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IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 536 of 2004

Present: **Mr. Justice Khadim Hussain Tunio**

Plaintiffs: Mr. Shaukat Zaib and 8 others
Through Mr. S.M. Bukhari, Advocate.

Defendants: KhuramZaid and 4 others
Through Mr. FazlurRahman, Advocate.

Dates of hearing: 13.01.2017 & 18.01.2017.

Date of Announcement: 16.03.2017

JUDGMENT

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KHADIM HUSSAIN TUNIO, J. This suit for Administration, Account, Partition and Permanent Injunction has been filed by the plaintiffs above named against the defendants.

2. Briefly facts of the present suit, as disclosed in the plaint, are that the plaintiffs are real sons and daughters of deceased Yousuf Ali Khan and Shahida Begum, who both expired on 17.05.1997 and 21.03.2004 respectively.

At the time of death they left behind the following moveable and immoveable properties-.

Moveable & immoveable properties which belonged to deceased Yousuf Ali Khan are as under :-

- A. Flat No. C-1, first floor, Sunni Arcade Block 7, Gulshane-Iqbal Karachi valued at Rs. 09,00000/-
- B. Flat No. D-4, Noman Plaza, Block II, Gulshan-e-Iqbal, Karachi valued at Rs. 11,00000/-
- C. Plot bearing No. C-35, Block 40/B, Scheme No. 36, Gulistan-e-Jauhar Karachi valued at Rs. 10,00000/-
- D. Vehicle FX Suzuki, bearing Registration No.G-1818, valued at Rs.75,000/-.

Moveable & immoveable properties which belonged to deceased Shahida Begum are as under :-

- A. Mukkaram Market constructed on Plot R-50, Sector 5-C/4, Karachi, consisting of house and seven shops valued at Rs. 35,00000/-
- B. Bank account with Allied Bank Limited, Gulshan-e-Iqbal Karachi valued Rs. 9,00000/-
- C. Locker No. 97/145, in Allied Bank Ltd. Rashid Minhas Road, Gulshan-e-Iqbal Karachi - Gold valued at Rs. 9,00000/-
Cash Rs. 1,00000/-.

3. It is the case of the plaintiffs that the defendant No.4 on 27.03.2004 filed an application before Manager Allied Bank Limited Gulshan-e-Iqbal Karachi regarding locker No. 97/145. The Plaintiffs also moved an application on 12.04.2004 before sub-Registrar T Division XIV, Karachi regarding transfer of property. The

defendants are the real brothers and sisters of the plaintiffs and plaintiffs and defendants are real sons and daughters and legal heirs of the deceased. After death of the deceased father and mother the defendants and plaintiffs are enjoying possessory rights over the above mentioned moveable and immoveable properties. The shops situated at Mukkuram Market are rented out to different tenants and the defendant No.1 is receiving the rent i.e. Rs.10,000/- of all the shops from the tenants and all the relevant documents of the property are in illegal possession of defendant No.1. Plaintiffs and defendants along with other legal heirs used to reside at the abovementioned property very smoothly and peacefully, but after death of their deceased father and mother, some dispute has been arisen between them. The defendants became dishonest and with mala-fide intention and ulterior motive want to usurp the share of the plaintiffs and other legal heirs of deceased. The deceased father was having reputation in the field of journalism and at the time of his death he was operating a bank account and cash amounting to Rs. More than 9,00,000/- and also had a locker in which cash amount and gold ornaments are still kept in the said locker. Furniture and other household articles are also in illegal custody of defendants and defendant No.2 is controlling and dealing with the shop and bank account unauthorisedly. The defendants No. 1 and 2 became so cruel that after the death of deceased father and mother, the defendants are exclusively enjoying the property left behind by the deceased mother and father without the consent of the plaintiffs and without paying them their due share, which is worst act of the defendant Nos. 1 & 2 and they are not entitled to get the profits without the distribution amongst all the legal heirs. The plaintiffs deceased father and mother were also absolute rightful owners of the moveable and immoveable properties; instead of satisfying all the heirs, the defendants are residing in the abovementioned property along with their family members whereas, the plaintiffs are deprived of their legitimate rights to use the property as per law of inheritance. The defendant Nos. 1 & 2 did not allow the plaintiffs to enter in the said property. The plaintiffs are entitled for the partition and separate possession in

accordance with law. The plaintiffs made several requests for partition of the property to the defendants who promised that a meeting should be called of the legal heirs immediately but they never honoured their promises made on several occasions on one or the other pretext and refused to partition the property which is an illegal act of the defendants. The defendants are in unlawful use of moveable and immovable properties which are not capable of division, therefore, the defendants be ordered for rendition of account and deposit before the court, the amount which the plaintiffs claim as their share. Therefore plaintiffs filed this suit and prayed for judgment and decree as under:

- i) To declare that the plaintiffs are legal heirs of the deceased Yousuf Ali Khan S/o Abdul Rahim Khan and Shahida Begum wife of Yousuf Ali Khan of the immovable and moveable properties mentioned in the para No.3 of the said suit, and the defendants have no right to usurp the share of the plaintiffs.
- ii) Decree of the partition of the suit property herein by ordering sale thereof and distributing the sale proceeds amongst the legal heirs of the deceased Yousuf Ali Khan S/o Abdul Rahim Khan and Shahida Begum wife of Yousuf Ali Khan, in accordance with law.
- iii) A preliminary decree may be passed for administration for the property in question of the deceased specifying the respective shares of the legal heirs of the deceased i.e. plaintiffs and defendants. A fit and proper person may be appointed as the Administrator with the direction to collect the property in question and effect partition of the property and if horizontally and vertically it is not possible, to sale the property and distribute the share amongst the legal heirs.
- iv) To grant permanent injunction in favour of the plaintiffs over suit properties duly mentioned in Para 3 of the plaint and thereby restrained the defendants from interfering distributing, selling, gifting creating third party claim, operating the bank account, collecting the rent, opening the locker

themselves or through their servants, subordinates, employee, agents or representative or anybody else who what so ever without due course of law.

v) To grant the cost of suit upon the defendants.

4. The defendants No.1, 2 and 3 filed their written statement separately and denied the case of the plaintiffs in *toto*. They have submitted that the properties mentioned in the said Paras are imaginary and unascertainable and never owned and possessed and remained in the names of parents of the parties as such no question of administration of the same arises at all. They have also submitted that without any valid proof of the parties to the alleged properties, no decree of the partition, accounts and profits could be passed as per law as such the suit filed by the plaintiffs is bound to be dismissed being devoid of merits. They have also submitted that late father of parties never left any of the alleged properties as mentioned in Para No. (III a), (b), (c) & (d) of plaint at the time of his death. They have further submitted that the car mentioned in Para 3 of the plaint was purchased/owned and registered by defendant No.3 in his own name as such late father of the parties has no concern with it. They have also submitted that the property mentioned as Mukkarm market in the plaint was never owned by late mother of the parties at the time of her death but it was gifted by way of "HIBA" by deceased mother of the parties during her life time in favour of defendant No.2 in presence of witnesses by handing over physical possession and original documents of the same to the defendant No.2 as it was named as Mukkaram Market after the said gift the defendant No.2 used to collect the rent and deal with the other matters of the said property as exclusive owner during life time of deceased mother of the parties which is within the knowledge of the all the parties, hence there is no question of administration of the said property. They have further submitted that regarding locker No. 97 at Allied Bank Limited Rashid Minhas Road, Karachi the same was never opened, operated and owned by the

deceased mother of the parties, but it was opened operated and used by defendant No.2 exclusively as such no question arises of its administration. The defendants have raised legal pleas that the suit as framed is not maintainable and liable to be dismissed being filed without cause of action. That the suit is barred by time hence requires dismissal. That the suit is not suit for administration as such same may be dealt at regular suit. That the defendant No.2, taken care, treatment and service of parents specially the mother was done by defendant No.2 and he has exclusively expended amount of Rs.800,000/- on the treatment of his mother out of his own pocket, as such defendant No.2 claims this amount being a debt over properties of deceased mother and in case nothing the left out of her legacy, the same amount may be recovered from all sons and daughters of their mother as per their respective shares.

5. Apart from these, defendants have raised preliminary legal objections regarding limitation and maintainability of the suit.

6. Thereafter on 16.05.2005 this court passed order, which is reproduced as under for ready reference.

“This suit appears to be suit for administration, account, partition and permanent injunction of the estate and property and left by deceased Yousuf Ali Khan. It is stated by the learned counsel that various properties are let out and some of the defendants are using the rental income to the exclusion of the other legal heir. This being suit for administration, let preliminary decree drawn Nazir is appointed as Receiver/ Commissioner to hold enquiry and record evidence.

Since this suit, for administration of estate of the deceased, Nazir is appointed Receiver/ Commission in respect of estate and property of the deceased. Parties are directed to file their respective claim entitlement before the Nazir and lead evidence in support of their claim.

Nazir to hold enquiry in respect of the assets left behind by the deceased, ascertain, legal heirs and their respective shares in the estate and property. Nazir to inquire any amount that is either due or payable and receivable by and on behalf of the deceased. Nazir is to submit report to enable the court to pass final judgment and decree. Nazir's fee in the sum of Rs.10,000/- to be paid by the parties in accordance with respective shares. Any party intends to lead evidence to pay further a sum of Rs.2,000/- per witness. Pre-decree be drawn as per order 20 Rule 13 CPC.

7. Thereafter, Commissioner submitted his report on 28.01.2008 and stated therein that:

"1. The Honourable Court vide order dated 16.5.2005 has been pleased to appoint the undersigned as a Receiver/Commissioner in respect of the estate and property of the deceased. Parties were directed file their respective claim entitlement before the Nazir and lead evidence in support of their claim. It was also directed to the Nazir to hold inquiry in respect of the assets left behind by the deceased, ascertain legal heirs and their respective shares in the estate and property and to inquire if any amount that is either due or payable and receivable by and on behalf of the deceased. The parties were allowed to file affidavit in evidence of the witnesses' along with the documents.

2. Accordingly notices were issued to the learned counsel for the parties and fixed the above matter from time to time for filing affidavit-in-evidence of their witnesses. However, the plaintiff No.1 Mr. Shaukat Alam has filed affidavit-in evidence on his behalf and on behalf of other plaintiff as attorney on 7-6-2005 as Ex. P.W-1. The learned counsel for the defendant cross-examined him and thereafter the plaintiff has closed his side and the matter was fixed for filing affidavit-in-evidence of witnesses. The defendant No.2 & 3 have filed their affidavit-in-evidence as Ex. DW-2 and DW-3. They also filed affidavit in evidence of one witness namely Mirza Masood Baig and they were cross-examined by the learned counsel for the plaintiffs and they closed their side of evidence.

3. According to the parties the deceased parents left behind following legal heirs and their respective shares in the estate and property as under:-

S.No.	Names of legal heirs	Relationship with deceased	Shares
1.	Shoukat Zaib	Son	2/22
2.	Hamid Ali Khan	Son	2/22
3.	Liaquat Ali Khan	Son	2/22
4.	Aurangzeb Khan	Son	2/22
5.	Khurram Zaib	Son	2/22
6.	Mukarram Zaib	Son	2/22
7.	Alam Zaib	Son	2/22
8.	Farooq Ali Khan	Son	2/22
9.	Mrs. Razia Sultana	Daughter	1/22
10.	Mrs. Safia Begum	Daughter	1/22
11.	Miss Zakia Begum	Daughter	1/22
12.	Miss Ghousia Begum	Daughter	1/22
13.	Miss Talat Farzana	Daughter	1/22
14.	Miss Zeba Tabassum	Daughter	1/22

4. The plaintiff has mentioned in his affidavit-in-evidence that **the deceased parents of the plaintiffs and defendants** left the following properties.

MOVEABLE & IMMOVEABLE PROPERTIES BELONGING TO DECEASED YOUSUF ALI KHAN AS SHOWN IN THE PLAINT.

A. Flat No. C-1, 1st Floor,
Sunny Arcade Block 7,
Gulshan-e-Iqbal
Karachi

*B. Flat No.D-4, Noman Plaza,
Block II,
Gulshan-e-Iqbal,
Karachi*

*C. Plot bearing No. C-35,
Block 40/B, Scheme No.36,
Gulistan-e-Jauhar
Karachi.*

*D. Vehicle FX Suzuki,
Bearing Registration No. G-1818*

MOVEABLE & IMMOVEABLE PROPERTIES BELONGING TO DECEASED SHAHIDA BEGUM

—

*A) Mukkaram Market,
Constructed on Plot
R-50, Sector 5-C/4,
Karachi, consisting of a
house and 7 shops.*

*B) Bank account No.
lying with
Gulshan-e-Iqbal Branch,
Karachi.*

*C) Locker No. 97/145,
Lying with Allied Bank Limited,
Rashid Minhas Road Branch
Gulshan-e-Iqbal Branch,*

Karachi.

5. In the cross-examination, the learned counsel for the defendants put question to the plaintiff that Flat No.C-1, did not belong to the deceased father of the plaintiffs but they failed to produce any documentary evidence in this regard. The property bearing Flat No.D-4 is purchased by the defendant No.3 from Mst. Naghma through his attorney, Mst. Shahida Begum and he filed copy of the Sale Deed. The Mukaram Market is in the name of deceased Mst. Shahida Begum but the defendant stated that the said property i.e. Mukaram Market has been gifted to him by his mother but he failed to produce any Gift Deed or title documents in respect of said property. According to the plaintiffs the defendant No.1 has illegally and unlawfully received the rent from the tenants of Mukaram Market without giving any shares to the other legal heirs and the defendant No.1 has also admitted in his cross-examination that he had received rent from the tenants of Mukaram Market after the death of Mst. Shahida Begum. He had received monthly rent from the tenants of Mukarum Market.

6. The defendant No.1 has also admitted that he had sold out the said vehicle bearing No.G-1818 to other persons but he has stated that the said vehicle did not belong to deceased parents. The plaintiff has also mentioned in his affidavit-in-evidence that Plot No.C-35, situated in Block-14-B, Scheme 46, Gulistan-e-Jauhar, Karachi belongs to deceased father but the defendant has stated that the said plot was cancelled by the concerned authority. The plaintiff in his plaint as well as in his affidavit in evidence has mentioned that all the original papers of all properties and vehicle are in possession of defendant No.1 but the defendant No.1 has not produced any documents. The defendant has stated in his statement that his mother had not maintained any bank account during her life time but the defendant No.3 has stated that he had paid the sale consideration amount of the said flat to her mother, attorney of Mst. Naghma through cheque with the name of Mst. Shahida Begum.

7. Whereas according to the statement of the parties it is clear that Mst. Shahida Begum has account in the Bank but the defendant failed to disclose correct account number and details of account in his case before this Honourable Court. Mukaram Market is still in the name of deceased Mst. Shahida Begum but the

defendant No.1 has also not produced any title documents. The Flat No. C-1, situated in Sunny Arcade, Block 7, Gulshan-e-Iqbal, Karachi, is still in possession of three sisters but the defendant has also not produced any title documents of the said flat, as per contention of the plaintiff that deceased father has purchased said flat on power of attorney. The defendant has admitted that **Plot No.C-35 belonged to deceased father but their contention is that the concerned authority canceled the said plot but they failed to produce any documentary evidence in this respect.** The vehicle Suzuki G-1818 is sold out by the defendant No.1 but as per the contention of the defendant the said vehicle is also not belonged to the deceased father but the defendant failed to produce any documentary evidence in this regard. It has come on record that Flat No.C-1 situated in Sunny Arcade is with the possession of three sisters and the said flat is the property of deceased father and the Mukaram Market is also property of the deceased mother Mst. Shahida Begum and Flat No.D-4 was purchased by the defendant No.3 from Mst. Naghma through attorney Mst. Shahida Begum during her left time and other details of the bank account and golden ornaments were not provided by the parties.

Report is submitted for kind perusal of this Honourable Court with the request that the fee deposited by the parties may kindly be sanctioned subject to the administrative approval of the Honourable Chief Justice.”

8. Thereafter, vide order dated 13.08.2007, this Court has ordered that the Nazir Report will be considered at the time of final arguments. On 31.08.2007, Defendants No. 1 to 3 filed objections to the Commissioner Report.
9. I have heard the learned counsel for the Plaintiffs and Defendants No.1 to 3.
10. Learned counsel for the plaintiffs has submitted that the property bearing Flat No. D-4, Noman Plaza was purchased by the Defendant No.3 in his favour from Mst. Naghma Parveenthrough his mother deceased Mst. Shahida Begum being his Attorney. He also submitted that vehicle No. G-1818 has been sold out by Defendant

No. 2 which was in his name as per registration book, produced copy of the same alongwith objection filed to the Nazir's Report. He has further submitted that the Mukaram Market was not gifted by deceased Mst. Shahida Begum to the Defendant No.3 during her lifetime. He further submits that the Mukaram Market is still in the name of deceased Mst. Shahida Begum. The Defendant No.3 has taken plea with malafide intention to usurp the property and deprive the other legal heirs from their due shares. He has lastly submitted that he prays the suit may kindly be decreed to the extent of property left by Mst. Shahida Begum i.e. Mukaram Market being inherited property of the plaintiffs and defendants.

11. Conversely, learned counsel for the Defendant No.3 has contended that the Mukaram market was gifted by Mst. Shahida Begum to him. He has also contended that all the ingredients of the valid gift had been completed. He further submitted that possession of the Mukaram Market was delivered to him by Mst. Shahida Begum. He also submitted that he is enjoying Mukaram market being his exclusive property and maintaining the same since the date of gift. He also submitted that the mother of the parties was got treated by him at private Hospital and incurred huge amount on her treatment and nothing was paid by the plaintiffs or other legal heirs. He has also submitted that the suit of the plaintiffs is not maintainable and barred by law. He has further submitted that the plaintiffs have to file regular suit before the proper forum. He has prayed that the suit may be dismissed. He has placed his reliance on provisions of Order 20 Rule 13 CPC, *Moulvi Abdullah and others vs. Abdul Aziz and others (1987 SCMR 1403)*, *Muhammad Amin vs. Mohammad Yasin and another through legal heirs (PLD 2001 Lahore 242)*, *Arif Zaman vs. Pir Dost Ali Shah through legal heirs and others (2005 MLD 98)*, *Sher Mohammad and 7 others vs. Mst. Sughran Bibi through Representatives and another (PLD 2005 Lahore 286)*, *Syed Mohsin Raza Bukhari and 4 others vs. Syed AzraZenab Bukhari (1993 CLC 31)*, *Syed Mehdi Hussain Shah vs. Mst. Shadoo Bibi and others (PLD 1962*

SC 291), *Mohammad Younis Qureshi and 5 others vs. Mrs. Feroz Qureshi and 2 others* (1982 CLC 976) & *Mohammad Sarwar and 2 others vs. Abdul Lateef and another* (PLD 1978 Lahore 391).

12. At the very outset, it is relevant to mention here that the scope of the **'Administrative suit'** stood defined by honourable apex courts as:-

'to determine what estate the deceased left at the time of his death; administration thereof; payment of debts and liability and partition of rest of estate between the heirs'

13. Thus, the *first* object of the administrative suit is to **'determine what estate the deceased left'** which, I can *safely* add cannot be achieved without an *inquiry* therefore, a plea of mere denial that a specific property was not owned by deceased *alone* shall never be sufficient to hold such a suit not-maintainable nor it legally can prevent the Court from an *inquiry* in that regard. Further, I can *safely* add here that a plea by one, out of legal heirs, to the effect that one of properties was gifted to him by deceased, would also be of no help for bringing the suit out of the scope of **'administrative suit'**; even a plea of *benami* title shall be of no help to restrain application of Order XX r 13 of the Code, if resorted to by one of legal heirs. Reference may be made to the case of *Asghar Ali v. Mrs. Zohrabi & another* (2000 MLD 122), relied by counsel for the defendants, wherein it is held as:

"At the time of death of said deceased admittedly above two properties stood in the name of deceased parents of the parties though the appellant/defendant claimed that the latter property was purchased by him in the name of his deceased mother, therefore, the respondents/plaintiffs being the legal heirs of the said deceased would be entitled to get their shares at least from the admitted property left by deceased at the time of their death according to Muslim Law, by filing the administration suit in respect of the estate of the deceased as the said remedy is permissible under the law and in case of choice between a partition suit and, administration suit, the latter is to be preferred. Reference may be made to the case Mahboob Alam v. Razia Begum and others (PLD 1949 Lahore 263, D.B.).' Accordingly, administration suit in absence of prayer of partition in the main suit is competent and

maintainable as both the parties to the suit are the legal heirs of deceased to inherit the properties left at the time of their death. Reference may also be made to the case Mehdi Hussain Shah v. Mst. Shade Bibi and others (PLD 1962 SC 291). ,

The preliminary decree for administration of assets of deceased cannot be withheld only on the assertion that one of the said properties was purchased by the appellant in the name of his deceased mother from his own funds, when the said property even stood in the name of his brother at the time of her death. *In view of the above circumstances, there is no merit in the contention of the learned counsel for the appellant.*

14. Further, reference can also be *safely* made to the case of *Muhammad Zahid* (PLD 2011 Karachi-83) wherein a touch-stone to examine maintainability of **'administrative suit'** is set as:

13. We would therefore (subject to the test formulated in para.11 above) sum up the foregoing analysis in the form of the following propositions:

- a) *when the question is whether a property forms part of the estate of a deceased, and **a determination of this question involves a person who is a stranger to the estate**, then question should be determined by means of separate proceedings;*
- b) *proposition (a) is subject to the qualification that if the question is also **whether the stranger is a sharer in the estate, then the matter comes within the scope of administration suit**;*
- c) *when a determination of the aforesaid question involves **a person who is a sharer** in the estate then the question comes within the scope of the administration suit, **and this is so regardless of whether the sharer claims through or under the deceased (e.g. by way of a gift or sale from the latter) or in his own right**;*
- d) *it is immaterial whether or not the property in question stood in the name of the deceased at the time of his death, and it is likewise immaterial whether any alienation was by way of a registered instrument or otherwise.*

(Emphases supplied)

Since, in the instant matter, the plea of gift was / is raised by one of the legal heirs (defendants) hence such plea *even* shall not disturb the competence of the suit within meaning of Order XX rule 13 of the Code. Therefore, such *plea* raised by defendants would not prejudice the said order under which inquiry has been conducted nor consequences thereof i.e **'inquiry'**.

15. From the perusal of record, it transpires that the Defendant No.3 Alam Zaib purchased Flat D-04, Nauman Plaza, Block-11, Gulshan-e-Iqbal, Karachi through Sale Deed and the said fact has been admitted by PW-1 Shoukat Zaib in his cross-examination; further it is also admitted that no proof has been produced by the plaintiffs regarding jewelry of Rs.8 lacs/ Rs. 9 lacs and said fact admitted by PW-1, therefore, claim of the plaintiff for inclusion of said property for *administration* and distribution thereof to such properties is not tenable.

16. However, as regard the property i.e Mukarram Market, the record shows that the Defendant No.3 Mukaram Zaib though has claimed that this property was gifted to him by his mother (one of the deceased) hence he (defendant no.3) *prima facie* owned ownership of his mother i.e Mst. Shahida then to avoid distribution thereof among legal heirs of Mst. Shahida the burden was upon him (defendant no.3) to establish a valid gift but he has not produced any cogent, confidence inspiring evidence in support of his plea. The Defendant No.3 has not disclosed the date, time and place when and where said property was gifted to him though he has disclosed the names of witnesses i.e. one his father-in-law namely: Mirza Masood Baig and Defendant No.3 namely: Alam Zaib Khan, which otherwise was/is requirement of law, as held in the case of *Bashir Ahmed & another v. Muhammad Rafiq*(2002 SCMR 1291), relied by learned counsel for the defendants that:

The learned Single Judge of the Lahore High Court while dismissing the civil revision filed by the petitioners has dealt all these aspects of the case in the following manner:--

*"I have heard learned counsel for the parties and find that the **petitioners have not been able to independently prove the factum of gift; no date, time, venue and person in whose presence, gift was made, has been established**. Learned counsel for the petitioner, mainly relies upon the mutation. The only witness of the mutation i.e. Lumberdar, who also identified Muhammad Ismail, was not produced rather he appeared from the plaintiff's side and had contradicted the mutation by saying that Muhammad Ismail was unable to comprehend about the nature of transaction; there is nothing on the record that possession was accordingly delivered on the time, when the gift was made; no specific change in possession in pursuance of the gift was made. "*

Learned counsel for the petitioners has failed to point out any legal infirmity in the impugned order warranting interference by this Court.

Resultantly, for foregoing discussion, the present petition being without any merit is hereby dismissed and leave declined.

17. It is admitted fact that Mukaram Market was and *still* in the name of deceased Mst. Shahida Begum. The defendant no.3 also never attempted to get the title transferred in his favour during life time of deceased Mst. Shahida nor *prima facie* did not resort to legal course for getting claimed title through court of law unless notice of instant suit. Surprisingly, the Defendant No.3 remained silent even from the date of filing of the suit when he came to know that the other legal heirs have claimed the property to be inheritable under Mst. Shahida Begum thereby denying all other claims. The evidence of the witnesses is silent. They have given contradictory statements. More particularly father-in-law of Defendant No.3 deposed that at the time of engagement of Defendant No.3 with his

daughter, deceased Shahida Begum informed him that she will give Mukaram Market to his son-in-law. Needless to say that a mere assertion or promise to make a gift shall not be sufficient to dress up such person as *lawful donee* nor such promise or assertion shall ever attain status of a complete gift. Furthermore, Defendant No.2 also not gave date, time place and date of delivery of possession of alleged gift. The Defendant No.3 has not filed his suit before the competent Court of law for declaration to declare him as owner of the Mukaram Market on the basis of alleged oral gift alleged to have been made by Mst. Shahida Begum. A mere claim or a *lisēven* shall not be sufficient to deprive other legal heirs from their rights of inheritance because a mere *claim* shall not prevail over a **legal right / entitlement**. The status of property in question to be still in name of Mst. Shahida Begum is not disputed and legally the moment she (Mst. Shahida Begum) died her surviving legal heirs have become co-owners in such property. Thus, it would not be within spirit of law, equity and good conscious to keep such co-owners away from their earned right and status merely with reference to a suit, filed by defendant no.3 after notice of claim of inheritance. The Nazir's Report also shows that Defendant No.3 has failed to prove the fact of gift through cogent and confidence inspiring evidence. None from other family members have been examined in support of his contention except his father-in-law and brother who are in league with him. Since, the parties are also not at dispute with regard to their status as legal heirs of deceased persons, therefore, I find this property to be asset, left by deceased Mst. Shahida Begum liable to administration. I am guided in such conclusion with the case law, relied by counsel for defendant i.e case of **MUHAMMAD YAQOOB through Legal Heirs Versus FEROZE KHAN and others** (2003 SCMR 41) wherein it is held as:

A carefully scrutiny of the entire record and evidence would reveal that no valid gift deed was ever executed in favour of petitioner whose entire case revolves around Hiba Mutation bearing No.3646 of village Dhudhial, Tehsil Chakwal, the then District Jhelum. It is worth mentioning that uncalled for pivotal role which smacks of mala fides had been played by Girdawar who allegedly got recorded the statement of Sher Zaman (donor) on the

basis whereby verbal gift was made a base to get the land in question mutated by means of Mutation No.3646 with the connivance of Patwari. We are not persuaded to agree with Chaudhry Muhammad Tariq, learned Advocate Supreme Court on behalf of petitioners that Girdawar had acted in accordance with order dated 27-11-1978 passed by Tehsildar for the reason that no such order could be produced before the Court which only finds a mention at the back of mutation entry having no legal sanctity whatsoever. It may not be out of place to mention here that Girdawar had recorded the statement of Sher Zaman (donor) who admittedly was ninety years of age and the Girdawar had not appeared before any Court to prove that he had recorded the statement of Sher Zaman (donor under the direction of Tehsildar. Whether such direction could have been given or not by Tehsildar would be another question, determination' whereof is not necessary as order dated 27-11-1978 allegedly passed by Tehsildar could not be produced in Court and thus can be treated as nonexistent.

6. The delivery of possession of the land in question was essential ingredient to constitute a valid gift, is lacking in this case and thus gift without possession being an initio void cannot be made to get the land in question mutated in favour of petitioner. In this regard we are fortified by the dictum laid down in the following cases:--

(i) *Shamshad A. Shah v. Hassan Shah* (PLD 1964 Supreme Court 143);

(ii) *Hedaya* (Vol. III, Second Edition, page 482);

(iii) *Amir Ali's Muhammadan Law* (Vol. I, Chap. V);

(iv) *Baillie's Digest of Muhammadan Law* (part 2, Second Edition, pages 203, 204);

(v) *RamchandraJivajiKanago and another v. LaxmanShrinivas Nair and another* (AIR 1945 PC 54);

(vi) *Jamma-ush-Shittat*;

(vii) *Sharaya-ul-Islam*;

(viii) *Ghulam Hassan and others v. Sarfaraz Khan and others* (PLD 1956 SC (Pak.) 309);

(ix) *Sadik Hussain Khan v. Hashim Ali Khan* (LR 43 IA 212), and

(x) *Bashir Ahmed v. Muhammad Rafiq* (2002 SCMR 1291)

7. We are of the considered view that factum of gift could not be proved by adducing cogent and convincing evidence. **Besides that there appears to be no justification for the exclusion of legal heir from the inheritance of Sher Zaman (donor) which makes the authenticity and genuineness of the gift doubtful.**

Furthermore, preliminary decree as provided under Order 20 Rule 13(1) CPC was passed and final decree is to be ordered for taking accounts and inquiries. However, needless to add that if the defendant no.3 succeeds in proving his suit (gift regarding Mukarram Market), the parties shall be governed by such decree.

18. As regard the FX car, the parties have admitted the transfer of FX car in favour of Defendant No.2 on the basis of open letter during the lifetime of deceased father and mother which was not challenged or questioned by the parents. As regard the Flat No.D-4, It is also admitted fact that it was also purchased by Defendant No.3 during life time of deceased Mst. Shahida Begum through her being his Attorney. The sale consideration was paid by him, therefore, *prima facie* these appear to be not part of left assets.

19. So far the case law referred by the learned counsel for the Defendants No.1 to 3 is concerned, same is not helpful to their case and depending upon different facts and circumstances from the facts of present case.

In the case reported as **HUSSAIN vs. MANSOOR ALI AND 5 OTHERS (PLD 1977 Karachi 8)**, this Court has observed as under:-

Order XX, rule 13 provides as under

"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 enquiries 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"

A perusal of this Rule shows that the object for passing of a preliminary decree is to enable the Court to first decide the preliminary question whether to grant the relief for taking over the administration of the Estate of a deceased person and to order further enquiries and accounts for the purpose of determining the debts and legacies and other dues payable in order of priority out of the Estate ; and finally for the distribution of the residue among the heirs. That this is the relief to be granted appears also from Form No. 17 in Appendix 'D' Schedule (1) to the Civil Procedure Code wherein is stated the form of the preliminary decree which is to be granted in such a suit. This Form deals with such a suit by a creditor, legatee, and next-of-kin separately so far as the first part of the decree is concerned. In the case of a suit by the legatee the first part of the decree has to order that an account be taken of the legacies given by the testator's will, whereas the case of a suit by next-of-kin such order is to be made for an enquiry and account of what or what share if any the plaintiff is entitled to as next-of-kin of the interests."

In said case, the competence of the administrative suit was affirmed.

Mst. GHAZALA ZAKIR versus MUHAMMAD KHURSHID and 7 others (1997 C L C 167)

8. The case of Banarsidas (AIR 1934. Cal. 33) is not relevant for the determination of the present question. Now, I will revert back to the case from the Pakistani jurisdiction. The leading case which still holds the field on the question of nature and scope of an administration suit is the case of Syed Mehdi Hussain Shah (PLD 1962 SC 291) wherein leave was granted by the Hon'ble Supreme Court to consider whether the form of the suit falls within the scope of administration suit since the Will was challenged and the rights of other heirs were also

disputed. It was held by the Hon'ble Supreme Court that in the suit for administration of deceased's properties, the Court assumed the functions of an administrator. It will realize the assets and to discharge the debts of legatees and to take account of properties and to distribute the assets among those entitled to it. It was further held that the Court is in pursuit to find out who the persons entitled are and can join all such persons who claim to be so entitled. It was further held that where the survivor is the sole legal heir he cannot file suit for administration for recovery against strangers/trespassers.

13. In view of the above case law it would be pertinent to observe that necessity for filing of a suit of administration arises when there exists dispute between the creditors, next of kin and heirs at law on the question of what movable or immovable properties of deceased was seized of or entitled to at the time of his death and how such properties are to be distributed. Therefore, there may be several instances where a suit of like nature may not be allowed to be maintained. Following are the few guidelines to determine the nature of administration suit:

(a) In a suit for administration for the estate and properties left by a deceased a preliminary decree is to be first granted prior to the final decree, to ascertain the correct position of assets and liabilities, if any, of a deceased in order to share the same amongst heirs, claimants and creditors.

(b) A Court is competent to probe into title of the properties for the limited purpose to ascertain whether it was alienated at any time prior to the death of the person whose properties are sought to be administered.

(c) Where legality or validity of a registered document is challenged or where a closed and past transaction is questioned then it is out of scope of administration suit.

(d) Where any property is alienated, transferred or conveyed through a registered document during the lifetime of a deceased then such property cannot be made subject-matter of an administration suit and that a separate suit for declaration and possession is to be preferred.

(e) Where there is only a sole survivor and where a stranger/trespasser (other than creditor) is made party to the suit for administration then such suit becomes an ordinary suit and loses its character as a suit for administration.

14. Here, I would like to lay down a mark of caution that in a suit for administration where any party claims to be owner of a property which admittedly stood in the name of deceased at the time of his death then for determination of such claim a suit for administration is maintainable. I would also like to observe that Form 17 of Appendix ' D' to Schedule I of the C.P.C. provides that a suit for administration, accounts and partition is maintainable which impliedly suggests joinder of several causes of action.

20. This also affirms the touch-stone, drawn in the case reported as PLD 2011 Karachi 83, referred above hence *prima facie* leaves no room for objections, raised by defendants towards competency of this suit and order of preliminary decree and inquiry, conducted thereunder.

TAHIR IKRAMULLAH and 23 others versus Mst. ZUBAIDA KHANUM and others (2002 MLD 334)

39. In Shahro and others v Mst. Fatima and others (PLD 1998 SC 1512), it has been laid down that possession of one co-sharer or co-owner is for benefit of all other co-sharers or co-owners. Mere fact that mutations had been attested in favour of some of co-sharers or co-owners would not extinguish title of other co-sharers or co-owners.

42.....The heirs of a Mahomedan succeed to his estate in specific shares as tenants in common and such suit is governed as regards immovable property by Article 144 and as regards movables by Article 120. In view of this, coupled with the fact that respondent No.1 has to be deemed always to have remained in possession of the immovable property left by her father as a co-sharer the suit filed by her cannot be said to be barred by limitation. This disposes of Issue No.7.

43. In the result the revision petition fails and is dismissed leaving the parties to bear their own costs.

This case law is also of no help as it reaffirms the settled principle of law that each co-owner would be deemed to be in possession and that opening of the succession shall dress all the legal heirs as co-owners in property, left by a deceased Muhammadan as was / is the claim of the plaintiff.

JAVAID MAJEED and 9 others Versus SOHALA MUSSARAT and 29 others (2009 M L D 561)

5. *To my mind, the application has been wrongly couched as for amendment of the decree. Order XX Rule 13, C.P.C. provides for a decree to be passed by a Court in administration suit, the said provision of law envisages an inquiry by Court passing the decree, inter alia, for purposes of determining the estate of the deceased person which is to be administered. This inquiry can be made at any time before passing of a final decree. Although under the provisions of Partition Act, 1893, an order of sale of joint property is to be treated and implemented, as final decree yet such an order would not debar the Court from continuing with the inquiry. The application by the petitioners by all means is a prayer for said inquiry, of course, with reference to evidence already on record.*

6. *So far as the complaint of Mr. Zafar Iqbal Kalanori, Advocate is concerned, suffice it to say that the said inquiry can be conducted without interfering with the process of sale already ordered. This writ petition is accordingly disposed of with the direction that the learned trial Court shall consider the application in the light of said provisions of said Order XX Rule 13, C.P.C. as an application for inquiry for determining the assets of the late M.A. Karim. Evidence is already on record. The learned trial Court shall examine the record and determine the matter after hearing the parties with reference to pieces of evidence already noted by the petitioners in ,their application as also in the said orders, dated 9-10-2006 and 21-11-2006 of this Court and such other evidence already present on record which parties may bring to the notice of the Court and in case it comes to the conclusion that properties are asset of M.A. Karim then the same be dealt with in accordance with law in these very proceedings. However, this process shall not at all interfere with the process of sale. It is suggested that dates for purpose of sale proceedings and those for the purpose of said enquiry be fixed separately. No order as to costs.*

In the said case law, the Court has been empowered to record final decree if after examination of inquiry material and hearing parties, it comes to such a conclusion that property is liable to inheritance, as found so in respect of property named as Mukarram Market.

21. Keeping in view the above position, discussion and case law cited above, the suit of the plaintiffs is decreed to the extent of Mukaram Market constructed on Plot No. R-50, Sector 5-C/4, Karachi consisting with one house and 07 shops which is mutated in the name of deceased Mst. Shahida Begum, which supports the plaintiffs' plea and direct the final decree be prepared accordingly. Nazir of this Court who has already been appointed as Commissioner is to act as an

Administrator of Mukaram Market left by deceased Mst. Shahida Begum. The expenses will be met from the assets left by deceased Mst. Shahida Begum. The property is not partition-able horizontally or vertically to sell the same and distribute the shares amongst the legal heirs of deceased Mst. Shahida Begum. **I therefore, pass decree as provided under Order 20 Rule 13 CPC read with Form-18 of Appendix-D to Schedule-1 of the Code of Civil Procedure and appoint Nazir of this Court as Receiver with all powers to auction the said property. The plaintiffs and Defendants are allowed to participate in the same proceedings, distribute the sale price amongst all the Plaintiffs and defendants according to Mohammadan Law of Inheritance. The Nazir is allowed to withdraw Rs.25,000/- as fees out of the sale price. The Objections filed by the defendants no. 1 to 3 to Nazir's Report are disposed of accordingly.**

J U D G E

16.03.2017