

# IN THE HIGH COURT OF SINDH AT KARACHI

## Suit No.1054 of 2007

[Alexis Hague Malik (formerly named as Ehtashamul Haq Malik)  
v. Ziaul Haq and others]

Date of hearing : 17.11.2021  
Date of decision : 17.11.2021  
Plaintiff : Through Khawaja Saiful Islam,  
Advocate  
Defendant No.1 : Through Mr. Abdul Wajid Wyne,  
Advocate  
Defendant No.2-4 : Through Mr. Irfan Aziz, Advocate  
Defendant No.5 : *Nemo*

## JUDGMENT

**Zulfiqar Ahmad Khan, J:-** The instant suit was initially filed for partition of property bearing House No.43, admeasuring 600 square yards, situated at Road No.3, Bahadurabad, Karachi (“the suit property”) praying for its possession, payment of rentals’ share and restraining the defendants from creating third party interest.

2. Relevant facts as averred in the plaint were that the plaintiff and defendant No.1 are real sons of Mst. Anwari Khatoon W/o late Inamul Haq, whereas, defendant Nos.2 to 4 are her real daughters. Admittedly the deceased was absolute owner of the suit property and defendant No.5 is the co-operative society. Through instant suit, plaintiff was claiming partition of the suit property and recovery of rentals of his shares w.e.f. 15.09.2003 from defendant No.1 until handing over possession of portion of the subject property or payment of a sum of Rs. 2 crores.

3. Upon notice of the instant suit, defendant No.1 filed written statement and has taken the preliminary legal objection that the suit is not maintainable. The defendant No.1 in most part of his written defence denied the claim of the plaintiff in respect of share as well as rentals. According to him, the plaintiff received his share in view of the deceased's WILL dated 26.01.2001. Defendant No.1 also took a stand that sisters of the plaintiff have also received their share in the suit property and in order to strengthen this position, the defendant introduced on record Pay Order alongwith its receipts wherein the sisters allegedly admitted that they have no right title in the suit property.

4. On 21.03.2016, this Court appointed Nazir of this Court as an Administrator under order XX rule 13 CPC to determine shares of the legal heirs of the deceased in accordance with Muslim Personnel Law and decreed the same preliminarily and framed following issues by appointing the Nazir as Commissioner to record the evidence:-

1. What is the extent to which the plaintiffs and the defendants are entitled to get their shares in the properties of the deceased?
2. What are the debts and liabilities of the estates of the deceased?
3. What properties were left behind by the deceased at the time of his death?
4. Whether any properties were purchased by the deceased in the names of anyone of the legal heirs of the deceased with his own funds?
5. What should decree be?

5. This Court through its order dated 13.12.2018 in the circumstances where property had already been sold out by Nazir and the respective share thereof was taken by the plaintiff and the defendant No.1 (both brothers) in the suit property, upon sisters reaching this Court for their shares by placing reliance on certain documents, referred the matter to the Nazir of this Court to record evidence as to the entitlement of the sisters in the subject property.

Accordingly, Nazir recorded the evidence and submitted his report on 22.03.2019, where the defendant No.1 appeared himself and defendant Nos.2 to 4 also appeared themselves. Learned counsel for defendant No.1 has read out the affidavit-in-evidence filed by the said witness as well as cross and the documents attached therewith.

**Issues Nos.1 and 3**

6. Counsel is heavily relying on the Family Settlement Agreement dated 17.08.1999 (Exhibit D1/2 - page 883) signed by the deceased mother with the defendants, not including the plaintiff where per learned counsel parties have agreed that the sisters upon having received shares from the sale of House No.50/4, admeasuring 200 square yards, situated in Bihar Colony, Karachi are satisfied and will not claim any right, interest or make any demand in respect of the suit property in Bahadurabad. Alongwith the said Agreement, documents showing that Bihar Colony property having been sold out and the respective shares given to three sisters were also produced (pages 889 - 905). Not only that, affidavits are also attached alongwith the affidavit-in-evidence from three sisters, each stating as under:-

**“AFFIDAVIT**

I Mrs. Ahmedi Bano Mallick D/O, Mr. Inam-ul-Haque W/O M. Abrar Ahmed Muslim, adult-resident of C-1B Falcon Plaza (ext) D.M.C.H.S Tariq Road Karachi. Holding NIC No.517-51-117527 do here by state on oath as under.

1. That I am the deponent of the Affidavit and one of legal heir of my father and fully conversant this - with the facts as stated herein

2. That my father died on 1972 and at this stage my family own some immovable property bearing No.

1. 50/4, Bihar colony Massan Road Karachi (sold out at RS.1,830,000/- only).

2. 43/3, Bahadur Yar Jung Cooperative Housing Society Karachi.

Which was mutually assessed by myself and other family members and agreed amount of Rs.675,000/- Six hundred & seventy five thousand only has been paid to me by my mother Anwari Khatoon, which I do hereby acknowledge and confirm to have been received by me.

3. That I further declare that I have been given my entire share and entitlements in my father's property and nothing remains to be further settled or paid to me.

4. That I further declare that I have no any right and title over all my father's properties referred above and I shall not raise any objection in case of remaining property No.43/3 Bahadur Yar Jung Cooperative Housing Society Karachi is transferred or sold out in favour of anybody else.

5. That whatever stated above is true and correct to best of my knowledge and belief."

7. Learned counsel for defendant No.1 states that once sisters have signed the Settlement Agreement and having sworn affidavits that they have received share in Bihar Colony property, they are bound under Article 114 of Qanun-e-Shahadat 1984 and restrained from raising any further demands in respect of the suit property. However it is significant to point out that the plaintiff has not raised any objection to the division of shares in accordance with Sharia to sisters too in Bahadurabad property too. In his cross he has stated that *"it is incorrect to suggest that the property situated at Bihar colony and the property situated at Bahadur Yar Jung Cooperative Housing Society, Karachi were of the same value in 1999."* It is only the defendant No.1, who is relying on these documents alleging that sisters not to be given shares because they have already received share from the Bihar Colony property. As the entire case of the defendant No.1 hinges upon the affidavit submitted by the sisters and by relying on Article 114 of Qanun-e-Shahadat 1984, learned counsel submits that each and every word of the said affidavit is to be considered by this Court, where in paragraph 1, there is an admission that signatory is legal heir of the father and well conversant with the facts of the matter. In the 2<sup>nd</sup> paragraph, it is stated that father died in the year 1972 and left two properties, one in Bihar Colony valued at Rs.1,830,000/- and second in Bahaduryar Jang Cooperative Housing Society, Karachi, which (earlier) property was mutually assessed by myself and other family members and agreed amount of Rs.675,000/- has been paid to me by my mother. In the paragraph 3, the signatory

affirms that she has been given her entire share and entitlements in **her father's property** and nothing remains further to be settled. In the paragraph 4, she declares that *"I have no any right, title or interest in the father's property as well as I shall not raise any objection in case of remaining property No.43/3 Bahadur Yar Jung is transferred or sold in favour of anyone."*

8. Learned counsel argues that *in fact* since the price of the property in Bihar Colony equated that of the property in Bahadurabad (denied by all the defendants), therefore through the Family Settlement sisters have received their respective shares. Evidence brought on record by the defendant No.1 has glaring infirmities though. In paragraph 11, it stated that the ladies admitted that they will not claim any share in the mother's property i.e. Bahaduryar Jang Society, where no such admission is available in the affidavit as the signatory has only confirmed receipt of share from father's property in Bihar Colony.

9. With regard to the receipt of shares, in paragraph 13 of his affidavit-in-evidence defendant No.1 admits having given share of 61.90% to himself in mother's property himself, and has only given 28.56% to the plaintiff brother. Even in case this Court comes to the conclusion that the sisters had no right, in all fairness the share between the brothers ought to be 50-50.

10. As it is evident that at the time of signing of the affidavits, mother was still alive and only "No objection" was given in respect of the property of the father, and the sisters agreed that they will have no objection if the mother's property be transferred, sold out to anybody but they never agreed that they will remain shareless from mother's property, the case before this Court is not of the transfer or sale, it is about equitable distribution of shares between all the legal heirs, for

which no promise is made by the sisters therefore, in my humble view, sisters' case does not fall under Article 114 of Qanun-e-Shahadat, 1984.

11. Resultantly, this Court reaches to the conclusion that the only property left behind by the deceased mother is the suit property at Bahaduryar Jang, which ought to be divided as per the ratios laid down by Sharia amongst all the legal heirs and while the plaintiff and defendant No.1 have already taken away their share, there is no impediment for releasing the share to defendant Nos.2, 3 and 4 by the Nazir as per Sharia. Issue Nos.1 and 3 are thus decided in Affirmative.

**Issues Nos.2 and 4**

12. No evidence has been brought on record with regards Issue Nos.2 and 4 as to debit/liabilities of the deceased, and that whether any properties were purchased by the deceased in the names of anyone of the legal heirs of the deceased with his own funds, hence these issues are answered in Negative.

**Issues No.5**

12. Preliminary decree issued on 03.09.2016 is made final decree of the Court and let the sums lying with Nazir be handed out to the defendant Nos.2 to 4 as per Sharia.

**Judge**

B-K Soomro