

# IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A NO.138/2017

**Present: Munib Akhtar & Yousuf Ali Sayeed, JJ**

Appellants: Muhammad Suleman & Others, through, Mr. Syed Abdul Waheed, Advocate.

Respondents: Muhammad Ahsan & Others, in person.

Date of hearing 21-03-2017

Date of Judgment

## JUDGMENT

**YOUSUF ALI SAYEED, J.** This matter stems from a pending Suit for Administration filed by the Respondent No.1, bearing Suit Number 399 of 2015 (the “**Administration Suit**”), whereby the Respondent claims what he states is his share by way of inheritance in the interest of his deceased parents in an immovable property bearing Survey No.333, Survey Sheet J.M (old Survey No. C/8), measuring 985 square yards, situated in Cosmopolitan Cooperative Housing Society, Karachi (the “**Subject Property**”).

2. In terms of an Order made in the Suit on 13.01.2017 (the “**Impugned Order**”), the Appellants Nos. 1 and 2 were given a period of 30 days to pay the Respondent No.1 an amount equivalent to his share in the Subject Property as per the valuation in respect thereof obtained by the Nazir of this Court, failing which the Subject Property is ordered to be sold through public auction, subject to the right of any of the parties to match the highest bid. Being aggrieved, the Appellants have filed the present Appeal.

3. Learned counsel for the Appellant contends that whilst the right of ownership in the Subject Property ostensibly vested jointly in 7 persons, namely the parents of the contestants (since deceased) as well as the Appellants Nos. 1 and 2 and three other siblings, in actual fact only the Appellants Nos. 1 and 2 were real owners, whereas all the other persons shown as owners, including their parents, were merely benamidars. He points out that this very plea was specifically taken by way of defense in the Administration Suit and a separate Suit, bearing Suit Number 2414 of 2015 (the "**Benami Suit**") was also filed by the Appellants Nos. 1 and 2 seeking a declaration in that regard.
  
4. The basic and indeed only proposition advanced by learned counsel in support of the Appeal on the basis of the aforesaid submission is that the question of ownership of the Subject Property is an issue that goes to the root of the matter and remains to be finally adjudicated in the Benami Suit. He submits that the learned single Judge erred in failing to properly consider this point whilst passing the Impugned Order, which is hence bad in law and ought to be set aside accordingly.
  
5. From an examination the Impugned Order, we have noted that this aspect has been duly addressed by the learned single Judge, in as much as it is noted in the Impugned Order that (a) on 07.09.2015 an Order for a preliminary decree had been made to the extent and claim of the Respondent No.1 in the Subject Property from the shares of his parents, (b) that subsequently, on 18.01.2016 an issue was framed as to the Respondent No.1's entitlement to a share in the Subject Property, (c) that this issue stood answered in the affirmative in terms of an Order made on 29.04.2016, and (d) that the Administration Suit had also been partly decreed vide the said Order of 29.04.2016 to the extent of directing the Nazir of this Court to effect mutation in favour of the Respondent No.1 and other legal heirs.

6. The learned single Judge went on to observe that the aforementioned Orders of 07.09.2015 and 18.01.2016 remained unchallenged, for although an appeal had initially been filed against the preliminary decree, the same had subsequently been withdrawn whilst stating that the Appellants would pursue the Benami Suit. Furthermore, as also noted by the learned single Judge, no application had been moved for consolidation of the aforementioned suits albeit a statement to that effect having been made on behalf of the Appellants at the time of withdrawal of the said appeal.
7. Hence, it was held by the learned single Judge that the Preliminary Decree and partial decree had attained finality, and the contention of the Appellants that no further proceedings could ensue in the Administration Suit until evidence had been recorded in the Benami Suit was misconceived, being contrary to the very conception and purpose of a proceeding of the nature of the Administration Suit as well as the intent and spirit of a preliminary decree.
8. Learned counsel for the Appellants has not advanced any argument before us to refute or controvert these findings and has merely fallen back on the plea that prior to ordering any of the measures envisaged in the Impugned Order, it was necessary for evidence to first have been recorded on the issue of ownership of the Subject Property in the Benami Suit.
9. Having considered the matter, we find this contention to be specious, as the Administration Suit is the appropriate forum for determination of all matters between heirs, including an issue as to whether or not the deceased had title to any property being claimed by an heir and whether such property forms part of the divisible estate.

10. In the case reported as Muhammad Zahid through Legal Heirs v. Mst. Ghazala Zakir and 7 others, PLD 2011 Karachi 83, a learned Division Bench of this Court (of which one of us, namely Munib Akhtar, J, was a member and author) considered the principles evolved in a number of Judgments of the Honourable Supreme Court as well as Division Benches of this Court so as to determine whether a dispute or objection as to ownership of property could properly be adjudicated within the framework of a suit for administration. In this context it was observed that:

“the proper test to establish whether such a determination lies within the scope of an administration suit, or beyond it is as follows: if the determination will not disturb the inter se position of the sharers, and will affect all the sharers equally, then the question lies outside the scope of the administration suit. If however, the determination will affect and upset the inter se position of the sharers, and may give one or more of the heirs an advantage over the others, then the question lies within the scope of the administration suit.” (at Page 93 A)

It was specifically observed that, as is the case in the matter at hand, where an heir claims a property in his own right and contends that it does not form part of the estate, the determination of such a question could affect the inter se position of the sharers. Hence, it is evident that, as per the aforementioned test, the question raised by the Appellants Nos. 1 and 2 as to their absolute ownership of the Subject Property to the exclusion of their parents and siblings properly fell within the scope of the Administration Suit.

10. In the matter at hand the Appellants have quite evidently not availed the remedies that were open to them at the appropriate stage, and have allowed the proceedings in the Administration Suit to advance to the conclusion that inevitably came to pass in the form of the Impugned Order.

11. In our view, the reasoning of the learned single Judge is unexceptionable and the Impugned Order does not warrant any interference. The Appeal, being without merit, is dismissed accordingly.
  
12. These are the reasons for our short Order dictated in open Court on 21.03.2017.

JUDGE

JUDGE

Karachi  
Dated \_\_\_\_\_