

# ***IN THE HIGH COURT OF SINDH, KARACHI***

***IIInd Appeal No.325 of 2024***

1. ***For orders on Office objection.***
2. ***For hearing of CMA No.8575/2024.***
3. ***For hearing of main case.***

For the Appellants	:	Mr. Sami Ahsan.
For the Respondents No. 1(i)	:	Mr. Arshad Jamal Siddique.
For Official respondents.	:	Ms. Deeba Ali Jaffery,AAG
Date of hearing	:	11-02-2025
Date of Judgment	:	09-04-2025

## **JUDGMENT**

***Ali Haider ‘Ada’, J;-*** This Second Appeal has been filed against the judgment and decree dated 31.07.2023, passed by the learned Senior Civil Judge-XI, Karachi Central(**Trial Court**). It further calls into question and challenges the judgment and decree dated 24.08.2024, passed by the learned Vith Additional District Judge, Karachi Central(**Appellate Court**), which upheld decree and judgment of the learned trial court.

2. The relevant facts are as under:-

Mst Zahida Begum (Respondent No.1), who is the plaintiff, filed Civil Suit against Mst Irshad un Nisa (Appellant No. 1). However, she was died and her legal heirs were joined, and also filed against one Muhammad Khurram Ali, the grandson of Syed Rahim din(Father of appellant No.1 and Respondent No.01) However, he was also died and his legal heirs were joined, the suit was instituted for partition and permanent injunction on the premise that that Mst Zahida Begum and Mst Irshad un Nisa are sister, while Muhammad Khurram Ali is the grandson of Syed Rahimuddin (father of appellant No.1 and Respondent No.01) and property bearing No. A/112, Block L North, Nizambad Improvement Scheme No.02, Karachi (**Suit Property**) was actually owned by their father, namely Syed Rahimuddin, who subsequently gifted the suit property to his wife, namely Mst. Zubeda Bibi in the year 1982, as Mst. Zubeda Bibi executed a power of attorney in

favor of her husband. In the civil suit, Respondent No.1, acting as the plaintiff, made the following prayers;

- (a) To grant decree for partition of inherited suit property among all the legal heirs, i.e. Plaintiff and Defendants equally according to the law of Shariha.
- (b) To direct the defendants for physical partition of the above said inherited property, i.e a constructed house on Plot No.A/112, Block “L” North Nazimabad, Improvement Scheme No.2, Karachi, if its physical partition is not possible, then to sell out the inherited suit property through public Auction through Nazir of this Honourable Court and its sale proceed be distributed among all the legal heirs (Plaintiff & Defendants) as per law of Muhammadan.
- (c) Cost of the suit be awarded.
- (d) To grant any other better relief/relieves which this Honourable Court may deem fit and proper under the circumstances of instant case.

3. During proceedings of Civil Suit the written statement was filed by the appellant No.1 with contention that the suit property was actually gifted by Mst. Zubeda Bibi/mother to the appellant No.1; and the physical possession of the property was also transferred. Therefore, the nature of the property changed from an inheritance to a personal belonging. Consequently, the civil suit filed against the appellant is not maintainable.

4. The learned trial court framed the issues and subsequently conducted a hearing in which both parties presented their respective evidence. Following the conclusion of the evidence, the court heard the parties and passed a preliminary decree and judgment. In favour of the Respondent

No.01. The relevant portion of the said decree for the sake of ready reference, is reproduced as under:

“ It is hereby ordered that the legal heirs of deceased Syed Rahimuddin and Mst. Zubaida Bi are entitled for their shares in suit property to be partitioned amongst them in accordance is mandatory requirement of law as enshrined under Order XX rule 18 CPC whereby the Court is required to pass preliminary decree, therefore, the Nazir of this Court is appointed as Commissioner with directions to make following inquiries:-

- (a) To record statements of legal heirs of deceased [Syed Rahimuddin and Mst. Zubaida Bi] and conduct necessary inquiry including obtaining necessary record from concerned departments about legal heirs in order to distribute the shares among the legal heirs according to Muslim Personal law.
- (b) The Nazir shall also make an inquiry regarding wife of Syed Qamaruddin and in case it is found that she has died issueless the Nazir shall also require about her legal heirs.
- (c) To record statement of LR's. in respect of liabilities of deceased Syed Rahimuddin and Mst. Zubaida Bi, if any.
- (d) To obtain verification of title documents and valuation of the suit property as per market value from two nearby Estate Agents and concerned Government authorities.
- (e) The Nazir to visit the suit property bearing constructed house on Plot No.A/112, Block-L, North Nazimabad, Improvement Scheme No.2, Karachi admeasuring 256 square yards and prepare such inspection/visit report before auction proceedings.
- (f) The Nazir to make private partition of the suit property constructed house on plot No.A/112, Block-L, North Nazimabad, Improvement Scheme No.2, Karachi admeasuring 256 square yards according to

their respective share. This is subject to verification of ownership by KDA in the name of deceased Syed Rahimuddin and Mst. Zubaida Bi. The legal heirs are directed to submit original documents of suit property with Nazir of this Court within 30 days.

- (g) If the private partition is not possible, put the suit property in private auction and if parties do not agree on the same, the Nazir is at liberty to initiate proceedings, for open public auction with permission and intimation to this Court.
- (h) The Nazir shall provide opportunity to all the legal heirs to raise their objections, if any, and Nazir shall submit his report to this Court before execution.
- (i) All the legal heirs are permitted to participate in public auction.
- (j) The fees of Nazir Rs.10,000/- shall be paid by all L.Rs equally and in case of failure by any of the L.Rs to deposit the Nazir fees as per his/her share, the same shall be deducted from his/her share of inheritance.
- (k) However all these above directions to Nazir are subject to partition Act, 1893. These is no order as to costs.

5. The decree and judgment of learned trial Court was contested during the appellate process by appellants, however, this effort was unsuccessful, as the Appellate Court upheld the decision rendered by the trial court.

6. Therefore, this second appeal is being filed in order to challenge the decision rendered by the learned courts below.

7. Learned Counsel contended that issues are not properly framed as Mst. Zubeda Bibi, mother, gifted the suit property through oral agreement, therefore, civil suit for partition is not maintainable instead to file suit for Administration u/s 295 of Succession Act 1925, further submitted that decree of learned trial court is hit under the Order XX Rule 6,7,13 and 18 CPC, as even, Appellate Court did not appreciate such facet and upheld the decision of trial court. He placed reliance upon the case laws reported in *2000 MLD 122*, *PLD 2011 Karachi 83*, *PLD 2017 Sindh 324*, *PLD 1956 Dacca 153*, *1982 SCMR 816*, *1998 MLD 250* and *PLD 2013 SC 241*.

8. On the other hand, learned counsel for the Respondent submitted that the relationship between the parties is not in dispute. It was contended that the registered gift deed executed in favour of Mst. Zubeda Bibi by her husband, the original owner of the Suit Property, remains unchallenged to date. The appellants' claim of entitlement through an alleged oral gift is unsupported by any cogent or credible evidence and is therefore baseless. It was further argued that such a plea appears to have been taken merely to prolong the proceedings and to deprive the Respondent of her lawful entitlement. Accordingly, the learned counsel submitted that the Courts below rightly decided the matter, lastly, prayed for dismissal of the instant appeal.

9. Learned AAG submitted that the appellants have not demonstrated that the decree and judgment are unlawful or irregular. The scope of the second appeal is limited to instance in which a question of law is implicated.

Therefore this second appeal is not maintainable and the same is to be dismissed.

10. Heard arguments and perused the material available on record.

11. **Firstly**, the Appellant No.1 asserted that the mother gifted the property to the Appellant No. 1 during her lifetime. The trial court addressed this issue during the proceedings as Issue No.06. For ready reference, the Issue No.06 is as under:-

*“Whether deceased Mst Zubeda Bi gifted the suit property in her life time to Defendant No.01( Appellant No.1)”*

The finding was negative and trial court gave reason, as the relevant portion is read as under:-

*41. The defendants have claimed that late Mst. Zubaida Bi gifted suit property in favour Mst. Irshad-un-Nisa but no specific date, time and even the names of witnesses, in whose presence alleged gift was pronounced, is mentioned in written statement as well in affidavit-in-evidence of defendants. The defendant No.1 during his cross-examination has also admitted that “It is correct to suggest that I have not mentioned the names of witnesses of gift deed in para-3 &7 of my affidavit in evidence as well as in my written statement”. This admission clearly shows that the defendant in his written statement as well as in his affidavit-in-evidence has failed to mention the names of witnesses of gift.*

*42. Since, the plaintiffs have denied the execution of gift in favour of defendant No.1, therefore, the defendants are not only bound to prove execution of gift but also to prove the gift by producing cogent and reliable evidence that the three necessary requirements of a valid gift namely, offer, acceptance, and delivery of possession have been fulfilled. The defendants have also failed to prove the essential conditions of a valid gift under*

*Muhammadian Law i.e. “Offer”, “Acceptance” and “Delivery of Possession”.*

43. *Though the defendant No.1 is in possession of the Suit property but he has failed to prove that the possession was delivered to him by the deceased Mst. Zubaida Bi under a valid gift. The written statement as well as affidavit-in-evidence of the defendant No.1 are totally silent to the extent of witnesses in whose presence the gift was made by the deceased Mst. Zubaida Bi. The defendants have examined two witnesses namely Muhammad Naeemuddin Farooqi at Ex.DW/1 and Muhammad Akber at Ex.DW/2. The perusal of cross-examination of witness Muhammad Naeemuddin Farooque shows that he has admitted during his cross-examination that “It is correct to suggest that at the time of gift of Suit property I was not physically present there”.*

44. *The perusal of cross-examination of other defendants’ witness namely Muhammad Akber also shows that he has admitted that “It is correct to suggest that at the time of said gift deed I was not physically available there”. The perusal of evidence would further show that the plaintiff has produced Photostat copy of death certificate of Syed Abid Hussain at annexure-X/2 and the same shows that residential address of Syed Abid Hussain is mentioned as suit property. Meaning thereby that till his death Syed Abid Hussain was residing at suit property. It is also come on record through cross examination of Defendant that Syed Abid Hussain died in the year, 2015 while residing at suit property.*

45. *In case of Faqir Ali and others v. Sakina Bibi and others (PLD 2022 Supreme Court 85), it has been held by the Honourable Supreme Court of Pakistan that;*

*“It is trite that a gift in order to be valid and binding on the parties must fulfill three conditions, namely (i) Declaration of gift by the donor, (ii) acceptance of gift by the done, and (iii) delivery of possession of corpus. A valid gift can also be effected orally if the afore-noted prerequisites are compiled with and*

*proved through valid and cogent evidence. A written instrument is not a requirement under the Muhammadan law not is the same compulsorily registerable under the provisions of the Registration Act, 1908. However, strict compliance of the aforementioned mandatory conditions is required and registration of the document is of no help if any of the aforementioned conditions are not satisfied. It has repeatedly been held that beneficiary of a document is not only bound to prove execution of the document but also to prove the gift by producing cogent and reliable evidence that the three necessary requirements of a valid gift namely, offer, acceptance and delivery of possession have been fulfilled, to the satisfaction of the Court”.*

46. *The Honourable Supreme Court of Pakistan has further been pleased to observe in the case of Faqir Ali (supra), under;*

*“It is therefore clear and obvious to us that natural love and affection was not the consideration of the gift and instead as alleged by the afforested two witnesses the intention behind the transaction was to please God, the Almighty. Even if that claim is accepted as true, it is ex facie hard to understand how depriving his real daughters of their rightful share in the inheritance/estate of the donor could be interpreted as an act which would please God, the Almighty who has specifically ordained that the daughters are entitled to a specified share by way of inheritance in the estate of their father on his demise. It therefore appears that the gifts were only a device to deprive the daughters from inheritance and the fit mutations were sanctioned to bypass the law of inheritance and to disinherit the daughters. In this background, the High Court in our opinion was correct in coming to the conclusions that the gift was based on a fraudulent intent. It is settled law that fraud vitiates even the most solemn transaction that is based upon fraud is void and notwithstanding the bar of limitation. Courts*



*would not act as helpless by stands and allow a fraud to perpetuate”.*

*47. In view of above, the defendants have failed to prove the execution of gift by Mst. Zubaida Bi in favour of her daughter Mst. Irshad-un-Nisa. Hence, Issue No.6 is answered in Negative.*

12. Similarly, D.F Mulla defines a Hiba or Gift in Muhammadan Law; “

***Hiba or gift:*** A hiba or gift is “a transfer of property, made immediately, and without any exchange,” by one person to another, and accepted by or on behalf of the latter.

“Hiba” means transfer of right of property in substance by one person another without consideration which is condition to be fulfilled in order to make a gift valid.”

13. The fulfillment of the aforementioned conditions would result in the completion and legal validity of the gift. However, in instant case, the specified requirements for elevation have not been met. The learned trial Court thorough discussed this issue, resulting in a cogent reason that was deemed sufficient and undeserving of interference.

14. **Secondly**, with respect to the issues of Suit for Administration and Suit for Partition, in this regard, the scope of a suit for administration is delineated as follows, according to U/O XX Rule 13 of CPC:.

**13. Decree in administration suit.**(1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be

observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit, is pending with respect to the estates of persons adjudged or declared insolvent, and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

15. A perusal of the record reveals that the suit property was bequeathed to the legal heirs. Consequently, no further inquiry is necessary for determination. In order to further elaborate on the case, the Order *XX rule 18 of the CPC* is concerned. In the matter of partition, Order XX Rule 18 of CPC governs the process. Therefore, for the purpose of discussion or convenient reference, the aforementioned rule is reproduced below:-

**18. Decree in suit for partition of property or separate possession of a share therein.** Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the right of the several parties interested in the property and giving such further directions as may be required.

16. To further elucidate this matter, the case of *Khair Muhammad Khatian and 5 others versus Liaquat Ali G. Kazi and 9 others* would be a valuable resource, reported in *2017 CLC Note 177* the relevant Para No. 17 is as under:-

17. The perusal of the record shows that the agricultural land (Form-VII B, attached with plaint as Annexure-A) foti-khata of agricultural land from Qazi Ghulam Mustufa stood devolved among the legal heirs, including Mst. Mehmooda hence she, the predecessor-in-interest of present plaintiffs, was/is an undisputed sharer in said land. Needless to add that on her (Mst. Mehmooda's) death present plaintiffs, being successors/L.Rs, have stepped into title and status of Mst. Mehmooda. Since this property (agricultural land) does not require any inquiry for:

- i) determination of status of property to be part of estate of deceased or otherwise;
- ii) no administration is required because each legal heir of deceased Qazi Ghulam Mustufa received their due share in land which, none of them, ever challenged; The proper course available for the plaintiffs is to seek official partition by approaching proper revenue forum/authority within meaning of the section 35 of the Land Revenue Act. This fact is even acknowledged by plaintiffs while couching the para-10 of the plaint as;

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10. That the partition/administration proceedings for the agricultural land described in the table above, pursuant to the inclusion in the proper record-of-rights, will separately be applied with the relevant revenue officer for partition of shares amongst the surviving legal heirs.

Now, there remains the property bearing No.54, JM-9985, area 1609 Sq. Yds. Muslimabad Co-Operative Housing Society Ltd. Karachi. To know the status of this, it would be proper to refer contents of the Annexure-C (attached with plaint) i.e a letter addressed by Office Secretary, Muslimabad Co-operative Housing Society Ltd. which is:

...With Reference to above subject the said property stands in the name of Ghulam Mustufa S. Kazi.

For the Administration of the Property refer to the Court of Law. Further we are not in position to provide any title documents of the said property till we will not received the Succession Certificate of the legal heirs.

This makes it clear that property is undisputedly standing in name of deceased (Ghulam Mustufa S. Kazi) and it may be in possession of defendant No.1 alone. The mutation (foti-khata badal) is not yet effected however, this does not change the legally established principle of law that:-

“the said property on opening of succession stood devolved among legal heirs of deceased Ghulam Mustufa S. Kazi, including Mst. Mehmooda, under whom plaintiffs are claiming;

This brings to conclusion that matter if any is of ‘partition’ of said property among the legal heirs but no question of administration of property is involved. At this juncture, I feel it quite proper to say that it is well settled law that partition of joint property is a continuing right enforcement of which is not bound by any period of limitation. Reliance in this regard is placed on the cases of Sarakhi Abdul Rahiman Trangan and another v. Muhaldin Pathaummil Bivi and another (AIR 1917 Madras 244), Habib-ur-Rehman v. Abdul Rahman and 3 others (1987 CLC 195), Hamayun Kabeer v. Qaiser Nazir (2006 MLD 1496) and Moinuddin Paracha v. Sirajuddin Paracha (1994 CLC 247). Further, it is also well settled principle of law that though mere holding of possession does not disentitle other co-owners from claiming partition of the property and in such cases limitation is not relevant and suit for partition could be filed at any time. Reliance in this regard is placed on the case of Moolchand and 9 others v. Muhammad Yousuf (Udhamdas) and 3 others (PLD 1994 SC 462), wherein it has been held as under:

"16. There is no cavil with proposition that if property is joint, possession of one co-heir is sufficient to be considered as possession of all co-heirs. Some co-heirs on the ground of exclusive possession cannot defeat the claim of other co-heirs by taking plea of adverse possession. Persons taking such plea have to produce positive evidence to show exclusion and ouster of other co-heirs. This question came up for consideration in the case of Mst. Omai and others vs. Hakeem Khan and others 1970 SCMR 499 and this Court has held that when property is inherited by co-heirs of deceased, then possession of one co-heir is in law possession of all the

co-heirs and mere non-participation in profits of property by one co-heir and exclusive possession by others would not be sufficient to constitute adverse possession. Persons making such claim have to show that they were in hostile possession of the property in dispute to the exclusion and ouster of others."

Since, in view of above discussion, I am of the clear view that a *lis* of 'administrative suit' or a suit for 'partition' are altogether different from character and nature. A suit for administration is one which qualifies the above discussed touch-stone while suit for partition, even if amongst the heirs, is controlled by section 8 of Specific Relief Act and manner of recording decree is provided by Order-XX, rule 18 of the Code. Therefore, I have got no hesitation in concluding that suit in its present form is not sustainable, therefore, same is hereby rejected under Order VII, rule 11, C.P.C. However, this shall not prejudice the right of the plaintiffs to file proper suit before proper court. Needless to add that the rejection of the plaint, shall make all pending interlocutory applications in-fructuous

17. **Thirdly**, it is imperative to examine and comprehend the concept of a decree. The term Decree is defined in Section 2(2) of CPC. The same is read as under:

Section 2(2) of the Code of Civil Procedure (CPC) defines a "decree" means the formal expression of adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final. It shall be deemed to include the rejection of a plaint [the determination of any question within section 144, and an order under rule 60,98,99,101 or 103 of Order XXI] but shall not include-

- (a) Any adjudication from which an appeal lies as an appeal from an order, or
- (b) Any order of dismissal for default.

18. Normally, in exercise, there are three classes of decree even other classes are also available but generally it has three types (i) Preliminary, (ii) Final and (iii) Partly Preliminary and Partly Final. A preliminary decree is issued when further proceedings are necessary and have not yet

been completed. It determines the rights of the parties involved and reserves the determination of additional matters for subsequent proceedings. Reliance is placed on the case *Ali Muhammad Brohi v. Haji Muhammad Hashim (PLD 1983 Karachi 527)*. The issuance of a final decree marks the point at which the matter is fully adjudicated.

19. Further in case of *Syed Tarique Mustafa v. Tauqeer Jahan Mustafa and others (PLD 2022 Sindh 423)*, it is held by this Court that:-

9. From the perusal of the above provisions, it reflects that in general there are three types; (i) Preliminary decree, (ii) Final decree and (iii) Partly preliminary and partly final decree. A decree is the final decision given by the Court after determining the rights of the parties in a dispute. The explanation attached to the Section 2(2) of the Code says that “*A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final.*” In certain situations, the court cannot give its final decision without conclusively determining the rights of the parties on a particular issue. The Code provides for passing of Preliminary decree in the following suits:

1. *Suits for possession and mesne profits (Order XX, Rule 12)*
2. *Administration suits (Order XX, Rule 13)*
3. *Suits for pre-emption (Order XX, Rule 14)*
4. *Suits for dissolution of partnership (Order XX, Rule 15)*
5. *Suits for accounts between principal and agent (Order XX, Rule 16)*
6. *Suits for partition and separate possession (Order XX, Rule 18)*
7. *Suits for foreclosure of a mortgage (Order XXXIV, Rules 2-3)*

8. *Suits for sale of mortgage property (Order XXXIV, Rules 4-5)*

9 *Suits for redemption of a mortgage property (Order XXXIV, Rules 7-8)*

20. The matter in question concerns inherited property, a fact that has been acknowledged after perusal of record. However, the appellants have not successfully substantiated their claim. Consequently, the initiation of a suit for partition is more appropriate than a suit for administration in such circumstances.

21. It is a well-established legal principle that concurrent findings of fact by learned Courts below are not subject to interference by the High Court in Second Appeals. However, such interference is permissible only in cases where the lower courts have either misinterpreted the evidence or in circumstances involving legal implications. The High Court's intervention is deemed perverse, if, it is found that the lower courts have committed such errors. Reference in this regard may be made to the case of *Muhammad Din Vs. Malik Muhammad Abdullah PLD 1994 SC 291*.

22. **Finally**, upon careful consideration of the decree and judgment rendered by the preceding courts, in the instant matter, this Court finds no grounds to intervene. Consequently, this Second Appeal, being devoid of merit, is hereby dismissed.

**J U D G E**