

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. **JUDICIAL DEPARTMENT.**

Civil Revision No. 168/2013.

Haseeb ud Din

Versus

Khawaja Tariq, etc.

**Petitioner by: Mr. Murtaza Hussain Turi and Mr. Arif Khan
Gigyani, Advocates.**

**Respondents by: Ms. Amna Ali, Advocate.
Mr. Arshad Mehmood, Advocate.**

Date of Decision: 02.05.2019.

MOHSIN AKHTAR KAYANI, J:- Through this Civil Revision, the petitioner has assailed the judgment dated 04.05.2011, passed by learned Civil Judge, 1st Class (West), Islamabad, whereby suit filed by petitioner for declaration, cancellation of sale deed and permanent injunction was dismissed. The petitioner has also assailed the judgment dated 15.03.2013, passed by learned Additional District Judge (West), Islamabad, whereby RFA filed by petitioner was also dismissed.

2. Brief facts referred in the instant matter are that petitioner filed a suit for declaration, cancellation of sale deed and permanent injunctions against respondents with prayer that he is real owner of House No.19, Street No.31, Sector G-6/2, Islamabad and respondent No.1 is just *benamidar*, who has no right to transfer, alienate the suit property to anyone else. The suit was contested by respondents by way of written statement and other preliminary objections in which respondent No.1 took the stance that he went to Japan for job in year 1979 and he transmitted different amounts through different modes including hundi and also through friends and he also visited Pakistan and from said amount suit

property was purchased and transferred to his name through registered sale deed No.832, dated 20.03.1999/Ex.P1 and petitioner has no source of income to purchase the said property at his own. The suit filed by the petitioner was dismissed vide judgment & decree dated 04.05.2011 by the trial Court and the said judgment was upheld by the appellate Court in favour of respondent No.1.

3. Learned counsel for the petitioner contends that petitioner and respondent No.1 are real brothers and as such trial Court has not given due weightage to the overwhelming evidence brought on record which include the mutation of *benami* transaction and proof of receiving of amount Rs.24,80,000/- transferred from his account in the account of seller Mst. Nafisa Kamal, even petitioner is in possession of title deed as well as in possession of property since its purchase; that petitioner while appearing as PW-1 has justified each and every aspect of the transaction and produced Ex.P-1 title documents, Ex.P-2 cheque book, Ex.P-3 bank statement of UBL Bank, Abpara Branch but the trial Court as well as appellate Court have not appreciated the record.

4. Conversely, learned counsel for respondents No.1 & 2 contends that suit property was purchased through the payment made by respondent No.1 and petitioner has no source of income of his own; that agreement to sell dated 31.08.1998 executed between Nafisa Kamal and Sarwari Begum (mother of petitioner & respondent No.1) spells out the terms & conditions in which property in dispute was to be transferred in the name of respondent No.1; that petitioner has never submitted his tax record to justify his source of income and mere possession of title document or possession of suit property does not fulfill the requirement of *benami* transaction especially when the parents of petitioner as well as respondent No.1 were living in the said property and after their death petitioner illegally occupied the same; that both the Courts below have rightly

adjudicated upon the matter in the light of principles laid down by the superior Courts.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner filed a suit for declaration, cancellation of sale deed and permanent injunction with the allegations that House No.19, Street No.31, Sector G-6/2, Islamabad, which is in the name of respondent No.1 on the basis of sale deed Ex.P-1 registered at S.No.832, dated 20.03.1999 registered before the Sub-Registrar, Islamabad was purchased by him and respondent is just *benamidar*. The petitioner and respondent No.1 are real brothers and petitioner claims that he is actual owner of the property in question. The petitioner further claims that he is in possession of property as well as in possession of title document, even payment of Rs.24,80,000/- as sale consideration was transferred from his personal account. PW-1 produced bank statement as Ex.P-2 & cheque book as Ex.P-3. The petitioner's claim has been refuted by the other side, who has denied such transaction rather took plea that he went abroad in the year 1979 in Japan and was doing business of cars and transferred different amounts through hundi as well as through friends and his brother i.e. petitioner. The petitioner is holding small cigarette and pan shop which was later on converted into perfume shop. The property in question was purchased in the name of respondent No.1 and same was transferred in his name, even property was transferred in the record of CDA in the name of respondent No.1, however, after the death of his parents the house has been retained by the petitioner.

7. I have gone through the evidence of the petitioner, who appeared as PW-1 in which he has taken specific plea that:-

میں نے نفیہ کمال سے بذریعہ agreement مکان متدعویہ خریدا۔ میں نے مکان متدعویہ کی ادائیگی بذریعہ cheques جو

میرے اکاؤنٹ کے تھے، کی تھی۔ رقم مبلغ 24 لاکھ اسی ہزار میں نے اپنے اکاؤنٹ میں سے ادا کی تھی۔ مکان متدعویہ کا قبضہ میرے پاس

ہے۔ میں نے agreement اپنی والدہ کے نام کروایا تھا۔ میں نے مکان متدعو یہ Income tax بچانے کیلئے اپنے بھائی مدعا علیہ نمبر 1 کے نام کروایا تھا۔ تمام اصل دستاویزات بابت agreement اور بیع نامہ میرے پاس ہیں۔

8. The above referred stance if seen in the light of agreement to sell Ex.X, which has been placed on record at the appellate stage i.e. agreement to sell dated 31.08.1998, which was executed between Nafisa Kamal/Ex-owner/Vendor and Sarwari Begum (mother of petitioner & respondent No.1), whereby clause 6 of the said agreement reflects that:-

6. After receiving Rs.24,80,000/- (Twenty four lacs and eighty thousand only) the VENDOR shall be bound to arrange transfer/registration of the said house in favor of the VENDEE or her son Kh. Tariq Javaid S/O Khawaja Ghulam Mustafa r/o H. No.19, Street No.31 Sector G-6/2 Islamabad Immediately.

9. The first ever stance taken by the petitioner that he entered into agreement to sell with Nafisa Kamal is refuted from the document Ex.X, which has been placed on record at the appellate stage and petitioner concealed the said document. The clause 6 of the document clearly spells out that the property in question was purchased for respondent No.1 and the said document was witnessed by Mumtaz Ahmed Bilal and Nazeer Qureshi, whereas petitioner stand nowhere in the said document. Surprisingly petitioner's plea for purchase of said house directly from Nafisa Kamal is not visible and he could not submit and legal justification as to why he has not witnessed that document. It is not plausible that any person who has paid an amount of Rs.24,80,000/- to the seller Nafisa Kamal through agreement has not claimed the property to be transferred in his name, therefore, plea raised by the petitioner is negated from the record by his own conduct as he could not explain the reasons as to why he has not executed the agreement directly by his own name when he was paying the amount as sale consideration to the vendor Nafisa Kamal.

10. The petitioner has also taken another plea that in order to safeguard the income tax he had transferred the property in the name of his brother but he has not produced a single document or witness through which it could be assumed that huge tax was involved in the purchase of said property, even otherwise the petitioner has been confronted with the question as to whether he has ever placed his own tax record of last 30 years as claimed in his examination in chief but learned counsel for the petitioner candidly conceded that no tax record is available, nor even produced before the trial Court.

11. In my humble view, the petitioner is under obligation to discharge the onus of *benami* transaction through which he has to justify his own status or he has to show his financial capacity that amount Rs.24,80,000/- was his own legal income but petitioner has failed to justify his business on record, although he is dealing with cosmetics wholesale but this is an oral assertion which requires evidence, which is lacking in this case.

12. Even petitioner has not discharged the onus by calling the ex owner Nafisa Kamal in witness box to justify that she received entire sale consideration from the petitioner through banking channel, even witnesses of agreement namely Mumtaz Ahmed Bilal and Nazeer Qureshi were not called by the petitioner to justify his own version.

13. The entire record reveals that claim of the petitioner is not substantiated in any manner. Even during the course of cross-examination he acknowledged that he is 45 years of age on 26.04.2010, which means he was of 33 years age at the time of execution of agreement to sell, however, his financial status has to be seen in the light of his answers given in the cross-examination which are as follows:-

والد صاحب کی ننگاری بازار میں دکان تھی۔ میں بچپن سے والد صاحب کے ساتھ کام کرتا تھا۔ والد صاحب 2000 تک ساتھ ہی کاروبار

کرتے رہے۔ 2000 تک میں اور میرا چھوٹا بھائی والد اور والدہ کے ساتھ رہتے تھے۔

میری کمپنی کا نام کے۔ کے۔ فور کاسمیٹک ہے اور یہ رجسٹرڈ فرم نہ ہے۔ سیلر ٹیکس رجسٹریشن بھی نہ ہے۔ میرے پاس کوئی Export/Import لائسنس نہ ہے از خود کہا کہ کسی کے ساتھ مل کے کرتا ہوں۔ میری دکان کرائے پہ ہے۔
یاد نہ ہے کہ انکم ٹیکس ادا کیا یا نہیں۔

ہم سیل کے پیسے اکاؤنٹ میں جمع نہیں کرواتے تھے۔ اس کے علاوہ میرا اور کوئی کاروبار نہ ہے۔

یہ درست ہے کہ مکان کا agreement میری والدہ کے نام ہوا تھا میں اُس وقت پاکستان میں تھا۔ انکم ٹیکس بچانے کیلئے میں نے والدہ کا نام مکان متدعو یہ agreement کروایا۔ میری والدہ نہ انکم ٹیکس دیتی تھی اور نہ کاروبار کرتی تھی۔

یہ درست ہے کہ میرے علم میں یہ بات ہے کہ مکان 1999 میں مدعا علیہ نمبر 1 کے نام ہو گیا تھا کیونکہ میں نے خود کروایا تھا۔ میں سیل ایگریمنٹ مورخہ 31.08.1998 کے گواہوں کو پیش نہ کروں گا۔ میں سیل ڈیڈ مورخہ 20.03.1999 بحق مدعا علیہ نمبر 1 کے گواہان ہاشیہ کو بھی پیش نہ کروں گا۔

ان تین transactions سے قبل میرے اکاؤنٹ میں ڈھائی لاکھ سے اوپر کی کوئی رقم نہ تھی۔ میں نے 1999ء میں ادھار لیا تھا۔

14. While considering the above mentioned statement and admissions of the petitioner, the petitioner has also tried to establish his financial status, he has taken a specific stance that he had obtained loan in the year 1999 and he has paid the amount to Nafisa Kamal but at the same time he acknowledged that payment was made in three transaction from his account but before the said transaction to Nafisa Kamal the total amount in his account was Rs.2,50,000/-, however, surprisingly he has not produced any of the witnesses of loan transaction or any person who extended Rs.24,80,000/- loan to him.

15. On the other hand Tariq Javaid appeared as DW-1, who acknowledged that he transferred the amount through different friends and hundi and agreement was executed in the name of his mother in which it is specifically written that suit house will be transferred in the name of respondent No.1, however, after the death of his mother title document was retained by the petitioner. Respondent No.1 also produced Faisal Majeed as DW-2, who stated that his elder brother and respondent No.1 are running joint business in Japan dealing with cars and the shipment of the cars whenever received in Pakistan or

personally paid amount to the petitioner as well as mother of respondent No.1 & petitioner.

16. The documentary evidence clearly reveals that agreement Exh.X proves the intention of parties to transfer the property in question on the name of respondent No.1 and in compliance of the said document Ex.P-1 sale deed was executed by Nafisa Kamal in the name of respondent No.1, whereby sale consideration shown in the said sale deed is Rs.19,00,000/-, registered before the Sub-Registrar, Islamabad.

17. I have gone through the judgment of the trial Court as well as appellate Court and is in full agreement with the findings which have been given after proper appreciation of the evidence, however, the ingredients of the *benami* transaction as referred in 1991 SCMR 703 (Muhammad Sajjad Hussain Vs. Muhammad Anwar Hussain), PLD 2008 SC 146 (Ch. Ghulam Rasool Vs. Mrs. Nusrat Rasool), 2017 YLR 224 [Lahore] (Muhammad Arif Vs. Haji Waheed-ul-Haq), PLD 2010 SC 569 (Ghulam Murtaza Vs. Mst. Asia Bibi) and 2010 CLC 1633 (S. Abid Ali Vs. Syed Inayat Ali) have not been fulfilled by the petitioner's side. Even otherwise, learned Appellate Court while answering the question of source (consideration) has given detailed view and considered the sale agreement dated 31.08.1998 as Exh.X, which correspond with the details of payment made to Nafisa Kamal/Ex-Vendor. Therefore, while considering the concurrent findings, the petitioner has failed to answer/reasons as to why witnesses of agreement to sell or sale deed were not produced in the Court although he claims to be the real owner of the property but he could not manage to produce the witnesses of both these documents rather he refused to produce the marginal witnesses in the Court which speaks volume about his conduct.

17. At last the appellate Court has also dismissed the appeal with costs of Rs.25,000/- while considering the entire background and in my humble

estimation the petitioner has prevailed with greed and lust of the property which was purchased and owned by respondent No.1 through his mother and petitioner has failed to explain the reasons as to why he kept silent after execution of agreement to sell dated 31.08.1998 and registered sale deed dated 20.03.1999 and filed suit for cancellation of sale deed and declaration on 17.02.2005 after the elapse of six years, therefore, all the evidence brought on record leans in favour of respondent No.1 who being brother has not yet filed suit for possession of the property against the petitioner. It is trite law that concurrent findings of fact recorded by the Courts below could not be interfered in the revisional jurisdiction by the High Court when evidence as well as record has rightly been appreciated. Reliance is placed upon 2016 SCMR 24 (Nazim-ud-Din and others Vs. Sheikh Zia-ul-Qamar and others), 2007 SCMR 953 (Province of Punjab through Collector, Sargodha and others Vs. Muhammad Akhtar), 2014 SCMR 1469 (Mst. Zaitoon Begum Vs. Nazar Hussain and another), 2000 SCMR 431 (Anwar Zaman and 5 others Vs. Bahadur Sher and others).

18. Keeping in view the above background, concurrent findings given by the Courts below are in accordance with law, no illegality has been observed and petitioner has failed to make out his case of interference in the concurrent findings. Therefore, instant petition is misconceived and the same is hereby dismissed.

(MOHSIN AKHTAR KAYANI)
JUDGE

Zahid