

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 818 of 1998

Date	Order with signature of Judge
Plaintiff	: Haji Muhammad Yunus Through Mr. Asim Iqbal, advocate.
Defendant No.1	: Haji Usman Through M/s.Anwar Tariq & Riaz Ahmed, advocates.
Defendant No.2	: Abdul Sattar Through Mr. M. Akram Javed, advocate.
Date of hearing	: 07.12.2017
Decided on	: 07.12.2017

JUDGMENT

Nazar Akbar.J,- This is a suit for declaration, injunction and partition of an immoveable property between the plaintiff who is first cousin of defendant No.1 and nephew of defendant No.2.

2. Brief facts of the case are that the plaintiff's father and defendant No.2 were brother of Late Zulekha Hajiani, mother of Defendant No1 and it is averred that a plot No.D-1, Dawood Cooperative Housing Society Ltd., Karachi admeasuring 1034 sq.yards was ostensibly acquired in the joint names of (i) Zulekha Hajiani and Defendant No.2 in **1971-72**. Later on it was sub-divided into two equal portion of 517 sq.yds each, by private arrangement. Two separate bungalow ground + first floor were constructed on the said two plots in **1972-73** (hereinafter same are referred to as Bungalow No.D-1 and Bungalow No.D-2 respectively). It is averred by the plaintiff that entire cost of construction of Bungalow No.D-1 measuring 517 sq. yards was borne by late Haji Abdul Rehman grandfather of the plaintiff and defendant No.1 and father of defendant No.2 for the benefit of defendant No.2 whereas the entire cost of construction of ground and first floor of Bungalow No.D-2 measuring 517

sq. yds (hereinafter the suit property) was jointly borne by Late Haji Wali Muhammad Dada father of plaintiff and Zulekha Hajiani, (mother of defendant No.1). It is averred that by an oral family settlement and arrangement arrived at in or about **1972-73** to the knowledge of the parties and their family members and common friends, it was confirmed that entire ground floor and first floor i.e Bungalow No.D-1 be awarded to and confirmed to be the property of Defendant No.2 (Abdul Sattar) who is in occupation, possession and enjoyment of the said Bungalow No.D-1 as his own property since its construction. Whereas 25% undivided share in the entire plot with first floor portion of Bungalow No.D-2 (the suit property) be awarded to and confirmed to be the property of the plaintiff (Muhammad Younus) who has been in possession thereof since its construction as its owner and 25% undivided share in the entire plot with ground floor of Bungalow No.2 be awarded to and confirmed to be the property of Late Zulekha Hajiani, (mother of defendant No.1) who alongwith Defendant No.1 has been in possession and occupation thereof as owner since its construction and after her death it came in the possession of the defendant No.1. It is further averred that after the death of Mst. Zulekha Hajiani sometime in **March 1985** the question of distribution of the assets left by Zulekha Hajiani including the ground floor portion of Bungalow No.D-2 between legal heirs of Late Zulekha Hajiani was referred by her heirs for arbitration to a common relative Mr. Haji Abdul Shakoor s/o Haji Aba Omer Dada (hereinafter called the Sole Arbitrator) in writing dated **25.6.1985** though it was Power of Attorney but it was actually a request for Arbitration. The sole arbitrator issued an award under which ground floor portion of Bungalow No.2 was given to defendant No.1 and other heirs of Late Zulekha Hajiani were given cash compensation in lieu of their share of inheritance. The said award has been accepted by all the heirs of Late Zulekha Hajiani. In pursuance of the said award Defendant No.1 alone to the exclusion of other heirs of

late Zulekha Hajiani continues to occupy, possess and enjoy the said ground floor portion of Bungalow No.2 constructed on 517 sq.yds and the first floor thereof continued to be in possession of plaintiff. It is averred that in terms of award a "Mutual Agreement/Family Settlement" Deed was also executed. The plaintiff on **25.2.1998** in order to avoid dispute in future called upon the defendant No.1 to partition the suit property in accordance with shares of the parties but the defendant No.1 has refused to do so and he has denied 25% ownership of the plaintiff in plot of land and first floor. In these circumstances the plaintiff seeks a declaration that he is owner in possession of 25% undivided share i.e. half portion of entire plot (measuring 1034 sq. yards) on which Bungalow No.D-2 measuring 517 sq.yds was constructed. It was also averred that Defendant No.1 & Defendant No.2 are Benami owners of the entire plot with two bungalows as shown in the records but they are owners of only to the extent of their shares/portions. Therefore, the plaintiff has filed the instant suit and prayed for the following relief.

(a) It may be declared that the plaintiff is the owner and in occupation, enjoyment and possession of 25% undivided share in plot of land bearing Plot No.D-1 Dawood cooperative Housing Society and construction of entire first floor of bungalow No.2 standing thereon.

(b) the plot No.D-1, measuring 1034 sq.yds, with bungalows be partitioned in accordance with portions/shares belonging to the parties as mentioned in para-5 of plaint and for that purpose any officer of Hon'ble Court be appointed with direction to partition the same in accordance with the respective share of the parties. The entries to the contrary in the relevant records be declared to be incorrect and liable to be corrected under viz:-

(a) 25% undivided share with first floor of Bungalow No.2 in favour of Plaintiff (b) 25% undivided share with ground floor portion in favour of Bungalow No.2 in favour of Defendant No.1 and (c) 50% undivided share with entire bungalow No.1 in favour of the defendant No.2.

(c) Any other and further orders may be warranted under the circumstances of this case.

3. Defendant No.1 filed written statement and raised preliminary objections about maintainability of the suit on limitation. He averred that property in question was jointly purchased by Mst. Zulekha Hajiani, the mother of defendant No.1 and defendant No.2, her brother and it was duly entered in the record of Dawood Cooperative Housing Society, Karachi on **25.7.1972** in their names and no right, title, interest in it at any point of time was created in favour of Hai Wali Muhammad, the father of the plaintiff. The story of family arbitration and settlement deed was denied and the possession of plaintiff was only of a licensee and not as an owner. The plaintiff suit challenging the transaction of **1972** and claiming title to the extent of 25% share on frivolous ground of construction raised by his father and so-called Award and/or Family Settlement deed in **July 1985** is hopelessly time barred.

4. Defendant No.2 also filed written statement and raised preliminary objections that plaintiff has no cause of action against defendant No.2 and also that the suit is time barred. It is urged that defendant No.2 is the exclusive owner of 50% undivided share in the entire plot measuring 1034 sq. yds as it presently stands in the official records. However, the defendant No.2 has no objection if the said plot No.D-1 measuring 1034 sq. yds is partitioned provided that the entire one-half portion measuring 517 sq. yds adjacent to Dawood Public School with the entire construction thereon and referred to as Bungalow No.D-1 is declared as the exclusive property of defendant No.2 and defendant No.2 be declared exclusive lawful owner of one-half (50%) in the said plot.

5. On **12.4.1999** out of the pleadings of the parties following issues were settled by this Court.

1. Whether the plaintiff has no locus standi and no cause of action to bring this suit and whether the suit is barred by limitation?

2. Whether the property in suit was privately divided between the defendants Nos.1 & 2 followed by delivery of possession of their respective portions to each of them?
3. What is the effect of award made by the sole Arbitrator Haji Abdul Shakoor as averred in the plaint?
4. What should the decree be?

The Plaintiff filed his affidavit-in-evidence as P-5/1 and produced an undated Special Power of Attorney as Ex.P/5/2; an undated "Mutual Agreement/Family Settlement" Awad as Ex.P-5/3; undated Award as Ex.P-5/4, also undated affidavits of Shahnawaz, Mst. Rahima Bai, Altaf, Abdul Shakoor Dada and photocopy of notice dated 25.02.1998 as Ex.P-5/5 to P-5/10. Plaintiff also examined two witness namely Haji Abdul Shakoor s/o Umer Dada as PW-2 who produced photocopies of certain documents which were taken on record as 'X' to 'X-4' and Haji Muhammad Yakoob Dada PW-3. Defendant No.1 filed his affidavit-in-evidence as Ex.D/1 and also filed photocopy of Letter dated **25.7.1972** issued by Dawood Cooperative Housing Society to the Administrative Officer Land and Estate Department KDA as Ex.D/2, transfer letter dated **22.10.1974** issued by KDA Ex.D/3, a public notice in newspaper as Ex.D/4, letter dated **05.7.1986** issued by Dawood Cooperative Housing Society to the Administrative Officer Land and Estate Department KDA; as Ex.D/5. Transfer letter dated **06.8.1996** issued by KDA as Ex.D/6 and PT-I Form dated **20.5.1987** as Ex.D/7.

6. I have heard learned counsel for the plaintiff and the defendants, and perused record and evidence. My findings on the above issues with reasons are as follows:-

Issue No.1

7. The burden of proof of issue No.1 was on plaintiff. Mr. Asim Iqbal, learned counsel for the plaintiff has contended that the case of the

plaintiff is that his father has constructed first floor of Bungalow No.D-2 and therefore, in the said Bungalow No.D-2 said Haji Wali Muhammad, father of plaintiff, has acquired half share that comes to 25% on the entire plot No.D-1 DCHS, Karachi. The entire record of construction raised by his father was lying in the office of a joint family business by the name and style of Dada Sons (Pvt) Ltd., in Suite No.218 & 219 Cotton Exchange Building, I.I Chundrigar Road, Karachi. The said office in 2003 caught fire and entire record of construction was gutted. Haji Abdul Shakoor son of Aba Umer Dada (PW-2), has produced documents regarding the incident of fire in the office of Dada Sons and related documents as such lodging of non-cognizance report etc. learned counsel further contended that the said PW-2 has also acted as Arbitrator for distribution of assets of Zulekha Hajiani, mother of defendant No.1, who is presently recorded owner of the suit property alongwith defendant No.2, who owns other half of the original plot measuring 1034 sq. yds. The learned counsel has contends that the claim of the plaintiff was also recorded in the family settlement deed as well as the award given by Haji Abdul Shakoor (PW-2), who was appointed Arbitrator by the legal heirs of Mst. Zulekha Hajiani, mother of defendant No.1, the recorded owner of Bungalow No.D-2 at the time of her death. He clarifies that Special Power of Attorney whereby Haji Abdul Shakoor was appointed Arbitrator by the legal heirs of Zulekha Hajiani for distribution of her assets amongst her legal heirs confirms that the plaintiff has 25% share in the entire plot and as such irrespective of the fact that the record of expenditure incurred by father of the plaintiff in raising construction of Bungalow No.2, the plaintiff otherwise is entitled to the declaration of ownership to the extent of 25% share. He is in continuous possession from day one when the first floor of Bungalow No.2 was constructed by his father.

8. In reply counsel for defendant No.1 contended that not a single document i.e affidavits and the so called arbitration award by Haji Abdul Shakoor constitutes legal transfer of the suit property in the name of plaintiff. He further contended that the plaintiff is not the sole legal heir of deceased Haji Wali Muhammad. The deceased Haji Wali Muhammad brother of Zulekha Hajiani has been survived by seven sons and daughters and none of them even remotely claimed that the suit property or any part of it was owned by their father on the ground that their father has raised construction of Bungalow No.D-2. Originally the property was purchased in 1972 and it was well within the knowledge of plaintiff's father that it was jointly purchased by his brother Abdul Sattar and sister Hajiani Zulekha. A claim of ownership or share in an immovable property which was never raised by late Hai Wali Muhamad in his lifetime cannot be raised by just one of his legal heirs after 12 years of his death. There is no dispute to the effect that the share of the plaintiff's father in the joint family business has not been handed over to him and other legal heirs of his father. The suit property was owned by Zulekha Hajiani and after her death with the consent / permission of all the NINE legal heirs of Zulekha Hajiani it stand transferred in the record of Society & KDA in **1986** in the name of defendant No.1. Defendant No.1 has even issued public notice in the newspaper before seeking transfer of the entire portion of Bungalow No.2 on half portion of plot No.D-1 in his name in official record and the plaintiff was fully aware of change of hands of the property by inheritance but he has never raised objection to it. Plaintiff has forged and fabricated so-called undated family settlement and award purportedly to be given by Haji Abdul Shakoor. Defendant No.1 has never accepted said Haji Abdul Shakoor as arbitrator nor he has ever been appointed arbitrator since there was no dispute between the legal heirs of Zulekha Hajiani on her death in respect of distribution of her assets. He denied that cause of action accrued on **25.2.1998** when

the plaintiff demanded partition. He contended that the plaintiff never had any legal right in the suit property and therefore, neither he demanded it nor cause of action accrued to him.

9. The perusal of record and evidence suggests that the plaintiff has filed this suit for declaration, injunction and partition in respect of the property in which he never had any legally recognized title in his own right and yet he has prayed for the partition of a plot measuring 1034 sq.yds with two bungalows, separately build on 517 sq. yds each since 1972-73 to be partitioned between the plaintiff (with no title) and defendant No.1 by 25% share each with first floor for plaintiff and ground floor for defendant No.1 of one of the two bungalows (the suit property) and the other bungalow to defendant No.2. In the evidence he has categorically admitted:-

“It is correct to say that the defendant No.2 is the owner of half of the plot No.D-1, DCHS Ltd, Karachi admeasuring 1034 sq. yds and that defendant No.2 is in possession of said portion of house. It is correct that I have no claim as against defendant No.2 namely Haji Abdul Sattar in this suit”.

Plaintiff's above admission shows that plaintiff had no case against defendant No.2, however, he has not given any explanation that why he has impleaded defendant No.2 and why his property was included in the pleadings. On above admission the plaintiff's suit to the extent of **prayer clause (b)** is dismissed. Therefore, the case of plaintiff is now only about declaration of ownership 25% share in the suit property in terms of prayer clause 'A' in the plaint. His claim is based on two grounds. Firstly, his father has built / constructed first floor of the suit property; and secondly there is an arbitration award in which Arbitrator has declared him owner to the extent of 25% share in plot No.D-1 of DCHS and first floor of Bungalow No.D-2.

10. The innocent Plaintiff in 1972 was 22 years of age when he and his father started living in the suit property owned by Mst. Zulekha Hajiani sister of his father. She died on **13.3.1985** and his father has died in **1984**. The plaintiff at the time of distribution of assets of his deceased father did not claim that the suit property or any portion of it was owned by his father at the time of his death on the basis of construction raised by him. He admits in his cross-examination that in 1972 he was 21/22 years young man.

*“I am residing at the address given in my affidavit-in-evidence (Gulshan-e-Iqbal) since 2000. In 1972 I must be having aged of 21 and 22 years. In the year 1972 I had completed my B.Com. It is correct that before filing of this suit in the year 1998 I did check the documents in respect of plots in question with the all concerned departments including Cooperative Society. We are in all seven brothers and sisters. **My father died in the year 1984. I do not know whether my father in his lifetime had ever lodged any claim or his right of ownership** and any other interest in respect of plot in question before any authority and / or any Court of law.”*

“In the year 1972 Mst. Zulekha Hajiani was married and she had children. Her husband Habib was also alive. In the year 1972 Habib was not doing any work or business but his children were in service of M/s. Dada Sons (Pvt) Ltd. Habib had his oil mill at Hyderabad.”

He claims 25% share in the suit property through his father though in 1972 when Zulekha Hajiani purchased the suit property he was grownup man with a degree of B. Com., therefore, it cannot be believed that he was unaware of the fact that who has purchased the suit property. And yet he claims 25% ownership rights on the basis of his father who never claimed it in his lifetime. The relevant portion from the cross-examination of the plaintiff is reproduced below:-

“I claim my right and interest in the property in question on the basis of my father, as he was brother of Mst. Zulekha Hajiani as well as on the basis of purported documents that I have filed with my affidavit in evidence as Ex.P/5/1 to P/5/9. The property in question was originally owned by my father. In fact this property was belonged to M/s. Dada

*Sons (Pvt) Ltd., which was purchased in the names of Mst. Zulekha Bai and Haji Abdul Sattar and money/consideration was paid from company's account. No money was paid by me in respect of plot in question. **It is correct that I have not filed any document showing that this plot was purchased from the (company's) account of M/s. Dada Sons (Pvt) Ltd.,***

The plaintiff in the cross examination has also said that;

“It is correct that Mst. Zulekha Hajiani was also shareholder in the Dada Sons (Pvt) Ltd., I do not know what amount was paid to the heirs of Mst. Zulekha Hajiani who had little shareholding in M/s. Dada Sons (Pvt) Ltd. My father's share was also distributed amongst legal heirs as per his shareholding in the company.”

If for the sake of argument, we presume his father had any title or interest in the suit property to whatever extent, then how he alone can be declared owner of 25% share in the suit property. He should have impleaded his other SEVEN brothers and sisters as legal heirs of his deceased father and prayed for declaration of joint ownership to the extent of 25% in the suit property as per law, but he has not impleaded any of them nor it is the case of the plaintiff that except the plaintiff himself nobody else can inherit assets of his father in the suit property. Therefore, it is not the case of partition of immoveable property amongst the legal heir of deceased Wali Muhammad in terms of **Order XX Rule 13 CPC** for administration of any property for which no limitation is applicable until the property is duly administered by the legal heirs themselves or through the Court. In any other suit outside the ambit of Administration suit the plaintiff has to explain how the relief sought by him in the suit is within limitation.

11. The plaintiff's first prayer is that he may be declared owner in possession of 25% undivided share in plot No.D-1 and first floor of the construction standing thereon. He was residing in the suit property since **1972** and his father has also died in **1984** almost 14 years before filing

of the suit in **1998** and the plaintiff never asserted that he is owner of 25% share in the property in question by virtue of any settlement deed or Award. He has filed the instant suit on **30.06.1998** seeking declaration of his ownership rights in the suit property on the basis of two documents that is so-called mutual agreement / Family Settlement Deed **Ex.P-5/3** and award **Ex.P-5/4**. Both the documents are un-dated. However, he himself has claimed that Ex.P-5/3 and Ex.P-5/4 were drawn sometime in **July, 1985**. The plaintiff is not signatory of any of the two documents. Nor these documents were prepared on his request. Strange, thus the right to seek declaration of ownership on the basis of these documents was accrued in **1985** and at the most within SIX years, the plaintiff should have approached the society for mutation of 25% share in his favour in the record of society but from his own showing he did not even check the record until **June, 1998**. Irrespective of legality or authenticity of Award and family settlement, the plaintiff's right to seek declaration of ownership on the basis of these documents was maximum six years according to **Article 120** of the Limitation Act, 1908. It reads as under:-

120.--Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues.
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The plaintiff has claimed that he has personally examined the official record of Dawood Cooperative Society and KDA then in 1998 when he came to know that the property stands in the name of defendant Nos.1 & 2. He has not filed any proof of the fact that in **June 1998** he has made any application for examination of the documents of the property in the official record of the Dawood Cooperative Society as well as the KDA. Merely by oral assertion that he came to know in **1998** that the property stands in the name of defendants cannot be believed unless he shows that at any point of time prior to **1998** he had reasons to believe that his

father or he was recorded owner of the 25% share in suit property. Even after checking the record he never requested the Dawood Cooperative Housing Society and KDA to enter his name in their record on the basis of AWARD or family settlement. Therefore, limitation to claim ownership of 25% share in the suit property on the basis of these documents has expired in **July 1991**. The right to sue for partition of immoveable property accrues only to the owner against the co-owner irrespective of possession. In the case in hand, the plaintiff was never owner and the documents relied upon by him to claim ownership to the extent of 25% share in the suit property are not title document, nor such documents after more than 14 years can be enforced against the lawful owner of immoveable property.

12. The other contention of plaintiff's counsel that since the plaintiff was in continuous possession of the first floor of the suit property constructed by his father and therefore, he is the owner 25% share in the suit property is misconceived. Raising construction on a piece of land which does not belong to the person raising construction simplicitor would not create right and interest in the plot adverse to the owner of the plot of land. There is difference between residing in an immoveable property and possession of the said immoveable property. The law does not recognize mere possession of an immoveable property as ownership rights. The ownership is dependent on the title documents and not on mere residence / possession of immoveable property. It is indeed a fact and undisputed that he was residing in the first floor of the suit property with his father, but this is also a fact that his father in his lifetime has never claimed to be in possession of the property as owner of the same nor any of the other SEVEN legal heir of deceased father of plaintiff has ever claimed that their father was co-owner to the extent of 25% in the suit property. Therefore, irrespective of the fact that the plaintiff and his

father have been residing in the suit property or in a portion thereof is no ground to recognize them by any definition of law as entitled to ownership to the extent of 25% share. In view of the above facts the plaintiff neither by way of inheritance nor on any other ground has any right for declaration of 25% share in the suit property as owner. Therefore, issue No.1 is decided in affirmative. The plaintiff had no locus standi and cause of action to bring this suit. It was even hopeless the time barred.

Issue No.2

13. In view of the admission of plaintiff quoted in discussion of issue No.1 that the plaintiff has no dispute with the defendant No.2. The plaintiff in fact conceded that there was no dispute with regards to the private arrangement / division of the original suit plot between defendant No.1 who acquired title by inheritance from Zulekha Hajiani and defendant No.2. This private partition was recognized by the Cooperative Society and KDA as it was followed by delivery of possession of the respective portion to each of them. In fact, it was never an issue and the plaintiff even in para-3 of the plaint himself conceded that the entire plot of land was sub-divided into two equal portion of 517 sq. yds each and two separate bungalows consisting of ground + first floor constructed on the two separate portion in 1972-73, therefore, the issue No.2 is answered accordingly.

Issue No.3

14. The burden of issue No.3 was on plaintiff who claimed to be beneficiary of award by so-called sole arbitration Haji Abdul Shakoore. The plaintiff's counsel has hardly referred to these documents during the course of his argument probably knowingly well that the award **Ex.P-5/4** by any stretch of imagination cannot be considered as an award in

respect of any dispute between the parties. Admittedly the so-called award is undated. It does not refer to any dispute between the plaintiff and defendant No.1. Nor it identifies any dispute referred for arbitration to the Arbitrator. Therefore, Ex.P-5/4 has no legal bearing. The so called arbitrator in his cross-examination conceded that;

“it is correct that Ex.P-5/4 there is no mention at all about the plaintiffs claim which is the subject matter of suit”.

Haji Muhammad Younus, the plaintiff himself, was not even party to the so called award and his name is not mentioned on the award. The arbitrator in his cross-examination stated that since there was no dispute between the plaintiff and mother of the defendant No.1 with regard to these properties, therefore, I did not mention name of Haji Younus in the award. The innocence of the sole arbitrator may also be appreciated from the following statement in his cross-examination.

“It is not in my knowledge that plot in question was transferred in the names of late zulekha Bai and Defendant No.2 in the year 1972. It is also not in my knowledge that subsequent this plot was also mutated in the names of Zulekha Bai and Defendant No.2 in the year 1974. It is also not in my knowledge that in the year 1986 house in question was transferred in the name of defendants No.1 and 2.”

The above cross-examination shows the sole arbitrator has not even examined any of the documents in respect of the suit property. The above evidence renders the so called award as of no legal bearing nor it can be considered as an award in respect of suit property in favour of the plaintiff.

Issue No.4.

15. In view of the above, the plaintiff is not entitled to claim 25% ownership rights in the suit property and its first floor. Plaintiff neither had any cause of action nor locus standi to file the hopelessly time

barred suit. Therefore, suit was dismissed by short order dated **07.12.2017** and these are the reasons for the same.

Karachi
Dated: _____
SM

JUDGE

