

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 749 of 2013

Syed Siddiq Ahmed and Another

Vs.

Syed Muhammad Ammadduddin & Others

- 1.For hearing of CMA No.16047/2016.
- 2.For hearing of CMA No.2267/2021.
- 3.For hearing of CMA No.7094/2018.

Plaintiffs : Represented by Mr. Anwar Hussain.

Defendant Nos.1,4&5 : Represented by Mr. Kashif Paracha.

Defendant No.2 : Represented by Mr. Mehmood Abbas.

Defendant No.7 : Represented by Mr. Mehmood Yousufi.

Date of hearing : 11 October 2023 and 2 March 2024

ORDER

MOHAMMAD ABDUR RAHMAN, J. By this Order I will be disposing of CMA No. 16047 of 2016 being an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 that has been maintained by the Defendant No.1.

2. The Plaintiffs have filed suit for declaration, cancellation of documents, partition and permanent injunction in respect of an immoveable property bearing Plot No. E/88, Block No.4, KDA Scheme No.24, Gulshan-e-Iqbal, Karachi, admeasuring 2050 square yards (hereinafter referred to as the 'Said Property') seeking the following prayer:

" ... A. Deed of Relinquishment dated 22-07-2008 bearing Registration No.4412 Book-I, bearing M.F. Roll No.480039/5440 dated 21-10-2008 executed before defendant No.7 may be declared as null and void and of no legal affect and a shame document and defendant No.1 may be directed to produce the same in original in court for its cancellation and any other document, agreement or deed executed by defendant No.1 on the basis of said Deed of Relinquishment may also be declared as null and void and may be cancelled as such.

B. It may be declared that the plaintiffs and defendant No.1 to 6 being the legal heirs of late Mst. Naeem-Un-Nisa W/O Late Syed Khalil Ahmed are the only surviving legal heirs as such inherited their undivided share according to the law in property i.e. Single Storeyed House constructed on Plot No.E/88, Block-4, Gulshan-e-Iqbal, KDA Scheme No.24, admeasuring 2050 square yards.

C. *That the suit property may be partitioned by meats and bounds and if it is not possible then the same may be sold in open market through auction either by the Official assignee or Nazir of this Honourable Court.*

D. *Permanently restrain the defendants from transferring, selling, letting out, alienating creating any art, mortgaging and / or creating any third party interest in respect of Single Storeyed House constructed on Plot No.E/88, Block-4, Gulshan-e-Iqbal, KDA Scheme No.24, admeasuring 2050 square yards or the defendants may be restrained from dispossessing the plaintiffs from the property i.e. Single Storeyed House constructed on Plot No.E/88, Block-4, Gulshan-e-Iqbal, KDA Scheme No.24, admeasuring 2050 square yards.*

E. *Cost of the suit may be granted.*

F. *Any other, better, adequate and / or alternate relief this Honourable Court may deem fit under the circumstances to grant."*

3. The Said Property was owned by one Mst. Naeem-Un-Nisa, who is the mother of the Plaintiffs and Defendants No.1 to 6 and who died on 11 February 2003 and on whose demise her entire estate was transposed in the name of the Plaintiffs and the Defendants No. 1 to 6 in accordance with the prescriptions of the Islamic Law of Sharia.

4. The Plaintiffs contend that after the demise of Mst. Naeem-Un-Nisa, a Deed of Relinquishment (hereinafter referred to as the "Relinquishment Deed") was executed by all the legal heirs including, but not limited to, the Plaintiffs in favour of the Defendant No.1 and which was duly registered with the Registrar of Rights & Assurances on 22 July 2008.

5. The Plaintiffs while not denying that they having executed and caused to be registered the said Relinquishment Deed contend that keeping in mind the number of owners of the Said Property, for the sake of convenience, the Said Property was transferred into the name of the Defendant No. 1 to allow for the easier sale of the Said Property as some of the owners of the Said Property were married women and hence would not be readily available to deal with issues pertaining to the sale of the Said Property. While, the Defendants No. 2 and 3 in their Written Statement have supported the contentions of the Plaintiff, conversely, The Defendant No.1, Defendant No. 4, Defendant No. 5 and the Defendant No. 6 have each filed their Written Statements and have contended that the Relinquishment Deed was properly executed and registered and the Defendant No. 1 is the sole and absolute owner of the Said Property.

6. The Defendant has maintained CMA No.16047 of 2016 on the ground of limitation saying that the suit has been presented on 7 June 2013 nearly five years after the registration of the Relinquishment Deed and as

such the plaint is liable to be rejected under Article 91 of the First Schedule read with Section 3 of the Limitation Act, 1908.

7. Mr. Kashif Paracha has entered appearance on behalf of the Defendant No. 1 and has contended that as per the contents of the Plaint, the Plaintiffs admit that they had executed the Relinquishment Deed on 22 July 2008. He contends that the Plaintiffs having admitted the execution of the Relinquishment Deed dated 22 July 2008 have thereafter presented suit this on 7 June 2013 for cancellation of that document. He contends that this suit having been maintained after the period prescribed in Article 91 of the First Schedule of the Limitation Act, 1908 is therefore barred under Section 3 of that statute and as such the Plaint is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908. Mr. Paracha did not rely on any case law in support of his contentions.

8. Mr. Anwar Hussain has entered appearance on behalf of the Plaintiff. While admitting to the execution of the Relinquishment Deed dated 22 July 2008 he had placed reliance on Article 103 of the Qanun e Shahdat Order, 1984 and states that on the basis of this provision reliance could be placed on additional facts to understand the motive for the Plaintiffs to transfer their right in the Said Property. He further contended that both the title documents and the possession of the Said Property is in their possession. He contended that the cause of action accrued in 2013 and that the limitation period for instituting such suits is prescribed under Article 120 and not under Article 91 of the First Schedule of the Limitation Act, 1908. He relied on two judgements of the Supreme Court of Pakistan reported as **Wali vs. Akbar**¹ and **Mst. Izzat vs. Allah Ditta**² wherein it was held that when in a suit for declaration as the status of a person's title to an immovable property, a prayer for ancillary relief such as for cancellation is also pleaded, the provisions of Article 120 of the First Schedule of the Limitation Act, 1908 would be considered for determining as to whether the suit was barred under the provisions of Section 3 of that statute. He relied on a judgment of a Division Bench of this Court reported as **Nazimuddin Ahmed vs. Ainuddin Ahmed**³ wherein it was clarified that the provisions of Article 120 and not Article 91 of the First Schedule of the Limitation Act, 1908 would have to be considered for determining whether a suit for declaration of a property as a benami property and for cancellation of document had been filed within time. He also relied on a judgment of the Supreme Court of Pakistan reported as **Abdul Rehman and others vs.**

¹ 1995 SCMR 284

² PLD 1981 SC 165

³ PLD 2010 Karachi 148

Ghulam Muhammad through L.Rs and others⁴ in which where a Sale Deed had been executed on the basis of Power of Attorney and which was purported to have been obtained fraudulently, it was considered that the provisions of Article 142 of Article 144 and not Article 91 of the First Schedule of the Limitation Act, 1908 would have to be considered when seeking the cancellation of a document in the circumstances of that case. He also relied on two decisions of the Supreme Court of Pakistan reported as **Irshad Ali vs. Sajjad Ali**⁵ **Haji Abdul Sattar vs. Farooq Inayat**⁶ wherein it was held that the question of limitation, when found to be mixed question of law requiring evidence, could not permit the rejection of a plaint summarily. He also relied on the decision of the Supreme Court of Pakistan reported as **Ghulam Ali and 2 others vs. Ghulam Sarwar Naqvi**⁷ wherein it was held that in respect of Muslims, they inherit to their share in a property at the moment of the demise of the owner. He finally relied on a decision of the Supreme Court of Pakistan reported as **Fatah Uddin vs. Zarshad and another**⁸ in which it was held that when interpreting the expression “when the right to sue accrues” as used in Article 91 of the First Schedule of the Limitation Act, 1908 where a declaration is sought as to title to vitiate a fraud, the time would have to be reckoned from the moment the fraud was discovered.

19. I have heard Mr. Kashif Paracha and Mr. Anwar Hussain and have perused the record.

10. The power vested in a Court to reject a plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 has been examined by the Honourable Supreme Court of Pakistan in the decision reported as **Haji Abdul Karim vs. Messrs Florida Builders (Private) Limited**⁹ and wherein it was held that:

“ ... 12. After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII, Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.

Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the

⁴ 2010 SCMR 978

⁵ PLD 1995 SC 629

⁶ 2013 SCMR 1493

⁷ PLD 1990 SC 1

⁸ 1973 SCMR 248

⁹ PLD 2012 SC 247

time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision

Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint."

In summary when examining a Plaint under Order 7 Rule 11 the Court is bound to "appraise" the Plaint but while carrying out such an appraisal is not to consider the terms of the Plaint to be the gospel truth. Rather, while carrying out such an appraisal, a Court is bound to apply its mind to consider the statements made in Plaint and to consider whether the same are true when compared as against both admitted documents and documents appended to the Plaint. The Court is however not to consider the contents of the Written Statement and which should be left to be considered at the time of the determination of the issues in the *lis*.

11. In the context of determining an issue of limitation the Supreme Court of Pakistan in the decision reported as **Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad**¹⁰ has held that where a Plaintiff maintains a plaint with several prayers the Court should consider the main relief claimed by the Plaintiff while determining a question of limitation it being held that:

" ... *The question which further arises for determination in the case on the point of limitation is whether in all those cases, like the one in hand, where a plaintiff has joined several causes of action and has sought multiple remedies, the cause of action/remedy entailing the maximum period of limitation should necessarily and mandatorily be restored to and should cover the question of limitation for the purpose of the whole suit, regardless of whether the suit is barred by time for other cause(s) of action or relief. Suffice it to say that this is not the absolute rule of law, rather legal aspects should be examined by taking into consideration the*

¹⁰ PLD 2015 SC 212

*facts of each case and particularly the frame and object of the suit, taking inter alia further into account the contents of the plaint itself. **And thus it should be determined what relief is being sought by the plaintiff and whether the other remedies asked for (may be carrying larger period of limitation) are ancillary, dependent and consequential to the main relief. The ratio of catena of judgments of the superior courts are to the effect, that in order to ascertain the application of correct Article of limitation to a particular suit, the frame of the suit should be considered, adverted and adhered to (as mentioned above). The true test for the determining the period of limitation is to see the true effect of the suit and not its form or verbal description.***"

12. The Privy Council in its decision reported as **Gur Narain vs. Sheolal Singh**¹¹ has elaborated on what can be classified as Benami Transaction as under:

" ... *The system of acquiring and holding property and even carrying on business in names other than those of the real owners, usually called the benami system is, and has been, a common practice in the country. There is nothing inherently wrong in it, and it accords, with its legitimate scope, with the ideas and habits of the people. The Rule applicable to benami transaction was stated with considerable directness in a judgment of this Board delivered by Sir George Farwell (Bilas Kunwar v. Des-Roj Ranjit Singh (42 I.A. 202) Referring to a benami dealing, their Lordships say:*

" it is quite unobjectionable and has a curious resemblance to the doctrine of our English Law, that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law where a feoffment is made without consideration the use results in the feoffor." ...

So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed the benamidar system has not beneficial interest in the property or business that stands in his name; he represents in fact the real owner and so far as their relative legal position is concerned he is a mere trustee for him..."

13. The relationship as between the person whose name the property is in i.e. the *benamidar* and the person who claims to be the owner i.e. *the real owner* is to my mind is clearly premised on what is recognised under the law of Trusts to be a resulting trust¹² and which obligation had been recognised under Section 82 of the Trusts Act, 1882 and which, in this province, parallels with Section 102 of the Sindh Trusts Act, 2020 and which reads under:

" ... 102. *Transfer to one for consideration paid by another –*

(1) Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

¹¹ AIR 1918 P.C. 140

¹²See **Muhammad Ali and 7 others vs. Sakar Khanoo Bai Represented by Legal Heirs** PLD 1984 Karachi 97; **Muhammad Nawaz vs Shahida Perveen and others** PLD 2017 Islamabad 275;

(2) Nothing in this section shall be affect the provisions of the Code of Civil Procedure, 1908."

14. The ability for a person to enter into a *benami transaction* has now been restricted by the passing of the Benami Transactions (Prohibition) Act, 2017 but the operation of which statute on account of Sub-Section (2) of Section 3 read with Sub-Section (3) of Section 1 would apparently lead to the conclusion that the statute does not have retrospective application and would therefore only apply to transactions entered into after the passing of that statute. In respect of the particular suit, the transaction alleged to have been benami would not be impacted by that statute as it was purportedly entered into well prior to the promulgation of that statute and additionally is also as between siblings and hence would be excepted by article (ii) of Sub-Clause (b) of Clause A of Sub-Section (8) of Section 2 of the Benami Transactions (Prohibition) Act, 2017.

15. It would seem for a person to succeed on a *lis* that any property is actually held benami would therefore first require a declaration to be passed by a Court that the property is held as such i.e. benami and only once so held could the ancillary relief of cancellation of any document which is found to touch the property be considered. As such, in any suit where a declaration is sought for a property to be held as Benami such relief must be considered to be the main relief and a relief of cancellation of a document premised on such a transaction must be considered to be the ancillary relief. This can only mean that the provisions of Article 120 and not Article 91 of the First Schedule of the Limitation Act, 1908 would be applicable to determining whether this suit is or is not barred under the provisions of Section 3 of the Limitation Act, 1908.

16. This issue has been addressed, as has correctly been relied on by Mr. Anwar Hussain, by a Division Bench of this Court in the decision reported as **Nazimuddin Ahmed vs. Ainuddin Ahmed**¹³ and wherein it was held that:

“ ... 9. From the Perusal of the prayer clauses, it is clear that the plaintiff in addition to declaration as to title has also sought cancellation of transfer in favour of defendant No. 2 as notified on 26-5-1997. Plaintiff has sought declaration of title as actual owner against the defendant No. 1 being ostensible owner, no period of limitation is provided in the Limitation Act for a suit of the nature. Suit to seek declaration fo title against a benamidar is governed under Article 120 read with Section 18 of the Limitation Act, right to sue would accrue and six year limitation in such case would commence from the time hostile or fraudulent assertion of the benamidar first became known to the person injuriously affected. Right to sue for declaration of title would

¹³ PLD 2010 Karachi 148

accrue to the affected person within six years of knowledge of the such entry in the record of title by the authority under law enjoined to maintain and keep such record under Article 120 of the Limitation Act.”

A similar view has been taken by various Learned Judges of this Court, sitting alone, in the decisions reported as **Muhammad Ali and 7 others vs. Sakar Khanoo Bai Represented by Legal Heirs;**¹⁴ **Abdul Rashid Velmi vs. Habib ur Rehman and 4 others;**¹⁵ **Kaleem Hyder Zaidi duly constituted attorney vs. Mehmooda Begum and 4 others;**¹⁶ **Mst. Nasira Ansari and 2 others vs. Mst Tahira Begum and 6 others;**¹⁷ and **Dr. Khusro Kamal Zia vs. Dr. Zehra;**¹⁸ and also by various Learned Judges of the Lahore High Court, Lahore in the decisions reported as **Mst. Shrifan Bibi and others vs. Abdul Majeed Raud and others**¹⁹ **Karam Hussain Khan and others vs. Sairan Bibi and others**²⁰ **Amanat Ullah vs. Karam Din and others**²¹ and **Muhamamd Rafi vs. Mst. Jamila Begum**²² and also by a Judge of the High Court of Dacca in the decision reported as **Nazir Ahmad Serang vs. Benoya Bhusan Sara and others.**²³

17. It is however to be mentioned that a different view, applying Article 91 of the First Schedule of the Limitation Act, 1908 was taken by a Learned Single Judge of this Court in the decision reported as **Chuttal Khan Chachar vs. Mst. Shahida Rani and another**²⁴ and wherein it was held that:

“ ... 18. The Suit No.1077 of 1999 and Suit No.1666 of 2000 were filed by Chuttal Khan Chachar in fact is for cancellation of disputed document viz. Registered sale-deed executed on 14-9-1995 (Exhs.P.2 and D.4) in favour of Mst. Shahida Rani on the ground that transaction was Benami transaction. Article 91 of the Limitation Act provides limitation of three years for filing a suit to cancel or set aside the instrument not otherwise provided for. The limitation is to run, when the fact entitling the plaintiff to have instrument cancelled or set aside becomes known to him. The instrument was admittedly executed on 14-9-1995. Therefore, the period of limitation in respect of suit property started running from the date of execution of document from 14-9-1995 which has expired on 13-9-1998. The earlier Suit No.1077 of 1999 was filed on 20-10-1999 which was time-barred and the plaint was returned for filing in competent Court. Whereas Suit No.1666 of 2000 has been filed on 14-12-2000. Thus, suit is liable to be dismissed as time-barred as well as on merit.”

As can be seen, the argument in this decision i.e. that the period from when limitation should be calculated in a suit for declaration and cancellation

¹⁴ PLD 1984 Karachi 97

¹⁵ 1995 MLD 397

¹⁶ 2006 YLR 599

¹⁷ 2007 CLC 92

¹⁸ 2009 CLC 39

¹⁹ PLD 2012 Lahore 141

²⁰ 2013 MLD 713

²¹ 2017 MLD 1539

²² 2022 YLR 1752

²³ PLD 1957 Dacca 575

²⁴ 2009 CLC 324

should be determined under Article 91 of the First Schedule of the Limitation Act, 1908 from the date of the execution of the document sought to be cancelled parallels with the arguments raised by Mr. Kashif Paracha in the application under Order. Respectfully, aside from being bound by the decision of the Division Bench reported as **Nazimuddin Ahmed vs. Ainuddin Ahmed**²⁵ I am also of the opinion that the main relief being sought in such a *lis* would necessarily be to seek a declaration that the property was held by the person indicated on the title as a benamidar and which applying the ratio decidendi of the decision of the Supreme Court of Pakistan in **Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad**²⁶ would mean that the period of limitation would be calculated under Article 120 and not Article 91 of the First Schedule of the Limitation Act, 1908. I am therefore both unable and not inclined to follow the decision reported as **Chuttal Khan Chachar vs. Mst. Shahida Rani and another**²⁷ on this issue.

18. Admittedly, the Plaint has been presented within a period of six years of the execution of the Relinquishment Deed. That being the case even in the event that the Defendant No. 1 had become “*hostile*” or made a “*fraudulent assertion*” as to his title over the Said Property on the same day as when the Relinquishment Deed was executed, this suit would be within time and would not be barred under Section 3 of the Limitation Act, 1908. The Application must therefore fail.

19. For the foregoing reasons, the Suit having been presented within the period prescribed in Article 120 of the First Schedule of the Limitation Act, 1908 and hence not being barred under Section 3 of the Limitation Act, 1908. CMA No. 16047 of 2016 is misconceived and is therefore dismissed with no order as to costs.

JUDGE

Karachi dated 16 March 2024

²⁵ PLD 2010 Karachi 148

²⁶ PLD 2015 SC 212

²⁷ 2009 CLC 324