

# THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No.170 of 2011.

Iqbal Ahmed and others. . . . .Applicants.

Versus

Maqbool Ahmed & others. . . . .Respondents.

Applicants: Through Mr. Arbab Ali Hakro,  
Advocate.

Respondents No.1 to 4: Through Mr. Rao Faisal Ali,  
Advocate.

Date of hearing and judgment: 16.05.2018.

## **J U D G M E N T**

**Zulfiqar Ahmad Khan, J:** This Revision filed against concurrent findings of the Courts below, where F.C. Suit No.15 of 2000, filed by the applicants against the respondents for declaration, cancellation of registered sale deed and entry in revenue record and permanent injunction, was dismissed by the trial Court vide its judgment dated 18.09.2004, which was made impugned through Civil Appeal No.294/2004, which also met the same fate, thus the instant revision.

2. Facts as narrated are that, late Ghulam Hussain, the predecessor-in-interest of the applicants and one Wishan Das, predecessor-in-interest of respondents No.5 to 8 were friends and Survey No.94(9-7 acres) and Survey No.96 (9-16 acres), total admeasuring 18-23 acres, situated in Deh Aamri Taluka Tando Allahyar was purchased by the late Haji Ghulam Hussain in the name of late Wishandas as a Benami to the extent of 50 paisa share. It is alleged that subsequently Wishandas executed a surrender deed in favour of late Haji Ghulam Hussain stating that his 50 paisa share in fact was purchased by late Haji Ghulam Hussain, who had paid the price and possession lies with said late Haji Ghulam Hussain. The said surrender deed was executed by Wishandas on 12.06.1985 in presence of witnesses Muhammad Yousuf and Bachoo Shaikh. The said Wishandas expired on 28.08.1987 and respondents

No.5 to 8 malafidely got Foti Khata Badal in their names on 12.08.1993. Subsequently, Haji Ghulam Hussain also died on 19.03.194. It was alleged that the land in question was on lease with one Shafi Muhammad Jarwar and in the year 1999 Shafi Muhammad informed the applicants that one Haji Khan Jarwar father of respondent Nos. 1 to 4 was claiming ownership over the land on the basis of registered sale deed dated 12.09.1995. Respondent Nos.1 to 7 filed their joint written statement and taken pleas that the suit was not maintainable being barred by law. It was denied that Wishandas was not the purchaser of the land in question and that it was either a Benami transation in his name, it was contended that Haji Ghulam Hussain had purchased 50 Paisas share and 50 Paisas share was purchased by Wishandas. They denied the execution of surrendered deed. The respondents Nos. 1 to 4 claimed that they have lawfully purchased the suit land from respondent Nos. 5 to 7 and no fraud has been committed by them and claimed ownership on the basis of registered sale deed. Whereas no written statement was filed by respondent No.8, thus she was made exparte on 16.01.2002.

3. A review of the record shows that after filing written statements the respondent Nos. 1 to 7 have not appeared before the trial Court while the applicant No.1 Iqbal Ahmed has filed his affidavit in exparte proof and that of Muhammad Yousif at Exs.87 and 90 respectively.

4. Learned trial Court after hearing the learned counsel for the parties dismissed the suit by judgment dated 18.09.2004, which was challenged through Civil Appeal No.294/2004, which met with the same fate. Thus, applicants have filed this revision against concurrent findings of the Courts below.

5. Heard the counsel and reviewed the record.

6. Learned appellate Court while deciding the aforementioned appeal under Order XLI Rule 31 C.P.C. framed the following point for determination:

“Whether late Haji Muhammad hussain has purchased the land as Benami in the name of Wishandas to to the extent of 50 Paisas share of the property?”

7. Appellate Court while deciding the above Civil Appeal observed that it was necessary to mention that after filling the written statement the respondents have failed to appear before the trial Court. It is a settled law that the applicants have to prove their case on their own strength and they cannot be allowed to get the benefit of any weakness of the respondents' side. It is also settled law that in the proceedings when the matter has proceeded ex parte the duty of the Court becomes double to properly appreciate the evidence and documents available on the record so that innocent should not be deprived of his legal right in any property or otherwise. Record of learned trial Court showed that the trial Court has decided the point regarding Benami transaction while deciding issue No.3 with the following observations:-

“Since this issue is root of issues No.4, 5 and 6, therefore claim of benami is required to be proved on the following ingredients:-

- (a) Purchase money was provided by person other than one in whose nameds transaction appears to be:
- (b) Production of original document by the person asserting transaction of Benami:
- (c) Possession.

Keeping in view the above ingredients the issue was visualized with the evidence of applicant Iqbal Ahmed, who stated on oath in his affidavit-in-evidence that Haji Ghulam Hussain was his father and businessman. He was running medical store at Tando Allahyar from 1950 to 1973. Wishandas S/o Mangharam was salesman at medical store of Haji Ghulsam Hussain and was most reliable to him. Late Haji Ghulam Hussain purchased survey Nos. 94(9-7) acres and f95 (-10) acres Deh Aamir Taluka Tando Allahyar and paid entire purchase price but registration was effected to the extent of 0.50 Paisas in the name of Wishandas as Benami. He deposed that from 1965 to 1970-71 his father late Haji Ghulam Hussain was in exclusive possession of the entire land and was paying Land Revenue. He has produced six land revenue receipts. He has also produced certified copy of registered sale deed as Ex. 89/A.

8. Appellate Court also observed that by production of certified copy by the applicants, the ingredients of production of original documents does not prove. Mere production of land revenue receipts did not prove the claim of

applicants that 0-50 Paisas share in favour of Wishandas was Benami in nature. He deposed that late Wishandas has executed surrender deed in respect of his 0-50 Paisas share in favour of late Hajhi Ghulam Hussain and it was produced as Ex. 89/D. The same is dated 12.06.1985. If this deed in fact was executed by Wishandas same did not get 0-50 Paisas share of Wishandas in his favour as he expired in the year 1994 and Wishandas expired in the year 1987. It appeared from the record that from 1965 when the joint sale deed was effected, till 1994 when Haji Ghulam Hussain died, he did not claim or challenge 0-50 Paisas share of Wishandas as Benami. Even after the death of Haji Ghulam Hussain, the applicants have failed to prove that wishandas was Benami to the extent of 0-50 paisas share in survey Nos.94 and 95 Deh Aamri Taluka Tanod Allahyar. Appellate Court was also of the view that admittedly, no reason apparently had been given for the purchase of the land in the name of Wishandas by the father of the applicants as a Benami because nowhere it was mentioned that he was Government Servant or for any other reason was unable to purchase the land in his name alone or in the name of other person. Moreover, admittedly the land in question was purchased in the year 1964. It was also an admitted fact that Wishandas expired in the year 1987 while Ghulam Hussain expired in the year 1994 and as mentioned the above land was purchased in the year 1964 but till the death of either Wishandas same was not challenged. Subsequently Foti Khata was also changed in favour of his legal heirs. Thereafter father of respondent Nos.1 to 4 purchased the land through registered sale deed from the legal heirs of said Wishandas. The burden of proving the fact that it was Benami transaction was upon the shoulders of the applicants but they have not produced any cogent convincing evidence in this connection before the trial or even a single reason has been advanced as to why the land was purchased by late Ghulam Hussain in the name of Wishandas as Benami. Moreover the alleged sale deed was executed in the year 1964 but till his death, the father of the applicants have not challenged the same and assailed the same in the year 1994 therefore, the appellate Court was of the view that the applicants had failed to prove their

case and the suit was also time barred, as such, trial Court has rightly dismissed the same. In these circumstances, the appellate Court also dismissed the appeal preferred by the applicants and against this judgment the instant revision has been filed.

9. Being cognizant of the fact that in the exercise of revisional powers, it is not the duty of the High Court to enter into the merits of the evidence as it has only to see whether the requirements of the law have been duly and properly obeyed by the court whose order is the subject of the revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. That's why if someone invokes the jurisdiction under S. 115, C.P.C. he must show not only that a jurisdictional error has been committed by the court below, but also that the interests of justice call for interference by the High Court, as the powers of the Court under S. 115 of the Code are purely discretionary, which are to be exercised in the interests of justice alone where the High Court could legitimately hold that the court below had exceeded its jurisdiction or had refrained from exercising a jurisdiction vested in it or it acted illegally or with material irregularity in the exercise of that jurisdiction, i.e. committed an error of procedure or of a mandatory procedure and that such an error had resulted in failure of justice. The words 'acted illegally' have been interpreted to mean *acting in breach of some provisions of law* and the words 'acting with material irregularity' are interpreted to mean *committing some error of procedure and in the course of proceedings, which is material in the sense that it may have affected the ultimate decision.*

10. A review of the judgments of the Courts below shows that neither any of these Courts decided the case perversely, nor it could be said that they acted illegally or with material irregularity in the exercise of their jurisdiction. Where a lower Court passes an order in exercise of its jurisdiction, the High Court is not to interfere with it in revision unless the order (being sought revision), if allowed to stand, is likely to occasion a failure of justice or cause an irreparable injury, which is not the case at hand. In the absence of any defect in the concurrent findings of both the Courts below, interference of High Court

in civil revision as held by Apex Court in **2006 SCMR 50**, amounts to improper exercise of revisional jurisdiction.

11. In the given circumstances as well as in the light of the above cited judgment of the Apex Court and other judgments delivered on the same point being **2006 SCMR 1304** and **2010 CLC 528**, the instant revision preferred against the concurrent findings of the Courts below for the reasons detailed, merit no consideration and the same is accordingly dismissed.

JUDGE

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