

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
R.A. No. 95 of 2019.

Date	Order with signature of Judge
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1. For orders on office objection.
2. For orders on CMA No. 4783 of 2019.
3. For hearing of main case.

04th November 2020

Mr. Mushtaq Qadri, advocate for the applicant.

Heard learned counsel for the applicant.

At this juncture, it would be conducive to refer paragraph No.4 of the impugned order passed by learned Additional District & Sessions Judge-III, Karachi South in SMA No. 430 of 2017, which is that:

“4. Heard and perused both sides, it is observed that this court vide order dated 16.09.2017 had declared the legal heirs of deceased namely Mushtaq Ahmed S/o Ghulam Ali as, Shahzada Mushtaq his widow, Humaira Mushtaq Saim his daughter and Muhammad Balaj Mushtaq as his son, duly verified through NADRA as well as publication and Police report from concerned P.S. It is also pertinent to mention here that the objector being family member of the deceased had not challenged the parentage of the legal heirs of the deceased during his life time as such the legal heirs had been entered as the offspring of the deceased with NADRA also. It is also observed that challenging parentage of legal heirs as well requiring the court to confirm the same by conducting DNA test does not come within the ambit of Succession Act 1925, which is meant to verify the legal heirs brought on record through legal resources, which has been duly complied by this Court. Hence in my humble view the application on behalf of objector U/s 383 of Succession Act 1925 read with section 12(2) CPC and application U/s 151 CPC are not maintainable at this stage and are being disposed off as dismissed. The objector is at liberty to challenge the parentage of the legal heirs before competent forum if he wishes to do so. Moreover the statement filed by the objector, informing this court that the petitioner has died could not render recalling the order dated 16.09.2019 as such this court vide such order had not authorized the petitioner for any act in respect of subject immovable property rather had declared her as the widow of the deceased who could receive her respective share in the assets of her husband. Hence, the statement is also filed accordingly.”

The learned counsel for the applicant contends that prayer of Letter of Administration was withdrawn by the respondent however, succession was granted. However, the applicant being a brother challenged the parentage of his siblings. Learned trial Court has rightly observed that Succession Petition as granted by order dated 16.09.2019 was in accordance with law and application under Section 12(2) CPC filed by present applicant was not considered and hence, dismissed the same. Besides, Succession proceedings are summary in nature and any title dispute with regard to property can be agitated before the competent civil Court. Accordingly, instant revision application is dismissed along with pending applications.

J U D G E

Sajid

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
R.A. No. 79 of 2019

Date	Order with signature of Judge
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1. For orders on office objection.
2. For hearing of CMA No. 4180 of 2019.
3. For hearing of main case.

31st January 2020.

Raja Shams-uz-Zaman, advocate for applicant alongwith applicant Muhammad Aftab.

Mr. Qadir Hussain Khan, advocate files *vakalatnama* on behalf of respondents, as well files copy of Power of Attorney of Ms. Shahida Begum and Ms. Farkhunda Parveen; taken on record.

All respondents are present except respondent No.4 Ms. Shahida Perveen.

Applicant through captioned revision application has challenged the concurrent findings recoded by the trial court and appellate court.

2. Relevant facts are that some of the legal heirs seek partition with regard to subject matter property i.e. House No. R-562, Block No.1, Sharifabad, Scheme No.16, Federal 'B' Area, Karachi; whereas applicant being son claims ownership of the same property on the plea that he is the owner by way of oral gift made by deceased Mst. Salma Begum, who is mother of applicant and respondents; dispute is between legal heirs of Mst. Salama Begum and this is the only property left by her.

2. Learned counsel for the applicant contends that impugned judgments recorded by the trial Court and appellate Court are against the settled principles of law. He refers *plethora* of cases reported in 1968 SCMR 464, PLD 1987 SC 447, PLD 1976 SC 208, PLJ 2019 SC (Cr.C) 265, PLD 1970 SC 224, 1990

MLD 1702 [Karachi], PLD 1983 Karachi 527, 2001 SCMR 1700, 1995 CLC 1541, PLD 1977 Karachi 933, 2007 SCMR 741, PLD 1993 Karachi 700, 1998 CLC 1883 and 2011 YLR 3089 and further contends that “*falses in unofalsus in omnibus*” is very much applicable in the present case; suit filed by the respondents was incompetent as they were required to file administrative suit; trial court and appellate Court failed to record issue wise findings.

3. Before examining the available material on said *touch-stone*, I would say that principles of **Criminal Administration of Justice** is not similar to that of **Civil Administration of Justice** because in civil jurisdiction the appreciation is done on *preponderance* while in criminal jurisdiction the prosecution continues under mandatory obligation to prove the charge **beyond reasonable doubts**.

4. As regard, plea of filing of administrative suit, it would suffice to say that scope of *administrative suit* is for **administration of estate** hence *independent* matter, involving declaration of title and status, would not fall within scope of **administrative suit**. It is matter of record that subject matter property is still in the name of deceased Mst. Salma Begum, who is mother of applicant and respondents, hence any legal heir was competent to seek partition.

5. While reverting to matter, it is needful to add that *prima facie*, the instant petition is against concurrent findings of two Courts below. It is settled principles of law that scope of revisional jurisdiction of this Court is quite narrow and normally the concurrent findings of facts cannot be disturbed in revisional jurisdiction unless this Court comes to the conclusion that the findings of learned Courts below are result of misreading or non-reading of evidence available on record or contrary to the settled law.

Reliance may be made to the decision titled as "Noor Muhammad and others v. Mst. Azmat-e-Bibi" (2012 SCMR 1373), wherein the Hon'ble Supreme Court of Pakistan has observed as under:

"6. There is no cavil to the proposition that the jurisdiction of High Court under section 115, C.P.C. is narrower and that the concurrent findings of facts cannot be disturbed in revisional jurisdiction unless courts below while recording findings of facts had either misread the evidence or have ignored any material piece of evidence or those are perverse and reflect some jurisdictional error."

At this point, it would be conducive to refer relevant portion of the appellate Court's judgment to see if the view is, *prima facie*, contrary to well settled principle of law or that there is any misreading of evidence.

"POINT No.1.

It has been solely contended by the appellant that subject property was orally gifted by the deceased mother Mst. Salma Begum to the appellant in presence of witnesses, namely; Abdul Shakoor, Farida Bano w/o Muhammad Shafi so also her son, husband (now late) and her three daughters. In support of his contention appellant got himself examined at Exh.D and deposed that **his deceased mother, namely; Mst. Salma Begum had orally gifted the subject house and a shop to him.** He deposed that **since the date of receiving the possession of the gifted properties he is maintaining, paying utilities bills and also bearing all the other expenses thereof.** Appellant produced Deed of declaration and confirmation of oral gift dated 10.02.1997 as Exh.D/1. Perusal of Exh.D/1 shows that it pertains to the shop No. 4/2, G-1 R.S.4/21 (18) as shown in the PT-1 Register, more specifically mentioned as property No.G-11, R.S.4/2-II-B-225, Sheet No.R.S.4, Survey No.2, old survey No.E-6/ 277, measuring 20.00 square yards, approx., situated in Ramswami, Karachi. It is a matter of record that **appellant has not produced any documentary evidence in respect of declaration and confirmation of the oral gift with reference to subject property i.e. House No.R-562, Block-I, Sharifabad, Scheme No.16, F.B. Area, Karachi.** In support of his contention appellant examined three witness, namely; Abdul Shakoor, Abdul Samad and Muhammad Zubair son of Muhammad Shafi. All the three witnesses formally deposed that subject property was gifted to the appellant. It is well settled principle that the testimony of witness has to be taken into consideration only if the same inspire confidence. One out of the three witnesses examined by the appellant is the marginal witness of the alleged declaration of oral gift deed but such witness **has not categorically deposed that alleged declaration was made in his presence.** He has formally deposed that the subject property has been gifted to the appellant. Second witness i.e. DW-Abdul Shakoor categorically opposed that **he did not remember the date, mother (month) and year of the gift deed** therefore, his evidence cannot be considered as confidence inspiring. **DW-2 Abdul Samad is neither the marginal nor the eye witness of the alleged declaration of oral gift deed.** The testimony even otherwise cannot be taken into consideration being an interested witness as Abdul Samad is the brother in law of the appellant. So far as the testimony of DW Muhammad Zubair is concerned, he is also the interested witness for being residing at the subject property. Besides **that, it is an admitted fact that at time of alleged declaration of oral gift, he was a child.** I have also gone through the testimony of rest of the legal heirs of Mst. Salma Begum who emphasize upon the legal distribution of their respective shares. It is pertinent to mention that Mst. Fareeda Bano (defendantNo.3) widow of

Muhammad Shafi formally deposed that subject property was gifted to the appellant. Her testimony also does not seem to confidence inspiring as neither she is the eye witness of the alleged declaration of oral gift nor did she remember the date, month and year of the same, rather she is an interested witness for being residing at subject property. Mst. Fareeda Bano however, categorically deposed that she had no knowledge that whether the subject property was gifted or inherited one. **It is well settled principle that burden to prove always lies upon the person who alleges.** In the instant case plaintiffs claimed their share in the subject property being legal heirs of Ms. Salma in whose name the subject property was registered vide conveyance deed of immovable property dated 22.01.1979. I have gone through the impugned judgment wherein learned trial Court has discussed each and every aspect of the case fairly and judicially and the impugned judgment does not suffer from any material illegality or irregularity, hence this point is answered in negative.”

6. *Prima facie*, the applicant claimed *gift* of two separate properties but produced record of one property only hence the presumption can well be drawn that if there would have been gift of two properties at one time by one and same person then there was no reason for making document for one property *only*. Besides, *onus probandi* was upon the applicant to prove the alleged gift as that was the burden upon him being beneficiary hence his failure must bring its consequences. Perusal of both courts' judgments reflect that same are in accordance with law; evidence of witnesses produced by the applicant was appreciated and discarded *properly* and matches with principles of **preponderance of evidence**, therefore, are reasonable one.

7. Accordingly, instant revision application is dismissed alongwith pending application(s).