

**IN THE HIGH COURT OF SINDH AT  
KARACHI**

Suit No.209 of 2010

*[Mohsin Ali vs. Safdar Hussain Birlas and Mrs. Afshan Safdar]*

Suit No.112 of 2011

*[Safdar Hussain Birlas and Mrs. Afshan Safdar vs. Mohsin Ali]*

**Date of hearings** : **18.02.2019, 04.03.2019, 11.03.2019 and  
18.03.2019.**

**Date of Decision** : **29.03.2019.**

M/s. Mirza Adil Beg and Muhammad Atif Shujaat M. Beg, Advocates for the Plaintiffs in Suit No.209 of 2010 and for Defendant in Suit No.112 of 2011.

Mr. Mustafa Lakhani, Advocate for the Defendants in Suit No.209 of 2010 and for Plaintiff in Suit No.112 of 2011.

**Case law cited by M/s. Mirza Adil Beg and  
Muhammad Atif Shujaat M. Beg, Advocates.**

1. PLD 2013 SC page-829  
*(Begum Nusrat Ali Gonda vs. Federation of Pakistan and others)*
2. PLD 1975 SC page-678  
*(Manager, Jammu & Kashmir, State Property in Pakistan vs. Khuda Yar and another).*
3. PLD 2002 SC page-491  
*(Muhammad Anwar Khan and 5 others vs. Chaudhry Riaz Ahmed and 5 others).*  
*[Anwer Khan case]*
4. PLD 1987 Karachi page-180  
*(Haji Muhammad Rafiq vs. Shahenshah Jehan Begum)*
5. PLD 2010 Karachi page-158  
*(Karim Dad Khushk vs. United Bank Limited).*  
*[Karim Dad case]*
6. 2015 MLD page-965  
*(Dr. Dilnawaz Rafi Shaikh and 3 others vs. Riyaz ur Rahim and 3 others)*

7. 2016 CLC page-1922  
(*Messrs Pakistan Hockey Federation through Secretary General and another vs. Mirza Imtiaz Baig*)  
[*Hockey Federation case*].
8. 1992 MLD page-2515 [Karachi]  
(*Major [Retd.] Syed Baqar Hussain Shah vs. Mst. Rashida Begum*).
9. 2005 SCMR page-577  
(*Abdul Majeed and others vs. Amir Muhammad and others*)  
[*Abdul Majeed case*]
10. 2009 SCMR page-124  
(*Muhammad Nawaz Minhas and others vs. Mst. Surriya Sabir Minhas and others*)  
[*Minhas case*].
11. 2017 MLD page-1539  
(*Amanat ullah vs. Karam Din and others*)  
[*Karam Din case*]

**Case law relied upon by Mr. Mustafa Lakhani, Advocate.**

1. 2005 SCMR page-577  
(*Abdul Majeed and others vs. Amir Muhammad and others*)  
[*Abdul Majeed case*]
2. PLD 2011 SC page-829  
(*Mst. Asia Bibi vs. Dr. Asif Ali Khan and others*)  
[*Asia Bibi case*].
3. PLD 2001 SC page-213  
(*Muhammad Aslam vs. Mst. Feroze and others*)
4. PLD 2004 Karachi page-17  
(*Abdul Hameed Khan vs. Mrs. Saeeda Khalid Kamal Khan*)  
[*Abdul Hameed case*].

- Other Precedents:**
- (1) 1991 SCMR page-2300  
(*Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi*)  
[*Naqvi case*].
  - (2) 2012 C L D page-6  
(*Abdul Majeed Khan v. Tawseen Abdul Haleem*) [*Abdul Majeed case*].
  - (3) PLD 1996 Supreme Court page-737  
(*Sufi Muhammad Ishaque vs. The Metropolitan Corporation Lahore through Mayor*) [*Ishaque case*].

- Law under discussion:**
- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
  - (2). Code of Civil Procedure, 1908 [CPC].
  - (3). Qanoon-e-Shahadat Order, 1984. [Evidence Law].
  - (4). Specific Relief Act, 1877 [SRC]
  - (5). Trust Act, 1881.
  - (6). Benami Transaction.

## **JUDGMENT**

**Muhammad Faisal Kamal Alam, J:** Due to commonality, the title suits are decided through this Judgment. Suit No.209 of 2010 is filed by Mohsin Ali against Safdar Hussain Birlas and his wife Mrs. Afshan Safdar, seeking following relief\_

*“It is, therefore, humbly prayed on behalf of the Plaintiff above named that this Hon’ble Court may be graciously pleased to pass Judgment and Decree against the Defendants No.1 and 2 and in favour of the Plaintiff as follows:*

- (a) *To pass Judgment and Decree directing the Defendants No.1 and 2, their agents, representatives and / or any other person(s) acting under them or on their behalf having possession of the suit plot bearing Bungalow No:103, Plot No.D-119/1, Block-14, KDA Improvement Scheme No.5, Kehkashan, Clifton, Karachi to hand over the vacant physical possession of the suit property to the Plaintiff.*
- (b) *Decree for a sum of Rs.10 millions as damages and compensation against the Defendant for the monetary losses and mental torture and agony caused to the Plaintiff*
- (c) *Decree for a sum of Rs.2,64,000/- (Rupees Two Lac Sixty Four Thousand Only) in favour of the Plaintiff as mesne profit at the rate of Rs.2,000/- per day from the month of*

*July 2006 till date and future mesne profit @ Rs.2,000/- till the premises is vacated and possession handed over.*

- (d) *To grant Permanent Injunction restraining the Defendants No.1 and 2 their men, agent and / or any other person acting under them or on their behalf holding possession of the suit property from alienating, transferring damaging, altering and / or creating third party interest in the suit property in any manner whatsoever.*
- (e) *That in alternative, in case the Defendants No.1 and 2 jointly and severally failed to put the Plaintiff in possession of the suit plot for any reason whatsoever, Decree for a sum of Rs.17 million as an alternative remedy being the present market value of the suit property.*
- (f) *Cost of the suit.*
- (g) *Any other relief this Hon'ble Court may deems fit and proper under the circumstances of the case."*

2. The subsequent Suit No.112 of 2011 has been filed by the above named Defendants against the above named Plaintiff. The plaint contains the following Prayer Clause\_

*"That the Plaintiff prays that this Hon'ble Court will be pleased to pass Judgment and Decree in favour of the Plaintiff and against the Defendant as under: -*

- i) *A declaration that the purchase of the Bungalow bearing No.D-119/1, Block-4, KDA Scheme, Kehkashan, Clifton, Karachi, as per Conveyance Deed dated 12.12.2001, Annexure "B" in the name of Defendant by the Plaintiff is a benamidar transaction, hence the Bungalow does not own / belong to the Defendant as its owner.*
- ii) *A declaration that the Plaintiff No.1, is the real owner, which is in possession and occupation of the Plaintiffs, the Bungalow No.103, constructed on the Plot No.D-119/1, Block-4, KDA Scheme No.5, Kehkashan, Clifton, Karachi for all intent and purposes.*

- iii) *A permanent injunction order against the Defendant restrained him from claiming himself to the real owner of the said Bungalow No.103, Clifton, Karachi, and from dealing with the same as its owner in any manner whatsoever.*
- iv) *Any other relief(s) which this Hon'ble Court deem fit and proper in the circumstances of the case may also be granted.*
- v) *Costs of the suit."*

3. Upon service of summons, the Defendants in both suits contested the respective claims of Plaintiffs. Undisputedly, the subject matter of both cases is a built up House-Property (*No.103*) having address D-119/1, Block-4, KDA, Improvement Scheme No.5, Kehkashan, Clifton, Karachi, measuring 260 Square Yards-the '**Suit Property**'.

4. The Plaintiff (*Dr. Mohsin Ali*) of the first suit, that is, the Suit No.209 of 2010 is claiming the subject property as his, whereas, the Defendants (*of Suit No.209 of 2010*) have disputed the claim; thus, merely for the sake of clarity, Mohsin Ali, who is the Plaintiff in Suit No.209 of 2010 and Defendant in the subsequent Suit No.112 of 2011 will be referred to as the '**Claimant**', whereas, the Defendants (*Safdar Hussain Birlas and Mrs. Afshan Safdar*) of the above Suit No.209 of 2010 and Plaintiffs of subsequent Suit No.112 of 2011 will be referred to as the '**Objectors**'.

5. Vide order dated 14.12.2010, passed in Suit No.209 of 2010, the following Issues Proposed by the Plaintiff (Claimant) were adopted as Court Issues\_

- "1. *Whether the Plaintiff has purchased the Suit plot through the Defendant No.1 and whether the Plaintiff sent the money to the Defendant No.1 through Banking Channels to purchase the Suit plot for Plaintiff?*

2. *Whether the Defendants obtained the loan for a sum of Rs.37,43,648/- from the Plaintiff and whether the Defendant No.1 offered to pay the alleged loan amount to the Plaintiff who refused the same?*
3. *Whether the Plaintiff accommodated and allowed the Defendants to live in the Suit property on humanitarian grounds as the Defendants were about to be evicted from their premises?*
4. *Whether the Defendant is living in the suit property as Benami owner or as a licensee?*
5. *Whether the Plaintiff has suffered mental torture, agony and huge monetary losses due to the acts and omission on the part of the Defendants? If so, what is the effect?*
6. *Whether the Plaintiff is entitled for permanent injunction in respect of the suit property and damages to the tune of Rs.10 million?*
7. *Whether the Plaintiff is entitled to recover a sum of Rs.2000/- per day from the month of July 2006 as mesne profit till the premises is vacated and possession handed over to the Plaintiff by the Defendants?*
8. *Whether the Plaintiff is entitled for the possession of the suit property?*
9. *Whether the Plaintiff is entitled for alternate remedy for a sum of Rs.17 million?*
10. *What should the Decree be?"*

6. By order dated 07.12.2013 passed in the above subsequent Suit, both suits were ordered to be **consolidated** with further clarification that the Suit No.209 of 2010 will be the leading Suit and the Issues framed therein and evidence led in pursuance thereof shall be treated as consolidated Issues and evidence in both the consolidated suits, respectively.

7. Jawed Mirza on behalf of Claimant and the Objector No.1 (*Safdar Hussain Birlas*) examined themselves as witnesses and were cross-examined.

8. Findings on the issues are as follows:

ISSUE NO.1:	In Affirmative.
ISSUE NO.1-(A):	In Negative.
ISSUE NO.1-(B):	In Affirmative.
ISSUE NO.2:	In Negative.
ISSUE NO.3:	In Affirmative.
ISSUE NO.4.	Accordingly.
ISSUE NO.5.	In Affirmative.
ISSUE NO.6.	Accordingly.
ISSUE NO.7.	In Negative.
ISSUE NO.8.	In Affirmative.
ISSUE NO.9	In Negative.
ISSUE NO.10	Suit No.209 of 2010 is decreed and Suit No.112 of 2011 is dismissed.

9. M/s. Mirza Adil Beg and Muhammad Atif Shujaat M. Beg, the learned Advocates representing the Claimant (*Dr. Mohsin Ali*) have argued that the Claimant in utmost good faith allowed the Objectors to reside in the suit property, which was purchased with the funds of Claimant, because both the parties were good friends and the Claimant also stayed with the Objectors at their Dubai residence when the Claimant was in Dubai in search of an employment. It is further argued that in due course of time, the Claimant got settled in the United Kingdom as a successful Medical Practitioner and when he visited Pakistan in the year 2001, he also visited the Defendant No.1 and was deeply concerned to see the financial plight of Defendants / Objectors, who shared their apprehension with Claimant about eviction from their rented Apartment. Since the Claimant wanted to

purchase a property in a good location as an investment, he discussed the idea with the Objectors and they readily agreed to find a suitable accommodation for the Claimant. After some time, the Objectors informed the Claimant about the suit property, which after exchange of Emails / correspondence between the parties hereto, was purchased with the funds of Claimant. However, in order to accommodate the Objectors, as in the intervening period they were evicted from the Apartment, the Claimant allowed the Objectors to move into the suit property. That in the year 2006, the Claimant himself and through common friends called upon the Objectors to vacate the premises, as by that time the financial condition of Objectors has become reasonably good, but the Objectors did not vacate the premises in question. Finally, in the year 2008, the Claimant wanted to dispose of the suit property and also took steps in this regard but could not fetch a good market price because the property was in possession of the Objectors and it was learnt that the latter (Objectors) had also attempted to misguide certain prospective buyers. Finally, a Legal Notice dated 12.01.2010 was sent to Objectors and eventually the filing of present *lis*.

10. The above arguments of Claimant have been controverted by Mr. Mustafa Lakhani, Advocate, while representing the Defendants / Objectors. The ownership of Claimant has been vehemently disputed while stating that it is the Objector No.1, who is the actual owner of the suit property and Claimant is merely a benamidar (*ostensible owner*). It is further contented by the learned counsel for the Objectors, that the latter (Defendants/Objectors) purchased the suit property from their own funds and with regard to the amount sent through Banking channel, it is argued, that it was a loan sent by the Claimant to the Objectors for purchase of an Apartment, but finally the Objectors decided to purchase the suit property and since Objectors could not arrange the entire sale price, therefore, the Claimant financially helped the Objectors by making payment of



Rs.37,43,648/- (*Rupees Thirty Seven Lac Forty Three Thousand Six Hundred Forty Eight Only*) towards the sale price of the suit property, but with the condition that the same should be purchased in the name of Claimant as a conditional / simple mortgage with the right of redemption and once the loan amount is paid off, the property would be transferred to the Objectors (*Defendants of Suit No.209 of 2010 and Plaintiff of Suit No.112 of 2011*). The learned counsel with the support of pleadings has also argued that the Objectors were residing in their own Apartment situated in Spring Town Building near Frere Town and was not in a financial crisis as contended by Claimant side.

11. Rival submissions heard and record of both the cases have been considered.

12. Looking at the controversy and pleadings of both suits, two more Issues are to be framed as Issue No.1 (A) and 1(B), which are\_

***“1(A) Whether the Objector (Safdar Hussain Birlas) is the actual owner of the suit property and Claimant is merely a benamidar?”***

***1(B) Whether Jawed Mirza is a duly constituted attorney of Claimant, if not, then, what is the consequence?”***

**ISSUE NO.1 (B).**

13. Since Mr. Mustafa Lakhani, Advocate, on behalf of one of the Objectors in subsequent Suit No.112 of 2011, has raised a legal question about the authority of the Attorney (Jawed Mirza) of Claimant and has strenuously argued that the entire evidence of the Claimant is to be discarded as Jawed Mirza son of Anwer Baig, who testified on behalf of the Claimant as his attorney, was not authorized to do so, thus it is necessary to decide this question first, that is, the Issue No.1(B), as it goes to the root of

the case. The learned counsel has further pointed out that the Verification Clause of the Plaint in Suit No.209 of 2010 (*filed on behalf of Claimant*) is also defective and should entail adverse consequences. He then referred to the General Power of Attorney, which is produced in the evidence by the above named Attorney as Exhibit P-1/1, that the same was only upto 01.01.2012 as per Clause-9 of the document itself. Thus, when the testimony of the said Attorney as PW-1 was recorded, he was not authorized to depose and hence, the evidence of the Claimant is to be discarded. He has referred to the portion of the cross-examination of the above named witness (PW-1) that he himself has admitted that he is not the attorney of the Claimant at the relevant time. He has placed reliance on a decision of this Court in *Abdul Hameed case (supra)*. It is contended that even the subsequent General Power of Attorney produced in the evidence as Exhibit-P-1/19 is also defective as it does not mention the description of the present *lis*, while referring to the deposition of the above named Claimant's sole witness that he did not deny the suggestion that the subsequent Power of Attorney (Exhibit P-1/19) does not specifically empower the said attorney for production of documents in the evidence.

14. The legal team of Claimant has obviously disputed the above contention. They first distinguished the above cited decision, by arguing, that the facts of the above case are quite different from the present one, as in the reported case, the authority to file the proceeding was challenged because the principal was seriously ill and mentally incapacitated for giving such an authority and thus with these distinct facts, the decision was given, whereas, undisputed facts of the present case are completely different. The Claimant (*Dr. Mohsin Ali*) has twice executed the General Power of Attorney in favour of the above named Attorney (Jawed Mirza) and in order to avoid any confusion and legal complexity, the subsequent Power of

Attorney (Exhibit P-1/19) contained Clause-9, whereby, *ex post facto* authority is given and extended in favour of Jawed Mirza (the above named Attorney). In support of his arguments, the learned counsel has relied upon the case law, mentioned in the opening paragraph of this Judgment.

15. On perusal, it is quite apparent that the subsequent General Power of Attorney (Exhibit P-1/19) mentions the description of the suit property; Clause-3 whereof states that the above named Attorney can file and defend the cases in respect of the suit property and also give evidence in any Court of law. The said Attorney has also empowered to settle and compromise the pending suits and other legal proceedings, as per Clause-5; whereas, the lacuna, if any, has been rectified and ratified through the (retrospective) *ex-post facto* approval and it is specifically provided in Clause-9, that the subsequent General Power of Attorney (**Exhibit P-1/19**) is the continuation of the earlier one, that is, **Exhibit P-1/1**. Hence, on the factual plane, the contention of the learned counsel for the Objectors has no force; rather it is contrary to record.

16. The gist of the case law cited on this point, particularly, **Anwar Khan case** (*of Hon'ble Supreme Court*) and subsequent cases of learned Division Bench of this Court handed down in **Hockey Federation** and **Karim Dad cases**, is that a party should not be non-suited if the Rules relating to pleadings, including, Order VI, Rules 14 and 15 of CPC, are not strictly followed. In the reported decisions question of non-signing of pleadings even at the stage of the evidence was rectified and held to be a curable defect, if the main party to the case subsequently ratify the act of his agent or Advocate/pleader, as the case may be. The above reported decision cited by the Objectors' learned counsel is clearly distinguishable, because in that reported precedent (*PLD 2004 Karachi page-17*), the Objection about the authority of plaintiff's attorney was sustained on

account of the facts that the original plaintiff was medically incapable to endorse his signatures and even his wife/the attorney herself could not sign but used to put her thumb-impression.

However, it is clarified that if a case is covered by Order XXIX, Rule 1 of CPC, pertaining to a Company or other legal entity, then the principle with regard to the authority of a person signing the pleadings is different and stricter than the one explained above, because in a subsequent situation, depending upon the circumstances, even a suit may be dismissed, specially, when a plaintiff is a corporate entity and the person filing the plaint is not authorised by a Board Resolution.

17. It is a matter of record that deposition of said Attorney (PW-1) was recorded on 28.01.2013, whereas, the subsequent General Power of Attorney (Exhibit P-1/19) is of 18.02.2013, which is also duly attested by the Pakistan Mission at London, as per requirement of Article-89 of the Evidence Law, therefore, the lacuna, even if it was there at the time of giving evidence, has been subsequently rectified/cured by the aforesaid subsequent General Power of Attorney, as authenticity whereof has never been disputed. More so, in terms of Article-103 of the Evidence Law, documentary evidence excludes the oral evidence and any contrary deposition of said Attorney (*Claimant witness*), at the relevant time, when subsequent General Power of Attorney was not there but subsequently produced in the evidence as Exhibit P-1/19, will not adversely affect the case of Complainant.

18. In view of the above, I have no hesitation to hold that the above named attorney was duly authorized by his principal / Claimant (*Dr. Mohsin Ali*) to institute and pursue the present litigation in all respects. Hence, **Issue No.1(B) is answered in Affirmative.**

**ISSUES NO.1, 1(A) AND 2.**

19. These Issues are interlinked and, therefore, they are decided together.

20. The reported decisions of Hon'ble Supreme Court relied upon by the legal team of both Parties (Claimant and Objectors) primarily relate to the principle rather jurisprudence of benami transaction (*ostensible ownership*) evolved in the Subcontinent. Interestingly couple of reported decisions relied upon by both the learned counsel for the parties are common; **2005 SCMR page-577** and **2009 SCMR page-124**. Précis of the case law cited by the learned counsel for the parties is that \_

- i). Motive for ostensible ownership, that is, a party setting up a claim of benami, should satisfy the Court that why the property in question does not stand in the name of the agitator but in the name of his opponent;
- ii). source of payment;
- iii). who is in possession of the property, and;
- iv). in whose custody the original title document(s) of the property is.

A reported judgment of this Court-**1992 MLD page-2515**, is also very relevant, as in the said Judgment the concept of benami transaction has been explained, inter alia, from the perspective of Section 82 of the Trust Act, 1881.

21. In the cross suit, filed by the Objectors as Plaintiff, they have claimed the ownership rights of the suit property and termed the Claimant (Dr. Mohsin Ali) as benamidar, therefore, newly framed Issue No.1(A) should be decided first. It is a settled rule in the light of various judicial pronouncements (including those cited by the learned Advocates for the parties), that onus to prove a benami transaction is on a person who is

claiming the same and is seeking a relief to this effect; in the case in hand, this burden of proof is on the Objectors.

The Objectors while justifying the motive for purchasing the suit property in the name of Claimant have averred, that because he (Claimant) initially provided the funds to the Objectors but in the shape of a loan, thus the suit property was purchased in the name of Claimant. Detailed submission on this aspect is already mentioned in the preceding paragraphs. The Objectors wanted to return the loan amount, but Claimant refused to take back the lent amount of Rs.37,43,648/- (*Rupees Thirty Seven Lac Forth Three Thousand Six Hundred Forty Eight Only*).

On this very Issue, the evidence of both the parties is appraised. The Objector No.1 (Safdar Hussain Birlas) has acknowledged in his evidence (Affidavit-in-Evidence) that the loan amount was paid by the Claimant on various dates, therefore, the property was purchased in his name. He further stated that the Objectors sold their privately owned Apartment in '**Spring Town Building**' for a sum of Rs.19,00,000/- (Rupees Nineteen Lac Only) and he repaid first installment of Rs.15,00,000/- (Rupees Fifteen Lac Only) as partial settlement of loan, to the Claimant (Dr. Mohsin Ali), but the latter returned the amount to Objector No.2 (Mrs. Afshan Safdar), the wife of Objector No.1. He further stated that Public Notice dated 28.11.2001 before the purchase of suit property (Exhibit D/5) was got published by the said Objector No.1. The Objector No.1 in his Affidavit-in-Evidence/examination-in-chief has deposed that the Claimant surreptitiously mentioned his name as Vendee / Purchaser in the Sale Deed dated 12.12.2001, which is an undisputed document, produced in the evidence as Exhibit P-1/3 by the Claimant's witness (afore named Attorney-Jawed Mirza), but in his Written Statement, the said Objector No.1 has stated (*on oath*) that the Sale Deed was registered in the name of

Claimant (*Dr. Mohsin Ali*) because he provided the loan to Objector No.1 for purchase of the suit property and unless the amount of Rs.3,743,648/- (*Rupees Thirty Seven Lac Forth Three Thousand Six Hundred Forty Eight Only*) is repaid, the title document is to be kept in the custody of Claimant, being a conditional / simple Mortgage, with right to redemption. Similarly, the plaint in Suit No.112 of 2011, filed by the Objectors, contains a new plea, that the Objectors have incurred a huge sum of Rs.18,75,000/- (Rupees Eighteen Lac Seventy Five Thousand Only) for making improvement in the suit property. Although no evidence is led by the Objectors in support of their claim about incurring expenditure.

As against this, the stance of Claimant at least to the extent of his pleadings, that is, as mentioned in the plaint of Suit No.209 of 2010 (filed by the Claimant) and his Written Statement in subsequent Suit No.112 of 2011, is consistent.

22. In his cross-examination, the Objector No.1 has not disputed the financial soundness of Claimant and that he is an Overseas Pakistani. The Objector No.1 did not dispute that he was residing in a rented Apartment in the year 2001, which is the same period when the Claimant visited Pakistan and met Objectors. Subsequently, the suit property was also purchased vide a Sale Deed dated 12.12.2001, already produced as Exhibit P-1/3.

The Objector No.1 has admitted in his cross-examination that he was evicted from the Apartment situated in Falcon Terrace, Block-4, Karachi, through the eviction proceeding initiated by the landlord. Although the Objector No.1 has denied the suggestion that he and his wife were in financial crisis and the suit property was purchased by the Claimant as an investment opportunity as well as to accommodate the Objectors to reside therein with family, but at the same time, the said witness / Objector No.1 did not deny the sending of E-mail dated 20.01.2001 (Exhibit P-1/7) and

admits his E-mail dated 30.11.2011 (Exhibit P-/9). The Objector No.1 also admits that it was the Claimant who transferred the funds from England in the Account of Objector No.1 to purchase the suit property. It would be necessary to reproduce herein below the relevant admission\_

***“It is correct that the Plaintiff had transferred 43 thousand 500 Pounds in my Account as mentioned in Ex-P-1/10. I do not know if High Commission had also confirmed the transfer of the above amount in my account.”***

23. The witness has acknowledged the receipt of Legal Notice dated 12.01.2010 (Exhibit P-1/14) [which was produced by the Claimant’s witness], which was never replied to by the Objectors. The Objector No.1 has further admitted that the original Sale Deed dated 12.12.2001 (Exhibit P-1/3) is with the Claimant. The said Sale Deed mentions the sale consideration as Rs.2,048,000/-.

24. With regard to the stance of Objector No.1 that he repaid an amount of Rs.1.5 million after sale of his Flat in ‘Spring Town Project’ at Frere Town, in his cross-examination, the Objector No.1 admitted that he has not produced any document, particularly relating to the sale of the said Apartment. It means that the statement of Objector No.1 that he paid a sum of Rs.1.5 million to Claimant towards partial settlement of loan amount out of the sale proceeds of afore referred Apartment, has been disproved. **Secondly**, the Objector No.1 could not explain that when the amount of Rs.15,00,000/- (Rupees Fifteen Hundred Thousand Only) towards partial settlement of his liability, was sent to Claimant but was returned by him to the wife of Objector No.1, viz., Objector No.2. The said Objector No.2 was never examined by the Objector No.1; thus this part of testimony is also without substance. Similarly, Objectors also failed to corroborate their claim of Rs.18,75,000/- (Rupees Eighteen Lac Seventy Five Thousand



Only) spent on the improvement of the suit property, hence, it is also rejected.

25. Evidence led by the Claimant through his Attorney is taken into the account. The Sale Deed produced by PW-1 (the said witness of Claimant), mentions the said Claimant as Vendee / purchaser of the suit property. The Claimant's witness (*the said attorney / PW-1*) has also produced the following documents in support of his deposition, that the money / funds to purchase the suit property were sent by the Claimant and it is he who is the actual owner, so also mentioned in the Sale Deed and not the Objectors:

- i) Statutory Declaration (Exhibit P-1/10) dated 19.11.2010 on behalf of Claimant (Dr. Mohsin Ali) that he has a Bank Account in Barclays Bank and sent £ 43,500 from his said Account to Objector No.1 (Safdar Hussain Birlas) in his Bank Account, maintained at Standard Chartered Bank at Clifton Branch, Karachi. The said Statutory Declaration is attested by the Commissioner for Oaths / Solicitor with a further certification by the Government of United Kingdom in favour of the said Commissioner / Solicitor and the said certification bears stamp of Pakistan Mission at London.
- ii) The above Statutory Declaration is accompanied by a customer order form of Barclays Bank dated 30.11.2001 showing that the above mentioned amount was sent in the name of Objector No.1 at the aforementioned Bank.
- iii) Fund Transfer – Debit Advice issued on 03.12.2001 by Barclays Bank mentioning the names of Claimant and Objector No.1 and confirming that the above amount in Pound Sterling, which comes to Pak Rs.3,743,648/- (*Rupees Thirty Seven Lac Forth Three Thousand Six Hundred Forty Eight Only*), was remitted to Standard Chartered Bank at Clifton Branch, Karachi.
- iv) Exhibit-P/1/10; a letter dated 11.12.2001, issued by Standard Chartered Bank, Clifton Branch, Karachi, certifying that the

Objector No.1 maintained a Pound Sterling Account with the said Bank.

- v) E-mail dated 30.11.2001, produced by the Claimant's witness as Exhibited P-1/9.

26. That Paragraphs 8 to 12 of the Affidavit-in-evidence of Claimant witness-Jawed Mirza (subsequently forms part of the examination-in-chief), unequivocally set forth the facts that for purchase of the suit property, funds were transferred / sent from the United Kingdom by Mohsin Ali (Claimant) to Objector No.1 (Safdar Hussain Birlas) in his Bank Account maintained at Standard Chartered Bank, Clifton Branch, Karachi. The testimony of the said witness (of Claimant) further reiterates the background of close relationship between the parties hereto; that since at the relevant time, the Objectors were facing financial crisis, therefore, to alleviate their problems, it was offered by the Claimant that the Objectors may start to reside there at the suit property temporarily. The said PW-1 (Claimant's witness) has also produced in evidence the record of eviction proceeding initiated by the landlord against the Objectors. The Eviction Order dated 05.04.2000 has been produced in evidence by the Claimant's side as PW-1/6 along with the report of handing over of the vacant possession by the Objectors to the landlord in respect of an Apartment No.103, Falcon Terrace, Block-4, Karachi.

27. The above named Claimant's witness has not been cross-examined on his evidence about the eviction of the Objectors from the above mentioned Apartment and thus it means that, that portion of the testimony of Claimant has been accepted by the Objectors. In this regard, a well-known reported decision of *Naqvi case (ibid)*, explaining this Rule of Evidence, is relevant here.

28. Evidence of Claimant's side, that the entire sale price in UK Pound Sterling £43,500 was transferred by the Claimant to Objector No.1 through the Banking Channel, stood proved.

The testimony of the Claimant's witness (*his attorney Jawed Mirza*) with regard to the Issues concerned, does not contradict the stance taken by the Claimant in respect of the suit property. The said witness (PW-1) has specifically denied that the Objector No.1 has borrowed a sum of Rs.3,743,648/- (*Rupees Thirty Seven Lac Forth Three Thousand Six Hundred Forty Eight Only*) from the Claimant for purchase of the suit property or the name of Claimant is mentioned in the Sale Deed as a condition of conditional mortgage (between the parties hereto). It is specifically refuted by the Claimant's witness in his cross-examination, that Objector No.1 (Safdar Hussain Birlas) is the actual owner of the suit property and the Claimant is benamidar. The said Claimant's witness has also refuted the suggestion that the Claimant received any amount as alleged by Objector No.1 towards partial settlement of the loan. Thus, it is quite apparent that evidence of Claimant is consistent throughout and the testimony of Claimant's witness could not be falsified by the Objectors, as is the case of the latter.

29. The Sale Deed in respect of the suit property is not disputed, so also the E-mails dated 20.11.2001 (Exhibit P-1/7) and 30.11.2001 (Exhibit P-1/9). Both E-mails have been sent by Objector No.1 (Safdar Hussain Birlas) to Claimant (Dr. Mohsin Ali). It is necessary to reproduce its contents, which pertains to the suit property and speaks of personal cordial relationship between the parties\_

***“Dear Mohsin,  
Assalam o aleikum I hope you have reached home safely.  
How are you and the family?  
Your visit was a very memorable one...we all had a great  
time: it was a real pleasure to have you here. My children  
really liked you and we all look forward to you next visit in***

*february with your family (inshallah) I wanted to tell you about the meeting I had with the house owners today...the deal was finalized on the following terms:*

<i>the house price is</i>	<i>3550000Rs</i>
<i>commission (2%)</i>	<i>75000Rs</i>
<i>register fees and documents (approximately)</i>	<i>100000Rs</i>
<i>kitchen/bathroom woodwork</i>	<i>175000Rs (approximately)</i>
-----	
<b>TOTAL</b>	<b>3900,000Rs</b>

*Please transfer funds to Hongkong Shanghai Banking Corporation, Karachi, Pakistan. A/c 001-040732070. (SAFDAR.H.BIRLAS) Ive taken instructions for the transferring of funds from bank. Please.*

*note them down.*

*For GBP please send the funds to Beneficiary bank Hongkong Shanghai Banking corporation London, International branch BC2P, 2BX, The Banks Sort Code is: 400515.*

*Beneficiary name. HBBC Pakistan*

*Beneficiary's account number : 35717604*

*Please add the following quote in payment details for the Beneficiary.*

**QUOTE**

**FOR FURTHER CREDIT TO MR. SAFDAR. H. BIRLAS. A/C 001-040732070 WITH HSBC KARACHI.**

*Mohsin, kindly give me a call as soon as you get this mail and let me know when the money will be transferred. I have another meeting with them.*

*Tuesday*

*20<sup>th</sup> november 3pm to finalize the deal.*

*Give my regards to bhabi and love to children. Take care and God bless you and your family love, Safdar. H. Birlas."*

**"Dear Moshin,**

*I opened a Pound Sterling account in Standard Chartered Bank, Clifton Branch Karachi, Pakistan. Now you can make pounds T.T. in my account.*

*My account number is 05-2343673-79,*

*My account title is Safdar Hussain Birlas.*

*When you are making the T.T. in your bank give the banker the standard Chartered Swift Code*

*Code is:- SCBLPKKXA XXX*

*Today the rate is Pak Rs.87 in open Market. Please when you make the T.T. give the T.T. number and amount through e-mail.*

*The town house address is :-*

*Town House no.103*  
*Plot no.D-119/1*  
*Block no.4*  
*K.D.A Scheme No.5*  
*Kehkashan, Clifton*  
*Karachi.*

*Take Care*  
*Safdar Birlas."*

Now advertent to the objections raised by the learned counsel for Objectors during evidence on the following documents, which are Exhibits P-1/1, original General Power of Attorney dated 15.12.2009 in favour of above named Claimant's Attorney, namely, Jawed Mirza. Exhibits P-1/4, Exhibits P-1/5, P-1/6 and P-1/8 pertain to documents produced by the Claimant's witness (about the rent proceeding against the objectors). In view of the discussion and the evidence that has come on record the objection on these documents is overruled, particularly, with regard to the record of rent proceeding against the objectors, which, *firstly*, are the certified copies of the judicial proceeding and fulfills the requirement of Article-88 of the Evidence Law; *secondly*, once this fact is accepted by the Objector No.1 that he was evicted from the Apartment through the said Rent Proceeding, the Objection to the above documents is meritless and is overruled.

Similarly, objections with regard to Exhibit P-1/10, which is a statutory declaration about the transfer of funds by Claimant from his Barclay Bank (at United Kingdom) to Standard Chartered Bank, Clifton Branch, Karachi, wherein, Account of Objector No.1 was maintained in Pound Sterling, is also overruled, *inter alia, firstly*, that the documents are produced in original and have been duly notarized as required under Article-89 of the Evidence Law; *secondly*, the receiving of funds by Objector No.1 has been admitted in the evidence so also the Emails (*referred above*), containing the Bank details of Objector No.1.

Objections with regard to Exhibits 1/14 to 1/18 are also devoid of merits, as Exhibit 1/14 is the Legal Notice dated 12.01.2010 addressed to Objector No.1 on behalf of Claimant, which the Objector No.1 has acknowledged in his deposition. The remaining are the courier receipts and the objection thereto is misconceived in nature.

30. As discussed in the foregoing paragraphs, that the initial burden to prove a benami transaction is on the party, who has taken the plea of benami (*ostensible ownership*) and as per the cited decision of Hon'ble Supreme Court in the cases of *Minhas* and *Asia Bibi (supra)*, the evidence to discharge the onus to prove, *inter alia*, should relate to source of income, possession of the property and whose possession the original title document is. The case / stance of Objectors in respect of benami transaction 'is also adversely effected by Article-118 of the Evidence Law', which for convenience is reproduced herein below\_

***“118. On whom burden of proof lies: The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”***

The conclusion is that it is the Claimant who financed the purchase of suit property and the original title / ownership documents are admittedly in his possession / custody. With regard to the possession of the Objectors in respect of the suit property, it is not difficult to hold after evaluation of the evidence, that now it is a proven fact, that the parties hereto; Claimant and the Objectors, since had cordial relationship and due to weak financial position of Objectors, they were allowed to reside in the suit property out of sheer goodwill gesture shown by the Claimant, as, by that time the Objectors were evicted from the above Apartment.

Therefore, the conclusion is that **Issue No.1 is answered in Affirmative**, whereas, **Issue No.1 (A) is answered in Negative** and **Issue No.2 is also answered in Negative**, that is, the suit property is purchased from the exclusive funds of Claimant / Plaintiff in Suit No.209 of 2010 by transfer of funds to Defendant No.1 / Objector No.1 through Banking Channel. The case of Objectors, with regard to seeking a declaration that they are the actual owners and Claimant is a mere benami (ostensible

owner), has been disproved. Similarly, the Objectors / Defendants did not obtain any loan amount of Rs.3,743,648/- (*Rupees Thirty Seven Lac Forth Three Thousand Six Hundred Forty Eight Only*) from the Plaintiff (Claimant) nor the same was offered to be repaid to Plaintiff / Claimant, who refused to accept the same.

#### **ISSUES NO. 3 AND 4.**

31. In view of the above discussion, **Issue No.3 is answered in Affirmative** and in favour of Claimant and against the Objectors; that the Plaintiff / Claimant accommodated and allowed the Defendants / Objectors to reside in the suit property on humanitarian grounds, *whereas*, **Issue No.4 is replied accordingly.** The Objectors / Defendants are not living in the suit property as benami owner but merely as a licensee, with the permission of Claimant.

#### **ISSUES NO.5, 6 AND 7.**

32. Broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her. In the present case, the Claimant has not produced convincing evidence with regard to his claim of Rupees Ten Million towards compensation and damages, which fall within the category of special damages. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, *Abdul Majeed Khan case (supra)*, being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. The Claimant being an owner of the suit property is being continuously deprived of his right to use and enjoy the same, for the past many years. The ownership right is a

fundamental right guaranteed under the Constitution of Islamic Republic of Pakistan, 1973, and its breach should be remedied forthwith.

Similarly, in the case of *Sufi Muhammad Ishaque (ibid)*, the damages vis-à-vis mental agony has been discussed and the conclusion is that they can be no yardstick or definite principle for assessing damages in such cases, which are meant to compensate a party who suffers an injury. The determination criteria should be such that it satisfies the conscience of the Court, depending on the facts and circumstances of the case.

33. In the present case, since it has been proved that the Claimant on account of his cordial relationship with the family of Objectors / Defendants allowed them to reside and use the suit property, in utmost good faith and to return a past favour, which was extended by Objectors to Claimant, by allowing the latter to reside with the Objectors when they were in Dubai, few decades back, the Objectors misused that bonafide gesture of Claimant, which resulted in the present litigation. Undisputedly, the Claimant has been put through the mill of litigation, merely to get back the possession of his own property. The attitude of Objectors has shaken the trust of a close family friend-the Claimant in the Objectors. This also indicates towards declining social values in our Society. Hence, in my considered view a sum of Rs.15,00,000/- (Rupees Fifteen Lac Only) is an adequate amount, which the Objectors are liable to pay to the Claimant towards general damages and compensation. Since for the claim of mesne profits, a preliminary inquiry is to be done, which was never done, therefore, the Claimant is not entitled for a relief of mesne profits. Therefore, **Issues No.5 is answered in Affirmative**, whereas, **Issue No.6 is answered accordingly** and **Issues No.7 is answered in Negative and against the Claimant.**



### **ISSUE NO.8**

34. The reported decision of *Muhammad Aslam vs. Mst. Feroze and others (ibid)*, relied upon by Mr. Mustafa Lakhani, Advocate, for Objectors is clearly distinguishable from the facts of the present case, for the reasons that the said reported case in which it is held that without seeking a declaratory prayer, as envisage in the **SRA**, possession cannot be sought, relates to a case revolving around an Agreement to Sale of a property whose complete proprietary rights were not even vested in the vendor. With these background facts, the Hon'ble Apex Court was of the view that a Suit for Specific Performance should have been filed and no possession can be given without seeking a Declaration in respect of title, because Agreement of Sale cannot be considered as a title / ownership document. Similarly, the second reported Judgment in *Sultan case (ibid)* relied upon by learned counsel for the Objectors is distinguishable because the subject matter in the said reported decision was a property falling in the category of "*Shamlat Deh*", that is, the common property of the village proprietary body.

In both matters in hand, in order to succeed, the Claimant is not required to seek a declaratory relief first, and thus the arguments of the learned counsel for the Objectors have hardly any force.

35. In view of the above discussion, **Issue No.8 is answered in Affirmative**, that the Claimant is entitled for the physical, vacant and peaceful possession of the suit property.

### **ISSUES NO.9 AND 10.**

36. In view of the above discussion, **Issue No.9 is answered in Negative** and the Suit No.209 of 2010 in the above terms is decreed.

Consequently, the Suit No.112 of 2011 is dismissed. However, parties are left to bear their own costs.

Dated: 29.03.2019.

**JUDGE**

M.Javaid.P.A