IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 878 of 2020

MST. BUSHRA HAMID AND OTHERS

VERSUS

MST. FARZANA NIZAM AND ANOTHER

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1. For hearing of CMA NO. 4407 of 2022
2. For hearing of CMA NO/ 6016 of 2022

Plaintiff	:	Through Mr Tasawar Hussain Rizvi, Advocate
Defendants	:	Through Mr. Raj Ali Wahid, Advocate
Dates of hearing	:	14 September 2023, 28 September 2023, 5 October 2023, 12 October 2023 and 24 February 2024
Date of Order	:	18 January 2025

O R D E R

MOHAMMAD ABDUR RAHMAN J. This order will decide CMA No. 4407 of 2022 that has been maintained by the Defendants under Rule 11 of Order VII of the Code of Civil Procedure,1908 seeking the rejection of the Plaint as being barred under Section 42 of the Specific Relief Act, 1877 and under Article 120 of the First Schedule read with Section 3 of the Limitation Act, 1908.

A. Facts

2. The Plaintiff No. 1 and the Plaintiff No. 5 are both the widows of the (late) Tariq Nizam Malik, while the Plaintiffs No. 2 to 4 are the children of the (late) Tariq Nizam Malik and the Plaintiff No. 1. This Suit has been maintained by the Plaintiffs claiming a share, through inheritance, in two immovable properties bearing Plot No. B-121, Block 15, Gulistan e Jauhar, Karachi Development Authority Scheme No. 36, Karachi admeasuring 400 square yards which is recorded since 27 January 1998 as being owned by the Defendant No. 2, who is the sister of the (late) Tariq Niaz Malik, and Plot No. D-16, Block 4, Gulshan e Iqbal, Karachi Development Authority Scheme No. 24, Karachi admeasuring 500 square yards which is recorded since 20 November 1996 as being owned by the Defendant No. 1, who is the mother of the (late) Tarqi Niaz Malik, on the basis:

(i) that the real owner of each of these two immovable properties was one Ghulam Nizamuddin Malik, who was the father of the (late) Tariq Nizam Malik, the husband of the Defendant No. 1 and the father of the Defendant No. 2, as the Defendant No. 1 and the Defendant No. 2 each held these two immovable properties as benamidars;

(ii) that the real owner of each of these two immovable properties was Ghulam Nizamuddin Malik and on whose demise on 15 May 2017 a share was inherited by his son the (late) Tariq Nizam Malik;

(iii) that the share inherited by the (late) Tariq Nizam Malik in each of these two immovable properties, on the demise of the (late) Tariq Nizam Malik on 3 July 2020, devolved on the Plaintiffs and hence they were entitled to a declaration as to their entitlement to each of the immovable properties.

B. Contentions of the Defendants.

3. Mr. Raj Ali Wahid entered appearance on behalf of the Defendants. He contended that as the (late) Ghulam Nizamuddin Malik had never maintained that he was the real owner of either of the two properties in his life time and as the (late) Tariq Nazim Malik had also not maintained that he had inherited to either of the two immovable properties in his life time, it was not open to the Plaintiffs to maintain this *lis* as:

(i) the Suit was barred under Article 120 of the First Schedule read with Section 3 of the Limitation Act, 1908;

(ii) the Plaintiffs had no right in either of the two immovable properties, the suit was barred under Section 42 of the Specific Relief Act, 1877.

4. In support of his contentions Mr. Raj Al Wahid relied on a decision of the Supreme Court of Pakistan reported as ***Mst. Faheeman Begum (Deceased) through L.Rs and others vs. Islam-ud-Din (Deceased) through L.Rs and others,***[1] ***Muhammad Rustam and another vs. Mst. Makhan Han and others,***[2] ***Abdul Haq and another v. Mst. Surrya Begum and others***[3] and a decision of the High Court of Balochistan reported as ***Mst. Alim Taj vs. Mst. Sahib Jan and***

[1] 2023 SCMR 1402.

[2] 2013 SCMR 299.

[3] 2002 SCMR 1330.

2 others[4] wherein when a derivative claim was made through a person who had not challenged a mutation in their lifetime, the Supreme Court of Pakistan held that the legal heirs of the person who did not challenge the mutation, had no locus standi after that persons demise to challenge a mutation. He also relied on a decision of the Supreme Court of Pakistan reported as ***Haji Muhammad Yunis through L. Rs and another v. Farukh Sultan & others***[5] wherein where an immovable property was purchased from the recorded owner, after the owners demise, some of the legal heirs of the owner maintained claims to the property as against the purchasers. Regarding the issue as to whether the Suits maintained by the legal heirs were barred under Section 3 of the Limitation Act, 1908, the Supreme Court of Pakistan while considering as to whether a new jamabandi issued every four years constituted separate causes of action, while interpreting Section 42 of the Specific Relief Act, 1877, after making a distinction as between what is an "actual denial of right" and an "apprehended or threatened denial of right" held that while an "apprehended or threatened denial of right" would result in a new cause of action arising on each occasion, where there was an "actual denial of a right" the period of limitation for obtaining a declaration as to a person's title as to property would be calculated from the date when the denial of right was made. In this context it was held that as entries made in the revenue record did not create or extinguish proprietary rights, such entries would be classified as "apprehended or a threatened denial of right" and hence whenever such an entry was made a new cause of action would arise. This situation was however to be contrasted where along with such a mutation, a person took possession of the Said Property and which act would be considered as an "actual denial of a right" and wherefrom limitation would calculated under Article 120 of the First Schedule of the Limitation Act, 1908.

5. He next referred to a Division Bench Judgement of this Court reported as ***Farrukh Afzal Munif vs. Muhammad Afzal Munif and 29 others***[6] wherein while deciding an appeal as against an order of a Learned Single Judge of this Court for want of jurisdiction, it was considered that where property was purchased by a person in the name of his wife or child and possession of the property was also handed over, a legal presumption would exist that the person recorded as the owner was the legal owner and the only person who could challenge such a right could be the person who claims to be the real owner and which claim has to be maintained in that persons lifetime; his legal heirs having no locus standi to maintain such a claim after the demise of the real owner. He concluded by relying on a decision of a learned Single Judge of this Court reported as ***Mst. Parveen***

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[4] 2014 YLR 385
[5] 2022 SCMR 1282
[6] PLD 2022 Sindh 34

Raza Jadun through L.R.s and others vs. Bashir Ahmed Chandio and 5 others.[7]

C. Contentions of the Plaintiff

6. Mr. Tasawar Hussain Rizvi entered appearance on behalf of the Plaintiff and contended that the Plaintiffs claimed their share to the estate of the deceased on the basis of inheritance and the law of limitation does not apply to such a lis. He therefore contended that there was no clog on the powers of this court to ensure that the rights of inheritance of the Plainitffs were secured and prayed for the dismissal of the application. He did not rely on any case law in support of his contentions.

D. Opinion of the Court

7. I have heard Mr. Raj Ali Wahid and Mr. Tasawar Hussain Rizvi and have perused the record.

(i) Devolution of an Immovable Property held as Benami as Applicable to Muslims

8. The expression "Estate" in the context of a person's real or personal property has been defined to mean:[8]

> *" … The amount, degree, nature and quality of a person's interest in land or other property."*

While such property in other jurisdiction may be subject to equitable interests, the law of Pakistan, on account of the codification of such rights, does not recognize equitable interest and which are hence to be considered as rights conferred by statute. Such a clarification was quite correctly made by the Supreme Court of India in the decision reported as ***Bai Dosabai and Ors. vs. Mathurdas Govinddas and Ors.***[9] and wherein it was held that:

> *" … 7. We do not wish to go in any detail into the question whether the English Equitable doctrine of conversion of reality into personalty is applicable in India. However, we do wish to say that the English doctrine of conversion of reality into personalty cannot be bodily lifted from its native English soil and transplanted in statute bound Indian law. But, we have to notice that many of the principles of English Equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes such as the Indian Trusts Act, the Specific Relief Act, Transfer of Property Act etc. and where a question of interpretation of such Equity based statutory provisions arises we will be well justified in seeking aid from the Equity source. **The concept and creation of duality of ownership, legal and equitable, on the execution of an***

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[7] 2020 YLR 1494

[8] Garner B.A. (2009) **Black's Law Dictionary**, 11th Edition, Thompson Reuters

[9] AIR 1980 SC 1334

> ***agreement to convey Immovable property, as understood in England is alien to Indian Law which recognises one owner i.e. the legal owner*** *: vide, Ramboran Prasad v. Ram Mohit Hazra and Ors. MANU/SC/0212/1966 : [1967]1 SCR 293 and Narandas Karsondas v. S.A. Kamtam and Anr. MANU/SC/0363/1976 : [1977] 2 SCR 341 . The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of Immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of them Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of Immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus the Equitable ownership in property recognised by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee.*
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> *If we now turn to the Indian Trusts Act, we find "trust" defined as : "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner", and "beneficial interest" defined as the interest of the beneficiary against the trustee as owner of the trust-property. Chapter IX of the Trusts Act enumerates in section after section cases where obligations in the nature of trust are created. Section 94 finally provides :*
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> > *94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."*

I am clear that the principle as enunciated by the Supreme Court of India, on account of the codification of such equitable interests in statutes e.g. Contract Act, 1872, Specific Relief Act, 1877, Transfer of Property Act, 1882, Trusts Act, 1882 and the Succession Act, 1925, is also the correct position of the law regarding equitable interests in Pakistan in respect of obligations *inter vivos* or in respect of the transmission of an estate.

9. As far as a Muslim is concerned, the manner in which an estate is transmitted to legal heirs is to be determined according to the personal law of that person and which would, subject to statute, be determined subjectively in terms of that persons Fiqh. The manner in which the transmission of such an estate takes place has been clarified by the Supreme Court of Pakistan in the decision reported as ***Ghulam Ali and 2 others vs. Mst. Ghulam Sawar Naqvi***[10] and in which it was held that:

> *" … The main points, of the controversy in this behalf get resolved on the touchstone of Islamic law of inheritance. As soon as an owner dies, succession to his, property opens. There is no State intervention or clergy's intervention needed for the*

[10] PLD 1990 Supreme Court 1; See also ***Shahro and others vs. Mst. Fatima and others*** PLD 1998 Supreme Court 1512***Mst. Reshman Bibi vs. Amir and others*** 2004 SCMR 392; ***Mst Hussain Bibi and others vs. Barkat Ali and others*** 2004 SCMR 1391; ***Mst. Kaneezan Bibi and others vs. Muhammad Ramzan*** 2005 SCMR 1534; ***Mst Suban vs. Allah Ditta*** 2007 SCMR 635; ***Muhammad Din through LRS and 16 others vs. Zulfiqar and 2 others*** 2008 SCMR 1054; ***Sahib Jan and others vs. Mst. Ayesha Bibi through L.R.S and others*** 2013 SCMR 1540; ***Mahmood Shah vs. Syed Khalid Hussain Shah and others*** 2015 SCMR 869; ***Bashir Ahmad Anjum vs. Muhammad Raffique and others*** 2021 SCMR 772; ***Ghulam Qasim and others vs. Mst. Razia Begum and others*** PLD 2021 Supreme Court 812.

> *passing of the title immediately, to the heirs. Thus it is obvious that a Muslim's estates legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction. It is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner. There is enough comment and case-law on this point which stands accepted."*

It is therefore quite well settled that whatever comprises part of the estate of a Muslim will be transmitted into the names of the legal heirs of the deceased at the moment of their demise in accordance with the legal heirs entitlement under the Islamic Law of Sharia, subject to statute, in accordance with the Fiqh of the deceased.

10. Issues can and do arise in determining as to what would constitute the estate of the deceased. Clearly a presumption that can be made, in terms of immovable property, is that where the title of the property has been established through registered documents the immovable property so identified would constitute a portion of the estate of the Deceased.

11. While, as clarified hereinabove, equitable interests are not recognised in Pakistan, it has been considered that a species of such interest referred to as an immovable property being held as "Benami" are statutorily recognized under Section 82 of the Trust Act, 1882, which provision parallels with Section 102 of the Sindh Trusts Act, 2020, and which reads as hereinunder:

> " … ***102. Transfer to one for consideration paid by another –***
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> *Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.*
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> *Nothing in this section shall be affect the provisions of the Code of Civil Procedure, 1908"*

This section is a codification of the rule that was established in ***Dyer v Dyer***[11] and in which it was held as hereinunder:

> " … *The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffinent is made without consideration, the use results to the feoffor. It is the established doctrine*

[11] (1788) 2 Cox 92; [1775-1802] All ER Rep 205; See also ***Midland Bank Plc vs. Cooke*** [1995] 4 All ER 562

of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be of course evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shews the father intended an advancement, and therefore the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for; then the question is; did the father intend to advance a son already provided for? Lord Nottingham could not get over this, and he ruled that in such a case the resulting trust was not rebutted; and in Pole v. Pole, in Vezey, Lord Hardwicke thought so too; and yet the rule in a court of equity as recognized in other cases is, that the father is the only judge as to the question of a son's provision; that distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to. It is then said that a purchase in the name of a son is a prima facie advancement (and indeed it seems difficult to put it in any way); in some of the cases some circumstances have appeared which go pretty much against that presumption, as where the father has entered and kept possession, and taken the rents; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father; the answer given is, that the father took the rents as guardian of his son; now would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner: but I own this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be that the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and therefore this is not a very solid argument. When the lessees are to take successive, it is said, that as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea: to be sure taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided. …

I do not find that there are in print more than three cases which respect copyholds, where the grant is to take successive. Rundle v. Rundle, 2 Vern. 264, which was a case perfectly clear; Benger v. Drew, 1 P. W. 781, where the purchase was made partly with the wife's money; and Smith v. Baker, 1 Atk. 385, where the general doctrine as applied to strangers was recognized; but the case turned on the question, whether the interest was well devised. Therefore, as far as respects this particular case, Dickinson v. Shaw is the only case quite in point; and then the question is, whether that case is to be abided by? With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time, or the opinion of learned men; and Lord Kenyon has certainly intimated his opinion against it. On examination of its

> *principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise because the purchase could not have been taken wholly in the name of the purchaser. This we think is not sufficient to turn the presumption against the child; if it is meant to be a trust, the purchaser must shew that intention by-a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended. And I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies equally in case of a purchase in the name of the child only; yet that case is admitted to be an advancement; indeed, if any thing, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout. This bill must therefore be dismissed; but after stating that the only case in point on the subject, is against our present opinion, it certainly will be proper to dismiss it without costs."*

The decision confirms that where a person provides the purchase price of property in its entirety, then there is a presumption that he retains the beneficial interest in the property in its entirety, by virtue of a resulting trust and such a resulting trust would prevail over the argument that the purchase of the property was an advancement to the child, ***if there was no other evidence to rebut this presumption.*** In terms of advancement by a Muslim this would be even more arduous to rebut as it is now well settled that the doctrine of advancements is contrary to the Islamic Law of Sharia[12] and which therefore could not be a basis to rebut such a presumption and which evidence would therefore have to be premised on facts and circumstances to show the intention to create a resulting trust. It can also be seen, from a plain reading of Section 102 of the Sindh Trusts Act, 2020 that the principle of law settled in ***Dyer v Dyer***[13] has been codified in that section.

12. The correlation as between Section 82 of the Trusts Act, 1882 and a "benami transaction" was clarified by in the decision reported as ***Muhammad Nawaz vs. Shahida Perveen and others***[14] and in which it was held that:

> *" … 18. In Pakistan, benami transactions were a recognized species of legal transactions pertaining to immovable properties. The genesis of the concept of benami is that the consideration for a transfer of property must flow from one person and the transfer is made in the name of the other person, and the consideration flowing for the transfer was not intended to be a gift in favour of the person in whose name the transfer is made. In other words, benami transactions are purchases of property in the name of a person, who does not pay consideration for the property, but merely lends his name to become an ostensible owner, while the real title vests in another person, who actually pays for the*

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[12] See ***Aftab Nasir vs. Mst Fazl Bibib and others*** PLD 1965 (W.P.) Lahore 550; ***Mrs. Aiyasha Koreshi and another vs. Hishmatullah Koreshi and another*** PLD 1972 Karachi 653, ***Muhammad Siddique vs. Shabbir Hussain*** 2003 MLD 384; ***Ismail Dada Adam Soomar vs.Shorat Banoo*** PLD 1960 (W.P.) Karachi 852

[13] (1788) 2 Cox 92; [1775-1802] All ER Rep 205; See also ***Midland Bank Plc vs. Cooke*** [1995] 4 All ER 562

[14] PLD 2017 Islamabad 375; See also ***Bilas Kunwar v. Besraj Ranjit Singh*** AIR 1915 P.C. 96; ***Gurnarayan V. Sheolal Singh*** AIR 1918 P.C. 140; ***Punjab Province v. Daulat Singh*** AIR. 1942 F.C. 3; ***Muhammad Ali and 7 others vs. Sakar Khanoo Bai represented by Legal Heirs*** PLD 1984 Karachi 97, ***Jane Margrete Willam vs. Abdul Hamid Mian*** 1994 CLC 1437; ***Feroze Sajan vs. Farzana Sajan*** PLD 2021 Karachi 88.

> *property and becomes the beneficial owner. Such transactions are rife in Pakistan. In the case of Guru Narayan v. Sheolal Singh (AIR 1918 PC 140), the Right Hon'ble Syed Ameer Ali also made the following general observations on benami transactions:-*
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> > *"The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people."*
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> *19. The word 'bename' is a Persian Compound word made up of two different words namely-"be" which means "without" and "name" which denotes "name". It, therefore, literally means "without a name", i.e., nameless or fictitious and as such a benami name is used to denote a transaction which is really done by a person without using his own name, but in the name of another. The principle underlying benami transactions is embodied in Section 82 of the Trusts Act 1882, which reads:-*
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> > *"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."*

A similar view was taken by the Federal Court in the decision reported as ***Punjab Province v. Daulat Singh***[15] wherein it was considered that:

> *" … "It is true that the Indian law does not recognise an equitable ownership in the sense known to the English law, because we here do not, as in England, have two kinds of law or jurisdiction , viz common law and equity; but on an analysis of the legal incidents involved, it will be found that for all practical purposes there is little or no difference between a beneficiary under the English law and a beneficiary under the Indian Trusts Act, so far as the substance of their rights is concerned. I may first point out that so far as the "rights and privileges" are concerned, there is little or no difference between a beneficiary under an express trust and a beneficiary under a resulting or constructive trust, if we leave alone questions arising under the Limitation Act. Section 82, Trusts Act, which deals with benami transfers, occurs in the chapter beginning with section 80, which provides that an obligation in the nature of a trust is created in certain specified cases; and section 82 enacts that the transferee must hold that property for the benefit of the person paying or providing the consideration, Section 95 reaffirms the provision implied in section 80. In the case of express trusts, the Act describes the beneficiary's rights against the trustee as "beneficial interest or interest of the beneficiary." Under section 58, the beneficiary has, subject to the provisions of the instrument of trust, a right to the rent and profits of trust property and under section 56 the beneficiary, if there is only one and he is competent to contract, may require the trustee to hand over possession of the trust property to himself. This is almost a matter of course where, as it benami transactions, the holder of the legal title is only a bare trustee. Under section 58, the beneficiary, if competent to contract, may transfer his interest, and under section 69, every person to whom a beneficiary transfers his interest has the rights of the beneficiary in respect of such interest at the date of the transfer."*

It is therefore evident that as per this analysis of the law, a Benami Transaction in terms of Section 102 of the Sindh Trusts Act, 2020 would create an obligation in the nature of a trust i.e. a resulting trust and whereby the property would be ***transferred*** in favour of the "Benamidar" and who would thereafter hold the property in trust for the benefit of the Real Owner.

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[15] AIR 1942 F.C. 38

13. However, the above proposition, as to the theoretical basis for an immovable property being held as benami, as resting on Section 102 of the Sindh Trusts Act, 2020, has not been universally accepted. A contrary view was given in the decision reported as ***Radhakrishnan v. Union of India***[16] wherein it was considered that:

> " … *Now, it is true that under sections 80 and 82 of the Trusts Act a benamidar holds the property for and on behalf of the real owner in consequence of which there would be a resulting trusts in respect of the property in favour of "the real owner"* ***But then, it would be fallacious to urge from those sections that the legal ownership in such property vests in the benamidar as it does in the case of trustee.*** *What those sections really mean is that a benamidar is in a fiduciary relationship with the real owner and therefore has all the obligations of a person in such fiduciary position towards the real owner. A benamidar is no more than an ostensible owner of the property he holds benami, though his acts in certain circumstances would be binding upon the real owner. That is because the real owner holds him out to third parties as an owner of the property.* ***It is, however, impossible to say as in the case of a trustee that any right in the property either vests in him or that under section 13 and the sections following thereaiter of the Trusts Act any obligations therein set out fall on him****. In Gur Narayan v. Sheolal Singh, I.L.R. 46 Cal. 566: (A.I.R. 1918 P.C. 140(C)), their Lordships of the Privy Council stated that so long as a benami transaction did not contravene the provisions of the law the Courts were bound to give effect to it but they made it clear also that the benamidar has no beneficial interest in the property that stands in his name; he represents in fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him."*

Similarly, in ***Pitchayya v. Rattamma***[17] a Division Bench of the Madras High Court opined that:

> " … *"When a person acquires an interest in property with his funds in the name of another for his own benefit, the latter is called a benamidar.* ***A benamidar is not a trustee in the strict senseof the term. He has the ostensible title to the property standing in his name, but the property does not vest in him but is vested in the real owner****. He is only a name lender or an alias for the real owner. The cardinal distinction between a trustee as known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the cestui que trust is only a beneficial owner, whereas, in the case of a benami transaction, the real owner has got the legal title though the property is in the nameof the benamidar.....If a mortgage stands in the name of a benamidar, the person for whom the mortgage was obtained could sue on the mortgage, and the same rule applies to other transactions except those forbidden by law. The benamidar has some of the liabilities of a trustee but not all his rights. When the benamidar is in possession of the property standing in his name, he is in a sense the trustee for the real owner."*

Each of these consider that the recording of the entry of the name of a person as an owner of a property and even the "holding out" by the real owner of the person as the owner of property would not amount to a transfer of the title to the property in his name, I assume were on the basis that it was never the ***"intention"*** of the real owner and the benamidar to transact on the property and the lack of such an intention would cause any transfer, registered or otherwise, to fail and

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[16] AIR 1959 Bom. 102
[17] AIR 1929 Mad. 268

consequentially the property having not been “transferred” into the name of the Benamidar a trust or any obligation akin to a trust could not be created.

14. The distinction made is important when considering an application under Rule 11 of the Order VII of the Code of Civil Procedure, 1908 in terms of:

(i) as to which Article of the First Schedule of the Limitation Act, 1908 would have to be considered in determining the period of limitation to institute a suit keeping in mind that:

(a) if it is considered that an immovable property held as benami is premised on a resulting trust then the immovable property would necessarily have to be considered as having ***actually been transferred*** into the name of the “benamidar” and who would thereafter hold the immovable property as a trustee for the benefit of the “real owner” and whereby Article 134 of the First Schedule of the Limitation Act, 1908 would have to be considered where the property is transferred by the benamidar to a third party or the residual Article 120 of the First Schedule of the Limitation Act, 1908 would have to be considered to seek a declaration as to the property being held in trust by the benamidar for the “benefit” of the real owner; or

(b) if it is considered than an immovable property held as benami is premised either on a custom or alternatively under the common law on the principles of justice, equity and good conscience and by which the benamidar is be considered as an ostensible owner of the immovable property, then as to whether Article 91 of the First Schedule of the Limitation Act, 1908 would have to be considered to set aside an instrument on the basis of which the property was transferred into the name of the benamidar or the residual Article 120 of the First Schedule of the Limitation Act, 1908 would have to be considered to seek a declaration as to the property being held by the benamidar as an ostensible owner and the legal title for which would continue to remain in the name of the real owner;

(ii) seeking a declaration as to the status of an immovable property under Section 42 of the Specific Relief Act, 1877 keeping in mind that:

(a) if it is considered that an immovable property held as benami is premised on a resulting trust then the immovable property would necessarily have to be considered as having ***actually been transferred*** into the name of the "benamidar" and who would thereafter hold the immovable property as a trustee for the benefit of the "real owner" and title to which immovable property on the demise of the real owner would therefore not pass to the legal heirs of the "real owner" the property and which would continue to being held by the "benamidar" for the "benefit" of the legal heirs of the real owner. Resultantly, the legal heirs would not be able to seek a declaration as to their title to the immovable property and only seek a declaration as to the property being held by the benamidar as a trustee for their benefit;

(b) if it is considered than an immovable property held as benami is premised either on a custom or alternatively under the common law on the principles of justice, equity and good conscience and by which the benamidar is be considered as an ostensible owner of the immovable property then, title having not been transferred into the name of the benamidar, to seek a declaration as to their title to the property as legal heirs of the real owner.

15. I have considered the law as exists in Pakistan and while there is no definitive finding as to which interpretation is to be preferred, I note that the Supreme Court of Pakistan has in numerous decisions consistently been referring to a benamidar as an "Ostensible" owner[18] thereby giving an impression that principles regulating a Benami Transaction are not be found in terms of Section 102 of the Sindh Trusts Act, 2020 and rather are to premised on either a custom or the common law premised on the principles of justice, equity and good conscience and by which the benamidar is not to be treated as the legal owner of the property holding as a trustee and rather is to be treated as a person being tacitly represented as an ostensible owner, the legal title to the immovable property continuing to vest in the name of the real owner.

16. To my mind, I can clearly see why an argument can be considered for considering an immovable property held as benami to be a resulting trust within

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[18] See ***Mansoor Ahmad vs. Maqbool Begum*** 1990 SMR 1259; ***Muhammad Siddiqi through Attorney vs. Messrs T.J. Ibrahim & Company*** 2011 SCMR 1443***; Abdul Aziz vs. Khuda Dad Khan*** PLD 2004 Supreme Court 147; ***Abdul Majeed and others vs. Amir Muhamamd and others*** 2005 SCMR 577; ***Abdul Khaliq (Deceased) vs. Ch. Rehmat Ali (Deceased)*** and ***Mst. Alttia Bano vs. Abdul Majeed*** 2020 SCMR 1396

the prescriptions of Section 102 of the Sindh Trusts Act, 2020 as most of the factual circumstances that occur when an immovable property is put in another persons name would, as required to be identified in that section, usually occur by default on the transfer of any immovable property in such a manner. However, the Section, while clearly making the intent of the person the basis for finding a resulting trust, having used the expression *"transferred to one person for a consideration paid or provided by another person"* would also create a dichotomy as between the situations where the immovable property is transferred into the name of a person for consideration and where the property is transferred into the name of a person without consideration, a resulting trust being found in the former situation while in the latter, the transfer without consideration, would not be recognised as a resulting trust. The Supreme Court of Pakistan has opined on the circumstances that would identify a property as being held benami and have in the decision reported as ***Muhammad Sajjad Hussain vs. Muhammad Anwar Hussain***[19] held that:

> *" … it may be observed that we have examined the above contention with reference to the oral and documentary evidence produced by the parties in conjunction with the case-law cited by the parties, namely, the case of Ismail Dada Adam Soomar v. Shorat Banoo PLD 1960 Kar. 852, the case of Mv. Md. Abdul Majid and others v. Md. Jainul Abedin and others PLD 1970 Dacca 414, the case of Dost Muhammad and another v. Mst. Satan and other PLD 1981 Kar. 339 and the case of Mst. Sardar Khatoon and others v. Dosl Muhammad an another 1988 SCMR 806 (the cases relied upon by Mr. Akhtar Mahmud), and the case of Akram Moquim Ansari (represented by heirs) and ? others v. Mst. Asghari Begum and another PLD 1971 Kar. 763 referred to by Mr. Muzaffar Ali Khan. Some of the criteria for determining the question, whether a transaction is a Benami transaction or not, inter alia the following factors are to be taken into consideration:*
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> > *(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."*

When one is to consider the prescriptions of a resulting trust as codified in Section 102 of the Sindh Trusts Act, 2020 as against the manner in which a property being identified as being held as benami is identified by the Supreme Court of Pakistan the similarities between the two circumstances become self-evident. The source of the consideration to purchase the property and the intent gathered from the possession of the title documents and the possession of the suit property and the motive all would overlap. ***The difference as between the two would, to my mind, therefore lie in the very fine distinction as between the intention of the real owner transferring ownership of the immovable property into the name***

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[19] 1991 SCMR 703, See also ***Mst. Farida Malik vs. Dr. Khalida Malik*** 1998 SCMR 816; ***Abdul Majeed and others vs. Amir Muhammad and others*** 2005 SCMR 577; ***Ch. Ghulam Rasool vs. Mrs. Nusrat Rasool*** PLD 2008 Supreme Court 146; ***Mst. Zohra Begum and 6 others vs. Muhammad Ismail*** 2008 SCMR 143; ***Muhammad Nawaz Minhas and others vs. Mst. Surriya Sabir Minhas*** 2009 SCMR 124; ***Ghulam Murtaza vs Mst. Asia Bibi*** PLD 2010 supreme Court 569; ***Wasi-ud-Din vs. Fakhra Akhtar*** 2011 SCMR 1550; ***Mst Asia Bibi vs. Dr Asif Ali Khan*** PLD 2011 Supreme Court 829; ***fo*** 2023 SCMR 572

<u>of the benamidar to be held in trust as opposed to the intention of the real owner in transferring ownership of the immovable property into the name of the benamidar while still holding out the benamidar as an ostensible owner of the property</u>. I must think, speaking generally, that the intention in most transactions, in respect of family members in terms of the social context of the Sub-Continent, including but not limited to Pakistan, would be one where the transfer of the ownership of the immovable property would not be premised on the person holding as a trustee and rather as an ostensible owner and therefore I am of the opinion that an immovable property being held benami would not be controlled by the provisions of Section 102 of the Sindh Trusts Act, 2020 but rather by a recognition of a custom or under the common law premised on the principles of justice, equity and good conscience. Needless to say, in the event that a litigant wishes to claim that the immovable property was not held benami but rather as a resulting trust under Section 102 of the Sindh Trusts Act, 2020 it would be necessary for such a person to plead as such in his Suit.

(ii) The application of the Provisions of Article 120 of the First Schedule of the Limitation Act, 1908 to a claim made to an immovable property <u>held as Benami as Applicable to Muslims</u>

17. Section 3 of the Limitation Act, 1908 prescribes that:

> *"* … ***3. Dismissal of suits, etc., instituted, etc., after period of limitation.***
>
> *Subject to the provisions contained in sections 4 to 25 (inclusive), every suit institute, appeal preferred, and application made, after the period of limitation prescribed therefore by the first schedule shall be dismissed, although limitation has not been set up as a defence."*

The principles that govern this Section are as "old as the hills" and do not need to be clarified any more than by saying that wherever an application, suit or appeal is presented before a court after the time period prescribed in the First Schedule of the Limitation Act, 1908, as considered against the circumstances on the basis of which such time period is be calculated, the application, suit or appeal is liable to be dismissed. Section 3 is to be read as subject to Section 4 to 25 of the Limitation Act, 1908 and on the basis of which a litigant can press the statutory prescriptions contained therein to negate such a dismissal or under Section 29 of the Limitation Act, 1908 to exclude the provisions of the Limitation Act, 1908 altogether.

18. The factual circumstances that are involved in an immovable property being litigated before a court as being benami usually involve two circumstances. Either the property has been purchased by a person directly in the name of another or the property, having been purchased by a person in their own name, is subsequently transferred by that person into the name of another through an instrument e.g. Deed of Gift, Deed of Relinquishment, Conveyance. It was often

considered that where an instrument had been used to transfer a property a prayer seeking the cancellation of the instrument is mandated and which therefore led to a question as to whether the period of limitation is to assessed as against Article 91 of the First Schedule of the Limitation Act, 1908 for cancellation of the instrument or as to whether the Declaration of the immovable property being a benami property would prevail as the dominant cause and whereby Article 120 of the First Schedule of the Limitation Act, 1908 would be the basis for making such an assessment. A Division Bench of this Court in the decision reported as ***Nazimuddin Ahmed vs. Ainuddin Ahmed and 2 others***[20] has considered this proposition and while overruling a decision of a learned Single Judge of this Court, who had applied Article 91 of the First Schedule of the Limitation Act, 1908 to cancel an instrument, has held that the provisions of Article 120 of the First Schedule would apply and opined that:

> " … *9. From the perusal of the prayer clauses, it is clear that the plaintiff in addition to declaration as to title has also sought cancellation of transfer in favour of defendant No.2 as notified on 26-5-1997. Plaintiff has sought declaration of his title as actual owner against the defendant No.1 being ostensible owner, no period of limitation is provided in the Limitation Act for a suit of the nature. Suit to seek declaration of title against a benamidar is governed under Article 120 read with section 18 of the Limitation Act, right to sue would accrue and six year limitation in such case would commence from the time hostile or fraudulent assertion of the benamidar first became known to the person injuriously affected. Right to sue for declaration of title would accrue to the affected person within six years of knowledge of the such entry in the record of title by the authority under law enjoined to maintain and keep such record under Article 120 of the Limitation Act."*

It is therefore apparent that where a challenge is made to the ownership of a person alleging that the person holds an immovable property as a benamidar, the provisions of Article 120 of the First Schedule of the Limitation Act, 1908 and not Article 91 of the First Schedule of the Limitation Act, 1908 would have to be considered irrelevant as to whether or not a person is seeking to cancel an instrument on the basis of which the person holds that immovable property.

19. In terms of an immovable property held by a person benami, in the context of inherited property, this period of limitation has to be considered in light of two separate factual circumstances. The first is where a person purchases or transfers an immovable property into the name of his parents, children, brothers or sisters to the exclusion of the others and a challenge is made by that person in his lifetime as to being the real owner of the immovable property. The second is a continuation of the same factual circumstances and whereby the immovable property is held in the name of such class of persons until the demise of the purported "real owner" without a challenge from the purported "real owner" in his lifetime. The arguments

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[20] PLD 2010 Karachi 148; See also ***Abdul Rashid Velmi vs. Habib ur Rehman and 4 others*** 1995 MLD 397; ***Kaleem Hyder Zaidi Duly Constituted Attorney vs. Mehmooda Begum and 4 others*** 2006 YLR 599; ***Mst. Nasira Ansari vs. Mst Tahira Begum and 6 others*** 2007 CLC 92

forwarded in this regard to challenge such a transaction would, to my mind revolve around determining as to whether the purchase or transfer was an advancement and which would therefore be invalid where the person purchasing or transferring the immovable property was a Muslim[21] or as to whether the immovable property was held by the person as benamidar and which could be rebutted by a person who holds the property by taking a position that such a purchase or transfer was made by the person with intent and in respect of a challenge made by the legal heirs of that person met with the additional contention that the person had every right to deal with his property in his lifetime as he chooses fit and hence not an advacement and the purchase or transfer having not been challenged by the person in his life time would confirm such an intent. The question to be determined by a Court in this regard would therefore clearly have to be to consider the factual circumstances around the purchase or transfer as against the threshold of intent and which being a question of fact would have to be determined through evidence.

20. But would a period of limitation apply where a challenge is made by one of the legal heirs of a person and who they contend was the "real owner" of a property which it is contended would be comprised in the estate of the Deceased? The starting point in such an analysis of the law would be to refer to the decisions of the the Supreme Court of Pakistan in which it has been held that the prescriptions of Section 3 of the Limitation Act, 1908 would not be applicable when determining an entitlement of a person to a property which they claim they have a right to inherit i.e. as co-sharers to a property.[22] A large number of cases that have been decided by the Supreme Court of Pakistan have considered the proposition in the context of a mutation entry being made after the demise of a person and whereby certain legal heirs, generally sisters, have been excluded from their inheritance on the basis of the mutation entry made in the land record, premised on custom or a limited interest in the immovable property, and in respect of which the Supreme Court have held that a mutation entry does not determine title and which entry cannot take away a legal heirs right to inherit an immovable property and have further opined that the provisions of the Limitation Act, 1908 would not preclude

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[21] See ***Aftab Nasir vs. Mst Fazl Bibib and others*** PLD 1965 (W.P.) Lahore 550; ***Mrs. Aiyasha Koreshi and another vs. Hishmatullah Koreshi and another*** PLD 1972 Karachi 653, ***Muhammad Siddique vs. Shabbir Hussain*** 2003 MLD 384; ***Ismail Dada Adam Soomar vs.Shorat Banoo*** PLD 1960 (W.P.) Karachi 852

[22] See ***Mst. Fazal Jan vs. Roshan Din*** PLD 1992 Supreme Court 811; ***Shahro and Others vs. Mst. Fatima and Others*** PLD 1998 SC 1512; ***Khair Din vs. Mst. Salaman and others*** PLD 2002 SC 677; ***Juma Khan and others vs. Mst. Bibi Zenaba and others*** PLD 2002 SC 823; ***Muhammad Rafiq and others vs. Muhammad Ali and others*** 2004 SCMR 704; ***Eada Khan v. Mst. Ghanwar and others*** 2004 SCM4 1524; ***Muhammad Iqbal and others vs. Allah Bachaya and others*** 2005 SCMR 1447; ***Mst. Kaneezan Bibi and others vs. Muhammad Ramzan and others*** 2005 SCMR 1534; ***Mehrban and others vs. Mst. Sahib Jan*** 2005 SCMR 1832; ***Mst. Janntan and others vs. Mst. Taggi through L.Rs. and others*** PLD 2006 SC 322; ***Mst. Suban vs. Allah Ditta and others*** 2007 SCMR 635; ***Rehmatullah and others vs. Saleh Khan and others*** 2007 SCMR 729; ***Mst. Gohar Khanum and others vs. Mst. Jamila Jan and others*** 2014 SCMR 801; ***Peer Baksh through LRs and others vs. Mst. Khanzadi and others*** 2016 SCMR 1467; ***Khan Muhammad through L.Rs and others Vs. Mst. Khatoon Bibi and others*** 2017 SCMR 1476; ***Shabla vs. Ms. Jahan Afroz Khilat*** 2020 SCMR 352; ***Mohammad Boota (Deceased) through LRs and others vs. Mst. Fatima daughter of Gohar Ali and others*** 2023 SMCR 1901; ***Noor Din (Deceased) through LRs vs. Pervaiz Akhtar*** and others 2023 SCMR 1928

such persons from maintaining a *lis* to seek a declaration as to their title to the immovable property.[23] However, when the property is purchased or transferred by a person in the name of another person e.g. a legal heir or otherwise, and which purchase or transfer was not challenged by the person who had financed the purchased or had transferred the property in their lifetime, or where he legal heir had not maintained a lis when there was an "actual denial" of their rights, the Supreme Court of Pakistan has held that the provisions of Section 3 read with Article 120 of the First Schedule of the Limitation Act, 1908[24] would apply to such circumstances.

21. The proposition with regard to the application of Section 3 read with Article 120 of the First Schedule of the Limitation Act, 1908 in this regard has recently been clarified by the Supreme Court of Pakistan in the decisions reported as ***Saadat Khan & others vs. Shahid-ur-Rehman & Others***[25] and in which it was held as hereinunder:

> " … *9. We may say at the very outset that in view of the provisions of the residuary Article 120 of Schedule-I to the Limitation Act 1908, there can hardly be any suit to which the bar of limitation does not apply. As per the said Article a suit for which no period of limitation is provided elsewhere in the Schedule, the period of limitation for that suit is six years from the time when the right to sue accrues. No specific Article of Schedule-I to the Limitation Act provides a period of limitation for a suit instituted by a person, under Section 42 of the Specific Relief Act 1877, for declaration of his ownership rights to any property against a person denying his said rights; therefore, the residuary Article 120 applies to such suit.* ***A suit instituted by a female legal heir for declaration of her ownership rights as to the property left by her deceased father in his inheritance, against her brother who denies her rights is thus governed by the provisions of Article 120****. To decide whether such a suit is barred by limitation, the six-year period of limitation provided by Article 120 is to be counted from the*

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[23] See ***Anwar Muhammad and others vs. Sharif Din*** 1983 SCMR 626, ***Haji vs. Khuda Yar*** PLD 1987 Supreme Court 453, ***Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi*** PLD 1990 Supreme Court 1; ***Shahro and Others vs. Mst. Fatima and Others***; ***Khair Din vs. Mst. Salaman and others*** PLD 2002 SC 677; ***Juma Khan and others vs. Mst. Bibi Zenaba and others*** PLD 2002 SC 823; ***Muhammad Rafiq and others vs. Muhammad Ali and others*** 2004 SCMR 704; ***Eada Khan v. Mst. Ghanwar and others*** 2004 SCM4 1524; ***Muhammad Iqbal and others vs. Allah Bachaya and others*** 2005 SCMR 1447; ***Mst. Kaneezan Bibi and others vs. Muhammad Ramzan and others*** 2005 SCMR 1534; ***Mehrban and others Vs. Mst. Sahib Jan*** 2005 SCMR 1832; ***Mst. Janntan and others vs. Mst Taggi through L.Rs and others*** PLD 2006 Supreme Court 322; ***Mst. Suban vs. Allah Ditta and others*** 2007 SCMR 635; ***Rehmatullah and others vs. Saleh Khan and others*** 2007 SCMR 729; ***Mst. Gohar Khanum and others vs. Mst. Jamila Jan and others*** 2014 SCMR 801; ***Peer Baksh through LRs and others vs. Mst. Khanzadi and others*** 2016 SCMR 1467; ***Khan Muhammad through L.Rs and others Vs. Mst. Khatoon Bibi and others*** 2017 SCMR 1476; ***Shabla vs. Ms. Jahan Afroz Khilat*** 2020 SCMR 352; ***Mohammad Boota (Deceased) through LRs and others vs. Mst. Fatima daughter of Gohar Ali and others*** 2023 SMCR 1901; ***Noor Din (Deceased) through LRs vs. Pervaiz Akhtar*** and others 2023 SCMR 1928

[24] See ***Abdul Haq and another vs. Mst. Surrya Begum*** 2002 SCMR 1330; ***Kala Khan and others vs. Rab Nawaz and others*** 2004 SCMR 517; ***Mst. Phaphan v. Muhammad Bakhsh*** 2005 SCMR 1278; ***Atta Muhammad v. Maula Bakhsh*** 2007 SCMR 1446; ***Lal Khan v Muhammad Yousaf*** PLD 2011 SC 657; ***Muhammad Rustam and another vs. Mst. Makhan Jan and others*** 2013 SCMR 299; ***Mst. Grana through Legal Heirs and others vs. Sahib Kamala Bibi and others*** PLD 2014 Supreme Court 167; ***Noor Din and another vs. Additional District Judge, Lahore and others*** 2014 SCMR 513; ***Intelligence Bureau Employees Cooperative Housing Society through Secretary vs. Shabbir Hussain and others*** 2022 SMCR 877; ***Mst Rabia Gula and others vs. Muhammad Janan*** 2022 SCMR 1009; ***Syed Kausar Ali Shah and others vs. Syed Farhat Hussain Shaha and others*** 2022 SCMR 1558; ***Faiz Ullah and others vs. Dilawar Hussain and others*** 2022 SCMR 1647; ***Saadat Khan and others vs. Shahid ur Rehman and other***s PLD 2023 Supreme Court 362; ***Khaleelullah and others vs. Muhaim Khan and other***s PLD 2024 Supreme Court 600; ***Akhtar Nasir Ahmed vs. Province of Punjab through District Collector Gujrat and others*** PLD 2024 Supreme Court 1268

[25] PLD 2023 Supreme Court 362

time when the right to sue for declaration accrues as provided therein. The question, when the right to sue for declaration has accrued in a case, depends upon the facts and circumstances of that case, as it accrues when the defendant denies (actually) or is interested to deny (threatens) the rights of the plaintiff as per Section 42 of the Specific relief Act 1877. The actual denial of rights gives rise to a compulsory cause of action and obligates the plaintiff to institute the suit for declaration of his rights, if he wants to do so, within the prescribed period of limitation; while in case of a threatened denial of rights, it is the option of the plaintiff to institute such a suit on a particular threat. On the actual denial of rights, the cause of action and the consequent right to sue matures for instituting the suit for declaration; whereas every threatened denial of rights gives rise to a fresh cause of action, and thus a fresh right to sue accrues on such a denial. This Court has, therefore, decided the question o limitation in the cases relied upon by the High Court and referred to by the counsel for the petitioners, in the peculiar facts and circumstances of each case.

10. Because of the special characteristics of their relationship, the criterion for determining the actual denial of a co- sharer's rights as to joint property by the other co-sharer is different from the one that is applied between strangers. Co-sharers have a relationship of trust and support for each other. Possession of joint property with one co-sharer is considered to be for and on behalf of all the co-sharers. A co-sharer who is not in actual possession is considered to be in constructive possession of the joint property. Each co-sharer protects the joint property against trespassers for the benefit of all the co-sharers. Even if one co-sharer acquires possession of some portion of the joint property in consequence of legal proceedings initiated by him against a trespasser, he is deemed to be in possession of that portion of the joint property, on behalf of all the co-sharers. Against this backdrop, the actual denial of a co-sharer's rights as to joint property by the other co-sharer is not to be readily inferred. ***Actual denial of a co-sharer's rights by the other co-sharer may occur when the latter does something explicit in denial of the former's rights. A mere oral negation, even made several times, of each other's rights by the co-sharers on different disputes as to the use and sharing of the profits of the joint property, but without doing any overt act to oust a co-sharer from the ownership of the joint property, cannot be treated as an actual denial of the rights and thus does not necessitate to sue for declaration of ownership rights.***

11. The obligations of the brothers to their sisters, as co-sharers of joint property, are further augmented when viewed in the light of the Islamic law and jurisprudence as expounded by this Court in Ghulam Ali. Because of the fiduciary and protecting relation of the brothers to their sisters, they cannot claim their possession of the joint property adverse to the rights of their sisters; possession of the brothers is taken to be the possession of their sisters. Mere omission to pay a share of the profits or produce of the joint property to their sisters by the brothers in possession of the joint property does not in itself constitute a repudiation of the sisters rights, nor does a wrong entry as to the inheritance rights in the revenue record oust the sisters from their ownership of the joint property as the devolution of the ownership of the property on legal heirs of a person takes place under the Islamic law of inheritance immediately on the death of that person without any intervention of anyone and without the sanction of the inheritance mutation in the revenue record. ***The position is, however, different when the brothers in possession of the joint property make a fraudulent sale or gift deed or get sanctioned some mutation, whether of sale or gift etc, in the revenue record claiming that their sisters have transferred their share in the joint property to them, or when they on the basis of a wrong inheritance mutation start selling out or otherwise disposing of the joint property claiming them to be the exclusive owners thereof. In such circumstances, the brothers by their overt act expressly repudiate the rights of their sisters in the joint property, and oust them from the ownership of the joint property. Their acts are, therefore, a clear and actual denial of the rights of the sisters, which give rise to a compulsory cause of action and obligates the sisters to institute the suit for declaration of their rights, if they want to do so, within the prescribed period of limitation.***

12. Although, by the said acts of the brothers, the right accrues to the sisters to sue for declaration of their rights, but if they by means of fraud are kept from the knowledge of those overt acts, the time limit of six years provided in Article 120 for instituting the suit for declaration against brothers or any person claiming through them otherwise than in good faith and for a valuable consideration, is to be computed from the time when the fraud of the brothers first became known to

> *the sisters, by virtue of the provisions of Section 18 of the Limitation Act. The "fraud" contemplated by Section 18 means suppression of those acts or transactions that give rise to the cause of action from coming into the knowledge of the plaintiff. A deliberate concealment of facts intended to prevent discovery of the right to sue is also a "fraud" within the meaning of the term used in this Section, but an open act of a party cannot be said to be a fraudulent act of concealment and is therefore not covered by this Section. The benefit of Section 18 is, however, not available against any person who though claims through the defrauding party but is a transferee in good faith and for a valuable consideration. That is why this Court has treated differently the two types of cases: (i) where the joint property is still in possession of the defrauding brothers or their legal heirs; and (ii) where the joint property has been alienated further to third persons- the transferees in good faith and for a valuable consideration."*

To summarise, the provisions of Article 120 of the First Schedule read with Section 3 of the Limitation Act, 1908 will apply wherever the person seeks to declare a property part of the estate of a deceased to which they inherit and which claim must be instituted within six years from the date there is an "actual denial" of their rights in a property, irrelevant as to their status of co sharers in the immovable property.

22. In the case in hand, the position that exists is that Plot No. B-121, Block 15, Gulistan e Jauhar, Karachi Development Authority Scheme No. 36, Karachi admeasuring 400 square yards has been recorded since 27 January 1998 as being owned by the Defendant No. 2, who is the sister of the (late) Tariq Niaz Malik but which is purportedly in the possession of the Plaintiffs while Plot No. D-16, Block 4, Gulshan e Iqbal, Karachi Development Authority Scheme No. 24, Karachi admeasuring 500 square yards has been recorded since 20 November 1996 as being owned by the Defendant No. 1, who is the mother of the (late) Tarqi Niaz Malik. The "actual denial" by the Defendant No. 1 and the Defendant No. 2 of the rights of the Plaintiffs to inherit to each of the properties has been pleaded in that suit on the basis that the Defendant No. 1 and the Defendant No. 2 are both intending to sell their property and the immovable property, being held by each of them as benamidars of Ghulam Nizamuddin Malik, would deprive the Plaintiffs of their "inherited" share. In terms of the question of the property being held by the Defendant No. 1 and the Defendant No. 2 as benamidars, an issue that would require determination would be as to the intention of the (late) Ghulam Nizamuddin Malik of transferring each of these properties into the name of the Defendant No. 1 and the Defendant No. 2 and additional questions as to who paid the consideration for the purchase of the properties and which, at least in respect of one of the properties is in dispute, and which would render the question of the status of the property being a question of fact which cannot be summarily decided at this stage. Secondly, it would seem as alleged in the plaint that the "actual denial" of any rights of the Plaintiffs only occurred after the demise of the (late) Tariq Niaz Malik and which occurred on 3 July 2020. The fact and is to whether there was or was not any acutal denial of the Plaintiffs rights before that date would also be a question of fact that would require evidence to decide such an issue. I

am therefore of the opinion the question of limitation necessitating evidence being led cannot be determined summarily and hence the Plaint cannot be rejected under Rule 11 of the Order VII of the Code of Civil Procedure, 1908 at this stage.

(iii) Whether the Plaintiffs have the requisite locus standi to maintain this Suit under Section 42 of the Specific Relief Act, 1877

23. The second issue that requires determination is as to whether the Plaintiffs lack the requisite locus standi to maintain a suit seeking the declaration of each of the properties as having been held by the Defendant No. 1 and the Defendant No. 2 as benamidars, the real owner being the (late) Ghulam Nizamuddin Malik. This issue is premised on the argument that as neither the (late) Ghulam Nizamuddin Malik nor for that matter the (late) Tarqi Niaz Malik claimed title or an undivided share to each of the two immovable properties in their lifetime, would it open to the Plaintiffs to make such a claim after the demise of each of the persons through whom they each claim.

24. The question has, as rightly contended by Mr. Raj Ali Wahid, been addressed by the Supreme Court of Pakistan in the decision reported as ***Abdul Haq and another vs. Mst Surrya Begum and others***[26] and in which it was held as hereinunder:

> " … *11. Atta Muhammad was deprived of right to inherit the property as a consequence of mutation in dispute but he did not challenge the same during his lifetime. The petitioners claimed the property through Atta Muhammad as his heirs who filed the suit as late in 1979 about nine years after the sanction of mutation which had already been given effect to in the record of rights. The petitioners, therefore, had no locus standi to challenge the mutation independently, for Atta Muhammad through whom they claimed inheritance himself had not challenged the same during his lifetime."*

This decision was followed by the Supreme Court of Pakistan in the decision reported as ***Muhammad Rustam and others vs. Mst. Makhan Jan***[27] and in the decision reported as ***Mst. Faheeman Begum (Deceased) through L.Rs and others vs. Islam-ud-Din (Deceased) through L.Rs and others.***[28] The proposition that has been settled by the Supreme Court of Pakistan, independent of the issue of limitation, is that where a predecessor in interest of a plaintiff fails to claim his right to an immovable property in his lifetime, his claim is deemed waived and thereafter his successors in interest cannot maintain a *lis* as they lack any legal character or any right in the property and hence the Plaint is liable to be rejected as being barred under Section 42 of the Specific Relief Act, 1877 for lacking *locus standi.*

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[26] 2002 SCMR 1330
[27] 2013 SCMR 299
[28] 2023 SCMR 1402.

25. In the case in hand, it is the case of the Plaintiffs that the real owner of each the properties was the (late) Ghulam Nizamuddin Malik and on his demise his son the (late)Tariq Niaz Malik had a right to claim to his estate. It is not been pleaded in the Suit that the (late) Ghulam Nizamuddin Malik or for that matter the (late)Tariq Niaz Malik claimed any right to either of the properties in their lifetime. That being the case, applying the principle settled in the above mentioned decisions of the Supreme Court of Pakistan, the Plaintiff each lack the locus standi to maintain the Suit. The Suit is therefore barred as no declaration as to any legal character or any right in the property can be made in favour of the Plaintiffs and hence the Plaint is liable to be rejected under clause (d) of Rule 11 of the Order VII of the Code of Civil Procedure, 1908 as being barred under Section 42 of the Specific Relief Act, 1877.

26. For the foregoing reasons, the Plaint is held as being barred on the principles settled by the Supreme Court of Pakistan in the decisions reported as ***Abdul Haq and another vs. Mst Surrya Begum and others,***[29] ***Muhammad Rustam and others vs. Mst. Makhan Jan,***[30] and ***Mst. Faheeman Begum (Deceased) through L.Rs and others vs. Islam-ud-Din (Deceased) through L.Rs and others,***[31] and the Plaint is rejected under clause (d) of Rule 11 of Order 7 of the Code of Civil Procedure, 1908 with no order as to costs

J U D G E

Karachi dated 18 January 2025.

[29] 2002 SCMR 1330
[30] 2013 SCMR 299
[31] 2023 SCMR 1402.