

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui &
Omar Sial, JJ

High Court Appeal No. 444 of 2018

Shamsher Khan Appellant

Versus

Mst. Rubina & another Respondents

Mr. Shahenshah Hussain, Advocate for the Appellant
Mst. Rubina, the Respondent No.1, in person

Date of hearing : 18.04.2024

Date of short order : 18.04.2024

Date of reasons : 03.06.2024

J U D G M E N T

OMAR SIAL, J. Shamsher Khan (“**Khan**”), the appellant, had filed Suit No. 1089/2014 against his ex-wife, Mst. Rubina, the respondent, for a declaration that he is the real owner of Plot No. 4-C, measuring 100 square yards, Commercial Street No.1, Phase VI, Karachi (“**suit land**”). The said suit was dismissed via an Impugned Judgment dated 10.11.2018.

2. Khan’s case was that he contracted marriage with Mst. Rubina on 28.01.1992. Soon after that, on 19.12.1992, he claimed to have purchased the suit land in the name of his wife, Mst. Rubina against a sale consideration of Rs. 480,000. He imputes that these funds were raised from his employment with PIA as its Passenger Services Supervisor. The transfer order of the suit land was in the name of Mst. Rubina’s father. Khan’s explanation for that is that the father of Mst. Rubina was an army personnel and, hence, exempt from paying

membership fees. It was to avoid the payment that the transfer order was in his name. He further averred that in 1997, he took three loans from (i) HBFC for Rs. 450,000, (ii) Faysal Bank for Rs. 200,000 and (iii) Standard Chartered Bank for Rs. 200,000. He claimed to have made numerous withdrawals from his provident fund account to finance the approval of ground plus three construction and the actual construction on the suit land. He claims that he spent Rs. 2,000,000 on the construction. Part of the property was their family abode, and part was rented out, which was rent received by Mst. Rubina. However, subsequently, differences arose between the husband and wife, culminating in divorce proceedings, which stood finalised in 2014. After that, Khan proceeded to file the instant suit.

3. Mst. Rubina, in her defence, strongly opposed Khan's case. She claims that the property was purchased by her father from his funds and subsequently gifted to her as the husband, the sole earner of a family of 8, could not provide her with a decent standard of living further, that she had travelled to the USA on 3.8.1993, where she worked hard and raised funds in the sum USD 8000 (Rs. 400,000) for the construction of the house. Upon her return on 5.4.1994, she provided Khan with the money for constructing the property on the suit land. Barring the duration and the provision of funds, Khan has not denied that they travelled to the USA. She further claims that the ground plus one floor of the building had already been constructed from these funds before 1997, when Khan claimed to have applied for a house loan. She also averred that Khan used a significant share of the said loan toward the expense of his sister's marriage, and only 30% of it was used towards the RCC structure for the 2nd and 3rd floors. Further, Khan has only filed this suit as a retribution for taking Khula from him.

4. The question before the Court is whether Khan is the real owner of the suit land and has demonstrated so during the trial and discharged his burden of proof as required under Article 117 of the

Qanun-e-Shahadat Order, 1984. The Supreme Court in **Muhammad Yusuf v. Muhammad Ishaq Rana (2023 SCM 572)** has held a combination of the following factors as the determinative test for benami ownership, *“(i) the source of purchase money relating to the transaction, (ii) possession of the property, (iii) the position of the parties and their relationship to one another, (iv) the circumstances, pecuniary or otherwise, of the alleged transferee, (v) the motive for the transaction, (vi) the custody and production of the title deed, and (vii) the previous and subsequent conduct of the parties.”* It further held that *“Each of the above stated circumstances, taken by itself, is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But a combination of some or all of them go a long way towards indicating whether the ownership has been really transferred or where the real title lies. Since the very object of a benami transaction is secrecy, the evidence adduced in cases of this character should stand the test of strict scrutiny and satisfy the tests mentioned above. In other word, the evidence must be reliable and acceptable impelling the Court to take a view contrary to the recitals in the impugned document...”*

5. In relation to the source of consideration for the purchase of the suit land, Khan has maintained that he was employed at the time of purchase of the suit land. However, he has not provided any documentary proof of his employment or pay slips. Neither has he provided any evidence of the instrument by which the payment was made. In fact, in his affidavit in evidence, he makes an additional submission to the effect that the plaintiff purchased the property from the money that was provided to him by his father. This appears to be an improvisation and contradiction on his part. Furthermore, Khan claims that construction on the suit land began in 1997 after he obtained loans from HBFC, Standard Chartered and Faysal Bank. However, as rightly pointed out by the Single Judge, the application dated 17.01.1997 to HBFC for a loan of Rs. 450,000 mentions the suit land as the place of residence of Khan, giving credence to Mst. Rubina’s assertion that ground plus one already stood constructed on

the suit land with Mst. Rubina's funds. This is further confirmed by Khan during his cross-examination where he admits that *"...I, along with the Defendant, started to reside in the first floor of the subject property in 1996, 14.8.1996 to be more specific"*. Accordingly, we hold that the evidence led concerning consideration either for the purchase of suit land and/or for the construction on the suit land cannot withstand the test of strict scrutiny owing to Khan's contradictions in his pleadings and documentary evidence relied upon.

6. It is also admitted that the possession of the suit land and its title documents is with Mst. Rubina. So far as the other factors are concerned, i.e., *(i) the position of the parties and their relationship to one another, (ii) the motive for the transaction and (iii) the previous and subsequent conduct of the parties* they all overlap in their scope to the instant case owing to the marital relationship of the contesting parties. Hence, we deem it proper that these overlapping factors be clubbed under the overarching factor of motive. Operating on the assumption that the consideration was paid by Khan (which does not stand proved), the motive, as spelt out by Khan in the plaint, was to purchase the Subject Land for his wife. The Supreme Court in **Ghulam Murtaza v. Mst. Asia Bibi (PLD 2010 SC 56)**, while dealing with a similar marital separation, has categorically held that:

"At this juncture, we may clarify that the motive part in the benami transactions is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other. We come across innumerable transactions where a father purchases property with his sources for his minor son or daughter keeping in mind that the property shall vest in the minor. Such transaction subsequently cannot be challenged by father as benami simply because he paid the amount. There are people who, with positive application of mind, purchase properties in the name of other with intention that the title shall vest in that other...A property purchased with ones own sources in the name of some close relative like wife, son or daughter

cannot be dubbed as benami when purchase with full intention of conferring title to the purchaser shown. If this principle is denied and that of benami attracted simply because the source of consideration could not be proved in favour of the named vendee, it would shatter the most honest and bona fide transactions thereby bringing no end to litigation. In the instant case, we have already held that the ingredients of a benami transaction have not been proved by the husband in all the three transactions. Still, we are of the view that even if the husband had proved himself to be the source of consideration, yet no transaction could have been set aside if made with positive intention of transferring or conferring title to the other beneficiary...At one time the husband came out with reason that name of his wife was entered merely to please her. Here comes the principle of bonafides, goodwill and sanctities attached to a transaction. Once having done so, when the husband and wife were amicably living, no one can turn around subsequently to claim exclusive title when the relations become strained and the spouses fall apart. We, therefore, hold in the instant case that even if the amount had been paid by the husband (which it is not proved) yet he could not have turned around to claim that the wife was a benami beneficiary.”

7. The above dicta is squarely applicable to the facts of the instant case. In this case too, Khan has failed to prove that the consideration for the purchase of the suit land was tendered by him. Further, his claim that construction on the suit land started in 1997 after he obtained a loan from various banks also stands discredited on account of the letter dated 17.01.1997. Neither does he have possession of either the suit land or its title documents. Even otherwise, had he shown to have provided for the consideration, his motive was to purchase a property in the name of his wife soon after marriage. Therefore, he cannot, at this stage, owing to the dissolution of his marriage, claim otherwise.

8. Above are the reasons for the short order dated 18.04.2024 by which this appeal was dismissed.

JUDGE

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