

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 67 of 2005

Syed Kamil Shah & others.....Applicants

Versus

Province of Sindh & others.....Respondents

Date of Hearing: **07-02-2022**

Date of Judgment: **07-02-2022**

Applicants Syed Kamil & others through Mr. Manoj Kumar Tejwani, Advocate.

Respondent No.5 Niaz Ahmed through his Legal Heirs through Mr. Nishad Ali Shaikh Associate of Mr. A.M Mobeen Khan, Advocate.

Official Respondents through Mr. Mehboob Ali Wassan, Assistant A.G-Sindh.

J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicants have impugned Judgment dated 07.04.2005, passed by 4th Additional District Judge, Mirpur Mathelo in Civil Appeal No.125 of 2000 (Niaz Ahmed v. Murad Shah and others), whereby Judgment dated 30.09.2000, passed by learned Senior Civil Judge, Ubauro in F.C Suit No.28 of 1995 (old No.34 of 1987) (Murad Shah and others v. P.O Sindh and others), through which the Applicants' Suit was decreed, has been set aside by allowing the Civil Appeal.

2. Heard learned Counsel for the Applicants and perused the written arguments of Respondents' Counsel so also record.

3. Record reflects that the Applicants filed a Civil Suit for declaration that the suit property was owned by Pir Shah, the predecessor-in-interest of the Applicants being its sole and exclusive owner and was owned in the name of the Respondents as ostensible and benamidar. The Trial Court after settlement of the issues and leading of evidence, decreed the Suit; whereas, in Civil Appeal, said Judgment and Decree have been reversed and the Suit has been dismissed.

4. Learned Trial Court settled the following issues:

ISSUES

1. Whether S.No.180 measuring 07-17 acres were granted to late Pir Shah by the C.O. Guddu Barrage, in the year 1963-64 on the permanent tenure?.
2. Whether the late Pir Shah is real owner of the suit land?
3. Whether the plaintiff is in legal possession of suit land?
4. Whether the revenue record which is in respect of the suit land is liable to be changed in the name of the plaintiffs?
5. Whether the defendant No.5 is benami owner of the suit land?
6. Whether the suit is maintainable at law?
7. Whether suit is barred by Section 36 of Colonization of Gov: Land Act, Specific Relief Act and Limitation act?
8. Whether plaintiff is entitled for the relief claimed?
9. What should the decree be?

5. Relevant issues are No.1, 2, 3 and 5 and the relevant findings of the Trial Court are as under:

“I have carefully examined the case of the parties and documents produced by them in their evidence, there are two main and basic documents are produced by the contesting parties. On the one hand plaintiffs have produced the number shumari Form No.VI of suit land for the year 1953-54 till the year 1963-64 Ex.100 in which the detail of crop of each year is mentioned and the name of Khatedar is shown namely Pir Shah son of Kamil Shah of the nakabooli S.No.180 measuring 7-17 acres, of deh Shams Chapri, Taluka Ubauro. On the other hand the defendant No.5 has produced the document viz: Deh Form No.VI Number Shumari, as Ex: 71 for the year 1961 in which his name is mentioned. This document is only for the one year and the document Ex.100 produced by the plaintiff disclosed that he remained in enjoyment and possession of suit land from the year 1953-54 till 1963-64 when the suit land was put in schedule for disposal to the person who were already granted the S.No.180 for yaksala tenure. It is the case of plaintiff that the suit S.No. was granted to Pir Shah on yaksalo tenure on lease and Pir Shah was in possession and enjoyment, therefore only he was eligible for its grant and the Kamil Shah in his evidence has deposed that the defendant No.5 was private servant of Pir Shah and defendant No.5 had no any source of income. The defendant No.5 was faithful servant of Pir Shah and he was paid money by Pir Shah for the

payment of initial deposit for grant of suit land, which was granted, but the defendant No.5 through fraud and misrepresentation got the suit land in his name and kept it secret and did not disclose the actual fact. The plaintiff has deposed that said Pir Shah had paid all the installment of suit land and remained in possession of suit land and constructed Haveli over the suit land and are paying land revenue etc. to the Govt: till today and have produced such land revenue receipt in original for the more than 12, 13 years. The defendant Niaz Muhammad in his deposition has deposed that he was granted suit S.No. in the year 1963-64, but he did not disclose/depose or mentioned in his written statement that on what basis he was granted suit land from the C.O. Guddu Barrage Sukkur, therefore, the document produced as Ex:71 number Shumari for the year 1961-62 has no footing and only a vest paper. The plaintiffs have also relied upon the judgment and decree dated 26.5.1982 of F.C.S.No.149/81 filed by the defendant No.5 against Muhammad Bux and Ors in which Murad Shah was party that suit was for possession and mesne profits of suit land including other S.Nos which was dismissed by the Senior Civil Judge, Ghotki, the appeal filed by Niaz Muhammad was also dismissed, which is produced as Ex.63-C and D and the Niaz Muhammad did not prefer any revision or C.P before the Honorable High Court, for possession and mesne profits, it means that he admitted the possession of plaintiff over the suit land. The defendant in his evidence also did not disclose about his source of income at that time. I therefore, hold that said Pir Shah who was in possession of suit land since 1953-54 was granted the suit land by the C.O. Guddu Barrage Sukkur, in the year 1963-64 on permanent tenure, but the defendant No.5 by playing fraud and misrepresentation got the suit land in his name granted and kept it secret. Hence answer of issue No.1 is in affirmative.

ISSUE NO.2.

As I have already discussed the issue No.1 in detail and hold that suit land was granted to late Pir Shah and he is the real owner of suit land.

ISSUE NO.5.

The burden of this issue lies upon the plaintiffs to prove. The plaintiff Kamil Shah in his deposition deposed that the defendant No.5 was servant of Pir Shah and he wholly solely was depending upon Pir Shah, for the outside work and defendant No.5 was also Kamdar of Pir Shah. The suit land was under yaksala grant in the name of Pir Shah from the year 1953-54 to 1960-61 continuously and in the year 1963-64 the suit land was put in schedule for grant for disposal under permanent tenure and defendant No.5 took Pir Shah in confidence that the suit land would be granted to him under the Khas Mokal right and obtained the initial amount for deposit for the land in the name of Pir Shah and Pir Shah paid initial amount to defendant No.5 on his behalf to get the suit land granted, but the defendant No.5 got the said suit land granted in his name fraudulently and did not disclose this fact to Pir Shah till his life time and after his death claimed his right and demanded possession and mesne profits. He further deposed that said Pir Shah had paid all the installments through defendant No.5 and the defendant No.5 was only benamdar

and original owner of the suit land was Pir Shah, Khamiso and Noor Hassan witnesses of plaintiffs have supported the assertion of plaintiff.

Learned counsel for the plaintiffs relied upon case law reported in C.L.C 1994 Page 1437, P.L.D. 1998 Lahore, Page 117 and 1998 SCMR Page 816.

On the other hand, the counsel for the Defendant No.5 relied upon the evidence of Niaz Muhammad defendant and his witnesses Rasool Bux, Defendant Niaz Muhammad in his evidence has deposed that he had paid the initial deposit as well as all the installments from his own pocket, but he did not disclose about his source of income at that time and also could not establish his possession over the suit land and also he could not produce the basic title document to establish his case regarding eligibility of the grant.

On the other hand the possession of suit land and enjoyment is proved by the plaintiff, and they have constructed Haveli over the suit land since beginning. The plaintiffs have proved that Pir Shah had source of income and the defendant No.5 was his murid/servant and had no any source of income at that time.

Therefore all the three ingredients for consideration of benami transaction is in favour of plaintiff side. Hence I hold that the defendant No.5 is benami owner of suit land. Answer of this issue is in affirmative”.

6. The Appellate Court while setting aside the Judgment has observed as follows:

“I have given due consideration to the arguments of learned advocate for appellant, contesting respondents as well as meticulously perused the R&Ps and benefited from the case law, the R&Ps reveals that plaintiff late Murad shah/respondent No.1 claimed to be ancestor of late Pir Shah, whereas appellant was confident servant of late Pir shah who used to discharge his duties to his satisfaction. It is also found that land in-question kept in schedule for disposal by respondent No. 9 which was subsequently granted in the name of appellant, where a kot constructed and tube-well installed. The perusal of evidence and documents manifested that form VII issued by Mukhtiarkar as Exh. 72 appearing in the name of Niaz Ahmed as the grantee of the land, whereas revenue receipts produced at Exh. 110 to 125 issued by Tapedar have also disclosed that installments of the land in question were paid by the appellant, therefore, such documents anchored the case of the appellant that it was granted in his name. The perusal of record also shows that no where late Pir shah had demand land in-question from the appellant. I do not find that it was benami transaction and it was granted in the name of late Pir shah. P.W Kamaluddin in his deposition has stated that land granted to late Pir shah and after his death respondent Murad shah is his legal heir but he admitted that actually the land was granted in the name of appellant. P.W Khamiso who knows the parties adduced that land in-question granted to late Pir shah

but he has not given any cogent material in his support. P.W Rasool Bux who is hari of the disputed land has stated that tube-well installed by appellant and he used to pay produce of land in-question to the appellant. The evidence appearing on record reveals that admittedly the land in-question was allotted to the appellant and TO form issued in his name, mutation entry kept in revenue record in his name a form VII issued by revenue office also denotes the name of appellant, therefore such material has establish the plea of appellant, whereas on the contrary contesting respondents have failed to produce any documents or material to establish that late Pir shah was the owner of suit property or it was granted in his name. The respondents claiming to be ancestor of late Pir shah have failed to produce any decisive evidence in their favour nor they have challenged the allotment of land of appellant before the revenue hierarchy therefore, I find that trial court erred while decreeing the suit of the appellant which requires interference. The findings delivered on the legal issues are correct and justified and those require no disturbance.

In view of the above discussion and reasons I find that trial court committed material irregularity while deciding issues on the facts, therefore findings on issues No. 1,7,8,9 and 10 are hereby annulled and accordingly impugned judgment and decree dated 30-09-2000 is hereby set-aside with the result that suit of the plaintiffs/respondents is dismissed. The appeal allowed with no order as to costs”.

Z. From perusal of the findings of the two Courts below, it appears that insofar as the Appellate Court is concerned, it has set aside the Judgment and Decree of the Trial Court without dilating upon the minute details of the evidence and in a cursory manner has given certain observations without having any nexus with the evidence on record. It is settled law that while appreciating the evidence, it has to be examined as a whole and only then a conclusion has to be drawn. This was the case of benami transaction and apparently the ingredients which are required to be present in a benami transaction, per settled law, were available and the Trial Court had correctly decreed the Suit after dilating upon these aspects. The most crucial aspect of the matter was the possession of the Applicants, which almost stands admitted by the Respondents. It is a matter of record that earlier the Respondent No.5 had filed a Suit for possession and mesne profit in respect of certain lands including land in question and the Suit was dismissed as the said Respondent had failed to prove that he was ever in possession and the same was taken over from him forcibly, as alleged by the Applicants. Even, an Appeal also failed against which no further remedy was availed by the Respondents and this is a matter of record, which has gone un-rebutted. There are also certain observations by the Appellate Court in the earlier round regarding ownership of the Respondents in respect of the Suit land, however,

without taking into consideration such observations overall the Respondents have failed to substantiate their stance as to how and in what manner the Suit land was granted in his name. On the other hand, the Applicants have produced relevant documents starting from 1953-54 till 1963-64; whereas, the Respondents could not rebut or challenge such documents. It has also come on record that the possession all along has been enjoyed by the Applicants and if that is so then the Respondents, who claim to be the owners have failed to take over the possession even through the Court and have also not taken any recourse to get the said findings overturned. If a person claims to be an owner in his own right who does not have possession and has also failed in getting a decree for mesne profit then for all such purpose presumption arises that he in fact he was a benami owner otherwise he ought to have availed further remedy against the findings of the two Courts in his Suit for possession and mesne profit. This clearly reflects that the Respondents were acting as benami owners of the Suit land the learned trial Court was fully justified in holding so.

8. In view of hereinabove facts and circumstances of this case, it appears that the Appellate Court has erred in law by overturning a well-reasoned Judgment of the Trial Court which has appreciated the evidence in details and therefore Judgment of the Appellate Court cannot be sustained. Accordingly, this Civil Revision is **allowed** and the Judgment of the Appellate Court dated 07.04.2005 is hereby set aside and that of the trial Court dated 30.09.2000 stands restored.

JUDGE

Ahmad