

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1498 of 2015  
*[Feroze Sajan and 3 others vs. Farzana Sajan]*

Dates of hearing : 16.08.2019, 21.08.2019  
and 07.10.2019

Plaintiffs  
*[Feroze Sajan and 3 others]* : Through Mr. S. Abid Hussain  
Sherazi, Advocate.

Defendant  
*[Farzana Sajan]* : Through Mr. Javed Akbar Bhatti,  
Advocate.

### *Case law cited by learned counsel for Plaintiffs*

1. PLD 1960 (W.P.) Karachi page-852  
*[Ismail Dada Adam Soomar vs. Shorat Banoo].*
2. PLD 1975 Karachi page-979  
*[Mohammed Bibi and 2 others vs. Abdul Ghani and 2 others].*
3. 1979 CLC page-338 [Karachi]  
*[Messrs Shalimar Ltd., Karachi vs. Raisuddin Siddiqui and 3 others].*
4. PLD 1965 (W.P.) Lahore page-550  
*[Aftab Nasir vs. Mst. Fazal Bibi and others].*
5. PLJ 1982 FSC page-178  
*[Mian Imtiaz Ahmad Khan vs. Islamic Republic of Pakistan]*
6. PLD 1972 Karachi page-653  
*[Mrs. Aiyasha Koreshi and another vs. Hishmatullah, Koreshi and another].*

### *Case law relied upon by learned counsel for Defendant.*

1. PLD 2010 SC page-569  
*[GhulamMurtaza vs. Mst. Asia Bibi and others].*
2. 2016 CLC page-569 (Sindh)  
*[Manzoor Butt through L.Rs. and 2 others vs. Mahmud Sufi and 7 others]*

3. 2014 YLR page-385 (Balochistan)  
*[Muhammad Hayat Khan vs. The State and another]*

**Other Precedent:**

**1992 MLD page-2515 [Karachi]**  
*(Major (Retd.) Syed Baqar Hussain Shah vs. Mst. Rashida Begum).*

- Law under discussion:**
- (1) The Trusts Act, 1882.
  - (2) The Code of Civil Procedure, 1908  
*[CPC].*
  - (3) The Qanoon-e-Shahadat Order, 1984.  
*[the Evidence Law].*
  - (4) Limitation Act, 1908.  
*[Limitation Law].*

**JUDGMENT**

**Muhammad Faisal Kamal Alam, J:** The present *lis* has been instituted by Plaintiffs for recovery of amount, *inter alia*, in respect of Defence Saving Certificates, from Defendant. Plaint contains the following prayer clause\_

*“On the facts and in the circumstances mentioned hereinabove, it is respectfully prayed that this Hon'ble Court may be pleased to pass a Judgment / Decree in favour of the plaintiffs against the defendant.*

- 1) *Directing the defendant to pay a sum of Rs.3,90,18,100/- on account of : -*
  - i) *Defence Saving Certificates having the face value of Rs.1,71,40,000/-.*
  - ii) *Interest recovered by her on encashment of Defence Saving Certificates amounting to Rs.58,78,700/-.*
  - iii) *Loss caused by the defendant on premature encashment of D.S.C amounting to Rs.1,59,99,400/-.*

- 2) *Return the Gold/Jewelry articles weighing 2210 grams in its original condition along with the precious stones and in alternate to pay a sum of Rs.106,08,000/- to the plaintiffs being the present market value of the Gold / Jewelry articles as mentioned in the list annexed with suit as per annexures P-41.*
- 3) *Return/pay a sum of Rs.5,60,500/- on account of cash of prize bonds to the plaintiffs which are taken by the defendant while leaving the house of plaintiff No.1.*
- 4) *Restrain the defendant from operating the Bank account No.000204233411 maintained with UBL Vault Branch, Karachi, and further transferring the funds placed by her in National Saving Schemes at National Saving Centre Soldier Baraz, Soneri Bank, Garden East Branch, Karachi, upon encashment of plaintiffs D.S.C., till the decision of the suit.*
5. *Any other better relief/s as this Hon'ble Court may deem fit and proper.”*

2. The case of Plaintiffs as mentioned in the plaint is that Plaintiff No.1 and Defendant were married on 22.03.1998 and out of the wedlock, two sons were born, namely, Imaad and Abdaal. The Parties hereto were living in a joint family system and since Defendant was a legally wedded wife of Plaintiff No.1, he used to blindly trust her and that is one of the reasons that Plaintiff No.1 opened following three bank accounts and at some point of time also purchased the Defence Saving Certificates (*DSCs*) having face value of Rs.1,71,40,000/- (rupees one crore seventy one lac forty thousand only) in the joint name of Plaintiff No.1 (Feroze Sajan) and Defendant (Farzana Sajan), whereas, Plaintiff No.2 was the nominee\_

<b>Sr.No.</b>	<b>Account No.</b>	<b>Bank</b>	<b>Branch</b>
1.	0361125	MCB	Main Branch, Karachi.

2.	01029647	Bank Al-Falah	Cloth Market, Karachi
3.	0865266	Barclays	Dawood Centre, Karachi

3. Per version of Plaintiffs, the DSCs, which are the main subject of controversy in the present proceeding, were purchased in the above manner, in order to ensure that if some mishap occurs, the remaining family members should not face legal complications and can readily encash the DSCs, for meeting their financial needs. It is averred that somewhere in the year 2012, when the Defendant joined Beaconhouse School, Clifton Campus, Karachi, as a Teacher, then relationship between Plaintiff No.1 and Defendant became strained and latter (Plaintiff No.1) discovered that the Defendant is not faithful to him and in this regard Plaintiff No.1 came across certain obscene text messages from the cell-phone of Plaintiff No.1 and her face book account. It is specifically pleaded that on 12.06.2015, the Defendant abruptly left the Plaintiffs' resident along with minor sons and other important articles from the house of Plaintiffs, particularly the subject DSCs. Plaintiff No.1 contacted the Office of National Saving Centre, Saddar, Karachi, and was informed that all the DSCs were encashed on 10.04.2015, 11.05.2015 and 09.06.2015 and the proceeds whereof were deposited in the Bank Account of Defendant maintained at United Bank Limited. Since the Parties hereto belong to Ismaili Community, Plaintiff No.1 approached the Ismaili Conciliation Board for Pakistan for settling the dispute amicably but this endeavor also failed, hence, the present proceeding.

4. The stance of Plaintiffs has been disputed by Defendant in her Written Statement, while questioning the maintainability of the present suit. Although Defendant has not disputed the factum of encashing the DSCs but with a rider that there was no agreement between Plaintiffs and Defendant

that the said DSCs could not be encashed before the maturity period and Defendant also contributed in purchasing the subject DSCs. Defendant has refuted the claim of Plaintiffs with regard to gold ornaments / jewelry and has averred that the same were gifted to Defendant by her parents on the occasion of her marriage with Plaintiff No.1; that Defendant was kicked out from the resident of Plaintiffs by the latter and she did not take anything from the house of Plaintiff. It is averred that on account of continuous threats and maltreatment, Defendant left with no choice but to seek separation from Plaintiff No.1 and filed the proceeding in the concerned Family Court. The allegation of unfaithfulness is also denied.

5. From the pleadings of the parties, following Issues were framed by the Court vide order dated 01.11.2016.

- “i. Whether the suit of plaintiffs is maintainable as framed?”*
- ii. Whether there was any written/oral agreement between the parties of the suit in respect of the encashment and utilization of the Defence Saving Certificates?*
- iii. Whether the defendant was added in Defence Saving Certificates in Trust having principal value at Rs.17,140,000/- and other Banks accounts bearing No.0361125 MCB, Main Branch, 01029647 Bank Al-Falah, Cloth Market and 0865266 Barclays, Dawood Centre Karachi, with Plaintiff No.1 so that in case of any mishap the plaintiffs and their survivors may not face any financial hardship for the utilization of their amount / savings?*
- iv. Whether the defendant has made any investment in Defence Saving Certificates having principal value at Rs.17,140,000/- and in the above accounts, if so what was the amount?*
- v. Whether the defendant become dishonest / disloyal towards the Plaintiff No.1 and by preplanning before seeking Khulla got encashed Defence Saving Certificates prematurely?*

- vi. *Whether the defendant taken away jewelry gold made weighing 2210 Grams Gold as well as cash and prize bonds worth Rs.560,500/- owned by the plaintiffs?*
- vii. *Whether the Plaintiffs are entitled to recover the amount along with the interest on Defence Saving Certificates amounting to Rs.21,878,100/- got encashed by defendant?*
- viii. *Whether the Plaintiffs are entitled to claim the losses amounting to Rs.15,999,400/- from the defendant on premature encashment of Defence Saving Certificates?*
- ix. *Whether the Plaintiffs are entitled for the relief(s) as claimed in suit, if yes to what extent?*
- x. *What should the decree be?"*

6. Both Plaintiffs and Defendant led the evidence by examining Plaintiff No.1 and Defendant herself. In the intervening period, the concerned Family Court passed the order for dissolution of marriage.

7. Findings on the above Issues are as under:-

ISSUE NO.i	As under.
ISSUE NO.ii	As under.
ISSUE NO.iii	Affirmative.
ISSUE NO.iv	Negative.
ISSUE NO.v	Affirmative.
ISSUE NO.vi	Negative.
ISSUE NO.vii	As under.
ISSUE NO.viii	Affirmative.
ISSUES NO.ix& x	Suit is decreed in the following terms.

## **REASONS**

### **ISSUE NO.i.**

8. Primarily monetary claims of Plaintiffs can be categorized into two; in category “A”, the Plaintiffs have stated that Defendant illegally encashed Defence Saving Certificates, which are mentioned in the form of Table in paragraph-7 of the Affidavit-in-Evidence and are not required to be reproduced in this decision, because same are not disputed. Category “B” is claim in respect of jewelry / gold and prize bonds, regarding which the Plaintiff No.1 has deposed that the same were taken away when Defendant left the house (of Plaintiff No.1) on 12.06.2015. With regard to the first category of claim, it is not disputed that she has encashed Defence Saving Certificates and had transferred the same in her independent Bank Account. Whether she was actually joint owner / beneficiary of the subject Defence Saving Certificates or not or her name was mentioned there being an erstwhile wife of Plaintiff No.1, is to be determined by giving findings on other Issues. *Secondly*, this suit was filed on 15.08.2015 and the cause of action as mentioned in the plaint started from 15.06.2015, therefore, for bringing such type of proceeding in respect of a monetary claim, the prescribed period of limitation is three years in terms of Articles 48 and 49 of the Limitation Act, 1908, thus, suit is maintainable.

### **ISSUES NO.ii, iii AND iv.**

9. All these three Issues are interlinked and pivotal for determining the controversy involved.

10. To substantiate his claim that although the subject Defence Saving Certificates (DSCs) were purchased from aforementioned joint Bank Accounts of Plaintiff No.1 and Defendant, but exclusive funds of Plaintiff

No.1 except DSCs having **serial numbers 557, 558/2004 dated 22.07.2003**, which were purchased through the joint account of Plaintiffs No.1 and 3 (Mst. Zarina, mother of Plaintiff No.1), he has produced following documents, which have been exhibited as **P/2 to P/49\_**

- i. A Summary of Defence Saving Certificates showing the Registration number, Certificate number, Principal amount, date of purchase, date of maturity and deduction of withholding tax.
- ii. Different Application Forms issued by National Saving Centre for purchase of subject Defence Saving Certificates (DSCs).
- iii. Statement of Accounts of the afore mentioned Banks in which both Plaintiff No.1 and Defendant were joint Account Holders. In these Statement(s) of Accounts of the above Banks, viz. Muslim Commercial Bank (MCB), Bank Al Falah and Barclays Bank, various amounts of different dates, which correspond to the purchase of DSCs, are reflected.
- iv. Various cheques drawn on the above Banks favouring National Saving Centre.
- v. Details of encashment of subject DSCs, bearing Official Stamp of National Saving Centre, Sadar, Karachi.

11. Authenticity of the above documents / exhibits is not disputed in the evidence.

In order to appreciate rival testimony of Plaintiff No.1 and Defendant, the above exhibits and in particular Application for Purchase of DSCs have been perused. Common feature in all these applications for purchase of DSCs is that it is **(i)** in the joint name of both Plaintiff No.1 and Defendant; **(ii)** DSCs are payable to either, that is, (Plaintiff or Defendant No.1); **(iii)** Zahra Sajan, the Plaintiff No.2 and real sister of Plaintiff No.1



(Feroz Sajjan) is mentioned as Nominee. All such documents / Applications for Purchase of Certificates are signed by both Plaintiff No.1 and Defendant, who at the relevant time were husband and wife.

Undisputedly and interestingly, the DSCs purchased from the joint Bank Account of Plaintiff No.1 and his mother Mrs. Zarina Sajan / Plaintiff No.3 **also has the same pattern as mentioned above.** These are undisputed documents (at pages-47 and 49 of the evidence file). On page-47, a copy of cross cheque favouring National Saving Centre for a sum of Rs.1,640,000/- (rupees sixteen lac forty thousand only) dated 19.01.2010 is available and this cheque bears the name of Plaintiffs No.1 and 3; whereas on page-49 the above prescribed Application Form is produced in which it is mentioned that Defence Saving Certificates equivalent to the above amount through payment of cheque drawn on Standard Chartered Bank, Clifton, Karachi, have been purchased, but in the joint name of Defendant and Plaintiff No.1.

12. Plaintiffs have throughout pleaded and testified the motive and purpose of purchasing the DSCs in the joint names of Plaintiff No.1 and Defendant, while mentioning Plaintiff No.2 (sister) as Nominee, which was to meet any exigency or mishap; then surviving family members should not face difficulty. It is categorically stated and testified by Plaintiff No.1 that all the subject DSCs were in the joint name of Defendant because she being wife of Plaintiff No.1 and part of family, it was a natural course of thing to purchase such DSCs in the joint name from the joint accounts of Plaintiff No.1 and Defendant (already mentioned herein-above). It is further deposed (by Plaintiff No.1) that all those DSCs were to be encashed at their respective maturity dates and not otherwise, for getting optimum benefits, while specifically stating that all the subject DSCs were in the joint name of Defendant as trust and not joint ownership.

13. Although the Plaintiff No.1 in his cross-examination has acknowledged that there was no written agreement between him and Defendant about purchase of subject DSCs, but in the same breath he has also stated that same were to be treated in trust. Similarly, to a specific question Plaintiff No.1 has admitted that Defendant being a joint owner has right to encash the subject DSCs, but again qualified this by deposing that she could not have encashed the DSCs without informing and permission of Plaintiff No.1. With regard to the evidence of Plaintiffs, that almost all the subject DSCs were exclusively purchased from the funds / finances of Plaintiff No.1 except DSCs having serial numbers 557, 558/2004 dated 22.07.2003, which were purchased through the joint account of Plaintiffs No.1 and 3, as already discussed in the foregoing paragraphs, in his cross-examination, the Plaintiff No.1 could not be contradicted on this material aspect. He has specifically answered a question that different Bank Statements produced in the evidence show the rental income of Plaintiff No.1 from various properties. These Bank Statements, which are produced in the evidence and have been exhibited, have positive evidential value because they are official documents issued by the Banks and not challenged as such by Defendant. Plaintiff No.1 has also deposed that Defendant No.1 had no source of independent income till she joined Beacon House School in March, 2012 and upto June 2014, her salary was Rs.14,000/- (rupees fourteen thousand only) per month.

Conversely, Defendant in her cross-examination has stated that her salary was Rs.25,000/- (rupees twenty five thousand only). In her Affidavit-in-Evidence/Examination-in-chief, Defendant has stated that Plaintiff No.2 (real sister of Plaintiff No.1) was made nominee in order to meet any sudden or accidental death of Plaintiff No.1 or Defendant, but during their life time, such nomination of Plaintiff No.2 has no scope. In the same paragraph-8 of her Affidavit-in-Evidence / examination-in-chief, she has admitted that subject DSCs were



of face value of Rs.171,40,000/-, while maintaining (in paragraph-13) of Affidavit-in-Evidence that *“Plaintiff No.1 with love and affection jointly purchased DSCs with effect of no term and condition.....”*. In her cross-examination she has testified that her salary used to be deposited in her separate Bank Account No.000204233411 at United Bank Limited, Vault Branch. She has admitted that the Defendant encashed the subject DSCs having principal face value of Rs.171,40,000/- (rupees one crore seventy one lac forty thousand only). She has further admitted that “It is correct to suggest that I have also drawn the interest amount of Rs.58,78,700/- upon the principal amount. It is correct to suggest that I encashed the above DSCs prematurely. It is correct to suggest that I lost the interest amount of Rs.1,59,99,400/- due to my encashment of certificates prematurely”. She has further admitted that the entire proceeds were deposited by Defendant in her individual Bank account. The Defendant earlier in the evidence refused to answer a question that where the money has been transferred by her; however, on a later date of evidence proceeding, to a specific question she has admitted that after encashment of subject DSCs she opened another Bank Account at Binori Town Branch of United Bank Limited, Karachi, being Account No.225074374 ,for transferring the entire proceeds. With regard to source of income, **contrary to her Affidavit-in-Evidence / examination-in-chief**, in her cross-examination, she has acknowledged that Plaintiff has inherited two properties, even though they are in bad condition, but a portion of this building are on rent. She has further acknowledged that after encashment of subject DSCs she filed aforementioned Family Suit for dissolution of marriage by Khula. She has further admitted that from her independent UBL Bank Account, no investment was made in purchasing DSCs, while denying the suggestion that name of Defendant in the subject DSCs was mentioned as a trustee.

14. The deposition of Defendant about her source of income and purchase of Special Saving Certificates / Behbood Saving Certificates having face value of Rs.65,41,679.12 is also **belied** by the documentary evidence produced by the Defendant herself. These Behbood Saving Certificates are produced by Defendant with her evidence as Exhibit-**D/1** to **D/7**. All these Certificate are in the name of 'Farida Mansoor'; whereas Investment Certificates issued by National Saving Centre (Government of Pakistan) produced as Exhibit-**D/9** (by Defendant), also state that certain Bahbood Saving Certificates representing an investment of Rs.Three Million, which is still intact, are in the name of 'Mansoor Ali', that is, father of present Defendant. None of the above Saving/Behbood Certificates are in the name of Defendant, nor, she is able to prove any nexus between the above Saving/Bahbood Certificates and encashment of subject DSCs.

15. The above testimony of Parties leads to the conclusion that Defendant did not encash the subject DSCs with the consent of Plaintiff No.1, as deposed by Defendant in her Affidavit-in-Evidence / examination-in-chief. **Secondly**, specific assertion of Plaintiff No.1 could not be disproved by Defendant that she pre-planned everything including usurpation the subject DSCs and discussing the same with her sister, *inter alia*, because record of e-mail exchanged between Defendant and her sister, are produced in his evidence by Plaintiff No.1, as Exhibits-P-44 to P-44/6 and particularly Exhibit-P/44/5, in which sister (Faiza) asked Defendant about her planning to leave Plaintiff No.1 and in respond to this she answered that ***'I have everything in control here so dont worry about me'***. ***'He doesnt know as yet that im planning all this'***, have not been challenged as such. Plaintiff No.1 was not cross-examined on this material

aspect of the case; so also, Defendant in her testimony has not asserted anything contrary on this factual aspect of the case.

16. If the encashment of subject DSCs would have been done by Defendant in routine course being a co-owner (as set forth by Defendant) then the Plaintiffs and particularly Plaintiff No.1 would be in knowledge of the same and sale proceeds from these subject DSCs would have and should have been landed in the afore-mentioned three joint Bank Accounts of Plaintiff No.1 and Defendant and not in the newly opened Bank Account in UBL, solely operated by Defendant, as admitted by her in the foregoing paragraphs, and which was opened only for this purpose (to transfer sale proceeds of subject DSCs). The conduct of Defendant clearly shows her *mala fide* and dishonesty. Even DSCs {numbers D-557-558/2004 dated 22.07.2003, as referred above}, having face value of Rs.1,640,000/- (rupees sixteen lacs forty thousand), which were purchased from the **incomes / funds of Plaintiffs No.1 and 3**, but mentioned the Defendant as joint owner and Plaintiff No.2 (sister) as Nominee, were also surreptitiously encashed by Defendant.

The above discussion concludes in holding that the subject DSCs were purchased primarily either from the incomes/ funds of Plaintiff No.1 and that of latter and Plaintiff No.3 (the ones purchased from the joint bank account at Standard Chartered Bank) and Defendant was not a joint owner as claimed by her, but in fact a trustee and Plaintiffs in this regard have proved their case including **the motive**, that in order to meet any eventuality, mishap or exigency, the subject DSCs were purchased in the joint name of Plaintiff No.1 and Defendant, and Plaintiff No.2 (sister of Plaintiff No.1) was mentioned as Nominee. Defendant was not authorized to dispose of / sell (encash) the subject DSCs even before the premature date, causing financial losses to Plaintiffs No.1 and 3.

17. Adverting to the case law cited by learned counsel for Defendant, gist of which is that motive in benami transaction is one of the main determinative factors and not the source of finance; burden of proof is on Plaintiffs for successfully claiming a banami transaction; gift and benefits given to a lady at the time of her marriage except dower amount, cannot be claimed back by her husband. The cited reported decisions have been carefully examined, but, they are distinguishable and rule laid down therein are not applicable to the peculiar facts of the case, which have been discussed in the foregoing paragraphs.

In view of the above, it is not necessary to discuss the reported decisions relied upon by Plaintiffs' legal team except *Ismail Dada case [PLD 1960 (W.P.) Karachi page-852]*, which was also considered in the subsequent Judgment of Baqar Hussain case (*ibid*) [1992 MLD page- 2515 (Karachi)]. In *Ismail Dada case* also the dispute was between husband and wife. The learned High Court has discussed in detailed the criteria of judging the intention of a donor, who intended to transfer the property in the name of donee's wife. It should be clarified that here that the terms donor and donee are used in general sense and should not be misunderstood for a transaction of gift under the Islamic Law. In this reported decision, one of the main properties was held to be in the actual ownership of appellant (husband) and not respondent (wife). It was held, that when a property is purchased from the income of husband in the name of wife, the principle of English law that such a purchase is assumed to be a purchase for the advancement of the wife, does not apply here in Pakistan. The determinative factor about intention / motive can be deduced from the surrounding circumstances and the subsequent conduct in so far it is relevant to the understanding of the initial intention. In the present *lis* it is already discussed in the foregoing paragraphs, that the name of the

Defendant in all subject DSCs was inserted simply because she was wife of Plaintiff No.1 and the subsequent conduct and acts of Defendant, *inter alia*, encashing the subject DSCs along with accruals and transferring the entire sale proceeds into her independent Bank account and not the joint Bank Accounts maintained by her and Plaintiff No.1, are sufficient to hold that she was not the joint owner but a trustee and is guilty of breach of trust. The motive for purchasing the subject DSCs in the joint name of Plaintiff No.1 and Defendant with Plaintiff No.2 (sister of Plaintiff No.2) being Nominee, has also been established and discussed in the above paragraphs.

This controversy can also be seen from a different angle. Sections 81 and 82 (in particular) of The Trusts Act (*ibid*) as judicially interpreted, are also applicable here. For a ready reference both provisions are reproduced herein under\_

### ***Section 81***

**“81. Where it does not appear that transferor intended to dispose of beneficial interests.** Where the owner of property transfers or bequeaths and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

#### Illustrations

- (a) A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.
- (b) A conveys to B two fields. Y and Z, and declares a trust of Y, but says nothing about Z. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in Z. B holds Z for the benefit of A.
- (c) A transfers certain stock belonging to him into the joint names of himself and B. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the stock during his life. A and B hold the stock for the benefit of A during his life.
- (d) A makes a gift of certain land to his wife B. She takes the beneficial interest in the land free from any trust in favour of A, for it may be inferred from the circumstances that the gift was for B's benefit.



*Section 82*

**“82. Transfer to one for consideration paid by another.** Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.”

**{Underlined to add emphasis}.**

In this regard, afore referred decision of Baqar Hussain Shah case (1992 MLD page-2515) is relevant, wherein, *inter alia*, a discussion has been done on benami transaction in the light of various well known decisions. It would be advantageous to reproduce here the relevant portions from the said Judgment\_

*“In the case of Muhammad Bibi and 2 others v. Abdul Ghani and 2 others PLD 1975 Kar. 979, Fakhruddin G. Ebrahim, J. (as he then was) has decreed as under: ---*

*“....It is now well settled that the source of purchase money is not conclusive in favour of the benami character of a transaction though it is an important criteria. Where there are other circumstances showing that the purchaser intended the property to belong to the person in whose favour the conveyance was taken, the essence of benami being the intention of the purchaser, the Court must give effect to such an intention. The law has been well summed up by Mr. K.A. A. Qamaruddin in his book “Law of Benami Transactions in India and Pakistan” at pages 86 and 87 as follows: ---*

*‘It would, therefore, seem clear upon the authorities cited so far that there is no conclusive presumption, either in favour of or against, benami transfers. Whatever presumption may arise from a transaction which is benami, such presumption is rebuttable. The long line of decisions of different High Courts in British India and the Privy Council firmly established the rules that in a benami transfer or purchase the source of purchase money for acquisition of the property must come from someone other than the ostensible transferee of the purchaser, that there will always be an initial and primary presumption in benami that the property belongs to the real purchaser. But it is also a well settled and established rule of law, that notwithstanding that doctrine of advancement does not apply in India and Pakistan, the presumption of resulting trusts in benami transfers is always liable to be rebutted upon evidence that the purchaser, grantor or donor intended to benefit the person in whose name the property was acquired and the*

*conveyance of the legal estate was taken. And, it seems necessary to point out here that this doctrine of Indo-Pakistani law of “Intention to Benefit” has not only been established by judicial decisions but the very essence of it is contemplated and embodied in section 82 of the Trusts Act, 1882, which deals, as we have seen earlier, with the application of the principles of resulting trusts in benami purchasers...”*

18. Summation of the above discussion is that **Issue No.ii is replied accordingly being subservient to the finding on Issue No.iii, which is answered in Affirmative** that Defendant was added / joined in subject DSCs as a trustee. In view of the admission of Defendant, **Issue No.iv is answered in Negative** that Defendant did not make any investment in purchasing of DSCs.

**ISSUE No. v.**

19 It is averred in the plaint as well as in the Affidavit-in-Evidence / examination-in-chief about the objectionable conduct of Defendant. To substantiate this assertion, the e-mails of Defendant with other persons and other record have been produced in the evidence by Plaintiff No.1 along with the cellular phone of Defendant, containing such record as Exhibit P/51 and C.D as P 51/A. Significantly Plaintiff No.1 has not been cross-examined on this material part of his evidence, for impeaching credibility. On the other hand, Defendant in her cross-examination although denied that the above record produced by Plaintiff is generated from the e-mail address used by Defendant, or she ever used the cell numbers as mentioned in her cross-examination, but, on the other hand, she has admitted that pages-533 and 597 of the evidence file containing part of such record, showing picture of Defendant, are correct; but, Defendant has disputed the conversation mentioned on these two pages. Page-597 only contains the picture of Defendant whereas page 533 is the conversation record of Defendant with some other person. Evidence of Defendant to this extent is not acceptable, because it is a settled rule that one cannot

approbate and reprobate at the same time. Page-533 of the evidence file contains highly objectionable content, which is not necessary to discuss here. Applying the settled rule of appraisal of evidence, this part of testimony of Plaintiff No.1 is held to be gone unchallenged. Resultantly,

**Issue No.V is answered in Affirmative.**

**ISSUE No. vi.**

20. The onus is on Plaintiffs to prove this claim as envisaged under Article-118 of the Evidence Law, which has not been discharged. Since jewelry and gold ornaments were in use of Defendant being (former) wife of Plaintiff No.1, therefore, if the law permits, the Plaintiff No.1 can institute an independent proceeding in this regard, which if instituted, can be decided on its own merits. Similarly, since no positive evidence is led by Plaintiffs in support of their claim about cash and prize bonds worth Rs.560,500/- (rupees five hundred sixty thousand five hundred only), thus this claim of Plaintiffs fails. **Hence, Issue No.vi is answered in the above terms.**

**ISSUES NO.vii**

21. In view of the above discussion and determination of Issues **i.** to **v.**, this Issue is also answered in affirmative, because, Defendant herself admitted that she has received an interest of Rs.5,878,700/- (rupees five million eight hundred seventy-eight thousand seven hundred only) on the subject DSCs having face value of Rs.17,140,000/- (rupees seventeen million one hundred forty thousand only), therefore, Defendant is liable to return the above two amounts to Plaintiff No.1 and 3. **Issue is answered accordingly.**

**ISSUE NO.viii**

22. To a specific question, the Defendant has admitted in her cross-examination that due to premature encashment of subject DSCs, she lost the

amount of Rs.15,999,400/- (rupees fifteen million nine hundred ninety-nine thousand four hundred only). Since it has already been determined that she was not the co-owner who can take such decision of encashing the DSCs prematurely, therefore, loss of Rs.15,999,400/- (rupees fifteen million nine hundred ninety-nine thousand four hundred only) since has been admitted by Defendant, therefore, this loss is actually incurred mainly by Plaintiff No.1 and partly by Plaintiff No.3 (as discussed above, as some DSCs were purchased from the common funds/income of Plaintiffs No.1 and 3). **Issue No.viii is answered in Affirmative.**

**ISSUES NO.ix AND x.**

23. In the above terms this *Lis* is decreed in the following terms:

- i. Defendant is also liable to return Rs.171,40,000/- (rupees seventeen million one hundred forty thousand only), being the admitted face value of the subject DSCs together with interest amounting to Rs.5,878,700 /- (rupees five million eight hundred seventy-eight thousand seven hundred only) to Plaintiffs No.1 and 3.
- ii. Defendant is further liable to return the loss amount of Rs.15,999,400 /- (rupees fifteen million nine hundred ninety-nine thousand four hundred only) to the Plaintiffs.

Thus, in total the Defendant is liable to pay / return a sum of Rs.39,018,100/- (rupees thirty-nine million eighteen thousand one hundred only) to the Plaintiffs.

24. Parties are left to bear their own costs.

**JUDGE**

**Karachi.**

**Dated: 20.04.2020.**

M.Javaid.PA