

ORDER SHEET
IN THE HIGH COURT OF SINDH,

IInd Appeal No.104 of 2012

DATE	ORDER WITH SIGNATURE OF JUDGE
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Appellant : Wakeel Ahmed Qureshi (since deceased)
Through legal heirs:
Mr. FaizalShahzad, Advocate for Appellant.

Respondents : Mst. Mahjabeen& 16 others

Mr. Abad-ul-Hasnain, advocate for
Respondents No.2, 3, 5 to 16.

Sardar Muhammad Zareen Khan,
Advocate for Respondent No4.

Date of hearing :11.11.2015

JUDGMENT

NAZAR AKBAR J:- This second appeal is directed against the judgment dated 23.5.2012 passed by Vth Additional District & Session Judge Karachi (East) whereby civil Appeal No.26/2011 was dismissed and the judgment and decree passed by the trial Court in suit No.419/1981 for administration of the property of deceased Ahmedullah and cancellation of gift deed in respect thereof was maintained.

2. The Plaintiff and Respondents are legal heirs of deceased Ahmedullah who died on **03.3.1970** leaving behind two sons, the Plaintiff and Defendant No2, widow Mst. Zubaida, Defendant No.1 and three daughters, Defendant Nos.3 to 5 as his legal heirs to inherit a double story bungalow constructed on Plot No.137-F/2 PECHS Karachi (hereinafter referred to as the suit premises). The Plaintiff in the suit has prayed for the following relief(s):-

- a) to adjudge the alleged gift deed made by the Defendant No.1 in favour of the Defendant No.2 in respect of the immovable property on plot measuring 300 sq.yds bearing No.137-F/2 situated at PECH Society void and order it to be delivered up and cancelled.
- b) to declare all heirs namely Plaintiff and Defendant Nos.1 to 5 as co-owner of the said immovable property.
- c) to grant permanent injunction against the Defendants No.1 & 2 from transferring in any manner the above referred immovable property to anyone.
- d) to grant decree as prayed above and for any other relief deemed appropriate by this Hon'ble Court in fitness of the claim of the Plaintiff in the suit.
- e) to grant cost of the suit.

3. The above said suit was decreed by the trial Court on

8.10.2010 after almost **19** years in the following terms:-

In the light of the above lengthy discussion and on the basis of my findings upon the above mentioned issues in favour of the Plaintiff and specifically against the Defendant No.2 the claim of the Plaintiff as a legal heirs having a right in suit property left by his deceased father, as there is no controversy and dispute that actually suit property was belonging to deceased Ahmedullah and the parties to the original suit were legal heirs and there is no dispute that on the death of Defendant No.1(i) and Defendant No.2(ii) are her legal heirs and they are entitled to be declared as such to claim their respective share from the suit property according to Muhammadan law. Consequently suit of the Plaintiff stand decreed.

The Defendant No.2 preferred first appeal against the above judgment which was dismissed by the impugned judgment. This Second Appeal is, therefore, against the concurrent findings.

4. The operative part of the judgment of the trial Court reproduced above suggests that out of 12 issues the actual controversy has been disposed of on the basis of the findings on issue No.2, 3, 4, 10 & 11, which are reproduced below:-

2. Whether the suit property upon death of the father of the Plaintiff was mutated in favour of Defendant No.1 as nominee of all the heirs of late Ahmedullah at their request?

3. Whether the alleged deed of relinquishment is a document executed by all the theirs or is it a forged document? If so with what effect?

4. Whether the alleged gift deed executed by the Defendant No.1 in favour of the Defendant No.2 is void and liable to be delivered up and cancelled?

10. Whether the deceased Defendant No.1 was an old illiterate and ailing purdahnashin lady under the absolute control and influence of the Defendant No.2 since before 1975? If so, what is its effect?

11. Whether the deed of relinquishment dated 09.2.1975 and Affidavit dated 05.02.1975 passed on any title of ownership of the suit property to the Defendant No.1 and whether the so-called gift of suit property to the Defendant No.2 by deceased Defendant No.1 lawfully passed on ownership to the Defendant No.2?

The findings on the above issues were against Defendant No.2 who is in possession of the suit premises exclusively on the basis of alleged gift and even enjoying rental income, therefore, only Defendant No.2 preferred first appeal which was also dismissed on **23.12.2012** and he has preferred this IInd Appeal against the dismissal of his first appeal.

5. Heard learned counsel for the parties and perused the record.

6. Learned counsel for the appellant has contended that the appellant has not been allowed to properly defend his case and his side for evidence was closed and he was even not allowed to cross-examine the witness of the Plaintiff and other Defendants. He claims that the appellant was condemned unheard by both the Court. He has

attempted to controvert the evidence brought on record though admittedly he has failed to cross-examine the Plaintiff as well as failed to produce his own evidence in support of his claim that the suit premises has been lawfully gifted by the deceased Zubaida Khatoon in his favour and that the said Zubaida Khatoon was an exclusive owner in her own right. There is no dispute that all the parties before the Court are legal heirs of late Ahmedullah who died in 1970 and the suit property stood in his name as owner in his own right at the time of his death. This is also admitted by the appellant that after the death of Ahmadullah, their father, in 1970 the suit premises was transferred in the name of Defendant No.2, their mother by the appellant and all others legal heirs through relinquishment deed. She has subsequently transferred the property byway of gift to the appellant.

7. The burden of proof of the above mentioned issues was on the appellant being beneficiary of the gift. He has not appeared in the witness box and he has not cross-examined the Plaintiff. He has not disclosed in the memo of appeal that under what circumstances, he failed to cross-examine the appellant and other witnesses and failed to lead his own evidence. However, at the bar he has stated that he has preferred a Revision against order of closing of his side for evidence by the trial Court. The perusal of memo of first appeal No.26/2011 shows that when his side was closed for cross-examination and his own evidence on **9.9.2009**, he moved an

application on **17.9.2009** for setting aside the order of closing of his side for evidence which was also dismissed. He preferred a Civil Revision **No.25/2010** against the order of dismissal of application for reopening of the side of the appellant. Pending his revision No.25/2010 the suit was decreed on **08.12.2011**. However, neither from the memo of 1st appeal, it transpires that what ultimately happened to his Revision No.25/2010 nor in the instant 2nd appeal he has raised any grievance against the closing of his side.

8. The Respondent has contended that admittedly the original Defendant No.1 Zubaida Khatoon was not the exclusive owner of the property in her own right. At the most she was benami owner of the suit property since all the legal heirs of deceased Ahmedullah who happened to be father of the Plaintiff and the other Defendants have transferred their respective shares in favour of their mother, Defendant No.1. She has admittedly not purchased the said property nor the legal heirs of Ahmedullah were otherwise compensated by her or the appellant. He has further contended that in reply to para-3 of the written statement the appellant has admitted that the Respondents' predecessor-in-interests namely the original Plaintiff and the original Defendants No.2 to 5 have executed a deed of relinquishment dated **5.2.1975** to surrender their rights in favour of Defendant No.1 and therefore, she has become registered owner of the suit premises. The so called relinquishment deed dated **5.2.1975** has also been filed with this appeal and it is available at page-61 of

the file. The perusal of this so called deed of relinquishment clearly shows that it is not a deed of relinquishment it is only an affidavit and it contains the intentions of all the executants in para 4 which is reproduced below:

*“4. That we have no objection, if the share and the property held by our father Mr. Ahmedullah is transferred in the exclusive name of our mother. **We have no claim over the share and the claim in the above property left by our father during the life of our mother, nor such claim shall be made against the Society at any time.**”*

The above was joint statement of all the legal heirs who were party in the suit. Therefore, the non-appearance of appellant in the witness box and delaying the case for over 19 years when his side was closed for cross-examination as well as for leading evidence followed by dismissal of his application for recalling orders dated **9.9.2009** in the suit which was filed in **1981** is understandable. The appellant has defeated the right of inheritance by delaying the suit proceedings for well over 30 years in trial Court. His Civil Revision No.25/2010 must had been dismissed, therefore, he has not even filed the final order passed in the said revision. The record shows that the appellants are enjoying rental income from the suit property for the last **35** years in which all the respondents have their share according to sharia being joint owners as legal heirs of the actual owner Ahmedullah and Mst. Zubida Khatoon. Since the accounts have not been maintained for the assessment of respective share in the income nor it was prayed in the suit, therefore, no orders can be passed in second appeal for the distribution of the unspecified income generated from the suit property in the past.

9, The scope of IInd Appeal is very limited and the counsel has failed to point out anything contrary to law or usage having the force of law in the impugned judgments. The appellant has also failed to

show any illegality in the impugned order of the Appellate Court. No material issue has been shown left unattended by the appellate Court therefore, no case is made out to interfere in the judgments of two Courts below in the IInd Appeal. However, since this is admitted position through the two judgments that all the legal heirs are lawfully entitled to have share in the suit property by way of inheritance and it has been misappropriated by the appellant.

10. Consequently, in exercise of power conferred on courts under Order VII Rule 7 CPC and on the strength of case law reported as *Mst. Amina Begum v. Mehar Ghulam Dastagir* (PLD 1978 SC 220) and *Samar Gul v. Central Government & Others* (PLD 1986 SC 35), while dismissing the instant IInd appeal, the judgment and decree of the trial Court is modified as follows:-

- 1) In continuation of decree dated 08.10.2010 in suit No.1739/2002 (Old No.419/1981) the Nazir of the trial Court is directed to obtain title documents from the Appellant (Defendant No.2 or his legal heirs) forthwith and auction the suit property bearing House No.137-F/II PECHS Karachi and distribute the sale proceeds amongst the respective legal heirs of deceased Ahmedullah in accordance with Muhammadan Law.
- 2) Respondents are jointly and severally directed to deposit a sum of Rs.30,000/- with the Nazir of trial Court as initial expenses for sale of the suit premises.
- 3) This amount of Rs.30,000/- shall be adjusted equally / proportionate to the respective share of the appellant and the respondents at the time of disbursing sale proceeds after auction of the suit property.
- 4) In the meanwhile the Nazir in presence of the respondents or their representatives shall inspect the suit premises within two weeks and make an inventory of tenants in occupation and direct them to vacate the suit premises within 60 days so that the property should fetch the proper market value.
- 5) The rental income of the premises from January 2016 shall be realized by the Nazir from the tenant in occupation and distributed amongst the parties alongwith sale proceeds.

- 6) The process of auction should be completed with in 60 days time in accordance with law.”

In view of the above, listed application has become infructuous and this appeal stood disposed of in above terms.

JUDGE

MAK/PS**