

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 131 of 2003

Raja Saqib Khan ----- Plaintiff

Versus

Raja Sabri Khan & another ----- Defendants

Date of hearing: 03.06.2017.

Date of Judgment: 18.07.2017.

Plaintiff: Ms. Saman Riffat Imtiaz Advocate.

Defendant

No. 1: Mr. Agha Faisal Advocate.

Defendant

No. 2: Mr. Ijaz Ahmed Zahid Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration, Possession, Partition and Mesne Profit filed by the Plaintiff against Defendant No.1 who is his real brother and Defendant No.2 who is his real sister by seeking the following prayer(s):-

- a) To declare that the plaintiff being one of the legal heirs is entitled to the 40 paisas share in all the properties, viz. (1) House No.53, Khayaban-e-Mujahid, Phase-V, Defence Housing Authority, Karachi measuring 1000 square yards; (2) Plot No. 12-C, Muslim Commercial Street, Phase-VI, Defence Housing Authority, Karachi measuring 100 square yards, and (3) 96 acres of agricultural land in deh Chhail, Tapo Seerani Taluka & District Badin;
- b) To declare that the plaintiff being one of the legal heirs is also entitled to the 40 paisas share in all the movable properties mentioned in para No.1 of the plaint including the Defence Saving Certificates and the joint account in the name of late Major Raja Allahdad Khan and Mrs. Allahdad

Khan at the National Bank of Pakistan, Kehkashan, Clifton Branch, Karachi;

- c) To further declare that the plaintiff is entitled 40 paisas share to the mesne profits of Rs.25,000/- per month from the month of December, 1994 till its realization on the property Bungalow No.53, Khayaban-e-Mujahid, Phase-V, Defence Housing Authority, Karachi; and Rs.1,00,000/- per year from the year 1994 on the property viz. No.96 acres of land in deh Chhail, Tapol Seerani Taluka & District Badin being the agricultural income till realization;
- d) To order/direct partition/possession of the property House No.53, Khayaban-e-Mujahid, Phase-V, Defence Housing Authority, Karachi measuring 1000 square yards; (2) Plot No.12-C, Muslim Commercial Street, Phase-VI, Defence Housing Authority, Karachi measuring 100 square yards and 96 acres of agricultural land in deh Chhail, Tapo Seerani Taluka & District Badin and the movable properties/articles mentioned in the Para No.7 of the plaint and the Defence Saving Certificates in the names of Mrs. Raja Allahdad Khan and the joint account maintained at the National Bank of Pakistan, Kehkashan, Clifton Branch, Karachi in accordance with the share of each party and put the parties herein above by meets and bounds in possession of their respective shares and appoint the Administrator/Receiver for the purpose to do all necessary acts and deeds.

ALTERNATIVELY

- e) If for any reason partition by way of meets and bounds of the said properties is not possible, the said properties be administered and assets be sold and the sale proceeds of the same be disbursed amongst the parties according to their respective share.
- f) Preliminary decree may kindly be passed directing the Administrator/Receiver as appointed by this Hon'ble Court to take possession of properties and distribute amongst the legal heirs, as he thinks fit and proper.
- g) Any other order/directions which the Hon'ble Court may be deem fit and proper in the circumstances of the case may also be granted.
- h) Cost of the suit may also be awarded."

2. After issuance of summons, Defendant No.1 while filing his written statement has filed a counter claim for Rs. 137,200,000/- and has sought the following prayers:-

- "a) A Decree in the sum of Rs.137,200,000/- against the plaintiff and in favour of the defendants (to be apportioned in accordance with the Islamic law of inheritance);

- b) A Declaration stipulating that the House is the sole and exclusive property of the answering defendant;
- c) A direction to the law enforcement agencies requiring criminal proceedings to be initiated against the plaintiff for having committed fraud and other cognizable offences;
- d) Costs of the suit;
- e) Any other relief that this Honourable Court deems fit.”

3. Written statement has also been filed on behalf of Defendant No.2 wherein, the claim of the Plaintiff has been denied and the case of Defendant No.1 is supported with a further prayer for a declaration that property No. 2 in prayer clause (a) i.e. Plot No. 12-C, Muslim Commercial Street, Phase VI, Defence Housing Authority, Karachi measuring 100 square yards is the sole and exclusive property of Defendant No.2.

4. The facts precisely as stated in the plaint are that the father of Plaintiff and Defendants Raja Allahdad Khan died on 4.11.1994 and according to the Plaintiff at the time of his death he owned the following properties:-

- “1) House No. 53, Khayaban-e-Mujahid, Phase V, Defence Housing Authority, Karachi measuring 1000 square yards. **“Property No.1”**
- 2) Plot No. 12-C, Muslim Commercial Street, Phase VI, Defence Housing Authority, Karachi measuring 100 square yards. **“Property No.2”**
- 3) 96 Acres of agricultural land in Deh Chhail, Tapo Seerani, Taluka and District Badin. **“Property No.3”**”

5. It is further stated that late Raja Allahdad Khan left the following legal heirs:-

- | | | | |
|-----|----------------------------|----------|----------|
| “1) | Mrs. Kishwar Allahdad Khan | Wife | 80 years |
| 2) | Mrs. Sarosh Salman Rahim | Daughter | 58 years |
| 3) | Raja Saqib Khan | Son | 56 |
| 4) | Raja Sabri Khan | Son | 42” |

6. It is the claim of the Plaintiff that according to the record of Defence Housing Authority, **("Property No.1")** is still in the name of his late father and therefore, according to Muhammadan Law the same is to be partitioned and divided amongst the legal heirs. It is further stated that **("Property No.2")** was also owned by his late father and the Defendants made an effort to have it transferred in their names; but the same could not be transferred as their mother Mst. Kishwar Allahdad also expired on 9.5.2002. It is further claimed that the **("Property No.3")** was also owned by his father and is presently in the occupation of Defendant No.1 since 1994 and the income so generated from such agricultural land is being misappropriated and therefore, this property also is to be divided according to Muhammadan Law amongst the legal heirs, whereas, the Plaintiff is also entitled for mesne profit at the rate of Rs. 100,000/- per year from such land and at the rate of Rs. 25000/- per month from property No. 1. In addition to the above claim, the Plaintiff has also in Para 7 of the plaint stated that various articles lying in his father's property have also been misappropriated including his share in the Defence Saving Certificates in the name of his father and so also the amount lying in a joint bank account in the name of his father and mother.

7. In the counter claim Defendant No.1 has sought compensation of Rs. 137,200,000/- by denying the averments of the Plaintiff and it is stated that **("Property No.1")** was purchased with the funds of Defendant No.1 and it was never a part of the estate of their late father. It is further stated that insofar as the **("Property No.2")** is concerned, the same always belonged to Defendant No.2 and was never a part of the estate of their father. Insofar as the claim regarding **("Property No.3")** is concerned, the same has been denied and it is averred that Defendant No.1 has access

only to his own land and part of the same is being cultivated by him, whereas, it is the Plaintiff who has misappropriated their father's agricultural land(s). Insofar as the counter claim is concerned, it has been alleged that the Plaintiff had taken an amount of Rs. 500,000/- from their late father in the shape of Defence Saving Certificates which was misappropriated by him and in the year 1996-1997 their maturity value was expected to be Rs. 2.4 million for which the Defendant is entitled for his share according to Muhammadan Law. It has been further stated that the Plaintiff has misappropriated various valuable weapons belonging to their late father and the same have been so stated in Para 56 of the written statement which reads as under:-

- a) Holland & Holland 12 gauge Royal Deluxe Shotgun;
- b) Holland & Holland 240 Magazine Rifle;
- c) Holland & Holland 416 Magazine Rifle;
- d) Holland & Holland 470 Double Rifle;
- e) Cogswell & Harrison 575 Rifle;
- f) Weatherby 316 Rifle;
- g) Beretta 38 Calibre Pistol;
- h) Luger 9mm Pistol;
- i) Approximately 10 ceremonial daggers;"

The approximate value of such weapons at the time of filing of counter claim has been stated as Rs. 9,000,000/-. It has been further claimed that land of 362 Kanal in Chakwal having an estimated value of Rs. 5,000,000/- in the name of their father has been misappropriated on the basis of a forged Power of Attorney. Similar claim has been made in respect of 150 Acres of land in Bakhar valuing Rs. 6,000,000/-. A similar claim has also been raised in respect of immovable property at Lahore and in Kaghan valley having value(s) estimated to the tune of Rs. 10,000,000/-. It is further claimed that the Plaintiff has taken over

possession of land of 1048 Acres in Badin forcibly and has never permitted the Defendant(s) to enter the said land which has an estimated value of Rs. 104,8000,000/-. On the basis of these claims, a money decree is sought in the sum of Rs. 137,2000,000/- in addition to a declaration that Property No. 1 is the sole and exclusive property of Defendant No.1.

8. After filing of written statement the following issues were settled by the Court on 7.3.2005:-

- “1) What is the estate left by deceased Haji Allah Dad Khan?
- 2) Whether any property out of the estate has been transferred, if so, whether the same is valid?
- 3) What [is] the respective shares of the parties?
- 4) What should the decree be?”

9. Learned Counsel for the Plaintiff at the very outset has contended that the issues have not been property settled by the Court as there is a claim of mesne profit raised on behalf of the Plaintiff in the Plaint which has not been incorporated as an issue and therefore, before delivering judgment this Court exercising its inherent powers can always frame an additional issue for adjudication of such claim of the Plaintiff. Insofar as **(“Property No.1”)** is concerned, learned Counsel has referred to (Exhibit P/4) (legal notice dated 30.12.2002) issued by the Plaintiff and its response as (Exhibit P/5) dated 13.1.2003 issued by Defendant No.1 and has contended that insofar as this property is concerned, the same was and is admittedly till date in the name of the late father of Plaintiff and Defendants. She has further contended that in fact all immovable properties are still in the name of late father, whereas, the dispute according to the Plaintiff is only to the extent of movable properties. She has referred to the Affidavit in Evidence of the Plaintiff and (Exhibit

D/25), the Sublease of the property in question which according to the learned Counsel is in the name of deceased father. She has also referred to the cross-examination of Defendant No.1 wherein, it is stated that, “It is correct that the Suit property still exists in the name of late Major (Retd) Allahdad Khan (late father of the parties).” By relying on this piece of evidence, it is next contended by her that the onus and burden is upon Defendant No.1 to show and prove that the property was purchased by him in the name of his father as a Benami. Insofar as the evidence led on behalf of Defendants is concerned, she has contended that the same is hearsay in nature, whereas, the noting in the diary of their late father has no evidentiary value and is even otherwise not clear and specific regarding alleged investment of Defendant No.1 in purchasing property No. 1. It is further contended that even otherwise if certain amount is paid by the children to their parents, the same does not relate to the purchase of a property; and it is a normal situation wherein, the children contribute money for maintenance and day to day expenditures. She has further stated that Defendant No.1 has not been able to substantiate his alleged earnings and the claim of generating income through tuition and photography, is not supported by any documentary evidence which could be considered by the Court. Insofar as possession of original documents is concerned, she has contended that since Defendants No. 1 & 2 were living with their parents and had access to their belongings; therefore, mere possession of original documents does not vests any ownership of the property in question. She has further contended that even otherwise, it is settled law that mere possession of a joint property is no exclusive proof of ownership.

Insofar as **(“Property No.2”)** is concerned, she has again contended that the same is still in the name of the deceased father, whereas,

Defendant No.2 has not even filed any counter claim for seeking a declaration that such property is owned by her. It is further contended that no source of income has been shown, whereas, nothing has been placed through evidence so as to justify that the said property was purchased by the deceased father in the name of Defendant No.2 as Benami. Insofar as reliance on a purported Power of Attorney dated 1.6.1994 is concerned, learned Counsel has contended that the same is a forged document and was never registered as required in law and therefore, cannot be acted upon. Learned Counsel has also referred to Para 1 of the Affidavit in Evidence of the plaintiff wherein, another property bearing residential Plot of 1000 square yards in the Veteran's Society Rawalpindi has been claimed to be a property of the late father and submits that though the same has not been mentioned in the plaint; however, it came to the knowledge of the Plaintiff subsequently and therefore, the same has been mentioned in the Affidavit in Evidence. Insofar as 96 Acres of land in Badin is concerned, she has contended that such property constitute the estate of the late father and there is no dispute to that effect. Regarding counter claim she has contended that no evidence has been placed on record regarding the alleged lands in question and therefore, to that extent there is no case of the Defendants. Insofar as the claim regarding weapons is concerned, she has admitted that the same are in possession of the Plaintiff and they have been kept in safe custody according to the wishes of his late mother. In support she has relied upon *Saba Jamil and 3 others V. Mst. Sultana Wilayat and 4 others (PLD 2007 Karachi 310)*, *Dr. Muhammad Riaz Mirza and others V. Muhammad Yousuf Mirza and others (2005 YLR 2213)* and *Bashir Ahmed and others V. Ghulam Rasool and others (2007 MLD 159)*.

10. On the other hand, learned Counsel for the Defendant No.1 has referred to the written statement and counter claim at Para 55 regarding the Defence Saving Certificates taken by the Plaintiff from their father and its misappropriation. Per learned Counsel in the year 1996-1997 the maturity value of such Certificates was expected to be Rs. 24,00,000/-, whereas, in the cross-examination the Plaintiff has admitted that the Defence Saving Certificates were given by his father to him for his financial needs, which, he allegedly returned; however, per learned Counsel, no supporting documents have been placed on record in the evidence so as to suggest that such amount was ever returned. Regarding land of 1048 Acres in Badin, the learned Counsel has referred to (Exhibit D/1 and D/2) and has contended that the same establishes the ownership of the land in the name of the entire family which has been misappropriated by the Plaintiff. Learned Counsel has also referred to (Exhibit D/32) regarding ownership of land at Chakwal and has contended that the Plaintiff by using the forged Power of Attorney (Exhibit D/30) has sold the entire land, whereas, such Power of Attorney was admittedly not signed by any of the legal heirs and therefore, the Defendants are entitled for their share in the said property. In respect of land at Bakhar, learned Counsel has referred to (Exhibit D/33) and has contended that the same was also sold on the basis of Power of Attorney as above and the sale proceeds have been misappropriated. Similar claim has been made by the learned Counsel in respect of the property at Lahore and Kaghan. Insofar as the weapons are concerned, learned Counsel has referred to the cross examination of the Plaintiff and has contended that the same stands admitted and therefore, no further adjudication is required. Regarding property No. 2, learned Counsel has referred to the cross-examination of the Plaintiff and has contended that

the Plaintiff has admitted in his cross-examination that such property as well as property at the Veteran's Society Rawalpindi never belonged to his father. Insofar as the property No. 1 is concerned, learned Counsel has referred to the written statement of Defendant No.2 who is the real sister of the Plaintiff and Defendant No.1 and has contended that she fully supports the claim of Defendant No.1 regarding ownership of such property. Learned Counsel has also referred to (Exhibit D/26) which is a sworn affidavit of their late mother and has contended that no further evidence is required as admittedly the property was purchased from the resources of Defendant No.1 in the name of their late father. Learned Counsel has also referred to the evidence of D.W's Birjis Hassan Khan and Raja Ahmed Khan in support thereof. Learned Counsel has also referred to various Exhibits regarding evidence of payment as well as raising of construction on the said plot and has contended that the property is owned by Defendant No.1 therefore, the declaration being sought may be allowed in favour of the Defendant No.1.

11. Insofar as learned Counsel for Defendant No.2 is concerned, he has contended that as per (Exhibit D/26) the ownership of such property stands confirmed in the name of Defendant No.2 and the Power of Attorney was also executed in favour of Defendant No.2 by their late father. He has further contended that the original documents of Plot No. 12-C Muslim Commercial Street are in possession of Defendant No.2 and throughout such period the dues of DHA and other concerned authorities are being regularly paid. Learned Counsel has also referred to cross-examination of the Plaintiff to the extent of this property and submits that after this admission there is no dispute regarding this property and therefore, the declaration sought through written statement to the extent of such property may be allowed.

12. I have heard all the learned Counsel and perused the record including the evidence led by the parties. My issue wise findings are as under:-

ISSUE NO. 1 (What is the estate left by deceased Haji Allah Dad Khan?)

13. In this matter the Plaintiff while filing this Suit for Declaration, Possession, Partition and Mesne Profit has sought his claim in respect of three properties stated in Para 1 of the plaint (already reproduced at Para 3 above) and has also sought administration of the Suit properties. The Plaintiff while filing his affidavit in evidence also included one additional property i.e. Plot at Veteran's Society Rawalpindi as being a property of his late father as according to him information regarding this property came to his knowledge after filing of the Suit. On the other hand, the Defendants while filing their written statement have also filed a counter claim wherein, Defendant No.1 seeks a declaration that he is the actual beneficial owner of one of the properties i.e. **("Property No.1")**, and in addition he has lodged a money claim against the Plaintiff in respect of various properties of the deceased father allegedly sold by him. Similarly Defendant No.2 has sought a declaration that she is the beneficial owner of one of the properties i.e. **("Property No.2")**, being claimed in the name of deceased father. Therefore, I will be dealing with the properties individually on the basis of evidence led by the parties that as to whether they were the properties of the deceased father or not.

PROPERTY NO. 1 HOUSE NO. 53, KHAYABAN-E-MUJAHID,
PHASE V, DEFENCE HOUSING AUTHORITY, KARACHI
MEASURING 1000 SQUARE YARDS.

14. Insofar as this property is concerned, there appears to be no dispute that at the time of the death of their late father, this property was in his name in the record being maintained by DHA. However, it is the claim of Defendant No.1 that this property was though in his father's name, but never belonged to him and was actually owned and purchased by him. It is the case of Defendant No.1 that the said property was purchased in the name of his father from his sources and funds and therefore, this is a Benami property in the name of his father and a declaration to that effect is sought in his counter claim. Since the property admittedly stands in the name of the late father of the parties therefore, the burden to prove it otherwise, rests upon Defendant No.1 who has primarily relied upon the evidence and support of Defendant No.2 who is their real sister and so also on two witnesses namely Birjis Hassan Khan and Raja Ahmed Khan. In addition to this the Defendant No.1 has also relied upon (Exhibit D/26) which is an affidavit sworn by their late mother in respect of claim of ownership of this property by Defendant No.1. Insofar as Defendant No.2 is concerned, she in her written statement in Para 1 (i) has stated as follows:-

"To the best of the knowledge of the answering defendant, it is submitted that the property bearing House No. 53 Khayaban-e-Mujahid, Phase V Pakistan Defence Officers Housing Authority (hereinafter referred to be as the "House") belongs to the Defendant No.1 who paid for its land purchase, the construction of the house and or its maintenance and all charges and expenses relating thereto. The House was not part of the estate of the answering defendant's late father."

In her cross examination at page 401 of the evidence file she states as follows:-

"It is correct that the House No. 53 Khayaban-e-Mujahid, DHA Karachi belongs to Defendant No.1. It is correct that the Defendant No.1 was never in possession of the assets belonging to the deceased."

15. The Defendant No.1 also relies upon an affidavit dated 7.9.1999 executed by the late mother of the parties namely Mrs. Kishwar Allahdad Khan which reads as under:-

“MRS. KISHWAR ALLAHDAD KHAN, wife of Late Lt.Col. RAJA ALLAHDAD KHAN do hereby depose that my late husband had given verbal consent to me for disposal of his estate and affairs, in the event of his death, as deemed fair in my judgment. I, therefore, would like to make the following decisions in favour of my children, whose names are mentioned below, regarding my late husband’s properties:

- SAROSH RAHIM - Daughter
 - RAJA SAQIB KHAN – Son
 - RAJA SABRI KHAN – Son
1. The sole ownership of House No. 53, Khayaban-e-Mujahid, Phase V, Defence Housing Authority, Karachi inclusive of all furniture, fittings and effects – in the name of my late husband, be given to my son RAJA SABRI KHAN.
 2. A commercial plot, measuring 100 square yards, located on Muslim Commercial Street, Phase VI, Defence Housing Authority and a plot located in Veteran’s Society, Rawalpindi / Islamabad – both in my late husband’s name – were paid for and are the sole property of my daughter MRS. SAROSH RAHIM and their ownership may be transferred in her name.
 3. An amount of Rs. 500,000/- (Rupees five lakhs) was taken as a loan, in the form of saving certificates, from my late husband by my son RAJA SAQIB KHAN. The amount was not returned – these certificates attained maturity in 1996-97. The matured amount may be adjusted against the share in other properties of my son RAJA SAQIB KHAN.
 4. All other properties, excepting (1) and (2) above, in my name or my late husband’s name, anywhere in Pakistan – be equally divided among my three children, SAROSH RAHIM, RAJA SAQIB KHAN, and RAJA SABRI KHAN.
 5. All licenced arms, and ammution belonging to my late husband be divided equally between my two sons. RAJA SAQIB KHAN, and RAJA SABRI KHAN.
 6. All cash, jewellery and personal effects belonging to myself or my late husband be divided equally amongst my three children.

Signed: SD/-
(BEGUM KISHWAR ALLAHDAD KHAN)

SD/-

Witnessed By: RAJA AHMED KHAN

Dated: 7.9.99.

SD/-

Witnessed By: BIRJIS HASSAN KHAN”

16. The Defendant No.1 also relies upon the evidence of witness namely Birjis Hassan Khan who is maternal uncle of the parties in

question. He is the attesting witness to the aforesaid affidavit dated 7.9.1999 and in his Affidavit in Evidence, at Para 3 he has stated that I am a witness to this affidavit. Similarly, the other witness was also examined by Defendant No.1 i.e. Raja Ahmed Khan who is the real paternal uncle of the parties to this Suit and he has also filed his affidavit in evidence wherein, it is stated that he is a witness to the said affidavit.

17. It needs to be appreciated that this is a family dispute in respect of the said property and the matter is to be decided on the basis of whatever evidence is led and available with the parties. The affidavit of the late mother in this regard is a crucial document and cannot be so lightly ignored by the Court as contended by the learned Counsel for the Plaintiff. In the said affidavit it has been stated that the late husband (father of the parties) had given her a verbal consent for disposal of his estates and affairs in the event of his death as deem fair in her judgment and therefore, the properties and the estate of the late father and her shall be distributed in the manner so stated in the affidavit. Insofar as this property is concerned, the same was required to be distributed or given to Defendant No.1. This affidavit has been witnessed by the aforesaid two witnesses and one out of them i.e. Birjis Hassan Khan was cross-examined on behalf of the Plaintiff. However, the evidence of that witness could not be shaken and the contents of the said affidavit appears to have been admitted. The learned Counsel for the Plaintiff while cross-examining this witness was unable to dislodge and could not challenge the veracity as well as existence of said affidavit. In fact no question was put to this witness regarding the said Affidavit which was relied upon by the witness through his Affidavit in Evidence.

18. Insofar as Defendant No.1 is concerned, in his Affidavit in Evidence from Para 10 to 32 he has stated that the plot in question was purchased in the name of his late father from the funds and resources given by him. In support he has placed reliance on the hand written diary (Exhibits D/5 to D/7) of his late father wherein, he has acknowledged receiving various payments from Defendant No.1. Not a single question was asked by the learned Counsel for the plaintiff regarding these Exhibits nor it is established from the record that any objection was ever raised regarding admissibility of the noting in the diary of deceased. For such reasons I do not deem it appropriate to discard this piece of evidence in the peculiar facts of this case. In addition to this, the Defendant No.1 has exhibited various supporting documents like details of the construction carried out by the contractor; the payments made to him and for purchase of various materials as well as the payments made to Cantonment Board and so also the documents of the property in question. The learned Counsel for the Plaintiff while cross-examining him has not been able to challenge the veracity of these documents and his evidence has not been shaken and appears to be confidence inspiring in this regard. Moreover, the Defendant No.1 has relied upon a very crucial document which is the diary written by the late father himself. Though the learned Counsel for the Plaintiff while making her submissions made an effort to argue that these payments cannot be related to the purchase and construction of the property in question and may have been given to meet the monthly expenditure of the joint family; however, I am not inclined to agree with such line of argument as if that had been a case, then the late father would have so recorded in his diary. Moreover, the amounts appear to be substantial (at the relevant time) and cannot be termed as amounts for monthly expenditure of the family. Therefore, I am of the view that

insofar as this property is concerned, the Defendant No.1 has brought on record enough evidence to substantiate his claim that the said property was in the name of his father as a Benami property of Defendant No.1. Accordingly, it is held and declared that this property in question was actually a property of Defendant No.1 and was in the name of the late father of the parties only as a Benami property.

PROPERTY NO. 2 PLOT NO. 12-C, MUSLIM COMMERCIAL STREET, PHASE VI, DEFENCE HOUSING AUTHORITY, KARACHI MEASURING 100 SQUARE YARDS.

19. Insofar as this property is concerned, though in the plaint and in the Affidavit in Evidence, it has been claimed by the Plaintiff that this property being in the name of his late father was purchased by his late father with his own resources and therefore, the same has to be partitioned or administered amongst all the legal heirs. However, in his cross-examination to the learned Counsel for Defendant No.2, the Plaintiff has stated as follows:-

“It is not correct to suggest that Plot No. 12-C, Muslim Commercial Area, DHA Karachi and Plot at Veteran Society at Rawalpindi belongs to my late father.”

20. In his cross-examination as above, the Plaintiff has categorically stated that, “It is not correct to suggest that Plot No. 12-C belongs to my late father.” This is clearly contradictory to his stance in the plaint as well as in the Affidavit in Evidence. While confronted, learned Counsel for the Plaintiff contended that this appears to be a typographical error by the learned Commissioner and the hand written version must be relied upon. On examination of the hand written version, it is noted that the typed version is somewhat different as compared to the hand written version which reads as under:-

“It is not correct to suggest that Plot No. 12-C, Muslim Commercial Street, DHA Karachi and Plot at Veteran Society at Rawalpindi belongs to Mrs. Salman (Defendant No.2) voluntarily states that it belongs to my late father.”

21. Therefore, the contention of Defendant’s Counsel to the effect that in his cross-examination the Plaintiff has admitted that both these properties did not belong to his father is ill-founded as well as incorrect as the learned Commissioner in the typed version has committed an error which is not supported by the hand written version as above. Therefore, reliance placed on this portion of the cross-examination is of no help to the Defendant’s case.

22. However, insofar as the ownership of **(“Property No.2”)** is concerned, I am of the opinion that even otherwise it is not established that the property was owned by the late father in his own name. In this regard again reliance may be placed on (Exhibit D/26) already reproduced hereinabove, which is the Affidavit of late mother of the parties, wherein, at Para 2 she has clearly stated “that a Commercial plot, measuring 100 square yards, located on Muslim Commercial Lane, Phase VI, Defence Housing Authority and a plot located in Veteran’s Society, Rawalpindi / Islamabad, both in my late husband’s name were paid for and are the sole property of my daughter Mrs. Sarosh Rahim (Defendant No 2) and their ownership may be transferred in her name”. As discussed hereinabove, this affidavit was attested by two witnesses out of which one witness namely Birjis Hassan Khan even came in the witness box and the Plaintiff could not shatter his evidence. Therefore, I am not inclined to discard this affidavit so lightly as contended by the Counsel for the Plaintiff. Moreover, it has also come on record through (Exhibit D/38) which is a General Power of Attorney dated 1.6.1994 executed by late Raja Allahdad Khan, the father of the parties, in respect of this property

in favour of Defendant No.2 and similarly (Exhibit D/39) which again is a General Power of Attorney executed by the Plaintiff, Defendant No.1 and their late mother in favour of Defendant No.2 in respect of the said property. Similarly, (Exhibit D/40) which again is a Power of Attorney executed by the late father in favour of Defendant No.2 in respect of the plot in the Veteran's Society Rawalpindi / Islamabad. All these documents have been exhibited in the evidence and originals have been placed on record, whereas, the Plaintiff has not been able to lead any substantial evidence to dislodge these documents and therefore, in view of the fact that these documents were executed by the late father and mother of the parties who could not come into evidence as they are no more alive but their credibility has not been appropriately challenged, whereas, the close family relatives have fully supported the very existence of these documents in the evidence. Therefore, I am inclined to accept these documents as admissible in favour of Defendant No.2. Accordingly, property No. 2 bearing Plot No. 12-C, Muslim Commercial Street, Phase VI, Defence Housing Authority, Karachi measuring 100 square yards and the plot at the Veteran's Society bearing No. 116A, Phase-I, admeasuring 1000 Square Yards are declared to be as properties of Defendant No.2 and not of the late father. It may be clarified that an objection was raised by the learned Counsel for the Plaintiff that Defendant No.2 has not filed any counter claim in this matter and only a written statement has been filed, without Court fee, whereas, even otherwise, her claim was only in respect of the (**"Property No.1"**). In this regard it would suffice to observe that insofar as the plot at the Veteran's Society at Rawalpindi is concerned, in the plaint there was no such averment by the Plaintiff and this property was only so stated in the Affidavit in Evidence by the Plaintiff subsequently, therefore, no claim or rebuttal would have been

made in the written statement. Insofar as the non-affixation of Court fee and filing a proper counter claim is concerned, again it would suffice to observe that this being a Suit for Administration, wherein there is already a counter claim of one of the legal heirs i.e. Defendant No.1 this objection is not sustainable and therefore, the Defendant No.2 can maintain its declaration in respect of the properties which were in the name of the deceased father at the time of filing of this Suit.

23. The Hon'ble Supreme Court in a recent case of ***Amina Bibi and others V. Zafar Iqbal and others*** (2017 SCMR 704) had the occasion of examining a judgment of the learned Lahore High Court wherein, while exercising revisional jurisdiction the learned Lahore High Court came to the conclusion that parentage of Mst. Sardar Begum was proved through a birth certificate coupled *with the statements of close relatives of the family* and the persons who otherwise had knowledge of such relationship and based on this the revision application was accepted by reversing the decisions of the two Courts below and the Suit of Sardar Begum claiming that she was daughter of Shah Muhammad and was entitled to inherit the estate of her late father was decreed. In that case Mst. Sardar Begum who was claiming inheritance could not come in evidence as she had expired before conclusion of Trial and the Court had relied upon the documentary evidence duly supported by the close relatives of Mst. Sardar Begum. The relevant observations of the Hon'ble Supreme Court while maintaining the judgment of the learned Lahore High Court is as follows:-

“Leave in this case was granted to examine the effect of non-appearance of Sardar Begum or her attorney(s) in the witness box; suffice it to say that Mst. Sardar Begum had died before the conclusion of the trial, thus obviously she could not appear. As far as the other evidence is concerned, there is overwhelming evidence to prove that she was the daughter of Shah Muhammad out of his

wedlock with Begum Muhammad. **This is even so stated by the maternal nephew of Sardar Muhammad.** This evidence is in line with the law laid down in the case reported as *Ghulam Muhammad and another V. Allah Yar and others* (PLD 1965 Lahore 482); besides, there is no rebuttal of the birth certificate which had been brought on the record, duly exhibited and at that time no objection qua the proof was taken by the appellants. **In our view, in the facts and circumstances of the case, the non-appearance of Mst. Sardar Begum or her attorney(s) is not fatal to the case of Plaintiff / respondents, because of the overwhelming oral evidence and also on account of the documentary evidence which has not been rebutted by the appellants.** No case for interference, has been made out. Dismissed accordingly.”

24. Insofar as the claim of the Plaintiff as well as the Defendants in respect of the other immovable properties are concerned, it appears to be an admitted position that at the time of filing of this Suit they were not in the name of their late father and therefore, they cannot be a part of his estate for which any jurisdiction or authority of administration of these properties could be exercised by this Court. All these immovable properties were allegedly sold out by the Plaintiff, whereas, even otherwise the claim of Defendant No.1 is a money claim in respect of the alleged sale proceeds received by the Plaintiff. However, I am of the view that Defendant No.1 has not been able to lead any satisfactory evidence to establish his claim in this regard. Similarly no substantial and credible evidence has been led on behalf of Defendants regarding Defence Saving Certificate given by the late father to the plaintiff. Though certain documents have been brought in the evidence; however, they do not convincingly establish the fact that these properties were owned by the late father and were sold and the sale proceeds were allegedly misappropriated; therefore, the Defendant No.1's claim in this regard is not substantiated and cannot be granted to that extent. The Defendant No.1's counter claim is dismissed in this regard.

25. Insofar as the claim of Defendant No.1 regarding movable properties i.e. various guns ("**weapons**") as mentioned in the counter claim in Para 53, as well as in the Affidavit in Evidence is concerned, the Plaintiff in his cross-examination has categorically stated as follows:-

"It is not correct to suggest that I have misappropriated the weapons belonging to my late father. The weapons belonging to my father are lying in safe custody with me. Voluntarily states that these weapons are kept by me at the instance of my late mother and these are on the license of my deceased father."

26. The Plaintiff in his cross-examination as above admits that these weapons belonging to his late father are lying in safe custody with him therefore; no further adjudication on this aspect of the case is required. The Plaintiff admits the claim of Defendant No.1 regarding these weapons as they belong to their deceased father; therefore, this movable property is to be administered amongst the legal heirs and requires passing of a preliminary decree to that extent.

In the circumstances so stated, accordingly, issue No. 1 is answered to the extent that the deceased *Haji Allahdad Khan* did not left any immovable or moveable properties except **weapons** i.e. (movable property) as above as his estate which is to be administered amongst the legal heirs.

ISSUE NO. 2 (Whether any property out of the estate has been transferred, if so, whether the same is valid?)

27. In view of the findings given regarding issue No. 1 this issue is answered in negative.

ISSUE NO. 3 (What [is] the respective shares of the parties?)

28. The respective shares of the parties is only in respect of the immovable property i.e. **weapons** as above and has to be distributed after its sale amongst the Plaintiff and Defendants according to Sharia.

ISSUE NO. 4 (What should the decree be?)

29. The Suit / Counter Claim stands dismissed / decreed in the following terms:-

- a) Insofar as the Plaintiff's Suit is concerned, the same stands dismissed.
- b) The counter claim of Defendants is decreed as follows;
 - i) By declaring that property No. 1 bearing House No. 53, Khayaban-e-Mujahid, Phase V, Defence Housing Authority, Karachi measuring 1000 square yards is owned by Defendant No.1 and the ownership of the same in the name of their late father Raja Allahdad Khan was a Benami ownership and therefore, the record with the concerned authority i.e. DHA may be corrected by transferring the said property in the name of Defendant No.1.
 - ii) Property bearing Plot No. 12-C, Muslim Commercial Street, Phase VI, Defence Housing Authority, Karachi measuring 100 square yards and Plot No. 116A, Phase-I, admeasuring 1000 Square Yards in Veteran's Society Rawalpindi is owned by Defendant No.2 and the ownership of the same in the name of their late father Raja Allahdad Khan was a Benami ownership

and therefore, the record with the concerned authorities may be corrected by transferring the said property in the name of Defendant No.2.

- iii) A preliminary decree is passed in respect of weapons so stated in Para 53 of the counter claim of Defendant No.1, by directing the Plaintiff to immediately deposit the weapons with the Nazir of this Court, who upon deposit is directed to first make an attempt to sell the same amongst the legal heirs, whosoever, gives the highest bid, and if not, then through Public Auction, after Advertisement according to Rules and distribute the sale proceeds amongst the Plaintiff and Defendants according to Shariah. Nazir's fee is settled at Rs. 100,000/- tentatively for this exercise, which including cost of Advertisement and other expenses shall be borne by the parties according to their share.

30. The Suit stands dismissed, whereas, Counter Claim is partly decreed as above.

Dated: 18.07.2017

J U D G E

ARSHAD/