

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Omar Sial

### High Court Appeal No. 281 of 2022

**Muhammad Yousuf Barakzai** ..... **Appellant**

through Mr. Usman Tufail Shaikh  
and Ms. Binish, Advocates

vs.

**Ms. Gulnar & others** ..... **Respondents**

Ms. Gulnar, respondent No.1 in person  
Mr. Abdul Jaleel Zubedi, A.A.G.

Dates of hearing : 16-02-2024 and 04-03-2024

Date of judgment : 09-04-2024

### JUDGMENT

**OMAR SIAL, J.**: Gulnar Memon (the answering respondent in these proceedings and referred to as “**Gulnar**”) and Yousuf Barakzai (the appellant herein and referred to as “**Barakzai**”) married each other in 1982. The couple, for a period ranging 30 years, seems to have lived happily and produced six children. Unfortunately for the couple, good times ended in December 2011 when Barakzai divorced Gulnar.

2. The case originates from events while the couple was married. Barakzai was a government servant. In 2004, a gentleman identified as Lt. Col. (Retd.) Mohammad Zafar Iqbal wanted to sell an apartment allotted to him in an Askari Housing project on 06.04.1999 (“**the apartment**”). It has been explained to us by the counsels that property in that particular project could not be transferred but delegated through the power of attorney. No conveyance deed was executed. Zafar Iqbal executed a power of attorney in favour of Gulnar. This is the point where the dispute originates. Barakzai

says that it was solely for logistical convenience that Zafar Iqbal transferred the apartment in Gulnar's name by executing a power of attorney on **01.03.2000**. He says that he was the person who had identified the property and paid for the property. At trial, he proved that the entire chain of property documents was with him. He also produced a possession letter and several letters by Zafar Iqbal to the Army housing administration, mentioning that he had sold the property to Barakzai and that the record should be amended to reflect it.

3. Gulnar's grievance did not end with the buying of the Askari apartment. On **03.12.2004**, Gulnar executed an Agreement to Sell with Amber Ansar, who agreed to buy the apartment from Gulnar for a total consideration of Rs. 5,250,000. The agreement to sell only records that Gulnar received Rs. 5 million, whereas the remaining Rs. 250,000 was to be paid when Gulnar appointed Amber Ansar as her attorney. The mode in which the payment was made was not recorded in the agreement although the record suggests that payment was made through pay orders. Gulnar, at trial, produced an agreement to sell that showed that Amber Ansar had purchased the property from Gulnar. The evidence led by Barakzai shows that the deal was transacted between Barakzai and Ansar Ahmed (Amber's husband), but for reasons known to them, they both chose to have their respective spouses as parties to the agreement to sell. It has been clarified in the agreement that the power of attorney would be executed in the name of Ansar Ahmed and not Amber Ansar.

4. Before the apartment was sold on 03.12.2004, Barakzai had already bought a house ("**House No. 17/1**" in DHA, Karachi) from Lt. Col. (Retd.) Naeem-ul-Haque through a duly registered Conveyance Deed on **30.11.2004**. In the Suit, Gulnar claimed that she had given Barakzai Rs. 5 million to enable him to buy House No. 17/1. In her Suit, she sought cancellation of the Conveyance Deed to an extent of 50%, possession and injunction. In essence, Gulnar sought a declaration that her husband is the Benami co-owner (with a 50% share) in House No. 17/1.

5. We have heard Mr Usman Shaikh, learned counsel appearing for Barakzai and have also heard Gulnar, who preferred to argue in person. Our observations and findings are as follows.

6. In order to facilitate reference, a chronology of events is as follows:

DATE	EVENT
29.04.1982	Gulnar and Barakzai married.
06.04.1999	Allotment of apartment made to Lt. Col. Mohammad Zafar Iqbal.
01.03.2000	Registered Power of attorney executed by the Colonel in favour of Gulnar.
30.11.2004	Barakzai bought house from Lt. Col Naeem-ul-Haque through Conveyance Deed.
03.12.2004	Gulnar agreed to sell the flat to Amber Ansar.
27.12.2011.	Barakzai divorced Gulnar.
29.06.2012	Gulnar claims that she returned from Islamabad to Karachi and was denied access to House No. 17/1.
10.11.2012	Suit No. 1534 of 2012 was filed.
10.11.2012	Status quo order given by this Court.
15.11.2012	Barakzai sold House No. 17/1 to Ayesha Khan through Conveyance Deed.

7. To determine the parties' rights, we have sought guidance from the wisdom of their Lordships in **Abdul Majeed and others vs Amir Muhammad and others (2005 SCMR 577)**. The Supreme Court held:

*“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 on a defendant and if he fails to discharge the burden of proof so shifted on him, the plaintiff shall succeed.”*

8. When queried about her sources of income that enabled her to invest a large amount of Rs. 5 million in House No. 17/1 purchased by Barakzai, Gulnar claimed that she had inherited some money at the death of her father, that she had been a teacher in a school; she had taken a loan from her family and friends and the Women Development Department of the Government of Sindh. At trial, she failed to bring any of her brothers and sisters to prove the inherited wealth. She produced no evidence from the school she taught in. She produced no evidence to prove that she took a loan or that she had earned income from the Women Development Department. While cross-examined at trial, Gulnar acknowledged that *“it is correct that I have not annexed any document to show my source of earning.”* She further admitted that *“it is correct that I have not annexed a single document, i.e. loan agreement, redemption deed, etc., along with my pleadings.”* She admitted that she could not give any evidence of her source of income - *“It is correct to say that I have not given any detail about my source of income, gifts from my mother or any other monetary detail in my pleadings/affidavit in evidence to show my source of funds/income.”* No evidence was produced at trial to show that Gulnar had the money to buy 50% of House No. 17/1. Without giving clarity to her statements, it seems from the record that another source of income relied upon by Gulnar was the money acquired from the sale of the apartment. The evidence at trial, however, does not support her in this aspect either. The apartment was sold a few days after Barakzai had bought House No. 17/1. It is correct that Gulnar was the owner on paper of the apartment as Zafar Iqbal executed a power of attorney in her favour; however, the documents at trial reflected that Barakzai’s assertion that he was the person who had bought and sold the apartment appears to be correct. Barakzai, at trial, produced the following documents: (i) The No Objection Certificate (undated but executed sometime in February 2000) issued by Zafar Iqbal and the other legal heirs with an interest in the property shows that the purchaser of the

apartment was Barakzai. (ii) An affidavit sworn by Zafar Iqbal (undated but executed sometime in February 2000) records that the purchaser of the apartment was Barakzai. (iii) Agreement to Sell (undated but executed in February 2000) signed by both Zafar Iqbal and Barakzai shows that Zafar Iqbal entered into the agreement for the sale of the apartment with Barakzai and that Barakzai had paid Zafar the sale consideration of Rs. 2,080,000. (iv) Zafar Iqbal had executed a receipt for Rs. 2,080,000 confirming that he had received the amount from Barakzai. A copy of the pay order issued in favour of Zafar Iqbal was also produced at trial. (v) Zafar Iqbal wrote a letter to the Director General (Housing) G.H.Q. (again undated) requesting that the apartment be transferred to Barakzai. (vi) Possession Letter dated 24.02.2000 showing that Zafar Iqbal handed over the possession of the apartment to Barakzai.

9. On 03.12.2004, Gulnar executed an Agreement to Sell with Amber Ansar, who had agreed to buy the apartment from Gulnar for a total consideration of Rs. 5,250,000. The agreement to sell only records that Rs. 5 million had been received by Gulnar whereas the remaining Rs. 250,000 would be paid when Gulnar would appoint Amber Ansar as her attorney. The mode in which the payment was made was not recorded in the agreement. Amber Ansar was not summoned as a witness by Gulnar to corroborate and support her version. No reason was given for not summoning her. Even if this is taken a correct, it was Gulnar who received the amount for sale of apartment, how would that help her in establishing that House No.17/1 was purchased from her money is still a mystery.

10. Admittedly the entire chain of title documents and other related documents were in Barakzai's possession. Apart from the fact that the evidence shows that Barakzai was the actual buyer of the apartment, the evidence also reflects that the deal to sell the apartment was also transacted between Barakzai and Ansar (Amber's husband) but for reasons known to them they both chose to have their respective spouses in the front. As far as the documents connected with the apartment were concerned, Gulnar acknowledged at trial that *"It is correct that my ex-husband had produced/attached all documents from Zafar Iqbal with his*

*affidavit-in-evidence.*” Gulnar in her cross-examination contended that “It is correct to say that I was not in possession of the original title documents.” but justified her not being in possession of the documents by stating that the documents were lying in a cupboard at home and that as she had been denied entry into House No. 17/1, she could not produce them. We find this assertion hard to believe keeping in view the fact that according to Gulnar herself, she continued to live in House No. 17/1 for a period of four months after her divorce. The relationship had gone sour and surely an intelligent lady like Gulnar would have the presence of mind to secure the documents to the property she claimed was half hers.

11. The evidence reflects that Barakzai at all times was in possession of House No. 17/1. Gulnar also shared possession with him during the period the couple was married however while Gulnar’s possession was taken away after the divorce, Barakzai continued to be in possession.

12. What was the motive for the benami transaction? The parties obviously differ on this count. According to Gulnar, her husband was a “*corrupt person*” and he was “fond of keeping cars in the names of his friends.” She took pains at trial to highlight her former husband’s corruption. It is ironical that Gulnar overlooked Barakzai’s alleged “corruption” for the thirty odd years that she was married to him but after divorce did not mince her words to malign him. Be that as it may, Gulnar’s depiction of her husband in itself would provide reason for Barakzai to buy the apartment in Gulnar’s name.

13. Gulnar admitted at trial that initially (when she had written a letter to the Honorable Chief Justice of Pakistan of the time) her claim was that Barakzai had “sworn and pledged” that he would transfer a house and a car in her name and that she had “demanded” only these two items of him. There was no mention of she selling her apartment to pay for House No. 17/1. She however put all the blame of each lapse on her previous advocate.

14. The only other witness, apart from herself, that Gulnar produced at trial was her daughter Laila-tul-Qadir. The young lady’s testimony did not

help Gulnar. On the contrary the young lady stated *"I do not know details of my mother's financial status nor I know where transactions were made as I am not associated with my mother. Agha Saeed is my Khaloo. My mother did not obtain any loan from Agha Saeed."* Agha Saeed was the person through whose account she said she had contributed Rs. 5 million for the house (House No.17/1). Upon the court's query as to why she had not summoned Agha Saeed or his wife (Gulnar's sister) as a witness, she said that Agha Saeed's health did not keep well and her sister had declined to appear as witness. As mentioned above, Gulnar also did not summon Amber Ansar (the lady to whom she claimed to have sold the apartment). No other witness was summoned by her to support or corroborate any claim or assertion of hers. In such a situation the presumption under Article 129 (illustration g) of the Qanun-e-Shahadat Order, 1984 would arise that had the above mentioned individuals come to trial they would not have supported Gulnar's stance.

15. Before concluding, we deem it appropriate to address certain other issues. It was argued by counsel that the suit is barred by limitation. He argued that Barakzai purchased the new house on 30.11.2004. Gulnar was admittedly aware at that point in time that Barakzai had bought House No.17/1 in his name, yet, it was not until 10.11.2012, that Gulnar filed the Suit.

16. Learned counsel is correct that the Suit was filed approximately eight years after the new house was purchased. We are however unable to agree with the learned counsel that the Suit was barred by limitation. The crucial date in this regard is the date upon which Gulnar was denied entry into the new house by Barakzai's watchman. This date was 29.06.2012. Article 91 of the Schedule to the Limitation Act prescribes a 3 year limitation period from the date "when the facts entitling the plaintiff to have the instrument cancelled or set aside, become known to him." It has been held in *Hamida Begum vs Murad Begum* (PLD 1975 SC 624) that "It follows, therefore, that the starting point of limitation under this Article [91] is the date when the plaintiff acquires knowledge of facts which give him a cause of action and entitle him to have the instrument cancelled or set aside; mere knowledge

of facts bearing on the true character of the instrument is not enough.” While Gulnar may have been aware that Barakzai has surreptitiously transferred the property in his name. It must be kept in mind that the couple was happily married at the time of the purchase. They had a few children, both before and after the event. Gulnar not insisting at that point in time to have the conveyance deed cancelled to the extent of 50% share is understandable. It was when she was denied the right to access and enjoy the property that the cause of action arose. The Suit in our opinion was not barred by limitation.

17. A prudent mind can gauge from the record as to what probably happened in the relationship of the parties. Gulnar remained married to Barakzai and the couple had six children. Barakzai's conduct while being a government servant, in attempting to prima facie conceal his wealth by documenting it in his wife's name, cannot be condoned. It can also not be forgotten that Barakzai sold House No. 17/1 in violation of a stay order of this court. So far as this issue is concerned the same is governed by the doctrine of *lis pendens* as enshrined in Section 52 of the Transfer of Property Act, 1882. The doctrine stands for the principle that any subsequent conveyance during the pendency of a case, though valid, would be subservient to the rights of the contesting parties. Hence should Gulnar have succeeded in her claim, the bona fide purchaser would have been "*bound by the result of the suit stricto sensu in all respects as his transferor would be bound...[for the] transferee...does not acquire any legal title free from the clog of his unsuccessful transferor in whose shoes he steps in for all intents and purposes and has to swim and sink with his predecessor in interest.*". **Muhammad Ashraf Butt v. Muhammad Asif Bhatti (2011 PLD SC 905)**. However, since Gulnar has failed to succeed on merits, the said principle has no application to the instant case.

18. So far as the second prong of this issue is concerned i.e. the violation of the injunction order the same would not be advantageous to Gulnar on merits. However, we have taken serious note of the fact that the injunction order was flagrantly disregarded by Barakzai and hence, his conduct falls within the purview of Section 2(a)(i) of the Contempt of Court Ordinance



2003. Accordingly, in view of the gravity of the offence of civil contempt and with the powers vested in us pursuant to section 12(1) of the Ordinance, to take *suo moto* notice of civil contempt, we, in accord with section 5 of the Ordinance, impose a fine of Rs. 100,000 on Barakzai to be deposited with the Nazir of this Court within two weeks of this judgment. The amount will be utilized towards the running of the Court Clinic.

19. On 17.01.2024, we had imposed a cost of Rs. 50,000 on the learned counsel for the appellant for his absence that day. It was not brought to our notice at that time that counsel had been granted a general adjournment except date by court cases. The hearing on 17.01.2024 was a date fixed by the roster. It would therefore be fair if learned counsel is not penalized. The order dated 17.01.2024 to the extent of the imposition of costs, is recalled. Learned counsel shall be returned the money that he has deposited.

20. Upon a preponderance of evidence, we believe that the apartment was bought by Barakzai from his own money. He was the owner of the apartment whereas she was only shown as an ostensible owner in terms of sale agreement/power of attorney. Barakzai also bought House No. 17/1 with his funds. He had the original title documents. Gulnar contested bravely but unfortunately failed to produce meaningful evidence in support of her case.

21. Appeal is allowed.

JUDGE

JUDGE