

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.41 of 2019

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Date: Order with Signature of Judge
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1. For hearing of CMA No. 9729 of 2021.
2. For hearing of CMA No. 250 of 2019.
3. For hearing of CMA No.13058 of 2022.
4. For examination of parties / settlement of issues

28.02.2023

Zahid Hussain, Advocate for Plaintiffs.
M/s. Javed Ahmed Qazi and Sadaf Gul, Advocates for Defendants No.1, 3 and 4.
Mr. Fawad Saeed, Advocate for Defendant No.6.
Defendant No.2- Irfan Ahmed present in person.

The dispute is about the sole **Suit Property**-Plot No.95/II, Commercial Avenue, Phase-IV, D.H.A., Karachi, in the name of Defendant No.1 (*Mst. Zainab*) and Mst. Khadija Bai, both shown to be the co-owners in the Official Record of DHA [*Defence Housing Authority*]. The present dispute is amongst the Family Members of Mst. Zainab widow of Abdul Karim, who is Defendant No.1 and is Mother of Plaintiffs No.1, 2 and Defendant Nos.2, 3, 4 and 5, *whereas*, Defendant No.6 is the son of Mst. Khadija Bai, whose 50% [*fifty percent*] ownership share is undisputed.

Arguments heard on Application-CMA No.9729 of 2021 [*under Order VII Rule 11 of CPC*].

Mr. Javed Ahmed Qazi, Advocate along with Ms. Sadaf Gul, Advocate representing the Defendants No.1, 3 and 4, states that the present Suit is barred by law, that is, Article 120 of the Limitation Act, 1908, so also the Order VI Rule 4 of CPC, as no particulars have been submitted

along with the plaintiff with regard to the claim. He states that admittedly the Suit Property was purchased on 16.11.1992 in the name of Defendant No.1 and Mst. Khadija Bai, whereas, husband of Defendant No.1, Abdul Karim passed away on 04.09.2003, but, the Suit is filed on 22.12.2018, that is, after twenty seven years from the date of purchase and is hopelessly time barred, as Article 120 (*ibid*) prescribes six (06) years' time for seeking a declaration. He states that the Defendant No.1 along with the two daughters, Defendants No.4 and 5 are in possession of the Suit Property, as is evident from the earlier Private Complaint No.516 of 2018, filed by Plaintiff No.2 (at page-55). He has cited the Judgment reported in **PLD 2010 Supreme Court 569 [Ghulam Murtaza vs. Mst. Asia Bibi and others]-Ghulam Murtaza Case**, that for determining the fact about the Benami transaction, a motive is also an important ingredient.

The above line of arguments is seriously opposed by Mr. Zahid Hussain, Advocate, appearing for Plaintiffs, who states that the stance of Defendant No.1 is contradictory, as in her Written Statement, she herself has admitted that she has no source of income and is looked after by Defendant No.3 (*Saleem*), who is employed in Saudi Arabia and finances the Defendant No.1-Mst. Zainab. It is stated that the Suit Property actually is Benami in the name of Mother/Defendant No.1, admittedly purchased by the late Father from his own funds and after the latter's demise, it is to be distributed as an inheritance of the Father (Abdul Karim), amongst the Plaintiffs and Defendants No. 1 to 5. To support his contention, he has cited the Case Law reported in **1993 CLC 605 [Miss. Qamar Ali vs. Syed Nadir Ali and others]** and **1993 MLD 2539 [Ghulam Muhammad through Legal Heirs vs. Mst. Saban and 3 others]**.

Mr. Irfan Ahmed, Defendant No.2, who is an Advocate himself, appears in person, while supporting the arguments of Plaintiffs, has relied

upon the Case Law reported in **1991 SCMR 703** [*Muhammad Sajjad Hussain vs. Muhammad Anwar Hussain*].

Plaintiffs and Defendant No.2 for the sake of reference be referred to as the “**Objectors**”.

The gist of the Case Law cited by Plaintiffs is that the Suit Property is purchased in the name of wife, then after the death of her husband, it is to be distributed as an inheritance; cause of action will accrue when the title of Plaintiffs is challenged and not before that. This Judgment is cited to augment the arguments that when the Defendant No.1 attempted to dispossess the Plaintiff No.2 from the Suit Property on 26.04.2018, the cause of action accrued and the present *Lis* is within the prescribed time of Article 120 (*ibid*), whereas the Case Law, viz. **1991 SCMR 703** [*Muhammad Sajjad Hussain vs. Muhammad Anwar Hussain*], relied upon by Defendant No.2 (*Mr. Irfan Ahmed*) is that the Benami transaction has the following ingredients_

- (i) *source of consideration;*
- (ii) *from whose custody the original title deed and other documents came in evidence;*
- (iii) *who is in possession of the suit property; and*
- (iv) *motive for the Benami transaction;*

and to prove the above, a full dress trial is required; thus the Application under consideration is misconceived, which and should be dismissed.

The Case Law cited on behalf of Defendant No.1 and Defendants No.3, 4 and 5 is also considered, in which motive has been explained vis-à-vis Benami transaction. The Hon’ble Supreme Court has made the following observation_

“7. At this juncture, we may clarify that the motive part in the benami transactions is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other. We come across innumerable transactions where a father purchases property with his own sources for his minor son or daughter keeping in mind that the property shall vest in the minor. Such transaction subsequently cannot be challenged by father as benami simply because the amount was paid by him. There are people who, with positive application of mind, purchase properties in the name of others with intention that the title shall vest in that other.”

Defendant No.6, who is son of Mst. Khadija Bai (co-owner of the Suit Property), has filed his Written Statement and reiterated that the Suit Property was purchased by his Father Adam and (late) Abdul Karim from the funds of a Joint Family Business and construction is also done at the Suit Property. Further stated, that the original documents of the Suit Property has been handed over by him to Defendant No.1 in the first week of January, 2018.

The undisputed facts are that the Suit Property was purchased in the name of Defendant No.1 by her husband-Abdul Karim and Mst. Khadija Bai by her husband Adam [*as per Paragraph-2 of the Plaint*] on 16.11.1992, as both these Gentlemen were Partners in a Business. The Father [Abdul Karim] passed away on 04.09.2003 and the Suit was filed on 22.12.2018. Except for Plaintiffs No.1, 2 and Defendant No.2 (the **Objectors**), the other Children, that is, Defendants No.3, 4 and 5 have supported the stance of Mother (Defendant No.1), that the Suit Property was actually purchased for her. *Secondly*, it does not appeal to logic that if the Suit Property was Benami and Father was the actual owner, then why no demand or objection was made by the **Objectors** for distributing the

same under the Law of Inheritance, after the death of the Father in the year 2003 or thereafter; but, now it has been challenged in this Suit after fifteen years.

Thirdly, admittedly the Suit Property was purchased in the names of the above two Ladies, by their husbands, who were Partners, which fact is not disputed. The motive is quite clear, that the above named two Gentlemen purchased the Suit Property in the names of their respective Wives. This is the reason that the ownership of Mst. Khadija Bai has not been challenged by her legal heirs. This crucial factor lends further support to the stance of Defendant No.1, as argued by her Counsel, that the Suit Property is actually Co-owned by the Defendant No.1 and above Lady and is not a Benami.

Fourthly, the averments of **Objectors** about cause of action accruing from the date of Criminal Complaint, has been considered. Private Complaint No.516 of 2018 is at page-55, filed by Plaintiff No.2 (Shoaib) against Defendants No.3 and 5; Saleem and Farzana, who are siblings of Plaintiff No.2. The Defendant No.3-Saleem is in Saudi Arabia and as per the averments of Defendant No.1, he (Saleem) financially supports his Mother. Primarily in the Complaint, highhandedness of Defendants No.3 and 5 and physical assault on their part against Plaintiff No.2 has been agitated. The said Criminal Complaint culminated into filing of Criminal Revision No.96 of 2021 in this Court by the Defendant No.1, which was disposed of with an observation that the Parties can agitate their claim in the present *Lis*. The earlier litigation between the Parties cannot give a fresh cause of action to the **Objectors** for filing the present proceeding after so many years; which started after the death of the Father in the year 2003, when the Property should have been devolved upon the **Objectors** and other legal heirs, but, it never happened; the alleged challenge to the title of

the **Objectors** was this particular period; but, no inheritance claim was made because the Property is not an inheritance estate. The stance of **Objectors** that when their possession was threatened in April, 2018, they came to this Court through the present *Lis*, is not tenable; because, merely residing as Children of Defendant No.1 with her and then interference in the possession due to some incident, cannot give a fresh cause of action to the **Objectors**, as living together in a Joint Family System is one thing and claiming inheritance of the deceased Father is a different aspect. More so, even the original title documents is in custody of Defendant No.1, which fact goes against the **Objectors**, in view of the above Judgment given in *Anwar Hussain Case [1991 SCMR 703]*.

The Judgment handed down by Hon'ble Supreme Court in **Ghulam Murtaza Case** is relevant, *inter alia*, that where the Suit Property purchased by husband in the name of wife during subsistence of their marriage was held to be a transaction in which husband and wife both were declared as Co-owners and the claim of husband, that he paid the entire sale price and the Suit Property was purchased in the name of wife only as Benami (as the wife was divorced subsequently), was rejected. Admittedly, in the present case, actual transaction took place in the year 1992 when the Suit Property was purchased in the name of above two Ladies, which was first time challenged by the **Objectors** in the year 2018. Even otherwise, it is also a common practice and custom of our Society that a property is purchased in the name of wife merely to provide her a sense of security and the same was never questioned or the title was never threatened even after passage of 15 (fifteen) years after the death of the Father. Article 120 (*ibid*) will start running from the date of death of Father, that is, 04.09.2003 and not April, 2018, as argued by learned counsel for Plaintiffs.

Consequently, the Suit is barred by Law of Limitation. Plaint is rejected. Application is allowed. All pending Applications are disposed of. Office to draw up a Decree.

J U D G E

M.Javid PA