

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1691 of 2010

[Habiba Mehboob Ali Khanv....Syed Masood Mehmood & others]

Dates of Hearing : 18.11.2021 & 14.12.2021
Date of Decision : 09.06.2022.
Plaintiffs through : Mr. Ijaz Ahmed, Advocate.
Defendants through : Defendant Nos. 1 to 5 are ex parte.
Mr. Asif Rasheed, Advocate for
defendant No.6.

JUDGMENT

Zulfiqar Ahmad Khan, J:- The present lis filed by the plaintiff seeks declaration and permanent injunction.

2. Precisely, the facts of the case as unfurled in the plaint are that the plaintiff a private individual was interested in purchasing a plot in Defence Officers Housing Society, Karachi in early seventies but owing to the then prevailing policy of defendant No.6 for not transferring and mutating plots in DHS to private individuals, the plaintiff provided funds to one Wing Commander Syed Mehmood for purchasing a plot for her that came up for sale bearing plot No. 62, Khayaban-e-Hilal, Phase VI, DHA, Karachi measuring 2000 sq. yards (“said plot”) from Chaudhry Abdul Rauf who was attorney of Captain Aziz Ahmed Ansari, the original allottee of the said plot. The plaintiff avowed that she paid full sale consideration to the attorney of the original allottee of the said plot who, thereafter, filed an Affidavit dated 01.11.1971 to transfer the said plot in the name of Wing Commander Syed Mehmood who, subsequently addressed a letter dated 03.11.1971 to the defendant No.6 setting-forth therein the plaintiff being his successor in respect of the said plot. The plaintiff

further avowed that Wing Commander Syed Mehmood executed a General Power of Attorney in favour of the plaintiff that was duly registered with the Sub-Registrar T. Division and as the time went by and rules were not changed, Wing Commander Syed Mehmood died whereupon defendant No.6 communicated through its letter dated 30.07.1980 to the plaintiff that the General Power of Attorney executed in her favour is no more in the field on account of death of its executant Syed Mehmood. It is further stated in the plaint that defendant Nos.1 to 5 being sons and daughters of late Wing Commander Syed Mehmood executed a General Power of Attorney in favour of their mother Khursheed Mehmood (wife of the late Wing Commander) who through an undertaking and an affidavit requested the defendant No.6 to transfer the said plot in the name of plaintiff, but that request was also denied and later on Khursheed Mehmood herself died, thereafter, the plaintiff tried her level best to contact the defendant Nos.1 to 5 (children of the late Wing Commander) but they did not respond. Plaintiff averred that she approached many a times at the doorstep of defendant No.6 requesting transfer of the said plot in her name and addressed various letters in this regard but her efforts did not borne any fruit, however, vide communication dated 27.07.1992 the plaintiff was informed that the transfer/mutation would only be possible after adjudication of the issue by a competent court of law, thereafter, plaintiff filed this suit and prayed as under:-

- “1. Declare that transfer of plot No.62, admeasuring 2000 square yards, Khayaban-e-Hilal, Phase VI, DHA, Karachi, in the name of Wing Commander (R) Syed Mehmood was in the nature of Benami Transaction and that the plaintiff is the real owner and late Wing Commander (R) Syed Mehmood was

the ostensible owner in respect of the said property;

2. Declare that the defendant No.1, 2, 3, 4 and 5 have no right whatsoever, including but not limited to that by way of inheritance, in the said property;
3. Direct the defendant No.6 to transfer the said property in the plaintiff's and/or her nominee(s) name and to this end effect and make the necessary entry/entries in its record show proper and lawful title of the plaintiff and/or nominee(s);
4. Restrain the defendants, their servants, agents, employees, representatives from creating any third-party interest in the said property or from alienating the same in any manner, whatsoever, detrimental to the right(s) and interest(s) of the plaintiff;
5. Award costs of the proceedings; and
6. Grant any other relief in the alternative which this court deems fit and proper in the nature and circumstances of the case.”

3. The record reflects that originally the suit was filed by the plaintiff Habiba Mehboob Ali Khan, however, with the passage of time, she also died and now her legal heirs are in the arena and such amended title was also filed vide order dated 06.12.2017.

4. It seems that summons/notices were issued to the defendants to contest the matter and to file their stance by way of written statement, where only defendant No.6 (DHS) contested the matter and filed its written statement, while considerable time was given to the defendant Nos.1 to 5 for filing written statement, but they failed to do so and vide order dated 15.04.2019, the defendant Nos.1 to 5 were declared *ex parte*.

5. The defendant No.6 contested the matter and in its written statement it introduced on record that the said plot was transferred in favour of Wing Commander Syed Mehmood, who executed a

General Power of Attorney in favour of the plaintiff. It is further stated in the written statement that the said Wing Commander Syed Mehmood died on 18.08.1978, therefore, the General Power of Attorney executed by him in favour of plaintiff became void, therefore, the claim of the plaintiff to transfer the said plot on the basis of the General Power of Attorney could not be entertained by the said defendant.

6. Record shows that on 09.12.2019 upon pleadings of the parties issues were framed by this Court and matter was referred to the Commissioner for recording evidence. The issues settled by this Court are as under:-

“1. Whether transfer of suit property in the name of Syed Mehmood (late) is a benami transaction and plaintiffs are the real owners of the suit property?

2. Whether Defendants No.1 to 5 have any right in the suit property?

3. Whether Defendants No.6's refusal to transfer the suit property in the plaintiff's name is unlawful and whether Defendant No.6 is obliged to transfer the suit property in the names of the plaintiffs?

4. What should the decree be?”

7. Mr. Ijaz Ahmed, Advocate set forth the case of the plaintiff and submitted that owing to then prevailing policy of DHA for not transferring the plot in defence authority lands, the plaintiff provided sale consideration to Syed Mehmood who was working as a Wing Commander in the Armed Forces for purchasing the said plot for her, which plot was purchased in his own name for the above reasons. He next contended that having purchased the said plot, Wing Commander Syed Mehmood vide his letter dated 03.11.1971 informed

the defendant No.6 that the plaintiff is his successor in respect of the said plot and a General Power of Attorney was also executed in favour of the plaintiff by him that was also registered with the Sub-Registrar T. Division. He next contended that Mst. Khursheed Mehmood, who was mother of defendant Nos.1 to 5 and wife of Wing Commander Syed Mehmood after the death of her husband through an undertaking and an affidavit requested the defendant No.6 to transfer the said plot in the name of the plaintiff which request was not considered by the defendant No.6 either. Main stance of learned counsel is that the General Power of Attorney executed by Syed Mehmood and Affidavit/undertaking executed by Mst. Khursheed Mehmood unequivocally proved that the plaintiff was lawful and *bona fide* owner of the said plot while Wing Commander Syed Mehmood was only a Benamidar, therefore, declining of defendant No.6 to transfer the said plot in the name of plaintiff was unlawful. He further contended that the claim of the plaintiff remained unrebutted as neither he was cross examined by the defendants nor any claim of the defendants has come on record which proves that the plaintiff remains lawful owner of the said plot, therefore, the suit of the plaintiff may kindly be decreed.

8. Heard the arguments and examined the evidence.

9. Issue No.1 is the penultimate issue that pertains to the Benami transaction, being a transaction where somebody recompenses for the property but does not get hold of it in his personal name. The person in whose name such a property is purchased is called “Benamidar” and the property so purchased is called the benami property. Despite the fact a benami property is purchased in the

name of someone else, the person who sponsored the transaction is considered to be the real owner.

10. The burden of proving whether a particular person is a benamidar lies upon the person alleging it. The main consideration, as one would expect boils down to the source of funds, but one could also imagine that source of funds would not always be the conclusive and significant factor to prove the real ownership, though it may prima facie show that the person who provided money did not intend to relinquish or give up the beneficial interest in the property, but at the same time some additional factors are also needed to be considered i.e. possession of title documents; conduct of the parties concerned in dealing with the property once it is purchased; who administers and oversees the property; and who is recognized as titleholder in general. In the case of *Ch. Ghulam Rasool vs. Nusrat Rasool* (PLD 2008 S.C. 146), the Apex Court held that two essential elements must exist to establish the benami status of a transaction. The first that there must be an agreement, express or implied between the ostensible owner and the purchaser for the purchase of the property in the name of ostensible owner for the benefit of such person, and second element required to be proved is that transaction was actually entered into between the real purchaser and the seller to which ostensible owner was not party. In the case of *Abdul Majeed vs. Amir Muhammad* (2005 SCMR 577), the Apex Court held that the question whether a transaction is benami or not has to be decided keeping in view a number of considerations too as detailed above. But what is important in the case at hand is to keep in mind that there is no rival version, nor there is any other party claiming the

said property, that forces me to believe that property one way or the other was purchased for the benefit of the plaintiff.

11. In the above circumstances when I examine the evidence of legal heirs of the plaintiff keeping in mind the fact that during pendency of the suit, the original plaintiff namely Habiba Mehboob Ali Khan also died and now her legal heirs are in the arena to contest the suit and such amended title was also filed vide order dated 06.12.2017, Mushtaq Ali Khan being one of the legal heirs of the deceased plaintiff amid his examination-in-chief produced number of documents in the following sequence:-

Exh. P/1 is an affidavit executed by Ch. Abdul Rauf in favour of Wing Commander Syed Mehmood.

Exh. P/2 is a Transfer Order in the name of Wing Commander Syed Mehmood issued by defendant No.6/DHA.

Exh. P/3 is a Sale Consideration receipt.

Exh. P/4 is a Payment Receipt issued by Kamal Agencies in the name of plaintiff Habiba Mehmood Ali Khan.

Exh. P/5 is a letter addressed to defendant No.6/DHA by Wing Commander Syed Mehmood nominating the plaintiff Habib Mehmood Ali Khan as owner of the said plot.

Exh. P/6 is a statement of account regarding upto-date status of the said plot issued by defendant No.6/DHA.

Exh. P/7 is a payment charges receipt issued by defendant No.6/DHA.

Exh. P/8 & P-9 are payment receipts issued by the defendant No.6/DHA in the name of plaintiff.

Exh. P/10 is a General Power of Attorney executed by defendant No. 1 to 5 in favour of their mother Khursheed Mehmood wife of Wing Commander Syed Mehmood.

Exh. P/10 is an undertaking issued by Khursheed Mehmood and defendant No. 1 to 5.

Exh. P/11 is an affidavit issued by Mrs. Khurshid Mehmood.

Exh. P/12 is an undertaking issued by Khursheed Mehmood and defendant No. 1 to 5.

Exh. P/13 is an affidavit executed by Mrs. Khursheed Mehmood in favour of plaintiff.

Exh. P-14 is Declaration/Undertaking executed by Mrs. Khurshid Mehmood in favour of plaintiff.

Exh. P-15 to P-20 are communications/correspondence made between the plaintiff and defendant No.6/DHA as well as legal counsel of plaintiff.

Exh. P-21 is a succession petition for grant of letter of administration filed by legal heirs of plaintiff and order dated 12.03.2012 passed in SMA No. 06 of 2012.

Exh. P-22 is a Special Power of Attorney.

12. This version of the plaintiff went un-rebutted. Neither the plaintiff's witness was put to the test of cross-examination nor any defendant came forward to shake the testimony of the plaintiff's witness. Record shows that the learned Commission served several notices upon the defendants to come forward for cross-examining the plaintiff's witness but the efforts of the learned commissioner went in vain, thereafter, side of the defendants to cross-examine the plaintiff's witness was closed by the learned commissioner. As this Court is under a sacred duty to decide the suit taking into consideration the overall effects of the case even if the evidence remained un-rebutted, when I examined the evidence, the first and foremost question to prove the question of a Benami becomes the source of consideration as put in Issue No.1. The plaintiff in order to strengthen and validate his case introduced on record Exh. P-14

(available at page No. 63) a Declaration/Undertaking executed by Mrs. Khurshid Mehmood, who was wife of late Wing Commander Syed Mehmood as well as attorney of defendant Nos.1 to 5. It would be more advantageous to reproduce the relevant excerpts of the said Declaration/Undertaking which is delineated hereunder:-

“3. That our late father received the full consideration of the above said plot from Mrs. Habiba Mahboob Ali Khan and we have no objection or claim whatsoever if the above said plot is transferred in the name of Mrs. Habiba Mahboob Ali Khan or any other person nominated by her.

4. That we as heirs of late Wing Codr. Syed Mahmood hereby agree and undertake to execute all necessary documents as and when the said will be required by the said Mrs. Habiba Mehboob Ali Khan and we also hereby release, surrender all our rights and interest in respect of the said plot in favour of Mrs. Habiba Mehboob Ali Khan.

IN WITNESS WHEREOF, we have executed this declaration on 9th day of July, 1987”

[underline added for emphasis]

13. It is gleaned from the appraisal of the foregoing that the legal heirs of the deceased Wing Commander Syed Mehmood themselves stated in Exh. P/14 that their late father received the sale consideration from the plaintiff Habiba Mahboob for purchasing the said plot, therefore, the first and the foremost ingredient is clearly established. Also all of the original documents of the said plot are found to be in the possession of the plaintiff/legal heirs of the plaintiff and the same have also been introduced on record and exhibited by the learned Commissioner in evidence file having seen the same. This also adds to the confidence of this Court.

14. Last but not the least, as the fourth condition of a Benami transaction is “motive”, the plaintiff in her pleadings set-forth that owing to the then prevailing policy of the defendant No.6 for not transferring/mutating a property in defence territory directly in the name of a private individual, the plaintiff liaised with Mr. Syed Mehmood who was a Wing Commander in Pakistan Armed Forces for purchasing the suit plot and provided him funds so that the said plot may be purchased. Exh P-2 is a Transfer Order produced by the plaintiff’s legal heir which exclusively explicates that the said plot was transferred in the name of Wing Commander Syed Mahmood vide Transfer Order dated 02.11.1971 who later on addressed a letter dated 03.11.1971 to the defendant No.6 informing the defendant No.6 that the plaintiff herself be considered as lawful owner of the said plot after former’s demise. In order to reach to a just conclusion of the issue under discussion, it would also be appropriate to reproduce hereunder the said letter dated 03.11.1971 which is also produced by the legal heir of the plaintiff in his examination-in-chief as Exh. P-5 (available at page No. 29 of the evidence file), the respective constituent of the said letter/Exh. P-5 is reproduced as under:-

Karachi 3rd November 1971

The Secretary,
P.D.S.O.C.H.S Ltd,
Karachi.

Dear Sir,

I, Wing Comdr. Syed Mahmood S/o Mr. Syed Ahmed, an allottee by transfer of plot No. 62, Khayaban-e-Hilal, Block VI, Pakistan Defence Services Officers Cooperative Housing Society Limited, Karachi, measuring approximately 2000 square yards vide Transfer Order No.DS/A/A-6554 dated 11-1971, do hereby state as under:-

That I have nominated Begum Habiba Khan W/o Mrs. Mahboob Ali Khan, resident of C/o Habib Bank Plaza (Head Office) Karachi, to be in the event of my death, my true and lawful successor of my above mentioned Plot No. 62, Khayaban-e-Hilal, Block VI, P.D.S.O.C.H.S. Ltd, Karachi, which may be transferred in her name or in the name of any other person or persons nominated by her. However, the said nominee shall not have any right whatsoever in respect of my other moveable and immovable properties and assets.

Yours faithfully,

Sd/-
Wing Comdr. Syed Mahmood)
II-M, Block 6, P.E.C.H.S. Ltd,
Karachi.

15. It is also useful to mention here that the said plot was transferred in the name of Wing Commander Syed Mehmood by the defendant No.6/DHA on 02.11.1971 and on the very next day i.e. 03.11.1971 the said Wing Commander Syed Mehmood communicated to the defendant No.6/DHS vide Exh. P-5 that the plaintiff Habiba Mehboob Ali Khan is lawful owner of the said plot, whereafter, the defendant No.6/DHS also addressed different letters to the plaintiff herself (Habiba Mehboob Ali Khan) for the payment of development charges, ground rent and such other ancillaries which were paid by the plaintiff and the said letters alongwith payment receipts have also been exhibited in the evidence by the legal heirs of the plaintiff as Exh. P-6 to P-9 (available at pages 31 to 37 of the evidence file). Apart from above, Mushtaq Ali Khan one of the legal heirs of the plaintiff in his examination-in-chief also produced petition filed under Section 278 of the Succession Act, 1925 being SMA No. 06 of 2012 as Exh. P-21 along with order dated 12.03.2012 passed thereon.

The said SMA was filed after the demise of plaintiff Habiba Mehboob Ali Khan.

16. Above evidence leads this Court to the conclusion that the transfer of the suit plot in the name of Wing Commander Syed Mehmood is a Benami transaction whilst the plaintiff Habiba Mehboob Ali Khan remained actual and ostensible owner of the said plot and owing to the demise of plaintiff Habiba Mehboob Ali Khan, the legal heirs of the plaintiff who were arrayed as plaintiff are the residual owner of the said plot by way of law of inheritance, therefore, in consequence to the above discussion and deliberation, **the issue No.1 is answered in affirmation.**

17. **Issue No. 2.** The onus to prove this issue rests on the defendant Nos.1 to 5. Examination of the record shows that the defendant No.1 to 5 neither contested the matter nor filed their version in the shape of any written statements, rather they were declared *ex parte* vide order dated 15.04.2019 after having been afforded considerable time and opportunities to defend their case. The defendant Nos.1 to 5 executed a General Power of Attorney in favour of their mother Mrs. Khurshid Mehmood to deal with the matters related to the said plot and the said Power of Attorney was also introduced on the record. The plaintiff's witness in his examination-in-chief also introduced on record an Affidavit as Exh. P-11 (available at page No. 53 of the evidence file) duly executed by the said Attorney of the defendant No.1 to 5 namely Mrs. Khurshid Mehmood, who as stated earlier was mother of defendant Nos.1 to 5 as well as wife of Wing Commander Syed Mehmood. In the said affidavit, the defendant Nos.1 to 5 as well as their mother Mrs. Khurshid Mehmood have made clear and

unambiguous admissions, as well as have relinquished their rights in favour of the plaintiff. I find it imperative to reproduce the relevant paragraph of the affidavit in the following:-

“2. That by virtue of Regulation No. 9 made by the Executive Board of the Authority we hereby return original Transfer Order dated 02.11.1971 for cancellation and relinquish the above said Transfer of plot in our name in favour of Mrs. Habiba Mahboob Ali Khan wife of Mr. Mahboob Ali Khan Muslim, adult, resident of 185.L, Block 2, PECHS, Karachi which is also registered in Category ‘A’ with the Authority vide Registration No. DHA/DS/K-AM 5474 dated 22/2/79.

3. That having relinquished the plot to the above said Authority for transfer to Mrs. Habiba Mahboob Ali Khan the plot be handed over to Mrs. Habiba Mahboob Ali Khan conferring exclusive hold, rights and possession of the plot upon the above said transferee.

4. That I solemnly affirm and declare that the name of Mrs. Habiba Mahboob Ali Khan should be entered in the records of Military Estate Office and of the Pakistan Defence Officers Housing Authority Karachi, as the Lessee of the aforesaid property.

5. That I solemnly affirm and declare that I have no right, title or interest in the said property and Mrs. Habiba Mahboob Ali Khan is the exclusive owner of the same.”

[underline added for emphasis]

18. It is gleaned from the appraisal of the foregoing that the defendant Nos.1 to 5 through their attorney relinquished their rights in favour of the plaintiff Habiba Mehboob Ali Khan as well as affirmed and declared in the said affidavit that they have no right, title or interest in the said plot and the plaintiff is the lawful owner of the said plot. In view of the reasoning and rationale encapsulated hereinabove, the Issue No.2 is answered in negation.

19. So far as issue Nos.3 & 4 are concerned, in the circumstances established above, in my humble view, the refusal of defendant No.6 to transfer the said plot in the name of plaintiff in her life time was unlawful particularly when the defendant Nos.1 to 5 through their attorney (mother) had already conveyed their no objection through an affidavit (discussed in the preceding paragraphs) to transfer the said plot in the name of the plaintiff or any other person nominated by the plaintiff, therefore, the defendant No.6 being custodian was left with no option but to transfer the said plot in the name of plaintiff and after her demise, in the name of the legal heirs of the plaintiff upon showing the letter of administration, which the legal heirs of the plaintiff have already obtained from the competent court of law. As defendant No.6 in its written statement has stated that the claim of plaintiff to transfer the said plot in her name will only be entertained after a decision from a court, **so here it is**. From what has been discussed above, the present plaintiffs turn out to be the lawful owners of the suit plot after the demise of the original plaintiff namely Habiba Mehboob Ali Khan (their mother) by way of inheritance, therefore, the defendant No.6 shall transfer/mutate the said plot in the names of the legal heirs of plaintiff forthwith.

20. Office to prepare a decree in the above terms, whilst parties are left to bear their own costs.

JUDGE

Karachi
Dated 09.06.2022
Adil Arab