

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. 430 of 2004****Mst. Shahla Kulsoom & another----- Plaintiffs****Versus****Mohammad Ali Akhtar Khan -----Defendant****Dates of hearing: 29.10.2016 & 17.11.2016.****Date of Judgment: 06.12.2016****Plaintiffs: Through Mr. Masood Khan Ghori,
Advocate.****Defendant: Through Ms. Sarwar Jehna, Advocate.****J U D G M E N T**

Muhammad Junaid Ghaffar, J. This is a Suit for Partition under the Partition Act, 1908 in respect of property bearing No. A-20, Block-L, North Nazimabad, Karachi. The property was and still is in the name of Muhammad Jehangir Khan S/o Muhammad Noor Khan and plaintiffs are wife and daughter of Late Dr. Mohammad Iqbal Khan S/o Late Muhammad Jehangir Khan, whereas, initially there were two defendants namely Mst. Khairunnisa widow of Late Muhammad Jehangir Khan and Mohammad Ali Akhtar Khan S/o Late Mohammad Jehangir Khan. During pendency of these proceedings, the defendant No.1 Mst. Khairun Nisa expired and her share stood devolved to the plaintiffs and surviving defendants. The plaintiffs and defendants are admittedly legal heirs of Late Mohammad Jehangir Khan. In short as of now there are two shares in the property one of defendant and the other of both the plaintiffs, which is to be distributed amongst both of them according to Shariah, however, subject to the claim of defendant that he had paid off the share of his deceased brother through a settlement during his life time.

2. It is the case of the plaintiffs that they are co-sharers/owners of the Suit Property, however, the defendant has deprived them from the joint possession of the property and from their legal shares as being widow and daughter of deceased Dr. Muhammad Iqbal Khan son of Late Muhammad Jehangir Khan. It is further stated that they tried their level best to resolve the controversy after death of their husband/father but for one reason or the other the same could not be resolved, hence instant Suit with the following prayers:-

- a) A preliminary decree be passed declaring proper shares of the plaintiffs and the defendants and a commissioner / receiver be appointed to take charge of the property and other assets of deceased and for partition of the Suit property by metes and bounds to put the plaintiffs and defendants in separate possession of their respective total shares in the Suit property bearing House No.A-20, admeasuring 233.33 Sq. Yds., situated at Block "L", North Nazimabad, K.D.A. Scheme No.2, Karachi (Central) and / or in the alternate to sale the property by auction and to distribute the proceeds thereof to the plaintiffs and the defendants according to their respective shares as mentioned here in above.
- b) A final decree for partition be passed, directing the plaintiffs and defendants to be put in separate possession of their total joint respective shares by metes and bounds in the Suit property bearing House No.A-20, Block "L", North Nazimabad, Scheme No.2, Karachi situated at K.D.A Scheme-2, North Nazimabad, Karachi or in the alternative order to sell, dispose off the entire property and the plaintiff be given their shares according to Muslim Personal law.
- c) For any better or further relief or reliefs which this Honourable Court may deem proper and fit under the circumstances of the case.
- d) Cost of the Suit.

3. After issuance of summons and notices and filing of written statement, the following Issues were settled on 22.02.2005 by the Court:-

- i. Whether the parties to the Suit are legal heirs of late Dr. Muhammad Iqbal Khan?
- ii. Whether the deceased left behind any assets and properties, if so asset and property?
- iii. Whether any of the party to the Suit is entitled to the property claimed in Suit, in his/her own, if so under what title and authority?
- iv. To what share each of the party to the Suit are entitled?
- v. What should the judgment and decree be?

4. The evidence was recorded through commission, wherein, the respective parties led their evidence through witnesses. The plaintiff No.1 Mst. Shahla Kulsoom was examined as P.W-1, Mst. Ruqayya Bibi as P.W- 2 and Irfan Ahmed Khan as P.W-3. Thereafter the defendant No.1 Khairunnisa (since deceased) was examined D.W-1, Defendant No.2 Muhammad Ali Akhtar Khan as D.W-2, Jawaid Yousuf Khan as D.W-3.

5. Learned Counsel for the plaintiffs has contended that husband/father of the plaintiffs committed suicide in the year 2003 due to rift when his brother/defendant, had refused to give him his share in the property as admittedly till today the said property is in the name of Late Muhammad Jehangir Khan, their father. Learned Counsel has referred to Ex.D-2/23 dated 24.5.1956 and has contended that admittedly the Suit plot was allotted to Late Muhammad Jehangir Khan. He has further contended that all along the plaintiffs were residing in the Suit Property and it is only after the unfortunate death of their husband/father that they were thrown out by the defendants and since then they are making efforts in getting the due share in the Suit Property. Learned Counsel has further contended that neither any agreement of settlement as alleged by the defendants was reached by Late Dr. Muhammad Iqbal Khan with the defendant, nor the amount of Rs.50,000/- was ever paid in lieu of any such alleged settlement. Learned Counsel has read out the cross-examination of P.W-2 Ruqaya Bibi and P.W-3 Irfan Ahmed Khan and has contended that their evidence has not been shaken, therefore, the contention of the defendant that the matter was settled by Late Dr. Muhammad Iqbal Khan in his life time is belied and is not proved. He has further contended that since the defendant claims to have settled the share of deceased Late Dr. Muhammad Iqbal Khan, therefore, the burden lies on the defendants to prove that any such settlement was reached. Learned Counsel has further submitted that neither any counter claim has been filed by the defendant nor a separate Suit for benami, nor any issue to that effect has been raised or settled in this matter, therefore, a decree be passed for distribution and/or partition of the Suit Property according to Shariah.

6. On the other hand learned Counsel for the defendant has contended that it is not in dispute that the plot in question was purchased by Late Muhammad Jehangir Khan but it is the case of the defendant that the construction was raised through his resources, whereas, the repayment of loan obtained by Late Muhammad Jehangir Khan from House Building Finance Corporation was also paid by him. She has referred to the evidence of D.W-1 deceased Khairunnisa (defendant No.1) and D.W-2, the present defendant. She has also referred to Ex.D-2/5 and D-2/17 and has contended that Rs.50,000/= was admittedly paid to Late Dr. Muhammad Iqbal Khan as a settlement of his share and therefore, the plaintiffs cannot claim any further share in the Suit Property.

7. I have heard both the learned Counsel and perused the record. My Issue-wise findings are as under:-

Issue No.1: *Whether the parties to the Suit are legal heirs of late Dr. Muhammad Iqbal Khan?*

8. Insofar as this issue is concerned perusal of the pleadings as well as the evidence reflects that the same stands admitted to the effect that both the plaintiffs are legal heirs of Late Dr. Muhammad Iqbal Khan and therefore this issue is answered in affirmative to the extent that the plaintiffs are legal heirs of Late Dr. Muhammad Iqbal Khan and entitled to his share in the Suit property.

Issue No.2: *Whether the deceased left behind any assets and properties, if so asset and property?*

9. Perusal of the plaint and the relevant documents reflects that in fact instant Suit is not in respect of any assets or property left by the deceased Late Dr. Muhammad Iqbal Khan and it is only in respect of his share in the property of his father and therefore the issue is answered accordingly.

Issue No.3. *Whether any of the party to the Suit is entitled to the property claimed in Suit, in his/her own, if so under what title and authority?*

10. In fact this is the main issue between the contesting parties and it requires adjudication by this Court. Insofar as the Suit Property is concerned there is no dispute that as of today, it is still in the name of Late Muhammad Jehangir Khan, who was the original allottee and was father of plaintiffs' husband/father and the defendant. Both the parties to the Suit are the legal heirs of Late Muhammad Jehangir Khan and admittedly entitled to their shares in the property according to Shariah. The only dispute which is before the Court is, that whether the defendant and Late Dr. Muhammad Iqbal Khan husband/father of the plaintiffs had settled the share in the property, and if so, then whether the defendant is now the absolute owner of the property. The defendant's claim is that he had paid Rs.50,000/- through a cross cheque to deceased Dr. Muhammad Iqbal Khan and had also offered him an apartment/flat as agreed upon between the parties, and therefore the plaintiffs are not entitled for any share in the Suit Property. It is also the case of the defendant as pleaded in the written statement that firstly the construction on the Suit Property was raised through his funds, and secondly, the loan of HBFC also repaid by him on behalf of his late father. On the other hand, the plaintiffs' case is that neither the construction was raised by defendant nor the loan was repaid by him, whereas, the defendant never paid Rs.50,000/- to the husband/father of the plaintiff. Perusal of the Order(s) passed in instant Suit reflects that initially when this Suit was filed, the parties were called before the Court and an attempt was also made to resolve the dispute and so also for passing a preliminary decree in this matter in terms of Order 20 Rule 18(2) CPC, however, this did not materialized. In this regard it would be advantageous to refer to Orders dated 05.09.2008 and 31.10.2008, which reflects that to a certain extent there is an admission on the part of the defendant insofar as the plaintiffs' share is concerned. The said orders read as follows:-

Order dated 05.09.2008.

"I have heard the learned counsel for the parties to some extent. The dispute between the parties, who are inter se related, is with regard to partition of the Suit property between legal heirs of one brother with the other brothers. Learned counsel for Defendant No.2, on instructions, states that during the life time the brothers have settled the dispute and the deceased brother agreed to accept a flat and some cash in lieu of his

share in the Suit property. He submits that the said flat is still available and can be handed over to the plaintiffs. He also submits that the defendant is also ready to pay some compensation to the plaintiffs.

The above offer is not acceptable to the learned counsel for the plaintiffs. It will be appropriate that before proceeding further both the parties may be called to the Court in person on the next date of hearing to explore possibility of an amicable settlement of the dispute. Order accordingly. To come up on 17.09.2008 when both the parties are directed to be present in Court personally.”

Order dated 31.10.2008.

“On the last date, the matter was adjourned as there appears some likelihood of settlement between the parties.

Learned counsel for the plaintiffs states that flat which was offered by the defendant the value of which is not in accordance with the shares of the plaintiffs in the property in question. He then submits that Nazir may be appointed to evaluate the value of the property. The defendant states that he is retired person and is not in a position to offer anything more than offered on 5-0-2008.

The plaintiffs are claiming their share in the property bearing No.A-20, Block-C, North Nazimabad, Karachi which originally belongs to Muhammad Jehangir Khan father of the husband of plaintiff No.1 and the defendant. After the filing of the Suit the widow of Muhammad Jehangir Khan was also expired and her share devolved on the plaintiffs and the defendant. The defendant states that in terms of agreement executed by deceased Muhammad Iqbal Khan which is available as annexure D-2/5 of the written statement the deceased has settled the right of inheritance with him and the plaintiffs are only entitled to their share in terms of that agreement. The plaintiffs are disputing the said agreement. The learned counsel for the plaintiff states that the plaintiffs are interested in their share and in case the defendant pay their shares, they are not interested in disposal of the property.

Keeping in view the nature of the dispute, it will be appropriate to appoint the Nazir to evaluate the present market value of the Suit property so that the shares of the plaintiffs be determined. The question whether the plaintiffs are entitled to any share in the property will be decided after hearing the parties on merits. The fee of the Nazir will be Rs.5000/- to be paid by the plaintiffs. Report be submitted within ten (10) days. To come up on 25.11.2008.”

However, thereafter for one reason or the other, the matter could not be resolved and since then it is coming up for final arguments for decision on the basis of evidence led by the parties.

11. The then the defendant No.1 deceased Khairunnisa, who was alive at the time of evidence had filed her affidavit-in-evidence and was cross-examined by the learned Counsel for the plaintiff and she has stated that **“It is correct that Plot of House No.A-20, Block-L, North Nazimabad was allotted in the name of my**

husband. I do not know that my husband had obtained permission from KDA for mortgaging the plot. However, he had obtained loan for construction of the house. He has obtained loan from House Building Corporation. I do not know what was the amount of loan. I do not remember the exact year when the house was constructed but it was constructed when my son Muhammad Iqbal was school going. At that time my son Muhammad Ali Akhtar had already passed matriculation examination while Muhammad Iqbal was still school going. The loan of House Building Corporation was repaid by my son Muhammad Ali Akhtar. It is incorrect to suggest that the loan was not refunded by Muhammad Ali Akhtar but by my husband. Voluntarily says that Muhammad Ali Akhtar was the guarantor for the said loan". Though she has appeared in the witness box and made such statement but nothing has been brought on record to substantiate this contention that the loan obtained by Late Muhammad Jehangir Khan was repaid by the present defendant. Mere verbal assertion of this witness without any corroborating material cannot be accepted as admittedly the loan was repaid to HBFC in the name of Late Muhammad Jehangir Khan. Coming to the evidence of D.W-2 (the present defendant), it appears that in fact the said witness has admitted in his cross-examination that he has not been able to produce documents to substantiate his stance that the expenses were incurred through his resources for construction of the Suit Property. The witness goes on saying that **"It is correct that my father deposited the installments of loan vide Ex.D-2/32 to D-2/38 in the above Bank. Voluntarily says that all these payments were arranged by me"** and similarly says that **"it is correct that I have not produced approved plan of the construction raised on the Suit plot. I have also not produced any document in proof of the expenses incurred by me on the above construction"**. Once again he says that **"It is correct that I had not filed any Suit regarding the subject property against my father late Jehangir Khan. I had also not filed any Suit against Dr. Muhammad Iqbal or his legal heirs"** and finally he further says that **"It is correct that no flat in the**

name of deceased Dr. Muhammad Iqbal Khan was purchased. It is correct that the alleged flat is neither in the name of Dr. Muhammad Iqbal nor in the names of his predecessor. It is correct that the Sale Agreement of that flat and the registered Power of Attorney is in my name. It is correct that the said flat is rented out and that I am realizing rent and that the income from the said flat was never realized by Dr. Muhammad Iqbal or his legal heirs". Perusal of the evidence led by the defendants clearly reflects that though they have asserted that the construction was raised through resources of defendant No.2 and so also the loan was repaid by him, but neither any corroborating material has been brought on record nor any acceptable and convincing evidence has been led in this regard, rather the witness (D.W-2) admits that I have not produced any such document in proof of the expenses incurred by me on the above construction. Therefore, insofar as this contention of defendant is concerned, the same is not proved as it has come on record that the property is still in the name of Late Muhammad Jehangir Khan. The witness was also confronted by the learned Counsel for the plaintiffs that whether any proceedings were initiated by him to prove that the Suit Property is benami and he is the actual owner to which he has replied in negative. This also goes against the stance of defendant, therefore, now it is only to the extent of the settlement allegedly reached between the parties by virtue of which the defendant claims that he had paid Rs.50,000/= and had also offered a flat in lieu of total settlement as agreed upon for Rs.1,75,000/-, that this Court has to decide. In support of this contention, the defendant has exhibited D-2/5, which is a receipt purportedly issued by deceased Late Dr. Muhammad Iqbal Khan, husband and father of the plaintiffs dated 28.12.2002, according to which an amount of Rs.50,000/- was paid through Cheque No.0367647 dated 28.12.2002 to UBL Gulshan-e-Zubaida Branch, Karachi. The defendant has also exhibited D-2/17, which is Bank Statement, which reflects that the said cheque was debited from his account on 31.12.2002. He has also examined the two signatories of the Receipt i.e. Khairunisa (the then defendant No.1) and another independent witness Muhammad Javed Yousaf, who

is D.W-3. The witness (DW-1) was cross-examined by the learned Counsel for the plaintiff and the evidence led by the said witness has not been shaken, who has categorically stated that compromise was reached and the amount of Rs.50,000/- was paid to deceased Late Dr. Muhammad Iqbal Khan. Similarly, other witness (D.W-3) to the said receipt also came in the witness box and affirmed that this amount was paid to Late Dr. Muhammad Iqbal Khan, Therefore, insofar as settlement to the extent of paying Rs.50,000/= is concerned the same has been proved and established by the defendant with certain corroborating material including the receipt and the bank statement as well as the evidence of the two signatories to the receipt, which has shifted the burden upon the plaintiff to prove it otherwise and on perusal of their evidence, it appears that they have not been able to dislodge the claim of defendants in this regard. They neither brought any of the bank official(s) nor the bank account details of Late Dr. Muhammad Iqbal Khan to rebut the contention of defendant that the cheque was not credited in his account. Insofar as other part of the settlement as allegedly entered into between the parties i.e. the flat in question is concerned in fact it has been admitted by the defendant in his cross-examination that the flat was not purchased in the name of Late Dr. Muhammad Iqbal Khan and presently it is in his name through a Sale Agreement and Power of Attorney and he has realized the rent. Therefore it can be safely concluded that the plaintiffs' share out of the Suit Property has only been paid to the extent of Rs.50,000/- and not beyond that. Accordingly Issue No.3 is answered by holding that the Suit Property was owned by Late Muhammad Jehangir Khan, the father of husband/father of the plaintiffs and the defendant, whereas, both the parties i.e. plaintiffs and defendants are entitled for their shares in the Suit Property. However, with the exception of Rs.50,000/- which was paid by the defendant to deceased Dr. Muhammad Iqbal Khan.

Issue No.4: *To what share each of the party to the Suit are entitled?*

12. In view of the finding given in respect of Issue No.3, this issue is answered by holding that both the parties to the Suit are entitled for their shares according to Shariah read with the aforesaid observation in respect of Rs. 50,000/- paid to deceased husband / father of the plaintiffs. Since in this matter the possession of the Suit property has all along been enjoyed by defendant to the exclusion of plaintiffs, it would be in the interest of justice, equity and fairplay that no markup is awarded on the said amount of Rs. 50,000/-, for which perhaps, under ordinary circumstances, the defendant may have been entitled.

Issue No.5. What should the judgment and decree be?

13. In view of hereinabove discussion, instant Suit is decreed to the extent of prayer clause "B", for partition of the Suit Property by appointing the Nazir of this Court as Administrator with the mandate to partition the Suit property with metes and bounds, if possible, and then to allot actual share by division and separate possession. If the property cannot be partitioned with metes and bounds, then Nazir is authorized to carry out sale of the property in accordance with the rules. Both the parties to the Suit are at liberty to apply / approach the Nazir to buy out share(s) of other, and if not, then property be sold through open auction, whereafter, the amount be distributed amongst the legal heirs according to their respective share(s). However, in both the situations the plaintiffs are liable to pay Rs.50,000/- to the defendant through Nazir. Such exercise be carried out by the Nazir preferably within 60 days, whereas, Nazir's fee is settled at Rs.50,000/- which shall be borne equally by the respective parties.

14. Suit stands decreed in the above terms.

Dated: 06.12.2016

J U D G E