

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.652 of 2007

Date	Order with Signature of Judge
Present: Mr. Justice Nazar Akbar	
Plaintiff No.1	: Shaikh Aftab Ahmed
Plaintiff No.2	: Nasreen Akhtar (since deceased) Through LRs.
Plaintiff No.3	: Yasmeen Mehmood
Plaintiff No.4	: Mrs. Saleem Aftab (Since deceased) through LRs. All through Mr. Shahnawaz Hussain Advocate.
Defendant No.1	: Usman Ahmed
Defendant No.2	: Mrs. Nasim Bhatti
Defendant No.3	: Mrs. Tasneem Faisal All through Mr. Arif Khan, Advocate.
Date of hearing	: 19.12.2017
Decided on	: 10.01.2018

JUDGMENT

NAZAR AKBAR, J. Plaintiffs had filed this suit for Partition Mense Profit, Permanent Injunction and Declaration valued at Rs.75 Million in respect of a property owned by their mother at the time of her death.

2. Brief facts of the case are that the plaintiffs and the defendants are real brothers and sisters and legal heirs of deceased Shaikh Basheer Ahmed and Mst. Khursheed Begum alias Surraiya Khanum. Their mother died on **24.7.1979** leaving behind two properties i.e **(a)** Bungalow No.D-9, measuring 1100 sq. yds.

situated at Jigar Muradabadi Road, Karachi (the suit property) and **(b)** Leasehold rights in land measuring 21418 sq. yds. in survey No.4402 old I-8/PO.4 situated at Lawrence Road, Karachi. The mother of the parties had died during the life time of their father. There was hardly any dispute between the parties for partition of the assets left by their deceased mother as long as their father was alive. However, after death of their father, who died on **02.09.1989**, a petition for Letter of Administration (SMA No.28/1990) in respect of the aforesaid properties in the name of their mother was filed by all the legal heirs before the High Court of Sindh at Karachi. The High Court at the joint request of the parties by order dated **18.3.1990** granted the said SMA subject to furnishing surety. However, for want of surety, by another order dated **20.10.1991** it was consigned to record. The property mentioned at serial No.(b) above was amicably sold out by the parties and the shares were distributed. The property i.e Bungalow No.D-9 measuring 1100 sq. yds situated at Jigar Muradabadi Road, Karachi was in possession of defendant No.1 alone, who was not ready to give share by inheritance to the rest of legal heirs of Mst. Khursheed Begum according to Sharia. The plaintiffs have repeatedly requested defendant No.1 to give their rights in the suit property but defendant No.1 has kept them on false hopes and false promises. Therefore, the plaintiffs filed the instant suit and prayed for the following relief(s):-

- A. *To declare that the Deceased mother of the parties namely Khursheed Begum alias Surraiya Khanum was the owner of Property No.D-9, Jigar Muradabadi Road, Karachi measuring 1100 Square Yards or thereabout.*
- B. *To declare that the Plaintiffs and the Defendants being the sons and daughters of the Deceased Khursheed Begum alias Surraiya Khanum are entitled to inherit their respective shares in the immovable property D-9,*

Jigar Muradabadi Road, Karachi and all movable properties antiques furniture, fixtures, carpets collected and left by the deceased mother Khursheed Begum alias Surraiya Khanum in the said immovable property.

- C. *For Decree of Mense profit at a rate of Rs.15/- per Square Yards from the date of illegal possession i.e 1990 in favour of all the parties entitled to share till realization.*
- D. *For Decree of Partition of the immovable Property namely D-9, Jigar Muradabadi Road, Karachi measuring 1100 square yards or thereabout. In case the partition of the above property is not possible by meats and bounds the property may be sell through public auction and shares of the plaintiffs and the defendants may be paid to them.*
- E. *For Decree of Movable items lying in the suit property namely, fixtures and furniture having antique value, carpets and painting amounting to Rs.1.5 Million.*
- F. *For permanent Injunction restraining the Defendant No.1 who is in possession of the property in question and all persons calming through defendant No.1 from alienating, encumbering transferring and creating third party interest in any manner in the property in question and other movable properties lying in the said property.*
- G. *Any other better relief/s deem fit and proper favoring the Plaintiffs.*
- H. *Cost of the proceedings.*

3. Defendant No.1 filed written statement wherein he took preliminary legal objections that the suit is not maintainable and denied the claim of the plaintiffs. In fact, he asserted that the leasehold rights in suit property was purchased by the deceased father as Benami owner in the name of deceased mother who was a housewife with no personal economic resources or any source of income whatsoever. It was averred that the deceased father was Chief Engineer at Karachi Port Trust (KPT) at the time of purchase of the said properties and as such he had procured the same from his income and earnings. Even after retirement from KPT the deceased father worked as an Independent Engineering Consultant from his savings from such consultancy work he furnished the suit

property with furniture, fittings and fixtures. Defendant No.1 further averred that both the parents had made an express arrangement and understanding in presence of all brothers and sisters that since they were residing at the suit property with defendant No.1 who looked after them and was also elder brother, therefore, after their death, the same shall exclusively belong to him with no right or claim of any kind whatsoever by any other brother or sister therein. He also claimed that since plaintiff No.1 was younger brother, the deceased father purchased open plot of land bearing No.D-8 in Karachi Administrative Society in his own name and gave physical possession thereof to him. He also funded construction of house thereon for plaintiff No.1. Defendant No.1 asserted that the suit property has been validly and lawfully gifted by the deceased father, being the real owner of the suit property to defendant No.1, who has accepted the same and he is right and lawful owner to the exclusion of any right or claim by any person whosoever. All other pieces of furniture, fixtures and fittings and other items, being old, depreciated and rotting had been disposed of and discarded by the deceased father during his lifetime and the same have been replaced by defendant No.1 from his own earnings and savings.

4. This court from the pleadings of the parties on **08.11.2010** framed the following issues:-

- i. Whether the suit is not maintainable?*
- ii. Whether the suit property was in the name of deceased mother of the parties to the proceedings as Benamidar of the father of the parties?*
- iii. Whether the suit property was gifted by the father to defendant No.1 vide Gift Deed dated 16.6.1982?*

- iv. Whether the subject property being estate of deceased mother of plaintiffs was not included in Petition for Letters of Administration bearing SMA No.28/1990?*
- v. Whether the parties hereto have inherited the suit property and are entitled for the respective share as per Sharia?*
- vi. Whether the plaintiffs are entitled for mesne profit at the rate of Rs.15 per square yard since 1990?*
- vii. Whether the plaintiffs are entitled for the share in movable articles/items lying in the suit property?*
- viii. Whether the Plaintiffs are entitled for the relief claimed?*
- ix. What should the decree be?*

5. On the same date i.e. 08.11.2010, Mr. Muhammad Waqar Lodhi, Advocate was appointed as Commissioner for recording evidence of the parties. Plaintiff No.1 for self and as attorney of plaintiffs No.2 to 4 has filed his affidavit in evidence as Ex.PW-1/2. He filed various documents alongwith his affidavit-in-evidence. All the witnesses of the plaintiffs were cross examined by defence counsel and learned counsel for the plaintiffs closed their side for evidence. Defendant No.1 has filed his affidavit in evidence as Ex.D-1/2. He also filed various documents in support of his case. The plaintiffs' counsel cross examined defendant No.1 and their counsel closed the side of defendants for evidence.

6. I have heard learned counsel for the parties at length and perused the record. My findings on the above issues with reasons thereon are as under:-

Issue No.1

7. Both the parties have not pressed Issue No.1.

Issues No.2 and 3

8. The burden of Issues No.2 and 3 was on defendant No.1, who is the beneficiary of gift deed dated 16.6.1982. Learned

counsel for the defendants contended that the mother being a housewife was unable to purchase the suit property at any point of time and, therefore, father was admittedly absolute owner of the property in dispute and was capable of disposing of the suit property by way of gift being real owner. However, this is an admitted position that the plaintiff and the defendants have filed a Miscellaneous Succession Application No.28/1990 which was supported with the affidavit of defendant No.1 and in the said Succession Petition the suit property was mentioned as one of the properties left by deceased Khusheed Begum alias Suraiya Khanum for distribution among the legal heirs in accordance with Sharia. It is also an admitted position that the alleged gift has been made by the father of both the plaintiffs and the defendants almost three years after the death of his wife Mst. Khursheed Begum. She died on **24.7.1979** and the purported gift deed by the father was executed on **16.6.1982**. The counsel for the plaintiffs has, however, attempted to explain that the suit property was mentioned in the petition for Letter of Administration after clear understanding between defendant No.1 and the other legal heirs that once the succession is granted they would not claim any right or interest in the suit property adverse to the interest of defendant No.1. Unfortunately, before filing of the said SMA or even subsequently no such understanding has been reduced into writing and, therefore, such arguments are not convincing to appreciate that even if the father was a lawful owner and he had rightly exercised his authority to execute the gift deed in respect of the suit property to defendant No.1 then why the property on the basis of gift since **1982** till the death of the donor (father) who died

on **02.9.1989** remained dormant and why it was not disclosed to the legal heirs by the father himself.

9. The beneficiary of the gift was under an obligation to otherwise prove the gift deed independently by producing two witnesses in whose presence the suit property was gifted. None of the witnesses of the declaration of gift has come forward to confirm even their own signatures on the said gift deeds. Defendant No.1 himself has admitted that he do not know who were the witnesses to the gift. In his cross examination he has categorically stated that: *"It is correct that I purchased non judicial stamp paper dated 29.8.1972 from Syed Asghar Ali stamp vendor license No.4 and seat No.58, City court Karachi. The said Asghar Al stamps vendor was of middle aged man at the time of purchasing of said stamp paper. I see the original of Ex: D-1/4 it does bear signature of said stamp vendor. The Ex: D-1/4 does contain names and addresses of the witnesses. I see the witnesses signature on D-1/4 and say that I do not know or recognize who have made the signature. It is correct that Ex:D-1/4 is not supported by any letter of transfer of possession or acceptance. I see Ex:D-1/5 the non judicial paper on which it is typed was also purchased by my from same Asghar Ali stamp vendor license No.4 seat No.58. It is not correct that same does not bear signature of the stamp vendor Syed Asghar Ali."* Two other witnesses produced by defendant No.1 in his support of the Gift Deeds were his wife PW-2 Naseem Usman and his maid Sabra Begum but neither of the two are witnesses of execution of declaration of gift deeds nor the gift deeds were executed in their presence. Both are hearsay evidence. The two witnesses have not even named before whom the gift deed had been executed by the

deceased father. The perusal of the gift deed suggests that despite the fact that the plaintiffs and the defendants are two brothers and five sisters but none of them was witness to these family gifts. One of the gifts is stated to have been executed in **1972** and even in this gift, the mother, who was then alive, was not even a witness to it. In none of the two gift deeds, a date of such declaration and the presence before whom such declaration was made have been mentioned in the body of the declaration of gift deeds. There is no date and time of pronouncement of gift on any of the gifts relied upon by defendant No.1. In view of the evidence produced by the defendant, in my humble view, the burden of proof in terms of **Article 79** of Qanun-e-Shahadat Order 1984 has not been discharged. Therefore, both the issues are decided against defendant No.1.

Issues No.4 and 5.

10. The above discussion on issues No.2 and 3 and the admitted documents Ex:P/3 which is the petition for Letter of Administration bearing SMA No.28 of 1990 clearly showing the suit property is mentioned in para-2 of the petition is enough to conclude that the suit property was included in the said SMA, therefore, as logical consequence Issues No.4 and 5 are decided in affirmative. The suit property is to be distributed among all the plaintiffs and the defendants in accordance with Sharia applicable to the parties.

Issue No.6, 7 & 8.

13. Defendant No.1 being one of the legal heirs was in lawful possession of the suit property both during the life time of his parents and after their death. He has never denied the plaintiffs

and/or defendants to enjoy the possession. At least there is no such allegation against defendant No.1 that they had been removed from the possession of the suit property. Even otherwise an owner by inheritance in possession of an immovable property, Defendant No.1 cannot be compelled to pay mense profit to the other co-owners also by inheritances and they were not enjoying possession of the suit property by their own choice. The question of share by way of inheritance in movable properties does not arise in the given facts of the case. Admittedly, mother has died in **1979** and the father had died in **1989** and the suit was filed in **2007**, that is to say after more than 30 years and as such neither the fittings and fixtures are supposed to be intact for inheritance nor any evidence has been led by the plaintiff to identify the same, therefore, issue No.6 and 7 are decided in negative and against all the plaintiffs and defendants except defendant No.1. Consequently, the plaintiffs and all the defendants are entitled to their respective shares only in the immovable suit property according to sharia.

Issue No.9.

12. In view of the above, the suit of the plaintiffs is decreed only to the extent of prayer clause A, D and F.

J U D G E

Karachi,
Dated: 10.01.2018