

## IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.1238 of 2008

Plaintiff                      Mr. Muhammad Aslam Mughal,  
advocate for plaintiff.

Defendant                      *Nemo for defendant.*  
(Declared Ex parte)

Date of hearing :        26<sup>th</sup> January, 2016

Date of judgment:    22<sup>nd</sup> March, 2016

### J U D G M E N T

SALAHUDDIN PANHWAR, J. Through instant judgment, I am going to decide captioned suit for '**Declaration, Cancellation, Mandatory & Permanent Injunction**'.

2.                      Succinctly, relevant facts are that plaintiff pleads that he married with defendant No.1 in year 1998 and there are two children namely Laiba Zafar and Alshi-Ba Zafar; that defendant No.1 is a house hold lady who (defendant No.1) requested and pressed plaintiff to transfer suit property in her name only to secure interest of daughters. The plaintiff in order to satisfy defendant No.1 executed Sale Deed on 13.08.2008 vide Registration No.3903 before defendant No.2 in consideration of Rs.96,26,000/-; plaintiff claimed to have paid stamp

duty and cost of sale deed as transaction was formal so as to cool down defendant No.1 else plaintiff claimed to be owner.

3. It is further pleaded that after registration of Sale Deed the defendant No.1 changed her attitude towards plaintiff and left house on 22.08.2008 alongwith her daughters; she had also taken original sale deed with her while leaving. The plaintiff *however* brought the defendant No.1 back from hotel but she (defendant No.1) had concealed the original document. After some time, defendant No.1 promised to return original sale deed but did not; she started claiming herself to be owner of property and even started sending Estate Agents. The plaintiff, claiming the sale deed as formal, and himself as actual owner, filed the instant suit.

With reference to such, the plaintiff sought following relief(s):-

- a) For declaration that the Sale Deed dated 13.8.2008, Registration No.3903 in respect of the double storied house bearing No.31/I, 28<sup>th</sup> Street, Khayaban-e-Shamsheer, Phase V-Ext. DHA Karachi, measuring 1000 Sq. yards in the name of defendant No.1 is sham and ineffective as actually no sale transaction or conveyance took place between the parties;
- b) For declaration that the plaintiff is still the actual owner of the same and the said Sale Deed has been formally made;
- c) For cancellation of Sale Deed dated 13.8.2008, Registration No.3903 in respect of the said property, as sham one;

- d) For mandatory injunction thereby directing the Defendant No.1 to surrender the said Sale Deed and Defendant No.2 to cancel the same in their record;
- e) For permanent injunction thereby restraining the Defendants their heirs, successors, nominees, servants, officials, sub-ordinates, directly or indirectly under them, from creating any third party interest in respect of the suit property in any manner whatsoever;
- f) Costs of the suit;
- g) Any other relief that this Hon'ble Court may deemed fit and proper;

4. The record shows that summons were issued to the defendant(s); service was held good but defendants did not appear hence were declared *ex-parte*.

5. The plaintiff filed his *affidavit in ex-parte proof*; he also examined himself as PW-1. He produced his *affidavit in ex-parte proof* so also photostat copies of title document(s) as PW-1/2 to PW-1/8.

6. Heard. Perused record.

7. It is settled principle of law that mere absence of the defendant shall not result into decreeing the suit of the plaintiff *blindly* or to take the words (evidence) of the plaintiff as *proved* but either of the two (plaintiff & Court) shall continue with their obligations i.e:

*i) the plaintiff shall be required to prove his claim, as required by law;*

*ii) the Court shall examine & determine the entitlement of the plaintiff and extent thereof;*

A reference in this regard may be made to the case of *Al-Pak Ghee Mills V Zeeshan Traders* (2008 CLC 120) wherein it is held:

*'Though the defendant is not represented, but while passing the decree it is the duty of the Court to see whether the plaintiff is entitled for the relief asked for and if so to what extent.'*

8. However, before discussing the merits, I would like to take a sail through *Benami transaction* because the issue, involved demands so. I have no hesitation in *safely* endorsing that the law relating to transfer of Property & that of Registration Act does not recognize the *Benami transaction*; since it has been a long prevailing practice in our society that people do indulge in '*benami transaction*' therefore, the Courts have stamped such practice. It (*Benami*) is such a transaction which *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.'*

As, per law, one would *normally* be regarded '*owner*' who is so appearing from the *Record of the Rights* and valid title document, else

object of '**Record of Rights**' shall fail on basis whereof Transfer of Property and Registration are *normally* 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.

9. Be that as it may all *Benami transactions* may not be reprehensible and improper and there may not be anything inherently wrong in it, however, there is also another opinion that 'every Benami transaction' is not harmless because past experience shows that benami transactions have often been resorted to for furthering illegal or questionable objects, including the evasion of taxes. Benami transactions are sometimes also resorted to in order to defeat creditors. Since, the law of the land and Shari'h *even nowhere* restricts one to purchase as many as property one wishes but he/she shall always be *legally* obliged to explain the sources for such assets because Islamic culture promotes *accountability* and even leaves no exception for a '**Khalifa**' of the '**Waqt**' (time) from explaining any disproportionate in his income and assets. The Laws of the land and Shari'ah even do not prevent one from **helping** deserving; loved or liked ones even by way

of 'gift', 'donation', 'Sadqa', 'khairat', 'Trust' e.t.c but *nowhere* leaves a room for entering into a *fictitious/false* transfer of title. I am also conscious that there have been made number of enactments, *focusing* this aspect, and even an act of having disproportionate assets than income has been recognized as '*penal offences*'. A reference to Sections 5-B and 5-C of Prevention of Corruption Act, 1947 may be made which are:

**'5-B. Declaration of assets.—(1)** When the Provincial Government on receipt of information....., is satisfied that there is reason to believe that any **public servant** or **any other person** on his behalf is in possession of pecuniary resources or property **disproportionate** to the known sources of income of such **public servant** it may, be order, require such public servant or other person to furnish in prescribed manner and within the prescribed time a statement of his property and liabilities and such information relating thereto as may be required by the order.

(1) if such public servant or persons--

a)...

b) ...'

**'5-C. Possession of property disproportionate to known sources of income-- (1)** Any public servant who has in his possession any property, moveable or immovable either in **his own name** or in the **name of any other person**, which there is reason to believe to have been acquired .....

Material to mention here that the term '**benamidar**' was included in Section 5 of the National Accountability Ordinance, 1999 by *National Accountability Bureau (Amdt.) Ordinance, 2002 dated 23.11.2002* as "(da) which reads as:

**'(da) 'benamidar'** means any person who ostensibly holds or is in possession or custody of any property of an accused on his behalf for the benefit and enjoyment of the accused;'

The Section 9(a)(v) of Ordinance, 1999 provides penal action while speaking as:

*'if he or any of his dependants or **benamidars** owns, possesses, or has acquired right or title in any 'assets' or holds irrevocable power of attorney in respect of any 'assets' or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income; or*

10. The object(s) and purposes of said enactments and that of relating to tax(es) upon **income** could not be aimed to restrict one from owning; possessing or dealing in moveable or immoveable properties which *otherwise* is guaranteed by Article 23 of the Constitution of Pakistan 1973 which is:

**Article 23. Provision as to property.**—Every citizen shall have the right to **acquire, hold and dispose of** property in any part of Pakistan, subject to the Constitution, and any reasonable restrictions imposed by law in the public interest.'

Since, there are also other laws *relating to* taxation on income of all masses (*private*); thus, the object of all these legislations *prima facie* seem to be with an aim to bring an end to disproportionateness between *income and assets*. However, I regretfully acknowledge that typical culture, prevailing in our country, allows such transactions which *otherwise* should come to an end particularly when continuity thereof may frustrate the object and purpose of certain *legislation(s)*, done specifically keeping this aspect '*benami/fictitious transaction*' in view. At this juncture, I would say that despite continuity of such practice it never qualified the terms as '**custom**' or '**usage**' having force of law, *as used in Article 8 of the Constitution of Pakistan 1973* because such *plea* is raised only in the event of *disputes* between *real owner & benamidar* *otherwise* they both make every attempt to keep such act '**secret**'. Thus, it would be quite safe to say that such practice (*benami transaction*) do not qualify the term '**custom**' or '**usage**' which per Black's Law Dictionary are:-

**'Custom'**. A practice that by its **common** adoption and long, unvarying habit has come to have the force of law.'

**'Usage'**. A well known, customary, and uniform practice, usu. in a specific profession or business.

11. There can be no denial to the fact that *normally* no plea of *benami* shall be brought into light (Court) for a '**decree**' unless and until there is denial or *least* dispute by **recorded owner** hence such act which



*otherwise* remains a *secret* be not termed as a '**custom**' or '**usage**'. Further, Transfer of Property Act also has no room for such *transaction* (*fictitious*) rather it allows a transfer of ownership in exchange for a price paid or promised to be paid hence if there is no *ill motive/intent* then parties may *openly* enter into a '**sale**', as is evident from Section 54 of the Transfer of Property Act, 1882, which is:

**Section. 54. 'Sale defined'**—Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

**Sale how made.**—Such transfer, in the case of tangible immovable property, of a value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, **or such person** as he directs in possession of the property.

Accordingly judicial propriety demands a proper *mechanism* in this regard, however till such time a claim of *Benami transaction* is to be examined on the settled principles, within the scope of *stare decisis*.

12. Be that as it may, in the instant case, the plaintiff claimed that he transferred the subject matter in name of his wife (defendant No.1) formally hence he be declared *actual owner* thereof. At this

juncture, it is necessary to examine the maintainability of such claim which would require *first* to have a look at known meaning of term '*Benami transaction*'.

13. The word '*Benami*' is of *Persian* origin which is made up of two words '*be*' and '*nam*' meaning '*no name*' i.e nameless or fictitious. It is a transaction where one purchases property in the name of another for his own benefit with no intent to make the other the beneficiary thereof. In short, simple meaning of *Benami* is that a purchaser desires to buy property but does not desire to buy in his own name and therefore buy it in the name of someone else. Besides, '**a benami transaction is normally triangular**' wherein three i.e. *an ostensible owner* and *real purchaser/owner* and a *seller* are involved. The *ostensible owner* and *real purchaser/owner* must have been agreed *expressly* or *impliedly* to the effect that ostensible owner shall take title in his/her name for *benefit* of real owner as consideration of such transaction is to be paid by such person (real owner). **Reference can be made to the case of *Ghulam Rasool V Nusrat Rasool* (PLD 2008 SC 146)** wherein honourable Supreme Court held 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.

*(emphasis supplied)*

The above meaning and requirement is sufficient to fail a claim of *legal transaction* as '*benami*' if it is not *triangular* but is claimed between two only i.e *seller and purchaser* because '*benami transaction*' shall not qualify its *known term* if a transaction does not include '*purchase of property in name of other for benefit of himself/herself*'. If other transactions are allowed to be challenged as '*benami*' then no '*transfer of property*' shall be from being challenged through sword of '*benami*' which too without a question of '*limitation*' because normally one (real owner) shall sue the '*ostensible owner*' seeking declaration of such title as '*benami*' only when there is denial of *express* or *implied* agreement by the '*ostensible*'.

In the case of *Abdul Majeed v. Amir Muhammad* (2005 SCMR 577) it is held that:

*'In the case of Mst. Zohra Begum it was held that the question whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no a solute formula or acid test uniformly applicable in all situations can be laid down. However, in the light of the rules laid down in the cases of Muhammad Sajjad Hussain v. Muhammad Anwar Hussain 1991 SCMR 703 and Jane Margrete William v. Abdul Hamid Mian 1994 CLC 1437, the Court highlighted four considerations for deciding the question of Benami character of a transaction. These considerations are as follows:-*

- i) *It is the duty of the party who raises such plea to prove such plea by adducing cogent, legal, relevant and unimpeachable evidence of definitiveness. The Court is not required to decide this plea on the basis of suspicion, however, strong they may be;*
- ii) *The Court is to examine as to who has supplied the funds for the **purchase of property in dispute**, it is proved that **purchase money from some person other than the person in whose favour the sale is made**, that circumstance, prima facie, would be strong evidence of the Benami nature of the transaction;*
- iii) *The character of a transaction is to be ascertained by determining the intentions of the parties at the relevant time which are to be gathered from all the surrounding circumstances i.e the relationship of parties, the motives underlying the transactions and any other subsequent conduct;*
- iv) *The possession of the property and custody of title deed.*

*(emphasis supplied)*

Even the above criterion affirms that only those transaction(s) could be challenged as 'benami' which are triangular.

14. In the instant matter, the plaintiff claims to have transferred the title of subject matter in name of the defendant No.1 by executing the registered deed. He (plaintiff) does not claim to have *purchased* the property in name of the defendant No.1 for his own benefits hence the plaintiff is not legally justified to claim such transaction as '*benami*' in view of what has been discussed above.

Besides, the plaintiff has not produced any evidence to *prima facie* establish that consideration of the transaction in question was made by him nor that the defendant No.1 had no source to make payment of such consideration. Mere words of the plaintiff shall not be sufficient to take as proof of his claims particularly when plaintiff himself has admitted during proceedings that the defendant No.1 shifted to Dubai in the year 2012 so it appears from the order dated 22<sup>nd</sup> October, 2015 which reads as:

*'I have heard the learned counsel for the plaintiff at length. During the course of hearing, it was stated by him that defendant No.1 shifted to Dubai in the year 2012. This fact has also been confirmed by the plaintiff, who is present in person. The plaintiff is directed to place on record latest and complete address of defendant No.1.....'*

The act of defendant No.1 to have shifted in Dubai is of significance to establish her financial position. Further, the plaintiff produced no witness to establish that such change of title was under *express* or *implied* agreement between him (plaintiff) and the defendant No.1. Failure, of establishing existence of such express or implied agreement is also sufficient to fail such a *lis*.

15. It is also a matter of record that the plaintiff does not hold/possess the *original document* which he (plaintiff) admits to be with the defendant No.1 who even did not return to the plaintiff though *allegedly* promised. The plaintiff has not claimed an *end* to

relationship between him (plaintiff) and his wife (defendant No.1), as is evident from the evidence of the plaintiff that:

‘Defendant No.1 occasionally visits me as my wife; there is no separation.’

Thus, if there had been any agreement between these two (plaintiff and defendant No.1) at relevant time i.e *change of title* or she (defendant No.1) had promised for return of same even at *later time* as claimed in the para-13 of the plaint that:

*‘That, after some time the **Defendant No.1, promised and took time to return the original Sale Deed to the plaintiff,** but that went in vain and now the Defendant No.1 has turned greedy and she is claiming that she is the owner of the said property and is entitled to sell the same to anyone in the market and the plaintiff has nothing to do with this property’.*

*(emphasis supplied)*

then he (plaintiff) could have established so either by producing the defendant No.1 herself or *least* by producing other witnesses to prove his such claim which he didn’t particularly when relationship is existing between the parties. The plaintiff has to bear the consequences of his own *failure*.

In the last, I would also attend to the  *motive*, pleaded by the plaintiff for transferring title of the subject matter in name of his wife. A reference to para-4 of plaint, being relevant is made for such purpose, which is:

*'That, the Defendant No.1 requested and demanded to the Plaintiff that the suit property be transferred in her name in order to only secure the interest of their said daughters and of Defendant No.1, who are already living therein with the plaintiff.*

*(emphasis supplied)*

I am not inclined to accept this because if both (plaintiff and defendant No.1) were interested in securing interest of the 'children' then title of the subject matter in names of minors could have easily satisfied grievance of both two.

15. Further, the plaintiff in his evidence pleaded reason for declaration of his status as "*benamidar*" only to transfer title of property in names of kids, as is evident from relevant portion thereof:

*'I want to transfer this property in favour of my kids; this property was purchased by me for that purpose. Repeatedly I have asked Defendant No.1 for transfer of property in favour of kids but she declined, therefore, I pray that my suit may be decreed.*

*(emphasis supplied)*

Since, marital tie between them (plaintiff and defendant No.1) is continuing hence ultimate beneficiaries are the *children*. Plaintiff has not alleged that interest of the defendant No.1 is adverse to that of children. Last but not the least, the perusal of the record shows that registered deed in question is dated 13.8.2008 and suit was filed on 4<sup>th</sup> September, 2008 i.e less than a month period from date of its execution yet the plaintiff could neither produced original documents nor any

witnesses to establish his claim to have made consideration and even existence of any understanding / agreement between him and defendant No.1, which are *otherwise* requirement to prove a transaction as '*benami*' , as held in case of *Ghulam Rasool* (supra).

16. In view of above discussion, I am of the clear view that plaintiff has failed to establish / prove his case and mere absence of the defendant *alone* has not changed this fact. Accordingly, the suit of the plaintiff is hereby dismissed with no order as to costs.

17. While parting, as I already concluded that time has come for a proper mechanism so as to bring a *full stop* to '*benami transaction*' or *least* to bring transactions out of the shadows of any ill motive or intention by making proper legislation, therefore, the office is directed to send a facsimile copy of this judgment to Learned Attorney General for Pakistan; Federal Secretary, Law Department and Advocate General Sindh for initiating necessary steps towards a concrete foundation (Law) in view of paragraphs No.8, 9, 10 and 11 of instant judgment.

Let such decree be drawn. Announced in open court, this  
22<sup>nd</sup> day of March, 2016.

**J U D G E**