

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
II<sup>nd</sup> Appeal No. 81 of 2022

Date	Order with Signature(s) of Judge(s)
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Fresh Case.

1. For orders on office objection at flag "A"
2. For order on C.M.A. No. 2156/2022 (Exemption Application)
3. For order on C.M.A. No. 2157/2022 (Stay Application)
4. For hearing of main case

**25.04.2022**

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Syed Salim Ahmed, Advocate for appellant.  
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**ZAFAR AHMED RAJPUT, J:-** Respondents No. 1 to 4 herein filed a Civil Suit bearing No. 297/2016 against the appellants No. 1 & 2 and the respondents No. 5 & 6 for partition of immovable property i.e. Flat No.E-302, 3<sup>rd</sup> Floor, situated in Ruffi Lake Drive, Gulistan-e-Jouhar, Block-18, Karachi (*the "suit property"*) alleging therein that the parties in suit were the co-sharers being legal heirs of the deceased Mumtaz Begum, who being the owner retained the suit property in her name till her death in 2008. It was further alleged that the suit property was in possession of the appellant No.1 and his family but till June 2014, the respondent No.2 was also residing in one room of the suit property; however, the wife of the appellant No.1 expelled her from suit property. It was case of the respondents No. 1 to 4 that they were deprived from their legal shares in the suit property and in this regard, they served notices upon the appellant No.1, dated 24.01.2015 and 31.03.2015, calling upon him to effect partition but he refused to do so; hence, cause of action accrued to them to file the instant suit. The appellants contested the suit by filing their joint written statements wherein they raised legal objection with regard to maintainability of the suit and pleaded that the appellant No.1 had purchased the suit property from his own sources of income as *BENAMI* property. The respondents No. 5 & 6 were debarred by the trial Court from filing the written statements. The trial Court after framing the issues, out of pleading of the parties; recording pro and contra evidence and

hearing both sides, decreed the suit of the respondent No. 1 to 4 vide judgment and decree, dated 23.01.2021. Against that, the appellants preferred Civil Appeal No. 50 of 2021, which was heard and dismissed by the learned IX<sup>th</sup> District Judge, (MCAC) Karachi-East vide judgment and decree, dated 24.01.2022 and 31.01.2022, respectively. It is against that concurrent findings of the Court below that the instant II<sup>nd</sup> Appeal has been preferred by the appellants.

2. Heard, record perused.

3. By virtue of section 101 C.P.C. a second appeal lies only on grounds covered by section 100 C.P.C. and not otherwise. As per terms of section 100 (ibid) the prerequisites for filing second appeal are; that decision of Courts below is contrary to law; that decision is contrary to usage having force of law; Courts below have failed to determine some material issue of law; and there has been failure to determine material issue of usage having force of law. Therefore, second appeal is permissible in the following cases:-

- i. When the decision is against the law.
- ii. Some material point of law has been left undecided.
- iii. Some substantial error, or procedural and jurisdictional defect has occurred, that resulted in error and defect in the decision on merits.

But where there is nothing to show that decision given by Courts below was contrary to law or any usage having the force of law or there had been failure of Courts below to determine issue of law or issue of usage, the appeal is not maintainable.

4. At very outset the learned counsel for the appellants failed to point out any substantial error, procedural defect, any misreading and non-reading of evidence or any misconceiving of fact or commission of any jurisdictional error by the learned Courts below.

5. It appears that against the claim of the respondents No.1 to 4 that they are entitled to receive their shares in suit property under the law of inheritance, the case of the appellant No.1 is that since the suit property was purchased from his own source of income as *BENAMI* property on the name of his deceased mother, the said respondents are not entitled to have any share. It is; however, matter of record that the appellant No. 1 has also failed to establish his claim of *BENAMI* property as during the course of cross-examination before trial Court, he admits that he has not produced any proof with regard to income earned by him in Saudi Arab. Furthermore, he has also failed to submit any documentary evidence in order to prove the transfer of amount from Saudi Arab for purchasing of suit property. Admittedly, suit property is still in the name of deceased mother of the parties and during her life time, appellant No.1 has not claimed its ownership. Therefore, the learned Courts below rightly included all the legal heirs of the deceased Mumtaz Begum to inherit suit property as per their respective shares.

6. In view of above discussion, as no case is made out on the ground of any substantial error, procedural defect, any misreading and non-reading of evidence or any misconceiving of fact or commission of any jurisdictional error, the impugned judgments of Courts below do not call for any interference or exercise of discretion on any point or law in the case of concurrent findings. Accordingly, this II<sup>nd</sup> Appeal is dismissed in limine along with listed applications.

Athar Zai

JUDGE