

THE HIGH COURT OF SINDH AT KARACHI

IIInd Appeal No. 58 of 2011

Present: Mr. Justice Salahuddin Panhwar

Appellant : Syed Hameed-ul-Hassan through Mr. Zahir Hussain Chishti advocate

Respondent No.1: Mst. Asma Hafeez through Mr. Fazal-ur-Rehman advocate

Respondent No.2: Nemo

Respondent No.3: KDA through Mr. Muhammad Aqil Zaidi advocate

JUDGMENT

SALAHUDDIN PANHWAR J.- This II-Appeal assails judgment dated 21.01.2011 passed by learned 1st Additional District Judge, Karachi East in Civil Appeal No. 98 of 2009, whereby while setting aside the consolidated judgment and Decree dated 28.04.2009 and 04.05.2009 respectively, passed by learned III- Senior Civil Judge, Karachi East, dismissed Suit No.813/2002 filed by appellant against respondents and decreed Suit No. 325/2003 filed by respondents No.1 and 2 against appellant with no order as to costs.

2. Succinctly the relevant facts for disposal of instant appeal are that appellant filed a suit for Declaration and Injunction as to his *benami* entitlement of the subject property i.e. H.No.A-220, Block-13-C, Gulshan-e-Iqbal, Karachi measuring 240 sq. yards, whereas, the respondents No.1 and 2 filed a suit for possession of the subject premises. The trial Court consolidated both the suits, framed the issues for their disposal, thereafter, parties presented oral as well as documentary evidence in favour of their respective claims. After considering the stances of the parties and the evidence brought on record, the trial Court decreed the suit of the appellant while suit filed by the respondents No.1 and 2 was dismissed. Such judgment was assailed before learned first Appellate Court whereby the findings recorded by learned trial Court were reversed and ultimately the suit of the appellant was dismissed, whereas suit filed

by the respondents No.1 and 2 was decreed, hence appellant being aggrieved has preferred instant appeal against the impugned judgment.

3. Learned counsel for the appellant argued that appellant had purchased the subject property from his own sources in the name of his brother Khatibul Hasan, who was *benamidar*; that the original documents of the subject property are in possession with the appellant; that appellant permitted his siblings including Khatibul Hasan and mother to reside in the said house as licensees; that Khatibul Hasan married with respondent No.1 in the year 1998 and resided in the subject property; that in the year 2001 his brother died leaving behind respondents No.1 and 2; that respondent No.1 though knowing well that her husband was only *benamidar* and the property belongs to the appellant, after the death of her husband, became dishonest and illegally and unlawfully got subject property mutated in her name and in the name of respondent No. 2 in collusion with the respondent No.3; that the trial Court after evaluating the evidence and material produced during trial, passed the well-reasoned judgment whereby the suit filed by the appellant was decreed and the suit filed by the respondents No.1 and 2 was dismissed, however, in appeal, the learned Appellate Court passed the impugned judgment in slipshod manner without taking into consideration the evidence and documents/record produced at trial; that the findings of the learned trial Court were based on proper appreciation of evidence/record, but the same were reversed by the learned appellate Court without any cogent reason, as such, it is prayed that the impugned judgment may be set aside and the judgment passed by learned trial Court may be upheld.

4. Conversely, learned counsel for the respondents No.1 and 2 mainly argued that learned trial court did not appreciate the evidence brought on record and passed the judgment, which was result of non-reading/mis-reading; that in appeal, the learned Appellate Court minutely gone through the evidence and material available on record and thereafter passed the impugned judgment which is well-reasoned and requires no interference by this Court. Lastly, it is submitted that instant appeal being misconceived merits dismissal.

5. Counsel for respondent No.3/KDA argued that the respondent No.1 and 2 were legal heirs of Khatibul Hasan in whose name the property in question was in the records of the KDA, hence the mutation in favour of respondents No.1 and 2 was effected in accordance with law after completing all the formalities.

6. Heard and perused the record.

7. Before dealing with the case in hand, firstly, I would like to examine the scope of the 2nd Appeal in the matter of conflicting findings of the courts below. The scope of the 2nd appeal is *narrow* and it could be exercised *only* if the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Guidance is taken from the case of the *Gulzar Ahmad and others vs. Ammad Aslam and others (2022 SCMR 1433)* wherein the Hon'ble Apex Court has held that:

"7. Compliant with section 100, C.P.C., the second appeal only lies in the High Court on the grounds that the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Meaning thereby, it does not lie to question the findings on facts. In the case of Madan Gopal v. Maran Bepari (PLD 1969 SC 617), this court held that if the finding of fact reached by the first appellate court is at variance with that of trial court, such a finding by the lower appellate court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first court which have been disfavored in the contrary finding. It was further held that interference would be justified if the decision of the lower courts is found to be contrary to law or some usage having the force of law has failed to determine some material issue of law. Whereas in another case reported as Amjad Ikram v. Mst. Asiya Kausar (2015 SCMR 1), the court held that in case of inconsistency between the trial court and the appellate court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by this court in the judgments reported, as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) and Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others (2013 SCMR 1300)."

8. The above legal position, prima facie, makes it clear and obvious that to succeed in second appeal, the appellant must establish that the finding of fact arrived at by the first appellate court is not found to be substantiated by evidence on the record and is result of its failure in determining the material issue or that conclusions, so drawn, are contrary to settled principles of law.

9. Before discussing the merits of the case, it is pertinent to mention here that 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. In cases of alleged *benami* transaction, there may be a ground for suspicion, nevertheless, the Court's decision must not be based on suspicion or conjecture, but on legal grounds. It is one of the essential elements of a fair trial that the law must be applied to any transaction in the light of its ordinary course of human conduct.

10. In a recent judgment of the apex Court in the case of **Muhammad Yousaf and others vs. Muhammad Ishaq Rana (deceased) through L.Rs and others (2023 SCMR 572)**, has analyzed the '**benami transaction**', as under:

"7. Be it noted that in cases of alleged benami transaction, there may be a ground for suspicion, nevertheless, the Court's decision must not be based on suspicion or conjecture, but on legal grounds. We, therefore, wish to say that it is one of the essential elements of a fair trial that the law must be applied to any transaction in the light of its ordinary course of human conduct. Keeping this in mind when we analyze the benami transaction, we find that there are three persons involved in it - the seller, the real owner, and the ostensible owner or benamidar, and, in the ordinary course of human conduct, it encompasses two different contracts, one is the contract, express or implied, between the ostensible owner and the purchaser (real owner) and it specifically mentions two things. First, the real owner expresses his desire or compulsion (also called motive) and obtains permission from the ostensible owner (Benamidar) to purchase the property in his name after paying the consideration amount to the seller, and second, it talks about the consent

of the ostensible owner (Benamidar) that whenever the real owner demands, he will be bound to transfer the property to him. The other is a contract between the ostensible owner (Benamidar) and the seller of the property. It is important to note here that both the above contracts, though differ from each other in their legal character and incidents, complement each other to establish benami transaction, and thus, in cases of such transaction, the plaintiff must first state them, in detail, in his plaint, and then prove them by legal testimony, and failure to do so is fatal....”

11. It has been held repeatedly that the burden of proof lies heavily on the person who claims against the tenor of the document or deed to show that the ostensible vendee (owner) was a mere name- lender and the property was in fact purchased only for his benefit. Such burden would be discharged by satisfying the well-known criteria, which reads as under:

- (1) Source of consideration
- (2) Motive for the Benami transaction
- (3) From whose custody the original title deeds and other documents came in evidence
- (4) Who is in possession of the suit property

12. On the above touchstone, I have gone through the evidence and the material place on record to find out the source of the consideration. Perusal of record it appears that during cross-examination the attorney of the appellant admitted that appellant has not produced any receipt of payment or witness to establish that the payment of the property in question was made by appellant. However, it was admitted by the attorney of the appellant that husband of the respondent No.1 was Doctor by profession. As such, the appellant has failed to bring on record that the subject property was purchased by him from his own sources. Record further reflects that subject property was purchased in the year 1988 for a total sale consideration of Rs.150,000/- and it is an admitted position that husband of the Respondent No.1 was Doctor by profession, who entered into the house job in the year 1984, as such, such amount was quite manageable.

13. In the present case though appellant claimed that suit property was purchased with a motive to dispose of the same after raising construction on it. Appellant claimed that after purchasing of the property in question in the name of his brother, he raised construction,

however, due to desire of his mother to reside in the said house, he did not dispose of the same. It is surprising to note here that if for the sake of arguments, it is believed that appellant was real owner of the property in question who purchased it for its disposal after construction then why after the desire of his mother to reside in the said property, the same was not mutated in his name. Moreover, it has come on record that Dr. Khatiful Hassan had undergone bypass operation but even then the appellant did not take any step to get the property in question mutated in his name and kept mum till death of his brother Dr. Khatibul Hassan. Thus, the appellant failed to establish source of purchase of the property in question as well as motive/reason for alleged benami transaction. There is nothing on the record to show that there was any impediment or hurdle before the appellant in transferring the suit property in his own name. Additionally, there is nothing on the record to suggest that there was an agreement or understanding between husband of respondent No.1 and appellant that the latter was to be the real owner of the suit house. Appellant had several years after the purchase of the suit house to have executed such an understanding with the husband of the respondent No.1. The absence of such an express understanding would go to respondent No.1's benefit.

14. With regard to the possession of the property in question and production of its title documents in the Court, the respondent No.1, during her cross-examination has asserted that after the death of her husband, the behavior of her in-laws had changed and they attempted to dispossess her from the property in question, therefore, she filed Suit No.305/2002 for permanent injunction wherein written statement was filed by the appellants and they denied the allegations and the said suit was disposed of with directions that appellants were restrained from dispossessing the respondent No.1 from the said property and during cross-examination she stated that she herself left the property but still a room is in her occupation, which fact is not disputed by the counsel for the appellants, as such it cannot be said that she is not in possession of the property in question. With regard to the production of title-deed, admittedly the property was purchased before marriage of respondent

No.1 with Khatibul Hassan thus, mere possession and production of original title documents by the appellants, in absence of proof of other ingredients of *benami* transaction, in my opinion, has no significance. Therefore, the appellants have failed to prove claim of *benami* transaction.

15. For the aforementioned reasons, the judgment and decree passed by learned Appellate Court do not call for any interference by this Court, therefore, the impugned judgment is maintained, resultantly, the instant II-Appeal being misconceived is dismissed. These are the reasons for the short order announced on 03.05.2023.

J U D G E

Sajid