# IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. No.D-318 of 2017

Present:-
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

| | |
|---|---|
| Appellant: | Raja Saqib Khan through Mr. Ovais Ali Shah, advocate. |
| Respondent No.1: | Raja Sabri Khan through Mr. Shahzad Nizam, Advocate. |
| Respondent No.2: | Mrs. Sarosh Rahim through Mr. Ali Almani, Advocate. |
| Date of hearing: | 06.05.2025. |
| Date of judgment: | 27-06-2025. |

## JUDGMENT

**Muhammad Osman Ali Hadi, J:-** The instant Appeal has been filed against Judgment dated 18.07.2017 and Decree dated 11.08.2017 (collectively referred to as the "**Impugned Judgment**"), resulting from a Suit for Declaration, Possession, Partition and Mesne Profit for the estate of (late) Mr. Raja Allahdad Khan ("**the Deceased**"). The Suit was filed by the Appellant (being a son of the Deceased) against his siblings, i.e. Respondents No. 1 & 2 abovenamed. The Appellant sought entitlement of three (3) immoveable properties and eight (8) moveable properties[1]. It is the claim of the Appellant that the three immoveable properties being: (i) House No. 53 Khayaban-E-Mujahid, Defence Housing Authority - Karachi ("**Property #1**"). (ii) Plot No. 12-C Muslim Commercial Street, Phase 6 Defence Housing Authority – Karachi ("**Property #2**"). (iii) 96 Acres of Agricultural Land in Deh Chhail Tapo Seerani, Taluka & District Badin ("**Property #3**") belonged to the Deceased, and as such form part of the Deceased's estate in which the Appellant is a co-sharer. The Appellant added a 4th immoveable property being a Residential Plot in Veteran's Society Rawalpindi ("**Property #4**") to his claim, when filing his Affidavit-in-Evidence. The Respondents (i.e. siblings of the Appellant) have countered by stating the Property #1, #2 & #4 were purchased by the Deceased through their (i.e. the Respondents') funds, but for all intents and

[1] Details of all the Properties are available in the Schedule to the Plaint at page 115 of the File

purposes the Properties belong to the Respondents respectively, as they are the actual owners. Since effect of the Impugned Judgment and Decree only relates primarily to Property #1, Property #2 and Property #4, we shall limit our opinion to the said mentioned three immoveable Properties only. We have issued a note of deliberation on Property #3 and the other moveable properties towards the end of this Judgement.[2] We find no error requiring adjudication on any of the other properties. The only moveable property which we shall discuss are the "***Weapons***",[3] as they are also mentioned in the Impugned Judgment / Decree.

2. In reverse order, we shall first adjudicate the matter of the moveable property being **'*Weapons*'**. As stated in the Impugned Judgment & Decree, the *Weapons* belonged to the Deceased. They have been ordered to be auctioned and the proceeds distributed amongst the legal heirs, i.e. the Appellant and Respondents, as per their respective shares under Shariah. As the *Weapons* were owned by the Deceased, we find no cavil with this part of the Impugned Judgment / Decree, considering it was the Appellant himself who first approached the Hon'ble Court to distribute the estate of his late father, i.e. the Deceased in accordance with Shariah / Muhammadan Law of inheritance. We therefore leave this part of the Impugned Judgment / Decree unfettered.

3. We shall now consider merits of this Appeal in relation to three (3) of the immoveable properties, i.e. Property #1, Property #2 & Property #4 *ibid*, which form the major crux of the disparity between the Parties (Property #1, #2 & #4 shall collectively be referred to as **"the Properties"**).

**ARGUMENTS OF THE COUNSELS**

4. Learned Counsel for the Appellant opened his arguments by submitting the Properties[4] belonged to his late father and were in his father's name at time of death, on 04.11.1994. He submitted that under Muhammadan / Shariah Law, he being a legal heir, was entitled to a share in the same. He submitted the Respondents have usurped his share, and the Impugned Judgment / Decree is erroneous in that it has snatched away the Appellant's legal entitlement.

---

[2] In Para 65
[3] Detailed at Para 56 of Respondent No. 1's Counter-Claim at page 135 of the File & Para 7 of the Impugned Judgement
[4] The term "Properties" means immoveable Property #1, #2 & #4 collectively

5. He referred to the Impugned Judgment[5], stating that in Paragraphs No.14 and 15, the Respondents repeatedly admitted that the Properties were in the name of the Deceased. He then referred to the affidavit-in-evidence (**"AiE"**) of Respondent No.1.[6] He highlighted Para No.13 of the AiE, in which Respondent No.1 claimed he purchased the Property #1 from the Deceased, but then submits Respondent No. 1 later contradicted his own statement, showing inconsistency in his narrative. He then proceeded to highlight various other contradictions made in Respondent No.1's AiE. He next referred to a *Diary*[7] (which the Respondents claim belonged to the Deceased) which he says was relied upon by the Respondents. He stated the *Diary* was a non-legal document which could not be considered when deciding ownership of the Properties. He stated the alleged entries in the *Diary* were vague in nature, and could not have formed a basis for establishing any Benami ownership of the Properties. He submits the Impugned Judgement / Decree has erroneously (mis)placed reliance on these documents.

6. He contended that on one hand Respondent No.1 claims to have purchased the Property #1 (himself), while on the other hand Respondent No. 1 asserts that he provided funds to the Deceased for the purchase of the Property #1. He submitted the two were divergent pleas.

7. He next referred to the affidavit-in-evidence of Respondent No.2[8], which stated that Property #1 remained in the name of the Deceased. He submitted that Respondent No.2 contradicts the earlier narrative by claiming that Property #1 belongs to Respondent No.1, because Respondent No.1 lived with and supported the Deceased and their (late) mother (hereinafter referred to as the **"Mother"**). He stated that the Respondents' own evidence challenges the reasoning of the Impugned Judgment, particularly in Paragraph No.14, wherein the learned Single Judge observed that although Property #1 was in the name of the Deceased, it was a Benami transaction and Respondent No.1 is the actual owner. He contended that there had been a gross misreading of the evidence and referred to multiple parts of the record.[9]

8. He next referred to Property #2, which was declared by the learned Single Judge to belong to Respondent No. 2. He submitted that this Property

---

[5] At page 49 of the File
[6] Available at page No.217 of the Court File
[7] Available at pages No.253 to 257 of the Court File
[8] Available at page no. 507 of the Court File
[9] At page nos. 217, 221, 253, 269, 507, 511, 443, 499, 501 of the Court File

was also in the name of the Deceased and should have formed part of his estate, but was wrongly given to Respondent No.2 in the Impugned Judgment.

9. He then argued that the principles required to prove a Benami transaction were not fulfilled, which aspect was not properly addressed in the Impugned Judgment. He averred that there was a well settled criteria required before any property can be declared Benami, which was not done. He stated the said criteria, *inter alia*, includes source of money for purchase, possession of property, motive for the transaction, custody of the title deed and a clear reasoning for a Benami purchase. He contended that all those ingredients were lacking and therefore the Impugned Judgement erred in holding the Properties to be Benami. He relied on case law in support of this contention.[10]

10. He next cited the evidence of Zafar Omer[11] (nephew of Respondent No. 2's husband) and claimed it was also inconsistent and should not have been relied upon, as the same did not show any source of funds used to purchase any of the Properties by Respondent No. 2. He reiterated the General Power of Attorney (**"GPOA"**)[12] executed by the Deceased himself, stated that the Deceased was the sole and absolute owner of Property #2, but this too was not adequately considered in the Impugned Judgement / Decree. He further referred to a second Power of Attorney (**"POA"**) given by the Mother[13] in which she declared that she and her two sons i.e., the Appellant and Respondent No.1, were co-owners of Property #2. He contended that the Impugned Judgment disregarded this portion, but relied upon another portion of the POA which stated Property #2 belonged to Respondent No. 2. He summarized that whilst the aforementioned relevant aspects of the GPOA & POA were not considered, the learned Single Judge however otherwise accepted other portions of the POA in holding that the Mother's statement (in the POA) was relevant, in reaching the conclusion the Properties were Benami and the Deceased was a Benamidar.

11. He also questioned the lack of information relating to the source of funds used by the Respondents to allegedly purchase Properties #1 and #2, arguing that their claims remain unverified. Although there are references to

---

[10] 2023 SCMR 572; P 2011 SC 829; P 2010 SC 569; P 2008 SC 146; 2005 SCMR 577; 1991 SCMR 703 & 2002 CLC 1209

[11] Zafar Omer appeared as a witness of Respondent No. 2 to show he acted as a conduit to send funds to the Deceased from Respondent No. 2 for purchase of Property# 2. Available at page no.575 of the Court File

[12] Available at page no.523 of the Court File

[13] Available at page no. 443 of the Court File

transfers of funds to the Deceased, no clear evidence has been provided linking these transfers to have been made by the Respondents to the Deceased, or that these transactions were used towards purchase of the Properties. He suggested that such transfers, even if made by the Respondents, could have been general assistance to a parent, rather than payments for the Properties. He particularly questioned Respondent No. 2's source of income at the time, and noted that no proper legal banking channel was shown through which any remittance was received by the Deceased from Respondent No. 2.

12. Learned Counsel contended that the Impugned Judgment misread and ignored key pieces of evidence and pleadings; erroneously concluding that the Properties did not belong to the Deceased but were Benami in nature. He reiterated that strict legal principles required to establish a Benami transaction were neither addressed, nor was the Respondents' reasoning supported by any cogent evidence. He stated that it is essential for transfer of property there must be a registered instrument, which was not present in the instant matter.

13. Counsel next submitted Respondent No.1's assertion that he (i.e. Respondent No.1) paid for construction on Property #1 also remains unverified. He continued that Respondent No. 1 was unable to show an iota of proof substantiating the same. He highlighted that the alleged receipts for construction attached by Respondent No.1, were completely vague and failed to show any nexus with the Property #1.

14. Lastly, he concluded by saying the Counter-Claim made by the Respondents was not maintainable as due Court fee had not been paid, which was essential. In support of all his above contentions, he relied upon various case laws.[14]

15. Learned Counsels for the Respondents (as expected) have denied all allegations and arguments made by Counsel for the Appellant. Learned Counsel for Respondent No.2 addressed the Court and submitted that the issue of the source of income and fund transfers was never raised by the Appellant during the evidence stage or in cross-examination, and thus cannot be considered at this stage. He stated that if the Appellant had any issue regarding the same, he should have raised it at the stage of evidence and it would have been adequately addressed. He submitted that since the issue was not initially

[14] 2023 SCMR 1928; P 2007 K 310; 2017 YLR 138; 2005 YLR 2213; P 2024 SC 600; P 2021 SC 812; 2009 SCMR 666

raised by the Appellant, it cannot now be used as a tool to set aside the Impugned Judgment.

16. Learned Counsel for Respondent No. 2 referred to the General Power of Attorney (GPOA)[15] referenced by Counsel for the Appellant, and rebutted the Appellant's stance. He noted that Clause No.8 of the GPOA specifically authorized Respondent No. 2 to gift, sell or otherwise transfer Property #2, proving she had legal control over it. He further referred to the Power of Attorney (POA) issued by the Mother[16], and controverted the Appellant's reliance upon the POA by stating that it was posthumous and therefore the reference by the Appellant to the said POA was invalid.

17. He next cited an affidavit by the Mother[17] in which she stated that Property #1 should go to Respondent No.1 and Property #2 to Respondent No.2. He also asserted that the Appellant had previously taken loans from the Deceased, which were to be adjusted, and thus he was not entitled to any of the Properties. He referred to cheques and receipts of payments made by Respondent No.2 regarding Property #2[18].

18. Learned Counsel argued that the Appeal itself was barred by limitation, because the Appellant failed to file the Decree along with the Appeal, as required under Order 41 Rule 1 CPC 1908 and Section 3 of the Law Reforms Ordinance 1972. He stated that the limitation period expired on 16.09.2017, and the Appellant only applied for a certified copy of the Decree on 18.01.2018, receiving it on 22.01.2018, rendering the Appeal time-barred. He also submitted documentary evidence showing Respondent No. 2's employment in England being a legitimate source of income, from which she sent monies to the Deceased for purchase of the Property #1 & #4. He relied on several case law in support of his contentions.[19]

19. Learned Counsel for Respondent No.1 then argued that Property #1 was purchased using funds sent by him while he was abroad, and that the Deceased never actually owned the Property #1. He referred to his affidavit-in-

---

[15] Available at page no.523 of the File
[16] Available at page no.531 of the File
[17] Available at page No.443 of the Court File
[18] Available at pages 563 to 567 of the Court File
[19] 2011 MLD 1628; 1597; 2011 CLD 1655; 2020 PLC(CS) 1359; 2016 MLD 1813; 1986 CLC 233; 2006 SCMR 1248; P 2008 SC 462; 2014 MLD 1255; 2016 PTD 55; 2018 PTD 1827; 2018 PLC 287; 2019 CLC 321; P 2020 SC 736; P 1991 SC 400; 1975 SCMR 157; 2002 CLC 295; 2003 SCMR 1560; P 2008 SC 577

evidence[20], specifically Paragraphs No.52 and 55, asserting that the Appellant misappropriated the Deceased's funds and executed fraudulent powers of attorney to dispose of the Deceased's other property. He referenced a Legal Notice dated 30.12.2002 issued by the Appellant, and its Response dated 13.01.2003 sent on behalf of Respondent No. 1,[21] through which he stated that the fraud committed by the Appellant in misappropriation of funds and properties of the Deceased was highlighted. He claimed the Appellant had not approached the Court with clean hands.

20. He next referred to the affidavit of the Mother (i.e. Deceased's widow)[22], asserting it established that the Deceased had received the money from Respondent No. 1.

21. He submitted that though the Mother had passed away in the year 2002, the affidavit of the Deceased's wife (executed in the year 1999) carries evidentiary value under Article 46 of the Qanun-e-Shahadat Order. He further pointed to the Deceased's *Diary*[23], showing substantial payments made by Respondent No.1 to the Deceased. At this point, Counsel for Respondent No. 2 interjected, stating that the *Diary* was never disputed by the Appellant during the evidence stage. Counsel for the Appellant rebutted that since the Mother was not cross examined (as she passed away before the legal proceedings commenced), the contents of the said affidavit could not be considered.

22. Learned Counsel for Respondent No.1 then continued, referring to payment receipts[24] and Paragraph No.16 of his affidavit-in-evidence. He asserted that he was abroad at the relevant time of purchase and hence did not take the Property #1 in his own name, a fact he states was not challenged by the Appellant. He cited his own cross-examination[25] to argue that none of his submissions were controverted, and therefore, must be presumed true. He emphasized that where facts are admitted or not denied, further proof is not required, and the burden shifts on to the Appellant. He states the Appellant has been unable to disperse the Respondent's contentions. He concluded that the

[20] Available at Page No.217 of the Court File
[21] Available at Page No.195 of the Court File
[22] Available at Page No.443 of the Court File
[23] Available at Pages No.253 to 257 of the Court File
[24] Available at Page No.259 of the Court File
[25] Available at Page No.481 of the Court File

Appeal is barred by limitation. He cited various case laws in support of his contentions.[26]

23. Learned Counsel for the Appellant, invoking his right of rebuttal, stated that the Deceased's *Diary*, heavily relied upon by the Respondents, does not mention that any funds sent by the Respondents were used to purchase any of the Properties. He further contended that the receipts[27] presented by the Respondents are nameless and unidentifiable. He rebutted the limitation argument, stating that he had filed an application for a certified true copy of both the judgment and decree on 25.07.2017 but was only provided the Impugned Judgment at such time since the Decree had not been drawn up. He then immediately proceeded to file the Appeal without delay. He stated that the Decree had not been drawn up initially, and he later filed a second application on 18.01.2018 for seeking a copy of the Decree, since the Office had appeared to have misplaced / not-acted upon his first application. He then obtained the Decree, which was filed with a Statement before the Court on 23.01.2018.[28] He concluded that he diligently pursued the Appeal and should not be penalized for the non-filing of the Decree due to it not being available. He reiterated that the initial application dated 24.07.2017 seeking a certified copy of the Decree was filed on 25.07.2017, a copy of which was also placed on record with Statement dated 29.10.2018, and therefore the matter should now be decided on its merits.

## THE COURT'S OPINION

24. We have heard the exhaustive arguments made by the learned Counsels for the Parties, along with having perused the voluminous material available on record, as well as the written submissions. Despite the comprehensive contentions put forth, it appears that there are two basic issues which require consideration to adjudicate on this Appeal:

(i) Whether the non-filing of the Decree by the Appellant along with the Memo of Appeal, in the given circumstances, is fatal to this Appeal?

(ii) Whether the Impugned Judgment / Decree is correct in holding that the Respondents have accurately fulfilled the legal threshold

[26] 2011 MLD 1597; 2020 PLC (CS) 1359; 1987 CLC 2043; P 2008 SC 577
[27] Available at page no.269 of the File
[28] Available at page no.51 of Part II of the File

required to show that they are the respective actual owners of the Properties?

25. We will first look at the effect of non-filing of the Decree by the Appellant at the time of the institution of the Appeal. The instant Appeal was filed on 02.08.2017, against Impugned Judgment dated 18.07.2017.[29] The Decree was filed belatedly along with a Statement dated 23.01.2018[30]. It was contended by the learned Advocates for the Respondents that the Decree was obtained belatedly, and the Appellant filed an application to receive a copy of the Decree on 18.01.2018, which was approximately four months after the period of limitation expired. Their contentions are that filing of the instant Appeal without the Decree was fatal and on this ground of limitation, the instant Appeal is liable to be dismissed. It was contended by the learned Counsel for the Appellant that he had filed an application dated 25.07.2017,[31] in which he had applied for certified true copies of both the Judgment & Decree. Copy of the Impugned Judgment was made ready on 27.07.2017, after which the Appeal was filed on 02.08.2017. He further stated that the copy of Decree remained unavailable and that's why he was unable to file it along with the Appeal. In this regard he contended that on 18.01.2018 he made a second application for receiving the certified true copy of the Decree, which was made available to him on 22.01.2018, and which was filed along with his statement on 23.01.2018.

26. There can be no cavil with the general proposition that non-filing of a decree along with the appeal is fatal. There is a plethora of case law by the Hon'ble Supreme and High Court (some of which was cited by learned Counsel for Respondent No. 2). Moreover, Order 41 Rule 1 Code of Civil Procedure 1908, is also clear on this point. Some judgements have even gone to the extent of elaborating that an appeal itself is not to be considered pending without a decree attached to it.

27. However, there have also been several exceptions to this, based on particular peculiarities. Every so often, convoluted matters arise with their own individual merits and meshes, which must be carefully deciphered and a

[29] A certified copy of the Impugned Judgement was attached along with the Memo of Appeal at the time of filing
[30] Available at page No.51 of part two of the File
[31] Available on the Court File

decision given thereon. Based on constantly evolving legal circumstances, each matter must be assessed subjectively to ensure justice is properly delivered.

28. It appears from the record that the Appeal was filed on 02.08.2017, but the first time the issue of non-filing of the Decree was raised by the Respondents was on 19.03.2018, as is reflected in the Order Sheet. At this stage, a copy of the Decree had already been filed (on 23.01.2018), and a copy of the initial application dated 25.07.2017 filed by the Appellant seeking a copy of the Decree was also placed on record (pursuant to Court Order dated 24.04.2018).

29. The learned Counsels of both the Appellant and the Respondents have provided a plethora of case law in support of their respective contentions. The Appellant has provided case law persuading that filing of the decree in certain circumstances is not essential for the maintainability of the Appeal, whereas the Respondent No. 2 has cited case law to support his contention that non-filing of a decree is absolutely fatal to any appeal.

30. Having gone through the various case laws, as well as our own thorough study of the matter, we have come to the conclusion that in the instant case the belated filing of the Decree by the Appellant would not be fatal to the Appeal, for the following reasons:

31. First and foremost, the learned Counsel for the Appellant filed a certified copy of his application dated 24.07.2017, which sought a copy of the (Impugned) Judgment and Decree dated 18.07.2017. The said application appears to have been presented on 25.07.2017. It would be bizarre to assume that the Appellant filed such Application just for the Impugned Judgement, and not for the Decree. Furthermore, on the second page attached with the copy of his application, there is a clear note by the Office stating that the Decree was not prepared at such time. However, a copy of the Impugned Judgement was provided to the Appellant. A perusal of the Decree itself shows it was signed by the learned Single Judge on 26.08.2017, i.e. 24 days after this H.C.A. was filed. Needless to mention, filing of an appeal from a decree under the Original Jurisdiction of the High Court was governed under Article 151 Limitation Act 1908, which provides a time period of 20 (days).

32. The Appellant appears prudent in his approach. He filed his application for obtaining a copy of the Decree and Judgement within one week after the

Impugned Judgement was passed. He filed the Appeal along with the Impugned Judgement within the permissible time frame,[32] to avoid any chance of being defeated by limitation. Notices on the Appeal were first issued by this Court to the Respondents on 02.08.2017. Notices were then re-issued on 15.08.2017 through the Court, and the Appellant also had notice issued through private courier (the receipt was attached).

33. More pertinently, the Advocate for the Appellant filed a Statement dated 19.10.2018 showing a copy of his application seeking a certified true copy of the Judgment and Decree, which was pursuant to Court order dated 24.04.2018 in the instant Appeal. It therefore appears that when this objection was raised by the Respondent, the Court itself had already granted the Appellant time to file a copy of the Decree. Moreover, in the same order dated 24.04.2018, the Court had directed the Office to issue a certified copy of the Appellant's initial application dated 25.07.2017, showing a tacit acceptance by the Court of the same.

34. Another order dated 29.10.2018 passed by this Court also observed and passed a tentative opinion that this matter was not barred by limitation.

35. From the record, it appears clear that the Appellant did file an application seeking a copy of the Judgement & Decree on 25.07.2017 (within the limitation period). However, the Decree was not ready on such date, and the Appellant felt he would have been caught by the trappings of limitation, had he waited any longer. After all, law favours the vigilant and not the indolent. Additionally, this Court allowed the learned Counsel for the Appellant to file the Decree and sought to ascertain the authenticity of the Appellant's initial application dated 25.07.2017 which sought a copy of the Decree (which was duly ascertained and is on record). In essence, non-filing of the Decree at the same time as filing of the Appeal was already condoned / accepted by this Court through their previous orders.[33]

36. The Hon'ble Supreme Court deliberated a similar legal point in the case of *Baseer Ahmed Siddiqui*,[34] whereby it also held that it appears improbable that a party would make an application seeking a copy of the judgement, but not for

[32] The Appeal was filed on 02.08.2017
[33] Dated 24.04.2018 & 29.10.2018
[34] 1988 SCMR 892

the decree. In that case the Court concluded that non-filing of the decree along with the appeal was condonable. A relevant excerpt reads:

> "5. In support of this petition, learned counsel contended that the view taken by the learned Judge in the High Court that the requirement of Order 41, rule 1, C.P.C., to the effect that copy of the decree shall be accompanied with the memorandum of appeal was a directory provision and that the copy of the decree received by the appellate Court alongwith the record of the suit was sufficient to satisfy this requirement, was erroneous. On hearing the learned counsel for the parties and perusing the impugned judgment, we, however, do not feel called upon to examine this contention. The fact remains that the respondent submitted application for copy on the same date when the judgment was announced by the trial Court. According to his affidavit before the appellate Court he had applied for the copy of the judgment and the decree, but somebody had scored off the word "decree" from the application for copy. The learned counsel for the petitioner was unable to controvert this assertion and only stated that the respondent herself must have done so because the decree was not yet prepared. In our view it is highly improbable for an advocate only to apply for the copy of judgment and not for decree as well, particularly when the party for whom the application was made was keen to file an appeal. The other glaring fact was that the decree was admittedly prepared and signed on 2nd January, 1978, incidentally on the same date on which the memo of appeal was presented. Soon thereafter the record was called for by the appellate Court. All these facts clearly make out a case for condonation of delay in presenting the copy of the decree sheet after obtaining the same from the appellate Court. Learned counsel for the respondent submitted that it is in these circumstances that the petitioner did not press his objection before the appellate Court and consequently no order was passed by the appellate Court on the application for condonation of delay.
>
> 6. The other aspect of the case is that if the respondent had actually made an application for copy of the decree before the trial Court, there is nothing on the record to indicate whether this copy was prepared and notice given to the respondent that the same is ready for delivery. All these circumstances seem to justify the conclusion of the High Court that the respondent was not at fault for not obtaining a copy of the decree from the trial Court. In these circumstances we feel that it is not necessary to determine the question of law raised by the learned counsel, as we do not consider this a fit case to determine the same. In substance the High Court had condoned the delay in submitting the decree sheet by the respondent after the filing of the appeal."

37. In the given circumstances, and relying on the reasoning in the *Baseer Ahmed*[35] case (ibid.) we find that the Appellant had made a timely application for seeking a copy of the Decree, but the Decree was not available at such time through no fault of the Appellant. The legal maxim *"actus curiae neminem gravabit"* meaning an act of the court shall prejudice no one, would be also be attracted to aid the Appellant.

38. In the case of *Rasheed Ahmad v Province of Punjab*[36], the Apex Court held that the High Court had correctly exercised their discretion by keeping the case intact (in the circumstances of that case), and not dismissing the appeal purely for the reason the decree was not filed alongside it. The Court observed that such a technical knock-out was only to be used sparingly, as cases ought to be decided on merits (where warranted). In *Mst. Safia Begum*[37] case the Hon'ble Supreme Court followed the dictum laid in *Baseer Ahmed* by holding that non-filing of a certified copy with an appeal was not fatal.

39. We have also gone through the following case laws cited by learned Counsel for Respondent No. 2, which are distinguishable for the ensuing reasons:

i. In *Cooperative Model Town Society*[38] the petitioner received a certified copy of the judgement on 05.07.1997, but did not make an application to file it until 30.03.1998, without justification. These were not the circumstances in the instant Appeal.

ii. In *Addl. Secretary v Muhammad Rafique*[39] the appeal was filed after the decree was prepared (which is distinguishable to the matter at hand). It is relevant to note that in that case the appeal was held to be instituted within time and was not hit by limitation. The same was the position in *Abdul Rashid v Abdul Ghani*[40] in which the decree was signed on 23.06.2008 and prepared on 02.07.2008, but the appeal was filed on 10.07.2008, i.e. 8 days after the decree was prepared.

---

[35] Which has been subsequently cited in several Apex and High Court Judgements
[36] 2004 SCMR 707
[37] 1993 SCMR 882
[38] 2005 SCMR 931
[39] 2011 MLD 1628
[40] 2011 MLD 1597

iii. In the *Apollo Textile Mills Ltd.*[41] case the final order was announced on 04.01.2010 and the appellants paid costs for obtaining a copy of the decree on 02.10.2010, and received the certified copy of the decree on 30.10.2010[42] after which they filed the Memo of Appeal (i.e. ten months belatedly). In the instant Appeal, it is undisputed the Memo of Appeal was filed on 02.08.2017 and the Decree was signed on 26.08.2017, i.e. twenty four days *after* the Appeal was filed.

Furthermore, the said *Apollo Textile Mills* judgement itself refers to the *Baseer Ahmed* judgement, and observes that time can be allowed for subsequently filing of a decree if the same was not drawn up at the time the appeal was filed. A relevant portion of Para 34 of the judgement reads:

> "34. It may be observed that in a situation where the decree has not been drawn-up and it is noticed at the time of presenting the appeal that the memorandum is not accompanied by a copy of the decree, time can be allowed for filing the decree-sheet under such circumstances. However, in the instant case, the decree was drawn on the same date when the judgment was announced whereafter the appellants applied for certified copy of the judgment and decree both, which were supplied to the appellants, however, appellants did not file the copy of the decree along with memo of appeal."

iv. In the *Karachi International Container Terminal Ltd.*[43] case cited by Counsel for Respondent No. 2, the appellant (in that case) filed an application for obtaining a copy of the decree on 19.02.2019, whereas the decree itself was prepared on 20.02.2016, i.e. three years prior.[44] This also is not the situation in the instant Appeal. More relevantly, even in this case, the learned Division Bench referenced the principle laid down in the *Baseer Ahmed* Judgment[45].

40. Upon passing of the Deceased, the Appellant (admittedly being a legal heir of the Deceased) would automatically stand to have inherited a share in his late father's (i.e. the Deceased) estate. Therefore, his plea to be granted his own share of Property from the Deceased's estate, cannot be hit by limitation,

---

[41] 2011 CLD 1655
[42] Timeline at Para 31 of the judgement
[43] 2020 PLC (CS) 1359
[44] Timeline at Para 15 of the judgement
[45] In Para 19

as the Appellant (under operation of law) is seeking to take formal control of his own share in inherited property. This view was elaborated by the Hon'ble Supreme Court in *Muhammad Rafiq v Muhammad Ali*[46], whereby it was held in that case the respondent (plaintiff in that inheritance suit) had become a co-sharer upon the death of her father, and hence the question of limitation against her bringing a suit did not arise.

41. In *Ghulam Ali v Mst. Ghulam Sarwar Naqvi*[47] the Apex Court whilst dealing with the issue of inheritance under Muhammadan Law, stated:

> "I. 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 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.[48]
>
> V. It has already been held that the devolution of property through Islamic inheritance takes place immediately without any other intervention; therefore, in this case the respondents petitioners' sister, became the owner of the suit property immediately on the death of her father. She is said to have relinquished her share in inheritance in petitioners (brothers) favour and accordingly as asserted by them a mutation of inheritance was sanctioned in their favour. It is interesting to note that she was not only deprived of inheritance but also her name was not mentioned in the pedigree table showing her as one of the heirs the claim of relinquishment of her property was asserted so strongly and accepted so readily that even her existence as a daughter, though that not otherwise denied, was not acknowledged in the documentation regarding inheritance; namely, in the mutation register and other connected documents.[49]"

42. In *Mst. Suban v Allah Ditta*[50] the Supreme Court followed a similar view. Para 11 of the judgement reads:

> "11. It is a proposition too well-established by now that as soon as someone who owns some property, dies, the succession to his property opens and the' property gets automatically and immediately vested in the heirs and the said vesting was not dependent upon any intervention or any act on the part of the Revenue Authorities or any other State agencies. It is also an established

---

[46] 2004 SCMR 704
[47] P 1990 SC 1
[48] @ page #12
[49] Page # 17.
[50] 2007 SCMR 635

> proposition that a mutation did not confer on anyone any right in any property as the Revenue Record was maintained only for realization of land revenue and did not, by itself confer any title on anyone. It may also be added that efflux of time did not extinguish any rights inheritance because on the death of an owner of property; all the co-inheritors, immediately and automatically, became co-sharers in the property and as has been mentioned above, limitation against them would start running not from the time of the death of their predecessor-in-interest nor even from the date of mutation, if there be any, but from the date when the right of any such co-sharers/co inheritors in such land was denied by someone.
>
> 12. Having thus, examined all aspects of the matter, we find that the learned Appellate Judge was right in holding that the plaintiff heirs of the said Gharu could not have been non-suited on account of limitation…"

43. In the case of *Shahro*[51] a three-member Bench of the Supreme Court *inter alia* cited the *Ghulam Ali* (ibid.) judgement and concurred that once land was inherited then an heir became a co-sharer and limitation could not run against them. This was also followed in a recent judgment of *Faiz Ullah*.[52]

44. The above ratios support the Appellant. It was clear the Appellant filed an application seeking a copy of both the Impugned Judgement and Decree before filing this Appeal, but only the Impugned Judgement was available at time of filing the Appeal. Subsequently the Decree was also filed. Additionally, the Appellant claiming as a co-sharer in the estate of the Deceased, cannot be deprived of his right to claim inheritance.

45. One of the relevant key considerations for the law of limitation to be taken strictly and not treated as a mere technicality, is because a possessor of property after certain time period, gains a vested interest in that property. That vested right is dislodged, if out-of-the-blue, a tardy claimant unsuspectingly makes a belated claim on property being enjoyed by such possessor. This however is not the matter at hand. The Respondents remained completely aware the Appellant had filed the instant Appeal, as notices etc. were issued within the prescribed limitation period. In this particular circumstance, the objection about non-filing of the Decree could not have any substantive or detrimental effect to the Respondents, as they were already conscious of the proceedings. It would appear the only reason this plea has been taken is to avoid a decision on merits, which in the given circumstances, we cannot agree with.

---

[51] P 1988 SC 1512
[52] 2022 SCMR 1647

46. Accordingly, the first issue is decided in the negative. We find the Decree not being filed alongside the Impugned Judgement at the institution of this Appeal (because it was not prepared) is not fatal to the instant Appeal. The Appellant made all efforts at the time of filing the Appeal to obtain the Decree, but through no fault of his own the same was unavailable. The Decree was then placed on File even before such objection was taken by the Respondents. The matter should be adjudicated purely upon its merits, and it is our opinion the Appeal ought not to be dismissed prematurely on grounds of limitation, as the same could result in an unjust deprivation of the Appellants' automatic legal right of inheritance to the Properties.

47. Now turning to the second point of consideration, whether or not the Respondents accurately fulfilled the legal requirements showing **Property#1, Property#2 & Property #4** to have been actually owned by the them? It is relevant to state at the outset that the said Properties are in the name of the Deceased.

48. In the Impugned Judgment, the learned Single Judge had declared the above Properties belong to the Respondents respectively. However, with the utmost respect we find that in the Impugned Judgement, reliance upon the evidence was misplaced in this regard. A perusal of Para Nos. 14 & 15 of the Impugned Judgment itself show certain contradictions. Para 14 states that Respondent No.1 claims Property #1 always belonged to him, as it was a Benami property and belonged to the Deceased only in name, not in actuality. Whereas in Para 15, while reproducing an affidavit dated 07.09.1999 by the (Late) Mother of the Parties, the said Para appears to show that the said Properties belonged to the Deceased. The affidavit is reproduced:[53]

> "MRS. KISHWAR ALLAHDAD KHAN, wife of Late Lt. Col. RAJA ALLAHDAD KHAN do hereby depose that my late husband had given verbal consent to me for disposal of <u>his estate</u> and affairs, in the event of his death, as deemed fair in my judgment. I, therefore, would like to make the following decisions in favour of my children, whose names are mentioned below, regarding my late husband's properties: *(emphasis supplied)*
>
> - SAROSH RAHIM – Daughter
> - RAJA, SAQIB KHAN – Son
> - RAJA SABRI KHAN - Son
>
> 1. The sole ownership of House No. 53, Khayaban-e-Mujahid, Phase V, Defence Housing Authority, Karachi inclusive of all furniture, fittings and

[53] The Affidavit is also available at page#443 of the File

effects - in the name of my late husband, be given to my son RAJA SABRI KHAN.

2. A commercial plot, measuring 100 square yards, located on Muslim Commercial Street, Phase VI, Defence Housing Authority and a plot located in Veteran's Society, Rawalpindi / Islamabad - both in my late husband's name - were paid for and are the sole property of my daughter MRS. SAROSH RAHIM and their ownership may be transferred in her name.

3. An amount of Rs. 500,000/- (Rupees five lakhs) was taken as a loan, in the form of saving certificates, from my late husband by my son RAJA SAQIB KHAN. The amount was not returned - these certificates attained maturity in 1996-97. The matured amount may be adjusted against the share in other properties of my son RAJA SAQIB KHAN.

4. All other properties, excepting (1) and (2) above, in my name or my late husband's name, anywhere in Pakistan - be equally divided among my three children, SAROSH RAHIM, RAJA SAQIB KHAN, and RAJA SABRI KHAN.

5. All licenced arms, and ammunition belonging to my late husband be divided equally between my two sons. RAJA SAQIB KHAN, and RAJA SABRI KHAN.

6. All cash, jewellery and personal effects belonging to myself or my late husband be divided equally amongst my three children.

Signed: SD/-

(BEGUM KISHWAR ALLAHDAD KHAN)"

49. This shows a contradiction. On the one hand it is stated Respondent No. 1 always owned Property #1, whereas in the next Para reliance is placed on an affidavit given by the Mother stating Property# 1 formed part of the Deceased's estate and should be 'given' to Respondent No. 1 (this affidavit is discussed further below).

50. Moreover, the said affidavit of the Mother (relied upon) would have the effect of being a **"Will"**, which cannot be granted to the legal heirs, as the same is contrary to our settled Muhammadan laws of succession.[54]

51. In Para No.18 of the Impugned Judgment, reference has been made to a "*Diary*" of the Deceased, on which the learned Single Judge has premised this portion of the Impugned Judgment.[55] The said *Diary* simply refers that someone named "Munoo" gave the Deceased Rs.80,000/- & Rs.60,000/- respectively.[56] On this basis, the Impugned Judgment has further formed the opinion that the Property #1 belongs to Respondent No.1, in the form of a

[54] Succession Act 1925 ^ Principles of Muhammadan Law
[55] Excerpts of the said *Diary* are available at pages 253-257 of the File
[56] The confirmed identity of "Munoo" also remains unsubstantiated for legal purposes

Benami transaction. Respectfully, this opinion cannot be sustained as there is no explanation as to who "Munoo" is; or what the said sums of monies were sent / used for? It is pertinent to note that the alleged *Diary* in its original form is a barely legible document, without any signature. This *Diary* cannot be considered as a valid legal document,[57] nor does it at any point state that Respondent No.1 purchased the Property #1 through his own funds as a Benami transaction.

52. The Impugned Judgment has formed its basis on unsubstantiated paper from the alleged *Diary* of the Deceased, as well as on an affidavit filed by the Mother (widow of the Deceased) who was not cross-examined (as she passed away prior in time). Whilst the Impugned Judgement (in Para 24) has placed heavy reliance on the *Amina Bibi* case,[58] the facts of which are distinguishable. In the *Amina Bibi* case, the matter pertained to proof of parentage, which relied upon statements of family members etc.; and the court also held that just due to non-appearance of the plaintiff (in that case) in the witness box, the same was not fatal (since she was not cross-examined). In that case the plaintiff could not appear in the witness box due to her death prior to the stage of evidence. The *Amina Bibi* case is on a different footing altogether to the matter at hand. In *Amina Bibi*, evidence was necessary to be gathered to ascertain her parentage so she (or her legal heirs) could claim inheritance. In the instant matter, there is no dispute that the Appellant is the son of the Deceased. Furthermore, the current matter primarily pertains to a right in immoveable property(s), for which a proper mechanism is already settled under law, requiring registered written instruments / documents / deeds etc. Therefore, we find the principle of the *Amina Bibi* case not applicable to the essence of this Appeal.

53. Furthermore, the Mother's own affidavit appears to be an effort of enforcing a Will. In her affidavit, she has categorically stated that the said Properties belonged to the estate of the Deceased, who wished to distribute them as directed in the manner stated (by his late Widow). In addition to a Will being impermissible under our settled laws of inheritance and succession,[59] the said affidavit (relied upon in the Impugned Judgement) which was signed in the year 1999, admits the Properties belonged to the Deceased, who passed away in the year 1994. Therefore meaning, that the Mother / Widow did not have any

[57] Reference to our laws relating to evidence (Qanun-E-Shahadat Order)
[58] 2017 SCMR 704
[59] For legal heirs

legal authority to distribute the said Properties in the year 1999, as the Properties already stood automatically devolved by operation of law to the legal heirs of the Deceased (i.e. the widow, the Appellant and the Respondents) at the time of his death in the year 1994.[60]

54. The Impugned Judgment also failed to address a power of attorney dated 01.06.1994[61] in which the Deceased himself stated that he is the sole and absolute owner of the Property #2, meaning Respondent No. 2 could not have been the owner of Property #2 if the Deceased claimed ownership.

55. A second power of attorney dated 23.05.1996[62] signed by the Mother / Widow states that she along with the Appellant and Respondent No.1 are the 'co-owners' of Property #2, and of which they given a power of attorney to Respondent No. 2. This further negates the claim by Respondent No.2 of being the sole owner of Property #2, otherwise why would she not be mentioned by her Mother as an owner?

56. Turning to the deposition of the Respondent No.2[63], she admits in her cross-examination[64] that a power of attorney to deal with Property #4 was executed by her family members in 1996, after the death of her father / Deceased. This in itself further illustrates that at the time the said power of attorney was executed, the Deceased had already passed away and therefore Property #4 would also have automatically devolved to his legal heirs at the time of his death, in the year 1994. As such the said power of attorney would also not hold any value. It is also relevant to mention that the said power of attorney referred by Respondent No. 2 was not registered.[65]

57. We now refer to the deposition of the Respondent No.1 and his cross-examination. In the said deposition, Respondent No.1 admitted that the Properties were in the name of the Deceased at the time of his death.

58. Turning to the affidavit in evidence of Respondent No.1, there appear clear discrepancies. In Para No.13[66], Respondent No.1 stated that he purchased Property #1 from the Deceased by paying three installment amounts.

---

[60] Case law in this regard has already been cited *ibid.*
[61] Available at Page #523 of the File
[62] Available at Page # 531 of the File
[63] Available at Page #569 of the File
[64] Available at Page #573 of the File
[65] As required under section 17 Registration Act 1908
[66] Available at Pag#221 of the File

However, in Para No.1 of his affidavit in evidence[67], he stated that Property No.1 'always' belonged to him.

59. Then in his Written Reply[68], Respondent No.1 stated the Deceased had purchased Property #1 as a short term-investment, and had intended to sell it.[69] The Respondent No.1 then stated that he purchased the said Property from the Deceased. This contradicts Para Nos. 2, 7, 17 & 27 of his Written Reply, whereby he stated that he always was Owner of Property #1.

60. We respectfully find the Impugned Judgement has not observed these serious discrepancies in the Respondents' pleadings / evidence, whilst on the other hand misplacing its reliance on certain other documents such as the alleged "*Diary*" of the Deceased and affidavits of the Mother / Widow; which documents we find do not meet the legal threshold for upholding the Respondents' claims on the Properties. The mandatory requirements under the laws of inheritance, evidence and transfer of property have not been fulfilled by the Respondents, and therefore we find the Respondents cannot be declared as absolute owners of the Properties.

61. The basic criterion for establishing a Benami ownership of property has been long settled by the Apex Court. In *Abdul Majeed's* case,[70] the Supreme Court established four basic factors to be taken into consideration:

i. Source of consideration;

ii. From whose custody original title deed and documents came into evidence;

iii. Who is in possession of the property;

iv. Motive for the benami transaction.

62. In the instant Appeal, it is our opinion that none of the abovementioned criterion were fulfilled by the Respondents. There is no clear money trail showing payment made by the Respondents towards the Properties.

63. While possession of some Properties was with the Deceased until he passed away, however even if it wasn't, the possession and original title

---

[67] Available at Page#217 of the File
[68] Available at Para No.11 @ page#123 of the File
[69] Para No. 10 @ page#123
[70] 2005 SCMR 577

documents being held by the Respondents would be considered as possession on behalf of all the legal heirs, as per settled principles.[71] Lastly, there has been no motive or otherwise substantial evidence shown whereby the Deceased has admitted / acknowledged the Properties to be Benami.[72]

64. Moreover, though not argued, but it appears strange the Respondents had never bothered to have the Properties transferred in their names during the lifetime of the Deceased, nor did they file an earlier claim for declaring the Properties to be Benami. They only made their counter claims for the Properties subsequent to the Appellant claiming his share in the Properties.

65. Lastly, we clarify regarding Property #3 and other moveable properties (including the *'Weapons'*) we have not passed any opinion as we have found the Impugned Judgement / Decree has correctly deliberated and adjudicated on them. However, if there is any further evidence that the Parties have regarding Property #3 and / or the other moveable properties (apart from the *'Weapons'*) they shall be at liberty to institute appropriate proceedings before the proper forum for their claim (if any) on the same.

**DECISION**

66. In conclusion, we find that the Impugned Judgment / Decree has erred under law by transferring Property #1, #2 and #4 respectively to the Respondents, and by declaring them to have been a Benami ownership in nature by the Deceased. Accordingly, for reasons explained (*ibid.*) this Appeal is allowed and Impugned Judgement dated 18.07.2017 & Decree dated 11.08.2017 are hereby set-aside to the extent and in the following terms:

> **Property #1**) House No. 53 Khayaban-E-Mujahid, Defence Housing Authority – Karachi measuring approx. 1000 square yards; AND
>
> **Property #2** Plot No. 12-C Muslim Commercial Street, Phase 6 Defence Housing Authority – Karachi measuring approx. 100 square yards; AND
>
> **Property #4** Residential Plot No. 116A Phase-I Veteran's Society Rawalpindi;

---

[71] PLD 1998 SC 1512

[72] For further elaboration regarding establishing a property to be Benami, reliance can also be placed on 2023 SCMR 572 & 2009 SCMR 124

Are all held to form part of the estate of the Deceased, namely the late Raja Allahdad Khan, and are to be divided between the Appellant and Respondents No. 1 & 2 as per applicable Shariah / Muhammadan law of inheritance, consistent with their respective shares thereunder.

*Appeal Allowed*

J U D G E

J U D G E

Irfan Ali