

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision Application No. 24 of 2010

Muhammad Musa KhanApplicant.

V e r s u s

Mst. Ansa Mariam Rasheeda Zamania and two others.....Respondents.

J U D G M E N T

Date of hearing : 12th October, 2020.
 Date of Judgment : 23rd November, 2020
 Applicant. : Amanul Haque, advocate

Kausar Sultana Hussain, J:- This Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908 has been directed against the judgment and decree dated 26.11.2009 & 02.12.2009 respectively, passed by learned Ist Additional District Judge, Karachi (East), whereby Civil Appeal No. 22 of 2009 filed by the applicant against the Judgment and Decree dated 30.1.2009 and 3.2.2009 respectively passed by the learned IIIrd Senior Civil Judge Karachi-East in Suit No.1021 of 2008 against the respondents was dismissed.

2. The concise germane facts forming background to institute instant Civil Revision are that the applicant filed Civil Suit No. 1021 of 2008 in the Court of learned IIIrd Senior Civil Judge Karachi-East against the respondents for seeking declaration, possession and permanent injunction, which was dismissed, vide judgment and decree dated 30.01.2009 and 03.02.2009 respectively. It was alleged by the applicant that he got employment as Flight Steward with PIA on 26.9.1979 at the salary of Rs.11,000/- per month including allowances and now is serving as flight purser. At that time he alongwith his parents was residing in a rented house, feeling difficulties in the rented

house, he in the month of February, 1987 purchased a bungalow No.F/7, Rafah-e-Aam Cooperative Society, Malir Halt, Karachi in the name of his mother Mst. Rasheeda from its owner and Administrator Abdul Rashid Jafri son of Late Abdul Aziz Jafri for total sale consideration of Rs.6,00,000/- and paid Rs.60,000/- as earnest money through pay order No.533963, MCB Drig Colony Branch, Karachi and the balance sale consideration was paid through pay orders PAA.625181 dated 12.4.1987 for Rs.1,93,000/-, pay order No.PAA-533992 dated 12.4.1087 for Rs.2,30,000/- pay order PAA-946352 dated 26.4.1987 for Rs.1,17,000/- (Total Rs.5.40,000/-) and such amended general letter of sale dated 07.5.1987 was executed by Vendor Abdul Rashid Jafri in favour of mother of the applicant. The Vendor after receiving full and final payment of Bungalow in question handed over its possession to the applicant. It is further alleged that respondent No.1 being real sister became widow as such she was brought alongwith her children by the applicant in suit property, she was maintained by applicant and was provided half portion of accommodation to her. The father of the applicant expired in the month of June, 1990 while the mother expired in the month of June, 1995. After death of parents of the applicant and respondent No.1 the bungalow in question was transferred in the year 1996 through sale deed by applicant in favour of the respondent No.1, as ostensible owner. The applicant retained all the original documents of the suit bungalow in his possession. In or about May, 2006, applicant asked the respondent No.1 to vacate the suit house but her son threatened him as such applicant by putting some house hold articles in one room of the suit bungalow shifted to C-17 Gulshan-e-Rafi, Jammia Millia Road, Karachi to avoid any conflict with son of respondent No.1.

In the month of September, 2008, the respondent No.1 approached Estate Agents for the sale of suit bungalow as such applicant asked the respondent No.1 that she being ostensible owner should vacate and re-convey the suit bungalow but no effect, hence he filed the suit with the following prayer :

a. *To declare that plaintiff is real owner of suit bungalow and the defendant No.1 being ostensible owner/benamidar is liable to re-convey the suit bungalow in favour of plaintiff. Consequently defendant No.1 to deliver possession.*

b. *To grant permanent injunction restraining defendant No.1 from selling, gifting, alienating, mortgaging, transferring, renting or parting with possession of any portion of suit bungalow.*

3. The learned trial Court, on conclusion of ex-parte trial and hearing arguments of the learned counsel for the plaintiff/applicant, dismissed the suit of the plaintiff/applicant vide judgment and decree dated 30.1.2009 and 03.2.2009 respectively.

4. Being aggrieved, the plaintiff filed a Civil Appeal No. 22 of 2009 against the said judgment and decree before the first appellate court. It is noticed that Mr. Ehtisham Zia, Advocate had made his attendance on behalf of the Respondent No.1 through filing his power before the learned first appellant Court of District East Karachi and advanced his arguments. The learned Ist Additional District judge Karachi (East), after hearing arguments of learned counsel for the parties dismissed the said appeal, vide judgment and decree dated 26.11.2009 and 02.12.2009 respectively. The appellant/applicant being dissatisfied with the said judgment had filed the Revision petition in hand.

5. Notices of the present Revision Application were issued against the respondents through different mode of service of notice including publication in daily Nawa-i-Waqt Karachi dated 25.6.2011. As a result of effective service of notice upon the respondent No.1, Mr. Akhlaq Ahmed, Advocate has submitted his Vakalatnama on her behalf and attended the Court till 10.10.2019 to pursue her case but after that he neither appeared before this Court in this matter nor advanced arguments. Since the matter has been pertaining to the year, 2010, and due to one or other reasons the learned counsel for the respondent No.1 had not contested this Revision in spite of his appearance for considerable time and chosen to remain absent without any intimation therefore, this Court having no choice allowed the learned counsel for the Applicant to argue the matter in absence of learned counsel for the respondent No.1.

6. The learned counsel for the applicant has contended that the judgments of two Courts below are perverse and arbitrary to the law as both the Courts have failed to consider the actual import of the suit; the applicant's suit was filed under Benami transaction and ample case laws on Benami transaction were cited before both the Courts but were not considered. He further contended that the learned trial Court while passing the judgment did not consider the evidence produced by him. The learned counsel for the applicant has further argued that the applicant had produced / exhibited pay orders before the learned trial Court in order to prove his contention that he had paid entire sale consideration of the house in question to the seller from his own funds, while the respondent No.1 was the ostensible.

7. Per learned counsel for the applicant the original documents of the property in question are lying with him and he vacated the suit house on his own in the year, 2006, due to threats issued by the son of respondent No.1 against him. The learned counsel has pointed out that the applicant has also produced two witnesses before the learned trial Court namely Sadiq Amin and Anisuddin Farooqui in support of his claim but the learned trial Court as well as learned appellate Court did not consider their testimonies to decide the matter on merits. The learned counsel for the applicant prayed for considering the contentions raised by him in the instant Revision Application and evidence produced by him before the learned trial Court on merits and may allow it in his favour.

8. None has appeared on behalf of the respondents to argue the matter in spite of providing ample opportunities to the learned counsel for the Respondent No.1 as mentioned above.

9. After hearing arguments and perusal of the record, I am of the view that the scope of the Revision is very limited. Section 115 of CPC under which provision this Revision Application has been filed by the applicant applies only to the cases involving the illegal assumption, non-exercise or the irregular exercise of jurisdiction. In instant case the respondent No.1 had never contested the matter either before the learned trial Court, appellate Court or before this Court in spite of having full knowledge of the case, even before this Court the learned counsel for the respondent No.1 has attended the Court regularly from 10.08.2011 up to 10.10.2019. Both the learned counsel during pendency of this Revision Application at several

occasions informed the Court that parties were trying to settle their dispute outside the Court through negotiations but due to unknown reasons it could not be materialized.

10. However, in order to decide this old Revision Application pertaining to the year 2010, I have gone through the entire record available on file and have also considered the relevant laws in this regard.

11. The applicant/plaintiff through filing a Suit for Declaration, Possession and Permanent Injunction against the respondent No.1 (his sister) and Sub-Registrar T-Division-III (Shah Faisal Town) sought declaration that the applicant/plaintiff is the real owner of suit-property and the defendant No.1/respondent No.1 being ostensible owner/benamidar is liable to re-convey the sale deed in his favour and in consequence thereof respondent No.1/defendant No.1 may be directed to deliver him possession of suit property. He further sought relief that permanent injunction may be granted against the defendant No.1/respondent No.1 from selling, gifting, alienating, mortgaging, transferring, renting or parting with possession of any portion of the suit bungalow. The applicant/plaintiff in his suit brought all relevant facts on record regarding his claim and produced documentary evidence in support of his claim. On the contrary the respondent No.1 who had complete knowledge in respect of filing of the instant case by the applicant/plaintiff against her, behaved like a deafened person, which shows that in fact she had nothing to prove in her defence or to rebut the claim of the applicant/plaintiff, which compelled her to keep quiet and wait for final fate of the suit.

12. The applicant not only produced several documents in support of his contention raised by him in his affidavit in evidence but also produced two witnesses in order to corroborate his contention. The learned trial Court while passing the Judgment was of the view that both the witnesses of the applicant/plaintiff had deposed in favour of the applicant/plaintiff on the point of purchase of house in question and dispute with the respondent No.1/defendant No.1. The learned trial Court in spite of having clear view regarding purchase of house in question after having examined the evidence produced by the applicant/plaintiff before it reached to the conclusion that the applicant could not establish the elements of source of consideration and the motive though he has produced documents in original to abortively attempt to establish that the criterion for proving the benami transaction was fulfilled. The learned trial Court has also opined that the applicant could not explain the reasons behind purchasing the property in question firstly in the name of his mother and then transferring to his sister.

13. The learned first appellate Court while deciding the appeal, filed by the applicant/plaintiff against the judgment of learned trial Court, whereby his suit was dismissed being not proved by him on merits, has opined that "only the pay orders issued in favour of the seller from the account of the applicant/plaintiff did not tend to prove his own sources for the purchase of the bungalow in question for his personal benefit, more specifically in the circumstances when the women in our society are generally do not operate bank accounts in their own names". The learned first appellate court has further opined that "production

of provisional sale receipts, different letters and copy of the challan etc. are superseded and lost its legal evidentiary value after the execution and registration of the sale deed in favour of Respondent No.1 by the Applicant as provided under the Registration Act or the Transfer of ownership rights in the immovable property". The learned first appellate Court further opined that "the property in question was admittedly in joint possession of the applicant/plaintiff and respondent No.1/defendant No.1 and more weight shall be attached to the possession of the respondent No.1 as she also carries with herself not only the possession but also registered sale deed executed in her favour". In consequence of above mentioned findings the learned appellate Court had dismissed the appeal of the applicant/plaintiff and maintained the judgment passed by the learned trial Court.

14. I have given due consideration to the concurrent findings of two Courts below and also carefully gone through the material produced by the applicant/plaintiff either before the learned trial Court or learned appellate Court. At the very outset the applicant/plaintiff after filing his suit against defendants / respondents took several efforts to get the notice severed upon them. I found few relevant order sheets on record which reflect that notices were duly severed upon the defendants including the prime defendant No.1/respondent No.1 not only through ordinary mode of service but also through special/substitute service by way of publication in daily newspaper Nawa-i-Waqt, Karachi dated 31.10.2008. Record shows that in spite of having service held good against the respondent No.1 she deliberately avoided to contest the suit although her son has personally

received the notice. Now question arises that what should had been the reasons to disbelief the plaintiff when the defendant deliberately avoided to come before the Court to defend her interest in suit, especially in the circumstances when the plaintiff had produced several original documents in support of his case and supportive witnesses too before the Court. In my view noticable and deliberate avoidance of the defendant to appear before the learned trial Court to prove her own case independently through contesting/defending the case of the plaintiff should had not been ignored by the Courts below. In this matter in spite of having knowledge of the institution of the suit and of the date fixed for appearing and answering the claim of the other side, the respondent No.1 deliberately did not come forward. On the contrary, I found that the applicant/plaintiff disclosed his job description and his initial salary amount in his plaint. The applicant / plaintiff also disclosed in his plaint that before purchasing the house in question he and his family were residing in a rented house therefore he purchased the house in question in the name of his mother. In our society purchasing house in the name of female family members i.e. mother/wife/daughter (s) is not unusual, therefore, without finding any adverse evidence on record no one can presume *ipso facto* that the claim of actual ownership made by the male member of the family is always wrong, fake and fabricated. In my view claim of ownership of property made by any one requires documentary as well as verbal evidence to be produced before the Court of law, if anyone has done so it cannot be disbelieved until and unless proven contrary or apparently document seem manipulated, fake and fabricated. The applicant/plaintiff has come to Court, claimed his ownership of

suit house, produced documentary evidence in original, two supportive witnesses and also led his own evidence before the learned trial Court with no cross examination, while the respondent No.1 had shown no courage to come before the Court to deny his claim or produce her own relevant documents and witnesses in order to prove claim of the applicant/plaintiff as wrong, manipulated, fabricated or fake. The learned trial Court had also not made such observation in the impugned judgment. In instant case, avoidance of the respondent No.1 towards the present case cannot be ignored as in spite of continuous denial of ownership of respondent No.1/defendant No.1 by the applicant/plaintiff, she did not even bother to approach to the concerned Court of law for seeking declaration regarding her ownership although remedy against such denial is/was available to her as provided under Section 42 of the Specific Relief Act. I would like to reproduce here Section 42 of the Specific Relief Act for ready reference:-

Section 42. ***Discretion of Court as to declaration of status or right:*** Any person entitled to any legal character, or to any rights as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

15. Provision of Section 42 of the Specific Relief Act, clearly provides such remedy to the owner of the property whose ownership is being denied by any person.

16. In my view the applicant/plaintiff has proven his claim before the learned trial Court by leading sufficient and appropriate evidence by producing original documents of the suit property i.e. (i) General Letter of sale of suit Bungalow duly

signed by the Seller and Buyer (his mother Rasheeda Begum) and the applicant being witness of the execution of such letter placed his signature on it, (ii) original provisional sale receipt dated 23.03.1987 of Rs.60,000/- duly signed by the parties and the applicant as witness of Rasheeda Begum, (iii) Receipt of payment of entire balance amount of Rs.5,40,000/- through three pay orders bearing Nos.PAA625181 dated 12.04.2008 for Rs.193,0000/-, PAA533992 dated 12.04.2008 for Rs.230,000/- and PAA946352 dated 26.04.2008 for Rs.117,000/- duly signed by the applicant on behalf of his mother and the seller, (iv) Re-amendments in the General Letter of Sale of suit property duly signed by the parties and the applicant as witness of Rasheed Begum, (v) sale deed of the suit Bungalow valued at Rs.600,000/- executed on 26.6.1996 by the seller (legal heir of Abdul Aziz Jafari) and the Respondent No.1 after death of Rasheeda Begum and (vi) The applicant had also produced original lease deed dated 11.6.1973, executed between Rafah-e-Aam Cooperative Housing Society Limited Karachi (Lessor) and first lessee Abdul Aziz Jafari).

17. Evidence produced by the applicant before the learned trial Court either oral or documentary remained unrebutted and uncontested. The applicant through leading unrebutted and uncontested evidence proved benami transaction according to the criteria and parameters as set forth by the Hon'ble Supreme Court in several Judgments i.e. source of consideration, motive for benami transaction, real intention of parties, possession and production of original title documents.

18. It is on record that the Respondent No.1/defendant No.1 had not denied the claim of the applicant/plaintiff although her

Counsel had continuously appeared before this Court for years. I, therefore, set aside the judgments passed by the learned trial Court as well as learned first appellate Court, vide judgments dated 30.1.2009 and 26.11.2009 respectively. The suit of the applicant/plaintiff I hereby decreed as prayed on the basis of material available on record. There shall be no orders as to costs. Office is directed to prepare Decree as ordered. The respondent No.1/defendant No.1 is directed to make compliance of the judgment passed by this Court within 60 days, by handing over possession of the suit house and executing conveyance deed in favour of the applicant/plaintiff and in case of failure of the respondent No.1 to do so the Nazir of this Court shall make such compliance under intimation to this Court through learned MIT-II of this Court. Nazir's fee is fixed at Rs.30,000/- payable by the applicant.

Faheem/PA

J U D G E