IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial

High Court Appeal No. 217 of 2022
High Court Appeal No. 218 of 2022

Mst. Ishrat Parveen & another ……. Appellants

through Mr. Shahenshah Hussain, Advocate

vs.

Syed Azhar Ali
(since deceased) through his legal heirs ……. Respondents

through Mr. Ahmed Nawaz, Advocate

Date of hearing: 06.03.2024

Date of short order: 06.03.2024

Date of reasons: 14.03.2024

JUDGMENT

OMAR SIAL, J: A 200 square yards plot of land shows Azhar Ali Khan as its owner by a Sale Deed registered in his favour in 1966. In 2006, a dispute arose with the widow (Ishrat Parveen) and son (Syed Dilawar Ali) of Azhar's older brother Musharaf, claiming that Azhar was only the ostensible owner of the property whereas the actual owner was Musharaf. Suit No. 102 of 2006 was filed by the heirs of Musharaf seeking a declaration that Musharaf was the true owner and Azhar was a benamidar. Consequently, they also prayed that as Musharaf was dead, they should be declared joint owners. They also sought a permanent injunction against Azhar. On the other hand, Azhar filed Suit No. 323 of 2006, praying that he be declared the owner, possession be handed over to him, and the wife and son of Musharaf be directed to pay Rs. 10,000 per month to him. He also sought a permanent injunction against the heirs. A learned Single Judge of this Court decreed Suit No. 323 of 2006 while dismissing Suit No. 102 of 2006. Being

unhappy with the decision, Ishrat Parveen and Syed Dilawar have preferred these appeals.

2. We have heard the learned counsel for both parties and have perused the record. Our observations and findings are as follows.

3. 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 Supreme 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 based on suspicions, however strong they may be.*
>
> *(ii) That 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."*

4. In Abdul Majeed and others vs Amir Muhammad and others (2005 SCMR 577), the Court, while reiterating the principles in the Muhammad Sajjad Hussain case (supra), stated that:

> *"Some of the criteria for determining the question of whether a transaction is a Benami transaction or not, among other things, the following factors are to be taken into consideration:-*
>
> *(i) source of consideration;*
>
> *(ii) from whose custody the original title deed and other documents came in evidence;*
>
> *(iii) who is in possession of the suit property; and*
>
> *(iv) motive for the Benami transaction.*

It is also well-settled law the initial burden of proof is on the party who alleges that an ostensible owner is a Benamidar for him and that the weakness in the defence evidence would not relieve a plaintiff from discharging the above burden of proof. However, it may be stated that the burden of proof may shift from one party to the other during the trial of a suit. Once the burden of proof is shifted from a plaintiff to the defendant and if he fails to discharge the burden of proof so shifted on him, the plaintiff shall succeed."

5. Applying the principles mentioned above to the case at hand, we observe as follows:

6. Muhammad Siddique Siddiqui, an 87-year-old gentleman who was a contractor in the 60s, testified at trial that he had brokered the deal between the seller of the plot (Raja Abdul Qayum) and Musharaf in the year 1966. Musharaf had paid Rs. 6400 for the property but had asked that the property be registered in the name of his younger brother, Azhar. Siddique was also the person who had built the house on the property and confirmed that Musharaf had paid for the construction as well.

7. On the contrary, Azhar could provide no evidence of the source of his income, which could have enabled him to buy the property. Although Azhar's learned counsel was unaware of how old he was at the time of purchase or how old he is now, we notice that he gave his age as *"about 62"* when his testimony at trial was recorded in 2009. That would make him a 1947-born person, and thus, around 19 years old when the property was purchased. At trial, during his cross-examination, he stated, *"I did my graduation in the year 1969. I was a student in 1966"* Perhaps realizing that he may have faltered, in the very next breath, he contradicted himself by saying, *"I was not a student in 1966"*. He acknowledged that he *"had no proof that I was working anywhere 1966 or before"* and that he *"was not maintaining any bank account in 1966 or prior to that."* Although he claimed that he had borrowed some money from his brother-in-law towards the purchase of the property, he admitted that *"I do not possess any proof in writing that I had borrowed money from my brother-in-law."*

Kasri Begum, whose husband had supposedly given Rs. 2,000 as a loan to Azhar, also expressed her inability to provide any evidence of the same. We also do not find his reasoning that he was a construction contractor or that his earnings as a munshi were the sources of his income that enabled him to buy the property plausible. Not even the remotest of evidence was given in this regard.

8. Then, there is a power of attorney executed and registered by Azhar in 1976, appointing Musharaf as his attorney to deal with all issues connected with the property, including the right to sell it. Based on this power of attorney, Musharaf mortgaged the property in favour of the National Bank of Pakistan in 1985 and obtained a loan against its collateral. Musharraf also paid back the loan, and in this connection, an order dated 15.04.1993 passed by the learned Banking Tribunal II at Karachi was exhibited at trial. It reveals that the suit against the Bank was dismissed, and costs against the Bank were also awarded. Azhar, therefore, relying on receipts of payment to the National Bank of Pakistan claiming that he had paid the loan, does not make sense or logic to us. Why he would pay a loan in 2005 when the suit of the Bank had been dismissed 12 years earlier was another area that the learned counsel could not justify. Azhar admitted at trial that he had never had a bank account with the National Bank of Pakistan, that there was no written demand from the Bank to repay the loan, and that he had never obtained a bank statement showing the outstanding loan. No representative of NBP appeared at trial to corroborate that the receipts exhibited by Azhar were even authentic. Azhar's counsel struggled to explain why the power was given. The best he could do to justify it was by replying that Azhar was going to Kuwait and, therefore, gave it. We do not find this a plausible reason as, according to the learned counsel himself, Azhar had gone abroad for 3 months. It was an admitted position that the power of attorney was never revoked in Musharaf's lifetime.

9. The original property documents were in Musharaf's possession throughout.

10. Musharaf and his family have been in possession of the property from the day it was purchased. In fact, Azhar left the house in 1981 and has been living on rented premises since then. Such a fact was admitted by Azhar in his cross-examination.

11. The motive for Musharaf buying property in Azhar's name is not explained well in the trial. Common sense and logic, although, make it abundantly clear that Musharaf bought and constructed the property with his own money (as he was in the electronics business) and that, for reasons best known to him, he did not want to be disclosed as the owner. No motive or reason was provided by Azhar either.

12. Given the above, and in view of the guidelines enunciated by the Supreme Court, we are of the view that the appellants succeeded in establishing that the benami owner of the property was Musharaf and Azhar was only an ostensible face.

13. Cumulative balance of evidence would make us believe that evidence weigh in favour of Musharaf buying property in the name of his younger brother Azhar

14. Above are the reasons for allowing the appeals through our short order dated 06.03.2024.

JUDGE

JUDGE