

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.1418 of 2010**

Date	Order with Signature of Judge
Present: <b>Mr. Justice Nazar Akbar</b>	
Plaintiffs	: Mst. Zubaida Idrees (since deceased) through Legal heirs. (i) Muhammad Idrees (ii) Muhammad Javed (iii) Imran Idrees (iv) Muhammad Irfan (v) Muhammad Kamran (vi) Mst. Rehana (vii) Mst. Rizwana (viii) Mst. Farhana Through <u>Mr. Masood Khan Ghory, Advocate.</u>
<b><u>Versus</u></b>	
Defendant No.1	: Mst. Jamila Khatoon (since deceased) through Legal Heirs. (i) Abdul Waheed Khan (ii) Abdul Wasie Khan (iii) Abdul Waseem Khan (iv) Abdul Waqar Khan (v) Mst. Shahida (vi) Mst. Salma (vii) Mst. Shazia through <u>Mr. Muzammil Saleem, Advocate.</u>
Defendant No.2	: Mst. Waheedan through Legal Heirs (i) Shaikh Abdul Hafeez (ii) Abdul Hameed (iii) Abdul Rehman (iv) Abdul Qadeer (v) Abdul Waheed (vi) Abdul Karim (vii) Abdul Khalique (viii) Mst. Saeeda (ix) Mst. Hameeda (x) Mst. Aashi
Defendant No.3	: Mst. Raeesa Begum through Legal Heirs (i) Adnan Rasheed (ii) Tariq Rasheed (iii) Mst. Amna (iv) Mst. Jamila (v) Mst. Fouzia Through <u>Syed Fazal-ur-Rehman, Advocate.</u>
Date of hearing	: <b><u>06.05.2021</u></b>

### **JUDGMENT**

**NAZAR AKBAR, J.** The Plaintiff has filed this suit on **09.09.2010** for Administration, Declaration, Partition/ Possession, Appointment of Receiver, Cancellation/Revocation of Hiba/Gift, Permanent Injunction and Grant of Mesne Profits in respect of estate of deceased Abdul Rahim.

2. Brief facts of the case are that the plaintiff is younger daughter of deceased Abdul Rahim, who died on 07.6.1980 and at the time of his death, he owned and possessed Ground plus two storey house on Plot No.10, Row No.21, Sub-Block-C, Block-V, Nazimabad, Karachi (the suit property). Defendant No.1 is real sister of the plaintiff and elder daughter of late Abdul Rahim and all the legal heirs of defendants are grandchildren of late Abdul Rahim. It was further averred that defendants No.14 to 16 are occupying the suit property are sons and daughter of late Abdul Rasheed who died on **28.2.2002**. The plaintiff on **26.01.2009** sent legal notice was sent to occupants of the suit property for settling the dispute but no reply was sent by them to the plaintiff. After about one year on **10.04.2010** the plaintiff sent another legal notice to the said legal heirs/occupants of the suit property which was replied through their counsel wherein they denied the right of the plaintiff and stated that the suit property was gifted by their grandfather to their father prior to his death i.e 07.6.1980. It was further averred that as per reply of legal notice sent by legal heirs/ occupants of the suit property, another property bearing No.D-149, Block-5, F.B Area, Karachi owned by the deceased Abdul Rahim was gifted by the deceased to his another son Shaikh Abdul Aziz (husband of defendant No.2). It was also averred that in fact father of plaintiff had been given General

Power of Attorney by the owner of the said plot Mst. Rabia and on the basis of said General Power of Attorney, the said plot was sold out and transferred in the name of late Shaikh Abdul Aziz by late Abdul Rahim (father of the plaintiff) and late Shaikh Abdul Aziz got the said plot mutated by way of Gift in the name of his seven sons (legal heirs of defendant No.2). It was further averred by the plaintiff that all the title documents of the properties are in the custody of grandchildren of late Abdul Rahim and sons of late Abdul Rasheed, who are enjoying rent, mesne profit of properties of plaintiff's father Abdul Rahim since 07.6.1980. Therefore, the Plaintiff filed the instant suit against the defendants for Administration, Declaration, Partition/ Possession, Appointment of Receiver, Cancellation/Revocation of Hiba/Gift, Permanent Injunction and Grant of Mesne Profits.

3. Notices of the instant suit were sent to the defendants. On **12.3.2011** defendant No.2, 3 and 5 to 12 filed written statement through their Attorney Inamullah Khan. They admitted the contents of plaint and being legal heirs of deceased Abdul Rahim also prayed for taking account and income of the said property and its partition/ distribution of shares amongst the legal heirs. On **19.5.2011** defendant No.15 filed written statement wherein he contested the claim of the plaintiff and other legal heirs' right of inheritance in the suit property on the ground that deceased Abdul Rahim had distributed all his properties and assets before his death with consent of all of his sons and daughters. It was also averred that one property bearing Plot No.D-149/5, F.B Area, Karachi was transferred to his son Addul Aziz and the suit property was gifted by him to another son, namely, Abdul Rasheed with direction to him to give handsome amount in cash to his daughters Zubeda and Jamila (plaintiff and defendant No.1) which was paid by his father. Then on

**09.9.2011** he also filed written statement on behalf of defendants No.17 and 18 wherein he narrated the same facts as were mentioned in his own written statement. This being a suit for administration of properties of deceased Abdul Rahim, a preliminary decree was ordered and prepared on **06.2.2017**. Subsequently, by order dated **17.10.2019** an amended title was filed in which since plaintiff has expired her legal heirs were impleaded and defendants whose predecessor-in-interest, too, have already died at the time of filing of suit in **2010** were also re-numbered as defendant No.1(i) to (vii), 2(i) to (x) and 3(i) to (v).

4. On **25.10.2017** from pleadings of the parties, followings issues were framed:-

1. Whether the Suit is not maintainable in law?
2. Whether the Suit is time barred?
3. Whether, under any family settlement/arrangement, the Property bearing No.21/10, V/C, Naziamabad, Karachi, was gifted by the Abdul Rahim to his son late Abdul Rasheed, in his life time?
4. Whether, under any family settlement/arrangement, the Property bearing No.D-149/5, F.B Area, Karachi, was transferred by late Abdul Rahim, in the name of his son late Abdul Aziz?
5. Whether late Abdul Rasheed, under the direction of late Abdul Rahim, gave due legal shares of Plaintiff and Defendant No1?
6. Whether property bearing No.D-149/5, F.B Area, Karachi, was purchased directly by the Abdul Aziz, from its owner Mst. Rabia Khatoon and subsequently it has been gifted to his sons Defendant Nos.3, 5, 6, 7, 8, 11 and 12?
7. Whether the Plaintiff served the Defendants Nos.13 to 18 with notices for settlement of the suit property?
8. Whether the Defendants Nos.14 and 15 are solely keeping documents and physical possession of the suit property unauthorizedly and illegally?

9. Whether the parties are entitled to Judgment and Decree against the defendant Nos.14 and 15 for the amount of mesne profit at the rate of Rs.60,000/- per month from June 1980 till the filing of this suit?
10. Whether the Suit Property is liable to be auctioned and the sale proceeds are to be distributed among the parties concerned?
11. Whether the plaintiff is entitled to the relief(s) as prayed?
12. What should the decree be?

5. Plaintiff No.1(i) Muhammad Idrees filed his affidavit-in-evidence. He was cross-examined by the learned counsel for the defendants. Defendant No.3(ii) (earlier defendant No.15) Tariq Rasheed has also filed his affidavit-in-evidence. Defendants No.3(i) to (v) have also filed affidavit-in-evidence of their two witnesses, namely, DW-02 Muhammad Tariq and DW-3 Muhammad Ziauddin. They were also cross-examined by the learned counsel for the plaintiff.

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

#### **ISSUE NO.1 & 2**

7. Both these issues were raised by the defendants in their written statement, however, neither in evidence nor at the bar any argument has been advanced by the defendants to establish that the suit was not maintainable or it is barred by time. Admittedly this is a suit for administration of the property left by the predecessor-in-interest of the plaintiffs and the defendants. It is also an admitted position that the suit property belongs to deceased father of the plaintiffs and plaintiffs have claimed their share by way of inheritance in the suit property. The plaintiffs have the cause of action and the suit for enforcement of rights of inheritance is not hit

by law of limitation, therefore, both the issues are decided in favour of the plaintiffs.

### **ISSUE NO.3 & 5**

8. The burden of these issues was on the defendants who claimed that their father late Abdul Rasheed has acquired the suit property by way of family settlement by consent of all sons and daughters of late Abdul Rahim in his lifetime. Defendant No.3(ii) who appeared as witness for himself and the other defendants, namely, defendants No.3(i), (iii) and (iv) on the issue of family settlement in his affidavit-in-evidence has not filed any document. Nor he could otherwise prove such settlement in the lifetime of deceased Abdul Rahim. However, in his affidavit-in-evidence he has claimed that the property in question was gifted by late Abdul Rahim to his father late Abdul Rasheed and his grandfather late Abdul Rahim had directed his father late Abdul Rasheed to give handsome amount in cash to Zubeda and Jamila (plaintiff and defendant No.1) and said amount was duly paid to them by his father in cash out of his pocket. However, he has not produced any receipt of such payments or any gift deed. In his cross-examination he stated that *"It is fact that I have not produced any document to establish such gift. Voluntarily says, that it is oral gift and I am witness of said gift. I do not remember the date of such gift, but it was during lifetime of our Grand Father. It is fact that I have not mentioned date of said alleged gift either in written statement, or my affidavit-in-evidence."* Then in support of his so-called oral gift and payment of handsome amount to the plaintiff and defendant No.1, defendants No.3(i) to (iv) also examined two witnesses. Unfortunately both witnesses have failed to properly support the claim of defendants No.3(i) to (v) as their evidence was nothing more than hearsay evidence. Their evidence was badly shattered in cross-

examination. The witness DW-2 Muhammad Iqbal in his cross-examination has stated as under:-

“My late father and mother has told me about given an amount to Zubaida Idrees and Jamila Khatoon again says my mother has told me.....It is a fact that the property bearing No.21/10 Nazimabad Karachi is still in the name of deceased Abdul Rahim. It is a fact that the deceased Abdul Rahim has two sons and two daughters. It is a fact that late Zubaida Idress has filed this suit during her life time that the property in question is to be distributed among the co-sharers.

DW-03 Muhammad Ziauddin in his cross-examination has stated as under:-

“I have never seen any written gift deed (Hiba) or any other documents in this respect of late Abdul Rasheed son of Abdul Rahim. I do not know if the late Abdul Rasheed or his children has given an application to the authority for transfer of property in their favour.....”

In view of above evidence, defendants No.3(i) to (v) have failed to discharge their burden of proof, hence both these issues are answered in negative.

#### **ISSUE NO.4 & 6**

9. The plaintiffs have not pressed these issues as admittedly the property bearing House No.D-149/5, F.B Area, Karachi was not even mentioned in the plaint of the suit for administration of the estate of the deceased Abdul Rahim. The plaintiffs have not claimed that the said property belongs to deceased Abdul Raheed nor they have even claimed share in the said property. Both these issues were framed from the written statement filed by defendants No.3(i) to (v) that the property of their uncle Abdul Aziz son of Abdul Raheem was also the property of their grandfather. However, they have failed to produce any evidence to show that this property should have been included in the suit for administration of properties of deceased late Abdu

Raheem. Defendant No.15 in his cross-examination has admitted that:

“It is fact that other legal heirs are not claiming their shares from another property bearing No.D-149-5, Federal B Area they are not claiming said property. It is a fact that I have not produced any document in respect of payment to other legal heirs..... It is fact that I have not produced any documents in respect of property bearing No # D-149/F (wrongly typed ‘F’ instead of ‘5’), Federal B Area, Karachi. Voluntarily says I will produce, I have a claim over property bearing No. # D-149/F (wrongly typed ‘F’ instead of ‘5’), Federal B Area, Karachi. However, I have not filed suit for the said property uptill now.”

In view of the above, issue No.4 is answered in negative while issue No.6 is answered in affirmative.

#### **ISSUE NO.7 & 8**

10. The plaintiffs have filed copy of legal notice sent by them and reply received by them. However, the defendants have denied having not received it and replied. It makes no difference, it is irrelevant that the legal notice was received or not and it was replied or not as the suit itself could be a legal notice and it has been contested by the defendants. This is an admitted position that defendant No.3(ii) and (iii) are in physical possession of the suit property, however, it cannot be said that they are unauthorizely or illegally occupying this property since they are legal heirs of the owner of the suit property, namely, late Abdul Raheem father of late Abdul Rasheed who was already residing in the property at the time of death of late Abdul Raheem, in 1980 and lived in it till his death on **28.02.2002** as one of the legal heirs of actual owner of the property. Late Abdul Rasheed in his lifetime has never claimed to be owner of suit property by virtue of any gift or family settlement. His son Tariq Rasheed has admitted in his evidence:-



“It is fact that no application has been filed by me before any authority on the basis of alleged gift, however I cannot say about my late father, if he field or not such application.”

In view of above discussion both the issues are answered accordingly.

#### **ISSUE NO.9**

11. The plaintiff has failed to establish through evidence the claim of mesne profit at the rate of Rs.60,000/- per month from 1980. It may be mentioned that even the suit has been filed in 2010 and said claim, if at all, it was to be raised within three years or for the last three years from the date of institution of the suit. Be that as it may, the plaintiff in this case has not produced any evidence in support of their claim the property in question was on rent. Not a single tenancy agreement has been produced, therefore, this issue is answered in negative. However, Nazir of this Court who has been appointed Receiver in terms of preliminary decree on **23.2.2017** shall distribute the amount, if any, has been received and realized by him during pendency of the suit or if he has gathered any information to the effect that whether defendants No.3(ii) and (iii) have ever received any rental income from the suit property. Whatever amount may be determined by him shall be distributed among legal heirs in accordance with their share as per sharia.

#### **ISSUE NO.10, 11 and 12**

12. This is a suit for administration of the inheritable property comprising Ground plus two storey house on Plot No.10, Row No.21, Sub-Block-C, Block-V, Nazimabad, Karachi of deceased Abdul Rahim. The only contesting defendants are defendants No.3(i) to (v) and their defense against the right of other legal heirs to deny their inheritance was based on plea of oral gift/family settlement. They

have failed to establish their defense through producing any cogent evidence. Therefore, in view of my finding on issue No.1 to 9 all the legal heirs are lawfully entitled to their respective shares in the suit property as per sharia law. The suit property is not divisible and therefore, the same is liable to be sold for distribution of share of the plaintiffs and defendants in accordance with law. The Nazir is directed to acquire original title documents from contesting defendant and sale the suit property and distribute the sale proceeds amongst the legal heirs of deceased Abdul Rahim in accordance with sharia law.

The instant suit was decreed by short order dated **06.05.2021** and above are the reasons for the same. The office is directed to prepare a final decree.

JUDGE

Karachi,  
Dated: 21.06.2021

Ayaz Gul