

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, KARACHI

II-Appeal No.147 of 2022

Muhammad Ateeq & other Appellants

Vs.

Muhammad Tariq
& another Respondents

II-Appeal No.148 of 2022

Muhammad Ateeq & other Appellants

Vs.

Muhammad Shafiq
& another Respondents

Date of hearings : 15.08.2024, 28.08.2024, 12.09.2024 & 03.10.2024

Date of judgment : 08.10.2024.

Mr. Mehmood Hussain, advocate for appellant
 Mr. Imran Husain, advocate for respondent No.1

J U D G M E N T

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MUHAMMAD IQBAL KALHORO J: By this judgment two II-Appeals in hand are being decided. These two appeals have been filed against impugned judgment dated 08.03.2022 rendered by District Judge, Karachi Central dismissing Civil Appeals No.27/2021 and No.28/2021 filed by appellants against the respondents.

2. Brief facts of the case are that respondent No.1, Muhammad Tariq Nabi filed a Suit No.1202/2011 against appellants for possession, permanent injunction and mense profit claiming to have purchased the subject property *viz.* House No.R-447, Block-20, Category 'R' measuring 120 square yards, KDA Scheme No.16, F.B. Area, Karachi from respondent No.2, Muhammad Safiq, the elder brother of appellants against a sale consideration of Rs.5,000,000/- (Rupees five lac), who executed a sale deed dated 28.04.2021 in his favour. After which, respondent, Muhammad Tariq Nabi asked for possession from Muhammad Shafiq, who sought some time on the ground that currently his brothers were residing in the suit property and he needed some time to arrange an alternate accommodation for them. However, when the possession of the suit property did not materialize in favour of Muhammad Tariq, he filed aforesaid suit with prayer as follows:-

- “a) Directing the defendants or any other person on their behalf found in possession to hand over the possession of the Suit Property i.e. House on plot of land bearing No.R-447, Block-20, Category 'R' measuring 120 square yards, constructed ground plus two floors, situated at KDA Scheme No.16, F.B Area, Karachi to the plaintiff.
- b) Directing the defendants to pay mense profits @ Rs.20,000/- per month since the date of registration of sale deed i.e. 28.04.2011 till the realization of possession to the plaintiff.

- c) Restraining the defendants, their legal heirs, agent(s), servant(s), attorney(s) or any other person acting or claiming on their behalf from sell/rent out or give possession of the suit property to any other person except the plaintiff or from creating any third party interest whatsoever in nature in respect of the suit property i.e. House on Plot of Land bearing No.R-447, Block-20, Category 'R' measuring 120 square yards, constructed ground plus Two Floors, situated at KDA Scheme No.16, F.B Area, Karachi.
- d) Granting cost of the suit.”

Whereas, appellants filed a Suit bearing No.586/2013 for declaration, cancellation of documents and permanent injunction against Muhammad Tariq Nabi and their elder brother Muhammad Shafiq, besides official defendants, claiming to be *benami* owners of the suit property. They further asserted that suit property was purchased/acquired by all the legal heirs as *benami* in the name of respondent, Muhammad Shafiq, their elder brothers, who transferred/sold the same in favour of Muhammad Tariq illegally. They also asserted that Muhammad Shafiq was not owner of the suit property, which was purchased in the year 1972 from the retirement funds of their father, contributions made by them, selling agriculture land situated in Larkana, Shahdadpur and Lahore and by disposing of three shops. They prayed as under:-

- “a) That this Hon'ble Court may graciously be pleased to declare that all the plaintiffs have equal right on the suit property.
- b) For cancellation of sale deed illegally executed between the defendant No.1 & 2 in the office of defendant No.3.
- c) For declaration that the defendants have no lawful authority to sell the suit property in any manner whatsoever except by consent of plaintiffs.
- d) For declaration that the threats, actions and acts of the defendants for harassing the plaintiffs and threatening them to vacate the suit property are ab-intio, illegal, unlawful, unconstitutional, malafide, ultra-virus, null & void having no legal effect whatsoever.
- e) Permanent Injunction restraining the defendant No.2, his agents, servants, employees and any other person and/or persons claiming through or under him from entering into any sale transaction with any other person and/or create any third party interest in respect of the suit property.
- f) Permanent Injunctions restraining the defendant No.2, his agents, servants, employees and any other person and / or persons claiming through or under him from interfering in the peaceful physical possession of the plaintiffs in respect of the suit property.
- g). Costs of the suit.
- h). Any other relief or reliefs that this Hon'ble Court may deem fit and proper under the circumstances of the case may also be granted.”

3. Since the parties in both the Suits were same, so also the subject matter and property, both the suits were consolidated and following consolidated issues were framed from pleadings of the parties:-

- 1) Whether the plaintiff Muhammad Tariq entered into verbal sale agreement in February, 2011 towards plot of land bearing No.R-447, Block-20, category 'R' measuring 120 Square Yards, constructed ground plus two floors, situated at KDA Scheme No.16, Federal 'B' Area, Karachi in total sale consideration of Rs.50,00,000/- which was duly paid to the defendant No.1 (Muhammad Shafiq)?
- 2) Whether the plaintiff has made various times requests for physical possession of suit property and the defendant No.1 given written undertaking for delivery of possession of suit property within six months?
- 3) Whether the plaintiff after payment of sale consideration and transfer by sale deed in his favour become lawful owner of the suit property and liable to claim mense profit from the defendants at the rate of Rs.20,000/- per month since the date of purchase of the suit property i.e. 28.04.2011?
- 4) Whether defendant Nos. 2 to 7 purchased suit property being benami in the name of defendant No.1 namely Muhammad Shafique s/o Muhammad Sharif?
- 5) Whether the sale transaction in respect of suit property taken place between defendant No.1 namely Muhammad Shafique and defendant No.2 namely Muhammad Tariq is unlawful and illegal?
- 6) Whether the defendant No.1 is sole owner of the suit property, if not, what would its effect?
- 7) Whether the defendants also shared their money to build up construction of the suit property, if yes, what would its effect?
- 8) Whether the plaintiff and defendant No.1 in Civil Suit No.586/2013 are the legal heirs of Muhammad Sharif and the property viz. H.No.R-447, Block-20, Ancholi Society, F.B Area Karachi the suit property was purchased by all legal heirs as benami in the name of defendant No.1?
- 9) Whether the defendant namely Muhammad Sharif in Civil Suit No.586/2013 executed sale deed illegally and transferred the suit property in the name of defendant No.2 in the office of defendant No.3 vide sale deed bearing No.1512 dated 28.04.2011, M.F. Roll No.40279/7133 dated 08.06.2011?
- 10) Whether plaintiffs in both suits are entitled for the relief as claimed by them?
- 11) What should the decree be?

4. Both the parties led their evidence during the trial. Learned trial Court after appreciating the evidence and hearing the parties, decreed the Suit No.1202/2011 and dismissed Suit No.586/2013 filed by the appellants vide judgment dated 15.12.2020. The appellants filed separate appeals against the said judgment as numbered above, which have been dismissed by the impugned judgment dated 08.03.2022.

5. Learned counsel for the appellants has submitted that the Courts below have not properly appreciated the evidence, which support contentions of the appellants; that their elder brother Muhammad Shafiq was *benami* owner of the suit property and the property was purchased from the funds left by their father, contributions made by them and by selling of ancestral agriculture property situated in different cities. According to him, both the Courts below have not properly looked into the documents submitted by the appellants to establish their case. He has relied upon the case laws reported in **1996 S C M R 669, 1991 S C M R 2300, 1991 S C M R 2527** and **212 C L C 644**.

6. On the other hand, learned counsel for the respondent No.1 (Muhammad Tariq Nabi) has supported the impugned judgments.

7. I have considered submissions of the parties and perused the material available on record including the case laws cited at bar. At the very outset, it may be mentioned that this is a second round of litigation between the parties over the same subject matter. Earlier also when the suit filed by the respondent, Muhammad Tariq Nabi bearing No.1202/2011 was decreed and appeal against which was dismissed, the matter landed up before this Court in II-Appeal No.96/2016 filed by the appellants. This appeal was disposed of vide order dated 25.04.2019, whereby the matter was remanded to the trial Court, where Suit No.586/2013 filed meanwhile by the appellants was pending for framing of issues, with the direction to consolidate both the suits and frame consolidated issues for deciding both the suits on merits within a period of three months.

8. It was in compliance of such order that both the suits were consolidated and consolidated issues were framed including the issue whether the appellants were *benami* owner of the property. The suits were decided by the trial Court vide judgment and decree dated 15.12.2020 and the appeals dismissed by the appellate Court vide impugned judgment dated 08.03.2022 in the terms as stated above.

9. It is not disputed, and record also reflects that respondent, Muhammad Tariq Nabi had purchased the suit property from Muhammad Shafiq in the year 2011, who was registered owner of the same. What has been impressed by the appellants however in their suit however is that their elder brother Muhammad Shafiq was symbolic / purported purchaser of the suit property, which otherwise was bought from the funds left by their father and by disposing of properties like shops and agriculture lands situated in different cities. It has also been asserted that appellant Muhammad Ateeq at the time of purchase of the said suit property was abroad and had sent remittances for purchasing the property.

10. The burden to prove that appellants were the *benami* owner of the property and the property was purchased from the retirement benefits left by their father and by selling agriculture property situated in different cities as well as disposing of the shops and from remittances sent by appellant Muhammad Ateeq was upon the appellants. Although they have led the evidence but these facts have not been proved by them through any tangible oral evidence, or documentary evidence. Muhammad Ateeq in his cross examination has admitted that he has not filed any documentary proof regarding purchasing the suit property from the sources as mentioned above. Excepting making bald assertions, no solid evidence was led by the appellants to establish the fact of Muhammad Shafiq being *benami* owner of the property. The property was purchased in the year 1972 and stood entered in the record in favour of Muhammad Shafiq, whereas, father of appellants and Muhammad Shafiq had died in the year 1971, one year before the purchase of the property by Muhammad Shafiq. He got the mutation recorded in his favour in the year 1992 after 20 years of actual purchase of the property. Neither at that time of purchase of the property, nor subsequently at the time of its mutation any objection was raised by the appellants.

11. They have not led any evidence to show that under what circumstances even after 20 years of purchasing the property purportedly in the name of their elder brother Muhammad Shafiq, they kept silent and did not record their objection when the mutation of suit property was being carried out in the name of their elder brother Muhammad Shafiq. In the record of rights, Muhammad Shafiq was shown as registered owner with no endorsement of any kind the the property was purchased by Muhammad Shafiq and his siblings from the mutual funds generated by all of them.

12. Both the Courts below have minutely attended to the issue of Muhammad Shafiq being *benami* owner of the suit property and have concurrently answered the same in negative by observing that the appellants have miserably failed to prove this point. The trial Court has further noted that in the pleadings the appellants have taken the plea that the property was purchased from the retirement benefits left by their late father, selling of the agriculture land situated in different cities, selling the shops and remittances sent by appellant Muhammad Ateeq, but at the time of evidence they confined themselves to making the assertions that the subject property was purchased only from the funds of retirement left by their father regarding which however no proof was submitted by the appellants. These observations appears to be unexceptional as no material has been brought to conflict the same. Further the appellate Court discussing the said point has observed as under:

“During the course of evidence, when appellant Muhammad Atiq cross-examined by the counsel for Muhammad Tariq Nabi, he admitted that he had not filed any documentary proof regarding purchasing the suit property from the funds, assets, income and others. It was the only piece of evidence available on record during which, appellant claimed that the property was acquired by respondent Muhammad Shafiq out of the funds, belonging of their late father Muhammad Sharif. Mere assertions made in the plaint or written statement are not enough to get relief from the court as due burden was to be discharged by the party who claims such benami transaction. It has been held in the case of Abdul Majeed and others Vs. Amir Mehmood and others reported in 2005 SCMR 577 that for terminating the question, whether a transaction is a benami transaction or not, inter alia, following factors are to be taken in to consideration:

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

It is further held that initial burden of proof is on the party who alleges that an ostensible owner is a Benamidar for him and that the weakness in the defence evidence would not relieve a plaintiff from discharging the above burden of proof. However, burden of proof may shift from one party to the other during the trial of a suit. Once burden of proof is shifted from a plaintiff on the defendant and he fails to discharge the burden of proof so shifted on him, the plaintiff shall succeed.

Careful perusal of evidence so produced by the parties, brought the learned trial court at the right conclusion that appellants miserably failed to discharge their burden of proof regarding their claim against Muhammad Shafiq to have acquired the property through funds provided by them duly acquired from the inherited property of their late father.”

13. In view of above discussion, I am of the view that both the Courts below have properly appreciated evidence led by the parties and this is not case of misreading or non-reading of evidence, which may justify interference by this Court in II-Appeal. Both the Courts below after appraising the evidence and material on record have come to a right and just conclusion by dismissing the case filed by the appellants and decreeing the suit filed by respondent Muhammad Tariq Nabi. No material has been brought before me to take exception to the findings recorded by the Courts below, which are properly supported by the valid reasons. In view of such facts and circumstances I see no merit in these appeals and dismiss accordingly along with pending application(s).

The second appeals stand disposed of along with pending applications in above terms. Office to place a copy of this order in connected second appeal.

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