IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

HCA No. 340 of 2006

Appellants	:	Mst. Tahira Begum and 2 others, through Shahenshah Hussain, Advocate.
Respondent No.1	:	Mst. Nasira Ansari, through, Aminuddin Ansari, Advocate
Respondents Nos. 2 to 7	:	Nemo
Date of hearing	:	19.10.20, 17.11.20, 02.12.20, 16.12.20 and 29.03.21.

JUDGMENT

YOUSUF ALI SAYEED, J - The captioned Appeal impugns the Judgment and Decree dated 07.08.2006 in Suit No.739 of 1993 (the "**Suit**"), with the central protagonists in that matter being kith and kin - the Appellant No.1 being the widow of the late Nasiruddin Ansari (the "**Deceased**") and mother of their two sons, the Appellants Nos. 2 and 3, and their five daughters, the Respondents Nos. 1 to 5, with the Suit having been instituted by those Respondents so as to espouse a share in Plot No.C-35 in Block-9, Works Cooperative Housing Society, Gulshan-e-Iqbal, Karachi and House No. A-153, Block-L, North Nazimabad, Karachi (hereinafter referred to individually as "**C-35**" and "**A-153**" and collectively as the "**Disputed Properties**"), alleging that the same were held benami by the Appellant No.1 for the Deceased, hence, as in the case of C-35, could not have been sold by her, nor, as in the case of A-153, been gifted to the Appellant No.2.

2. As it transpires, the Deceased had passed away as far back as 20.01.1985, with SMA Nos.104 and 105 of 1985 then being filed before this Court, with the former seeking the grant of a Letter of Administration in respect of a single immovable property bearing No.3D-28/51, Block, Nazimabad, and the latter seeking the grant of a Succession Certificate in respect of the amount left by the Deceased in his bank accounts and provident fund.

3. Both of those SMAs were granted with the consent of all the legal heirs, without any cavil to the exclusion of the Disputed Properties, and the Respondents Nos. 1 to 5 apparently having received their due share of the sums standing to the credit of the bank accounts and provident fund and also received their share of the monetary value of the sole immovable property that was the subject of the grant, whereafter they executed a Deed of Relinquishment in favour of the Appellant No.3, as was then duly registered.

4. It is in that backdrop that the Suit came to be filed several years after the demise of the Deceased, with it being prayed *inter alia* that the Court be pleased to:-

> "a. Declare that the Property No. C/35, Block-9, Works Cooperative Society, Gulshan-e-Iqbal, Karachi and House No. A-153, Block-L, North Nazimabad, Karachi, which at the time of death of Plaintiffs' father late Nasiruddin Ansari, were in the name of Defendant No.1 Mst. Tahira Begum being BENAMI properties of late Nasiruddin Ansari belonged to all the heirs of late Nasiruddin Ansari.
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> b. Declare that all moveable properties left by the deceased Nasiruddin Ansari in House No.A-153, Block-L, North Nazimabad, Karachi namely jewelry, furniture, household goods, electronic goods including TV, fridge, etc including a car in

the name of his son Mr. Rashid bin Nasir valued at Rs.200,000/- (Rupees Two Lacs only) also belonged to late Nasiruddin Ansari and in terms of the amicable settlement made by the Defendants and the Plaintiffs after the death of late Nasiruddin Ansari, belonged to all legal heirs of Nasiruddin Ansari and remained as trust properties in the hands of Defendant No.1 Mst. Tahira Begum.

c. Declare that the Property No. C/35, Block-9, Works Cooperative Society, was sold in November, 1992 by the Defendant No.1 secretly under the influence of her sons in order to deprive the Plaintiffs their legitimate share in the said property without their consent and knowledge.

d. Declare the transfer of the Property No. A-153, Block-L, North Nazimabad, Karachi by way of gift also was made by the Defendant No.1 under the undue influence of Defendant No.2 and being without the written consent of the Plaintiffs, was ab-initio void and illegal.

e. Declare that the Plaintiffs being the legal heirs of late Nasiruddin Ansari are the co-owners in the Properties No. C/35, Block-9, Works Cooperative Society, Gulshan-e-Iqbal, Karachi and House No. A-153, Block-L, North Nazimabad, Karachi and the moveable properties including car in the name of Defendant No.2 which are still in the custody of the Defendant No.1 are the estate left by the late Nasiruddin Ansari.

f. Declare that the Plaintiffs are entitled for the share of rent in respect of house property House No. A-153, Block-L, North Nazimabad, Karachi from the Defendants No.2 and 3 who are drawing rent allowances from their employer Pakistan Steel Mills and are not paying any rent/share of rent accruing to the Plaintiffs.

g. Declare that the Plaintiffs are entitled for profits accruing on their share of sale proceeds of Property No. C/35, Block-9, Works Cooperative Society, Gulshan-e-Iqbal, Karachi which the Defendant No.1 Mst. Tahira Begum sold on 16.11.1992 and has handed over sale proceeds to Defendants No.2 and 3 who are enjoying the fruits of earning out of the investments made by them on account of sale of property No. C/35, Block-9, Works Cooperative Society, Gulshan-e-Iqbal, Karachi.

h. Issue decree for compensation/damages and to the extent of shares of the Plaintiffs at market value of the suit properties both immoveable and moveable.

i. Costs including damages and mesne profits at the rate of Rs.1000/- (Rupees One Thousand only) per day arising from 1st day of February, 1985 to the date passing the decree and till the date of satisfaction of decree."

5. The Respondents Nos. 1 to 5 based their claim and cause action on an amicable settlement said to have been arrived at between them and the Appellants in respect of the Disputed Properties (the "**Alleged Settlement**"), which was explained in Paragraph 3 of the Plaint as reproduced below:

> "3. That after the death of late Nasiruddin Ansari legal heirs of late Nasiruddin Ansari named above, arrived at an amicable settlement as under:-
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> > "That the movable and immovable properties which stood in the name of late Nasiruddin Ansari be distributed among the legal heirs according to share of inheritance; and the immovable properties purchased by late Nasiruddin Ansari in the name of his wife Mst. Tahira Begum i.e. House No.A-153, Block L, North Nazimabad, Karachi with all the furniture and fixture, household goods, electronic goods and jewellery (in the personal use of Mst. Tahira Begum) and car in the name of Mr. Rashid-bin-Nasir (son of the deceased) in order to keep and maintain the House No. A-153, Block L, North Nazimabad, Karachi intact as a mark of respect to late Nasiruddin Ansari and to this wife/widow Mst. Tahir Begum and also plot No. C/35 Block-9, Works Cooperative Housing Society, Gulshan-e-Iqbal, Karachi measuring 600 sqr. yards being Benami property of late Nasiruddin Ansari to be kept intact in the name of Mst. Tahira Begum in order to provide her moral and financial support and backing to maintain the status of Mst. Tahira Begum; in view of the high official status of late Nasiruddin Ansari who at the time of his death was in Government service in the high status of Assistant Collector Customs in the department of Central Excise and Land Customs."

6. The Suit was contested by the Appellants, who filed their written statement refuting the existence of the Alleged Settlement and denying the claim while contending that the Appellant No.1 owned and exercised absolute dominion over the Disputed Properties, with the Court initially framing 8 issues and thereafter proceedings to frame three additional issues, as follows:

The initial Issues:

1. Whether the defendant No.1, namely, Mst. Tahira Begum is the lawful owner of the house bearing No.A-153, Block-L, North Nazimabad, Karachi. If not, what is its effect?

2. Whether the gift of house bearing No. A-1/5, Block-L, North Nazimabad, Karachi by the defendant No.1 to the defendant No.2 is illegal, unauthorized and of no legal consequences?

3. Whether the defendant No.1 is the lawful and bonafide owner of the property bearing No.C-35, Block-9, Works Cooperative Housing Society, Karachi. If not, what is its effect?

4. Whether the sale of the property bearing No.C/35, Block-9, Works Cooperative Housing Society, Gulshan-e-Iqbal Karachi by defendant No.1 is illegal, unauthorized and of no legal effect?

5. What properties, if any, deceased Nasiruddin Ansari had left behind him?

6. Whether all the legal heirs of late Nasiruddin were paid their respective shares out of the estates, properties and assets of deceased Nasiruddin Ansari?

7. Whether the plaintiffs are entitled for any relief. If so, upto what extent?

8. What should the decree be?

The Additional Issues:

1. Whether the deceased Nasiruddin Ansari was actual, legal and lawful owner of the properties viz. House No.A-153, Block-L, North Nazimabad, Karachi, Plot No.C/35, Block-9, Works Cooperative Housing Society, Gulshan-e-Iqbal, Karachi and other movable and the defendant No.1 was holding the same as benami till his death? If so what is its effect?

2. Whether plaintiffs and defendant Nos.1 to 3, after the death of deceased Nasiruddin Ansari, arrived at an oral agreement whereby defendant No.1 was permitted/allowed to be in possession and enjoyment of the above mentioned properties? If so what is its effect?

3. Whether the suit is barred by law?

7. The evidence was recorded on commission, where the only witness from the side of the Respondent/plaintiffs was the Respondent No.1, as the names of the Respondents No.3 and 4 had been struck off from the plaint on their own application under Order 23 Rule 1 CPC, and the Respondents Nos. 2 and 5 did not appear before the Commissioner, with the Respondent No.5 in fact submitting that she did not wish to lead any evidence in view of a like Application moved by her for withdrawing from the proceedings. Conversely, the Appellants No.1 and 2 filed their Affidavits-in-Evidence and were then cross-examined on behalf of Respondent No.1.

8. After conclusion of the evidentiary exercise and following a hearing, the learned Single Judge seized of the matter was pleased to enter judgment in favour of the Respondents Nos. 1 to 5 on 07.08.2006, holding that the Disputed Properties belonged to the Deceased and were held benami on his behalf by the Appellant No.1 with the all the legal heirs being entitled to their respective shares therein in accordance with the

Islamic law of inheritance and the impugned transfer/gift thereof being declared as illegal and of no effect. Consequentially, the Appellants were directed to provide true accounts of the sale of C-35 and deposit the shares of the Respondents Nos. 1 to 5 along with interest @ 10% from the date of sale till the realization of amount with the Nazir of this Court within four weeks, and the Nazir was appointed as receiver of A-153 so as to take over physical control and possession thereof and sell the same through public auction and distribute the sale proceed amongst the legal heirs, with the parties having the right to match the highest bid. Furthermore, the Appellants were held liable to compensate the Respondents and to deposit mesne profit at the rate of Rs.2,000/- per month from the Deceased's death (i.e. February, 1985) till delivery of possession to the Nazir, failing which the amount was adjustable against their shares from the sale proceeds. A decree was then drawn up accordingly.

9. Learned counsel for the Appellants submitted that the impugned Judgment and Decree were bad in law and fact as the basis of the Respondent's claim was the Alleged Settlement – an oral agreement which had not been proved, hence the Suit could not have been decreed. He pointed out that the existence of the Alleged Settlement had been categorically denied by the Appellants and the burden of proving the same had lain squarely on the Respondent Nos.1 to 5, however the Respondent No.1, being the only one from their midst left to contest the matter, did not examine any other witness or produce any evidence in that regard. This was despite her deposing that three other persons, namely (i) Abdul Salam Niazi, (ii) Ahmed Farooq Niazi, and (iii) Arifa Begum, who were described as being the first cousins of the Deceased, had been

witness to the Appellant No.1's subsequent affirmation thereof during the course of mediation between the heirs conducted under their aegis, following the issuance of a legal notice on behalf of the Respondents upon their purportedly coming to have knowledge of the transactions undertaken in respect of the Disputed Properties.

10. It was submitted that the entire estate of the Deceased had been the subject of the SMAs, as supported by and granted with the consent of all his legal heirs, with the Respondents No.1 to 5 receiving their respective shares in full and final settlement of their claims, hence in view of the principles of *res judicata*, *estoppel* as well as Order 2 Rule 2 of CPC, could not have agitated a claim in the wake of those proceedings that the Disputed Properties belonged to the Deceased. He placed reliance on the judgments in the cases reported as 'Damodarlal versus Gopinath' AIR 1956 Nagpur 209 and 'M/s. Tank Steel and Re-Polling Mills (Pvt.) Ltd., Dera Ismail Khan and others versus Federation of Pakistan and others' PLD 1996 SC 77.

11. He pointed out that the Suit was essentially one for a declaration as to the composition of the Deceased's estate, with other reliefs being predicated thereon, and had been filed more than 8 years after his demise albeit that a suit of that nature was governed by Article 120 of the Limitation Act, 1908, prescribing a period of limitation of 6 years, which in the instant case would began to run from the date of demise. He submitted that that the Respondents had therefore resorted to the device of the Alleged Settlement in an endeavour to explain away the exclusion of the Disputed Properties from the SMAs and to also evade the bar of limitation.

12. He submitted that positive evidence as to the oral agreement said to constitute the Alleged Settlement ought to have been introduced by the Respondent No.1, which had not been forthcoming, however in the absence of any such evidence the learned Single Judge nonetheless arrived at a finding as to the existence of "some settlement" between the legal heirs, based entirely on the device that a question had been put to the Respondent No.1 in that regard by counsel for the Appellant No.2 during the course of cross-examination, with it accordingly being held that if there was no settlement in existence, there was then no occasion for such a question to have been put to the Respondent No.1 at all, and by putting such a question, counsel had 'admitted' that there was some settlement between the parties. He contended that such a hypothesis was completely erroneous and implausible, submitting that the purpose of posing the question regarding the Alleged Settlement was an endeavour to demonstrate that it was a fallacy rather than to concede thereto, which was an illogical assumption. He placed reliance on the judgments in the cases reported as Alamsher and others v. The Member, Board of Revenue (Colonies), Punjab, Lahore and others 1994 SCMR 465, Ch. Ghulam Rasool v. Mrs. Nusrat Rasool and 4 others' PLD 2008 SC 146, and Muhammad Nawaz through LRs v. Haji Muhammad Baran Khan through LRs and others 2013 SCMR 1300.

13. He submitted further that the failure to produce the three so-called witnesses to the Appellants affirmation of the Alleged Settlement attracted the presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984, that if those persons had been produced as witnesses, they would not have deposed in favour of the Respondents.

14. Building on those submissions, learned counsel argued that the Alleged Settlement was thus the sheet anchor of the Respondent's case, which, in the absence of proof, collapsed into the quagmire of uncertainty. He prayed that the Impugned Judgment and Decree be set aside.

15. Moreover, he contended that there was even otherwise no evidence to prove that the Disputed Properties belonged to the Deceased and that the Appellant No.1 was his benamidar, as the elements necessary for constituting a benami transaction were lacking in the instant case. In that regard, he relied on the judgments of the Honourable Supreme Court in the cases reported as Mst. Asia Bibi v. Dr. Asif Ali Khan PLD 2011 SC 829, Mst. Zohra Begum and 6 others v. Muhammad Ismail 2008 SCMR 143, Abdul Majeed and others v. Amir Muhammad and others 2005 SCMR 577, and Muhammad Nawaz Minhas and others v. Mst. Surriya Sabir Minhas and others 2009 SCMR 124. It was submitted that both C-35 and A-153 had been exclusively/absolutely owned by the Appellant No.1, with the former property having been purchased by her from her own resources and out of the income of the Appellants No.2 and 3, whereas the cost of the land of A-153 had been paid by her and the construction raised after securing a loan of Rs.108,319/- from the House Building Finance Corporation ("**HBFC**"), which was then repaid by her on 01.02.1987. He emphasised that the impugned transactions in respect of the Disputed Properties were well within the competence of the Appellant No.1 and save for the Respondent No.1, the other Respondents had either withdrawn from the Suit or declined to participate, hence had abandoned their espoused claim.

16. On the other hand, learned counsel for the Respondent No.1 resoundingly endorsed the correctness of the Impugned Judgment on the basis of the approach adopted by the learned Single Judge and submitted that the same was unobjectionable and had been passed in view of what he contended was the reality of the arrangement inter se the legal heirs in terms of the Alleged Settlement.

17. He averred that it was the Deceased who had been solely responsible for the payment of the sale consideration of the Subject Properties, it being contended that the Appellant No.1 did not have any source of income, hence lacked the means to have acquired the Subject Properties or raised construction thereon.

18. Furthermore, he emphasised that it had been conceded by the Appellant No.1 during the course of her cross-examination that the sale of C-35 and the gift of A-153 had not been disclosed to the Respondent No.1 at the time of those transactions, and submitted that this was so as it was in contravention of the Alleged Settlement, hence was a matter that the Appellants had sought to conceal. He argued that the Appeal was baseless and misconceived, and sought its dismissal.

19. We have examined the record in light of the submissions made by the learned counsel for the respective parties. From a plain reading of the Impugned Judgment it is apparent that while firstly determining the question of maintainability arising in terms of Additional Issue No. 3, the learned Single Judge considered Article 120 of the Limitation Act and

rightly observed that "the time for filing the suit starts on the day when the right in respect of which the declaration is sought is denied or challenged", but accepted the period stated in the plaint as being the time that the Respondents claim that they first came to have knowledge of the sale of C-35 (i.e. July, 1993) as being the time from which limitation would being to run, rather than the date of filing or grant of SMA No.104 of 1985, citing the admission of the Appellant No.1 that she had not disclosed the sale or gift to any of the Respondents as being material in that regard, and also going on to find in favour of the existence of the Alleged Settlement solely on the basis of a question put to the Respondent No.1, which, per the learned Single Judge, furnished an explanation as to why the Disputed Properties were not included in the aforementioned SMA and addressed the question of *res judicata* and estoppel. The relevant excerpt from the Impugned Judgment reflecting that approach is reproduced for reference, reading as follows:

> "Furthermore, the plaintiffs have filed the suit for their shares in the properties left by their deceased father and had pleaded that there was an settlement between the legal heirs that the properties in the name of deceased be distributed and the properties in the name of defendant No.1 be kept intact in the name of defendant No.1. The settlement is proved from the contents of cross-examination of the plaintiff conducted by Mr. Faiq Hussain, learned counsel for the defendant No.2. The relevant portion of cross-examination is reproduced below: -
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> > "The settlement in respect of other properties was arrived at before filing of SMA. I do not know whether the settlement in respect of other properties was brought to the knowledge of two advocates, who were appearing in the SMAs."
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> > "It is correct that the suit was filed as there was violation of the settlement by the defendant No.1 as she sold the plot of Works Cooperative Housing Society and gifted House No.A-153, Block-L, North Nazimabad, Karachi."

> From the above cross-examination, it is established that there was some settlement between the parties regarding the properties in dispute. If no settlement was in existence there was no occasion to put such question to the Plaintiff No.1. By putting such question the learned counsel admitted that there was some settlement between the parties.
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> I have considered the submissions of the learned counsels. The principle of res-judicata is only applicable when the matter in controversy has been adjudicated and finally decided between the parties. Admittedly, the two properties were not subject matter of earlier SMAs and there was no adjudication. Therefore, the suit is not hit by the principle of res-judicata.
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> The other point is estoppel. From the evidence, it is clear that the defendants failed to prove that the plaintiffs have accepted the title of the defendant No.1 on the disputed properties. The plaintiffs pleaded a settlement, which find support from the questions asked by Mr. Faiq Hussain, learned counsel for the Plaintiff No.1 during her cross-examination."

20. The learned Single Judge then went on to apply the finding as to the existence of 'some settlement' to the remaining issues, with their being determined accordingly and the Suit being decreed in favour of the Respondent in the terms mentioned herein above.

21. As to the core issues, being Issues Nos. 1 and 3 and Additional Issue No.1, the same were considered by the learned Single Judge to be interconnected, hence were dealt with together. Whilst it was observed that the Disputed Properties were admittedly purchased and held in the name of the Appellant No.1 and the burden of proof in that regard was on the Respondents, it was held to have been established from the pleadings and depositions of the Appellants that a considerable amount was provided by the Deceased for purchase of the Disputed Properties to the Appellant No.1, who had

failed to show that she had any independent source of income, whereas the Respondent No.1's 'contention' that the Disputed Properties were purchased from the finance of the Deceased had not been rebutted and remained unshaken, hence it was determined that the same had been purchased by the deceased as Benami in the name of the Appellant No.1, and that the latter was not the actual owner thereof and was not legally authorized to transfer them.

22. To our minds, when one considers the case set up by the Respondent's through the Suit, it is apparent that the cornerstone thereof was the Alleged Settlement. However, other than the bare testimony of the Respondent No.1, absolutely no other evidence was forthcoming to support the assertion made by her in that regard. In our view, the mere putting of a question to the Respondent No.1 regarding the Alleged Settlement on which the Respondents had based their claim did not bridge the evidentiary chasm otherwise arising in the absence of the persons said to have witnessed its affirmation by the Appellant No.1 and did not afford a platform to support the leap made by the learned Single Judge in finding that there was 'some settlement' with regard to the Disputed Properties due to which they were not made the subject of the Letter of Administration, and that there had then been some violation of that settlement. Even the particular question put to the Respondent No.1 had not been recorded and the terms and scope of the settlement inferred from the putting of the question remained undetermined. Furthermore, we are not convinced that the putting of a question as to the Alleged Settlement constituted an admission of its existence, as it can scarcely be regarded as a clear, unambiguous, unqualified and unequivocal expression in that

regard. Indeed, had no question been put to the Respondent No.1 at all on that score, the failure to do so would have meant that her evidence went unchallenged as no cross-examination was conducted by the Appellants as to her assertion, and we therefore see force in the argument made by learned counsel for the Appellants that the real purpose of posing the question regarding the Alleged Settlement was to confront and rebut the Respondent No.1's assertion that it was due to the existence thereof that the matter of the Disputed Properties was not agitated at the time of filing or grant of the SMA in respect of the single immovable property shown at the time as being that of the Deceased. Astonishingly, the three persons said to have been witnesses to the Appellant No.1's affirmation of the Alleged Settlement were not produced produced as witnesses albeit that they ought by any reckoning to have been the star witnesses in view of the case set up through the Suit. To our minds their omission is material and constitutes a lacuna that cannot be overlooked, thus attracting the presumption envisaged in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984.

23. Furthermore, when the depositions of the witnesses are viewed in juxtaposition with the documents exhibited in evidence, it emerges that no material had been brought on record to support the assertion of a benami arrangement inter se the Deceased and the Appellant No.1 or demonstrate that the Deceased had mainly provided the funds through which the Disputed Properties had been acquired, and the finding of the learned Single Judge as to funding was predicated entirely on inferences drawn from disparate excerpts from the oral evidence tendered. In fact, other than the bare assertion in paragraph 4 of the plaint that the

Disputed Properties had been purchased/financed by the Deceased in the name of the Appellant No.1 as benami properties, there was no further elucidation as to the motive underpinning the alleged benami arrangement or even as to details/mechanics of the relevant transactions.

24. In view of the foregoing, we are constrained to say with utmost respect that the Impugned Judgment suffers from certain material infirmities which go to the root of the matter, as discussed, and cannot therefore be sustained. Thus, the Appeal is allowed with the result that the Impugned Judgment and Decree are set aside and the Suit stands dismissed. There is no order as to costs.

JUDGE

JUDGE

Karachi
Dated _____