel for the appellants prayed for the appeal to be allowed and for the impugned judgment and preliminary decree dated 29.10.2015 to be set-aside. In making his submissions, learned counsel for the appellants placed reliance on the cases of Chuttal Khan Chachar Vs. Mst. Shahid Rani and another (2009 CLC 324), Ghulam Murtaza Vs. Asia Bibi (PLD 2010 SC 569), Bilqees Begum Vs. Registrar of Properties and another (PLD 2006 617), Mst. Alim Jan Vs. Sahib Jan (2014 YLR 385), Kaleem Hyder Zaidi Vs. Mehmooda Begum (2006 YLR 599), Muhammad Arif Vs. Haji Waheed-ul-Haq (2017 YLR 224), Ch. Ghulam Rasool Vs. Mrs. Nusrat Rasool (PLD 2008 SC 146), Zardullah Khan Vs. Mst. Ruqiyya Hanif Maniar (2014 YLR 1840), Wali Bhai through General Attorney Vs. District Judge, Hyderabad (2015 YLR 1714), Messrs Nagina Cotton Mills Ltd. Vs. Asif Dinnar (2013 YLR 839), Abdul Majeed Vs. Amir Muhammad (2005 SCMR 577), S.Abid Ali Vs. Syed Inayat Ali (2010 CLC 1633), Hameeda Begum Vs. Farzand Ali (2002 YLR 1311), Muhammad Sajjad Hussain Vs. Muhammad Anwar Hussain (1991 SCMR 703), Province of the Punjab through Secretary, Irrigation and Power Department P.W.D. Vs. Ch. Mehraj Din & Co. (2003 CLC 504), Muhammad Hussain Vs. Khushi Muhammad (2003 CLC 478), Syed Habib Mehmood Vs. Mst. Bilqees Fatima (1997 MLD 390), Ch. Ghulam Rasool Vs. Mrs. Nusrat Rasool (PLD 2008 SC 146), and Sher Muhammad Vs. Muhammad Sharif (PLD 1946 Lahore 117).

13. On the other hand, learned counsel for respondents No.1 and 2 submitted that respondents No.1 and 2's father, Noor Muhammad, had worked as an Executive Engineer, Pak. PWD and was, therefore, a man of means; that Noor Muhammad was the real owner of the suit property, whereas appellant No.1 was merely an ostensible owner; that since appellant No.2 was a minor in 1975, he could not have purchased the suit property; that the motive behind Noor Muhammad's purchasing the suit property in appellant No.2's name

was that he wanted to *"avoid tax authorities and other government agencies"* ; that appellants No.1 to 4 have benefitted financially by giving the suit property on rent; that since suit property was actually owned by Noor Muhammad, respondents No.1 and 2 have inherited a share in the said property; that it had not been proved that appellant No.1 had sufficient resources to purchase the suit property in 1975; that it was the appellants' case that since Noor Muhammad wanted to give the suit property to appellant No.2, the same was purchased in the latter's name; that appellant No.2 had deposed, in his cross-examination, that the application for the transfer of the suit property in the joint names of Noor Muhammad and appellant No.2 had been processed by him; that this shows Noor Muhammad's intention that the ownership of the suit property should not vest exclusively in appellant No.2; that since the subject matter of the suit was not in dispute between the real owner and the ostensible/*benami* owner, but between a third party and the ostensible/*benami* owner, the conduct of the parties and the surrounding circumstances would be taken into consideration for determining whether the transaction was *benami* or not; that since respondents No.1 and 2 proved that Noor Muhammad was a man of means, the onus to prove that the suit property was purchased by appellant No.2 had shifted; that the appellants have not discharged the burden of proving that either appellant No.1 or appellant No.2 had sufficient resources to purchase the suit property; that appellant No.1 was a housewife and appellant No.2 was a student in 1975 when the suit property was purchased; and that the biggest flaw in the appellants' case was that appellant No.1 had failed to appear as a witness to prove that she had paid the sale consideration for the suit property.

14. Learned counsel for respondents No.1 and 2 further submitted that two of Noor Muhammad's nephews, namely Mehmood Akhtar Malik and Aftab Ahmed, appeared as PW-3 and PW-4, respectively, and denied knowledge as to the factum of the payment of the sale consideration for the suit property by appellant No.1; that another key witness, who was not produced by the appellants was S.M.A. Bukhari, who was the original owner of the suit property; that had S.M.A. Bukhari appeared and testified that appellant No.1 had paid the sale

consideration, respondents No.1 and 2 would have had no case; that appellants were unable to prove the execution of the receipt (Ex.D/4) by failing to produce its second marginal witness; that the reason why the title documents of the suit property were not in respondents No.1 and 2's possession was because Noor Muhammad had lived the last 15 years of his life with the appellants; that this is also the reason why respondents No.1 and 2 did not have possession of the suit property; that since respondents No.1 and 2 only claim to be co-sharers in the suit property, they could not be expected to remain in exclusive possession of the suit property; that it was not disputed that Noor Muhammad was living with the appellants when he died, whereas respondents No.1 and 2 were living in Karachi; that if the suit property had been purchased with the funds provided by appellant No.1, it does not appeal to reason as to why an application was filed to put the suit property in the joint names of Noor Muhammad and appellant No.2; and that the judgment and preliminary decree passed by the learned Civil Court is strictly in accordance with the facts of the case and law on the subject. Learned counsel for respondents No.1 and 2 prayed for the appeal to be dismissed. In making his submissions, learned counsel for respondents No.1 and 2 placed reliance on the judgments reported as Ghulam Murtaza Vs. Asia Bibi (PLD 2010 SC 569), S. Iqbal Ahmad through Legal Heirs Vs. Jawaid Iqbal (2011 CLC 29), Akram Moquim Ansari Vs. Mst. Asghari Begum (PLD 1971 Karachi 763), Iqbal Ahmed Turabi Vs. The State (PLD 2004 SC 830), Walayat Bibi alias Rani Vs. Liaqat Ali alias Fayaz Ahmad (2006 YLR 2466), Kamran Ahmed Vs. The State (2006 YLR 2470), Mst. Sabira Begum Vs. Hakim Muhammad Akhtar (NLR 1994 UC 170), Abdul Majeed Vs. Amir Muhammad (2005 SCMR 577), Mst. Sabira Begum Vs. Hakim Muhammad Akhtar (1993 MLD 955), Siraj Ahmed Nomani Vs. Iftikhar Ahmed Nomani (2004 CLC 782), Mst. Muhammadi Begum Vs. S. Salauuddin Ahmad (PLD 1992 Karachi 86), Muhammad Zaman Vs. Sheikh Abdul Hamid (2002 CLC 1209), Dr. Muhammad Riaz Mirza Vs. Muhammad Yousaf Mirza (2005 YLR 2213), Syed Ansar Hussain Vs. Khawaja Muhammad Kaleem (2006 CLC 732), Aftab Nasir Vs. Mst. Fazal Bibi (PLD 1965 (W.P.) Lahore 550), Muhammad

Ali Vs. Sakar Khanoo Bai (PLD 1984 Karachi 97), and Kaleem Hyder Zaidi Vs. Mehmood Begum (2006 YLR 599).

15. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal are set out in sufficient detail in paragraphs 2 to 10 above, and need not be recapitulated.

16. Respondents No.1 and 2 are Noor Muhammad's children from his first wife, Zahida Begum. After Noor Muhammad's marriage with Zahida Begum ended, respondents No.1 and 2 lived in Karachi and hardly remained in contact with their father. Appellant No.1 is Noor Muhammad's second wife and appellants No.2 to 4 are their children.

17. Respondents No.1 and 2's case, in their civil suit, was that the suit property was purchased in 1975 by their father in the name of their half brother, appellant No.2. Respondents No.1 and 2 had asserted that Noor Muhammad, on account of being an Executive Engineer in Pak. PWD, had sufficient resources to purchase the suit property; and that since appellant No.2 was only an ostensible/*benami* owner whereas their father was the real owner, respondents No.1 and 2 were entitled to their inherited share in the suit property.

18. The appellants' stance was not that the suit property had been purchased by appellant No.2, or that the same was purchased by Noor Muhammad with the intention of gifting it to appellant No.2, but that it was purchased with the funds provided by appellant No.1, (i.e. appellant No.2's mother) in appellant No.2's name.

19. 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.

20. It is well settled that the burden of proving that a particular sale is *benami* and that the apparent purchaser is not the real purchaser

always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing evidence of a definite character, which would either directly prove the fact of *benami* or establish circumstances unerringly raising an inference of that fact. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail. These principles we have noted from judicial precedents which, for the sake of brevity, need not be listed here.

21. It is also well settled that the primary and most important question in cases where a transaction is sought to be declared as *benami* is the source of the money for the purchase of the property in question. There is a catena of case law in support of the proposition that the source whence the purchase money came is by far the most important test for determining whether the sale standing in the name of one person is in reality for the benefit of another. The party taking the plea of *benami* must show that the purchase money was provided by the real owner and not by the *benami*/ostensible owner. There is no denying the fact that in 1975 when the suit property was purchased, appellant No.2 was a 15-year old student and could not be expected to have the resources to make the purchase. Appellant No.1 did not appear as a witness, but this by itself was not sufficient to hold that the suit property had been purchased with funds provided by Noor Muhammad. Be that as it may, respondents No.1 and 2 did not produce any documentary evidence in order to discharge their burden of showing that Noor Muhammad had provided the funds for the purchase of the suit property. In their suit, respondents No.1 and 2 simply pleaded that their father *"was working in Pak. PWD as Executive Engineer and he was in a position to purchase the said house".* Although respondent No.1 appeared as PW-1 and in his examination-in-chief deposed that his father had worked as Sub-Divisional Officer in Pak. PWD and had risen to the rank of Executive Engineer Pak. PWD, but PW-1 did not depose with clarity that his father had provided the funds for the purchase of the suit property. As mentioned above, there is no document on the record to show that the suit property was purchased with funds provided by Noor

Muhammad. Mere assumption that Noor Muhammad, being appellant No.2's father with the earning of a government servant, must have paid for the suit property cannot be an acceptable substitute for the requirement to prove through cogent evidence that the sale consideration was indeed paid by Noor Muhammad who was being sought by respondents No.1 and 2 to be declared as the real owner of the suit property. Therefore, it is our view that respondents No.1 and 2 were not able to discharge the burden of proving that Noor Muhammad had paid the sale consideration for the suit property.

22. In order to prove that the sale consideration for the suit property was paid by appellant No.1, Ex.D-4 was tendered in evidence by appellant No.2. Ex.D-4 is receipt dated 31.03.1975 issued by S.M.A. Bokhari stating that an amount of Rs.50,000/- had been received from appellant No.2 through appellant No.1 for the suit property. Khalid M. Ibrahim and Tariq Mahmood Ibrahim were the attesting witnesses of said receipt. In order to prove the execution of said receipt, Tariq Mahmood Ibrahim appeared as DW-2 and deposed that the suit property was purchased with the funds provided by appellant No.1. He also identified his signatures on the said receipt. The second witness, Khalid M. Ibrahim, was Tariq Mahmood Ibrahim's brother. Tariq Mahmood Ibrahim also identified his brother's signature on the said receipt. Since Khalid M. Ibrahim was not produced as a witness, the learned Civil Court held that the execution of the said receipt had not been proved in accordance with Article 79 of the *Qanoon-e-Shahadat* Order, 1984 ("the 1984 Order").

23. Article 79 of the 1984 Order provides that if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence. Furthermore, Article 17(2)(a) of the said Order provides that in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women so that one may remind the other, if necessary, and evidence shall be led accordingly.

24. The receipt (Ex.D-4) is said to have been issued on 31.03.1975, i.e. prior to the passing of the 1984 Order. The 1984 Order had repealed the Evidence Act, 1872 ("the 1872 Act"). Under Section 68 of the 1872 Act, only one attesting witness was sufficient to prove the execution of such a receipt. The 1984 Order came into force on 28.10.1984. A document validly executed prior to 28.10.1984 in accordance with the requirements of the 1872 Act cannot be required to be proved in accordance with the requirements of the 1984 Order otherwise no document attested by one witness and validly executed in accordance with the requirements of the 1872 Act could be proved after coming into force of the 1984 Order in accordance with the requirements of the said Order. For the purposes of clarity and comparison, Section 68 of the 1872 Act and Article 79 of the 1984 Order are reproduced herein below:-

Section 68 of the Evidence Act, 1872	**Article 79 of the *Qanoon-e-Shahadat* Order, 1984**
"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied".	"If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given evidence: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

25. As mentioned above, one of the two attesting witnesses of Ex.D-4, had appeared as a witness (DW-2) and had identified his signatures on the said document. Hence, we are of the view that the learned Civil Court erred by not giving any evidentiary value to Ex.D-4 and holding that its execution had not been proved in accordance with the requirements of Article 79 of the 1984 Order. The receipt/Ex.D-4

executed on 31.03.1975 was required to be proved and was proved in accordance with Section 68 of the 1872 Act since one of its attesting witness had deposed as to the factum of its execution. Such proof negates the assertion of respondents No.1 and 2 that the suit house was purchased with the funds provided by Noor Muhammad. In holding so, we place reliance on the law laid down in the following judgments:-

(i) In Muhammad Amin Vs. Sardar Ali (PLD 2006 SC 318), it has been held as follows:-

> *"It is an admitted fact that agreement to sell was executed between the parties on 16-11-1981 whereas Qanun-e-Shahadat Order came into force on 26-10-1984 meaning thereby agreement to sell executed prior to coming into force of the said Order, 1984 (President's Order No.10/1984). By virtue of Article 1(3) of the said Order came into force at once, there it does not apply retrospectively to documents already executed and are past and closed. See Manzoor Ahmad's case 2002 SCMR 1391, Noor Muhammad's case 2002 SCMR 1301, Syed Muhammad Sultan's case 1997 CLC 1580 and Ramzan's case 2001 MLD 957."*

(ii) In the case of Mst. Rasheeda Begum Vs. Muhammad Yousaf (2002 SCMR 1089), the Hon'ble Supreme Court held as follows:-

> *"[W]here an agreement to sell executed prior to promulgation of Qanun-e-Shahadat Order, 1984 has been reduced into writing and attested by witnesses its execution must be proved in accordance with the provisions of section 68 of the erstwhile Evidence Act notwithstanding the fact that the same apply only to that document which is required by law to be attested."*

(iii) In the case of Bilawal Vs. Abdul Razzak (1990 SCMR 1336), it was held *inter-alia* that Section 68 of the Evidence Act, 1872, permitted the proof of the execution of a document by examining one attesting witness. This view was also taken by the Hon'ble Supreme Court in the case of Noor Muhammad Vs. Nazar Muhammad (2002 SCMR 1301).

(iv) In the case of Muhammad Yasin Vs. Muhammad Latif (2016 CLC 553), an agreement to sell executed prior to the *Qanoon-e-Shahadat* Order, 1984, coming into force was attested by two witnesses. One of the two witnesses was produced to prove the execution of the agreement. Even though the second attesting witness, despite being alive, was not produced, the agreement was held by the Honourable Lahore High Court to have been proved. Furthermore, it was held as follows:-

"The instant case is regarding the execution of an agreement to sell and which agreement to sell was executed on 7.3.1982. The agreement thus pre-dates the Qanun-e-Shahadat Order, 1984 and thus section 68 of the Evidence Act, 1872 will be applicable in such matters."

(v) In the case of Allah Dad Vs. Fazal Haq (2010 YLR 1766), the Hon'ble Lahore High Court held as follows:-

"7. So far as production of only one marginal witness is concerned, having all respect to the judgment cited, it is to be noted that the judgment was delivered with a concept that law of evidence/Qanun-e-Shahadat Order is procedural law, therefore, the same will have retrospective effect. In my humble view, rights of the parties are to be determined in such-like cases on the date when the agreement was executed and the mode of proof and the quantity of evidence would also be the same which was required on the said date, therefore, the cited judgment would not be applicable to the instant case."

(vi) In the case of Jain Khan Vs. Muhammad Zaman (2005 YLR 1456), the Hon'ble Lahore High Court held that documents executed prior to the passing of the 1984 Order would be required to be proved in accordance with the provisions of the 1872 Act. The relevant observations in the said report are as follows:-

"Undeniably, both the agreement dated 4-12-1981 and cancellation note appearing on its back dated 17-5-1982 were executed earlier to promulgation of Qanun-e-Shahadat Order, 1984. Controversy regarding proof of the document executed earlier to coming into force of Qanun-e-Shahadat Order, 1984 is settled whereunder said document had to be proved in accordance with the provisions of Evidence Act, 1872 and its section 68 envisaged proof of document by producing only one marginal witness. Reference in this behalf can conveniently be made to Zafarul Hassan Qureshi v. Messrs Pakistan Tobacco Company Ltd. and 6 others (1991 CLC 1580), Syed Muhammad Sultan v. Kabir-ud-Din and others 1997 CLC 1580 and Mst. Rasheeda Begum and others v. Muhammad Yousaf and others (2002 SCMR 1089)."

(vii) In the case of Dr. Sadiq Hussain Vs. Mst. Maqbool Begum (2005 CLC 368), the Hon'ble Lahore High Court held *inter alia* that sale deeds executed prior to the coming into force of the 1984 Order were required to be proved as per the provisions of the 1872 Act. Furthermore, it was held that to such deeds the provisions of the 1984 Order were not applicable.

(viii) In the case of Mst. Said Khoban Vs. Momin Khan (2003 CLC 78), the Hon'ble Peshawar High Court held as follows:-

"7. The plea of the learned counsel for the petitioner that sale-deed (Exh.P.W.5/1) being not proved by two attesting

witnesses in terms of Article 79 of Qanun-e-Shahadat is bad in the eye of law is misconceived. There can be no denial of the fact that under section 68 of the Evidence Act examination of one attesting witness was the requirement of the law to prove the execution of a document/deed. Section 6 of the General Clauses Act provides that repeal shall not affect anything not in-force or existing at the time at which the repeal takes place. The new law of evidence i.e. Qanun-e-Shahadat came into existence in the year 1984. The sale-deed (Exh.P.W.5/1) in question was scribed in 1963 and the present suit was filed in the year 1983 prior to the promulgation of Qanun-e-Shahadat, 1984, therefore, the execution of the deed was to be proved in the light of section 68 of the erstwhile Evidence Act, 1872 and not under Article 79 of the Qanun-e-Shahadat, 1984."

26. It is an admitted position that possession (constructive or otherwise) rested with appellant No.2 at all material times. Lease agreement dated 04.06.1983 (Ex.P/10) between appellant No.2 as lessor and Project Manager National Engineering Services Limited as lessee, whereby the suit property was leased to the latter, describes appellant No.2 as the "lessor" and "owner" of the suit property. This lease agreement has also been witnessed by Noor Muhammad. The said lease agreement does not contain a clause providing for the lease amount to be paid to Noor Muhammad. Furthermore, there is nothing on the record to show that the lease amount had been paid to Noor Muhammad and not to appellant No.2. Therefore, it is safe to hold that possession (constructive or otherwise) of the suit property remained with appellant No.2.

27. As regards the requirement to prove motive for the *benami* transaction, respondents No.1 and 2, in their suit, pleaded that Noor Muhammad *"was in a position to purchase the said house but the benami transaction was caused to avoid tax authorities and other government agencies".* Respondent No.1, in his examination-in-chief, elaborated the said pleading by deposing that while Noor Muhammad was in service, there had been severe pressure on him by the departments of anti-corruption and income tax; that he had also been involved in a case; that due to this, he had not invested his savings and earnings; and that in order to avoid further worries, Noor Muhammad had purchased the house/plot in appellant No.2's name. Neither was any document brought on record nor was any independent evidence led to prove that any inquiry or proceedings before the anti-corruption department were pending against Noor

Muhammad when the suit house was purchased. We are of the view that the appellants' said insinuation against their own father is a figment of their imagination and motivated by the desire to get a share in the suit house.

28. We are also of the view that the motive for entering into a *benami* transaction has to be explicitly and clearly pleaded in the suit. The above-mentioned pleadings in the suit regarding the motive for the *benami* transaction are ambiguous and vague. There is no pleading in the suit as to any case having been initiated by the anti-corruption or income tax departments against Noor Muhammad. The Superior Courts have time and again held 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. Respondent No.1's testimony as to Noor Muhammad being involved in a case can safely be held to be beyond the pleadings in respondent No.1 and 2's suit, and therefore not worthy of any consideration.

29. In view of the above, the instant appeal is allowed; the impugned judgment and preliminary decree dated 29.10.2015, passed by the learned Civil Court is set-aside; and the suit for declaration, partition, and mandatory and permanent injunction instituted by the plaintiffs/respondents No.1 and 2, is dismissed. There shall be no order as to costs.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON 01/07/**2019**

(CHIEF JUSTICE) **(JUDGE)**

*Qamar Khan**

Approved for reporting.

Blue Slip added.