

**ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI**

**Suit No.938 of 2017**

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<b>Date</b>	<b>Order with signature of Judge</b>
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**Present:**

**Mr. Justice Muhammad Ali Mazhar**

**Farrukh Afzal Munif.....Plaintiff**

**Vs.**

**Muhammad Afzal Munif & others.....Defendants**

Dates of hearing: 02.05.2018, 14.09.2018 & 17.09.2018.

M/s Khawaja Shamsul Islam, Imran Taj, Khalid Iqbal, Shahzad Mehmood and Syed Amjad Ali Shah Advocates for Plaintiff.

Mr. Muhammad Haseeb Jamali and Ms.Shahreen Nusrat Chugtai, Advocates for Defendant Nos.1, 2 & 6.

Ms. Umaimah Anwar Khan & Ms. Shumaila, Advocates for Defendant Nos.3 & 4.

M/s. Tahmasp Rasheed Razvi, Abbas Rasheed Razvi, and Shoaib Khatyan, Advocates for Defendant No.5.

Mr. Ghulam Murtaza Malik, Advocate for Defendant Nos.7 & 8.

Mr. Abid Naseem, Advocate for Defendant No.14.

M/s. Nadir Khan Burdi & Ali Akbar Poonawala, Advocates for Defendant No.25.

Mr. Naeem Ahmed Rana, Advocate for Defendant No.30.

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**Muhammad Ali Mazhar, J.** This suit has been brought to entreat a declaration, injunction, cancellation, possession, directions, recovery and damages. Along with the plaint, the plaintiff has also filed **CMA No.5903/2017** under Order 39 Rule 1 & 2 CPC for restraining the defendant No.2 to 5 from counterfeiting

the signature of defendant No.1 and not to create any third party interest in the properties mentioned in paragraph 7 to 9 of the plaint with further restraining order not to transfer the shares and not to withdraw the amount from the banks. During pendency, the defendant No.1 has also filed **CMA No.7636/2017** under Order 7 Rule 11 CPC for rejection of plaint on various grounds including that the suit is barred under Section 42 of the Specific Relief Act and Sindh Mental Health Act 2013. The application is supported by the personal affidavit of defendant No.1 whose photograph is affixed on the affidavit with his signature on each page of his affidavit which is also duly attested by Saman Muneeb, Consul/HOC, Consulate General of Pakistan, Chicago 27.4.2017. (See page 95-part-11 of the court file)

2. The learned counsel for the plaintiff argued that the plaintiff is the eldest son of defendant No.1 and 2 and brother of defendants No.3 and 4. The perusal of the doctor's report dated 5.7.2016 available at page 87 shows that the defendant No.1 is suffering from dementia and he is unable to take care of his financial matters and look after his legal matters. The defendant No.1 was under the treatment of doctor for more than five years. This medical certificate was produced by defendants No.2 and 3 to the Banks confirming that the defendant No.1 is unable to take care of his financial matter as well as legal matter. The plaintiff's sister (defendant No.3) and brother in law (defendant No.5) have been taking advantage of the plaintiff's father's (defendant No.1) ill health and secretly and illegally transferring properties and assets in their own names and also forging his signatures on various documents.

3. He further argued that defendant No.1 has established well-known Chartered Accountant Firm i.e. Munif Ziauddin & Co. He also established M/s Tulip Industries (Pvt.) Limited and M/s Twin Star (Pvt.) Limited and out of love and affection, he inducted the plaintiff and defendant No.2 as Directors in the aforesaid companies. However in the last week of June 2016, the defendant No.1 came to know that his properties and assets had been deceitfully transferred in the names of defendants No.2, 3 and 4. The defendant No.1 then called the plaintiff and asked his help thereafter the plaintiff took the defendant No.1 to various financial institutions for reversing illegal transactions. The plaintiff also approached the defendant No.2 to discuss the matter but she refused to listen to the plaintiff and asked him to leave. The plaintiff also tried to visit his father but he was not allowed access by security guards posted at the bungalow by defendants No.2, 3 and 5. The plaintiff also filed a Constitution Petition No.1157 of 2016 against the illegal confinement of defendant No.1 but despite this Court orders dated 18.7.2016 for production, the defendants No.2, 3, 4 and 5 forcibly took the defendant No.1 abroad. The learned counsel also referred to an interpleader Suit No.1732 of 2016 filed by Bank Al-Habib Limited to establish that the defendant No.1 is not in a fit state of mind. The defendants No.2 to 5 took away the defendant No.1 from the territorial jurisdiction of this court, who at the moment is in illegal custody of defendant No.4.

4. So far as the application moved by the defendant No.1 under Order VII Rule 11 CPC, the learned counsel argued that admittedly Mental Health Act, 2013 pertains to the mentally disordered person. In terms of Section 29 of the aforesaid Act, it is clearly mentioned that the person

should be available within the jurisdiction of the court. In terms of Section 31 of the Mental Health Act, 2013 if a person is not available within 50 miles of the court then there should be a Commission. This Act amply demonstrates and proves that for the purpose of invoking the provisions of the Mental Health Act, 2013 the physical presence of the patient is sine qua non. The defendant Nos.2 to 5 have deprived the plaintiff from love and affection of his father and despite clear orders of this court they have taken away the defendant No.1 to USA. The learned counsel during arguments, on an oral motion conveyed that the plaintiff does not want to press prayer clause (i) and (j). It was further averred that in order to enforce the attendance on the basis of Mental Health Act, 2013, even this court has the powers under Order 10 CPC to examine the parties. The learned counsel concluded that the plaint involves questions of law and facts so it cannot be rejected. In support of his contention, the learned counsel for the plaintiff referred to **2017 YLR 1579, 2002 CLD 1466, PLD 2017 Sindh 438, 2017 MLD 785, 2017 YLR 1579, PLD 2018 Sindh 327, PLD 2016 Sindh 26, 2016 MLD 266, 2014 MLD 1537, 2014 YLR 444, 2013 CLD 1263, 2010 YLR 3313 and 2009 MLD 1378.**

5. The learned counsel for the defendant No.1, 2 & 6 argued that the plaintiff has filed this suit to harass and torture his ageing parents by disallowing and depriving them to have access to their own movable and immovable assets. The plaintiff is an unemployed man who has always been financially supported by defendants No.1 and 2. Despite his age and illnesses, the defendant No.1 is reasonably healthy and mentally fit person. He is able to take his own decisions and in the company of his wife is leading a satisfied life. It is

evident through the documents signed by the defendant No.1 in presence of officials at Embassy as well as before High Court of Sindh that he is a mentally fit person. It was further argued that the defendant No.1 has been residing in Bungalow No. 57, Main Khayaban-e-Hafiz, Phase V, DHA, Karachi for last three decades. He was never detained as claimed by the plaintiff. However, presently for the purpose of care and treatment the defendants No.1 and 2 have chosen to stay abroad. The defendant No.1 is fit to travel on his freewill. He is also receiving medical treatment and being well taken care by the defendants No.2 & 4. The plaintiff does not have any right over the assets and properties of the defendant No.1 nor is he in any manner entitled to the assets and properties of the defendant No.2. The properties and assets mentioned by the plaintiff in the plaint belong to defendant No.1 and 2 and they both have the sole right to use and dispose of these assets as per their own will and wishes. The properties claimed by the plaintiff as benami properties under defendant No.2's name are in fact properties purchased and owned by the defendant No.2 by her own funds hence are not benami. The same can be established from her Tax Returns filed with the plaintiff. The plaintiff has failed to disclose any enforceable right or entitlement on the properties owned and possessed by the defendant No.1 and defendant No.2.

6. He further argued that under the Sindh Mental Health Act 2013, it is the Court of Protection which is mandated to undertake such proceedings. This court in its Original civil Jurisdiction is not empowered to substitute itself as a Court of Protection under the Sindh Mental Health Act, 2013. The Mental Health Ordinance 2001 has been repealed by Section 61 of the Sindh Mental Health Act

2013. Under Section 29 read with Section 2 (e) of the Sindh Mental Health Act 2013, the proceedings are to be filed before the concerned Court of Protection, which under the law is the District Court. Under Section 30(d) of the Act the Court may examine a person or may appoint any person to report the mental capacity and condition of such mentally disordered person. The court may also appoint two or more persons to act as assessors to the Court in the said proceedings. He further argued that under Section 33(1) of the Act, the Court may appoint any suitable person to be the manager of such property. Under Section 46 of the Act, the High Court is the Appellate forum hence even for want of jurisdiction under this special enactment, the present proceedings are not maintainable.

7. It was further contended that the special law supersedes the general law. The suit falls under the Sindh Mental Health Act 2013 and not the general law. Section 9 of CPC will not over weigh Section 29 & 30 read with Section 2(e) of the special Statute. Section 60 of the Sindh Mental Health Act 2013 has an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The learned counsel referred to **2017 SCMR 831, 2017 SCMR 1218, 2017 PTD 884 and 2016 YLR 1739.**

8. The learned counsel further argued that no evidence has been provided in order to support that the properties belonging to the defendant No.2 are benami. None of the properties mentioned in Para 7 of the Plaint are gifted by defendant No.1 rather all were directly purchased by her from her own funds. If there was any right to claim these alleged benami properties then the same lies only with

the defendant No.1. In support of this contention, he referred to **2005 SCMR 577, PLD 2008 SC 146, 2017 YLR 224 and 2004 SCMR 1111**. It was further contended that the suit is barred under Section 42 of the Specific Relief Act. The plaintiff has no locus standi as none of the properties claimed are owned/purchased by him. The suit does not disclose any cause of action as it is based on untrue and fabricated facts. He further argued that on basis of the above factual narration, it is evident that on account of lack of cause of action and on account of jurisdiction the present lis is not maintainable. The learned counsel further referred to **PLD 2016 SC 55, 2017 YLR 138, PLD 2012 SC 211, PLD 2017 Sindh 528., 2016 CLC 1660, 2016 MLD 1514, 2017 CLC 40 and PLD 2012 Sindh 92**. The learned counsel concluded that all prayers made in the plaint are emanating from the single cause of action, i.e. the assumption of mental illness which is yet to be adjudicated upon by the competent forum. Merely withdrawing couple of prayers does not change nature of pleadings. The plaintiff cannot take refuge under Order 2 Rule 2 CPC as he has no cause of action. The plaint is liable to be rejected and injunction application is liable to be dismissed.

9. The learned counsel for the defendant No.3 and 4 argued that the plaintiff has filed this suit for the sole purpose of disallowing the defendant No. 1 to have access to his own property during his life time, so that the plaintiff may have larger share in the inheritance pool on the demise of the defendant No.1. The plaintiff never took interest in his parents well-being and did not provide any support or empathy for his father. Moreover, the plaintiff did not enjoy a good relationship with the defendant No. 1 and therefore the plaintiff thought that

his parents would transfer all their properties to the defendants 3 and 4, leaving him to suffer. The defendant No. 3 and 4 have been financially independent of the defendant No. 1 and 2 since their marriages. She further argued that in the Habeas Corpus Petition, the defendant No. 1 appeared to mark his attendance but unfortunately that day the work of the court was suspended. However, the defendant No. 1 went and swore in an affidavit giving his statement which was filed in CP.NO-S-1157 of 2016. The entire prayer clauses are focused on one point, that the defendant No. 1's wealth should be frozen so that the plaintiff can either have access now or later. It was further contended that the Sindh Mental Health Act 2013 is applicable for the evaluation of the mental health of a person. The plaintiff has no prima facie case. The plaintiff has no right over the property of the defendant No. 1. If the injunction is confirmed, irreparable loss will be caused to defendant No. 1 and 2. The learned counsel also supported the arguments advanced by the learned counsel for the defendant No.1 for rejection of plaint under Order 7 Rule 11 C.P.C.

10. Heard the arguments. The veneer of this lawsuit is primarily based on the notion that the defendant No.1 due to mental disorder and ailment of dementia is lacking ability to look after his affairs and matters related to his properties. The edifice of the plaint is built on various prayers including some consequential reliefs. The gist of the prayers implored in the plaint are that the defendant No. 2 to 5 are not allowing to meet the plaintiff to his father (defendant No.1); the defendant No. 2 to 6 have no right to transfer the shares, moveable or immovable properties in their names due to mental



incapacity of the defendant No.1; the properties mentioned in paragraph No.7 of the plaint in the name of defendant No.2 are benami therefore the defendant No. 2 to 5 have no lawful authority to claim the same; cancellation of transaction in respect of the shares as well as the accounts of defendant No.1 with defendant No. 7 to 11 and defendant No. 14 to 16 as the defendant No.1 is unable to take care of his legal as well as financial matters; directions have also been sought against the defendant No. 2 to 5 to produce the record of all movable and immovable properties belong to defendant No. 1 or any gift deed, thereafter the same may be cancelled; directions have been sought against the defendant No. 17 to hold inquiry and submit report regarding the forged signatures of the defendant No. 1 by defendant No. 3 to 6 on the cheque books, TDR shares transfer certificates; orders of this court have been sought to constitute medical board to examine the defendant No. 1 and submit the report; further directions have been sought against the defendant No. 2 to 5 to produce the defendant No. 1 before this court for physical examination; a request has been made to conduct inquiry under the provisions of Mental Health Ordinance, 2001 for the purpose of ascertaining as to whether the defendant No.1 is incapable of managing himself and his movable and immovable properties and pass an appropriate order under Section 30(3) of the Mental Health Ordinance, 2001; a further request has been made for the appointment of guardian/manager of the movable and immovable properties of the defendant No.1; restraining order has been claimed against the defendant No. 2 to 5 from entering into any transaction, misappropriating or putting to their own use any movable or immovable properties of the defendant No.1

and finally the plaintiff has also prayed for money decree in the sum of Rs.1 billion on account of damages payable by defendant No. 2 to 5 jointly and severally to the plaintiff on account of losses mentioned in the statement of claim. However during course of the arguments, the learned counsel for the plaintiff on oral motion addressed that he does not want to press prayer **clause (i) and (j)** which are in fact related to directions to the defendant No. 2 to 5 to produce the defendant No.1 in court and inquiry under the provisions of Mental Health Ordinance, 2001.

11. On 1.11,2013, the Sindh Mental Health Act, 2013 was promulgated which was made effective from 07<sup>th</sup> August, 2013. Under Section 61 of this Act, the provisions of Mental Health Ordinance, 2001 applicable to the Province of Sindh were repealed so for all intent and purposes when this suit was filed in the year 2017, the Sindh Mental Health Act, 2013 was in field, henceforth, the reliance placed by the plaintiff for the purposes of inquiry under the provisions of 2001 Ordinance was meaningless and inconsequential. The elementary examination or inquisition requires to be conducted is whether the defendant No.1 is suffering from mental disorder or not? The plaintiff has asserted that defendant No.1 is patient of dementia whereas some correspondence is also available on record with medical certificates that the defendant No.1 was suffering from dementia and in this regard the defendant No.2 who is the wife of defendant No.1 also communicated to the banks that he is not a mentally fit to look after his person and property. One financial institution has also filed interpleader suit in this court on the same basis that the defendant No.1 is suffering from dementia. This attribute of the case has not been denied by the counsel for the

defendant No.1 to 5 but in unison they also argued that in some point of time the defendant No.1 was suffering from dementia but later on after his proper treatment and medication he has got some improvement and now he is able to understand and look after his affairs independently. It is also an admitted fact that the same plaintiff has filed C.P. No.S-1157/2016 for issuing a writ of habeas corpus directing the SHO PS Darakhshan to produce defendant No.1 in the court. The learned counsel for the plaintiff admitted that this petition is pending in this court and at one point of time the court directed the Respondent No. 2 and 3 (wife and daughter of the defendant No.1 who are defendant No. 2 & 4 in this suit) to produce the defendant No.1 in court. The counsel for the defendant No.1 argued that on directions of the court the defendant No.1 appeared in the habeas corpus petition but on that date due to some strike or incident the court work was suspended therefore his presence could not be marked however on the same day, he sworn in affidavit which is available on record duly verified by ISMS department of this court.

12. The *raison d'être* of promulgating Sindh Mental Health Act, 2013 is to regulate the matters relating to mentally disordered persons vis-à-vis their care, treatment, management of their property and to encourage community care of such mentally disordered persons and further to provide for the promotion of mental health and prevention of mental disorder. To maintain the sanctity being a special law, it is clearly provided under Section 60 that the provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. In Section 2 of the Act, “mental

disorder” means a mentally ill person who is in need of treatment by reason of any disorder of the mind other than mental impairment and sever personality disorder whereas the “treatment of mentally disordered person” means the assessments and treatment of a mentally disordered person and shall include assessment, care, training, habilitation as well as rehabilitation techniques or measures as the case may be. Chapter V of the Act germane to the judicial proceedings for appointment of guardian of a person and manager of the property of the mentally disordered whereas the Court of Protection means a District Court having jurisdiction under this Act in the matters specified herein and designated as such by government. Under Section 29, the court of protection upon an application may direct an inquiry for ascertaining whether a person is mentally disordered and incapable of managing himself and his property. For the ease of reference, Section 29 is reproduced as under:-

**“29. Whenever any person is possessed of property and is alleged to be mentally disordered, the Court of Protection, within whose jurisdiction such person is residing may, upon application by any of his relatives having obtained consent in writing of the Advocate General of Sindh, by order direct an inquiry for the purpose of ascertaining whether such person is mentally disordered and incapable of managing himself, his property and his affairs”.**

Whereas Section 30 of the same Act provides the regulation of proceedings of the court of protection which is reproduced as under:-

**30. (1) The following provisions shall regulate the proceedings of the Court of Protection with regard to the matter to which they relate, namely:-**

**(a) Notice shall be given to the mentally disordered person of the time and place at which it is proposed to hold the inquiry;**

**(b) if it appears that personal service on the alleged mentally disordered person would be ineffectual, the Court may direct such substituted service of notice as it thinks fit;**

**(c) the Court may also direct copy of such notice to be served upon any relative of the alleged mentally disordered person and upon any other person to whom in the opinion of the Court notice of the application should be given;**

**(d) the Court may require the alleged mentally disordered person to attend, at such convenient time and place as it may appoint for the purpose of being personally examined by the Court, or to any person**

from whom the Court may desire to have a report of the mental capacity and condition of such mentally disordered person;

(e) the Court may likewise make an order authorizing any person or persons therein named to have access to the alleged mentally disordered person for the purpose of personal examination; and

(f) the attendance and examination of the alleged mentally disordered person under the provisions of clause (d) and clause (e) shall, if the alleged mentally disordered person be a woman who, according to customs of the country, ought not to be compelled to appear in public, be regulated by the law and practice for the examination of such persons in other civil cases.

(2) The Court, if it thinks fit, may appoint two or more persons to act as assessors to the Court in the said proceedings.

(3) Upon the completion of the inquiry, the Court shall determine whether the alleged mentally disordered person is suffering from mental disorder and is incapable of managing himself and his affairs, or may come to a special finding that such person lacks the capacity to manage his affairs, but is capable of managing himself and is not dangerous to himself or to others, or may make any such order it deems fit, in the circumstances of the case, in the best interests of such person.

13. Consistent with the literature accessible out of different websites, the disease such as Dementia and Alzheimer have been exemplified as under:

“some forms of dementia, such as Alzheimer's disease, are degenerative. They get worse over time. Other forms of dementia, such as vascular dementia, may be non-degenerative and may not get worse over time. Dementia occurs as a result of the death of brain cells or damage in parts of the brain that deal with our thought processes. This may follow other problems like a lack of blood or oxygen supply to these brain areas; a head injury (from boxing or whip lash after a car crash, for instance); pressure on the brain (from a tumor, for example); hydrocephalus (fluid build-up between the brain and the brain lining); a neurological disease (such as Parkinson's disease... The second most common type of dementia is vascular or multi-infarct dementia. This is caused by mini strokes that constrict blood flow and oxygen to the brain. Ref: <https://www.mentalhealth.org.uk/a-to-z/d/dementia>. Major neurocognitive disorder is a decline in mental ability severe enough to interfere with independence and daily life. The word dementia is related to a Latin word for mad or insane. Because of this, the introduction of the term neurocognitive disorder attempts to help reduce the stigma associated with both the word dementia and the conditions that it refers to. Dementia causes can be reversible or they can be irreversible and progressive. Potentially reversible dementia symptoms include those caused by depression, stroke, traumatic brain injury, certain medications and even bladder infections. Irreversible and progressive dementias include Alzheimer's disease and vascular dementia. Ref: <https://www.crisisprevention.com/Blog/July-2013/Major-Neurocognitive-Disorder-Dementia>. It is a form of insanity resulting from degeneration or disorder of the brain (ideo- pathic or traumatic but not congenital) and characterized by general mental weakness and decrepitude, loss of coherence and total inability to reason but not accompanied by delusions or uncontrollable impulses. Pyott v. Pyott, 90 III. App. 221; Hall v. Unger, 2 Abb. U. S. 510, Fed. Cas. No. 5,949; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; People v. Lake, 2 Parker, Cr. R. (N. Y.) 218.... Among the sub-divisions of dementia should be noticed the following: Acute primary dementia is a form of temporary dementia, though often extreme in its intensity and occurring in young people or adolescents, accompanied by general physical debility or exhaustion and induced by conditions likely to produce that state, as malnutrition, overwork, dissipation or too rapid growth. Dementia paralytic is a progressive form of insanity, beginning with slight degeneration of the physical, intellectual and moral powers and leading to complete loss of mentality or imbecility with general paralysis. Dementia praecox. A term applicable either to the early stages of dementia or to the dementia of adolescence but more commonly applied to the latter....Dementia occurring in persons of advanced age and characterized by slowness and

weakness of the mental processes and general physical degeneration, verging on or passing into imbecility, indicating the breaking down of the mental powers in advance of bodily decay. Tiett v. Shull. 36 W. Va. 5a3, 15 S. E. 146; Pyott v. Pvott, 191 HI. 280. 61 N. E. 88; McDaniel v. McCoy, 68 Mich. 332. 36 N. W. 84; llamon v. Hamon, 180 Mo. 685, 79 S. W. 422. Ref: <https://thelawdictionary.org/dementia/>. Dementia is the name for a group of symptoms caused by disorders that affect the brain. People with dementia may not be able to think well enough to do normal activities, such as getting dressed or eating. They may lose their ability to solve problems or control their emotions. Memory loss is a common symptom of dementia. People with dementia have serious problems with two or more brain functions, such as memory and language. Although dementia is common in very elderly people, it is not part of normal aging. Drugs are available to treat some of these diseases. While these drugs cannot cure dementia or repair brain damage, they may improve symptoms or slow down the disease. Ref:-<https://medlineplus.gov/dementia.html>. Clinicians can diagnose the syndromes of dementia (major neurocognitive disorder) and mild cognitive impairment (mild neurocognitive disorder) based on history, examination, and appropriate objective assessments, using standard criteria such as DSM-5. Brain imaging and biomarkers are gaining ground for the differential diagnoses among the different disorders. Treatments for the most part are still symptomatic. The impairment must be sufficient to interfere with independence in everyday activities. The diagnosis of Mild Neurocognitive Disorder, corresponding to MCI, is made when there is modest impairment in one or more cognitive domains. Ref: <https://www.ncbi.nlm.nih.gov/pmc/articles>

14. In the habeas corpus petition, the plaintiff alleged that his father (alleged detenu) is confined in the house No. 57, Khayaban-e-Hafiz Phase-V, DHA, Karachi and he requested to this court to issue writ of habeas corpus with the directions to the SHO PS Darakhshan to produce the alleged detenu in the court. In the present suit also, the plaintiff has mentioned the same address of the defendant No.1 and counsel for the defendant No.1 to 5 categorically stated that at one time the defendant No.1 appeared in the above petition but due to strike or some other incident the court work was suspended. The plaintiff has mentioned two addresses in the plaint, one is bungalow number as stated above with the present address of the defendant No.1 as 440, Flock Avenue, Naperville, Illinois, Chicago. It is an admitted position that at the moment the defendant No.1 is out of country so the counsel for the plaintiff argued that the court of protection has no jurisdiction to enforce the attendance so instead of filing application under the 2013 Act, the plaintiff has filed the present suit. The letters of the law clearly provides under Section 30 which I have

reproduced above that the court of protection may personally examine a person who is alleged to be mentally disordered person or any other person may also be appointed to report the mental capacity and condition of such mentally disordered person. The court of protection likewise may pass an order authorizing any person or persons to have access to the mentally disordered person for the purposes of personal examination. The court if thinks fit may also appoint two or more persons to act as assessors to the court in the said proceedings. The court of protection may also serve the alleged mentally disordered person through substituted service if the personal service would be ineffectual. Merely for the reasons that the defendant No. 1 is presently out of country does not oust or drive out the jurisdiction of court of protection which is not so helpless that may not enforce the attendance. At one fell swoop, this court in the pending habeas corpus petition has ample power and jurisdiction to enforce the attendance by applying different means and methods where the plaintiff can easily make a request for the production of the defendant No.1 who allegedly left the jurisdiction of the court during pendency. Even in the 2013 Act on filing application to the court of protection, nevertheless, the defendant No.1 is presently out of country but ample provisions have been incorporated in the law to deal with such type of exigencies and situations. The plaintiff may also apply to the court of protection for the appointment of any person on his own expenses who may visit the defendant No.1 and report his mental state to the court. The court of protection may also serve the mentally disordered person through Pakistan Embassy including the person in whose care the alleged mentally disordered person is said to be

living. The Sindh Mental Health Act, 2013 is a special Act made to deal and regulate the special situations and cases of mentally disordered persons with respect to their care, treatment and management of their property. Besides giving up prayer clause (i) and (j) on oral motion by the plaintiff's counsel (*which otherwise in my view not proper way to give up such prayer clauses as a fallback of his argument orally without applying in writing with plaintiff's affidavit*) still certain other prayers are in field in which the pith and substance is one and the same that the defendant No.1 is allegedly a mentally disordered person and in prayer clause (k) the plaintiff has specifically asked for the appointment of guardian and manager of the property of the defendant No.1 for which recourse is available to him to file appropriate application to the court of protection. In the presence of special law dealing with the special subject such type of declaration cannot be granted in the civil suit which does not postulate any precise and unambiguous legal character of the plaintiff to sue predominantly in the scenario when special law commands its overriding effect on the general law. In the case of **Major Retd. Pervaiz Iqbal vs. Muhammad Akram Almas (2017 SCMR 831)**, the apex court held that where special law provided elaborate mechanism and procedure to challenge certain action under the scheme of special law, recourse to general law and or challenge to such action that too through collateral proceedings are not approved. In the case of **Syed Mushahid Shah vs. Federal Investment Agency (2017 SCMR 1218)**, the apex court held where there is a conflict between special law and general law, the former would prevail over the later. In the case of **All Pakistan Newspapers Society vs. Federation of Pakistan (PLD 2004 S.C. 600)** the apex court held that in the



administration of justice determination of jurisdiction by the court seized with the matter is one of the important elements because if justice has been provided basing upon corum non judice order, it would have no legal sanction behind it. According to plaintiff's own assertion the defendant No.1 is suffering from the disease of dementia and Alzheimer and the literature and sources interrelated to medical sciences referred to above deciphers in clear terms that a person suffering from Dementia and Alzheimer's is considered to be a mentally disordered person even in the definition clause of 2013 Act, mental disorder means a mentally ill person who is in need of treatment by reason of any disorder of the mind other than mental impairment, therefore, the proper remedy was to approach the court of protection in all fairness rather than filing this suit for similar relief in this court which is otherwise an appellate court against the orders passed by the court of protection. **[See Section 46 and Chapter-V of 2013 Act].**

15. Now let me take up the attributes of benami transaction. In reality it means a transaction in the name of another person to describe and express a transaction of a property who holds the said property being an ostensible owner for its beneficial owner. In fact it is a genre of transaction where somebody recompenses for the property but does not get hold of it in his personal name. The person in whose name this type of property is purchased is called benamidar and the property so purchased is called the benami property. Despite the fact a benami property is purchased on the name of someone else, the person who sponsored the transaction shall be the real owner. By and large, the assets acquired in the name of spouse or a child for

which the money is paid from known cores of income is called the benami property. But a primary point at issue is who can challenge the benami transaction? The burden of proving whether a particular person is a benamidar is upon the person alleging the same. The probe whether the acquisition in the name of the wife by a husband is benami for his own benefit or not this entirely depends on the intention of the parties at the epoch of buying. The acid test for resolving the character of transactions is obviously the source of funds but it is not always conclusive and significant to the real ownership though it may prima facie show that the person who provided money did not intend to relinquish or give up the beneficial interest in the property but some other factors are also need to be considered i.e. possession of title documents, after purchase the conduct of the parties concerned in dealing with the property; who administers and oversees the property; who relishes the usufruct and who is recognized as titleholder in general as well as government departments. All these important physical characteristics depend on the facts of each case separately which requires concrete evidence to prove. In the case of **Ch. Ghulam Rasool vs. Nusrat Rasool (PLD 2008 S.C. 146)**, the apex court held that two essentials elements must exist to establish the benami status of the transaction. The first element is that there must be an agreement express or implied, between the ostensible owner and the purchaser for the purchase of the property in the name of ostensible owner for the benefit of such person and second element required to be proved is that transaction was actually entered between the real purchaser and the seller to which ostensible owner was not party. In the case of **Abdul Majeed vs. Amir Muhammad (2005 SCMR 577)**,

the apex court held that the question whether a transaction is benami character or not has to be decided keeping in view a number of factors/consideration. The source of purchase money is not conclusive in favour of the benami character of transaction though it is an important criterion and that where there are other circumstances showing that the purchaser intended the property to belong to the person in whose favour the conveyance was made, the essence of benami being the intention of the purchaser and the court must give effect to such intention. In a benami transaction the actual possession of the property or receipt of rents of the property is most important.

16. Here the plaintiff being son of defendant No.1 and 2 has asserted that his living father has purchased some properties in the name of defendant No.2 who is mother of plaintiff. Right now this subject matter is concerning to a husband and his wife. Only the defendant No.1 has a right to challenge that the defendant No.2 is ostensible owner of alleged properties but the plaintiff has no right and authority to challenge that his father has purchased some properties in his mother name and during the life time of his father he cannot challenge the factum of such transaction nor can claim any share in it merely for the reason of alleged ailment of his father. The plaintiff has no legal character to seek such type of preposterous and nonsensical declaration in which his legal character is not involved. Under Section 42 of the Specific Relief Act any person entitled to any legal character or to any right as to any property may institute a suit against any person denying his title to such character or right only then the court in its discretion may make a declaration that he is so entitled. The object of Section 42 is to

express in definite terms the kind of cases in which declaration of right, apart from other relief may be granted. No declaration can be allowed unless it is brought within the four corners of this Section which follows that a person who has no right to sue either because he has no legal character or right in any property cannot bring a suit for declaration. This cannot be invoked in the matters or mere sentiments which have no concern with the vindication of the plaintiff's title or status to any property. The plaintiff cannot be allowed to setup an abstract right to satisfy his ego or grudge against others. Where no right has been conferred on the plaintiff by any law, he cannot seek declaration on mere general principles. Even at this stage, the plaintiff cannot claim any right of inheritance during lifetime of his parents. After the death of a Muslim, his properties are expended, first for the payment of funeral expenses, debts and the legacies (wills), if any and after these imbursements, the residual are called hereditary assets. Under the Muslim law, an heir neither possesses nor can claim any right of inheritance before the death of his ancestor. It is only the death of a Muslim when succession opens and gives the right of inheritance to the legal heirs.

17. The judgment authored by me in the case of **Ilyas Ahmed versus Muhammad Munir & Others**, reported in **PLD 2012 Sindh 92**, is quite relevant in which I have discussed in detail the exactitudes and distinctiveness of Section 42 of the Specific Relief Act. The expression legal character has been understood as synonymous with the expression status. Section 42 of the Specific Relief Act applies only to a case where a person files a suit claiming entitlement to any legal character or any right to property which entitlement is denied by the

defendants or in denying which the defendants are interested. It cannot apply to a case where the plaintiffs do not allege their entitlement to any legal character or any right to property or its denial by the defendants. As a necessary corollary it cannot apply to a case where only the entitlement to the legal character or the property of the defendant is denied by the plaintiff. Section 42 would be attracted to a case in which the plaintiff approaches the court for the safeguard of his right to legal character or property but where right to his own legal character or property is not involved the suit is not maintainable. Section 42 does not permit an unrestricted right of instituting all kinds of declaratory suit at the will and pleasure of the parties but this right is strictly limited. In the same judgment, I further discussed the niceties of Order VII, Rule 11, C.P.C. which enumerates certain categories under which the court is called upon to reject a plaint but it is obvious that they are not exhaustive. It appears from the language that an incompetent suit should be laid at rest at the earliest moment so that no further time is wasted over what is bound to collapse not being permitted by law. It is necessary incidence that in the trial of judicial issues i.e. suit which is on the face of it incompetent not because of any formal, technical or curable defect but because of any express or implied embargo imposed upon it by or under law should not be allowed to further encumber legal proceedings. While deciding an application under Order VII, Rule 11, C.P.C, besides, averments made in the plaint other material available on record which on its own strength is legally sufficient to completely refute the claim of the plaintiff can also be looked into for the purpose of rejection of the plaint. Reference can be made to **PLD**

**1967 Dhaka 190, 2002 SCMR 338, 2000 CLC 1633, 1989 CLC 15, 1994 MLD 207, 1994 SCMR 826 and 2011 YLR 1473.**

18. The learned counsel for the plaintiff referred to the case of **Al-Tamash Medical Society vs. Dr. Anwer YE Bin Ju (2017 MLD 785)** this judgment was authored by me in which I held that where substantial question of law and facts are involved, the proper course is to frame issues and decide the same on merits in the light of evidence. The controversy in this case was related to allotment of an amenity plot in which I have introduced the concept of whistle blower. In my view, the judgment is not helpful to the case of plaintiff. In the case of **Najmuddin Zia vs. Asma Qamar (2013 CLD 1263)**, I held that the rejection of plaint on technical ground amounts to deprive a person from his legitimate right of availing legal remedy in undoing the wrong done in respect of such right. The facts of this case are also distinguishable. The counsel further referred to the case of **Aroma Travel Services vs. Faisal Al Abdullah Al Faisal Al Saud (2017 YLR 1579)** in which I held that misjoinder of parties or misjoinder of causes of action is a procedural objection which does not create any embargo therefore by no stretch of imagination the suit bad for misjoinder of the parties or misjoinder of causes of action can be held barred by any law. This case is also distinguishable. In the case of **Sabir Hussain vs. Board of Trustees of the Port of Karachi (2010 YLR 3313)**, I held that plaint cannot be rejected in piece meal as besides claiming declaration regarding validity of the letter, the plaintiff has also claimed recovery of dues and damages. In the judgment reported in **PLD 2017 Sindh 438 (Dr.Abdul Jabbar Khatak vs. IInd Senior Civil**

**Judge Larkana)** the learned division bench of this court held that it is settled principle of law that special law excludes general law. In this case the matter pertained to the Defamation Ordinance 2002 in which it is provided that the District Court shall have the jurisdiction to try cases under the Ordinance. Here too under the Special Act the plaintiff has to apply to the court of protection rather than seeking remedy through this civil suit. In the case of **Izhar Muhammad vs. M/s. Memon Housing Services (2009 MLD 1378)** the court held that where a cause of action is disclosed in the plaint, the plaintiff has a right to have a fair trial. This case is also distinguishable. A bare look to the averments of the plaint in the case in hand unequivocally shows that the entire infrastructure is based on the assertions that the defendant No.1 is mentally disordered person for which remedy for the appointment of guardian and or manger of the property lies to the court of protection under 2013 Act. In the case of **Amir Karim vs. Muhammad Asif (2014 MLD 1537)**, the court held that plaint cannot be rejected if cause of action is spelt out from the same assuming the plaint to be correct. This case is also distinguishable. In the case of **Shahzad vs. IVth Additional District Judge Karachi East (PLD 2016 Sindh 26)**, the learned division bench of this court held that even if one of the prayer is maintainable the plaint cannot be rejected.

19. A scant look to the prayer clauses and the set of circumstances, except prayer clause “n”, it is explicitly and distinctly perceptible that the plaintiff wants this court to constitute a medical board for evaluation and examination as to whether the defendant No.1 is a mentally disordered person or not? he further wants the appointment of a suitable person as guardian and

manager of movable and immovable properties of the defendant No.1 by this court. For the above reliefs, the plaintiff should have approached to the Court of protection under the provisions of Sindh Mental Health Act 2013. So far as the prayer challenging the alleged benami transaction with regard to the properties mentioned in paragraph 07 of the plaint, an exhaustive discussion on the characteristics of benami transaction has already been made out supra. In my considerate view, the plaintiff has no right and authority to challenge it which is a matter strictly between a living wife and living husband hence no declaration under Section 42 of the Specific Relief Act can be granted in favour of plaintiff right now. The plaintiff has also sought declaration that defendant No.2 to 5 have no right to transfer the shares, movable and immovable properties of the defendant No.1 who is mentally incapacitated and also prayed for cancellation of some transaction with further directions against the defendant No.2 to 5 to produce all record of movable and immovable properties of the defendant No.1. In my view all such reliefs are contingent and subject to the decision of the court of protection as to whether the defendant No.1 is still a mentally disordered person or not?. The plaintiff can also apply to the court of protection to appoint guardian of the defendant No.1 and the manager of his properties. At this stage the plaintiff cannot seek any cancellation in respect of the accounts and shares of the defendant No.1 nor can claim any inquiry through FIA for the alleged forge signatures made by defendant No.3 to 6. So far as relief of permanent injunction is concerned, it has been prayed as consequential relief. Unless the main relief of declaration is granted, the prayer for injunction cannot be considered



in isolation in the facts and circumstances set out in the plaint.

20. The plaint in the present suit comprises at least 30 paragraphs and in paragraph 24, the plaintiff has jot down the statement of claim on account of damages. The plaintiff has described the cause of action for filing this suit in paragraph No. 26 of the plaint. It is quite noticeable from this paragraph that nothing has been said with regard to the accrual of cause of action for setting into motion or lodge a huge claim of damages against the defendant No. 2 to 5. Here I would like to thrash out the claim in seriatim. The plaintiff has claimed damages on account of character assassination. The allegation of character assassination virtually means the defamation which is regulated by Defamation Ordinance, 2002. Any wrongful act or publication or circulation of false statement or representation made orally or in written or visual form which injures the reputation of person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike contempt or hatred is actionable defamation under Section 3 of the Defamation Ordinance, 2002. Any false oral statement or representation that amounts to defamation shall be actionable as *slander* whereas any false written, documentary or visual statement or representation made either by ordinary form or expression or by electronic or other means of devices that amounts to defamation shall be actionable as *libel*. The suit for recovery of damages on account of defamation is governed and regulated by Defamation Ordinance, 2002 in which before filing a suit certain mandatory requirements are to be fulfilled such as notice of action as provided under Section 8 of the

Ordinance. No action lies unless the plaintiff has within two months after the publication of defamatory matter has come to his notice or knowledge, given to the defendant, fourteen days' notice in writing of his intention to bring an action, specifying the defamatory matter complained of. Neither any such notice is attached which was tendered to defendant No. 2 to 5 under Section 8 of the aforesaid Ordinance nor any specific allegations have been incorporated in the plaint in what manner (whether libel or slander) the defendant No. 2 to 5 have caused any defamation or loss of reputation to the plaintiff. No date of alleged cause of action is mentioned which is necessary for determining the limitation which is one year in accordance with **Article 24 (for libel) and Article 25 (for slander)** of the **Limitation Act**. The plaintiff has also claimed huge amount of damages on account of malicious prosecution. The law of malicious prosecution is perfectly settled as stated in **Clerk and Lindsell on Torts, 9<sup>th</sup> Ed., at page 662** "It is obviously a grievance that an individual should be harassed by legal proceedings improperly instituted against him. If there is no foundation for them no doubt they will not ultimately succeed, but during their progress they may cause great injury. It is the right of everyone to put the law in motion, if he does so with the honest intention of protecting his own or the public interest or if the circumstances are such, be his motives what they may, as to render it probable prima facie that the law is on his side. But it is an abuse of that right to proceed maliciously and without reasonable and probable cause for anticipating success. Such an abuse of necessity may be injurious as involving damage to character or it may, in any particular cause bring about damage, to a person or property". (*Dhanjishaw Rattanji*

*Karani v. Bombay Municipality, A.I.R. 1945 Bom. 320 at p. 325*). Along with the plaint the plaintiff has only filed a copy of charge sheet No. 229 of 2016 submitted in Crime No. 329/2016 on 05.08.2016. This FIR was lodged by defendant No. 2 against the plaintiff under 506B/34 PPC. In order to claim damages for malicious prosecution it is well settled exposition of law that the plaintiff has to prove (i). *that he was prosecuted by the defendant* (ii) *that the prosecution ended in the plaintiff's favour* (iii) *that the defendant acted without reasonable and probable cause* and (iv) *that the defendant was actuated by malice*. All these elementary set of circumstances have to accumulate or mount up and if any of them is found lacking, the suit must be failed. According to Salmond the burden of proving absence of reasonable and probable cause is on the plaintiff, who thus, undertakes the notoriously difficult task, of proving a negative (***Salmond on Torts 12<sup>th</sup> Edition page 691***- Ref: *Law of Defamation and Malicious Prosecution by Mr. M. Farani*). It is translucent from the plaint and the cause of action allude to that the plaintiff has failed to depict any minutiae of alleged malicious prosecution. Even no date for this alleged cause of action is mentioned for the purposes of limitation which is one year under Article 23 of the Limitation Act from the date of acquittal or the prosecution is otherwise terminated. No judgment is attached to put on view that the plaintiff was acquitted from the charge and prosecution was culminated or terminated in his favour and if the case is still pending then it does not give any rise to lodge this suit on account of malicious prosecution pending adjudication of the proceedings in the court of competent jurisdiction. The plaintiff has also alleged the development of some chronic ailments due to unreasonable conduct of

defendant No. 2 to 5 but again nothing has been uttered for this cause of action nor any medical history, ailment and or treatment has been pointed out including the expenses if any borne on it. He has also claimed the expenses on account of successfully defending the criminal proceedings at different levels but for this also nothing has been articulated in essence. For other heads in which certain quantum of damages have been claimed are also without any utterance or expression of cause of action to try. On the strength of mere statement of claim alone without requisite details constituting a cause of action, the plaintiff is not entitled even to maintain the claim of damages against the defendant No. 2 to 5 and other officials. The suit framed in its present form even for the purposes of damages does not put into words any cause of action to sue.

21. According to Order II Rule 1 C.P.C, every suit as far as practicable is required to be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. After that, Rule 3 of Order II C.P.C envisions that plaintiff may unite in the same suit several causes of action against the same defendants jointly. Under Order VII Rule 1 C.P.C a number of mandatory requirements are provided which a plaint should contain. The most imperative and fundamental constituents are the facts constituting the cause of action and when it arose; the facts showing that the court has jurisdiction and the relief which the plaintiff claims (**see clause e, f & g of Rule 1 Order VII C.P.C.**). According to Order VI Rule 2 C.P.C. the pleadings of parties should contain the material facts. The purpose of pleading is to let the other party get the drift what the case it has to encounter. The material facts

which constitutes the cause of action has to be explicitly and expressly pleaded. The material facts should be stated with the certitude and definiteness. The term cause of action refers to the grounds on the basis of which the plaintiff claims a favourable judgment. It is basically a bundle or totality of essential facts which is necessary for the plaintiff to prove before he can succeed. The court may reject the plaint which is manifestly meritless, vexatious and does not disclose a clear right to sue. The provisions of Order VII Rule 11 CPC are not exhaustive of the circumstances in which the plaint may be rejected. The court may reject a plaint if a straightforward proscription or prohibition can be spelt out of any legal provision.

22. So far as the injunction application is concerned, it is well settled exposition of law that before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted than to the plaintiff from withholding it in the event of the legal right proving to be in his favour, the injunction may not be granted. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the

plaintiff, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendant, if the injunction is granted. Ref: the judgments authored by me in the case of **Hajj Organizers Association of Pakistan versus Federation of Pakistan (2017 MLD 1616)**, **MTW Pak Assembling v/s Shahzad Riaz Industries Pvt. Ltd. (2017 CLC 1140)**, **Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority (2010 MLD 1267)**, **Shahzad Trade Links versus MTW Pak Assembling Industries (Pvt) Ltd. (2016 CLC 83)** and **Roche Pakistan Limited Vs. Pakistan (PLD 2018 Sindh 222)**.

23. As a result of above discussion, I have reached to the conclusion that the plaint does not disclose any cause of action and it is also barred by Section 42 of the Specific Relief Act and Section 29, 30 and 60 of the Sindh Mental Health Act 2013 including all enabling provisions of the same Act. The C.M.A No. 7636/2017 moved under Order 7 Rule 11 C.P.C is allowed and the plaint is rejected. Consequently, the injunction application C.M.A No.5903/2017 is also dismissed.

**Karachi:**  
**Dated. 28.9.2018**

**Judge**