

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.87 of 2010

*[Muhammad Azam Masood vs. Muhammad Rauf
since deceased through L.Rs Kazim Masood and others]*

Dates of hearing : 18.02.2019, 11.03.2019,
25.03.2019 and 02.10.2019

Date of Decision : 31.01.2020

Plaintiff
[Muhammad Azam Masood] : Through Mr. Ikram Siddiqui,
Advocate.

Defendant No.1
[Muhammad Rauf] : Through Mr. Moulvi Iqbal
Haider, Advocate.

Defendant No.3
[Mst. Tahira Ismail] : Through Mr. Mehmood
Habibullah, Advocate.

Defendant No.6
[Muhammad Haroon] : Through Syed Hassan Jafri,
Advocate.

Defendants No.2, 4, 5, 7 to 12
*[Ali Adil Shah, Mst. Saira,
Muhammad Hashim Masood,
Muhammad Tariq, Muhammad
Shariq, Mst. Sabin Fatima,
Rashid Qureshi, Mst. Kausar
Parveen and Mst. Shazia Irfan].* : Nemo

Case law cited by learned counsel for Plaintiff

Case law relied upon by learned counsel for Defendant No.6.

1. 1986 SCMR page-1349
[Ghulam Nabi vs. Farrukh Latif]
2. 2001 MLD page-1603

[GhulamHaider vs. Mst. Rasoolan]

3. 2006 YLR page-1166 (Lahore)
[Muhammad Asghar vs. Muhammad Ashraf]
4. PLD 1981 Supreme Court page-474
[Shahid Hussain vs. Lahore Municipal Corporation]
5. 1996 CLC page-202 [Peshawar]
[Badar Zaman vs. Sultan]
6. 1994 MLD page-1747 [Karachi]
[Agra Cooperative Housing Society Limited vs. Syed Akhtar Ali and others]
7. PLD 1963 Dacca page-175
[Muhammad Moslemul Haque vs. Commissioner of Income-Tax, East Pakistan]
8. 2000 SCMR page-1391 [Supreme Court of Pakistan]
[Abdul Majid vs. Syed Muhammad Ali Shamim and 10 others]
9. PLD 1982 Karachi page-378
[Messrs Taj Construction Company vs. Federation of Pakistan and 9 others]
10. PLD 2004 Karachi page-595
[Muhammad Farooq Marfani vs. Abdul Qadir Tawakal and 7 others]
11. PLD 1989 Supreme Court page-749
[Barkhurdar vs. Muhammad Razzaq]
12. Unreported Judgment in C.P. Nos.D-904 of 1991 and 898 of 1992.

Other Precedent:

1. 2014 SCMR page-1181
(Rab Nawaz and others v. Ghulam Rasul).
Rab Nawaz case.
2. 2010 SCMR page-1370
*(Khaliqdad Khan and others v. Mst. Zeenat Khatoon and others)****Khan case.***
3. 2008 SCMR page-1318
(Abdul Sattar and others v. Muhammad Ashraf and others).
Ashraf case.

4. 2018 MLD page-1099 [Sindh]
[*Muhammad Ibrahim through Attorney vs. Province of Sindh through Chief Secretary, Government of Sindh, Sindh Secretariat, Karachi and 6 others*]
5. 2014 SCMR page-1210
[*Tahir Hussain and others vs. Ilyas Ahmad and others*]
6. 2017 SCMR page-831 [Supreme Court of Pakistan]
[*Major (R) Pervez Iqbal vs. Muhammad Ram Almas*]

- Law under discussion:
- (1). Islamic Law on Gift.
 - (2). The Transfer of Property Act, [IV of 1882]-**Property Law**.
 - (3). The Co-operative Societies Act, 1925.
 - (4). Code of Civil Procedure, 1908 (**CPC**).
 - (5). Qanoon-e-Shahadat Order, 1984.
[Evidence Law].

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present *lis* has been instituted in respect of a built up property / House No.2209, situated in PIB Colony, Karachi, measuring 195 square yards-‘**Suit Property**’, which Plaintiff and other private Defendants except Defendants No.5 and 6, state that the same was owned by the deceased father of the Plaintiff and Defendants, namely, Muhammad Masood Ahmed. Plaintiff has stated that if the property is not partitionable then it may be disposed of / sold out and the sale proceeds may be distributed amongst Plaintiffs and Defendants except Defendant No.6, because he being in possession of the suit property has so far collected a huge amount towards rentals from different tenants, who were given portions on the ground floor. Plaint contains the following Prayer Clause_

“The Plaintiff, therefore, respectfully prayed that this Hon'ble Court may be pleased to pass Judgment and Decree in favour of Plaintiff and against Defendants as under: -

- a. For partition of the property residential house ground floor plus one along with the nine shops situated on Plot No.2209, Pir Ellahi Bux Cooperative Housing Society, Karachi, measuring 195 Sq. Yds. and determine and effecting the due share of the plaintiff and delivering the executive portion thereof to the plaintiff or in rear portion is not possible or not convenient then in the alternate for sale of the said property and distribution of the due shares thereof to the Plaintiff.*
- b. Decree for amount of electricity, suit gas and property tax from the shares of the occupant building for plaintiff and the defendants No.1 to 10 except the defendant No.6.*
- c. For necessary preliminary and final decree according to law.*
- d. To grant the cost of this suit.*
- e. To grant any other relief or relives which this Hon'ble Court may be pleased deed fit and proper.”*

2. Upon issuance of summons and notices, formal Written Statements were filed by Defendants, except Defendants No.5 and 6, who contested the matter.

3. It is necessary to clarify that the present controversy was originally amongst the children of Late Muhammad Masood Ahmed and Mst. Akhter Fatima. With the passage of time some of the siblings of Plaintiff have passed away and are

succeeded by their children, who are also Defendants, therefore, Plaintiff and those Defendants, who claim that the suit property is an estate left by their father/grandfather and is to be distributed as inheritance, may be referred to as '*Claimants*', whereas, Defendants No.5 and 6, who maintained that the suit property was gifted by the deceased mother in favour of Defendant No.6 (*Haroon Masood*) may be referred to as '*Objectors*'.

4. The record of the case shows that Defendant No.2 has filed a supportive Written Statement to the plaint and another Written Statement was filed on behalf of other Defendants by the said Defendant No.2 on the basis of a Special Power of Attorney, original whereof is appended with the Written Statement.

5. The Defendant No.5 (*Muhammad Hashim Masood*) in his Written Statement has emphasized about other properties at Lahore but he has not disputed the fact that he is residing in the suit property. The main Objector-Defendant No.6 (*Muhammad Haroon Masood*) has pleaded in his Written Statement that the subject property was first gifted by the late father to the deceased mother and then the latter gifted the suit property to him (the Objector). In his Written Statement, he has not disputed the fact, that for some years he received the rentals from tenants of the shops located at the ground floor of the suit property, but all rents were handed over to the late mother of present parties, to meet out her daily expenses and payment of utility bills. It is further averred in the Written Statement as is done by the other Objector-Defendant No.5, that many other properties were given to the deceased parents by different authorities in lieu of settlement of claim,

which also have to be distributed between the legal heirs / parties to the present proceedings.

6. From the pleadings of the parties, following Issues were framed by the Court vide order dated 10.02.2017_

- “1. *Whether the suit is maintainable in its present form?*
2. *Whether the property in question, viz. built up Property/Plot No.2209, Pir Ellahi Bux Cooperative Housing Society, Karachi, measuring 195 Square Yards was in the name of deceased father Muhammad Masood Ahmed at the time of his death on 02.01.1966?*
3. *Whether the property in question was transferred in the name of deceased mother Mst. Akhtar Fatima in the life time of her husband?*
4. *Whether the gift deed (alleged) dated 22.11.1990 (Exhibit “D”) is a valid instrument”*
5. *What should the decree be?”*

7. Even though Plaintiff has filed his Affidavit in Evidence but did not lead the evidence, instead Defendant No.2 (Ali Adil Shah) led the evidence in support of the main stance in the plaint that the suit property is an inheritable property; whereas, both Objectors (Defendant No.5 and 6) testified in support of their case.

8. On 20.09.2010, a Preliminary Decree was passed and thereafter Nazir was further directed to record the evidence. Nazir’s Report dated 09.09.2013 is on record about the evidence proceeding, which was objected to by Defendant No.6, to the extent of certain formal corrections in the Depositions

and availability of some documents in the Record/File submitted by Pir Ellahi Bux Cooperative Housing Society, Limited (**PIB Society**) to Nazir.

9. Findings on the Issues are as follows:

ISSUE NO.1	:	Affirmative.
ISSUE NO.2	:	Affirmative.
ISSUE NO.3	:	Negative.
ISSUE NO.4	:	Negative.
ISSUE NO.5	:	Suit is decreed. There is no order as to costs.

REASONS

ISSUE NO.1.

10. Status of legal heirs *inter se* has not been disputed. With the plaint as well as in the evidence, the last Mutation Order dated 17.03.2003, issued by PIB Society is available, according to which the property has been mutated in the names of Plaintiff and Defendants **and on this basis** either partition or disposition of the suit property is sought. Even though, the Defendants No.5 and 6 /Objectors have disputed this position by claiming that the suit property was earlier gifted to Defendant No.6 (*Muhammad Haroon Masood*), but this issue is yet to be decided in the present proceeding. The above Mutation Order has been challenged by Defendant No.6 in a Suit No.794 of 2011 *sub judice* in the Court of learned IXth Senior Civil Judge (East) in Karachi, as plaint whereof has been produced by the said Defendant No.6 in his evidence as **Exhibit-D/8**, which means, that the mutation dated 17.03.2003 is still in the field and original whereof is available on page-288 in the record of PIB Society File, available with the Nazir of this Court. It is further clarified that vide a Report of Nazir dated 24.02.2011, record consisting of main File and 'Noting Page' relating to the Suit Property was handed over by PIB Society with a covering Letter

bearing Ref: 2209/PIB/83/2011 dated 12.02.2011 to learned Nazir on the Application moved by the Objectors.

Similarly, it is also a settled rule that if a Gift is challenged, in particular, by other legal heirs then onus to prove a valid gift is shifted on the beneficiary / donee; in the present case, the Defendant No.6 (*Muhammad Haroon Masood*).

11. It has not been disputed by any of the Parties in their evidence that the suit property was originally owned by late Muhammad Masood Ahmed, that is, father of Plaintiff and Defendants and grandfather of Defendants No.1(i), (ii); 7, 8, 9, 10, 11 and 12.

12. It is also necessary to consider the arguments of Mr. Hassan Jaffery, learned Advocate for Defendant No.6 (Objectors). The learned Advocate has argued that the suit is to be dismissed because Plaintiff failed to lead the evidence. In support of this submission, he has cited the case law, already mentioned in the opening part of this decision. The case law has been considered, crux of which is that a Court can pronounce decision under Rule 3 of Order XVII, if the Plaintiff fails to lead the evidence; the burden is on Plaintiff to prove his case on the basis of evidence led; pleadings (plaint or Written Statement) themselves cannot be treated as evidence, unless Plaintiff or witness, as the case may be, enters the witness box in support of his claim and/or defence. The reported Judgments are clearly distinguishable, because Parties hereto belong to same family and they are claiming their respective shares in the inheritance; *secondly*, one of the Defendants who fall within the category of Claimants has led the evidence in support of the plaint and stance of the Plaintiff and though the latter

(Plaintiff) does not led the evidence, the nature of present proceeding being that of a partition suit, Defendant No.2 (*Ali Adil Shah*) has the same standing being a legal heir as that of Plaintiff; thus, this argument of learned counsel for the Objectors is devoid of any force. On the contrary, Defendant No.6 claiming to be the Donee/beneficiary of the suit property, which has been challenged by other legal heirs, onus is on him to prove his claim.

13. In view of these facts, **I decide this Issue in Affirmative that the present suit is maintainable.**

ISSUES NO.2 AND 3.

14. The sole witness of Claimant (*Ali Adil Shah-Defendant No.2*) has produced with his Affidavit-in-Evidence/examination-in-chief, the Mutation Letter dated 17.03.2003 and a Letter of same date to Excise and Taxation Office, issued by the above Society. It is necessary to mention that the above documents are available in original in the **PIB Society File at pages-235/251 and 288**, respectively. In both these documents, it is clearly mentioned that the property in question has been mutated in the names of present Plaintiff and Defendants being legal heirs of Muhammad Masood Ahmed (late). The Claimants' witness has specifically testified that in fact the above named father was the original owner and the mother (Mst. Akhter Fatima) was never an owner and thus was not in a position to gift the suit property to Defendant No.6. In his cross examination the said Defendant No.2 has not been contradicted. Significantly, in their cross-examination, both Objectors (*who have led the evidence*) have also acknowledged this fact that there is no ownership document in the name of above named mother. They have

acknowledged that the suit property now stands in the name of all legal heirs (Plaintiff and Defendants). The cross-examination of Defendant No.6/beneficiary of the gift, is also worth consideration because it is *ex facie* contradictory. He in one breath has denied that the suit property was in the name of deceased father but to another question he agreed that at the time of death of deceased father (January 1966), the suit property was not mutated in favour of late mother. The said Objector / beneficiary (Muhammad Haroon Masood) has further admitted that he is unable to produce any paper with regard to the gift of suit property in favour of late mother. It would be advantageous to reproduce relevant portion of cross-examination of above named witness (*Defendant No.6/one of the Objectors*)_

“1. My father was died on Jan/1966. It is incorrect that the property was in the name of my deceased father at the time of his death.

2. It is correct to suggest that till Jan/1966 at the time of death of my father the suit property was not mutated in favour of my mother. I voluntary says that it was in the record of PIB Society Colony that suit property his father gifted out said property to my mother.

3. It is correct to suggest that I cannot produce any paper with regard to the gift of suit property in favour of my mother. Voluntarily says that this gift deed was in against of Haq Mahair, but it can be given in orally according to Sharia.

4. It is correct to suggest that I have not mentioned in my affidavit in evidence that my father gifted PIB Property to my mother in lieu of Dower. Voluntarily I say that in written statement word only gift was mentioned but the word dower is not mentioned.

5. It is correct to suggest that the property given by my father has been given in writing and it is in the society record.

6. Suit property is consisting Ground + One Floor on Ground Floor there are Eight shops and two rooms, with

one kitchen and one bath room. At first floor Four Rooms and some open space.

16. It is in my knowledge that society had mutated the suit property in favour of all the legal heirs of my late father on 18.03.2003. Voluntarily says that I challenged it.

17. It is correct to suggest that I cannot produce any order or letter from society that the names of all the legal heirs have been cancelled from the owner ship. Voluntarily says that the case is pending before the Hon'ble Court.

18. It is correct to suggest that I have not produced any copy of case in Affidavit in evidence.

19. It is correct to suggest that the subject property is still in the name of all the legal heirs in the record of Society. Voluntarily says that it is illegal and under the pressure of Advisor of Chief Minister of Sindh.

20. It is correct to suggest that I have not mentioned in affidavit in evidence the said property is illegally transferred in favour of legal heirs. Voluntarily says that I am absolutely owner of the suit property.”

15. Learned Advocate for Defendant No.6 (*Objector*) argued in favour of Gift and has also filed a chronology of transaction in respect of the Suit Property on 25.03.2019. This chronology is based on the afore-referred Record produced by the PIB Society before the Nazir, which was in his safe custody. During the arguments, the above Original file / record of PIB Society was directed to be produced and tagged with the present record of this *lis*. Relevant page-23 of the Society File shows that after the death of above named father, one of the legal heirs-Muhammad Shah Alam, father of present Defendants No.8 and 9, has filed an Application dated 27.12.1966 that the property may be allotted in the name of mother. On this document the deceased mother put her signature on behalf of minor children, who are now Parties to the present proceeding. On page-25 of this Society File, a copy of the Memorandum is placed, which is issued by the then Honorary Secretary of PIB Society to deceased mother,

communicating her that the Managing Committee of PIB Society was pleased to confirm the allotment of suit plot and its mutation in her favour (late Akhter Fatima widow of late Muhammad Masood Ahmed). Thereafter approval was given by the concerned Authority to the deceased mother for raising construction of residential house. On page-65 of the Society File, an Application dated 15.10.1990 is available, which is filed by present Defendant No.6 claiming to be the allottee of the Plot. On page-71, a Declaration of Gift Document dated 22.11.1990 (*the impugned Gift*) is available presenting that the deceased mother had gifted the property to Defendant No.6. The present Defendant No.6 has signed this document as donee, which is attested by two witnesses, namely, (i) Abdul Majeed Khan and (ii) Jameel Akhter. However, it is significant to note that both these witnesses were never produced by the Objectors in the evidence, to corroborate the version of Defendant No.6, about factum of a valid gift.

16. Since this issue warrants a deeper probe, hence, the above Society File is examined. On page-74 is the Public Notice dated 25.11.1990, purportedly on behalf of above named deceased Mother that the suit property has been gifted to Defendant No.6. At page-78 of the Society File, another Public Notice is available, dated 12.01.1991, on behalf of Plaintiff and other Defendants (siblings of Objectors), informing the public at large that the gift in question is illegal. It is also significant that the first challenge to the gift was raised in the above Public Notice, which was issued in response to the Public Notice dated 25.11.1990, that is, around after two months. This File of PIB Society has a correspondence dated 02.02.1991, addressed by the Society to the Mother (who was alive at the relevant time) that the impugned gift is illegal. Simultaneously, this

information was communicated to Plaintiff and Defendants by another Missive of same date. Relevant portion of this letter, which is *at page-82/85 of the Society File* is reproduced herein under_

“2. With reference to your letter dated 01.01.1991 in which you have submitted your objection on the Public Notice in Daily “Jasarat” dated 12th Jan 1991 was found correct and lawfully. That though the Special Power of Attorney, neither Mst. AkhtarFatmato get the said house No.2209 P.I.B Colony, Karachi in favour of her name nor it could do the same in favour of any legal heir as some of the legal heirs were minors at that time.

3. The previous Management of the P.I.B. Cooperative Housing Society either due to mis-representation or mis-interpretation wrongly, unauthorisedly changed the allotment order in favour of Mst. “Akhtar Fatma” without examining any documents and issuing any notices to the legal heirs of late Mohammad Masood Ahmad. Mutation was illegally made which needs N.O.Gs from all legal heirs of late Mohammad Masood Ahmad.

4. In view of the above facts now the Society desires that names of all the legal heirs of late Mohammad Masood Ahmad be included in the allotment / mutation order in legal way and by Islamic Law of Quran and Sunnah accordingly to be made.”

17. Some of the above mentioned documents are also produced by the Defendant No.6 in his testimony to prove that suit property was owned by the late Mother who later gifted it to Defendant No.6. Gift Document is Exhibit D; above Memorandum issued by PIB Society about mutation in the name of deceased mother, is Exhibit D-P/1; Approval of Building Plan dated 21.12.1982 is Exhibit-D/3. But most significant are the official documents referred herein-above, Mutation Letter and Correspondence of 17.03.2003. This last mentioned Document of PIB Society (at page 235/251 of the Society File) clearly states that this mutation has been done in pursuance of Special Meeting of PIB Society held on 15.03.2003, which is approved the

implementation of Court order dated 01.11.2002 passed in ABN Case No.122 of 1993 and in Execution Application No.15 of 1995.

In the Affidavit-in-Evidence/examination-in-chief of Defendant No.6 (*purported beneficiary of the gift*), it is mentioned that the Claimant challenged the gift by filing an ABN Case No.01 of 1993 (*new No.122 of 1993*). It is further testified by the said Defendant No.6 that the decision in favour of Claimants is based on misrepresentation and fraud because the deceased mother filed a subsequent Case-ABN Case No.125 of 2002 “for cancellation of ABN Case No.122 of 1993”, which was decided in favour of the deceased mother. Subsequently, the Claimants filed an Application to Advisor to Chief Minister and he illegally set aside the Award passed in favour of the deceased mother, which was challenged in a Constitutional Petition No.D-668 of 2003, but it was subsequently withdrawn though fraudulently and by manipulation.

18. The above testimony of Defendant No.6 (*Objector/purported beneficiary of the gift*) has been examined. In his cross-examination, the Defendant No.6 has acknowledged that it is in his knowledge that the suit property has been mutated in the name of all legal heirs of deceased father. He has stated that he has challenged that subsequently. He has produced copy of Suit No.794 of 2011 with his examination-in-chief as **Exhibit-D/8**, which is still *sub judice*, as already mentioned in the foregoing paragraphs. The above suit filed by the present Defendant No.6 as Plaintiff, obviously is a counter blast to the present case, where he has challenged the mutation dated 17.03.2003 in a Suit filed in the year 2011. However, the said suit is to be decided on its own merits.

19. The Defendant No.6 / Objector has produced the Award dated 04.12.2002 passed in Arbitration Case No.125 of 2002 (preferred by the deceased mother) as **Exhibit-D/7**. This Award has declared the earlier Award handed down in ABN Case No.01 of 1993 (as mentioned in the foregoing paragraphs), as null and void, while decreeing the case in favour of deceased mother. Further proceeding in respect of this Award as deposed by the said Defendant No.6 and argued by his learned Advocate, can only be considered, if the validity of this subsequent Award passed in ABN Case No.125 of 2002 (**Exhibit-D/7**) is decided positively.

20. The original Award given in ABN Case No.122 of 1993 is available in the PIB Society File, at page-174. The gist of this Award is that the suit property is held to be an estate left by the above named deceased father which is to be mutated in the name of all legal heirs including the above named mother and earlier mutation made in her favour was set aside. The Award itself shows that present contesting parties were duly notified about the proceeding in terms of Section-54 of the Cooperative Societies Act, 1925. After examining record it was determined in the above Award that the suit property was fraudulently transferred in the name of mother only because at the relevant time some of the children were minors. This Award is of 05.03.1994. The Official Record as available in the Society File is considered. From the undisputed record it appears that when the said Award (hereinafter referred to as the **earlier Award**) was executed by the learned Trial Court vide its order dated 12.10.1996, the same was challenged in Civil Revision Application No.31 of 1997, by the deceased mother and present Objectors, which Revision Application was also dismissed on **29.07.1999**. Thereafter there is a complete silence on the part

of Objectors for almost three years, when the deceased mother opted to file above Arbitration Case No.125 of 2002, which was decided in her favour, as already stated in the preceding paragraphs. Under Section 56 of the Societies Act, 1925 (ibid), an aggrieved party can challenge the Award in Appeal within thirty (30) days from the date of Award. Admittedly, **no Appeal was preferred by the deceased mother and the present Objectors against the earlier Award.** This subsequent Award passed in ABN Case No.125 of 2002 is of no consequence as it is adversely affected/hit by the doctrine of collateral proceedings, as developed through numerous judicial pronouncements, including (i) 2017 SCMR page-831 and (ii) 2018 MLD page-1099 [*supra*], crux of which is, that it is a settled rule, when a final decision is passed by a competent court, tribunal or any other authority having jurisdiction in a case and if a party has not preferred a remedy before higher forum as envisaged in the scheme of a statute governing (relating to) the dispute, then the sentences awarded in cases, having attained finality, the same cannot be agitated in a collateral proceeding.

21. In view of the above, the arguments advanced by learned Advocate for Defendants No.5 and 6 (Objectors) about the illegality of decision given by the Advisor to Chief Minister for Cooperative Societies, who has set aside the Award passed in subsequent ABN Case No.125 of 2002 (*supra*), is misconceived in nature, because the subsequent decision of Advisor to Chief Minister and challenging the same by the deceased mother in above mentioned Constitutional Petition, is of no consequence, in view of the above discussion. Subsequent proceeding of ABN Case No.125 of 2002 and its decision was itself patently illegal. Thus, the unreported Judgment

handed down by this Court in Constitutional Petitions No.904 of 1991 and 898 of 1992, cited by learned Advocate for Defendants No.5 and 6, is distinguishable and rule laid therein is not applicable to the facts of present case. Consequently, it has been proved from the appraisal of the evidence adduced by the parties as well as the undisputed record of PIB Society, that the above named deceased father of Plaintiff and Defendants was the allottee/owner of the suit plot and the same was not transferred in the name of deceased mother (Mst. Akther Fatima) in the life time of her husband. Hence, **Issue No.2 is answered in Affirmative and Issue No.3 in Negative.**

ISSUE NO.4.

22. The undisputed fact is that suit property at present stands in the name of legal heirs, including the present Objectors. Even though Defendant No.5 has supported the case of Defendant No.6 in his pleadings, but his (Defendant No.5) credibility was impeached during evidence. In his Affidavit-in-Evidence / Examination-in-Chief he has stated that Suit Property cannot be partitioned because it has shares of more than thirteen legal heirs. He has repeated this assertion in paragraph 5 of his Affidavit-in-Evidence in the following words_

“ I say that all the immoveable properties in Lahore and the suit property are liable to be partitioned/soldout, and distributed the respective shares among the legal heirs out of the sale proceed of aforesaid properties, and not only the suit property.”

It is a proven fact that the suit property was never validly transferred in the name of deceased mother (Mst. Akthar Fatima). It is a basic principle that no one can transfer a better title to other person, than

what he has. Since the deceased mother was not an owner of the suit property, therefore, she could not have gifted the same to anyone, including the present Defendant No.6. **Secondly**, it is a settled rule that when a Gift (usually made under the Islamic Law) is seriously challenged and questioned by other interested parties, particularly the other legal heirs, as in the present case, then the onus to prove the same is on the donee. The three reported decisions handed down by Hon'ble Supreme Court in the **Rab Nawaz, Khan** and **Ashraf** Cases {*supra*}, are relevant in the regard and the rule laid down therein is fully applicable to the facts of present case.

Thirdly, Defendant No.6 also did not examine the above named two attesting witnesses (Abdul Majid Khan and Jamil Akhtar) of the impugned Gift, to corroborate the version of the said Defendant No.6. Non-examination of these two attesting witnesses further weakens the case of said Defendant No.6. Upon appraisal of the evidence it is not difficult to conclude that Defendant No.6 has failed to discharge the burden of proof about a valid gift in his favour.

23. Conversely, the above named sole witness from the Claimants side (Ali Adil Shah-Defendant No.2) remained consistent in his cross-examination about the fact, that initially the suit property was wrongly transferred in the name of deceased mother and could not be gifted to Defendant No.6. **Fourthly**, the beneficiary of the gift, viz. Defendant No.6 since himself has admitted that the suit property was not mutated in the name of deceased mother during life time of late father, as already discussed in the foregoing paragraphs, thus it is disproved that a valid gift was made in favour of Defendant No.6. The impugned Gift (**Exhibit-D**)

dated 22.11.1990 is an invalid document. **Hence, Issue No.4 is answered in Negative.**

ISSUE NO.5.

24. On 09.10.2019 the matter was fixed for rehearing on a short issue about Nazir's Report regarding other properties in the Province of the Punjab, as mentioned by the Objectors. In the evidence it has come on record that no proceeding till date has been filed by any of the parties with regard to the other properties. On 09.10.2019, all the learned counsel for the parties (*Plaintiff and Defendants*) stated that if there are other properties then any of the legal heirs is entitled to his or her respective shares of inheritance in such properties and can also file a proceeding in this regard.

25. Since the suit property is held to be a joint estate left by the above named deceased father, therefore, it has to be disposed of as ordered earlier by this Court, by the learned Nazir and sale proceeds should be distributed amongst Plaintiff and Defendants in accordance with their respective share in the inheritance, except Defendant No.6, because the Claimants have specifically pleaded and deposed that Defendant No.6 has usurped the rental income from the different tenants in the suit property, therefore, the said Defendant No.6 is not entitled to his share in the sale proceeds. After evaluation of the evidence, it is a proven fact that only *Objectors* (Defendants 5 and 6) are living in the suit property and have enjoyed the same in all these years, to the exclusion of other legal heirs / Claimants.

26. Although the sole witness of Claimants (*said Defendant No.2*) has deposed that an amount of Rupees Five Million has been illegally received by Defendant No.6 from different tenants, which should have been

distributed amongst all legal heirs, but this figure of Rupees Five Million could not be proved through a positive evidence. On the other hand, this very fact that Defendant No.6 has received rentals for almost 10 years has been admitted by the Defendant No.6 in his cross-examination. The relevant paragraph of his cross-examination is reproduced herein under_

“12. I have received only rent up to 10 years, but the shops are closed for the last 10 years.”

27. The order dated 06.11.2014 shows that Nazir was directed to collect the rent from different tenants and distribute the same amongst all the legal heirs. While complying the above order if the learned Nazir has come to know about the rent income, which was earlier received by the Defendant No.6, then once the Suit Property is sold out as directed herein-above, then Nazir shall deduct the amount of rent income which was already received by Defendant No.6 from his share and the said Defendant No.6 will be entitled to the remaining amount in sale proceeds, as per his share as one of the legal heirs. If in case, Nazir does not have the record about the rental income received by Defendant No.6, then the said Defendant No.6 will be called upon to state on oath about quantum of rent he has received so far and the said amount shall be deducted from his share in the sale proceeds; however, Defendant No.6 will not be subject to cross examination. It is further clarified that since it has come in the evidence as an undisputed fact that both Objectors are in possession of the Suit Property, therefore, any unpaid utility bills or any other levy, tax, including the property tax in respect of the suit property are the liability of Objectors and shall be paid by them, or in the alternate, the learned Nazir will first deduct all such

amounts from the share of said Objectors (*Defendants No.5 and 6*) and will then pay their respective shares in the sale proceeds.

Consequently, the suit is decreed in the above terms but with no order as to costs.

The learned Nazir will return the Original Record to PIB Society either through its Honorary Secretary or any other senior Office Bearer, in accordance with rules.

Dated: _____

M.Javaid.P.A.

JUDGE