

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Jawad Akbar Sarwana

High Court Appeal No. 36 of 2021

Muhammad Wasim Awan
Versus
Muhammad Riaz Awan

A N D

High Court Appeal No. 37 of 2021

Muhammad Wasim Awan
Versus
Muhammad Riaz Awan & others

Date of Hearing: 11.12.2023

Appellant: Through Mr. Neel Keshav along with Mr. Anwar Ali Tunio Advocates.

Respondents: Through Mr. Irfan Bashir Bhutta Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Instants appeals have challenged a common judgment dated 04.02.2021 passed by learned Single Judge in terms whereof Suit No.1738 of 2009 filed by respondent against the appellant for possession, declaration, mesne profit and permanent injunction was “partly” decreed whereas Suit No.584 of 2011 filed by appellant against respondent for rendition of accounts and recovery of 50 Million was dismissed. Since both the appeals are against common judgment, we propose to dispose them of by this common judgment.

2. Subject matter of these appeals is a flat which respondent claims to have purchased from his funds however he got it registered in the name of appellant as being a benamidar/ostensible, in the year 1999. Respondent then allowed appellant to temporarily reside in the subject flat as his nephew and also since he was working/employed with him

(respondent). It is case of the respondent that when he asked the appellant to deliver possession of the subject flat, when required, appellant refused. This led to filing of suit No.1738 of 2009 by respondent against the appellant.

3. Appellant however refuted the claim of the respondent by filing written statement in which he has taken the plea that he is one of the partners of the firm Rizwan International with respondent in equal share, which firm was subsequently converted into a limited company, in which he has also invested huge amount. The appellant claimed to be an active partner of the firm (as it then was) and not an employee of the respondent, rather respondent was a sleeping partner and the company affairs were run by the appellant. Thus, the appellant claimed that in fact the flat was given to him in lieu of his services that he provided in running the affairs of the company and/or his share/profit in the company. The appellant also filed a suit bearing No.584 of 2011 for rendition of accounts on the same set of facts as narrated in his written statement.

4. Issues in both the suits were framed separately and so also the evidence however both the suits were being fixed together for a considerable time. In Suit No.1738 of 2009 issues were framed on 17.08.2010 whereas in Suit No.584 of 2011 the issues were framed on 28.05.2014. However, on 19.01.2021 a consent order was passed in terms whereof the the suits were consolidated and the issues were, in a way, shortlisted, relevant part of order, along with issues shortlisted, is reproduced as under:-

“Learned counsels present agrees that both these cases pertaining to the same parties and for the same subject matter although not considered earlier for consolidation may be so considered now and be decided by recasting the issues covering the controversy between the parties as follows:

1. *Whether the subject property is available with the defendant as benami of plaintiff?*
2. *What should the decree be?*

....”

5. Above order was passed with the consent of learned counsel appearing for the parties and has attained finality as it has not been challenged by any of the parties, particularly the appellant whose suit was/is for rendition of accounts. Even no arguments were raised for rest of the issues.

6. We have heard learned counsel for parties and perused material available on record and reappraised the entire evidence.

7. Admittedly, the subject property was purchased from the funds of respondent and/or the firm/company. The appellant claims that the flat was purchased in his name in lieu of his profit/investment in the business of the respondent. On the other hand respondent's claim is that the flat was purchased in appellant's name as being ostensible owner as he was his nephew and working with him in his business as being a trusted employee. Hence the controversy is only to the extent if the appellant had any interest/share in the business of the respondent.

8. Since appellant claims his share/interest/profit in the business, the initial and foremost burden lies on him to prove such assertion. He in the suit of respondent bearing No.1738 of 2009 has not produced any document except copy of plaint of his suit bearing No.584 of 2011. The appellant however filed affidavit-in-evidence of two witnesses in Suit No.1738 of 2009 but examined only one witness Abrar Alam Khan (Witness No.2 on behalf of the defendant) in his support who deposed on hearsay and also not

placed any document to support case of the appellant. The appellant could have examined the witnesses of the sale deed executed in his favour but instead he chose to bring these witnesses who are not personally aware of any developments/events in respect of purchase of the subject flat. Even these witnesses are not employees of the firm/company hence cannot say anything about the affairs and/or partners or directors of the company.

9. In his own suit bearing No.584 of 2011 appellant, while taking same pleas, has exhibited following documents:

1.	NTN certificate	Ex.P/1
2.	Tax payment receipts of different years	Ex.P/2 to P/10
3.	Salary cheque and deposit	Ex.P/10 and P/11
4.	Statement of account of Rizwan International showing salary transaction	Ex.P/12

10. All above documents exhibited by the appellant are in relation to showing the appellant to be an employee and getting salary. One fails to understand the logic behind exhibiting these documents as these tend to show the appellant to be an employee of the respondent, which is a plea taken by the respondent in the pleading. Appellant has not been able to exhibit any document which could prove him to be a shareholder/director partner/investor in the business of the respondent.

11. Indeed replies to questions put to appellant during his cross-examination suggest that the appellant had no means to invest any amount in the business. In cross he admitted that his father was a railway employee and he was brought up by his grandparents and

while in Karachi he was living with respondent. Appellant specifically admitted in his cross-examination as under:-

“It is correct that I was financially supported by defendant No.1 Riaz Awan”.

Thus, his assertion that he invested huge amount over the business of the respondent is not confidence inspiring, particularly, when he has not produced a single document to that effect nor has brought any witness in presence of whom such amount was paid. The appellant in paragraph 2 of his affidavit-in-evidence has claimed that he became a partner of the respondent in 1982 however he has not showed anywhere the date, mode and manner in which such (huge) amount was invested in the business, which made him 50% partner in the business, as claimed by the appellant.

12. Respondent on the other hand has exhibited the documents of business being carried out by him. He has exhibited the memorandum and articles of association of Rizwan International (Pvt.) Limited, NTN Certificates and the documents showing him to be the CEO of the company. Copy of Form A-Annual Return, duly certified by SECP, is exhibited as Ex.P/3, which shows three directors; appellant is not shown to be a director of the company.

13. The respondent has also stated in his affidavit-in-evidence that the original title documents are with him as being the real owner and the appellant in his pleadings has not seriously disputed this fact, which rather gives an impression of admission on his part. Appellant, though claims to be the absolute owner, has nowhere in entire the pleadings stated the reason for leaving the original documents with the respondent or any attempt on his part for

retrieving such documents from the respondent. The respondent in his cross has specifically stated the reason of getting the property in the name of the appellant; he has stated that he and his son were out of country whereas his wife is a household lady whereas appellant's second son was a special child (as not disputed). Had it not been correct, the appellant could have simply asked for production of their passports but he has not. Appellant from his evidence has not been able to shatter such assertions in the cross-examination.

14. Very crucial point of the respondent's evidence is that he has also produce father of appellant as his witness as PW-2. Evidence of this witness appears to have not favoured anyone, however, it is only material to the effect that no amount from any of their family members was ever given to the appellant which he could have invested in the business of the respondent. Rather from his evidence it appears that the appellant was dependent on respondent.

15. The appellant has claimed that he was a business partner and so also drawing salary. As to drawing salary, he has stated that it was a very meager amount that he was drawing for the reason that remaining amount was being kept in the company as balance and that is the reason he was given subject flat. This oral assertion is without support of any document. Even this very submission is not supported by his father who has appeared as PW-2. The appellant has also not examined the witnesses of the registered sale deed to corroborate his claim; rather he has examined the

witness who's deposition is on hearsay basis and not witness to any of the events.

16. It is a well settled by the superior Courts that while deciding a benami transaction/ostensibility, the Court should take into account (i) the source of consideration; (ii) in whose custody the original documents are; (iii) possession; and (iv) motive of benami transaction. On all these four counts, learned Single Judge has also discussed the evidence in the impugned judgment. On source of consideration, even PW-2 who is father of the appellant, has categorically stated that from family he had no financial support and more importantly, the payment of apartment/flat was made from the account of company/firm and not made by appellant. The original documents are admittedly with the respondent and the possession has been delivered to the appellant as he being nephew of the respondent and trusted person and for this reason the property documents were registered in his name in the absence of respondent and his son being out of the country at the relevant time and the other son being special child.

17. Thus, cumulative effect of entire evidence would weigh in favour of respondent and against the appellant. The appellant has miserably failed to discharge the burden of proof even for all original, issues, in his favour on all the counts, particularly his investment in the business of the respondent to entitle him for the directorship and/or the profit/share in the business. Hence, the findings recorded by learned Single Judge in the impugned judgment do not call for any interference by this Court.

Resultantly, the appeals merit no consideration and the same are dismissed along with pending applications.

18. Above are the reasons of our short order dated 11.12.2023.

Dated:22.12.2023

J U D G E

J U D G E