SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Ijaz ul Ahsan
Mr. Justice Shahid Waheed

Civil Appeal No.801 of 2021

[On appeal against the judgment dated 25.06.2021 of the Lahore High Court, Rawalpindi Bench, Rawalpindi, passed in C.R. No.08-D of 2013]

Muhammad Yousaf and others *...Appellant(s)*

VERSUS

Muhammad Ishaq Rana (deceased) through LRs and others *...Respondent(s)*

For the Appellant(s) : Mr. Agha Muhammad Ali Khan, ASC

Respondents No.1 to 12 : Mr. Rashid Mehmood Sindhu, ASC

Date of Hearing : 14.12.2022

JUDGMENT

SHAHID WAHEED, J.— It is true that the affirming judgment needs not speak elaborately, but, in this direct appeal, though we do not disagree with the High Court, we still wish to consider the matter in a little detail because it has a touch of human crises. The empirical study suggests that what counts in interpersonal relationships is the truth of feelings, if hearts are mistrusted, houses become desolate, and families are broken up. This litigation is an epitome of such a reality and projects the vicissitudes of life where once the feelings of mutual relations were so warm that everything in a family was considered to be the property of all, but then overtime, mistrust crept into the hearts resulting in a cleft in the unity. With this prefatory statement, we now go straight to the facts that give rise to the moot question as to who is the real owner of the suit property?

2. The subject-matter of the present dispute is a two-marla house bearing No.F-616, Bahbar Khana, presently

Nishtar Abad near Noorani Masjid, Rawalpindi. This house was purchased from Nawab Mirza on 25th of August 1973 in the name of Sakina Bibi (predecessor of respondents No.1 to 12) under registered sale-deed No.4281 (Ex.P-3) and from that date Imam-ud-Din (predecessor of the appellants) till his death resided in it, and after his death, it is in the possession of the appellants. Since the house was in Sakina Bibi's name as per the sale-deed (Ex.P-3), her legal heirs claiming their ownership instituted a suit for its partition on 14th of March 2005 with the assertion that their brother, Fayyaz Ahmad Rana (respondent No.5 herein), gave the sale-deed (Ex.P-3) to one of the appellants because he wanted to apply for his domicile certificate and, that on his refusal to return the sale-deed (Ex.P-3) it was found that he had taken Rs.200,000/- for the house from Zahid (defendant No.9) through Shafiq alias Niazi (defendant No.10). It is to be noted that Riaz Ahmad Rana (respondent No.6 herein), Zahid, Shafiq alias Niazi along with all the present appellants were made defendants in the suit, praying that a decree be issued for: (i) partition of the house, (ii) return of the original sale-deed, and (iii) restraining the defendants, that is, the present appellants from further selling the house. Three years after the said suit, the appellants also instituted a counter-suit on 6th of May 2008 in which they contended that their predecessor, namely, Imam-ud-Din had purchased the house for Rs.3,500/- and since Imam-ud-Din treated Sakina Bibi as his mother, he also considered himself as her eldest son, and thus, he got transferred the house in her name. Based on these assertions, the appellants sought a declaration that Imam-ud-Din was the real owner of the house while Sakina Bibi was only a Benamidar and had nothing to do with the house.

3. The trial Court consolidated the two suits and framed the issues based on which they could be decided. Both the parties presented oral as well as documentary evidence in favour of their respective claims. After considering the stances of the parties and the evidence brought on record, the trial Court came to hold that the suit of the appellants must be dismissed as they failed to prove that Sakiban Bibi was the Benami owner of the house, while the

prayer of the respondents regarding partition of the house was declined on the ground that unnecessary persons were made parties to the suit; however, the claim for return of the sale-deed was found valid. Based on these findings, the trial Court through its consolidated judgment dated 20th of May 2011 issued a decree dismissing the suit of the appellants and also a decree partially accepting the suit of the respondents.

4. Grieved by the aforesaid decrees, the appellants preferred their single appeal wherein it was contended that the trial Court not only misread and non-read the evidence but also misapplied the law, and thus, had fallen into error by dismissing their suit. The first appellate Court, considering the contentions raised before it, concluded that the appellants had produced sufficient evidence to prove that Sakina Bibi was Benami owner of the house and thus by its judgment dated 27th of November 2012 issued a decree in favour of the appellants.

5. The respondents, aggrieved by the reversing judgment of the lower appellate Court, then carried their application under Section 115 CPC to the High Court and sought revision of the decree dated 27th of November, 2012. The High Court opined that under Article 117 of the Qanun-e-Shahadat, 1984 the appellants were under burden to prove that they were the real owners of the house and that Sakina Bibi was a mere Benamidar, but they failed to do so because the first witness, of their side, was Mohammad Yousaf (DW-1), and he was only four years old at the time of purchase of the house, the second witness Mohammad Taj (DW-2) did not utter a single word about the essential elements of the benami transaction, and the third witness Mohammad Rafiq (DW-3) was also on the same lines of DW-2. So the statements of all the witnesses had no value and the High Court concluded that the appellants not only failed to disclose the motive of making Sakina Bibi as Benamidar but also could not prove the alleged benami transaction. Led by these findings, the High Court by its judgment and decree dated 25th of June 2021 revised the decree of the first appellate Court and set it aside, and restored the decree of the trial Court. So, this appeal.

6. The appellants' counsel mainly contends that the purchase of the house was only benami in the name of Sakina Bibi, and that Imam-ud-Din obtained (Ex.P-3), the sale-deed dated 28th of August 1973, from Nawab Mirza, the seller, in the name of Sakina Bibi. According to the appellants, Imam-ud-Din paid the sale price to the seller and as such the respondents have no manner of right over the house. In view of these arguments, the question which we are required to consider is whether Imam-ud-Din was the actual owner in possession of the house or (Ex.P-3) was a benami transaction or not?

7. Be it noted that in cases of alleged benami transaction, there may be a ground for suspicion, nevertheless, the Court's decision must not be based on suspicion or conjecture, but on legal grounds. We, therefore, wish to say that it is one of the essential elements of a fair trial that the law must be applied to any transaction in the light of its ordinary course of human conduct. Keeping this in mind when we analyze the benami transaction, we find that there are three persons involved in it — the seller, the real owner, and the ostensible owner or benamidar, and, in the ordinary course of human conduct, it encompasses two different contracts, one is the contract, express or implied, between the ostensible owner and the purchaser (real owner) and it specifically mentions two things. First, the real owner expresses his desire or compulsion (also called motive) and obtains permission from the ostensible owner (Benamidar) to purchase the property in his name after paying the consideration amount to the seller, and second, it talks about the consent of the ostensible owner (Benamidar) that whenever the real owner demands, he will be bound to transfer the property to him. The other is a contract between the ostensible owner (Benamidar) and the seller of the property.[1] It is important to note here that both the above contracts, though differ from each other in their legal character and incidents, complement each other to establish benami transaction, and thus, in cases of such transaction, the plaintiff

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[1] Sultan v. Nawab Mouladad (PLD 1969 Karachi 221)
Abdus Samad Khan v. Moulvi Abdullah (K.L.R. 1989 Civil Cases 612)
Ch. Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others (PLD 2008 SC 146)

must first state them, in detail, in his plaint, and then prove them by legal testimony, and failure to do so is fatal. Mindful of this legal position, we have perused the pleadings and the evidence brought on record and find that they fall short of the material facts mentioned above. This omission cannot be condoned and that alone is sufficient to reject the claim of the appellants.

8. Let us look at the dispute involved in this appeal from another angle and try to find out an answer to the question at hand. It goes without saying that the case of benami dispute is not one in which the authenticity of the document is in question, but in such cases the execution of the document is an admitted fact and the seeker only intends rectification of the document and wants that in it the name of the Benamidar be delated and instead his name be written. How can this be done? The determination of this question depends not only on direct oral evidence but also upon circumstances and surroundings of the case concerned. It has been held repeatedly that the burden of proof lies heavily on the person who claims against the tenor of the document or deed to show that the ostensible vendee (owner) was a mere name-lender and the property was in fact purchased only for his benefit. Such burden would be discharged by satisfying the well-known criteria, to wit, (i) the source of purchase money relating to the transaction; (ii) possession of the property, (iii) the position of the parties and their relationship to one another, (iv) the circumstances, pecuniary or otherwise, of the alleged transferee, (v) the motive for the transaction, (vi) the custody and production of the title deed, and (vii) the previous and subsequent conduct of the parties. Each of the above-stated circumstances, taken by itself, is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the ownership has been really transferred or where the real title lies. Since the very object of a benami transaction is secrecy, the evidence adduced in cases of this character should stand the test of strict scrutiny and satisfy the

tests mentioned above. In other words, the evidence must be reliable and acceptable impelling the Court to take a view contrary to the recitals in the impugned document. The consideration of such evidence should be in a proper manner and in the right perspective.[2] Now, having the principles in mind we shall discuss the evidence, oral and documentary, under the various heads.

9. The first point that is to be considered is to find out the source of purchase money. In this context, the first factor, to see is how much was the purchase money, and secondly, what was the source of its payment. There is a sale-deed (Ex.P-3) on record for determining the purchase money which was executed by Nawab Mirza on 27th of August 1973. According to this sale-deed the purchase money was Rs.3,500/-. The appellants have stated in their plaint that this amount was paid by their predecessor, Imam-ud-Din. To prove this fact, one of the appellants, Mohammad Yousaf appeared in the Court as DW-1 and stated in his examination-in-chief that his father Imam-ud-Din had acquired the possession by purchasing the house from Nawab Mirza for Rs.3,500/-. In our view, the oral statement of this witness is not direct in terms of Article 71 of the Qanun-e-Shahadat, 1984 for two reasons. The first is that this witness told during cross-examination that he was born in 1969. It means that he was about four years old at the time of execution of the sale-deed (Ex.P-3) and thus, it could not be construed that he had the direct knowledge about the sale. Secondly, this witness though in his cross-examination said that he was told by his father that the house was purchased in 1963, he did not say that his father had told him that the payment for the house was made by him. For the said reasons the statement of this witness is of no value. The other two witnesses produced by the appellants were Mohammad Taj (DW-2) and Mohammad Rafiq (DW-3). These two witnesses did not

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[2] Mina Kumari Bibi v. Bijoy Singh Dudhuria (1917) ILR 44P.C.662
Abdul Lajij Kazi v. Abdul Huq Kazi (1925) 28 CWN 62
Muhammad Sajjad Hussain v. Muhammad Anwar Hussain (1991 SCMR 703)
Muhammad Siddiqi through Attorney v. Messrs T.J. Ibrahim and Company and others (2001 SCMR 1443)
Abdul Majeed and others v. Amir Muhammad and others (2005 SCMR 577)
Mst. Zohra Begum and 6 others v. Muhammad Ismail (2008 SCMR 143)
Ghulam Murtaza v. Mst. Asia Bibi and others (PLD 2010 SC 569)
Mst. Asia Bibi v. Dr. Asif Ali Khan and others (PLD 2011 SC 829)

say a word about the purchase money and its payment in their statements. On the contrary, a witness to the sale-deed (Ex.P-3), namely, Riaz Ahmad Rana, who is the real son of the alleged Benamidar Sakina Bibi, appeared in the Court as DW-4 and stated that he had paid Rs.3,500/- for the house to Nawab Mirza, and this money was given to him by his mother after taking it from his father. Given these circumstances, it would not be unjust to hold that the appellants had failed to prove that their father Imam-ud-Din paid the purchase money.

10. Now before we enter upon to examine the evidence tendered to find out whether the other points essential to determine the Benami transaction are discernable from the facts of the instant case, it is necessary and important to consider the position of the parties and their relationship to one another. A conjoint reading of the pleadings of the parties, the statement of appellant No.1, Mohammad Yousaf (DW-1), and respondent No.5, Fayyaz Ahmad Rana (PW-1), makes it clear that Imam-ud-Din, the predecessor of the appellants, migrated from Delhi in 1947 along with his maternal grandfather (Nana), maternal uncles (Mamoo) and maternal aunt (Khala), and then started living together in Pakistan. Respondents' predecessor Sakina Bibi (the alleged Benamidar) was Imam-ud-Din's aunt (Khala) and she brought him up. It is admitted on all hands that Imam-ud-Din treated his aunt Sakina Bibi as his mother and considered himself as her eldest son. So, it emerges that the parties were closely related to each other and were living like one family. It is also on record that Sakina Bibi died on 5th of April 1994 (Ex.P-2) while Imam-ud-Din died in 2000. No evidence has been brought on record as to whether there was any dispute between Sakina Bibi and Imam-ud-Din regarding the house during this time. However, after the death of both of them, a dispute started between their successors over the house and the cause for this has been described by the appellants in para 11 of their plaint, the explanation thereof may be found in the statement of Mohammad Yousaf (DW-1), and such was not denied by Fayyaz Ahmad Rana (PW-1) in his statement. In the light of the aforesaid statements, the cause of dispute appears

to be that the brother of brother-in-law of the appellants was married to Rukhsana Wajid (respondent No.7 herein), daughter of Sakina Bibi and after his death business and property disputes arose, in continuation of it, Rukhsana Wajid also filed a case against the brother-in-law of the appellants, in which the appellants supported their brother-in-law. It can easily be imagined that this was the point when mistrust arose in the hearts, the warmth of mutual relations began to melt and the strength of family unity was lost. Taking stock of this family milieu, we have to address the points as to whether the motive set up by the appellants was plausible, who had the house, from whose custody the original sale-deed was produced, and also what will be the effect of their answer on the claims put forward by the parties?

11. What was the motive founded by the appellants for the transaction, is an important point for ascertaining benami transaction. It is to be noted that the essence of a benami is the intention of the party or parties concerned; and often such intention is shrouded in a thick veil which cannot be easily pierced through. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. The presumption is though rebuttable, and for doing it, legal evidence must be let in particularly on the motive part of the transaction by the person who wants the Court to give judgment as to his legal rights.[3] In this perspective, we have to first examine the contents of the appellants' plaint to find out what material facts are stated therein about the motive of the transaction and then to see what legal evidence did they adduce to prove these facts. We followed suit and found that the appellants had stated in para 7 of their plaint that Sakina Bibi was like a mother to Imam-ud-Din, and he also considered himself to be her elder son, hence he obtained a registered sale-deed (Ex.P-3) in her favour. This assertion about the motive part was sketchy even so, no effort was made to provide

[3] Article 117 of the Qanun-e-Shahadat, 1984

its details during the evidence. One of the appellant's Mohammad Yousaf appeared as his own witness before the trial Court as DW-1 but he reiterated the same stance in his statement. The statement of appellants' other two witnesses was completely silent about the motive part. So, we are poised to hold that the appellants had failed to rebut the presumption attached to the recitals of the sale-deed (Ex.P-3), for, firstly, the oral statement of DW-1, as stated hereinabove in para 9, was not direct in terms of Article 71 of the Qanun-e-Shahadat, 1984, and secondly, appellants have not pleaded or claimed anywhere expressly that at the time of purchase of the house in the name of Sakina Bibi there was a clear agreement between Imam-ud-Din and Sakina Bibi that the house was owned by Imam-ud-Din and Sakina Bibi was simply Benamidar.

12. We have reached the stage of examining the effects of possession of the house and production of its title document in the Court. We think that since the evidence adduced by the appellants is of no value as it does not throw any light on the essential points involved in the case, and in the wake of our findings that the appellants have failed to prove the other points for the determination of the alleged benami transaction, no detailed inquiry is required on these two points and they may be dealt with summarily. So far as the possession of this house is concerned, it is sufficient to say that it was and still is with the appellants, because, the preponderance of evidence brought on record suggests that Sakina Bibi owing to the above-stated intimate family bond and, considering Imam-ud-Din to be her son, had allowed him to live in it. As regards the production of title-deed, the standpoint of the respondents is that Fayyaz Ahmad Rana (respondents No.5 herein) PW-1 had given it to Mohammad Yousaf (appellant No.1 herein) as he wanted it for obtaining a domicile certificate. Although the date of handing over the sale-deed to Mohammad Yousaf was not furnished in the pleadings, nor was it disclosed during the evidence, given the interpersonal relationship of the parties, the stance of the respondents does not appear to be improbable.

13. Thus, viewing the case from each and every angle, there is not even an iota of evidence to support the claim of the appellants. On an overall appreciation of the evidence adduced by both parties, in the light of all relevant and surrounding circumstance, we have no hesitation to hold that the sale-deed dated 28th of August 1973 (Ex.P-3) is not a benami transaction.

14. We accordingly confirm the findings of the High Court and dismiss the appeal with no order as to costs.

JUDGE

JUDGE

Islamabad, the
14.12.2022
'APPROVED FOR REPORTING'
Asif Siddiqui