

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.28 of 2017

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant : Muhammad Kamran,
through Ch. A. Rasheed, advocate.

Versus

Respondent : Yousuf Baig
Ms. Quratulain, advocate holding brief for
Mr. Adeel Rana, advocate for Respondent.

Date of hearing : **30.05.2019**

Date of Decision : **08.07.2019**

JUDGEMENT

NAZAR AKBAR, J. The appellant through this IInd Appeal has challenged the concurrent findings. The VIIIth Senior Civil Judge, South Karachi by Judgment dated **14.05.2013** decreed **suit No.432/2010** filed by the Respondent and the VIIth Additional District Judge South Karachi by judgment dated **16.01.2017** passed in **Civil Appeal No.124/2013** maintained the said findings of trial Court.

2. Precisely the facts of the case are that the Respondent/ plaintiff filed suit bearing No.432/2013 for declaration of benami transaction, possession, permanent injunction and mense profit against defendant/ appellant alleging therein that the defendant/ appellant was benami/ostensible owner of the property Flat No.3-B, 3rd Floor, plot No.3-C/35, Commercial Area, Phase-V, Defence Housing Authority, Karachi (The suit property). The Respondent averred that the appellant was working as Coin/ Note Examiner

Grade-1 with State Bank of Pakistan on salary of Rs.4,488/- per month as such it was difficult for him to meet the family expenses, therefore, the respondent/ plaintiff had started giving financial aid to the appellant after his marriage with his daughter. In the year 1992 the plaintiff/ respondent at the request of the defendant/ appellant arranged his visit to Canada where the defendant/ appellant stayed with the plaintiff/ respondent who borne all his expenses there. Subsequently on coming back from Canada, the plaintiff/ respondent's family purchased a flat for the defendant/ appellant and his family in the name of his daughter namely Nabeela in Ruffi Heights and another flat in Ruffi Lake Drive in which the defendant/ appellant resides with plaintiff/ Respondent's daughter and his family. The respondent/ plaintiff's further case is that the appellant/ defendant used to demand financial assistance from him therefore in order to make permanent arrangement, the plaintiff/ respondent purchased the suit property out of his income in the name of defendant/ appellant as benami transaction for consideration of Rs.6,75,000/- and it was given on rent through tenancy agreement. Thereafter in the month of October/ November 2008 the relationship between the parties had become so strained that finally marriage between the defendant/ appellant and plaintiff/ defendant's daughter was dissolved by way of Khulla. Since the relationship between the parties did not exist as such the respondent/ plaintiff asked the defendant/ appellant in May 2008 to transfer the suit property in his favour, whereupon the defendant/ appellant avoided and delayed the matter on one or other pretext and finally in January 2009 when he refused to surrender the suit property in favour of

the plaintiff/ respondent, the plaintiff/ respondent filed **civil suit No.432/2010** against the appellant/ defendant.

3. Appellant/defendant was served and filed written statement in which he raised preliminary objections that the suit of the plaintiff/ respondent is not maintainable as it is without cause of action and is barred by time. It is further averred that the salary mentioned by the plaintiff/ respondent was basic salary and he denied that the plaintiff/respondent had given financial help to him. It was also contended that he was doing job in State Bank of Pakistan and also worked at Canada during his stay there for about three years where he resided with his wife and her parents as they are Canadian National and settled in Canada. Apart from it the defendant/ appellant stated that he did different jobs at Canada to earn money. He denied that during his visit to Canada all the time he remained sick and all the medical expenses were borne by the plaintiff/ respondent as the defendant/ appellant went there in the capacity of an immigrant and medical plus unemployment allowance was given to him from Canadian Government. It is further averred that the suit property was purchased by him from his own funds and savings and the plaintiffs/ respondent's has nothing to do with it. The defendant/ appellant has contended that he purchased a flat firstly in the project known as Rofi Heights and after some time sold out the said flat and purchased the other flat in the project known as Rofi Lake Drive at Gulistan-e-Jauhar and after some time sold out the other flat also and thereafter on return from Canada they started residing in a flat purchased by the plaintiff/ respondent in the name of his wife and after some time he purchased bungalow

situated at plot No.73-B/1, Q Street, phase-VII, Defense Housing Authority, Karachi in the year 2002 from his own funds in the name of his wife therefore, he is a real owner and his wife is an ostensible owner of the said bungalow and the said transaction is benami transaction. In the year 2004 the defendant/ appellant decided to let out the first floor in rent, subsequently the plaintiff/ respondent returned back to Pakistan from Canada and they intend to reside here as such looking to the circumstances he offered the plaintiff/ respondent to reside with them on first floor but due to their old age they opted to reside at ground floor and as per their wish they used to start paying rent of Rs.25000/- directly to the wife of the defendant/ appellant. The defendant / appellant has contended that the plaintiff / respondent and his wife started interference in the lives of defendant/ appellant and his wife, as the defendant/ appellant had objected to the western style dressing of his wife and daughters, subsequently the plaintiff/ respondent and his wife asked the defendant/ appellant to stay separate from his wife for few days so that both should think over their disputes, upon which in October 2008 he left the bungalow, while leaving behind all his belongings, documents etc. After some days of his leaving the plaintiff respondent managed to file family suit by the defendant's/ appellant's wife for dissolution of marriage by way of Khulla and now the plaintiff/ respondent by using the documents left by the defendant / appellant at the time of leaving the bungalow there, filed such type of cases against him. The defendant / appellant has further contended that apart from it the plaintiff / respondent had taken Rs.15,84,000/- from him to invest

the same in some property and promised to return the same with profit but plaintiff / respondent has not returned the same.

4. The trial Court from pleading of the parties framed the following issues:-

- i. Whether the suit is maintainable under the law?*
- ii. Whether the suit property was purchased by the plaintiff from his amount and the said transaction was Benami transaction?*
- iii. Whether the plaintiff is entitled to receive the rent from 01.07.2007 up till the possession of the suit property is handed over to the plaintiff with 20% markup?*
- iv. Whether any cause of action has accrued to the plaintiff against the defendant?*
- v. Whether the plaintiff is entitled for the relief as claimed?*
- vi. Whether the plaintiff is entitled for the relief as claimed?*

5. The trial Court after recording evidence and hearing the parties decreed the suit in favour of Respondent/ plaintiff by judgment dated **14.05.2013**. Appellant/ Defendant preferred **Civil Appeal No.124/2013** before VIIth Additional District Judge, South Karachi which was dismissed by judgment dated **16.01.2017**. The appellant has then filed the instant second appeal.

6. I have heard learned counsel for the parties and perused the record.

7. Learned counsel for the appellant after having gone through the impugned judgments was unable to point out any legal infirmity in the findings of the two Courts below to the effect that the suit property was not purchased by the appellant himself from

his own resources. Since it was a case of declaration that the appellant was a benami owner of the suit property, the initial burden of proof was discharged when through a very elaborate evidence it was established that the suit property was purchased in the name of his son-in-law from the funds provided by Respondent. Even daughter of Respondent No.1 who was wife of the appellant also appeared in the witness box to establish that the appellant was never capable to purchase the suit property. The most convincing evidence was the evidence of bank officer, who had produced the bank record showing the transaction of sale purchase of the property from the account of Respondent. Once the plaintiff/Respondent has established that the funds were provided by him and the motive of purchasing the property in the name of appellant was to secure a better life for his daughter who happens to be wife of the appellant, two main ingredients of proof of benami transaction i.e source of funds to purchase the suit property and the purpose/motive of purchasing in the name of benami owner stand established. The very fact that even the original title documents are in the hands of the Respondent has further strengthened the case of the Respondent. As far as the question of possession of the subject property is concerned, it is always supposed to be with the person in whose name and for whose benefit the property has been purchased and even otherwise mere possession of the suit property is not sufficient to negate the claim of the Respondent which has been proved through convincing evidence. Nor mere possession of the suit property is proof of ownership unless it is proved by evidence that the appellant has purchased the suit property from his own funds. The

appellant has miserably failed to establish the resources for purchasing the property.

8. In view of the above, this second appeal stands dismissed as none of the ingredients of **Section 100** of the CPC were made out which requires that the second appeal can be entertained only when the appellant establish that the impugned judgments of the two Courts below are neither contrary to law nor the courts have failed to determine any material issue of law or usage having the force of law.

JUDGE

Karachi, Dated: 08.07.2019

SM
Ayaz Gul