

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Dr. Syed Fiaz Ul Hassan Shah

H.C.A. No.43 of 2022

Appellant : Through M/s. Syed Maqbool Hussain Shah,
Burhan Khan Jagerani and Talha Azim,
Advocates.

Respondents : Through Mr. Abdul Wajid Wyne, Advocate

Date of Hearing : 17.10.2025

Date of Decision : 25.11.2025

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J U D G M E N T

Dr. Syed Fiaz ul Hasan Shah, J - The instant High Court Appeal is directed against the Judgment dated 22.07.2019 and Decree dated 07.08.2019 (**impugned Judgment**) passed by the learned Single Judge of this Court in Suit No.231 of 1995 (**said suit**) filed by the Respondents seeking declaration, injunction, administration, accounts, partition and possession in respect of properties and estate left by their father Akhtar Muhammad Shaikh son of Late Dost Muhammad Shaikh (**deceased**).

2. The facts as stated in the plaint of said suit are that deceased died on 11.02.1981 and he had had two wives. From first wife Mst.Zahida, the deceased left one son Jamil Ahmed Shaikh (Appellant), daughter Rashida Shaikh and another daughter Dr. Badar Nisa who also passed away before the institution of suit on 22.11.1993. From the second wife Khairunnisa, the deceased left Respondent No.1, 2 and respondent No.3.

3. The Respondents filed said suit claiming that the deceased left behind various moveable and immoveable properties in Karachi and Shikarpur and some of them stand in the name of deceased while remaining properties as described in the schedule are standing in the names of Appellant or his sister Dr. Badar Nisa (now deceased) but actually belongs to the deceased and liable to be distributed amongst legal heirs as the owners are simply benami owners on behalf of the deceased father. The properties are given in the schedule to the plaint as well as in the impugned judgment. It is alleged that after the death of deceased, the appellant occupied and controlled the affairs of the above said properties being only son and he did not pay anything to the respondents from the profit and income of the agricultural land and other inherited properties despite demands by said Respondents from time to time. The Respondents No.1&3 requested the appellant to render accounts of the properties / assets and to ascertain / settle the use and occupancy charges/mesne profits of other moveable and immovable properties and to partition the same but the appellant failed to distribute, apportion, partition the same and render the accounts.

4. The Appellant has denied the allegations and claimed that the property situated in Federal B. Area was gifted to him in the year 1970 and subsequently KDA leased it out in his favor. Similarly, the property of SMCHS was gifted to the deceased sister Dr. Badar Nisa and leased it out in the year 1966 and therefore, these properties are out of question of inheritance.

5. The learned Single Judge after hearing the parties passed Judgment dated 22.07.2019 and recorded Preliminary Decree on 24.08.2019. Thereafter, on 03.12.2021 the matter was fixed for arguments where the Appellant remained absent and a final Decree was passed. The appellants have impugned the said Judgment before us now. On the other hand, the Respondent No.2(iii) has filed counter-affidavit and objections to the instant appeal in which contents of paras 1 to 25 of the appeal need not to reply, whereas contents of

paras 26 and 27 are denied. It is submitted that as per the law final decree in administration / partition suit always follow the preliminary judgment and decree passed in the instant case. Contents of grounds of the appeal are also denied.

6. From the pleadings of the parties, following issues were framed by the Court on 16.11.1998:

1. *Whether the suit is maintainable?*
2. *Whether any cause accrued to the plaintiff as against defendant No.1?*
3. *Whether the deceased Akhtar Muhammad Shaikh owned and possessed immovable and movable properties as mentioned in the plaint, if not its effect?*
4. *Whether the deceased Akhtar Muhammad Shaikh owned property bearing Plot No. A-109, Block 3, Scheme No.24, situated in Gulshan-e-Iqbal, Karachi and which is in possession of defendant No.2, if so whether the plaintiffs and defendants are entitled to inherit the said property?*
5. *Whether the defendant No.1 is bound to render accounts of the properties mentioned in the plaint to the plaintiffs?*
6. *Whether the plaintiffs are entitled to the reliefs claimed?*
7. *What should the decree be?*

7. The Respondent No.1 (being plaintiff) examined herself at Exh.PW-1 and produced documents from Exh.P/2 to P/13 respectively, whereas she was cross-examined by the Appellant's counsel. The appellant No.1(b) (being Defendant No.1) examined hiself at Exh.DW-1 and produced the documents from Exh.D/1 to D/17 respectively, whereas he was cross-examined by the respondent No.1's counsel.

8. The learned Single Judge after hearing the parties passed the preliminary Decree vide Order dated 24.08.2019 that all properties are subject of inheritance amongst legal heirs. Thereafter, the matter

was fixed for final arguments and the learned Single Judge passed the judgment dated 03.12.2021 and decree which is impugned before us.

9. Learned counsel appearing on behalf of the appellant while reiterating the aforesaid facts has vehemently argued that the impugned judgment and decree have been passed by the learned Single Judge without considering the evidence adduced by the parties and findings are against the record. He further contends that the learned single Judge has mainly placed reliance on the report of the Nazir of this Court who has miserably failed to give conclusive report on the issues involved in the instant case while the learned single judge passed the impugned judgment and decree considering such incomplete report. He further contends that the learned Single Judge has failed to consider that property No.71-B situated in SMCHS was the property of Mst. Badar Shaikh, who was the real sister of appellants and who was the sole owner of the said property and that the respondents No.1 to 3 are the stepsister of late Mst. Badar Shaikh (now deceased) and they are not sharers in the presence of real brother late Jamil Ahmed Shaikh, hence the impugned judgment cannot be legally sustained and liable to be set aside.

10. Conversely, learned counsel appearing on behalf of the respondents has supported the impugned judgment by vehemently opposing the contentions of the learned counsel for appellant.

11. We have heard learned counsel for the parties, perused the record and the evidence produced in the instant matter and have also gone through the impugned judgment passed by the learned Single Judge on the issues formulated on 16.11.1998.

12. The present suit was filed in the year 1995 and during its pendency, the parties have also been expired and their legal heirs have been substituted and brought on record. The learned Single Judge, on the basis of evidence of parties and the initial inquiry report presented by the Nazir of this Court, has passed the impugned judgment.

Needless to mention here that neither the witnesses were produced nor were called or summoned by any of the party.

13. It is admitted fact that the Appellant is the real son and Respondent No.3 is real daughter from first wife (Zahida) while one daughter from first wife (Zahida) namely Dr.Badar Nisa died on 22.11.1993 before the institution of present suit. On the other hand, the Respondents No.1&2 are real daughters from second wife (Khair-un-Nisa).

14. Upon examination of the pleadings, we have noticed that the instant suit presents a dual legal character, encompassing both the *“administration of estate”* and a claim for *“declaration of benami ownership.”* These two parallel claims raise distinct factual and legal considerations. Such circumstances typically arise where: (i) a person purchases property in the name of another, including a legal heir; (ii) legal heirs, after the death of the owner, transfer property into their own names while excluding other heirs; or (iii) the right of ownership is not challenged during the lifetime of the actual owner, but is contested by legal heirs after their death. These scenarios require careful judicial scrutiny, and the applicable legal principles must be examined in light of the precedents laid down by the Supreme Court of Pakistan.

- a. **Islamic Law of Inheritance** - Under Islamic law, succession opens immediately upon the death of a Muslim, and the estate vests automatically and irrevocably in the legal heirs in fixed shares according to the deceased’s personal Fiqh. There is no concept of an intermediary such as an executor or administrator. The heirs’ rights arise instantly and independently, regardless of their personal preferences, and they may lawfully alienate their respective shares thereafter. This principle has been affirmed in *Ghulam Ali v. Mst. Ghulam Sarwar Naqvi* (PLD 1990 SC 1), *Mst. Reshman Bibi v. Amir* (2004 SCMR 392), *Mst. Hussain Bibi v. Barkat Ali*

(2004 SCMR 1391), *Bashir Ahmad Anjum v. Muhammad Raffique* (2021 SCMR 772), and *Ghulam Qasim v. Mst. Razia Begum* (PLD 2021 SC 812).

- b. **Benami Transactions** - Where immovable property is purchased or transferred by a person in the name of another including a legal heir—and the transaction is not challenged during the lifetime of the person (actual owner) who financed or effected the transfer, the legal analysis centers on whether the transaction was an “advancement” or a benami arrangement. If the transfer was made with intent and not disputed during the lifetime of the actual or real owner, courts may infer that the property was not part of the estate. The determination of such intent is a question of fact and must be established through evidence. Relevant precedents include *Aftab Nasir v. Mst. Fazl Bibi* (PLD 1965 Lahore 550), *Mrs. Aiyasha Koreshi v. Hishmatullah Koreshi* (PLD 1972 Karachi 653), *Muhammad Siddique v. Shabbir Hussain* (2003 MLD 384), and *Ismail Dada Adam Soomar v. Shorat Banoo* (PLD 1960 Karachi 852).
- c. **Mutation Entries and Customary Exclusion of Heirs** - A recurring issue in inheritance disputes involves mutation entries made in land records after the death of a person, often used to exclude certain legal heirs—particularly sisters—based on customary practices or claims of limited interest. The Supreme Court has unequivocally held that mutation entries do not confer or determine title and cannot override the lawful entitlement of heirs. Moreover, the provisions of the Limitation Act, 1908 do not bar such heirs from seeking a declaration of their title. This principle has been reinforced in *Anwar Muhammad v. Sharif Din* (1983 SCMR 626), *Khan Muhammad v. Mst. Khatoon Bibi* (2017 SCMR 1476), *Shabla v. Ms. Jahan Afroz Khilat* (2020 SCMR 352), *Mohammad*

Boota v. Mst. Fatima (2023 SCMR 1901), and *Noor Din v. Pervaiz Akhtar* (2023 SCMR 1928).

- d. **Co-Sharer Claims Without Denial** - Where a legal heir asserts their right to inherit property as a co-sharer and there has been no express denial of their rights, the Supreme Court has held that the provisions of Section 3 of the Limitation Act, 1908 do not apply. The right to inherit is considered a continuing right. This principle has been upheld in *Mst. Fazal Jan v. Roshan Din* (PLD 1992 SC 811), *Shahro v. Mst. Fatima* (PLD 1998 SC 1512), *Khair Din v. Mst. Salaman* (PLD 2002 SC 677), *Juma Khan v. Mst. Bibi Zenaba* (PLD 2002 SC 823), *Muhammad Rafiq v. Muhammad Ali* (2004 SCMR 704), *Rehmatullah v. Saleh Khan* (2007 SCMR 729) and other cases.
- e. **“Actual Denial” of Rights**- Conversely where immovable property is purchased or transferred in the name of another and the transaction is not challenged during the lifetime of the person who financed it, or where a legal heir fails to initiate proceedings upon an “actual denial” of their rights, the Supreme Court has held that Section 3 read with Article 120 of the Limitation Act, 1908 applies. Specifically, when a person seeks to declare such property as part of the estate of a deceased individual, the limitation period for instituting such a suit is six years from the date of actual denial, regardless of the claimant’s status as a co-sharer. This principle has been affirmed in *Abdul Haq v. Mst. Surrya Begum* (2002 SCMR 1330), *Kala Khan v. Rab Nawaz* (2004 SCMR 517), *Syed Kausar Ali Shah v. Syed Farhat Hussain Shah* (2022 SCMR 1558), *Saadat Khan v. Shahid ur Rehman* (PLD 2023 SC 362), *Khaleelullah v. Muhaim Khan* (PLD 2024 SC 600).

15. It appears that the learned Single Judge concluded that the FB Area property formed part of the deceased’s estate on the ground that

the Appellant failed to establish the claim of Gift. However, the judgment does not reflect any discussion or analysis of the evidence produced by the Appellant, including Exhibit D/3 and the registered Lease Deed marked as Exhibit D/4. Similarly, Respondents No.1 and 2 (Plaintiffs) asserted that the SMCH property was part of the estate left by the deceased father. The Appellant, however, denied this assertion and contended that the property had been gifted to his deceased sister, Dr. Badar-un-Nisa Shaikh, and subsequently leased out. In support of this claim, he produced a Declaration (Exhibit D/5) and a Lease Deed dated 06.03.1970 (Exhibit D/9) in her favor but again no finding has been recorded on this point too. We have noted that the learned Single Judge failed to examine or record findings on the basis of evidence on this material point. Furthermore, the controversy at hand squarely falls within the scope of the legal principles enunciated by the Hon'ble Supreme Court of Pakistan, as previously cited in foregoing paragraph. However, those judicial tests were not applied, nor were proper Issues framed to invite the parties to lead evidence. The pleadings of Respondents No.1 and 2 involve a claim of benami ownership, while the Appellant asserts a counterclaim of Gift, which need to be proved in the light of evidence and the material concerning father's behavior; express or implied consent and its silence or lack of knowledge. Therefore, the matter remained unaddressed on material points. In our considered view, the failure to frame proper issues and to determine points, the right of parties to the property constitutes an infirmity rendering the impugned judgment unsustainable.

16. The concept of burden of proof, as governed by Articles 117 to 122 of the Qanun-e-Shahadat Order, 1984, plays a pivotal role in adjudication, particularly when the evidence presented by both parties is so evenly balanced that the Court cannot reach a definitive conclusion. Article 117 embodies the principle *ei incumbit probatio qui dicit, non qui negat*, signifying that the burden lies on the party who affirms a fact rather than one who denies it, as negatives are

generally incapable of proof. This burden remains with the asserting party until discharged, and only then does the obligation shift to the opposing party. Jurisprudence has further clarified that the burden of proof comprises two distinct facets: the legal burden, which is static and determined by the pleadings, and the evidential burden, which is dynamic and shifts during the trial as evidence is adduced. The Supreme Court of Pakistan has elaborated on these principles in cases such as *Allah Din v. Habib* (PLD 1982 SC 465), *Mst. Surraya Begum v. Mst. Susan Begum* (1992 SCMR 652), *Muhammad Amir v. Khan Bahadur* (PLD 1996 SC 267), and *Raja Khurram Ali Khan v. Tayyaba Bibi* (PLD 2020 SC 146), underscoring that the burden of proof becomes material only when the Court finds the evidence in equipoise.

17. Without framing necessary Issue on the main point of controversy and determination of burden of proof and its judicious reasoning and findings—whether both properties were gifted by the deceased father during his lifetime or otherwise or as to whether the deceased father was fully aware of the two lease deeds registered in 1970 which are standing in favor of the Appellant and his deceased sister, Dr. Badar-u-Nissa, and whether there is any prolonged silence of Respondents No.1 and 2 or not and whether it bears any legal consequence, we are constrained to hold that the impugned judgment, to the extent it pertains to the properties situated in FB Area and SMCH Society, is not sustainable in law. Therefore, the impugned Judgment and Decree passed by the learned Single Judge in Suit No.231 of 1995 is set aside to the extent of two disputed properties located in FB Area and SMCH, Karachi and matter is remanded to the trial Court by framing following additional Issues:

2-A. Whether there is a valid Gift in favor of Appellant and his deceased sister Dr Badar u Nissa Shaikh in respect of Plot No.B-592, Block-13, Scheme No.16 measuring 400 sq yards situated at Federal B. Area, Karachi and Plot No.71-B, Block-B

measuring 700 square yards situated at Sindhi Muslim Cooperative Housing Society, Karachi? if so, its effect?

2-B Whether the KDA and SMCH society Ltd have executed Lease Deeds in favor of the Appellant and his sister to the express or imply consent or knowledge of deceased father? If so, its effect?

18. We may further observe that out of the estate and assets, two properties Plot No. B-592, Block-13, Scheme-16, Federal B. Area, Karachi measuring 400 sq yards (**FB Area Property**) and Plot No. Plot No.71-B Sindh Muslims Cooperative Housing Society, measuring 700 sq yards (**SMCH Property**) have been disputed by the Appellant while there is no dispute on the remaining three properties (1) 04 Plots situated at Station Road, District Shikarpur (2) Plot No.A-109, Block-3, Gulshan-e-Iqbal, Karachi measuring 240 sq yards and (3) Agriculture land Survey No.72,73,74,157&158, situated in Shikarpur City, District Shikarpur measuring 12 Acres and thirteen ghuntas and thus the findings of learned Single Judge at paragraph 3,4&5 do not warrant any interference. Therefore, the properties bearing Plot No.A-109, Block-3, Gulshan-e-Iqbal, Karachi measuring 240 sq yards, 04 Plots situated in Shikarpur are subject of inheritance and shall be distributed between the Appellant and Respondents No.1,2&3 according to Muhammadan Law (Fiqh) while agriculture land situated in Shikarpur vide Surveys No.72, 73,74, 157 &158 measuring 12 acres 13 ghuntas, has been transformed into moveable property under **Ex.D/12** which is a letter issued by the then Deputy District Officer Land Requisition Officer District Shikarpur wherein it has been stated that land was acquired and the amount Rs.12,90.9000/- was deposited in the National Bank vide Challan No.7 dated 28.07.1994 and this amount has been collected by the Nazir vide Order dated 04.03.2005 passed in Suit No.231/1995 therefore instead of agriculture land after acquisition by the Government of Sindh, the amount lying with Nazir shall be distributed between the Appellant and Respondents as per

inheritance under Muhammadan Law (relevant Fiqh) including the profit accrued thereto.

19. While we have framed additional Issues in respect of two disputed properties and we are remanding the case to the trial Court with directions to record the evidence and decide the matter afresh within four months hereof. Office is directed to prepare and draw a Decree in the light of paragraphs 13, 17 and 18 above. The trial Court would be at liberty to frame any additional issue to resolve the controversy in accordance with law. The Nazir shall take steps to distribute the properties according to the findings and decree within 90 days hereof.

20. Appeal Stands disposed of in terms of above modifications.

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