ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
R.A. No. 46 of 2005.

Date | Order with signature of Judge

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1. For hearing of CMA No. 7498 of 2017.
2. For hearing of CMA No. 4478 of 2017.
3. For hearing of CMA No. 7377 of 2016.
4. For hearing of main case.

04th December 2019

M/s. Muhammad Sajjad Abbasi and Farooq Akhtar Shaikh, advocate for applicants.

Mr. Abdul Qadir Khan, advocate for respondent No.1.

M/s. Jawed Raza and Danish Raza, advocates for respondent No.2.

M/s. Abdur Rehman and Ahmed Madni, advocates for respondent No.4.

Salahuddin Panhwar,J:- Through instant revision application the applicants have challenged the order dated **18.12.2004** whereby the IV-Additional District Judge, Karachi East, while dismissing Civil Appeal No. 18 of 2003 maintained the order dated **21.02.2002** passed by the V-Senior Civil Judge, Karachi East, whereby the plaint in suit No. 1488 of 2002 filed by the applicants was rejected under Order VII rule 11 CPC.

2. Precisely, controversy between the parties is that subject matter property, which is a commercial building, was owned by late Muhammad Yousuf and late Mst. Gulshan Afroze with equal share; such property was mortgaged with bank, there was a litigation with the bank wherein respondent No.1 Muhammad Jamal and Mst. Gulshan Afroze were party. Case of Muhammad Jamal is that he received subject matter property through gift by Mst. Gulshan Afroze (his mother) as she was alive at that time and through Relinquishment Deed by other legal heirs (07 daughters and 03 sons), however, the mother Mst. Gulshan Afroze

filed suit for cancellation of Gift Deed and she filed suit alongwith other legal heirs by challenging the Relinquishment Deed. Second suit whereby Gift Deed was challenged was rejected on two grounds i.e. firstly, the plaint was barred under Order II rule 2 CPC, as in first suit they failed to claim the same relief, and secondly the plaint was barred by limitation. Whereas in suit relating to Relinquishment Deed, an application under Order VII rule 11 CPC was preferred wherein jurisdiction of Civil Court was challenged on the plea that admittedly property is valued more than rupees eight crores, *inter alia*, limitation. Learned trial Judge rejected the plaint on the sole ground of limitation, which order was assailed in appeal but in same manner appeal was also dismissed, hence, this revision application.

3. Heard learned counsel for the respective parties.

4. It would be conducive to refer prayer clause a) and b) of suit in question i.e. Suit No. 1488 of 2002, which are that:-

> a) to declare that the Relinquishment Deed dated 04-04-1993 and dated 06-12-1993 were BENAMI and were not to be acted upon in view of such understanding between the parties before execution of the deeds, hence liable to be cancelled.
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> b) to grant mandatory injunction directing the defendant No.1, his agents, servants, subordinates any other person acting on his behalf to transfer or alienate away the suit property and to distribute income from the suit property just like as envisaged under Mohammadan law amongst the legal heirs of deceased Muhammad Yousuf."

5. Learned counsel for the respondent No.1 has emphasized over the deed of relinquishment contending that same was legally executed in his favour, hence, suit filed in 2002 seeking cancellation of relinquishment deed executed in 1993 is time barred and this Court only can examine this aspect. He has relied upon decision reported as 2007 SCMR 621.

6. Keeping in view the contentions raised by learned counsel it would be pertinent to refer the relevant paragraph of the impugned order of the trial Court, which is that:-

> "The brief facts as stated in the plaint are that plaintiff's father deceased Muhammad Yousuf along with his wife Gulshan Afroze had jointly purchased the property bearing No. 15-A-6, situated in P.E.C.H.S Karachi measuring 1105.55 square yards. Plaintiff No.1, 3 to 6 have executed a General Power of Attorney in favour of the plaintiff No.7, and further plaintiff No.2 has separately executed a Power of Attorney in favour of plaintiff No.7. The deceased Muhammad Yousuf had 50% share in the said property who expired on 7-4-1992 and leaving behind widow Mst. Gulshan Afroze and 7 daughters and 4 sons. Mst. Gulshan Afroze widow of late Muhammad Yousuf had 50% share in property which was purchased by jointly. The plaintiff due to pre-occupied with certain affairs no to serve, look after and manage the suit property, hence they selected it better to entrust the management of the property in question to defendant No.1. In this connection for effectively managing the suit property. The plaintiff executed a deed of banami relinquishment in favour of defendant No.1. One of the legal heir of deceased Muhammad Yousuf namely Shahnaz Begum who is also co-sharer in disputed property, had separately executed a relinquishment deed in favour of defendant No.1 dated 4-4-19936 and 6-12-1993. Before execution of the Deeds defendant No.1 had agreed with the earnings from the suit property would be equally distributed amongst all the legal heirs of deceased Muhammad Yousuf, but he failed to do so and did not bother to approach any of the legal heir in respect thereof.
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> In the instant case the relinquishment deed dated 4-4-1993 and 6-12-1993, were executed in the year 1993. Article 91 provides to cancel or set-aside to instrument not otherwise provided for the limitation period is 3 years.
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> The relinquishment deed dated 6-12-1993 was registered on 6-12-1993, while relinquishment deed dated 4-4-1993 registered on 13-4-1993, the period for canellation starts from the date of registration which is obviously three years while the plaintiff filed the present suit for cancellation of relinquishment deed dated 12-11-2002, which is barred under the Limitation Act. Hence the suit is not maintainable and the plaint is hereby rejected under Order 7 Rule 11 CPC with no order as to costs."

7. Besides, learned counsel for the respondent No.1 has emphasized over paragraphs No. 12, 13 & 16 of judgment passed in H.C.A No. 150 of 2007. For the sake of convenience, same are also reproduced herewith:-

> 12. Thus, it is clear from the above statement of the Plaintiff/Appellant itself, that she slept over her alleged right for a long period of about 10 years though the Defendant No.1, allegedly, started claiming to be the owner of the suit property after obtaining signatures in the same year 1993 on the aforesaid documents including the gift deed in question and he allegedly,

> received all rents, income and profits and never distributed anything amongst the plaintiff party. All this goes to show that the alleged facts as mentioned above, were known to her in the same year 1993 soon after the execution of document in question. Thus, in view of the above admitted facts appearing from the averments of plaint itself, as well as the legal position as discussed above, the suit was rightly found by learned Single Judge to be barred by limitation as, not only the substantial relief of cancellation governed by Article 91 of Limitation Act but the premier relief of declaration covered by Article 120 of Limitation Act, was also barred by time in a similar manner, while the remaining reliefs of accounts, permanent and mandatory injunction were merely ancillary to the above main reliefs.
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> 13. Apart from above, the suit was also held to be barred U/O 2 Rule 2 CPC and in this regard, the contention of learned Counsel for Appellant was that the earlier suit No.1488/2002 was in respect of 50% share involved in Relinquishment Deeds dated 4.4.1993 and 6.12.1993 while the present suit No. 280/2003 was in respect of remaining 50% share involved in the Gift Deed dated 25.2.1993 and the Plaintiff/Appellant had a separate cause of action accrued for the second suit during the pendency of first suit, therefore, these two suits could not be connected in one suit and as such, the bar of Order 2 Rule 2 CPC was not attracted at all. Whereas, the contention of learned Counsel for Respondent No.1 was that the provisions of Order 2 Rule 2 CPC are fully attracted to the second suit as the cause of action in both suits being the same, was available to plaintiff/Appellant at the same time of filing the first suit but she totally concealed all the facts relating to the Gift Deed, from her first suit though such document was earlier than the Relinquishment Deeds and last Relinquishment Deed was admittedly executed on 06.12.1993, meaning thereby, there was nothing wrong in respect of Gift Deed dated 25.2.1993, at least up to 06.12.1993 when the last document was executed.
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> 16. It is evident from the plaints of both suits themselves that the object/purpose of execution of all the three documents was the same as mentioned above, therefore, the alleged violation or infringement of such understanding, no doubt, constituted one and the same cause of action in respect of whole of the claim and any portion of which, could not be omitted but the Plaintiff/Appellant in her earlier Suit No. 1488/2002, mentioned nothing about the portion of her claim relating to the first document of Gift Deed dated 25.2.1993 and while omitting the same, she made claim in respect of subsequent documents of Relinquishment Deeds dated 4.4.1993 and 6.12.1993 therefore, the portion of the claim so omitted from earlier suit, could not be claimed afterwards by way of second suit specially when it is not the case of Plaintiff/Appellant that at the time of filing her first/earlier suit she was not aware of her alleged right to the portion of the claim so omitted by her. Accordingly, the second/subsequent suit was rightly found to be hit by Order 2 Rule 2 CPC."

8. Learned counsel for the respondents No.2 contends that trial court was required to examine the question of jurisdiction at the first instance when defendants were challenging the jurisdiction, hence, leaving that question decision on merits is against the principles of Civil

Administration of Justice. He has relied upon case-laws reported as **2002 CLC 1382, 2006 SCMR 470, 2013 SCMR 338, 1995 SCMR 584 and 2001 SCJ 553**.

9. Here, it needs to be clarified at the outset that in a *declaratory* suit, challenging title as ***'Benami',*** the date of execution thereof needs not be treated as **'start of limitation'** because execution of *document* in such case is *first* acknowledged but not as ***bona fide*** rather as ***'formal'.*** In short, in such like matter, it is not the ***title document*** which matters but the *hidden/secretly* arrived intentions between a *title holder* (benamidar) and ***real purchaser.*** The cause for such like *declaratory* suit only arises when such hidden/secret commitments/understandings come under dispute. Thus, I would be *safe* in concluding that in such like case, the question of *cause* of action has nothing to do with the date of execution of document but such questions, including that of *limitation* would *largely* depend upon *asserted* facts whereby one *(plaintiff)* sets cause of action *(breach of secret/hidden commitments)*. Guidance is taken from the case of ***Muhammad Nawaz Minhas v. Surriya Sabir Minhas*** 2009 SCMR 124 wherein it been observed as:-

> 9. It is well-settled by the superior Courts that the onus of the particular sale/purchase if 'Benami' and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. 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. **The essence of a Benami is the intention of the party or parties concerned;** and not un-often such intention is shrouded in a thick 'veil', which cannot be easily pierced through. Despite that such difficulties do not relieve the person taking the plea of *'benami'* transaction to be Benami of any part of the serious onus that rests on him. **The question, whether a particular sale is 'Benami' or not, is largely one of fact**, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down, yet in determining the probabilities and for gathering the relevant indicia, the courts have usually laid down the criteria to determine the 'Benami' transaction.

10. In the instant matter, mother and some of the brothers and sisters are claiming this property as *Benami.* Determination of such question has its own ingredients and question of *limitation* would depend upon asserted fact of *breach* of secret/hidden commitments. Now, it can safely be concluded that both the lower courts were not *right* in giving much weight to date of document because when the question of limitation *largely* depends upon a fact or facts then same shall *squarely* be a ***mixed question*** of law and facts which, *legally,* cannot determined without recording evidences. Reference is made to case of *Haji Abdul Sattar & Ors v. Farooq Inayat & others* 2013 SCMR 1493 wherein the principle was reaffirmed as:-

> "7. …..Consequently, we are of the opinion that the issue of limitation in the matter is a mixed question of law and fact, **and without evidence being recorded the same cannot be determined".**

Further, it also needs not be reiterated that while deciding application Under Order 7 r 11 CPC the averments of the plaint, *normally,* are to be taken as correct, therefore, both the courts below were required to have appreciated this legal position in view. Accordingly, impugned orders are set aside; case is remanded back to the trial Court to decide it as fresh on merits, where the parties would be at liberty to agitate with regard to jurisdiction. Needless to mention that these are old proceedings, therefore, the trial court preferably shall decide the case within six months.

J U D G E

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