ORDER SHEET

IN THE HIGH COURT OF SINDH,

IInd Appeal No.85 of 2011.

DATE	ORDER WITH SIGNATURE OF JUDGE

Present: Mr. Justice Nazar Akbar

Appellant	:	Gul-e-Nasreen through Mr. Jawad A. Sarwana, advocate
Respondent No.1	:	Maj. Lala Rukh (Retd) (late) and others through Mr. Faisal Siddiqui, advocate.
Respondent No.2	:	Pakistan Defense Officers Housing Authority, Through Mr. Ejaz Khattak, advocate.
Respondent No.3	:	Hafiz Muhammad Iqbal, (None present)
Date of hearing	:	30.03.2016
Date of announcement:		_____

JUDGMENT

NAZAR AKBAR J:- This second appeal is directed against the Judgment dated **11.5.2011** and Decree dated **16.5.2011** whereby Civil Appeal No.83/2010, filed by the appellant was dismissed by VIth Additional District Judge (South) Karachi, and judgment **29.01.2010** and Decree dated **25.02.2010** of dismissal of appellant's Suit No.603/2003 (**Old Suit No.350/1986**) passed by IInd Sr. Civil Judge South Karachi, has been maintained.

2. The relevant facts of the case are that the appellant and Respondent No.1, are two real sisters. Respondent No.1 was Captain in Pakistan Army and posted (AFNS) C.M.H in 1973. The appellant was residing at Bungalow No.87, Clifton, Shahrah-e-Iraq Karachi and she was desirous to

purchase a plot in the Pakistan Defence Officers Cooperative Housing Society Ltd., Karachi, (PDOCH Society) Respondent No.1 being member of Armed Forces was entitled to apply for a residential and a commercial plot in PDOCH Society. However, she was neither interested in a plot in Karachi, nor she had the funds, therefore, the appellant who had the funds requested her to apply for the plots with clear understanding that the plots if allotted shall be the property of the appellant and Respondent No.1 shall only be a BENAMI. Therefore, on **27.12.1973** Respondent No.1 acting on this understanding applied to the PDOCH Society for allotment of residential plot measuring 2000 sq.yds and a commercial plot. She was first enrolled as member of Defence Officers Co-operative Housing Society and she was given membership card through a letter dated **6.2.1974.** The said membership card of Respondent No.1 was received at the address of the appellant. In **August 1974** a ballot was held and plot No.57 Khayaban-e-Ittehad Phase-VI measuring 2000 sq.yds (hereinafter the suit plot) was allotted to Respondent No.1 and Respondent No.2 intimated the said fact to Respondent No.1 through a letter dated **14.9.1974** alongwith the statement of account which was also received by the appellant. The appellant made the payment of Rs.16300/- toward advance payment. Then in the year **1977** Respondent No.1 was allotted a commercial plot bearing No.23/C, Al-Murtaza, Commercial Lane No.2, Phase-VIII in the Defence Housing Society and on **30.5.1977** the appellant paid an amount of Rs.1335/- towards its cost, Respondent No.3 issued allotment order of the said commercial plot on **01.6.1977** and by **1977** the appellant was shifted to a new address and the allotment order was delivered at the changed address of the appellant i.e 15-A, Behind

Mohatta Place, Clifton, Karachi. Respondent No.2 by a letter on **09.08.1977** demanded payment of balance outstanding amount of Rs.14,125/- and on **4.9.1978** the appellant paid a sum of Rs.10,000/-. Then on **22.3.1982** and **11.08.1982** again Respondent No.2 sent letters alongwith balance sheet showing Rs.47,503/- and demanded the payment of the said amount. The appellant got a pay order for Rs.47500/- issued from her account in Grindlays Bank Ltd., Hotel Metropole, Karachi, bearing pay-order No.072336 dated **18.8.1982** in the name of Respondent No.2 and paid the same to Respondent No.2. However, later on some differences arose between the appellant and Respondent No.1, therefore, when Respondent No.1 refused to meet the appellant and it transpired that she intends to sell the suit plot, the appellant immediately approached the office of Respondent No.2 and she met its **Law Officer, Raja M. Irshad**, Advocate and came to know that Respondent No.1 has got the residential plot sub-divided into two portions of 1000 sq.yards each. Instantly, the appellant sent a legal notice dated **15.5.1986** to Respondent No.2 and on **17.5.1986** filed suit for declaration and permanent injunction and obtained interim order in respect of the suit plots.

3. On service of summons Respondent No.1 in her written statements filed in **August, 1986** raised preliminary legal objections and denied the claim of the appellant that there was any understanding between them to act as Benami. She also alleged certain facts about payment of cost of the suit plot to Respondent No.2 through the appellant. She averred that she has handed over share certificates of Sarhad Colony Mill and National Shipping Corporation worth Rs.13,000/- which were encashed by the appellant for depositing installment to Respondent No.2. She also alleged

in her written statement different payments to appellant. Regarding original documents with the appellant, she alleged in the written statement that appellant has stolen original documents from her box.

4. Respondent No.2 (DHA) despite service of summons did not file written statement and Respondent No.2 was declared exparte on **7.9.1986**. However, prior to that on **11.8.1986** Law Officer of Respondent No.2, Raja M. Irshad, Advocate, filed an application under **Order 1 Rule 10 CPC** on behalf of respondent No.3. The said application was granted on **21.11.1986** and Respondent No.3 in **May 1987** also filed his written statement.

5. The trial Court on **18.10.1987** from the pleadings of the parties framed the following issues.

1. Whether the Plaintiff is the real owner of Plot No.57, Khayaban-e-*Ittehad*, Phase-VI and Commercial Plot No.23/C, Al-Murtaza Commercial Lane and Defendant No.1 only a "Benami" of the Plaintiff?

2. Whether a "Benami" transaction as alleged by the Plaintiff is valid and legal, if not its effect?

3. Whether the plot in dispute can be legally transferred to Defendant No.3?

4. Is the Defendant No.3 a bonafide purchaser for valuable consideration without notice of Plaintiff claim?

5. To what relief, the Plaintiff is entitled?

6. What should the decree be?

Initial burden of proof of issue No.1 and 2 was on the appellant and initial burden of proof of issue No.3 and 4 was on respondent No.3. In support of her case the appellant/Plaintiff examined herself as **Exh.6** and filed affidavit-in-evidence as Exh.6/1. She produced several documents as

Ex.6/2 to Ex.6/27. The appellant/Plaintiff also examined a witness namely Angel Joseph Misquita, Assistant Sub-Manager of Grindlays Bank Limited as **Ex.7**, who produced documents as Ex.7/1 to Ex.7/3. Both were cross examined by the advocate for Respondents No.1 & 3. However, Respondent No.1 despite ample opportunities failed to file her affidavit-in-evidence. Respondent No.3 before his own evidence, filed any application for calling and production of documents from the office of Respondent No.2. Therefore, Mr. Masoodul Haq, Principal Administrative Officer DHA, was examined as **Ex.8.** His examination-in-chief was recorded through counsel for Respondent No.3 and he produced documents from Ex.8/1 to Ex.8/21. He was cross-examined by the advocate for the appellant/Plaintiff. The Respondent No.3 also filed his affidavit-in-evidence as Ex.9. He produced photocopies of documents from Ex.9/1 to Ex.9/16. He was cross examined by advocate for the appellant/Plaintiff.

6. Learned trial Court after hearing the counsel for the parties dismissed the suit of appellant by judgment dated **29.01.2010**. The appellant filed first Appeal No.83 of 2010 which was dismissed by VIth Additional District and Sessions Judge, South Karachi by judgment dated **11.5.2011** endorsing the findings of the trial Court, therefore, the appellant has preferred the instant second appeal.

7. I have heard learned counsel for both the parties i.e Appellant and Respondent No.3 and during their arguments they have read entire evidence and discussed documents. Respondent No.2 was exparte in trial Court, however Law officer of Respondent No.2 was appearing on behalf of Respondent No.3. In the instant Second Appeal, respondent No.3 is

represented by Mr. Faisal Sidique, advocate and present law officer of DHA, Mr.Eijaz Khatak, is vigilantly appearing on behalf of Respondent No.2 and he has adopted the arguments advanced by Counsel for Respondent No.3. It is pertinent to mention here that Respondent No.1 Major Retd. Lala Rukh did not appear in the witness box and Respondent No.2 Pakistan Defence Housing Authority has neither filed any written statement nor led any evidence. However, at the request of Respondent No.3 who claimed to be a "*bonafide* purchaser" of the suit plot, the Principal Administrative Officer of D.H.A, (Respondent No.2) was summoned as witness and he was examined as witness of defendant No.3 at Exh.8.

8. Learned counsel for the appellant has contended that both the courts below have failed to discharge their duty of properly examining the evidence led by the parties and passed the impugned judgment without referring to the evidence. According to the learned counsel, the burden of proof of "*benami transaction*" on the appellant was discharged when the appellant on oath disclosed the source of payment i.e her own bank accounts and also produced original documents in respect of the suit plot including membership card of Respondent No.1 issued by D.H.A to become legible for making an application for allotment of suit property as member of Armed Forces, allotment letter and payment receipt. The appellant has also produced Bank Manager who has produced banking documents showing the payment made by the appellant to Respondent No.2 through pay orders from the Grindlays Bank from her own account to clear the dues against the suit plot. The appellant's counsel has further contended that Respondent No1 in her written statement has admitted that

all the payments were made by the appellant. However, she has made certain allegations in her written statement that she has paid cost of suit plots to the appellant on different occasions. Once Respondent No.1 admitted in her written statement that payments were made by the appellant and qualified her such statement by alleging that she has compensated/paid the money to the appellant and the evidence of appellant contrary to assertion of Respondent No.1 was not shaken in the cross examination, the burden of proof had been shifted on Respondent No.1 to prove that it was **not** *benami* transaction. She did not enter into witness box therefore, her claim that she has paid the cost of suit plot to the appellant was not proved and the entire evidence of *benami transaction* had gone unrebutted. Learned counsel for the appellant has also vehemently contended that Respondent No.3 has failed to prove even the execution of agreement of sale (**Exh:9/2 & 9/3**) and receipts of payment of consideration (**Exh:9/4 & 9/5**) as none of the marginal witnesses of the agreements to sell was examined by Respondent No.3 nor there is any one mentioned as witness on the payment receipt. Therefore, when the sale agreement was bogus and not proved the question of *bonafide* does not arise on the basis of the documents which were not proved in terms of **Article 17 and 79** of Qanoon e Shahadat Order, 1984. The burden of proof of *bonafide* purchaser was not discharged in accordance with law. He has also argued in details about the manner and method in which Respondent No.3 had entered in the proceedings under the patronage of Law Officer of Respondent No.2 by filing an application under **Order 1 Rule 10 CPC**. He has also highlighted the role of Law Officer of D.H.A in helping Respondent

No.3 to slowly and gradually carve documents one after the other to illegally usurp the property of the appellant by capitalizing on the misunderstandings and differences between the two sisters, the appellant and Respondent No.1. In this context he has referred to the conduct of **Mr.Raja M. Irshad**, Advocate who was representing Respondent No.3, the so called *bonafide* purchaser and he was Chief Law Officer of Respondent No.2 and yet respondent No.2 has gone unrepresented before the Courts below. Learned counsel for the appellant has referred to the order **7.12.1992** passed by my lord Justice Nizam Ahmed as he then was judge of this Court and the case was before this Court on its original jurisdiction. Hon'ble Mr.Justice Nizam Ahmed, as he then was, had directed Respondent No.3 to engage some other counsel and reprimanded Mr.Raja M. Irshad, Advocate for representing Respondent No.3. The Respondent No.3 has admitted in his cross examination that he has moved application under **Order 1 Rule 10 CPC** through Advocate Raja M. Irshad and he further admitted that it was in his knowledge that Raja M. Irshad was also advocate for the other Respondent. Learned counsel for the appellant has also referred to the pleadings of the Respondent No.3 i.e Application under **Order 1 Rule 10 CPC** and argued that in the said application he has not disclosed particulars of the properties he claimed to have purchased just 10 days prior to the injunction orders dated **17.5.1986** and had completed the transaction within 24 hours between 5th and 6th May, 1986.

9. Mr. Faisal Siddiqui, learned Counsel for Respondent No.3 has firstly contended that concurrent findings of facts by the two courts below cannot be disturbed by this Court in exercise of powers under

Section 100 CPC i.e Second Appeal. He has relied on a reported case tilted Haji Muhammad Din ..Vs..Malik Muhammad Abdullah (**PLD 1994 SC 291**)**.** On the question of bonafide purchase, he has only contended that the Respondent No.3 has checked official record before entering into the agreement of sale of the suit property and that was sufficient to satisfy the requirement of bonafide purchaser. He has however, not commented on the role of **Raja M. Irshad**, Advocate/Law Officer of Respondent No.2 in representing Respondent No.3 when his own institution i.e Defence Housing Authority was also party to the suit and it was declared exparte in presence of Law Officer. Learned Counsel for Respondent No.3 has further contended that *benami transaction* of suit property was not proved since Respondent No.1 had denied such allegation and she has also sold the suit plot prior to filing of the suit by the appellant and transaction between Respondent No.1 and 3 had been completed in the office of Respondent No.2.

10. Both the counsel have supplied copies of more than hundred 100 case laws on different propositions advanced by them. I am afraid, many of the citations relied upon by the either side have no bearing on their case or even otherwise were not required in the given facts of the case. The citations relied upon by the two Counsel can be summarized in the table below:-

Case law referred by **APPELLANT**	Case law referred by **RESPONDENTS No.3**
a. Benami transaction 1. PLD 1969 Kar 221 2. PLD 1971 Kar 763 3. 1991 SCMR 703	**a. Benami transaction and Burden of Proof** 1. 2004 CLC 1835 2. 2004 CLC 782 3. 2009 YLR 605

4. 2005 SCMR 577 5. AIR 1960 Mad. 341 6. PLD 1957 SC (Ind) 188 7. 1998 SCMR 816	4. 2003 SCMR 18 & 19 5. 2011 SCMR 1550 6. 1997 MLD 390 7. PLD 2004 Lahore 515 8. 2005 SCMR 577 9. 2014 YLR 385 Balochistan 10. 2010 SCMR 171 11. 2010 YLR 3214
b. Evidence Act. Section 114 8. AIR 1930 Lah. 1 9. AIR 1930 Lah. 401 10. 1994 SCMR 137 11. 2001 SCMR 1700	b. What is the effect where **one Defendant does not lead evidence but other do?** 12. 2010 CLC 191
c. Failure to step in witness box 12. 1983 CLC 244 13. AIR 1931 Bom. 97	**c. When fraud is being perpetrated through a Benami transaction then the said transaction would be held as void.** 13. 1969 PLD Karachi 221 14. AIR 1954 Madras 811 15. 2010 YLR 3214
d. Order VIII R. I CPC. 14. PLD 1972 SC 25 15. AIR 1917 Cal 269 16. PLD 1962 Dacca 643 17. 1981 CLC 867 18. 1984 CLC 243 19. PLD 2004 SC 465 20. 2002 CLC 96 21. 2003 CLC 1670 22. 2003 MLD 205 23. 1979 CLC 338 24. 1994 MLD 871 25. 2006 CLC 1976 26. 1996 SCMR 1770 27. PLD 1974 SC 61 28. 1995 CLC 1751	**d. If Benami is not claimed by Plaintiff in due time, then the case would be held as time barred.** 16. PLD 2012 Lahore 141 17. 2006 YLR 599
e. Order VI R.1 CPC. 29. PLD 1975 Kar 598 30. 2000 SCMR 1391 31. 2000 CLC 1559 32. 2000 SCMR 1391 33. 2007 SCMR 569 34. 2006 CLC 1815	**e. Bona fide purchaser.** 18. 2000 CLC 1745 19. PLD 2005 Karachi 288 20. 2013 MLD 1547 21. 2007 YLR 1636

35. 2005 YLR 2655 36. 2008 CLD 1288 37. PLD 2003 SC 594 38. 1997 SC 883 39. PLD 2007 SC 362	
f. Qanun-e-Shahadat Order, 1984, Art. 129. 40. PLD 1994 K 492 41. 2007 CLC 1885 42. PLD 2004 SC 682 43. 2002 CLC 960 44. 2002 CLC 1770 45. 2006 SCMR 1927	**f. Natural Justice** 22. NLR 2014 Tax S.C 1 23. 2003 MLD 378 24. 1992 CLJ 286 25. PLD 1976 Lah. 897 26. PLD 1977 Kar 1012 27. PLD 1977 Lah. 353 28. PLD 1959 Kar. 669
g. Section 100---Second Appeal 46. 2000 CLC 1745 47. 2000 SCMR 903	**g.** A case **shall not be remanded** back if there is sufficient evidence available. 29. 2010 SCMR 1119 30. 2007 SCMR 1867 31. 1993 SCMR 216
h. Transfer of Property Act, 48. AIR 1921 Cal. 549 49. PLD 1967 Dacca 203 50. PLD 1973 Lah. 586 51. PLD 1975 Lah. 619	**h. Courts not to decide in favour of the Appellants because there were errors in the impugned judgment**. 32. 2015 SCMR 742
i. Personal Knowledge 52. PLD 1957 K. 409 53. Pld 1960 K 594 54. Air 1933 Oudh 151	i. **Parole Rule**: if there is a contradiction between oral and documentary evidence then documentary evidence would prevail (Article 103 of Qanun-e-Shahadat) 33. PLD 2012 Lah. 141 34. 2010 YLR 3214 35. 2014 YLR 385
j. The decision should be based on the case as pleased and should not be travel beyond he issues as framed.	**j. Second Appeal**: Concurrent finding on facts by two courts below not to be disturbed lightly by the High Court in Second Appeal.

55. 1989 MLD 1840 56. AIR 1970 SC 361 57. AIR 1954 SC 425 58. AIR 1953 SC 235 59. AIR 1953 Pu.220 60. AIR 1971 SC 631 **k.** A judgment should, inter alia contain the **reasons for the decision**. 61. PDL 1991 SC 363 62. 1986 SCMR 1736 63. PLD 1988 SC AJK 184 64. PLD 1986 AJK 228 65. 1990 CLC 1852, 66. 1990 CLC 1883 67. 1989 CLC 2372 **l.** It should be **speaking order** 68. 1992 CLC 2036 **m. If a judgment is brief or contains no discussion nor any reasons are given, it will be set aside**. 69. 1984 SCMR 1014, 70. 1983 LN (SC) 1, 71. 1990 ALD 190, 72. 1989 ALD 162 73. PLD 1984 Lah 421, 74. PLJ1983 Q. 24 75. PLD 19779 Q. 72, 76. AIR 1959 All 505 77. AIR 1922 Lah. 122, 78. 1987 SCMR 1005 **n**. **Not to be based on personal knowledge**. 79. PLD 1971 Kar. 613 80. PLD 1957 Kar. 409 **o.Nor on suspicions, conjectures or surmises**. 81. PLD 1959 Lah. 826 82. PLD 1957 Kar. 832 83. PLD 1958 Kar 975	36. PLD 1994 SC 291

p. Evidence should not be ignored or misread. 84. 1989 CLC 2372 **q. The Court should apply its conscious mind**. 85. PLD 1984 Lah. 421, 86. PLD 1970 SC 173/158 **r. Speaking Order.** Cogent Reasons – Provision of Law. 87. PLD 1970 SC 173 2. 88. PLD 1970 SC 158 3. 89. 1992 CLC 2036 4. 90. 1985 CLC 1660 5. 91. PLD 1984 Lah 421 **s. Misreading, Non-reading and evidence ignored.** 92. PLD 1959 Lah. 826 93. 1989 CLC 2372	

11. Courts are not supposed to read over **100** case laws on different propositions which may not even have direct bearing on a small case which has only two orthodox contesting issues as under:

(1) whether the appellant is benami owner of the suit plots? and

(2) whether Respondent No.3 is bonafide purchaser of the suit plot?

However, I have gone through almost every case law, and I am not inclined to refer to any one of the case laws. In my humble view most of the citations were not even required to be referred. This practice of flooding Courts with the several case laws after conclusion of the arguments is only a bid to further delay the decision on merits. In one of my earlier Judgment reported as Mrs. Shabina Aziz v/s. State Life Insurance Corporation of Pakistan (**2014 CLC 420** relevant page **425**). I have shown my reservation to such practice and observed that it is one of

the major factors responsible for delay in timely administration of justice, I cannot resist the need to reproduce my observation here:

> "It is indeed a matter of great concern that there has been a complaint of overwork in the Judiciary which is one of the basic obstacles in the administration of justice. It is not for the Courts alone to administer justice and ensure that the justice is not denied on account of inordinate delay in disposal of cases. It is equal responsibility of each and every lawyer appearing in Court that they should not consume the time of the Court out of proportionate to the issue in hand on the date of hearing. Had the counsel for the Plaintiff not supplied copies of nine case-laws which include out of context five case-law of the Hon'ble Supreme Court, this very order could have been passed at least two weeks earlier. A very valuable time of the Court has been consumed in reading the case-laws which were not relevant. This, on the part of lawyers, is one of the major contributing factor in delaying administration of justice. It is expected that the counsel while presenting the case of their respective clients, they should be brief and to the point as it will help save time of the Courts which in turn will again be utilized by the Courts in disposal of their other cases particularly the old cases of more than three decades.

I regret to observe that if the practice of flooding the court with irrelevant or out of context case law and insistence of lawyer to advance propositions out of the context of their cases, the Court would be justified in amending the Sindh Chief Court Rules and Civil Courts Rules to incorporate the provisions of imposing heavy cost/penalty as MANDATORY duty of Court on the litigants for resorting to such conduct in handling their case.

12. Be that as it may, while examining the impugned judgments, in the light of respective contentions of learned counsel and on careful examination of record and proceedings as well as the evidence, I have observed as follow:-

i. Both the Courts below have failed to apply their judicial mind to the documents produced and the admissibility and inadmissibility of evidence according to the relevant provisions of

Qanoon-e-Shahadat Order, 1984. In this context out of 27 original documents exhibited by appellant in her evidence and 04 documents were produced by Bank Manager including pay-order but none was read/looked into by the two Courts below. At least these documents were worthy of a comment.

ii. Similarly, there is no discussion on issue of bonafide purchase by Respondent No.3. Whether he has led any evidence on this issue and/or the burden of proof of bonafide purchase was on Respondent No.3 or not? Such burden was discharged through positive evidence or not.

iii. The findings of the trial Court on Issue No.1 and 2 i.e ownership rights of appellant in the suit plot and status of Respondent No.1 as "benami" was perverse and contrary to the record. In this context original documents produced by appellant were brushed aside and only one letter dated **4.10.1983** (**Exh:8/20**) produced by witness of Respondent No.3 namely Principal Administrative Officer of D.H.A was referred on the finding of these issues. This document is a request for issuing copy of allotment order in respect of 2000 sq.yds plot No.57, Khayaban-e-Itehad, Phase-VI, DHA Karachi and it does not refer to loss of any other original document. In the first place this document was not produced by Respondent No.2 and it does not say that original of it was stolen by the appellant as alleged in her written statement. While relying on **Exh.8/20** both the learned trial Court as well as the Appellate Court failed to appreciate the rest of the evidence of the said witness particularly his cross examination. In fact he has corroborated the evidence of appellant when he stated that Exh:6/2, to Exh.6/27 are original documents issued by the Society i.e. PDOCH Society (Respondent No.2). These documents were produced by appellant in her evidence. I quote relevant evidence from cross examination of witness from DHA (Ex.8) as follows:

> "It is a fact that after the receipt of the application for allotment, Society used to issue the membership card to the

applicant. In the record which I have brought there is no card in favour of Lala Rukh dated **6.2.1974**. I see **Ex.6/2** it is original membership card issued by the Pakistan Defence Officers Co-operative Housing Society Ltd. **Exh.6/3** is covering letter of **Exh.6/2**. It is incorrect to suggest that the Defence Housing Authority received any application any application from Captain Lala Rukh for issuing of the duplicate membership card. I see **Exh.6/13**, it is letter dated **25.5.1983**, addressed to Major Lala Rukh C/O **DIG Police 65, 8th Street DHA Karachi**. There is no application from Major Lala Rukh for the change of address mentioned in **Exh.6/13**. It is a fact that Society issued any letter on any changed address without proper application. At present, the application for change of address is not available in the file which I have brought today, however, if further exercise is done I can intimate about the application if any. It is incorrect to suggest that I am not giving correct answers and that application is not available in the record of Society. From the file, which I have brought it is not clear whether Society has issued letter dated **11th August, 1982** on the changed address of Major Lala Rukh. I see **Exh.6/25**, it is a letter issued by the Society on the changed address 158/A, Model Town Lahore, alongwith the original envelope. I see **Exh.6/26**, it is the letter issued by the Society alongwith original envelope. There is no formal application from Major Lala Rukh for the change of address **158/A, Model Town Lahore**. I see Exh. 6/2, 6/3, 6/4, 6/5, 6/6, 6/7, 6/8, 6/9, 6/10, 6/12, 6/13, 6/14, 6/18, 6/23, 6/24, 6/25 alongwith envelope, and Exh.6/26 and 6/27, these are original documents issued by the Society. It is a fact that the plaintiff issued a letter dated **15th May, 1986** to Administrator Defence Housing Authority through her advocate. I see **Exh.6/19**, which is copy of the original letter, mentioned above. It is a fact that copies of letter **dated 15th May, 1986** addressed to the Administrator of Society were delivered to Law Officer in the legal branch of the Society. **Mr. Raja Muhammad Irshad Advocate** was the head of law department of the Society at that time. I can not say whether Raja Muhammad Irshad Advocate has received the said copy or not. I do not know if the Administrator of the Society has passed any order on the letter dated **15th May, 1986**. On the perusal of file, which I have brought, I can say that no action was taken by the Society on letter dated **15.5.1986**. There is every possibility that order of the Administrator may be in another file. The action taken by the legal branch on the letter dated **15.5.1986**, may be available in another file. I can bring that file if it is as desired by the Court."

iv. Learned trial Court not only failed to take any judicial notice of the above evidence but at the same time seems to have refused to

look into the evidence of **PW-2** produced by the appellant namely Anglo Joseph, Assistant Sub-Manager of Grindlays Bank Limited showing payment of Rs.47,500/= in favour of Respondent No.2 from the account of appellant. The said witness has categorically stated that this amount was paid on behalf of appellant and the money was debited in account of appellant from the account of her husband Ghulam Mohiuddin who was also having account in the same Branch. It is pertinent to mention here that Mr.Ghulam Mohiuddin, husband of appellant was **DIGP** at the relevant time and therefore, capability of making payment by appellant who was housewife was also confirmed.

v) The learned counsel of Respondent No.1 and 3 in their cross examination have confronted the appellant with each and every averments/allegations of Respondent No.1 in her written statement and the appellant has denied all such allegations on oath, therefore, the burden was shifted on Respondent No.1 to prove payments of cost of the suit plot from her own sources and also other allegations of various nature against the appellant by cogent evidence. A few such averments of Respondent No.1, from her written statement which needed to be proved but could not be proved are as follows:

a) Respondent No.1 in her written statement has alleged handing over of share certificate of Sarhad Colony Mills and National Shipping Corporation amounting to Rs.13000/= to the appellant which she claimed to have been encashed by appellant for payment of installments to Respondent No.2 but neither the photo copies of such share certificate were annexed nor any other proof of encashment of such certificates through the appellant was discussed in the written statement.

b). Her most devastating averment in the written statement was that the original documents were allegedly removed/stolen by the appellant to show that she was not otherwise retaining the same in her own right as real owner but respondent No.1 did not come in the witness box to re-assert

her claim on oath and both the Courts below mis-read the letter dated **4.10.1983** (**Exh:8/20**) as a piece of supporting documentary evidence of such statement of Respondent No.1 in her written statement. **Exh.8/20** was produced by witness of Respondent No.3 namely Principal Administrative Officer of D.H.A and the perusal of it shows that it does not at all refer to the allegation of theft of original documents by Respondent No.1 against the appellant.

vi. Learned trial Court in its findings on issue of *benami transaction* has mostly relied on evidence from office of Respondent No.2 particularly on the so called affidavit of transfer **Exh.8/2** and undertaking **Exh.8/6** and another affidavit of transfer **Exh.8/8** and undertaking **Exh.8/9**. However, learned Court did not bother to look into these documents from the eye of a Judicial Officer. The so called transfer affidavits are undated. These affidavits are not even sworn before any Commissioner for Taking Affidavits. These affidavits are not even notarized and the stamp papers are dated **28.4.1986**. In the request letter Exh.9/6 already presented by Respondent No.1 to the Administrator PDOH Authority for transfer of the suit plot, Respondent No.1 has stated that such transfers were made on **28.4.1986** and it contradicts the transfer by sale agreements and payments were made dated **6.5.1986**. These documents contradict the statement of witnesses of respondents 2 & 3 that these documents were executed on **6.5.1986** before the designated Officer of DHA. On the face of it and on account of its contents, these documents do not inspire any confidence. Therefore, the reliance placed on these documents to answer the issue of bonafide purchase in favour of Respondent No.3 was perverse and against the norms of Evidence Act.

vii. Learned Appellate Court also by ignoring all the evidence of appellant and her ability to make the payment from her bank account being wife of a senior bureaucrat/Police Officer heavily relied on the irrelevant cross examination of appellant to find out

lacuna in her evidence. The Appellate Court ignored all confidence inspiring evidence of the appellant and referred to irrelevant pieces of her cross examination. In such endeavor the Appellate Court was misled and misconceived the following statement from cross examination of appellant:-

> "Fact that lease was executed by the Society in favour of defendant No.1 was not in my knowledge therefore, there was no question for demanding the lease from the defendant No.1."

The above quotation from the evidence of appellant has been highlighted in bold in the impugned judgment by the Appellate court. However, the Appellate Court fell short of finding the document of lease in evidence. The parties have not produced any lease-deed. Neither the witness coming from office of Defence Housing Authority nor Respondent No.3 has placed any lease deed on record. In the first place the question posed by Counsel for the Respondent No.3 was factually incorrect as there was no lease executed by Respondent No.2 in favour of Respondent No.1 in respect of the suit plot. Secondly, during the course of arguments when this Court asked about availability of such lease deed, learned Counsel for Respondent No.3 referred to Para No.18 of the written statement filed by RespondentNo.1 and annexure Y-4 available at **page 201**. However, neither this annexure was produced in evidence nor it is lease deed at all. It does not bear any registration mark. Learned counsel for the Respondent No.3 concedes that even this is not leased deed. What else be an example of failure of a judicial officer to judiciously examine record and evidence.

(viii) The findings of both he Courts below on the issue of **bonafide purchase** of the suit property by Respondent No.3 are devoid of any evidence. It was an independent issue and the burden of this issue was squarely on Respondent No.3. Learned trial Court has not mentioned that how the burden of proof of issue of bonafide purchaser was discharged by Respondent No.3. The learned trial Court referred to the payment of an amount of Rs.4,50,000/- and another sum of Rs.2,50,000/- through a pay order

in respect of sale consideration of plot No.57/1 and 57/2 respectively through receipts **Exh.9/4 and 9/5** by Respondent No.3 The other two documents viz; agreements of sale **Ex:9/2 & and 9/3** were not even mentioned in the impugned judgment by the Courts below. These agreements of sale were said to have been executed on **6.5.1986** but without any excuse for not producing the marginal witnesses, the Respondent No.3 closed his side by just exhibiting the disputed sale agreement and the Courts below failed to appreciate that these basic documents were not legally proved. The learned trial Court did not mention that how these two receipts and two agreements were enough to discharge burden of proof of bonafide purchase on the respondent No.3 and also did not appreciate that the two receipts were neither witnessed by any one nor Respondent No.3 produced any other witness in support of his claim that such payments were made by Respondent No.3 to Respondent No.1 in presence of any person. These receipts were not sufficient proof of payment of sale consideration to declare that respondent No.3 was a bonafide purchaser. The trial Courts failed to appreciate that agreement of sale and payment receipts were required to be proved in terms of **Article 17 r/w Section 79** of Qanoon e Shahadat Order, 1984. Both the Sections of Qanoon e Shahadat are reproduced below:

> 17. **Competence and number of witnesses**: (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:
>
> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law:
>
> (a) 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 ; and
>
> (b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such

other evidence as the circumstances of the case may warrant.

79. **Proof of execution of document required by law to be attested**: 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.

e. The learned appellate Court while endorsing the finding of the trial Court has not discussed evidence of parties and simply declared that the findings drawn by learned trial Courts are outcome of proper appraisal of evidence in accordance with law. The appreciation of evidence by the trial Court, as discussed above, was perverse and contrary to norms of law.

13. In given facts and evidence on record, the contention of learned counsel for Respondent No.3 that the findings of facts of two Courts below cannot be disturbed by High Court in IInd Appeal is misconceived. This is not absolute rule. Even in the case law reported as Haji Mohammad Din vs. Malik Mohammad Abdullah **(PLD 1994 SC 291**) and relied upon by the learned Counsel for Respondent No.3, the Hon'ble Supreme Court has qualified such restriction on Courts in second appeal by three possibilities for interference in the concurrent impugned judgments and observed that in the cases, where (i) the findings on facts is either result of misreading of evidence, or (ii) it is result of ignoring/not looking material evidence on record and /or (iii) the same is perverse, the Court can interfere to meet ends of justice. All the three principles on

which concurrent findings of facts can be upset by this court in second appeal are available in the impugned judgments. It can be appreciated from the above discussion of evidence which has been totally ignored by the Courts below.

14. Another legal aspect which permits interference in the concurrent findings of Courts below in the instant Second Appeal is the power of High Court under **Section 103** of Civil Procedure Code, 1908 to determine issues of facts if the evidence on record was sufficient for disposal of the appeal and the issue has been wrongly determined by the two Courts by ignoring the evidence on record. – Section 103 of CPC reads as under:-

> **103. Power of High court to determine issues of fact.--** In any second appeal the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal [5][which has been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100].

By now it is settled law that all the Courts should act in accordance with law and decide the cases before them on the basis of legally admissible evidence on record and decisions should be in consonance with the entire evidence. The Courts are also supposed to discuss important evidence led by either side so that judicial pronouncements on examination should indicate that evidence was considered in support of reasoning in arriving at a particular finding.

15. In the case in hand, as discussed above, I was unable to find the two impugned judgments of the Court below in accordance with law and evidence on record therefore, the findings of the two Courts below are

hereby set aside. The suit of the appellant/plaintiff bearing Suit No.350/1986 (New No.603/2003) is decreed as prayed with cost throughout.

JUDGE

Karachi
Dated:_____