

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.102 of 2006

[Mst. Ishrat Parveen & anotherv.....Syed Azhar Ali]

&

Suit No.323 of 2006

[Syed Azhar Ali & othersv.....Mst. Ishrat Parveen & another]

Dates of Hearing : 27.09.2021 & 18.11.2021
Date of Decision : 29.05.2022
Plaintiffs : Through Mr. Shahenshah Hussain,
Advocate.
Defendants : Through M/s. Sheikh Rehan Farooq &
Noor Alam Khatri, Advocates.

JUDGMENT

Zulfiqar Ahmad Khan, J:- The lis in hand sought through two separate suits, since these are two connected suits in which the property is same, therefore, it would be just and proper to decide the same through a common deliberation.

2. The trivia and or minutiae of both Suits filed vice versa are as under:-

(i). Suit No. 102 of 2006

Plaintiff No.1 (Mst. Ishrat Parveen) is the widow of deceased Musharraf Ali who purchased a residential plot No.A-348, Block-A, North Nazimabad, Karachi in the name of defendant and having purchased the said plot, constructed a house from his own funds. Plaintiff averred that her deceased husband paid the entire sale consideration of Rs.6,400/- Plaintiff (Mst. Ishrat Parveen) alleged in the plaint that her deceased husband so as to protect his interest in the said house, obtained a general power of attorney from the defendant in the year 1976, thereafter, in the year 1985 the deceased husband of the Plaintiff obtained a loan from National Bank of Pakistan and in lieu thereof deposited the original document of the said house after that the said loan was repaid by her deceased husband but unfortunately he left this mortal world and could not obtain the original documents from

the bank. The Plaintiff further averred that her deceased husband gifted the said house to her and in this respect a gift deed was also executed in her favour. Plaintiff Ishrat Parveen went on to state further in her pleadings that her son i.e. plaintiff No.2 raised additional construction in the said house after the demise of her deceased husband. The plaintiffs further pleaded in the plaint that the defendant Syed Azhar Ali approached to the bank for the return of the title documents of the said house which demand of the defendant is illegal as the defendant is only a benamedar whereas the actual owner of the said house is deceased husband of the plaintiff, thereafter, the plaintiff filed the suit and made certain prayers which are delineated as under:-

“i. Declaration that House No. A-348, Block-A, North Nazimabad, Karachi exclusively vested in and belonged to the late Syed Musharraf Ali and that defendant who is only his benamidar.

ii. Declaration that the plaintiffs are the joint owners of the aforesaid property.

iii. Permanent injunction restraining the defendant from selling, mortgaging, alienating or otherwise disposing of the said property.

iv. Cost of the suit.

v. Any other relief which this honourable court may deem fit and proper in the circumstances of the case.”

(ii). Suit No.323 of 2006

Plaintiff Syed Azhar Ali, deceased husband of the Defendant No.1 i.e. Syed Musharraf Ali and one Syed Azhar Ali were three brothers inter se. The Plaintiff i.e. Syed Azhar Ali purchased a house bearing No.A-348, Block-A, North Nazimabad, Karachi, measuring 200 square yards (hereinafter referred as “said house”), thereafter, the said house was transferred in his favour. Having purchased the said house, the Plaintiff Syed Azhar Ali got completed the necessary construction and shifted his mother and brothers in the said house who used to reside in Hyderabad and so as to earn his livelihood, the Plaintiff Syed Azhar Ali left for abroad and executed a Power of Attorney in favour of deceased husband of Defendant No.1 with the sole object to look after the said house. Plaintiff averred that the deceased husband of the Defendant No.1 (Syed Musharraf Ali) faced financial crises who beseeched the Plaintiff (Syed Azhar Ali) to act as a Guarantor in obtaining the loan from National Bank of Pakistan for the reasons that the said

house was in the name of Plaintiff being a bona fide and lawful owner. Resultantly, the Plaintiff (Syed Azhar Ali) mortgaged the said house with National Bank of Pakistan owing to which the deceased husband of the Defendant No.1 (Syed Musharraf Ali) obtained loan of Rs.1,50,000/-. Plaintiff (Syed Azhar Ali) further averred that neither the deceased husband of the Defendant No.1 (Syed Musharraf Ali) nor his legal heirs paid the loan amount rather the Plaintiff (Syed Azhar Ali) paid the entire amount and got redeemed the said house. Plaintiff further submitted that the Defendant No.2 is an estate agent and the Defendants hatched a conspiracy to deprive the Plaintiff (Syed Azhar Ali) from the said house hence introduced on record a Gift Deed which neither valid nor a registered instrument but a forged, fictitious and concocted document prepared by the Defendants just to deprive the Plaintiff (Syed Azhar Ali) from the said house who is Lawful and bona fide owner and having come to know the unlawful acts of the Defendants, the Plaintiff (Syed Azhar Ali) filed this suit beseeching, entreating therein as under:-

“ a. To declare that the plaintiff is lawful owner of house constructed on Plot No. A-348, Block-A, North Nazimabad, Karachi and further be pleased to declare that gift deed dated 05.10.1985 which is with plaint at page No. 91 to 93 is forged, fraudulent and illegal documents.

b. Cancel the gift deed dated 5.10.1985, which is with the plaint at page No. 91 to 93.

c. Direct the defendants or anybody else if found in possession of house constructed on Plot No.A-348, Block-A, North Nazimabad, Karachi, to hand over its peaceful and vacant possession to plaintiff.

d. Direct the defendant to deposit monthly income of the suit house @ of Rs.10,000/- per month with Nazir of this Honourable Court and finally same may be paid to plaintiff.

e. Permanently defendants may be restrained from damaging/creating any third party interest in suit house constructed on Plot No.A-348, Block-A, North Nazimabad, Karachi.

f. Cost of the proceeding.

g. Any other relief or reliefs which this Honourable Court may deem fit and proper for discharging of complete justice under prevailing circumstances of the case at the time of passing of judgment.”

3. The present cause was contested by the rival parties, both parties are plaintiffs and defendants in their respective suits filed vice versa filed their written statements and denied the assertions and claim made in the present lis.

4. The record reflects that originally the Suit No. 323 of 2006 was filed by the Plaintiff namely Syed Azhar Ali, however, with the passage of time, the Plaintiff Syed Azhar Ali in Suit No. 323 of 2006 and Defendant in Suit No.102 of 2006 left this mortal world (may Allah rest his soul in eternal peace) and now his legal heirs are in arena and such amended title was also filed in both the suits.

5. The record insinuates that on 30.10.2006 issues were framed and with mutual consent of the learned counsel for the respective parties matter was referred to Commissioner for recording evidence.

The issues settled by this court are as under:-

“1. Whether Syed Musharraf Ali (deceased) was the actual owner of the suit property and the defendant was only a benamdar?

2. Whether the deceased had constructed the house of the suit property from his own resources and was in its possession as owner?

3. Whether it was the deceased or the defendant who mortgaged the suit property with National Bank of Pakistan and obtained loan, and whether it was the deceased Syed Muhsarraf Ali or the defendant who repaid the loan and got the property redeemed?

4. Whether the deceased gifted the suit property in favour of the plaintiff in the year 1985 and the gift is valid?

5. Whether the plaintiff No.2 has raised any additional construction and renovated the suit property after the death of his father. If so at what costs and what is its effect?

6. What should the decree be?"

6. Before starting the deliberations on the above issues, it would be appropriate to mention here that the expression Mst. Ishrat Parveen & Syed Dilawar Ali who are Plaintiffs in Suit No. 102 of 2006 and Defendants in Suit No. 323 of 2006 will be represented by their names instead of plaintiffs or defendants nonetheless Syed Azhar Ali who is plaintiff in Suit No. 323 of 2006 and defendant in Suit No.102 of 2006 will be represented by his name instead of plaintiff or defendant.

7. Mr. Shahenshah Hussain learned Senior Counsel presented the case of Mst. Ishrat Parveen and Dilawar Hussain (plaintiffs in suit No. 323 of 2006 and defendants in Suit No. 102 of 2006). The main thrust of the submissions of Mr. Shahenshah is that the deceased husband of Mst. Ishrat Parveen was a businessman who paid the entire consideration while Syed Azhar Ali (defendant in Suit No. 102 of 2006 and plaintiff in Suit No. 323 of 2006) was only his Benamedar and at the time of purchasing the said house Syed Azhar Ali was only a student who had no sources of income and was totally dependent upon the deceased husband of Ishrat Parveen. His next stance is that Syed Azhar Ali executed a power of attorney in favour of deceased husband of Ishrat Parveen conveying all powers in respect of selling, transferring and gifting the said house as lawful owner who thereafter executed a Gift Deed in favour of Ishrat Parveen. He further contended that on the basis of power of attorney the deceased husband obtained loan from the National Bank of Pakistan and repaid the same in his life time. He next contended that Ishrat

Parveen alongwith her son are in possession of the said house and her son also constructed the additional floor on the said house from his own resources and that Syed Azhar Ali was fully aware of the fact of such construction and did not raise any objection. He candidly contended that deceased husband of Mst. Ishrat Parveen was the actual and real owner of the said house while Syed Azhar Ali was only his Benamidar and the all title documents are in the possession of Mst. Ishrat Parveen. While summing up his submissions, he relied upon the precedents of Superior Courts reported as 2005 SCMR 577, 1991 SCMR 703, PLD 2011 S.C. 829 and 2009 SCMR 124.

8. Conversely, Mr. Sheikh Rehan made his appearance on behalf of Syed Azhar Ali and challenged the validity of the Gift Deed. He strenuously contended that the alleged Gift Deed is forged, fabricated as well as unregistered instruments and the Gift Deed is required to be registered under the Registration Act, therefore, the suit of Mst. Ishrat Parveen is liable to be dismissed. He next submitted that it is unequivocally proved that Mst. Ishrat Parveen and her witnesses in their evidence admitted that Syed Azhar Ali is the actual owner of the said house which was purchased by him and the loan amount was also repaid by Syed Azhar Ali. He further contended that sale agreement, sale receipts, transfer deed and other ancillaries documents are in the name of Syed Azhar and consideration was also paid by him. Lastly, he submitted that Mst. Ishrat Parveen and her son are unlawfully occupying the said house and that the alleged Gift Deed is liable to be cancelled by this Court and the suit filed by Syed Azhar may be decreed as prayed. In support of his submissions, he placed reliance on the case laws reported as

PLD 2010 S.C. 569, PLD 2008 S.C. 146, 2010 SCMR 171, 1991 SCMR 703, PLD 2003 S.C. 494, 1997 SCMR 1811, 2009 CLC 324 and 2019 MLD 545.

9. Heard the arguments. Issue No.1 is correlated and concomitant to the ownership of the said house and other aspect of the Issue No.1 is Benami. It would be advantageous to discuss both aspects of the issue simultaneously, in same breath.

10. Since, the law relating to Transfer of Property and that of Registration Act does not recognize the Benami transaction because such transaction normally carries a motive/reason because of which one though pays the consideration yet avoids in taking the title in his/her own name but puts someone else with known status of 'owner' at all relevant places i.e. Record of the Rights. The term 'owner', per Black's Law Dictionary (Eighth Edition) is:

“Owner.- One who has the right to possess, use, and convey something; a proprietor.”

11. Per law, one would normally be regarded “owner” who is so appearing from the Record of the Rights else object of “Record of Rights” shall fail on basis whereof Transfer of Property and Registration are normally done/entertained. A reference to the case of Halima v. Muhammad Kassam [1999 MLD 2934] may be made for such view. In short, the whole scheme and object of Transfer of Property Act and that of Registration Act shall fail if every transaction is allowed to be challenged as benami. This is the only reason that all the laws, relating to transfer of title, neither

recognize the consent of any other person except the one prima facie appearing to be owner with reference to Record of the Rights.

12. 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 sources 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 entirely depends on the intention of the parties at the epoch of buying. The litmus 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 required 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 essential 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.

13. However, I regretfully acknowledge that typical culture, prevailing in our community, allows such transactions which otherwise should come to an end because such transaction always carries some deliberation on part of the actual owner which motivates him/her to avoid dressing up the status of ownership despite he/she otherwise pays consideration thereof. Since, the law of the land nowhere restricts one to purchase as many properties as one wishes but he/she shall always be legally obliged to explain the sources for such assets. Therefore, it is now well settled principle of law that to accept a challenge on ground of its being Benami one

would require certain facts/circumstances which an actual owner otherwise would establish:--

- “(i) source of consideration;
- (ii) from whose custody the original title deed and other documents come in evidence;
- (iii) who is in possession of the suit property; and
- (iv) motive of Benami transaction.”

14. Each ingredient has its own peculiar reasons. Consideration, being the prime ingredient, for a sale transaction, hence has been placed on the top; since an absolute owner would also normally keep the original documents and other related documents and even same may be required to be produced by purchaser would be required therefore, an actual owner would be shown to possess such documents so as to show a resistance even not of much significance towards right of ownership which an owner otherwise must possess; then comes the question of possession and control over the property. Last but not the least the explanation for dressing some one else with status of owner. In absence of plausible motive/reason one would not be legally entitled to disbelieve the ownership of one who otherwise, per record of the rights, is owner of the property. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of 'Benanmi' or establish circumstances reasonably raising an inference of that fact. Reference is made to the case of Muhammad Nawaz Minhas v. Surriya Sabir Minhas [2009 SCMR 124].

15. It is pertinent to mention that one would not let another person to enjoy prima facie title (ownership) without having made something in his/her favour. This is the reason, required by an

ordinary prudent mind, because of which the honourable Supreme Court of Pakistan in the case of Ghulam Rasool v. Nusrat Rasool (PLD 2008 SC 146) that:--

“The first element is that there must be an agreement express or implied, between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the person who has to make payment of the consideration and second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party.”

16. Let's examine the evidence of Mst. Ishrat Parveen on above touch-stone. The pleading of the Plaintiff (Mst. Ishrat Parveen) so also examination-in-chief are silent with regard to 'motive/reason' which made her deceased husband Syed Muhsarraaf Ali to purchase the said house in the name of his brother Syed Azhar Ali. It has been established Syed Azhar Ali that he purchased the said house from one Raja Abdul Qayyum Khan on 05.04.1966 against sale consideration of Rs.6,400/- and such sale agreement was also entered between the Syed Azhar Ali and Raja Abdul Qayyum. Syed Azhar Ali during his examination-in-chief produced sale agreement as well as payment receipts which was also acknowledged by Raja Abdul Qayyum as Exh. D/1 (page No. 653 and page No. 655 of evidence file). Thereafter the said house was also transferred in favour of the Syed Azhar Ali through a Transfer Deed which was also produced by Syed Azhar Ali in his examination-in-chief as Exh D/3 (page No.659 of evidence file). Exhibit D/4 (page No. 675 of the evidence file) is letter issued by Karachi Development Authority declaring that the said house had been transferred in the name of the Syed Azhar Ali vide Transfer

Letter dated 11.10.1966 and the said letter was also produced by the Syed Azhar Ali in his evidence

17. Apart from above, Ishrat Parveen (Defendant No.1 in Suit No. 323 of 2006 and Plaintiff No.1 in Suit No. 102 of 2006) was thoroughly put to the test of cross-examination wherein she went on to admit that the said house was purchased by Syed Azhar Ali. Not only Ishrat Parveen admitted the ownership of Syed Azhar Ali but also the witnesses produced by the Ishrat Parveen namely Shabbir Ahmed Khan who is representative of the National Bank of Pakistan went on to admit the ownership of the Syed Azhar Ali. So as to reach at just and right conclusion of the issue under discussion, it is advantageous to reproduce the relevant excerpt of the admissions made in cross-examination by Ishrat Parveen and her witness namely Shabbir Ahmed Khan which reads as follows:-

“It is correct that plot in dispute was purchased by defendant Sayed Azhar Ali on 05.04.1996. Voluntarily states that it was purchased by her husband Sayed Musharraf Ali. It is correct that an agreement of sale was executed in his favour by Raja Abdul Qayyum Khan on the same date. It is correct the subsequently a sale deed was executed and registered in his favour. Voluntarily states it was all done by Sayed Musharraf Ali.”

18. Admission of like nature was also made by witness of Mst. Ishrat Parveen namely Shabbir Ahmed Khan who entered in appearance on behalf of National Bank of Pakistan which is reproduced here under:-

“It is correct that owner of the property is Syed Azhar Ali.”

19. An Austere look to the above reproduction explicates that not only the Ishrat Parveen (Plaintiff in Suit No.102 of 2006 and defendant in Suit No. 323 of 2006) but also her witness Shabbir Ahmed Khan went on to admit that the said house was purchased by the Syed Azhar Ali (defendant in Suit No.102 of 2006 and plaintiff in Suit No. 323 of 2006) not only the Sale Agreement is in his name but also the Transfer Deed. On examination of record it further reveals that the acknowledgement receipt of payment was also issued in the name of Syed Azhar Ali which suggests that Raja Abdul Qayyum acknowledged to have received a sum of Rs. 6,400/- from Syed Azhar Ali.

20. Mst. Ishrat Parveen in her cross-examination excerpt of which delineated supra voluntarily stated that all act was performed by her deceased husband Syed Musharraf Ali. It is by now judicially settled that the Voluntary statement by a witness in cross-examination has no legal evidentiary value. witness is not permitted to foist into his answer statement any material which is not in answer to or explanatory of his answer to the questions put to him. Such voluntary evidence is denominated as "irresponsive" testimony and the introduction of such evidence shall be against the rule of re-examination as contemplated under Art.133 of Qanun-e-Shahadat, 1984. The learned Lahore High Court in the case of Mushtaq Ahmed Malik v. Muhammad Sunawar Choudhary (2003 Y L R 406) held the similar principal and it is considered imperative to reproduce the rule laid down in the latter case which reads as follows:-

“(a) Qanun-e-Shahadat (10 of 1984)---

----Art. 133--- Order of examination--
 Scope---Voluntary statement by a witness in
 cross-examination has no legal evidentiary
 value---Witness is not permitted to foist into his
 answer statement any material which is not in
 answer to or explanatory of his answer to the
 questions put to him---Such voluntary evidence is
 denominated as "irresponsive" testimony and the
 introduction of such evidence shall be against the
 rule of re -examination as contemplated under
 Art.133 of Qanun-e-Shahadat, 1984---Principles.

According to Article 133 of the Qanun-e-Shahadat
 Order, 1984, the order of examination of witnesses
 has been set down. The witnesses shall be first
 examined-in-chief and then if the adverse party so
 desires shall be cross-examined. The
 re-examination, however, is limited to the
 explanation of matters referred to
 in-cross-examination and if permission in this
 respect is granted by the Court. It would thus, be
 seen that the voluntary statement by a witness in
 cross- examination has no legal evidentiary value.
 It is not permissible for a witness to foist into his
 answer statement any material which is not in
 answer to or explanatory of his answer to the
 questions put to him. In jurisprudence, such
 voluntary evidence is denominated as "irresponsive"
 testimony and the introduction of such evidence
 shall be against the rule of re-examination as
 contemplated under Article 133 of the
 Qanun-e-Shahadat Order, 1984."

21. Reverting to the merits of the case, it is gleaned from the appraisal of the foregoing that the Syed Azhar Ali is Lawful owner of the said house and he has purchased the said house lawfully thereafter not only a Transfer Deed was executed in his favour but also it was also mutated in the record of Karachi Development Authority while Ishrat Parveen failed to produce any iota of documents favouring that the said house was purchased by her deceased husband Muhsarraaf Ali.
22. In view of the above discussion, I am quite clear that Mst. Ishrat Parveen has failed in:-

- (i). Explaining that sale transaction was actually entered between his deceased husband Syed Musharraf Ali while sale transaction was entered between Syed Azhar Ali who is real purchaser and the seller to which the deceased husband of Mst. Ishrat Parveen i.e. Syed Muhsarraf Ali was not party.
- (ii). Explaining that the consideration for purchasing the said house was paid by her deceased husband while the consideration for purchasing the said house was paid by Syed Azhar Ali to which Mst. Ishraf Parveen and her witness admitted in their cross examination.
- (iii). Ishrat Parveen failed to produce any witness that her deceased husband Syed Musharraf Ali purchased the said house on the other hand the Syed Azhar Ali produced one witness namely Mst. Kasri Begum in his defence who introduced on record through her affidavit-in-evidence that Syed Azhar Ali obtain Rs.2000/- in the year 1966 from her husband for purchasing the said house, therefore, the essential ingredients of source of consideration establishes that Syed Azhar Ali purchased the said house.
- (iv). Mst. Ishrat Parveen further failed showing original title documents in the name of her deceased husband Syed Musharraf Ali while Syed Azhar Ali produced title documents containing his name which establishes that the original title documents are in possession of Syed Azhar Ali.

23. It establishes that the Syed Azhar Ali purchased the said house and in this respect he introduced on record Sale Agreement, Transfer Deed, Transfer Letter issued by KDA showing that the title documents are in his possession and has been produced in evidence by him which is also one of the conditions which is mentioned as supra while no

original documents of like nature produced by Ishrat Parveen in the name of her deceased husband namely Musharraf Ali in respect of the said house, therefore, claim of Ishrat Parveen that her deceased husband Syed Musharraf to be actual owner cannot be believed, hence Issue No.1 is accordingly answered as negative.

24. Issue No.2 germane to construction of the said house as well as its possession. The onus to prove construction of the said house lies upon Mst. Ishrat Parveen, latter neither introduced on record any documentary proof to prove that her deceased husband constructed the said house from his own resources. A cursory glance over the examination-in-chief of Mst. Ishrat Parveen is silent with regards that her deceased husband so as to construct the said house obtained any building plan from the Karachi Development Authority (“KDA”), however, on the other hand Syed Azhar Ali having purchased the said house applied to the KDA for building plan seeking necessary permission for construction of the said house which requisition of Syed Azhar Ali was approved by the KDA vide letter dated 15.11.1966 and the said approval letter of building plan in respect of the said house was also exhibited by Syed Azhar Ali in his evidence as Exh.D/5 as well as said letter was addressed to Syed Azhar Ali containing his name by the KDA proving that the said house was constructed by Syed Azhar Ali from his own resources Syed Azhar Ali was doing job with a contractor drawing monthly salary, nonetheless, Ishrat Parveen failed to produce any single evidence/documents that her deceased husband Syed Musharraf Ali constructed the said house, therefore, the issue under discussion is answered in negation to the extent of construction of the said house by the deceased husband of Mst. Ishrat

Parveen (Syed Musharraf Ali). In sequel to the above, it is an admitted position that Mst. Ishrat Parveen alongwith her son Dilawar Ali is in the possession of the said house, therefore, the issue under discussion to the extent of possession is answered as accordingly.

25. Issue No.3 denotes mortgaging of the said house with National Bank of Pakistan as well as repayment of loan amount. Syed Azhar Ali in his connected suit averred that deceased husband of the Mst. Ishrat Parveen fell in financial crises, requested him for financial help who being his brother and in love & affection mortgaged the said house with National Bank of Pakistan. Record insinuates that Mst. Ishrat Parveen in her evidence introduced on record Mortgaged Deed (Exh P-5/4) executed between Syed Azhar Ali and National Bank of Pakistan. Learned counsel for Syed Azhar Ali during course of arguments candidly contended that the loan obtained in respect of the said house for the help of deceased husband of Ishrat Parveen was paid by Syed Azhar Ali which has been admitted by the witness of the Ishrat Parveen. The said witness of Mst. Ishrat Parveen in his examination-in-chief introduced on record the factum of obtaining the loan amount from his Bank and having been tested to the test of cross-examination, the said witness of Mst. Ishrat Parveen admitted certain suggestions of counsel for Syed Azhar Ali, the said admission is delineated hereunder:-

“It is correct that Syed Azhar Ali had paid the balance of the loan as owner of the suit property. It is correct that Syed Azhar Ali has deposited Rs. 79,292/- in excess of the amount of loan due”

26. It is gleaned from appraisal of the foregoing that Syed Azhar Ali had paid the loan amount and having paid the entire loan amount,

the Redemption Deed dated 02.06.2017 was issued by the National Bank of Pakistan which was also issued in favour of the Syed Azhar Ali and he presented the said Redemption Deed through statement. It is unequivocally proved from the record that the documents exhibited by the Ishrat Parveen such as Mortgage Deed and Search Certificate are also in favour of the Syed Azhar Ali. Syed Azhar Ali has also exhibited loan payment receipt issued by National Bank of Pakistan which also establishes that the loan was obtained for the financial help of the deceased husband of Ishrat Parveen namely Musharraf Ali on the basis of said house was repaid by the Syed Azhar Ali, therefore, the issue under discussion is answered as accordingly.

27. As far as issue No.4 is concerned, Syed Azhar Ali in his connected suit beseeched for cancellation of alleged Gift Deed and learned counsel for Syed Azhar Ali during course of his arguments strenuously deny the Gift Deed introduced on record by Ishrat Parveen. Record reflects that the said house was mortgaged with the National Bank of Pakistan on 08.08.1985 which is admitted from the record and all original title documents of the said house were with the Bank then how a Gift can be executed in favour of the Ishrat Parveen by her deceased husband namely Musharraf Ali. It is well settled in these days that the Bank obtains all original title documents and in lieu thereof a mortgage agreement is executed between the mortgagor and the mortgagee, therefore, a question arises in a prudent mind that when certain original documents of the said house were in the possession of the NBP then how a Gift Deed can be executed.

28. Reverting to the merit of this issue, Mst. Ishrat Parveen, admitted the suggestion that the Gift Deed is executed much latter than the mortgage Deed. In order to reach at just and proper conclusion of the issue under discussion, it would advantageous to reproduce the relevant excerpt from the evidence recorded by Ishrat Parveen which reads as follows:-

“...In fact it was gifted to us in July 1985. Para No.2 of the declaration of gift has been readout to me in which it is stated that the gift was made on 05.10.1985. I say that this date is correct...”

29. Since the Ishrat Parveen admitted the very existence of the Gift Deed executed by her deceased husband in her favour after the mortgage of the said house. The Mortgage Deed came into force on 08.08.1985 and the alleged Gift Deed executed on 05.10.1985, a question arises in a prudent mind that how a Gift Deed can be executed without original title documents which were already in possession of the National Bank, therefore, the very existence of the alleged Gift Deed is highly questionable more particularly it is neither a registered instrument nor register number is affixed or a stamp of the concerned registry branch confirming that the said alleged Gift Deed was registered.

30. Apart from above, there are plethora of precedents of august Court laying down a principle that Gift Deed is required to be registered. The apex court in a case of Allah Diwaya v. Ghulam Fatima reported as PLD 2008 S.C. 73 went on to hold that a Gift Deed was compulsory registerable under Section 17 of the Registration Act, 1908, without getting Gift Deed registered, it would not confer title of property upon the done. Furthermore, this Court in the case of

State Life Insurance Corporation of Pakistan v. Fazal & Sons reported in 2010 CLC 1895 held that according to section 123 of Transfer of Property Act, 1882 (Chapter VII), it is clear that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument (missing in the case at hand) signed by or on behalf of donor and attested by at least two witnesses. In view of the above rational contained hereinabove, the issue No.4 is answered in negation.

31. Issue No.5 connotes renovation and additional construction of the said house. Syed Dilawar Ali (plaintiff No.2 in Suit No. 102 of 2006 and defendant No.2 in Suit No. 323 of 2006) produced certain documents in his examination-in-chief, however, he failed to produced any documents regarding approvals that might have been sought for additional constructions. It is a necessary practice that the owner of a plot when eager to construct some additional construction or an additional floor, he is required to apply KDA/SBCA seeking necessary permission for constructing additional floor/additional construction but here in this case the said Syed Dilawar Hussain failed to introduce on record any approval letter of SBCA/KDA for the construction of additional floor/additional construction, therefore, the issue under discussion is answered in negation. Furthermore, it is by now well-settled principle of law that fraud vitiates the most solemn of proceedings and whenever such transaction is declared null and void then the whole series of such order along with superstructure built upon it is bound to collapse like a house of cards. Reliance in this regard may be placed on the case of Al-Meezan Investment Management Company Ltd and 2 others v. WAPDA First

Sukuk Company Limited Lahore and others (PLD 2017 SC 01), Baja through L.Rs. and others v. Mst. Bakhan and others (2015 SCMR 1704), Lal and another v. Muhammad Ibrahim (1993 SCMR 710), Government of Sindh through Chief Secretary and others v. Khalil Ahmad and others (1994 SCMR 782), John Paul v. Irshad Ali and others (PLD 1997 Karachi 267), Ghias-ud-Din v. Iqbal Ahmed and 5 others (PLD 1975 Lahore 780), and Mst. Sarwari Begum v. Atta ur Rehman 1997 CLC 1500. Since the alleged Gift Deed is a void document (as held earlier), the entire superstructure built upon the said house was also without any lawful foundation.

32. Syed Azhar Ali in his connected suit beseeched for the cancellation of the Gift Deed side by side possession of the said house and mense profit. Section 39 of Specific Relief Act, 1877 empowers and enables the court to cancel any instrument when it is established by the person appearing before the court that the instrument is void. For the ease of reference, Section 39 of Specific Relief Act, 1877 is reproduced as under:-

“....39. When cancellation may be ordered: Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it an order it to be delivered up and cancelled....”

33. From perusal of above reproduction, it appears that “any person” can seek cancellation of a written instrument as “void or voidable”. Since it has been established from the foregoing deliberation that the Gift Deed is void and voidable instrument which needs to be cancelled, therefore, Syed Azhar Ali (plaintiff in Suit No.

323 of 2006) is at the doorstep of this court seeking cancellation of alleged Gift Deed which is liable to be cancelled as well as beseeched for declaration and possession of the said house.

34. So far as issue No.6 is concerned, in view of the rationale and discussion contained hereinabove, the Suit No.102 of 2006 filed by Mst. Ishrat Parveen is dismissed while Suit No. 323 of 2006 filed by Syed Azhar Ali is decreed as prayed, with no order as to costs. Let a decree be drawn accordingly.

Karachi
Dated:29.05.2022

JUDGE

Aadil Arab