

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1250 of 1997

Date	Order with Signature of Judge
------	-------------------------------

Present: **Mr. Justice Nazar Akbar**

Plaintiff No.1 : Syed Ali Muhammad Naqvi.
Plaintiff No.2 : Syed Saqlain Raza Naqvi.
Plaintiff No.3 : Syed Hasnain Raza Naqvi.
Plaintiff No.4 : Mrs. Naheed Fatima.
Plaintiff No.5 : Mrs. Nafees Zehra.
Plaintiff No.6 : Mrs. Iqbal Zehra through her Lrs. Namely
Mushtaq Ahmed Naqvi & others.
through Mr. Muhammad Ameen Advocate.

Defendant No.1 : Abbas Raza.
Through Mr. K.A Wahab, Advocate

Defendant No.2 : City District Govt., Karachi. (Nemo).

Date of hearing : 30.11.2017

Decided on : 10.01.2018

JUDGMENT

NAZAR AKBAR, J. Plaintiffs have jointly filed this suit on **19.9.1997** for Declaration, Possession, Cancellation of Sale Deed and Injunction against the sole private defendant and have also impleaded KDA as proforma defendant in respect of House bearing Plot No.4, Row No.2, Block-II, Sub-Block 'E' measuring 216 sq. yards situated at Nazimabad, Karachi, (suit property). Plaintiff No.1 is real grandfather and plaintiff Nos.2 to 6 are real uncles and aunties of the sole private defendant who claimed to have purchased the suit property on **31.12.1996** from his grandmother Mst. Saeeda Begum. The plaintiffs have prayed for the following relief(s):-

- a) *To declare that the Plaintiffs and late Mr. M.A Kazim are the sole and absolute owners in respect of House bearing Plot No.4, Row No.2, Block-II, Sub-Block 'E' measuring 216 sq. yards situated at Nazimabad, Karachi, and that Mrs. Saeeda Begum was only a Benamidar in respect of the said house and has no right, ownership, title thereto in any manner whatsoever.*
- b) *To grant judgment and decree cancelling the Sale Deed dated 31.12.1996 executed by Mrs. Saeeda Begum in the name of Defendant No.1 in respect of House on Plot No.4, Row No.2, Block-II, Sub-Block 'E' measuring 216 sq. yards having been registered with Sub-Registrar, T Division Karachi on 31.12.1996, bearing Registration No.3977 by Mrs. Saeeda Begum without having any right, ownership and title thereto and declare the mutation carried out by the Karachi Development Authority based on said so-called sale deed of no legal effect.*
- c) *To grant judgment and decree for possession in favour of the plaintiffs of the said House bearing Plot No.4, Row No.2, Block-II, Sub-Block 'E' measuring 216 sq. yards situated at Nazimabad, Karachi*

*or in the alternative and
without prejudice to relief
(a), (b) (c) under Para 21 above*

To declare that the sale deed dated 29th October, 1996 bearing Registration No.3977, dated 31.12.1996, has been executed and registered by Mrs. Saeeda Begum in the name of Defendant No.1 without any consideration having no legal right, title and ownership and by misrepresentation and fraudulent means having no legal effect whatsoever.

- d) *To grant permanent injunction restraining the defendants, their servants, their employees or any body claiming through them from interfering with the possession of plaintiffs No.1 and 2 of the said house and from further negotiating, entering into agreement to sell or in any way transferring the said House by way of sale, gift or otherwise and giving the said sale deed dated 29.10.1996 any legal effect whatsoever.*
- e) *To grant any other relief or reliefs as this Hon'ble Court may deem fit in the circumstances of the case.*
- f) *To award costs of the suit to the plaintiffs.*

2. Brief facts of the case are that plaintiffs No.1, Syed Ali Muhammad Naqvi, Plaintiff No.3, Syed Hasnain Raza, Plaintiff No.4 Mrs. Naheed Fatima and Mohammad Agha Kazim, (who died in

January, 1977) had jointly purchased the suit property and paid the entire sale consideration of Rs.9,500/- in the name of Mrs. Saeeda Begum (Wife of Plaintiff No.1 and mother of remaining plaintiffs and M.A Kazim (late) father of defendant No.1) as Benamidar. The plaintiffs as well as Mr. M.A Kazim had renovated and re-constructed the suit property from September, 1963 to early 1964. Plaintiffs No.1 to 5 and (Late) M.A Kazim had started living in the suit property. The plaintiffs and Mr. M.A Kazim during 1976 to June, 1977 further constructed first and second floors of the suit property from personal resources and loan of Rs.57,000/- from House Building Finance Corporation (HBFC). Their personal contribution was as under:-

1. Plaintiff No.2	Rs.172,000-00
2. Plaintiff No.3	Rs.110,000-00
3. M.A Kazim	Rs. 43,000-00

Total:	Rs.325,000-00

The funds for initial purchase of the suit property in 1963 together with renovation/rebuilding followed by 1st and 2nd floor construction in 1976/77 were pooled out of personal savings of plaintiffs No.1 to 4 and late M.A. Kazim, father of defendant No.1 and remittances from abroad to Pakistan by plaintiff No.2. Plaintiff No.2 Mr. Saqlain Raza Naqvi was in U.K during 1970-77 and plaintiff No.3 Mr. Hasnain Raza Naqvi was on Government special training in Canada and USA during 1977. Mrs. Saeeda Begum had no source of income whatsoever. She was living with the plaintiffs in joint family. All the plaintiffs and late M.A Kazim had provided her proper maintenance and other amenities of life. She was heart patient and in the year 1995 she had a severe heart attack, she was in a very bad state of her health and not in a position to

understand the things properly and she was also hard of hearing and almost deaf.

3. It was averred that the plaintiffs are the sole and absolute owners and Mrs. Saeeda Begum was only a Benamidar and she was not real owner of the suit property and as such she had no lawful right or authority to execute the purported sale deed dated **31.12.1996** of the suit property in favour of defendant No.1. Mrs. Saeeda Begum lived with plaintiff No.3 at Islamabad for just over two months from **19.11.1996** till **22.1.1997** when she died due to heart failure. She never disclosed anything about the signing of sale deed in favour of defendant No.1 regarding the sale of the suit property on **31.12.1996** against consideration of Rs.6,60,000/-. Therefore, the sale deed transferring the suit property to defendant No.1 is without consideration and had been obtained by misrepresentation and fraudulent means and does not appear to have been signed and executed by her. On **24.2.1997** at time of chehlum of deceased Saeeda Begum at Islamabad, the plaintiffs within the knowledge of all the family members decided to transfer the suit property in the names of the plaintiffs. Therefore, the plaintiffs carried out search of all the documents relating to the suit property including National ID of Mrs. Saeeda Begum but the same were missing and not traceable. On **20.3.1997** the plaintiffs informed KDA (defendant No.2) and Excise Department in writing about the death of Mrs. Saeeda Begum and requested them to refrain from recording any change of ownership in their record. Later on it was learnt that the suit property has allegedly been sold by Mrs. Saeeda Begum to defendant No.1 and the request for mutation was pending in KDA. Plaintiff No.2 on **5.4.1997** again

sent an application to KDA requesting them not to carry out mutation. The KDA, however, on **6.6.1997** carried out mutation without giving notice to the plaintiffs and ignored the correspondence on the ground that it was a family dispute and it has nothing to do with the mutation. The plaintiffs had, therefore, filed the instant suit.

4. Defendant No.1 filed his written statement wherein he denied that the suit property was purchased in the name of Mst. Saeeda Begum as Benamidar by plaintiffs No.1, 3, 4 and by Mohammad Agha Kazim, his own father jointly as alleged. It is alleged that in the year 1963/64 plaintiffs No.2 & 3 were minors/students and had no source of income. The only earning member of the family at the time was plaintiff No.1, who was a teacher at monthly salary of about Rs.200/- and the father of defendant No.1 (M.A Kazim), was in Custom department. Since the parties were living in a joint family system and the father of defendant No.1 was unmarried, he used to give all his income in the hands of his mother Mst. Saeeda Begum. He admitted that a sum of Rs.57,000/- was taken as loan by Mst. Saeeda Begum from HBFC in the year 1976/77 but he denied that plaintiff No.1 and 3 contributed any amount towards the construction of first and second floor or they contributed any amount for the repayment of HBFC loan. Defendant No.1 had, however, admitted that Mst. Saeeda Begum had no source of income and she was living in a joint family system but he denied that except his father any of the plaintiffs had provided any maintenance to said Mst. Saeeda Begum.

5. Defendant No.2/KDA had also filed written statement wherein different legal pleas were taken including suit is not maintainable, the relief claimed against KDA is barred under Section 42 & 56 of the Specific Relief Act, 1877 and no cause of action has accrued to the plaintiff against the defendant/KDA. It was averred that the plot in dispute has been mutated in the name of defendant No.1 Mr. Abbas Raza on the basis of Registered sale deed executed in his favour by Mst. Saeeda Begum, the owner of the plot.

6. The court from pleadings of the parties on **12.10.1998**, had framed seven issues. However, on **29.11.2017**, before the arguments, learned counsel for parties have conceded that issues adopted on 12.10.1998 may be re-casted as there are only two main issues and the decision on the two issues would cover the entire controversy. These two issues are as follows:-

- i. Whether plaintiff No.1 to 4 and late M.A Kazim, father of defendant No.1 were absolute joint owner of the property in dispute and Mst. Saeeda Begum was benamidar and therefore, she had no right and title in the said house?*
- ii. Whether the defendant No.1 has obtained the sale deed dated 31.12.96 of the said house in his name by misrepresentation and fraudulent means without payment of sale consideration, if so, the said sale deed is liable to be cancelled?*
- iii. What should the decree be?*

7. Evidence of the parties was recorded by Mr. Tehsin Ahmed Bhatti, Retired District Judge, who was appointed as Commissioner for recording evidence. Plaintiff No.2 Syed Saqlain Raza Naqvi had filed his affidavit in evidence as Ex.P/1 alongwith various documents. He was cross examined by defence counsel and learned counsel for the plaintiffs closed their side for evidence.

Defendant No.1, S. Abbas Raza Naqvi had filed his affidavit in evidence as Ex.D/1. He filed original Sale Deed dated **31.12.1996** Ex:D/21 and several other documents. Defendant No.1 also produced one S. Hassan Raza jaffery as his witness Ex:DW-2, he has filed affidavit in evidence as Ex;D/26. The plaintiffs' counsel cross examined both the witnesses of defendant No.1 and his counsel closed the side of defendant No.1 for evidence.

8. I have heard learned counsel for the parties at length and perused the record.

9. Learned counsel for the plaintiff has contended that Mst. Saeeda Begum was housewife and she never had independent source of earning. She was so illiterate that she had affixed her thumb impression on the sale deed in 1963 (**Ex.D/3**). The deceased Saeeda Begum was 81 years of age when the alleged sale deed was executed by her in favour of defendant No.1. He has further contended that the defendant himself has admitted that Mst. Saeeda Begum had no source of income and the entire family has been living under one roof right from 1963 when the suit property was purchased from the joint fund of the earning members of the family namely the grandfather of defendant No.1, his own father late M.A. Kazim and his two uncles and one aunty (plaintiffs No.2, 3 & 4). Learned counsel has further contended that the fraud and misrepresentation in getting the sale executed in favour of defendant No.1 is apparent from the perusal of the sale deed itself that the executants Mst. Saeeda Begum has never appeared before the Sub-Registrar nor even the sale consideration has been paid before Sub-Registrar. The witnesses of execution of sale deed were one woman who was mother of defendant No.1 and

one man who was maternal uncle of defendant No.1. His mother was not witness of payment of sale consideration to Mst. Saeeda Begum, though it was said to have been allegedly paid to her in her home, the suit property. He further contended that the very fact that defendant No.1 before purchasing the suit property from his old grandmother did not prefer to seek objection to the proposed sale transaction by publishing a public notice is sufficient to appreciate that he knew his grandfather who was then alive and living in the suit property and all uncles and aunties would object to such transfer as the suit property actually did not belong to her (Saeeda Begum) as she was ostensible owner out of respect and love for her being wife of plaintiff No.1 and mother of other plaintiffs and grandmother of defendant No.1. Even mother and sister of defendant No.1 have not come forward to support the sale transaction in favour of defendant No.1. Learned counsel has provided list of the books of following case law.

- i. *Abdul Hameed through L.Rs. and others vs. Shamasuddin and others* (**PLD 2008 SC 140**);
- ii. *Shams-ud-Din and others..Vs..Nusrat Hussain Cheema and others* (**2002 YLR 1568**);
- iii. *Mirza Allah Ditta @ Mirza Javed Akhter ..Vs.. Mst. Amna Bibi and another* (**2004 YLR 239**);
- iv. *Mst. Akbar Jan through L.Rs and 9 others ..Vs. Mst. Kalsoom Bibi and 6 others* (**2015 CLC 549**);
- v. *Mst. Bakhan ..Vs.. Ahmad Yar* (**2006 YLR 831**).

10. In rebuttal learned counsel for the defendant has contended that Mst. Saeeda Begum at all times has been real owner of the suit property and she was not benami. She exercised her authority on the suit property by letting it out to different tenants in her lifetimes namely WAPD & PIA etc. and the original title documents

had always been in her possession. None of the plaintiffs including her husband has disputed her title in her lifetime and therefore, she was not benami owner. He has further contended that she had furnished the title documents of the suit property as surety in **G&W suit No.503/1978** when after the demise of father of defendant NO.1, his mother Mst. Tasneem Fatima Naqvi, had filed an application under **Section 10** of the Guardian and Ward Act, 1890 for her appointment as Guardian of the person and property of the minors namely defendant No.1, who was 05 years of age in **1978** and his sister Farwa who was only 3 years. The surety furnished by Saeeda Begum was released from the Court in **September, 1996** on the application of Mst. Saeeda Begum before it could be sold by her to defendant No.1 on **29.10.1996**. He has contended that plaintiff has failed to discharge the burden of proving that the said Mst. Saeeda Begum was benami owner since the basic ingredients of benami transaction could not be established by the plaintiff. The possession of the suit property and original title documents had always been with the seller Mst. Saeeda Begum and the same were handed over to defendant No.1 when it was purchased by him. The counsel for the defendant at the end of arguments has provided list of the following case law.

- i. *Muhammad Sajjad Hussain ..Vs.. Muhammad Anwar Hussain* (**1991 SCMR 703**)
- ii. *Manzoor Ahmed and 4 others ..Vs.. Mehrban and 5 others* (**2002 SCMR 1391**)
- iii. *Abdul Mjeed and others ..Vs.. Amir Muhammad and others* (**2005 SCMR 577**)
- iii. *Wasi-ud-Din ..Vs.. Fakhra Akhtar and 4 others* (**2011 SCMR 1550**)
- iv. *Dr. Muhammad Riaz Mirza and others ..Vs..* (**2005 YLR 2213**)

- v. *Salman Ashraf ..Vs.. Begum Asmatun Nisa*
(1997 CLC 176)
- vi. *Din Muhammad Wagan ..Vs.. Mst. Rashida Khatoon through LRs* (2002 CLC 1573)
- vii. *Mst. Asia Bibi ..Vs.. Dr. Asif Ali Khan and others*
(PLD 2011 SC 829)
- viii. *Mst. Sharifan Bibi and others ..Vs.. Abdul Mjeed Rauf and others* (PLD 2012 Lahore 141)

11. My findings on the above issues with reasons thereon are as under:-

ISSUE NO.1

12. The initial burden of proving the title of the deceased Saeeda Begum as Benami owner was on the plaintiffs and the plaintiff in his cross examination has been consistent to the plea that the property has been jointly purchased from the funds of the plaintiff No.1 (Late grandfather of defendant), plaintiff himself and other plaintiffs and even father of defendant No.1. In the cross examination, it has been categorically stated by the plaintiff that Mrs. Saeeda Begum, who was mother of the plaintiffs and grandmother of defendant No.1 had not purchased the suit property from her own resources and savings. The relevant portion of evidence regarding the payment of the sale consideration by the plaintiffs and not by Saeeda Beum is as follows:-

It is incorrect to suggest that the suit property was purchased by my mother from her resources and savings. Voluntarily states, "my mother had no independent source of income or savings." S. Ali Muhammad Naqvi one of the plaintiffs was School Head Master in 1963 and his salary was and Rs.500/- per month. Nahid the plaintiff No.4 is my sister and was School teacher from 1960 to 1970 and she got married in 1967 which marriage was dissolved but she again married in 1969. Mst. Nahid the co-plaintiff is presently settled in Bolton U.K since 1974. It is incorrect to suggest that Mst. Nahid the co-plaintiff was not working or employed before her marriage or that she is still

without any work or job. The suit property was purchased for Rs.9,500/- but it is incorrect to suggest that the purchase money was not pooled by plaintiff No.1, 3, 4 & M.A Kazim.

13. The plaintiff has also produced some of the original documents regarding disbursement and repayment of House Building Finance loan obtained by Saeeda Begum on **12.7.1976** which include letters from House Building Finance Corporation confirming repayment and release of title documents and even refund of extra amount repaid. (Ex.P/60, Ex: P/61 and Ex:P/62). The payments to the House Building Finance Corporation too have been deposited by one of the plaintiffs as it is mentioned in the receipts. The original counter foils of the payment towards clearance of loan have also been produced by defendant No.1 himself as Ex:D-5/1 to D-5/7. The plaintiffs have also produced proof of remittances from abroad in favour of plaintiff No.1 as well as in favour of father of defendant No.1 during the year 1971-1976. At least more than 23 exhibits of remittances out of Ex:P/6 to P/51 indicate that remittances were also in favour of M.A. Kazim Naqvi, father of defendant No.1 prior to his death in January, 1977. The dates of remittances are from 1971 to November, 1976. The burden of proof of issue No.1 on the evidence referred hereinabove was then shifted on Defendant No.1 to prove that Saeeda Begum was absolute and actual owner of the suit property. But unfortunately defendant No.1 himself has admitted in his cross-examination as under:-

*At the time when the suit house was purchased, Mst. Saeeda Begum was neither in service nor having any source of income. -----
-----The loan from HBFC is sanctioned in the name of the owner of the property.-----
-----It is a fact that the said loan*

was repaid after the death of my father. It is a fact that the loan repayment can be made by any one but its receipt is issued in the name of the person who was sanctioned the loan. In the receipts issued at the time of repayment of loan, the names of plaintiff Nos.1 & 2 are given as depositors. -----

----- It is a fact that I have not produced any documents to show that my grand mother had any savings.

He has also stated in his cross-examination as under:-

I have been residing in that house since my birth alongwith my father Mr. M.A Kazim Naqvi, my mother Tasnim Fatima and my sister Umme Farwa. Plaintiff No.3 namely Syed Hasnain Raza Naqvi was in Islamabad in 1972 where he was serving in the Oil & Gas Department. -----

----- It is a fact that we all used to reside as a joint family having common kitchen in the suit house. Plaintiff No.2 namely Saqlain Raza was in United Kingdom in the year 1970 and even at that time we continued with the joint family system having common kitchen. I do not know whether plaintiff No.2 used to send any remittance from U.K to any one from our family. Mst. Saeeda Begum my grandmother lived in the suit house since from the date she purchased the suit house till 19.11.1996.

The above evidence shows that even repayment of loan to HBFC was from the common funds arranged by the plaintiffs and Mst. Saeeda Begum had not contributed single penny for it.

14. The learned counsel for the defendant has contended that the seller Saeeda Begum was in possession of the suit property and the original title documents were also in her possession, therefore, it cannot be said that the burden of proof of Benami ownership on the plaintiff stands discharged. As far as the claim of defendant No.1 that deceased Saeeda Begum was in possession of the suit property is concerned, Saeeda Begum, as Vendor, had never handed over possession of the suit property to defendant No.1 though it is expressly mentioned in para-2 of the sale deed that ***“The vendor doth hereby agree, and covenant with the***

Vendee to deliver to the Vendee on the execution of these presents possession of the said plot of land alongwith construction thereon.” It was only about the delivery of documents to which same covenant of sale deed says that ***“The Vendor has already delivered to the Vendee all Documents and Deeds relating to the said property in Vendor’s possession.”*** The plaintiffs were in continuous possession of the suit property even before and at the time of so-called sale and thereafter Mst. Saeeda Begum pursuant to registered covenant referred above had never handed over possession of the suit property to defendant No.1 and that is why in his written statement he has raised counter claim of mense profit and possession. Defendant No.1 without offering Court fee has prayed from the Court for the following relief(s):-

PRAYER

*It is, therefore, respectfully prayed that this Hon’ble Court would be pleased to pass a judgment and decree against the **plaintiffs No.1 to 3** jointly and/or severally as under:-*

- (a) Directing the plaintiffs to vacate the house bearing No.2.E, 2/4 Nazimabad, Karachi and hand over its vacant physical possession to the defendant No.1.*
- (b) Mesne profit & Rs.15,000/- per month from the date of filing of the suit till the defendant No.1 is put in physical possession of the suit property.*
- (c) Cost may also be awarded.*

15. The plaintiffs’ counsel has very elaborately discussed the circumstances in which the documents had come in the hands of the plaintiffs. The perusal of annexure P/81, para-7 shows that Saeeda Begum pursuant to order dated **5.10.1978** stood surety by depositing title documents of the suit property in the Court of District and Sessions Judge, Central, Karachi in Guardian and

Ward **Suit No.503/1978** (Re-Tasneem Fatima Naqvi) since the defendant's mother wanted to sell another property in which defendant No.1 and his sister were major shareholders by inheritance. The suit property was released from G&W Court after 18 years in **September, 1996** when grandmother Saeeda Begum filed an application of discharge of surety and release of the documents from the Court as defendant No.1 and his sister had become major. Therefore, defendant had received the original documents which were deposited by Saeeda Begum as security from the office of the Nazir of District and Sessions Judge, East, Karachi pursuant to the order dated **15.9.1996** in G&W Suit No.503/1978. Then within hardly 30 days he manipulated the execution of sale deed in respect of the suit property showing signatures of Saeeda Begum affixed on **29.10.1996** on sale deed (Ex:D/21). However, the registration of the document was deferred and subsequently the document was admitted for registration on **31.12.1996**. Defendant No.1 has not offered any explanation as to why the registration was adjourned/ deferred on **29.10.1996** and how it was registered on **31.12.1999** when on both dates it was not signed and/or it remained unsigned by at least two witnesses before the Sub-Registrar.

16. The real owners who have jointly contributed funds to purchase the suit property had never parted with possession and they on account of their relation with Saeeda Begum never had any occasion to seek any declaration about the status of Mst. Saeeda Begum as owner for the simple reason that none of the co-owner was under threat that he/she would be denied his/her legitimate share in the suit property to the extent of their respective share as

per Sharia Law in her life time by Mst. Saeeda Begum herself or on her death by any one else. The occasion to challenge the title of Saeeda Begum had arisen to the plaintiffs only after her death, when they came to know that defendant No.1 has fraudulently taken over title documents and claiming title of the suit property through a fraudulently registered sale deed dated **31.12.1996**. Had defendant No.1 published his intention to buy and Saeeda Begum's desire to sale the suit property to him through public notice in newspaper or even subsequently had Saeeda Begum ever requested the real owners in possession to hand over physical possession of the suit property to defendant No.1, then only suit could have been filed in her life time. Defendant No.1 in his cross examination admitted that:-

I had not got published any notice to the fact that I was going to purchase the suit house. At that time plaintiff No.3 was in private service with M/s Pak Suzuki in Karachi. It is correct that sale consideration was not paid to the vendor in respect of the suit house before the Registrar on the day sale deed was registered.

Therefore, the contention of learned counsel that the plaintiff including her husband have never claimed ownership of the suit property in her life time has no force. The evidence as discussed above shows that Saeeda Begum was never in exclusive possession of the suit property. She was never capable to purchase it without the funds provided by the plaintiffs and father of defendant No.1. It cannot be disputed that the first and the foremost factor of real ownership of an immovable property is the proof of the ability of the claimant that sale consideration was paid from his/her own earnings/or any other sources other than the person who claims that he/she has paid the consideration of sale. In view of the

evidence discussed above and documents on record the issue No.1 is decided in affirmative.

Issue No.2

17. The burden of proof of issue No.2 was on defendant No.1 that he had lawfully purchased the suit property without any misrepresentation and fraud as well as he has passed on the sale consideration to the seller Ms. Saeeda Begum. Defendant No.1 has claimed the ownership rights in the suit property on the basis of **Ex.D/18** dated **27.10.1996** which is purported receipt of payment of sale consideration and also on the basis of **Ex:D/21** dated **31.12.1996**, the alleged registered sale deed. The very fact that the payment receipt and sale deed are in English and it has also come on the record that Mst. Saeeda Begum was an illiterate lady as she has affixed her signature on these documents in Urdu, defendant No.1 is additionally burdened to proof not only execution but also that Saeeda Begum had full knowledge that one document is the receipt of payment of sale consideration and the other document is sale deed of the suit property. The receipt of payment of sale consideration is dated **27.10.1996**, i.e two days before the execution of so-called sale deed said to have been signed by the parties on **29.10.1996**. The perusal of sale deed shows that payment of sale consideration has been mentioned in para-1 of the sale deed but neither date nor time of payment is mentioned in the sale deed. The very existence of a separate receipt (Ex:D/18) of sale consideration is not mentioned in the sale deed. Why is it not mentioned in the sale deed that the sale consideration has already been paid on **27.10.1996** against a separate receipt issued by the seller? I have also noticed that sale deed has not been even

witnessed by two persons as required under **Section 17** of the Qanun-e-Shahadat Order, 1984. Only one man and one woman have been mentioned as witnesses on the sale deed. The requirement of **Section 17** of Qanun-e-Shahadat Order 1984 is that **“the instrument shall be attested by two men, or one man and two women”**. The only man as witness is one Mr. Ali Asim Naqvi, who was maternal uncle of defendant No.1. But he could not be produced because said Ali Asim Naqvi has died in 2003. However, defendant No.1 himself destroyed the sanctity of the said witness of sale deed when he himself admitted in the cross examination that late Syed Ali Asim has not affixed his signatures on the sale deed as witness before the Sub-Registrar of properties. Relevant evidence of Defendant No.1 about attestation of Ali Asim Naqvi on sale deed is as follows:-

*The witnesses of the sale deed were my mother namely Tasneem Fatima and my uncle namely Syed Ali Asim Naqvi. **The sale deed was sent for micro film and at that time it was not signed by Syed Ali Asim Naqvi.** It is incorrect to suggest that I have forged the signature of Syed Ali Asim after sale deed was micro filmed. Voluntarily states that **it is true that it was signed after micro film but it was signed by Syed Ali Asim Naqvi himself** and not by me. **It is a fact that above mentioned subsequent signatures was put on the sale deed without permission of the Court or the Registrar.** The signature of **Syed Asim Naqvi had put the signature on the date we received back the registered sale deed** and not after three months.*

In fact by affixing his signature on the sale deed after registration by Syed Ali Asim Naqvi, the illegally registered sale deed stand tampered. The other witness shown on the sale deed is Mst. Tasneem Fatima (mother of defendant No.1) but her signature are not available on the document and she has not come in the witness box to support the stance of her son. There is no proof of

the fact that the seller Saeeda Begum and any of the witnesses of execution of sale deed has appeared before the Sub-Registrar to affix their signatures on the sale deed. Rather the evidence is otherwise. This confirms that the sale deed has been unlawfully registered by the Sub-Registrar or at least since the instrument of sale has not been ***“attested by two men or one man and two women”***, its execution cannot be proved in terms of **Section 79** of the Qanun-e-Shahadat Order, 1984, therefore, irrespective of the fact that Saeeda Begum was competent to sale the suit property or not, the execution of sale deed is not established.

18. The evidence of payment of sale consideration, too, is not confidence inspiring. One witness of the payment of sale consideration (Ex:D/18) is same Ali Asim Naqvi his uncle and the other witness is his uncle's friend Hasan Raza Jaffery. About Mr. Ali Asim, it has already come on record that he had signed the registered sale deed as witness after the registration was completed without his signatures on it as witness. He was capable of testifying at any point of time any document at the request of defendant No.1. As far as second witness Mr. S. Hasan Raza Jaffery is concerned, his credibility is also zero. The place of witnessing the payment of sale consideration is house of aunty of Syed Ali Asim Naqvi in Nazimabad and on **27.10.1996** just by chance he visited Syed Ali Asim Naqvi in Gulshan-e-Iqbal at a time when said Ali Asim was going to Nazimabad to see his aunty (para-2 of his affidavit) and he also accompanied Ali Asim to later's house. At that time defendant No.1, Mst. Saeeda Begum and other family members were also present. (para-3 of his affidavit) and on the spot he came to know that Saeeda Begum has agreed to sale

the suit property to defendant No.1. (para-4 of his affidavit) In his cross-examination he conceded that:-

“I had chance meeting with Syed Ali Asim Naqvi on 27.10.1996 and sat with him for about half an hour in his house Gulshan-e-Iqbal from where we both back (went) to the house of his aunty Saeeda Begum in Nazimabad.”

This witness is chance witness and in presence of other family members he was preferred to witness the payment of sale consideration by grandson to grandmother. How and why a stranger, who came there by chance only once in life was selected to be witness cash payment of sale consideration of Rs.660,000/- by a young boy of **23** years to his **81** years old grandmother. He has further stated in his cross that:-

“It is correct that my said visit to the house of Mst. Saeeda was first and last.”

Defendant No.1 was also unable to satisfactorily give an account of his source of funds to buy the suit property at the age of 23 years in 1996 on cash payment of Rs.660,000/-. The relevant evidence is as under:-

I have not filed my Bank Statement in this suit in respect of the year in which the suit house was registered regarding the payment of consideration. Voluntarily states that however I have declared receipt of the payment in my Income Tax Return. I have not filed the Income Tax Return of the year in which payment of consideration was made. Similarly we have not filed Bank Statement of my grand-mother Saeeda Begum regarding payment of the sale consideration. It is a fact that I am businessman by profession as I have declared in the sale deed. I deal in garment business but I have not filed any proof of it in this suit. We had also sold one property in North Nazimabad after about one month of the transaction of the suit house. It is a fact that in the sale deed in respect of the property of Nazimabad I have shown myself as student, but even at that time, I used to do business of garments and at that time I had the money to purchase the suit house.

The counsel for the plaintiffs, amongst others; has also relied on a case of Abdul Hameed through L.Rs. and others vs. Shamasuddin and others (**PLD 2008 SC 140**) which appears to be quite relevant in the given facts of the case in hand. In view of the facts and clear evidence discussed hereinabove, in my humble view, the burden of proof of both the execution of sale deed as well as payment of sale consideration as required under **Section 79** of the Qanun-e-Shahadat Order, 1984 has not been discharged by defendant No.1. Therefore, issue No.2 is also decided in affirmative.

Issue No.3

19. In view of my findings on issue No.1 and 2, it is clear that the suit property belongs to the joint family of the plaintiffs including late father and grandfather of defendant No.1. There is neither any definite claim of any of the plaintiffs that anyone has contributed to any specific extent in the purchase and renovation of the suit property to claim specific more or less share in the suit property then the claim of any other co-owner and/or family member, therefore, all the plaintiffs, and deceased M.A. Kazim Naqvi (father of defendant No.1) are declared to be the joint owners of the suit property. They all are also undisputed legal heirs of deceased Saeeda Begum, who was an ostensible owner of the suit property, therefore, they are entitled to their respective share in the suit property as per Sharia Law applicable to the parties. It is, however, necessary to mention here that since father of defendant No.1 was also co-owner in the suit property right from day one, therefore, his share in the suit property cannot be denied on the ground that he (S.M.A Kazim Naqvi) is predeceased son of deceased Saeeda Begum and late plaintiff No.1. Defendant No.1, his sister

Ume-Farwa as well as his mother Tasneem Fatima are jointly entitled to one share in the suit property through deceased S.M.A Kazim Naqvi whose contribution in the purchase and even renovation of the suit property has been admitted by all the members of the family. The suit property is indivisible, therefore, it may be sold through auction and the sale proceeds may be distributed among the plaintiffs and deceased M.A Kazim whose share may further be distributed amongst his widow (Tasneem Fatima), his daughter (Umme Farwa) and his son, defendant No.1.

22. The suit stands decreed in the above terms.

J U D G E

Karachi,
Dated: 10.01.2018

Ayaz Gul/PA*